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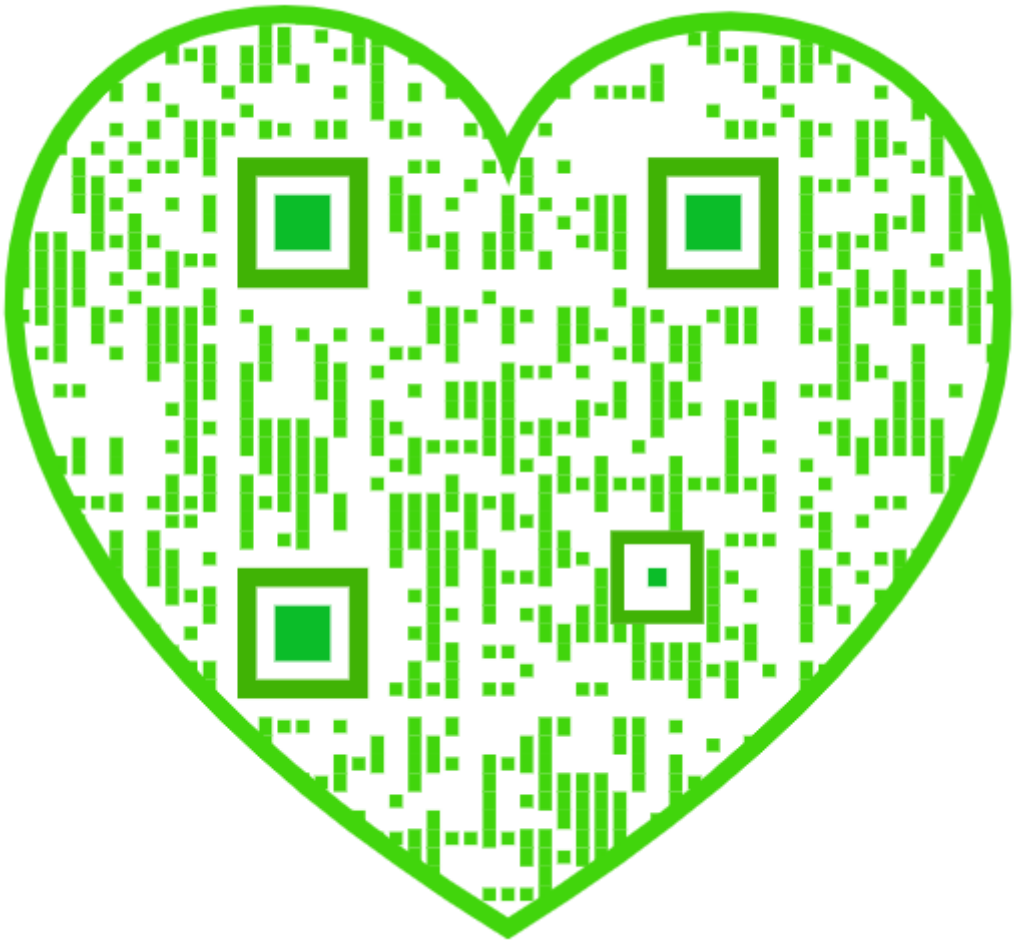

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To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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I. NATURE AND SUBJECT-MATTER.

A. Definition and Nature. A mechanic's lien is a species of lien created by statute in most of the states, which exists in favor of persons who have performed work or furnished material in and for the erection of a building.[1] It is not a general, but a particular, lien, and is in its nature peculiar and of an equitable character,[2] and has been said to be somewhat analogous in its aims to the equitable lien of a vendor for unpaid purchase-money of lands sold.[3] The lien is given to secure priority of payment of the price and value of work performed and the materials furnished,[4] and springs out of the appropriation and use by the land-owner of the mechanic's labor or the furnisher's materials.[5] It rests upon the broad ground of natural equity and commercial necessity.[6]

B. Origin. Mechanics' liens on buildings and land were recognized and favored by the civilians,[7] and were clearly defined and regulated in the civil law;[8] but such liens were not recognized at common law,[9] nor were they allowed in

1. Black L. Dict. See also Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 136, 12 S. Ct. 181, 35 L. ed. 961, where it is said: "It may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon."

2. Mochon *v.* Sullivan, 1 Mont. 470.

Analogy to mortgage, etc.— A mechanic's lien upon real property has been declared to be in the nature of a mortgage of the property, although it is imposed by statute in favor of a whole closs of persons. It has also been likened to an attachment and to a *lis pendens*. Springston *v.* Wheeler, 3 Indian Terr. 388, 58 S. W. 658.

3. *Ex p.* Schmidt, 62 Ala. 252. *Contra*, Rex *v.* Alford, 9 Ont. 643.

4. Goodman *v.* Baerlocher, 88 Wis. 287, 292, 60 N. W. 415, 43 Am. St. Rep. 893 [*quoting* Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 136, 12 S. Ct. 181, 35 L. ed. 961].

Extension of scope.— "Many statutes have been enacted which were intended to secure to mechanics and contractors what might be due them for betterments put upon property. The original purpose of these enactments has long since been lost sight of, and, by an imperceptible process of extension, they have been brought to include everything that may be necessary to secure to either the mechanics, material men, or contractors pay for any service rendered in the betterment of property." Church *v.* Smithea, 4 Colo. App. 175, 35 Pac. 267, 268.

5. Anderson *v.* Seamans, 49 Ark. 475, 5 S. W. 799.

6. See Mochon *v.* Sullivan, 1 Mont. 470, 472, where it is said: "The doctrine upon which it is founded is upon the consideration of natural justice, that the party who has enhanced the value of property, by incorporating therein his labor or materials, shall have a preferred claim on said property for the value of said labor or materials. . . . The theory of the lien is, that the party by whom the labor is performed or materials furnished for the erection or repair of buildings, on credit, retains his claim to them after they have entered into the structure and become inseparably connected with it."

"'It is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man or laborer his lien under the statute.' The object is not only to encourage building, but to afford the contractor, materialman, or laborer security upon and against the property of the owner materially increased in value by the materials and labor wrought into it, and so rests upon the strongest equitable basis, for the building becomes a part of the realty, and it is the principal matter, to which the lien on the realty seems to be an incident, and without which the lien on the building would be fruitless or of little value." Goodman *v.* Baerlocher, 88 Wis. 287, 292, 60 N. W. 415, 43 Am. St. Rep. 893 [*quoting* Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 136, 12 S. Ct. 181, 35 L. ed. 961].

Remedy cumulative.— The fact that the money due a mechanic's lien claimant was in the hands of a trust company, and that claimant had a right of action against it therefor, did not preclude claimant from enforcing his lien, where the money was not paid to him by the trust company because the other party instructed it not to pay it. Baumhoff *v.* St. Louis, etc., R. Co., 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770.

7. Durling *v.* Gould, 83 Me. 134, 137, 21 Atl. 833.

8. South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 571, 18 L. ed. 894; Domat Civ. L. §§ 1741, 1742, 1744.

9. *Alabama.*— *Ex p.* Schmidt, 62 Ala. 252.

Colorado.— Pitschke *v.* Pope, 20 Colo. App. 328, 78 Pac. 1077.

Maine.— Durling *v.* Gould, 83 Me. 134, 21 Atl. 833.

New York.— Birmingham Iron Foundry *v.* Glen Cove Starch Mfg. Co., 78 N. Y. 30.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

United States.— Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35

equity.[10] So while mechanics' liens are now recognized and provided for in all of the United States and the Canadian provinces,[11] the lien is purely a creature of statute.[12] There is no mechanics' lien law in England[13] or in Mexico.[14]

C. Constitutionality of Statutes. Whatever may be the opinion about the wisdom of mechanics' lien laws, the general validity and constitutionality of this class of legislation are too well settled to admit of discussion.[15] They have been

L. ed. 961; Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61.

10. Ellison *v.* Jackson Water Co., 12 Cal. 542; Emerson *v.* Gainey, 26 Fla. 133, 7 So. 526; Slack *v.* Collins, 145 Ind. 569, 42 N. E. 910; Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61.

11. See Shaw *v.* Young, 87 Me. 271, 32 Atl. 897. And see, generally, the statutes of the various states and provinces.

Local statutes.— A number of the earlier mechanics' lien statutes applied only to certain designated localities or parts of the state, and their operation was strictly confined to such localities. See Nunes *v.* Wellisch, 12 Bush (Ky.) 363; Heamann *v.* Porter, 35 Mo. 137; Speilman *v.* Shook, 11 Mo. 340; Cockerill *v.* Loonam, 36 Hun (N. Y.) 353; Rafter *v.* Sullivan, 13 Abb. Pr. (N. Y.) 262; Hickey *v.* Schwab, 64 How. Pr. (N. Y.) 8; Parsons *v.* Winslow, 1 Grant (Pa.) 160; Tilford *v.* Wallace, 3 Watts (Pa.) 141; James *v.* Keller, 2 Pa. Dist. 165.

12. *Alabama.*— *Ex p.* Schmidt, 62 Ala. 252.

Colorado.— Pitschke *v.* Pope, 20 Colo. App. 328, 78 Pac. 1077; Johnston *v.* Bennett, 6 Colo. App. 362, 40 Pac. 847; Florman *v.* El Paso County School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469.

Illinois.— May, etc., Brick Co. *v.* General Engineering Co., 180 Ill. 535, 54 N. E. 638.

Indiana.— Slack *v.* Collins, 145 Ind. 569, 42 N. E. 910.

Kansas.— Martin *v.* Burns, 54 Kan. 641, 39 Pac. 177; Blattner *v.* Wadleigh, 48 Kan. 290, 29 Pac. 165; Newman *v.* Brown, 27 Kan. 117.

Maine.— Durling *v.* Gould, 83 Me. 134, 21 Atl. 833; Frost *v.* Ilsley, 54 Me. 345; Gray *v.* Carleton, 35 Me. 481; Bangor *v.* Goding, 35 Me. 73, 56 Am. Dec. 688.

Montana.— Bonner *v.* Minnier, 13 Mont. 269, 34 Pac. 30, 40 Am. St. Rep. 441.

New York.— Birmingham Iron Foundry *v.* Glen Cove Starch Mfg. Co., 78 N. Y. 30.

Pennsylvania.— Wolf Co. *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 439.

Tennessee.— Thompson *v.* Baxter, 92 Tenn. 305, 21 S. W. 668.

Texas.— Muscogee First Nat. Bank *v.* Camphell, 24 Tex. Civ. App. 160, 58 S. W. 628.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

United States.—Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61.

Canada.— Cole *v.* Hall, 12 Ont. Pr. 584.

The design of mechanic's lien statutes is simply to secure to mechanics the same lien upon improvements made upon real estate as was secured by the common law to artisans upon articles manufactured in their workshops. Sweet *v.* James, 2 R. I. 270.

Lien cannot be restricted or extended by acts of contracting parties.— Johnston *v.* Bennett, 6 Colo. App. 362, 40 Pac. 847.

Mechanic's lien laws have no extraterritorial effect.— Birmingham Iron Foundry *v.* Glen Cove Starch Mfg. Co., 78 N. Y. 30.

By agreement, independent of statute, a lien in the nature of a mechanic's lien may be reserved between the parties, and may be enforced against any one acquiring a subsequent interest with notice of such lien. Smith *v.* Kennedy, 89 Ill. 485; Taylor *v.* Huck, 65 Tex. 238; Martin *v.* Roberts, 57 Tex. 364; Gaylord *v.* Loughridge, 50 Tex. 573.

13. Shaw *v.* Young, 87 Me. 271, 32 Atl. 897.

14. Macondray *v.* Simmons, 1 Cal. 393.

15. *Colorado.*— Church *v.* Smithea, 4 Colo. App. 175, 35 Pac. 267.

Indiana.— Colter *v.* Frese, 45 Ind. 96.

Maine.— Spofford *v.* True, 33 Me. 283, 54 Am. Dec. 621.

Massachusetts.— Parker *v.* Bell, 7 Gray 429.

Montana.— Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

Ohio.— Palmer *v.* Tingle, 55 Ohio St. 423, 45 N. E. 313; Pence *v.* Roads, 6 Ohio S. & C. Pl. Dec. 90, 4 Ohio N. P. 63.

Pennsylvania.— White *v.* Miller, 18 Pa. St. 52.

Tennessee.—Cole Mfg. Co. *v.* Falls, 90 Tenn. 466, 16 S. W. 1045.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 4.

Statute providing that lienor may collect an attorney's fee valid.— Helena Steam-Heating, etc., Co. *v.* Wells, 16 Mont. 65, 40 Pac. 78; Wortman *v.* Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

Contract with "reputed" owner.—Cal. Code Civ. Proc. § 1191, is unconstitutional in so far as it authorizes a lien on abutting property for the cost of a street improvement, by virtue of a contract with one who is only the reputed, and not the actual, owner. Santa Cruz Rock Pavement Co. *v.* Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174.

Interference with contract of parties.— The first section of the Pennsylvania act of June 8, 1891 (Pamphl. Laws 225), which requires the written consent of the subcontractor in order to bind him by a stipulation in the contract between the original contractor and owner that no mechanics' liens shall be filed is unconstitutional in that it attempts to create a debt and give a lien therefor, against

upheld against objections that they were class legislation,[16] that they abridged the freedom of contract,[17] and that they amounted to a taking of property without due process of law.[18] The weight of authority supports the view that a law providing that a materialman or a subcontractor may enforce his lien without regard to the indebtedness existing between the contractor and the owner is constitutional,[19] but in a few cases this has been denied.[20] Even though a part of a mechanic's lien law be unconstitutional the remainder, if separable, may be valid.[21]

D. What Law Governs.[22] In the case of lands which have been ceded to

the express covenant in the contract; and the second section of the act, providing that the contractor shall be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials shall be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation shall be consented to by said subcontractor, is unconstitutional in that it attempts to frame a new contract and substitute it for the one made by the parties. Waters *v.* Wolf, 162 Pa. St. 153, 29 Atl. 646, 42 Am. St. Rep. 815. As to effect upon subcontractor's rights of stipulation against liens in principal contract see, generally, *infra,* II, D, 7, e, (III).

16. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667; Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

17. Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797, holding that the Michigan Mechanics' Lien Law of 1891, as amended, is not unconstitutional in that it authorizes the owner to withhold from the principal contractor the amounts shown by the latter's sworn statement to be owing to subcontractors, laborers, and materialmen, and subjects him to liability to such persons in case payments are made to the principal contractor in disregard of or without requiring such statement.

18. Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685.

Even though the lien be made prior to a preëxisting mortgage so far as the materials increase the value of the property, the law is constitutional. Hicks *v.* Murray, 43 Cal. 515; Warren *v.* Sohn, 112 Ind. 213, 13 N. E. 863; Alvord *v.* Hendrie, 2 Mont. 115. Priority between mechanics' liens and other encumbrances see, generally, *infra,* IV, C, 2.

19. *California.*— Hicks *v.* Murray, 43 Cal. 515.

Colorado.— Jensen *v.* Brown, 2 Colo. 694.

Indiana.— Merritt *v.* Pearson, 58 Ind. 385; Colter *v.* Frese, 45 Ind. 96.

Kentucky.— Hightower *v.* Bailey, 108 Ky. 198, 56 S. W. 147, 22 Ky. L. Rep. 88, 94 Am. St. Rep. 350, 49 L. R. A. 255.

Maine.—Atwood *v.* Williams, 40 Me. 409.

Massachusetts.— Bowen *v.* Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 391; Donahy *v.* Clapp, 12 Cush. 440.

Minnesota.— Laird *v.* Moonan, 32 Minn. 358, 20 N. W. 354.

Missouri.— Henry, etc., Co. *v.* Evans, 97 Mo. 447, 10 S. W. 868, 3 L. R. A. 332 [*overruling* Henry *v.* Hinds, 18 Mo. App. 497].

Nebraska.— Ballou *v.* Black, 21 Nebr. 131, 31 N. W. 673.

Nevada.— Lonkey *v.* Cook, 15 Nev. 58; Hunter *v.* Truckee Lodge No. 14, I. O. O. F., 14 Nev. 24.

Oregon.—Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97.

Tennessee.— Cole Mfg. Co. *v.* Falls, 90 Tenn. 466, 16 S. W. 1045.

Virginia.— Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821; Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589.

Wisconsin.— Mallory *v.* La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071.

United States.— Jones *v.* Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108 [*reversing* 79 Fed. 477, and *reversed* on other grounds in 177 U. S. 449, 20 S. Ct. 690, 44 L. ed. 482, and *followed* in Great Southern Fireproof Hotel Co. *v.* Jones, 116 Fed. 793, 54 C. C. A. 165], where the court refused to be bound by the decision of the state court (Young *v.* Lion Hardware Co., 55 Ohio St. 423, 45 N. E. 313), holding the statute in question unconstitutional.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 4.

20. Selma Sash, etc., Factory *v.* Stoddard, 116 Ala. 251, 22 So. 555; Spry Lumber Co. *v.* Sault Sav. Bank, etc., Co., 77 Mich. 199, 43 N. W. 778, 18 Am. St. Rep. 396, 6 L. R. A. 204; Palmer *v.* Tingle, 55 Ohio St. 423, 45 N. E. 313, holding the Ohio act of April 13, 1894, to this extent unconstitutional. See also Stewart *v.* Westwood Brick Co., 27 Ohio Cir. Ct. 272; Gorman *v.* Bepler, 7 Ohio S. & C. Pl. Dec. 15, 4 Ohio N. P. 241; Van Cleve Glass Co. *v.* Wamelink, 6 Ohio S. & C. Pl. Dec. 521, 4 Ohio N. P. 383; Jenks *v.* Kress, 6 Ohio S. & C. Pl. Dec. 109, 4 Ohio N. P. 82; Pence *v.* Roads, 6 Ohio S. & C. Pl. Dec. 90, 4 Ohio N. P. 63; *In re* Mechanics' Lien Land, 5 Ohio S. & C. Pl. Dec. 564, 7 Ohio N. P. 668.

21. McCune *v.* Snyder, 8 Ohio S. & C. Pl. Dec. 316; New England Engineering Co. *v.* Oakwood St. Engineering Co., 75 Fed. 162.

So much of the Ohio act of April 13, 1894, as gave a lien to one performing labor and furnishing material under a contract with the owner was separate and constitutional. Jenks *v.* Kress, 6 Ohio S. & C. Pl. Dec. 109, 4 Ohio N. P. 82; Pence *v.* Roads, 6 Ohio S. & C. Pl. Dec. 90, 4 Ohio N. P. 63; *In re* Mechanics' Lien Land, 5 Ohio S. & C. Pl. Dec. 564, 7 Ohio N. P. 668. *Compare* Gorman *v.* Bepler, 7 Ohio S. & C. Pl. Dec. 15, 4 Ohio N. P. 241; Van Cleve Glass Co. *v.* Wamelink, 6 Ohio S. & C. Pl. Dec. 521, 4 Ohio N. P. 383.

22. Change of lien law see *infra,* I, G.

the United States by a state for governmental uses the laws of the state apply,[23] but where a territory is carved out of a state, if there is no provision making the laws of the state applicable to the new territory, no lien can be acquired in the territory under such state laws.[24]

E. Construction of Lien Laws. It has been frequently laid down that mechanics' lien laws create a new right and are in derogation of the common law, and must therefore be strictly construed;[25] but there is also a great deal of authority for the view that such laws are remedial in their nature and hence call for a liberal construction.[26] The most logical view appears to be that such laws create both a right and a remedy and are subject to both rules of construction; that is, where the question is whether the particular case is within the statute a strict construction should be given, but where the circumstances are such that there is clearly a right to a lien under the statute and the question is whether the

23. Crook *v.* Old Point Comfort Hotel Co., 54 Fed. 604.

24. Townsend *v.* Wild, 1 Colo. 10.

25. *California.*—Bottomly *v.* Grace Church, 2 Cal. 90.

Illinois.— Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22; Pugh Co. *v.* Wallace, 198 Ill. 422, 64 N. E. 1005; Freeman *v.* Rinaker, 185 Ill. 172, 56 N. E. 1055 [*reversing* 84 Ill. App. 283]; Griffin *v.* Booth, 152 Ill. 219, 38 N. E. 551 [*affirming* 50 Ill. App. 217]; Carey-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899; Butler *v.* Gain, 128 Ill. 23, 21 N. E. 350; Belanger *v.* Hersey, 90 Ill. 70; Carney *v.* Tully, 74 Ill. 375; Canisius *v.* Merrill, 65 Ill. 67; Huntington *v.* Barton, 64 Ill. 502; Stephens *v.* Holmes, 64 Ill. 336; Brady *v.* Anderson, 24 Ill. 110; Ludwig *v.* Huverstuhl, 108 Ill. App. 461; Kewanee Boiler Co. *v.* Genoa Electric Co., 106 Ill. App. 230; Simon *v.* Blocks, 16 Ill. App. 450; Bayard *v.* McGraw, 1 Ill. App. 134.

Iowa.— Logan *v.* Attix, 7 Iowa 77; Greene *v.* Ely, 2 Greene 508.

Louisiana.— Landry *v.* Blanchard, 16 La. Ann. 173.

Michigan.—Wagar *v.* Briscoe, 38 Mich. 587; Willard *v.* Magoon, 30 Mich. 273.

Minnesota.— Farmers' Bank *v.* Winslow, 3 Minn. 86, 74 Am. Dec. 740.

Mississippi.— Jones *v.* Alexander, 10 Sm. & M. 627.

New Jersey.— Jersey County *v.* Davison, 29 N. J. L. 415.

New York.—Mushlitt *v.* Silverman, 50 N. Y. 360; Dart *v.* Fitch, 23 Hun 361; Roberts *v.* Fowler, 4 Abb. Pr. 263; Dugan *v.* Brophy, 55 How. Pr. 121.

Pennsylvania.— McCay's Appeal, 37 Pa. St. 125.

Rhode Island.— Newell *v.* Campbell Mach. Co., 17 R. I. 74, 20 Atl. 158.

Texas.— Murphey *v.* Heidenheimer, 2 Tex. Unrep. Cas. 721; McCreary *v.* Waco Lodge No. 70, I. O. O. F., 2 Tex. Unrep. Cas. 675.

West Virginia.— Mayes *v.* Ruffners, 8 W. Va. 384.

Canada.— Archibold *v.* Hubley, 18 Can. Sup. Ct. 116; Smith *v.* McIntosh, 3 Brit. Col. 26; Haggerty *v.* Grant, 2 Brit. Col. 173.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 5.

Statute not to be hypercritically interpreted.— Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300.

By "strict construction" is not meant an arbitrary, inequitable, or harsh construction, one which will give the property-owner, or even third persons, the opportunity to take advantage of technicalities to deprive an honest laborer of his wages; but such a construction as will require a substantial compliance with the statute; such a one as, while it protects the honest laborer, cannot be made the means by a loose and uncertain construction of perpetuating fraud, or of holding out inducements thereto. Hooper *v.* Flood, 54 Cal. 218; Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481. See also Davis *v.* Alvord, 94 U. S. 545, 24 L. ed. 283.

26. *Arkansas.*— White *v.* Chaffin, 32 Ark. 59.

Colorado.— Florman *v.* School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469. *Compare* Rice *v.* Carmichael, 4 Colo. App. 84, 34 Pac. 1010.

District of Columbia.— U. S. *v.* City Trust, etc., Co., 21 App. Cas. 369.

Indiana.— Gilman *v.* Gard, 29 Ind. 291.

Maine.—Shaw *v.* Young, 87 Me. 271, 32 Atl. 897; Durling *v.* Gould, 83 Me. 134, 21 Atl. 833.

Maryland.— The statute expressly requires that there shall be a liberal construction of its provisions. Hermann *v.* Mertens, 87 Md. 725, 39 Atl. 618; Plummer *v.* Eckenrode, 50 Md. 225.

Mississippi.— Sharpe *v.* Spengler, 48 Miss. 360.

Missouri.— De Witt *v.* Smith, 63 Mo. 263; Oster *v.* Rabeneau, 46 Mo. 595; Baldwin *v.* Merrick, 1 Mo. App. 281. See also Putnam *v.* Ross, 46 Mo. 337.

Nebraska.—White Lake Lumber Co. *v.* Russell, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. Rep. 262.

Nevada.— Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50; Hunter *v.* Truckee Lodge No. 14, I. O. O. F., 14 Nev. 24.

New Mexico.— Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*overruling* Finane *v.* Las Vegas Hotel, etc., Co., 3 N. M. 256, 5 Pac. 725]. *Compare* Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481.

New York.— By the express provisions of

claimant has taken the proper course to establish his lien, the statute should be liberally construed.[27] An application of this distinction to the facts of particular cases will reconcile most of the seemingly conflicting decisions.[28] It has also been said that a mechanic's lien statute should be construed so as to render the greatest amount of benefit to those for whose interest it was made and at the same time to save the other class of persons upon whom it operates from injury as far as practicable.[29] It is the function of the court to construe the law, and the legislature cannot exercise judicial authority,[30] although where the meaning is doubtful it may be explained by the legislature,[31] provided no constitutional provisions are

section 22 of the Lien Law (Laws (1897), p. 525, c. 418), the article relating to mechanics' liens is to be construed liberally to secure the beneficial purposes thereof. Martin *v.* Ambrose A. Gavigan Co., 107 N. Y. App. Div. 279, 95 N. Y. Suppl. 14.

Ohio.—Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Tennessee.— Steger *v.* Arctic Refrigerating Co., 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580.

United States.— Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424; Hooven *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229; Wisconsin Trust Co. *v.* Robinson, etc., Co., 68 Fed. 778, 15 C. C. A. 668.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 5.

Construction consistent with natural equity. — If a statute be susceptible to two constructions, one consistent with natural equity and the other not, the court should give the former construction to it. Lombard *v.* Young Men's Library Assoc. Fund, 73 Ga. 322.

Like other statutes introducing new policy. — Mechanic's lien laws are to be construed as other statutes, introductive of a new policy, are construed; and while it is not permissible, under the guise of interpretation, to extend the provisions of the enactments to cases not provided for, it is equally unjust and unauthorized to emasculate the statutes by a narrow or strict construction of their beneficial provisions. *Ex p.* Schmidt, 62 Ala. 252.

Construction such as will carry out intention see Powers Lumber Co. *v.* Wade, 15 Tex. Civ. App. 295, 39 S. W. 158.

The scope of the statute cannot be enlarged by attaching to the language employed a forced or unusual meaning. Florman *v.* School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469.

27. *Colorado.*— Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744, 746, where it is said: "Much of the seeming conflict in authority as to the rule for the construction of mechanic's lien statutes is more apparent than real. It arises in many instances from a neglect to scrutinize closely the special circumstances of the case under review and the particular part of the statute construed, and also from the fact, often overlooked, that there are material differences in the statutes of the various states. It is too frequently asserted broadly and hastily that mechanic's lien statutes are in derogation of the common law, and therefore subject to the well-known canon of construction that they must be construed strictly. This is true as to parts of such statutes, but it also may be, and invariably is, the case as to the greater portion of the same statute that its provisions are remedial in their nature, and hence, according to a rule of construction equally well settled, should be liberally construed. If the facts of each case are thoroughly investigated with reference to this distinction, the opinions of courts can be reconciled in many instances where they would appear at first glance to be in direct conflict. No inflexible rule of either strict or liberal construction can be laid down which will be applicable to every part of such a statute in the absence of the provisions in the statute itself as to how it should be construed."

Connecticut.— Chapin *v.* Persse, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

Maine.— See Shaw *v.* Young, 87 Me. 271, 32 Atl. 897.

New York.— Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300.

Tennessee.— Nanz *v.* Cumberland Gap Park Co., 103 Tenn. 299, 52 S. W. 999, 76 Am. St. Rep. 650, 47 L. R. A. 273; Thompson *v.* Baxter, 92 Tenn. 305, 21 S. W. 668, 36 Am. St. Rep. 85.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 5.

Compare Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 558, 77 Pac. 413, where it is said: "In so far as the granting of the lien is concerned, the statute is remedial in character, and should be liberally construed. In so far, however, as the procedure is concerned by which the lien is claimed and enforced . . . such statute must be strictly followed."

Provisions relating to lien after it attaches should be liberally construed. Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466.

Substantial compliance with statutory requirements sufficient.— Este *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521; Springer Land Assoc. *v.* Ford, 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562. See, generally, as to compliance with statutory requirements, *infra*, III, A.

28. Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

29. Patrick *v.* Ballentine, 22 Mo. 143.

30. Titusville Iron-Works *v.* Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917, 1 L. R. A. 361.

31. O'Conner *v.* Warner, 4 Watts & S. (Pa.) 223.

contravened.[32] By reason of the constant changes, and dissimilarity of the statutes of the different states, the decisions of one state are not considered of as great a value in another as they otherwise might be, and the statute under which the decision is rendered must usually be consulted to ascertain the weight to be given to any holding of the court.[33]

F. Retroactive Operation of Laws. Pursuant to the general rule that a law is never to be construed to operate retrospectively unless such an intention is unmistakable,[34] a statute giving a mechanic's lien is usually held to apply only to labor performed or materials furnished subsequent to its passage.[35] A mechanic's lien may, however, be acquired under a statute passed before the work was done or the materials furnished, although the contract therefor was made before such enactment,[36] and a lien law has also been held to apply in the case of work done or materials furnished partly before and partly after it went into effect.[37]

Where the legislature reënacts a provision of a law in almost the same words as the original, which has been judicially construed, it will be presumed that such provision was reënacted in view of such construction. Kelley *v.* Northern Trust Co., 190 Ill. 401, 60 N. E. 585.

32. Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777.

33. Aste *v.* Wilson, 14 Colo. App. 323, 59 Pac. 846; Great Western Mfg. Co. *v.* Hunter, 15 Nebr. 32, 16 N. W. 759; Nanz *v.* Cumberland Gap Park Co., 103 Tenn. 299, 52 S. W. 999, 76 Am. St. Rep. 650, 47 L. R. A. 273.

Adoption of law of another state.— "It is a rule of construction, too familiar to require the citation of authorities, that where one state adopts the statute of another it is adopted with the construction placed upon it by the highest court of judicature of the state from which it is taken. The reason upon which this rule rests gives it an importance and weight which should not be disregarded except upon the most urgent reasons. When the legislature of one state adopts the law of another, it is presumed to know the construction placed upon those laws in the state from which they are adopted, and therefore that it adopts the construction with the law." Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24, 35 [*quoting* McLane *v.* Abrams, 2 Nev. 199]. See, generally, STATUTES.

In the federal courts the decision of the highest court of a state in regard to the meaning of the statutes of that state is to be considered the law of the state, under the requirement of section 721 of the Revised Statutes. Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667, 26 L. ed. 1204; Leffingwell *v.* Warren, 2 Black (U. S.) 599, 17 L. ed. 261; Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Pacific Rolling-Mills Co. *v.* James St. Constr. Co., 68 Fed. 966, 16 C. C. A. 68.

34. Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519; Howard *v.* American Boiler Co., 68 Ill. App. 566; Horn, etc., Mfg. Co. *v.* Steelman, 215 Pa. St. 187, 64 Atl. 409 [*reversing* 29 Pa. Super. Ct. 544 (*affirming* 13 Pa. Dist. 732, 30 Pa. Co. Ct. 524)]; Collum *v.* Pennsylvania Paint, etc., Co., 185 Pa. St. 411, 39 Atl. 1009; Vanderpool *v.* La Crosse, etc., R. Co., 44 Wis. 652. See, generally, STATUTES.

35. *Alabama.*— Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; Smith *v.* Kolb, 58 Ala. 645.

Colorado.— Townsend *v.* Wild, 1 Colo. 10; Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989.

Florida.— McCarthy *v.* Havis, 23 Fla. 508, 2 So. 819.

Georgia.— Stonewall Jackson Loan, etc., Assoc. *v.* McGruder, 43 Ga. 9.

Illinois.— Springer *v.* Bowerman, 75 Ill. App. 352.

Kentucky.— Vass *v.* Otting, 58 S. W. 433, 22 Ky. L. Rep. 551.

Maine.— Kendall *v.* Folsom, 34 Me. 198.

Massachusetts.— French *v.* Hussey, 159 Mass. 206, 34 N. E. 362; Pierce *v.* Cabot, 159 Mass. 202, 34 N. E. 362.

Minnesota.— Pond Mach. Tool Co. *v.* Robinson, 38 Minn. 272, 37 N. W. 99.

Mississippi.— Andrews *v.* Washburn, 3 Sm. & M. 109.

New York.— Fitzpatrick *v.* Boylan, 57 N. Y. 433; Donaldson *v.* O'Connor, 1 E. D. Smith 695; McDonald *v.* New York, 29 Misc. 504, 62 N. Y. Suppl. 72.

Ohio.— Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90.

Pennsylvania.— Church *v.* Davis, 9 Watts 304; Gibson *v.* Women's Homœopathic Assoc., 4 Pa. Co. Ct. 479, 21 Wkly. Notes Cas. 63; Brown *v.* Peterson, 2 Woodw. 112.

Texas.— Central, etc., R. Co. *v.* Henning, 52 Tex. 466.

Virginia.— Hendricks *v.* Fields, 26 Gratt. 447.

Canada.— Irwin *v.* Benyon, 4 Manitoba 10. See 34 Cent. Dig. tit. "Mechanics' Liens," § 6.

36. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667; Donahy *v.* Clapp, 12 Cush. (Mass.) 440; Wheaton *v.* Berg, 50 Minn. 525, 52 N. W. 926; Hauptman *v.* Catlin, 20 N. Y. 247; Sullivan *v.* Brewster, 1 E. D. Smith (N. Y.) 681, 8 How. Pr. 207. *Contra*, Horn, etc., Mfg. Co. *v.* Steelman, 215 Pa. St. 187, 64 Atl. 409 [*reversing* 29 Pa. Super. Ct. 544 (*affirming* 13 Pa. Dist. 732, 30 Pa. Co. Ct. 524)].

37. Kerckhoff-Cuzner Mill, etc., Co. *v.* Olm-

G. Change or Repeal of Lien Law. The right to a mechanic's lien is usually determined by the statute in force at the time the work is done or the materials are furnished;[38] but the lien must be established or preserved and enforced by the law in force at the time the necessary proceedings are had for that purpose,[39] unless there is some saving clause in the new law with regard to rights acquired under the old law,[40] or unless to require enforcement under the new remedy would infringe substantial vested rights.[41] Where the right to a lien has accrued under a statute allowing a certain time in which to perfect or enforce the lien, such time will not as a rule be cut down by a subsequent statute allowing a shorter time;[42] but the time of the enforcement of a lien may be extended.[43] When a mechanic's lien law is repealed or superseded all inchoate rights under the

stead, 85 Cal. 80, 24 Pac. 648; Mason *v.* Heyward, 5 Minn. 74; O'Driscoll's Estate, 33 Pittsb. Leg. J. N. S. (Pa.) 107. *Compare* Steinmetz *v.* Boudinot, 3 Serg. & R. (Pa.) 541; Orr *v.* Rogers, 29 Pa. Super. Ct. 175.

38. *Colorado.*— Griffin *v.* Seymour, 15 Colo. App. 487, 63 Pac. 809.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318. The law in force at the time the contract was executed governs. Joseph N. Eidendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22; Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387 [*followed* in Springer *v.* Bowerman, 75 Ill. App. 352].

Indiana.— Goodbub *v.* Hornung, 127 Ind. 181, 26 N. E. 770.

Kansas.— Nixon *v.* Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236.

Kentucky.— Kinsey *v.* Eilerman, 110 Ky. 948, 62 S. W. 1009, 23 Ky. L. Rep. 913.

Minnesota.— O'Neil *v.* St. Olaf's School, 26 Minn. 329, 4 N. W. 47.

North Dakota.— Mahon *v.* Surerus, 9 N. D. 57, 81 N. W. 64.

Oregon.— Willamette Falls Transp., etc., Co. *v.* Riley, 1 Oreg. 183.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 9.

39. *California.*— McCrea *v.* Craig, 23 Cal. 522.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318; Turney *v.* Saunders, 5 Ill. 527; Berndt *v.* Armknecht, 50 Ill. App. 467; Barton *v.* Steinmitz, 37 Ill. App. 141. *Compare* Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22, holding that the statute in force at the date of the execution of the contract governs as to the time for bringing suit to enforce the lien.

Kansas.— Main St. Hotel Co. *v.* Horton Hardware Co., 56 Kan. 448, 43 Pac. 769; Nixon *v.* Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236.

Kentucky.— Kinsey *v.* Eilerman, 110 Ky. 948, 62 S. W. 1009, 23 Ky. L. Rep. 913.

Minnesota.— Willim *v.* Bernheimer, 5 Minn. 288. But in view of the saving clause in Laws (1889), c. 200, the statement for the lien, both as to its contents and the time of filing, comes under the law in force when the right to the lien accrued and became complete. Hill *v.* Lovell, 47 Minn. 293, 50 N. W. 81; Bardwell *v.* Mann, 46 Minn. 285, 48 N. W. 1120; Tell *v.* Woodruff, 45 Minn. 10, 47 N. W. 262 (holding that where part of the materials were furnished before and part after the law of 1889 went into effect, that law governed as to what the statement should contain); Nelson *v.* Sykes, 44 Minn. 68, 46 N. W. 207 (holding that where all the materials were delivered before the law of 1889 went into effect, the prior law controlled as to the time of filing the statement).

Missouri.— Hauser *v.* Hoffman, 32 Mo. 334.

New York.— Heckmann *v.* Pinkney, 8 Daly 466, 6 Abb. N. Cas. 371 [*affirmed* in 81 N. Y. 211].

North Dakota.— Mahon *v.* Surerus, 9 N. D. 57, 81 N. W. 64. See also Craig *v.* Herzman, 9 N. D. 140, 81 N. W. 288.

Ohio.— Lane *v.* Thomas, 25 Ohio Cir. Ct. 303; Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90; *In re* Mechanics' Lien Land, 5 Ohio S. & C. Pl. Dec. 564, 7 Ohio N. P. 668.

Oregon.— Willamette Falls Transp., etc., Co. *v.* Riley, 1 Oreg. 183.

South Carolina.— Waring *v.* Miller Batting, etc., Co., 36 S. C. 310, 15 S. E. 132.

Tennessee.— Phillips *v.* Mason, 7 Heisk. 61.

Washington.— Hopkins *v.* Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815; Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 10.

40. Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64 [*followed* in Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989]; Welde *v.* Henderson, 6 N. Y. Suppl. 176.

The Washington Lien Act of 1893 did not require actions subsequently brought to enforce liens for labor and materials previously furnished to be proceeded with under the previous law. Hopkins *v.* Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815.

41. Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259; Tabor-Pierce Lumber Co. *v.* International Trust Co., 19 Colo. App. 108, 75 Pac. 150.

42. Montgomery *v.* Allen, 107 Ky. 298, 53 S. W. 813, 21 Ky. L. Rep. 1001; Fox *v.* Somerset Odd Fellows Hall, etc., Co., 54 S. W. 835, 21 Ky. L. Rep. 1272; Nystrom *v.* Hamm, 47 Minn. 33, 49 N. W. 394; Nystrom *v.* London, etc., Mortg. Co., 47 Minn. 31, 49 N. W. 394; Nelson *v.* Sykes, 44 Minn. 68, 46 N. W. 207.

43. Trim *v.* Willoughby, 44 How. Pr. (N. Y.) 189.

old law are destroyed,[44] unless there is a saving clause as to such rights,[45] although if it is plain that it was never intended to destroy rights acquired under the old law, but simply to consolidate, a lien under the old law then may be a remedy under the new.[46] Where the right has become vested it is of course not affected.[47]

H. Who May Acquire Lien.[48] Generally whoever is competent to make the contract which is the basis of the lien is entitled to the lien.[49] The statutes generally provide that any person who furnishes material or does work shall have a lien, and this is construed to mean either a natural or an artificial person.[50] Thus the lien may be acquired by a partnership,[51] or a corporation,[52] either domestic[53] or foreign.[54] As a rule non-residents as well as residents of the state may be entitled to the lien.[55] The owner of property cannot enforce a mechanic's lien on it to the prejudice of third persons who hold liens on it.[56]

44. *Colorado.*— Purmort *v.* Tucker Lumber Co., 2 Colo. 470.

Illinois.— Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031; Boynton *v.* Holcomb, 49 Ill. App. 503.

Maine.— Frost *v.* Ilsley, 54 Me. 345.

Michigan.— Kirkwood *v.* Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549; Hanes *v.* Wadey, 73 Mich. 178, 41 N. W. 222, 2 L. R. A. 498.

Minnesota.— Dunwell *v.* Bidwell, 8 Minn. 34; Bailey *v.* Mason, 4 Minn. 546.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 9.

45. Christman *v.* Charleville, 36 Mo. 610; Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188.

46. Stone *v.* Tyler, 173 Ill. 147, 50 N. E. 688; Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97; Rhine *v.* Mauk, 21 Pa. Co. Ct. 345, 14 Montg. Co. Rep. 197; Sabin *v.* Connor, 21 Fed. Cas. No. 12,197.

47. Weaver *v.* Sells, 10 Kan. 609; Craig *v.* Herzman, 9 N. D. 140, 81 N. W. 288.

48. Persons entitled to lien see *infra*, II, D.

49. Donahy *v.* Clapp, 12 Cush. (Mass.) 440; Husted *v.* Mathes, 77 N. Y. 388; Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324.

50. Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779. See also Doane *v.* Clinton, 2 Utah 417.

51. Chambersburg Woollen Mfg. Co. *v.* Hazelet, 3 Brewst. (Pa.) 98; Doane *v.* Clinton, 2 Utah 417. See also Bickerton *v.* Dakin, 20 Ont. 192 [*affirmed* in 20 Ont. 695].

The death of one of two partners who are delivering materials under a special contract does not prevent the survivor from going on with the contract and claiming a mechanic's lien for the whole; *aliter* as to materials furnished on running account. Miller *v.* Hoffman, 26 Mo. App. 199.

The administrator of a partnership estate cannot contract in the name of the partnership for the sale of material, and hence cannot enforce a lien as such administrator for materials so furnished. Richardson *v.* O'Connell, 88 Mo. App. 12.

52. Doane *v.* Clinton, 2 Utah 417; Tennis Bros. Co. *v.* Wetzel, etc., R. Co., 140 Fed. 193.

A municipal corporation could not take out a lien for work done under its direction unless expressly authorized by statute. Mauch Chunk *v.* Shortz, 61 Pa. St. 399; Yates *v.* Meadville, 56 Pa. St. 21.

Ultra vires.— A corporation organized for the purpose of manufacturing and selling lumber is not entitled to a lien for labor performed because the act is beyond its corporate powers. Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527.

53. Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779; Gaskell *v.* Beard, 58 Hun (N. Y.) 101, 11 N. Y. Suppl. 399.

54. *Georgia.*— Loudon *v.* Coleman, 59 Ga. 653.

Nebraska.— Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779.

New York.—New York Architectural Terra-Cotta Co. *v.* Williams, 102 N. Y. App. Div. 1, 92 N. Y. Suppl. 808 [*affirmed* in 184 N. Y. 579, 77 N. E. 1192].

Oregon.— Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527.

Texas.— Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324.

Utah.— Doane *v.* Clinton, 2 Utah 417.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 11.

55. *Michigan.*— Stout *v.* Sawyer, 37 Mich. 313.

Minnesota.— Atkins *v.* Little, 17 Minn. 342.

New Mexico.— Genest *v.* Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. 743.

New York.— Matter of Simonds Furnace Co., 30 Misc. 209, 61 N. Y. Suppl. 974 [*citing* Campbell *v.* Coon, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410].

Tennessee.— Greenwood *v.* Tennessee Mfg. Co., etc., 2 Swan 130.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 11.

56. Stevenson *v.* Stonehill, 5 Whart. (Pa.) 301.

A member of an unincorporated association cannot without a special agreement recover for services rendered to the association, nor can he file a mechanic's lien for services or commissions in purchasing lumber for the association. Feinour *v.* Farmers' Alliance, 27 Pa. Co. Ct. 257, 8 North. Co. Rep. 315. See also Babb *v.* Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650, holding that a mechanic's lien filed by a member of a mutual benevolent

I. Property Subject to Lien [57] — **1. Public Property.** [58] Public property is not as a rule subject to a mechanic's lien,[59] it being considered that unless it is expressly made subject to such lien by statute [60] it is by implication exempted from the operation of the lien laws.[61] Accordingly a mechanic's lien cannot attach to a

association against a building erected by it was not available against the liens of other persons who were not members.

57. See also *infra*, IV, B.

58. Land occupied by homestead claimant see *infra*, I, I, 6.

59. *California.*— Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438; Mayrhofer *v.* San Diego Bd. of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451.

Georgia.— Neal-Millard Co. *v.* Chatham Academy, 121 Ga. 208, 48 S. E. 978; Albany *v.* Lynch, 119 Ga. 491, 46 S. E. 622.

Illinois.— Bouton *v.* McDonough County, 84 Ill. 384; District No. 3 Bd. of Education *v.* Neidenberger, 78 Ill. 58; State Bd. of Education *v.* Greenbaum, 39 Ill. 609; Salem *v.* Lane, etc., Co., 90 Ill. App. 560.

Indiana.— Secrist *v.* Delaware County, 100 Ind. 59; Lowe *v.* Howard County, 94 Ind. 553; Parke County *v.* O'Conner, 86 Ind. 531, 44 Am. Rep. 338.

Iowa.— Whiting *v.* Story County, 54 Iowa 81, 6 N. W. 137, 37 Am. Rep. 189; Loring *v.* Small, 50 Iowa 271, 32 Am. Rep. 136; Lewis *v.* Chickasaw County, 50 Iowa 234. Under Code (1897), § 3102, providing that subcontractors furnishing material for the construction of any building shall have claims against any public corporation constructing such building for labor, and material furnished, which, due notice having been given, shall be entitled to priority in the order in which they are filed, a subcontractor furnishing material for a public building acquires no lien on the building or on the moneys becoming due the contractor from the county, although to the extent that he may acquire a right to priority as to the distribution of the fund, his claim is in the nature of a lien. Thompson *v.* Stephens, (1906) 107 N. W. 1905.

Maine.— A. L. Goss, etc., Co. *v.* Greenleaf Co., 98 Me. 436, 57 Atl. 581.

Michigan.— Knapp *v.* Swaney, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397.

Mississippi.— Panola County Sup'rs *v.* Gillen, 59 Miss. 198.

Nebraska.— Ripley *v.* Gage County, 3 Nebr. 397.

New Jersey.— Frank *v.* Hudson County, 39 N. J. L. 347.

New York.— Poillon *v.* New York, 47 N. Y. 666; Tice *v.* Atlantic Constr. Co., 52 N. Y. App. Div. 284, 65 N. Y. Suppl. 79.

North Dakota.— Arrison *v.* Company D, 12 N. D. 554, 98 N. W. 83.

Oregon.— Portland Lumbering, etc., Co. *v.* School Dist. No. 1, 13 Oreg. 283, 10 Pac. 350.

Pennsylvania.— Foster *v.* Fowler, 60 Pa. St. 27; Wilson *v.* Huntington County, 7 Watts & S. 197.

Rhode Island.— Ferguson *v.* Neilson, 17 R. I. 81, 20 Atl. 229, 33 Am. St. Rep. 855, 9 L. R. A. 155.

Texas.— Dallas *v.* Loonie, 83 Tex. 291, 18 S. W. 726; Atascosa County *v.* Angus, 83 Tex. 202, 18 S. W. 563, 29 Am. St. Rep. 637; Herring-Hall-Marvin Co. *v.* Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980.

Virginia.— Phillips *v.* State University, 97 Va. 472, 34 S. E. 66, 47 L. R. A. 284; Hicks *v.* Roanoke Brick Co., 94 Va. 741, 27 S. E. 596.

West Virginia.— Hall's Safe, etc., Co. *v.* Scites, 38 W. Va. 691, 18 S. E. 895.

Wisconsin.— Platteville *v.* Bell, 66 Wis. 326, 28 N. W. 404; Wilkinson *v.* Hoffman, 61 Wis. 637, 21 N. W. 816.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 14.

Compare McKnight *v.* Grant's Parish, 30 La. Ann. 361, 31 Am. Rep. 226.

Rule based on public policy.— Ferguson *v.* Neilson, 17 R. I. 81, 20 Atl. 229, 33 Am. St. Rep. 855, 9 L. R. A. 155.

A statute imposing a personal liability on the owner of property for the claims of materialmen does not establish any personal liability against a county in favor of one who furnished materials to a contractor for a public building of the county. Secrist *v.* Delaware County, 100 Ind. 59.

In Kansas a mechanic's lien can attach against public property. Wilson *v.* School Dist. No. 2, 17 Kan. 104 [*followed* in Jewell County *v.* Snodgrass, etc., Mfg. Co., 52 Kan. 253, 34 Pac. 741 (holding that Civ. Code, §§ 638*e*, 638*f*, providing that a contractor on public work shall give bond, on which any person having a claim for work or material may sue, do not take from the laborer or materialman his right to a mechanic's lien upon a public building); Badger Lumber Co. *v.* Marion Water Supply, etc., Co., 48 Kan. 187, 30 Pac. 117, 30 Am. St. Rep. 306; School Dist. No. 2 *v.* Conrad, 17 Kan. 522; Topeka *v.* Thomas, 1 Kan. App. 113, 40 Pac. 930].

In Manitoba a city hall has been held subject to sale under the Mechanics' Lien Act. McArthur *v.* Dewar, 3 Manitoba 72.

60. See Trenton Public Instruction Com'rs *v.* Fell, 52 N. J. Eq. 689, 29 Atl. 816; Bell *v.* New York, 105 N. Y. 139, 11 N. E. 495.

61. *Illinois.*—Bouton *v.* McDonough County, 84 Ill. 384; District No. 3 Bd. of Education *v.* Neidenberger, 78 Ill. 58.

Iowa.— Loring *v.* Small, 50 Iowa 271, 32 Am. Rep. 136.

Maine.— Goss Co. *v.* Greenleaf, 98 Me. 436, 57 Atl. 581.

Michigan.— Knapp *v.* Swaney, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397.

New Jersey.— Frank *v.* Hudson County, 39 N. J. L. 347.

New York.— Poillon *v.* New York, 47 N. Y. 666.

county court-house,[62] a county bridge,[63] a municipal fire-bell tower,[64] municipal waterworks,[65] a public library erected by a town,[66] a lunatic asylum,[67] or public school buildings.[68] Under some statutes, however, a lien is provided for upon the fund appropriated for public building or improvement,[69] and where property is subject to a mechanic's lien at the time of its acquisition by a city the lien is not displaced but the land may still be sold to enforce it.[70]

2. Property of Quasi-Public Corporations.[71] As a rule the property of a quasi-

Pennsylvania.— Foster *v.* Fowler, 60 Pa. St. 27.

Rhode Island.— Ferguson *v.* Neilson, 17 R. I. 81, 20 Atl. 229, 33 Am. St. Rep. 855, 9 L. R. A. 155; Hovey *v.* East Providence, 17 R. I. 80, 20 Atl. 205, 9 L. R. A. 156.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 14.

62. *Illinois.*—Bouton *v.* McDonough County Sup'rs, 84 Ill. 384.

Indiana.— Parke County Com'rs *v.* O'Conner, 86 Ind. 531, 44 Am. Rep. 338.

Minnesota.— Burlington Mfg. Co. *v.* Court House, etc., Com'rs, 67 Minn. 327, 69 N. W. 1091.

North Carolina.— Snow *v.* Durham County Com'rs, 112 N. C. 335, 17 S. E. 176.

Texas.— Atascosa County *v.* Angus, 83 Tex. 202, 18 S. W. 563, 29 Am. St. Rep. 637.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 14.

63. Pike County Com'rs *v.* Norrington, 82 Ind. 190; Loring *v.* Small, 50 Iowa 271, 32 Am. Rep. 136; Idaho Nat. Bank *v.* Malheur County, 30 Oreg. 420, 45 Pac. 781, 35 L. R. A. 141. See also McPheeters *v.* Merimac Bridge Co., 28 Mo. 465.

64. Leonard *v.* Reynolds, 7 Hun (N. Y.) 73 [*affirmed* in 71 N. Y. 498].

65. Wilkinson *v.* Hoffman, 61 Wis. 637, 21 N. W. 816.

66. A. L. Goss, etc., Co. *v.* Greenleaf, 98 Me. 436, 57 Atl. 581; Young *v.* Falmouth, 183 Mass. 80, 66 N. E. 419, 97 Am. St. Rep. 418.

67. People *v.* Butler, 2 Nebr. 5.

68. *California.*— Mayrhofer *v.* San Diego Bd. of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451.

Colorado.— Florman *v.* El Paso County School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469.

Georgia.— Neal-Millard Co. *v.* Chatham Academy, 121 Ga. 208, 48 S. E. 978.

Illinois.— Quinn *v.* Allen, 85 Ill. 39; District No. 3 Bd. of Education *v.* Neidenberger, 78 Ill. 58; Thomas *v.* Illinois Industrial University, 71 Ill. 310; Thomas *v.* Urbana School Dist., 71 Ill. 283.

Indiana.— Fatout *v.* Indianapolis School Com'rs, 102 Ind. 223, 1 N. E. 389.

Iowa.— Charnock *v.* Colfax Dist. Tp., 51 Iowa 70, 50 N. W. 286, 33 Am. Rep. 116 [*approved* in Baker *v.* Bryan, 64 Iowa 561, 21 N. W. 83].

Massachusetts.— Staples *v.* Somerville, 176 Mass. 237, 57 N. E. 380; Lessard *v.* Revere, 171 Mass. 294, 50 N. E. 533.

Minnesota.— Jordon *v.* Taylor's Falls Bd. of Education, 39 Minn. 298, 39 N. W. 801.

Missouri.— Abercrombie *v.* Ely, 60 Mo. 23; Hastings *v.* Woods, 2 Mo. App. 148.

Montana.— Whiteside *v.* Flathead County School Dist. No. 5, 20 Mont. 44, 49 Pac. 445.

New York.— Poillon *v.* New York, 47 N. Y. 666; Terwilliger *v.* Wheeler, 81 N. Y. App. Div. 460, 81 N. Y. Suppl. 173; Brinckerhoff *v.* New York Bd. of Education, 6 Abb. Pr. N. S. 428, 37 How. Pr. 499.

Pennsylvania.— Williams *v.* First School Dist., 18 Pa. St. 275.

Utah.— Salt Lake City Bd. of Education *v.* Salt Lake Pressed Brick Co., 13 Utah 211, 44 Pac. 709.

Vermont.— Greenough *v.* Nichols, 30 Vt. 768.

United States.—Missouri *v.* Tiedermann, 10 Fed. 20, 3 McCrary 309.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 15.

Contra.— Moore *v.* Bradley Protestant School Dist. No. 369, 5 Manitoba 49.

State reform school building not liable.— Patterson *v.* Pennsylvania Reform School, 92 Pa. St. 229.

Buildings of state university not liable.— Phillips *v.* Virginia University, 97 Va. 472, 34 S. E. 66, 47 L. R. A. 284.

69. Beardsley *v.* Brown, 71 Ill. App. 199; Tice *v.* Atlantic Constr. Co., 52 N. Y. App. Div. 284, 65 N. Y. Suppl. 79 (holding that N. Y. Laws (1897), c. 418, § 5, as amended by N. Y. Laws (1898), c. 169, providing that persons performing labor and furnishing materials to a contractor for the construction of a public improvement shall have a lien for such materials and services, does not give a mechanic's lien against the state, because, although the terms of the statute include the state, the provisions for the enforcement of the law are limited to municipal corporations and do not apply to the state, and hence there is no method by which a lien against the state may be enforced); Mason *v.* New York State Hospital, 50 Misc. (N. Y.) 40, 100 N. Y. Suppl. 272 (holding that, although N. Y. Laws (1897), c. 418, § 5, as amended by Laws (1902), p. 74, c. 37, expressly give a lien on funds in the hands of the state appropriated for a public improvement, yet as there are no provisions in the code of civil procedure for the enforcement of the lien given by such statutes, where the state is made a party defendant in an action to foreclose such a lien, its demurrer upon the ground that it appears on the face of the proceeding that the court has no jurisdiction of defendant will be sustained).

70. Salem *v.* Lane, etc., Co., 189 Ill. 593, 60 N. E. 37, 32 Am. St. Rep. 481 [*affirming* 90 Ill. App. 560].

71. Statutory lien for construction of railroads see Railroads.

public corporation, which is affected with a public use, is not subject to a mechanic's lien.[72] Accordingly it has been held that a lien cannot attach to a strip of land granted to a railroad,[73] a railroad depot,[74] a street railroad power-house,[75] or a waterworks plant supplying a city with water.[76] A mechanic's lien may, however, be enforced against property of a quasi-public corporation which is not essential to the carrying out of the public purposes for which it was established,[77] and statutes expressly giving a lien on bridges have been held to apply to railroad bridges.[78] It has also been held that an electric light company which has a franchise to occupy the streets of a city with its poles, wires, and lamps, and is engaged in furnishing light to the people of the city is not so distinctively public in its nature and operations as to exempt the property from the operation of the Mechanics' Lien Law.[79]

3. Property of Private Corporations. The property of a private corporation, like that of an individual, is subject to a mechanic's lien.[80]

4. Churches. A church is subject to a mechanic's lien.[81]

5. College Buildings.[82] College buildings may be subjected to a mechanic's lien.[83]

6. Homesteads.[84] As a general rule property held exempt from ordinary debts as a homestead is subject to a mechanic's lien the same as other property,[85]

72. *Indiana.*— Kentucky Lead, etc., Co. *v.* New Albany Water-Works, 62 Ind. 63.

Kentucky.— Ausbeck *v.* Schardien, 45 S. W. 507, 20 Ky. L. Rep. 178.

Pennsylvania.— McLeod *v.* Central Normal School Assoc., 152 Pa. St. 575, 25 Atl. 1109; Guest *v.* Merion Water Co., 142 Pa. St. 610, 21 Atl. 1001, 12 L. R. A. 324; Foster *v.* Fowler, 60 Pa. St. 27.

Wisconsin.— Pittsburg Testing Laboratory *v.* Milwaukee Electric R., etc., Co., 110 Wis. 633, 86 N. W. 592.

United States.— Buncombe County *v.* Tommey, 115 U. S. 122, 5 S. Ct. 1186, 29 L. ed. 305 [*followed* in Greenwood, etc., R. Co. *v.* Strang, 77 Fed. 498]; McNeal Pipe, etc., Co. *v.* Bullock, 38 Fed. 565.

Canada.— Breeze *v.* Midland R. Co., 26 Grant Ch. (U. C.) 225.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 13.

The board of education of the state of Illinois, being a private corporation and not a state department, its property may be subjected to a mechanic's lien. State Bd. of Education *v.* Greenbaum, 39 Ill. 609.

A corporation organized under N. D. Laws (1897), p. 159, c. 101, authorizing three or more members of the National Guard to incorporate to erect an armory building, is a private and not a public corporation, and, save as to taxes and charter fees which are excepted by the act, is subject to the same liabilities as any other private corporation, so that its property is subject to the operation of the Mechanic's Lien Law. Arrison *v.* Company D, 12 N. D. 554, 98 N. W. 83.

73. Schulenburg *v.* Memphis, etc., R. Co., 67 Mo. 442 [*following* Dunn *v.* North Missouri R. Co., 24 Mo. 493].

74. Shrainka *v.* Rohan, 18 Mo. App. 340. *Contra,* Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

75. Oberholtzer *v.* Norristown Pass. R. Co., 16 Pa. Co. Ct. 13.

76. Kentucky Lead, etc., Co. *v.* New Albany Water-Works, 62 Ind. 63; Chapman Valve Mfg. Co. *v.* Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830 [*disapproving* National Foundry Co. *v.* Oconto Water, etc., Works, 52 Fed. 43 (*affirmed* in 59 Fed. 19, 7 C. C. A. 603)]; McNeal Pipe, etc., Co. *v.* Bullock, 38 Fed. 565. *Contra,* McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743.

77. Pittsburg Testing Laboratory *v.* Milwaukee Electric R., etc., Co., 110 Wis. 633, 86 N. W. 592, 84 Am. St. Rep. 948.

A stable built by and occupied for the purposes of a passenger railway is liable to a mechanic's lien. McIlvain *v.* Hestonville, etc., R. Co., 5 Phila. (Pa.) 13.

78. Smith Bridge Co. *v.* Bowman, 41 Ohio St. 37, 52 Am. Rep. 66; Purtell *v.* Chicago Forge, etc., Co., 74 Wis. 132, 42 N. W. 265.

79. Badger Lumber Co. *v.* Marion Water Supply, etc., Co., 48 Kan. 187, 30 Pac. 117, 30 Am. St. Rep. 306; Southern Electrical Supply Co. *v.* Rolla Electric Light, etc., Co., 75 Mo. App. 622.

80. Matter of Simonds Furnace Co., 30 Misc. (N. Y.) 209, 61 N. Y. Suppl. 974; Fisher Foundry, etc., Co. *v.* Susquehanna Iron, etc., Co., 23 Lanc. L. Rev. (Pa.) 398.

81. Jones *v.* Mt. Zion Cong., 30 La. Ann. 711; Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390; Presbyterian Church *v.* Allison, 10 Pa. St. 413.

82. As to public schools see *supra,* I, I, 1.

83. Ray County Sav. Bank *v.* Cramer, 54 Mo. App. 587; Lewisburg University *v.* Reber, 43 Pa. St. 305, although the statute establishing the college prohibited the encumbering of its property.

84. See, generally, Homesteads.

Signing and acknowledgment of contract see *infra,* II, C, 5, i.

Recording of contract see *infra,* II, C, 7.

85. *Alabama.*— McAnally *v.* Hawkins Lum-

although in some states the rule is otherwise.[86] The lien does not attach to land acquired under the United States Homestead Act before the patent is issued.[87]

ber Co., 109 Ala. 397, 19 So. 417; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

Arkansas.— Anderson *v.* Seamans, 49 Ark. 475, 5 S. W. 799; Murray *v.* Rapley, 30 Ark. 568.

Michigan.— The contract must be in writing, signed by both husband and wife. McAllister *v.* Des Rochers, 132 Mich. 381, 93 N. W. 887; Jossman *v.* Rice, 121 Mich. 220, 80 N. W. 25, 80 Am. St. Rep. 493.

Montana.—Bonner *v.* Minnier, 13 Mont. 269, 34 Pac. 30, 40 Am. St. Rep. 441; Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837, homestead subject to lien for materials as well as labor, where the material is the object of the labor for which the lien is claimed.

Nebraska.— Phelps, etc., Wind-Mill Co. *v.* Shay, 32 Nebr. 19, 48 N. W. 896.

North Carolina.— The constitution gives the "mechanic's lien for work done on the premises" priority over the homestead exemption. And when a contractor agrees to put up a building and complete it, the contract is indivisible, and his lien, which is superior to the homestead exemption, embraces the entire outlay whether in labor or material. Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31 [*followed* in Isler *v.* Dixon, 140 N. C. 529, 53 S. E. 348]. But the homestead right is not affected by a lien for materials furnished merely, and a statute attempting to give such lien priority is unconstitutional. Cumming *v.* Bloodworth, 87 N. C. 83. See also Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31.

Oklahoma.— The homestead is subject to the lien if the work or material was contracted for in writing and the consent of the wife given in the manner required in making a sale and conveyance of the homestead; otherwise it is not subject. Rowley *v.* Varnum, 15 Okla. 612, 84 Pac. 487.

Pennsylvania.— Laucks' Appeal, 24 Pa. St. 426.

Tennessee.— Thompson *v.* Wickersham, 9 Baxt. 216.

Texas.— Tinsley *v.* Boykin, 46 Tex. 592. *Contra*, Merchant *v.* Perez, 11 Tex. 20, unless there is a contract for a lien.

Washington.— Parsons *v.* Pearson, 9 Wash. 48, 36 Pac. 974.

Wisconsin.— Darling *v.* Neumister, 99 Wis. 426, 75 N. W. 175.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 16.

The statute must be substantially complied with in every respect in order to fix a mechanic's lien on the homestead. Tinsley *v.* Boykin, 46 Tex. 592. An express agreement in a mechanic's contract that he should have a lien upon the homestead, as provided by law, would not create a lien until all the requirements of the statute were complied with. Cameron *v.* Marshall, 65 Tex. 7.

A lien on a homestead may be given in the contract providing for the work and material (Lippencott *v.* York, 86 Tex. 276, 24 S. W. 275), and such lien may include attorney's fees (Summerville *v.* King, 98 Tex. 332, 83 S. W. 680). But although a contract for improvements on a homestead provides for a "mechanic's lien," it will not be held to be a contract for a mere statutory lien unless the contract shows an intention to so limit it. Lippencott *v.* York, *supra*.

Acquiescence of wife.— Under Nebr. Comp. St. c. 54, § 3, which provides that "the homestead is subject to execution or forced sale in satisfaction of judgment obtained . . . on debts secured by mechanics' . . . liens upon the premises," the lien-holder's right to enforce a sale of such premises will not be affected by want of the wife's consent to the creation of the debt secured by the lien, when she sat by and saw the improvements for which the debt was incurred placed on the premises without objection. Phelps, etc., Wind-Mill Co. *v.* Shay, 32 Nebr. 19, 48 N. W. 896. As to implied contract or consent arising from acquiescence in or failure to object to improvement see, generally, *infra*, II, C, 5, k, (II).

If the personal security of the debtor alone is relied on in doing the work or furnishing the materials the claim of homestead exemption is superior. Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905. Necessity for reliance on credit of building or property see, generally, *infra*, II, B, 6, d.

When the claimant knows that the property is to be used as a homestead the lien will not attach. Haldeman *v.* McDonald, (Tex. Civ. App. 1900) 58 S. W. 1040.

In California the statute expressly makes the homestead subject to "mechanics'" and "laborers'" liens, but it has been held not subject to sale under the lien of a materialman. Walsh *v.* McMenomy, 74 Cal. 356, 16 Pac. 17 (even though the materials were furnished before the homestead was declared, the lien being filed subsequent to the declaration); Richards *v.* Shear, 70 Cal. 187, 11 Pac. 607.

86. Coleman *v.* Ballandi, 22 Minn. 144 [*followed* in Keller *v.* Struck, 31 Minn. 446, 18 N. W. 280] (unless there is a contract for a lien); Cogel *v.* Mickow, 11 Minn. 475; Morgan *v.* Benthein, 10 S. D. 650, 75 N. W. 204, 66 Am. St. Rep. 733; Fallihee *v.* Wittmayer, 9 S. D. 479, 70 N. W. 642.

Where the lien attached before the homestead right it may be enforced without reference to such right. Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205.

87. Kansas Lumber Co. *v.* Jones, 32 Kan. 195, 4 Pac. 74; Green *v.* Tenold, (N. D. 1905) 103 N. W. 398 (as the homesteader has no interest in the land that can be sold to enforce the lien); Paige *v.* Peters, 70 Wis. 178, 35 N. W. 328, 5 Am. St. Rep. 156. But *compare* Turney *v.* Saunders, 5 Ill. 527.

J. Estates or Interests Subject to Lien[88] — **1. In General.** As a general rule the lien attaches to the building or other improvement, etc., and the interest of the owner in the land upon which it is situated, whether such interest be a fee simple, an estate for life, or any less estate than a fee.[89] The lien extends to any interest in land that is legally subject to mortgage.[90]

2. Equitable Estates or Interests. A mechanic's lien can attach to equitable as well as legal estates or interests in land.[91] Thus the interest of one who, being in possession of land under a contract of purchase, erects a building or other improvements thereon is subject to the lien.[92] But a mechanic's lien cannot

88. **Married woman's separate property** see Husband and Wife, 21 Cyc. 1444.

89. *Arkansas.*—White *v.* Chaffin, 32 Ark. 59.

Illinois.— Tracy *v.* Rogers, 69 Ill. 662.

Indiana.— Littlejohn *v.* Millirons, 7 Ind. 125.

Kansas.— Hathaway *v.* Davis, 32 Kan. 693, 5 Pac. 29.

Minnesota.— Benjamin *v.* Wilson, 34 Minn. 517, 26 N. W. 725.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 17.

Dower.— A wife's inchoate right of dower is not subject to a mechanic's lien. Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711; Bishop *v.* Boyle, 9 Ind. 169, 68 Am. Dec. 615; Van Vronker *v.* Eastman, 7 Metc. (Mass.) 157; Johnston *v.* Dahlgren, 14 Misc. (N. Y.) 623, 36 N. Y. Suppl. 806. But after dower is assigned she is an owner within the statute. Redman *v.* Williamson, 2 Iowa 488.

Curtesy.— A husband's curtesy estate may be subject to lien. Flannery *v.* Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Kirby *v.* Tead, 13 Metc. (Mass.) 149. But *compare* Fischer *v.* Anslyn, 30 Mo. App. 316; Spinning *v.* Blackburn, 13 Ohio St. 131, holding that a husband's curtesy cannot be sold during the wife's life to satisfy a mechanic's lien against him.

A wife having a life-estate, with joint seizin in herself and husband, has an interest in land which may be sold under the Mechanics' Lien Law. Littlejohn *v.* Millirons, 7 Ind. 125.

90. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84.

91. *Connecticut.*— Hooker *v.* McGlone, 42 Conn. 95.

Illinois.— Le Forgee *v.* Colby, 69 Ill. App. 443.

Iowa.— Smith *v.* St. Paul F. & M. Ins. Co., 106 Iowa 225, 76 N. W. 676; Lane *v.* Snow, 66 Iowa 544, 24 N. W. 35; Clark *v.* Parker, 58 Iowa 509, 12 N. W. 553.

Kansas.— Seitz *v.* Union Pac. R. Co., 16 Kan. 133.

Maryland.— Goldheim *v.* Clark, 68 Md. 498, 13 Atl. 363.

Minnesota.— Carey-Lombard Lumber Co. *v.* Bierbauer, 76 Minn. 434, 79 N. W. 541; Atkins *v.* Little, 17 Minn. 342.

Pennsylvania.— Weaver *v.* Sheeler, 124 Pa. St. 473, 17 Atl. 17, 118 Pa. St. 634, 12 Atl. 558; Keller *v.* Denmead, 68 Pa. St. 449; Campbell's Appeal, 36 Pa. St. 247, 78 Am. Dec. 375; Morgan *v.* Bloecker, 6 Pa. Dist. 659, 41 Wkly. Notes Cas. 127.

Texas.— See Berry *v.* McAdams, (Civ. App. 1899) 50 S. W. 952.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 19, 332.

Contra.— Dalrymple *v.* Ramsey, 45 N. J. Eq. 494, 18 Atl. 105.

Interest of occupying claimant.— The lien attaches to any equitable interest in the land growing out of the amelioration thereof by the debtor, and any right he may have under the statute protecting occupying claimants. Dakin *v.* Lecklider, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308.

While a deed is held in escrow the grantee has an interest that can be subjected to a mechanic's lien. Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989.

92. *Florida.*— Jacksonville Nat. Bank *v.* Williams, 38 Fla. 305, 20 So. 931.

Illinois.— Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529.

Iowa.— Monroe *v.* West, 12 Iowa 119, 79 Am. Dec. 524.

Kansas.— Harsh *v.* Morgan, 1 Kan. 293.

Minnesota.— King *v.* Smith, 42 Minn. 286, 44 N. W. 65.

Mississippi.— Laud *v.* Muirhead, 31 Miss. 89.

Missouri.— Short *v.* Stephens, 92 Mo. App. 151; Sawyer-Austin Lumber Co. *v.* Clark, 82 Mo. App. 225, holding further that the fact that when the lien suit was tried the vendee had lost his interest in the land did not deprive the lienor of the right to enforce the lien against the building.

Nebraska.— Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132.

New Jersey.— Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

New York.— Miller *v.* Schmitt, 67 N. Y. Suppl. 1077.

Ohio.— Smith *v.* Woodruff, 1 Handy 276, 12 Ohio Dec. (Reprint) 140.

Pennsylvania.— Dietrich *v.* Crabtree, 8 Wkly. Notes Cas. 418.

South Dakota.— See Pinkerton *v.* Le Beau, 3 S. D. 440, 54 N. W. 97.

Texas.— Security Mortg., etc., Co. *v.* Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 837.

Utah.— Cary-Lombard Lumber Co. *v.* Partridge, 10 Utah 322, 37 Pac. 572.

Washington.— Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996.

Wisconsin.— Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

attach to the equitable lien of a vendor for the purchase-money, when he has conveyed the whole title.[93]

3. Interest of Mortgagor. The interest of the mortgagor in mortgaged property is subject to a mechanic's lien.[94]

4. Leaseholds. A mechanic's lien may attach to the interest of a lessee in the demised premises,[95] whether he has an estate for years,[96] or is merely a tenant

Canada.— Reggin *v.* Manes, 22 Ont. 443.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 19, 332; and *infra*, II, C, 3, i, (I).

Effect of extinguishment of vendee's interest see *infra*, VI, C, 5.

93. Smullen *v.* Hall, 13 Daly (N. Y.) 392.

94. Tracy *v.* Rogers, 69 Ill. 662.

Contract pending foreclosure proceedings.— Where contracts for work and material on a building on mortgaged land are made pending a proceeding to foreclose the mortgage, a decree of foreclosure and a sale thereunder will prevent the establishment of a mechanic's lien. Green *v.* Sprague, 120 Ill. 416, 11 N. E. 859.

Where the equity of redemption has been foreclosed by a sale under a trust deed, no title or estate remains to which the lien can attach. Tracy *v.* Rogers, 69 Ill. 662.

Priorities between mortgages and mechanics' liens see *infra*, IV, C, 2, b, (VI).

95. *Alabama.*— Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84.

Arkansas.— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

California.— Johnson *v.* Dewey, 36 Cal. 623; Gaskill *v.* Moore, 4 Cal. 233; Gaskill *v.* Trainer, 3 Cal. 334.

Illinois.— Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192 [*affirming* 18 Ill. App. 386]; Reed *v.* Boyd, 84 Ill. 66; Jones *v.* Carey-Lombard Lumber Co., 87 Ill. App. 533; Chicago Smokeless Fuel Gas Co. *v.* Lyman, 62 Ill. App. 538.

Indiana.— McCarty *v.* Burnet, 84 Ind. 23; McAnally *v.* Glidden, 30 Ind. App. 22, 65 N. E. 291.

Iowa.— Nordyke, etc., Co. *v.* Hawkeye Woolen Mills Co., 53 Iowa 521, 5 N. W. 693.

Kansas.— Hathaway *v.* Davis, 32 Kan. 693, 5 Pac. 29; Badger Lumber Co. *v.* Malone, 8 Kan. App. 121, 54 Pac. 692.

Kentucky.— A materialman has a lien on the interest of a lessee of a house for materials furnished for the house, although the house stands on lands leased from different landlords. Laviolette *v.* Redding, 4 B. Mon. 81.

Louisiana.— See Schwartz *v.* Saiter, 40 La. Ann. 264, 4 So. 77.

Massachusetts.— Forbes *v.* Mosquito Fleet Yacht Club, 175 Mass. 432, 56 N. E. 615.

Michigan.— Peninsular Gen. Electric Co. *v.* Norris, 100 Mich. 496, 59 N. W. 151.

Missouri.— See Collins *v.* Mott, 45 Mo. 100.

Montana.— Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

Nebraska.— Zabriskie *v.* Greater America Exposition Co., 67 Nebr. 581, 93 N. W. 958, 62 L. R. A. 369 (holding that a mechanic's lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, notwithstanding the removal of the buildings at the end of the term is expressly required by the lease); Moore *v.* Vaughn, 42 Nebr. 696, 60 N. W. 914.

New York.— Jones *v.* Manning, 6 N. Y. Suppl. 338.

North Carolina.—Asheville Woodworking Co. *v.* Southwick, 119 N. C. 611, 26 S. E. 253.

Ohio.— Dutro *v.* Wilson, 4 Ohio St. 101; Choteau *v.* Thompson, 2 Ohio St. 114.

Pennsylvania.— Mountain City Market House, etc., Assoc. *v.* Kearns, 103 Pa. St. 403 (under act, Feb. 17, 1858, Pamphl. Laws 29); Dame's Appeal, 62 Pa. St. 417 (construing act 1868, Pamphl. Laws 752); Thomas *v.* Smith, 42 Pa. St. 68; Gaule *v.* Bilyeau, 25 Pa. St. 521; Sherman *v.* Thompson, 7 Pa. Super. Ct. 555, 43 Wkly. Notes Cas. 150 [*followed* in Wiles *v.* People's Gas Co., 7 Pa. Super. Ct. 562] (construing the act of March 7, 1873, Pamphl. Laws 219). *Aliter* under law of 1836 and its supplements. Schenley's Appeal, 70 Pa. St. 98. See also Gaul *v.* Seyfert, 1 Woodw. 43.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

Tennessee.—Alley *v.* Lanier, 1 Coldw. 540.

Washington.— Masow *v.* Life, 10 Wash. 528, 39 Pac. 140; Miles Co. *v.* Gordon, 8 Wash. 442, 36 Pac. 265.

West Virginia.— Showalter *v.* Lowndes, 56 W. Va. 462, 49 S. E. 448.

Wisconsin.— Leismann *v.* Lovely, 45 Wis. 420.

Canada.— Garing *v.* Hunt, 27 Ont. 149.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 21, 333; and *infra*, II, C, 3, g, (I).

A written lease is required under the Pennsylvania act of 1868 (Pamphl. Laws 752). Dame's Appeal, 62 Pa. St. 417.

A parol lease is sufficient where partly performed by delivery of possession and making of improvements by lessee. O'Brien *v.* Myer, 8 Ohio Dec. (Reprint) 777, 9 Cinc. L. Bul. 337.

Lien may be enforced against the lessees' assignee.— Daniel *v.* Weaver, 5 Lea (Tenn.) 392.

A sublessee has an assignable interest within Colo. Laws (1889), p. 247, providing that any one having an assignable interest in any land shall be deemed an owner, although the original lease forbids subleasing and the lessor therein has not given his consent to the subleasing. Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

Effect of extinguishment of leasehold interest see *infra*, VI, C, 5.

96. Benjamin *v.* Wilson, 34 Minn. 517, 26

from month to month.[97] A mechanic's lien upon a leasehold estate attaches subject to all the conditions of the lease.[98]

5. Trust Estates.[99] Property held in trust is not subject to a mechanic's lien where the trust deed, which is duly recorded, expressly provides that no contract creating a lien shall be made.[1] And it has been held in Connecticut that a husband's interest in a lease for an unexpired term of nine hundred and ninety-nine years, owned by his wife, could not be subjected to a mechanic's lien; the lease being merely a chattel real vesting in the husband only a life-estate in trust with remainder to the wife.[2]

II. Right to Lien.

A. Nature of Improvement — 1. Annexation or Benefit to Realty. In order to establish a mechanic's lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to and become a part of the realty,[3] and has added substantially to the value thereof.[4] A lien cannot attach to one piece of property for labor performed on other property, although it be contiguous;[5] but the fact that a building on which a lien is claimed extends over the line of the land described in the petition will not defeat the lien on that part of the building standing on the land described for the value of the labor thereon, if this can be ascertained.[6]

2. Particular Buildings, Structures, or Improvements. The nature of the building, structure, or improvement for or upon which a mechanic's lien may be acquired depends entirely upon the terms of the particular statute under which the lien is claimed.[7] Various statutes have been held to include an oil-well derrick,[8] a smelter,[9] a windmill,[10] a breakwater and dam attached to a sawmill,[11]

N. W. 725; Haworth *v.* Wallace, 14 Pa. St. 118.

97. Deatherage *v.* Sheidley, 50 Mo. App. 490.

98. Gaskill *v.* Trainer, 3 Cal. 334; Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489 [*affirming* 40 Ill. App. 298].

99. See also *infra*, II, C, 3, c.

1. Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397, holding that the destruction of the record by fire had no effect upon the constructive notice existing by virtue of the recording, and that the fact that after the execution of the contract the burnt record was restored by a decree falsely reciting that the trustee had power to encumber could not validate the lien.

2. Flannery *v.* Rohrmayer, 49 Conn. 27.

3. Compound Lumber Co. *v.* Murphy, 169 Ill. 343, 48 N. E. 472; Hunter *v.* Blanchard, 18 Ill. 318; Brunner *v.* Picking, 75 Ill. App. 293; Cox *v.* Colles, 17 Ill. App. 503; Baker v. Fessenden, 71 Me. 292; Lombard *v.* Pike, 33 Me. 141.

Structure must stand upon the land.— Coddington *v.* Beebe, 31 N. J. L. 477.

Building placed temporarily on property.— Where A, who had purchased certain lots from B, under contract of sale, built and paid for a house thereon but afterward, after default in the payments on the lots, removed the house on to the land of C, with his consent, as a mere temporary resting place, it being understood that it might be removed at any time by A, the land of C was not subject to a mechanic's lien for materials furnished for the house. Fresno Loan, etc., Bank *v.* Husted, (Cal. 1897) 49 Pac. 195, holding further that under the circumstances it was not to be implied that B furnished the material with which the house was built.

4. Coddington *v.* Hudson County Dry Dock, etc., Co., 31 N. J. L. 477; Campbell *v.* John W. Taylor Mfg. Co., 62 N. J. Eq. 307, 45 Atl. 1119.

5. Foster *v.* Cox, 123 Mass. 45 [*followed* in McGuinness *v.* Boyle, 123 Mass. 570, 25 Am. Rep. 123]; Stevens *v.* Lincoln, 114 Mass. 476.

6. Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452; Stevens *v.* Lincoln, 114 Mass. 476.

7. See the statutes of the various states.

The word "building" cannot be held to include every species of erection on land, such as fences, gates, or other like structures. Taken in its broadest sense it can mean only an erection intended for use and occupation as a habitation or some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. Truesdell *v.* Gay, 13 Gray (Mass.) 311, 312.

8. Showalter *v.* Lowndes, 56 W. Va. 462, 49 S. E. 448.

9. McAllister *v.* Benson Min., etc., Co., 2 Ariz. 350, 16 Pac. 271, it being a "mill" or "manufactory" within the statute.

10. Phelps, etc., Windmill Co. *v.* Baker, 49 Kan. 434, 30 Pac. 472 (an "erection or improvement" under Kan. Comp. L. (1885) par. 4447); Phelps, etc., Wind-Mill Co. *v.* Shay, 32 Nebr. 19, 48 N. W. 896 (an "appurtenance" within Nebr. Comp. St. c. 54, § 1).

11. Willamette Falls Transp., etc., Co. *v.* Remick, 1 Oreg. 169.

lightning rods,[12] a wharf,[13] a floating wharf,[14] a wharf-boat,[15] sheds erected on piers,[16] poles set in the ground and wires suspended thereby for the transmission of electricity for light and power,[17] a plant for the generation of steam to be distributed under a municipal franchise through pipes laid in the streets,[18] a railroad,[19] a railroad depot,[20] fences,[21] a flume,[22] an amphitheater and framework built on posts firmly imbedded in the soil,[23] an oil refinery,[24] a mine or pit sunk within a mining claim,[25] water-pipes,[26] a drain pipe,[27] an ice-house[28] when attached to the principal building,[29] and scenery and other articles constituting the stage and scenic outfit of a theater.[30] On the other hand lien statutes have been held to exclude an electric lighting apparatus, railway, and power-house,[31] a vessel,[32]

12. Harris *v.* Schultz, 64 Iowa 539, 541, 21 N. W. 22, where it is said: "The labor and material used in their construction and erection is done and furnished for the building in contemplation of the statute, for which a lien will attach. The utility of lightning rods cannot be a subject of inquiry in this case." *Contra*, Drew *v.* Mason, 81 Ill. 498, 499, 25 Am. Rep. 288, where it is said: "Furnishing materials and labor in placing a lightning rod on a house, is not furnishing materials and labor in 'building, altering, repairing or ornamenting' a house, in the sense those terms are used in the Mechanic's Lien Law."

13. Burt *v.* Washington, 3 Cal. 246.

14. Olmsted *v.* McNall, 7 Blackf. (Ind.) 387. *Contra*, Coddington *v.* Beebe, 31 N. J. L. 477, a floating dock is not a building or fixture.

15. Galhreath *v.* Davidson, 25 Ark. 490, 99 Am. Dec. 233.

16. Collins *v.* Drew, 6 Daly (N. Y.) 234 [*affirmed* in 67 N. Y. 149], decided under a law allowing a lien on wharves, piers, and structures connected therewith.

17. Forbes *v.* Willamette Falls Electric Co., 19 Oreg. 61, 23 Pac. 670, 20 Am. St. Rep. 793, they constitute a structure within Code, § 3669. See also Badger Lumber Co. *v.* Marion Water Supply, etc., Co., 48 Kan. 182, 29 Pac. 476, 30 Am. St. Rep. 301, 15 L. R. A. 652.

18. Wells *v.* Christian, 165 Ind. 662, 76 N. E. 518, it is a "manufactory" within Burns Annot. St. Ind. (1901) § 7255.

19. Ban *v.* Columbia Southern R. Co., 117 Fed. 21, 54 C. C. A. 407, it is included within the term "other structure." *Contra*, Rutherford *v.* Cincinnati, etc., R. Co., 35 Ohio St. 559, not a "house . . . bridge, or other structure" within 74 Ohio Laws, p. 168, § 1. And see La Crosse, etc., R. Co. *v.* Vanderpool, 11 Wis. 119, 78 Am. Dec. 691, holding that a railroad bridge or track is not a "dwelling house or other building" within the Wisconsin statute.

Statutory lien for construction of railroad see RAILROADS.

20. Hill *v.* LaCrosse, etc., R. Co., 11 Wis. 214.

21. Henry *v.* Plitt, 84 Mo. 237 (Missouri statute gives lien for fences and walks on premises when constructed as appurtenant to the buildings and at the same time); Missouri Valley Cut Stone Works *v.* Brown, 50 Mo. App. 407 (they fall within the term "other improvements" in Rev. St. §§ 6705, 6706).

Where a fence is built under a separate contract there is no lien, although it would be otherwise if it was included in a general contract for the building. Ermentrout's Account, 1 Woodw. (Pa.) 158.

22. Derrickson *v.* Edwards, 29 N. J. L. 468, 473, 80 Am. Dec. 220 [*affirming* 28 N. J. L. 39], so holding on the ground that the flume in question was a fixture necessary for carrying on the manufacturing purposes for which the mill was designed. The court said: "It will not be necessary . . . that the court shall say that every structure which may properly be called a flume will be within the intent of the lien law."

23. H. F. Cady Lumber Co. *v.* Greater American Exposition Co., 4 Nebr. (Unoff.) 268, 93 N. W. 961, an appurtenance, within Comp. St. c. 54, § 1.

24. Short *v.* Miller, 120 Pa. St. 470, 14 Atl. 374, holding that a boiler house, filter house, barrel house, tank house, pump house, tool house, etc., the whole forming a plant known as an "oil refinery," although not absolutely essential to the business, and of an extremely simple character, yet, if permanent and suited to their purpose, are "buildings" subject to a mechanic's lien for materials employed in their construction, under Pa. Act, June 16, 1836.

25. Helm *v.* Chapman, 66 Cal. 291, 5 Pac. 352, it is a "structure."

26. Eufaula Water Co. *v.* Addyston Pipe, etc., Co., 89 Ala. 552, 8 So. 25, the laying of pipe on the land is an "improvement" within Code, § 3018.

27. Beatty *v.* Parker, 141 Mass. 523, 6 N. E. 754, it is part of the house.

28. Thomas *v.* Smith, 42 Pa. St. 68.

29. Killingsworth *v.* Allen, 1 Phila. (Pa.) 220. *Aliter* if it is distinct from the principal building. Killingsworth *v.* Allen, *supra*.

30. Waycross Opera House Co. *v.* Sossman, 94 Ga. 100, 20 S. E. 252, 47 Am. Rep. 144, they necessarily form a part and parcel of the edifice itself. See also *infra*, II, A, 11.

31. Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471, statute giving lien for materials furnished for "erecting, repairing, or removing a house . . . or other structure."

32. Stewart *v.* Gorgoza, 23 Fed. Cas. No. 13,428, 3 Hughes 459, decided under Va. Code, c. 115, §§ 3, 4.

a coke oven,[33] a kiln,[34] a bridge,[35] a stone driveway,[36] a ditch,[37] swings and seats,[38] a stone retaining wall,[39] and an oil tank.[40] Where materials are furnished for a structure not in itself unlawful, the fact that it is used for an unlawful purpose will not defeat the lien where the claimant did not know of the intended use.[41]

3. ERECTION OR CONSTRUCTION. In the construction of statutes giving a lien for the erection and construction of buildings, or for erections and structures, the controlling element in deciding whether or not a lien can exist appears to be whether or not a new building has been put up.[42] Whether or not the lien can be obtained in a particular case must depend upon the facts, for while a building may be greatly changed in structure, in the materials which enter into it, and in its internal arrangements, without losing its identity or ceasing to be the same building,[43] it may on the other hand be so entirely changed in plan, structure, dimensions, and general appearance as to become in a fair sense a new building, although some portion of the old materials may remain in it.[44] Such a statute has been held to extend to the remodeling of an old building,[45] or substantial additions thereto,[46] which are of such a character that the structure of the old building is

33. Central Trust Co. *v.* Cameron Iron, etc., Co., 47 Fed. 136, decided under the Pennsylvania act of June 16, 1836, section 1.

34. Cowdrick *v.* Morris, 9 Pa. Co. Ct. 312, a limekiln is not a "building," within the Pennsylvania act of June 16, 1836.

Under N. H. Pub. St. c. 141, § 11, providing that any person who performs labor or furnishes materials for making brick, through a contract with the owner, shall have a lien "upon the kiln containing such brick," a general lien attaches to all kilns upon which the labor was performed, or any part of the materials was furnished. Lavoie *v.* Burke, 69 N. H. 144, 38 Atl. 723.

35. Burt *v.* Washington, 3 Cal. 246 (decided under California Mechanics' Lien Law of 1850); Pike County *v.* Norrington, 82 Ind. 190 (not a "building").

36. Missouri Valley Cut Stone Works *v.* Brown, 50 Mo. App. 407.

37. Ellison *v.* Jackson Water Co., 12 Cal. 542, not a "building, wharf, or superstructure," within St. (1855) or St. (1856).

38. Lothian *v.* Wood, 55 Cal. 159.

39. Missouri Valley Cut Stone Works *v.* Brown, 50 Mo. App. 407.

40. Seiders, etc., International Boiler Works *v.* Lewis, etc., Co., 7 Pa. Dist. 278, 21 Pa. Co. Ct. 80.

41. Dorsey *v.* Langworthy, 3 Greene (Iowa) 341. See also Bishop *v.* Honey, 34 Tex. 245.

42. See Combs *v.* Lippincott, 35 N. J. L. 481.

A back building, however much it may be enlarged or improved, cannot be treated as a new building, and made liable to a mechanic's lien, as it is a mere appurtenance to the main building, and cannot be separated therefrom. Harris *v.* Woolston, 3 Phila. (Pa.) 376.

A boiler battery, consisting of a stone foundation on which a furnace is erected, with brick walls above, and smoke-stacks to be used in connection with machinery in the manufacture of pig iron, is a new building, within the act of June 16, 1836. Wheeler *v.* Pierce, 167 Pa. St. 416, 31 Atl. 649, 46 Am. St. Rep. 679.

43. Combs *v.* Lippincott, 35 N. J. L. 481.

44. Combs *v.* Lippincott, 35 N. J. L. 481. See also Ward *v.* Crane, 118 Cal. 676, 50 Pac. 839.

A substantial addition of material parts, a rebuilding upon another and larger scale, constitutes a new building, even though parts of the old are preserved and incorporated in the new. Hershey *v.* Shenk, 58 Pa. St. 382.

45. Hill's Estate, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323, conversion of large building into six separate dwellings. See also Matter of Burling, 1 Ashm. (Pa.) 377.

46. Driesbach *v.* Keller, 2 Pa. St. 77; Hill's Estate, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323.

A kitchen is an erection authorizing the filing of a mechanic's lien, which will extend to the main building to which the kitchen is attached. Hershey *v.* Shenk, 58 Pa. St. 382; Pretz's Appeal, 35 Pa. St. 349; Lightfoot *v.* Krug, 35 Pa. St. 348. *Compare* Rand *v.* Mann, 3 Phila. (Pa.) 429.

A new wing or addition to a building is an erection. Harman *v.* Cummings, 43 Pa. St. 322. See also Hershey *v.* Shenk, 58 Pa. St. 382. Pa. Act, Aug. 1, 1868, relating to mechanics' liens in the city of Philadelphia, amends the general law (Act June 16, 1836), so as to create for that city two classes of liens, the first embracing claims for work or material furnished in the erection of a building; the second, claims for work or material furnished "for or about the repair, alteration, or addition to any house or other building." A claim for materials for the erection of an independent wing attached to a building falls within the second class; and the fact that the general law of 1836 has been considered broad enough to include within the first class new additions to buildings does not interfere with the above conclusion, as specific provisions, relating to a particular subject, must prevail over general provisions, although the latter, standing alone, might be broad enough to include the same subject. Thomas *v.* Hinkle, 126 Pa. St. 478, 17 Atl. 670.

Repairs and additions may constitute a new erection within the statute. Driesbach

completely changed.[47] But merely adding a basement is not an erection or construction,[48] nor is the adding of a bath-house,[49] and where an old house whose walls are standing is repaired there is no lien therefor.[50] So also the putting in of new machinery to supplant old is not a new erection where the frame of the old building is neither raised nor enlarged.[51]

4. Repairs, Alterations, and Improvements. Under some of the statutes providing for mechanics' liens, such a lien is given for repairs,[52] alterations,[53]

v. Keller, 2 Pa. St. 77. *Compare* Perigo *v.* Vanhorn, 2 Miles (Pa.) 359.

Changes constituting addition and not new erection.— On the side of, and attached to, a two-story building 60 x 22 was erected a two-story building 80 x 28. The partitions in the upper story of the old part were taken out, its roof and the upper story of the wall next the new part were taken off, the studdings of the old part were raised to be on a level with those of the new part, and all was inclosed under one roof, the upper floor of both parts being used as a single hall. It was held that a mechanic's lien should he filed as for an addition or alteration, and not for a new erection. Smyers *v.* Beam, 158 Pa. St. 57, 27 Atl. 884.

Work not constituting substantial addition. — Where the new part of the external walls and roof of a building is in precisely the same position which had been occupied by a part of the building torn away, and the interior arrangement remains unchanged, the operation is not a substantial addition to a building, within the meaning of Pa. Act, June 4, 1901 (Pamphl. Laws 431), but a work of restoration and repair, the substitution of new work for old in a part of the building which had fallen into decay. Porter *v.* Weightman, 29 Pa. Super. Ct. 488.

47. Armstrong *v.* Ware, 20 Pa. St. 519 [*reversing* 1 Phila. 213]; Grable *v.* Helman, 5 Pa. Super. Ct. 324, 40 Wkly. Notes Cas. 466.

If the building has undergone no change of identity, the new building being merged in the old, there is no lien. Sabbaton's Estate, 2 Am. L. J. (Pa.) 83.

Where the changes were principally internal, the only external change being a new door in front and some new windows in the rear, the alterations did not amount to the erection of a new building or a rebuilding and there was no lien under Pa. Act, June 16, 1836. Patterson *v.* Frazier, 123 Pa. St. 414, 16 Atl. 477. Where the interior of a building was torn out by the tenant, and materially changed, and the front altered to some extent, but the tenant continued to occupy the building throughout the work, it constituted repairs of an old building, and not a new structure, entitling the contractor therefor to a lien. De Wald *v.* Woog, 158 Pa. St. 497, 27 Atl. 1088.

There must be substantially a rebuilding.— The idea which runs throughout all the cases is newness of structure in the main mass of the building, that entire change of external appearance which denotes a different building from that which gave place to it, although into the composition of the new structure some of the old parts may have entered. The reason for this is only in the fact that the external walls of a building constitute the strongest mark of its identity and are its main part, but also in the notice that the external change furnishes to purchasers and lien creditors. Miller *v.* Hershey, 59 Pa. St. 64.

48. Miller *v.* Oliver, 8 Watts (Pa.) 514. *Compare* Matter of Burling, 1 Ashm. (Pa.) 377.

49. Rand *v.* Mann, 3 Phila. (Pa.) 429.

50. Perigo *v.* Vanhorn, 2 Miles (Pa.) 359.

51. Summerville *v.* Wann, 37 Pa. St. 182.

52. *California.*— Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775.

Delaware.— McCartney *v.* Buck, 8 Houst. 34, 12 Atl. 717.

Illinois.— Drew *v.* Mason, 81 Ill. 498, 25 Am. Rep. 288.

Indiana.— Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283.

Massachusetts.— Kelley *v.* Border City Mills, 126 Mass. 148.

Missouri.— Allen *v.* Frumet Min., etc., Co., 73 Mo. 688.

Oregon.— Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

Pennsylvania.— Smyers *v.* Beam, 158 Pa. St. 57, 27 Atl. 884, under the Pennsylvania act of May 18, 1887.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 27.

A boiler situated in a building joined to a mill and used to supply steam to the mill is a part of the realty, and for repairs on the boiler a lien can be maintained under Mass. Gen. St. c. 150; and the whole of the land on which the mill and the building containing the boiler are situated may properly be included in a description of the premises on which the lien is claimed. Kelley *v.* Border City Mills, 126 Mass. 148.

Wagner St. Mo. p. 907, § 3, extending the lien to a building erected subsequent to a mortgage does not give a lien for repairs on an existing building, to the prejudice of a mortgagee. Haenssler *v.* Thomas, 4 Mo. App. 463.

A stove with its funnel cannot be considered as materials for the repair of a building, within the meaning of the statute respecting a mechanic's lien. Lambard *v.* Pike, 33 Me. 141.

53. *California.*— Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775; Donahue *v.* Cromartie, 21 Cal. 80.

Delaware.— McCartney *v.* Buck, 8 Houst. 34, 12 Atl. 717.

improvements,[54] and additions;[55] but under others no lien is allowed for any repairs to,[56] or alterations in,[57] an old building, unless the structure of the building is so completely changed that in common parlance it may properly be termed a new building or a rebuilding.[58]

Illinois.— Drew *v.* Mason, 81 Ill. 498, 25 Am. Rep. 288.

Indiana.— Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283, person who raises house, puts in brick work, and fixes grate and roof entitled to lien.

Oregon.— Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 28.

Slight changes in a building, which are merely incidental to work on personal property, do not give rise to any lien. Curnew *v.* Lee, 143 Mass. 105, 8 N. E. 890.

Wainscoting attached with screws to strips nailed to the wall of a building constitutes "alterations" or "repairs" for which a lien attaches. Matthiesen *v.* Arata, 32 Oreg. 342, 50 Pac. 1015, 67 Am. St. Rep. 535.

In Delaware a lien may exist for painting and glazing (France *v.* Wooiston, 4 Houst. (Del.) 557), but not for upholstering (McCartney *v.* Buck, 8 Houst. (Del.) 34, 12 Atl. 717).

54. La Grill *v.* Mallard, 90 Cal. 373, 27 Pac. 294; National L. Ins. Co. *v.* Ayres, 111 Iowa 200, 82 N. W. 607 (holding that lumber furnished for the purpose of building an office, and putting in floors and ceiling an office in the building, and putting in stairs and elevators, and erecting a shed behind the building, was furnished for "improvements," within Code, § 3089, giving a lien for lumber furnished for improvements on land); Harris *v.* Schultz, 64 Iowa 539, 21 N. W. 22.

Papering or decorating a house is an improvement of the building authorizing the lien. La Grill *v.* Mallard, 90 Cal. 373, 27 Pac. 294; Freeman *v.* Gilpin, 7 Leg. Int. (Pa.) 11, before the act of 1849.

Where tanks and a sheet iron floor were put into a building as a permanent improvement, and were adapted to the transaction of the business conducted therein, a lien could be enforced. O'Brien *v.* Hanson, 9 Mo. App. 545.

Where improvements become part of a building, the fact that they were designed specially for the tenants' business will not affect the right of the person doing the work to a mechanic's lien. Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 31 N. Y. Suppl. 433.

Only useful and important erections constituting part of the works placed there by the tenant are within the word "improvements," as used in the Pennsylvania Mechanics' Lien Law of 1858. Schmidt *v.* Armstrong, 72 Pa. St. 355.

In Iowa Revision, § 1855, the word "improvement" means an independent structure. Getchell *v.* Allen, 34 Iowa 559.

55. Updike *v.* Skillman, 27 N. J. L. 131; Whitenack *v.* Noe, 11 N. J. Eq. 321; Smyers *v.* Beam, 158 Pa. St. 57, 27 Atl. 884, under the Pennsylvania act of May 18, 1887.

A piazza is an addition, but folding doors are not. Whitenack *v.* Noe, 11 N. J. Eq. 321.

Addition or alteration as distinguished from new building see Smyers *v.* Beam, 158 Pa. St. 57, 27 Atl. 884; Chester City Presb. Church *v.* Conlin, 19 Pa. Super. Ct. 515.

"Ornamenting" is within the Illinois statute. Drew *v.* Mason, 81 Ill. 498, 25 Am. Rep. 288.

Where the additions made to an old building are substantial, for permanent purposes, and made at a heavy cost, and are so connected with the original structure as to make their connection as available, essential, and direct as if they had been built beside its walls, they are "additions of material parts" to the original structure, and where they serve in their actual use all the purposes that actual additions would have served and their extent and value are significant enough to give ample notice to purchasers and creditors of the change in the character of the property, the additions so made, the work and materials so furnished therefor, and the machinery placed therein, are the subjects of mechanic's liens under the act of June 16, 1836. Parrish's Appeal, 83 Pa. St. 111.

56. Kirk *v.* Taliaferro, 8 Sm. & M. (Miss.) 754; Whitenack *v.* Noe, 11 N. J. Eq. 413; Warren *v.* Freeman, 187 Pa. St. 455, 41 Atl. 290, 67 Am. St. Rep. 583, under the Pennsylvania act of June 16, 1836.

57. Whitenack *v.* Noe, 11 N. J. Eq. 321 (holding that converting a garret into bedrooms is a mere alteration for which no lien can be acquired); Warren *v.* Freeman, 187 Pa. St. 455, 41 Atl. 290, 67 Am. St. Rep. 583 (under the Pennsylvania act of June 16, 1836); Patterson *v.* Frazier, 123 Pa. St. 414, 16 Atl. 477.

Putting an additional story on a building is merely an alteration for which no lien attaches, and not an addition. Updike *v.* Skillman, 27 N. J. L. 131.

58. Warren *v.* Freeman, 187 Pa. St. 455, 41 Atl. 290, 67 Am. St. Rep. 583. See also Miller *v.* Hershey, 59 Pa. St. 64; Chester City Presb. Church *v.* Conlin, 11 Pa. Super. Ct. 413, 7 Del. Co. 437.

Where the main design of a building remains unchanged, and the lines of its foundation walls are in no respect altered, and the interior, except for certain bay windows, is left untouched, the court, in proceedings for a mechanic's lien, will not construe the building to be a new building, although the external appearance has been changed by an alteration in the roof, and by repainting. Goeringer *v.* Schappert, 17 Pa. Super. Ct. 293.

When the facts with regard to a building operation are disputed, the court in determining the question as to the character of the

5. Removal or Destruction. Under some statutes a lien may be acquired for moving a building,[59] but under other statutes this is denied.[60] A lien has been denied for the taking down of fixtures, and putting them up in another store,[61] and removing a portable engine.[62] No lien arises for simply tearing down a building or a part thereof;[63] but where improvements for which a lien can properly be obtained are made, the lien may include the work of tearing down old structures or parts thereof which was a necessary part of the making of the improvements,[64] and the lien may also attach where under the contract the old material is to be used to erect a new building.[65]

6. Excavations and Foundations. Excavations and foundations for a building are generally held to be within the lien laws,[66] even though the building is not completed.[67]

7. Wells. In some cases mechanic's lien statutes have been held to extend to wells and give a lien for work done and materials furnished in digging and constructing them,[68] but in other cases wells have been held not to be within the statutes.[69]

structure, in proceedings for mechanic's lien, is not to be governed exclusively by what a person who saw the building for the first time after it was completed, being ignorant of the existence of an old building, from a mere external inspection, might conclude. Goeringer *v.* Schappert, 17 Pa. Super. Ct. 293.

Alterations held not to make a new structure see Warren *v.* Freeman, 187 Pa. St. 455, 41 Atl. 290, 67 Am. St. Rep. 583.

59. Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775 (moving is within Code Civ. Proc. § 1183, giving a lien for construction, alteration, or repair); Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283; Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54 (holding that work and labor performed in moving a house on a lot, and raising and lowering it for repairs, is work and labor performed in "its alteration and repair," within 2 Hill Annot. Laws Oreg. § 3669, giving a lien for work and labor so performed); Burke *v.* Brown, 10 Tex. Civ. App. 298, 30 S. W. 936 (statutory lien for furnishing "tools to erect any house" applies to tools rented for use in moving a house).

60. Stephens *v.* Holmes, 64 Ill. 336 (it is not "erecting or repairing"); Trask *v.* Searle, 121 Mass. 229 (it is not an "erection" within Gen. St. c. 150, § 1); Eichleay *v.* Wilson, 29 Pittsb. Leg. J. N. S. (Pa.) 50.

61. A. F. Engelhardt *v.* Benjamin, 5 N. Y. App. Div. 475, 39 N. Y. Suppl. 31.

62. Truxall *v.* Williams, 15 Lea (Tenn.) 427.

63. Holzhour *v.* Meer, 59 Mo. 434; Bruns *v.* Brann, 35 Mo. App. 337. See also Thompson-Starrett Co. *v.* Brooklyn Heights Realty Co., 111 N. Y. App. Div. 358, 98 N. Y. Suppl. 128.

64. Bruns *v.* Brann, 35 Mo. App. 337.

65. Whitford *v.* Newall, 2 Allen (Mass.) 424.

66. Scott *v.* Goldinhorst, 123 Ind. 268, 24 N. E. 333; Baker *v.* Waldron, 92 Me. 17, 42 Atl. 223, 69 Am. St. Rep. 483 (the fact that one of the foundation walls of a mill serves *pro tanto* as a section of a dam does not destroy the lien); McCristal *v.* Cochran, 147 Pa. St. 225, 23 Atl. 444. See also Whitford *v.* Newall, 2 Allen (Mass.) 424.

The right to a lien does not depend upon the size or shape of the excavation, but upon the purpose for which it was made. If it was made in digging a cellar under a building, opening or constructing a mine, or other similar purpose, these might well be considered acts done in making improvements upon the land, for which the person performing the labor would have a lien. Colvin *v.* Weimer, 64 Minn. 37, 65 N. W. 1079. The same would be true of the labor performed in "stripping" a mine preparatory to getting out the ore. Colvin *v.* Weimer, *supra*. See also Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528.

Hole drilled in exploration for ore.— A hole drilled in the ground solely to ascertain whether there is ore underneath, and, if so, whether it exists in paying quantities, is not an excavation, within Minn. Gen. St. (1894) § 6230, which provides that whoever performs labor "for grading, filling in, or excavating any land" shall have a lien on the land for the price of his labor. Colvin *v.* Weimer, 64 Minn. 37, 65 N. W. 1079.

67. Baker *v.* Waldron, 92 Me. 17, 42 Atl. 225, 69 Am. St. Rep. 483; Somerville *v.* Walker, 168 Mass. 388, 47 N. E. 127; Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219; Truesdell *v.* Gay, 13 Gray (Mass.) 311; Thompson *v.* Porter, 14 Pa. Co. Ct. 232; Florin *v.* McIntire, 14 Pa. Co. Ct. 127.

68. Bates *v.* Harte, 124 Ala. 427, 26 So. 898 (an improvement upon land within Code, § 2723); Haskell *v.* Gallagher, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. Rep. 250 (an oil well, together with the derrick engine, boiler pumps, piping, and appliances attached thereto, is a "structure" within Burns Rev. St. Ind. (1894) § 7255); Hoppes *v.* Baie, 105 Iowa 648, 75 N. W. 495 (an improvement within Iowa Acts 16th Gen. Assembly. c. 100, § 3); Rolewitch *v.* Harrington, (S. D. 1906) 107 N. W. 207 (the drilling and casing of a well constituted an improvement within Code Civ. Proc. § 696).

69. Guise *v.* Oliver, 51 Ark. 356, 11 S. W.

8. Filling, Grading, Sodding, and Cultivating. While a lien is denied under some statutes for filling, grading, or sodding,[70] under other statutes it is allowed.[71] A lien for breaking land for cultivation has been denied.[72]

9. Dredging. Where the statute so provides a person who dredges for a riparian proprietor may have a lien.[73]

10. Party-Walls. One who builds a party-wall of which the adjoining landowner promises to pay half the cost when he uses the wall is not entitled to a mechanic's lien on the adjoining lot when the owner thereof makes use of the wall.[74]

11. Fixtures in General. Personal property which is so attached to real estate as to become a part of such real estate is usually held to be within the mechanic's lien laws.[75] Accordingly lien laws have been held to extend to stage fittings and scenery,[76] theater seats or chairs,[77] store shelves placed so as to conform to the building and nailed to the wall,[78] window and door screens manufactured for and fitted to a building,[79] wires and insulators in an electric lighting plant,[80] mirrors set in a wall,[81] and a large tank upon a foundation expressly built for it.[82] But the lien laws do not cover trade fixtures,[83] a cover for a stove-pipe flue,[84] removable partitions put in a hotel by a lessee for convenience,[85] tables placed in a store building

515 (not an improvement within Mansfield Dig. Ark. §§ 4402–4409); Omaha Consol. Vinegar Co. *v.* Burns, 49 Nebr. 229, 68 N. W. 492, 44 Nebr. 21, 62 N. W. 301 (holding that under Nebr. Comp. St. c. 54, § 1, giving a mechanic's lien to persons who "perform labor, or furnish any material or machinery or fixtures, for the erection . . . of any . . . building or appurtenance," an account for labor performed and material furnished in sinking a tubular well cannot support a claim for a mechanic's lien); Davis *v.* Wood, 1 Del. Co. (Pa.) 382.

70. Pratt *v.* Duncan, 36 Minn. 545, 32 N. W. 709, 1 Am. St. Rep. 697 (the work being unconnected with the erection, alteration, or repair of any building or structure upon the premises); Stichtenoth *v.* Rife, 6 Ohio Cir. Ct. 540, 3 Ohio Cir. Dec. 575 (grading and sodding not an "appurtenance" within Rev. St. § 3184).

71. Williams *v.* Rowell, 145 Cal. 259, 78 Pac. 725 (lien expressly given by Code Civ. Proc. § 1191); McNair *v.* Richardson, 7 Mart. N. S. (La.) 17; Parker *v.* Walden, 6 Mart. N. S. (La.) 713; Reid *v.* Berry, 178 Mass. 260, 59 N. E. 760 (where it is reasonably connected with the building and done under one contract).

Under N. Y. Laws (1885), c. 342, § 1, giving a lien for altering or repairing a "building or building lot" a lien may be had for grading (Raven *v.* Smith, 71 Hun (N. Y.) 197, 24 N. Y. Suppl. 601), terracing and sodding (Pickett *v.* Gollner, 7 N. Y. Suppl. 196), even though there is no building on the property (Fredericks *v.* Goodman St. Homestead Assoc., 29 N. Y. Suppl. 1041).

72. Brown *v.* Wyman, 56 Iowa 452, 9 N. W. 344, 41 Am. Rep. 117.

73. Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

74. Swift *v.* Calnan, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462.

75 *California.*— McGreary *v.* Osborne, 9 Cal. 119.

Missouri.— Goodin *v.* Elleardsville Hall Assoc., 5 Mo. App. 289.

Pennsylvania.— Wademan *v.* Thorp, 5 Watts 115.

Tennessee.— Grewar *v.* Alloway, 3 Tenn. Ch. 584.

Texas.— Nicholstone City Co. *v.* Smalley, 21 Tex. Civ. App. 210, 51 S. W. 527.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 35.

The general rules on the subject of fixtures govern the determination whether any particular article of personalty has become a fixture. Goodin *v.* Elleardsville Hall Assoc., 5 Mo. App. 289. See, generally, Fixtures.

76. Sosman *v.* Conlon, 57 Mo. App. 25; Halley *v.* Alloway, 10 Lea (Tenn.) 523; Grewar *v.* Alloway, 3 Tenn. Ch. 584. See also *supra*, II, A, 2.

77. Grosz *v.* Jackson, 6 Daly (N. Y.) 463; Halley *v.* Alloway, 10 Lea (Tenn.) 523.

78. Rinzel *v.* Stumpf, 116 Wis. 287, 93 N. W. 36.

79. E. M. Fish Co. *v.* Young, 127 Wis. 149, 106 N. W. 795, although so made as to be detachable without injury to the house.

80. Badger Lumber Co. *v.* Marion Water Supply, etc., Co., 48 Kan. 182, 29 Pac. 476, 30 Am. St. Rep. 301, 15 L. R. A. 652; Hughes *v.* Lambertville Electric Light, etc., Co., 53 N. J. Eq. 435, 32 Atl. 69.

81. Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; McKeage *v.* Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471.

Aliter as to mirrors in removable frames. Vogel *v.* Farrand, 26 Misc. (N. Y.) 130, 55 N. Y. Suppl. 977.

82. Parker Land, etc., Co. *v.* Reddick, 18 Ind. App. 616, 47 N. E. 848.

83. Carroll *v.* Shooting the Chutes Co., 85 Mo. App. 563; O'Brien Boiler Works Co. *v.* Haydock, 59 Mo. App. 653; Church *v.* Griffith, 9 Pa. St. 117, 49 Am. Dec. 548.

84. Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

85. Hanson *v.* News Pub. Co., 97 Me. 99, 53 Atl. 990.

but not attached,[86] temporary partitions placed by a tenant in a store,[87] or erections by a tenant who has the right to remove the same at the expiration of his term.[88]

12. Apparatus For Heating, Cooking, Water-Supply, or Lighting. Appliances for heating, cooking, lighting, and furnishing water must of course constitute a part of the building in order to be within the lien laws.[89] Lien laws have been held to include furnaces,[90] heaters,[91] kitchen equipment,[92] cooking-stoves or ranges,[93] a heating plant for a hotel,[94] steam heating apparatus,[95] and laundry apparatus.[96] But portable stoves, ranges, or heaters are not within the lien laws,[97] even though furnished during the construction of the building,[98] or provided for in the original contract.[99] A gas machine,[1] or electric lighting appliances are within the lien laws,[2] but it has been held otherwise as to gas fixtures as distinguished from gas fittings.[3]

13. Machinery. Whether or not machinery is within the lien laws usually depends upon whether it has become a fixture.[4] If it is stationary and firmly attached to the realty so as to become a part thereof it is the subject of a

86. Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119; Baum *v.* Covert, 62 Miss. 113; Rinzel *v.* Stumpf, 116 Wis. 287, 93 N. W. 36.

87. Hanson *v.* News Pub. Co., 97 Me. 99, 53 Atl. 990.

88. White's Appeal, 10 Pa. St. 252.

89. Michael *v.* Reeves, 14 Colo. App. 460, 60 Pac. 577; Lamhard *v.* Pike, 33 Me. 141.

90. Goodin *v.* Elleardsville Hall Assoc., 5 Mo. App. 289; U. S. National Bank *v.* Bonacum, 33 Nebr. 820, 51 N. W. 233; Union Stove Works *v.* Klingman, 164 N. Y. 589, 58 N. E. 1093; Schwartz *v.* Allen, 7 N. Y. Suppl. 5.

A furnace not fastened down, but set upon a stand of brickwork, and which could be carried out without disturbing the ceiling, walls, or floor of the house, even though a fixture as between vendor and vendee, is not a fixture within the meaning of the Mechanics' Lien Law. Baldwin *v.* Merrick, 1 Mo. App. 281.

91. Schaper *v.* Bibb, 71 Md. 145, 17 Atl. 935.

92. Porch *v.* Agnew Co., (N. J. Ch. 1905) 61 Atl. 721.

93. Schaper *v.* Bibb, 71 Md. 145, 17 Atl. 935; Union Stove Works *v.* Klingman, 164 N. Y. 589, 58 N. E. 1093.

Cooking apparatus, including a large stock or soup kettle, furnished during the construction of a hotel, were part of the building, and a lien could be enforced for them. Dimmick *v.* Cook, 115 Pa. St. 573, 8 Atl. 627.

Building range in old house.— The validity of a mechanic's lien for building a range in a house is not affected by the fact that the house at the time of building the range was four or five years old. Reilly *v.* Hudson, 62 Mo. 383.

Contract of parties as affecting right to lien.— A lien will not attach for the furnishing of furnaces and ranges if the transaction was merely a sale of the furnaces and ranges as personal property. But if by the contract of the parties the furnaces and ranges were to be furnished as parts of the several houses in which they were put, and it was the intention and understanding that they should be, and they were in fact applied so as to constitute parts of the building, the person furnishing them will have a lien therefor. Turner *v.* Wentworth, 119 Mass. 459.

94. Siegmond *v.* Kellogg-Mackay-Cameron Co., (Ind. App. 1906) 77 N. E. 1096.

95. Stebbins *v.* Culbreth, 86 Md. 656, 39 Atl. 321; Dimmick *v.* Cook, 115 Pa. St. 573, 8 Atl. 627.

96. Dimmick *v.* Cook, 115 Pa. St. 573, 8 Atl. 627.

97. Homœopathic Assoc. *v.* Harrison, 120 Pa. St. 28, 13 Atl. 501; Williams *v.* Bower, 11 Pa. Co. Ct. 151; Elston *v.* Jury, 3 Lack. Jur. (Pa.) 107.

98. Michael *v.* Reeves, 14 Colo. App. 460, 60 Pac. 577; Boston Furnace Co. *v.* Dimock, 158 Mass. 552, 33 N. E. 647.

99. Harrison *v.* Women's Homœopathic Assoc., 134 Pa. St. 558, 19 Atl. 804, 19 Am. St. Rep. 714.

1. Light Co. *v.* Gill, 14 Pa. Co. Ct. 6.

2. Southern Electrical Supply Co. *v.* Rolla Electric Light, etc., Co., 75 Mo. App. 622; Hughes *v.* Lambertville Electric Light, etc., Co., 53 N. J. Eq. 435, 32 Atl. 69; Scannevin *v.* Consolidated Mineral Water Co., 25 R. I. 318, 55 Atl. 754.

3. Jarechi *v.* Philharmonic Soc., 79 Pa. St. 403, 21 Am. Rep. 78. But *compare* Baum *v.* Covert, 62 Miss. 113.

Gas appliances, such as pendants, chandeliers, brackets, and globes, are not fixtures nor lienable articles within the statute giving liens for material furnished and labor done on buildings, in the absence of evidence of an intention on the part of the owner when he has them put in to make them permanent parts of the building, and such intention is not shown by the mere fact that they are put in by the original owner of the building, and remain in the same after it is sold by him to another. Frank Adam Electric Co. *v.* Gottlieb, 112 Mo. App. 226, 86 S. W. 901.

4. "The controlling question in such cases is, was the machinery furnished and received with the intention of forming integral parts of a building which was constructed for a certain purpose." Buchannan *v.* Cole, 57 Mo. App. 11, 17. See also Sosman *v.* Conlon, 57 Mo. App. 25; Cooke *v.* McNeil, 49 Mo. App. 81.

lien,[5] otherwise not.[6] Various statutes have been held to include an engine for a steam sawmill[7] or a packing plant;[8] an engine, boilers and fixtures, and boiler stack for an iron furnace;[9] a pump for use in waterworks;[10] a "squeezer" and steam

5. *California.*— Goss *v.* Helbing, 77 Cal. 190, 19 Pac. 277; Donahue *v.* Cromartie, 21 Cal. 80.

Georgia.— Schofield *v.* Stout, 59 Ga. 537.

Maine.— Baker *v.* Fessenden, 71 Me. 292.

Minnesota.— Pond Mach. Tool Co. *v.* Robinson, 38 Minn. 272, 37 N. W. 99.

Missouri.— Buchannan *v.* Cole, 57 Mo. App. 11.

New York.— Watts-Campbell Co. *v.* Yuengling, 125 N. Y. 1, 25 N. E. 1060 [*affirming* 51 Hun 302, 3 N. Y. Suppl. 869].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 37.

Machinery furnished for the production and control of electric power by mechanical means and its adaptation for use upon a trolley system is for a "manufacturing purpose" within N. J. Laws (1898), p. 538. Bates Mach. Co. *v.* Trenton, etc., R. Co., 70 N. J. L. 684, 58 Atl. 935, 103 Am. St. Rep. 811.

Everything necessary to put a manufactory in motion and apply its power to the different machines used is machinery, appurtenances, or fixtures, within Ohio Rev. St. § 3184, giving persons who perform labor or furnish machinery for erecting a manufactory, appurtenances, or fixtures under contract with the owner a lien thereon, and on the interest of owner in the land on which the same may stand. Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130.

Machinery furnished to lessee.—A mechanic or materialman, who, under a contract with the lessee, furnishes an engine and fixtures attached to the soil, is entitled to a lien against the estate of the lessee on account thereof. Dobschuetz *v.* Holliday, 82 Ill. 371.

Wheels and boxes designed and built especially for use in a certain dry kiln, which have no value apart from such kiln, and without which the kiln could not be used without altering its structure, although running on a tramway and not actually fastened thereto, are constructively attached to, and a part of, the building, within the meaning of the Mechanic's Lien Act. Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

The fact that the several parts of machinery were separated, except for the roof which covered them, will not affect the right of one furnishing such machinery to a lien where from the nature of the plant it was necessarily made up of parts. Progress Press Brick, etc., Co. *v.* Gratiot Brick, etc., Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557, holding further that the right to a lien on a building for machinery was not affected by the fact that parts of the plant were located upon different platted lots, where the owner had obliterated the lot lines, and by his use of the property had treated the whole as one lot.

Estoppel to deny that machinery is a fixture see Arnett *v.* Finney, 29 N. J. Eq. 309 [*reversing* 26 N. J. Eq. 459].

In Tennessee it seems that there is no lien for machinery. Allman *v.* Corban, 4 Baxt. 74; East Tennessee Iron Mfg. Co. *v.* Bynum, 3 Sneed 268, 65 Am. Dec. 56.

Under the Connecticut statute giving a lien for materials furnished and services rendered in the construction, erection, or repairs of any building, where materials and labor were furnished in equipping with fixed machinery for the manufacture of paper a building intended in its erection as a paper mill, but which was in itself a complete and independent structure, they could not be regarded as furnished for the construction or reparation of a building, and no lien attached to the premises in favor of the person furnishing the same. Rose *v.* Persse, etc., Paper Works, 29 Conn. 256.

6. *Arkansas.*— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119, holding that a mechanic's lien does not exist for the price of steel wrenches or rubber belting which are not in any manner attached to the land, although used in connection with a sawmill or dry kiln.

Georgia.— Schofield *v.* Stout, 59 Ga. 537.

Maine.— Baker *v.* Fessenden, 71 Me. 292.

Missouri.— Richardson *v.* Koch, 81 Mo. 264.

New Hampshire.— Thompson Mfg. Co. *v.* Smith, 67 N. H. 409, 29 Atl. 405, 68 Am. St. Rep. 679.

New Jersey.— Hughes *v.* Lambertville Electric Light, etc., Co., 53 N. J. Eq. 435, 32 Atl. 69. Under the Mechanics' Lien Act, granting a lien for the price of fixed machinery, a lien does not attach for the purchase-price of complete machines, which are stayed in their places merely to make them steady, and not for the purpose of incorporating them into, and making them a part of, the realty. Campbell *v.* John W. Taylor Mfg. Co., 64 N. J. Eq. 344, 51 Atl. 723 [*reversing* 62 N. J. Eq. 307, 49 Atl. 1119].

Virginia.— Haskin Wood Vulcanizing Co. *v.* Cleveland Ship-Building Co., 94 Va. 439, 26 S. E. 878.

United States.— Beers *v.* Knapp, 3 Fed. Cas. No. 1,232, 5 Ben. 104.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 37.

Machinery subject to common-law lien.— The purpose of N. J. Revision, p. 669, is to afford mechanics a lien on machinery, of which they cannot have such possession as would give them a lien by the common law; hence, where machinery is of such a character that the common-law lien may be had upon it; doubts should not be so resolved as to hold it also liable to the statutory lien. Griggs *v.* Stone, 51 N. J. L. 549, 18 Atl. 1094, 7 L. R. A. 48.

7. Morgan *v.* Arthurs, 3 Watts (Pa.) 140.

8. Hooven *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229.

9. Parrish's Appeal, 83 Pa. St. 111.

10. Goss *v.* Helbing, 77 Cal. 190, 19 Pac. 277.

pump for a steel mill;[11] foundations for a boiler;[12] a battery of boilers, embedded in brick, stone, and mortar, a furnace chimney or stack, built on firm foundations, and extending up through the roof, the engines, cranes, wire mills, furnace trains, and other fixtures, firmly attached, all part of the realty, and all together constituting one plant;[13] an electric passenger elevator;[14] bolting cloth in a flouring mill;[15] brewery appliances;[16] Burr millstones;[17] matte pots, fore hearths, and ore cars in a smelting furnace;[18] and an ice machine.[19] But a carding machine[20] and a derrick[21] have been held not to be within the statutes. A lien has been held to attach to a building for machinery purchased for and placed therein, whether such building is already completed or is being erected at the time of the purchase of the machinery;[22] but there is no lien for machinery where the transaction by which it was furnished was merely an ordinary sale of personalty.[23]

14. Improvements Outside of Building. In order for work or materials furnished on improvements outside of a building to be included in a mechanic's lien, such improvements must be either appurtenant to the building[24] or included in the contract for the building;[25] otherwise there is no lien.[26]

15. Sidewalks and Other Street Improvements. As a general rule, under the statutes, a mechanic's lien is not allowed for the construction of sidewalks[27] or

11. Pflueger *v.* Lewis Foundry, etc., Co., 134 Fed. 28, 67 C. C. A. 102.

12. Kountz Bros. Co. *v.* Consolidated Ice Co., 28 Pa. Super. Ct. 266.

13. Dickey's Appeal, 115 Pa. St. 73, 7 Atl. 577.

14. Lefler *v.* Forsberg, 1 App. Cas. (D. C.) 36, it is both an engine and a machine within the act of congress of 1884.

15. Heidegger *v.* Atlantic Milling Co., 16 Mo. App. 327.

16. Watts-Campbell Co. *v.* Yuengling, 125 N. Y. 1, 25 N. E. 1060.

17. Wademan *v.* Thorp, 5 Watts (Pa.) 115.

18. Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

19. Nason Ice Mach. Co. *v.* Upham, 26 N. Y. App. Div. 420, 50 N. Y. Suppl. 197.

20. Graves *v.* Pierce, 53 Mo. 423.

21. Honeyman *v.* Thomas, 25 Oreg. 539, 36 Pac. 636.

22. White *v.* Chaffin, 32 Ark. 59; Progress Press Brick, etc., Co. *v.* Gratiot Brick, etc., Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557. But *compare* Haslett *v.* Gillespie, 95 Pa. St. 371.

23. Jerecke Mfg. Co. *v.* Struther, 14 Ohio Cir. Ct. 400, 8 Ohio Cir. Dec. 5.

Merely selling detached parts, not uniting them, does not give lien. Loudon *v.* Coleman, 59 Ga. 653.

24. *Connecticut.*— Balch *v.* Chaffee, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155, a well.

Kansas.— Badger Lumber Co. *v.* Marion Water Supply, etc., Co., 48 Kan. 182, 29 Pac. 476, 30 Am. St. Rep. 301, 15 L. R. A. 652, electric light poles and wires.

Massachusetts.— Beatty *v.* Parker, 141 Mass. 523, 6 N. E. 754, a pipe connecting a house with a sewer.

Ohio.— Brush Electric Co. *v.* Warwick Electric Mfg. Co., 6 Ohio S. & C. Pl. Dec. 475, 4 Ohio N. P. 279, a reservoir to store water for use of a factory.

Oregon.— Willamette Falls Transp., etc., Co. *v.* Remick, 1 Oreg. 169, a dam for a mill.

Tennessee.— Steger *v.* Arctic Refrigerating Co., 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580, pipes in a cold storage plant to convey vapor to customers.

West Virginia.— O'Neil *v.* Taylor, 59 W. Va. 370, 53 S. E. 471, walks, fences, coal house, sample room, and drain pipe from house to sewer in street.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 38.

The Wisconsin statute giving a lien for manual labor performed upon any land, timber, or lumber gives a lien on the land for the charge of building a fence on it. Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706.

25. Henry *v.* Plitt, 84 Mo. 237 (a fence); Missouri Valley Cut Stone Works *v.* Brown, 50 Mo. App. 407 (retaining wall); Ermentrout's Account, 1 Woodw. (Pa.) 158.

26. *Arkansas.*—Eastern Arkansas Hedge-Fence Co. *v.* Tanner, 67 Ark. 156, 53 S. W. 886, a hedge.

Connecticut.— Balch *v.* Chaffee, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155.

Illinois.— Canisius *v.* Merrill, 65 Ill. 67 (fencing); Parmelee *v.* Hambleton, 19 Ill. 615 (a vault under a sidewalk).

Massachusetts.— Truesdell *v.* Gay, 13 Gray (Mass.) 311, a retaining wall.

Pennsylvania.— Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 16, 38 Atl. 1081 (a gas producer two hundred and eighty-nine feet distant); Worthington *v.* Cambridge Springs Co., 24 Pa. Co. Ct. 281 (furnishings of a power house, located seventeen hundred feet away, on an entirely separate lot).

Tennessee.— Nanz *v.* Cumberland Gap Park Co., 103 Tenn. 299, 52 S. W. 999, 76 Am. St. Rep. 650, 47 L. R. A. 273, furnishing and planting flowers, trees, and shrubbery, and grading and graveling of walks.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 38.

27. *Colorado.*— Fleming *v.* Prudential Ins. Co., 19 Colo. App. 125, 73 Pac. 752.

other street improvements,[28] although under some statutes a lien is allowed for work of this character.[29]

16. Completion of Building. The right to a lien for work done in the construction of a building is not dependent upon whether the building is actually completed but upon whether the construction is commenced. If this is done and lienable work is done in aid thereof the right of lien thereby becomes perfect,[30] and cannot thereafter be defeated by any act of the proprietor.[31]

B. Nature of Claim — 1. In General. As a rule the statutes give a lien only for work or labor performed on,[32] or materials furnished for,[33] the building or other improvement, and a lien can be acquired only where there is something due to the claimant,[34] and the claim to be secured and enforced is such as the statute contemplates.[35] When a round price is to be paid for labor and materials for a

Georgia.— Seeman *v.* Schultze, 100 Ga. 603, 28 S. E. 378.

Indiana.— Knaube *v.* Kerchner, 39 Ind. 217.

Iowa.— Coenen *v.* Staub, 74 Iowa 32, 36 N. W. 877, 7 Am. Rep. 470.

Pennsylvania.— W. T. Bradley Co. *v.* Gaghan, 208 Pa. St. 511, 57 Atl. 985; Edelkamm *v.* Comly, 12 Pa. Co. Ct. 371; Clymer Paving Co. *v.* Donegan, 4 Pa. Dist. 243, 36 Wkly. Notes Cas. 261. *Compare* Yearsley *v.* Flanigen, 22 Pa. St. 489.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 39.

28. Smith *v.* Kennedy, 89 Ill. 485; Edelkamm *v.* Comly, 12 Pa. Co. Ct. 371, laying curbs.

29. Leiper *v.* Minnig, 74 Ark. 510, 86 S. W. 407 (sidewalk); Williams, etc., Co. *v.* Rowell, 145 Cal. 259, 78 Pac. 725 (sewer); McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182 (sidewalk); Kenney *v.* Apgar, 93 N. Y. 539 (sidewalk); Dugan Cut Stone Co. *v.* Gray, 114 Mo. 497, 21 S. W. 854, 35 Am. St. Rep. 767 (sidewalk); McDermott *v.* Claas, 104 Mo. 14, 15 S. W. 995 (sidewalk). See also Pullis *v.* Hoffman, 28 Mo. App. 666, illuminating tiling placed over areas under sidewalk. *Compare* Dugan Cut-Stone Co. *v.* Gray, 43 Mo. App. 671.

30. Baker *v.* Waldron, 92 Me. 17, 42 Atl. 225, 69 Am. St. Rep. 483.

31. Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824.

32. See Willamette Falls Transp. Co. *v.* Remick, 1 Oreg. 169; Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706.

Marble work.—One contracting with a principal contractor to carve, furnish models, and erect in place all exterior marble work for the building only contracts to do work — the models not being materials — and he is entitled to enforce a lien for such work. Evans Marble Co. *v.* International Trust Co., 101 Md. 22, 60 Atl. 667, 109 Am. St. Rep. 568.

Acting as foreman in addition to labor.— A mechanic's lien for labor cannot be defeated merely because the plaintiff, in addition to other services, acted as foreman over the other hands employed, and a portion of his claim is for services as foreman. Foerder *v.* Wesner, 56 Iowa 157, 9 N. W. 100.

A contractor who does not perform any work or labor personally does not come within Sandels & H. Dig. Ark. § 6521, providing a lien for "every mechanic, builder, lumberman, artisan, workman, laborer, or other person or persons that shall do or perform any work or labor" on a railroad. Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 194, 47 S. W. 196, 42 L. R. A. 334.

Giving direction to work.— A subcontractor under a contract with the principal contractor to carve and erect in place and finish all the exterior marble work, employed because of his skill in the class of work, who does the work in the sense of giving it intelligent direction, and who is responsible for its proper execution, is entitled to a lien for his compensation under Md. Acts (1898), p. 1169, c. 502, subjecting every building to a lien for the payment for work done thereon. Evans Marble Co. *v.* International Trust Co., 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568.

33. See Busfield *v.* Wheeler, 14 Allen (Mass.) 139; Willamette Falls Transp. Co. *v.* Remick, 1 Oreg. 169.

Lubricating oil sold to be and actually used on mill machinery is not "material," within the purview of Sanborn & B. Annot. St. Wis. § 3314, as amended, which provides *inter alia* that every person who, as principal contractor, architect, etc., furnishes any materials in or about the erection, construction, protection, or removal of any machinery, erected or constructed so as to be or become a part of the freehold, shall have a lien for such materials. Standard Oil Co. *v.* Lane, 75 Wis. 636, 44 N. W. 644, 7 L. R. A. 191.

Md. Acts (1898), c. 502, eliminated the right of a lien for materials furnished for a building and gave a lien for labor only. Evans Marble Co. *v.* International Trust Co., 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568.

34. Condon *v.* St. Augustine Church, 112 N. Y. App. Div. 168, 98 N. Y. Suppl. 253.

35. See Willamette Falls Transp. Co. *v.* Remick, 1 Oreg. 169; Spaulding *v.* Burke, 33 Wash. 679, 74 Pac. 829.

A plumber who hires out his license to another, who has no plumber's license, so that the latter may purchase materials and perform a contract he has on hand, has no lien on the premises for the price agreed on. Burnside *v.* O'Hara, 35 Ill. App. 150.

Sawing timber.— The proprietors of a saw-

part of which the law gives a lien, and for another part of which there can be no lien, and there is no way of determining how much is of one kind, and how much of the other, no lien can be enforced for either.[36]

2. Services — a. Nature in General. In order that there may be a lien for services, such services must be performed in the erection, repair, etc., of the building or structure, as by the statute provided,[37] and must be such as are reasonably included in the contract between the owner and the contractor.[38]

b. Services as Architect. In some jurisdictions it is held that an architect who prepares plans and specifications for a building or otherwise performs with respect thereto the ordinary duties of his profession is entitled to a mechanic's lien under the statutes;[39] but in other jurisdictions the courts, in some cases con-

mill cannot assert a mechanic's lien for sawing timber into lumber to be used in a building. Evans *v.* Beddingfield, 106 Ga. 755, 32 S. E. 664, holding that they have, however, a special lien on the product of their mill for the work done.

A charge for commissions for securing and paying for labor and material is not lienable. Edgar *v.* Salisbury, 17 Mo. 271. But *compare* Price *v.* Merritt, 55 Mo. App. 640, holding that where the contract with a materialman is that he shall have ten per cent above cost and carriage for the materials, items for drayage, freight, and commissions are proper charges in a lien account.

"Loss of time for men . . . delay, risk and inconvenience to contract work" are neither work nor materials within the mechanic's lien statute. Lee *v.* Brayton, 18 R. I. 232, 26 Atl. 256.

Patents.— A mechanic's lien cannot be acquired by a contractor for the erection of a gas plant for the assignment of patent rights which are not included in the use of the appliances which the contractor was required to furnish. Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. Rep. 276.

Md. Acts (1898), p. 1169, c. 502, subjecting every building to a lien for the payment of debts contracted for work done on or about the same, eliminates the right of a lien for materials furnished for a building, and gives a lien for labor only. Evans Marble Co. *v.* International Trust Co., 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568.

36. Evans Marble Co. *v.* International Trust Co., 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568; Angier *v.* Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630 [*distinguishing* Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452]; Childs *v.* Anderson, 128 Mass. 108; McGuinness *v.* Boyle, 123 Mass. 570, 25 Am. Rep. 123; Foster *v.* Cox, 123 Mass. 45; Jones *v.* Keen, 115 Mass. 170; Driscoll *v.* Hill, 11 Allen (Mass.) 154; Mulrey *v.* Barrow, 11 Allen (Mass.) 152; Graves *v.* Bemis, 8 Allen (Mass.) 573; Clarke *v.* Kingsley, 8 Allen (Mass.) 543; Felton *v.* Minot, 7 Allen (Mass.) 412; Morrison *v.* Minot, 5 Allen (Mass.) 403.

37. Pitschke *v.* Pope, 20 Colo. App. 328, 78 Pac. 1077 (holding that a superintendent employed by the contractor is not entitled to a lien for services rendered in traveling about and urging persons from whom the contractor had ordered material to hasten its delivery); Burnside *v.* O'Hara, 35 Ill. App. 150; Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. Rep. 276 (holding that a contractor for the erection of a gas plant is not entitled to a lien for services rendered in instructing the superintendent); Webster *v.* Real Estate Imp. Co., 140 Mass. 526, 6 N. E. 71.

Work "on or about" building.— A subcontractor agreed with the principal contractor to "carve, furnish the models and . . . erect in place and finish all the exterior marble work" for a building. The material was taken to the subcontractor's yard, where stonecutters put the stones into proper shape. The stones were then loaded on cars and transported to the site of the building, where they were unloaded, and then hoisted from the sidewalk and placed in the building, in proper place. It was held that the subcontractor furnished work "on or about" the building, within Md. Acts (1898), p. 1169, c. 502, subjecting every building to a lien for the payment for work done on or about the same. Evans Marble Co. *v.* International Trust Co., 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568.

Services rendered in surveying and marking the site for a building and drawing a contract for construction of the building are not labor for which a mechanic's lien may be claimed. Buckingham *v.* Flummerfelt, (N. D. 1906) 106 N. W. 403.

38. Stokes *v.* Green, 10 S. D. 286, 73 N. W. 100.

Starting engine.—Where a stationary engine was sold and put up by a machinist, and, as a part of the contract of sale, it was stipulated that the engine was to be started and put in proper order for running, necessary work done to start it and fit it for running in position was done in pursuance of the original contract, although such work was charged for in open account, and the price of the engine itself was covered by drafts, and did not enter into the account. Loudon *v.* Coleman, 62 Ga. 146.

39. *Alabama.*— Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600, he has done "work or labor" within Code, § 3018.

Illinois.— Laws (1895), p. 226, giving a lien to one who shall "perform services as

struing the statutes using substantially the same terms, have held that an architect is not entitled to a lien.[40] In some states a lien is allowed to architects who furnish plans and also superintend the construction,[41] but denied to architects who merely furnish plans, drawings, and specifications.[42]

c. Superintendence. The lien is usually allowed for services in superintending the construction of a building or other improvement,[43] although in some cases

an architect" authorizes a lien for preparing plans. Freeman *v.* Rinaker, 185 Ill. 172, 56 N. E. 1055.

Iowa.— Parsons *v.* Brown, 97 Iowa 699, 66 N. W. 880. See also Foster *v.* Tierney, 91 Iowa 253, 59 N. W. 56, 51 Am. St. Rep. 343.

Minnesota.—Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746; Knight *v.* Norris, 13 Minn. 473, he "performs labor" within Gen. St. (1866) c. 90.

Nebraska.— Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616; Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800.

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389.

New Mexico.— Johnson *v.* McClure, 10 N. M. 506, 62 Pac. 983.

New York.— Stryker *v.* Cassidy, 76 N. Y. 50, 32 Am. Rep. 262 [*reversing* 10 Hun 18], he performs "labor" within Laws (1862), c. 478.

North Dakota.— A supervising architect who furnishes plans and specifications and supervises the construction of a building under a contract with the owner for such services is entitled to a lien therefor, under Rev. Codes (1899), § 4788, which gives a lien to any person who shall perform any labor on any building. Friedlander *v.* Taintor, (1905) 104 N. W. 527.

Rhode Island.— Field *v.* Consolidated Mineral Water Co., 25 R. I. 319, 55 Atl. 757, 105 Am. St. Rep. 895.

United States.— Phœnix Furniture Co. *v.* Put-in-Bay Hotel Co., 66 Fed. 683, he "performs labor" within Ohio Laws (1894), p. 135.

Canada.— Arnoldi *v.* Gouin, 22 Grant Ch. (U. C.) 314.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 41.

If the plans are not used there is no lien.— Foster *v.* Tierney, 91 Iowa 253, 59 N. W. 56, 51 Am. St. Rep. 343; Buckingham *v.* Flummerfelt, (N. D. 1906) 106 N. W. 403.

Services not giving rise to lien.— Ill. Rev. St. c. 82, § 1, which gives a mechanic's lien to any person who shall by contract, express or implied, with the owner of land, furnish labor or materials or services as an architect or superintendent in building, altering, repairing, or ornamenting any house or other building or appurtenance thereto, confers no lien on architects for keeping books, auditing accounts, and making settlements with the various contractors engaged in erecting a building, or for labor as supervising architects in the improvement of grounds and accessories. Adler *v.* World's Pastime Exposition Co., 126 Ill. 373, 18 N. E. 809.

40. Foushee *v.* Grigsby, 12 Bush (Ky.) 75; Raeder *v.* Bensberg, 6 Mo. App. 445 ("drawing plans and specifications and giving directions to the builder under whose special superintendence the house is being erected cannot be called, in any proper sense of the words, 'work or labor upon the building'"); Thompson *v.* Baxter, 92 Tenn. 305, 21 S. W. 668, 36 Am. St. Rep. 85 (an architect is not a "mechanic," "undertaker," or "furnisher" within the statute).

41. Rinn *v.* Electric Power Co., 3 N. Y. App. Div. 305, 38 N. Y. Suppl. 345; St. Clair Coal Co. *v.* Martz, 75 Pa. St. 384; Pennsylvania Bank *v.* Gries, 35 Pa. St. 423.

42. Rinn *v.* Electric Power Co., 3 N. Y. App. Div. 305, 38 N. Y. Suppl. 345; Price *v.* Kirk, 90 Pa. St. 47 [*affirming* 13 Phila. 497]; Pennsylvania Bank *v.* Gries, 35 Pa. St. 423. See also Thompson-Starrett Co. *v.* Brooklyn Heights Realty Co., 111 N. Y. App. Div. 358, 98 N. Y. Suppl. 128.

In Massachusetts an architect is entitled to a lien for superintending construction but not for preparing plans and specifications, and if his contract is entire and it cannot be ascertained what part of the price is due for superintendence, he is not entitled to any lien whatever. Libbey *v.* Tidden, 192 Mass. 175, 78 N. E. 313; Mitchell *v.* Packard, 168 Mass. 467, 47 N. E. 113, 60 Am. St. Rep. 404.

43. *Colorado.*— Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303. See also Pitschke *v.* Pope, 20 Colo. App. 328, 78 Pac. 1077.

Louisiana.— Mulligan *v.* Mulligan, 18 La. Ann. 20.

Massachusetts.— Mitchell *v.* Packard, 168 Mass. 467, 47 N. E. 113, 60 Am. St. Rep. 404.

Minnesota.— Wanganstein *v.* Jones, 61 Minn. 262, 63 N. W. 717; Knight *v.* Norris, 13 Minn. 473.

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389.

New York.— Stryker *v.* Cassidy, 76 N. Y. 50, 32 Am. Rep. 262 [*reversing* 10 Hun 18]; Rinn *v.* Electric Power Co., 3 N. Y. App. Div. 305, 38 N. Y. Suppl. 345.

Oregon.— Willamette Falls Transp., etc., Co. *v.* Remick, 1 Oreg. 169.

Pennsylvania.—St. Clair Coal Co. *v.* Martz, 75 Pa. St. 384; Pennsylvania Bank *v.* Gries, 35 Pa. St. 423. *Compare* Jones *v.* Shawhan, 4 Watts & S. 257.

United States.— Phœnix Furniture Co. *v.* Put-in-Bay Hotel Co., 66 Fed. 683; Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723.

Canada.—Arnoldi *v.* Gouin, 22 Grant Ch. (U. C.) 314.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 42.

the work of superintendence has been held not to be within the terms or meaning of the statutes.[44]

d. Work Not Done on Premises. A mechanic's lien may be acquired for work done on materials intended for use and actually used, although done away from the premises on which the building is located;[45] or, in a proper case, for labor performed outside of the premises, but necessarily connected with the structure thereon.[46]

e. Transportation of Materials. A lien is usually allowed for transportation of the material to be used in the construction of the building.[47]

3. Board or Lodging of Workmen. As a general rule the board or lodging of workmen is not the subject of a mechanic's lien,[48] but under special circumstances it may be otherwise.[49]

44. Foushee *v.* Grigsby, 12 Bush (Ky.) 75; Blakey *v.* Blakey, 27 Mo. 39 (holding that a mechanic who builds a house is not entitled to a lien for his own services in superintending his workmen); Cook *v.* Ross, 117 N. C. 193, 23 S. E. 252.

The superintendent of a corporation, having general charge of its affairs, is not entitled to a mechanic's lien for his salary on a building erected under his supervision, he not being a laborer within Cod. St. p. 409, § 1, giving laborers a lien for their wages on buildings erected by them. Smallhouse *v.* Kentucky, etc., Gold, etc., Min. Co., 2 Mont. 443.

45. Scannell *v.* Hub Brewing Co., 178 Mass. 288, 59 N. E. 628 [*distinguishing* Tracy *v.* Wetherell, 165 Mass. 113, 42 N. E. 497]; Daley *v.* Legate, 169 Mass. 257, 47 N. E. 1013; Wilson *v.* Sleeper, 131 Mass. 177; Howes *v.* Reliance Wire-Works Co., 46 Minn. 44, 48 N. W. 448; Parrish's Appeal, 83 Pa. St. 111; Sweet *v.* James, 2 R. I. 270.

Laborers making brick in a brick-yard of the contractor in his regular business have no lien on the house in which the bricks are laid. Haynes *v.* Holland, (Tenn. Ch. App. 1898) 48 S. W. 400.

46. Wells *v.* Christian, 165 Ind. 662, 76 N. E. 518, holding that under Burns Annot. St. Ind. (1901) § 7255 (Acts (1899), p. 569, c. 255), providing that contractors, etc., and all persons performing labor, etc., for the erection, altering, repairing, etc., of any house, mill, manufactory, etc., may have a lien on the house, mill, manufactory, etc., a laborer employed to haul away dirt dug out of and to haul sand to be used in refilling a trench dug in a street for a steam pipe connecting a plant for generating steam to be distributed for heating purposes throughout the city is entitled to a lien, irrespective of whether such work was performed by him on the particular premises to which the lien primarily attached, or on the street in front of the same, or at some other point where the owners of the steam plant owned merely an easement operated under a municipal license.

47. *California.*— McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622 [*distinguishing* Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640]. *Compare* Wilson *v.* Nugent, 125 Cal. 280, 57 Pac. 1008.

Colorado.— Tabor *v.* Armstrong, 9 Colo. 285, 12 Pac. 157.

Kentucky.— Fowler *v.* Pompelly, 76 S. W. 173, 25 Ky. L. Rep. 615.

Minnesota.—McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195.

Pennsylvania.— Hill *v.* Newman, 38 Pa. St. 151, 80 Am. Dec. 473; Holeman *v.* Redemptorist Fathers, 4 Pa. Co. Ct. 233; Tizzard *v.* Hughes, 3 Phila. 261, hoisting with derrick. *Contra,* Wilson *v.* Whitcomb, 100 Pa. St. 547.

South Dakota.— Kehoe *v.* Hansen, 8 S. D. 198, 200, 65 N. W. 1075, 59 Am. St. Rep. 759, where it is said: "Ordinarily the contractor for material delivers the same, and includes the expense of hauling in the price of the material. No objection, so far as we are aware, has ever been made to thus including the expense of hauling in the price of the material. If it may be so included, and lien made to cover the same, why may not the cartman make a separate contract for hauling, and acquire a valid lien therefor? We can discover no valid reason why, if the contract to haul the lumber is made directly by the owner with the cartman, he may not enforce a lien therefor."

See 34 Cent. Dig. tit. "Mechanics' Liens," § 47.

Contra.— Webster *v.* Real Estate Imp. Co., 140 Mass. 526, 6 N. E. 71, where a lien was denied for carting lumber and sand to be used in the erection of a building.

48. Perrault *v.* Shaw, 69 N. H. 180, 38 Atl. 724, 76 Am. St. Rep. 160.

Cooking.— Under Cal. St. (1867–1868) p. 590, a person has no lien for the value of services rendered in cooking for the men employed in constructing the building, notwithstanding the cooking was done on the ground as the work progressed. McCormick *v.* Los Angeles City Water Co., 40 Cal. 185.

49. Salem *v.* Lane, etc., Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481 (holding that where the contract for an engine provided that if an erector was required fifty dollars should be added to the price of the engine, the lien could include that amount for board, traveling expenses, and time of an erector furnished by request); Lybrandt *v.* Eberly, 36 Pa. St. 347 (holding that if the mechanic engage his hands at a certain sum *per diem* and their board, he may include in his lien the boarding of the journeymen).

4. Materials — a. Nature in General. The right to a lien for materials furnished extends to all such materials as ordinarily enter into or are used in the construction, repair, or improvement of buildings,[50] etc., or which are within the express or implied terms of the building contract.[51] Whatever may be the condition of materials furnished in the construction of the building, whether they are very rough or perfectly adapted for their purposes, and in whatever quantities, or from whomsoever they may have been originally purchased, or although kept by the contractor as merchandise, his lien is not affected by these considerations, provided only the materials are included in the work contracted for.[52] Where one agreed to put upon a lot a small frame house already constructed, and to make additions thereto, it was held that, by regarding this house as material going to the construction of the whole, it might be covered by the Mechanics' Lien Act, although, if considered as a building already constructed, it could not be.[53] Where, after an old building was partly repaired by plaintiff, it was torn down, and a new one erected by him in its stead, he could claim a lien on the new building for materials furnished for and used in the old building which were afterward used in the new.[54]

b. Place of Furnishing. It has been held that a mechanic's lien for materials may attach, although they were furnished at a place other than where the building or other improvement was erected or made,[55] and even though the place of furnishing the materials is without the state.[56]

c. Materials Used But Not Incorporated in Building or Improvement. A lien has been denied for the furnishing of materials which, although used in the con-

See also Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90, where it was a part of the contract that the owner of the property to be improved should board the hands and team engaged in the work.

50. Hazard Powder Co. *v.* Byrnes, 12 Abb. Pr. (N. Y.) 469, 21 How. Pr. 189. Where the materials furnished are of such a kind that a careful and skilful man, acquainted with the building for which they were designed, might properly believe that they could be used in its erection, and if in fact they could be usefully applied in its construction, then the materialman is not bound to inquire into the character of the materials which the contractor has agreed, with the owner of the building, to use in its construction. Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 508, 64 Am. Dec. 675.

Person furnishing paint entitled to lien.— Van Calvert *v.* McKinney, 2 Tex. Unrep. Cas. 345.

Asbestos covering for a still and pipe is material used in "erection." Angier *v.* Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630.

Sod furnished for a public park is material used on a public improvement within Ohio Rev. St. § 3193, and can be protected by a lien. Fox *v.* Wunker Rehsteiner, 18 Ohio Cir. Ct. 610, 19 Ohio Cir. Dec. 176.

Appliances left on premises.— A contractor who left ladders and other appliances on the job which he claimed as his own property and which he had not furnished to defendant was not entitled to enforce a contractor's lien therefor because of the fact that defendant had refused to permit him to remove them. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729.

51. Hazard Powder Co. *v.* Byrnes, 12 Abb. Pr. (N. Y.) 469, 21 How. Pr. 189, holding that where the building contract required rocks to be blasted and removed preparatory to building, powder and fuses necessarily used came within the term "materials for building."

Dynamite furnished and used for blasting rock for the excavation and building of a railway is material within N. Y. Laws (1897), c. 418, § 3. Schaghticoke Powder Co. *v.* Greenwich, etc., R. Co., 183 N. Y. 306, 76 N. E. 153, 11 Am. St. Rep. 751, 2 L. R. A. N. S. 288 [*reversing* 96 N. Y. App. Div. 631, 89 N. Y. Suppl. 1115].

52. Weatherly *v.* Van Wyck, 128 Cal. 329, 60 Pac. 846; Roebling Sons Co. *v.* Bear Valley Irr. Co., 99 Cal. 488, 34 Pac. 80; Progress Press Brick, etc., Co. *v.* Gratiot Brick, etc., Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557; Sweet *v.* James, 2 R. I. 270. See also Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

53. Selden *v.* Meeks, 17 Cal. 128.

54. Nichols *v.* Culver, 51 Conn. 177.

55. Great Western Mfg. Co. *v.* Hunter, 15 Nebr. 32, 16 N. W. 759.

56. Parker Land, etc., Co. *v.* Reddick, 18 Ind. App. 616, 47 N. E. 848; Badger Lumber Co. *v.* Mayes, 38 Nebr. 822, 57 N. W. 519; Mallory *v.* La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071. See also Atkins *v.* Little, 17 Minn. 342. *Contra*, Birmingham Iron Foundry *v.* Glen Cove Starch Mfg. Co., 78 N. Y. 30 [*recognized* and *distinguished* in Campbell *v.* Coon, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410 (*reversing* 8 Misc. 234, 28 N. Y. Suppl. 561)]; Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163.

struction, etc., of the building and improvement are not incorporated therein,[57] or for the use of tools, machinery, or appliances furnished, lent, or hired for the purpose of facilitating the work.[58]

d. Materials Prepared or Furnished But Not Used. It is laid down as the general rule that the lien attaches only for materials actually used in the construction of the building, etc.[59] Nevertheless a lien may be allowed where materials have been prepared or furnished as ordered and the owner refuses to accept or use them,[60] goes into bankruptcy,[61] allows his property, while unfinished, to go into

57. Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45 (no lien for patterns used in the manufacture of couplings for a pipe line); Oppenheimer *v.* Morrell, 118 Pa. St. 189, 12 Atl. 307 (no lien for lumber for scaffolding). See also Stimson Mill Co. *v.* Los Angeles Traction Co., 141 Cal. 30, 74 Pac. 357, no lien upon a completed bridge for materials furnished for a temporary bridge erected for use during construction of permanent bridge.

Where material is usually delivered in packages it is proper to charge for it as packed, although the small material constituting the package does not literally go into the construction of the building. Thus including a charge for lime barrels is proper where such barrels were not returned. Snell *v.* Payne, 115 Cal. 218, 46 Pac. 1069.

58. Basshor *v.* Baltimore, etc., R. Co., 65 Md. 99, 3 Atl. 285 (machinery purchased by the contractor to manufacture materials used in the building); Evans *v.* Lower, 67 N. J. L. 232, 58 Atl. 294; Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54 (they are neither materials furnished to be used in the construction, alteration, or repair of a building, or labor performed thereon, within 2 Hill Annot. Laws, § 3669); McAuliffe *v.* Jorgenson, 107 Wis. 132, 82 N. W. 706.

In Texas such a lien is given by the act of April 5, 1889, and one who furnishes tools to move a house is entitled to a lien. Burke *v.* Brown, 10 Tex. Civ. App. 298, 30 S. W. 936.

59. *Alabama.*— Lee *v.* King, 99 Ala. 246, 13 So. 506.

California.— See Wilson *v.* Nugent, 125 Cal. 280, 57 Pac. 1008.

Connecticut.— Chapin *v.* Persse, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

Kansas.— McGarry *v.* Averill, 50 Kan. 362, 31 Pac. 1082, 34 Am. St. Rep. 120; Hill *v.* Bowers, 45 Kan. 592, 26 Pac. 13.

Louisiana.— Consolidated Engineering Co. *v.* Crowley, 105 La. 615, 30 So. 222.

Michigan.— North *v.* Globe Fence Co., 144 Mich. 557, 108 N. W. 285.

Missouri.— Deardorff *v.* Everhartt, 74 Mo. 37; Schulenberg *v.* Prairie Home Inst., 65 Mo. 295; Fitzpatrick *v.* Thomas, 61 Mo. 515; Simmons *v.* Carrier, 60 Mo. 581 [*explaining* and *distinguishing* Morrison *v.* Hancock, 40 Mo. 561]; A. M. Stevens Lumber Co. *v.* Kansas City Lumber Co., 72 Mo. App. 248; Current River Lumber Co. *v.* Cravens, 54 Mo. App. 216.

Nebraska.— Weir *v.* Barnes, 38 Nebr. 875, 57 N. W. 750. See also Marrener *v.* Paxton, 17 Nebr. 634, 636, 24 N. W. 209 [*following* Foster *v.* Dohle, 17 Nebr. 631, 24 N. W. 208], where it is said: "Where, however, a subcontractor seeks to charge the owner, it devolves on him to show either that the material furnished by him was used in the erection of the building, or at least that he delivered it there under an agreement with the contractor that it would be used in the erection of the building on which the lien is sought."

Oregon.— Fitch *v.* Howitt, 32 Oreg. 396, 52 Pac. 192.

South Carolina.— Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658.

Texas.— Murphy *v.* Fleetford, 30 Tex. Civ. App. 487, 70 S. W. 989.

Vermont.— Hinckley, etc., Iron Co. *v.* James, 51 Vt. 240.

West Virginia.— McConnell *v.* Hewes, 50 W. Va. 33, 40 S. E. 436.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 51.

The fact that the materialman furnished to the owner other materials which were not used upon the land does not bar his right to a mechanic's lien when his accounts show just what materials were furnished for the land on which the lien is claimed. Portones *v.* Badenoch, 132 Ill. 377, 23 N. E. 349.

Fraudulent sale of materials by subcontractor.—Where materials furnished to a subcontractor are actually placed in the building for which they were furnished, the materialman is entitled to a lien, notwithstanding the fact that the subcontractor fraudulently disposed of the materials to a third person by whom they were placed in the building. A. M. Stevens Lumber Co. *v.* Kansas City Lumber Co., 72 Mo. App. 248.

Use in building other than that for which furnished.— Where H purchased lumber and conveyed it to a lot he had contracted to purchase, and, after doing a small amount of work in the erection of a building, sold the lumber to K, who was aware that it had not been paid for, and who removed it to another lot whereon he erected a building for which he used the lumber a mechanic's lien for the purchase-price could not be enforced against the lot and building of K. Heaton *v.* Horr, 42 Iowa 187.

60. Salem *v.* Lane, etc., Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481; Berger *v.* Turnblad, (Minn. 1906) 107 N. W. 543; Trammell *v.* Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

61. Sears *v.* Wise, 52 N. Y. App. Div. 118, 64 N. Y. Suppl. 1063; Hinchman *v.* Graham, 2 Serg. & R. (Pa.) 170.

the hands of a receiver,[62] diverts the materials to other uses,[63] or otherwise appropriates them without the consent of the furnisher;[64] and subcontractors who furnish materials specially designed and made for a building are not deprived of their lien if the contractor suspends work.[65] So also the fact that material purchased by a contracting company for the construction of a line of electric railroad under authority given by the railroad company, as provided by the contract, had not been used at the time the contract was terminated by the railroad company does not affect the right to a lien therefor.[66] In some states it is sufficient that the material be furnished on the credit of the building for use therein, and it is immaterial as between owner and furnisher whether they are used or not.[67]

e. Defective or Unsuitable Materials. A materialman has no lien on a house for materials furnished on the order of a contractor for a particular purpose, unless they are fit for that purpose;[68] but it is otherwise if the materials were furnished on the order of the owner of the house.[69]

f. Amount. It has been held that the lien for materials furnished on the credit of the building extends only to such quantity as is reasonably necessary for the erection of the building, and there is no lien for materials furnished in excess of this requirement.[70]

5. Advances of Money. There can be no mechanic's lien for money lent or

62. Totten, etc., Iron, etc., Foundry Co. *v.* Muncie Nail Co., 148 Ind. 372, 47 N. E. 703; Burns *v.* Sewell, 48 Minn. 425, 51 N. W. 224; Hickey *v.* Collom, 47 Minn. 565, 50 N. W. 918.

63. *Colorado.*— Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64.

Illinois.— Chicago Artesian Well Co. *v.* Corey, 60 Ill. 73.

New Jersey.— Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

Pennsylvania.— Spruks *v.* Mursch, 1 Lack. Leg. N. 247.

Wisconsin.— Esslinger *v.* Huebner, 22 Wis. 632.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 51.

64. Beckel *v.* Petticrew, 6 Ohio St. 247.

65. Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.

66. Tennis Bros. Co. *v.* Wetzel, etc., R. Co., 140 Fed. 193.

67. *Illinois.*— Under Hurd St. Ill. (1899) p. 1106, § 7, providing that the lien for material shall not be defeated because of the lack of proof that the material actually went into the building, if it was delivered at the place where the building was being constructed, the fact that some of the material furnished was used in making screens, boxes, etc., which were not attached to the realty, cannot affect the right to the lien, where the material was all delivered at the place where the building was being constructed for the use in the structure. Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923. Prior to the Revision of 1895, the rule was that the lien could be enforced against the property only to the extent of materials actually used in the construction of the building. Compound Lumber Co. *v.* Murphy, 169 Ill. 343, 48 N. E. 472; Hunter *v.* Blanchard, 18 Ill. 318. See also Chicago Artesian Wells Co. *v.* Corey, 60 Ill. 73.

Iowa.— Hobson *v.* Townsend, 126 Iowa 453, 102 N. W. 413; Feudden Lumber Co. *v.* Kinnan, 117 Iowa 93, 90 N. W. 515; Lee *v.* Hoyt, 101 Iowa 101, 70 N. W. 95; Neilson *v.* Iowa East. R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124.

New Jersey.— Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

Pennsylvania.— Linden Steel Co. *v.* Imperial Refining Co., 146 Pa. St. 4, 23 Atl. 800; Gaule *v.* Bilyeau, 25 Pa. St. 521; Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675; Presbyterian Church *v.* Allison, 10 Pa. St. 413; Murphy *v.* Ellis, 11 Pa. Co. Ct. 301. *Compare* Scranton Lathe Turning Co. *v.* Cassidy, 167 Pa. St. 469, 31 Atl. 734.

Tennessee.— Daniel *v.* Weaver, 5 Lea 392; Jonte *v.* Gill, (Ch. App. 1897) 39 S. W. 750.

Utah.— Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779.

Wisconsin.— Esslinger *v.* Huebner, 22 Wis. 632.

Canada.— Larkin *v.* Larkin, 32 Ont. 80.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 51.

Materials delivered after the order therefor is countermanded, and not used, do not entitle the furnisher to a lien. Stephens *v.* Campbell, 13 Pa. Super. Ct. 7.

68. Boynton Furnace Co. *v.* Gilbert, 87 Iowa 15, 53 N. W. 1085; Harlan *v.* Rand, 27 Pa. St. 511.

If the materials were of such a character as might ordinarily be used in such buildings as the one for which they were furnished, although not of such quality as were required to be used in that particular building, the seller is entitled to his lien if he had no knowledge of their unfitness. Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675.

69. Harlan *v.* Rand, 27 Pa. St. 511.

70. Boyd *v.* Mole, 9 Phila. (Pa.) 118.

advanced to a contractor or other person for the purpose of enabling him to purchase material for or pay for labor upon a building or other improvement.[71]

6. INTENT OR PURPOSE IN FURNISHING — a. In General. The statutes giving a lien for materials furnished usually apply only to furnishing for building purposes,[72] and do not include a furnishing for general or unknown purposes[73] or a sale in the usual course of trade[74] or on general account.[75]

b. Contemplation of Particular Building. As a general rule it is not sufficient that the material was used in a certain building, but it must also have been furnished for the purpose of being used in such building,[76] although in some jurisdictions it is held sufficient if the materials be furnished for use upon some building, although no particular building is in mind.[77]

c. Furnishing to Contractor Engaged on Several Buildings. It has been held that when labor or materials are furnished to a contractor engaged in the construction of several buildings, each building with the lot on which it stands can be subjected to a lien for materials used in or labor expended on it.[78]

71. *California.*— Godeffroy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

Louisiana.— First Municipality *v.* Bell, 4 La. Ann. 121.

Missouri.— Ray County Sav. Bank *v.* Cramer, 54 Mo. App. 587.

New Jersey.— Evans *v.* Lower, 67 N. J. Eq. 232, 58 Atl. 294; Williams *v.* Bradford, (Ch. 1891) 21 Atl. 331.

New York.— See Kerby *v.* Daly, 45 N. Y. 84.

Ohio.—Hamilton *v.* Stilwaugh, 11 Ohio Cir. Ct. 182, 5 Ohio Cir. Dec. 324.

Texas.— Gaylord *v.* Loughridge, 50 Tex. 573; Muscogee First Nat. Bank *v.* Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628; International Bldg., etc., Assoc *v.* Fortassain, (Civ. App. 1903) 23 S. W. 496.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 53.

72. Cotes *v.* Shorey, 8 Iowa 416; Ryan Drug Co. *v.* Rowe, 66 Minn. 480, 69 N. W. 468; Hatch *v.* Coleman, 29 Barb. (N. Y.) 201.

73. Cotes *v.* Shorey, 8 Iowa 416.

74. Footman *v.* Pusey, 45 Ga. 561; Ryan Drug Co. *v.* Rowe, 66 Minn. 480, 69 N. W. 468 [*followed* in Forman *v.* St. Germain, 81 Minn. 26, 83 N. W. 438]; Tatum *v.* Cherry, 12 Oreg. 135, 6 Pac. 715. See also Front Rank Steel Range Co. *v.* Jeffers, 79 Mo. App. 174.

A sale and setting in position of a tile mantel does not constitute the seller a contractor within the lien law, the labor bestowed in setting it up being merely trifling in comparison with the price of the mantel. Bennett *v.* Davis, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354.

75. Esslinger *v.* Huebner, 22 Wis. 632.

76. *Alabama.*— Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918.

California.— Wilson *v.* Nugent, 125 Cal. 280, 57 Pac. 1008; Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54; Houghton *v.* Blake, 5 Cal. 240; Bottomly *v.* Grace Church, 2 Cal. 90.

Connecticut.— Chapin *v* Persse, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

Idaho.— Colorado Iron Works *v.* Rickenberg, 4 Ida. 705, 43 Pac. 681.

Illinois.— Pogue *v.* Clark, 25 Ill. 351; Hill *v.* Bishop, 25 Ill. 349, 79 Am. Dec. 333.

Indiana.— Hill *v.* Sloan, 59 Ind. 181.

Kansas.— James *v.* Hayes, 63 Kan. 133, 65 Pac. 241; Weaver *v.* Sells, 10 Kan. 609.

Massachusetts.— Bennett *v.* Shackford, 11 Allen 444.

New York.—Watrous *v.* Elmendorf, 55 How. Pr. 461.

North Carolina.— Lanier *v.* Bell, 81 N. C. 337.

Ohio.— Horton *v.* Carlisle, 2 Disn. 184.

Oregon.— Tatum *v.* Cherry, 12 Oreg. 135, 6 Pac. 715.

Pennsylvania.— Hills *v.* Elliott, 16 Serg. & R. 56.

Tennessee.— Mills *v.* Terry Mfg. Co., 91 Tenn. 469, 19 S. W. 328.

Washington.— Whittier *v.* Puget Sound Loan, etc., Co., 4 Wash. 666, 30 Pac. 1094, 31 Am. St. Rep. 944 [*following* Eisenbeis *v.* Wakeman, 3 Wash. 534, 28 Pac. 923].

United States.— *In re* Cook, 6 Fed. Cas. No. 3,151, 3 Biss. 116.

Canada.— Sprague *v.* Besant, 3 Manitoba 519; McArthur *v.* Dewar, 3 Manitoba 72.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 54, 55.

77. *Iowa.*— Cotes *v.* Shorey, 8 Iowa 416.

Minnesota.— Emery *v.* Hertig, 60 Minn. 54, 61 N. W. 830; Atkins *v.* Little, 17 Minn. 342.

Missouri.— Schulenberg, etc., Lumber Co. *v.* Johnson, 38 Mo. App. 404 [*followed* in Current River Lumber Co. *v.* Cravens, 54 Mo. App. 216]. *Compare* A. M. Stevens Lumber Co. *v.* Kansas City Lumber Co., 72 Mo. App. 248.

Nebraska.— Great Western Mfg. Co. *v.* Hunter, 15 Nebr. 32, 16 N. W. 759. But see White Lake Lumber Co. *v.* Russell, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. Rep. 262; Marrener *v.* Paxton, 17 Nebr. 634, 24 N. W. 209.

New Jersey.— Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 54, 55.

78. Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367 (under Pub. St. c. 191); Com-

d. Reliance on Credit of Building or Property. In order that a mechanic's lien may be acquired the labor must have been performed or the materials furnished upon the credit of the building and not merely upon the general credit of the owner or contractor.[79] But the mere fact that the materialman looks to

pound Lumber Co. *v.* Tehlhammer Planing Mill Co., 59 Mo. App. 661; Davis *v.* Farr, 13 Pa. St. 167 [*followed* in Harper *v.* Keely, 17 Pa. St. 234]. *Contra*, Childs *v.* Anderson, 128 Mass. 108 (under Gen. St. c. 150, as amended by St. (1872) c. 318); Eisenbeis *v.* Wakeman, 3 Wash. 534, 28 Pac. 923 [*followed* in Whitten *v.* Puget Sound Loan, etc., Co., 4 Wash. 666, 30 Pac. 1094, 31 Am. St. Rep. 944].

Separate entries of the items in the materialman's book of original entry are sufficient to preserve the integrity of a lien account for materials furnished for the erection of a building, although his ledger contains an account in which such items are lumped together with others. Compound Lumber Co. *v.* Tehlhammer Planing Mill Co., 59 Mo. App. 661; Kaufman-Wilkinson Lumber Co. *v.* Christophel, 59 Mo. App. 80, 62 Mo. App. 98.

The burden of proof is upon defendant to show that the divided account is not correct. Lewis *v.* Saylors, 73 Iowa 504, 35 N. W. 601.

Personal liability of owner.— Under Ind. Rev. St. (1881) § 5295, providing for the liability of the owner of a building on notice from a subcontractor of the amount and services for which his employer is indebted to him, where a subcontractor furnished materials for two buildings owned by different persons, no distinction being made in the furnishing of the materials or in his claim or notice, no personal liability could be enforced against an owner of one of the buildings. Crawford *v.* Powell, 101 Ind. 421.

Sale pending construction.— Plaintiff furnished C, who was building a row of houses, bricks for such houses and for pavements, as they were ordered during the progress of the work, and without any special contract for furnishing them. C sold to T three of the houses when they were finished, except some work about the fireplaces and the laying of pavements in the yards. There were no bricks furnished for such houses after they were sold, but there were some paving bricks furnished C afterward, to be used about some of the other houses. It was held that plaintiff was not entitled to a lien on the houses sold to T for bricks furnished C after the sale. Ortwine *v.* Caskey, 43 Md. 134 [*distinguishing* Miller *v.* Barroll, 14 Md. 173].

79. *Alabama.*— Eufaula Water Co. *v.* Addyston, etc., Co., 89 Ala. 552, 8 So. 25.

Colorado.— Tabor-Pierce Lumber Co. *v.* International Trust Co., 19 Colo. App. 108, 75 Pac. 150.

Connecticut.— Chapin *v.* Persse, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

Delaware.— McCartney *v.* Buck, 8 Houst. 34, 12 Atl. 717; Duncan *v.* Aaron, 6 Houst. 566; Mulrine *v.* Washington Lodge No. 5 I. O. O. F., 6 Houst. 350.

Illinois.— Wetherill *v.* Ohlendorf, 61 Ill. 283.

Iowa.— Brown *v.* Rodocker, 65 Iowa 55, 21 N. W. 160.

Kansas.— Wagner *v.* Darby, 49 Kan. 343, 30 Pac. 475, 33 Am. St. Rep. 369.

Missouri.— See Hause *v.* Carroll, 37 Mo. 578; Hause *v.* Thompson, 36 Mo. 450; Ridge *v.* Mercantile L. & T. Co., 56 Mo. App. 155.

Pennsylvania.— Scranton Lathe Turning Co. *v.* Cassidy, 167 Pa. St. 469, 31 Atl. 734; Poole *v.* Union Pass. R. Co., (1889) 16 Atl. 736; Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675; Spring Brook Lumber Co. *v.* Watkins, 26 Pa. Super. Ct. 199; Wall Paper Co.'s Appeal, 15 Pa. Super. Ct. 407; Southwark Mortar Co. *v.* Cassell, 15 Pa. Super. Ct. 330 (reliance on guaranty of contractor); McDonald *v.* Williams, 2 Leg. Gaz. 121; Hoffa *v.* Spohn, 1 Woodw. 485.

Rhode Island.— Gurney *v.* Walsham, 16 R. I. 698, 19 Atl. 323.

United States.— Grant *v.* Strong, 18 Wall. 623, 21 L. ed. 859.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 57.

Compare Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152; Sodini *v.* Winter, 32 Md. 130; Mallory *v.* La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071, holding that one who furnished materials may enforce a lien therefor, although he did not know of his right to such lien when he parted with his property.

A reliance upon the husband's credit in a sale to him of materials which are used to improve the wife's property precludes a mechanic's lien. Hawkins Lumber Co. *v.* Brown, 100 Ala. 217, 14 So. 110; Little *v.* Vredenburgh, 16 Ill. App. 189; Getty *v.* Tramel, 67 Iowa 288, 25 N. W. 245. See also Esslinger *v.* Huebner, 22 Wis. 632.

It is presumed that the credit of the building was relied on where the claimant has complied with all the provisions of the lien law (Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702. See also Noar *v.* Gill, 111 Pa. St. 488, 2 Atl. 552; Hommel *v.* Lewis, 104 Pa. St. 465), and has done nothing to exclude the idea that he will, if need be, look to the property for payment (Eufaula Water Co. *v.* Addyston Pipe, etc., Co., 89 Ala. 552, 8 So. 25; Smith-Anthony Stove Co. *v.* Spear, 65 Mo. App. 87. See also Shilling *v.* Templeton, 66 Ind. 585; Jones *v.* Swan, 21 Iowa 181; Smith *v.* Coe, 29 N. Y. 666). But this presumption may be rebutted by evidence that the material charged in the bill of particulars did not go into any of the buildings mentioned in the claim of lien, and that it was charged to the contractor. Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702.

Evidence.— That plaintiff demanded and received a large cash payment before delivery

the contractor in the first instance, and if he fails, to the building, will not defeat the lien.[80]

C. Contract With or Consent Of Owner — 1. Necessity — a. In General. In order that a mechanic's lien may be established it is necessary that the work should have been done or the materials furnished in pursuance of a contract with the owner of the property or interest sought to be charged,[81] or at least that he

of goods, and had also previously replevied some of them from the vendees after delivery, are facts for the jury to consider in determining whether such goods were sold on the credit of the building or of the individual vendees. McCartney *v.* Buck, 8 Houst. (Del.) 34, 12 Atl. 717. That the materialman delivered part of the materials on the premises sought to be charged is no evidence that they were sold on the credit of the building. Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766.

80. Ridge *v.* Mercantile Loan, etc., Co., 56 Mo. App. 155. See also Bassett *v.* Bertorelli, 92 Tenn. 548, 550, 22 S. W. 423, where it is said: "It was not necessary to the creation of such a lien that complainants should have had an 'understanding that they intended to claim' it. Nor is it important that they charged Larkin [the contractor] personally with the debt. They were entitled to both securities, his personal liability and a lien on the property; and their reliance on the one did not impair their right to rely on the other also. They could not be put to an election between the two so long as their debt, or any part of it, remained unpaid."

Charging to contractor.— The fact that the materials furnished, for which a mechanic's lien is claimed, were charged to the contractor individually, without any reference to the building, does not preclude plaintiff from showing that they were furnished on the credit of the building. Presbyterian Church *v.* Allison, 10 Pa. St. 413. Such a charge is not even *prima facie* evidence that the credit of the building was excluded. Hommel *v.* Lewis, 104 Pa. St. 465. See also Ryman *v.* Wolf, 6 Kulp (Pa.) 325, holding that where materials for the improvement of a married woman's property are furnished with her knowledge and consent the mere fact that they were charged to her husband is not of itself sufficient to defeat the lien.

81. *Arkansas.*— Galbreath *v.* Davidson, 25 Ark. 490, 99 Am. Dec. 233.

Georgia.— Powers *v.* Armstrong, 19 Ga. 427.

Indiana.— Ogg *v.* Tate, 52 Ind. 159.

Iowa.— Des Moines Sav. Bank *v.* Goode, 106 Iowa 568, 76 N. W. 825; Miller *v.* Hollingsworth, 33 Iowa 224; Redman *v.* Williamson, 2 Iowa 488.

Kansas.— Doane *v.* Bever, 63 Kan. 458, 65 Pac. 693.

Massachusetts.— Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Peabody *v.* Eastern Methodist Soc., 5 Allen 540.

Michigan.— Wagar *v.* Briscoe, 38 Mich. 587.

Minnesota.— King *v.* Smith, 42 Minn. 286, 44 N. W. 65.

Missouri.— Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059; Louisiana, etc., Lumber Co. *v.* Myers, 87 Mo. App. 671; Pickel Marble, etc., Co. *v.* Apollo Turkish Bath Co., 85 Mo. App. 313. See also Front Rank Steel Range Co. *v.* Jeffers, 79 Mo. App. 174.

Nebraska.— Snyder *v.* Sparks, (1905), 103 N. W. 662.

New York.— Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292 [*reversing* 10 Misc. 185, 30 N. Y. Suppl. 1040]; Spruck *v.* McRoberts, 139 N. Y. 193, 34 N. E. 896; Jones *v.* Walker, 63 N. Y. 612; Muldoon *v.* Pitt, 54 N. Y. 269; Johnson *v.* Alexander, 23 N. Y. App. Div. 538, 48 N. Y. Suppl. 541; Ziegler *v.* Galvin, 45 Hun 44; Dressel *v.* French, 7 How. Pr. 350.

North Carolina.— Nicholson *v.* Nichols, 115 N. C. 200, 20 S. E. 294; Thompson *v.* Taylor, 110 N. C. 70, 14 S. E. 513.

Oregon.— Sellwood Lumber Co. *v.* Monnell, 26 Oreg. 267, 38 Pac. 66.

Pennsylvania.— Long *v.* Black, 5 Pa. Co. Ct. 258.

South Carolina.— Gray *v.* Walker, 16 S. C. 143.

Tennessee.— Gillispie *v.* Stanton, 8 Baxt. 284.

Utah.— Morrison *v.* Clark, 20 Utah 432, 59 Pac. 235, 77 Am. St. Rep. 924.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 60, 77.

One who takes possession of land for the purpose of constructing a ditch is an owner within the Utah statute. Bear Lake, etc., Irr. Co. *v.* Garland, 164 U. S. 1, 17 S. Ct. 7, 41 L. ed. 327.

Embryo corporation.— Where one of several persons, who were about to form a land company, purchased land and erected a building thereon, under an agreement with the others that he should convey the land and building to the company when formed, the person who erected the building was not, after the sale to the company, entitled to a mechanic's lien on the building under the statute since, the company not existing at the time of building, there could be no contracts as a basis of a lien; but he could recover against the company for all sums expended by him under the agreement. Littleton Sav. Bank *v.* Osceola Land Co., 76 Iowa 660, 39 N. W. 201.

Where a written contract for building a house is void, the contractor may establish a mechanic's lien either by showing that a new contract was made, or, in the absence of such new contract, by showing the reasonable value of the labor and materials which went into the house. Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095.

should have so consented to the improvement of his property that it is equitable that it should be charged with a lien for the cost thereof.[82]

b. Extras. It is usually held that where the contract is for a building generally extras subsequently ordered will be covered by the lien,[83] at any rate if

82. *California.*— San Francisco Paving Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255.

Connecticut.— Huntley *v.* Holt, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111.

Georgia.— Reppard *v.* Morrison, 120 Ga. 28, 47 S. E. 554.

Illinois.— Procter *v.* Tows, 115 Ill. 138, 3 N. E. 569; Brokaw *v.* Tyler, 91 Ill. App. 148.

Massachusetts.— Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Stevens *v.* Lincoln, 114 Mass. 476.

Missouri.— Sibley *v.* Casey, 6 Mo. 164; Pickel Marble, etc., Co. *v.* Apollo Turkish Bath Co., 85 Mo. App. 313.

New York.— Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292 [*reversing* 10 Misc. 185, 30 N. Y. Suppl. 1040]; Spruck *v.* McRoberts, 139 N. Y. 193, 24 N. E. 896; Otis *v.* Dodd, 90 N. Y. 336 [*affirming* 24 Hun 538] (mere consent sufficient and contract not essential); Marshall *v.* Cohen, 11 Misc. 397, 32 N. Y. Suppl. 283 (consent sufficient without contract); McGraw *v.* Godfrey, 16 Abb. Pr. N. S. 358. Under Laws (1880), c. 143 (limited to the city of Buffalo), giving a lien for work, materials, etc., furnished or performed "by virtue of any contract with the owner thereof [of the premises] or his agent, or with any contractor or subcontractor, or any other person contracting with the owner of such lands," the mere knowledge and consent of the owner are not, in the absence of a contract, sufficient to confer a lien for improvements made on his premises. Ziegler *v.* Galvin, 45 Hun 44.

Texas.— Warren *v.* Smith, 44 Tex. 245.

Wisconsin.— Wheeler *v.* Hall, 41 Wis. 447.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 60, 77.

What is meant by consent.— "Consent means the unity of opinion — the accord of minds — to think alike — to be of one mind. Consent involves the presence of two or more persons, for without at least two persons there cannot be an unity of opinion, or an accord of minds, or any thinking alike. When the statute uses the words 'by the consent of the owner of the land,' it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it. The words 'consent of the owner' are used in the statute as something different from an agreement with the owner; and while it may be urged that they do not require such a meeting of the minds of the parties as would be essential to the making of a contract, there must be enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense. It cannot be supposed that the statute was designed to be made a cover for entrapping a party into a seeming consent when there was no real one. Without this degree of unanimity there could be no real consent." Huntley *v.* Holt, 58 Conn. 445, 449, 20 Atl. 469, 9 L. R. A. 111.

The burden of proof is upon the lien claimant to show knowledge of the owner. Dodge *v.* Romain, (N. J. 1889) 18 Atl. 114.

Circumstances showing consent of owner see Builders' Supply Co. *v.* North Augusta Electric, etc., Co., 71 S. C. 361, 51 S. E. 231.

Circumstances not establishing consent see Peabody *v.* Eastern Methodist Soc., 5 Allen (Mass.) 540; Tidball *v.* Holyoke, 70 Nebr. 726, 97 N. W. 1019; Bloomer *v.* Nolan, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. Rep. 690; Sheer *v.* Cummings, 80 Tex. 294, 16 S. W. 37.

Consent alone not sufficient.— Mere knowledge of or consent to the work being done or the materials being supplied is not enough; there must be a request, either express or by implication from circumstances, to give rise to the lien. Gearing *v.* Robinson, 27 Ont. App. 364.

83. *Illinois.*— Martine *v.* Nelson, 51 Ill. 422.

Iowa.— Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021.

Massachusetts.— Mulrey *v.* Barrow, 11 Allen 152.

New York.— Otis Elevator Co. *v.* Dusenbury, 47 Misc. 450, 95 N. Y. Suppl. 959.

Pennsylvania.— Rush *v.* Able, 90 Pa. St. 153.

Texas.— Zollars *v.* Snyder, (1906) 94 S. W. 1096.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 61.

Contractual restrictions as to extras.— Where the contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects extras could not be allowed unless a writing was proved. Wood *v.* Stringer, 20 Ont. 148. When a contract for building a house provided that no claim should be made for extra work which was not indorsed on the contract, work performed in putting in a catch-basin which was not mentioned in the contract or specifications was extra work, for which the contractor was not entitled to a lien; but where the specifications accompanying the contract provided for drains in the cellar, and for blasting rock, the contractor was entitled to a lien for blasting for such drains, such work being provided for in the contract, and necessary to the completion of the house, although the price to be paid for such blasting was not set forth in the contract. Lee *v.* Brayton, 18 R. I. 232, 26 Atl. 256. Where a contract between a contractor and subcontractor provided that the architect might direct alterations only by a written agreement with the contractor in advance,

provision is made in the contract with regard to extras, thereby showing that they were contemplated.[84]

c. **Damages.** There is no lien for damages sustained by the contractor by reason of a breach of the contract by the owner,[85] or damages of protest on an acceptance given for work and labor.[86] Neither is a subcontractor entitled to a lien for damages and expense incurred through idleness, or on account of work made necessary by the default or negligence of the principal contractor,[87] or for breach of contract on his part.[88]

d. **Death of Owner.** The death of the owner of the property, with whom the contract for an improvement was made, does not affect the right of lien claimants to perfect and enforce their liens.[89]

2. **What Constitutes Ownership.** The term "owner" as used in the mechanic's lien statutes does not mean the absolute owner,[90] but merely the owner of an estate

the subcontractor is not entitled to recover for extras furnished without the consent or authority of the contractor. Ponti *v.* Eckels, (Wis. 1906) 108 N. W. 62.

84. Pullis *v.* Hoffman, 28 Mo. App. 666; Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 357. Where the original contract is for a specific sum of money, but with an express provision for alterations and changes in the plans, and an agreement by the owner to pay what is equitable and just, any increased work, growing out of such alteration in the plans, is not extra work, but is fully within the contract, although not named in the specifications; and the lien of a subcontractor attaches to the money due for such additional work as completely as to the work done under the specifications. Brown *v.* Lowell, 79 Ill. 484.

Extra work not in any manner provided for in the contract is not included within the provisions of the New York Mechanics' Lien Law of 1851. Foley *v.* Alger, 4 E. D. Smith (N. Y.) 719.

Provision in specifications only.— Where, in filing a mechanic's lien, the building contract filed therewith contains no mention of extra work, although the contract refers to the specifications, which contain a provision therefor, the lien does not attach for any extra work. Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

85. Hale *v.* Johnson, 6 Kan. 137; Pardue *v.* Missouri Pac. R. Co., 52 Nebr. 201, 71 N. W. 1022; Morgan *v.* Taylor, 15 Daly (N. Y.) 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253]; Dennistoun *v.* McAllister, 4 E. D. Smith (N. Y.) 729; Wolf *v.* Horn, 12 Misc. (N. Y.) 100, 33 N. Y. Suppl. 173; Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490.

Personal judgment for damages not recoverable in action to enforce lien see *infra*, VIII, L, 3, a.

86. Bradbury *v.* Idaho, etc., Land Imp. Co., 2 Ida. (Hasb.) 239, 10 Pac. 620.

87. Tabor *v.* Armstrong, 9 Colo. 285, 12 Pac. 157; Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71.

88. Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71.

89. *Georgia.*— Boynton *v.* Westbrook, 74 Ga. 68, holding that where a contractor had furnished materials and almost completed a house when the owner died, and under an agreement with the administrator the contractor completed the work within a few days, the owner's death did not affect the lien.

Indiana.— McGrew *v.* McCarty, 78 Ind. 496; Pifer *v.* Ward, 8 Blackf. 252.

New York.— Under some of the earlier statutes the right to file a mechanic's lien for materials furnished and labor performed terminated upon the death of the owner and no lien could be acquired as against his heirs (Tubridy *v.* Wright, 144 N. Y. 519, 39 N. E. 640, 43 Am. St. Rep. 776 [*affirming* 7 Misc. 403, 27 N. Y. Suppl. 978]; Leavy *v.* Gardner, 63 N. Y. 624; Brown *v.* Zeiss, 9 Daly 240; Meyers *v.* Bennett, 7 Daly 471; Crystal *v.* Flannelly, 2 E. D. Smith 583); but the rule was otherwise under Laws (1862), c. 478, applicable to Kings and Queens counties (Marryatt *v.* Riley, 2 Abb. N. Cas. 119), and the present New York statute, Laws (1897), c. 418, § 10, expressly provides that the validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

Ohio.— Holbrook *v.* Ives, 44 Ohio St. 516, 9 N. E. 228 [*reversing* 9 Ohio Dec. (Reprint) 96, 10 Cinc. L. Bul. 414]; Williams *v.* Webb, 2 Disn. 430.

Pennsylvania.— Wagner *v.* Manbeck, 18 Pa. Co. Ct. 471. But see Hoff's Appeal, 102 Pa. St. 218; Watts *v.* Vezin, 12 Wkly. Notes Cas. 250.

Wisconsin.— The contrary was held in Dobbs *v.* Enearl, 4 Wis. 451, but the rule stated in the text was established by Gen. Laws (1874), c. 272.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 63.

Claims of other creditors.— A materialman cannot enforce his lien against the estate of the deceased owner of the building after six months from the time payment is due so as to cut off the lien of other creditors who have proven their claims, where the personalty is insufficient for their payment. Rietz *v.* Coyer, 83 Ill. 28.

90. Benjamin *v.* Wilson, 34 Minn. 517, 26 N. W. 725. One who buys land and pays therefor, gets deeds therefor to be made in the name of another as trustee and in the name of his son, and who assumes any possession and control of the property at all

or interest which the court may order sold.[91] But the person making the contract must have some kind of ownership,[92] although neither possession of, nor legal title to, land upon which a mechanic's lien is claimed is necessarily conclusive of the right to a lien upon such land, or upon a structure which has been constructed thereon.[93] While it is the rule that the possession must be actual, and not constructive, yet the estate of the one in constructive possession can be subjected to the lien unless some other person is in actual possession.[94] A mere momentary seizin is not sufficient to support a mechanic's lien.[95] An equitable ownership is sufficient.[96] An executor,[97] administrator,[98] or guardian,[99] without order of court, a person merely holding a vendor's lien,[1] a widow, before dower is assigned,[2] a purchaser at a judicial sale, before the deed is delivered,[3] or an heir before the death of his ancestor,[4] has not sufficient ownership to support a lien, nor has an insurance company rebuilding a house to discharge its liability for one burned.[5] The owner of one of several adjoining lots cannot, in the absence of any agency, so contract as to charge the other lots with a lien.[6]

times thereafter until the completion of the improvements thereon made under a contract with him, has a sufficient ownership in such land to create a lien thereon for such improvements as against his son to whom the deeds were never delivered and who had no knowledge thereof until after such improvements were made. Hamilton *v.* Whitson, 5 Kan. App. 347, 48 Pac. 462.

91. Benjamin *v.* Wilson, 34 Minn. 517, 26 N. W. 725.

Recovery not dependent upon quantum of defendant's interest.— Van Billiard *v.* Nace, 1 Grant (Pa.) 233.

92. See Dierks *v.* Walrod, 66 Iowa 354, 23 N. W. 751 (holding that where the evidence fails to show the interest of the party to whom the material was furnished in the lot sought to be subjected to the mechanic's lien, a foreclosure should not be decreed); Lang *v.* Adams, 71 Kan. 309, 80 Pac. 593; Newell *v.* Haworth, 66 Pa. St. 363.

The contract must be with the owner of some interest in the land. Tracy *v.* Rogers, 69 Ill. 662.

A contract with the holder of the mere legal title cannot give rise to a lien where the equitable owner is in open, visible, and exclusive possession. Marston *v.* Stickney, 60 N. H. 112.

93. Empire Land, etc., Co. *v.* Engley, 18 Colo. 388, 33 Pac. 153.

94. Prutzman *v.* Bushong, 83 Pa. St. 526.

95. Clark *v.* Butler, 32 N. J. Eq. 664.

96. Atkins *v.* Little, 17 Minn. 342, holding further that one who purchases lands from the equitable owner thereof, and, in pursuance of an agreement with him, procures a direct conveyance from the holder of the legal title, by paying a balance due him from the equitable owner, is estopped to claim that the latter was not the owner, as against one claiming a materialman's lien under a contract with him.

What constitutes equitable ownership.— Where property was purchased by the lender for the borrower's benefit, and at his request, and with the money lent, and the deed was taken in the lender's name as a convenient method of evidencing a vendor's lien which the lender was to have, the equitable title was in the borrower, and as to him it was no defense to a mechanic's lien created by him that the property was not his. Geisberg *v.* Mutual Bldg., etc., Assoc., (Tex. Civ. App. 1900) 60 S. W. 478.

A naked equitable right, which might be enforced in equity, to reinvest the grantor with the title which had passed, does not constitute him the owner within the statute. Griffin *v.* Seymour, 15 Colo. App. 487, 63 Pac. 809.

Apparent equitable ownership sufficient.— Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989.

97. San Francisco Paving Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255.

98. Waldermeyer *v.* Loebig, 183 Mo. 363, 81 S. W. 904, unauthorized and invalid order permitting administrator to take charge of and finish building. *Compare* Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756, holding that where one, after erecting buildings on the land of another, dies, and his administratrix purchases the land and takes a deed therefor in her own name, using estate funds for that purpose, and rebuilds the building after its destruction by fire, using insurance money belonging to the estate, a person who, without notice of the rights of the estate, supplies labor and materials for the building, and files a mechanic's lien therefor, acquires a lien on the building and land prior to the rights of the heir.

Building subject to lien.— Weathersby *v.* Sinclair, 43 Miss. 189.

99. Fish *v.* McCarthy, 96 Cal. 484, 31 Pac. 529, 31 Am. St. Rep. 237; Guy *v.* Dü Uprey, 16 Cal. 195, 76 Am. Dec. 518; Bent *v.* Barnett, 95 Ky. 499, 26 S. W. 537, 16 Ky. L. Rep. 209; Copley *v.* O'Niel, 57 Barb. (N. Y.) 299, 39 How. Pr. 41.

1. Griffin *v.* Seymour, 15 Colo. App. 487, 63 Pac. 809.

2. Ermul *v.* Kullok, 3 Kan. 499.

3. Robbins *v.* Arendt, 4 Misc. (N. Y.) 196, 23 N. Y. Suppl. 1019 [*reversing* 1 Misc. 510, 20 N. Y. Suppl. 992, and *modified* in 148 N. Y. 673, 43 N. E. 165].

4. Watson *v.* Woods, 3 R. I. 226.

5. Bruner *v.* Sheik, 9 Watts & S. (Pa.) 119.

6. Johnston *v.* Bennett, 6 Colo. App. 362,

3. **Authority to Contract or Consent** — **a. Part or Joint Owners.** A tenant in common in possession can contract so as to bind his interest,[7] but has no authority to bind his cotenant's interest,[8] unless the latter consents, in which case the entire interest may be bound.[9] The husband, where community property is in his control, can subject it to a lien,[10] and real estate held in fee by husband and wife has been held subject to a mechanic's lien for buildings erected thereon under an agreement with the husband alone.[11] A partner may subject the partnership property.[12] Where tenants in common enter into a contract for the erection of a building on the property, the contract binding each separately to the payment only of the amount subscribed by him, which is proportionate to his interest in the property, the lien attaches to the undivided interest of each of the owners for the amount personally owing by him, and not to the entire lot and building for the balance unpaid on the entire contract.[13] So also it has been held that where the liability of subscribers on a contract for the erection for them of a plant which they were to operate on incorporation was several, and not joint, and the corporation was not liable on the contract, the contractors were not entitled to a mechanic's lien on the joint property for the unpaid contract price.[14]

b. Owner of Building. Under the statutes of a few states it is held sufficient if the contract be made with the owner of the building, and not with one who has an interest in the land, but in such cases only the building is subject to the lien.[15]

c. **Trustees.**[16] A trustee having full power to manage, improve, and repair the property can usually by his contract subject it to a mechanic's lien.[17] But

40 Pac. 847, neither can he charge his own land with a lien for work done on the adjoining lots.

7. Mellor *v.* Valentine, 3 Colo. 260; Hillburn *v.* O'Barr, 19 Ga. 591; Van Riper *v.* Morton, 61 Mo. App. 440; Keller *v.* Denmead, 68 Pa. St. 449.

8. Mellor *v.* Valentine, 3 Colo. 260; Van Riper *v.* Morton, 61 Mo. App. 440; Leslie *v.* Leonard, 10 Pa. Super. Ct. 548.

The other cotenants need not protest or object in order to avoid liability. Mellor *v.* Valentine, 3 Colo. 260.

9. Wilson *v.* Logue, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. Rep. 426; Dalton *v.* Tindolph, 87 Ind. 490; Taggart *v.* Kem, 22 Ind. App. 271, 53 N. E. 651.

Subscribers to embryo corporation.— Defendants were to pay four thousand five hundred dollars for a building, which plaintiffs were to erect, and it was agreed that as soon as four thousand five hundred dollars was raised by subscription among defendants they should become incorporated with a capital stock of four thousand five hundred dollars distributed among the subscribers in proportion to their subscriptions. Defendants signed this contract, subscribing for various amounts, and in addition to the four thousand five hundred dollars subscribed in money the owner of the lot on which the building was erected subscribed for two shares at the price of two hundred dollars, to be paid for by such lot. In an action to enforce a mechanic's lien it was held that under the provisions of the contract all the subscribers thereto were the owners of the lot within the meaning of the Mechanics' Lien Law. Burnap *v.* Sylvania Butter Co., 1 Ohio S. & C. Pl. Dec. 110, 7 Ohio N. P. 217.

10. Douthitt *v.* MacCulsky, 11 Wash. 601, 40 Pac. 186; Littell, etc., Mfg. Co. *v.* Miller, 3 Wash. 480, 28 Pac. 1035.

11. Washburn *v.* Burns, 34 N. J. L. 18.

12. Smith *v.* Johnson, 2 MacArthur (D. C.) 481 (although the title is in one only of the partners); Van Court *v.* Bushnell, 21 Ill. 624; Christian *v.* Illinois Malleable Iron Co., 92 Ill. App. 320; Hoagland *v.* Lusk, 33 Nebr. 376, 50 N. W. 162, 29 Am. St. Rep. 485. See also Real Estate, etc., Co. *v.* Phillips, 90 Md. 515, 45 Atl. 174.

Work for individual benefit of one partner. — Where a person employed to work for a firm in the erection of a building continues to work under the direction of the partners, or one of them, supposing himself to be in the service of the firm, and having no intimation to the contrary, the fact that a part of his labor is employed in preparing materials really belonging to one partner, some of which are not ultimately used for any partnership purpose, will not relieve the firm from liability to him for the whole of such labor, nor prevent his having a lien on the building for the whole amount. Spruhen *v.* Stout, 52 Wis. 517, 9 N. W. 277.

13. Hines *v.* Chicago Bldg., etc., Co., 115 Ala. 637, 22 So. 160.

14. Davis *v.* Ravenna Creamery Co., 48 Nebr. 471, 67 N. W. 436.

15. Lane *v.* Snow, 66 Iowa 544, 24 N. W. 35; Benjamin *v.* Wilson, 34 Minn. 517, 26 N. W. 725; Seaman *v.* Paddock, 51 Mo. App. 465; Muldoon *v.* Pitt, 4 Daly (N. Y.) 105 [*affirmed* in 54 N. Y. 269].

16. See also *supra*, I, J, 5.

17. Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Taylor *v.* Gilsdorff, 74 Ill. 354; Cheatham *v.* Rowland, 92 N. C. 340. A

where a guardian, with his wards' money, purchases real estate, which by a deed duly recorded is conveyed to him in trust for his wards, with power to sell, convey, and encumber in his discretion, a materialman furnishing material in the erection of improvements on the real estate is chargeable with notice of the trust, and his right to a mechanic's lien is inferior to the right of the wards to follow their money thus wrongfully invested.[18]

d. Promoters of Corporation. The promoters of a corporation cannot charge property to be afterward acquired by the corporation with a mechanic's lien.[19] But if the promoters were under contract to take a certain interest in the new concern after its corporation a lien might be enforced against their interest in the new corporation,[20] and if the incorporators have knowledge and the building is erected in pursuance to their agreement, the corporation will be liable to the lien.[21]

e. Mortgagors and Mortgagees.[22] A mortgagor in possession can by his contract give rise to a lien affecting his interest,[23] but the interest of the mortgagee cannot be affected.[24] After a decree of foreclosure, the mortgagor has no such ownership as will give a lien to a person who afterward furnishes material on his contract.[25] It has been held that a mortgagee might, if in possession, be deemed an owner.[26]

f. Occupants or Persons in Control or Possession. While the weight of authority supports the view that the mere fact that a person is in lawful possession and control of land does not give him authority to subject it to a mechanic's lien,[27] mere possession has been held to involve such right and interest as makes the possessor an owner within the Mechanic's Lien Law, so that the lien attaches to such interest and possession and right of possession if such right exists.[28]

trustee who holds the legal title to land under a contract whereby he is to build a factory on the land, and then convey the whole property to the *cestui que trust*, is the "owner," within Cal. Code Civ. Proc. § 1183, although he has already received the consideration of the contract. Hinckley *v.* Field's Biscuit, etc., Co., 91 Cal. 136, 27 Pac. 594.

18. Alfred Richards Brick Co. *v.* Atkinson, 16 App. Cas. (D. C.) 462.

19. Davis *v.* Maysville Creamery Assoc., 53 Mo. App. 477; Davis *v.* Ravenna Creamery Co., 48 Nebr. 471, 67 N. W. 436.

20. Davis, etc., Bldg., etc., Co. *v.* Vice, 15 Ind. App. 117, 43 N. E. 889. See also Davis *v.* Ravenna Creamery Co., 48 Nebr. 471, 67 N. W. 436.

21. Waddy Bluegrass Creamery Co. *v.* Davis-Rankin Bldg., etc., Co., 103 Ky. 579, 45 S. W. 895, 20 Ky. L. Rep. 259.

22. Priority between mortgage and mechanic's lien see *infra*, IV, C, 2, b, (VI).

23. Otley *v.* Haviland, 36 Miss. 19.

24. Broman *v.* Young, 35 Hun (N. Y.) 173.

25. Davis *v.* Connecticut Mut. L. Ins. Co., 84 Ill. 508.

26. Ombony *v.* Jones, 19 N. Y. 234; Cox *v.* Broderick, 4 E. D. Smith (N. Y.) 721.

Where the title is in the mortgagee he can subject the property to a lien. Price *v.* Merritt, 55 Mo. App. 640.

27. *Arkansas.*— Miller Lumber Co. *v.* Wilson, 56 Ark. 380, 19 S. W. 974.

Colorado.— Empire Land, etc., Co. *v.* Engley, 18 Colo. 388, 33 Pac. 153.

Illinois.— Proctor *v.* Tows, 115 Ill. 138, 3 N. E. 569; Tracy *v.* Rogers, 69 Ill. 662; Underhill *v.* Corwin, 15 Ill. 556.

Iowa.— Hoag *v.* Hay, 103 Iowa 291, 72 N. W. 525; Dierks *v.* Walrod, 66 Iowa 354, 23 N. W. 751.

Massachusetts.— Fletcher *v.* Stedman, 159 Mass. 124, 34 N. E. 183.

Mississippi.—Hawley *v.* Henderson, 34 Miss. 261.

New York.— Spruck *v.* McRoberts, 139 N. Y. 193, 34 N. E. 896.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 71.

28. Chambers *v.* Benoist, 25 Mo. App. 520; Dakin *v.* Lecklider, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308.

Possession and subsequent title.— One in open, undisputed possession of real property, who afterward receives a conveyance of the legal title, has such a title as will enable him to create a mechanic's lien thereon as against mortgagees and grantees of himself. Chicago Lumber Co. *v.* Fretz, 51 Kan. 134, 32 Pac. 908. See *supra*, IV, B, 5, b.

A husband, in charge of his wife's lot, who contracts for a building on it, which he lets, and appropriates the rents, is an "owner or proprietor," under Rev. St. § 6726, defining as such a person for whose immediate use or benefit a building shall be erected, and the building is subject to lien of the contractor. Kline *v.* Perry, 51 Mo. App. 422.

Under Ga. Code (1868), § 1959, giving a lien to mechanics on "improvements" made by them on property, "without regard to the title," a brick mason, who completes the brickwork of a brick house, under a contract with the occupant of the premises, may, when such occupant is insolvent, file a bill in equity against the owner of the premises to subject the property to the payment of his lien, to

g. Lessees — (i) *In General.* A lessee may by his contract subject his leasehold interest to a mechanic's lien,[29] but his contract cannot as a rule give rise to a lien against the leased property itself,[30] unless the lessor authorized or con-

the extent of the value of the brickwork. Gaskill *v.* Davis, 63 Ga. 645.

29. *Alabama.*— Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84.

Arkansas.— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

California.— Gaskill *v.* Trainer, 3 Cal. 334.

Illinois.— Reed *v.* Boyd, 84 Ill. 66; Jones *v.* Carey-Lombard Lumber Co., 87 Ill. App. 533.

Indiana.— McAnally *v.* Glidden, 30 Ind. App. 22, 65 N. E. 291.

Iowa.— Nordyke, etc., Co. *v.* Hawkeye Woolen Mills Co., 53 Iowa 521, 5 N. W. 693.

Kansas.— Badger Lumber Co. *v.* Malone, 8 Kan. App. 121, 54 Pac. 692.

Kentucky.—Laviolette *v.* Redding, 4 B. Mon. 81.

Louisiana.— See Schwartz *v.* Saiter, 40 La. Ann. 264, 4 So. 77.

Massachusetts.— Forbes *v.* Mosquito Fleet Yacht Club, 175 Mass. 432, 56 N. E. 615.

Michigan.— Peninsular Gen. Electric Co. *v.* Norris, 100 Mich. 496, 59 N. W. 151.

Missouri.—Pickel Marble, etc., Co. *v.* Handlan, 85 Mo. App. 313.

Montana.— Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

Nebraska.— Moore *v.* Vaughn, 42 Nebr. 696, 60 N. W. 914.

New York.— Chamberlin *v.* McCarthy, 59 Hun 158, 13 N. Y. Suppl. 217; Jones *v.* Manning, 6 N. Y. Suppl. 338.

North Carolina.—Asheville Woodworking Co. *v.* Southwick, 119 N. C. 611, 26 S. E. 253.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114.

Pennsylvania.— Anshutz *v.* McClelland, 5 Watts 487.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

Tennessee.—Alley *v.* Lanier, 1 Coldw. 540.

Washington.— Miles Co. *v.* Gordon, 8 Wash. 442, 36 Pac. 265.

West Virginia.— Showalter *v.* Lowndes, 56 W. Va. 462, 49 S. E. 448.

Wisconsin.— Kendall Mfg. Co. *v.* Rundle, 78 Wis. 150, 47 N. W. 364; Leismann *v.* Lovely, 45 Wis. 420.

Canada.— Garing *v.* Hunt, 27 Ont. 149.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 72, 105, 333; and *supra*, I, J, 4.

The object of Wis. Laws (1887), c. 466, providing that Wis. Rev. St. § 3314, as amended by Laws (1887), c. 442, "shall not be construed as giving a lien where the relation of landlord and tenant exists," was to protect the landlord, and prevent a mere tenant from encumbering so much of the estate as remained in the landlord. It was manifestly not intended to prevent a tenant for a long term of years from thus encumbering his leasehold interest. Accordingly, where A employed B to cut and saw lumber from land to be provided by him, B to erect a sawmill on A's land for that purpose, the contract cannot be regarded as creating the technical relation of landlord and tenant, and it gives to B such an interest in the land as can be subjected to the lien of one who furnishes labor and machinery for such sawmill. Cook *v.* Goodyear, 79 Wis. 606, 48 N. W. 860.

30. *Arizona.*— Gates *v.* Fredericks, 5 Ariz. 343, 52 Pac. 1118.

Colorado.— Antlers Park Regent Min. Co. *v.* Cunningham, 29 Colo. 284, 68 Pac. 226.

Georgia.— Georgia Cent. R. Co. *v.* Shivers, 125 Ga. 218, 53 S. E. 610; Pittsburgh Plate Glass Co. *v.* Peters Land Co., 123 Ga. 723, 51 S. E. 725; Reppard *v.* Morrison, 120 Ga. 28, 47 S. E. 554.

Illinois.— Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Judson *v.* Stephens, 75 Ill. 255.

Indiana.— Coburn *v.* Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218; Wilkerson *v.* Rust, 57 Ind. 172.

Iowa.— Oregon Lumber Co. *v.* Beckleen, 130 Iowa 42, 106 N. W. 260.

Maine.— Hanson *v.* News Pub. Co., 97 Me. 99, 53 Atl. 990, where the lessor had no knowledge of and did not consent to the work.

Maryland.— Hoffman *v.* McColgan, 81 Md. 390, 32 Atl. 179; Beehler *v.* Ijams, 72 Md. 193, 19 Atl. 646; Gable *v.* Preacher's Fund Soc., 59 Md. 455.

Mississippi.— Kirk *v.* Taliaferro, 8 Sm. & M. 754.

Missouri.— Squires *v.* Fithian, 27 Mo. 134; Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405; McMahon *v.* Vickery, 4 Mo. App. 225.

Montana.— Stenberg *v.* Liennemann, 20 Mont. 457, 52 Pac. 84, 63 Am. St. Rep. 636.

Nebraska.— Stevens *v.* Burnham, 62 Nebr. 672, 87 N. W. 546; Moore *v.* Vaughn, 42 Nebr. 696, 60 N. W. 914; Waterman *v.* Stout, 38 Nebr. 396, 56 N. W. 987.

New Jersey.— Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

New York.— Chamberlin *v.* McCarthy, 59 Hun 158, 13 N. Y. Suppl. 217; Seklir *v.* Krizer, 48 Misc. 25, 96 N. Y. Suppl. 74; Jones *v.* Manning, 6 N. Y. Suppl. 338.

Ohio.— Filberl *v.* Davis, 4 Ohio Dec. (Reprint) 496, 2 Clev. L. Rep. 265, 4 Cinc. L. Bul. 629.

Oregon.— Patterson *v.* Gallagher, 25 Oreg. 227, 35 Pac. 454, 42 Am. St. Rep. 794.

Pennsylvania.— McKown *v.* Harris, 15 Pa. Dist. 611. But *compare* Holdship *v.* Abercrombie, 9 Watts 52.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

Tennessee.— Reed *v.* Estes, 113 Tenn. 200, 80 S. W. 1086.

Washington.— Stetson-Post Mill Co. *v.* Brown, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862.

Wisconsin.—J. B. Alfree Mfg. Co. *v.* Henry,

sented to the making of the improvements or repairs.[81] Where the building

96 Wis. 327, 71 N. W. 370; Leismann *v.* Lovely, 45 Wis. 420.

Canada.— Garing *v.* Hunt, 27 Ont. 149; Graham *v.* Williams, 9 Ont. 458 [*affirming* 8 Ont. 478].

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 72, 334.

Where the lessee has the right to remove the building no lien attaches to the land. Rice *v.* Culver, 172 N. Y. 60, 64 N. E. 761 [*modifying* 57 N. Y. App. Div. 552, 68 N. Y. Suppl. 24].

Under Ind. St. (1843) p. 776, § 2, the tenant of a building could not subject it to a lien for repairs, but, as to them, the contract must have been made with the owner. But for work done on, and materials furnished for, a new building erected by the tenant on land held otherwise than in fee, he might create a valid lien. Lyman *v.* King, 9 Ind. 3.

Where work is done before the date and execution of the lease with the knowledge of the owner, although at the instance of the lessee, the property is subject to a lien, it not being shown that at the time the lessee was in possession or the owner had surrendered possession. Rice *v.* Culver, 172 N. Y. 60, 64 N. E. 761 [*modifying* 57 N. Y. App. Div. 552, 68 N. Y. Suppl. 24].

31. *California.*— Santa Monica Lumber, etc., Co. *v.* Hege, (1897) 48 Pac. 69.

Indiana.— Wilkerson *v.* Rust, 57 Ind. 172.

Louisiana.— Sewall *v.* Duplessis, 2 Rob. 66; Hoffman *v.* Laurans, 18 La. 70.

Missouri.— Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405. See also Rogers *v.* C. C. C. Min. Co., 75 Mo. App. 114.

New York.— Ottiwell *v.* Watkins, 15 Daly 308, 6 N. Y. Suppl. 518 [*affirmed* in 125 N. Y. 706, 26 N. E. 752], under Laws (1885), c. 342. *Contra,* Jones *v.* Manning, 6 N. Y. Suppl. 338, under Laws (1875), c. 233.

Texas.— Penfield *v.* Harris, 7 Tex. Civ. App. 659, 27 S. W. 762.

Wisconsin.— Leismann *v.* Lovely, 45 Wis. 420; Lauer *v.* Bandow, 43 Wis. 556, 28 Am. Rep. 571.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 72, 101; and *infra,* II, C, 2, g, (II); II, C, 5, k, (II).

Consideration.— An agreement by a lessee to leave the alterations which he might make on the premises is a sufficient consideration for the consent by the owner to the making of the alterations, although it does not appear that the property was increased in value, or that the owner received any increased rent, in consequence of the alterations. Hankinson *v.* Riker, 10 Misc. (N. Y.) 185, 30 N. Y. Suppl. 1040.

"Consent implies the power to authorize and to prevent, a degree of superiority which arises from the presence of a combined mental and physical ability to act" (Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 379, 31 N. Y. Suppl. 433); "it implies not merely that a person accedes to, but authorizes an act" (Ottiwell *v.* Watkins, 15 Daly (N. Y.) 308, 309, 6 N. Y. Suppl. 518 [*affirmed* in 125 N. Y. 706, 26 N. E. 752]).

Submission of plans and specifications.— Where a lease provided that the tenant should not make any alteration without the landlord's written consent, and permission was given to make certain alterations then contemplated, but it was required that the plans and specifications should be first submitted to the landlord and the tenant made the repairs without submitting the plans and specifications to the landlord and without his knowledge or consent, there was no such consent on the part of the landlord as would render the property liable to a mechanic's lien for such alterations. Hartley *v.* Murtha, 36 N. Y. App. Div. 196, 56 N. Y. Suppl. 686.

Consent to improvements or repairs at tenant's expense.— Where the statute provides that in order to make the owner liable, the consent must be in writing, a written consent to the making of repairs and improvements by a tenant at his own expense is insufficient. Hervey *v.* Gay, 42 N. J. L. 168; McClintock *v.* Criswell, 67 Pa. St. 183. See also Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292; Muldoon *v.* Pitt, 4 Daly (N. Y.) 105 [*affirmed* in 54 N. Y. 269].

The lessor's mere consent to improvements made by the lessee is not sufficient to create a lien on the lessor's interest. Hoffman *v.* Laurans, 18 La. 70. See also Havens *v.* West Side Electric Light, etc., Co., 20 N. Y. Suppl. 764. Thus where a landlord, on being told by the tenant that he could procure the lumber for a building which he wished to erect if the landlord would permit the construction of the building, wrote a note to the lumber dealer as follows: "It is O. K. with me as for Mr. O. having the lumber and building" and after having received this note the lumber dealer sold the tenant the lumber, the seller of the lumber was not entitled to a lien for the price thereof on the landlord's interest in the premises. Oregon Lumber Co. *v.* Beckleen, 130 Iowa 42, 106 N. W. 260.

Ratification.— Where a tenant erects buildings upon leased property without authority from the landlord, and the landlord afterward acknowledges the expense of erecting such buildings as a proper charge by the tenant against him and settles with the tenant upon that basis, such facts constitute a ratification of the tenant's acts and render the landlord's estate subject to a mechanic's lien arising out of such improvements, and in such case the payment by the landlord to the tenant of the cost of the improvements does not defeat the lien. Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548.

A recital in a lease that the premises were intended for a certain purpose, for which they were then unsuitable, and that all improvements made by the lessee should become

erected by the tenant does not become a part of the realty the lien may attach to the building.[32]

(II) *LEASES PROVIDING FOR IMPROVEMENTS.* It is usually held that where a lease contains a provision authorizing the lessee to make repairs or improvements at the cost of the lessor, either generally,[33] or by deducting the cost from the rent,[34] or where part of the consideration for the lease is the making by the lessee of improvements which become a part of the realty,[35] or that improvements made by the lessee shall revert to the lessor,[36] a mechanic's lien may attach to the property for work done or materials furnished pursuant to a contract with the lessee.[37] And it has even been held that a mere provision in the lease authorizing the lessee to make improvements at his own expense shows such consent of the lessor as will authorize a lien on the property.[38] But where, although the terms

the property of the lessor on the expiration of the lease, is not a consent by the lessor that the lessee should make improvements, where the lease further provided that none should be made without the written consent of the lessor. Regan *v.* Borst, 11 Misc. (N. Y.) 92, 32 N. Y. Suppl. 810.

32. Forbes *v.* Mosquito Fleet Yacht Club, 175 Mass. 432, 56 N. E. 615; Ombony *v.* Jones, 21 Barb. (N. Y.) 520 [*affirmed* in 19 N. Y. 234].

33. Boteler *v.* Espen, 99 Pa. St. 313.

34. Hall *v.* Parker, 94 Pa. St. 109 [*affirming* 14 Phila. 619]; Kremer *v.* Walton, 11 Wash. 120, 39 Pac. 374, 48 Am. St. Rep. 870. See also McLean *v.* Sanford, 26 N. Y. App. Div. 603, 51 N. Y. Suppl. 678. *Contra*, Rothe *v.* Bellingrath, 71 Ala. 55; Regan *v.* Borst, 11 Misc. (N. Y.) 92, 32 N. Y. Suppl. 810; Garing *v.* Hunt, 27 Ont. 149.

If the lease stipulates that no liens shall be created none can be enforced against the property. Boone *v.* Chatfield, 118 N. C. 916, 24 S. E. 745.

35. *Illinois.*— Carey-Lombard Lumber Co. *v.* Jones, 187 Ill. 203, 58 N. E. 347.

Minnesota.— John Martin Lumber Co. *v.* Wood, 42 Minn. 433, 44 N. W. 315; Ness *v.* Wood, 42 Minn. 427, 44 N. W. 313.

Missouri.— Gruner, etc., Lumber Co. *v.* Nelson, 71 Mo. App. 110.

New York.— Jones *v.* Menke, 168 N. Y. 61, 60 N. E. 1053 [*reversing* 36 N. Y. App. Div. 636, 56 N. Y. Suppl. 1109]; Otis *v.* Dodd, 90 N. Y. 336 [*affirming* 24 Hun 538]. *Compare* Knapp *v.* Brown, 45 N. Y. 207.

Pennsylvania.— Long *v.* McLanahan, 103 Pa. St. 537 (*aliter*, however, as to improvements not provided for in the lease); Barclay *v.* Wainwright, 86 Pa. St. 191; Fisher *v.* Rush, 71 Pa. St. 40; Hopper *v.* Childs, 43 Pa. St. 310; Leiby *v.* Wilson, 40 Pa. St. 63; Woodward *v.* Leiby, 36 Pa. St. 437; Wainwright *v.* Barclay, 12 Phila. 221; Rush *v.* Perot, 12 Phila. 175.

Washington.—Kremer *v.* Walton, 16 Wash. 139, 47 Pac. 238.

Wisconsin.— Bentley *v.* Adams, 92 Wis. 386, 66 N. W. 505.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 73.

Contract made after default of lessee.— An agreement for the lease of land by defendant to one H provided that H might enter on the premises forthwith, that he should expend a certain sum in improvements, and that, in default in payment of rent, defendant might reënter. H entered under the agreement, but failed to pay the rent, and refused to execute the lease, whereupon defendant rescinded the agreement, and notified plaintiff, with whom H, after his default, had contracted for the improvements mentioned in the agreement. It was held that plaintiff was not entitled to a lien for work done under such contract, as H, when he made it, was a mere trespasser; and it was immaterial that defendant did not forcibly oust H, or prevent the entry of plaintiff's workmen. Lowry *v.* Woolsey, 83 Hun (N. Y.) 257, 31 N. Y. Suppl. 1101.

36. Burkitt *v.* Harper, 79 N. Y. 273 [*affirming* 14 Hun 581]. See also Evans *v.* Judson, 120 Cal. 282, 52 Pac. 585; Otis *v.* Dodd, 24 Hun (N. Y.) 538 [*affirmed* in 90 N. Y. 336].

37. Crandall *v.* Sorg, 198 Ill. 48, 64 N. E. 769; Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292; Mosher *v.* Lewis, 14 N. Y. App. Div. 565, 43 N. Y. Suppl. 1052.

The improvement must be the one agreed upon or consented to.—Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292; Hammond *v.* Martin, 15 Tex. Civ. App. 570, 40 S. W. 347.

38. Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405; Otis *v.* Dodd, 90 N. Y. 336; Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 31 N. Y. Suppl. 433 (under N. Y. Laws (1885), c. 342); Amos *v.* Clare, 9 Phila. (Pa.) 35. *Contra*, Conant *v.* Brackett, 112 Mass. 18; Cornell *v.* Barney, 94 N. Y. 394 [*affirming* 26 Hun 134, and *distinguishing*, as decided under different statutes, Otis *v.* Dodd, 90 N. Y. 336; Burkitt *v.* Harper, 79 N. Y. 273] (construing Laws (1875), c. 379); Boteler *v.* Espen, 99 Pa. St. 313. See also Francis *v.* Sayles, 101 Mass. 435.

Improvement not within provisions of lease.— A provision in a lease that the lessee may repair and alter the building on the demised premises does not give him the right to build a new sidewalk, so as to entitle one who, under contract with the lessee, builds the sidewalk, to acquire a mechanic's lien on the leased land. Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 31 N. Y. Suppl. 433.

of the lease require the lessee to erect a building on the property, it is also provided that such building shall be the property of the lessee, removable at the expiration of the lease, no lien on the lessor's interest arises out of the erection of such building.[39]

h. Vendor Under Contract of Sale. Where the vendor in an executory contract of sale directly contracts for improvements, he thereby subjects his interest in the land to a mechanic's lien,[40] and where the holder of an unrecorded bond for a conveyance stands by and sees work go on under a contract with the holder of the legal and record title, who is in possession, he cannot afterward defeat a lien by the production of such bond.[41]

i. Purchaser Under Contract of Sale — (i) *In General.* A purchaser under a contract of sale who is in possession [42] is so far an owner that he can by his contract for improvements on the land render his interest therein subject to a mechanic's lien.[43] But no lien affecting the interest of the vendor can arise out

Notice of an agreement that the lessor shall not be answerable for improvements or repairs does not impair the right to a lien. Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 31 N. Y. Suppl. 433, holding further that the claimants had no notice, as there was no actual notice, and constructive notice in favor of the lessor did not arise from the record of the lease.

39. Georgia Cent. R. Co. *v.* Shiver, 125 Ga. 218, 53 S. E. 610.

40. Pickens *v.* Plattsmouth Inv. Co., 37 Nebr. 272, 55 N. W. 947, although he contracts in conjunction with the vendee.

41. Mellor *v.* Valentine, 3 Colo. 255.

42. A purchaser who is not in possession is not an owner within N. Y. Laws (1885), c. 342, § 1. Mitchell Vance Co. *v.* Daiker, 19 N. Y. Suppl. 378.

43. *Connecticut.*— Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905.

Florida.— Jacksonville Nat. Bank *v.* Williams, 38 Fla. 305, 20 So. 931.

Illinois.— Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490 [*affirming* 23 Ill. App. 601].

Iowa.— Stockwell *v.* Carpenter, 27 Iowa 119; Monroe *v.* West, 12 Iowa 119, 79 Am. Dec. 524.

Kansas.— Mulvane *v.* Chicago Lumber Co., 56 Kan. 675, 44 Pac. 613; Meyer Bros. Drug Co. *v.* Brown, 46 Kan. 543, 26 Pac. 1019; Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473; Pierce *v.* Osborn, 40 Kan. 168, 19 Pac. 656; Johnson *v.* Badger Lumber Co., 8 Kan. App. 580, 55 Pac. 517.

Minnesota.— King *v.* Smith, 42 Minn. 286, 44 N. W. 65.

Mississippi.— Laud *v.* Muirhead, 31 Miss. 89.

Missouri.— Sawyer, etc., Lumber Co. *v.* Clark, 172 Mo. 588, 73 S. W. 137, 95 Am. St. Rep. 529; O'Leary *v.* Roe, 45 Mo. App. 567.

Nebraska.— Fuller *v.* Pauley, 48 Nebr. 138, 66 N. W. 1115; Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132.

New Jersey.— Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174; National Bank of Metropolis *v.* Sprague, 20 N. J. Eq. 13; Scott *v.* Reeve, 10 N. J. L. J. 12.

New York.— Beck *v.* Catholic University of America, 62 N. Y. App. Div. 599, 71 N. Y. Suppl. 370; Belmont *v.* Smith, 1 Duer 675; Hallahan *v.* Herbert, 4 Daly 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409]; Gay *v.* Brown, 1 E. D. Smith 725.

Ohio.— Smith *v.* Woodruff, 1 Handy 276, 12 Ohio Dec. (Reprint) 140.

Pennsylvania.— Dietrich *v.* Crabtree, 8 Wkly. Notes Cas. 418. See also Weaver *v.* Sheeler, 124 Pa. St. 473, 17 Atl. 17.

South Dakota.— See Pinkerton *v.* Le Beau, 3 S. D. 440, 54 N. W. 97.

Texas.— Security Mortg., etc., Co. *v.* Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 837.

Utah.— Cary-Lombard Co. *v.* Partridge, 10 Utah 322, 37 Pac. 572.

Washington.— Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996.

Wisconsin.—Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

Canada.— Blight *v.* Ray, 23 Ont. 415; Reggin *v.* Manes, 22 Ont. 443.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 75, 105, 332; and *supra*, I, J, 2.

Compare Hayes *v.* Fessenden, 106 Mass. 228.

Verbal contract of sale sufficient.— Meyer Bros. Drug Co. *v.* Brown, 46 Kan. 543, 26 Pac. 1019. *Compare* Gray *v.* Carleton, 35 Me. 481.

Mere offer to purchase.— H had authority to negotiate for the sale of town lots, at a certain price, part to be paid in cash and the balance on time, and the contracts with the proposed purchasers were to be reduced to writing, and forwarded to the owner for approval, and were not to be effective until payment was made and the contracts so approved. J inquired of H the price of a lot, and stated that he would take it, but, while acquainted with the terms of sale, he never made any payment on the lot, nor entered into a written contract of purchase. It was held that he had no interest in the lot, and could not create a lien on it for labor and material furnished in the erection of a building by M. Huff *v.* Jolly, 41 Kan. 537, 21 Pac. 646.

Procuring conveyance to another person.— Where a person erects a building on land which he has paid for and taken possession

of the doing of work or furnishing of materials pursuant to a contract with the purchaser[44] unless the vendor has in some way consented thereto.[45]

of, although no conveyance had been executed, he is the absolute owner of the whole of the beneficial interest therein, and the lien of parties furnishing materials for such building will vest at the date of the first charge for materials so used; and the fact that such equitable owner afterward procures a conveyance of the land to be made to a third person is immaterial. Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825.

Stipulations between vendor and purchaser. — The vendor and vendee in an executory contract for the sale of real estate cannot, by any stipulation between themselves, deprive third persons, not parties to the contract, of their statutory rights to liens for material or labor subsequently furnished to the vendee for the construction of buildings on the premises. Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753.

Contract limiting right to create liens.— S entered into an agreement to sell certain lots to J on credit, which provided that J was to build a house on the lots, and when the house was inclosed S was to convey to J when J was authorized to make certain mortgages to S and others. It was also stipulated that until the deed and mortgages were made, as provided, the legal and equitable title should remain in S, and that J could not subject the property to any liens. The deed and mortgages were made as provided in the contract, but some time prior to their execution J purchased from a lumber company material for use in the construction of the house, but did not pay for the same, and the lumber company filed a statement for a lien on the lots against J as owner. It was held that the contract under which J held limited his interest and ownership and his right to create liens on the lots, and that the lien of the lumber company was subordinate to the mortgage liens given in pursuance of the contract. Chicago Lumber Co. *v.* Schweiter, 45 Kan. 207, 25 Pac. 592.

An agreement to convey on ground-rent gives the purchaser such an equitable title that one who furnishes him labor or materials is entitled to a lien. Gaule *v.* Bilyeau, 25 Pa. St. 521 [*affirming* 1 Phila. 466] (on the buildings); Carson *v.* Boudinot, 5 Fed. Cas. No. 2,462, 2 Wash. 33.

44. *Arizona.*— Bremer *v.* Foreman, 1 Ariz. 413, 25 Pac. 539.

Arkansas.— Thomas *v.* Ellison, 57 Ark. 481, 22 S. W. 95; Brown *v.* Morison, 5 Ark. 217.

Connecticut.— Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905.

Idaho.— Steel *v.* Argentine Min. Co., 4 Ida. 505, 42 Pac. 585, 95 Am. St. Rep. 144.

Illinois.— Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490; Proctor *v.* Tows, 115 Ill. 138, 3 N. E. 569; Hickox *v.* Greenwood. 94 Ill. 266.

Iowa.— Wilkins *v.* Litchfield, 69 Iowa 465, 29 N. W. 447; Millard *v.* West, 50 Iowa 616. See also Logan *v.* Taylor, 20 Iowa 297.

Kansas.— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473; Harsh *v.* Morgan, 1 Kan. 293; Johnson *v.* Badger Lumber Co., 8 Kan. App. 580, 55 Pac. 517.

Maine.— Johnson *v.* Pike, 35 Me. 291; Conner *v.* Lewis, 16 Me. 268. See also Dustin *v.* Crosby, 75 Me. 75; Gray *v.* Carleton, 35 Me. 481.

Massachusetts.— Courtemanche *v.* Blackstone Valley St. R. Co., 170 Mass. 50, 48 N. E. 937, 64 Am. St. Rep. 275; Stevens *v.* Lincoln, 114 Mass. 476. See also Hayes *v.* Fessenden, 106 Mass. 228 [*followed* in Ettridge *v.* Bassett, 136 Mass. 314].

Michigan.— Wagar *v.* Briscoe, 38 Mich. 587.

Mississippi.— English *v.* Foote, 8 Sm. & M. 444.

Montana.— Block *v.* Murray, 12 Mont. 545, 31 Pac. 550.

Nebraska.— West *v.* Reeves, 53 Nebr. 472, 73 N. W. 935; Fuller *v.* Pauley, 48 Nebr. 138, 66 N. W. 1115; Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132.

New Jersey.— Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174; National Bank of Metropolis *v.* Sprague, 20 N. J. Eq. 13.

New York.— Moore *v.* McLaughlin, 11 N. Y. App. Div. 477, 42 N. Y. Suppl. 256; Craig *v.* Swinerton, 8 Hun 144 [*affirmed* in 76 N. Y. 608]; Hallahan *v.* Herbert, 4 Daly 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409]; Gay *v.* Brown, 1 E. D. Smith 725; Rossi *v.* MacKellar, 13 N. Y. Suppl. 827.

Ohio.—Mutual Aid Bldg., etc., Co. *v.* Gashe, 56 Ohio St. 273, 46 N. E. 985; Dutro *v.* Wilson, 4 Ohio St. 101.

Pennsylvania.— Kline *v.* Lewis, 1 Ashm. 31. But *compare* Bickel *v.* James, 7 Watts 9.

Rhode Island.— Long Island Brick Co. *v.* Arnold, 18 R. I. 455, 28 Atl. 801.

South Dakota.— Pinkerton *v.* Le Beau, 3 S. D. 440, 54 N. W. 97.

Tennessee.— Gillespie *v.* Bradford, 7 Yerg. 168, 27 Am. Dec. 494.

Texas.— Faber *v.* Muir, 27 Tex. Civ. App. 27, 64 S. W. 938; Smith *v.* Huckaby, 4 Tex. Civ. App. 80, 23 S. W. 397.

Washington.— Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Iliff *v.* Forssell, 7 Wash. 225, 34 Pac. 928; St. Paul, etc., Lumber Co. *v.* Bolton, 5 Wash. 763, 32 Pac. 787.

Wisconsin.—Lauer *v.* Bandow, 43 Wis. 556, 28 Am. Rep. 571.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 75, 105, 335.

45. Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490 [*affirming* 23 Ill. App. 601]; West *v.* Pullen, 88 Ill. App. 620; West *v.* Reeves, 53 Nebr. 472, 73 N. W. 935; Garland *v.* Van Rensselaer, 71 Hun (N. Y.) 2, 24 N. Y. Suppl. 781; Craig *v.* Swinerton, 8 Hun (N. Y.) 144 [*affirmed* in 76 N. Y.

(11) *CONTRACTS PROVIDING FOR IMPROVEMENTS.* As a general rule, where the contract of purchase stipulates that the purchaser shall erect certain buildings or make certain improvements the lien will attach to and bind the interest of the vendor,[46] even though the vendee forfeit his contract.[47]

608]; Beck *v.* Catholic University, 32 Misc. (N. Y.) 567, 67 N. Y. Suppl. 305. See *infra*, II, C, 2, j, (II). *Compare* People's Sav., etc., Assoc. *v.* Spears, 115 Ind. 297, 301, 17 N. E. 570, where it is said: "That the purchaser in possession under a contract of purchase made improvements or repairs with the knowledge and consent of the vendor, did not estop the latter to assert its prior title. Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property."

Facts showing consent see Butler *v.* Flynn, 51 N. Y. App. Div. 225, 64 N. Y. Suppl. 877, 7 N. Y. Annot. Cas. 403.

Facts not showing consent see Courtemanche *v.* Blackstone Valley St. R. Co., 170 Mass. 50, 48 N. E. 937, 64 Am. St. Rep. 275.

46. *Colorado.*— Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108; Hendrie, etc., Mfg. Co. *v.* Holy Cross Gold Min. Co., 17 Colo. App. 341, 68 Pac. 785.

Illinois.— Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532; Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490 [*affirming* 23 Ill. App. 601].

Iowa.— Jameson *v.* Gile, 98 Iowa 490, 67 N. W. 396. See also Janes *v.* Osborne, 108 Iowa 409, 79 N. W. 143.

Massachusetts.— Borden *v.* Mercer, 163 Mass. 7, 39 N. E. 413; McCue *v.* Whitwell, 156 Mass. 205, 30 N. E. 1134; Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219; Davis *v.* Humphrey, 112 Mass. 309; Hilton *v.* Merrill, 106 Mass. 528. *Compare* Metcalf *v.* Hunnewell, 1 Gray 297.

Minnesota.— Hickey *v.* Collom, 47 Minn. 565, 50 N. W. 918; Hill *v.* Gill, 40 Minn. 441, 42 N. W. 294.

Missouri.— O'Leary *v.* Roe, 45 Mo. App. 567.

Nebraska.— Sheehy *v.* Fulton, 38 Nebr. 691, 57 N. W. 395, 41 Am. St. Rep. 767 (where the vendor's agreement with the purchaser is such as to constitute the latter his agent in such construction); Bohn Mfg. Co. *v.* Kountze, 30 Nebr. 719, 46 N. W. 1123, 12 L. R. A. 33 [*followed* in Millsap *v.* Ball, 30 Nebr. 728, 46 N. W. 1125].

New Jersey.— Young *v.* Wilson, 44 N. J. L. 157.

New York.— Miller *v.* Mead, 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701 [*affirming* 6 N. Y. Suppl. 273 (*affirming* 3 N. Y. Suppl. 784)]; Schmalz *v.* Mead, 125 N. Y. 188, 26 N. E. 251 [*affirming* 15 Daly 223,, 4 N. Y. Suppl. 614]; Hackett *v.* Badeau, 63 N. Y. 476; Garland *v.* Van Rensselaer, 71 Hun 2, 24 N. Y. Suppl. 781 [*affirmed* in 140 N. Y. 638, 35 N. E. 892]; McDermott *v.* Palmer, 11 Barb. 9 [*reversed* on other grounds in 8 N. Y. 383]; Hart *v.* Wheeler, 1 Thomps. & C. 403; Hobby *v.* Day, 3 N. Y. Suppl. 900. See also Kealey *v.* Murray, 15 N. Y. Suppl. 403.

Wisconsin.— Edwards, etc., Lumber Co. *v.* Mosher, 88 Wis. 672, 60 N. W. 264.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 76.

Contra.— Pinkerton *v.* Le Beau, 3 S. D. 440, 54 N. W. 97; Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996. And see Lapham *v.* Ransford, 27 Ohio Cir. Ct. 80.

Lien covers land as well as buildings.— Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108.

Stipulation against lien affecting vendor's interest.— A stipulation in the contract of sale that any mechanic's lien should be subject to the vendor's interest in the property did not destroy the vendor's consent to the erection of the houses, and was not sufficient to subordinate to the vendor's rights the lien of a person furnishing materials for the work, who was not in privity with either of the parties to the contract, and who had no notice of the stipulation. Miller *v.* Mead, 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701 [*affirming* 6 N. Y. Suppl. 273 (*affirming* 3 N. Y. Suppl. 784)].

Mere permission or authority from the vendor to the purchaser to make improvements does not subject the vendor's interest to a lien. Dietrick *v.* Crabtree, 8 Wkly. Notes Cas. (Pa.) 418.

Where the contract merely grants the vendee the privilege of moving an old building from one corner of the lot to another, there is no lien on the interest of the vendor, although he knows that a new building is to be erected. Vosseller *v.* Slater, 163 N. Y. 564, 57 N. E. 1127.

Advancing money to build.— Some cases hold that where the vendor agrees to advance money to the purchaser to build, this does not render the vendor's interest subject to a mechanic's lien. Jersey City Associates *v.* Davison, 29 N. J. L. 415; Loonie *v.* Hogan, 9 N. Y. 435, 61 Am. Dec. 683 [*affirming* 2 E. D. Smith 681]; Hallahan *v.* Herbert, 4 Daly 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409]; Miller *v.* Clark, 2 E. D. Smith (N. Y.) 543 (at most a lien could affect the title of the purchaser only); Holley *v.* Van Dolsen, 55 How. Pr. (N. Y.) 333; Dugan *v.* Brophy, 55 How. Pr. (N. Y.) 121; Burbridge *v.* Marcy, 54 How. Pr. (N. Y.) 446. But see cases cited *supra*, this note.

47. Henderson *v.* Connolly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490; Shearer *v.* Wilder, 56 Kan. 252, 43 Pac. 224; Brown *v.* Jones, 52 Minn. 484, 55 N. W. 54; Hill *v.* Gill, 40 Minn. 441, 42 N. W. 294; Irish *v.* O'Hanlon, 34 Nebr. 786, 52 N. W. 695, lien at least on the building. *Compare* McGinniss *v.* Purrington, 43 Conn. 143.

Invalid contract of sale by married woman. — Where a married woman has sold her land under a contract contingent upon the erection

j. Husband of Owner. As a general rule where a husband contracts in his own name for a building or improvement on land owned by his wife a mechanic's lien on the land cannot be obtained.[48] But the property of the wife may, however, be subjected to a lien where the husband in making the contract acted as her

of a building thereon by the vendee, which contract is invalid because her husband did not join in its execution, a mechanic's lien for labor performed in the erection of such building under a contract with the vendee cannot be enforced against her interest in the premises under Gen. Laws (1889), c. 200, § 4, providing that, where the owner of land sells it on condition that the vendee shall erect a building on it, and the contract is forfeited or surrendered, the vendor shall be considered the owner of the building for the purpose of enforcing a lien for labor in its erection, performed under a contract with the vendee. Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

48. *Alabama.*— Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194.

Arkansas.— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.

Colorado.— Groth *v.* Stahl, 3 Colo. App. 8, 30 Pac. 1051.

Connecticut.— Lyon *v.* Champion, 62 Conn. 75, 25 Atl. 392.

Illinois.— Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39; Wilson *v.* Schuck, 5 Ill. App. 572.

Indiana.— Johnson *v.* Tutewiler, 35 Ind. 353.

Iowa.— James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51; Miller *v.* Hollingsworth, 33 Iowa 224.

Kentucky.— Pell *v.* Cole, 2 Metc. 252.

Michigan.— Hall *v.* Erkfitz, 125 Mich. 332, 84 N. W. 310.

Missouri.— Meyer *v.* Broadwell, 83 Mo. 571; Duross *v.* Broderick, 78 Mo. App. 260; Alexander *v.* Perkins, 71 Mo. App. 286; Fathman, etc., Planing Mill Co. *v.* Christophel, 60 Mo. App. 106; Kline *v.* Perry, 51 Mo. App. 422; Kansas City Planing Mill Co. *v.* Brundage, 25 Mo. App. 268; Garnett *v.* Berry, 3 Mo. App. 197.

Nebraska.—Rust-Owen Lumber Co. *v.* Holt, 60 Nebr. 80, 82 N. W. 112, 82 Am. St. Rep. 512; Bradford *v.* Higgins, 31 Nebr. 192, 47 N. W. 749.

New York.— Jones *v.* Walker, 63 N. Y. 612; Lippmann *v.* Low, 69 N. Y. App. Div. 24, 74 N. Y. Suppl. 516; Ziegler *v.* Galvin, 45 Hun 44; Copley *v.* O'Niel, 39 How. Pr. 41.

Ohio.— Spinning *v.* Blackburn, 13 Ohio St. 131.

Pennsylvania.— Dearie *v.* Martin, 78 Pa. St. 55; Miller *v.* Anne, 17 Lanc. L. Rev. 312. See also Wilson *v.* Smith, 2 Leg. Rec. 368.

Tennessee.— Baker *v.* Stone, (Ch. App. 1896) 58 S. W. 761.

Texas.— Blevins *v.* Cameron, 2 Tex. Unrep. Cas. 461.

Utah.— Morrison *v.* Clark, 20 Utah 432, 59 Pac. 235, 77 Am. St. Rep. 924, contract by husband without wife's consent and against her protests.

Wisconsin.— Coorsen *v.* Ziehl, 103 Wis. 381, 79 N. W. 562.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 88, 106.

Even necessary repairs on the wife's property made under contract with her husband and without her consent do not give rise to a lien. Dearie *v.* Martin, 78 Pa. St. 55.

Lien on building.— A husband who, being in possession of his wife's land by her consent, constructs thereon a building which he rents, and receives and appropriates the rents to his own use is an "owner or proprietor" within Mo. Rev. St. (1889) §§ 6705, 6726, and the building is subject to a mechanic's lien, although the land is not. Kline *v.* Perry, 51 Mo. App. 422.

Kan. Civ. Code, § 630, gives a lien for buildings, improvements, etc., made under contract with the husband or wife of the owner, and no contract between the husband and wife, not disclosed to the contractor, can defeat such lien. Bethell *v.* Chicago Lumber Co., 39 Kan. 230, 17 Pac. 813.

The husband cannot charge his curtesy estate in his wife's land, since the Kentucky act of 1846, unless she joins with him in the contract for labor. Tetter *v.* Wilson, 12 B. Mon. (Ky.) 90.

Property appearing as community property.— Where land which is really the separate property of a wife appears on the records as community property, a materialman who is informed by the husband that it is his property, and who, without notice that it is the wife's separate property, furnishes material to erect a house thereon, may enforce a mechanic's lien against the property. Hord *v.* Owens, 20 Tex. Civ. App. 21, 48 S. W. 200.

The burden of proof is upon the wife to show by a preponderance of the evidence that the land upon which the lien is claimed was, at the time the materials were furnished and used, her separate property, and that the lien claimant had notice thereof. Hord *v.* Owens, 20 Tex. Civ. App. 21, 48 S. W. 200.

Estoppel to assert ownership as against lien claimant.— A husband holding a lot by contract of purchase in his own name, who, with his wife's knowledge and consent, makes a written contract for the erection of a building on the lot, and conducts the business throughout in his own name and for himself, without disclosing any agency for the wife, must be deemed the owner of the lot as to mechanics and materialmen furnishing labor and material on the house; and the wife cannot, as against them, assert ownership in the lot. Bartlett *v.* Mahlum, 88 Iowa 329, 55 N. W. 514.

Removal of property.— Under Tenn. Act (1889), c. 103, providing that where material is furnished for a building on the land of a married woman who has not signed the build-

agent or representative,[49] or where she has held out her husband as her agent,[50] or, it has been held, where she authorizes or consents to what is done by him in her behalf.[51] The fact that the wife makes payments under the contract[52] or gives

ing contract, and the material is furnished in ignorance of her right, the materialmen shall have the right to remove the property, care being had to protect the rights of all parties, where furnishers of material allege in their complaint that their property cannot be removed without prejudicing both the owners and other lien-holders, and such allegations are supported by the evidence, the right of removal must be denied. Baker *v.* Stone, (Tenn. Ch. App. 1896) 58 S. W. 761.

49. *Arkansas.*— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.

Illinois.— Inter State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342 [*affirming* 71 Ill. App. 529]; McNichols *v.* Kettner, 22 Ill. App. 493.

Indiana.— Jones *v.* Pothast, 72 Ind. 158, although the wife may not have intended that the expense should be a charge on her property.

Iowa.— Kidd *v.* Wilson, 23 Iowa 464, although the account be made out against the husband alone.

Maryland.— Rimmey *v.* Getterman, 63 Md. 424.

Massachusetts.— Wheaton *v.* Trimble, 145 Mass. 345, 14 N. E. 104, 1 Am. St. Rep. 463.

Michigan.— Frohlich *v.* Carroll, 127 Mich. 561, 86 N. W. 1034.

Missouri.— See Fischer *v.* Anslyn, 30 Mo. App. 316, lien on building.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 88, 106.

There must be some evidence that the husband acted as agent, and not as principal, and that his contract was for the wife, upon her credit, and with her consent, with knowledge that her credit was pledged, and that she is understood to be the contracting party; his agency will not be assumed without any evidence. Jones *v.* Walker, 63 N. Y. 612.

Agency of husband a question of fact for jury.— A. M. Becker Lumber Co. *v.* Stevens, 84 Mo. App. 558.

Some previous appointment or general holding out of the husband as agent of the wife, or a subsequent adoption or ratification of his acts, is essential in order to hold the wife bound thereby and subject her property to a mechanic's lien. Miller *v.* Hollingsworth, 33 Iowa 224.

Evidence sufficient to go to jury on question of agency see Gerry *v.* Howe, 130 Mass. 350, knowledge of work and occupation of house.

Treating husband as owner.— Where the husband contracted in his own name, but on behalf of his wife, for the erection of buildings on her land, they colluding between themselves to defeat the claims of those who should furnish labor and materials therefor, the fact that a statement of lien for materials so furnished mentioned the husband as the owner of the land, and that a copy of the statement was served on him alone, will not prevent a lien from attaching to the premises. Frohlich *v.* Carroll, 127 Mich. 561, 86 N. W. 1034.

Express agency in husband need not be shown.— Fischer *v.* Anslyn, 30 Mo. App. 316.

The agency of the husband should be alleged if it is intended to bind the wife's land by reason thereof. Wilson *v.* Schuck, 5 Ill. App. 572.

Where the husband is made by law the trustee of the wife's separate estate his contract for buildings or improvements thereon may subject it to a lien. *Ex p.* Schmidt, 62 Ala. 252. The husband is no longer the trustee of the wife's statutory separate estate in Alabama. Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194.

50. Interstate Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529; Thompson *v.* Shepard, 85 Ind. 352.

51. *Alabama.*— Schmidt *v.* Joseph, 65 Ala. 475. See also Hanchey *v.* Hurley, 129 Ala. 306, 30 So. 742.

Illinois.— Schwartz *v.* Saunders, 46 Ill. 18; Prendergast *v.* McNally, 76 Ill. App. 335 [*affirmed* in 179 Ill. 553, 53 N. E. 995, 70 Am. St. Rep. 128].

Missouri.— See Fischer *v.* Anslyn, 30 Mo. App. 316.

Nebraska.— Howell *v.* Hathaway, 28 Nebr. 807, 44 N. W. 1136.

New York.— Husted *v.* Mathes, 77 N. Y. 388; Schummer *v.* Clark, 107 N. Y. App. Div. 207, 631, 95 N. Y. Suppl. 836.

Pennsylvania.— Bevan *v.* Thackara, 143 Pa. St. 182, 22 Atl. 873, 24 Am. St. Rep. 529; Wilson *v.* Smith, 2 Leg. Rec. 368; Lex *v.* Holmes, 4 Phila. 10; Forrester *v.* Preston, 2 Pittsb. 298. See also Dearie *v.* Martin, 78 Pa. St. 55.

Wisconsin.— Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181; Heath *v.* Solles, 73 Wis. 217, 40 N. W. 804.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 88, 106.

If it is intended to bind the wife's land by way of estoppel, the facts relied upon as in the estoppel must be alleged in the petition. Wilson *v.* Schuck, 5 Ill. App. 572.

52. *Illinois.*— McNichols *v.* Kettner, 22 Ill. App. 493.

Maryland.— Rimmey *v.* Getterman, 63 Md. 424.

Michigan.— Frohlich *v.* Carroll, 127 Mich. 561, 86 N. W. 1034, although the husband furnished some of the money used in building.

Missouri.— See Chicago Lumber Co. *v.* Mahan, 53 Mo. App. 425; Fischer *v.* Anslyn, 30 Mo. App. 316, where the wife joined in a mortgage to raise money for the improvements.

New York.— Dennis *v.* Walsh, 16 N. Y. Suppl. 257.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 88, 106.

directions as to the work[53] go to show the agency of or representation by the husband so as to subject the property to a lien. Nevertheless, in order to charge the wife's land under a contract made by her husband it must clearly appear that she authorized him to act for her in the premises,[54] and no authority from the wife to the husband will be inferred from the mere existence of the marital relation.[55] Where the wife consents that her husband shall build on her land at his own expense there is no lien on the land.[56] It has been held that where parties have contracted with the husband for the erection of a building on property as community property, without notice of any claim of his wife that it was her separate property, their liens will prevail over such a claim asserted by her after they were acquired.[57]

k. Agent of Owner.[58] A contract with the authorized agent of the owner is as a rule sufficient to render the property subject to a lien.[59] The contract must be

53. *Illinois.*— McNichols *v.* Kettner, 22 Ill. App. 493.

Maryland.— Rimmey *v.* Getterman, 63 Md. 424, where the wife made changes in the plans.

Massachusetts.— Wheaton *v.* Trimble, 145 Mass. 345, 14 N. E. 104, 1 Am. St. Rep. 463, selection of wall paper.

Missouri.— Collins *v.* Megraw, 47 Mo. 495; Schmitt *v.* Wright, 6 Mo. App. 601; Leisse *v.* Schwartz, 6 Mo. App. 413. See also Chicago Lumber Co. *v.* Mahan, 53 Mo. App. 425.

Nebraska.— Bradford *v.* Peterson, 30 Nebr. 96, 46 N. W. 220, agency of husband presumed where wife gives directions to workmen.

Pennsylvania.— Jobe *v.* Hunter, 165 Pa. St. 5, 30 Atl. 452, 44 Am. St. Rep. 639; Bodey *v.* Thackara, 143 Pa. St. 171, 22 Atl. 754, 24 Am. St. Rep. 526; Einstein *v.* Jamison, 95 Pa. St. 403.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 88, 106.

The bearing of a message from her husband to a person employed by the husband to erect a house upon her estate, in relation to it, although she also expresses her satisfaction with what satisfies him, was not, under the old law, conduct of a wife from which the jury could infer her contract or assent that her interest in the estate should be subjected to a lien for the price of the work and materials originally furnished for the erection upon the credit of her husband. Bliss *v.* Patten, 5 R. I. 376.

54. A wife's merely joining with her husband in a note given for labor and materials bestowed on her real property cannot be the basis of a mechanic's lien. Johnson *v.* Tutewiler, 35 Ind. 353.

55. *Arkansas.*— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.

Indiana.— Johnson *v.* Tutewiler, 35 Ind. 353.

Missouri.— Kansas City Planing Mill Co. *v.* Brundage, 25 Mo. App. 268.

New York.— Lippmann *v.* Low, 69 N. Y. App. Div. 24, 74 N. Y. Suppl. 516.

Texas.— Blevins *v.* Cameron, 2 Tex. Unrep. Cas. 461.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 88, 106.

56. Huntley *v.* Holt, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111.

57. House *v.* Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654.

58. Contract made by: Joint owner see *supra*, II, C, 3, a. Trustee see *supra*, II, C, 3, c. Mortgagor or mortgagee see *supra*, II, C, 3, e. Occupant or possessor see *supra*, II, C, 3, f. Lessee see *supra*, II, C, 3, g. Purchaser see *supra*, II, C, 3, i. Husband of owner see *supra*, II, C, 3, j.

59. *Alabama.*— Youngblood *v.* McAnally, 88 Ala. 512, 7 So. 263.

California.— See Hines *v.* Miller, 122 Cal. 517, 55 Pac. 401.

Colorado.— Williams *v.* Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806.

Connecticut.— Paine *v.* Tillinghast, 52 Conn. 532.

Illinois.— Inter State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342 [*affirming* 71 Ill. App. 529] (although principal not disclosed until work partly performed); Hough *v.* Collins, 176 Ill. 188, 52 N. E. 847 [*affirming* 70 Ill. App. 661]; Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95].

Iowa.— Mineah *v.* Stotts, 130 Iowa 530, 107 N. W. 425.

Maryland.— Blake *v.* Pitcher, 46 Md. 453, holding that it is immaterial whether such agent also occupied the relation of contractor for the owner for the building of the house.

Massachusetts.— Morse *v.* Newbury School Dist. No. 7, 3 Allen 307, holding that a lien exists, under St. [1875] c. 431, for work done in enlarging a school-house under a written contract with a building committee, chosen by the district, with authority to make the enlargement, although by the terms of the contract the committee were personally responsible therefor; and it is immaterial whether the acts of the committee were subsequently ratified by the district at a legal meeting.

Missouri.— Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405.

Nebraska.— Snyder *v.* Sparks, (1905) 103 N. W. 662.

Vermont.— See Greene *v.* McDonald, 70 Vt. 372, 40 Atl. 1035.

Washington.— Seattle Lumber Co. *v.* Sweeney, (1906) 85 Pac. 677.

within the scope of the agent's authority,[60] but if the agent has the power to contract, the lien cannot be defeated because the amount is in excess of his authority.[61]

4. Capacity to Contract or Consent — a. In General. The lien being a mere incident to the legal liability to pay the debt,[62] it is necessary that the contracting owner should have the capacity to make a valid contract.[63]

b. Infants.[64] The contract of an infant not being binding upon him, a mechanic's lien cannot be predicated thereon,[65] nor will a retention of the property as improved amount to such ratification as to sustain a lien.[66]

c. Married Women.[67] Under statutes giving to a married woman power to contract with reference to her separate estate, she can by her contract render

United States.— Mammoth Min. Co. *v.* Salt Lake Foundry, etc., Co., 151 U. S. 447, 14 S. Ct. 384, 38 L. ed. 229 [*affirming* 6 Utah 351, 23 Pac. 760], notwithstanding the existence of an agreement, not known to the lien claimant, whereby the agent was to have possession of the property, and make the improvements on his own sole credit.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 86.

Written authority is not required unless the statute so provides. American Brick, etc., Co. *v.* Drinkhouse, 59 N. J. L. 462, 36 Atl. 1034.

If the owner holds a person out as having authority, he is estopped to assert the contrary. Hough *v.* Collins, 70 Ill. App. 661.

An agent furnished by his principal with funds, and instructed to build a house on his principal's land with those funds, has no implied power to build on credit. And if such agent is a tenant at sufferance, one who furnishes materials for the house with notice of the nature of the tenancy cannot enforce a mechanic's lien. Proctor *v.* Tows, 115 Ill. 138, 3 N. E. 569.

Authority granted by decree of court to one of a class of remainder-men to act as their agent in superintending the building of a hotel on the property, and to apply sums to be realized from certain mortgages thereon in payment for its construction, does not give such agent the right to contract, so as to subject the property to a mechanics' lien. Rudd *v.* Littell, 45 S. W. 451, 46 S. W. 3, 20 Ky. L. Rep. 158.

Circumstances sufficient to establish agency see the following cases:

California.— Moore *v.* Jackson, 49 Cal. 109.

Colorado.— Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989.

Illinois.— Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95].

New Jersey.— Porch *v.* Agnew Co., (Ch. 1905) 61 Atl. 721.

Tennessee.— Jonte *v.* Gill, (Ch. App. 1897) 39 S. W. 750.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 86.

Circumstances not sufficient to establish agency see Lapham *v.* Ransford, 27 Ohio Cir. Ct. 80; Perkins *v.* Blair, 22 R. I. 334, 47 Atl. 883; Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996.

60. Greene *v.* McDonald, 70 Vt. 372, 375, 40 Atl. 1035, where it is said: "If the contract is made with an agent the right to a lien will depend upon the scope of the agency. A mere general agency will not enable one to charge the land of his principal. A general authorization to take care of the property will not be sufficient." See also Ros *v.* Sebastian, 160 Ill. 602, 43 N. E. 708 [*affirming* 57 Ill. App. 417].

Promoters of a corporation cannot bind the corporation subsequently incorporated. Davis *v.* Maysville Creamery Assoc., 63 Mo. App. 477. See also Burnap *v.* Sylvania Butter Co., 12 Ohio Cir. Ct. 639, 5 Ohio Cir. Dec. 582.

61. Paine *v.* Tillinghast, 52 Conn. 532.

62. McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572; Hall *v.* Acken, 47 N. J. L. 340.

63. Cornell *v.* Barney, 94 N. Y. 394; Knapp *v.* Brown, 45 N. Y. 207; Choteau *v.* Thompson, 2 Ohio St. 114.

The power of an owner to make contracts is not exhausted when he has entered into an agreement with one person which contains a covenant against liens; he may make new contracts with other persons, and if he does so he may be called upon to perform. Spring Brook Lumber Co. *v.* Watkins, 28 Pa. Super. Ct. 199.

64. See, generally, Infants.

65. McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572; Alvey *v.* Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. Rep. 418; Price *v.* Jennings, 62 Ind. 111; Bloomer *v.* Nolan, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. Rep. 690; Hall *v.* Acken, 47 N. J. L. 340.

Duty to ascertain capacity to contract.— A party performing work or furnishing materials for the improvement of property must ascertain whether the party with whom he contracts is a minor or not. McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572.

66. McCarty *v.* Carter, 49 Ill. 53, 55, 95 Am. Dec. 572 (where it is said: "Neither do we consider her receipt of rents, after she became of age, such a ratification of the contract . . . as would operate to create a lien against her. . . . It would be unreasonable to compel a minor to choose between the utter abandonment of his property and the creation of a lien upon it under a contract made during his minority, and to say, if he retains the property he ratifies the lien"); Bloomer *v.* Nolan, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

67. See, generally, Husband and Wife.

such estate liable to a mechanic's lien,[68] but she cannot do this unless the disabilities of coverture have been removed by statute.[69]

5. Form, Requisites, and Sufficiency of Agreement or Consent — a. In General. Whether a mechanic's lien attaches under a building contract depends at the outset upon the nature of the contract and not upon that which is done under it. A contractor must show that his contract brings him within the terms of the law or he cannot have a lien.[70] The contract pursuant to which the labor is done or the materials are furnished must be one that can be enforced[71] in an action at

68. *Alabama.*— Youngblood *v.* McAnally, 88 Ala. 512, 7 So. 263; Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331; Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194.

Illinois.— Greenleaf *v.* Beebe, 80 Ill. 520.

Indiana.— Stephenson *v.* Ballard, 82 Ind. 87; Shilling *v.* Templeton, 66 Ind. 585, (holding that it is not necessary that the married woman should enter into the contract with a view of charging her estate); Capp *v.* Stewart, 38 Ind. 479; Littlejohn *v.* Millirons, 7 Ind. 125.

Iowa.— Greenough *v.* Wigginton, 2 Greene 435.

Kentucky.— Jefferson *v.* Hopson, 84 S. W. 540, 27 Ky. L. Rep. 140, under St. (1903) § 2128. Formerly the work done must have been necessary for the comfort of the wife. Roberts *v.* Riggs, 84 Ky. 251, 1 S. W. 431, 8 Ky. L. Rep. 247 [*following* Pell *v.* Cole, 2 Metc. 252].

Minnesota.— Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205; Carpenter *v.* Wilverschied, 5 Minn. 170; Carpenter *v.* Leonard, 5 Minn. 155.

Missouri.— Tucker *v.* Gest, 46 Mo. 339; Carthage Marble, etc., Co. *v.* Bauman, 44 Mo. App. 386.

New York.— Hauptman *v.* Catlin, 20 N. Y. 247 [*affirming* 3 E. D. Smith 666, 4 Abb. Pr. 472].

North Carolina.— A lien may be enforced on the separate property of a married woman for work and material furnished under a contract for its improvement executed with her husband's consent, and where she was examined apart from her husband. Ball *v.* Paquin, 140 N. C. 83, 52 S. E. 410, 23 L. R. A. N. S. 307.

Ohio.— Machir *v.* Burroughs, 14 Ohio St. 519 (holding that a married woman, unless restrained by the terms of the instrument of settlement, may, by her contract, and without the consent of trustees in whom the legal title may be vested, charge her separate estate, at least to the extent of the rents, issues, and profits thereof, with the cost of reasonable repairs and improvements, for the benefit of the estate; and to that extent a mechanic's lien may attach under the statute); St. Clair Bldg. Assoc. *v.* Hayes, 2 Ohio Cir. Ct. 225, 1 Ohio Cir. Dec. 456 (holding that where husband and wife, she being the owner of the real estate, go together and purchase materials to be used as stated by them in the construction of a house on the premises, the husband being the principal spokesman, and nothing being said as to which of them owns the property, or to indicate that the sale is on the personal credit of the husband, a lien for the price of such articles may properly be taken on such real estate, and will be enforced).

Pennsylvania.— Germania Sav. Bank's Appeal, 95 Pa. St. 329. It must be alleged and proved that the work or materials were necessary for the reasonable improvement or repair of such separate estate, and, substantially, that they were so applied, and that the same was done and furnished by her authority and consent. Einstein *v.* Jamison, 95 Pa. St. 403.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 83.

An oral contract with a married woman without the assent of the husband is sufficient to create a lien for work done or materials furnished. Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194 [*followed* in Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331].

Unless a married woman has a separate estate in land with the power of charging it she cannot be an employer in the sense in which the term is used in the Kentucky statutes of 1831 and 1834, so as to charge the land. Fetter *v.* Wilson, 12 B. Mon. (Ky.) 90.

Fla. Rev. St. (1892) §§ 1726–1749, providing for mechanics' and materialmen's liens do not apply to the separate property of married women. Smith *v.* Ganby, 43 Fla. 142, 30 So. 683 [*followed* in Macfarlane *v.* Southern Lumber, etc., Co., 47 Fla. 271, 36 So. 1029]. Subsequent amendments, however, render them applicable thereto. See Macfarlane *v.* Southern Lumber, etc., Co., *supra.*

69. O'Neil *v.* Percival, 20 Fla. 937, 51 Am. Rep. 634; Gray *v.* Pope, 35 Miss. 116, 72 Am. Dec. 117; Selph *v.* Howland, 23 Miss. 264; Sexton *v.* Alberti, 10 Lea (Tenn.) 452.

70. Cook *v.* Heald, 21 Ill. 425; Vanderpoel *v.* Knight, 102 Ill. App. 596.

Single contract.— A contract to cut from plaintiff's own material and furnish all the cut stone required for a building, payments to be made from time to time as the work under said contract progresses, is one contract, and the party is entitled to a lien under Minn. Gen. St. (1866) c. 90, for material furnished thereunder, although the contract may be to furnish distinct items of material, or perform distinct items of labor, to be paid for as the work progressed. Milner *v.* Norris, 13 Minn. 455.

71. Hills *v.* Halliwell, 50 Conn. 270; Yeates *v.* Weedon, 6 Bush (Ky.) 438; Vandiver *v.* Hodge, 4 Bush (Ky.) 538.

law.[72] It must rest upon a valid consideration,[73] and be sufficiently definite to enable the amount to become due under it to be determined with reasonable accuracy and precision.[74] But a mere request to furnish materials which are accordingly furnished,[75] or an employment and undertaking to do work which is accordingly done,[76] is sufficient. And where a person furnishes material with the knowledge that it is to be used in the construction of a particular building, and sells it for that purpose, he may enforce a mechanic's lien on such building without any more definite or specific contract, or agreement that the building material shall be used in the construction of such building.[77] Where a contractor is doing business under a trade-name other than his own a contract made with him in such name shows that he is the real party in interest and entitled to a lien.[78] The consent of the owner to the improvements for which the lien is claimed must be absolute[79] and not clogged with conditions.[80]

b. Time of Making. In Texas in order to support a lien on the homestead the contract must have been made before the work was done or the materials furnished,[81] but a contract made after the work is finished may support the lien on other property.[82]

c. Place of Making. Unless the statute provides otherwise, a mechanic's lien may be enforced for work done or materials furnished pursuant to a contract made outside of the state.[83]

d. Necessity of Writing. Unless the statute so requires the contract need not be in writing;[84] but under some statutes it is necessary to the establishment

The relation of debtor and creditor must exist and the lien is for the debt. Wilkie *v.* Bray, 71 N. C. 205.

72. Loonie *v.* Hogan, 9 N. Y. 435, 61 Am. Dec. 683.

No lien where contract void under statute of frauds.— Birchell *v.* Neaster, 36 Ohio St. 331.

73. Masow *v.* Fife, 10 Wash. 528, 39 Pac. 140.

74. Manchester *v.* Searle, 121 Mass. 418; Wilder *v.* French, 9 Gray (Mass.) 393.

75. Henderson *v.* Wasserman, 12 N. Y. Suppl. 151. See also Hazard Powder Co. *v.* Loomis, 2 Disn. (Ohio) 544.

A substantial promise to pay for materials to be furnished is sufficient. Richardson, etc., Co. *v.* Reid, 3 N. Y. Suppl. 224.

76. Barnes *v.* Thompson, 2 Swan (Tenn.) 313, even though the statute requires a "special contract."

77. Sturges *v.* Green, 27 Kan. 235.

78. Littell *v.* Saulsberry, 40 Wash. 550, 82 Pac. 909.

79. Hervey *v.* Gay, 42 N. J. L. 168; Smith *v.* Gay, 3 N. J. L. J. 145.

A contract to convey land, although in writing, does not amount to a consent in writing to erect buildings, so as to make the estate of the vendor subject to a lien for the building erected thereon by a tenant or other person. Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

Writing not amounting to consent.—A writing evidently designed to answer a temporary purpose, and not embodying the agreement of the parties or any consent in direct terms, but only by vague implication, and manifestly framed to prevent liens from attaching, should not be construed as a consent such as the statute requires to support a lien. Jersey Co. *v.* Davison, 29 N. J. L. 415.

80. Hervey *v.* Gay, 42 N. J. L. 168; Smith *v.* Gay, 3 N. J. L. J. 145.

81. Lignoski *v.* Crooker, 86 Tex. 324, 24 S. W. 278, 788; Lyon *v.* Ozee, 66 Tex. 95, 17 S. W. 405; Taylor *v.* Huck, 65 Tex. 238; Reese *v.* Corlew, 60 Tex. 70.

82. Mundine *v.* Berwin, 62 Tex. 341.

83. *Illinois.*— Gaty *v.* Casey, 15 Ill. 189.

Kansas.— U. S. Investment Co. *v.* Phelps, etc., Windmill Co., 54 Kan. 144, 37 Pac. 982.

Louisiana.— See Willey *v.* St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182.

Minnesota.— Atkins *v.* Little, 17 Minn. 342.

New York.— Campbell *v.* Coon, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410 [*reversing* 8 Misc. 234, 28 N. Y. Suppl. 561].

Texas.— Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 89.

84. *Alabama.*— Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331; Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194.

Iowa.— Cotes *v.* Shorey, 8 Iowa 416.

Kentucky.— Jefferson *v.* Hopson, 84 S. W. 540, 27 Ky. L. Rep. 140.

Massachusetts.— Whitford *v.* Newell, 2 Allen 424.

Mississippi.— Harrison *v.* Breeden, 7 How. 670.

Texas.— State *v.* Cherokee Mfg. Co., 2 Tex. Civ. App. 588, 22 S. W. 253.

Virginia.— Merchants', etc., Sav. Bank *v.* Dashiell, 25 Gratt. 616.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 90.

Where the work is performed within one

of a mechanic's lien that the work should have been done or the materials furnished pursuant to a written contract with the owner of the property or that he should have consented in writing to the improvement out of which the lien is claimed to arise.[85] And a writing is in several jurisdictions required in order to charge a homestead,[86] or the separate estate of a married woman[87] with a mechanic's lien. In some jurisdictions the contract must be in writing when the price exceeds a specified amount,[88] but a contract for a smaller amount may be oral.[89]

e. Description of Land. Under some statutes the land on which the building is to be erected or the work done must be specified or described,[90] but it is suffi-

year from the time when the verbal contract was made, the performance brings the contract within the statute. Levinson *v.* Malloy, 64 Ill. App. 425.

85. Murphy *v.* Hussa, 70 N. J. L. 381, 57 Atl. 388; Jersey County Association *v.* Davison, 29 N. J. L. 415 (consent must be in writing); Strong *v.* Van Duersen, 23 N. J. Eq. 369; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Haswell *v.* Goodchild, 12 Wend. (N. Y.) 373.

Under Ont. Rev. St. c. 126, § 2, subs. 3, the fee simple may, with the consent of the owner, be subject to a mechanic's lien for repairs made by a tenant, provided such consent is testified by the signature of the owner upon the claim of lien at the time of the registering thereof, and duly verified. Gearing *v.* Hunt, 27 Ont. 149.

86. Sternberger *v.* Gowdy, 93 Ky. 146, 19 S. W. 186, 14 Ky. L. Rep. 88; Roberts *v.* Riggs, 84 Ky. 251, 1 S. W. 431, 8 Ky. L. Rep. 247; Burtch *v.* McGibbon, 98 Mich. 139, 56 N. W. 1110; Interstate Bldg., etc., Assoc. *v.* Goforth, 94 Tex. 259, 59 S. W. 871; Huff *v.* Clark, 59 Tex. 347; Barnes *v.* White, 53 Tex. 628; Campbell *v.* Fields, 35 Tex. 751, contract must be in writing and recorded within thirty days after execution.

87. Cameron *v.* McCullough, 11 R. I. 173; Briggs *v.* Titus, 7 R. I. 441; Bliss *v.* Patten, 5 R. I. 376. *Contra*, Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331; Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194.

In Kentucky a written contract is not now necessary to subject the separate estate of a married woman to a mechanic's lien. Tarr *v.* Muir, 107 Ky. 283, 53 S. W. 663, 21 Ky. L. Rep. 988; Jefferson *v.* Hopson, 84 S. W. 540, 27 Ky. L. Rep. 140 (holding that St. (1894) § 2128, prescribing the powers of married women, repealed that part of section 2479 requiring a written contract, signed by a married woman, before a lien could be placed on her property for improvements made thereon); Johnson *v.* Bush, 64 S. W. 628, 65 S. W. 158, 23 Ky. L. Rep. 1399; Spillman *v.* Gaines, 13 Ky. L. Rep. 328. But formerly a contract in writing was required. Passmore *v.* Eastin, 90 Ky. 380, 14 S. W. 356, 12 Ky. L. Rep. 349; Webster *v.* Tattershall, 36 S. W. 1126, 18 Ky. L. Rep. 439.

88. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897; Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac 109; Murray *v.* Sweeney, 48 La. Ann. 760, 19 So. 753 (as against third persons); Lacoste *v.* West, 19 La. Ann. 446; McRae *v.* His Creditors, 16 La. Ann. 305; Turner *v.* Parker, 10 Rob. (La.) 154; Taylor *v.* Crain, 16 La. 290; Oddie *v.* His Creditors, 6 Mart. N. S. (La.) 473.

Parol evidence cannot be allowed to connect unsigned specifications with the contract where the written contract does not refer to the specifications in such a manner that their connection is apparent upon their production. Worden *v.* Hammond, 37 Cal. 61.

Sidewalks.— Cal. Code Civ. Proc. § 1183, which gives mechanics a lien on buildings, etc., for work and materials, but provides that, where the amount agreed on exceeds one thousand dollars, the contract is void unless in writing, has no application to a contract to construct a sidewalk in a city; but such a contract may be oral, under section 1191, which provides for a lien for the construction of sidewalks, but does not require a writing. Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109.

The contract of a subcontractor or materialman need not be in writing. Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

89. Sidlinger *v.* Kerkow, 82 Cal. 42, 22 Pac. 932.

90. Burkhart *v.* Reisig, 24 Ill. 539.

A homestead is not bound by a mechanic's lien unless the premises are identified by a written description; and hence where a contract to erect a building designates no particular place for the building, and the building is afterward erected on premises occupied at the time and prior thereto as a homestead, the contract cannot form the basis on which to establish a mechanic's lien on such homestead. Hammond *v.* Wells, 45 Mich. 11, 7 N. W. 218.

Under the Illinois Lien Law of 1861 a lien exists where the premises are correctly described in the petition as those upon which the work was actually done, although they were misdescribed in the written contract. Clark *v.* Manning, 90 Ill. 380.

Curing omission to describe land.— In an action to enforce a mechanic's lien the omission in the contract to describe the land on which the house was built is overcome by an admission in the answer that whatever contract was made was with reference to the lots owned by defendant. Burns *v.* Lane, 23 Ill. App. 504. See also Bastrup *v.* Prendergast, 179 Ill. 553, 53 N. E. 995, 70 Am. St. Rep. 128 [*affirming* 76 Ill. App. 335].

cient if enough appears in the contract to identify the property.[91] The contract need not describe the land unless the statute so requires.[92]

f. Description of Building or Work and Materials. It would seem proper that the contract should contain a description of the building or improvement to be made, or clearly designate the work to be done or the materials to be furnished;[93] but it is not necessary to entitle a mechanic or builder to his lien that every item furnished should be contemplated and specifically named at the time of making the contract.[94]

g. Amount to Be Paid. Under some statutes, in order to give rise to a lien, the amount due or to become due must be fixed in the contract,[95] or the contract must be of such character and upon such terms and stipulations between the parties that the amount which may be earned under it may in some way be ascertained and determined with precision and certainty.[96] But in other jurisdictions a lien may be enforced, although the amount to be paid was not agreed upon,[97] or stated in the contract.[98]

91. Strawn *v.* Cogswell, 28 Ill. 457 (holding that a contract to furnish materials for a mill at Marseilles, if it does not appear that defendant has more than one mill at that place, is sufficiently definite in the description of the property to support a mechanic's lien); Jossman *v.* Rice, 121 Mich. 270, 80 N. W. 25, 80 Am. St. Rep. 493 (holding that a mechanic's lien may attach to a building erected under a contract describing the premises merely as "ground situated" in a given village, where the building was constructed upon the only land owned by the parties in the village named); Houston *v.* Myers, 88 Tex. 126, 30 S. W. 912 [*affirming* (Civ. App. 1894) 27 S. W. 950, 1083]; D. June *v.* Doke, 35 Tex. Civ. App. 240, 80 S. W. 402 (holding that where a building contract provided that the contractor should retain a lien on "one certain ginhouse, and accompanying buildings, situated in Corsicana, on" a certain street, and the owner had no property except certain lots on which the buildings were built, the description was sufficient).

Where only the building is described in the contract there can be a lien on the land. Powers Lumber Co. *v.* Wade, 15 Tex. Civ. App. 295, 39 S. W. 158.

92. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84; Yancy *v.* Morton, 94 Cal. 558, 29 Pac. 1111; San Diego Lumber Co. *v.* Wooldredge, 90 Cal. 574, 27 Pac. 431.

93. See Manchester *v.* Searle, 121 Mass. 418 (holding that in order to create a lien on real estate by a parol contract against a subsequent mortgagee without notice, it is necessary that the contract should be precise, certain, and definite, not subject to be affected, modified, and changed by the will of one of the parties); Wilder *v.* French, 9 Gray (Mass.) 393; Sanderson *v.* Taft, 6 Gray (Mass.) 533. *Compare* Thielman *v.* Carr, 75 Ill. 385, holding that under Ill. Acts (1861), p. 179, a materialman was entitled to a lien, although his contract was not for a specified amount of material, but the material for which the lien was claimed was obtained from time to time as required for use in the progress of the building.

Specifications an essential part of contract. — Worden *v.* Hammond, 37 Cal. 61.

Reference to another building. — A building contract was not rendered invalid by reason of the fact that, instead of describing the specifications in detail, it referred to an adjoining house, and portions of work therein, as patterns and samples for the corresponding portions of the work contracted for. California Iron Constr. Co. *v.* Bradbury, 138 Cal. 328, 71 Pac. 346, 617.

Sufficient description. — A recital in a building contract that the structure was to be an eighteen-room, two-story frame house, and was to be built on lots 2 and 3, in block 121, Oak Cliff, Dallas county, Tex., coupled with an affidavit attached to the contract giving the name of the contractor, and stating that it was the only house on the two lots, is sufficient, without the filing of plans and specifications, to support a mechanic's lien. Collier *v.* Betterton, 8 Tex. Civ. App. 479, 29 S. W. 490.

94. Jones *v.* Swan, 21 Iowa 181.

95. First Municipality *v.* Hall, 2 La. Ann. 549, where it exceeds five hundred dollars.

96. Wilder *v.* French, 9 Gray (Mass.) 393; Sanderson *v.* Taft, 6 Gray (Mass.) 533. See also Manchester *v.* Searle, 121 Mass. 418.

97. Foerder *v.* Wesner, 56 Iowa 157, 9 N. W. 100 (holding that a mechanic's lien for labor will be enforced, although there may have been no express agreement as to the amount to be charged therefor); O'Brien *v.* Hanson, 9 Mo. App. 545 (holding that a lien may be maintained upon a running account, although the price was agreed on as to some of the articles and not as to others); Hutchins *v.* Bautch, 123 Wis. 394, 101 N. W. 671, 107 Am. St. Rep. 1014 (holding that under Rev. St. (1898) c. 143, giving a lien to mechanics and materialmen, it is not necessary that the contract should be so definite as to enable one to determine precisely the contract price for such labor or material; but it is sufficient, if either was furnished under the contract, to show that it was in fact so furnished).

98. Snell *v.* Bradbury, 139 Cal. 379, 73 Pac. 150.

h. Terms and Times of Payment — (i) *In General.* Unless the statute so requires,[99] the contract need not state the terms of payment.[1] Under some statutes the contract price must by the terms of the contract be made payable in instalments at specified times after the commencement of the work or on the completion of specified portions of the work or of the whole work;[2] and a certain part of the contract price must be made payable not earlier than a designated number of days after the final completion of the contract;[3] and unless the con-

99. The former Illinois statute, Rev. St. (1899) c. 82, § 20, required the contract to state the time for completion of the work and for payment therefor, but this requirement does not now obtain, it having been done away with by St. (1903) p. 191. For decisions upon such requirement see Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22; Bolter *v.* Kozlowski, 211 Ill. 79, 71 N. E. 858 [*affirming* 112 Ill. App. 13]; Roulet *v.* Hogan, 203 Ill. 525, 68 N. E. 97 [*affirming* 107 Ill. App. 164]; Von Platen *v.* Winterbotham, 203 Ill. 198, 67 N. E. 843; Dymond *v.* Bruhns, 200 Ill. 292, 65 N. E. 641 [*reversing* 101 Ill. App. 425]; Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 64 N. E. 935 [*reversing* 98 Ill. App. 548]; Hindert *v.* American Trust, etc., Bank, 198 Ill. 538, 64 N. E. 1008 [*affirming* 100 Ill. App. 85]; Pugh *v.* Wallace, 198 Ill. 422, 64 N. E. 1005; Webbe *v.* Curran, 198 Ill. 18, 64 N. E. 710; King *v.* Lamon, 193 Ill. 537, 61 N. E. 1074 [*affirming* 91 Ill. App. 74]; Kelley *v.* Northern Trust Co., 190 Ill. 401, 60 N. E. 585; Freeman *v.* Rinaker, 185 Ill. 172, 56 N. E. 1055 [*reversing* 84 Ill. App. 283]; Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Driver *v.* Ford, 90 Ill. 595; Clark *v.* Manning, 90 Ill. 380; Grundies *v.* Hartwell, 90 Ill. 324; Reed *v.* Boyd, 84 Ill. 66; Powell *v.* Webber, 79 Ill. 134; Fish *v.* Stubbings, 65 Ill. 492; Beasley *v.* Webster, 64 Ill. 458; Coburn *v.* Tyler, 41 Ill. 354; Senior *v.* Brebnor, 22 Ill. 252; Cook *v.* Vreeland, 21 Ill. 431; Cook *v.* Heald, 21 Ill. 425; Ryan *v.* Desmond, 118 Ill. App. 186; Cooke *v.* Haungs, 113 Ill. App. 501; Smith *v.* Central Lumber Co., 113 Ill. App. 477; Henry *v.* Applegate, 111 Ill. App. 13; Ludwig *v.* Huverstuhl, 108 Ill. App. 461; Garden City Banking, etc., Co. *v.* Grahe, 108 Ill. App. 453; Roulet *v.* Hogan, 107 Ill. App. 164; Pierce *v.* Barnes, 106 Ill. App. 241; Concord Apartment House Co. *v.* Von Platen, 106 Ill. App. 40; Richardson *v.* Central Lumber Co., 105 Ill. App. 358; Zuttermeister *v.* Central Lumber Co., 104 Ill. App. 120; Vanderpoel *v.* Knight, 102 Ill. App. 596; Superior Lumber Co. *v.* Gottlieb, 102 Ill. App. 392; Harvey, etc., Plumbing Co. *v.* Wallace, 99 Ill. App. 212; Curran *v.* Webbe, 97 Ill. App. 525; Rogers *v.* Concord Apartment House Co., 93 Ill. App. 302; M. J. Fitch Paper Co. *v.* McDonald, 91 Ill. App. 543; Harwood *v.* Brownell, 32 Ill. App. 347; Adler *v.* World's Pastime Exposition Co., 26 Ill. App. 528 [*affirmed* in 126 Ill. 373, 18 N. E. 809]; Haines *v.* Chandler, 26 Ill. App. 400; Stout *v.* Sower, 22 Ill. App. 65; Chisholm *v.* Randolph, 21 Ill. App. 312; Simon *v.* Blocks, 16 Ill. App. 450; Younger *v.* Louks, 7 Ill. App. 280; Austin *v.* Wohler, 5 Ill. App. 300.

1. Snell *v.* Bradbury, 139 Cal. 379, 73 Pac. 150, holding that this is not required by Code Civ. Proc. §§ 1183, 1184.

2. Cal. Code Civ. Proc. § 1184; 3 Mills Annot. St. Colo. (1904) § 2868.

Contract complying with statute.— A contract providing that the owner shall pay, upon the written order of the contractor, the materialmen when the materials are used in the building, and also pay the mechanics and laborers at the end of every week for work performed, is specific enough as to time and amounts to comply with Cal. Code Civ. Proc. § 1184. Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426. See also Brill *v.* De Turk, 130 Cal. 241, 62 Pac. 462.

3. Cal. Code Civ. Proc. § 1184 (twenty-five per cent at least thirty-five days after completion); 3 Mills Annot. St. Colo. (1904) § 2868 (fifteen per cent at least thirty-five days after completion).

Such a statute is constitutional.— Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786, upholding Laws (1893), c. 117, p. 315.

A contract making the final payment due in thirty days after completion of the work is sufficient, because, as the liens must be filed within thirty days and attach before the payment can be made under the contract, the claimants are in as good a position as though the time fixed by the contract had been thirty-five days. San Diego Lumber Co. *v.* Wooldredge, 90 Cal. 574, 27 Pac. 431.

Instalments based on cost.— Cal. Code Civ. Proc. § 1184, is not complied with by a contract providing that "seventy-five per cent of the cost of material and work completed at the time of payment is to be paid on the first and third Saturdays of each month as the work progresses," and that "the last and final payment to be made 35 days after completion of the work according to contract," but containing no provision that at least twenty-five per cent of the whole contract price shall be made payable thirty-five days after the completion of the contract. Willamette Steam Mills Lumbering, etc., Co., *v.* Los Angeles College Co., 94 Cal. 229, 235, 29 Pac. 629, where it is said: "There is a manifest difference between setting forth the amount that is to be paid at any particular date, and stating that a certain percentage of the cost will be so paid. Although the cost and the contract price of the work contracted for may be the same, yet there is no necessary connection between the two. It is easy to see that a contract might be entered into at

tract conforms substantially to these requirements persons other than the contractor who perform labor or furnish materials have a lien for the value thereof irrespective of the contract price.[4]

(II) *CONTRACTS PAYABLE OTHERWISE THAN IN MONEY.* The right of a person who furnishes labor or materials pursuant to a contract with the owner to enforce a mechanic's lien is not affected by the fact that by the terms of the contract the price was to be paid not in money, but in land, specified articles of personalty, or otherwise, if the owner refuses to pay in the manner agreed upon.[5]

i. Signature and Authentication. In California a contract signed by the reputed owner is sufficient.[6] In Texas, in order to fix a mechanic's lien on the homestead, the contract must be not only signed by the owner and his wife,[7] but

such a figure for the entire work that a payment of seventy-five per cent of the cost of the material and work completed at stated times as the work progressed would exhaust the entire contract price at or before the completion of the building, so that there would be nothing with which to meet the liens that might be filed within thirty days thereafter."

Contracts sufficiently complying with statute.— A contract for erecting a building, which provides that twenty-five per cent of the sum to be paid shall remain unpaid until thirty-five days after completion of the building, and the remainder be paid in partial payments equal to seventy-five per cent of the value of the work and material done and furnished at the time of such payments, sufficiently complies with Cal. Code Civ. Proc. § 1184. Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92. A contract providing that the last payment "shall be made within thirty-six days after this contract is fulfilled" does not violate the statute. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533. A contract which, after providing that the balance of twenty-five per cent shall be paid thirty-five days after completion of the building, further provides that payment may be made at any time between the completion of the building and the expiration of the thirty-five days if the contractor shows receipts and gives special bonds that all bills will be paid, and that no liens or other claims exist against the premises substantially complies with the statute. Yancy *v.* Morton, 94 Cal. 558, 29 Pac. 1111. The fact that the building contract, in providing for the payments, retains, until thirty-five days after the completion of the work, slightly less than the twenty-five per cent of the contract price required by statute does not render the owner personally liable for all labor and materials furnished, especially when more than twenty-five per cent was in fact actually retained. Stimson Mill Co. *v.* Riley, (Cal. 1895) 42 Pac. 1072.

4. Cal. Code Civ. Proc. § 1184; 3 Mills Annot. St. Colo. (1904) § 2868.

This is a penalty and not a statutory mode of acquiring a right against another. San Diego Lumber Co. *v.* Wooldredge, 90 Cal. 574, 27 Pac. 431. Consequently those who seek to inflict upon the owner a penalty for his failure to comply with the terms of the law must show clearly that the dereliction has occurred. The law must be construed against the exaction of the penalty if in reason it can be. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533.

A contract is not rendered void by a failure to comply with these requirements. Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92; San Diego Lumber Co. *v.* Wooldredge, 90 Cal. 574, 27 Pac. 431.

Where the contract price is less than one thousand dollars the California statute is not applicable. Denison *v.* Burrell, 119 Cal. 180, 51 Pac. 1.

5. *Colorado.*— Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519.

Illinois.— Davis, etc., Bldg., etc., Co. *v.* Colusa Dairy Assoc., 55 Ill. App. 591.

Iowa.— Reiley *v.* Ward, 4 Greene 21.

Kentucky.— Protection Ins. Co. *v.* Hall, 15 B. Mon. 411, especially if the agreement to pay in land is unenforceable.

Maryland.— McLaughlin *v.* Reinhart, 54 Md. 71, contract to accept one of houses built as part of compensation.

New York.— Dowdney *v.* McCullom, 59 N. Y. 367.

Pennsylvania.— Pierce *v.* Marple, 148 Pa. St. 69, 23 Atl. 1008, 33 Am. St. Rep. 808.

United States.— McMurray *v.* Brown, 91 U. S. 257, 23 L. ed. 321; Tennis Bros. Co. *v.* Wetzel, etc., R. Co., 140 Fed. 193, option to pay part of price in bonds, which were not tendered.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 98.

Who is an original contractor.— Under Cal. Code Civ. Proc. § 1184, declaring void all contracts for labor and materials expended on buildings, except that of the contractor, unless the whole contract price is payable in money, a painter who contracts to paint a hotel is an original contractor, and the contract is not void because part of the price is to be paid in land. Baird *v.* Peall, 92 Cal. 235, 28 Pac. 285 [*distinguishing* Schwartz *v.* Knight, 74 Cal. 432, 16 Pac. 235; Sparks *v.* Butte County Gravel Min. Co., 55 Cal. 389]. Distinction between contractors and subcontractors generally see *infra*, II, D, 7, c.

6. Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92.

7. Cameron *v.* Gebhard, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; Lyon *v.* Ozee, 66 Tex. 95, 17 S. W. 405; Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App.

it must also be privily acknowledged by the wife in the method usually required where she joins in her husband's deed, contract, etc.[8]

j. Contracts Including Non-Lienable Elements. It has been held that where an entire contract on a single consideration includes non-lienable as well as lienable elements no lien can be acquired thereunder,[9] but it is otherwise where the agreements are separate and distinct, although embodied in the same writing.[10]

k. Implied Contract or Consent — (I) *IN GENERAL.* In the absence of any statute requiring an express contract or consent, a mechanic's lien may as a general rule be predicated upon an implied contract with or consent of the owner of the property.[11] But the facts from which the inference of consent is to be drawn

1894) 26 S. W. 468; Walker *v.* House, (Tex. Civ. App. 1893) 24 S. W. 82; Ricker *v.* Schadt, 5 Tex. Civ. App. 460, 23 S. W. 907. Under Paschal Dig. Tex. art. 7112, the lien could be acquired under the contract of the husband alone. Miner *v.* Moore, 53 Tex. 224.

Excess over exemption.— In Mich. Comp. Laws, § 10,711, providing that where lands on which improvements are made are held and occupied as a homestead, the mechanic's lien provided for in the act shall attach to the lands and improvements if the improvements be made in pursuance of a written contract signed by both husband and wife, the word "homestead" is used in its constitutional sense, and the excess over the fifteen-hundred-dollar exemption provided for in the constitution is subject to mechanics' liens, although the contract for improvements is not signed by the wife. McAllister *v.* Des Rochers, 132 Mich. 381, 93 N. W. 887.

8. Cameron *v.* Gebhard, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; Lyon *v.* Ozee, 66 Tex. 95, 17 S. W. 405; Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 468; Walker *v.* House, (Tex. Civ. App. 1893) 24 S. W. 82; Ricker *v.* Schadt, 5 Tex. Civ. App. 460, 23 S. W. 907.

Wife's consent must precede purchase of material.— Lyon *v.* Ozee, 66 Tex. 95, 17 S. W. 405; Walker *v.* House, (Tex. Civ. App. 1893) 24 S. W. 82.

An acknowledgment by the wife after the work is commenced will give a right to a lien for what is subsequently done or furnished. Bexar Bldg., etc., Assoc., (Tex. Civ. App. App. 1894) 26 S. W. 468; Walker *v.* House, (Tex. Civ. App. 1893) 24 S. W. 82.

9. Adler *v.* World's Pastime Exposition Co., 126 Ill. 373, 18 N. E. 809; Getty *v.* Ames, 30 Oreg. 573, 48 Pac. 355, 60 Am. St. Rep. 835 [*following* Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54].

Under the Massachusetts statute where labor and materials are furnished under an entire contract for an entire price, and the lien cannot attach for the materials because of a failure to give the necessary notice to the owner, a lien not to exceed the entire contract price may be enforced for the labor alone, provided the value of such labor is distinctly shown. Smith *v.* Emerson, 126 Mass. 169. Prior to Mass. St. (1872) c. 318, the rule was otherwise. Mulrey *v.* Barrow, 11 Allen 152; Graves *v.* Bemiss, 8 Allen 573; Brewster *v.* Wyman, 5 Allen 405 note; Morrison *v.* Minot, 5 Allen 403. But if labor and materials were furnished and used in the erection of a building under an entire contract so far as the labor and materials were concerned, but with no stipulation for any definite price, a lien could, under the former statute, exist for the value of the labor, although there was none for the materials. Felton *v.* Minot, 7 Allen 412. Even under the present statute, where the labor is merely incidental to a contract to furnish materials in a certain condition, no lien can be enforced therefor when a lien cannot be had for the materials. Donaher *v.* Boston, 126 Mass. 300.

10. Fullmer *v.* Proust, 155 Pa. St. 275, 26 Atl. 543, 35 Am. St. Rep. 881, holding that where plaintiff agreed to sell defendant a vacant lot, and to build her a house thereon, both agreements being written on the same paper, but the consideration for each being separate, and payable at a different time; and plaintiff built the house, and then gave defendant a deed of the property, he was entitled to a mechanic's lien on the property for the amount due him for building the house.

11. *Colorado.*— Williams *v.* Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806.

Georgia.— See Reppard *v.* Morrison, 120 Ga. 28, 47 S. E. 554.

Illinois.— Cunningham *v.* Ferry, 74 Ill. 426.

Iowa.— Carney *v.* Cook, 80 Iowa 747, 45 N. W. 919.

Kansas.— Sturges *v.* Green, 27 Kan. 235.

Massachusetts.— Monaghan *v.* Goddard, 173 Mass. 468, 53 N. E. 895. *Contra*, under St. (1851) c. 343. Parker *v.* Anthony, 4 Gray 289.

Nebraska.— See Miller *v.* Neely, 59 Nebr. 539, 81 N. W. 443.

New York.— National Wall Paper Co. *v.* Sire, 163 N. Y. 122, 57 N. E. 293 [*reversing* 37 N. Y. App. Div. 405, 55 N. Y. Suppl. 1009]; Cowen *v.* Paddock, 137 N. Y. 188, 33 N. E. 154; Schmalz *v.* Mead, 125 N. Y. 188, 26 N. E. 251; Muldoon *v.* Pitt, 54 N. Y. 269; Henderson *v.* Wasserman, 12 N. Y. Suppl. 151; Richardson, etc., Co. *v.* Reid, 3 N. Y. Suppl. 224.

South Dakota.—Tom Sweeney Hardware Co. *v.* Gardner, 18 S. D. 166, 99 N. W. 1105.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 103.

Circumstances from which contract or consent implied see Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Steeves *v.* Sinclair,

must be such as to indicate a willingness at least on the part of the owner to have the improvements made, or an acquiescence in the means adopted for that purpose with knowledge of the object for which there employed;[12] a contract cannot be implied merely from the fact that the work is done on a building belonging to a person sought to be charged,[13] but the owner must do something or fail to do something, from which the contract or consent may be implied.[14]

(II) *ACQUIESCENCE IN OR FAILURE TO OBJECT TO IMPROVEMENTS.*[15] It has been laid down that where the owner of property knows that improvements are being made thereon and acquiesces therein or fails to make any objection thereto, his consent to such improvements will be implied, and he will be estopped to set up his title in order to defeat a mechanic's lien.[16] It has also been held that a lessor who, knowing of improvements by his lessee, fails to object thereto,[17] or a vendor under a contract of sale who acquiesces in improvements by the purchaser,[18]

171 N. Y. 676, 64 N. E. 1125; Fischer *v.* Jordan, 169 N. Y. 615, 62 N. E. 1095; Otis *v.* Dodd, 90 N. Y. 336; Gilmour *v.* Colcord, 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689; Hurd *v.* Wing, 93 N. Y. App. Div. 62, 86 N. Y. Suppl. 907; Rice *v.* Culver, 57 N. Y. App. Div. 552, 68 N. Y. Suppl. 24; Steeves *v.* Sinclair, 56 N. Y. App. Div. 448, 67 N. Y. Suppl. 776; Fisher *v.* Jordan, 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 286; Wollreich *v.* Fettretch, 4 N. Y. Suppl. 326.

12. National Wall Paper Co. *v.* Sire, 163 N. Y. 122, 57 N. E. 293 [*reversing* 37 N. Y. App. Div. 405, 55 N. Y. Suppl. 1009]; Cowen *v.* Paddock, 137 N. Y. 188, 33 N. Y. Suppl. 154; Berger Mfg. Co. *v.* Zabriskie, 75 N. Y. Suppl. 1038.

Facts showing consent.— Evidence that the owner of property was present at the making of a contract to construct an improvement on the property and almost constantly during the work, and that the money to pay for the construction was raised by a mortgage on the property, shows her consent to the work, as required by the Mechanics' Lien Law. Brunold *v.* Glasser, 25 Misc. (N. Y.) 285, 53 N. Y. Suppl. 1021. Where a contract for the sale of land to defendant provided that the vendor should complete a building then in process of construction thereon, which was unfinished, according to the existing contracts, defendant thereby impliedly consented that the contractors proceed with their contract; and hence they were entitled to a lien for labor and materials furnished thereunder subsequent to defendant's purchase, as against him. Pope *v.* Heckscher, 109 N. Y. App. Div. 495, 96 N. Y. Suppl. 533.

13. Stout *v.* McLachlin, 38 Kan. 120, 15 Pac. 902.

14. Nellis *v.* Bellinger, 6 Hun (N. Y.) 560; Eichler *v.* Warner, 46 Misc. (N. Y.) 246, 91 N. Y. Suppl. 793.

15. **Notice of non-liability** see *infra*, II, C, 8.

16. *Alabama.*— Hanchey *v.* Hurley, 129 Ala. 306, 30 So. 742.

Illinois.— Bastrup *v.* Prendergast, 179 Ill. 553, 53 N. E. 995, 70 Am. St. Rep. 128; Donaldson *v.* Holmes, 23 Ill. 85.

Indiana.— Lengelsen *v.* McGregor, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248; Cannon *v.* Helfrick, 99 Ind. 164.

Iowa.— Willverding *v.* Offineer, 87 Iowa 475, 54 N. W. 592.

Kentucky.— Phillips *v.* Clark, 4 Metc. 348, 83 Am. Dec. 471.

Nebraska.— Buckstaff *v.* Dunbar, 15 Nebr. 114, 17 N. W. 345.

Pennsylvania.— Evans *v.* Cunningham, 6 Pa. Co. Ct. 156.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 104.

Compare Bliss *v.* Patten, 5 R. I. 376.

The knowledge which will bind the owner of property must be the personal knowledge of the person sought to be charged or of his authorized agent. Shaw *v.* Young, 87 Me. 271, 32 Atl. 897.

Knowledge attributable to corporation.— Knowledge of a director is not attributable to the corporation (Lothian *v.* Wood, 55 Cal. 159), but the knowledge of the president is that of the corporation (Phelps *v.* Maxwell's Creek Gold Min. Co., 49 Cal. 336).

Where the statute requires a contract mere knowledge is not sufficient. Rust-Owen Lumber Co. *v.* Holt, 60 Nebr. 80, 82 N. W. 112, 83 Am. St. Rep. 512.

In New York mere acquiescence in the erection or alteration, with knowledge, is not sufficient evidence of the consent which the statute requires. De Klyn *v.* Gould, 165 N. Y. 282, 59 N. E. 95, 80 Am. St. Rep. 719 [*affirming* 34 N. Y. App. Div. 436, 54 N. Y. Suppl. 345, and *explaining* National Wall Paper Co. *v.* Sire, 163 N. Y. 122, 57 N. E. 293 (*reversing* 37 N. Y. App. Div. 405, 55 N. Y. Suppl. 1009)]; Berger Mfg. Co. *v.* Zabriskie, 75 N. Y. Suppl. 1038. But see Husted *v.* Mathes, 77 N. Y. 388; Butler *v.* Flynn, 51 N. Y. App. Div. 225, 64 N. Y. Suppl. 877 [*followed* in Fischer *v.* Jordan, 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 286 (*affirmed* in 169 N. Y. 615, 62 N. E. 1095)]; Nellis *v.* Bellinger, 6 Hun 560; Hellwig *v.* Blumenberg, 5 Silv. Sup. 290, 7 N. Y. Suppl. 746; Kealey *v.* Murray, 15 N. Y. Suppl. 403.

17. Wells *v.* Sherwin, 92 Ill. App. 282; Shaw *v.* Young, 87 Me. 271, 32 Atl. 897. *Compare* McRae *v.* Murdock Campbell Co., 94 Ill. App. 105. See *supra*, II, C, 3, g.

18. Weber *v.* Weatherby, 34 Md. 656; Leonard *v.* Cook, (N. J. Ch. 1890) 20 Atl. 855. See *supra*, II, C, 3, i.

thereby consents so as to render his interest subject to a lien; but in the absence of some statutory provision on the subject the better rule would appear to be that a lessor[19] or vendor[20] should not be held to subject his interest to a lien by mere failure to object to improvements by his vendee or lessee, for not only is he in many instances powerless to prevent the making of the improvements,[21] but the statutes give a lien therefor on the estate or interest of the person under contract with whom the improvements are made, and the mechanic or materialman must be supposed to rely on such lien and should not be given by construction a lien on the estate in reversion.[22] The mere fact that a wife knows that the work is being done and does not forbid it is not usually considered sufficient to subject her property to a lien therefor.[23]

6. Ratification. Even though the owner did not originally contract for or consent to the performance of the work or the furnishing of the material, yet he may by his acts ratify the same and thus subject his property to the lien.[24]

7. Filing or Recording Contract — a. In General. In some states the filing or recording of the contract is provided for by statute.[25] The filing of the contract

19. Sunshine *v.* Morgan, 39 Misc. (N. Y.) 778, 81 N. Y. Suppl. 278; Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 31 N. Y. Suppl. 433; McCauley *v.* Hatfield, 28 N. Y. Suppl. 648; Havens *v.* West Side Electric Light Co., 17 N. Y. Suppl. 580 [*affirmed* in 20 N. Y. Suppl. 764]; Graham *v.* Williams, 9 Ont. 458 [*affirming* 8 Ont. 478].

20. Callaway *v.* Freeman, 29 Ga. 408; Courtemanche *v.* Blackstone Valley St. R. Co., 170 Mass. 50, 48 N. E. 937, 64 Am. St. Rep. 275; Saunders *v.* Bennett, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456; Vosseller *v.* Slater, 25 N. Y. App. Div. 368, 49 N. Y. Suppl. 478. *Compare* Kealey *v.* Murray, 15 N. Y. Suppl. 403, where it was provided in the contract that, if the purchaser failed to perform, the improvements should belong to the vendor.

Fact bearing on question of consent.— The omission of the owner to object to improvements made upon his premises by a tenant when he has knowledge of the circumstances under which they are being made is an important fact bearing upon the question of consent to the improvements. National Wall Paper Co. *v.* Sire, 163 N. Y. 122, 57 N. E. 293 [*reversing* 37 N. Y. App. Div. 405, 37 N. E. 1009].

21. Callaway *v.* Freeman, 29 Ga. 408; Vosseller *v.* Slater, 25 N. Y. App. Div. 368, 49 N. Y. Suppl. 478.

22. See McCue *v.* Whitwell, 156 Mass. 205, 30 N. E. 1134; Conant *v.* Brackett, 112 Mass. 18; Francis *v.* Sayles, 101 Mass. 435.

23. *Alabama.*— Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194.

Arkansas.— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.

Colorado.— Groth *v.* Stahl, 3 Colo. App. 8, 30 Pac. 1051.

Connecticut.— Lyon *v.* Champion, 62 Conn. 75, 25 Atl. 392; Flannery *v.* Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36.

Illinois.— Wilson *v.* Schuck, 5 Ill. App. 572. *Compare* Bruck *v.* Bowermaster, 36 Ill. App. 510.

Missouri.— Duross *v.* Broderick, 78 Mo. App. 260 (where the wife did not know at the time that the title to the real estate was in her); Kline *v.* Perry, 51 Mo. App. 422; Garnett *v.* Berry, 3 Mo. App. 197.

Nebraska.— Rust-Owen Lumber Co. *v.* Holt, 60 Nebr. 80, 82 N. W. 112, 83 Am. St. Rep. 512; Bradford *v.* Higgins, 31 Nebr. 192, 47 N. W. 749.

Texas.— Blevins *v.* Cameron, 2 Tex. Unrep. Cas. 461.

Utah.— Morrison *v.* Clark, 20 Utah 432, 59 Pac. 235, 77 Am. St. Rep. 924.

Wisconsin.— Coorsen *v.* Ziehl, 103 Wis. 381, 79 N. W. 562; Lauer *v.* Bandow, 43 Wis. 556, 28 Am. Rep. 571.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 78, 85, 106.

Contra.— Husted *v.* Mathes, 77 N. Y. 388; McDougall *v.* Nast, 5 N. Y. St. 144.

24. Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548 (acknowledging expenses incurred as a proper charge against himself); Kerrigan *v.* Fielding, 47 N. Y. App. Div. 246, 62 N. Y. Suppl. 115 (erection by grantee of buildings on foundations built by a contractor under an agreement with the grantor); Bankard *v.* Shaw, 23 Pa. Co. Ct. 561, 16 Montg. Co. Rep. 137 (giving note); Greene *v.* McDonald, 70 Vt. 372, 40 Atl. 1035 (assuming indebtedness).

Mere occupation by a wife with her husband of the building erected by him is not conclusive as a ratification. Garnett *v.* Berry, 3 Mo. App. 197; Rust-Owen Lumber Co. *v.* Holt, 60 Nebr. 80, 82 N. W. 112, 83 Am. St. Rep. 512.

Retention of the contractor's bill does not constitute ratification. Engfer *v.* Roemer, 71 Wis. 11, 36 N. W. 618.

Allowing the use of materials is not a ratification of the contractor's unauthorized contract therefor. New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892.

25. See Foster *v.* Stone, 20 Pick. (Mass.) 542; Buck *v.* Brian, 2 How. (Miss.) 874; and *infra*, II, C, 7, b–f.

Recording without intent to create lien.— Where the statute gave a lien when the building contract was recorded, and plain-

operates as notice of the lien to subsequent purchasers.[26] The death of the owner before the contract is recorded does not prevent the lien from attaching if the contract is recorded in the proper time.[27] Where the statute requires the contract to be recorded, and a contract is altered after being recorded but the alteration is not recorded, there can be no lien for what is done under the altered contract.[28] A statute providing that one whose contract is not filed and registered shall not be entitled to a lien does not take away the right of action personally against the one with whom the contract was made.[29]

b. California and Colorado Statutes. In California[30] and Colorado,[31] where a written contract is necessary,[32] either the contract itself[33] or a memorandum thereof[34] setting forth the names of all the parties to the contract,[35] and containing a description of the property to be affected thereby[36] and a statement of the

tiff refused to proceed unless the contract was recorded, whereupon defendant caused this to be done, but without being aware of the legal consequences of his act, and without any intent to give a lien, the intent was immaterial and there was a good lien, there being no pretense of fraud or misrepresentation of the effect of the record by plaintiff. Iaege *v.* Brossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

Pa. Act, April 3, 1872, requiring a building contract to be recorded within fifteen days, etc., is complied with by recording in a deed book, no other being specified in the statute. Glading *v.* Frick, 88 Pa. St. 460.

26. Buck *v.* Brian, 2 How. (Miss.) 874.

27. Foster *v.* Stone, 20 Pick. (Mass.) 542.

28. McClallan *v.* Smith, 11 Cush. (Mass.) 238.

29. Davidson *v.* Campbell, 5 Manitoba 250.

30. See Cal. Code Civ. Proc. § 1183.

The object of the statute is twofold: (1) As a security for the owner, who is thereby shielded from liability to subcontractors, laborers, and materialmen beyond his contract price; and (2) to afford information to all others furnishing materials or performing services in or about the contemplated improvements upon which to predicate an opinion founded upon the value of the property, the price to be paid, and the dates of payment, as to whether the contract price is such as will probably be adequate security, and the lien therefor given to them by the statute sufficient to warrant them in bestowing their labor or furnishing materials for the proposed improvement. Greig *v.* Riordan, 99 Cal. 316, 33 Pac. 913. See also Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629.

31. 3 Mills Annot. St. Colo. (1904) § 2867. See Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786.

32. See *supra*, II, C, 5, d.

Failure of contract to state aggregate price. — Where a contract for plastering specified the prices per square yard and the work to be done at that figure amounted to much more than one thousand dollars and defendant had paid over two thousand dollars under the contract, he was not relieved from the necessity of filing the contract because it did not state the aggregate price. Smith *v.* Bradbury, 148 Cal. 41, 82 Pac. 367.

33. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896.

The contract of a subcontractor or materialman need not be filed for record. Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

A person who agrees to set up a steam plant in a factory under a written contract is not a "contractor," within Cal. Code Civ. Proc. § 1183, relating to mechanics' liens, and providing that the contract must be in writing, and recorded, where the only work to be done on the premises is incidental to the delivery of the machinery and placing it in position. Hinckley *v.* Field's Biscuit, etc., Co., 91 Cal. 136, 27 Pac. 594.

34. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897. Where a memorandum is filed instead of the contract itself, such memorandum must contain all matters which are prescribed in the statute as the equivalent of the contract. Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629.

The word "memorandum" ex vi termini implies that it need not contain a full and particular statement of the contract. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896.

The recording of a verbatim copy of the building contract, with sun-print copies of the plans and drawings, marked "Memorandum of contract," and consisting of three parts, namely, the covenants of the parties, the specifications, and the drawings or plans, the first of which shows the signatures of the parties, but not the last two, as in the original, and by which, without the aid of oral evidence, the building and the ground on which it is situated can be identified and the general character of the work ascertained, and which contains everything else required by the statute, is a sufficient compliance with Cal. Code Civ. Proc. § 1183. L. W. Blinn Lumber Co. *v.* Walker, 129 Cal. 62, 61 Pac. 664 [*explaining* San Francisco Lumber Co. *v.* O'Neil, 120 Cal. 455, 52 Pac. 728].

35. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896; Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

Memorandum need not be signed or subscribed by parties. — Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896.

36. Butterworth *v.* Levy, 104 Cal. 506, 38 Pa. 897.

A slight misdescription of the premises will

general character of the work to be done,[37] and of the total amount to be paid thereunder,[38] and the amounts of all partial payments,[39] together with the times when such payments shall be due and payable,[40] must be filed in the office of the county recorder[41] before the work is commenced.[42] Plans and specifications must be filed with the contract where they are made a part thereof or referred to therein,[43] or where without them the contract is so indefinite and uncertain as not to comply with the statutory requirements.[44] Where a memorandum is filed instead of the contract, the filing of plans and specifications is not necessary if the memorandum does not disclose that there are any,[45] but a memorandum which, as part of the general description of the work, refers to plans and specifications which are not filed with it is insufficient.[46] Where the contract or memorandum is not filed or the memorandum is not sufficient under the statute, the contract is void and the contractor is not entitled to any lien;[47] but all persons other than the contractor who have furnished labor and material for the building or improvement are deemed to have done and furnished the same at the personal instance of

not destroy the sufficiency of the memorandum. Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92.

37. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896; Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

The words "general character" do not mean a special, particular, minute, or detailed description of the work to be done. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896.

Insufficient memoranda.— A memorandum describing the work as "a two story building 51.0 by 25.0" (Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897), describing the building as "three stories high" (Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629), reciting that the contractor is to furnish the material and labor for the erection of a "one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans . . . by the construction committee" (Wood *v.* Oakland, etc., Rapid Transit Co., 107 Cal. 500, 40 Pac. 806), or stating that "the building is to be a frame building" (Blyth *v.* Torre, (Cal. 1894) 38 Pac. 639) is not sufficient.

Memorandum held sufficient.— A memorandum reciting that the general character of the work to be done was raising, and making alterations, additions, and repairs to, a two-story frame building, to be used for two tenements, etc., sufficiently showed the general character of the work to be done. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896.

38. Snell *v.* Bradbury, 139 Cal. 379, 73 Pac. 150 (this requirement applies only to the memorandum, and where the contract itself is filed it is no objection that the contract does not state the total amount to be paid); Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

39. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

40. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

Statement held sufficient.— The statement, "Said Helm to be paid five thousand five hundred dollars for all work, labor, and material; three fourths thereof payable in installments as work progressed. . . . The other one fourth payable in thirty-five days after the final completion of the contract," is sufficient. Reed *v.* Norton, 90 Cal. 590, 602, 26 Pac. 767, 27 Pac. 426.

41. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

42. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

Trivial work before filing.—Where the memorandum of contract was filed at ten thirty o'clock A. M., and it was claimed that the work was commenced about eight or eight thirty A. M. of the same day, but the evidence thereof was doubtful, and the work, even if any was done, was of a trivial nature, a finding that the work commenced before the filing will not be sustained. Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

43. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533; Pierce *v.* Birkholm, 115 Cal. 657, 47 Pac. 681; Yancy *v.* Morton, 94 Cal. 558, 29 Pac. 1111; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Holland *v.* Wilson, 76 Cal. 434, 18 Pac. 412; Worden *v.* Hammond, 37 Cal. 61.

Plans and specifications which do not correspond with the reference in the contract cannot be shown by extrinsic evidence to be the plans and specifications referred to. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533.

44. Greig *v.* Riordan, 99 Cal. 316, 33 Pac. 913, even though contract does not expressly refer to plans and specifications.

45. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896. See also Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

46. Wood *v.* Oakland, etc., Transit Co., 107 Cal. 500, 40 Pac. 806; Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897; Dunlop *v.* Kennedy, 102 Cal. 443, 36 Pac. 765; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629.

47. Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840; Spinney *v.* Griffith, 98 Cal. 149, 32 Pac. 974; Morris *v.* Wilson, 97 Cal. 644, 32 Pac. 801.

the owner, and they have a lien for the value thereof regardless of the contract price.[48]

e. Louisiana Statute. In Louisiana if the demand exceeds five hundred dollars the contract must be registered with the recorder of mortgages;[49] and persons furnishing work or materials are entitled to a lien only in so far as they have recorded the act containing the bargains they have made,[50] or a detailed and properly attested statement of the amount due.[51] The lien is valid against third persons from the date of the recording of the act or evidence of indebtedness,[52] and without such recording has no effect against third persons.[53] In order to give preference over a mortgagee it must be recorded within seven days from its date, where registry in made in the parish where the act is passed.[54]

48. Dunlop *v.* Kennedy, 102 Cal. 443, 36 Pac. 765; Greig *v.* Riordan, 99 Cal. 316, 33 Pac. 913; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; San Diego Lumber Co. *v.* Wooldredge, 90 Cal. 574, 27 Pac. 431; Davis-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860; Kellogg *v.* Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588 [*distinguishing* as being decided under earlier statutes Wiggins *v.* Bridge, 70 Cal. 437, 11 Pac. 754; Wilson *v.* Barnard, 67 Cal. 422, 7 Pac. 845; O'Donnell *v.* Kramer, 65 Cal. 353, 4 Pac. 204; Whittier *v.* Hollister, 64 Cal. 283, 30 Pac. 846; Renton *v.* Conley, 49 Cal. 185; Dore *v.* Sellers, 27 Cal. 588; Bowen *v.* Aubrey, 22 Cal. 566; McAlpin *v.* Duncan, 16 Cal. 126; Knowles *v.* Joost, 13 Cal. 620; Cahoon *v.* Levy, 6 Cal. 295, 65 Am. Dec. 515; Latson *v.* Nelson, 11 Pac. L. J. 589].

Such a provision is within the power of the legislature.— Kellogg *v.* Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588.

Contract not complying with statutory requirements.— The provision of the Colorado Mechanics' Lien Law necessitating the record of the contracts therein provided for between the owner and principal contractor, in order to bind subcontractors by their terms, relates merely to the statutory contract, and contracts materially different in terms from the statutory contract do not bind subcontractors or affect their rights, irrespective of the questions of their notice or knowledge of the terms of such contracts. Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786.

Where materials were furnished before the contract was recorded, the materialman is entitled to a lien for the value thereof. Giant Powder Co. *v.* San Diego Flume Co., 97 Cal. 263, 32 Pac. 172.

49. Merrick Civ. Code La. art. 2775; Murray *v.* Sweeney, 48 La. Ann. 760, 19 So. 753 (as against third persons); McRae *v.* His Creditors, 16 La. Ann. 305; Whitla *v.* Taylor, 6 La. Ann. 480; Spence *v.* Brooks, 6 La. Ann. 63; State *v.* Mexican Gulf R. Co., 5 La. Ann. 333; First Municipality *v.* Hall, 2 La. Ann. 549; Turner *v.* Parker, 10 Rob. (La.) 154; Taylor *v.* Crain, 16 La. 290; Oddie *v.* His Creditors, 6 Mart. N. S. (La.) 473.

The object of registry is notice.— When an instrument is recorded, whose registry is intended to affect the rights of third persons, as a privilege, it should contain and show upon its face, and not by reference to documents to be found elsewhere, or to proceedings to be instituted at some future time, all the essential facts which would go to create and fix the privilege. Wheelwright *v.* St. Louis, etc., Transp. Co., 47 La. Ann. 533, 17 So. 133.

Erasure of registry.—Where workmen have their contract with an undertaker recorded, the proprietor who has contracted with the latter cannot have the registry erased, unless contradictorily with the workmen; nor can he insist on a certificate omitting mention of such registry. Florence *v.* Mercier, 2 La. 487.

Formerly recording was not necessary.— Millandon *v.* New Orleans Water Co., 11 Mart. (La.) 278; Turpin *v.* His Creditors, 9 Mart. (La.) 562; Lafon *v.* Saddler, 4 Mart. (La.) 476.

Statute not retroactive.— Turpin *v.* His Creditors, 9 Mart. (La.) 562.

50. Merrick Civ. Code La. art. 3272.

The recording of notes, given in payment for materials after they have been furnished, will not answer the purpose of the law. Cox's Succession, 32 La. Ann. 1035.

51. Merrick Civ. Code La. art. 3272; State *v.* Recorder, 28 La. Ann. 534.

52. Merrick Civ. Code La. art. 3273.

By La. Acts (1813), No. 49, a building contract must be registered within ten days, otherwise it would not affect third persons, even from the date of a subsequent registry. Jenkins *v.* Nelson's Syndics, 11 Mart. (La.) 437.

53. Merrick Civ. Code La. art. 3274; Murray *v.* Sweeney, 48 La. Ann. 760, 19 So. 753; Van Loan *v.* Heffner, 30 La. Ann. 1213; Kohn *v.* McHatton, 20 La. Ann. 485.

As between the parties there may be a lien without recording the contract. Roberts *v.* Hyde, 15 La. Ann. 51; Townsend *v.* Harrison, 2 La. Ann. 174.

54. Merrick Civ. Code La. art. 3274; Murray *v.* Sweeney, 48 La. Ann. 760, 19 So. 753; Wheelwright *v.* St. Louis, etc., Transp. Co., 47 La. Ann. 533, 17 So. 133.

Formerly it was required that the contract should be recorded on the day it was entered into in order to obtain priority over mortgagees. State *v.* Recorder, 28 La. Ann. 534; Citizens' Bank *v.* St. Louis Hotel Assoc., 27 La. Ann. 460.

d. New Jersey Statute. Under the New Jersey statute,[55] where a building is erected in whole or in part by contract in writing, the owner may protect the building and the land on which it stands from a lien in favor of any person except the original contractor[56] for work done or materials furnished pursuant to the contract,[57] by filing the contract[58] or a duplicate thereof, together with the specifications accompanying the same,[59] or a copy or copies thereof in the office of the clerk of the county in which the building is situated before the work is done or the materials furnished.[60] Unless the contract is filed according to these requirements the person furnishing labor or materials to the contractor can acquire a lien therefor.[61]

Impossibility of recording.— The requirement of law, that a notarial act or other evidence of debt, to have a preference over other debts secured by mortgage, must be recorded on the day that the contract was entered into, is not affected by the fact that under the circumstances it was impossible so to record it. Bird *v.* Lobdell, 28 La. Ann. 305.

Where the contract is recorded before a mortgage it has priority, although not recorded within the statutory time. State *v.* Recorder, 28 La. Ann. 534.

55. N. J. Laws (1898), c. 226, § 2.

56. See Willetts *v.* Earl, 53 N. J. L. 270, 21 Atl. 327.

The abandonment of the contract does not entitle one who furnished labor and materials pursuant thereto to a lien. Willetts *v.* Earl, 53 N. J. L. 270, 21 Atl. 327 [*reversed* on other grounds in 56 N. J. L. 334, 29 Atl. 198].

Conveyance to contractor.— Where a building contract was duly filed, and after the building was completed the premises were *bona fide* conveyed by the owner to the contractor, a materialman had no lien on the premises for materials furnished in erecting the building thereon, and a judgment recovered on such claim gave no greater right. Scudder *v.* Harden, 31 N. J. Eq. 503.

57. La Foucherie *v.* Knutzen, 58 N. J. L. 234, 33 Atl. 203.

If the work or materials are not furnished pursuant to the contract a lien may be acquired therefor. Murphey-Hardy Lumber Co. *v.* Nicholas, 66 N. J. L. 414, 49 Atl. 447; Willetts *v.* Earl, 53 N. J. L. 270, 21 Atl. 327 [*reversed* on other grounds in 56 N. J. L. 334, 29 Atl. 198].

Where the owner buys the materials himself, and they are furnished on his credit, and not that of the contractor, the statute does not apply. Mechanics' Mut. Loan Assoc. *v.* Albertson, 23 N. J. Eq. 318.

58. See Young *v.* Wilson, 44 N. J. L. 157.

The real contract or a duplicate thereof must be filed. Thus where a writing purporting to be the contract and filed with the county clerk stated the price of the building as more than the real price agreed on by the parties, the property was not protected from liens. Murphey-Hardy Lumber Co. *v.* Nichols, 66 N. J. L. 414, 49 Atl. 447.

The filing of a contract signed by an agent of the owner in his own name is sufficient to protect the property, there being no fraudulent intent. Earle *v.* Willetts, 56 N. J. L. 334, 29 Atl. 198 [*reversing* 53 N. J. L. 270, 21 Atl. 327].

The contract must be a real, not a fictitious, bargain on the part of an owner who, with a purpose himself to erect a building, employs, for a price, the agency of another to do it for him. Accordingly where A purchased land on which to build a house, and put the title in B's name, and a contract was then executed between A and B, by which A agreed to build a house upon the land for B for a certain sum, to be secured by mortgage on the property, this contract, being a mere fiction, would not, although filed, prevent liens from attaching in favor of A's workmen, and a purchaser with notice of the facts took the title subject to such liens. Young *v.* Wilson, 44 N. J. L. 157.

59. English *v.* Warren, 65 N. J. Eq. 30, 54 Atl. 860 [*citing* Weaver *v.* Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858], the statute is peremptory.

Under the old law, which did not expressly require the specifications to be filed, the necessity of filing the specifications with the contract in order to gain the benefit of the statute was held to depend upon whether or not it was necessary to resort to such specifications in order to ascertain how much of the building the contract covered; where all the work was to be done and all the materials were to be furnished by the contractor the filing of the contract alone was sufficient to protect the building from liens, but where the contract was limited to a part of the work upon the building which could only be ascertained by an inspection of the specifications it was necessary to file such specifications as well as the contract. La Foucherie *v.* Knutzen, 58 N. J. L. 234, 33 Atl. 203; Pimlott *v.* Hall, 55 N. J. L. 192, 26 Atl. 94; Budd *v.* Lucky, 28 N. J. L. 484; Babbitt *v.* Condon, 27 N. J. L. 154; Ayres *v.* Revere, 25 N. J. L. 474; Freedman *v.* Sandknop, 53 N. J. Eq. 243, 31 Atl. 232.

60. La Foucherie *v.* Knutzen, 58 N. J. L. 234, 33 Atl. 203, holding that under the former Mechanics' Lien Law as amended by the act of March 29, 1892, which did not state when the filing should take place, it was obligatory on the owner in order to have his building exempted from the liens of mechanics and materialmen, to file his contract at or before the time when such building was begun.

61. Stewart Contracting Co. *v.* Trenton,

e. Texas Statute. The Texas statute[62] provides that the contract must be filed within a certain time in order to secure a lien,[63] but that if the claimant has no written contract it shall be sufficient for him to file an itemized and verified statement of his claim.[64] Under this statute the lien is not defeated by failure to file the contract where, although it is in writing, it is in the possession of the other party who refuses to surrender it to the claimant to be filed;[65] but in such case it is sufficient for the claimant to file an itemized and verified statement of his claim.[66] So far as one who contracts directly with the owner is concerned the requirement of the filing of the contract is only intended to protect the contractor as against subsequent purchasers, mortgagees, and lien-holders in good faith without notice, by furnishing constructive notice to the world where such matters can be found recorded, and a failure to file the contract does not defeat the lien as against the owner or any other person charged with notice;[67] but a subcon-

etc., R. Co., 71 N. J. L. 568, 60 Atl. 405 (notwithstanding a provision against liens in the unfiled contract); Buckley *v.* Hann, 68 N. J. L. 624, 54 Atl. 825; Weaver *v.* Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858.

62. Sayles Civ. St. Tex. (1897) § 3295.

63. Warner Elevator Mfg. Co. *v.* Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499 [*reversing* (Civ. App. 1894) 28 S. W. 405]; Cameron *v.* Marshall, 65 Tex. 7; Faber *v.* Muir, 27 Tex. Civ. App. 27, 64 S. W. 938; Baxter Lumber Co. *v.* Nickell, 24 Tex. Civ. App. 519, 60 S. W. 450.

A bond embodying all the terms of the contract and conditioned for its faithful performance on the part of the mechanic, signed only by him and his sureties but accepted and acted on by both parties, is a written contract, and if duly recorded fixes the mechanic's lien. Martin *v.* Roberts, 57 Tex. 564.

The recording of a note from the owner of a house, which recites that it is "in settlement for account for lumber," is not a sufficient compliance with the statute to preserve the lien. Lyon *v.* Elser, 72 Tex. 304, 12 S. W. 177. See also Lyon *v.* Ozee, 66 Tex. 95, 17 S. W. 405.

The omission in the record of some of the specifications appended to a bond constituting the contract between the parties is immaterial. Martin *v.* Roberts, 57 Tex. 564.

Time of filing.— The provision of the statute that it shall be the duty of the contractor "within four months after . . . the indebtedness shall have accrued to file his contract," etc., does not require the contract to be filed after the indebtedness accrues in order to secure the lien, but merely means that the filing of it later than four months after that time will not have the effect to secure the lien. It is not inconsistent with the statute to file the contract at the time it is made, but such a filing is a compliance with the statute. Claes *v.* Dallas Homestead, etc., Assoc., 83 Tex. 50, 18 S. W. 421.

Where an express lien is given by the contract it need not be recorded within the time prescribed by statute for fixing the mechanic's lien. Farrell *v.* Palestine Loan Assoc., (Tex. Civ. App. 1895) 30 S. W. 814; Phelps, etc., Windmill Co. *v.* Parker, (Tex. Civ. App. 1895) 30 S. W. 365.

64. Warner Elevator Mfg. Co. *v.* Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499 [*reversing* (Civ. App. 1894) 28 S. W. 405].

An original contractor may file a verified account to secure a lien when he has no written contract. Whiteselle *v.* Texas Loan Agency, (Tex. Civ. App. 1894) 27 S. W. 309.

What is a written contract.— Where a contract was contained in an offer in writing and in an acceptance by telegram, one claiming a mechanic's lien under it, who had possession of the telegram only, while the owner of the building had the offer, did not "have" a written contract, within the meaning of Tex. Rev. Civ. St. art. 3165, providing that, if the lien claimant "have" no written contract, it shall be sufficient to file an itemized account of the claim. Warner Elevator Mfg. Co. *v.* Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499 [*reversing* (Civ. App. 1894) 28 S. W. 405].

65. Warner Elevator Mfg. Co. *v.* Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499 [*reversing* (Civ. App. 1894) 28 S. W. 405, and *followed* in Parks *v.* Tippie, (Tex. Civ. App. 1896) 34 S. W. 676; Strang *v.* Pray, (Tex. Civ. App. 1896) 34 S. W. 666 (*affirmed* in 89 Tex. 525, 35 S. W. 1054)].

Where the contract consisted of letters, some of which were written by the lienor and were not in his possession, he could fix his lien by filing a bill of items. Riter *v.* Houston Oil Refining, etc., Co., 19 Tex. Civ. App. 516, 48 S. W. 758.

66. Warner Elevator Mfg. Co. *v.* Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499 [*reversing* (Civ. App. 1894) 28 S. W. 405].

67. Johnson *v.* Amarillo Imp. Co., 88 Tex. 505, 31 S. W. 503; Guarantee Sav., etc., Co. *v.* Cash, (Tex. Civ. App. 1905) 87 S. W. 749; June *v.* Doke, 35 Tex. Civ. App. 240, 80 S. W. 402; Farmers', etc., Nat. Bank *v.* Taylor, (Tex. Civ. App. 1897) 40 S. W. 876, 966; Strang *v.* Pray, (Tex. Civ. App. 1896) 34 S. W. 666 [*affirmed* in 89 Tex. 525, 35 S. W. 1054]; Phelps, etc., Windmill Co. *v.* Parker, (Tex. Civ. App. 1895) 30 S. W. 365.

tractor acquires no lien unless he files his contract or an itemized account of his claim.[68]

f. West Virginia Statute. Under the West Virginia statute[69] the owner may limit his liability so that the amounts to be paid by him shall not exceed in the aggregate the price stipulated in the contract between himself and the contractor by having the contract or so much thereof as shows the contract price and the times of its payment recorded in the office of the clerk of the county court of the county where the building or structure is situated prior to the performance of the labor or the furnishing of the material.[70]

8. Notice by Owner of Non-Liability.[71] Under some statutes, where the owner knows that buildings are being erected or improvements are being made on his property, his estate is subject to a mechanic's lien, unless within a specified time after obtaining such knowledge he gives notice that he will not be responsible therefor.[72] Such statutes refer to the owner of the legal title to the land and not to the person who causes the building to be constructed.[73] The holder of a vendor's

The lien of an original contractor is given by the constitution, and that instrument does not require filing and recording as a condition precedent to the fixing of the lien, as does the statute in cases where the party seeking to fix the lien is other than an original contractor. Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160. See also Strang *v.* Pray, 89 Tex. 525, 35 S. W. 1054 [*affirming* (Civ. App. 1896) 34 S. W. 666].

68. Cameron *v.* Terrell, (Tex. Civ. App. 1896) 36 S. W. 142. See also Strang *v.* Pray, 89 Tex. 525, 35 S. W. 1054 [*affirming* (Civ. App. 1896) 34 S. W. 666]; Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160.

69. W. Va. Code (1906), § 3114.

70. *In re* Hobbs, 145 Fed. 211.

The contract need not be acknowledged in order to be entitled to record under the statute. *In re* Hobbs, 145 Fed. 211.

71. **Implied contract arising from failure to object to improvements** see *supra*, II, C, 5, k, (II).

72. *California.*— Ah Louis *v.* Harwood, 140 Cal. 500, 71 Pac. 41; Evans *v.* Judson, 120 Cal. 282, 52 Pac. 585; Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555; Harlan *v.* Stufflebeem, 87 Cal. 508, 25 Pac. 686; West Coast Lumber Co. *v.* Apfield, 86 Cal. 335, 24 Pac. 993; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231. *Compare* Santa Cruz Rock Pavement Co. *v.* Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174.

Colorado.— Seely *v.* Neill, (1906) 86 Pac. 334.

Massachusetts.— See Shaw *v.* Tompson, 105 Mass. 345.

Minnesota.— Congdon *v.* Cook, 55 Minn. 1, 56 N. W. 253 (holding that Laws (1889), c. 200, § 5, applies to a lessor and is constitutional); Wheaton *v.* Berg, 50 Minn. 525, 52 N. W. 926; Martin Lumber Co. *v.* Howard, 49 Minn. 404, 52 N. W. 34.

Nevada.— Gould *v.* Wise, 18 Nev. 253, 3 Pac. 30.

Oregon.— Marshall *v.* Cardinell, 46 Oreg. 410, 80 Pac. 652; Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454; Allen *v.* Rowe, 19 Oreg. 188, 23 Pac. 901.

Washington.— Cutter *v.* Striegel, 4 Wash. 346, 30 Pac. 326.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 111.

Such a statute is constitutional, as it only prescribes what shall be evidence of the owner's consent and does not permit a lien to attach without his consent. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

Right of tenant to remove building.— A landlord who has failed to post the required notice cannot be heard to say that the tenants have the right to remove the building at the expiration of their term, and thereby deprive the materialmen of their liens on his land for material furnished for the building. West Coast Lumber Co. *v.* Apfield, 86 Cal. 335, 24 Pac. 993.

Time running from commencement of work. — Under Cal. Code Civ. Proc. § 1192, releasing an owner of land from mechanics' liens if he shall "within three days after he shall have obtained knowledge of the construction . . . or the intended construction" post on the land a notice disaffirming liability, such notice may be posted within three days after construction is actually commenced on leased land, although its owner had knowledge for a longer period of the intention to construct. Birch *v.* Magic Transit Co., 139 Cal. 496, 73 Pac. 238.

When notice ineffectual.— Where a tenant contracts with the landlord to build or repair buildings for compensation to be made by the landlord, either in money or the occupation and use of the premises, the tenant is the landlord's agent, and notice by the landlord to the mechanics that they must look to the tenant for compensation does not destroy their right to the security of the building. Hall *v.* Parker, 94 Pa. St. 109 [*affirming* 14 Phila. 619].

73. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454 [*following* West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231]. But *compare* St. Paul, etc., Lumber Co. *v.* Bolton,

lien[74] or a mortgagee[75] is not required to give any notice in order to prevent a lien from attaching to his interest. Knowledge of the owner must be shown in order to charge him with a lien,[76] but the burden of excusing a default to comply with the law in this respect is upon the landowner.[77] The usual requirement is that a notice of non-liability shall be posted in a conspicuous place in the building or on the property,[78] and kept continuously posted.[79] Orally forbidding the performance of labor will not prevent a lien from attaching therefor where the statute requires notice in writing.[80]

D. Persons Entitled to Lien[81] — **1. In General.** While the mechanics' lien statutes originated in a design to protect mechanics, in the proper sense of that term,[82] and to secure them payment for their labor,[83] the policy of the law has been very considerably extended and these statutes are generally not confined to mechanics, but extend to all persons who have made repairs or improvements upon the estate of another under contract with or at the request of the owner.[84]

5 Wash. 763, 32 Pac. 787, holding that where a person purchases land by taking a bond for a deed duly recorded and erects a building thereon, the owner of the legal title, although he has not posted the notice referred to in Wash. St. § 1761, has a lien on land superior to the lien for materials furnished subsequent to the recording of the bond, since such owner stands in the same position as if he had conveyed the land outright and taken a mortgage back, and the purchaser of the bond title and not the owner of the legal title is the owner referred to in the statute.

74. Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397.

75. Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397; Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 5 Pac. 85; Martin Lumber Co. *v.* Howard, 49 Minn. 404, 52 N. W. 34; Capital Lumbering Co. *v.* Ryan, 34 Oreg. 73, 54 Pac. 1093. See also St. Paul, etc., Lumber Co. *v.* Bolton, 5 Wash. 763, 32 Pac. 787. *Aliter* as to holder of trust deed conveying legal title to be reconveyed if debt is paid at maturity. Fuquay *v.* Stickney, 41 Cal. 583.

76. Allen *v.* Rowe, 19 Oreg. 188, 23 Pac. 901; Cutter *v.* Striegel, 4 Wash. 346, 30 Pac. 326. See also Gould *v.* Wise, 18 Nev. 253, 3 Pac. 30.

77. Wheaton *v.* Berg, 50 Minn. 525, 52 N. W. 926.

78. Seely *v.* Neill, (Colo. 1906) 86 Pac. 334; Gould *v.* Wise, 18 Nev. 253, 3 Pac. 30; Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

Place of posting.— Where a notice was posted on the front of a building on a public street and its position was such that it would be readily observed by persons entering the building, both by the stairway and on the first floor, it was in a conspicuous place within Ballinger & C. Comp. St. Oreg. § 5643. Marshall *v.* Cardinell, 46 Oreg. 410, 80 Pac. 652. Posting the notice on a partition wall several feet back from the street where it would not be likely to be seen is not sufficient. Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822. A notice is not posted conspicuously enough when placed in a closed building which is locked the greater part of the time. Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

79. Kraus *v.* Murphy, 38 Minn. 422, 38 N. W. 112, holding that notwithstanding the owner of the building procured and filed the bond of his contractors, under Minn. Gen. St. (1878) c. 90, § 3, and posted the notice therein mentioned, a subcontractor is entitled to a lien, if, as a matter of fact, such notice was not posted on or about the premises during any part of the time in which such subcontractor performed labor and furnished material.

80. Shaw *v.* Tompson, 105 Mass. 345.

81. Who may acquire lien see *supra*, I, H.

82. Sweet *v.* James, 2 R. I. 270. See also Savannah, etc., R. Co. *v.* Grant, 56 Ga. 68.

83. Sweet *v.* James, 2 R. I. 270.

The Georgia act of 1869 only gave a summary remedy for the enforcement of mechanics' and laborers' liens when the debt was due for labor actually performed by the claimant, and for materials furnished with which and upon which the labor was performed. Hence although contractors might be mechanics, this fact did not entitle them to the benefit of the act, if the work was done by them as contractors through the labor of others employed by them for that purpose. Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506.

84. Sweet *v.* James, 2 R. I. 270.

House painters are persons who "furnish labor or materials for erecting or repairing" a building, within the meaning of the Mechanics' Lien Law. Martine *v.* Nelson, 51 Ill. 422.

Paper-hangers were entitled to a lien under the Pennsylvania act of 1836, giving a lien for "all debts for work done or materials furnished." Freeman *v.* Gilpin, 1 Phila. (Pa.) 23.

Railroad construction contract.— A contract by a corporation relating to the construction of a line of electric railroad, by which it undertook to hire the labor, supervise the grading, the trestle and bridge work, the laying of the rails, etc., being primarily liable to pay all labor bills, supply all tools, and to be wholly under the direction and control of the railroad company's supervising

The lien can, however, be acquired only by a person who is within the class or one of the classes to which the lien is given by the statute under which he claims.[85]

2. Lien in Two Capacities. It has been held that a carpenter who has built a house under a contract with the owner of the land is entitled to a lien both as contractor and as mechanic.[86]

3. Mechanics. A plasterer is a mechanic within the lien law,[87] as is also one who owns a sawmill and machinery, and works therein, not as a mere speculator or buyer and seller of lumber, but in shaping and fitting lumber to be useful as materials in a building.[88]

4. Laborers. One who performs labor on and about a building is ordinarily entitled to the benefit of the lien law.[89] A plasterer,[90] teamster,[91] or a miner[92] is a laborer within the lien laws, but a person employed to act as clerk and make himself generally useful is not.[93] An independent contractor engaged to excavate a cellar is not a laborer employed by a contractor.[94]

5. Materialmen.[95] Persons furnishing materials for the construction of buildings or other improvements are ordinarily, under the more modern statutes, entitled to a lien therefor.[96] But under the more restricted statutes a material-

engineer, was one to perform "work and labor," which entitled it to a lien under W. Va. Code (1899), c. 75, § 7. Tennis Bros. Co. *v.* Wetzel, etc., R. Co., 140 Fed. 193.

85. Fox *v.* Rucker, 30 Ga. 525 (a plasterer is not entitled to the benefit of an act giving a lien to "masons and carpenters"); Garing *v.* Hunt, 27 Ont. 149 (a scenic artist is not "a mechanic, laborer, or other person who performs labor" under Ont. Rev. St. c. 126, § 6, (I)).

Guarantor of contractor.— A person who is not a party to the contract, but merely guarantees that the contractor will comply with his contract, can have no lien. Dye *v.* Forbes, 34 Minn. 13, 24 N. W. 309.

Furnishing materials.— Subcontractors, furnishing for a building in process of erection, an apparatus for opening and closing windows and making a lump charge for the apparatus installed are entitled to a lien by stop notice under N. J. Laws (1898), c. 226, § 3, giving such lien to materialmen who have furnished materials; the claim being regarded as growing out of materials furnished *in situ*. McNab, etc., Mfg. Co. *v.* Paterson Bldg. Co., (N. J. Ch. 1906) 63 Atl. 709. See also Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 63 Atl. 705 [*reversing* 68 N. J. Eq. 315, 59 Atl. 253].

86. Thurman *v.* Pettitt, 72 Ga. 38 [*distinguishing* Savannah, etc., R. Co. *v.* Grant, 56 Ga. 68], under Code, § 1979.

87. Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

88. Gulledge *v.* Preddy, 32 Ark. 433.

89. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396, holding that it cannot be successfully urged that his claim is not that of a mechanic within the meaning of the law.

Purpose of hiring.— The mere performance of labor upon a structure is sufficient to give a lien under a statute providing that laborers of every class performing labor in the construction of a building shall have a lien, and it is not necessary that the laborer should have been originally hired to do the particular work for which a lien is given. Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41.

90. Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837. See also Parker *v.* Bell, 7 Gray (Mass.) 429.

91. McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272, within the act of March 9, 1889, § 1, giving "laborers" a lien.

92. Holden *v.* Bright Prospects Gold Min., etc., Co., 6 Brit. Col. 439.

93. Nash *v.* Southwick, 120 N. C. 459, 27 S. E. 127.

94. McNab, etc., Mfg. Co. *v.* Paterson Bldg. Co., (N. J. Ch. 1906) 63 Atl. 709.

95. See also *infra*, II, D, 7, f, (IV)–(VI).

96. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156; Geiger *v.* Hussey, 63 Ala. 338.

Connecticut.— Chapin *v.* Persse, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263, holding that the acts of 1849 and 1852 apply to mere sales of material and it is not necessary that the materialmen should also be contractors or subcontractors for the erection or repair.

Indiana.— Carter *v.* Martin, 22 Ind. App. 445, 53 N. E. 1066.

Iowa.— Green Bay Lumber Co. *v.* Adams, 107 Iowa 672, 78 N. W. 699.

Maryland.— Blake *v.* Pitcher, 46 Md. 453.

Missouri.— Miller *v.* Whitelaw, 28 Mo. App. 639.

Oregon.— Cline *v.* Shell, 43 Oreg. 372, 73 Pac. 12.

Pennsylvania.— Savoy *v.* Jones, 2 Rawle 343.

Wisconsin.— Wisconsin Planing-Mill Co. *v.* Grams, 72 Wis. 275, 39 N. W. 531; Willer *v.* Bergenthal, 50 Wis. 474, 7 N. W. 352.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 115, 116.

The N. Y. Lien Act of 1852 "for the better security of mechanics and others erecting buildings and furnishing materials therefor," in certain enumerated counties, did not apply to a case where a lumber merchant, without any previously existing contract, furnished lumber to a person who used the same in

man is not an artisan,[97] builder,[98] carpenter,[99] contractor,[1] journeyman,[2] laborer,[3] machinist,[4] mason,[5] mechanic,[6] subcontractor,[7] or undertaker.[8]

6. CONTRACTORS[9] — a. In General. Under the more modern statutes the contractor is usually entitled to a lien.[10] A contractor is one who contracts directly with the owner of the property[11] to erect or construct a building or other structure or improvement[12] or any main division or part thereof,[13] or, according to

erecting buildings for himself. Hatch *v.* Coleman, 29 Barb. 201.

Under the Rhode Island Act of 1847 the lien for materials extended only to such materials as were furnished by the person who furnished labor, and which were in the work which he was employed to do; but for materials supplied by him for other work, although upon the same building, he stood simply as a materialman, and was not entitled to a lien. Sweet *v.* James, 2 R. I. 270.

Materials purchased from another person and paid for by the materialman may be included in his lien. Avery *v.* Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272.

97. Duncan *v.* Bateman, 23 Ark. 327, 79 Am. Dec. 709 [*followed* in Boutner *v.* Kent, 23 Ark. 389]; Huck *v.* Gaylord, 50 Tex. 578.

98. Duncan *v.* Bateman, 23 Ark. 327, 79 Am. Dec. 109 [*followed* in Boutner *v.* Kent, 23 Ark. 389]; Darlington-Miller Lumber Co. *v.* Lobsitz, 4 Okla. 355, 46 Pac. 481.

99. Pitts *v.* Bomar, 33 Ga. 96.

1. Leitch *v.* Central Dispensary, etc., Hospital, 6 App. Cas. (D. C.) 247; Arnold *v.* Budlong, 11 R. I. 561.

2. Stevens *v.* Wells, 4 Sneed (Tenn.) 387.

3. Arnold *v.* Budlong, 11 R. I. 561.

4. Allman *v.* Corban, 4 Baxt. (Tenn.) 74.

5. Pitts *v.* Bomar, 33 Ga. 96.

6. Duncan *v.* Bateman, 23 Ark. 327, 79 Am. Dec. 109 [*followed* in Boutner *v.* Kent, 23 Ark. 389]; Huck *v.* Gaylord, 50 Tex. 578.

7. Leitch *v.* Central Dispensary, etc., Hospital, 6 App. Cas. (D. C.) 247.

8. Greenwood *v.* Tennessee Mfg. Co., etc., 2 Swan (Tenn.) 130.

9. Distinction between contractors and subcontractors see *infra*, II, D, 7, c.

10. *Illinois.*— Bryan *v.* Whitford, 66 Ill. 33, lien of contractor for erecting or repairing under the act of 1845 not extended to altering, beautifying, or ornamenting by the act of 1869.

North Carolina.— See Lester *v.* Houston, 101 N. C. 605, 8 S. E. 366.

Pennsylvania.— Chapman *v.* Faith, 18 Pa. Super. Ct. 578 (holding that the act of April 16, 1845 (Pamphl. Laws 538), extended the provisions of the act of June 16, 1836 (Pamphl. Laws 695), relating to mechanics' liens, to contractors and changed the law as it had been declared in Haley *v.* Prosser, 8 Watts & S. 133; Hoatz *v.* Patterson, 5 Watts & S. 537); Ross *v.* Hunter, 3 Brewst. 169.

Tennessee.— Haynes *v.* Holland, (Ch. App. 1898) 48 S. W. 400, holding that Shannon Code, § 3531, giving a lien on buildings erected by special contract with the owner or his agent, in favor of "the mechanic or undertaker, finder or machinist who does the work or any part of the work or furnishes any of the material," applies only to original contractors.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Canada.— Galarneau *v.* Tremblay, 22 Quebec Super. Ct. 143.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 117.

Aliter under the act of congress of 1833, c. 80. Winder *v.* Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487.

A contractor's failure to procure a permit from the building department for alterations in the premises which he is to make does not defeat his right to a recovery therefor where he never agreed to obtain the permit, since the statute (N. Y. Laws (1892), c. 275, § 39) requires statements on which the permit is granted to be submitted by "the owner or his agent or architect." Duhrkpop *v.* White, 15 N. Y. App. Div. 613, 44 N. Y. Suppl. 694.

Filing of liens by subcontractors.— Where a contract provides that payment shall be made for work on final estimate and certificate of an engineer approving the work, and a showing that the work is free from all liens, and, after the final estimate is made and the certificate procured, the contractor, being refused payment, files his lien, the fact that subcontractors subsequently file liens for work will not defeat the contractor's lien. Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

11. Hearne *v.* Chillicothe, etc., R. Co., 53 Mo. 324; Western Sash, etc., Co. *v.* Buckner, 80 Mo. App. 95; Ambrose Mfg. Co. *v.* Gapen, 22 Mo. App. 397; Lester *v.* Houston, 101 N. C. 605, 8 S. E. 366; Merchants', etc., Sav. Bank *v.* Dashiell, 25 Gratt. (Va.) 616.

A lessee who by contract with the lessor undertakes to make certain improvements on the leased premises is not a contractor within the meaning of the Mechanics' Lien Law, but an agent of the lessor. Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405.

12. Brown *v.* Cowan, 110 Pa. St. 588, 1 Atl. 520; Duff *v.* Hoffman, 63 Pa. St. 191.

Where a lien is allowed for repairs, alterations, or additions the contractor is the person employed to construct the same. Brown *v.* Cowan, 110 Pa. St. 588, 1 Atl. 520.

13. *Colorado.*— Church *v.* Smithea, 4 Colo. App. 175, 35 Pac. 267.

Missouri.— Walden *v.* Robertson, 120 Mo. 38, 25 S. W. 349.

some authorities, to furnish materials to the owner for a building, structure, or improvement.[14]

b. Services of Workmen. The contractor is entitled to his lien, not only for his own labor, but for the labor of those under him,[15] and even though his workmen have taken out liens the effect is only to diminish the contractor's lien *pro tanto*.[16]

c. Materials. The contractor has also a lien for necessary materials furnished by him to comply with his contract.[17]

d. Stipulations of Contract as to Lien. If the contract between the owner and contractor stipulates that the contractor will assert no lien, the contractor will of course be bound by such stipulation;[18] but the stipulation must be explicit.[19]

Pennsylvania.— Brown *v.* Cowan, 110 Pa. St. 588, 592, 1 Atl. 520; Schenck *v.* Uber, 81 Pa. St. 31; Duff *v.* Hoffman, 63 Pa. St. 191; Young *v.* Elliott, 2 Phila. 352; Derrickson *v.* Nagle, 2 Phila. 120.

Texas.— Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160, holding that where a contract was made to erect a building with the exception that the owner was to furnish the brick and stone and erect the walls, and the owner afterward contracted with a firm to furnish such materials and erect the walls, the latter contract was independent of the former and the firm were original contractors.

Virginia.— Merchants', etc., Sav. Bank *v.* Dashiell, 25 Gratt. 616.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 118.

A contractor has also been defined as "one, who under contract with the owner, undertakes for a consideration to furnish the material, labor, and superintendence required in the improvement of the owner's premises, either in the erection of a structure thereon or in the alteration or repair of one in existence." Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 587, 90 S. W. 405.

A contractor is not a mere workman or materialman.— Brown *v.* Cowan, 110 Pa. St. 588, 1 Atl. 520.

14. Hearne *v.* Chillicothe, etc., R. Co., 53 Mo. 324; Western Sash, etc., Co. *v.* Buckner, 80 Mo. App. 95; Ambrose Mfg. Co. *v.* Gapen, 22 Mo. App. 397; Merchants', etc., Sav. Bank *v.* Dashiell, 25 Gratt. (Va.) 616. *Compare* Brown *v.* Cowan, 110 Pa. St. 588, 1 Atl. 520.

One who contracts to furnish an engine to be placed in a lighting plant constructed by a private individual on his own land, to be conveyed to the city when the plant is completed, is a contractor, within Mechanics' Lien Law (Hurd Rev. St. (1899) p. 1104, § 1), giving contractors a lien for machinery and materials used in erecting buildings on land. Salem *v.* Lane, etc., Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481 [*affirming* 90 Ill. App. 560].

15. Wera *v.* Bowerman, 191 Mass. 458, 78 N. E. 102; Sweet *v.* James, 2 R. I. 270. See also Lybrandt *v.* Eberly, 36 Pa. St. 347.

16. Sweet *v.* James, 2 R. I. 270.

In the absence of conflicting claims between the person who actually performed the labor and the person who under contract caused it to be performed, the latter is given the lien under the New Jersey statute. Bates Mach. Co. *v.* Trenton, etc., R. Co., 70 N. J. L. 684, 58 Atl. 935, 103 Am. St. Rep. 811.

17. Collini *v.* Nicolson, 51 Ga. 560; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Materials furnished by persons not relying on contractor.— Where materials for the erection of a house were furnished by several dealers on the faith of a mortgage of the premises made by the owner to one of the dealers, and in pursuance of an understanding that the mortgage was to stand as security for all of them, the contractor who built the house and to whom the materials were apparently sold and delivered but upon whom the dealers had no claim and to whom they did not look for payment of the bills, is not entitled to a mechanic's lien for the amount of such bills charged in his account. Cusson *v.* Gemme, 19 R. I. 507, 34 Atl. 1115.

18. Montello Brick Works *v.* Hoot, 19 Montg. Co. Rep. (Pa.) 188, holding that where such contract is held valid, a court of equity will restrain the filing of a lien.

Contract confining lien to particular lot.— One who contracted to excavate two lots under separate contracts, and afterward agreed with the owner that payments made on both the lots should apply to one only, such payments being sufficient to pay for the work done on that lot, and that any lien for unpaid work should attach only to the other, could not subsequently file a lien against both lots for an alleged balance for work done on both. Gallick *v.* Engelhardt, 36 Misc. (N. Y.) 269, 73 N. Y. Suppl. 309.

19. Barker *v.* Berry, 4 Mo. App. 585 (holding that an agreement that the owner will pay the builder a certain balance when the house shall have been finished and accepted, free from all liens, is not an explicit contract that no liens shall be filed, or shall exist, against the house); Brydon *v.* Lutes, 9 Manitoba 463.

Implication.— When under a building contract the time for payment of the price of the work is fixed at a date later than that at which a bill could be filed to enforce a mechanic's lien, there is an implied agreement that no lien shall exist. But if, by the contract, a promissory note or other security for the price of the work is to be given within

A stipulation that the contractor shall promptly pay for all materials, so that the same will not become a lien,[20] that he shall give security that no liens will be filed,[21] that the building shall be delivered free from liens,[22] that all bills shall be paid by check of the contractor,[23] that the contractor will satisfy every claim,[24] or that the contractor will not permit any liens to be set up by subcontractors[25] will not defeat the right of the contractor to a lien.

e. Performance of Contract. Performance of his contract is necessary to entitle the contractor to a lien;[26] but if the contractor has acted in good faith in endeavoring to perform his contract and has substantially, although not fully, performed it, he is entitled to a lien,[27] for the contract price less such deductions

the time for enforcing a mechanic's lien, the implied agreement to waive the lien is conditional upon the giving of the note or other security. Ritchie *v.* Grundy, 7 Manitoba 532.

20. Zarrs *v.* Keck, 40 Nebr. 456, 58 N. W. 933.

21. Young *v.* Lyman, 9 Pa. St. 449.

22. Schmid *v.* Palm Garden Imp. Co., 162 Pa. St. 211, 29 Atl. 727.

23. Lowenstein *v.* Reynolds, 92 Tenn. 543, 22 S. W. 210.

24. Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076.

25. *Colorado.*— Jarvis *v.* State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129; Aste *v.* Wilson, 14 Colo. App. 323, 59 Pac. 846.

Kansas.— Clough *v.* McDonald, 18 Kan. 114.

Maine.— Norton *v.* Clark, 85 Me. 357, 27 Atl. 252.

Montana.— Miles *v.* Coutts, 20 Mont. 47, 49 Pac. 393.

Pennsylvania.— Schmid *v.* Palm Garden Imp. Co., 162 Pa. St. 211, 29 Atl. 727; Lucas *v.* O'Brien, 159 Pa. St. 535, 28 Atl. 364; Iron Works *v.* O'Brien, 156 Pa. St. 172, 27 Atl. 131; Nice *v.* Walker, 153 Pa. St. 123, 25 Atl. 1065, 34 Am. St. Rep. 688.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 121.

26. *Massachusetts.*— Burke *v.* Coyne, 188 Mass. 401, 74 N. E. 942.

New York.— Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205]; Smith *v.* Ruggiero, 52 N. Y. App. Div. 382, 65 N. Y. Suppl. 89; McNeal *v.* Clement, 2 Thomps. & C. 363; Mahon *v.* Guilfoyle, 18 N. Y. Suppl. 93.

Ohio.— Kane *v.* Stone Co., 39 Ohio St. 1.

Pennsylvania.— Bohen *v.* Seabury, 141 Pa. St. 594, 21 Atl. 674.

Wisconsin.— Malbon *v.* Birney, 11 Wis. 107.

Canada.— Brydon *v.* Lutes, 9 Manitoba 463.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 124.

Payment by contractor for labor and materials.— A building contractor's agreement to "furnish all materials and do all labor" is not satisfied unless the materials and labor are paid for. Cockrill *v.* Davie, 14 Mont. 131, 35 Pac. 958.

27. *Illinois.*— Hobart *v.* Reeves, 73 Ill. 527.

Massachusetts.— Burke *v.* Coyne, 188 Mass. 401, 74 N. E. 942.

Michigan.— Frolich *v.* Carroll, 127 Mich. 561, 86 N. W. 1034, holding that where plaintiff had completed his contract to furnish materials for defendant's buildings, except certain doors and drawers, the dimensions of which were not furnished to him, he being at all times ready to supply them when he should receive the dimensions, his right to a lien was complete.

Minnesota.— Hankee *v.* Arundel Realty Co., 98 Minn. 219, 108 N. W. 842; Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Nebraska.— Hahn *v.* Bonacum, (1906) 107 N. W. 1001, 109 N. W. 368.

New York.— Phillip *v.* Gallant, 62 N. Y. 256; King *v.* Moore, 61 N. Y. App. Div. 609, 70 N. Y. Suppl. 6; Nunan *v.* Doyle, 60 N. Y. Super. Ct. 377, 18 N. Y. Suppl. 192 [*affirmed* in 139 N. Y. 643, 35 N. E. 206]; Otis Elevator Co. *v.* Dusenbury, 47 Misc. 450, 95 N. Y. Suppl. 959; Holl *v.* Long, 34 Misc. 1, 68 N. Y. Suppl. 522; Ansonia Brass, etc., Co. *v.* Gerlach, 8 Misc. 256, 28 N. Y. Suppl. 546; Rogers *v.* McGuire, 10 N. Y. Suppl. 831.

West Virginia.—West Virginia Bldg. Co. *v.* Saucer, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822.

Wisconsin.— Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 124.

Good faith an element.— "The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract and has succeeded, except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omissions. . . . But when, as in this case, there is a willful refusal by the contractor to perform his contract and he wholly abandons it, and after due notice refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith." Van Clief *v.* Van Vechten, 130 N. Y. 571, 579, 29 N. E. 1017.

There must not be any wilful or intentional departure, and the defects must not pervade the whole, or be so essential that the object which the parties intended to accomplish, to wit: to have a specified amount of work performed in a particular manner, is

as should be made on account of the errors or omissions in doing the work.[28] Whether there has been a substantial performance is a question of fact for the jury to decide from all the facts and circumstances of the case.[29] Compliance with the contract is sufficiently shown where it appears that the claimant offered to do any work which the owner should designate that should be done, and the owner failed to designate any,[30] or that the owner accepted the building, knowing the defects complained of.[31] If the contract authorizes the owner to complete

not accomplished. Phillip *v.* Gallant, 62 N. Y. 256.

"Trivial imperfections."— Under Cal. Code Civ. Proc. § 1187, a "trivial imperfection" in the work shall "not be deemed such a lack of completion as to prevent the filing of any lien." This provision relates to the question whether or not there has been an actual completion of the building. Bianchi *v.* Hughes, 124 Cal. 24, 56 Pac. 610; Marble Lime Co. *v.* Lordsbury Hotel Co., 96 Cal. 332, 31 Pac. 164. What constitutes a trivial imperfection is a question of fact in each instance (Bianchi *v.* Hughes, *supra*; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629), and the decision of the trial court thereon cannot be disregarded unless the party complaining makes it clearly appear to be without any evidence in its support (Bianchi *v.* Hughes, *supra*; Harlan *v.* Stufflebeem, 87 Cal. 508, 25 Pac. 686). The trivial imperfections mentioned in the code refer to imperfect or defective performance of the work upon a building which is claimed to have been completed, and not to a case in which the building is admittedly incomplete and workmen are still engaged in constructing substantial portions thereof. Bianchi *v.* Hughes, *supra*. See also Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555. Neither is the question whether an omitted portion of the building is a trivial imperfection or a substantial failure in its completion to be determined by its relative cost to that of the entire building. Bianchi *v.* Hughes, *supra*. If the omissions are so substantial that the contractor would not have a right of recovery upon his contract he cannot enforce a lien therefor. Bianchi *v.* Hughes, *supra*. See also Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840. The unworkmanlike failure of a contractor to place the front windows in the basement story of a small house directly underneath the front windows of the upper portion of the house did not constitute a trivial imperfection, but was a substantial non-compliance with the contract, the effect of which was to preclude the enforcement of a lien by the contractor. Schindler *v.* Green, (Cal. App. 1905) 82 Pac. 341, 631.

The failure of a contractor to furnish proper and suitable doors, as required by his contract, constitutes such a defect as to show that his contract was not substantially performed, where it would cost from three thousand five hundred dollars to over seven thousand dollars to replace the doors. Nesbit *v.* Braker, 104 N. Y. App. Div. 393, 93 N. Y. Suppl. 856.

Failure to show cost of remedying omission. — Where an action to foreclose a mechanic's lien for the balance due on a building was based on substantial performance of the contract, but the evidence showed a substantial omission in the construction of the foundation, which plaintiff failed to supply after notice, and the cost of remedying which was not proven, it was held that plaintiff had not sustained the burden of showing substantial performance, so that the omission might be deducted from the contract price. Derr *v.* Kearney, 46 Misc. (N. Y.) 148, 93 N. Y. Suppl. 1009.

28. *District of Columbia.*— Beha *v.* Ottenberg, 6 Mackey 348, lien for agreed price less amount required to put work in condition promised.

Illinois.— Sohns *v.* Murphy, 168 Ill. 346, 48 N. E. 52.

Massachusetts.— Burke *v.* Coyne, 188 Mass. 401, 74 N. E. 942; Moore *v.* Dugan, 179 Mass. 153, 60 N. E. 488; Orr *v.* Fuller, 172 Mass. 597, 52 N. E. 1091; McCue *v.* Whitwell, 156 Mass. 205, 30 N. E. 1134; Powell *v.* Howard, 109 Mass. 192; Reed *v.* Scituate, 5 Allen 120.

Nebraska.— Millsap *v.* Ball, 30 Nebr. 728, 46 N. W. 1125.

New York.— White *v.* Livingston, 174 N. Y. 538, 66 N. E. 1118; Charlton *v.* Scoville, 68 Hun 348, 22 N. Y. Suppl. 883; Holl *v.* Long, 34 Misc. 1, 68 N. Y. Suppl. 522; Bates *v.* Masonic Hall, etc., Fund, 7 Misc. 609, 27 N. Y. Suppl. 951.

Ohio.— Kane *v.* Stone Co., 39 Ohio St. 6.

Pennsylvania.— Moore *v.* Carter, 146 Pa. St. 492, 23 Atl. 243, it is error to charge that substantial performance is sufficient to entitle the contractor to recover, omitting the qualification that deductions are to be made from the contract price for minor matters left uncompleted.

Wisconsin.— Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 124.

29. White *v.* Oliver, 36 Me. 92; Jewett *v.* Weston, 11 Me. 346; Olmstead *v.* Beale, 19 Pick. (Mass.) 528; Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Nolan *v.* Whitney, 88 N. Y. 648; Phillip *v.* Gallant, 62 N. Y. 256; Nunan *v.* Doyle, 60 N. Y. Super. Ct. 377, 18 N. Y. Suppl. 192; Ansonia Brass, etc., Co. *v.* Gerlach, 8 Misc. 256, 28 N. Y. Suppl. 546.

30. Dennis *v.* Walsh, 16 N. Y. Suppl. 257; Windham *v.* Independent Tel. Co., 35 Wash. 166, 76 Pac. 936.

31. Haller *v.* Clark, 21 D. C. 128; Rogers

the work on the contractor's neglect or refusal so to do, and the owner does so the contractor may still have a lien for the difference between the cost of completion and the balance due on the contract.[32] Failure to complete within the stipulated time will not ordinarily defeat a substantial performance or prevent a lien;[33] but it is otherwise when the time of completion is of the essence of the contract.[34] If the contract is to be performed to the satisfaction of an architect[35] or the owner,[36] such satisfaction must be shown. But neither the owner[37] nor the architect[38] will be allowed to defeat the lien by unjust or capricious action in the matter.

f. Modification of Contract. Slight alterations or modifications of the contract as to the manner of the execution and the like will not abrogate the right to a lien.[39]

g. Rescission of Contract. If the owner, before any work is done, rescinds the contract, the contractor cannot proceed and have a lien;[40] but where a partly performed building contract is canceled by mutual consent, and the value of the work already performed and of the materials furnished ascertained and agreed upon, and the owner promises to pay such agreed value, the right to a lien is not waived or lost by the contractor.[41]

h. Abandonment by Contractor. In case the contractor abandons the contract or ceases work, he forfeits all right to a lien if such abandonment or cessation of work is due to any fault of his;[42] but if it is attributable to the fault of the owner, and the contractor was free from fault in the matter and justified in abandoning the work, he is entitled to a lien for what was done or furnished.[43]

v. McGuire, 10 N. Y. Suppl. 831; Windham *v.* Independent Tel. Co., 35 Wash. 166, 76 Pac. 936.

32. McGrath *v.* Horgan, 72 N. Y. App. Div. 152, 76 N. Y. Suppl. 412; Sweatt *v.* Hunt, 42 Wash. 96, 84 Pac. 1.

33. Sedgwick *v.* Concord Apartment House Co., 104 Ill. App. 5; Heckmann *v.* Pinkney, 81 N. Y. 211; Phillip *v.* Gallant, 62 N. Y. 256.

34. Tompkins Co. *v.* Monticello Cotton Oil Co., 137 Fed. 625.

Delay caused by owner does not defeat lien.— Central Bldg. Co. *v.* Karr Supply Co., 115 Ill. App. 610.

35. Barney *v.* Giles, 120 Ill. 154, 11 N. E. 206; Vermont Street M. E. Church *v.* Brose, 104 Ill. 206; Ewing *v.* Fiedler, 30 Ill. App. 202; Boden *v.* Maher, 95 Wis. 65, 69 N. W. 980; Forster Lumber Co. *v.* Atkinson, 94 Wis. 578, 69 N. W. 347; Hudson *v.* McCartney, 33 Wis. 331.

36. Boots *v.* Steinberg, 100 Mich. 134, 58 N. W. 657.

37. Windham *v.* Independent Tel. Co., 35 Wash. 166, 76 Pac. 936; Mindeman *v.* Douville, 112 Wis. 413, 88 N. W. 299.

38. Wendt *v.* Vogel, 87 Wis. 462, 58 N. W. 764.

Burden of proof.— Where a building contract provides for payments only upon the written certificate of the architect, the contractors, in order to enforce a mechanic's lien in the absence of the certificate, must affirmatively show not only a demand and refusal of the architect to deliver the certificate, but also that it is unreasonably withheld by him. Nesbit *v.* Braker, 104 N. Y. App. Div. 393, 93 N. Y. Suppl. 856.

39. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84. See also McCue *v.* Whitwell, 156 Mass. 205, 30 N. E. 1134.

40. Horr *v.* Slavik, 35 Ill. App. 140, the contractor's remedy is an action for breach of contract.

41. Bruce *v.* Lennon, 52 Minn. 547, 54 N. W. 739.

42. Thomas *v.* Illinois Industrial University, 71 Ill. 310; Kinney *v.* Sherman, 28 Ill. 520; Rochford *v.* Rochford, 192 Mass. 231, 78 N. E. 454; General Fire Extinguisher Co. *v.* Chaplin, 183 Mass. 375, 67 N. E. 321; Mahon *v.* Guilfoyle, 18 N. Y. Suppl. 93; Bohem *v.* Seabury, 141 Pa. St. 594, 21 Atl. 674. And see *supra*, II, D, 6, e. But *compare* McGrath *v.* Horgan, 72 N. Y. App. Div. 152, 76 N. Y. Suppl. 412 [*citing* Edison Electric Illuminating Co. *v.* Guastavino Fire Proof Constr. Co., 16 N. Y. App. Div. 358, 44 N. Y. Suppl. 1022], holding that where a contractor abandoned the work and the owner, in accordance with the terms of the contract, completed the work, the contractor could enforce a lien for the difference between the cost of completion and the balance unpaid on the contract.

43. *California.*— Pacific Rolling Mill Co. *v.* Bear Valley Irr. Co., 120 Cal. 94, 52 Pac. 136, 65 Am. St. Rep. 158.

Georgia.— See Rome Hotel Co. *v.* Warlick, 87 Ga. 34, 13 S. E. 116.

Illinois.— Schwartz *v.* Saunders, 46 Ill. 18; Watrous *v.* Davies, 35 Ill. App. 542. See also Kinney *v.* Sherman, 28 Ill. 520.

Indiana.— Vail *v.* Meyer, 71 Ind. 159.

Kansas.— Hale *v.* Johnson, 6 Kan. 137.

Massachusetts.— Smith *v.* Norris, 120 Mass. 58; Busfield *v.* Wheeler, 14 Allen 139.

Michigan.— Landyskowski *v.* Martyn, 93 Mich. 575, 53 N. W. 781.

Minnesota.—Howes *v.* Reliance Wire-Works

7. Persons Not Contracting Directly With Owner — a. Right to Lien — (i) *In General.* The lien is not confined to persons contracting directly with the owner of the property, but extends to persons who do work and furnish materials under contract with the contractor.[44] But in order that any person may establish a lien it is essential that the work or materials for which he claims the lien should have been done or furnished in conformity with the terms of a contract with the

Co., 46 Minn. 44, 48 N. W. 448; Knight *v.* Norris, 13 Minn. 473.

Nebraska.— Pardue *v.* Missouri Pac. R. Co., 52 Nebr. 201, 71 N. W. 1022, 66 Am. St. Rep. 489, lien for reasonable value of what was done and furnished.

New York.—Morgan *v.* Taylor, 15 Daly 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253]; Dennistoun *v.* McAllister, 4 E. D. Smith 729 (completion prevented by owner); Wolf *v.* Horn, 12 Misc. 100, 33 N. Y. Suppl. 173; Sproessig *v.* Keutel, 17 N. Y. Suppl. 839 (holding that a carpenter who, having nearly finished a building contract, is reproached for being a swindler, knocked down by the owner, and ordered never to come into the building again, may enforce his lien for the work already done without completing the same, although notified so to do by the owner); Hunter *v.* Walter, 12 N. Y. Suppl. 60 [*affirmed* in 128 N. Y. 668, 29 N. E. 145]; Powers *v.* Hogan, 67 How. Pr. 255.

Oregon.— Justice *v.* Elwert, 28 Oreg. 460, 43 Pac. 649.

Washington.— Huetter *v.* Redhead, 31 Wash. 320, 71 Pac. 1016.

Wisconsin.— Hutchins *v.* Bautch, 123 Wis. 394, 101 N. W. 671, 107 Am. St. Rep. 1014; Charnley *v.* Honig, 74 Wis. 163, 42 N. W. 220, refusal of owner to allow contractor to proceed.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 123.

Refusal of architect to give certificate as to work.— Plaintiff contracted to do certain building for defendant, to be paid for in instalments as the work progressed, on certificates of defendant's architect that the work was done to his satisfaction. After a part of the work had been done, the architect unreasonably refused to give such certificate, and defendant thereupon discharged plaintiff. In an action to foreclose a mechanic's lien for the work done, it was held that judgment was properly entered for plaintiff on the report of a referee showing these facts. Wright *v.* Reusens, 15 N. Y. Suppl. 590 [*affirmed* in 133 N. Y. 298, 31 N. E. 215].

The sale of the premises by the owner is not sufficient cause for the abandonment by the contractor, it not appearing that the grantees abandoned the construction. Cohn *v.* Wright, 89 Cal. 86, 26 Pac. 643.

The owner's refusal to make payments as the work progresses is a breach of the contract which excuses the contractor from proceeding further with the work, and authorizes the enforcement of a lien for what has been done. Woolf *v.* Shaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205]; Hunter *v.* Walter, 12 N. Y. Suppl. 60. See also Thomas *v.* Stewart, 132 N. Y. 580, 30 N. E. 577 [*affirming* 10 N. Y. Suppl. 874], holding that the owner, who had broken his building contract by refusing to pay the second instalment at the stage of the work agreed upon was liable for the full amount unpaid on such instalment, regardless of what it cost him to complete the building. *Compare* Geary *v.* Bangs, 33 Ill. App. 582 [*affirmed* in 138 Ill. 77, 27 N. E. 462].

Contract with tenant.—Where a contractor performs work under a contract with the tenant and also relies upon the consent of the owner to charge the property with a lien, he is not justified in abandoning the work because the tenant refuses to pay or is otherwise guilty of a breach of the contract, unless he be prevented from performing; and if he does so abandon he loses his lien as against the owner of the property. New York Elevator Supply, etc., Co. *v.* Bremer, 74 N. Y. App. Div. 400, 77 N. Y. Suppl. 509.

44. Clark *v.* Huey, (Ind. App. 1894) 36 N. E. 52; McCormack *v.* Butland, 191 Mass. 424, 77 N. E. 761; Urin *v.* Waugh, 11 Mo. 412; Fullenwider *v.* Longmoor, 73 Tex. 480, 11 S. W. 500. See *infra*, II, D, 7, f. *Compare* Woodward *v.* McLaren, 100 Ind. 586.

There need be no privity of contract between the subcontractor, the materialman, and the laborer on the one hand, and the owner of the property on the other. It is sufficient to give them a status to sue that there has been a contract by the owner with somebody to improve the property, and that the party claiming a lien should either have furnished materials under a contract with the principal contractor, or be a subcontractor for the doing of some of the work, or be simply a laborer employed either by the contractor or subcontractor. Spalding *v.* Dodge, 6 Mackey (D. C.) 289.

Workmen and materialmen cannot be deprived of their right to the fund formed by the contract by the act of either the contractor or the owner or of both of them. Noltê *v.* His Creditors, 6 Mart. N. S. (La.) 168.

Duty of inquiry as to nature of contract.— Those who furnish work for a building, whether with or without material, must inquire whether they are engaged by the general contractor for erection, or by one who has specially contracted with the owner to furnish the kind of work called for. If by the latter, they can have no recourse to the building, except that which a claim filed in his name and right may give them. Kitson *v.* Crump, 9 Phila. (Pa.) 41.

owner,[45] and that the owner should be actually liable therefor according to the terms of his contract with his contractor.[46]

(II) *DEATH OF CONTRACTOR.* The death of the contractor, after the completion of the work, does not deprive a subcontractor, laborer, or materialman of the right to acquire a lien for what was done or furnished at the request of the contractor.[47]

b. Basis of Lien — (I) *DIFFERENT SYSTEMS COMPARED.* The protection of the subcontractor and materialman, with a just regard to the rights of the owner of the property, has been the subject of much solicitude with most of the legislatures.[48] Two systems seem principally to have been adopted,[49] one known as the New York system, the other as the Pennsylvania system.[50] The one in Pennsylvania, which was the first, where the mechanic who did the work and the materialman who supplied the articles used were deemed entitled to protection, rather than a mere builder or undertaker of contracts, made provision that the subcontractor and materialman should have a lien for whatever sum might be due to him directly on the building and land upon which it stood, and subordinated the lien of the contractor thereto.[51] The other was the plan adopted in New York, which did not secure to any one except the original contractor an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allowed the subcontractor and materialman to give written notice to the owner of his unpaid claim, requiring the owner thereupon to retain such funds as were in his hands belonging to the contractor, to answer the suit of the subcontractor, and securing the same either by lien upon the interest of the owner in the property, or a right of action against him — the payment of this sum to operate as a valid set-off against any demand of the contractor.[52] The prominent distinction between the two systems is this: Under the New York system the subcontractor cannot recover more than is due from the owner to the contractor; while under the other system the original contract, or payment to the original contractor, is no defense to a claim of a subcontractor.[53] A clear conception of the distinction between these two systems is necessary to an understanding of the cases, for not only have different systems prevailed in different states but in some instances the legislative history of a single state shows that each of the two systems mentioned has prevailed therein at some period;[54]

45. *Connecticut.*— Spaulding *v.* Thompson Ecclesiastical Soc., 27 Conn. 573.

Missouri.— See Kling *v.* Railway Constr. Co., 4 Mo. App. 574.

New York.— Grogan *v.* New York, 2 E. D. Smith 693; Walker *v.* Paine, 2 E. D. Smith 662; Quinn *v.* New York, 2 E. D. Smith 558; Broderick *v.* Poillon, 2 E. D. Smith 554; Dixon *v.* La Farge, 1 E. D. Smith 522; Haswell *v.* Goodchild, 12 Wend. 373.

Tennessee.— McCrary *v.* Bristol Bank, etc., Co., 97 Tenn. 469, 37 S. W. 543.

Wisconsin.— Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 126; and *supra*, II, C.

46. Pendleburg *v.* Meade, 1 E. D. Smith (N. Y.) 728. See *infra*, II, D, 7, e, (II).

47. Telfer *v.* Kierstead, 2 Hilt. (N. Y.) 577 [*followed* in Watrous *v.* Elmendorf, 55 How. Pr. (N. Y.) 461].

48. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24, 40, 41 [*quoting* Phillips Mechanics' Liens, § 57]. See also Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

49. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24, 41 [*quoting* Phillips Mechanics' Liens, § 57].

50. Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

51. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24, 41 [*quoting* Phillips Mechanics' Liens, § 57]. See also Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

52. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24, 41 [*quoting* Phillips Mechanics' Liens, § 57]. See also Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

53. Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837. See also Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24.

54. In California, for example, the Pennsylvania system was adopted in 1858; in 1862 existing laws were repealed and a new act embodying the New York system was passed; this in turn was repealed in 1868 by a statute modeled upon the law of 1858. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24. The present California statute (Code Proc. § 1183 *et seq.*) conforms in its

and many propositions of law laid down with reference to one system are totally inapplicable (or would even be incorrect) where the other system prevails. It seems, however, that the plan of conferring on subcontractors and materialmen a right of lien for all sums which may be due to them irrespective of payments already made by the owner to the contractor is passing out of favor and the tendency in later legislation is to confine their right to what may be owing by the owner to the contractor at the time of notice to him of their claims.[55]

(II) *DIRECT LIEN.* Under statutes which follow the Pennsylvania system[56] a subcontractor, laborer, or materialman is entitled to a direct lien for what he has done or furnished without regard to any rights of the contractor.[57] These statutes proceed upon the view that by the contract the owner makes the contractor a sort of agent with power to bind the property for what is necessary,[58] or without going so far as to recognize any agency, that the owner knows that

salient features to the New York system, although if certain requirements as to the contract are not complied with the subcontractor or materialman has a lien for the value of what he has done or furnished irrespective of the contract price. See Macomber *v.* Bigelow, 126 Cal. 9, 58 Pac. 312; Coss *v.* MacDonough, 111 Cal. 662, 44 Pac. 325; Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860. See also *supra*, II, C, 5, d; II, C, 7, b.

In Montana the New York system prevailed prior to March, 1887, when the existing law was changed. Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

In Nebraska, under Rev. St. (1866), pp. 257, 258, the owner was liable to subcontractors and materialmen, when there was no contract between them, express or implied, only to the extent of the amount due from the owner to the contractor; or in other words the owner could be garnisheed for the amount owing by him to the contractor. But the Lien Law of 1881 (Comp. St. c. 54, § 2), made the owner liable for the labor and material used in the erection of the building without regard to the state of the account between himself and the contractor. Ballou *v.* Black, 21 Nebr. 131, 31 N. W. 673.

In Wisconsin the Pennsylvania system was established by Laws (1889), c. 333, repealing former statutes conforming to the New York system. Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385.

55. Hunt *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24 [*citing* Phillips Mechanics' Liens, § 57].

56. See *supra*, II, D, 7, b, (I).

57. *Massachusetts.*— Pub. St. c. 191, § 1, gives an immediate lien to one who has performed labor in the erection or repair of a building by the consent of its owner, and the lien of a subcontractor or a laborer employed by the contractor is not by way of subrogation. Perry *v.* Potashinski, 169 Mass. 351, 47 N. E. 1022; Bowen *v.* Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 391.

Montana.— Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837, but the rule was otherwise prior to 1887.

Nebraska.— Ballou *v.* Black, 21 Nebr. 131, 31 N. W. 673, so under the Lien Law of 1881 (Comp. St. c. 54, § 2), but the rule was otherwise under Rev. St. (1866) pp. 257, 258. See as to law prior to 1881 Doolittle *v.* Goodrich, 13 Nebr. 296, 13 N. W. 400.

North Dakota.— Robertson Lumber Co. *v.* Edinburg State Bank, (1905) 105 N. W. 719, holding that Rev. Codes (1899), §§ 4788, 4791, give a subcontractor a lien without regard to the state of the account between the contractor and the owner.

Pennsylvania.— Linden Steel Co. *v.* Rough Run Mfg. Co., 158 Pa. St. 238, 27 Atl. 895; Willey *v.* Topping, 146 Pa. St. 427, 23 Atl. 335; Schroeder *v.* Galland, 134 Pa. St. 277, 19 Atl. 632, 19 Am. St. Rep. 691, 7 L. R. A. 711; White *v.* Miller, 18 Pa. St. 52. *Compare* Campbell *v.* Scaife, 1 Phila. 187.

Tennessee.— Green *v.* Williams, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478.

Wisconsin.— Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490, lien of subcontractor not dependent upon contractor's right to lien.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 127, 128.

58. Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710; Beach *v.* Stamper, 44 Oreg. 4, 74 Pac. 208, 102 Am. St. Rep. 597; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305; Brown *v.* Cowan, 110 Pa. St. 588, 592, 1 Atl. 520 (where it is said: "An architect or builder is the agent for the owner, and, representing him, has power by contract to subject the building to a lien for work or labor procured by him; the contractor, however, builds upon his own credit, and binds the building by virtue of the peculiar statutory relation he bears to the owner under the contract"); Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490. See also Pacific Rolling-Mill Co. *v.* Hamilton, 61 Fed. 476 [*affirmed* in 68 Fed. 966, 16 C. C. A. 68].

False representation.— Where materials are obtained by a person on his falsely representing himself as the contractor or architect, the person furnishing the materials has no right to a lien, and, as it was his duty to know the relation of the alleged contractor to the owner, the loss should fall on him, rather than on an owner who has already

the contractor must employ others to do work and furnish material and therefore consents to what is done and furnished by persons so employed;[59] or that the claimant has contributed to the making of the improvement and is entitled to be protected to the extent of what he has done or furnished.[60] One of the objects of such statutes is to prevent collusion between the contractor and the owner and protect those who performed labor in or furnished material for the erection of a building from being defrauded.[61]

(III) *Lien by Subrogation to Right of Contractor.* Under statutes conforming to the New York system[62] the lien of a subcontractor, materialman, or workman is based upon a species of subrogation to the rights of the original contractor.[63] Under some such statutes the contractor must himself be entitled to a lien in order that the subcontractor may acquire one,[64] while in others the controlling requisite to the subcontractor's right to a lien is that there shall be something due or to become due to the principal contractor,[65] and the lien attaches

paid for the materials and protected himself as much as possible. Brown *v.* Cowan, 110 Pa. St. 588, 1 Atl. 520.

59. Norton *v.* Clark, 85 Me. 357, 27 Atl. 252 (although the contract contains a stipulation by the contractor that no liens shall exist or be claimed for any labor or materials furnished by him or by others employed by him); Perry *v.* Potashinski, 169 Mass. 351, 47 N. E. 1022 [*following* Wahlstrom *v.* Trukon, 165 Mass. 429, 43 N. E. 183] (notwithstanding a provision in the contract that the contractor should "not let, assign, or transfer this contract or any interest therein without the written consent of the architect" such provision being interpreted to refer to attempted assignments of an interest in the principal contract and not to subcontracts); Daley *v.* Legate, 169 Mass. 257, 47 N. E. 1013; Moore *v.* Erickson, 158 Mass. 71, 32 N. E. 1031; Beatty *v.* Parker, 141 Mass. 523, 6 N. E. 754; Hilton *v.* Merrill, 106 Mass. 528; Parker *v.* Bell, 7 Gray (Mass.) 429; Pilz *v.* Killingworth, 20 Oreg. 432, 26 Pac. 305. See also Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136. *Compare* Alderman *v.* Hartford, etc., Transp. Co., 66 Conn. 47, 33 Atl. 589; Smith *v.* Naugatuck Cong. Soc., 23 Conn. 635; Green's Farms Consociated Presb. Soc. *v.* Staples, 23 Conn. 544.

Where the statute requires that the owner shall assent in writing to the contract of a subcontractor, an order drawn on the owner by the contractor in favor of the subcontractor and accepted by the owner in writing is sufficient. Hartford Bldg., etc., Assoc. *v.* Goldreyer, 71 Conn. 95, 41 Atl. 659.

The contractor is not the agent of the owner.— Deardorff *v.* Everhartt, 74 Mo. 37 [*overruling* Morrison *v.* Hancock, 40 Mo. 561], holding that therefore the lien extends only to the market value of materials furnished to the contractor and not to the contract price, and the declarations of the contractor that the materials were purchased for the building on which the lien is claimed are not evidence against the owner.

60. Pomeroy *v.* White Lake Lumber Co., 33 Nebr. 243, 245, 49 N. W. 1131, where it is said: "The lien of a material-man is not derived from the relation of agency between the contractor for the erection of the building and the owner, but from the fact the materials, or a portion of those used in the erection thereof, were furnished by him and used therein, and hence to the extent of the value of such materials he has contributed to the erection of the building."

61. Ballou *v.* Black, 21 Nebr. 131, 31 N. W. 673.

62. See *supra*, II, D, 7, b, (I).

63. Schwartz *v.* Cronan, 30 La. Ann. 993; Nolte *v.* His Creditors, 6 Mart. N. S. (La.) 168; Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24. See also Travis *v.* Smith, 6 N. Y. St. 371.

64. Von Platen *v.* Winterbotham, 203 Ill. 198, 67 N. E. 843 [*following* Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 64 N. E. 995 (*reversing* 98 Ill. App. 548), and *overruling* Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923] (holding that under Ill. Rev. St. (1899) c. 82, §§ 20, 36, providing that no lien shall be had by virtue thereof unless the contract complies with certain requirements, and that subcontractors shall have a lien to the same extent as is provided for the contractor there can be no lien in favor of a subcontractor unless the original contract complies with the statutory requirements); Watts *v.* Metcalf, 66 S. W. 824, 23 Ky. L. Rep. 2189 (holding the under Ky. St. § 2467, providing that no lien shall exist in favor of a subcontractor in case the contractor himself is not entitled to a lien, where the owner owed the principal contractor at the time the subcontractor's notice for lien was served, but afterward resumed possession of the property because of the contractor's unnecessary delay in completing the work, and used the amount he owed the contractor in paying for finishing the work, as the contract stipulated he might do in that event, the subcontractor had no lien); Schwartz *v.* Cronan, 30 La. Ann. 993; Baker *v.* Pagaud, 26 La. Ann. 220; Whitla *v.* Taylor, 6 La. Ann. 480; First Municipality *v.* Bell, 4 La. Ann. 121.

65. Craig *v.* Smith, 37 N. J. L. 549; La Pasta *v.* Weil, 20 Misc. (N. Y.) 554, 46 N. Y. Suppl. 275 [*reversing* 20 Misc. 10, 44 N. Y.

only to that extent,[66] unless the owner has violated the duty imposed upon him by statute to withhold sums due the contractor in order to meet such claims.[67]

c. Distinction Between Contractors and Subcontractors. It sometimes becomes of vital importance in determining whether a lien claimant is entitled to a lien, or whether he has complied with the provisions of the statute in order to perfect the lien, to determine whether he or the person with whom he contracted stands in the position of a contractor or a subcontractor.[68] It has been held that where two or more persons who have jointly, as original contractors, entered into a contract to erect a building, agree between themselves that each shall do a particular portion of the work and receive a specified part of the compensation, this makes each of them a subcontractor under the original contract,[69] although it does not release them from their joint liability for the due performance of their contract;[70] but other cases hold that they remain principal contractors for all purposes and do not become subcontractors by reason of such agreement.[71] Where, after a contract for the erection of a house for an entire sum had been executed, the contractor took another person into partnership with himself in the mason work but not in the other work, and the owner made no agreement with the new firm, it was held that as to the mason work the partnership was a subcontractor.[72] The mere fact that a building contract in relation to property held in the names of the individual partners is made with the firm does not show that the contractor was a subcontractor, the firm being the principal contractor.[73] One who deeds mortgaged property to the mortgagee and takes back a land contract for a stated consideration representing the amount of the mortgage and a further sum which the vendor agrees to furnish him to complete a building on the premises does not stand in the position of a contractor of the vendor so as to entitle one who furnishes labor or material at the vendee's request to a lien as a subcontractor against the vendor's interest.[74] An assignee of the contractor, who has furnished the material and performed the labor called for by the contract, is entitled to a lien for the amount due either as a contractor or as a subcontractor, where nothing was paid to the original contractor and the latter did no part of the work under the contract and has waived all claim thereunder.[75] Where,

Suppl. 778]; Kirschner *v.* Mahoney, 96 N. Y. Suppl. 195.

66. See *infra*, IV, A, 1, c, (II), (B); VI, E, 3, a, j.

67. See *infra*, VI, E, 3, b-i.

68. See the following cases, where the question of status was passed upon:

Connecticut.— Kinney *v.* Blackmer, 55 Conn. 261, 10 Atl. 568; Hooker *v.* McGlone, 42 Conn. 95.

Delaware.— Travis *v.* Meredith, 2 Marv. 376, 43 Atl. 176.

Georgia.— Sparks *v.* Dunbar, 102 Ga. 129, 29 S. E. 295.

Illinois.— Jones *v.* Carey-Lombard Lumber Co., 87 Ill. App. 533.

Kansas.— Stout *v.* McLachlin, 38 Kan. 120, 15 Pac. 902.

Pennsylvania.— Owen *v.* Johnson, 174 Pa. St. 99, 34 Atl. 549.

Virginia.— Sands *v.* Stagg, 105 Va. 444, 52 S. E. 633, 54 S. E. 21.

Wisconsin.— Van Horn *v.* Van Dyke, 96 Wis. 30, 70 N. W. 1067.

69. Vogel *v.* Whitmore, 72 Hun (N. Y.) 417, 25 N. Y. Suppl. 202 [*affirmed* in 149 N. Y. 595, 44 N. E. 1129] (holding that therefore each may file a separate lien for the amount due him); Stroebel *v.* Ochse, 14 Misc. (N. Y.) 522, 35 N. Y. Suppl. 1089 (holding that the lien of a person furnishing material to one of such contractors is limited to the amount due him and does not extend to the amount due to the other contractor).

70. Vogel *v.* Whitmore, 72 Hun (N. Y.) 417, 25 N. Y. Suppl. 202 [*affirmed* in 149 N. Y. 595, 44 N. E. 1129].

71. Davis *v.* Livingston, 29 Cal. 283 (the lien of a person dealing with one of such contractors is not limited to the amount due him but extends to the amount due the joint contractors on the whole contract); Harbeck *v.* Southwell, 18 Wis. 418 (a subcontractor under one of such persons is not a subcontractor in the second degree but is a subcontractor to all the principal contractors).

72. Shaar *v.* Knickerbocker Ice Co., 149 Ill. 441, 37 N. E. 54.

73. Hill *v.* Gray, 81 Mo. App. 456, hence the contractor is not required, under the Missouri statute, to file his lien within four months after the final completion of the work.

74. Fuller *v.* Detroit Loan, etc., Assoc., 119 Mich. 71, 77 N. W. 642.

75. Haney, etc., Mfg. Co. *v.* Adaza Co-operative Creamery Co., 108 Iowa 313, 79 N. W. 79.

after a subcontractor has entered into a contract with the contractor, the contract between the owner and the principal contractor is canceled, and the owner agrees to pay claims for labor and materials then outstanding, and the subcontractor furnishes to the owner the remainder of the necessary material, he is entitled to a mechanic's lien as a principal contractor.[76]

d. Contract With or Employment by Contractor. The contract of a subcontractor or materialman with the contractor need not be express but may be implied.[77] A general employment of a carpenter by the contractor to work at day's wages to be afterward fixed is a sufficiently definite contract for the foundation of a mechanic's lien.[78] Where work is done and materials are furnished for a building by persons as partners, and the owner knows that such persons are doing the work, their right to a lien is not affected by the fact that one of them made the agreement with the contractor without disclosing the fact that he was acting for the firm.[79] Where it appears that the labor and material for which a subcontractor claims a lien went, by actual measurement, into the house on which the lien is claimed, it is immaterial whether the contract between the contractor and the claimant, which related to two houses, fixed the price for each at the amount claimed or the price for both at double that amount.[80]

e. Effect of Stipulations in Principal Contract— (i) *In General.* As a general rule the right of subcontractors, materialmen, and workmen to a lien is controlled by the terms of the original contract.[81] They are chargeable with notice of the terms of such contract.[82] But the provisions of the contract cannot

76. Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

77. Bruce *v.* Berg, 8 Mo. App. 204.

78. Wilson *v.* Sleeper, 131 Mass. 177 [*distinguishing* Manchester *v.* Searle, 121 Mass. 418].

79. Wahlstrom *v.* Trulson, 165 Mass. 429, 43 N. E. 183.

80. Hannon *v.* Logan, 14 Mo. App. 33 [*following* Hayden *v.* Logan, 9 Mo. App. 492].

81. *California.*— Henley *v.* Wadsworth, 38 Cal. 356; Shaver *v.* Murdock, 36 Cal. 293.

District of Columbia.— Herrell *v.* Donovan, 7 App. Cas. 322.

Illinois.— Foster *v.* Swaback, 58 Ill. App. 581 (the allowance of a lien to a subcontractor is a special privilege, and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it); Marski *v.* Simmerling, 46 Ill. App. 531.

Iowa.— Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93.

Kansas.— Nixon *v.* Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236. *Contra,* Clough *v.* McDonald, 18 Kan. 114, except that the amount which can be secured by the subcontractor is limited to what is due from the owner to the contractor.

Ohio.— Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163.

Pennsylvania.—Campbell *v.* Scaife, 1 Phila. 187.

Tennessee.— McCrary *v.* Bristol Bank, etc., Co., 97 Tenn. 469, 37 S. W. 543.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 134.

Contra.— Wahlstrom *v.* Trulson, 165 Mass. 429, 43 N. E. 183; Borden *v.* Mercer, 163 Mass. 7, 39 N. E. 413; Bowen *v.* Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 391.

Where the contract forbids underletting any part thereof without the written assent of the owner's engineer, a subcontractor to whose subcontract there is no such assent cannot claim a lien. Benedict *v.* Danbury, etc., R. Co., 24 Conn. 320, holding that the evidence did not show assent to the subcontract.

Under Cal. Code Civ. Proc. §§ 1183, 1184, 1201, providing that laborers shall have a lien for work done, and that the whole contract price, except that part due the contractor, shall be payable in money, without regard to any contract made between the landowner and contractor, the laborer may enforce a lien, although the contract price is less than one thousand dollars, and payable in something other than money, when it remains unpaid at the time the lien is filed and the action begun. Schmid *v.* Busch, 97 Cal. 184, 31 Pac. 893.

Waiver by owner of terms of original contract see Wambold *v.* Gehring, 109 Wis. 122, 85 N. W. 117.

Allowing contractors to purchase material on owner's responsibility.— The act of the owner of a building in allowing contractors to purchase part of the materials on his responsibility because they cannot secure them on their own credit does not annul the construction contract so as to render him liable for all materials furnished to them. Sunset Brick, etc., Co. *v.* Stratton, (Tex. Civ. App. 1899) 53 S. W. 703.

82. Shaver *v.* Murdock, 36 Cal. 293; Nixon *v.* Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236; Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163; McCrary *v.*

enlarge the statute and give a lien to a person not entitled thereto under the law.[83]

(II) *Stipulations as to Payment.* If the mode of payment provided for in the original contract is inconsistent with the existence of a lien in favor of subcontractors and others they can have no lien,[84] unless the owner has by his conduct deprived himself of the right to set up such provisions against the lien claimant.[85] Neither can the owner be required to pay money to the lien claimant before it becomes payable according to the contract between the owner and the contractor.[86] Where an owner refuses to pay the contractor, relying on a provision of the contract that permits him to retain enough of the contract price to satisfy liens of subcontractors, he cannot also refuse to pay the subcontractors.[87]

(III) *Stipulations Against Liens.*[88] In some states a covenant or stipulation against liens in the contract between the owner and the contractor is binding upon all persons who furnish labor or materials and precludes their acquiring any lien,[89]

Bristol Bank, etc., Co., 97 Tenn. 469, 37 S. W. 543.

In the absence of fraud or misrepresentation by the owner, the presumption of full knowledge of the terms of the original contract is conclusive against all subcontractors, laborers, and materialmen. Henley *v.* Wadsworth, 38 Cal. 356.

83. Lowenstein *v.* Reynolds, 92 Tenn. 543, 22 S. W. 210, holding that a provision in a contract between the owner and the contractor, that "all money for brickwork and materials should be paid by individual checks to parties furnishing the same," does not entitle a company furnishing brick to a subcontractor, and used in the building erected under such contract, to a mechanic's lien on such building therefor, since parties cannot enlarge the statute by contract, if such is the intent.

84. Ewing *v.* Folsom, 67 Iowa 65, 24 N. W. 595 (holding that where it is agreed between the owner and the contractor that a claim of the former against the latter shall be regarded as a payment on the last instalment due under the contract, this is binding on a subcontractor filing a claim for a lien thereafter, for under Iowa Code (1873), § 2134, he is only given a lien to the extent of the balance remaining due to the contractor); Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 893 (holding that a provision that the owner should give notes and a mortgage for part of the price defeated *pro tanto* a subcontractor's lien, but that the subcontractor was entitled to a lien to the extent of so much of the amount payable in cash as remained unpaid, which lien had priority over the mortgage in the hands of the contractor or an assignee with notice of the subcontractor's rights); Frost *v.* Falgetter, 52 Nebr. 692, 73 N. W. 12 (agreement of contractor to accept conveyance of certain real estate in payment). See also Kilbourne *v.* Jennings, 38 Iowa 533.

85. Weleh *v.* Sherer, 93 Ill. 64, holding that where the owner, upon being requested by a subcontractor to state the terms of the contract, failed to do so, and the subcontractor performed the work in reliance upon the owner's promise to see that he was paid therefor, the owner could not set up as against the subcontractor a provision in the contract for payment in land.

86. Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625.

87. Travis *v.* Smith, 6 N. Y. St. 371.

88. Waiver of lien generally see *infra*, VI, A.

89. Glassport Lumber Co. *v.* Wolf, 213 Pa. St. 407, 62 Atl. 1074; Craig *v.* Commercial Trust Co., 211 Pa. St. 7, 60 Atl. 317; Morris *v.* Ross, 184 Pa. St. 241, 38 Atl. 1084; Fidelity Mut. Life Assoc. *v.* Jackson, 163 Pa. St. 208, 29 Atl. 883, 43 Am. St. Rep. 789; Waters *v.* Wolf, 162 Pa. St. 153, 29 Atl. 646, 42 Am. St. Rep. 815; McElroy *v.* Braden, 152 Pa. St. 78, 25 Atl. 235; Bolton *v.* Hey, 148 Pa. St. 156, 23 Atl. 973 [*affirming* 10 Pa. Co. Ct. 381]; Tebray *v.* Kirkpatrick, 146 Pa. St. 120, 23 Atl. 318; Dersheimer *v.* Maloney, 143 Pa. St. 532, 22 Atl. 813; Benedict *v.* Hood, 134 Pa. St. 289, 19 Atl. 635, 19 Am. St. Rep. 698; Schroeder *v.* Galland, 134 Pa. St. 277, 19 Atl. 632, 19 Am. St. Rep. 691, 7 L. R. A. 711; Healy *v.* Wayne Title, etc., Co., 19 Pa. Super. Ct. 371; Williamson *v.* Tunis, 19 Pa. Super. Ct. 207; Spruks *v.* Mursch, 1 Lack. Leg. N. (Pa.) 247; Marshall *v.* Krauskop, 18 Lanc. L. Rev. (Pa.) 388; Sener *v.* Bare, 12 Montg. Co. Rep. (Pa.) 115; Glassport Lumber Co. *v.* Wolf, 36 Pittsb. Leg. J. (Pa.) 302; *In re* Brumbaugh, 43 Wkly. Notes Cas. (Pa.) 271; Cote *v.* Schoen, 38 Wkly. Notes Cas. (Pa.) 382; Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490 [*following* Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71].

Contract not in writing.— To be binding on subcontractors and materialmen, it is not necessary that the contract between the owner and the contractor that no liens shall be filed against the building be in writing, if it is definite. McElroy *v.* Braden, 152 Pa. St. 78, 25 Atl. 235. See also East Stroudsburg Lumber Co. *v.* Gill, 187 Pa. St. 24, 41 Atl. 41; Rhine *v.* Mauk, 21 Pa. Co. Ct. 345, 14 Montg. Co. Rep. 197.

The contract must be recorded and indexed in order to prevent the filing of liens. King *v.* Reese, 15 York Leg. Rec. (Pa.) 86.

Fraudulent stipulation.— Evidence that the

provided it is so clear and plain that it must be understood.[90] But the more generally accepted view is that the owner and contractor cannot by contract between

ostensible owner of a lot was a sister of the contractor and was working for small wages; that the loan for building was arranged by the contractor; and that the sister could not tell where she got the money required for the building was sufficient to authorize a finding that the contract between the contractor and his sister, by which he covenanted against liens, was in fraud of subcontractors and materialmen. Ballman *v.* Heron, 169 Pa. St. 510, 32 Atl. 594.

Secret agreement.— A subcontractor for a house on a lot apparently owned by the contractor, in whose name the deed stood, and who was in possession and represented himself to be the owner, is entitled to a lien for materials furnished prior to the time he knew or should have known that another was the owner, notwithstanding a secret agreement by the apparent owner to build and not allow any liens. McCollum *v.* Riale, 163 Pa. St. 603, 30 Atl. 282, 43 Am. St. Rep. 816.

Effect of new contract containing stipulation against liens, made during progress of work in place of original contract which contained no such stipulation see Lee *v.* Williams, 22 Pa. Super. Ct. 564, 571, 26 Pa. Super. Ct. 405, 410, 30 Pa. Super. Ct. 349, 357; Shook *v.* Geiselman, 22 Montg. Co. Rep. (Pa.) 124.

Provision ineffectual to give lien.— Where a building contract expressly provided that there should be no lien or right of lien, and was recorded as provided by Pa. Act, June 26, 1895 (Pamphl. Laws 369), so as to be binding on subcontractors and materialmen, a provision that final payment should not be due until "all mechanics' liens and materialmen" should have acknowledged full payment by the contractor was merely for the protection of the owner, and gave no right of lien. Ludowici Roofing Tile Co. *v.* Pennsylvania Inst. for Instruction of Blind, 116 Fed. 661 [*following* Getty *v.* Pennsylvania Inst. for Inst. of Blind, 194 Pa. St. 571, 45 Atl. 333].

Provision for retention of price by owner. —Although a provision in a building contract that no liens shall be filed is binding on a subcontractor, a mere agreement that the contract price in whole or in part shall be retained by the owner till all lienable claims are paid, or that it shall constitute a trust fund to pay them, recognizes the probability of there being such claims, rather than stipulates that no lien shall be filed, and does not prevent a subcontractor from filing a lien. Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490.

Provision for security against liens.— The lien of a materialman is not defeated because the contract between the owner and the contractor provided that the latter should furnish security against mechanics' liens, which was not done, the materialman being neither parties to the original contract nor sureties or bondsmen for the contractor. Carter *v.* Martin, 22 Ind. App. 445, 53 N. E. 1066.

Ownership of contractor.— Where a contractor covenants that no lien shall be filed, a subcontractor cannot have a lien, although the contractor is part-owner of the property, if the contract is in good faith, and not to mislead and defraud; but if the contractor is the sole owner of the property, and the person with whom he contracts holds the property in her name merely as his trustee, the covenant against liens is of no effect. Ballman *v.* Heron, 160 Pa. St. 377, 28 Atl. 914.

A lien regular on its face cannot be struck off because of an agreement between the contractor and the owner that no liens should be filed, but such agreement must be put in as a defense to the scire facias on the lien. Connell *v.* Ker, 9 Pa. Dist. 145 [*refusing* to follow Blaisdell *v.* Dean, 9 Pa. Super. Ct. 639, 44 Wkly. Notes Cas. 81].

Evidence not sufficient to show waiver of stipulation against liens see Waters *v.* Wolf, 2 Pa. Super. Ct. 200, 39 Wkly. Notes Cas. 38.

Filing a separate stipulation in the shape of an original document which furnished notice to all subcontractors of the existence and terms of the stipulation against liens contained in a building contract, and further explicitly stated that the stipulation was executed before work was authorized to commence under the contract, fulfilled all that was required by the spirit of the act of June 26, 1895 (Pamphl. Laws 369, since repealed), providing that a property-owner might protect himself against contractors' and subcontractors' liens by filing with the prothonotary the written contract in which it had been agreed that no lien should be filed, and a lien filed by a subcontractor in face of such a document of record was properly stricken off. Blaisdell *v.* Dean, 9 Pa. Super. Ct. 639, 44 Wkly. Notes Cas. 81.

The record of the stipulation should give a description of the property sufficient in itself to enable persons to identify the property without resort to any other record, otherwise the acquirement of liens will not be prevented. Gordon *v.* Fulmer, 7 Pa. Dist. 368, 21 Pa. Co. Ct. 93.

90. Creswell Iron Works *v.* O'Brien, 156 Pa. St. 172, 27 Atl. 131, 36 Am. St. Rep. 30 ("a covenant so clearly implied that the mechanic or material man cannot fail to understand it"); Nice *v.* Walker, 153 Pa. St. 123, 132, 25 Atl. 1065, 34 Am. St. Rep. 688 [*followed* in Murphy *v.* Ellis, 153 Pa. St. 133, 25 Atl. 1068 (*affirming* 1 Pa. Dist. 397, 11 Pa. Co. Ct. 301)] ("in order to prevent the contractor or subcontractor from filing a lien against the building, there must be an express covenant against liens, or a covenant resulting as a necessary implication from the language employed; and that the implied covenant should so clearly appear, that the mechanic or material man can understand it without consulting a lawyer as to its legal

themselves deprive the subcontractor, materialman, or workman of the right to a lien which the statute gives him.[91]

f. Persons Entitled to Lien — (I) *Subcontractors.* A subcontractor is one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance;[92] one who

effect"); Sullivan *v.* Hancock, 2 Pa. Super. Ct. 525, 39 Wkly. Notes Cas. 245; Commonwealth Title Ins., etc., Co. *v.* Ellis, 5 Pa. Dist. 33.

Ambiguity.— A waiver in a building contract of the subcontractor's statutory right of lien must be unambiguous, and, if one clause necessarily implies that such liens will be filed, and provides for their release by the contractor before payment of the contract price, a subsequent clause, expressly waiving the lien of subcontractors, will be ineffectual. Commonwealth Title Ins., etc., Co. *v.* Ellis, 5 Pa. Dist. 33. See also Shannon *v.* Philadelphia German Protestant Home for Aged, 16 Pa. Super. Ct. 250.

Stipulations not defeating lien see Gordon *v.* Norton, 186 Pa. St. 168, 40 Atl. 312; Howarth *v.* Chester City Presb. Church, 162 Pa. St. 17, 29 Atl. 291; Lucas *v.* O'Brien, 159 Pa. St. 535, 28 Atl. 364; Creswell Iron Works *v.* O'Brien, 156 Pa. St. 172, 27 Atl. 131, 36 Am. St. Rep. 30; Smith *v.* Levick, 153 Pa. St. 522, 26 Atl. 97; Nice *v.* Walker, 153 Pa. St. 123, 25 Atl. 1065, 34 Am. St. Rep. 688 [*followed* in Murphy *v.* Ellis, 153 Pa. St. 133, 25 Atl. 1068 (*affirming* 1 Pa. Dist. 397, 11 Pa. Co. Ct. 301)]; Evans *v.* Grogan, 153 Pa. St. 121, 25 Atl. 804; Cook *v.* Williams, (Pa. 1892) 24 Atl. 746; Cook *v.* Murphy, 150 Pa. St. 41, 24 Atl. 630; Taylor *v.* Murphy, 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. Rep. 825; Loyd *v.* Krause, 147 Pa. St. 402, 23 Atl. 602; Murphy *v.* Morton, 139 Pa. St. 345, 20 Atl. 1049; Bitbell *v.* Diven, 18 Pa. Super. Ct. 178; Hazleton Plumbing Co. *v.* Powell, 13 Pa. Super. Ct. 426; Commonwealth Title Ins., etc., Co. *v.* Ellis, 8 Pa. Dist. 5, 22 Pa. Co. Ct. 86; Rice *v.* Baxter, 3 Pa. Dist. 827, 15 Pa. Co. Ct. 198; Rhine *v.* Mauk, 21 Pa. Co. Ct. 345, 14 Montg. Co. Rep. 197. See also Jarvis *v.* State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129; Aste *v.* Wilson, 14 Colo. App. 323, 59 Pac. 846, in both of which cases the court, although apparently inclined to the view that the contract between the owner and the contractor could not defeat the lien of subcontractors, etc., held merely that the contract in question did not purport to deprive them of liens.

91. *California.*— Whittier *v.* Wilbur, 48 Cal. 175, 177, where it is said: "The contractor and owner cannot deprive the material man of his lien by introducing a stipulation into the building contract, by which the contractor agrees to indemnify the owner against any lien by persons furnishing materials to be used in the construction of the building." *Compare* Bowen *v.* Aubrey, 22 Cal. 566.

Colorado.— See Jarvis *v.* State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129; Aste *v.* Wilson, 14 Colo. App. 323, 59 Pac. 846, in both of which cases the court appeared to favor the rule of the text but did not decide the point.

Iowa.— See Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 898.

Maine.— Norton *v.* Clark, 85 Me. 357, 27 Atl. 252.

Michigan.— Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

Montana.— Miles *v.* Coutts, 20 Mont. 47, 49 Pac. 393.

New Jersey.— A provision against liens in an unfiled building contract does not protect the building against liens in favor of persons other than the contractor. Stewart Contracting Co. *v.* Trenton, etc., R. Co., 71 N. J. L. 568, 60 Atl. 405; Atlantic Coast Brewing Co. *v.* Donnelly, 59 N. J. L. 48, 35 Atl. 647. See also Bates Mach. Co. *v.* Trenton, etc., R. Co., 70 N. J. L. 684, 58 Atl. 935, 103 Am. St. Rep. 811. Prevention of liens by filing contract see *supra*, IV, C, 7, d.

Ohio.— Gimbert *v.* Heinsath, 11 Ohio Cir. Ct. 339, 5 Ohio Cir. Dec. 176 [*reversing* 3 Ohio S. & C. Pl. Dec. 497, 2 Ohio N. P. 346].

Canada.— Anly *v.* Holy Trinity Church, 2 Manitoba 248.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 135.

Notice of stipulation.— A provision in a building contract against the assertion of liens by any one will prevent a subcontractor or materialman who has notice of such provision from asserting a lien for labor or materials furnished pursuant to such contract. Bates Mach. Co. *v.* Trenton, etc., R. Co., 70 N. J. L. 684, 693, 58 Atl. 935, 103 Am. St. Rep. 811, where it is said: "If with knowledge that such a condition is contained in the contract they accept employment under it, they accept the condition; if they decline to accept the condition they must decline to accept the employment. Common fairness requires that notice of the condition shall be given if a waiver of liens is to be claimed, and common honesty requires that when notice of the condition has been given no lien shall be claimed."

92. Lester *v.* Houston, 101 N. C. 605, 8 S. E. 366, 369; Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 709, 75 Pac. 710 [*quoting* Phillips Mechanics' Liens, § 44].

Subcontract for entire work.— The term "subcontractor" is not inappropriate to designate one who has contracted with the principal contractor to perform the whole as well as a part of the service which the latter has undertaken to perform. Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

Circumstances constituting one a subcontractor to principal contractor.— A principal

directly contracts with the principal contractor.[93] As ordinarily used the term implies one who undertakes to do a particular part of the work of building and does not include one who simply furnishes materials for the building,[94] although under some statutes a materialman is considered a subcontractor.[95] As a general rule the statutes give subcontractors the right to a lien,[96] although under some of the earlier statutes such right was denied to them.[97]

contractor for the construction of a building contracted with a marble company for the furnishing of the material and labor for the marble work by an entire contract. The marble company contracted with a third person to carve and erect in place and finish all the exterior marble work. The marble company failed to furnish the stone, and the principal contractor undertook to furnish it, and agreed with the third person that he should continue the work at the price agreed on with the marble company. It was held that the third person was a subcontractor of the principal contractor, and entitled to enforce a lien for the work done. Evans Marble Co. *v.* International Trust Co., 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 168.

Novation.— Where a subcontractor, after assigning his contract to a bank as collateral security for an existing indebtedness, died insolvent, leaving the work unfinished, and in order to protect its security the bank, with the consent of the subcontractor's administratrix, of the principal contractor, and of the owner, assumed the completion of the contract and was accepted as subcontractor in place of the deceased, there was a complete novation of parties, and the bank was entitled to the lien of a subcontractor. Security Nat. Bank *v.* St. Croix Power Co., 117 Wis. 211, 94 N. W. 74.

Circumstances showing claimant not to be a subcontractor.— One S. incorporated his business into two companies, the A heating and ventilating company and the B foundry company. The two companies remained entirely under S's control, and engaged in carrying out substantially the same set of contracts, the A company attending to the contracts and the financial part and the B company to the manufacturing. The B company made the castings and received credit therefor, at cost, on the books of the A company, which paid the bills of the B company for labor and materials. It was held that the B company could not assert a lien as a subcontractor on amounts due to the A company on its contracts. Andrews, etc., Iron Co. *v.* I. D. Smead Heating, etc., Co., 11 Ohio Cir. Ct. 286, 5 Ohio S. & C. Pl. Dec. 292, 7 Ohio N. P. 439.

93. Nixon *v.* Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236. See also Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

Under the Arkansas statute all persons who furnish labor or materials, except such as have contracts directly with the owner or his agent are considered subcontractors. Thus one who performs labor for a contractor is a subcontractor. Buckley *v.* Taylor, 51 Ark. 302, 11 S. W. 281.

94. Hightower *v.* Bailey, 108 Ky. 198, 56 S. W. 147, 22 Ky. L. Rep. 88, 94 Am. St. Rep. 350, 49 L. R. A. 255; Staffon *v.* Lyon, 104 Mich. 249, 62 N. W. 354; Merriman *v.* Jones, 43 Minn. 29, 44 N. W. 526.

95. Jones *v.* Carey-Lombard Lumber Co., 87 Ill. App. 533; Campbell *v.* William Cameron, 5 Indian Terr. 323, 82 S. W. 762; Western Sash, etc., Co. *v.* Buckner, 80 Mo. App. 95; Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

96. *Arkansas.*— Buckley *v.* Taylor, 51 Ark. 302, 11 S. W. 281.

Illinois.— Newhall *v.* Kastens, 70 Ill. 156.

Indian Territory.— Campbell *v.* William Cameron, 5 Indian Terr. 323, 82 S. W. 762.

Missouri.— Urin *v.* Waugh, 11 Mo. 412.

New York.— New *v.* Carroll, 73 Hun 564, 26 N. Y. Suppl. 320.

Oklahoma.— Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

Oregon.— Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

Pennsylvania.— Kitson *v.* Crump, 9 Phila. 41.

Wisconsin.— Kirby *v.* McGarry, 16 Wis. 68.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 137.

Under R. I. Pub. St. c. 177, a subcontractor could acquire a lien for the labor performed by himself and his employees, but not for materials furnished by him. Hatch *v.* Fancher, 15 R. I. 459, 8 Atl. 543.

Under Mass. St. (1855) c. 431, § 1, a plasterer, employed by a builder, who had made a written contract with the owner of land to build a house thereon was entitled to a lien on the house and land for his own labor and that of his apprentices, but not for that of journeymen and laborers employed and paid by him. Parker *v.* Bell, 7 Gray 429.

The contractor's disallowance of a subcontractor's claim will not prevent a suit against the owner on such claim. Reeve *v.* Elmendorf, 38 N. J. L. 125.

The New Jersey statute of 1898, providing that "laborers or materialmen giving notices in accordance with" a previous provision of the statute "shall have priority and preference in the disposition of the moneys due and to grow due upon the contract over any persons claiming such moneys or any part thereof by reason of order or orders thereon or assignments thereof," does not include subcontractors who are not themselves laborers or furnishers of material but who, under their subcontracts, employ persons to labor on the building with materials furnished by them in the performance of their subcontracts. Adams *v.* Wells, 64 N. J. Eq. 211, 53 Atl. 610.

97. *Illinois.*— Dawson *v.* Harrington, 12 Ill. 300.

(II) *Subcontractors of Subcontractors.* A subcontractor of a subcontractor is of course entitled to a lien where this right is clearly conferred on him by the statute;[98] but the declaration of such intention on the part of the legislature must be very plain and specific,[99] otherwise he is not entitled to a lien.[1]

(III) *Employees of Contractor or Subcontractor.* The right to a lien is usually extended to employees of the principal contractor,[2] but not to employees of a subcontractor,[3] unless the statute clearly shows that it was the legislative intention that they should have a lien.[4]

Minnesota.—Toledo Novelty Works *v.* Bernheimer, 8 Minn. 118.

Mississippi.—Rivers *v.* Mulholland, 62 Miss. 766; Holmes *v.* Shands, 27 Miss. 40.

South Carolina.—Kelley *v.* State Bank, McMull. Eq. 431.

Texas.—Shields *v.* Morrow, 51 Tex. 393.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 137.

98. Barlow Bros. Co. *v.* Gaffney, 76 Conn. 107, 55 Atl. 582; Duignan *v.* Montana Club, 16 Mont. 189, 40 Pac. 294, holding that he is included within a statute giving a lien to "all persons furnishing things or doing work."

The Illinois Mechanics' Lien Law of 1895 gave subcontractors of subcontractors the right to a lien, but this statute was not retroactive. Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387 [*affirming* 67 Ill. App. 303, and *followed* in Culver *v.* Atwood, 170 Ill. 432, 48 N. E. 979 (*affirming* 67 Ill. App. 303)].

99. See Duignan *v.* Montana Club, 16 Mont. 189, 40 Pac. 294; and cases cited *infra*, note 1.

1. *Alabama.*—Turcott *v.* Hall, 8 Ala. 522.

Colorado.—Sayre-Newton Lumber Co. *v.* Denver Union Bank, 6 Colo. App. 541, 41 Pac. 844, subcontractor in the third degree.

District of Columbia.—Somerville *v.* Williams, 12 App. Cas. 520; Harrell *v.* Donovan, 7 App. Cas. 322; Monroe *v.* Hannan, 7 Mackey 197, 3 L. R. A. 549.

Illinois.—Schaar *v.* Knickerbocker Ice Co., 149 Ill. 441, 37 N. E. 54; Smith Bridge Co. *v.* Louisville, etc., R. Co., 72 Ill. 506; Rothgerber *v.* Dupuy, 64 Ill. 452. See also Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387 [*affirming* 67 Ill. App. 303, and *followed* in Culver *v.* Atwood, 170 Ill. 432, 48 N. E. 979 (*affirming* 67 Ill. App. 303)].

Kansas.—Nixon *v.* Cydon Lodge No. 5 K. of P., 56 Kan. 298, 43 Pac. 236.

New York.—Wood *v.* Donaldson, 17 Wend. 550 [*affirmed* in 22 Wend. 395].

Ohio.—Stephens *v.* United Railroads Stock Yard Co., 29 Ohio St. 227.

Pennsylvania.—Harlan *v.* Rand, 27 Pa. St. 511.

Rhode Island.—Morrison *v.* Whaley, 16 R. I. 715, 19 Atl. 330.

South Carolina.—Geddes *v.* Bowden, 19 S. C. 1.

West Virginia.—McGugin *v.* Ohio River R. Co., 33 W. Va. 63, 10 S. E. 36.

Wisconsin.—Farmer *v.* St. Croix Power Co., 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914; Dallman *v.* Clasen, 116 Wis. 113, 92 N. W. 565; Harbeck *v.* Southwell, 18 Wis. 418, holding, however, that where A and B who had contracted to construct a building agreed between themselves that each should do a certain part of the work this did not render A a subcontractor of A and B but he remained an original contractor, and a subcontractor under him became a subcontractor to both the original contractors, and was entitled to a lien.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 138.

2. *California.*—Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890.

Massachusetts.—Weeks *v.* Walcott, 15 Gray 54; Dewing *v.* Wilbraham Cong. Soc., 13 Gray 414.

New Jersey.—Van Pelt *v.* Hartough, 31 N. J. L. 331, under Rev. p. 668, § 2 (since repealed), an employee of the contractor was entitled to a lien only where the contract was not in writing.

New York.—Heroy *v.* Hendricks, 4 E. D. Smith 768.

Wisconsin.—Kirby *v.* McGarry, 16 Wis. 68.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 139.

Contra.—Johsen *v.* Boden, 8 Pa. St. 463; Greenough *v.* Nichols, 30 Vt. 768.

3. Turcott *v.* Hall, 8 Ala. 522; Newhall *v.* Kastens, 70 Ill. 156; Ahern *v.* Evans, 66 Ill. 125; Rothgerber *v.* Dupuy, 64 Ill. 452; Berkowsky *v.* Sable, 43 Ill. App. 410; Heroy *v.* Hendricks, 4 E. D. Smith (N. Y.) 768.

Where a court of equity acquires jurisdiction of the fund due a subcontractor on a bill of interpleader, in which the persons performing labor or furnishing materials for the subcontractor are made parties, it is the duty of the court to adjust the equities of all parties interested in the fund, as they have an equitable claim on the fund. Newhall *v.* Kasten, 70 Ill. 156.

4. Heard *v.* Holmes, 113 Ga. 159, 38 S. E. 393. See also Clark *v.* Kingsley, 8 Allen (Mass.) 543.

The fact that a subcontractor might not have had any lien for the labor for which his employees seek to maintain liens does not prevent them from maintaining such liens. Daley *v.* Legate, 169 Mass. 257, 47 N. E. 1013.

Effect of settlement between contractor and subcontractor.—Under Ga. Civ. Code, § 2801, as amended by the act of Dec. 18, 1897 (Acts (1897), p. 30), allowing an employee of a subcontractor a lien for work done on real estate for the amount due him from the subcontractor, provided at the time of the

(iv) *Persons Furnishing Material to Contractor.* As a general rule, under the later statutes, a person furnishing material to the principal contractor is entitled to a lien therefor,[5] but under some of the earlier statutes this right was denied.[6]

(v) *Persons Furnishing Material to Subcontractor.* Persons who furnish materials to subcontractors are given a lien therefor under some statutes,[7] but where it does not clearly appear to be the legislative intent that such persons shall have a lien it is not allowed.[8]

service of the notice on the true owner such owner is still indebted to the contractor in an amount equal to or greater than the sum due by the subcontractor to his employee, an employee of a subcontractor is entitled to a lien, although at the time the notice was served the contractor had settled in full with the subcontractor. Heard *v.* Holmes, 113 Ga. 159, 38 S. E. 393.

5. *Alabama.*— Dunham *v.* Milhous, 70 Ala. 596.

Indiana.— Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598; Colter *v.* Frese, 45 Ind. 96.

Indian Territory.— Campbell *v.* William Cameron, 5 Indian Terr. 323, 82 S. W. 762.

Kentucky.— Browinski *v.* Pickett, 113 Ky. 420, 68 S. W. 408, 24 Ky. L. Rep. 305.

Maryland.— Sodini *v.* Winter, 32 Md. 130.

Missouri.— Western Sash, etc., Co. *v.* Buckner, 80 Mo. App. 95.

Oklahoma.— Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

Pennsylvania.— Owen *v.* Johnson, 174 Pa. St. 99, 34 Atl. 549.

Washington.— Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729.

Wisconsin.— Kirby *v.* McGarry, 16 Wis. 68.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 140.

The fact that the contract is not for the whole building does not limit the power of the contractor to bind the building for materials furnished. Owen *v.* Johnson, 174 Pa. St. 99, 34 Atl. 549. See also Singerly *v.* Doerr, 62 Pa. St. 9.

Material furnished while the contractor's bondsmen are completing the work, after its abandonment by the contractor, is as much the subject of a lien as if delivered to the contractor personally. Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729.

Laborers engaged in the regular business of making brick out of material furnished by their employer are not entitled to a lien on a house, for which their employer furnished and delivered the brick, for their wages which accrued during the furnishing of such brick, within Shannon Code Tenn. § 3540, providing that every journeyman or other person employed by a contractor to work on a building, "or to furnish material for the same," shall have a lien therefor. Haynes *v.* Holland, (Tenn. Ch. App. 1898) 48 S. W. 400.

6. *Minnesota.*— Toledo Novelty Works *v.* Bernheimer, 8 Minn. 118.

Mississippi.— Holmes *v.* Shands, 26 Miss. 639; Shotwell *v.* Kilgore, 26 Miss. 125.

New York.— Burst *v.* Jackson, 10 Barb. 219.

Pennsylvania.— Schenck *v.* Uber, 81 Pa. St. 31; Lee *v.* Burke, 66 Pa. St. 336.

Texas.— Horan *v.* Frank, 51 Tex. 401; Shields *v.* Morrow, 51 Tex. 393.

Canada.— Crone *v.* Struthers, 22 Grant Ch. (U. C.) 247.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 140.

7. *Indiana.*— Barker *v.* Buell, 35 Ind. 297.

Minnesota.— Pittsburg Plate Glass Co. *v.* Sisters of Sorrowful Mother, 83 Minn. 29, 85 N. W. 829.

Missouri.— Western Sash, etc., Co. *v.* Buckner, 80 Mo. App. 95; A. M. Stevens Lumber Co. *v.* Kansas City Lumber Co., 72 Mo. App. 248.

Nebraska.— Zarrs *v.* Keck, 40 Nebr. 456, 58 N. W. 933; Pomeroy *v.* White Lake Lumber Co., 33 Nebr. 243, 49 N. W. 1131.

New Jersey.— Where the building contract is not filed a lien may be claimed for materials furnished to a subcontractor. Gardner, etc., Co. *v.* New York Cent., etc., R. Co., 72 N. J. L. 257, 62 Atl. 416 [*followed* in Snyder *v.* New York Cent., etc., R. Co., 72 N. J. L. 262, 62 Atl. 418]. But where the contract is filed persons who have furnished materials to a subcontractor are not entitled to the remedy by serving stop notices on the owner, as only creditors of the original contractor have that privilege. Carlisle *v.* Knapp, 51 N. J. L. 329, 17 Atl. 633; Fehling *v.* Goings, 67 N. J. Eq. 375, 58 Atl. 642.

New York.— Mack *v.* Colleran, 136 N. Y. 617, 32 N. E. 604 (lien on amount due subcontractor); Vogel *v.* Luitwieler, 52 Hun 184, 5 N. Y. Suppl. 154 (although material furnished on personal credit of subcontractor).

Texas.— Bassett *v.* Mills, 89 Tex. 162, 34 S. W. 93 [*reversing* (Civ. App. 1895) 30 S. W. 558].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 141.

8. *Illinois.*— Shaar *v.* Knickerbocker Ice Co., 149 Ill. 441, 37 N. E. 54; Newhall *v.* Kastens, 70 Ill. 156; Rothgerber *v.* Dupuy, 64 Ill. 452.

Ohio.—Stephens *v.* United Railroads Stockyard Co., 5 Ohio Dec. (Reprint) 334, 1 Cinc. L. Bul. 84, 4 Am. L. Rec. 669 [*affirmed* in 29 Ohio St. 227].

Pennsylvania.— Owen *v.* Johnson, 174 Pa. St. 99, 34 Atl. 549; Harlan *v.* Rand, 27 Pa. St. 511 [*reversing* 2 Phila. 160].

Tennessee.— Lowenstein *v.* Reynolds, 92 Tenn. 543, 22 S. W. 210; Bedford Stone Co.

(VI) *Persons Furnishing Material to Materialmen.* Persons furnishing material to materialmen are as a rule not entitled to a lien,[9] although under some statutes a lien is allowed to them.[10]

g. Modification or Rescission of Principal Contract. The rights of subcontractors, materialmen, and workmen cannot be affected by any subsequent agreement between the owner and the contractor to which they have not assented[11] and of which they had no notice,[12] or by any act of waiver of the original contractor.[13] Neither can the owner, by canceling his contract with the contractor, disappoint those who on the faith of the contract have entered into engagements with the contractor to furnish labor or materials, especially when the materials have been furnished to a considerable extent.[14] But no lien is acquired by a delivery of materials after the contract between the owner and the contractor, pursuant to which the delivery is claimed to have been made, has terminated.[15] Where the original contract is modified, but the modified contract would have been valid originally and the performance of it the basis for a lien, the fact that the performance was according to the terms of the modified and not of the original contract does not defeat the lien of a subcontractor.[16]

h. Default in Performance of Principal Contract[17] — (I) *Effect on Right to Lien.* It is well established as a general rule that the failure of the principal contractor to complete his contract does not of itself defeat the right of the subcontractor, workman, or materialman to a lien.[18]

v. Board of Publication, 91 Tenn. 200, 18 S. W. 406.

Wisconsin.— Dallman *v.* Clasen, 116 Wis. 113, 92 N. W. 565; Kirby *v.* McGarry, 16 Wis. 68.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 141.

9. *California.*— Wilson *v.* Hind, 113 Cal. 357, 45 Pac. 695; Roebling's Sons Co. *v.* Humboldt Electric Light, etc., Co., 112 Cal. 288, 44 Pac. 568.

Indiana.— Caulfield *v.* Polk, 17 Ind. App. 429, 46 N. E. 932.

Iowa.— See Heaton *v.* Horr, 42 Iowa 187.

Kentucky.— Hightower *v.* Bailey, 108 Ky. 198, 56 S. W. 147, 22 Ky. L. Rep. 88, 94 Am. St. Rep. 350, 49 L. R. A. 255.

Louisiana.—Woodward *v.* American Exposition R. Co., 39 La. Ann. 566, 2 So. 413.

Minnesota.— Ryan Drug Co. *v.* Rowe, 66 Minn. 480, 69 N. W. 468 [*followed* in Forman *v.* St. Germain, 81 Minn. 26, 83 N. W. 438]; Merriman *v.* Jones, 43 Minn. 29, 44 N. W. 526. See also Pittsburg Plate Glass Co. *v.* Sisters of Sorrowful Mother, 83 Minn. 29, 85 N. W. 829.

Oregon.—Fisher *v.* Tomlinson, 40 Oreg. 111, 60 Pac. 390, 66 Pac. 696.

Pennsylvania.— Schenck *v.* Uber, 81 Pa. St. 31; Duff *v.* Hoffman, 63 Pa. St. 191; Steinmetz *v.* Boudinot, 3 Serg. & R. 541; Kitson *v.* Crump, 9 Phila. 41.

United States.— Pacific Rolling-Mills Co. *v.* James St. Constr. Co., 68 Fed. 966, 16 C. C. A. 68 (construing 1 Hill Annot. Codes & St. § 1663); Pacific Rolling-Mill Co. *v.* Hamilton, 61 Fed. 476 [*affirmed* in 68 Fed. 966, 16 C. C. A. 68].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 142.

10. Western Sash, etc., Co. *v.* Buckner, 80 Mo. App. 95.

11. Shaver *v.* Murdock, 36 Cal. 293; Nixon *v.* Cydon Lodge No. 5 K. of P., 56 Kan. 298, 43 Pac. 236; Rosenbaum *v.* Carlisle, 78 Miss. 882, 29 So. 517; Jenks *v.* Brown, 66 N. Y. 629.

The date of a cancellation agreement between the owner and the contractor is not conclusive, there being other evidence to show that it was executed after the lien had attached. Jenks *v.* Brown, 66 N. Y. 629.

12. Shaver *v.* Murdock, 36 Cal. 293; Smith *v.* Levick, 153 Pa. St. 522, 26 Atl. 97.

Evidence as to when new contract made admissible.— Smith *v.* Levick, 153 Pa. St. 522, 26 Atl. 97.

13. Nixon *v.* Cydon Lodge No. 5 K. of P., 56 Kan. 298, 43 Pac. 236.

14. Girarthy *v.* Campbell, 6 Rob. (La.) 378.

15. Greenway *v.* Turner, 4 Md. 296.

No formal notice is necessary to be given to those furnishing materials to the contractor, of the termination of the contract, provided it is *bona fide* and in fact at an end. Greenway *v.* Turner, 4 Md. 296.

16. Winkle Terra Cotta Co. *v.* Galena Safety Valve, etc., Co., 64 Ill. App. 184.

17. **Effect on right of contractor** see *supra*, II, D, 6, e, h.

18. *California.*— McDonald *v.* Hayes, 132 Cal. 490, 64 Pac. 850.

Colorado.— Jarvis *v.* State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129.

Illinois.— Mehrle *v.* Dunne, 75 Ill. 239; Morehouse *v.* Moulding, 74 Ill. 322; Miller *v.* Calumet Lumber, etc., Co., 111 Ill. App. 651; Mantonya *v.* Reilly, 83 Ill. App. 275; Wood *v.* Gumm, 67 Ill. App. 518; Brin *v.* Larimer, 62 Ill. App. 657; Doyle *v.* Munster, 27 Ill. App. 130. See also Conklin *v.* Plant, 34 Ill. App. 264.

Louisiana.— St. Paul's Protestant Episcopal Church *v.* Giraud, 15 La. Ann. 124; Allen *v.* Wills, 4 La. Ann. 97.

(II) *Effect on Extent of Lien*—(A) *Under Pennsylvania System.* Under the Pennsylvania system whereby the subcontractor, materialman, etc., is entitled to a direct lien,[19] the failure of the principal contractor to complete his contract does not even affect the extent of the lien to which such person is entitled; but he may enforce a lien for the full amount due him regardless of such failure, and whether or not anything is due the contractor.[20] But no lien can be acquired for what is done or furnished pursuant to the contract after the contractor has lost his right to continue work through his failure to perform and the owner has entered into possession for the purpose of completing on his own account.[21]

(B) *Under New York System.* Under the New York system by which the lien of the subcontractor, materialman, etc., arises through a species of subrogation to the right of the contractor,[22] the right to a lien is dependent upon there being something due or to become due the contractor under the contract,[23] and a failure of the principal contractor to complete his work, as bearing upon the question as to whether there is any such amount due or to become due is important upon the question of the right to a lien. The contractor's abandonment or failure to complete the work does not in any way affect the right of subcontractors or others to a lien to the extent of what is due the contractor when the notice is given or the lien filed;[24] but where the contract contains a provision for payment from time to

Michigan.— Delray Lumber Co. *v.* Keohane, 132 Mich. 17, 92 N. W. 489.

New York.— Mack *v.* Colleran, 136 N. Y. 617, 32 N. E. 604; Person *v.* Stoll, 72 N. Y. App. Div. 141, 76 N. Y. Suppl. 324 [*affirmed* in 174 N. Y. 548, 67 N. E. 1089]; White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118]; Wright *v.* Roberts, 43 Hun 413 [*affirmed* in 118 N. Y. 672, 23 N. E. 1145]; Bates *v.* Masonic Hall, etc., Fund, 7 Misc. 609, 27 N. Y. Suppl. 951.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Ohio.— See Sturm *v.* Ritz, 7 Ohio Dec. (Reprint) 135, 1 Cinc. L. Bul. 150.

Oregon.— Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305.

Pennsylvania.— Cook *v.* Murphy, 150 Pa. St. 41, 24 Atl. 630; Burr *v.* Mazer, 2 Pa. Super. Ct. 436, 39 Wkly. Notes Cas. 157; North End Lumber Co. *v.* Hewitt, 8 Pa. Dist. 510.

Texas.— Breneman *v.* Beaumont Lumber Co., 12 Tex. Civ. App. 517, 34 S. W. 198.

Virginia.— Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821.

Wisconsin.— Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490.

Canada.— McArthur *v.* Dewar, 3 Manitoba 72.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 144; and cases cited *infra*, notes 20–42.

Extension of time for completion.— It is no defense to a petition for the enforcement of a mechanic's lien, by one employed by a contractor to aid in the erection of a house upon the land of another, to prove that, before the labor was performed, the time had expired within which the contractor by his written agreement was to finish the same, if such time had been enlarged by a parol agreement or otherwise. Rockwood *v.* Walcott, 3 Allen (Mass.) 458.

19. See *supra*, II, D, 7, b, (I), (II).

20. Taylor *v.* Murphy, 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. Rep. 825; Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821. See also Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203; Cook *v.* Murphy, 150 Pa. St. 41, 24 Atl. 630; Burr *v.* Mazer, 2 Pa. Super. Ct. 436.

21. O'Driscoll *v.* Bradford, 171 Mass. 231, 50 N. E. 628, such work cannot be held to have been done with the owner's consent.

22. See *supra*, II, D, 7, b, (I), (III).

23. Marski *v.* Simmerling, 46 Ill. App. 531; Hollester *v.* Mott, 132 N. Y. 18, 29 N. E. 1103 [*reversing* 57 Hun 585, 10 N. Y. Suppl. 409]; Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017 [*reversing* 55 Hun 467, 8 N. Y. Suppl. 760]; Lemieux *v.* English, 19 Misc. (N. Y.) 545, 43 N. Y. Suppl. 1066; Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604; Houlahan *v.* Clark, 110 Wis. 43, 85 N. W. 676.

24. St. Paul's Protestant Episcopal Church *v.* Giraud, 15 La. Ann. 124; Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305. See also Adamson *v.* Shaner, 3 Ind. App. 448, 29 N. W. 944; Foshay *v.* Robinson, 137 N. Y. 134, 32 N. E. 1041 [*affirming* 16 N. Y. Suppl. 817]; New Jersey Steel, etc., Co. *v.* Robinson, 33 Misc. (N. Y.) 361, 68 N. Y. Suppl. 577; Drake *v.* O'Donnell, 49 How. Pr. (N. Y.) 25 (where the owner prevented the contractor from completing his contract); Wright *v.* Pohls, 83 Wis. 560, 53 N. W. 848.

Instalment nearly due.— Where an owner, under the terms of a building contract, undertakes the completion of the building shortly before an instalment is due the contractor, because of failure of the latter to comply with its requirements, the materialmen are entitled to liens to the amount of such instalment, less the sum necessary to pay for defective work to that time, and to complete it to the stage when such instalment

time of a certain proportion of the value of the work done, the remainder to be paid on completion of the contract, and the contractor abandons, the amounts so retained never become due the contractor, and hence do not afford a basis for a lien.[25] Where nothing is due the contractor when the subcontractor files his lien or gives his notice and the contractor abandons the work so that nothing becomes due, the subcontractor cannot enforce any lien,[26] neither has he any lien where by the terms of the contract no part of the price is due until the contract is performed and the contractor fails to perform.[27] It has been held that if the failure is due to the owner's breach of the contract the lien attaches to the extent of so much of the contract price as remains unpaid.[28] Where the contractor has abandoned his contract and the owner is compelled to expend an amount to complete the building he is entitled to deduct such amount from the amount for which he is liable to subcontractors;[29] and if the cost of completion equals or exceeds the unpaid portion of the contract price no lien can be enforced.[30] So also damages

would become due, although nothing would be due the contractor on the completion of the building. Foshay *v.* Robinson, 137 N. Y. 134, 32 N. E. 1041 [*affirming* 16 N. Y. Suppl. 817].

25. Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93; Brainard *v.* Kings County, 155 N. Y. 538, 50 N. E. 263 [*affirming* 84 Hun 290, 32 N. Y. Suppl. 311]; Kelly *v.* Bloomingdale, 139 N. Y. 343, 34 N. E. 919 [*affirming* 19 N. Y. Suppl. 126]; Hawkins *v.* Burrell, 69 N. Y. App. Div. 462, 74 N. Y. Suppl. 1003; Weiseman *v.* Buffalo, 57 Hun (N. Y.) 48, 10 N. Y. Suppl. 569; McArthur *v.* Dewar, 3 Manitoba 72. *Compare* Van Clief *v.* Van Vechten, 48 Hun (N. Y.) 304, 1 N. Y. Suppl. 99.

26. *California.*— Wiggins *v.* Bridge, 70 Cal. 437, 11 Pac. 754; Henley *v.* Wadsworth, 38 Cal. 356; Blythe *v.* Poultney, 31 Cal. 233.

Georgia.— Hunnicutt, etc., Co. *v.* Van Hoose, 111 Ga. 518, 36 S. E. 669, where the contractor abandons when nothing is due him and the building is not completed under the contract.

Illinois.— Schultz *v.* Hay, 62 Ill. 157.

Michigan.— Jewell *v.* Paron, 94 Mich. 83, 53 N. W. 951.

New York.— Allen *v.* Carman, 1 E. D. Smith 692; Beecher *v.* Schuback, 4 Misc. 54, 23 N. Y. Suppl. 604; McDougall *v.* Nast, 5 N. Y. St. 144.

Texas.— Dudley *v.* Jones, 77 Tex. 69, 14 S. W. 335; Dudley *v.* Jones, (Civ. App. 1894) 25 S. W. 994; Ricker *v.* Schadt, 5 Tex. Civ. App. 460, 23 S. W. 907; Riter *v.* Houston Oil Refining, etc., Co., 19 Tex. Civ. App. 516, 48 S. W. 758.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 144, 145.

Completion by sureties of contractor.— Where nothing was due the contractor when he abandoned the work on a public building a lien for materials furnished to him does not attach to the unexpended portion of the funds appropriated for the building as against the surety of the defaulting contractor who completed the work. McChesney *v.* Syracuse, 75 Hun (N. Y.) 503, 27 N. Y. Suppl. 508 [*affirming* 22 N. Y. Suppl. 507].

27. Terrell *v.* McHenry, 89 S. W. 306, 28 Ky. L. Rep. 402; Linn *v.* O'Hara, 2 E. D. Smith (N. Y.) 560, 1 Abb. Pr. 360; Lemieux *v.* English, 19 Misc. (N. Y.) 545, 43 N. Y. Suppl. 1066; Cunningham *v.* Jones, 4 Abb. Pr. (N. Y.) 433, 3 E. D. Smith 650 [*affirmed* in 20 N. Y. 486]; Malbon *v.* Birney, 11 Wis. 107. See also Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305.

28. Person *v.* Stoll, 72 N. Y. App. Div. 141, 76 N. Y. Suppl. 324 [*affirmed* in 174 N. Y. 548, 67 N. E. 1089].

29. *Arkansas.*— Long *v.* Abeles, 77 Ark. 156, 93 S. W. 67.

Iowa.— Page *v.* Grant, 127 Iowa 249, 103 N. W. 124.

Louisiana.— Jorda *v.* Gobet, 5 La. Ann. 431; Allen *v.* Wills, 4 La. Ann. 97.

Ohio.— Sturm *v.* Ritz, 7 Ohio Dec. (Reprint) 135, 1 Cinc. L. Bul. 150.

Texas.— Slade *v.* Amarillo Lumber Co., (Civ. App. 1906) 93 S. W. 475; Breneman *v.* Beaumont Lumber Co., 12 Tex. Civ. App. 517, 34 S. W. 198.

Canada.— *In re* Sear, 23 Ont. 474.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 144, 145.

The owner is not bound to let subcontractors finish the work or even to notify them of the contractor's abandonment. Sturm *v.* Ritz, 7 Ohio Dec. (Reprint) 135, 1 Cinc. L. Bul. 150. *Compare* Simonton *v.* Cicero Lumber Co., 108 Ill. App. 481.

30. Hunnicutt, etc. *v.* Van Hoose, 111 Ga. 518, 36 S. E. 669; Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93; Ferguson *v.* Burk, 4 E. D. Smith (N. Y.) 760; Hutton *v.* Gordon, 2 Misc. (N. Y.) 267, 23 N. Y. Suppl. 770; Watson *v.* Cone, 21 N. Y. Suppl. 224 [*following* Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017]; House *v.* Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654.

Burden of proof as to necessity of advanced cost.— Where the owner of a building seeks to defeat a materialman's claim, on the ground that the contract was abandoned by the contractor, and that it cost more than the contract price to complete the building, he must show that the advanced cost was necessary, in order to complete the building according to the plans and specifications of the original contract. Long *v.* Abeles, 77 Ark. 156, 93 S. W. 67.

sustained by the owner by reason of the contractor's default have been held available to reduce *pro tanto* the amount for which subcontractors and others can enforce a lien.[31] In New York if there is nothing due at the time of the contractor's abandonment, but the owner avails himself of a right given him by the contract in case of the contractor's abandonment or failure to prosecute the work vigorously to complete the building himself and deduct the cost from the contract price, the lien attaches to the extent of what is due the contractor after such deduction;[32] but where there is a failure on the part of the contractor to per-

Payment of claims which accrued under contract.— Where the owner of the land contracted to have a buliding erected thereon for six thousand six hundred dollars, and the contractor abandoned the work when the owner had expended four thousand nine hundred and eight dollars, and including such sums the owner of the building expended in completing the building nine thousand six hundred and thirty-seven dollars and thirty-four cents, it was held that in determining whether plaintiff was entitled to a lien for materials furnished under the contract, the owner should be given no credit for any payment made by him after the abandonment of the contract, which was used in paying off claims that accrued under the contract before its abandonment. Long *v.* Abeles, 77 Ark. 156, 93 S. W. 67.

31. *California.*— Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

Connecticut.— Waterbury Lumber, etc., Co. *v.* Coogan, 73 Conn. 519, 48 Atl. 204.

Illinois.— Julin *v.* Ristow Poths Mfg. Co., 54 Ill. App. 460.

Kentucky.— Parrish *v.* Christopher, 3 S. W. 603.

New York.— Morgan *v.* Stevens, 6 Abb. N. Cas. 356.

Canada.— McBean *v.* Kinnear, 23 Ont. 313, liquidated damages for non-completion.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 288.

32. Brainard *v.* Kings County, 155 N. Y. 538, 50 N. E. 263 [*affirming* 84 Hun 290, 32 N. Y. Suppl. 311]; Campbell *v.* Coon, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410 [*reversing* 8 Misc. 234, 28 N. Y. Suppl. 561] (although there was nothing due under the contract when the lien was filed); Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641]; Mack *v.* Colleran, 136 N. Y. 617, 32 N. E. 604; Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017 [*reversing* 55 Hun 467, 8 N. Y. Suppl. 760]; Murphy *v.* Watertown, 112 N. Y. App. Div. 670, 99 N. Y. Suppl. 6; Person *v.* Stoll, 72 N. Y. App. Div. 141, 76 N. Y. Suppl. 324 [*affirmed* in 174 N. Y. 548, 67 N. E. 1089]; White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 166 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118]; Blakeslee *v.* Fisher, 66 Hun 261, 21 N. Y. Suppl. 219; Warwick First Nat. Bank *v.* Mitchell, 46 Misc. 30, 93 N. Y. Suppl. 231; Bates *v.* Masonic Hall, etc., Fund, 7 Misc. 609, 27 N. Y. Suppl. 951 [*affirmed* in 88 Hun 236, 34 N. Y. Suppl. 598]; McKee *v.* Rapp, 35 N. Y. Suppl. 175. See also Graf *v.* Cunningham, 109 N. Y. 369, 16 N. E. 551; New Jersey Steel, etc., Co. *v.* Robinson, 33 Misc. (N. Y.) 361, 68 N. Y. Suppl. 577; Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604; Sheffield *v.* Loeffler, 3 N. Y. Suppl. 150, holding further that the owner could not interpose as a defense the filing of other notices of liens against the building prior to the lien of plaintiff.

Severable contract.— Where a contractor agrees to build several buildings, with a separate price and a different day of completion for each, it is a severable contract; and if the owner, under the contract, after the abandonment by the contractor, completes the work, and the cost of completing any one or more of the buildings was less than the amount the contractor would have been entitled to if he had completed it, the owner is liable to the materialmen who have filed liens for the difference. White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118]. *Compare* Timmons *v.* Casey, 19 Tex. Civ. App. 476, 47 S. W. 805.

Liquidated damages for delay in completion agreed upon between the owner and the contractor cannot reduce the amount to which the lien of subcontractors and others would otherwise attach. White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118]. See also McKee *v.* Rapp, 35 N. Y. Suppl. 175.

Amount retained under contract.— Where a building contract provided that fifteen per cent of the price should be retained until the work was completed, a subcontractor's lien attaches to all the unpaid money earned by the contractor, unless the amount unearned is insufficient to complete the building by the owner. Warwick First Nat. Bank *v.* Mitchell, 46 Misc. (N. Y.) 30, 93 N. Y. Suppl. 231.

The burden of proof is upon the claimant to show that the amount of the contract price remaining unpaid exceeds the cost of completion. Brainard *v.* Kings County, 155 N. Y. 538, 50 N. E. 263 [*affirming* 84 Hun 290, 32 N. Y. Suppl. 311]; Beardsley *v.* Cook, 143 N. Y. 143, 38 N. E. 109.

Completion by owner with consent of contractor.— The owner of a building, who, after discontinuance of the work of construction by the contractor, does not declare the contract forfeited, but finishes the building, with the contractor's consent, at a cost less than the amount remaining unpaid on the contract, cannot defeat an action by materialmen to foreclose a mechanic's lien, on the ground that the contract was forfeited by the contractor;

form a substantial part of the work, and there is no provision in the contract for its completion by the owner in the event of the failure of the contractor, and no understanding between them that the owner shall proceed with the work, and no failure on the part of the owner to perform his obligation under the contract, a subcontractor cannot recover, for there is nothing due the contractor upon which the subcontractor's lien can attach,[33] even though the amount of the contract price which is unpaid exceeds what it would cost to complete the work according to the contract;[34] and it has been held that, although under the contract the owner has the right at his election to waive a forfeiture and complete the contract at the contractor's expense, if he chooses to insist upon the forfeitnre, and completes the work, not under the contract, but in his own way and at his own expense, the subcontractor has no lien notwithstanding the cost of completion is less than the portion of the contract price not due and unpaid at the time of the contractor's abandonment.[35] It has also been laid down that the subcontractor is entitled to a lien for what the work done and materials furnished are actually worth after deducting any claims for damages for the contractor's non-performance;[36] that the subcontractor's lien is limited to the contract price less payments lawfully made to the contractor;[37] and damages sustained by the owner by reason of the abandonment;[38] and that the subcontractor is entitled to enforce a lien for such proportion of the amount of his claim as the contract price bears to the cost of construction according to the contract.[39] In California the rule is to deduct from the

the inference in such case being that he undertook the completion of the building at the contractor's expense, so as to entitle the lien claimants to the residue of the amount unpaid on the contract. Wheeler *v.* Scofield, 67 N. Y. 311.

Computation.— Where the original contractor has suspended operations, in arriving at the fair value of the cost of completion to determine the balance to which a mechanic's lien can attach, the value of materials delivered but not used, and extra work done by the original contractor, should be deducted from the amount of the owner's contract for completion of the work. Warwick First Nat. Bank *v.* Mitchell, 46 Misc. (N. Y.) 30, 93 N. Y. Suppl. 231. Where a building contract provided that the contractor before final payment should produce satisfaction-pieces of all liens, the contract price for the completion of the work, in an action to enforce a lien, on differences arising between the owner and the contractor, in order to determine the amount to which a subcontractor's lien would attach, was not the reasonable cost of completion, because it included the payment of liens filed under the prior contracts. Warwick First Nat. Bank *v.* Mitchell, 46 Misc. (N. Y.) 30, 93 N. Y. Suppl. 231.

Fund due for extra work.— Where a building is completed by the owner after abandonment by the contractor, the unpaid portion of the contract price must be applied to the expense of completion before recourse is had to the fund due the contractor for extra work. Bates *v.* Masonic Hall, etc., Fund, 7 Misc. (N. Y.) 609, 27 N. Y. Suppl. 951 [*affirmed* in 88 Hun 236, 34 N. Y. Suppl. 598].

33. Hollister *v.* Mott, 132 N. Y. 18, 29 N. E. 1103 [*reversing* 10 N. Y. Suppl. 409]; Larkin *v.* McMullin, 120 N. Y. 206, 24 N. E. 447 [*reversing* 14 Daly 311, 12 N. Y. St. 123]; Smith *v.* Sheltering Arms, 89 Hun (N. Y.) 70, 35 N. Y. Suppl. 62.

Lien may attach to extent of sum due contractor for extra work.— See Smith *v.* Sheltering Arms, 89 Hun (N. Y.) 70, 35 N. Y. Suppl. 62.

34. Larkin *v.* McMullin, 120 N. Y. 206, 24 N. E. 447 [*reversing* 14 Daly 311, 12 N. Y. St. 123, and *disapproving* Sheffield *v.* Loeffler, 20 N. Y. St. 890].

35. Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641], holding, however, that the facts in the case at bar showed that the owner had proceeded under the contract. But *compare* Blakeslee *v.* Fisher, 66 Hun (N. Y.) 261, 21 N. Y. Suppl. 217, holding that the fact that the owner did not exercise his option of doing what he claimed the contractor had left undone, did not, where the expense of doing such things could be ascertained, deprive the subcontractor of the right to a lien to the extent of the excess of the unpaid part of the contract price over such amount.

36. Jarvis *v.* State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129.

37. Mehrle *v.* Dunne, 75 Ill. 239; Morehouse *v.* Moulding, 74 Ill. 322; Miller *v.* Calumet Lumber, etc., Co., 111 Ill. App. 651; Mantonya *v.* Reilly, 83 Ill. App. 275.

Where the contract price has been fixed unreasonably low by the owner and the contractor for the purpose of defrauding subcontractors, the fair price of the labor and material is to be regarded as the contract price. Mantonya *v.* Reilly, 83 Ill. App. 275.

38. Morehouse *v.* Moulding, 74 Ill. 322; Miller *v.* Calumet Lumber, etc., Co., 111 Ill. App. 651. See also Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

39. Delray Lumber Co. *v.* Keohane, 132 Mich. 17, 92 N. W. 489 [*following* Smalley *v.*

value of the work done and materials furnished, the amount of all payments due and actually made to the contractor at the time of abandonment, and the liens of subcontractors and others attach to the balance, if any.[40] In Canada the owner is required to retain out of payments to be made to the contractor a certain percentage of the value of the work done and materials provided, to form a fund for the payment of the lien-holders, not subject to be affected by the failure of the contractor to perform his contract.[41] Where a subcontractor does work for the owner after the contractor's abandonment he is of course entitled to the full amount of his claim for such work.[42]

i. Performance of Subcontract. In order to entitle a subcontractor to a lien it is as a rule necessary that he shall have substantially performed his subcontract;[43] but a subcontractor does not lose his right to a lien because of his failure to complete the work under the contractor where the cause of his ceasing work was the contractor's insolvency and failure to pay him,[44] or abandonment of the contract,[45] or his being stopped in the performance of the work by disputes between the contractor and the owner.[46] The right of a subcontractor to a lien will not be

Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797].

40. McDonald *v.* Hayes, 132 Cal. 490, 64 Pac. 850.

41. Carroll *v.* McVicar, 15 Manitoba 379; Russell *v.* French, 28 Ont. 215 [*distinguishing* as no longer applicable Goddard *v.* Coulson, 10 Ont. App. 1; *In re* Sear, 23 Ont. 474; *In re* Cornish, 6 Ont. 259].

42. Delray Lumber Co. *v.* Keohane, 132 Mich. 17, 92 N. W. 489.

43. Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425; MacKnight Flintic Stone Co. *v.* New York, 78 N. Y. App. Div. 641, 79 N. Y. Suppl. 521 [*affirmed* in 176 N. Y. 586, 68 N. E. 1119]; Rand *v.* Leeds, 2 Phila. (Pa.) 160. *Compare* Newcomer *v.* Hutchings, 96 Ind. 119, holding that in an action by a subcontractor to enforce a mechanic's lien a counter-claim by the owner which alleged a breach of plaintiff's contract with the contractor on which the lien was based, and claimed the benefit of that contract and asked damages for the breach was bad on demurrer.

Compliance with principal contract.— It is not necessary in order to entitle a subcontractor to a lien that his contract and his performance of the same should conform in all respects to the contract between the contractor and the owner. Wisconsin Red Pressed Brick Co. *v.* Hood, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. Rep. 418.

The contractor's erroneous construction of the main contract in one detail does not justify the subcontractor's failing to perform other work concededly within the contract. MacKnight Flintic Stone Co. *v.* New York, 78 N. Y. App. Div. 641, 79 N. Y. Suppl. 521 [*affirmed* in 176 N. Y. 586, 68 N. E. 1119].

Claim of implied contract.— Where the only contract pleaded as a basis for the subcontractor's lien is an entire contract, a contention that even if plaintiff failed to perform the contract he is still entitled to a lien for the value of material left on the premises and used by the contractor under an implied contract to pay therefor will not be considered. MacKnight Flintic Stone Co. *v.* New York, 78 N. Y. App. Div. 640, 79 N. Y. Suppl. 523 [*affirmed* in 176 N. Y. 586, 68 N. E. 1119].

The owner of the building is estopped to claim that the subcontractor's contract for his own work included quoins, where the detail drawings furnished the subcontractor from which to make an estimate, did not show the quoins, and the original contract provided that the work should be done in accordance with the working drawings furnished by the architect whenever required. Mantonya *v.* Reilley, 184 Ill. 183, 56 N. E. 425.

Where a subcontractor never saw the drawings for door and window frames which he furnished, and was repeatedly told that there would be no detail drawings for the frames and that he must be governed by his own judgment in their preparation, and neither the architect nor the owner made any objection at the time but permitted the frames to become a part of the building, the fact that the frames did not accord with the drawings does not deprive the subcontractor of a lien. Toan *v.* Russell, 111 Ill. App. 629.

Completion by contractor.— Where subcontractors being unable to complete their contract authorized the contractor to complete it on their account, which he did, the cost was to be deducted from the contract price before anything became due to the subcontractors to which a lien could attach. Brainard *v.* Kings County, 84 Hun (N. Y.) 290, 32 N. Y. Suppl. 311.

Duty of owner to accept.— Where certain scales supplied by a subcontractor were properly constructed as found by the jury, the owner was bound to accept them, and a lien attached therefor. Girard Point Storage Co. *v.* Riehle, 7 Pa. Cas. 594, 12 Atl. 172.

44. Pierce *v.* Cabot, 159 Mass. 202, 34 N. E. 362; Moore *v.* Erickson, 158 Mass. 71, 32 N. E. 1031; Henderson *v.* Sturgis, 1 Daly (N. Y.) 336.

45. Bates *v.* Masonic Hall, etc., Fund, 7 Misc. (N. Y.) 609, 27 N. Y. Suppl. 951 [*affirmed* in 88 Hun 236, 34 N. Y. Suppl. 598]; Mull *v.* Jones, 18 N. Y. Suppl. 359.

46. Warwick First Nat. Bank *v.* Mitchell, 46 Misc. (N. Y.) 30, 93 N. Y. Suppl. 231.

defeated by defects in the work arising from the architecture,[47] and where the subcontractor offers to correct work differing from the plan but is prevented by the owner from doing so, he may enforce his lien if the cost of correction is trifling.[48] Where a principal contractor on a default of a subcontractor undertook with the consent of the owner and a materialman, who had furnished materials to the subcontractor, to complete the work, the right of the materialman to claim a lien on the money coming due under the contract from the principal contractor to the subcontractor continued as if the subcontractor had completed his contract.[49]

j. Lien on Amounts Due Contractor. In a number of states the subcontractor, workman, or materialman has the right to serve upon the owner a notice or statement of the amount due him by the contractor, and it then becomes the duty of the owner to hold back out of any money due or to become due the contractor a sufficient amount to meet the claim,[50] and to the extent of the amount due or to

47. Welch *v.* Sherer, 93 Ill. 64.

48. Welch *v.* Sherer, 93 Ill. 64.

49. Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577, holding further that the lien of the materialman for what he had furnished was not affected by the fact that the principal contractor also defaulted and the work was completed by the owner.

50. *California.*— Hampton *v.* Christensen, (1905) 84 Pac. 200 (the owner must withhold sufficient funds from the contractor to pay the claimant, together with attorney's fees in the sum of one hundred dollars and estimated costs); Newport Wharf, etc., Co. *v.* Drew, 125 Cal. 585, 58 Pac. 187; Bridgeport First Nat. Bank *v.* Peris Irr. Dist., 107 Cal. 55, 40 Pac. 45; Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438 [*followed* in Russ Lumber, etc., Co. *v.* Roggenkamp, (1894) 35 Pac. 643]; Kruse *v.* Wilson, (App. 1906) 84 Pac. 442.

Kentucky.— Roe *v.* Scanlan, 98 Ky. 24, 32 S. W. 216, 17 Ky. L. Rep. 595.

Louisiana.— See Jorda *v.* Gobet, 5 La. Ann. 431.

New Jersey.— Budd *v.* Camden School Dist. No. 4, 51 N. J. L. 36, 16 Atl. 194; Mayer *v.* Mutchler, 50 N. J. L. 162, 13 Atl. 620; McNab, etc., Mfg. Co. *v.* Paterson Bldg. Co., (Ch. 1906) 63 Atl. 709; Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 63 Atl. 705 [*reversing* 68 N. J. Eq. 315, 59 Atl. 253]; Kreutz *v.* Cramer, 64 N. J. Eq. 648, 54 Atl. 535; Anderson *v.* Huff, 49 N. J. Eq. 349, 23 Atl. 654; Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269. See also Fell *v.* McMannus, (Ch. 1885) 1 Atl. 747. The remedy by stop notices is limited to cases where the contract and specifications have been filed. English *v.* Warren, 65 N. J. Eq. 30, 54 Atl. 860.

New York.— Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229 [*reversing* 54 Hun 419, 7 N. Y. Suppl. 771]; McCorkle *v.* Herrmann, 117 N. Y. 297, 22 N. E. 948 [*reversing* 22 N. Y. St. 519]; Devlin *v.* Mack, 2 Daly 94. See also Monteith *v.* Evans, 3 Sandf. 65. The only persons who have any right to deliver to the owner of a building an attested copy of their account against the contractor, and thus acquire a lien upon the sum due him from the owner, are those mentioned in the statute. If the account rendered is not of such a character as to give the party a lien, even if correct, it is not necessary for the owner to deliver it to the contractor. Burst *v.* Jackson, 10 Barb. 219.

Ohio.— Dunn *v.* Rankin, 27 Ohio St. 132; McCullom *v.* Richardson, 2 Handy 274, 12 Ohio Dec. (Reprint) 440.

Texas.— Muller *v.* McLaughlin, (Civ. App.) 1905) 84 S. W. 687.

West Virginia.— Stout *v.* Golden, 9 W. Va. 231.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 148.

Moneys to become due must be retained as well as moneys due. Budd *v.* Camden School Dist. No. 4, 51 N. J. L. 36, 16 Atl. 194 [*following* Mayer *v.* Mutchler, 50 N. J. L. 162, 13 Atl. 620, and *disapproving* Craig *v.* Smith, 37 N. J. L. 549; Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269]. See also McDonald Stone Co. *v.* Stern, 142 Ala. 506, 38 So. 643.

The mechanic has no lien upon unliquidated damages due to the builder on account of a violation of the contract on the part of the owner, but only on amounts due or to become due for actual performance. Miner *v.* Hoyt, 4 Hill (N. Y.) 193.

Amount due for extra work.— When a contract for a structure provides for changes in the plans and specifications, and extra work is done in completing the structure, without a new contract, a subcontractor of any part of the job may perfect a lien on the amount due from the owner to the contractor for such extra work. Dunn *v.* Rankin, 27 Ohio St. 132.

Separate contracts.— A materialman who furnished material under one contract cannot obtain a lien upon the balance due under another. Quinlan *v.* Russell, 94 N. Y. 350 [*affirming* 47 N. Y. Super. Ct. 212].

By whom notice given.— A subcontractor employed by a building contractor demanded payment of the contractor and was refused. He then gave an order on the contractor to a materialman whom he owed for materials used in the work. This order was taken, not as a payment but only to be credited on the subcontractor's debt when paid, and it was

become due the contractor the owner then becomes directly liable to the claimant,[51] the effect of the notice being to work an assignment *pro tanto* of that which is due or to become due from the owner to the contractor from the time of the service of the notice.[52] But it is only by compliance with the statute that the lien on money due the contractor from the owner can be obtained,[53] and if the notice does not conform to the statutory requirements no right or lien is obtained

not paid but was returned to the subcontractor. It was held that the order was not an assignment so as to make it incumbent on the materialman as assignee to give the stop notice to the owner but was merely an authority to collect and apply, so that a stop notice was properly given by the subcontractor. South End Imp. Co. *v.* Harden, (N. J. Ch. 1902) 52 Atl. 1127.

Actual notice to owner necessary.— McCune *v.* Snyder, 18 Ohio Cir. Ct. 24, 9 Ohio Cir. Dec. 572.

Notice of intention to acquire lien on property not sufficient.— Crawford *v.* Crockett, 55 Ind. 220. As to notice of intention to file lien see *infra*, III, B.

Where the surety of the contractor completes the work with the consent of the owner, the amount due him on the completion is subject to liens perfected against the original contractor. Smith *v.* Lange, 81 N. Y. App. Div. 192, 80 N. Y. Suppl. 1078.

The dismissal of a suit brought by the contractor against the owner on the ground that there is nothing due him is not a determination against claims of subcontractors upon the fund still in the owner's hands. Owen *v.* Murry, 6 Ohio S. & C. Pl. Dec. 223, 4 Ohio N. P. 151.

Failure to give notice as items furnished.— Where a furnisher of materials gave notice of its claim and fixed its lien therefor at a time when the owner had in his hands an amount more than sufficient to pay it, and when no other claims had been presented, it thereby secured the right to have the owner withhold that sum from the contractor for its benefit, although the claimant failed to give notice of the items of its bills as the material was furnished. Nichols *v.* Dixon, (Tex. 1905) 89 S. W. 765 [*affirming* (Civ. App.) 85 S. W. 1051].

Money due from contractor to materialmen cannot be intercepted.— Kruse *v.* Wilson, (Cal. App. 1906) 84 Pac. 442.

Under the South Carolina statute of 1896 (22 St. at L. 198) giving subcontractors and others "a first lien on the money received by said contractor" no lien can exist until the contractor has received the money, and there is no lien on funds in the possession of the owner or of the sheriff under attachment against the owner. Morgan *v.* D. W. Alderman, etc., Co., 70 S. C. 462, 50 S. E. 26.

51. Culver *v.* Fleming, 61 Ill. 498; Busse *v.* Voss, 9 Ohio Dec. (Reprint) 441, 13 Cinc. L. Bul. 542; Loonie *v.* Frank, 51 Tex. 406.

Where the contract provides for payment in land the notice fixes a right in the materialman or workman to be paid from the land, which equity will enforce. Anderson *v.* Huff, 49 N. J. Eq. 349, 23 Atl. 654.

Retaining balance to complete work.— The owner of a building has not the right to retain the balance due on the original contract remaining in his hands, with which to enable the contractor to complete the work, after notice of the claims of subcontractors. Morehouse *v.* Moulding, 74 Ill. 322.

An agreement between the owner and the contractor that no suit shall be brought until the lien notices shall have been paid does not prevent subcontractors from maintaining a suit for money still due under the contract. Owen *v.* Murry, 6 Ohio S. & C. Pl. Dec. 223, 4 Ohio N. P. 151.

52. Budd *v.* Camden County School Dist. No. 4, 51 N. J. L. 36, 16 Atl. 194; Mayer *v.* Mutchler, 50 N. J. L. 162, 13 Atl. 620; Frank *v.* Hudson County, 39 N. J. L. 347; South End Imp. Co. *v.* Harden, (N. J. Ch. 1902) 52 Atl. 1127; Anderson *v.* Huff, 49 N. J. Eq. 349, 23 Atl. 654; Wightman *v.* Bremer, 26 N. J. Eq. 489.

A deposit of money with the county clerk by the owner at the request of the contractor to discharge mechanics' liens then of record against the property is a payment to the contractor on account and cannot be reached by a mechanic's lien subsequently filed. White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118].

Mortgage.— Where an owner of land executes a mortgage to a contractor engaged in the construction of a house thereon, as security for a portion of the contract price, and not as a payment thereof, the mortgage debt is to be treated as a sum due upon the contract, and a mechanic's lien filed before the mortgage is paid, for materials furnished to the contractor, attaches to the mortgage debt. And the fact that after the lien is filed the contractor assigns the mortgage as collateral security for money advanced to him does not impair the validity of the lien on the mortgage debt. Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305.

When any residue of the contract price remains after the payment of costs, statutory notices, and equitable assignments which are effective, it belongs to the contractor. Flaherty *v.* Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186.

53. Hull *v.* Baldwin, 45 N. J. Eq. 858, 18 Atl. 976.

When the owner is a corporation the delivery of the attested account to the person whom the corporation has authorized to be its representative or active agent to act in the special matter arising under the contract upon which the claim is based is a compliance with the statute. Dunn *v.* Rankin, 27 Ohio St. 132.

thereby.[54] The claimant must show himself to be within the class contemplated by the statute and his claim to be such as the statute includes.[55] In order to be entitled to this remedy against funds in the hands of the owner the claimant must be a creditor of the contractor[56] whose debt was contracted for work done on, or materials furnished for, the building or other improvement;[57] his debt must be due;[58] he must have demanded payment from the contractor of such an amount as he was entitled to receive at once and been refused;[59] and he must give notice in writing to the owner of the contractor's refusal to pay and of the amount by him demanded.[60] This is a remedy entirely disconnected from[61] and additional

54. Hall *v.* Baldwin, 45 N. J. Eq. 858, 18 Atl. 976.

A written demand made upon the owner by an agent without any written authority from the principal giving such agent power to receive the money due may properly be disregarded by the owner. Foster *v.* Rudderow, (N. J. Ch. 1885) 3 Atl. 694.

55. A notice which states that the material was sold to the contractor for the building, but does not expressly allege that it was actually used in the building, is sufficient. McNab, etc., Mfg. Co. *v.* Paterson Bldg. Co., (N. J. Ch. 1906) 63 Atl. 709; Donnelly *v.* Johnes, 58 N. J. Eq. 442, 44 Atl. 180.

Service together of stop notice and assignment from contractor.— Where a written assignment from the contractor to a materialman, purporting to transfer to the materialman a certain sum of the amount due from the owner to the contractor, was delivered by the materialman to the owner, together with a notice stating that a certain sum was due from the contractor for labor and materials used in the construction of the building, and the notice incorrectly stated that the material was used by the owner instead of the contractor in the erection of the building, but the assignment stated this matter correctly, and the labor for which the lien was sought was labor expended in transporting materials to the site of the building, it was held that, even though the claim for labor might not be lienable, the assignment and notice, construed together, were sufficient under the statute to fix a lien on the amount due the contractor for the lienable portion of the debt. McNab, etc., Mfg. Co. *v.* Paterson Bldg. Co., (N. J. Ch. 1906) 63 Atl. 709.

56. The right is limited to creditors of the contractor and does not extend to the creditors of a subcontractor. Donaldson *v.* Wood, 22 Wend. (N. Y.) 395 [*affirming* 17 Wend. (N. Y.) 550]; Stephens *v.* United Railroads Stock Yard Co., 29 Ohio St. 227 [*affirming* 5 Ohio Dec. (Reprint) 334, 4 Am. L. Rec. 669, 7 Ohio Dec. (Reprint) 47, 1 Cinc. L. Bul. 84].

57. Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

Sufficiency of notice.— A stop notice which declares that certain materials were furnished to the contractor "for and in the erection" of a building sufficiently shows that the materials were actually used in the building. Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 63 Atl. 705 [*reversing* 68 N. J. Eq. 315, 59 Atl. 253].

58. Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

59. Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269; Williams *v.* Bradford, (N. J. Ch. 1891) 21 Atl. 331.

Sufficiency of demand.— Where a building contractor abandoned his contract with the owner before a subcontractor had completed his work, and gave the subcontractor a written agreement rescinding the subcontract as to the uncompleted portion, and fixing the amount agreed to be due for the work performed, this agreement, being given because the contractor could not proceed and was unable to pay, and for the purpose of filing notice with the owner, was a sufficient demand to entitle the subcontractor to file a stop notice with the owner. South End Imp. Co. *v.* Harden, (N. J. Ch. 1902) 52 Atl. 1127. Where a materialman presented his bill to the contractor, stating that a notice was to be presented to the owner, and, although there was some talk about the examination of vouchers, there was no claim that the bill was incorrect or that the contractor offered to pay it, there was sufficient evidence of a demand on the contractor to support a notice to the owner. Evans *v.* Lower, (N. J. 1904) 58 Atl. 294.

Sufficiency of notice.— A stop notice which sets forth that a certain sum is due from the contractor to the claimant for materials in the erection of a building, and that the contractor has refused to pay therefor, need not more explicitly state that payment has been demanded. Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 63 Atl. 705 [*reversing* 68 N. J. Eq. 315, 59 Atl. 253]. *Compare* Flaherty *v.* Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186.

60. Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

61. Weldon *v.* Los Angeles County Super. Ct., 138 Cal. 427, 71 Pac. 502; Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438; Crawford *v.* Crockett, 55 Ind. 220; Loonie *v.* Frank, 51 Tex. 406. See also Stout *v.* Golden, 9 W. Va. 231.

Failure to file notice of lien.— The right of a materialman to serve notice of his demand on the owner, requiring him to retain a sufficient sum to pay it, as provided by Cal. Code Civ. Proc. § 1184, is not affected by a failure to file a notice of lien within thirty days, as provided by section 1187, nor by section 1190, declaring that no lien shall be binding longer than ninety days unless proceedings to enforce it be commenced within such time.

to[62] the remedy by lien upon the building, and should be regarded with favor by the courts.[63] It does not depend upon the right to enforce a mechanic's lien,[64] or upon the completion of the principal contract by the contractor.[65] A recovery of judgment against the contractor does not destroy the rights acquired by the notice.[66] The subcontractor acquires no general lien on the whole fund in the owner's hands, but what amounts to a specific appropriation of a part sufficient to pay his account; and the owner may pay over the balance to the contractor.[67] If an instalment coming to be due next after the service of such notices satisfies them and leaves a residue, that residue is at the disposal of the contractor, and liable to the attack of his outside creditors;[68] but if there be a deficiency unsatisfied, notices will operate upon the next instalment which comes to be due under the contract in the progress of the work, and so on until the final instalment has been disposed of in the same manner.[69] Until he has filed the prescribed notice the subcontractor, workman, or materialman has no preferential right to payment out of the sum due the contractor from the owner,[70] and if before this is done other creditors pursuing the usual remedies for the collection of debts have acquired a legal or equitable right to have the debt applied in satisfaction of other claims, that right is not overreached by liens subsequently filed,[71] unless priority is given by the provisions of the statute.[72]

Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45.

62. Weldon *v.* Los Angeles County Super. Ct., 138 Cal. 427, 71 Pac. 502; Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438.

63. Weldon *v.* Los Angeles County Super. Ct., 138 Cal. 427, 71 Pac. 502; Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438.

Time of serving notice.— Under Cal. Code Civ. Proc. § 1184, providing, in regard to mechanics' liens, that the owner shall retain a certain percentage of the contract price for thirty-five days after the completion of the work, and that the materialmen, etc., may at any time serve notice on the owner of their claim for material furnished or labor performed, whereupon the owner shall retain sufficient of the money due or to become due the contractor to satisfy such claims, the notices may be served after the expiration of the thirty-five days, provided there are funds due the contractor still in the hands of the owner. San Francisco Bd. of Education *v.* Blake, (Cal. 1894) 38 Pac. 536.

64. Roe *v.* Scanlan, 98 Ky. 24, 32 S. W. 216, 17 Ky. L. Rep. 595; Brush Electric Co. *v.* Warwick Electric Mfg. Co., 6 Ohio S. & C. Pl. Dec. 475, 4 Ohio N. P. 279. *Contra*, Muller *v.* McLaughlin, (Tex. Civ. App. 1905) 84 S. W. 687.

Public building.— A subcontractor can, by giving the statutory notice, acquire a right to payment out of the fund due the contractor for a public building, although the building itself is not subject to the lien. Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438; Roe *v.* Scanlan, 98 Ky. 24, 32 S. W. 216, 17 Ky. L. Rep. 595; McKee *v.* Rapp, 35 N. Y. Suppl. 175; Clark *v.* Haggerty, 5 Ohio Cir. Ct. 235, 3 Ohio Cir. Dec. 118 [*distinguishing* Lumber Co. *v.* Purdum, 41 Ohio St. 373]. *Contra*, Breneman *v.* Harvey, 70 Iowa 479, 30 N. Y. 846. And see Wilkinson *v.* Hoffman, 61 Wis. 637, 21 N. W. 816.

65. Russ Lumber, etc., Mill Co. *v.* Roggenkamp, (Cal. 1894) 35 Pac. 643 [*following* Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438]; Mayer *v.* Mutchler, 50 N. J. L. 162, 13 Atl. 620 (holding that if the contractor, although the contract is never completely executed, is in a position to recover from the owner either on the contract or on *quantum meruit*, a notice given to the owner by a subcontractor will reach the amount so recoverable); McKee *v.* Rapp, 35 N. Y. Suppl. 175.

66. Anderson *v.* Huff, 49 N. J. Eq. 349, 23 Atl. 654, holding, however, that the costs of suit and interest upon the demand given as damages for its detention are not a lien upon the fund by virtue of the notice.

67. McCullom *v.* Richardson, 2 Handy (Ohio) 274, 12 Ohio Dec. (Reprint) 440.

68. Donnelly *v.* Johnes, 58 N. J. Eq. 442, 44 Atl. 180.

69. Donnelly *v.* Johnes, 58 N. J. Eq. 442, 44 Atl. 180.

70. Adams *v.* Wells, 64 N. J. Eq. 211, 53 Atl. 610; Hall *v.* Baldwin, 45 N. J. Eq. 858, 18 Atl. 976; Bates *v.* Salt Springs Nat. Bank, 157 N. Y. 322, 51 N. E. 1033 [*reversing* 88 Hun 236, 34 N. Y. Suppl. 598]; Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229 [*reversing* 54 Hun 419, 7 N. Y. Suppl. 771]; McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948 [*reversing* 5 N. Y. Suppl. 881]; Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270 [*affirming* 52 Hun 191, 5 N. Y. Suppl. 161]; Mahoney *v.* McWalters, 3 N. Y. App. Div. 248, 38 N. Y. Suppl. 256. See also Nichols *v.* Dixon, (Tex. 1905) 89 S. W. 765 [*affirming* (Civ. App.) 85 S. W. 1051].

71. Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229 [*reversing* 54 Hun 419, 7 N. Y. Suppl. 771]; McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948 [*reversing* 5 N. Y. Suppl. 881]; Payne *v.* Wilson, 74 N. Y. 348.

72. Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229 [*reversing* 54 Hun 419, 7 N. Y. Suppl. 771]; McCorkle *v.* Herrman, 117

III. PERFECTION OF LIEN.[73]

A. Necessity For Compliance With Statutory Requirements. The doing of work or furnishing of materials gives merely an inchoate lien or the right to acquire a lien, and the statutes prescribe the steps to be taken to perfect the lien.[74] A compliance with the statutory requirements is necessary in order to acquire a valid and enforceable lien,[75] but the same rule which makes this

N. Y. 297, 22 N. E. 948 [*reversing* 5 N. Y. Suppl. 881].

73. Filing or recording contract see *supra*, II, C, 7.

74. The owner cannot waive a statutory condition precedent to the attaching of a mechanic's lien in favor of the contractor. Burnside *v.* O'Hara, 35 Ill. App. 150.

Alternative methods of acquiring lien.— If the contract be in writing, the lien may be acquired either under the previous statute (Va. Code, c. 115, § 2), by the recordation of the contract as therein provided, in which case the remedy would be by bill in equity, or under the act of 1870, by filing in the clerk's office and having recorded "a true account of the work done or materials furnished," etc., as provided by section 4 of said chapter. Pairo *v.* Bethell, 75 Va. 825.

75. *Alabama.*— Long *v.* Pocahontas Coal Co., 117 Ala. 587, 23 So. 526; Chandler *v.* Hanna, 73 Ala. 390.

California.— San Francisco Pav. Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255; Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873; Morris *v.* Wilson, 97 Cal. 644, 32 Pac. 801.

Colorado.— Cannon *v.* Williams, 14 Colo. 21, 23 Pac. 456; Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226, 20 Pac. 764.

Connecticut.— Mead's Appeal, 46 Conn. 417.

Illinois.— Griffin *v.* Booth, 152 Ill. 219, 38 N. E. 551 [*affirming* 50 Ill. App. 217]; Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39 [*affirming* 46 Ill. App. 287]; Whitlow *v.* Champlin, 52 Ill. App. 644; Naughten *v.* Palmer, 46 Ill. App. 574.

Iowa.— Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863; Mears *v.* Stubbs, 45 Iowa 675.

Maryland.— Reindollar *v.* Flickinger, 59 Md. 469. While the Mechanics' Lien Law expressly requires a liberal construction to be given to its provisions, it is nevertheless necessary that it be substantially complied with before a party seeking to enforce an alleged mechanic's lien can do so successfully, either in a court of law or of equity. Hermann *v.* Mertens, 87 Md. 725, 39 Atl. 618; Plummer *v.* Eckenrode, 50 Md. 225; Hess *v.* Poultney, 10 Md. 257. A materialman has, however, a subsisting lien in the intermediate time between the furnishing of the materials and the expiration of the six months limited by the law for filing his claim, although no claim has been filed by him. Franklin F. Ins. Co. *v.* Coates, 14 Md. 285.

Michigan.— Hall *v.* Erkfitz, 125 Mich. 332, 84 N. W. 310.

Missouri.— Towner *v.* Remick, 19 Mo. App. 205.

Oklahoma.— Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Pennsylvania.— Knelly *v.* Horwath, 208 Pa. St. 487, 57 Atl. 957; Wolf Co. *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 439 (holding that the provision of the Pa. Act of June 4, 1901 (Pamphl. Laws 431), that the owner shall not only have notice of a subcontractor's intention to file a mechanic's lien, but also that a sworn statement shall be served on the owner setting forth "the date when the last work was done or materials furnished," is an essential requirement, and failure to comply with it is fatal to the validity of the claim); Este *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521; Law *v.* Levine, 13 Pa. Super. Ct. 152.

Texas.— Lee *v.* O'Brien, 54 Tex. 635; Lee *v.* Phelps, 54 Tex. 367; Ferguson *v.* Ashbell, 53 Tex. 245; McCreary *v.* Waco Lodge, No. 70 I. O. O. F., 2 Tex. Unrep. Cas. 675.

Utah.— Elwell *v.* Morrow, 28 Utah 278, 78 Pac. 605.

Virginia.— Franklin St. Church *v.* Davis, 85 Va. 193, 7 S. E. 245; Shackleford *v.* Beck, 80 Va. 573.

West Virginia.— Mertens *v.* Cassini Mosaic, etc., Co., 53 W. Va. 192, 44 S. E. 241; Niswander *v.* Black, 50 W. Va. 188, 40 S. E. 431; Stout *v.* Golden, 9 W. Va. 231; Mayes *v.* Ruffners, 8 W. Va. 384.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

United States.— Cameron *v.* Campbell, 141 Fed. 32, 72 C. C. A. 520 [*reversing* 5 Indian Terr. 323, 82 S. W. 762]; Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424; Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61.

Furnishing account to owner.— Under a statute providing that a subcontractor or materialman who has given notice to the owner of his intention to claim the lien "shall, as often as once in thirty days, furnish to the owner . . . an account in writing of the labor performed or materials furnished during the thirty days," the failure to render an account within thirty days after notice of the intention to assert a lien is not a withdrawal of the notice or a waiver of the lien as to work and material subsequently furnished. The account is merely a prerequisite to the maintenance of a lien for the work and materials furnished during the preceding thirty days. Lawson *v.* Kimball, 68 N. H. 549, 38 Atl. 380.

Statement by contractor as to subcontractors, etc.— Under a statute making the right of the contractor to enforce a lien dependent upon his having furnished to the owner a sworn statement giving the names of

essential renders it unnecessary to take any other step than is thus required.[76] Some cases have laid down the rule that the statute must be strictly complied with,[77] but the better opinion seems to be that as such requirements relate to the remedy rather than to the right, a substantial compliance with the statute is sufficient.[78]

B. Notice to Owner[79] — **1. Necessity.** As a general rule a person other than the principal contractor, who wishes to acquire a lien, is required to give the owner notice that he has furnished labor or materials for which he has not been paid and intends to claim a lien;[80] and mere knowledge to the owner that a

all subcontractors, laborers, and materialmen with the amount due to each of them, such a statement is indispensable (Wiltsie *v.* Harvey, 114 Mich. 131, 72 N. W. 134; Sterner *v.* Haas, 108 Mich. 488, 66 N. W. 348, holding that a plumber and gas-fitter who furnishes the necessary materials and labor for plumbing, roofing, steam-heating and electric wiring in a building is a contractor within the meaning of such a statute, even though the parties did not agree upon an aggregate price for the work and material furnished, but the articles furnished were purchased as wanted and at the time of purchasing it was arranged with the plumber and gas-fitter to place the same in the building. See also Martin *v.* Warren, 109 Mich. 584, 67 N. W. 897), notwithstanding the owner and contractor are the only parties interested (Kerr-Murray Mfg. Co. *v.* Kalamazoo Heat, etc., Co., 124 Mich. 111, 82 N. W. 801, holding, however, that manufacturers who sell window frames, sash, and doors, made in their own shops for use in a building in process of erection, are materialmen and are not required to furnish such a statement).

Recording copy of account filed.— A statute requiring a subcontractor who has filed an account with the owner to deposit a copy thereof with the recorder of the county has been held to be for the protection of his fellow subcontractors who are then entitled and required to furnish their sworn statements to the owner within a certain time, and the requirement of filing with the county recorder applies only to the first subcontractor's account filed, and subsequent claimants need only file their account with the owner. Kennett *v.* Rebholz, 6 Ohio Dec. (Reprint) 824, 8 Am. L. Rec. 354.

76. Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873.

77. Davis *v.* Livingston, 29 Cal. 283; Gross *v.* Butler, 72 Ga. 187; Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413; Odum *v.* Loomis, 1 Tex. App. Civ. Cas. § 524.

78. *Alabama.*— Long *v.* Pocahontas Coal Co., 117 Ala. 587, 589, 23 So. 526 ("compliance in all matters of substance"); Chandler *v.* Hanna, 73 Ala. 390.

Arkansas.— Anderson *v.* Seamans, 49 Ark. 475, 479, 5 S. W. 799, where it is said: "When the controversy is between the holder of the lien and the proprietor of the land, an exact compliance with the statute at all points is not indispensable."

California.— Hagman *v.* Williams, 88 Cal. 146, 25 Pac. 1111; Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139; Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772; Tredinnick *v.* Red Cloud Consol. Min. Co., 72 Cal. 78, 13 Pac. 152. But see *supra*, note 77.

Colorado.— Cannon *v.* Williams, 14 Colo. 21, 23 Pac. 456.

Illinois.— Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39 [*affirming* 46 Ill. App. 287].

Iowa.— See Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015; Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255.

Maryland.— Reindollar *v.* Flickinger, 59 Md. 469; Wehr *v.* Shryock, 55 Md. 334.

Missouri.— Towner *v.* Remick, 19 Mo. App. 205.

Oklahoma.—Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac 303.

Pennsylvania.— American Car, etc., Co. *v.* Alexandria Water Co., 215 Pa. St. 520, 64 Atl. 683; Este *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521.

Texas.— Lee *v.* O'Brien, 54 Tex. 635; Lee *v.* Phelps, 54 Tex. 367; Ferguson *v.* Ashbell, 53 Tex. 245. But see *supra*, note 77.

West Virginia.—Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 381, 52 S. E 473; Mayes *v.* Ruffners, 8 W. Va. 384.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

Canada.— Robock *v.* Peters, 13 Manitoba 124, holding that the effect of the Manitoba statute is that only substantial compliance with the directions as to the contents of the claim and the registration of it is required, and no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some other party is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

79. Notice of filing of lien see *infra*, III, C, 8.

80. *Colorado.*— Sickman *v.* Wollett, 31 Colo. 58, 71 Pac. 1107.

Connecticut.— Hill *v.* Mathewson, 56 Conn. 323, 15 Atl. 368; Kinney *v.* Blackmer, 55 Conn. 261, 10 Atl. 568; White *v.* Washington School Dist., 42 Conn. 541; Hooker *v.* McGlone, 42 Conn. 95.

Dakota.— McMillan *v.* Phillips, 5 Dak. 294, 40 N. W. 349.

Florida.— Futch *v.* Adams, (1904) 36 So. 575; Scott *v.* Hempel, 33 Fla. 313, 14 So. 840.

Georgia.— Reaves *v.* Meredeth, 123 Ga. 444, 51 S. E. 391, 120 Ga. 727, 48 S. E. 199; Sparks *v.* Dunbar, 102 Ga. 129, 29 S. E. 295.

certain person is doing work or furnishing materials is not sufficient to entitle

Illinois.— Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425; Torrance *v.* Bouton, 96 Ill. App. 475; Jones *v.* Carey-Lombard Lumber Co., 87 Ill. App. 533; McGrath *v.* Donaldson, 87 Ill. App. 269; Standard Radiator Co. *v.* Fox, 85 Ill. App. 389; Mantonya *v.* Reilly, 83 Ill. App. 275; Green, etc., Lumber Co. *v.* Bain, 77 Ill. App. 17.

Indiana.— Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158; Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598; Vinton *v.* Builders, etc., Assoc., 109 Ind. 351, 9 N. E. 177; Crawfordsville *v.* Brundage, 57 Ind. 262; Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (App. 1901) 60 N. E. 464, (App. 1902) 62 N. E. 649.

Indian Territory.— Campbell *v.* Cameron, 5 Indian Terr. 323, 82 S. W. 762.

Iowa.— Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255. See also Robinson *v.* State Ins. Co., 55 Iowa 489, 8 N. W. 314; Nelson *v.* Cover, 47 Iowa 250, notice of intent to furnish.

Louisiana.—Stewart *v.* Christy, 15 La. Ann. 325.

Maryland.— Conway *v.* Crook, 66 Md. 290, 7 Atl. 402.

Massachusetts.— French *v.* Hussey, 159 Mass. 206, 34 N. E. 362. A mechanic employed by a contractor to furnish both labor and materials on a building has a lien for the labor only, if he has not notified the owner of the building of his intention to claim a lien before furnishing the materials. Robbins *v.* Blevins, 109 Mass. 219.

Montana.— Whiteside *v.* Lebcher, 7 Mont. 473, 17 Pac. 548.

Nevada.— Coscia *v.* Kyle, 15 Nev. 394.

New Hampshire.— Bixby *v.* Whitcomb, 69 N. H. 646, 46 Atl. 1049; Eastman *v.* Newman, 59 N. H. 581.

New Jersey.— Beckard *v.* Rudolph, 68 N. J. Eq. 315, 59 Atl. 253; Bayonne Bldg. Assoc. No. 2 *v.* Williams, 59 N. J. Eq. 617, 43 Atl. 669; Ter Knile *v.* Reddick, (Ch. 1898) 39 Atl. 1062.

New York.— Kenney *v.* Apgar, 93 N. Y. 539; Whipple *v.* Christian, 80 N. Y. 523.

North Carolina.— Clark *v.* Edwards, 119 N. C. 115, 25 S. E. 794; Pinkston *v.* Young, 104 N. C. 102, 10 S. E. 133, holding that the statute providing for an itemized statement by the contractor did not dispense with the necessity of notice by subcontractors and others except when such statement was furnished.

Ohio.— Van Cleve Glass Co. *v.* Wamelink, 20 Ohio Cir. Ct. 510, 10 Ohio Cir. Dec. 12.

Oklahoma.— Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

Pennsylvania.— Wheeler *v.* Pierce, 167 Pa. St. 416, 31 Atl. 649, 46 Am. St. Rep. 679; Best *v.* Baumgardner, 122 Pa. St. 17, 15 Atl. 691, 1 L. R. A. 356 (holding that the Pennsylvania act of May 18, 1887, extending the Mechanics' Lien Acts of May 1, 1861, and March 22, 1865, which applied only to Lancaster and three other counties, to all the counties of the state, with a new provision making the giving of notice a prerequisite to a lien, requires such notice as well in Lancaster as in the remaining counties); Collins *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 547; Este *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521; Getz *v.* Brubaker, 25 Pa. Super. Ct. 303; Mehl *v.* Fisher, 13 Pa. Super. Ct. 330; German Fairhill Bldg. Assoc. No. 2 *v.* Heebner, 3 Pa. Super. Ct. 643; West Chester *v.* Sahler, 8 Pa. Co. Ct. 656; Dreibelbis *v.* Scazholtz, 8 Pa. Co. Ct. 655; Roth *v.* Hobson, 5 Pa. Co. Ct. 17; McKeever *v.* Albert, 4 Pa. Co. Ct. 251; Foster *v.* Montanye, 7 Kulp 14.

Tennessee.— McLeod *v.* Capell, 7 Baxt. 196; Shelby *v.* Hicks, 5 Sneed 197.

Texas.— James *v.* St. Paul's Sanitarium, 24 Tex. Civ. App. 664, 60 S. W. 322.

Utah.— Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 161.

Contra, under Oreg. Act, May 22, 1885. Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97.

Burns Rev. St. Ind. (1901) § 7255, giving contractors, etc., a lien for erecting, altering, etc., any house, building, waterworks, etc., and providing that all claims for wages for mechanics and laborers employed in or about any shop, etc., shall be a first lien on all machinery, tools, etc., in the shop, etc., and that in case the owner shall be in failing circumstances the claims shall be preferred debts, whether notice of lien has been filed or not, does not give a mechanic's lien to a subcontractor without the filing of the notice required by section 7257, as the statute is to be construed as only preferring claims of laborers or mechanics in case of the insolvency of the employer. Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (App. 1902) 62 N. E. 649, (App. 1901) 60 N. E. 464 [*following* McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272].

Pa. Act, May 18, 1887, requiring that notice of a materialman's intention to file a lien shall be given, is intended to apply only to such cases as do not fall within the act of June 16, 1836, providing for the lien for the erection and construction of a building, or the act of April 21, 1856, extending the provisions of the latter act to embrace certain designated kinds of machinery, neither of the latter acts requiring that such notice be given. Wheeler *v.* Pierce, 167 Pa. St. 416, 31 Atl. 649, 46 Am. St. Rep. 679.

Original structure.— Evidence that the alteration on the premises, made on the order of the lessee, for which the lien was claimed, consisted merely of the erection of a wooden partition in one of the rooms, does not authorize a finding that the work was part of the original structure, so as to dispense with a notice to the owner, as required by the Pennsylvania acts of Aug. 1, 1868, and May 18, 1887, in case of repairs, alterations, or

such person to a lien, without other notice by or on behalf of such person.[81] One notice is sufficient, although the material for which the lien is claimed may have been furnished under more than one contract.[82] The owner cannot waive the defect of a failure to give notice in the mode prescribed so as to make the lien a valid one as against other lien claimants[83] or mortgagees.[84] Some statutes make it the duty of the contractor to furnish to the owner an itemized statement of the amounts owing to subcontractors, materialmen, workmen, etc., and when such statement is furnished the lien in favor of such person attaches without their giving notice to the owner.[85] Persons who contract directly with the owner are not as a rule required to give any notice.[86]

2. To Whom Notice Given. The notice should be given to the owner of the property,[87] and where there has been a change of ownership the person who is

additions. Hall *v.* Blackburn, 173 Pa. St. 310, 34 Atl. 18.

This notice need not be recorded.— Gilman *v.* Gard, 29 Ind. 291. As to filing or recording notice or claim of lien see *infra*, III, C.

Averment of notice.— A lien which avers that notice of intention to file a lien was given within the ten days required by the Pennsylvania act of 1887 will not on rule be stricken off on the ground that such notice was not given. Geigle *v.* Lavis, Wilcox (Pa.) 208.

81. Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514; Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158; Caylor *v.* Thorn, 125 Ind. 201, 25 N. E. 217; Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598; Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255 [*quoted* in Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015]. *Contra*, Padgitt *v.* Dallas Brick, etc., Co., (Tex. Civ. App. 1899) 51 S. W. 529.

82. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118.

83. White *v.* Washington School Dist., 42 Conn. 541.

84. Richards *v.* O'Brien, 173 Mass. 332, 53 N. E. 858.

85. Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923; Butler *v.* Cain, 128 Ill. 23, 21 N. E. 350 [*affirming* 29 Ill. App. 425]; Pinkston *v.* Young, 104 N. C. 102, 10 S. E. 133, holding, however, that notice to the owner is a prerequisite to the establishment of the lien where the contractor does not furnish such statement.

86. *Illinois.*— Le Forgee *v.* Colby, 69 Ill. App. 443.

Massachusetts.— Whitford *v.* Newell, 2 Allen 424.

Michigan.— Lamont *v.* Le Fevre, 96 Mich. 175, 55 N. W. 687. See also Kirkwood *v.* Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549.

Missouri.— Squires *v.* Fithian, 27 Mo. 134.

Oklahoma.— Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

Pennsylvania.— Stormfeltz's Appeal, 135 Pa. St. 604, 19 Atl. 950; Stoner's Appeal, 135 Pa. St. 604, 19 Atl. 949; Crider *v.* McCafferty, 13 Pa. Dist. 638; Compton *v.* Sankey, 13 Pa. Dist. 535, 29 Pa. Co. Ct. 25, 7 Dauph. Co. Rep. 215; Mock *v.* Roscoe, 9 Del. Co. 286; Hoopes *v.* Greer, 9 Del. Co. 162.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

South Carolina.— Matthews *v.* Mouts, 61 S. C. 385, 39 S. E. 575.

Tennessee.— Jonte *v.* Gill, (Ch. App. 1897) 39 S. W. 750, holding that the facts showed the builder to be the mere agent of the owner and that consequently the contracts of those furnishing materials and labor were with "the owner or his agent" within Milliken & V. Code, § 2739. See also Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136, contract with purchaser under contract of sale.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 161.

Under the California statute where the principal contract is not made and filed as required, persons other than the principal contractor who have furnished labor or materials are deemed to have done so at the special instance of the owner, and the statutory notice to the owner is not necessary to entitle them to a lien. Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860; Kellogg *v.* Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588.

Where an owner of property ordered materials in behalf of a firm of which he was a member, he was a purchaser thereof, within the exception of Mass. Pub. St. c. 191, § 3, requiring notice in writing of an intention to claim a lien to be given the owner of the property "if such owner is not the purchaser." Fletcher *v.* Stedman, 159 Mass. 124, 34 N. E. 183.

A contract with a firm of which the owner is a member does not dispense with the necessity of giving the statutory notice to the owner as owner. Remdollar *v.* Flickinger, 59 Md. 469.

87. *Georgia.*— Pou *v.* Covington, etc., R. Co., 84 Ga. 311, 10 S. E. 744 [*followed* in Bullard *v.* Dudley, 101 Ga. 299, 28 S. E. 845].

Maryland.— Hess *v.* Poultney, 10 Md. 257.

Massachusetts.— Richards *v.* O'Brien, 173 Mass. 332, 53 N. E. 858.

Michigan.— Hall *v.* Erkfitz, 125 Mich. 332, 84 N. W. 310.

Missouri.— Schulenburg *v.* Bascom, 38 Mo. 189; Towner *v.* Remick, 19 Mo. App. 205.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

the owner at the time the lien attaches is the proper person to be served.[88] Where the notice is given to the person who appears by the public records to be the owner the lien is not defeated because it subsequently appears that some other person is the real owner.[89] Under some statutes notice to an agent of the owner is not sufficient,[90] but under other statutes it is sufficient that the notice be served on the authorized agent of the owner.[91] Where the statute authorizes service upon

See 34 Cent. Dig. tit. "Mechanics' Liens," § 163.

Where there is more than one owner the notice must be served on all or their agent. Towner *v.* Remick, 19 Mo. App. 205, although notice of an intention to file a mechanic's lien was not served on all the owners of the property, where it was served on one of such owners the lien can be enforced against his undivided interest. Kneisley Lumber Co. *v.* Edward B. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774.

Where the title to property is in a bishop, and the priest of a church within his diocese employs the contractor to construct a church building thereon, one furnishing materials to the contractor and desiring to obtain a lien therefor should give notice to the bishop, and notice to the priest is not sufficient. Gross *v.* Butler, 72 Ga. 187.

Under a contract with the board of education of the city of Brooklyn, notice of lien should be served on the city treasurer and not on the controller. Yellow Pine Co. *v.* Brooklyn Bd. of Education, 15 Misc. (N. Y.) 58, 36 N. Y. Suppl. 922.

An indorsement by the city attorney acknowledging service of the notice of a mechanic's lien against the city is sufficient to cause the lien to attach, especially where the lienor was prevented from serving it on the mayor, and was informed by the city attorney that his acceptance was sufficient. Ausbeck *v.* Schardien, 45 S. W. 507, 20 Ky. L. Rep. 178.

A tenant by the curtesy initiate is an owner within the meaning of the Missouri statute and is entitled to notice of the filing of the lien. Meyer *v.* Christian, 64 Mo. App. 203.

The vendor in an executory contract under which the purchaser takes possession of the lot and treats it as his own, and which contemplates the erection of a building by him and the passing of the title and execution of a mortgage to secure the purchase-price and advances on the building thirty days after completion of the building and proofs that there are no mechanics' liens, is not the owner within the meaning of Tenn. Acts (1889), c. 103, requiring of subcontractors thirty days' notice to the owner of a mechanic's lien, and notice to the vendor is not essential to give such a lien priority over his mortgage subsequently executed in compliance with the contract. Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136.

A notice addressed to other persons besides the owner but also addressed to him and served on him within the time limited is sufficient. Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575.

Death of owner.—Under Mo. Rev. St. (1889) § 4212, providing that where a property-owner who has contracted for an improvement dies while there is a lienable demand outstanding against the property, his executors or administrators must be made parties in an action to enforce the lien, and that it is unnecessary to make his heirs or devisees parties unless there is no executor or administrator, the executors and not trustees to whom the property has been devised are the proper persons on whom to serve notice of demand in a proceeding to enforce the lien. P. M. Bruner Granitoid Co. *v.* Klein, 100 Mo. App. 289, 73 S. W. 313.

88. Lefler *v.* Forsberg, 1 App. Cas. (D. C.) 36; McDowell *v.* Rockwood, 182 Mass. 150, 65 N. E. 65 (holding that where materials were furnished for a building under a contract with the person holding a contract to purchase, but who had no title to the land at the time, and the contractor did not give notice in writing to the owner of the land that he intended to claim a lien for such materials as provided by Mass. Pub. St. c. 191, § 3, he was not entitled to a lien as against a mortgagee of the purchaser); Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219 (holding that where materials were not furnished under a contract with the vendee until after the delivery of a deed to him and his simultaneous delivery of a mortgage to the vendor, notice to the vendor was not necessary to establish a lien); Kuhleman *v.* Schuler, 35 Mo. 142.

The purchaser of lands whereon the vendor has contracted for a building in process of construction at the time of the sale is the owner to be notified of the filing of a subcontractor's lien. Rice *v.* Carmichael, 4 Colo. App. 84, 34 Pac. 1010. *Compare* Miller *v.* Barroll, 14 Md. 173.

In Georgia, under the act of 1868 and the amending act of 1870, where lumber has been furnished to a person in possession of the premises for the erection of buildings and permanent fixtures thereon, who afterward assigns and transfers the premises, the demand for payment should be made on both the person to whom the lumber was furnished and the person in possession of the premises on which the buildings and other fixtures have been erected with plaintiff's lumber. Porter *v.* Lively, 45 Ga. 159.

89. Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412.

90. Pou *v.* Covington, etc., R. Co., 84 Ga. 311, 10 S. E. 744 [*followed* in Bullard *v.* Dudley, 101 Ga. 299, 28 S. E. 845].

91. Wickham *v.* Monroe, 89 Iowa 666, 57 N. W. 434 (service upon agent of notice addressed to owner); Smith-Anthony Stove

the agent of the owner the person served must be such an agent as the statute contemplates.[92] Where a wife's land is built on by the husband or by some person employed by him in his character as husband, he undertaking to make the improvement in the exercise of his own authority as such, the notice must be given to the wife,[93] and notice to the husband is not sufficient;[94] but where the husband in making improvements on his wife's land acts as her agent, notice to him is sufficient[95] and no notice to the wife is necessary.[96] A statutory requirement that notice of a claim for lien shall be served on the owner of a building or his agent is not complied with by service on a member of a building committee of an unincorporated society.[97] Under a statute requiring the notice of lien to be served on every person for whose immediate use, enjoyment, or benefit the building shall be made, his agent or either of them, service on one who holds the title as trustee for himself and another, who signed the building contract as trustee, and who supervised the construction, is sufficient, his acknowledgment of service reciting that it was for himself and the other.[98] A pretended and fraudulent owner who holds the record title for the protection of the real owner with whom the contract was made is not entitled to the notice required by statute to be given to owners when the contract has been made by others.[99] Service of a mechanic's lien notice for the erection of a school-house on one of the trustees of the district, who was called the "treasurer" of such trustees, but who did not appear to be treasurer of the district who was the only person having authority to hold the district funds, was not a substantial compliance with a statute requiring such liens to be filed with the board of trustees of the district.[1]

3. Time For Notice. The time for giving notice is fixed by statute and if the notice is not given at or within the proper time there can be no lien.[2] Under

Co. *v.* Speer, 65 Mo. App. 87; Shaw *v.* Bryan, 39 Mo. App. 523; Towner *v.* Remick, 19 Mo. App. 205; Laev Lumber Co. *v.* Auer, 123 Wis. 178, 101 N. W. 425. See also Dusick *v.* Green, 118 Wis. 240, 95 N. W. 144.

A coöwner of property may receive notice as principal for himself and as agent for the other coöwner. Smith-Anthony Stove Co. *v.* Spear, 65 Mo. App. 87.

Service upon the agent as owner instead of as agent is sufficient. Shaw *v.* Bryan, 39 Mo. App. 523.

The burden of proof as to the agency of the person served is upon the lien claimant. Johnson *v.* Barnes, etc., Bldg. Co., 23 Mo. App. 546.

92. Wiltsie *v.* Harvey, 114 Mich. 131, 72 N. W. 134, holding that under a statute authorizing service in case of the owner's absence from the county "on his agent having charge of such premises" service on an agent and bookkeeper for the owner at the owner's office is not sufficient, where it is not shown that such person had charge of the premises on which the lien is sought.

A supervising architect is not the owner's agent for the purpose of receiving notice of intention to claim a mechanic's lien. Drummond *v.* Rice, 27 Pa. Super. Ct. 226; Langenheim *v.* Anschutz-Bradberry Co., 2 Pa. Super. Ct. 285, 38 Wkly. Notes Cas. 505.

A notice to an agent whose powers are limited to renting offices in the building during the owner's absence is not sufficient. Henry *v.* Bunker, 22 Mo. App. 650.

Evidence that a person acted as agent for defendant in settling a contract for building a house and in making some payments thereon does not show that he was an agent to accept a notice of a mechanic's lien. Anderson *v.* Volmer, 83 Mo. 403.

A person charged by a non-resident owner with the duty of approving all bills or demands prior to their payment is the owner's agent on whom notice may be served. Johnson *v.* Barnes, etc., Bldg., Co., 23 Mo. App. 546.

93. Conway *v.* Crook, 66 Md. 290, 7 Atl. 402; Rimmey *v.* Getterman, 63 Md. 424.

94. Shafer *v.* Archbold, 116 Ind. 29, 18 N. E. 56.

95. Conway *v.* Crook, 66 Md. 290, 7 Atl. 402.

96. Rimmey *v.* Getterman, 63 Md. 424.

97. Padgitt *v.* Dallas Brick, etc., Co., (Tex. Civ. App. 1899) 51 S. W. 529; McCreary *v.* Waco Lodge No. 70 I. O. O. F., 2 Tex. Unrep. Cas. 675.

98. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118.

99. Baltis *v.* Friend, 90 Mo. App. 408.

1. Terwilliger *v.* Wheeler, 81 N. Y. App. Div. 460, 81 N. Y. Suppl. 173.

2. *Connecticut.*— Hill *v.* Mathewson, 56 Conn. 323, 15 Atl. 368.

Illinois.— Cary-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899; St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546; Torrance *v.* Bowton, 96 Ill. App. 475; O'Brien *v.* Graham, 33 Ill. App. 546.

Missouri.— Patrick *v.* Ballentine, 22 Mo. 143.

Rhode Island.— Newell *v.* Campbell Mach. Co., 17 R. I. 74, 20 Atl. 158; Mowry *v.* Hill, 14 R. I. 504.

Tennessee.— Cole Mfg. Co. *v.* Falls, 92

some of the statutes the notice must be given at or before the time of furnishing the labor or materials,[3] under others the notice must be given within a certain time after the commencement of furnishing such labor or materials,[4] while under

Tenn. 607, 22 S. W. 856; Shelby *v.* Hicks, 5 Sneed 197.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 164.

Who may raise objection.— The objection that notice was not served upon the owner within the statutory time, although it may be a good defense for the owner if he sees proper to interpose it, cannot, so far as it relates to his interest or the rights of those claiming under or through him, be raised by any other persons excepting those acquiring rights before the commencement of the proceedings to enforce the lien. Ombony *v.* Jones, 21 Barb. (N. Y.) 520 [*affirmed* in 19 N. Y. 234].

The law in force at the date of the contract governs as to the notice to be given notwithstanding it is repealed before the lien is perfected. Weber *v.* Bushnell, 171 Ill. 587, 49 N. E. 728 [*reversing* 69 Ill. App. 26].

3. *Dakota.*— McMillan *v.* Phillips, 5 Dak. 294, 40 N. W. 349.

Indiana.— Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158; Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598; Vinton *v.* Builders, etc., Assoc., 109 Ind. 351, 9 N. E. 177.

Indian Territory.— Campbell *v.* Cameron, 5 Indian Terr. 323, 82 S. W. 762.

Massachusetts.— Before any of the materials are furnished. French *v.* Hussey, 159 Mass. 206, 34 N. E. 362; Robbins *v.* Blevins, 109 Mass. 219.

Montana.— Whiteside *v.* Lebeber, 7 Mont. 473, 17 Pac. 548.

Pennsylvania.— Strawick *v.* Munhall, 139 Pa. St. 163, 21 Atl. 151 (holding that under the Pennsylvania act of June 17, 1887, authorizing the filing of mechanics' liens on leaseholds, which provides that, when the materials were furnished or labor performed by others than the original contractor, they shall notify the owners or reputed owners of the leasehold of their intention to file a lien, "and, unless such notice shall be given, no such lien shall be filed, nor be of any validity," the notice must precede the performance of the work to sustain the lien); Moss *v.* Greenberg, 3 Pa. Dist. 247, 34 Wkly. Notes Cas. 83; East Side Bank *v.* Columbus Tanning Co., 15 Pa. Co. Ct. 357.

Tennessee.— McLeod *v.* Capell, 7 Baxt. 196; Shelby *v.* Hicks, 5 Sneed 197, under former Tennessee statute.

Texas.— The statute requiring notice to the owner of each item as it is furnished has for its object to advise the owner as to the lien and to enable him to protect himself from loss by withholding the amount due the contractors, and the lien is not discharged by delay or irregularity in giving the notice when the owner is not prejudiced thereby. Breneman *v.* Beaumont Lumber Co., 12 Tex. Civ. App. 517, 34 S. W. 198.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 164.

Notice after commencement.— Under a statute requiring notice to be given at or before the time of furnishing the materials, one who gives notice after commencing to furnish materials but during the time he is engaged in furnishing them is not entitled to a lien even for what is furnished subsequent to such notice. French *v.* Hussey, 159 Mass. 206, 34 N. E. 362 (holding that, if some materials are furnished before, and some after, the giving of the notice, the materialman is not entitled to a lien, since the statute provides for no apportionment); Morrison *v.* Minot, 5 Allen (Mass.) 403 [*distinguishing* Whitford *v.* Newell, 2 Allen (Mass.) 424]. And see McMillan *v.* Phillips, 5 Dak. 294, 40 N. W. 349. *Contra,* Hubbard *v.* Moore, 132 Ind. 178, 31 N. E. 534; Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514, holding that a notice given while material is being delivered is not good as to what has been already used, but is good as to such material as has then been delivered but is unused at the time and is subsequently incorporated in the building, as well as what is subsequently delivered.

4. Hill *v.* Mathewson, 56 Conn. 323, 330, 15 Atl. 368 (holding that under Gen. St. § 3020, providing that "no person other than the original contractor for the building, or a subcontractor whose contract with such original contractor is in writing, and has been assented to in writing by the other party to such original contract, shall be entitled to claim any such lien, unless he shall, within sixty days from the time he shall have commenced to furnish materials or render services, give written notice to the owner of such building that he has so commenced to furnish materials or render services, and intends to claim a lien therefor on said building," a materialman who furnished materials under a single contract for a period of more than four months and gave notice to the owner after the materials were all furnished was not entitled to any lien for materials furnished within sixty days prior to the giving of the notice); Mowry *v.* Hill, 14 R. I. 504.

Temporary cessation of work.— Under a statute requiring notice to be given within thirty days after beginning the work, where a laborer employed by the day to work on a house began work more than thirty days before giving notice of a claim of lien, but was afterward taken away from the work and returned to it less than thirty days before giving notice and worked continuously thereafter, the notice was given in time to entitle him to a lien for the work done after he commenced work for the second time; for his employment being by the day his last assignment to the work was a new employment. Aubin *v.* Darling, 26 R. I. 469, 59

still other statutes the notice must be given within a certain time after the completion of the furnishing of labor or materials,[5] or after the completion of the building,[6] or after the time when payment should have been made.[7] It is some-

Atl. 390. See also Kenyon *v.* Peckham, 10 R. I. 402.

5. *Illinois.*— Cary-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899; Metz *v.* Lowell, 83 Ill. 565; Torrance *v.* Bowton, 96 Ill. App. 475; Standard Radiator Co. *v.* Fox, 85 Ill. App. 389, sixty days after completion of subcontract.

Maryland.— Hermann *v.* Mertens, 87 Md. 725, 39 Atl. 618 (holding the evidence sufficient to show the notice to have been in time); Conway *v.* Crook, 66 Md. 290, 7 Atl. 402 (within sixty days after furnishing work or materials).

Rhode Island.— Paterson *v.* St. Thomas' Church, 18 R. I. 349, 27 Atl. 449.

Tennessee.— Cole Mfg. Co. *v.* Falls, 92 Tenn. 607, 22 S. W. 856; Bassett *v.* Bertorelli, 92 Tenn. 548, 22 S. W. 423, holding that under Tenn. Acts (1889), c. 103, § 1, a subcontractor or materialman may perfect his inchoate lien by giving proper notice within thirty days after the expiration of his contract and without reference to the completion of the building. See also Green *v.* Williams, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478; Reeves *v.* Henderson, 90 Tenn. 521, 18 S. W. 242, in which cases it was assumed without discussion or decision that such was the law.

Virginia.—Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589.

See 34 Cent Dig. tit. "Mechanics' Liens," § 164.

Accrual of indebtedness or completion of building.— Under a statute providing that a subcontractor, materialman, or workman desiring to obtain a lien shall give notice to the owner "within thirty days after the indebtedness accrued, or the completion of the building or improvement," a materialman who completed the furnishing of materials before the completion of the building must give the notice within thirty days after the last material was furnished, and is not entitled to wait until thirty days after the completion of the building before giving notice. The proper construction of such statute is, that where the indebtedness accrues before the completion of the building, the thirty days runs from the time it accrued, while if the debt does not become due until the completion of the building the thirty days runs from that time. Patrick *v.* Ballentine, 22 Mo. 43. *Compare* Cole Mfg. Co. *v.* Falls, 92 Tenn. 607, 609, 22 S. W. 856, where the court in a case held to be governed by a statute requiring a subcontractor to give notice "within thirty days after the building is completed, or his contract shall expire, or he be discharged," said: "The period in which the notice before us was given is not embraced in that provision. The notice was not given within thirty days after the expiration of complainant's contract, nor within thirty days after the building was completed, nor within thirty days after complainant was discharged; for complainant was not discharged at all, and the notice was given seventy days after the expiration of its contract, and twenty-four days before the completion of the building." And see Brown *v.* Lowell, 79 Ill. 484.

6. Emack *v.* Campbell, 14 App. Cas. (D. C.) 186 (holding that under a statute requiring the notice to be filed within three months after the completion of the building, a notice of lien filed Oct. 6, 1893, is sufficient where the testimony is that the work on the houses was completed "probably some time about the middle of July, 1893," although the bill of complaint alleges, and the lienor, who is made a defendant to the bill, and the owner, in their answers admit, that the houses were completed "on or about the first day of July, 1893"); Cole Mfg. Co. *v.* Falls, 92 Tenn. 607, 22 S. W. 856.

Abandonment of contract by contractor.— Under a statute requiring a subcontractor to present his claim to the landowner within ten days after the "job or contract" let by the owner "shall have been fully completed," the time allowed for presenting such claim must be computed from the completion of the work to be done under the contract of the owner with the principal contractor, although the contemplated improvements may not then be completed; and where the principal contractor abandons his contract after having done work under it, his subcontractors must present their claims within ten days after such abandonment, and cannot postpone the presentation until the work is completed under a new contract with a stranger to the first one, or is completed by the owner himself. Basham *v.* Toors, 51 Ark. 309, 11 S. W. 282.

Completion or acceptance.— Under N. J. Laws (1892), p. 370, § 2, which provides that any claimant of a lien on the unpaid portion of the price of a public building at any time before, and within fifteen days after the whole work to be performed by the contractor is completed, or accepted by the city, may file notice of his claim with the chairman, or the man in charge of the work, or with the financial officer of the city, there are but two periods during which the lien claim notices may be filed, viz., before the whole work is completed, or within fifteen days after it is either completed or accepted, whichever of the latter dates comes first. Somers Brick Co. *v.* Sonder, (N. J. Ch. 1905) 61 Atl. 840.

7. Cary-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899; Metz *v.* Lowell, 83 Ill. 565; Kelly *v.* Kellogg, 79 Ill. 477, holding that the contractor and materialman cannot extend the time of payment by contract so as to extend the statutory liability of the owner without his knowledge or consent.

times required that notice of the claim shall be given to the owner a certain number of days before filing the lien.[8] The notice may be given at any time after the subcontract is made and before the expiration of the time limited by statute.[9] In determining whether or not notice has been given at the proper time the courts adopt the usual method of computing time, by excluding the first day and including the last.[10] When the time runs from the completion of the subcontract and work is done or material furnished from time to time as required under one and the same contract, the date to be considered in determining whether notice was given in time is that upon which the last work was done or the last delivery of material made;[11] but where there are separate jobs or contracts the notice for each must be given within the required time, and they cannot be tacked together so that a notice within the required time after the completion of the last will give a lien as to all.[12] Neither can a delivery of materials after the contract between the owner and the contractor has come to an end by the owner's acceptance of the building as completed avail to extend the time for notice to secure a lien for what was delivered while such contract was in force.[13] Where the right to a lien has been lost by failure to comply with a statutory requirement that notice of the claim shall be served on the owner within a specified time after the materials have been furnished, it cannot be revived by a subsequent collusive delivery of materials which are not used.[14] Under a statute providing that no lien shall attach for materials furnished unless notice in writing be given and recorded by the materialman within sixty days after the materials are placed upon the land, the materialman is entitled to a lien only for materials placed upon the land within sixty days prior to the giving of notice to the landowner,[15] although all the materials were furnished to the contractor under an entire contract.[16]

4. Form and Requisites[17] — a. In General. The notice must at least sub-

Construction of statute.— Where the statute provides that notice shall be served within a certain time after payment should have been made to the person performing labor or furnishing material, and under the contract between the contractor and subcontractor final payment was to be made within ninety days from the time the last item was furnished, the statutory time runs from the expiration of such ninety days and not from final delivery under the contract. Weber *v.* Bushnell, 171 Ill. 587, 49 N. E. 728 [*reversing* 69 Ill. App. 26].

8. Hahn *v.* Dierkes, 37 Mo. 574; Schubert *v.* Crowley, 33 Mo. 564; Towner *v.* Remick, 19 Mo. App. 205.

Statement in notice that lien will be filed before expiration of time.— Under Mo. Rev. St. (1899) § 4221, providing that a person desiring a mechanic's lien shall give ten days' notice before the filing of the lien, the statement in a notice of intention that a lien will be filed on a certain day, less than ten days from the date of the notice, is immaterial, and the notice is sufficient as a basis for a lien filed at the end of ten days from the giving of the notice. Faulkner *v.* Bridget, 110 Mo. App. 377, 86 S. W. 483.

9. Cary-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899. A provision that notice of intention to claim a lien must be given within sixty days from the time the lienor has ceased to furnish material or render services, being solely in the interest of the landowner, he cannot object if the notice is given before the lienor has ceased to furnish materials or render services. Waterbury Lumber, etc., Co. *v.* Coogan, 73 Conn. 519, 48 Atl. 204.

10. Hahn *v.* Dierkes, 37 Mo. 574; Schubert *v.* Crowley, 33 Mo. 564; Paterson *v.* St. Thomas' Church, 18 R. I. 349, 27 Atl. 449.

11. Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575. See also Sheehan *v.* South River Brick Co., 111 Ga. 444, 36 S. E. 759.

It is a question for the jury whether materials were furnished under one continuous contract or under separate contracts with the builder. Treusch *v.* Shryock, 51 Md. 162.

12. Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575 (but such notice will of course give a lien as to contracts finished within the statutory time before it was given); Watts *v.* Whittington, 48 Md. 353.

13. Sheehan *v.* South River Brick Co., 111 Ga. 444, 36 S. E. 759, notwithstanding such material was actually placed upon the building.

14. Greenway *v.* Turner, 4 Md. 296.

15. Gurney *v.* Walsham, 16 R. I. 698, 19 Atl. 323.

16. Newell *v.* Campbell Mach. Co., 17 R. I. 74, 20 Atl. 158.

17. **Form of notice** see Davis *v.* Livingston, 29 Cal. 283, 284; Henry *v.* Plitt, 84 Mo. 237, 239; O'Shea *v.* O'Shea, 91 Mo. App. 221; Bambrick *v.* King, 59 Mo. App. 284, 285; Estes *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521, 522; Louis Werner Saw-Mill Co. *v.* General Chemical Co., 11 Pa. Dist. 722, 33 Pittsb. Leg. J. N. S. 193; Bassett *v.* Bertor-

stantially conform to the statutory requirements,[18] and must contain the statements required by law to be included,[19] otherwise it is fatally defective.[20] If a claimant serves more than one notice claiming a lien for the same account, the several notices cannot be considered together for the purpose of determining the sufficiency of notice to hold a lien, but each must stand on its own merits, and no lien will exist unless one of the notices is in itself sufficient to give it.[21] It is, however, sufficient if the notice gives the information required by the statute, although it does not use the exact words of the statute.[22] The statute need not be referred to by name or section.[23] Neither is it necessary to state the facts necessary to make the lien valid.[24] Superfluous statements will not invalidate the notice.[25] If no particular form of notice be prescribed, it must be by some affirmative act or declaration which puts the owner on his guard, or warns him that the initiatory step to the acquisition of a lien is being taken[26] and gives him the necessary information with regard to the claim for which it is proposed to hold a lien.[27] Merely informing the owner that the materialman is furnishing materials and looks to the owner for payment has been held sufficient.[28] The lien

elli, 92 Tenn. 548, 552, 22 S. W. 423; Reeves *v.* Henderson, 90 Tenn. 521, 526, 18 S. W. 242.

18. Towner *v.* Remick, 19 Mo. App. 205 (substantial compliance with statute sufficient); Hausmann Bros. Mfg. Co. *v.* Kempfert, 93 Wis. 587, 67 N. W. 1136.

The exhibits and affidavit attached to a subcontractor's notice to the owner are a part thereof, and the sufficiency of the notice is to be determined by an examination of the notice and the exhibits and affidavits attached. Este *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521.

Notice held sufficient.— Where it appears from the notice and the exhibits and affidavits attached that the materials for which the lien was filed were sold and delivered under numerous verbal orders received by the claimant, and it also appears that the notice as a whole showed full details of the deliveries, including dates, prices, amounts, and kind and description of material furnished, together with receipts from the contractors, the notice cannot be charged as an insufficient compliance with the act, because it did not set forth the contract under which the subcontractor claimed. Este *v.* Pennsylvania R. Co., 27 Pa. Super. Ct. 521.

19. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665; Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341; Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015; Beckhard *v.* Rudolph, 68 N. J. Eq. 315, 59 Atl. 253.

Statement of contract.— A statement that the materials were furnished "in pursuance of a verbal contract between" the contractor and the claimant is not a compliance with a statutory requirement that the claimant shall give the written notice of his intention to file a lien claim "together with a sworn statement setting forth the contract under which he claims." Collins *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 547.

Inclusion of copy of subcontract.— A mere estimate in writing and the acceptance of the same do not constitute a written contract so as to bring the case within a statutory requirement that a notice to the owner shall contain a copy of the subcontract. Murphy *v.* Cicero Lumber Co., 97 Ill. App. 510.

20. Hess *v.* Poultney, 10 Md. 257.

21. Davis *v.* Livingston, 29 Cal. 283.

22. Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144.

If a notice is such as to put the owner upon his guard and protect him against making payments to contractors while claims against them may be outstanding in favor of subcontractors and materialmen, this fact will go a great way to sustain its sufficiency. Henry *v.* Plitt, 84 Mo. 237.

Failure to state that claimant "intended" to claim lien not fatal.— Fulton *v.* Parlett, (Md. 1906) 64 Atl. 58.

23. Hausmann Bros. Mfg. Co. *v.* Kempfert, 93 Wis. 587, 67 N. W. 1136.

24. Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163.

25. Wambold *v.* Gehring, 109 Wis. 122, 85 N. W. 117.

26. Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598 [*quoted* in Caylor *v.* Thorn, 125 Ind. 201, 25 N. E. 217]. See also Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514; Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158.

A letter to the owner from subcontractors furnishing material, asking him when making payment to the contractor for the building in question to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day," is a sufficient notice in writing of a lien, under Ont. Rev. St. c. 153, § 11, subs. 2. Craig *v.* Cromwell, 27 Ont. App. 585 [*affirming* 32 Ont. 27].

27. Simonds *v.* Buford, 18 Ind. 176, where it is said: "A notice of intention to hold a lien for materials furnished, would appear to be sufficient, when it states the amount, to whom, by whom, and for what due, and the premises upon which the lien is contemplated."

28. Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514. *Contra*, Langenheim *v.* Anschutz-

will not be defeated because of unimportant errors in the notice.[29] Where contractors were employed by a husband to construct certain buildings on land belonging to his wife, a notice of materialmen of their intent to claim a lien was not defective for failure to recite that the contractors, who purchased the material, were the contractors employed by the owner.[30]

b. Necessity of Writing. It is very generally required by statute that the notice shall be in writing, and compliance with the statute in this respect is essential;[31] but in the absence of such a requirement verbal notice may be sufficient.[32]

c. Description of Parties. The notice must have a sufficient description of the

Bradberry Co., 2 Pa. Super. Ct. 285, 38 Wkly. Notes Cas. 505.

Where the materialman informs the owner in a casual conversation that he is furnishing material, this is not sufficient. Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158; Caylor *v.* Thorn, 125 Ind. 201, 25 N. E. 217.

29. *California.*— Linck *v.* Johnson, (1901) 66 Pac. 674, holding that the fact that the notice improperly set forth the contract as to one item did not render the lien void as to other items concerning which the contract was correctly stated.

Illinois.— Botto *v.* Kingwald, 60 Ill. App. 415, holding that the omission of the dollar mark opposite figures showing value or price of material furnished, the figures being in ruled columns and it clearly appearing that those representing cents were in a column to the right of those representing dollars did not invalidate the notice.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Missouri.— Henry *v.* Plitt, 84 Mo. 237 (holding that a notice of a mechanic's lien for materials furnished is sufficient if it puts the owner on his guard, although it does not mention every building into which the materials entered); Laswell *v.* Jefferson City Presb. Church, 46 Mo. 279 (holding that where a mechanic's lien account comprehended labor and material, the claimant will not be confined to his action for labor done because his notice to defendant claimed only for labor, and not for material).

Texas.— Breneman *v.* Beaumont Lumber Co., 12 Tex. Civ. App. 517, 34 S. W. 198, holding that one who performed work on buildings owned by different persons is not deprived of his lien because the notice served on the owners included the amounts owing for work and material on all the buildings when no one was prejudiced by the irregularity.

See 34 Cent Dig. tit. "Mechanics' Liens," § 165 *et seq.*

Notice addressed to wrong person.— If the right person gets the notice, the fact that it is addressed to another person will not avoid it, if it is sufficient to put the owner upon guard as to the rights of the parties. Colorado Iron Works *v.* Taylor, 12 Colo. App. 451, 55 Pac. 942; Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47. Under Maryland Code, art. 63, § 11, providing that one furnishing materials under a contract with a builder shall be entitled to a lien, if he gives within a specified time a notice "in writing to the owner of his intention to claim a lien," a written notice by a materialman to the owner of the building, notifying the owner of his intention to claim a lien, is sufficient, although also addressed to other persons. Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575.

30. Fulton *v.* Parlett, (Md. 1906) 64 Atl. 58.

31. *Alabama.*—Seibs *v.* Engelhardt, 78 Ala. 508.

Florida.— Futch *v.* Adams, 47 Fla. 257, 36 So. 575.

Georgia.— Pou *v.* Covington, etc., R. Co., 84 Ga. 311, 10 S. E. 744 [*followed* in Bullard *v.* Dudley, 101 Ga. 299, 28 S. E. 845].

Illinois.— Carney *v.* Tully, 74 Ill. 375; McGrath *v.* Donaldson, 87 Ill. App. 269; Peck *v.* Hinds, 68 Ill. App. 319.

Iowa.— Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255, 256 [*quoted* in Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015] (where it is said: "As this is a statutory lien, it matters not what notice or knowledge the owner may have, if the required notice is not given, at least in substance. No such thing as constructive notice is known to, or recognized by, the statute"); Jeure *v.* Perkins, 29 Iowa 262.

Maryland.— Hess *v.* Poultney, 10 Md. 257.

Missouri.— Schulenburg *v.* Bascom, 38 Mo. 188; Towner *v.* Remick, 19 Mo. App. 205.

New Hampshire.— Eastman *v.* Newman, 59 N. H. 581.

Rhode Island.— Newell *v.* Campbell Mach. Co., 17 R. I. 74, 20 Atl. 158.

Texas.— Berry *v.* McAdams, 93 Tex. 431, 55 S. W. 1112.

Canada.— Craig *v.* Cromwell, 27 Ont. App. 585 [*affirming* 32 Ont. 27].

See 34 Cent Dig. tit. "Mechanics' Liens," § 166.

Waiver of objection.— The rejection of the subcontractor's demand by the owner, on the ground that he had paid the contractor, waives the objection that the statement of the account was not in writing. Buckley *v.* Taylor, 51 Ark. 302, 11 S. W. 281.

32. Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514; Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158; Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Vinton *v.* Builders', etc., Assoc., 109 Ind. 351, 9 N. E. 177; McLeod *v.* Capell, 7 Bax. (Tenn.) 196, holding that the act of 1859 repealed Code, § 1986, requiring notice in writing, under which provision Shelby *v.* Hicks, 5 Sneed (Tenn.) 197, was decided.

parties, so that it will convey the information as to who is claiming a lien as well as against whom it is claimed.[33]

d. Amount and Particulars of Claim. The notice must give information as to the nature and extent of the claim.[34] Among the most usual requirements are that the notice shall state or show the amount due[35] or to become due,[36] whether the amount claimed is due or not,[37] when payments were to be made under the

33. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4; Kenly *v.* St. Joseph Sisters of Charity, 63 Md. 306 (holding that a notice addressed to the "St. Mary's Female Orphan Asylum," and handed to a sister of charity who opened the door of the building, was not sufficient to establish a mechanic's lien against "The Sisters of Charity of St. Joseph"); Putnam *v.* Ross, 55 Mo. 116, 46 Mo. 337; Fruin-Bambrick Constr. Co. *v.* Jones, 60 Mo. App. 1 (holding that a notice served on an officer of a corporation, describing the debtor as "B. & P.," whereas it should be the "B. & P. Pipe Co.," and otherwise correct, was sufficient); Bambrick *v.* Webster Groves Presby. Church Assoc., 53 Mo. App. 225; Downey *v.* Higgs, 41 Mo. App. 215; Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163.

Where partners do the work it is not necessary that the notice state the parties are partners, if it otherwise shows the fact. Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

Waiver of objection.— Under the New York Law of 1851, after defendant has appeared and contested the claim upon the ground that nothing was due by him to the contractor, it does not lie with him to object that the name of the contractor was not in the notice. McBride *v.* Crawford, 1 E. D. Smith (N. Y.) 658.

34. Davis *v.* Livingston, 29 Cal. 283. The notice required by the Pennsylvania act of June 4, 1901, to be given by a subcontractor to the owner before filing a lien should contain definite and specific information as to the character and details of the claim and the contract under which it was furnished, covering substantially the requirements of a declaration in assumpsit. Howard *v.* Allison, 27 Pa. Co. Ct. 262.

Claimant can recover only on contract stated in notice of lien.— Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772 [*followed* in San Francisco Paving Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255].

35. *California.*— Davis *v.* Livingston, 29 Cal. 283, statement of amount due "over and above all payments and offsets."

Illinois.— Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341.

Indiana.— Gilman *v.* Gard, 29 Ind. 291.

Maryland.— Thomas *v.* Barber, 10 Md. 380, where no reference is made to any claim filed.

New Jersey.— Reeve *v.* Elmendorf, 38 N. J. L. 125.

Oregon.— Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305, holding that the notice is sufficient when it states the amount claimed to be due, and that the same is unpaid, without containing the words of the statute, "over and above all payments or offsets," as whether the claim is false or true must be aseertained by proof.

Wisconsin.— Laev Lumber Co. *v.* Auer, 123 Wis. 178, 101 N. W. 425.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 168.

An order accepted by the owner which gives him information as to the amount due cannot operate as a substitute for the statutory notice. Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341.

Misstatement of amount.— The notice is void if it claims more than was really due (Donnelly *v.* Johnes, 58 N. J. Eq. 442, 44 Atl. 180; McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21. *Contra*, when it does not appear that any one was prejudiced by the mistake. Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157), but not if it claims less, although the claimant will be held to have waived his claim for the difference between the sum demanded and the sum actually due (Donnelly *v.* Johnes, *supra*).

Variance between statements in successive notices.— The fact that the notice of a materialman claims a larger amount than was claimed in a previous notice does not vitiate it, as each notice is to be considered absolutely and not relatively to the others. Davis *v.* Livingston, 29 Cal. 283.

36. Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341.

In Montana the notice must state the probable value of the labor or materials to be furnished, and the words "probable value" mean that the employer shall be notified of some particular sum approximating the value of the labor done or materials furnished by the claimant. Whiteside *v.* Lebcher, 7 Mont. 473, 17 Pac. 548.

Notice held sufficient.— Where a subcontractor agreed to furnish all the lumber for the erection of a dwelling at prices agreed on under a verbal contract, and notifies the owner of an intention to file a lien, in which he gives an itemized statement of all the various kinds of lumber furnished and the price and quantity of each kind, and declares the same was furnished in accordance with the verbal contract, such notice is sufficient; it is not necessary to repeat the prices in reciting the verbal contract. Shearer *v.* Geiselman, 22 Montg. Co. Rep. (Pa.) 126.

37. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665. But see Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157, holding that the failure to state in the

subcontract,[38] when the amount claimed became due[39] or will become due,[40] that the balance due is due from the principal contractor,[41] that the claimant was employed by the contractor,[42] what labor was performed or what materials furnished,[43] the nature and kind of materials furnished,[44] that the work was done for or the materials furnished to a contractor with the owner,[45] that the claimant furnished the materials,[46] when the materials were delivered,[47] or were to be delivered under the subcontract,[48] and whether the material was furnished under one or more contracts.[49] It has been held not necessary to state the conditions of the sale of the material to the principal contractor,[50] the particular character of the materials,[51] that the materials were used in constructing the building,[52] or the items of work or material,[53] or to give a specific description of the materials furnished and used.[54]

e. Description of Property. The statutes do not as a general rule require that the notice given to the owner should describe the premises.[55]

notice that the claim is due does not impair the notice as between the original parties.

38. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665.

39. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665; Keefe *v.* Minehan, 93 Ill. App. 586; Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341.

40. Keefe *v.* Minehan, 93 Ill. App. 586; Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341.

41. Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144, holding that this was sufficiently shown by a notice declaring in substance that the claimant claimed to have a lien for a quantity of lumber, etc., furnished in pursuance of an agreement with the principal contractor, in the sum of four thousand three hundred and fifty-nine dollars and seventy-four cents, of which only two thousand three hundred and eighty-nine dollars and seventy-four cents had been paid and that there was still due and owing claimant the sum of one thousand nine hundred and seventy dollars.

Where there are several contractors the notice is sufficient if it names one. Davis *v.* Livingston, 29 Cal. 283.

42. Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144.

Stating that the materials were furnished pursuant to an agreement with the contractor sufficiently declares an employment. Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144.

43. See Hausmann Bros. Mfg. Co. *v.* Kempfert, 93 Wis. 587, 67 N. W. 1136.

Notice substantially complying with statute.— A requirement that the notice shall contain "a statement of the labor performed and materials furnished" is substantially complied with by a notice stating that the lien is claimed for "work, labor and services done and performed upon said building, and sash, doors, blinds, moulding, and other building materials sold and delivered to be used, and which were actually used, in and upon said building and premises under said agreement with said principal contractors for the agreed price of," etc. Hausmann Bros. Mfg. Co. *v.* Kempfert, 93 Wis. 587, 67 N. W. 1136.

44. Thomas *v.* Barber, 10 Md. 380, where no reference is made to any claim filed.

45. Gilman *v.* Gard, 29 Ind. 291.

46. Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144, holding that a notice stating in substance that the lien was claimed for a quantity of lumber furnished for use and used in the building pursuant to an agreement with the contractor, and that there was still due and owing to the claimant a certain amount, sufficiently showed the materials to have been furnished by the claimant.

47. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665.

48. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665.

49. Hurtt *v.* Sanders Bros. Mfg. Co., 99 Ill. App. 665.

50. Laev Lumber Co. *v.* Auer, 123 Wis. 178, 101 N. W. 425, holding that a notice by a subcontractor stating that he was employed to furnish and did furnish material as specified for the construction of the building, with the amount due from the principal contractor, is sufficient.

51. Davis *v.* Livingston, 29 Cal. 283.

52. Davis *v.* Livingston, 29 Cal. 283.

53. Gilman *v.* Gard, 29 Ind. 291; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283. *Compare* Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163.

An itemized statement of the prices charged for materials furnished need not be attached to the notice under the Pennsylvania act of June 4, 1901 (Pamphl. Laws 434). Louis Werner Saw-Mill Co. *v.* General Chemical Co., 11 Pa. Dist. 722.

54. Bassett *v.* Bertorelli, 92 Tenn. 548, 22 S. W. 423.

55. Gilman *v.* Gard, 29 Ind. 291.

The Missouri statute does not require that the land on which the improvement is situated should be described in the notice to the owner, provided such notice is sufficient in other respects to identify the house or improvement. Bambrick *v.* King, 59 Mo. App. 284, holding that a partial misdescription of the premises would not invalidate the notice, if, on rejection of a surplusage, enough was

f. Signature. As a general rule the notice should be signed by the claimant[56] or his agent[57] or attorney.[58] Where, however, under the statute, it is not necessary that either the filed notice of lien or the affidavit of verification thereof shall be signed by the claimant in order to constitute a valid notice, service by a materialman on the owner of the property, of a notice of lien which is a copy of the notice filed, except that neither the copy nor the verification is signed, although the notice filed is signed by the claimant, is sufficient to charge the owner.[59]

g. Date. The fact that the notice is not dated does not affect its sufficiency.[60]

5. SERVICE. It has been held that the notice may be efficiently served in any form or by any method which in effect gives the written notice prescribed by the statute.[61] But the statutes sometimes require the notice to be served on the owner personally[62] if he is to be found within the county,[63] and in such case service by mail[64] or by leaving the original notice or a copy thereof at the residence of the owner, with a servant in his employ[65] or a member of his family,[66] is not sufficient. Where the statute did not provide how or upon whom the notice should be served, leaving the notice with a clerk in charge of the office of the trustees of a

left in the notice to identify the building and the owner could not have been misled.

56. Wetenkamp *v.* Billigh, 27 Ill. App. 585; Schulenburg *v.* Bascom, 38 Mo. 188 (holding that a notice written, but with no name signed to it, and not stating from whom it came or who held the claim, is not sufficient, nor can the omissions be supplied by evidence of verbal information to the owner of the facts); Towner *v.* Remick, 19 Mo. App. 205.

In the case of a copartnership a notice signed in the firm-name is sufficient. Dwyer Brick Works *v.* Flanagan, 87 Mo. App. 340. And if the notice by a firm of its claim is signed in the presence and by authority of the firm, although not individually by one of the members, it is a sufficient compliance with a statute, requiring "the journeyman or laborer or materialman to give notice in writing to the owner." Williams *v.* Bradford, (N. J. Ch. 1891) 21 Atl. 331.

Where the subcontractor is a corporation, a notice signed by it, by its attorney, without the corporate seal, is sufficient. Cary-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899.

57. Towner *v.* Remick, 19 Mo. App. 205; Williams *v.* Brodford, (N. J. Ch. 1891) 21 Atl. 331.

58. Treusch *v.* Shryock, 51 Md. 162; Towner *v.* Remick, 19 Mo. App. 205.

59. Reeves *v.* Seitz, 47 N. Y. App. Div. 267, 62 N. Y. Suppl. 101.

60. Rosenberg *v.* Union Iron, etc., Co., 63 Ill. App. 99, 101, where it is said: "The date of the notice was not material, as the right of appellee accrued from the date of service of the notice."

61. Fehling *v.* Goings, 67 N. J. Eq. 375, 58 Atl. 642.

Service held sufficient.— At the time service of a statement of a mechanic's lien was made upon defendant's wife, he was absent from and the wife present in his residence. Defendant had never expressly authorized her to act as his agent, and owing to a physical affliction she did not attempt to control the premises, and defendant had in his employ one who, defendant testified, generally supervised matters for defendant during his absence; but such person testified that any orders given by the wife concerning the premises were executed. It was held that the service was sufficient, under Mich. Comp. Laws (1897), § 10,715, authorizing service on the agent having the premises in charge. J. E. Greilick Co. *v.* Rogers, 144 Mich. 313, 107 N. W. 885.

62. Carney *v.* Tully, 74 Ill. 375; Peck *v.* Hinds, 68 Ill. App. 319; Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575; Ryan *v.* Kelly, 9 Mo. App. 396; Dusick *v.* Green, 118 Wis. 240, 95 N. W. 144.

63. Dusick *v.* Green, 118 Wis. 240, 95 N. W. 144.

Place of service.— A statute requiring that the subcontractor "shall give notice in writing to the owner, or his agent . . . if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court," while it requires only that the notice shall be given to the owner or his agent if found in the county does not prohibit service upon the owner elsewhere; and personal service of the written notice on him, whether in the county or elsewhere, fully satisfies the requirement. Dusick *v.* Green, 118 Wis. 240, 95 N. W. 144.

64. Carney *v.* Tully, 74 Ill. 375; Peck *v.* Hinds, 68 Ill. App. 319.

65. Ryan *v.* Kelly, 9 Mo. App. 396.

66. Ryan *v.* Kelly, 9 Mo. App. 396; Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575; Maddocks *v.* McGann, 12 Pa. Dist. 701. See also Meyer *v.* Christian, 64 Mo. App. 203, holding that under Mo. Rev. St. (1889) § 6723, requiring notice of a subcontractor's lien to be given the owner, service on the owner's wife is insufficient, unless it clearly appears that the husband actually received the notice, or was away from home at the time of the attempted service.

sanitary district was held to be sufficient service on the trustees.[67] Posting the notice on the building is not sufficient without proof that on account of absence or other causes personal service could not be made.[68] Service of a copy of the notice of lien is sufficient.[69] The notice may be served by any one who would be a competent witness to make affidavit to the service[70] or by any officer authorized to serve writs or other process of a court.[71] An officer's return indorsed upon the notice showing service constitutes legal and sufficient proof of service.[72] The notice is a mere evidentiary instrument relevant to the question of lien or no lien, and it is in no sense process such as is necessary to give jurisdiction, and hence after the lapse of the term at which a judgment establishing such a lien has been rendered it cannot be set aside on the theory of irregularity because of a defective service of this notice.[73]

C. Filing Claim or Statement — 1. Necessity. The statutes generally require that in order to acquire or perfect a mechanic's lien[74] the claimant shall file and have recorded in a designated place[75] and at or within a designated time[76] an instrument in the nature of a claim, notice, or statement of lien, showing that a lien is claimed and sought to be enforced against the property to be charged.[77]

67. Chicago Sanitary Dist. *v.* Phœnix Powder Mfg. Co., 79 Ill. App. 36, the statute not providing how or upon whom the notice shall be served.

68. Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575.

69. Kelley *v.* Syracuse, 10 Misc. (N. Y.) 306, 31 N. Y. Suppl. 283; Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181.

70. Hassett *v.* Rust, 64 Mo. 325.

Service need not be by an officer.— Bassett *v.* Bertorelli, 92 Tenn. 548, 22 S. W. 423.

Service need not be by the claimant in person but service by the agent or attorney of the claimant is sufficient. Fehling *v.* Goings, 67 N. J. Eq. 375, 58 Atl. 642.

71. Hassett *v.* Rust, 64 Mo. 325, holding that the notice may be served by a constable.

72. Cary-Lombard Lumber Co. *v.* Thomas, 92 Tenn. 587, 22 S. W. 743.

Evidence not sufficient to show service see McGann *v.* Sloan, 74 Conn. 726, 52 Atl. 405.

73. Rumsey Mfg. Co. *v.* Baker, 35 Mo. App. 217.

74. The filing of a verified statement for record operates as the creation of the lien, and until this is done an action to enforce it cannot be maintained. Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777.

75. See *infra*, III, C, 5.

76. See *infra*, III, C, 10.

77. *Alabama.*— Long *v.* Pocahontas Coal Co., 117 Ala. 587, 23 So. 526.

California.— Davis *v.* MacDonough, 109 Cal. 547, 42 Pac. 450; Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pacc. 758; Walker *v.* Hauss-Hijo, 1 Cal. 183.

Illinois.— Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39; Christian *v.* Allee, 104 Ill. App. 177; Whitlow *v.* Champlin, 52 Ill. App. 644; Naughten *v.* Palmer, 46 Ill. App. 574.

Indiana.— Pifer *v.* Ward, 8 Blackf. 252; Robinson *v.* Marney, 5 Blackf. 329.

Indian Territory.— Campbell *v.* Cameron, 5 Indian Terr. 323, 82 S. W. 762.

Iowa.— Breneman *v.* Harvey, 70 Iowa 479, 30 N. W. 846; Evans *v.* Tripp, 35 Iowa 371.

Maryland.— Carson *v.* White, 6 Gill 17.

Michigan.— Sisson *v.* Holcomb, 58 Mich. 634, 26 N. W. 155.

Minnesota.— Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777.

Missouri.— Patrick *v.* Faulke, 45 Mo. 312; Sanderson *v.* Fleming, 37 Mo. App. 595; Burrough *v.* White, 18 Mo. App. 229.

Nebraska.— Tidball *v.* Holyoke, 70 Nebr. 726, 97 N. W. 1019; Cummins *v.* Vandeventer, 52 Nebr. 478, 78 N. W. 955; Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722.

Pennsylvania.— See Lewis *v.* Morgan, 11 Serg. & R. 234.

Tennessee.— Reeves *v.* Henderson, 90 Tenn. 521, 18 S. W. 242.

Texas.— Lyon *v.* Elser, 72 Tex. 304, 12 S. W. 177; Huck *v.* Gaylord, 50 Tex. 578; Gilmer *v.* Wells, 17 Tex. Civ. App. 436, 43 S. W. 1058.

Utah.— Elwell *v.* Morrow, 28 Utah 278, 78 Pac. 605. The filing of the statement required by Utah Sess. Laws (1890), c. 30, § 10, providing that "any party claiming a lien shall file in the office of the recorder of the county where said land is situated a statement containing — first, a notice of intention to hold and claim a lien; second, a description of the property to be charged therewith, third, an abstract of indebtedness, showing the whole amount of debt," etc., is indispensable to preserve the lien. But section 12, which provides that "any sub-contractor of either degree who shall intend to do work or to furnish material for which such lien is given, may file in the office of the recorder of such county wherein said land is situated a statement containing — first, a notice of intention to hold and claim a lien; second, a description of the property to be charged therewith; third, the probable value of the work to be done, and the probable value of the materials to be furnished, as near as may be," simply provides an additional safeguard

The form, character, and designation of this instrument varies under different statutes, but the general purpose of such filing under all the statutes is the same; to fix on designated property[78] owned by a designated person[79] a lien for a designated amount[80] in favor of a designated person[81] who has furnished designated work or material for the improvement of such property,[82] and to give notice of the existence of such a lien.[83] Under some statutes the filing of the prescribed statement is essential to the creation of the lien, even though enforcement thereof is sought solely against the owner and no rights of other persons are involved;[84] but under other statutes the filing is necessary only to preserve the lien against

for subcontractors if they choose to avail themselves of it and is permissive merely, so that a failure to file such statement does not interfere with the lien. Morrison *v.* Carey-Lombard Co., 9 Utah 70, 33 Pac. 238.

Virginia.— Shackleford *v.* Beck, 80 Va. 573; Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180.

West Virginia.— Mayes *v.* Ruffners, 8 W. Va. 384.

United States.— Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61.

Canada.— Hynes *v.* Smith, 8 Ont. Pr. 73.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 177.

Subcontractors.— The word "creditor," as used in Ill. Rev. St. c. 82, § 4, as amended, May 31, 1887, providing that "every creditor or contractor" who wishes to avail himself of the provisions of the act shall file a statement of account, etc., does not mean a subcontractor, and hence a subcontractor may enforce a lien under the other provisions of the statute without filing such a statement. Maxwell *v.* Koeritz, 35 Ill. App. 300.

A court of equity cannot create a mechanic's lien, where the claimant has not perfected the same as required by statute, by filing an account showing the amount and character of the work done or material furnished, merely because he had an inchoate right to such a lien at the time of the institution of a suit for the administration of the property and the appointment of a receiver therefor. A. F. Withrow Lumber Co. *v.* Glasgow Inv. Co., 106 Fed. 363, 45 C. C. A. 321.

Where the owner prevents completion of the work the filing of a statement is not necessary to secure a lien under a statute providing that such statement must be filed within thirty days after completion of the work. Merchants', etc., Sav. Bank *v.* Dashiell, 25 Gratt. (Va.) 616.

A single notice or claim of lien for materials furnished to the same property, under different contracts between the same parties, is sufficient and valid. Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229. See also Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118.

The fact that the property goes into the hands of a receiver does not dispense with the necessity of filing and recording a lien claim. Filer, etc., Co. *v.* Empire Lumber Co., 91 Ga. 657, 18 S. E. 359; A. F. Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61.

"As between the claimant and the owner it is not material whether a copy of the attested account be filed in the recorder's office or not." Keating *v.* Worthington, 11 Ohio Dec. (Reprint) 428, 429, 27 Cinc. L. Bul. 14 [*quoting* Rockel & W. Ohio Mech. Lien L., p. 117].

The owner's expression of willingness that the lien should be valid cannot have the effect of continuing its existence as against other lien-holders when lost by failing to file an account as required by statute. Lyon *v.* Elser, 72 Tex. 304, 12 S. W. 177.

78. See *infra*, III, C, 11 f.
79. See *infra*, III, C, 11, g.
80. See *infra*, III, C, 11, m.
81. See *infra*, III, C, 11, b.
82. See *infra*, III, C, 11, h.
83. *Illinois.*— Grace *v.* Oakland Bldg. Assoc., 166 Ill. 637, 46 N. E. 1102; Badenoch *v.* Homan, 50 Ill. App. 512; O'Brien *v.* Krockinski, 50 Ill. App. 456.

Minnesota.— Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

Texas.— Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511.

Virginia.— Shackleford *v.* Beck, 80 Va. 573.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 177.

84. McIntosh *v.* Schroeder, 154 Ill. 520, 39 N. E. 478 [*affirming* 55 Ill. App. 149]; Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39 [*affirming* 46 Ill. App. 287]; Christian *v.* Allee, 104 Ill. App. 177; Brady *v.* Pearson Lumber Co., 58 Ill. App. 417; Sebastian *v.* Rass, 57 Ill. App. 417 [*affirmed* in 160 Ill. 602, 43 N. E. 708, and *overruling* Berndt *v.* Armknecht, 50 Ill. App. 467; Moore *v.* Parrish, 50 Ill. App. 233 (*followed* in Orr, etc., Hardware Co. *v.* Needham Co., 51 Ill. App. 57)]; Ostrander *v.* Von Tobel, 56 Ill. App. 381 [*affirmed* in 158 Ill. 499, 42 N. E. 152]; Whitlow *v.* Champlin, 52 Ill. App. 644; Kirkwood *v.* Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549; Burrough *v.* White, 18 Mo. App. 229 [*following* Patrick *v.* Faulke, 45 Mo. 312]; Huck *v.* Gaylord, 50 Tex. 578, so holding as to a claimant whose lien was given by statute and not by the constitution. As to lien given by constitution see *infra*, note 85.

purchasers or encumbrancers in good faith without notice.[85] It has been held that the filing of a claim or statement is not necessary where suit is brought to enforce the lien within the time allowed for such filing.[86]

2. Joinder or Splitting of Claims[87] — a. In General. The lien statement may cover and include more than one claim or demand[88] accruing in favor of the same person and against the same person and property,[89] provided the statutory requirements are complied with as to each.[90] But where a firm which had contracted to furnish materials was incorporated before the contract was completed, the corporation succeeding to the rights of the firm and undertaking to carry out the contract, it was held that a claim for what was furnished by the firm could not be combined with what was furnished by the corporation and the whole filed as one account for a mechanic's lien, but separate accounts should be filed;[91] and so also where a firm to which, as owner, the materials were to be furnished, was converted into a corporation before the contract was completed, a single lien account could not be filed covering what was furnished both before and after the incorporation.[92]

b. Improvements on Same Lot or Tract. Under some statutes, where several

85. Hoppes *v.* Baie, 105 Iowa 648, 75 N. W. 495; Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. Rep. 276; Lee *v.* Hoyt, 101 Iowa 101, 70 N. W. 95; Chicago Lumber Co. *v.* Des Moines Driving Park, 97 Iowa 25, 65 N. W. 1017; National Lumber Co. *v.* Bowman, 77 Iowa 706, 42 N. W. 557; Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177; Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. St. Rep. 124; Kidd *v.* Wilson, 23 Iowa 464; Noel *v.* Temple, 12 Iowa 276, Reeves *v.* Henderson, 90 Tenn. 521, 18 S. W. 242.

Where the lien is given by the constitution, statutory provisions concerning registration of the claim are important only for the protection of the owner of the property or purchasers and encumbrancers. Farmers', etc., Nat. Bank *v.* Taylor, 91 Tex. 78, 40 S. W. 876, 966; Strang *v.* Pray, 89 Tex. 525, 35 S. W. 1054; Bassett *v.* Mills, 89 Tex. 162, 34 S. W. 93; Delauney *v.* Butler, (Tex. Civ. App. 1900) 55 S. W. 752; Padgitt *v.* Dallas Brick, etc., Co., (Tex. Civ. App. 1899) 51 S. W. 529. Hence where the owner had actual notice of a materialman's claim and there are no rights of third persons involved, he is liable for the materials to the extent of the amount in his hands due the contractor at the time of such notice, although the statute was not fully complied with. Delauney *v.* Butler, *supra*. As to statutory lien see *supra*, note 84.

86. Salem *v.* Lane, etc., Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481 [*affirming* 90 Ill. App. 560].

87. See also *infra*, IV, B, 2, c.

88. Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528.

89. Benjamin *v.* Wilson, 34 Minn. 517, 26 N. W. 725. But *compare* Baker *v.* Fessenden, 71 Me. 292, holding that one single lien cannot cover several distinct alterations, made at different times and independent of each other, so as to entitle the claimant to a lien judgment for the whole.

Where work is done or materials are furnished under several different contracts between the same parties and relating to the same property all the items done or furnished may be included in one lien claim or statement. Kern *v.* Pfaff, 44 Mo. App. 29; Bruns *v.* Braun, 35 Mo. App. 337; Kearney *v.* Wurdeman, 33 Mo. App. 447. See also *infra*, III, C, 2, b.

Extras.— Where material for a building was largely purchased in one transaction, but certain extras were purchased from time to time thereafter, and the lien account included the general bill and the "extras" itemized under the several dates of purchase, this was proper, and separate lien accounts did not have to be filed for each separate purchase. Louisiana, etc., Lumber Co. *v.* O'Connell, 87 Mo. App. 671.

Contracts between different parties.— A claim for a lien for an aggregate amount of materials furnished under contracts between different parties, and mingled together in one account, is void. Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229. See also Reitz *v.* Ghio, 47 Mo. App. 287 [*following* Schulenbury *v.* Robison, 5 Mo. App. 561].

90. Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528.

Filing must be within statutory period after completion of each contract.— Kern *v.* Pfaff, 44 Mo. App. 29; Bruns *v.* Braun, 35 Mo. App. 337; Kearney *v.* Wurdeman, 33 Mo. App. 667. See *infra*, III, C, 10.

Expiration of time as to some items.— Where a lien is filed for work done under three separate contracts, and is in time as to one of the contracts but too late as to the other two, the lien is valid for the last contract. Steeves *v.* Sinclair, 56 N. Y. App. Div. 448, 67 N. Y. Suppl. 776 [*affirmed* in 171 N. Y. 676, 64 N. E. 1125].

91. Allen *v.* Frumet Min., etc., Co., 73 Mo. 688.

92. Allen *v.* Frumet Min., etc., Co., 73 Mo. 688.

buildings or structures are erected on the same lot or tract of land, a single claim of lien may be filed covering all the property and including all the items,[93] whether the work was done or the materials furnished under one general contract[94]

93. Okisko Co. *v.* Matthews, 3 Md. 168; Sullivan *v.* Trecn, 13 Wash. 261, 43 Pac. 38. *Contra,* Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407 [*following* Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527], holding that the liens under the Oregon statute are specific and extend to the particular building, structure, or the erection where the materials were used or labor performed, and therefore a party cannot unite in the same claim items for materials used in building a fence and also for materials used in building or repairing a house, and claim a lien on the fence and house for such materials, but the fence and the house being separate structures or erections the liens claimed must be for the materials used in each respectively.

In Pennsylvania the filing of joint apportioned claims was formerly allowed. Taylor *v.* Montgomery, 20 Pa. St. 443; Donahoo *v.* Scott, 12 Pa. St. 45 [*following* Young *v.* Lyman, 9 Pa. St. 449; Pennock *v.* Hoover, 5 Rawle 291; Gorgas *v.* Douglas, 6 Serg. & R. 512]; Miller *v.* McDuffee, 12 Pa. Co. Ct. 381. See also Armbrust *v.* Galloway, 2 Wkly. Notes Cas. 585. But the act of June 4, 1901 (Pamphl. Laws 431), prohibits filing of apportioned claims in the future and requires separate claims.

In Indiana a joint lien cannot be taken on two or more separate and distinct buildings for work done or material furnished in their construction or repair; but there is no reason why a joint lien cannot be taken upon a dwelling with all its appurtenant outbuildings, all of these being in law considered as one building. Crawford *v.* Anderson, 129 Ind. 117, 28 N. E. 314.

The buildings must be erected for some general and connected use in order that a single lien upon all may be valid. Wilcox *v.* Woodruff, 61 Conn. 578, 24 Atl. 521, 1056, 29 Am. St. Rep. 222, 17 L. R. A. 314.

Connected buildings.— Where a claimant of a mechanic's lien bargained for a gross sum to do the plumbing work upon certain structures which stood on one lot and were connected on the street line by a framework attached to each, there being a door placed therein for the use of occupants of both structures, and cellar windows in each opening upon the passway, a certificate of lien claiming a lien on a certain "bnilding" and upon the entire lot was sufficient notwithstanding the adaptation of the structures to being used separately. Cronan *v.* Corbett, 78 Conn. 475, 62 Atl. 662.

Where three houses were built crosswise over four lots, no segregation of the lots being made, showing the extent thereof occupied by each house, and the material furnished by a lienor went into all of the houses indiscriminately, he is not required, at his peril, to divide his claim, and assign to each house as built, the proportion of the debt which it ought in equity to bear, but he may file a single lien against the whole. Sprague Inv. Co. *v.* Mouat Lumber, etc., Co., 14 Colo. App. 107, 60 Pac. 179 [*following* Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64].

Leaving unimproved spaces.—Where thirty-one houses were built on a tract of land, the fact that two strips, each thirty feet wide, were left open for purposes of ingress and egress, thus dividing the houses in three blocks, does not so separate the houses as to require a distinct notice of lien for each parcel, but one joint lien may be filed against all. Miller *v.* McDuffee, 12 Pa. Co. Ct. 381. See also West Philadelphia Brick Co. *v.* Johnson, 3 Pa. Super. Ct. 220.

Single plant.— A single lien may be had upon all the buildings and land constituting a single plant, for materials used in a building belonging to all the buildings, without specifying the particular buildings upon which the separate portions of materials were furnished. Premier Steele Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876.

94. *Alabama.*— Cocciola *v.* Wood-Dickerson Supply Co., 136 Ala. 532, 33 So. 856.

Connecticut.— Brabazon *v.* Allen, 41 Conn. 361.

Kansas.— See Mulvane *v.* Chicago Lumber Co., 56 Kan. 675, 44 Pac. 613.

Massachusetts.— Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; Wall *v.* Robinson, 115 Mass. 429.

Minnesota.—Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746; Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3 [*followed* in Glass *v.* St. Paul Park Carriage, etc., Co., 43 Minn. 228, 45 N. W. 150].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 178.

Where work done or material furnished all go to the same general purpose and they are furnished as parts of the general improvement of the property, such work and material, although not contracted for on the same day, may be regarded as done and furnished under one contract, and may be included in one lien account. Flanagan *v.* O'Connell, 88 Mo. App. 1; Kearney *v.* Wurdeman, 33 Mo. App. 447 [*approved* in Press Brick Co. *v.* Quarry Co., 151 Mo. 509]; Page *v.* Bettes, 17 Mo. App. 366.

Question for jury.— Whether the work was done or performed or the materials furnished under one entire or general contract or under distinct contracts is necessarily a question for the jury and not for the court. Flanagan *v.* O'Connell, 88 Mo. App. 1; Page *v.* Bettes, 17 Mo. App. 366.

Separate accounts not necessary.— Where one agreed to furnish such hardware as the owner of the premises should need, to use in the erection of two houses upon one city lot, and did furnish the same as required, it was not incumbent upon him to keep separate ac-

or under separate contracts.[95] But it is also permissible in such case to file a separate claim against each building.[96]

c. Improvements on Separate Lots or Parcels. In some states a single general lien may be filed against all the property for which labor and materials have been furnished under a single contract notwithstanding the improvements are made on separate lots;[97] but in other states where the buildings or improvements are upon separate lots or tracts of land it is not permissible to file a single claim against all the property, but a separate claim must be filed against each piece of property for the work done thereon or the materials furnished therefor, even though all the property belongs to the same owner and all the work was done or all the materials furnished pursuant to one general contract.[98]

counts of the goods furnished for each house, or to file separate lien statements thereon. Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746.

95. Booth *v.* Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; Fitch *v.* Baker, 23 Conn. 563; Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Kittrell *v.* Hopkins, 114 Mo. App. 431, 90 S. W. 109 [*distinguishing* Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 S. W. 1059; O'Connor *v.* Current River R. Co., 111 Mo. 185, 20 S. W. 16; Livermore *v.* Wright, 33 Mo. 31; Flanagan *v.* O'Connell, 88 Mo. App. 1] (if the amounts due under the several contracts are separately stated); Kern *v.* Pfaff, 44 Mo. App. 29. See also St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546; Gruner, etc., Lumber Co. *v.* Nelson, 71 Mo. App. 110; Bruns *v.* Braun, 35 Mo. App. 337. And see *supra*, III, C, 2, a. But *compare* Currier *v.* Friedrick, 22 Grant Ch. (U. C.) 243. And see Dugan *v.* Higgs, 43 Mo. App. 161.

96. Halsted, etc., Co. *v.* Arick, 76 Conn. 382, 56 Atl. 628 (holding that where under one agreement with the owner of a large plot of land plaintiff furnished lumber for the construction thereon of three tenement buildings of substantially the same size and construction, which were separated by narrow passways and connected only by means of a wooden framework across the passways at the street line, in which a door was placed for the use of the occupants of the buildings on either side, the three buildings did not in fact constitute one block and plaintiff was justified in filing a separate certificate of lien for the materials used in each building. Whether a single lien could properly have been filed on all the buildings for all the materials was not decided); Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3 (holding that if the person by whom labor is performed or material furnished under one entire contract for the erection of several buildings owned by the same person, and situated upon the same tract of land knows, and has the means of proving, the kind and amount of material and labor which in fact went into the construction of each building, his lien will not be lost or prejudiced by the fact that he filed a separate claim therefor against each building, provided there are no third persons interested in the property whose rights would be affected); West Philadelphia Brick Co. *v.* Johnson, 3 Pa. Super. Ct. 220, 39 Wkly. Notes Cas. 509.

97. *Iowa.*— Williams *v.* Judd-Wells Co., 91 Iowa 378, 59 N. W. 271, 51 Am. St. Rep. 350 [*following* Bowman Lumber Co. *v.* Newton, 72 Iowa 90, 33 N. W. 377]. This does not mean "that the plaintiff would be entitled to a lien upon one building for material which it was shown went to another. All that was meant is that, if the question is of any materiality to the defendant, the burden will be upon him to show how the material was expended." Lewis *v.* Saylors, 73 Iowa 504, 35 N. W. 601 [*quoted* in Williams *v.* Judd-Wells Co., 91 Iowa 378, 381, 59 N. W. 271, 51 Am. St. Rep. 350].

Nebraska.— Bohn Sash, etc., Co. *v.* Case, 42 Nebr. 281, 60 N. W. 576.

New Jersey.— Culver *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812 [*overruling* Johnson *v.* Alger, 65 N. J. L. 363, 47 Atl. 571], holding that the debt is to be apportioned among the buildings.

North Carolina.— Chadbourn *v.* Williams, 71 N. C. 444.

Washington.— Scattle Lumber Co. *v.* Sweency, 33 Wash. 691, 74 Pac. 1000; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 179.

A failure to designate the amount due on each piece of property as required by Ballinger Annot. Code Wash. § 5907, does not defeat the lien, but postpones it to other liens in regard to which the statute has been complied with. Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001.

Contract must be entire.— Work done and materials furnished for the improvement of two separate tracts of land will not create a lien on both tracts for the aggregate amount thereof, unless the work was done and the materials furnished under an entire contract. Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

98. *Connecticut.*— Chapin *v.* Persee, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

District of Columbia.— Alfred Richards Brick Co. *v.* Trott, 23 App. Cas. 284, 295, where it is said: "Of course, by anything that has here been said, we are not to be understood as intimating that two or more distinct and separate notices of lien may not be comprised in one single instrument of writing or that two or more notices of lien may not be enforced in one and the same proceeding in equity where the parties may

d. Improvements on Contiguous Lots. As a general rule where improvements are made under one general contract[99] on several contiguous lots[1] owned by the

be the same. What we hold here is that two separate and distinct buildings, or two separate and distinct groups of buildings, may not be treated as one and the same building for the purpose of the notice required to be given of mechanics' liens where there are other rights to be affected thereby than those of the principal contractor."

Illinois.— Aurand *v.* Martin, 87 Ill. App. 337, 341 [*affirmed* in 188 Ill. 117, 58 N. E. 926], where it is said: "We find nothing in the statute as it now exists, authorizing a contractor to file a single lien for the whole amount due him for labor and material furnished in the erection of houses located on lots which are not adjoining or adjacent to one another." See also Buckley *v.* Commercial Nat. Bank, 171 Ill. 284, 49 N. E. 617 [*affirming* 62 Ill. App. 202]; St. Louis Nat. Stock Yards Co. *v.* O'Reilly, 85 Ill. 546; Metzger *v.* McCann, 92 Ill. App. 109 [*followed* in Friedlaender *v.* McCann, 91 Ill. App. 415].

Indiana.— McGrew *v.* McCarty, 78 Ind. 496; Hill *v.* Ryan, 54 Ind. 118; Hill *v.* Braden, 54 Ind. 72.

Massachusetts.— Osborne *v.* Barnes, 179 Mass. 597, 61 N. E. 276 [*distinguishing* Batchelder *v.* Rand, 117 Mass. 176].

Missouri.— Missouri Cent. Lumber Co. *v.* Sedalia Brewing Co., 78 Mo. App. 230.

Pennsylvania.— Lucas *v.* Hunter, 153 Pa. St. 293, 25 Atl. 827 [*following* Schultz *v.* Asay, 2 Pennyp. 411]; Goepp *v.* Gartiser, 35 Pa. St. 130 [*affirming* 3 Phila. 335]; Chambers *v.* Yarnall, 15 Pa. St. 265; Jeannette Planing Mill Co. *v.* Greenawalt, 11 Pa. Super. Ct. 157 [*following* Gordon *v.* Norton, 186 Pa. St. 168, 40 Atl. 312; Pennock *v.* Hoover, 5 Rawle (Pa.) 291]; West Philadelphia Brick Co. *v.* Johnson, 3 Pa. Super. Ct. 220; Lucas *v.* Hunter, 11 Pa. Co. Ct. 343; Hayes *v.* Goodman, 16 Montg. Co. Rep. 43; Allen *v.* Fitzpatrick, 9 Phila. 142. See also Scott *v.* Scott, 196 Pa. St. 132, 46 Atl. 379. *Compare* Reece *v.* Haymaker, 164 Pa. St. 575, 30 Atl. 404 [*affirming* 25 Pittsb. Leg. J. N. S. 74].

Rhode Island.— McElroy *v.* Keily, 27 R. I. 474, 63 Atl. 238, 27 R. I. 64, 60 Atl. 679.

Virginia.— Where an estimate is made or the price fixed for the materials furnished for or the work done on each building, separate liens must be filed. Gilman *v.* Ryan, 95 Va. 494, 28 S. E. 875. But where the contract merely provides generally for furnishing material for or doing work upon all, the whole amount due is a lien upon all the buildings and lots. Sergeant *v.* Durby, 87 Va. 206, 12 S. E. 402.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 179.

The claimant may not designate by an apportionment the amount for which each house is liable, and cannot recover when he is unable to offer any direct evidence to show that any of the materials claimed in the bill of particulars were furnished on the credit of the particular house against which the lien in suit was filed. Jeannette Planing Mill Co. *v.* Greenawalt, 11 Pa. Super. Ct. 157. See also Bradley *v.* Anderson, 20 Pa. Co. Ct. 236.

99. Mulvane *v.* Chicago Lumber Co., 56 Kan. 675, 44 Pac. 613 [*distinguishing* Lumber Co. *v.* Hegwer, 1 Kan. App. 623, 42 Pac. 388]; Walden *v.* Robertson, 120 Mo. 38, 25 S. W. 349.

What is a general contract.— The words "erected under one general contract" as used in the Missouri statute are not to be confined to a case where the owner may contract for the completion of the buildings in one general contract (Deardorff *v.* Roy, 50 Mo. App. 70 [*followed* in Gruner, etc., Lumber Co. *v.* Nelson, 71 Mo. App. 110]), but will include a case where the entire building is not let to a contractor, but the lienor furnishes to the owner, for all the buildings, material or labor which goes into such erection, notwithstanding such material may compose only a part of such erections, and the labor may not be all that is expended on them (Walden *v.* Robertson, 120 Mo. 38, 25 S. W. 349; Deardorff *v.* Roy, *supra*), or the general contract may be with the owner or with the contractor to erect all the improvements, and the "one general contract" mentioned in the statutes should not be restricted to the contractor for the erection and construction of the buildings or the making of the improvements, but should be extended so as to include within its remedial provisions a materialman who makes a general contract to furnish all the material or all of a specified kind for all the buildings or improvements (Gruner, etc. Lumber Co. *v.* Nelson, *supra*). An agreement to roof twenty-nine houses, more or less, is a general contract, although the price of the work is fixed at a specified sum for each house. Bulger *v.* Robertson, 50 Mo. App. 499.

General contract with contractor having separate contracts with owner.— A subcontractor furnishing materials for and performing labor on several buildings under an entire contract with a contractor bound by separate contracts for the construction of the separate buildings is not entitled to a lien on all the buildings for the lump sum alleged to be due. Beach *v.* Stamper, 44 Oreg. 4, 74 Pac. 208 [*distinguishing* Willamette Mills, etc., Mfg. Co. *v.* Shea, 24 Oreg. 40, 32 Pac. 759, and *approving* Larkins *v.* Blakeman, 42 Conn. 292; Knauft *v.* Miller, 45 Minn. 61, 47 N. W. 313].

1. Bulger *v.* Robertson, 50 Mo. App. 499.

Houses located on adjoining platted lots are on contiguous lots, within the meaning of Mo. Rev. St. (1889) § 6729, providing that only one lien shall be necessary when the separate buildings shall be erected under one general contract and on contiguous lots; and the facts that the houses are separated by an intervening house and that the half lots on which the houses are situated are mortgaged by the owner to different persons is

same person[2] it is not necessary to file separate claims, but one claim covering all the property and including all the work done or materials furnished is sufficient,[3] although the lienor has the right to file a separate claim as to each piece of property if he prefers to do so.[4] But where the work is done or the materials furnished under separate contracts relating to the different properties a single lien claim covering all the properties cannot be filed, although such properties are contiguous.[5]

e. Double Houses. Where a building is constructed with a solid partition wall dividing it so as to make two houses adapted and intended for separate use, it is not necessary that a separate certificate or claim of lien should be filed for the materials used in each half.[6]

immaterial. Bulger *v.* Robertson, 50 Mo. App. 499.

Lots separated by a public alley are not contiguous and a single lien cannot be maintained upon them. Missouri Cent. Lumber Co. *v.* Sedalia Brewing Co., 78 Mo. App. 230; Bolen Coal Co. *v.* Ryan, 48 Mo. App. 512.

A private alley between some of the lots does not prevent the maintenance of a single lien. Goldheim *v.* Clark, 68 Md. 498, 13 Atl. 363; Fitzpatrick *v.* Allen, 80 Pa. St. 292; West Philadelphia Brick Co. *v.* Johnson, 3 Pa. Super. Ct. 220.

Prospective street.— Under the Pennsylvania acts of 1836 and 1850, an apportioned lien for materials might be filed against houses in the same block separated by a prospective street which was not dedicated at the time the contract was entered into and over which the public had then acquired no right, notwithstanding a subsequent dedication and acceptance. Atkinson *v.* Shoemaker, 151 Pa. St. 153, 25 Atl. 59. See also Kline's Appeal, 93 Pa. St. 422; Fleck *v.* Collins, 28 Pa. Super. Ct. 443.

2. Moran *v.* Chase, 52 N. Y. 346; Willamette Steam Mills Lumbering, etc., Co. *v.* Shea, 24 Oreg. 40, 32 Pac. 759.

Property of different owners see *supra*, III, C, 2, f.

3. *Alabama.*— Cocciola *v.* Wood-Dickerson Supply Co., 136 Ala. 532, 33 So. 856.

Arkansas.— Tenney *v.* Sly, 54 Ark. 93, 14 S. W. 1091.

Connecticut.—Marston *v.* Kenyon, 44 Conn. 349.

District of Columbia.—Alfred Richards Brick Co. *v.* Trott, 23 App. Cas. 284.

Illinois.— Moore *v.* Parish, 163 Ill. 93, 45 N. E. 573 [*reversing* 58 Ill. App. 617]; Aurand *v.* Martin, 87 Ill. App. 337 [*affirmed* in 188 Ill. 117, 58 N. E. 926]; Prendergast *v.* McNally, 76 Ill. App. 335 [*affirmed* in 179 Ill. 553, 53 N. E. 995, 70 Am. St. Rep. 128].

Indiana.— Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130.

Kansas.— Mulvane *v.* Chicago Lumber Co., 56 Kan. 675, 44 Pac. 613.

Maryland.— Goldheim *v.* Clark, 68 Md. 498, 13 Atl. 363.

Minnesota.— Glass *v.* St. Paul Park Carriage, etc., Co., 43 Minn. 228, 45 N. W. 150 [*following* Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3].

Missouri.— Walden *v.* Robertson, 120 Mo. 38, 25 S. W. 349; Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737; Flanagan *v.* O'Connell, 88 Mo. App. 1; Bickel *v.* Gray, 81 Mo. App. 653; Hill *v.* Gray, 81 Mo. App. 456; Missouri Cent. Lumber Co. *v.* Sedalia Brewing Co., 78 Mo. App. 230; Deardorff *v.* Roy, 50 Mo. App. 70; O'Leary *v.* Roe, 45 Mo. App. 567; Kick *v.* Doerste, 45 Mo. App. 134; Schroeder *v.* Mueller, 33 Mo. App. 28. The object of the statute establishing the rule stated in the text was to remedy the inconvenience disclosed in Fitzgerald *v.* Thomas, 61 Mo. 499 [*followed* in Fitzpatrick *v.* Thomas, 61 Mo. 512, 515, 76 Mo. 513 (*affirming* 7 Mo. App. 343)] and Miller *v.* Hoffman, 26 Mo. 199. See Deardorff *v.* Roy, *supra*.

Nebraska.— Doolittle *v.* Plenz, 16 Nebr. 153, 20 N. W. 116.

New York.— Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205]; Deegan *v.* Kilpatrick, 54 N. Y. App. Div. 371, 66 N. Y. Suppl. 628; Paine *v.* Bonney, 4 E. D. Smith 734, 6 Abb. Pr. 99.

Texas.— Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511.

Washington.— Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709.

United States.— Phillips *v.* Gilbert, 101 U. S. 721, 25 L. ed. 833.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 181.

Compare McElroy *v.* Keiley, 27 R. I. 64, 60 Atl. 679.

Apportionment of material used on each building not necessary.— Bickel *v.* Gray, 81 Mo. App. 653.

4. Bickel *v.* Gray, 81 Mo. App. 653; Hill *v.* Gray, 81 Mo. App. 456; Kick *v.* Doerste, 45 Mo. App. 134; Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127 [*followed* in Hines *v.* Cochran, 44 Nebr. 12, 62 N. W. 299].

5. *Connecticut.*— Larkins *v.* Blakeman, 42 Conn. 292.

Kansas.— North, etc., Lumber Co. *v.* Hegwer, 1 Kan. App. 623, 42 Pac. 388.

Massachusetts.— Landers *v.* Dexter, 106 Mass. 531.

Minnesota.— Knauft *v.* Miller, 45 Minn. 61, 47 N. W. 313.

Missouri.— Flanagan *v.* O'Connell, 88 Mo. App. 1.

Canada.— See Currier *v.* Friedrick, 22 Grant Ch. (U. C.) 243.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 181.

6. Halsted, etc., Co. *v.* Arick, 76 Conn. 382, 56 Atl. 628 [*following* Brabazon *v.* Allen, 41 Conn. 361]; McKelleget *v.* Eckhard, 4 Mo.

f. Improvements on Property of Different Owners.[7] In some jurisdictions a single lien cannot be claimed on two or more pieces of property belonging to different owners,[8] even though the properties are contiguous,[9] and the work was done or the materials furnished under an entire contract.[10] But in other states, where the several owners of contiguous property jointly contract for the improvement of their properties a single lien covering all the properties may be filed,[11] or subcontractors may file a single apportioned lien against all the properties for which they have furnished labor or materials under a single contract with the contractor, although such properties belong to different owners.[12]

g. Death of Contractor. Where the original contractor dies, and his executor completes the building contract, a subcontractor may include in a single lien claim all the work done and materials supplied by him whether for or to the contractor or the executor.[13]

3. Filing Separate Claims For Same Work or Material. It has been held that only one valid lien can be filed against the same property for the same account,[14] and hence where a claimant who has filed a good and valid lien claim fails to bring suit thereon within the time limited therefor he loses his lien and the special remedy thereon and cannot cure his neglect by filing a second lien, although he files it within the time allowed for filing.[15] But where the lien claim filed is defective and not sufficient under the law the lien claimant is entitled to fix his lien by filing a second claim within the time limited by statute;[16] and it

App. 589; Boyd *v.* Mole, 9 Phila. (Pa.) 118, under former statute.

7. See *infra*, IV, B, 2, c, (III).

8. Bartlett *v.* Bilger, 92 Iowa 732, 61 N. W. 233; Oldfield *v.* Barbour, 12 Ont. Pr. 554.

Where a subcontractor confuses the accounts of material and labor advanced to the contractor for buildings belonging to different owners, the identity of the accounts is lost, and no lien for the same attaches to any of the buildings. Reitz *v.* Ghio, 47 Mo. App. 287.

Under Mass. Pub. St. c. 191, § 2, providing that, where labor is performed and materials furnished under an entire contract for an entire price, a lien for the labor alone may be enforced if its value can be distinctly shown and section 6, providing that where such a lien is claimed the entire contract must be shown in the statement filed, where the owners of two adjoining lots each separately employed the same contractor to build a house on her lot, the contractor employing the same person to do the plumbing and furnish the material therefor for both houses at an entire price, it was held that, as there was but a single price for the labor and materials for both buildings, it could not be apportioned, and there could be no lien. Cahill *v.* Capen, 147 Mass. 493, 18 N. E. 419.

The contractor may object to such lien claim. Oldfield *v.* Barbour, 12 Ont. Pr. 554.

Where different persons own different stories of the same building there cannot be a single lien on the entire building, nor is the part belonging to one owner subject to a lien for what was furnished for the part belonging to the other. Badger Lumber Co. *v.* Stepp, 157 Mo. 366, 57 N. W. 1059.

9. Gorgas *v.* Douglas, 6 Serg. & R. (Pa.) 512; Kerbaugh *v.* Henderson, 3 Phila. (Pa.) 17.

10. Rathbun *v.* Hayford, 5 Allen (Mass.) 406.

11. Deegan *v.* Kilpatrick, 54 N. Y. App. Div. 371, 66 N. Y. Suppl. 628; Mandeville *v.* Reed, 13 Abb. Pr. (N. Y.) 173.

12. Culver *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812 [*overruling* Johnson *v.* Alger, 65 N. J. L. 363, 47 Atl. 571].

13. Bambrick *v.* Webster Groves Presb. Church Assoc., 53 Mo. App. 225.

14. Mulloy *v.* Lawrence, 31 Mo. 583; Hormann *v.* Wirtel, 59 Mo. App. 646.

15. Mulloy *v.* Lawrence, 31 Mo. 583. *Contra*, Clarke *v.* Heylman, 80 N. Y. App. Div. 572, 80 N. Y. Suppl. 794.

16. Southern Missouri, etc., Lumber Co. *v.* Wright, 114 Mo. 326, 21 S. W. 811; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Davis *v.* Schuler, 38 Mo. 24; Barnett *v.* Clooney, 68 Mo. App. 146, 67 Mo. App. 664; Hormann *v.* Wirtel, 59 Mo. App. 646; Mechanics' Planing-Mill Co. *v.* Nast, 7 Mo. App. 147; Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219; Chambers *v.* Yarnall, 15 Pa. St. 265; Bournonville *v.* Goodale, 10 Pa. St. 133; Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073, 6 Wash. 624, 34 Pac. 774.

The proper practice in such cases is to have the second lien account in some manner refer to the first, that the record may not show two encumbrances, when in fact only one exists. Barnett *v.* Clooney, 68 Mo. App. 146.

Burden of proof.— In order to preclude a mechanic from enforcing the lien subsequently filed defendant must make it affirmatively appear that the preceding lien statement filed by plaintiff was a valid statement and against the same property, this being a matter of defense. Hormann *v.* Wirtel, 59 Mo. App. 646.

has been held that where there is uncertainty as to who is the owner of the land on which the building or improvement was erected [17] or as to the person for whom the material was furnished [18] the claimant may file two or more liens to cover the exigencies of the case, although there may of course be but one recovery of the amount due.[19]

4. Joint Notice by Distinct Claimants. As a general rule a joint notice or claim of lien filed by two or more claimants whose interests are distinct and several is invalid,[20] but the statutes sometimes permit such a joinder.[21]

5. Place For Filing. It is necessary to the perfection of the lien that the notice, claim, or statement should be filed in the place designated by the statute,[22]

Judgment on lien.— Where a lien which misdescribes the property is foreclosed the lien does not become merged in the judgment so as to prevent the filing of another lien correctly describing the property. Gray *v.* Dunham, 50 Iowa 170.

17. Clark *v.* Miller, 14 Pa. Co. Ct. 227. There is no objection to a mechanic filing two claims for the same work against the same building, alleging ownership in different persons, nor is the pendency of one a bar to the other. Highfield *v.* Pierce, 3 Phila. (Pa.) 507.

18. Clark *v.* Miller, 14 Pa. Co. Ct. 227.

19. Clark *v.* Miller, 14 Pa. Co. Ct. 227.

20. McGrew *v.* McCarty, 78 Ind. 496; Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219. But see Van Slyck *v.* Arseneau, 140 Mich. 154, 103 N. W. 571, holding that, although Mich. Comp. Laws, § 10,762, only authorizes lien claimants for labor for sums less than one hundred dollars to unite their claims, and although section 10,757, which provides how liens shall be filed, makes no allusion to a practice of joining several claims in a single statement, a statement showing the claim of a person for services exceeding one hundred dollars is not invalid because an attempt was made to include the claims of others in the same statement.

21. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Hopkins *v.* Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815. See also Van Slyck *v.* Arseneau, 140 Mich. 154, 103 N. W. 571, claims less than one hundred dollars.

22. *California.*— Walker *v.* Hauss-Hijo, 1 Cal. 183, recorder's office.

Indiana.— Pifer *v.* Ward, 8 Blackf. 252 (recorder's office); Robinson *v.* Marney, 5 Blackf. 329 (recorder's office).

Maine.— Skillin *v.* Moore, 79 Me. 554, 11 Atl. 603, registry of deeds.

Maryland.— Carson *v.* White, 6 Gill 17, office of clerk of county court.

Massachusetts.—Weeks *v.* Walcott, 15 Gray 54, town-clerk's office under St. (1855) c. 431, § 2, which repealed the provision of St. (1851) c. 343, § 2, requiring recording in the registry of deeds.

Nebraska.— Tidball *v.* Holyoke, 70 Nebr. 726, 97 N. W. 1019; Cummins *v.* Vandeventer, 52 Nebr. 478, 72 N. W. 955; Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722, register of deeds.

New York.— Tommasi *v.* Archibald, 114 N. Y. App. Div. 838, 100 N. Y. Suppl. 367; Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794; Terwilliger *v.* Wheeler, 81 N. Y. App. Div. 460, 81 N. Y. Suppl. 173 (holding that where mechanics' liens against a school-district for the construction of a school-house were filed in the county clerk's office as liens for a private improvement, instead of with the board of trustees of the district, as required by Laws (1897), p. 520, c. 418, § 12, no lien was created thereby); Whipple *v.* Christian, 15 Hun 321 [*affirmed* in 80 N. Y. 523] (county clerk's office in certain villages under N. Y. Laws (1844), c. 305, which was not changed in this respect by Laws (1854), c. 402, and Laws (1858), c. 204); Bell *v.* Vanderbilt, 12 Daly 467, 67 How. Pr. 332 (holding that the requirements of the act of 1878, as to liens on city school-houses, that notice of claim should be filed with the head of the department having the work in charge and with the financial officer of the city, is complied with, in New York city, by filing the notice with the clerk of the board of education and with the controller).

North Carolina.— Boyle *v.* Robbins, 71 N. C. 130, holding that the notice of the claim to enforce a mechanic's lien for an amount within the jurisdiction of a justice of the peace may be filed with the clerk of the superior court.

Rhode Island.— Gurney *v.* Walsham, 16 R. I. 698, 19 Atl. 323 [*followed* in Dodge *v.* Walsham, 16 R. I. 704, 19 Atl. 326], under Pub. St. c. 177, § 5, as amended by Pub. Laws (1888), c. 696, § 4, and Pub. Laws (1866), c. 598, § 5, cl. 5, in the city of Providence the notice must be placed on record in the office of the recorder of deeds.

South Carolina.— Waring *v.* Miller Bathing, etc., Co., 36 S. C. 310, 15 S. E. 132, office of the clerk of the court under the act of 1884 (18 St. at L. p. 822) amending Gen. St. § 2354, which required the statement to be filed in the office of the register of mesne conveyances.

Virginia.— Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 184.

Construction of statute.— Wharves situated outside of the corporate limits, but within the jurisdiction of the city court, were not "within the city" within the meaning of the Virginia Mechanics' Lien Law of 1870, providing that where the property was situated within the city of Richmond the

in the proper county, town, etc.,[23] in the determination of which the *situs* of the property to be charged governs.[24]

6. PERSONS ENTITLED TO FILE.[25] An objection that a mechanic's lien claim was not made or filed by the claimant should be overruled when it appears that the claimant signed the claim and gave it to another to file, and it was indorsed by the recorder as filed by the claimant.[26]

7. MODE AND SUFFICIENCY OF FILING OR RECORDING. The proper filing of a claim consists in placing the sworn statement in the custody of and leaving the same with the proper officer for the purpose of recording,[27] and the failure of the officer

claim for the lien should be filed in the clerk's office of the chancery court of that city. Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180.

Filing held sufficient.— Under N. Y. Laws (1897), c. 418, providing that notice to perfect a mechanic's lien against municipal improvements may be filed by the claimant with the head of the department or bureau having charge of the work and with the financial officers of the city, and N. Y. Laws (1894), c. 703, providing that the commissioners of the sinking fund should be the proper authorities to construct a hospital and to authorize payment for the same, where a claimant filed notice of a lien with the controller, who was the head of the financial department of the city and *ex officio* a member of the board of commissioners of the sinking fund, and also with the commissioners of public buildings, there was a sufficient filing, although a separate notice was not filed with the clerk of the sinking fund commissioners, it not appearing that the city's rights had been prejudiced by a failure to so file. Smith *v.* New York, 32 Misc. (N. Y.) 380, 66 N. Y. Suppl. 686.

Where no place provided.— Under N. Y. Laws (1854), c. 402, extended by Laws (1858), c. 204, which provided for the filing of a lien in certain cases in the office of a town-clerk, where the property was situate in a city where there was no town-clerk, the filing of the lien with the county clerk was not sufficient. The failure of the legislature to provide for such a contingency was a *casus omissus*, which could not be remedied by the courts. Cheney *v.* Wolf, 2 Lans. (N. Y.) 188.

23. Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722.

24. Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180; Phœnix Furniture Co. *v.* Put-in-Bay Hotel Co., 66 Fed. 683, holding that the lien claim is properly filed in the county where the building was erected and the labor of superintendence performed, although most of the labor of preparing the plans and specifications was performed in a different county.

25. Right of assignee of claim to file lien see *infra*, V, A, 3.

26. Corbett *v.* Chambers, (Cal. 1895) 41 Pac. 873.

27. Watkins *v.* Bugge, 56 Nebr. 615, 77 N. W. 83; Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203; Lang *v.* Menasha Paper Co., 119 Wis. 1, 96 N. W. 393.

What constitutes filing.— A lien claimant's attorney gained access to the register's office after it was closed on a Saturday afternoon, between one and two o'clock, and tendered a lien statement and fee to the register, who refused to accept it on the ground that it was after office hours. At the suggestion of the register the attorney then inclosed the statement and fee in an envelope, went outside the office door, and, after the door was closed, pushed the envelope under it. He was watched through a glass panel in the door by the clerk, and on Monday morning the envelope was on the register's desk, and was recorded by him. It was held that the statement was filed on Saturday. Orne *v.* Barstow, 175 Mass. 193, 55 N. E. 896.

Delivery to officer at his residence.— Where before the expiration of the time allowed for filing the statement it is delivered to the officer in whose office it is required to be filed, who notes thereon the time of such receipt, the lien cannot be defeated by showing that the paper was received and the memorandum thereon made by the officer at his residence, and that he did not take it to his office and record it until after the expiration of the time allowed for filing. Wood *v.* Simons, 110 Mass. 116 [*following* Fuller *v.* Cunningham, 105 Mass. 442].

Non-payment of fee.— Where a contractor's attorney prepared a claim for a mechanic's lien, as required by statute, and on May 22, 1902, sent the same to the clerk of the circuit court, with directions to file the same, and send his bill therefor to such attorney, and the clerk acknowledged receipt of the claim by a letter written to the attorney, stating that his fee therefor was thirty-five cents but made no demand for payment thereof, and the fee was not paid and the lien was not docketed until June 21, 1902, but the claim remained in the clerk's office, it was held that, since the clerk made no demand for payment of the fee as a condition to filing the claim, as authorized by Wis. Rev. St. (1898) § 748, the claim should be regarded as filed on the date of its receipt. Lang *v.* Menasha Paper Co., 119 Wis. 1, 96 N. W. 393.

Filing before and entry after expiration of statutory time.— A mechanic's lien filed on the last day of the term limited by law but not entered on the docket until the next day is good, as the time of actual filing governs. Speakman *v* Knight, 3 Phila. (Pa.) 25. See also Bassett *v.* Brewer, 74 Tex. 554, 12 S. W. 229.

to record or to properly record the statement does not as a rule affect the validity of the lien between the parties,[28] or even, it has been held, as against third persons.[29] The statutes often provide that mechanics' liens shall be recorded in a book kept for that purpose,[30] but such a statute has been held not to make it necessary that the book in which they are recorded shall be kept exclusively for that purpose.[31]

8. Notice of Filing or Service of Copy of Claim.[32] Under some of the statutes the person claiming a mechanic's lien is required to serve on the owner[33] or his

File-mark.— Where the claim was marked duly filed over the signature of one who appeared from a jurat attached and belonging to the same paper to be the clerk of the district court this showed at least *prima facie* that the person who marked the paper as filed was the clerk of the district court. Ewing *v.* Folsom, 67 Iowa 65, 24 N. W. 595.

28. *Arkansas.*— Anderson *v.* Seamans, 49 Ark. 475, 479, 5 S. W. 799.

Indiana.— Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108; Wilson *v.* Logue, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. Rep. 426; Adams *v.* Buhler, 131 Ind. 66, 30 N. E. 883; Wilson *v.* Hopkins, 51 Ind. 231 [*overruling* Falkner *v.* Colshear, 39 Ind. 201]; Sharpe *v.* Clifford, 44 Ind. 346; Waldo *v.* Walters, 17 Ind. 534; Millikin *v.* Armstrong, 17 Ind. 456; Green *v.* Green, 16 Ind. 253, 79 Am. Dec. 428; Goble *v.* Gale, 7 Blackf. 218, 41 Am. Dec. 219; McKinney *v.* Springer, 6 Blackf. 511; Robinson *v.* Marney, 5 Blackf. 329; Leeper *v.* Meyers, 10 Ind. App. 314, 37 N. E. 1070.

Minnesota.— Smith *v.* Headley, 33 Minn. 384, 23 N. W. 550.

Missouri.— Cornelius *v.* Grant, 8 Mo. 59.

Nebraska.— Watkins *v.* Bugge, 56 Nebr. 615, 77 N. W. 83.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Pennsylvania.— Irish *v.* Harvey, 44 Pa. St. 76.

Wisconsin.— Goodman *v.* Baerlocher, 88 Wis. 287, 60 N. W. 415, 43 Am. St. Rep. 893.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 186.

Under the Georgia statute the claim of lien must be actually recorded within the time limited; the mere filing thereof within such time will not suffice. Jones *v.* Kern, 101 Ga. 309, 28 S. E. 850 [*following* Filer, etc., Co. *v.* Empire Lumber Co., 91 Ga. 657, 18 S. E. 359; Benson *v.* Green, 80 Ga. 230, 4 S. E. 851].

Under the Rhode Island statute (Pub. St. c. 177, § 5, as amended by Pub. Laws (1888), c. 696, § 4) which provides that "no lien shall attach for materials furnished unless the person furnishing the same" shall give notice, as required, and "place a copy of said notice on record . . . in a book to be kept for that purpose," the mere filing of the copy is not enough, nor is the mere recording of the names of the parties to the notice, with a minute of the time when the copy was filed, a sufficient recording. Dodge *v.* Walsham, 16 R. I. 704, 19 Atl. 326.

29. Wilson *v.* Hopkins, 51 Ind. 231 [*following* Sharpe *v.* Clifford, 44 Ind. 346; Waldo *v.* Walters, 17 Ind. 534; Millikin *v.* Armstrong, 17 Ind. 456; Green *v.* Green, 16 Ind. 253, 79 Am. Dec. 428; Goble *v.* Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219; McKinney *v.* Springer, 6 Blackf. (Ind.) 511; Robinson *v.* Marney, 5 Blackf. (Ind.) 329, and *overruling* Falkner *v.* Colshear, 39 Ind. 201]. But *compare* Cessna's Appeal, 7 Pa. Cas. 183, 10 Atl. 1.

30. Spencer *v.* Doherty, 17 R. I. 89, 20 Atl. 232, provision to this effect in R. I. Pub. St. c. 177, § 7, directory merely. See also Lignoski *v.* Crooker, (Tex. Civ. App. 1893) 22 S. W. 774; Bosley *v.* Pease, (Tex. Civ. App. 1893) 22 S. W. 516.

31. Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511; Quinn *v.* Logan, 67 Tex. 600, 4 S. W. 247; Lignoski *v.* Crooker, (Tex. Civ. App. 1893) 22 S. W. 774; Bosley *v.* Pease, (Tex. Civ. App. 1893) 22 S. W. 516.

32. **Notice of intention to claim lien** see *supra*, III, B.

33. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445; Waters *v.* Johnson, 134 Mich. 436, 96 N. W. 504; Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466; Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120; Maddocks *v.* McGann, 12 Pa. Dist. 701, 4 Lack. Jur. 34, 16 York Leg. Rec. 184.

Ownership by fraternal society lodge.— Under a statute requiring "the duplicate copy of the bill of particulars to be served on the party owing the debt," in order to fix the lien, where the building is being erected for a lodge of the I. O. O. F., service on the chairman of the lodge's building committee, who possesses no other powers than those pertaining to that particular undertaking, is not sufficient; the copy should be served on a principal officer of the lodge. McCreary *v.* Waco Lodge No. 70 I. O. O. F., 2 Tex. Unrep. Cas. 675.

What constitutes service.— Where a statement of lien was filed against a society, and the sheriff was a member of its building committee, the delivery to the sheriff, in his official capacity, for service, of a notice of the lienor's claim and the filing thereof, addressed to the society, is not sufficient service of the notice on the society, it not appearing what the duties of the building committee were, or that it was then in existence, and the sheriff not having served such paper. Steele *v.* McBurney, 96 Iowa 449, 65 N. W. 332.

Proof of service.— An affidavit attached to

agent[34] if he can be found within the county[35] a copy of the claim or statement[36] or a notice of the filing thereof[37] at or within a specified time.[38] This notice is distinct

a claim of lien filed in the office of the register of deeds, in which the deponent states that he served a true copy of the foregoing statement or claim of lien by "delivering the same to him personally," is *prima facie* proof that such service was made upon the owner of the land upon which the claim is sought to be enforced, who is named as such in such claim or statement, when offered in evidence in connection with the claim to which it is attached. Bourget *v.* Donaldson, 83 Mich. 478, 47 N. W. 326.

Filing proof of service.— Although the Michigan Mechanics' Lien Law provides that one furnishing labor or material to a contractor shall file a lien with the register of deeds, within sixty days after the last is furnished, serve a copy on the owner or his agent, and file proof of service with the register before commencement of proceedings to enforce the lien, where all other requirements of the statute have been complied with, proceedings to enforce the lien will not be defeated because proof of service of notice was not filed with the register of deeds until after such proceedings were commenced. Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466.

34. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445; Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466; Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120, in case of owner's absence.

An attorney intrusted by the owner with the adjustment of claims of the contractor and subcontractors is an agent within the meaning of a statute requiring notice of the filing of the lien to be served on the owner or his agent. Wickham *v.* Monroe, 89 Iowa 666, 57 N. W. 434.

The fact that the notice is addressed to the owner by name does not impair the service on the agent. Wickham *v.* Monroe, 89 Iowa 666, 57 N. W. 434.

A notice to the members of a building committee of the common council of a city that the persons giving the notice have filed a lien on a building being constructed by the city under the supervision of the committee, and that said members will be held liable to a certain amount for brick furnished for said building, will fix no personal liability on the city. Crawfordsville *v.* Irwin, 46 Ind. 438.

35. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445. See also Read *v.* Gillespie, 64 Tex. 42; Warren *v.* Smith, 44 Tex. 245.

False affidavit that owner or agent cannot be found.— Under the Colorado act of 1889, providing that if neither the owner nor agent can be found in the county where the property is situated, an affidavit must be filed to that effect, even though an affidavit is filed, sufficient under the statute to give the court jurisdiction, the court is divested of jurisdiction where affiant's own testimony shows it to be false. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445.

Posting notice if neither owner nor agent to be found see Hannah, etc., Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120.

36. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445; Waters *v.* Johnson, 134 Mich. 436, 96 N. W. 504; Hannah, etc., Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120; Kelly *v.* Bloomingdale, 139 N. Y. 343, 34 N. E. 919 [*affirming* 19 N. Y. Suppl. 126] (copy of notice of lien); Lee *v.* Phelps, 54 Tex. 367 [*followed* in Lee *v.* O'Brien, 54 Tex. 635] (copy of bill of particulars); Tremont Hotel Co. *v.* Rosamond, 2 Tex. Unrep. Cas. 682 (duplicate copy of contract or bill of particulars).

37. Walker *v.* Queal, 91 Iowa 704, 58 N. W. 1083 (notice to owner essential to preservation as against lien of subcontractor's lien); Wickham *v.* Monroe, 89 Iowa 666, 57 N. W. 434; Maddocks *v.* McGann, 12 Pa. Dist. 701, 4 Lack. Jur. 34, 16 York Leg. Rec. 184.

Written notice must be served, although the owner has actual notice of the filing of the claim. Frost *v.* Rawson, 91 Iowa 553, 60 N. W. 131 [*following* Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 898; Robinson *v.* State Ins. Co., 55 Iowa 489, 8 N. W. 314; Lounsberry *v.* Iowa, etc., R. Co., 49 Iowa 255].

38. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445 (at or before time of filing); Walker *v.* Queal, 91 Iowa 704, 58 N. W. 1083 (within thirty days after last work done or last material furnished); Waters *v.* Johnson, 134 Mich. 436, 96 N. W. 504 (ten days after filing); Hanna, etc., Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120 (ten days after filing).

Service before filing.— Where service of a notice of filing a mechanic's lien was made on the day of its date, and one day before filing, there was a sufficient compliance with a statute providing that the notice must be served within ten days after filing. Fairbairn *v.* Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

Where no time specified in statute.— Under Kan. Comp. Laws (1885), p. 685, art. 27, § 631, providing that any person who furnishes material to a contractor and wishes to claim a lien therefor shall file a statement of the amount due him from the contractor for the material furnished within sixty days after the completion of the building in which it was used, and shall furnish a copy thereof to the owner of the building, such materialman has a reasonable time in which to furnish such copy to the owner. Deatherage *v.* Henderson, 43 Kan. 684, 23 Pac. 1052 [*followed* in Deatherage *v.* Howenstein, 43 Kan. 691, 23 Pac. 1054]. Under Tex. Rev. St. art. 3166, providing that a duplicate of the bill of particulars of the lien debt must be recorded within six months from the maturity of the debt, and that a copy must be served on "the

from and additional to the notice of intention to file a lien.[39] It has been held that under such statutes service must be made in the mode prescribed or there is no lien.[40] Service upon the owner is sufficient, and a mere mortgagee need not be served.[41]

9. Withdrawal After Filing. A temporary withdrawal of the lien claim after its filing will not defeat the lien as between the parties,[42] and where the lien claim or an abstract thereof has been duly recorded as required by law the withdrawal of the original paper from the files will neither destroy the lien nor defeat the constructive notice to all persons resulting from the record.[43]

10. Time For Filing — a. In General. It is essential to the existence of a mechanic's lien that the claim or statement shall be filed within the time limited by statute,[44] which is usually a designated period after the completion of the build-

party owing the debt," without specifying within what time such copy shall be served, the failure to serve such party with a copy of the bill of particulars within six months after the maturity of the debt does not prevent the lien. Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338.

39. Maddocks *v.* McGann, 12 Pa. Dist. 701, 702, 4 Lack. Jur. 34, 16 York Leg. Rec. 184, where it is said that under the Pennsylvania act of June 4, 1901 (Pamphl. Laws 431), "a subcontractor, therefore, is bound to serve two notices, one, under section 8, of his intention to file a lien, and another, under section 21, informing the owner that a lien has been filed."

Notice of intention to file lien see *supra*, III, B.

40. Hannah, etc., Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120. *Contra*, La Pasta *v.* Weil, 20 Misc. (N. Y.) 10, 12, 44 N. Y. Suppl. 778, where it is said: "The failure to serve the notice of lien within ten days after filing in no way affects the validity of the lien. The statute never intended any such thing, and we have been unable to find any reported case which has so construed it. The object of the service is but notice and to protect the owner against making any payment after notice filed, and to prevent payments by him, thus also affording a like protection to the lienor."

Estoppel of owner through acceptance of service.— In a proceeding by the original contractor to enforce a mechanic's lien against the owner of the land, no rights of a subsequent purchaser intervening, the owner, by accepting service of a copy of the statement in lieu of the statutory service, before the time had elapsed within which the statutory service could have been made, became estopped to assert that the service was not made in the statutory manner. Mouat *v.* Fisher, 104 Mich. 262, 62 N. W. 338.

41. Kay *v.* Towsley, 113 Mich. 281, 71 N. W. 490, although the security is in the form of an absolute deed, there being an unrecorded agreement to reconvey on repayment of the loan.

42. Great Spirit Springs Co. *v.* Chicago Lumber Co., 47 Kan. 672, 28 Pac. 714, holding that after a statement for a mechanic's lien has been duly filed, and remained on file for several months, the temporary withdrawal thereof by the attorney of the person who filed it, for the purpose of preparing pleadings for its enforcement, does not waive the lien as between such person and the owner of the building, although "if the rights of third persons had intervened a very different question would be presented."

43. Bell *v.* Teague, 85 Ala. 211, 3 So. 861; Mars *v.* McKay, 14 Cal. 127; Paul *v.* Nample, 44 Minn. 453, 47 N. W. 51.

44. *Colorado.*— Stidger *v.* McPhee, 15 Colo. App. 252, 62 Pac. 332.

Connecticut.— Lapenta *v.* Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315; Flint *v.* Raymond, 41 Conn. 510.

Delaware.— Carswell *v.* Patzowski, 4 Pennew. 403, 55 Atl. 342, 1013.

District of Columbia.— Alfred Richards Brick Co. *v.* Trott, 23 App. Cas. 284.

Illinois.— Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22.

Indiana.— Crawfordsville *v.* Brundage, 57 Ind. 262; Alexandria Bldg. Co. *v.* McHugh, 12 Ind. App. 282, 39 N. E. 877, 40 N. E. 80.

Kentucky.— Ponder *v.* Safety Building, etc., Co., 59 S. W. 523, 858, 22 Ky. L. Rep. 1074.

Louisiana.— McKnight *v.* Acadia Bank, 114 La. 289, 38 So. 172.

Maine.— Foss *v.* Desjardins, 98 Me. 539, 57 Atl. 881; Billings *v.* Martin, (1887) 10 Atl. 445.

Minnesota.— See Olson *v.* Pennington, 37 Minn. 298, 33 N. W. 791.

Missouri.— Darlington *v.* Eldridge, 88 Mo. App. 525.

Nebraska.— Tidball *v.* Holyoke, 70 Nebr. 726, 97 N. W. 1019; Cummins *v.* Vandeventer, 52 Nebr. 478, 72 N. W. 955; Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722.

New York.— Collins *v.* Drew, 67 N. Y. 149 [*affirming* 6 Daly 234, 50 How. Pr. 477]; Mathiasen *v.* Barkin, 62 N. Y. App. Div. 614, 70 N. Y. Suppl. 770; Cody *v.* White, 34 Misc. 638, 70 N. Y. Suppl. 589.

Ohio.— King *v.* Cleveland Ship Bldg. Co., 50 Ohio St. 320, 34 N. E. 436.

Oregon.— See Inman *v.* Henderson, 29 Oreg. 116, 45 Pac. 300.

Pennsylvania.— Bolton's Appeal, 3 Grant 204; Egolf *v.* Casselberry, 14 Pa. Co. Ct. 87; Philadelphia *v.* Slonaker, 6 Phila. 48; *In re* Quickel, 11 York Leg. Rec. 150. See also Knorr *v.* Elliott, 5 Serg. & R. 49.

Texas.— Huck *v.* Gaylord, 50 Tex. 578, even as between the parties.

Utah.— Eclipse Steam Mfg. Co. *v.* Nichols,

ing,[45] after the claimant has completed the work or the furnishing of the materials for which the lien is claimed,[46] or after the debt became due.[47] The claim may be filed at any time within the period limited therefor by the statute,[48] and the mere fact that a claimant has postponed the filing of his lien till toward the end of the time limited for that purpose will not affect his statutory right, no matter what may have been the motive which prompted such delay on his part.[49] The

1 Utah 252, the Mechanics' Lien Law of 1869 makes no distinction whatever among lienholders as to the time within which the lien shall be filed.

Virginia.— Franklin St. Church *v.* Davis, 85 Va. 193, 7 S. E. 245; Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180.

Wisconsin.— Hinkley *v.* Grafton Hall, 101 Wis. 69, 76 N. W. 1093. See also Cuer *v.* Ross, 49 Wis. 652, 6 N. W. 331.

Wyoming.— Big Horn Lumber Co. *v.* Davis, 14 Wyo. 423, 84 Pac. 900, 85 Pac. 1048.

Canada.— Hall *v.* Hogg, 20 Ont. 13.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 190.

What statute governs.— In N. Y. Laws (1872), c. 669, relating to mechanics' liens upon wharves, piers, bulkheads, bridges, and other structures connected therewith, the term "other structures connected therewith" included all structures connected with the wharves and piers, and necessary for their proper use, such as sheds erected upon piers of a steam navigation company for offices and other purposes of the company; and a lien, for materials furnished for such sheds, not filed within the time limited by that statute was invalid, although filed within the time prescribed by the general lien law applicable to the locality. Collins *v.* Drew, 67 N. Y. 149 [*affirming* 6 Daly 234, 50 How. Pr. 477].

Failure to file in time as merely postponing lien see *infra*, III, C, 10, l.

45. *California.*— Walker *v.* Hauss-Hijo, 1 Cal. 183.

District of Columbia.— Phœnix Iron Co. *v.* The Richmond, 6 Mackey 180.

Indiana.— Crawfordsville *v.* Brundage, 57 Ind. 262.

Missouri.— Bolen Coal Co. *v.* Ryan, 48 Mo. App. 512.

Oregon.— Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67; Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97.

Utah.— Eclipse Steam Mfg. Co. *v.* Nichols, 1 Utah 252.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 190; and *infra*, III, C, 10, d.

A recital in the lien statement as to the date of completion of the building is not conclusive on the lienor. Burleigh Bldg. Co. *v.* Merchant Brick, etc., Co., 13 Colo. App. 455, 59 Pac. 83.

46. *Connecticut.*— Shattuck *v.* Beardsley, 46 Conn. 386.

Iowa.— Breneman *v.* Harvey, 70 Iowa 479, 30 N. W. 846.

Kentucky.—Cunningham *v.* Fischer, (1899) 48 S. W. 993.

Minnesota.— Coughlan *v.* Longini, 77 Minn. 514, 80 N. W. 695.

Missouri.— Stebed *v.* Stock, 31 Mo. 456.

New York.— Collins *v.* Drew, 67 N. Y. 149 [*affirming* 6 Daly 234, 50 How. Pr. 477].

Pennsylvania.— Russell *v.* Bell, 44 Pa. St. 47; Bolton's Appeal, 3 Grant 204; *In re* Quickel, 11 York Leg. Rec. 150.

Utah.— Culmer *v.* Clift, 14 Utah 286, 47 Pac. 85; Lumber Co. *v.* Partridge, 10 Utah 322, 37 Pac. 572; Morrison *v.* Carey-Lombard Co., 9 Utah 70, 33 Pac. 238; Eclipse Steam Mfg. Co. *v.* Nichols, 1 Utah 252.

Virginia.— Franklin St. Church *v.* Davis, 85 Va. 193, 7 S. E. 245.

West Virginia.— Mayes *v.* Ruffners, 8 W. Va. 384.

Canada.— Hall *v.* Hogg, 20 Ont. 13.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 190; and *infra*, III, C, 10, e.

New contract.— Where a contract provided that the seller was to furnish and put in place certain mantels, and in pursuance thereof the seller shipped them at his own expense, and several days later a new contract was made, whereby the seller was relieved of his obligation to put the mantels in place, a lien filed more than the statutory period after the shipment of the mantels, but less than the statutory period after the making of the new contract, was filed in time. St. Clair Bldg. Assoc. *v.* Hayes, 2 Ohio Cir. Ct. 225, 1 Ohio Cir. Dec. 456.

47. Pifer *v.* Wark, 8 Blackf. (Ind.) 252; Robinson *v.* Marney, 5 Blackf. (Ind. 329. And see *infra*, III, C, 10, c.

48. Ward *v.* Crane, 118 Cal. 676, 50 Pac. 839. See also Sullivan *v.* Brewster, 1 E. D. Smith (N. Y.) 681.

Filing certificate before giving notice to owner.—Under statutes providing that written notice of the claim of lien must be given to the owner within sixty days after the commencement of the furnishing of the material, and that a certificate of the lien must be filed with the town-clerk, within sixty days after its completion, where the delivery was completed within sixty days after it was commenced, the lien is not affected by the fact that the certificate was filed before the written notice was given to the owner, where both the filing and the notice to the owner were within the time limited therefor. Shattuck *v.* Beardsley, 46 Conn. 386.

An architect who files his lien for preparing the plans and specifications before the building is commenced does not thereby lose his right to a lien. Rinaker *v.* Freeman, 84 Ill. App. 283 [*reversed* on the ground that under the contract in question the architect was not entitled to a lien in 185 Ill. 172, 56 N. E. 1055].

49. Bohn Sash, etc., Co. *v.* Case, 42 Nebr. 281, 60 N. W. 576.

fact that the affidavit and claim of lien was sworn to one day before the date of filing does not invalidate the lien.[50]

b. Different Periods For Different Classes of Claimants. Under some statutes the time within which the lien claim or statement may be filed varies according to whether the claimant is a contractor, subcontractor, materialman, or laborer, and the claimant must of course file his claim or statement within the period allowed for the class to which he belongs.[51]

c. Maturity of Claim or Accrual of Indebtedness. Some of the statutes contemplate that the money shall be due and payable when the claim or statement is filed,[52] but under other statutes the claim may be filed when the money becomes due, although by the terms of the contract it is not payable until some time thereafter.[53] A statute requiring the claim to be filed within a certain time after payment becomes due has reference to the time when payment becomes due by the terms of the contract;[54] under such a statute where materials are sold without any agreement for credit payment is due on delivery and the period runs from that time,[55] and if credit is given the period runs from the time when the credit expires;[56] but an agreement made after payment became due under the

50. Fairbairn *v.* Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469 [*distinguishing* and refusing to follow McPherson *v.* McGillis, 93 Mich. 525, 53 N. W. 794; Drew *v.* Dequindre, 2 Dougl. (Mich.) 93].

51. See the following cases involving questions of the status of persons claiming mechanics' liens:

Alabama.— Lane, etc., Co. *v.* Jones, 79 Ala. 156.

California.— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Willamette Steam Mills Co. *v.* Kremer, 94 Cal. 205, 29 Pac. 633; La Grill *v.* Mallard, 90 Cal. 373, 27 Pac. 294; Sparks *v.* Butte County Gravel Min. Co., 55 Cal. 389.

Colorado.— Hart, etc., Corp. *v.* Mullen, 4 Colo. 512.

Delaware.—Curlett *v.* Aaron, 6 Houst. 477; Mulrine *v.* Washington Lodge No. 5, I. O. O. F., 6 Houst. 350; France *v.* Woolston, 4 Houst. 557.

District of Columbia.— Martin *v.* Campbell, 6 Mackey 296.

Idaho.— Colorado Iron Works *v.* Rickenberg, 4 Ida. 262, 38 Pac. 651.

Indiana.— Stephenson *v.* Ballard, 82 Ind. 87; Thomas *v.* Kiblinger, 77 Ind. 85; Hamilton *v.* Naylor, 72 Ind. 171.

Iowa.— Missouri River Lumber Co. *v.* Finance Co., 93 Iowa 640, 61 N. W. 913.

Kansas.— Higley *v.* Ringle, 57 Kan. 222, 45 Pac. 619; Weyerhaeuser *v.* Fraim, 54 Kan. 645, 39 Pac. 188; Cunningham *v.* Barr, 45 Kan. 158, 25 Pac. 583; Crawford *v.* Blackman, 30 Kan. 527, 1 Pac. 136; Clough *v.* McDonald, 18 Kan. 114; Shellabarger *v.* Bishop, 14 Kan. 432; Groesbeck *v.* Barger, 1 Kan. App. 61, 41 Pac. 204.

Maryland.— Heath *v.* Tyler, 44 Md. 312.

Massachusetts.— Kennebec Framing Co. *v.* Pickering, 142 Mass. 80, 7 N. E. 30; Gale *v.* Blaikie, 129 Mass. 206.

Michigan.— Comstock *v.* McEvoy, 52 Mich. 324, 17 N. W. 931.

Missouri.— Schulenburgh *v.* Gibson, 15 Mo. 281.

Nebraska.— Drexel *v.* Richards, 48 Nebr. 322, 67 N. W. 169; Wells *v.* David City Imp. Co., 43 Nebr. 366, 61 N. W. 623; McPhee *v.* Kay, 30 Nebr. 62, 46 N. W. 223.

New York.— McMahon *v.* Hodge, 2 Misc. 234, 21 N. Y. Suppl. 971.

Oregon.— Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97.

South Dakota.— Albright *v.* Smith, 3 S. D. 631, 54 N. W. 816.

Texas.— Matthews *v.* Wagenhaeuser Brewing Assoc., 83 Tex. 604, 19 S. W. 150; Burke *v.* Brown, 10 Tex. Civ. App. 298, 30 S. W. 936; Whiteselle *v.* Texas Loan Agency, (Civ. App. 1894) 27 S. W. 309.

Washington.— Seattle, etc., R. Co. *v.* Ah Kowe, 2 Wash. Terr. 36, 3 Pac. 188.

United States.— Salt Lake Hardware Co. *v.* Chainman Min., etc., Co., 128 Fed. 509.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 205, 206.

Persons included in various classes see *supra*, II, D, 3, 4, 5; II, D, 6, a; II, D, 7, a, (I); II, D, 7, c, f.

52. Schroth *v.* Black, 50 Ill. App. 168, the statute providing that the claimant "may bring suit at once."

53. Ringle *v.* Wallis Iron Works, 4 Misc. 15, 24 N. Y. Suppl. 757 [*affirmed* in 76 Hun 449, 28 N. Y. Suppl. 107].

54. Dawson *v.* Black, 148 Ill. 484, 36 N. E. 413.

55. Robinson *v.* Marney, 5 Blackf. (Ind.) 329.

Delivery of last item.— Under Wyo. Rev. St. (1899) § 2893, providing that one seeking a lien must file a statement within ninety days after the indebtedness shall have accrued, the indebtedness is to be deemed as having accrued at the date of the furnishing of the last item originally included in the account, and not at the date of the last item which remains unpaid. Big Horn Lumber Co. *v.* Davis, (Wyo. 1906) 84 Pac. 900, 85 Pac. 1048.

56. Goble *v.* Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219.

contract to extend the time for payment does not extend the time for filing,[57] and *a fortiori* a mere agreement not to press for payment for a reasonable time does not extend the time.[58] It has been held that a statute requiring the lien to be filed within a certain time "after the indebtedness shall have accrued" means within such time after the work is finished, and does not refer to the date at which the debt is due;[59] but the better view appears to be that the indebtedness accrues within the meaning of such a statute when it comes to maturity so as to be due and payable,[60] and the period does not begin to run until such time, although the work has been previously completed.[61]

d. Completion of Building. A building may be completed so as to start the running of the time allowed for filing lien notices, although a few minor details are omitted;[62] but it is not completed while work of considerable value and importance remains to be done,[63] even though the unfinished part constitutes a mere convenience and the building may be used without it.[64] Where the time for filing a lien under the statute runs from the completion of the building, the abandonment of work upon the building is to be deemed a completion for the purpose of fixing the time for filing.[65] Under some statutes the occupation of the building by the

57. Dawson *v.* Black, 148 Ill. 484, 36 N. E. 413.

58. Lazzari *v.* Havens, 39 Misc. (N. Y.) 255, 79 N. Y. Suppl. 395.

59. General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318. This is upon the theory that an indebtedness accrues when it comes into existence as a completed obligation, although it may not be presently due and payable. Great Western Mfg. Co. *v.* Burns, 59 Mo. App. 391.

An unintentional omission to deliver a part of machinery purchased cannot extend the time of the accrual of the indebtedness or within which the lien claim must be filed, as such omission is a matter of which only the purchaser can take advantage. Great Western Mfg. Co. *v.* Burns, 59 Mo. App. 391.

60. Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331.

Accrual of payments withheld as security on destruction of building.— Where a building contract provided for the construction of a house, and the furnishing of the material, for a stipulated compensation, payable in several specific instalments according to the progress of the work, the last, including a sum retained by the owner as security for faithful performance, being payable on the completion of the house, and while in the process of construction, the house was wilfully burned by the owner's husband without the contractor's fault, the owner's obligation to pay the sum retained as security accrued on the destruction of the house, within the meaning of Ala. Code (1876), § 3444, requiring every contractor who seeks to enforce a mechanic's lien to file his demand within six months after the indebtedness has accrued. Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331.

61. Johnson *v.* White, Tex. Civ. App. 1894) 27 S. W. 174, holding that where a building contract provides for payment only upon acceptance of the work, filing the contract within four months after such acceptance, although more than four months after completion of the work, will sustain a lien under Sayles Civ. St. Tex. art. 3165, requiring original contractors to file their contracts within four months after the indebtedness accrues, in order to obtain a lien.

62. Riggs F. Ins. Co. *v.* Shedd, 16 App. Cas. (D. C.) 150.

Acceptance by owner.— Where the building is substantially completed and so treated by all the parties and delivered as such by the contractor to the owner, with only a few trifling particulars remaining to be done, and as to those the owner accepts the promise of the contractor to do them afterward, the promise to do being accepted in lieu of the actual deed, the time for filing the lien begins to run from the date of such delivery of the building to the owner. General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318.

Discharge of claimant.— Where a mechanic, engaged by the day to erect a building, under the control of the owner, is discharged by him when the work is on the verge of full and actual completion, the owner undertaking to finish it, such discharge is equivalent to an acceptance of the work as completed, and the notice of lien may be properly filed at any time within thirty days thereafter. Ward *v.* Crane, 118 Cal. 676, 50 Pac. 839.

63. Coss *v.* MacDonough, 111 Cal. 662, 44 Pac. 325 (elevator called for by original plans not put in); Riggs F. Ins. Co. *v.* Shedd, 16 App. Cas. (D. C.) 150.

64. Coss *v.* MacDonough, 111 Cal. 662, 666, 44 Pac. 325, where it is said: "Conveniences are a material part of the building when provided for by the plans and specifications; and when so provided for, the building is not completed until the demands of the plans and specifications in this regard have been satisfied."

65. *California.*— Johnson *v.* La Grave, 102 Cal. 324, 36 Pac. 651; Kerckhoff-Cuzner Mill, etc., Co. *v.* Olmstead, 85 Cal. 80, 24 Pac. 648.

Kansas.— Main St. Hotel Co. *v.* Horton Hardware Co., 56 Kan. 448, 43 Pac. 769; Chicago Lumber Co. *v.* Merrimack River Sav.

owner is to be deemed conclusive evidence of completion;[66] but in order to have this effect the occupation must be open, entire, and exclusive, and of such a character as to be inconsistent with a continuance by the contractor in the completion of his contract,[67] and whether in any particular case there has been such occupation or use must be determined from the facts of that case.[68] Where the statute makes the completion of the building the time from which the period for filing the notice of lien runs, a notice filed within such period after such completion is in time, although more than the period allowed has elapsed since the claimant completed his work.[69] Where subcontractors are required to file their liens within a certain time after completion of the building, such time runs from the actual completion and not from the time of the issuance of the architect's certificate of completion, although the original contract makes such certificate a condition precedent to the contractor's right to demand payment.[70] An understanding between one who contracted to build a church and the majority of the trustees of the church that it should be accepted as completed when it was not so in fact is not conclusive on the question of the time of completion, as against subcontractors claiming to have filed lien statements within the statutory time after actual completion;[71] but where by the terms of a building contract it is to terminate when the work reaches a certain stage, the period for filing the lien notice runs from the time such stage is reached.[72]

e. Completion of Work or Furnishing of Materials. Where a statute requires filing within a certain time after the completion of the work or of the furnishing of materials, the period runs from the date on which the last item is done or

Bank, 52 Kan. 410, 34 Pac. 1045; Shaw *v.* Stewart, 43 Kan. 572, 23 Pac. 616.

Minnesota.— Knight *v.* Norris, 13 Minn. 473, holding that where an architect was to receive what his services were reasonably worth, and, before his contract had been wholly performed, work was suspended without his fault, he may properly file his account and claim for a lien for his services up to that time without waiting for resumption and completion of the work as originally contemplated.

Missouri.— Naughton, etc., Slate Co. *v.* Nicholson, 97 Mo. App. 332, 71 S. W. 64, holding that a subcontractor, who was informed several months before by the contractors that they had had trouble with the architect, and who knew that the work had been abandoned, and the house boarded up, was put on inquiry as to whether the contract with the owner was abandoned; so that, it having been abandoned, his work thereafter performed could not be considered done under his contract with the contractors, for the purpose of determining the time for filing his lien.

United States.— Catlin *v.* Douglass, 33 Fed. 569.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 201.

The actual cessation of work and not the secret purposes or mental conclusions of the owners determines the time when the abandonment occurred. Chicago Lumber Co. *v.* Merrimack River Sav. Bank, 52 Kan. 410, 34 Pac. 1045.

The cessation of labor upon a building for thirty days is, under Cal. Code Civ. Proc. § 1187, equivalent to a completion for the purpose of starting the running of the period for filing lien claims. Buell *v.* Brown, 131 Cal. 158, 63 Pac. 167.

Any labor performed on a building before it is completed and which is in furtherance of its completion, whatever the character of such labor, will prevent the operation of a statute providing that the cessation of labor on an unfinished building for a certain time shall be deemed a completion so far as mechanics' liens are concerned. Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

66. See Orlandi *v.* Gray, 125 Cal. 372, 58 Pac. 15. Prior to the amendment of 1897 the provision of Cal. Code Civ. Proc. § 1187, to this effect, was limited to apply only "in case of contracts." Jones *v.* Kruse, 138 Cal. 613, 72 Pac. 146.

67. Orlandi *v.* Gray, 125 Cal. 372, 58 Pac. 15 [*following* Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629].

68. Orlandi *v.* Gray, 125 Cal. 372, 58 Pac. 15, holding that an occupation by the owner while work was being performed with full knowledge of the circumstances under which the work was being done was not sufficient to start the running of the time for filing liens.

69. Phœnix Iron Co. *v.* The Richmond, 6 Mackey (D. C.) 180. See also Fitch *v.* Howitt, 32 Oreg. 396, 52 Pac. 192 [*following* Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67; Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97].

70. McLaughlin *v.* Perkins, 102 Cal. 502, 36 Pac. 839.

71. Hutchinson First Presb. Church *v.* Santy, 52 Kan. 462, 34 Pac. 974.

72. Hinkley *v.* Grafton Hall, 101 Wis. 69, 76 N. W. 1093.

furnished.[73] Where the claimant has merely furnished material, the time for filing the claim runs from the date on which the last materials were furnished, and not from the date on which they were used,[74] and the time is to be computed from the date of the last actual delivery, and not from the time that the last delivery might have been made under the contract.[75] Where materials are sent from a distance, the date of their arrival at their destination and receipt by the person to whom they are furnished is the date on which they are furnished.[76]

73. *California.*— Gordon Hardware Co. *v.* San Francisco, etc., R. Co., 86 Cal. 620, 25 Pac. 125; McIntyre *v.* Trautner, 63 Cal. 429.

Connecticut.— Nichols *v.* Culver, 51 Conn. 177; Cole *v.* Uhl, 46 Conn. 296.

Illinois.— St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546.

Kansas.— Main St. Hotel Co. *v.* Horton Hardware Co., 56 Kan. 448, 43 Pac. 769; Wellington Bd. of Education *v.* Gelino, 9 Kan. App. 555, 58 Pac. 277.

Massachusetts.— Miller *v.* Wilkinson, 167 Mass. 136, 44 N. E. 1083; Monaghan *v.* Putney, 161 Mass. 338, 37 N. E. 171; Worthen *v.* Cleaveland, 129 Mass. 570.

Minnesota.— McCarthy *v.* Groff, 48 Minn. 325, 51 N. W. 218.

Missouri.— General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318; Fulton Iron Works *v.* North Center Creek Min., etc., Co., 80 Mo. 265; Allen *v.* Frumet Min., etc., Co., 73 Mo. 688; Livermore *v.* Wright, 33 Mo. 31; Squires *v.* Fithian, 27 Mo. 134; Bruns *v.* Braun, 35 Mo. App. 337; Miller *v.* Whitelaw, 28 Mo. App. 639; Cole *v.* Barron, 8 Mo. App. 509.

Nebraska.— Nye, etc., Co. *v.* Berger, 52 Nebr. 758, 73 N. W. 274.

New York.— Watts-Campbell Co. *v.* Yuengling, 125 N. Y. 1, 25 N. E. 1060 [*affirming* 51 Hun 302, 3 N. Y. Suppl. 869].

Pennsylvania.— Egolf *v.* Casselberry, 14 Pa. Co. Ct. 87. See also Pace *v.* Yost, 9 Kulp 357; Bird *v.* Shirk, 2 Leg. Chron. 158, 6 Leg. Gaz. 149.

Texas.— Matthews *v.* Wagenhaeuser Brewing Assoc., 83 Tex. 604, 19 S. W. 150; J. H. Baxter Lumber Co. *v.* Nickell, 24 Tex. Civ. App. 519, 60 S. W. 450.

Washington.— Washington Bridge Co. *v.* Land, etc., Imp. Co., 12 Wash. 272, 40 Pac. 982.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 195 *et seq.*

Contract to build and keep in order for a certain time.— Where a contractor agreed to construct "a plumbing and heating plant" in a building, and keep and maintain the plant in good order for one year after it was completed, in consideration of a certain sum at the end of the year, and in performing the contract, the contractor made repairs three times after the plant was completed, the last time being on the last day of the year, and filed a lien statement within ninety days thereafter, as against the owner the contract was an entirety and the lien statement was filed in time, but as against third parties acquiring rights in the property for value after the completion of the plant and without actual notice or knowledge of the contract it was not an entirety, and the statement was not filed in time. Shaw *v.* Fjellman, 72 Minn. 465, 75 N. W. 705.

Delivery at building.— Under a statute requiring the statement to be filed within a certain time after the last of the materials are furnished, the period runs from the date when the last materials are furnished to the owner or delivered at the building and not from an earlier date at which it was delivered to the contractor at his place of business. Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

Where materials are delivered and received subject to approval the delivery is not complete, for the purpose of fixing the time from which the period allowed to file a lien runs, until the material is accepted. Franklin Bank *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 545, 8 Ohio N. P. 517.

74. Hall *v.* Hogg, 20 Ont. 13.

Under special circumstances the time when material was used may fix the time of furnishing for the purposes of the lien. Thus where a lumber dealer was furnishing lumber for a building in the course of erection under contract, and the contractor applied at the lumber yard for certain pieces of lumber, stating that the immediate purpose for which he wanted them was to prop up the brick walls; that he might use them in the erection of the building, and that if he did not use them in building he would return them, and that if he did use them he would notify the lumberman, so that he might charge them up, and four days after the delivery by the dealer of the last material for the building other than the pieces of lumber in question, the contractor called at the office of the dealer, and told him that he had used the said pieces of lumber in the building, and to charge them up, the said pieces of lumber were furnished, for the purpose of the Mechanics' Lien Law, at the date of the notification of the lumber dealer by the contractor that he had used them in the building and to charge them up. Marble *v.* Jones, etc., Lumber Co., 19 Nebr. 732, 28 N. W. 309.

75. Miller *v.* Whitelaw, 28 Mo. App. 639.

76. Buchanan *v.* Selden, 43 Nebr. 559, 61 N. W. 732, holding that where a contractor who had undertaken to erect a building at B procured material from a materialman in another place, and the last items were shipped from such place on December 1, and reached B on December 5, and the contractor on that date received the material and paid the

Where a contractor, working for several owners, has but a single contract with a materialman, the time for the filing of the materialman's lien is not to be determined by the duration of deliveries under the contract between the materialman and the contractor, but runs as to each property from the completion of the work by the contractor for the owner thereof.[77] Where the statute requires the claim to be filed within a certain time after the completion of the work or of the furnishing of the materials, a claim filed within such time may cover all the items done or furnished, under the contract;[78] but, under a statute requiring notice to be filed a certain number of days after the materials were furnished or the work done, it has been held that the notice protected and secured only what was done or furnished within such time prior to the filing.[79] Where the statute requires the lien to be filed within a certain time after the work is done or the materials furnished, where work is done or materials furnished under a contract, the period does not begin to run until the contract is performed;[80] but where the parties agree to consider the work completed, although certain finishing touches are not

freight thereon, but at his request the material was left at the depot until December 10, the date of furnishing was December 5. *Compare* Hooven v. Featherstone, 111 Fed. 81, 49 C. C. A. 229, holding that where an engine was to be delivered by the shipper at the city of the vendee, and when it arrived at the station there the vendee, in answer to the question of the railroad agent, "What disposition?" answered. "Send it to our plant," and it was so sent without extra charges for freight, such direction of the vendee was a mere designation of the place of delivery within the original destination, and not the starting engine on an additional journey, and delivery was not made until it was received at the plant and the time for filing a lien ran from such receipt.

Contract for delivery F. O. B. — Under a contract to furnish machinery and deliver it "free on board of cars" at a designated place, for a stipulated sum, the machinery is furnished, when it is delivered, in accordance with the contract, on board the cars at the place named, without expense to the purchaser; and, to obtain a lien, the claim must be filed within the statutory period thereafter. Congdon *v.* Kendall, 53 Nebr. 282, 73 N. W. 659; King *v.* Cleveland Ship Buildg. Co., 50 Ohio St. 320, 34 N. E. 436.

77. *Re* Moorehouse, 13 Ont. 290.

78. Edwards *v.* Derrickson, 28 N. J. L. 39; Chase *v.* James, 10 Hun (N. Y.) 506; Costello *v.* Dale, 1 Hun (N. Y.) 489, 3 Thomps. & C. 493; McGraw *v.* Godfrey, 16 Abb. Pr. N. S. (N. Y.) 358.

Lapse of time between items.—Where there is an entire contract to furnish the cornice of a building and four bases and four gable ornaments at such time as the building shall be ready for them and the cornice, bases, and two of the ornaments are furnished in May, and the other two ornaments in September, and there is no evidence as to when the building was ready for the ornaments, a mechanic's lien filed in the following February will be as good as the material furnished in May. Eller *v.* Cambridge Springs Co., 18 Pa. Super. Ct. 44. Under a statute requiring the statement to be filed within a certain period after the claimant has ceased to labor on or furnish labor or materials for the building, a statement filed within such time after the last work was done is sufficient to cover the entire claim notwithstanding the fact that during the progress of the work more than the statutory period passed without the claimant doing anything on the job, where the work thereafter was done in good faith pursuant to and under the contract and not merely colorably to save the lien. D. L. Billings Co. *v.* Brand, 187 Mass. 417, 419, 420, 73 N. E. 637, where it is said: "Without undertaking to say that there might not be a case in which the delay was so great and unreasonable as to justify the judge in saying as matter of law that the right to a lien had been lost, we do not see how it can be said in these cases."

79. Spencer *v.* Barnett, 35 N. Y. 94 [*followed* in Tiley *v.* Thousand Island Hotel Co., 9 Hun (N. Y.) 424; Goodale *v.* Walsh, 2 Thomps. & C. (N. Y.) 311].

80. Jones *v.* Swan, 21 Iowa 181; Derrickson *v.* Edwards, 29 N. J. L. 468, 80 Am. Dec. 220; Bolton's Appeal, 3 Grant (Pa.) 204 [*following* Bartlett *v.* Kingan, 19 Pa. St. 341].

Under N. Y. Laws (1885), c. 342, a contractor may file a valid mechanic's lien for the whole contract price before all the work is done or all the materials furnished, provided the balance of the contract is thereafter fully completed according to the terms thereof. Heinlein *v.* Murphy, 3 Misc. 47, 22 N. Y. Suppl. 713.

Qualified certificate of completion.— Where the certificate of the engineer accepting a bridge as completed recited that certain other work remained yet to be done, and advised the owner to retain a certain amount of the contract price to insure its completion, a claim for a lien filed by the contractor within the statutory time after the completion of the work reserved from the certificate was sufficient under the statute. Washington Bridge Co. *v.* Land, etc., Imp. Co., 12 Wash. 272, 40 Pac. 982.

then put upon it, the period for filing a lien claim runs from that time and not from actual completion.[81] Where a contract for the sale of machinery provides that the seller shall do the work necessary to put it in operation, the time for filing the lien runs from the completion of such work and not from the date of the sale.[82] Where the lien claim is filed within the statutory period after the furnishing of the last item of materials, and it is not controverted that part of such item was used in the construction of the building, the lien is not defeated by the claimant's failure to establish that all of such item entered into the construction of the building, or how much of it was so used,[83] and where the last item in a lien statement is not proved the claim is nevertheless valid if the statement is filed within the specified time after the last item stated and proved.[84] It has been held that where the last item in a materialman's account was for material furnished for the construction of the house in question, and was delivered on the premises for that purpose, the date such material was furnished was available to determine whether the materialman's statement was filed in time, although the material, after delivery, was used for another structure;[85] but it has also been asserted that where only the last item was furnished within the statutory period before the filing, the whole proceeding must fail unless the right to recover for that item under the lien as filed can be sustained.[86] Where an architect is employed to supervise the construction of a building for a percentage of the cost, and under the building contract final settlement with the contractor is to be made upon the architect's certificate of completion, the architect's work is not complete until he has given such certificate and the period in which he may file a lien runs from such time;[87] but where the contract requires the work to be done to the satisfaction of the superintendent of streets, the time within which a lien may be filed begins to run from the completion of the work, and not from the time a certificate is made by such superintendent that the work is done to his satisfaction.[88]

f. Delay in Completion.[89] After a contract is substantially completed there must be no unnecessary or unreasonable delay under all the circumstances in fully completing the work;[90] and the time for filing a lien cannot be extended by a delay for a considerable time to do a small piece of work necessary to full completion;[91] but where work necessary to the completion of the contract is

81. Franklin St. Church *v.* Davis, 85 Va. 193, 7 S. E. 245.

82. Loudon *v.* Coleman, 62 Ga. 146; Salt Lake Hardware Co. *v.* Chainman Min., etc., Co., 137 Fed. 632.

Extra machinery and materials furnished by a contractor for the equipment of a mill, and made necessary by changes in the specifications, by the owner, are to be regarded as having been furnished under the original, and not under an independent, contract. Salt Lake Hardware Co. *v.* Chainman Min., etc., Co., 137 Fed. 632.

83. Schulenburg, etc., Lumber Co. *v.* Strimple, 33 Mo. App. 154.

84. Lundell *v.* Ahlman, 53 Minn. 57, 54 N. W. 936.

85. Page *v.* Grant, 127 Iowa 249, 103 N. W. 124; John Paul Lumber Co. *v.* Hormel, 61 Minn. 303, 63 N. W. 718.

86. Miller *v.* Heath, 22 Pa. Super. Ct. 313.

87. Bentley *v.* Adams, 92 Wis. 386, 66 N. W. 505.

88. Beatty *v.* Mills, 113 Cal. 312, 313, 45 Pac. 468, where it is said: "By the contract the superintendent was arbiter, at most, of only the quality of the work; and his certificate only purports to state that the work which had been done was done well and to his satisfaction. If it had contained a statement of the date of the completion of the work, such statement would have been of no value."

89. See also *infra*, III, C, 10, h.

90. Sanford *v.* Frost, 41 Conn. 517 (holding further that it must affirmatively appear that there was no unnecessary or unreasonable delay); Flint *v.* Raymond, 41 Conn. 510.

91. Flint *v.* Raymond, 41 Conn. 510, holding that where applying the second coat of paint to a small piazza, involving about three hours' work, was delayed for more than the statutory period after the rest of the work was done — partly for the convenience of the tenants and partly out of consideration for the condition of the owner — and no lien was filed in such time, the lien was lost, notwithstanding a filing within the period limited after doing the postponed work. But *compare* Burrell *v.* Way, 176 Mass. 164, 57 N. E. 335, holding that where plaintiff in a suit to enforce a mechanic's lien testified that he held back four piazza posts and did not deliver them for two or three weeks after delivering the other material in order to extend the time for filing his lien, the trial court was not bound to rule as matter of

delayed at the instance and request of the owner, he cannot claim that such delay was unreasonable, and a lien claim filed within the statutory period after the final work was done is sufficient.[92]

g. Entire or Separate Contracts. Where labor or materials are furnished under separate contracts, even though such contracts are between the same persons and relate to the same building or improvement, the contracts cannot be tacked together so as to enlarge the time for filing a lien for what was done or furnished under either, but a lien must be filed for what was done or furnished under each contract within the statutory period after its completion.[93] Where,

law that the delivery of the posts did not extend the lien, where there was no time specified for their delivery.

92. Cole *v.* Uhl, 46 Conn. 296; McCarthy *v.* Groff, 48 Minn. 325, 51 N. W. 218; Pedretti *v.* Stichtenoth, 6 Ohio Cir. Ct. 516, 3 Ohio Cir. Dec. 564.

93. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Iowa.— National L Ins. Co. *v.* Ayres, 111 Iowa 200, 82 N. W. 607; Chase *v.* Garver Coal, etc., Co., 90 Iowa 25, 57 N. W. 648; Gilbert *v.* Tharp, 72 Iowa 714, 32 N. W. 24.

Maine.— Farnham *v.* Davis, 79 Me. 282, 9 Atl. 725. See also Darrington *v.* Moore, 88 Me. 569, 34 Atl. 419.

Maryland.— Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575; Maryland Brick Co. *v.* Dunkerly, 85 Md. 199, 36 Atl. 761; Watts *v.* Whittington, 48 Md. 353.

Massachusetts.— Worthen *v.* Cleaveland, 129 Mass. 570.

Michigan.— John T. Noye Mfg. Co. *v.* Thread Flouring-Mills Co., 110 Mich. 161, 67 N. W. 1108.

Minnesota.—Scheible *v.* Schickler, 63 Minn. 471, 65 N. W. 920; Frankoviz *v.* Smith, 34 Minn. 403, 26 N. W. 225.

Missouri.— Livermore *v.* Wright, 33 Mo. 31; E. R. Darlington Lumber Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688; Schulenburg *v.* Vrooman, 7 Mo. App. 133.

Nebraska.— Nye, etc., Co. *v.* Berger, 52 Nebr. 758, 73 N. W. 274; Central Loan, etc., Co. *v.* O'Sullivan, 44 Nebr. 834, 63 N. W. 5.

New York.— McGraw *v.* Godfrey, 56 N. Y. 610, 16 Abb. Pr. N. S. 358; Steeves *v.* Sinclair, 56 N. Y. App. Div. 448, 67 N. Y. Suppl. 776 [*affirmed* in 171 N. Y. 676, 64 N. E. 1125]. See also Mathiasen *v.* Barkin, 62 N. Y. App. Div. 614, 70 N. Y. Suppl. 770.

Ohio.— King *v.* Cleveland Ship Bldg. Co., 50 Ohio St. 320, 34 N. E. 436.

Oregon.— See Hobkirk *v.* Portland Baseball Club, 44 Oreg. 605, 76 Pac. 776.

Pennsylvania.— Yearsley *v.* Flanigen, 22 Pa. St. 489; Hudnit *v.* Roberts, 10 Phila. 535.

Rhode Island.— Sweet *v.* James, 2 R. I. 270.

Washington.— Pacific Mfg. Co. *v.* Brown, 8 Wash. 347, 36 Pac. 273.

Wisconsin.— Brown *v.* Edward P. Allis Co., 98 Wis. 120, 73 N. W. 656.

Canada.— Chadwick *v.* Hunter, 1 Manitoba 39, holding that where materials are furnished for a building from time to time as ordered, without any contract to supply them, each sale is a separate transaction and a lien claim must be filed within the statutory period thereafter.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 203.

This rule does not preclude filing a single claim or statement for work or materials done or furnished under separate contracts, provided the filing is within the statutory period of the completion of each contract. See *supra*, III, C, 2, a.

Facts not showing separate contracts.— Where certain manufacturers made a written offer to a purchaser to furnish machinery at stated prices, and the purchaser did not sign the memorandum, but bought, from time to time, various articles named therein, and other articles not so named, the memorandum was not a complete contract, and the right to a lien for the articles named therein was not lost by failure to file the claim within the statutory period where the other articles were furnished within that time. Spruhen *v.* Stout, 52 Wis. 517, 9 N. W. 277.

Where a long period intervenes between the furnishing of items the presumption is that the items furnished after the hiatus were furnished under a contract separate from that under which those preceding the hiatus were furnished (Buchanan *v.* Selden, 43 Nebr. 559, 61 N. W. 732; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 35 N. W. 643. *Compare* Haines *v.* Chandler, 26 Ill. App. 400; Billings *v.* Brand, 187 Mass. 417, 73 N. E. 637); and it is incumbent upon the claimant to make it appear by competent evidence that all the items were furnished pursuant to one contract (E. R. Darlington Lumber Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643), which fact the affidavit attached to the account of the items is not competent evidence to prove (Henry, etc., Co. *v.* Fisherdick, *supra*).

Several contracts constituting single employment.—Where, although several contracts have been made, the whole of them taken together constitute but one employment to do certain stipulated work, and furnish certain materials, the details of which and the prices to be paid therefor were agreed to on separate occasions in several agreements, the work may be treated as if done under one agreement, and a lien filed within the statutory period after the last of the work is done will be sufficient to cover all of the items. Miller *v.* Batchelder, 117 Mass. 179, 181, where the lien claimant was engaged in a continuous service or employment on the

however, all the work is done or all the materials are furnished under one entire continuing contract, although at different times, a lien claim or statement filed within the statutory period after the last item was done or finished is sufficient as to all the items;[94] and in order that the contract may be a continuing one

property on which the lien was claimed, which service was rendered under three separate agreements, the first to perform labor as a painter on certain portions of the houses, the owner to furnish the materials, the second to perform labor and furnish materials in painting the inside walls of the houses, and the third, made while the work under the others was in progress, to put up moldings and borders on the inside walls when painted, and it was held that a lien filed within the statutory period after work under the last contract was completed was sufficient to cover all that had been done under all the contracts, the court saying: "All these agreements related to the same premises, called for similar kinds of work, and the last two may be said to be additional to the first. The third was in terms additional to the second, providing that mouldings and borders should be put up on the inside walls after painting. The whole constituted one employment to do certain stipulated work and furnish certain materials, the details of which, and the prices to be paid therefor, were agreed to on three separate occasions in several agreements, but all entered into before the work under either had been completed, and therefore existing contemporaneously with each other. Under these circumstances the work may be treated as if done under one agreement, and the parties contracting to do it cannot be said to have ceased to labor and furnish labor and material until they had completed all they had agreed to do." See also Carroll *v.* McVicar, 15 Manitoba 379, holding that where a subcontractor's claim consisted of charges for different jobs, all in his lien of business but ordered at different times, it was not necessary that he should file a lien after completing each piece of work, but filing his lien after he had completed all the work was sufficient, although more than the time allowed for filing the lien had elapsed since the completion of the first job.

Unity of purpose.— Under some statutes, when labor or material is continuously done for or furnished to the same contractor for a single building, in the ordinary progress of the work, there being thus a unity of purpose if not of contract, a lien filed within the statutory period after the last item is done or furnished will cover the whole. Hofer's Appeal, 116 Pa. St. 360, 9 Atl. 441; Singerly *v.* Doerr, 62 Pa. St. 9.

Where one contracted to plaster several houses for a gross sum, the fact that work is done on one of them within the statutory period preceding the time of filing the joint claim will not cause the mechanic's lien to attach to the others, on which no work was done within that time. Wilson *v.* Forder, 30 Pa. St. 129.

94. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Colorado.— Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

Indiana.— Premier Steel Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876.

Iowa.— Lamb *v.* Hanneman, 40 Iowa 41.

Kansas.— Great Spirit Springs Co. *v.* Chicago Lumber Co., 47 Kan. 672, 28 Pac. 714.

Louisiana.— Brashear *v.* Alexandria Cooperage Co., 50 La. Ann. 587, 23 So. 540.

Maryland.— Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575; Maryland Brick Co. *v.* Dunkerly, 85 Md. 199, 36 Atl. 761; Okisko *v.* Matthews, 3 Md. 168.

Michigan.— Union Trust Co. *v.* Casserly, 127 Mich. 183, 86 N. W. 545; Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

Minnesota.— State Sash, etc., Mfg. Co. *v.* Norwegian-Danish Seminary, 45 Minn. 254, 47 N. W. 796; Frankoviz *v.* Smith, 34 Minn. 403, 26 N. W. 225.

Mississippi.— O'Leary *v.* Burns, 53 Miss. 171.

Missouri.— Walden *v.* Robertson, 120 Mo. 38, 25 S. W. 349; Fulton Iron Works *v.* North Centre Creek Min., etc., Co., 80 Mo. 265; Schmeiding *v.* Ewing, 57 Mo. 78; Livermore *v.* Wright, 33 Mo. 31; Squires *v.* Fithian, 27 Mo. 134; E. R. Darlington Lumber Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688; Heltzell *v.* Chicago, etc., R. Co., 20 Mo. App. 435.

Nebraska.— Nye, etc., Co. *v.* Berger, 52 Nebr. 758, 73 N. W. 274; Ballou *v.* Black, 17 Nebr. 389, 23 N. W. 3.

Nevada.— Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

New York.— Spencer *v.* Barnett, 35 N. Y. 94; Haden *v.* Buddensiek, 6 Daly 3.

Pennsylvania.— Bartlett *v.* Kingan, 19 Pa. St. 341; Geiss *v.* Rapp, 1 Walk. 111; Croskey *v.* Coryell, 2 Whart. 223; Brick Co. *v.* Norton, 2 Pa. Dist. 559; Hill's Estate, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323.

Tennessee.— Bristol Brick Works *v.* King College, (Ch. App. 1896) 41 S. W. 1069.

Virginia.— Osborne *v.* Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446.

Wisconsin.— Dorestan *v.* Krieg, 66 Wis. 604, 29 N. W. 576; Spruhen *v.* Stout, 52 Wis. 517, 9 N. W. 277.

Canada.— Robock *v.* Peters, 13 Manitoba 124 [*distinguishing* Chadwick *v.* Hunter, 1 Manitoba 39]; Morris *v.* Tharle, 24 Ont. 159.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 202.

Charges which are struck out because their dates in the lien claim do not correspond with their dates in the claimant's book of original entry may, if the items were actu-

within this rule it is not necessary that all the work or materials should be ordered at one time,[95] that the amount of work or materials should be determined at the time of the first order,[96] or that the prices should be then agreed upon,[97] or the time of payment fixed;[98] but a mere general arrangement to furnish labor or materials for a particular building or improvement is sufficient, if complied with,[99] even though the original arrangement was not legally binding.[1] Whether there was one general contract or several separate contracts is a question of fact for the jury,[2] or for the court if the case is tried to the court without a jury.[3]

h. Renewal or Extension of Period. Where the period allowed for filing the

ally furnished within the statutory period before filing the lien, save the lien as to earlier items not furnished within such time. Hill *v.* Milligan, 38 Pa. St. 237.

Furnishing to both contractor and subcontractor.—Where materials for a building were furnished in part to the contractor and in part to his subcontractor, and the notice of lien was filed by the materialman after the expiration of the statutory period of limitation as to one of such bills, but within such period as to the other, the assignee of the lienor may tack such expired claim to that of later date, and avoid the statutory limitation. Truehlood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47, 49 [*following* Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685], where the court said, however: "We do not understand the opinion in Smith *v.* Newbaur, *supra*, to apply to the sale of materials to different contractors under separate and distinct contracts."

Facts showing contract to be continuous.—The fact that bills for labor performed and materials furnished for the construction of a smelting plant were rendered and accepted on the first of every month and subsequently paid without any attempt to apply the charges to separate contracts shows that the labor was performed and the materials were furnished under one continuous contract. Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

Mere knowledge that a building is being built, and the supplying of orders for materials suitable for such building will not constitute a "continuing" or "entire" contract for what was furnished within the meaning of the Mechanics' Lien Law. Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401.

Where the subcontractor's furnishing to the contractor was continuous the time runs from the last item, although the materials were used by the contractor on separate contracts between himself and the owner. Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 898; Smaltz *v.* Hagy, 4 Phila. (Pa.) 99.

Presumption.—On motion in arrest of judgment on the ground that the larger portion of the lumber for which the lien is claimed was furnished more than six months before the lien was filed, it will be presumed that the lumber was all furnished under one general contract in which case if any of it was within the time, the lien would cover the whole. Ferguson *v.* Vollum, 1 Phila. (Pa.) 181.

95. Premier Steel Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876; Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575; Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Robock *v.* Peters, 13 Manitoba 124; Morris *v.* Tharle, 24 Ont. 159.

96. *Maryland.*— Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575.

Michigan.— Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

Minnesota.— Coughlan *v.* Longini, 77 Minn. 514, 80 N. W. 695; St. Paul, etc., Pressed Brick Co. *v.* Stout, 45 Minn. 327, 47 N. W. 974.

Pennsylvania.— Diller *v.* Burger, 68 Pa. St. 432.

South Dakota.— Albright *v.* Smith, 2 S. D. 577, 51 N. W. 590.

Wisconsin.— Chapman *v.* Wadleigh, 33 Wis. 267.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 202.

97. Perkins *v.* Boyd, 16 Colo. App. 266, 65 Pac. 350; Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575. Where a contractor undertakes to repair a building without a contract price as to the whole work, but in the course of the work it is agreed that a certain sum shall be paid for a particular part of it, such sum may constitute one item in the general account and form a part of the mechanic's lien, although the work and material furnished therefor may have been done or furnished more than sixty days prior to the filing of the lien. O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471.

98. Patton *v.* Matter, 21 Ind. App. 277, 52 N. E. 173.

99. Premier Steel Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876; Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575 (it will be presumed that the materials were furnished in accordance with the agreement); Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Robock *v.* Peters, 13 Manitoba 124 [*distinguishing* Chadwick *v.* Hunter, 1 Manitoba 39]; Morris v. Tharle, 24 Ont. 159. *Compare* Lane, etc., Co. *v.* Jones, 79 Ala. 156.

1. Morris *v.* Tharle, 24 Ont. 159.

2. Helena Steam-Heating, etc., Co. *v.* Wells, 16 Mont. 65, 40 Pac. 78; Nye, etc., Co. *v.* Berger, 52 Nebr. 758, 73 N. W. 274.

3. Nye, etc., Co. *v.* Berger, 52 Nebr. 758, 73 N. W. 274.

lien has commenced to run, by reason of the completion of the building, the work of the claimant, or the furnishing of the materials, the claimant cannot thereafter extend the time by doing or furnishing small items and thereby fixing a date from which the period must commence anew to run,[4] especially where the doing or furnishing of such item is merely colorable and the real intention is to save or restore a right which is already imperiled or lost.[5] Thus labor gratuitously performed cannot have the effect of extending the time for filing a lien for what was done or furnished under a contract,[6] nor can a materialman extend the time for filing his lien claim by gratuitously replacing defective articles previously furnished and charged for.[7] Where, however, even after the contract is substantially completed, the claimant does further work or furnishes further material which is necessary for the proper performance of his contract,[8] and this is done in good faith,[9] at the request of the owner,[10] or in the case of a subcontractor at the

4. *California.*— Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896; Lippert *v.* Lasar, (1893) 33 Pac. 797; Santa Clara Valley Mill, etc., Co. *v.* Williams, (1892) 31 Pac. 1128; Barrows *v.* Knight, 55 Cal. 155.

Colorado.— Burleigh Bldg. Co. *v.* Merchant Brick, etc., Co., 13 Colo. App. 455, 59 Pac. 83.

Connecticut.— Sanford *v.* Frost, 41 Conn. 617; Flint *v.* Raymond, 41 Conn. 510.

District of Columbia.— Brown *v.* Waring, 1 App. Cas. 378.

Illinois.— St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546.

Indiana.— Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (App. 1902) 62 N. E. 649.

Maine.— Woodruff *v.* Hovey, 91 Me. 116, 39 Atl. 469; Cole *v.* Clark, 85 Me. 336, 27 Atl. 186, 21 L. R. A. 714.

Massachusetts.— Miller *v.* Wilkinson, 167 Mass. 136, 44 N. E. 1083.

Minnesota.— Dayton *v.* Minneapolis Radiator, etc., Co., 63 Minn. 48, 65 N. W. 133; Johnson *v.* Gold, 32 Minn. 535, 21 N. W. 719.

Missouri.— General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318; Hayden Slate Co. *v.* Anderson, 76 Mo. App. 281; Krah *v.* Weidlich, 55 Mo. App. 536; Scott *v.* Cook, 8 Mo. App. 193.

Nebraska.— Congdon *v.* Kendall, 53 Nebr. 282, 73 N. W. 659.

New York.— Steuerwald *v.* Gill, 85 N. Y. App. Div. 605, 83 N. Y. Suppl. 396; Fay *v.* Muhlker, 1 Misc. 321, 20 N. Y. Suppl. 671.

Ohio.— King *v.* Cleveland Ship-Bldg. Co., 50 Ohio St. 320, 34 N. E. 436.

Oregon.— Avery *v.* Butler, 30 Oreg. 287, 47 Pac. 706.

Pennsylvania.— Harrison *v.* Women's Homœopathic Assoc., 134 Pa. St. 558, 19 Atl. 804, 19 Am. St. Rep. 714; Women's Homœopathic Assoc. *v.* Harrison, 120 Pa. St. 28, 13 Atl. 301; Philadelphia Packing, etc., Co.'s Estate, 4 Pa. Dist. 57, 15 Pa. Co. Ct. 650.

Tennessee.— Dunn *v.* McKee, 5 Sneed 657; Wood *v.* Haney, (Ch. App. 1897) 41 S. W. 1072.

Utah.— Cahoon *v.* Fortune Min., etc., Co., 26 Utah 86, 72 Pac. 437.

Wisconsin.— Berry *v.* Turner, 45 Wis. 105.

United States.— A mechanic's lien once destroyed is not capable of revival in the absence of fraud or mistake, and hence the subsequent delivery of materials under the same original contract will not revive a lien for a prior debt which has once been destroyed. Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., 137 Fed. 26, 71 C. C. A. 1 [*reversing* 129 Fed. 455, 128 Fed. 129].

Canada.— Summers *v.* Beard, 24 Ont. 641. See 34 Cent. Dig. tit. "Mechanics' Liens," § 200.

Order of contractor.— After the owner has accepted the fixtures and machinery contracted for as fully completed and has for more than four months been in the possession thereof, the contractor ceases to be the agent of the owner in the absence of an objection by the latter that the contract has not been completed, and cannot order additional materials that may be made the basis for an extension of the time in which the subcontractor may file a lien for the original work and materials furnished by him. Sulzer-Vogt Mach Co. *v.* Rushville Water Co., 160 Ind. 202, 65 N. E. 583.

5. O'Driscoll *v.* Bradford, 171 Mass. 231, 50 N. E. 628; McLean *v.* Sanford, 26 N. Y. App. Div. 603, 51 N. Y. Suppl. 678; Kelly *v.* William J. Merritt Co., 68 N. Y. Suppl. 774; Duffy *v.* Baker, 17 Abb. N. Cas. (N. Y.) 357; Wood *v.* Haney, (Tenn. Ch. 1897) 41 S. W. 1072. See also Hubbard *v.* Brown, 8 Allen (Mass.) 590.

6. Hartley *v.* Richardson, 91 Me. 424, 40 Atl. 336; King *v.* Cleveland Ship-Bldg. Co., 50 Ohio St. 320, 34 N. E. 436.

7. R. J. Schwab, etc., Co. *v.* Frieze, 107 Mo. App. 553, 81 S. W. 1174; Congdon *v.* Kendall, 53 Nebr. 282, 73 N. W. 659; Brown, etc., Co. *v.* Trane, 98 Wis. 1, 73 N. W. 561.

8. Nichols *v.* Culver, 51 Conn. 177; Hubbard *v.* Brown, 8 Allen (Mass.) 590.

9. Nichols *v.* Culver, 51 Conn. 177; Turner *v.* Wentworth, 119 Mass. 459; Hubbard *v.* Brown, 8 Allen (Mass.) 590.

10. Nichols *v.* Culver, 51 Conn. 177.

Extra work done as substitute for work included in contract.— Where work done under a contract is substantially finished and accepted more than six months before filing

request of the contractor,[11] or for the purpose of fully completing the contract,[12] and not merely for the purpose of fixing a later date from which to compute the time for filing the lien claim or statement,[13] or as a gratuity or act of friendly accommodation,[14] the period for filing the lien will run from the doing of such work or the furnishing of such materials,[15] regardless of the value thereof.[16] Thus where the owner claims that certain details of the work are not according to the contract or not satisfactory, and they are accordingly changed or set right by the claimant, the lien is in time if filed within the statutory period after such changes are made or such additional work is done,[17] and where more material is demanded under the contract and is furnished without extra charge a claim filed within the statutory period thereafter is in time.[18] Extra work done at the request of the owner after the completion of the original contract may extend the time for filing a lien claim for all the work;[19] and so also where a contract is made to furnish specified materials to be used in the construction of a building, an implied understanding to furnish extras if called for may be inferred from the circumstances of the case, and in such case the extras so furnished and the other material form one continuous account, and the time allowed in which to file the lien statement runs from the date of the last item of the whole account.[20] But where, after the delivery of brick required for the construction of a building, the contractor ordered another car-load of brick, stating that they also were for use in the building, but the brick were not so used, or delivered to the owner of the

a mechanic's lien, if extra work is thereafter done under an agreement with the owner that it shall be done under the original contract, and no additional compensation is to be allowed therefor, the time for filing the lien will be extended. McKelvey *v.* Jarvis, 87 Pa. St. 414.

The doing of independent work by a contractor, on request, after the original work has been done, does not enlarge the time allowed for completion of his contract for the filing of a lien. Fay *v.* Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Suppl. 671 [*distinguishing* Watts-Campbell Co. *v.* Yuengling, 125 N. Y. 1, 25 N. E. 1060].

11. Farnham *v.* Richardson, 91 Me. 559, 40 Atl. 553.

12. Turner *v.* Wentworth, 119 Mass. 459; Hubbard *v.* Brown, 8 Allen (Mass.) 590.

Repairs necessitated by subsequent work on building.— Where a contract to slate a roof is entire, and it is a uniform rule and custom that such a contract includes the repairing of the slating necessitated by the subsequent work on the building during its construction, the time during which a lien for the slating may be taken runs from the completion of the repairs. Bernsdorf *v.* Hardway, 7 Ohio Cir. Ct. 378, 4 Ohio Cir. Dec. 645.

13. Turner *v.* Wentworth, 119 Mass. 459. See also Hubbard *v.* Brown, 8 Allen (Mass.) 590.

14. Farnham *v.* Richardson, 91 Me. 559, 40 Atl. 553 [*distinguishing* Cole *v.* Clark, 85 Me. 336, 27 Atl. 186, 21 L. R. A. 714].

15. Nichols *v.* Culver, 51 Conn. 177 (there being no intervening rights); Farnham *v.* Richardson, 91 Me. 559, 40 Atl. 553; Turner *v.* Wentworth, 119 Mass. 459; Hubbard *v.* Brown, 8 Allen (Mass.) 590.

16. Farnham *v.* Richardson, 91 Me. 559, 40 Atl. 553, 565, where it is said: "It is undoubtedly true that the trifling character of the labor last performed or material last furnished may often throw more or less light upon the question, whether the service was at the time intended to be gratuitous and was only afterwards relied upon to save a lien which would otherwise have expired or not. But . . . we do not think that his lien depends at all upon the amount or value of the material last furnished, provided all the other conditions necessary to the maintenance of the lien exist."

17. McIntyre *v.* Trautner, 63 Cal. 429 (the owner cannot be heard to say that such work was not a continuation of the previous work and done under the same contract); Stidger *v.* McPhee, 15 Colo. App. 252, 62 Pac. 332.

18. Minneapolis Trust Co. *v.* Great Northern R. Co., 74 Minn. 30, 76 N. W. 953, 81 Minn. 28, 83 N. W. 463, where the additional material was furnished on the demand of the contractor who was held to be the agent of the owner for the purpose of the resulting estoppel.

19. Parrish's Appeal, 83 Pa. St. 111; Johns *v.* Bolton, 12 Pa. St. 339. Where after the original contract is completed the claimant, at the owner's request, continues on the job and furnishes extra labor and material, the time for filing the claim does not begin to run until all is finished. New England Engineering Co. *v.* Oakwood St. R. Co., 75 Fed. 162. *Compare* Caldwell *v.* Winder, 30 Fed. Cas. No. 18,245, 2 Hayw. & H. 24, holding that under Act Cong. March 2, 1833, 4 U. S. St. at L. 659, no extra work not completed within the statutory period preceding the filing of the claim was covered by the lien.

20. Coughlan *v.* Longini, 77 Minn. 514, 80 N. W. 695. See also Siegmund *v.* Kellogg-Mackay-Cameron Co., (Ind. App. 1906) 77 N. E. 1096.

building the period within which the manufacturer of brick might file a notice of lien did not run from the time the last car-load of brick was delivered to the contractor.[21] Where a contract is concededly completed and the contractor has removed his tools and plant, a subsequent employment of the contractor to perform additional work on the land does not extend the time for filing a lien for what was done under the first contract.[22] Where a contract for furnishing material provided that the material might be changed, and such a change was made shortly after the delivery of all the material called for by the contract, the time in which to file the lien commenced to run from the date of such change.[23] Where an account for a mechanic's lien was filed within the time allowed by statute after the completion of additional work done to meet the requirements of the public authorities, in place of work provided for in the original contract, this was in time, although not within the statutory period after the completion of the work according to the original contract.[24] The time for filing a mechanic's lien claim cannot be extended by agreement of the parties,[25] and the furnishing of additional material ordered by the owner for the express purpose of reviving the right to a lien cannot extend the time for filing the claim as against a mortgagee who was not a party to the transaction.[26] Whether what was done or furnished was of such a character as to extend the time for filing is a question of fact.[27] A court has no jurisdiction to give leave to file a lien *nunc pro tunc* after the time allowed by statute for such filing has expired.[28]

i. Computation of Time. When the date from which the period allowed for filing the lien claim is to run is established[29] the usual rules as to the computation of time[30] govern.[31]

j. Transfer or Encumbrance of Property. The claim may be filed after a judicial sale of the premises, if otherwise in time,[32] and the statement of one who has done work or furnished materials under contract with the owner is properly filed within the statutory period after the last work was done or the last materials furnished, notwithstanding a conveyance by the owner to another person after the commencement and before the completion of work or the furnishing.[33]

21. North *v.* Globe Fence Co., 144 Mich. 557, 108 N. W. 285.

22. Hobkirk *v.* Portland Nat. Baseball Club, 44 Oreg. 605, 76 Pac. 776. See also Baker *v.* Fessenden, 71 Me. 292.

23. Coughlan *v.* Longini, 77 Minn. 514, 80 N. W. 695.

24. Bruns *v.* Braun, 35 Mo. App. 337.

25. General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318.

26. Inman *v.* Henderson, 29 Oreg. 116, 45 Pac. 300.

27. Turner *v.* Wentworth, 119 Mass. 459, the finding of the judge who tries the case without a jury is conclusive.

28. Adler *v.* Lumley, 46 N. Y. App. Div. 229, 61 N. Y. Suppl. 688.

29. See *supra*, III, C, 10, b–h.

30. See TIME.

31. Jones *v.* Kern, 101 Ga. 309, 28 S. E. 850 (holding that where the last materials were delivered on May 6 a claim not recorded until August 6 following was not sufficient, the statute allowing three months); Hoops *v.* Parsons, 2 Miles (Pa.) 241 (holding that a claim filed July 23, for materials furnished January 22, is not filed "within six months," as the law provides); Philadelphia *v.* Slonaker, 6 Phila. (Pa.) 48 (holding that November 17 is too late to file a claim for work done May 16 of the same year, the statute requiring liens to be filed within six months); Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001 (holding that where the last day of delivery was May 6, the lien claimant had all of August 4, which was ninety days thereafter, within which to file the lien); *In re* Martin, 4 Fed. 208 (holding that either the day on which the last work is done, or the day on which the claim is filed, must be excluded).

When last day falls on Sunday.— Under 2 Wagner St. Mo. p. 888, § 6, providing that the "time within which an act is to be done, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded," when the four months prescribed by the Mechanics' Lien Law, after the indebtedness accrues, expires on Sunday, the lien is insufficient unless filed on the Saturday preceding. Patrick *v.* Faulke, 45 Mo. 312.

32. Burt *v.* Kurtz, 5 Rawle (Pa.) 246.

33. Conlee *v.* Clark, 14 Ind. App. 205, 42 N. E. 762, 56 Am. St. Rep. 298; Gale *v.* Blaikie, 126 Mass. 274.

Correction of defect at instance of purchaser.— Where shortly after the work has been reported complete the purchaser discovers a defect and at his instance the claimant rectifies such defect without charge, the

k. Change in Personnel of Contracting Firm.[34] A change in the personnel of the contracting firm does not affect the time within which the lien should be filed.[35]

l. Effect of Failure to File in Time. As a general rule the failure to file the notice, claim, or statement within the time limited by statute defeats the lien;[36] but under some statutes it does not defeat the lien as against the owner of the property,[37] but operates merely to postpone it to the rights of purchasers without notice and the claims of third persons which have arisen since the expiration of such time,[38] or to afford the owner protection with respect to payments made to the contractor after the expiration of such time.[39]

m. Premature Filing — (i) *In General.* A lien claim or statement filed before the time when the filing thereof is authorized by the statute is ineffectual and unenforceable.[40] But where the contract is substantially completed and full

time for filing the notice of lien runs from the date on which this is done. Conlee *v.* Clark, 14 Ind. App. 205, 42 N. E. 762, 56 Am. St. Rep. 298.

34. See *infra*, V, A, 6.

35. Miller *v.* Hoffman, 26 Mo. App. 199, holding that where a surviving partner completes the delivery of materials for a building, under a special contract of the firm, the limitation on the lien claim runs from the delivery of the last of the materials under the contract, and not from the death of the partner.

36. Weithoff *v.* Murray, 76 Cal. 508, 18 Pac. 435. And see *supra*, III, C, 10, a.

37. Thompson *v.* Spencer, 95 Iowa 265, 63 N. W. 695; Kidd *v.* Wilson, 23 Iowa 464; Noel *v.* Temple, 12 Iowa 276; Robertson Lumber Co. *v.* Edinburg State Bank, (N. D. 1905) 105 N. W. 719.

38. Floete *v.* Brown, 104 Iowa 154, 73 N. W. 483, 65 Am. St. Rep. 434; Lee *v.* Hoyt, 101 Iowa 101, 70 N. W. 95; Thompson *v.* Spencer, 95 Iowa 265, 63 N. W. 695; Frost *v.* Clark, 82 Iowa 298, 48 N. W. 82; Roose *v.* Billingsly, etc., Commission Co., 74 Iowa 51, 36 N. W. 885; Gilbert *v.* Tharp, 72 Iowa 714, 32 N. W. 24; Curtis *v.* Broadwell, 66 Iowa 662, 24 N. W. 265; Hoskins *v.* Carter, 66 Iowa 638, 24 N. W. 249; Noel *v.* Temple, 12 Iowa 276; Robertson Lumber Co. *v.* Edinburg State Bank, (N. D. 1905) 105 N. W. 719; Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819; Reynolds *v.* Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620 (under Nebr. Consol. St. (1891) § 2171); Wisconsin Trust Co. *v.* Robinson, etc., Co., 68 Fed. 778, 15 C. C. A. 668 (under N. D. Comp. Laws, § 5474).

Purchaser paying no cash.— The rule precluding a mechanic's lien not filed within ninety days, when the property has passed to an innocent purchaser, is not varied by the fact that he only took a bond for a deed, and paid no cash, but gave his note for the purchase-money. Weston *v.* Dunlap, 50 Iowa 183.

A mortgage given before the expiration of the period allowed for filing is postponed to a lien filed after the expiration of such period. Gilbert *v.* Tharp, 72 Iowa 714, 32 N. W. 24; Wisconsin Trust Co. *v.* Robinson, etc., Co., 68 Fed. 778, 15 C. C. A. 668. Where one lent money to the owner of the improvement before the expiration of the ninety days, taking deeds of the premises as security, the fact that after the expiration of said time further deeds of the premises were executed to him as additional security did not give him priority over a mechanic's lien claimant subsequently filing a statement. Lee *v.* Hoyt, 101 Iowa 101, 70 N. W. 95.

Rival lien claimants.— Under Iowa Acts, 16th Gen. Assembl. c. 100, providing that failure to file a statement of mechanic's lien within the time limited shall not defeat the lien, except as against purchasers or encumbrancers in good faith, whose rights accrued after such time, and before any claim for lien was filed, a lienor cannot acquire priority over co-lienors, whose lien statements fail to describe the property, by first filing a statement containing a description thereof, as his rights did not accrue during the period covered by the statutory exception. Chicago Lumber Co. *v.* Des Moines Driving Park, 97 Iowa 25, 65 N. W. 1017.

39. Thompson *v.* Spencer, 95 Iowa 265, 63 N. W. 695; Robertson Lumber Co. *v.* Edinburg State Bank, (N. D. 1905) 105 N. W. 719.

What payments to contractor ineffective as against subcontractors, etc., see *infra*, VI, E, 3, b–i.

40. *California.*— Marchant *v.* Hayes, 120 Cal. 137, 52 Pac. 154.

Kansas.— Higley *v.* Ringle, 57 Kan. 222, 45 Pac. 619; Conroy *v.* Perry, 26 Kan. 472.

Massachusetts.—General Fire Extinguisher Co. *v.* Chaplin, 183 Mass. 375, 67 N. E. 321, contractor not entitled to file a lien before completing the work.

Minnesota.— Clark *v.* Anderson, 88 Minn. 200, 92 N. W. 964.

Pennsylvania.— See *In re* Hill, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 195 *et seq.*

Judgment on lien prematurely filed.— Under a statute allowing laborers and materialmen to have the first sixty days, and contractors the thirty days between the sixtieth and ninetieth day, after completion of the work, in which to file their claims, if judgment be entered, in the absence of an affidavit of defense by the owner of the build-

performance in minor details is dispensed with by the party to whom it is due[41] or is attributable to his failure to do what the contract requires of him[42] a lien claim filed thereafter is not premature.[43] Where the statute allows the notice to be filed at any time during the progress of the work, or within a certain time thereafter, there is no force in an objection that at the time of filing the architect's certificate had not been given and there was nothing actually due, no question being raised as to the substantial performance of the contract.[44]

(II) *FILING BEFORE COMPLETION OF BUILDING.* Where the statute requires the claim to be filed within a certain time after completion of the building, a filing before the building is completed is premature and confers no rights;[45] but a filing after the building is substantially completed is not premature,[46] although there may be trivial imperfections in the work which need to be remedied thereafter.[47]

ing, on a claim which the contractor has erroneously filed within sixty days after the completion of his contract, it will not be set aside on the application of a purchaser of the premises at sheriff's sale on a mortgage executed by the owner to another, and recorded after the claimant had commenced, but before he had completed, his contract on the building. France *v.* Woolston, 4 Houst. (Del.) 557.

41. Stewart *v.* McQuaide, 48 Pa. St. 191; Pennsylvania Bank *v.* Gries, 35 Pa. St. 423; Young *v.* Lyman, 9 Pa. St. 449.

42. McMechan *v.* Baker, 11 N. Y. Suppl. 781 [*distinguishing* Foster *v.* Schneider, 50 Hun (N. Y.) 151, 2 N. Y. Suppl. 875].

43. See *supra*, notes 41, 42.

44. Smith *v.* New York, 32 Misc. (N. Y.) 380, 66 N. Y. Suppl. 686.

45. *California.*— Jones *v.* Kruse, 138 Cal. 613, 72 Pac. 146; Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555; Davis *v.* MacDonough, 109 Cal. 547, 42 Pac. 450; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Schwartz *v.* Knight, 74 Cal. 432, 16 Pac. 235 (unless it appears that the original purpose was to build only in part or that the original purpose to finish was abandoned); Roylance *v.* San Luis Hotel Co., 74 Cal. 273, 20 Pac. 573, 15 Pac. 777; Perry *v.* Brainard, (1884) 8 Pac. 882.

Colorado.— Tabor-Pierce Lumber Co. *v.* International Trust Co., 19 Colo. App. 108, 75 Pac. 150.

Delaware.— Mulrine *v.* Washington Lodge No. 5 I. O. O. F., 6 Houst. 350.

Indiana.— Crawfordsville *v.* Brundage, 57 Ind. 262.

Kansas.— Higley *v.* Ringle, 57 Kan. 222, 45 Pac. 619; Chicago Lumber Co. *v.* Tomlinson, 54 Kan. 770, 39 Pac. 694 (where no separate contract is made for the erection of a distinct portion of the building); Seaton *v.* Chamberlain, 32 Kan. 239, 4 Pac. 89; Davis *v.* Bullard, 32 Kan. 234, 4 Pac. 75; Conroy *v.* Perry, 26 Kan. 472.

United States.— Catlin *v.* Douglass, 33 Fed. 569.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 196.

Contra.— Hunter *v.* Truckle Lodge No. 14 I. O. O. F., 14 Nev. 24.

Contract for part of building.— Under a statute providing that a contractor cannot file his statement until after the expiration of a certain time from the completion of the building contracted for by him, where a contractor contracted merely for a part of a building his lien may be filed after the period limited after the completion of so much of the building as he contracted to build, and it is not necessary that the period limited should elapse after the completion of the entire building before he can file his lien. Malone *v.* Zielian, 1 Marv. (Del.) 285, 40 Atl. 944.

Cessation for thirty days from labor on an unfinished building which the owner has not abandoned the intention of completing fixes the date upon and after which it is, under the California statute, deemed complete for the purpose of claiming liens thereon, and claims of lien filed before the expiration of such thirty days are premature and cannot be enforced. Marchant *v.* Hayes, 120 Cal. 137, 52 Pac. 154.

An architect whose compensation is based upon a percentage of the actual cost of the building, payment to be made thereon as the work progresses, with final payment at a stipulated time after the completion of the drawings and specifications, is not entitled to a lien until after the completion of the buildings, notwithstanding the time fixed for such final payment may have elapsed, inasmuch as the cost of such building cannot be definitely ascertained until its completion and therefore the amount of his compensation cannot be accurately fixed until such time. Richardson *v.* Central Lumber Co., 112 Ill. App. 160 [*following* Freeman *v.* Rinaker, 185 Ill. 172, 56 N. E. 1055].

46. Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555; Rice *v.* Brown, 1 Kan. App. 646, 42 Pac. 396 (holding that where a building is substantially completed according to contract, and the owner takes possession of and moves into it, and the contractor ceases all work upon it, and both parties seem to treat the house as completed, and the subcontractor files his statement of claim as a lien within sixty days after the owner takes possession, his lien is valid); Genest *v.* Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. 743.

47. Cal. Code Civ. Proc. § 1187, provides that any "trivial imperfection" in the con-

Where the statute allows merely a certain period after the doing of the work or the furnishing of the materials the completion of the entire building is not a prerequisite to the right of one whose contract is not for the entire building to file his lien claim.[48]

11. Form and Contents of Claim or Statement[49] — a. In General. The notice, claim, or statement must comply substantially with all the requirements of the statute,[50] and be sufficient in and of itself without reference to extrinsic proof to supplement deficiencies in it.[51] It should show on its face all the facts necessary to create and fix the lien,[52] and all the matters which the statute requires to be stated must be substantially set forth.[53] But the statute should be liberally

struction shall not be deemed such a lack of completion as to prevent the filing of the lien. See Schallert-Ganahl Lumber Co. *v.* Sheldon, (Cal. 1893) 32 Pac. 235.

What are "trivial imperfections" see Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555.

Omissions amounting to more than "trivial imperfections" see Schallert-Ganahl Lumber Co. *v.* Sheldon, (Cal. 1893) 32 Pac. 235.

48. Guilfoyle *v.* MacIntyre, 11 Montg. Co. Rep. (Pa.) 12. See *supra*, III, C, 10, a, e.

49. **Form of notice, claim, or statement** see the following cases:

Colorado.— Sickman *v.* Wollett, 31 Colo. 58, 71 Pac. 1107.

District of Columbia.— Phœnix Iron Co. *v.* The Richmond, 6 Mackey 180.

Illinois.— Moore *v.* Parish, 163 Ill. 93, 45 N. E. 573 [*reversing* 58 Ill. App. 617].

Indiana.— Peck *v.* Hensley, 21 Ind. 344.

Kansas.— Deatherage *v.* Woods, 37 Kan. 59, 14 Pac. 474.

Maine.— Wescott *v.* Bunker, 83 Me. 499, 22 Atl. 388.

Massachusetts.— Patrick *v.* Smith, 120 Mass. 510.

Missouri.— O'Shea *v.* O'Shea, 91 Mo. App. 221.

Nebraska.— Hays *v.* Mercier, 22 Nebr. 656, 35 N. W. 894.

Nevada.— Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090.

New York.— Riley *v.* Watson, 3 Hun 568, 6 Thomps. & C. 310.

Oklahoma.—Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184.

Oregon.— Allen *v.* Rowe, 19 Oreg. 188, 23 Pac. 901; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

Pennsylvania.— Mercer Milling, etc., Co. *v.* Kreaps, 18 Pa. Super. Ct. 1.

Rhode Island.— McPherson *v.* Greenwell, 27 R. I. 178, 61 Atl. 175.

Washington.— Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161.

West Virginia.— Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

Canada.— Truax *v.* Dixon, 17 Ont. 366.

50. Armstrong *v.* Chisolm, 100 N. Y. App. Div. 440, 91 N. Y. Suppl. 693; New Jersey Steel, etc., Co. *v.* Robinson, 85 N. Y. App. Div. 512, 83 N. Y. Suppl. 450 [*affirmed* in 178 N. Y. 632, 71 N. E. 1134]; McKinney *v.* White, 15 N. Y. App. Div. 423, 44 N. Y. Suppl. 561; Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

51. Armstrong *v.* Chisolm, 100 N. Y. App. Div. 440, 91 N. Y. Suppl. 693.

52. Wheelwright *v.* St. Louis, etc., Canal, etc., Co., 47 La. Ann. 533, 17 So. 133; McGlauflin *v.* Beeden, 41 Minn. 408, 43 N. W. 86; Knelly *v.* Horwath, 208 Pa. St. 487, 57 Atl. 957; Dearie *v.* Martin, 78 Pa. St. 55; Smaltz *v.* Knott, 3 Grant (Pa.) 227; Este *v* Pennsylvania R. Co., 13 Pa. Dist. 451; Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36, holding that the verified account filed in the clerk's office for the purpose of preserving a mechanic's lien must show on its face substantial compliance with the conditions specified in the statute as requisites of such lien. *Compare* Red River Lumber Co. v. Children of Israel, 7 N. D. 46, 73 N. W. 203, holding that the notice need not set forth all the facts necessary to entitle the claimant to a lien, but only the facts stated in N. D. Comp. Laws, § 5470.

Lien statements must be explicit and comprehensive to protect strangers to the contract, who may have other contracts relating to the same property, or liens thereon, from fraud. Carson *v.* White, 6 Gill (Md.) 17.

The account must show the relation of debtor and creditor between the claimant and the owner of some interest in the land. Lapham *v.* Ransford, 27 Ohio Cir. Ct. 80.

The affidavit must connect the lien claimant with the owner whose property rights are sought to be affected, in respect to the work in the performance of which the claimant has furnished labor or material. McGlauflin *v.* Beeden, 41 Minn. 408, 43 N. W. 86.

All papers considered as a whole.— To determine the sufficiency of a verified account filed in support of a mechanic's lien, the account proper and the sworn statement appended to it may be read together and considered as a whole. Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

The clerk's docket does not take the place of the claim itself as notice to the public, and hence a docket entry containing all that the statute requires cannot aid a defective claim. Ehdin *v.* Murphy, 170 Ill. 399, 48 N. E. 956 [*affirming* 69 Ill. App. 555, and *following* McDonald *v.* Rosengarten, 134 Ill. 126, 25 N. E. 429].

53. *California.*— Russ Lumber, etc., Co. *v.* Garrettson, 87 Cal. 589, 25 Pac. 747.

construed so far as the form is concerned;[54] it is not necessary that the exact words of the statute should be used,[55] and certainty to a common intent is sufficient.[56] The lien will not be defeated because the claim or statement is awkwardly and inartistically drawn,[57] or because of merely technical objections.[58] Matters as to which the statute requires nothing to be stated are properly

Illinois.— Orr, etc., Hardware Co. *v.* Needham Co., 51 Ill. App. 57.

Missouri.— Foster *v.* Wulfing, 20 Mo. App. 85, without reference to other papers or contracts.

New York.— Fogarty *v.* Wick, 8 Daly 166.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Oklahoma.—Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Oregon.— Getty *v.* Ames, 30 Oreg. 573, 48 Pac. 355, 60 Am. St. Rep. 835.

Pennsylvania.— Russell *v.* Bell, 44 Pa. St. 47; Collins *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 547; Wolf Co. *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 439; Wolf *v.* Kelley, 23 Pa. Co. Ct. 408.

United States.— *In re* Emslie, 102 Fed. 291, 42 C. C. A. 350.

Canada.— Smith *v.* McIntosh, 3 Brit. Col. 26.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 208.

Substantial compliance with statute sufficient.— Baldwin *v.* Spear, (Vt. 1906) 64 Atl. 235; Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 381, 52 S. E. 473. See, generally, *supra*, III, A.

Statement should contain notice of intention to claim lien.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

Caption.— Where the notice states the matters required by statute it is sufficient, although there may be no formal caption attached, or although the caption may not be in all particulars exactly correct. Phœnix Iron Co. *v.* The Richmond, 6 Mackey (D. C.) 180.

54. Durling *v.* Gould, 83 Me. 134, 21 Atl. 833; Jarrett *v.* Hoover, 41 Nebr. 231, 59 N. W. 353, holding that under Nebr. Comp. St. (Mechanics' Lien Law) c. 54, § 3, where one furnishing material has taken notes for the price, he may have the benefit of a lien by filing a verified itemized account with the register of deeds, or copies of the notes with a sworn statement, but need not do both.

As between the mechanic and the owner of the improvement, a literal compliance with the provisions of the statute in regard to the filing of an account, etc., is not necessary, but placing on record the written declaration of the party whose property is charged with the lien, containing the material facts necessary to constitute a lien, is a sufficient compliance with the provisions of the law. Murray *v.* Rapley, 30 Ark. 568.

55. Hobbs *v.* Spiegelberg, 3 N. M. 222, 5 Pac. 529; Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97; Taylor *v.* Wittkamp, 13 Phila. (Pa.) 31.

A demand that claimant have the benefit of the law allowing the lien is equivalent to a statement that he claims a lien. Bringham *v.* Knox, 127 Cal. 40, 59 Pac. 198.

Substantial adherence to terms of statute indispensable.— Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424.

56. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; Driesbach *v.* Keller, 2 Pa. St. 77; Warren *v.* Quade, 3 Wash. 750, 29 Pac. 827.

57. *Arkansas.*— Buckley *v.* Taylor, 51 Ark. 302, 11 S. W. 281.

Maine.— Durling *v.* Gould, 83 Me. 134, 21 Atl. 833.

Missouri.— Miller *v.* Faulk, 47 Mo. 262.

Pennsylvania.— Kelly *v.* Brown, 20 Pa. St. 446.

Rhode Island.— Anderson *v.* Silverman, 27 R. I. 151, 61 Atl. 52, holding that where one, after filing notice of intention to claim a lien, and serving a copy thereof, within sixty days of furnishing material, files with the recorder of deeds a paper headed "Statement of Account or Demand for Which a Lien is Claimed," and containing an itemized account and references to the property and the title sought to be subjected to the lien, the latter is sufficient as a commencement of legal proceedings to enforce the lien, without its being accompanied with a statement that it is lodged for such purpose.

West Virginia.— Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36, however informal the account filed in the clerk's office may be, if it shows on its face substantial compliance with the statutory requisites, the lien will stand.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 208.

The mere wording of the notice is of little importance.— Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152, (App. 1894) 36 N. E. 52.

Curing ambiguity.— An ambiguity in the introduction of the notice, in describing the claim as being against one person, instead of as against two, may be cured by reference to a full and accurate statement of the claim in subsequent parts of the notice. Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300 [*reversing* 4 Daly 362, 14 Abb. Pr. N. S. 284].

58. *California.*— Madary *v.* Smartt, 1 Cal. App. 498, 82 Pac. 561, holding that where a claim for a mechanic's lien, containing the matter specified by Cal. Code Civ. Proc. § 1187, is filed within the time required, the lien attaches, and it is immaterial whether the claimant styles it a "claim of lien," or a "claim of benefit under the lien law."

Kansas.— Bethell *v.* Chicago Lumber Co., 39 Kan. 230, 17 Pac. 813.

Maine.— Durling *v.* Gould, 83 Me. 134, 21 Atl. 833.

Minnesota.— Atkins *v.* Little, 17 Minn. 342.

omitted,[59] but the fact that the claim states more than is required does not render it defective.[60] A defective claim or statement cannot be aided or validated by statements in the complaint or petition for foreclosure.[61]

b. Designation of Claimant. The claim or statement must of course show by whom the lien is claimed;[62] but the omission of the claimant's christian name has been held not fatal;[63] and where the lien is claimed by a partnership and the statement correctly specifies the individuals who furnished the materials and is signed by them in their proper partnership name a misstatement of the partnership name in the body of the statement does not destroy the lien, the mistake not having misled or prejudiced any one.[64] A statutory requirement that the claim shall state the names and residences of all the claimants means such claimants only as are interested in the particular claim and not all persons who may have claims against the same property.[65] In a joint mechanic's claim, it is unnecessary to set out whether the parties filing it claim as partners.[66] Where the claimants are partners, and are designated in the statement for lien by the partnership name, the mention of the individual names of the partners is not essential to the validity of the statement,[67] and a lien, filed by several joint contractors who were partners, which set out the names of the individuals composing the firm, and afterward referred to them by the firm-name, which was also signed to the paper, has been held sufficient, although there was no formal allegation that the parties named constituted a partnership.[68] Where the statute requires the statement to contain the name and residence of lienors, it is not complied with by giving the firm-name and place of business;[69] but stating the name of the town and county in which the lienor resides has been held sufficient.[70]

Nevada.— Maynard *v.* Ivey, 21 Nev. 241, 244, 29 Pac. 1090, where it is said: "It was not intended by the legislature that laborers' lien statements should be strangled by technicalities."

New York.— Ryan *v.* Klock, 36 Hun 104; Buess *v.* Pugh, 46 Misc. 414, 92 N. Y. Suppl. 359.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 208.

59. Murphy *v.* Harris, 57 Ill. App. 351; Jeffersonville Water Supply Co. *v.* Riter, 146 Ind. 521, 45 N. E. 697; Twitchell *v.* Devens, 45 Mo. App. 283.

It has been held not essential to state the capacity in which the claimant did the work relied on for the lien (Lutz *v.* Ey, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. 475) or to make reference to the statute under which the lien is claimed (White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466; Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324). Neither is it necessary, in an account and affidavit filed to preserve a mechanic's lien, to state that the party claims a lien. Smith *v.* Headley, 33 Minn. 384, 23 N. W. 550.

Showing contiguity of lots.—The lien paper need not state that the improvements were made on contiguous lots, or under one general contract, as that is a matter of pleading. Twitchell *v.* Devens, 45 Mo. App. 283 [*followed* in Bruce *v.* Hoos, 48 Mo. App. 161].

60. John Paul Lumber Co. *v.* Hormel, 61 Minn. 303, 63 N. W. 718.

61. Madera Flume, etc., Co. *v.* Kendall, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177.

62. See Kane *v.* Hutkoff, 81 N. Y. App. Div. 105, 81 N. Y. Suppl. 85.

Where a contractor does business for an undisclosed principal under the name of "H., Agent," a lien is properly filed in that name. Hooker *v.* McGlone, 42 Conn. 95.

Affidavit of agent.— An affidavit for a mechanic's lien, stating that it is made by a person named, "agent for" a certain firm, and that the amount alleged therein "is due and owing him," for which "he claims" a mechanic's lien, is sufficient to support a lien in favor of the firm named in the affidavit, and not merely in favor of the person named as agent. Lamb *v.* Hanneman, 40 Iowa 41.

63. *In re* Hill, 2 Pa. L. J. Rep. 96.

64. Shattuck *v.* Beardsley, 46 Conn. 386.

65. Morgan *v.* Taylor, 15 Daly 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253]. See also Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300 [*reversing* 4 Daly 362, 14 Abb. Pr. N. S. 284].

66. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472.

67. Pierce *v.* Osborn, 40 Kan. 168, 19 Pac. 656; Black's Appeal, 2 Watts & S. (Pa.) 179.

68. Miller *v.* Faulk, 47 Mo. 262, 264, where it is said: "This, although inartificial, answered the purposes and requirements of the statute."

69. Kane *v.* Hutkoff, 81 N. Y. App. Div. 105, 81 N. Y. Suppl. 85.

70. Dufton *v.* Horning, 26 Ont. 252.

Claimants residing in unorganized district. —Where a statement of claim made by the claimants' solicitor stated that they resided in a certain district which was then unorgan-

c. Description of Improvement. The claim or statement should specify the building or improvement on which the work was done or for which the materials were furnished,[71] so as to exclude work done or materials furnished for anything else,[72] and to show that the improvement is of a character for which a lien can be acquired under the statute.[73] Where the claim misdescribes the character of the improvement it is fatally defective.[74]

d. Statement as to Notice to Owner. Although the statute may require that the claimant shall serve upon the owner a notice of his intention to claim a lien before the lien claim or statement is filed,[75] it is not necessary that the claim or statement should set forth that such notice has been given[76] unless the statute expressly requires such an averment.[77]

e. Showing as to Whether Claim Filed Within Statutory Period. It has been held necessary that the claim or statement should show on the face that it is filed within the time allowed by statute after the completion of the work or fur-

ized and the name and address of the solicitor were also stated, it was held not necessary to give more precise particulars of the places of residence of the claimants. Crerar *v.* Canadian Pac. R. Co., 5 Ont. L. Rep. 383.

71. Riverside Lumber Co. *v.* Hampton, 7 Houst. (Del.) 486, 32 Atl. 960 (holding that a claim for a mechanic's lien for materials furnished for the construction of a house does not cover materials furnished for a fence to inclose the same); Bevan *v.* Thackara, 143 Pa. St. 182, 22 Atl. 873, 24 Am. St. Rep. 529; Harman *v.* Cummings, 43 Pa. St. 322, 323 (where it is said: "In strict propriety, the claim ought not to have averred that the work was done in the erection of the whole house, but only of the new part; but we do not now see that this is material, for only the work pertaining to the new wing, and that which connects it with the old building, can be allowed a lien, though the lien, when established, will extend to the whole"); Barclay's Appeal, 13 Pa. St. 495; Mercer Milling, etc., Co. *v.* Kreaps, 18 Pa. Super. Ct. 1; Nolan *v.* Warren, 11 Pa. Dist. 561. See also Linck *v.* Wolf, 2 Pa. Cas. 442, 4 Atl. 23; Mertens *v.* Cassini Mosaic, etc., Co., 53 W. Va. 192, 44 S. E. 241. *Compare* Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918, holding that, although materials for which a lien is claimed must, under the statute, have been furnished for the erection or betterment of a certain building, such fact need not appear in the statement filed for record with the probate judge.

Reference to annexed bill.— The word "appurtenance" in the body of a mechanic's claim may be explained, and the particular erection to which it refers ascertained, by a bill annexed to such claim. Killingsworth *v.* Allen, 1 Phila. (Pa.) 220.

"Repairs and alterations."— Where certain counters and partitions placed in a building were shown to be such additions to the building as amounted to a repair and alteration thereof, they were properly styled "repairs and alterations" in a claim for a mechanic's lien. Madary *v.* Smartt, 1 Cal. App. 498, 82 Pac. 561.

72. Barclay's Appeal, 13 Pa. St. 495.

73. See Whitenack *v.* Noe, 11 N. J. Eq. 321.

Where a claim is filed for both construction and repairs the amount of each should be distinguished. James *v.* Van Horn, 39 N. J. L. 353.

74. Cox *v.* Flanagan, (N. J. Ch. 1885) 2 Atl. 33, lien claim expressed to be for repairs, whereas the work was done upon new structures, although in juxtaposition to others, and intended to be used with the latter.

75. See *supra*, III, B.

76. Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108; Adams *v.* Buhler, 131 Ind. 66, 30 N. E. 883; Winton *v.* Benore, 28 Pa. Super. Ct. 27 [*approving* Harbolsheimer *v.* Totten, 7 Pa. Co. Ct. 665, and *overruling* Benore *v.* Leonard, 9 Pa. Dist. 211; Uber *v.* McAfee, 2 Pa. Dist. 372; Irwin *v.* Nittany Rod, etc., Club, 23 Pa. Co. Ct. 375; Purvis *v.* Ross, 12 Pa. Co. Ct. 193; West Chester *v.* Sahler, 8 Pa. Co. Ct. 656; Dreibelbis *v.* Seazholtz, 8 Pa. Co. Ct. 655; Foster *v.* Montanye, 7 Kulp (Pa.) 14; Fuller *v.* Grim, 30 Pittsb. Leg. J. N. S. (Pa.) 83], holding that the Pennsylvania act of May 18, 1887 (Pamphl. Laws 118), does not require such an averment; for if the notice was actually given the lien is good, and notice may be proved and the lien amended accordingly); Riter *v.* Houston Oil Refining, etc., Co., 19 Tex. Civ. App. 516, 48 S. W. 758; Niswander *v.* Black, 50 W. Va. 188, 40 S. E. 431.

77. Under the Pennsylvania act of June 4, 1901 (Pamphl. Laws 431), where the claimant's contract was made with a person other than the owner, the lien claim filed must state when and how notice was given to the owner of an intention to file the claim. Collins *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 547.

Sufficiency of averment.— Where a subcontractor avers in his statement of claim that a written notice of intent to file a claim, duly sworn to, was served on the owner at a certain date by delivery to him personally, this is a sufficient compliance with the statute, without setting out a copy of the notice in his lien. Thirsk *v.* Evans, 211 Pa. St. 239, 60 Atl. 726.

Copy of notice need not be set out in claim.—American Car, etc., Co. *v.* Alexandria Water Co., 215 Pa. St. 520, 64 Atl. 683.

nishing of materials or after the accrual of the indebtedness;[78] and the statement is ineffectual to perfect a lien if it shows affirmatively on its face that it is filed too late,[79] even though the fact be otherwise.[80]

f. Description of Property — (i) *NECESSITY.* The statutes regulating the acquisition of mechanics' liens universally require that the lien notice, claim, or statement shall contain a description of the property on which the lien is claimed[81]

78. *Minnesota.*—Knauft *v.* Miller, 45 Minn. 61, 47 N. W. 313.

Missouri.— Sanderson *v.* Fleming, 37 Mo. App. 595.

Nebraska. — Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722. See also Chappell *v.* Smith, 40 Nebr. 579, 59 N. W. 110, holding that the failure of the account and statement filed for a mechanic's lien to show affirmatively that the filing is within the statutory time prevents the lien from taking precedence of mortgage liens previously existing.

Pennsylvania. — Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 16, 38 Atl. 1081.

Texas.— Meyers *v.* Wood, 26 Tex. Civ. App. 591, 594, 65 S. W. 671, where it is said: "It is essential to the validity of such lien that it be recorded within the time prescribed by the statnte, and this must appear from the record itself. The object of the statute in requiring the account and affidavit to be recorded is to give notice to the owner of the building as well as to third parties of the existence of the lien, and this object is not attained unless the record itself shows that the account was filed within the time prescribed by law."

West Virginia.— O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 212.

Contra.— Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918; Lutz *v.* Ey, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. 475, holding that it is not necessary that the notice state that the labor was performed within the statutory period of six months, as it is the time of filing, and not the date of the notice, that must be within the statutory period. See also Phillips *v.* Hyde, 45 Ga. 220; Crandall *v.* Lyon, 188 Ill. 86, 58 N. E. 972 [*reversing* 90 Ill. App. 265]; Baker *v.* Winter, 15 Md. 1.

Sufficient statement.— A mechanic's lien claim dated the 1st and filed on the 3d of November, alleging that the work was done and the materials furnished "within the twelve months last past, and the work, when completed, was delivered by" the contractor to the owner "on the twenty-first day of September last," sufficiently showed that it was filed within six months after the completion of the work, as required by statute. Baker *v.* Winter, 15 Md. 1. A lien account which states that the "demand accrued within four months prior to the filing of this lien" is sufficient, although the items of the account are not dated. People's Lumber Co. *v.* Hays, 75 Mo. App. 516 [*following* Mitchell Planing-Mill Co. *v.* Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544]. Where the claim avers that the work was done, etc., "within six months last past," the claim is valid, although the bill of particulars does not show affirmatively that such is the case. McCay's Appeal, 37 Pa. St. 125. *Compare* Fourth Baptist Church *v.* Trout, 28 Pa. St. 153; Lehman *v.* Thomas, 5 Watts & S. (Pa.) 262; McNamee *v.* Hildeburn, 9 Pa. Co. Ct. 267; Ellice *v.* Paul, 2 Phila. (Pa.) 102.

79. Olson *v.* Pennington, 37 Minn. 298, 33 N. W. 791.

80. Olson *v.* Pennington, 37 Minn. 298, 33 N. W. 791.

81. *Alabama.*— Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Turner *v.* Robbins, 78 Ala. 592; Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

California.— Penrose *v.* Calkins, 77 Cal. 396, 19 Pac. 641.

Idaho.— Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218.

Indiana.— Peck *v.* Hensley, 21 Ind. 344.

Minnesota.— Knox *v.* Starks, 4 Minn. 20.

Missouri.— E. R. Darlington Lumber Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688; Mayes *v.* Murphy, 93 Mo. App. 37.

Nebraska.— Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592; Drexel *v.* Richards, 50 Nebr. 509, 70 N. W. 23, 48 Nebr. 732, 67 N. W. 742; Bell *v.* Bosche, 41 Nebr. 853, 60 N. W. 92; Holmes *v.* Hutchins, 38 Nebr. 601, 57 N. W. 514.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Oklahoma.—Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Pennsylvania.— Ely *v.* Wren, 90 Pa. St. 148; Morrow *v.* Corcoran, 9 Kulp 314.

Texas.— Merchants', etc., Bank *v.* Hollis, (Civ. App. 1904) 84 S. W. 269.

Utah.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

West Virginia.— O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471; Mertens *v.* Cassini Mosaic, etc., Co., 53 W. Va. 192, 44 S. E. 241; Mayes *v.* Ruffers, 8 W. Va. 384.

Wisconsin.— Dusick *v.* Meiselhach, 118 Wis. 240, 95 N. W. 144.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 213; and cases cited *infra*, note 82.

The "property" to be identified under a statute requiring the lien notice to contain a correct description of the property to be charged with the lien is the building or improvement upon which the lien is given. Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

for the purpose of having the papers on record afford a ready means of identification of the property.[82]

(II) *SUFFICIENCY IN GENERAL.*[83] The same fulness and precision of description is not required in a lien statement as in the case of a conveyance or a judgment,[84] and the courts are reluctant to set aside a mechanic's lien claim merely because of a loose description of the property,[85] as the statutes generally contemplate that the claimants should prepare their own papers.[86] As a general rule any description which will enable one familiar with the locality to identify the property upon which the lien is intended to be claimed with reasonable certainty is sufficient;[87] but if the description is not accurate to this extent it is fatally defective and the

Misdescription in docket entry.— A mechanic's claim is not a record. The lien docket is the record, and it alone affects encumbrancers and purchasers; hence, where the claim itself is lost, it can make no difference what it showed, as, if the docket entry misdescribes the premises, there is no lien. Armstrong *v.* Hallowell, 35 Pa. St. 485.

Description of wrong property.—Where the description is clear and plain, but the metes and bounds given therein exclude the land on which the work was done, there is no lien, although the claim also contains a reference to a description in a deed which includes such land. Muto *v.* Smith, 175 Mass. 175, 55 N. E. 1041. See also Goodrich Lumber Co. *v.* Davie, 13 Mont. 76, 32 Pac. 282.

Description of curtilage.— It matters not whether any or what curtilage is described in the claim filed, for the law provides for the settlement of this as part of the proceeding, according to the purposes of the building. Pretz's Appeal, 35 Pa. St. 349.

82. *California.*— Brunner *v.* Marks, 98 Cal. 374, 33 Pac. 265.

Minnesota.— North Star Iron Works Co. *v.* Strong, 33 Minn. 1, 21 N. W. 740.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

Nebraska.— Drexel *v.* Richards, 50 Nebr. 509, 70 N. W. 23.

Virginia.— Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 213.

83. **Mistake in description** see *infra*, III, C, 12, b.

84. Nystrom *v.* London, etc., Mortg. Co., 47 Minn. 31, 49 N. W. 394; Northwestern Cement, etc., Pavement Co. *v.* Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 45 N. W. 868; Russell *v.* Hayden, 40 Minn. 88, 41 N. W. 456. *Compare* Knox *v.* Starks, 4 Minn. 20.

Description need not be full or precise.— McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423.

85. McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423; McClintock *v.* Rush, 63 Pa. St. 203.

86. McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423.

87. *Alabama.*— Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Hughes *v.* Forgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600; Turner *v.* Robbins, 78 Ala. 592; Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

Colorado.— Martin *v.* Simmons, 11 Colo. 411, 18 Pac. 535.

Connecticut.— Where the premises are described with as much certainty as is common in deeds of conveyance this is sufficient. Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325.

Illinois.— Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Wood *v.* Gumm, 67 Ill. App. 518; Rockwell *v.* O'Brien-Green Co., 62 Ill. App. 293; O'Brien *v.* Krockinski, 50 Ill. App. 456.

Indiana.— Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514; McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423; Kealing *v.* Voss, 61 Ind. 466.

Iowa.— National Lumber Co. *v.* Bowman, 77 Iowa 706, 42 N. W. 557.

Kansas.— Seaton *v.* Hixon, 35 Kan. 663, 12 Pac. 22.

Massachusetts.— Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326.

Minnesota.— Evans *v.* Sanford, 65 Minn. 271, 68 N. W. 21; Nystrom *v.* London, etc., Mortg. Co., 47 Minn. 31, 49 N. W. 394; Northwestern Cement, etc., Pavement Co. *v.* Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 45 N. W. 868.

Missouri.— Bradish *v.* James, 83 Mo. 313; De Witt *v.* Smith, 63 Mo. 263; Hammond *v.* Darlington, 109 Mo. App. 333, 84 S. W. 446; Hydraulic Press Brick Co. *v.* Schlingmann, 88 Mo. App. 17; Bambrick *v.* King, 59 Mo. App. 284; Buchannan *v.* Cole, 57 Mo. App. 11; Fairbanks *v.* Crescent Elevator Co., 52 Mo. App. 637; Brown *v.* Wright, 25 Mo. App. 54.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

Nebraska.— Drexel *v.* Richards, 50 Nebr. 509, 511, 70 N. W. 23, 48 Nebr. 732, 67 N. W. 742, where it is said: "A description of the property in a statement for a mechanic's lien as 'The Lincoln Hotel, in the City of Lincoln, Nebraska," or the 'Burr Block' in said city, most assuredly would not be void for indefiniteness of description, since either is amply sufficient for the identification of the premises intended to be described."

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203; Howe *v.* Smith, 6 N. D. 432, 71 N. W. 552.

lien is defeated.[88] The claim must describe the land with sufficient accuracy to enable the court to decree the sale and the purchaser to find the land under such

Oklahoma.— Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

Pennsylvania.— Linden Steel Co. *v.* Imperial Refining Co., 138 Pa. St. 10, 18, 20 Atl. 867, 869, 9 L. R. A. 863 (where it is said: "If there be enough in the description of the locality and of the peculiarities of the building, to point out and identify it with reasonable certainty, it is a sufficient compliance with the requirements of the act"); Titusville Iron-Works *v.* Keystone Oil Co., 130 Pa. St. 211, 18 Atl. 739; McClintock *v.* Rush, 63 Pa. St. 203; Kennedy *v.* House, 41 Pa. St. 39, 80 Am. Dec. 594; *In re* Messersmith, 1 Dauph. Co. Rep. 223.

Texas.— Scholes *v.* Hughes, 77 Tex. 482, 14 S. W. 148; Swope *v.* Stantzenberger, 59 Tex. 387; Myers *v.* Maverick, (Civ. App. 1894) 27 S. W. 950, 1083.

Washington.— See Whittier *v.* Stetson, etc., Mill Co., 6 Wash. 190, 33 Pac. 393, 36 Am. St. Rep. 149.

West Virginia.— O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471; Mertens *v.* Cassini Mosaic, etc., Co., 53 W. Va. 192, 44 S. E. 241; Mayes *v.* Ruffners, 8 W. Va. 384.

United States.— Hooven *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229 [*reversing* 99 Fed. 180].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 214.

Certainty to a common intent is sufficient in a description of property in a mechanic's lien. Ewing *v.* Barras, 4 Watts & S. (Pa.) 467; Holland *v.* Garland, 13 Phila. (Pa.) 544.

Descriptions held sufficient see the following cases:

Alabama.— Turner *v.* Robbins, 78 Ala. 592, sufficient as to dwelling-house but insufficient as to other improvements.

California.— Tibbetts *v.* Moore, 23 Cal. 208; Hotaling *v.* Cronise, 2 Cal. 60.

Illinois.— Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084.

Indiana.— Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514; White *v.* Stanton, 111 Ind. 540, 13 N. E. 48; Crawfordsville *v.* Boots, 76 Ind. 32; Crawfordsville *v.* Johnson, 51 Ind. 397; Caldwell *v.* Asbury, 29 Ind. 451.

Massachusetts.— York *v.* Barstow, 175 Mass. 167, 55 N. E. 846; Parker *v.* Bell, 7 Gray 429.

Minnesota.— Evans *v.* Sanford, 65 Minn. 271, 68 N. W. 21; Nystrom *v.* London, etc., Mortg. Co., 47 Minn. 31, 49 N. W. 394.

Missouri.— De Witt *v.* Smith, 63 Mo. 263; Hydraulic Press Brick Co. *v.* Weidner, 88 Mo. App. 17; Fairbanks *v.* Crescent Elevator Co., 52 Mo. App. 627.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

Nebraska.— Drexel *v.* Richards, 50 Nebr. 509, 70 N. W. 23, 48 Nebr. 732, 67 N. W. 742; White Lake Lumber Co. *v.* Russell, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. Rep. 262.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203; Howe *v.* Smith, 6 N. D. 432, 71 N. W. 552.

Oklahoma.— Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Oregon.— Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

Pennsylvania.— Safe Deposit, etc., Co. *v.* Columbia Iron, etc., Co., 176 Pa. St. 536, 35 Atl. 229; Linden Steel Co. *v.* Rough Run Mfg. Co., 158 Pa. St. 238, 27 Atl. 895; Linden Steel Co. *v.* Imperial Refining Co., 138 Pa. St. 10, 20 Atl. 867, 869, 9 L. R. A. 863; Titusville Iron-Works *v.* Keystone Oil Co., 130 Pa. St. 211, 18 Atl. 739; Short *v.* Miller, 120 Pa. St. 470, 14 Atl. 374; Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; Springer *v.* Keyser, 6 Whart. 187; Harker *v.* Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691; Cowdrick *v.* Morris, 9 Pa. Co. Ct. 312; Holland *v.* Garland, 13 Phila. 544.

South Dakota.— Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

Texas.— Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338; Swope *v.* Stantzenberger, 59 Tex. 387; Owens *v.* Hord, 14 Tex. Civ. App. 542, 37 S. W. 1093.

Washington.— Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 214.

A description of the land as "such convenient space" around the building "as may be required for the convenient use and occupation thereof" is sufficient; but it is proper for the court by its decree to define the amount and extent of the land connected with the building which is properly subject to the lien, and if the decree follows the description in the lien it is doubtful whether the purchaser will acquire any land beyond that covered by the building. Tibbetts *v.* Moore, 23 Cal. 208.

88. *Alabama.*— Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600.

Indiana.— White *v.* Stanton, 111 Ind. 540, 13 N. E. 48.

Nebraska.— A description which is entirely inapplicable to the land actually benefited cannot be made effective to any extent for the purpose of subjecting the land actually built upon to the operation of the lien claimed. Holmes *v.* Hutchins, 38 Nebr. 601, 57 N. W. 514.

Pennsylvania.— Simpson *v.* Murray, 2 Pa. St. 76; Ewing *v.* Barras, 4 Watts & S. 467; Security Bldg., etc., Sav. Union *v.* Colvin, 5 Lack. Jur. 4.

description,[89] and the description to be sufficient must be such as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with real estate with notice of such claim for lien.[90] The fact that no other property answers the description in the notice will aid what might otherwise be an insufficient description.[91]

(III) *AREA INCLUDED IN DESCRIPTION*—(A) *Inclusion of Too Much Land.* As a general rule the fact that the claim or statement describes more land than is subject to the lien does not defeat the lien as to the land properly subject thereto, if there is no fraudulent intent and no one is injured thereby;[92] and where the

South Dakota.— Laird-Norton Co. *v.* Hopkins, 6 S. D. 217, 60 N. W. 857.

Washington.— Mt. Tacoma Mfg. Co. *v.* Cultum, 5 Wash. 294, 32 Pac. 95.

Wisconsin.—Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 214.

An averment in the complaint that the notice was intended to apply to certain property described in the complaint cannot make effective a notice which is inoperative and void for uncertainty of description of the property on which the lien is claimed. Irwin *v.* Crawfordsville, 72 Ind. 111.

Court cannot reform defective description. — Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610.

Descriptions held insufficient see the following cases:

California.— Montrose *v.* Conner, 8 Cal. 344.

Connecticut.— Rose *v.* Persse, etc., Paper Works, 29 Conn. 256.

District of Columbia.— Basshor *v.* Kilbourn, 3 MacArthur 273.

Indiana.— Irwin *v.* Crawfordsville, 72 Ind. 111; Crawfordsville *v.* Irwin, 46 Ind. 438; Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Howell *v.* Zerbee, 26 Ind. 214; Maynard *v.* East, 13 Ind. App. 432, 41 N. E. 839, 55 Am. St. Rep. 238.

Iowa.— Roose *v.* Billingsly, etc., Commission Co., 74 Iowa 51, 36 N. W. 885.

Missouri.— Lemly *v.* La Grange Iron, etc., Co., 65 Mo. 545; Matlack *v.* Lare, 32 Mo. 262.

Oregon.— Runey *v.* Rea, 7 Oreg. 130.

Pennsylvania.— Short *v.* Ames, 121 Pa. St. 530, 15 Atl. 607; Washburn *v.* Russel, 1 Pa. St. 499.

Washington.— Young *v.* Howell, 5 Wash. 239, 31 Pac. 629; Warren *v.* Quade, 3 Wash. 750, 29 Pac. 827; Cowie *v.* Ahrenstedt, 1 Wash. 416, 25 Pac. 458; Kellogg *v.* Littell, etc., Mfg. Co., 1 Wash. 407, 25 Pac. 461.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 214.

89. Knox *v.* Starks, 4 Minn. 20. See also Ely *v.* Wren, 90 Pa. St. 148, 151, where it is said: "The property against which the lien is given should be so accurately described that when judgment is obtained on the scire facias, the writ of levari facias, following the claim, may so designate the property and extent of the interest therein to be sold, that a separate schedule will not be required for the guidance of the sheriff."

Showing contiguity of lots.— A statement setting out that the buildings were erected on "lots twenty-six and twenty-seven . . . in city block No. 3770 S., having a front on Bayard avenue of one hundred and twenty feet . . . the southern line of said lots being two hundred and sixty-four feet and four inches north of Fountain avenue" shows the lots to be contiguous. Heier *v.* Meisch, 33 Mo. App. 35.

90. Drexel *v.* Richards, 50 Nebr. 509, 70 N. W. 23, 48 Nebr. 732, 67 N. W. 742. See also McNamee *v.* Rauck, 128 Ind. 59, 61, 27 N. E. 423 (where it is said: "Where the description is so uncertain as to afford no reliable clue to a more definite and correct description, no lien is acquired; but where the description, though too defective and insufficient of itself to identify any particular tract of land, can, nevertheless, be aided by the introduction of extrinsic evidence in support of such averments, it will be held to be sufficient for the purpose intended, and a true description will be supplied at the hearing. . . . The principle drawn from the authorities seems to be this: That a description in a notice of lien can not be supplied by oral evidence, but that an ambiguity may be explained and the premises identified"); White *v.* Stanton, 111 Ind. 540, 13 N. E. 48.

Extrinsic evidence is admissible under proper allegations in the pleadings to aid an imperfect description of the property in the lien notice. Coburn *v.* Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218.

"The record should be sufficient to give in itself the information intended by the recordation and should not be made to depend upon verbal explanations of its meaning, and the record cannot be supplemented by parol evidence after suit brought to enforce the lien." Niswander *v.* Black, 50 W. Va. 188, 196, 40 S. E. 431 [*quoted* in Mertens *v.* Cassini Mosaic, etc., Co., 53 W. Va. 192, 202, 44 S. E. 241].

91. McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423 [*citing* Phillips Mechanics' Liens, § 382].

92. *Alabama.*—Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Colorado.— Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744, if the land subject to the lien is embraced in the tract described.

Connecticut.— Shattuck *v.* Beardsley, 46 Conn. 386.

Illinois.— Sorg *v.* Pfalzgraf, 113 Ill. App. 569.

tract on which the improvement is erected is of greater area than the statute allows to be subjected to the lien, a claim or statement describing the entire tract is sufficient, and it is not necessary to specifically describe a portion thereof which is of the permitted area,[93] as in such case it is for the court to decide what portion of the land is to be subjected to the lien.[94] But other cases hold that under such circumstances the claim or statement must describe the portion of the tract upon which the lien is to be enforced.[95]

(B) *Failure to Include All Land Subject to Lien.* The validity of the claim is not affected by the fact that it does not cover as much land as it might properly have covered.[96] Thus it has been held that where a house is built on two lots and the lien claim describes only one of the lots, the failure to describe the

Indiana.— Scott *v.* Goldinhorst, 123 Ind. 268, 24 N. E. 333; White *v.* Stanton, 111 Ind. 540, 13 N. E. 48; Heyde *v.* Suit, 22 Ind. App. 83, 52 N. E. 456.

Iowa.— Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177.

Massachusetts.— Underwood *v.* Walcott, 3 Allen 464.

Minnesota.— Evans *v.* Sanford, 65 Minn. 271, 68 N. W. 21; Northwestern Cement, etc., Pavement Co. *v.* Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 45 N. W. 868; North Star Iron Works Co. *v.* Strong, 33 Minn. 1, 21 N. W. 740 [*followed* in Smith *v.* Headley, 33 Minn. 384, 23 N. W. 550].

Missouri.— Bradish *v.* James, 83 Mo. 313; Othenin *v.* Brown, 66 Mo. App. 318. See also Oster *v.* Rabeneau, 46 Mo. 595. But see *infra*, note 95.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

Nebraska.— White Lake Lumber Co. *v.* Russell, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. Rep. 262.

Nevada.— Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090.

New Jersey.— Derrickson *v.* Edwards, 29 N. J. L. 468, 80 Am. Dec. 220; Edwards *v.* Derrickson, 28 N. J. L. 39; Whitenack *v.* Noe, 11 N. J. Eq. 321.

Texas.— Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511.

Wisconsin.— Halsey *v.* Waukesha Springs Sanitarium Co., 125 Wis. 311, 104 N. W. 94, 110 Am. St. Rep. 838.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 215.

Compare Wharton *v.* Douglas, 92 Pa. St. 66, holding that when materials are furnished for a new building to be used in connection with an old one, the mechanic's lien should be filed specifically against the new erection and it is fatal to the claim to file it against the general building.

93. Evans *v.* Sanford, 65 Minn. 271, 68 N. W. 21; North Star Iron Works *v.* Strong, 33 Minn. 1, 21 N. W. 740 [*disapproving obiter* remarks to the contrary in Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205]; Swope *v.* Stantzenberger, 59 Tex. 387.

94. Evans *v.* Sanford, 65 Minn. 271, 68 N. W. 21; North Star Iron Works Co. *v.* Strong, 33 Minn. 1, 21 N. W. 740; Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413; Swope *v.* Stantzenberger, 59 Tex. 387, holding that the specific portion is properly designated by an official survey ordered by the court as a basis for foreclosure of the lien by sale.

95. Bedsole *v.* Peters, 79 Ala. 133; Turner *v.* Robbins, 78 Ala. 592; Montgomery Iron Works *v.* Dorman, 78 Ala. 218; Ranson *v.* Sheehan, 78 Mo. 668; Wright *v.* Beardsley, 69 Mo. 548; Williams *v.* Porter, 51 Mo. 441; Gerard *v.* Birch, 28 N. J. Eq. 317. See also Rall *v.* McCrary, 45 Mo. App. 365, holding that a mechanic's lien paper describing the premises as "frame barn and one acre on which same is situated, being erected" on a certain half quarter section, was, as to third persons, ineffectual to give a lien because of vagueness and uncertainty, but as between the owner and the claimant the description might be helped out by a survey of the land sought to be charged, and, in the absence of such survey, the lien would attach only to the building.

A survey made after suit begun, definitely ascertaining the acre of ground on which the building stands and setting out this acre in an amended petition, does not cure the defect of describing the entire tract and not the one acre in the lien claim. Ranson *v.* Sheehan, 78 Mo. 668 [*distinguishing* Oster *v.* Rabeneau, 46 Mo. 595].

Where it is intended only to claim a lien upon the buildings and improvements, and not upon the land, the claim need only describe the building and improvements and the tract on which they are situated, and it is not necessary to describe a smaller portion thereof to the extent upon which the statute allows a lien. Turner *v.* Robbins, 78 Ala. 592.

Where the lien on the land fails by reason of failure to designate and sufficiently describe a specific portion of the tract, it can nevertheless be sustained against the buildings, erections, or improvements if they are sufficiently described. Bedsole *v.* Peters, 79 Ala. 133. *Contra*, Ranson *v.* Sheehan, 78 Mo. 668 [*following* but *criticizing* Williams *v.* Porter, 51 Mo. 441].

96. Culmer *v.* Clift, 14 Utah 286, 47 Pac. 85. See also Pacific Rolling Mill Co. *v.* Bear Valley Irr. Co., 120 Cal. 94, 52 Pac. 136, 65 Am. St. Rep. 158; McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39, where the lien was claimed on the land and on one only of three buildings erected thereon.

other lot does not defeat the lien on the lot described,[97] and also that the lien may be enforced against the building and the land which properly goes with it, even though a part of the land covered by the building is not included in the description in the lien claim.[98] *A fortiori* when it is sought to subject only the building to the lien and the description is otherwise sufficient the fact that it is stated to be on one lot without mentioning another lot on which a small part of it stands does not defeat the lien.[99] Where a stamp mill and a tramway from the mill to a mine are built, the mill, mine, and tramway do not constitute such an entire "structure" within the meaning of the Mechanics' Lien Law as to invalidate a lien filed for materials used in erecting the mill and constructing the tramway because such lien was not filed against the mine also.[1]

(IV) *STREETS AND NUMBERS, ADJOINERS, OR STREET INTERSECTIONS AS DESCRIPTIONS.* Streets and street numbers, adjoiners, and street intersections

97. Sorg *v.* Pfalzgraf, 113 Ill. App. 569, 570, where it is said: "Appellee was entitled to a lien upon both lots for the entire cost of the house. He had a lien upon each lot upon which the house rested for the entire amount still due him for its construction. . . . The owner cannot be permitted to defeat the lien upon his land which the law has given to the builder, simply because the latter might have obtained a lien upon more of the owner's land." See also Heyde *v.* Sult, 22 Ind. App. 83, 52 N. E. 456. *Contra,* Whittier *v.* Stetson, etc., Mill Co., 6 Wash. 190, 195, 33 Pac. 393, 36 Am. St. Rep. 149, where it is said, however: "A more sensible and effectual administration of this law could be had if there were some provision by which a claim in such a case could be amended where no one could be injured by it; but we must take the statute as we find it, and in this case neither the actual building nor the land having been described the liens must fail."

Amount secured.— Such a lien can be enforced, if at all, only for the work and materials expended on or furnished for such part of the improvement as stands on the lot described, and not for what was done or furnished for the part on the other lot. Barnett *v.* Murray, 62 Mo. App. 500, 502 (where it is said: "The building is a single structure, and the right under any circumstances to enforce a mechanic's lien against a portion of such an improvement is not clear); Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592 (where the question whether the lien might be enforced against the lot described for material used and labor performed in and on the part of the building which stood on the said lot was not presented, discussed, or adjudicated).

98. Willamette Steam Mill Co. *v.* Kremer, 94 Cal. 205, 209, 29 Pac. 633, where it is said: "Nor was the sufficiency of the description impaired by the statement that the building was on lot 6 in that block. The greater portion of it was in fact upon that lot, and the building intended was thus sufficiently identified, notwithstanding it extended a short distance beyond the line of division between the two lots. If there had been a building upon each of the lots, and the plaintiff had stated that the building upon which he claimed the lien was upon lot 6, he might have been precluded from enforcing a lien against the one upon lot 7, but, in the absence of any ambiguity or uncertainty, the statement must be held sufficient, whenever it can be determined from it what building was intended. . . . The claimant is not required, before filing his claim of lien, to make an accurate survey of the lot upon which the building stands, at the risk of losing his lien if he makes a slight mistake in giving its boundaries, nor is he even required to give the boundaries of the lot. . . . The claims of lien as filed were sufficient to embrace the entire building, and when it was shown that the building was upon more land than was described in the complaint, the court should have directed amendments to be made to the complaints, so that they might conform to the proofs, and should then have directed a sale of the entire building, and such land as it should determine to be required for the convenient use and occupation thereof"); Springer *v.* Kroeschell, 161 Ill. 358, 369, 43 N. E. 1084 [*affirming* 59 Ill. App. 434] (where it is said: "It is quite manifest, that a statement, which claimed a lien upon the building situated on lots 10 and 11 in block 51, was sufficient to notify owners and purchasers, that a lien was claimed upon the building which covered those two lots and the seven and one-sixth feet adjoining them. The description was not calculated to mislead subsequent purchasers and creditors, and was sufficient to enable them to identify the premises, intended to be described, as the premises which were covered by the brick building referred to); Field *v.* Oberteuffer, 2 Phila. (Pa.) 271 (holding that where a building extends through from one street to another, a mechanic who has performed work supposing that the building faced on but one street, and has so described the property in his claim of lien, is entitled to payment out of the proceeds of the sale of the whole). But *compare* Willamette Steam Mill, etc., Co. *v.* Kremer, (Cal. 1890) 24 Pac. 1026.

99. Sawyer, etc., Lumber Co. *v.* Clark, 172 Mo. 588, 73 S. W. 137.

1. Watson *v.* Noon-Day Min. Co., 37 Oreg. 287, 55 Pac. 867, 58 Pac. 36, 60 Pac. 994.

may properly be used to designate and locate the property, and if such description makes it clear what property is intended it is sufficient.[2]

(v) *Lot and Block Numbers and Government Subdivisions as Descriptions.* It is a sufficient description of city or town lots to give the lot and block numbers as appearing on a recorded plat to which reference is made,[3] and a description by government subdivisions giving the section numbers, etc., has also

2. *Delaware.*—France *v.* Woolston, 4 Houst. 557, holding that "two two-story brick houses (with mansard roof) adjoining each other on a lot at the south-easterly intersection of Delaware Avenue and Rodney Street in the City of Wilmington," with the number of feet on each street and on the other two sides of it stated, is a sufficient description of the several pieces of ground on which the houses are respectively situated.

Indiana.— Caldwell *v.* Asbury, 29 Ind. 451, holding that a description as "house and lot on the south-west corner of Fourth and Oak streets, in Terre Haute, Indiana," is sufficient, but will not give a lien on two lots, although two be charged in the complaint.

New York.— Duffy *v.* McManus, 3 E. D. Smith 657, 4 Abb. Pr. 432 (holding that a description of premises by a general statement that they are on the west side of a certain street, between two others, may be sufficient if the number is unknown); Walkam *v.* Henry, 7 Misc. 532, 27 N. Y. Suppl. 997 (holding that a lien which describes the premises as situated on the east side of M street, known and designated as "No. 355," and being the lot occupied by Nos. 353 and 355 on said street, and being about fifty feet frontage on said street, with side lines extending back at right angles therewith, is sufficient where there was a building on the lot, numbered 353, and the building erected on the same lot for which the lien is claimed would, if numbered according to the city ordinance, be designated as "No. 355").

Pennsylvania.— Shaw *v.* Barnes, 5 Pa. St. 18, 47 Am. Dec. 399 (holding that a mechanic's lien describing the premises as being "on the north side of Lombard street, west of Ninth street . . . adjoining Stephen Smith's lot on the east," was sufficiently certain, after verdict); Harker *v.* Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691 (holding that a claim filed "against the owners, or reputed owners of a three storied brick house, situate on the south side of Walnut street, between Eleventh and Twelfth streets, in the city of Philadelphia" sufficiently describes the building); Shaffer *v.* Hull, 2 Pa. L. J. Rep. 93, 3 Pa. L. J. 321 (holding that a description of a building as situated "in Dillersville, adjoining land of P. Hentz and the Pennsylvania Railroad," was sufficient, it not being shown that there was any other building there answering to that description).

Texas.— Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338, holding that a description of the premises as "house No. 323, occupied by said . . . [lien debtor] as his residence, and being on a lot or tract of land bounded on the north by" certain described premises and streets in a certain city and county is sufficient.

Virginia.— Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888, holding that a description, as "that certain three-story building No. —, situate and being in the city of Richmond, Va., on Grace street, between Shafer and Harrison streets, and the lot or piece of ground and curtilage appurtenant to the said building, fronting on said south line of Grace street 49 feet, and running back 156 feet, more or less . . . of which Wirt E. Taylor is the owner or reputed owner" was sufficient.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 217.

Descriptions not sufficiently certain.—A description in the claim of the property, as two three-story brick houses, on the east side of Fifth street, between Franklin avenue and Morgan street, is insufficient to support a lien, as it does not sufficiently identify the subject of the lien. Matlack *v.* Lare, 32 Mo. 262. A description of the building as "a house and stable on North Green street adjoining property of Jacob Zecker and others," and not giving the name of the owner or reputed owner, is bad for uncertainty, where Jacob Zecker is admitted to be the owner of two houses on opposite sides of that street. *In re* Hill, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323.

3. *Indiana.*— White *v.* Stanton, 111 Ind. 540, 13 N. E. 48; O'Halloran *v.* Leachey, 39 Ind. 150.

Missouri.— Hill *v.* Gray, 81 Mo. App. 456.

Montana.— Whiteside *v.* Lebcher, 7 Mont. 473, 17 Pac. 548.

Nebraska.— White Lake Lumber Co. *v.* Russell, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. Rep. 262.

Washington.— Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 218.

Vacated plat.— Where a recorded plat of lots and blocks has been vacated and the property is used for a different purpose a description by block numbers on such plot is sufficient as to the land included in such blocks, but creates no lien on the land platted as streets and alleys. Chicago Lumber Co. *v.* Des Moines Driving Park, 97 Iowa 25, 65 N. W. 1017.

A description by block number alone without stating the quantity of land in the block was held insufficient in Knox *v.* Starks, 4 Minn. 20.

been held to identify and locate the property with sufficient certainty to sustain the lien.[4]

(VI) *FAILURE TO NAME CITY, TOWN, OR COUNTY.* A notice or claim of lien which fails to name the city, town, or county in which the property sought to be charged is situated, and which contains no statement aiding in its identification, is insufficient.[5]

(VII) *DESCRIPTION OF BUILDING.* It is sometimes expressly required that the building shall be described,[6] and in such case in setting out the situation and peculiarities of a building, such matters of description as are adequate to identify the building are sufficient;[7] but the description is insufficient where it describes a part of a single building as a separate building.[8] Unless the statute requires the building to be described, a description of the land will include the buildings on it and the lien will attach to both, although the buildings are not mentioned.[9] A reference in the description to the building on the property may serve as an aid to the identification of land not clearly described.[10] It is not necessary to state the name of the building;[11] but where the building has a well-known name which distinguishes it from all other buildings in the locality the use of such name in the description may of itself serve as a sufficient identification of the property.[12]

(VIII) *ALLEGATION OF OWNERSHIP AS AIDER IN DESCRIPTION.* The statement of the name of the owner has considerable weight in aiding the description where the property sought to be charged is the only property owned by him in the locality.[13]

(IX) *LIEN COVERING IMPROVEMENTS SEPARATE FROM LAND.* When the lien can be enforced or is claimed only against the building, erection, or improve-

4. Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562]; Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

5. Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445 (statement describing property as "plat 2 in block 13 of Harman's subdivision," without naming the state, county, or city, insufficient); Anderson *v.* Bingham, 1 Colo. App. 222, 28 Pac. 145; Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254 (description by street and number and adjoiners, without naming the city, borough, or town in which property situated, not sufficient). *Compare* Tinker *v.* Geraghty, 1 E. D. Smith (N. Y.) 687, holding that a notice describing the building as situated "in Eighty-Fifth street, between Fourth and Fifth avenues," without stating that the building is situated in the city and county of New York, but addressed to the clerk of that city and county, although lacking in precision, is so far a compliance with the spirit of the statute that the court will not reverse the judgment for the defect in the notice).

6. The Pennsylvania act of June 16, 1836, so required. Short *v.* Ames, 121 Pa. St. 530, 15 Atl. 607.

7. Mountain City Market House, etc., Assoc. *v.* Kearns, 103 Pa. St. 403; McClintock *v.* Rush, 63 Pa. St. 603; Kennedy *v.* House, 41 Pa. St. 39, 41, 80 Am. Dec. 594, where it is said: "A claim is not necessarily void because it does not accurately describe the size of the building." See also Short *v.* Ames, 121 Pa. St. 530, 15 Atl. 607; Wethered *v.* Garrett, 7 Pa. Co. Ct. 529, 535.

8. Philadelphia Packing, etc., Co.'s Estate, 4 Pa. Dist. 57, 15 Pa. Co. Ct. 650.

9. Johnson *v.* Salter, 70 Minn. 146, 72 N. W. 974, 68 Am. St. Rep. 516.

10. McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423; Crawfordsville *v.* Johnson, 51 Ind. 397.

11. Northwestern Cement, etc., Pavement Co. *v.* Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 451, 45 N. W. 868, where it is said: "A remark is made in that case [North Star Iron Works Co. *v.* Strong, 33 Minn. 1, 21 N. W. 740] that might seem to imply that it is necessary that the building should be described by its common name, but that must be construed in the light of the facts of the case then being considered. Many buildings have no common name, and can only be described by location and style of construction. The reference to the name of the building or its kind, contained in the form given in the statute, must be considered as merely suggestive of one way of describing it."

12. Tibbetts *v.* Moore, 23 Cal. 208 ("Moore's New Quartz Mill"); Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390 [*distinguishing* Hendy Mach. Works *v.* Pacific Cable Constr. Co., 24 Oreg. 152, 33 Pac. 403] ("the Methodist Episcopal Church," there being but one church of that denomination in the city); Scholes *v.* Hughes, 77 Tex. 482, 14 S. W. 148 ("the brick city hall building").

13. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; Springer *v.* Keyser, 6 Whart. (Pa.) 187. But *compare* Montrose *v.* Conner, 8 Cal. 344, holding that a description which may apply to various houses is not made cer-

ment, and not against the land on which it is situated, a description of such building, erection, or improvement sufficiently definite and certain to enable the officer who may be called on to remove it from the premises to identify it from all other buildings, erections, or improvements on the premises is indispensable to the obtention of the lien;[14] but if the building is sufficiently described for the purposes of identification, the lien is not defeated by a failure to describe the land.[15]

(x) *Sufficiency a Question For Jury.* Whether the description is sufficient to identify the property is a question for the jury.[16]

g. Ownership or Possession of Property — (i) *Necessity of Statement of Ownership.* The statutes regulating the acquisition of mechanics' liens usually require that the lien claim or statement shall state the name of the owner[17] or

tain by describing the house as the property of a certain person, who only owns one of the various houses, as against an innocent purchaser, who is not shown to have notice of this latter fact.

14. Hydraulic Press Brick Co. *v.* Weidner, 88 Mo. App. 17, holding further that no such definite description is necessary when it is sought, through the improvement, to bring the land itself under the lien, although there should always be a sufficient description of the building, erection, or improvement to furnish the primary object of the lien.

15. Emerson *v.* Gainey, 26 Fla. 133, 7 So. 526; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407. Under a statute allowing a lien on the building alone, a lien which describes the building accurately but the land imperfectly may be enforced against the building alone. Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120.

16. Cleverly *v.* Moseley, 148 Mass. 280, 19 N. E. 394; Kennedy *v.* House, 41 Pa. St. 39, 80 Am. Dec. 594; Wethered *v.* Garrett, 7 Pa. Co. Ct. 529, 535; Morrison *v.* Swarthmore Nat. Bank, 9 Del. Co. (Pa.) 573.

17. *Alabama.*— Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26.

California.— Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231; Phelps *v.* Maxwell's Creek Gold Min. Co., 49 Cal. 336; Hicks *v.* Murray, 43 Cal. 515.

Idaho.— Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218; White *v.* Mullins, 3 Ida. 434, 31 Pac. 801.

Kansas.— Lang *v.* Adams, 71 Kan. 309, 80 Pac. 593; Blattner *v.* Wadleigh, 48 Kan. 290, 29 Pac. 165.

Maryland.— Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412; Reindollar *v.* Flickinger, 59 Md. 469.

Massachusetts.— McPhee *v.* Litchfield, 145 Mass. 565, 14 N. E. 923, 1 Am. St. Rep. 422.

Montana.— Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991 (holding that a recorded lien claim which fails to state the name of the owner or person whose interest is sought to be charged is fatally defective); Richards *v.* Lewisohn, 19 Mont. 128, 47 Pac. 645.

Nevada.— Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50.

New Mexico.— Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481.

New York.— Beals *v.* B'Nai Jeshurun Cong., 1 E. D. Smith 654; McElwee *v.* Sandford, 53 How. Pr. 89.

Oklahoma.— Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanchard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Oregon.— Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

Pennsylvania.— *In re* Hill, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323.

Rhode Island.— A mechanic's lien cannot be enforced against the interest of any one in an estate, upon which interest no claim of lien is made in the notice required to be filed in the town-clerk's office. Bliss *v.* Patten, 5 R. I. 376.

Washington.— Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161.

Wyoming.— Davis *v.* Big Horn Lumber Co., 14 Wyo. 517, 85 Pac. 980; Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988, holding that the lien statement must show the name of the owner or owners, contractor or contractors, or both.

United States.— Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 225.

In the absence of any statutory requirement to that effect it is not necessary that the name of the owner of the land should be set forth in the statement. Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203; Christine *v.* Manderson, 2 Pa. St. 363.

In Nebraska it is not necessary to set forth the ownership of the property. Garlichs *v.* Donnelly, 42 Nebr. 57, 60 N. W. 323; Wakefield *v.* Latey, 39 Nebr. 285, 57 N. W. 1002; Hays *v.* Mercier, 22 Nebr. 656, 35 N. W. 894.

Where the object is to charge only the building, and not the land, the notice of lien need not state the name of the owner of the land. Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

The addition of the name of an agent as defendant and his description in the claim as such is mere surplusage, and may be amended under the Pennsylvania acts of April

reputed owner[18] of the property sought to be charged. It has been held that the failure to name some particular person as the owner renders the claim or statement fatally defective,[19] but the statutes usually require the name of the owner to be stated only where known to the claimant.[20] Under such statutes if the owner's name is known a statement thereof is essential to the validity of the claim,[21] and if the name of the owner is unknown that fact ought to be stated and the name of the reputed owner given;[22] but it has been held that if the owner's name be not known the claim need aver nothing on the subject.[23] The legal owner is the one to be named.[24] It has been said that it is the owner of the building or other improvement whose name must be specified in the notice and not the owner of the land where the same is erected.[25]

(II) *SUFFICIENCY OF STATEMENT.* The lien paper must clearly show who is

9, 1862, and June 11, 1879. Harner *v.* Thomas, 10 Pa. Dist. 487.

Where the building and the land are owned by different persons and the notice names only the owner of the building the lien attaches to the building but not to the land. Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

The residence of the owner must be stated under some Canadian statutes. Smith *v.* McIntosh, 3 Brit. Col. 26; Wallis *v.* Skain, 21 Ont. 532.

18. *California.*— Bryan *v.* Abbott, 131 Cal. 222, 63 Pac. 363 [*explaining* Santa Cruz Rock Pavement Co. *v.* Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174]; Kelly *v.* Lemberger, (1896) 46 Pac. 8; Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873; Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231; Phelps *v.* Maxwell's Creek Gold Min. Co., 49 Cal. 336; Hicks *v.* Murray, 43 Cal. 515.

Idaho.— Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218; White *v.* Mullins, 3 Ida. 434, 31 Pac. 801.

Maryland.— Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412.

Nevada.— Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50.

New Mexico.— Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481.

Oregon.—Allen *v.* Rowe, 19 Oreg. 188, 23 Pac. 901; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

Pennsylvania.— *In re* Hill, 2 Pa. L. J. Rep. 96, 3 Pa. L. J. 323.

Washington.— Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

United States.— Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 225.

The fact that conveyances to other persons were on record does not impair a finding that the person named as such was the reputed owner. Kelly *v.* Lemberger, (Cal. 1896) 46 Pac. 8.

19. Blattner *v.* Wadleigh, 48 Kan. 290, 29 Pac. 165.

20. *California.*— Kelly *v.* Lemberger, (1896) 46 Pac. 8; Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231.

Massachusetts.— McPhee *v.* Litchfield, 145 Mass. 565, 14 N. E. 923, 1 Am. St. Rep. 482 [*distinguishing* Amidon *v.* Benjamin, 128 Mass. 534; Kelly *v.* Laws, 109 Mass. 395].

Michigan.— Waters *v.* Johnson, 134 Mich. 436, 96 N. W. 504.

Montana.— Richards *v.* Lewisohn, 19 Mont. 128, 47 Pac. 645.

Nevada.— Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

United States.— Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 225.

21. Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50; Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

22. Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50; Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424. See also Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

23. It is not necessary to aver that the owner is unknown. West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231.

24. Sprague Inv. Co. *v.* Monat Lumber, etc., Co., 14 Colo. App. 107, 60 Pac. 179 (holding that a lien claim which fails to designate the legal owner is ineffectual as against subsequent encumbrancers and lienors, although it may designate the equitable owner); Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325 (holding that, although a deed absolute upon its face is intended as a mortgage between the parties to it, yet the mortgagee so holding the legal title is, for the purpose of foreclosure of a mechanic's lien, properly designated as the "owner or reputed owner" of the premises in the lien notice).

Filing ineffective second claim.— When a grantor of mortgaged property conveyed it to a judgment creditor by deed absolute on its face, but in fact a mortgage, the fact that a claimant, after having filed a lien in which the grantor was named as owner, filed a second lien on the property, styling the grantee in such deed as owner, did not impair his rights under the first lien. Kerrigan *v.* Fielding, 47 N. Y. App. Div. 246, 62 N. Y. Suppl. 115.

25. Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407 [*quoted* in Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67].

the owner of the property.[26] It is not sufficient that the name of the owner appears in the lien paper incidentally,[27] or as part of the description of the property;[28] but that he is the owner of the property sought to be charged must appear on the face of the lien as an independent matter,[29] either directly or by necessary inference.[30] Where, however, it is necessarily to be implied from the language used in the lien paper that a certain person named therein is the owner of the property this is sufficient, although it is not stated in positive and direct terms that such is the case.[31] In ascertaining whether the requirement in respect to designating the owner of the property has been complied with the account proper and the sworn statement annexed thereto may be read together.[32] It is not necessary to state in so many words that a lien is claimed against the interest of any particular person or owner, but the statutory requirements are satisfied when the name of the person against whose interest the lien is claimed is given together with a statement of the facts subjecting his interest to the lien.[33] If the property is owned by a corporation, the corporation should be named as owner,[34] while if it is owned by an unincorporated association the persons composing it should be described by their associate or joint name, or otherwise so that they can be identified.[35] Where the property is owned by several cotenants all should be named.[36] A statement naming as the owner the estate of a certain decedent is sufficient.[37] Where the statute requires a statement of the name of

26. See Scott *v.* Senderling, 7 Leg. Int. (Pa.) 42.

The owner's name must be truly stated.— Where it was stated that J owned the south half and M the north half of the lot and that J made the contract on behalf of himself and M, when in fact J owned the whole lot, the statement was insufficient. Conter *v.* Farrington, 46 Minn. 336, 48 N. W. 1134.

Sufficient statement.— A statement for a mechanic's lien as follows, "Name of owner, George A. Woods . . . Said contractors and claimants . . . claim a lien upon the following-described property . . . for that they did, under contract with said owner, furnish material for erecting the two-story frame building in and upon said property," sufficiently shows the owner's name. Deatherage *v.* Woods, 37 Kan. 59, 14 Pac. 474. *Compare* White *v.* Mullins, 3 Ida. 434, 31 Pac. 801, holding that a description of the parties at the head of the notice as follows: "W. and M., Subcontractors, versus B., Contractor, and M., Owner," is not such a direct allegation of the owner's name as the statute contemplates.

Insufficient statement.— An affidavit verifying an account filed on the basis of a mechanic's lien which alleged that at defendant's request he delivered to defendant, for the repairing, etc., "of his mill at C., in the county of P., and state of Minnesota, which mill is situate on lands in said county of P., described as lots 1, 2, 3, and 4, in block 38, town site of C.," certain mill supplies, was too loose, indefinite, and ambiguous as respects the ownership of the property sought to be subjected to the lien to satisfy the requirements of the statute, and hence fatally defective. Rugg *v.* Hoover, 28 Minn. 404, 10 N. W. 473.

27. Couter *v.* Farrington, 46 Minn. 336, 48 N. W. 1134; Gordon *v.* Deal, 23 Oreg. 153, 31 Pac. 287.

28. Gordon *v.* Deal, 23 Oreg. 153, 31 Pac. 287.

29. Gordon *v.* Deal, 23 Oreg. 153, 23 Pac. 287 [*distinguishing* Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407].

30. Gordon *v.* Deal, 23 Oreg. 153, 31 Pac. 287.

31. Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67. *Compare* White *v.* Mullins, 3 Ida. 434, 31 Pac. 801, holding that a notice which fails to state unequivocally and plainly the name of the owner or reputed owner is fatally defective.

32. U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

33. Ross *v.* Simon, 16 Daly (N. Y.) 159, 9 N. Y. Suppl. 536, 10 N. Y. Suppl. 742 [*reversing* 8 N. Y. Suppl. 2]. See also Ogden *v.* Alexander, (N. Y. 1893) 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641].

34. Beals *v.* B'Nai Jeshurun Cong., 1 E. D. Smith (N. Y.) 654.

35. Beals *v.* B'Nai Jeshurun Cong., 1 E. D. Smith (N. Y.) 654.

36. F. A. Drew Glass Co. *v.* Eagle Mill Co., 1 Kan. App. 614, 42 Pac. 387, holding that where a lien statement and the petition to enforce the lien alleged that two persons only owned the land, and it appeared from the agreed statement of facts on which the case was tried that the land was owned by such persons in common with another, the lien was void, and the lien claimant was not entitled to a lien for a proportionate share of his claim on the undivided interest in the premises of the persons specified in his statement and petition.

37. Reece *v.* Haymaker, 164 Pa. St. 575, 578, 30 Atl. 404 [*affirming* 25 Pittsb. Leg. J. N. S. 74], where it is said: "While this may not be considered the name of a person, it is sufficient to give notice and put all on inquiry." See also Welsh *v.* McGrath, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638, hold-

the owner or reputed owner it is sufficient to designate a particular person in the conjunctive as owner and reputed owner,[38] or in the alternative as owner or reputed owner.[39] The claimant can only be charged with knowledge of the ownership as apparent upon the public records and a claim charging the facts concerning the title as they there appear is sufficient.[40] The lien is not defeated by a mistake in the name of the owner,[41] or even by an honest mistake in naming the wrong person as the owner, believing him to be such;[42] but if the claimant knows the true owner and yet gives a wrong name in the statement the lien is defeated.[43] So where the claimant has in good faith named a particular person as reputed owner, under a statute allowing this, the lien is not lost if it turns out that another person is the real owner,[44] and *a fortiori* the lien is not defeated by naming the real owner as reputed owner.[45] As a rule it is not necessary that the claim should set forth the nature of the owner's estate or interest in the prop-

ing that where the owner who has incurred the indebtedness dies before the filing of a mechanic's lien, the statement is sufficient, as against the heirs, if filed against the estate of the owner, no statute requiring that the present owner's name be set forth.

38. Kelly *v.* Lemberger, (Cal. 1896) 46 Pac. 8; Arata *v.* Tellurium Great Southern Min. Co., 65 Cal. 340, 4 Pac. 195.

Proof that such person was the reputed owner only does not impair the lien. Kelly *v.* Lemberger, (Cal. 1896) 46 Pac. 8.

39. Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873; Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562]; Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481. See also Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

40. Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519 (holding that such a claim is not avoided by subsequently filing a complaint declaring the title otherwise and as it actually exists); Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412. *Compare* Lang *v.* Adams, 71 Kan. 309, 80 Pac. 593, holding that in ascertaining who is the owner of property on which a lien is claimed, and naming him in the statement for a lien, claimant cannot rest alone upon the public records and ignore all other sources of information.

41. Getchell *v.* Moran, 124 Mass. 404; Hays *v.* Tryon, 2 Miles (Pa.) 208.

42. Santa Cruz Rock-Pavement Co. *v.* Lyons, 133 Cal. 114, 65 Pac. 329; McPhee *v.* Litchfield, 145 Mass. 565, 14 N. E. 923, 1 Am. St. Rep. 482 ("especially in a case like this, where the honest mistake of the petitioner has not in any way misled or injured the respondents"); Hopkins *v.* Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815. *Compare* Waters *v.* Johnson, 134 Mich. 436, 96 N. W. 504, holding that a statute requiring the claim to state the name of the owner if known does not relieve the claimant of the consequences of a mistake in naming the wrong person as owner, and a mistake in stating the name of the wrong person as owner can be excused only by showing that it is justly chargeable to the true owner, as where a vendee neither took possession of the property nor recorded his deed.

In New York it has been expressly provided by statute that a failure to state the true name of the owner shall not affect the validity of the lien. Laws (1885), c. 342, § 4. See De Klyn *v.* Gould, 165 N. Y. 282, 59 N. E. 95, 80 Am. St. Rep. 719 [*affirming* 34 N. Y. App. Div. 436, 54 N. Y. Suppl. 345]; Steeves *v.* Sinclair, 56 N. Y. App. Div. 448, 67 N. Y. Suppl. 776 [*affirmed* in 171 N. Y. 676, 64 N. E. 1125]; Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305; Grippin *v.* Weed, 22 N. Y. App. Div. 593, 48 N. Y. Suppl. 112; Hankinson *v.* Riker, 10 Misc. (N. Y.) 185, 30 N. Y. Suppl. 1040 [*reversed* on other grounds in 152 N. Y. 20, 46 N. E. 292]; Walkam *v.* Henry, 7 Misc. (N. Y.) 532, 27 N. Y. Suppl. 997; Spruck *v.* McRoberts, 19 N. Y. Suppl. 128 [*reversed* on other grounds in 139 N. Y. 193, 34 N. E. 896]; Dennis *v.* Walsh, 16 N. Y. Suppl. 257. But under this statute a notice naming a lessee as the person against whose interest a lien is claimed, while valid as against him, is not sufficient to bind the estate of the lessor. De Klyn *v.* Simpson, 34 N. Y. App. Div. 436, 54 N. Y. Suppl. 345; Grippin *v.* Weed, 22 N. Y. App. Div. 593, 48 N. Y. Suppl. 112.

A claim of lien upon the separate property of a married woman, giving the names of the husband and wife as "the names of the owners and reputed owners of the said premises," is not void upon the ground that the husband had no interest in the property. The claimant need not state the name of the owner or reputed owner if he is ignorant of it; and a mistake therein cannot affect the validity of his claim. McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

A statement that the husband was the owner of the wife's property did not deprive the claimant of his lien where the lien was claimed against both the husband and the wife. Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177.

43. Amidon *v.* Benjamin, 128 Mass. 534; Kelly *v.* Laws, 109 Mass. 395.

44. Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41; Bryan *v.* Abbott, 131 Cal. 222, 63 Pac. 363; Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873.

45. Bryan *v.* Abbott, 131 Cal. 222, 63 Pac. 363.

erty.[46] The omission from the body of a mechanic's claim of the initial letter of the middle name of the owner is immaterial,[47] and a statement of the surname alone, with the additional statement that the christian name is unknown to the claimant, is sufficient.[48] So also a slight error in stating the name of a corporation which is the owner will not defeat the lien where the effect is not to mislead.[49] An objection that the claim states that a certain person is the owner of the "premises," instead of the "building," is frivolous.[50] Where it is stated that the claimant is informed that a person named was the owner of the premises, and it appears that such person is in fact the owner, the notice is sufficient, although the averment is not stated to be in accordance with the "best" information possessed, as required by the statute.[51]

(III) *Property of Married Women.* A statement showing that the work was done and the materials furnished for the improvement of the separate estate of a named married woman is sufficient, without other averments, to charge her property;[52] but an allegation in a mechanic's lien claim that a married woman is the owner of a building will not be extended to the ground on which it is erected.[53] The fact that a wife who has a community interest with her husband in real estate is not named as owner in a notice of claim for lien thereon will not defeat the lien, where it does not appear that the claimant knew of her interest;[54] but it has been held that a claim which shows that claimant knew that the owner was married, but fails to give the name of such owner's wife, is fatally defective.[55] A claim filed against the husband alone as owner and contractor, not referring to the wife or in any way making her a party to the record, gives no lien against her interest.[56]

(IV) *Property Held Under Contract of Sale.* An owner of property who has made an executory contract of sale remains the owner nevertheless and

46. Cornell *v.* Matthews, 27 N. J. L. 522; Cox *v.* Flanagan, (N. J. Ch. 1885) 2 Atl. 33; Ross *v.* Simon, 16 Daly (N. Y.) 159, 9 N. Y. Suppl. 536, 10 N. Y. Suppl. 742; Thomas *v.* Smith, 42 Pa. St. 68; Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338.

Mistake as to nature of title.— As against the owner of the property, a lien notice sufficiently alleges the ownership, although it erroneously states that the equitable title only is in him, and the legal title is in another. McHugh *v.* Slack, 11 Wash. 370, 39 Pac. 674.

Statutory requirement.— Under a statute requiring the lien to state whether it is claimed "against the fee itself or a lesser estate or interest therein," an averment in a mechanic's lien that the lien is claimed against "the building and curtilage" is insufficient. Maddocks *v.* McGann, 12 Pa. Dist. 701.

47. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472.

48. Richards *v.* Lewisohn, 19 Mont. 128, 47 Pac. 645.

49. Whiteselle *v.* Texas Loan Agency, (Tex. Civ. App. 1894) 27 S. W. 309 (holding that an affidavit for a mechanic's lien, in terms against the "Navarro County Fair Association" is sufficient to establish a lien against the "Navarro Fair Association"); Installment Bldg., etc., Co. *v.* Wentworth, 1 Wash. 467, 469, 25 Pac. 298 (where, in the notice of claim of lien, the corporation was described as "Installment Building and Loan Association," whereas in fact its true name was "Installment Building and Loan Company," and the court said: "We do not think that the variance was material. The corporation itself was making the improvement and would not have been misled by the slight error in stating its name. The case might be different if the property of the corporation was sought to be charged for an improvement for which it had not contracted"); Grafton Grocery Co. *v.* Home Brewing Co., (W. Va. 1906) 54 S. E. 349 (holding that a lien recorded against the "Home Brewing Company" whereas the full name was the "Home Brewing Company of Grafton" was sufficient).

50. Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873.

51. Hurbert *v.* New Ulm Basket-Works, 47 Minn. 81, 49 N. W. 521.

52. Reece *v.* Haymaker, 164 Pa. St. 575, 30 Atl. 404 [*affirming* 25 Pittsb. Leg. J. N. S. 74].

53. Shannon *v.* Shultz, 87 Pa. St. 481, 485, where it is said: "Against one *sui juris* it may be conceded that the averment of ownership in the building would, *prima facie*, extend the claim to the ground and curtilage. No such presumption can be applied to create a lien on the real estate of the wife."

54. Bolster *v.* Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Douthitt *v.* MacCulsky, 11 Wash. 601, 40 Pac. 186; Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161.

55. Sagmeister *v.* Foss, 4 Wash. 320, 39 Pac. 80, 744 [apparently *doubted* in Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161].

56. Finley's Appeal, 67 Pa. St. 453.

is properly named as owner in the notice of lien,[57] and a notice which does not name him as owner is fatally defective.[58] It has been held, however, that a statement naming only the vendee was sufficient to create a lien on the building owned by him, although the lien could not affect the land.[59]

(v) *LEASED PROPERTY.* In the case of leased property, if it is intended to claim a lien against the lessor's interest, he must be named as owner, and a notice stating only the name of the lessee creates no lien on the lessor's interest;[60] and conversely a notice simply naming the lessor as owner, possessor, and occupant creates no lien on the estate of the lessee.[61]

(vi) *CHANGE OF OWNERSHIP.* In case there has been a change of ownership, the general rule is that the person to be named as owner is the one who owns the property at the time when the claim of lien is made or filed,[62] and the claim is

57. Riley *v.* Watson, 3 Hun (N. Y.) 568, 6 Thomps. & C. 310. Where the property is in the possession of a vendee under a contract of sale a notice stating that the vendee is the possessor of the premises and occupies under a contract of purchase with the vendor "who is the owner . . . subject to said contract" is sufficient to reach the vendor's interest. Kealey *v.* Murray, 15 N. Y. Suppl. 403 [*distinguishing* Jones *v.* Manning, 6 N. Y. Suppl. 338].

58. Packard *v.* Sugarman, 31 Misc. (N. Y.) 623, 66 N. Y. Suppl. 30.

59. Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

60. De Klyn *v.* Gould, 165 N. Y. 282, 59 N. E. 95, 80 Am. St. Rep. 719 [*affirming* 34 N. Y. App. Div. 436, 54 N. Y. Suppl. 345] (holding that the provision of N. Y. Laws (1885), c. 342, § 4, that the failure to state in the notice of lien the name of the true owner, lessee, general assignee, or person in possession, against whose interest a lien is claimed, shall not impair the validity of such lien, refers to an unsuccessful attempt to designate such person, and does not authorize the lienor to name the lessee as the true person against whose interest he claims a lien and afterward proceed against the lessor against whose interest he did not intend to file notice of a claim); Hankinson *v.* Riker, 10 Misc. (N. Y.) 185, 30 N. Y. Suppl. 1049 [*reversed* on other grounds in 152 N. Y. 20, 46 N. E. 292]; Gordon *v.* Deal, 23 Oreg. 153, 31 Pac. 287.

61. Jones *v.* Manning, 6 N. Y. Suppl. 338. See also Carey *v.* Wintersteen, 60 Pa. St. 395.

62. *California.*—Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41; Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873.

Colorado.— Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989.

Massachusetts.— Amidon *v.* Benjamin, 128 Mass. 534.

Michigan.— Waters *v.* Johnson, 134 Mich. 436, 439, 96 N. W. 504, where it is said: "We cannot suppose that the law contemplated so futile a proceeding as a notice to one who has no interest whatever in the property, simply because he once had an interest therein."

Minnesota.— Laws (1889), c. 200, § 8, provides that the statement shall set forth "the name of the owner or reputed owner, at the time of making said statement . . . according to the best information then had." This statute was not, however, intended to imperatively require the allegation of ownership to relate strictly and inflexibly to the time of the making of the statement, and a lien was not defeated because the person named as owner was the one who owned the property at the time of the making of the contract and the furnishing of the materials instead of the one who owned it when the statement was filed. Finlayson *v.* Biebighauser, 51 Minn. 202, 53 N. W. 362. Prior to the adoption of this statute it was considered that the person to be named as owner was the one who was such when the contract was made or the materials furnished. Morrison *v.* Philippi, 35 Minn. 192, 193, 28 N. W. 239, where it is said: "The affidavit of lien claim in this case wholly fails to state that defendant was either at the time the materials were furnished, or the contract for furnishing them made, the owner of, or of any estate or interest in, the building for the construction of which they were furnished, or of any right, title, or interest in the land upon which the same was erected. Its only allegation in either of these respects is that the 'building is situated upon a certain lot owned by' defendant, which cannot mean more than that it is owned by him at the date of the affidavit. It follows that the affidavit is insufficient, under Anderson *v.* Knudsen, 33 Minn. 172, 22 N. W. 302; Keller *v.* Houlihan, 32 Minn. 486, 21 N. W. 729; Rugg *v.* Hoover, 28 Minn. 404, 10 N. W. 473; and Clark *v.* Schatz, 24 Minn. 300").

New Jersey.— Derrickson *v.* Edwards, 29 N. J. L. 468, 80 Am. Dec. 220 [*affirming* 28 N. J. L. 39].

Oregon.— Willamette Steam Mills, etc., Co. *v.* McLeod, 27 Oreg. 272, 40 Pac. 93.

Washington.— See Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161.

Wyoming.— Davis *v.* Big Horn Lumber Co., 14 Wyo. 517, 85 Pac. 980.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 233.

A statement that a certain person was the owner when the work was done or the materials furnished authorizes the construction that he is still the owner. Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001.

sufficient if it names such person only,[63] although it is not invalidated by stating the names of both the owner when the claimant was employed and the owner when the claim is filed,[64] without stating at what time title passed from the one to the other.[65] In some states, however, it is held that the name of the person who owned the property at the time when the contract was made or the work commenced is the proper one to be given.[66]

h. Description of Services or Materials — (i) *In General.* It is as a rule required that the claim or statement shall set forth the nature and amount of the labor or materials for which the lien is claimed,[67] although this is held to be necessary only when the claimant contracted with the contractor and not when his contract was directly with the owner or his agent.[68]

63. Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41.

64. Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41.

A separate claim was not required because of the change of ownership or because of mortgages executed by the new owner to the former owners. Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41.

65. Ah Louis *v.* Harwood, 140 Cal. 500, 74 Pac. 41.

66. Fourth Ave. Baptist Church *v.* Schreiner, 88 Pa. St. 124; Jones *v.* Shawhan, 4 Watts & S. (Pa.) 257; Wagner *v.* Manheck, 18 Pa. Co. Ct. 471; Chace *v.* Pidge, 21 R. I. 70, 41 Atl. 1015, holding that R. I. Gen. Laws, c. 206, § 7, requiring the account for a mechanic's lien to contain a notice "to . . . whose estate in the same the said account or demand refers," means the owner when the construction was begun and the lien attached, and not the owner when the account is lodged.

The former owner may be named as contractor and the purchaser joined as owner. Sullivan *v.* Johns, 5 Whart. (Pa.) 366.

67. *Illinois.*— Orr, etc., Hardware Co. *v.* Needham Co., 62 Ill. App. 152 [*affirmed* in 169 Ill. 100, 48 N. E. 444, 61 Am. St. Rep. 151].

Iowa.— Greene *v.* Ely, 2 Greene 508, the particulars of the claim must be fully stated.

Maryland.— Carson *v.* White, 6 Gill 17.

Missouri.— Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225; O'Shea *v.* O'Shea, 91 Mo. App. 221; Cahill *v.* Christian Church Orphan School, 63 Mo. App. 28.

New York.— Toop *v.* Smith, 181 N. Y. 283, 73 N. E. 1113, 34 N. Y. Civ. Proc. 211 [*affirming* 87 N. Y. App. Div. 241, 84 N. Y. Suppl. 326]; McKinney *v.* White, 15 N. Y. App. Div. 423, 44 N. Y. Suppl. 561; Vogel *v.* Luitwieler, 52 Hun 184, 5 N. Y. Suppl. 154; Luscher *v.* Morris, 18 Abb. N. Cas. 67.

Pennsylvania.— Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254; Lee *v.* Burke, 66 Pa. St. 336; Russell *v.* Bell, 44 Pa. St. 47; Singerly *v.* Cawley, 26 Pa. St. 248; Barclay's Appeal, 13 Pa. St. 495; Lauman's Appeal, 8 Pa. St. 473; Noll *v.* Swineford, 6 Pa. St. 187; Smaltz *v.* Knott, 3 Grant 227; Wolfe *v.* Keeley, 9 Pa. Dist. 515; McNamee *v.* Hildeburn, 9 Pa. Co. Ct. 267; Heron *v.* Robinson, 2 Pars. Eq. Cas. 248; *In re* Wells, 2 Del. Co. 172; Endy *v.* Ogrydziak, 10 Kulp 102; Lynch *v.* Feigle, 11 Phila. 247.

Virginia.— Gilman *v.* Ryan, 95 Va. 494, 28 S. E. 875; Shackleford *v.* Beck, 80 Va. 573.

Washington.— Tacoma Lumber, etc., Co. *v.* Kennedy, 4 Wash. 305, 30 Pac. 79, a lien notice should be sufficiently definite to fairly apprise the owner of what he is charged with, what kind of material, and what the same was furnished for.

West Virginia.— See Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

United States.— Breed *v.* Glasgow, Inv. Co., 92 Fed. 760 [*affirmed* in 101 Fed. 863, 42 C. C. A. 61], Virginia statute.

Canada.— Smith *v.* McIntosh, 3 Brit. Col. 26.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 234.

Contra.— McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; Davis *v.* Livingston, 29 Cal. 283; Wescott *v.* Bunker, 83 Me. 499, 22 Atl. 388; Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090, under Gen. St. § 3812, the particular kind of labor performed need not be specified.

Whether the claim is for work or materials must be shown. Robinson *v.* Davis, 8 Del. Co. (Pa.) 237.

Claims for labor and for material must be stated as separate items.— Noll *v.* Swineford, 6 Pa. St. 187.

Where the claim was for labor only it was not necessary to specify the number of days of labor as a separate item, Mass. St. (1872) c. 318, not being applicable in such case. Patrick *v.* Smith, 120 Mass. 510.

As between the contractor and one furnishing materials to the subcontractor, it is not necessary that the notice of the lien of the latter, which states that the materials were furnished for and used in the erection of the building, and that there is due a certain sum from the contractor's agent in whose name the contract was made, should also state the nature and character of the materials, it not appearing that the contractor was misled. Vogel *v.* Luitwieler, 52 Hun (N. Y.) 184, 5 N. Y. Suppl. 154.

Claim need not state reasonable value of materials furnished.— McDonnell *v.* Nicholson, 67 Mo. App. 408.

68. Harnish *v.* Herr, 98 Pa. St. 6; Russell *v.* Bell, 44 Pa. St. 47; Young *v.* Lyman, 9 Pa.

(II) *AVERMENT AS TO USE OR FURNISHING FOR USE IN BUILDING.* As a rule the lien statement for materials furnished must contain a statement that the materials were furnished for[69] or on the account of the building,[70] and were actually used therein.[71] The failure of the lien claim to state the necessary facts in this respect is not cured by verdict on testimony showing the necessary facts to have actually existed.[72]

(III) *STATEMENT OF CAPACITY IN WHICH CLAIM ACQUIRED.* It would seem proper that the claim or statement should show whether the lienor claims as contractor, subcontractor, materialman, or otherwise.[73]

(IV) *SUFFICIENCY.* The statement must show on its face what the work or materials were for which the lien is claimed,[74] but if this appears with reasonable

St. 449. See also Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254; Endy *v.* Ogrydziak, 10 Kulp (Pa.) 102.

69. McGlauflin *v.* Beeden, 41 Minn. 408, 43 N. W. 86; Keller *v.* Houlihan, 32 Minn. 486, 21 N. W. 729; Smith *v.* Baily, 8 Daly (N. Y.) 128; Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822; Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

Claim held sufficient.— A claim filed in due time for lumber furnished in and about the erection and construction of the building and appurtenances, describing the building, accompanied by a bill of particulars, in which it is stated that the lumber was delivered for the building in question, designating it, is a sufficient compliance with the requirements of the statute. Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675.

70. Lee *v.* Exeter Club, 9 Kulp (Pa.) 209.

71. Hill *v.* Ryan, 54 Ind. 118; Bouchard *v.* Gnisti, 22 R. I. 591, 48 Atl. 934. *Contra*, Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

Under the Missouri statute it is not necessary that the lien claim should state that the materials went into the building (McDonnell *v.* Nicholson, 67 Mo. App. 408), but a statement which fails to show that the materials were furnished for the building described is insufficient, although it alleges that the materials actually went into the construction (Fathman, etc., Planing Mill Co. *v.* Ritter, 33 Mo. App. 404).

Under the California statute it is not necessary to state either that the materials were furnished to be used (Neihaus *v.* Morgan, (Cal. 1896) 45 Pac. 255), or that they were used in constructing the buildings provided for in the original contract (Davis *v.* Livingston, 29 Cal. 283).

Where several buildings are erected under one contract it is not necessary, especially as between the original parties, to aver what went into each building. White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466.

Materials for different structures.— Where a claimant attempts to include in his claim against a building materials furnished for and used in some structure not an integral part of the building, although appurtenant to and necessary for its convenient enjoyment, the statements in the claim as filed must be in accordance with the facts. Thus where a claim is filed against a dwelling-house plaintiff's right to recover is not sustained by evidence that the material was furnished for the erection of a fence, outhouse, or stable not erected under the same contract and not mentioned in the claim as filed. Miller *v.* Heath, 22 Pa. Super. Ct. 313.

Sufficient statement.— A statement in the notice that "said lien is claimed to secure the payment of an account . . . for materials furnished to and for" the contractor, "under his contract with the said owners to erect said house," is sufficient to show that the materials furnished were to be used in building such house. Johnston *v.* Harrington, 5 Wash. 73, 31 Pac. 316.

72. Fathman, etc., Planing Mill Co. *v.* Ritter, 33 Mo. App. 404.

73. See McMonegal *v.* Wilson, 103 Mich. 264, 61 N. W. 495 (holding that an affidavit for a mechanic's lien, asserting that deponent furnished labor and material for building a house on a lot in pursuance of a contract with W, the owner of the lot, and there is due deponent therefor, from W, a certain amount on the contract, and a certain amount for extras done on the house under the contract, and damages suffered by deponent because W failed to comply with the contract, purports to be the affidavit of a principal contractor and not of a materialman); Ward *v.* Conwell, 8 Del. Co. (Pa.) 17 (holding that an allegation that the work was done in pursuance to a contract with the agent of the owners sufficiently shows that the claimants were contractors and not subcontractors).

74. Dwyer Brick Works *v.* Flanagan, 87 Mo. App. 340 [*distinguishing* Henry *v.* Plitt, 84 Mo. 237], holding that where the account consisted merely of numbers preceded by the words "red" and "hard" the account was not sufficient, and that the fact that the account showed that the D. B. "Brick Works" was the claimant, was not sufficient to show that the words and figures referred to brick.

Statements held insufficient see Toop *v.* Smith, 181 N. Y. 283, 73 N. E. 1113, 34 N. Y. Civ. Proc. 211 [*affirming* 87 N. Y. App. Div. 241, 84 N. Y. Suppl. 326]; McKinney *v.* White, 162 N. Y. 601, 57 N. E. 1116; Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254; Heron *v.* Robinson, 2 Pars. Eq. Cas. (Pa.) 248; Bolster *v.* Stocks, 13 Wash. 460, 43 Pac. 532,

certainty and precision the statement is sufficient.[75] The statement should so describe the labor and materials as to enable the owner to determine as to the *bona fides* and reasonableness of the contract,[76] and should inform the owner of the particulars of the claim so that he may make the necessary inquiries to satisfy himself as to its justice as a lien on his property.[77] A claim for materials should be sufficiently definite to fairly apprise the owner of what he is charged with, what kind of materials, and what the same were furnished for;[78] but precise accuracy as to the amount of material furnished is not essential to the validity of the statement,[79] and the court will not require too great a particularity in the specification of the quality of the materials.[80] The lien is not defeated by a slight discrepancy between the claim and the bill filed with it,[81] or by the failure of the statement to state in express terms that the materials for which the lien is claimed were furnished by the claimant.[82] Where various papers forming part of a mechanic's lien account refer to each other in such a way as to give the information required by the lien law touching the materials and labor furnished, the account will be held sufficient.[83] It has been held that where a contract is made for a gross sum, with a provision that extra material shall be furnished at an agreed price, if the extras are to be included in the lien they must be specified.[84]

534, 1099; U. S. Savings, etc., Co. *v.* Jones, 9 Wash. 434, 37 Pac. 666; Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729; Tacoma Lumber, etc., Co. *v.* Wolff, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462; Tacoma Lumber, etc., Co. *v.* Wilson, 3 Wash. 786, 29 Pac. 829; Breed *v.* Glasgow Inv. Co., 92 Fed. 760 [*affirmed* in 101 Fed. 863, 42 C. C. A. 61].

75. See Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638.

Statements held sufficient see the following cases:

Indiana.— Siegmund *v.* Kellogg-Mackay-Cameron Co., (App. 1906) 77 N. E. 1096.

Iowa.— Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021.

Minnesota.— Knight *v.* Norris, 13 Minn. 473.

Missouri.— Steininger *v.* Raeman, 28 Mo. App. 594.

New York.— Gilmour *v.* Colcord, 183 N. Y. 342, 76 N. E. 273 [*modifying* 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689]; Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638; Clarke *v.* Heylman, 80 N. Y. App. Div. 572, 80 N. Y. Suppl. 794; Hunter *v.* Walter, 12 N. Y. Suppl. 60 [*affirmed* in 128 N. Y. 668, 29 N. E. 145, 1030].

Pennsylvania.— McDowell *v.* Hill, 1 Phila. 102.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 236.

Where there is a contract for a fixed sum to do the work and furnish the material, it is sufficient to set out the contract price, for no amount has been fixed for either the work or the material separately. Gunther *v.* Bennett, 72 Md. 384, 19 Atl. 1048; Pue *v.* Hetzell, 16 Md. 539.

76. Warren *v.* Quade, 3 Wash. 750, 29 Pac. 827.

77. Endy *v.* Ogrydziak, 10 Kulp (Pa.) 102.

Lumping charge.— A claim filed by a subcontractor and containing only a lumping charge is incurably bad. Wharton *v.* Real Estate Inv. Co., 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. Rep. 629 [*reversing* 5 Pa. Dist. 283, and *following* McFarland *v.* Schultz, 168 Pa. St. 634, 32 Atl. 94; Lee *v.* Burke, 66 Pa. St. 336; Shields *v.* Garrett, 5 Wkly. Notes Cas. (Pa.) 120].

It is not necessary to set forth the details of work and material, since the Pennsylvania act of 1849, provided the dates of the commencement and completion of the items of work done under the contract are stated, although the contract was not with the owner. Evans *v.* Weaver, 12 Phila. (Pa.) 337.

78. Tacoma Lumber, etc., Co. *v.* Kennedy, 4 Wash. 305, 30 Pac. 79.

79. Halsted, etc., Co. *v.* Arick, 76 Conn. 382, 56 Atl. 628.

80. Ferguson *v.* Vollum, 1 Phila. (Pa.) 181, holding that a claim describing lumber as "third common" was sufficient.

81. Francis *v.* Wernwag, 12 Montg. Co. Rep. (Pa.) 104, holding that a claim for a mechanic's lien for "hauling stone, sand, etc.," is not invalidated by the fact that the bill filed with the lien only mentions stone.

82. Sickman *v.* Wollett, 31 Colo. 58, 71 Pac. 1107.

83. Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737; O'Shea *v.* O'Shea, 91 Mo. App. 221, holding that where a notice to the owner referred to in the lien statement and attached thereto and filed therewith describes the character of the work and where done this supplies an omission to characterize the work in the lien statement itself.

84. Smith *v.* Gilmore, 34 Wkly. Notes Cas. (Pa.) 128. But *compare* Bruns *v.* Braun, 35 Mo. App. 337, holding that it is not necessary to state separately additional items resulting from changes agreed upon by the claimant and the owner during the progress of the work where there was no separate contract therefor.

Where price not fixed.— A claim "for extra work done on said house, $200," is insufficient, where the sum stated was not agreed upon or fixed; but the number of days

Where the contract is that the price of the work shall be ascertained by measurement and computation after its completion, it is sufficient to set out generally the nature of the work and the amount due without further specifications;[85] but where the amount of the claim is not a sum agreed upon or fixed, but is the result of computation, as in the case of extra work, the elements of the computation are the subject of an account which should be given.[86] It is no objection to a lien statement that it does not include all the labor that was performed by the claimant, with credits for payments admitted to have been made, where it does not include any labor for which payment is not claimed. The fact that the claimant performed other labor which has been paid for is immaterial.[87] Under the New York statute where the claim is for labor and materials already performed and furnished it is not necessary to state separately the amounts claimed for labor and for materials.[88] In Pennsylvania the claim must specify on its face the class to which it belongs, whether for original erection and construction, or for addition, alteration, or repair.[89] A claim on its face relating to one class will not support a lien relating to the other;[90] but a claim which shows by apt words the class to which it belongs is sufficient, although it does not use the statutory phrase.[91]

i. Statement as to Contract or Consent — (i) *Agreement or Consent of Owner* — (a) *In General.* In some states it is required that the lien notice, claim, or statement should show that the work was done or the materials furnished pursuant to a contract with or with the consent of the owner of the property or of the interest sought to be charged;[92] but in other states this is not necessary,[93] the existence of any contract or consent of the owner such as will

worked, and when performed and the prices charged, should have appeared. McPherson *v.* Greenwell, 27 R. I. 178, 61 Atl. 175.

85. Miller *v.* Bedford, 86 Pa. St. 454; Hill *v.* McDowell, 14 Pa. St. 175.

86. McPherson *v.* Greenwell, 27 R. I. 178, 61 Atl. 175, where it is said: "The number of days' work, and when performed, and the price or prices charged, at least, should appear."

87. Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367.

88. Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205], since the statute only requires the amount claimed for labor and materials performed and furnished to be stated separately from the claim for labor and materials to be performed and furnished.

89. Wharton *v.* Real Estate Inv. Co., 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. Rep. 629 [*reversing* 5 Pa. Dist. 283]; Morrison *v.* Henderson, 126 Pa. St. 216, 17 Atl. 599.

90. Wetmore's Appeal, 91 Pa. St. 276.

91. Wharton *v.* Real Estate Inv. Co., 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. Rep. 629 [*reversing* 5 Pa. Dist. 283].

92. Lapham *v.* Ransford, 27 Ohio Cir. Ct. 80; Fenner *v.* Real Estate Trust Co., 13 Pa. Dist. 47, 29 Pa. Co. Ct. 329; Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424. *Contra,* Wagner *v.* Manbeck, 18 Pa. Co. Ct. 471.

In Wisconsin a subcontractor's lien claim must show with whom the original contract was made, and that such person had an interest in the premises (Bertheolet *v.* Parker, 43 Wis. 551), but a claim filed by a principal contractor need not state that the person against whom the demand is claimed has any interest in the premises (Moritz *v.* Splitt, 55 Wis. 441, 13 N. W. 555).

Authority to contract. — A claim filed against property held by a trustee is fatally defective where it sets forth no contract made by authority of the court or of any power contained in a deed or will, and contains no allegation of the right of the trustee to subject the trust property to a lien. Fenner *v.* Real Estate Trust Co., 13 Pa. Dist. 47, 29 Pa. Co. Ct. 329.

Under the Pennsylvania act of 1845 a reference to a special contract in a mechanic's claim was unnecessary. O'Brien *v.* Logan, 9 Pa. St. 97.

A statement showing a contract with a firm, the members of which are the owners of the property, sufficiently shows a contract with the owners of the property. Eau Claire-St. Louis Lumber Co. *v.* Roeder, 81 Mo. App. 337.

Person in possession. — Where a statement for a lien alleges that the work was done under a contract with a person in possession of the premises, it creates no lien against the owners, and an allegation in the petition that the person in possession was agent for the owners, so as to make the contract that of the owners, is insufficient for that purpose. Filberl *v.* Davis, 4 Ohio Dec. (Reprint) 496, 2 Clev. L. Rep. 265.

93. Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139; Burkitt *v.* Harper, 79 N. Y. 273; Hauptman *v.* Catlin, 20 N. Y. 247 [*affirming* 3 E. D. Smith 666, 4 Abb. Pr. 472]; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997 [*explaining* Willamette Steam Mills, etc., Co. *v.* McLeod, 27 Oreg. 272, 40 Pac. 93; Curtis *v.* Sestanovich, 26

render his land subject to the lien being considered a matter of pleading and proof at the trial.[94]

(B) *Where Owner a Married Woman.* In Pennsylvania in order that a mechanic's lien claim may bind the estate of a married woman, it must show on its face every requisite to make it a valid claim against her.[95] Her coverture must explicitly appear,[96] and the claim must show that the work or material was necessary for the improvement or repair of her separate estate,[97] that it was so applied,[98] and that it was done or furnished at her instance and request,[99] on her contract,[1] or by her authority and with consent.[2] Merely naming the husband as contractor is not sufficient.[3]

Oreg. 107, 37 Pac. 67; Rankin *v.* Malarkey, 23 Oreg. 593, 32 Pac. 620, 34 Pac. 816 (*distinguished* in Cross *v.* Tscharnig, 27 Oreg. 49, 39 Pac. 540)], holding that it is not necessary that the claim should state the contractual relations existing between the lien claimant and the owner.

Relation between employer and owner.— It is not necessary that the claim should show that the person with whom the claimant contracted or to whom he furnished material, etc., stood in such a relation to the owner that he could bind the property. Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860; Cahill *v.* Ely, 55 Mo. App. 102.

In Minnesota and Washington it was formerly required that the statement should show that the work was done or the materials furnished by virtue of a contract with the owner or at his instance (Merriman *v.* Bartlett, 34 Minn. 524, 26 N. W. 728; Anderson *v.* Knudsen, 33 Minn. 172, 22 N. W. 302; Keller *v.* Houlihan, 32 Minn. 486, 21 N. W. 729; Rugg *v.* Hoover, 28 Minn. 404, 10 N. W. 473; O'Neil *v.* St. Olaf's School, 26 Minn. 329, 4 N. W. 47; Clark *v.* Schatz, 24 Minn. 300; Sautter *v.* McDonald, 12 Wash. 27, 40 Pac. 418; Collins *v.* Snoke, 9 Wash. 566, 38 Pac. 161; Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729; Heald *v.* Hodder, 5 Wash. 677, 32 Pac. 728; Tacoma Lumber, etc., Co. *v.* Wilson, 3 Wash. 786, 29 Pac. 829; Warren *v.* Quade, 3 Wash. 750, 29 Pac. 827); but this requirement was dispensed with in Minnesota by Laws (1889), c. 200 (Hurlbert *v.* New Ulm Basket-Works, 47 Minn. 81, 49 N. W. 521), and in Washington by Laws (1893), p. 34, § 5, Ballinger St. Wash. (1897) § 5904 (Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001).

94. Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860; Burkitt *v.* Harper, 79 N. Y. 273; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997. Although the notice should probably contain an allegation that the person to whom the materials were furnished was a contractor with the owner an omission thereof is not a fatal defect, and where the complaint in a proceeding to foreclose the lien contains all the necessary allegations, and the parties go to trial, the defect may be disregarded, or supplied by amendment. Darrow *v.* Morgan, 65 N. Y. 333.

95. Loomis *v.* Fry, 91 Pa. St. 396; Lloyd *v.* Hibbs, 81 Pa. St. 306. A lien against the property of a married woman filed against husband and wife, but not stating that the wife contracted the debt, or that the husband was the contractor for the building, is invalid, and should be stricken off on motion. Ward *v.* Black, 7 Phila. (Pa.) 342.

It must appear from the record that the debt which is sought to be charged upon her separate estate is within the spirit and meaning of the statute. Schriffer *v.* Saum, 81 Pa. St. 385; Dearie *v.* Martin, 78 Pa. St. 55. See also Murray *v.* Keyes, 35 Pa. St. 384; Mahon *v.* Gormley, 24 Pa. St. 80.

96. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Dearie *v.* Martin, 78 Pa. St. 55; Van Roden *v.* Sterrett, 7 Wkly. Notes Cas. (Pa.) 196.

The coverture of the owner is necessarily implied where the claim states that the materials were furnished "at her request and the request of her said husband." Kelly *v.* McGehee, 137 Pa. St. 443, 20 Atl. 623.

97. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Loomis *v.* Fry, 91 Pa. St. 396; Kuhns *v.* Turney, 87 Pa. St. 497.

98. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Kuhns *v.* Turney, 87 Pa. St. 497; Schriffer *v.* Saum, 81 Pa. St. 385; Heugh *v.* Jones, 32 Pa. St. 432. *Compare* Shannon *v.* Broadbent, 2 Pa. Dist. 220.

99. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Lloyd *v.* Hibbs, 81 Pa. St. 306.

A statement that materials were furnished "at the request" of a married woman shows her knowledge and assent, or direction. Duck *v.* O'Rourke, 19 Wkly. Notes Cas. (Pa.) 497.

That the work or materials were in fact furnished on her order is immaterial, if this fact is not made to appear in the lien claim. Lloyd *v.* Hibbs, 81 Pa. St. 306; Dearie *v.* Martin, 78 Pa. St. 55; Finley's Appeal, 67 Pa. St. 453.

1. Lloyd *v.* Hibbs, 81 Pa. St. 306. *Compare* Shannon *v.* Broadbent, 2 Pa. Dist. 220.

Language raising legal implication of contract on part of married woman see Flinn *v.* Graff, 2 Pa. Co. Ct. 533.

2. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Dearie *v.* Martin, 78 Pa. St. 55. *Compare* Shannon *v.* Broadbent, 2 Pa. Dist. 220.

Claim held sufficient in all respects see Kelly *v.* McGehee, 137 Pa. St. 443, 20 Atl. 623.

3. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Dearie *v.* Martin, 78 Pa. St. 55; Ward *v.* Black, 7 Phila. (Pa.) 342.

(II) *TERMS OF CONTRACT.* Under some statutes the lien claim is required to state the terms, time given, and conditions of the claimant's contract with the owner or the contractor, as the case may be,[4] and the notice must state these matters plainly, unequivocally,[5] and correctly[6] or it will be fatally defective. But a

A claim setting forth a joint contract by a husband and wife to charge her real estate will be stricken off. Davis *v.* Narey, 2 Leg. Rec. (Pa.) 326.

4. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 109 Cal. 566, 42 Pac. 154.

Idaho.— White *v.* Mullins, 3 Ida. 434, 31 Pac. 801.

Maryland.— Baker *v.* Winter, 15 Md. 1.

New Mexico.— Pearce *v.* Albright, 12 N. M. 202, 76 Pac. 286; Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

New York.— Dugan *v.* Brophy, 55 How. Pr. 121.

Pennsylvania.— Billmeyer, etc., Co. *v.* Brubaker, 17 York Leg. Rec. 113, 114, 115.

Utah.— Morrison *v.* Willard, 17 Utah 306, 53 Pac. 832, 70 Am. St. Rep. 784.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 239.

In Colorado it has been held that the requirement of the law that the lien claimant shall incorporate the terms and conditions of his contract into his lien statement refers only to the principal contractor and not to the subcontractors. Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786. *Compare* Harris *v.* Harris, 9 Colo. App. 211, 47 Pac. 841.

In Washington it was formerly required that the lien notice should state the terms and conditions of the contract under which the work was done or the materials were furnished (Collins *v.* Snoke, 9 Wash. 566; Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729; Heald *v.* Hodder, 5 Wash. 677, 32 Pac. 728; Tacoma Lumber, etc., Co. *v.* Wilson, 3 Wash. 786, 29 Pac. 829; Warren *v.* Quadé, 3 Wash. 750, 29 Pac. 827; Gates *v.* Brown, 1 Wash. 470, 25 Pac. 914), but under the present statute (Ballinger Code Wash. (1897) § 5904) this is not necessary (Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001).

Ill. Rev. St. c. 82, § 4, does not require that the statement shall state the time when the amount claimed is due. Schroth *v.* Black, 50 Ill. App. 168.

In the case of a verbal contract the Texas statute does not contemplate that the terms thereof should be set out, but a statement that the work was done "at the request and with the approval of" defendant is sufficient. Pool *v.* Wedemeyer, 56 Tex. 287. Under the Ohio statute, when the contract is not in writing, no "statement of the amount and times of payment to be made thereunder" is required in the affidavit for a lien. Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401.

If a claim is made for extra work or material the statement must state the terms and conditions of the contract under which it was done or furnished. Knelly *v.* Horwath, 208 Pa. St. 487, 57 Atl. 957 [*affirming* 27 Pa. Co. Ct. 545].

5. White *v.* Mullins, 3 Ida. 434, 31 Pac. 801.

Alternative statement.— A notice which states that the amount claimed is the "agreed price or value" is insufficient because of the alternative statement. Siegel *v.* Ehrshowsky, 46 Misc. (N. Y.) 605, 92 N. Y. Suppl. 733; Villaume *v.* Kirchner, 85 N. Y. Suppl. 377.

With reference to price, a notice is sufficient which states the price agreed on to have been "the usual price, and what said materials were reasonably worth at their place of business." Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426. The statement in a claim that the labor was to be performed "at the usual rates" is equivalent to stating "for what it was reasonably worth." McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

A notice is sufficient which states that the terms and conditions were "cash on completion of the contract" (Kelley *v.* Plover, 103 Cal. 35, 36 Pac. 1020), "cash upon demand, in gold coin of the United States" (Blackman *v.* Marsicano, 61 Cal. 638 [*distinguishing* Hooper *v.* Flood, 54 Cal. 218), or "that the price of all materials furnished . . . should be due on the delivery of the same" (Cohn *v.* Wright, 89 Cal. 86, 26 Pac. 643); but a statement simply that the terms of the contract "were and are cash" has been held insufficient (Hooper *v.* Flood, 54 Cal. 218). A statement in the claim that at the time of the work there was no agreement as to price, but it was agreed that the claimant was to be paid what the labor was reasonably worth, and that afterward the sum of four dollars per day was agreed upon between the claimant and the contractor as a reasonable sum, properly states the terms of the contract. McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

Segregating claims for labor and for materials.— A lien notice which claims both for materials furnished and labor performed, but does not segregate the two or describe the kind of materials, is defective as not sufficiently describing the terms and conditions of the contract. U. S. Savings, etc., Co. *v.* Jones, 9 Wash. 434, 37 Pac. 666. But *compare* Spears *v.* Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789, holding that where there is no separate contract for labor and materials but one gross contract for everything required in the prosecution of a particular work, it is not necessary that the lien notice in setting out the terms of the contract should claim separate amounts for materials and for labor.

6. Nofziger Bros. Lumber Co. *v.* Shafer, 2 Cal. App. 219, 83 Pac. 284.

A substantial variance between the statement of the lien notice as to the terms and

substantial compliance with this requirement is sufficient,[7] and the law is satisfied with a general statement of what each party to the contract obligated himself to do.[8] The fact that the contract is with the owner instead of with the contractor will not excuse a lien claimant from fully stating the terms and conditions of the contract in the lien notice filed by him on the ground that the owner has knowledge of the terms.[9] Under a statute requiring the claimant to state the terms of his contract a subcontractor need not set out the contract between the principal contractor and the owner;[10] and a notice of lien of a materialman which refers to the contract between the contractor and the owner of the building for the times of making payments to the materialman, which were to be made at the times when payments became due to the contractor, is not invalidated because it does not repeat the provisions of the principal contract on that subject where the principal contract has been duly recorded and the terms of payment can be ascertained therefrom.[11] Of course if there are no special terms, time given, or conditions, none can be stated, and in the absence of any such specifications or proofs to the contrary, it will be presumed that none existed and that payment was to be made on delivery;[12] and the fact that the law implies an agreement to pay upon delivery does not render it essential to state such legal rule in the notice as a term or condition.[13] A notice which refers to a copy of the contract attached to the notice and made a part thereof in which the terms, time given, and conditions are stated is sufficient.[14] A statement which fails to give the entire contract price as required by statute is fatally defective.[15] A notice which in stating the terms of the contract refers to the plans and specifications, which are not attached to the notice, is not thereby rendered defective if it states their substance,[16] although it would be otherwise if their substance was not stated.[17] In the absence of any statu-

conditions of the contract and the actual contract proved is fatal to the lien. Wilson *v.* Nugent, 125 Cal. 280, 57 Pac. 1008; Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; Jones *v.* Walker, Sheld. (N. Y.) 350 [*affirmed* in 63 N. Y. 612].

An incorrect statement of the date of the claimant's contract does not invalidate the lien where the terms and conditions are correctly set forth and are sufficient to identify the contract referred to, and no one is misled by the error. Pacific Mut. L. Ins. Co. *v.* Fisher, 109 Cal. 566, 42 Pac. 154 (holding that a statement that the date of the contract was Jan. 23, 1889, while the contract proved was entered into on or about April 27, 1891, did not invalidate the lien, although at the earlier date neither of the parties with whom the contract was made owned the real estate); Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310]; Mitchell *v.* Penfield, 8 Kan. 186.

7. McGinty *v.* Morgan, 122 Cal. 103, 54 Pac. 392.

Claims held sufficient see McGinty *v.* Morgan, 122 Cal. 103, 54 Pac. 392; Snell *v.* Payne, 115 Cal. 218, 46 Pac. 1069; Bolster *v.* Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Washington Mill Co. *v.* Craig, 7 Wash. 556, 35 Pac. 413.

8. Branham *v.* Nye, 9 Colo. App. 19, 47 Pac. 402, holding that a lien claim which states in general terms that the conditions of the contract were the furnishing of materials and labor by the claimant, and the payment of a specified sum by the owner on completion and acceptance of the building is sufficient. See also Bolster *v.* Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099.

9. U. S. Savings, etc., Co. *v.* Jones, 9 Wash. 434, 37 Pac. 666.

10. Harris *v.* Harris, 9 Colo. App. 211, 47 Pac. 841; Brubaker *v.* Bennett, 19 Utah 401, 57 Pac. 170.

11. San Diego Lumber Co. *v.* Wooldredge, 90 Cal. 574, 27 Pac. 431.

12. Lonkey *v.* Wells, 16 Nev. 271. A requirement that the notice shall state the "time given" means the time of payment for the work and labor performed and materials furnished as agreed upon and expressed in the contract and does not apply where no distinct time was agreed upon. Hills *v.* Ohlig, 63 Cal. 104.

13. Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729.

14. Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

Necessity of annexing contract or copy thereof see *infra*, III, C, 11, i, (III).

15. French *v.* Hussey, 159 Mass. 206, 34 N. E. 362; Pierce *v.* Cabot, 159 Mass. 202, 34 N. E. 362; Hurley *v.* Lally, 151 Mass. 129, 23 N. E. 834; Gogin *v.* Walsh, 124 Mass. 516.

The fact that the claimant might maintain an action on a quantum meruit against the party, other than the owner, with whom he contracted, in consequence of such party's breach, is immaterial. Gogin *v.* Walsh, 124 Mass. 516.

16. Mras *v.* Duff, 11 Wash. 36, 39 Pac. 267.

17. See Mras *v.* Duff, 11 Wash. 36, 39 Pac. 267.

tory requirement to that effect it is not necessary to set forth the terms of the contract.[18]

(III) *ANNEXING CONTRACT OR COPY THEREOF.* Under some statutes where the claimant had a written contract, he must file the same or a copy thereof with his claim or statement;[19] and a failure to comply with the statute in this respect defeats the lien[20] unless such compliance was prevented by the wrongful act of the person for whom the work was done;[21] but when the contract was in fact a verbal one, the fact that by inadvertence or mistake the claimant alleged in his affidavit that it was in writing does not estop him in a suit to foreclose the lien, from alleging and proving that the contract was in fact a verbal one, nor does it make the verified "account of items" filed to obtain a lien incompetent evidence.[22] When the statute requires the lien statement to set forth a copy of the contract, the omission to file specifications which are an essential part of the contract is a fatal defect,[23] unless the claimant did not have possession of such specifications and could not secure them.[24]

(IV) *PERFORMANCE OF CONTRACT.* In the absence of any statutory requirement to that effect it is not necessary that the claim should show that the claimant has performed his contract,[25] or that the building has been completed.[26] Under the New York statute the notice must show what part of the labor and materials has been performed or furnished and what part remains to be performed or furnished;[27] and a notice stating that the contract has been all per-

18. Baldwin *v.* Spear, (Vt. 1906) 64 Atl. 235, holding also that it is not necessary to specify whether the contract was in writing or not.

19. Abbott *v.* Nash, 35 Minn. 451, 29 N. W. 65; Barnacle *v.* Henderson, 42 Nebr. 169, 60 N. W. 382; Benore *v.* Leonard, 6 Lack. Leg. N. (Pa.) 198.

Contract not within statute.—Where A, the claimant, agreed in writing with B, the contractor, to furnish him materials, part for a lump price and the rest at a fair market price, and furnished part of them which were used by B, and afterward B and C, the owner, canceled their contract, and A and C orally agreed that C should stand in B's place, and that A should furnish C the rest of the materials contracted for by B, and A furnished such materials, it was held that to entitle A to a lien therefor he need not file with his account the written contract between himself and B; the court saying: "The 'written contract' which the statute (Gen. St. (1878) c. 90, § 6) requires to be filed with the account, in order to secure a lien, is a written contract between the person furnishing labor or materials and the person to whom they are furnished. There was no written contract between the plaintiffs and the defendant." Abbott *v.* Nash, 35 Minn. 451, 454, 29 N. W. 65.

A written bid and an oral acceptance thereof do not constitute a written contract, within Nebr. Comp. St. c. 54, § 3, providing that, when any labor has been done or materials furnished under a written contract, the same or a copy thereof shall be filed with the account. Specht *v.* Stevens, 46 Nebr. 874, 65 N. W. 879.

A subcontractor's claim for a lien need not have attached thereto a copy of the written contract under the terms of which his rights accrued. Garlichs *v.* Donnelly, 42 Nebr. 57, 60 N. W. 323. *Compare* Specht *v.* Stevens, 46 Nebr. 874, 65 N. W. 879.

20. Barnacle *v.* Henderson, 42 Nebr. 169, 60 N. W. 382.

21. Although the statute requires that where work is done upon written contract the lienor shall file "the same or a copy thereof," with the statement of work done and material furnished, yet if he is prevented from so doing by the wrongful act of the party for whom the labor is performed he will not thereby lose his lien. And it seems that parol evidence of the contents of such contract would be admissible McCormick *v.* Lawton, 3 Nebr. 449.

22. Barnacle *v.* Henderson, 42 Nebr. 169, 60 N. W. 382.

23. Knelly *v.* Horwath, 208 Pa. St. 487, 57 Atl. 957 [*affirming* 27 Pa. Co. Ct. 545], but plans need not be filed.

24. Thirsk *v.* Evans, 211 Pa. St. 239, 60 Atl. 726 [*distinguishing* Knelly *v.* Horwath, 208 Pa. St. 487, 57 Atl. 957 (*affirming* 27 Pa. Co. Ct. 545)].

25. Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139; Ford *v.* Wilson, 85 Ga. 109, 11 S. E. 559.

26. Harmon *v.* Ashmead, 68 Cal. 321, 9 Pac. 183.

27. Foster *v.* Schneider, 50 Hun (N. Y.) 151, 2 N. Y. Suppl. 875; Bossert *v.* Happel, 40 Misc. (N. Y.) 569, 82 N. Y. Suppl. 872 [*affirmed* in 89 N. Y. App. Div. 7, 85 N. Y. Suppl. 308]; Brandt *v.* Verdon, 18 N. Y. Suppl. 119 [*affirmed* in 137 N. Y. 616, 33 N. E. 745]. See also Luscher *v.* Morris, 18 Abb. N. Cas. (N. Y.) 67.

Sufficient statements.—Where plaintiff performed part of certain work contracted for, and, having abandoned the contract on account of defendant's default, filed a lien for the work done, stating "that all the work and materials for which the claim is made

formed when in fact it has been only partly performed does not entitle the claimant to a lien;[28] but if the contract has been substantially performed, although a small and unimportant part remains unperformed, a statement that the contract has been performed is sufficient.[29] Where a materialman furnished materials to a subcontractor, who failed to complete his contract and it was agreed that the principal contractor should complete it, and on his failure to do so the owner completed it, but the notice of the lien filed by the materialman was in terms under the subcontractor's contract, and against him as subcontractor, and did not allege that the principal contractor undertook to complete the contract, or that on his default the owner completed it, it was held that the notice was sufficient, it being immaterial who completed the contract.[30]

j. Designation of Employer or Contractor — (I) *NECESSITY.* It is generally required that the claim or statement shall state the name of the person by whom the claimant was employed, with whom the claimant's contract was made, for whom the work was performed, or to whom the material was furnished, and a failure to comply with this requirement defeats the lien.[31] A contractor need,

has been actually performed or furnished," this was a sufficient compliance with the statute requiring that the notice of lien shall contain a statement of the work, performed and unperformed. Bulkley *v.* Kimball, 19 N. Y. Suppl. 672. A notice of lien for labor performed and to be performed, and for material furnished and to be furnished, to cover roofs of houses in process of erection, at the agreed price of nine hundred and forty dollars, specifying that labor and material of the value of five hundred dollars has been performed and furnished, and that the amount unpaid is the contract price of nine hundred and forty dollars, sufficiently shows the value of the labor and material remaining to be performed and furnished. Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 194 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205].

Insufficient statement.— A notice filed by a subcontractor, stating that "the labor performed and to be performed, and the materials furnished and to be furnished, consists of," etc., is insufficient in not stating how much is claimed for labor, and how much for material, and how much is still to be furnished. Bradley, etc., Co. *v.* Pacheteau, 175 N. Y. 492, 67 N. E. 1080; Alexander *v.* Hollender, 106 N. Y. App. Div. 404, 94 N. Y. Suppl. 796; Armstrong *v.* Chisolm, 100 N. Y. App. Div. 440, 91 N. Y. Suppl. 693; Satzinger *v.* Chebra Chai Idom Anshi Minsk, 91 N. Y. App. Div. 612, 86 N. Y. Suppl. 1146; Bossert *v.* Fox, 89 N. Y. App. Div. 7, 85 N. Y. Suppl. 308; New Jersey Steel, etc., Co. *v.* Robinson, 85 N. Y. App. Div. 512, 83 N. Y. Suppl. 450 [*affirmed* in 178 N. Y. 632, 71 N. E. 1134]; Bradley, etc., Co. *v.* Pacheteau, 71 N. Y. App. Div. 148, 75 N. Y. Suppl. 531; McKinney *v.* White, 15 N. Y. App. Div. 423, 44 N. Y. Suppl. 561; Westergren *v.* Pabst Brewing Co., 91 N. Y. Suppl. 1117.

A notice framed in the alternative as for labor performed or to be performed or for materials furnished or to be furnished is fatally defective. New Jersey Steel, etc., Co. *v.* Robinson, 85 N. Y. App. Div. 512, 83 N. Y. Suppl. 450 [*affirmed* in 178 N. Y. 632, 71 N. E. 1134, and *explaining* Bradley, etc., Co. *v.* Pachteau, 175 N. Y. 492, 67 N. E. 1080 (*reversing* 71 N. Y. App. Div. 148, 75 N. Y. Suppl. 531)]; Armstrong *v.* Chisolm, 100 N. Y. App. Div. 440, 91 N. Y. Suppl. 693.

28. Foster *v.* Schneider, 50 Hun (N. Y.) 151, 2 N. Y. Suppl. 875; Close *v.* Clark, 16 Daly (N. Y.) 91, 9 N. Y. Suppl. 538; Brandt *v.* Verdon, 18 N. Y. Suppl. 119 [*affirmed* in 137 N. Y. 616, 33 N. E. 745].

A notice of lien which sets out several contracts and alleges completion of all will not be vitiated as to the completed contracts by the fact that one of the contracts set out remains incomplete. Brandt *v.* Verdon, 18 N. Y. Suppl. 119 [*affirmed* in 137 N. Y. 616, 33 N. E. 745].

Unintentional misstatement.— The right of a subcontractor to a lien is not lost because the notice of lien stated that the contract had been completed, and the contract price was all due, when in fact a portion of the work had been omitted, and was afterward performed by the principal contractor, and charged to the subcontractor under the terms of his contract, where such omission was unintentional, and was not known by the claimant until after filing the lien, and the statement appears to have been made in good faith. Ringle *v* Wallis Iron Works, 149 N. Y. 439, 44 N. E. 175 [*reversing* 76 Hun 449, 28 N. Y. Suppl. 107]. See, generally, as to effect of errors *infra,* III, C, 12.

29. Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638; Mull *v.* Jones, 18 N. Y. Suppl. 359, claimant not being in default as to the unimportant part unfinished.

30. Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577.

31. *California.*— Madera Flume, etc., Co. *v.* Kendall, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177; Phelps *v.* Maxwell's Creek Gold Min. Co., 49 Cal. 336; Wood *v.* Wrede, 46 Cal. 637.

Idaho.— Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218.

Indiana.— See Peck *v.* Hensley, 21 Ind. 334.

Kansas.— Western Sash etc., Co. *v.* Heiman, 71 Kan. 43, 80 Pac. 16.

however, be named only when the contract was made with a builder distinct from the owner of the building.[32]

(II) *SUFFICIENCY.* The notice must plainly designate the person to whom the materials were furnished or with whom the contract was made,[33] and a merely incidental mention of the name of the contractor is not sufficient;[34] but if it is a neces-

Minnesota.— Keller *v.* Houlihan, 32 Minn. 486, 21 N. W. 729.

New York.—Bradley, etc., Co. *v.* Pacheteau, 71 N. Y. App. Div. 148, 75 N. Y. Suppl. 531, under Laws (1897), c. 418. Under Laws (1875), c. 379, failure to state the name of the person by whom claimant was employed or to whom he furnished materials was a fatal defect. Fogarty *v.* Wick, 8 Daly 166. But under Laws (1863), c. 400, although where the claim was for materials furnished to a contractor with the owner, it should have been so stated in the notice; failure to state that fact was not a fatal defect. Darrow *v.* Morgan, 65 N. Y. 333.

Oklahoma.—Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Oregon.— Barton *v.* Rose, (1906) 85 Pac. 1009 [*following* Rankin *v.* Malarkey, 23 Oreg. 593, 32 Pac. 620, 34 Pac. 816]; Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822; Getty *v.* Ames, 30 Oreg. 573, 48 Pac. 355, 60 Am. St. Rep. 835; Dillon *v.* Hart, 25 Oreg. 49, 34 Pac. 817 [*followed* in Leick *v.* Beers, 28 Oreg. 483, 43 Pac. 658].

Pennsylvania.— McCoy's Appeal, 37 Pa. St. 125; Murta *v.* Stephenson, 12 Pa. Co. Ct. 653; Whitman *v.* Wilkes-Barre Deposit, etc., Bank, 9 Kulp 522; Dagg *v.* Thomas, 31 Pittsb. Leg. J. N. S. 210.

Rhode Island.— Maroni *v.* Junty, 26 R. I. 109, 58 Atl. 450, a mechanic's lien notice having attached to it an account without a heading or anything to show from whom it is due is insufficient.

Wisconsin.—Scott *v.* Christianson, 110 Wis. 164, 85 N. W. 658; Bertheolet *v.* Parker, 43 Wis. 551.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988, name of the owner or owners, contractor or contractors, or both.

Canada.— Wallis *v.* Skain, 21 Ont. 532.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 243.

Mass. Pub. St. c. 191, § 6, does not require that the name of the person with whom the contract was made shall be stated. Brosnan *v.* Trulson, 164 Mass. 410, 41 N. E. 660.

The omission is not cured, as against lien creditors, by a subsequent confession of judgment by the owner. Such judgment takes effect only from its date. McCay's Appeal, 37 Pa. St. 125.

The residence of the contractor must be stated under the Canada statute. Smith *v.* McIntosh, 3 Brit. Col. 26; Wallis *v.* Skain, 21 Ont. 532.

32. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; Jones *v.* Shawhan, 4 Watts & S. (Pa.) 257; Sullivan *v.* Johns, 5 Whart. (Pa.) 366; Stevenson *v.* Dick, 13 Phila. (Pa.) 132.

Husband acting for wife.—Where materials for the improvement of the wife's separate estate are ordered by the husband with her knowledge and consent, he acts, not as an independent contractor, but as her agent; and it is not necessary to name him as contractor in claiming a lien on the building. Ryman *v.* Wolf, 6 Kulp (Pa.) 325.

33. Sawyer Goodman Co. *v.* Neagle, 110 Ill. App. 178.

Sufficient notice.— A notice stating that "the name of the person by whom the lienor was employed or to whom he furnished or is to furnish materials is A, and the person with whom the contract was made is A," sufficiently complies with N. Y. Laws (1897), p. 518, c. 418, § 9, subd. 3, requiring the notice of lien to state the name of the person by whom the lienor was employed or to whom he furnished materials, or, if the lienor is a contractor or subcontractor, the person with whom the contract is made. Martin *v.* Ambrose A. Gavigan Co., 107 N. Y. App. Div. 279, 95 N. Y. Suppl. 14.

It is sufficient to name the foreman or superintendent by whom claimant was actually employed, stating whom such person represented and his capacity. Hopkins *v.* Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815.

Naming both contractor and subcontractor. — A statement that the amount claimed is the price of certain materials furnished to the contractor and subcontractor, giving their names, which were used in the building, necessarily implies that the amount claimed is due from the subcontractors. Hydraulic Press Brick Co. *v.* McTaggert, 76 Mo. App. 347, 352, where it is said: "It having been shown that the notice sufficiently stated the correct debtor of the plaintiff, it certainly was not vitiated because it also claimed that some one else was liable for the debt."

Contract with incorporators.—Where a contract for the erection and equipment of a factory is made with a number of natural persons, who agree therein to obtain a charter for a corporation, in which each of such persons shall be interested to the extent of his individual liability on the contract, and such charter is subsequently obtained and the corporation organized, a right of action upon such contract arises after the completion of the work undertaken against the corporation, and the right of action against the individuals ceases. In such case the contractor would have a lien upon the factory and its equipment, and a claim of lien setting forth that such a contract had been made with the individuals (naming them), and with the corporation would be sufficient to authorize a foreclosure suit against the corporation alone. Chicago Bldg., etc., Co. *v.* Talbotton Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809.

34. Western Sash, etc., Co. *v.* Heiman, 71 Kan. 43, 80 Pac. 16.

sary inference from the language used in the claim that the material was furnished to or the claimant was employed by a person named therein, although this fact may not be directly stated, the claim is sufficient.[35] As a rule a mistake in the statement as to the name of the person with whom the claimant contracted or by whom he was employed will not defeat the lien, where there was no intention to deceive and no one has been misled to his detriment;[36] but it is otherwise when the mistake is of a character to be clearly misleading.[37] Where there are several co-contractors a notice naming one only may be sufficient;[38] and in case a firm is the contractor a notice naming as contractor only the individual partner with whom the claimant dealt is not fatally defective.[39] Where under the statute a building contract is void because unrecorded and the labor and materials are deemed to have been done and furnished at the instance of the owner it is immaterial whether the claim mentions the name of the owner or of the contractor.[40] Where it is shown from the statement for a subcontractor's lien and otherwise that the contractor purchased of the subcontractor materials to be put into the house, and that the materials were actually put into the house, such statement is not invalid because it also shows that the credit was originally given to the owner of the property.[41] Under a statute requiring that a notice of lien on moneys due to a contractor shall state the amount of the lien, and from whom the same is due to claimant, a notice which states that the amount claimed is due by a contractor under a contract made with his agent, when the fact is that the alleged agent was a subcontractor, and not an agent, and that the money is due from him, and not from

35. Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822; Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67; Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421; Sautter *v.* McDonald, 12 Wash. 27, 40 Pac. 418. See also Rowland *v.* Harmon, 24 Oreg. 529, 34 Pac. 357.

36. *California.*— Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139; Tibbetts *v.* Moore, 23 Cal. 208.

Kansas.— Hutchinson First Presb. Church *v.* Santy, 52 Kan. 462, 34 Pac. 974.

Massachusetts.— Brosnan *v.* Trulson, 164 Mass. 410, 41 N. E. 660, holding that the statement need not set forth the name of the person with whom claimant contracted, but if it is stated, a mistake in it, innocently made, will not affect the claimant's rights.

Missouri.— Steinmann *v.* Strimple, 29 Mo. App. 478.

Nebraska.— Cady Lumber Co. *v.* Conkling, 70 Nebr. 807, 98 N. W. 42.

New York.— By the express provision of the statute a failure to state the true name of the contractor does not affect the validity of the lien. Steeves *v.* Sinclair, 56 N. Y. App. Div. 448, 67 N. Y. Suppl. 776 [*affirmed* in 171 N. Y. 676, 64 N. E. 1125]; Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305. And see Brown *v.* Welch, 5 Hun 582.

Oregon.— Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 244.

37. Sawyer Goodman Co. *v.* Neagle, 110 Ill. App. 178, where the materials were furnished to N. & Son, a partnership, and the notice stated that the material was furnished to N. & Son Co., which was a corporation, and it was held that the notice was misleading and insufficient, the court saying: "Appellant contends that the word "company" in the notice after "F. C. Neagle & Son" should be stricken out as surplusage. This might perhaps be properly done, were it not for the fact that there was a corporation in existence by that name, to which appellant had delivered lumber used in Wolf's building after the completion of the subcontract and before the service of the notice. Moreover the language of the notice ("to furnish lumber to be used") is such as to lead any one reading it to the belief that it relates to lumber to be delivered after the service of the notice. But whether this be so or not, Wolf would naturally refer the notice to appellant's dealings with the corporation, and he would have been justified in believing, as he likely did believe, that the word "company" was inserted for that purpose. If he did not already know that the corporation was indebted to appellant, the legitimate effect of the notice was to start him on an inquiry whether the corporation was so indebted, and not whether the partnership was. The notice was misleading and not in accordance with the facts. To all intents and purposes it was the same as if a subcontractor, having been employed by Smith, notifies the owner that he has been employed by Jones."

38. Davis *v.* Livingston, 29 Cal. 283.

39. Hutchinson First Presb. Church *v.* Santy, 52 Kan. 462, 34 Pac. 974; Cady Lumber Co. *v.* Conkling, 70 Nebr. 807, 98 N. W. 42. See also Pell *v.* Baur, 16 N. Y. Suppl. 258 [*affirmed* in 133 N. Y. 377, 31 N. E. 224].

40. McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182.

41. Cunningham *v.* Barr, 45 Kan. 158, 25 Pac. 583.

the contractor, is insufficient.[42] Where the claim of lien stated that the materials were furnished to a contractor and that the claimant was employed by both the contractor and the owner of the building to furnish them, and the evidence showed that the owner alone originally contracted with the claimant to furnish the material, but that it went into the building which the contractor was erecting for the owner and for which he got the material from the claimant, and that the contractor admitted his liability therefor by giving orders for part payments drawn on the owner, which were paid, the variance between the claim of lien and contract proved is immaterial.[43] Where material is furnished for a building under a contract with the owner, a notice of lien, stating that the material was furnished to the owner, is sufficient, although it was actually ordered and received by an agent of the owner.[44] A notice which alleges that two persons to whom the lienor furnished materials were the contractors for the construction of the building is sufficient, although on the trial it appears that one of them was the contractor, and that the other was his subcontractor.[45] A statement that one claims as a subcontractor through a contractor, who is in reality the agent of the owner, cannot mislead the owner, and hence is not fatally defective.[46] Where, after a subcontractor furnishes material, and before the filing of the claim for a lien the owner of the premises conveys them, the fact that the affidavit by the subcontractor for a lien states that the contractor, to whom the material was furnished, was the agent of the grantee instead of the grantor, will not invalidate the lien.[47]

k. Statement as to Time of Rendering Services or Furnishing Material — (i) *Necessity.* It is very generally required that the claim or statement shall show the time when the work was done or the materials furnished for which the lien is claimed.[48] But in the absence of any statutory requirement to that effect

42. Fiske *v.* Rogers, 60 N. Y. Super. Ct. 418, 18 N. Y. Suppl. 191.

43. Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

44. Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

45. McHugh *v.* Slack, 11 Wash. 370, 39 Pac. 674, it also appearing that both told the claimant that they were contractors for the erection of the building.

46. Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519.

47. Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3.

48. *Delaware.*— France *v.* Woolston, 4 Houst. 557.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; May, etc., Brick Co. *v.* General Engineering Co., 180 Ill. 535, 54 N. E. 638 [*affirming* 76 Ill. App. 380]; Buckley *v.* Commercial Nat. Bank, 171 Ill. 284, 49 N. E. 617 [*affirming* 62 Ill. App. 202]; Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39; McDonald *v.* Rosengarten, 134 Ill. 126, 25 N. E. 429 [*affirming* 35 Ill. App. 71]; National Home Bldg., etc., Assoc. *v.* McAllister, 64 Ill. App. 143; Grace *v.* Oakland Bldg. Assoc., 63 Ill. App. 339; Fried *v.* Blanchard, 58 Ill. App. 622; O'Brien *v.* Krockinski, 50 Ill. App. 456.

Iowa.— Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518.

Maryland.— Carson *v.* White, 6 Gill 17.

New Jersey.—Jersey Co. Associates *v.* Davison, 29 N. J. L. 415 (except in the case of one contracting directly with the owner); Edwards *v.* Derrickson, 28 N. J. L. 39.

New York.— Mahley *v.* Buffalo German Bank, 174 N. Y. 499, 67 N. E. 117 [*reversing* 66 N. Y. App. Div. 623, 73 N. Y. Suppl. 1140], under Laws (1807), c. 418, § 9.

Oregon.— Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

Pennsylvania.— Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254; Russell *v.* Bell, 44 Pa. St. 47; Noll *v.* Swineford, 6 Pa. St. 187; Smaltz *v.* Knott, 3 Grant 227; Witman *v.* Walker, 9 Watts & S. 183; Rehrer *v.* Zeigler, 3 Watts & S. 258; Wolfe *v.* Keeley, 9 Pa. Dist. 515; Endy *v.* Ogrydziak, 10 Kulp 102; Faulkner *v.* Reilly, 1 Phila. 234. See also Murphy *v.* Cappeau, 147 Pa. St. 45, 23 Atl. 438. *Compare* Jones *v.* Shawhan, 4 Watts & S. 257.

Texas.— Meyers *v.* Wood, 95 Tex. 67, 65 S. W. 174, 26 Tex. Civ. App. 591, 65 S. W. 671.

United States.— *In re* Emslie, 98 Fed. 716, under N. Y. Laws (1897), c. 418, § 9.

Canada.— See Truax *v.* Dixon, 17 Ont. 366.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 246.

The reference to dates is material.— McNamee *v.* Hildeburn, 9 Pa. Co. Ct. 267; Shields *v.* Garrett, 12 Phila. (Pa.) 458; Lynch *v.* Feigle, 11 Phila. (Pa.) 247.

The requirement exists with respect to the original debtor with whom the contract was made as well as to creditors, purchasers, and encumbrancers. McIntosh *v.* Schroeder, 154 Ill. 520, 39 N. E. 478; Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39; National Home.

it has been held not necessary to the validity of the claim that it should state the time of doing the work or furnishing the materials,[49] although it is the better practice to give in the account the dates on which the items were done or furnished.[50] Under some statutes it is not necessary to state the time of the completion of the work.[51]

(II) *SUFFICIENCY IN GENERAL.*[52] As to the time and dates of work done and materials furnished for which a lien is claimed, all that is required is such certainty as will enable those interested to discover during what period the materials were delivered or the work done so as to individuate the transaction;[53] and although an affidavit for a mechanic's lien does not state in the language of the form prescribed by statute that the material was furnished at the times mentioned in the account, it is sufficient if it otherwise appears that the materials were furnished at such times.[54] So also, where the itemized account filed with the sworn

Bldg., etc., Assoc. *v.* McAllister, 64 Ill. App. 143.

A statutory provision that substantial compliance shall be sufficient and that a liberal construction shall be given cannot have the effect of dispensing with what the statute requires the notice to contain, and hence cannot support a notice failing to give the dates as required. Mahley *v.* Buffalo German Bank, 174 N. Y. 499, 67 N. E. 117 [*reversing* 66 N. Y. App. Div. 623, 73 N. Y. Suppl. 1140]; *In re* Emslie, 98 Fed. 716.

Supplying omission.— It has been held that the lien account is not necessarily invalidated as a lien because it fails to give the dates when the work was done, provided it appears from it or from other parts of the lien paper filed that it was completed and the indebtedness accrued within the period required by the statute to entitle the contractor or subcontractor to a lien. Hayden *v.* Wulfing, 19 Mo. App. 353 [*followed* in Kern *v.* Pfaff, 44 Mo. App. 29].

49. *Colorado.*— Mouat Lumber, etc., Co. *v.* Freeman, 7 Colo. App. 152, 42 Pac. 1040, the statement need not show when either the first or the last material was furnished.

Missouri.—Kneisley Lumber Co. *v.* Edward B. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774.

Nebraska.— Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722, where it appears from all the papers filed that the work was done or the materials furnished within the time requisite to entitle the claimant to a lien.

Vermont.— Baldwin *v.* Spear, (1906) 64 Atl. 235.

West Virginia.—O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 246.

Under N. Y. Laws (1883), c. 276, § 14, it was sufficient if the claim was filed by original contractors within sixty days after the completion of their contracts, and by subcontractors within thirty days after the completion of the building, furnishing of the material, etc.; and the claim filed need not show when the work was performed, nor when it was completed, but the facts might be shown on the trial. Morgan *v.* Taylor, 15 Daly (N. Y.) 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253].

50. Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722.

51. Slight *v.* Patton, 96 Cal. 384, 31 Pac. 248; Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67. *Contra,* Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 16, 38 Atl. 1081.

In Delaware a contractor for a particular portion of the work, as the painting and glazing, need not state the time when the building as a whole was begun and completed, but only when his portion was begun and finished. France *v.* Woolston, 4 Houst. 557.

52. **Error as to dates** see *infra,* III, C, 12, c.

53. Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64; Rush *v.* Able, 90 Pa. St. 153; McClintock *v.* Rush, 63 Pa. St. 203; Bayer *v.* Reeside, 14 Pa. St. 167; Calhoun *v.* Mahon, 14 Pa. St. 56; Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; Richabaugh *v.* Dugan, 7 Pa. St. 394; Shaw *v.* Barnes, 5 Pa. St. 18, 47 Am. Dec. 399; Driesbach *v.* Keller, 2 Pa. St. 77; Brown *v.* Kolb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26; Aman *v.* Brady, 2 Wkly. Notes Cas. (Pa.) 262.

Statement held sufficient.— A statement for a mechanic's lien for materials, charging defendant on a certain day "To bill received" for certain amounts, followed by credits, with the month and day of each, and showing a balance due plaintiff, to which are attached sheets setting out the several items of the bills, is sufficient to show when the material was furnished. Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518.

Statement held insufficient.— A notice setting forth that the last materials were delivered "on or about July 30, 1903," without explaining why the date is indefinitely given, and served on Oct. 31, 1903, is insufficient and the lien will be stricken off. Wolf Co. *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 439 [*affirming* 13 Pa. Dist. 791].

"Six months last past."— A claim for plastering furnished "within six months last past," although not dated, has been held sufficient after verdict. Shaw *v.* Barnes, 5 Pa. St. 18, 47 Am. Dec. 399 [*followed* in Bayer *v.* Reeside, 14 Pa. St. 167; Calhoun *v.* Mahon, 14 Pa. St. 56].

54. St. Paul, etc., Pressed Brick Co. *v.* Stout, 45 Minn. 327, 47 N. W. 974.

statement and claim of lien discloses when the furnishing of labor or material began and ended, it is not essential that the same facts should be restated as conclusions.[55] As a general rule it is held that the requirement under consideration is fulfilled by stating that the work was done or the material furnished between two given dates,[56] at least where the work was done or the material furnished, or both, under an entire contract for a gross sum,[57] or when the claimant worked or furnished material under a contract continuously between the given dates.[58] But the designation of the time merely of the last item is not sufficient.[59] A statement that the work or the furnishing of materials was commenced on a certain day and finished "on or about,"[60] or "on or before,"[61] a certain other day has been held sufficient.

(III) *SUFFICIENCY OF SINGLE DATE.* A claim is valid where there is but one entry for an article which required time for its completion, and an entry on the day the last work is done and the article completed will sustain the lien;[62] and where the work is done by contract with the owner, the whole work and materials are in contemplation of law furnished when the contract is finished, and the statement of that date alone is sufficient.[63] It has been held that where but one date is given in connection with the work done or materials furnished, such date

55. Garlichs *v.* Donnelly, 42 Nebr. 57, 60 N. W. 323.

56. *Illinois.*— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Ehdin *v.* Murphy, 170 Ill. 399, 48 N. E. 956 [*affirming* 69 Ill. App. 555]; Grace *v.* Oakland Bldg. Assoc., 166 Ill. 637, 46 N. E. 1102; Moore *v.* Parish, 163 Ill. 93, 45 N. E. 573; Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422; Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Carlson *v.* Anderson, 66 Ill. App. 663.

Iowa.— See Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90 [*followed* in Eggert *v.* Snoke, 122 Iowa 582, 98 N. W. 372].

Minnesota.— Johnson *v.* Stout, 42 Minn. 514, 44 N. W. 534.

Missouri.— Mitchell Planing-Mill Co. *v.* Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544; Ittner *v.* Hughes, 133 Mo. 679, 34 S. W. 1110.

Nebraska.— Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722.

Pennsylvania.— Rush *v.* Able, 90 Pa. St. 153; Hill *v.* McDowell, 14 Pa. St. 175; Bayer *v.* Reeside, 14 Pa. St. 167; Driesbach *v.* Keller, 2 Pa. St. 77; Francis *v.* Wernwag, 12 Montg. Co. Rep. 104.

Texas.— Stuart *v.* Broome, 59 Tex. 466. See also Meyers *v.* Wood, 95 Tex. 67, 65 S. W. 174.

Canada.— Flack *v.* Jeffrey, 10 Manitoba 514 [*following* Truax *v.* Dixon, 17 Ont. 366].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 247.

Contra.— Jersey Co. Associates *v.* Davison, 29 N. J. L. 415.

Where there are several buildings a statement that "work on the aforesaid buildings was commenced January 20, 1893, and completed August 18, 1893," is insufficient, as it gives no information as to when the work was done on any particular building. Buckely *v.* Commercial Nat. Bank, 171 Ill. 284, 49 N. E. 617 [*affirming* 62 Ill. App. 202].

57. France *v.* Woolston, 4 Houst. (Del.) 557; Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Ehdin *v.* Murphy, 170 Ill. 399, 48 N. E. 956 [*affirming* 69 Ill. App. 555]; Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310]; National Home Bldg., etc., Assoc. *v.* McAllister, 64 Ill. App. 143; Mitchell Planing Mill Co. *v.* Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544 [*reversing* 71 Mo. App. 251].

58. Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310].

Extra work and material.— Where the statement of claim for mechanic's lien shows that the work was done under a contract continuously between certain dates, and that during such time extra work and material was furnished, it is not necessary to state each day on which the items for such extra work and material accrued. Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310].

59. Lynch *v.* Feigle, 11 Phila. (Pa.) 247.

60. Kendall *v.* Fader, 99 Ill. App. 104, 107, where it is said: "The words 'on or about,' while weakening the positive force of the statement, do not contradict it, and may, in this connection, be treated as surplusage. . . . Certainty to a common intent is all that is required." *Contra*, Wolf Co. *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 439.

61. Flack *v.* Jeffrey, 10 Manitoba 514 [*following* Truax *v.* Dixon, 17 Ont. 366 (*overruling* Roberts *v.* McDonald, 15 Ont. 80)].

62. Young *v.* Elliott, 2 Phila. (Pa.) 352.

63. Edwards *v.* Derrickson, 28 N. J. L. 39; Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277 (holding that a mechanic's lien notice for contract work and materials is sufficient where it states that it is for work and materials furnished "within a year past," and the bill of particulars declares they were furnished "up to the 21st of November last"); Schaffer *v.* Hull, 2 Pa. L. J. Rep. 93, 3 Pa. L. J. 321. *Contra*, Lynch *v.* Feigle, 11 Phila. (Pa.) 247.

is presumed to be the day on which the materials were furnished[64] or the work completed.[65]

(iv) *STATEMENT OF YEAR.* Under a statute requiring the claim to state the time when the materials were furnished or the work done the omission of the year is fatal, although the months and days are stated;[66] but under a statute requiring merely "a just and true account" the omission of the year is not fatal when the months and days on which the items were furnished are stated.[67] Where the year is stated only at the head of the account but the paper itself shows that such year refers to the days and months placed opposite the items it is sufficient.[68]

l. Statement as to Accrual or Maturity of Claim. Where the statute giving a mechanic's lien contemplates two classes of claims, due and not due, the notice should so describe the claim as to inform the public to which class it belongs, and ambiguities should operate to the prejudice of the claimant rather than to that of the public.[69] In the absence of a statutory requirement to that effect it has been held that it is not necessary to show the date of the maturity of the claimant's claim;[70] and an erroneous statement of such date will not affect the lien where there was no fraudulent intent or improper motive and no one has been prejudiced thereby.[71]

m. Statement as to Amount Due. The notice, claim, or statement must set forth the amount due the claimant,[72] after allowing all just and proper credits and

64. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472.

65. Donahoo *v.* Scott, 12 Pa. St. 45.

66. Rehrer *v.* Zeigler, 3 Watts & S. (Pa.) 258; Reneker *v.* Hill, 3 Phila. (Pa.) 110.

67. Cole *v.* Barron, 8 Mo. App. 509.

68. Blanchard *v.* Fried, 162 Ill. 462, 44 N. E. 880 [*reversing* 58 Ill. App. 622] (where a detailed statement of materials furnished gave the month and the day of the month on which the items were furnished (the dates running from April 11 to July 8) but the year was not stated except in the date of the statement itself at the head thereof, which was "Sept. 1, 1892," this sufficiently indicated that the materials were furnished in the year 1892); Bruce *v.* Hoos, 48 Mo. App. 161 [*distinguishing* Curless *v.* Lewis, 46 Mo. App. 278] (where the affidavit was made in December of the year given and stated that the account accrued within six months); McClintock *v.* Rush, 63 Pa. St. 203 (where the date of the bill for materials "furnished within six months" was Dec. 3, 1868, the time of filing, and in the margin to the first item was June 9, without any year, and there was no date to any other item, this implied that all the materials were furnished June 9, 1868). But *compare* Reneker *v.* Hill, 3 Phila. (Pa.) 110.

69. Wade *v.* Reitz, 18 Ind. 307 [*followed* in Hill *v.* Stagg, Wils. (Ind.) 403].

70. Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115 [*affirming* 54 Ill. App. 643]; Bruce *v.* Hoos, 48 Mo. App. 161, 164 (where it is said: "It is not necessary that either the lien paper or the affidavit thereto, when complete and proper, should state when the account accrued. The dates to the account, and the filing with the clerk, will show the fact whether the paper has been filed within the proper period. The date of the last item, in the absence of anything appearing to the contrary, will be presumed to be the date at which the account accrued. So that, if such date and the date of the filing with the clerk are within the period of six months or other time allowed, it is sufficient. The lien paper may, as in this case, contain statements which may help out imperfections, but which would not have been necessary had such imperfections not existed. The petition which declares on the lien paper is the proper place in which to state such matter. All that the lien paper should state will be found set out in section 6709, Revised Statutes, 1889"); Doane *v.* Clinton, 2 Utah 417; Baldwin *v.* Spear, (Vt. 1906) 64 Atl. 235.

71. Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115 [*affirming* 54 Ill. App. 643].

72. *Alabama.*— Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26.

California.— Neihaus *v.* Morgan, (1896) 45 Pac. 255; Preston *v.* Sonora Lodge No. 10 I. O. O. F., 39 Cal. 116.

Colorado.— Harris *v.* Harris, 9 Colo. App. 211, 47 Pac. 841; Hanna *v.* Colorado Sav. Bank, 3 Colo. App. 28, 31 Pac. 1020.

Idaho.— Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218.

Indiana.— Peck *v.* Hensley, 21 Ind. 344.

Maine.— Wescott *v.* Bunker, 83 Me. 499, 22 Atl. 388.

Massachusetts.— Borden *v.* Mercer, 163 Mass. 7, 39 N. E. 413.

Michigan.— J. E. Greilick Co. *v.* Taylor, 143 Mich. 704, 107 N. W. 712.

Missouri.— Laswell *v.* Jefferson Presb. Church, 46 Mo. 279; Reitz *v.* Ghio, 47 Mo. App. 287; Nelson *v.* Withrow, 14 Mo. App. 270.

New Mexico.— Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

New York.— Martin *v.* Ambrose A. Gavi-

offsets.[73] The exact words of the statute need not be used in stating the amount and the credits,[74] and it is sufficient if from the whole statement, including all the papers filed, the amount due clearly appears, although the language used is not as apt or accurate as might be desirable;[75] but where the lien paper is indefinite as to the

gan Co., 107 N. Y. App. Div. 279, 95 N. Y. Suppl. 14 (notice held sufficient); Maurer *v.* Bliss, 14 Daly 150, 6 N. Y. St. 224 [*affirmed* in 116 N. Y. 665, 22 N. E. 1135]; Lutz *v.* Ey, 3 E. D. Smith 621; New York Protective Union *v.* Nixon, 1 E. D. Smith 671. A notice of lien alleging an agreement to furnish the plumbing for the dwelling-house, stable, and gardener's cottage for a certain sum, and that the lienors had furnished certain of the materials and done a portion of the work, but failing to state how much of the agreement had been performed, or the value thereof, is fatally defective. White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Oklahoma.— Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184.

Oregon.— Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407; Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305.

Pennsylvania.— See Murphy *v.* Cappeau, 147 Pa. St. 45, 23 Atl. 438.

Washington.— See Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001.

West Virginia.—O'Neil *v.* Taylor, 59 W. Va. 370, 53 S. E. 471; Mayes *v.* Ruffners, 8 W. Va. 384.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 253.

The value of labor and of materials need not be separately stated under N. Y. Laws (1897), p. 518, c. 418, § 9, subds. 4, 5. Martin *v.* Ambrose A. Gavigan Co., 107 N. Y. App. Div. 279, 95 N. Y. Suppl. 14.

Variance.— There is no substantial variance between a claim setting forth a contract for interest at the rate of ten per cent after sixty days from time of purchase of each item of materials, and the findings, which fail specifically to set forth the claim for interest, but which show that the claim attached to the complaint and not denied "contained a true statement of the demand," etc. McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

Judgment cannot be rendered for more than the amount claimed.— Maurer *v.* Bliss, 14 Daly (N. Y.) 150, 6 N. Y. St. 224 [*affirmed* in 116 N. Y. 665, 22 N. E. 1135]; Lutz *v.* Ey, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. 475; New York Protective Union *v.* Nixon, 1 E. D. Smith (N. Y.) 671.

73. *Alabama.*— Alabama, etc., Lumber Co. *v.* Tisdale, 139 Ala. 250, 36 So. 618; Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26.

California.— Preston *v.* Sonora Lodge No. 10 I. O. O. F., 39 Cal. 116.

Maine.— Wescott *v.* Bunker, 83 Me. 499, 22 Atl. 388.

Massachusetts.— Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367.

Michigan.— J. E. Greilick Co. *v.* Taylor, 143 Mich. 704, 107 N. W. 712.

Missouri.— Schroeder *v.* Mueller, 33 Mo. App. 28.

New Mexico.— Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562]; Hobbs *v.* Spiegelberg, 3 N. M. 222, 5 Pac. 529.

New York.— Smith *v.* Baily, 8 Daly 128.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Oregon.— Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407; Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305.

Texas.— Bassett *v.* Brewer, 74 Tex. 554, 12 S. W. 229.

Washington.— Merchant *v.* Humeston, 2 Wash. Terr. 433, 7 Pac. 903.

West Virginia.—O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471; Mayes *v.* Ruffners, 8 W. Va. 384.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 254.

74. Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97.

Statements held sufficient.— A statement using the words "payments and offsets" is sufficient, these being substantially equivalent to the statutory words "credits and offsets." Preston *v.* Sonora Lodge No. 10 I. O. O. F., 39 Cal. 116. A notice stating that there remains a certain sum due "after deducting all credits" sufficiently complies with a statute requiring it to state the sum due "after deducting all just credits and offsets." Hobbs *v.* Spiegelberg, 3 N. M. 222, 5 Pac. 529. A notice stating that the "bill hereto annexed contains a correct statement of the work done and the moneys paid and the balance due" is a sufficient fulfilment of a statutory requirement that the notice shall state that the amount demanded is one existing after deducting all just credits and offsets. Smith *v.* Baily, 8 Daly (N. Y.) 128. A statement using the words "over and above all credits and effects" instead of the words "over and above all credits and offsets" used in the statute is a substantial compliance with the statute. Merchant *v.* Humeston, 2 Wash. Terr. 433, 437, 7 Pac. 903, where it is said: "We are of the opinion that . . . we can either substitute for said word 'effects,' in said notice, the proper word, 'offsets,' or that the expression 'over and above all credits,' taken in connection with the other allegations of those notices, is a substantial compliance with the statute, without the addition of the words 'or offsets.'"

75. *Colorado.*— Harris *v.* Harris, 9 Colo. App. 211, 47 Pac. 841, statement that the contract price was two hundred and fifty dollars, that the owner had paid one hundred

amount claimed there is no lien.[76] A statement of the unpaid balance due the claimant is sufficient without in terms declaring that all just credits have been given,[77] and so also a statement reciting that a certain sum is due, after allowing all just credits, deductions, and set-offs, is sufficient, although no credits or deductions are set out in the statement, as it will not be presumed that there are in fact credits, deductions, or set-offs which should be itemized.[78] While it is the better and more usual practice to state the whole amount which became due to the claimant, and to give credit for any payments and offsets, and then state the balance remaining due and unpaid, and it has been held necessary to state the account in this manner,[79] there are decisions upholding the view that it is sufficient to state merely the balance claimed to be due.[80] The requirement of a just and true account is complied with where it appears that the account filed has not been knowingly, intentionally, or fraudulently falsified;[81] and errors in the account arising from mere mistake will not defeat the lien.[82] A statement by one to whom a number of claims have been assigned, showing merely the total and not the amount of each claim, is insufficient;[83] but a statement including the claim of the lienor, and also claims of others assigned to him, the amount due on each claim being stated separately, is not void because an aggregate credit is given; it being presumed, in the absence of evidence to the contrary, that the payment was made after the assignment, and applied by the creditor to the total debt.[84] A statement that the amount claimed is due "in gold coin of the United States" is sufficiently definite.[85] Where the amount of the claim is

and twenty-five dollars, " and that the sum of $—— is still due," sufficient.

Missouri.— Baumhoff *v.* St. Louis, etc., R. Co., 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770.

Nebraska.— Drexel *v.* Richards, 50 Nebr. 509, 70 N. W. 23.

North Dakota.—Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

Pennsylvania.— Lee *v.* Exeter Club, 9 Kulp 209; Muffly *v.* Karchnak, 8 Kulp 278.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 253.

Notice held sufficient. — A notice setting forth that plans and specifications were submitted to claimant for an estimate on mill work; that he bid a certain sum; that the contractor accepted the bid; that claimant verbally agreed to furnish the mill work as estimated on by him; and that the contractor agreed to pay for the same the sum bid, is sufficient. Beam *v.* Geiselman, 22 Montg. Co. Rep. (Pa.) 106.

76. Reitz *v.* Ghio, 47 Mo. App. 287.

77. Alabama, etc., Lumber Co. *v.* Tisdale, 139 Ala. 250, 36 So. 618; Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Schroeder *v.* Mueller, 33 Mo. App. 28; Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407 [*following* Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305]; Bassett *v.* Brewer, 74 Tex. 554, 12 S. W. 229.

78. Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310].

79. Hanna *v.* Colorado Sav. Bank, 3 Colo. App. 28, 31 Pac. 1020; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

Under the Washington statute requiring the notice to contain a statement of the demand and the amount thereof after deducting all just credits and offsets the statement must contain the full amount of the claim before any deductions are made, and also the amount thereof after the deduction of credits and offsets (Wheeler *v.* Port Blakely Mill Co., 2 Wash. Terr. 71, 3 Pac. 635 [*followed* in McLeod *v.* Port Blakely Mill Co., (1881) 3 Pac. 898]), and a claim stating merely a balance of account is fatally defective (Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729 [*citing* Gates *v.* Brown, 1 Wash. 470, 25 Pac. 914]).

80. Nichols *v.* Culver, 51 Conn. 177; Borden *v.* Mercer, 163 Mass. 7, 39 N. E. 413; Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562]; Bryson *v.* St. Helen, 79 Hun (N. Y.) 167, 29 N. Y. Suppl. 524.

81. Hydraulic Press Brick Co. *v.* McTaggart, 76 Mo. App. 347.

82. Hydraulic Press Brick Co. *v.* McTaggart, 76 Mo. App. 347; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008. See, generally, *infra*, II, C, 12.

An account containing a debit and a credit for the same item does not therefore fail of being a just and true account when the evidence shows that the item does not include either a final debit or credit and might without affecting the rights of either party be omitted altogether. McLaughlin *v.* Schawacker, 31 Mo. App. 365.

83. Hanna *v.* Colorado Sav. Bank, 3 Colo. App. 28, 31 Pac. 1020.

84. Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64.

85. Neihaus *v.* Morgan, (Cal. 1896) 45 Pac. 255, 257, where it is said: "United States gold coin is lawful money, by which all values of property or labor may be accurately measured in any part of the United States. Read in connection with all other parts of the

stated the addition of the words "with interest" does not vitiate the lien notice.[86] A claim for extras furnished in the performance of a building contract may be properly included in a claim for a mechanic's lien for the amount due under the contract.[87]

n. Itemized Statement of Account — (i) *Necessity.* In some states it is held to be necessary that the claim or statement should contain an itemized account of the work done and materials furnished;[88] but in other states, in some of which

claim, this statement of plaintiffs' demand is clearly sufficient. Under it the plaintiffs were entitled to prove and recover, as they did, $365.40, in lawful money of the United States."

86. McMillan *v.* Seneca Grape, etc., Co., 5 Hun (N. Y.) 12 [*reversed* on other grounds in 67 N. Y. 215], "if need be, they may be rejected as surplusage."

87. Baldwin *v.* Spear, (Vt. 1906) 64 Atl. 235.

88. *Illinois.*— Crandall *v.* Lyon, 188 Ill. 86, 58 N. E. 972 [*reversing* 90 Ill. App. 265]; Moore *v.* Parish, 163 Ill. 93, 45 N. E. 573 [*reversing* 58 Ill. App. 617]; McDonald *v.* Rosengarten, 35 Ill. App. 71 [*affirmed* in 134 Ill. 126, 25 N. E. 429]. Where the contract did not fix a specific price for the whole work, but fixed different prices for different kinds of work, the total amount to be paid being thus left to computation after the work was done, an itemized account is necessary to comply with the statutory requirement of "a just and true statement or account." Ehdin *v.* Murphy, 170 Ill. 399, 48 N. E. 956 [*affirming* 69 Ill. App. 555].

Iowa.— Valentine *v.* Rawson, 57 Iowa 179, 10 N. W. 338.

Maryland.— Carson *v.* White, 6 Gill 17.

Minnesota.— Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309, under Gen. St. (1878) c. 90, §§ 2, 6, a subcontractor must make an account in writing of the items of labor and materials furnished.

Missouri.— McWilliams *v.* Allan, 45 Mo. 573 [*followed* in Graves *v.* Pierce, 53 Mo. 423]; Mitchell Planing Mill Co. *v.* Allison, 71 Mo. App. 251; Cahill *v.* Christian Church Orphan School, 63 Mo. App. 28; Holtschneider *v.* Page, 51 Mo. App. 285; Curless *v.* Lewis, 46 Mo. App. 278; Lowis *v.* Cutter, 6 Mo. App. 54. See also Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118.

Nebraska.— Manly *v.* Downing, 15 Nebr. 637, 19 N. W. 601.

New Jersey.— Jersey Co. Associates *v.* Davison, 29 N. J. L. 415.

North Carolina.— Wray *v.* Harris, 77 N. C. 77.

Ohio.— Sosman *v.* Great Southern Fireproof Hotel Co., 116 Fed. 800, 54 C. C. A. 162. See also Keating *v.* Worthington, 11 Ohio Dec. (Reprint) 428, 27 Cinc. L. Bul. 14. *Compare* Thomas *v.* Huesman, 10 Ohio St. 152, construing the acts of March 11, 1843, and March 12, 1853.

Oklahoma.— Ferguson *v.* Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184.

Pennsylvania.— A subcontractor must specify the items of his claim for work or materials, and a lumping charge for either does not satisfy the requirement of the statute. Wharton *v.* Real Estate Inv. Co., 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. Rep. 629; McFarland *v.* Schultz, 168 Pa. St. 634, 32 Atl. 94; Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254; Gray *v.* Dick, 97 Pa. St. 142; Fahnestock *v.* Speer, 92 Pa. St. 146; Lee *v.* Burke, 66 Pa. St. 336; Russell *v.* Bell, 44 Pa. St. 47; Chapman *v.* Faith, 18 Pa. Super. Ct. 578; Lee *v.* Exeter Club, 9 Pa. Super. Ct. 581; Brown *v.* Kolb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26; Davenport *v.* Persch, 5 Pa. Dist. 38, 17 Pa. Co. Ct. 423; Joyce *v.* Corcoran, 9 Kulp 502; Malaney *v.* Mears, 2 Lack. Leg. N. 77; Shields *v.* Garrett, 5 Wkly. Notes Cas. 120 [*affirming* 12 Phila. 458]. See also Wolf *v.* Keeley, 23 Pa. Co. Ct. 408. In the absence of any allegation in the lien claim that the contract was made with the owner it is conclusive that it was made with the contractor, and that the claimant is a subcontractor, and if the claim does not specify the items of work and materials, it is fatally defectivo and will be stricken out. Dunn *v.* Cutter, 6 Pa. Dist. 666, 19 Pa. Co. Ct. 24.

Texas.— Ferguson *v.* Ashbell, 53 Tex. 245; Meyers *v.* Wood, 26 Tex. Civ. App. 591, 65 S. W. 671.

Virginia. — Shackleford *v.* Beck, 80 Va. 573.

Washington.— Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729; Warren *v.* Quade, 3 Wash. 750, 29 Pac. 827; Gates *v.* Brown, 1 Wash. 470, 25 Pac. 914.

West Virginia.— Niswander *v.* Black, 50 W. Va. 188, 40 S. E. 431. See also Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36. In case of a contract with an owner, it is unnecessary that the contractor file an itemized account of the work done and material furnished in order to procure a mechanic's lien. O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471.

Canada.— Weller *v.* Shupe, 6 Brit. Col. 58; Smith *v.* McIntosh, 3 Brit. Col. 26.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 256.

Requirement a substantial one.— A mechanic's lien, being purely statutory, can only arise where all the requirements of the statute have been substantially complied with, and a provision requiring the filing of an itemized account of the work or materials for which the lien is claimed is a substantial one, which must be observed. Withrow Lumber Co. *v.* Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61 [*affirming* 92 Fed. 760].

Reason of requirement.— Itemization is required so that the debtor and other creditors may determine from an inspection of the recorded account for what the lien is claimed,

the statutory provisions are substantially the same or very similar, an itemized account is held not necessary.[89]

(11) *Contract For a Gross Sum.* Whatever may be the view as to the necessity of itemizing the account, where work has been done or materials furnished, without any contract definitely fixing the amount of work or materials and the sum to be paid therefor, it is well established that where the work was done or the materials furnished under an entire contract to do or furnish the same for a gross sum it is not necessary that the claimant should in his lien statement itemize his account.[90] The most usual application of this rule is in the case of persons who contract directly with the owner, in which case the owner knows the contract that he has made and there is no necessity for informing him further as to what has been done or furnished thereunder;[91] but the same rule has also been

whether for work and labor, and if so, the nature of it, when performed and at what price; or materials, and if so, the kind, quality, and price, and when furnished; or both labor and materials, and if so, the kind, quality, and price of each and when performed or furnished. Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

89. *Alabama.*— Garrison *v.* Hawkins Lumber Co., 111 Ala. 308, 20 So. 427; Green *v.* Robinson, 110 Ala. 503, 20 So. 65; Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

California.— Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139; Seldon *v.* Meeks, 17 Cal. 128; Brennan *v.* Swasey, 16 Cal. 140, 76 Am. Dec. 507.

District of Columbia.— Emack *v.* Campbell, 14 App. Cas. 186.

Indiana.— Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598.

Maine.— Ricker *v.* Joy, 72 Me. 106.

Massachusetts.— Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367; Busfield *v.* Wheeler, 14 Allen 139.

Nevada.— Lonkey *v.* Wells, 16 Nev. 271.

Oregon.— Curtis *v.* Sestanovich, 26 Oreg. 107, 37 Pac. 67; Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97.

Utah.— See Culner *v.* Caine, 22 Utah 216, 61 Pac. 1008.

Vermont.— Baldwin *v.* Spear, (1906) 64 Atl. 235.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 256.

90. *California.*— Heston *v.* Martin, 11 Cal. 41.

Delaware.— France *v.* Woolston, 4 Houst. 557.

Illinois.— Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310]; Moore *v.* Parish, 58 Ill. App. 617.

Kansas.— Republic County School-Dist. No. 3 *v.* Howell, 44 Kan. 285, 24 Pac. 365; Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230.

Maine.— Wescott *v.* Bunker, 83 Me. 499, 22 Atl. 388.

Maryland.— Baker *v.* Winter, 15 Md. 1.

Minnesota.— Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Missouri.— Cahill *v.* Christian Church Orphan School, 63 Mo. App. 28 [*citing* Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Hilliker *v.* Francisco, 65 Mo. 598; Miller *v.* Whitelaw, 28 Mo. App. 639].

Nebraska.— Doolittle *v.* Plenz, 16 Nebr. 153, 20 N. W. 116.

New Jersey.— Edwards *v.* Derrickson, 28 N. J. L. 39.

Ohio.— Thomas *v.* Huesman, 10 Ohio St. 152; Davis *v.* Hines, 6 Ohio St. 473.

Pennsylvania.— Knabb's Appeal 10 Pa. St. 186, 51 Am. Dec. 472; Young *v.* Lyman, 9 Pa. St. 449; Smaltz *v.* Knott, 3 Grant 227; Brown *v.* Kolb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26; Thorn *v.* Heugh, 1 Phila. 322; Haines *v.* Burr, 1 Phila. 52; Stiles *v.* Leamy, 1 Phila. 29. See also Thorn *v.* Heugh, 1 Phila. 322.

Texas.— Ferguson *v.* Ashbell, 53 Tex. 245; Houston Cotton Exch. *v.* Crawley, 3 Tex. App. Civ. Cas. § 138.

Virginia.— Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888.

United States.— Great Southern Fireproof Hotel Co. *v.* Jones, 116 Fed. 793, 54 C. C. A. 165.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 257.

91. *California.*— Heston *v.* Martin, 11 Cal. 41.

Maryland.— Baker *v.* Winter, 15 Md. 1.

Missouri.— Mahan *v.* Brinnell, 94 Mo. App. 165, 67 S. W. 930; Abbott *v.* Hood, 60 Mo. App. 196 [*following* Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118]; Buchanan *v.* Cole, 57 Mo. App. 11; Busso *v.* Fette, 55 Mo. App. 453, 455 (where it is said: "Under the decision of the supreme court in the case of Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225, and that of Hilliker *v.* Francisco, 65 Mo. 598, both of which involve the sufficiency of mechanics' lien accounts, it is made difficult to apply the law in some cases. The objectionable item in the Hilliker case reads: 'To Junction City. Stone furnished First National Bank, as per contract, $7,790.' This was held sufficient to satisfy the statute. The main item in the Rude case reads: '1892. Dec. 1. For alterations and additions to buildings Nos. 210 and 212 N. Third St., as per plans and specifications, $22,287.' Then followed various other items for extra work. The statement of this account was held to be too indefinite. The court in its opinion in the Rude case approved its pre-

held to be applicable in the case of a subcontractor whose contract with the principal contractor is for a gross sum in payment for all work done or material furnished.[92] When the original contract between the claimant and the owner is for

vious ruling in the Hilliker case, and undertook to distinguish the cases. In referring to the Hilliker case, Judge Black said: 'The suit was one by the subcontractor, and there was evidence to show that the bank had agreed with the contractor to the sum of $7,000 as compensation to the plaintiffs for the material and labor mentioned in the item. Under these circumstances it was held that the item was sufficiently specific. The item there in dispute, it will be seen, related to the stone work and labor of setting only, and the price is given. In the present case the first item is for $22,287, and there is nothing to show, on the face of the account, what is, or what is not, intended to be included.' It seems to us that another distinctive difference between the two cases, and which perhaps would require greater particularity in the statement of one account than the other, is, that the recovery in the Hilliker case was on a special contract, in which the parties had agreed on a lumping price for the work which was actually performed and which was designated in the account, whereas, in the Rude case the recovery was on a *quantum meruit*, — the referee holding that there could be no recovery under the contract for the reason that the difference in the price for the alterations and extra work had not been fixed by the architects as the contract required"); Kling *v.* Carondelet R. Constr. Co., 7 Mo. App. 410. But *compare* Neal *v.* Smith, 49 Mo. App. 328; Bruns *v.* Capstick, 46 Mo. App. 397; Smith *v.* Haley, 41 Mo. App. 611 [all *following* Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225].

Nebraska.— Doolittle *v.* Plentz, 16 Nebr. 153, 20 N. W. 116 (where the contract price was charged as a single item and the extra work and material itemized, this was sufficient); Manly *v.* Downing, 15 Nebr. 637, 19 N. W. 601.

New Jersey.— Edwards *v.* Derrickson, 28 N. J. L. 39.

Pennsylvania.— Bohem *v.* Seel, 185 Pa. St. 382, 39 Atl. 1009; Lee *v.* Burke, 66 Pa. St. 336; Hahn's Appeal, 39 Pa. St. 409; Philadelphia Fourth Baptist Church *v.* Trout, 28 Pa. St. 153; Young *v.* Lyman, 9 Pa. St. 449; Chapman *v.* Faith, 18 Pa. Super. Ct. 578; McCune *v.* Hatch, 18 Pa. Super. Ct. 469; Brown *v.* Kolb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26; McDowell *v.* Hill, 1 Phila. 102; Haines *v.* Burr, 1 Phila. 52. See also Brown *v.* Myers, 145 Pa. St. 17, 23 Atl. 254; Gray *v.* Dick, 97 Pa. St. 142; Russell *v.* Bell, 44 Pa. St. 47; Shields *v.* Garrett, 5 Wkly. Notes Cas. 120 [*affirming* 12 Phila. 458].

Texas.— Pool *v.* Wedemeyer, 56 Tex. 287. See also Meyers *v.* Wood, 26 Tex. Civ. App. 591, 65 S. W. 671.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 257.

Contract furnishing merely a basis of computation.— Where a contract between the owner and the contractor for papering a house provided that the contractor would furnish and hang the paper for a certain amount per roll, it was necessary, in order to acquire a lien, that the contractor should in his statement specify the number of rolls and the contract price per roll, and a statement of a lump sum for paper hanging was insufficient. Kern *v.* Pfaff, 44 Mo. App. 29.

Where the building operation is abandoned by the owner before completion and the contractor claims a lien for what was done and furnished prior to the abandonment, he must itemize his claim as nearly as practicable and a single lumping charge is insufficient. Nixon *v.* Cydon Lodge No. 5 K. of P., 56 Kan. 298, 43 Pac. 236.

92. *Kansas.*— Nixon *v.* Cydon Lodge No. 5 K. of P., 56 Kan. 298, 43 Pac. 236.

Maine.— Wescott *v.* Bunker, 83 Me. 499, 22 Atl. 388 [*approving* Ricker *v.* Joy, 72 Me. 106].

Minnesota.— Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Missouri.— Hilliker *v.* Francisco, 65 Mo. 598 [said in Mitchell Planing-Mill Co. *v.* Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544, to greatly *limit* if not in effect *overrule* McWilliams *v.* Allan, 45 Mo. 573], the owner being apprised of the terms of the contract between the principal contractor and the subcontractor. *Compare* Kling *v.* Carondelet R. Constr. Co., 7 Mo. App. 410 [*reconciling* Hilliker *v.* Francisco, 65 Mo. 598, and Lowis *v.* Cutter, 6 Mo. App. 54].

United States.— Great Southern Fireproof Hotel Co. *v.* Jones, 116 Fed. 793, 54 C. C. A. 165.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 257.

Contra.— Gray *v.* Dick, 97 Pa. St. 142 [in effect *overruling* Knowlan *v.* Ellis, 12 Phila. (Pa.) 396; Howell *v.* Campbell, 12 Phila. (Pa.) 388]; Meyers *v.* Wood, 95 Tex. 67, 65 S. W. 174, 26 Tex. Civ. App. 591, 65 S. W. 671.

Where the owner has assumed the contract and directed a subcontractor to proceed with his contract, the objection to a lumping charge as made by the subcontractor does not apply; but such work, done under a special contract with the owner, for a stipulated sum, need not be itemized in the claim or bill of particulars. Brown *v.* Kolb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26.

Colorable interposition of assumed contractor.— Where an owner of land enters into a written contract for the erection of houses on the land, and the person named as contractor makes a written contract with a third person to do the work and furnish the material, and the subcontractor, after the work is finished, files a lien for a lump balance without giving items of work and material furnished, the lien will be sustained if the jury find upon sufficient evidence that

a gross sum, but extras have been furnished, a failure to itemize the extras as required by statute does not defeat the entire claim.[93]

(III) *SUFFICIENCY.* The itemized account or bill of particulars should be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information.[94] The claim should show what the materials were,[95] and what work was done;[96] but it has been held not essential to the validity of the claim that the date on which each particular item was furnished should be given.[97] Ordinarily the prices charged for the various items should be stated;[98] but where an aggregate price was agreed on between the claimant and the contractor[99] or the owner[1] it is not essential that the price of each item set forth in the account should be stated,[2] but it is sufficient where the account gives the aggregate price so agreed upon by the parties[3] and the items are

the owner was as a matter of fact the real contractor, and that the named contractor was the agent of the owner and a mere subterfuge used for the purpose of escaping a lien in a lump sum by the subcontractor. McCune *v.* Hatch, 18 Pa. Super. Ct. 469.

93. Sedgwick *v.* Concord Apartment House Co., 104 Ill. App. 5.

94. Ferguson *v.* Ashbell, 53 Tex. 245. See also Meyers *v.* Wood, 95 Tex. 67, 65 S. W. 174.

Test of sufficiency.— The sufficiency of the bill of particulars required upon the filing of a mechanic's lien under a verbal contract may be properly tested by the same rules as would be applicable in deciding upon special demurrer the sufficiency of a petition upon a *quantum meruit* for materials furnished and work and labor done. Ferguson *v.* Ashbell, 53 Tex. 245.

A statute requiring "an account in writing of the items" is sufficiently complied with where the claim contains an account in writing stating the character and time of labor, or the character and value of materials, machinery, or fixtures as the case may be. Manly *v.* Downing, 15 Nebr. 637, 19 N. W. 601, holding that an account consisting of a charge, "To lumber for house," and of a credit, "By work," was sufficiently itemized.

95. Cahill *v.* Christian Church Orphan School, 63 Mo. App. 28.

Each article should be stated separately.— Meyers *v.* Wood, 26 Tex. Civ. App. 591, 65 S. W. 671.

96. Cahill *v.* Christian Church Orphan School, 63 Mo. App. 28. Non-compliance with a statutory requirement that the whole number of days' labor shall be stated is fatal. Ellinwood *v.* Worcester, 154 Mass. 590, 28 N. E. 1053, holding that a statement which contains items as follows: "Labor of myself between September 1, 1889, and May 1, 1890," and "Labor laying 1100 yards concreting at 25 cents per yard in the last part of August, 1890, and ending August 30, 1890," is insufficient.

97. People's Lumber Co. *v.* Hays, 75 Mo. App. 516 [*following* Mitchell Planing-Mill Co. *v.* Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544]; Meyers *v.* Wood, 95 Tex. 67, 65 S. W. 174; Stuart *v.* Broome, 59 Tex. 466. *Compare* Ferguson *v.* Ashbell, 53 Tex. 245.

98. Cahill *v.* Christian Church Orphan School, 63 Mo. App. 28; Meyers *v.* Wood, 95 Tex. 67, 65 S. W. 174, 26 Tex. Civ. App. 591, 65 S. W. 671; Ferguson *v.* Ashbell, 53 Tex. 245.

Omission of dollar marks, etc.— Where the account contained certain figures manifestly intended to state the value or price of the materials for which the lien was claimed, the two right-hand figures being separated from the others by a perpendicular line, but without any dollar mark or other designation of denomination, the figures at the left were to be taken as representing dollars, and those at the right, cents. Smith *v.* Headley, 33 Minn. 384, 23 N. W. 550 [*following* Gutzwiller *v.* Crowe, 32 Minn. 70, 19 N. W. 344].

99. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Sosman *v.* Conlon, 57 Mo. App. 25 (where the contract is made for a lumping price which is shown to be reasonable); Miller *v.* Whitelaw, 28 Mo. App. 639; Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

1. See Dallas *v.* Brown, 60 Mo. App. 493.

2. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Dallas *v.* Brown, 60 Mo. App. 493; Sosman *v.* Conlon, 57 Mo. App. 25; Deardorff *v.* Roy, 50 Mo. App. 70; Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

3. Mitchell Planing-Mill Co. *v.* Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544 [*reversing* 71 Mo. App. 251]; Grace *v.* Nesbitt, 109 Mo. 9, 18, 18 S. W. 1118 (where the court said: "It is said in Rude *v.* Mitchell, 97 Mo. 365, 373, 11 S. W. 225, 'many things are often included in these building contracts for which the law gives no lien; and, when it calls for a just and true account, it means a fairly itemized account showing what the materials are, and the work that was done, and the price charged, so that it can be seen from the face of the account that the law gives a lien therefor. A lumping item of the whole contract price on the one hand, and the credits on the other, is no compliance with the law at all. The account should be complete on its face.' The account itemized in this case was as follows: '1882, December 1, for alterations and additions, to buildings Nos. 210 and 212, North Third street, as per plans and specifications, $22,287.' We understand from this opinion (which is given entirely upon the item of account filed in that case), that the account must show what the

specified[4] with such particularity as to enable any one interested to investigate as to whether the materials set forth in the account went into the structure and as to their value.[5] Where the work is of a kind usually charged for by measurement and estimate, such as brick-laying, lathing, plastering, etc., it is sufficient to show the quantity and measurement of each of the different elements, with the price charged per unit of computation, and the total price.[6] So also where the claim is for labor an account showing the number of days' or hours' labor performed or furnished, with the price per day or per hour and the total amount claimed to be due, is sufficient.[7] Where an entire bill of materials is purchased at one time but the items are delivered at various subsequent dates it is proper to either arrange all the items under the one date of purchase, or to start with the date of purchase and continue with dates corresponding to the deliveries, but it would be more complete to state that the whole was purchased at one date and delivered piecemeal at certain named times thereafter.[8] The lien is not invalidated by the use of ordinary bookkeeping[9] or commercial[10] abbreviations in stating the account, or by

materials were, what work was done, and the prices charged. In other words the statute requires more than merely giving a 'lumping item of the whole contract price.' It requires a specification of the work done or material furnished, so that it can be seen from the face of the account that the law gives a lien therefor, and that the owner can investigate the reasonableness of the charges. If a lumping price was agreed upon between the parties, no other price could have been specified so that the account would have been 'just and true'"); Dallas *v.* Brown, 60 Mo. App. 493; Sosman *v.* Conlon, 57 Mo. App. 25; Deardorff *v.* Roy, 50 Mo. App. 70 (lumping charge at foot of each group of items); Miller *v.* Whitelaw, 28 Mo. App. 639; Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

4. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Dallas *v.* Brown, 60 Mo. App. 493; Sosman *v.* Conlon, 57 Mo. App. 25; Deardorff *v.* Roy, 50 Mo. App. 70; Miller *v.* Whitelaw, 28 Mo. App. 639; Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

5. Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

6. Walden *v.* Robertson, 120 Mo. 38, 45, 25 S. W. 349 (where it is said: "Defendants make the further point that the charge in the lien account of $1,239.90 for labor is but a lumping account, and for that reason is not a just and true account within the meaning of the statute. . . . The objection is not well taken for these reasons: The account discloses the exact number of brick used, and it also shows on its face the length, height and thickness of each wall. From this data the charge per thousand for laying the brick is a matter of simple calculation. An account specifying the number of thousand and amount per thousand for laying the brick is quite as accurate as an account giving the number of days' work and the price per day"); McDermott *v.* Claas, 104 Mo. 14, 23, 15 S. W. 995 (where it is said: "The evident intent in this case was to charge for the brick in the wall, and we can see no more reason for requiring a lienor to give in his account the items of sand, lime, scaffolding and labor, as well as of the number of brick in a wall, than to require the items of clay, water, moulds, kilns and labor in making brick, when sold as brick not in a wall"); Kearney *v.* Wurdeman, 33 Mo. App. 447, 455 (where it is said: "To require the mechanic to . . . specify the amount in each room, and how much of it was work and how much material, and what part of the value of the lathing and plastering which is charged for by the square yard is represented by the lathing and what part by the plastering, — would be to require of him an idle superfluity"); McLaughlin *v.* Schawacker, 31 Mo. App. 365 [*following* Johnson *v.* Barnes, etc., Bldg. Co., 23 Mo. App. 546; Hayden *v.* Wulfing, 19 Mo. App. 353] (holding that an account filed for a mechanic's lien for brickwork, which itemizes the charge according to the kinds of brick used, and the number of each kind, is not open to the objection that it makes a lumping charge); Smith *v.* Sarver, 4 Pa. Cas. 289, 7 Atl. 99 (holding that a claim as follows, "To 1,100 yards of plastering . . . commenced on or about Jan. 5, 1885, and finished on April 7, 1885, $300.00. Of this sum the one half, viz., $150.00, is for work and labor done in plastering said house, and the other half, viz., $150.00, is for materials, viz., lime, sand, hair, water, etc., furnished for said plastering," is sufficient).

It is not necessary to state how the result was obtained, whether by actual count of brick used, by wall measurement, or by what sort of measurement or computation. See McDermott *v.* Claas, 104 Mo. 14, 15 S. W. 995.

7. Brockmeier *v.* Dette, 58 Mo. App. 607, 609, 610, where the claim was on a *quantum meruit*, and the account was "For 2493 hours carpenters' work done . . . at forty cents per hour $997.20," and the court said: "It is hardly conceivable how, under the circumstances, the plaintiff could have filed a more detailed account than he has done."

8. Louisiana, etc., Lumber Co. *v.* Myers, 87 Mo. App. 671.

9. Schulenburg *v.* Werner, 6 Mo. App. 292; Great Southern Fireproof Hotel Co. *v.* Jones, Jones, 116 Fed. 793, 54 C. C. A. 165.

10. Kneisley Lumber Co. *v.* Edward B. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774.

the use of trade terms[11] in describing the items; and *a fortiori* where there is a sufficient general designation or description of each article, the addition, by way of more particular description, of letters or abbreviations not commonly understood by persons not in the business of furnishing such materials does not vitiate the account.[12] Where an itemized account is annexed to the claim and referred to therein and made a part thereof this is sufficient.[13] Where the statute requires both the specifications of the contract and an account of items to be filed, the same paper may serve both purposes when appropriate for both.[14] Itemization in form is unnecessary if it appear in substance and effect.[15] It is not ground for striking off a claim as a whole that some of the items are insufficient.[16]

o. Apportionment Between Buildings and Improvements.[17] Where several buildings or improvements intended to be used together are erected on the same lot of land it is not necessary to specify the amount due for labor or materials on each separately,[18] and apportionment has also been held unnecessary in case of a claim of lien on several buildings on adjoining lots,[19] or even on separate lots.[20] Under some statutes, however, a claimant who files a lien against two or more buildings or other improvements is required to designate the specific amount for which he claims a lien upon each;[21] but the failure to apportion the claim merely

11. Great Southern Fireproof Hotel Co. *v.* Jones, 116 Fed. 793, 54 C. C. A. 165.

12. Smith *v.* Headley, 33 Minn. 384, 23 N. W. 550.

13. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; Johnston *v.* Harrington, 5 Wash. 73, 31 Pac. 316.

14. Sosman *v.* Great Southern Fireproof Hotel Co., 116 Fed. 800, 54 C. C. A. 162.

15. Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36, holding that where the basis of the lien claimed was work and labor performed under a contract at a fixed salary per year, payable monthly, and the recorded paper showed the kind, amount, and price of the work, the failure to enter each month's, day's, or year's service as a separate item of charge, and credit each payment as a separate item with the date thereof, would not vitiate the paper where on its face it disclosed with reasonable certainty the kind, amount, and contract price of the service and time of performance.

16. Mercer Milling, etc., Co. *v.* Kreaps, 18 Pa. Super. Ct. 1.

17. Joinder of claims see *supra*, III, C, 2.

In Pennsylvania the filing of apportioned liens was formerly allowed but is now prohibited. See *supra*, III, C, 2, b.

18. Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325 (house and barn); Lauman's Appeal, 8 Pa. St. 473 (mansion house, barn, wagon house, etc., on one farm); Griel's Appeal, 7 Pa. Cas. 137, 9 Atl. 861 (bone-boiling establishment, bone-house, wagon-shed, dwelling-house, and stable, on one tract of land).

19. A contractor who has erected a row of buildings on adjacent lots under contract with the owner may claim a lien on the whole row and need not specifically set forth the amount claimed upon each. Phillips *v.* Gilbert, 101 U. S. 721, 725, 25 L. ed. 833, where it is said: "The whole row was a building, within the meaning of the law, from having been united by the parties in one contract, as one general piece of work." *Contra*, Goodman *v.* Fried, 55 Ill. App. 362, holding that a claim for work and materials on several buildings on adjoining lots must specify what was done and furnished for and the amount due on each lot "as no lien could be had upon any lot except for the work and materials for that lot."

20. S. H. Bowman Lumber Co. *v.* Newton, 72 Iowa 90, 33 N. W. 377, claim need not show what was furnished for each. See also Carpenter *v.* Leonard, 5 Minn. 155, holding that a claim for a lien upon a building and its appurtenances need not specify the value of the work and materials expended upon each separately, even though they are not on the same land, and the owner of the building and the land on which it is situated does not own the land on which the appurtenance is situated. *Contra*, Morris County Bank *v.* Rockaway Mfg. Co., 16 N. J. Eq. 150, holding further that a failure to apportion in the claim is not remedied by the fact that from the evidence the claim can be properly apportioned.

21. Warren *v.* Hopkins, 110 Cal. 506, 42 Pac. 986. This was required under the Pennsylvania act of June 13, 1836. Thomas *v.* James, 7 Watts & S. (Pa.) 381; Beitzel *v.* Stair, 2 Pa. Dist. 337; Gross *v.* Stoltz, 2 Pa. Co. Ct. 190.

Such requirement applies only where there is in fact a specific sum due to him on each of such improvements, for "it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings." Warren *v.* Hopkins, 110 Cal. 506, 42 Pac. 986, holding that where two blocks are graded under one contract with the owner, the earth from one being used for filling the other and the compensation being fixed at a certain amount per cubic yard for filling the claim for a lien need not specify any amount as being due upon each block.

Buildings or improvements on same lot.—In Dickenson *v.* Bolyer, 55 Cal. 285, 286, it

postpones the lien to other specific liens upon each improvement and does not entirely defeat it.[22] It has been held that what may be termed a "double house," that is, a building erected at one time but completely divided by a solid partition wall into two houses intended for separate use and occupancy, is nevertheless a single building, and a lien thereon need not be apportioned.[23]

p. Signature. It is generally required that the notice, claim, statement, or account shall be signed[24] by the claimant[25] or by someone in his behalf.[26] A signing by the agent[27] or attorney[28] of the claimant is sufficient. Where the statute does not require the claim to be signed it is sufficient if the name of the claimant appears in the body of the paper;[29] but a statute requiring the statement to be "subscribed" by the claimant means that there must be a writing of his signature for the purpose of attesting the correctness of the statement, and it is not sufficient that his name appears in the statement although written by himself.[30] Where the statute does not require that the statement shall be signed, the omission of the signature is unimportant, especially where immediately following the

was squarely held that Cal. Code Civ. Proc. § 1188, did not require a specification of the amount due on each building or improvement where all the work was done on the same piece of property. In this case the claimant had performed certain work upon a dwelling-house and also in and upon a tunnel and other portions of the mining claim, and filed a lien not designating the amount due on each improvement. From a decree enforcing the lien a mortgagee of the property appealed on the ground that as the claim of lien did not designate the amount and the value of the work performed upon the dwelling-house and the amount and value of that performed upon the tunnel and other portions of the mining claim, the lien of the claimant should have been postponed to the mortgage by virtue of Cal. Code Civ. Proc., § 1188. But the court refused to sustain this contention, saying: "We think appellants do not correctly construe this section. It plainly applies only to cases in which one claim is filed against two or more separate and distinct 'buildings, mining claims, or other improvements owned by the same person,' and not to a case where, as here, all of the work was performed upon one and the same piece of property, although upon different portions of it." The court of California has, however, apparently receded from this opinion, although avoiding, expressly overruling this case, for in Booth *v.* Pendola, 88 Cal. 36, 43, 23 Pac. 200, 25 Pac. 1101, it is said: "There were two houses built on the same lot, — the Western Hotel and the Pendola cottage, — and appellant objects that in some of the liens it does not appear how much material and labor were furnished for one, and how much for the other. But that circumstance, under section 1188 of the Code of Civil Procedure, would only have the effect of giving precedence to other liens. It would be no concern of the owner of the lot (see Dickenson *v.* Bolyer, *supra*)."

22. Booth *v.* Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101. See also Dickenson *v.* Bolyer, 55 Cal. 285. This was so under the Pennsylvania act of June 13, 1836. Thomas *v.* James, 7 Watts & S. (Pa.) 381; Beitzel *v.* Stair, 2 Pa. Dist. 337; Gross *v.* Stoltz, 2 Pa. Co. Ct. 190.

23. Bastrup *v.* Prendergast, 179 Ill. 553, 53 N. E. 995, 70 Am. St. Rep. 128, building erected on two lots. *Contra*, under the Pennsylvania act of June 16, 1836, § 13 (Pamphl. Laws 699). Roat *v.* Frear, 167 Pa. St. 614, 31 Atl. 861; Malone's Appeal, 79 Pa. St. 481.

24. Stratton *v.* Shoenbar, (Me. 1887) 10 Atl. 446; Stout *v.* Golden, 9 W. Va. 231; Mayes *v.* Ruffners, 8 W. Va. 384.

25. Stout *v.* Golden, 9 W. Va. 231.

26. Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452; Stout *v.* Golden, 9 W. Va. 231.

27. Sharon Town Co. *v.* Morris, 39 Kan. 372, 18 Pac. 230 (holding that a statement signed by the local manager and agent of the firm claiming the lien who is stated to be such is sufficient); Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51 [*approved* in White *v.* Dumpke, 45 Wis. 454].

Ratification of unauthorized signature.— A statement signed without authority is sufficient if ratified by the claimant. Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452.

28. Siegmund *v.* Kellogg-Mackay-Cameron Co., (Ind. App. 1906) 77 N. E. 1096 (holding that the signature of a notice of claim of a materialman's lien in the name of the materialman by a certain attorney was sufficient); Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51 [*approved* in White *v.* Dumpke, 45 Wis. 454]. The fact that the name of the claimant was signed to the notice through the agency of his attorney will not defeat the lien. Jeffersonville Water Supply Co. *v.* Riter, 146 Ind. 521, 45 N. E. 697 (the statute not expressly requiring the notice to be signed by any one); Donahoo *v.* Scott, 12 Pa. St. 45.

A notice signed by the attorney of a corporation without the seal of the corporation is sufficient. Carv-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899.

29. Sturdevant *v.* Nugent, 9 Kulp (Pa.) 176.

30. Stratton *v.* Shoenbar, (Me. 1887) 10 Atl. 446, name at top of bill.

statement is the affidavit which is signed;[31] but under a statute requiring that the "account shall be subscribed and sworn to" the account itself must be signed, and subscribing the affidavit to the account is not the subscribing of the account.[32] A notice signed in the firm-name of the claimant instead of the individual names of the partners is sufficient,[33] as is also a claim in favor of two partners, signed by one of them only.[34] When the notice states the full name of the corporation claiming the lien but is signed by using an abbreviated designation, the notice is sufficient, as no one could be misled or injured.[35] Under a statute requiring merely that the notice shall be "in writing," it has been held not necessary that it should be signed by the claimant;[36] but even where the statute does not declare that the claim must be signed by any one it is probable that enough must appear on the face of the claim to show that it has been made and filed by the parties who seek to avail themselves of its benefits.[37]

q. Verification — (i) *NECESSITY.* It is usually required that the claim or statement shall be verified,[38] and as a rule a lack of verification defeats the

31. Deatherage v. Woods, 37 Kan. 59, 14 Pac. 474 [*recognized* in Hentig v. Sperry, 38 Kan. 459, 17 Pac. 42]. See also Hicks v. Murray, 43 Cal. 515.

If neither the statement nor the verification is signed no lien is acquired. Hentig v. Sperry, 38 Kan. 459, 17 Pac. 42.

32. Mayes v. Ruffners, 8 W. Va. 384.

33. Smith v. Johnson, 2 MacArthur (D. C.) 481; Sharon Town Co. v. Morris, 39 Kan. 377, 18 Pac. 230; it being sworn to by a member of the firm who states in his affidavit that he is such.

34. White v. Dumpke, 45 Wis. 454.

35. Mississippi Planing Mill v. Presbyterian Church, 54 Mo. 520, where the claimant was designated in the body of the notice as "the Mississippi Planing Mill Company of St. Louis and the notice was signed simply "Mississippi Planing Mill Company."

36. Reeves v. Seitz, 47 N. Y. App. Div. 267, 62 N. Y. Suppl. 101 (holding that neither the notice nor the verification thereof need be signed); Moore v. McLaughlin, 66 Hun (N. Y.) 432, 21 N. Y. Suppl. 55 (where it appeared, however, that the verification was signed).

37. White v. Dumpke, 45 Wis. 454.

38. *Alabama.*—McConnell v. Meridian Sash, etc., Factory, 112 Ala. 582, 20 So. 929.

Colorado.— Small v. Foley, 8 Colo. App. 435, 47 Pac. 64; Rice v. Carmichael, 4 Colo. App. 84, 34 Pac. 1010.

Idaho.— Robertson v. Moore, 10 Ida. 115, 77 Pac. 218.

Illinois.—McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429 [*affirming* 35 Ill. App. 71].

Iowa.— McGillivary v. Case, 107 Iowa 17, 77 N. W. 483; Wetmore v. Marsh, 81 Iowa 677, 47 N. W. 1021; Hug v. Hintrager, 80 Iowa 359, 45 N. W. 1035; Lamb v. Hanneman, 40 Iowa 41.

Kansas.— Martin v. Burns, 54 Kan. 641, 39 Pac. 177; Hentig v. Sperry, 38 Kan. 459, 17 Pac. 42.

Maine.— Stratton v. Shoenbar, (1887) 10 Atl. 446.

Michigan.— Lindsay v. Huth, 74 Mich. 712, 42 N. W. 358.

Minnesota.— Colman v. Goodnow, 36 Minn. 9, 29 N. W. 338, 1 Am. St. Rep. 632.

Missouri.— Darlington v. Eldridge, 88 Mo. App. 525.

Montana.— Western Plumbing Co. v. Fried, 33 Mont. 7, 81 Pac. 394.

Nebraska.— Terry v. Prevo, (1901) 95 N. W. 338; Byrd v. Cochran, 39 Nebr. 109, 58 N. W. 127; Henry, etc., Co. v. Fisherdick, 37 Nebr. 207, 55 N. W. 643.

New Mexico.— Minor v. Marshall, 6 N. M. 194, 27 Pac. 481; Finane v. Las Vegas Hotel, etc., Co., 3 N. M. 256, 5 Pac. 725.

New York.— Schenectady Contracting Co. v. Schenectady R. Co., 106 N. Y. App. Div. 336, 94 N. Y. Suppl. 401; Kane v. Hutkoff, 81 N. Y. App. Div. 105, 81 N. Y. Suppl. 85; Conklin v. Wood, 3 E. D. Smith 662; Cream City Furniture Co. v. Squier, 2 Misc. 438, 21 N. Y. Suppl. 972. Under some of the earlier New York statutes verification was not required. See Graf v. Cunningham, 109 N. Y. 369, 16 N. E. 551; Foley v. Gough, 4 E. D. Smith 724.

North Dakota.— Turner v. St. John, 8 N. D. 245, 78 N. W. 340; Red River Lumber Co. v. Children of Israel, 7 N. D. 46, 73 N. W. 203.

Oklahoma.— Ferguson v. Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; Blanshard v. Schwartz, 7 Okla. 23, 54 Pac. 303.

Oregon.— Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. 649, 60 Pac. 1.

Pennsylvania.— Gibbs v. Peck, 77 Pa. St. 86; Snyder v. Crothers, 1 Walk. 39; Egolf v. Casselberry, 14 Pa. Co. Ct. 87.

South Dakota.— Hill v. Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

Utah.— Culmer v. Caine, 22 Utah 216, 61 Pac. 1008.

Virginia.— Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888.

Washington.— Stetson, etc., Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108; Gates v. Brown, 1 Wash. 470, 25 Pac. 914.

West Virginia.— Lockhead v. Berkeley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 S. E. 1031; Mayes v. Ruffners, 8 W. Va. 384.

lien,[39] although under some statutes it merely postpones the lien as to purchasers and encumbrancers in good faith whose rights accrued after the expiration of the time for filing.[40]

(II) *WHO MAY VERIFY.* As the statutes do not as a rule require the verification to be by the claimant in person,[41] verification by an agent[42] or attorney[43] of the claimant is sufficient whether the claimant is a natural person or a corporation.[44] In case the lien is claimed by a firm, a verification by one of the partners[45] or the manager of the firm is sufficient,[46] while an attempted verification by the firm is invalid.[47] Where the lien is claimed by a corporation a verification by one of its officers is proper,[48] and a verification by a person described as a member of the corporation has been held sufficient.[49] It has been held that where the lien is filed by an assignee of the claimant[50] the affidavit of verification should be made by the assignee and not by the assignor.[51]

Canada.— Haggerty *v.* Grant, 2 Brit. Col. 173.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 261.

Verification after filing.— The filing of a subcontractor's unverified statement, of which a copy was served on the owner, and which was afterward verified without notice to the owner, established no lien. Rice *v.* Carmichael, 4 Colo. App. 84, 34 Pac. 1010.

39. Lindsay *v.* Huth, 74 Mich. 712, 42 N. W. 358; Cream City Furniture Co. *v.* Squier, 2 Misc. (N. Y.) 438, 21 N. Y. Suppl. 972. And see *supra*, note 38.

40. Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819, holding that a failure to verify the claim filed for a mechanic's lien postpones the lien as to purchasers of the property in good faith, but not as to one who, with notice thereof, takes a quitclaim deed to the property. See also *supra*, III, C, 10, l.

41. The more usual requirements are that the verification shall be by the claimant "or some credible person for him" (McLaughlin *v.* Schultz, 125 Mo. 469, 28 S. W. 755; Missouri Valley Lumber Co. *v.* Weber, 43 Mo. App. 179), "or some other person having knowledge of the facts" (Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48. See also Nordine *v.* Knutson, 62 Minn. 264, 64 N. W. 565), or some similar provision letting in persons other than the claimant.

Verification by claimant's bookkeeper sufficient.— Billmeyer, etc., Co. *v.* Brubaker, 17 York Leg. Rec. (Pa.) 113, 114, 115.

42. *California.*— Park, etc., Co. *v.* Inter Nos Oil, etc., Co., 147 Cal. 490, 82 Pac. 51.

Iowa.— Hug *v.* Hintrager, 80 Iowa 359, 45 N. W. 1035.

Kansas.— Delahay *v.* Goldie, 17 Kan. 263.

Minnesota.— Nordine *v.* Knutson, 62 Minn. 264, 64 N. W. 565.

Nebraska.— Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643; Great Western Mfg. Co. *v.* Hunter, 15 Nebr. 32, 16 N. W. 759.

New York.— Kane *v.* Hutkoff, 81 N. Y. App. Div. 105, 81 N. Y. Suppl. 85; Union Stove Works *v.* Klingman, 20 N. Y. App. Div. 449, 46 N. Y. Suppl. 721 [*affirmed* in 164 N. Y. 589, 58 N. E. 1093].

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Ohio.— Williams *v.* Webb, 2 Disn. 430; St. Clair Bldg. Assoc. *v.* Hayes, 2 Ohio Cir. Ct. 225, 1 Ohio Cir. Dec. 456.

South Dakota.— Fullerton *v.* Leonard, 3 S. D. 118, 52 N. W. 325.

Texas.— Riter *v.* Houston Oil Refining, etc., Co., 19 Tex. Civ. App. 516, 48 S. W. 758.

Virginia.— Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888.

West Virginia.— See Mayes *v.* Ruffners, 8 W. Va. 384.

United States.— Great Southern Fire Proof Hotel Co. *v.* American Blower Co., 116 Fed. 793, 54 C. C. A. 165.

Canada.— Crerar *v.* Canadian Pac. R. Co., 5 Ont. L. Rep. 383.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 264.

43. Jones *v.* Kruse, 138 Cal. 613, 72 Pac. 146.

An attorney for a foreign corporation claiming a lien may verify the claim, although not specially authorized to do so by his appointment. Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073, 6 Wash. 624, 34 Pac. 774.

44. Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

45. Cunningham *v.* Barr, 45 Kan. 158, 25 Pac. 583; Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230 (the statement being signed in the firm-name); Deatherage *v.* Woods, 37 Kan. 59, 14 Pac. 474.

46. Pierce *v.* Osborn, 40 Kan. 168, 19 Pac. 656; Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230.

47. Kane *v.* Hutkoff, 81 N. Y. App. Div. 105, 81 N. Y. Suppl. 85. See AFFIDAVITS, 2 Cyc. 8 note 24.

48. Cooper Mfg. Co. *v.* Delahunt, 36 Oreg. 402, 51 Pac. 649, 60 Pac. 1, secretary.

49. Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26, verification by "C. H. Colvin of" a certain named company.

50. Assignability of inchoate lien see *infra*, V, A, 1.

51. Kelly *v.* McKenzie, 1 Manitoba 169; Grant *v.* Dunn, 3 Ont. 376.

(III) *Before Whom Verification Made.* The oath of verification of a mechanic's lien claim may be made before any person authorized to administer oaths[52] or take depositions;[53] and under a statute empowering county recorders "to take and certify the acknowledgment and proof of all conveyances affecting any real estate, or of any other written instrument," they have authority to administer the oath and certify to the verification of a mechanic's lien claim.[54] Under a statute requiring the statement to be verified, but silent as to where or before whom such affidavit shall be made, the affidavit may be made in another state before any officer authorized by the laws of such state to administer oaths,[55] and an affidavit to a mechanic's lien statement sworn to before a notary in another state is sufficient.[56] Where the affidavit of verification shows upon its face that it was taken outside of the jurisdiction of the notary who administered the oath, it is invalid.[57] Where a lien is claimed by partners, one of the partners who is a notary has no right to administer the oath to the other partner who verifies the statement;[58] but the fact that the lien claim is verified before a notary public who is an attorney and who prior to the verification has been consulted as such by the claimant in regard to the matters in dispute between him and the owner will not invalidate the lien where there was no action or proceeding begun or pending between the parties at the time of the verification.[59] Where a statement of claim was verified by two affidavits, one preceding and the other following an account of the items of the claim, and the first affidavit was sufficient in form and properly

52. Phelps, etc., Wind-Mill Co. *v.* Shay, 32 Nebr. 19, 48 N. W. 896. See also Chandler *v.* Hanna, 73 Ala. 390.

Commissioners.— An affidavit verifying a lien claim made in a county other than that in which the land is situated and sworn to before a commissioner for taking affidavits in the county in which it was made is sufficient. Truax *v.* Dixon, 17 Ont. 366. But *compare* Kelly *v.* McKenzie, 1 Manitoba 169, holding that a commissioner to administer oaths has no power to take an affidavit verifying a statement of claim to be filed.

53. Carr *v.* Hooper, 48 Kan. 253, 29 Pac. 398, holding that where a notary public is authorized to take depositions the affidavit of verification to a mechanic's lien claim may be before him.

54. Arrington *v.* Wittenberg, 12 Nev. 99, 101, where it is said: "It was certainly the intention of the legislature in passing the act under consideration, to authorize county recorders to take the acknowledgment and proof of all conveyances affecting any real estate, or of any other written instrument, in the manner provided by law. This authority must, necessarily, extend to all such written instruments as are by law required to be recorded. . . . A mechanic's lien is a written instrument that is required to be recorded. The proof that entitles it to be recorded is the verification. The county recorder is, in our opinion, an officer authorized by law to administer the oath and take and certify the proofs in such cases."

55. Wood *v.* St. Paul City R. Co., 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149. *Contra*, Chandler *v.* Hanna, 73 Ala. 390, holding that in the absence of a provision in the Mechanics' Lien Law with reference to the verification of the claim without the state the statute could not be construed as authorizing the verification elsewhere than within the state and before an officer known to the laws and judicial tribunals of the state as having authority to administer and certify authority.

56. Wood *v.* St. Paul City R. Co., 42 Minn. 411, 414, 44 N. W. 308, 7 L. R. A. 149 (where it is said: "It is true that perhaps in every state the powers of notaries, including that of administering oaths, have been regulated by statute, which, however, are largely declaratory in their nature. But whether this authority be of statutory origin, or founded on customary law, the recognition of its existence has become so general, if not universal, that there is now no good reason why it should not be judicially recognized as one of the general powers of notaries, and affidavits authenticated by seals of notaries of other states placed on precisely the same footing as their certificates of protest or authentications of so-called commercial documents"); Phelps, etc., Wind-Mill Co. *v.* Shay, 32 Nebr. 19, 22, 48 N. W. 896 (where it is said: "The fact is apparent that the oath may be made before any person authorized to administer oaths, and the particular county or state where the oath is taken is not material"). *Compare* Chandler *v.* Hanna, 73 Ala. 390, holding that as it does not lie within the scope of the authority or duty of a notary public to administer oaths or affirmations required, not in the transaction of commercial affairs, but by official statutory enactment, he is not a proper officer to administer the oath for the verification of a lien claim, and in the case of a notary in another state it will not be presumed, in the absence of evidence, that authority to administer such an oath has been conferred upon him by statute.

57. Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127.

58. Smalley *v.* Bodinus, 120 Mich. 363, 79 N. W. 567, 77 Am. St. Rep. 602.

59. Carr *v.* Hooper, 48 Kan. 253, 29 Pac.

verified, but the second was sworn to before an attorney at law who was also a member of the firm who acted as claimant's solicitor in the attempted enforcement of the lien, this fact did not invalidate the first affidavit even if the second one should be treated as void.[60]

(iv) *Sufficiency*—(a) *In General.*[61] In order to be effectual the oath of verification must be in writing as part in some way of the paper writing filed for record.[62] A verification which is in substantial compliance with the statute is sufficient,[63] and so *a fortiori* is a verification following the exact language of the statute.[64] It is not necessary that the affidavit of verification should restate the facts on which the claim is based,[65] and it is sufficient to state that the claim or statement is true[66] or that the facts stated therein are true;[67] but an affidavit of verification certifying merely that a part of the statement is true and not that the whole of it is true is insufficient.[68] Under some statutes the verification must be

398, so holding, notwithstanding a statutory provision that depositions must not be taken before an "attorney of either party."

60. McMonegal *v.* Wilson, 103 Mich. 264, 61 N. W. 495.

61. Affidavits generally see Affidavits.

Form of verification held sufficient see Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

62. Lockhead *v.* Berkley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 S. E. 1031.

63. Parke, etc., Co. *v.* Inter Nos Oil, etc., Co., 147 Cal. 490, 82 Pac. 51 (holding that the fact that the verification stated that it was made by the agent of "plaintiff" did not render it insufficient, it manifestly meaning that the affiant was the agent of the claimant); Williams *v.* Strouh, 168 Mo. 346, 67 S. W. 875 (holding that the fact that the verification, although referring to the "preceding and foregoing statement and description," precedes instead of follows the account and description, does not render the verification insufficient); Schwartz *v.* Allen, 7 N. Y. Suppl. 5 (holding that an affidavit as follows: "I have read the said notice, and I know the contents thereof. The same is true," etc., sufficiently complies with N. Y. Laws (1885), c. 342, § 4, requiring a verification of the notice "to the effect that the 'statements' therein contained are true"); Sautter *v.* McDonald, 12 Wash. 27, 40 Pac. 418 (holding that the employment of the term "lien" instead of "claim of lien" in referring to the claim in the verification thereof does not render the verification insufficient); Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729 (holding that a statement in the verification that the claim is "true" is sufficient under a statute requiring a verification to the effect that the claim is "just"); Johnston *v.* Harrington, 5 Wash. 73, 31 Pac. 316 (holding that a verification stating that the claimant "has read the foregoing notice, knows the contents thereof, that said claim is just and correct," is sufficient under a statute requiring that the verification shall be "to the effect that the affiant believes the same to be just."

Verification of notice served on owner only. —Where the notice of a mechanic's lien, served on the owner, stated the amount of the account and described the property to be charged and was sworn to, and the account was attached to the notice, specifying the materials and when furnished, and the whole was filed with the clerk, this was a substantial compliance with the law, although the account was not sworn to. Hassett *v.* Rust, 64 Mo. 325.

If the affidavit is within the spirit of the law it will not be held insufficient, although it may be carelessly drawn. Thus where the oath attached to an "account of the items" for material furnished, and for which a lien was claimed, recited that "J. A. B., being first duly sworn . . . says . . . is a true and correct account . . . of materials furnished by this affiant," etc., and was signed "Capital City Planing Mills. Per J. A. B., Sec'y," and the account of the items was headed: "M. I. B. to Capital City Planing Mills, Dr.," it sufficiently appeared that the lien was claimed by the Capital City Planing Mills, and not by J. A. B., and there was a substantial compliance with Nebr. Comp. St. c. 54, § 3, providing for an account verified under oath. Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

64. Union Stove Works *v.* Klingman, 20 N. Y. App. Div. 449, 46 N. Y. Suppl. 721 [*affirmed* in 164 N. Y. 589, 58 N. E. 1093].

65. Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422.

66. Arata *v.* Tellurium Gold, etc., Min. Co., 65 Cal. 340, 4 Pac. 195; Orr, etc., Hardware Co. *v.* Needham Co., 169 Ill. 100, 48 N. E. 444, 61 Am. St. Rep. 151 [*affirming* 62 Ill. App. 152]; Moore *v.* Parish, 163 Ill. 93, 45 N. E. 573; Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422; Schwartz *v.* Allen, 7 N. Y. Suppl. 5.

67. Corbett *v.* Chambers, 109 Cal. 178, 41 Pac. 873 (holding that an objection to a mechanic's lien claim that the verification states that the facts stated therein are true, instead of that the claim is true, is frivolous); Nordine *v.* Knutson, 62 Minn. 264, 64 N. W. 565.

68. Thus a verification stating that the labor and material for which the lien is claimed was performed and furnished, and that the amount claimed is justly due, but not verifying the statements of the claim as to dates is insufficient. Orr, etc., Hardware, etc., Co. *v.* Needham Co., 169 Ill. 100, 104, 48 N. E. 444, 61 Am. St. Rep. 151 [*affirming* 62

based upon the affiant's knowledge of the facts stated, and is insufficient if it appears to be based upon information or belief;[69] but other statutes permit a verification upon information and belief.[70] In the absence of any statutory requirement to that effect it is not necessary that an affidavit of verification made by an agent of the claimant should state the agency.[71] Where the statute requires a verification to the effect that the statements contained in the notice are true, a notice having merely a certificate of acknowledgment is insufficient;[72] but where the statute does not prescribe any particular form of verification a claim signed by the claimant and verified by his oath is sufficient, although even in such case the better practice is to have the verification in the form of an affidavit annexed to the claim to the effect that the facts therein stated are true.[73] As a general rule the fact that the affidavit of verification is not signed by the affiant does not invalidate the statement if it can be proved that it was in fact sworn to.[74] An

Ill. App. 152] (where it is said, however: "If the affiant had simply sworn that the statement was true, his oath would be understood as applying to the whole statement"); McDonald *v.* Rosengarten, 134 Ill. 126, 25 N. E. 429 [*affirming* 35 Ill. App. 71]; A. R. Becker Lumber Co. *v.* Halsey, 41 Ill. App. 349. A verification to a notice containing all the statements required by statute is insufficient when it declares that the "abstract of indebtedness mentioned and described in the foregoing notice is true and correct," since this applies to only one of the statements. Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481. A verification declaring that the statement is a true and correct account of labor done and materials furnished is defective in that it does not verify the description of the property and the names of the contractor and the owner. El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

69. *Alabama.*— Long *v.* Pocahontas Coal Co., 117 Ala. 587, 23 So. 526; Florence Bldg., etc., Assoc. *v.* Schall, 107 Ala. 531, 18 So. 108; Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918; Globe Iron Roofing, etc., Co. *v.* Thacher, 87 Ala. 458, 6 So. 366.

Kansas.— Dorman *v.* Crozier, 14 Kan. 224.

Montana.— Western Plumbing Co. *v.* Fried, 33 Mont. 7, 81 Pac. 394.

Ohio.— Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163.

Texas.— Merchants', etc., Bank *v.* Hollis, (Civ. App. 1904) 84 S. W. 269.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 263.

Affiant's knowledge of the facts need not be affirmed.—Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918 [*distinguishing* Globe Iron Roofing, etc., Co. *v.* Thacher, 87 Ala. 458, 6 So. 366; Arata *v.* Tellurium Gold etc., Min. Co., 65 Cal. 340, 4 Pac. 195].

Untrue statement as to knowledge.—Where the verification is sufficient in form, and the affiant swears that he knows the facts alleged in the notice or statement to be true, the lien is not defeated by the fact that he may not have personal knowledge of the facts so alleged. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48 [*recognized* in Long *v.* Pocahontas Coal Co., 117 Ala. 587, 23 So. 526]; Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674.

70. Grace *v.* Oakland Bldg. Assoc., 166 Ill. 637, 46 N. E. 1102; Finley *v.* West, 51 Mo. App. 569; Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779; Kealey *v.* Murray, 15 N. Y. Suppl. 403, under Laws (1885), c. 342, § 4. A verification on information and belief was insufficient under earlier New York statutes. Keogh *v.* Main, 50 N. Y. Super. Ct. 183; Childs *v.* Bostwick, 12 Daly (N. Y.) 15, 65 How. Pr. 146; Conklin *v.* Wood, 3 E. D. Smith (N. Y.) 662.

Verification based on knowledge "or" information, etc.— A verification of the notice, reciting that the statements therein contained are true to affiant's knowledge "or" information and belief, exactly following the words of the statute (N. Y. Laws (1885), c. 342, § 4) is sufficient. Moore *v.* McLaughlin, 66 Hun (N. Y.) 133, 21 N. Y. Suppl. 55; Cunningham *v.* Doyle, 5 Misc. (N. Y.) 219, 25 N. Y. Suppl. 476; Stauhsandt *v.* Lennon, 3 Misc. (N. Y.) 90, 22 N. Y. Suppl. 544 [*affirmed* in 142 N. Y. 666, 37 N. E. 570]. See also Union Stove Works *v.* Klingham, 20 N. Y. App. Div. 449, 46 N. Y. Suppl. 721; Kealey *v.* Murray, 15 N. Y. Suppl. 403, verification on "knowledge, information, and belief."

71. McLaughlin *v.* Schultz, 125 Mo. 469, 28 S. W. 755; Missouri Valley Lumber Co. *v.* Weber, 43 Mo. App. 179; Riter *v.* Houston Oil Refining, etc., Co., 19 Tex. Civ. App. 516, 48 S. W. 758.

72. Schenectady Contracting Co. *v.* Schenectady R. Co., 106 N. Y. App. Div. 336, 94 N. Y. Suppl. 401.

73. Kezartee *v.* Marks, 15 Oreg. 529, 16 Pac. 407.

A certificate of a notary at the foot of the account that the claimant personally appeared before him and "made oath to the correctness of the account" is a sufficient verification under Va. Code (1887), § 2476, which requires verification but prescribes no particular form. Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888 [*distinguishing* McDonald *v.* Rosengarten, 134 Ill. 126, 25 N. E. 429].

74. Laswell *v.* Jefferson City Presb. Church, 46 Mo. 279; Reeves *v.* Seitz, 47 N. Y. App. Div. 267, 62 N. Y. Suppl. 101 [*following* Jackson *v.* Virgil, 3 Johns. (N. Y.) 540]; Ainslie *v.* Kohn, 16 Oreg. 363, 19 Pac. 97. See AFFIDAVITS, 2 Cyc. 26 note 36. *Contra,*

affidavit to a lien claim filed by a corporation which is subscribed with the name of the company by its manager is sufficient, where it appears that such manager was the person to whom the oath was administered, and the affidavit appears from its own terms to be the individual expression and affirmation of such manager from his own personal knowledge.[75]

(B) *Jurat.* It has been held that the absence of the jurat is not fatal;[76] but it may be shown by extraneous evidence that the affidavit signed by the claimant or some authorized person for him was in fact sworn to,[77] and an amendment by attaching the proper jurat should be allowed.[78] But on the other hand a statement without any jurat has been held fatally defective, although it was in fact sworn to;[79] and it has also been held that the verification is insufficient where the jurat is not signed by the officer before whom the oath was made,[80] although his seal is upon it,[81] or where the signature of the officer is not authenticated by his official seal,[82] or other certificate of authority,[83] and the defect cannot be remedied by proof at the trial that the notice or claim was in fact sworn to.[84] Where the statement is filed in the office of the person administering the oath the omission of his seal,[85] or his failure to give the title of his office[86] or his full official title[87] does not invalidate the lien. An affidavit verifying an account for a lien, taken in one state to be used in another, must be properly authenticated and show on its face the official character of the officer before whom it is sworn to and his authority to administer oaths.[88]

McGillivary *v.* Case, 107 Iowa 17, 77 N. W. 483; Hentig *v.* Sperry, 38 Kan. 459, 17 Pac. 42. And see AFFIDAVITS, 2 Cyc. 26 notes 37, 38.

75. Montana Lumber, etc., Co. *v.* Oberlisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

76. Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340. See AFFIDAVITS, 2 Cyc. 27 note 41.

77. Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340. See AFFIDAVITS, 2 Cyc. 27 note 43.

78. Laswell *v.* Jefferson City Presb. Church, 46 Mo. 279.

79. McGillivray *v.* Barton Dist. Tp., 96 Iowa 629, 65 N. W. 974. See AFFIDAVITS, 2 Cyc. 27 note 40.

80. Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819. See AFFIDAVITS, 2 Cyc. 30 note 69. *Contra*, Finley *v.* West, 51 Mo. App. 569, 571, where it was said: "The fact that the jurat is not signed by the officer, shown to be an oversight, ought not to nullify the paper. He should be permitted to attach his signature yet," and proof that the paper was in fact sworn to was held admissible. See also Sage *v.* Stafford 42 N. Y. App. Div. 449, 59 N. Y. Suppl. 545 [*distinguishing* Cream City Furniture Co. *v.* Squire, 2 Misc. (N. Y.) 438, 21 N. Y. Suppl. 972]. And see AFFIDAVITS, 2 Cyc. 31 note 70.

81. Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

82. Colman *v.* Goodnow, 36 Minn. 9, 29 N. W. 338, 1 Am. St. Rep. 632; Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819; Stetson, etc., Mill Co. *v.* McDonald, 5 Wash. 496, 32 Pac. 108 [*following* Gates *v.* Brown, 1 Wash. 470, 25 Pac. 914]. See AFFIDAVITS, 2 Cyc. 32 note 81.

Record showing attachment of seal.—Where the copy of the lien notice in the record shows that it was verified by the notary who signed the same, and the word "seal" is written thereafter but no impression of the notarial seal itself appears, this indicates that the seal was properly attached to the original. Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

83. Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819. See AFFIDAVITS, 2 Cyc. 31 notes 73, 74.

84. Stetson, etc., Mill Co. *v.* McDonald, 5 Wash. 496, 32 Pac. 109.

85. Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863 [*following* Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021; Finn *v.* Rose, 12 Iowa 565], verification before deputy of clerk in whose office statement filed.

86. Jackman *v.* Gloucester, 143 Mass. 380, 9 N. E. 740.

87. Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021, where the statement was verified before the clerk of the court, who signed his name to the jurat merely adding the word "Clerk," but the venue showed the county and the court.

88. Hickey *v.* Collom, 47 Minn. 565, 568, 50 N. W. 918 [*distinguishing* Wood *v.* St. Paul City R. Co., 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149, the court saying: "In that case the certificate of a notary under his seal was held sufficient, owing to the peculiar nature of his office, and the credit everywhere given to his official acts under seal"]; Lockhead *v.* Berkeley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 S. E. 1031. Under N. Y. Laws (1850), c. 270, § 4, providing that before any affidavit taken before a commissioner out of the state shall be entitled to be used, recorded, or read in evidence, there shall be affixed to the certificate of such commissioner a certificate of the secretary of state that such person is a commissioner for the state of New York, a notice of

(v) *Time to Raise Objection.* An objection that the notice or statement of lien is not sufficiently verified can be raised at the trial, and need not be raised any sooner.[89]

12. Effect of Errors and Defects in Claim or Statement[90] — a. In General. The lien is not defeated by reason of an unintentional misstatement or a trivial error, omission, or surplusage, where the defect is not misleading and can be easily corrected;[91] but an intentional false statement of a material matter will vitiate the claim,[92] and a claim or statement which does not even substantially

a lien verified without the state before a commissioner for New York, and filed without the required certificate by the secretary of state being affixed, is void, although such certificate is attached after the commencement of the action. Cream City Furniture Co. *v.* Squier, 2 Misc. (N. Y.) 438, 21 N. Y. Suppl. 972 [*disapproving* Lawton *v.* Kiel, 51 Barb. (N. Y.) 30].

89. Conklin *v.* Wood, 3 E. D. Smith (N. Y.) 662.

90. Mistake in name of owner see *supra*, II, C, 11, g, (II).

91. *California.*— McDonald *v.* Backus, 45 Cal. 262. See also Continental Bldg., etc., Assoc. *v.* Hutton, 144 Cal. 609, 78 Pac. 21.

Colorado.— Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519.

Connecticut.— Shattuck *v.* Beardsley, 46 Conn. 386.

Illinois.— Inter-State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342 [*affirming* 71 Ill. App. 529]; Kendall *v.* Fader, 99 Ill. App. 104; Schroth *v.* Black, 50 Ill. App. 168. See also Christian *v.* Allee, 104 Ill. App. 177.

Iowa.— Ewing *v.* Stockwell, 106 Iowa 26, 75 N. W. 657; St. Croix Lumber Co. *v.* Davis, 105 Iowa 27, 29, 74 N. W. 756 [*following* Green Bay Lumber Co. *v.* Miller, 98 Iowa 468, 62 N. W. 742, 67 N. W. 383, and *distinguishing* Stubbs *v.* Clarinda, etc., R. Co., 65 Iowa 513, 22 N. W. 654] (where it is said: "The mistake or inaccuracy that will nullify the statement for a lien must, at least where no one is directly injured by it, be willful and intentional"); Lee *v.* Hoyt, 101 Iowa 101, 70 N. W. 95.

Massachusetts.—The earlier cases held that any error in the claim stated in the notice of lien destroyed the lien or the right to enforce it. Truesdell *v.* Gay, 13 Gray 311; Lynch *v.* Cronan, 6 Gray 531. But these decisions led to legislation establishing the rule that any inaccuracy in the claim should not invalidate the lien unless the claimant intentionally and wilfully claimed more than was his due. Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Muto *v.* Smith, 175 Mass. 175, 55 N. E. 1041; Ellinwood *v.* Worcester, 154 Mass. 590, 28 N. E. 1053; Jones *v.* Keen, 115 Mass. 170; Hubbard *v.* Brown, 8 Allen 590.

Michigan.— McAllister *v.* Des Rochers, 132 Mich. 381, 93 N. W. 887; Gibbs *v.* Hanchette, 9 Mich. 657, 51 N. W. 691 [*followed* in Hannah, etc., Marcantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120].

Minnesota.— Coughlin *v.* Longini, 77 Minn. 514, 80 N. W. 695; Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47.

Missouri.— Ittner *v.* Hughes, 133 Mo. 679, 34 S. W. 1110; O'Shea *v.* O'Shea, 91 Mo. App. 221; Eau Claire-St. Louis Lumber Co. *v.* Gray, 81 Mo. App. 337; Hydraulic Press Brick Co. *v.* McTaggart, 76 Mo. App. 347. *Compare* McAdow *v.* Miltenberger, 75 Mo. App. 346.

Nebraska.— See Barnacle *v.* Henderson, 42 Nebr. 169, 60 N. W. 382.

New York.— Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954; Ringle *v.* Wallis Iron Works, 4 Misc. 15, 24 N. Y. Suppl. 757 [*modified* and *affirmed* in 76 Hun 449, 28 N. Y. Suppl. 107]. See also Tibbits *v.* Phipps, 163 N. Y. 580, 57 N. E. 1126; Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300 [*reversing* 4 Daly 362, 14 Abb. Pr. N. S. 284].

Oregon.— Cooper Mfg. Co. *v.* Delahunt, 36 Oreg. 402, 51 Pac. 649, 60 Pac. 1.

Pennsylvania.— Simpson *v.* Cameron, 3 Pa. Dist. 612.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 268.

Including name of person not liable.— Where a subcontractor in his notice of lien gave the name of his real debtor but coupled with it that of a third person who was not liable, the error did not vitiate the lien if the owner was not misled to his injury thereby and there was no presumption that he was so misled. Putnam *v.* Ross, 46 Mo. 337, 55 Mo. 116 [*followed* in Building, etc., Co. *v.* Huber, 42 Mo. App. 432].

Effect of failure to apportion.— Where materialmen furnished materials for the construction of three buildings on land belonging to the same owner, and it was impossible for them to know what materials were intended for each building, their failure to distribute the materials furnished among the several buildings did not invalidate their lien; its only effect in any event being to postpone their claim to those of other lien creditors, as provided by Md. Code (1904), art. 63, § 31. Fulton *v.* Parlett, (Md. 1906) 64 Atl. 58.

92. *Connecticut.*— Rose *v.* Persse, etc., Paper Works, 29 Conn. 256.

Illinois.— Crandall *v.* Lyon, 188 Ill. 86, 58 N. E. 972; Christian *v.* Allee, 104 Ill. App. 177.

Iowa.— Stubbs *v.* Clarinda, etc., R. Co., 65 Iowa 513, 22 N. W. 654. See also St. Croix Lumber Co. *v.* Davis, 105 Iowa 27, 74 N. W. 756.

Michigan.— Gibbs *v.* Hanchette, 90 Mich. 657, 51 N. W. 691 [*followed* in Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120].

Missouri.— Uthoff *v.* Gerhard, 42 Mo. App.

comply with the statutory requirements is of course fatally defective.[93] A mistake of the claimant in crediting a discount for which there was no consideration does not preclude him from asserting the right to recover the value of the materials disregarding the discount.[94]

b. Mistake in Description of Property. A mistake in the description of the property sought to be charged will not not invalidate the lien where it is not of a character to mislead and the property intended can be certainly identified notwithstanding.[95] Thus, under such circumstances, the lien will not be defeated because of an error in the name of the street on which[96] or the subdivision in which[97] the property is located, or in the platted number of the lot,[98] block,[99] or section[1] on which the building or improvement is situated.

c. Mistake as to Date. A mistake or inaccuracy in the statement as to a date is not necessarily fatal if no one is misled thereby to his prejudice;[2] nor will such

256; Kling *v.* Carondelet Railway Constr. Co., 7 Mo. App. 410.

New Jersey.— McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21.

New York.— Aeschlimann *v.* Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723 [*affirming* 29 N. Y. App. Div. 630, 53 N. Y. Suppl. 998]; McKinney *v.* White, 15 N. Y. App. Div. 423, 44 N. Y. Suppl. 561; Ringle *v.* Wallis Iron Works, 76 Hun 449, 452, 28 N. Y. Suppl. 107 [*modifying* 4 Misc. 15, 24 N. Y. Suppl. 757] (where it is said: "A mechanic's lien in which it is knowingly and falsely stated that all of the work has been performed and materials furnished, pursuant to the contract, and that the whole amount of the contract price is due, is invalid, unless the mis-statement is an unimportant one"); Gaskell *v.* Beard, 58 Hun 101, 11 N. Y. Suppl. 399; Foster *v.* Schneider, 50 Hun 150, 2 N. Y. Suppl. 875; Mull *v.* Jones, 18 N. Y. Suppl. 359; Brandt *v.* Verdon, 18 N. Y. Suppl. 119.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 268.

93. Wagner *v.* Hansen, 103 Cal. 104, 37 Pac. 195; Denver Hardware Co. *v.* Croke, 4 Colo. App. 530, 36 Pac. 624, holding that where the statute prescribes a form of lien statement for the case of a principal contractor different from that of a subcontractor, and the statement filed is that of a principal contractor, while the court finds, upon conflicting testimony, that the work was done by plaintiff as a subcontractor, there is no lien to be enforced.

Any person interested may take advantage of a defect in the form of the lien claim. Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472 (any lien creditor); Lauman's Appeal, 8 Pa. St. 473; *In re* Wells, 2 Del. Co. (Pa.) 172.

Form and contents of claim or statement see *supra*, III, C, 11.

94. Noyes *v.* Smith, (Tex. Civ. App. 1903) 77 S. W. 649.

95. *Minnesota.*—Northwestern Cement, etc., Pavement Co. *v.* Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 45 N. W. 868.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— Kennedy *v.* House, 41 Pa. St. 39, 80 Am. Dec. 594. See also Brundage *v.* Phillips, 3 Grant 313.

Washington.— McHugh *v.* Slack, 11 Wash. 370, 39 Pac. 674.

Wisconsin.— Brown *v.* La Crosse City Gas Light, etc., Co., 16 Wis. 555.

Rejection of part of description.— Where the description in a claim of lien unequivocally refers to one building built on one triangular lot, specifically described, which is in fact the separate property of a married woman, the words immediately following the description, "together with that triangular piece," deeded to such married woman by a specified grantor, and referring to a similar situation thereof, if not intended to be another description of the same triangular lot, may be rejected as repugnant to the preceding description. McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

96. O'Brien *v.* Krockinski, 50 Ill. App. 456, "Dowing" instead of "Downing."

97. Martin *v.* Simmons, 11 Colo. 411, 18 Pac. 535 ("Highland subdivision" instead of "Highland, in the town of Highland"); Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685 ("Haney's" instead of "Henley's" addition); Bassett *v.* Menage, 52 Minn. 121, 53 N. W. 1064 ("St. Louis Park addition to Minneapolis" instead of "St. Louis Park Center, Hennepin county"); Russell *v.* Hayden, 40 Minn. 88, 41 N. W. 456 ("North Minneapolis Addition to Minneapolis" instead of "North Minneapolis").

98. Newcomer *v.* Hutchings, 96 Ind. 119; Holland *v.* Garland, 13 Phila. (Pa.) 544. *Contra*, Goodrich Lumber Co. *v.* Davie, 13 Mont. 76, 32 Pac. 282.

99. McLean *v.* Young, 2 MacArthur (D. C.) 184; Bassett *v.* Menage, 52 Minn. 121, 53 N. W. 1064; De Witt *v.* Smith, 63 Mo. 263.

1. McNamee *v.* Rauck, 128 Ind. 59, 27 N. E. 423; National Lumber Co. *v.* Bownan, 77 Iowa 706, 42 N. W. 557.

2. *California.*— Boscow *v.* Patton, 136 Cal. 90, 68 Pac. 490; Slight *v.* Patton, 96 Cal. 384, 31 Pac. 248.

Iowa.— Johnson *v.* Otto, 105 Iowa 605, 75 N. W. 492; St. Croix Lumber Co. *v.* Davis, 105 Iowa 27, 74 N. W. 756; Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90, holding that where the statement of account attached to an affidavit for a lien represented all the labor

mistake preclude the claimant, when necessary to sustain his lien, from showing the true date.[3]

d. Excessive Claims — (1) *In General.* It is well established as a general rule that the fact that a claimant claims an amount greater than is really due to him will not defeat the lien where such excessive claim is due to an honest mistake,[4] but in such case the lien may be sustained and enforced *pro tanto* if the true amount for which the claimant is entitled to a lien can be segregated from

and materials as having been furnished on the same date, which obviously could not have been the case, the error did not defeat the lien where from the statement of account and affidavit together there plainly appeared the date of the contract under which the work was done, the date of its completion, and that the labor and materials mentioned in the account were supplied between those dates. See also Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518.

Maryland.— Treusch *v.* Shryock, 55 Md. 330.

Michigan.— Union Trust Co. *v.* Casserly, 127 Mich. 183, 86 N. W. 545.

Minnesota.—Coughlan *v.* Longini, 77 Minn. 514, 80 N. W. 695; Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47; Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616 (the statement having been filed within the prescribed time in any event); Linne *v.* Stout, 41 Minn. 483, 43 N. W. 377.

Missouri.— Baltis *v.* Friend, 90 Mo. App. 408; Brockmeier *v.* Dette, 58 Mo. App. 607; Mesker *v.* Cutler, 51 Mo. App. 341.

Oregon.— Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

Pennsylvania.— McClintock *v.* Rush, 63 Pa. St. 203 (if the correct date can be determined from the marginal date and the date of filing the claim); Hillary *v.* Pollock, 13 Pa. St. 186; Haviland *v.* Pratt, 1 Phila. 364. But *compare* Milligan *v.* Hill, 4 Phila. 52.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 269.

Contra.— May, etc., Brick Co. *v.* General Engineering Co., 180 Ill. 535, 54 N. E. 638 [*affirming* 76 Ill. App. 380].

3. Westland *v.* Goodman, 47 Conn. 83; Cole *v.* Uhl, 46 Conn. 296; Burrell *v.* Way, 176 Mass. 164, 57 N. E. 335.

4. *Alabama.*— Alabama, etc., Lumber Co. *v.* Tisdale, 139 Ala. 250, 36 So. 618.

California.— Snell *v.* Payne, 115 Cal. 218, 221, 46 Pac. 1069 (where it is said: "At most the only penalty for such error would be a postponement of the liens to the claims of other lienholders"); Schallert-Ganahl Lumber Co. *v.* Neal, 91 Cal. 362, 27 Pac. 743; Harmon *v.* San Francisco, etc., R. Co., 86 Cal. 617, 25 Pac. 124, (1889) 22 Pac. 407.

Connecticut.— Kiel *v.* Carll, 51 Conn. 440; Marston *v.* Kenyon, 41 Conn. 349; Hopkins *v.* Forrester, 39 Conn. 351.

Illinois.— Day *v.* Chapman, 88 Ill. App. 358 [*following* Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 (*affirming* 61 Ill. App. 310)]; Rockwell *v.* O'Brien-Green Co., 62 Ill. App. 293.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157 (where it is said: "A mistake of that character, which has not operated to the prejudice of anyone, will not defeat a lien"); Harrington *v.* Dollman, 64 Ind. 255.

Iowa.— Ewing *v.* Stockwell, 106 Iowa 26, 75 N. W. 657; Simonson Bros. Mfg. Co. *v.* Citizens' State Bank, 105 Iowa 264, 74 N. W. 905.

Massachusetts.— Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367; Smith *v.* Norris, 120 Mass. 58; Hubbard *v.* Brown, 8 Allen 590; Underwood *v.* Walcott, 3 Allen 464; Whitford *v.* Newell, 2 Allen 424; Parker *v.* Bell, 7 Gray 429.

Michigan.— McAllister *v.* Des Rochers, 132 Mich. 381, 93 N. W. 887; Union Trust Co. *v.* Casserly, 127 Mich. 183, 86 N. W. 545; Hulburt *v.* Just, 126 Mich. 337, 85 N. W. 872; Fairbairn *v.* Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; Scheibner *v.* Cohnen, 108 Mich. 165, 65 N. W. 760; McMonegal *v.* Wilson, 103 Mich. 264, 61 N. W. 495; Lamont *v.* La Fevre, 96 Mich. 175, 55 N. W. 687; Gibbs *v.* Hanchette, 90 Mich. 657, 51 N. W. 691 [*followed* in Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120].

Missouri.— Heamann *v.* Porter, 35 Mo. 137.

New Jersey.— Taylor *v.* Wahl, 69 N. J. L. 471, 55 Atl. 40.

New York.— Ringle *v.* Wallis Iron Works, 149 N. Y. 439, 44 N. E. 175; Held *v.* New York, 83 N. Y. App. Div. 509, 82 N. Y. Suppl. 426; Beattys *v.* Searles, 74 N. Y. App. Div. 214, 77 N. Y. Suppl. 497; Gaskell *v.* Beard, 58 Hun 101, 11 N. Y. Suppl. 399; Morgan *v.* Taylor, 15 Daly 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253]; American Mortg. Co. *v.* Butler, 36 Misc. 253, 73 N. Y. Suppl. 334.

North Dakota.— Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

Ohio.— Thomas *v.* Huesman, 10 Ohio St. 152.

Oregon.— Cooper Mfg. Co. *v.* Delahunt, 36 Oreg. 402, 51 Pac. 649, 60 Pac. 1; Fitch *v.* Howitt, 32 Oreg. 396, 52 Pac. 192; Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54; Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390; Chamberlain *v.* Hibbard, 26 Oreg. 428, 38 Pac. 437; Rowland *v.* Harmon, 24 Oreg. 529, 34 Pac. 357; Nicolai Bros. Co. *v.* Van Fridagh, 23 Oreg. 149, 31 Pac. 288.

Pennsylvania.— Morrison *v.* Swarthmore Nat. Bank, 9 Del. Co. 573.

Rhode Island.— Murphy *v.* Guisti, 22 R. I. 588, 48 Atl. 944.

Utah.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008; Garner *v.* Van Patten, 20 Utah 342, 58 Pac. 684.

the aggregate amount claimed.[5] But where the claimant knowingly and intentionally claims an amount larger than what is due to him, his entire lien is defeated;[6] and even the fact that the claimant might have known by the exercise of reasonable diligence that the statement filed by him is not a true statement of his claim may be sufficient to defeat the lien.[7]

(II) *ITEMS IMPROPERLY INCLUDED.* The lien is not defeated by the inclusion in the lien claim or statement of charges for items which are not lienable,[8] or

United States.— Springer Land Assoc. *v.* Ford, 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562 [*affirming* 8 N. M. 37, 41 Pac. 541]; Salt Lake Hardware Co. *v.* Chainman Min., etc., Co., 137 Fed. 632; Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 270.

A statute annulling any "willfully false claim" should not be construed as applying to a case of mere discrepancy in the amount of a claim as filed, such as may be consistent with good faith. Barber *v.* Reynolds, 44 Cal. 519.

5. Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229. And see *supra*, note 4.

6. *Iowa.*— Stubbs *v.* Clarinda, etc., R. Co., 65 Iowa 513, 22 N. W. 654.

Massachusetts.—Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367; Lewin *v.* Whittenton Mills, 13 Gray 100 [*distinguishing* Parker *v.* Bell, 7 Gray 429].

Michigan.— McMonegal *v.* Wilson, 103 Mich. 264, 61 N. W. 495; Brennan *v.* Miller, 97 Mich. 182, 56 N. W. 354; Gibbs *v.* Hanchette, 90 Mich. 657, 51 N. W. 691 [*followed* in Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120].

Missouri.— Uthoff *v.* Gerhard, 42 Mo. App. 256; Kling *v.* Carondelet R. Constr. Co., 7 Mo. App. 410.

New Jersey.— Reeve *v.* Elmendorf, 38 N. J. L. 125 [*followed* in McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21].

New York.— Aeschlimann *v.* Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723 [*affirming* 29 N. Y. App. Div. 630, 53 N. Y. Suppl. 998]; New Jersey Steel, etc., Co. *v.* Robinson, 85 N. Y. App. Div. 512, 83 N. Y. Suppl. 450; Williams *v.* Daiker, 63 N. Y. App. Div. 614, 71 N. Y. Suppl. 247; Goodrich *v.* Gillies, 82 Hun 18, 31 N. Y. Suppl. 76 [*affirmed* in 151 N. Y. 631, 45 N. E. 1132].

North Dakota.—Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

South Dakota.— Bohn Mfg. Co. *v.* Keenan, 15 S. D. 377, 89 N. W. 1009.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 270.

Even though there is no actual and affirmative fraud the lien is lost if the claimant has wilfully grossly exaggerated his claim and thereby worked or might have worked an injury to subsequent lienors and other parties interested in the fund. New Jersey Steel, etc., Co. *v.* Robinson, 85 N. Y. App. Div. 512, 83 N. Y. Suppl. 450.

7. Brennan *v.* Miller, 97 Mich. 182, 185, 56 N. W. 354 (where it is said: "Lien laws are recognized as harsh remedies, and when, as by our statute, parties are required to file 'just and true statements of the demand, over and above all legal set-offs,' equity treats as insufficient a statement which is largely excessive. Parties are not permitted to include speculative items in their claims, thereby incumbering the lands of others with untrue and unjust claims; and, as the means of information is within their reach, they are held to a degree of accuracy greater than may be necessary in mere actions upon demands"); Cooper Mfg. Co. *v.* Delahunt, 36 Oreg. 402, 51 Pac. 649, 60 Pac. 1; Nicolai *v.* Van Fridagh, 23 Oreg. 149, 31 Pac. 288.

8. *Arizona.*— Wolfley *v.* Hughes, (1903) 71 Pac. 951.

California.—Harmon *v.* San Francisco, etc., R. Co., (1889) 22 Pac. 407.

Connecticut.— Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Iowa.— Page *v.* Grant, 127 Iowa 249, 103 N. W. 124; Palmer *v.* McGinness, 127 Iowa 118, 102 N. W. 802.

Massachusetts.— Hubbard *v.* Brown, 8 Allen 590; Whitford *v.* Newell, 2 Allen 424; Parker *v.* Bell, 7 Gray 429. *Aliter* under St. (1851) c. 343. Truesdell *v.* Gay, 13 Gray 311.

Minnesota.— Dennis *v.* Smith, 38 Minn. 494, 38 N. W. 695.

Missouri.— Walden *v.* Robertson, 120 Mo. 38, 25 S. W. 349; Allen *v.* Frumet Min., etc., Co., 73 Mo. 688; Kittrell *v.* Hopkins, 114 Mo. App. 431, 90 S. W. 105; Eau Claire-St. Louis Lumber Co. *v.* Wright, 81 Mo. App. 535, 337; Price *v.* Merritt, 55 Mo. App. 640; McLaughlin *v.* Schawacker, 31 Mo. App. 365; Pullis *v.* Hoffman, 28 Mo. App. 666; Johnson *v.* Barnes, etc., Bldg Co., 23 Mo. App. 546.

Nevada.— Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090.

New Jersey.— Evans *v.* Lower, 67 N. J. Eq. 232, 58 Atl. 294.

New York.— Gaskell *v.* Beard, 58 Hun 101, 11 N. Y. Suppl. 399.

Oregon.— Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454; Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641; Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— McCristal *v.* Cochran, 147 Pa. St. 225, 23 Atl. 444 (holding that the fact that some of the items are insufficient is not ground for striking off the lien claim where it contains one good item which is

which were not furnished for or used in the building or improvement,[9] where the inclusion of such charges is due to an honest mistake without fraudulent intent,[10] and the items for which the claimant is entitled to a lien can be segregated from those which are improperly included,[11] but the lien will be enforced as to the proper and lienable charges.[12] The inclusion of such improper charges will, however, defeat the entire lien where they are wilfully and intentionally included by

lienable); Simpson *v.* Cameron, 3 Pa. Dist. 612.

South Dakota.— Stokes *v.* Green, 10 S. D. 286, 73 N. W. 100.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Wisconsin.— North *v.* La Flesh, 73 Wis. 520, 41 N. W. 633.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 272.

Payments on account covering objectionable items.— It is no ground for reducing the amount for which a lien is allowed that certain items charged on the account are not within the lien law, it appearing that the payments on account were more than enough to pay all items up to and including the dates of such objectionable items. Cuer *v.* Ross, 49 Wis. 652, 6 N. W. 331.

9. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

Iowa.— St. Croix Lumber Co. *v.* Davis, 105 Iowa 27, 74 N. W. 756.

Michigan.— Union Trust Co. *v.* Casserly, 127 Mich. 183, 86 N. W. 545.

Missouri.— Uhrich *v.* Osborn, 106 Mo. App. 492, 81 S. W. 228; Western Brass Mfg. Co. *v.* Mepham, 64 Mo. App. 50; Midland Lumber Co. *v.* Kreeger, 52 Mo. App. 418. See also Schulenburg, etc., Lumber Co. *v.* Strimple, 33 Mo. App. 154, holding that a lien account which contains items which are in the original bid, but for which no charge is made, as they were never delivered, is not deprived of its character of a just and true account.

New York.— Goodrich *v.* Gillies, 82 Hun 18, 31 N. Y. Suppl. 76 [*affirmed* in 151 N. Y. 631, 45 N. E. 1132]; Gaskell *v.* Beard, 58 Hun 101, 11 N. Y. Suppl. 399; Pierson *v.* Jackman, 27 Misc. 425, 58 N. Y. Suppl. 344 [*affirmed* in 47 N. Y. App. Div. 625, 62 N. Y. Suppl. 1145].

Pennsylvania.— Walter *v.* Powell, 13 Pa. Dist. 667.

Washington.— Bolster *v.* Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Peterman *v.* Milwaukee Brewing Co., 11 Wash. 199, 39 Pac. 452. See also Whittier *v.* Stetson, etc., Mill Co., 6 Wash. 190, 33 Pac. 393, 36 Am. St. Rep. 149.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 271.

10. *Arizona.*— Wolfley *v.* Hughes, (1903) 71 Pac. 951.

California.— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

Connecticut.— Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325.

Illinois.— Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115.

Iowa.— Palmer *v.* McGinness, 127 Iowa 118, 102 N. W. 802.

Massachusetts.— Hubbard *v.* Brown, 8 Allen 590.

Missouri.— Uhrich *v.* Osborn, 106 Mo. App. 492, 81 S. W. 228; Midland Lumber Co. *v.* Kreeger, 52 Mo. App. 418.

New Jersey.— Evans *v.* Lower, 67 N. J. Eq. 232, 58 Atl. 294.

South Dakota.— Stokes *v.* Green, 10 S. D. 286, 73 N. W. 100.

Washington.— Bolster *v.* Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 271, 272; and *supra*, notes 8, 9.

11. *California.*— Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772.

Connecticut.— Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104].

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Iowa.— St. Croix Lumber Co. *v.* Davis, 105 Iowa 27, 74 N. W. 756.

Massachusetts.— Hubbard *v.* Brown, 8 Allen 590.

Minnesota.— Dennis *v.* Smith, 38 Minn. 494, 38 N. W. 695.

Missouri.— Eau Claire-St. Louis Lumber Co. *v.* Wright, 81 Mo. App. 535; Western Brass Mfg. Co. *v.* Mepham, 64 Mo. App. 50; Midland Lumber Co. *v.* Kreeger, 52 Mo. App. 418.

Nevada.— Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090.

New York.— Gaskell *v.* Beard, 58 Hun 101, 11 N. Y. Suppl. 399.

Oregon.— Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

Pennsylvania.— McCristal *v.* Cochran, 147 Pa. St. 225, 23 Atl. 444.

South Dakota.— Stokes *v.* Green, 10 S. D. 286, 73 N. W. 100.

Wisconsin.— Rinzel *v.* Stumpf, 116 Wis. 287, 93 N. W. 36.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 271, 272; and *supra*, notes 8, 9.

12. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Gordon Hardware Co. *v.* San Francisco, etc., R. Co., 86 Cal. 620, 25 Pac. 125; Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Iowa.— See Chase *v.* Garver Coal, etc., Co., 90 Iowa 25, 57 N. W. 648.

Minnesota.— Dennis *v.* Smith, 38 Minn. 494, 38 N. W. 695.

Missouri.— Ittner *v.* Hughes, 133 Mo. 679, 34 S. W. 1110; Eau Claire-St. Louis Lumber Co. *v.* Wright, 81 Mo. App. 535, 337; McLaughlin *v.* Schwacker, 31 Mo. App. 365.

the claimant in order to obtain a lien for a larger amount than he is entitled to,[13] or where the account is so stated that the lienable and non-lienable items cannot be segregated.[14]

(III) *OMISSION OF CREDITS.* The intentional omission from the lien claim or statement of credits which should be given will defeat the lien,[15] but the lien is not lost where the omission is due to an honest mistake.[16] Neither will the lien be defeated by the omission of a credit as to which the claimant has not accu-

Nevada.— Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090.

New York.— Gaskell *v.* Beard, 58 Hun 101, 11 N. Y. Suppl. 390.

Pennsylvania.— McCristal *v.* Cochran, 147 Pa. St. 225, 23 Atl. 444; Waymard *v.* Dalz, 30 Pittsb. Leg. J. N. S. 96. See also Walter *v.* Powell, 13 Pa. Dist. 667.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 271, 272; and *supra*, notes 8, 9.

It is proper to receive evidence to segregate the lienable from the non-lienable items. Wolfley *v.* Hughes, (Ariz. 1903) 71 Pac. 951.

The fact that the parties have had an accounting, and adjusted the amount due on the whole account, will not destroy the lien, nor prevent the court from eliminating the non-lienable items in a suit to enforce the lien. Dennis *v.* Smith, 38 Minn. 494, 38 N. W. 695.

If the judgment taken includes non-lienable claims the lien to secure the others is lost. Salem First Nat. Bank *v.* Redman, 57 Me. 405.

13. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

Iowa.— Stubbs *v.* Clarinda, etc., R. Co., 65 Iowa 513, 22 N. W. 654.

Massachusetts.— Lynch *v.* Cronan, 6 Gray 531.

Missouri.— Kittrell *v.* Hopkins, 114 Mo. App. 431, 90 S. W. 109; Eau Claire-St. Louis Lumber Co. *v.* Wright, 81 Mo. App. 535, 337.

New Jersey.— McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21 [*following* Reeve *v.* Elmendorf, 38 N. J. L. 125].

New York.— Goodrich *v.* Gillies, 66 Hun 422, 21 N. Y. Suppl. 400; Williams *v.* Daiker, 33 Misc. 70, 68 N. Y. Suppl. 348.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 271, 272; and cases cited *supra*, note 10.

14. *California.*— McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac 182, 622; Pacific Mut L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

Colorado.— Cannon *v.* Williams, 14 Colo. 21, 23 Pac. 456.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115; Adler *v.* World's Pastime Exposition Co., 126 Ill. 373, 18 N. E. 809.

Iowa.— Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. Rep. 276.

Maine.— Baker *v.* Fessenden, 71 Me. 292.

Massachusetts.— Driscoll *v.* Hill, 11 Allen 154.

Missouri.— Edgar *v.* Salisbury, 17 Mo. 271; O'Brien Boiler Works Co. *v.* Haydock, 59 Mo. App. 653; Dugan Cut-Stone Co. *v.* Gray, 43 Mo. App. 671; Schulenburg, etc., Lumber Co. *v.* Strimple, 33 Mo. App. 154; Gauss *v.* Hussmann, 22 Mo. App. 115; Murphy *v.* Murphy, 22 Mo. App. 18; Nelson *v.* Withrow, 14 Mo. App. 270.

Oregon.— Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574; Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54; Williams *v.* Toledo Coal Co., 25 Oreg. 426, 36 Pac. 159, 42 Am. St. Rep. 799.

Pennsylvania.— Bradley *v.* Gaghan, 208 Pa. St. 511, 57 Atl. 985.

Wisconsin.— Rinzel *v.* Stumpf, 116 Wis. 287, 93 N. W. 36.

Canada.— Weller *v.* Shupe, 6 Brit. Col. 58.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 271, 272; and cases cited *supra*, note 11.

The blending of lienable items, some of which remain unproved, or unproved to their full extent, does not defeat the entire lien. Schulenburg, etc., Lumber Co. *v.* Strimple, 33 Mo. App. 154.

15. Lane, etc., Co. *v.* Jones, 79 Ala. 156; Hoffman *v.* Walton, 36 Mo. 613; Nicolai Bros. Co. *v.* Van Fridagh, 23 Oreg. 149, 31 Pac. 288, if the error is one which could have been avoided by the exercise of reasonable diligence the lien is lost.

16. *Dakota.*— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104].

Massachusetts.—Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367. *Aliter* under St. (1851) c. 343, § 2. Lynch *v.* Cronan, 6 Gray 531.

Michigan.— Frohlich *v.* Carroll, 127 Mich. 561, 86 N. W. 1034.

Missouri.— Hydraulic Press Brick Co. *v.* McTaggart, 76 Mo. App. 347; Schroeder *v.* Mueller, 33 Mo. App. 28.

North Dakota.— Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

Oregon.— Rowland *v.* Harmon, 24 Oreg. 529, 34 Pac. 357 [*distinguishing* Nicolai Bros. Co. *v.* Van Fridagh, 23 Oreg. 149, 31 Pac. 288], the omission being neither negligent nor wilful.

Utah.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 273.

Failure to credit land to be taken in payment.— Where a contractor constructing an irrigation ditch agrees to select a tract of land out of those to be benefited, which is to be credited to him, at a fixed price, as part payment for the work, provided his employer secures a sufficient deed from the owner to himself, a subsequent mechanic's lien filed by such contractor is not invalid

rate information[17] and is unable to get a statement;[18] nor, where the deductions to be made are unliquidated and in dispute will a failure to credit the precise amount subsequently allowed by the court defeat the lien.[19]

e. Waiver and Cure of Errors. A defect or irregularity in the lien claim or statement is waived by a failure to object to it[20] in the answer[21] or at the time when it is offered in evidence to establish the lien,[22] and going to trial on the merits.[23] But the mere appearance of defendants in proceedings to foreclose a lien does not waive a defect in the notice;[24] and it has been held that the owner does not by merely reading the claim as filed to the jury on the trial admit it or become estopped to allege that it is defective.[25] The fact that the owner himself bought the materials and promised to pay for them furnishes no reason for sustaining a defective claim;[26] and where the lien claim or statement is fatally defective in form the fact that a purchaser, subsequent lien creditor, or other person interested in the estate has actual notice of the claim will not cure the defect as against him.[27] An amendment of the bill brought to enforce the lien cannot cure an error in the lien claim.[28]

13. Amendment of Claim or Statement. It has been laid down flatly that the notice or claim of lien must be complete in itself at the time when it is filed for record in order to authorize its enforcement, and it is not capable of being amended or reformed;[29] but the better rule appears to be that while the claim cannot be amended after the expiration of the time allowed for filing without statutory authority,[30] prior to the expiration of that time it may be amended,[31] or a new

for failure to credit the price of such land on the amount of his claim, where it does not appear that there was ever any tender of the deed, or any showing of readiness or willingness to deliver it. Springer Land Assoc. *v.* Ford, 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562 [*affirming* 8 N. M. 37, 41 Pac. 541].

17. Rison *v.* Moon, 91 Va. 384, 22 S. E. 165.

18. Kasper *v.* St. Louis Terminal R. Co., 101 Mo. App. 323, 74 S. W. 145.

19. Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310].

20. Boyd *v.* Bassett, 16 N. Y. Suppl. 10, verification not full and complete.

21. General Fire Extinguisher Co. *v.* Magee Carpet Works, 199 Pa. St. 647, 49 Atl. 366, holding that defendant waives defects in the lien claim by pleading the general issue.

22. Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709.

Agreement for admission.— Where it is agreed by the parties before a commissioner that a notice of lien with the indorsement of the county auditor thereon as to the time and place of record shall be admitted as evidence without formal proof in lieu of copies, such agreement is a waiver of any objection to the sufficiency of the lien. Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709.

23. See Barrall *v.* Ruberry, 9 Kulp (Pa.) 285, where it is said: "After trial on the merits the defect would have to be bad indeed to warrant the court in striking off the lien."

24. Beals *v.* B'Nai Jeshurun Cong., 1 E. D. Smith (N. Y.) 654.

25. Harman *v.* Cummings, 43 Pa. St. 322, 323, where it is said: "The business which the jury had before them was to decide upon the truth of that claim, which they could not do without having it read to them. The plaintiff ought himself to have presented it to them, that they might know what they were trying. The defendants can suffer no prejudice by doing this for him."

26. Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729.

27. *In re* Wells, 2 Del. Co. (Pa.) 172.

28. May, etc., Brick Co. *v.* General Engineering Co., 180 Ill. 535, 54 N. E. 638 [*affirming* 76 Ill. App. 380].

29. Madera Flume, etc., Co. *v.* Kendall, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177; Goss *v.* Strelitz, 54 Cal. 640; Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Hill *v.* Stagg, Wils. (Ind.) 403; Maurer *v.* Bliss, 14 Daly (N. Y.) 150, 6 N. Y. St. 224 [*affirmed* in 116 N. Y. 665, 22 N. E. 1135]; Conklin *v.* Wood, 3 E. D. Smith (N. Y.) 662; Beals *v.* B'Nai Jeshurun Cong., 1 E. D. Smith (N. Y.) 654; Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324; Harris *v.* Page, 23 R. I. 440, 50 Atl. 859 [*distinguishing* Murphy *v.* Guisti, 22 R. I. 588, 48 Atl. 944].

30. Drake *v.* Green, 48 Kan. 534, 536, 29 Pac. 584, where it is said: "We think, under the unbroken current of authorities a mechanic's lien statement cannot be so amended after the statutory period for filing has elapsed as to change the description of the property entirely unless upon express statutory authority." See also McDonald *v.* Rosengarten, 134 Ill. 126, 132, 25 N. E. 429 (where it is said: "Any amendment would have to be attached to the original, and filed within the time provided in that section for the filing of the original"); Dorman *v.* Crozier, 14 Kan. 224. The claim of lien cannot be amended after suit brought so as to affect the suit. May, etc., Brick Co. *v.* General Engineering Co., 180 Ill. 535, 54 N. E. 638 [*affirming* 76 Ill. App. 380].

31. *Dakota.*— Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748.

claim may be filed.[32] In a number of jurisdictions, however, the statutes provide for the amendment of the claim or statement,[33] even after the time allowed for filing has expired,[34] and such amendments may be in matters of substance as well as in matters of form.[35] Statutes authorizing amendments of the lien claim are

Illinois.— See McDonald *v.* Rosengarten, 134 Ill. 126, 25 N. E. 429.

Kansas.— See Dorman *v.* Crozier, 14 Kan. 224.

Missouri.— See South Missouri Lumber Co. *v.* Wright, 114 Mo. 326, 21 S. W. 811.

Nevada.— Hunter *v.* Truckee Lodge No. 14, I. O. O. F., 14 Nev. 24.

Oklahoma.— El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

Pennsylvania.— Dill *v.* Gaughan, 9 Kulp 384. See also Benore *v.* Leonard, 9 Pa. Dist. 211; Morrison *v.* Swarthmore Nat. Bank, 9 Del. Co. 573.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 275.

Alteration of record.— Where after the lien is filed, but within the statutory period for filing, it is corrected by an alteration in the description of the land, the clerk indorsing on the record the circumstance of the alteration, it thereupon becomes a new and separate lien notwithstanding such irregularity. Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748.

32. Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748; El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

33. Atkinson *v.* Woodmansee, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; Dill *v.* Gaughan, 9 Kulp (Pa.) 384 (where the application was made before the expiration of the time limited for filing); Lee *v.* Anderson, 6 Kulp (Pa.) 319; Sullivan *v.* Treen, 13 Wash. 261, 43 Pac. 38.

Statute authorizing amendment constitutional see Atkinson *v.* Woodmansee, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325.

34. *Maryland.*— Real Estate, etc., Co. *v.* Phillips, 90 Md. 515, 45 Atl. 174.

Missouri.— See Darlington *v.* Eldridge, 88 Mo. App. 525.

New Jersey.— American Brick, etc., Co. *v.* Drinkhouse, 59 N. J. L. 462, 36 Atl. 1034, 58 N. J. L. 432, 33 Atl. 950.

Oklahoma.— El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 763, 50 Pac. 144, where it is said: "Counsel contends that the language of this section authorizing the amendment of the lien by leave of court, gives no right to amend after the time for filing the lien has expired. Such a construction as that, we think, would entirely defeat the purpose of the statute. . . . If this provision authorizing amendments does not allow an amendment to be made after the time for filing the lien has expired, then it would just as well never have been written for it would hardly seem to us that it could be contended with any degree of force that a person could not do that, if this part of the statute were out of it. So long as a party's time for filing a mechanic's lien had not expired he could file as many statements in his effort to make a good lien as he chose, and certainly he could not be held to have exhausted his right by filing one or two or more imperfect statements. He might file half a dozen defective ones during that period, and then file one good and perfect one and recover on that, disregarding all of the others. But the trouble with the statute in its old form was that it gave no right to amend after the time had expired. This was a serious defect in the statute, and resulted in the defeat of meritorious claims for liens, upon purely technical grounds, and the statute was therefore changed and placed in the form in which the legislature of this territory adopted it."

Pennsylvania.— Thirsk *v.* Evans, 211 Pa. St. 239, 60 Atl. 726; Bohem *v.* Seel, 185 Pa. St. 382, 39 Atl. 1009; Linden Steel Co. *v.* Imperial Refining Co., 138 Pa. St. 10, 20 Atl. 867, 869, 9 L. R. A. 863; Benore *v.* Leonard, 9 Pa. Dist. 211; Dennis *v.* Williamson, 2 Pa. Dist. 481; Beam *v.* Geiselman, 22 Montg. Co. Rep. 106; Schaeffer *v.* Rohrbach, Wilcox 250.

Wisconsin.— Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181; Mark Paine Lumber Co. *v.* Douglas County Imp. Co., 94 Wis. 322, 68 N. W. 1013; Kerrick *v.* Ruggles, 78 Wis. 274, 47 N. W. 437; Stacy *v.* Bryant, 73 Wis. 14, 40 N. W. 632; Huse *v.* Washburn, 59 Wis. 414, 18 N. W. 341; Sherry *v.* Schraage, 48 Wis. 93, 4 N. W. 117; Challoner *v.* Howard, 41 Wis. 355; Witte *v.* Meyer, 11 Wis. 295.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 207, 275.

35. American Brick, etc., Co. *v.* Drinkhouse, 59 N. J. L. 462, 36 Atl. 1034, 58 N. J. L. 432, 33 Atl. 950; Gebhard *v.* Levering, 14 Phila. (Pa.) 120. *Compare* McFarland *v.* Schultz, 168 Pa. St. 634, 32 Atl. 94 [*followed* in Lee *v.* Exeter Club, 9 Kulp (Pa.) 209].

Permissible amendments.—Amendments have been permitted to make the claim more precise, specific, and particular (Linden Steel Co. *v.* Imperial Refining Co., 138 Pa. St. 10, 20 Atl. 867, 869, 9 L. R. A. 863, where the amendment was the filing of a paper explaining with particularity the making of diagrams on a map filed with the claim), to make the person named as contractor appear as owner (Bohem *v.* Seel, 185 Pa. St. 382, 39 Atl. 1009), to correct a clerical error in inserting the name of the wrong person as owner (Darlington *v.* Eldridge, 88 Mo. App. 525, where no one was misled or deceived by the error or prejudiced by the amendment), to change the date of furnishing the first materials so as to include a longer time than that previously given (Schaeffer *v.* Rohrbach, Wilcox (Pa.) 250), to supply an omission to aver notice to the owner of the intention to file the lien (Benore *v.* Leonard, 9 Pa. Dist. 211; Winton *v.* Leonard, 4 Lack. Jur. (Pa.) 338), to give the terms and conditions of a verbal contract and the nature of the estate

prospective in their operation,[36] and not retrospective so as to apply to claims filed before their enactment.[37] The courts will not permit an amendment after the time allowed for filing so as to affect the rights of a *bona fide* purchaser or encumbrancer.[38] Where a lien claim as filed is fatally defective or for some other reason the amendment sought would be in effect the filing of a new claim it will not be allowed after the expiration of the time for filing,[39] and it has been held that after such time amendments to the claim introducing new parties cannot be made.[40]

(Mulherin, etc., Lumber Co. *v.* Jones, 5 Lack. Jur. (Pa.) 72, 9 North. Co. Rep. 219), to cure an omission to show with whom the original contract was made (Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181), to correct an erroneous or imperfect description of the land (Mark Paine Lumber Co. *v.* Douglas County Imp. Co., 94 Wis. 322, 68 N. W. 1013; Huse *v.* Washburn, 59 Wis. 414, 18 N. W. 341; Sherry *v.* Schraage, 48 Wis. 93, 4 N. W. 117. See also Atkinson *v.* Woodmansee, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325. *Aliter* if the alteration of the description makes in effect a new claim. Gault *v.* Wittman, 34 Md. 35 [*explained* in Real Estate, etc., Co. *v.* Phillips, 90 Md. 515, 45 Atl. 174]), to supply the omission of the notary before whom a lien claim was sworn to, to state his place of residence after his signature and official title, as required by statute (Sullivan *v.* Treen, 13 Wash. 261, 43 Pac. 38), to apportion the claim (James *v.* Van Horn, 39 N. J. L. 353; Hoffmaster *v.* Knupp, 15 Pa. Co. Ct. 140, 143, where it is said: "We believe this amendment to be 'conducive to justice and a fair trial upon the merits,' and therefore to be authorized and required by § 2 of the Act of 1879, P. L. 122"), to correct the name of the owner (see Atkinson *v.* Woodmansee, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325), and to show that the work was done within six months where the claim was filed did not show this (Gebhard *v.* Levering, 14 Phila. (Pa.) 120). Where the person who is really the owner of a building or an officer of a company owning the building and authorized to make the contract is named as contractor, the lien can be amended so as to show the true state of facts. Livezey *v.* Qualey, 14 Montg. Co. Rep. 205. A claim filed stating that A was the contractor and B the reputed owner may be amended, after the expiration of the time allowed for filing, so as to show that A and C were both the builders and the equitable owners. Real Estate, etc., Co. *v.* Phillips, 90 Md. 515, 45 Atl. 174.

36. The Pennsylvania act of June 11, 1879, Pamphl. Laws 122), authorizing amendment of lien claims, was not limited in its operation to claims that were filed at the time of its passage. Gebhard *v.* Levering, 14 Phila. (Pa.) 120.

37. Drake *v.* Green, 48 Kan. 534, 29 Pac. 584; Vreeland *v.* Bramhall, 38 N. J. L. 1, 2; Fahnestock *v.* Wilson, 95 Pa. St. 301; Spare *v.* Walz, 14 Phila. (Pa.) 132.

38. *Illinois.*— Richardson *v.* Central Lumber Co., 112 Ill. App. 160.

Indiana.— Wade *v.* Reitz, 18 Ind. 307.

Iowa.— McGillivary *v.* Case, 107 Iowa 17, 77 N. W. 483; Chicago Lumber Co. *v.* Des Moines Driving Park, 97 Iowa 25, 65 N. W. 1017.

Minnesota.— Meehan *v.* St. Paul, etc., R. Co., 83 Minn. 187, 86 N. W. 19; Wetmore *v.* Royal, 55 Minn. 162, 56 N. W. 594.

Pennsylvania.— Thirsk *v.* Evans, 211 Pa. St. 239, 60 Atl. 726; Bohem *v.* Seel, 185 Pa. St. 382, 39 Atl. 1009; Armstrong *v.* Hallowell, 35 Pa. St. 485; Benore *v.* Leonard, 9 Pa. Dist. 211; Schaeffer *v.* Rohrbach, Wilcox 250.

Wisconsin.— Sherry *v.* Schraage, 48 Wis. 93, 4 N. W. 117.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 207, 275, 278.

The burden of showing that such persons would not be prejudiced is upon the claimant. Wetmore *v.* Royal, 55 Minn. 162, 56 N. W. 594. See also Dennis *v.* Williamson, 2 Pa. Dist. 481.

The provision of Wash. Laws (1893), p. 34, § 5, authorizing an amendment of a lien notice where the interests of third persons will not be affected thereby, has reference only to such third persons as acquire some interest subsequent to the filing of the lien notice. Sullivan *v.* Treen, 13 Wash. 261, 43 Pac. 38, holding that mortgagees of the property whose relation to the property has not been changed since the filing of the lien claim cannot object to an amendment correcting the defective verification on the ground that their interests would be prejudiced.

39. McGillivray *v.* Barton Dist. Tp., 96 Iowa 629, 65 N. W. 974; Gault *v.* Whittman, 34 Md. 35 [*explained* in Real Estate, etc., Co. *v.* Phillips, 90 Md. 515, 45 Atl. 174]; Thirsk *v.* Evans, 211 Pa. St. 239, 60 Atl. 726; McFarland *v.* Schultz, 168 Pa. St. 634, 32 Atl. 94; Dennis *v.* Williamson, 2 Pa. Dist. 481; Alfree Mfg. Co. *v.* Henry, 96 Wis. 327, 332, 71 N. W. 370. Where a statement as filed is insufficient and it is subsequently changed, without authority, by interlineation, such change cannot cure the defect. Newman *v.* Brown, 27 Kan. 117.

40. Knox *v.* Hilty, 118 Pa. St. 430, 11 Atl. 792 [*following* Fourth Ave. Baptist Church *v.* Schreiner, 88 Pa. St. 124; Dearie *v.* Martin, 78 Pa. St. 55; Russell *v.* Bell, 44 Pa. St. 47, holding that the rule established by these cases was not changed by the act of June 11, 1779 (Pamphl. Laws 122)]; Murta *v.* Stephenson, 2 Pa. Dist. 480 (even though the party sought to be added consents to the amendment); Horton *v.* Watson, 8 Pa. Co. Ct. 143; Nason Mfg. Co. *v.* Jefferson Medical College Hospital, 12 Phila. (Pa.) 483 (amendment changing name of owner not permissible); O'Neill *v.* Hurst, 11 Phila. (Pa.) 171.

The amendment must be made in the trial court,[41] and must be in writing and signed by the judge,[42] but the amended lien claim need not be sworn to.[43] An affidavit that a proposed amendment sought to be filed to a mechanic's lien is "conducive to justice and a fair trial on the merits" should show specifically wherein the record or paper on file is not correct if wanting in particularity or substance.[44] A claimant who seeks to amend his lien after the award of arbitrators has been filed must pay all costs to the time of his seeking the amendment.[45]

14. Proof of Execution. A provision of the general registry law that "before any deed or instrument in writing can be recorded in the proper office, the execution thereof shall be first proved by an affidavit in writing of a subscribing witness to such instrument" has been held not to apply to a mechanic's lien statement.[46]

15. Filing Promissory Note Given For Amount Due. Under some statutes, where a lien claimant has received a promissory note for the amount due him, the note or a copy thereof, with a statement as to the origin of the indebtedness, may be filed instead of the usual lien claim or statement;[47] but such a statute is permissive rather than compulsory, and even where a note has been taken the filing of an itemized statement in the usual form will sustain the lien.[48]

16. Striking Off Claim or Statement.[49] The court has discretionary power to strike off a lien claim or statement where it would be inequitable to allow it to remain on record as a lien;[50] but the claim can be stricken off only for defects or irregularities appearing on its face.[51] In Pennsylvania the remedy against defect-

See also Vreeland *v.* Boyle, 37 N. J. L. 346, 347.

Name improperly appearing may be struck out.— Beetem *v.* Treibler, 4 Pa. Dist. 738, 16 Pa. Co. Ct. 605; Aldine Mfg. Co. *v.* Butler, 9 Kulp (Pa.) 33.

Setting forth claimant's title.— Where the claim as filed sets forth the name of the claimant or person entitled to the lien as required by statute, an amendment which does not add a new claimant or new party to the proceeding, but merely sets forth the claimant's title, is permissible. Jones *v.* Philler, 13 Pa. Co. Ct. 232, where the lien claim named W as the claimant, and the court allowed it to be amended so as to name "J., R., and W., to the use of W."

Formal statement.— Where the lien statement shows who is the contractor, an amendment by adding a formal statement that such person is the contractor is permissible, under the Pennsylvania act of June 11, 1879, and is not objectionable as the addition of a new party by amendment. Hoffa *v.* Homestead Bldg. Assoc., 3 Pa. Dist. 566, 567, where it is said: "An amendment, adding the name of a party as owner or contractor, can properly be designated as the introduction of a new party only where . . . there is nothing on the face of the instrument showing that he was a proper person to be named and made a party in the one capacity or the other, and therefore presumptively intended so to be. If the instrument contains that which shows he ought to have been, and was to be brought in, and the defect designed to be cured by the amendment is simply an inadvertent omission in formal and technical words to do so, its allowance clearly does not introduce any new parties."

Under the Wisconsin statute after a lien claim has been filed it may be amended by making another person a party. Challoner *v.* Howard, 41 Wis. 355 [*following* Brown *v.* La Crosse City Gas Light, etc., Co., 16 Wis. 556; Witte *v.* Meyer, 11 Wis. 295].

41. Baker *v.* Winter, 15 Md. 1, holding that under Md. Act (1845), c. 287, an amendment of a lien claim cannot be made in the court of appeals but must be made in the court below.

42. Drinkhouse *v.* American Brick, etc., Co., 58 N. J. L. 432, 33 Atl. 950.

43. Drinkhouse *v.* American Brick, etc., Co., 58 N. J. L. 432, 33 Atl. 950.

44. Wrought-Iron Bridge Co. *v.* York Mfg. Co., 11 York Leg. Rec. (Pa.) 45.

45. Connery *v.* Howe, 4 L. T. N. S. (Pa.) 231.

46. Murphy *v.* Valk, 30 S. C. 262, 9 S. E. 101.

47. Higley *v.* Ringle, 57 Kan. 222, 45 Pac. 619; Knutzen *v.* Hanson, 28 Nebr. 591, 44 N. W. 1065.

48. Higley *v.* Ringle, 57 Kan. 222, 45 Pac. 619.

49. Cancellation or discharge for failure to prosecute see *infra*, VIII, C, 1.

50. Gerrard *v.* Ecker, 12 Pa. Dist. 332, 33 Pittsb. Leg. J. N. S. 293.

The lien can be discharged only in one of the modes provided by the statute.— Fettrich *v.* Totten, 2 Abb. Pr. N. S. (N. Y.) 264. But *compare* McGuckin *v.* Coulter, 33 N. Y. Super. Ct. 324, 10 Abb. Pr. N. S. 128, holding that where a motion to discharge the lien is not based upon any of the reasons for a discharge contained in the statute, the burden is upon the moving party to furnish another reason sufficient in law for granting the relief sought.

51. Fahnestock *v.* Speer, 92 Pa. St. 146; Miller *v.* Bedford, 86 Pa. St. 454; Hoffmaster *v.* Knupp, 15 Pa. Co. Ct. 140; Whit-

ive lien claims is by demurrer or motion to strike off,[52] and on the hearing of such motion if the lien is not self-sustaining it must be struck off.[53] It has been held that the contractor has no standing to demand that a lien filed by a subcontractor shall be struck off for any reason,[54] nor will a lien filed against a certain person as owner or reputed owner be struck off at the instance of another person claiming title.[55] After plea by defendant in an action to enforce the lien it is too late to ask to have the lien stricken off for defects appearing on its face.[56] The right of a claimant to recover for part performance of an uncompleted contract cannot be determined on a motion to strike off his lien, but must be settled by a trial of the case.[57] The court will decline to strike off a mechanic's lien where it is apparent that a question of fact must be determined precedent to the application of a controlling principle of law.[58] In Maryland defects apparent upon the face of the lien claim may be taken advantage of by a motion to quash the scire facias issued upon such claim.[59] The mechanic's lien cannot be discharged where a motion to cancel the notice of the pendency of an action to foreclose a mechanic's lien should not be granted, and plaintiff's rights under the notice and under the lien are inseparable.[60]

IV. OPERATION AND EFFECT.

A. Amount and Extent of Lien — 1. Amount Secured[61] — a. In General. As a rule the lien can be enforced for the full amount due and unpaid for the work and materials furnished,[62] but this is subject to certain limitations herein-

man *v.* Wilkes-Barre Deposit, etc., Bank, 9 Kulp (Pa.) 512; Smith *v.* Robbins, 8 Luz. Leg. Reg. (Pa.) 288; Frick *v.* Gladdings, 10 Phila. (Pa.) 79.

Matter dehors the record.— The court will not strike off a mechanic's lien on certain houses, although part of the material for which the lien was supplied to houses separated by a public street from the houses to which the lien attached, where such fact does not appear from the face of the record, but it is only ascertainable by examining other claims filed by the same claimant against the same property-owner. Jeffers *v.* Anderson, 7 Pa. Dist. 482, 21 Pa. Co. Ct. 294.

A subcontractor's lien filed in violation of an anti-mechanic's lien contract duly entered and recorded as required by the Pennsylvania act of June 26, 1895 (Pamphl. Laws 369), cannot be struck out on motion, but the entry and record of such contract can only be urged as a defense to such lien on scire facias. Whitman *v.* Wilkes-Barre Deposit, etc., Bank, 9 Kulp (Pa.) 512.

52. Wharton *v.* Real Estate Inv. Co., 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. Rep. 629; Klinefelter *v.* Baum, 172 Pa. St. 652, 33 Atl. 582; McFarland *v.* Schultz, 168 Pa. St. 634, 32 Atl. 94; Scholl *v.* Gerhab, 93 Pa. St. 346; Fahnestock *v.* Speer, 92 Pa. St. 146; Rush *v.* Able, 90 Pa. St. 153; Lybrandt *v.* Eberly, 36 Pa. St. 347; Wolfe *v.* Keeley, 9 Pa. Dist. 515; Wrigley *v.* Mahaffey, 5 Pa. Dist. 389; Barrall *v.* Ruberry, 9 Kulp (Pa.) 285; Mitchell *v.* Martin, 3 Pittsb. (Pa.) 474.

There must be a rule bringing all parties in interest before the court for the purpose of forming an issue to be tried in the usual way as if a scire facias had been regularly issued and plea thereto entered. May *v.* Creasi, 8 Kulp (Pa.) 360.

All objections the mover has should be stated in the motion.— Benore *v.* Leonard, 6 Lack. Leg. N. (Pa.) 198.

An owner may proceed by petition and rule to strike off the lien under the Pennsylvania act of June 4, 1901, section 23. Este *v.* Pennsylvania R. Co., 13 Pa. Dist. 451.

Lien may be struck off on petition and answer or demurrer.— Lehman *v.* Thomas, 5 Watts & S. (Pa.) 262.

53. Wharton *v.* Real Estate Inv. Co., 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. Rep. 629; Klinefelter *v.* Baum, 172 Pa. St. 652, 33 Atl. 582; Barrall *v.* Ruberry, 9 Kulp (Pa.) 285.

54. Cordes *v.* Ralston, 12 Pa. Dist. 438. *Compare* Wrigley *v.* Mahaffey, 5 Pa. Dist. 389.

55. Cutter *v.* Magaw, 23 Pa. Co. Ct. 475.

56. Cornell *v.* Nicol, 2 Lack. Leg. N. (Pa.) 177. See also Matter of Lien on 740 Broadway, 15 Abb. Pr. N. S. (N. Y.) 335; McGuchin *v.* Coulter, 10 Abb. Pr. N. S. (N. Y.) 128; Thorn *v.* Shields, 8 Pa. Dist. 129. And see *supra*, III, C, 12, e.

57. Harner *v.* Thomas, 10 Pa. Dist. 487.

58. R. H. Johnson Co. *v.* Patton, 7 Pa. Dist. 218, 20 Pa. Co. Ct. 623.

59. Baker *v.* Winter, 15 Md. 1.

60. Madden *v.* Lennon, 23 Misc. (N. Y.) 79, 50 N. Y. Suppl. 690.

61. **Recovery for part performance:** Where contract substantially but not completely performed see *supra*, II, D, 6, e. Where contract abandoned see *supra*, II, D, 6, h.

62. German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314 (holding that where part of the materials for which a lien was claimed were furnished after the machinery in the factory was running, but these were used to complete and perfect such machinery, the value of such

after discussed.[63] The recovery in an action to enforce the lien is limited to the amount claimed in the notice, claim, or statement filed pursuant to statute,[64] with interest.[65] Thus where a subcontractor's lien notice does not cover labor to be performed or materials to be furnished he is not entitled to a lien for what was done or furnished after filing the notice.[66]

b. Value of Labor or Materials. In the absence of a special contract fixing the price of the services or materials the limit of the lien is the reasonable value of what was done or furnished,[67] but this does not exclude a reasonable profit to the claimant.[68] Under the Pennsylvania system[69] the lien of a person other than the principal contractor is limited to the reasonable value of what was done and furnished regardless of the price agreed upon between the claimant and the contractor.[70]

c. Contract Price — (I) *Persons Contracting Directly With Owner.* As between the owner and the contractor the contract price furnishes the limit to which the contractor's lien for what was done or furnished under the contract can extend.[71] Where a contractor agreed with the owner to erect a house for a certain amount, a part of which was to be paid by the owner, the balance being assumed by a third person, it was held that where the owner had paid his portion a mechanic's lien could not be enforced for the remainder.[72]

(II) *Persons Not Contracting Directly With Owner* — (A) *Limitation to Price Fixed in Subcontract.* In the case of a subcontractor, materialman, or other person claiming under a contract with the contractor, the claimant is entitled to enforce a lien up to the amount fixed by such contract,[73] although the con-

material was to be added to the amount of notes given for the machinery originally furnished, to ascertain the amount due under the lien); Schmalz *v.* Mead, 125 N. Y. 188, 26 N. E. 251; Isler *v.* Dixon, 140 N. C. 529, 53 S. E. 348.

Where note given for more than value of labor or materials.— A judgment in favor of a transferee of a note, executed for material and labor furnished, for the face amount thereof, was proper, although the special verdict found that the value of the materials and labor performed in the construction of the improvement was less than the sum stated in the note. Featherstone *v.* Brown, (Tex. Civ. App. 1905) 88 S. W. 470.

Where the credit is extended to the owner the lien can be enforced for the entire debt. Trammell *v.* Hudmon, 78 Ala. 222.

63. See *infra*, IV, A, 1, b, c.

64. New York Protective Union *v.* Nixon, 1 E. D. Smith (N. Y.) 671.

65. New York Protective Union *v.* Nixon 1 E. D. Smith (N. Y.) 671. And see *infra*, IV, A, 1, d.

66. Hutton *v.* Gordon, 2 Misc. (N. Y.) 267, 23 N. Y. Suppl. 770.

67. Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779. A person performing work is entitled to recover, in proceedings to foreclose a mechanic's lien, not what he pays his workmen, with a percentage thereon, but a *quantum meruit*, and, as to the materials furnished, a *quantum valebant*. Hauptman *v.* Catlin, 1 E. D. Smith (N. Y.) 729.

68. Thus a subcontractor may charge a profit on labor furnished, for such labor "may be worth more than is paid to the laborer, even if the laborer is paid the going rate, or a reasonable price." Borden *v.* Mercer, 163 Mass. 7, 39 N. E. 413.

69. See *supra*, II, D, 7, b, (I), (II).

70. *Arkansas.*— Basham *v.* Toors, 51 Ark. 309, 11 S. W. 282.

Indiana.— Morris *v.* Louisville, etc., R. Co., 123 Ind. 489, 24 N. E. 335; Merritt *v.* Pearson, 58 Ind. 385.

Minnesota.— Laird *v.* Moonan, 32 Minn. 358, 20 N. W. 354.

Missouri.— Deardorff *v.* Everhartt, 74 Mo. 37; Miller *v.* Whitelaw, 28 Mo. App. 639.

Pennsylvania.— Cattanach *v.* Ingersoll, 11 Pa. L. J. 345.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 282.

71. Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779.

Payment in full.— Where the owner of a building pays the contractor the amount agreed between them to be due for a specific portion of the work the latter is debarred from making any further claim for such work. Dengler *v.* Auer, 55 Mo. App. 548.

72. Smith *v.* Iowa City, etc., Assoc., 60 Iowa 164, 14 N. W. 221.

73. *California.*— Dore *v.* Sellers, 27 Cal. 588.

Massachusetts.— Bowen *v.* Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 391.

New York.— Vogel *v.* Whitmore, 72 Hun 417, 25 N. Y. Suppl. 202 [*affirmed* in 149 N. Y. 595, 44 N. E. 1129].

Oregon.— Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

Utah.— Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 296.

tract price includes a profit over the value of the labor or materials furnished,[74] subject to the limitations that under the Pennsylvania system a person other than the original contractor cannot enforce a lien for more than the reasonable value of what was done or furnished,[75] and that under the New York system such person cannot enforce a lien for more than the original contract price agreed upon between the owner and the contractor or such portion thereof as remains due and unpaid to the contractor.[76]

(B) *Limitation to Price Fixed in Principal Contract.* Under the Pennsylvania system,[77] subcontractors, materialmen, and other persons not contracting directly with the owner may enforce liens for the full amount due them regardless of the contract price agreed on between the owner and the contractor.[78] But in the majority of the states, conforming in this respect to the New York system,[79] the contract price agreed upon between the owner and the contractor fixes the limit of the amount for which subcontractors, materialmen, and other persons not contracting directly with the owner can enforce their liens;[80]

74. Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

75. See *supra*, IV, A, 1, b.

76. See *infra*, IV, A, 1, c, (II), (B).

77. See *supra*, I, D, 7, b, (I), (II).

78. Vickery *v.* Richardson, 189 Mass. 53, 75 N. E. 136; Bowen *v.* Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 39; Laird *v.* Moonan, 32 Minn. 358, 20 N. W. 354; Henry, etc., Co. *v.* Evans, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332 [*followed* in Chilton *v.* Lindsay, 38 Mo. App. 57]; Hilliker *v.* Francisco, 65 Mo. 598; Hobbs *v.* Spiegelberg, 3 N. M. 222, 5 Pac. 529.

79. See *supra*, II, D, 7, b, (I), (III).

80. *Arkansas.*—Barton *v.* Grand Lodge I. O. O. F., 71 Ark. 35, 70 S. W. 305.

California.— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

Georgia.— Rowell *v.* Harris, 121 Ga. 239, 48 S. E. 948; Green *v.* Farrar Lumber Co., 119 Ga. 30, 46 S. E. 62.

Illinois.— Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425 [*affirming* 83 Ill. App. 275]; Marski *v.* Simmerling, 46 Ill. App. 531.

Iowa.— Page *v.* Grant, 127 Iowa 249, 103 N. W. 127; Wickham *v.* Monroe, 89 Iowa 666, 57 N. W. 434.

Kansas.— Nixon *v.* Cydon Lodge No. 5, K. of P., 56 Kan. 298, 43 Pac. 236.

Kentucky.— Canady *v.* Webb, 80 S. W. 172, 25 Ky. L. Rep. 2107.

Michigan.— Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 114, 80 N. W. 797.

Oregon.— Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

South Dakota.— Albright *v.* Smith, 3 S. D. 631, 54 N. W. 816.

Utah.— Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 285.

Fraud between owner and contractor.— Where an unreasonably low price is fixed for the work in the original contract between the owner and the contractor for the purpose of defrauding subcontractors and others, the liens of persons other than the contractor are not confined to the contract price but will extend to an amount representing a fair price for what was done and furnished. Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425 [*affirming* 83 Ill. App. 275]. But such fraud must be alleged and clearly shown by the evidence in order to authorize the court to act. Foster *v.* Swaback, 58 Ill. App. 581, holding that a mere mistaken opinion of the parties as to the value of city lots to be taken in part payment is not equivalent to fraud.

Contract payable otherwise than in money.— Where a contractor elects to take a note and mortgage in part payment of the purchase-price, in accordance with an option of his contract, a subcontractor is entitled to a lien only to the extent of the balance of the purchase-money due in cash. Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 898.

Contract of sale providing for building by purchaser.— When an owner of land agrees to sell it to another, and advances him money with which to build thereon, and after completion of the houses the purchaser is to secure the purchase-price and advances by mortgage, the relation of owner and contractor does not subsist between the parties, so as to limit a mechanic's right to a lien to the amount due the contractor from the owner. In such cases the person who agrees to purchase builds by permission of the owner, and the property is chargeable with the lien until the deed is actually delivered, without regard to the terms of the contract, and without limit as to the amount, other than the value of the labor and materials. Schmalz *v.* Mead, 125 N. Y. 188, 26 N. E. 251 [*affirming* 15 Daly 223, 4 N. Y. Suppl. 614]; Gates *v.* Whitcomb, 4 Hun (N. Y.) 137, 6 Thomps. & C. 341; Hart *v.* Wheeler, 1 Thomps. & C. (N. Y.) 403.

An amount due the contractor for extras can be reached by subcontractors and others. Blakeslee *v.* Fisher, 66 Hun (N. Y.) 261, 21 N. Y. Suppl. 217; Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356.

A contractor's claim against the owner for damages is not available to increase the amount for which subcontractors and others can enforce a lien. Nolan *v.* Gardner, 4 E. D. Smith (N. Y.) 727; Hoyt *v.* Miner, 7 Hill (N. Y.) 525.

and where payments have been properly made to the contractor[81] the lien of such persons is limited to the portion of the contract price remaining unpaid[82] at the time that they give notice of their intention to claim liens[83] or file their lien claims.[84] In case the liens of such persons exceed in the aggregate the contract price or the part thereof remaining unpaid, the claimants share *pro rata* in the

A secret agreement between the owner and the contractor whereby the real contract price was to be a smaller sum than that fixed in the written contract upon which a subcontractor relied in furnishing materials is not available to defeat or reduce the subcontractor's lien. Hitchings *v.* Teague, 113 N. Y. App. Div. 670, 99 N. Y. Suppl. 967.

81. See *infra*, VI, E, 3, a.

82. *Alabama.*— Trammell *v.* Hudmon, 78 Ala. 222; Childers *v.* Greenville, 69 Ala. 103.

California.— Gibson *v.* Wheeler, 110 Cal. 243, 42 Pac. 810; Turner *v.* Strenzel, 70 Cal. 28, 11 Pac. 389; O'Donnell *v.* Kramer, 65 Cal. 353, 4 Pac. 204; Whittier *v.* Hollister, 64 Cal. 283, 30 Pac. 846.

District of Columbia.— Herrell *v.* Donovan, 7 App. Cas. 322.

Florida.— Hathorne *v.* Panama Park Co., 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138 (holding that other indebtedness of the owner to the contractor at the time of service of the notice will not entitle the subcontractor to a lien); Wylly Academy *v.* Sanford, 17 Fla. 162.

Illinois.— Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425 [*affirming* 83 Ill. App. 275]; Culver *v.* Elwell, 73 Ill. 536.

Iowa.— Wickham *v.* Monroe, 89 Iowa 666, 57 N. W. 434; Parker *v.* Scott, 82 Iowa 266, 47 N. W. 1073.

Kansas.— Main St. Hotel Co. *v.* Horton Hardware Co., 56 Kan. 448, 43 Pac. 769; Clough *v.* McDonald, 18 Kan. 114.

Louisiana.— McLaughlin *v.* Goodchaux, 7 La Ann. 101; Hall *v.* Wills, 3 La. Ann. 504.

Nevada.— Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24.

New Hampshire.— Cudworth *v.* Bostwick, 69 N. H. 536, 45 Atl. 408.

New Jersey.— Craig *v.* Smith, 37 N. J. L. 549; St. Peter's Catholic Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037.

New York.— Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017 [*reversing* 55 Hun 467, 8 N. Y. Suppl. 760]; Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270 [*affirming* 52 Hun 191, 5 N. Y. Suppl. 161]; Butler *v.* Aquehonga Land Co., 86 N. Y. App. Div. 439, 83 N. Y. Suppl. 874 (the owner's knowledge of and consent to what is done by the subcontractor does not change the rule); De Lorenzo *v.* Von Raitz, 44 N. Y. App. Div. 329, 60 N. Y. Suppl. 736; Pike *v.* Irwin, 1 Sandf. 14; Spalding *v.* King, 1 E. D. Smith 717; Doughty *v.* Devlin, 1 E. D. Smith 625; Holley *v.* Van Dolsen, 55 How. Pr. 333; Drake *v.* O'Donnell, 49 How. Pr. 25.

Texas.— Potshuisky *v.* Krempkan, 26 Tex. 307.

Utah.— Teahen *v.* Nelson, 6 Utah 363, 23 Pac. 764.

Canada.— Wood *v.* Stringer, 20 Ont. 148.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 285.

In South Dakota the lien of a subcontractor, within the limit of the contract price between the owner and the contractor, may be enforced irrespective of the state of the account between the owner and the contractor, or the amount due or unpaid upon such contract. Albright *v.* Smith, 3 S. D. 631, 54 N. W. 816.

Payments not due to contractor.— The lien of subcontractors, etc., is not confined to the amount due to the contractor at the time such lien is perfected but extends also to the amount of payments subsequently becoming due. The owner's aggregate liability is the amount which he has contracted to pay, deducting payments made before the lien was perfected. Tabor *v.* Armstrong, 9 Colo. 285, 12 Pac. 157; Heekmann *v.* Pinkney, 81 N. Y. 211. Even if nothing is due to the contractor according to the contract when the lien is filed, but a certain amount subsequently becomes due thereunder, the lien attaches to the extent of that amount. Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017 [*reversing* 55 Hun 467, 8 N. Y. Suppl. 760].

Where joint contractors apportion the job and the compensation among themselves by a contract to which the owner is not a party, although he knows thereof and assents thereto, the lien of a materialman is not defeated by the fact that there is nothing due under the apportionment to the particular contractor to whom he furnished the materials, there being a portion of the entire contract price unpaid. Davis *v.* Livingston, 29 Cal. 283.

83. *Alabama.*— Greene *v.* Robinson, 110 Ala. 503, 20 So. 65.

California.— Blythe *v.* Poultney, 31 Cal. 233; Davis *v.* Livingston, 29 Cal. 283; Knowles *v.* Joost, 13 Cal. 620.

Colorado.— Epley *v.* Scherer, 5 Colo. 536; Jensen *v.* Brown, 2 Colo. 694.

Florida.— Hathorne *v.* Panama Park Co. 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138.

Illinois.— Douglas *v.* McCord, 12 Ill. App. 278.

New York.— Cheney *v.* Troy Hospital Assoc., 65 N. Y. 282; Riggs *v.* Chapin, 7 N. Y. Suppl. 765.

Ohio.— Dunn *v.* Rankin, 27 Ohio St. 132.

Virginia.— Schrieber *v.* Citizens' Bank, 99 Va. 257, 38 S. E. 134. *Compare* Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821, under the act of March 31, 1875.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 285.

84. Van Clief *v.* Van Vechten, 130 N. Y.

fund,[85] subject of course to such priorities among themselves as may have been acquired by superior diligence and the like.[86] In some states the application of the New York system in this respect is dependent upon the filing or recording of the contract between the owner and the contractor, or a copy thereof, and if this be not done persons other than the contractor can enforce liens for the full amount of their claims regardless of the contract price;[87] and the owner may also become liable for more than the original contract price by failing to observe his original contract as to the times of payment or otherwise to follow the law as to the rights of subcontractors.[88]

d. Interest.[89] The lien may include interest on the amount of the claim from the time it became due;[90] but where it is sought to enforce a lien for the reasonable value of what was done and furnished and the precise amount due is neither fixed nor ascertainable by mere mathematical calculation, the demand, not being liquidated, does not draw interest.[91]

571, 29 N. E. 1017 [*reversing* 55 Hun 467, 8 N. Y. Suppl. 760].

85. Chicago Lumber Co. *v.* Allen, 52 Kan. 795, 35 Pac. 781; Clough *v.* McDonald, 18 Kan. 114; Canady *v.* Webb, 80 S. W. 172, 25 Ky. L. Rep. 2107. See *infra*, IV, C, 1, a.

Failure of some claimants to file liens.— Under Ky. St. (1903) § 2463, providing that in no case shall liens be for a greater amount in the aggregate than the contract price, and, should the aggregate amount of liens exceed the contract price, then there shall be a *pro rata* distribution thereof among the lien-holders, where the cost of a building exceeded the contract price, the fact that other laborers and materialmen have not filed lien claims does not entitle a particular lien claimant to more than his *pro rata* share of the contract price, although his claim is the only one filed and the amount thereof is less than the contract price. Canady *v.* Webb, 80 S. W. 172, 25 Ky. L. Rep. 2107.

86. See *infra*, IV, C, 1, a, c.

87. Dunlop *v.* Kennedy, 102 Cal. 443, 36 Pac. 765; Schmidt *v.* Eitel, (N. J. Ch. 1906) 62 Atl. 558; Niswander *v.* Black, 50 W. Va. 188, 40 S. E. 431. See *supra*, II, C, 7.

88. Page *v.* Grant, 127 Iowa 249, 103 N. W. 124.

89. See, generally, INTEREST.

90. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758, holding that when the contract fixes the time of payment interest should be allowed from such time, otherwise from the commencement of the action.

Colorado.— Hurd *v.* Tomkins, 17 Colo. 394, 30 Pac. 247; Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374.

Illinois.— McDonald *v.* Patterson, 186 Ill. 381, 57 N. E. 1027 [*affirming* 84 Ill. App. 326].

Indiana.— Merritt *v.* Pearson, 76 Ind. 44.

Maryland.— Smith *v.* Shaffer, 50 Md. 132. But *compare* Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575 [*following* German Lutheran Evangelical St. Matthew's Cong. *v.* Heise, 44 Md. 453], holding that interest should be allowed only from the time of filing the lien claim.

Michigan.— Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

New York.— McConologue *v.* Larkins, 32 Misc. 166, 66 N. Y. Suppl. 188.

Oregon.— Forbes *v.* Willamette Falls Electric Co., 19 Oreg. 61, 23 Pac. 670, 20 Am. St. Rep. 793; Willamette Falls Transp., etc., Co. *v.* Riley, 1 Oreg. 183.

Wisconsin.— Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 283.

Interest from the time of filing the petition is sometimes allowed. Casey *v.* Weaver, 141 Mass. 280, 6 N. E. 372; Johnson *v.* Boudry, 116 Mass. 196, even though not specifically claimed.

Where the lien notice did not claim interest and the complainant for foreclosure of the lien asks for interest only from the date of filing the notice, it is error to allow interest on the amount of the claim prior to the date of the notice. Huetter *v.* Redhead, 31 Wash. 320, 71 Pac. 1016.

It is discretionary with the chancellor to allow interest or not on rendering a *nisi* decree, under the act giving mechanics a lien. If the amount decreed is not paid, then interest is given by the act; and where the complainant, under such act, obtained a decree for a less amount than he claimed, although more than was admitted, it was held that a decree for the amount, without interest, and subjecting each party to the payment of the costs, was correct. Kaye *v.* Louisville Bank, 9 Dana (Ky.) 261.

91. Macomber *v.* Bigelow, 126 Cal. 9, 58 Pac. 312 (until the amount is fixed by judgment); Fox *v.* Davidson, 111 N. Y. App. Div. 174, 97 N. Y. Suppl. 603.

Where the amount is capable of ascertainment by reference to reasonably certain market values of the various items, and the claim has been duly and adequately presented and payment demanded before suit commenced, the claimant is entitled to interest from the time of such demand. Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

Unreasonable and vexatious delay.— Where a claim is founded upon an open account, the items unliquidated and uncertain in amount, and there is no promise to pay interest, the liability to pay interest at all must be derived from that clause of the statute which

2. Time of Accrual or Commencement — a. In General.[92] Under some statutes it has been held that the right to a lien accrues when the claimant has completed the work or the furnishing of the materials,[93] and also that the lien attaches to the property at the time when the contract for the improvement is made[94] or recorded.[95] But the general rule is that the right to a lien accrues at the time of the commencement of the work or the furnishing of materials out of which the lien arises,[96] or the commencement of the building or improvements

allows it on money "withheld by an unreasonable and vexatious delay of payment," etc., as to which it is impossible to lay down any definite rule; and each case must necessarily depend, to some extent, upon its own circumstances. Watkins *v.* Wassell, 20 Ark. 410, where interest was allowed from the time when the amount due was ascertained.

92. Accrual on filing of claim or notice see *infra*, IV, A, 2, d.

93. McCullough *v.* Caldwell, 8 Ark. 231. See also White *v.* Chaffin, 32 Ark. 59, holding that a mechanic's lien for machinery furnished relates back to the time when it was placed upon the premises.

94. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Clark *v.* Moore, 64 Ill. 273 [*followed* in Freeman *v.* Arnold, 39 Ill. App. 216]; Morse *v.* Dole, 73 Me. 351; Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219; Batchelder *v.* Rand, 117 Mass. 176; Dunklee *v.* Crane, 103 Mass. 470; Sly *v.* Pattee, 58 N. H. 102. But *compare* Williams *v.* Chapman, 17 Ill. 423, 65 Am. Dec. 669 [*following* McLagan *v.* Brown, 11 Ill. 519], holding that the lien attaches at the time of the completion of the work.

95. Homans *v.* Coombe, 12 Fed. Cas. No. 6,654, 3 Cranch C. C. 365, under Md. Acts (1791), c. 45, § 10.

96. *Arkansas.*— White *v.* Chaffin, 32 Ark. 59.

California.— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860; Barber *v.* Reynolds, 44 Cal. 519; McCrea *v.* Craig, 23 Cal. 522.

Colorado.—Keystone Min. Co. *v.* Gallagher, 5 Colo. 23; Mellor *v.* Valentine, 3 Colo. 255.

Indiana.— Mark *v.* Murphy, 76 Ind. 534; Fleming *v.* Bumgarner, 29 Ind. 424; Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130. *Compare* Wilson *v.* Hopkins, 51 Ind. 231 [*following* Sharpe *v.* Clifford, 44 Ind. 346; Waldo *v.* Walters 17 Ind. 534; Millikin *v.* Armstrong, 17 Ind. 456; Green *v.* Green, 16 Ind. 253, 79 Am. Dec. 428; Gohle *v.* Gale, 7 Blackf. 218, 41 Am. Dec. 219; McKinney *v.* Springer, 6 Blackf. 511; Robinson *v.* Marney, 5 Blackf. 329].

Iowa.— Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 898; Neilson *v.* Iowa Eastern R. Co., 44 Iowa 71; Shields *v.* Keys, 24 Iowa 298; Jones *v.* Swan, 21 Iowa 181; Monroe *v.* West, 12 Iowa 119, 79 Am. Dec. 524; Julien Gas Light Co. *v.* Hurley, 11 Iowa 520.

Kentucky.— Waddy Bluegrass Creamery Co. *v.* Davis-Rankin Bldg., etc., Co., 103 Ky. 579, 45 S. W. 895, 20 Ky. L. Rep. 259; Finck, etc., Lumber Co. *v.* Mehler, 102 Ky. 111, 43 S. W. 403, 766, 19 Ky. L. Rep. 1146; Caldwell Inst. *v.* Young, 2 Dur. 582.

Minnesota.—Mason *v.* Heyward, 5 Minn. 74.

Missouri.—Viti *v.* Dixon, 12 Mo. 479, under act of 1835.

Nebraska.— The lien of a mechanic or materialmen attaches when he commences to furnish material or to perform labor, and not at the beginning of the construction of the improvement on which he labors or for which he furnishes material. Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

New Hampshire.— Graton, etc., Mfg. Co. *v.* Woodworth-Mason Co., 69 N. H. 177, 38 Atl. 790.

North Carolina.— McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; Lookout Lumber Co. *v.* Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35; Burr *v.* Maultsby, 99 N. C. 263, 6 S. E. 108, 6 Am. St. Rep. 517.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114; Hazard Powder Co. *v.* Loomis, 2 Disn. 544; Woodman *v.* Richardson, 1 Ohio Cir. Ct. 191, 1 Ohio Cir. Dec. 104; Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 410.

Pennsylvania.— Keller *v.* Denmead, 68 Pa. St. 449, holding that a lien for a boiler and other fixtures sold to the owner as an entire transaction, there being no building in course of erection, commences when the materials are furnished.

Tennessee.—Bristol-Goodson Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19; Green *v.* Williams, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478.

Texas.— Keating Implement Co. *v.* Marshall Electric Light, etc., Co., 74 Tex. 605, 12 S. W. 489; Trammell *v.* Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

Utah.— Sanford *v.* Kunkel, 30 Utah 379, 85 Pac. 363, 1012; Fields *v.* Daisy Gold Min. Co., 25 Utah 76, 69 Pac. 528; Teahen *v.* Nelson, 6 Utah 363, 23 Pac. 764.

Washington.— Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940 (claims of materialmen and laborers cannot date back to commencement of building); Nason *v.* Northwestern Milling, etc., Co., 17 Wash. 142, 49 Pac. 235. See also Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680.

United States.— Courtney *v.* Insurance Co. of North America, 49 Fed. 309, 1 C. C. A. 249, under Nebr. Comp. St. c. 54, § 3.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 297, 299.

for work done or materials furnished for the construction of which the lien is claimed.[97]

Where materials are furnished from time to time for a particular purpose and the dates are so near each other as to constitute one running account the lien dates from the time when the first article was supplied, although strictly speaking the articles were not furnished under one entire contract. Choteau *v.* Thompson, 2 Ohio St. 114.

Where materials are furnished for different purposes, or where there are intervals of time in the account so long that it cannot properly be called one account, there is not, in the absence of an entire contract, a lien for the whole from the date when the first article was furnished, but the items will be regarded as forming two or more distinct accounts. Choteau *v.* Thompson, 2 Ohio St. 114.

Delivery at building.— The lien of a materialman does not attach at the date that he commenced preparation of the material in another state, but at the time when he delivered it at the building as required by his contract. Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073, 6 Wash. 624, 34 Pac. 774.

When materials are ready for delivery they are "furnished" within the meaning of the California statute, and the lien attaches at that time. Tibbetts *v.* Moore, 23 Cal. 208.

Monthly payments.— The fact that one performing lienable work under an entire contract is paid by the month does not prevent his lien from attaching from the date of the first work. Nason *v.* Northwestern Milling, etc., Co., 17 Wash. 142, 49 Pac. 235.

Where the contractor abandoned the work and a subcontractor completed his subcontract under a new contract made directly with the owner, his lien dated from the first item done or furnished under the latter contract. Feike *v.* Cincinnati, etc., R. Co., 14 Ohio Cir. Ct. 186, 7 Ohio Cir. Dec. 652.

97. *Kansas.*— Kansas Mortg. Co. *v.* Weyerhaeuser, 48 Kan. 335, 29 Pac. 153; National Mortg., etc., Co. *v.* Hutchinson Mfg. Co., 6 Kan. App. 673, 50 Pac. 100. The lien for fixtures which become a part of the building attaches at the commencement of the building, without regard to the time of furnishing. Keystone Iron Works Co. *v.* Douglass Sugar Co., 55 Kan. 195, 40 Pac. 273; Flint, etc., Mfg. Co. *v.* Douglass Sugar Co., 54 Kan. 455, 38 Pac. 566.

Maryland.— Rosenthal *v.* Maryland Brick Co., 61 Md. 590; Wells *v.* Canton Co., 3 Md. 234.

Minnesota.— Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543; Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746; Glass *v.* Freeburg, 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335; Knox *v.* Starks, 4 Minn. 20; Farmers' Bank *v.* Winslow, 3 Minn. 86, 74 Am. Dec. 740.

Mississippi.— The exact time when the lien accrues does not appear to be settled. But it is settled that it begins either from the date of the contract (Ivey *v.* White, 50 Miss. 142; Bell *v.* Cooper, 26 Miss. 650, 27 Miss. 57) or from the commencement of the work on the ground toward the erection of the building (Ivey *v.* White, *supra*; McLaughlin *v.* Green, 48 Miss. 175).

Missouri.— Allen *v.* Sales, 56 Mo. 28; Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737.

New Jersey.— Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273.

Oregon.— Henry *v.* Hand, 36 Oreg. 492, 59 Pac. 330; Kendall *v.* McFarland, 4 Oreg. 292. Under the statute of 1853 the lien of the builder commenced at the filing of the notice; and while the lien of the mechanic might relate back to the commencement of the building it was not a lien until the notice was filed. Ritchey *v.* Risley, 3 Oreg. 184.

Pennsylvania.— Parrish's Appeal, 83 Pa. St. 111; Pennock *v.* Hoover, 5 Rawle 291; Wrigley *v.* Mahaffey, 5 Pa. Dist. 389; Reilly *v.* Elliott, 1 Del. Co. 77. When a mechanic's lien is filed against an old building, it takes effect from the time of filing. Reilly *v.* Elliott, 1 Del. Co. 77.

Rhode Island.— Bassett *v.* Swarts, 17 R. I. 215, 217, 21 Atl. 352, where it is said: "Clearly, what is meant by 'the commencement of such construction' is the commencement of the construction of the building itself, and not the commencement of different jobs of work thereon, where the work is performed, dividedly, at different times, by different employees or contractors."

Utah.— Sanford *v.* Kunkel, 30 Utah 379, 85 Pac. 363, 1012.

Wisconsin.— Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824.

United States.— *In re* Hoyt, 12 Fed. Cas. No. 6,805, 3 Biss. 436 (holding that under the Mechanics' Lien Law of Wisconsin, the liens relate back to the commencement of the building, without reference to the time when the work was actually done or materials furnished); Sabin *v.* Connor, 21 Fed. Cas. No. 12,197.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 297, 299.

There is no distinction between claims for labor and for materials with respect to the time when the lien attaches. Rosenthal *v.* Maryland Brick Co., 61 Md. 590.

Lien cannot antedate actual commencement of building.— Under Kan. Code, § 630, a lien for material (not fixtures or machinery) furnished for and used in the erection of a building dates from the actual commencement of the building, and not from the time the material is furnished and placed on the lot on which the building is subsequently erected. Kansas Mortg. Co. *v.* Weyerhaeuser, 48 Kan. 335, 29 Pac. 153.

An architect's lien does not relate back to the time when he began work on the plans but only to the time when the actual improvement of the land was commenced. Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543.

b. What Constitutes Commencement of Building or Improvement. The commencement of the building or improvement within the meaning of the lien law is the visible commencement of actual operations on the ground for the erection of the building;[98] the doing of some work or labor on the ground,[99] such as beginning to excavate for the foundation[1] or the cellar,[2] walling the cellar,[3] or work of a like description, which everyone can readily see and recognize as the commencement of a building,[4] and which is done with the intention and purpose then formed to continue the work until the completion of the building.[5] But work which is merely preparatory to building operations at some future time, and does not of itself tend to contribute directly to the erection,[6] such as clearing,[7] leveling,[8] filling up[9] or fencing the property,[10] staking out the plan of the building[11] or the line of foundations,[12] or placing lumber[13] or other materials[14] on the premises does not constitute a commencement for the purpose of fixing the time to which the lien relates.

c. Interruption of Work. A temporary cessation of work, where the design of building is not abandoned and work is subsequently resumed and prosecuted without any substantial change in the design, will not prevent the relation back of liens to the time of the original commencement;[15] but where the project is abandoned and work is afterward resumed under a new contract between different parties, a mechanic's lien cannot relate back to the time when the building was originally commenced,[16] but relates back only to the time of the recommencement.[17]

When the plan of a building is changed and greatly enlarged while in course of construction, the liens of mechanics and materialmen subsequent to such change relate only to the commencement of the alteration on the ground, and are subject to all liens which had then fastened on the land. Norris' Appeal, 30 Pa. St. 122; Smedley *v.* Conaway, 5 Pa. L. J. Rep. 417.

A change of ownership in the land after work begins will not affect the time the lien attaches. Pennock *v.* Hoover, 5 Rawle (Pa.) 291. See as to change of ownership generally *infra*, VI, C, 4.

98. Kansas Mortg. Co. *v.* Weyerhaeuser, 48 Kan. 335, 29 Pac. 153; Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389; Pennock *v.* Hoover, 5 Rawle (Pa.) 291; Hagenman *v.* Fink, 19 Pa. Co. Ct. 660.

99. Kelly *v.* Rosenstock, 45 Md. 389; Brooks *v.* Lester, 36 Md. 65; Pennock *v.* Hoover, 5 Rawle (Pa.) 291.

1. Kansas Mortg. Co. *v.* Weyerhaeuser, 48 Kan. 335, 29 Pac. 153; National Mortg., etc., Co. *v.* Hutchinson Mfg. Co., 6 Kan. App. 673, 50 Pac. 100; Brooks *v.* Lester, 36 Md. 65; Jacobus *v.* Mutual Ben. L. Ins. Co., 27 N. J. Eq. 604 (holding that the excavation for the foundation, when so far progressed with as to make it apparent on the ground that the building is to be erected, is the "commencement of the building" within the meaning of the Mechanics' Lien Law); Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389; Parrish's Appeal, 83 Pa. St. 111; Pennock *v.* Hoover, 5 Rawle (Pa.) 291; Hagenman *v.* Fink, 19 Pa. Co. Ct. 660.

Although the foundation was built by the owner before the contract for the construction of the building itself was entered into, yet the beginning of work on the foundation was held to be the "commencement of the building" within the meaning of the lien law. National Mortg., etc., Co. *v.* Hutchinson Mfg. Co., 6 Kan. App. 673, 50 Pac. 100.

2. Nixon *v.* Cydon Lodge No. 5 K. of P., 56 Kan. 298, 43 Pac. 256; Kansas Mortg. Co. *v.* Weyerhaeuser, 48 Kan. 335, 29 Pac. 153; Thomas *v.* Mowers, 27 Kan. 265; Pennock *v.* Hoover, 5 Rawle (Pa.) 291.

3. Pennock *v.* Hoover, 5 Rawle (Pa.) 291.

4. Kelly *v.* Rosenstock, 45 Md. 389; Brooks *v.* Lester, 36 Md. 65.

5. Kelly *v.* Rosenstock, 45 Md. 389; Jean *v.* Wilson, 38 Md. 288. See also Kiene *v.* Hodge, 90 Iowa 212, 57 N. W. 717.

6. See *infra*, notes 7–14.

7. Central Trust Co. *v.* Cameron Iron, etc., Co., 47 Fed. 136.

8. Kelly *v.* Rosenstock, 45 Md. 389.

9. Kiene *v.* Hodge, 90 Iowa 212, 57 N. W. 717, there being no present intention to build.

10. Middletown Sav. Bank *v.* Fellowes, 42 Conn. 36.

11. Hagenman *v.* Fink, 19 Pa. Co. Ct. 660.

12. Kelly *v.* Rosenstock, 45 Md. 389.

13. Middletown Sav. Bank *v.* Fellowes, 42 Conn. 36.

14. Kansas Mortg. Co. *v.* Weyerhaeuser, 48 Kan. 335, 29 Pac. 153.

15. Savoy *v.* Dudley, 168 Mass. 538, 47 N. E. 424; Manhattan L. Ins. Co. *v.* Paulison, 28 N. J. Eq. 304 (where there was an interruption for several months caused by the season of the year being unsuitable for the work); Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273; Hutchins *v.* Bautch, 123 Wis. 394, 101 N. W. 671, 107 Am. St. Rep. 1014.

16. Fordham's Appeal, 78 Pa. St. 120 [*affirming* 7 Leg. Gaz. 31]; Kelly's Appeal, 1 Pa. Cas. 280, 2 Atl. 868.

17. Kelly's Appeal, 1 Pa. Cas. 280, 2 Atl. 868.

d. Relation Back. It cannot be successfully contended that the lien does not attach until the commencement of the proceedings to enforce it;[18] and while a compliance with the statutory requirements is necessary to perfect or preserve the lien[19] the time of such compliance does not as a rule fix the date of the commencement of the lien,[20] but upon the taking of the proper steps the lien relates back to the time when the right to a lien accrued.[21] Under some statutes, however, it has been held that the lien dates from the time the notice or claim is filed and does not relate back.[22]

e. Necessity For Completion of Building. Where a subcontractor has performed his work, and a sum greater than the value thereof has already been earned by the general contractor and is unpaid, the lien of the subcontractor attaches against the owner, although the work of the general contractor is still unfinished.[23]

3. Duration.[24] Under most of the statutes the duration of the lien is limited to a certain period,[25] after the doing of the work or the furnishing of the mate-

18. See Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273. There is nothing in the Rhode Island mechanics' liens statute to warrant the construction that a lien of any kind does not attach until the notice of the commencement of proceedings. Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324.

19. Ritchey *v.* Risley, 3 Oreg. 184, there is no lien until the notice is filed. See *supra*, III, A.

20. Nason *v.* Northwestern Milling, etc., Co., 17 Wash. 142, 49 Pac. 235; Sabin *v.* Connor, 21 Fed. Cas. No. 12,197.

21. *Arkansas.*— White *v.* Chaffin, 32 Ark. 59.

California.— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860; Barber *v.* Reynolds, 44 Cal. 519.

Indiana.— Mark *v.* Murphy, 76 Ind. 534; Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130.

Kentucky.— Finck, etc., Lumber Co. *v.* Mehler, 102 Ky. 111, 43 S. W. 403, 766, 19 Ky. L. Rep. 1146.

Minnesota.— Cogel *v.* Mickow, 11 Minn. 475.

Missouri.— Allen *v.* Sales, 56 Mo. 28; Viti *v.* Dixon, 12 Mo. 479.

North Carolina.— McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; Lookout Lumber Co. *v.* Mansion Hotel, etc., Co., 109 N. C. 658, 14 S. E. 35; Burr *v.* Maultsby, 99 N. C. 263, 6 S. E. 108, 6 Am. St. Rep. 517.

Ohio.— Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Oregon.— Henry *v.* Hand, 36 Oreg. 492, 59 Pac. 330.

Texas.— Keating Implement Co. *v.* Marshall Electric Light, etc., Co., 74 Tex. 605, 12 S. W. 489; Trammell *v.* Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

Utah.— Sanford *v.* Kunkel, 30 Utah 379, 85 Pac. 363, 1012; Fields *v.* Daisy Gold Min. Co., 25 Utah 76, 69 Pac. 528; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

Washington.— Nason *v.* Northwestern Milling, etc., Co, 17 Wash. 142, 49 Pac. 235.

United States.— Courtney *v.* Insurance Co. of North America, 49 Fed. 309, 1 C. C. A. 249; *In re* Cook, 6 Fed. Cas. No. 3,151, 3 Biss. 116.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 304.

Time of accrual or commencement see *supra*, IV, A, 2, a.

22. *District of Columbia.*— Cotton *v.* Holden, 1 MacArthur 463.

Florida.— Bond Lumber Co. *v.* Masland, 45 Fla. 188, 34 So. 254, as against purchasers and creditors of the owner without notice.

Louisiana.— Marmillon *v.* Archinard, 24 La. Ann. 610.

Michigan.— Sisson *v.* Holcomb, 58 Mich. 634, 26 N. W. 155.

New York.— Sinclair *v.* Fitch, 3 E. D. Smith 677, under statute of 1851.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 304.

23. New Jersey Steel, etc., Co. *v.* Robinson, 33 Misc (N. Y.) 361, 68 N. Y. Suppl. 577.

24. Time for bringing proceedings to enforce lien see *infra*, VIII, F.

25. *Illinois.*— Clark *v.* Manning, 90 Ill. 380; Grundeis *v.* Hartwell, 90 Ill. 324; George Green Lumber Co. *v.* Nutriment Co., 113 Ill. App. 635; Concord Apartment House Co. *v.* Von Platen, 106 Ill. App. 40; Harvey, etc., Plumbing Co. *v.* Wallace, 99 Ill. App. 212; Harwood *v.* Brownell, 32 Ill. App. 347; Younger *v.* Louks, 7 Ill. App. 280; Austin *v.* Wohler, 5 Ill. App. 300; Graham *v.* Meehan, 4 Ill. App. 522.

Maryland.— Blocher *v.* Worthington, 10 Md. 1, construing Acts (1841), c. 76.

Minnesota.— Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

New York.— Freeman *v.* Cram, 3 N. Y. 305.

Ohio.— Ambrose *v.* Woodmansee, 27 Ohio St. 147.

Pennsylvania.— See Cornelius *v.* Uhler, 2 Browne 229.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 305.

Under the Pennsylvania act of March 17, 1806, the lien was indefinite in duration where

rials,[26] the time payment became due,[27] or the filing of the notice or claim of statement.[28] But as a general rule the commencement of proceedings to enforce the lien before it has expired by limitation is sufficient to preserve it until the conclusion of such proceedings;[29] and it is not necessary that the claimant should himself institute proceedings to enforce his lien, but the lien is preserved if within the

the claim was filed within the time limited. Knorr *v.* Elliot, 5 Serg. & R. 49.

The debt may survive when the lien is gone, and hence an estoppel to deny the debt will not keep the lien alive. Hunter *v.* Lanning, 76 Pa. St. 25.

26. Eddins *v.* Tweddle, 35 Fla. 107, 17 So. 66; Reynolds *v.* Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620, holding that under the Nebraska statute the lien of a contractor continues, not for two years from the expiration of the time allowed for filing the claim, but only for two years from the time when the last act was done in the performance of the contract, whereby the lien first becomes determined in amount, so as to be complete and actionable.

27. Jones *v.* Alexander, 10 Sm. & M. (Miss.) 627.

An extension of the time of payment beyond that fixed in the original contract cannot extend the life of the lien. Jones *v.* Alexander, 10 Sm. & M. (Miss.) 627.

28. Danziger *v.* Simpson, 116 N. Y. 329, 22 N. E. 570; People *v.* Lamb, 3 Lans. (N. Y.) 134; McAllister *v.* Case, 15 Daly (N. Y.) 299, 5 N. Y. Suppl. 918; Haden *v.* Buddensiek, 6 Daly (N. Y.) 3; Matthews *v.* Daley, 3 Daly (N. Y.) 214 note, 7 Abb. Pr. N. S. 379, 38 How. Pr. 382; Stone *v.* Smith, 3 Daly (N. Y.) 213.

Computation of time.— In computing the year within which a mechanic's lien expires the day of filing the notice should be excluded. Haden *v.* Buddensiek, 6 Daly (N. Y.) 3.

29. Eddins *v.* Tweddle, 35 Fla. 107, 17 So. 66; Jones *v.* Alexander, 10 Sm. & M. (Miss.) 627; Danziger *v.* Simonson, 116 N. Y. 329, 22 N. E. 570; Fox *v.* Kidd, 77 N. Y. 489 (under Laws (1862), c. 478); Fitzpatrick *v.* Boylan, 57 N. Y. 433 (under Laws (1851), c. 513); Matter of Gould Coupler Co., 79 Hun (N. Y.) 206, 29 N. Y. Suppl. 622 (under Laws (1885), c. 342); Haag *v.* Hillemeier, 41 Hun (N. Y.) 390 (under Laws (1871), c. 188); McAllister *v.* Case, 15 Daly (N. Y.) 299, 5 N. Y. Suppl. 918; Heckmann *v.* Plnkney, 8 Daly (N. Y.) 466 [*affirmed* in 81 N. Y. 211] (under Laws (1875), c. 379); Paine *v.* Bonney, 4 E. D. Smith (N. Y.) 734, 6 Abb. Pr. 99 (under Laws (1851), c. 513); Ambrose *v.* Woodmansee, 27 Ohio St. 147 (holding that where a mechanic's lien has been kept in force beyond the two years for which it remains operative, by the commencement within the two years of a suit on the claim, the premises charged with the lien may be subjected to the satisfaction of the lien, as against a purchaser in good faith who bought without actual notice of plaintiff's claim pending the action thereon, and after the expiration of the two years).

The filing of a complaint may well be held to be a notice of the pendency of an action. Wright *v.* Roberts, 8 N. Y. Suppl. 745.

If a judgment for defendant is reversed on appeal the lien does not cease to exist where a judgment is afterward rendered for plaintiff. Fox *v.* Kidd, 77 N. Y. 489.

Defective proceedings.— Where claimant filed his bill to enforce his lien, but failed to swear to the bill or pray an attachment, for which reason defendant demurred, and no further steps were taken until more than four years later, when claimant filed an amended bill praying an attachment, which was issued and levied, and defendant answered and filed a cross bill to recover damages for defective work, it was held that although the demurrer to the original bill should have been sustained and the amended bill was likewise open to demurrer, yet as defendant had answered, jurisdiction was properly exercised in rendering a decree for the balance due, and ordering a sale of the attached premises to satisfy it. Brown *v.* Jacobi, 10 Heisk. (Tenn.) 335.

Setting aside of faulty judgment.— Under N. Y. Laws (1871), c. 188, which saved the proceedings in the foreclosure of a mechanic's lien until a year after judgment was rendered, where a faulty judgment was obtained and set aside, the case was still pending, and the lien valid, although more than a year had elapsed since the rendition of the faulty judgment. Haag *v.* Hillemeier, 41 Hun (N. Y.) 390, 1 N. Y. St. 549.

Failure to serve other lien-holders.— In an action to enforce a mechanic's lien under Minn. Gen. St. (1878) c. 90, service of the summons on the owner within the two years does not preserve the lien as against other holders of liens named as defendants in the action but not served with the summons until after the two years. Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661 [*followed* in Falconer *v.* Cochran, 68 Minn. 405, 71 N. W. 386].

Under some of the earlier New York statutes the rule was otherwise than as stated in the text. Thus under Laws (1844), c. 220, the lien continued in force for one year only and was not prolonged by obtaining a judgment against the owner of the property. Freeman *v.* Cram, 3 N. Y. 305. Under Laws (1854), c. 402, the lien expired at the expiration of a year from the filing of the notice unless judgment was recovered in the proceedings within that period. People *v.* Lamb, 3 Lans. 134; Grant *v.* Vandercook, 57 Barb. 165, 8 Abb. Pr. N. S. 455; Huxford *v.* Bogardus, 40 How. Pr. 94. So also under Laws (1871), c. 872, the lien expired unless judgment was entered within a year from the time the notice was filed; and where a judg-

prescribed time he is made a party to an action in which his lien, if sustained, will be enforced.[30] Under some statutes the lien may also be extended by obtaining an order for its continuance and making a new docket pursuant thereto.[31]

B. Property, Estates, and Rights Affected — 1. Nature of Property Affected.[32] The mechanics' lien statutes do not give any lien on specific articles furnished for a building as distinct from the building[33] or on chattels separate

ment entered within such time was set aside for irregularity after the year the court could not save the lien by ordering a new judgment to be entered *nunc pro tunc*. Dart *v.* Fitch, 23 Hun 361. Under Laws (1863), c. 500, the lien ceased one year after the filing of the notice thereof unless it was continued by order of court and a new docket made showing the continuance, notwithstanding the pendency of proceedings to foreclose the lien (Darrow *v.* Morgan, 65 N. Y. 333; Schaettler *v.* Gardiner, 4 Daly 56, 41 How. Pr. 243; Barton *v.* Herman, 3 Daly 320, 8 Abb. Pr. N. S. 399; Matthews *v.* Daley, 3 Daly 214 note, 7 Abb. Pr. N. S. 379, 38 How. Pr. 382; Stone *v.* Smith, 3 Daly 213; O'Donnell *v.* Rosenberg, 14 Abb. Pr. N. S. 59; Welch *v.* New York, 19 Abb. Pr. 132), and after the year had elapsed the court could not grant an order continuing the lien *nunc pro tunc* (Poerschke *v.* Kedenburg, 6 Abb. Pr. N. S. 172).

In Pennsylvania under the act of June 16, 1836, the lien expired at the end of five years from the day on which the claim was filed unless it was revived by scire facias, in which case the lien continued for another period of five years, but unless judgment was obtained within five years after the issuance of the scire facias the lien was lost. Hunter *v.* Lanning, 76 Pa. St. 25; Hershey *v.* Shenk, 58 Pa. St. 382; Ward *v.* Patterson, 46 Pa. St. 372; Sweeny *v.* McGittigan, 20 Pa. St. 319; Garbian *v.* McGee, 7 Pa. Co. Ct. 498; Cornelius *v.* Junior, 5 Phila. 171; Collins *v.* Schock, 14 Wkly. Notes Cas. 485; Philadelphia *v.* Scott, 3 Wkly. Notes Cas. 562 [*affirmed* in 93 Pa. St. 25]. The present statute (Act June 4, 1901, Pamphl. Laws 431) is very similar in its provisions. Under the Pennsylvania act of May 16, 1895, issuance within the five years of writs in which the name of the terre-tenant was not inserted until after the expiration of the five years did not continue the lien against the terre-tenant. Hood *v.* Norton, 202 Pa. St. 114, 51 Atl. 748. Under the act of March 17, 1806, where the sale of the building was delayed until after the expiration of the lien by limitation the lien creditor had no preference over other judgment creditors. Cornelius *v.* Uhler, 2 Browne 229.

30. McCallister *v.* Case, 15 Daly (N. Y.) 299, 5 N. Y. Suppl. 918, holding that under Laws (1885), c. 342, the filing of a *lis pendens* by a plaintiff seeking to enforce his lien preserves the liens of all the claimants who are made defendants.

Necessity for lis pendens by claimant.— Under N. Y. Laws (1882), c. 410, as amended by N. Y. Laws (1883), c. 276, defendant in an action to foreclose a mortgage, who claims under a mechanic's lien, must, in order to maintain his lien, file a notice of the pendency of such action. Danziger *v.* Simonson, 116 N. Y. 329, 22 N. E. 570.

31. N. Y. Laws (1897), c. 418, § 16; N. Y. Laws (1885), c. 342. See Matter of Gould Coupler Co., 79 Hun (N. Y.) 206, 29 N. Y. Suppl. 622. As to earlier New York statutes see *supra*, note 29.

Duration of extension.— Under N. Y. Laws (1885), c. 342, which provided that the lien should not bind the property for more than a year after the filing of the notice unless within that time an action was commenced to enforce it or an order was made by a court of record continuing the lien and a new docket made stating such fact, after such a lien was continued generally without any limitation as to time it continued until the vacation of the order of continuance or until the lien was disposed of in the other manners provided by the statute. Bigelow *v.* Bailey, 59 Hun (N. Y.) 403, 13 N. Y. Suppl. 362 [*distinguishing* Darrow *v.* Morgan, 65 N. Y. 333, decided under the act of 1863]. The rule announced in this case is abrogated by the provision of N. Y. Laws (1897), c. 418, § 16, that "no lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year."

The new docket must be made; and if this is not done the lien expires notwithstanding an order for its continuance. Barton *v.* Herman, 3 Daly (N. Y.) 320, 8 Abb. Pr. N. S. 399, under Laws (1863), c. 500.

Presumption of docketing.— If it appears that an order continuing the lien was filed, the making of a new docket will be presumed. McGuckin *v.* Coulter, 33 N. Y. Super. Ct. 324, 10 Abb. Pr. N. S. 128, under Laws (1863), c. 500.

Where judgment is obtained within the year, no formal order to continue the lien is necessary under N. Y. Laws (1885), c. 342. Wright *v.* Roberts, 8 N. Y. Suppl. 745.

Claim on proceeds of property.— The provision of N. Y. Laws (1863), c. 500, § 11, that a mechanic's lien shall "in all cases" cease in one year unless continued by order of court, does not refer to a lienor's claim for surplus money arising on sale of the premises upon a judgment in foreclosure. Such claim is reduced to a right to the avails, and no further order of the court is necessary. Emigrant Industrial Sav. Bank *v.* Goldman, 75 N. Y. 127.

32. See also *supra*, I, I.

33. Baylies *v.* Sinex, 21 Ind. 45. "The lien created by the law, is not against the specific thing furnished, nor necessarily against the interest alone, in the land of the

from the land;[34] but the lien is a general one upon the building or improvement and the land on which it is erected,[35] and attaches only to such property and fixtures as form part of the realty.[36] The lien cannot attach to other premises separate and distinct from those upon which the improvement or repair is made.[37]

2. LAND — a. Amount or Area Affected. The lien usually extends to the building and so much of the land upon which it is situated as is necessary to its convenient use and occupation,[38] and ordinarily covers the entire lot, tract, or par-

party for whom they are furnished, but against the land, and should be satisfied out of the same in any manner consistent with the statute, and the principles of equity." Steigleman *v.* McBride, 17 Ill. 300, 301. The party who furnishes material or machinery for a building by the filing of his lien papers acquires a lien upon the entire structure, and what he furnishes becomes in turn subject to all liens of his fellow mechanics which attached earlier. Equitable L. Ins. Co. *v.* Slye, 45 Iowa 615.

A lien for machinery "is not a separate lien. It does not attach to the machinery, but to the building or other structure to which it is attached, and indirectly only to the machinery as a part of such building and lot of land." Hall *v.* St. Louis Mfg. Co., 22 Mo. App. 33 [*quoted* in Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130].

34. Wagar *v.* Briscoe, 38 Mich. 587; Collins *v.* Mott, 45 Mo. 100. A boiler, pump, engine, and machinery simply placed and used at a mining shaft in drawing therefrom coal and water, and not situated in, or in any way connected with, any building or improvement, are not subject to a mechanic's lien. Meistrell *v.* Reach, 56 Mo. App. 243.

Machinery put in by licensee.— Mining machinery placed in a building erected on land by persons working the land under a miner's license does not become part of the land, so that a mechanic's lien can attach to it. Springfield Foundry, etc., Co. *v.* Cole, 130 Mo. 1, 31 S. W. 922.

35. *California.*— McGreary *v.* Osborne, 9 Cal. 119.

Indiana.— Baylies *v.* Sinex, 21 Ind. 45.

Iowa.— Early *v.* Burt, 68 Iowa 716, 28 N. W. 35.

Michigan.— Wagar *v.* Briscoe, 38 Mich. 587.

Minnesota.— King *v.* Smith, 42 Minn. 286, 44 N. W. 65.

Missouri.— Menefee *v.* Beverforden, 95 Mo. App. 105, 68 S. W. 972.

Montana.— See Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

New York.— See Hilton, etc., Lumber Co. *v.* Murray, 47 N. Y. App. Div. 289, 62 N. Y. Suppl. 35.

Pennsylvania.— Olympic Theatre's Case, 2 Browne 275.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 309.

Compare Gaskill *v.* Davis, 66 Ga. 665 (holding that the lien is confined to the improvements); Montreal Bank *v.* Haffner, 3 Ont. 183, 189 (where it is said: "Each lien under the Act must stand on its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of his work and materials").

The lien covers the lot upon which the building is erected as well as the building itself. Browne *v.* Smith, 2 Browne (Pa.) 229.

A contract for a "builder's lien" will be construed to use the term in its statutory sense, as including the land. June *v.* Doke, 35 Tex. Civ. App. 240, 80 S. W. 402.

36. Haeussler *v.* Missouri Glass Co., 52 Mo. 452.

37. Bayard *v.* McGraw, 1 Ill. App. 134; Rice *v.* Nantasket Co., 140 Mass. 256, 5 N. E. 524 [*following* McGuinness *v.* Boyle, 123 Mass. 570, 25 Am. Rep. 123; Foster *v.* Cox, 123 Mass. 45]; Lambert *v.* Williams, 2 Tex. Civ. App. 413, 21 S. W. 108, where this is said to be "a rule of law too well settled to require any citation of authorities to support it."

38. *California.*— Macomber *v.* Bigelow, 126 Cal. 9, 58 Pac. 312; Ward *v.* Crane, 118 Cal. 676, 50 Pac. 839; Tunis *v.* Lakeport Agricultural Park Assoc., 98 Cal. 285, 33 Pac. 63, (1893) 33 Pac. 447, only such area as is necessary to the enjoyment of the building for the purpose in view in its construction.

Colorado.— Colorado Iron Works *v.* Taylor, 12 Colo. App. 451, 55 Pac. 942.

Connecticut.— Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325.

Georgia.— Findlay *v.* Roberts, 19 Ga. 163.

Iowa.— Ewing *v.* Allen, 99 Iowa 379, 381, 68 N. W. 702, holding that under Acts 16th Gen. Assembl. c. 100, § 4, providing that "the entire land upon which any such building, erection, or other improvement, is situated, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter," the lien extends only to the building for the erection of which the material was furnished or labor done, the land upon which it actually rests, and the other land properly appurtenant to the building, and does not cover a separate house standing on the same undivided lot, the court saying: "The two buildings are not so situated as to be used by the same persons, or as one dwelling house, but they are separate and distinct; and a certain portion of the lot must, of necessity, or by reason of convenience, be used in connection with each house. In other words, in such a case the lien extends to the particular improvement, and the land upon which it is erected, and to such other land surrounding the improvement as is properly appurtenant thereto. By this construction the intent of the legislature is effectuated, and we escape

cel upon which the building or improvement is situated.[39] Under some statutes, however, if the tract can be divided without injury, only so much as is necessary

the difficulties which would often arise, and the injustice which would follow, were we to construe the law as creating a lien in all cases upon the entire lot, parcel, or division of land upon which the erection is placed, regardless of independent existing buildings or erections thereon, or the land upon which they are situated, or which is properly appurtenant thereto."

Maryland.— Fulton *v.* Parlett, (1906) 64 Atl. 58.

New Mexico.— Mountain Electric Co. *v.* Miles, 9 N. M. 512, 56 Pac. 284.

Pennsylvania.— Nelson *v.* Campbell, 28 Pa. St. 156; Pennock *v.* Hoover, 5 Rawle 291; Brown *v.* Peterson, 2 Woodw. 112.

Vermont.— Roby *v.* Vermont University Corp., 36 Vt. 564.

Virginia.— Pairo *v.* Bethell, 75 Va. 825.

Wisconsin.— Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214; Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

United States.— Springer Land Assoc. *v.* Ford, 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562 [*affirming* 6 N. M. 222, 27 Pac. 415].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 310.

Where building not completed.—If the fault of the owner in not paying instalments prevents the mechanic from erecting the whole building, the lien extends to the parcel intended to be used with the whole building when finished, and not merely to that portion specially intended to be used in connection with the part actually erected. Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

Where materials are furnished for one or more of several buildings on a large tract of land used for a common purpose, a lien may be filed against the particular building or buildings for which the materials were furnished and the appurtenant lots, and should not be filed against the entire property. Girard Point Storage Co. *v.* Southwark Foundry Co., 105 Pa. St. 248.

It is the province of the jury to ascertain and determine by their verdict what part of the ground is necessary for the convenient use of the building for the purposes for which it was intended, and to which the lien of the mechanic is to extend. Keppel *v.* Jackson, 3 Watts & S. (Pa.) 320.

Evidence as to use.— Testimony showing that the land and reduction works thereon had been leased together and sold together tends to prove that the property has been treated as a unit and used for a common purpose, and in the absence of any other testimony or objections at the trial the court has the right to infer that the land so used and treated is reasonably convenient for the use of the reduction works. Gould *v.* Wise, 18 Nev. 253, 3 Pac. 30.

A lien for a stamp mill covers the mill site only, and not the lode mining claims from which the ores to be worked are obtained, under Colo. Laws (1893), p. 320, § 7. Colorado Iron Works *v.* Taylor, 12 Colo. App. 451, 55 Pac. 942.

In the case of a farm, Cal. Code Civ. Proc. § 1185, allowing a lien on so much of the land about the building as may be required for the convenient use and occupation thereof does not mean that sufficient land about the dwelling to support the owner while living there shall be subject to the lien, and hence the lien cannot be enforced upon the whole of a forty-acre tract on which the dwelling is located. Cowan *v.* Griffith, 108 Cal. 224, 41 Pac. 42, 49 Am. St. Rep. 82.

Excessive amount of land.— A decree establishing mechanics' liens on the entire premises constituting the fair grounds of an agricultural society, consisting of about sixty acres of land, with race track, grand stand, corrals, stables, and other improvements thereon, in favor of persons who constructed a building on such grounds to be used as a hotel, club house, and saloon, is erroneous. Tunis *v.* Lakeport Agricultural Park Assoc., 98 Cal. 285, 33 Pac. 63, (1893) 33 Pac. 447.

A burial-ground is not necessary for the enjoyment of a church building for the purpose for which it was designed and hence is not subject to a lien for the erection of the church. Beam *v.* Methodist Episcopal Church, 3 Pa. L. J. Rep. 343, 5 Pa. L. J. 286.

39. *Connecticut.*— Lindsay *v.* Gunning, 59 Conn. 296, 22 Atl. 310, 11 L. R. A. 553 (where the lien for farm buildings was held to extend to the whole of a three-hundred-and-fifty-acre farm under Gen. St. § 3018, giving a lien on the building "with the land on which the same may stand"); Charleston Bank *v.* Curtiss, 18 Conn. 342, 46 Am. Dec. 325 (holding that a lien for building a house and barn on a building lot containing about one acre will embrace the whole of the parcel as necessary and reasonably convenient for the use of the buildings).

Illinois.— St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546 (holding that there is no error in making a decree in respect to the erection of two buildings on a United States survey of four hundred acres extend to the entire tract); Woodburn *v.* Gifford, 66 Ill. 285; Le Forgee *v.* Colby, 69 Ill. App. 443.

Indiana.— Crawfordsville *v.* Barr, 65 Ind. 367.

Massachusetts.— Orr *v.* Fuller, 172 Mass. 597, 52 N. E. 1091 (the whole lot as it was when the contract was made including buildings thereon); Whalen *v.* Collins, 164 Mass. 146, 41 N. E. 124; Collins *v.* Patch, 156 Mass. 317, 31 N. E. 295; Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; Wall *v.* Robinson, 115 Mass. 429.

Minnesota.— Bergsma *v.* Dewey, 46 Minn. 357, 49 N. W. 57.

Missouri.— Miller *v.* Hoffman, 26 Mo. App. 199.

New Jersey.— Edwards *v.* Derrickson, 28 N. J. L. 39, holding that a lien claim would cover and attach to, as being part of the lot

to satisfy the lien should be sold.[40] The lien covers only the property described in the claim filed by the lienor.[41] As a rule, land outside the tract or parcel on which the building or improvement is situated is not subject to the lien,[42] but the parties may by contract extend the area of property to be covered by the lien beyond what would be subject thereto under the statute.[43] Where the statute gives a lien upon the building and "the lot of land upon which the same is situated," a lien cannot, at the option of the holder thereof, be established on a part only of the whole lot.[44]

b. Statutory Limitations as to Area. Some of the statutes limit the amount or area of land on which the lien may be enforced, and if the tract exceeds that area the statutory amount must be carved out of it, the remainder being left free from the lien.[45] But a statute forbidding that a curtilage of more than a desig-

and curtilage whereon the building was erected, about fifty-three acres of land which had always been treated and sold as one lot of mill property, although part of it was uninclosed, and was chiefly open, broken, back land. See also Vandyne *v.* Vanners, 5 N. J. Eq. 485, holding that the lien extends to so much of the tract of land on which the house is built as, with the house, would be required to discharge it.

North Carolina.— Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114.

Pennsylvania.— Wismer's Estate, 2 Pa. Co. Ct. 387, holding that under the act of June 16, 1886, providing that the lien shall extend "to the ground covered by such building and to so much other ground immediately adjacent thereto as may be necessary for the useful purposes of such building," where a barn is built on a farm, and is of the proper and necessary size for the correct farming of such farm, the lien on the barn will extend to the whole farm.

Virginia.— Pairo *v.* Bethell, 75 Va. 825, holding that in the absence of proof to the contrary, a lot in a town is necessary to the convenient and reasonable enjoyment of the buildings put upon it, and hence subject to the lien under the statute giving a lien on the buildings and also on "so much land therewith as shall be necessary for the convenient use and enjoyment of the premises."

Wisconsin.— Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 310.

Fencing in of part.— Where a house is built for the owner upon a tract of eighty acres, it is no segregation of the house from the tract that it is within a fence inclosing about three acres. Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31.

The lien may extend to an entire plant, all of the several structures of which are on one lot of ground and are used together for the single purpose of smelting ores, although the claimant furnished materials for only one building. Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

Proof that there is another building on the lot not connected with that for which the material is furnished, without showing the character of such other building, or whether the one is or is not appurtenant to the other, is not sufficient to exclude any part of the lot from the operation of the lien. Bergsma *v.* Dewey, 46 Minn. 357, 49 N. W. 57.

Lien established on entire property may be froeclosed on part.— Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

40. North Presb. Church *v.* Jevne, 32 Ill. 214, 83 Am. Dec. 261 (such division can be made only when the part separated will be sufficient to pay all the claims); Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31.

41. McDonald *v.* Lindall, 3 Rawle (Pa.) 492.

42. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Woodburn *v.* Gifford, 66 Ill. 285; Seiler *v.* Schaefer, 40 Ill. App. 74 (holding that a lien existing for work and materials in a building on one lot gives no lien on an adjacent lot, even if in the same inclosure, unless by proper averments both lots are to be considered as one); Stout *v.* Sower, 22 Ill. App. 65; Van Lone *v.* Whittemore, 19 Ill. App. 447; McDonald *v.* Minneapolis Lumber Co., 28 Minn. 262, 9 N. W. 765.

43. Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574, 578, 13 S. Ct. 936, 37 L. ed. 853, where it is said: "Such a stipulation is tantamount to an equitable mortgage."

44. Whalen *v.* Collins, 164 Mass. 146, 41 N. E. 124.

45. *Alabama.*— Bedsole *v.* Peters, 79 Ala. 133; Turner *v.* Robbins, 78 Ala. 592; Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

Arkansas.— White *v.* Chaffin, 32 Ark. 59.

Minnesota.— Evans *v.* Sanford, 65 Minn. 271, 68 N. W. 21; North Star Iron Works *v.* Strong, 33 Minn. 1, 21 N. W. 740; Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205.

Missouri.—Rawson *v.* Sheehan, 78 Mo. 668; Wright *v.* Beardsley, 69 Mo. 548; Williams *v.* Porter, 51 Mo. 441; Engleman *v.* Graves, 47 Mo. 348.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413.

New Jersey.— Gerard *v.* Birch, 28 N. J. Eq. 317.

Texas.— Swope *v.* Stautzenberger, 59 Tex. 387.

Wisconsin.—Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144; McAuliffe *v.* Jorgenson, 107 Wis. 132, 82 N. W. 706; McCoy *v.* Quick,

nated area shall be assigned to the building has been held to apply only where there has been no designation of the curtilage by the owner and the means of designation by map do not exist.[46]

c. Separate Lots or Buildings — (I) *In General.* Where the circumstances warrant the filing of a single lien claim or notice covering several lots or parcels[47] the lien may, according to some authorities, be enforced as a whole against all of the property.[48] Thus where labor or material is furnished under an entire contract upon separate buildings owned by the same person[49] and situated upon the same lot or tract, the lien attaches upon the whole property for the whole value of the labor.[50] But it has also been held that where there are several lots the amount should be apportioned according to the value of the labor and material expended on each,[51] at least where subsequent purchasers and encumbrancers have

30 Wis. 521; Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 311.

Whether designation made by claimant or court see *supra*, III, C, 11, f, (III), (A).

46. Gerard *v.* Birch, 28 N. J. Eq. 317.

47. See *supra*, III, C, 2, c–e.

48. *Illinois.* — Where the buildings constitute a block, compact as one building, and under one roof, it has been held proper to decree a lien against the entire block for the amount due, without apportionment. James *v.* Hambleton, 42 Ill. 308 [*approved* in Culver *v.* Elwell, 73 Ill. 536]; Christian *v.* Illinois Malleable Iron Co., 92 Ill. App. 320; Peck *v.* Standart, 1 Ill. App. 228.

Maryland.— Maryland Brick Co. *v.* Spilman, 76 Md. 337, 25 Atl. 297, 35 Am. St. Rep. 431, 17 L. R. A. 599 [*followed* in Maryland Brick Co. *v.* Dunkerly, 85 Md. 199, 36 Atl. 761].

Massachusetts.— Where the structure on which the work was done is one building, although arranged for use as two dwelling-houses, the lien can be maintained on the whole premises for the whole amount due, although part of the work was done on each of the houses. Getchell *v* Moran, 124 Mass. 404.

Missouri.— Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737.

Nebraska.— In Badger Lumber Co. *v.* Holmes, 44 Nebr. 244, 62 N. W. 446, 48 Am. St. Rep. 726, it was held that where materials were furnished for several buildings on different lots under a single contract with the owner, the whole debt could be charged to all the lots, but that all the debt should not be charged to a part of the lots; and hence where it was sought to charge part of the lots only the value of the material furnished must be apportioned so that such part should bear no greater amount of the expense than the value of the material actually used in constructing the improvements made on such part. In Badger Lumber Co. *v.* Holmes, 55 Nebr. 473, 76 N. W. 174, a second appeal in the same case, the court expressed its adherence to the former ruling, and held, as being in compliance therewith, that where the claimant was entitled to a first lien on certain parts and a junior lien on other parts, and the lien as to the latter parts was cut off by a foreclosure and sale under the prior lien, the claimant's lien was valid and binding on the remainder of the lots for the entire balance of the unpaid part of the claim.

New York.— Where a mechanic's lien for materials, furnished for the erection of several houses but supplied under a single contract for a gross sum, has attached, the lienor is entitled to be paid out of all or any of the houses. Livingston *v.* Miller, 16 Abb. Pr. 371, holding the lienor entitled to payment in full out of the surplus arising out of a sale of some of the houses under foreclosure of a prior mortgage.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 316, 318, 319, 321.

Release of portion of property.— Where some of the houses are released from the lien there can be no lien against them for materials subsequently furnished in their construction, and as a consequence there can be no lien for such materials upon the residue of the houses. But the burden of proof to establish such a condition of fact rests upon the owner of the property or whoever may be seeking to avoid the lien. Maryland Brick Co. *v.* Dunkerly, 85 Md. 199, 36 Atl. 761.

49. **Property of different owners** see *infra*, IV, B, 2, c, (III).

50. Brabazon *v.* Allen, 41 Conn. 361 (block of buildings); Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; Batchelder *v.* Rand, 117 Mass. 176 (although the land was conveyed to the owner in separate lots and one building is upon each parcel, and after the contract was made the parcels were mortgaged to different persons); Wall *v.* Robinson, 115 Mass. 429 [*followed* in Worthley *v.* Emerson, 116 Mass. 374] (although the contract specified separate amounts for the work done on each building); Glass *v.* St. Paul Park Carriage, etc., Co., 43 Minn. 228, 45 N. W. 150 [*following* Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3]; Salt Lake Lithographing Co. *v.* Ibex Mine, etc., Co., 15 Utah 440, 49 Pac. 768, 62 Am. St. Rep. 944.

51. Culver *v.* Elwell, 73 Ill. 536 (holding that where a mechanic's lien is sought against several separate buildings on separate lots the decree must be against each for the value of work and material on it, and not against all for the aggregate value of work and material on all); Doolittle *v.*

become interested in different portions of the premises;[52] and where it is sought to enforce the lien on less than the whole number of lots each is subject to the lien only to the extent of what was done or furnished for the building or improvement thereon.[53] Where a mechanic performs work under two separate contracts upon one block of houses, he cannot enforce a lien upon the whole block as one estate for the general balance due from the owner.[54] When tenants in common partition their land and take possession of their several parts, although no deed passes, and one of the parties has a house erected on his part, such part only is subject to the lien.[55] The lien is properly confined to the building upon which the work was done, although the original contract embraced other buildings.[56] Where a mechanic performs work on two separate buildings of the same owner, on separate pieces of land, and a settlement is made between the mechanic and the owner by which the latter acknowledges a certain balance to be due to the former, such balance may fairly be a lien on either property; and if the balance has been appropriated it is a lien upon the property to which it is appropriated, while if it is not appropriated it should be left to the jury to settle how much of the balance is due upon each house.[57] Where defendant occupied several buildings as a factory, on some of which only the material was furnished and the labor performed, the mechanic's lien does not extend to all the buildings, but is confined to the building for which the material was furnished or on which the work was done.[58] A claim for material furnished in building two houses under separate contracts, filed as a lien against one of the buildings, is invalid as against a mortgagee of the building, although the owner has consented to a decree establishing the lien in a suit by the claimant against him.[59] A stack constructed in a pork house, essential both for the pork house and a distillery, whether the distillery is attached to the pork house or not, and although the pork house may be used independently of the distillery, yet, being erected for and necessary to both establishments, must be regarded as a part thereof; and the account for constructing the stack is a lien upon both.[60]

(II) *USE OF SEVERAL LOTS OR PARCELS AS ONE.* Where the owner of several adjoining lots or parcels of land treats the same as a single undivided tract and as such places improvements thereon, a single lien for all that was done or furnished will cover the tract as a whole.[61]

Planz, 16 Nebr. 153, 20 N. W. 116; Edwards *v.* Edwards, 24 Ohio St. 402.

Removal of building.— Where petitioners for a mechanic's lien furnished labor and materials toward the erection and repair of certain mills, upon a certain parcel of land, and the buildings were afterward removed to another parcel, where the petitioners also furnished labor and materials in the repair of the same, they had a lien upon each parcel to the extent of the value of the work done and materials furnished thereon. Steigleman *v.* McBride, 17 Ill. 300.

52. Moore *v.* Parish, 163 Ill. 93, 45 N. E. 573 [*reversing* 58 Ill. App. 617]; Blanchard *v.* Fried, 162 Ill. 462, 44 N. E. 880 [*reversing* 58 Ill. App. 622].

53. Badger Lumber Co. *v.* Holmes, 44 Nebr. 244, 62 N. W. 446, 48 Am. St. Rep. 726 [*following* Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127]. See also Williams *v.* Judd-Wells Co., 91 Iowa 378, 59 N. W. 271, 51 Am. St. Rep. 350; Paine *v.* Bonney, 4 E. D. Smith (N. Y.) 734, 6 Abb. Pr. 99 (holding, however, that where a person purchased three houses and lots, with full knowledge that they were encumbered with a valid subsisting mechanic's lien, and having sold two of them, brought a suit in equity, in his own behalf, and without joining the other persons interested, asking to have his house and lot discharged from the lien, upon payment of the value of the materials used in its construction, the relief asked for should be denied); Guaranty Sav., etc., Co. *v.* Cash, (Tex. 1906) 91 S. W. 781 [*reversing* (Civ. App. 1905) 87 S. W. 749, and *explaining* Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511].

54. Landers *v.* Dexter, 106 Mass. 531.

55. Otis *v.* Cusack, 43 Barb. (N. Y.) 546.

56. Macomber *v.* Bigelow, 126 Cal. 9, 58 Pac. 312; Brunner *v.* Marks, 98 Cal. 374, 33 Pac. 265.

57. Stewart *v.* McQuaide, 48 Pa. St. 195.

58. Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527.

59. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

60. Bodley *v.* Denmead, 1 W. Va. 249.

61. *California.*— A statute giving a lien upon the "lot" for grading is not limited to any artificial subdivision upon the surface of the earth or to any official designation upon a map, but its meaning includes whatever territory is owned by a person which he may cause to be graded under a single con-

(III) *PROPERTY OF DIFFERENT OWNERS.*[62] In some states it has been held that where the owners of adjoining properties join in making an entire contract for improvements thereon, an entire lien attaches to the properties as a whole for what was done or furnished thereunder;[63] but it has also been held that in such case a lien attaches to each of the lots for the labor and materials expended in the improvement thereof,[64] and the cost should be apportioned between the lots accordingly.[65]

d. Land Without Buildings. The foundation of the mechanic's lien being the improvement of land, it follows that the lien cannot as a rule be taken against land without buildings or improvements upon it.[66]

3. BUILDINGS. While it has been held that a mechanic's lien cannot attach to or be enforced against a building alone apart from the land upon which it is located,[67] the more general rule is that the building, as distinct from the land, may be subjected to the lien under certain circumstances,[68] although a

tract. Warren *v.* Hopkins, 110 Cal. 506, 42 Pac. 986.

Colorado.— Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64.

Connecticut.—Marston *v.* Kenyon, 44 Conn. 349.

Illinois.— Berndt *v.* Armknecht, 50 Ill. App. 467.

Michigan.— Lamont *v.* Le Fevre, 96 Mich. 175, 55 N. W. 687.

Minnesota.— Miller *v.* Shepard, 50 Minn. 268, 52 N. W. 894; Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3.

Missouri.— Meinholz *v.* Grodt, 4 Mo. App. 568.

Nebraska.— Wakefield *v.* Latey, 39 Nebr. 285, 57 N. W. 1002; Doolittle *v.* Plenz, 16 Nebr. 153, 156, 20 N. W. 116, where it is said: "The words . . . 'and the lot upon which the same shall stand,' do not restrict the lien to arbitrary and artificial lines but include at least all the lots upon which the buildings or any part thereof are erected."

New York.— Miller *v.* Schmitt, 67 N. Y. Suppl. 1077.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114.

South Carolina.— *Ex p.* Davis, 9 S. C. 204, although the owner of the building was not the absolute owner of some of the lots.

Wisconsin.— The word "lot" as used in the statute does not refer to the lots recorded on city plats, but means the particular piece or parcel of land used or designated for use in connection with the building erected. Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

United States.—Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 320.

Separate owners.— Where two owners in severalty of contiguous city or platted lots join in the construction of a single building on both lots, those doing work on or furnishing material for the building have a right to claim a lien on the whole building and both lots. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

62. See *supra*, III, C, 2, f.

63. Meixell *v.* Griest, 1 Kan. App. 145, 40 Pac. 1070 (where the contract was made by the owner of one lot for himself and as agent for the owner of the adjoining lot); Fullerton *v.* Leonard, 3 S. D. 118, 52 N. W. 325.

64. Edwards *v.* Edwards, 24 Ohio St. 402.

65. Edwards *v.* Edwards, 24 Ohio St. 402.

Where the contract contains a convenient method of apportioning the cost between the two owners of a building contracted for and erected as a unit, the same will be adopted by the court as a proper method of apportioning the lien upon the separate lots upon which the building is situated. Ballou *v.* Black, 17 Nebr. 389, 23 N. W. 3, 21 Nebr. 131, 31 N. W. 673.

66. Holzhour *v.* Meer, 59 Mo. 434. See also Lingren *v.* Nilsen, 50 Minn. 448, 52 N. W. 915, holding that where materials were furnished to be used in erecting a building on lot 3, but through mistake the building was erected on lot 4, and it was afterward removed to lot 2, the materialman was not entitled to a lien on lot 3. *Compare* Fredericks *v.* Goodman St. Homestead Assoc., 29 N. Y. Suppl. 1041, where a lien was allowed under Laws (1885), c. 342, for grading and laying out roadways on a tract intended for building lots, although there was no building on the tract.

67. *Kentucky.*— Fetter *v.* Wilson, 12 B. Mon. 90.

Massachusetts.— Stevens *v.* Lincoln, 114 Mass. 476; Belding *v.* Cushing, 1 Gray 576.

New Jersey.— Leaver *v.* Kilmer, 71 N. J. L. 291, 59 Atl. 643.

Washington.— Vendome Turkish Bath Co. *v.* Schettler, 2 Wash. 457, 27 Pac. 76; Kellogg *v.* Littell, etc., Mfg. Co., 1 Wash. 407, 25 Pac. 461.

Wisconsin.— Jessup *v.* Stone, 13 Wis. 446; Rees *v.* Ludington, 13 Wis. 276, 80 Am. Dec. 741.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 323.

68. *Alabama.*— Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600 [*following* Bedsole *v.* Peters, 79 Ala. 133]; Turner *v.* Robbins, 78 Ala. 592. See also May, etc., Hardware Co. *v.* McConnell, 102 Ala. 577, 14 So. 768.

California.— McGreary *v.* Osborne, 9 Cal. 119 (where the owner of the superstructure

mechanic's lien cannot be maintained on or enforced against a part of an entire building.[69]

4. Fixtures. The lien extends to and covers fixtures[70] and appurtenances[71] so attached to and connected with the realty as to form a part thereof; and under some statutes the lien may be enforced upon machinery or other fixtures, separately from the land, if they are capable of being severed and removed without material injury.[72]

5. Estate or Interest Affected[73] — a. In General. The lien attaches to what-

does not own the land); Linck *v.* Meikeljohn, 2 Cal. App. 506, 84 Pac. 309 (building erected under contract with a person who falsely represented himself to be the owner of the land).

Georgia.— Gaskill *v.* Davis, 66 Ga. 665, 672, where it is said: "The law fixes the lien on the improvements put on the house, and the verdict is contrary to the law in that it spreads that lien over all the premises — the ground on which the house stands as well as the house. *Compare* Gaskill *v.* Davis, 61 Ga. 644.

Indian Territory.— Arnold *v.* Campbell, 3 Indian Terr. 550, 64 S. W. 532.

Iowa.— Smith *v.* St. Paul F. & M. Ins. Co., 106 Iowa 225, 76 N. W. 676 [*following* Lane *v.* Snow, 66 Iowa 544, 24 S. E. 35] (where the owner of the building has no title to the land); Estabrook *v.* Riley, 81 Iowa 479, 46 N. W. 1072, 10 L. R. A. 33 (where the owner of the building does not own the land); Oliver *v.* Davis, 81 Iowa 287, 46 N. W. 1000; Early *v.* Burt, 68 Iowa 716, 28 N. W. 35 (holding, however, that where the owner of the building also owns the land, and it does not appear that there is any prior lien on the land, it is error to foreclose the lien on the building alone).

Michigan.— Jossman *v.* Rice, 121 Mich. 270, 80 N. W. 25, 80 Am. St. Rep. 493. *Compare* Wagar *v.* Briscoe, 38 Mich. 587.

Mississippi.— Weathersby *v.* Sinclair, 43 Miss. 189; Buchanan *v.* Smith, 43 Miss. 90.

Missouri.—Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279 (although the owner of the building is also the owner of the land on which it stands); Holzhour *v.* Meer, 59 Mo. 434; Collins *v.* Mott, 45 Mo. 100 (building erected on leased property by tenant with power of removal). There cannot be a mechanic's lien on a building or other improvement separate and apart from the land itself, save for the statutory exceptions where improvements have been made on leased or mortgaged premises under contract with the lessee or mortgagor. Fathman, etc., Planing Mill Co. *v.* Christophel, 60 Mo. App. 106 [*followed* in State *v.* Harley, 71 Mo. App. 200].

Montana.— Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

Nebraska.— Shull *v.* Best, 4 Nebr. (Unoff.) 212, 93 N. W. 753 [*following* Pickens *v.* Plattsmouth Land, etc., Co., 31 Nebr. 585, 48 N. W. 473].

New York.— Ombony *v.* Jones, 19 N. Y. 234 [*affirming* 21 Barb. 520], building erected by tenant at will and removable by him.

North Dakota.— Gull River Lumber Co. *v.* Briggs, 9 N. D. 485, 84 N. W. 349; Mahon *v.* Surerus, 9 N. D. 57, 81 N. W. 64.

Texas.— See Collier *v.* Betterton, 8 Tex. Civ. App. 479, 29 S. W. 490; Crooker *v.* Grant, 5 Tex. Civ. App. 182, 24 S. W. 689, where a lien arising out of the erection of a building extending over two lots was enforced against the entire building but against only one of the lots.

Utah.— See Sanford *v.* Kunkel, 30 Utah 379, 85 Pac. 363, 1012.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 323; and numerous cases cited *passim* this article where the lien was enforced on the building alone.

Provision in lease against removal.— It is no objection to the establishment and enforcement of a mechanic's lien upon buildings and improvements on leased premises under a contract with the lessee, and upon the unexpired term of the lease, that there is a provision in the lease prohibiting the removal of improvements from the premises unless the rent be paid. Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26.

69. Seidel *v.* Bloeser, 77 Mo. App. 172; Wright *v.* Cowie, 5 Wash. 341, 31 Pac. 878, although the work may have been done for the sole and exclusive benefit of the occupant or lessee of such part. See also Deatherage *v.* Sheidley, 50 Mo. App. 490; McMahon *v.* Vickery, 4 Mo. App. 225. But *compare* Whitenack *v.* Noe, 11 N. J. Eq. 413.

70. Collins *v.* Mott, 45 Mo. 100; Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130.

A boiler in a brew house is a fixture, and subject to a mechanic's lien. Gray *v.* Holdship, 17 Serg. & R. (Pa.) 413, 17 Am. Dec. 680.

71. Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130.

Cars used in connection with a drier in a brickyard, upon which the bricks are loaded and kept until the drying process is complete, are part of the realty and subject to the lien. Curran *v.* Smith, 37 Ill. App. 69.

In the case of a mill or factory whatever is permanently needed to complete the structure and make it capable of performing its intended function is an appurtenance or fixture and subject to the lien. Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130.

72. Slocum *v.* Caldwell, 13 S. W. 1069, 12 Ky. L. Rep. 514.

73. Estates or interests subject to lien see *supra*, I, J.

ever interest or estate in the property is owned by the person who caused the building or other improvement to be placed thereon,[74] and in case such person owns less than a fee-simple estate it attaches only to his interest or estate and not to other interests or estates in the land owned by other persons,[75] unless the latter have, by themselves consenting to the improvement, rendered their interests also

74. *Arizona.*— Bremen *v.* Foreman, 1 Ariz. 413, 25 Pac. 539.

California.— Johnson *v.* Dewey, 36 Cal. 623; McGreary *v.* Osborne, 9 Cal. 119.

Connecticut.— Flannery *v.* Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Hooker *v.* McGlone, 42 Conn. 95.

District of Columbia.— Alfred Richards Brick Co. *v.* Atkinson, 16 App. Cas. 462.

Illinois.— McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572; Donaldson *v.* Holmes, 23 Ill. 85; Steigleman *v.* McBride, 17 Ill. 300; Garrett *v.* Stevenson, 8 Ill. 261; Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529; Le Forgee *v.* Colby, 69 Ill. App. 443; Chicago Smokeless Fuel Gas Co. *v.* Lyman, 62 Ill. App. 538; Randolph *v.* Chisholm, 29 Ill. App. 172.

Indiana.— Truehlood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

Iowa.— Clark *v.* Parker, 58 Iowa 509, 12 N. W. 553; Nordyke, etc., Co. *v.* Hawkeye Woolen Mills Co., 53 Iowa 521, 5 N. W. 693. Where a decree foreclosing a mechanic's lien establishes the lien only against the interest of the person in possession, he cannot object that the legal title is in another person. Bray *v.* Smith, 87 Iowa 339, 54 N. W. 222.

Kansas.— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473; Seitz *v.* Union Pac. R. Co., 16 Kan. 133; Harsh *v.* Morgan, 1 Kan. 293; Badger Lumber Co. *v.* Malone, 8 Kan. App. 121, 54 Pac. 692.

Kentucky.—Caldwell Inst. *v.* Young, 2 Duv. 582.

Louisiana.— See Schwartz *v.* Saiter, 40 La. Ann. 264, 4 So. 77.

Maine.— Shaw *v.* Young, 87 Me. 271, 32 Atl. 897.

Maryland.— Mills *v.* Matthews, 7 Md. 315.

Michigan.— Peninsular Gen. Electric Co. *v.* Norris, 100 Mich. 496, 59 N. W. 151; Scales *v.* Griffin, 2 Dougl. 54.

Minnesota.— Carpenter *v.* Leonard, 5 Minn. 155 [*followed* in Carpenter *v.* Wilverschied, 5 Minn. 170].

Mississippi.— Laud *v.* Muirhead, 31 Miss. 89; Hoover *v.* Wheeler, 23 Miss. 314; English *v.* Foote, 8 Sm. & M. 444.

Montana.— Montana Lumber, etc., Co. *v.* Obelisk Min., etc., Co., 15 Mont. 20, 37 Pac. 897.

Nebraska.—Moore *v.* Vaughn, 42 Nebr. 696, 60 N. W. 914; Hoagland *v.* Lowe, 39 Nebr. 397, 58 N. W. 197; Waterman *v.* Stout, 38 Nebr. 396, 56 N. W. 987; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

New Jersey.— Stewart Contracting Co. *v.* Trenton, etc., R. Co., 71 N. J. L. 568, 60 Atl. 405; Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

New York.— Rollin *v.* Cross, 45 N. Y. 766; Blauvelt *v.* Woodworth, 31 N. Y. 285.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114; Lord *v.* Chaffee, 4 Ohio Dec. (Reprint) 514, 2 Clev. L. Rep. 297.

Pennsylvania.— Weaver *v.* Sheeler, 124 Pa. St. 473, 17 Atl. 17, 118 Pa. St. 634, 12 Atl. 558; O'Conner *v.* Warner, 4 Watts & S. 223; Evans *v.* Montgomery, 4 Watts & S. 218; Savoy *v.* Jones, 2 Rawle 343. See also James Smith Woolen Mach. Co. *v.* Browne, 206 Pa. St. 543, 56 Atl. 43.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

Texas.— Strang *v.* Pray, 89 Tex. 525, 35 S. W. 1054.

Vermont.— Kenny *v.* Gage, 33 Vt. 302.

Washington.— Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Masow *v.* Fife, 10 Wash. 528, 39 Pac. 140; Miles Co. *v.* Gordon, 8 Wash. 442, 36 Pac. 265.

Wisconsin.— Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77; Kerrick *v.* Ruggles, 78 Wis. 274, 47 N. W. 437; Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

United States.— Pflueger *v.* Lewis Foundry, etc., Co., 134 Fed. 28, 67 C. C. A. 102.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 326, 328; and *supra*, II, C, 3, a, b, e–i.

75. *Arizona.*— Bremen *v.* Foreman, 1 Ariz. 413, 25 Pac. 539.

California.— Johnson *v.* Dewey, 36 Cal. 623.

Connecticut.— Flannery *v.* Rohrmayer, 46 Coun. 558, 33 Am. Rep. 36; Hooker *v.* McGlone, 42 Conn. 95.

Illinois.— McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572; Garrett *v.* Stevenson, 8 Ill. 261.

Kansas.— Seitz *v.* Union Pac. R. Co., 16 Kan. 133 [*followed* in Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473]; Harsh *v.* Morgan, 1 Kan. 293; Johnson *v.* Badger Lumber Co., 8 Kan. App. 580, 55 Pac. 517.

Maryland.— Mills *v.* Matthews, 7 Md. 315. A materialman, selling materials to a lessee to erect buildings on the leased property, with knowledge that a ground-rent is reserved to the owner, cannot subject the ground-rent to the payment of his claim. Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Michigan.— Peninsular Gen. Electric Co. *v.* Norris, 100 Mich. 496, 59 N. W. 151; Wagar *v.* Briscoe, 38 Mich. 587; Scales *v.* Griffin, 2 Dougl. 54.

Mississippi.— Laud *v.* Muirhead, 31 Miss. 89; Hoover *v.* Wheeler, 23 Miss. 314; English *v.* Foote, 8 Sm. & M. 444; Falconer *v.* Frazier, 7 Sm. & M. 235.

Nebraska.— Moore *v.* Vaughn, 42 Nebr. 696, 60 N. W. 914; Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132.

liable.[76] The lien attaches only to the interest of the person against whom the notice or statement required by statute[77] is filed and not to the interest of another person not named therein.[78]

b. Subsequently Acquired Interests. If the person by whom the contract for the building or improvement was made was not then the owner or the absolute owner, but subsequently becomes the absolute owner or acquires a larger interest than he formerly had, the lien attaches to the subsequently acquired interest.[79] So also where a person falsely represents that he has an interest subject to a lien and he afterward acquires such an interest, the lien will attach thereto.[80]

c. Claim Against Lesser Interest Than Might Be Subjected. Where the owner changes his interest in lots from a fee into a leasehold after the erection of the buildings, the materialman may, if he so elect, file a mechanic's lien against the lesser interest.[81]

New Jersey.— Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

New York.— Rollin *v.* Cross, 45 N. Y. 766.

Ohio.— Dutro *v.* Wilson, 4 Ohio St. 101.

Pennsylvania.— Weaver *v.* Sheeler, 124 Pa. St. 473, 17 Atl. 17, 118 Pa. St. 634, 12 Atl. 558; Schenley's Appeal, 70 Pa. St. 98; Woodward *v.* Wilson, 68 Pa. St. 208; Evans *v.* Montgomery, 4 Watts & S. 218; Ottinger's Estate, 4 Pa. Dist. 711, 17 Pa. Co. Ct. 244; Gould *v.* Deming, 3 Phila. 337. See also Barnes' Appeal, 46 Pa. St. 350.

Rhode Island.— Poole *v.* Fellows, 25 R. I. 64, 54 Atl. 772.

Vermont.— Greene *v.* McDonald, 70 Vt. 372, 40 Atl. 1035.

Washington.— Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Masow *v.* Fife, 10 Wash. 528, 39 Pac. 140; Z. C. Miles Co. *v.* Gordon, 8 Wash. 442, 36 Pac. 265; Iliff *v.* Forssell, 7 Wash. 225, 34 Pac. 928.

Wisconsin.— Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 326, 328; and *supra*, II, C, 3, a, b, e–i.

76. See *supra*, II, C, a, b, e–i; II, C, 5, k, (II).

77. See *supra*, III, C.

78. Pennsylvania Steel Co. *v.* Title Guarantee, etc., Co., 50 Misc. (N. Y.) 51, 100 N. Y. Suppl. 299; Packard *v.* Sugarman, 31 Misc. (N. Y.) 623, 66 N. Y. Suppl. 30.

79. *Colorado.*— Tritch *v.* Norton, 10 Colo. 337, 15 Pac. 680.

Connecticut.— Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905.

Illinois.— Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529.

Indiana.— Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

Kansas.— Jarvis-Conklin Mortg. Trust Co. *v.* Sutton, 46 Kan. 166, 26 Pac. 406. See also Chicago Lumber Co. *v.* Fretz, 51 Kan. 134, 32 Pac. 908.

Massachusetts.— Anderson *v.* Berg, 174 Mass. 404, 54 N. E. 877; Corbett *v.* Greenlaw, 117 Mass. 167. See also Courtemanche *v.* Blackstone Valley St. R. Co., 170 Mass. 50, 48 N. E. 937, 64 Am. St. Rep. 275. *Compare* Howard *v.* Veazie, 3 Gray 233.

Minnesota.— Brown *v.* Jones, 52 Minn. 484, 55 N. W. 54; Hill *v.* Gill, 40 Minn. 441, 42 N. W. 294; Colman *v.* Goodnow, 36 Minn. 9, 29 N. W. 338, 1 Am. St. Rep. 632.

Mississippi.— Bell *v.* Cooper, 26 Miss. 650, 27 Miss. 57.

New Jersey— Stewart Contracting Co. *v.* Trenton, etc., R. Co., 71 N. J. L. 568, 60 Atl. 405.

New York.— Rollin *v.* Cross, 45 N. Y. 766; McGraw *v.* Godfrey, 16 Abb. Pr. N. S. 358. *Compare* De Ronde *v.* Olmsted, 5 Daly 398, 47 How. Pr. 175.

Pennsylvania.— Allen *v.* Oxnard, 152 Pa. St. 621, 25 Atl. 568; Mountain City Market House, etc., Assoc. *v.* Kearns, 103 Pa. St. 403 (holding that where before the incorporation of an association, and before it had taken a formal lease of land, it caused improvements to be made, wherein materials were furnished and work done, under a mechanic's lien act, which gave a lien on improvements erected by a lessee on his leasehold, a lien could be enforced after the execution of the lease and the incorporation of the association, the corporation having formally assumed the debts of the association); Lyon *v.* McGuffey, 4 Pa. St. 126, 45 Am. Dec. 675. See also Weaver *v.* Sheeler, 124 Pa. St. 473, 17 Atl. 17.

Tennessee.— Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136.

Texas.— Schultze *v.* Alamo Ice, etc., Co., 2 Tex. Civ. App. 236, 21 S. W. 160.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 68.

Contra.— Mills *v.* Matthews, 7 Md. 315; Sisson *v.* Holcomb, 58 Mich. 634, 26 N. W. 155 (holding that Howell Annot. St. § 8377, gives a lien only upon such interest as the owner had when materials began to be furnished); Wagar *v.* Briscoe, 38 Mich. 587 (holding that a building contract made with a person who afterward acquires an equitable title by purchase on contract can have no effect to create a lien on the land so purchased for buildings afterward erected, without aid from some subsequent express or implied engagement). And see Goldheim *v.* Clark, 68 Md. 498, 13 Atl. 363.

80. Floete *v.* Brown, 104 Iowa 154, 73 N. W. 483, 65 Am. St. Rep. 434. See also Commonwealth Title Ins., etc., Co. *v.* Ellis, 8 Pa. Dist. 5, 22 Pa. Co. Ct. 86.

81. Goldheim *v.* Clark, 68 Md. 498, 13 Atl. 363.

6. Proceeds of Property. Where the property subject to the lien has been sold and converted into money, and has passed beyond the reach of the court, the court will follow the fund into the hands of the person who converted the property into money and have the lien satisfied out of such fund;[82] but it has been held that where the building has been destroyed by fire, the lien does not attach to the proceeds of a fire insurance policy.[83]

7. Rents of Property. In a case where the lien was unenforceable against the property because of a prior mortgage, it was held that the claimant was entitled to the rents received from the property by the representatives or heirs of the owner while it was in their possession.[84]

C. Priorities — 1. Between Different Mechanics' Liens — a. General Rule. As a general rule all mechanics' liens on the same property and arising out of the erection of the same building or improvement stand on an equality and share *pro rata* in the amount realized if it be not sufficient to pay all in full,[85] regardless of whether the claims are for labor or for materials,[86] or of the times when the several claimants entered into their contracts for what they did or furnished,[87] or actually commenced the performance of their parts of the work or the furnishing of materials,[88] or of the times when the various lien claims or notices were filed.[89]

82. Gaty *v.* Casey, 15 Ill. 189; Ness *v.* Davidson, 49 Minn. 469, 52 N. W. 46 [*followed* in Looby *v.* Davidson, 49 Minn. 481, 52 N. W. 48]. See also Teter *v.* Dersher, 2 Leg. Rec. (Pa.) 61. But *compare* Jones *v.* Hancock, 1 Md. Ch. 187.

83. Cameron *v.* Fay, 55 Tex. 58. See also Galyon *v.* Ketchen, 85 Tenn. 55, 1 S. W. 508, insurance assigned after loss, but before filing of lienor's bill, to a mortgagee of the property.

84. Hoover *v.* Wheeler, 23 Miss. 314.

85. *Arkansas.*— Long *v.* Abeles, 77 Ark. 156, 93 S. W. 67.

California.— Crowell *v.* Gilmore, 18 Cal. 370; Moxley *v.* Shepard, 3 Cal. 64.

Illinois.—Wing *v.* Carr, 86 Ill. 347; Mehrle *v.* Dunne, 75 Ill. 239; Buchter *v.* Dew, 39 Ill. 40; Beardsley *v.* Brown, 71 Ill. App. 199.

Louisiana.— Jamison *v.* Barelli, 20 La. Ann. 452; Erard's Succession, 6 Rob. 333; Nolte *v.* His Creditors, 6 Mart. N. S. 168.

Minnesota.— Miller *v.* Stoddard, 54 Minn. 486, 56 N. W. 131, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543.

Missouri.— St. Louis *v.* O'Neil Lumber Co., 114 Mo. 74, 21 S. W. 484.

Nebraska.— Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643; Irish *v.* Lundin, 28 Nebr. 84, 44 N. W. 80.

New Jersey.— Stiles *v.* Galbreath, (Ch. 1905) 60 Atl. 224; Bayonne Bldg., etc., Assoc. *v.* Williams, 57 N. J. Eq. 503, 42 Atl. 172.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114.

Oregon.— Willamette Falls Transp., etc., Co. *v.* Riley, 1 Oreg. 183.

Pennsylvania.— Wrigley *v.* Mahaffey, 5 Pa. Dist. 389; Lay *v.* Millette, 1 Phila. 513.

Texas.— Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765; Baumgarten *v.* Mauer, (Civ. App. 1900) 60 S. W. 451. See also Nichols *v.* Dixon, (1905) 89 S. W. 765 [*affirming* (Civ. App. 1905) 85 S. W. 1051].

United States.—*In re* Hoyt, 12 Fed. Cas. No. 6,805, 3 Biss. 436.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 336 *et seq.*

86. Moxley *v.* Shepard, 3 Cal. 64; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

87. Crowell *v.* Gilmore, 18 Cal. 370; Wing *v.* Carr, 86 Ill. 347.

Time of registry of contracts immaterial.— The several contractors for doing the different kinds of work necessary in constructing a building, although done at different times, have a concurrent lien upon the building, without regard to the date of registry of their several contracts. Jamison *v.* Barelli, 20 La. Ann. 452.

88. Crowell *v.* Gilmore, 18 Cal. 370.

In Utah the priority between subcontractors is determined by the date on which each commenced the performance of his subcontract. But a subcontractor whose performance is not to commence until some time after entering into the contract may file a statement and thereby secure priority over others who commence to do work or furnish materials after such filing and before he enters upon performance of his contract. Morrison *v.* Carey-Lombard Co., 9 Utah 70, 33 Pac. 238.

89. St. Louis *v.* O'Neil Lumber Co., 114 Mo. 74, 21 S. W. 484; Bayonne Bldg., etc., Assoc. *v.* Williams, 57 N. J. Eq. 503, 42 Atl. 172; Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765.

Priority in the order of filing is the rule under some statutes.— Lindsay, etc., Co. *v.* Zœckler, 128 Iowa 558, 104 N. W. 802; Robertson *v.* Barrack, 80 Iowa 538, 45 N. W. 1062 (both under Code (1897), § 3095); Kaylor *v.* O'Connor, 1 E. D. Smith (N. Y.) 672 (under act of July 11, 1851).

Under the Ohio statute, when a subcontractor or materialman files his lien he gets a lien on all then due or becoming due within ten days thereafter from the owner to the contractor, and is to *pro rate* with all who

In some states, however, there are priorities between claimants based upon the time when their liens accrued, or when steps to enforce them were taken,[90] and claimants may obtain priority by superior diligence,[91] or be postponed because of their failure to take the necessary steps to fully protect their rights.[92]

b. Postponement of Principal Contractor. As a rule the equality among lien claimants[93] does not include the principal contractor, but he is postponed to all other lien claimants whose claims arise through him.[94] Where there are two or more joint contractors the lien of a subcontractor is prior to the liens of all the contractors and not merely to the lien of the contractor to whom he furnished labor or materials.[95]

c. Liens on Amount Due Contractor From Owner. Under statutes giving subcontractors, materialmen, etc., a lien on the amount due the contractor from the owner,[96] the claimants are sometimes entitled to priority of payment out of such fund in the order of the time in which their notices were served upon the owner.[97]

d. Priority Between Assignee of Contractor or Subcontractor and Person Claiming Through Assignor — (i) *IN GENERAL.* It has been held that if before the notice or claim of lien is served on the owner or filed the contractor assigns his claim against the owner the assignee has the prior right to the fund,[98] and an order given by the contractor on the owner payable out of what is due or to

come in within the ten days. After the ten days, the funds due are to be regarded as appropriated to the extent of the liens filed before the ten days were up. Liens filed after the ten days become liens only on funds due after the ten days and on any balance after the liens filed before the ten days are satisfied out of the funds due before the ten days. Saginaw Bay Co. *v.* Engle, 19 Ohio Cir. Ct. 632, 10 Ohio Cir. Dec. 234.

90. Under N. H. Pub. St. c. 141, §§ 16, 17, mechanics' liens have precedence in the order of their accrual, and, if they accrue simultaneously, in the order of the attachments made to secure them. Kendall *v.* Pickard, 67 N. H. 470, 32 Atl. 763.

91. A claimant who has taken the necessary steps to impose a personal liability of the owner is entitled to priority over other lien claimants who have not taken such steps but merely, and subsequently, perfected their liens upon the property itself. Schrieber *v.* Citizens' Bank, 99 Va. 257, 38 S. E. 134.

92. A claimant's failure to give the owner notice that he is furnishing material, as provided by statute, will postpone his lien to that of another claimant who has fully complied with the statute, for in such case the delinquent claimant has not filed his lien as provided by the statute, which is required by Tex. Rev. St. (1895) art. 3310, in order to entitle him to share in the *pro rata* distribution. Nichols *v.* Dixon, (Tex. 1905) 89 S. W. 765 [*affirming* (Civ. App. 1905) 85 S. W. 1051].

93. See *supra*, IV, C, 1, a.

94. Pell *v.* Baur, 133 N. Y. 377, 31 N. E. 224 [*affirming* 16 N. Y. Suppl. 258]; English *v.* Lee, 63 Hun (N. Y.) 572, 18 N. Y. Suppl. 576; Vogel *v.* Luitwieler, 52 Hun (N. Y.) 184, 5 N. Y. Suppl. 154 (holding that a lien for materials furnished to a subcontractor must be paid before payment of the contractor's lien); McConologue *v.* Larkins, 32 Misc. (N. Y.) 166, 66 N. Y. Suppl. 188; Keim *v.* McRoberts, 18 Pa. Super. Ct. 167; Lay *v.* Millette, 1 Phila. (Pa.) 513; Forster Lumber Co. *v.* Atkinson, 94 Wis. 578, 60 N. W. 347.

95. Pell *v.* Baur, 133 N. Y. 377, 31 N. E. 224 [*affirming* 16 N. Y. Suppl. 258]; Forster Lumber Co. *v.* Atkinson, 94 Wis. 578, 69 N. W. 347.

96. See *supra*, II, D, 7, j.

97. Bayonne Bldg. Assoc. No. 2 *v.* Williams, 59 N. J. Eq. 617, 43 Atl. 669 [*reversing* 57 N. J. Eq. 503, 42 Atl. 172, and *overruling* Leary *v.* Lamont, (N. J. Ch. 1898) 42 Atl. 97]; Smith *v.* Dodge, etc., Co., 59 N. J. Eq. 584, 44 Atl. 639; Donnelly *v.* Johnes, 58 N. J. Eq. 442, 44 Atl. 180 (notices to retain operate in succession, in the order of their time of service, to secure payment in full of the amount noticed to be retained); Trenton Public Schools *v.* Heath, 15 N. J. Eq. 22.

98. *California.*— Long Beach School Dist. *v.* Lutge, 129 Cal. 409, 62 Pac. 36; Newport Wharf, etc., Co. *v.* Drew, 125 Cal. 585, 58 Pac. 187; Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45.

Iowa.— Cutler *v.* McCormick, 48 Iowa 406.

New Jersey.— Foster *v.* Rudderow, (Ch. 1885) 3 Atl. 694, holding that an order given by an insolvent contractor on the owner of a building and presented before notices are given by other creditors is entitled to priority over such notices. See also Kreutz *v.* Cramer, 64 N. J. Eq. 648, 54 Atl. 535.

New York.— Bates *v.* Salt Springs Nat. Bank, 157 N. Y. 322, 51 N. E. 1033 [*reversing* 88 Hun 236, 34 N. Y. Suppl. 598]; Beardsley *v.* Cook, 143 N. Y. 143, 38 N. E. 109; Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229 [*reversing* 54 Hun 419, 7 N. Y. Suppl. 771]; McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948 [*reversing* 22 N. Y. St. 519]; Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270 [*affirming* 52 Hun 191, 5 N. Y. Suppl. 161]; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Hall *v.* New York, 79 N. Y. App. Div. 102, 79 N. Y. Suppl. 979; Bradley, etc., Co. *v.* Ward, 15 N. Y. App. Div. 386, 44 N. Y. Suppl. 164;

become due under the contract operates as an assignment *pro tanto* of the fund,[99]

Garden City Co. *v.* Schnugg, 39 Misc. 840, 81 N. Y. Suppl. 496; Hurd *v.* Johnson Park Inv. Co., 13 Misc. 643, 34 N. Y. Suppl. 915. But *compare* English *v.* Lee, 63 Hun 572, 18 N. Y. Suppl. 576.

Ohio.— Copeland *v.* Manton, 22 Ohio St. 398. *Contra*, St. Paul's M. E. Church *v.* Gorman, 10 Ohio Cir. Dec. 103; Hamilton *v.* Stilwaugh, 11 Ohio Cir. Ct. 182, 5 Ohio Cir. Dec. 324; Andrews, etc., Iron Co. *v.* Isaac D. Smead Heating, etc., Co., 5 Ohio S. & C. Pl. Dec. 292, 7 Ohio N. P. 439.

Wisconsin.— Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 149.

Contra.— Carter *v.* Brady, (Fla. 1906) 41 So. 539; Beardsley *v.* Brown, 71 Ill. App. 199; Simpson *v.* New Orleans, 109 La. 897, 33 So. 912; Bourget *v.* Donaldson, 83 Mich. 478, 47 N. W. 326; Anly *v.* Holy Trinity Church, 2 Manitoba 248, unless the owner has in good faith bound himself to pay the assignee.

A receiver appointed in supplementary proceedings against the contractor has a right to the debt prior to that of a lienor who filed his lien after the supplementary proceedings were commenced, although before the receiver was appointed. McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948 [*reversing* 22 N. Y. St. 519].

Provision in contract for certificate against lien.— A provision in a building contract that no payment shall be made until the contractor has procured a certificate that there are no liens filed against the premises or building is presumably for the benefit of the owner only, and not for the protection of laborers or materialmen, and does not deprive a creditor of the contractor holding an assignment of which the owner has notice of moneys due or to become due under the contract, of a right to such moneys to the extent of his debt as against subsequently filed liens of laborers and materialmen. Bates *v.* Salt Springs Nat. Bank, 157 N. Y. 322, 51 N. E. 1033 [*reversing* 88 Hun 236, 34 N. Y. Suppl. 598]. See also McKay *v.* New York, 46 N. Y. App. Div. 579, 62 N. Y. Suppl. 58.

Where a building contractor defaulted, and his surety took his place in completing the work, assignments of the money to become due on such contract, made by such contractor before the filing of any mechanic's liens against the building, would not affect such liens, since all payments were due to the surety after the contractor's default, and none to the contractor. Harley *v.* Mapes Reeves Constr. Co., 33 Misc. (N. Y.) 626, 68 N. Y. Suppl. 191.

Where the contractor cannot collect from the owner until all subcontractors are paid he cannot make a valid assignment until they are paid. Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. 24. See also Texas Builders' Supply Co. *v.* National Loan, etc., Co., 22 Tex. Civ. App. 349, 54 S. W. 1059.

If the statute forbids the assignment it is of course invalid. Simpson *v.* New Orleans, 109 La. 897, 33 So. 912; Franklin Bank *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 545, 8 Ohio N. P. 517.

Assignment of mortgage as collateral security.— Where the owner gave the contractor a mortgage for twelve hundred dollars on the premises as security for the payment of the contract price, which mortgage was afterward assigned as collateral security for three hundred dollars advanced by the assignee to the contractor, the assignment of the mortgage did not operate as an assignment of the principal debt, which still existed as an indebtedness due the contractor to which liens duly filed before its payment would attach. Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305 [*affirmed* in 167 N. Y. 604, 60 N. E. 1111].

99. *Indiana.*— Raleigh *v.* Tossettel, 36 Ind. 295.

Iowa.— Cutler *v.* McCormick, 48 Iowa 406.

New Jersey.— Blauvelt *v.* Fuller, 66 N. J. L. 46, 48 Atl. 538; South End Imp. Co. *v.* Harden, (Ch. 1902) 52 Atl. 1127; Leary *v.* Lamont, (Ch. 1898) 42 Atl. 97; Slingerland *v.* Binns, 56 N. J. Eq. 413, 39 Atl. 712; Foster *v.* Rudderow, (Ch. 1885) 3 Atl. 694.

New York.— Bates *v.* Salt Springs Nat. Bank, 157 N. Y. 322, 51 N. E. 1033; Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229 [*reversing* 54 Hun 419, 7 N. Y. Suppl. 771]; Mechanics', etc., Nat. Bank *v.* Winant, 123 N. Y. 265, 25 N. E. 262; Mayer *v.* Killilea, 63 N. Y. App. Div. 318, 71 N. Y. Suppl. 786; Garden City Co. *v.* Schnugg, 39 Misc. 840, 81 N. Y. Suppl. 496.

Ohio.— Copeland *v.* Manton, 22 Ohio St. 398; Tollheis *v.* James, 7 Ohio Cir. Ct. 386, 4 Ohio Cir. Dec. 646.

Texas.— Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; House *v.* Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654.

Canada.— Jennings *v.* Willis, 22 Ont. 439.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 149.

Failure to demand payment.— An accepted order, drawn by the contractor on the owner in favor of the materialman, is an assignment of so much of the payment due the contractor, which the materialman does not forfeit by a failure to demand payment thereof. White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118].

Order may cover amount becoming due thereafter.— School Dist. No. 85 Bd. of Education *v.* Duparquet, 50 N. J. Eq. 234, 24 Atl. 922; White *v.* Livingston, 69 N. Y. App. Div. 361, 75 N. Y. Suppl. 466 [*affirmed* in 174 N. Y. 538, 66 N. E. 1118]; Hondorf *v.* Atwater, 75 Hun (N. Y.) 369, 27 N. Y. Suppl. 447; Young Stone Dressing Co. *v.* St. James' Church, 61 Barb. (N. Y.) 489; Oates *v.* Haley, 1 Daly (N. Y.) 338; Frederick *v.* Goodman St. Homestead Assoc., 29 N. Y. Suppl. 1041. *Compare* Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45.

even without any acceptance of the order by the owner.[1] So also a subcontractor may assign the whole or a part of the amount due or to become due him from the contractor, and his assignee is entitled to priority over one who subsequently files a lien notice or claim for work done for, or materials furnished to, the subcontractor.[2] The mere fact that the owner knows the subcontractors are unpaid will not defeat the priority of the assignee of the contractor.[3] Where the building was intended as a homestead, and the holders of mechanics' liens possessed knowledge sufficient to put them on inquiry as to the intended use of the property, their claims were not entitled to priority in the appropriation of a balance due on the original contract which the owner had deposited in court, as against a claim under the original contract by an assignee who had completed the building in accordance with its terms.[4] The rights of subcontractors, whose liens have been defeated by an assignment by the contractor, are in no wise affected by the fact that the contractor and his assignee have given bond to indemnify the owner against claims of subcontractors.[5]

(II) *Assignment For Benefit of Creditors.* Where mechanics' liens are filed in time, the subcontractor's rights are not defeated because the contractor makes an assignment for the benefit of creditors;[6] but his claim is superior to that of a general creditor,[7] and his right to receive amounts coming due after the notice is filed is superior to that of the assignee.[8]

(III) *Receivership.* Where a receiver has been appointed for the contractor, and his receivership perfected before a subcontractor or materialman files his notice of lien, the rights of the receiver are superior and prior to the rights of the lien claimant.[9]

e. Priority Between Sureties of Contractor and Subcontractors, Etc. Where a building contractor became insolvent before completion of the work and the sureties on his bond bought material for him, and became responsible for labor to be used by him in completing the contract, they had no prior lien on the amount due the contractor on completion of the contract but stood in the same position as any other person furnishing labor and material.[10] But where the contractor abandoned the work and it was completed by his sureties under agreement

The owner is not obliged to accept orders for part of a payment to become due. Miller *v.* Brigot, 8 La. 533.

Payment of order not filed as required by statute.— An owner who has paid an order of the contractor on him given for material used in the house, but not filed with the county clerk as required by N. Y. Laws (1897), c. 418, § 15, is not entitled to credit for the amount of such payment in reduction of the claim of another materialman. Kenyon *v.* Walsh, 31 Misc. (N. Y.) 634, 66 N. Y. Suppl. 35.

1. Fell *v.* McMannus, (N. J. Ch. 1885) 1 Atl. 747; Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229; Newman *v.* Levy, 84 Hun (N. Y.) 478, 32 N. Y. Suppl. 557.

Indorsement over of architect's certificate. — Where a contractor indorsed and delivered a certificate, issued to him by the architect and calling for a payment, to a subcontractor, in payment of money due the latter, a lien subsequently filed by another subcontractor could not attach to the balance due on the certificate at the time of filing. Smith *v.* Sheltering Arms, 89 Hun (N. Y.) 70, 35 N. Y. Suppl. 62.

2. Wood *v.* Grifenhagen, 37 Misc. (N. Y.) 553, 75 N. Y. Suppl. 1014.

3. Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385.

4. Haldeman *v.* McDonald, (Tex. Civ. App. 1900) 58 S. W. 1040.

5. Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385; Dorestan *v.* Krieg, 66 Wis. 604, 29 N. W. 576.

6. John P. Kane Co. *v.* Kinney, 174 N. Y. 69, 66 N. E. 619 [*reversing* 68 N. Y. App. Div. 163, 74 N. Y. Suppl. 260] (the assignee takes title to moneys due or to become due the contractor subject to liens filed by laborers, mechanics, materialmen, or subcontractors subsequent to the assignment but within the ninety days prescribed by statute); Henderson *v.* Sturgis, 1 Daly (N. Y.) 336; Mandeville *v.* Reed, 13 Abb. Pr. (N. Y.) 173; McMurray *v.* Hutcheson, 59 How. Pr. (N. Y.) 210 (although the assignment is made before the lien is filed).

7. John P. Kane Co. *v.* Kinney, 35 Misc. (N. Y.) 1, 71 N. Y. Suppl. 8.

8. Crist *v.* Langhorst, 5 Ohio Dec. (Reprint) 352, 1 Cinc. L. Bul. 111.

9. Smith *v.* Pierce, 45 N. Y. App. Div. 628, 60 N. Y. Suppl. 1011 [*citing* Stevens *v.* Ogden, 130 N. Y. 182, 29 N. E. 229; McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948; Payne *v.* Wilson, 74 N. Y. 348]. But *compare* Deady *v.* Fink, 5 N. Y. Suppl. 3.

10. Evans *v.* Lower, 67 N. J. Eq. 232, 58 Atl. 294 [*distinguishing* St. Peter's Catholic

with the owner, the right of the sureties as to an indemnity fund retained by the owner pursuant to the terms of the contract to be used by him to complete the work in the contingency of abandonment by the contractor was superior to the claims of materialmen and laborers for work done for and materials furnished to the contractor.[11]

f. Effect of Judgment on Lien. The fact that a judgment at law has been entered upon a lien gives it no priority in payment or advantage over liens upon which a judgment has not been rendered.[12]

g. Effect of Intervening Encumbrance. Although as between themselves several mechanics' liens may be entitled to stand on an equality, this may be prevented by the existence of another encumbrance which while inferior to some of the liens is superior to others; in such case the fund is to be applied first to the payment of the liens superior to the intervening encumbrance, in full or *pro rata* as the case may be, next to the encumbrance, and lastly to the liens inferior to the encumbrance, *pro rata*.[13]

h. Liens Arising Out of Different Improvements. As between mechanics' liens arising out of different improvements on the same property, the lien which first attached has priority.[14]

2. Between Mechanics' Liens and Other Encumbrances[15] — a. General Rule. Where the property is subject to a mortgage or other encumbrance at the time when the building or work or furnishing of materials is commenced, such lien is entitled to priority over any mechanic's lien arising out of the improvement of the property;[16] but mechanics' liens are entitled to priority over all subsequent liens and encumbrances,[17] attaching to the property after the commencement of the

Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037].

11. St. Peter's Catholic Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037.

12. Morris County Bank *v.* Rockaway Mfg. Co., 16 N. J. Eq. 150, the lien claim not having been filed pursuant to the statute.

13. *California.*—Crowell *v.* Gilmore, 18 Cal. 370.

Louisiana.— See Fudickar *v.* Monroe Athletic Club, 49 La. Ann. 1457, 22 So. 381.

Minnesota.— Finlayson *v.* Crooks, 47 Minn. 74, 49 N. W. 398, 645.

Nebraska.— Heary, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114; Hazard Powder Co. *v.* Loomis, 2 Disn. 544. But *compare* Ohio Sav., etc., Co. *v.* Johnson, 20 Ohio Cir. Ct. 96, 10 Ohio Cir. Dec. 752 [*following* Babbett *v.* Morgan, 31 Ohio St. 273], holding that where a mortgage intervened between two mechanics' liens the amount of the first lien should be taken out of the proceeds of the sale of the property; then out of what remained, the mortgage should be paid, and what still remained should be added to what was taken out on account of the first mechanic's lien, and that amount divided *pro rata* between the two mechanics' lien-holders.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 341.

14. State *v.* Drew, 43 Mo App. 362; Cain *v.* Texas Bldg., etc., Assoc., 21 Tex. Civ. App. 61, 51 S. W. 879, holding that a mechanic's lien which has attached to a house and lot attaches to another house thereafter erected on the lot on the destruction of the house for the erection of which the lien accrued, and takes priority over a lien for the erection of the second house.

15. Priority between mechanic's lien and dower see Dower. Landlord's lien see Landlord and Tenant. Laborer's lien see Master and Servant. Assessment for local improvement see Municipal Corporations. Tax liens see Taxation.

16. *Colorado.*— Tritch *v.* Norton, 10 Colo. 337, 15 Pac. 680, unless the claimant was without actual or constructive notice of such prior lien.

Georgia.— Athens Nat. Bank *v.* Danforth, 80 Ga. 55, 7 S. E. 546.

Indiana.— Close *v.* Hunt, 8 Blackf. 254.

Iowa.— Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347.

Maryland.— McKim *v.* Mason, 3 Md. Ch. 186; Jones *v.* Hancock, 1 Md. Ch. 187.

Mississippi.— McAllister *v.* Clopton, 51 Miss. 257; Ivey *v.* White, 50 Miss. 142; Otley *v* Haviland, 36 Miss. 19.

Nebraska.— Irish *v.* Lundin, 28 Nebr. 84, 44 N. W. 80.

Ohio.— Neil *v.* Kinney, 11 Ohio St. 58.

Rhode Island.— Blackmer *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

Tennessee.— Gillespie *v.* Bradford, 7 Yerg. 168, 27 Am. Dec. 494.

United States.— Homans *v.* Coombe, 12 Fed. Cas. No. 6,654, 3 Cranch C. C. 365.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 349.

17. Ivey *v.* White, 50 Miss. 142; McLaughlin *v.* Green, 48 Miss. 175; Buchanan *v.* Smith, 43 Miss. 90; Otley *v.* Haviland, 36 Miss. 19; English *v.* Foote, 8 Sm. & M. (Miss.) 444; Livingston *v.* Miller, 16 Abb. Pr. (N. Y.) 371.

building[18] or of the work or furnishing of materials out of which the lien arises.[19]

b. Particular Liens and Encumbrances — (I) *ATTACHMENTS.*[20] An attachment is prior to a mechanic's lien subsequently accruing,[21] but an attachment subsequent to the accrual of a mechanic's lien is postponed thereto.[22]

(II) *CLAIMS AGAINST DECEDENT'S ESTATE.*[23] Where the proceeds of a house and lot of a decedent are in the hands of his administrator for distribution, the claim of a contractor under the foreclosure of his lien for work done on such house and materials furnished therefor will take precedence of a claim of the widow on account of a debt for trust funds.[24]

(III) *CLAIM OF MORTGAGEE FOR TAXES PAID.* A mortgagee whose mortgage is prior to a mechanic's lien[25] cannot claim priority for amounts paid by him

18. *Alabama.*— Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305.

Arkansas.— Monticello Bank *v.* Sweet, 64 Ark. 502, 43 S. W. 500.

Illinois.— Hickox *v.* Greenwood, 94 Ill. 266.

Kansas.— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473.

Kentucky.—Grainger *v.* Old Kentucky Paper Co., 105 Ky. 683, 49 S. W. 477, 20 Ky. L. Rep. 1491.

Maryland.— Rosenthal *v.* Maryland Brick Co., 61 Md. 590; Wells *v.* Canton Co., 3 Md. 234; Jones *v.* Hancock, 1 Md. Ch. 187.

Minnesota.— Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543; Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746.

Missouri.— Dubois *v.* Wilson, 21 Mo. 213.

New Jersey.— Tompkins *v.* Horton, 25 N. J. Eq. 284.

Oregon.— Kendall *v.* McFarland, 4 Oreg. 292.

Texas.— June *v.* Doke, 35 Tex. Civ. App. 240, 80 S. W. 402.

Wisconsin.— Lampson *v.* Bowen, 41 Wis. 484; Hall *v.* Hinckley, 32 Wis. 362.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 350.

Where the plan of a building is changed and greatly enlarged while it is in course of erection the liens of mechanics and materialmen subsequent to such change relate only to the commencement of the alteration on the ground and are subject to all liens which have then fastened on the land. Norris' Appeal, 30 Pa. St. 122 [*affirming* 5 Pa. L. J. Rep. 417].

19. *Alabama.*— Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305; Young *v.* Stoutz, 74 Ala. 574.

Arkansas.— White *v.* Chaffin, 32 Ark. 59.

Colorado.— Tritch *v.* Norton, 10 Colo. 337, 15 Pac. 680.

Indiana.— Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

Iowa.— Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

Kentucky.— Montgomery *v.* Allen, 107 Ky. 298, 53 S. W. 813, 21 Ky. L. Rep. 1001 (the act of Feb. 25, 1893, making liens acquired after the work is begun subordinate to mechanics' liens is not unconstitutional); Finck, etc., Lumber Co. *v.* Mehler, 102 Ky. 111, 43 S. W. 403, 766, 19 Ky. L. Rep. 1146; Caldwell Institute *v.* Young, 2 Duv. 582.

Montana.— Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441.

Texas.— Keating Implement Co. *v.* Marshall Electric Light, etc., Co., 74 Tex. 605, 12 S. W. 489; Trammell *v.* Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

Virginia.—Pace *v.* Moorman, 99 Va. 246, 37 S. E. 911.

Washington.— Bell *v.* Groves, 20 Wash. 602, 56 Pac. 401.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 350.

20. Attachments generally see ATTACHMENT.

21. Salem First Nat. Bank *v.* Redman, 57 Me. 405.

A seasonable levy of the execution on real estate which has been attached has the same effect as a statute conveyance made at the date of the attachment, and gives a better title than a mechanic's lien for labor and materials, the first item of which was subsequent to the date of the attachment. Salem First Nat. Bank *v.* Redman, 57 Me. 405.

22. Young *v.* Stoutz, 74 Ala. 574; Lane *v.* Thomas, 25 Ohio Cir. Ct. 303, although the lien was not perfected until after the attachment process was served.

Where attaching creditor not made a party to action to enforce lien.— A creditor whose attachment has been levied on the property after the accrual of the mechanic's lien may be made a party to the action to enforce the lien and will be bound by the judgment rendered therein; but if he is not made a party he is not bound by recitals as to the time when the lien accrued, and if the property is sold under executions on the judgments rendered in both the attachment suit and the action to enforce the lien, and the money is brought into court and the records of the two cases are the only evidence before the court, the money is properly awarded to plaintiff in the attachment case, where his attachment was levied before the mechanic's lien claim was filed. Young *v.* Stoutz, 74 Ala. 574.

23. **Right to lien after death of owner** see *supra*, II, C, 1, d.

Claims against decedents' estates generally see EXECUTORS AND ADMINISTRATORS.

24. Boynton *v.* Westbrook, 74 Ga. 68.

25. See *infra*, IV, C, 2, b, (VI), (A).

for taxes upon the property where there is no provision in the mortgage securing such payments by its lien,[26] and a mortgagee whose mortgage is inferior to mechanics' liens[27] cannot claim priority for taxes paid on the property even though the mortgage provides that on default of the mortgagor in paying the taxes the mortgagee may pay the same and tack the amount paid to his mortgage.[28]

(IV) *GARNISHMENT OF AMOUNT DUE CONTRACTOR.*[29] A garnishment served on the owner in a suit against the contractor after the commencement of the building but before the subcontractor has served his notice on the owner is superior to the lien of the subcontractor;[30] but where the right of the lien claimant has attached before the garnishment the lienor has priority.[31]

(V) *JUDGMENTS.*[32] Where a judgment lien has become effective it is superior to mechanics' liens accruing subsequently,[33] but a judgment becoming a lien after a mechanic's lien has accrued is postponed to the mechanic's lien.[34]

(VI) *MORTGAGES*[35] — (A) *Mortgages Given Before Accrual of Lien* — (1) RULE STATED. Where the property is subject to a mortgage at the time of the accrual of a mechanic's lien, such mortgage retains its priority and the mechanic's lien is postponed thereto,[36] notwithstanding the fact that the value

26. Devereux *v.* Taft, 20 S. C. 555, holding also that the same is true as to amounts paid for insurance on the property.

27. See *infra*, IV, C, 2, b, (VI), (B).

28. Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177, where it is said that as to the amount so paid the mortgagee is not an encumbrancer in good faith without notice.

29. Garnishment generally see GARNISHMENT.

30. Conboy *v.* Ericke, 50 Ala. 414; Cahoon *v.* Levy, 6 Cal. 295, 65 Am. Dec. 515; Bell *v.* Burke, 89 Ga. 772, 15 S. E. 705; Dorestan *v.* Krieg, 66 Wis. 604, 29 N. W. 576. But *compare* Tuttle *v.* Montford, 7 Cal. 358; Cincinnati *v.* McNeely, 7 Ohio Dec. (Reprint) 216, 1 Cinc. L. Bul. 302.

31. Jones *v.* Holy Trinity Church, 15 Nebr. 81, 17 N. W. 362.

32. See, generally, JUDGMENTS.

33. *Arkansas.*— McCullough *v.* Caldwell, 8 Ark. 231. See also McCullough *v.* Caldwell, 5 Ark. 237.

Illinois.— McLagan *v.* Brown, 11 Ill. 519.

Missouri.— Page *v.* Bettes, 17 Mo. App. 366.

New York.— Payne *v.* Wilson, 74 N. Y. 348.

Ohio.— Choteau *v.* Thompson, 2 Ohio St. 114.

Pennsylvania.— Fordham's Appeal, 78 Pa. St. 120 [*affirming* 7 Leg. Gaz. 31]; *In re* Vandevender, 2 Browne 304; Shapnack *v.* Wilson, 1 Journ. Jurispr. 93; Boll *v.* Boll, 11 York Leg. Rec. 20.

Tennessee.— Gillespie *v.* Bradford, 7 Yerg. 163, 27 Am. Dec. 494.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 356.

34. Hazard Powder Co. *v.* Loomis, 2 Disn. (Ohio) 544; Bitner's Estate, 176 Pa. St. 90, 34 Atl. 957; Nolt *v.* Crow, 22 Pa. Super. Ct. 113; Vandevender's Case, 2 Browne (Pa.) 304; Pace *v.* Moorman, 99 Va. 246, 37 S. E. 911.

If the mechanic does not pursue his remedy by a lien but seeks a personal judgment, such judgment will rank as any other judgment rendered on a personal claim. Love *v.* Cox, 68 Ga. 269.

35. See, generally, MORTGAGES.

36. *Alabama.*— Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305.

Arkansas.— Monticello Bank *v.* Sweet, 64 Ark. 502, 43 S. W. 500.

California.— McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; Kuschel *v.* Hunter, (1897) 50 Pac. 397; Fergusson *v.* Miller, 6 Cal. 402.

Colorado.— Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

District of Columbia.— Anglo-American Sav., etc., Assoc. *v.* Campbell, 13 App. Cas. 581, 43 L. R. A. 622.

Illinois.— Lunt *v.* Stephens, 75 Ill. 507.

Indiana.— Erwin *v.* Acker, 126 Ind. 133, 25 N. E. 888; Troth *v.* Hunt, 8 Blackf. 580; Zehner *v.* Johnston, 22 Ind. App. 452, 53 N. E. 1080; Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266; Thorpe Block Sav., etc., Assoc. *v.* James, 13 Ind. App. 522, 41 N. E. 978.

Iowa.— Tower *v.* Moore, 104 Iowa 345, 73 N. W. 823; Bartlett *v.* Bilger, 92 Iowa 732, 61 N. W. 233; Curtis *v.* Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314; Equitable L. Ins. Co. *v.* Slye, 45 Iowa 615; Grosbeck *v.* Ferguson, 43 Iowa 532; O'Brien *v.* Pettis, 42 Iowa 293.

Kansas.— Martsolf *v.* Barnwell, 15 Kan. 612.

Kentucky.— Kentucky Bldg., etc., Assoc. *v.* Kister, 101 Ky. 321, 41 S. W. 293, 19 Ky. L. Rep. 494.

Maine.— Morse *v.* Dole, 73 Me. 351.

Maryland.— Denmead *v.* Baltimore Bank, 9 Md. 179.

Minnesota.— Miller *v.* Stoddard, 54 Minn. 486, 56 N. W. 131, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; Hill *v.* Aldrich, 48 Minn. 73, 50 N. W. 1020; Knox *v.* Starks, 4 Minn. 20.

Mississippi.— Hoover *v.* Wheeler, 23 Miss. 314.

of the mortgage security is increased by the labor or material of the mechanic's

Missouri.— Schulenburg *v.* Hayden, 146 Mo. 583, 48 S. W. 472; Bridwell *v.* Clark, 39 Mo. 170; Keller *v.* Carterville Bldg., etc., Assoc., 71 Mo. App. 465; Reed *v.* Lambertson, 53 Mo. App. 76; McAdow *v.* Sturtevant, 41 Mo. App. 220; Dugan *v.* Scott, 37 Mo. App. 663; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67; Hall *v.* St. Louis Mfg. Co., 22 Mo. App. 33.

Montana.— Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607.

Nebraska.— Boggs *v.* McEwen, 69 Nebr. 705, 96 N. W. 666; Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616; Grand Island Banking Co. *v.* Koehler, 57 Nebr. 649, 78 N. W. 265; Patrick Land Co. *v.* Leavenworth, 42 Nebr. 715, 60 N. W. 954; Holmes *v.* Hutchins, 38 Nebr. 601, 57 N. W. 514; Livesey *v.* Brown, 35 Nebr. 111, 52 N. W. 838.

New Jersey.— Raymond *v.* Post, 25 N. J. Eq. 447.

New York.— Bradley *v.* Stafford, 1 N. Y. Suppl. 138.

North Carolina.— Baker *v.* Robbins, 119 N. C. 289, 25 S. E. 876.

Oregon.— Smith *v.* Wilkins, 38 Oreg. 583, 64 Pac. 760; Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454; Holmes *v.* Ferguson, 1 Oreg. 220. See also Inverarity *v.* Stowell, 10 Oreg. 261.

Pennsylvania.— Lyle *v.* Duncomb, 5 Binn. 585; Lieb *v.* Bean, 1 Ashm. 207; Sill *v.* Wright, 21 Pittsb. Leg. J. 190.

Tennessee.— New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880 (although the contract antedated the mortgage); Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19; Pride *v.* Viles, 3 Sneed 125 (although the mortgagee knew of the work when the claimant performed the same and did not object thereto); Reid *v.* Tennessee Bank, 1 Sneed 262; Garrett *v.* Adams, (Ch. App. 1897) 39 S. W. 730.

Texas.— Sullivan *v.* Texas Briquette, etc., Co., 94 Tex. 541, 63 S. W. 307 [*reversing* (Civ. App. 1900) 60 S. W. 330]. See also Sedgwick *v.* Carlew, 2 Tex. Unrep. Cas. 441.

Virginia.— Wright *v.* Vaughan, (1899) 33 S. E. 595; Wroten *v.* Armat, 31 Gratt. 228.

Wisconsin.— Jessup *v.* Stone, 13 Wis. 466. See also Challoner *v.* Bouck, 56 Wis. 652, 14 N. W. 810.

United States.—Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905; Chauncey *v.* Dyke, 119 Fed. 1, 55 C. C. A. 579; Edler *v.* Clark, 51 Fed. 117; Moran *v.* Schnugg, 17 Fed. Cas. No. 9,786, 7 Ben. 399.

Canada.— Robock *v.* Peters, 13 Manitoba 124; McVean *v.* Tiffin, 13 Ont. App. 1; Dufton *v.* Horning, 26 Ont. 252; Cook *v.* Belshaw, 23 Ont. 545; Richards *v.* Chamberlain, 25 Grant Ch. (U. C.) 402. See also Kennedy *v.* Haddow, 19 Ont. 240; Broughton *v.* Smallpiece, 25 Grant Ch. (U. C.) 290.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 358, 361, 364.

A fictitious or fraudulent mortgage can have no priority over a mechanic's lien. Deacon *v.* Harris, 14 Phila. (Pa.) 59; Thomas *v.* Davis, 3 Phila. (Pa.) 171.

Agreement to give mortgage.— Where an agreement to give a mortgage was attempted to be carried out, but the mortgage executed was invalid for want of acknowledgment and attestation, and it was subsequently perfected and recorded, but not until a mechanic's lien had been filed on the premises, the mortgage was entitled to priority over the lien. Payne *v.* Wilson, 74 N. Y. 348 [*affirming* 11 Hun 302].

Attack on validity of mortgage.— An objection by a mechanic's lien creditor to the appropriation to a prior mortgage duly recorded of the proceeds of the sale of defendant's real estate, on the ground that it was executed by defendant by the name of her husband, from whom she had obtained a divorce while her true and legal name was the name she bore before such marriage, could not be sustained, as, even assuming the mortgagor's name was as contended, it was doubtful if a purchaser would be protected against the mortgage and certainly not a mechanic's lien-holder. Sill *v.* Wright, 21 Pittsb. Leg. J. (Pa.) 190.

Mistake in mortgage as to property.— Where a mortgage, by mutual mistake of the parties, is made to cover a tract of land different from that intended, and subsequently a person without notice of the mortgagee's claim furnishes material for an improvement on and acquires a mechanic's lien on the tract intended to be covered by the mortgage, and the mortgage is subsequently reformed to conform to the intention of the parties, the mechanic's lien has priority over the mortgage. Gaines *v.* Childers, 38 Oreg. 200, 63 Pac. 487. But a finding by the trial court that a mortgage which erroneously described the premises intended to be covered thereby took precedence of a mechanic's lien subsequently arising will not be disturbed when, so far as appears, the error in description must have been palpable to any one furnishing labor and materials on the property, and there is nothing to show that the finding was not based on evidence of actual knowledge by the lienors as to the property intended to be covered by the mortgage. Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607.

A mechanic's lien filed against fixtures has priority over the lien of a chattel mortgage on such fixtures previously executed. Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

Mortgage not covering entire tract subject to lien — Priorities as to proceeds.— Where three lots of equal value were mortgaged to A, and B held a second mortgage on two of the lots, and C subsequently acquired a mechanic's lien on the three lots, and under foreclosure of A's mortgage the three lots were sold together for a sum more than sufficient to pay A's mortgage, B's mortgage was

lien claimant,[37] or that the building is so changed that very little of the original structure remains.[38] The fact that the improvements for which the lien is claimed were contemplated by the mortgagor prior to the execution of the mortgage does not give the lien priority where the improvements were not contracted for until after the mortgage was executed.[39] Neither does the knowledge of the mortgagee that the mortgagor intends to build upon the mortgaged property[40] or the fact that the money to secure which the mortgage was given was lent for the purpose of improving the property, and under a previous contract that it should be so used,[41] render the mortgage subordinate to a mechanic's lien subsequently arising. A loan secured on land, made on the contract of the owner to erect certain improvements, but without a contract that the money obtained should be used in payment of the same, is superior to a lien for work and material furnished after the recording of the mortgage, although the mechanic was induced, by representations of the owner, to rely for payment out of the loan, the mortgagee not having led the mechanic to rely on his seeing to the application of the money.[42] A mortgage which was a subsisting encumbrance upon premises on which a mechanic's lien is claimed when the premises were purchased by defendant is a prior encumbrance to the liens of the mechanics and materialmen, both upon the land and upon the buildings which were then upon it.[43] The fact that the equitable owner of land in procuring a loan had the party holding the legal title in trust execute a deed of trust thereon to secure repayment of the loan will not affect the lien acquired under such deed, and postpone the same in favor of a subsequent lien obtained under the statute in favor of one performing labor and fur-

entitled to payment out of the surplus in priority to C's lien. Oppenheimer *v.* Walker, 3 Hun (N. Y.) 30, 5 Thomps. & C. 325.

Estoppel of lienor to attack mortgage see West *v.* Klotz, 37 Ohio St. 420.

Record of absolute deed, defeasance resting in parol.— Where an absolute deed is intended only as a mortgage, and the contract to reconvey rests in parol, the proper recording of the instrument is constructive notice of the interest of the grantee in the property therein described, and his lien is superior to a mechanic's lien for materials furnished under a contract entered into after the recording of such deed, the provision of Nebr. Comp. St. c. 73, § 25, that no advantage shall be derived from recording a deed unless, where a written defeasance has been given, it also be recorded, being inapplicable. Livesey *v.* Brown, 35 Nebr. 111, 52 N. W. 838.

Where the mortgagor acts as to mortgagee's agent in procuring work to be done on the mortgaged property the mechanic's right of action is against the mortgagee alone, and no proceeding against the mortgagor can prejudice the right of the mortgagee to enforce his lien upon the property. Pride *v.* Viles, 3 Sneed (Tenn.) 125.

Mortgage apparently, but not actually, prior in time.— Where the owner of property applied to a loan company for a loan, and at that time executed a note to the company for the amount applied for, and also executed a mortgage to secure the note, and the company refused the application, but the note and mortgage were allowed to stand, and subsequently the owner made another application to the company upon which he obtained the loan, the note and mortgage standing as security therefor, it was held that mechanics' liens arising out of the erection of a building which was begun after the time of the first application, but before the time of the second application, upon which the loan was actually made, were superior to the mortgage, as the note and mortgage had no vitality when the rights of the lien claimants attached, and although the mortgage appeared to be prior in point of time it was not so in fact, and the fact was susceptible of proof. Hewson-Herzog Supply Co. *v.* Cook, 52 Minn. 534, 54 N. W. 751.

37. Thorpe Block Sav., etc., Assoc. *v.* James, 13 Ind. App. 522, 41 N. E. 978.

The construction of such improvements does not give an equitable lien prior to the mortgage lien. Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905.

38. Equitable L. Ins. Co. *v.* Slye, 45 Iowa 615.

39. Sullivan *v.* Texas Briquette, etc., Co., 94 Tex. 541, 63 S. W. 307 [*reversing* (Civ. App. 1900) 60 S. W. 330].

40. Holmes *v.* Hutchins, 38 Nebr. 601, 57 N. W. 514, purchase-money mortgage.

41. Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616 [*following* Patrick Land Co. *v.* Leavenworth, 42 Nebr. 715, 60 N. W. 954; Hoagland *v.* Lowe, 39 Nebr. 397, 58 N. W. 197, and *followed* in Chaffee *v.* Sehestedt, 4 Nebr. (Unoff.) 740, 96 N. W. 161]; Richards *v.* Chamberlain, 25 Grant Ch. (U. C.) 402. But *compare* Erard's Succession, 6 Rob. (La.) 333.

Priority of mortgage for building purposes as to building see *infra*, IV, C, 2, b, (VI), (B), (6).

42. Patrick Land Co. *v.* Leavenworth, 42 Nebr. 715, 60 N. W. 954.

43. Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

nishing materials for the erection of buildings thereon.[44] The fact that the mortgagor did not have the full legal title when the mortgage was made will not affect its priority as to his interest in the property, where he had the full equitable title before the contract for the construction of the improvements was entered into, and the mortgage contained words of general description, as it thus conveyed property held by full equitable title as well as that held by legal title.[45]

(2) MORTGAGES FOR FUTURE ADVANCES. A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens,[46] where the making of such advances was obliga-

44. Lunt *v.* Stephens, 75 Ill. 507.

45. Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905.

46. *District of Columbia.*—Anglo-American Sav., etc., Assoc. *v.* Campbell, 13 App. Cas. 581, 43 L. R. A. 622; Richards *v.* Waldron, 20 D. C. 585.

Iowa.— Kiene *v.* Hodge, 90 Iowa 212, 57 N. W. 717.

Kansas.—See Martsolf *v.* Barnwell, 15 Kan. 612, holding that where, although a mortgage given and recorded before commencement of work on the building did not upon its face provide for future advances, the money was paid over at different times to the mortgagor, and only a small portion before the commencement of the work, but it did not appear that any part of the work done or materials furnished, which were not paid for and for which a lien was claimed, were so due and furnished before the last advancement of money by the mortgagor upon the mortgage, the mortgage was properly adjudged to be the prior lien.

Maryland.— Brooks *v.* Lester, 36 Md. 65.

Minnesota.— Hill *v.* Aldrich, 48 Minn. 73, 50 N. W. 1020.

New Jersey.— Platt *v.* Griffith, 27 N. J. Eq. 207; Barnett *v.* Griffith, 27 N. J. Eq. 201; Taylor *v.* La Bar, 25 N. J. Eq. 222. See also Reed *v.* Rochford, 62 N. J. Eq. 186, 50 Atl. 70. But see N. J. Laws (1898), p. 538, § 14. A mortgage executed, acknowledged, and recorded by the mortgagor, in pursuance of an agreement for a loan on such security, and afterward delivered to the mortgagee when the loan is made, will have priority in equity over a mechanic's lien for work and materials furnished in erecting a building on the mortgaged premises, after the recording and before the delivery of the mortgage; the mortgagee having no knowledge of the commencement of the building when he parted with his money. Jacobus *v.* Mutual Ben. L. Ins. Co., 27 N. J. Eq. 604 [*reversing* 26 N. J. Eq. 389].

New York.— Lipman *v.* Jackson Architectural Iron-Works, 128 N. Y. 58, 27 N. E. 975 [*affirming* 13 N. Y. Suppl. 284].

Pennsylvania.— Moroney's Appeal, 24 Pa. St. 372.

Rhode Island.— Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

Virginia.— Wroten *v.* Armat, 31 Gratt. 228.

Washington.— Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940, if the mortgage is recorded before the performance of services or furnishing of materials.

Wisconsin.— Wisconsin Planing-Mill Co. *v.* Schuda, 72 Wis. 277, 39 N. W. 558.

Canada.— Richards *v.* Chamberlain, 25 Grant Ch. (U. C.) 402.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 368.

A mortgage to secure bonds to be issued subsequently is within the rule and entitled to the same priority. Central Trust Co. *v.* Bartlett, 57 N. J. L. 206, 30 Atl. 583; Central Trust Co. *v.* Continental Iron Works, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539.

The rule applies to advances of materials as well as of money. Brooks *v.* Lester, 36 Md. 65 [*followed* in Richards *v.* Waldron, 20 D. C. 585].

Purchase-money mortgages.— In New Jersey it was held that a mortgage given for the purchase-money of land was entitled to preference over lien claims for work and materials done and furnished upon a building and improvements placed upon the mortgaged premises by the vendee between the execution of the contract of purchase and the conveyance, not only as to the purchase-money, but also for all advances made pursuant to the contract of purchase, for erecting the building, improving the land, and paying municipal assessments and taxes upon the premises. Macintosh *v.* Thurston, 25 N. J. Eq. 242. Subsequent to the rendition of this decision the act of March 4, 1879 (Pamphl. Laws 77), was enacted, providing that mechanics' liens should have priority over advance money mortgages given by purchasers to their vendors. This statute gave priority to the mechanic's lien over the entire amount of such mortgage, save so much as represented the unpaid purchase-money, even though a part of the money to be advanced for the building was paid in cash at the time of the execution of the mortgage. Mutual L. Ins. Co. *v.* Walling, 51 N. J. Eq. 99, 26 Atl. 453. The statute referred to has since been amended by Laws (1895), p. 313, § 6, and Laws (1898), p. 538, §§ 14, 15, and the result of such amendments appears to be that under the present law purchase-money mortgages, including amounts to be advanced by the vendor, are entitled to priority over mechanic's liens to the extent of the money actually advanced pursuant thereto, provided the mortgage is recorded or registered before any lien claim is filed. See Luce N. J. Mech. Lien L. 25–28. As to pur-

tory upon the mortgagee under the terms of his contract with the mortgagor;[47] but as to mere voluntary advances made after the mechanics' liens accrued and with notice thereof the mortgagee is postponed.[48]

(3) Record of Mortgage as Affecting Priority. In some jurisdictions the priority of a mortgage executed before a mechanic's lien attached is not lost by reason of the mortgage not being recorded prior to such time;[49] but in other jurisdictions it is held that in order for a mortgage to have priority over a mechanic's lien it must be recorded before the mechanic's lien accrues,[50] and the mere fact that it was executed before that time will not give it priority if it is not recorded until afterward.[51] Where a mortgage is not recorded within the time prescribed by statute it is postponed to mechanics' liens which accrued after its execution but before it was recorded,[52] although such liens were not perfected until after the mortgage was recorded.[53] Where the claimant has actual notice of the existence of an unrecorded mortgage, his lien is inferior thereto.[54]

(4) Mortgage of After-Acquired Property. A mechanic's lien attaching to property when it comes into the mortgagor's hands is superior to a mortgage executed previously and covering that property as after-acquired property;[55] but a mechanic's lien for improvements made on the property after the title was acquired by the mortgagor is inferior to a mortgage executed before title was acquired, but covering the property as after-acquired property.[56]

(5) Renewal or Substitution of Security. The priority of a mortgage is not lost by a renewal thereof where the debt secured is the same and the property

chase-money mortgages generally see *infra*, IV, C, 2, b, (VIII).

47. *District of Columbia.* — Anglo-American Sav., etc., Assoc. *v.* Campbell, 13 App. Cas. 581, 43 L. R. A. 622.

New Jersey.— Barnett *v.* Griffith, 27 N. J. Eq. 201; Taylor *v.* La Bar, 25 N. J. Eq. 222.

New York.— Lipman *v.* Jackson Architectural Iron-Works, 128 N. Y. 58, 27 N. E. 975 [*affirming* 13 N. Y. Suppl. 284].

Pennsylvania.— Moroney's Appeal, 24 Pa. St. 372.

Rhode Island.— Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 368.

A verbal agreement is sufficient to entitle the mortgagee to priority as to advances made pursuant thereto. Platt *v.* Griffith, 27 N. J. Eq. 207.

48. Finlayson *v.* Crooks, 47 Minn. 78, 49 N. W. 398, 645. See also Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

49. Root *v.* Bryant, 57 Cal. 48; Rose *v.* Munie, 4 Cal. 173; Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347 (chattel mortgage of building); Mathwig *v.* Mann, 96 Wis. 213, 71 N. W. 105, 65 Am. St. Rep. 47; Cook *v.* Belshaw, 23 Ont. 545.

50. *Colorado.*—Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64.

Illinois.— Thielman *v.* Carr, 75 Ill. 385.

Maryland.— Brooks *v.* Lester, 36 Md. 65, mortgage for future advances.

Minnesota.— Ortonville *v.* Geer, 93 Minn. 501, 101 N. W. 963, 106 Am. St. Rep. 445. But *compare* under earlier Minnesota statutes Miller *v.* Stoddard, 54 Minn. 486, 56 N. W. 131, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; Noerenberg *v.* Johnson, 51 Minn. 75, 52 N. W. 1069.

New Jersey.— See Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

New York.— Stuyvesant *v.* Browning, 33 N. Y. Super. Ct. 203.

Washington.— Bell *v.* Groves, 20 Wash. 602, 56 Pac. 401.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 369.

51. Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64; Thielman *v.* Carr, 75 Ill. 385; Ortonville *v.* Geer, 93 Minn. 501, 101 N. W. 963, 106 Am. St. Rep. 445. The decision in Miller *v.* Stoddard, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288, that an unrecorded mortgage executed before the work began was superior to mechanics' liens led to the enactment of Minn. Laws (1895), c. 101, p. 224, establishing the rule stated in the text.

52. Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632; Allen *v.* Oxnard, 152 Pa. St. 621, 25 Atl. 568, purchase-money mortgage.

53. Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632. See also Mitchel *v.* Evans, 2 Browne (Pa.) 329, where the mechanic's lien was given priority as to the building, the liability of the land not being considered.

54. Root *v.* Bryant, 57 Cal. 48 (holding that to entitle the lien claimant to priority it should be found as a fact that he did not have notice of the mortgage); Bradford *v.* Anderson, 60 Nebr. 368, 83 N. W. 173; Livesey *v.* Brown, 35 Nebr. 111, 52 N. W. 838. *Aliter* under Mass. Pub. St. c. 191, § 5. Dixon *v.* Hyndman, 177 Mass. 506, 59 N. E. 73.

55. Hall *v.* Mullanphy Planing Mill Co., 16 Mo. App. 454. See also Botsford *v.* New Haven, etc., R. Co., 41 Conn. 454; Harris *v.* Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69.

56. Reed *v.* Ginsburg, 64 Ohio St. 11, 59 N. E. 738.

is never released from the lien;[57] but where after mechanics' liens have attached the original mortgage is discharged and an entirely new mortgage given for the amount due,[58] or for a larger amount including the original debt,[59] the mechanics' liens have priority over the new mortgage. The fact that the money which a mortgage was given to secure was used in the payment of a previous mortgage is immaterial on the question of priority.[60]

(6) Release of Part of Property Covered by Mortgage. The holder of a mechanic's lien claim upon premises covered by a mortgage is not entitled to the benefit of a release, made after the commencement of the building, of other land embraced in the mortgage, unless the mortgagee knew of the claim when he executed the release, and acted in bad faith,[61] and the mere fact that when the release was made the mortgagee knew that the building was in progress is not sufficient.[62]

(7) Stipulation of Mortgagee Giving One Claimant Priority. Where there were several lien claimants whose claims were coördinate and inferior to a mortgage, but the mortgagee entered into a stipulation with one of the lien claimants by which it was agreed that such claimant might be awarded priority over the mortgage, it was held that the claimant was entitled to have its claim paid to the extent of the amounts stipulated prior to any payment to the mortgagee, and that the amount of such payment should be deducted from the mortgage claim in so far as it was entitled to priority over the other lien claimants, and placed upon the same footing with regard to priority of payment as the other lien claimants, the mortgagee being to the extent of such payment subrogated to the rights as originally established of the lien claimant to whom he had yielded priority.[63]

(8) Changes After Completion of Building. Where after a factory is completed as originally planned a mortgage is given on the property, and subsequently changes in the plans are found to be necessary in order to carry out the objects sought, the mortgage has priority over a lien for work and materials furnished for such changes, although the lienor is one of the contractors for the original plant.[64]

(9) Date of Commencement Given in Lien Statement Conclusive on Claimant. A lien claimant is bound by his lien statement and cannot show by parol, for the purpose of cutting out an encumbrance executed and recorded before the date of commencement of the work given in the lien statement, that the buildings were commenced before such date.[65]

(10) Mortgage to Contractor For Price of Work. A mortgage given to the contractor for the price of the work to be done by him is inferior to the liens

57. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454 [*following* Capital Lumbering Co. *v.* Ryan, 34 Oreg. 73, 54 Pac. 1093; Kern *v.* A. P. Hotaling Co., 27 Oreg. 205, 40 Pac. 168, 50 Am. St. Rep. 710; Pearce *v.* Buell, 22 Oreg. 29, 29 Pac. 78], renewal before filing of liens and in ignorance of any intervening liens or rights to liens. See also Erwin *v.* Acker, 126 Ind. 133, 25 N. E. 888.

The taking of a subsequent mortgage to remedy a supposed defect in a prior one will not postpone the equitable lien attaching in favor of the mortgagee to the lien of a mechanic attaching before the second mortgage was given. Payne *v.* Wilson, 74 N. Y. 348 [*affirming* 11 Hun 302].

58. Chicago Lumber Co. *v.* Anderson, 51 Nebr. 159, 70 N. W. 919.

59. Easton *v.* Brown, 170 Mass. 311, 49 N. E. 433.

60. Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452.

61. Ward *v.* Hague, 25 N. J. Eq. 397; McIlvain *v.* Mutual Assur. Co., 93 Pa. St. 30.

62. Ward *v.* Hague, 25 N. J. Eq. 397; McIlvain *v.* Mutual Assur. Co., 93 Pa. St. 30.

63. Potvin *v.* Denny Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002. *Compare* Phœnix Mut. L. Ins. Co. *v.* Batchen, 6 Ill. App. 621.

64. Collum *v.* Pennsylvania Paint, etc., Co., 185 Pa. St. 411, 39 Atl. 1009 [*following In re* Thoma, 76 Pa. St. 30].

65. Landau *v.* Cottrill, 159 Mo. 308, 60 S. W. 64. See also Hartford Bldg., etc., Assoc. *v.* Goldreyer, 71 Conn. 95, 41 Atl. 659, holding that where the certificate of a mechanic's lien filed in May, 1897, stated that the lien attached May 12, 1896, such statement estopped the lienor and his assignee from subsequently claiming that the lien attached May 4, 1896, and took precedence of a mortgage executed on that day but not recorded until the day following, as against a *bona fide* assignee of such mortgage who acquired his title in November, 1897.

of subcontractors and others notwithstanding the fact that in point of time it antedates such liens.[66]

(11) Attorney's Fees, Etc. Although a mortgage given before a mechanic's lien accrued stipulates for attorney's fees and trustee expenses in case of default in payment when due, the mechanic's lien has priority over the mortgagee's claim for such amounts.[67]

(12) Enforcement of Mechanic's Lien.[68] The fact that a trust deed of certain lands is superior to mechanics' liens does not deprive the lien claimants of the right to have the property sold subject to the encumbrance to pay their liens.[69]

(13) Purchase of Property by Mortgagee. Where the holder of a mortgage which is prior to a mechanic's lien becomes the purchaser of the property at a tax-sale and takes tax title, such purchase extinguishes the mortgage debt, and the mechanic's lien remains the only lien upon the property in the hands of the purchaser.[70]

(14) Estoppel of Mortgagee. It has been held that the mere fact that the mortgagee knew of the work and did not object thereto does not deprive him of priority;[71] but under some statutes the mortgagee's consent to the improvement or failure to object thereto after receiving notice thereof may have such effect.[72] A mortgagee who encourages the improvement of the mortgaged property by an agreement to subordinate his lien to the cost thereof is, as to persons furnishing

66. Bassett *v.* Menage, 52 Minn. 121, 63 N. W. 1064, in which case the mortgagee sold to the mortgagor a certain building, agreeing at the same time to remove and completely rebuild it on a lot belonging to the mortgagor, and liens were filed against the property for materials furnished for use in rebuilding, and it was held that the mortgagee stood in exactly the same position as if the mortgagor had purchased the building from a third person and then contracted with the mortgagee to take it down, remove, and rebuild it, giving to the latter a mortgage as security for the payment of the price, and that under the circumstances the lien of the mortgagee must be postponed to the mechanics' liens.

Postponement of principal contractor generally see *infra*, IV, C, 1, b.

67. Garrett *v.* Adams, (Tenn. Ch. App. 1897) 39 S. W. 730.

68. **Enforcement** generally see *infra*, VIII.

69. Seely *v.* Neill, (Colo. 1906) 86 Pac. 334; Buntyn *v.* Shippers' Compress Co., 63 Miss. 94.

70. Devereux *v.* Taft, 20 S. C. 555.

71. Pride *v.* Viles, 3 Sneed (Tenn.) 125; Security Mortg., etc., Co. *v.* Caruthers, (Tex. Civ. App. 1895) 32 S. W. 843, holding that the fact that the mortgagee assents to the erection of a building on the mortgaged land and tells the contractor to proceed with the work does not estop the mortgagee to claim that his lien is superior to the contractor's mechanic's lien.

Notice of non-liability.—A mortgagee knowing of the erection of a building on the mortgaged property is not required to give notice that he will not be liable for the same in order to prevent a mechanic's lien taking precedence over his mortgage. Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 5 Pac. 85; Capital Lumbering Co. *v.* Ryan, 34 Oreg. 73, 54 Pac. 1093.

Reservation of right to pay off lien.—A mortgagee is not estopped to assert the priority of his mortgage over the mechanic's lien claims by reason of the fact that he sought to protect himself against such liens by reserving the right to pay the same from the amount of the mortgage loan. Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 624, 32 Pac. 1073, 34 Pac. 774.

For extra work done on a building by the contractor in pursuance of a general provision in the contract for extra work at the will of the owner, there may be a lien on the property as against a mortgage given by the owner before the extra work was commenced provided the work was done with the knowledge of the mortgagee and without objection from him. Soule *v.* Dawes, 14 Cal. 247.

72. Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19, holding that under the Tennessee statute where the mortgagee has written notice of the same before the work is begun or the materials are furnished and consents thereto or fails to object within ten days after the receipt of the notice, the lien of the mechanic will have priority over the mortgage. See also Seely *v.* Neill, (Colo. 1906) 86 Pac. 334, holding that where one of the tenants in common of certain lands sold the same, taking a deed of trust for a portion of the price for the benefit of all the tenants in common, and thereafter failed to post a notice, as required by Colo. Laws (1899), c. 118, § 5, prior to the erection of certain improvements on the land by the purchaser, the interest of such tenant in the encumbrance to secure the purchase-price was postponed to mechanics' liens acquired in the construction of such improvement, but that the interest of other tenants in common who were not shown to have had any knowledge that the improvements were being made on the land was superior to that of the lien claimants.

labor and material for use thereon upon the faith of his promise, a promoter of such improvement, and their liens for labor and material are entitled to priority over his mortgage;[73] and where a building and loan association has induced a materialman to furnish material to a prospective borrower, accepting orders drawn on its agent by the borrower in favor of the materialman, which orders it afterward refuses to pay, it cannot assert a lien prior to the mechanic's lien of the materialman for sums advanced by it to complete the building.[74]

(B) *Mortgages Given After Accrual of Lien* — (1) RULE STATED. A mechanic's lien has priority over a mortgage given after the lien accrued,[75] on the

73. Cummings *v.* Emslie, 49 Nebr. 485, 68 N. W. 621 [*following* Holmes *v.* Hutchins, 38 Nebr. 601, 57 N. W. 514; Pickens *v.* Plattsmouth Inv. Co., 37 Nebr. 277, 55 N. W. 947; Millsap *v.* Ball, 30 Nebr. 728, 46 N. W. 1125; Bohn Mfg. Co. *v.* Kountze, 30 Nebr. 719, 46 N. W. 1123, 12 L. R. A. 33].

Release of mortgage.— Where a mortgagee of certain lots on which the owner wished to erect a building released his mortgage in consideration of a written promise by the contractors that they would pay him the amount thereof out of the payments made to them as the building progressed, which promise they failed to keep, they will be estopped, in an action by them to enforce mechanics' liens on the premises, from claiming liens prior to that of the mortgagee. Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

74. Southern Bldg., etc., Assoc. *v.* Bean, (Tex. Civ. App. 1899) 49 S. W. 910.

75. *Arkansas.*— Spence *v.* Etter, 8 Ark. 69, mortgage executed after lien account filed and recorded.

Connecticut.— Soule *v.* Hurlbut, 58 Conn. 511, 20 Atl. 610, although by the terms of an agreement between the mortgagor and the mortgagee the mortgage should have been executed and recorded before the lien accrued.

Illinois.— Inter State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529.

Indiana.— Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266.

Iowa.— Lamb *v.* Hanneman, 40 Iowa 41.

Kansas.— Thomas *v.* Hoge, 58 Kan. 166, 48 Pac. 844.

Louisiana.— Lenel's Succession, 34 La. Ann. 868.

Massachusetts.— Osborne *v.* Barnes, 179 Mass. 597, 61 N. E. 276; Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452; Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219.

Mississippi.—Buntyn *v.* Shippers' Compress Co., 63 Miss. 94, deed of trust executed after institution of proceedings to enforce mechanic's lien.

Nebraska.— Goodwin *v.* Cunningham, 54 Nebr. 11, 74 N. W. 315; Ansley *v.* Pasahro, 22 Nebr. 662, 35 N. W. 885.

New Hampshire.— Graton, etc., Mfg. Co. *v.* Woodworth-Mason Co., 69 N. H. 177, 38 Atl. 790.

New Jersey.— Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174; Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273; Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

North Carolina.—Cheesborough *v.* Asheville Sanatorium, 134 N. C. 245, 46 S. E. 494.

North Dakota.— Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

Oklahoma.—Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Tennessee.— Gillespie *v.* Bradford, 7 Yerg. 168, 27 Am. Dec. 494.

Utah.— Fields *v.* Daisy Gold Min. Co., 25 Utah 76, 69 Pac. 528.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

United States.— Atkins *v.* Volmer, 21 Fed. 697.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 365.

A chattel mortgage on machinery is subordinate to a mechanic's lien as to such portions of the machinery as have become fixtures. Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

Building erected on wrong property by mistake.— Where materials were furnished to the owner of a lot for the erection of a building thereon, and subsequently another person, supposing the house was being built on said lot, took a mortgage thereon, but by mistake the house was built on another lot belonging to a third person, the materialman was not entitled to a lien on the mortgaged lot as against the mortgagee. Smith *v.* Barnes, 38 Minn. 240, 36 N. W. 346.

Effect of exemption claim superior to mechanic's lien and inferior to mortgage.— Where in distributing the fund arising from the sale of real estate, a mechanic's lien was found superior to a mortgage, but inferior to the widow's claim, but under the exemption law the mortgage was superior to the widow's claim, the mortgage was entitled to the fund, there not being enough to pay it. Bilger *v.* Bilger, 4 Pa. Co. Ct. 109.

Application of payments.— A mortgagee of premises upon which there was at the time a house in course of construction, for which the contractor was entitled to a prior lien, cannot complain that payments made by the owner were applied first toward the satisfaction of the contractor's demand for extras, where there was no collusion shown between the parties, and most of the extras had been furnished prior to the execution of the mortgage and the mortgage security had been in no way impaired by such application of the payments made. Powell *v* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Circumstances entitling mortgage to priority.— Where after an action to enforce a me-

commencement of the building[76] or of the work or furnishing of materials out of which the lien arose,[77] and the fact that the mortgage was given to secure a debt

chanic's lien was begun a third person purchased both the property and the lien thereon and executed to the vendor of the property a mortgage to secure his notes, which notes were transferred before maturity, it was held that, even if the mechanic's lien had any existence after its purchase by the purchaser of the property, it was inferior to the mortgage. Madaris *v.* Edwards, 32 Kan. 284, 4 Pac. 313.

Loss of right to foreclose lien as against owner.— Mechanics' liens may be asserted as against a mortgagee after the expiration of the time allowed by statute for foreclosing such liens against the owner. Thomas *v.* Hoge, 58 Kan. 166, 48 Pac. 844.

76. *Colorado.*— Joralman *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

Kansas.— Nixon *v.* Cydon Lodge No. 5, K. of P., 56 Kan. 298, 43 Pac. 236.

Maryland.— Rosenthal *v.* Maryland Brick Co., 61 Md. 590.

Michigan.— Kay *v.* Towsley, 113 Mich. 281, 71 N. W. 490.

Minnesota.— Ortonville *v.* Geer, 93 Minn. 501, 101 N. W. 963, 106 Am. St. Rep. 445 [*following* Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746; Glass *v.* Freeburg, 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335]; Miller *v.* Stoddard, 54 Minn. 486, 56 N. W. 131, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; Hewson-Herzog Supply Co. *v.* Cook, 52 Minn. 534, 54 N. W. 751; Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753. See also Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543.

Missouri.— Landau *v.* Cottrill, 159 Mo. 308, 60 S. W. 64; Schulenburg *v.* Hayden, 146 Mo. 583, 48 S. W. 472; Dubois *v.* Wilson, 21 Mo. 213; Hydraulic Press Brick Co. *v.* Bormans, 19 Mo. App. 664 [*followed* in Great Western Planing Mill Co. *v.* Bormans, 19 Mo. App. 671].

Montana.— Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441.

Nebraska.— Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779 [*following* Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643].

New Hampshire.— Cheshire Provident Inst. *v.* Stone, 52 N. H. 365.

New Jersey.— Erdman *v.* Moore, 58 N. J. L. 445, 33 Atl. 958; Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273; Morris County Bank *v.* Rockaway Mfg. Co., 14 N. J. Eq. 189.

North Dakota.—Bastien *v.* Barras, 10 N. D. 29, 84 N. W. 559; Haxtun Steam Heater Co. *v.* Gordon, 2 N. D. 246, 50 N. W. 708, 32 Am. St. Rep. 776.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— Reynolds *v.* Miller, 177 Pa. St. 168, 35 Atl. 702 [*distinguishing* Wilson's Appeal, 172 Pa. St. 354, 33 Atl. 574; Reading *v.* Hopson, 90 Pa. St. 494]; Hahn's Appeal, 39 Pa. St. 409; American F. Ins. Co. *v.* Pringle, 2 Serg. & R. 138.

Rhode Island.— Bassett *v.* Swarts, 17 R. I. 215, 21 Atl. 352.

Texas.— Farmers', etc., Nat. Bank *v.* Taylor, 91 Tex. 78, 40 S. W. 876, 966; Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765.

Wisconsin.— Alfree Mfg. Co. *v.* Henry, 96 Wis. 327, 71 N. W. 370 [*following* Vilas *v.* McDonough Mfg. Co., 91 Wis. 607, 65 N. W. 488, 51 Am. St. Rep. 925, 30 L. R. A. 778]; Mathwig *v.* Mann, 96 Wis. 213, 71 N. W. 105, 65 Am. St. Rep. 47; Lampson *v.* Bowen, 41 Wis. 484.

United States.— Davis *v.* Bilsland, 18 Wall. 659, 21 L. ed. 969; *In re* Matthews, 109 Fed. 603.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 362.

Failure of lien claim to show date of commencement.— Where a mortgage is recorded before a mechanic's lien claim is filed and the claim does not show when the building was commenced, a purchaser at a sheriff's sale cannot show by parol evidence that the building was commenced before the mortgage was given so as to entitle the mechanic's lien to priority over the mortgage. Reading *v.* Hopson, 90 Pa. St. 494 [*followed* in Hilliard *v.* Tustin, 172 Pa. St. 354, 33 Atl. 574; Wheelock *v.* Harding, 4 Pa. Super. Ct. 21]. But where, although the lien claim does not state the date of commencement many of the items antedate the mortgage and the mortgage itself recites the existence of the buildings for which the lien is claimed, the lien claim has priority over the mortgage and a purchaser at an assignee's sale has the right to presume that the lien of the mortgage will be discharged. Reynolds *v.* Miller, 177 Pa. St. 168, 35 Atl. 702.

Cessation of work.— Where a building has been started and the foundations laid, and there is then an entire stoppage of work, and more than six months after the commencement of the building a new contract is made with another person under which it is finished, mechanics' liens cannot be carried back beyond the time of the recommencement of the building, and hence are postponed to a mortgage recorded after the commencement but before the recommencement. Kelly's Appeal, 1 Pa. Cas. 280, 2 Atl. 868.

77. *California.*— Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Crowell *v.* Gilmore, 13 Cal. 54, 17 Cal. 194, 18 Cal. 370.

Colorado.— Tritch *v.* Norton, 10 Colo. 337, 15 Pac. 680.

Iowa.— Sioux City Electrical Supply Co. *v.* Sioux City, etc., Electric R. Co., 106 Iowa 573, 76 N. W. 838; Iowa Mortg. Co. *v.* Shanquest, 70 Iowa 124, 29 N. W. 820.

Kentucky.— Humboldt Bldg. Assoc. *v.* Volmering, 47 S. W. 1084, 20 Ky. L. Rep. 899, mortgagee having actual notice of the contract and the commencement of work thereunder.

for work done on or materials furnished for the building,[78] or that the purchase-price of the land was paid out of the proceeds of the mortgage,[79] does not give the mortgage priority. The rights of the lienors are not affected by the fact that the liens were filed at the instance of the mortgagor,[80] or that the mortgagor concealed the existence of such liens from the mortgagee at the time of obtaining the loan for which the mortgage was given.[81] A stipulation by the parties to a mortgage that such mortgage shall be paramount to all other liens and that the mortgagor covenants to keep the premises free from all other encumbrances cannot defeat the priority of mechanics' liens.[82]

(2) MORTGAGE GIVEN AFTER MAKING OF CONTRACT. As a general rule the fact that the claimant's contract antedated the mortgage does not give his lien priority where the mortgage was given before the claimant did or furnished anything pursuant to his contract,[83] but under statutes by which lien attaches at the time the contract between the owner and mechanic is made,[84] a mortgage given thereafter is subject to the lien of the mechanic,[85] although the mortgage is

Minnesota.—Milner *v.* Norris, 13 Minn. 455.

Missouri.— General Fire Extinguisher Co. *v.* Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318; Reilly *v.* Hudson, 62 Mo. 383; Viti *v.* Dixon, 12 Mo. 479; Keller *v.* Carterville Bldg., etc., Assoc., 71 Mo. App. 465.

Montana.— Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413; Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441.

Nebraska.— Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643; Cahn *v.* Romandorf, 4 Nebr. (Unoff.) 84, 93 N. W. 411.

New Jersey.— Morris County Bank *v.* The Rockaway Mfg. Co., 14 N. J. Eq. 189.

North Carolina.— Dunavant *v.* Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837; Lookout Lumber Co. *v.* Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

Ohio.— Woodman *v.* Richardson, 1 Ohio Cir. Ct. 191, 1 Ohio Cir. Dec. 104.

Rhode Island.— McDonald *v.* Kelly, 14 R. I. 335.

Tennessee.— Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19.

Texas.— Schultze *v.* Alamo Ice, etc., Co., 2 Tex. Civ. App. 236, 21 S. W. 160.

West Virginia.— Cushwa *v.* Imp., etc., Assoc., 45 W. Va. 490, 32 S. E. 259.

United States.— Courtney *v.* Insurance Co. of North America, 49 Fed. 309, 1 C. C. A. 249; *In re* Hoyt, 12 Fed. Cas. No. 6,805, 3 Biss. 436, under Wisconsin statute.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 362.

Burden of proof.— The lien claimant must allege and show affirmatively that "stock was laid," or work commenced, before the mortgage attached. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48; Farmers' Bank *v.* Winslow, 3 Minn. 86, 74 Am. Dec. 740.

78. Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266; Kendall Mfg. Co. *v.* Rundle, 78 Wis. 150, 47 N. W. 364, chattel mortgage. See also Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174.

79. Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021; Thomas *v.* Hoge, 58 Kan. 166, 48 Pac. 844.

Purchase-money mortgages see *infra*, IV, C, 2, b, (VIII).

80. Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273.

81. Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273.

82. Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765.

83. *In re* New Memphis Gaslight Co., 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880. And see *supra*, IV, C, 2, b, (VI), (A), (1).

84. See *supra*, IV, A, 2, a.

85. Inter-State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342 [*affirming* 71 Ill. App. 529]; Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Farnham *v.* Richardson, 91 Me. 559, 40 Atl. 553; Morse *v.* Dole, 73 Me. 351; McDowell *v.* Rockwood, 182 Mass. 150, 65 N. E. 65; Taylor *v.* Springfield Lumber Co., 180 Mass. 3, 61 N. E. 217; Sprague *v.* McDougall, 172 Mass. 553, 52 N. E. 1077; Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219; Batchelder *v.* Rand, 117 Mass. 176; Dunklee *v.* Crane, 103 Mass. 470. See also Phœnix Mut. L. Ins. Co. *v.* Batchen, 6 Ill. App. 621.

Facts showing contract existing before execution of mortgage see Taylor *v.* Springfield Lumber Co., 180 Mass. 3, 61 N. E. 217.

Agreement to "continue" contract.—Where a contract was entered into by which one party was to furnish lumber for the other during the following year, at a specified price, an agreement at the expiration of that year to "continue" the contract "to complete the purpose" for which the lumber was purchased, as the purchaser desired "a little more lumber than the contract contemplated," was a new contract and did not operate to continue the old contract so as to accord the seller's lien for the lumber furnished under the new contract any priority which the lien for lumber sold under the original contract might have had over a deed of trust of the purchaser's property given during the life of the old contract. Martin *v.* Texas Briquette, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 651.

given [86] and recorded [87] before the labor is performed or the materials furnished. But in order to entitle the claimant to priority over a mortgage there must have been at the time the mortgage was made a contract with the owner of the property for the improvement, of which the mortgagee had actual or constructive notice.[88]

(3) MORTGAGE GIVEN AFTER COMMENCEMENT OF BUILDING, ETC., BUT BEFORE CLAIMANT COMMENCED TO FURNISH LABOR OR MATERIALS. As a general rule mechanics' liens take priority from the time of the commencement of the building or other work and not from the time when the particular lien claimant furnished labor or materials, and hence a lien claimant has priority over a mortgage given after the commencement of the building, although before he performed any work or furnished any materials therefor.[89] But in some states the rule is

Contract to sell lumber merely.— A contract whereby the seller agreed for a period of a year to sell lumber to the buyer, at a specified price, for use in the construction of improvements on the latter's plant — there being at the time such contract was entered into no contract for the improvements, and the parties not knowing precisely what improvements would be needed — is not sufficient to give a lien to the seller on the buyer's property superior to that obtained by a deed of trust covering the same and executed after the contract but before any improvements were made. Martin *v.* Texas Briquette, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 651.

Contract with person other than owner — misrepresentations.— B, having no interest or contract for an interest in certain land of which A was the owner, contracted under seal with the petitioners for the building of a house upon it, payment to be made in four instalments by his notes. The petitioners, until the first note was given, supposed that B was the owner, but upon learning the truth they went to A, who indorsed the note and assured them that B was all right, that he had sold him the land, although the deed was not given, and that a part of the purchase-money had been paid, and made other statements, all false, to the same effect. The petitioners relying on this information completed their contract and in accordance with its terms were paid by B's notes but were unable to collect. Soon after the work was done the land was conveyed to B and a mortgage given in his name to C to secure the payment of money then actually advanced to A, without notice of any lien, or of any fraud on the part of A and B. No notice, under Mass. Pub. St. c. 191, §§ 1–3, had been given to A of an intention to claim a lien. It was held, in an action against A, B, and C to enforce a mechanic's lien for labor and materials furnished, that, although A might be liable for deceit, there was no valid lien, and that even if a lien could be enforced against A and B it would not be valid against C's mortgage. Ellenwood *v.* Burgess, 144 Mass. 534, 11 N. E. 755.

86. Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. 219.

87. Morse *v.* Dole, 73 Me. 351.

88. Sly *v.* Pattee, 58 N. H. 102.

89. *Arkansas.*— Apperson *v.* Farrell, 56 Ark. 640, 20 S. W. 514.

Iowa.— Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177; Neilson *v.* Iowa Eastern R. Co., 44 Iowa 71.

Kansas.—Keystone Iron Works Co. *v.* Douglass Sugar Co., 55 Kan. 195, 40 Pac. 273; Flint, etc., Mfg. Co. *v.* Douglass Sugar Co., 54 Kan. 455, 38 Pac. 566; Thomas *v.* Mowers, 27 Kan. 265.

Maryland.— Rosenthal *v.* Maryland Brick Co., 61 Md. 590.

Michigan.— Kay *v.* Towsley, 113 Mich. 281, 71 N. W. 490.

Minnesota.— Ortonville *v.* Geer, 93 Minn. 501, 101 N. W. 963, 106 Am. St. Rep. 445 [*following* Gardner *v.* Leck, 52 Minn. 522, 54 N. W. 746; Glass *v.* Freeburg, 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335]; Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543; Hewson-Herzog Supply Co. *v.* Cook, 52 Minn. 534, 54 N. W. 751. See also Miller *v.* Stoddard, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288.

Missouri.— Dubois *v.* Wilson, 21 Mo. 213; Hydraulic Press Brick Co. *v.* Bormans, 19 Mo. App. 664 [*followed* in Great Western Planing Mill Co. *v.* Bormans, 19 Mo. App. 671].

Montana.— Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441; Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

New Jersey.— Erdman *v.* Moore, 58 N. J. L. 445, 33 Atl. 958.

North Dakota.— Haxtun Steam Heater Co. *v.* Gordon, 2 N. D. 246, 50 N. W. 708, 33 Am. St. Rep. 776.

Pennsylvania.— American F. Ins. Co. *v.* Pringle, 2 Serg. & R. 138.

Texas.— Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765.

Wisconsin.— Vilas *v.* McDonough Mfg. Co., 91 Wis. 607, 65 N. W. 488, 51 Am. St. Rep. 925, 30 L. R. A. 778 (mortgage given after building was commenced and machinery for which lien was claimed was contracted for but before such machinery was actually furnished); Lampson *v.* Bowen, 41 Wis. 484.

United States.— Davis *v.* Bilsland, 18 Wall. 659, 21 L. ed. 969; *In re* Hoyt, 12 Fed. Cas. No. 6,805, 3 Biss. 436.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 363.

otherwise, and a mortgage, although given after the commencement of the building, has priority over mechanics' liens arising out of the doing of work or the furnishing of materials which was not commenced until after the mortgage was given.[90]

(4) Work Done or Materials Furnished After Mortgage Given. The priority of a mechanic's lien over a mortgage given after its accrual extends to the entire claim and includes the amount due for what was done or furnished after as well as before the mortgage was executed or recorded.[91]

(5) Perfection of Lien. A mechanic's lien claimant may lose his priority over other liens and encumbrances by failing to give notice to the owner,[92] to file his claim or statement,[93] in accordance with the statutory requirements[94] or to commence proceedings to enforce his lien[95] within the time prescribed by statute,[96] and the debtor cannot, by admissions inconsistent with the existing facts, create a

This works no injustice to any one dealing with the property, as the work itself is notice to all of the mechanics' claims and enables them by ocular examination to ascertain whether they can safely deal with the property. Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543.

Alteration of plans.—Where a mortgage was executed after the commencement of construction of a building on the land, which, according to the original plans, was to be heated by stoves, and after the mortgage was recorded, but before the building was completed, a contract was made for putting in steam-heating apparatus, there was not such an alteration in the original plans as could deprive the contractor of a lien, for putting in the heating apparatus, therefor superior to the mortgage, under N. D. Comp. Laws, § 5478, making mechanics' liens for the construction of a building superior to all other liens or encumbrances which shall be attached to the building or land subsequent to the commencement of the building. Haxtun Steam Heater Co. *v.* Gordon, 2 N. D. 246, 50 N. W. 708, 33 Am. St. Rep. 776.

90. Welch *v.* Porter, 63 Ala. 225; Grand Island Banking Co. *v.* Koehler, 57 Nebr. 649, 78 N. W. 265; Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073, 6 Wash. 624, 34 Pac. 774. See also Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680.

91. Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Fuquay *v.* Stickney, 41 Cal. 583 (holding that where an insurance company lent the owner of a lot and uncompleted building money for the purpose of completing the building, and took from him a deed of trust conveying the fee, defeasible on the payment of the debt, and the owner allowed the building to be completed without giving notice that he would not be responsible therefor, the insurance company's interest in the property was subject to the mechanic's lien for work done and materials furnished after the making of the trust deed); Milner *v.* Norris, 13 Minn. 455; Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19. And see cases cited *supra*, IV, C, 2, b, (VI), (B), (1). But *compare* Robock *v.* Peters, 13 Manitoba 124.

Extra work.—Where a contract was for specified work, and such extra work at a certain rate of price as the owner might direct, and the owner then mortgaged, and afterward extra work was done with the knowledge of the mortgagee, it was held that, through the acquiescence of the mortgagee, the mechanic acquired a lien for the extra work superior to the lien of the mortgage. Soule *v.* Dawes, 14 Cal. 247.

Work done by the day without continuous contract.—A mortgage takes priority of a lien for work done, after the recording of the mortgage, by one who had previously worked on the building by the day, with no continuous contract, but who did no work thereon for over a month before the mortgage was recorded. Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452.

92 Perry *v.* Parrott, 135 Cal. 238, 67 Pac. 144.

Notice to owner see *supra*, III, B.

93. Kendall *v.* McFarland, 4 Oreg. 292.

Filing claim or statement see *supra*, III, C.

A judgment at law entered upon the lien, where the lien claim was not filed pursuant to the statute, gives it no priority in payment. Morris County Bank *v.* Rockaway Mfg. Co., 16 N. J. Eq. 150.

Knowledge of claim.—On who becomes an encumbrancer after the time for filing a mechanic's lien has expired may have priority over a claimant whose lien statement fails to describe land covered by the encumbrance, although the encumbrancer knew that the claimant had the right to a lien upon such land. Chicago Lumber Co. *v.* Des Moines Driving Park, 97 Iowa 25, 65 N. W. 1017.

Where the debtor is in failing circumstances the mechanics' claims are preferred debts under Ind. Rev. St. (1897) § 7596, whether notices of lien are filed or not. Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632.

94. Security Bldg., etc., Union *v.* Colvin, 27 Pa. Super. Ct. 594, lien fatally defective as against subsequent mortgagee where description of property erroneous and defective.

Form and contents of claim or statement see *supra*, III, C, 11.

95. Shaeffer *v.* Weed, 8 Ill. 511.

Enforcement of lien see *infra*, VIII.

96. Rictz *v.* Coyer, 83 Ill. 28 [*following* Shaeffer *v.* Weed, 8 Ill. 511]; Lunt *v.* Stephens, 75 Ill. 507.

lien upon his property which shall have precedence over other encumbrances made after the lien attached, or restore a lost lien.[97] Under some statutes a mortgage given before the lien claim is filed is, in the absence of notice to the mortgagee of the mechanic's lien, entitled to priority over such lien;[98] but the principle of the relation back of the lien[99] would seem to lead to the conclusion that as a general rule it is not necessary to entitle a mechanic's lien to priority over a mortgage that the lien claim or statement should be filed before the mortgage is

Time for: Giving notice to owner see *supra*, III, B, 3. Filing claim or statement see *supra*, III, C, 10. Commencement of proceedings to enforce lien see *infra*, VIII, F.

Notice to mortgagee.— Under a statute providing that, as against creditors with notice, a mechanic's lien is acquired by any person in privity with the landowner by the performance of the labor or the furnishing of the materials, a lien claimant is entitled to priority over a mortgagee who, at the time of making the loan, knew that the mortgagor was erecting a building on the land, and that the claimant had furnished materials therefor, and that further indebtedness would have to be incurred in completing the building, although the claimant did not file his lien notice within the statutory time. Bond Lumber Co. *v.* Masland, 45 Fla. 188, 34 So. 254.

97. Frost *v.* Ilsley, 54 Me. 345.

98. *Indiana.*— Green *v.* Green, 16 Ind. 253, 79 Am. Dec. 428.

Kentucky.— Foushee *v.* Grigsby, 12 Bush 75 [*following* Gere *v.* Cushing, 5 Bush 304], so under the act of Feb. 17, 1858 (Meyers Suppl. 300).

Louisiana.— Marmillon *v.* Archinard, 24 La. Ann. 610.

Massachusetts.— Mulrey *v.* Barrow, 11 Allen 152.

New Jersey.— Reed *v.* Rochford, 62 N. J. Eq. 186, 50 Atl. 70, liens for repairs and alterations.

New York.— Payne *v.* Wilson, 74 N. Y. 348 [*affirming* 11 Hun 302] (holding that the mechanic's lien is therefore subject to a prior equitable lien, although the claimant had no notice thereof); Munger *v.* Curtis, 42 Hun 465; Stuyvesant *v.* Browning, 33 N. Y. Super. Ct. 203.

Vermont.— Hinckley, etc., Iron Co. *v.* James, 51 Vt. 240.

Canada.— Kiewell *v.* Murray, 2 Manitoba 209; Reinhart *v.* Shutt, 15 Ont. 325 [*following* McVean *v.* Tiffin, 13 Ont. App. 1]; Hynes *v.* Smith, 27 Grant Ch. (U. C.) 150, 8 Ont. Pr. 73. See also Cook *v.* Belshaw, 23 Ont. 545. But *compare* Robock *v.* Peters, 13 Manitoba 124.

See 34 Cent. Dig. tit. "Mechanics' Liens, § 366; and *supra*, IV, A, 2, d.

Fraudulent mortgage—liens filed before assignment.— Where a mortgage executed to the wife of a contractor by the owners of the building in payment of the amount due the contractor, and therefore fraudulent as to the creditors of the contractor, is not assigned by the wife to a creditor of the contractor until after mechanics' liens have been filed against the building by creditors of the contractor, the mechanics' liens have preference over the mortgage. Mahoney *v.* McWalters, 3 N. Y. App. Div. 248, 38 N. Y. Suppl. 256.

A mortgage given for a preëxisting debt on property on which alterations are being made, without notice thereof to the mortgagee, is a mortgage in good faith within N. J. Laws (1898), p. 538, § 10, so as to entitle it to priority over a mechanic's lien subsequently filed. Reed *v.* Rochford, 62 N. J. Eq. 186, 50 Atl. 70.

Payment after filing of lien notice of order given previously.— A fund was held by S, to be paid out, as directed by defendant, in erecting buildings on defendant's land. Two orders drawn on the fund were presented to S, but before they were paid a sum exceeding the entire amount of the fund was paid out on other orders, and defendant thereupon gave S a mortgage on the land to secure past and future advances by him. After the mortgage was recorded, F filed a notice of lien for materials, and later S paid the two orders theretofore presented. It was held that these orders, being assignments of the fund *pro tanto* at the time they were presented, should be deducted from the fund as of that time, and therefore the whole amount paid by S in excess of the fund was advanced by him before notice of F's lien, and to that extent the mortgage was superior. Hirshfield *v.* Ludwig, 69 Hun (N. Y.) 554, 24 N. Y. Suppl. 634.

Claiming benefit of amendment to statute. — If a contractor claims the benefit of the Kentucky act of Sept. 30, 1896, amending the Mechanics' Lien Law and allowing six months from the completion of the work in which to file a statement of lien instead of sixty days as theretofore allowed, he must, although his contract was made before the law was amended, accept the burdens of the amendment, under which the lien does not take priority over an intervening mortgage unless the mortgagee had actual notice thereof, or unless the contractor, prior to the recording of the mortgage, filed a statement showing that he had performed labor or furnished materials, or expected to do so, stating the amount; and the contractor's allegation that the statement of lien was filed within six months from the completion of the work shows his intention to claim under the amendment. Harris *v.* Gardiner, 68 S. W. 8, 24 Ky. L. Rep. 103.

Knowledge of an agent who acted for the mortgagee in taking the mortgage that buildings were being erected thereon is sufficient to give the mechanics' liens priority under Ky. St. (2d ed.) § 2463. *In re* Wagner, 110 Fed. 931.

99. See *supra*, IV, A, 2, d.

given or recorded,[1] although the claimant must of course perfect his lien within the statutory time.[2]

(6) Mortgage to Secure Building Loan. The statutes sometimes give priority to a mortgage for moneys advanced for the erection of a building and actually used for that purpose.[3]

(7) Loan Negotiated Before Lien Attached. The mortgage is not entitled to priority because of the fact that the loan secured thereby was negotiated before the mechanic's lien attached, where the papers were not executed until afterward.[4]

(8) Provision of Building Contract Postponing Liens. A provision in a building contract that liens "filed under this contract" for labor and material enumerated in a schedule attached thereto shall be postponed to a certain mortgage does not apply to extra work not covered by the schedule.[5]

(9) Agreement Increasing Amount Payable to Lien Claimant. After encumbrances junior to a mechanic's lien have attached their priority cannot be disturbed by an agreement between the owner and the lien claimant increasing the amount recoverable by the latter.[6]

(10) Waiver and Loss of Priority. Where a mechanic's lien claimant, in an action to foreclose his lien, made no claim of priority over a mortgage, and the judgment established the lien as of the date of the judgment and directed a sale of the premises to satisfy the same, the purchaser at such sale acquired only the interest of the lien claimant as established by the judgment, and not the interest which he would have had if the claimant, as he might have done, had asserted and established his lien as relating back to a time prior to the giving of the mortgage, and hence the interest of the purchaser was subordinate to the lien of the mortgage.[7] A waiver of priority of a mechanic's lien, in an agreement to submit to arbitration, is without effect where proceedings to enforce the lien are instituted before award, such proceedings being a revocation of the agreement to arbitrate.[8] A person who furnishes material and does work on a building, taking machinery in payment therefor, loses priority of lien over a *bona fide* mortgagee who

1. Iowa Mortg. Co. *v.* Sharquest, 70 Iowa 124, 29 N. W. 820; Reilly *v.* Hudson, 62 Mo. 383; Vandyne *v.* Vanness, 5 N. J. Eq. 485.

2. Woodman *v.* Richardson, 1 Ohio Cir. Ct. 191, 1 Ohio Cir. Dec. 104; Schultze *v.* Alamo Ice, etc., Co., 2 Tex. Civ. App. 236, 21 S. W. 160. See *supra*, III, B, 3; III, C, 10.

3. Under N. J. Laws (1895), p. 313, § 6, such a mortgage has priority notwithstanding the fact that the moneys have been advanced and the mortgage has been executed while the building was in course of erection; and this priority is given whether the mortgage be made to secure future advances or money already advanced. The only test is whether the money has been lent for the erection, alteration, or repair of, or addition to, the building and has been actually applied for that purpose. When such is the case the mortgage has priority over a mechanic's lien filed subsequent to the date of its record. Young *v.* Haight, 69 N. J. L. 453, 55 Atl. 100 [*distinguishing* Erdman *v.* Moore, 58 N. J. L. 445, 33 Atl. 958, as having been decided upon rights arising before the enactment of the statute referred to]. See also *In re* Matthews, 109 Fed. 603, 6 Am. Bankr. Rep. 96, holding that under Ark. Acts (1895), p. 217, giving to a mechanic's lien priority over any prior lien or encumbrance or mortgage as to the building or improvement "provided, however, that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act," gives priority to a mortgagee over mechanics or materialmen as to the building or improvement only when the mortgage was given for the purpose of raising money which was actually used by the borrower in making the erections, improvements, or buildings on the land, and such a mortgage is entitled to priority only to the extent that the proceeds were so used.

4. Nixon *v.* Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236. See also Soule *v.* Hurlbut, 58 Conn. 511, 20 Atl. 610.

5. Sankey *v.* Burton, 196 Pa. St. 504, 46 Atl. 850.

6. Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177 (agreement to pay ten per cent interest on amount due claimant); Osborne *v.* Barnes, 179 Mass. 597, 61 N. E. 276 (change of plans).

7. Bastien *v.* Barrus, 10 N. D. 29, 84 N. W. 559, holding further that the right to assert priority over the mortgage belonged exclusively to the lien claimant and not to the purchaser at the sheriff's sale.

8. Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95].

advanced money after such payment, although the title to the machinery fails and it is taken on replevin by the legal owner.[9]

(11) Estoppel of Lien-Holder. The holder of a mechanic's lien cannot claim priority over a mortgage which he in effect procured to be made,[10] and where at the time of the execution of a mortgage it was agreed between the mortgagee and a lienor that the mortgage should be superior to any lien which the lienor might have for material and labor, the lienor is estopped from asserting priority for his lien.[11] But an appearance in an action to foreclose a mortgage by a prior mechanic's lien claimant, and waiver of service of papers, "except notice of sale and application for surplus moneys," does not import consent to come in subject to the mortgage, or estop the claimant, in the absence of any proof that the premises were, with his knowledge and consent, sold clear of the lien.[12]

(vii) *Purchase-Money Judgments.* Where upon the delivery of a deed the vendor takes a judgment against the purchaser for the unpaid purchase-money, which is entered the same day, such judgment has priority over mechanics' liens arising out of improvements commenced by the purchaser before the deed was delivered.[13]

(viii) *Purchase-Money Mortgages*[14] — (a) *To Vendors.* A purchase-money mortgage given prior to the accrual of the mechanic's lien will take priority thereof the same as any other mortgage.[15] The priority of a purchase-money mortgage is not, however, dependent upon priority in point of time, for it is well settled that where a person not the owner of the property, but in possession thereof under a contract of sale or otherwise, makes improvements thereon and subsequently receives a deed of the property, and at the same time executes and delivers to the vendor a purchase-money mortgage, such mortgage is prior to mechanics' liens arising out of the improvements.[16] But this rule applies only to a technical purchase-money mortgage given as part of the transaction by which the property is conveyed to the purchaser, and if the mortgagor had more than

9. Garrett *v.* Adams, (Tenn. Ch. App. 1897) 39 S. W. 730.

10. Ponder *v.* Safety Bldg., etc., Co., 59 S. W. 858, 523, 22 Ky. L. Rep. 1074.

Canceling notice of lien.— Where a materialman, after having filed a notice of lien, although it was unnecessary, canceled the notice on being told by the owner that he could not borrow money by mortgage unless the notice was canceled, and another lent money, taking a mortgage as security, and part of the money borrowed was paid to the lienor, he was estopped to claim that the mechanic's lien was prior to the mortgage, although he did not know who was going to lend the money. Spargo *v.* Nelson, 10 Utah 274, 37 Pac. 495.

11. Acker *v.* Massman, 12 Ind. App. 696, 41 N. E. 77.

12. Emigrant Industrial Sav. Bank *v.* Goldman, 75 N. Y. 127.

13. Stoner *v.* Neff, 50 Pa. St. 258.

14. See, generally, Mortgages.

15. Hill *v.* Aldrick, 48 Minn. 73, 50 N. W. 1020; Hoagland *v.* Lowe, 39 Nebr. 397, 58 N. W. 197; Kelly's Appeal, 1 Pa. Cas. 280, 2 Atl. 868; McCree *v.* Campion, 5 Phila. (Pa.) 9, holding that where the owner has completed the house according to his original plan and sold the same, taking a purchase-money mortgage, and the purchaser subsequently employs a paper-hanger to do papering work, which is not in the original plan of the building and is not necessary to make it fit for use, the lien of the paper-hanger cannot relate back to the commencement of the building so as to affect the holder of the purchase-money mortgage. See also Haupt Lumber Co. *v.* Westman, 49 Minn. 397, 52 N. W. 33. And see *supra*, IV, C, 2, b, (vi), (a), (1).

Effect of agreement to postpone purchase-money mortgage to another mortgage.— The fact that a vendor agrees that his purchase-money mortgage shall be subordinate to one given by the purchaser to obtain money with which to erect a building on the premises does not render it subordinate to mechanics' liens which should have been paid from the money so obtained by the purchaser. Hoagland *v.* Lowe, 39 Nebr. 397, 58 N. W. 197.

Under Ga. Code, § 1979, where an absolute deed of land is given, and a mortgage returned for the purchase-money and recorded at once, such mortgage is postponed to the lien of one who, without actual notice of the prior mortgage, furnishes material to the holder of the deed for improvements on the land, if the lien is properly recorded and sued upon. Tanner *v.* Bell, 61 Ga. 584.

16. *Connecticut.*— Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905, if the contract of sale gave the purchaser no right to do any act before title vested in him which might create a lien upon the land.

Indiana.— Erwin *v.* Acker, 126 Ind. 133, 25 N. E. 888.

Iowa.— Thorpe *v.* Durbon, 45 Iowa 192.

a momentary seizin the mechanics' liens have precedence over the mortgage which he gave after having acquired title,[17] notwithstanding the fact that such mortgage was given to secure unpaid purchase-money.[18] The status of a purchase-money mortgage given after mechanics' liens have attached is the same as that of the interest for the purchase-price of which it is given,[19] and hence in order for it to have priority the vendor's interest must be free of the mechanics' liens,[20] while if such liens have attached to the interest of the vendor they have priority over the purchase-money mortgage.[21] So where by the terms of a contract for the sale of land the purchaser is to make certain improvements before receiving title mechanics' liens growing out of such improvements take priority over a purchase-money mortgage given pursuant to the contract of sale.[22]

(B) *To Third Persons.* In determining whether a mortgage is entitled to priority as a purchase-money mortgage the test is not whether the mortgage is given to the vendor but whether it is to be used as purchase-money,[23] and hence where a prospective purchaser of property obtains a loan from a third person to pay the purchase-money, and a mortgage to secure such loan is executed as part of the transaction by which the purchaser receives his deed, such mortgage has priority over mechanics' liens arising out of improvements on the property commenced by the purchaser before he acquired title.[24] But a third person advancing

Kansas.— Missouri Valley Lumber Co. *v.* Reid, 4 Kan. App. 4, 45 Pac. 722.

Massachussetts.—Rochford *v.* Rochford, 188 Mass. 108, 74 N. E. 299, 108 Am. St. Rep. 465; Saunders *v.* Bennett, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456; Perkins *v.* Davis, 120 Mass. 408.

Minnesota.— Moody *v.* Tschabold, 52 Minn. 51, 53 N. W. 1023; Oliver *v.* Davy, 34 Minn. 292, 25 N. W. 629.

Missouri.— Wilson *v.* Lubke, 176 Mo. 210, 75 S. W. 602, 98 Am. St. Rep. 503; Russell *v.* Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563.

Nevada.— Virgin *v.* Brubaker, 4 Nev. 31.

New Jersey.— Lamb *v.* Cannon, 38 N. J. L. 362; Gibbs *v.* Grant, 29 N. J. Eq. 419; Paul *v.* Hoept, 28 N. J. Eq. 11; Macintosh *v.* Thurston, 25 N. J. Eq. 242; Strong *v.* Van Deursen, 23 N. J. Eq. 369.

Wisconsin.— Rees *v.* Ludington, 13 Wis. 276, 80 Am. Dec. 741.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 372.

Contra.— Avery *v.* Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272.

Delay in recording.— Where, after the making of a contract for the purchase of land, the purchaser contracted with plaintiff for materials to be furnished by the latter for a house thereon, and the deed of the land and a mortgage for purchase-money were subsequently executed at the same time, but neither was recorded until after the materials had been furnished and a statement and claim of a mechanic's lien therefor had been filed, it was held that the lien of the mortgage was intrinsically superior to the mechanic's lien, and the omission of the mortgagee to record his mortgage until the deed was recorded was not to be construed as a waiver or estoppel, so as to subordinate the lien of the mortgage to that of plaintiff, although plaintiff had knowledge of the unrecorded deed but no notice of the mortgage. Oliver *v.* Davy, 34 Minn. 292, 25 N. W. 629.

17. Osborne *v.* Barnes, 179 Mass. 597, 61 N. E. 276; Saunders *v.* Bennett, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456.

18. Ansley *v.* Pasahro, 22 Nebr. 662, 35 N. W. 885.

19. McCausland *v.* West Duluth Land Co., 51 Minn. 246, 53 N. W. 464.

20. Moody *v.* Tschabold, 52 Minn. 51, 53 N. W. 1023; McCausland *v.* West Duluth Land Co., 51 Minn. 246, 53 N. W. 464.

21. McCausland *v.* West Duluth Land Co., 51 Minn. 246, 53 N. W. 464; Kittredge *v.* Neumann, 26 N. J. Eq. 195.

Where a partly finished building was sold and a mortgage given for the purchase-money and recorded, and the vendee then went on with the building, the lien of the mechanics who completed the building after the recording of the mortgage was prior to the mortgage. American F. Ins. Co. *v.* Pringle, 2 Serg. & R. (Pa.) 138.

22. Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905, but only to the extent of the labor and materials necessary to the improvement as designated in the contract of sale. See also Haupt Lumber Co. *v.* Westman, 49 Minn. 397, 52 N. W. 33, as to liens relating back to time anterior to giving of mortgage.

23. Jackson *v.* Austin, 15 Johns. (N. Y.) 477; Commonwealth Title Ins., etc., Co. *v.* Ellis, 8 Pa. Dist. 5, 22 Pa. Co. Ct. 86.

24. *Alabama.*— Birmingham Bldg., etc., Assoc. *v.* Boggs, 116 Ala. 587, 22 So. 852, 67 Am. St. Rep. 147.

Connecticut.— Middletown Sav. Bank *v.* Fellowes, 42 Conn. 36.

Massachusetts.— Thaxter *v.* Williams, 14 Pick. 49.

New Jersey.— New Jersey Bldg., etc., Co. *v.* Bachelor, 54 N. J. Eq. 600, 35 Atl. 745.

Pennsylvania.— Campbell's Appeal, 36 Pa. St. 247, 78 Am. Dec. 375; Weldon *v.* Gibbon, 2 Phila. 176.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 373.

the purchase-money and taking a purchase-money mortgage can stand in no better position than the vendor, and if mechanics' liens have attached to the vendor's interest in the property they take priority over the mortgage.[25]

(IX) *VENDOR'S LIENS.*[26] Where at the time a mechanic's lien accrues the property is subject to a vendor's lien, such vendor's lien is of course entitled to priority,[27] and where a person in possession of property under a contract of sale commences improvements thereon, and subsequently the title is conveyed to him, the vendor expressly reserving a vendor's lien for the unpaid purchase-money, the vendor's lien takes priority over mechanics' liens arising out of the improvement.[28] Where the vendor required or authorized the making of the improvement the mechanics' liens are prior to the vendor's lien for unpaid purchase-money.[29] Where the vendor's lien is released as to a mortgage which is inferior to a mechanic's lien, the mortgagee is subrogated to the lien of the vendor and entitled to priority as to the amount secured thereby.[30]

c. Rule as to Buildings or Improvements — (I) *PRIORITY OF MECHANICS' LIENS.* In the absence of any statute providing otherwise an encumbrance upon the land, existing before a building is commenced, attaches to the building as it progresses, and is entitled to priority, as to the building as well as the land, over mechanics' liens arising out of the construction of the building;[31] but in a great many jurisdictions where a building or improvement is erected upon encumbered land, mechanics' liens upon the building or improvement as distinct from the land

Mortgage has priority only to the extent that it secures purchase-money.— New Jersey Bldg., etc., Co. *v.* Bachelor, 54 N. J. Eq. 600, 35 Atl. 745.

25. Finlayson *v.* Crooks, 47 Minn. 74, 49 N. W. 398, 645.

26. Vendors' liens generally see VENDOR AND PURCHASER.

27. *California.*— Kuschel *v.* Hunter, (1897) 50 Pac. 397.

Illinois.— Wing *v.* Carr, 86 Ill. 347.

Iowa.— Stockwell *v.* Carpenter, 27 Iowa 119.

Kentucky.— Cooley *v.* Black, 105 Ky. 267, 48 S. W. 1075, 20 Ky. L. Rep. 1181 [*following* Orr *v.* Batterton, 14 B. Mon. 100].

Ohio.— Neil *v.* Kinney, 11 Ohio St. 58; Walbridge *v.* Barrett, 21 Ohio Cir. Ct. 522, 11 Ohio Cir. Dec. 634; Anderson *v.* Gregg, 10 Ohio Cir. Ct. 311, 6 Ohio Cir. Dec. 629. See also Mutual Aid Bldg., etc., Co. *v.* Gashe, 56 Ohio St. 273, 46 N. E. 985.

Tennessee.— Leming *v.* Stephens, 95 Tenn. 444, 32 S. W. 961. See also Gillespie *v.* Bradford, 7 Yerg. 168, 27 Am. Dec. 494.

Texas.— Land Mortg. Bank *v.* Quanah Hotel Co., 89 Tex. 332, 34 S. W. 730 [*affirming* (Civ. App. 1895) 32 S. W. 573]; Watson *v.* Markham, 33 Tex. Civ. App. 476, 77 S. W. 660.

Wisconsin.— Rees *v.* Ludington, 13 Wis. 276, 80 Am. Dec. 741.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 371.

Right of vendor in executory contract of sale see II, C, 3, i.

Ky. Act, March 20, 1876, providing that liens of laborers and supply men shall be superior to the lien of "any mortgage or other encumbrance heretofore or hereafter created," does not apply to a vendor's lien. Northern Bank *v.* Deckebach, 83 Ky. 154.

Removable fixtures.— The lien of one who furnishes removable fixtures is, as to such fixtures, prior to a vendor's lien on the land. Phelps *v.* Edwards, 52 Tex. 371.

When vendor's lien postponed.— A vendor is not entitled to a prior lien for the amount of the purchase-price which was to have been paid in cash at the time of the contract, but which was never paid, over a mechanic's lien for labor and material furnished in the erection of a house thereon by the purchaser under such circumstances as to make the lien attach to the land as well as to the building where the contract shows that the vendor did not intend to reserve any lien for such amount, but expressly gave the cost of the house priority over his claim for purchase-money. Janes *v.* Osborne, 108 Iowa 409, 79 N. W. 143.

28. Charleston Lumber, etc., Co. *v.* Brockmyer, 18 W. Va. 586.

29. Bohn Mfg. Co. *v.* Kountze, 30 Nebr. 719, 46 N. W. 1123, 12 L. R. A. 33 [*followed* in Millsap *v.* Ball, 30 Nebr. 728, 46 N. W. 1125]; Lee *v.* Gibson, 104 Tenn. 698, 58 S. W 330 [*following* Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136]. But *compare* Charleston Lumber, etc., Co. *v.* Brockmyer, 18 W. Va. 586.

30. Leming *v.* Stephens, 95 Tenn. 444, 32 S. W. 961, where the order of priority was held to be: (1) The mortgage to the amount of the unpaid purchase-money secured by the vendor's lien; (2) the mechanic's lien to the full amount thereof; (3) the mortgage as to the balance due thereon; and (4) the vendor's lien.

31. Monticello Bank *v.* Sweet, 64 Ark. 502, 43 S. W. 500; Cooley *v.* Black, 105 Ky. 267, 48 S. W. 1075, 20 Ky. L. Rep. 1181 [*following* Orr *v.* Batterton, 14 B. Mon. (Ky.) 100]; Bridwell *v.* Clark, 39 Mo. 170; Lyle *v.* Ducomb, 5 Binn. (Pa.) 585. See also English *v.* Foote, 8 Sm. & M. (Miss.) 444.

are allowed priority over the previous encumbrances,[32] although as to the land itself the prior encumbrance is not displaced but remains superior to the mechanics' liens.[33]

(II) *Susceptibility of Building or Improvement to Removal.* The most usual method of enforcing the priority of a mechanic's lien as to a building or improvement over a preëxisting encumbrance is by a sale of such building or improvement separate from the land, the purchaser having the right to remove

32. *Alabama.*— Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305; Turner *v.* Robbins, 78 Ala. 592. See also Hanchey *v.* Hurley, 129 Ala. 306, 30 So. 742.

Colorado.— Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419. See also Seely *v.* Neill, (1906) 86 Pac. 334.

Illinois.— Wing *v.* Carr, 86 Ill. 347; Smith *v.* Moore, 26 Ill. 392.

Indiana.— Dakota Bldg., etc., Assoc. *v.* Coburn, 150 Ind. 684, 50 N. E. 885; Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266; Thorpe Block Sav., etc., Assoc. *v.* James, 13 Ind. App. 522, 41 N. E. 978.

Iowa.— Tower *v.* Moore, 104 Iowa 345, 73 N. W. 823; Early *v.* Burt, 68 Iowa 716, 28 N. W. 35; Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 541, 3 N. W. 547; Conrad *v.* Starr, 50 Iowa 470; Stockwell *v.* Carpenter, 27 Iowa 119.

Kansas.— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473.

Kentucky.— Grainger *v.* Old Kentucky Paper Co., 105 Ky. 683, 49 S. W. 477, 20 Ky. L. Rep. 1491, under the act of March 2, 1869.

Louisiana.— Baltimore *v.* Parlange, 23 La. Ann. 365. See also Jamison *v.* Barelli, 20 La. Ann. 452.

Mississippi.— McAllister *v.* Clopton, 51 Miss. 257; Ivey *v.* White, 50 Miss. 142; Otley *v.* Haviland, 36 Miss. 19.

Missouri.— Crandall *v.* Cooper, 62 Mo. 478; Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737; State *v.* Drew, 43 Mo. App. 362; McAdow *v.* Sturtevant, 41 Mo. App. 220; Fisher *v.* Anslyn, 30 Mo. App. 316; Hall *v.* St. Louis Mfg. Co., 22 Mo. App. 33; Hall *v.* Mullanphy Planing Mill Co., 16 Mo. App. 454; Haeussler *v.* Thomass, 4 Mo. App. 463.

Montana.— Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441.

North Dakota.— James River Lumber Co. *v.* Danner, 3 N. D. 470, 57 N. W. 343.

Oregon.— Smith *v.* Wilkins, 38 Oreg. 583, 64 Pac. 760 [*following* Cooper Mfg. Co. *v.* Delahunt, 36 Oreg. 402, 51 Pac. 649, 60 Pac. 1].

South Dakota.— Laird-Norton Co. *v.* Herker, 6 S. D. 509, 62 N. W. 104.

Texas.— Land Mortg. Bank *v.* Quanah Hotel Co., 89 Tex. 332, 34 S. W. 730 [*affirming* (Civ. App. 1895) 32 S. W. 573]; People's Bldg., etc., Assoc. *v.* Clark, (Civ. App. 1896) 33 S. W. 881.

Virginia.— Hudson *v.* Barham, 101 Va. 63, 43 S. E. 189, 99 Am. St. Rep. 849; Fidelity L. & T. Co. *v.* Dennis, 93 Va. 504, 25 S. E. 546.

Washington.— Bell *v.* Groves, 20 Wash. 602, 56 Pac. 401.

United States.— Chauncey *v.* Dyke, 119 Fed. 1, 55 C. C. A. 579; *In re* Matthews, 109 Fed. 603, both under Ark. Acts (1895), p. 217. See also Harris *v.* Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 355, 370, 374.

Statute not retroactive.— Where, at the time of its execution, a mortgage on land was entitled to priority over a lien for materials subsequently furnished for the erection of a building thereon, the mortgagee's rights are not affected by the subsequent passage of an act giving such liens priority over existing mortgages as to the building. Monticello Bank *v.* Sweet, 64 Ark. 502, 43 S. W. 500.

In New Jersey a mechanic's lien has no priority over a previous encumbrance even as to the building erected, save in the case of buildings erected by a tenant on leased property and removable as between the landlord and tenant. Heidelbach *v.* Jacobi, 28 N. J. Eq. 544. *Compare* under earlier statutes Newark Lime, etc., Co. *v.* Morrison, 13 N. J. Eq. 133; Whitenack *v.* Noe, 11 N. J. Eq. 321.

33. *Alabama.*— Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305.

Colorado.— Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419. See also Seely *v.* Neill, (1906) 86 Pac. 334.

Illinois.— Wing *v.* Carr, 86 Ill. 347; Smith *v.* Moore, 26 Ill. 392.

Indiana.— Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266; Thorpe Block Sav., etc., Assoc. *v.* James, 13 Ind. App. 522, 41 N. E. 978.

Iowa.— Tower *v.* Moore, 104 Iowa 345, 73 N. W. 823; Stockwell *v.* Carpenter, 27 Iowa 119.

Mississippi.— McAllister *v.* Clopton, 51 Miss. 257; Ivey *v.* White, 50 Miss. 142; Otley *v.* Haviland, 36 Miss. 19; McAdow *v.* Sturtevant, 41 Mo. App. 220; Hall *v.* St. Louis Mfg. Co., 22 Mo. App. 33.

Montana.— Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441.

Oregon.— Smith *v.* Wilkins, 38 Oreg. 583, 64 Pac. 760.

Texas.— Land Mortg. Bank *v.* Quanah Hotel Co., 89 Tex. 332, 34 S. W. 730 [*affirming* (Civ. App. 1895) 32 S. W. 573].

Virginia.— Hudson *v.* Barham, 101 Va. 63, 43 S. E. 189, 99 Am. St. Rep. 849; Fidelity L. & T. Co. *v.* Dennis, 93 Va. 504, 25 S. E. 546.

United States.—Chauncey *v.* Dyke, 119 Fed. 1, 55 C. C. A. 579.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 355, 370, 374.

Apportionment of rent.— If one person

the same;[34] and it follows that the lien claimant's right to priority is dependent upon the building or improvement being of such a character that it is susceptible of removal from the land,[35] and if the building or improvement is not susceptible of removal, the mechanic's lien is postponed to the prior encumbrance.[36] In some states, however, the priority to which the mechanic's lien is entitled is accorded by an apportionment of the respective values of the building or improvement and of the land, and a distribution of the proceeds of the entire property in accordance with such apportionment,[37] and where such system prevails it would seem that the right of the mechanic's lien claimant to priority as to the proportionate value of the building or improvement is in no way dependent upon the latter being susceptible of removal from the land.[38]

(III) *LOAN MADE FOR PURPOSE OF IMPROVEMENT.* In some jurisdictions it is held that where a loan secured by mortgage is made for the purpose of raising funds for the construction of a building, and the money is so used, the mortgage has priority over mechanic's liens arising out of such construction as to the building as well as to the land.[39]

(IV) *REPLACEMENT OF BUILDINGS DESTROYED BY FIRE.* Where buildings on mortgaged premises are destroyed by fire a mechanic's lien arising out of the erection of new buildings in their place takes priority over the mortgage,[40] even though the mortgage permitted the use of insurance money for the erection of such new buildings.[41] But where the building is only partially destroyed a lien arising out of the repairing thereof is postponed to the prior mortgage.[42]

(V) *REPAIRS OR ADDITIONS TO EXISTING BUILDINGS.* A mechanic's lien arising, not out of the erection or construction of an independent structure, but out of repairs or additions to an existing building, has been held to have no priority over a preëxisting mortgage even as to the building,[43] notwithstanding

holds a lien on machinery and fixtures, and another on the building in which they are situated, and rent has been received for the use of the entire property by trustees before a sale under a decree, in apportioning such rent the holder of the lien on the machinery should be reasonably allowed for the greater wear and tear of the machinery. McKim *v.* Mason, 3 Md. Ch. 186.

34. See *infra*, VIII, N, 2, b.

35. See Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 541, 3 N. W. 547.

36. Tower *v.* Moore, 104 Iowa 345, 73 N. W. 823; Conrad *v.* Starr, 50 Iowa 470; O'Brien *v.* Pettis, 42 Iowa 293 [*following* Getchell *v.* Allen, 34 Iowa 559]; Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; James River Lumber Co. *v.* Danner, 3 N. D. 470, 57 N. W. 343, holding accordingly that a lien arising out of the replacing of parts of a building destroyed by fire was subordinate to a prior mortgage.

The fact that a house rests on posts instead of masonry does not give the builder a right, as against a prior mortgagee, to remove such house, on the failure of the owner of the premises to pay for the labor and material used, where, at the time of its erection, there was no agreement to that effect between the parties. Rowland *v.* Sworts, 17 N. Y. Suppl. 399.

37. See *infra*, VIII, N, 2, b.

38. See Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419; Fidelity L. & T. Co. *v.* Dennis, 93 Va. 504, 25 S. E. 546.

39. Kiene *v.* Hodge, 90 Iowa 212, 77 N. W. 717 (where the loan was in excess of the value of the land without the buildings); Wroten *v.* Armat, 31 Gratt. (Va.) 228. But *compare* Dakota Bldg., etc., Assoc. *v.* Coburn, 150 Ind. 684, 50 N. E. 885.

Use of portion only of amount lent for improvement of property.— Under Ark. Acts (1895), p. 217, § 3, providing that where the prior encumbrance was executed to raise money with which to make the improvements, it should be prior to mechanics' liens as to the improvements, and section 10, providing that contractors for the erection of improvements must on request furnish to the mortgagee a full list of the claims of those laboring on the improvement, or furnishing material therefor, where a mortgage was executed for the purpose of securing money for improvements, but only a portion thereof went to pay for labor or materials, the balance being turned over to the mortgagor who diverted it from that purpose, the liens of materialmen and laborers on the improvements were superior to the lien of the mortgagee as to the portion of the loan turned over to the mortgagor. Chauncey *v.* Dyke, 119 Fed. 1, 55 C. C. A. 579.

40. People's Bldg., etc., Assoc. *v.* Clark, (Tex. Civ. App. 1896) 33 S. W. 881.

41. People's Bldg., etc., Assoc. *v.* Clark, (Tex. Civ. App. 1896) 33 S. W. 881.

42. Schulenburg *v.* Hayden, 146 Mo. 583, 48 S. W. 472 (although the old plan is considerably altered and enlarged); James River Lumber Co. *v.* Donner, 3 N. D. 470, 57 N. W. 343. See *infra*, IV, C, 2, c, (V).

43. Getchell *v.* Allen, 34 Iowa 559 [*approved* in Neilson *v.* Iowa Eastern R. Co., 44

the fact that such mortgage was executed and recorded prior to the erection of the building.[44]

(VI) *Loss of Priority.* It has been held that a lienor who is entitled to priority as to the improvement but not as to the land loses such priority by proceeding against both the land and the improvement.[45]

d. Rule as to Increased Value of Property. Under some statutes, where improvements are made upon property which is already encumbered, the mechanic's lien is entitled to priority as to the increased value of the property arising from such improvements;[46] but the prior encumbrance retains its priority to the extent of the value of the security before the work began,[47] and where it does not clearly appear that the selling value of the property has been increased by the improvement the lien is entitled to no priority whatever.[48]

V. ASSIGNMENT.

A. Assignment of Inchoate Lien — 1. In General. In some jurisdictions it is held that an inchoate mechanic's lien may be assigned so as to invest the assignee with the right to perfect and enforce the same[49] in the same manner and

Iowa 71]; Schulenburg *v.* Hayden, 146 Mo. 583, 48 S. W. 472; Reed *v.* Lambertson, 53 Mo. App. 76; Haeussler *v.* Thomas, 4 Mo. App. 463; James River Lumber Co. *v.* Danner, 3 N. D. 470, 57 N. W. 343. But *compare* Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305 [*followed* in Christian, etc., Grocery Co. *v.* Kling, 121 Ala. 292, 25 So. 629] (holding that in such case the mechanic's lien has priority to the extent of the enhancement in value of the property); Croskey *v.* Northwestern Mfg. Co., 48 Ill. 481.

Under Ky. Act, March 2, 1869, there is a prior lien for repairs, alterations, etc., upon such machinery, fixtures, etc., as are capable of being removed from the building without serious injury thereto. Grainger *v.* Old Kentucky Paper Co., 105 Ky. 683, 49 S. W. 477, 20 Ky. L. Rep. 1491.

44. Reed *v.* Lambertson, 53 Mo. App. 76.

45. State *v.* Drew, 43 Mo. App. 362.

46. Croskey *v.* Northwestern Mfg. Co., 48 Ill. 481; Dufton *v.* Horning, 26 Ont. 252; Kennedy *v.* Haddow, 19 Ont. 240; Broughton *v.* Smallpiece, 25 Grant Ch. (U. C.) 290; Douglas *v.* Chamberlain, 25 Grant Ch. (U. C.) 288. *Contra*, Curtis *v.* Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314.

47. Croskey *v.* Northwestern Mfg. Co., 48 Ill. 481; Kennedy *v.* Haddow, 19 Ont. 240; Broughton *v.* Smallpiece, 25 Grant Ch. (U. C.) 290.

Improvements to which lien claimant did not contribute.— The word "land," as used in the Illinois statute providing that, where a mortgage of land to which a mechanic's lien attaches is the prior lien, it shall retain its priority to the extent of the value of the land at the time the contract is made with the mechanic or materialman, means the land with such improvements as were on it at the execution of the mortgage. Croskey *v.* Northwestern Mfg. Co., 48 Ill. 481.

48. Kennedy *v.* Haddow, 19 Ont. 240.

Where the improvements are destroyed by fire pending proceedings to enforce the mechanic's lien the claim of the lien-holder is at an end so far as the interests of a prior mortgagee are affected by it. Patrick *v.* Walbourne, 27 Ont. 221. See, generally, as to destruction of improvements, *infra*, VI, C, 2.

49. *Alabama.*— Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

Colorado.— Perkins *v.* Boyd, 16 Colo. App. 266, 65 Pac. 350; Sprague Inv. Co. *v.* Mouat Lumber Co., 14 Colo. App. 107, 60 Pac. 179.

Florida.— See Clarkson *v.* Louderback, 36 Fla. 660, 19 So. 887.

Iowa.— Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. Rep. 276 [*explaining* and *distinguishing* Langan *v.* Sankey, 55 Iowa 52, 7 N. W. 393; Brown *v.* Smith, 55 Iowa 31, 7 N. W. 401; Merchant *v.* Ottumwa Water Power Co., 54 Iowa 451, 6 N. W. 709; Decorah First Nat. Bank *v.* Day, 52 Iowa 680, 3 N. W. 728].

Kansas.— Brown *v.* Neosho County School Dist. No. 84, 48 Kan. 709, 29 Pac. 1069; Milwaukee Mechanics' Inv. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35. See also Hamilton *v.* Whitson, 5 Kan. App. 347, 48 Pac. 462.

Maine.— Murphy *v.* Adams, 71 Me. 113, 36 Am. Rep. 299 [*distinguishing* Pearsons *v.* Tincker, 36 Me. 384, and *followed* in Phillips *v.* Vose, 81 Me. 134, 16 Atl. 463].

Massachusetts.— See Wiley *v.* Connelly, 179 Mass. 360, 364, 60 N. E. 784, where it is said: "The filing of the certificate was not necessary in order to create the lien. It simply kept the lien alive and prevented its dissolution."

Michigan.— McAllister *v.* Des Rochers, 132 Mich. 381, 93 N. W. 887. But *compare* Fitzgerald *v.* Port Huron First Presb. Church, 1 Mich. N. P. 243.

Minnesota.— Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528; Davis *v.* Crookston Waterworks, etc., Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622.

Mississippi.— Kerr *v.* Moore, 54 Miss. 286.

Rhode Island.— McDonald *v.* Kelly, 14 R. I. 335.

to the same extent as the assignor might have done;[50] but in other jurisdictions the right to acquire a lien in the present or future is held to be a personal one[51] and not assignable,[52] so that while lienable claims may of course be assigned they carry no lien unless the lien has first been perfected by the person in whose favor the right to the lien primarily exists,[53] and the assignment of the claim or amount before the perfection of the lien destroys the right to a lien.[54]

South Dakota.— Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

Canada.— Kelly *v.* McKenzie, 1 Manitoba 169; Grant *v.* Dunn, 3 Ont. 376.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 375.

A receiver of a corporation may perfect and enforce a mechanic's lien to which the corporation is entitled. Andrews, etc., Iron Co. *v.* Isaac D. Smead Heating, etc., Co., 5 Ohio S. & C. Pl. Dec. 292, 7 Ohio N. P. 439.

Assigning debt without lien.— The person entitled to a mechanic's lien may waive it and may also assign the debt without the lien. Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. Rep. 276. As to waiver of lien see *infra*, VI, A.

50. Kerr *v.* Moore, 54 Miss. 286.

51. *Arkansas.*— Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564.

California.— Mills *v.* La Verne Land Co., 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168.

Missouri.— Griswold *v.* Carthage, etc., R. Co., 18 Mo. App. 52 [*followed* in Brown *v.* Chicago, etc., R. Co., 36 Mo. App. 458].

New York.— Rollin *v.* Cross, 45 N. Y. 766.

Oregon.— See Brown *v.* Harper, 4 Oreg. 89.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 375.

52. *Arkansas.*— Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564.

California.— Rauer *v.* Fay, 110 Cal. 361, 42 Pac. 902; Mills *v.* La Verne Land Co., 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168 [*followed* in McCrea *v.* Johnson, 104 Cal. 224, 37 Pac. 902]. See also Simons *v.* Webster, 108 Cal. 16, 40 Pac. 1056.

Georgia.— Hooper *v.* Sells, 58 Ga. 127.

Illinois.— See Cairo, etc., R. Co. *v.* Lackney, 78 Ill. 116; Phœnix Mut. L. Ins. Co. *v.* Batchen, 6 Ill. App. 621.

Indiana.— Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632. But *compare* Midland R. Co. *v.* Wilcox, 122 Ind. 84, 23 N. E. 506 [*following* Sinton *v.* The R. R. Roberts, 46 Ind. 476].

Missouri.— Griswold *v.* Carthage, etc., R. Co., 18 Mo. App. 52 [*followed* in Brown *v.* Chicago, etc., R. Co., 36 Mo. App. 458].

Montana.— Mason *v.* Germaine, 1 Mont. 263.

Nebraska.— Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722; Goodman, etc., Co. *v.* Pence, 21 Nebr. 459, 32 N. W. 219.

New York.— Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641]; Rollin *v.* Cross, 45 N. Y. 766 (unless the assignment is made for the benefit of the assignor, and to be held as his agent so that the lien may be preserved); Roberts *v.* Fowler, 3 E. D. Smith 632, 4 Abb. Pr. 263. See also Schalk *v.* Norris, 7 Misc. 20, 27 N. Y. Suppl. 390. But *compare* English *v.* Lee, 63 Hun 572, 18 N. Y. Suppl. 576.

North Carolina.— See Zachary *v.* Perry, 130 N. C. 289, 41 S. E. 533.

Oregon.— See Brown *v.* Harper, 4 Oreg. 89.

Texas.—Muscogee First Nat. Bank *v.* Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628.

Washington.— See Potvin *v.* Denny Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002; Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070, laborer's lien on lumber.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 375.

The mere appointment of a receiver for the lienor under a creditor's bill does not release the lien, it not appearing that the receiver ever laid claim to the demand. Barstow *v.* McLachlan, 99 Ill. 641.

53. Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632; Muscogee First Nat. Bank *v.* Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628.

54. Davis *v.* Crookston Waterworks, etc., Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622 (holding that where a lien claimant makes an absolute assignment of the sum due him, and not merely an assignment for the purpose of security, a lien statement afterward filed by the assignor on his own behalf will not inure to the benefit of his assignee but is void); Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722; Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641]. See also Rollin *v.* Cross, 45 N. Y. 766; Potvin *v.* Denny Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002; Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070. But *compare* Hallahan *v.* Herbert, 4 Daly (N. Y.) 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409].

The mere execution and delivery by the claimant of an order requesting the debtor to pay the amount of the claim to a third person will not defeat the right to a lien when no payment was ever made on such order and it is not shown that it was ever presented or even accepted by the person in whose favor it was drawn. Omaha Oil, etc., Co. *v.* Greater America Exposition, 4 Nebr. (Unoff.) 275, 93 N. W. 963 [*citing* Palmer *v.* Uncus Min. Co., 79 Cal. 614, 11 Pac. 666; Dowd *v.* Dowd, 126 Mich. 649, 86 N. W. 128; Ittner *v.* Hughes, 154 Mo. 55, 55 S. W. 267].

Transfer of note taken for amount due.— A contractor may file his notice of lien after assigning a note taken by him for the amount due, and may then assign the lien to the holder of the note. Linneman *v.* Bieber, 85 Hun (N. Y.) 477, 479, 33 N. Y. Suppl. 129, where it is said: "As the note was held by the plaintiff at the time the notice of lien

2. Requisites of Assignment.[55] Where the inchoate lien is held assignable, the mere assignment of a lienable claim will carry with it the right to perfect and enforce a lien without any express mention thereof.[56] Thus, where the holder of such a claim has made a general assignment for the benefit of his creditors, the assignee has full power to file a lien statement and acquire a lien.[57]

3. In Whose Name Lien Perfected.[58] According to some authorities the assignee of a lienable claim may perfect a lien in his own name,[59] but other cases hold that the lien should be perfected in the name of the assignor.[60]

4. In Whose Name Lien Enforced.[61] So also some authorities hold that where the right to the lien has been assigned, an action to enforce the lien may be brought in the name of the real party in interest,[62] while others require the lien to be enforced in the name of the assignor for the benefit of the assignee.[63]

5. Assignment as Security. Where a person entitled to a mechanic's lien, before filing the lien statement assigns his claim to another as collateral security for the payment of a debt due from him to such other, the assignor is entitled to file a lien statement afterward, and the same will secure his equitable rights in the claim assigned, and also inure to the benefit of the assignee.[64]

was filed by John F. Linneman it is contended that no lien was effectually created. It would have been futile if the note had been taken in satisfaction of the debt, and such would have been the effect if he had then ceased to have any relation to the note, because he then would have no interest to protect. . . . Mr. Linneman was contingently liable as indorser of the note, having the right at its maturity on default in payment by the maker to take up and hold it against him."

55. Assignment of perfected lien see *infra*, V, B, 2.

56. *Alabama.*— Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

Colorado.— Perkins *v.* Boyd, 16 Colo. App. 266, 65 Pac. 350 [*following* Sprague Inv. Co. *v.* Mouat Lumber, etc., Co., 14 Colo. App. 107, 60 Pac. 179].

Iowa.— Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 74 N. W. 689, 87 Am. St. Rep. 276 [*explaining* and *distinguishing* Langan *v.* Sankey, 55 Iowa 52, 7 N. W. 393; Brown *v.* Smith, 55 Iowa 31, 7 N. W. 401; Merchant *v.* Ottumwa Water Power Co., 54 Iowa 451, 6 N. W. 709; Decorah First Nat. Bank *v.* Day, 52 Iowa 680, 3 N. W. 728].

Kansas.— Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35.

Massachusetts.— Wiley *v.* Connelly, 179 Mass. 360, 60 N. E. 784.

Minnesota.— Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528.

Rhode Island.— McDonald *v.* Kelly, 14 R. I. 335.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 376.

Compare St. John *v.* Hall, 41 Conn. 522, holding that the mere transfer of a promissory note given by the owner's husband to the builder in payment of his claim for labor and materials does not transfer also the builder's right to a lien on the building where the committee appointed to find the facts finds that the builder, when he transferred the note, "did not convey or attempt to convey any rights or interests other than those represented by the note."

57. Sprague Inv. Co. *v.* Mouat Lumber, etc. Co., 14 Colo. App. 107, 60 Pac. 179.

58. In case of assignment of contract see *infra*, V, A, 7.

In case of change in personnel of contracting firm see *infra*, V, A, 6.

59. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48; Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528; Davis *v.* Crookston Waterworks, etc., Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622 (where the assignment is absolute and not merely as security); Kelly *v.* McKenzie, 1 Manitoba 169; Grant *v.* Dunn, 3 Ont. 376.

60. McDonald *v.* Kelly, 14 R. I. 335. See also Williams *v.* Weinbaum, 178 Mass. 238, 59 N. E. 626; Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

61. In case of assignment of contract see *infra*, V, A, 7.

In case of assignment of perfected lien see *infra*, V, B, 3.

In case of change in personnel of contracting firm see *infra*, V, A, 6.

62. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48; Brown *v.* Neosho County School Dist. No. 84, 48 Kan. 709, 29 Pac. 1069; Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35.

63. Williams *v.* Weinbaum, 178 Mass. 238, 59 N. E. 626; McDonald *v.* Kelly, 14 R. I. 335. See also Murphy *v.* Adams, 71 Me. 113, 36 Am. Rep. 299 [*followed* in Phillips *v.* Vose, 81 Me. 134] (laborer's lien on logs); Pearsons *v.* Tincker, 36 Me. 384 (laborer's lien on vessel).

64. Hamilton *v.* Whitson, 5 Kan. App. 347, 48 Pac. 462 (where the assignment was as security for a debt considerably less than the amount of the lienable claim); Davis *v.* Crookston Waterworks, etc., Co., 57 Minn. 402, 59 N. W. 582, 47 Am. St. Rep. 622; Ittner *v.* Hughes, 154 Mo. 55, 55 S. W. 267, 133 Mo. 679, 34 S. W. 1110; Potvin *v.* Denny

6. Change in Personnel of Contracting Firm. A change in the personnel of the contracting firm does not destroy the right to a lien for what was done or furnished pursuant to the contract;[65] but a lien may be perfected either, according to some authorities, in the names of the original partners,[66] or, according to others, in the names of the successors.[67] But the fact that a contractor, after making the contract, entered into a partnership with another person, who is the legal successor of the firm, has been held not to authorize such person to file a lien under the contract between the contractor and owner to which he was a stranger.[68]

7. Assignment of Contract. Where a building contract is assigned before completion, and completed by the assignee, the latter may file and enforce a lien in his own name if the effect of the assignment was to substitute him as original contractor, and the owner consented to such substitution;[69] but if the assignee completed the contract merely as representing the original contractor, without being substituted for him, the lien is properly perfected and enforced in the name of the assignee for the benefit of the assignor.[70]

B. Assignment of Perfected Lien — 1. General Rule. It is well established as a general rule that after a mechanic's lien has been perfected by filing the necessary papers, it may be assigned.[71]

Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002 [*distinguishing* Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070]. See also Shapiro *v.* Schultz, 32 Ind. App. 219, 68 N. E. 184, holding that where a building contractor assigned the contract and the amount to be earned thereunder to indemnify the assignee for loss as surety on the assignee's note for an amount smaller than would be due under the contract, it being agreed that the contractor should perfect his right to a mechanic's lien for the whole amount earned by the contract, and in an action to enforce the lien the assignee was made a party defendant, acquiesced in the course pursued by the assignor, and disclaimed all interest in the contract, the contractor did not, by such assignment, part with his right to sue to enforce the lien.

Parol evidence is admissible to show that an assignment, absolute on its face was in fact intended merely as security. Davis *v.* Crookston Waterworks, etc., Co., 57 Minn. 402, 47 Am. St. Rep. 622.

Reassignment to claimant.— A claimant's assignment of his claim to another as security merely, and its reassignment to him, prior to the filing by him of a claim of lien, leaves him the owner of the claim at the time of the filing, and entitled to enforce a lien in his own name. Macomber *v.* Bigelow, 126 Cal. 9, 58 Pac. 312; Weber *v.* Bushnell, 171 Ill. 587, 49 N. E. 728 [*reversing* 69 Ill. App. 26]; Currier *v.* Friedrick, 22 Grant Ch. (U. C.) 243.

65. *California.*— Simons *v.* Webster, 108 Cal. 16, 40 Pac. 1056 [*distinguishing* Mills *v.* La Verne Land Co., 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168], holding that such a case is not within the rule that the right to create a lien cannot be assigned.

Iowa.— German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314.

Kansas.— Brown *v.* Neosho County School Dist. No. 84, 48 Kan. 709, 29 Pac. 1069 [*followed* in Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35].

Massachusetts.— Busfield *v.* Wheeler, 14 Allen 139.

Missouri.— See Jones *v.* Hurst, 67 Mo. 568.

New York.— Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641], a member of a firm who acquires the interests of his partner does not stand simply in the position of an assignee.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 378.

66. German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314. See also Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

67. Brown *v.* Neosho County School Dist. No. 84, 48 Kan. 709, 29 Pac. 1069 [*followed* in Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35]. See also Simons *v.* Webster, 108 Cal. 16, 40 Pac. 1056; Ogden *v.* Alexander, 140 N. Y. 356, 35 N. E. 638 [*affirming* 63 Hun 56, 17 N. Y. Suppl. 641].

68. Bohem *v.* Seabury, 141 Pa. St. 594, 21 Atl. 674.

69. Pensacola R. Co. *v.* Schaffer, 76 Ala. 233 (holding that the case was not affected by the facts that the original contractor was not released from liability for his breach of contract in the past or that the assignee had agreed to pay the original contractor a part of the profits which he might realize from the transaction); Schalk *v.* Norris, 7 Misc. (N. Y.) 20, 27 N. Y. Suppl. 390 (where the court recognized the principle that an assignment merely of the right to receive payment under the contract would not give the assignee a right to file a lien); Iaege *v.* Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

70. McDonald *v.* Kelly, 14 R. I. 335. See also Moore *v.* Dugan, 179 Mass. 153, 60 N. E. 488, holding, however, that the assignee's joining in the petition, if improper, was no ground for giving a judgment for defendant.

71. *California.*— Rauer *v.* Fay, 110 Cal. 361, 42 Pac. 902.

Colorado.— Sprague Inv. Co. *v.* Mouat Lumber, etc., Co., 14 Colo. App. 107, 60 Pac. 179.

Florida.— Clarkson *v.* Louderback, 36 Fla.

2. Requisites of Assignment.[72] No particular words are necessary to constitute an assignment of the lien claim,[73] and if the intent of the parties to effect an assignment is clearly expressed, this is sufficient to accomplish the purpose.[74] A perfected mechanic's lien passes as an incident with the assignment of the demand for which it stands as security.[75] An assignment indorsed on the lien paper of "the within lien and all my rights thereunder" is an assignment of the debt as

660, 19 So. 887. In this case a notice of lien had been filed and recorded, although this was not required by the statute in force at the time.

Georgia.— See Hooper *v.* Sells, 58 Ga. 127.

Indiana.—Jenckes *v.* Jenckes, 145 Ind. 624, 44 N. E. 632; Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

Iowa.— Langan *v.* Sankey, 55 Iowa 52, 7 N. W. 393; Brown *v.* Smith, 55 Iowa 31, 7 N. W. 401.

Kansas.— Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35 [*following* Brown *v.* Neosho County School Dist. No. 84, 48 Kan. 709, 29 Pac. 1069].

Minnesota.— Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205 [*approved* in Kinney *v.* Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528].

Missouri.— Ittner *v.* Hughes, 154 Mo. 55, 55 S. W. 267; Allen *v.* Frumet Min., etc., Co., 73 Mo. 688; Jones *v.* Hurst, 67 Mo. 568.

Montana.— Mason *v.* Germaine, 1 Mont. 263.

Nebraska.— Hoagland *v.* Van Etten, 31 Nebr. 292, 47 N. W. 920, 23 Nebr. 462, 36 N. W. 755, 22 Nebr. 681, 35 N. W. 869; Goodman, etc., Co. *v.* Pence, 21 Nebr. 459, 32 N. W. 219; Rogers *v.* Omaha Hotel Co., 4 Nebr. 54.

Nevada.— Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

New York.— Davis *v.* New York, 75 N. Y. App. Div. 518, 78 N. Y. Suppl. 336 (holding that building contractors who became bankrupt while performing their contract were entitled to file a mechanic's lien and assign it to the trustee in bankruptcy that he might enforce it for them); Linneman *v.* Bieber, 85 Hun 477, 33 N. Y. Suppl. 129; Roberts *v.* Fowler, 3 E. D. Smith 632; Warwick First Nat. Bank *v.* Mitchell, 46 Misc. 30, 93 N. Y. Suppl. 231; Wood *v.* Grifenhagen, 37 Misc. 553, 75 N. Y. Suppl. 1014. See also Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24 [*affirming* 32 N. Y. App. Div. 489, 53 N. Y. Suppl. 145].

North Carolina.— See Boyle *v.* Rohbins, 71 N. C. 130.

Oregon.— Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822; Brown *v.* Harper, 4 Oreg. 89.

Pennsylvania.— Keim *v.* McRoberts, 18 Pa. Super. Ct. 167.

Rhode Island.— McDonald *v.* Kelly, 14 R. I. 335.

South Carolina.— Oliver *v.* Fowler, 22 S. C. 534.

South Dakota.— Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

Texas.— Muscogee First Nat. Bank *v.* Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628. See also House *v.* Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654.

Virginia.— Iaege *v.* Bossieux, 15 Gratt. 83, 76 Am. Dec. 189.

Washington.— Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729.

Wisconsin.— The courts have held that in the absence of statute the lien, even though perfected, is not assignable (Caldwell *v.* Lawrence, 10 Wis. 331), and an assignment of the claim destroys the lien (Tewksbury *v.* Bronson, 48 Wis. 581, 4 N. W. 749); and it is not revived by a reassignment to the original claimant (Tewksbury *v.* Bronson, *supra*); and while Rev. St. (1898) § 3316, makes the lien assignable (Iron River Bank *v.* Iron River, 91 Wis. 596, 65 N. W. 368) that statute, with its limitations and conditions, is the measure of assignability, and an assignment not in compliance with the statutory requirements destroys the lien (Shearer *v.* Browne, 102 Wis. 585, 78 N. W. 744). The remedy given by Rev. St. § 3328, providing that any subcontractor who has furnished materials to a principal contractor for any building for any school-district, etc., may maintain an action therefor against such principal contractor and such school-district jointly, etc., is assignable. Iron River Bank *v.* Iron River, *supra*.

United States.—Davis *v.* Bilsland, 18 Wall. 659, 21 L. ed. 969, under Montana statute.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 375.

72. Assignment of inchoate lien see *supra*, V, A, 2.

73. Clarkson *v.* Louderback, 36 Fla. 660, 19 So. 887; Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

74. Clarkson *v.* Louderback, 36 Fla. 660, 19 So. 887.

75. *California.*— Rauer *v.* Fay, 110 Cal. 361, 42 Pac. 902.

Indiana.— Truehlood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

Missouri.— Allen *v.* Frumet Min., etc., Co., 73 Mo. 688; Jones *v.* Hurst, 67 Mo. 568.

Montana.— Mason *v.* Germaine, 1 Mont. 263.

Nebraska.— Goodman, etc., Co. *v.* Pence, 21 Nebr. 459, 32 N. W. 219.

Oregon.— Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822, holding that an assignment of "our claim against M" for materials furnished on a building, made after the filing of the lien and prior to the commencement of the suit, is sufficient to constitute an assignment of the lien as against the owner; both the assignor and assignee testifying that it was intended as an assignment of the lien, in order that it

well as of the lien.[76] According to some authorities an assignment of the lien must be in writing,[77] but it has also been held that the lien may be assigned by parol.[78]

3. In Whose Name Lien Enforced.[79] According to some authorities the assignee may enforce the lien in his own name,[80] but it has also been held that the lien

might be foreclosed in the same suit with the lien of the assignee.

Rhode Island.—McDonald *v.* Kelly, 14 R. I. 335.

Texas.— Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 376.

Lien will not pass except by assignment of debt.— Ritter *v.* Stevenson, 7 Cal. 388.

76. Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

77. Ritter *v.* Stevenson, 7 Cal. 388 (holding that as the account carries with it the lien, which is an encumbrance upon the land or an estate or interest therein, an assignment thereof must be in writing); Wood *v.* Grifenhagen, 37 Misc. (N. Y.) 553, 75 N. Y. Suppl. 1014 (holding that under the New York statute the assignment must be by a written instrument signed and acknowledged by the lienor); Shearer *v.* Browne, 102 Wis. 585, 78 N. W. 744 (holding that under the Wisconsin statute the assignment must be in writing and notice thereof must be given to the owner within fifteen days and if the statute is not complied with the lien is waived by the assignment thereof).

The mere signing of an assignment without delivery is insufficient.— Ritter *v.* Stevenson, 7 Cal. 388.

A finding that the claim was transferred and assigned imports, in the absence of anything to show the contrary, that the court found upon sufficient evidence that the claim was assigned in writing. Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890.

78. Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47, so holding on the ground that the account, being a chose in action, is assignable either in writing or verbally and the assignment of the account carries the lien with it.

79. In case of assignment of inchoate lien see *supra*, V, A, 4.

80. *Minnesota.*— Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205.

Missouri.— Ittner *v.* Hughes, 154 Mo. 55, 55 S. W. 267; Goff *v.* Papin, 34 Mo. 177, holding that the assignee is a party to the contract by substitution.

Nebraska.— Hoagland *v.* Van Etten, 31 Nebr. 292, 47 N. W. 920, 23 Nebr. 462, 36 N. W. 755, 22 Nebr. 681, 35 N. W. 869; Rogers *v.* Omaha Hotel Co., 4 Nebr. 54.

Nevada.— Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

Oregon.— Nottingham *v.* McKendrick, 38 Oreg. 495, 57 Pac. 195, 63 Pac. 822.

South Carolina.— Oliver *v.* Fowler, 22 S. C. 534.

South Dakota.— Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

Texas.—House *v.* Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654.

Virginia.— laege *v.* Bossieux, 15 Gratt. 83, 76 Am. Dec. 189.

United States.— Davis *v.* Bilsland, 18 Wall. 659, 21 L. ed. 969, under Montana statute.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 470.

Substitution of assignee as plaintiff.— Where the lien is assigned after the commencement of proceedings to enforce it the assignee should be substituted as plaintiff. Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729. See also Hawkins *v.* Mapes-Reeves Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794. An order, made upon notice to defendant, substituting the assignee of a claim under an assignment as collateral security as plaintiff in place of the assignor is in effect an adjudication that the assignee has such an interest in the claim under the assignment as entitles him to prosecute the action. Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24 [*affirming* 32 N. Y. App. Div. 489, 53 N. Y. Suppl. 145]. If plaintiff is substituted as assignee after defendant has defaulted, and seeks judgment in his own name, there should be filed a supplemental pleading by the substituted plaintiff because the default in failing to answer the original complaint amounts only to a consent that the original plaintiff might have judgment and not to a consent that a stranger to the record may take judgment, and further because defendant has a right to contest the assignment or set up any counterclaim he might have against the assignee. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Assignment for purposes of suit.— In Nevada and Texas it has been held that where various holders of mechanics' liens assigned their liens to one person upon an understanding that he was to bring suit in his own name, each assignor to bear his proportion of the expense incurred, and to share *pro rata* in the amount realized, a suit by such assignee on all the liens might be maintained. Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219; House *v.* Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654. In Nebraska, however, it has been held that an assignee for the purpose of suing merely is not the real party in interest under the statute requiring an action to be brought by the real party in interest (Hoagland *v.* Van Etten, 22 Nebr. 681, 35 N. W. 869, 23 Nebr. 462, 36 N. W. 755), but where the individual liens are small, and the assignment thereof was in the interest of economy on behalf of both the lienors and defendant, it is proper to permit plaintiff to acquire the beneficial interest as well as the legal title so that he may proceed with the action (Hoagland *v.* Van Etten, 23 Nebr.

should be enforced in the name of the assignor.[81] An assignment of the claim as collateral security has been held not to preclude the assignor from bringing an action to enforce it;[82] but it has also been held that where a note evidencing a debt secured by a mechanic's lien has been delivered, unindorsed, to another person, as collateral security, such person may, in the names of himself and the lienor, maintain a petition for an account, foreclosure of the lien, and equitable disposition of the funds.[83] Where the lienor, before the commencement of an action to enforce the lien, assigns a part of his claim to another person, such assignee is not a necessary party to the action.[84]

C. Rights of Assignee. The assignee of a mechanic's lien occupies the same position as the assignor,[85] having the same rights,[86] and being subject to the same equities in regard to the original parties as the law gives to the assignee of a judgment or any non-negotiable chose in action.[87] A purchaser of a mechanic's lien who pays therefor less than the face value is not, as against other lien claimants, limited to a recovery of the amount he paid, but may recover the face value, or if the fund be not sufficient to pay all liens in full, he is entitled to a share proportionate to the face value.[88] After a claim and the right to a mechanic's lien therefor have been assigned, the rights of the assignor cannot be affected by any statement made by the assignee in a petition to be declared a bankrupt, unless such statement is ratified by the assignee.[89] Payments made by the owner to the assignor after the assignment, but in good faith and without notice thereof, may be set off against the assignee;[90] but an owner who, after the termination of the original building contract without the fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment, entered into a new contract with the assignor with reference to the same subject-matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract.[91] The assignee can stand in no better position than his assignor,[92] and hence if the assignor had waived his right to a lien prior to the assignment,[93] or the claim is not of such a character as would have entitled the assignor to a lien,[94] the assignee can enforce no lien.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.[95]

A. Waiver and Estoppel—1. LIEN MAY BE WAIVED. The principle that a person of full age and acting *sui juris* can waive a statutory or even a constitu-

462, 36 N. W. 755, 31 Nebr. 292, 47 N. W. 920).

81. Phœnix Mut. L. Ins. Co. *v.* Batchen, 6 Ill. App. 621 (holding that where the lien is assigned pending a proceeding to enforce it, the assignee is not a necessary party and a decree in the name of the assignor for the use of the assignee is proper); Hallahan *v.* Herbert, 57 N. Y. 409 [*affirming* 4 Daly 209, 11 Abb. Pr. N. S. 326], under Laws (1851), c. 513, as amended by Laws (1855), c. 404.

82. Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794 [*affirmed* in 178 N. Y. 236, 70 N. E. 783].

83. Friedman *v.* Roderick, 20 Ill. App. 622.

84. Boyle *v.* Robbins, 71 N. C. 130.

85. Goldman *v.* Brinton, 90 Md. 259, 44 Atl. 1029.

86. Goldman *v.* Brinton, 90 Md. 259, 44 Atl. 1029; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643; Rogers *v.* Omaha Hotel Co., 4 Nebr. 54; Keim *v.* McRoberts, 18 Pa. Super. Ct. 167.

Objection to other liens.— An assignee of a mechanic's lien filed by a contractor has a standing to object to the validity of a lien filed by a subcontractor. Keim *v.* McRoberts, 18 Pa. Super. Ct. 167.

87. Goldman *v.* Brinton, 90 Md. 259, 44 Atl. 1029, assignee takes subject to equities against assignor.

88. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

89. Kudner *v.* Bath, 135 Mich. 241, 97 N. W. 685.

90. Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24 [*affirming* 32 N. Y. App. Div. 489, 53 N. Y. Suppl. 145].

91. Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24 [*affirming* 32 N. Y. App. Div. 489, 53 N. Y. Suppl. 145].

92. Muscogee First Nat. Bank *v.* Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628.

93. Kent Lumber Co. *v.* Ward, 37 Wash. 60, 79 Pac. 485.

94. Muscogee First Nat. Bank *v.* Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628.

95. Loss of lien through failure to comply with statutory requirements see *supra*, III.

tional provision in his own favor, affecting simply his property or alienable rights and not involving considerations of public policy,[96] applies to mechanics' liens,[97] and when the lien has been once waived it cannot afterward be revived.[98]

2. What Amounts to Waiver — a. In General. What constitutes a waiver is essentially a question of intention.[99] A waiver of a mechanic's lien may be inferred or implied from the course of dealing between the parties[1] or acts showing that such was their intention;[2] but in order to establish a waiver the intention to waive must clearly appear,[3] and a waiver of the lien will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby[4] unless by his conduct the opposite party was misled to his prejudice into the honest belief that such waiver was intended or consented to.[5] The mere fact that neither of the parties to the contract contemplated a lien does not constitute a waiver thereof,[6] but the submission to arbitration of the matters in dispute under a contract is a waiver of a right to a mechanic's lien.[7] The mere fact that a person furnishing material for improvements on mortgaged premises knew that the mortgagor had executed a bond to keep the premises free from

Loss of lien through delay, etc., in enforcement see *infra*, VIII, F, 1, a.

96. Phyfe *v.* Eimer, 45 N. Y. 102; Buel *v.* Lockport, 3 N. Y. 197; Tombs *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 583; Matthews *v.* Young, 16 Misc. (N. Y.) 525, 40 N. Y. Suppl. 26.

97. *California.*— Bowen *v.* Aubrey, 22 Cal. 566.

Louisiana.— Consolidated Engineering Co. *v.* Crowley, 105 La. 615, 30 So. 222.

Maryland.— Pinning *v.* Skipper, 71 Md. 347, 18 Atl. 659; Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530.

Missouri.— Sanders Pressed Brick Co. *v.* Barr, 76 Mo. App. 380; Lee *v.* Hassett, 39 Mo. App. 67.

New York.— Matthews *v.* Young, 16 Misc. 525, 40 N. Y. Suppl. 26.

Ohio.— Portsmouth Iron Co. *v.* Murray, 38 Ohio St. 323.

Oregon.— Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

Utah.— Dwyer *v.* Salt Lake City Copper Mfg. Co., 14 Utah 339, 47 Pac. 311.

Wisconsin.— Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351.

And see cases cited throughout this section.

Lien may be waived in advance.— Keller *v.* Home L. Ins. Co., 95 Mo. App. 627, 69 S. W. 612; Sanders Pressed Brick Co. *v.* Barr, 76 Mo. App. 380.

98. Blakeley *v.* Moshier, 94 Mich. 299, 54 N. W. 54; Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358.

99. Dymond *v.* Bruhns, 101 Ill. App. 425 (holding the instrument in question an absolute waiver); Lee *v.* Hassett, 39 Mo. App. 67.

1. Portsmouth Iron Co. *v.* Murray, 38 Ohio St. 323.

2. Harris *v.* Youngstown Bridge Co., 93 Fed. 355, 35 C. C. A. 341.

Appearance in interpleader action.— A person who files a lien on the property for material furnished and thereafter appears in an interpleader action brought to determine the priority of the rights of creditors to the purchase-price paid for the property on which the lien is claimed, and demands that his claim be paid out of such fund, waives his lien, and is estopped from foreclosing the same. Idaho Gold Min. Co. *v.* Winchell, 6 Ida. 729, 59 Pac. 533, 96 Am. St. Rep. 290.

A refusal to accept pay for materials furnished after the taking of a note in settlement of a demand for materials previously furnished, which note so extended the time of payment as to defeat a lien for the amount represented thereby, coupled with the statement of the materialman that he would "collect it all together" is a waiver of the lien for the materials furnished after the giving of the note. Blakeley *v.* Moshier, 94 Mich. 299, 54 N. W. 54.

3. Lee *v.* Hassett, 39 Mo. App. 67; Peck *v.* Bridwell, 10 Mo. App. 524; Jodd *v.* Duncan, 9 Mo. App. 417.

Failure to appear and prove lien.— Under a statute providing that at the time of filing the complaint for a lien and issuing the summons, plaintiff shall cause a notice to be published notifying all persons claiming liens on the premises in question before the court on a specified day and prove such liens, and all the liens against property not then exhibited shall be deemed waived, where a contractor published such notice, and on the date fixed for hearing another contractor's time within which he could file a lien had not expired, and such contractor was neither made a party nor served with process, his failure to appear and prove his lien on the day specified was not a waiver of his lien. Elwell *v.* Morrow, 28 Utah 278, 78 Pac. 605.

4. Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741. See also Weber *v.* Bushnell, 171 Ill. 587, 49 N. E. 728 [*reversing* 69 Ill. App. 26].

5. Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741.

6. Harris *v.* Youngstown Bridge Co., 93 Fed. 355, 35 C. C. A. 341.

7. New York Lumber, etc., Co. *v.* Schneider, 15 Daly (N. Y.) 15, 1 N. Y. Suppl. 441, 15 N. Y. Civ. Proc. 30 [*affirmed* in 119 N. Y. 475, 24 N. E. 4].

mechanics' liens does not show a waiver of his right to a lien.[8] The receiving of part payment in real estate is no more a waiver of the lien for the residue of the claim than if such part payment were in money.[9] An express waiver of "all claims for lumber or materials furnished" to the contractor is equivalent to a waiver of the right to a lien therefor.[10]

b. Agreements Between Parties — (i) *In General.* An agreement between the owner and a person furnishing labor or materials that the latter will not claim or file a lien is a waiver of the right to a lien.[11] And a subcontractor whose contract with the principal contractor contains a stipulation that no lien shall be filed on his account is bound thereby and cannot acquire a lien.[12]

(ii) *Sufficiency and Construction of Agreement.* Any agreement or stipulation which clearly shows that it is the intention of the parties that the right to a lien shall be waived is sufficient to accomplish the purpose;[13] but the contract must receive a reasonable construction, and in the absence of language indicating a purpose under no circumstances to claim a lien it is not to be supposed that the contractor intended to absolutely relinquish his right,[14] and where the terms of the contract are ambiguous the doubt should be resolved against the waiver.[15] Agreements with respect to the manner of payment will not effect a

8. Bruce Lumber Co. *v.* Hoos, 67 Mo. App. 264.

9. Bayard *v.* McGraw, 1 Ill. App. 134.

10. Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 15, 75 Am. St. Rep. 574.

11. *California.*— Bowen *v.* Aubrey, 22 Cal. 566.

Missouri.— Sanders Pressed Brick Co. *v.* Barr, 76 Mo. App. 380; Isenman *v.* Frigate, 36 Mo. App. 166.

New York.— Matthews *v.* Young, 16 Misc. 525, 40 N. Y. Suppl. 26.

Ohio.— Portsmouth Iron Co. *v.* Murray, 38 Ohio St. 323.

Oregon.— Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

Pennsylvania.— Fidelity Mut. L. Assoc. *v.* Jackson, 163 Pa. St. 208, 29 Atl. 883, 43 Am. St. Rep. 789; Ballman *v.* Heron, 160 Pa. St. 377; Benedict *v.* Hood, 134 Pa. St. 289, 19 Atl. 635, 19 Am. St. Rep. 698; Schroeder *v.* Galland. 134 Pa. St. 277, 19 Atl. 632, 19 Am. St. Rep. 691, 7 L. R. A. 711; Long *v.* Caffrey, 93 Pa. St. 526.

Wisconsin.— Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351; Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 381.

Contract not complete.— Where one P was the lowest bidder for the work, but, being unable to give bond, a materialman agreed that he would waive his lien on the work, in consideration of his being allowed to furnish the material therefor, and a memorandum of this agreement was made, but it was to be reduced to writing and signed by the parties, and before this was done the owner let the contract for the work to P, it was held that, under the proof, the contract was not to be complete until signed by the parties, and that the materialman was entitled to a lien. Irish *v.* Pulliam, 32 Nebr. 24, 48 N. W. 963.

Filing stipulation.— Under the Pennsylvania act of June 26, 1895 (Pamphl. Laws 369, since repealed), in order to prevent a contractor from filing a mechanic's lien, there must not only have been a stipulation against liens, but such stipulation must have been made a matter of record. Carle *v.* Neeld, 24 Pa. Co. Ct. 223, 10 Kulp 101.

12. Stoneback *v.* Waters, 198 Pa. St. 459, 48 Atl. 296; Diemer *v.* Philadelphia German Protestant Home, 19 Pa. Super. Ct. 225, where the court refused to sustain a contention that such stipulation on the part of the subcontractor was induced by false representations of the contractor.

Owner as well as contractor entitled to benefit of waiver.— Security Nat. Bank *v.* St. Croix Power Co., 126 Wis. 370, 105 N. W. 914.

Death of subcontractor and transfer of contract to surety.— Where a subcontract provided that the subcontractor should keep the improvements and the land on which it was situated free from any and all liens by reason of his work, materials, or other things used therein, and such contract, on the death of the subcontractor leaving the work unfinished, was duly transferred to plaintiff as his surety, plaintiff was not entitled to a mechanic's lien on the property for work done in completing the contract. Security Nat. Bank *v.* St. Croix Power Co., 126 Wis. 370, 105 N. W. 914.

13. Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351. See also Harris *v.* Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69.

14. McLaughlin *v.* Reinhart, 54 Md. 71, holding that where A made a contract with B to build a number of houses for him, which contained a clause that A would execute and deliver to B a release from mechanics' liens and claims of all of the houses as soon as they should be respectively completed and ready for occupancy, A did not thereby waive his right to a mechanic's lien upon the houses, but the evident purpose was to free each house as it was done from the lien, the others meanwhile remaining liable to the lien until they should respectively be finished.

15. Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351.

waiver of the lien unless the terms agreed on are inconsistent with the existence or enforcement of the lien.[16] A contractor waives his right to a lien when he makes an agreement in form that no lien shall be filed on the building,[17] that he will not suffer or permit a lien to be filed,[18] or that there shall be no liens filed by any subcontractors or by any other persons.[19] A special contract inconsistent with the existence or enforcement of the lien is in effect an express waiver of the lien,[20] and where persons who have furnished labor and materials enter into a new contract inconsistent with the enforcement of a lien for what has been previously done and furnished the lien therefor is waived.[21] Where a mechanic stipulates with the vendee of premises that he will look to some other person for the payment of his claims for services performed thereon, or that all such claims have been paid, he thereby waives his lien on the premises,[22] and an agreement by a subcontractor to "look to the contractor" for his pay "and to no other source" is a waiver of any right to a lien.[23] A provision in the building contract that payment shall be made only on sufficient evidence that all claims upon the building for work and materials are discharged is not a waiver of the contractor's right to a lien.[24] Where contractors, by an instrument in writing, waived "all liens which they now or may hereafter have for work or labor done, or materials or fixtures furnished by them" on the property, this was a waiver of liens for materials and fixtures furnished under the then existing contracts, but not of a lien for labor and materials under a new contract.[25] The mere fact that a contract for the erection of a building provides that the parties thereto other than the contractor shall subscribe to shares of the stock of a corporation thereafter to be formed in amounts therein stated, and that each subscriber shall be liable only for the amount subscribed by him, does not preclude the contractor from filing a mechanic's lien on the building for an amount due him.[26] A mechanic or materialman is not barred from

Stipulation to deliver free of liens.— A provision in a building contract that the building shall be delivered to the owner free of all liens, claims, and charges by a certain time and that final payment shall not be made until the architect is satisfied that the building is free of liens refers to liens of subcontractors, etc., and is not a waiver of the contractor's right to a lien. Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351. A stipulation in a building contract that the last payment shall become due thirty-five days after the completion and acceptance of the building "provided said building and premises were free and clear from all liens and incumbrances arising from or created or placed thereon by said contractor" does not preclude the filing of a lien by the contractor before the expiration of the thirty-five days. Knowles *v.* Baldwin, 125 Cal. 224, 57 Pac. 988.

16. Maryland Brick Co. *v.* Spilman, 76 Md. 337, 25 Atl. 297, 35 Am. St. Rep. 431, 17 L. R. A. 599 [*following* Pinning *v.* Skipper, 71 Md. 347, 18 Atl. 659; Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530].

17. Lydick *v.* Anderson, 188 Pa. St. 600, 41 Atl. 729 (stipulation in building contract that "no liens shall be filed against the building by either the contractor or any subcontractor"); Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351; Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490.

18. Scheid *v.* Rapp, 121 Pa. St. 593, 15 Atl. 652 [*following* Long *v.* Caffrey, 93 Pa. St. 526]; Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351. A covenant of the contractor in a building contract that he will not allow "any lien or liens to be filed," and that the building and premises "shall be at all times free from any and all liens," is a waiver of his right of lien. Gray *v.* Jones, 47 Oreg. 40, 81 Pac. 813.

19. Commonwealth Title Ins., etc., Co. *v.* Ellis, 192 Pa. St. 321, 329, 43 Atl. 1034, 1101, 73 Am. St. Rep. 816 [*reversing* 5 Pa. Dist. 33].

20. Pinning *v.* Skipper, 71 Md. 347, 18 Atl. 659.

21. Whitney *v.* Joslin, 108 Mass. 103, where subcontractors, after the contractor had abandoned the work, made a new contract with the owner accepting his personal liability for a fixed sum as a substitute for her liability upon the debts for materials and labor previously furnished.

22. Dwyer *v.* Salt Lake City Copper Mfg. Co., 14 Utah 339, 47 Pac. 311.

23. Murray *v.* Earle, 13 S. C. 87 [*distinguishing* Sodini *v.* Winter, 32 Md. 130]. See also Isenman *v.* Fugate, 36 Mo. App. 166; Bailey *v.* Adams, 14 Wend. (N. Y.) 201.

24. Poirier *v.* Desmond, 177 Mass. 201, 58 N. E. 684, so holding upon the ground that the manifest purpose of such a provision is to protect the owner from liability under liens of subcontractors and others after making full payment to the contractor, and it is not inconsistent with the existence of a right on the part of the principal contractor to claim a lien.

25. Lee *v.* Hassett, 39 Mo. App. 67.

26. Davis, etc., Bldg., etc., Co. *v.* Colusa Dairy Assoc., 55 Ill. App. 591.

filing a lien by a provision in his contract with the owner of the property that the costs of any changes, etc., shall be determined by the architect, whose decision shall be final and binding upon both parties.[27] The agreement of a materialman not to file a lien for materials furnished for a building does not prevent him from acquiring by assignment and enforcing a claim perfected by another.[28]

(III) *CONSIDERATION FOR WAIVER.* A waiver of a mechanic's lien must be supported by a consideration in order to be effective.[29] A payment by the owner to the contractor upon the faith of a written waiver by a materialman of his claim is a sufficient consideration for the waiver, although no consideration was expressed therein, especially where the materialman secured the benefit of the payment or its equivalent.[30] The owner's omission to give notice of non-liability in the manner required by statute,[31] because of a subcontractor's agreement not to claim a lien, is a sufficient consideration for such waiver.[32]

(IV) *STIPULATION FOR CREDIT.* The fact that the contract stipulates for a credit does not show a waiver of the lien[33] unless the credit is inconsistent with its enforcement,[34] as where the time of payment is fixed at a date after the time within which proceedings to enforce the lien must be commenced.[35]

(V) *EXTENSION OF TIME FOR PAYMENT.* An extension of the time of payment is not a waiver of the lien,[36] although the lien is lost if the time for payment is extended by agreement beyond the time allowed for enforcing the lien.[37]

(VI) *WAIVER BY AGENT.* Where an agent has authority to represent the principal in carrying on the business of manufacturing and selling lumber, and in filing mechanics' liens, the agent's waiver of a mechanic's lien for lumber sold by him for the principal is binding upon the principal.[38] But the unauthorized act of an agent of a materialman in signing the name of his principal to an obligation for the faithful performance by a contractor of his building contract cannot be construed as a waiver by the agent of his principal's right to a lien for materials

27. Kreilich *v.* Klein, 10 Phila. (Pa.) 486, 490, where the court said: "Submitting the cost to a chosen umpire is one thing; yielding a remedy specially given by statute to secure its payment, is quite another. . . . A question may arise, however, whether these contractors have not estopped themselves by their covenant from establishing the value of their work and materials, other than by the testimony of the architect; but, as this can only come up at a subsequent stage of the proceeding, we are not called upon to decide it now."

28. Hines *v.* Cochran, 44 Nebr. 12, 62 N. W. 299.

29. Abbott *v.* Nash, 35 Minn. 451, 29 N. W. 65.

Where the waiver is under seal the seal imports a consideration. Dymond *v.* Bruhns, 101 Ill. App. 425.

30. Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

31. **Notice of non-liability** see *infra*, II, C, 8.

32. Murray *v.* Earle, 13 S. C. 87.

33. Osborne *v.* Burnes, 179 Mass. 597, 61 N. E. 276 [*distinguishing* Ellenwood *v.* Burgess, 144 Mass. 534, 11 N. E. 755].

34. Ellenwood *v.* Burgess, 144 Mass. 534, 11 N. E. 755.

35. Ritchie *v.* Grundy, 7 Manitoba 532.

Time for commencement of proceedings see *infra*, VIII, F.

36. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84; Chisholm *v.* Williams, 128 Ill. 115, 21 N. E. 215; Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Stout *v.* Sower, 22 Ill. App. 65; Chisholm *v.* Randolph, 21 Ill. App. 312; Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205]. But *compare* Hill *v.* Witmer, 2 Phila. (Pa.) 72, holding that the owner or the building itself stood in the position of a surety for the contractor, and that an agreement by a subcontractor extending the time for payment of his claim defeated the lien.

Unexecuted agreement to extend. — An agreement to extend the time of payment beyond a year, provided a mortgage should be given, will not defeat a mechanic's lien, if the mortgage should not be executed, as the giving of the mortgage is in such case a condition precedent. Gardner *v.* Hall, 29 Ill. 277; Cunningham *v.* Fischer, (Ky. 1899) 48 S. W. 993.

37. Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439.

Time for commencement of proceedings see *infra*, VIII, F.

38. Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

Written authority to waive not necessary. — The right to claim a mechanic's lien for building material furnished is not an interest in lands which, under the statute of frauds, an agent of the materialman cannot waive without written authority from his principal. Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

furnished to the contractor in carrying out the contract or be given vitality for the purpose of depriving the materialman of the right to a lien which he otherwise possessed.[39]

(VII) *Effect of Owner's Failure to Comply With Contract.* Where the right to a mechanic's lien is absolutely waived by the contract, the binding effect of such waiver is not defeated or the right to a lien revived by the owner's failure to comply with his own independent covenants and agreements.[40]

e. Bond For Payment of Claims or Protection Against Liens.[41] That a contractor waives his own right to a lien where he gives a bond that no lien shall be filed on the building or that he will protect the owner against liens has been both asserted[42] and denied.[43] So also it is held in some jurisdictions that a surety on a contractor's bond is not entitled to enforce a lien in his own behalf as subcontractor or materialman[44] unless he has been in some way discharged from his contract of suretyship,[45] while other courts hold that a surety is not estopped to enforce a lien;[46] but on his attempting to do so the owner may set up the bond,

39. Bullard *v.* De Groff, 59 Nebr. 783, 82 N. W. 4.

40. Pinning *v.* Skipper, 71 Md. 347, 18 Atl. 659 [*distinguishing* German Lutheran Evangelical St. Matthew's Cong. *v.* Heise, 44 Md. 453]; Sanders Pressed Brick Co. *v.* Barr, 76 Mo. App. 380; Long *v.* Caffrey, 93 Pa. St. 526 [*followed* in Purvis *v.* Brumbaugh, 8 Pa. Super. Ct. 292, 43 Wkly. Notes Cas. 271]; Brzezinski *v.* Neeves, 93 Wis. 567, 67 N. W. 1125.

41. Contractors' bond for payment of claims and indemnity against liens see *infra*, VII.

42. Pinning *v.* Skipper, 71 Md. 347, 18 Atl. 659; Davis *v.* La Crosse Hospital Assoc., 121 Wis. 579, 99 N. W. 351.

Indemnifying surety.— A contractor who gives a bond indemnifying a surety given for any loss or damage which may be sustained on account of a bond given by the surety company to protect the owner from mechanics' liens waives his right to assert a lien on his own behalf. Kent Lumber Co. *v.* Ward, 37 Wash. 60, 79 Pac. 485.

43. Bassett *v.* Swarts, 17 R. I. 215, 21 Atl. 352, so holding upon the ground that the object of such a bond is to protect the owner from the contractor's default and not to release him from the consequences of his own.

44. *District of Columbia.*—Herrell *v.* Donovan, 7 App. Cas. 322.

Indiana.— McHenry *v.* Knickerbacker, 128 Ind. 77, 27 N. E. 430 [*followed* in Closson *v.* Billman, 161 Ind. 610, 69 N. E. 449]; Miller *v.* Taggart, 36 Ind. App. 595, 76 N. E. 321.

Montana.— Aikens *v.* Frank, 21 Mont. 192, 53 Pac. 538.

Pennsylvania.— Rynd *v.* Pittsburg Natatorium, 173 Pa. St. 237, 33 Atl. 1041; Given *v.* German Evangelical Reformed Church, 15 Phila. 300. See also Haine *v.* Dambach, 4 Pa. Co. Ct. 633.

Washington.— Spears *v.* Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789, although the owner may in fact be indebted to the contractor.

Wisconsin.— Interior Woodwork Co. *v.* Prasser, 108 Wis. 557, 84 N. W. 833.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 657.

Effect of representations of contractor to surety.— The fact that representations were made by a contractor to his subcontractors that the bond which they were signing to secure the owner against mechanics' liens was to be of no force unless signed by all the subcontractors, which was not done, will not invalidate the bond in an action against the owner by one of the signers of the bond to enforce a mechanic's lien, where it appears that the contractor was not agent for the owner, but was acting for himself in procuring the bond, and that the owner had no knowledge of such representations. Bugger *v.* Cresswell, 8 Pa. Cas. 555, 12 Atl. 829.

45. Herrell *v.* Donovan, 7 App. Cas. (D. C.) 322.

46. Blyth *v.* Torre, (Cal. 1894) 38 Pac. 639; Hartman *v.* Berry, 56 Mo. 487; Badger Lumber Co. *v.* Muehlebach, 109 Mo. App. 646, 83 S. W. 546; Deitz *v.* Leete, 28 Mo. App. 540; Atlantic Coast Brewing Co. *v.* Clement, 59 N. J. L. 438, 36 Atl. 883 [*affirming* 59 N. J. L. 48, 35 Atl. 647].

Lien to extent of balance due contractor.— A surety on a contractor's bond may enforce a mechanic's lien where the owner has not paid out the contract price for a sum not exceeding what remains in the hands of the owner (Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201 [*following* Hartman *v.* Berry, 56 Mo. 487]), but if the owner has paid out the contract price the surety cannot enforce a lien (Fullerton Lumber Co. *v.* Gates, *supra* [*following* Handley *v.* Ward, 70 Mo. App. 146]), and if the owner has been damaged in such manner that the surety would be liable therefor the amount of his damage may be deducted from the contract price in ascertaining whether the owner has anything in his hands due the contractor (Fullerton Lumber Co. *v.* Gates, *supra*).

Enforcement of lien by firm of which surety a member.— A firm of which one of the sureties on the contractor's bond for the payment of claims is a member may recover the amount of its claim from the owner upon the failure of the contractor to pay. Vorden-

prove his damage, and establish the claimant's liability, and the rights of both parties may be thus fully and equitably adjudged in the action.[47]

d. Personal Action on Claim. The lien is not waived by bringing a personal action on the claim or account,[48] and the recovery of judgment therein.[49] Neither is a mechanic's lien waived by causing an attachment to be issued and levied upon the property of the debtor for the same claim.[50]

e. Taking Note or Draft For Amount of Claim [51] — (i) *GENERAL RULE.* It is

baumen *v.* Bartlett, 105 La. 752, 30 So. 219. But the failure of the contractor to pay the amount due to the firm of the surety is a breach of the condition of the bond, whereby the surety becomes liable for the amount, and the owner is entitled to recover from the surety. Neith Lodge No. 21 I. O. O. F. *v.* Vordenbaumen, 111 La. 213, 35 So. 524.

Release of or forbearance to foreclose lien as consideration for note.—Where the sureties upon a bond given by a contractor sold and delivered lumber to the contractor and claimed a lien upon the building for the purchase-price, a note given to them by the owner of the building in consideration of the cancellation of such lien is without any legal consideration to support it; nor is the forbearance of the sureties to foreclose such lien a sufficient consideration for the note, for they are already under a legal obligation not to foreclose such a lien by the terms of the bond executed by them, and in canceling the lien they confer no benefit upon the owner to which he has not a legal title and suffer no detriment which they are not legally bound to suffer. Blyth *v.* Robinson, 104 Cal. 239, 37 Pac. 904.

47. Blyth *v.* Torre, (Cal. 1894) 38 Pac. 639; Hartman *v.* Berry, 56 Mo. 487; McAdow *v.* Ross, 53 Mo. 199; Deitz *v.* Leete, 28 Mo. App. 540. See also Blyth *v.* Robinson, 104 Cal. 239, 37 Pac. 904.

Guaranty and contractor's failure to perform must be specially pleaded.— Kelley *v.* Plover, 103 Cal. 35, 36 Pac. 1020.

48. Spence *v.* Etter, 8 Ark. 69; Angier *v.* Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630; Vandyne *v.* Vanness, 5 N. J. Eq. 485.

Simultaneous actions.— A personal action to recover the amount of the debt and a proceeding to enforce the lien may be maintained simultaneously. Gambling *v.* Haight, 59 N. Y. 354; Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600. But there can of course be only one satisfaction. Gambling *v.* Haight, *supra.*

49. *Arkansas.*— Spence *v.* Etter, 8 Ark. 69.

California.— Germania Bldg., etc., Assoc. *v.* Wagner, 61 Cal. 349.

Colorado.—Marean *v.* Stanley, 5 Colo. App. 335, 38 Pac. 395.

Michigan.— Kirkwood *v.* Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549.

New Jersey.— Anderson *v.* Huff, 49 N. J. Eq. 349, 23 Atl. 654.

Pennsylvania.— Crean *v.* McFee, 2 Miles 214. See also *In re* Thompson, 2 Browne 297, judgment confessed on bond and warrant of attorney.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 414.

But *compare* Hayden Slate Co. *v.* Natural Cornice, etc., Co., 62 Mo. App. 569, holding that where an account in favor of a subcontractor is allowed by the assignee for the benefit of creditors of the original contractor, such allowance operates as a judgment, and the account is no longer enforceable as a lien against the owner of the building.

Necessity for return of execution unsatisfied.— N. Y. Code Civ. Proc. § 1630, providing that an action to foreclose a mortgage "shall not be commenced or maintained," where a judgment has been recovered at law for the mortgage debt, until execution issued on the judgment is returned unsatisfied, applies to actions to foreclose mechanics' liens under N. Y. Laws (1885), c. 342, § 8, which declares that the manner and form of instituting and prosecuting actions to foreclose mechanics' liens "shall be the same as in actions for the foreclosure of mortgages on real property," as the provision of said section 1630 is merely a rule of procedure, the right to sue not being abolished thereby, but only suspended. Barbig *v.* Kick, 35 N. Y. Suppl. 676, 25 N. Y. Civ. Proc. 62, 237.

Circumstances under which judgment a waiver.— Where materialmen sold lumber to a person whom they believed to be the owner and took his note therefor, and upon discovering that he was not the owner filed a lien against the true owner, their action in subsequently obtaining judgment on the note amounted to the taking of outside security and was a waiver of the lien. Carey-Lombard Lumber Co. *v.* Burnet, 68 Ill. App. 475. Taking security generally, see *infra*, VI, A, 2, f.

Issuance of general execution.— Where a mechanic recovered a judgment under the Mississippi act of 1838 for work done or materials furnished in the erection of a building, he might resort to a special execution and have the specific property sold, or he might sue out a general execution against all or any of defendant's property, but if he adopted the latter course he thereby waived or abandoned his special lien. Kirk *v.* Taliaferro, 8 Sm. & M. (Miss.) 754 [*following* Richardson *v.* Warwick, 7 How. (Miss.) 131].

50. Roberts *v.* Wilcoxson, 36 Ark. 355; Brennan *v.* Swasey, 16 Cal. 140, 76 Am. Dec. 507 (the two remedies being cumulative); Angier *v.* Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630.

51. Note or indorsement of third person see *infra*, VI, A, 2, f, (I).

well established as a general rule that a mechanic's lien claimant does not waive or forfeit his right to a lien by taking a promissory note of the owner or the contractor for what is due to him[52] unless the parties have agreed that the note shall

52. *Alabama.*—Hines *v.* Chicago Bldg., etc., Co., 115 Ala. 637, 22 So. 160; Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48; Lane, etc., Co. *v.* Jones, 79 Ala. 156; Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84.

Arkansas.— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

Connecticut.— Hopkins *v.* Forrester, 39 Conn. 351.

District of Columbia.— See Smith *v.* Johnson, 2 MacArthur 481.

Georgia.— Belmont Farm *v.* Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312.

Illinois.— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Brady *v.* Anderson, 24 Ill. 110; Van Court *v.* Bushnell, 21 Ill. 624; Bradford *v.* Neill, etc., Constr. Co., 76 Ill. App. 488 (taking acceptances of owner); Cary-Lombard Lumber Co. *v.* Burnet, 68 Ill. App. 475; Friedman *v.* Roderick, 20 Ill. App. 622 (note expressly reserving lien); Bayard *v.* McGraw, 1 Ill. App. 134.

Indiana.— Goble *v.* Gale, 7 Blackf. 218, 41 Am. Dec. 219. *Contra,* Teal *v.* Spangler, 72 Ind. 380 (there being no agreement that the note should not operate as payment); Schneider *v.* Kolthoff, 59 Ind. 568; Hill *v.* Sloan, 59 Ind. 181 (note *prima facie* a payment of the account).

Iowa.— Logan *v.* Attix, 7 Iowa 77; Scott *v.* Ward, 4 Greene 112; Mix *v.* Ely, 2 Greene 513; Greene *v.* Ely, 2 Greene 508.

Kansas.— Bashor *v.* Nordyke, etc., Co., 25 Kan. 222.

Kentucky.— Finch *v.* Redding, 4 B. Mon. 87; Laviolette *v.* Redding, 4 B. Mon. 81; Graham *v.* Holt, 4 B. Mon. 61; Mivalaz *v.* Genovely, 89 S. W. 109, 28 Ky. L. Rep. 203; Gilbert *v.* Moody, 36 S. W. 523, 18 Ky. L. Rep. 312. See also Gere *v.* Cushing, 5 Bush 304.

Louisiana.— Whitla *v.* Taylor, 6 La. Ann. 480; Turpin *v.* His Creditors, 9 Mart. 562.

Maine.— Bryant *v.* Grady, 98 Me. 389, 57 Atl. 92.

Maryland.— Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530; Blake *v.* Pitcher, 46 Md. 453; Sodini *v.* Winter, 32 Md. 130.

Massachusetts.— McLean *v.* Wiley, 176 Mass. 233, 57 N. E. 347.

Michigan.— Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Smalley *v.* Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29.

Minnesota.—McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195; Howe *v.* Kindred, 42 Minn. 433, 44 N. W. 311; Milwain *v.* Sanford, 3 Minn. 147. See also Flenniken *v.* Liscoe, 64 Minn. 269, 66 N. W. 979.

Mississippi.— Ehlers *v.* Elder, 51 Miss. 495.

Missouri.— Jones *v.* Hurst, 67 Mo. 568; Ashdown *v.* Woods, 31 Mo. 465; McMurray *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611; Darlington Lumber Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688; Western Brass Mfg. Co. *v.* Boyce, 74 Mo. App. 343; Kaufman-Wilkinson Lumber Co. *v.* Christophel, 59 Mo. App. 80; O'Brien *v.* Hanson, 9 Mo. App. 545.

Nebraska.—Hersh *v.* Carman, 51 Nebr. 784, 71 N. W. 713; Livesey *v.* Hamilton, 47 Nebr. 644, 66 N. W. 644; Barnacle *v.* Henderson, 42 Nebr. 169, 60 N. W. 382; Smith *v.* Parsons, 37 Nebr. 677, 56 N. W. 326; Hoagland *v.* Lusk, 33 Nebr. 376, 50 N. W. 162, 29 Am. St. Rep. 485.

New Jerscy.— Edwards *v.* Derrickson, 28 N. J. L. 39. See also Dey *v.* Anderson, 39 N. J. L. 199.

New Mexico.— Mountain Electric Co. *v.* Miles, 9 N. M. 512, 56 Pac. 284.

New York.— Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205]; Donovan *v.* Frazier, 15 N. Y. App. Div. 521, 44 N. Y. Suppl. 533; Linneman *v.* Bieber, 85 Hun 477, 33 N. Y. Suppl. 129; Jones *v.* Moores, 67 Hun 109, 22 N. Y. Suppl. 53 [*affirmed* in 142 N. Y. 661, 37 N. E. 569]; Althause *v.* Warren, 2 E. D. Smith 657; Miller *v.* Moore, 1 E. D. Smith 739; Bates *v.* Masonic Hall, etc., Fund, 7 Misc. 609, 27 N. Y. Suppl. 951; Keogh Mfg. Co. *v.* Eisenberg, 7 Misc. 79, 27 N. Y. Suppl. 356.

North Dakota.— See Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

Ohio.— Standard Oil Co. *v.* Sowden, 55 Ohio St. 332, 45 N. E. 320; Bernsdorf *v.* Hardway, 7 Ohio Cir. Ct. 378, 4 Ohio Cir. Dec. 645; Victoria Bldg. Assoc. No. 2 *v.* Kelsey, 9 Ohio Dec. (Reprint) 123, 11 Cinc. L. Bul. 38; Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401.

Pennsylvania.— Shaw *v.* First Associated Reformed Presb. Church, 39 Pa. St. 226; Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675; Jones *v.* Shawhan, 4 Watts & S. 257; Kinsley *v.* Buchanan, 5 Watts 118; Walter *v.* Powell, 13 Pa. Dist. 667; Rush *v.* Fisher, 8 Phila. 44 [*affirmed* in 71 Pa. St. 40].

Rhode Island.— Wheeler *v.* Schroeder, 4 R. I. 383.

South Dakota.— Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819 [*approved* in Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 70 N. W. 650 (*approved* in Charles Betcher Co. *v.* Cleveland, 13 S. D. 347, 83 N. W. 366)].

Texas.— Myers *v.* Humphries, (Civ. App. 1898) 47 S. W. 812; Farmers', etc., Nat. Bank *v.* Taylor, (Civ. App. 1897) 40 S. W. 876.

Utah.— Doane *v.* Clinton, 2 Utah 417.

Washington.— See Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

West Virginia.— Cushwa *v.* Imp. Loan, etc., Assoc., 45 W. Va. 490, 32 S. E. 259. See also Bodley *v.* Denmead, 1 W. Va. 249, bill of exchange.

Wisconsin.— Phœnix Mfg. Co. *v.* McCor-

have the effect of extinguishing the lien[53] or such was their intention;[54] but the only effect of such a note is to suspend the right to enforce the lien until its maturity.[55]

(II) *TIME OF MATURITY OF NOTE.* The rule that the taking of the note is not a waiver of the lien[56] applies only where the note is payable within the time allowed by statute for commencing proceedings to enforce the lien,[57] and if the

mick Harvesting Mach. Co., 111 Wis. 570, 87 N. W. 458; Schmidt *v.* Gilson, 14 Wis. 514 [*following* Bailey *v.* Hull, 11 Wis. 289, 78 Am. Decc. 706].

United States.—Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Wisconsin Trust Co. *v.* Robinson, etc., Co., 68 Fed. 778, 15 C. C. A. 668; Beers *v.* Knapp, 3 Fed. Cas. No. 1,232, 5 Ben. 104. See also Reynolds *v.* Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 387, 392.

Contra.— Edmonds *v.* Tiernan, 21 Can. Sup. Ct. 406, 407 [*affirming* 2 Brit. Col. 82], where it is said: "The lien was waived by taking the promissory note from the contractor and by its negotiation. . . . The statute does not give the lien but only a potential right of creating it, and during the thirty days the note was running it having been discounted it was impossible that the lien could have been created and the potentiality of creating it was, therefore, gone. . . . There is nothing in the statute in question here which provides that if a lien has once been abandoned it is to be considered as being abandoned merely for a time." The lower court said: "We think his lien on Walter's land was extinguished, at all events when he negotiated the note, and cannot be revived." Edmonds *v.* Walter, 2 Brit. Col. 82, 83.

The fact that the note provides for interest does not effect a waiver. Brady *v.* Anderson, 24 Ill. 110.

Note for part of amount due.— The mere fact that the owner of real property has given his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished. Livesey *v.* Hamilton, 47 Nebr. 644, 66 N. W. 644. See also Johns *v.* Bolton, 12 Pa. St. 339, the note being dishonored.

Fanciful designation of payee.— Where a person has furnished materials for the improvement of real property, and in all respects has complied with the Mechanics' Lien Law in respect thereto, his rights will not be held destroyed, merely because, in taking a note for the amount due, he has described himself by the fanciful designation of the "Western Cornice Works," when there is no claim that, thereby, any one was misled or injured. Livesey *v.* Hamilton, 47 Nebr. 644, 66 N. W. 644.

Where the identity of the lien claim is gone, as where a subcontractor has accepted from the contractor a note including sums due on other accounts, the specific remedy against the property cannot be enforced. Schulenburg *v.* Robison, 5 Mo. App. 561. But the fact that a materialman furnishes a subcontractor, under one contract, materials for the buildings of different owners, and receives the subcontractor's acceptance of a draft for the contract price of all the materials, will not deprive him of a lien against one of the buildings for such materials as entered into its construction, if he ascertained that portion before filing his lien, and, in making the contract, gave credit to the separate structures. Compound Lumber Co. *v.* Fehlhammer Planing Mill Co., 59 Mo. App. 661 [*distinguishing* Schulenburg *v.* Robison, *supra*].

53. Belmont Farm *v.* Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312; Blake *v.* Pitcher, 46 Md. 453; Sodini *v.* Winter, 32 Md. 130; Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819; Doane *v.* Clinton, 2 Utah 417.

54. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84; Bayard *v.* McGraw, 1 Ill. App. 134; Mix *v.* Ely, 2 Greene (Iowa) 513; Greene *v.* Ely, 2 Greene (Iowa) 508; Wheeler *v.* Schroeder, 4 R. I. 383.

55. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Maryland.— Blake *v.* Pitcher, 46 Md. 453; Sodini *v.* Winter, 32 Md. 130.

New Jersey.— Dey *v.* Anderson, 39 N. J. L. 199.

New York.— Jones *v.* Moores, 67 Hun 109, 22 N. Y. Suppl. 53 [*affirmed* in 142 N. Y. 661, 37 N. E. 569]; Althause *v.* Warren, 2 E. D. Smith 657; Miller *v.* Moore, 1 E. D. Smith 739; Keogh Mfg. Co. *v.* Eisenberg, 7 Misc. 79, 27 N. Y. Suppl. 356 [*affirmed* in 149 N. Y. 592, 44 N. E. 1123].

Ohio.— Victoria Bldg. Assoc. No. 2 *v.* Kelsey, 9 Ohio Dec. (Reprint) 123, 11 Cinc. L. Bul. 38.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 387, 392.

56. See *supra*, VI, A, 2, e, (I).

57. See the following cases:

Alabama.— Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48; Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Minnesota.—McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195; Howe *v.* Kindred, 42 Minn. 433, 44 N. W. 311.

Mississippi.— Ehlers *v.* Elder, 51 Miss. 495.

Missouri.— Jones *v.* Hurst, 67 Mo. 568; Ashdown *v.* Woods, 31 Mo. 465; McMurray *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611.

Nebraska.— Smith, etc., Co. *v.* Parsons, 37 Nebr. 677, 56 N. W. 326.

New Jersey.— Dey *v.* Anderson, 39 N. J. L. 199.

New Mexico.— Mountain Electric Co. *v.* Miles, 9 N. M. 512, 56 Pac. 284.

New York.— Linneman *v.* Bieber, 85 Hun

note does not mature until after the expiration of that time the lien is lost.[58] But it has been held that if the note matures within such time the fact that it does not mature until after the expiration of the time allowed for perfecting the lien[59] does not result in a waiver;[60] but the claimant may perfect his lien notwithstanding the fact that the note is not yet payable,[61] although he cannot of course enforce his lien until the money is payable.[62] Under a statute providing that suit to enforce the lien must be commenced within a certain time after the money became due and payable, it has been held that the acceptance of a note payable at a future day by a creditor claiming a mechanic's lien is an abandonment of the lien, if by the terms of the note the time of the payment has been extended beyond the date as fixed by the original contract;[63] but if the note conforms to the terms of the original contract it is but a memorial of such contract and the lien is unaffected.

(III) *TRANSFER OF NOTE BY PAYEE.* The transfer or negotiation of notes

477, 33 N. Y. Suppl. 129; Althause *v.* Warren, 2 E. D. Smith 657.

Ohio.— Victoria Bldg. Assoc. *v.* Kelsey No. 2, 9 Ohio Dec. (Reprint) 123, 11 Cinc. L. Bul. 38.

West Virginia.— Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 32 S. E. 259.

Wisconsin.— Schmidt *v.* Gilson, 14 Wis. 514; Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706.

United States.—Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Wisconsin Trust Co. *v.* Robinson, etc., Co., 68 Fed. 778, 15 C. C. A. 668.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 389.

Time for commencement of proceedings see *infra*, VIII, F.

58. *Alabama.*— Hines *v.* Chicago Bldg., etc., Co., 115 Ala. 637, 22 So. 160.

Kentucky.— Pryor *v.* White, 16 B. Mon. 605.

Massachusetts.— See Green *v.* Fox, 7 Allen 85.

Minnesota.— Flenniken *v.* Liscoe, 64 Minn. 269, 66 N. W. 979, so holding, notwithstanding the provision of Gen. St. (1894) § 6243, that the taking of a note for labor or material shall not discharge the lien.

Missouri.— Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439.

New York.—Miller *v.* Moore, 1 E. D. Smith 739.

Wisconsin.— Phœnix Mfg. Co. *v.* McCormick Harvesting Mach. Co., 111 Wis. 570, 87 N. W. 458 [*citing* De Forest *v.* Holum, 38 Wis. 516; Schmidt *v.* Gilson, 14 Wis. 514; Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706].

United States.— Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., 137 Fed. 26, 71 C. C. A. 1 [*reversing* 129 Fed. 455, 128 Fed. 129].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 389.

A mere agreement to accept such notes is not a waiver of the lien where the notes are not given. Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961; Ritchie *v.* Grundy, 7 Manitoba 532.

Where several notes maturing at different times are given the lien can be enforced to the extent of the amount of the notes maturing before the time for commencing proceedings expired, and to that extent only. Pryor *v.* White, 16 B. Mon. (Ky.) 605.

Stipulation reserving lien.— Where a building contract provides for the owner giving time notes for part of the contract price, which by their terms will not mature within the time allowed by statute for commencing an action to enforce a mechanic's lien, and the contract expressly provides that the taking of such notes shall not be construed as a waiver of the right of the contractor to impose or enforce a statutory lien on the property, the taking of the notes in accordance with the contract does not waive or suspend the right to enforce the lien against the property, but the notes are to be deemed as merely collateral to the right of lien. Butler-Ryan Co. *v.* Silvey, 70 Minn. 507, 73 N. W. 406, 510.

59. Time for filing claim or statement see *supra*, III, C, 10.

60. Jones *v.* Hurst, 67 Mo. 568; Ashdown *v.* Woods, 31 Mo. 465; McMurray *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611; Kaufman-Wilkinson Lumber Co. *v.* Christophel, 59 Mo. App. 80; Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 32 S. E. 259; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961, stating the law of Missouri. *Contra*, Quinby *v.* Wilmington, 5 Houst. (Del.) 26; Blakeley *v.* Moshier, 94 Mich. 299, 54 N. W. 54. And see McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195; Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205].

61. Smalley *v.* Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29 [*distinguishing* Brennan *v.* Miller, 97 Mich. 182, 56 N. W. 354]; Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739; Standard Oil Co. *v.* Sowden, 55 Ohio St. 332, 45 N. E. 320. *Contra*, Dey *v.* Anderson, 39 N. J. L. 199. And see Blakeley *v.* Moshier, 94 Mich. 299, 54 N. W. 54; McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21.

62. Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739.

63. Ehlers *v.* Elder, 51 Miss. 495; Jones *v.* Alexander, 10 Sm. & M. (Miss.) 627.

taken by the claimant does not defeat his right to a lien.[64] But one who has taken a note for his claim must, in order to enforce a mechanic's lien, produce and surrender the note to the maker,[65] or satisfactorily account for his failure to do so,[66] and show that the note is not in any event enforceable against the maker.[67]

64. *Arkansas.*— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119, where the payee takes up the note at maturity.

Illinois.— Bayard *v.* McGraw, 1 Ill. App. 134.

Iowa.— German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314 [*following* Farwell *v.* Grier, 38 Iowa 83, and *overruling* Scott *v.* Warde, 4 Greene 112], the claimant having been compelled to take up the note after dishonor.

Kansas.— Bashor *v.* Nordyke, etc., Co., 25 Kan. 222, the note having been indorsed back to the claimant.

Kentucky.— Graham *v.* Holt, 4 B. Mon. 61; Mivalaz *v.* Genovely, 89 S. W. 109, 28 Ky. L. Rep. 203, where the claimant is compelled to take up the note.

Louisiana.— Swain *v.* Barrow, 11 La. Ann. 547.

Massachusetts.— McLean *v.* Wiley, 176 Mass. 233, 57 N. E. 347; Davis *v.* Parsons, 157 Mass. 584, 32 N. E. 1117, where claimant redeemed the note before filing his claim and afterward surrendered it in court.

New Jersey.— Edwards *v.* Derrickson, 28 N. J. L. 39, notes indorsed and afterward taken up by claimant.

New York.— Linneman *v.* Bieber, 85 Hun 477, 33 N. Y. Suppl. 129.

Ohio.— Standard Oil Co. *v.* Sowden, 55 Ohio St. 332, 45 N. E. 320; Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401.

South Dakota.— Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

United States.— Wisconsin Trust Co. *v.* Robinson, etc., Co., 68 Fed. 778, 15 C. C. A. 668; Beers *v.* Knapp, 3 Fed. Cas. No. 1,232, 5 Ben. 104, notes taken up at maturity by payee.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 391.

A mere attempt to negotiate the note or leaving it with a third person as security is not a waiver of the lien. Hawley *v.* Warde, 4 Greene (Iowa) 36.

A blank or erased indorsement is not conclusive that the note has been negotiated, and evidence that the note has never been negotiated is admissible notwithstanding such indorsement. Scott *v.* Ward, 4 Greene (Iowa) 112.

65. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Arkansas.— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

Georgia.— Belmont Farm *v.* Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312.

Illinois.— Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 128 Ill. 627, 21 N. E. 500 [*reversing* 28 Ill. App. 371]; Clement *v.* Newton, 78 Ill. 427; Bayard *v.* McGraw, 1 Ill. App. 134.

Massachusetts.— See Davis *v.* Parsons, 157 Mass. 584, 32 N. E. 1117.

New York.— See Holl *v.* Long, 34 Misc. 1, 68 N. Y. Suppl. 522.

Pennsylvania.— McDuffee *v.* Rea, 13 Pa. Co. Ct. 261, holding that a lien claimant was not entitled to judgment where he had discounted notes taken by him for the amount due and such notes were not under his control.

South Dakota.— Hill *v.* Alliance Bldg. Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819.

Tennessee.— A mechanic's lien cannot be given the payee of two notes taken for work on a building, where the notes have been transferred by him and the holders are not in court, although he is liable as indorser on one of the notes, and as stayor on a judgment on the other. Garrett *v.* Adams, (Ch. App. 1897) 39 S. W. 730.

West Virginia.— Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 32 S. E. 259.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 391.

Compare Blake *v.* Pitcher, 46 Md. 453.

A stipulation that the notes were due and unpaid where the petition was filed, as charged therein, will not dispense with the production of the notes. Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 128 Ill. 627, 21 N. E. 500 [*reversing* 28 Ill. App. 371].

Who may object to failure to surrender notes.— A lienor's failure to surrender notes taken for his claim cannot be set up by a mortgagee claiming priority for his mortgage over mechanics' liens. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

66. Lane, etc., Co. *v.* Jones, 79 Ala. 156; Belmont Farm *v.* Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 128 Ill. 627, 21 N. E. 500 [*reversing* 28 Ill. App. 371]; Clement *v.* Newton, 78 Ill. 427. *Compare* Blake *v.* Pitcher, 46 Md. 453.

67. Belmont Farm *v.* Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312.

Mere production of note insufficient.— Where plaintiff had a claim on defendant for work, etc., for which defendant gave his note to plaintiff, who transferred it, and the note was protested, and judgment recovered against defendant by the indorsee, but the execution was returned unsatisfied, and after protest plaintiff filed a notice of lien, which he sought to foreclose, and produced the note to be canceled, but by what means he was again possessed of it did not appear, the production of the note, without showing that the judgment recovered thereon was satisfied by him, or that the title was again in him, was not enough to warrant a recovery. Teaz *v.*

(iv) *NOTE TAKEN AS PAYMENT.* If the note is taken as a payment of the debt the lien is waived.[68] It is not, however, to be presumed that a note taken by a person entitled to a lien was taken as payment;[69] but it must be shown that such was the case,[70] for even in those states where the doctrine prevails that the acceptance of a negotiable promissory note is presumed, in the absence of any testimony or circumstances to the contrary, to be a payment of the indebtedness for which it was given, this presumption is overcome by the fact that the acceptance of a note in payment would deprive the creditor taking the note of the substantial benefit of some security.[71] The fact that the lienor upon receiving a promissory note gave a receipt for the amount[72] or credited the amount upon his books[73] does not conclusively establish that the note was taken in payment so as to defeat the lien,[74] but is only a circumstance bearing upon the question of whether or not it was so taken,[75] such question being one of fact.[76]

(v) *DRAFT OR ORDER OF CONTRACTOR ON OWNER.* A subcontractor or materialman does not lose his right to a lien by taking a draft or order of the contractor upon the owner for his account,[77] even though the draft or order be

Chrystie, 2 E. D. Smith (N. Y.) 621, 2 Abb. Pr. 109.

68. *Alabama.*— Lane, etc., Co. *v.* Jones, 79 Ala. 156.

Arkansas.— Meek *v.* Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119.

Georgia.— Vason *v.* Bell, 53 Ga. 416.

Illinois.— Croskey *v.* Corey, 48 Ill. 442; Benneson *v.* Thayer, 23 Ill. 374. See also Van Court *v.* Bushnell, 21 Ill. 624; Bradford *v.* Neill, etc., Constr. Co., 76 Ill. App. 488.

Maryland.— Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530; Blake *v.* Pitcher, 46 Md. 453; Sodini *v.* Winter, 32 Md. 130.

Massachusetts.— Green *v.* Fox, 7 Allen 85.

Michigan.— Blakeley *v.* Moshier, 94 Mich. 299, 54 N. W. 54.

Ohio.— Crooks *v.* Finney, 39 Ohio St. 57; Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163; Bernsdorf *v.* Hardway, 7 Ohio Cir. Ct. 378, 4 Ohio Cir. Dec. 645.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 388.

Renewal of lien notes given in payment.— Where a landowner executed notes in payment for material used in the erection of a building which showed that they were lien notes, and subsequently he executed other notes, after the maturity of the first, which referred to the old notes as collateral security for the new, and afterward executed another note for the full amount of the debt, the new notes were not necessarily a payment of the lien notes, so as to extinguish the lien as against a subsequent mortgagee. Gilbert *v.* Moody, 36 S. W. 523, 18 Ky. L. Rep. 312.

A mere agreement to take a note in payment is not a waiver of the lien where such note is never delivered. Lutz *v.* Ey, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. 475.

Where the note of a firm is taken in satisfaction of a claim for work and materials furnished one of the partners, and the settlement is made in the usual mode of doing business, a mechanic's lien cannot afterward be maintained for the work and materials as against a subsequent purchaser. Benneson *v.* Thayer, 23 Ill. 374.

69. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Smith, etc., Co. *v.* Parsons, 37 Nebr. 677, 56 N. W. 326; Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 32 S. E. 259.

70. Smith, etc., Co. *v.* Parsons, 37 Nebr. 677, 56 N. W. 326.

71. Bryant *v.* Grady, 98 Me. 389, 57 Atl. 92 [*citing* Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282].

72. *Indiana.*— Goble *v.* Gale, 7 Blackf. 218, 41 Am. Dec. 219. But see Teal *v.* Spangler, 72 Ind. 380; Hill *v.* Sloan, 59 Ind. 181.

Louisiana.— Whitla *v.* Taylor, 6 La. Ann. 480.

Nebraska.— Hoagland *v.* Lusk, 33 Nebr. 376, 50 N. W. 162, 29 Am. St. Rep. 485.

New York.— Althause *v.* Warren, 2 E. D. Smith 657.

Pennsylvania.— Shaw *v.* First Associated Reformed Presb. Church, 39 Pa. St. 226.

Rhode Island.— Wheeler *v.* Schroeder, 4 R. I. 383.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 388.

Compare Rose *v.* Persse, etc., Paper Works, 29 Conn. 256.

73. Bryant *v.* Grady, 98 Me. 389, 57 Atl. 92 [*citing* Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282]; Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 522; Beers *v.* Knapp, 3 Fed. Cas. No. 1,232, 5 Ben. 104.

74. See *supra*, notes 72, 73.

75. Bryant *v.* Grady, 98 Me. 389, 57 Atl. 92 [*citing* Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282]; Jones *v.* Shawhan, 4 Watts & S. (Pa.) 257.

76. Casey *v.* Weaver, 141 Mass. 280, 6 N. E. 372.

77. Meeks *v.* Sims, 84 Ill. 422; Jones *v.* White, 72 Tex. 316, 12 S. W. 179; Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181. See also Moran *v.* Murray Hill Bank, 58 N. Y. Super. Ct. 199, 9 N. Y. Suppl. 715, assignment by contractor to subcontractor of portion of moneys due or to become due from owner under the contract.

accepted by the owner[78] and partial payments made thereon,[79] unless there was an express agreement that the lien should be waived[80] or the draft or order was expressly received as payment.[81] So also where the owner accepts a draft of the contractor on him, which draft the contractor negotiates, the contractor does not thereby waive his lien.[82]

f. Taking Security — (i) *In General.* The decisions and statutes of the various states differ widely as to the effect of a mechanic's lien on the taking of other security for the claim. In a number of states the rule is that a mechanic's lien is waived by taking any other security for the debt,[83] whether such security be personal or on property;[84] while in other states the taking of other security is not a waiver of the mechanic's lien[85] unless such was the intention of the

78. Meeks *v.* Sims, 84 Ill. 422; Jones *v.* White, 72 Tex. 316, 12 S. W. 179; Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181, conditional acceptance.

79. Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181.

80. Jones *v.* White, 72 Tex. 316, 12 S. W. 179.

81. Lentz *v.* Eimermann, 119 Wis. 492, 97 N. W. 181.

82. Swain *v.* Barrow, 11 La. Ann. 547.

83. *Illinois.*— Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935 [*reversing* 38 Ill. App. 555]; Clark *v.* Moore, 64 Ill. 273; Croskey *v.* Corey, 48 Ill. 442; Gardner *v.* Hall, 29 Ill. 273; Kinzey *v.* Thomas, 28 Ill. 502; Brady *v.* Anderson, 24 Ill. 110; Cosgrove *v.* Farwell, 114 Ill. App. 491; Carey-Lombard Lumber Co. *v.* Burnet, 68 Ill. App. 475.

Iowa.— For rule in Iowa under present statute see *infra*, note 85.

Kentucky.— Norton *v.* Hope Milling, etc., Co., 101 Ky. 223, 40 S. W. 688, 19 Ky. L. Rep. 382.

New Mexico.— Mountain Electric Co. *v.* Miles, 9 N. M. 512, 56 Pac. 284.

South Dakota.— Rolewitch *v.* Harrington, (1906) 107 N. W. 207; Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 70 N. W. 650 [*approved* in Charles Betcher Co. *v.* Cleveland, 13 S. D. 347, 83 N. W. 366].

Wisconsin.— Phœnix Mfg. Co. *v.* McCormick Harvesting Mach. Co., 111 Wis. 570, 87 N. W. 458 [*citing* De Forest *v.* Holum, 38 Wis. 516; Schmidt *v.* Gilson, 14 Wis. 514; Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 393 *et seq.*

Effect of agreement that lien not waived.— An agreement between the owner and the lien claimant that the latter does not waive his right to a lien by taking security is not binding on other persons interested in the property and without knowledge of such agreement. Lyon, etc., Lumber, etc., Co. *v.* Equitable Loan, etc., Co., 174 Ill. 31, 50 N. E. 1006 [*affirming* 72 Ill. App. 489].

84. Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 [*affirming* 99 Ill. App. 104]; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935 [*reversing* 38 Ill. App. 555]; Clark *v.* Moore, 64 Ill. 273; Croskey *v.* Corey, 48 Ill. 442; Kinzey *v.* Thomas, 28 Ill. 502; Brady *v.* Anderson, 24 Ill. 110; Cosgrove *v.* Farwell, 114 Ill. App. 491.

85. *Georgia.*— Lord *v.* Wilson, 85 Ga. 109, 11 S. E. 359.

Iowa.— Under Code (1897), § 3088, no person is entitled to a lien who at the time of making the contract or during the progress of the work takes any collateral security, but the taking of such security after the completion of the work does not affect the right to a lien unless such security is by express agreement given and received in lieu of the mechanic's lien. See Atlantic Trust Co. *v.* Carbondale Coal Co., 99 Iowa 234, 68 N. W. 697. Where a railroad company on agreeing to furnish material for a spur from its track to a coal company's mine, taking the coal company's notes therefor, stated that it might require the president of the coal company to indorse the notes personally, and upon completion of the spur the notes were given, and on the request of the railroad company, signed by the president of the coal company, this did not defeat the railroad company's lien, for the language used in the agreement did not express a present intention to require the indorsement and there was no security taken until the notes were executed. Atlantic Trust Co. *v.* Carbondale Coal Co., *supra* [*citing* Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177]. A mechanic or materialman does not lose his lien by taking collateral security after full performance on his part, although the building may be incomplete. Bissell *v.* Lewis, *supra*.

Maryland.— Maryland Brick Co. *v.* Spilman, 76 Md. 337, 25 Atl. 297, 35 Am. St. Rep. 431, 17 L. R. A. 599; Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530.

Minnesota.—McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195; Howe *v.* Kindred, 42 Minn. 433, 44 N. W. 311 [*followed* in St. Paul Labor Exch. Co. *v.* Eden, 48 Minn. 5, 50 N. W. 921].

Mississippi.—Parberry *v.* Johnson, 51 Miss. 291 [*followed* but *criticized* in Smith, etc., Co. *v.* Butts, 72 Miss. 269, 16 So. 242].

Missouri.— See Peck *v.* Bridwell, 10 Mo. App. 524.

Nebraska.— Union Stock Yards State Bank *v.* Baker, 42 Nebr. 880, 61 N. W. 91; Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741.

parties[86] or the security is inconsistent with the existence or enforcement of the lien.[87] It has been held that the lien is waived by taking a mortgage on the property subject to the lien[88] or other real property,[89] by taking a pledge[90] or chattel mortgage,[91] or by accepting the note of a third person[92] or a note of the

New Jersey.— Taliaferro *v.* Stevenson, 58 N. J. L. 165, 33 Atl. 383.

Pennsylvania.—Thompson's Case, 2 Browne 297.

Tennessee.— The acceptance of collateral security for part of a lienable claim raises a *prima facie* presumption that the lienor thereby intended to waive his lien on the property as to the secured part of his claim but not as to the unsecured balance; and the presumption of waiver is rebutted by proof of an agreement of the parties that the lien was to continue. Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19.

Texas.— See Myers *v.* Humphries, (Civ. App. 1898) 47 S. W. 812.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 393 *et seq.*

86. Union Stock Yards State Bank *v.* Baker, 42 Nebr. 880, 61 N. W. 91.

87. Maryland Brick Co. *v.* Spilman, 76 Md. 337, 25 Atl. 297, 35 Am. St. Rep. 431, 17 L. R. A. 599; Smith, etc., Co. *v.* Butts, 72 Miss. 269, 16 So. 242; Peck *v.* Bridwell, 10 Mo. App. 524; Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741.

88. *Maryland.*— Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530.

Michigan.— Barrows *v.* Baughman, 9 Mich. 213, 217, where it is said that a mortgage is "a species of security entirely inconsistent with the idea of a mechanic's lien upon the same land as a security for the same debt."

Missouri.— Baumhoff *v.* St. Louis, etc., R. Co., 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770; Gorman *v.* Sagner, 22 Mo. 137.

New Jersey.— See Weaver *v.* Demuth, 40 N. J. L. 238, agreement for mortgage.

Oregon.—Trullinger *v.* Kofoed, 7 Oreg. 228, 33 Am. Rep. 708.

United States.— See McMurray *v.* Brown, 91 U. S. 257, 23 L. ed. 321.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 398.

Contra.— *Arkansas.*— Roberts *v.* Wilcoxon, 36 Ark. 355.

Illinois.— Clark *v.* Moore, 64 Ill. 273. But *compare* Gardner *v.* Hall, 29 Ill. 273.

Iowa.— Gilcrest *v.* Gottschalk, 39 Iowa 311, holding that the acceptance of a mortgage upon property covered by a mechanic's lien, and for the same debt, is not "collateral security," within the meaning of Revision (1860), § 1845, which provides that "no person is entitled to a mechanic's lien who takes collateral security on the same contract."

Mississippi.—Parberry *v.* Johnson, 51 Miss. 291, mortgage on property including that covered by lien. See also Kingsland, etc., Mfg. Co. *v.* Massey, 69 Miss. 296, 13 So. 269.

Nebraska.— Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779 (where it is not the intention of the parties to waive the lien and the additional security does not infringe upon the rights of other persons); Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

New York.— Brumme *v.* Herod, 38 N. Y. App. Div. 558, 56 N. Y. Suppl. 670 [*reversing* 26 Misc. 33, 55 N. Y. Suppl. 215]; Hall *v.* Pettigrove, 10 Hun 609.

North Carolina.— Boyle *v.* Robbins, 71 N. C. 130, 133, where the court said: "In the absence from the mortgage of any inconsistent provisions, we concede" that the lien was not waived by taking the mortgage.

South Dakota.— See Charles Betcher Co. *v.* Cleveland, 13 S. D. 347, 83 N. W. 366.

Texas.— Farmers', etc., Nat. Bank *v.* Taylor, 91 Tex. 78, 40 S. W. 876, 966.

United States.— Hale *v.* Burlington, etc., R. Co., 13 Fed. 203, 2 McCrary 558.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 398.

An action to foreclose the mortgage is not to be regarded as a waiver of the mechanic's lien where the petition recites all the facts and prays judgment and the enforcement of the lien basing the claim upon an account for materials furnished. Gilcrest *v.* Gottschalk, 39 Iowa 311.

89. Clark *v.* Moore, 64 Ill. 273; Trullinger *v.* Kofoed, 7 Oreg. 228, 33 Am. St. Rep. 708; Hale *v.* Burlington, etc., R. Co., 13 Fed. 203, 2 McCrary 558. *Contra*, Halsted, etc., Co. *v.* Arick, 76 Conn. 382, 56 Atl. 628; Parberry *v.* Johnson, 51 Miss. 291, mortgage on property including that covered by lien.

Fraudulent mortgage.— The lien is not lost by the acceptance of a mortgage where the mortgagor had no title to the mortgaged property and the lien claimant was induced to accept the mortgage by fraudulent representations. Norton *v.* Hope Milling, etc., Co., 101 Ky. 223, 40 S. W. 688, 19 Ky. L. Rep. 382.

90. Clark *v.* Moore, 64 Ill. 273, pledge of other property or choses in action.

91. Phœnix Mfg. Co. *v.* McCormick Harvesting Mach. Co., 111 Wis. 570, 87 N. W. 458; Kendall Mfg. Co. *v.* Rundle, 78 Wis. 150, 47 N. W. 364. *Contra*, Howe *v.* Kindred, 42 Minn. 433, 44 N. W. 311; Hoagland *v.* Lusk, 33 Nebr. 376, 50 N. W. 162, 29 Am. St. Rep. 485.

92. Cosgrove *v.* Farwell, 114 Ill. App. 491; Dutton *v.* New England Mut. F. Ins. Co., 29 N. H. 153, holding that a mechanic's lien upon property is lost by discharging the debt which created the lien and taking the note of a third person in payment. *Contra*, Smith *v.* Johnson, 2 MacArthur (D. C.) 481; Ford *v.* Wilson, 85 Ga. 109, 11 S. E. 559; Allis *v.* Meadow Spring Distilling Co., 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

debtor with a third person as joint maker, indorser, surety, or guarantor;[93] but most of these rulings are opposed by contrary decisions in other states,[94] although it is recognized that even if the act itself may not, standing alone, amount to a waiver, it will have that effect if such was the intention of the parties.[95]

(II) *WHAT AMOUNTS TO TAKING OTHER SECURITY.* The contract, promise, or property taken must have been intended and accepted as collateral security before the lien can be said to be waived or defeated by the taking thereof.[96] Thus receiving an assignment of policies of insurance on the building has been held not to be a waiver of the lien.[97] So also, where a husband contracts as agent for his wife for materials to be used in erecting buildings on the land, and binds himself to pay therefor, his undertaking is not such collateral security as will defeat a mechanic's lien.[98] Neither will the promise of a subsequent purchaser of the premises subject to the lien to pay the claim amount to such collateral security as will avoid the lien.[99] Where material was furnished to a tenant to make improvements on the landlord's farm, the fact that a materialman in the complaint to enforce a lien on the improvements alleged that the landlord was personally liable for the material did not amount to a waiver of the lien by taking collateral security therefor when before trial he dismissed his claim of personal liability against the landlord without prejudice.[1] A sum of money deposited as security for the performance on the part of a construction company of a contract with a materialman, and out of which the latter is to be paid upon default of the other party, is such collateral security as will divest the materialman of his right to a mechanic's lien.[2]

(III) *UNEXECUTED AGREEMENT AS TO SECURITY.* It has been held that a mere agreement by a person entitled to a mechanic's lien to accept other security does not amount to a waiver of the lien where such agreement is not executed.[3]

93. Lyon, etc., Lumber, etc., Co. *v.* Equitable Loan, etc., Co., 174 Ill. 31, 50 N. E. 1006 [*affirming* 72 Ill. App. 489]; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935 [*reversing* 38 Ill. App. 555]; Andrews *v.* Kentucky Citizens' Bldg., etc., Assoc., 67 S. W. 826, 23 Ky. L. Rep. 2418; Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 70 N. W. 650 [*approved* in Charles Betcher Co. *v.* Cleveland, 13 S. D. 347, 83 N. W. 366]. *Contra,* Smith, etc., Co. *v.* Butts, 72 Miss. 269, 16 So. 242 [*following* but *criticizing* Parberry *v.* Johnson, 51 Miss. 291]. And see Peck *v.* Bridwell, 10 Mo. App. 524; Hinchman *v.* Lyhrand, 14 Serg. & R. (Pa.) 32.

An indorsement in blank is presumed to have been placed on the note as a guaranty. Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 209, 27 N. E. 935 [*reversing* 38 Ill. App. 555].

Note of partnership indorsed by one partner individually.— Where the holder of a mechanic's lien takes the note of his debtors in their copartnership name, indorsed by one of them individually, he acquires no additional security which could amount to a waiver of the lien. Millikin *v.* Armstrong, 17 Ind. 456, 458, where it is said: "Whether a mechanic's lien . . . would be waived by taking collateral security we need not decide, but the point is regarded as doubtful."

94. See cases cited as *contra, supra,* notes 88–93.

95. Halsted, etc., Co. *v.* Arick, 76 Conn. 382, 56 Atl. 628; Gilcrest *v.* Gottschalk, 39 Iowa 311; Hale *v.* Burlington, etc., R. Co., 13 Fed. 203, 2 McCrary 558.

96. Mervin *v.* Sherman, 9 Iowa 331.

97. Clark *v.* Moore, 64 Ill. 273, 280, where it is said: "There was in fact no security. The policy could not become a security unless the property was destroyed by fire, and that is a contingency which may not happen during the life of the policy. We do not see that there is any evidence which shows that appellees received this assignment with the intention of releasing their lien on the property. It was only to secure themselves in the event their lien should become unavailing by the destruction of the property by fire. We fail to see that it was intended to or did operate as a release or waiver of their lien."

98. Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177. See also Charles Betcher Co. *v.* Cleveland, 13 S. D. 347, 83 N. W. 366 [*following* Pinkerton *v.* La Beau, 3 S. D. 440, 54 N. W. 97].

99. Mervin *v.* Sherman, 9 Iowa 331.

1. National Lumber Co. *v.* Bowman, 77 Iowa 706, 42 N. W. 557.

2. Shickle, etc., Iron Co. *v.* Council Bluffs Water-Works Co., 33 Fed. 13, 25 Fed. 170, under Iowa statute.

3. *Missouri.*— Baumhoff *v.* St. Louis, etc., R. Co., 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770.

New York.— Firth *v.* Rehfeldt, 30 N. Y. App. Div. 326, 51 N. Y. Suppl. 980 [*affirmed* in 164 N. Y. 588, 58 N. E. 1087].

South Dakota.— Rolewitch *v.* Harrington, (1906) 107 N. W. 207; Barnard, etc., Mfg.

(iv) *Retention of Title to Materials Furnished.* The fact that one who furnishes materials for improvements on land retains the title to the materials until they are paid for does not deprive him of the right to a mechanic's lien.[4]

(v) *Surrender of Security.* It has been held that after collateral security has been taken it may be surrendered and the lien restored by agreement of the parties so as to be effectual against the owner and persons acquiring rights in the property after the lien is filed.[5]

3. Right to Set Up Waiver. The mere fact that the holder of a legal title, subject to a recorded declaration of trust in favor of the trustee's wife, designates himself in a building contract by the word "owner" is not such fraudulent misrepresentation as will debar the wife or her lien creditors from insisting on a covenant against liens in said building contract, either as against the contractor or subcontractors.[6] Where plaintiff furnished material for a house, relying on orders drawn in his favor by the owner upon defendant, which orders were accepted by defendant's agents conditioned upon defendant's making a loan on the property, and such loan was afterward made, but defendant refused to pay the orders on the ground that the money had been paid to the owner, defendant had no standing in equity to claim that plaintiff had waived his right to a mechanic's lien by accepting the independent security.[7]

4. Estoppel to Claim Lien.[8] Any act which will render it inequitable for a party to enforce his lien may operate as an estoppel in equity,[9] provided all the

Co. *v.* Galloway, 5 S. D. 205, 58 N. W. 565, where in the same contract the parties agreed in express terms that the right should not be thus waived, and the owner by alienating the property had made a compliance on his part as to the execution of the mortgage impossible.

Tennessee.—Bristol-Goodson Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19.

United States.—McMurray *v.* Brown, 91 U. S. 257, 23 L. ed. 321; Reynolds *v.* Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620.

Contra.—Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530 (where the security agreed on was offered and refused); Weaver *v.* Demuth, 40 N. J. L. 238 (holding that a contract by a materialman to take in payment second mortgages upon the houses was a waiver of his statutory lien, it not appearing that any demand had been made for the mortgages or that there was any ability to give them). See also Barrows *v.* Baughman, 9 Mich. 213.

4. Peninsular Gen. Electric Co. *v.* Norris, 100 Mich. 496, 59 N. W. 151; Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643; Great Western Mfg. Co. *v.* Hunter, 15 Nebr. 32, 16 N. W. 759; Cooper *v.* Cleghorn, 50 Wis. 113, 6 N. W. 491; Salt Lake Hardware Co. *v.* Chainman Min., etc., Co., 128 Fed. 509 [*following* Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229 (*reversing* 99 Fed. 180)]; Case Mfg. Co. *v.* Smith, 40 Fed. 339, 5 L. R. A. 231.

Reasserting title to materials for which a lien is claimed and selling them to another person is a waiver of the lien. Barnett *v.* Stevens, 16 Ind. App. 420, 43 N. E. 661, 45 N. E. 485.

5. Getchell *v.* Musgrove, 54 Iowa 744, 7 N. W. 154.

6. Purvis *v.* Brumbaugh, 8 Pa. Super. Ct. 292.

7. Southern Bldg., etc., Assoc. *v.* Bean, (Tex. Civ. App. 1899) 49 S. W. 910.

8. Estoppel of sureties on contractor's indemnity bond to owner see *infra*, VI, A, 2, c.

9. Commercial Loan, etc., Assoc. *v.* Trevette, 160 Ill. 390, 43 N. E. 769 [*reversing* 58 Ill. App. 656] (holding that where a building association, holding a mortgage on land to secure a lien, agreed to advance a certain portion of such loan to contractors for the erection of two stories of a building for the mortgagor, payable as the work progressed, and the contractors, without the knowledge of such association, took an additional contract for work on the third story, and, after doing work thereunder, presented to the association certificates signed by the architect, and reciting that the total amount of their contract was the sum fixed for work on the two stories, but failing to mention the second contract, and received payments on such certificates, they were estopped to claim, as against the association, a lien for work on the third story); McGraw *v.* Bayard, 96 Ill. 146 (holding that where, after the work was done, the lien claimants had a settlement with the owner, and accepted his notes for a part of their claim, and also a deed of land at an agreed price, giving back a mortgage for the difference between the value of the land and the amount of the balance of their claim, and were aware of efforts of the owner to obtain money on a deed of trust of the land on which the lien was claimed, and a loan was obtained thereupon with their approbation, and expectation that the owner would, from the money thus obtained, pay encumbrances on the land taken by them from him, the acts of the lien claimants operated as a waiver of their rights against the interest of the lender of the money).

essential elements of estoppel are clearly proved.[10] The statements or acts of a lienor cannot estop him to claim a lien as against the owner where he was not misled or induced to change his position thereby;[11] but it has been held that a mechanic's lien claimant estops himself to assert his lien as against the innocent holders of bonds reciting that they are secured by first mortgage on the improved property by suggesting the issue of such bonds and offering to take part of the same as collateral security for a part of his lien claim, and by assisting in the sale of the balance of such bonds to innocent purchasers, although the latter are not shown to have been directly influenced by his statements or assurances.[12] A subcontractor is estopped to assert a lien where the owner has settled with the contractor in reliance upon the subcontractor's receipt for the amount due him,[13] his statement that he has been paid by the contractor,[14] his expressed desire that payment be made to the contractor,[15] or his direction to pay the contractor money withheld for the subcontractor's protection.[16] But the fact that a subcontractor knew that the principal contractor intended to and did collect the contract price from the owner has been held not to estop the subcontractor to claim a lien.[17] Where a subcontractor represented to the owner, before settlement with the principal contractor, that he would not look to the owner for payment for materials furnished, he is estopped from claiming a lien as to part of an instalment due at that time to the principal contractor which was paid by the owner to other subcontractors in reliance upon such representation.[18] A person furnishing material under a contract with the owner may, by his agreement as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien as against such creditors, although he has made no express promise that he will not assert such lien.[19] A mechanic who has filed a lien upon real estate for work and materials furnished in the erec-

10. Gull River Lumber Co. *v.* Keefe, 6 Dak. 160, 41 N. W. 743 (holding that where the owner testified that he had gone to the agent of plaintiff, a subcontractor, and asked him if the principal contractors were paying their bills, and if they were owing plaintiff any amount, and that the agent replied that they were not owing anything of any account, and that they were all right, but it appeared that this conversation occurred at a place where the agent did not have access to his books, and that there was no reason why the latter should have desired to mislead the owner, and there was some conflict as to what the agent did say, plaintiff was not estopped to enforce his lien); Green Bay Lumber Co. *v.* Adams, 107 Iowa 672, 78 N. W. 699 (holding that the fact that a materialman's agent stated to the owner while the house was unfinished that the principal contractor "had paid all his bills as he had paid them last winter,—when the buildings were finished" did not estop the materialman from asserting his lien for material furnished the contractor).

11. Washburn *v.* Kahler, 97 Cal. 58, 31 Pac. 741; Simonsen *v.* Stachlewicz, 82 Wis. 338, 52 N. W. 310.

A subcontractor's mere presence at a settlement between the owner and the contractor at which the owner accepted an order of the contractor in favor of a third person for the balance due does not estop the subcontractor to claim a lien where he did not say or do anything which could have had the effect of leading the owner to believe that he was paid or had released him. Havighorst *v.* Lindberg, 67 Ill. 463.

12. Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19.

13. Cote Brilliant Pressed Brick Co. *v.* Sadring, 68 Mo. App. 15; Cook *v.* Herring, 30 Pittsb. Leg. J. N. S. (Pa.) 70.

14. D. T. Norton Lumber Co. *v.* Driving Park Assoc., 64 Mo. App. 377, holding a statement of the subcontractor's agent to this effect sufficient to estop the subcontractor.

15. Fairbairn *v.* Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

16. Rand *v.* Grubbs, 26 Mo. App. 591.

17. Mivalaz *v.* Genovely, 89 S. W. 109, 28 Ky. L. Rep. 203, holding that where, in a suit by a subcontractor to enforce a mechanic's lien, there was evidence that the subcontractor knew that the principal contractor intended to collect the contract price for the building from the owner, and that he did collect it, but there was no proof that the subcontractor said or did anything showing that he waived his lien, or that the owner was induced to pay the principal contractor the contract price by reason of any representations made by the subcontractor, or that the subcontractor authorized the principal contractor to give a receipt, on payment of the price, reciting that all claims for labor had been paid, the subcontractor was not estopped from enforcing his lien. But *compare* Chilton *v.* Lindsay, 38 Mo. App. 57.

18. Green Bay Lumber Co. *v.* Thomas, 106 Iowa 154, 76 N. W. 651.

19. West *v.* Klotz, 37 Ohio St. 420.

tion of houses thereon, and releases it for the purpose of enabling the owner to secure a new loan, cannot afterward claim to enforce the same lien, as against the person making such loan upon the security of the property.[20] A subcontractor is not estopped to assert a mechanic's lien, as against the owner, by reason of the fact that the owner was induced to employ the principal contractor by the subcontractor's verbal assurance that the former was responsible, and that he himself would not allow liens to be filed if the work was given to the principal contractor;[21] and it has been held that a subcontractor does not lose his right to a lien because he has assisted the contractor to dispose of the latter's property, thus preventing a recovery from him of the amount due,[22] or has permitted the contractor to leave the state, taking with him property sufficient to pay the subcontractor's claim, without attempting to collect it.[23]

B. Bond or Deposit to Prevent or Discharge Lien — 1. Bond[24] — a. In General. The statutes of some states provide for the execution and filing of a bond[25] by the owner[26] or the contractor[27] for the use of persons in whose favor liens might accrue conditioned for the payment of claims which might be a basis of liens,[28] which bond is substituted as security in place of the lien on the real estate.[29]

20. Phillips *v.* Gilbert, 2 MacArthur (D. C.) 415.

21. Abham *v.* Boyd, 7 Daly (N. Y.) 30.

22. Audis *v.* Davis, 63 Ind. 17.

23. Merritt *v.* Pearson, 58 Ind. 385.

24. Contractor's bond for payment of claims and indemnity against liens see *infra*, VII.

25. Carnegie *v.* Hulbert, 70 Fed. 209.

The words "bond" and "undertaking" are used synonymously in N. Y. Laws (1897), c. 418, § 18, subd. 4. Mathiasen *v.* Shannon, 25 Misc. (N. Y.) 274, 54 N. Y. Suppl. 305.

Statute not retroactive.— The giving of a bond under Kan. Acts (1889), c. 168, § 13, does not operate to divest a lien the right to which accrued under the act of 1872. Main St. Hotel Co. *v.* Horton Hardware Co., 56 Kan. 448, 43 Pac. 769.

Filing one or more bonds.— As many bonds may be executed as the necessities of the case may require. One bond may be executed to release the lien of claims already filed and another to prevent the filing of such claims in the future, or both classes of claims may be included in one bond. Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498.

26. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232; Miller *v.* Schmitt, 35 Misc. (N. Y.) 231, 71 N. Y. Suppl. 771; Mathiasen *v.* Shannon, 25 Misc. (N. Y.) 274, 54 N. Y. Suppl. 305.

27. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515]; Risse *v.* Hopkins Planing Mill Co., 55 Kan. 518, 40 Pac. 904; Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232; New York Lumber, etc., Co. *v.* Seventy-Third St. Bldg. Co., 15 Daly (N. Y.) 133, 3 N. Y. Suppl. 937.

Owner need not join in bond.— A bond executed by the contractor as principal, without the owner of the property uniting therein, is sufficient to discharge a lien filed by a materialman. New York Lumber, etc., Co. *v.* Seventy-Third St. Bldg. Co., 15 Daly (N. Y.) 133, 3 N. Y. Suppl. 937, decided under New York Mechanics' Lien Act of 1885.

Execution by successor of partnership.— One member of a firm of contractors who has succeeded to the business of the firm on its dissolution, after the lien attached, may sign the bond as such successor with as much effect as if all the members of the firm united therein. New York Lumber, etc., Co. *v.* Seventy-Third St. Bldg. Co., 15 Daly (N. Y.) 133, 3 N. Y. Suppl. 937.

28. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515]; Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232.

N. Y. Laws (1863), c. 500, which provides for a discharge of the lien effected under that act by an entry on the judgment docket, by order of court, that the judgment has been "secured on appeal," does not interfere with liens acquired under the provisions of the previous acts of 1851 and 1855, or authorize their discharge in the manner provided for those acquired under the act of 1863; nor is there any provision in the code of procedure by which such a judgment can be marked "secured on appeal" with any such effect as to discharge the lien or security on the property. The most that such an order could do would be to stay the enforcement of the personal judgment. Hallahan *v.* Herbert, 4 Daly 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409].

29. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515]; Risse *v.* Hopkins Planing Mill Co., 55 Kan. 518, 40 Pac. 904; Morton *v.* Tucker, 145 N. Y. 244, 40 N. E. 3 [*reversing* 10 Misc. 538, 31 N. Y. Suppl. 446, 1 N. Y. Annot. Cas. 114]; Kerrigan *v.* Fielding, 47 N. Y. App. Div. 246, 62 N. Y. Suppl. 115; Smith *v.* New York, 32 Misc. (N. Y.) 380, 66 N. Y. Suppl. 686; Reilly *v.* Poerschke, 19 Misc. (N. Y.) 612, 44 N. Y. Suppl. 422 [*affirming* 18 Misc. 750, 42 N. Y. Suppl. 1132], 14 Misc. 466, 36 N. Y. Suppl. 1111.

Bond to discharge lien on amount due contractor for public improvement.— N. Y. Laws (1897), c. 418, § 20, provides that a lien on the amount due a contractor for a public im-

b. Persons Entitled to Give Bond. The owner of any interest in property on which there is a mechanic's lien may become the principal in a bond for the purpose of discharging the lien, and it is not necessary that all the owners or persons interested should unite in the bond as principals.[30] The statutes sometimes allow any person having an interest in property upon which a mechanic's lien is claimed to give a bond to dissolve the lien upon his interest,[31] the purpose being to allow any one possessing an interest in the whole or any part of the realty to free his title from such an encumbrance and to prevent the land from being sold to satisfy the lien.[32] A bond executed by a person having no interest in the land is insufficient,[33] although it was executed at the request of a person having an interest.[34]

c. Time For Giving Bond. Under some statutes the bond may be given and filed at any time after the making of the contract,[35] and it need not be filed before, but may be filed after, the institution of a suit to enforce a lien.[36]

d. Form, Requisites, and Sufficiency of Bond. The bond should comply with the statutory requirements,[37] but although it does not do so it may be valid and binding as a common-law bond.[38] A bond given pursuant to an unconstitutional statute is, however, void and cannot be upheld as a common-law obligation.[39] Under some statutes the bond is required to be in a sum not less than the contract

provement may be discharged by the contractor giving a bond with surety to the state or municipal corporation with which the notice of lien is filed conditioned for the payment of any judgment. The lienor has a direct interest in such an undertaking which gives him a standing to enforce it (Smith *v.* New York, 32 Misc. (N. Y.) 380, 66 N. Y. Suppl. 686) and may maintain an action thereon in his own name after procuring an order granting him leave to do so (*In re* John P. Kane Co., 66 N. Y. Suppl. 684 [*affirmed* in 52 N. Y. App. Div. 630, 65 N. Y. Suppl. 1136]).

30. Miller *v.* Schmitt, 35 Misc. (N. Y.) 231, 71 N. Y. Suppl. 771.

A statute allowing "the defendant" to give bond and release the property uses the word "defendant" not in its technical sense but with a meaning broad enough to cover the owner of the premises in whom, at the time, title may be vested. Hence one who purchased the property at a sale under a deed of trust pending a suit to enforce a mechanics' lien may give bond and release the property, although he is not a defendant in the suit. Anglo-American Sav., etc., Assoc. *v.* Campbell, 13 App. Cas. (D. C.) 581, 43 L. R. A. 622.

31. Rockwell *v.* Kelly, 190 Mass. 439, 77 N. E. 490; Breed *v.* Gardner, 187 Mass. 300, 72 N. E. 983.

Conveyance made to enable grantee to give bond.— The mere fact that a conveyance of the equity of redemption of real estate, subject to mortgages, is made to a person with a view to his giving bond to dissolve a mechanic's lien on the property does not affect his title. Breed *v.* Gardner, 187 Mass. 300, 72 N. E. 983.

32. Rockwell *v.* Kelly, 190 Mass. 439, 77 N. E. 490.

33. Landers *v.* Adams, 165 Mass. 415, 43 N. E. 119; Glendon *v.* Townsend, 120 Mass. 346.

A former owner who conveyed with a warranty against encumbrances has not such an interest in the land as entitles him to dissolve a mechanic's lien thereon by giving the statutory bond. Glendon *v.* Townsend, 120 Mass. 346.

34. Landers *v.* Adams, 165 Mass. 415, 43 N. E. 119.

35. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515].

36. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515]. But *compare* Maulsbury *v.* Simpson, 11 Phila. (Pa.) 196; Hood *v.* Building Assoc., 9 Phila. (Pa.) 105.

37. See Rockwell *v.* Kelly, 190 Mass. 439, 77 N. E. 490 [*approving* Taunton Sav. Bank *v.* Burrell, 179 Mass. 421, 60 N. E. 930], holding that while a proper bond dissolves the lien only as to the interest of the principal, leaving unaffected the right of other persons in the premises, yet to effect this purpose the statutory condition must appear in the instrument, which is to pay the lienor the amount fixed as the value of his legal or equitable ownership or so much of the valuation as may be required to satisfy either the whole claim or the proportionate part which the obligor's interest may be required to contribute.

38. Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498, holding that the fact that a bond given under the Iowa act of April 7, 1884, for the purpose of releasing mechanics' liens, and preventing the filing thereof against public buildings, is not made to the county owning the building, and does not contain a penalty, as required by the act, but instead runs directly to the parties whose liens are to be released, and to all others then or thereafter having the right to file liens for the amount which may be due on their claims, does not render the bond invalid. See also U. S. Wind Engine, etc., Co. *v.* Drexel, 53 Nebr. 771, 74 N. W. 317.

39. San Francisco Lumber Co. *v.* Bibb, 139 Cal. 192, 72 Pac. 964 [*following* Shaughnessy *v.* American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701].

price,[40] while under other statutes the amount of the bond must be fixed by the court.[41] The statutes usually require that the bond shall be executed with good and sufficient sureties,[42] who are to be approved by the court or a designated officer.[43] The sureties cannot object to the sufficiency of the bond because of their failure to justify as required by statute;[44] but where the sureties whose names were signed to the bond were impersonated by others appearing before the master in chancery, who gave false answers in regard to their property, the bond, although signed and approved by the master, is not within the statute, and does not effect a dissolution of the lien.[45] It has been held that the court will not approve of the security offered after scire facias has issued on a mechanic's lien, unless the issuing of the scire facias is recited in the bond, and it contains a warrant of attorney for entering judgment for the amount that shall be found due, with interest and costs.[46] Where a single contract for an entire sum for the erection of one building on two lots is made and the building is constructed, the foreclosure of a mechanic's lien on the two lots cannot be defeated or discharged by the giving of a bond as to one lot only.[47] It is usually required that the bond shall be approved by the court or by a designated officer,[48] and filed in a designated office.[49] The approval of an irregular bond, limited to certain beneficiaries named therein and based on an express waiver of their rights, is a rejection of such bond as to all other persons for whose benefit it was intended.[50]

e. Effect of Bond. When a bond is given, approved, and filed as provided by law, the effect is to prevent liens from attaching,[51] and discharge liens which

40. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232.

41. Copley *v.* Hay, 16 Daly (N. Y.) 446, 12 N. Y. Suppl. 277.

Separate order not necessary.— Sureties on a bond given to discharge a mechanic's lien cannot escape liability thereon by reason of the fact that there was no separate order fixing the amount of the bond where the order discharging the lien fixed the amount of the bond. Ringle *v.* O'Matthiessen, 39 N. Y. Suppl. 92.

42. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232; Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498.

Sureties need not be residents of state.— Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498, under the Iowa act of April 7, 1884.

43. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232; Sulzer *v.* Ross, 12 Pa. Super. Ct. 206.

44. Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369.

45. Breed *v.* Gardner, 187 Mass. 300, 72 N. E. 983.

46. Hood *v.* Building Assoc., 9 Phila. (Pa.) 105.

47. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232.

48. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232 (clerk of district court); Sulzer *v.* Ross, 12 Pa. Super. Ct. 206. See also U. S. Wind Engine, etc., Co. *v.* Drexel, 53 Nebr. 771, 74 N. W. 317.

Real estate offered as security must be approved.— Sulzer *v.* Ross, 12 Pa. Super. Ct. 206.

Notice to claimant.— The claimant is entitled to be heard as to the sufficiency of the security to be substituted for his lien, and hence notice of the substitution must be given to him before it is entered. Sulzer *v.* Ross, 12 Pa. Super. Ct. 206 [*affirming* 8 Pa. Dist. 573].

Proceedings for approval.— If the pecuniary value of the interest to be released is not ascertained by agreement then proceedings may be had similar to those provided for the approval of bonds given to dissolve attachments, and the inquiry which the acting magistrate has to make is judicial and cannot be dispensed with even though a penal sum is named which is in excess of the amount of each lien, and hence where the magistrate approved the bond without causing any appraisal to be made and did not pass upon the question of value, there was no valid condition in the bonds because of his failure to comply with this requirement and consequently the liens remained undischarged. Rockwell *v.* Kelly, 190 Mass. 439, 77 N. E. 490.

49. Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232, office of clerk of district court in county in which property is situated.

50. U. S. Wind Engine, etc., Co. *v.* Drexel, 53 Nebr. 771, 74 N. W. 317.

51. *Illinois.*— Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515].

Kansas.— Risse *v.* Hopkins Planing Mill Co., 55 Kan. 518, 40 Pac. 904; Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232.

Minnesota.— Bohn *v.* McCarthy, 29 Minn. 23, 11 N. W. 127.

New York.— *In re* Burstein, 68 N. Y. Suppl. 742, holding that where a contractor filed a lien for labor and materials, which was discharged on the date it was filed, a second notice of lien subsequently filed on the same day, for the identical labor and materials, for the same amount, and against the same owners and their property, will be canceled on application, as a paper improperly filed.

have been already filed.[52] The filing of a bond after a suit to enforce a lien has been commenced does not necessitate the dismissal of the suit,[53] but after the bond has been filed it is error to decree a lien[54] or render a decree *in personam*.[55] The giving of a bond to discharge property from a mechanic's lien is not an acknowledgment of the validity of the lien;[56] but where a grantee of land subject to a mechanic's lien has given a bond to discharge the lien, he cannot show for the purpose of defeating a recovery on the bond that the lien could not have been satisfied out of the grantor's interest because of prior encumbrances.[57]

f. Liabilities on Bond. The obligation of the sureties on a bond given by the contractor conditioned for the payment to persons performing labor and furnishing materials of the value of such labor and materials is collateral to the obligation of the contractor to pay therefor and can be enforced against them only to the extent that the same obligation could be enforced against the contractor.[58] Where the condition of the bond is that the principal obligor will pay or cause to be paid "any judgment rendered against it in said suit, and adjudged and decreed to be a lien on the above-described premises," a valid personal judgment against the principal obligor is necessary in order to hold the sureties liable.[59] Where a bond to discharge a mechanic's lien is conditioned for the payment of any judgment rendered against the property, a judgment against the principal for a lien against the property is conclusive on the sureties;[60] but where the lienor fails to establish a lien against the property he cannot recover on such a bond,[61] although the sureties are not released from liability because the judgment in the foreclosure action did not provide for the enforcement of the lien against the property.[62] After a judgment in form only has been rendered, enforcing the lien against the premises, to enable the person entitled to the lien to recover on the bond, the sureties cannot object that the action should have been in equity as on foreclosure, and all persons in interest made parties as in foreclosure proceedings.[63] The fact that the principal procured the signature of a surety upon the promise that the principal would afterward obtain the signature of another surety, which was not done, will not relieve the surety from obligation on a bond delivered, approved, and filed as

United States — Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 409.

Claimant need not take statutory steps to fix lien before suing on bond. — Bohn *v.* McCarthy, 29 Minn. 23, 11 N. W. 127.

52. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515]; Risse *v.* Hopkins Planing Mill Co., 55 Kan. 518, 40 Pac. 904; Kille *v.* Bentley, 6 Kan. App. 804, 51 Pac. 232; Sulzer *v.* Ross, 12 Pa. Super. Ct. 206; Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498.

An order of court discharging the lien must be made under the New York statute. Copley *v.* Hay, 16 Daly (N. Y.) 446, 12 N. Y. Suppl. 277.

53. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515].

54. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201 [*reversing* 20 Ill. App. 515].

55. Martin *v.* Swift, 120 Ill. 488, 492, 12 N. E. 201 [*reversing* 20 Ill. App. 515], where it is said: "The law does not contemplate that in such a proceeding there shall be any decree *in personam*, except where there has been establishment of the lien, and decree for the deficiency after sale made of the subject of the lien."

56. Parsons *v.* Moses, 40 N. Y. App. Div. 58, 57 N. Y. Suppl. 727, holding that a recital in a bond that the claimant had filed a notice of lien against certain persons as owners and contractors did not estop the sureties to dispute the validity of the lien.

57. Kerrigan *v.* Fielding, 47 N. Y. App. Div. 246, 62 N. Y. Suppl. 115.

58. Towle *v.* Sweeney, 2 Cal. App. 29, 83 Pac. 74.

59. Burleigh Bldg. Co. *v.* Merchant Brick, etc., Co., 13 Colo. App. 455, 59 Pac. 83.

60. Ringle *v.* O'Matthiessen, 39 N. Y. Suppl. 92.

61. Parsons *v.* Moses, 40 N. Y. App. Div. 58, 57 N. Y. Suppl. 727. See also Anglo-American Sav., etc., Assoc. *v.* Campbell, 13 App. Cas. (D. C.) 581, 43 L. R. A. 622, holding that where claimants fail to establish the mechanics' liens sought to be enforced, but a constructive trust upon a fund in the hands of one of the defendants is declared in favor of the lienors, the obligation of the undertaking filed by a subsequent purchaser of the property ceases, and the principal and his sureties are discharged.

62. Ringle *v.* Matthiessen, 17 N. Y. App. Div. 374, 45 N. Y. Suppl. 226.

63. Ringle *v.* O'Matthiessen, 39 N. Y. Suppl. 92 [*affirmed* in 10 N. Y. App. Div. 274, 41 N. Y. Suppl. 962 (*affirmed* in 158 N. Y. 740, 53 N. E. 1131)].

the law requires.[64] As between the sureties upon a bond to discharge a mechanic's lien, binding them to pay any judgment in an action to enforce the claim or foreclose the lien, and the sureties upon an undertaking given by the owner upon appeal from a judgment in an action against him to foreclose the lien, the former are in effect principals and the latter sureties; and the former cannot therefore insist that the person for whose benefit the bond and undertaking were given shall, before proceeding against them, pursue his remedies against the latter.[65]

g. Estoppel to Deny Validity of Bond. The sureties on a bond to prevent or discharge liens are estopped to deny its validity where persons entitled to liens have in reliance upon the bond refrained from filing lien claims and in consequence lost their right to perfect liens,[66] or where liens which have been filed have been discharged on the faith of the bond.[67] Neither can the obligor, after the bond has been treated as valid by all the parties and the lien discharged, object in an action on the bond that the amount thereof exceeded the jurisdiction of the court which accepted it[68] or evade liability because of the omission of a seal from the bond.[69] But the lienor is not estopped to assert any objection to the bond which he can make good by reason of his taking part in the proceeding in which the bond was given.[70]

h. Cancellation of Bond. Where the owner of property subject to a mechanic's lien fraudulently conveyed it to an irresponsible person for the purpose of having him sign a bond to dissolve the lien, and the grantee as principal and two other irresponsible persons as sureties executed a bond, the approval of which was procured by false testimony of the sureties as to their financial ability, equity had jurisdiction to cancel the bond and order a release of all rights acquired by its approval and record.[71]

i. Actions on Bond. It has been held that where a bill is filed to enforce a mechanic's lien, and the lien is discharged by the owner's written undertaking, with surety approved by the court that he will pay the amount recovered with costs, the decree *in personam* for the amount due the mechanic can be taken only against the owner, and the remedy of the mechanic against the surety is by an action at law upon the undertaking,[72] and that a judgment in an ordinary action at law for a debt secured by a mechanic's lien is not admissible evidence against a surety on an undertaking given to discharge the lien.[73] In New York, after some conflict of opinion, it appears to be now settled that the remedy to enforce the obligations of the sureties on a bond given to discharge a mechanic's lien is not by an action at law upon the bond but by an action in equity in which all persons interested, including the sureties on the bond, are made parties, and it is not a

64. Risse *v.* Hopkins Planing Mill Co., 55 Kan. 518, 40 Pac. 904.

65. Sullivan *v.* Goodwin, 30 N. Y. App. Div. 194, 51 N. Y. Suppl. 1000 [*affirmed* in 164 N. Y. 583, 58 N. E. 1092].

66. Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498.

67. Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794; Mathiasen *v.* Shannon, 25 Misc. (N. Y.) 274, 54 N. Y. Suppl. 305; Miller *v.* Youmans, 13 Misc. (N. Y.) 59, 34 N. Y. Suppl. 140.

68. Sheffield *v.* Murray, 80 Hun (N. Y.) 555, 30 N. Y. Suppl. 799 [*following* Goodwin *v.* Bunzl, 102 N. Y. 224, 6 N. E. 399].

69. Whitney *v.* Coleman, 9 Daly (N. Y.) 238, so holding where the bond had been approved.

70. Taunton Sav. Bank *v.* Burrell, 179 Mass. 421, 423, 60 N. E. 930, where it is said: "They [the lienors] did nothing beyond taking their part in a proceeding which any one claiming an interest in the land might institute, whether they liked it or not."

71. Keyes *v.* Brackett, 187 Mass. 306, 72 N. E. 986.

72. Phillips *v.* Gilbert, 101 U. S. 721, 25 L. ed. 833.

Evidence.— In an action by a materialman on a contractor's bond, given under Minn. Gen. St. c. 90, § 3, a writing signed by the contractor requesting the persons for whom he was erecting the building to pay all money due him to G is not admissible as tending to show that plaintiff sold the material to G, where it is not shown that plaintiff knew of the existence of such writing. Neither is evidence that plaintiff at first refused to furnish material to the contractor, but did so after one G went to see him in regard to the matter, admissible to show that the materials were sold to G, and not to the contractor. Burns *v.* Maltby, 43 Minn. 161, 45 N. W. 3.

73. Phillips *v.* Coburn, 2 MacArthur (D. C.) 409.

condition precedent to the bringing of the action that the lienor shall exhaust his remedy against the landowner by recovering a judgment of foreclosure in form against the property described in the notice of lien.[74] The complaint should be in the usual form of a complaint in an action to foreclose the lien with the exception that it should allege the giving of the bond and the consequent discharge of the lien, and instead of asking judgment for a sale of the premises it should demand relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien.[75] The sureties may defend the action and set up any legal or equitable defense which would have availed the principal, and may establish it by proof, and are not precluded from contesting an unjust, false, and exaggerated claim by the default of the principal in failing

74. Morton *v.* Tucker, 145 N. Y. 244, 247, 40 N. E. 3 [*reversing* 10 Misc. 538, 31 N. Y. Suppl. 446, 1 N. Y. Annot. Cas. 114, and *criticizing* Sheffield *v.* Robinson, 73 Hun (N. Y.) 173, 25 N. Y. Suppl. 1098; Garland *v.* Van Rensselaer, 71 Hun (N. Y.) 2, 24 N. Y. Suppl. 781; Cunningham *v.* Doyle, 5 Misc. (N. Y.) 219, 25 N. Y. Suppl. 476; Kruger *v.* Braender, 3 Misc. (N. Y.) 275, 23 N. Y. Suppl. 324; Heinlein *v.* Murphy, 3 Misc. (N. Y.) 47, 22 N. Y. Suppl. 713; Brandt *v.* Radley, 23 N. Y. Suppl. 277; Highton *v.* Dessau, 19 N. Y. Suppl. 395; Scherrer *v.* New York Music Hall Co., 18 N. Y. Suppl. 459; Lawson *v.* Reilly, 13 N. Y. Civ. Proc. 290] (where it is said: "After a lien has been discharged it may be difficult to obtain a judgment against the premises, for the owner has but to interpose the order discharging and vacating the lien in order to defeat the recovery of such a judgment. An action at law could not well be maintained upon the bond, for the reason that the right of the plaintiffs to maintain the action might depend upon the priority of their lien and of there being a sufficient sum unpaid upon the contract with the owner with which to pay their claim, involving rights and equities of other persons who could not properly be made parties in an action at law upon the bond. It appears to us that the proper remedy is clearly pointed out by the statute"); Miller *v.* McKeon, 15 N. Y. App. Div. 133, 44 N. Y. Suppl. 371; Mathiasen *v.* Shannon, 25 Misc. (N. Y.) 274, 54 N. Y. Suppl. 305. See also Reilly *v.* Poerschke, 19 Misc. (N. Y.) 612, 44 N. Y. Suppl. 422 [*affirming* 18 Misc. 750, 42 N. Y. Suppl. 1132]. *Compare* Ringle *v.* Matthiessen, 10 N. Y. App. Div. 274, 41 N. Y. Suppl. 962 [*affirming* 39 N. Y. Suppl. 92, and *affirmed* in 158 N. Y. 740, 53 N. E. 1131].

The owner of the property is a necessary party to an action on a bond to discharge a mechanic's lien conditioned that the owner shall pay any judgment in favor of plaintiff in an action to enforce the lien, the sureties being entitled to have it adjudged against the owner what the amount of the lien, if any, is. Von den Driesch *v.* Rohrig, 45 N. Y. App. Div. 526, 61 N. Y. Suppl. 341. But *compare* Copley *v.* Hay, 16 Daly (N. Y.) 446, 12 N. Y. Suppl. 277.

Other lienors proper parties.— Where a mechanic's lien has been discharged by the filing of a bond, as provided by N. Y. Laws (1885), c. 342, § 24, subd. 6, the lienor, in an action to establish his lien and enforce it against the sureties on the bond, may properly make parties all who have filed liens upon the premises, as is required by section 17 in an ordinary action to foreclose such a lien, including those whose liens have been discharged by a deposit of money, as provided by section 24, subd. 2. Scherrer *v.* New York Music Hall Co., 18 N. Y. Suppl. 459.

The lienor may sue in his own name to enforce the bond. Ringle *v.* Wallis Iron Works, 16 Misc. (N. Y.) 167, 38 N. Y. Suppl. 875, 25 N. Y. Civ. Proc. 261.

Leave to sue.— In an action on an undertaking running to the clerk of the county, given to procure a discharge of a mechanic's lien filed by plaintiff's assignor, the obtaining of leave to sue is an essential fact which plaintiff is bound to allege under a statute providing that where a bond has been given in the course of an action to the people or to a public officer for the benefit of a party, and provision is not specially made for the prosecution thereof, the party may maintain an action in his own name for a breach of condition upon procuring an order granting leave. Goldstein *v.* Michelson, 45 Misc. (N. Y.) 601, 91 N. Y. Suppl. 33, holding further that an averment of the complaint that the undertaking ran to plaintiff's assignor is rendered nugatory by the annexation of the instrument, which runs to the county clerk, and the form of the instrument controls over the pleader's conclusion as to its legal effect. But *compare* Reilly *v.* Poerschke, 19 Misc. (N. Y.) 612, 44 N. Y. Suppl. 422 [*affirming* 18 Misc. 750, 42 N. Y. Suppl. 1132], 14 Misc. 466, 36 N. Y. Suppl. 1111, holding that a lien claimant need not obtain leave of court before suing on a bond given by the contractor to discharge the lien.

75. Morton *v.* Tucker, 145 N. Y. 244, 40 N. E. 3 [*reversing* 10 Misc. 538, 31 N. Y. Suppl. 446, 1 N. Y. Annot. Cas. 114] (where the complaint was held on demurrer to state facts sufficient to constitute a cause of action); Reilly *v.* Poerschke, 19 Misc. (N. Y.) 612, 44 N. Y. Suppl. 422 [*affirming* 18 Misc. 750, 42 N. Y. Suppl. 1132].

Sufficiency of complaint.— Where a complaint to foreclose a mechanic's lien contains all the allegations necessary to authorize a personal judgment against defendant sureties

to defend it.[76] Where the lien has been discharged by the bond of a surety company, the judgment should be against the company for the amount of the lien.[77] In an action upon a bond given to discharge a lien for material furnished for a public improvement, the claimant must allege and prove the performance of his contract with the contractor, but need not allege or prove the performance of the contractor's obligation to the city.[78] Where building contractors, after giving an undertaking to discharge the mechanic's lien of a subcontractor by securing the payment of any judgment against said property in his favor, brought an action against the owner to foreclose a lien filed by themselves and made the subcontractor a party defendant; and the owner appealed from a judgment establishing both liens, and directing sale of the property and payment, and gave an undertaking to stay execution, this appeal and stay constituted no defense to an action by the subcontractor upon the undertaking to discharge his lien.[79]

2. Deposit in Court. Under some statutes a mechanic's lien may be discharged by the owner depositing in court an amount sufficient to satisfy the claim[80] or the balance due from him to the contractor.[81] An offer to pay such an amount into court must follow the language of the statute and state that it is "in discharge of the lien" or it will be ineffectual.[82] The money deposited stands in place of

on a bond given to discharge the lien, and asks for judgment according to the law of the case and for further relief, defendants are sufficiently apprised that a personal judgment is to be demanded. Mathiasen *v.* Shannon, 25 Misc. (N. Y.) 274, 54 N. Y. Suppl. 305. A complaint in an action to enforce a bond given to discharge a lien alleges the name of the obligor sufficiently to withstand a demurrer where it states that the contractor obtained an order of the court of common pleas fixing the amount of the bond, and that he thereafter gave bond with sureties in the amount fixed, and that an order was entered approving the bond and discharging the lien, since such allegations necessarily refer to the bond authorized by the Mechanics' Lien Law which required it to be executed to the clerk of the county. Reilly *v.* Poerschke, 19 Misc. (N. Y.) 612, 44 N. Y. Suppl. 422 [*affirming* 18 Misc. 750, 42 N. Y. Suppl. 1132]. A complaint in an action on a bond to discharge a mechanic's lien, which alleges that the contractor instituted proceedings for the purpose of securing the discharge of the property from the mechanic's lien, and that thereafter the amount of the bonds to be given for the purpose of discharging said lien was duly fixed at the sum of thirteen thousand dollars, sufficiently alleges that the court fixed the amount of the bond given in discharge of the lien. Ringle *v.* Wallis Iron Works, 16 Misc. (N. Y.) 167, 38 N. Y. Suppl. 875, 25 N. Y. Civ. Proc. 261.

76. Aeschlimann *v.* Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723 [*affirming* 29 N. Y. App. Div. 630, 53 N. Y. Suppl. 998].

77. Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 522 [*following* Morton *v.* Tucker, 145 N. Y. 244, 40 N. E. 3; Ringle *v.* Matthiessen, 10 N. Y. App. Div. 274, 41 N. Y. Suppl. 962 (*affirmed* in 158 N. Y. 740, 53 N. E. 1131)].

78. Pierson *v.* Jackman, 27 Misc. (N. Y.) 425, 58 N. Y. Suppl. 344 [*affirmed* in 47 N. Y. App. Div. 625, 62 N. Y. Suppl. 1145].

79. Heagney *v.* Hopkins, 23 Misc. (N. Y.) 608, 52 N. Y. Suppl. 207.

80. Burton *v.* Rockwell, 63 Hun (N. Y.) 163, 17 N. Y. Suppl. 665; Matter of 478 Cherry St., 27 Misc. (N. Y.) 682, 58 N. Y. Suppl. 665; Hall *v.* Dennerlein, 14 N. Y. Suppl. 796; Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305.

Amount claimed must be deposited.—Where the claimant appeals from a judgment allowing him less than he claims, the owner, in order to discharge the lien by payment into court, must pay the amount claimed, and not merely the amount of the judgment. Dowdney *v.* McCollom, 5 Daly (N. Y.) 240.

Court cannot discharge lien without deposit. — The only question for the court, on an application to cancel a lien, is the amount of the deposit to be made, and the validity of the claim cannot then be inquired into, and therefore an order directing the cancellation of a lien without requiring a deposit to secure it is void, although the claimant was made a defendant to the action, and failed to appear. Fischer *v.* Hussey, 11 Misc. (N. Y.) 529, 32 N. Y. Suppl. 762.

Making of deposit optional.— The provision of the Oregon Mechanics' Lien Act, relating to the deposit in the office of the county clerk of the amounts required to pay claims, only confers a privilege which the employer has to discharge the liens *pro tanto*, and it is optional on his part to make the deposit or not. Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305.

81. Wylly Academy *v.* Sanford, 17 Fla. 162; Wagner *v.* McMillen, 72 Wis. 327, 39 N. W. 777, holding that on paying into court the amount owing by him to the principal contractor, the owner may have the principal contractor substituted as defendant and be discharged as provided for by Wis. Rev. St. § 2610.

82. Hall *v.* Dennerlein, 14 N. Y. Suppl. 796 [*followed* but *criticized* in Burton *v.* Rockwell, 63 Hun (N. Y.) 163, 17 N. Y. Suppl. 665].

the lien and belongs to the lienor so far as it is necessary to pay his claim,[83] but the claimant is not entitled to receive the amount deposited until he has established his claim and lien on the land in an action brought for that purpose,[84] and the payment into court is not an acknowledgment of the claimant's right or a waiver of defenses.[85] The lien on the fund is not discharged by lapse of time,[86] but the money must remain in court until the depositor has given the lienor the statutory notice to proceed upon his claim, and upon his failure to do so obtained an order vacating the claim, or until an action has been brought by the lienor and his claim upon the fund adjudicated.[87] When a judgment on plaintiff's default, in an action to foreclose a mechanic's lien, is vacated, the action is reinstated, and the moneys which were on deposit with the county clerk to discharge the lien, and which were withdrawn by defendant after judgment, should be redeposited.[88]

C. Extinguishment or Loss of Lien — 1. In General. The courts will not readily hold that a mechanic's lien, once duly acquired, has been lost or extinguished in the absence of circumstances tending to show a waiver or making it inequitable that the lien should remain in force.[89] Thus the right to a lien is not lost because in an attempted settlement the lienor refused an offer of more than he subsequently recovered, no tender having been made.[90] The right of a subcontractor to enforce a mechanic's lien on the property is not affected by the insolvency of and the appointment of a receiver for the principal contractor,[91] or lost by the subcontractor's failure to consolidate his claim for labor with others in an action before a justice of the peace against the original contractor, where such

83. Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134; Matter of Dean, 83 Hun (N. Y.) 413, 31 N. Y. Suppl. 959; Dunning *v.* Clark, 2 E. D. Smith (N. Y.) 535. See also People *v.* Butler, 61 How. Pr. (N. Y.) 274.

Substitution of bond for deposit.— After such deposit has been made a bond cannot be substituted in place of the money. Matter of 478 Cherry St., 27 Misc. (N. Y.) 682, 58 N. Y. Suppl. 665.

A scire facias will not lie on the claim where the money has been paid into court under the Pennsylvania act of Aug. 1, 1868, but the court will grant a rule to show cause why the claimant should not take out of court the amount of his claim, and, if disputed, award an issue. Hoffman *v.* Haines, 8 Phila. (Pa.) 248.

84. Schillinger Fire Proof Cement, etc., Co. *v.* Arnott, 86 Hun (N. Y.) 182, 33 N. Y. Suppl. 343; Matter of Dean, 83 Hun (N. Y.) 413, 31 N. Y. Suppl. 959; Raven *v.* Smith, 76 Hun (N. Y.) 60, 27 N. Y. Suppl. 611; Dunning *v.* Clark, 2 E. D. Smith (N. Y.) 535; People *v.* Butler, 61 How. Pr. (N. Y.) 274.

Form of action.— An action in form as in an action to foreclose the lien is proper, although no sale of the premises can be ordered. Kruger *v.* Braender, 3 Misc. (N. Y.) 275, 23 N. Y. Suppl. 324 [*affirming* 1 Misc. 509, 20 N. Y. Suppl. 991, and *followed* in Cunningham *v.* Doyle, 5 Misc. (N. Y.) 219, 25 N. Y. Suppl. 476]. See also Schillinger Fire Proof Cement, etc., Co. *v.* Arnott, 86 Hun (N. Y.) 182, 33 N. Y. Suppl. 343 [*affirmed* in 152 N. Y. 584, 46 N. E. 956].

85. Hall *v.* Blackburn, 173 Pa. St. 310, 34 Atl. 18. See also Yankey *v.* Buckman, 18 Pa. Super. Ct. 378.

86. Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134, holding that Laws (1885), c. 342, § 24, subd. 4, which provides that when one year has elapsed from the time of the filing of the notice of lien, and no action has been commenced to enforce the lien or order of court made continuing it, the lien shall be discharged, applies only to the lien on the property, and not to the lien on money paid into court for the purpose of releasing the property.

87. Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134.

88. Cunningham *v.* Hatch, 18 N. Y. Suppl. 458, holding that an order directing such redeposit is not unauthorized as being without a trial and judgment of ownership.

89. See cases cited *infra*, notes 90–96.

Loss of lien through failure to comply with statutory requirements for perfection of lien see *supra*, III. Failure to commence proceedings to enforce lien within time limited by statute see *infra*, VIII, F, 1, a.

Owner's discharge in bankruptcy does not impair lien see BANKRUPTCY, 5 Cyc. 403 note 64.

Lien lost by including non-lien claims in judgment.— Johnson *v.* Pike, 35 Me. 291; Lambard *v.* Pike, 33 Me. 141.

Where there are two separate counts on the same claim in the declaration, one as a lien claim and one for money had and received, and the declaration shows that the action is brought to enforce the lien, it cannot be successfully contended that the counts are for independent causes of action and that the lien claim is lost because merged in a judgment with a non-lien claim. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

90. Palmer *v.* McGinness, 127 Iowa 118, 102 N. W. 802.

91. Matter of Christie Mfg. Co., 15 Misc. (N. Y.) 588, 36 N. Y. Suppl. 923, holding

other claims are wholly disconnected with his lien and have no relation to the transaction out of which it arose.[92] Since the holder of a mechanic's lien on lands is entitled to be made a party to proceedings to foreclose a mortgage thereon, his lien is not affected by proceedings without notice to him.[93] The lien is not destroyed by an order granting a stay of execution on a judgment of foreclosure,[94] or by a nonsuit in a scire facias upon the lien.[95] Where a contract provides that payment shall be made for work on final estimate and certificate of an engineer approving the work, and a showing that the work is free from all liens, and, after the final estimate is made and the certificate procured, the contractor, being refused payment, files his lien, the fact that subcontractors subsequently file liens for work will not defeat the contractor's lien.[96] Where the statute provides that each person claiming a lien upon the demand of the owner or lessee furnish a written statement of the amount and materials furnished to the date of the statement and then unpaid as nearly as can be ascertained, under penalty of forfeiture of his lien, the penalty of the statute must be enforced, although the owner who demanded the statement was not prejudiced by the claimant's failure to comply with the demand.[97]

2. DESTRUCTION OF BUILDING OR IMPROVEMENT. While it is held in some states that the destruction of the building or improvement out of which the lien is claimed to arise defeats the lien upon the land,[98] the more general rule is that a mechanic's lien which has attached to a building or improvement and the land on which it is situated is not defeated or extinguished by the destruction of the building or improvement by fire or other casualty, but remains effective against the land,[99] even though the building or improvement is destroyed before

therefore that, as under the statute the owner would have the right, on paying off the lien, to deduct the amount thereof from the contract price, the subcontractor was entitled to payment in full out of amounts received by the receiver of the contractor on account of the contract.

92. Meeks *v.* Sims, 84 Ill. 422.

93. Hallahan *v.* Herbert, 4 Daly (N. Y.) 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409].

94. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

95. Berger *v.* Long, 1 Walk. (Pa.) 143.

96. Lord *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541.

97. Frohlich *v.* Beecher, 139 Mich. 278, 102 N. W. 736.

98. Humboldt Lumber Mill Co. *v.* Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75; Wood *v.* Wilmington Conference Academy, 1 Marv. (Del.) 416, 41 Atl. 89; Wigton's Appeal, 28 Pa. St. 161; Third Associate Reformed Presb. Church *v.* Stettler, 26 Pa. St. 246; Wrigley *v.* Mahaffey, 5 Pa. Dist. 389; Baird *v.* Otto, 2 Pa. Dist. 484, 12 Pa. Co. Ct. 510; Gross *v.* Camp, 4 Pa. Co. Ct. 461; Lehr *v.* Schroth, 1 Lehigh Co. L. J. (Pa.) 4.

Where work or materials are furnished for several buildings erected in a group as a single improvement the destruction of one of the buildings does not defeat the lien (Montgomery *v.* Keystone Fibre Co., 1 Pa. Super. Ct. 261), although the materials for which the lien is claimed were used in the building which has been destroyed (Linden Steel Co. *v.* Rough Run Mfg. Co., 158 Pa. St. 238, 27 Atl. 895).

99. *Illinois.*— Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Sontag *v.* Brennan, 75 Ill. 279; Steigleman *v.* McBride, 17 Ill. 300.

Indiana.— Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; Bratton *v.* Ralph, 14 Ind. App. 153, 42 N. E. 644.

Iowa.— Clark *v.* Parker, 58 Iowa 509, 12 N. W. 553. But *compare* Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287.

Louisiana.— Sargeant *v.* Daunoy, 14 La. 43, 33 Am. Dec. 573.

Minnesota.— Freeman *v.* Carson, 27 Minn. 516, 8 N. W. 764.

New Mexico.— Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726.

Texas.— Stuart *v.* Broome, 59 Tex. 466; Cain *v.* Texas Bldg., etc., Assoc., 21 Tex. Civ. App. 61, 51 S. W. 879.

Wisconsin.— Halsey *v.* Waukesha Springs Sanitarium, 125 Wis. 311, 104 N. W. 94, 110 Am. St. Rep. 838 [*approving* Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824; Viles *v.* Green, 91 Wis. 217, 64 N. W. 856, and *criticizing* Goodman *v.* Baerlocher, 88 Wis. 287, 60 N. W. 415, 43 Am. St. Rep. 893].

United States.— Hooven, etc., Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229 [*reversing* 99 Fed. 180].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 413.

The proceeds of a sale of the remains of machinery furnished for a mill are subject to the lien just as the mill and machinery were before the mill was burned. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182.

Priority over lien arising out of rebuilding. — A mechanic's lien, once attached to a house and lot, attaches to a house thereafter erected on the lot, on the destruction of the house for

the work thereon is completed[1] or before the lien notice, claim, or statement is filed.[2]

3. Removal of Building or Improvement. So also it is usually held that the removal of the building or improvement after the lien has attached does not defeat the lien on the land.[3]

4. Transfer of Title — a. Conveyance — (i) *In General.* A sale or conveyance of the premises after the lien has attached thereto[4] does not affect the rights of the lienor.[5] This is true as a general rule even though such conveyance was made before the filing of the lien notice or claim required by statute to perfect

the erection of which the lien accrued, and takes priority over a lien for the erection of the second house. Cain *v.* Texas Bldg., etc., Assoc., 21 Tex. Civ. App. 61, 51 S. W. 879.

Priority over preëxisting encumbrance as to débris.— Where a mechanic's lien is as to the building entitled to priority over a preëxisting encumbrance, and the building is destroyed by fire, the lienor still has a prior right to satisfaction out of the bricks, iron, and other remains of the building. McLaughlin *v.* Green, 48 Miss. 175.

1. *Illinois.*— Sontag *v.* Brennan, 75 Ill. 279.

Indiana.— Bratton *v.* Ralph, 14 Ind. App. 153, 42 N. E. 644.

Louisiana.— Sargeant *v.* Daunoy, 14 La. 43, 33 Am. Dec. 573.

Minnesota.— Freeman *v.* Carson, 27 Minn. 516, 8 N. W. 764.

Wisconsin.— Halsey *v.* Waukesha Springs Sanitarium, 125 Wis. 311, 104 N. W. 94, 110 Am. St. Rep. 838 [*approving* Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824; Viles *v.* Green, 91 Wis. 217, 64 N. W. 856, and *criticizing* Goodman *v.* Baerlocher, 88 Wis. 287, 60 N. W. 415, 43 Am. St. Rep. 893].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 413.

Contra.— Shine *v.* Heimburger, 60 Mo. App. 174, holding that if a building is destroyed during the process of construction from accidental causes the loss is not to be borne by the owner unless the contract so provides, and where there has been an entire destruction of the building and none of the old materials have been used in its reconstruction neither the land nor the new building can be subjected to a lien in favor of a subcontractor for work done on or materials furnished for the first building.

A contractor for an entire building, not being excused from performance because of the destruction of the building, may, if the building be destroyed before completion and not rebuilt, lose his right to compensation for what was previously done or furnished, and in such case there could of course be no lien. See Builders and Architects, 2 Cyc. 71.

2. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; Freeman *v.* Carson, 27 Minn. 516, 8 N. W. 764. *Contra,* Schukraft *v.* Ruck, 6 Daly (N. Y.) 1.

3. Steigleman *v.* McBride, 17 Ill. 300; Chicago Smokeless Fuel Gas Co. *v.* Lyman, 62 Ill. App. 538 (holding that a lien upon a leasehold estate for improvements placed thereon is not lost by reason of the removal by a third person of the materials of which such improvements were composed, although the value of such lien may be affected by such removal); Clark *v.* Parker, 58 Iowa 509, 12 N. W. 553; Bishop *v.* Honey, 34 Tex. 245. *Contra,* Willauer's Estate, 1 Chest. Co. Rep. (Pa.) 533.

Severance of the materials from the freehold does not remove or discharge the lien. Gaty *v.* Casey, 15 Ill. 189 [*approved* in Ellett *v.* Tyler, 41 Ill. 449].

4. **Time of accrual or commencement** see *supra,* IV, A, 2.

5. *Alabama.*— Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84, holding that where the person for whom the building is erected has only a leasehold interest, the lien of the builder is paramount to the right of one who takes an assignment of the lease after the completion of the building and the recording of the contract.

Arkansas.— White *v.* Chaffin, 32 Ark. 59; Loring *v.* Flora, 24 Ark. 151.

California.— Soule *v.* Dawes, 7 Cal. 575; Hotaling *v.* Cronise, 2 Cal. 60.

Colorado.— Mellor *v.* Valentine, 3 Colo. 255; Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912.

Connecticut.— Hooker *v.* McGlone, 42 Conn. 95, voluntary conveyance.

Illinois.— Salem *v.* Lane, etc., Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481; Austin *v.* Wohler, 5 Ill. App. 300.

Indiana.— Jeffersonville Water Supply Co. *v.* Riter, 138 Ind. 170, 37 N. E. 652; Kellenberger *v.* Boyer, 37 Ind. 188; Fleming *v.* Bumgarner, 29 Ind. 424.

Iowa.— Clark *v.* Parker, 58 Iowa 509, 12 N. W. 553.

Kansas.— Warden *v.* Sabins, 36 Kan. 165, 12 Pac. 520.

Kentucky.— Houston *v.* Long, 23 S. W. 586, 15 Ky. L. Rep. 721. See also Jefferson *v.* Hopson, 84 S. W. 540, 27 Ky. L. Rep. 140.

Louisiana.— Diggs *v.* Green, 15 La. 416.

Maryland.— Miller *v.* Barroll, 14 Md. 173.

Massachusetts.—D. L. Billings Co. *v.* Brand, 187 Mass. 417, 73 N. E. 637; Buck *v.* Hall, 170 Mass. 419, 49 N. E. 658; Dodge *v.* Hall, 168 Mass. 435, 47 N. E. 110; Collins *v.* Patch, 156 Mass. 317, 31 N. E. 295 (sale of portion of lot); Gale *v.* Blaikie, 126 Mass. 274.

Minnesota.— Atkins *v.* Little, 17 Minn. 342. See also King *v.* Smith, 42 Minn. 286, 44 N. W. 65.

the lien,[6] provided of course the claimant perfects his lien within the statutory period.[7] But where under the statute the lien dates from the time the notice or

Missouri.— Allen *v.* Sales, 56 Mo. 28; Hammond *v.* Darlington, 109 Mo. App. 333, 84 S. W. 446; McAdow *v.* Sturtevant, 41 Mo. App. 220.

Nebraska.— Doolittle *v.* Plenz, 16 Nebr. 153, 20 N. W. 116.

New Jersey.— Bates Mach. Co. *v.* Trenton, etc., R. Co., 70 N. J. L. 684, 58 Atl. 935, 103 Am. St. Rep. 811; Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273, conveyance merely as security. See also Slingerland *v.* Lindsley, 1 N. J. L. J. 115.

New York.— Blauvelt *v.* Woodworth, 31 N. Y. 285; Meehan *v.* Williams, 2 Daly 367, 36 How. Pr. 73; Hankinson *v.* Riker, 10 Misc. 185, 30 N. Y. Suppl. 1040; Brown *v.* Zeiss, 59 How. Pr. 345. *Compare* Noyes *v.* Burton, 29 Barb. 631.

North Carolina.— McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; Burr *v.* Maultsby, 99 N. C. 263, 6 S. E. 108, 6 Am. St. Rep. 517.

Pennsylvania.— Mears *v.* Dickerson, 2 Phila. 19, holding that a mechanic's lien filed against the vendor of an unfinished building, as owner and contractor, for materials furnished for its completion after the sale, binds the land in the hands of the vendee.

Tennessee.— Green *v.* Williams, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478; Weller *v.* McNabb, 4 Sneed 422.

Texas.— Van Calvert *v.* McKinney, 2 Tex. Unrep. Cas. 345 [*following* Huck *v.* Gaylord, 50 Tex. 578].

Wisconsin.— Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884. See Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825, holding that, where at the date of the first charge for materials furnished defendant was in possession of the land under a contract of sale and had paid therefor in full, the lien was not defeated by his subsequently procuring a conveyance to be made to his sister instead of to himself.

Wyoming.— Lee *v.* Cook, 2 Wyo. 312.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 69, 342 *et seq.*, 415.

Alteration of contract.— A person who, with notice of the nature and amount of a contractor's mechanic's lien, takes a conveyance of the property subject to it, cannot be affected by a subsequent alteration of the contractor's contract. Soule *v.* Dawes, 7 Cal. 575.

The question of fraudulent intent in the transfer of the title is immaterial. Jefferson *v.* Hopson, 84 S. W. 540, 27 Ky. L. Rep. 140.

Married woman's separate property.— Fla. Const. (1885) art. 11, § 2, providing that a married woman's separate real property may be charged in equity and sold, or the rents and profits thereof segregated for labor and material used with her knowledge or assent in the construction of buildings, or repairs or improvements upon the property, does not create a lien upon the property to secure the demands named. It merely authorizes courts of equity to charge the property with the payment of such demands, and until proceedings for that purpose are begun there is nothing in this section of the constitution, or in any statute in force, which denies to the married woman the right to sell her property in the manner pointed out by statutes permitting her to do so; and if the sale is made in good faith, with no intention of defrauding, hindering, or delaying the persons holding such demands, the property in the hands of the purchaser will not be liable to be charged with the payment of such demands. Smith *v.* Gauby, 43 Fla. 142, 30 So. 683.

Sale of reversionary interest in land subject to ground-rent.— Where land was sold subject to a ground-rent, and the owner of the reversion and the owner of the leasehold agreed that buildings should be erected at their joint expense, and when sold the proceeds should be divided between them according to the value of their respective interests, and while the buildings were in the course of erection the owner of the reversionary interest conveyed the same to a person who bought without any notice of the agreement as to the buildings or that the materials were being furnished upon the order of his grantor, it was held that a mechanic's lien could not be enforced against the purchaser of the reversionary interest. Beehler *v.* Ijams, 72 Md. 193, 19 Atl. 646 [*following* Gabel *v.* Preachers' Fund Soc., 59 Md. 455].

A devolution of title through the death of the owner does not defeat the lien. Richardson *v.* Hickman, 32 Ark. 406; Pifer *v.* Ward, 8 Blackf. (Ind.) 252. See also *supra*, II, C, 1, d.

6. *Arkansas.*— White *v.* Chaffin, 32 Ark. 59. But see Loring *v.* Flora, 24 Ark. 151.

California.— Hotaling *v.* Cronise, 2 Cal. 60.

Minnesota.— Atkins *v.* Little, 17 Minn. 342; Cogel *v.* Mickow, 11 Minn. 475.

Missouri.— Allen *v.* Sales, 56 Mo. 28; McAdow *v.* Sturtevant, 41 Mo. App. 220.

Nebraska.— Doolittle *v.* Plenz, 16 Nebr. 153, 20 N. W. 116.

North Carolina.— McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; Burr *v.* Maultsby, 99 N. C. 263, 6 S. E. 108, 6 Am. St. Rep. 517.

Tennessee.— Green *v.* Williams, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478.

Texas.— Van Calvert *v.* McKinney, 2 Tex. Unrep. Cas. 345 [*following* Huck *v.* Gaylord, 50 Tex. 578]. *Contra*, Odum *v.* Loomis, 1 Tex. App. Civ. Cas. § 524.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 69, 342 *et seq.*, 415.

7. See Von Tobel *v.* Ostrander, 158 Ill. 499, 42 N. E. 152 [*affirming* 56 Ill. App. 381], holding that one who purchases after the lien claim is filed and with full notice of it takes title free of the lien where the claim was not filed within the statutory period.

Filing and recording must be in compliance with statutory requirements.— Shepherd *v.* Leeds, 12 La. Ann. 1.

claim is filed and does not relate back,[8] it follows as a necessary consequence that the lien does not attach as against a *bona fide* purchaser who purchased before the filing of the lien notice, although after work was commenced.[9] It is immaterial that the purchaser purchased in good faith and without notice,[10] for the mere fact that buildings or improvements are being erected on the property constitutes constructive notice of the mechanics' liens to persons dealing with the property.[11] As the lien extends to the entire lot or tract on which the building or improvement is situated,[12] a part thereof cannot be sold, free from the lien,[13] and it has been held that where labor and materials for the improvement of three houses were furnished under a single contract, subsequent purchasers of two of the lots, with notice, were not entitled to complain that their lots were held responsible for the entire debt.[14] A conveyance after the lien claim or notice is filed,[15] or after proceedings to enforce the lien have been commenced,[16] is of course subject to the lien, and a purchaser of property, who has actual notice of a decree foreclosing a mechanic's lien thereon, takes the property subject to the lien, although no notice of *lis pendens* or transcript of the judgment is filed with the county auditor.[17] Where a grantee accepts a deed expressly providing that it is subject to the claim of certain persons for a mechanic's lien, the right of such persons to a lien is in no way affected by the conveyance.[18]

(II) *WORK DONE OR MATERIALS FURNISHED AFTER CONVEYANCE.* It has been held that a lien may be established for work done or materials furnished

Priority of conveyance after statutory period over lien subsequently filed see *supra*, III, C, 10, l.

Time for filing claim or statement see *supra*, III, C, 10.

8. See *supra*, IV, A, 2, d.

9. Sisson *v.* Holcomb, 58 Mich. 634, 26 N. W. 155; Sinclair *v.* Fitch, 3 E. D. Smith (N. Y.) 677 (although the purchaser had notice of the nature and extent of the claim, and the property was conveyed subject to the payment thereof); Jackson *v.* Sloan, 2 E. D. Smith (N. Y.) 616, 2 Abb. Pr. 104; Quimby *v.* Sloan, 2 E. D. Smith (N. Y.) 594. See also Tiley *v.* Thousand Island Hotel Co., 9 Hun (N. Y.) 424; Altieri *v.* Lyon, 59 N. Y. Super. Ct. 110, 13 N. Y. Suppl. 617.

A fraudulent conveyance before the lien notice is filed does not defeat the lien. Gross *v.* Daly, 5 Daly (N. Y.) 540 [*distinguishing* Mechanics', etc., Bank *v.* Dakin, 51 N. Y. 519, *following* Meehan *v.* Williams, 2 Daly (N. Y.) 367, 36 How. Pr. 73, and *followed* in New York Lumber, etc., Co. *v.* Seventy-Third St. Bldg. Co., 5 N. Y. App. Div. 87, 38 N. Y. Suppl. 869].

Conveyance intended as mortgage.— A conveyance of the premises by the owner and builder, made before the filing of the notice of a mechanic's lien, but which, by an instrument executed subsequently to such filing, is shown to have been intended only as a mortgage, does not prevent the lien from attaching upon the equitable interest of the owner at the date of such filing. McAuley *v.* Mildrum, 1 Daly (N. Y.) 396.

Devolution of title.— If no lien has been created prior to the death of the owner, and the title has passed to another, no lien can be acquired against a subsequent owner by proceedings founded on claims arising under a contract with the deceased owner. Crystal *v.* Flannelly, 2 E. D. Smith (N. Y.) 583.

10. Atkins *v.* Little, 17 Minn. 342; Cogel *v.* Mickow, 11 Minn. 475.

11. Soule *v.* Dawes, 7 Cal. 575; Austin *v.* Wohler, 5 Ill. App. 300.

12. See *supra*, IV, B, 2, a.

13. Collins *v.* Patch, 156 Mass. 317, 31 N. E. 295; Dunklee *v.* Crane, 103 Mass. 470.

14. Guarantee Sav., etc., Co. *v.* Cash, (Tex. Civ. App. 1905) 87 S. W. 749.

15. Burdick *v.* Moulton, 53 Iowa 761, 6 N. W. 48; Baxter Lumber Co. *v.* Nickell, 24 Tex. Civ. App. 519, 60 S. W. 450. See also Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84.

Deed not entitled to record.— Under N. Y. Laws (1885), c. 342, § 5, declaring that a mechanic's lien shall be preferred to any deed which was not recorded at the time notice of lien was filed, a mechanic's lien has priority over a deed which was actually copied into the register's books before the lien was filed, where the grantor's acknowledgment was taken in another state by an officer who at the time was not authorized by the laws of such state to take acknowledgments, although there was attached to the deed a certificate of the clerk of the court in the county in which the acknowledgment was taken, stating that the officer was duly authorized to take the same. Lemmer *v.* Morison, 89 Hun (N. Y.) 277, 35 N. Y. Suppl. 623, 2 N. Y. Annot. Cas. 240.

16. Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, 7 N. E. 498. A deed recorded after the bill to enforce a mechanic's lien has been filed, although it purports to have been executed previously, cannot affect plaintiff's rights. Mouat *v.* Fisher, 104 Mich. 262, 62 N. W. 338.

17. Frank *v.* Jenkins, 11 Wash. 611, 40 Pac. 220.

18. Eggert *v.* Snoke, 122 Iowa 582, 98 N. W. 372 (where the grantee also had ex-

pursuant to the original contract after a sale of the premises;[19] but materials furnished after the sale, not in pursuance of the original contract and without the knowledge of the purchaser but merely to preserve the right of lien, are not lienable.[20]

(III) *Conveyance to Lienor.* A conveyance of the property to the lienor does not necessarily merge the lien in the legal title,[21] but the lien is of course satisfied and discharged by the conveyance where a part of the consideration therefor is the release of the indebtedness and the lien.[22]

b. Assignment For Benefit of Creditors.[23] An assignment by the owner for the benefit of creditors does not prejudice the right of mechanic's lien claimants, but their lien as to the property to which it has attached remains superior to the rights of general creditors.[24]

c. Receivership.[25] After a mechanic's lien has accrued it is not defeated by the appointment of a receiver for the owner of the property.[26]

press notice of the claim); Howes *v.* Reliance Wire-Works Co., 46 Minn. 44, 48 N. W. 448; Crombie *v.* Rosentock, 19 Abb. N. Cas. (N. Y.) 312 (holding that a deed of land subject to "all contracts outstanding relating to said premises and the building now in course of erection and construction thereon, and all moneys now due or to grow due on account of said contracts" creates an equitable lien in favor of mechanics and materialmen for claims in existence when the deed was executed).

Agreement of purchaser to pay off lien.— Where the purchaser of land on which there is a mechanic's lien agrees to pay off the same, and save his grantor harmless therefrom, the lien may be enforced against the land in the hands of the purchaser, without first exhausting the lienor's remedy against the grantor. Cullers *v.* Greenville First Nat. Bank, (Tex. Civ. App. 1894) 29 S. W. 72.

19. Mellor *v.* Valentine, 3 Colo. 255; Miller *v.* Barroll, 14 Md. 173. *Compare* Dustin *v.* Schroeder, 100 Ill. App. 118 (holding that where the owner, while he is making repairs, sells the premises and notifies the mechanics to discontinue their work and pays them for what they have done, the property is not subject to a lien for work done thereafter, the court saying that the question of the owner's right to rescind the contract for the repairs did not arise); Smullen *v.* Hall, 13 Daly (N. Y.) 392.

Where the lien claimant had no notice of the conveyance because of the fraud or mistake of the grantee, as by failing to record the deed, the lien will be upheld, although the materials were not furnished or the labor done until after the transfer. Jeffersonville Water Supply Co. *v.* Riter, 138 Ind. 170, 37 N. E. 652.

Conveyance before lien notice filed.— Where property is sold and conveyed during the time the mechanic is doing the work under a contract with the original owner, and a lien is subsequently filed, the mechanic is entitled to a lien for only so much of the labor as was performed after the conveyance. Tiley *v.* Thousand Island Hotel Co., 9 Hun (N. Y.) 424.

20. Heath *v.* Tyler, 44 Md. 312.

21. Bowling *v.* Garrett, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377, holding that where the holder of a mechanic's lien acquires the title to the property upon which the mechanic's lien exists, by a conveyance thereof from the owner, the mechanic's lien will not be so merged in the legal title, or be so extinguished, that a judgment subsequently rendered in favor of a third person against such owner, but rendered at a term of the court commenced before the conveyance was made, and in an action pending at the beginning of the term, will create a lien prior to the mechanic's lien.

Purchase of interest by lienor.— The fact that, during the progress of their work, contractors claiming mechanics' liens purchased an undivided half interest in the property, will not extinguish their lien, where it appears that the owner had become insolvent, and unable to pay such contractors, that the deed was taken in order to procure a loan on the property and complete the work, that the contracts were not surrendered or canceled, and that there was no express agreement for discharge of the liens. Blatchford *v.* Blanchard, 160 Ill. 115, 43 N. E. 794 [*affirming* 57 Ill. App. 518].

22. Simpson *v.* Masterson, (Tex. Civ. App. 1895) 31 S. W. 419.

23. See, generally, Assignments For Benefit of Creditors.

24. *Louisiana.*— Pullis Bros. Iron Co. *v.* Natchitoches Parish, 51 La. Ann. 1377, 26 So. 402.

Maine.— See Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

New York.— Reading Hardware Co. *v.* New York, 27 Misc. 448, 59 N. Y. Suppl. 253.

Ohio.— Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Pennsylvania.— Crump *v.* Gill, 9 Phila. (Pa.) 117.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 347.

25. See, generally, Receivers.

26. Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 573, 53 Am. St. Rep. 494, 31 L. R. A. 335, (1895) 32 S. W. 1; Matter of Simonds Furnace Co., 30 Misc. (N. Y.) 209, 61 N. Y. Suppl. 974; Fisher Foundry, etc., Co. *v.* Susquehanna Iron, etc., Co., 23 Lanc. L. Rev. (Pa.) 398;

d. Judicial Sale.[27] A judicial sale of property under a lien prior to a mechanic's lien divests the latter lien and the claimant must look to the surplus proceeds of the sale for satisfaction,[28] and in some states a mechanic's lien on the land is discharged by a judicial sale thereof, even though the mechanic's lien is prior to the lien or claim under which the sale is made.[29] Where there are several mechanics' liens arising out of the same improvement and thus of equal rank[30] a sale under one of the liens passes the land free from all the others.[31] The foreclosure of a mechanic's lien, prior in time but limited to the building, will not divest a subsequent mechanic's lien upon the land, the two liens attaching on different properties;[32] but it has been held that where the holder of a judgment with a builder's privilege against a house permits it to be sold on another execution without securing an appraisement of it separate from the lot, he thereby waives the lien of his judgment.[33]

5. Extinguishment or Merger of Interest or Estate to Which Lien Attached. The surrender of a lease prior to its expiration and acceptance thereof by the lessor or the sale of the leasehold estate to the lessor cannot defeat mechanics' liens on the leasehold estate complete before the surrender or sale was made,[34] and it has been held that in such case the entire estate becomes liable for payment of the liens.[35] Where, however, the lease is forfeited for non-payment of rent, pursuant to a provision therein for such forfeiture, no lien can thereafter be enforced against the lessor.[36] So also if the purchaser of land under contract of sale, to

Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324. See also Richardson *v.* Hickman, 32 Ark. 406.

The lien may be perfected after the receiver is appointed, for this does not newly encumber the property but simply fixes and secures upon it an already existing lien. Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324.

27. See, generally, Judicial Sales.

28. Matlack *v.* Deal, 1 Miles (Pa.) 254; Lieb *v.* Bean, 1 Ashm. (Pa.) 207.

A sale under a deed of trust which is prior to a mechanic's lien releases the land from the mechanic's lien. Crandall *v.* Cooper, 62 Mo. 478.

29. Sharpe *v.* Tatnall, 5 Del. Ch. 302.

30. See *supra*, IV, C, 1, a.

31. Anshutz *v.* McClelland, 5 Watts (Pa.) 487. See also Ritchey *v.* Risley, 3 Oreg. 184.

32. Clark *v.* Parker, 58 Iowa 509, 12 N. W. 553.

33. Hoy *v.* Peterman, 23 La. Ann. 289. See also Citizens' Bank *v.* Maureau, 37 La. Ann. 857; Cox's Succession, 32 La. Ann. 1035.

34. *California.*— Gaskill *v.* Moore, 4 Cal. 233; Gaskill *v.* Trainer, 3 Cal. 334.

Illinois.— Dobschuetz *v.* Holliday, 82 Ill. 371.

Indiana.— McAnally *v.* Glidden, 30 Ind. App. 22, 65 N. E. 291.

New Jersey.— Hagan *v.* Gaskill, 42 N. J. Eq. 215, 6 Atl. 879, notwithstanding a clause in the lease making it null and void in case, among other things, the lessee abandon the property.

New York.— Jones *v.* Manning, 6 N. Y. Suppl. 338.

Utah.— Ellis *v.* Brisacher, 8 Utah 108, 29 Pac. 879.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 417.

Improvements subsequently made by lessor cannot impair lien.— Gaskill *v.* Moore, 4 Cal. 233.

35. Evans *v.* Young, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583; Dobschuetz *v.* Holliday, 82 Ill. 371. See also Koenig *v.* Mueller, 39 Mo. 165.

36. Gaskill *v.* Trainer, 3 Cal. 334; Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489 [*affirming* 40 Ill. App. 298].

Time of forfeiture.— The forfeiture of a lease, in order to be effective against one who has performed work or furnished materials for a structure on the leased property for the lessee, must be declared before the laborer or materialman has acquired his lien. Montpelier Light, etc., Co. *v.* Stephenson, 22 Ind. App. 175, 53 N. E. 444. Where a materialman recovered judgment of foreclosure against the holders of a leasehold interest in certain real estate, imposing a lien on such interest only, but took out no execution thereon until after the lease was forfeited to the lessors for breach of conditions and the lessors had peaceably reëntered, the claimant could not thereafter obtain any rights by an attempted sale of the leasehold under such judgment, nor was he entitled to recover damages for the lessor's refusal to permit him to occupy the premises for the balance of the term of the lease. Stetson, etc., Mill Co. *v.* Pacific Amusement Co., 37 Wash. 335, 79 Pac. 935.

Purchase of improvements by lessor.— Where the lessee forfeits his lease, the purchase by the owner of the improvements placed thereon, after taking possession of the premises, does not merge the leasehold interest in the fee so as to entitle a person having a mechanic's lien against the leasehold to enforce it against the fee. Masow *v.* Fife, 10 Wash. 528, 39 Pac. 140.

whose interest a mechanic's lien has attached, fails to complete his purchase and loses his interest in the land, no lien can be enforced against the land;[37] but if the vendor repurchases or takes a surrender of the vendee's interest the lien remains.[38]

D. Release of Lien — 1. **Requisites and Sufficiency.** A release of a mechanic's lien must, in order to be effective, be founded upon a consideration,[39] and if the consideration fails the release is void and the lien may be enforced.[40] A release executed by mechanics or materialmen during the progress of the construction of a building of all manner of liens, etc., "which we or any or either of us now have or might or could have on or against the said building," is an unconditional agreement to look to the personal responsibility of the owner or contractor and not to the structure,[41] and such a release, although made during the progress of the work, is operative to discharge the building from mechanics' liens as effectively as though made after its completion, and releases the lien for labor done and materials furnished after as well as before its execution.[42] In order for a release of liens to be effective it must be delivered to or for the use of the owner.[43] The

37. *Georgia.*— Callaway *v.* Freeman, 29 Ga. 408.

Idaho.— Steel *v.* Argentine Min. Co., 4 Ida. 505, 42 Pac. 585, 95 Am. St. Rep. 144, failure to exercise option to purchase.

Michigan.— Scales *v.* Griffin, 2 Dougl. 54.

New York.— Beck *v.* Catholic University of America, 172 N. Y. 387, 65 N. E. 204, 60 L. R. A. 315; Bernard *v.* Adjoran, 43 Misc. 276, 88 N. Y. Suppl. 859. See also Randolph *v.* Garvey, 10 Abb. Pr. 179.

Pennsylvania.— Dietrich *v.* Crabtree, 8 Wkly. Notes Cas. 418.

Texas.— Galveston Exhibition Assoc. *v.* Perkins, 80 Tex. 62, 15 S. W. 633.

Washington.— Mentzer *v.* Peters, 6 Wash. 540, 33 Pac. 1078.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 75, 417.

Contra.— Rusche *v.* Pittman, (Ind. App. 1904) 70 N. E. 382; Davis *v.* Elliott, 7 Ind. App. 246, 34 N. E. 591; Brown *v.* Jones, 52 Minn. 484, 55 N. W. 54.

The improvements may be sold separately from the land and removed by the purchaser, although the vendee subsequently abandons the premises and forfeits his rights under the contract. Pinkerton *v.* Le Beau, 3 S. D. 440, 54 N. W. 97. See, generally, *infra*, VIII, N, 2, b.

Permitting purchaser to continue improvements.— Vendors who permit a purchaser who has failed to comply with the terms of his purchase to continue the expenditure of money in making improvements after the expiration of the time for payment cannot by notice terminate his interest in the property so as to cut off the lien of a carpenter employed by the purchaser to erect buildings on the land, but the latter may enforce his claim subject to the right of the vendors to recover the purchase-money. Hoffstrom *v.* Stanley, 14 Manitoba 227.

Improvements provided for by contract of sale see *supra*, II, C, 3, i, (II).

38. King *v.* Smith, 42 Minn. 286, 44 N. W. 65; Boyd *v.* Blake, 42 Minn. 1, 43 N. W. 485 (holding that where there is a mechanic's lien upon a vendee's interest in land, and by agreement between the vendor and vendee such interest is surrendered, the vendor, as a consideration for the surrender, undertaking to pay the lien claim, the court, there being no equitable consideration requiring it to treat the vendee's interest as still outstanding, will treat it as merged in the legal estate and enforce the lien claim against the whole estate); Cochran *v.* Wimberly, 44 Miss. 503; Wingert *v.* Stone, 142 Pa. St. 258, 21 Atl. 812; Kerrick *v.* Ruggles, 78 Wis. 274, 47 N. W. 437. See also Adams *v.* Russell, 85 Ill. 284.

39. Abbott *v.* Nash, 35 Minn. 451, 29 N. W. 65; Katzenbach *v.* Holt, 43 N. J. Eq. 536, 12 Atl. 383.

Sufficiency of consideration.— A payment of less than the amount due is a sufficient consideration for a release of the lien. Burns *v.* Carlson, 53 Minn. 70, 54 N. W. 1055. Where by the original agreement between the contractor and a subcontractor the latter is to receive payment subject to certain conditions a subsequent agreement by which the subcontractor is to receive a part of his compensation free of such conditions is a sufficient consideration for his release of his right to a mechanic's lien. Mason *v.* Gass, 62 Mo. App. 449.

40. Benson *v.* Mole, 9 Phila. (Pa.) 66, holding that in such case the fact that the release was under seal made no difference in the rule.

41. Brown *v.* Williams, 120 Pa. St. 24, 13 Atl. 519, 6 Am. St. Rep. 689.

42. Brown *v.* Williams, 120 Pa. St. 24, 13 Atl. 519, 6 Am. St. Rep. 689. But *compare* Jepherson *v.* Tucker, 18 R. I. 429, 28 Atl. 610, holding that where a materialman, in order to enable a contractor to obtain payment of an instalment which had been earned, executed a paper purporting to release all his "right of lien, title and interest in and to the estate . . . for material furnished and labor performed on said house" the release was not prospective in its operation but applied only to the claim for materials furnished prior to its date.

43. Wetherill *v.* Harbert, 2 Pa. St. 348.

right to a mechanic's lien is not an estate or interest in land which must be surrendered or released in the manner provided by statute for such estates or interests.[44] Where a release names no person to whom it is made and expresses no consideration, extrinsic evidence is admissible to show the consideration and to determine in whose favor it was intended to be made.[45] A release of the contractor by a lien claimant will not extinguish the claimant's cause of action or deprive him of his right to a lien where the release contains an express declaration that such is not the intent.[46] Where it was mutually agreed between the owner and the contractor that he should stop work and receive pay for what was already done, and the contractor thereupon signed a paper releasing the owner from "further liability," this did not amount to a release of the lien for what was then due.[47]

2. Effect of Release. A release by a contractor of his lien for erecting a building, as against a mortgagee receiving his mortgage on the faith thereof, covers the claims for all work done on the building, whether before or after the release was executed.[48] Where a contractor who is responsible for the erection and completion of a building according to terms agreed on executes a release of all claims for mechanics' liens, neither the contractor nor the subcontractors and materialmen are entitled to liens.[49] Even though subcontractors may have released their lien, if the contractor fails to complete his contract, and they are subsequently employed by the owner to complete certain work they can enforce a lien for what is done under the latter employment.[50] A conditional release is not effective unless the terms upon which it is conditioned are complied with by the person asserting a right under it.[51] A release of the lien as to part of the property covered thereby does not destroy the lien on the rest of the property;[52] but if one building is released, an item for work or materials therein cannot be included in a lien on the remaining buildings.[53] Where a release of a mechanic's

44. Burns *v.* Carlson, 53 Minn. 70, 54 N. W. 1055.

45. Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95].

46. Hoyt *v.* Miner, 7 Hill (N. Y.) 525 [*affirming* 4 Hill 193].

47. McLaughlin *v.* Reinhart, 54 Md. 71.

48. Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (N. J. Ch. 1899) 42 Atl. 284. See also Weinberg *v.* Valente, 79 Conn. 247, 64 Atl. 337.

49. Whitcomb *v.* Eustice, 6 Ill. App. 574.

50. Shropshire *v.* Duncan, 25 Nebr. 485, 41 N. W. 403.

51. Albrecht *v.* Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Katzenbach *v.* Holt, 43 N. J. Eq. 536, 12 Atl. 383. But *compare* Golrick *v.* Tella, 22 R. I. 281, 47 Atl. 598, holding that where a materialman executed to the owner a release of lien for the purpose of enabling the contractor to obtain a payment upon the contract, the understanding between the materialman and the contractor being that the full payment due under the contract should be obtained or the release be of no effect, and the release was presented to the architect according to the terms of the contract, who gave an order upon the owner for payment, and demand was made upon the latter by the contractor, and a portion only of the amount due paid to the contractor, the release was effective and the materialman had no right to a lien.

52. Carr *v.* Hooper, 48 Kan. 253, 29 Pac. 398; Meixell *v.* Griest, 1 Kan. App. 145, 40 Pac. 1070; Reilly *v.* Williams, 47 Minn. 590, 50 N. W. 826; Hill *v.* Gray, 81 Mo. App. 456; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389. *Contra*, Schulenburg *v.* Vrooman, 7 Mo. App. 133.

Suit against adjoining landowners — Dismissal as to one. — Where plaintiff, in a suit against adjoining lot owners, under a contract for the erection of one building thereon, dismisses as to one defendant and seeks to enforce his lien, proportionately reduced, as to the others, the latter will not be heard to complain of such apportionment. C. B. Carter Lumber Co. *v.* Simpson, 83 Tex. 370, 18 S. W. 812.

53. Nickel *v.* Blanch, 67 Md. 456, 10 Atl. 234 [*following* Wilson *v.* Wilson, 51 Md. 159].

Agreement for lien on unreleased property for entire claim. — Where a contractor who, under one general contract with the owner, had constructed, upon contiguous lots, two separate buildings, each requiring the same amount and character of labor and material, after having been paid more than half the contract price, released one of the houses and lots from his lien, under an agreement with the owner that he should retain a lien on the other for the balance due on his contract, he could file and enforce his lien on the remaining house and lot for the entire balance due him, where there were no third persons whose interests were prejudicially affected by the release. Reilly *v.* Williams, 47 Minn. 590, 50 N. W. 826.

lien is executed for the sole purpose of giving priority to a mortgage the release is available only to the mortgagee.[54]

E. Payment — 1. In General. A payment of the debt necessarily extinguishes the lien,[55] and a partial payment reduces the lien *pro tanto*,[56] although it does not of course destroy the lien for the unpaid balance.[57]

2. Application of Payments. Where the lien claimant at the time of receiving a payment from the owner or the contractor has other claims against the person by whom such payment is made, the effect of the payment upon the lien depends upon whether the payment was applied to the lienable claim,[58] and the application

54. Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532 [*affirming* 24 Ill. App. 95].

55. See Bopp *v.* Wittich, 88 Mo. App. 129.

If there are mutual accounts between the builder and mechanic and there be no balance due to the mechanic at the filing of the bill claiming a lien he can have no relief, especially against an innocent purchaser of the property. Graham *v.* Holt, 4 B. Mon. (Ky.) 61.

A payment by the assignee to the assignor of a mechanic's lien at the time of the assignment is presumed to be in consideration of the assignment and not a payment of the claim. McFarland's Estate, 16 Pa. Super. Ct. 142.

An overdraft by the contractor on his bank, which has been allowed by direction of the owner, an officer of the bank, but for which the contractor remains bound to the bank, is not a payment to the contractor which reduces his lien claim. Hulburt *v.* Just, 126 Mich. 337, 85 N. W. 872.

Deposit not a payment.— Where plaintiff, a materialman, who was also a private banker, furnished a contractor with materials for the construction of defendant's building, without any agreement between plaintiff and the contractor as to when plaintiff should be paid for the materials except that the contractor would make a payment out of the first money received from defendant, and the contractor deposited with plaintiff a sum more than sufficient to pay for the materials and which plaintiff knew the contractor had received from defendant on the contract price but the deposit was subject to the contractor's order and the contractor checked out a part of the deposit to pay for labor on the building and agreed to let plaintiff apply a part on the debt for materials, the deposit was not a payment to plaintiff precluding him from the enforcement of a mechanic's lien for the balance of his claim. Carter *v.* Martin, 22 Ind. App. 445, 53 N. E. 1066.

56. Duncan *v.* Aaron, 6 Houst. (Del.) 566; Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152; Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

Where a contractor files apportioned liens against a number of houses, and then receives a part payment from the owner, and afterward receives the full amount of the liens filed against some of the houses from a sheriff's sale, thus being overpaid as to those houses, the owner, in a suit on the other liens, is entitled to a credit for such excess. Moore *v.* Culbertson, 3 Walk. (Pa.) 448.

Indebtedness of claimant to owner.—Where a person who is erecting a building and has purchased lumber of a merchant becomes possessed of a note of the merchant payable in lumber of a greater amount than that already purchased, and afterward purchases more than the balance of the note, and a lien is filed by the merchant, the claim is *pro tanto* extinguished by the note, and the owner and merchant cannot, by agreement between themselves after the house has been sold, apply the note to another house of the owner on which the merchant failed to claim a lien. Hopkins *v.* Conrad, 2 Rawle (Pa.) 316.

57. Dennis *v.* Smith, 38 Minn. 494, 38 N. W. 695, holding that where an account containing both lienable and non-lienable items was filed, but the items were severable and hence the lien was not defeated (see *supra*, IV, C, 12, d, (II)) the application generally on the account of a payment less than the amount of the lienable items would not extinguish the whole lien.

Where a lienor agrees to relinquish his lien on payment to him of a certain amount, although less than the amount of his claim, his status as a lienor ceases on his acceptance of the amount agreed on. Taylor *v.* Dutcher, 60 N. Y. App. Div. 531, 69 N. Y. Suppl. 951.

58. Gantner *v.* Kemper, 58 Mo. 567.

Misrepresentation of contractor to owner as to application of payment to materialmen. — In an action to enforce a lien for materials furnished to a contractor who was building a house for defendants, the court found that the contractor delivered a check to plaintiffs' agent, taking a receipt therefor, and requested the agent to apply the proceeds to materials furnished by plaintiffs on a building then being erected for a third person; that the agent refused to so apply the proceeds of the check, but stated that part would be so applied, and that the residue would be applied to certain other accounts, not including that for materials furnished for defendant's house; that afterward the contractor went to plaintiffs' office, showed plaintiffs' bookkeeper the receipt for the check given by the agent, and the bookkeeper, in ignorance of the facts, and relying on the contractor's statements, gave him a receipt for the amount of the check on the materials furnished for defendants' house; that plaintiffs, on discovery of the facts, promptly repudiated the application of the check so made

of such payments is governed by the general rules on the subject.[59] If the debtor applies the payment his application governs;[60] but if he does not do so the creditor may apply the payment on whichever debt he chooses,[61] and if he applies it to a debt other than the one for which the lien is claimed, as he is entitled to do,[62] the payment does not discharge or reduce the lien.[63] But if he applies the payment to the lien debt and the lien is thus extinguished, the application cannot be changed without the consent of the debtor so as to revive the lien.[64] If no application is made by either the law will apply the payment as justice and equity may require,[65] and under the general rule that a payment should be applied to the least secure debt[66] the court will as a rule apply a payment to unsecured debts or non-lienable items, leaving the lienable claim and the lien therefor unaffected.[67] Where there is a joint lien on several houses a payment applicable to lien claims will be applied *pro rata* to reduce the lien on each house,[68] and where a contractor makes a general payment to a subcontractor having several accounts against him for materials furnished for different buildings the payment must be apportioned among the several accounts so as to reduce *pro rata* the lienable claim against each building.[69]

3. Payments to Contractor as Affecting Subcontractors' Liens — a. In General. Under statutes conforming to the Pennsylvania system[70] the right of a subcontractor, materialman, or workman to a lien is not dependent upon the state of accounts between the owner and contractor, and hence the lien is not defeated or affected by any payment to the contractor.[71] But under the New York

by the contractor, and the contractor afterward approved plaintiffs' bill for the whole amount of materials furnished on defendants' house, without claiming any credit on account of the check; that the contractor, by producing the receipt, afterward induced defendants to advance "further money" on his contract; and that plaintiffs did not know of the use to which the contractor put the receipt. It was held that such findings did not support a conclusion of law that defendants were entitled to have the amount of the check deducted from plaintiffs' claim for materials furnished. Schallert-Ganahl Lumber Co. *v.* Neal, 91 Cal. 362, 27 Pac. 743.

59. See Dey *v.* Anderson, 39 N. J. L. 199. And see, generally, Payment.

60. Petersen *v.* Shain, (Cal. 1893) 33 Pac. 1086.

61. Brigham *v.* Dewald, 7 Ind. App. 115, 34 N. E. 498; Christnot *v.* Montana Gold, etc., Min. Co., 1 Mont. 44; Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

Creditor may apply part to lienable claim and balance to other accounts.— Ridge *v.* Mercantile L. & T. Co., 56 Mo. App. 155.

62. Union Trust Co. *v.* Casserly, 127 Mich. 183, 86 N. W. 545.

63. Brigham *v.* Dewald, 7 Ind. App. 115, 34 N. E. 498.

64. Bobb *v.* Wittich, 88 Mo. App. 129; Spalding *v.* Burke, 33 Wash. 679, 74 Pac. 829.

65. Gantner *v.* Kemper, 58 Mo. 567.

Discharge of property conveyed to third person.— Where, in a proceeding to enforce mechanics' liens on several separate tracts of land, a person who had purchased one of the tracts subsequent to the filing of the notices of the liens was made a defendant, and it was found that certain sums had been paid on each lien respectively, and that another sum, exceeding the amount still due on the purchaser's tract, had been paid without any special direction as to the tract to which it should be applied, such sum should be first applied to discharge the lien on the purchaser's tract. Dungan *v.* Dollman, 64 Ind. 327.

66. Caldwell *v.* Winder, 30 Fed. Cas. No. 18,245, 2 Hayw. & H. 24 [*reversed* on other grounds in 14 How. 434, 14 L. ed. 487].

67. *Massachusetts.*— Casey *v.* Weaver, 141 Mass. 280, 6 N. E. 372.

Minnesota.— Dennis *v.* Smith, 38 Minn. 494, 38 N. W. 695.

Missouri.— Gantner *v.* Kemper, 58 Mo. 567.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, holding that where one of several houses covered by a joint mechanic's lien was released from the lien in consideration of payments already made such payments should be applied first to the amount due on account of the house released and then *pro rata* to the amounts due on the others.

Wisconsin.— North *v.* La Flesh, 73 Wis. 520, 41 N. W. 633.

United States.— Caldwell *v.* Winder, 30 Fed. Cas. No. 18,245, 2 Hayw. & H. 24 [*reversed* on other grounds in 14 How. 434, 14 L. ed. 487].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 421.

68. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

69. Ballou *v.* Black, 17 Nebr. 389, 23 N. W. 3.

70. See *supra*, II, D, 7, b, (I), (II).

71. *Indiana.*— Crawfordsville *v.* Johnson, 51 Ind. 397 [*following* Colter *v.* Frese, 45 Ind. 96]; Indiana R. Co. *v.* Wadsworth, 29 Ind. App. 586, 64 N. E. 938; Caulfield *v.* Polk, 17 Ind. App. 429, 46 N. E. 932; Clark *v.* Iluey, 12 Ind. App. 224, 40 N. E. 152.

system [72] the right of such persons to a lien is dependent upon there being something due or to become due the contractor, and exists only to the extent of such amount and payments properly made to the contractor before the owner is given notice of their claims will deprive them of the right to a lien, entirely or *pro tanto* according as the payments are in full or in part only, leaving something still due.[73] And it has been said that if the owner, at the request of the original contractor, prior to an attempt to create liens by any one, assumes a legal obligation to pay subcontractors or materialmen for labor or material used in the erection of a build-

Kentucky.— Browinski *v.* Pickett, 113 Ky. 420, 68 S. W. 408, 24 Ky. L. Rep. 305.

Maryland.— Shoop *v.* Powles, 13 Md. 304.

Missouri.— Ittner *v.* Hughes, 133 Mo. 679, 34 S. W. 1110; Henry, etc., Co. *v.* Evans, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332.

Montana.— Gould *v.* Barnard, 14 Mont. 335, 36 Pac. 317.

Nebraska.— Ballou *v.* Black, 21 Nebr. 131, 31 N. W. 673.

Nevada.— Lonkey *v.* Cook, 15 Nev. 58 [*following* Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24].

Tennessee.— Reeves *v.* Henderson, 90 Tenn. 521, 18 S. W. 242. But see Brown *v.* Crump, 2 Swan 531.

Washington.— Spokane Mfg., etc., Co. *v.* McChesney, 1 Wash. 609, 21 Pac. 198.

Wisconsin.— Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385, but the statute establishing this rule was not retrospective.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 151.

72. See *supra*, II, D, 7, b, (I), (III).

73. *Alabama.*— Alabama, etc., Lumber Co. *v.* Tisdale, 139 Ala. 250, 36 So. 618.

California.— Dunlop *v.* Kennedy, (1893) 34 Pac. 92; Kerckhoff-Cuzner Mill, etc., Co. *v.* Cummings, 86 Cal. 22, 24 Pac. 814; Wells *v.* Cahn, 51 Cal. 423; Renton *v.* Conley, 49 Cal. 185 (payment before either actual or constructive notice); McAlpin *v.* Duncan, 16 Cal. 126. See also Hampton *v.* Christensen, 148 Cal. 729, 84 Pac. 200, payment of obligation for material furnished, assumed for contractor.

Colorado.— Sayre-Newton Lumber Co. *v.* Union Bank, 6 Colo. App. 541, 41 Pac. 844.

Connecticut.— Abbey *v.* Herzer, 74 Conn. 493, 51 Atl. 513; Gridley *v.* Sumner, 43 Conn. 14.

District of Columbia.— Whelan *v.* Young, 21 D. C. 51.

Florida.— Carter *v.* Brady, (1906) 41 So. 539; Macfarlane *v.* Southern Lumber, etc., Co., 47 Fla. 271, 36 So. 1029.

Georgia.— Allen *v.* Schweigert, 113 Ga. 69, 38 S. E. 397; New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892; Guernsey *v.* Reeves, 58 Ga. 290.

Illinois.— Shaw *v.* Chicago Sash, etc., Mfg. Co., 144 Ill. 520, 33 N. E. 870; Brown *v.* Lowell, 79 Ill. 484; Biggs *v.* Clapp, 74 Ill. 335; Prescott *v.* Maxwell, 48 Ill. 82.

Iowa.— Empire Portland Cement Co. *v.* Payne, 128 Iowa 730, 105 N. W. 331; Iowa Stone Co. *v.* Crissman, 112 Iowa 122, 83 N. W. 794 [*distinguishing* Green Bay Lumber Co. *v.* Thomas, 106 Iowa 154, 76 N. W. 651; Simonson Bros. Mfg. Co. *v.* Citizens' State Bank, 105 Iowa 264, 74 N. W. 905; Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015; Chicago Lumber Co. *v.* Woodside, 71 Iowa 359, 32 N. W. 381; Othmer *v.* Clifton, 69 Iowa 656, 29 N. W. 767; Gilchrist *v.* Anderson, 59 Iowa 274, 13 N. W. 290]; Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93; Hug *v.* Hintrager, 80 Iowa 359, 45 N. W. 1035; Fullerton Lumber Co. *v.* Osborn, 72 Iowa 472, 34 N. W. 215; Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275 (payment before notice served and without knowledge of claim); Stewart *v.* Wright, 52 Iowa 335, 3 N. W. 144; Kilbourne *v.* Jennings, 38 Iowa 533. See also Robinson *v.* State Ins. Co., 55 Iowa 489, 8 N. W. 314.

Louisiana.— State *v.* Recorder of Mortgages, 25 La. Ann. 61: Rousselot *v.* Kirwin, 8 La. Ann. 300. *Compare* Nolte *v.* His Creditors, 6 Mart. N. S. 168.

New Jersey.— Taylor *v.* Reed, 68 N. J. L. 178, 52 Atl. 579; Person *v.* Herring, 63 N. J. L. 599, 44 Atl. 753.

New York.— Robbins *v.* Arendt, 148 N. Y. 673, 43 N. E. 165; Gibson *v.* Lenane, 94 N. Y. 183; Crane *v.* Genin, 60 N. Y. 127; Lumbard *v.* Syracuse, etc., R. Co., 55 N. Y. 491; Carman *v.* McIncrow, 13 N. Y. 70; Snyder *v.* Monroe Eckstein Brewing Co., 107 N. Y. App. Div. 328, 95 N. Y. Suppl. 144; Lawrence *v.* Dawson, 50 N. Y. App. Div. 570, 64 N. Y. Suppl. 185 [*affirmed* in 167 N. Y. 609, 60 N. E. 1115]; Ball, etc., Co. *v.* Clark, etc., Co., 31 N. Y. App. Div. 356, 52 N. Y. Suppl. 443; Smith *v.* Merriam, 67 Barb. 403; Smith *v.* Coe, 2 Hilt. 365 [*affirmed* in 29 N. Y. 666]; Kennedy *v.* Paine, 1 E. D. Smith 651; Shulman *v.* Maison, 25 Misc. 765, 54 N. Y. Suppl. 1009; Lemieux *v.* English, 19 Misc. 545, 43 N. Y. Suppl. 1066; Schneider *v.* Hobein, 41 How. Pr. 232; Thompson *v.* Yates, 28 How. Pr. 142.

North Carolina.— Wood *v.* Atlantic, etc., R. Co., 131 N. C. 48, 42 S. E. 462; Clark *v.* Edwards, 119 N. C. 115, 25 S. E. 794; Parsley *v.* David, 106 N. C. 225, 10 S. E. 1028.

Ohio.— Courtat *v.* Ehrhardt, 11 Ohio Dec. (Reprint) 628, 28 Cinc. L. Bul. 138.

Texas.— Burt *v.* Parker County, 77 Tex. 338, 14 S. W. 335; Sens *v.* Trentune, 54 Tex. 218; Nichols *v.* Dixon, (Civ. App. 1905) 85 S. W. 1051 [*affirmed* in (1905) 89 S. W. 765]; Sunset Brick, etc., Co. *v.* Stratton, (Civ. App. 1899) 53 S. W. 703; Riter *v.* Houston Oil Refining, etc., Co., 19 Tex. Civ. App. 516, 48 S. W. 758.

ing, it constitutes a valid payment upon the contract to the extent of such obliga-

Virginia.— Schrieber *v.* Citizens' Bank, 99 Va. 257, 38 S. E. 134.

West Virginia.— McKnight *v.* Washington, 8 W. Va. 666.

Canada.— Goddard *v.* Coulson, 10 Ont. App. 1 (payments up to ninety per cent of price under Ont. Rev. St. c. 120, as amended by Ont. Acts (1878), c. 17); *In re* Sear, 23 Ont. 474; Truax *v.* Dixon, 17 Ont. 366.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 151.

Contra. — Cary-Lombard Lumber Co. *v.* Partridge, 10 Utah 322, 37 Pac. 572 [*followed* in Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779].

The word "payment" in Ont. Rev. St. (1887) c. 126, § 9, covers the giving of a bill or promissory note; or payments made by the owner at the instance or by the direction of the contractor to those who supply materials to him; or tripartite arrangements by which an order is given by the contractor on the owner for the payment of the materialman out of the fund, which, when accepted, fixes the owner with direct liability to pay for the materials. Jennings *v.* Willis, 22 Ont. 439.

Promise of owner to see that subcontractor was paid.— Where a subcontractor asked the owner to state the terms of the original contract, and the owner failed to do so, but on the strength of his promise to see that the subcontractor should be paid for his work the latter performed the work, the owner could not, as against the subcontractor, assert that the principal contractor had been paid. Welch *v.* Sherer, 93 Ill. 64.

Giving the contractor credit for the amount of a debt due by him to the owner, if done in good faith and before notice, is a valid payment. Allen *v.* Carman, 1 E. D. Smith (N. Y.) 692.

The owner's verbal assumption of claims against the contractor, in consideration of which the contractor discharges him as to that much of the contract price, amounts to a payment to that extent on the contract, and is good against claimants who have not then given notice, although the claims are not actually paid until after notice. Sunset Brick, etc., Co. *v.* Stratton, (Tex. Civ. App. 1899) 53 S. W. 703. See also Gibson *v.* Lenane, 94 N. Y. 183; Garrison *v.* Mooney, 9 Daly (N. Y.) 218.

Where the owner has verbally accepted an order drawn by the contractor on him to be paid out of the amount due the contractor before receiving notice of any lien, a payment of such order is good as against lien claimants, although made after their notices are served. St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546. See also Gibson *v.* Lenane, 94 N. Y. 183.

Facts not constituting payment as against subcontractor. — Where a contractor undertook to erect a house in consideration of a stock of goods and some money, and plaintiff as subcontractor furnished materials to the contractor after the goods had been turned over and the money paid, but the agreement was that the money and the proceeds of the goods were to be held in trust to be applied by the trustee in payment of a balance incurred in the erection of the house, and this agreement was in effect observed, the principal contractor was not paid in full prior to the furnishing of materials by plaintiff in such sense as to deprive the latter of his right to a lien as a subcontractor. Bartlett *v.* Mahlum, 88 Iowa 329, 55 N. W. 514.

The owner's indorsement of the contractor's promissory notes when not in pursuance of any claims for liens cannot be allowed to prevail over the liens of subcontractors. Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015.

A verbal guaranty by the owner of the payment of certain debts of the contractor for materials purchased for the building is not a "payment" affecting the rights of a subcontractor. And as the rights of the subcontractor with respect to his lien are to be determined by the state of things at the time he gave notice to the owner, his rights are not affected by the fact that the owner afterward and before suit brought upon the lien paid the bills which he had guaranteed. Gridley *v.* Sumner, 43 Conn. 14.

False statements as to amounts due.— The subcontractor has no right to a lien for more than was due because of the false statements of the contractor and owner that more was due, he having suffered no loss by relying thereon. Wolf *v.* Mendelsohn, 87 N. Y. Suppl. 465.

Where the owner promised to make no further payments without notice to the subcontractor payments subsequently made without regard to such obligation were not effective against the subcontractor. Rope *v.* Hess, 6 N. Y. St. 710 [*reversed* on other grounds in 118 N. Y. 668, 23 N. E. 128].

Burden of proof as to propriety or appropriation of payments.— Where the contractor abandoned the work and the owner took charge and completed it at a cost less than the total contract price, and a materialman who had furnished material to the contractor which was used in the improvement proceeded to foreclose his lien on the property for an amount less than the balance left after deducting the cost of completion from the contract price, if the owner sought to defend on the ground that he had made advances or payments to the contractor, it was incumbent on him to show that he had done so in accordance with the provisions of the law creating materialmen's liens, or that amounts advanced by him to the contractor had been properly appropriated. Prince *v.* Neal-Millard Co., 124 Ga. 884, 53 S. E. 761.

Application of payment to contractor.— Where a payment is made on the aggregate of the balances due under several building contracts, but is not applied to any particular portion of such aggregate sum, it

tion.[74] Unless the statute directs, or the contract provides otherwise, the owner may make payment to the principal contractor in any method and at any time that he chooses;[75] but the right of the owner to defeat liens by paying the contractor has been hedged about with a number of restrictions which are now to be considered.[76]

b. Advances and Premature Payments. The more general rule is that payments to the contractor before they are due according to the terms of the contract are not valid as against lien claimants who give the owner the statutory notice of their claims before the time when such payments fall due.[77] But in some states it is held that payments made in good faith by the owner to the contractor before they fall due according to the terms of the contract are good against subcontractors

will be presumed that the parties intended to apply it to the several balances in the order in which they became payable; and one who furnished materials for the building on which the last balance became due, and who filed his notice of lien after such payment, is entitled to a lien on such building so far as the balance due the contractor therefor has not been satisfied after such application of the payment. Reynolds *v.* Patten, 5 Misc. (N. Y.) 215, 25 N. Y. Suppl. 100.

Sufficiency of evidence as to full payment having been made.— Proof that the owner paid for labor and materials, on the order of the contractor, an amount exceeding the original contract price is not sufficient of itself to show that he has discharged his full obligations under the contract, where it appears that some extras were furnished and the contract gave him the right to make alterations in the plans whereby the contract price might be increased. Hannah, etc., Mercantile Co. *v.* Hartzell, 125 Mich. 177, 84 N. W. 52.

74. Gibson *v.* Lenane, 94 N. Y. 183, 187 [*quoted* in Lawrence *v.* Dawson, 50 N. Y. App. Div. 570, 64 N. Y. Suppl. 185 (*affirmed* in 167 N. Y. 609, 60 N. E. 1115)].

Priority between subcontractor, etc., and assignee of contractor see *infra*, IV, C, 1, d.

Acceptance of order as payment.— Where the contractor drew an order upon the owner for part of the moneys due him payable to a subcontractor who had filed a lien for the amount represented by the order, and the owner accepted the order and promised in writing to pay it, and such promise was accepted by the subcontractor in satisfaction of his lien, which was thereupon discharged of record, the transaction amounted to a payment by the owner on account of the amount due the contractor as against persons subsequently filing liens, and N. Y. Laws (1897), c. 418, § 15, requiring the filing of orders of the contractor upon the owner for the payment of money was not applicable. Harvey *v.* Brewer, 178 N. Y. 5, 70 N. E. 73 [*affirming* 82 N. Y. App. Div. 589, 81 N. Y. Suppl. 846]. But *compare* Riley *v.* Kenney, 33 Misc. (N. Y.) 384, 67 N. Y. Suppl. 584.

Order of contractor repudiated by owner.— Where a principal contractor's order on the owner in favor of a subcontractor was expressly repudiated by the owner, the owner cannot avail himself of its force as payment in determining the amount due on the contract at the time another subcontractor filed a lien after the expiration of the statutory period and gave the notice. Lindsay, etc., Co. *v.* Zœckler, 128 Iowa 558, 104 N. W. 802.

75. Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92; Simonton *v.* Cicero Lumber Co., 108 Ill. App. 481; Rousselot *v.* Kirwin, 8 La. Ann. 300; Sunset Brick, etc., Co. *v.* Stratton, (Tex. Civ. App. 1899) 53 S. W. 703.

76. See *infra*, VI, E, 3, b–i.

77. *California.*— Ganahl *v.* Weir, 130 Cal. 237, 62 Pac. 512 (notwithstanding no notice has been served upon the owner); Dunlop *v.* Kennedy, (1893) 34 Pac. 92; Walsh *v.* McMenomy, 74 Cal. 356, 16 Pac. 17. Where the contract price is less than one thousand dollars payment may be made to the contractor at any time without liability to subcontractors, etc. Southern California Lumber Co. *v.* Jones, 133 Cal. 242, 65 Pac. 378.

Connecticut.— Abbey *v.* Herzer, 74 Conn. 493, 51 Atl. 513, unless notice of intention to make such payment be given in writing to persons known to have furnished labor or materials at least five days before such payment. *Compare* Spaulding *v.* Thompson Ecclesiastical Soc., 27 Conn. 573.

Iowa.— Green Bay Lumber Co. *v.* Thomas, 106 Iowa 154, 76 N. W. 651, payment with knowledge of subcontractor's claim. See also Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275.

Louisiana.— Fourcher *v.* Day, 6 La. Ann. 60; Jorda *v.* Gobet, 5 La. Ann. 431; Dumont *v.* Roman Catholic Church of Ascension, 6 Rob. 532; Miller *v.* Reynolds, 5 Mart. N. S. 665, but the rule was formerly otherwise, and the statute establishing the rule of the text was not retroactive.

New Jersey.— Daly *v.* Somers Lumber Co., (1905) 61 Atl. 730; Person *v.* Herring, 63 N. J. L. 599, 44 Atl. 753; Slingerland *v.* Binns, 56 N. J. Eq. 413, 39 Atl. 712. *Compare* as to claims for work on public buildings Somers Brick Co. *v.* Souder, (Ch. 1905) 61 Atl. 840.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 152.

Circumstances not amounting to payment in advance.— Where a building was to be completed and paid for at a certain time, and by default of the contractor it was not completed at that time, and the owner thereupon settled with the contractor, paying him for what had been done and treating the contract as at an end, the payment was not made in advance within the meaning of the Me-

and others,[78] although collusive payments will not be allowed to defeat the liens of those who have furnished labor or materials.[79]

c. Payments After Notice or Knowledge of Claim. The rights of a subcontractor, materialman, or workman cannot be defeated or impaired by reason of any payment made to the contractor by the owner after the statutory notice of the claim[80] has been filed or served upon the owner,[81] or after the owner has actual

chanics' Lien Law, and the owner was not liable by reason thereof to a materialman or subcontractor subsequently serving an attested account. Fitzgibbon *v.* Green, 5 Ohio Dec. (Reprint) 350, 5 Am. L. Rec. 2, 1 Cinc. L. Bul. 110.

Payment due on acceptance of work by architect.— It has been held that where payments are to be made upon the architect's certificate of completion, payments made before such certificate is given are not effective as against claimants who filed stop notices, notwithstanding the architect's certificate, subsequently given, states that the building was in fact completed when the payments were made. Daly *v.* Somers Lumber Co., (N. J. Ch. 1905) 61 Atl. 730. But it has also been held that the payment, after completion, but before acceptance by the architect, of an instalment due when the building should be "completed and accepted by the architect," was not premature, the provision for acceptance being solely for the benefit of the owner. Valley Lumber Co. *v.* Struck, 146 Cal. 266, 80 Pac. 405.

Where the contract provides for payments as the work progresses, payments made when the work has been substantially finished to the required stages cannot be considered premature so as to subject the owner to liability to subcontractors and materialmen to the additional extent of the payments so made. Stimson Mill Co. *v.* Riley, (Cal. 1895) 42 Pac. 1072; Veitch *v.* Clark, 67 N. J. Eq. 57, 57 Atl. 272.

Modification of contract.— Where a lot owner contracted for the building of a house, payments to be made at stipulated times, and two days later, but at least a week before any work was done or materials furnished by the subcontractors, signed an order at the contractor's instance, requesting a lumber company to let the contractor have the necessary lumber, and to charge the value thereof to him, it was held that as the order was given before the subcontractors had acquired any rights, the contract with the contractor should be regarded as modified by it in determining whether payments made by the owner were in accordance with the contract so as to discharge the owner *pro tanto* from liability to subcontractors. Abbey *v.* Herzer, 74 Conn. 493, 51 Atl. 513.

Supplemental contract.— Where the building contract provides for specific payments by instalments from time to time as the work progresses, and for a final payment upon completion and upon the production in each case of a receipt or release from the subcontractors, it is not competent for the owner and builder to cut out the subcontractors and nullify the lien law by a supplemental agreement between themselves to anticipate the final payment and dispense with the requirement of receipts from the subcontractors. Riggs F. Ins. Co. *v.* Shedd, 16 App. Cas. (D. C.) 150.

Consent of subcontractor to payment.— Where a subcontractor, after serving notice of his lien on the owner, signs a writing authorizing the owner to pay a certain other instalment, referring to it as due when certain work is done, this will not be held conditional, but as indicating a particular instalment; and the owner may rightfully make such payment before it is due without becoming liable to the subcontractor. Biggs *v.* Clapp, 74 Ill. 335.

Premature payments are effective as against a surety on the contractor's bond.— Ganahl *v.* Weir, 130 Cal. 237, 62 Pac. 512.

78. Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270 [*affirming* 52 Hun 191, 5 N. Y. Suppl. 161]; Tommasi *v.* Archibald, 114 N. Y. App. Div. 838, 100 N. Y. Suppl. 367; Behrer *v.* McMillan, 114 N. Y. App. Div. 450, 100 N. Y. Suppl. 35; Lind *v.* Braender, 15 Daly (N. Y.) 370, 7 N. Y. Suppl. 664; Lynch *v.* Cashman, 3 E. D. Smith (N. Y.) 660; Wolf *v.* Mendelsohn, 87 N. Y. Suppl. 465; Schneider *v.* Hobein, 41 How. Pr. (N. Y.) 232; Schneidhorst *v.* Luecking, 26 Ohio St. 47; Lynch *v.* Cashman, 3 E. D. Smith (N. Y.) 660; Port Clinton *v.* Cleveland Stone Co., 10 Ohio Cir. Ct. 1, 6 Ohio Cir. Dec. 218; Foeller *v.* Voight, 5 Ohio Dec. (Reprint) 349, 5 Am. L. Rec. 2, 1 Cinc. L. Bul. 116. *Contra*, Post *v.* Campbell, 83 N. Y. 279 [*affirming* 18 Hun 51]; Banham *v.* Roberts, 78 Hun (N. Y.) 246, 28 N. Y. Suppl. 828.

79. Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270 [*affirming* 52 Hun 191, 5 N. Y. Suppl. 161]; Tommasi *v.* Archibald, 114 N. Y. App. Div. 838, 100 N. Y. Suppl. 367; Behrer *v.* McMillan, 114 N. Y. App. Div. 450, 100 N. Y. Suppl. 35; Lind *v.* Braender, 15 Daly (N. Y.) 370, 7 N. Y. Suppl. 664; Lynch *v.* Cashman, 3 E. D. Smith (N. Y.) 660; Wolf *v.* Mendelsohn, 87 N. Y. Suppl. 465; Foeller *v.* Voight, 5 Ohio Dec. (Reprint) 349, 5 Am. L. Rec. 1, 1 Cinc. L. Bul. 116.

Circumstances not showing intent to evade statute in payments made see Tommasi *v.* Archibald, 114 N. Y. App. Div. 838, 100 N. Y. Suppl. 367.

Collusive payments not in advance of terms of contract see *infra*, VI, E, 3, e.

80. See *supra*, III, B, C.

81. *Alabama.*— McDonald Stone Co. *v.* Stern, 142 Ala. 506, 38 So. 643; Alabama, etc., Lumber Co. *v.* Tisdale, 139 Ala. 250, 36 So. 618.

California.— Hampton *v.* Christensen, 148 Cal. 729, 84 Pac. 200; Kerckhoff-Cuzner Mill, etc., Co. *v.* Cummings, 86 Cal. 22, 24 Pac.

knowledge or notice of such claim.[82] But the payment by the owner to the principal contractor of a sum not due, after notice of a subcontractor's lien, does not

814; McCants *v.* Bush, 70 Cal. 125, 11 Pac. 601.

Georgia.— New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892.

Illinois.— Butler *v.* Gain, 128 Ill. 23, 21 N. E. 350 [*affirming* 29 Ill. App. 425]; Brown *v.* Lowell, 79 Ill. 484; Morehouse *v.* Moulding, 74 Ill. 322; Prescott *v.* Maxwell, 48 Ill. 82.

Louisiana.— Moores *v.* Wire, 8 La. Ann. 382; Rousselot *v.* Kirwin, 8 La. Ann. 300; McBurney *v.* Bradbury, 6 La. Ann. 39.

New York.— Carman *v.* McIncrow, 13 N. Y. 70 [*affirming* 2 E. D. Smith 689]; Harley *v.* Mapes Reeves Constr. Co., 33 Misc. 626, 68 N. Y. Suppl. 191 (holding that where a surety continued the work on school buildings after default of the contractor, and the city paid the instalments coming due on the contract to such surety from the time it came in to complete work, in disregard of liens filed against the original contractor, the city paid the money in its own wrong, and hence such action would not affect the lienor's right to payment in full); Schneider *v.* Hobein, 41 How. Pr. 232.

Texas.— Sens *v.* Trentune, 54 Tex. 218; Baumgarten *v.* Mauer, (Civ. App. 1900) 60 S. W. 451.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 157–159.

Failure of owner to serve copy of account on contractor.— An owner who pays an amount to his contractor after having received notice of the attested account of a laborer or materialman may be held liable for the amount, although the owner may not have served a copy of the account on his contractor as required by statute, for it could not have been the legislative intention that the owner's violation of his duty should deprive the workman or materialman of his lien. Vordenbaumen *v.* Bartlett, 105 La. 752, 30 So. 219 [*modifying* Schwartz *v.* Cronan, 50 La. Ann. 993]; Pullis Bros. Iron Co. *v.* Natchitoches Parish, 51 La. Ann. 1377, 26 So. 402; Stewart *v.* Christy, 15 La. Ann. 325; Hogge *v.* Taliaferro, 10 La. Ann. 561; McBurney *v.* Bradbury, 6 La. Ann. 39; Jorda *v.* Gobet, 5 La. Ann. 431; Allen *v.* Wills, 4 La. Ann. 97; Hall *v.* Wills, 3 La. Ann. 504.

Payment for material purchased on owner's credit.— Where a lot owner, at the instance of his contractor and before subcontractors had acquired any rights, signed an order requesting a lumber company to furnish him the necessary lumber and to charge the value to him, and afterward, the contractor having abandoned the work, he paid the company a balance due for lumber, having meanwhile received notice of subcontractors' liens, it was held that the payment to the contractor was made in contemplation of law when the obligation to the lumber company was incurred, and therefore before notice of any liens and should be allowed to the owner. Abbey *v.* Herzer, 74 Conn. 493, 51 Atl. 513.

Expenditures for completion of building.— Where a contractor became unable to complete the building, and after the filing of the lien of a materialman, the owner, in order to complete the building, was forced to and did purchase materials and pay for labor to an amount exceeding the residue unpaid of the contract price, these expenditures could not be treated as payments to the contractor upon his contract which would render the owner liable to a materialman even though there had been no formal abandonment of the contract. Rodbourn *v.* Seneca Lake Grape, etc., Co., 67 N. Y. 215 [*reversing* 5 Hun 12]. See also McDougall *v.* Nast, 5 N. Y. St. 144.

Notice of demand not due.— It is not necessary for the owner to heed a stop notice served by a subcontractor who has accepted the contractor's note for the amount of his demand, where at the time the notice is served the note has not matured, so that the demand against the contractor is not due. Taylor *v.* Wahl, 72 N. J. L. 10, 60 Atl. 63.

A payment after the filing but before service on the owner of a copy of the notice as required by statute does not, where such service is actually made within the time allowed, affect the rights of the claimant, although the provision of the statute is that after service on the owner of a copy of the notice of lien he shall not be protected in making payments. Kelly *v.* Bloomingdale, 139 N. Y. 343, 34 N. E. 919 [*affirming* 19 N. Y. Suppl. 126, and *following* McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948; Kenny *v.* Apgar, 93 N. Y. 539; Hall *v.* Sheehan, 69 N. Y. 618].

Distribution of fund where payment invalid as to one claimant and good as to others.— Where the owner of a building made an improper payment to the contractor after the filing of a subcontractor's lien claim, and after such payment other claimants intervened, the amount remaining due to the contractor after such intervention should be prorated between all the claimants, after which the original claimant was entitled to recover from the owner the balance remaining unpaid, to the extent of the payment wrongfully made. D. J. McDonald Stone Co. *v.* Stern, 142 Ala. 506, 38 So. 643.

82. Page *v.* Grant, 127 Iowa 249, 103 N. W. 124; Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863; Queal *v.* Stradley, 117 Iowa 748, 90 N. W. 588; Green Bay Lumber Co. *v.* Thomas, 106 Iowa 154, 76 N. W. 651 (anticipated payment); Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015 [*following* Chicago Lumber Co. *v.* Woodside, 71 Iowa 359, 32 N. W. 381; Jones, etc., Lumber Co. *v.* Murphy, 64 Iowa 165, 19 N. W. 898; Gilchrist *v.* Anderson, 59 Iowa 274, 13 N. W. 290; Winter *v.* Hudson, 54 Iowa 336, 6 N. W. 541]; Hug *v.* Hintrager, 80 Iowa 359, 45 N. W. 1035; Martin *v.* Morgan, 64 Iowa 270, 20 N. W. 184; Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275, although the payment was

operate to give the subcontractor any right which he would not have had if the payment had not been made.[83]

d. Payments Before Expiration of Period Allowed For Filing Liens. Under some statutes payments made by the owner before the expiration of the time allowed a subcontractor or materialman in which to give his notice or file his claim are at the owner's risk and cannot reduce or defeat the lien.[84]

e. Collusive Payments.[85] A collusive payment by the owner to the contractor for the purpose of avoiding the Mechanics' Lien Law will not defeat the lien of a subcontractor, etc., even though not found to have been made in advance of the terms of the contract.[86] But it has been held that the fact that a payment was made to a creditor of a contractor on the false representation of such creditor that he had assumed all the contractor's debts does not make the payment fraudulent as against the subcontractors, the owner not being obliged to protect them until they give him the statutory notice.[87]

f. Duty to See That Subcontractors, Etc., Are Paid. Under some statutes it is made the duty of the owner to see that subcontractors, materialmen, and workmen are paid to the extent of the contract price, and no payment by the owner to the contractor can relieve him from liability as to the claims of such persons.[88]

g. Requiring Statement of Claims. Under some statutes it is the duty of the owner before making any payment to the contractor to require of him a verified

made before the statutory notice was given to the owner. See also Green Bay Lumber Co. *v.* Adams, 107 Iowa 672, 78 N. W. 699; Simonson Bros. Mfg. Co. *v.* Citizens' State Bank, 105 Iowa 264, 74 N. W. 905 [*distinguishing* Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93]; Winter *v.* Hudson, 54 Iowa 336, 6 N. W. 541; Snyder *v.* Monroe Eckstein Brewing Co., 107 N. Y. App. Div. 328, 95 N. Y. Suppl. 144.

Rule applies although payments are in accord with terms of contract.— Page *v.* Grant, 127 Iowa 249, 103 N. W. 124; Queal *v.* Stradley, 117 Iowa 748, 90 N. W. 588; Iowa Stone Co. *v.* Crissman, 112 Iowa 122, 83 N. W. 794; Green Bay Lumber Co. *v.* Adams, 107 Iowa 672, 78 N. W. 699; Green Bay Lumber Co. *v.* Thomas, 106 Iowa 154, 76 N. W. 651; Simonson Bros. Mfg. Co. *v.* Citizens' State Bank, 105 Iowa 264, 74 N. W. 905.

Delay in filing claim.— Under Iowa Code, § 3094, a subcontractor who fails to file his claim within thirty days from completion of the work is entitled to enforce it only to the extent of the balance then due to the contractor, although the owner knew that the subcontractor had not been paid when he made payments to the contractor. Empire Portland Cement Co. *v.* Payne, 128 Iowa 730, 105 N. W. 331 [*following* Thompson *v.* Spencer, 95 Iowa 265, 63 N. W. 695]. See also Hug *v.* Hintrager, 80 Iowa 359, 45 N. W. 1035.

The owner's knowledge of facts sufficient to put him on inquiry as to the existence of claims, which he might have discovered by the exercise of reasonable diligence, renders payments by him to the contractor invalid as against lien claimants. Chicago Lumber Co. *v.* Woodside, 71 Iowa 359, 32 N. W. 381; Othmer *v.* Clifton, 69 Iowa 656, 29 N. W. 767; Fay *v.* Orison, 60 Iowa 136, 14 N. W. 213; Gilchrist *v.* Anderson, 59 Iowa 274, 13 N. W. 290.

83. Cudworth *v.* Bostwick, 69 N. H. 536, 45 Atl. 408.

84. *Illinois.*— Havighorst *v.* Lindberg, 67 Ill. 463.

Kansas.— Chicago Lumber Co. *v.* Allen, 52 Kan. 795, 35 Pac. 781; Shellabarger *v.* Thayer, 15 Kan. 619.

Michigan.— Fairbairn *v.* Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

North Dakota.— Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

South Dakota.— Albright *v.* Smith, 2 S. D. 577, 51 N. W. 590.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 154.

Contra.—Courtat *v.* Ehrhardt, 11 Ohio Dec. (Reprint) 628, 28 Cinc. L. Bul. 138; McKnight *v.* Washington, 8 W. Va. 666. And see *supra*, VI, E, 3, a.

The fact that the entire payments were distributed by the contractor among persons who furnished labor and materials affords the owner no protection where the distribution was not *pro rata* among all claimants. Fairbairn *v.* Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

85. **Collusive payments before due** see *supra*, VI, E, 3, b.

86. Hofgesang *v.* Meyer, 2 Abb. N. Cas. (N. Y.) 111. See also Smith *v.* Coe, 2 Hilt. (N. Y.) 365 [*affirmed* in 29 N. Y. 666].

Facts not showing bad faith.— Where sureties on the contractor's bond offered to pay all subcontractors claiming liens, and to litigate the claim of an assignee of the contractor, and to indemnify the owner against it if he would pay to them the money due the contractor, the owner's refusal of such offer was no evidence of bad faith toward the subcontractors. Hall *v.* Banks 79 Wis. 229, 48 N. W. 385.

87. Burt *v.* Parker County, 77 Tex. 338, 14 S. W. 335.

88. Green *v.* Farrar Lumber Co., 119 Ga.

statement of the names of persons furnishing labor or material and the amounts due or to become due to each,[89] and payments made without such statement are not rightfully made and cannot defeat or reduce the claim of a subcontractor, etc., for a lien,[90] even though he has failed to serve upon the owner a detailed statement of his claim as provided for by statute.[91]

h. Retaining Funds to Meet Claims. Under some statutes the owner cannot pay the contractor until subcontractors, materialmen, and workmen have been paid for work done or materials furnished, and if he does so the payment does not relieve him from liability to such persons.[92] Other statutes make it the duty of the owner to withhold a certain proportion of the contract price for a designated time in order to meet the claims of subcontractors and others, and payments made in violation of this requirement afford no protection;[93] but under such a statute the owner may make and be protected in making partial payments to the contractor to any extent which does not impair the fund which he is required to hold back.[94] A provision in a contract giving an owner the right to retain a portion of the contract price until a certain time after the completion of the work is

30, 46 S. E. 62; Nelson Mfg. Co. *v.* Mann, 71 S. W. 851, 24 Ky. L. Rep. 1547.

89. George Green Lumber Co. *v.* Nutriment Co., 113 Ill. App. 635; Campbell *v.* Green, etc., Lumber Co., 99 Ill. App. 647; Standard Radiator Co. *v.* Fox, 85 Ill. App. 389; Blitz *v.* Fields, 115 Mich. 675, 74 N. W. 186.

Such a statute is constitutional.— Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797, upholding Mich. Pub. Acts (1891), No. 179, and pointing out the differences between that statute and Mich. Pub. Acts (1887), No. 270, which was held unconstitutional in John Spry Lumber Co. *v.* Sault Sav. Bank, etc., Co., 77 Mich. 199, 43 N. W. 778, 18 Am. St. Rep. 396, 6 L. R. A. 204.

The exception in the Illinois statute that such provision shall not apply to merchants and dealers in materials only refers to contractors and not to subcontractors who are such merchants and dealers. Standard Radiator Co. *v.* Fox, 85 Ill. App. 389.

90. Butler *v.* Gain, 128 Ill. 23, 21 N. E. 350 [*affirming* 29 Ill. App. 425]; George Green Lumber Co. *v.* Nutriment Co., 113 Ill. App. 635; Campbell *v.* Green, etc., Lumber Co., 99 Ill. App. 647; Nutriment Co. *v.* George Green Lumber Co., 94 Ill. App. 342; Standard Radiator Co. *v.* Fox, 85 Ill. App. 389; Hintze *v.* Weiss, 45 Ill. App. 220; Chicago Sash, etc., Mfg. Co. *v.* Shaw, 44 Ill. App. 618; Wieska *v.* Imroth, 43 Ill. App. 357; Conklin *v.* Plant, 34 Ill. App. 264; J. E. Greilick Co. *v.* Rogers, 144 Mich. 313, 107 N. W. 885; Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Blitz *v.* Fields, 115 Mich. 675, 74 N. W. 186, 118 Mich. 85, 76 N. W. 119; Munroe *v.* Merrell, 113 Mich. 491, 71 N. W. 850. See also Hannah, etc., Mercantile Co. *v.* Hartzell, 125 Mich. 177, 84 N. W. 52.

Belief of owner that claims fully paid.—The fact that the owner believed at the time of making payments to the contractor that moneys previously advanced by him to materialmen on the contractor's order had paid such claims in full will not release the property from a lien for the balance due to the materialmen, there having been no misrepresentation on the part of the claimants. Munroe *v.* Merrell, 113 Mich. 491, 71 N. W. 850.

When subcontractor not protected.— Under the Illinois act of June 19, 1895 (repealed by the act of May 18, 1903), making it the duty of the contractor to give to the owner, and also the duty of the owner to require of him within ten days after the contract was made and before commencing work thereunder a detailed statement as to subcontracts or bids and proposals therefor, a subcontractor whose dealings with the contractor were more than ten days after the making of the original contract could not take advantage of the owner's failure to demand a statement from the contractor. Home Lumber Co *v.* Deisher, 91 Ill. App. 628.

91. Blitz *v.* Fields, 115 Mich. 675, 74 N. W. 186 [*following* Smalley *v.* Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29].

92. Barton *v.* Grand Lodge I. O. O. F., 71 Ark. 35, 70 S. W. 305. See also Sierra Nevada Lumber Co. *v.* Whitmore, 24 Utah 130, 66 Pac. 779.

93. Kerckhoff-Cuzner Mill, etc., Co. *v.* Cummings, 86 Cal. 22, 24 Pac. 814; Hunnicutt, etc., Co. *v.* Van Hoose, 111 Ga. 518, 36 S. E. 669; McAuliffe *v.* Bailie, 89 Ga. 356, 15 S. E. 474; Torrance *v.* Caratchley, 31 Ont. 546, holding that the owner of a building is not prohibited from making payments before the expiration of the thirty days from completion out of the twenty per cent reserved required by Ont. Rev. St. c. 153, § 11, to persons entitled to liens, but he makes such payments at his own risk as against any one ultimately prejudiced thereby.

Where the contract price is less than one thousand dollars the provisions of Cal. Code Civ. Proc. § 1184, relative to the withholding of a percentage of the contract price are not applicable. Southern California Lumber Co. *v.* Jones, 133 Cal. 242, 65 Pac. 378; Denison *v.* Burrell, 119 Cal. 180, 51 Pac. 1; Kerckhoff-Cuzner Mill, etc., Co. *v.* Cummings, 86 Cal. 22, 24 Pac. 814; Sidlinger *v.* Kerkow, 82 Cal. 42, 22 Pac. 932.

94. Hunnicutt, etc., Co. *v.* Van Hoose, 111

for the benefit of the owner and may be waived by him and payment made in advance of that time without incurring any liability to subcontractors and others.[95]

i. Obtaining Release of Liens. Where the statute requires the owner to procure from the contractor a verified release of liens before making payments to him, payments made without such release are not effective as against subcontractors and others.[96]

j. Indebtedness of Contractor to Owner, Offsets, Etc. A statute providing that as to all liens except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the owner and against the contractor, refers only to offsets not arising under the terms of the contract and of which, from an inspection of the contract, materialmen and laborers could have no notice.[97]

4. Payments to Subcontractors as Affecting Contractor's Lien. Where a subcontractor or materialman has taken the necessary steps to perfect his lien and impose a direct liability on the owner, payments made by the owner in discharge thereof are effective to reduce or defeat the claim of the principal contractor.[98] Thus where the statute makes it the duty of the contractor to protect the property of the owner against liens of subcontractors, materialmen, and laborers employed by him the owner is entitled to credit, against the lien claim of the contractor, for whatever he has been compelled to pay to relieve his property from liens in favor of such persons,[99] and when such liens have been pressed to judg-

Ga. 518, 36 S. E. 669; McAuliffe *v.* Bailie, 89 Ga. 356, 15 S. E. 474, holding that the Georgia act of Oct. 19, 1891, does not require the owner to withhold twenty-five per cent of all earnings for work actually done, but merely twenty-five per cent of the total contract price.

95. Weisemair *v.* Buffalo, 57 Hun (N. Y.) 48, 10 N. Y. Suppl. 569; James *v.* St. Paul's Sanitarium, 24 Tex. Civ. App. 664, 60 S. W. 322 [*following* Berry *v.* McAdams, 93 Tex. 431, 55 S. W. 1112]. *Compare* Merritt *v.* Hopkins, 96 Iowa 652, 65 N. W. 1015, holding that where a building contract provided that the owner should pay a part of the contract price by giving the contractor an order on a third person, and also that ten per cent of the contract price as estimated should be retained until the work was completed, the sum reserved should be ten per cent of the total price and not of the price minus the order, and this ten per cent should not, as against persons who might file subcontractors' liens, have been paid before the completion of the work.

96. Bruce *v.* Pearsall, 59 N. J. L. 62, 34 Atl. 982; Anderson Lumber Co. *v.* Friedlander, 54 N. J. L. 375, 24 Atl. 434.

A release of claims executed by only a portion of the laborers and materialmen, to which was annexed an affidavit of the contractor showing that some of the laborers and materialmen had not joined in the release, was not a compliance with the New Jersey act of March 29, 1892, supplementing the Mechanics' Lien Law; and hence a payment by the owner to the contractor of money due on the contract on presentation of such release and affidavit did not operate as a bar to such claims as remained unreleased and unsatisfied. Magowan *v.* Stevenson, 58 N. J. L. 31, 32 Atl. 1057.

97. Hampton *v.* Christensen, 148 Cal. 729, 84 Pac. 200, holding therefore that where a building contract provided for a completion payment of two thousand dollars and a final payment of two thousand seven hundred and fifty dollars, which amounted to twenty-five per cent of the contract price which was not due until thirty-five days after completion of the building, as provided by statute for the benefit of mechanic's lien claimants, the owner, as against such claimants, was entitled to deduct as a first lien from the completion payment an amount due from the contractor for materials provided for but not furnished and damages actually sustained by the contractor's failure to complete the building within the time prescribed, notwithstanding Cal. Code Civ. Proc. § 1183, providing that a mechanic's lien shall extend to the entire contract price, etc.; but that the excess, if any, due the owner above the amount of such completion payment could not be charged against the twenty-five per cent final payment to the injury of mechanic's lien claimants.

98. Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

Payment at owner's risk.— Where one who has retained twenty-five per cent of the contract price for the repair of a building, after he has knowledge of the appointment of an assignee for the benefit of the contractor's creditors, and a demand made by him for the money retained, without any order of court or any judgment as to the validity of alleged liens, pays them, he does so at his own risk, and, if they are not valid liens, he will be liable to the assignee for the amount paid. Wilson *v.* Nugent, 125 Cal. 280, 57 Pac. 1008.

99. Clancy *v.* Plover, 107 Cal. 272, 40 Pac. 394.

ment the owner may set off against the contractor the amount of the judgment,[1] although it includes costs and attorney's fees as well as the amount of the claim for labor or materials.[2] But where the filing of a lien by a subcontractor was due to the owner's refusal to pay an order upon him given by the contractor to the subcontractor for the amount of his claim, the owner being at the time of such refusal indebted to the contractor in an amount exceeding the amount of the order the owner can offset against the contractor only the amount of the lien claim proper and not the costs and expenses incident to the lien.[3] Where the statute requires that the contractor should signify his assent or dissent to the owner within a certain time after being notified of the claim of his journeyman or other person upon the owner for work performed this is a matter which concerns only the contractor and the owner. A payment made to a claimant after the lapse of the time specified, and before the contractor has notified his dissent to the owner, will be binding as between the two latter; the law presuming assent from the silence of the parties.[4] Payments made by the owner to subcontractors without the contractor's knowledge or assent and before the subcontractors have taken the necessary steps to perfect their liens and impose a direct liability on the owner are not available to defeat or reduce the claim of the contractor.[5]

5. Payments to Subcontractors as Affecting Lien of Other Subcontractors. Under the New York system[6] it has been held that payments made to subcontractors, materialmen, or laborers who were entitled to file liens and would have filed them but for such payment should be allowed to the owner in reduction of the amount available for the liens of other subcontractors, materialmen, or laborers.[7] But the owner cannot defeat a materialman's lien by showing that he had paid out to subcontractors, materialmen, and mechanics more than the contract price of the building, when he does not claim that the payments were compulsory or even made in good faith without notice of the claimant's demand.[8]

6. Payments to Subcontractors as Affecting Lien of Their Employees, Etc. Under the Pennsylvania system[9] the fact that a subcontractor has been paid for the labor of his employees does not prevent them from maintaining liens if they have not been paid.[10] And even under the New York system[11] it has been held that a person furnishing labor or material to a subcontractor can enforce a lien, notwithstanding the fact that the subcontractor has been paid in full, where there still remains something due from the owner to the principal contractor.[12]

F. Penalty For Failure to Discharge Lien of Record. Under some statutes it is the duty of the lien claimant — a failure in which subjects him to a penalty — to cause the lien to be satisfied of record upon payment or tender of the amount due or upon demand for the entry of such satisfaction after the lien has become ineffective.[13]

1. Whittier *v.* Wilbur, 48 Cal. 175.
2. Clancy *v.* Plover, 107 Cal. 272, 40 Pac. 394; Covell *v.* Washburn, 91 Cal. 560, 27 Pac. 859.
3. Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640.
4. Baxter *v.* Sisters of Charity, 15 La. Ann. 686, holding, however, that this presumption is not absolute, and the contractor may object to the correctness of a demand at any time before payment.
5. Walker *v.* Newton, 53 Wis. 336, 10 N. W. 436.
6. See *supra*, II, D, 7, b, (I), (III).
7. Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92, where the owner, besides making such payments, had retained out of the contract price the twenty-five per cent required by Cal. Code Civ. Proc. § 1184, to be retained until thirty-five days after completion of the contract.
8. Schroeder *v.* Mueller, 33 Mo. App. 28.
9. See *supra*, II, D, 7, b, (I), (II).
10. Daley *v.* Legate, 169 Mass. 257, 47 N. E. 1013.
11. See *supra*, II, D, 7, b, (I), (III).
12. Barlow Bros. Co. *v.* Gaffney, 76 Conn. 107, 55 Atl. 582; Padgitt *v.* Dallas Brick, etc., Co., 92 Tex. 626, 50 S. W. 1010. *Contra*, French *v.* Bauer, 134 N. Y. 548, 32 N. E. 77, 20 L. R. A. 560 [*affirming* 16 Daly 309, 11 N. Y. Suppl. 69]; Crane *v.* Genin, 60 N. Y. 127; Lumbard *v.* Syracuse, etc., R. Co., 55 N. Y. 491 [*reversing* 64 Barb. 609]; Hagan *v.* American Baptist Home Missionary Soc., 14 Daly (N. Y.) 131, 6 N. Y. St. 212.
13. See Houlihan *v.* Keller, 34 Minn. 407, 26 N. W. 227, holding, however, that where the complaint in an action for the penalty given by Minn. Gen. St. (1878) c. 90, § 15, for refusing to discharge of record a me-

VII. STIPULATIONS FOR PAYMENT OF CLAIMS AND INDEMNITY AGAINST LIENS.[14]

A. Contractors' Bonds[15] — **1. IN GENERAL.** It is a very usual practice that in connection with a building contract the contractor shall execute to the owner a bond with sureties conditioned that the contractor shall faithfully perform his contract, pay all claims for labor and materials, and indemnify the owner against liens arising out of the work.[16] In a number of jurisdictions such a bond is provided for by statute,[17] but the validity or propriety of such a bond is not dependent upon legislative sanction[18] or upon the applicability of the general Mechanics' Lien Law to the particular improvement with respect to which it is given.[19]

chanic's lien failed to allege that there ever was such a lien, as it did not set forth the contents or character of the account or of the affidavit verifying it, or of the claim of lien filed for record, but showed only that some sort of verified account and claim of lien were filed which had been adjudged null and void, this was insufficient to show a cause of action.

14. Indemnity undertakings generally see INDEMNITY.

15. See also BUILDERS AND ARCHITECTS, 6 Cyc. 82–84.

Bond to prevent or discharge lien see *supra*, VI, B.

16. See cases cited throughout this section.

17. See the statutes of the various states.

In Louisiana it is required by Rev. Laws (1904), p. 1336, that a person making a contract for one thousand dollars or over with a contractor for the construction or repair of a building shall require of the contractor security to the full amount of the contract for the payment of all workmen, mechanics, and laborers, and all those who furnish materials and supplies actually used in the building (Brink *v.* Bartlett, 105 La. 336, 29 So. 958; Willey *v.* St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182), and if the owner fails to require such security he is personally liable for all balances due to workmen, laborers, and furnishers of material (Lhote Lumber Mfg. Co. *v.* Dugne, 115 La. 669, 39 So. 803; Willey *v.* St. Charles Hotel Co., *supra*). The object of this statute is to grant further and additional safeguards to workmen and materialmen for the payment of their claims over and above the lien given by statute (Willey *v.* St. Charles Hotel Co., *supra*. See also Wellman *v.* Smith, 114 La. 228, 38 So. 151, holding that therefore the owner should not encumber the bond with conditions in his own interest), and this liability of the owner is independent of any such lien (Willey *v.* St. Charles Hotel Co., *supra*). The benefits of this statute extend to all persons who furnish materials used in the building, even those who deal with remote subcontractors (Willey *v.* St. Charles Hotel Co., *supra* [*approved* in Brink *v.* Bartlett, 105 La. 336, 29 So. 958]), whether the contracts or agreements for such material are made in or out of the state (Willey *v.* St. Charles Hotel Co.,, *supra*). In such a bond the persons furnishing labor and materials should be designated with reasonable certainty as the obligees, and a bond running to the owner and conditioned for the faithful performance of the building contract and the payment of claims and holding the owner free is not such a bond as the statute requires. Hughes *v.* Smith, 114 La. 297, 38 So. 175 [*followed* in Lhote Lumber Mfg. Co. *v.* Dugne, 115 La. 669, 39 So. 803]. See also Wellman *v.* Smith, *supra*. Where the owner takes a bond from the contractor but such bond is for less than the full amount of the contract, the owner is not thereby relieved from the liability imposed by the statute. Willey *v.* St. Charles Hotel Co., *supra*.

Cal. Code Civ. Proc. § 1203, requiring the filing of a bond for the use of persons performing labor for or furnishing materials to the contractor is unconstitutional. San Francisco Lumber Co. *v.* Bibb, 139 Cal. 192, 72 Pac. 964; Shaughnessy *v.* American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; Gibbs *v.* Talby, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815, (1900) 63 Pac. 168. *Contra*, Carpenter *v.* Turrey, 128 Cal. 665, 61 Pac. 369.

18. It is within the province of the proper officers of the state in entering into an agreement in behalf of the state for the erection or repair of its buildings or additions thereto to require the insertion of a condition in the contract and the bond executed to secure its faithful performance whereby the contractor agrees to pay for all labor performed or materials furnished in completing such contract, and the right to execute such a condition exists independently of statutory provisions conferring it, nor does the absence of statutory provisions authorizing it render such a condition in the contract illegal or void. Kaufmann *v.* Cooper, 46 Nebr. 644, 69 N. W. 796.

19. The validity of a bond given by a contractor for the faithful performance of his contract to build a public school-house, which recites a valuable consideration and guarantees payment in full of all claims of subcontractors, laborers, and materialmen due them from the contractor, and states that the bond shall inure to their benefit, does not depend upon the applicability or operation of the Mechanics' Lien Law to or on the public building, but it is sufficient that the bond is not prohibited by law, and persons who bring themselves within the terms of the guarantee

2. REQUISITES AND VALIDITY OF BOND. Where a bond is given by a contractor to secure laborers and materialmen for labor performed and material furnished thereunder, it is immaterial whether the contract between the contractor and the owner is executed before or after the execution of the bond,[20] and so also where a bond is given to secure a mortgagee against mechanics' liens, to which the premises were liable at the time of the loan secured by the mortgage, it is no defense for the surety that the money was advanced and the mortgage taken prior to the execution and delivery of the bond.[21] The signers of the bond are not released because other persons whom they understood would sign did not do so, unless the obligee knew that they signed with such understanding.[22] Where a contractor's bond for the payment of claims is executed and filed pursuant to the statute, it is immaterial what interest the nominal obligee has, or whether he has any interest, in the land on which the building is to be constructed, if he be the person who, as owner, has contracted to have the building constructed.[23] Where a contractor's bond, given for the use of all persons performing labor or furnishing materials in the building of a house, recites that the principal is a corporation, the sureties cannot escape liability on the ground that the principal had no legal existence as a corporation, and that the persons assuming to act for it in the premises had no authority so to do.[24] A building contractor's bond is so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the building contract; and the sureties thereon are liable upon the bond, although the original contract is rendered wholly void because of a failure to comply with the statutory requirements as to filing and recording of the contract and specifications,[25] but if the law requires the bond itself to be filed and this is not done it cannot be enforced.[26]

3. CONSIDERATION. An antecedent promise of a contractor to give a bond indemnifying against liens is a sufficient consideration for the execution of such a bond subsequent to the execution of the building contract;[27] but in the absence of some such antecedent agreement no action can be maintained against a surety on a bond given by a builder to indemnify the owner against loss where the bond

may sue the sureties upon the bond and the sureties are estopped in such action to deny the validity of their undertaking. Union Sheet Metal Works *v.* Dodge, 129 Cal. 390, 62 Pac. 41.

20. Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, holding that the date of the bond does not affect its validity, and therefore an objection based upon the fact that the date of the bond was antecedent to the date of the contract, and that the bond was therefore given to secure a different contract from that sued on, was properly overruled.

21. Union Bldg., etc., Assoc. *v.* Hull, 135 Pa. St. 565, 19 Atl. 949.

22. Slack *v.* Cresswell, 2 Montg. Co. Rep. (Pa.) 145.

Failure of principal to sign.—The sureties cannot escape liability upon the ground that their principal did not sign the bond as it was understood he should, where the liability of the principal is already fixed by contract or by operation of law (Cockrill *v.* Davie, 14 Mont. 131, 35 Pac. 958), or where the bond has been delivered by the contractor to, and accepted by, the other contracting party with the knowledge and consent of the sureties (Eureka Sandstone Co. *v.* Long, 11 Wash. 161, 39 Pac. 446, holding that the presumption arises from the delivery of a bond by the principal as the agent of the sureties that they must have known its conditions, and ratification by them of the bond while ignorant that it was unsigned by the principal will not affect their liability).

23. Steffes *v.* Lemke, 40 Minn. 27, 41 N. W. 302.

24. Jefferson *v.* McCarthy, 44 Minn. 26, 46 N. W. 140.

25. Kiessig *v.* Allspaugh, 99 Cal. 452, 34 Pac. 106, 91 Cal. 234, 27 Pac. 662 [*overruling* Schallert-Ganahl Lumber Co. *v.* Neal, 90 Cal. 213, 27 Pac. 192, and *followed* in Summerton *v.* Hanson, 117 Cal. 252, 49 Pac. 135; McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109; Blyth *v.* Robinson, 104 Cal. 239, 37 Pac. 904], holding further that the failure of the owner of the property to record the building contract does not have the effect to increase the obligation assumed by the sureties for the principal obligors named in the bond so as to operate as a release of the sureties, in the absence of a stipulation in the bond providing that the contract shall be filed as a condition precedent to the liability of the sureties.

26. Mangrum *v.* Truesdale, 128 Cal. 145, 60 Pac. 775.

27. Fullerton Lumber Co. *v.* Calhoun, 89 Mo. App. 209 (where the bond was given before commencing work under the contract); Oberbeck *v.* Mayer, 59 Mo. App. 289 (where

is given after the execution of the contract and the commencement of the work by the builder, unless the bond is supported by some new consideration.[28] The payment to subcontractors of the amount of their lien claims is not a sufficient consideration for a bond given by them to indemnify the owner against the liens of other subcontractors.[29]

4. Construction and Effect of Bond.[30] The obligation of a contractor's bond for the payment of claims is absolute, and not merely an offer of guaranty requiring notice of acceptance.[31] A bond of a building contractor which, after reciting that the obligor has made proposals to erect a hall according to plans, is conditioned "that the obligors have entered into a contract as per said proposals, and, having given a good and sufficient bond for the faithful performance and completion of the work aforesaid . . . agree to forfeit this bond . . . if all the requirements of said contract are not carried out," is a bond of idemnity, protecting the obligee against liabilities arising on a subcontractor's lien.[32] A bond to secure the obligees "against all claims or suits at law, or both," includes claims for labor and material enforced by bill in equity by virtue of the Mechanics' Lien Law.[33] The execution of a bond by the contractor to the owner to indemnify him against the claims of a subcontractor does not seem to imply an agreement on the part of the owner that the subcontractor shall be paid so that he may not make payment to the contractor even in accordance with the terms of the contract without seeing that the subcontractor's claims are satisfied;[34] but where a building contractor has covenanted to keep a building free from liens for a time extending beyond the time fixed for making the last payment, neither he nor his sureties can require the last payment if he is then in default.[35]

5. Breach of and Liability on Bond. The sureties on a contractor's bond are held according to the strict terms of their contract and it cannot be extended by implication so as to make them liable beyond its terms;[36] but in ascertaining those

the bond was given after commencing work under the contract). See also Ring *v.* Kelly, 10 Mo. App. 411.

28. Ring *v.* Kelly, 10 Mo. App. 411. See also Oberheck *v.* Mayer, 59 Mo. App. 289.

Sufficiency of consideration.— Where after the contract for the building was made the owner applied for a loan to enable her to meet the payments thereunder, and was informed that before the loan could be made the contractors would have to execute a builder's bond, and a bond was thereupon executed, there having been no antecedent agreement therefor, it was held that the fact that the bond was given in part for the purpose of raising money to pay the contractor for his work and that the money was raised partly on the bond and paid to the contractor for his work was a good and valid consideration to support the bond, and such a one as would estop the contractor and his sureties from defending against it on the ground that it was given without consideration. Winfield *v.* Paulus, etc., Architectural Co., 77 Mo. App. 370.

29. Hanks *v.* Barron, 95 Tenn. 275, 32 S. W. 195.

30. Effect on right to lien see *supra*, VI, A, 2, c.

31. Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369.

32 McRae *v.* University of the South, (Tenn. Ch. App. 1898) 52 S. W. 463.

33. Wilson *v.* Davidson County, 3 Tenn. Ch. 536.

34. Slagle *v.* De Goover, 115 Iowa 401, 403, 88 N. W. 932, where the court said: "We do not desire to conclusively commit ourselves on this proposition, but, in the absence of any convincing argument made in this case, we are not inclined to recognize any such rule."

35. Henry *v.* Hand, 36 Oreg. 492, 59 Pac. 330.

36. *California.*— Boas *v.* Maloney, 138 Cal. 105, 70 Pac. 1004.

Florida.— Gato *v.* Warrington, 37 Fla. 542, 19 So. 883.

Indiana.— Standiford *v.* Shideler, 26 Ind. App. 496, 60 N. E. 168.

Minnesota.— Simonson *v.* Grant, 36 Minn. 439, 31 N. W. 861.

Missouri.— Manny *v.* National Surety Co., 103 Mo. App. 716, 78 S. W. 69; Oberfeck *v.* Mayer, 59 Mo. App. 289.

Nebraska.— Bell *v.* Paul, 35 Nebr. 240, 52 N. W. 1110.

North Dakota.— Northern Light Lodge, No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 658.

Illustrative cases.— The owner of a building who has neglected to avail himself of a valid defense to a foreclosure of liens filed in excess of the amount due the contractor under a valid contract and has paid a judgment foreclosing the same must be deemed to have made a voluntary payment of such excess and cannot maintain an action to recover the ex-

terms the same rules of construction must be applied as in other contracts,[37] and when the alleged breach comes within the terms of the undertaking the sureties are liable.[38] Where the undertaking is to protect and save harmless from liens, the mere existence of unpaid claims for which no lien has been perfected does not constitute a breach,[39] nor can the owner recover the amount paid by him on claims for which he was not liable and which could not become liens.[40] So also where the property-owner overpays the building contractor during the progress of the work, so that at the completion of the building payments for materials and

cess so paid against a surety on the contractor's bond to protect the owner against the claims that may have accrued against the said building by reason of the erection, as such obligation does not extend to the release of the building from invalid liens. Brill *v.* De Turk, 130 Cal. 241, 62 Pac. 462. Where the bond is conditioned merely for the contractor's fulfilment of his contract to complete the work properly according to the plans and specifications, and does not provide that the building shall be kept or delivered free of liens, the sureties are not responsible for the amount of liens filed against the property. Boas *v.* Maloney, 138 Cal. 105, 70 Pac. 1004; Gato *v.* Warrington, 37 Fla. 542, 19 So. 883. The sureties on a bond to secure the performance of a contract for the erection of a building for a county, which provides that the contractor shall obtain a certificate to the effect that no mechanics' liens or other claims are chargeable to the county as a prerequisite to a final settlement are not liable for claims against the contractor for materials furnished for which the materialmen have no claim or lien against the county. Hunt *v.* King, 97 Iowa 88, 66 N. W. 71. Where a contractor's bond was conditioned that it should be void if the contractor should pay all just claims for work and material furnished, and upon the contractor abandoning the contract the owner himself completed the building, the sureties on the contractor's bond were not liable for the expenditures made by the owner in so doing; the breach assigned not being the same as that for which they became responsible. Holcombe *v.* Mattson, 50 Minn. 324, 52 N. W. 857. Where a contractor gives a bond for the payment of all claims for labor and material as they become due, the sureties are liable only for payment which the owner was compelled to make to protect his property from a lien and not for payments voluntarily made by the owner to persons furnishing labor and materials. Price *v.* Doyle, 34 Minn. 400, 26 N. W. 14. The indemnity secured by a contractor's bond for the payment of claims and protection of the owner against liens is coextensive with the work necessary to complete the buildings according to the contract, and liens for materials not necessary to complete the buildings according to the contract are not within the provisions of the bond and are properly excluded from the computation of damages for its breach. Hurst *v.* Randall, 68 Mo. App. 507. Where the condition of a bond is that the contractor shall turn over the building to the owner "free from liens for labor or materials," the liability of sureties is limited to the amount paid by the owner in settlement of liens against the property, and it is error to instruct the jury that the sureties are liable for amounts paid in liquidation of claims for labor performed and material furnished under the contract for the construction of the building. Bell *v.* Paul, 35 Nebr. 240, 52 N. W. 1110.

37. Northern Light Lodge, No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

38. See Kiewit *v.* Carter, 25 Nebr. 460, 41 N. W. 286.

Illustrative cases.— Where the contract requires the contractor to furnish all material, a surety or guarantor on the contractor's bond conditioned for the completion of the work according to the contract is liable for a failure of the contractor to pay for materials, by reason of which a lien is filed on the building. Closson *v.* Billman, 161 Ind. 610, 69 N. E. 449; Kiewit *v.* Carter, 25 Nebr. 460, 41 N. W. 286; Friend *v.* Ralston, 35 Wash. 422, 77 Pac. 794; Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784. The sureties on a bond to secure the performance of the covenants and stipulations of a contract for the erection of a building assume liability for the failure of the contractors to do the work within the time specified, where time is of the essence of the building contract, and damages for delay in the completion are provided for therein. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550. Where a subcontractor executed to the contractor a bond with surety conditioned that the subcontractors should pay all just claims for work and material furnished in the execution of the subcontract, and in such a bond the subcontractors and sureties were bound to the contractors "for the use of all persons who may do work or furnish materials pursuant" to the subcontract, the cause of action on the bond accrued in favor of the contractor as soon as the subcontractor failed to pay for materials and the contractor was by law compelled to do so. Cassan *v.* Maxwell, 39 Minn. 391, 40 N. W. 357. The sureties on a bond given to indemnify one against liens arising under a building contract are liable if valid liens have been established in proceedings in which the principal contractor was made a party by publication, and the judgments in these proceedings have been assigned to the obligee and satisfied. Winfield *v.* Paulus, etc., Architectural Co., 68 Mo. App. 194.

39. Simonson *v.* Grant, 36 Minn. 439, 31 N. W. 861.

40. Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223, 67 N. W. 123.

labor have to be made to third persons in excess of the contract price, the sureties of the contractor are not liable for such payments.[41] A bond to protect against liens is usually considered to contemplate indemnity against damage rather than against liability,[42] and hence the owner is not entitled to recover as against the obligors in the bond the full amount of liens claimed as soon as they become established under the law as liens upon the building, but it is necessary for him to pay off and discharge the liens before he can recover more than nominal damages for a breach of the bond.[43] The owner is not, however, obliged to wait until liens are actually filed,[44] but he is entitled to recover on the bond where, in order to prevent the filing of liens, he pays claims for work and materials which the original contractor has failed to pay;[45] and where the owner has satisfied a mechanic's lien which has been filed against the building, it is not necessary to his right to recover on the bond that such lien should have been reduced to judgment, provided the amount of the account is duly proven.[46] Where a bond of indemnity is given to a person who lends money to the owner there can be no recovery upon the bond on account of liens filed where the lender, without authority from the owner, retains, in order to satisfy another debt, an amount exceeding what would be required to satisfy the liens;[47] but where a contract for the erection of a building provides that the owner shall withhold a certain per cent of the contract price until the building was completed and also for damages for delay in completion, and the contractor fails to complete the building in the time agreed on, thus subjecting himself to the payment of damages for the delay, and also abandons the work before it is finished, the sureties on the contractor's bond cannot successfully contend that they are not liable to respond to an action on the bond until the owner has paid the full contract price, predicating such contention on the fact that the owner has withheld the amount of damages due him for delay, since he is not required to leave his own claim unpaid and apply the money for the benefit of the sureties.[48] A contractor who has seen the work performed and the material furnished in constructing the building is not in a situation to deny his liability on the ground that he has not been notified, and the surety on his bond is held to the same liability.[49] A judgment establishing a lien in favor of a subcontractor is conclusive against the sureties on the contractor's bond given to the owner to protect him against such lien,[50] and where proceedings to enforce a mechanic's lien are defended by the surety on the contractor's bond, and it does not make the defense that the lien was not filed in time, on judgment being rendered against the owner, and paid by him, the surety is liable in an action on the bond, and cannot make such defense thereto.[51] Where the sureties in a contractor's bond, after the abandonment of the contract by their principal, employ another builder to complete the work, they assume the relation of principal obligors as to the work thereafter done, and are responsible to the owner for liens thereafter imposed on the property by reason of the debts of their employee.[52]

41. Tinsley *v.* Kemery, 111 Mo. App. 87, 84 S. W. 993.

42. Henry *v.* Hand, 36 Oreg. 492, 59 Pac. 330.

43. Carson Opera House Assoc. *v.* Miller, 16 Nev. 327; Henry *v.* Hand, 36 Oreg. 492, 59 Pac. 330. *Compare* Chester City Presb. Church *v.* Conlin, 11 Pa. Super. Ct. 413, 7 Del. Co. 437.

44. Chapman *v.* Eneberg, 95 Mo. App. 127, 68 S. W. 974.

45. Chapman *v.* Eneberg, 95 Mo. App. 127, 68 S. W. 974; Oberbeck *v.* Mayer, 59 Mo. App. 289, holding that in such case it is not material as bearing on the owner's right to recover on the bond whether or not the liens could have been defeated by raising proper defenses in proceedings for their enforcement.

46. Allen County *v.* U. S. Fidelity, etc., Co., 93 S. W. 44, 29 Ky. L. Rep. 356; Northern Light Lodge, No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

47. Hurst *v.* Randall, 68 Mo. App. 507.

48. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550.

49. Brink *v.* Bartlett, 105 La. 336, 29 So. 958.

50. Oberbeck *v.* Mayer, 59 Mo. App. 289; Friend *v.* Ralston, 35 Wash. 422, 77 Pac. 794.

51. Manny *v.* New York Nat. Surety Co., 103 Mo. App. 716, 78 S. W. 69.

52. Robinson *v.* Hagenkamp, 52 Minn. 101, 53 N. W. 813.

The only limit of the surety's liability is the penalty named in the bond,[53] but a person suing on the bond cannot recover more in damages than the loss actually suffered.[54] Where the owner pays judgments establishing mechanics' liens which are conclusive on the contractor and the sureties on a bond given by him to protect the owner against mechanics' liens, he is entitled to recover interest on such payments in an action on the bond,[55] and if the principal amount of a judgment on a bond is less than the penalty thereof, the recovery is not excessive, although the judgment is for principal and interest accruing during the pendency of the action which together exceed the amount of the penalty.[56] Where the filing of liens constitutes a breach of the bond, the owner may recover in addition to the amount paid on the liens his reasonable costs and expenses in defending foreclosure suits,[57] including attorney's fees.[58] It has been held that the sureties are entitled to have the value of extra work offset against the owner's claim.[59]

6. RELEASE OR DISCHARGE OF SURETIES.[60] A surety has the right to stand upon the letter of the contract, and any material alteration thereof or departure therefrom without his consent will discharge him,[61] notwithstanding the fact that he

53. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550.

54. Wagner *v.* Dette, 2 Mo. App. 254, holding that in an action on such a bond it was error to instruct the jury that plaintiff was entitled to recover the amount of the liens paid off by him and to refuse to allow defendants to show that when such amount was paid plaintiff had in his hands and then due the contractor an amount more than sufficient to cover the liens.

55. McFall *v.* Dempsey, 43 Mo. App. 369.

56. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550. See also Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, holding that where under a statute requiring a bond to be executed by one contracting to do public work for a municipal corporation to secure payment for such work, a bond, joint and several in form, was executed, in which each surety bound himself in a specific sum, a joint judgment rendered against the principal and all sureties for a certain sum and interest is not excessive as to a surety who was by the terms of the bond bound for a sum more than the amount of the judgment without interest, but less than such amount with interest, for the surety was liable for interest at the legal rate after demand for payment was made of the principal and refused, or after the date of service in the case.

57. Manny *v.* New York Nat. Surety Co., 103 Mo. App. 716, 78 S. W. 69; Henry *v.* Hand, 36 Oreg. 492, 59 Pac. 330; Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784.

58. Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784.

When counsel fees not recoverable.— Where the contractor gave bond to indemnify the owner against any counsel fees which might be incurred in defending against lien claims of subcontractors, and the owner withheld his consent to a payment of a subcontractor, and advised the contractor to contest the claim, and the latter paid his own counsel fees in the ensuing litigation, the owner could not recover on the bond for counsel fees paid on his own behalf in the same litigation. Hoyt *v.* Greene, 33 Mo. App. 205.

59. Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784, holding that therefore in an action on the bond evidence that the owner had refused to arbitrate the reasonable value of extras, as provided in the contract, was admissible.

60. **For matters relating to validity of bond** see *supra*, VII, B.

61. Gato *v.* Warrington, 37 Fla. 542, 19 So. 883; Erickson *v.* Brandt, 53 Minn. 10, 55 N. W. 62; Simonson *v.* Grant, 36 Minn. 439, 31 N. W. 861; Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201; Northern Light Lodge, No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

Minor changes in the contract or in its execution made by the principal parties to it without the knowledge of the laborers or materialmen who furnished the work and supplies to construct the building do not release the surety from his liability to the laborers or materialmen under a bond given to secure to the owner of the building a prompt performance of the contract, and to secure to the laborers and materialmen the payment for the work and materials which they bestow upon the building. Chaffee *v.* U. S. Fidelity, etc., Co., 128 Fed. 918, 63 C. C. A. 644; U. S. *v.* National Security Co., 92 Fed. 549, 34 C. C. A. 526.

Unauthorized attempt to change contract. — A surety on the bond of a contractor for the construction of a court-house is not discharged because changes were attempted to be made in the contract by the building committee, where the order appointing such committee provided that it should not have the power to make any changes in the specifications adopted by the fiscal court. Allen County *v.* U. S. Fidelity, etc., Co., 93 S. W. 44, 29 Ky. L. Rep. 356.

Where the sureties complete the building after abandonment of the work by the contractor and receive the contract price, including a certain amount which was reserved while the contractor was engaged in the

may have sustained no injury by the change,[62] or even though such alteration was designed for his benefit.[63] Where the contract itself contemplates an alteration it may be altered without affecting the liability of the surety,[64] provided the alteration is made in the manner contemplated by the contract itself;[65] but if a change or alteration is made otherwise than as provided for the surety is discharged, for this is an alteration without his consent.[66] Where the conditions of the bond are such that a change in the contract does not in any way affect the obligation of the surety, such a change will not release him.[67] A subsequent and independent contract of the contractor to do other and different work for the same person will not discharge the surety.[68] A surety cannot be discharged because of anything done by the owner in pursuance of the provisions of the contract,[69] and the fact that the owner in making payment under the contract has taken precautions not required by the contract does not release the contractor's sureties from liability.[70] But the surety is released where the owner makes payments in advance,[71] or not

work, they are precluded from claiming that they were discharged from their obligation on the bond by reason of changes in the contract. Robinson *v.* Hagenkamp, 52 Minn. 101, 53 N. W. 813.

62. Simonson *v.* Grant, 36 Minn. 439, 31 N. W. 861.

63. Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201.

64. Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556 (holding this to be true notwithstanding the surety was not notified of the change, where the obligee was guiltless of any deceit in the matter); Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201.

65. Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201.

66. Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201.

Requirement of writing.— Where a building contract provided that the owner might change the plans at his option but extra work was prohibited unless agreed on in writing, the sureties on the contractor's bond were released where extra work which increased the contract price was done without any written agreement being made therefor. Chapman *v.* Eneberg, 95 Mo. App. 127, 68 S. W. 974.

67. Steffes *v.* Lemke, 40 Minn. 27, 29, 41 N. W. 302, holding that the sureties of a contractor's bond conditioned that he will "pay all just claims for all work done and to be done, and all materials furnished and to be furnished" in the construction of a building are not discharged by an extension of the time to complete the building, the court saying: "If the bond were for the performance of that [the original] contract, an agreement between the principals, without the consent of the sureties, extending the time for its performance, or changing any of its material terms, might have the effect to discharge the sureties. But this is no such bond. It is not conditioned that the contractor will perform his contract to construct the building, but that he will pay for all labor and material which, to fulfil that contract, he employs or procures."

68. Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201, 208 [*following* Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620], where it is said: "It is sometimes difficult to say when a certain work constitutes a change in the original contract, or is a subsequent disconnected contract, without bearing a relation to the original. Without pretending to state a rule applicable to all cases, we will say that where the different matter does not consist of a change of that provided for or contemplated by the contract, but is something additional not included in the contract, then it is an independent transaction and does not affect the contract and consequently does not release the surety."

69. Chapman *v.* Eneberg, 95 Mo. App. 127, 68 S. W. 974, holding that where a building contract provided that payment should be made on certificates of the architect and that the amount of the certificates prior to the final one should not exceed eighty-five per cent of the value of the work done, and the owner paid mechanics' liens, not retaining fifteen per cent, the sureties on the contractor's bond for the performance of the contract could not defend on the ground that the owner should have retained the fifteen per cent as a protection to them, for the owner was bound by the terms of the contract to pay the amount represented by the certificates of the architect and the latter was the person agreed upon to determine when the payments were to be made and his certificate in good faith bound all the parties.

Failure to reserve money to pay claims.— Sureties on a contractor's bond are not released by the fact that the owner has paid the contractor in full, without retaining money to pay claims of mechanics and materialmen, where the owner was authorized by the contract to do so. Northern Light Lodge No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

70. Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784, holding that where the contract provided that the owner should pay receipted bills as they became due, the fact that he required such bills to be approved by the foreman in charge did not relieve the surety on the contractor's bond.

71. Simonson *v.* Grant, 36 Minn. 439, 31

in conformity with the contract,[72] or fails to withhold a proportion of the price to protect himself against claims and liens of subcontractors, materialmen, and others according to the provisions of the contract,[73] although it has been held that where the bond is conditioned for the payment of claims for labor and material as well as for the protection of the owner, the sureties are not discharged from liability to persons furnishing labor and materials by reason of the owner having made such payments.[74] Sureties on a contractor's bond to keep an owner harmless from mechanics' liens are released by the failure of the owner to pay the contractor according to agreement before default by the contractor,[75] and payments by the owner on claims which are not and cannot become liens operate to reduce *pro tanto* the obligation of the sureties on the contractor's bond to indemnify the owner against loss by reason of liens.[76] Sureties have been held not to be released by the fact that the obligee of the bond is designated as "owner" whereas he does not hold the legal title;[77] the fact that the surety and the owner were

N. W. 861. But *compare* Herrell *v.* Donovan, 7 App. Cas. (D. C.) 322, 335, holding that the contractor's surety is not discharged by the owner's making premature payments before they become due under the contract, where the payments were merely equitable subdivisions of the payments stipulated to be made, and the work which they represented had all been actually performed and the payments injured no one, the court saying further: "A more pointed answer, however, to the contention on behalf of the appellant Johnson, is that he approved and ratified these payments; and he cannot now be heard to controvert their propriety."

72. Queal *v.* Stradley, 117 Iowa 748, 90 N. W. 588; Simonson *v.* Grant, 36 Minn. 439, 31 N. W. 861.

Estoppel through consent.— Where payments by the owner not in accordance with the contract have been made with the knowledge and upon the written authority of the surety's agent, the surety is estopped to object to the irregularity of such payments. Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556.

Payment by note.— The fact that the owners paid the contractors partly by note instead of in money as agreed does not change the original contract so as to release a surety on the contractor's bond, and is not even a partial defense as to the surety, although the note was worthless, where the owner, having under his contract no control over the money to be paid to the contractor, could not pay off mechanics' liens therewith. Foster *v.* Gaston, 123 Ind. 96, 23 N. E. 1092.

Payments of proper amounts but at intervals different from those specified in the contract are immaterial. Robinson *v.* Hagenkamp, 52 Minn. 101, 53 N. W. 813.

It is not a defense for the principal obligor in an action on the contractor's bond that the property-owner, at the request of the contractor, paid instalments for materials and labor, other than those provided for in the contract. Tinsley *v.* Kennery, 111 Mo. App. 87, 84 S. W. 993.

73. Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223, 67 N. W. 123 (obligation of sureties reduced *pro tanto*); Bell *v.* Paul, 35 Nebr. 240, 52 N. W. 1110.

Payment held not a departure from contract.— Where by the contract the contract price was to be paid as the work progressed, not exceeding eighty-five per cent of the total amount of materials and labor furnished, the balance to be withheld until completion of the contract, the fact that the owner, during the progress of the work, made payments to the contractor exceeding eighty-five per cent of the contract price is not a defense to an action for a breach of the bond given to secure performance of the contract, where it is not shown that such payment exceeded eighty-five per cent of the total amount for the materials and labor already furnished for the construction of the house. Graves *v.* Merrill, 67 Minn. 463, 70 N. W. 562.

74. Kauffmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796; Chaffee *v.* U. S. Fidelity, etc., Co., 128 Fed. 918, 63 C. C. A. 644.

75. Carson Opera House Assoc. *v.* Miller, 16 Nev. 327.

Withholding payments after liens filed.— Under Nev. St. (1875) c. 124, § 10, authorizing an owner to withhold payments to a contractor pending an action to foreclose a mechanic's lien by one furnishing materials to the contractor, the owner has no right to withhold such payments after a lien is filed and before suit is brought thereon; and, by so withholding payments justly due the contractor, the sureties on a bond to keep the owner harmless from liens are discharged. Carson Opera House Assoc. *v.* Miller, 16 Nev. 327.

76. Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223, 67 N. W. 123.

77. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550, holding that where the statute defines an "owner" of land as the person having title thereto or the lessee or occupant thereof, and provides that every person for whose use or benefit any improvement is made shall be included in the word "owner," the fact that a contract for the erection of a building and the bond given by the contractor for faithful performance thereof speak of the obligee of the bond as the "owner" of the premises does not constitute a false representation to the surety on the bond of the obligee, although the legal title to the lot on which

ignorant that the contractor had a partner;[78] a dissolution or change in the *personnel* of the contracting firm;[79] the execution of a note to the sureties by the owner in consideration of their cancellation of a lien filed by them;[80] the owner's assumption of the work after the contractor's default without notice of the default from the architect as provided by the contract,[81] or without giving the contractor the notice required by the contract before terminating the same;[82] the fact that the owner pays for work and material necessary to complete the contract after default of the contractor, although nothing is due the contractor;[83] the failure of the architect to sign the certificate of the cost of completing the work after the contractor's default;[84] or an extension of time to the contractor by a materialman, who might in the first instance have fixed the time of the maturity of his claim without the knowledge or consent of the surety.[85] Where a building contract did not require a written audit or certificate from the architect for the payment of damages recoverable on the contractor's bond, the obligation of the surety on the bond of the contractor, in an action of a subcontractor thereon, is not affected because the owner recovered damages, and by the sum so recovered reduced the amount in his hands applicable to the payment of the subcontractor's claim.[86]

the house is built is in the name of another, there being no pretense that the obligee of the bond is a trespasser on the land and that he is not the owner of the building.

78. Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784, holding that where an owner who had contracted for the erection of certain buildings did not know that the contractor had a partner until the contract was made and the work well under way, but when this fact was discovered neither the owner nor the contractor's surety made any objection on account thereof, the surety was not relieved from his obligation to indemnify the owner against the failure of the contractor to perform the contract.

79. Kaufmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796, holding that the sureties on the bond of a contracting firm are not released from their obligation to pay claims for labor or materials by the dissolution or change in the *personnel* of the contracting firm, the contract having been completed by the successors of the firm.

80. Blyth *v.* Robinson, 104 Cal. 239, 37 Pac. 904.

Execution of bond as waiver of liens or estoppel see *supra*, IV, A, 2, c.

81. Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556, holding that where the contract provides for its termination by the owner on three days' written notice in case of the refusal, neglect, or failure of the contractor to perform his agreement, on certification of that fact to the owner by the architects, the act of the owner on learning of the abandonment of the contract by the contractor in giving notice and himself assuming charge of the work of completing the building without a written notice from the architects, does not release the sureties on the contractor's bond.

82. Allen County *v.* U. S. Fidelity, etc., Co., 93 S. W. 44, 29 Ky. L. Rep. 356, holding that where a contract for the construction of a court-house provided that upon the failure of the contractor to prosecute the work the county might after ten days' written notice to him terminate the contract, and the contractor abandoned the contract and absconded, and the county attempted to give the required notice before canceling the contract, but on being unable to do so it completed the work, the surety on the contractor's bond for the performance of his covenants was not discharged from liability as the county was only required to exercise reasonable diligence to serve the notice.

83. Chester City Presb. Church *v.* Conlin, 11 Pa. Super. Ct. 413, 7 Del. Co. (Pa.) 437, so holding on the ground that such action is for the relief and protection of the surety and the owner is not bound to wait until such mechanics and materialmen have filed liens.

84. Allen County *v.* U. S. Fidelity, etc., Co., 93 S. W. 44, 29 Ky. L. Rep. 356, holding that where a contract for the construction of a court-house stipulated that the expenses of the county in finishing the work should be certified by the architect, whose certificate should be conclusive, and the county incurred expenses in finishing the work after default by the contractor, and at a meeting of the building committee and the architect for the purpose of auditing the expenses incurred by the county by reason of the breach of the contract such expenses were audited and certified as provided by the contract, the surety on the contractor's bond was not discharged from liability because the certification was not signed by the architect.

85. Chaffee *v.* U. S. Fidelity, etc., Co., 128 Fed. 918, 63 C. C. A. 644, holding that a materialman does not discharge a surety on the contractor's bond, given to secure moneys due laborers and materialmen, by receiving acceptances from the contractor, and thereby extending the time of payment, where the acceptances have not been paid, and it does not appear that the contractor was solvent when they were made and insolvent when they were due, or that the extension resulted in loss or injury to the surety.

86. Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556.

7. RIGHT OF SUBCONTRACTORS TO SUE ON BOND. The right of subcontractors to sue upon the contractor's bond is dependent upon whether or not the bond was given for their benefit as well as for the protection of the owner. The general rule is that where the bond is conditioned for the payment of claims for labor or material, persons furnishing such labor or material may sue on the bond [87] in order to avoid circuity of action,[88] although they have the right to enforce a lien on the building.[89] The right of such persons to sue is obvious where the bond is stated to be for their use;[90] but the right is not dependent upon an express provision to such effect, for the mere promise to pay claims, being for the benefit of persons having claims, is considered sufficient to give them a right of action on the bond.[91]

87. *California.*— Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369.

Indiana.— Conn *v.* State, 125 Ind. 514, 25 N. E. 443; Ochs *v.* M. J. Carnahan Co., (App. 1906) 76 N. E. 788; King *v.* Downey, 24 Ind. App. 262, 56 N. E. 680.

Iowa.— Baker *v.* Bryan, 64 Iowa 561, 21 N. W. 83.

Kansas.— Heery *v.* J. L. Mott Iron Works Co., 10 Kan. App. 579, 62 Pac. 904.

Nebraska.— Pickle Marble, etc., Co. *v.* McClay, 54 Nebr. 661, 74 N. W. 1062 [*followed* in Pioneer Fire-Proof, etc., Co. *v.* McClay, 54 Nebr. 663, 74 N. W. 1063]; Lyman *v.* Lincoln, 38 Nebr. 794, 57 N. W. 531 [*following* Sample *v.* Hale, 34 Nebr. 220, 51 N. W. 837; Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506; Stewart *v.* Snelling, 15 Nebr. 502, 19 N. W. 705].

Washington.— Eureka Sandstone Co. *v.* Long, 11 Wash. 161, 39 Pac. 446, holding that materialmen, in an action to recover for materials furnished a contractor for the erection of a public building, may join as defendants the contractor and the sureties on his bond, although the bond was not signed by the contractor.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 659.

Agreements or acts of the principal obligor and nominal obligee cannot affect the rights of the persons furnishing labor or material, who are the real obligees in a bond by the contractor to the owner for the payment of claims against the sureties. Steffes *v.* Lemke, 40 Minn. 27, 41 N. W. 302.

Necessity of performance of principal contract.— It is not necessary to a subcontractor's right of action on the bond that the original contractor shall have fully performed his contract with the owner of the premises. St. Paul Foundry Co. *v.* Wegmann, 40 Minn. 419, 42 N. W. 288.

Measure of damages.— Where a contract price for the labor or material has been fixed by the contractor and subcontractor, this will, in the absence of fraud, be the measure of damages in such action. St. Paul Foundry Co. *v.* Wegmann, 40 Minn. 419, 42 N. W. 288.

Person furnishing materials to materialman.— A person who furnishes galvanized iron and solder to a manufacturer, which is made by the latter into gutters and spouts and delivered to a contractor for a building, cannot recover on a bond given by the contractor for the faithful performance of his contract, the provisions of which contract are that the contractor shall pay "the wages of artisans and laborers, and all those employed by or furnishing materials to the said party of the second part." Berger Mfg. Co. *v.* Lloyd, 113 Mo. App. 205, 91 S. W. 468, so holding upon the ground that such person did not furnish materials to the contractor.

Where action on contract barred.— Where materials were furnished to building contractors under an oral contract, the materialmen were barred by limitations from maintaining an action on the contractors' bond given to secure payment by them of claims for material, etc., after expiration of the time fixed for the maintenance of an action against the contractors on such oral contract. Towle *v.* Sweeney, 2 Cal. App. 29, 83 Pac. 74.

88. Ochs *v.* M. J. Carnahan Co., (Ind. App. 1906) 76 N. E. 788.

89. Ochs *v.* M. J. Carnahan Co., (Ind. App. 1906) 76 N. E. 788.

90. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550 (obligation running to the owner and "all persons who may be injured by a breach" of the conditions of the bond); American Surety Co. *v.* Raeder, 15 Ohio Cir. Ct. 47, 8 Ohio Cir. Dec. 684 [*affirmed* in 43 Cinc. L. Bul. 39]. See also St. Louis *v.* Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695.

A subcontractor cannot be deprived of his right to recover on the bond by any act of the owner. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550. Neither will changes made by an architect and the board of county commissioners in the course of the erection of a county building, without the consent of the laborers or materialmen employed thereon, deprive the latter of a cause of action on the contractor's bond given according to statute for their benefit and security. Conn *v.* State, 125 Ind. 514, 25 N. E. 443.

91. Baker *v.* Bryan, 64 Iowa 561, 21 N. W. 83; Lichtentag *v.* Feitel, 113 La. 931, 37 So. 880 (holding that where a contract contemplates the erection of a building by reason of labor and material to be furnished at the expense of the contractor, and the bond is given for the faithful discharge of the obligations of the contract of which it especially takes cognizance, the obligation to pay for labor and material is secured by the bond, although not specifically mentioned therein); Lyman *v.* Lincoln, 38 Nebr. 794, 57 N. W.

Subcontractors cannot maintain an action on a bond which does not stipulate for the payment of claims but is conditioned merely that the contractor shall perform his contract with the owner,[92] or protect the owner against liens.[93]

8. Actions on Bonds. The owner may proceed against the surety on the contractor's bond without first exhausting his remedy against the contractor.[94] A complaint against the principal and surety upon a contractor's bond which was not signed by the principal is not demurrable on the ground of misjoinder of parties defendant.[95] The complaint in an action on a contractor's bond must show such a breach as fixes the liability thereon,[96] but need not negative matters of defense[97] or set forth matters not affecting liability on the bond.[98] In an action by a subcontractor on a contractor's bond the complaint need not set out in detail the contract between the owner and the contractor,[99] and if it states a direct and primary cause of action in favor of the subcontractor, other allegations attempting to set up a cause of action by assignment of the bond from the owner may, if

531 [*following* Sample *v.* Hale, 34 Nebr. 220, 51 N. W. 837; Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506; Stewart *v.* Snelling, 15 Nebr. 502, 19 N. W. 705].

Reliance on the bond need not be shown as it will be presumed, until the contrary is shown, that persons furnishing materials did so in reliance on the bond. Baker *v.* Bryan, 64 Iowa 561, 21 N. W. 83.

92. M. T. Jones Lumber Co. *v.* Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558, holding that where a contractor agrees with the owner to furnish all the material for a building, and gives a bond for performance of his contract, a materialman who sells the contractor such material cannot sue on the bond for a balance due therefor. See also Salmen Brick, etc., Co. *v.* Le Sassier, 106 La. 389, 31 So. 7.

93. Beardsley *v.* Brown, 71 Ill. App. 199 (holding that where the condition of a contractor's bond is that he shall "pay and discharge from said premises all liens for material, labor or otherwise, which may accrue on account of said building contract," and there are no liens upon the premises and can be none, so that so far as the obligee is concerned the contractor is under no obligation, subcontractors have no claims under the bond, as the sureties did not undertake to protect subcontractors and their obligations cannot be so extended); Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 121 Iowa 663, 97 N. W. 72.

94. Manny *v.* New York Nat. Surety Co., 103 Mo. App. 716, 78 S. W. 69.

95. Eureka Sandstone Co. *v.* Long, 11 Wash. 161, 39 Pac. 446, holding that this is true for the reason that the obligations of the parties and the rights of plaintiff are identical, although founded in the case of the principal upon the contract, and in the case of the sureties upon the bond.

96. Standiford *v.* Shideler, 26 Ind. App. 496, 60 N. E. 168, holding that where a contractor gave a bond conditioned that if there was any evidence of liens for which, if established, the premises might be liable and which were chargeable to the contractor, the owner might retain an amount sufficient to indemnify him, and if after all payments were made there should prove to be any lien the contractor should refund to the owner all money that the latter might be compelled to pay to discharge the lien, a complaint in an action for a breach of the bond which alleged that certain mechanics had filed liens and others were about to do so, and that the owner paid certain materialmen and was compelled to do so to prevent foreclosure of their liens, was insufficient in failing to allege the personal liability of the owner or the filing of the notice of intention to hold liens on the property necessary under the statute to establish a valid lien.

Petition held sufficient.—A petition states a good cause of action against a contractor and the sureties on his bond where it avers that the contract was to build or repair a public school building, that the bond was conditioned for the faithful performance of the work by the contractor and for the payment by him of all claims for materials used in the building, that plaintiff furnished such materials to a subcontractor under the original contractor, and that the contractor and subcontractor had failed to pay for them. Glencoe Lime, etc., Co. *v.* Wind, 86 Mo. App. 163.

97. St. Paul Foundry Co. *v.* Wegmann, 40 Minn. 419, 42 N. W. 288, holding that it is not necessary to allege in the complaint that the sureties have not previously paid the full amount of the penal sum of the bond.

98. St. Paul Foundry Co. *v.* Wegmann, 40 Minn. 419, 42 N. W. 288, holding that it is not necessary to allege that notice of the bond was posted on the premises as required by statute, as this is necessary only for the purpose of relieving the property from a lien, and the failure to post would not affect the liability of the obligors on the bond.

99. Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369 (holding that the complaint is sufficient as against a general demurrer if it only sets out the facts showing that plaintiff had pursuant to his contract furnished materials that were used in the building by the contractor in pursuance of the contract with the owner, as in the absence of a special demurrer it will be presumed from the fact that the materials were furnished to be used by the contractor in the construction of the house, that they were so furnished and used

insufficient, be ignored and do not invalidate the complaint.[1] Where the breach alleged is the neglect to pay off certain mechanics' liens, an answer alleging that defendants were unable to pay the mechanics because plaintiffs failed to lend them money as agreed, without showing the terms of the agreed loan or the damage sustained by defendants from losing it, is bad.[2] In a suit against the sureties upon a building contractor's bond to recover the price of materials furnished by a third person, for which the owner of a building had become liable and against which liability the bond indemnified him, defendant may show under a plea of the general issue that plaintiff has in his hands money sufficient to satisfy the demand.[3] The pendency of an action by the lienors to recover personally against sureties for materials is no defense to an action by the owner to recover for the liens imposed on the property.[4] Where the owner seeks to recover the amount of a judgment establishing a mechanic's lien for material furnished to the contractors, it is no defense that plaintiff had refused to pay the contractors two small items for a balance due and for extras, where due credits were received therefor by the contractors and inured to the benefit of the surety on the bond, having been deducted from the amount of plaintiff's claim.[5] On an issue as to the liability of the guarantor on a building contractor's bond, the burden is on the guarantor to show omission to give notice of default and that he was damaged by the omission.[6] A statement of account rendered by the contractor to the owner is admissible in evidence in favor of the owner when followed by an instruction to the jury that it is only *prima facie* evidence as against the surety.[7] In an action by the owner against the builder for breach of covenant to keep the building free from liens, defendant is entitled to prove in reduction of damages the amount due him on the contract from plaintiff at the time the latter paid off the liens complained of and at the commencement of the suit.[8] Defendants are entitled to have the question of their liability and the extent thereof determined by the jury,[9] and all material issues should be passed upon.[10] Where the surety has defended an action brought to enforce a mechanic's lien without questioning the identity of the land, it is too late after verdict in an action on the bond to raise on motion for a new trial the defense that the evidence fails to show that the land on which the lien was filed is the same as that on which the building mentioned in the bond was built.[11] In an action against two sureties on a bond, where the action was erroneously dismissed as to one, the court will, on appeal by the surety against whom judgment was rendered, reverse the order of dismissal

in pursuance of the contract with the owner); Conn *v.* State, 125 Ind. 514, 25 N. E. 443.

1. Ochs *v.* M. J. Carnahan Co., (Ind. App. 1906) 76 N. E. 788.

2. Foster *v.* Gaston, 123 Ind. 96, 23 N. E. 1092.

3. Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223, 67 N. W. 123, holding, however, that the owner of the property cannot under such circumstances be compelled to apply upon the demand an amount due to the contractor for extras where the owner's obligation to pay for such extras did not arise until the architect had given an estimate therefor, and it was not shown that such estimate was made by the architect, it being the duty of defendants, if they relied on a breach of the contract, in that the architect had failed to give such estimate, to give notice of such defect.

4. Robinson *v.* Hagenkamp, 52 Minn. 101, 53 N. W. 813.

5. Friend *v.* Ralston, 35 Wash. 422, 77 Pac. 794.

6. Closson *v.* Billman, 161 Ind. 610, 69 N. E. 449.

7. Foster *v.* Gaston, 123 Ind. 96, 23 N. E. 1092.

8. Wagner *v.* Dette, 2 Mo. App. 254.

9. Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, the statute authorizing taking the case from the jury only when the facts are so clearly established that the court can see as a matter of law what the verdict and decision should be.

10. Ernst *v.* Cummings, 55 Cal. 179, holding that where liens were filed and judgments obtained, and the owner paid thereon a balance due the contractor at the time the liens were filed, and an additional sum beyond that called for by the contract, and, on a suit on the bond, the complaint alleged, and the answer denied, that the surety had seasonable notice of the lien suits, and that they were properly defended by the owner; these were material issues, and should have been passed upon.

11. Foster *v.* Gaston, 123 Ind. 96, 23 N. E. 1092.

and modify the judgment by providing that it shall not determine the rights of the appellant to enforce contribution of his cosurety, and that the case may be opened at the instance of either plaintiff or appellant to determine such cosurety's liability on the bond.[12]

B. Provisions in Contract For Delivery Free of Liens. Where the contract provides that final payment shall be made to the contractor when the building is completed and delivered to the owner "with a full release of liens" the delivery of a release of liens is a condition precedent to the contractor's right to recover unless it affirmatively appears that there are no liens or claims to be released;[13] but the lien of a materialman for materials furnished to the contractor cannot be enforced against persons who entered into the original building contract merely as sureties that the contractor would turn over the building to the owner when complete, free from liens, the material having been charged to the contractor, and furnished solely on his credit.[14]

C. Retention as Security of Money Due Contractor. It has been held that a provision in a building contract that the final instalment of the contract price shall not be payable until all the mechanics and materialmen "shall have in writing acknowledged that they have been fully paid by the contractors for their work and materials done and furnished" is for the benefit of the owner and not of subcontractors and the latter cannot recover from the owner the amount so retained.[15] But where the state retains a fund due contractors for a public work, as security for materialmen, under a statute providing that when public works are to be constructed the state shall obtain sufficient security for the payment by the contractor for all material used one who has furnished material may hold it answerable.[16]

VIII. ENFORCEMENT.

A. Nature and Form of Remedy — 1. IN GENERAL. The right to a mechanic's lien being entirely statutory, not only the right itself,[17] but the method of enforcing it must depend upon the statute,[18] and must be pursued in strict compliance with

12. Cockrill *v.* Davie, 14 Mont. 131, 35 Pac. 958.

13. Titus *v.* Gunn, 69 N. J. L. 410, 55 Atl. 735.

14. Stetson, etc., Mill Co. *v.* McDonald, 5 Wash. 496, 32 Pac. 108.

15. Getty *v.* Pennsylvania Institution for Instruction of Blind, 194 Pa. St. 571, 45 Atl. 333, so holding, although the contract provided that there should be no liens, and holding that no right accrued to the subcontractors by reason of the architect's assurance that the provision was for their benefit, he having no authority to make such representation. See also Sayre-Newton Lumber Co. *v.* Denver Union Bank, 6 Colo. App. 541, 41 Pac. 844, holding that where by the agreement between a contractor and one for whom, and on whose land, he was to erect buildings, a certain amount was to be deposited in a bank, to be held until the time for filing liens by subcontractors should expire, when the money was to be paid to the contractor, unless there should then be pending and unsettled mechanics' liens against the buildings, in which case the bank should retain the amount of such liens and a certain per cent additional from the fund, and pay over the balance to the contractor as the liens should be discharged, lien claimants could not reach such fund, but their sole remedy was against the property.

16. Nash *v.* Com., 174 Mass. 335, 54 N. E. 865, holding further that where a petitioner, in an action to subject a fund due by the state to contractors for the construction of a public work, alleges that by the contract the state was to keep back any moneys which would be otherwise payable, and apply the same to the payment of all claims for materials, and avers that the state has by virtue of such stipulation and others kept back large sums for the payment of such claims and holds the same, it must be taken that it has money in its possession which the law intends shall be security for the petitioner's claim.

It is not necessary to give notice before furnishing materials of an intention to claim a lien in order to enforce a claim against a fund so retained, and none of the statutory requirements in regard to enforcing mechanics' liens have any application. Nash *v.* Com., 182 Mass. 12, 64 N. E. 690.

17. See *supra*, I, A.

18. *Alabama.*— Nunnally *v.* Dorand, 110 Ala. 539, 18 So. 5.

Georgia.— Kimball *v.* Moody, 97 Ga. 549, 25 S. E. 338; Love *v.* Cox, 68 Ga. 269, holding that where a laborer neither recorded nor foreclosed his lien as such, but brought complaint on an open account for the amount due him and recovered judgment, his claim was postponed to judgments junior to the per-

the terms of the statutes.[19] Sometimes the statute does not assume to prescribe any special rules of practice or procedure but leaves such matters to be regulated by the general rules governing other actions of a similar nature, and in this case the proceeding is an ordinary civil action and not a special proceeding.[20] And as to matters of general practice the general rules or statutory provisions apply except in so far as particular statutory rules have been adopted.[21]

2. JURISDICTION AND VENUE. For the jurisdiction of particular courts reference must be had to the statutes creating the right and prescribing the remedy,[22] and these differ so widely in the several states that no more definite rule can be stated than that if a particular court is designated to administer the remedy resort must be had to that court, but if the character of the remedy only is prescribed the court within whose general jurisdiction and powers the subject-matter falls may administer the remedy,[23] and where the statute creating the remedy expressly prescribes the court in which it shall be pursued that jurisdiction is

formance of the work but senior to the date of his judgment.

Illinois.— McCarthy *v.* New, 93 Ill. 455.

Nebraska.— Durkee *v.* Koehler, (1905) 103 N. W. 767.

Tennessee.— Taylor *v.* Tennessee Lumber Co., 107 Tenn. 41, 63 S. W. 1130 (as to exclusiveness of remedy by attachment on behalf of subcontractor); Barnes *v.* Thompson, 2 Swan 313.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 427.

Lien on funds in hands of state.— Under N. Y. Laws (1897), p. 517, c. 418, § 5, as amended by Laws (1902), p. 74, c. 37, a lien was given on the funds in the hands of the state appropriated for a public improvement on performance of the work with reference to which the improvement has been made; but it was held that there are no provisions in the code of civil procedure for the enforcement of such liens and that where, in an action to foreclose such a lien, the state is made a party defendant, its demurrer on the ground that it appears on the face thereof that the court has no jurisdiction of defendant will be sustained. Mason *v.* New York State Hospital, 50 Misc. (N. Y.) 40, 100 N. Y. Suppl. 272.

Retaining possession.— Where a builder of a house has a valid lien under the statute, he cannot maintain possession against the owner, but must enforce his remedy by suit. Pratt *v.* Tudor, 14 Tex. 37.

Contract lien.— In Texas the constitution of the state restricts the power of the husband and wife to charge the homestead but recognizes their power to impose a lien by contract for work and labor and for improvements constructed upon the homestead, but the method of enforcing such a lien differs from that of enforcing a mechanic's lien which rests entirely upon the statute and the method for enforcing the statutory lien need not be pursued to enforce the contract lien but the latter may be enforced by the usual methods for enforcing contract liens. Lippencott *v.* York, 86 Tex. 276, 24 S. W. 275.

19. Kimball *v.* Moody, 97 Ga. 549, 25 S. E. 338; O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898; Johnson *v.* Algor, 65 N. J. L. 363, 47 Atl. 571; Tenney *v.* Anderson Water, etc., Co., 67 S. C. 11, 45 S. E. 111; Murphy *v.* Valk, 30 S. C. 262, 9 S. E. 101.

A remedy provided for other liens does not apply. Columbus Iron Works Co. *v.* Loudon, 53 Ga. 433.

20. Finlayson *v.* Crooks, 47 Minn. 74, 49 N. W. 398, 645, where the statute provided that such liens may be enforced in the same manner as in actions for the foreclosure of mortgages upon real estate, etc.

Special proceeding.— In Hallahan *v.* Herbert, 57 N. Y. 409, the proceeding under the statute prevailing was considered a special proceeding as distinguished from an action, said statute prescribing a particular method of procedure for enforcing the lien differing from the ordinary action commenced by summons. But in Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625, and Kelsey *v.* Rourke, 50 How. Pr. (N. Y.) 315, it was held that on appearance of the parties according to the statute, the proceedings assume the form of an ordinary civil action, and are in all things after the appearance governed by the same rules as other civil actions brought for the enforcement of similar rights. See also Smith *v.* Maince, Code Rep. N. S. (N. Y.) 230.

21. Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555; Finlayson *v.* Crooks, 47 Minn. 74, 49 N. W. 398, 645; Pittsburg Plate Glass Co. *v.* Peper, 96 Mo. App. 595, 70 S. W. 910; Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737.

In so far as the action is for a personal judgment it is governed by the rules applicable to actions for the recovery of money only. Booth *v.* Barron, 29 N. Y. App. Div. 66, 51 N. Y. Suppl. 391.

22. Raven *v.* Smith, 148 N. Y. 415, 43 N. E. 63.

23. See Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84; Finane *v.* Las Vegas Hotel, etc., Co., 3 N. M. 256, 5 Pac. 725; Roth *v.* Tiedeman, 53 Mo. 489 (recognizing the jurisdiction of a court of common pleas under its general jurisdiction of civil actions); Hammond *v.* Barnum, 13 Mo. 325; Gaty *v.* Brown, 11 Mo. 138 (the last two cases denying the jurisdiction of the court of common pleas of St. Louis county under a statute relating to the city of St. Louis and requiring suits

exclusive.[24] The action or proceeding being *in rem* in so far as it is directed against the property it must be brought in the court within whose territorial jurisdiction the property is situated,[25] irrespective of the residence of the parties to the action.[26] So where the proceeding is purely *in rem*, it cannot be brought in a court whose jurisdiction is limited to actions for debt or damages,[27] and a court of limited and inferior jurisdiction which under its constitutional powers cannot deal with proceedings relating to land has no jurisdiction,[28] although under some of the statutes jurisdiction is conferred upon courts of inferior and limited jurisdiction at least to the extent of declaring and establishing the lien even when the land cannot be sold under its order or judgment.[29] The jurisdiction

to be brought in the circuit court); Noyes *v.* Burton, 29 Barb. (N. Y.) 631, 17 How. Pr. 449; Noyes *v.* Smith, (Tex. Civ. App. 1903) 77 S. W. 649 (recognizing the jurisdiction of the district court).

The fact that a petition is wrongly addressed does not affect the jurisdiction of the court. Challoner *v.* Howard, 41 Wis. 355.

Incidental power.— The trial term of the city court of New York having been given jurisdiction of an action to foreclose a mechanic's lien, it was held to have power, as incident to that jurisdiction, to declare fraudulent a transfer intended to defeat that lien. Murray *v.* Gerety, 11 N. Y. Suppl. 205, 25 Abb. N. Cas. 161.

Effect of insolvency proceedings.— In Stout *v.* Sower, 22 Ill. App. 65, it was held that, although the person against whom a mechanic's lien is sought to be enforced has made an assignment so that the county court acquired control of the assignee's estate, yet where there was a mortgage on the land sought to be subjected to the satisfaction of the lien and the lien was larger than the value of the land, the suit to foreclose the lien may be brought in the circuit court because the county court had no jurisdiction to enforce mechanics' liens as against *cestuis que trustent*. But see Quinby *v.* Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899, holding that an assignment for the benefit of creditors prevents the enforcement of a mechanic's lien on the debtor's property without leave of court because by the assignment jurisdiction of the entire matter of adjusting claims against the estate passes to the particular court and those having claims must present them in the insolvency proceeding.

24. O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898, under a statute whereby the remedy of the contractor against the owner must be enforced by a bill or petition in a court having chancery jurisdiction.

Exclusive and concurrent jurisdiction see *infra*, VIII, A, 3, 4.

25. Mathews *v.* Heisler, 58 Mo. App. 145 (jurisdiction confined to the county in which the property is situated); Chadwick *v.* Hunter, 1 Manitoba 363.

State and federal courts.— If the state court once assumes jurisdiction of an action to enforce a mechanic's lien, it will retain it to the exclusion of any interference with its control of the property by a federal court until the lien action is finally determined (Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., (Mo. 1895) 32 S. W. 1); but if the property has been seized in a forfeiture proceeding by the United States, a state court cannot enforce a mechanic's lien (Heidritter *v.* Elizabeth Oil-Cloth Co., 6 Fed. 138 [*affirmed* in 112 U. S. 294, 5 S. Ct. 135, 28 L. ed. 729]).

26. Weiner *v.* Rumble, 11 Colo. 607, 19 Pac. 760; Boyle *v.* Gould, 164 Mass. 144, 41 N. E. 114; Guerrant *v.* Dawson, 34 Miss. 149; Raven *v.* Smith, 148 N. Y. 415, 43 N. E. 63, holding that, although the particular court has not jurisdiction in common-law actions for the recovery of money only without regard to defendant's residence, in granting the jurisdiction in mechanic's lien proceedings, the legislature did not have in mind when speaking of actions on contract, those actions where the jurisdiction depended upon such residence.

Jurisdiction of the person see *infra*, VIII, H.

27. Gelston *v.* Thompson, 29 Md. 595; Miller *v.* Barroll, 14 Md. 173. See also Dillon *v.* Sinclair, 7 Brit. Col. 328, holding that an action to enforce a mechanic's lien was not one of debt within the small debt statute.

28. White *v.* Millbourne, 31 Ark. 486, as to the want of jurisdiction of a justice of the peace, although the amount involved is within the ordinary jurisdiction of such a court.

Where the proceeding is peculiar to a court of record, a justice of the peace has no jurisdiction. Noss *v.* Cord, 1 Wis. 389.

29. Egan *v.* Laemmle, 5 Misc. (N. Y.) 224, 25 N. Y. Suppl. 330; Finger *v.* Hunter, 130 N. C. 529, 41 S. E. 890; Smaw *v.* Cohen, 95 N. C. 85 (the last two cases referring to the jurisdiction of a justice of the peace where the amount involved is under two hundred dollars, under the statute providing that the judgment of the justice is to be docketed in the circuit court whence execution issues); Phillips, etc., Mfg. Co. *v.* Campbell, 93 Tenn. 469, 25 S. W. 961 (where by statute a justice of the peace had jurisdiction of such liens for all sums within his ordinary jurisdiction, provision being made for return of the papers after a levy of execution to the circuit court); Brown *v.* Brown, 2 Sneed (Tenn.) 431 (upholding the jurisdiction of a justice of the peace under the statute providing for the enforcement of the lien by attachment "either at law or in equity" when the amount is within the justice's jurisdiction).

of actions to enforce mechanics' liens is sometimes determined by the amount involved.[30]

3. Exclusive, Cumulative, and Concurrent Remedies. The lien given by the statute to mechanics and materialmen is but a cumulative remedy to enforce their respective contracts, and independently of the lien such parties may resort to the ordinary common-law remedies to enforce their contracts, as by action to recover personal judgment.[31] The two remedies may be pursued simultaneously, although there can be but one satisfaction,[32] and often they may be pursued in the same action.[33] So where by the statute a subcontractor or materialman may acquire a

30. Phillips, etc., Mfg. Co. *v.* Campbell, 93 Tenn. 469, 25 S. W. 961 (holding that the jurisdiction of the circuit court not extending to cases involving an amount not exceeding fifty dollars does not embrace a mechanic's lien proceeding wherein the amount does not exceed fifty dollars, jurisdiction being with a justice of the peace in such a case); Hall *v.* Pilz, 11 Ont. Pr. 449 (holding that, although plaintiff's claim was less than the jurisdictional amount of the high court of justice, the action was properly brought there when at the time it was begun the aggregate amount of the liens filed against the property was in excess of the jurisdictional amount).

Where the lien fails in a court whose jurisdiction of the action in so far as a personal judgment is concerned depends upon the amount in controversy, although the jurisdiction to enforce the lien is independent of such consideration, the proceeding must fall. Miller *v.* Carlisle, 127 Cal. 327, 59 Pac. 785 (holding that the aggregate of separate liens will not support the jurisdiction); Brock *v.* Bruce, 5 Cal. 279; Tian *v.* Lloyd, 21 Tex. Civ. App. 433, 52 S. W. 982. But the amount involved is not material where the jurisdiction depends upon the nature of the proceeding because of the lien involved (Curnow *v.* Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 Pac. 149; Faville *v.* Hadcock, 39 Misc. (N. Y.) 397, 80 N. Y. Suppl. 23); and the fact that a justice of the peace may have a certain jurisdiction in such cases involving a particular amount does not deprive the higher court of its jurisdiction (Faville *v.* Hadcock, *supra*).

Cross suit.— In a suit to enforce a mechanic's lien which arose on defendant's property under a contract between plaintiff and defendant's vendor, where the vendor was made a party, and admitted the debt, but claimed that defendant had assumed it, and set up by cross bill a claim against defendant for sums which the vendor had been compelled to pay on the contract, the district court had jurisdiction to determine the claim set up in the cross bill, although the claim was in an amount beneath the jurisdiction of that court. Haberzettle *v.* Dearing, (Tex. Civ. App. 1904) 80 S. W. 539.

31. *California.*— Germania Bldg., etc., Assoc. *v.* Wagner, 61 Cal. 349; Brennan *v.* Swasey, 16 Cal. 140, 76 Am. Dec. 507.

Colorado.— Marean *v.* Stanley, 5 Colo. App. 335, 38 Pac. 395, by statutory provision.

Illinois.— Templeton *v.* Horne, 82 Ill. 491; West *v.* Flemming, 18 Ill. 248, 68 Am. Dec. 539; Olson *v.* O'Malia, 75 Ill. App. 387.

Indiana.— Colter *v.* Frese, 45 Ind. 96.

Massachusetts.—See Holmes *v.* Humphreys, 187 Mass. 513, 73 N. E. 668.

Michigan.— Cady *v.* Fair Plains Literary Assoc., 135 Mich. 295, 97 N. W. 680.

Mississippi.—Ehlers *v.* Elder, 51 Miss. 495.

New York.— Raven *v.* Smith, 71 Hun 197, 24 N. Y. Suppl. 601 [*affirmed* in 148 N. Y. 415, 43 N. E. 63]; Hall *v.* Bennett 48 N. Y. Super. Ct. 302; Cremin *v.* Byrnes, 4 E. D. Smith 756; Pollock *v.* Ehle, 2 E. D. Smith 541; Maxey *v.* Larkin, 2 E. D. Smith 540; Gridley *v.* Rowland, 1 E. D. Smith 670; Biershenk *v.* Stokes, 18 N. Y. Suppl. 854. But see Ogden *v.* Bodle, 2 Duer 611.

North Carolina.— Lookout Lumber Co. *v.* Sanford, 112 N. C. 655, 16 S. E. 849.

Pennsylvania.— Crean *v.* McFee, 2 Miles 214. That plaintiff has shown his claim as a set-off in an action between the same parties before a justice of the peace, the action being still pending, is no defense. Ohlinger *v.* Phillips, 2 Woodw. 53.

South Carolina.— Tenney *v.* Anderson Water, etc., Co., 67 S. C. 11, 45 S. E. 111.

Utah.— See Salt Lake Lith. Co. *v.* Ibex Mine, etc., Co., 15 Utah 440, 49 Pac. 768, 62 Am. St. Rep. 944.

Washington.— Potvin *v.* Wickersham, 15 Wash. 646, 47 Pac. 25, by express statutory provision.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

Wisconsin.— Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214; Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

United States.— Hatcher *v.* Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 68 C. C. A. 19, as to the rule in Colorado.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 431.

32. Brennan *v.* Swasey, 16 Cal. 141, 76 Am. Dec. 507; McCarthy *v.* New, 93 Ill. 455; West *v.* Flemming, 18 Ill. 248, 68 Am. Dec. 539; Olson *v.* O'Malia, 75 Ill. App. 387; Potvin *v.* Wickersham, 15 Wash. 646, 47 Pac. 25; Hatcher *v.* Hendrie, etc., Supply Co., 133 Fed. 267, 68 C. C. A. 19.

A judgment for the debt does not extinguish the lien. Germania Bldg., etc., Assoc. *v.* Wagner, 61 Cal. 349; Marean *v.* Stanley, 5 Colo. App. 335, 38 Pac. 395; Dickson *v.* Corbett, 11 Nev. 277; Crean *v.* McFee, 2 Miles (Pa.) 214; Thompson's Case, 2 Browne (Pa.) 297.

33. See *infra*, VIII, I, 1, b, (IV); VIII, L, 3.

lien upon the property to the extent of the value of the materials furnished, or may hold the owner of the building personally liable, not exceeding the amount that may be due or may become due from him to the contractor, they may do one or the other, or both.[34] But the remedy prescribed by the statute for the enforcement of the lien itself is held to be exclusive.[35] A judgment in favor of a general contractor for an amount including a subcontractor's claim is not incompatible with a judgment in favor of the subcontractor in an independent proceeding. The several judgments may remain, and the court by a proper order should provide for the application of the proceeds so as to protect the rights of all the parties, but should not reduce the amount of the contractor's judgment.[36]

4. Legal or Equitable Proceedings. Under some statutes the remedy for the enforcement of a mechanic's lien has been prescribed by an ordinary action at law or a proceeding in a court of law,[37] not governed by equitable principles.[38] Such a remedy has been held to be exclusive of the jurisdiction of a court of equity in the absence of special circumstances demanding equitable interference,[39] but a bill will lie when such peculiar circumstances exist as to render the interposition of a court of equity proper.[40] On the other hand enforcement of such liens is

34. Crawford *v.* Crockett, 55 Ind. 220; Colter *v.* Frese, 45 Ind. 96.

35. Chandler *v.* Hanna, 73 Ala. 390; Tenney *v.* Anderson Water, etc., Co. 67 S. C. 11, 45 S. E. 111. See also Williams *v.* Tearney, 8 Serg. & R. (Pa.) 58; and *infra*, VIII, A, 4.

36. Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214, the reason of which is that, notwithstanding the subcontractor's judgment, he might sue the contractor for the same debt and collect it out of the latter's property, and, if this should be done, then the only remedy of the contractor would be to have his judgment modified back to its original amount.

Action for each lienor.— There may be as many actions as there are lienors. See Egan *v.* Laemmle, 5 Misc. (N. Y.) 224, 25 N. Y. Suppl. 331. See also *infra*, VIII, G, 3, b, (XI), (B).

37. Walker *v.* Dainwood, 80 Ala. 245; Chandler *v.* Hanna, 73 Ala. 390; Coleman *v.* Freeman, 3 Ga. 137; Cole *v.* Colby, 57 N. H. 98; Hall *v.* Hinckley, 32 Wis. 362; Marsh *v.* Fraser, 27 Wis. 596. Under a later statute in Wisconsin the proceeding was held to be of an equitable nature. George *v.* Everhart, 57 Wis. 397, 15 N. W. 387; Willer *v.* Bergenthal, 50 Wis. 474, 7 N. W. 352. See also Kimball *v.* Moody, 97 Ga. 549, 25 S. E. 338, where it is said that a common-law action against the contractor and a garnishment served on the owner in time may be sufficient, but that the mere institution of an action at law is not sufficient if the garnishment is not served in time.

38. Miller *v.* Hollingsworth, 33 Iowa 224; Redman *v.* Williamson, 2 Iowa 488. The proceedings by a subcontractor to procure his lien, and fix the liability of the owner of the property, under Iowa Code (1851), c. 64, § 1006, were to be conducted as in an ordinary garnishment. Parmenter *v.* Childs, 12 Iowa 22. But see Greenough *v.* Wigginton, 2 Greene (Iowa) 435, decided under an earlier statute.

39. Walker *v.* Daimwood, 80 Ala. 245; Chandler *v.* Hanna, 73 Ala. 390; Coleman *v.* Freeman, 3 Ga. 137; Cole *v.* Colby, 57 N. H. 98; Hall *v.* Hinckley, 32 Wis. 362.

40. Foust *v.* Wilson, 3 Humphr. (Tenn.) 31, holding that where the debtor was insolvent and had left the state a bill in equity would lie to enforce the lien, and creditors of the debtor might well be made parties to the bill to prevent circuity of action and for the greater safety of all concerned. So in Nunnally *v.* Dorand, 110 Ala. 539, 18 So. 5, where the statute made no provision for enforcing the lien of employees or materialmen of subcontractors, it was said that they had no remedy outside of a court of equity.

Claim against unincorporated association.— Gress Lumber Co. *v.* Rogers, 85 Ga. 587, 11 S. E. 867, where the suit was to enforce a lien on property belonging to an unincorporated association, which could not be sued at law, and it was held that the petition made out a case for equitable relief and although filed on the law side of the court the lien would be enforced.

Adjustment of liens.— The rights between holders of mortgage and mechanics' liens can be adjusted only by a court of equity. Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305. So where the remedy is by action at law and a subsequent lienor of the same kind is not a necessary party and cannot enjoin the prosecution of an action to enforce the prior lien against such subsequent lienor who was not joined, the latter, it seems, may impeach the amount of the claim of the prior lien-holder or charge fraud or collusion or set up a higher equity in his own favor by a bill in equity to have such claim set aside or postponed in his favor. Hall *v.* Hinckley, 32 Wis. 362.

Purchaser under judgment.— A mechanic's lien claimant who has purchased the property at a sale under a judgment at law on his claim may come into equity against a prior mortgagee of the property who has purchased the same at a sale under his mortgage to have the priorities of their respective liens adjusted and the property sold for their satisfaction. Birmingham Bldg., etc., Assoc.

recognized as within the jurisdiction of the court of equity,[41] although no particular court is designated in the statute,[42] or where the statute expressly assigns the administration of the remedy to any court having equitable jurisdiction.[43] The proceeding is regarded as essentially of an equitable nature and governed by the rules and principles of chancery practice,[44] and so where the blended practice of the codes prevails the courts exercise jurisdiction of these lien actions on their equitable side and the proceedings are regarded as actions in equity or of an equitable nature to be governed by the rules which apply to actions of that character.[45] Where the statute expressly provides for the enforcement of a particular lien by a bill in equity that remedy is exclusive.[46]

5. PERSONAL ACTIONS OR PROCEEDINGS IN REM. Although where defendant is personally liable for the debt a judgment for the debt and the enforcement of

v. May, etc., Hardware Co., 99 Ala. 276, 13 So. 612.

41. Kizer Lumber Co. v. Mosely, 56 Ark. 544, 40 S. W. 409; Murray v. Rapley, 30 Ark. 568; Andrews v. Washburn, 3 Sm. & M. (Miss.) 109; Bailey Constr. Co. v. Purcell, under statute providing that such liens may be enforced in a court of equity. And in Pairo v. Bethell, 75 Va. 825, it was held that a statutory remedy by motion as well as by bill was provided by the statute which motion was a summary proceeding and in the nature of an equitable remedy.

42. Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84, where the statute provided that the lien should be in the nature of a mortgage, from which it was held that the court of equity had jurisdiction notwithstanding the statute provided also for the issue of execution, inasmuch as executions might issue on decrees.

At law or in equity.— De Soto Lumber Co. v. Loeb, 110 Tenn. 251, 75 S. W. 1043 (where the statute provides a remedy by bill or petition in the chancery or circuit court, and it is held that whether in the one or the other, the proceeding should be in the nature of an equity suit and conducted as such); Hillman v. Anthony, 4 Baxt. (Tenn.) 444 (holding that under the statute the remedy by attachment may be pursued at law or in equity, and that when the proceeding is begun at law it is a proper exercise of discretion for the court to transfer it to the chancery court, where a bill for a like purpose was pending, that all the questions arising might be there determined); Barnes v. Thompson, 2 Swan (Tenn.) 313. *Compare* Faust v. Wilson, 3 Humphr. (Tenn.) 31, under earlier statute.

43. Fargo v. Hamlin, 5 N. Y. St. 297.

44. McGraw v. Bayard, 96 Ill. 146; Reed v. Boyd, 84 Ill. 66; Clark v. Moore, 64 Ill. 273; Clarke v. Boyle, 51 Ill. 104; Lomax v. Dore, 45 Ill. 379; Sutherland v. Ryerson, 24 Ill. 517; Hamilton v. Dunn, 22 Ill. 259; West v. Fleming, 18 Ill. 248, 68 Am. Dec. 539; Ross v. Derr, 18 Ill. 245; Shaeffer v. Weed, 8 Ill. 511; Kimball v. Cook, 6 Ill. 423; Bowman v. McLaughlin, 45 Miss. 461; De Soto Lumber Co. v. Loeb, 110 Tenn. 251, 75 S. W. 1043.

45. *California.*— Miller v. Carlisle, 127 Cal. 327, 59 Pac. 785; Curnow v. Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 Pac. 149; Brock v. Bruce, 5 Cal. 279.

Colorado.— Clear Creek, etc., Gold, etc., Min. Co. v. Root, 1 Colo. 374, petition in district court.

Dakota.— See McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39.

Indiana.— Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333, an equitable proceeding in the nature of a proceeding *in rem*.

New Mexico.— Houghton v. Las Vegas Hotel, etc., Co., 3 N. M. 260, 5 Pac. 729; Straus v. Finane, 3 N. M. 260, 5 Pac. 729; Finane v. Las Vegas Hotel, etc., Co., 3 N. M. 256, 5 Pac. 725; Hobbs v. Spiegelberg, 3 N. M. 222, 5 Pac. 529.

New York.— Schillinger Fire-Proof Cement, etc., Co. v. Arnott, 152 N. Y. 584, 46 N. E. 956; Raven v. Smith, 148 N. Y. 415, 43 N. E. 63; Kenney v. Apgar, 93 N. Y. 539; Faville v. Hadcock, 39 Misc. 397, 80 N. Y. Suppl. 23. Where the claim within the jurisdiction of a justice's court may be enforced in such court or in a court of record, if the suit is brought in the latter court and the complaint seeks special relief on account of a defective notice it goes beyond a simple suit to foreclose the lien and is an equitable action. Faville v. Hadcock, *supra*.

Oregon.— Ming Yue v. Coos Bay, etc., R., etc., Co., 24 Oreg. 392, 33 Pac. 641.

Washington.— Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. 140; Kilroy v. Mitchell, 2 Wash. 407, 26 Pac. 865, holding that it cannot be transferred into an action at law by defendant's interposing a legal defense.

Wisconsin.— George v. Everhart, 57 Wis. 397, 15 N. W. 387; Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 428.

46. O'Brien v. Gooding, 194 Ill. 466, 62 N. E. 898. But the mere fact that the statute provided a remedy by a bill in equity was held not to destroy or deprive the claimant of the benefit of another remedy existing by summary legal proceedings, but that the remedies were cumulative. Futch v. Adams, 47 Fla. 257, 36 So. 575. See also West v. Grainger, 46 Fla. 257, 35 So. 91; Hathorne v. Panama Park Co., 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138.

the lien may be procured,[47] or a personal action is provided for the enforcement of the lien,[48] generally in so far as the action or proceeding is for the enforcement of the lien it is *in rem*,[49] or in part,[50] or in the nature of a proceeding *in rem*,[51] where it is directed primarily to charging the particular property with the lien[52] wholly independent of the personal remedies which the contracting parties may have,[53] as may be gathered also from the cases in which the lien is enforced irrespective of whether there is any personal liability on the part of the owner,[54] or where the debtor may be brought in by publication.[55]

6. Removal of Improvements From Premises.[56] Sometimes under particular conditions prescribed by the statute the lien attaches only to the improvement;[57] and the removal of such improvement, if it can be done without material injury to the property as it stood prior to the improvement, is the remedy prescribed for enforcing such lien.[58]

B. Conditions Precedent — 1. In General. There can be no foreclosure of the lien until the debt for which the lien is made and held as security has become

47. Hatcher *v.* Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 68 C. C. A. 19. See also *supra*, VIII, A, 3.

Personal judgment see *infra*, VIII, L, 3.

48. Dewey *v.* Fifield, 2 Wis. 73, holding that where the statute provided that the claimant may proceed to recover by personal action against the debtor, or in the case of a subcontractor by scire facias against the owner of the building, the words "personal action" did not mean the ordinary action *in personam* for the recovery of a sum of money or damages against the owner because judgment in such an action would bind defendant's estate only from the time it was rendered, whereas the purpose is to bind the particular property from the time the labor was performed or the material provided; that while the action is personal it must be adapted to the object to be accomplished. The same construction is adopted in Durkee *v.* Keehler, (Nebr. 1905) 103 N. W. 767. So in Steinmetz *v.* Boudinot, 3 Serg. & R. (Pa.) 541, it was held that even if an action on the case would lie instead of scire facias when the contract was not made with the owner, it should be special and mention the manner in which defendant is liable in order that a judgment may be entered binding the property alone. But see Spence *v.* Etter, 8 Ark. 69; Miller *v.* Hollingsworth, 33 Iowa 224; Redman *v.* Williamson, 2 Iowa 488. See also *infra*, VIII, L, 3.

49. *Illinois.*— McCarthy *v.* New, 93 Ill. 455.

Iowa.— Simonson Bros. Mfg. Co. *v.* Citizens' State Bank, 105 Iowa 264, 74 N. W. 905, where no personal judgment is sought, as in an action by a subcontractor wherein the principal contractor is served only by publication.

Maryland.— Miller *v.* Barroll, 14 Md. 173, scire facias.

Nebraska.—Pickens *v.* Polk, 42 Nebr. 267, 60 N. W. 566.

New Jersey.— Washburn *v.* Burns, 34 N. J. L. 18; Gordon *v.* Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273.

New York.— Marryatt *v.* Riley, 2 Abb. N. Cas. 119.

North Carolina.— Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Pennsylvania.— Anshutz *v.* McClelland, 5 Watts 487, under an act providing "that no judgment rendered in any scire facias shall warrant the issuing an execution, except against the building or buildings upon which the lien existed."

Wisconsin.— In the proceeding by scire facias execution could go only against the property, while in an action at law the judgment bound the debtor as well as his property. Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

United States.— Homans *v.* Coomb, 12 Fed. Cas. No. 6,654, 3 Cranch C. C. 365, under an early Maryland statute.

50. Ehlers *v.* Elder, 51 Miss. 495.

51. Scott *v.* Goldinghorst, 123 Ind. 268, 24 N. E. 333; Crawfordsville *v.* Barr, 65 Ind. 367.

52. Holmes *v.* Humphreys, 187 Mass. 513, 73 N. E. 668; Howard *v.* Robinson, 5 Cush. (Mass.) 119.

53. Holmes *v.* Humphreys, 187 Mass. 513, 73 N. E. 668, where it is said that perhaps for this reason the statute makes a distinction in regard to process to be issued between the owner and the debtor when they are different persons, in that the one is to be summoned and the other is to be notified.

54. Gortemiller *v.* Rosengarn, 103 Ind. 414, 2 N. E. 829; David, etc., Bldg., etc., Co. *v.* Niel, 15 Ind. App. 117, 43 N. E. 889.

55. Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737. See also *infra*, VIII, H, I, b, (II).

56. Priority of liens as to improvements see *supra*, IV, C, 2, c.

Removal by purchaser at sale see *infra*, VIII, N, 2, b.

57. See *supra*, IV, B, 3.

58. Schaefer-Meyer Brewing Co. *v.* Meyer, 40 S. W. 685, 19 Ky. L. Rep. 411, under an act which gave such a remedy to one who had performed work or furnished materials for a lessee for which he refuses to pay, when there is a forfeiture or surrender of the lease, and holding that under the evidence a recess front added to the leased building and a beer pump and attachments could be removed

payable;[59] and the lienor must of course have created and perfected his lien in the manner the statute provides before he can successfully bring an action to enforce it.[60] Other conditions cannot be imposed upon the right to proceed for the enforcement of the lien unless they arise out of the statute or are incorporated in the contract of the parties.[61] But where the contract itself annexes conditions,[62] as that certain matters shall be settled by arbitration,[63] or that a certificate of the supervising architect or other stipulated person must be presented before a payment is due, etc.,[64] or where the statute annexes conditions,[65] as that the contractor furnish the owner a statement of all persons having claims,[66] or that notice of inten-

without material injury to any previous improvements on the leased premises.

But where a contract with a tenant gives no lien there can be no right of removal; if the law should give such a right it would be essentially a lien or privilege. And a statute which gives a tenant a right to remove improvements cannot be extended to a builder who makes improvements under a contract with the tenant. Sewall *v.* Duplessis, 2 Rob. (La.) 66.

59. See *infra*, VIII, F, 2; VIII, I, 1, b, (VI), (E), (F); *supra*, II, D, 7, h, i; III, C, 11, l.

60. See *supra*, III.

Enforcement on funds under execution sale. — The lien attaches and the right to enforce it accrues at the completion of the contract and when the labor has been fully performed. But the mere existence of the lien does not give the party a right to come into court and claim money arising from the sale of the property subject to it, under an execution in favor of another party. Something more than this is indispensable; the lien must be established by a judgment, and process must issue upon that judgment, in order to entitle the laborer to participate in the proceeds of such a sale. Cumming *v.* Wright, 72 Ga. 767; Love *v.* Cox, 68 Ga. 269.

61. Julius *v.* Callahan, 63 Minn. 154, 65 N. W. 267 (holding that the filing of a notice of *lis pendens* was not under the statute a condition precedent to an action to enforce the lien and did not go to the jurisdiction of the court, but that the failure to file it may be a ground for a motion before trial to require it to be filed but could not be raised after trial by objection to the rendition of the judgment); Whittier *v.* Blakely, 13 Oreg. 546, 11 Pac. 305 (holding that the filing of an account with the county clerk as required by the statute did not establish the lien but merely prevented a lien previously acquired from lapsing and that such account might be filed after suit commenced if within the statutory time).

Demand is not necessary before filing suit. Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283; Steel Brick Siding Co. *v.* Muskegon Mach., etc., Co., 98 Mich. 616, 57 N. W. 817.

62. Bates *v.* Masonic Hall, etc., Fund, 7 Misc. (N. Y.) 609, 27 N. Y. Suppl. 951 [*affirmed* in 88 Hun 236, 34 N. Y. Suppl. 598], under a contract provision that the last instalment should be paid when the building was completed and accepted and that no payment should be made until the contractor should procure from the county clerk a certain certificate, and holding that where the work was abandoned by the contractor an assignee of the final payment to become due to the contractor could not recover without procuring such certificate.

63. Boots *v.* Steinberg, 100 Mich. 134, 58 N. W. 657, holding that under the provision of a building contract that the price of extra work and material unless agreed upon should be settled by arbitration, such agreement for settlement was a condition precedent to a suit to foreclose a lien for such work or material. See also Kirby *v.* Tead, 13 Metc. (Mass.) 149; Watkins *v.* Shaw, 7 Ohio Cir. Ct. 415, 4 Ohio Cir. Dec. 660.

64. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384 [*affirming* 27 Ill. App. 336]; McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428; Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269; Thompson-Starrett Co. *v.* Brooklyn Heights Realty Co., 111 N. Y. App. Div. 358, 98 N. Y. Suppl. 128, as to the right to recover a personal judgment in the absence of the architect's certificate required by the contract. See also Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22. And see BUILDERS AND ARCHITECTS, 6 Cyc. 88, 93.

But as to a subcontractor, notwithstanding the contract with the principal contractor required an architect's certificate of satisfactory performance of the conditions of the contract, the production of such a certificate is not prerequisite to the right of the former to enforce his lien, the subcontractor's lien not being dependent under the statute upon whether there is anything due the principal contractor. Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490.

65. **Arbitration required by statute.** — In Louisiana under the act of 1885, relative to the mechanic's lien, where the laborer and contractor could not agree as to the amount due the laborer, it was necessary to submit an arbitration in writing; and, if in point of fact there was not a written submission, the award was not binding in an action against the owner. Baxter *v.* Sisters of Charity, 15 La. Ann. 686, where plaintiff (laborer) was nonsuited, it appearing that the contractor had brought a suit to set aside the award and had notified the owner of the proceedings.

66. Bonheim *v.* Meany, 43 Ill. App. 532; Curran *v.* Smith, 37 Ill. App. 69; Martin *v.* Warren, 109 Mich. 584, 67 N. W. 897.

tion to sue be filed, such contract and statutory requirements and conditions must be met and performed or the remedy will not be available.[67] But a provision for the release of liens of subcontractors, etc., before the last instalment of the contract price shall be paid, is held not to prevent an effective commencement of the proceedings by the contractor to enforce his lien, although there may be unreleased liens on the record, but he will not be permitted to enforce his claim to the exclusion of such other liens without showing that they have been released.[68]

2. Suit by Subcontractor. The statutory conditions must exist to entitle the subcontractor to sue the owner,[69] and under various statutes the debt must be judicially ascertained by a judgment in favor of the subcontractor against the contractor before the former can enforce the lien against the owner's property,[70] although this is not necessary where the owner is liable for the debt.[71]

C. Compelling, Restraining, and Staying Enforcement — 1. Compelling Enforcement. Under various statutory provisions the owner has been given a remedy to compel the claimants to proceed to enforce their claims, as by notice to close the lien, after which and failure to institute proceeding within the time limited, the lien may be discharged,[72] or by petition upon which the claimant is

67. Heier *v.* Meisch, 33 Mo. App. 35 (holding that such notice which gives the name of the justice of the peace in full without adding his local address, and signed by plaintiff's agent or attorney as such, is sufficient); Schroeder *v.* Mueller, 33 Mo. App. 28 (holding that the notice may be filed simultaneously with the lien account or not so that it is filed before the commencement of the suit). These cases are under a statute providing that before the commencement of suit to foreclose a lien (see Mo. Rev. St. (1899) § 3893) plaintiff shall file with the clerk of the circuit court a notice showing when and before what justice of the peace such suit will be instituted; and before any process shall be issued he shall file with the justice a statement of the facts constituting his cause of action, and a description of the property sought to be charged with the lien.

68. Moore *v.* Carter, 146 Pa. St. 492, 23 Atl. 243, holding that scire facias may issue notwithstanding the existence of liens unreleased, although upon the trial the court would restrain execution until the liens on the record had been satisfied, and therefore a release of such liens is properly admitted in evidence. So in Fogg *v.* Suburban Rapid Transit Co., 90 Hun (N. Y.) 274, 35 N. Y. Suppl. 954, plaintiff was required to show the satisfaction of other claims under a provision in the contract requiring him to furnish such evidence. And in Weber *v.* Hearn, 49 N. Y. App. Div. 213, 63 N. Y. Suppl. 41, a provision giving the owner the option to make payments during the continuance of any lien or liens that may be filed was held not to prevent a suit by the contractor to foreclose his lien during the existence of other unsatisfied liens where such lienors are made parties and the owner's refusal to pay was not based solely on the ground that such liens existed, as the action being an equitable one the court could formulate its relief in accordance with the rights of the parties as they then existed. See also Thomas *v.* O'Donnell, 183 Pa. St. 145, 38 Atl. 597, holding that an affidavit of defense showing such other liens is sufficient to prevent judgment until they are satisfied.

69. Reeve *v.* Elmendorf, 38 N. J. L. 125, holding that under the statute providing that when the contractor refuses to pay money due for materials or wages the materialman or workmen may give notice of such nonpayment to the owner, who is then authorized upon notice to the contractor to retain the amount and pay it over to the workmen or materialmen on being satisfied of the correctness of the claim, an action at law can be maintained against the owner by such laborer or materialman after such notice, but if the owner is not satisfied of the correctness of the claim the action will not lie and the workman or materialman must verify his claim by a judgment against the contractor. See also Booth *v.* Horwitz, 40 N. Y. App. Div. 621, 57 N. Y. Suppl. 1066, where the New Jersey law was applied to ascertain the liability of one sued in New York for materials used in New Jersey. See also *infra*, VIII, E, 1.

70. May, etc., Hardware Co. *v.* McConnell, 102 Ala. 577, 14 So. 768 (as to materialmen, the contractor not being the owner's agent); Vreeland *v.* Ellsworth, 71 Iowa 347, 32 N. W. 374; Lewis *v.* Williams, 3 Minn. 151; Emmet *v.* Rotary Mill Co., 2 Minn. 286 (the last two cases being under the act of 1855); Crane Co. *v.* Hanley, 53 Mo. App. 540.

71. Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110, where by statute upon a failure of a municipal corporation to take a bond from a contractor for public work it shall be liable to laborers and materialmen for the full amount of their claims.

72. Jones, etc., Lumber Co. *v.* Boggs, 63 Iowa 589, 19 N. W. 678 (notice by owner, his agent, or contractor); Wheeler *v.* Almond, 46 N. J. L. 161; William H. Jackson Co. *v.* Haven, 87 N. Y. App. Div. 236, 84 N. Y. Suppl. 356 (holding that the statute was not a statute of limitations but vested the court with a discretion as to whether or not the lien should be vacated for a failure of the lienor to proceed within the time pro-

required to proceed as upon scire facias regularly issued.[73] And likewise the owner may institute suit and bring in all interested parties for the purpose of ascertaining and adjusting all their claims and of having himself discharged,[74] or the owner or any lien-holder may bring suit to have all liens adjusted in one proceeding.[75]

2. **Restraining and Staying Enforcement.** No injunction will be granted at the instance of the owner to restrain a sale in a foreclosure of a mechanic's lien upon grounds which, if available at all, should have been set up in the foreclosure proceeding,[76] or to prevent the setting up and establishment of the lien in the proceedings at law where the objection raised affords a full and complete defense in that action.[77] But the owner may resort to this remedy to prevent a sale of improvements attached to the soil under a contract with a lessee by which the owner was not bound and under proceedings to which he was not a party so that he was not concluded upon the question of the character of the improvements,[78] and the court will restrain a sale under a foreclosure proceeding in order to prevent a cloud on complainant's title.[79] Other lienors who are entitled to have their claims adjusted and their rights protected in the chancery proceedings brought to foreclose a mechanic's lien but who are not made parties thereto may, by a petition, have the rights and liens of all parties interested adjusted and enforced and to that end a sale under the original proceedings enjoined;[80] and so where one

vided). To the same effect see Mushlitt *v.* Silverman, 50 N. Y. 360; *In re* Poole, 14 N. Y. Suppl. 790 (where the court extended the lien-holder's time in which to make service of his complaint, he having exercised reasonable diligence to discover the owner's whereabouts); Butler *v.* Magie, 2 E. D. Smith (N. Y.) 654; Carpenter *v.* Jaques, 2 E. D. Smith (N. Y.) 571 (the two preceding cases holding that the statute then in force did not apply to a general contractor); Carroll *v.* Caughlin, 7 Abb. Pr. N. S. (N. Y.) 72; Fettrich *v.* Totten, 2 Abb. Pr. N. S. (N. Y.) 264.

Where the lien is discharged by bond.— Under the act providing that a mechanic's lien shall be discharged if an action to foreclose is not begun or an order entered continuing it within the year from the filing of the notice and that the lien shall be discharged by the execution of a prescribed undertaking by the owner, after the lien has been discharged, by the execution of such an undertaking the lienor is entitled to a year within which to bring his action during which the lien cannot be again discharged and the liability of the undertaking terminated by a notice to prosecute under a provision that a notice may be given to the lienor to enforce the lien within a specified time not less than thirty days from the time of service or to show cause why the notice of lien should not be vacated. Uris *v.* Brackett Realty Co., 114 N. Y. App. Div. 29, 99 N. Y. Suppl. 642.

73. Borton *v.* Morris, 2 Miles (Pa.) 109.

74. Stimson *v.* Dunham, etc., Co., 146 Cal. 281, 79 Pac. 968, under the code provision entitling and requiring an owner served with subcontractors' notices to hold the amount due the principal contractor to pay the claims of the subcontractors.

75. McGraw *v.* Storke, 44 Ill. App. 311, where the statutory provision appears, the court holding, however, that it had no application to a husband who contracts for work upon a house belonging to his wife.

76. Patch *v.* Collins, 158 Mass. 468, 33 N. E. 567, where the relief was sought on the ground that a tender of the amount had been refused by defendant, the court holding that if the amount was due when tendered it should have been pleaded in the lien suit if it was a good defense, and that if the amount was not due when tendered then defendant was not obliged to accept it.

77. Wolf *v.* Glassport Lumber Co., 210 Pa. St. 370, 59 Atl. 1105, where the complainant sought to restrain a prosecution of the lien proceedings by a subcontractor upon the ground that the contract between the owner and the original contractor was a no-lien contract. See also Lehretter *v.* Koffman, 1 E. D. Smith (N. Y.) 664, Code Rep. N. S. 284.

78. Hammond *v.* Martin, 15 Tex. Civ. App. 570, 40 S. W. 347, upon the theory that the suit is to prevent a threatened waste and trespass and that it would lie notwithstanding the complainant might have an action for damages.

79. Quinby *v.* Slippe, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899, holding that as by an assignment for creditors the entire matter of adjusting claims against the insolvent estate passes to the court and as a sale of the property of the estate would constitute a cloud on the assignee's title, although he, as such, was not a party to the suit he might maintain an action to restrain the sale.

An owner under a prior paramount lien is entitled to an injunction restraining a sale to satisfy a mechanic's lien. Bond *v.* Carroll, 71 Wis. 347, 37 N. W. 91.

80. Clark *v.* Moore, 64 Ill. 273; Raymond *v.* Ewing, 26 Ill. 329, where it was held that a sale under a prior decree should be enjoined and that the court should then go on and settle the rights of the parties.

who has an interest in the property is not bound by the proceedings because he is not joined as a party therein, he may bring his suit to restrain a sale for reasons which would have defeated the foreclosure proceedings if he had been a party.[81] Under some circumstances the court in which the mechanic's lien proceeding is pending may stay the proceeding or execution if such a course should become necessary by reason of other proceedings of the same character by other claimants against the same defendant, but only when it appears necessary to a proper administration of justice will this be done.[82]

D. Joinder and Splitting of Liens[83] — **1. In General.** While claimants having several interests may be made defendants,[84] those whose claims and interests are several should not be joined as plaintiffs in the same action.[85] However, the mechanics' lien statute sometimes authorizes[86] or requires the joinder of the lien claimants;[87] and even where the impropriety of such joinder is recognized, if

Petition by owner for general settlement.— Under the statute in Illinois a remedy was provided by the filing of a petition for a general settlement of mechanics' liens, and it was further provided that upon the filing of such bill or petition, the court on motion of any person interested might stay any further proceedings upon any judgment against the owner on account of such lien. It was held that this statute did not contemplate an injunction against the prosecution of a suit at law merely, but only against the enforcement of the judgment after it had been obtained. Garretson *v.* Appleton Mfg. Co., 61 Ill. App. 443.

Where lien transferred to proceeds.— The sale under a foreclosure of a valid senior mechanic's lien cannot be restrained at the instance of the holder of a junior mechanic's lien on a lessee's interest acquired with notice of the senior lien. Winn *v.* Henderson, 63 Ga. 365, holding that even if it were doubtful which lien ought to be preferred, both would be transferred to the fund raised from the sale and each would take out of the fund what he ought to have and the sale should not be enjoined.

81. Gates *v.* Ballou, 56 Iowa 741, 10 N. W. 258, upholding the right to enjoin a sale because the foreclosure proceeding was barred by limitations.

Lien barred as to omitted mortgagee.— Where under the statute a proceeding is void as to the interested persons who were not made parties to it within the period prescribed for instituting the suit, the lien cannot thereafter be enforced against such party, and if a mortgagee is not joined in the foreclosure proceedings, he may, after the expiration of the prescribed period for instituting it, enjoin the sale under the foreclosure judgment. Martin *v.* Berry, 159 Ind. 566, 64 N. E. 912.

82. Flanagan *v.* O'Connell, 88 Mo. App. 1, holding that the statute providing that where a lien is filed by any other person than the contractor, the latter should defend any action brought thereon at his own expense and that the owner might withhold the amount of money for which the lien is claimed and in case of judgment against him or his property deduct the amount thereof, etc., from the amount due the contractor, has no application to actions to enforce distinct liens by subcontractors and materialmen, as there is no privity between a materialman furnishing material to a subcontractor and the landowner; that where the validity of the subcontractor's lien is put in issue by the owner there is no reason why suit to foreclose such lien should be stayed until that to enforce the lien of the materialman who furnished the subcontractor should be finally determined; that if the materialman's lien should be declared invalid there will be no occasion for staying the proceedings of the subcontractor, but if the validity of both liens should be upheld the court could then interfere as it has entire control over its process, and in its discretion could grant or stay the execution; that if the owner had admitted the validity of the subcontractor's lien the danger to the owner if the lien of the materialman should be upheld would be apparent and in such a case the court would not, hesitate to stay the suit of the former until that of the latter should be determined.

83. See *supra*, III, C, 2; *infra*, VIII, I, 1, b, (IV).

84. See *infra*, VIII, G, 3, b, (I), (VII).

Separate proceedings not necessary.—In McDermott *v.* McDonald, 50 N. Y. Super. Ct. 153, it was held that under the statute with reference to enforcing mechanics' liens on funds in the hands of the city, where one brings an action and files a *lis pendens* pursuant to the statute and makes another lienor a party the latter need not bring a separate action. But in Moran *v.* Murray Hill Bank, 58 N. Y. Super. Ct. 199, 9 N. Y. Suppl. 715, it was held that the above rule did not apply except to parties who had filed their claims at the time the action was commenced.

85. Bush *v.* Connelly, 33 Ill. 447; Harsh *v.* Morgan, 1 Kan. 293.

The statute authorizing the consolidation of lien suits and providing that all lien claimants may be made parties to such a proceeding does not authorize several claimants having independent interests to join as plaintiffs in the same action. Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130.

86. Miller *v.* Carlisle, 127 Cal. 327, 59 Pac. 785; Barber *v.* Reynolds, 33 Cal. 497.

87. J. A. Treat Lumber Co. *v.* Warner, 60

the claims are stated separately and the findings and judgment are several as to each plaintiff, the error in overruling a demurrer to the complaint is harmless.[88] But a mechanic has no power to split up one entire demand and maintain several suits and enforce several liens therefor.[89]

2. Consolidation. While under the general rule of the chancery practice causes having different parties and involving different rights cannot be consolidated, the practice is nevertheless approved in mechanics' lien suits and is sometimes adopted as a necessary expedient to enable the court to settle and adjust the rights of the various lien-holders,[90] and the practice is sometimes adopted by express statutory provision.[91]

3. Dealings With Different Contracts Relative to Same Buildings. A single lien may be enforced in one action for an amount due under two separate contracts under which the work and material were furnished, the same property being improved under both agreements and the rights growing out of them being identical in character and as to parties.[92] And so a single lien may be enforced for all materials furnished in the same building, although there are different contractors for the same.[93]

4. Under Contracts With Several Owners. A claim for services performed on one man's property cannot be charged against the property of another person;[94] and upon this principle it is held that a joint lien cannot be enforced against the property of several owners for material or labor put into improvements on the several lots of land, but that the claimant must proceed separately against each

Wis. 183, 18 N. W. 747. See also *infra*, VIII, G, 3, c.

88. Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130.

89. Thomas *v.* Illinois Industrial University, 71 Ill. 310. The inhibition against splitting demands does not apply, however, where the law itself splits a demand authorizing a workman to file a lien for the amount due him irrespective of whether the amount corresponds with the original contract price. Boucher *v.* Powers, 29 Mont. 342, 74 Pac. 942.

90. Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Thielman *v.* Carr, 75 Ill. 385 (where it is pointed out that the practice is peculiarly proper because the lien law authorizes all persons interested in the subject-matter or the property to become parties to a mechanics' lien suit upon application and that the court should ascertain the amount of each claim and no practical means could be employed to have a trial as provided by the act unless resort was had to the hearing of all the cases at the same time); Schnell *v.* Clements, 73 Ill. 613. But see Graff *v.* Rosenbergh, 6 Abh. Pr. N. S. (N. Y.) 428 note, holding that one who is a party to such proceeding in which all the equities may be passed upon need not file a separate suit and if he should do so the two actions would not be consolidated but the second should be dismissed.

After remand for defect of parties.— So where, in an action to enforce a subcontractor's lien, the cause was remanded because the contractor was not made a party defendant, and another action was then instituted, in which the contractor was made a party defendant, an order joining and consolidating the two actions was properly granted. Lookout Lumber Co. *v.* Sanford, 112 N. C. 655, 16 S. E. 849.

91. *California.*— Miller *v.* Carlisle, 127 Cal. 327, 59 Pac. 785.

Indiana.— Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130.

Kansas.— Van Laer *v.* Kansas Triphammer Brick Works, 56 Kan. 545, 43 Pac. 1143.

Minnesota.— Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47.

Tennessee.— See De Soto Lumber Co. *v.* Loeb, 110 Tenn. 251, 75 S. W. 1043.

Wisconsin.— Allis *v.* Meadow Spring Distilling Co., 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 440.

92. Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Kiel *v.* Carll, 51 Conn. 440.

93. Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685, as to enforcement of one lien for materials furnished a contractor and subcontractor for use in the same building. *Contra*, Dugan *v.* Higgs, 43 Mo. App. 161; Robinson *v.* Davis, 8 Del. Co. (Pa.) 237, holding that distinct claims, one under a contract with the contractor and one for work done on the same building for the owner, cannot be joined. See also in this connection *supra*, III, C, 2, b.

94. Oldfield *v.* Barbour, 12 Ont. Pr. 554, where several mechanics worked with a contractor for wages but on two buildings owned by different persons and each registered a lien for his services against the contractor and against both owners and their property, each lien being for the amount of the whole wages claimed, and all of them attempt to join in one action against the contractor and the owners to enforce their liens.

owner or lot for separate liens,[95] even though the contract for the improvements is a joint one by the several owners.[96] On the other hand the full force of these decisions is not maintained in several cases which adopt the view that the separate owners of several contiguous lots may so treat them as to constitute but one lot within the meaning of the Mechanics' Lien Law, and that if such owners enter into a joint contract for the construction of a building to be situated on such lots the lien may be treated as a single one covering the entire property and foreclosed as such.[97]

5. Procedure After Consolidation or Interplea — a. In General. After proceedings have been consolidated or other lien claimants have been brought in by interplea under the statute the rights of all the parties should be heard and determined before an order or judgment is made,[98] and the action is treated as if it were a single action.[99] Of course each claim should be tried on its own merits, and should not be prejudiced by testimony relating to another.[1] So where a subcontractor appears in a suit in which he is named as a party claiming a lien and files an answer or cross bill setting up his claim, the fact that he had begun an independent proceeding to enforce his demand is no bar to a recovery under his cross bill, although he can have but one satisfaction.[2]

b. Effect of Failure of Principal Claimant to Establish Lien. Where the rights of all lien claimants are to be determined in one proceeding, or such claimants are permitted or required to intervene for the purpose of enforcing their claims, a dismissal or withdrawal of plaintiff's cause of action, or his failure to establish his cause for any reason, will not prejudice the right of any defendant or intervener to proceed and enforce his claim in the action.[3]

E. Defenses, Set-Offs, and Counter-Claims[4] — 1. Defenses in General. A party defendant to a mechanic's lien proceeding may set up as many defenses

95. Davis *v.* Farr, 13 Pa. St. 167; Gorgas *v.* Douglas, 6 Serg. & R. (Pa.) 512; Butler *v.* Rivers, 4 R. I. 38, holding that several proceedings to enforce the several liens may be maintained, although the contract covers work on other estates of the same or of other persons.

96. Butler *v.* Rivers, 4 R. I. 38. *Contra*, Mandeville *v.* Reed, 13 Abb. Pr. (N. Y.) 173.

97. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 17 L. R. A. 815; Miller *v.* Shepard, 50 Minn. 268, 52 N. W. 894; Carter Lumber Co. *v.* Simpson, 83 Tex. 370, 18 S. W. 812; J. A. Treat Lumber Co. *v.* Warner, 60 Wis. 183, 18 N. W. 747.

The lien may be enforced against the property of one of such owners, but only by showing the proportionate amount and value of the material which went into each building. Kinney *v.* Mathias, 81 Minn. 64, 83 N. W. 497; Miller *v.* Shepard, 50 Minn. 268, 52 N. W. 894. And if plaintiff in such an action dismisses as to one defendant and seeks to enforce his lien proportionately reduced as to the others, the latter cannot complain of such apportionment. C. B. Carter Lumber Co. *v.* Simpson, 83 Tex. 370, 18 S. W. 812.

98. Power *v.* McCord, 36 Ill. 214.

99. Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629, holding that the decision should be embodied in a single set of findings and judgment. But if separate findings are made it would not be reversible error, only one judgment being rendered. Marble Lime Co. *v.* Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164.

Segregation of issue not material to claimants' action.— After the several lien claimants' causes of action have been consolidated an order directing an issue to be made up between the owner and the contractors has the effect of segregating to that extent the actions theretofore consolidated and would not affect the causes of the lien claimants. The order of consolidation would not preclude the court from making such segregating order. Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709.

1. Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325.

2. Culver *v.* Elwell, 73 Ill. 536. See also *supra*, VIII, A, 3, 4.

3. *Kansas.*— Johnson *v.* Keeler, 46 Kan. 304, 26 Pac. 728.

Massachusetts.— Angier *v.* Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630, although the intervening petition was not filed within ninety days from the time the intervener ceased to labor as required by the statute in the case of an original petition.

Minnesota.— Burns *v.* Phinney, 53 Minn. 431, 55 N. W. 540 (where plaintiff fails because his lien is barred); Sandberg *v.* Palm, 53 Minn. 252, 54 N. W. 1109.

Nevada.— Elliott *v.* Ivers, 6 Nev. 287.

New York.— Wilson *v.* Niagara City Land Co., 79 Hun 162, 29 N. Y. Suppl. 517 (where plaintiff's claim had been adjusted); Morgan *v.* Taylor, 15 Daly 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253]; Abham *v.* Boyd, 5 Daly 321; Morgan *v.* Stevens, 6 Abb. N. Cas. 356.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 443.

4. Pleading see *infra*, VIII, I, 2.

as he has,[5] and any objection which goes to the validity or existence of the lien,[6] or the existence or amount of the debt for which the lien is claimed,[7] and an agreement by one whose duty it is to introduce a defense that he will not make the defense will not be permitted to prejudice the rights of another on whose behalf the defense would be available.[8] Where under the statute the owner cannot be held for more than funds in his hands which are not absorbed by prior liens, if there are prior liens which exhaust such funds the fact is a defense;[9] but under a contract provision permitting the owner to withhold from the amount due the contractor such sums as may be necessary to indemnify the former against claims filed by subcontractors, the filing of such claims will not defeat the contractor's right to recover the balance,[10] and the payment of the entire con-

Effect of payment into court see *supra*, VI, B, 2.

5. See *infra*, VIII, I, 2, b.

6. McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. 417. See also Davis *v.* Stratton, 1 Phila. (Pa.) 289, holding that under the statute if the person named as contractor is not and never was contractor it will be a good defense by him to defeat the scire facias); Owens *v.* Hord, 14 Tex. Civ. App. 542, 37 S. W. 1093.

Steps necessary to perfect lien see *supra*, III.

Conditions precedent see *supra*, VIII, B.

In suit by subcontractor.— The owner may set up against a subcontractor or furnisher to the general contractor facts which show that such subcontractor or materialman has obtained no lien as that the labor or material was furnished to a contractor personally, and not as agent for the owner, and that no lien has been obtained on account of the poor work done by said contractor, and his subcontractor. Hoagland *v.* Van Etten, 22 Nebr. 681, 35 N. W. 869.

In a suit by an undisclosed principal the defenses are available against him which would have been available against the agent. Berry *v.* Gavin, 88 Hun (N. Y.) 1, 34 N. Y. Suppl. 505.

7. McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. 417. See also Moore *v.* Culbertson, 3 Walk. (Pa.) 448; and *infra*, VIII, E. 4. *Compare* McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Payments made after the issues joined may be credited on the judgment. North *v.* La Flesh, 73 Wis. 520, 41 N. W. 633.

8. Young *v.* Burtman, 1 Phila. (Pa.) 203, holding that an agreement between a materialman and a contractor that if the latter would not take defense to the scire facias the materialman would look to the building alone and discharge the contractor from personal liability is contrary to the policy of the law and void and will not be available as a defense in an action between the contractor and the materialman because the very object of making the contractors parties is to call upon them to make defense.

An agreement by defendant as against purchasers not parties.— Where the evidence tended to establish a defense pleaded that the material was not in fact furnished or used in the building and after the defense was pleaded defendant agreed for a consideration to abandon it, but at this time he had sold the premises and a purchaser from his grantee was in possession of the same and neither such grantee nor his purchaser was a party to the suit, it was held that the agreement would not be recognized to authorize a judgment for plaintiff. Chamberlain *v.* Golden, 86 S. W. 521, 27 Ky. L. Rep. 686.

9. Chamberlain *v.* O'Connor, 1 E. D. Smith (N. Y.) 665; Lehretter *v.* Koffman, 1 E. D. Smith (N. Y.) 664, Code Rep. N. S. 284 (holding that the claimant may contest the validity of the liens set up to exhaust the fund and if he succeeds in impeaching them take judgment for the amount of his claim, or if not then a judgment to the extent of the available fund); Cronk *v.* Whittaker, 1 E. D. Smith (N. Y.) 647. See also Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552; and *infra*, VIII, E, 4.

Admission of funds in hand — parol acceptance.— In Pike *v.* Irwin, 1 Sandf. (N. Y.) 14, where the owner promised to pay the amount on being furnished with an order from the contractors, it was held that he was not precluded from showing in defense that there was nothing due from him to the contractors; that the promise to accept the order was at most an implied admission that there was something due on the contract which he could explain and rebut, and that the promise could not sustain the action because it was void under the statute of frauds, being a parol promise to pay the debt of the contractors. *Compare* McConnell *v.* Worns, 102 Ala. 587, 14 So. 849, *infra*, note 18.

Objection by other subcontractors.— An action by a subcontractor against the contractor and a county wherein a judgment was rendered against the county for the payment of plaintiff's claim from the amount due to the contractor at the time the judgment was rendered, other subcontractors who brought similar actions before anything was due to the contractor and who intervened in plaintiff's action cannot attack the judgment on the ground that nothing was due the contractor when plaintiff's action was commenced because if plaintiff is defeated on that ground the ruling would defeat the other subcontractor's action. James *v.* Davidson, 81 Wis. 321, 51 N. W. 565.

10. Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104].

tract price on claims not legally filed and with notice of plaintiff's claim will afford no defense to the latter.[11] Where the right of the subcontractor cannot be impaired by any default of the principal contractor, and a claim is lienable in favor of a subcontractor if in any event it would be lienable under the principal contract in favor of the contractor, the subcontractor's lien is not dependent upon the question of the original contractor's performance or default;[12] and if the conditions exist which entitle a mechanic to a lien the right cannot be defeated because of any collateral consequence attending the steps taken to perfect it,[13] or for other reasons which do not go to the validity of the lien claimed or the right to enforce it.[14]

2. Want of Title in Defendant or Debtor. Under some statutes, that one not a party to the suit has a paramount title,[15] or want of title in defendant and allegations that the title is in the third person, will not defeat the action as only the interest of defendant can be bound;[16] and a mechanic's lien on improvements alone cannot be defeated by the party who contracted for them upon the ground that he had wrongfully entered upon the land of another and was a trespasser.[17]

3. Waiver and Estoppel to Assert Defenses. A party may by waiver or estoppel be precluded from resisting or attacking a mechanic's lien;[18] but he should

11. Iowa Brick Co. *v.* Des Moines, 111 Iowa 272, 82 N. W. 922, holding that the provision for retaining a part of the contract price was for the owner's benefit and could be waived.

12. Seeman *v.* Biemann, 108 Wis. 365, 84 N. W. 490, holding that the neglect of a principal contractor to acquire the right to recover for the construction of a building which has been actually completed and is in existence as an improvement upon the proprietor's land will not defeat the subcontractor's right to look to the property for payment.

13. Mull *v.* Jones, 18 N. Y. Suppl. 359, holding that it is no defense that the filing of liens so destroyed the credit of the contractors as to force them to abandon their contract, because so far as the owner is concerned any inconvenience he suffers is from the conduct of his own contractor, and besides he is not damaged because he is allowed the full costs of completing the contract and other liens attach only to the balance of the money unpaid on the original contract.

14. Richardson *v.* Hickman, 32 Ark. 406 (holding that it is not a defense that the property is in the hands of a receiver, as a sale under a judgment could not impair the rights of the parties to the receivership suit who are not parties to the mechanic's lien proceeding and the purchaser could not disturb the possession of the receiver, but would be entitled to become a party to the suit in equity and set up his title against the parties there); Iowa Brick Co. *v.* Des Moines, 111 Iowa 272, 82 N. W. 922 (holding that under the provision of an agreement with a city contractor for furnishing materials that a certain per cent of certificates issued for the work done by the contractor should be assigned to the materialman as collateral security and that the certificates issued and assigned for each section of work should be surrendered as the material for that section was paid for, it is no defense to an action against the city to establish the materialman's lien for material used in subsequent sections that plaintiff had been assigned certificates sufficient to pay his entire claim, the certificates having been assigned to secure materials used in previous sections and having been surrendered upon payment for such materials); General Fire Extinguisher Co. *v.* Magee Carpet Works, 199 Pa. St. 647, 49 Atl. 366 (holding that it is no objection to the claim of a subcontractor that the principal contractor had no power under its charter to make the contract). See also Cremin *v.* Byrnes, 4 E. D. Smith (N. Y.) 756, holding that the filing of a lien against defendant as owner and charging the contractor as employer will not estop the claimant from proceeding against the owner for the sum claimed as upon a separate contract made with him. In connection with this last point see *supra*, VIII, A, 3.

15. Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77; Cook *v.* Goodyear, 79 Wis. 606, 48 N. W. 860.

Lien on leasehold interest see *supra*, I, J, 4.

16. Ford *v.* Wilson, 85 Ga. 109, 11 S. E. 559; Porter *v.* Wilder, 62 Ga. 520; Falconer *v.* Frazier, 7 Sm. & M. (Miss.) 235; Washburn *v.* Burns, 34 N. J. L. 18. So a plea to a scire facias that defendant is not the owner was held improper in Pennsylvania, as that was not an issue to be raised in that proceeding. Spare *v.* Walz, 15 Phila. (Pa.) 263.

Ownership at time suit is brought.— It is no answer that defendant did not own the property at the time suit was brought as he may have owned it when the lien attached. Ainsworth *v.* Atkinson, 14 Ind. 538.

Estoppel see *infra*, VIII, E, 3.

17. Lane *v.* Snow, 66 Iowa 544, 24 N. W. 35.

Lien on improvements see *supra*, IV, B.

18. McConnell *v.* Worns, 102 Ala. 587, 14 So. 849 (holding that where defendant failed to comply with the Mechanics' Lien Law to protect his property from the enforcement of a subcontractor's lien, and told the subcontractor that he had enough to pay him from

not be held to waive any formality that is necessary to perfect a mechanic's lien against him unless it clearly appears from the evidence that he actually intended to waive it, or his conduct has been such as to estop him to deny that he did waive it.[19] Merely because a grantee purchases property subject to all liens thereon does not estop him from defending against liens.[20]

4. Set-Off and Counter-Claim — Reduction of Recovery — a. In General. Proper demands against the contractor may be set off or pleaded by way of counter-claim to defeat his lien.[21] And where the owner's property is subject to other liens under the contract with the original contractor, the owner may set up said liens against the claim of the general contractor, and if they have been paid may plead them by way of counter-claim against a general contractor or set-off against his assignee.[22] In an action by a subcontractor, the owner cannot plead

the money going to the principal contractor, and allowed the subcontractor to complete the contract, he was estopped to deny that he had money of the principal contractor's sufficient to pay the subcontractor); Kenny *v.* Monahan, 53 N. Y. App. Div. 421, 66 N. Y. Suppl. 10 [*affirmed* in 169 N. Y. 591, 62 N. E. 1096] (holding that delay in completion of contract is waived as a defense but not as a counter-claim, by permitting the completion of the work); Bunton *v.* Palm, (Tex. 1888) 9 S. W. 182 (as against an innocent purchaser). *Compare* Pike *v.* Irwin, 1 Sandf. (N. Y.) 14, *supra*, note 9.

Putting title in another's name.— One induced by fraud to convey title to land to another, under a contract contemplating the construction of buildings thereon, cannot, in an action to set aside the conveyance and discharge the property from liens, defeat the claims of those who, in good faith, relying on the apparent title of the purchaser, furnished materials and performed labor in the construction of the buildings contemplated, and complied with the statutory requirements in establishing their liens. West *v.* Badger Lumber Co., 56 Kan. 287, 43 Pac. 239.

19. Floyd *v.* Rathledge, 41 Ill. App. 370; Kribs *v.* Craig, (Tex. Civ. App. 1900) 60 S. W. 62.

Waiver by the husband of all claims against the contractor for failure to comply with the contract will not affect the wife's right to assert the invalidity of the lien where the property is a homestead and no lien has in fact attached by a failure to substantially comply with the contract. Rhodes *v.* Jones, 26 Tex. Civ. App. 568, 64 S. W. 699.

20. Jones *v.* Manning, 6 N. Y. Suppl. 338. But see Chicago Lumber Co. *v.* Dillon, 13 Colo. App. 196, 56 Pac. 989, holding that if a grantee in a trust deed reserves a sufficient sum to meet a lien, with notice of the particular claim, and the work or material is furnished the lien claimant should recover such amount, although the lien is invalid.

Purchase after judgment see *infra*, VI, C, 4, a, (I).

21. Brackney *v.* Turrentine, 14 Ark. 416; Tracy *v.* Kerr, 47 Kan. 656, 28 Pac. 707.

A demand, which accrued in another transaction, from plaintiff to the owner, may be set off by the latter. Naylor *v.* Smith, 63 N. J. L. 596, 44 Atl. 649; Owens *v.* Ackerson, 1 E. D. Smith (N. Y.) 691.

Independent covenants.— If a building contract embodies another and independent contract between the parties of different natures to be performed at different and distinct periods, in an action to enforce the mechanic's lien under the building contract a claim arising as for a breach of the other and independent covenant contained in the same instrument, is not available as a set-off. McQuaide *v.* Stewart, 48 Pa. St. 198, holding that in a suit to foreclose a mechanic's lien under an agreement which provided further for a lease to plaintiff for a term of years, a claim for rent accruing subsequently to the completion of the building cannot be set off; that the two claims in this instance do not arise out of the same transaction.

22. Boucher *v.* Powers, 29 Mont. 342, 74 Pac. 942. But a contractor who is primarily liable for materials is entitled to enforce a lien therefor, although the materialman has also filed a lien, where the contractor has requested the owner to pay the same out of the balance due him under his contract, and the materialman's lien is unenforceable in the action for want of proper service upon the owner. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Payment.—In New Jersey where the claims of workmen or materialmen were not paid by the owner it was held that he was not entitled to credit for the amounts due under such claims, but as the notice of such workmen or materialmen amounted to an assignment *pro tanto* of the debt due to the contractor, if the contractor recovers judgment including such claims and attempts to enforce it in fraud of the rights of the workmen and materialmen, the court of equity will enjoin its collection, take possession of the fund, and adjust the rights and the equities of the claimants. Wightman *v.* Brenner, 26 N. J. Eq. 489. See also *supra*, VIII, E, 1, note 9.

Credit against contractor's judgment.— Where a subcontractor recovers the owner may have credit for the amount of the recovery on the contractor's judgment which covers the claim of the subcontractor. Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

by way of set-off a demand entirely independent of and unrelated to the original contract, under which the work and material was furnished,[23] or take advantage of payments to the contractor contrary to the provisions of the statute;[24] but upon the principle that the Mechanics' Lien Law purports to protect lien claimants only to the extent of moneys which may be due from the owner to the contractor under the original contract, it is held that while the owner cannot make a subsequently acquired set-off against the contractor available against the demand of a mechanic to defeat his right to resort to an indebtedness of the owner to the contractor which existed when the mechanic performed his labor,[25] the owner may set off an indebtedness against the contractor which existed at the time the contract was made to defeat the claims of other mechanics.[26] Where the contractor is the primary debtor in an action by a subcontractor in which the former is a party, he may set up by way of counter-claim or set-off any demand which he may have against the subcontractor.[27]

b. Damages For Default of Contractor or Claimant. Damages resulting from a default in the performance of a contract for the erection of buildings or improvements, as by delay in completing performance, defects in construction and material used, and the like, may be set up to reduce or defeat the claim of the builder or mechanic if the damages are sufficient,[28] and liquidated damages provided for in the contract for such delay, defects, etc., may be recouped or set off against

23. Develin *v.* Mack, 2 Daly (N. Y.) 94 (holding that under a provision declaring that no transfer of the contractor's interest should affect the right of any person to file liens, the lien law operated as an equitable transfer to a lienor of the money due to the general contractor at the time of the filing of the lien against which nothing should prevail except that which should spring out of the contract itself, and therefore the retention by the owner out of the sum due the contractor of an amount claimed as damages in an independent suit between the owner and contractor would be regarded as a transfer within the spirit of the act which could not destroy the equitable assignment of the fund due to the contractor so as to affect the right of the subcontractor); Hoyt *v.* Miner, 7 Hill (N. Y.) 525 (holding that nothing short of what would be equivalent to a *bona fide* payment can reduce the fund in the owner's hands).

Demand against subcontractor.— Where the owner has a cause of action personally against the subcontractor growing out of the lien statute, he may set it up by way of counterclaim. Thus under a statute requiring a subcontractor to join the contractor as defendant and that the contractor shall defend the claim at his own expense where the subcontractor fails to join the contractor and afterward takes an assignment of the contractor's claim in a subsequent suit to enforce the assigned claim, defendant may set up the damages by reason of the failure to join the contractor in the first proceeding. Tracy *v.* Kerr, 47 Kan. 656, 28 Pac. 707.

24. Hannah, etc., Mercantile Co. *v.* Hartzell, 125 Mich. 177, 84 N. W. 52, holding that where the statute requires the distribution of payments to the contractor to be made *pro rata* among subcontractors and materialmen, the owner cannot require deductions of payments against claimants asserting their liens in the absence of a showing that payments made to the contractor were so distributed.

25. Bullock *v.* Horn, 44 Ohio St. 420, 7 N. E. 737.

26. Stark *v.* Simmons, 54 Ohio St. 435, 43 N. E. 999, holding that the indebtedness of the contractor to the owner at the time the contract was made being greater than the amount to become due under the contract, the owner was never at any time indebted to the contractor within the purpose of the statute, and further that the provision of the statute that if the owner by collusion or fraud pays in advance of the payments due under the contract and thereby diminishes the fund available to the subcontractor, he shall be liable as if said payment had not been made, would seem to be exclusive in defining the circumstances which will give the sublienor a right to resort to an obligation which as between the owner and contractor had been discharged when the sublienor's right accrued.

27. Wescott *v.* Bridwell, 40 Mo. 146; Cody *v.* Turn Verein, 48 N. Y. App. Div. 279, 64 N. Y. Suppl. 219 [*affirmed* in 167 N. Y. 607, 60 N. E. 1108]; Grogan *v.* McMahon, 4 E. D. Smith (N. Y.) 754, 6 Abb. Pr. 306; Gable *v.* Parry, 13 Pa. St. 181.

28. *District of Columbia.*— Burn *v.* Whittlesey, 2 MacArthur 189.

Illinois.— Strawn *v.* Cogswell, 28 Ill. 457; Heberlein *v.* Wendt, 99 Ill. App. 506; Benner *v.* Schmidt, 44 Ill. App. 304.

Missouri.— McAdow *v.* Ross, 53 Mo. 199.

Nebraska.— Millsap *v.* Ball, 30 Nebr. 728, 46 N. W. 1125.

New York.— Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104] (holding that where the contract is substantially complete deduction may be made for trivial omissions); Gourdier *v.* Thorp, 1 E. D. Smith

plaintiff's claim to defeat his lien in whole or in part.[29] A court of equity is governed mainly by considerations of right and justice between the parties. It

(N. Y.) 697 (recoupment by way of abatement of contract price); Bulkly *v.* Healy, 12 N. Y. Suppl. 54. But a vendor of land under a contract in which he agrees to advance to the vendee money to enable the latter to complete unfinished houses which he stipulated to complete by a certain time, cannot recoup as damages in an action by the materialman rents and profits on account of the vendee's failure to complete the houses within the time fixed, not having claimed a forfeiture against the vendee on that ground but having acquiesced and made further payments after the building was completed and having taken possession of the houses but not in pursuance to the terms of the contract of sale, the houses not being for the use of the vendor when completed but for the use and occupation of his vendee. Schuyler *v.* Hayward, 67 N. Y. 253.

Pennsylvania.— Rockwell Mfg. Co. *v.* Cambridge Springs Co., 191 Pa. St. 386, 43 Atl. 327 (holding that notwithstanding the general ruling in that state that having accepted goods contracted for at a time later than that at which the delivery was agreed upon defendant cannot set up the delay as a defense to plaintiff's recovery of the price, yet he may set up damage resulting from such delay by reason of which he suffered loss in his business and profits to be derived therefrom where he alleges that he could not find such lumber as he had contracted for in such large quantities and could not purchase it in such quantities from other parties and proceed with the finishing of the building and was therefore compelled to wait on account of the delays caused by plaintiff); Blessing *v.* Miller, 102 Pa. St. 45; McQuaide *v.* Stewart, 48 Pa. St. 198; Bayne *v.* Gaylord, 3 Watts 301 (set-off in scire facias proceedings to defeat plaintiff's claim).

United States.— Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487, holding that while unliquidated damages cannot be the subject of set-off generally, the total or partial failure of consideration, acts of non-feasance or misfeasance immediately connected with the cause of action, or any equitable defense arising out of the same transaction may be given in evidence in mitigation of damages or recouped, not strictly by way of defalcation or set-off, but for the purpose of defeating plaintiff's action in whole or in part and to avoid circuity of action.

Canada.— Wood *v.* Stringer, 20 Ont. 148, where it was held that the difference in value between the bad material and the material which should have been used was not an adequate measure of damages in the particular case.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 448.

Personal judgment.— Where a plaintiff or petitioner cannot, under the statutory proceeding, recover a judgment *in personam* against defendant, there is no good reason why a defendant should be allowed to allege a state of facts that would enable him to recover a judgment *in personam* against plaintiff. Tenney *v.* Anderson Water, etc., Co., 67 S. C. 11, 45 S. E. 111. But unliquidated damages, arising from deficiency in the performance of a contract for the erection of a building, may be given in evidence as a set-off against plaintiff's claim under a mechanic's lien, although it will not authorize the jury to find a balance in favor of defendant. Bayne *v.* Gaylord, 3 Watts (Pa.) 301.

Damages upon abandonment of contract.— In Woolf *v.* Schaefer, 41 Misc. (N. Y.) 640, 85 N. Y. Suppl. 205, where the contractors agreed to furnish materials and construct the house, the first payment to be made when the house was fully inclosed and roofed, and before the house was roofed the contractor stopped furnishing material and filed a notice of mechanic's lien, it was held that no lien could be enforced under these conditions and that the owner might recover under his counter-claim for damages done by the elements to the house left unroofed and for the consequent loss of rentals.

The subcontractor is bound by the original contract, and if he furnishes defective material his claim may be made and reduced by claim for damages on account of such defective material. Taylor *v.* Murphy, 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. Rep. 825. And where the owner cannot be compelled to pay to the workmen or materialmen any moneys which by force of his contract with the original contractor he is not compellable to pay to the latter, defenses available under the contract against the contractor may protect the owner from payment to the subcontractor. Reeve *v.* Elmendorf, 38 N. J. L. 125. So where the subcontractor has no lien but only a remedy against the owner to recover judgment to the extent of the amount due by him to the contractor, in an action by the subcontractor against the owner he may set up a breach by the contractor whereby stipulated damages become due from him sufficient to offset the balance due to him, and the subcontractor is not the proper party to seek relief against such damages as a penalty. Toledo Novelty Works *v.* Bernheimer, 8 Minn. 118.

Contractor against subcontractor.— The general contractor being a party to a proceeding to enforce a mechanic's lien may set up by counter-claim a demand for damages against the subcontractor for a default in the performance in the contract. Cody *v.* Turn Verein, 48 N. Y. App. Div. 279, 64 N. Y. Suppl. 219 [*affirmed* in 167 N. Y. 607, 60 N. E. 1108].

Breach of indemnity see *supra*, VII, A, 5.

29. Tenney *v.* Anderson, etc., Power Co., 69 S. C. 430, 48 S. E. 457; Winder *v.* Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487. See also McBean *v.* Kinnear, 23 Ont. 313.

does not disregard legal rights; on the contrary it follows the law; but it may allow something for what is deemed insufficient work while granting a decree for the amount found equitably due.[30] While the mere fact that materials are received will not estop the purchaser from claiming damage if the materials were defective,[31] the owner may estop himself by his acts from setting up damages by reason of a default in the performance of the contract, and where he accepts the building from the contractor as completed within the terms of the contract he cannot thereafter recoup damages for imperfect work as against the materialman.[32]

F. Time to Sue, Limitation, and Laches — 1. Limitation in General — a. The Rule Stated. The statutes usnally provide the period within which the lienor must proceed for the enforcement of his lien, which periods differ in length and as to points of beginning in the various jurisdictions, but the particular statute controls,[33] to the exclusion of another limitation act relating to other causes of

30. Heberlein *v.* Wendt, 99 Ill. App. 506; Julin *v.* Ristow Poths Mfg. Co., 54 Ill. App. 460, under a cross bill. See also Burn *v.* Whittlesey, 2 MacArthur (D. C.) 189.

Cross bill.— Defendant in a suit to foreclose a mechanic's lien may maintain a cross bill for damages on account of complainant's failure to construct the building according to contract. Koch *v.* Sumner, 145 Mich. 358, 108 N. W. 725 (holding that this remedy is available notwithstanding the only provision of the lien law authorizing a personal decree relates to a personal decree against the party liable for the lien claims); Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389 (sustaining a cross bill which alleged the non-fulfilment of the guaranties of the contract and also that complainant had damaged defendant's mill and asked for a cancellation of the recorded lien and for a judgment for the damages). But see Brown *v.* Boker, 20 D. C. 99 (holding that a cross bill for damages for defective work cannot be filed in a suit to enforce a mechanic's lien, but the court may reserve to defendant the right to proceed at law, and to that end, if need be, may enjoin the lienor to plead limitations); Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506 [*modifying* 61 N. J. Eq. 508, 48 Atl. 822, upon another point] where allegations were stricken out in so far as they were in the nature of a cross bill for personal judgment).

31. Strawn *v.* Cogswell, 28 Ill. 457; Wood *v.* Stringer, 20 Ont. 148.

32. Hannah, etc., Co. *v.* Hartzell, 125 Mich. 177, 84 N. W. 52.

So if the owner reserves the amount of certain claims and promises to pay them upon settling in full with the contractor, without making any claim for damages or asserting any right to recoup damages for delay in completing the contract, the jury may be justified in finding that he has estopped himself from setting up a claim for damages on account of such delay in completing the contract. Cook *v.* Roman Brick Co., 98 Ala. 409, 12 So. 918.

Inconsistent defense.— Spaulding *v.* Burke, 33 Wash. 679, 74 Pac. 829, holding that where in an action by an architect defendant pleaded and attempted to show full payment at a time when damage by reason of improper work existed, he was estopped to urge such damage by way of counter-claim in reduction of the contract amount so alleged to have been paid, the counter-claim not stating that the alleged defect causing the damages claimed arose after the payment was made and could not have been reasonably discovered prior to that time.

33. **Limitation of actions** generally see Limitations of Actions, 25 Cyc. 963.

In the absence of such provision delay in bringing suit will not affect the right. Garrett *v.* Stevenson, 8 Ill. 261.

Modification or repeal of statute.— The right which plaintiff has acquired by the completion of his contract to bring a suit under the law giving a mechanic's lien and the liability incurred by defendant to be sued are held to be the rights and liabilities under the law in force at the time the contract was made and, although such act was repealed before the lien was perfected, it will govern as to the notice to be given and the limitation of the time for service and for bringing suit. Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22; Weber *v.* Bushnell, 171 Ill. 587, 49 N. E. 728 [*reversing* 69 Ill. App. 26]. But in Mustin *v.* Vanhook, 3 Whart. (Pa.) 574, it was held that an act providing that after its passage no claim filed in pursuance of a mechanics' lien law should continue to be a lien for a longer period than five years from the day of filing same, etc., did not apply to claims which had been filed before the passage of the act. To the same effect see Walker *v.* Walton, 1 Ont. App. 579 [*reversing* 24 Grant Ch. (U. C.) 209], holding that the Interpretation Act providing that the repeal of a statute at any time shall not affect any act done or right or rights of action existing, accruing, accrued, or established before the time when such repeal shall take effect, will keep in force the period prescribed by the mechanic's lien statute under which the lien was acquired. And in Bear Lake, etc., Waterworks, etc., Co. *v.* Garland, 164 U. S. 1, 17 S. Ct. 7, 41 L. ed. 327, it was held that a subsequent statutory provision enlarging the time will apply to one who at the time of the passage of the new law had only entered upon the work. See also Sedgwick *v.* Concord Apartment House Co., 104 Ill. App. 5.

action,[34] and if it is not observed the right to enforce the lien will be barred or the lien itself discharged.[35] But where the owner discharges the lien, under the provisions of the statute, by a deposit of the money in court, it is held that the limitation of a year prescribed for commencing an action or procuring an order continuing the lien has no application.[36]

b. Parties Affected. The action may be properly dismissed at the instance of a defendant other than the owner when it is not commenced within the prescribed period,[37] and the lien of another encumbrancer who is a necessary party to the foreclosure proceeding will prevail over a mechanic's lien if such encum-

34. Dunning *v.* Stovall, 30 Ga. 444.

35. *Alabama.*—Seibs *v.* Engelhardt, 78 Ala. 508.

California.— Green *v.* Jackson Water Co., 10 Cal. 374.

Illinois.— McIntosh *v.* Schroeder, 154 Ill. 520, 39 N. E. 478 [*affirming* 55 Ill. App. 149]; Huntington *v.* Barton, 64 Ill. 502; Rittenhouse *v.* Sable, 43 Ill. App. 558.

Indiana.— Close *v.* Hunt, 8 Blackf. 254; Kulp *v.* Chamberlain, 4 Ind. App. 560, 31 N. E. 376.

Iowa.— Gates *v.* Ballou, 56 Iowa 741, 10 N. W. 258 (holding that a contract for a mechanic's lien in which it is agreed that the mechanic shall have a lien "until the sum is paid," but which provides for payment at a date within the statutory period of limitations, is not a waiver of the limitation); Squier *v.* Parks, 56 Iowa 407, 9 N. W. 324; Gilcrest *v.* Gottschalk, 39 Iowa 311.

Kentucky.— Stagner *v.* Woodward, (1886) 1 S. W. 583.

Maine.— Foss *v.* Desjardins, 98 Me. 539, 57 Atl. 881; Oakland Mfg. Co. *v.* Lemieux, 98 Me. 488, 57 Atl. 795; Dole *v.* Bangor Auditorium Assoc., 94 Me. 532, 48 Atl. 115.

Massachusetts.—Davis *v.* Arthur, 170 Mass. 449, 49 N. E. 739; Gilson *v.* Emery, 11 Gray 430; Hilliard *v.* Allen, 4 Cush. 532.

Michigan.— See Hall *v.* Erkfitz, 125 Mich. 332, 84 N. W. 310.

Minnesota.—Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; Steinmetz *v.* St. Paul Trust Co., 50 Minn. 445, 52 N. W. 915; Burbank *v.* Wright, 44 Minn. 544, 47 N. E. 162.

Mississippi.— Dinkins *v.* Bowers, 49 Miss. 219; Jones *v.* Alexander, 10 Sm. & M. 627.

Nebraska.— Calkins *v.* Miller, 55 Nebr. 601, 75 N. W. 1108; Monroe *v.* Hanson, 47 Nebr. 30, 66 N. W. 12; Burlingim *v.* Cooper, 36 Nebr. 73, 53 N. W. 1025.

New Jersey.— Somers Brick Co. *v.* Souder, (Ch. 1905) 61 Atl. 840.

New York.— Terwilliger *v.* Wheeler, 81 N. Y. App. Div. 460, 81 N. Y. Suppl. 173; Prior *v.* White, 32 Hun 14; Noyes *v.* Burton, 29 Barb. 631, 17 How. Pr. 449; Paine *v.* Bonney, 4 E. D. Smith 734, 6 Abb. Pr. 99; Fettrich *v.* Totten, 2 Abb. Pr. N. S. 264.

Oregon.— Capital Lumbering Co. *v.* Ryan, 34 Oreg. 73, 54 Pac. 1093; Coggan *v.* Reeves, 3 Oreg. 275; Willamette Falls, etc., Milling Co. *v.* Perrin, 1 Oreg. 182.

Pennsylvania.— Hern *v.* Hopkins, 13 Serg. & R. 269; Williams *v.* Tearney, 8 Serg. & R. 58.

Tennessee.— Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136; Kay *v.* Smith, 10 Heisk. 41; Furguson *v.* Ellis, 6 Humphr. 268.

Vermont.— Piper *v.* Hoyt, 61 Vt. 539, 17 Atl. 798.

Virginia.— Richmond Sav. Bank *v.* Powhatan Clay Mfg. Co., 102 Va. 274, 46 S. E. 294.

Washington.— Peterson *v.* Dillon, 27 Wash. 78, 67 Pac. 397.

West Virginia.— Phillips *v.* Roberts, 26 W. Va. 783.

United States.— McClellan *v.* Withers, 15 Fed. Cas. No. 8,696, 4 Cranch C. C. 668; Waller *v.* Dyer, 29 Fed. Cas. No. 17,108, 5 Cranch C. C. 571.

Canada.— McLennan *v.* Winnipeg, 3 Manitoba 474; McLaren *v.* Loyer, 3 Quebec Pr. 60.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 418, 456.

Limitation of proceeding in rem inapplicable.— In Princeton School Town *v.* Gebhart, 61 Ind. 187, it was held that an action by a subcontractor under the statute which gave him a personal action against the owner under certain conditions to the extent of the amount due from the owner to the contractor was not affected by the limitation prescribed in another section for the commencement of proceedings *in rem* against the building.

Compelling enforcement see *supra*, VIII, C, 1.

36. Hafker *v.* Henry, 5 N. Y. App. Div. 258, 39 N. Y. Suppl. 134; Perini *v.* Schmyg, 24 Misc. (N. Y.) 761, 53 N. Y. Suppl. 946, which cases hold that in the event of such deposit no order for the continuance of the lien is necessary to support a foreclosure proceeding instituted more than a year from the date of the filing of the lien.

And where the owner discharges the lien by a bond in pursuance of the statute the land is no longer liable and the provision requiring an action to be commenced to enforce the lien and a *lis pendens* to be filed within a prescribed time does not apply. Sheffield *v.* Robinson, 73 Hun (N. Y.) 173, 25 N. Y. Suppl. 1098 [*following* Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674].

37. Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; Steinmetz *v.* St. Paul Trust Co., 50 Minn. 445, 52 N. W. 915.

Under statute for bringing in parties at any time.—But a provision of the lien limiting the force and effect of the lien to a certain period before suit brought to enforce it in connection with another provision permitting other lien

brancer is not made a party to the mechanic's proceeding within the statutory period.[38] The statute sometimes particularly provides the period within which proceedings must be commenced as against other creditors and encumbrancers, the effect of which is that if the proceeding is not brought within the time prescribed, the lien becomes unavailable as against such other creditors and encumbrancers;[39] but with this provision it is held that the owner has no concern and of the violation of it only the creditor or encumbrancer who comes within it can complain.[40] One lien claimant who is made a party defendant to the suit of another lien claimant must assert his lien in such suit within the period fixed by the statute for the bringing of proceedings to enforce such liens,[41] but the filing

claimants to be brought in at any time before trial, has been held to fix the time within which the suit must be brought only as against the owner and not to require as against other lien claimants that the action should be brought within such period. San Juan Hardware Co. *v.* Carrothers, 7 Colo. App. 413, 43 Pac. 1053.

As to each defendant against whom the action must be commenced within a limited time the action is commenced and pending only from the time of service of summons on him or his appearance without service. Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661, holding that there is no such unity of interest between the legal owner and a lien-holder, whether by mortgage, mechanic's lien, or otherwise, as to make service of summons on one equivalent to service on the other.

38. Martin *v.* Berry, 159 Ind. 566, 64 N. E. 912; Union Nat. Sav., etc., Assoc. *v.* Helberg, 152 Ind. 139, 51 N. E. 916, under a statutory provision that the lien shall be null and void if the proceeding is not commenced within the prescribed period. See also *infra*, VIII, F, 4, c; VIII, G, 3, b, (VII).

39. Rietz *v.* Coyer, 83 Ill. 28; Cook *v.* Vreeland, 21 Ill. 431.

Necessity to join as parties in time.— Under a statute providing that "no creditor shall be allowed to enforce the lien created under the foregoing provisions, as against or to the prejudice of any other creditor or any encumbrance unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due and payable," as applied to liens created by trust deed, the *cestui que trust* is the real creditor intended, and to postpone his lien to that of the mechanic or materialman he must be made a party to the proceeding for the enforcement of the lien within the six months therein limited. McGraw *v.* Bayard, 96 Ill. 146; Clark *v.* Manning, 95 Ill. 580; Dunphy *v.* Riddle, 86 Ill. 22; Lamb *v.* Campbell, 19 Ill. App. 272; Phœnix Mut. L. Ins. Co. *v.* Batcheu, 6 Ill. App. 621. So under statute in Ontario a prior mortgagee against whom relief is sought must be made a party to the action within the time limited. Montreal Bank *v.* Haffner, 10 Ont. App. 592; Larkin *v.* Larkin, 32 Ont. 80. But it is held that a subsequent mortgagee may be added before the master. Cole *v.* Hall, 13 Ont. Pr. 100. See also Hall *v.* Hogg, 14 Ont. Pr. 45.

40. Dunphy *v.* Riddle, 86 Ill. 22 (holding that the statute does not apply to a purchaser from the owner); Jennings *v.* Hinkle, 81 Ill. 183; Van Pelt *v.* Dunford, 58 Ill. 145; Central Bldg. Co. *v.* Karr Supply Co., 115 Ill. App. 610. See also Moore *v.* Parrish, 50 Ill. App. 233.

A subcontractor is not a creditor within the meaning of such provision but must bring his suit within the period prescribed for the bringing of suits to enforce subcontractor's liens. Maxwell *v.* Koeritz, 35 Ill. App. 300. See also Green, etc., Lumber Co. *v.* Bain, 77 Ill. App. 17.

An extension of the time for making payment, by agreement between the materialman and the owner, cannot, as against a subsequent mortgagee, extend the time for bringing suit to enforce the lien, and unless such suit is brought within the time limited by statute the lien is lost as against a subsequent mortgagee. Brown *v.* Moore, 26 Ill. 421, 79 Am. Dec. 383.

41. Burns *v.* Phinney, 53 Minn. 431, 55 N. W. 540. But see Abham *v.* Boyd, 5 Daly (N. Y.) 321; Neuchatel Asphalt Co. *v.* New York, 9 Misc. (N. Y.) 376, 30 N. Y. Suppl. 252; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008, where defendant's lien is not lost on account of the time of filing his cross complaint, the court acquiring jurisdiction of all subsequent proceedings in the cause by the timely commencement of his original suit. In Louisiana where plaintiff tendered the amount it owed, and offered its bond in payment of the claims of materialmen, *in concurso*, this precluded prescription against the creditors, who did not file an appearance within six months, as required by the contract. Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 28 So. 217.

Interveners must proceed in time.— Davis *v.* Arthur, 170 Mass. 449, 49 N. E. 739, where the lienor had not filed an independent petition within the time prescribed and therefore his petition in intervention after the time prescribed was held to be too late [Angier *v.* Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630, being distinguishable in that the filing of the intervening petition after the prescribed period was held to be in time because the petitioner had already filed an independent petition setting up his lien]. But see Neuchatel Asphalte Co. *v.* New York, 12 Misc. (N. Y.) 26, 33 N. Y. Suppl. 64. But under the provision that any action brought by a lien-holder should be taken to be

of an answer,[42] or a petition in intervention within the time prescribed is as effectual as the bringing of an independent proceeding,[43] and it will not matter that plaintiff's lien is barred in so far as the right of defendant or intervener to proceed for the establishment of his lien is concerned.[44]

2. When Suit May Be Brought in General — Prematurity. One in whose favor the law creates a mechanic's lien may sue to enforce it when the amount due him is payable, in the absence of any statutory restriction in that regard,[45] and ordinarily such lien cannot be enforced until the debt for which the lien is security has become payable or the term of credit has expired.[46] If the statute expressly provides that the proceeding may be taken after a certain time within which the money due is to be paid, it fixes a point of time before which the suit cannot be brought, and if commenced before that time it is premature.[47] Where the lien law expressly authorizes a lien to be filed in anticipation of work to be done and materials to be furnished, and further expressly requires that the action to fore-

brought on behalf of all other lien-holders, it was held that the claims of subsequent encumbrancers and other lien-holders might be disposed of at the trial by making such claimants parties to the action and, although the notice of trial had been served after the time limited for bringing the action. Robock *v.* Peters, 13 Manitoba 124.

42. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454. *Compare* Coggan *v.* Reeves, 3 Oreg. 275.

43. Mars *v.* McKay, 14 Cal. 127. See also Hughes *v.* Hoover, (Cal. App. 1906) 84 Pac. 681, as to the commencement of an action in time by filing a cross complaint. But where the law requires all liens to be adjudicated in one proceeding it is held that a petition by interveners is unnecessary. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24; Elliot *v.* Ivers, 6 Nev. 287.

44. Burns *v.* Phinney, 53 Minn. 431, 55 N. W. 540; Sandberg *v.* Palm, 53 Minn. 252, 54 N. W. 1109, 55 N. W. 540. See also *supra*, VIII, D, 5, b.

45. Weeks *v.* Walcott, 15 Gray (Mass.) 54; Iaege *v.* Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

46. *Arkansas.*—Hicks *v.* Branton, 21 Ark. 186.

California.— Harmon *v.* Ashmead, 60 Cal. 439, holding, however, that if the action is brought before the building is completed under a contract providing for payment upon the completion of the building, and the building is completed pending suit, the complaint may be amended.

Florida.— Pitt *v.* Acosta, 18 Fla. 270.

Illinois.— Kinney *v.* Hudnut, 3 Ill. 472.

Kentucky.— Hardin *v.* Marble, 13 Bush 58.

Maryland.— Thomas *v.* Turner, 16 Md. 105.

Canada.— Burritt *v.* Renihan, 25 Grant Ch. (U. C.) 183.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 458.

A subcontractor cannot enforce his lien unless payment is due the contractor. Pitt *v.* Acosta, 18 Fla. 270; Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604; Preusser *v.* Florence, 4 Abb. N. Cas. (N. Y.) 136, 51 How. Pr. 385; McCrary *v.* Bristol Bank, etc., Co., 97 Tenn. 469, 37 S. W. 543, holding, however, that the subcontractor may recover a decree for his debt against the contractor and have his lien declared against the property to be thereafter enforced by proper proceedings when the building has been completed and accepted. In McLennon *v.* Winnipeg, 3 Manitoba 474, it is held that whether anything is due the contractor is a matter to be ascertained in the master's office after the right to a lien on the fund is established.

Provision in decree for future instalments. — A statute requiring a suit to enforce the lien within six months from the time when the money or the last instalment of the money to be paid under the contract shall become payable, was held to be intended to give the mechanic the right to assert the lien for all instalments whenever due, provided he commences his suit before the expiration of six months after the last instalment becomes due, but not to prevent him from proceeding for future instalments before the last becomes payable; that where other instalments become due after the bill is filed and pending the suit, the court may decree payment of all instalments that have fallen due up to the time of the decree and if any become due thereafter may provide that the party may come in at the foot of the decree to obtain satisfaction out of the surplus proceedings, if any there should prove to be. Iaege *v.* Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189. But see Burritt *v.* Renihan, 25 Grant Ch. (U. C.) 183.

47. Knickerbocker Ice Co. *v.* Kirkpatrick, 51 Ill. App. 60; Millsap *v.* Ball, 30 Nebr. 728, 46 N. W. 1125, holding that the pleading may be withdrawn and refiled after the expiration of the statutory period.

Waiver of objection.— But should defendant go to trial on the merits of the lien, filing counter-claim for damages, and make no objection because the action was brought within the period, he will waive the objection that the action was prematurely brought. Fulkerson *v.* Kilgore, 10 Okla. 655, 64 Pac. 5; El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

Attempt to commence action see *infra*, VIII, F, 4, a.

close the lien shall be commenced within a certain period after the lien has been filed, the lienor is entitled to bring his action within the prescribed period after filing his lien, although the full amount of his labor or materials may not then be due and he is entitled to foreclose and to recover all that has become due up to the time of the trial if anything was due at the commencement of the action.[48]

3. When Period Begins to Run — a. In General. The point from which the statutory period runs depends entirely upon and must be gathered from the statute itself.[49]

b. Filing of Lien Claim or Statement. Under various provisions the proceeding to enforce a mechanic's lien is to be brought within a fixed time from the filing of the lien or claim.[50]

c. Maturity of Claim or Accrual of Indebtedness — (I) *In General.* So the lien proceeding must be commenced within the prescribed period after the accrual of the indebtedness or the arrival of the time of payment,[51] or the expiration of

48. Ringle *v.* Wallis Iron Works, 85 Hun (N. Y.) 279, 32 N. Y. Suppl. 1011. But where one section of the statute requires a statement of the amount due to be filed within sixty days after the party has ceased to work or furnish material and another section provides that the lien shall be deemed dissolved unless the action is brought to enforce it within six months from the date of filing the account, it is held that as the action cannot be maintained until payment has become due, the lien is lost if the contract fixes a time of payment beyond the period limited for commencing the proceedings to foreclose. Hardin *v.* Marble, 13 Bush (Ky.) 58.

49. See *infra*, VIII, F, 3, b–d.

Computation of time.— In Phœnix Planing Mill Co. *v.* Harrison, 108 Mo. 603, 84 S. W. 174, it was held that a statutory provision that the time within which an act is to be done shall be computed by excluding the first day and including the last does not apply to the provision of the Mechanics' Lien Law that actions to enforce such liens shall be commenced within ninety days of the filing of the lien, so as to give force to an objection that a suit begun on the same day the lien was filed but after the filing of the lien is prematurely brought, the purpose of the provision of the statute being merely to prevent the lien from standing against the property without an action to enforce it for more than ninety days and not to prevent a suit from being brought on the same day that the lien is filed. But in Haden *v.* Buddensick, 49 How. Pr. (N. Y.) 241, under a statute requiring an action to be brought within a year unless the lien should be continued by an order of court, it was held that where plaintiff did not have the whole of the day on which the lien notice was filed to bring his action or proceeding to foreclose the lien the day of filing should be excluded and the last day on which the lien could be continued should be included, the court holding that the law ordinarily takes no notice of fractions of the day and that it is only when the precise hour becomes material, as for instance in ascertaining the priority of liens, that a different rule obtains. See also McLennan *v.* Winnipeg, 3 Manitoba 474.

When the last day falls on Sunday, the attachment made on the following day is too late under the rule that when the time limited is such as must necessarily include one or more Sundays, those days are to be included unless they are expressly excluded or the intention of the legislature to exclude them appears manifest. Oakland Mfg. Co. *v.* Lemieux, 98 Me. 488, 57 Atl. 795; Bowes *v.* New York Christian Home, 64 How. Pr. (N. Y.) 509; Williams *v.* Lane, 87 Wis. 152.

50. *California.*—Bradford *v.* Dorsey, 63 Cal. 122.

Colorado.— Hart, etc., Corp. *v.* Mullen, 4 Colo. 512, holding that if the lien is filed within the period limited therefor, nevertheless the limitation will run from the filing.

Illinois.— McIntosh *v.* Schroeder, 154 Ill. 520, 39 N. E. 478.

Iowa.— The fact that the failure to file the lien will not necessarily destroy it does not relieve from the necessity of bringing the suit within the statutory period from the time when the lien should have been filed. Squier *v.* Parks, 56 Iowa 407, 9 N. W. 324; Gilcrest *v.* Gottschalk, 39 Iowa 311.

Missouri.— Lee *v.* Chambers, 13 Mo. 238; Phœnix Planing Mill Co. *v.* Harrison, 108 Mo. App. 603, 84 S. W. 174.

Nebraska.— Pardue *v.* Missouri Pac. R. Co., 52 Nebr. 201, 71 N. W. 1022, 66 Am. St. Rep. 489; Monroe *v.* Hanson, 47 Nebr. 30, 66 N. W. 12.

Oregon.— Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 460.

51. Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22; Johnson *v.* Pike, 35 Me. 291; Dinkins *v.* Bowers, 49 Miss. 219; Jones *v.* Alexander, 10 Sm. & M. (Miss.) 627; Iaege *v.* Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

From date of award.— Where the contract provides for a submission to arbitration under certain contingencies, in case of such submission the date of the award will fix

the term of credit where credit is given;[52] and a statute which prescribes a limitation of a number of days within which to enforce the lien by proper proceedings after the expiration of a credit given does not, without more, refer only to liens based on direct contract with the owner.[53] But if no credit is given by the contractor the debt becomes due when the material is furnished,[54] or when the contract has been performed.[55]

(II) *From Last Item of Account.* The last item on an account filed, in the absence of anything else showing that it matured by agreement at a different date, may be treated as the date of the indebtedness sought to be secured by lien.[56]

(III) *Payments Due in Instalments.* And under some of the statutes where the payments become due in instalments, the proceedings may be brought within the time prescribed after the payment of the last instalment is due.[57]

d. Completion of Work or Furnishing Material — (I) *In General.* Under statutory provisions requiring suit to be brought within a prescribed period after the work is completed or materials furnished, the completion of the whole building is contemplated with reference to the work of the original contractor who undertakes to erect a building, or the completion of the particular work of a subcontractor who undertakes to do a part of the work of construction.[58] And where the limitation prescribed is from the time the material is furnished or labor

the maturity of the debt with respect to the running of the statute of limitations. Kirby *v.* Tead, 13 Metc. (Mass.) 149.

Date of architect's certificate.— Where the contract fixes a date of completion and provides for payment on certificates of the architect, who was authorized to make deductions from or additions to the contract price on account of alterations and find the balance due and give his certificate therefor, a bill filed within the statutory period after the final certificate of the architect is given is in time. Joseph N. Eisendrath Co. *v.* Gebhardt, 222 Ill. 113, 78 N. E. 22.

52. Schneider *v.* Kolthoff, 59 Ind. 568, holding that where the notice does not state that credit has been given subsequent encumbrancers may assume that no credit has been given.

Where the contract provides for a time note when the work should be complete, the limitation will run from the maturity of the note provided for, and if the note is not executed it will run from the date when the note would have matured if it had been executed. Wheeler *v.* Schroeder, 4 R. I. 383. See also Pitt *v.* Acosta, 18 Fla. 270. But where, after the time fixed in the contract for payment has elapsed, a note is given for the amount due for materials furnished, the statutory period will run from the date of the maturity of the debt under the contract and not from the date of the maturity of the note. Jones *v.* Alexander, 10 Sm. & M. (Miss.) 627. But see otherwise in Bonsall *v.* Taylor, 5 Iowa 546; Mix *v.* Ely, 2 Greene (Iowa) 513.

53. Hughes *v.* Hoover, (Cal. App. 1906) 84 Pac. 681. And in Meeks *v.* Sims, 84 Ill. 422, it was held that a subcontractor's proceeding is in time if filed within the prescribed period after the money is due the original contractor, although more than that time has expired since the subcontractor's debt became due from the original contractor.

54. Hill *v.* Stagg, Wils. (Ind.) 403.

55. Hamilton *v.* Naylor, 72 Ind. 171; Piper *v.* Hoyt, 61 Vt. 539, 7 Atl. 798.

Time extended.— If payment is due on completion of the contract, and the time of completion is extended, the time for bringing the action will be extended. Sedgwick *v.* Concord Apartment House Co., 104 Ill. App. 5.

56. Garrison *v.* Hawkins Lumber Co., 111 Ala. 308, 20 So. 427; Merchand *v.* Cook, 4 Greene (Iowa) 115; Stine *v.* Austin, 9 Mo. 558.

57. Hughes *v.* Hoover, (Cal. App. 1906) 84 Pac. 681; McClallan *v.* Smith, 11 Cush. (Mass.) 238. But in Capital Lumbering Co. *v.* Ryan, 34 Oreg. 73, 54 Pac. 1093, it was held under a provision that no lien should be binding for longer than a fixed time after it should have been filed or after the expiration of credit given unless suit should be brought within such time that it was not necessary to wait until the last instalment became due before bringing suit and that instalments maturing more than the prescribed time before suit is brought are barred. This case is distinguished in Hughes *v.* Hoover, *supra*, in that the right to a lien is a constitutional right in California and that the statute did not relate to the right itself.

58. Hamilton *v.* Naylor, 72 Ind. 171; Longest *v.* Breden, 9 Dana (Ky.) 141; Kay *v.* Smith, 10 Heisk. (Tenn.) 41.

Where the contractor fails to perform his contract and the building is completed by the owner, the time will run in favor of the materialman from the completion by the owner where it would have run in favor of the materialman only from the completion by the contractor, the owner completing the building under the terms of the contract authorizing him so to do. Hughes *v.* Hoover, (Cal. App. 1906) 84 Pac. 681.

Where the subcontractor was discharged before he had completed his work, the time

performed, the period will run from the time the last material was furnished,[59] or from the completion of the work where continuous labor is performed under the entire contract.[60] Where the contract is entire and the building is substantially completed and is treated by all parties as completed the limitation will run, although there may be minor and unimportant details of the work left undone, especially if intervening rights have attached in favor of third persons.[61]

(II) *Successive Deliveries and Continuing Contracts.* Where the work is done or materials furnished at different times under one contract, the time will begin to run from the date of the last work, or at the time the last item of material was furnished.[62] But a single lien cannot cover several distinct improvements made at different times and independent of each other; in such a case the suit must be brought within the statutory period after the labor on the particular improvement is finished in order to enforce a lien for that improvement,[63] and suit must be commenced within the statutory period after the last materials were furnished,[64] or the last work was performed.[65]

4. Commencement and Prosecution of Suit[66] — a. In General. The statute contemplates and requires the timely commencement of the appropriate proceeding which it provides as the medium for the enforcement of the lien,[67] and what will

runs from that day under the statute making the lien continue only for a prescribed period after the doing of the work or furnishing of the material. Huntington *v.* Barton, 64 Ill. 502.

If a lienee induces a termination of the contract before it is completed by the lienor, the limitation runs from that time, nothing further having been done under the contract thereafter. Freeto *v.* Houghton, 58 N. H. 100. In South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894, after a default by the lienee and notice by the lienors that they considered the contract annulled by reason of such breach but that they would continue work for a designated number of days longer and at the end of such time they renewed their previous notice except that part of it declaring the contract annulled, a suit brought within the statutory period from the actual time when the lienors stopped work was held to be in time.

59. Pike *v.* Scott, 60 N. H. 469.

A provision for periodical payments on account of the contract price was held not to change the rule that under a provision limiting the time for enforcing the lien to a fixed period "from the time of performance of the sub-contractor or doing the work or furnishing the materials," a suit to enforce a lien for materials furnished from time to time on the entire contract may be brought within the prescribed period from the furnishing of the last materials. Cary-Lombard Lumber Co. *v.* Fullenwider, 150 Ill. 629, 37 N. E. 899.

60. Hill *v.* Callahan, 58 N. H. 497.

61. Luter *v.* Cobb, 1 Coldw. (Tenn.) 525.

62. McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470; O'Leary *v.* Burns, 53 Miss. 171; Fowler *v.* Bailley, 14 Wis. 125.

63. Baker *v.* Fessenden, 71 Me. 292. In Indiana the law gives a lien for articles furnished at different times under different contracts, as to such articles furnished within a prescribed time next preceding the filing of notice of intention to hold a lien. Indiana Mut. Bldg., etc., Assoc. *v.* Paxton, 18 Ind. App. 304, 47 N. E. 1082.

Commencement of delivery. — In Gurney *v.* Walsham, 16 R. I. 698, 19 Atl. 323, under a statute which required the commencement of proceedings within a prescribed period from the time of the commencing of the doing of the work or of the delivery of materials, it was held that, although an account was lodged more than the statutory period after the commencement of delivery of the material, the materialman was entitled to have any delivery within the statutory period before the account was lodged regarded as the time for commencing the delivery for materials then or subsequently where each delivery was a separate transaction.

64. Foss *v.* Desjardins, 98 Me. 539, 57 Atl. 881.

Different orders for separate improvements. — Where material was ordered at different times for separate improvements and the amount due was computed and settled from time to time when notes were given by the purchaser for the balances due, it was held that the continuity was broken and that as to material furnished under the earlier contracts limitation began to run before the date of the last item furnished under the last contract. Hoag *v.* Hay, 103 Iowa 291, 72 N. W. 525.

65. Bement *v.* Trenton Locomotive Co., 31 N. J. L. 246, holding that under the Lien Law of 1853, although the last work actually performed was within the year, the suit could not be maintained because the last item in the bill of particulars was more than a year previous to the commencement of the suit.

66. **Claims by defendants or interveners** see *supra*, VIII, F, 1, b.

67. Coggan *v.* Reeves, 3 Oreg. 275; Williams *v.* Tearney, 8 Serg. & R. (Pa.) 58, holding that entering judgment on a bond with warrant of attorney is not filing a claim or instituting a suit within the meaning of the Mechanics' Lien Law and will not preserve the lien.

constitute a commencement of the proceeding differs in the various jurisdictions as the statutory provisions in that regard differ. Under some of the statutes the suit is commenced within the limitation period when the summons is issued within that period,[68] although it may be served afterward.[69] Under other provisions the proceedings are commenced when the summons is delivered to the officer followed by service as the statute prescribes;[70] and under still other provisions the proceedings must be commenced by the filing of a complaint,[71] bill, or petition, the filing of which within the statutory period is sufficient without regard to the time of service of process or other steps necessary to be taken in the progress of the cause.[72] Where the statute requires an attachment within the limitation prescribed in order to preserve the lien, the mere commencement of

68. Flandreau *v.* White, 18 Cal. 639; Green *v.* Jackson Water Co., 10 Cal. 374; Calkins *v.* Miller, 55 Nebr. 601, 75 N. W. 1108; Burlingim *v.* Cooper, 36 Nebr. 73, 53 N. W. 1025; Bement *v.* Trenton Locomotive Co., 31 N. J. L. 246 [*affirmed* in 32 N. J. L. 513].

69. Spofford *v.* Huse, 9 Allen (Mass.) 575; Burlingim *v.* Cooper, 36 Nebr. 73, 53 N. W. 1025.

70. Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; Steinmetz *v.* St. Paul Trust Co., 50 Minn. 445, 52 N. W. 915 (which cases hold that under the statute as to the commencement of actions generally, a mechanic's lien action is commenced when the summons is served on defendant or is delivered to the sheriff with the intention that it shall be served and followed by the first publication of the summons or the service within sixty days); Brown *v.* Wood, 2 Hilt. (N. Y.) 579 (as to service of notice requiring the owner to appear and submit to an accounting, etc.). But see Kelsey *v.* Rourke, 50 How. Pr. (N. Y.) 315, under a provision requiring service on the contractor within a year, holding that leaving the process with the officer with the intent to have the same served was not sufficient. In Gee *v.* Torrey, 77 Hun (N. Y.) 23, 28 N. Y. Suppl. 239, it was held that under an act providing that an action to enforce a mechanic's lien on an oil well shall be commenced in the same manner as actions to enforce liens under an earlier act which provided for commencement by service of notice, the proceeding will be deemed to have been commenced when notice has been delivered to the sheriff for service under the provision of the New York code of civil procedure that an attempt to commence an action is equivalent to the commencement when the summons is delivered to the sheriff. And under N. Y. Laws (1885), c. 342, providing for the expiration of a mechanic's lien in a designated time unless within that time an action is commenced, and also providing that such action shall be instituted in the same manner as a mortgage foreclosure, provision being made for a mode of commencing an action in a court not of record directing service of summons in the former case, it was held that in the case of a proceeding in a court of record the lien is preserved by delivery of the summons to the sheriff for service within the prescribed time for commencing proceedings, although it is not served until after that time has expired. Hammond *v.* Shephard, 50 Hun (N. Y.) 318, 3 N. Y. Suppl. 349. *Compare* Wright *v.* Roberts, 8 N. Y. Suppl. 745.

71. Coggan *v.* Reeves, 3 Oreg. 275, holding that the fact that a defendant in a suit to foreclose a mortgage sets up his lien in an answer thereto does not relieve him of the necessity of filing his complaint as required by the statute. See also Noyes *v.* Burton, 29 Barb. (N. Y.) 631 17 How. Pr. 449.

72. *California.*— Van Winkle *v.* Stow, 23 Cal. 457, distinguishing the earlier cases cited in this section upon the difference in the terms of the statutes.

Illinois.— Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, 7 N. E. 498; Work *v.* Hall, 79 Ill. 196.

Indiana.— Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266.

Massachusetts.— The petitioner, by bringing his petition to the clerk's office and placing it there in the hands of the clerk to be filed, had done all that was necessary on his part. He had filed the petition within the meaning of the law. It was the duty of the judge presiding in the court where the cause was pending to ascertain when this was done, and on a motion to dismiss it may be shown by parol evidence that the petition was filed in time. Goulding *v.* Smith, 114 Mass. 487.

Michigan.— Casserly *v.* Waite, 124 Mich. 157, 82 N. W. 841, 83 Am. St. Rep. 320; Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120; Sheridan *v.* Cameron, 65 Mich. 680, 32 N. W. 894.

Mississippi.— Christian *v.* O'Neal, 46 Miss. 669.

Missouri.— Gosline *v.* Thompson, 61 Mo. 471.

Rhode Island.—The statute defines the commencement of legal process which is required for enforcing the lien as the lodging of an account or demand for which the lien is claimed in the office of the town-clerk or recorder of deeds, etc., and a petition is required to be filed within a certain number of days after the lodging of such demand. This demand may be lodged at the same time as the notice to the owner of an intention to claim the lien, but it is a separate step and must be sufficient under the statute in order to support a petition filed within the prescribed time after its lodgment. Goff *v.* Hosmer, 20 R. I. 91, 37 Atl. 533; Tingley *v.* White, 17 R. I. 533, 23 Atl. 100.

suit in time will not avail if the attachment of the property is not effected.[73] Under the provisions of some statutes the lien may be preserved by an unsuccessful attempt to commence the action within the prescribed period.[74]

b. Prosecution — Diligence. The requirements of the statute in respect of the steps to be taken in the prosecution of the lien claim must be pursued,[75] and a diligent prosecution of a mechanic's lien suit has been required in order to preserve the lien as against innocent parties without notice;[76] but a provision requiring diligence in the prosecution of the proceeding within a prescribed time after the issuance of the summons does not prescribe a time after which a judgment cannot be entered,[77] and a provision limiting the period during which the lien may

South Carolina.— Oliver *v.* Fowler, 22 S. C. 534.

Washington. — Service *v.* McMahon, 42 Wash. 452, 85 Pac. 33, under a general provision in relation to limitations that an action should be deemed commenced when the complaint was filed and holding that an action is barred if the complaint is not filed in time, although summons may be served on some of defendants within that time.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 465.

73. See *infra*, VIII, H, 2.

74. Gee *v.* Torrey, 77 Hun (N. Y.) 23, 28 N. Y. Suppl. 239; Hammond *v.* Shephard, 50 Hun (N. Y.) 318, 3 N. Y. Suppl. 349, which cases hold that the provision of the New York code of civil procedure that an attempt to commence an action is equivalent to the commencement when the summons is delivered to the sheriff applies to a proceeding to foreclose a mechanic's lien whether such proceeding is regarded as an action or special proceeding.

New summons after defective service.— Under a statute providing for the issuing of a new summons where there is defective service and that service of the new summons shall be as effectual as if service had been made and returned on the original, service of a new summons issued after the expiration of the statutory period for bringing the proceeding because of a defective service of the original summons is effectual to preserve the claim. Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389 [*reversed* on other grounds in 27 N. J. Eq. 604].

New action after dismissal.—Under a clause of the Mechanics' Lien Law Act providing that the general provisions of the code of civil procedure shall apply except as otherwise designated in the act, it is held that the provision that where a judgment is reversed or the action fails otherwise than upon the merits after the statute of limitations would bar a new action the parties shall have a year in which to bring a new action, applies to a mechanic's lien proceeding. Seaton *v.* Hixon, 35 Kan. 663, 12 Pac. 22; Rice *v.* Brown, 1 Kan. App. 646, 42 Pac. 396. But see *contra*, Walker *v.* Burt, 57 Ga. 20, where, however, it does not appear that the Mechanics' Lien Law contained any provision under which the general saving statute could be applied.

75. Wheeler *v.* Almond, 46 N. J. L. 161 (holding that a requirement that the time of issuing summons to enforce the lien shall be indorsed on the claim within one year after the date of the latest item in the claim or within thirty days after notice from the owner to the claimant to sue is mandatory); Mushlitt *v.* Silverman, 50 N. Y. 360 (holding that a lien is discharged by the omission of the lienor to file an affidavit of the issue or service of a summons and complaint in an action to enforce the lien within thirty days after the time specified in a notice by the owner requiring the commencement of an action by the lienor as required by the statute). See also *supra*, VIII, C, 1.

76. Erhman *v.* Kendrick, 1 Metc. (Ky.) 146, holding that the failure to prosecute to a decree for four years will deprive the lien of its validity as against a subsequent mortgagee without notice.

Provision in decree delaying enforcement.— Where judgment of foreclosure provided that it should not be enforced unless so directed by plaintiff and that the case should remain on the docket until further orders, and no sale having been directed an order was made four years later that the case be filed away subject to be redocketed, it was held that there was no such laches as would destroy the lien as against the debtor where the sale was made four years later by plaintiff's direction. Pittman *v.* Wakefield, 90 Ky. 171, 13 S. W. 525, 11 Ky. L. Rep. 972.

77. Ennis *v.* Eden Mills Paper Co., 65 N. J. L. 577, 48 Atl. 610, holding that under such a provision the lienor is not required to proceed to judgment within a year where the property has passed into the hands of a receiver because a judgment would have been useless.

Scire facias — *second writ after voluntary stay.*— But where a writ of scire facias on a mechanic's lien was voluntarily stayed by plaintiff's attorney, and a second writ was not issued until after the expiration of a year, such writ should be quashed, and the statement of claim stricken from the record for want of prosecution. Peninsular Lumber Co. *v.* Fehrenbach, 1 Marv. (Del.) 98, 37 Atl. 38.

To revive judgment.— And in Pennsylvania where more than five years after the filing of a claim the writ of scire facias was sued out to revive a judgment which had been entered on a scire facias nearly five years after the first writ issued, it was held that under the statute providing that the lien of the debt for which the claim shall be filed shall ex-

remain in force before action brought does not require that the action shall be prosecuted to final judgment within the time so limited, and if the action is brought within the time the judgment may be taken after the time has expired.[78]

c. **Amendment After Expiration of Period.** A defect which does not go to the validity of the lien, as a defect of that character in the pleading, may be cured by amendment, after the time limited for commencing proceedings;[79] but an amendment after the time limited to supply a step which is prerequisite to the validity of the lien itself cannot be allowed, the lien having been discharged by the omission.[80] Where the owner or an encumbrancer or other person acquiring an interest in the property which cannot be affected by the foreclosure proceeding in his absence from the record is originally omitted and thereafter brought in by amendment, the statutory bar will operate in his favor if the period expired before the date of the amendment because as to him the suit is commenced at the date of the amendment making him a party.[81]

G. Parties — 1. Persons Entitled to Enforce.[82] The person to whom the debt is due, who is the real party in interest, usually has the right to enforce the lien.[83] An assignee for the benefit of creditors[84] or a surety on a contractor's bond may enforce payment of lien of the contractor.[85] But it has been held that one

pire at the end of five years from the day on which the claim was filed, unless it shall be revived by scire facias in manner provided by law in case of a judgment, the scire facias to revive was unauthorized and should be stricken out. Morgan *v.* Blocker, 6 Pa. Dist. 659.

Notice to clerk of commencement of proceeding.— Under a statute in New York providing that a lien might be discharged among other modes by the entry of the clerk after the year has elapsed since the filing of the claim when no notice has been given to him of legal steps to enforce the lien, if proceedings have been commenced within a year a failure to give the notice to the clerk until after that period will not of itself invalidate the lien. Paine *v.* Bonney, 4 E. D. Smith (N. Y.) 734.

78. North Star Iron Works Co. *v.* Strong, 33 Minn. 1, 21 N. W. 740; Fox *v.* Kidd, 77 N. Y. 489 [*distinguishing* Glacius *v.* Black, 67 N. Y. 563; Benton *v.* Wickwire, 54 N. Y. 226; Freeman *v.* Cram, 3 N. Y. 305, in that these cases were decided under statutes limiting the existence of the lien in any event]; Pacific Mfg. Co. *v.* Brown, 8 Wash. 347, 36 Pac. 273, holding that where the provision requires the action to be brought within a prescribed time and adds, "but no lien shall continue in force . . . for a longer time than two years from the time the work is completed by agreement or credit given," this means that a lien cannot be maintained where credit for more than the prescribed time is given and not that final judgment cannot be obtained in any case after the expiration of two years. See also Dutton *v.* Herman, 22 Mo. App. 458.

79. See *infra*, VIII, I, 6.

Attempt to commence action see *supra*, VIII, F, 4, a.

80. Wheeler *v.* Almond, 46 N. J. L. 161, failure to indorse on claim the date of the issue of the summons.

81. Seibs *v.* Engelhardt, 78 Ala. 508; Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, 7 N. E. 498; Clark *v.* Manning, 95 Ill. 580; Crowl *v.* Nagle, 86 Ill. 437; Dunphy *v.* Riddle, 86 Ill. 22; Mosier *v.* Flanner-Miller Lumber Co., 66 Ill. App. 630; Rice *v.* Simpson, 30 Kan. 28, 1 Pac. 311; Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Peterson *v.* Dillon, 27 Wash. 78, 67 Pac. 397.

But the bringing in of the general contractor as a party defendant after the expiration of the statutory period in an action by a materialman or subcontractor will not affect the original action which was brought in time because he is not the party against whom the lien is to be enforced and is not interested in that phase of the litigation so as to require his presence when the suit is originally brought to save it from the operation of the limitation. Green *v.* Clifford, 94 Cal. 49, 29 Pac. 331; Western Sash, etc., Co. *v.* Heiman, 65 Kan. 5, 68 Pac. 1080; Casserly *v.* Waite, 124 Mich. 157, 82 N. W. 841, 83 Am. St. Rep. 320. *Contra*, Rumsey, etc., Co. *v.* Pieffer, 108 Mo. App. 486, 83 S. W. 1027; Bombeck *v.* Devorss, 19 Mo. App. 38. See also Kelsey *v.* O'Rourke, 50 How. Pr. (N. Y.) 315. And see *infra*, VIII, G, 3, b, (IX).

82. **Who may acquire lien** see *supra*, I, H.

83. See *infra*, VIII, G, 3, a, (I).

84. German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314. See also *supra*, V.

85. Hartman *v.* Berry, 56 Mo. 487; Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201, in which cases it appears that the surety on a contractor's bond may himself enforce the mechanic's lien in instances where the owner has not paid out the contract price, for a sum not exceeding what remains in the hands of the owner; that if the owner has been damaged in such manner as that the surety would be liable therefor, that sum may be deducted from the contract price in ascertaining whether the owner has anything in his hands due the contractor. But if the owner has paid out the contract price he cannot do

whose interest is merely in the subject-matter rather than in the lien cannot enforce such lien, and a judgment in his favor is unauthorized.[86]

2. Persons Entitled to Contest — a. In General. Any person who may be affected by the judgment enforcing a mechanic's lien may contest the same and show its invalidity, as a mortgagee or other lienor,[87] who may show fatal defects in the perfecting of the principal lien to enforce which the suit was instituted, as they have an interest to secure prior satisfaction of their own claims;[88] or the owner of the property at the time of the proceeding to enforce the lien, who was not a party to the contract for the credit.[89] And the grantee in a deed void as to the grantor's creditors but good as between the parties to it has sufficient interest to entitle him to contest the validity of such lien,[90] although where the owner recognizes the existence of the debt and validity of the lien, and sells the property subject to the lien, it has been held that the purchaser who thus takes the property cannot dispute the validity of the lien.[91] But one who has no interest in the property affected is not entitled to contest the validity of the lien.[92]

b. Contest by Contractor of Lien of Subcontractor. While a general contractor may contest the lien or claim of a subcontractor or materialman upon objections which go to that part of the matter in which the general contractor has an interest, as that the materials were never furnished, or had been paid for, or that the charge was excessive,[93] he has no concern with objections which affect only the owner of the building and cannot set them up to defeat the lien of a materialman or subcontractor if the owner is satisfied to forego the objections.[94]

3. Proper and Necessary Parties[95] — a. Plaintiff — (i) *In General.* The rule that an action should be brought by and in the name of the real party in

so. Fullerton Lumber Co. *v.* Gates, *supra*; Handley *v.* Ward, 70 Mo. App. 146.

86. Roberts *v.* Gates, 64 Ill. 374.

87. Walker *v.* Hauss-Hijo, 1 Cal. 183; Carson *v.* White, 6 Gill (Md.) 17; Wiltsie *v.* Harvey, 114 Mich. 131, 72 N. W. 134; Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472; *In re* Wells, 2 Del. Co. (Pa.) 172; McAdam *v.* Bailey, 1 Phila. (Pa.) 297.

Any person claiming an interest may contest the right to the lien and the amount of the claim. Jepherson *v.* Green, 22 R. I. 276, 47 Atl. 599.

Capacity to contract see *supra*, II, C, 4.

88. Wiltsie *v.* Harvey, 114 Mich. 131, 72 N. W. 134. But in Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64, a notice of intention to file a statement, which the statute required, was considered to be for the benefit of the owner only, the giving of which was not for the benefit of another lienor and the failure to give which was not the subject-matter of an objection by him.

89. Thomas *v.* Turner, 16 Md. 105 (holding that the defense that scire facias issued before the expiration of the credit, under a statute preventing the issue of scire facias to enforce a mechanic's lien, where credit is given or notes or other securities received, until the expiration of the credit agreed on, is as available to any one whose property is sought to be charged as to the party with whom the contract was made); Thaxter *v.* Williams, 14 Pick. (Mass.) 49.

Time of ownership.— Ownership at the time the lien attached or at the time it is enforced is sufficient to give one the right to contest. Bell *v.* Bosche, 41 Nebr. 853, 60 N. W. 92; Grove *v.* Lewis, 17 Pa. Co. Ct. 452.

90. Toop *v.* Smith, 181 N. Y. 283, 73 N. E. 1113, 34 N. Y. Civ. Proc. 211 [*affirming* 87 N. Y. App. Div. 241, 84 N. Y. Suppl. 326], as to the right of such grantee to assail the validity of the lien for insufficiency of the notice of lien for labor.

91. Michigan Sav., etc., Assoc. *v.* Attebery, 16 Tex. Civ. App. 222, 42 S. W. 569.

92. Lake Shore, etc., R. Co. *v.* McMillan, 84 Ill. 208; Cogel *v.* Mackow, 11 Minn. 475.

93. Wethered *v.* Garrett, 140 Pa. St. 224, 41 Atl. 319.

Statutory conditions.— Under a statutory provision requiring notice by the contractor, within a certain time, of his intention to dispute the claim, the assignee of a contractor who might have contested acquires no greater rights than the assignor had at the time of the assignment, and if the assignor has lost his right to contest the claim by failure to pursue the statute, the assignee cannot contest it. Fox *v.* Wunker, 18 Ohio Cir. Ct. 610, 9 Ohio Cir. Dec. 176.

94. Clark *v.* Brown, 22 Mo. 140 (holding that the contractor has no such interest as entitles him to contest the validity of a lien on the ground of an absence of a timely notice to the owner); Wethered *v.* Garrett, 140 Pa. St. 224, 41 Atl. 319 (holding that the contractor could not set up the claim that the lien of a materialman had not described the premises sufficiently, in a proceeding *in rem* against the building). *Compare* Oldfield *v.* Barbour, 12 Ont. Pr. 554.

95. Enforcement of assigned claim or lien see *supra*, V.

In actions at law generally see Parties.

In suits in equity generally see Equity.

interest is applied to suits to enforce mechanics' liens.[96] But one has no such interest as will make him a proper party to enforce such lien unless that interest is in the lien itself as distinguished from a mere interest in the result of the action.[97] And under the rule that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon the contract, an undisclosed principal may sue to enforce the lien under a contract made with the agent;[98] and if a party does business in his own name as agent for an undisclosed principal and files the lien in the same name the action to enforce the lien is properly brought in that name.[99]

(II) *Upon Dissolution of Partnership.* When the debt, and the lien for its security, accrues to a copartnership, all proceedings for enforcement of the claim must be had in the name of the copartnership, notwithstanding its dissolution and the assignment of his interest by one copartner to the other. The remaining partner takes all the rights of the firm, and may exercise them in the name of the firm, for all purposes necessary for their enforcement and for closing up the joint business.[1]

(III) *Joinder of Plaintiffs.*[2] If the cause of action accrues jointly to more than one, all must join and the action cannot be maintained by one in his own name.[3] Two or more persons may join if they together have furnished the work or materials and are jointly interested in the lien;[4] but one who has no interest in the lien itself, although he may have an interest in the subject-matter of the recovery, cannot be joined with the party who is entitled to the lien, and if there is such an unauthorized joinder, a judgment cannot be rendered in favor of the former.[5] On the other hand it is held that where a contractor is a proper party in an equitable suit by a subcontractor, it is immaterial whether he is joined as plaintiff or defendant, under the general equity rule.[6]

b. Defendant — (I) *In General.* All persons who have an interest in the property upon which the mechanic's lien is claimed or in the subject-matter of the controversy,[7] or whose presence may be necessary for a complete determination of the matters involved in the action or suit may properly be joined[8]

96. Pensacola R. Co. *v.* Schaffer, 76 Ala. 233; Hoagland *v.* Van Etten, 22 Nebr. 681, 35 N. W. 869.

Where the remedy is a special proceeding the statutory provision that "every action must be prosecuted in the name of the real party in interest" has no application. Hallahan *v.* Herbert, 57 N. Y. 409.

97. Roberts *v.* Gates, 64 Ill. 374.

98. Berry *v.* Gavin, 88 Hun (N. Y.) 1, 34 N. Y. Suppl. 505.

99. Hooker *v.* McGlone, 42 Conn. 95.

1. Busfield *v.* Wheeler, 14 Allen (Mass.) 139. See also, generally, PARTNERSHIP.

2. **Joinder of liens in same proceeding** see *supra*, VIII, D; *infra*, VIII, I, 1, h, (IV).

3. Howard *v.* McKowen, 2 Browne (Pa.) 150; Ricker *v.* Schadt, 5 Tex. Civ. App. 460, 23 S. W. 907.

4. Lombard *v.* Johnson, 76 Ill. 599 (holding that while the contract was made with one of plaintiffs it was in fact made for the benefit of himself and his co-plaintiff as partners and the bill was properly filed in the names of both); Rockwood *v.* Walcott, 3 Allen (Mass.) 458. But the non-joinder of a partner is not available in a suit by the member in whose name the contract was made, the firm doing business in his name, the answer admitting the making of the contract alleged and there being no amendment of the answer. Gilbert *v.* Fowler, 116 Mass. 375.

5. Roberts *v.* Gates, 64 Ill. 374, where plaintiffs entered upon a partnership after the making of the contract by one of them under which the lien was claimed, and the joinder of the party who was not a party to the contract and a judgment in favor of both parties were unauthorized. To the same effect see Barker *v.* Maxwell, 8 Watts (Pa.) 478. But if there is no objection to the form of the petition the judgment may be rendered for the party entitled to the lien under the contract. Moore *v.* Dugan, 179 Mass. 153, 60 N. E. 488.

6. Freese *v.* Avery, 57 N. Y. App. Div. 633, 69 N. Y. Suppl. 150.

7. Trammell *v.* Hudmon, 78 Ala. 222; Mervin *v.* Sherman, 9 Iowa 331; McMahon *v.* Tenth Ward School-Officers, 12 Abb. Pr. (N. Y.) 129; Hausmann Bros. Mfg. Co. *v.* Kempfort, 93 Wis. 587, 67 N. W. 1136; Rice *v.* Hall, 41 Wis. 453.

8. Marvin *v.* Taylor, 27 Ind. 73; Bierschenk *v.* King, 38 N. Y. App. Div. 360, 56 N. Y. Suppl. 696; Williams *v.* Edison Electric Illuminating Co., 16 N. Y. Suppl. 857; Williams *v.* Deutscher Verein, 14 N. Y. Suppl. 368.

A tax-title holder may be joined under the

and are necessary parties under code provisions,[9] as well as under the rules in equity governing the subject of parties,[10] at least in so far as their joinder is necessary for the purpose of concluding them by the proceedings and judgment, because only such persons as are made parties or are in privity with parties can be concluded by the judgment.[11] The lien statute sometimes designates particular classes of persons who must be made parties to the proceeding,[12] and an omission of these in a proper case is fatal.[13] On the other hand one who is not interested or who cannot be prejudicially affected by the proceedings and judgment is not a necessary party.[14] It is the duty of a complainant to see and know that he has before the court all necessary parties, or his decree will not be binding; and where he takes a decree without making the necessary parties defendant to his bill and the necessity of their presence is disclosed the decree will be reversed.[15]

statute providing that all persons interested in the land may be made parties. Glos *v.* John O'Brien Lumber Co., 183 Ill. 211, 55 N. E. 712.

9. Johnston *v.* Bennett, 6 Colo. App. 362, 40 Pac. 847; Brandt *v.* Radley, 23 N. Y. Suppl. 277; Burgi *v.* Rudgers, (S. D. 1906) 108 N. W. 253; Pairo *v.* Bethel, 75 Va. 825, as to a statutory summary motion, which is held to be in the nature of an equitable proceeding.

10. Lomax *v.* Dore, 45 Ill. 379; Williams *v.* Chapman, 17 Ill. 423, 65 Am. Dec. 669; Harrison, etc., Iron Co. *v.* Council Bluffs City Water-Works Co., 25 Fed. 170.

11. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748; Krotz *v.* A. R. Beck Lumber Co., 23 Ind. App. 577, 73 N. E. 273; Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109, 68 N. W. 587, 61 Am. St. Rep. 226; Schaeffer *v.* Lohman, 34 Mo. 68 (under statute by which all persons interested who are made parties are bound by judgment and sale); Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737. See also *infra*, VIII, G, 3, b, (VI), (B); VIII, G, 3, b, (VII).

Representative capacity.— An allegation in a complaint that a person named claims some interest in the property does not make the estate which such person represents as assignee a party but is merely directed against him in his personal capacity. Quinby *v.* Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899.

12. Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305 [*affirmed* in 167 N. Y. 604, 60 N. E. 1111]; Brown *v.* Danforth, 37 N. Y. App. Div. 321, 55 N. Y. Suppl. 825; Lavanway *v.* Cannon, 37 Wash. 593, 79 Pac. 1117.

13. O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898 (as to joinder of general contractor and owner in suit by subcontractor); Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305 [*affirmed* in 167 N. Y. 604, 60 N. E. 1111].

All persons interested.— Under provisions that all persons interested in the subject of the suit may be made or may become parties and defining parties in interest as all persons who may have a legal or equitable claim to the whole or any part of the premises, all persons whose interests, either legal or equitable, direct or remote, may, by any possibility, be affected by the proceeding, not only have the right to become parties, but from the unlimited power which the court has to settle and finally determine all their rights as they may be affected by the lien, they are necessary parties, as much as in any chancery suit whatever. Kimball *v.* Cook, 6 Ill. 423; Race *v.* Sullivan, 1 Ill. App. 94.

Parties not designated in such a statute need not be joined in the proceeding. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912; Burgi *v.* Rudgers, (S. D. 1906) 108 N. W. 253. But a provision that persons who have filed notices of liens as well as those having subsequent liens and claims by judgment, mortgage, or conveyance shall be made parties defendant does not preclude the introduction of other defendants when necessary for a complete determination of the action. Williams *v.* Edison Electric Illuminating Co., 16 N. Y. Suppl. 857.

Other than immediate parties to the contract are sometimes expressly made proper but not necessary parties to the proceeding, while the immediate parties to the contract are made necessary parties to the proceeding. Rumsey, etc., Co. *v.* Pieffer, 108 Mo. App. 486, 83 S. W. 1027.

14. Hawkins *v.* Mapes-Reeves Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794; Harrison, etc., Iron Co. *v.* Council Bluffs City Water-Works Co., 25 Fed. 170.

Minors.— Whether the interest of minors can or cannot be charged with the lien, the minors are, if not necessary, at least proper, parties to a proceeding seeking to subject the property in which they have an interest with others. Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726 (holding that if adult defendants have the suit dismissed as to the minors, the adults will be held to pay the entire debt); Post *v.* Miles, 7 N. M. 317, 34 Pac. 586.

15. Race *v.* Sullivan, 1 Ill. App. 94.

As of date of commencing suit.— As the statute of limitation governing the proceeding requires the institution of the suit within a prescribed period, the question of parties must be determined as of the date when the proceeding is brought. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912.

(II) *In Suit by Assignee.*[16] Under the rule requiring all parties in interest to be before the court, the assignor of the claim is a proper if not a necessary party to a proceeding by the assignee.[17] An assignee who assigns all of his rights and interests is not a necessary party in a suit by his assignee;[18] but in an action by an assignee of the builder's claim under an assignment made expressly subject to a prior assignment, it seems that the omission of the prior assignee creates a defect of parties.[19]

(III) *Sureties.*[20] A surety in a bond conditioned for the protection of a vendee in the event of the determination of the vendor's liability[21] is a proper, although not a necessary, party to a suit in which the vendor is joined as a defendant.[22]

(IV) *Husband and Wife.* If a married woman having no power to contract so as to bind her estate joins with her husband in a contract, she does not create a lien on her estate and she is not properly joined in a suit to foreclose the lien, but the suit may be continued against the husband for the purpose of selling his interest to satisfy the lien.[23] But where the contract may give rise to a valid lien upon the married woman's estate, she is a necessary party to a proceeding to enforce the lien,[24] although the husband may be a proper person to be joined as a party in interest under the statute,[25] or in order to answer to any interest or right of redemption which he may claim in the property,[26] and for this last purpose he is a necessary party under the allegation in the petition that he has some interest in the property.[27] A wife having a homestead in her husband's land which may be divested by a decree and sale is properly joined as a defendant, although she is not a party to the contract,[28] and so she has an adverse interest which makes her a proper party for a complete determination of the questions involved, although it may turn out that the land is not a homestead and the inchoate right of dower cannot be divested in the action.[29] And it is held that the wife is a necessary

16. See *supra*, V, A, 4; V, B, 3.

17. Pairo *v.* Bethell, 75 Va. 825, under the statutory provision as to parties in interest.

18. Batesville Inst. *v.* Kauffman, 18 Wall. (U. S.) 151, 21 L. ed. 775.

19. Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24.

20. **Bond to discharge liens** see *supra*, VI, B.

21. See Vendor and Purchaser.

22. Haberzettle *v.* Dearing, (Tex. Civ. App. 1904) 80 S. W. 539, holding that the surety is a proper party, although his liability does not become absolute until the establishment of the vendor's liability; that these matters can be determined in this suit, thereby avoiding costs and a multiplicity of suits, and it does not appear that by making the sureties parties the rights of plaintiff would be prejudiced.

23. Kirby *v.* Tead, 13 Metc. (Mass.) 149.

24. Roman *v.* Thorn, 83 Ala. 443, 3 So. 759, holding that, although the lien may be created by the contract of an agent or trustee, where the contract is made by a husband as trustee of his wife's statutory separate estate, the action cannot be maintained against him alone and without joining the wife.

25. Roman *v.* Thorn, 83 Ala. 443, 3 So. 759.

26. Scott *v.* Goldinghorst, 123 Ind. 268, 24 N. E. 333 (holding that while it is true as a general rule that a complaint must state facts sufficient to constitute a cause of action against all who are made defendants, this rule does not apply to one who is made a party to a foreclosure or other suit of an equitable character, or in the nature of a proceeding *in rem*, to answer to his supposed or possible, but unknown or undefined, interest in the property to be affected by the litigation); Vorhees *v.* Beckwell, 10 Ind. App. 224, 37 N. E. 811. See also Becker *v.* Price, 1 Lack. Leg. Rec. (Pa.) 483.

27. Greenleaf *v.* Beebe, 80 Ill. 520.

At common law a wife could not be sued unless her husband was joined in the action (see Husband and Wife, 21 Cyc. 1512 *et seq.*); and unless this rule has been changed by statute an action under the Mechanics' Lien Law is no exception to it (Fink *v.* Hanegan, 51 Mo. 280; Latshaw *v.* McNees, 50 Mo. 381; Clark *v.* Boarman, 89 Md. 428, 43 Atl. 926).

28. Hausmann Bros. Mfg. Co. *v.* Kempfert, 93 Wis. 587, 67 N. W. 1136; Weston *v.* Weston, 46 Wis. 130, 49 N. W. 834.

Lien accruing when land not homestead.— Where a lien attached to land before it became a homestead, the wife is not a necessary party to an action foreclosing the same. Watkins *v.* Spoull, 8 Tex. Civ. App. 427, 28 S. W. 356.

29. Hausmann Bros. Mfg. Co. *v.* Kempfert, 93 Wis. 587, 67 N. W. 1136. But on the other hand where a wife's dower is in all the land of which the husband is seized during coverture, and cannot be affected except by a release as prescribed by law, she is not a proper party to a lien suit where her only interest is the dower. Shaeffer *v.* Weed, 8 Ill. 511.

party to a proceeding to foreclose a lien on community property, notwithstanding the husband individually incurred the debt which the lien secures.[30]

(v) *PARTY PERSONALLY LIABLE FOR DEBT.* Under some of the statutes it is held that the party who is personally liable for a debt must be made a party to the proceedings, as the existence of the lien depends upon the existence of the debt for which the lien stands as security and the fact of indebtedness can be determined only in a proper judicial proceeding to which the debtor is made a party.[31] But the fact that a personal judgment cannot be rendered will not defeat the enforcement of the lien.[32] And if the party with whom the contract was made was a corporation, which has since become disorganized and gone out of existence, it need not be made a party, and its omission in a suit against one claiming title to the property will not defeat the enforcement of the lien.[33]

(vi) *OWNERS* — (A) *In General.* The owner of the property or of the interest sought to be charged is a necessary party without whose presence a valid judgment foreclosing the lien cannot be rendered,[34] the basis upon which the

30. Northwest Bridge Co. *v.* Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Sagmeister *v.* Foss, 4 Wash. 320, 30 Pac. 80, 744; Littell, etc., Mfg. Co. *v.* Miller, 3 Wash. 480, 28 Pac. 1035.

But if the husband holds the record title and it is not brought to the knowledge of the claimant that the debtor had a wife, it is held that she is not a necessary party. Washington Rock Plaster Co. *v.* Johnson, 10 Wash. 445, 39 Pac. 115.

31. Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991; Lookout Lumber Co. *v.* Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35; Walter *v.* Dearing, (Tex. Civ. App. 1901) 65 S. W. 380. But see further in this connection *infra*, VIII, G, 3, b, (VI), (VII), (IX).

32. Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737, holding that while the liability of the debtor may be enforced when it is proper, the fixing of the lien upon the property is one of the prime objects of the statute; that if the debtor is insolvent the execution against him is levied on the property charged with the lien, and if he is absent and not brought before the court by personal service a personal judgment is dispensed with, the indebtedness found due and ordered to be levied on the property; that the provisions of the statute in these respects are designed to prevent a default of justice. In Massachusetts the proceedings being in the nature of a proceeding *in rem* to charge the estate and the statute making a distinction in regard to the process to be issued between the owner and the debtor when they are different persons, the one being required to be summoned and the other to be notified, and as the judgment is *in rem* and not *in personam*, where jurisdiction cannot be obtained of the debtor he is not a necessary party and the proceedings can go on without him. Holmes *v.* Humphreys, 187 Mass. 513, 73 N. E. 668.

Parties organizing corporation.— In Davis, etc., Bldg., etc., Mfg. Co. *v.* Vice, 15 Ind. App. 117, 43 N. E. 889, it is held that where a building is erected under a contract signed by a number of individuals each binding himself for a specific sum, after the subscribers have organized into a corporation which is vested with title to the property the contractor may maintain a single action to enforce his lien for the amount of the unpaid subscriptions, notwithstanding the stock-holders who paid their subscriptions and the corporation itself are not bound for the indebtedness.

33. Jennings *v.* Hinkle, 81 Ill. 183.

34. *Alabama.*— Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600.

Colorado.— Snodgrass *v.* Holland, 6 Colo. 596.

Iowa.— Keller *v.* Tracy, 11 Iowa 530.

Massachusetts.— Peabody *v.* Eastern Methodist Soc., 5 Allen 540.

Montana.— Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

Nebraska.— Green *v.* Sanford, 34 Nebr. 363, 51 N. W. 967; Manly *v.* Downing, 15 Nebr. 637, 19 N. W. 601.

New Jersey.— Babbitt *v.* Condon, 27 N. J. L. 154.

Pennsylvania.—Hampton *v.* Broom, 1 Miles 241, where the lien creditor elects to proceed by scire facias. But plaintiff was entitled to judgment, although the real owner was not named, as the real owner could defend in ejectment if the reputed owner had no authority to appear and act as owner, and if the reputed owner was the contractor and was procured by the real owner to appear and act as owner, the scire facias against the latter as contractor and owner or reputed owner would be sufficient. Christine *v.* Manderson, 2 Pa. St. 363. See also Anshutz *v.* McClelland, 5 Watts (Pa.) 487, holding that the provision of the statute was directory. Under the statutes prevailing when these cases were decided the lien could be created whether the debt was contracted by the owner himself or another person, and the claimant either might have recovered a personal judgment against the debtor or proceeded by scire facias against the debtor and the owner of the building. But where the creditor omitted to file his claim within the period prescribed, he did not come within the

right to the lien rests being a contract with the owner,[35] and under statutory provisions requiring the owner to be made a party, the word "owner" is held to mean the person for whom, as the owner of the land, the building is constructed, etc.[36] And so a joint owner of the land is a necessary party under a statute requiring all parties in interest to be joined;[37] but where a contract made with one of two joint owners creates a lien on the whole property and a personal liability only on the party to the contract the lien may be enforced in a suit against the latter alone.[38]

(B) *Change in or Transfer of Title*—(1) IN GENERAL. There is much apparent conflict of authority as to who should be made parties defendant where there has been a change of ownership after the contract is made, which it would seem may be referred to the varying language and provisions of the statutes of the different states and to the methods of enforcing the lien whether by a proceeding

purview of the act and could not bring an action against the contractor alone, the owner being a different person, and recover judgment against the former alone, and sell the property of the contractor and by such sale transfer the property of the owner. Rogers *v.* Klingler, 3 Whart. (Pa.) 332.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 473.

Part of building—leasehold interest.—In Washington it was held that a mechanic's lien could not be enforced against a part of a building and that an action to foreclose a mechanic's lien could not be maintained when the owner of a leasehold interest in the property is not made a party to the notice of lien, or to the action. Wright *v* Cowie, 5 Wash. 341, 31 Pac. 878.

Owner at time action is brought.—On the other hand, even though the owner of the legal title at the time the action is brought is not joined the judgment may be good except as against such omitted party, as where he acquired the title after the materials were furnished. McCoy *v.* Quick, 30 Wis. 521.

Incorporated and unincorporated bodies.—If a body is unincorporated, it should be sued by its corporate name; if not the individual members may be sued collectively, or, under the statute, if they are too numerous, and it is impracticable to bring them all before the court, one or more may be sued who can defend for the whole, but in either event the person or officer holding the legal title should be made a party. Keller *v.* Tracy, 11 Iowa 530. So an unincorporated body, although not suable at law, may be sued by proceeding against the trustees holding the legal title to the property for which the materials are furnished, joining the building committee charged with the superintendence of the building and the contractor who erected the building. Gress Lumber Co. *v.* Rodgers, 85 Ga. 587, 11 S. E. 867. In Middleton *v.* Davis-Rankin Bldg., etc., Co., 45 S. W. 896, 20 Ky. L. Rep. 263, and Waddy Blue Grass Creamery Co. *v.* Davis-Rankin Bldg., etc., Co., 103 Ky. 579, 45 S. W. 895, 20 Ky. L. Rep. 259, upon the theory that one in possession under a contract with the owner is the owner, it is held that if subscribers for stock severally liable therefor purchase land and erect improvements thereon under an agreement to form a corporation and have the title conveyed to it, and the corporation is formed and takes title with knowledge of the facts, it does so subject to the mechanic's lien for the costs of the improvements.

School property.—In McMahon *v.* Tenth Ward School-Officers, 12 Abb. Pr. (N. Y.) 129, the court, construing the provision of a statute declaring that all suits in relation to school property should be brought in the name of the board of education, held that the statute had no application to defendant; that in an action to enforce a mechanic's lien the title to the building and the reversionary right to its use is in the mayor, aldermen, and commonalty, and their proprietary right in the building could not be affected unless they are made parties to the proceeding; that the ward officers and the board of education mads the contract out of which the cause of action arose, and their rights in the use of the building for educational purposes would be directly affected by the judgment which is sought to be obtained, and they are therefore properly joined as parties defendant.

35. Lang *v.* Adams, 71 Kan. 309, 80 Pac. 593; Stough *v.* Badger Lumber Co., 70 Kan. 713, 79 Pac. 737.

Contract by agent.—While the lien created by the statute may arise on a contract made by an agent of the owner or proprietor, the suit authorized by the statute is one against the principal and not against the agent, and cannot be maintained against such agent as sole defendant. Roman *v.* Thorn, 83 Ala. 443, 3 So. 759.

36. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912; Carswell *v.* Patzowski, 4 Pennew. (Del.) 403, 55 Atl. 342, 1013; Tompkins *v.* Horton, 25 N. J. Eq. 284.

37. Race *v.* Sullivan, 1 Ill. App. 94.

Title in name of one partner conveyed before suit.—Where the title to land subject to the firm debts stands in the name of one of the partners who, after the making of a contract upon which a mechanic's lien arises, conveys the property subject to the lien, the lien may be enforced in a suit in which the vendee is a party together with the other partners, although the partner who conveyed the legal title was not served with process. Fowler *v.* Bailley, 14 Wis. 125.

38. Johnson *v.* Weinstock, 31 La. Ann. 698.

at law or in equity, and so either under the rules governing the equitable proceedings or under statutes clearly importing that the owner of the land at the time the suit is brought should be made defendant, such person is held to be the proper party,[39] and may be properly joined,[40] and in some cases he is held to be a necessary or indispensable party.[41] The original owner who has parted with his interest need not be joined,[42] no personal judgment being demanded,[43] but he may be a proper party.[44] On the other hand under a statute prescribing the steps in perfecting and obtaining a lien in pursuance of a contract with the owner and requiring the statement or claim which is the commencement of the suit to set out the name of the owner, contractor, etc., and similar statutes, a subsequent purchaser is not a necessary party,[45] although he may properly be joined as a

39. Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600; Rose *v.* Persse, etc., Paper Works, 29 Conn. 256; Robins *v.* Bunn, 34 N. J. L. 322; Edwards *v.* Derrickson, 28 N. J. L. 39, which cases are as to a change of title between the time of making the contract or doing the work and the time of filing the lien.

The assignee of a leasehold interest is the proper party defendant. Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325. See also Southard *v.* Moss, 2 Misc. (N. Y.) 121, 20 N. Y. Suppl. 848 [*affirmed* in 141 N. Y. 607, 36 N. E. 740].

A fraudulent grantee in a conveyance to defeat a lien made since work commenced may be considered as an encumbrancer, and is properly made a party. Meehan *v.* Williams, 2 Daly (N. Y.) 367, 36 How. Pr. 73. But in Amidon *v.* Benjamin, 126 Mass. 275, it is held that the claimant may regard the fraudulent grantor as the owner and proceed against him if he wishes to assume the burden of showing that the conveyance is fraudulent.

Intermediate grantee.— But where the complaint alleged that the husband, to fraudulently hinder the collection of the claim, conveyed the premises, and that his grantee conveyed them to the grantor's wife, and prayed a personal judgment against the parties, the grantee was not a necessary party, since he divested himself of title by his conveyance, and no personal claim was made against him. Bierschenk *v.* King, 38 N. Y. App. Div. 360, 56 N. Y. Suppl. 696.

40. Voorhees *v.* Beckwell, 10 Ind. App. 224, 37 N. E. 811; Mervin *v.* Sherman, 9 Iowa 331 (holding that such joinder is proper but not for the purpose of recovering a personal judgment); Lampton *v.* Bowen, 41 Wis. 484; Rice *v.* Hall, 41 Wis. 453; McCoy *v.* Quick, 30 Wis. 521.

41. Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600; Ortwine *v.* Caskey, 43 Md. 134; Pickens *v.* Polk, 42 Nebr. 267, 60 N. W. 566, in a proceeding *in rem*.

One in possession under an unrecorded deed at the commencement of the suit to which he is not a party is not affected by the decree. Monroe *v.* Hanson, 47 Nebr. 30, 66 N. W. 12.

Judgment not conclusive.—One who acquires title after the date of the contract should be made a party to the suit to enforce the lien, otherwise he will not be concluded by the judgment. White *v.* Chaffin, 32 Ark. 59; Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748; Marvin *v.* Taylor, 27 Ind. 73; Holland *v.* Jones, 9 Ind. 495; Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273; Stough *v.* Badger Lumber Co., 70 Kan. 713, 79 Pac. 737. In other cases such party is necessary only in order to preclude his going behind the judgment and the proceedings and judgment will be valid except for his right to impeach them. Schaeffer *v.* Lohman, 34 Mo. 68; McCoy *v.* Quick, 30 Wis. 521. So in the absence of such party the proceedings may be valid as to the interest of the party who was before the court. White *v.* Chaffin, 32 Ark. 59. Under an earlier statute in Missouri providing a proceeding by scire facias a judgment could not be entered without the presence of the record owner and if he were not a party the judgment was a nullity. Clark *v.* Brown, 25 Mo. 559.

42. Rose *v.* Persse, etc., Paper Works, 29 Conn. 256; Pickens *v.* Polk, 42 Nebr. 267, 60 N. W. 566; McCormick *v.* Lawton, 3 Nebr. 449.

43. Kellenberger *v.* Boyer, 37 Ind. 188.

The assignor of a lessee is not a necessary party to an action to foreclose a mechanic's lien, under the rule that all persons interested in the subject-matter in controversy should be made parties, either plaintiff or defendant. Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325. So where the materials are furnished to the assignee of the lease, the assignor is not a necessary party, nor even a proper party over his objection, although the lease and the assignment are not of record. Southard *v.* Moss, 2 Misc. (N. Y.) 121, 20 N. Y. Suppl. 848 [*affirmed* in 141 N. Y. 607, 36 N. E. 740].

44. Schaeffer *v.* Lohman, 34 Mo. 68. See also Voorhees *v.* Beckwell, 10 Ind. App. 224, 37 N. E. 811; Fowler *v.* Bailley, 14 Wis. 125.

45. Carswell *v.* Patzowski, 4 Pennew. (Del.) 403, 55 Atl. 342, 1013 (holding that "owner" or "reputed owner" means the owner or the reputed owner with whom the contract was made and he is therefore the only necessary party defendant as such owner or reputed owner); Colley *v.* Doughty, 62 Me. 501 (where the statutory proceeding was purely *in personam* involving only the question of indebtedness upon the determination of which and the levy of process upon the property the question of its efficiency could be determined between such parties as might see fit to ques-

defendant,[46] and where the original debt must be established it is held that in proceedings to foreclose a mechanic's lien on property transferred after the lien had attached, the original debtor is a necessary party where the grantee of the property had not assumed the debt.[47]

(2) Death of Owner. If the owner die, having made the contract while living, and a suit be commenced to foreclose a lien, his legal heirs are proper parties defendant.[48] And if the owner dies intestate before suit is brought to enforce the lien, then under the rule that a lien cannot be declared in a proceeding to which the owner of the property is not a party, it is held that his heirs must be made parties to the suit,[49] and the statutory provision for reviving suits against the personal representatives alone would apply only where the suit is begun in the lifetime of the owner.[50] However, in the proceeding in which the heirs are parties the personal representative may be joined.[51] On the other hand where the personal estate is liable to the payment of the judgment and the lien is but an additional security, both the heirs and the administrator are necessary parties.[52] In other cases, turning upon the terms of the statutes, it is held that the heirs need not be made parties but that it is sufficient to make the administrator a party.[53] Where the lien attaches to the extent of the interest of the owner and does not create a personal claim against such owner, if the executors have no interest in the land by devise or otherwise the proceeding cannot be maintained against them.[54]

tion it, and it was held that a subsequent purchaser was not a necessary party to the first proceeding). See also Fourth Ave. Baptist Church *v.* Schreiner, 88 Pa. St. 124; Jones *v.* Shawhan, 4 Watts & S. (Pa.) 257.

Administrator of former owner.—In Shields *v.* Keys, 24 Iowa 298, it was held that where, when one died who had conveyed real estate, and taken a mortgage back to secure the purchase-price, the right to the debt and security passed to his personal representative, and it was necessary to make him only a party defendant to a proceeding to enforce a prior existing mechanic's lien thereon, although the heirs and subsequent mortgagees and purchasers may be made parties thereto.

46. Carswell *v.* Patzowski, 4 Pennew. (Del.) 403, 55 Atl. 342, 1013.

47. Walter *v.* Dearing, (Tex. Civ. App. 1901) 65 S. W. 380. See also Colley *v.* Doughty, 62 Me. 501.

But where the purchaser assumed the debt it was held that the lien could be enforced against him without joining the original owner. Cullers *v.* Greenville First. Nat. Bank, (Tex. Civ. App. 1894) 29 S. W. 72.

48. Simonds *v.* Buford, 18 Ind. 176.

49. Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600; Robins *v.* Bunn, 34 N. J. L. 322, under the peculiar provision of the statute requiring the lien claim to contain the name of the owner of the property and holding that where the title is changed between the time of making the contract or doing the work and the time of filing the lien, the parties who were owners by devise or inheritance should be made parties and not the executors of the original owner, and that the provision of the statute which prevents the abatement of the proceedings by the death of the builder or owner and extends the remedy to his executors or administrators means the executors or administrators of the owner at the time the lien is filed.

50. Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600.

51. Hughes *v.* Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600, holding that the prohibition against bringing suits against personal representatives within six months after the grant of letters does not apply to suits for the enforcement of such liens.

52. Guerrant *v.* Dawson, 34 Miss. 149.

53. Welch *v.* McGrath, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638 (distinguishing the rule in New Jersey in that the statute in Iowa did not require the claim to name the owner); Shields *v.* Keys, 24 Iowa 298. But see Mix *v.* Ely, 2 Greene (Iowa) 513.

In proceeding in rem.—In Pennsylvania the statute which provides that in all actions against executors and administrators to charge real estate the widow and heirs or devisees, etc., shall be made parties, does not apply to a proceeding by scire facias to enforce a mechanic's lien obtained in the lifetime of the testator or intestate because the lien was obtained before the death, having attached when the material was furnished or the work was done, and the filing of the lien being merely for the purpose of preserving it, and also because the lien is against the building, *in rem* and not *in personam*, and the act was intended to apply when a judgment is sought to be obtained. Reece *v.* Haymaker, 25 Pittsb. Leg. J. N. S. 74 [*affirmed* in 164 Pa. St. 575, 30 Atl. 404].

54. Crystal *v.* Flannelly, 2 E. D. Smith (N. Y.) 583.

After interest has ceased.—In Massachusetts where the proceeding is assimilated to a proceeding *in rem*, and the judgment is *in rem* against the property, if the debtor who was the owner has ceased to have an

(VII) *OTHER LIENORS AND ENCUMBRANCERS*—(A) *In General.* Under the statute all lien-holders and encumbrancers may be made parties to an action to foreclose a mechanic's lien, in order to adjust all rights and priorities, if it is intended that all persons shall be bound,[55] and the same is true under the rules governing the equity practice.[56] But they are not necessary where complainant does not seek priority over such other liens,[57] and where the right of the first lien-holder is absolute to the extent of the fund in the owner's hands, to the exclusion of all who come after him, subsequent claimants of mechanics' liens are not necessary parties, in the absence of some peculiar statutory requirement in that respect.[58] Under some statutes, however,[59] especially under express provisions declaring that all lienors shall be joined, such lienors are necessary parties.[60] But on the other hand it is held that a statutory provision requiring that persons having liens subsequent to that of plaintiff shall be made parties defendant does not require the joinder of such parties as indispensable to the entry of a decree binding the parties before the court, but the intent of it is only that such parties shall be joined in order that a decree may be rendered which will bind all parties interested in the land and under which a sale may be effected which will transfer the title to the purchaser free from all liens and encumbrances,[61] and this is also held

interest in the estate and has deceased and his estate has been settled and the time for presenting claims has passed and there were no assets for his heirs, his administrator is not a necessary even though he may be a proper party to proceedings to enforce the lien. Holmes *v.* Humphreys, 187 Mass. 513, 73 N. E. 668. In Texas it has been held that where the lien accrued under a contract with a deceased owner, and the land was sold under a deed of trust prior to the commencement of the action, neither the representative nor the heirs of the decedent have any interest in the property and are not necessary parties. Security Mortg., etc., Co. *v.* Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 837.

55. Johnson *v.* Keeler, 46 Kan. 304, 26 Pac. 728 (holding that persons claiming liens for materials furnished the general contractor are proper parties to a suit by the contractor to enforce his lien); Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230; Kenney *v.* Apgar, 93 N. Y. 539. See also *supra*, VIII, D.

Judgment creditors of an insolvent absconding debtor may be joined in a suit to enforce such lien even where the ordinary method of enforcing such liens is by a proceeding at law. Foust *v.* Wilson, 3 Humphr. (Tenn.) 31.

56. McLogan *v.* Brown, 11 Ill. 519; Kenney *v.* Apgar, 93 N. Y. 539; Case Mfg. Co. *v.* Smith, 40 Fed. 339, 5 L. R. A. 231.

57. Sullivan *v.* Decker, 1 E. D. Smith (N. Y.) 699 (where it was held that if a prior lienor was not joined plaintiff would be taken to admit the validity and amount of the prior lien); Case Mfg. Co. *v.* Smith, 40 Fed. 339, 5 L. R. A. 231.

58. Kaylor *v.* O'Connor, 1 E. D. Smith (N. Y.) 672, holding that under the statute then prevailing a proceeding for the foreclosure of a mechanic's lien in respect to subsequent lien-holders divested them of no right, legal or equitable, except such as the statute itself created, and that if the statute be construed to authorize a foreclosure to which they are not parties, it works no wrong because their liens are given in subordination to all its provisions and as without the statute they have no lien they are not injured if the fund in the owner's hands is exhausted before the lien is reached.

59. Wakefield *v.* Van Dorn, 53 Nebr. 23, 73 N. W. 226, holding that where two contractors under separate contracts furnish material, etc., on the same building and one forecloses his claim, the other should be a party; that it does not matter that the claim of the omitted party had not been filed at the time the suit was brought, as, the work having been commenced, the lien when perfected dated back to the time the first labor or material was furnished, and that plaintiff was bound to take notice of all such liens.

60. Mehrle *v.* Dunne, 75 Ill. 239; Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305 [*affirmed* in 169 N. Y. 604, 60 N. E. 1111], holding that the presence of such party is necessary in order to determine the priority of liens as between the lienors and also to protect the rights of the owner. But see Egan *v.* Lacmmle, 5 Misc. (N. Y.) 224, 25 N. Y. Suppl. 330, holding that the provision requiring the joinder of other lienors did not apply to actions in courts not of record.

Parties who have been paid and who therefore have no interest are not necessary parties to a proceeding to enforce a subcontractor's lien against the building. Meeks *v.* Sims, 84 Ill. 422.

Furnisher retaining title.—In an action against builders to foreclose a mechanic's lien it was not necessary to join as parties defendant persons who had furnished gas fixtures for the building under an alleged contract of conditional sale, whereby ownership was to remain in the vendors until payment in full. Baldinger *v.* Levine, 83 N. Y. App. Div. 130, 82 N. Y. Suppl. 483.

61. Gaines *v.* Childers, 38 Oreg. 200, 63 Pac. 487.

to be the effect of a provision that all persons interested in the controversy or in the property may be joined but that such as are not joined shall not be bound.[62] And although the lien of mechanics is purely the creature of the statute, a decree for the sale of the premises in its enforcement is held to have the same and no greater effect upon the rights of other lienors and encumbrancers, prior to the commencement of suit, than a similar decree would have upon the foreclosure of a mortgage, and if they are not made parties they are not bound by the decree or proceedings thereunder.[63]

(B) *Mortgages.* A mortgagee may be made a party to an action to foreclose a mechanic's lien and his rights adjudicated whenever it might be done in an action to foreclose a mortgage.[64] Under the equity rule that all persons interested should be made parties in a chancery proceeding to enforce a mechanic's lien, and under statutes in effect adopting such rule, a mortgagee, and where the legal title is in a trustee, the trustee and the *cestui que trust*, should be made parties to the equitable proceeding to enforce a mechanic's lien,[65] if it is the purpose of plaintiff to litigate with the holders of such claims or to bind them by the proceedings

62. Jones *v.* Hartsock, 42 Iowa 147 (as to the right to redeem); Evans *v.* Tripp, 35 Iowa 371; Russell *v.* Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563; Hicks *v.* Scofield, 121 Mo. 381, 25 S. W. 755; Western Brass Mfg. Co. *v.* Boyce, 74 Mo. App. 343.

However, a mandatory provision of the lien act will control, as where a subsequent lienor is not permitted to bring an independent action, but must intervene in the action brought by a prior lien-holder. Lavanway *v.* Cannon, 37 Wash. 593, 79 Pac. 1117.

63. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748; Clark *v.* Moore, 64 Ill. 273; Case Mfg. Co. *v.* Smith, 40 Fed. 339, 5 L. R. A. 231.

Proceedings quasi in rem.— And so where proceedings by scire facias under the statute were in the nature of proceedings *in rem*, it was held that they were not purely so, the suit being *inter partes*, and that if the notice prescribed for other parties claiming priorities was not given they were not bound. McKim *v.* Mason, 3 Md. Ch. 186. To the same effect see Hassall *v.* Wilcox, 130 U. S. 493, 9 S. Ct. 590, 32 L. ed. 1001.

Adding before master.— In Ontario under a statute requiring the joinder of an encumbrancer within a particular time, it is sufficient if he is added in the master's office after such time, the action having been commenced within the time prescribed. Hall *v.* Hogg, 14 Ont. Pr. 45; Cole *v.* Hall, 13 Ont. Pr. 100.

The lien of a judgment creditor cannot be defeated by a proceeding to which he is not a party. McLagan *v.* Brown, 11 Ill. 519.

64. Bassett *v.* Menage, 52 Minn. 121, 53 N. W. 1064; Finlayson *v.* Crooks, 47 Minn. 74, 49 N. W. 398, 645.

Court of limited jurisdiction.— Where the statute confers jurisdiction of the proceedings for the enforcement of a mechanic's lien upon a court of limited powers and jurisdiction, mortgagees are not proper parties because such court cannot fully adjudicate the rights and claims of different classes of lien-holders, although a sale under such proceedings will not affect the rights of such other classes of lien-holders. Van Winkle *v.* Stow, 23 Cal. 457.

Equity jurisdiction only to enforce the mechanic's lien being the extent of the court's equity jurisdiction a suit to enforce a mechanic's lien is not the proper proceeding to adjust and determine priorities as between such liens and other liens, as mortgages, yet when the question arises necessarily as an incident to the decision of the mechanic's right, the court will pass upon it as essential to a full determination of the case. Dugan *v.* Scott, 37 Mo. App. 636; Steininger *v.* Raeman, 28 Mo. App. 594.

Even if the debt is not yet due, a prior mortgagee is a proper party under the statute providing that such persons may become parties. Chicago North Presb. Church *v.* Jevne, 32 Ill. 214, 83 Am. Dec. 261.

65. Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, 7 N. E. 498; McGraw *v.* Bayard, 96 Ill. 146; Clark *v.* Manning, 95 Ill. 580; Lomax *v.* Dore, 45 Ill. 379; Columbia Bldg., etc., Assoc. *v.* Taylor, 25 Ill. App. 429; Phœnix Mut. L. Ins. Co. *v.* Batchen, 6 Ill. App. 621; Schillinger Fire-Proof Cement, etc., Co. *v.* Arnott, 14 N. Y. Suppl. 326 (holding that under the statute declaring that persons who have subsequent liens by judgment or mortgage must be made parties defendant, one who holds a mortgage as trustee must be made a party as such and joining him individually is not sufficient); Farmers' Bank *v.* Watson, 39 W. Va. 342, 19 S. E. 413 (holding that the trustee and *cestui que trust* must be made parties to the bill, although the trust deed was made more than twenty years previously).

Subsequent and prior encumbrancers.— In New York under Laws (1885), c. 342, § 17, providing that plaintiff must make the parties who have filed notice of liens as well as those who have subsequent liens and claims by judgment, mortgage, or conveyance parties defendant, subsequent encumbrancers only can be made parties. Brown *v.* Danforth, 37 N. Y. App. Div. 321, 55 N. Y. Suppl. 825; Alyea *v.* Citizens' Sav. Bank, 12 N. Y. App. Div. 574, 42 N. Y. Suppl. 185. So by a

and judgment in his foreclosure proceeding;[66] but where the statute specifically designates who shall be parties and mortgagees are not included, it is held that by construction they are excluded.[67] The *cestui que trust* is an indispensable party where plaintiff seeks a decree establishing the priority of his right as against the title represented by the trust deed, and a decree cannot be rendered establishing such priority in the absence of such party,[68] although the decree may be binding upon the other parties to the suit in so far as it passes only upon the

comparatively recent statute in New Jersey the right to bring in a mortgagee under a subsequent mortgage was given. This, however, does not authorize the bringing in of a mortgagee under a prior mortgage whose rights cannot be affected by a foreclosure of a mechanic's lien. New York Cent. Trust Co. *v.* Bartlett, 57 N. J. L. 206, 30 Atl. 583. In Rhode Island prior mortgagees may be made parties. Jepherson *v.* Green, 22 R. I. 276, 47 Atl. 599.

66. Portones *v.* Badenoch, 132 Ill. 377, 23 N. E. 349; Lomax *v.* Dore, 45 Ill. 379; Williams *v.* Chapman, 17 Ill. 423, 65 Am. Dec. 669; Evans *v.* Tripp, 35 Iowa 371 (distinguishing earlier cases in Iowa as arising before the statute providing that parties in interest who are not joined shall not be barred, and applying the statute to a lien inferior to that of the mechanic so that the former's right of redemption or any other right he might have was not cut off); Landau *v.* Cottrill, 159 Mo. 308, 60 S. W. 64 (as to prior claims); Russell *v.* Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563; Hicks *v.* Scofield, 121 Mo. 381, 25 S. W. 755 (which last three cases are under a statute providing that such parties may be joined in the proceeding, otherwise they will not be bound); Case Mfg. Co. *v.* Smith, 40 Fed. 339, 5 L. R. A. 231. In Hassall *v.* Wilcox, 130 U. S. 493, 9 S. Ct. 590, 32 L. ed. 1001, the state law made no provision for notice to other lien-holders, but provided that such lien-holders might intervene and become parties to a suit instituted in the state court, and gave the holder of a mechanic's lien priority over all other liens, and although a suit was brought in the state court and judgment recovered by the mechanic lien-holder against the railroad property, yet it was held that as to a plaintiff lienor under a mortgage not made a party to such proceeding, the judgment in the state court could not operate even as *prima facie* evidence against the mortgage lienor, and might be questioned by him in the federal court in a proceeding in that court to foreclose the mortgage.

Interest acquired by party to suit.— The omission to make a mortgagee of part of the property affected by the lien a party defendant does not operate to release the lien as to the other parts covered by the mortgage, especially where the interest of such mortgagee is acquired by one who is a party defendant to the suit before the trial and pending the suit. Badger Lumber Co. *v.* Ballentine, 54 Mo. App. 172.

Assignee of bond and mortgage.— One who acquires a mechanic's lien on property does not thereby become a purchaser and he is charged with notice of all liens or conveyances affecting it, whether recorded or not; and where the holder of an unrecorded assignment of a bond and mortgage is not made a party, although his assignor is, he is not concluded by a decree entered after the recording of his assignment. Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109, 68 N. W. 587, 61 Am. St. Rep. 226.

Uninfluenced by peculiar statutory provisions as to the question of parties, and where the proceeding is not assimilated to a suit in equity or is referred to the literal provisions of the act creating the remedy, other views are maintained, although the result that an omitted party is not affected is the same. Thus a prior encumbrancer is not a proper party. Smith *v.* Shaffer, 46 Md. 573; Howard *v.* Robinson, 5 Cush. (Mass.) 119. And where the proceeding is not an equitable one in the nature of a suit to foreclose a mortgage, the equitable rule that junior mortgagees, although not indispensable, should be made parties if it is desirable to cut off their equity of redemption, does not apply (State *v.* Eads, 15 Iowa 114, 83 Am. Dec. 399), although a subsequent mortgagee may be joined (Shields *v.* Keys, 24 Iowa 298). So a subsequent encumbrancer would not be entitled to notice even though a sale would pass the property free from the lien of his mortgage. Tompkins *v.* Horton, 25 N. J. Eq. 284.

67. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912, where the proceeding in Illinois is distinguished in that it is a purely chancery proceeding and mortgagees are specially included in the statute, the court further holding that a beneficiary is not an "owner" under the statute prescribing who shall be parties. To the last point see also Tompkins *v.* Horton, 25 N. J. Eq. 284.

Where the equitable title may be subjected the trustee holding the legal title is not a necessary party, and when the equitable interest is sold under the judgment the holder of the deed is subrogated to the rights of the debtor in the equitable estate and may pay the debt and redeem. Sheppard *v.* Messenger, 107 Iowa 717, 77 N. W. 515.

68. McClair *v.* Huddart, 6 Colo. App. 493, 41 Pac. 832; Johnston *v.* Bennett, 6 Colo. App. 362, 40 Pac. 847.

Where the petitioner subordinates his lien to that of a prior trust deed the holder of the note secured by such deed is not a necessary party to the proceedings to fore-

rights and obligations as between themselves.[69] And while it may be better that the trustee should be made a party with a view to conclude him and those whom he represents, he is not an indispensable party to the statutory foreclosure of a lien which cannot be affected by the trust deed, there being nothing in the statute requiring it.[70]

(VIII) *PURCHASER OR ENCUMBRANCER PENDENTE LITE.*[71] Persons acquiring liens other than mechanics' liens, after the commencement of a suit to foreclose a mechanic's lien, are not necessary parties to the latter.[72] And a purchaser *pendente lite* need not be made a party to the mechanic's lien proceeding.[73]

(IX) *ORIGINAL OR GENERAL CONTRACTOR.* The general contractor is a proper party to a suit to enforce the lien of a subcontractor or materialman,[74] especially if a personal judgment is desired, and even under circumstances which render him an unnecessary party,[75] for the purpose of avoiding a multiplicity of suits,[76] and under the theory of the statutory remedy in some jurisdictions he is only a proper party and is not a necessary party where no personal judgment is sought.[77] But where the statute does not expressly or by implication require the principal contractor to be a party and the subcontractor is not required to exhaust his remedy against the principal contractor before proceeding against the property, and in an action by the subcontractor the owner may interpose any defense which would be available to the contractor, it is held that while the contractor is a proper, he is not a necessary, party, so as to require a stay of proceedings until

close the lien. Portones *v.* Badenoch, 132 Ill. 377, 22 N. E. 349 [*affirming* 33 Ill. App. 312].

So where sale is ordered subject to the trust deed and there has been no timely objection to the omission it will not be fatal to the proceedings. Portones *v.* Badenoch, 132 Ill. 377, 23 N. E. 349.

69. McClair *v.* Huddart, 6 Colo. App. 493, 41 Pac. 832.

70. Lookout Lumber Co. *v.* Mansion Hotel, etc., Co., 109 N. C. 658, 14 S. E. 35.

71. See *infra*, VIII, G, 3, b, (XI).

72. Suydam *v.* Holden, 11 Abb. Pr. N. S. (N. Y.) 329 note.

A mortgagee who takes his mortgage pending an action to foreclose a mechanic's lien is not a necessary party to that action. Middleton *v.* Davis-Rankin Bldg., etc., Co., 45 S. W. 896, 20 Ky. L. Rep. 263.

Judgment.—And so also of one who perfects a judgment lien during the pendency of a mechanic's lien suit. Harrington *v.* Latta, 23 Nebr. 84, 36 N. W. 364, holding that the judgment lien was only an encumbrance on defendant's equity of redemption which would be extinguished by the foreclosure.

73. Mosier *v.* Flanner-Miller Lumber Co., 66 Ill. App. 630.

Purchase at mortgage sale.— The purchaser of property at sale under a trust deed, after commencement of an action to enforce a mechanic's lien, and after expiration of the time for bringing the action, is not a necessary party. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912.

When not bound.— The purchaser succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; or, in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser is, then, only concerned with the state of the title at the date of the mortgage, and the existence of liens affecting the rights of the mortgagee, and his rights are not affected by liens adjudged against the mortgagor in a suit in which neither he nor the mortgagee is a party. Hokanson *v.* Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354.

74. Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512; Walkenhorst *v.* Coste, 33 Mo. 401 (holding that such contractor is properly joined, although no personal judgment can be rendered against him); Slade *v.* Amarillo Lumber Co., (Tex. Civ. App. 1906) 93 S. W. 475; Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503 (holding that if he is a necessary party a failure to object to his omission by demurrer or answer waives the objection). See also Trammell *v.* Hudmon, 78 Ala. 222. Where a subcontractor, on notifying the owner of his claim, fails to file the copy of his account in the recorder's office and notify the contractor, as provided by the statute, the contractor is not concluded as to the amount and justice of his claim; and, in an action to enforce the lien the contractor is a proper party. Geller *v.* Puchta, 1 Ohio Cir. Ct. 30, 1 Ohio Cir. Dec. 18.

75. Wood *v.* Oakland, etc., Rapid Transit Co., 107 Cal. 500, 40 Pac. 806, where the contract with the original contractor was void.

76. Wood *v.* Oakland, etc., Rapid Transit Co., 107 Cal. 500, 40 Pac. 806; Giant Powder Co. *v.* San Diego Flume Co., 78 Cal. 193, 20 Pac. 419. But where the materials are furnished to the contractor merely as the agent of the owner, it is held that the contractor should not be joined. Hooper *v.* Flood, 54 Cal. 218.

77. Hubbard *v.* Moore, 132 Ind. 178, 31 N. E. 534; Crawfordsville *v.* Barr, 65 Ind.

service of process upon the non-resident contractor.[78] On the other hand the general contractor is a necessary party where the contract relation and state of accounts between the defendant and the general contractor and between the latter and the subcontractor must be adjudicated before the lien can be established and the rights and liabilities of the parties ascertained.[79] So where the right of a subcontractor to foreclose a mechanic's lien depends upon the fact that payments were made by the owner to the general contractor to whom they were due under the contract, the contractor is a necessary party in order that the owner may be protected as against such contractor by the judgment concluding the facts upon

367 (where the proceeding was *in rem*); Hand Mfg. Co. *v.* Marks, 36 Oreg. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997 (where it is held that the contractor being the agent of the owner, his acts may be said to be the acts of the owner, thereby establishing a privity, for the purpose of the lien, between the owner and the subcontractors, materialmen, and laborers; so that a direct relationship exists between the owner and the subcontractor, and it is not necessary that the contractor be present in the proceeding to supply a link to complete and establish such relationship). That the contractor is not a necessary party is also substantially held in California. Green *v.* Clifford, 94 Cal. 49, 29 Pac. 331 (where the contractor had abandoned his contract). Russ Lumber, etc., Co. *v.* Garrettson, 87 Cal. 589, 25 Pac. 747.

Where owner becomes debtor.— Where a contractor agrees with his materialmen that part of the sum due him for building a house shall be paid by the owner to the materialmen, and the owner assents, and the materialmen release the contractor from liability, the contractor is not a necessary party to an action by the materialmen to foreclose a lien on the house. Leeper *v.* Myers, 10 Ind. App. 314, 37 N. E. 1070. Where school directors by failing to take from a contractor a bond to pay all materialmen for materials furnished such contractor for the erection of a schoolhouse, as required by the statute, make the school-district liable to such materialmen for the full amount of their claims, a materialman need not make the contractor a party to an action against the district in such a case before he can recover from it. Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110.

If the contractor has assigned his interest to the subcontractor the former is not a necessary party. Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90.

78. Burgi *v.* Rudgers, (S. D. 1906) 108 N. W. 253.

79. *Colorado.*— Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445; Estey *v.* Hallack, etc., Lumber Co., 4 Colo. App. 165, 34 Pac. 1113; Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187. In an action by a laborer employed by a subcontractor to enforce a mechanic's lien, the contractor, if service can be had on him, is a necessary party. Union Pac. R. Co. *v.* Davidson, 21 Colo. 93, 39 Pac. 1095.

Georgia.—Lombard *v.* Young Men's Library Assoc. Fund, 73 Ga. 322. But when the contractor has absconded and left the state so that he cannot be served with personal process, the materialman may resort to an equitable proceeding between the owner and contractor jointly, serving the latter by publication or by attachment against the contractor and garnishment of the owner. Castleberry *v.* Johnston, 92 Ga. 499, 17 S. E. 772.

Iowa.— Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863 (holding that the ruling that if the contractor has absconded he may be served by publication is not in conflict with the rule requiring him to be made a party); Vreeland *v.* Ellsworth, 71 Iowa 347, 32 N. W. 374.

Michigan.— Kerns *v.* Flynn, 51 Mich. 573, 17 N. W. 62.

Minnesota.— Northwestern Cement, etc., Pavement Co. *v.* Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 45 N. W. 868.

Missouri.— Ashburn *v.* Ayres, 28 Mo. 75; Wibbing *v.* Powers, 25 Mo. 599 (both cases relating to the proceeding by scire facias under an early statute and holding that where the proceeding is brought against the contractor, who was the principal debtor, and also against the owners of the building, plaintiff cannot, after discontinuing against the former, proceed to judgment against the latter, and the first case holding further that the fact that the contractor cannot be found is no excuse as the statute makes provision for such cases); T. A. Miller Lumber Co. *v.* Oliver, 65 Mo. App. 435; Bomheck *v.* Devorss, 19 Mo. App. 38. Under a statute that all parties to the contract must be made parties while all other persons interested may be made parties, in a suit by a subcontractor who had furnished materials or labor to a subcontractor the original contractor must be made a party. Rumsey, etc., Co. *v.* Pieffer, 108 Mo. App. 486, 83 S. W. 1027. But in Horstkotte *v.* Menier, 50 Mo. 158, it was held that the omission of the contractor is a mere irregularity and the judgment will not be had if the objection was not made in due time. See also Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737. Where the materials are purchased by the contractor as agent for the owner the former is not a necessary party, the provision requiring the parties to the contract to be made parties referring only to the contract which is the subject-matter of the inquiry, and to the parties against whom

which the right of the subcontractor to recover depends,[80] and sometimes by the express terms of the statute the general contractor and owner are required to be joined.[81] But where the statute under which the action is brought creates a duty directly on the part of the owner to the materialman or laborer, the action for a breach of such duty is not for the enforcement of a lien and the general contractor is not a necessary party.[82]

(x) *Effect of Failure to Join Parties.*[83] If the issues between those who are present can be tried notwithstanding the absence of others who may not be concluded by the proceeding, or, if the establishment of the lien does not depend on the presence of such omitted parties, the rule that an objection for a defect of parties will be waived if not made properly or in time has been applied.[84]

a personal judgment is to be rendered. Whitmeyer *v.* Dart, 29 Mo. App. 565.

Nebraska.— If such contractor is not made a party, the decree is a nullity as to him, and, after completing his contract and complying with the statute, he may bring suit to enforce his lien. Wakefield *v.* Van Dorn, 53 Nebr. 23, 73 N. W. 226.

North Carolina.— Lookout Lumber Co. *v.* Mansion Hotel, etc., Co., 109 N. C. 658, 14 S. E. 35.

Pennsylvania.—Barnes *v.* Wright, 2 Whart. 193, as to the necessity of joining the builder in the proceeding by scire facias under the act of 1808.

Texas.— Thomas *v.* Ownby, 1 Tex. App. Civ. Cas. § 1212. See also Slade *v.* Amarillo Lumber Co., (Civ. App. 1906) 93 S. W. 475, where it was held that the contractor was a proper party, some of the members of the court being of opinion that he was a necessary party.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 479.

Joinder of several general contractors.— Where the subcontractor or materialman is employed by several original contractors all of the latter should be joined. McDonald *v.* Backus, 45 Cal. 262 (under the statute of 1868 which required the person filing a claim or lien to state the name of the person by whom he was employed); Harbeck *v.* Southwell, 18 Wis. 418 (holding, however, that a failure to object seasonably to the non-joinder of one of the contractors waived the objection). But in Missouri where several contractors jointly undertake the contract, being jointly and severally liable, it is sufficient if either or only one of them is made a party defendant in a suit by a subcontractor under the statute requiring that in such a suit all of the parties to the contract must be made parties. Hassett *v.* Rust, 64 Mo. 325; Putnam *v.* Ross, 55 Mo. 116; Steinmann *v.* Strimple, 29 Mo. App. 478; Fruin *v.* Mitchell Furniture Co., 20 Mo. App. 313; Foster *v.* Wulfing, 20 Mo. App. 85. And in Julius *v.* Callahan, 63 Minn. 154, 65 N. W. 267, it is held that the court may proceed, although one of two contractors was not served, and render judgment against both enforceable against the joint property of both and the separate property of the one served.

Service by publication see *infra*, VIII, H, I, b, (II).

80. Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390, 40 N. E. 86. And where the materialman has no lien because the general contractor has not properly acquired one, in an action by the former to enforce a privilege for materials furnished for defendant's house, the amount still due from defendant to the contractor cannot be distributed among his creditors where he is not made a party. Baker *v.* Pagaud, 26 La. Ann. 220.

81. O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898; Ayres *v.* Revere, 25 N. J. L. 474; Simnickson *v.* Lynch, 25 N. J. L. 317. In Kansas under Gen. St. (1889) p. 4738, where an action against the owner of a building is brought by a subcontractor or other person, the contractor shall be made a party defendant, and shall at his own expense defend against the claim; and, if he fails to make such defense, the owner may defend at his (the contractor's) expense. It is the duty of the subcontractor or other person to make the original contractor a party, and, if he fails or refuses to do so, the owner can recover from him damages for the wrongful institution of the action. Tracy *v.* Kerr, 47 Kan. 656, 28 Pac. 707.

82. R. C. Wilder's Sons Co. *v.* Walker, 98 Ga. 508, 25 S. E. 571, under a statute providing that every person who gives out a contract for the building of a house, store, or mill, etc., shall retain twenty-five per cent of the contract price thereof until the contractor shall submit to such person an affidavit that all debts incurred for material and labor in building such house have been paid, or that the persons to whom such debts for labor and material are owed have consented to the payment of said twenty-five per cent; and that any person who shall pay over to the contractor the said twenty-five per cent of the contract price without requiring the affidavit as aforesaid shall be liable to the extent of twenty-five per cent of said contract price to any materialman or laborer for material furnished or work for said contractor in building or constructing said house, etc.

83. See, generally, as to the effect of omitting particular parties *supra*, VIII, G, 3, b, (VI), (VII), (VIII), (IX).

84. Horstkotte *v.* Menier, 50 Mo. 158; Fruin *v.* Mitchell Furniture Co., 20 Mo. App. 313; Lawrence *v.* Greenfield Cong. Church, 164 N. Y. 115, 58 N. E. 24 (holding that in an action in which an assignee, under an assignment expressly subject to a prior assign-

But where a judgment against a particular party is a prerequisite to the validity of the lien, his non-joinder cannot be waived.[85] The general rule applies that parties who are interested in the property or subject-matter and between whom and the parties to the proceeding there is no privity are not bound by the judgment in such proceeding if they are not parties before the court.[86]

(XI) *INTERVENTION, ADDITION, OR SUBSTITUTION* — (A) *Addition and Substitution in General.* While in an action at law pure and simple a plaintiff cannot be compelled to bring in other parties,[87] new parties may be introduced in equity at any time,[88] and while the addition or substitution of parties rests largely upon the law and practice of the forum in which the lien action is pending, generally the court has power in the equitable proceeding through which the lien is enforced, and under the statutory provisions in that regard, to add other parties if their presence is necessary to a complete determination of the matters involved as between all persons interested.[89] But plaintiff cannot bring in or the court add parties, unless plaintiff has a cause of action against defendant or some per-

ment, is substituted as plaintiff, if the absence of the prior assignee creates a defect of parties and the attention of the court is not directed to the point at the trial and no ruling is asked on or the point referred to in a motion for a nonsuit, the defect is as effectually waived as if defendant had omitted to plead it); Hawkins *v.* Mapes-Reeves Constr. Co., 81 N. Y. Suppl. 794; Harbuck *v.* Southwill, 18 Wis. 418; Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503.

85. Estey *v.* Hallack, etc., Lumber Co., 4 Colo. App. 165, 34 Pac. 1113; O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898 (as to a proceeding by a subcontractor before a justice of the peace under a statute providing that a judgment cannot be entered unless the owner and contractor are joined); Johnson-Frazier Lumber Co. *v.* Schuler, 49 Mo. App. 90 (distinguishing the cases from this state cited in the last preceding note in that they announce a rule of practice under a statute applicable to courts of record, while the case in hand involves the jurisdiction of a justice of the peace under a statute requiring the joinder of the owner and contractor).

86. *Alabama.*— Young *v.* Stoutz, 74 Ala. 574.

Arkansas.— Richardson *v.* Hickman, 32 Ark. 406; White *v.* Chaffin, 32 Ark. 59.

Illinois.— Lomax *v.* Dore, 45 Ill. 379; Williams *v.* Chapman, 17 Ill. 423, 65 Am. Dec. 669; Kelley *v.* Chapman, 13 Ill. 530, 56 Am. Dec. 474.

Indiana.— Martin *v.* Berry, 159 Ind. 566, 64 N. E. 912; Marvin *v.* Taylor, 27 Ind. 73; Holland *v.* Jones, 9 Ind. 495; Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

Iowa.—Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109, 68 N. W. 587, 61 Am. St. Rep. 226.

Kansas.— Stough *v.* Badger Lumber Co., 70 Kan. 713, 79 Pac. 737.

Missouri.— Schaeffer *v.* Lohman, 34 Mo. 68, holding that those not made parties may impeach the judgment.

Nebraska.— Monroe *v.* Hanson, 47 Nebr. 30, 66 N. W. 12.

Pennsylvania.—A judgment on a mechanic's lien claim is not, at least against other lien claimants who are not parties, an adjudication that the mechanic's claim was a valid subsisting lien. The judgment itself is a lien and can be attacked collaterally only for fraud or collusion, but the existence of the judgment does not preclude other lien claimants from attacking the validity of the lien claim itself, whether fraudulent or not, for the purpose of having it postponed to other liens. Wrigley *v.* Mahaffey, 5 Pa. Dist. 389.

Wisconsin.— McCoy *v.* Quick, 30 Wis. 521.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 481.

87. See PARTIES.

88. Gress Lumber Co. *v.* Rogers, 85 Ga. 587, 11 S. E. 867; Kelly *v.* Gilbert, 78 Md. 431, 28 Atl. 274; Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390, 40 N. E. 86. See also for parties in equity, EQUITY, 16 Cyc. 200.

89. *Colorado.*— Snodgrass *v.* Holland, 6 Colo. 596.

Georgia.— Gress Lumber Co. *v.* Rogers, 85 Ga. 587, 11 S. E. 867, holding that the rule in equity would be applied, although plaintiff entered the court on the law side if by his petition he makes such a case as entitles him to relief in equity.

Kansas.— The purpose to be served by making the contractor a party is that he may defend at his own expense, and the statute (section 5122) provides that, "if he fails to make such defense, the owner may make it for him." For this purpose the contractor may be brought into the action at any time on the application of either party, provided the action is properly brought against the owner of the premises within the year. Western Sash, etc., Co. *v.* Heiman, 65 Kan. 5, 68 Pac. 1080.

Kentucky.— Laviolette *v.* Redding, 4 B. Mon. 81.

New York.— Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390, 40 N. E. 86; Lowber *v.* Childs, 2 E. D. Smith 577, 1 Abb. Pr. 415 (holding that it is error to dismiss because the original contractor was not served); Foster *v.* Skidmore, 1 E. D. Smith 719; Sullivan *v.* Decker, 1 E. D. Smith 699; Williams *v.* Deutscher Verein, 14 N. Y.

son originally made a defendant,[90] nor can the petition be amended so as to bring in a necessary party, if the lien has already expired;[91] and if the matter has already been submitted, and the party be not a necessary party, the trial will not be opened.[92] Where the proceeding is in the nature of a proceeding *in rem* by a bill in equity on behalf of the complainant and all other lien claimants, in which all lien claimants must appear and file their claims, if any refuse so to appear the decree and sale thereunder will extinguish all mechanics' liens and there is no necessity to bring in such refusing party as a defendant.[93] And one who disputes the amount of his liability cannot have another substituted to bear the expense of the litigation.[94]

(B) *Intervention.* Generally under the various statutory provisions persons having liens on the property or interests in the controversy or whose presence may be proper or necessary to a complete determination of the entire litigation may come in and be made parties as if they had been originally joined,[95] as in the

Suppl. 368. It is not fatal to a motion to add a party as defendant that the relief asked is in the alternative. Williams *v.* Edison Electric Illuminating Co., 16 N. Y. Suppl. 857.

Tennessee.— Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136, holding that a mortgagee may be brought in by supplemental bill to test priorities.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 482.

Guardian of insane and insolvent defendant.— Under a statute in Maine providing that the administrator or executor of an insolvent estate shall upon citation be holden to answer to any action brought upon a claim secured by such lien, a defendant who becomes insane and for whom a guardian has been appointed and whose estate is duly represented as insolvent stands in the same position. Pratt *v.* Seavey, 41 Me. 370.

The court of its own motion should order parties brought in who by the statute are made necessary parties to the proceeding. Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305 [*affirmed* in 167 N. Y. 604, 60 N. E. 1111], where it was held that plaintiff was excused for not making another lienor a party at the time the action was begun as a search against the premises did not disclose the lien but that there was no excuse for not bringing in such lienor after his lien was made to appear and that the court should have ordered him brought in.

Striking out sureties on bond.— Where, in foreclosure of a mechanic's lien, the owner, contractor, other lienors, and the sureties on the bond to discharge the lien, who are also sureties on the bond to discharge the lien of the other lienors, are made parties, but the sureties have not yet been served, and the other lienors demand affirmative relief against the sureties, and object to striking them from the summons, this will not be done, although plaintiff lienor has changed his mind, and decided not to proceed against the sureties. Brewster *v.* McLaughlin, 28 Misc. (N. Y.) 50, 58 N. Y. Suppl. 989.

90. Cook *v.* Gallatin R. Co., 28 Mont. 340, 72 Pac. 678; Spence *v.* Griswold, 7 N. Y. Suppl. 145, 23 Abb. N. Cas. 239.

91. See *supra*, VIII, F, 4, c.

92. Mulligan *v.* Vreeland, 88 Hun (N. Y.) 183, 34 N. Y. Suppl. 990.

Even as late as at the time of trial other lien claimants may be brought in if no one is prejudiced. Wheaton *v.* Berg, 50 Minn. 525, 52 N. W. 926.

93. Kelly *v.* Gilbert, 78 Md. 431, 28 Atl. 274.

Subsequent lienors required to intervene.— Under the statute which provides that those who have filed liens prior to the commencement of the action shall be joined as plaintiffs or defendants but that subsequent lien claimants must apply to be joined as parties in intervention, if a subsequent lienor has not applied to be made a party it is proper to deny a motion to make him a defendant. Lavanway *v.* Cannon, 37 Wash. 593, 75 Pac. 1117.

94. Chamberlain *v.* O'Connor, 1 E. D. Smith (N. Y.) 665, 8 How. Pr. 45; Busse *v.* Voss, 9 Ohio Dec. (Reprint) 441, 13 Cinc. L. Bul. 542.

95. *Maryland.*— Wilson *v.* Merryman, 48 Md. 328, where the statute required a party to come in on the return of the writ.

Massachusetts.— Thaxter *v.* Williams, 14 Pick. 49, as to owner's right to appear.

Missouri.— Kling *v.* Railway Constr. Co., 4 Mo. App. 574, as to one who acquired an interest in the property by the foreclosure of a trust deed executed before the commencement of the work for which the mechanic's lien was claimed on leasehold property.

Pennsylvania.—Shannon *v.* McDuffee, 2 Pa. Dist. 230, as to the right of a present owner to come in where the title was conveyed after the lien was filed. But in Pace *v.* Yost, 10 Kulp 538, it was held that one who seeks to come in as a party defendant because he is the owner of the property, for the purpose of having the judgment on the scire facias opened, cannot succeed unless he shows title to the property.

Virginia.— Pairo *v.* Bethell, 75 Va. 825, assignors.

Wisconsin.— Weston *v.* Weston, 46 Wis. 130, 49 N. W. 834 (as to the right of a wife who in addition to her inchoate dower and homestead rights had been awarded exclusive possession of the homestead pending a suit for divorce, and where judgment by default

case of mortgagees,[96] or other mechanics' lien claimants, whose rights and priorities should be settled.[97]

had been obtained against the husband alone by collusion between him and plaintiff); Lampson *v.* Bowen, 41 Wis. 484 (as to the right of a present owner to come in, holding that upon a proper showing the court will set aside the judgment within a year after its entry and admit such party to defend against the claim for a lien, and that generally this is the best course in order to avoid circuity of action).

See 34 Cent. Dig. tit. "Mechanics' Liens," § 483.

A party interested in the proceedings only and who will not be bound by the judgment on a scire facias on a mechanic's lien claim has no standing to intervene prior to judgment. Watts *v.* Eckels, 11 Pa. Dist. 570, 26 Pa. Co. Ct. 439. So where pending a mechanic's suit the property is sold at judicial sale which extinguishes the mechanic's lien the purchaser cannot make himself a party to the mechanic's action and tender an issue denying the character in which the mechanic is served, questions touching the priority and validity of conflicting liens being such as properly arise on a rule for a distribution of the proceeds of the sale. De Give *v.* Meador, 51 Ga. 160.

96. Walker *v.* Hauss-Hijo, 1 Cal. 183; Erving *v.* Phelps, etc., Windmill Co., 52 Kan. 787, 35 Pac. 800, holding that where service by publication was made on parties who appear on the records to hold mortgages, the first mortgage being owned by the person whose assignment has not been recorded and on application of the second mortgagee before any sale of the premises and before any intervening rights have been acquired, the judgment is opened, the assignees of the first mortgage should be permitted to answer.

Time to intervene.— The fact that a prior mortgagee is not made a party and does not enter his appearance until after the time limited for the commencement of the original lien suit is no reason why his rights should not be adjudicated. The statute which requires the mechanic's lien claimant to make such mortgagee a party imposes the duty on such claimant which he fails to perform at his peril but the lien of the mortgagee cannot be effected by the failure. Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519.

A subsequent mortgagee has no absolute right to intervene and the court properly refuses his application if he delays it until the mechanic is about to have judgment and the effect of the intervention will be to postpone the judgment. Hocker *v.* Kelley, 14 Cal. 164.

Waiver of right.— A mortgagee or beneficiary in a trust deed, not being an owner at the time of the institution of the proceedings under a statute requiring owners to be made parties, is not a necessary party, and such a person or one who after the commencement of the action buys the property under the first lien having a right by statute to intervene in the action and interpose any legal defense, waives his right to be a party by failing to intervene. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912.

Where jurisdiction of court is limited.—But where the jurisdiction of the statutory remedy is conferred upon a court of limited powers which cannot adjudicate between different classes of lien-holders, although a mortgagee will not be bound by such proceedings and embarrassment may arise as to the rights of purchasers under the decree of sale, mortgagees cannot intervene. Van Winkle *v.* Stow, 23 Cal. 457.

97. *Kansas.*— Johnson *v.* Keeler, 46 Kan. 304, 26 Pac. 728, under a statute requiring all persons whose liens are filed to be made parties.

Massachusetts.— Dewing *v.* Wilbraham Cong. Soc., 13 Gray 414 holding that others having claims have the same right to enforce their claims as if they had filed separate petitions.

Minnesota.—Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47; Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

Pennsylvania.— Noyes *v.* Fritz, 2 Miles 162.

Texas.— Pool *v.* Sanford, 52 Tex. 621.

Utah.— Elwell *v.* Morrow, 28 Utah 278, 78 Pac. 605.

Washington.— Washington Rock Plaster Co. *v.* Johnson, 10 Wash. 445, 39 Pac. 115. See also Lavanway *v.* Cannon, 37 Wash. 593, 79 Pac. 1117, cited *supra*, note 93.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 486.

Necessity.— A provision which gives a lienor the right to come in after a prescribed period in a suit commenced by another lienor within that time is construed not to take away from the former the right to protect his own lien by commencing a suit. The parties who may come in are not obliged to accept the benefit of the privilege but may rely upon their individual suits, and if one creditor who has commenced a suit fails to prove his debt or maintain his right to a lien, another creditor who has not appeared in that suit may avail himself of a pending suit, although subsequently commenced, and will not be barred from commencing proceedings to enforce his own lien. Casey *v.* Weaver, 141 Mass. 280, 6 N. E. 372; Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367. So where two contractors furnish labor and material in pursuance of separate contracts with the owner, the failure of one of them to intervene in the proceeding brought by the other will not estop the former from maintaining his action. Wakefield *v* Van Dorn, 53 Nebr. 23, 73 N. W. 226. But in Hunter *v.* Truckee Lodge No. 14, I. O. O. F., 14 Nev. 24, it is held that under the statute of Nevada interveners were connected with the proceeding by force of the statute from the moment the action was commenced and notice

c. Joinder Either as Defendant or Plaintiff. Where the proceeding is in effect a suit in chancery the general rule which obtains in courts of equity controls and all parties in interest should be before the court either as plaintiffs or defendants and they may be introduced in either capacity.[98]

H. Process[99] **— 1. Necessity and Sufficiency — a. In General.** It is not sufficient merely to name one as a party in the pleadings in order to conclude him as a party to the proceedings, but he must be served with process according to the method provided or voluntarily appear as in other cases.[1] A lien cannot be foreclosed in the absence of service of process or notice upon the parties whose presence is essential to a judgment in the proceeding, in accordance with the statutory requirements as to service, whether such service be actual or only constructive, when constructive service is proper,[2] and where the contractor is a necessary party in a suit by a subcontractor in that the claim against him must be established before the lien can be enforced, he must be brought in by process if he does not appear.[3] It has been held that as the court has jurisdiction to determine all liens set up, a separate summons to the owner by each of the defendant lienors is not necessary,[4] although service upon the parties affected by the allegations of the cross complaint setting up the lien is required if a summons is not served.[5]

published by plaintiffs; that the action was a proceeding to enforce not only the lien of plaintiffs but all the recorded liens, and that the holders of those liens not only had the right, but they were obliged to prove up their claims in this action, or be held to have waived them. Under the act of 1856 in California, the liens which were required to be exhibited and proved upon publication of notice or to be deemed waived were held to be liens which arose under the act and the act did not apply to other liens. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748.

Confined to mechanics' lien suits.—A statute requiring a lien claimant to intervene in a pending mechanic's lien proceeding and restraining him from bringing a separate action does not require him to intervene in a mortgage foreclosure proceeding. Nason *v.* Northwestern Milling, etc., Co., 17 Wash. 142, 49 Pac. 235.

Cause of action for money only.—Having a right of action against defendant for the recovery of money only without a right to a lien will not warrant an intervention. Cook *v.* Gallatin R. Co., 28 Mont. 340, 72 Pac. 678.

98. Lombard *v.* Johnson, 76 Ill. 599; Freese *v.* Avery, 57 N. Y. App. Div. 633, 69 N. Y. Suppl. 150.

Local statutes sometimes expressly so provide. See Burgi *v.* Rudgers, (S. D. 1906) 108 N. W. 253; Lavanway *v.* Cannon, 37 Wash. 593, 79 Pac. 1117.

99. Process generally see Process.

1. Clayton *v.* Farrar Lumber Co., 119 Ga. 37, 45 S. E. 723; Vreeland *v.* Ellsworth, 71 Iowa 347, 32 N. W. 374; Hokanson *v.* Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991. See also *supra*, VIII, G, 3, b, (I).

2. McKim *v.* Mason, 3 Md. Ch. 186 (applying the rule as essential for the validity of a judgment *in rem* as actual notice is to that of a judgment *in personam*); Meyers *v.* Le Poidevin, 9 Nebr. 535, 4 N. W. 319; Vickerle *v.* Spencer, 9 R. I. 585, citation.

Service on one of co-defendants.— Under a statute providing that an action shall be deemed to be commenced against a defendant when a summons is served "on a co-defendant who is a joint contractor, or otherwise united in interest with him," it is held that a vendor and purchaser in an executory contract are not so united in interest that service on his co-defendant will be deemed the commencement of the action against the purchaser. Moore *v.* McLaughlin, 11 N. Y. App. Div. 477, 42 N. Y. Suppl. 256. See also Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661, where, in passing upon the question of the limitation of the time to sue as against several parties defendant, it was held that there was no unity of interest between the legal owner and the lien-holder whether by mortgage, mechanic's lien, or otherwise, such as made either the representative of the other so as to render service of summons on one equivalent to service on the other.

3. Vreeland *v.* Ellsworth, 71 Iowa 347, 32 N. W. 374.

4. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

But a personal judgment against the employer or owner is not authorized without service of summons upon the cross petition, although he is bound to take notice of all claims asserted against the property by persons who are made parties under the original petition under a statute providing that all defendants having liens may set them up in their answers. Seiglestyle *v.* Diesenroth, 12 Bush (Ky.) 296.

5. Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, holding that an allegation in the original complaint that a defendant

b. Sufficiency — (i) *In General.* Where the statute provides that the action shall proceed according to the chancery practice so far as it may be applicable, the summons is not objectionable because it refers to the petition as on the chancery side of the court, notwithstanding the cause is required to be placed on the common-law docket.[6] The character of process or notice in a proceeding to foreclose a mechanic's lien is sometimes fixed by the particular statutes with reference to the character of the parties or interests represented.[7] And aside from the application of general rules and statutory provisions,[8] it may be stated that where the statute conferring the jurisdiction prescribes the process, nothing else will do, but such provisions must be followed in respect of the essential elements of form[9] as well as in respect of the substance,[10] and the issue and service of the summons, notice, or other process prescribed,[11] and unless the process itself or defects in the substance or service thereof have been waived by a general

had a lien was not sufficient to cure the failure of such service.

Waiver.— And where the owner is served with answers in the nature of cross bills by lien claimants and stipulates that all the causes shall be heard together and his attorneys are present at the hearing, he cannot thereafter claim that process was not issued or that service was not made in time. Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120.

6. Reed *v.* Boyd, 84 Ill. 66, holding that the position of the cause on the docket did not change its nature or inherent qualities.

7. Holmes *v.* Humphreys, 187 Mass. 513, 73 N. E. 668, where it was said that because the course of proceeding, although conformable in part to proceedings *in rem* and in part to proceedings *in personam*, was to be considered as more nearly resembling a proceeding *in rem*, the statute made a distinction in regard to the process to be issued between the owner and the debtor when they were different persons; the one was to be summoned and the other, like other creditors, having collateral interests, was to be notified. So in Colorado while persons interested were to have notice, the owner was to be summoned and the summons was to be served and returned as in chancery proceedings. Snodgrass *v.* Holland, 6 Colo. 596; Decker *v.* Myles, 4 Colo. 558.

Service of petition and order to appear.— Where the statute provides for the service of a petition and order made thereon by the court requiring defendant to appear and answer, no summons is necessary. Johnson *v.* Frazee, 20 S. C. 500.

8. See Process.

9. Wheeler *v.* Almond, 46 N. J. L. 161; Currier *v.* Cummings, 40 N. J. Eq. 145, 3 Atl. 174; Cox *v.* Flanagan, (N. J. Ch. 1885) 2 Atl. 33, which cases hold that the failure to indorse on the claim the date of the issue of the summons as required by the statute was fatal. But see Hall *v.* Spalding, 40 N. J. L. 166; James *v.* Van Horn, 39 N. J. L. 353, in which cases it is held that as to persons who cannot be misled or prejudiced by the failure to make the indorsement, as concurrent claimants, the statute is directory.

10. McKelvey *v.* Wonderly, 26 Mo. App. 631 (holding that the posting of an order of publication which fails to state on what account the amount sued for is claimed to be due as required by the statute is not a sufficient service to support a judgment); Otis *v.* Voorhis, 49 How. Pr. (N. Y.) 273 (under Laws (1863), requiring a notice to contain a statement of all the liens filed of lienors other than plaintiffs, the amount thereof and the times of filing such liens); Vickerie *v.* Spencer, 9 R. I. 585. Under an early statute in New York it was held that notice to the owner to appear in proceedings to foreclose a lien need not state when the lien was filed or when the labor was performed. Tinker *v.* Geraghty, 1 E. D. Smith (N. Y.) 687. But see McSorley *v.* Hogan, Code Rep. N. S. (N. Y.) 285.

Claim for lien in summons.— In Willamette Falls Transp., etc., Co. *v.* Riley, 1 Oreg. 183, it was held that under a statute classifying actions an action for foreclosing a mechanic's lien fell within that designated as an action arising on a contract for money wherein the summons was required to contain in substance a statement that plaintiff will take judgment for the sum specified therein, etc., although the court was empowered to order that the judgment should be a lien on the specific part of the estate and that it was not necessary that the claim should state that judgment would be taken for a lien.

Requiring appearance on day passed.— A notice requiring appearance on a day passed is bad. Jones, etc., Lumber Co. *v.* Boggs, 63 Iowa 589, 19 N. W. 678.

11. Jones, etc., Lumber Co. *v.* Boggs, 63 Iowa 589, 19 N. W. 678; Vickerie *v.* Spencer, 9 R. I. 585, holding that where the statute giving the jurisdiction provides that the proceeding to enforce the lien shall be by petition and that the time within which the petition shall be filed shall be limited to the next term of the court after filing the claim, and that ten days before the sitting of the court to which the petition is preferred citation shall be served upon the owner, nothing less than a citation as prescribed will be sufficient.

Construction.— Under the Missouri statute it was held not essential, when a mechanic's lien is sought to be enforced by suit before a justice of the peace, that summons should issue on the day specified for the commence-

appearance, as may be done,[12] the court will have no jurisdiction to proceed,[13] and a judgment by default will be a nullity.[14]

(II) *PUBLICATION.* A personal judgment for the amount of the claim which will bind the general estate of defendant must be supported by personal service,[15] but a constructive service is permitted, as by posting,[16] or by publication in proper cases, for the purpose of sustaining a judgment against the property, under particular statutes or under provisions relating generally to process appropriate to the remedies for the enforcement of mechanics' liens.[17]

ment of the suit in the notice filed in the office of the clerk of the circuit court; the filing of the statement of the cause of action on that day with the justice designated in the notice will suffice. McDonnell *v.* Nicholson, 67 Mo. App. 408. A provision requiring the court in which the petition is entered to order notice to be given the owner and creditors having like liens that they may appear and answer at a certain day in the same term or the next term of the court by serving them with an attested copy of the petition with the order of the court thereon a certain number of days before the time assigned for the hearing does not require the notice to be issued at the term when the petition is entered or the next ensuing term, but that the court shall make no order until a time has been first assigned for the hearing (Rockwood *v.* Walcott, 3 Allen (Mass.) 458); and the order of notice on the petition filed in vacation need not be made returnable at the next term (Worthen *v.* Cleaveland, 129 Mass. 570).

Process running into another county.—Under a statute permitting process to be issued to another county than the one in which the suit is brought where defendant residing in such other county can with propriety be joined as a co-defendant, if the owner resides and is served in the county where the property is situated and where the suit is brought summons may be issued to another county for the contractor. Mathews *v.* Heisler, 58 Mo. App. 145, from which case it would seem that if neither the owner nor the contractor resided in the county both should be brought in by publication. But where the pleading did not show on its face that the materials were furnished under a contract with the owner, which was necessary in order to show a lien under the particular statute, service upon the contractor in another county was not sufficient to support a judgment by default against the contractor for the amount of the claim, no judgment being recovered for the enforcement of the lien. Chapman *v.* Bolton Steel Co., 4 Ohio Cir. Ct. 242, 2 Ohio Cir. Dec. 523.

Service within the state.—Under the provisions of the New York code of civil procedure which declare: (1) That a mechanic's lien may be enforced in a court which has jurisdiction in an action founded upon a contract for a sum of money equivalent to the amount of said debt; (2) that the provisions of the code relating to actions for the foreclosure of a mortgage upon real property apply to actions in a court of record to enforce mechanics' liens, etc.; and (3) that an order directing service of a summons either without the city of New York or by publication may be granted by the court or by a justice thereof, etc., it was held that in actions brought in the city court the summons and complaint might be served in the state, although at a point not within the city, as otherwise the first provision above recited, so far as the city court was concerned, would be meaningless when a necessary defendant was a non-resident of the city and could not be served therein. McCann *v.* Gerding, 27 Misc. (N. Y.) 845, 59 N. Y. Suppl. 381.

12. Cornell *v.* Matthews, 27 N. J. L. 522; Otis *v.* Voorhis, 49 How. Pr. (N. Y.) 273; Oliver *v.* Fowler, 22 S. C. 534. But an agreement between a mechanic and defendant that the latter should acknowledge service of summons to have been made during a former term while good as between the parties will not prevent an attack by one who has acquired title at a judicial sale. Christian *v.* O'Neal, 46 Miss. 669.

13. Otis *v.* Voorhis, 49 How. Pr. (N. Y.) 273; Vickerie *v.* Spencer, 9 R. I. 585.

14. Jones, etc., Lumber Co. *v.* Boggs, 63 Iowa 589, 19 N. W. 678.

15. Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187 (holding that an action against a non-resident contractor and an owner to establish and foreclose a mechanic's lien is not a proceeding *in rem*, and the court has no jurisdiction to render a personal judgment against such contractor who has not been personally served, although publication of a summons is properly made); Colcord *v.* Funck, Morr. (Iowa) 178; Murdock *v.* Hillyer, 45 Mo. App. 287; Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402. *Contra*, Gould *v.* Garrison, 48 Ill. 258.

16. Colcord *v.* Funck, Morr. (Iowa) 178, holding, however, that personal service is necessary when defendant can be found in the county.

17. Mathews *v.* Heisler, 58 Mo. App. 145 (holding that if neither the owner nor the contractor resides in the county both may be brought in by publication, although no personal judgment can be rendered against either); Murdock *v.* Hillyer, 45 Mo. App. 287 (holding that there must be an adjudication of the debt claimed before the lien can be enforced, for which purpose the debtor must be brought before the court by personal service, publication, or voluntary appearance, and that there must be a judgment for the debt personally against defendant if he is brought into court by service of process or against the property if he is served by pub-

2. ATTACHMENT. Actual seizure or attachment of the property is not necessary in order to acquire jurisdiction in a proceeding which is *in rem*,[18] and attachment is not a proper remedy[19] without a statute authorizing it, except for the causes enumerated in the general attachment laws.[20] But by statutory provisions in several jurisdictions the remedy for preserving and enforcing the lien is prescribed by attachment based upon a sworn bill or petition,[21] or affidavit showing the necessary facts entitling the party to the relief,[22] and under such provisions the attachment must be issued and levied within the limitation period, and the mere commencement of a suit without such issue and levy of attachment is not sufficient,[23] even though the attachment is issued and levied subsequently.[24] The proceeding being statutory, the party resorting to it must allege in his affidavit the

lication); O'Rourke *v.* Butte Lodge No. 14, I. O. G. T., 19 Mont. 541, 48 Pac. 1106; Genest *v.* Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. 743 (as to non-resident defendants, to support judgment *in rem*); Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402 (holding that the statute permitting publication, where defendant cannot be found, authorizes such service whether defendant is a resident or a non-resident of the state); Vickerie *v.* Spencer, 9 R. I. 585.

Where the Mechanics' Lien Law makes no provision for publication and this method of service is not permitted at law except in special cases provided by statute, in a suit at law to subject the property to a mechanic's lien order of publication to bring in the owner is unauthorized. Falconer *v.* Frazier, 7 Sm. & M. (Miss.) 235.

The rule requiring the contractor to be joined in an action by the subcontractor is not in conflict with the rule that, if a contractor is a non-resident or has absconded, service may be had on him by publication and the amount of the claim against him adjudicated in the action for the purpose of foreclosing the lien. Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863; Simonson Bros. Mfg. Co. *v.* Citizens' State Bank, 105 Iowa 264, 74 N. W. 905. See also Castleberry *v.* Johnston, 92 Ga. 499, 17 S. E. 772.

Due process of law.— Minn. Gen. St. (1878) c. 81, § 28 (also made applicable to mechanics' liens), providing for service by publication against all parties against whom no personal judgment is sought in actions to foreclose mortgages upon real estate, was held to be void as to non-resident defendants as well as residents, since it made no distinction between them, and there was no reason to suppose that the legislature intended to enact the provision for non-residents alone, since ample provision had already been made for such cases. Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

Sufficiency.— Under a statute requiring a notice by publication at least once a week for three weeks in some newspaper published in the county if there be one, and if not, then by posting, etc., notifying all persons holding or claiming liens to appear, etc., notice published three times in three successive weeks in a weekly newspaper is sufficient, although less than twenty-one days intervened between the date of the first publication and the time other lien claimants were therein notified to appear. Decker *v.* Myles, 4 Colo. 558.

Proof.— A certificate that a notice "was inserted in said paper, commencing with August 21, 1852, and ending October 2, 1852, six weeks," will be taken to show that publication had been made four successive weeks within those dates. Underhill *v.* Corwin, 15 Ill. 556.

18. Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

In garnishment proceedings provided under an earlier statute in Iowa as a remedy by a subcontractor to enforce the lien of the original contractor, it was not necessary that an attachment against the principal contractor should issue. Parmenter *v.* Childs, 12 Iowa 22.

19. Aiken *v.* Kennedy, 1 Tex. Civ. App. Cas. § 1321.

20. Hillman *v.* Anthony, 4 Baxt. (Tenn.) 444.

21. De Soto Lumber Co. *v.* Loeb, 110 Tenn. 251, 75 S. W. 1043; Hillman *v.* Anthony, 4 Baxt. (Tenn.) 444.

22. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667.

23. Oakland Mfg. Co. *v.* Lemieux, 98 Me. 488, 57 Atl. 795; Taylor *v.* Tennessee Lumber Co., 107 Tenn. 41, 63 S. W. 1130; Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136; Shelby *v.* Hicks, 5 Sneed (Tenn.) 197; Barnes *v.* Thompson, 2 Swan (Tenn.) 313; Piper *v.* Hoyt, 61 Vt. 539, 17 Atl. 798.

Additional remedy by judgment and execution.— In Taylor *v.* Tennessee Lumber Co., 107 Tenn. 41, 63 S. W. 1130, it was held that the act of 1875, providing an additional remedy by judgment and execution to be levied on the property, while general in terms, must be confined to parties who are in privity with the owner, as other parties would not be entitled to such judgment. And in Dollman *v.* Collier, 92 Tenn. 660, 22 S. W. 741, it was held that the bill having been framed as for the enforcement of a lien by attachment the remedy by judgment and execution to be levied on the property could not be made available upon failure to sue out the attachment.

The levy may be made without going on the land. Burr *v.* Graves, 4 Lea (Tenn.) 552.

24. Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136.

facts which entitle him to the relief under the statute;[25] but an affidavit which states the facts required by the statute in order to secure the lien and complies with the statute in other respects is sufficient,[26] and the grounds for attachment under the general attachment laws need not be set out,[27] and other requirements relating to attachments under the general attachment laws are not applicable.[28]

3. SCIRE FACIAS. While scire facias was known to the common law, its application to the enforcement of mechanics' liens is statutory.[29] Being a proceeding *in rem*, a judicial sale under one writ discharges all other such liens on the property and another writ will not lie.[30] The writ discloses the facts on which it is founded; it is in the nature of a declaration and the plea is properly directed to it,[31] and it must be issued[32] and served in strict compliance with the requirements of the statute.[33] Parties interested who are not notified as required by the statute

25. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667; Stearns *v.* Jaudon, 27 Fla. 469, 8 So. 640, holding that the provision requiring the affidavit to state the sum due and unpaid specifically, when and where the labor was done, and to describe the land subject to the lien, was not designed to prescribe a sufficient formula of allegation as to the work and labor done; that an affidavit which merely stated that work was done in and upon the mill was insufficient in a proceeding for a lien for labor in constructing, repairing, or operating a mill.

26. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667.

27. Strong *v.* Lake Weir Chautauqua, etc., Assoc., 25 Fla. 765, 6 So. 882; Hillman *v.* Anthony, 4 Baxt. (Tenn.) 444.

28. McLeod *v.* Capell, 7 Baxt. (Tenn.) 196, holding that the recitals necessary in ancillary attachments are not required. The provision in the Florida statute that liens shall be enforced "by attachment in manner provided by law" refers to the general attachment laws as to the necessity of affidavit and bond. Strong *v.* Lake Weir Chautauqua, etc., Assoc., 25 Fla. 765, 6 So. 882.

Necessity of fiat.— As attachments which the code authorizes the clerk to issue are original and ancillary attachments, and no provision is made for such issuance in case of mechanics' liens, the attachment for the enforcement of such liens must be issued by the judge or chancellor as extraordinary process. De Soto Lumber Co. *v.* Loeb, 110 Tenn. 251, 75 S. W. 1043 [*distinguishing* Brown *v.* Brown, 2 Sneed (Tenn.) 431]; Lane *v.* Wood, 1 Tenn. Cas. 648.

Service of process on defendant.— But the attachment being collateral to the original action a judgment by default without service of process on defendant or notice to him is unauthorized and invalid. Brown *v.* Brown, 2 Sneed (Tenn.) 431.

29. Doellner *v.* Rogers, 16 Mo. 340. See also Morgan *v.* Bloecker, 6 Pa. Dist. 659, 41 Wkly. Notes Cas. 127.

30. Anshutz *v.* McClelland, 5 Watts (Pa.) 487, where it appears that the interests of the other lien-holders are to be taken out of the funds raised by the sale. See also McLaughlin *v.* Smith, 2 Whart. (Pa.) 122.

31. Winder *v.* Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487.

No bill of particulars is demandable, and if the lien claim filed does not set out what the statute requires the proper remedy is not by a motion for a bill of particulars but by motion to quash the writ. Wilson *v.* Merryman, 48 Md. 328.

Lien on several buildings.— Where the lien is claimed on several buildings, the amount claimed on each building should be stated separately and not blended together so that the lien on each building is claimed for the entire sum. Plummer *v.* Eckenrode, 50 Md. 225.

Separate writs were required in Pennsylvania for a claim apportioned among several buildings. Jones *v.* Shawham, 4 Watts & S. (Pa.) 257; Barnes *v.* Wright, 2 Whart. (Pa.) 193; Smith *v.* Klinger, 9 Pa. Co. Ct. 301. See also Munger *v.* Silsbee, 64 Pa. St. 454; Taylor *v.* Montgomery, 20 Pa. St. 443; Donahoo *v.* Scott, 12 Pa. St. 45.

32. East Stroudsburg Lumber Co. *v.* Ottenheimer, 4 Pa. Dist. 730; Crawford *v.* Shoe, 14 Pa. Co. Ct. 419; Stocker *v.* Wood, 14 Lanc. Bar (Pa.) 79, which cases construe the act providing that no such "scire facias shall, in any case, be issued within fifteen days previous to the return day of the next term." Miles *v.* Pleasants, 9 Wkly. Notes Cas. (Pa.) 63.

33. Carswell *v.* Patzowski, 3 Pennew. (Del.) 593, 53 Atl. 54 (holding that the provision requiring service on defendant personally if he can be found within the county, and by leaving a copy with some person residing in the building if occupied as a residence, or if not so occupied by affixing a copy on the door or other front part of such building, is not complied with by mere service on defendant); Plummer *v.* Eckenrode, 50 Md. 225 (holding that a return "scire feci" is insufficient, and that the officer should have returned what was done as to leaving the copy at the building as required by statute). But a return "served by copy on A., one of the defendants," and by putting up a copy in front of the building, and nihil as to B, the other defendant, was held to be sufficient under a statute similar to those controlling the cases above cited. Donahoo *v.* Scott, 12 Pa. St. 45.

A nonsuit will not destroy a claim or its lien since the scire facias is but process to enforce the claim, and the failure to pursue it to judgment is of the same effect as the

cannot be prejudiced by any consent agreement between the mechanic filing the lien and the parties against whom the writ issues by which notice is waived.[34]

4. NOTICE OF PENDENCY OF ACTION.[35] Where the statute provides that no lien shall bind the property longer than a fixed time after it is filed, unless within that time an action is commenced and a notice of *lis pendens* filed, such notice must be filed within the time prescribed in order to preserve the lien.[36] Under some statutes the lien claimant is required at the time of filing the complaint and issuing summons to publish a notice of his claim for a certain time in a newspaper notifying all persons holding or claiming liens on the premises to appear and exhibit them;[37] but it has been held that the failure to publish such a notice does not defeat the claimant's right of action where it does not appear that there are any other liens, as in such case defendant is not prejudiced.[38]

I. Pleading — 1. DECLARATION, COMPLAINT, BILL, OR PETITION — a. Necessity For. In accordance with general rules the issues must be presented by pleadings appropriate to the form of remedy in which the lien is enforced.[39] But where the remedy is by scire facias no declaration is necessary.[40] And where the statute requires an adjudication of all recorded claims in one action, it is sometimes held that formal pleadings on the part of claimants who may come into the proceeding and prove their liens are not necessary.[41]

b. Form, Requisites, and Sufficiency — (i) *IN GENERAL.* Relief can be no greater than that justified by the claimant's allegations, and the right to a mechanic's lien, being entirely dependent upon statute, the facts upon which such lien arises and which authorize its enforcement under the statute must be alleged,[42] and the

failure to prosecute other cases. Berger *v.* Long, 1 Walk. (Pa.) 143.

34. McKim *v.* Mason, 3 Md. Ch. 186.

35. See LIS PENDENS, 25 Cyc. 1447.

36. Bowes *v.* New York Christian Home, 64 How. Pr. (N. Y.) 509, holding that where the last day fell on Sunday a notice filed on the next day was too late.

But where the lien on the property is discharged by depositing the money in court and the lien shifted to the fund, the filing of a *lis pendens* is unnecessary. Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Sheffield *v.* Robinson, 73 Hun (N. Y.) 173, 25 N. Y. Suppl. 1078.

Not jurisdictional.— In Minnesota the omission to file a *lis pendens* does not go to the jurisdiction of the court. It is not a condition precedent to bring the action and cannot be raised for the first time after trial as an objection to the entry of a judgment. Julius *v.* Callahan, 63 Minn. 154, 65 N. W. 267.

37. See Lonkey *v.* Wells, 16 Nev. 271; Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360.

38. Lonkey *v.* Wells, 16 Nev. 271; Elliott *v.* Ivers, 6 Nev. 287; Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360.

39. See EQUITY, 16 Cyc. 216 *et seq.*; PLEADING.

A power of attorney to enter judgment is sufficient to authorize a judgment without a complaint when the material averments are inserted in the power. Agard *v.* Hawks, 24 Ind. 276.

40. Winder *v.* Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487, holding that the writ discloses the facts on which it is founded, and requires an answer from defendant; that it is in the nature of a declaration, and the plea is properly to the writ.

41. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24. But see also *supra*, VIII, F, 1, b.

42. *Alabama.*— Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918.

Colorado.— Arkansas River, etc., Co. *v.* Flinn, 3 Colo. App. 381, 33 Pac. 1006.

Illinois.— Hindert *v.* American Trust, etc., Bank, 100 Ill. App. 85; Seiler *v.* Schaefer, 40 Ill. App. 74.

Indiana.— Crawford *v.* Crockett, 55 Ind. 220.

Kentucky.— Newport, etc., Lumber Co. *v.* Lichtenfeldt, 72 S. W. 778, 24 Ky. L. Rep. 1969.

Missouri.— Heltzell *v.* Langford, 33 Mo. 396. Allegation of facts as distinguished from mere reference to extraneous matters, as what the lien claim contains, is necessary and a petition which merely refers to a notice of lien without alleging essential facts upon which the lien is based is fatally defective. Fay *v.* Adams, 8 Mo. App. 566.

Montana.— McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428.

New Jersey.— James *v.* Van Horn, 39 N. J. L. 353 (holding, in a declaration to enforce a mechanic's lien for labor and materials, that a failure to aver or state the manner of service of the summons as provided by the Mechanics' Lien Act is available as a ground of objection only to the builder, as it only affects the form of judgment against him); Summerman *v.* Knowles, 33 N. J. L. 202.

New York.— Duffy *v.* McManus, 3 E. D. Smith 657; Foster *v.* Poillon, 2 E. D. Smith 556, 1 Abb. Pr. 321.

pleading which does this is sufficient[43] if it conforms in other respects to the general rules governing the sufficiency of pleading in a particular forum.[44] Aside from this there is no peculiar rule of pleading which is especially and only applicable to petitions for the enforcement of mechanics' liens.[45] While it is held that

Ohio.— Watkins *v.* Shaw, 7 Ohio Cir. Ct. 415, 4 Ohio Cir. Dec. 660.

Oregon.— Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305; Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527.

Texas.— Pool *v.* Sanford, 52 Tex. 621; Rhodes *v.* Jones, 26 Tex. Civ. App. 568, 64 S. W. 699; Lignoski *v.* Crooker, (Civ. App. 1893) 22 S. W. 774 (holding, where a contract for the erection of a building on a homestead by its own terms creates a lien in favor of the contractor, that an allegation in the petition that the contract was filed with the county clerk, and recorded by him in a specified book, shows sufficient compliance with the statute requiring mechanics' liens on homesteads to be recorded, and also with the provision requiring such contracts to be recorded in a book kept for that purpose); Sedgwick *v.* Patterson, 2 Tex. Unrep. Cas. 352.

West Virginia.— Central City Brick Co. *v.* Norfolk, etc., R. Co., 44 W. Va. 286, 28 S. E. 926.

Wisconsin.— Dewey *v.* Fifield, 2 Wis. 73.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 494.

When personal liability of the owner to the materialman may be enforced under fixed statutory conditions, the pleading must show that all steps prescribed by the statute have been taken. Crawford *v.* Crockett, 55 Ind. 220.

43. *Georgia.*— Arnold *v.* Farmers' Exch., 123 Ga. 731, 51 S. E. 754.

Illinois.— Portoues *v.* Holmes, 33 Ill. App. 312.

Missouri.— Kasper *v.* St. Louis Terminal R. Co., 101 Mo. App. 323, 74 S. W. 145; Walker *v.* O'Donohoe, 67 Mo. App. 660; Bricker *v.* Gresham, 1 Mo. App. Rep. 421.

Nebraska.— Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

Texas.— Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 494. See also *infra*, VIII, I, 1, b, (III).

Forms of pleading in full, in substance, or in part may be found in McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39; Robertson *v.* Moore, 10 Idaho 115, 77 Pac. 218; Doyle *v.* Munster, 27 Ill. App. 130 (petition by subcontractor); Price *v.* Jennings, 62 Ind. 111 (complaint by materialman against owner and subsequent purchaser); Montpelier Light, etc., Co. *v.* Stephenson, 22 Ind. App. 175, 53 S. E. 444 (complaint setting up special contract and performance without bill of particulars); Boude *v.* Methodist Episcopal Church, 47 Iowa 705; Briggs *v.* Worrell, 33 Mo. 157 (complaint against owner and subsequent purchaser held sufficient on motion in arrest, although inartificially drawn); Cole *v.* Barron, 8 Mo. App. 509 (sufficient allegations as to contract with owner); Bogue *v.* Guthe, 54 Nebr. 236, 74 N. W. 588; Clarke *v.* Heylman, 80 N. Y. App. Div. 572, 80 N. Y. Suppl. 794 (complaint by subcontractor who performed his own and the original contractor's contract after abandonment by the contractor); Stark *v.* Simmons, 54 Ohio St. 435, 43 N. E. 999; Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90 (petition by subcontractor against owner after notice prescribed by statute and no dispute by contractor).

For complaint by owner against general contractor and subcontractor to ascertain latter's claims and to apply proceeds to payment and to discharge plaintiff and to restrain defendants from filing liens see Stimson *v.* Dunham, etc., Co., 146 Cal. 281, 79 Pac. 968.

44. Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218.

The class to which complainant belongs need not be alleged, as that he is a subcontractor or a contractor, if the material facts under which he claims the right to relief are alleged, as the class to which he belongs is not to be determined from his legal conclusion. Salem *v.* Lane, 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481 [*affirming* 90 Ill. App. 560]. *Compare* Gates *v.* O'Gara, 145 Ala. 665, 39 So. 729.

Right of assignee.— Under a statute providing that the lien claimant may assign the same in writing it is not necessary in a proceeding by the assignee to allege and prove that the assignment was in writing unless that fact is denied. An allegation that the claim of the person entitled to perfect the lien had been assigned to plaintiff is a sufficient averment of the assignment. Eagle Gold Min. Co. *v.* Bryarly, 28 Colo. 262, 65 Pac. 52; Small *v.* Foley, 8 Colo. App. 435, 47 Pac. 64.

Performance of condition of contract.— Where by the terms of the contract the obtaining and presentation of an architect's certificate is a condition precedent to the maturing of the final payment, the complaint must state that such certificate was given or demanded and if refused the reasons why it should have been given or if waived a statement of the facts. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428. See also BUILDERS AND ARCHITECTS, 6 Cyc. 88, 93.

Excuse.— Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384, holding allegations of fraud and conspiracy to cheat complainant sufficient to show excuse for failure to procure the certificate.

45. Benner *v.* Schmidt, 44 Ill. App. 304.

If personal liability of a subsequent vendee is sought to be enforced, a bill for the foreclosure of a mechanic's lien is not sufficient

plaintiff's bill should show that the suit was begun before the statutory period of limitation expired,[46] where the record shows that the suit was instituted in time the bill need not allege the fact affirmatively, since the court will take notice of the record.[47] Matters which cannot affect the lienor's right to a lien need not be alleged.[48]

(II) *As to Purpose of Suit and Relief Demanded.* In so far as the facts authorizing an enforcement of the lien are to be alleged the purpose of the suit must appear,[49] and although the remedy is by a personal action, it must be adapted to the object to be accomplished.[50] And in an action in which the judgment is purely to enforce the lien, and not generally against defendant, directing execution be levied upon the particular property, the pleading should set up the manner in which defendant is liable in order that the proper form of judgment may be entered.[51] If there is a prayer for personal judgment by one who is not entitled to such relief in a pleading which is sufficient for the enforcement of the lien, such prayer is of no consequence and cannot affect the right to the enforcement of the lien.[52] The sufficiency of a complaint in an equity action against sureties on a statutory bond given to discharge the lien has been treated elsewhere.[53]

(III) *Anticipating Defense.* Matters purely of a defensive nature need not be anticipated and negatived in the claimant's pleading.[54]

for the personal relief which alleges that the purchaser agreed in writing to pay the claim, but containing no allegation showing to whom the promise was made, or as to any consideration therefor. Miller *v.* Schaefer, 75 Ill. App. 389.

46. Richmond Sav. Bank *v.* Powhatan Clay Mfg. Co., 102 Va. 274, 46 S. E. 294.

47. Twitchell *v.* Devens, 45 Mo. App. 283; Hayden *v.* Wulfing, 19 Mo. App. 358; Sands *v.* Stagg, 105 Va. 444, 52 S. E. 633, 54 N. E. 21, holding that a bill need not allege that the suit was brought within the time prescribed after the amount claimed became payable, where it alleges the dates on which the amounts became due and payable and it appears from the date of the process that the suit was brought within the statutory period. See also *infra*, VIII, I, 1, b, (VI), (E), (F).

48. Waterbury Lumber, etc., Co. *v.* Coogan, 73 Conn. 519, 48 Atl. 204; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283; Steel Brick Siding Co. *v.* Muskegon Mach., etc., Co., 98 Mich. 616, 57 N. W. 817, the last two cases holding that an allegation of demand for payment is unnecessary.

49. Foster *v.* Poillon, 2 E. D. Smith (N. Y.) 556, 1 Abb. Pr. 321. See also cases cited *supra*, note 42.

50. Mason *v.* Heyward, 5 Minn. 74; Dewey *v.* Fifield, 2 Wis. 73. So where by statute the remedy is by suit in equity or an action at law, and it is required that the declaration state the manner in which the lien arose, etc. West *v.* Grainger, 46 Fla. 257, 35 So. 91. But see Spence *v.* Etter, 8 Ark. 69.

Prayer.— In McCarthy *v.* Van Etten, 4 Minn. 461, it was held that the complaint must pray for a lien on the premises under the statutory provision that "a claim or petition" for the lien must be filed. See also Ford Gold Min. Co. *v.* Langford, 1 Colo. 62.

51. Steinmetz *v.* Boudinot, 3 Serg. & R. (Pa.) 541; Dewey *v.* Fifield, 2 Wis. 73. See also Coddington *v.* Beebe, 29 N. J. L. 550; Cornell *v.* Matthews, 27 N. J. L. 522, which cases were under a statute requiring the declaration to conclude with an averment that the debt is a lien upon the premises, the first case holding that an averment need not precede the formal close of the count.

Prayer for execution.— It is not necessary that a petition to enforce a lien should pray for an execution against the property. If the account filed with the pleadings and that filed with the claim for lien correspond, it sufficiently appears that the suit is for the purpose of enforcing the lien. Johnson *v.* McHenry, 27 Mo. 264.

52. Kasper *v.* St. Louis Terminal R. Co., 101 Mo. App. 323, 74 S. W. 145. See also *infra*, VIII, I, 1, b, (IV).

53. See *supra*, VI, B, 1, i.

54. *California.*— Under a statutory provision that certain buildings constructed on land with the knowledge of the owner thereof shall be held to have been constructed at his instance, and the land shall be subject to a lien therefor, unless the owner shall give proper notice that he will not be responsible for such construction, the giving of such notice is matter of defense, and need not be denied in the complaint, in an action to foreclose such a lien. West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231.

Colorado — Colorado Iron Works *v.* Taylor, 12 Colo. App. 451, 55 Pac. 942, holding that where a contract of sale provided for an expenditure of a certain sum for improvements it is not necessary that the complaint for the enforcement of a mechanic's lien for such improvements should show that the sum provided for in the contract of sale had not been expended before the material for which the lien is sought had been furnished.

District of Columbia.— Spalding *v.* Dodge, 6 Mackey 289.

(IV) *JOINDER OF COUNTS AND CAUSES.*[55] A cause of action for enforcement of a lien should not be joined with one for the collection of a debt not included in the lien claim,[56] and sometimes it is expressly provided by the statute that no other cause of action shall be joined with the equitable action to foreclose the mechanic's lien.[57] But no misjoinder results from the seeking of such relief as is necessary to effect the foreclosure of the lien, as under allegations setting up fraudulent conveyances to defeat the lienor.[58] Allegations of the steps taken to obtain a lien do not constitute a separate cause of action, but merely show the right of plaintiff to have the property in controversy subjected to the payment of his judgment;[59] nor is a bill multifarious for making prior mortgagees parties and seeking as against them to subject to complainant's demand that part of the value of the property which resulted from the improvements which complainant put upon it in labor and supplies.[60] And where the claimant's lien applies only to the extent of the amount due from the owner to the principal contractor, allegations of such amount, although appropriate to a cause of action in assumpsit, are equally appropriate to an action in equity to enforce a subcontractor's or materialman's lien, and do not constitute a misjoinder of causes.[61] So separate counts may be joined in an action against the owner and his contractor, presenting two theories: (1) That plaintiff's claim is founded on a contract with the owner, in which case the lien is enforceable for the whole amount, by reason of the personal liability of the owner; and (2) setting up the rights of a subcontractor or materialman furnishing the contractor, in which case the lien is worked out by a species of subrogation.[62] Where separate liens may be joined in one complaint it is sufficient

Florida.— Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667, under a statute requiring the cause of action to be set forth in the affidavit for attachment.

Georgia.— Arnold *v.* Farmers' Exch., 123 Ga. 731, 51 S. E. 574; R. C. Wilder's Sons Co. *v.* Walker, 98 Ga. 508, 25 S. E. 571.

Illinois.— Portoues *v.* Holmes, 33 Ill. App. 312 [*affirmed* in 132 Ill. 377, 22 N. E. 349], under the general rule that at law if there be first "a general clause, and afterward a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause, in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception."

Michigan.— Smalley *v.* Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29, where the claimant set up his lien in an answer in the nature of a cross bill.

North Dakota.— Robertson Lumber Co. *v.* Edinburg State Bank, (1905) 105 N. W. 719.

Pennsylvania.— The fact that a materialman gave credit solely to the contractor, and agreed to waive his right to a lien, are matters of defense, and need not be negatived in an action to establish a mechanic's lien as part of plaintiff's main case. Dougherty *v.* Loebelenz, 9 Pa. Super. Ct. 344, 43 Wkly. Notes Cas. 447.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 511.

Abandonment of lien by acceptance of note. — A complaint setting up the execution of a note for the amount of the lien claim and alleging that plaintiff did not intend to waive or abandon his lien by taking the note, which is tendered back, is not demurrable. Hersh *v.* Carman, 51 Nebr. 784, 71 N. W. 713.

55. Joinder of liens see *supra*, VIII, D.

56. Schillinger Fire-Proof Cement, etc., Co. *v.* Arnott, 14 N. Y. Suppl. 326.

57. Sweetzer *v.* Harwick, 67 Iowa 488, 25 N. W. 744, holding that a cause of action on a note against one party cannot be joined with a cause of action against others to foreclose a lien based upon the consideration for which the note was given.

58. Tisdale *v.* Moore, 8 Hun (N. Y.) 19, where it was held that a lienor must prove ownership at the filing of his notice, and therefore a complaint setting up such conveyances, the parties to the conveyances being joined, is sufficient to justify relief against them and the foreclosure of the lien. See also Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Peck *v.* Hensley, 21 Ind. 344.

59. Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

60. Christian, etc., Grocery *v.* Kling, 121 Ala. 292, 25 So. 629, holding that the object of the bill is single, to enforce the lien, and such will be the effect of granting the relief prayed; that so long as only this end is kept in view and sought to be effectuated, it cannot be said to be multifarious, however many respondents may be brought in and however diverse and independent may be their claims and attitudes with respect to each other. See also *supra*, VIII, G, 3, b, (VII).

61. Freeze *v.* Avery, 57 N. Y. App. Div. 633, 69 N. Y. Suppl. 150.

62. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4, 78 Ala. 222, under a statute authorizing joinder of all parties interested, the action being one in the nature of a bill in equity.

if the facts concerning each are embraced in separate and distinct statements without the formality of numbering and otherwise designating them.[63] The remedies for the enforcement of the debt and the foreclosure of the lien are cumulative;[64] and where the statute contemplates a personal judgment to be enforced by execution on particular property, it is permissible to join a special count for the enforcement of the lien and common counts for work done and material furnished upon an account stated,[65] and the pleading may be bad for the enforcement of the lien and at the same time good for the recovery of a personal judgment,[66] and where the statutory practice permits the blending together of proceedings in law and equity, both remedies may be pursued in the same action.[67]

(v) *VERIFICATION.* A complaint in the statutory action to foreclose the lien need not be verified in the absence of a provision in the statute requiring it.[68]

(vi) *SPECIFIC ALLEGATIONS AND OBJECTIONS* — (A) *Description of Premises and Improvements* — (1) IN GENERAL. Claimant's pleading should describe the premises which he seeks to subject to his lien.[69] And while it is said that a

63. Booth *v.* Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

On apportionment of lien.— Where labor and material are furnished in the erection of two or more buildings under a statute requiring the claimant to apportion such labor and material among the buildings in proportion to the value of the labor performed and the material furnished for each of the buildings, the declaration should proceed for each building in the form in which it would have been proper to declare if the labor and materials apportioned to the particular building had been performed and furnished for such building alone. Johnson *v.* Algon, 65 N. J. L. 363, 37 Atl. 571.

64. See *supra*, VIII, A, 3.

65. West *v.* Grainger, 46 Fla. 257, 35 So. 91.

66. O'Halloran *v.* Leachey, 39 Ind. 150; Bourgette *v.* Hubinger, 30 Ind. 296; Williams *v.* Porter, 51 Mo. 441; Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170. See also *infra*, VIII, I, 5, b, (II).

67. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39; New Jersey Steel, etc., Co. *v.* Robinson, 33 Misc. (N. Y.) 361, 68 N. Y. Suppl. 577; Hatcher *v.* Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 68 C. C. A. 19.

Prayer for satisfaction of a personal judgment by the enforcement of the lien under an allegation that plaintiff has obtained a judgment against defendant on the account will not render the bill multifarious. U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

Personal judgment against contractor.— In an action by a subcontractor the contractor may be joined and a personal judgment recovered against him (McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109. See also Merchant *v.* Hayes, 120 Cal. 137, 52 Pac. 154; Gnekow *v.* Confer, (Cal. 1897) 48 Pac. 331); but where the statute authorizes a personal judgment only as incident to the main relief, so that if the lien fails the action must fall altogether (see *infra*, VIII, L, 3, b), it is not permissible to join in a complaint a cause of action on the lien and one for the debt as upon a distinct cause (Burroughs *v.* Tostevan, 75 N. Y. 567); and where the statute requires as a condition precedent to a foreclosure proceeding by a subcontractor, that he shall have recovered a judgment for his debt against the contractor, a cause of action against the contractor cannot be joined in the proceeding for the enforcement of the lien (Lewis *v.* Williams, 3 Minn. 151).

Judgment against grantee.— So in California it is held that the grantee of the premises who has assumed the debt may be joined and a personal judgment rendered against him, this union of legal and equitable remedies being permitted in order to avoid a multiplicity of suits. San Francisco Paving Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255.

68. Parke, etc., Co. *v.* Inter Nos Oil, etc., Co., 147 Cal. 490, 82 Pac. 51.

Sufficiency when required.— Under a statute requiring pleadings to be verified, and providing that in the absence of the party the affidavit may be made by any person having knowledge of the facts in which case his knowledge or the ground of his belief should be set forth, an affidavit of the possession of a promissory note is only evidence of the indebtedness and is no verification of the complaint as to the existence of a lien to support a default judgment for the lien. Willamette Falls Transp., etc., Co. *v.* Riley, 1 Oreg. 183.

Verification of bill in equity see EQUITY, 16 Cyc. 366. And see also *infra*, VIII, I, 5, b, (I).

69. *Alabama.*— Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

Georgia.— Snow *v.* Council, 65 Ga. 123.

Illinois.— Turney *v.* Saunders, 5 Ill. 527.

Indiana.— Crawfordsville *v.* Barr, 65 Ind. 367.

Minnesota.— McCarty *v.* Van Etten, 4 Minn. 461; Knox *v.* Starks, 4 Minn. 20.

Missouri.— Bradish *v.* James, 83 Mo. 313; Williams *v.* Porter, 51 Mo. 441.

Montana.— Big Blackfoot Milling Co. *v.* Blue Bird Min. Co., 19 Mont. 454, 48 Pac. 778.

Wisconsin.— Dewey *v.* Fifield, 2 Wis. 73.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 496.

building or improvement for which the material was furnished should be described also,[70] a complaint is not bad which does not state the nature of the alterations or repairs made,[71] or which does not allege specifically what was constructed,[72] unless a description of an improvement may be necessary under the peculiar provisions of the statute in order to show the right to a lien.[73] Where the statute limits a particular lien to a prescribed amount of land, the description in the pleading should conform to the provision.[74]

(2) SUFFICIENCY — (a) IN GENERAL. The description of the premises must be sufficient to identify the property upon which the lien attaches,[75] and with sufficient accuracy to enable the court to decree the sale and the purchaser to find the land under such description.[76] And where the land which the statute subjects to the lien is that upon which the building is constructed together with a sufficient space about the same required for the convenient use and occupation thereof, if the lien is claimed on more than that occupied by the building for its convenient use, the allegations of the complaint must embrace such claim.[77] But it is sufficient if the description points out and indicates the premises so that by applying

Manufacturer of machinery.— A petition to enforce a lien for labor performed and money expended in manufacturing machinery need not describe the property intended to be covered by the lien as in the case of a mechanic's lien, where the claim is to affect property not in claimant's possession and must be recorded for the information of third persons Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

70. Dewey *v.* Fifield, 2 Wis. 73.

71. Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139.

72. Parker Land, etc., Co. *v.* Reddick, 18 Ind. App. 616, 47 N. E. 848, under a statute which used the word "structure," which language the pleading followed, the court holding that the complaint was sufficient in connection with the exhibit attached thereto setting forth the amount of materials furnished and the labor done and that if more certainty was required a motion for that purpose was the proper remedy.

73. Marshall *v.* Archie Bank, 76 Mo. App. 92, holding that as under the statute in order to secure a lien on a fence and sidewalk the contract therefor must have been let as one entire contract for the improvement of the building, it must be alleged in the petition that the contract for the improvements to the building included the building of sidewalks and such other improvements on the premises for which a lien is sought and which are not a portion of the building.

74. Montgomery Iron Works *v.* Dorman, 78 Ala. 218 (holding that a complaint to establish a lien for materials furnished on a tramroad four miles long is bad if it fails to describe the one acre to which the lien is limited); McCarty *v.* Van Etten, 4 Minn. 461; Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305; McAuliffe *v.* Jorgenson, 107 Wis. 132, 82 N. W. 706.

75. *Alabama.*— Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

Illinois.— Turney *v.* Saunders, 5 Ill. 527.

Indiana.— Crawfordsville *v.* Barr, 65 Ind. 367.

Missouri.— Bradish *v.* James, 83 Mo. 313.

Montana.— Big Blackfoot Milling Co. *v.* Blue Bird Min. Co., 19 Mont. 454, 48 Pac. 778.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 496.

According to division line established by owner.— Where the owner after acquiring adjoining lots establishes a new division line between them, one seeking a lien on one of the lots for work done thereafter properly describes the lot according to the new division line and should not adopt the description in the owner's deed of conveyance. Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326, 177 Mass. 412, 59 N. E. 80.

76. McCarty *v.* Van Etten, 4 Minn. 461; Knox *v.* Starks, 4 Minn. 20; Duffy *v.* McManus, 3 E. D. Smith (N. Y.) 657, 4 Abb. Pr. 432.

77. Willamette Steam Mills Co. *v.* Kremer, 94 Cal. 205, 29 Pac. 633. A description of the property as a large building on certain lots, in a certain block, together with a convenient space of land around the same, is sufficient. Dickson *v.* Corbett, 11 Nev. 277.

Where no more land than that occupied by the building is required for its reasonable use and occupation, it is not necessary to make any allegations as to such other land because the land actually occupied by the building is necessarily subject to the lien under the statute. Sachse *v.* Auburn, 95 Cal. 650, 30 Pac. 800. And where the decree directs the sale only of the building and land upon which it stands, it is not material that land convenient for the use and occupation of the house is not described. Newell *v.* Brill, 2 Cal. App. 61, 83 Pac. 76.

Presumption as to necessity of land for convenient use.— In Seely *v.* Neill, (Colo. 1906) 86 Pac. 334, it is held that a complaint is sufficient which alleges that the materials furnished were used in the erection of buildings on land described without averring that the land is necessary for the convenient use and occupation of the buildings; that if the owners desire to contest the claim of the lienors they may by proper pleadings question the right to subject the amount of land

the description to the land it can be found and identified,[78] and the same rule has been applied to the description of the building or improvement on account of which the lien is sought to be enforced.[79] Sometimes the pleading may be rendered sufficiently certain in respect of the description of the property by reference to the claim of lien filed which contains a sufficient description,[80] or other instrument attached as an exhibit to the pleading.[81]

(b) IMMATERIAL MISTAKE. The use of a term in the description of land which the context shows was a mere mistake will not vitiate the description if the substitution of the proper term will complete it.[82] And the fact that the lien is claimed on more land than it can lawfully apply to will not vitiate it in its application to so much of the land described as it may properly apply to in the absence

claimed; that it will be presumed in the absence of pleading or proof to the contrary, under allegations as above mentioned, that the land described is necessary for the convenient use and occupancy of the buildings.

78. *Illinois.*— Quackenbush *v.* Carson, 21 Ill. 99.

Indiana.— Caldwell *v.* Asbury, 29 Ind. 451 (that is certain which can be made certain); Davis, etc., Bldg., etc., Co. *v.* Vice, 15 Ind. App. 117, 43 N. E. 889 (where the description was regarded as sufficient under the liberal statute prevailing in that state notwithstanding some uncertainty in the terms used in the complaint and notice).

Iowa.— O'Halloran *v.* Sullivan, 1 Greene 75, where the description of a lot as "No. 751 in the city of Dubuque" was held sufficient.

Massachusetts.— Dodge *v.* Hall, 168 Mass. 435, 47 N. E. 110; Parker *v.* Bell, 7 Gray 429.

Missouri.— Wright *v.* Beardsley, 69 Mo. 548, where an omission of the name of the county was held not to render the description insufficient, the section, township, and range being given.

Nevada.— Dickson *v.* Corbett, 11 Nev. 277, where the description of property as a large structure on block 66, lots 3, 4, 5, 6, 7, and 8 of Musser's Addition to Carson City, was held sufficient.

Texas.— Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338, where a description giving the number of the house occupied by the party as his residence and bounding the lot on two sides by residences of persons named and fronting on a designated avenue between two streets named, in a particular city and county of the state, was held sufficient to identify the property.

Washington.— Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

Wisconsin.— Security Nat. Bank *v.* St. Croix Power Co., 117 Wis. 211, 94 N. W. 74; Brown *v.* La Crosse City Gas Light, etc., Co., 16 Wis. 555.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 496.

Judicial notice of the incorporation of a city will be taken by the court in considering the sufficiency of a complaint for a mechanic's lien for building a sidewalk which described the property as situated in a certain city without stating that the city was incorporated, under statute providing for a lien for improving the streets and sidewalks in front of a lot in an incorporated city. Bryan *v.* Abbott, 131 Cal. 222, 63 Pac. 363.

79. O'Halloran *v.* Sullivan, 1 Greene (Iowa) 75 (where "a brick house, upon said lot, to be twenty feet by thirty, two stories high, and a cellar," was held sufficient); Owens *v.* Hord, 14 Tex. Civ. App. 542, 37 S. W. 1093. See also Bryan *v.* Abbott, 131 Cal. 222, 63 Pac. 363.

80. Newell *v.* Brill, 2 Cal. App. 61, 83 Pac. 76. See also Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338.

81. Richlands Flint-Glass Co. *v.* Hiltebeitel, 92 Va. 91, 22 S. E. 806, where reference was had to a mortgage attached to the bill in which mortgage the property was particularly described.

Reference to contract.— Where the bill alleges that at the time of the making of the contract defendant owned certain lots, naming them, in the town, county, and state designated, and the contract which is made a part of the bill shows that plaintiff agreed to furnish the materials and put up a house for defendant on his lots in the town designated in the contract, and the bill alleges that upon making the contract petitioner erected the improvements in accordance with the contract, and concluded with an allegation that he had a lien "upon the said two lots and all the improvements upon the same," etc., it was sufficiently shown that the house was to be built on the lots in the particular place belonging to defendant. Lombard *v.* Johnson, 76 Ill. 599.

Reference to contract by subcontractor.— And a petition is sufficient when it describes the property by reference to the contract made by the owners with the general contractor to whom petitioner furnished the materials. Murphy *v.* Guisti, 22 R. I. 588, 48 Atl. 944.

82. Sawyer, etc., Lumber Co. *v.* Clark, 172 Mo. 588, 73 S. W. 137 [*affirming* 82 Mo. App. 225], holding that when the petition described the boundary of the property as the south line instead of the north line of the street, the balance of the description being correct and locating the land on the north side of the street, the error will not vitiate the description.

Giving the wrong house number will not destroy the description if the lot is otherwise sufficiently described so as to be capable of identification. Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

of fraud or injury to the owner or some third person.[83] But where the statute confines the particular lien to a specific amount of land, a description of a larger tract will not justify an enforcement of a lien on any part of the tract so described without evidence to locate the lien on such part.[84] If the lot is sufficiently described to identify it the lien will not be defeated merely because the lot is of greater area than that designated in the description.[85]

(B) *Ownership or Interest* — (1) IN GENERAL. As mechanics' liens rest upon contract, either express or implied, with the owner of the land or other person whose interest therein it is proposed to bind or affect by the lien, and notwithstanding persons who perform labor or furnish material for a contractor may acquire a lien upon the land or building by pursuing the statutory steps in that behalf, nevertheless it is essential to the sufficiency of the claimant's pleading that it should appear therein who was the owner of the real estate or the interest to be affected.[86] General allegations as to the interests of third persons made

83. Carter Lumber Co. *v.* Simpson, 83 Tex. 370, 18 S. W. 812; Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511. See also Bradish *v.* James, 83 Mo. 313. *Compare* Turney *v.* Saunders, 5 Ill. 527; Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326.

Description in lien claim or statement see *supra*, III, C, 11, f, (III), (A).

84. McAuliffe *v.* Jorgenson, 107 Wis. 132, 82 N. W. 706.

85. Smith *v.* Johnson, 2 MacArthur (D. C.) 481.

Excess not included in judgment.— So in Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26, an action against a lessee to enforce a lien on the improvements and the unexpired term of the leasehold, it was held that under the statute when land is in a city the extent of it which may be subjected is not limited in area and that, although the tract involved was described as lying wholly within the city, a part of it being in fact out of the city, this was immaterial, since none of the improvements claimed for were on that part which was out of the city and the latter was not included in the judgment of condemnation.

86. *Indiana.*— Adams *v.* Buhler, 116 Ind. 100, 18 N. E. 269; Lawton *v.* Case, 73 Ind. 60. *Compare* Clark *v.* Maxwell, 12 Ind. App. 199, 40 N. E. 274, where the rule was recognized but the action being for the recovery of a balance due and to foreclose the lien therefor, it was held that the complaint which alleged personal liability for the amount due was not insufficient for failure to allege that defendant owned any interest in the real estate, the objection being made for the first time by assignment in the appellate court.

Massachusetts.— Simpson *v.* Dalrymple, 11 Cush. 308.

Michigan.— Knapp Electrical Works *v.* Mecosta Electric Co., 110 Mich. 547, 68 N. W. 245; Clark *v.* Raymond, 27 Mich. 456.

Missouri.— Porter *v.* Tooke, 35 Mo. 107; Badger Lumber Co. *v.* Muelebach, 109 Mo. App. 646, 83 S. W. 546, where the allegations were held sufficient. An allegation that defendant is the owner of certain "premises" sufficiently alleges the ownership of the buildings thereon. Stone *v.* Taylor, 72 Mo. App. 482.

South Carolina.— Matthews *v.* Monts, 61 S. C. 385, 39 S. E. 575, holding that an exhibit may be resorted to for the purpose of making the complaint more definite and certain and that an allegation in the complaint that defendant "then and there stated that he was the owner of said real estate" was sufficient where the statement filed in perfecting the lien and accompanying the complaint as an exhibit says that the party is the owner of the premises.

Texas.— Lignoski *v.* Crooker, (Civ. App. 1893) 22 S. W. 774, holding the petition sufficient which alleged an agreement to furnish defendants labor and material for the construction of a building "on the property of said defendants," describing it, the contracts being filed with the petition and made a part thereof.

Wisconsin.— Shaw *v.* Allen, 24 Wis. 563, requiring the complaint to show plaintiff's interest independently of any exhibit attached to the pleading as a part thereof.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

United States.— McNeal Pipe, etc., Co. *v.* Bullock, 38 Fed. 565.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 497.

Land of married owner.— In Willard *v.* Magoon, 30 Mich. 273, it was held that it is not sufficient to set forth only the state of the title at the time the petition is filed and that to establish the lien upon the lands of a married woman by virtue of an implied contract it must appear that defendant had some interest in the lands at the time the material was furnished or when the certificate was filed. But in Caldwell *v.* Asbury, 29 Ind. 451, it was held that where a *feme sole* owner of the building marries before the completion of the work the complaint need not allege that the property is her separate estate, as the contract when made was valid and a subsequent marriage in no wise affected it.

Title fraudulently in another's name.— A complaint against husband and wife setting up a note executed by the former and alleging that he holds the property by an unrecorded title bond fraudulently taken in the name of his wife, but paid for by him, and that the wife stood by and encouraged the building

defendants will be sufficient if enough appears to disclose the rights of such parties,[87] and it is held sufficient to allege merely that such parties claim some right or interest in the property in question so as to require them to set up their interests or claims.[88] Such general allegation is sufficient as against the person for whom the improvements are made in order to reach his interest whatever it may be, although less than the fee in the land;[89] but an allegation that certain parties other than the owner have or claim to have some interest in the premises is not an admission that they had any interest.[90] If the answer admits the ownership, a defect in the complaint, in that such ownership was not sufficiently alleged, will be cured.[91]

(2) In Action For Personal Judgment. In an action in which the judgment and execution are special, the latter being directed to be levied of defendant's interest in the land, the declaration properly concludes with an averment that the debt is a lien on defendant's interest in the land without describing that interest.[92]

(c) *Description of Services or Materials and Purpose of Furnishing* — (1) In General. The pleading should describe the labor performed so that from the allegation it may be ascertained whether the work is of the sort which enti-

of the house, etc., is sufficient on demurrer. Peck *v.* Hensley, 21 Ind. 344. See also *supra*, VIII, I, 1, b, (IV).

Termination of executory contract of sale. — In Minnesota under a statute providing that where the vendee shall forfeit or surrender an executory contract of sale contingent on the erection of a building on the land, the vendor shall be deemed the owner of the building and the vendee his contractor for the purpose of establishing a lien for labor and material, it is necessary in an action for such lien under a contract with the vendee to allege that the contract between the vendor and vendee has been unconditionally terminated. Nolander *v.* Burns, 48 Minn. 13, 50 N. W. 1016.

Reference to an attached lien notice which contains the owner's name may save the pleading after decree. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

87. Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490 [*affirming* 23 Ill. App. 601].

88. Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490; Steel Brick Siding Co. *v.* Muskegon Mach., etc., Co., 98 Mich. 616, 57 N. W. 817, holding that such an allegation is sufficient by analogy to a chancery rule which permits subsequent purchasers and lienors to be made defendants to a bill to foreclose a mortgage by a general allegation of the kind mentioned.

Allegation of inferiority of claim.—In Rust-Owen Lumber Co. *v.* Fitch, 3 S. D. 213, 52 N. W. 879, a general allegation that certain defendants other than the owner had or claimed to have some interest in or lien upon the premises was held sufficient, but there was added to such allegation the further allegation that such lien or interest claimed, if any, accrued subsequently to plaintiff's lien. But in Delahay *v.* Goldie, 17 Kan. 263, it was held that an allegation that such defendant claimed an interest in the controversy adverse to plaintiff and that "the extent of such interest, if any, to this plaintiff is unknown," was not sufficient to warrant a decree barring such defendant's interest in the premises or any other decree against her, there being no allegation that the claim referred to was junior or inferior to that of complainant. See also Douglas *v.* Chamberlain, 25 Grant Ch. (U. C.) 288, holding that under the statute which gives the contractor a lien for work done and material furnished upon land subject to a mortgage, and priority to the mortgagee, on the amount by which the selling value of the property has been increased by the work and materials furnished, the bill to enforce such claim must distinctly state the dates of the creation of the encumbrances.

Mortgagee as owner.—Although a deed absolute on its face is intended as a mortgage between the parties to it yet the mortgagee so holding the legal title is, for the purpose of foreclosure of a mechanic's lien, properly designated as the "owner or reputed owner" of the premises in the complaint in the action to foreclose. Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325.

89. Parke, etc., Co. *v.* Inter Nos Oil, etc., Co., 147 Cal. 490, 82 Pac. 51, holding that a complaint for a lien for materials used in the construction of a well alleging that one of defendants was the owner of the well and its appurtenances and an owner of an interest in the land, sufficiently showed a lienable interest, although the action was dismissed as to the landowner.

90. Orr, etc., Hardware Co. *v.* Needham Co., 51 Ill. App. 57.

91. Boude *v.* Methodist Episcopal Church, 47 Iowa 705; Lyon *v.* Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511. But see Clark *v.* Raymond, 27 Mich. 456.

92. Cornell *v.* Matthews, 27 N. J. L. 522. See also Clark *v.* Maxwell, 12 Ind. App. 199, 40 N. E. 274, holding that the complaint seeking a personal judgment was not fatally defective for failing to allege ownership.

tles the claimant to a lien,[93] and if a lien is sought for extra work it should be shown by plaintiff's allegations of what such extra work consisted.[94] But where there is no difficulty in ascertaining with certainty the precise nature of the claims upon which plaintiff is to recover and for which he is to have a lien, the complaint is sufficient.[95]

(2) USE IN PARTICULAR BUILDING. Plaintiff's pleading must show by proper allegations that the materials for which the lien is claimed were furnished to be used in the construction of the building upon which the lien is claimed,[96] and it is not sufficient to state that such materials actually entered into and became a part of the building,[97] although under some provisions the complaint must show not only the purpose for which the material was furnished but also that it was used in the construction of the particular building, in a suit by a materialman furnishing a contractor.[98] If the fact that materials were furnished to be used in

93. Ford Gold Min. Co. *v.* Langford, 1 Colo. 62; Arkansas River, etc., Canal Co. *v.* Flinn, 3 Colo. App. 381, 33 Pac. 1006.

Mingling of lienable and non-lienable claims.— Where a corporation organized for the purpose of manufacturing and selling lumber was held incapable of holding a lien for labor, in a suit to enforce a lien for lumber furnished and labor performed the complaint failing to show how much of the gross amount was for lumber furnished is not sufficient to support a judgment. Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527. See also Smith *v.* Van Hoose, 110 Ga. 633, 36 S. E. 77, where a subcontractor's pleading was bad because he did not specify the amount for which his claim was for material furnished or for labor performed.

Labor performed in person or by servant.— Where under one contract the contractor performs personally and also furnishes labor an allegation showing that he either personally or by his servant labored on the premises within the statutory period before his statement was filed is sufficient to secure a lien for the whole amount due for labor under the contract. Getchell *v.* Moran, 124 Mass. 404.

Amount or value see *infra*, VIII, I, 1, b, (VI), (G), (1).

Improvement of separate estate see HUSBAND AND WIFE, 21 Cyc. 1561.

94. Sweeney *v.* Meyer, 124 Cal. 512, 57 Pac. 479. See also Vorhees *v.* Beckwell, 10 Ind. App. 224, 37 N. E. 811, where the complaint was held to show sufficiently that the materials and work were of the kind contracted for.

95. Barnes *v.* Stacy, 73 Wis. 1, 40 N. W. 615, holding that where a copy of the contract under which the particular articles are furnished for a fixed price is annexed to the complaint, and a bill of particulars of all charges which contains the aggregate charge for articles under the contract as well as other materials and services, the complaint is sufficient, although it does not separately state the cause of action for the articles furnished under the contract and that for the other items; the special agreement would control as to the price of articles furnished under it, and as to other materials and services plaintiff can recover only their reasonable value.

96. *California.*— Cohn *v.* Wright, 89 Cal. 86, 26 Pac. 643. But under a statute requiring all lien claimants to be made parties, not by name but by published notice requiring them to file proof of their liens, it was held that a petition exhibited by one of such defendants setting out his lien claim was good over the objection that it did not show that the materials were furnished for use in the particular building and that the strict rules of pleading did not apply to the filing of the proof of lien under this statute. Tibbetts *v.* Moore, 23 Cal. 208.

Indiana.— Lawton *v.* Case, 73 Ind. 60; Price *v.* Jennings, 62 Ind. 111; Miller *v.* Roseboon, 59 Ind. 345; Crawfordsville *v.* Lockhart, 58 Ind. 477; Crawfordsville *v.* Brundage, 57 Ind. 262; Crawford *v.* Crockett, 55 Ind. 220 (complaint held bad on motion in arrest); Hill *v.* Ryan, 54 Ind. 118; Crawfordsville *v.* Barr, 45 Ind. 258.

Missouri.— Fathman, etc., Planing Mill Co. *v.* Ritter, 33 Mo. App. 404.

New York.—Watrous *v.* Elmendorf, 55 How. Pr. 461.

Ohio.— Teachout *v.* Cleveland, 4 Ohio Dec. (Reprint) 376, 2 Clev. L. Rep. 58.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 499.

97. Holmes *v.* Ricket, 56 Cal. 307, 38 Am. Rep. 54; Houghton *v.* Blake, 5 Cal. 240; Bottomly *v.* Grace Church, 2 Cal. 90; Crawford *v.* Crockett, 55 Ind. 220; Hill *v.* Ryan, 54 Ind. 118; Crawfordsville *v.* Barr, 45 Ind. 258; Fathman, etc., Planing Mill Co. *v.* Ritter, 33 Mo. App. 404. See also the cases cited in the last preceding note.

98. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Rall *v.* McCrary, 45 Mo. App. 365 (where it is held that the allegation is not necessary in the case of a furnishing to the owner directly for any building or improvement on the land); Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170 (holding, however, that the defect by reason of the failure to make such allegation cannot be reached by a general demurrer, the main action there being for the recovery of the debt and the claim for lien being ancillary).

Omission cured by denial in answer.— Upon the principle that a defendant must abide the

the particular building can be inferred from the allegations as made in the pleading, it will be sufficient, notwithstanding more certainty could be required on a motion for that purpose.[99]

(D) *Contract* — (1) AGREEMENT OR CONSENT OF OWNER IN GENERAL. Under the statutes generally, mechanics' liens rest upon contract, express or implied, with the owner or other person whose interest in the real estate it is proposed to bind or affect by the lien, and while persons who perform labor or furnish material for a contractor may secure a lien upon the real estate or building by notifying the owner and taking the other necessary steps, it is nevertheless essential to the sufficiency of a complaint to foreclose such a lien that it should appear therein, not only who owned the real estate, or the interest to be affected at the time the building was erected,[1] but also that the improvement was erected in pursuance of a contract express or implied, between such owner and plaintiff or between such owner and the original contractor.[2] Mere uncertainty in the allegation must be reached by a motion to make more definite and certain where a demurrer does

result of an issue which he aids in making, a denial that the materials went into the building is sufficient to form an issue on this point and cures the omission of the allegation in the complaint. Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118.

99. McFadden *v.* Stark, 58 Ark. 7, 22 S. W. 884.

Direct allegation without reference to exhibit.— In Cohn *v.* Wright, 89 Cal. 86, 27 Pac. 643, it was held that conceding that a notice of lien attached to the complaint as an exhibit may by reference be made a part of the complaint and treated as a sufficient averment of the terms of the contract there must still be a direct allegation that the materials were furnished to be used in the building on which a lien is claimed.

For sufficient showing of purpose see Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598; Price *v.* Jennings, 62 Ind. 111; Miller *v.* Roseboom, 59 Ind. 345; Manor *v.* Heffner, 15 Ind. App. 299, 43 N. E. 1011; Adamson *v.* Shaner, 3 Ind. App. 448, 29 N. E. 944; Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285; Watkins *v.* Shaw, 7 Ohio Cir. Ct. 415, 4 Ohio Cir. Dec. 660.

For sufficient showing of use in particular building see Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426 (where the allegation of the sale of materials "to be used in the erection or construction of said building, and affixed and attached thereto" was held sufficient to support the finding that the materials were used in the building); Manor *v.* Heffner, 15 Ind. App. 299, 43 N. E. 1011; Leeper *v.* Myers, 10 Ind. App. 314, 37 N. E. 1070; Bogue *v.* Guthe, 54 Nebr. 236, 74 N. W. 588.

1. See *supra*, VIII, I, 1, b, (VI), (B).

2. *California.*— Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775, holding that where a copy of the lien claim made a part of the complaint shows a contract with the wife and the complaint alleges a contract "with the defendants," who are the husband and wife, the complaint was bad on demurrer for uncertainty.

Illinois.— Leslie *v.* Reed, 107 Ill. App. 248.

Indiana.— Adams *v.* Buhler, 116 Ind. 100, 18 N. E. 269.

Massachusetts.— Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452; Parker *v.* Bell, 7 Gray 429; Simpson *v.* Dalrymple, 11 Cush. 308.

Michigan.— Clark *v.* Raymond, 27 Mich. 456, holding that under the statute the contract must be made with the owner or lessee and the petition must allege that the respondent was either such an owner or lessee and that an omission in this regard is not cured by an answer which admits that respondent was the owner, especially when coupled with a denial that the work was done or agreed to be done on the particular land.

Minnesota.— Keller *v.* Struck, 31 Minn. 446, 18 N. W. 280; O'Neil *v.* St. Olaf's School, 26 Minn. 329, 4 N. W. 47.

Missouri.— Porter *v.* Tooke, 35 Mo. 107; Peck *v.* Bridwell, 6 Mo. App. 451. But it is only necessary that a subcontractor should allege that the work was done under a contract between the principal contractor and the owner, and he need not allege a request of the owner. McLaughlin *v.* Schawacker, 31 Mo. App. 365.

New Jersey.— Summerman *v.* Knowles, 33 N. J. L. 202, holding under the statute in force that it must be alleged that the contract between the owner and the contractor to whom plaintiff furnished was in writing.

New York.— Entenman *v.* Anderson, 106 N. Y. App. Div. 149, 94 N. Y. Suppl. 45; Clapper *v.* Strong, 41 Misc. 184, 83 N. Y. Suppl. 935. A complaint which shows the erection of a building by a lessee with the knowledge and consent of the owner is sufficient without stating how or under what circumstances the consent of the owner was given. Ross *v.* Simon, 16 Daly 159, 9 N. Y. Suppl. 536, 10 N. Y. Suppl. 742, holding that a previous authority which decided that the work must be done at the owner's expense in order to bind him (Cornell *v.* Barney, 94 N. Y. 394) goes only to the evidence and does not affect the question of pleading.

Ohio.— Spinning *v.* Blackburn, 13 Ohio St. 131 (as to contract of married woman); U. S. Mortgage, etc., Co. *v.* Wood, 19 Ohio Cir. Ct. 358, 10 Ohio Cir. Dec. 324.

not raise such objection.[3] Under a statute providing that when the contract is void for any of the reasons enumerated in the statute materials shall be deemed to have been furnished at the special request of the owner, a materialman may plead that the goods were sold at the special request of the owner and need not plead the construction and validity of the contract.[4]

(2) SETTING UP CONTRACT — (a) IN GENERAL. Plaintiff's pleading must state the contract under which the lien is claimed.[5] If the complaint alleges a special contract to do particular work for an agreed price and the performance of the contract by plaintiff, it is sufficiently specific.[6] But a special contract must be averred and full performance alleged in order to render a more specific statement of claim unnecessary.[7] On the other hand it has been held unnecessary to allege in direct terms that materials were furnished or work performed under a contract with the contractor, and that it is enough if the facts alleged show the contract.[8]

Oregon.— Wilcox *v.* Keith, 3 Oreg. 372.

Pennsylvania.— Dearie *v.* Martin, 78 Pa. St. 55, requiring a claim against the estate of a married woman to show coverture and that the work was done at her request or by her consent.

Texas.— Morris *v.* Montgomery, 2 Tex. Unrep. Cas. 385.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 500.

But see Parmenter *v.* Childs, 12 Iowa 22 (where in a statutory proceeding by garnishment to enforce a subcontractor's lien it was held that the pleadings need not specially refer to the contract between the principal contractor and the owner summoned in as garnishee as in a case commenced by the principal to enforce his lien); Pike *v.* Scott, 60 N. H. 469.

Improvements by stranger.— Where it is sought to foreclose a lien for repairs made by a stranger to the title the complaint must allege that the owner knew of such repairs being made. Hunter *v.* Cordon, 32 Oreg. 443, 52 Pac. 182; Cross *v.* Tscharnig, 27 Oreg. 49, 39 Pac. 540.

3. McFadden *v.* Stark, 58 Ark. 7, 22 S. W. 884. But it is otherwise where the objection may be raised by demurrer. Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775.

For sufficient allegations in respect of contract or consent of owner see the following cases: Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466 (holding that an objection to a complaint to foreclose a mechanic's lien that it cannot be determined therefrom whether the contract was made by one or both of two defendants named is without merit where it expressly alleges that the contract was made "with the said defendant," thereupon naming one of defendants referred to); Newell *v.* Brill, 2 Cal. App. 61, 83 Pac. 76; Egan *v.* Cheshire St. R. Co., 78 Conn. 291, 61 Atl. 950; Baxter *v.* Hutchings, 49 Ill. 116 (holding that an allegation that the son of a widow who was the owner of a mill contracted for machinery placed therein as well for himself as for his mother with her knowledge and consent and as her agent was good on demurrer, although mere possession by the son as agent would not be evidence of authority to bind any interest other than his own); Cole *v.* Barron, 8 Mo. App. 509 (where a subcontractor's petition alleging that one of the parties was owner and the other the original contractor was regarded after verdict as sufficiently alleging the original contract was made with the owner); Griggs *v.* Le Poidevin, 11 Nebr. 385, 9 N. W. 557; Clarke *v.* Heylman, 80 N. Y. App. Div. 572, 80 N. Y. Suppl. 794; Cochran *v.* Yoho, 34 Wash. 238, 75 Pac. 815.

The lien statement attached as an exhibit which shows that the materials were furnished under a contract with the owner may render the petition sufficient on demurrer, although there is no direct allegation of such contract. Jarvis-Conklin Mortg. Trust Co. *v.* Sutton, 46 Kan. 166, 26 Pac. 406.

Agency of contractor.— Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571, holding that a materialman's complaint for material furnished a contractor need not contain an averment of agency on the part of the contractor, the statute providing that every contractor shall be held to be the agent of the owner, etc. But in McCune *v.* Snyder, 18 Ohio Cir. Ct. 24, 9 Ohio Cir. Dec. 572, it is held that it is not sufficient to allege a verbal contract with the principal contractor as the agent of the owner under the statutory requirement that such contract must be entered into by the owner or his "authorized" agent.

4. Yancy *v.* Morton, 94 Cal. 558, 29 Pac. 1111.

5. Logan *v.* Attix, 7 Iowa 77; Simpson *v.* Dalrymple, 11 Cush. (Mass.) 308. But see Kiel *v.* Carll, 51 Conn. 440, holding that it is unnecessary to allege any particular contract where the statutory lien is not made to depend upon that, but that it is only necessary that the party have a claim which he may show to exist under one or many contracts.

6. Montpelier Light, etc., Co. *v.* Stephenson, 22 Ind. App. 175, 53 N. E. 444.

That plaintiff did work at defendant's request, which work was reasonably worth a designated sum, are sufficient allegations of a contract under which the work was done. Edleman *v.* Kidd, 65 Wis. 18, 26 N. W. 116.

7. Stephenson *v.* Ballard, 50 Ind. 176; Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90.

8. Tisdale *v.* Alabama, etc., Lumber Co., 131 Ala. 456, 31 So. 729.

(b) Statement of Terms of Contract. It is held under particular statutes that the petition or complaint must contain a statement of the contract,[9] or that the contract must be set out in the pleading;[10] and where the statute makes restrictions as to the character of the contract under which the lien can attach, the general allegation of the contract will not do but the terms of the contract must be set up to show the right to the lien.[11] The terms are sufficiently set up when they are alleged as fully as the contract itself permits,[12] and the petition need not show facts relating to the contract which under the particular statutes are not essential to support the lien.[13] Under some statutes, a subcontractor should aver and show that by the terms of his contract with the principal contractor he is within the terms of the principal contract;[14] and the terms of the contract between the original contractor and the owner must be so alleged that it may be seen from the facts set forth in the complaint that some amount was due from the owner to the contractor where that is necessary to support the claim of a subcontractor;[15] although on the other hand it is held that under a provision that the lien shall not be enforced for an amount in excess of the original contract

9. Simpson *v.* Dalrymple, 11 Cush. (Mass.) 308.

10. Logan *v.* Dunlap, 4 Ill. 188.

11. Belanger *v.* Hersey, 90 Ill. 70; Brown *v.* Lovell, 79 Ill. 484; Rowley *v.* James, 31 Ill. 298; Scott *v.* Keeling, 25 Ill. 358; Columbus Mach. Mfg. Co. *v.* Dorwin, 25 Ill. 169; Phillips *v.* Stone, 25 Ill. 77; Brady *v.* Anderson, 24 Ill. 110; Rogers *v.* Ward, 23 Ill. 473; McClurken *v.* Logan, 23 Ill. 79; Senior *v.* Brebnor, 22 Ill. 252; Cook *v.* Rofinot, 21 Ill. 437; Cook *v.* Vreeland, 21 Ill. 431; Cook *v.* Heald, 21 Ill. 425; Muller *v.* Smith, 4 Ill. 543; Logan *v.* Dunlap, 4 Ill. 188; Smith *v.* Central Lumber Co., 113 Ill. App. 477; Hindert *v.* American Trust, etc., Bank, 100 Ill. App. 85; Rogers *v.* Powell, 1 Ill. App. 631, holding that the omission to state the portions of the contract relating to the time for delivery of materials will justify the inference that it is beyond the statutory limitation. The foregoing cases relate to statutory provisions as to the time within which materials are to be furnished, labor performed, or money paid under contracts for the purpose of creating a lien, and said decisions require the statement of the terms of such contracts as the statute describes. A petition is sufficient which avers that the payments are to be made in instalments of ten per cent from time to time as the work should progress, and that the amount was to be fully paid when the work was completed and that it was completed within the statutory period. Reed *v.* Boyd, 84 Ill. 66. And under the requirement to state in a petition when the money was to be paid in order that it may be determined that the suit was commenced in time, the averment that the time had not elapsed is sufficient. Burkhart *v.* Reisig, 24 Ill. 539. *Compare* Winkle Terra Cotta Co. *v.* Galena Safety Vault, etc., Co., 64 Ill. App. 184; Portoues *v.* Holmes, 33 Ill. App. 312 [*affirmed* in 132 Ill. 377, 23 N. E. 349], which cases uphold the right to a lien under an implied contract.

12. Mix *v.* Ely, 2 Greene (Iowa) 513, where the contract provided, and was so alleged, that payment was to be made as the work progressed and any balance which should remain when the work was completed should be paid as the parties could agree.

An immaterial variance between the complaint and lien claim and the contract itself, as to the character of the work covered by the contract, by which variance no one could be misled or injured, is not fatal. Newell *v.* Brill, 2 Cal. App. 61, 83 Pac. 76. So a mistake in the complaint in stating the time of payment under the terms of the contract is immaterial, the contract being correctly described in the notice of lien which was filed. Webb *v.* Kuns, (Cal. 1898) 54 Pac. 78.

Exhibit controls.— If there be any discrepancy between the contract attached as an exhibit, and the description of it in the petition, the exhibit governs. Benner *v.* Schmidt, 44 Ill. App. 304. But see Schroth *v.* Black, 50 Ill. App. 168.

13. Gillespie *v.* Remington, 66 Tex. 108, 18 S. W. 338, holding that the statute made the fixing of the lien have reference to the time of the maturing and not to the time of the making of the contract and therefore it was not necessary to allege the date of the agreement for furnishing the materials.

14. Thomas *v.* Illinois Industrial University, 71 Ill. 310; Quin *v.* McOliff, 1 Abb. Pr. (N. Y.) 322; Broderick *v.* Boyle, 1 Abb. Pr. (N. Y.) 319, holding that the failure to allege that the subcontractor's contract was made in conformity with the contract between the owner and original contractor would subject the complaint to a motion to make it more definite and certain.

15. Thomas *v.* Illinois Industrial University, 71 Ill. 310; Clapper *v.* Strong, 41 Misc. (N. Y.) 184, 83 N. Y. Suppl. 935 (holding that a complaint should set forth the contract as it would be required to be set forth in an action by the contractor against the owner); Breuchaud *v.* New York, 61 Hun (N. Y.) 564, 16 N. Y. Suppl. 347 (the last two cases being under the New York City Consolidation Act providing that labor and material for which a lien is claimed on city property must be performed and furnished

price, it is a matter of defense if the claim is larger than the contract price and the original contract price need not be alleged by the subcontractor.[16]

(E) *Time of Furnishing Work or Materials.* Under various statutory provisions the fixing of a lien depends upon the filing of a statement of claim within a prescribed period after the labor is performed or the material furnished, or the right to enforce such lien depends upon the commencement of proceedings within a time limited after the labor is performed and the materials furnished or after the filing of the lien claim, and in order to show a valid lien or a present right to enforce it plaintiff's pleading should show when the labor was performed or material furnished;[17] but the pleading will be sufficient if from the facts alleged such time may be fairly inferred.[18] Under the rule that the alienation of the property before any labor was performed or material furnished defeats the right to subject the property in the hands of the purchaser for such labor or materials as were furnished after such alienation, the complaint must show the commencement of the work or the furnishing the materials before the alienation.[19]

(F) *Completion of Work or Performance of Contract.* The pleading for the enforcement of a mechanic's lien for work and materials furnished under a contract must allege the performance of the contract,[20] or set up a sufficient legal

"in pursuance of, or in conformity with the terms of any contract made between any person or persons and the city"); Scerbo *v.* Smith, 16 Misc. (N. Y.) 102, 38 N. Y. Suppl. 570 [*disapproving* Drennan *v.* New York, 14 Misc. 112, 35 N. Y. Suppl. 244].

16. Spalding *v.* Dodge, 6 Mackey (D. C.) 289; Morrison *v.* Inter-Mountain Salt Co., 14 Utah 201, 46 Pac. 1104 [changing the rule in Teahen *v.* Nelson, 6 Utah 363, 23 Pac. 764], holding that subcontractors, in cases where the original contract is not of record, need not make positive averments as to the amount of the original contract or of payments made thereunder. See also *infra*, VIII, I, 1, b, (VI), (G), (2).

17. Bradish *v.* James, 83 Mo. 313; Cantwell *v.* Massman, 45 Mo. 103; Jaques *v.* Morris, 2 E. D. Smith (N. Y.) 639 (requiring the complaint to show that labor was performed at or before the time of filing the notice of lien); Willamette Falls Transp., etc., Co. *v.* Smith, 1 Oreg. 181 (under the statute requiring the suit to be brought within the prescribed time after the furnishing).

A complaint before a justice of the peace which alleges that the material was furnished within the statutory period before suit brought is good notwithstanding the bill contained therein showing the amount of the material furnished does not show the dates opposite each item. Seaman *v.* Paddock, 51 Mo. App. 465.

A mistake in the date of the last item furnished is immaterial where the evidence and the account show when it was furnished and either date would be sufficient. Smith-Anthony Stove Co. *v.* Spear, 65 Mo. App. 87.

Commencement.— Where the judgment can operate as a lien only as an ordinary judgment from the time it is placed upon the judgment lien docket when no time is specified in the judgment when the building was commenced on which the lien is claimed, if the party desires his lien to be enforced from the commencement of the building he should allege the time of such commencement in his complaint so that it may be determined and adjudged by the court at what time the lien attached to the building. Kendall *v.* McFarland, 4 Oreg. 292.

18. McCrea *v.* Craig, 23 Cal. 522; Cantwell *v.* Massman, 45 Mo. 103; Peck *v.* Bridwell, 10 Mo. App. 524 (where the complaint was sustained after verdict); Matthews *v.* Monts, 61 S. C. 385, 39 S. E. 575; Rust-Owen Lumber Co. *v.* Fitch, 3 S. D. 213, 52 N. W. 879, in which cases pleadings were sustained which alleged a furnishing between two named dates, the fair construction of which was held to be that the furnishing began at the former date and continued until the last-named date. In Frankoviz *v.* Smith, 34 Minn. 403, 26 N. W. 225, the complaint was construed after judgment as fairly alleging that all the items were furnished pursuant to one agreement, so that the time for filing the affidavit and account for a lien would begin to run from the time of the delivery of the last item.

If one item is shown to have been furnished within the time prescribed by the statute, the complaint will be good at least as to that item. Indiana Mut. Bldg., etc., Assoc. *v.* Paxton, 18 Ind. App. 304, 47 N. E. 1082.

An itemized account filed and referred to as a part of the pleading may supply an omission to state in the pleading when the work was done or materials furnished. Hassett *v.* Rust, 64 Mo. 325; Jones *v.* Shaw, 53 Mo. 68, after verdict.

19. Jeffersonville Water Supply Co. *v.* Riter, 138 Ind. 170, 37 N. E. 652, where, however, a complaint alleging that "on April 10, 1888, the work of furnishing material . . . commenced," etc., and that "on April 21, 1888," the property was conveyed is sufficient to show that materials and labor were furnished and performed before the conveyance.

20. Arnold *v.* Farmers' Exch., 123 Ga. 731, 51 S. E. 754 (as to materialman's contract with general contractor); Thomas *v.* Illinois Industrial University, 71 Ill. 310; Kirn *v.*

excuse for the failure to perform.[21] This is essential where the obligation to pay does not mature until the contract has been performed,[22] and so where the time for the completion of the work or performance of the contract is material as furnishing the point from which the limitation period for perfecting the lien or commencing suit to enforce it begins to run it must be alleged.[23] It has been held, however, that an allegation that the work was completed in accordance with the contract sufficiently alleges performance.[24] Where the subcontractor's lien depends upon the fact he must aver that the work or materials were such as come within the terms of the original contract between the owner and the original contractor;[25] but it is otherwise when the right does not depend upon such fact,[26] and it is not necessary to allege that the contractor had completed his contract where plaintiff states all that is necessary to show his right *prima facie* under the statute.[27]

(G) *Amount or Value and Maturity of Debt*—(1) IN GENERAL.[28] Plaintiff's pleading should show the amount or value of the services performed or materials

Champion Iron Fence Co., 86 Va. 608, 10 S. E. 885 (as to a subcontractor's contract with the general contractor, where the correctness of the subcontractor's account is disputed by the contractor, under peculiar statutory provisions imposing personal liability on the owner where the subcontractor furnishes the owner with a verified account of his claim against the contractor after completion of the building). Allegations that plaintiff furnished materials and erected a house on defendant's land under a contract with defendant; that during the performance of the work plaintiff furnished additional material and labor at defendant's request; that defendant was present during the progress of the work and directed it and agreed to pay therefor, sufficiently show the furnishing of materials and work of the kind contracted for and the erection of the building according to the contract. Vorhees *v.* Beckwell, 10 Ind. App. 224, 37 N. E. 811.

21. Robinson *v.* Chinese Charitable, etc., Assoc., 47 N. Y. App. Div. 69, 62 N. Y. Suppl. 292; Fox *v.* Davidson, 36 N. Y. App. Div. 159, 55 N. Y. Suppl. 524. See also Robinson *v.* Davis, 8 Del. Co. (Pa.) 237, to the same effect.

Failure to pay instalments.— It is not sufficient for the lien claimant to allege a failure on the part of defendant to make payments under a provision in the contract for such payments as fast as the money should be needed for labor and materials, where such payments are not required as a condition precedent. Kinney *v.* Sherman, 28 Ill. 520. See also BUILDERS AND ARCHITECTS, 6 Cyc. 87, 92.

22. Harmon *v.* Ashmead, 60 Cal. 439 (where the complaint was bad because it alleged that the building was not completed, thus showing that the action was premature); Robinson *v.* Chinese Charitable, etc., Assoc., 47 N. Y. App. Div. 69, 62 N. Y. Suppl. 292. See also *supra*, VIII, F, 2.

23. Burkhart *v.* Reisig, 24 Ill. 539; Cook *v.* Heald, 21 Ill. 425. See also *supra*, VIII, I, 1, b, (VI), (E).

An allegation of completion "on or about" a certain date is sufficient when taken with the further allegation that the claim of lien was filed within thirty days after said completion, the only purpose of the allegation as to completion being to show that plaintiffs were within the provision of the statute requiring the filing of the lien claim within thirty days from the date of completion. Wood *v.* Oakland, etc., Rapid Transit Co., 107 Cal. 500, 40 Pac. 806; Giant Powder Co. *v.* San Diego Flume Co., 78 Cal. 193, 20 Pac. 419.

Substantial completion — surrender to and acceptance by defendant.— Under a statute providing that trifling imperfections in a building should not prevent the filing of a lien and that in the case of contracts the occupation or use of the building, etc., by the owner shall be deemed conclusive evidence of completion, a complaint by a materialman alleging suspension of work by the original contractor on or about a certain date before the filing of plaintiff's lien, and a surrender of the contract to and acceptance of such surrender by the owner and his occupation and use of the building, shows a completion at the date of the filing of the lien. Giant Powder Co. *v.* San Diego Flume Co., 78 Cal. 193, 20 Pac. 419.

24. Winkle Terra Cotta Co. *v.* Galena Safety Vault, etc., Co., 64 Ill. App. 184 (upon the principle that where the performance is a question of fact for the jury such general allegation is proper; where a question of law for the court the manner of performance must be stated); Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90 (where in the absence of a motion to make the pleading more certain, it is held that such allegation as to the completion of a well was a sufficient averment that the well furnished enough water for the purposes required). See also CONTRACTS, 9 Cyc. 622.

25. Broderick *v.* Poillon, 2 E. D. Smith (N. Y.) 554; Daughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625.

26. Gilman *v.* Gard, 29 Ind. 291, where plaintiff may recover for the reasonable value of the service.

27. Arnold *v.* Farmers' Exch., 123 Ga. 731, 51 S. E. 754, holding that plaintiff need not anticipate defenses. But see also *infra*, VIII, I, 1, b, (VI), (G), (2).

28. Excessive claims see *supra*, III, C, 12, d.

furnished,[29] and the amount that is due,[30] as well as that it is payable.[31] But under a statutory provision requiring certain items of costs to be allowed a successful lien claimant, averment of the amount thereof in the complaint is not necessary.[32]

(2) Owner's Indebtedness to General Contractor. Under various statutory provisions making the right of the subcontractor to depend upon the liability of the owner to the contractor for some amount under the original contract at the time of the filing of the lien or the bringing of the suit, a subcontractor or materialman is required to allege in his pleading that the owner was indebted to the principal contractor under the terms of the contract between those parties at the time contemplated by the statutory provision,[33] or set up some fact which would entitle the petitioner to the lien, such as a premature

29. Booth *v.* Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101 (holding that where the written contract under which material is furnished and work done is void because not recorded as required by the statute so that a recovery cannot be had upon the written contract the complaint must allege the value of the material or the work); Ford Gold Min. Co. *v.* Langford, 1 Colo. 62.

"Amounting to."— The general allegation that plaintiff furnished materials "amounting to" a designated sum is sufficient without any further mention of value. Jarvis-Conklin Mortg. Trust Co. *v.* Sutton, 46 Kan. 166, 26 Pac. 406.

Value showing quantity.— An allegation of the value of certain work under a contract for a fixed rate per cubic foot sufficiently shows the number of cubic feet. D'Andre *v.* Zimmermann, 17 Misc. (N. Y.) 357, 39 N. Y. Suppl. 1086.

Agreed price under void contract.— An allegation of the agreed price under a void contract, although an allegation of *prima facie* evidence of value and not of the ultimate facts, will be taken as sufficient in the absence of a proper objection for uncertainty. Bringham *v.* Knox, 127 Cal. 40, 59 Pac. 198.

30. Crawfordsville *v.* Irwin, 46 Ind. 438 (holding that an averment that a notice of a lien to a certain amount was filed is not equivalent to an averment that that or any other amount was due); McPherson *v.* Greenwell, 27 R. I. 178, 61 Atl. 175; Huse *v.* Wash burn, 59 Wis. 414, 18 N. W. 341 (holding, however, that the complaint was sufficient by reference to the lien petition which was made a part of the complaint); Dewey *v.* Fifield, 2 Wis. 73.

Sufficiency of allegation — *In general.* An averment that the amount due petitioners for work, etc., is a sum named, upon which has been paid a sum named, leaving a balance due according to the agreement, of a sum named, etc., according to a bill rendered, and approved as correct by defendant, is sufficient. Reed *v.* Boyd, 84 Ill. 66.

Reference to bill of particulars.— An averment referring to a bill of particulars attached thereto which shows the amount due from the contractor to plaintiff is sufficient. Merritt *v.* Pearson, 58 Ind. 385.

31. McPherson *v.* Hattich, (Ariz. 1906) 85 Pac. 731 (holding that the statement in the notice of lien, filed with and made a part of the complaint, that a certain amount is due as compensation under the contract, even if it might be considered an allegation of the complaint, is an insufficient allegation of nonpayment as it refers to the time of filing the lien, and not to the time of commencing the action); Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625. But in Freese *v.* Avery, 57 N. Y. App. Div. 633, 69 N. Y. Suppl. 150, it is held that in an action on a mechanic's lien by subcontractors, they having joined the principal contractor as plaintiffs, allegations of the amount due by defendant to the principal contractor were sufficient, without averring that the principal contractor had not paid the subcontractors. See also *supra*, VIII, I, 1, b, (VI), (F).

32. See *infra*, VIII, P, 2.

33. *Alabama.*— Alabama Lumber Co. *v.* Smith, 139 Ala. 179, 35 So. 693.

California.— Turner *v.* Strenzel, 70 Cal. 28, 11 Pac. 389; Rosenkranz *v.* Wagner, 62 Cal. 151; Nason *v.* John, 1 Cal. App. 538, 82 Pac. 566.

Colorado.— Epley *v.* Scherer, 5 Colo. 536, under a statute requiring an averment that a payment was due or was to become due at the time of service of notice upon the owner.

Illinois.— Thomas *v.* Illinois Industrial University, 71 Ill. 310.

Indiana.— Lawton *v.* Case, 73 Ind. 60.

New York.— Ball, etc., Co. *v.* Clark, etc., Co., 31 N. Y. App. Div. 356, 52 N. Y. Suppl. 443; Dart *v.* Fitch, 23 Hun 361 (requiring the allegation that something is due or will become due, in a notice of the commencement of suit under the lien law which made such notice take the place of a complaint); Bailey *v.* Johnson, 1 Daly 61; Siegel *v.* Ehrshowsky, 46 Misc. 605, 92 N. Y. Suppl. 733; Scerbo *v.* Smith, 16 Misc. 102, 38 N. Y. Suppl. 570. But see Doughty *v.* Devlin, 1 E. D. Smith 625, where it was considered that the matter was of a defensive nature and need not be anticipated.

North Carolina.— See Parsley *v.* David, 106 N. C. 225, 10 S. E. 1028, holding that allegations that after plaintiff's lien was filed the owner paid the contractor a designated amount and also paid him another named sum for the cancellation of the contract, thus placing it beyond the contractor's power to perform his contract, and a denial of these

payment by the owner to the contractor.[34] This rule is not universal but is denied in a number of cases which hold that plaintiff need not allege more than what the statute requires him to do in order to acquire a *prima facie* right to a lien and that, although payment by the owner to the original contractor may under particular circumstances defeat the subcontractor, this is purely a matter of defense.[35] Some of the cases in announcing the general rule use language which implies that it is necessary to state the amount which is due the original contractor;[36] but it has been held otherwise where the point was directly involved,[37] and the allegation of indebtedness will be sufficient which shows that there is

allegations by the answer sufficiently presented the issue whether or not the owner owed plaintiffs anything when the lien was filed.

Ohio.— Watkins *v.* Shaw, 7 Ohio Cir. Ct. 415, 4 Ohio Cir. Dec. 660, as to the necessity of an averment as to when any payment should fall due subsequent to the filing of plaintiff's claim and that the payment became due to the contractor after the filing of such claim. See also Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90, for a sufficient petition.

Texas.— Fullenwider *v.* Longmoor, 73 Tex. 480, 11 S. W. 500 (under a provision requiring ten days' notice in writing to the owner before the filing of the lien of a subcontractor that he holds a claim and that thereafter the owner shall be authorized to retain the amount of the claim); Ricker *v.* Schadt, 5 Tex. Civ. App. 460, 23 S. W. 907.

United States.— McNeal Pipe, etc., Co. *v.* Bullock, 38 Fed. 565.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 506. See also *supra*, VIII, I, 1, b, (VI), (D), (2), (b).

Value where original contractor abandons contract.— Where the right of the subcontractor, however, does not depend upon complete performance of the original contract by the general contractor but the subcontractor is entitled to be paid for work and materials for which the original contractor has not been paid under the original contract, if the original contractor abandons his contract the subcontractor need not allege that there is anything due the original contractor under the original contract. Doyle *v.* Munster, 27 Ill. App. 130.

Completion by owner.— Under the statute of New York, it was held that the essential fact to be alleged being that the work was completed, a complaint by a materialman who had furnished a subcontractor which alleged the default of the subcontractor and that the principal contractor agreed to and completed the contract but did not allege that the latter also defaulted and that the owner completed the work was sufficient. Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577.

Furnisher to subcontractor.— In Los Angeles Pressed Brick Co. *v.* Los Angeles Pac. Boulevard, etc., Co., 2 Cal. App. 303, 83 Pac. 292, it was held that a complaint to foreclose a lien for materials furnished a subcontractor which shows the existence of an unpaid balance in the hands of the owner is sufficient without alleging that anything was due and unpaid from the contractor to the subcontractor at the time notice was given, in the absence of any claim on the fund by the contractor.

That there are no other claims on the fund need not be alleged. Los Angeles Pressed Brick Co. *v.* Los Angeles Pac. Boulevard, etc., Co., 2 Cal. App. 303, 83 Pac. 292; Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90.

34. Nason *v.* John, 1 Cal. App. 538, 82 Pac. 506. But an allegation that there was due the contractor the sum prematurely paid him by the owner is held sufficient to raise an issue as to the premature character of the payment. Ganahl *v.* Weir, 130 Cal. 237, 62 Pac. 512.

Payment not connecting with contract.— But the allegations must connect the indebtedness with the contract for the improvements, and a mere allegation that after notice by plaintiff to the owner the latter paid large sums of money to the contractor and that the owner still owed the contractor a large sum of money is not sufficient. Hathorne *v.* Panama Park Co., 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138.

35. Arnold *v.* Farmers' Exch., 123 Ga. 731, 51 S. E. 754; R. C. Wilder's Sons Co. *v.* Walker, 98 Ga. 508, 25 S. E. 571; Robertson Lumber Co. *v.* Edinburgh State Bank, (N. D. 1905) 105 N. W. 719; Norfolk, etc., R. Co. *v.* Howison, 81 Va. 125; Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821; Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589.

36. Thomas *v.* Illinois Industrial University, 71 Ill. 310; Freese *v.* Avery, 57 N. Y. App. Div. 633, 69 N. Y. Suppl. 150.

37. Morrison *v.* Inter-Mountain Salt Co., 14 Utah 201, 46 Pac. 1104 [changing the rule in Teahen *v.* Nelson, 6 Utah 363, 23 Pac. 764], holding that where the original contract was not of record an averment as to the amount of the original contract or payments thereunder are unnecessary; that under any other rule the owner by collusion with the original contractor could withdraw the terms of the original contract from the subcontractor so as to effectually defeat his lien if he were required to allege facts about which he was deprived of all information. So in Watkins *v.* Shaw, 7 Ohio Cir. Ct. 415, 4 Ohio Cir. Dec. 660, it was held that the subcontractor need not allege the amount of subsequent payments out of which he should have been paid; that this is a matter so peculiarly within the knowledge of the owner that it is more properly a matter of defense and not essential as to the cause of action.

sufficient to meet the lienor's claim.[38] And the entire failure to allege an indebtedness from the owner to the contractor will be cured by an admission of an indebtedness by the owner in his answer.[39] The allegation is not necessary where the owner has made himself responsible directly to plaintiff for the amount of his claim.[40]

(H) *Itemized Account or Bill of Particulars.*[41] Where the statute does not require a bill of particulars none is necessary, and it is sufficient that a claim is set up in the terms and with that particularity only which the statute prescribes.[42] If plaintiff pleads a special contract and alleges full and complete performance on his part, a bill of particulars is not necessary.[43] Where the filing of an account or bill of particulars is required in order to perfect the right to enforce the lien, the claimant's pleading should show a compliance with the statute.[44] A bill of particulars being required only to set forth in detail the items which make up the general charge in the pleading,[45] it is sufficient if, when taken in connection with the statements contained in the petition, it advises defendant with reasonable certainty of the petitioner's claim,[46] and where there is but a single item of account no bill is necessary.[47] If the account sued on is set out in the pleading it is not necessary to file a more particular statement as an exhibit unless called for by a special motion.[48]

(I) *As to Notice to Owner.* Under various statutory provisions requiring the

38. Green *v.* Clifford, 94 Cal. 49, 29 Pac. 331, sustaining a complaint alleging indebtedness from the owner to the contractor in "an amount exceeding the sum due this plaintiff, as hereinbefore stated."

Averments implying indebtedness are held sufficient in Ditto *v.* Jackson, 3 Colo. App. 281, 33 Pac. 81.

39. Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

40. Harris *v.* Harris, 18 Colo. App. 34, 69 Pac. 309, 9 Colo. App. 211, 47 Pac. 841.

41. **In perfecting lien** see *supra*, III, B, 4, d; III, C, 11, n.

42. Wood *v.* King, 57 Ark. 284, 21 S. W. 471; Collini *v.* Nicolson, 51 Ga. 560.

43. Montpelier Light, etc., Co. *v.* Stephenson, 22 Ind. App. 175, 53 N. E. 444; Houston Cotton Exch. *v.* Crawley, 3 Tex. App. Civ. Cas. § 138; Lignoski *v.* Crooker, (Tex. Civ. App. 1893) 22 S. W. 774. But where the complaint merely sets up the doing of work or furnishing of materials, the nature of the claim must be more specifically stated, and in the absence of the required bill of particulars will be bad. Stephenson *v.* Ballard, 50 Ind. 176.

44. Pool *v.* Sanford, 52 Tex. 621; Sedgwick *v.* Patterson, 2 Tex. Unrep. Cas. 352, where a petition was held bad on special exceptions because it failed to allege that the claimant had caused his bill of particulars to be recorded. See McDermott *v.* Claas, 104 Mo. 14, 50 S. W. 995, holding that a petition stating who the contractor was, that he was indebted to plaintiff, that plaintiff notified the owner of his claim of lien for such indebtedness and from whom it was due, and that he afterward filed a just and true account of the demand so due him sufficiently showed that the account filed gave the name of the contractor as required by the statute.

As between the immediate parties or purchasers with notice no bill of particulars need be filed. Security Mortgage, etc., Co. *v.* Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 837.

45. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

46. McLaughlin *v.* Shaughnessey, 42 Miss. 520; Seaman *v.* Paddock, 51 Mo. App. 465 (holding that a complaint in the justice's court containing a bill showing the amount of materials furnished is not bad for lack of dates opposite each item, where it alleges that the material was furnished within six months of suit brought); Webb *v.* Koger, 78 Tex. 1, 14 S. W. 238 (where an account made out in the form generally used by dealers in the particular materials was held sufficiently intelligible).

The verification of a bill of particulars that it is "in all respects true, to the best of his [claimant's] knowledge and belief" is sufficient. Grey *v.* Vorhis, 8 Hun (N. Y.) 612.

Objection.— If there is service of a defective bill of particulars, a more complete bill can be demanded before answering. Brown *v.* Wood, 2 Hilt. (N. Y.) 579. And if plaintiff fails to serve with the notice of suit the bill of particulars required by the statute, by answering defendant waives the defect and cannot take advantage of it at the trial. Norcott *v.* First Baptist Church, 8 Hun (N. Y.) 639. An objection that the bill of particulars in a scire facias on a mechanic's lien includes items not properly the subject of a lien must be made at the trial, and not by exception to the statement of claim. Perkins *v.* Wilson, 1 Marv. (Del.) 196, 40 Atl. 950.

47. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

48. Adamson *v.* Shaver, 3 Ind. App. 448, 29 N. E. 944, under a statutory provision requiring the account to be filed with the complaint in an action on the account.

claimant to give the owner a particular notice,[49] the claimant's petition or complaint must allege a performance of this condition and show a sufficient notice under the statute.[50] If a compliance with the statute is shown with substantial and reasonable certainty, however, the pleading will be sufficient;[51] and where several claims are properly united in one lien statement it is not necessary that the complaint should allege service of notice in each separate cause of action set

49. See *supra*, III, B.

50. *California.*— Kruse *v.* Wilson, (App. 1906) 84 Pac. 442, notice required from a materialman for the purpose of intercepting money due from the owner to the contractor.

Illinois.— Munster *v.* Doyle, 50 Ill. App. 672.

Indiana.— Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108, as to notice from materialman of his intention to furnish materials.

Missouri.— Heltzell *v.* Hynes, 35 Mo. 482 (holding that under a special provision relating to mechanics' liens in St. Louis county, a petition showing only an eight days' notice, whereas a ten days' notice is required, is bad after judgment); Hewitt *v.* Truitt, 23 Mo. App. 443.

New York.— Kechler *v.* Stumme, 36 N. Y. Super. Ct. 337; Schillinger Fire-Proof Cement, etc., Co. *v.* Arnott, 14 N. Y. Suppl. 326.

Wisconsin.— Security Nat. Bank *v.* St. Croix Power Co., 117 Wis. 211, 94 N. W. 74, where the complaint was bad in an action to foreclose a subcontractor's lien which alleged that plaintiff duly gave notice to the owner, but proceeded to set forth specifically what such notice contained and the notice as there given failed to comply with the statutory requirements.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 508.

Notice recorded for benefit of lien-holders.— Under a statute providing that a subcontractor shall file with the recorder a copy of the notice of lien served on the owner in order to notify the other subcontractors, a petition for a mechanic's lien which failed to allege that the copy of the notice had been filed with the recorder is not open to demurrer by the owner of the premises, since the provision is for the sole benefit of other lien-holders. Keating *v.* Worthington, 11 Ohio Dec. (Reprint) 428, 27 Cinc. L. Bul. 14.

51. See Tisdale *v.* Alabama, etc., Lumber Co., 131 Ala. 456, 31 So. 729 (where the pleading was sufficient which alleged that on a certain day plaintiff served notice on the owner which set forth that they claimed a lien on the property and improvements, the amount thereof, for what and from whom it was owing, which followed an allegation stating the amount of the claim and that it was due from the contractor and that it was for materials furnished for the improvements described); Russ Lumber, etc., Co. *v.* Garrettson, 87 Cal. 589, 25 Pac. 747 (where the complaint sufficiently showed the service of a notice stating the amount and value of materials and their price and averred that plaintiff gave the owner written notice of the agreement to furnish the material "as aforesaid"); Robertson Lumber Co. *v.* Edinburg State Bank, (N. D. 1905) 105 N. W. 719 (holding that, under a statute providing that a subcontractor shall not be entitled to file a lien unless he notifies the owner "by registered letter previous to the completion of said contract that he has furnished said materials," an allegation that, prior to the filing of the lien, plaintiff had notified defendant by registered letter that he had furnished "said materials to the said company" is sufficient, the words "said materials" referring to materials previously described in the complaint).

Service.— In Munster *v.* Doyle, 50 Ill. App. 672, it is held that under a statute providing for notice to the owner or his agent, the petition must show whether the service was on the one or the other. But in Quaack *v.* Schmid, 131 Ind. 185, 30 N. E. 514, it is held that an allegation of notice to the "defendant corporation" of delivery of material to the contractor is sufficiently specific without naming the person or officer receiving notice.

Setting out or attaching as exhibit.— In Indiana the notice required from the subcontractor in order to entitle him to a lien is held to be the foundation of the cause of action and therefore it was required that the original notice or a copy be filed with the complaint. But it was also held that no particular form of reference was essential to make the exhibit a part of the pleading, and that it was sufficient if the complaint identified the instrument with reasonable certainty; that the complaint describing the instrument with common certainty with the additional allegation "which notice was duly recorded," in the proper place and "is filed herewith," sufficiently identifies the notice and properly constituted it an exhibit. McCarty *v.* Burnet, 84 Ind. 23. See also Davis *v.* McMillan, 13 Ind. App. 424, 41 N. E. 851, notice of intention. But under another provision of the statute relating to a notice in order to hold the owner personally liable, it was held that this notice is not the foundation of the action and need not be set up in the complaint. Princeton School Town *v.* Gebhart, 61 Ind. 187; Irwin *v.* Crawfordsville, 58 Ind. 492; Adamson *v.* Shauer, 3 Ind. App. 448, 29 N. E. 944.

Exhibit as part of pleading.— In Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466, it was held that in determining the sufficiency of a complaint as to the allegation of the contents of a notice of lien, a copy of the notice attached and made a part of the complaint must be regarded as a part of it as if it had been set out in the body thereof. But see Pool *v.* Sanford, 52 Tex. 621.

out, but one allegation in the complaint of the service of the required notice will be sufficient.[52]

(J) *As to Lien Claim or Statement.* Among other facts which a mechanic's lien claimant must allege because they are essential to the existence of the lien, he must allege the filing of a statutory lien claim, statement, or notice,[53] that it was verified by affidavit as required by the lien act,[54] was filed in the proper office,[55] within the statutory period limited for the filing of such claims,[56] and that it contains the matters of substance which the statute prescribes.[57] A general allegation that the claim was duly made out and filed is not sufficient to show that it contained the essential provisions required by the statute,[58] or that it was verified as required,[59] or was filed in time;[60] but the pleading will be sufficient if it is made to appear therein with reasonable certainty that the legal requirements have been complied with in these respects;[61] and where several claims are properly

52. Rialto Min., etc., Co. *v.* Lowell, 23 Colo. 253, 44 Pac. 263.

53. *Alabama.*— Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918.

Arkansas — Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682.

Illinois.— Rittenhouse *v.* Sable, 43 Ill. App. 558; Boals *v.* Intrup, 40 Ill. App. 62.

Minnesota.— J. D. Moran Mfg. Co. *v.* Clarke, 59 Minn. 456, 61 N. W. 556; Hurlbert *v.* New Ulm Basket-Works, 47 Minn. 81, 49 N. W. 521.

Missouri.— Gault *v.* Soldani, 34 Mo. 150; Heltzell *v.* Langford, 33 Mo. 396.

Oregon.— Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305; Willamette Falls, etc., Milling Co. *v.* Riley, 1 Oreg. 183.

Wisconsin.— Wright *v.* Allen, 26 Wis. 661 (holding that the complaint cannot serve as a substitute); Dean *v.* Wheeler, 2 Wis. 224.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 509.

54. *Alabama.*— Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918.

Illinois.— Boals *v.* Intrup, 40 Ill. App. 62.

Kentucky.— Newport, etc., Lumber Co. *v.* Lichtenfeldt, 72 S. W. 778, 24 Ky. L. Rep. 1969.

New York.— Hallagan *v.* Herbert, 2 Daly 253.

Oregon.— Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 509.

55. Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918; Pool *v.* Sanford, 52 Tex. 62, holding that an attached account, showing that it was recorded, was not sufficient in the absence of an allegation of that fact.

56. *Alabama.*— Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918.

Arkansas.— Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682.

Illinois.— Rittenhouse *v.* Sable, 43 Ill. App. 558, where the pleading was bad because it showed the claim was not filed in time.

Indiana.— Crawfordsville *v.* Brundage, 57 Ind. 262 (holding that an averment in a complaint that "notice of lien was made out, filed and recorded within sixty days of the time" the lien claimant "was to have been paid for said work and labor and materials" does not show that the notice was filed within sixty days after the completion of the building as required by statute, and therefore is insufficient); Crawfordsville *v.* Barr, 45 Ind. 258.

Minnesota.— J. D. Moran Mfg. Co. *v.* Clarke, 59 Minn. 456, 61 N. W. 556; Hurlbert *v.* New Ulm Basket-Works, 47 Minn. 81, 49 N. W. 521; Price *v.* Doyle, 34 Minn. 400, 26 N. W. 14.

Missouri.— Gault *v.* Soldani, 34 Mo. 150; Heltzell *v.* Langford, 33 Mo. 396.

Oregon.— Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 509. See also *supra*, VIII, I, 1, h, (VI), (E).

57. Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682; Hicks *v.* Murray, 43 Cal. 515; Kechler *v.* Stumme, 36 N. Y. Super. Ct. 337; Schillinger Fire-Proof Cement, etc., Co. *v.* Arnott, 14 N. Y. Suppl. 326; Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305.

Omission may be cured by verdict where the evidence, admitted without objection, supports the finding of a compliance with the statute. Bickel *v.* Gray, 81 Mo. App. 653.

58. Kechler *v.* Stumme, 36 N. Y. Super. Ct. 337; Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305. See also Smith *v.* Wilkins, (Oreg. 1897) 48 Pac. 708, the decision in which, however, was vacated in 31 Oreg. 421, 51 Pac. 438, without deciding any of the questions involved, and the cause remanded. But in Watrous *v.* Elmendorf, 55 How. Pr. (N. Y.) 461, it is held that an allegation that plaintiff had filed the notice required by a particular statute is sufficient without specifying all the details which should be stated in the notice.

59. Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305.

60. Pilz *v.* Killingsworth, 20 Oreg. 432, 26 Pac. 305.

Legal conclusion.—An allegation that plaintiff filed a lien account and that "said account . . . so filed constituted and was a valid and specific lien," etc., does not show that the account was filed in time, and alleges a mere conclusion. Price *v.* Doyle, 34 Minn. 400, 26 N. W. 14.

61. *California.*— Parke, etc., Co. *v.* Inter Nos. Oil, etc., Co., 147 Cal. 490, 82 Pac. 51, where the complaint was sufficient which al-

united in one statement of lien the complaint need not allege the filing of the statement in each separate cause of action set out, but one allegation of such fact referring to all of the lien claims will be sufficient.[62]

(K) *As to Notice of Lis Pendens.* The notice of pendency is of the exist-

leged that the liens were filed for record within thirty days after the completion of the work. See also Wood *v.* Oakland, etc., Rapid Transit Co., 107 Cal. 500, 40 Pac. 806.

Indiana — Jeffersonville Water Supply Co. *v.* Riter, 138 Ind. 170, 37 N. E. 652 (holding that a general allegation that notice was filed "within sixty days after the furnishing of the material and doing said work" is sufficient on a motion to strike from complaint, in the absence of special statements showing that the allegation is not true); Hubbard *v.* Moore, 132 Ind. 178, 31 N. E. 534 (holding that where the dates in the items of a bill of particulars show that some of the items were furnished less than sixty days before the notice of lien was filed, a complaint containing the allegation that the notice was filed less than sixty days after said materials were furnished is sufficient after judgment); Carriger *v.* Mackey, 15 Ind. App. 392, 44 N. E. 266 (holding that an allegation that notice of intention was filed in the recorder's office on a certain day is sufficient allegation that the notice was received by the recorder on that date).

Minnesota.— Glass *v.* St. Paul Carriage, etc., Co., 43 Minn. 228, 45 N. W. 150, holding that an allegation of filing was sufficient without alleging that the affidavit was of the form prescribed, in which case it further appeared that the objection was made for the first time in the appellate court.

Missouri.— McDermott *v.* Claas, 104 Mo. 14, 15 S. W. 995.

Virginia.— Richlands Flint-Glass Co. *v.* Hiltebeitel, 92 Va. 91, 22 S. E. 806, holding that the bill was sufficient to show the filing of the lien within the prescribed period where it alleged that the lien was filed "as provided for in" a specified section of the code and it appeared from the copy of the record of the lien filed with the bill as an exhibit that the last charge in the account was for work during the month of October and that the lien was filed for record November 8 following.

Wisconsin.— Edleman *v.* Kidd, 65 Wis. 18, 26 N. W. 116, holding that a complaint which alleged the filing within six months after the work was done but named a date variant from this which was clearly a clerical error was good after verdict, no issue having been made as to the time when the petition was filed and there being no denial of the allegation that it was filed within six months, as it was competent for the court to allow plaintiff to show upon the trial that the petition was filed within the six months as alleged and to direct the complaint to be amended if necessary.

Time with respect to last item furnished.— Where by fair construction of the complaint, which sets up the furnishing of materials between two dates, it is sufficiently alleged that the last item was furnished on the last date mentioned, an averment that the account was filed on a date named which was less than the statutory period after the last of the two dates between which the materials were alleged to have been furnished sufficiently alleges compliance with the statute as to the time of filing the account. Rust-Owen Lumber Co. *v.* Fitch, 3 S. D. 213, 52 N. W. 879. But where the allegation of furnishing between two dates is not such as that the last item will be construed to have been furnished on the last date named, an allegation that the lien statement was filed on a date specified, which might or might not be within the statutory period of the last date mentioned in the allegation as to the time of furnishing materials, is not sufficient. Hurlbert *v.* New Ulm Basket-Works, 47 Minn. 81, 49 N. W. 521. So under an allegation that the labor was performed "during the years 1892 and 1893," another allegation that the lien was filed "November 6, 1893," is not sufficient to show a filing within ninety days after the labor was performed. J. D. Moran Mfg. Co. *v.* Clarke, 59 Minn. 456, 61 N. W. 556.

Effect of setting out or attaching.— Where the notice of lien as filed is set out in the pleading or a copy is annexed to and made a part of the pleading as an exhibit, it is held that this is a sufficient compliance with the rule that it must affirmatively appear from the complaint that the notice was in proper form and contained all the essential provisions. Matthiesen *v.* Arata, 32 Oreg. 342, 50 Pac. 1015, 67 Am. St. Rep. 535. See also Richlands Flint-Glass Co. *v.* Hillebeitel, 92 Va. 91, 22 S. E. 806. A clerical error in the allegations referring to the time of filing of the notice of lien may be made to appear from the notice filed so that the error in the pleading will not be fatal. Seattle Lumber Co. *v.* Sweeney, 33 Wash. 691, 74 Pac. 1001. On the other hand it has been held that the averments of the pleading must show a compliance with the law without reference to the statements filed with the pleading, under the rule that an exhibit cannot aid or destroy a material averment. Newport, etc., Lumber Co. *v.* Lichtenfeldt, 72 S. W. 778, 24 Ky. L. Rep. 1969; Pool *v.* Sanford, 52 Tex. 621. But even where an exhibit cannot be used to supply a material allegation or cure a vital defect it may be used to make the allegations definite and certain, as where the exhibit shows that the property intended to be covered by the lien is sufficiently described in the statement filed and recorded. Matthews *v.* Monts, 61 S. C. 385, 39 S. E. 575.

62. Rialto Min., etc., Co. *v.* Lowell, 23 Colo. 253, 47 Pac. 263.

ence of the action, and therefore the complaint is not required to state the filing of a notice which follows the complaint.[63]

2. Plea, Answer, or Affidavit of Defense[64] — a. Necessity in General. Regularly a plea or answer should be filed as in other cases, except as otherwise required by the peculiar statutory provisions,[65] in order to properly form an issue to be tried.[66] No appearance and pleading is necessary, however, to protect the interest of an owner, although made a party, whose interest the court is not authorized to subject under the law applicable to the facts set up in the petition.[67]

b. Number of Defenses. Under general rules a defendant in a mechanic's lien proceeding may set up as many defenses as he has,[68] whether they be such as are legal or equitable or both.[69]

c. Form and Sufficiency — (i) *In General.* A plea in a proceeding to enforce a mechanic's lien must be a form of plea which is appropriate to the remedy.[70] Except as controlled by particular statutory provision the ordinary rules of pleading are applied.[71] Thus defects of parties must be specifically and

63. John Paul Lumber Co. *v.* Hormel, 61 Minn. 303, 63 N. W. 718; Gass *v.* Souther, 46 N. Y. App. Div. 256, 61 N. Y. Suppl. 305 [*affirmed* in 167 N. Y. 604, 60 N. E. 1111].

64. Defenses see *supra*, VIII, E.

Waiver and estoppel to assert defenses see *supra*, VIII, E, 3.

65. Burlingame *v.* Emerson, 5 R. I. 62, holding that a plea and answer filed to a petition in equity to enforce a lien under "the mechanics' lien law" will, upon motion of the petitioner, be ordered to be stricken out or taken off the file; the purpose of the particular statute in authorizing the petitioner to proceed in this way being to give him a summary remedy, without the encumbrance and delay of plea, answer, and replication.

66. Thielmann *v.* Burg, 73 Ill. 293 (where the statute required the answer to be filed on or before the day on which the cause shall be set for trial on the docket in order to prevent a default judgment); Hamilton *v.* Dunn, 22 Ill. 259 (holding that the pendency of a motion for security for costs in a suit pending on mechanic's lien will not necessarily excuse a party for not filing an answer or prevent the rendition of a decree *pro confesso*); Roberts *v.* Miller, 32 Mich. 289 (where in the absence of proof of the facts alleged a judgment cannot be rendered on claimant's pleading); Hill *v.* Meyer, 47 Mo. 585.

Counter affidavit in summary proceeding.— In Georgia under a statutory summary proceeding by execution issued on the affidavit of the creditors as mechanics, it was held that the counter affidavit of defendant must be before the court in order to justify the trial of an issue and that if it is missing it should be supplied before the trial proceeds; that the record must show what was in controversy, whether the amount of the claim, the justness of the claim, or the existence of the lien, either or all of which issues may be raised by such affidavit. Morris *v.* Ogle, 56 Ga. 592.

Administrator of contractor.— A judgment for want of an affidavit of defense ought not to be given in a scire facias on a mechanic's claim, where the contractor is dead, and his administrator sued. Richards *v.* Reed, 1 Phila. (Pa.) 220.

67. Judson *v.* Stephens, 75 Ill. 255, which involved a petition against a lessee and the owner of the real estate to enforce a lien for work done for the lessee only and it was held that the owner of the fee could not have placed his interest and rights in any better position by answering than that in which they were placed by the averments of the petition.

68. Hoagland *v.* Van Etten, 22 Nebr. 681, 35 N. W. 869.

69. McAdow *v.* Ross, 53 Mo. 199, the general statute applied to mechanics' lien suits.

70. Kees *v.* Kerney, 5 Md. 419; Geiss *v.* Rapp, 1 Walk. (Pa.) 111 (holding that a plea of not guilty in a scire facias on a mechanic's lien is a nullity); Davis *v.* Church, 1 Watts & S. (Pa.) 240 (holding that a plea of *nul tiel record* to a scire facias on a mechanic's lien is a nullity, the registry of the lien not being a record).

Forms see McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 398, 19 So. 417; Taylor *v.* Wahl, 69 N. J. L. 471, 472, 55 Atl. 40; Stark *v.* Simmons, 54 Ohio St. 435, 43 N. E. 999 (denial and set-off); Dearie *v.* Martin, 78 Pa. St. 55, 56; Hoffmaster *v.* Krupp, No. 2, 15 Pa. Co. Ct. 465 (affidavit of defense).

71. Kees *v.* Kerney, 5 Md. 419; Gray *v.* Elbling, 35 Nebr. 278, 53 N. W. 68, holding that under the code the plea of *nil debet* raises no issue of fact, and an answer that defendant is not indebted in the full amount claimed in the petition is not a denial of any fact upon which the right to recover depends. See Owens *v.* Hord, 14 Tex. Civ. App. 542, 37 S. W. 1093, where the answer of a wife setting up that the property was her separate estate and homestead, although the title deeds showed it to be community property, and that it was bought with her separate money under an agreement that it should be conveyed to her, which plaintiff knew when he furnished the material, was held to be sufficient.

distinctly pointed out,[72] and matter in abatement should be pleaded as such and not in bar.[73] Matter which can have no effect upon plaintiff's cause may be stricken out of an answer,[74] or a plea which raises an issue improper to be tried in the proceeding, may be stricken,[75] and it is not error to strike out superfluous repetition;[76] but unless a plea is frivolous it should not be stricken on motion but the objections should be raised on demurrer so that defendant might have an opportunity to meet them and amend his pleading.[77]

(II) *DENIAL OR ALLEGATION OF MATERIAL FACTS* — (A) *In General.* Defendant's pleading must controvert the cause of action set up, or allege some fact or facts in legal opposition to the right claimed by plaintiff,[78] and a special

72. Hawkins *v.* Mapes-Reeves Constr. Co., 101 N. Y. App. Div. 83, 91 N. Y. Suppl. 794.

Necessity of joining and effect of omitting plaintiffs see *supra*, VIII, G, 1; VIII, G, 3, a, (III).

73. Campbell *v.* Scaife, 1 Phila. (Pa.) 187, holding that in scire facias upon a lien for materials, a plea in bar, averring that the materials were furnished on a credit which had not yet expired, is bad, and that the allegation that plaintiffs were subcontractors and the builder had contracted to receive payment, partly in goods and partly in money, in a specified time, not yet elapsed, is bad, because of the uncertainty in averring the mode of payment.

74. Ontario-Colorado Gold Min. Co. *v.* MacKenzie, 19 Colo. App. 298, 74 Pac. 791, where averments that plaintiff was not a miner and was wholly unacquainted with and unused to mining, and that plaintiff claimed that he owed certain sums for taxes which he was unable to pay, were stricken because they could have no possible bearing upon his cause of action for a lien under a contract to do certain work at a specified price.

Judgment on pleadings distinguished.— So it is held that, although the pleading may be stricken out on motion, yet on a motion for a judgment on the pleadings if it can be gathered therefrom that any issue is tendered on the material matter the movant should not prevail. Rourk *v.* Miller, 3 Wash. 73, 27 Pac. 1029.

75. Christine *v.* Manderson, 2 Pa. St. 363; Spare *v.* Walz, 15 Phila. (Pa.) 263.

76. Ontario-Colorado Gold Min. Co. *v.* MacKenzie, 19 Colo. App. 298, 74 Pac. 791.

77. McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. 417; Webb *v.* Vanzandt, 16 Abb. Pr. (N. Y.) 190, where the court refused to strike out a defense that the agreed price was payable by instalments, that the notice of lien was not filed within six months after the first instalment became due, and that there was an action at law pending to recover the same amount.

78. *California.*— Holland *v.* Wilson, 76 Cal. 434, 18 Pac. 412, where in an action for the reasonable value of work and materials defendant set up a special contract for the improvements to be made according to certain plans and specifications, under a statutory provision requiring the recording of such contract in order to make it valid, it was held that the plans and specifications were a part of the contract and that the answer was insufficient to set up the contract, and a breach thereof which merely alleged that the agreement was filed for record without alleging that the plans and specifications were so filed.

Missouri.— Westhus *v.* Springmeyer, 52 Mo. 220, holding that where plaintiff declares on a contract providing for a fixed sum for certain work and reasonable prices for extras, which are alleged to amount to a certain sum, and the answer makes no claim that there were two distinct contracts, the first of which is outlawed, that question is not in issue.

Nebraska.— Gray *v.* Elbling, 35 Nebr. 278, 53 N. W. 68.

Nevada.— Dickson *v.* Corbett, 11 Nev. 277.

Washington.— Rourke *v.* Miller, 3 Wash. 73, 27 Pac. 1029.

Wisconsin.— Harbeck *v.* Southwell, 18 Wis. 418.

Wyoming.— Big Horn Lumber Co. *v.* Davis, 14 Wyo. 455, 84 Pac. 900, 85 Pac. 1048, holding that an answer setting up that defendant demanded of plaintiff a statement of the amount due for materials and was furnished a partial statement but not alleging that defendant was thereby misled to her injury, did not present an issue as to whether plaintiff was estopped to claim the full amount due.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 517.

An affidavit of defense failing to state that an agreement that no mechanic's lien should be filed against the premises was filed in the prothonotary's office as required by the Pennsylvania statute of 1895 was insufficient. Finn *v.* Connell, 2 Lack. Leg. N. (Pa.) 118.

Challenge of facts upon which right depends — Limitation.— Where the legal sufficiency of plaintiff's claim depends upon facts which are challenged by the affidavit of defense, the court will not consider the legal question on a rule for judgment for want of a sufficient affidavit of defense and in advance of a determination of the facts. Thus an affidavit in a proceeding against a building to enforce its apportioned part of a claim for which a single apportioned lien was filed against several buildings, alleging that the materials for which the lien was filed were furnished more than six months before the lien was filed, is sufficient to resist a rule for judgment (Shannon *v.* Broadbent, 162 Pa. St. 194, 29 Atl. 865); and the same is true of an affidavit alleging that the lien was filed after the expiration of said period and that some if not all of the houses against

plea must set up facts in order that the court may see that they constitute a defense and that plaintiff may know what he is called on to meet by proof if the plea is traversed or what to confess and avoid by counterpleading.[79] Therefore a plea is bad which sets up a mere legal conclusion of the pleader or raises a question which is proper for demurrer.[80] The allegations upon which defendant seeks to defeat plaintiff's claims must be distinct and positive as distinguished from mere argumentative, inferential,[81] or equivocal and evasive statements.[82] As to facts which are presumptively in the actual personal knowledge of defendant or as to which it is his duty to have such knowledge he must answer positively,[83] but as to other facts he may deny them on information and belief.[84]

(B) *Admission by Failure to Deny.* Material allegations of the petition which are not denied in the answer are deemed to be admitted,[85] and the mere fact that defendant says in his pleading that he does not admit an allegation is held to be of no consequence if it is not denied.[86] By pleading one fact in opposition to the claimant's right, and in the absence of a general denial, the material allegations of the claimant's pleading are admitted.[87]

(C) *General and Special Pleading and Issues Raised Thereby*[88] — (1) IN GENERAL. A general denial puts in issue only such facts as are issuable,[89] but as to these it requires proof of every material allegation in the petition not admitted

which the lien is sought were completed more than six months prior to the filing of the bill of particulars, in a proceeding to enforce liens for materials furnished for the erection of a large number of the houses upon which there were two apportioned liens, and the lien sought to be enforced was filed on only a part of the number included in one of the apportioned liens (Philadelphia Brick Co. *v.* J. D. Johnson Co., 162 Pa. St. 199, 29 Atl. 864).

Character of improvements.— Where the character of the improvement as a substantially new structure is material to the lien, and a mechanic's lien was claimed for materials and work supplied in the erection and construction of a building, and an affidavit of defense was filed alleging that the work was alteration, and not construction, it was held that an issue was presented for the jury as to what was the character of the work done. Gerry *v.* Painter, 9 Pa. Super. Ct. 150, 43 Wkly. Notes Cas. 275.

79. Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26.

80. See *infra*, VIII, I, 2, c, (II), (D).

81. Catanach *v.* Cassidy, 159 Pa. St. 474, 28 Atl. 297, holding the affidavit of defense insufficient. *Compare* Fister *v.* Kline, 1 Woodw. (Pa.) 457.

82. Curnow *v.* Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 Pac. 149.

83. Curnow *v.* Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 Pac. 149, where a denial in the form that defendant "is not sufficiently informed to admit that the plaintiff performed work," etc., was held bad in an answer which admitted ownership of the property and the employment of plaintiff to perform labor upon it.

84. Hagman *v.* Williams, 88 Cal. 146, 25 Pac. 1111 (where such a denial that the claim contained the necessary averments was sufficient, the complaint alleging that the claim was duly recorded and stated its contents substantially in the language of the statute, but the claim as recorded being insufficiently drawn and not in the language of the complaint); Cowie *v.* Ahrenstedt, 1 Wash. 416, 25 Pac. 458 (sustaining an answer alleging want of a sufficient knowledge or information to form a belief upon which the denial was based, as to the recording of a notice of lien, notwithstanding the general rule that the law makes a record constructive notice). See also Hoffmaster *v.* Knapp, 15 Pa. Co. Ct. 465.

85. Lingard *v.* Beta Theta Pi Hall Assoc., (Cal. 1899) 56 Pac. 58; McGinty *v.* Morgan, 122 Cal. 103, 54 Pac. 392 (holding that a statement in the notice of lien that extra work was performed for an agreed price is supported by an allegation of that fact in the complaint and its admission by failure of the answer to deny); Lombard *v.* Johnson, 76 Ill. 599; Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863; Fitzpatrick *v.* Thomas, 61 Mo. 515; Westhus *v.* Springmeyer, 52 Mo. 220; Gorman *v.* Dierkes, 37 Mo. 576. See also *infra*, VIII, I, 7, b.

86. Irish *v.* Pheby, 28 Nebr. 231, 44 N. W. 438. But on the other hand where defendant files no pleading it is held that plaintiff must nevertheless prove the material facts upon which the existence of the lien depends and which facts are not admitted. Roberts *v.* Miller, 32 Mich. 289. See also Hicks *v.* Branton, 21 Ark. 186.

87. Dickson *v.* Corbett, 11 Nev. 277; Geiss *v.* Rapp, 1 Walk. (Pa.) 111.

88. Issues see *infra*, VIII, I, 7, a.

89. Elder *v.* Spinks, 53 Cal. 293, holding that an allegation that defendant has or claims an interest in the land is wholly immaterial, and a general denial does not amount to a disclaimer of such interest, but only puts in issue the fact that it was subject to the lien.

Defense of want of title see *supra*, VIII, E, 2.

of record to be true.[90] On the other hand matter in avoidance of the cause of action pleaded must be specially set up and will not be available under a mere general denial of the claimant's allegations.[91]

(2) PLEA AS TO PRESENT INDEBTEDNESS[92] — (a) IN GENERAL. As hereinbefore stated the plea should conform to the particular form of remedy through which the lien is enforced,[93] in pursuance of which rule, where the lien claim shows that the debt was contracted by the owner the general issue of *non assumpsit* is proper,[94] and *nil debet* has been held sufficient as a general denial to put the mechanic on proof of his claim, where the statute requires such proof in any event, even upon the failure of defendant to appear.[95] So a plea of the general issue or general denial puts in issue the allegation of indebtedness from the owner to the general contractor at the time of the service of notice by the subcontractor,[96] and is sufficient to put the materialman on proof of the amount due for materials furnished,[97] and a plea by the owner, in a suit by the materialman, which sets up facts showing that there was no indebtedness from the owner to the contractor, is sufficient;[98] but where the lien of a subcontractor attaches to an instalment due the contractor at the filing of the former's lien, an answer setting up damages by way of equitable set-off and counter-claim, by reason of the contractor's failure to complete the work, is bad if it fails to allege that the damage arose or existed at the

90. Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9; Hassett *v.* Curtis, 20 Nebr. 162, 29 N. W. 295. See also *infra*, VIII, I, 7, b, (I).

91. Cosgrove *v.* Farwell, 114 Ill. App. 491; Hallahan *v.* Herbert, 4 Daly (N. Y.) 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409], which cases hold that the discharge of a lien must be pleaded.

That the premises constitute a homestead so as to entitle defendant to the benefit of an exemption on that account must be specially pleaded. Bergsma *v.* Dewey, 46 Minn. 357, 49 N. W. 57. But see otherwise in Security Mortg., etc., Co. *v.* Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 837.

92. Estoppel of surety on indemnity bond see *supra*, VI, A, 2, c.

Recoupment, set-off, and counter-claim generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

93. See *supra*, VIII, I, 2, c, (I).

94. Kees *v.* Kerney, 5 Md. 419, holding that such a plea would be proper if the claim was filed before the scire facias issues, because the claim would show a contract express or implied on the part of defendant, but that the plea is not proper as between the owner and a claimant for work or materials furnished to the builder employed by the owner, as the law raises no assumpsit as between the owner and such claimant, and in such a case defendant must plead so as to give notice of his defense.

Effect of plea.— As objection to the sufficiency of the lien on its face raises a question of law, it cannot be considered under a plea of *non assumpsit*. Klinefelter *v.* Baum, 172 Pa. St. 652, 33 Atl. 582; Scholl *v.* Gerhab, 93 Pa. St. 346.

95. Hicks *v.* Branton, 21 Ark. 186, *nil debet* to a scire facias.

Under the Nebraska code *nil debet* is held not a sufficient plea as it puts no fact in issue. Gray *v.* Elbling, 35 Nebr. 278, 53 N. W. 68.

96. Alabama Lumber Co. *v.* Smith, 139 Ala. 179, 35 So. 693.

All defendants joined may plead the general issue that the builder does not owe. Culver *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812.

But where the law gives the subcontractor a direct lien it is held that the plea denying defendant's indebtedness to plaintiff is a mere conclusion of law and hence defective. Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

97. Lee *v.* Story Brewing Co., (Nebr. 1905) 106 N. W. 220.

98. Alabama Lumber Co. *v.* Smith, 139 Ala. 179, 35 So. 693, where the plea alleged facts showing that at the time of service of notice by the materialman the contractor had abandoned the work and that under the provisions of the contract the owner took possession of and completed the building at his own expense which was to an amount in excess of the sum to be paid the contractor under the contract.

Payment by contractor.— In Kee *v.* Hilt, 33 Wkly. Notes Cas. (Pa.) 104, an affidavit of defense in a proceeding to enforce a subcontractor's lien that plaintiff had received from the contractor a sum in excess of the amount due for the work done as measured by the contract price, and had abandoned the work, was sufficient.

Claim in excess of amount due contractor. — Under the statute in New Jersey the owner was not compelled to answer for any claim of workmen or materialmen who made a claim in excess of the amount due the general contractor from the owner, and a plea that at the time of notice to the owner he owed the contractor less than the sum claimed by plaintiff was held good, notwithstanding the allegation by plaintiff that he had recovered a judgment against the contractor. Taylor *v.* Wahl, 69 N. J. L. 471, 55 Atl. 40.

time the lien was filed.[99] A general denial puts in issue an allegation of performance of the contract by plaintiff,[1] and non-performance, as that the work was unskilfully performed, may be shown in an answer setting up the fact as a ground of defense.[2] If defendant wishes to set up another debt to defeat plaintiff's claim, he must show by his allegations that the debt is a subsisting one.[3]

(b) PAYMENT AND TENDER. An allegation of payment should be distinct and positive;[4] but where the pleading shows the manner of payment and alleges a mutual settlement of account by the parties it is not necessary to file an itemized account of payments,[5] and it has been held that the formal validity of the lien is not put in issue by such a plea.[6] An admission of indebtedness in a sum less than that claimed and a tender of the amount admitted is held to be an admission of the lien to that extent.[7]

(D) *Denial of Lien.* A plea or answer which merely sets up that plaintiff

99. Anisansel *v.* Coggeshall, 83 N. Y. App. Div. 491, 82 N. Y. Suppl. 430.

1. Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331, holding that defendant may show non-performance under such an answer.

In action by materialman.— But in an action by a materialman who furnished to the contractor a breach of contract by the contractor must be pleaded in order to raise an issue on such breach. Blethen *v.* Blake, 44 Cal. 117.

That defective material was furnished in violation of the contract may be shown as an equitable defense under the general issue. Blessing *v.* Miller, 102 Pa. St. 45.

2. Gourdier *v.* Thorp, 1 E. D. Smith (N. Y.) 697, holding that it is not necessary for defendant to file a bill of particulars required in case of a set-off in order to entitle him to show non-performance of the contract as a defense or to recoup damages in abatement of the price.

Particulars in which contract is uncompleted.— In Wilt *v.* Rush, 1 Wkly. Notes Cas. (Pa.) 103, where an affidavit of defense to the scire facias on an apportioned lien failed to specify the item in which plaintiff had failed to complete the contract, a supplementary affidavit was ordered.

Damages for defective material.— In Rockwell Mfg. Co. *v.* Cambridge Springs Co., 191 Pa. St. 386, 43 Atl. 327, an affidavit of defense which set up damage in a designated amount on account of a defect in the material furnished in that it was not properly seasoned by reason of which it shrank so that the paneling came loose and the joints opened and that such was the result of much, if not all, of the woodwork, was held to be sufficiently certain. But an affidavit which alleged deficiency in the quality of material and measured the extent of the deficiency by an alleged difference in the value of the house as a whole on account of the defectiveness of the material instead of by a difference in the value of the articles furnished as compared with those contracted for was held to be bad. Taylor *v.* Murphy, 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. Rep. 825.

3. Smyth *v.* Armstrong, 2 Wkly. Notes Cas. (Pa.) 383, holding that an affidavit of defense to a scire facias is insufficient which alleges that defendant had a good defense consisting of a book-account for coal delivered but which did not state that the account was unpaid.

4. Young *v.* Pulte, 1 Wkly. Notes Cas. (Pa.) 38, holding that an affidavit of defense was insufficient which alleged that the claim never was due and that so much as was due was paid or discharged so as to liberate the property from the lien.

Apportioned lien.— An affidavit of defense to a scire facias that the whole amount of the claim was a part of the sum due upon building operations embracing a designated number of houses on which only a specified sum was due and that deponents had paid the specified sum, which was in excess of that alleged to have been due to plaintiff thereby having paid more than was due, was held sufficient to take the case to the jury. Collins *v.* Schoch, 14 Wkly. Notes Cas. (Pa.) 485. So in Swenk *v.* Irwin, 8 Del. Co. (Pa.) 6, the affidavit of defense to a scire facias on one of a number of liens apportioned against different houses alleging payment of a stated sum on account of materials on which liens have been filed without apportioning the sum paid, and the amount of payment specified being less than the amount claimed on all the liens combined, was held sufficient, as the court could not on a rule for judgment apportion the amount paid to the several liens.

5. Easterling *v.* Shaifer, (Miss. 1905) 38 So. 230.

6. Klinefelter *v.* Baum, 172 Pa. St. 652, 33 Atl. 582; Scholl *v.* Gerhab, 93 Pa. St. 346; St. Clair Coal Co. *v.* Martz, 75 Pa. St. 384; Lee *v.* Burke, 66 Pa. St. 336; Howell *v.* Philadelphia, 38 Pa. St. 471; Lybrandt *v.* Eberly, 36 Pa. St. 347; Lewis *v.* Morgan, 11 Serg. & R. (Pa.) 234; Lucas *v.* Brockway, 10 Pa. Cas. 47, 13 Atl. 285.

7. Cameron *v.* Campbell, 141 Fed. 32, 72 C. C. A. 520.

Under plea of special contract.— But a plea of tender and payment of the money into court under a special contract set up by defendant will not be construed as an admission of the cause of action set up by the claimant but only as an admission of the amount due under the special contract pleaded by defendant. Yaukey *v.* Buckman, 18 Pa. Super. Ct. 378.

Payment into court to discharge lien see *supra*, VI, B, 2.

has no lien,[8] or that he never had a claim as alleged,[9] or denying that he had complied with the law or is entitled to a lien, is a mere conclusion of law and raises no issue of fact to be tried.[10]

(E) *Denial of Contract or Consent.* Where a materialman may have a lien for all material used in the construction of a building erected under a contract with the owner or with his knowledge and consent, in a proceeding by scire facias to enforce a lien for materials furnished, it is not sufficient to deny that they were purchased by defendant where it is not denied that the building was erected or the materials furnished with defendant's knowledge and consent.[11]

(F) *Denial of Furnishing to Particular Building.* A plea by the owner denying that the materials were used in improvements goes to the validity of the lien where the materials were not furnished to the owner, and is good notwithstanding a judgment may be rendered for the debt against a co-defendant.[12]

3. Cross Bill or Cross Complaint; Answer Setting Up Lien. Where judgment is demanded by a defendant lienor and the facts constituting his cause of action are not set out in the complaint, it is proper to set the same up in an answer in the nature of a cross complaint,[13] and it is held that, whether by cross bill, answer, or other pleading, defendant should set forth his claim so as to show that he has a lien just as if he were plaintiff in the action.[14] But the general rule in equity requiring

8. Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131 Ala. 256, 31 So. 26; Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

Issue restricted to identity of land.— In Missouri it was held that such a denial put in issue the liability of the property as described, but that every other thing necessary to give a lien must be specially denied or stand admitted. Fitzpatrick *v.* Thomas, 61 Mo. 515.

"No lien" short plea.— In Lee *v.* Burke, 66 Pa. St. 336, it was held that a plea in short "no lien" to a scire facias on a mechanic's lien may be accepted by plaintiff as tendering an issue of fact because it may be that for some reason *dehors* the record there was no lien, as that the claim had not been filed in time, that the work was not done or materials furnished on the credit of the building, etc., but that such a plea raised no question as to defects on the face of the claim filed and that it was not a demurrer. But see McDowell *v.* Hill, 1 Phila. (Pa.) 102, where it was considered that such a plea amounted merely to a demurrer and might be stricken out.

9. Campbell *v.* Scaife, 1 Phila. (Pa.) 187.

10. Curnow *v.* Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 Pac. 149. See also Wood *v.* King, 57 Ark. 284, 21 S. W. 471. In New Jersey it was held that in assumpsit under the Lien Law of 1853, brought against the builder and owner for materials or labor and to enforce a lien, the owner must plead specially that the house and land is not liable to the debt and no matter which merely affects the existence of the lien can be pleaded in bar of the action; that the pleadings must be such as would avail in an action brought to recover money due on a contract; that if the plea is interposed that the house and land are not liable to the debt it then becomes necessary for plaintiff, in order to entitle himself to a judgment against the real estate, to prove that the provisions of the statute requisite to constitute such lien have been complied with. Tomlinson *v.* Degraw, 26 N. J. L. 73.

11. Evans *v.* Cunningham, 6 Pa. Co. Ct. 156. An affidavit of defense in such a case alleging that the deponent never contracted with plaintiff is bad because if the materials were furnished to and on the credit of the building it may be liable notwithstanding the truth of the plea. Hill *v.* Bramall, 1 Miles (Pa.) 352.

Want of consent in writing.— To a complaint which proceeded upon the theory that one of defendants, a married woman, had employed a contractor to erect a house on her lot, an answer by way of confession and avoidance which sets up that the improvements were made by order of defendant's husband and without her consent in writing is bad. Neeley *v.* Searight, 113 Ind. 316, 15 N. E. 598.

12. McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. 417.

Labor not done on building.— See Hoffmaster *v.* Knupp, 15 Pa. Co. Ct. 465, where an affidavit of defense alleging that the sum for which the lien was claimed was not for labor done on the house on which the lien was filed, but was for a balance owing from a contractor named for labor done by the claimant on other houses, detailing circumstances, was sufficient.

13. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Defendant concluded by his pleading.— The cross complainant is held to be concluded by his claim as set up in his cross-complaint. Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

14. Ford Gold Min. Co. *v.* Langford, 1 Colo. 62, where, although not deciding that it was necessary, it was said to be the better practice for a defendant to set up his lien by cross bill. See also Burns *v.* Phinney, 53

a defendant to make himself complainant either by petition or cross bill, or by transfer in some way from the position of a defendant to that of a complainant, asking affirmative relief, is subject in mechanics' lien suits, as in other cases, to the exception that, where a fund or property is in the control of the court to be administered and distributed among those entitled to it, affirmative action is not necessary but relief is proper under an answer setting up facts upon which the respondent is entitled to it.[15] No cross bill is necessary to set up that there is no indebtedness by reason of damage sustained by defendant from a breach of the contract.[16] In a suit by the owner against all the lienors for the purpose of adjusting or settling all matters between the parties and to prevent the prosecution of separate lien proceedings, the liens of defendants may be enforced by cross bill.[17] But matter which does not relate to or depend upon the contract or transaction on which plaintiff's action for the enforcement of a lien is brought or which does not affect the property to which the action relates cannot be set up by cross complaint but is properly cognizable under a counter-claim;[18] and where a

Minn. 431, 55 N. W. 540. But under a statute requiring all lien-holders to prove their claims in one proceeding, it has been held that intervening holders of recorded liens may prove their claims without having pleaded them. Hunter *v.* Truckee Lodge No. 14 I. O. O. F., 14 Nev. 24. See also Robock *v.* Peters, 13 Manitoba 124. And see *supra*, VIII, F, 1, b; VIII, G, 3, b, (XI).

Sometimes it is expressly provided by statute that in a mechanic's lien proceeding every defendant as lienor shall by his answer set forth his lien or he will be deemed to have waived it unless the lien is admitted in the complaint and not contested by another defendant. McConologue *v.* Larkins, 32 Misc. (N. Y.) 166, 66 N. Y. Suppl. 188. And the admission of proof, without objection, in support of a claim, does not dispense with the necessity of alleging it in the answer. Hondorf *v.* Atwater, 75 Hun (N. Y.) 369, 27 N. Y. Suppl. 447.

Sufficiency.— *The facts necessary to show a lien* must be set up in the answer or cross bill. Ford Gold Min. Co. *v.* Langford, 1 Colo. 62; Sutherland *v.* Ryerson, 24 Ill. 517. But in Tibbetts *v.* Moore, 23 Cal. 208, under a statute providing that all lien-holders shall be made parties by notice, although they need not be named, and must exhibit proof of their liens, a petition filed by a defendant who comes in under such notice is held not to be regulated by the strict rules relating to pleadings in ordinary actions and they are not interveners under the statute as to intervention. The general rules of pleading on behalf of lien claimants have been stated hereinbefore without reference to whether the claimant was plaintiff or defendant. See *supra*, VIII, I, 1, b, (I).

Where the oath to the answer is waived in the bill the answer setting up a lien is not objectionable because of the fact that it is not sworn to. Ford Gold Min. Co. *v.* Langford, 1 Colo. 62.

15. Emack *v.* Campbell, 14 App. Cas. (D. C.) 186, where a defendant appeared but did not answer and the owner, also a defendant, in his answer admitted the former's claim but denied the sufficiency of his notice and his right to a lien and the exception mentioned in the text was held to govern.

A formal cross bill is not necessary but relief may be demanded in the answer. Thielman *v.* Carr, 75 Ill. 385; Smalley *v.* Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29; Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466. But in Howett *v.* Selby, 54 Ill. 151, it was held that where a prior mortgagee was made a party and claimed by his answer, but not by cross bill, that he had also furnished materials for the improvements, it was proper to postpone his claim to that of a mechanic who had filed his petition.

Personal judgment.— But where an original contractor had not filed his lien if he merely answers in a suit by a subcontractor he cannot recover judgment for the amount of his claim over and above the claim of the subcontractor, not having set it up by pleading in the nature of a cross action but will be left to a personal action against the owner. Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356.

16. Julin *v.* Ristow Poths Mfg. Co., 54 Ill. App. 460.

Damages for breach of contract see *supra*, VIII, E, 4, b.

17. Perkins Oil Co. *v.* Everhart, 107 Tenn. 409, 64 S. W. 760, holding that the complainant in such a suit could not of course bring the property before the court by attachment, which process is necessary in such proceedings, but that is no reason why the writ could not issue under such cross bills.

Denial of contractor as to amount due.— Where the contractor filed an answer and cross bill in such a suit, for the purpose of enforcing his lien, but did not deny the amount due, on the allegation in the complaint that the amount due was insufficient to pay any claims of subcontractors and that such amount exceeded the sum due by the owner under the contract, it was held that the court properly denied him the foreclosure. Stimson *v.* Dunham, etc., Co., 146 Cal. 281, 79 Pac. 968.

18. Clark *v.* Taylor, 91 Cal. 552, 27 Pac. 860.

subcontractor brings a suit in equity to enforce a mechanic's lien, the owner has no right to file a cross bill making the sureties on the contractor's bond parties to the suit, for the purpose of enforcing the liability on the bond.[19] Defendant has been permitted to file a cross bill against his co-defendant for relief to which he is entitled by reason of transactions between these two parties relating to the property involved.[20]

4. Replication or Reply. Where defendant pleads matter in his answer which goes to defeat plaintiff's right to recover the latter may plead in reply the facts which in legal effect will overcome the defensive matter,[21] unless the answer does not contain new matter and in such case no reply is necessary,[22] or unless plaintiff has admitted in his complaint what he denies in his replication.[23] But the omission of a vital statement from the lien claim itself cannot be cured by a replication setting up the omitted facts in answer to a plea based upon a condition which the lien claim should have anticipated.[24] Sometimes under special statutory provision applying to these proceedings replications are dispensed with and the allegations in answers are taken to be controverted;[25] and the general equity practice under a statute abolishing special replications in chancery controls where the proceeding for the enforcement of the lien is essentially a chancery one.[26] A replication to a plea setting up a breach of plaintiff's contract must answer such plea completely when the matter of the plea is not intended to be

19. McRae *v.* University of The South, (Tenn. Ch. App. 1898) 52 S. W. 463. But *compare* Meyers *v.* Wood, 26 Tex. Civ. App. 591, 65 S. W. 671.

Liability on indemnity bonds see *supra*, VII, A, 5.

20. Haberzettle *v.* Dearing, (Tex. Civ. App. 1904) 80 S. W. 539, where in a suit to enforce a mechanic's lien which arose on defendant's property under a contract between plaintiff and defendant's vendor, the vendor was made a party and admitted the debt, but claimed that his co-defendant had assumed it, and set up by cross bill a claim against his co-defendant for sums which the vendor had been compelled to pay on the contract, and it was held that the district court had jurisdiction to determine the claim set up in the cross bill, although the claim was in an amount beneath the jurisdiction of that court.

21. Hibbard *v.* Talmage, 32 Nebr. 147, 49 N. W. 219, holding that to an answer claiming damages for failure to complete the building in time it is proper to allege in reply that the delay was caused by certain acts of defendant and to an answer pleading payments it is proper to reply that the amounts paid were for extra work; that as to the last defense it devolved upon plaintiff to show how the money which was admittedly received had been applied, and that the statement that it was received for extra work, plaintiff not having claimed a lien for such extra work, is not a new cause of action.

Where plaintiff was surety on the contractor's bond, and the answer sets up liability accrued under such bond, any defense which plaintiff has to the cause thus set up in the answer must be set out by way of reply. Closson *v.* Billman, 161 Ind. 610, 69 N. E. 449.

22. Englebrecht *v.* Rickert, 14 Minn. 140; Foutty *v.* Poar, 35 W. Va. 70, 12 S. E. 1096, under the code provision dispensing with special replications where the answer does not set up new matter calling for affirmative relief and holding that the statute rule applies so as to dispense with a replication to an answer seeking to recoup damages in a certain amount on account of the manner in which work was done.

23. Helena Lumber Co. *v.* Montana Cent. R. Co., 10 Mont. 81, 24 Pac. 702, where it was held that under the construction of the pleadings the particular allegations set up in the answer had not been admitted in the complaint and that therefore it was error to strike out a replication denying the allegations of the answer.

24. Dearie *v.* Martin, 78 Pa. St. 55, where the claimant had failed to perfect a lien because his lien claim against the estate of a married woman did not show coverture and that the work was done at her request or with her consent, and it was held that a replication alleging these facts in answer to a plea of coverture was bad.

25. Johnson *v.* Lau, 58 Minn. 508, 60 N. W. 342 (where the proceeding was against husband and wife to enforce a lien against the latter's property and the husband having filed his answer as required by the statute providing that in actions to enforce mechanics' liens the allegations in the answer shall be deemed to be controverted was held to have adopted the practice under that statute and a replication was not necessary notwithstanding he was not the owner of the land, however the rule might have been if he had served his answer on plaintiff under the general practice and had not adopted the practice of the particular statute); Bruce *v.* Lennon, 52 Minn. 547, 54 N. W. 739.

26. Linnemeyer *v.* Miller, 70 Ill. 244; Person *v.* Smith, 30 Ill. App. 103.

New matter must be set up by amending the bill as in other cases. Shaeffer *v.* Weed, 8 Ill. 511; Kimball *v.* Cook, 6 Ill. 423.

met by a general replication denying it,[27] and plaintiff cannot depart from the cause of action originally set up by him, as by pleading in reply a contract different from that declared on.[28]

5. Demurrer — a. In General. In mechanics' lien proceedings issues of law may be raised by demurrer as in other cases, there being nothing in the statute confining the issues to facts;[29] and even where the statute prescribes as a rule of pleading that defendant shall plead that the property is not liable for the debt, he is not precluded thereby from demurring when plaintiff himself shows that the property described is not liable and that the case is not one within the lien act.[30]

b. Objections Raised by Demurrer — (i) *In General.* General rules governing demurrers apply,[31] and a demurrer will not lie unless the defect appears upon the face of the pleading;[32] but if the claimant's pleading shows on its face that he has no lien or fails to show the facts essential to the right, his suit should be dismissed on demurrer,[33] unless he is entitled to recover a personal judgment

27. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729, holding that to a plea setting up a breach of plaintiff's contract by failure to complete the building by the time fixed in the contract, a replication alleging that the failure was due to defendant's failure to furnish materials until after the time fixed, without alleging that it was defendant's duty to furnish such material, is bad; and that to such a plea a replication admitting that the house was not completed on time and alleging that the delay was caused by defendant changing the plans, etc., is bad for failure to allege that plaintiff ever completed the house.

28. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729.

29. Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625.

30. Coddington *v.* Beebe, 29 N. J. L. 550.

31. Demurrers: At law see Pleading; in equity see Equity.

Want of verification.— Upon the ground that a bill in equity is demurrable under chancery practice if not sworn to when an oath is required (see Equity, 16 Cyc. 366), such a defect in a bill to foreclose a mechanic's lien will render the bill bad on demurrer assigning the ground. Daschke *v.* Schellenberg, 124 Mich. 16, 82 N. W. 665, 125 Mich. 216, 84 N. W. 67.

32. Fredrickson *v.* Riebsam, 72 Wis. 587, 40 N. W. 501.

33. Kinzey *v.* Thomas, 28 Ill. 502; Phillips *v.* Roberts, 26 W. Va. 783, as to a bill showing on its face that the suit was not brought within the statutory period.

Objection to lien claim.— Where an affidavit upon which a lien claim is based is not part of the complaint of which it is filed as an exhibit, its sufficiency cannot be questioned on demurrer to the pleading. McFadden *v.* Stark, 58 Ark. 7, 22 S. W. 884. On the other hand it is held that where the mechanic's lien claim is set out in the pleading or attached thereto as a part thereof, a demurrer will lie if the claim is bad. Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285; Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481. See also Lyon *v.* Logan, 66 Tex. 57, 17 S. W. 264. And in Pennsylvania on a scire facias to enforce a mechanic's lien the question of law involving the validity of the lien should be raised by demurrer or motion to strike off the lien and cannot be raised under a pleading raising an issue of fact. Klinefelter *v.* Baum, 172 Pa. St. 652, 23 Atl. 582; Scholl *v.* Gerhab, 93 Pa. St. 346; Lybrandt *v.* Eberly, 36 Pa. St. 347; Bernheisel *v.* Smothers, 5 Pa. Super. Ct. 113, 41 Wkly. Notes Cas. 40; Pittsburgh Heating Supply Co. *v.* Will, 5 Pa. Dist. 618. In California where the lien claim made a part of the complaint was inconsistent with the statements in the complaint, the latter was held to be bad on demurrer assigning the ground of uncertainty and ambiguity. Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775; Frazer *v.* Barlow, 63 Cal. 71. But in Dalton *v.* Hoffman, 8 Ind. App. 101, 35 N. E. 291, applying the general rule of pleading that that is certain which may be made certain, where an allegation in the pleading aided a description in the lien notice, it was held that it was error to sustain a demurrer to the complaint for insufficiency of the notice and that the question whether the description in the complaint was at variance with the notice should have been submitted for trial.

Non-joinder of party.— In Foster *v.* Skidmore, 1 E. D. Smith (N. Y.) 719, it was held that the omission of the contractor as a party in a proceeding by a subcontractor will not be raised by demurrer, the claimant being required only to follow the precise course pointed out by the statute; that while the contractor is a proper party, if it should appear to be necessary to have him before the court he may be brought in by the court of its own motion or on defendant's motion. See also Sullivan *v.* Decker, 1 E. D. Smith (N. Y.) 699, where the practice of bringing in such parties on motion appears. In Wisconsin it is held that a complaint would not be considered as stating no cause of action because it failed to allege that there were no other lienors, under a statute requiring joinder of all lienors, and that where the complaint made no reference to a principal contractor a demurrer for defective parties will not lie. Fredrickson *v.* Riebsam, 72 Wis. 587, 40 N. W. 501. But where the contractor is an indispensable party to a bill by a subcontractor, the objection that such contractor is not impleaded is cause for

and his pleading is good for that, in which event the demurrer will be overruled.[34]

(II) *To Joinder and Statement of Causes.* An objection that an action to foreclose a lien against the owner and one to recover a personal judgment against a party liable therefor are not separately stated should be raised by motion and not by demurrer,[35] and does arise on a demurrer for misjoinder of actions where such actions may be properly joined.[36] But where the statute requires that for labor and materials performed and furnished in the construction of two or more buildings the claimant shall apportion to each building such labor or materials as went into it and that the declaration for each shall be in the form in which plaintiff would have declared if the labor and material apportioned for the particular building had been performed and furnished for it alone, the declaration which fails so to proceed is demurrable, the defect appearing on its face.[37]

(III) *Uncertainty.* Mere uncertainty or indefiniteness in some of the particulars of the pleading should be raised on a motion to make more certain and not by demurrer.[38]

(IV) *General and Special Demurrers.* If the claimant's pleading fails to allege such facts as entitle him to a lien under the statute a general demurrer will reach the defect,[39] but objections to allegations formally defective must be specifically pointed out.[40] A general demurrer should be overruled if the complaint entitles the complainant to any relief,[41] and if two or more defendants join in a demurrer and the pleading is good as to one of them the demurrer will be overruled.[42]

c. Waiver and Pleading Over. Mere defective allegations must be raised by demurrer or the defects will be deemed to have been waived and cannot be raised

demurrer. Kerns *v.* Flynn, 51 Mich. 573, 17 N. W. 62.

No presumption of fact will be indulged to supply a material allegation omitted from the complaint. Cross *v.* Tscharnig, 27 Oreg. 49, 39 Pac. 540.

Questions dependent on facts to be found. — In Coddington *v.* Beebe, 29 N. J. L. 550, it was held that whether, under the particular statute, a floating dock, described in the declaration as a "building," was subject to a mechanic's lien depended upon the purposes for which it was used and the manner of its connection with the realty; that these facts not being clearly shown upon the pleadings, the court would not pass upon the question on demurrer, but would leave it to be settled by the evidence at the trial.

34. Griggs *v.* Le Poidevin, 11 Nebr. 385, 9 N. W. 557.

Liability of contractor to one of defendants.— If the pleading states a cause of action against the contractor for a personal judgment in favor of the lienor, but does not state a cause of action against the owner either for a lien on the property or for a personal judgment, a joint demurrer by the parties must be overruled. Paine Lumber Co. *v.* Douglas County Imp. Co., 94 Wis. 322, 68 N. W. 1013.

Remedy by motion.— In Indiana the practice in such a case was by a motion to strike out so much of the complaint as referred to the lien. Lawton *v.* Case, 73 Ind. 60; Rankin *v.* Walker, 65 Ind. 222; Bourgette *v.* Hubinger, 30 Ind. 296; Farrell *v.* Lafayette Lumber, etc., Co., 12 Ind. App. 326, 40 N. E. 25. See also Howell *v.* Zerbee, 26 Ind. 214.

35. San Francisco Paving Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255.

36. San Francisco Paving Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255.

37. Johnson *v.* Algor, 65 N. J. L. 363, 37 Atl. 571.

38. McFadden *v.* Stark, 58 Ark. 7, 22 S. W. 884; Willer *v.* Bergenthal, 50 Wis. 474, 7 N. W. 352. But demurrer for uncertainty and ambiguity being the proper remedy under the general statute is the proper remedy in mechanic's lien proceedings. See Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775; Frazer *v.* Barlow, 63 Cal. 71.

39. Kinzey *v.* Thomas, 28 Ill. 502.

40. San Joaquin Lumber Co. *v.* Welton, 115 Cal. 1, 46 Pac. 735, 1057 (uncertainty); Buck *v.* Hall, 170 Mass. 419, 49 N. E. 658 (formal objection to description of premises); Goulding *v.* Smith, 114 Mass. 487; Houston Cotton Exch. *v.* Crawley, 3 Tex. App. Civ. Cas. § 138 (objection for uncertainty). See also Slight *v.* Patton, 96 Cal. 384, 31 Pac. 248.

41. Knowles *v.* Baldwin, 125 Cal. 224, 57 Pac. 988; Farrell *v.* Lafayette Lumber, etc., Co., 12 Ind. App. 326, 40 N. E. 25; Griggs *v.* Le Poidevin, 11 Nebr. 385, 9 N. W. 557; Paine Lumber Co. *v.* Douglass County Imp. Co., 94 Wis. 322, 68 N. W. 1013.

42. Burk *v.* Muskegon Mach., etc., Co., 98 Mich. 614, 57 N. W. 804; Paine Lumber Co. *v.* Douglass County Imp. Co., 94 Wis. 322, 68 N. W. 1013.

on the trial.[43] But where the objection goes to the right to recover, upon the application of the law to the facts, the question may be decided after the evidence is in notwithstanding it could have been raised by demurrer.[44] Pleading over is a waiver of mere defects or objections which may be cured by amendment.[45] But where plaintiff's proceeding is contrary to the statute which alone gives him the right to maintain the suit, the objection goes to the foundation of the action and may be taken at the trial;[46] and where an exception may be taken in an answer or at the trial it cannot be said to have been lost under the application of the rule that an answer overrules a demurrer.[47]

d. Effect of Demurrer. For the purpose of determining the questions raised, a demurrer admits all facts which are well pleaded,[48] but not the conclusions of the pleader.[49]

6. Amendment[50] — a. Right and Authority to Make in General. As a general rule the pleadings in an action, suit, or proceeding for the foreclosure of a mechanic's lien may be amended as in other actions, suits or proceedings,[51] either under the general statutes of amendments which are held to apply to these proceedings,[52] or under special provisions in the mechanics' lien laws with

43. San Joaquin Lumber Co. *v.* Welton, 115 Cal. 1, 46 Pac. 735, 1057; Goulding *v.* Smith, 114 Mass. 487; Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219, holding an omission to allege that the lien was filed within the statutory period waived by a failure to demur.

44. Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285, holding that while the objection to the introduction of a lien account "because there is nothing therein which operates as a notice to defendants of the materials, and value thereof, which were furnished for said building," should have been raised by demurrer, and the objection to the introduction is properly overruled, reserving the determination of the application of the law to the facts to the time when all the evidence is in.

45. Pomeroy *v.* White Lake Lumber Co., 33 Nebr. 240, 44 N. W. 730, 33 Nebr. 243, 49 N. W. 1131; Johnson *v.* Algor, 65 N. J. L. 363, 47 Atl. 571.

46. Johnson *v.* Algor, 65 N. J. L. 363, 37 Atl. 571, failure to declare separately for the labor or material which went into each of several buildings, under a statute so requiring.

47. Kerns *v.* Flynn, 51 Mich. 573, 17 N. W. 62, holding that, where a petitioner, a subcontractor, refused to amend by bringing in the contractor, his refusal was properly dismissed at the trial, notwithstanding the demurrer was followed by an answer.

48. Slight *v.* Patton, 96 Cal. 384, 31 Pac. 248; Schroth *v.* Black, 50 Ill. App. 168; Minor *v.* Marshall, 6 N. M. 194, 27 Pac. 481.

49. Wood *v.* King, 57 Ark. 284, 21 S. W. 471, holding that if an answer is designed to allege that the filing of the complaint was not sufficient to charge a lien, such allegation is merely a conclusion of law, and is not admitted by demurrer.

50. Of lien claim see *supra*, III, C, 13.
Of pleadings generally see Pleading.
In equity see Equity.

51. *California.*— Willamette Steam Mills Co. *v.* Kremer, 94 Cal. 205, 29 Pac. 633.
Colorado.— Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887.
Georgia.— Reynolds *v.* Randall, 97 Ga. 231, 22 S. E. 577.
Indiana.— Wasson *v.* Beauchamp, 11 Ind. 18; Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152, (App. 1894) 36 N. E. 52.
Mississippi.— Prairie Lodge No. 87, A. F. & A. M. *v.* Smith, 58 Miss. 301; Duff *v.* Snider, 54 Miss. 245; Weathersby *v.* Sinclair, 43 Miss. 189.
Missouri.— Mann *v.* Schroer, 50 Mo. 306; Schaffner *v.* Leahy, 21 Mo. App. 110.
New York.— Poerschke *v.* Horowitz, 84 N. Y. App. Div. 443, 82 N. Y. Suppl. 742 [*affirmed* in 178 N. Y. 601, 70 N. E. 1107].
Rhode Island.—McPherson *v.* Greenwell, 27 R. I. 178, 61 Atl. 175; Murphy *v.* Guisti, 26 R. I. 306, 58 Atl. 952, 22 R. I. 588, 48 Atl. 944; Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324; Spencer *v.* Doherty, 17 R. I. 89, 20 Atl. 232.
See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 539, 540.
On appeal from justice of the peace.— In Fathman, etc., Planing Mill Co. *v.* Ritter, 33 Mo. App. 404, it was held that where the suit is commenced before a justice of the peace and is appealed from the justice to the circuit court, an amendment which goes to the extent of supplying an averment necessary to show jurisdiction of the subject-matter in the justice may be allowed in the circuit court.
Consent after judgment for plaintiff in a scire facias, entered into by the attorneys for all the parties, that the name of the wife, co-defendant with her husband, might be changed, the judgment stricken off, and a certain time allowed to file an affidavit of defense will bind the wife and she will not be permitted to repudiate it, having obtained an important concession for the agreement. Jobe *v.* Hunter, 165 Pa. St. 5, 30 Atl. 452, 44 Am. St. Rep. 639.

52. McGee *v.* Piedmont Mfg. Co., 7 S. C. 263; Nary *v.* Henni, 45 Wis. 473; Lackner *v.* Turnbull, 7 Wis. 105.

reference to the amendment of pleadings in actions to enforce the lien provided for.[53]

b. When Allowed. The arrest of judgment puts an end to the case and the subsequent filing of an amended complaint does not bring the parties back into court.[54] But a mere defect in pleading which does not go to the validity of a lien itself may be cured by amendment even after the expiration of the statutory period limited for the commencement of the proceedings, the action having been brought and the original pleading having been filed in time.[55] And as in other cases the court will permit an amendment of the allegations to conform to the proof on the trial,[56] where no prejudice is shown,[57] and when evidence of a material fact is admitted without objection in conformity with the theory of the case, a defect in the pleading by reason of an omission of allegation to which the evidence is pertinent may be considered as amended to conform to the proof.[58]

c. Amendments Allowable — (i) *In General.* The rule permitting amend-

Supplemental pleading.— In Gambling *v.* Haight, 5 Daly (N. Y.) 152 [*affirmed* in 58 N. Y. 623], the general provision of the code as to filing of a supplemental complaint is applied to permit such filing in mechanics' lien suits.

53. Dodge *v.* Hall, 168 Mass. 435, 47 N. E. 110; Daschkey *v.* Schellenberg, 124 Mich. 16, 82 N. W. 665, 125 Mich. 216, 84 N. W. 67; Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466; Bartley *v.* Smith, 43 N. J. L. 321 (where the court was held to have a discretion under the statute); Washburn *v.* Burns, 34 N. J. L. 18; McGraw *v.* Godfrey, 56 N. Y. 610 [*affirming* 16 Abb. Pr. N. S. 358] (under a lien law for the city of New York making matters of form amendable at all times as a matter of judicial discretion).

54. Crawford *v.* Crockett, 55 Ind. 220.

55. *Indiana.*— Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47, permitting an amendment correcting a description of the property.

Massachusetts.— Burrell *v.* Way, 176 Mass. 164, 57 N. E. 335, holding that under a provision requiring the suit to be commenced within a prescribed period after the lienor has ceased to labor or furnish material, the petition filed December 13 stating that the last material was furnished September 13 might be amended by changing the date of furnishing of the last material to September 15, and that it was too late after the amendment allowed and evidence introduced to support it to object that the petition was not filed in time; that the objection that the statement of lien cannot be amended was not available in such case because the statute did not require the statement to contain any averment as to the time when the petitioner ceased to furnish material or labor, but on the other hand provided that it should not be deemed invalid solely by reason of inaccuracy in stating or failing to state the number of days of labor performed or furnished, etc.

Michigan.— Daschke *v.* Shellenberg, 124 Mich. 16, 82 N. W. 665, 125 Mich. 216, 84 N. W. 67, where the amendment supplying the oath to the bill was allowed, the court holding further that the express provision of the statute for amendments in these proceedings contemplated an amendment after the expiration of the period prescribed for bringing suit.

Missouri.— Mann *v.* Schroer, 50 Mo. 306 (an amendment correcting an original description); Wheeler *v.* Monett Milling Co., 73 Mo. App. 672; Newman *v.* Jefferson City, etc., R. Co., 19 Mo. App. 100.

Wisconsin.— Huse *v.* Washburn, 59 Wis. 414, 18 N. W. 341, where the amendment was of a petition for lien and the complaint in the action subsequently brought to enforce it, in the description of the property. But in McCarty *v.* Van Etten, 4 Minn. 461, it is held that under the statute requiring a lien claim or petition, the lien cannot be acquired without such a petition as is prescribed and that where the complaint in the action to enforce the lien is the only petition filed, it cannot be amended to perfect the lien. But it appears that the ruling was made for the protection of an innocent purchaser to whom the property had passed.

56. *California.*— Willamette Steam Mills Co. *v.* Kremer, 94 Cal. 205, 29 Pac. 633.

Colorado.— Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887, changing statement as to the manner in which payments to be made should be determined.

Nebraska.— Pomeroy *v.* White Lake Lumber Co., 33 Nebr. 240, 44 N. W. 730.

New York.— Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577.

Wisconsin.— Charles Baumbach Co. *v.* Laube, 99 Wis. 171, 74 N. W. 96, if the evidence is introduced without objection.

57. Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887 (amendment without cause shown, to meet evidence received without objection); Baltis *v.* Friend, 90 Mo. App. 408. There is no limitation on the right of the court except that no new cause of action shall be introduced, and upon a hearing before a referee he has the same power to allow such amendment as the court. Poerschke *v.* Horowitz, 84 N. Y. App. Div. 443, 82 N. Y. Suppl. 742 [*affirmed* in 178 N. Y. 601, 70 N. E. 1107].

58. Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095; Charles Baumbach Co. *v.* Laube, 99 Wis. 171, 74 N. W. 96.

ments is applied to such as will not prejudice or cause surprise.[59] Amendments have been allowed to correct a petition defective for failure to show how far the work has progressed and what payments are due;[60] to reform allegations setting out the particulars of the account, or to supply such allegations;[61] to correct defects in the prayer as to the property sought to be subjected,[62] or by amending the prayer so as to ask for a personal judgment;[63] to make the allegations show that the materials were furnished for the particular building;[64] to supply an allegation of notice to the owner,[65] or the filing of a lien;[66] and to correct allegations as to the sufficiency of such notice or lien claim.[67]

(II) *Introduction of New Cause of Action.* It is not permitted to plaintiff to substitute for the original cause of action a new and different one under the guise of an amendment,[68] but an amendment which introduces no new cause of action distinct and complete in itself, but which is merely variant from the original pleading in the statement of facts pertinent to the cause of action originally stated,[69] or properly states the cause which was not sufficiently stated in the original pleading, is not obnoxious to the rule.[70]

(III) *Change in Form of Action.* The proceeding for the enforcement of mechanics' liens may be converted by amendment into an ordinary suit for the collection of the debt for work and material as between the parties respectively

59. Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152 (where it is held that if the amendment is so material as to necessitate the procurement of additional evidence or to require further time for any reason, there should be a request for the postponement of the trial and the party complaining of the amendment must show in what respect he was injured); New Jersey Steel, etc., Co. *v.* Robinson, 74 N. Y. App. Div. 481, 77 N. Y. Suppl. 547.

Surplusage in the lien claim.— Where matters unnecessary as stated in the lien claim are stated in the pleading, mistakes therein may be corrected by amendment. Brosnan *v.* Trulson, 164 Mass. 410, 41 N. E. 660.

Amendment refused.— In Kilby Mfg. Co. *v.* Menominee Cir. Judge, 138 Mich. 277, 101 N. W. 542, in a suit by a subcontractor alleging performance of his contract and that delay had been caused by the contractor and waived by him, the latter denied the waiver, alleged damages by the delay which were recoverable by the owner against him, and asked that the owner be required to pay the contractor the balance after paying the subcontractor's claim as established, and it was held that the contractor was properly refused permission to amend by omitting the prayer for judgment against the owner which would result in requiring the owner to split up its cause of action by forcing it to enter upon a recoupment confined to such damages as it sustained by the subcontractor's default.

60. McPherson *v.* Greenwell, 27 R. I. 178, 61 Atl. 175.

Amendment to show modification of contract instead of performance may be allowed. Poerschke *v.* Horowitz, 84 N. Y. App. Div. 443, 82 N. Y. Suppl. 742 [*affirmed* in 178 N. Y. 601, 70 N. E. 1107].

61. Murphy *v.* Guisti, 22 R. I. 588, 48 Atl. 944; Spencer *v.* Doherty, 17 R. I. 89, 20 Atl. 232. See also Scannell *v.* Hub Brewing Co., 178 Mass. 288, 59 N. E. 629; Dodge *v.* Hall, 168 Mass. 435, 47 N. E. 110.

62. Spencer *v.* Doherty, 17 R. I. 89, 20 Atl. 232.

63. Reynolds *v.* Randall, 97 Ga. 231, 22 S. E. 577.

Change in form of action see *infra*, VIII, 1, 6, c, (III).

64. Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

65. Murphy *v.* Guisti, 22 R. I. 588, 48 Atl. 944.

66. Newman *v.* Jefferson City, etc., R. Co., 19 Mo. App. 100.

67. Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152 (allowing plaintiff to change the copy of lien notice filed as an exhibit to correspond with the original notice); Willer *v.* Bergenthal, 50 Wis. 474, 7 N. W. 352.

68. See Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887. And the provision of the statute permitting amendment at any time of matters of form does not give the right to amend by changing the issues which are to be tried. McGraw *v.* Godfrey, 16 Abb. Pr. N. S. (N. Y.) 358 [*affirmed* in 56 N. Y. 610].

69. Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887, where the only difference between the pleadings was the statement of the manner in which the amounts to be paid should be determined.

70. Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466, under a provision expressly allowing amendments either in form or substance at any time before final decree.

Supplemental pleading.— In a proceeding founded on a contract and for extra work, a supplemental complaint on a *quantum meruit* alleging that plaintiff had just discovered that the original contract which had been in the owner's possession was materially altered in fraud of plaintiff's rights, did not set up a new and different cause of action. Gambling *v.* Haight, 5 Daly (N. Y.) 152 [*affirming* 14 Abb. Pr. N. S. 397, and *affirmed* in 58 N. Y. 623].

liable and entitled to the judgment in such an action,[71] and where a special contract is stated the action may be converted into one on the contract.[72]

(iv) *DESCRIPTION OF PROPERTY OR IMPROVEMENTS.* Failure to describe particularly the property,[73] or the building or improvement upon which the lien is claimed,[74] or a mistake in the description of the property, may be corrected by amendment.[75]

(v) *AS TO PARTIES.*[76] An amendment may be allowed to correct a mistake in the name of the petitioner,[77] or to add matter of description of the person of defendant.[78] And so also it is held that new parties may be brought in,[79] or omitted by amendment.[80]

d. Plea or Answer to Amended Pleading. When an amendment is made after the issues are formed and the evidence has been heard in whole or in part, time should be given to file an answer to such amended pleading.[81] But a general denial pleaded to the original may be sufficient to put in issue the allegations of an amended pleading.[82]

71. Reynolds *v.* Randall, 97 Ga. 231, 22 S. E. 577; Dunning *v.* Stovall, 30 Ga. 444; Prairie Lodge No. 87, A. F. & A. M. *v.* Smith, 58 Miss. 301; Duff *v.* Snider, 54 Miss. 245; Shaffner *v.* Leahy, 21 Mo. App. 110. But in Wood *v.* Wilmington Conference Academy, 5 Houst. (Del.) 513, under a general policy and practice of allowing amendments liberally and almost as a matter of course before argument and after issue joined where the rights of the adverse party would not be prejudiced, the court refused to permit the amendment after argument and especially on general demurrer.

Change to proceeding in rem.— So it has been held that a personal action to recover for material or labor may be changed in form to a proceeding *in rem* for the enforcement of the mechanic's lien. Weathersby *v.* Sinclair, 43 Miss. 189; Lachner *v.* Turnbull, 7 Wis. 105, amendment by adding prayer for a lien.

Where personal judgment cannot be rendered if the lien fails, it is otherwise. See Bailey *v.* Johnson, 1 Daly (N. Y.) 61; Quimby *v.* Sloan, 2 E. D. Smith (N. Y.) 594.

In a suit by a subcontractor the personal liability of the owner being dependent upon a compliance with certain requirements of the statute, an amendment changing the action to one to enforce such personal liability, but leaving the complaint fatally defective for want of an allegation of compliance with the statute, cannot be allowed. Crawford *v.* Crockett, 55 Ind. 220.

72. Castagnino *v.* Balletta, 82 Cal. 250, 23 Pac. 127, holding that in the amended complaint the contract may be counted on specially, or the common counts in *indebitatus assumpsit* may be used, and the special contract is admissible in evidence under the common counts upon general principles.

73. Brosnan *v.* Trulson, 164 Mass. 410, 41 N. E. 660.

74. Murphy *v.* Guisti, 22 R. I. 588, 48 Atl. 944.

75. Willamette Steam Mills Co. *v.* Kremer, 94 Cal. 205, 29 Pac. 633; Wasson *v.* Beauchamp, 11 Ind. 18; Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326; Mann *v.* Schroer, 50 Mo. 306; Wheeler *v.* Monett Milling Co., 73 Mo. App. 672 (amendment to conform to lien notice); Brown *v.* La Crosse City Gas Light, etc., Co., 16 Wis. 555.

76. Introducing parties after expiration of limitation see *supra*, VIII, F, 4, c.

77. Witte *v.* Meyer, 11 Wis. 295.

78. Nary *v.* Henni, 45 Wis. 473.

79. Laviolette *v.* Redding, 4 B. Mon. (Ky.) 81 (by a supplemental bill when interest of omitted party is disclosed); Bartley *v.* Smith, 43 N. J. L. 321 (holding, however, that where a claimant with full knowledge of all the facts filed a claim and brought his suit against the wrong person as builder, an amendment was properly refused at the trial substituting the name of the person who contracted the debt).

The action will not be converted into one against another person, as where it is attempted to convert an action against a husband to enforce a materialman's lien into one against the wife by alleging that her husband acted as her agent, the wife not being a party to the original proceedings. Jennings *v.* Huggins, 125 Ga. 338, 54 S. E. 169.

80. Washburn *v.* Burns, 34 N. J. L. 18, holding that in an action against husband and wife to enforce a mechanic's lien for a debt contracted by the husband alone, the proceedings may be amended by striking the wife's name from the record, although she was described in the lien claim as joint owner.

81. Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47, holding that ordinarily time to answer should be granted when requested, but that there was no prejudice from the refusal in this case to open up the issues, the court having offered to hear any evidence in contradiction of the amendments.

Effect of permission to plead.— Under an order permitting the withdrawal of original pleas and granting leave to file "further pleas in this behalf" it was held that only pleas to the merits could be pleaded and not a plea in abatement on account of the dismissal of the suit as to certain defendants. Bowman *v.* McLaughlin, 45 Miss. 461.

82. Great Spirit Springs Co. *v.* Chicago

7. Issues, Burden of Proof, and Variance[83] **— a. Issues in General.** The issues in proceedings for the enforcement of mechanics' liens are controlled in their nature and extent by the pleadings,[84] as well as by the inherent character of the statutory right itself.[85] Thus essential elements, pertinent to a particular theory of the claimant's cause, which are not alleged cannot be proved,[86] or found,[87] and material allegations which stand admitted on the pleadings are not in issue.[88]

b. Burden of Proof — (I) *Claimant's Burden.* Where the allegations of the claimant's pleading for the enforcement of a mechanic's lien are properly in issue the burden of proof is on him to maintain the affirmative of the issues raised and upon which his right to a lien on the particular property depends.[89] To sustain this burden the claimant must prove a contract by which his right is acquired, and its performance,[90] as well as that the statutory steps and require-

Lumber Co., 47 Kan. 672, 28 Pac. 714. Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095.

83. **Evidence admissible under pleadings** see *infra*, VIII, J, 2, b.

Under amended pleadings see *supra*, VIII, I, 6, d.

84. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729 (holding that where plaintiff sued to enforce a contractor's lien for the construction of a building, and did not allege that he was entitled to a lien as a materialman, he was not entitled to enforce a lien for the furnishing of material for the plasterer's scaffold); Whiting *v.* Koepke, 71 Conn. 77, 40 Atl. 1053; Belanger *v.* Hersey, 90 Ill. 70; Ward *v.* Edmunds, 110 Mass. 340 (holding that a mere denial of petitioner's right to maintain the petition does not put in issue the amount of his bill for labor performed).

Matters in issue under particular pleadings see *supra*, VIII, I, 1, 2.

Sufficiency of judgment, findings, etc., see *infra*, VIII, K, 7, a, (II); VIII, L, 11.

85. **Rights of mortgagees** see *supra*, VIII, G, 3, b, (VII), (B).

86. Murphy *v.* Watertown, 112 N. Y. App. Div. 670, 99 N. Y. Suppl. 6. In Iowa under the general rule of practice when no objection is made to the introduction of evidence relating to an issue not presented by the pleadings, it amounts to a consent to try such issue. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197. See also Frazier *v.* McGuckin, 58 N. Y. Super. Ct. 71, 9 N. Y. Suppl. 435.

Amendment to conform to proof see *supra*, VIII, I, 6, c, (I).

87. Whiting *v.* Koepke, 71 Conn. 77, 40 Atl. 1053.

Necessary allegations by claimant see *supra*, VIII, I, 1, b, (I), *et seq.* See also *supra*, VIII, I, 2, c, (II), (B); *infra*, VII, I, 7, b.

88. Westhus *v.* Springmeyer, 52 Mo. 220.

Admission by failure to deny see *supra*, VIII, I, 2, b, (III), (B).

Burden to prove matters admitted see *infra*, VIII, I, 7, b, (I).

Immaterial issues — Want of title see *supra*, VIII, E, 2.

Instruction submitting matter admitted see *infra*, VIII, K, 6.

89. *Georgia.*— Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. 105.

Illinois.— Schmelzer *v.* Chicago Ave. Sash, etc., Mfg. Co., 85 Ill. App. 596 (that something was due from owner to contractor, in suit by subcontractor); Munster *v.* Doyle, 50 Ill. App. 672.

Iowa.— Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9, identity of property and defendant's ownership.

Michigan.— Brennan *v.* Miller, 97 Mich. 182, 56 N. W. 354.

Minnesota.— L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143 (as to delivery of materials within the statutory period before filing of lien); McDonald *v.* Ryan, 39 Minn. 341, 40 N. W. 158.

Missouri.— Jose *v.* Hoyt, 106 Mo. App. 594, 81 S. W. 468 (proof of contract between owner and person to materials were furnished); Keller *v.* Carterville Bldg., etc., Assoc., 71 Mo. App. 465 (interest of stranger made a party under an allegation that he has some interest in the premises).

Montana.— Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

Oregon.— Hunter *v.* Cordon, 32 Oreg. 443, 52 Pac. 182; Morehouse *v.* Collins, 23 Oreg. 138, 31 Pac. 295, identity of property.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 556.

90. Tanxley *v.* Lampkin, 113 Ga. 1007, 39 S. E. 473; Gunther *v.* Bennett, 72 Md. 384, 19 Atl. 1048; Willard *v.* Magoon, 30 Mich. 273; Justus *v.* Myers, 68 Minn. 481, 71 N. W. 667; Nesbit *v.* Braker, 104 N. Y. App. Div. 393, 93 N. Y. Suppl. 856.

Extras.— Under a denial of charges for extra work plaintiff must prove such charges. Landvoight *v.* Melovich, 1 App. Cas. (D. C.) 498.

Agency.— One claiming for services rendered at the request of another than the owner has the burden to prove such other's agency. Shinn *v.* Matheny, 48 Ill. App. 135.

In an action by a subcontractor or materialman, the claimant must show the existence of the conditions which under the statute would entitle him to a lien. Stevens *v.* Georgia Land Co., 122 Ga. 317, 50 S. E. 100; Wynn *v.* South River Brick Co., 99 Ga. 126, 24 S. E. 869; Wookey *v.* Slemmons, 65 Ill. App. 553; Brainard *v.* Kings County, 155 N. Y. 538, 50 N. E. 263; Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577; Beecher *v.* Schuback, 1 N. Y. App. Div. 359, 37 N. Y. Suppl. 325 [*affirmed*

ments for acquiring and perfecting the lien have been complied with,[91] and if other parties are permitted to intervene in the action and file denials, as they are entitled to do, this will not relieve plaintiff of his burden of proof but he still has the affirmative of the issue to maintain.[92] The proof, however, is confined to the establishment of such elements as are properly in the cause and none other,[93] and matters which are admitted or not denied by defendant's pleading need not be proved.[94]

in 158 N. Y. 687, 53 N. E. 1123], the last three cases holding that where the owner completes the building under a provision in the contract on default of the contractor, in an action by a subcontractor the burden is not upon the owner to show a completion according to the specifications and the costs thereof but the clamaint has the burden of proving these facts.

The lienor must prove that there was a sum due upon which his lien might attach and that the contract has been substantially performed. Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017; Brandt *v.* New York, 110 N. Y. App. Div. 396, 97 N. Y. Suppl. 280; Madden *v.* Lennon, 23 Misc. (N. Y.) 704, 52 N. Y. Suppl. 8; Sullivan *v.* Brewster, 1 E. D. Smith (N. Y.) 681; Hauptman *v.* Halsey, 1 E. D. Smith (N. Y.) 668; Haswell *v.* Goodchild, 12 Wend. (N. Y.) 373. But in Rudd *v.* Davis, 1 Hill (N. Y.) 277 [*distinguishing* Haswell *v.* Goodchild, *supra*], it was held that after the subcontractor had shown that the work had been performed according to the contract, the amount stipulated by the contract should be held *prima facie* to be due the contractor.

91. *Colorado.*—Stidger *v.* McPhee, 15 Colo. App. 252, 62 Pac. 332.

District of Columbia.—Landvoight *v.* Melovich, 1 App. Cas. 498.

Indiana.— Killian *v.* Eigenmann, 57 Ind. 480.

Maryland.— Wehr *v.* Shryock, 55 Md. 334; Wilson *v.* Wilson, 51 Md. 159.

Michigan.—Roberts *v.* Miller, 32 Mich. 289.

Missouri.— Anderson *v.* Volmer, 83 Mo. 403 (holding that the claimant must prove the existence of the agency upon showing that the ten days' notice of claim of lien required by the statute was served upon a person as the owner's agent); Darlington *v.* Eldridge, 88 Mo. App. 525.

Montana.— McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428; Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

Nebraska.— Tidhall *v.* Holyoke, 70 Nebr. 726, 97 N. W. 1019; Urlau *v.* Ruhe, 63 Nebr. 883, 89 N. W. 427; Cummins *v.* Vandeventer, 52 Nebr. 478, 72 N. W. 955; Noll *v.* Kenneally, 37 Nebr. 879, 56 N. W. 722; Hassett *v.* Curtis, 20 Nebr. 162, 29 N. W. 295.

New York.— Donnelly *v.* Libby, 1 Sweeny 259; Cronkright *v.* Thomson, 1 E. D. Smith 661.

Pennsylvania.— W. T. Bradley Co. *v.* Gaghan, 208 Pa. St. 511, 57 Atl. 985; Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552; Hommel *v.* Lewis, 104 Pa. St. 465.

Tennessee.— Kay *v.* Smith, 10 Heisk. 41.

Texas.— Lee *v.* O'Brien, 54 Tex. 635; Lee *v.* Phelps, 54 Tex. 367.

West Virginia.— Central City Brick Co. *v.* Norfolk, etc., R. Co., 44 W. Va. 286, 28 S. E. 926.

United States.— Davis *v.* Alvord, 94 U. S. 545, 24 L. ed. 283.

Canada.— McLennan *v.* Winnipeg, 3 Manitoba 474.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 556.

92. Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. 105.

93. Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9 (general denial requires proof of every fact essential to recovery); Hassett *v.* Curtis, 20 Nebr. 162, 29 N. W. 295 (holding that a general denial is a denial of an allegation of the sale of materials for the purposes alleged and of the ownership of the property upon which the lien is sought to be estahlished casting the burden of proof upon plaintiff); Cornell *v.* Matthews, 27 N. J. L. 522 (nnder the statute plaintiff was not required to prove ownership or estate of defendant in the property nnder a plea that the premises were not liable to the debt); Tomlinson *v.* Degraw, 26 N. J. L. 73 (holding that the last-mentioned plea required the claimant to prove a compliance with the statute); Crawford *v.* O'Connor, 73 N. Y. 600 (holding that where in an action to foreclose a lien for materials furnished a contractor, upon the owner's claim of payment in full to the contractor supported by his receipts for such payments, the contractor testified that such payments consisted in part of accounts due plaintiffs and others, which were counted in, with a secret understanding between him and defendants that they should contest these claims, the claimant need not establish fraud in order to recover, as a finding of fraud would not alter the fact that there was in truth an amount due and unpaid and this was sufficient to maintain a judgment).

Actual value in action based on contract need not be proved. Beattys *v.* Searles, 74 N. Y. App. Div. 214, 77 N. Y. Suppl. 497.

Title.—Where the interest of the party for whom the work is done is subject to the lien it is held that the claimant need not prove the title of such person, the complaint raising no issue to any paramount title. Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77; Cook *v.* Goodyear, 79 Wis. 606, 48 N. W. 860. See also *supra*, VIII, E, 2.

94. Schmid *v.* Busch, 97 Cal. 184, 31 Pac. 893; Newell *v.* Brill, 2 Cal. App. 61, 83 Pac.

(II) *Matters of Defense.* When the claimant has shown a *prima facie* right to the lien claimed he need go no further, but matter which might defeat him by way of defense must be proved by defendant,[95] and so as to facts which rest peculiarly within defendant's knowledge it is held that the onus of proving them is on him.[96]

c. Variance — (I) *In General.* In an action to foreclose a mechanic's lien the trial must be conducted and a conclusion reached, as in other cases, *secundum allegata et probata.*[97] The claimant must recover, if at all, upon the contract as

76; Lombard *v.* Johnson, 76 Ill. 599 (ownership of property); Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863; Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197; Wisconsin Red Pressed-Brick Co. *v.* St. Peter St. Imp. Co., 46 Minn. 231, 48 N. W. 1022; South Omaha Lumber Co. *v.* Central Inv. Co., 32 Nebr. 529, 49 N. W. 429. But see Hicks *v.* Branton, 21 Ark. 186, where it appears that the statutory elements must be proved where defendant defaults in the pleading. And in Close *v.* Hunt, 8 Blackf. (Ind.) 254, it was held that where the allegations of the bill were uncertain and indefinite, although taken as confessed, no decree should be rendered unless the uncertainty is removed by evidence. See also Wagenhorst *v.* Wessner, 1 Woodw. (Pa.) 151, under the early statute in Pennsylvania which made it necessary to file a copy of the lien in order to entitle plaintiff in a scire facias to a judgment for want of a sufficient affidavit of defense.

Failure of contractor to dispute claim.— In Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163, it was held that in a contest between materialmen and subcontractors, the general contractor's failure to dispute the claim of which statutory notice had been filed with the owner and by him with the general contractor is not *prima facie* evidence of the correctness of such claims as valid liens, as each claimant must establish the elements necessary under the statute to the validity of his lien.

Answers of other lien claimants.— Where it is necessary to prove that a note was given in liquidation of a debt for which a lien existed the silence of other parties in their answers claiming liens on the same property does not amount to such proof. Finch *v.* Redding, 4 B. Mon. (Ky.) 87.

Agreed facts need not be proved. Linck *v.* Johnson, (Cal. 1901) 66 Pac. 674.

95. Long *v.* Abeles, 77 Ark. 156, 93 S. W. 67; McCausland *v.* West Duluth Land Co., 51 Minn. 246, 53 N. W. 464 (holding that the burden of proving the serving or posting of notice by the owner, under the statute, to protect his property from mechanics' liens, is on the owner and in the absence of evidence on the point it must be taken that no notice was served); Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625; Rudd *v.* Davis, 1 Hill (N. Y.) 277 (holding that where a subcontractor shows that the work was performed according to the contract, the amount stipulated by the contract is held *prima facie* to be due the contractor and the burden of proving the contrary is on defendant); Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702; Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552; Hommel *v.* Lewis, 104 Pa. St. 465; Dougherty *v.* Loebelenz, 9 Pa. Super. Ct. 344, 43 Wkly. Notes Cas. 447 (the last cases holding that plaintiff need not prove affirmatively that the work was done or materials furnished on the credit of the building, but that if he shows that they were furnished for or about the construction of the building and that the claim was properly made and filed, defendant must show that the debt was made on the credit of the contractor alone).

Quantity of land.— It is not necessary for a lien claimant to show that the quantity of land on which the lien is claimed is within the statutory limit. If defendant claim that it exceeds that limit, he must show it, and the court must then carve out a tract within the limit, and confine the lien to it. Boyd *v.* Blake, 42 Minn. 1, 43 N. W. 485.

New contract.— Where defendant pleads a new contract substituted for the original one, the burden is on him to prove it. Kruegel *v.* Kitchen, 33 Wash. 214, 74 Pac. 373.

Under replication.— A reply alleging that plaintiff has no knowledge or information sufficient to form a belief as to the matters alleged in defense subjects defendant to the same burden of proving and gives plaintiff the same right of controverting the allegations of the answer as a denial would have done. Banks *v.* Moshier, 73 Conn. 448, 47 Atl. 656.

Priority of mortgages.— In a proceeding to enforce a mechanic's lien, the burden of showing the priority of their mortgages is on the mortgagees. Harmon *v.* Ashmead, 68 Cal. 321, 9 Pac. 183.

96. Iowa Brick Co. *v.* Des Moines, 111 Iowa 272, 82 N. W. 922.

Conversely in Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48, which was a suit in equity by a mortgagee to declare his mortgage superior to mechanics' liens, it was held that the priority of the mechanics' liens depended upon the question whether work had been commenced at the time the mortgage was executed, and that as if it was a fact that the work had been so commenced the contractors, who were parties defendant to the bill along with others who claimed through them, had peculiar knowledge thereof, this cast the burden of proof upon defendant mechanics' lienors.

97. *Georgia.*— Jennings *v.* Huggins, 125 Ga. 338, 54 S. E. 169.

alleged and proof of another contract or of terms different from those alleged will be fatal,[98] and where a contract is alleged with two defendants jointly, proof that the contract was made with one and that the materials were furnished him individually is held to constitute a fatal variance.[99] So if a claimant alleges performance on his part he can recover only by establishing that fact, and anything short of a substantial performance will not do in the absence of allegations justifying or authorizing such proof.[1] If the claimant sues for work and labor performed and mate-

Illinois.— Stein *v.* Schultz, 23 Ill. 646; Ludwig *v.* Huverstuhl, 108 Ill. App. 461.

New York.—Brandt *v.* New York, 110 N. Y. App. Div. 396, 97 N. Y. Suppl. 280.

Rhode Island.— Long Island Brick Co. *v.* Arnold, 18 R. I. 455, 28 Atl. 801, holding that a vendee's equitable ownership cannot be subjected to the lien on petition against the vendor and his interest as owner in fee.

Wisconsin.— Charles Baumbach Co. *v.* Laube, 99 Wis. 171, 74 N. W. 96, where it was held that under a statute requiring the subcontractor to give notice to the owner or his agent or if they could not be found in the county to file the notice in the office of the circuit court clerk, an allegation of notice served could not be proved by evidence of the filing of a notice in the clerk's office.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 553.

98. *California.*— Wilson *v.* Hind, 113 Cal. 357, 45 Pac. 695; Wagner *v.* Hansen, 103 Cal. 104, 37 Pac. 195; Reed *v.* Norton, 99 Cal. 617, 34 Pac. 333; Eaton *v.* Malatesta, 92 Cal. 75, 28 Pac. 54; Jones *v.* Shuey, (Cal. 1895) 40 Pac. 17.

Colorado.— Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303.

Illinois.— Randolph *v.* Onstott, 58 Ill. 52; Bush *v.* Connelly, 33 Ill. 447; Stein *v.* Schultz, 23 Ill. 646; Van Court *v.* Bushnell, 21 Ill. 624; Carroll *v.* Craine, 9 Ill. 563; Kimball *v.* Cook, 6 Ill. 423; Pierce *v.* Barnes, 106 Ill. App. 241; Kewanee Boiler Co. *v.* Genoa Electric Co., 106 Ill. App. 230.

Massachusetts.— Wilder *v.* French, 9 Gray 393, holding that where the contract alleged was too indefinite to support a lien, it could not have been shown to have been more specific.

New York.— La Pasta *v.* Weil, 20 Misc. 554, 46 N. Y. Suppl. 275; Hauptman *v.* Halsey, 1 E. D. Smith 668, in which cases it is held that under the statute a subcontractor claiming that the work was done under an agreement with the contractor cannot show a lien for work done for the owner as contractor.

Wisconsin.— Security Nat. Bank *v.* St. Croix Powder Co., 126 Wis. 370, 105 N. W. 914.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 554.

Matters not constituting variance.— Where the contract is set out *in extenso* any error in stating the terms or legal effect of the contract when so set out will be rejected as surplusage. Austin *v.* Wohler, 5 Ill. App. 300. Evidence of furnishing of materials at the request of defendant at a certain price and bill rendered therefor is not variant from allegations that the materials were furnished at defendant's verbal request and that he verbally agreed to pay a certain sum therefor, and a notice stating that they were furnished at a specified price at the special instance of defendant. Wolfley *v.* Hughes, (Ariz. 1903) 71 Pac. 951.

Date of contract — "On or about."— Under an allegation that the contract was made "on or about" August 1, of a certain year, proof that it was made on June 15 of that year does not constitute a variance. Toan *v.* Russell, 111 Ill. App. 629.

Suing as subcontractor to recover against owner.— The fact that a subcontractor is entitled under the statute to enforce his claim against the owner where the original contract is void does not render him an original contractor so as to create a variance from his complaint in which he sues as subcontractor. Coss *v.* MacDonough, 111 Cal. 662, 44 Pac. 325.

99. Garrison *v.* Hawkins Lumber Co., 111 Ala. 308, 20 So. 427; Thruston *v.* Schroeder, 6 R. I. 272. So where the allegation is that defendants, husband and wife, are owners and parties to the contract, evidence that the husband had no interest and was not a party to the contract is fatal. Munster *v.* Doyle, 50 Ill. App. 672. And an allegation of a contract with two persons jointly will not sustain proof of a divisible contract for separate materials for different houses of either party. McAdow *v.* Miltenberger, 75 Mo. App. 346. But in Dodge *v.* Hall, 168 Mass. 435, 47 N. E. 110, it was held that the fact that the petition described the land as owned by a man and his wife whereas they were not joint owners is not fatal. And in Kruger *v.* Braender, 3 Misc. (N. Y.) 275, 23 N. Y. Suppl. 324 [*affirming* 1 Misc. 509, 20 N. Y. Suppl. 991], it is held that where a joint contract was alleged with the owner of a building and a contractor, under which plaintiffs claimed to have furnished materials, while the evidence showed only a several contract with the owner, this cannot be urged by the owner as a defense, since in either event he is liable.

1. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729; Brandt *v.* New York, 110 N. Y. App. Div. 396, 97 N. Y. Suppl. 280; Morowsky *v.* Rohrig, 4 Misc. (N. Y.) 167, 23 N. Y. Suppl. 880.

Performance of original contract in an action by subcontractor.— So where the subcontractor's right depends upon the performance of the contract of the general contractor, an allegation of performance of such contract

rials furnished, as on the common counts, as well as on a special contract, his suit cannot be dismissed for failure to prove a performance of the contract on his part.[2] If the proof follows the allegations in essential particulars, variances which are not substantial should be disregarded,[3] no one being misled to his injury;[4] and if an allegation of the complaint is admitted by the answer it becomes unnecessary to prove such allegation, and a variance between such admitted allegation and proof offered is immaterial.[5]

(II) *Between Pleading and Lien Claim or Notice.* A material and substantial variance between the essential allegations of the claimant's pleading and the lien claim or notice will be fatal.[6] But variances which are not material or are merely technical and do not affect the claim or its identity will not be fatal;[7] and it is held that incongruous matter in the lien paper not affecting its

cannot be sustained by proof of a substantial completion by the owner after abandonment by the contractor in the absence of an amendment of the complaint. Beecher *v.* Schuback, 1 N. Y. App. Div. 359, 37 N. Y. Suppl. 325 [*affirmed* in 158 N. Y. 687, 53 N. E. 1123].

2. Kealing *v.* Voss, 61 Ind. 466.

The suit may be on a quantum meruit notwithstanding a special contract, but the recovery will be for the reasonable value of the work and cannot exceed the contract price. Kick *v.* Doerste, 45 Mo. App. 134; Jodd *v.* Duncan, 9 Mo. App. 417.

3. Althen *v.* Tarbor, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616 (where a variance of four days between the lien statement and the proof, as to the day on which the claimant completed his work, the statement being filed within the prescribed period of time in any event, was held immaterial); Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401 (holding that an affidavit which states that the materials were furnished for the "alteration" of a house is not materially variant from evidence showing they were furnished for the "erection"); Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54 (between lien notice and proof, as to dates of certain deliveries); Peterman *v.* Milwaukee Brewing Co., 11 Wash. 199, 39 Pac. 452 (holding that a lien claim for material furnished for a "one-story refrigerating machine building and boiler house" is not at variance with proof that there were two buildings on the ground, where it is shown that they were so substantially connected as to make but one building, and that there could be no mistake as to the identity of the structure).

A mistake in the pleader's nomenclature will be disregarded. Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405.

4. Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786; Dougherty-Moss Lumber Co. *v.* Churchill, 114 Mo. App. 578, 90 S. W. 405; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

5. Wisconsin Red Pressed Brick Co. *v.* St. Peter St. Imp. Co., 46 Minn. 231, 48 N. W. 1022.

Matters not denied.— While a fatal variance may be created between a lien claim and complaint on the one side and the proof on the other by showing that the lien did not cover the entire building, where the pleading shows a lien on the entire building and the allegation is not denied and the claim is in conformity with the allegation, there is no variance. Brunner *v.* Marks, 98 Cal. 374, 33 Pac. 265.

6. Buell *v.* Brown, 131 Cal. 158, 63 Pac. 167 (as to terms of contract); Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775 (where the claim and notice of lien stated that the contract on which a lien is based was made with the wife, and the complaint alleged that it was made with both husband and wife); Bristow *v.* Evans, 124 Mass. 548 (as to description of property); Poppert *v.* Wright, 52 Mo. App. 576 (between a petition alleging a contract to furnish materials for three houses on contiguous lots at a lump price of five hundred and twenty-five dollars, and a lien account for the material in one of such houses at the price of one hundred and seventy-five dollars); Joshua Hendy Mach. Works *v.* Pacific Cable Constr. Co., 24 Oreg. 152, 33 Pac. 403 (as to description of property). But in Hannah, etc., Mercantile Co. *v.* Hartzell, 125 Mich. 177, 84 N. W. 52, it is held that where the building on which a mechanic's lien was filed was owned by defendant, and was built by the contractor named in the lien, and was the only one built by him for defendant, and defendant did not own any other lots than those described in the complaint, a decree giving plaintiff a lien for material furnished will not be reversed, on the ground that there was a variance between the description of the premises as filed with the register of deeds and in the complaint.

The objection should specifically point out wherein the variance between a complaint and a lien notice offered in evidence exists. Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466.

7. *Arizona.*— Wolfley *v.* Hughes, (1903) 71 Pac. 951.

California.— Brunner *v.* Marks, 98 Cal. 374, 33 Pac. 265 (description of premises); Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426 (purchaser of material as contractor and agent in lien notice, and as agent in complaint); Newell *v.* Brill, 2 Cal. App. 61, 83 Pac. 76 (as to extra material for which nothing was allowed).

Connecticut.— Nichols *v.* Culver, 51 Conn.

validity and which may be rejected as surplusage will not give rise to a variance by reason of its omission from the pleading,[8] and that a mere mistake in the lien notice may be corrected by the complaint.[9]

J. Evidence — 1. Presumptions. Although there is no evidence that the owner agreed to pay upon the completion of the work, it is held that such terms will be implied, if no others were specified, to support an allegation that labor and materials were to be paid for at that time.[10] And when the claimant shows a *prima facie* case under the terms of the statute, matters of defense must be shown by defendant,[11] and the existence of conditions opposed to such matters of defense will be presumed until they are so shown. Thus it will be presumed that the materials furnished and the labor performed in and about the construction of a building were so furnished and performed on the credit of the building.[12] So it has been held that if a materialman furnishes suitable material to a person whom he knows is erecting a building, it will be presumed that the materials are furnished for that building;[13] that if a person was shown to be the owner of property within a short time of the attaching of the lien he would be presumed to be still the owner,[14] or if it is shown that the materials were furnished at different times, at appropriate stages of the building, it will be presumed that they were all furnished under one continuing contract;[15] that it will be presumed

177, statement of balance due in certificate, and of whole amount in bill of particulars in complaint.

Illinois.—Badenoch *v.* Hoffman, 50 Ill. App. 512, as to time amount claimed was due.

Indiana.— Duckwall *v.* Jones, (1900) 58 N. E. 1055 (as between a description "lot No. 4, in Kirby's addition" and "lot No. 4, in Kirby's Third addition"); Newhouse *v.* Morgan, 127 Ind. 436, 26 N. E. 158; Clark *v.* Huey, 12 Ind. App. 224, 40 N. E. 152.

Montana.— Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285, as to amount or value.

Utah.— Culmer *v.* Clift, 14 Utah 286, 47 Pac. 85, complaint alleging that plaintiffs furnished materials, at the request of defendant owner and his architects, and the lien filed in proof stating that the materials were furnished in pursuance of a contract made by plaintiffs with the principal contractors.

Wisconsin.— North *v.* La Flesh, 73 Wis. 520, 41 N. W. 633, holding that in an action to enforce a mechanic's lien for material furnished to a husband to be used in building on his wife's land, the fact that the petition for the lien charges the sale of the materials to both defendants, while the complaint charges the sale to one of them alone, is an immaterial variance.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 552.

Pleading and lien paper construed together. —Where it plainly appears from the mechanic's lien paper and the petition for enforcement of the same, when construed together, what the respective interests of defendants were, there is no fatal variance. Twitchell *v.* Devens, 45 Mo. App. 283.

Measurement established by statute.— Where wall measurement for brick was established by a statute, and a petition for a mechanic's lien alleged the furnishing and laying of a specified number of "merchantable brick, as per brick measurer's measurement," worth a certain sum per thousand, and the account filed was for furnishing and laying the same number of "merchantable brick," at the same price, it was held that the account was to be construed as for such number of brick according to "wall measurement," as prescribed by the statute for such measurement and not according to actual count, and that there was no variance between it and the petition. Doyle *v.* Wurdeman, 35 Mo. App. 330. See also Custom and Usage, 12 Cyc. 1085.

8. Stone *v.* Taylor, 72 Mo. App. 482.

9. White *v.* Stanton, 111 Ind. 540, 13 N. E. 48 (as to description of property); Newcomer *v.* Hutchings, 96 Ind. 119; Leiegne *v.* Schwarzler, 10 Daly (N. Y.) 547, 67 How. Pr. 130 (error in stating name of owner).

10. Claycomb *v.* Cecil, 27 Ill. 497; Burkhart *v.* Reisig, 24 Ill. 539; Brady *v.* Anderson, 24 Ill. 110.

11. See *supra*, VIII, I, 7, b, (II).

12. Eufaula Water Co. *v.* Addyston Pipe, etc., Co., 89 Ala. 552, 8 So. 25; Smith-Anthony Stone Co. *v.* Spear, 65 Mo. App. 87; Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702; Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552; Hommel *v.* Lewis, 104 Pa. St. 465; Rider-Ericsson Engine Co. *v.* Fredericks, 25 Pa. Super. Ct. 72; Dougherty *v.* Loebelenz, 9 Pa. Super. Ct. 344, 43 Wkly. Notes Cas. 447. *Compare* McCartney *v.* Buck, 8 Houst. (Del.) 34, 12 Atl. 717.

13. Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401.

14. Badger Lumber Co. *v.* Muehlebach, 109 Mo. App. 646, 83 S. W. 546.

15. Kizer Lumber Co. *v.* Mosely, 56 Ark. 544, 20 S. W. 409.

If the work is distinct and separate in its nature, it has been held that the rule is otherwise. Page *v.* Bettes, 17 Mo. App. 366.

Period intervening between items.— Where labor was performed at two different periods between which more than sixty days intervened, it was held that the presumption was

that the equitable owners consented to the erection of a building at the instance of those holding the legal title and who had authority to charge the property with debts.[16] So it is held that where the owner posts a notice, under the statute, that he will not be liable for repairs on the property, a presumption arises that it remained a sufficient length of time to impart knowledge to the persons it is intended to affect.[17] Such presumptions, however, are rebuttable.[18]

2. Admissibility and Competency — a. In General. A mechanics' lien statute not prescribing the kind of evidence by which to prove particular facts, it is left to depend upon and be determined by the ordinary rules of evidence.[19] Whatever tends to establish the plaintiff's cause of action,[20] or defendant's defense, is admissible,[21] and the statements of various parties connected with the transaction have been held admissible as throwing light upon or tending to support the particular cause of action or defense.[22]

that the labor was performed under two contracts. Hansen *v.* Kinney, 46 Nebr. 207, 64 N. W. 710; Buchanan *v.* Selden, 43 Nebr. 559, 61 N. W. 732. However, it may be shown that it was all furnished under one contract. Cornell *v.* Kime, 2 Nebr. (Unoff.) 478, 89 N. W. 254.

16. Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390, where trustees held the legal title for members of a religious society and had power to charge the property with the consent of the society, and it was presumed that the society consented to the erection of a building at the instance of the trustees.

17. Marshall *v.* Cardinell, 46 Oreg. 410, 80 Pac. 652.

18. Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702.

Presumption of consent from knowledge of the work which was done may be rebutted (Shinn *v.* Matheny, 48 Ill. App. 135); and such presumption cannot be indulged unless the fact of knowledge is shown (Hunter *v.* Cordon, 32 Oreg. 443, 52 Pac. 182).

19. Church *v.* Davis, 9 Watts (Pa.) 304.

Harmless error.— Evidence which can in no way affect plaintiff's right to a lien or prejudice defendant, the right being proved by other uncontradicted evidence is harmless and a judgment will not be reversed on account of its admission. McDermott *v.* Claas, 104 Mo. 14, 15 S. W. 995.

20. See Wera *v.* Bowerman, 191 Mass. 458, 78 N. E. 102 (holding that evidence that petitioner had furnished labor on defendant's building according to the contract alleged, etc., and that the labor had been furnished with the latter's knowledge and consent, was admissible notwithstanding the parties had agreed that the petitioner himself did no labor on the building within the statutory period prior to the filing of the lien, since under the statute the lien arose for labor whether furnished by the petitioner or done by him personally); Goulding *v.* Smith, 14 Mass. 487 (holding that for the purpose of showing the relations of a subsequent purchaser to the case he may be asked if he has not refused to pay for the premises and cautioned all persons by public notice against purchasing his note for the balance of the purchase-price of the property because it was given without consideration by reason of the claimant's lien); Ottiwell *v.* Watkins, 15 Daly (N. Y.) 308, 6 N. Y. Suppl. 518 [*affirmed* in 125 N. Y. 706, 26 N. E. 752] (holding that under the statute giving the mechanic a lien for work done with the consent of the owner where a lessee leased to a responsible person at a time when the building was not completed, and the latter finished the building and paid no rent, evidence of the dealings between the lessor and the first lessee are admissible to show whether or not the second lease was made in good faith).

Survey by commissioner see *infra*, VIII, K, 3.

21. Gaskill *v.* Davis, 66 Ga. 665, as to evidence that the claimant was not a mechanic in which character only he was entitled to a lien.

Extent of land.— Where the owner of two lots moved the dividing fence and had improvements made on one of them, in a proceeding to enforce a lien for such improvements in which the claimant described the lot according to the description in defendant's deed, it was held that defendant might testify that by moving the fence he intended to establish a new and permanent division line between the two lots. Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326.

Payment.—Where the contract requires the builder to furnish the materials, the owner may show that he had paid for some materials in order to save the property from liens and to show the amount for which he is entitled to credit against the contractor's claim. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729.

Itemized account.— Defendant pleading payment may introduce an itemized account of payments made, although he did not file such account. Easterling *v.* Shaifer, (Miss. 1905) 38 So. 230.

22. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729 (holding that statements of the contractor to a materialman who furnished materials for the improvements, of facts relating to the subject-matter of the suit may be shown in evidence in the contractor's suit); Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77 (holding that where defendant's inspector and timekeeper, in the course of business, gave statements to plaintiff of the

b. Under Particular Pleadings and Issues. Evidence which is irrelevant and immaterial should not be admitted,[23] and evidence is inadmissible which is not in support of the issues made by the pleadings or which goes to the establishment of facts variant from those which must be shown under the pleadings.[24] But a

date and amount of each day's work, such statements were admissible to show when plaintiff did the work, and that his suit was not barred by the statute of limitations). But see Carson *v.* White, 6 Gill (Md.) 17, holding that a written admission by the owner at whose request work and labor were done upon the house that the claim is correct, made after said owner had mortgaged the property, was inadmissible to affect a mortgage.

Receipt for money paid during deliveries.— So in Pratt *v.* Campbell, 24 Pa. St. 184, it is held that in case of a lien claimed for building materials, receipts given for money during the delivery of the materials are competent evidence for the jury upon the question whether the contract was an entire one for all the materials, or whether they were to be paid for as delivered.

Estoppel to assert invalidity of lien.— So where plaintiff, suing for materials furnished a contractor to reach the fund due from the owner to the contractor, after filing his notice, ascertains that a son of the contractor was jointly interested with him in the erection of the building, and in the notice by which the action was commenced, the son was made a party under the allegation that he claimed to have some interest in the fund but in fact he had none, plaintiff may show that prior to the filing of the lien the owner of the property and the contractor both stated to him that defendant was the sole contractor, as under such proof the parties would be estopped from asserting that the lien was defective in not naming the son as one of the purchasers of the material. Brown *v.* Welch, 5 Hun (N. Y.) 582.

Good faith in asserting item of work.— On an issue as to the good faith of a claimant in stating the amount due, in the certificate for a mechanic's lien, where he testified that he kept no account of the time a subcontractor worked, which was included as one of the items, an account of his time, written up and given to him by the subcontractor, was admissible. Monaghan *v.* Goddard, 173 Mass. 468, 53 N. E. 895.

Admissions generally see EVIDENCE, 16 Cyc. 938 *et seq.*

23. Rothe *v.* Bellingrath, 71 Ala. 55 (holding under a statute giving a lien on the leasehold and the materials furnished where the furnishing is to the lessee, evidence of the amount of rent due the lessor by the lessee is not admissible, being immaterial to the issue, although it may become material after judgment in favor of plaintiff and purchase of the leasehold estate thereunder); Brunold *v.* Glasser, 25 Misc. (N. Y.) 285, 15 N. Y. Suppl. 1021 (inadmissibility of evidence as to difference between the value of the building as it was finished and as it should have been finished where there was evidence that the defects could he remedied); McGillivary *v.* Cremer, 125 Wis. 74, 103 N. W. 250 (holding that, on an issue as to whether the owner of a building promised to pay the claim of a materialman if the latter would refrain for a time from enforcing his lien, evidence that the materialman had instructed his agent to perfect the lien was, in the absence of any showing that the owner knew of the instruction, irrelevant). But see Thayer *v.* Williams, 65 Mo. App. 673, where it was held that the admission of evidence that the owner had paid the contractor, in an action by a materialman, notwithstanding the liability of the owner to be enforced without regard to such payment, was harmless error where from the instructions of the court the jury could not have understood that such payment had any bearing upon the right of plaintiff to recover.

24. Jennings *v.* Huggins, 125 Ga. 338, 54 S. E. 169; Bergsma *v.* Dewey, 46 Minn. 357, 49 N. W. 57; Murphy *v.* Watertown, 112 N. Y. App. Div. 670, 99 N. Y. Suppl 6; Beecher *v.* Schuback, 1 N. Y. App. Div. 359, 37 N. Y. Suppl. 325; Morowsky *v.* Rohrig, 4 Misc. (N. Y.) 167, 23 N. Y. Suppl. 880; Guarantee, etc., Co. *v.* Cash, (Tex. Civ. App. 1905) 87 S. W. 749, where evidence to prove an alleged prior and superior lien was excluded because defendants did not plead such lien.

Objection.— In Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366, which was an action against a married woman, it was held that recovery might be had on evidence that she was a concealed principal of her husband, etc., although the fact was not alleged in the pleadings, and that if the objection of want of necessary allegations was a good one to the evidence it should have been presented upon the offering of the evidence so that the declaration could have been amended. So in Stapleton *v.* Meyer, 17 Misc. (N. Y.) 67, 39 N. Y. Suppl. 845, it was held that in an action against a contractor defendant cannot object to plaintiff's showing that the work was done in several places while the complaint alleged that it was done in one place and plaintiff had furnished a bill of particulars showing that the work was done in several places, defendant showing no surprise at the trial.

A special contract may be shown in an action on common counts.— Shilling *v.* Templeton, 66 Ind. 585.

Verbal agreement of owner — Material furnished contractor.— In Pool *v.* Wedemeyer, 56 Tex. 287, where counsel agreed that the material was furnished and charged to the contractor it was held not error to admit evidence of a verbal agreement by the owner who was the original defendant to pay for such materials in the absence of a plea of

defendant cannot object to the introduction of evidence of a fact which he has admitted in his pleading,[25] nor can he introduce evidence against his own admission resulting from his failure to deny an allegation of his adversary's pleading.[26] However, defendant under a general denial is not confined to negative proof but may introduce evidence of facts which are inconsistent with the averments upon which the adversary's right depends.[27]

e. Ownership of Premises. The deed of conveyance to defendant may be introduced as evidence of ownership,[28] and other evidence bearing upon the question which is raised by the pleading and is properly an issue in the proceeding is admissible,[29] but the ownership involved being that which existed at the time the lien attached, evidence of ownership at time of trial is irrelevant.[30] On the other hand, where the title is not in issue under the complaint, defendant's interest only, whatever that may be, being affected by the sale, evidence of an outstanding or paramount title is inadmissible.[31]

d. Contract and Performance in General. Evidence which tends to show that work was done at the request of the owner is admissible,[32] and if the owner is to be charged by his consent to the work being done, then all matters tending to prove his knowledge of the erection of the building are admissible;[33] but evidence as to the doing of other work is inadmissible to show employment by defendant to do the

the statute of frauds, and that even if the objection could be reached on a general denial, where no objection is made to the proof when offered on the ground of the statute of frauds it is waived.

25. Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512.

26. Brunner *v.* Marks, 98 Cal. 374, 33 Pac. 265. See also *supra*, VIII, I, 2, c, (II), (B).

27. Jeffersonville Water Supply Co. *v.* Riter, 146 Ind. 521, 45 N. E. 697; Close *v.* Clark, 16 Daly (N. Y.) 91, 9 N. Y. Suppl. 538.

So under a replication which is in effect a general denial evidence of facts inconsistent with the averments of the plea is admissible in rebuttal. Banks *v.* Moshier, 73 Conn. 448, 47 Atl. 656.

28. Badger Lumber Co. *v.* Muehlebach, 109 Mo. App. 646, 83 S. W. 546.

Presumption of continuance of ownership see *supra*, VIII, J, 1.

29. Wilson *v.* Merryman, 48 Md. 328, holding that a lease conveying to defendant the several lots of ground described in the lien claim, executed during the time the materials in question were being furnished, between the date of the first and last items in the account, is admissible as evidence, in connection with other evidence to be subsequently offered, to show defendant's ownership of the property at and before the time of the ordering and furnishing of the materials in question and the making of said lease.

30. Coats *v.* Dickenson, 5 Alb. L. J. (N. Y.) 333.

If the property has been fraudulently conveyed, the petitioner may treat either the grantor or the grantee as the owner in the foreclosure of his lien, and if the former, then the claimant assumes the burden of showing that the conveyance was fraudulent and evidence in this behalf is admissible. Amidon *v.* Benjamin, 126 Mass. 276.

31. Cook *v.* Goodyear, 79 Wis. 606, 48 N. W. 860. See also *supra*, VIII, E, 2.

32. Miller *v.* Barroll, 14 Md. 173, holding that evidence that about the time the house in question and an adjoining one were commenced the owner said to plaintiffs that he wanted them to prime the frames for and see about painting the houses is competent to go to the jury on the question as to whether plaintiffs did the painting on the houses at the request of said owner.

33. Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616 (holding that a contract by a married woman selling her land on condition that the vendee will erect a building thereon, although invalid for non-joinder of her husband, is admissible in an action to foreclose a mechanic's lien on the land for labor on the building, under a contract with the vendee, to show that the work was done with her knowledge and assent and at her instance); McCarthy *v.* Caldwell, 43 Minn. 442, 45 N. W. 723 (proof that the wife saw and conversed about the plumbing while it was being done).

To show who was contracting party.— In an action against a married woman to enforce a mechanic's lien, evidence of her acts and doings while the house was in process of erection is admissible upon the issue whether she or her husband was the contracting party in relation thereto. Kirschbon *v.* Bonzel, 67 Wis. 178, 29 N. W. 907.

Evidence of orders by authority of admitted agent.— Where, in an action to foreclose a mechanic's lien, it is stipulated that defendant was at all times represented by her father as her agent in all the matters in controversy, that proof of such agency is unnecessary, and that her father attended to all business with plaintiff, evidence that such father told witness, when he wanted materials, to order them, and that when materials were wanted the father either ordered them or directed the witness to do so is admissible to show authority for supplying extra materials. Linck *v.* Johnson, (Cal. 1901) 66 Pac. 674.

particular work for which the recovery is sought;[34] and where a written contract is not merely collateral and incidental to the issues, but is the basis of the right set up, it must be produced or its absence must be accounted for before secondary evidence of its terms can be received.[35] In a proceeding by a materialman who has a direct lien, irrespective of any contract between him and the owner, which arises upon furnishing to one having a contract with the owner, evidence of the nature of the contract between the owner and contractor is admissible.[36] And although a contract may be void under the statute because not recorded it may still be used as evidence to determine the character of the building to be erected and thereby furnish the test by which it can be ascertained when the building was completed.[37] As in other cases evidence is not admissible to contradict or vary the terms of a written contract,[38] or to show that certain materials used were more suitable than others which the contract required.[39]

e. Quality, Quantity, and Value of Work or Materials.[40] Evidence as to the reasonable value of materials furnished is properly excluded where such value is a matter of special contract provision,[41] but if no more than the contract price

34. Miller *v.* Barroll, 14 Md. 173.

35. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4; Land Mortg. Bank *v.* Quanah Hotel Co., (Tex. Civ. App. 1895) 32 S. W. 573, requiring proof of loss, after recording, by the custodian of the record.

Admitted contract need not be read.— It is not error to refuse to allow the introduction of the original contract when the petition sets out the contract and it is admitted to be correct. Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 28 Ill. App. 371 [*reversed* on other grounds in 128 Ill. 627, 21 N. E. 500].

Introduction of copies on question of alterations.— Where upon the introduction of a contract in evidence it appeared to have been changed in certain particulars, upon the issue whether the changes were made before or after the execution of the contract and for the purpose of showing what the real contract was on the question in dispute, a copy may be read in evidence and proved by a witness to be a true copy, although the witness is not the party who made the copy from the original. Lombard *v.* Johnson, 76 Ill. 599.

36. Treusch *v.* Shryock, 51 Md. 162, where the right of the materialman depends only on his furnishing material to a contractor while the latter's contract with the owner is alive.

Statements by contractor.— But, the right of a materialman furnishing a contractor not depending upon any relation of agency of the latter to the owner but upon the statute which gives the lien upon the furnishing to a builder for the owner independently of whether anything is due the builder or not, or of whether he has properly performed his contract, and only upon condition that the contract is alive at the time of furnishing the contractor, declarations not made in the owner's presence as to whether the building was completed and accepted or the materials were delivered cannot be proved as against the owner, although the builder's receipt for the materials is admissible as a part of the *res gestæ* and as an admission against his interest. Terusch *v.* Shryock, 51 Md. 162.

37. Barker *v.* Doherty, 97 Cal. 10, 31 Pac. 1117.

38. Justus *v.* Myers, 68 Minn. 481, 71 N. W. 667; Murphy *v.* Fleetford, 30 Tex. Civ. App. 487, 70 S. W. 989, where the particular evidence was held not in contradiction of the contract.

Question not in contradiction of contract.— In a suit to foreclose a contractor's lien, where the contractor had claimed pay for material furnished above what was to be embraced in the contract, it is not erroneous to permit him to be asked if he "was not to furnish material;" such evidence is not in contradiction of the written contract. Gates *v.* O'Gara, (Ala. 1905) 39 So. 729.

That claim is not within contract.— So it may be proved by parol that the character of the building was changed from that contemplated at the time the contract was made, after the complete performance of the contract, to show that articles subsequently furnished were furnished under a later contract. Brown *v.* Edward P. Allis Co., 98 Wis. 120, 73 N. W. 656.

39. Schultze *v.* Goodstein, 180 N. Y. 248, 73 N. E. 21.

40 Statement in lien claim see *infra*, VIII, J, 3, g.

41. Reid *v.* Berry, 178 Mass. 260, 59 N. E. 760.

To show mistake in contract.— In Murphy *v.* Fleetford, 30 Tex. Civ. App. 487, 70 S. W. 989, it was held that while evidence of a *quantum meruit* is inadmissible as a basis for recovery in proceedings founded on the contract, where the contract provided that the contractor should do all the work and furnish all the materials among which "all stairwork and furnishing lumber," in an action to enforce a materialman's lien, on an issue whether the word "furnishing" was mistakenly written in the contract instead of the word "finishing," the claimant insisting that as the lumber furnished was not finishing lumber the owner was liable and not the contractor, evidence to show that the con-

is allowed, the admission of such evidence is at most harmless error.[42] Evidence of a settlement made between the parties is admissible to show the balance due;[43] and in a proceeding against the owner and the contractor the contract between plaintiff and the contractor is admissible as evidence of the contract price between those parties,[44] and the contractor's receipt for materials is admissible in a suit by the materialman to enforce his lien which arises under the statute merely upon furnishing to one who is building for the owner.[45] Estimates of the amount of work done made by one person cannot be proved by another person.[46] A defendant may introduce evidence to show that the work was not properly performed, in opposition to the case attempted to be made by plaintiff,[47] and that plaintiff's

tract price was the reasonable value of the work done and materials furnished is admissible as a circumstance material to the issue.

Where the contract is abandoned defendant may show the value of the work, taking into consideration the contract price, and the sum required to complete the contract. McDonald *v.* Hayes, 132 Cal. 490, 64 Pac. 850.

Provision for estimate of particular person. — Where plaintiff sues on a contract which provides for a settlement upon the final estimate of defendant's superintendent of construction, and both sides repudiate the estimate of such person in open court upon the record, the admission of evidence as to the inaccuracy of such estimate cannot be made the ground of error. Cook *v.* Gallatin R. Co., 28 Mont. 340, 72 Pac. 678, holding further that hearsay evidence of statements of the superintendent that his estimate was false could not be prejudicial in such a case.

42. Horgan *v.* McKenzie, 17 N. Y. Suppl. 174.

43. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, where evidence of a settlement made with one spouse acting for the community in order to ascertain the amount due on the contract, and the memorandum signed showing the amount so ascertained were admissible in evidence.

Application of rule. — *A statement between the contractor and the materialman* is admissible on the question of the value of material as against the owner of the building. Charles *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 283, 43 Pac. 548.

A note given by a subcontractor for materials is evidence to prove the agreed price in a proceeding to enforce the lien. Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675.

Arbitration agreement. — Where a subcontractor sues the owner and original contractor and the owner puts in issue the amount and value of the work performed by the subcontractor and the validity of his lien, an arbitration agreement between the subcontractor and the contractor to which the owner is not a party is not binding upon him, and the statute which declares a contractor and subcontractor to be the agents of the owner for the purpose of binding the property with a lien does not make the contractor the owner's agent to determine the value of the materials furnished or the labor performed. Quackenbush *v.* Artesian Land Co., 47 Oreg. 303, 83 Pac. 787.

44. Hilliker *v.* Francisco, 65 Mo. 598; Cattanach *v.* Ingersoll, 1 Phila. 285.

45. Treusch *v.* Shryock, 51 Md. 162, holding that such receipt is admissible as part of the *res gestæ* and as being against interest.

Delivery tickets. — Where delivery tickets signed by the contractor or his servant, and one not signed, were admitted in evidence in an action by the materialman, without proof of the signatures to those which were signed, any error in such admission is not reversible where there is no substantial dispute as to the delivery of the material and there was ample competent evidence of such delivery outside of such tickets. L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143.

46. Cook *v.* Gallatin R. Co., 28 Mont. 340, 72 Pac. 678, where the evidence was offered by defendant in a proceeding under a contract providing for a settlement on the final estimate of defendant's superintendent of construction and both sides had already repudiated the correctness of the superintendent's estimate and it was held that the evidence referred to was immaterial on account of such repudiation, being offered to show that the estimate was incorrect.

47. Hagman *v.* Williams, 88 Cal. 146, 25 Pac. 1111.

Competency. — A measurer of painter's work is competent to show what the quantity and value of that work is. Thorn *v.* Heugh, 1 Phila. (Pa.) 322. But in Brunold *v.* Glasser, 25 Misc. (N. Y.) 285, 53 N. Y. Suppl. 1021, where on the question involved in the defense as to the sufficiency of the performance of a contract by reason of defects in the work a cornice-maker who was not a bricklayer and who did not know how to remedy the alleged defects in the walls of a structure was held not competent to testify to the cost of taking down such walls and rebuilding them. And where the evidence showed that the contractor had failed to comply with the contract, providing for warranty of all the plumbing and gas-fitting for a year, and an agreement to make necessary repairs during that time, and that the owner had expended a certain amount for repairs, which the contractor had neglected to make after notice, questions to show generally the reasonable cost of keeping the plumbing in repair for one year were properly excluded,

charges embraced a greater quantity of material than could have been used in the building, where there is a duty on the materialman to inquire into the nature of the building on the credit of which he undertakes to furnish material.[48]

f. State of Accounts Between Owner and Contractor Employing Plaintiff. Where plaintiff's lien rights depend upon the fact that something is due the contractor from the owner at the time it is sought to have the lien attach, then the condition of the accounts between the owner and contractor is material, and evidence relating thereto is admissible.[49]

g. Book-Accounts and Explanations Thereof. The claimant's books of original entry are competent evidence of the items and the amount of the debt claimed, and he may show by evidence the other facts which entitle him to recover.[50] Such books of entry are admissible upon the question of the application of moneys to an unsecured debt, where the debtor and creditor have not made the application, to show the existence of such debt,[51] and bills rendered to one charged with materials may be introduced in evidence as bearing upon the issue as to whom the credit was extended, on behalf of defendant to whom such materials were not charged.[52] Parol evidence is admissible to show for what building the work was done or the materials were furnished, and the mechanic's book of original entries is not the sole test of the building to be charged, the statute not prescribing the kind of evidence by which the facts shall be proved.[53] The account as it appears on the claimant's books may be explained,[54] and if it

where the actual cost of the repairs was not called for, nor any evidence as to how much the repairs that were made were reasonably worth, or whether they were necessary. Schultze *v.* Goodstein, 180 N. Y. 248, 73 N. E. 21.

48. Dickinson College *v.* Church, 1 Watts & S. (Pa.) 462. But see Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022.

49. Parsley *v.* David, 106 N. C. 225, 10 S. E. 1028, holding that the owner may testify how much he had paid the contractor when plaintiff, a materialman, filed his lien, to show that nothing was due the contractor at that time.

Completion by owner after abandonment by contractor.— Where the contractor has abandoned the work before completion, it is competent, in an action by the subcontractors to enforce their liens, for the owner to prove how much of the work the contractor left undone, and what it had cost to complete it in the manner provided by the contract. Rodbourn *v.* Seneca Lake Grape, etc., Co., 67 N. Y. 215 [*reversing* 5 Hun 12]; Lind *v.* Braender, 15 Daly (N. Y.) 370, 7 N. Y. Suppl. 664.

Certificate of architect as to cost of completion.— Under a provision of a building contract that on failure of the contractor to complete the building the owner may do so and deduct the cost from the contract price remaining unpaid, and that the certificate of the architect as to the cost of completing the building shall be conclusive as to the cost thereof, the certificate is admissible to show the cost of completing the building after the default of the contractor, as against persons seeking to enforce mechanics' liens for materials furnished the contractor. Malone *v.* Mayfield, 13 Tex. Civ. App. 548, 36 S. W. 148.

50. Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552.

51. McQuaide *v.* Stewart, 48 Pa. St. 198.

52. Wright *v.* Hood, 49 Wis. 235, 5 N. W. 488.

53. Church *v.* Davis, 9 Watts (Pa.) 304.

Necessity of other evidence — *In general.*— Unless there is evidence to show which one of several buildings materials sold and charged in joint account were furnished for, such account is inadmissible. Chambers *v.* Yarnall, 15 Pa. St. 265.

Oath of party required.— Where a book-account is evidence only when supplemented by the oath of the party to whom they belong of the sale and delivery of the goods charged and their price, the mere statement in a lien claimant's book of accounts that materials delivered by him are to be used in the erection, alteration, or repair of a building is not by itself evidence sufficient to constitute a lien, but the claimant must establish the fact in some other way that the credit was given to the building. This may be done by the oath of plaintiff, and defendant may give proof by his oath to the contrary. McCartney *v.* Buck, 8 Houst. (Del.) 34, 12 Atl. 717.

54. Green Bay Lumber Co. *v.* Thomas, 106 Iowa 420, 76 N. W. 749 (holding that where a contractor, under a contract with a county, procured a warrant for four hundred dollars and for the purpose of paying three hundred dollars to a subcontractor transferred the warrant to him and received back one hundred dollars in cash, but instead of crediting the contractor with three hundred dollars the subcontractor credited him with the amount of the warrant and charged him back with one hundred dollars cash, the entries indicated the correct net credit and oral evidence was admissible to show that both en-

appears that the account on plaintiff's books is against the contractor, plaintiff may introduce evidence to explain how this was so consistently with the theory of the owner's direct liability.[55]

h. Lien Claim or Statement and Record Thereof. The record of a lien claim or statement made and filed as required by law is admissible in evidence,[56] and the original notice of lien itself is admissible as between the immediate parties, together with the indorsement showing its filing for record as required by the statute,[57] or where the record of such original paper is shown by competent evidence.[58] But a memorandum not recorded with the lien is not of itself evidence.[59] The affidavit of the correctness of the account attached to the lien claim is not evidence of the correctness of the account or of the date of its accrual.[60]

i. Pleadings as Evidence. Where the proceeding is essentially a chancery one, the answer is evidence under the same conditions and to the same extent as answers generally in chancery suits.[61]

tries were part of one and the same transaction and rightly understood showed a payment of three hundred dollars on account); Cline *v.* Shell, 43 Oreg. 372, 73 Pac. 12; Brown *v.* Colb, 8 Pa. Super. Ct. 413, 43 Wkly. Notes Cas. 26 (holding that an apparent variance between the book-account and the claim may be explained); Creasy *v.* Emanuel Reformed Church, 1 Pa. Super. Ct. 372.

Contractor's statements as affecting other lien claimants.— A contractor's statement to a subcontractor because of which the latter changed a credit are admissible as between these parties, but as to other subcontractors such statements are hearsay and inadmissible. Green Bay Lumber Co. *v.* Thomas, 106 Iowa 420, 76 N. W. 749.

55. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4, where it was held that as to an entry charging materials to a contractor plaintiff may show that the charge was made in order to keep the transaction separate from other claims which plaintiff had against the owner and that such entry had been made without his authority.

56. New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892 (holding that parol evidence is admissible to show when the materials embraced in the indicated items were furnished, over the objection to the admissibility of the recorded lien claim because some of the items in the account bear date more than three months after the date of recording, the last items not being dated at all); Merritt *v.* Pearson, 58 Ind. 385 (holding that such record is relevant to the issue as to whether plaintiff had filed the notice in time and in proper terms).

Must be consistent with cause of action.— The record of a claim of lien against defendant's wife is inadmissible in an action for materials furnished defendant. Jennings *v.* Huggins, 125 Ga. 338, 54 S. E. 169.

57. Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108, where it was held further that the fact that the notice was recorded in a record not provided by law did not render the admission of such record reversible error, where the original notice was introduced and rights of innocent third parties were not involved. See also Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863, where the statement itself was produced and identified to prove the proper filing.

58. Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144, where it was further held that it was proper to permit the county auditor to read from the original record a transcript of the lien, a certified copy having been tendered and received in evidence subsequently. But under a statute in New York requiring the filing of a notice of lien with the county clerk it was held that a copy of such notice in which the signatures are not proved or acknowledged is not admissible as evidence of the due filing of a proper notice and is not rendered admissible by the authentication of the county clerk; and proof of the genuineness of the paper and time of filing is necessary. Sampson *v.* Buffalo, etc., R. Co., 4 Thomps. & C. (N. Y.) 600; Jennings *v.* Newman, 52 How. Pr. (N. Y.) 282.

59. Lawson *v.* Coates, 56 Ga. 379, as to a memorandum that the work was completed on a certain date, there being no proof as to who made it or as to its truth, and it was held that the memorandum was no evidence upon the question as to whether the lien was recorded within the time fixed by statute.

60. Darlington *v.* Eldridge, 88 Mo. App. 525.

Where the lien claim contains a statement of particulars and a witness who ordered the goods testifies that such statement is correct it is properly allowed to go to the jury. Mooney *v.* Peck, 49 N. J. L. 232, 12 Atl. 177.

In Pennsylvania bills filed with a lien claim are not evidence for the claimant where their correctness is disputed by the affidavit of defense. Weaver *v.* Sheeler, 118 Pa. St. 634, 12 Atl. 558. See also Van Billiard *v.* Nace, 1 Grant (Pa.) 233; Hills *v.* Elliott, 16 Serg. & R. (Pa.) 56.

61. Tracy *v.* Rogers, 69 Ill. 662; Garrett *v.* Stevenson, 8 Ill. 261; Kimball *v.* Cook, 6 Ill. 423.

Admissions by failure to deny allegations see *supra*, VIII, I, 2, c, (II), (B).

Pleadings in chancery as evidence generally see EQUITY, 16 Cyc. 382 *et seq.*

3. Weight and Sufficiency — a. In General. The burden of proof upon the issues involved in a proceeding for the enforcement of a mechanic's lien must, as in other actions, be supported by a preponderance of evidence[62] legally sufficient to justify a finding.[63]

b. Ownership of Property. It is not necessary that ownership should be proved by the best evidence, or by such evidence as would be admissible in an action to try title.[64] A deed conveying the property to defendant a short time before the date of the transaction out of which the lien claim arises, together with a recital in the contract that defendant is the owner, is sufficient evidence of such ownership at the time the contract was made;[65] and if it is shown that the person for whom the work was done is in possession claiming ownership of the

62. Moreno *v.* Spencer, (Tex. Civ. App. 1904) 82 S. W. 1054, where an instruction was held erroneous because it cast a greater burden of proof upon defendant who had denied in an answer that the contract purporting to be acknowledged by husband and wife so as to create a lien on a homestead was in fact acknowledged by the wife, in that it required the evidence to establish the defense to be clear and convincing and to show the facts set up to the satisfaction of the jury. So in Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48, which was a suit in equity to declare a mortgage superior to a mechanic's lien, upon declaring that the burden was on defendant to show that the mortgage was executed after the work was begun, which fact was determinative of the question of priority, the court held that where the testimony of the mechanic's lienor was that the work was commenced before and that of the mortgagor was that it was commenced after the execution of the mortgage defendant had failed to meet his burden of proof.

63. See Heald *v.* Hodder, 5 Wash. 677, 32 Pac. 728.

Evidence sufficient to show: That claimant is entitled to a lien. Jacoby *v.* Scougale, 26 Ill. App. 46 (on conflicting testimony); McAllister *v.* Des Rochers, 132 Mich. 381, 93 N. W. 887 (as to evidence of value of property above homestead exemption). That claimant furnished labor or materials. Frudden Lumber Co. *v.* Kinnan, 117 Iowa 93, 90 N. W. 515; Wakefield *v.* Latey, 39 Nebr. 285, 57 N. W. 1002; Wolf *v.* Batchelder, 56 Pa. St. 87 (holding that it is not necessary that the sale of materials should be charged in a book, any evidence that satisfies that they furnished, etc., is sufficient); Haviland *v.* Pratt, 1 Phila. (Pa.) 364. That the materials were furnished for use in the particular building. Laev Lumber Co. *v.* Auer, 123 Wis. 178, 101 N. W. 425, testimony of the subcontractor's salesman that the sale was made to the principal contractor on bills presented by the contractor specifying the materials required in the construction of the improvements and that the materials were sold for that purpose. That the materials were used in the particular building. Rice *v.* Hodge, 26 Kan. 164; E. R. Darlington Lumber Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688; Allen *v.* Elwert, 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54; Seattle Lumber Co. *v.* Sweeney, (Wash. 1906) 85 Pac. 677, in which cases it is held that evidence that material contracted for was delivered at a building, and that a large part of the material was used in the building, without any evidence that any of it was not so used, is sufficient to show that all of it was used in the construction of the building. See also Noyes *v.* Smith, (Tex. Civ. App. 1903) 77 S. W. 649. That the lien had not been discharged or canceled by agreement. Hine *v.* Vanderbeek, 56 N. Y. App. Div. 621, 67 N. Y. Suppl. 801 [*affirmed* in 170 N. Y. 580, 63 N. E. 1118]. That owner had sufficiently posted statutory notice to protect himself from liability. Marshall *v.* Cardinell, 46 Oreg. 410, 80 Pac. 652.

Evidence insufficient to show: Defendant entitled to general verdict. Foote *v.* Kendall, 113 Ga. 946, 39 S. E. 303, where, in an action to recover a balance due on a building contract and an additional sum for work done not covered by the contract, defendant asserted that plaintiff never completed the building according to contract, but gave no data on which to base an estimate of the loss he sustained, and did not allege that he had suffered any damages by the failure to comply with the contract. That the materials were delivered. Henry, etc., Co. *v.* McCurdy, 36 Nebr. 863, 55 N. W. 261. That the materials were furnished for the particular building. Johnson *v.* Simmons, 123 Ala. 564, 26 So. 650 (evidence of plaintiff, who had furnished a contractor for several buildings indiscriminately, that he thought about two hundred and ten dollars' worth of lumber, corresponding to that sold by him to the contractor, was used in defendant's house); Finch *v.* Redding, 4 B. Mon. (Ky.) 87 (no proof of consideration of note which makes no reference to the consideration on which it was founded); Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

64. Rohan Bros. Boiler Mfg. Co. *v.* St Louis, Malleable Iron Co., 34 Mo. App. 157, where it is said that slight evidence will be sufficient to move the court, since if defendant is not the owner and has no interest he is in no sense harmed by any judgment that may be rendered establishing the lien against the property.

65. Badger Lumber Co. *v.* Muehlebach, 109 Mo. App. 646, 83 S. W. 546.

property described,[66] or occupies the house as a residence,[67] or, in the absence of any controversy as to the ownership, that he took possession of the property upon completion of the improvements, together with the testimony of witnesses that he owned the property,[68] it will be sufficient evidence of ownership to support a judgment in favor of the lien claimant.

c. Identity of Building or Property. There must be sufficient evidence to show that the work or materials were furnished on the property sought to be charged with the lien.[69]

d. Time of Completion of Work or Furnishing Materials. The evidence must be sufficient upon which to find the date of the completion of the work or the furnishing of the material when such date is important in determining whether the lienor has taken the statutory steps within the period prescribed from such completion or furnishing.[70]

e. Contract or Consent, Terms, and Performance — (i) *IN GENERAL.* The contract under which the lien is claimed must be shown by sufficient evidence,[71]

66. Chisholm *v.* Williams, 128 Ill. 115, 21 N. E. 215; Coats *v.* Dickenson, 5 Alb. L. J. (N. Y.) 333.

"Reputed owner" — Statement of husband. — Evidence that a husband signed a contract for street work in front of a lot, the record title to which was in the wife, and stated to the contractors that the lot was community property, will sustain a finding that he was the "reputed owner." Santa Cruz Rock Pavement Co. *v.* Lyons, (Cal. 1896) 43 Pac. 599.

67. Lewis *v.* Saylors, 73 Iowa 504, 35 N. W. 601.

68. Cole *v.* Barron, 8 Mo. App. 509.

Use and tax assessment.— Evidence that defendant uses the building for which the materials were furnished as a factory, and that the property is assessed for taxes against him, is sufficient evidence of defendant's ownership of the property to support the lien. Rohan Bros. Boiler Mfg. Co. *v.* St. Louis Malleable Iron Co., 34 Mo. App. 157.

69. See *supra*, VIII, I, 7, b, (I).

Evidence sufficient in connection with pleadings.— Where the petition described the land upon which the house was situated, and defendant admitted in his answer that he was the owner of the house "on the lands described in plaintiff's petition," and the evidence showed that the painting was done on defendant's dwelling-house, and the claim for the lien was put in evidence, this is sufficient to identify the building upon which the work was done. Pease *v.* Thompson, 67 Iowa 70, 24 N. W. 598. But where the complaint described the property by metes and bounds, and the notice of lien introduced as evidence described it by referring to the date and record of a certain deed of the premises, and the answer admitted that the house was built on the land described in the complaint, but no evidence was introduced to show that the land described in the lien was the same as that described in the complaint, it was held that there was no evidence on which to establish a lien on the land in question. Morehouse *v.* Collins, 23 Oreg. 138, 31 Pac. 295.

70. McLennan *v.* Winnipeg, 3 Manitoba 474, where it is held that when the completion of the work is alleged as of a particular day, which is a considerable time after the bulk of the work was performed, clear and satisfactory evidence must be given to enable the court to find the date proved.

Sufficient evidence to support a finding that the work continued on the building until a certain date without cessation for a period of thirty days (Marble Lime Co. *v.* Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164); that the last work was done in time (Monaghan *v.* Putney, 161 Mass. 338, 37 N. E. 171; Bankers' Bldg., etc., Assoc. *v.* Williams, 4 Nebr. (Unoff.) 795, 96 N. W. 655); that material was furnished in time (L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143; Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390); that the last deliveries of material were not made under separate purchases by the builder but that all material was furnished under one contract (Hill *v.* Kaufman, 98 Md. 247, 56 Atl. 783; Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413).

Insufficient evidence to support a finding of completion on a date within the prescribed period for filing lien (Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896; Washburn *v.* Kahler, 97 Cal. 58, 31 Pac. 741); that material was furnished in time (Forest Grove Door, etc., Co. *v.* McPherson, 31 Oreg. 586, 46 Pac. 884); that the date of the last item of material furnished was in time (McDonald *v.* Ryan, 39 Minn. 341, 40 N. W. 158).

An admission that the materials went into the building, made on the trial, does not admit, and contains nothing from which it can be inferred that the account accrued within the statutory period. Darlington *v.* Eldridge, 88 Mo. App. 525.

71. Cadwell *v.* Brackett, 2 Wash. 321, 26 Pac. 219. See also Miller *v.* Isear, 99 N. Y. Suppl. 869 (where the testimony of plaintiff that the contract called for the use of brown stone, the only evidence tending to show that any other kind of stone was required consisting of cross-examination showing that there had been some talk about blue stone, and evidence by defendant that he ordered some one to write a letter about blue stone,

as that the work was done under a contract with the owner;[72] but evidence of a contract with the duly authorized agent of the owner may be sufficient.[73] Express consent of the owner need not be shown, however, under a statute giving the lien where the work is done or the materials are furnished with the owner's consent; but such consent may be shown by the owner's acts and declarations,[74] or by his knowledge without objection on his part that the improvements are being made, from which his consent may be inferred;[75] but the facts from which the inference of a consent is to be drawn must be such as to indicate at least a willingness on the part of the owner to have the improvements made, or an acquiescence on his part in the means adopted for that purpose, with knowledge of the object for which they are employed.[76]

(II) *PERFORMANCE OF CONTRACT.* The evidence must be sufficient to show a substantial performance of the contract under which the right to a lien is claimed.[77]

did not support a finding that blue stone was to be used, and from which testimony it was held that the court must assume that the contract was oral); Dennis *v.* Walsh, 16 N. Y. Suppl. 257 (where the evidence showed a contract with plaintiff's agent justifying a recovery by plaintiff); Land Mortg. Bank *v.* Quanah Hotel Co., (Tex. Civ. App. 1895) 32 S. W. 573 (where the evidence was held to support a finding of a verbal contract between contractor and subcontractor over the objection that the registration of the accounts fell short of a compliance with the statute in the case of written contracts).

Admissibility see *supra*, VIII, J, 2, d.

Separate contracts to justify separate liens were held sufficiently shown in Smith *v.* Wilcox, 44 Oreg. 323, 74 Pac. 708, 75 Pac. 710.

72. Libbey *v.* Tidden, 192 Mass. 175, 78 N. E. 313, where the evidence was held sufficient to show a valid oral contract for the furnishing of labor and material and for what is known as a "uniform contract," which was executed and delivered later, and that the subsequent written contract was a continuation of and not a substitute for the oral contract, although it contained terms not provided for in the oral contract.

In a suit by a subcontractor as materialman the evidence is insufficient which does not show what the relation was between the one with whom claimant says he contracted and the owner. Brennan *v.* Miller, 97 Mich. 182, 56 N. W. 354; Jose *v.* Hoyt, 106 Mo. App. 594, 81 S. W. 468 (where a statement of an attorney in objecting to the introduction of the lien was held not to contain an admission that there was an original contractor); Snyder *v.* Sparks, (Nebr. 1905) 103 N. W. 662.

73. *Iowa.*— Rand *v.* Parker, 73 Iowa 396, 35 N. W. 493, evidence showing that a husband was acting for his wife who owned the property and not as her contractor so as to require notice from a materialman.

Missouri.— Carthage Marble, etc., Co. *v.* Bauman, 44 Mo. App. 386, evidence of agency of husband for wife sufficient to be submitted to jury.

New York.— Farmilo *v.* Stiles, 52 Hun 450, 5 N. Y. Suppl. 579, evidence sufficient to prevent nonsuit.

South Carolina.— Builders Supply Co. *v.* North Augusta Electric, etc., Co., 71 S. C. 361, 51 S. E. 231, evidence sufficient to support finding of agency.

Washington.— Cattell *v.* Fergusson, 3 Wash. 541, 28 Pac. 750.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 570.

74. Cowen *v.* Paddock, 137 N. Y. 188, 33 N. E. 154; Nellis *v.* Bellinger, 6 Hun (N. Y.) 560; Brunold *v.* Glasser, 25 Misc. (N. Y.) 285, 53 N. Y. Suppl. 1021, evidence that the owner was present at the making of the contract for the improvements on her property and that money was raised by mortgage on the property to pay for the improvements.

75. Miller *v.* Mead, 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701; Schmalz *v.* Mead, 125 N. Y. 188, 26 N. E. 251 (where work was prosecuted and materials were furnished for improvements by one in possession under a contract of sale, but with the owner's knowledge and the improvements were contemplated by the parties to the contract, the vendor furnishing money for such improvements); Husted *v.* Mathes, 77 N. Y. 388 (as to consent of married woman); Dennis *v.* Walsh, 16 N. Y. Suppl. 257.

Where "knowledge and consent" on the part of a married woman are required by the statute, proof of knowledge only is held insufficient. Smith *v.* Gill, 37 Minn. 455, 35 N. W. 178.

76. Cowen *v.* Paddock, 137 N. Y. 188, 33 N. E. 154.

77. MacKnight Flintic Stone Co. *v.* New York, 78 N. Y. App. Div. 641, 79 N. Y. Suppl. 521 [*affirmed* in 176 N. Y. 586, 68 N. E. 1119].

Sufficient evidence to show: That the contract was substantially performed. Hahn *v.* Bonacum, (Nebr. 1906) 107 N. W. 1001; Dennis *v.* Walsh, 16 N. Y. Suppl. 257, compliance held sufficiently shown by evidence that plaintiff offered to do any work which defendant desired to have done in completion of the contract and that defendant failed to designate any part as unfinished. That plaintiff was forcibly ejected so as to prevent his completion of the contract. Cochran *v.* Yoho, 34 Wash. 238, 75 Pac. 815. That the contract has not been performed. Terrell *v.* McHenry, 89 S. W. 306, 28 Ky. L. Rep. 402, that a roof was put on under a contract that it should

f. Indebtedness. There must be sufficient competent evidence of the indebtedness for which the lien is sought to be foreclosed, either under the terms of the contract,[78] or according to the value of the work and material, as where such value is not fixed by contract,[79] as in the case of a subcontractor whose claim is not measured by his contract with the general contractor, but by the value of his work performed or materials furnished.[80]

g. Lien Claim or Notice and Filing Thereof. The evidence must be sufficient to support a finding that a lien notice was given or claim filed such as the statute requires,[81] unless the fact is admitted;[82] that it was served as the statute pro-

not be paid for if it leaked. That there was damage as found by reason of poor material and workmanship in excess of the amount due on the contract. Fletcher *v.* Sandusky, 83 S. W. 644, 26 Ky. L. Rep. 1232. That defendant, the original contractor, was justified in preventing plaintiff, a subcontractor, from continuing work on account of defects in that already done. McLoughlin *v.* Sayle, 190 Mass. 583, 77 N. E. 639.

78. See Huetter *v.* Redhead, 31 Wash. 320, 71 Pac. 1016, where, in an action to enforce a mechanic's lien for labor and material put into a building prior to the rescission of a building contract, the testimony of the superintending architect that on the date of the rescission he made an estimate of all the work done and materials furnished and put into the building and that the reasonable value thereof according to the contract price was fifteen thousand one hundred and ninety-three dollars, to which should be added certain extras worth six hundred and eighty-nine dollars and twenty-eight cents, for which plaintiff was entitled under the contract, was held sufficient evidence, uncontradicted, to show that the estimate was based on the contract price and not on a *quantum meruit*.

Architect's certificate.—If the building contract stipulates that the architect's certificate shall be conclusive evidence of the right to a lien, no further evidence is required if the certificate is unimpeached. Snaith *v.* Smith, 5 Misc. (N. Y.) 593, 25 N. Y. Suppl. 513 [*affirmed* in 7 Misc. 37, 27 N. Y. Suppl. 379].

79. See Cline *v.* Shell, 43 Oreg. 372, 73 Pac. 12, where the evidence was held sufficient to support a finding of the reasonable value of materials furnished.

Wilful excessive claim.— In Massachusetts, where to wilfully and knowingly claim more than was due defeated the lien under the statute, evidence that a statement of the claim filed with the register of deeds contained charges for hired labor at higher prices than plaintiff paid therefor, although to some extent explained by plaintiff's testimony, was held sufficient to support a finding that plaintiff wilfully and knowingly claimed more than was due. Walls *v.* Ducharme, 162 Mass. 432, 38 N. E. 1114.

80. Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127. See also Bender *v.* Stettinius, 10 Ohio Dec. (Reprint) 186, 19 Cinc. L. Bul. 163, holding that the mere fact that the head contractor does not dispute the subcontractor's claim does not make it *prima facie* correct. And see *supra*, IV, A, 1, b.

Contract price in absence of objection.— Where the notice of mechanic's lien received in evidence in a suit to foreclose the same states the amount due, and the contract price for the material is proven, this is sufficient as to the value of the materials, where no question of its sufficiency is raised in the trial court. Wheeler *v.* Ralph, 4 Wash. St. 617, 30 Pac. 709.

Work or material for different jobs.— Where a subcontractor works on or furnishes material for separate houses under one contract with the original contractor and for one contract sum, in order to enforce his lien against one of the houses and the lot upon which it stands, the evidence must show that the amount charged against such house is the value of the labor performed upon it or of the materials furnished for it, or an estimate made by some method or plan which will produce a certain definite result; mere approximation or guess work will not suffice to establish the lien. Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127 [*followed* in Hines *v.* Cochran, 44 Nebr. 12, 62 N. W. 299]; Heald *v.* Hodder, 5 Wash. 677, 32 Pac. 728.

Application of payments see Prince *v.* Neal-Millard Co., 124 Ga. 884, 53 S. E. 761 (where the evidence was held sufficient to support a finding that money paid to the contractor was not applied by him in satisfaction of plaintiff's claim); Central Planing Mill, etc., Co. *v.* Betz, 92 S. W. 591, 29 Ky. L. Rep. 252 (where the evidence was held sufficient to show that payments, made by the contractor to a materialman who had furnished materials for several houses which the former was building, out of the proceeds of defendant's checks, should be applied to the payment of bills for materials furnished for defendant's house).

81. Reed *v.* Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

Seasonable receipt of notice may appear inferentially.— Miller *v.* Hoffman, 26 Mo. App. 199.

Formal defects must be specifically objected to when a certified copy of a notice of lien is introduced in evidence. Hunter *v.* Walter, 12 N. Y. Suppl. 60 [*affirmed* in 128 N. Y. 668, 29 N. E. 145].

82. Lewis *v.* Saylors, 73 Iowa 504, 35 N. W. 601, holding that the sworn statement need not be introduced to prove that it was filed, where it was admitted on the trial that the copy of the account attached to the petition as an exhibit was a copy of the statement of the account filed with the clerk, and that the

vides;[83] that it was filed within the time prescribed,[84] which, however, may sufficiently appear from an attached certificate of the custodian of the record,[85] or from the indorsement of the clerk of the filing.[86] But the statement itself is held to be at most only evidence of its filing and of its own contents as touching its own sufficiency.[87]

K. Trial and Procedure — 1. Appointment of Receiver. It has been held that in the absence of any statutory provision authorizing it to be done, the complainant is not entitled to the appointment of a receiver of the rents and profits *pendente lite*.[88]

2. Dismissal. The courts have a general control over lien actions pending therein and may direct their discontinuance upon grounds applicable to the dismissal of other actions;[89] but the action cannot be dismissed so as to affect the right of a defendant, who has set up in his answer a lien claim against his co-defendants, to a trial,[90] and if a personal judgment can be recovered in the lien proceeding the waiver of the lien is no ground for dismissal of the complaint.[91]

same was sworn to and claimed a mechanic's lien.

83. Ponti *v.* Eckels, (Wis. 1906) 108 N. W. 62, where the evidence was held to show that the owner's agent was known to the subcontractors to be in the county, and could be found by them, so that they were not excused from the service of notice under a statute requiring notice to be given the owner or his agent if to be found in the county, and if neither can be found by filing the notice in the office of the clerk of circuit court.

Authority of agent to make and file the claim was held to be sufficiently shown in Hine *v.* Vanderbeek, 56 N. Y. App. Div. 621, 67 N. Y. Suppl. 801 [*affirmed* in 170 N. Y. 580, 63 N. E. 1118].

84. Hunter *v.* Walter, 12 N. Y. Suppl. 60 [*affirmed* in 128 N. Y. 668, 29 N. E. 145], holding that where plaintiff's counsel, in offering proof of the notice of lien, stated that it was filed on a certain day, and no proof of said date of filing was given, but the notice claimed interest from a previous date, and was itself dated the day before the date of filing stated, and a copy was served on the owner the next day thereafter, in the absence of any specific objection for want of proof of the date, the referee was justified in finding the notice to have been filed on the day stated by counsel. See also *supra*, VIII, J, 3, d.

85. Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 32 Pac. 729, where the original lien notices, with the auditor's certificate of recording, and an additional certificate that they are "as the same appear of record" was held sufficient.

86. Bruce *v.* Hoos, 48 Mo. App. 161, where the lien account and affidavit were on separate pieces of paper, but tacked together, folded so that the paper upon which the affidavit was written came upon the outside, and upon this paper was indorsed the clerk's file, and it was held that the time of filing sufficiently appeared.

Error in indorsement.— Although the indorsement made by the clerk upon the regular account required by the statute to perfect a mechanic's lien will be *prima facie* evidence as to the date of the filing, it will nevertheless be competent to show that he erred in this respect, and if the fact clearly appears it is within the province of the court before whom the suit is tried to make the correction. Grubbs *v.* Cones, 57 Mo. 83.

87. Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9; Urlau *v.* Rube, 63 Nebr. 883, 89 N. W. 427; Wakefield *v.* Latey, 39 Nebr. 285, 57 N. W. 1002; Hassett *v.* Curtis, 20 Nebr. 162, 29 N. W. 295.

88. Stone *v.* Tyler, 173 Ill. 147, 50 N. E. 688; Meyer *v.* Seehald, 11 Abb. Pr. N. S. (N. Y.) 326 note. But see Webb *v.* Van Zandt, 16 Abb. Pr. (N. Y.) 314 note, where a receiver of rents was appointed on affidavits of inadequacy of security.

89. McGuckin *v.* Coulter, 33 N. Y. Super. Ct. 324, 10 Abb. Pr. N. S. 128, where, however, it was held improper to dismiss upon *ex parte* affidavits touching material facts involved in the merits.

Striking off lien see *supra*, III, C, 16.

90. Hinkle *v.* Sullivan, 108 N. Y. App. Div. 316, 95 N. Y. Suppl. 788, where a defendant in a lien proceeding served an answer setting up his lien claim against his co-defendants, under statutory provisions requiring the claims of such defendants to be determined, and no notice of trial was served on him, and a dismissal procured by his co-defendants because plaintiff's claim had been settled was set aside. See also *supra*, VIII, D, 5, b.

Dismissal by plaintiff.— But where the answer merely affects the validity of the lien and there is no affirmative relief demanded, the case may be dismissed on plaintiff's application, after the trial has begun and part of plaintiff's evidence has been introduced. Althen *v.* Tarbox, 48 Minn. 1, 50 N. W. 828. See also Scoville *v.* Chapman, 17 Ind. 470, where after jury sworn and evidence offered plaintiff was permitted to dismiss as to certain defendants so far as it was sought to obtain a personal judgment against them, and to retain them as defendants so far as it was sought to enforce the lien on the premises.

91. Snaith *v.* Smith, 7 Misc. (N. Y.) 37,

3. Notice of Trial.[92] A notice of trial required by a local statute is necessary in order to bring the issues involved regularly to trial.[93]

4. Conduct of Trial — a. In General. The practice in ordinary suits and actions is pursued generally after issue, although peculiar requirements may govern up to that stage.[94] Where there is an issue of fact involved, the court cannot enter a decree without having testimony, even though defendant should not contest.[95]

b. Reference. As in other cases, references are had in mechanics' lien proceedings, to referees, for the purpose of hearing and determining the issues,[96] or to auditors, masters, and the like, to take proof and state the accounts and to ascertain and report particular facts.[97] Upon a reference to ascertain claims and report on liens and their priorities, the parties are entitled to notice of the time and place for the hearing of proofs;[98] but one who suffers a petition to be taken as confessed is not entitled to notice of the taking of testimony before the master,[99] and if he does not except to the report he cannot question the master's conclusion of fact as therein contained.[1]

c. Time of Trial and Continuance. It is substantial error to force a defend-

27 N. Y. Suppl. 379. See also *supra*, VIII, A, 3; VIII, I, 5.

92. Notice of trial generally see Trial.

93. Hinkle *v.* Sullivan, 108 N. Y. App. Div. 316, 95 N. Y. Suppl. 788; Mahoney *v.* McWalters, 91 Hun (N. Y.) 247, 36 N. Y Suppl. 149.

94. See *supra*, VIII, A, 1.

Consolidation see *supra*, VIII, D, 2.

Right to jury trial see Juries, 24 Cyc. 116.

95. McConnell *v.* Bryant, 38 Ga. 639.

Where an affidavit of defense is on file judgment cannot be entered for plaintiff in disregard of such affidavit on the ground that it was improperly filed, without first testing the regularity of the affidavit by an appropriate motion to remove it from the file. Wilkinson *v.* Brice, 148 Pa. St. 153, 23 Atl. 982.

96. Kent *v.* Brown, 59 N. H. 236 (where the question decided was held to be a mixed question of law and fact so that the referee's decision would not be disturbed in the absence of a misapplication of the law); Schaettler *v.* Gardiner, 4 Daly (N. Y.) 56, 41 How. Pr. 243.

Pending such reference the court cannot discharge a lien upon an application based upon *ex parte* affidavits touching the merits. McGuckin *v.* Coulter, 33 N. Y. Super. Ct. 324, 10 Abb. Pr. N. S. 128.

Where a reference by agreement is entered into by the parties, in which they submit all matters in controversy, a question of law and fact not raised by proper plea or before the referee cannot be raised thereafter. Scott *v.* Roberts, 7 Pa. Dist. 606, 21 Pa. Co. Ct. 491.

For award under a compulsory arbitration law held to be good, which made the unpaid balance of past-due instalments and the proportion of the current instalments to the date of the award immediately payable, and directing the balance to be paid when the last instalment should become due see Beegle *v.* McGarry, 1 Lack. Leg. N. (Pa.) 131.

97. Corbett *v.* Greenlaw, 117 Mass. 167 (holding that upon reference of a petition, an auditor who has authority to pass upon any fact pertinent to the inquiry may determine whether the petitioner's certificate was seasonably filed and whether he wilfully claimed more than was due as well as all matters of fact legitimately involved in the question of the lien); Yohe's Appeal, 55 Pa. St. 121 (where the question whether when an old building is renewed by repairs it is "an erection or construction" is properly referred to a commissioner); Pairo *v.* Bethell, 75 Va. 825.

Survey by commissioner.— A commissioner may be appointed by the court to survey and fix the locality of the precise acre of land to be subjected so as to determine what portion of a larger lot shall be taken as the acre to be subjected. Oster *v.* Rabenean, 46 Mo. 595; Rall *v.* McCrary, 45 Mo. App. 365. In Pennsylvania commissioners were appointed under statute to ascertain and designate the boundaries of the lot or curtilage appurtenant to a building on which a lien was claimed. Menner *v.* Nichols, 5 Pa. Cas. 356, 8 Atl. 647.

98. Carl *v.* Grosse, 65 S. W. 604, 23 Ky. L. Rep. 1586.

Time of view of boundary commissioners.— But in Menner *v.* Nichols, 5 Pa. Cas. 356, 8 Atl. 647, the statute requiring notice to be given of the appointment of commissioners to ascertain and designate the boundaries of the lot or curtilage appurtenant to a building was held not to require notice of the time of view.

99. Fergus *v.* Chicago Sash, etc., Co., 64 Ill. App. 364.

1. Fergus *v.* Chicago Sash, etc., Co., 64 Ill. App. 364.

Exception to referee's report.— In Schaettler *v.* Gardiner, 4 Daly (N. Y.) 56, 41 How. Pr. 243, it was held that the supreme court rule requiring exceptions to the referee's report to be heard in the first instance at the special term did not apply to a reference of the issues in proceedings for foreclosure of mechanics' liens.

ant, over his objection, into a trial at a term prior to that at which the action first becomes triable.[2] The hearing may be postponed from time to time,[3] and the court may grant a continuance for the purpose of bringing in parties not served.[4]

d. Reception of Evidence and Objections Thereto.[5] Evidence that is proper to be received may be introduced out of its regular order, at the discretion of the trial judge.[6] And the general rule is applied that in order to show error objections to evidence must be made when it is offered and must be specific.[7]

e. Submission of Issues to Jury. If the action is treated as a common-law action, or the statute specifically so says, a trial by jury is had, otherwise it is treated as a chancery action, and no jury is had, unless the judge makes up an issue to be submitted to the jury,[8] which is within the sound discretion of the court,[9] the verdict being advisory only.[10]

5. Questions of Law and Fact — a. In General. Where there is evidence tending to support the claimants' cause, notwithstanding there may be evidence to the contrary the questions so raised must be left to the triers of the facts.[11] The question of lien or no lien, where it depends upon questions of controverted facts,[12] whether or not the claimant has performed those things that bring him

2. Rice *v.* Simpson, 26 Kan. 143, where the error was in forcing a party to trial at the term at which he was made a party and filed his answer.

3. Lester *v.* Pedigo, 84 Va. 309, 4 S. E. 703, where upon service of a notice of lien and of motion to enforce the same at the first day of the next term, the motion was called and docketed on the first day when the court began its term, and was postponed from day to day to a subsequent day of the term.

4. Schulenburg *v.* Werner, 6 Mo. App. 292, holding that a statutory provision declaring that no delay should be granted for such purpose at the second term did not apply to a mechanic's lien case where no trial could be had with defendants who were before the court and a dismissal would operate to bar a recovery on the lien.

Where one of joint parties was served so that the court could proceed to judgment against all so as to bind their joint property, as in a case of joint general contractors, the court may in its discretion refuse to continue for the purpose of bringing in one of the contractors who was not served. Julius *v.* Callahan, 63 Minn. 154, 65 N. W. 267.

5. View of jury.— Under a statute providing that where a jury is called in a mechanic's lien suit their verdict is as conclusive as in other cases, the jury may view the premises without the judge's presence. Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331.

6. Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

After verdict finding the amount of indebtedness, it is not error to admit evidence as to lien, etc., since the existence of the lien and priorities of the lien-holders are questions for the court. Carr *v.* Hooper, 48 Kan. 253, 29 Pac. 398.

7. *California.*—Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466, general objection to notice of lien as variant from pleading held insufficient.

Missouri.— Hall *v.* St. Louis Mfg. Co., 22 Mo. App. 33, refusing to disturb a verdict as excessive where the lien account, claiming a still larger sum, was admitted without objection, and no specific item thereof was pointed out to the trial court as not a proper subject of lien.

Montana.— Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

New York.— Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674 (party confined to precise objection made on the trial); Hunter *v.* Walter, 12 N. Y. Suppl. 60 [*affirmed* in 128 N. Y. 668, 29 N. E. 145, 1030] (general objection not reaching informality in certification of lien notice).

Texas.— Texas Land Mortg. Bank *v.* Quanah Hotel Co., (Civ. App. 1895) 32 S. W. 573.

Washington.— Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144, objection to lien claim.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 580.

8. Garrett *v.* Stevenson, 8 Ill. 261.

Right to trial by jury see Juries, 24 Cyc. 116.

9. Bradbury *v.* Butler, 1 Colo. App. 430, 29 Pac. 463; Pairo *v.* Bethell, 75 Va. 825, as to the practice on the statutory summary motion which is in the nature of an equitable proceeding.

By statute in Wisconsin either party may demand the submission of issues of fact to a jury, but in the absence of such demand the court may determine the issues (Willer *v.* Bergenthal, 50 Wis. 474, 7 N. W. 352), or may refer such issues of fact as it may deem proper (Bartlett *v.* Clough, 94 Wis. 196, 68 N. W. 875; Huse *v.* Washburn, 59 Wis. 414, 18 N. W. 341). In Massachusetts, by statute, the whole case is not submitted to the jury as in ordinary civil actions, but only such material questions of fact as arise in the case are to be submitted upon a question stated, or an issue framed, or otherwise, as the court may order. Ward *v.* Edmunds, 110 Mass. 340.

10. See *infra*, VIII, K, 7, b.

11. Kelly *v.* McGehee, 137 Pa. St. 443, 20 Atl. 623.

12. Kelly *v.* Rowane, 33 Mo. App. 440.

within the statutory provisions creating a lien,[13] whether materials were furnished upon the credit of the contractor or the building,[14] what materials could have been used in the building,[15] whether the lien claim has been paid,[16] whether a credit was knowingly and wilfully omitted from the claimant's lien account,[17] the time when the work was commenced,[18] what constitutes a completion of the building under particular circumstances, in arriving at the time of such completion for the purposes of the statutory provision as to limitation,[19] whether a lien has been filed within the time required by law, where the evidence is conflicting or there is some evidence of the seasonable filing,[20] or whether an assignee who is also surety on the contractor's bond is finishing the building as assignee or on his individual credit are all questions of fact, to be decided by the triers of facts.[21] But the jury have nothing to do with the question whether respondents are proper parties.[22] And if the particular facts are undisputed or ascertained it is for the court to determine the ultimate fact,[23] and if there is no evidence of an essential fact without proof of which the claimant is not entitled to a lien, a demurrer to the evidence should be sustained.[24]

b. Contract, Terms, and Performance. Whether materials furnished or labor performed were so furnished or performed under one or separate contracts,[25] or a provision of the contract was waived,[26] or the original contract has been waived and a new one substituted,[27] or in what kind of pay, cash or property the con-

Instantaneous seizin.— Upon the question whether the materialman has a lien by reason of his furnishing under a contract with one who was not at the time the owner, but who afterward acquired title and simultaneously with the delivery to him of his deed executed a mortgage on the property, the decision depends upon whether the deed and mortgage are parts of one transaction in which the seizin was instantaneous; if there is no dispute in regard to the facts the question is for the court, otherwise it is for the jury under suitable instructions. Sprague *v.* Brown, 178 Mass. 220, 59 N. E. 631.

13. Treusch *v.* Shryock, 51 Md. 162; Williams *v.* Porter, 51 Mo. 441; Moore *v.* Carter, 146 Pa. St. 492, 23 Atl. 243.

14. Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675; Rider-Ericsson Engine Co. *v.* Fredericks, 25 Pa. Super. Ct. 72.

15. Coverdill *v.* Heath, 12 Pa. Super. Ct. 15.

16. Easterling *v.* Shaifer, (Miss. 1905) 38 So. 230; Stoke *v.* McCullough, 107 Pa. St. 39. See also Corbett *v.* Greenlaw, 117 Mass. 167.

17. Burrell *v.* Way, 176 Mass. 164, 57 N. E. 335; Corbett *v.* Greenlaw, 117 Mass. 167. See also Buck *v.* Hall, 170 Mass. 419, 49 N. E. 658, holding that where an auditor found that "petitioner made a just and true statement of the amount due him for materials furnished," with certain exceptions, such finding does not show, *prima facie*, that petitioner's statement was not just and true.

18. Kelly *v.* Rosenstock, 45 Md. 389.

19. Cole *v.* Barron, 8 Mo. App. 509, holding that where buildings are built under a general and informal agreement without specifications, whether coal bins therein, built immediately on completion of the houses, are a part thereof, so as to fix the time when limitations will begin to run against the lien, is a question for the jury under proper instructions. See also Presbyterian Church *v.* Allison, 10 Pa. St. 413.

20. Holden *v.* Winslow, 18 Pa. St. 160; Galland *v.* Schroeder, 9 Pa. Cas. 497, 12 Atl. 866.

21. McChesney *v.* Syracuse, 75 Hun (N. Y.) 503, 27 N. Y. Suppl. 508.

22. Van Billiard *v.* Nace, 1 Grant (Pa.) 233.

23. Porter *v.* Weightman, 29 Pa. Super. Ct. 488.

24. Hengstenberg *v.* Hoyt, 109 Mo. App. 622, 83 S. W. 539. In Williams *v.* Porter, 51 Mo. 441, it is held that where the lien statement fails to describe the property sufficiently the question whether there is a lien should be submitted to the jury with an instruction that there was no lien to enforce. The question of lien or no lien is a question of law where the facts are conceded. Kelly *v.* Rowane, 33 Mo. App. 440.

25. Flanagan *v.* O'Connell, 88 Mo. App. 1; Western Iron Works *v.* Montana Pulp, etc., Co., 30 Mont. 550, 77 Pac. 413; Helena Steam-Heating, etc., Co. *v.* Wells, 16 Mont. 65, 40 Pac. 78; Fleck *v.* Collins, 28 Pa. Super. Ct. 443; E. M. Fish Co. *v.* Young, 127 Wis. 149, 106 N. W. 795.

Separate items constituting one debt.— Whether an item of work done within four months from the filing of a claim for a lien is so connected with the earlier items that together they constitute one debt is for the jury, where such an inference is permissible under the testimony. Downingtown Mfg. Co. *v.* Franklin Paper Mills, 63 N. J. L. 32, 42 Atl. 705.

26. Moore *v.* Carter, 146 Pa. St. 492, 23 Atl. 243.

27. Wahlstrom *v.* Trulson, 165 Mass. 429, 43 N. E. 183.

Substitution of parol for written contract. — Whether a parol contract has been made

tractor was to be paid ;[28] whether a contract between the owner and builder was at an end when the materials for which the lien is claimed were furnished the latter ;[29] or whether the contract was performed according to its terms are questions of fact.[30]

c. Character of Building or Work. Whether under particular circumstances a machine became a permanent addition to the freehold so as to be a fixture for manufacturing purposes within the meaning of the lien law is held to be a question of fact for the jury,[31] as is also the question whether a particular improvement is or is not a constituent part of a building, if it is not admittedly or palpably so,[32] and whether there was a substantially new construction or a mere repair of an old building.[33]

d. Description or Identity of Property. What land is covered by the lien claim,[34] the identification of the property from the description given,[35] and the sufficiency of the description to identify the property are questions ordinarily of fact for the jury.[36]

6. INSTRUCTIONS. In the foreclosure of mechanics' liens the rule is the same as in other cases, that where the matter is submitted to a jury questions of law are for the court, and those of fact for the jury; if there is evidence upon which issues may be found the court cannot give a binding instruction but should submit the issues to the jury by instructions,[37] which enunciate the principles of law applicable to the issues under the pleadings and the evidence,[38] and governing

since the written one is a question of fact for the jury. Buckley *v.* Hann, 68 N. J. L. 624, 54 Atl. 825.

28. Pierce *v.* Marple, 148 Pa. St. 69, 23 Atl. 1008, 33 Am. St. Rep. 808.

29. Treusch *v.* Shryock, 51 Md. 162.

30. Goodfellow *v.* Manning, 148 Pa. St. 96, 23 Atl. 1052.

Good faith.— Whether the last item of work was done in good faith in performance of the contract is a question of fact. Bankers' Bldg., etc., Assoc. *v.* Williams, 4 Nebr. (Unoff.) 795, 96 N. W. 655.

31. American Brick, etc., Co. *v.* Drinkhouse, 59 N. J. L. 462, 36 Atl. 1034.

32. Barber *v.* Roth, 19 Pa. Co. Ct. 366, as to a lightning rod, which is said not to be like a wall, roof, etc.

33. Gerry *v.* Painter, 9 Pa. Super. Ct. 150, 43 Wkly. Notes Cas. 275; Grable *v.* Helman, 5 Pa. Super. Ct. 324.

If the facts are ascertained or admitted the question whether the improvement constitutes a new structure is for the court. Warren *v.* Freeman, 187 Pa. St. 455, 41 Atl. 290, 67 Am. St. Rep. 583; Patterson *v.* Frazier, 123 Pa. St. 414, 16 Atl. 477; Norris' Appeal, 30 Pa. St. 122; Porter *v.* Weightman, 29 Pa. Super. Ct. 488; McDowell *v.* Riley, 16 Pa. Super. Ct. 515, 8 Del. Co. 181; Mehl *v.* Fisher, 13 Pa. Super. Ct. 330; Goeringer *v.* Schappert, 10 Kulp (Pa.) 95; Smith *v.* Nelson, 2 Phila. (Pa.) 113. If it is difficult to decide it is for the jury, but in palpable cases it is for the court to decide. Armstrong *v.* Ware, 20 Pa. St. 519; Furman *v.* Masson, 6 Phila. (Pa.) 222.

Mixed question of law and fact.— Whether a furnace and cistern were furnished for erecting, altering, or repairing a house, so that a lien attaches for the price, is a mixed question of law and fact; and therefore a referee's decision thereon will not ordinarily be disturbed, unless he misapplied the law. Kent *v.* Brown, 59 N. H. 236. So it is held that whether, when an old building is renewed by considerable repairs, it is "an erection or construction," is a mixed question of law and fact, and is properly referred to a commissioner competent to pass upon both law and fact. Yohe's Appeal, 55 Pa. St. 121. And whether the structure is a single or a double building, or one building or two, is a mixed question of law and fact; and, when it depends upon disputed facts, it is for the jury. Munger *v.* Silsbee, 64 Pa. St. 454.

34. James *v.* Van Horn, 39 N. J. L. 353, holding that whether a tract of fifty acres was surrounded by an inclosure separating it from the owner's adjoining lands so as to make the statutory provision inapplicable which declares that where there is no separation of such lots if the land is mapped for building lots the curtilage shall include the building lots so mapped upon which the building is erected, and if not mapped the curtilage shall not exceed half an acre, is a question of fact.

35. Kennedy *v.* House, 41 Pa. St. 39, 80 Am. Dec. 594; Ewing *v.* Barras, 4 Watts & S. (Pa.) 467; Hoffmaster *v.* Knupp, 15 Pa. Co. Ct. 140.

36. Dodge *v.* Hall, 168 Mass. 435, 47 N. E. 110; Brown *v.* West, 7 Pa. Co. Ct. 619.

37. Moore *v.* Carter, 146 Pa. St. 492, 23 Atl. 243; Kelly *v.* McGehee, 137 Pa. St. 443, 20 Atl. 623; Cote *v.* Schoen, 38 Wkly. Notes Cas. (Pa.) 382. See also *supra*, VIII, K, 5, a.

38. See Ittner *v.* Hughes, 133 Mo. 679, 34 S. W. 1110; Moore *v.* Carter, 146 Pa. St. 492, 23 Atl. 243 (where an instruction that if "changes in the original contract were plain and palpable to the defendants, the silence of

the whole case so presented.[39] The instruction should not proceed upon a theory or submit issues not warranted by the pleadings and the evidence.[40] An instruction assuming a material fact which it is the province of the jury to find is erroneous,[41] as well as an instruction which authorizes a finding without reference to a material fact as to which there is competent evidence in the record,[42] or an instruction which ignores a statutory requirement for the acquisition of a lien and permits a recovery upon a finding of facts which falls short of those necessary to the lien right.[43] But an instruction need not submit to the consideration of the jury matters about which there is no controversy,[44] and if the evidence on a material issue is uncontradicted it is proper to instruct the jury to find the issue in accord-

defendants is some presumptive evidence of a previous mutual consent," is erroneous since it authorizes a finding of such consent whether the changes were made in the presence of and noticed by defendant or not); Cote *v.* Schoen, 38 Wkly. Notes Cas. (Pa.) 382 (where it was held that in charging a jury that if the contract contained a certain provision against liens plaintiff was not entitled to a lien, an additional statement of the principle upon which the rule announced was based could not be said to be misleading).

39. Heiman *v.* Schrœder, 74 Ill. 158 (holding that where there was evidence that the work was not completed within the required time an instruction that if plaintiff was hindered and prevented by defendant from finishing the work he was not precluded from recovery is not objectionable as authorizing a recovery for all the work contracted to be done, including that which was not done by the claimant); Kelly *v.* Rowane, 33 Mo. App. 440 (holding that where the only issue was whether plaintiff was prevented from completing the contract, upon which issue he had the burden, an instruction that if the work was done under contract and the charges were reasonable and fair and plaintiff "was prevented by defendant from completing the contract, they will find for the plaintiff," etc., did not exclude from the consideration of the jury defendant's claim that he did not discharge plaintiff). See also General Fire Extinguisher Co. *v.* Schwartz Bros. Comm. Co., 165 Mo. 171, 65 S. W. 318; Coverdill *v.* Heath, 12 Pa. Super. Ct. 15, for sufficiency of instructions as to the consideration of various terms employed therein.

Sufficiency of the instruction in respect to form is governed by general rules. See Goldstein *v.* Leake, 138 Ala. 573, 36 So. 458.

40. Goldstein *v.* Leake, 138 Ala. 573, 36 So. 458; Westhus *v.* Springmeyer, 52 Mo. 220; Trippensee *v.* Braun, 104 Mo. App. 628, 78 S. W. 674. See also Stillings *v.* Haggerty, 12 N. Y. Suppl. 813 (where a request to charge that there was no evidence to show that plaintiff's claim against the owner was inconsistent with his claim against the contractor was immaterial since the issue was whether plaintiff was estopped from enforcing his claim); Girard Point Storage Co. *v.* Riehle, 7 Pa. Cas. 594, 12 Atl. 172 (where the question involved was whether scales were properly constructed and, the jury having found for plaintiffs, it was held that error was not well assigned on a refusal to instruct the jury that if the failure to show accurate results in weighing tests was due to defects in the foundations of the scales the fault was that of an independent contractor and defendant was not liable for the defect).

Performance of contract.— Where a contract made by one of two partners was sued on by both, the contract being attached to the pleading as a part thereof, the instruction basing plaintiff's right to recover on performance as "required by the contract" is not open to the objection that it should have been "as alleged in the petition." Such instruction does not ignore the rule that the party must recover according to the allegation of his pleading, and if the objection sought to be raised was upon the variance arising from the fact that the contract was made by one of the parties only, it should have been urged as an objection to the evidence. Lombard *v.* Johnson, 76 Ill. 599.

41. Okisko Co. *v.* Matthews, 3 Md. 168, where a prayer that if the claim was filed more than six months after all the materials were furnished the verdict must be for defendant was properly refused because the lien continued until six months after the completion of the work, and the prayer assumed that the building had been completed more than six months before the filing of the claim, whereas it should have been so framed as to present both alternatives.

42. Williamson *v.* Smith, (Tex. Civ. App. 1904) 79 S. W. 51.

43. Hall *v.* Johnson, 57 Mo. 521.

44. Kelly *v.* Rowane, 33 Mo. App. 440, holding that if there is no controversy as to the sufficiency of steps taken to secure a lien, an instruction that plaintiff was entitled to a lien if he was entitled to recovery was not erroneous.

Misleading instruction.— Where one clause of the charge properly assumed that there was a contract, both parties having testified to the fact, and another paragraph instructed that if there was a misunderstanding between the parties as to the terms of the contract, in other words, if they found no contract was made, the liability would be for the reasonable value of the labor and material, these were held to be irreconcilable and calculated to confound and mislead the jury. Williamson *v.* Smith, (Tex. Civ. App. 1904) 79 S. W. 51.

ance with such evidence if they believe it.[45] An instruction which imposes too great a burden of proof upon a party is erroneous.[46]

7. Verdict and Findings — a. Necessity, Form, and Requisites — (I) *In General.* Under some statutes there must be a finding that plaintiff is entitled to a lien where the lien is in issue, and if no issue relating to the right to a lien is submitted to[47] or found by the jury, a judgment cannot be rendered declaring the lien,[48] although where there is a trial by jury as in ordinary actions, and the statute does not require special findings in such cases, a general verdict is held sufficient.[49] It is not necessary or proper that the finding should narrate the evidence upon which the result is based,[50] and a verdict finding a lien need not direct a foreclosure;[51] but facts must be found as such, as in other cases, and if cast among conclusions of law the finding cannot be considered to supply any defect in the special findings of facts.[52]

(II) *Sufficiency* — (A) *In General.* Findings are sufficient which show the facts essential to the support of the judgment.[53] But the court must ascertain

45. Wood *v.* Atlantic, etc., R. Co., 131 N. C. 48, 42 S. E. 462, where under the statutory rule that a subcontractor's right depended upon an indebtedness from the owner to the contractor at the time of the service of the subcontractor's notice of claim on the owner, the uncontradicted evidence showing that at such time the contractor had been overpaid for the building, it was held proper to instruct the jury that if they believed such evidence they should find that defendant was not indebted to plaintiff.

46. Moreno *v.* Spencer, (Tex. Civ. App. 1904) 82 S. W. 1054, where defendant was required to show a defense by clear and convincing evidence to the satisfaction of the jury instead of by a preponderance of the evidence only.

47. Brooks *v.* Blackwell, 76 Mo. 309.

48. Goldstein *v.* Leake, 138 Ala. 573, 36 So. 458; Florence Bldg., etc., Assoc. *v.* Schall, 107 Ala. 531, 18 So. 108; Brooks *v.* Blackwell, 76 Mo. 309. See also Ryals *v.* Smith, 102 Ga. 768, 29 S. E. 968.

Contract for pay in property.—Defendant should be allowed to show that the contractor agreed to take his pay in property, and that defendant has always been ready to pay in that way, and to have that issue submitted to the jury for a special verdict, and if the jury finds the fact to be so it should be found specially. Pierce *v.* Marple, 148 Pa. St. 69, 23 Atl. 1008, 33 Am. St. Rep. 808.

Where the finding is by a jury in a court of equity, although it may be irregular, the court may award judgment (see *infra*, VIII, K, 7, b), as justice and the facts determine, and may put the verdict in form, as by finding in the decree that there is due from the owner to the contractor the aggregate of both sums, out of which aggregate there is due from the contractor to the subcontractor the sum so found by the verdict to be due to him, where the jury finds that there is due from the owner of a building to the contractor a certain sum, and from said contractor to a subcontractor, who was a party to the suit, another sum. Schnell *v.* Clements, 73 Ill. 613.

49. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 29, holding that where the parties stipulate for a trial by jury upon the issues made by the pleadings, the verdict of the jury and judgment of the court will stand, notwithstanding the fact that the mode of trial adopted by the parties may not in all respects be in accord with the ordinary practice in such case; that a general verdict for plaintiff assessing his damages at a specified sum, including a finding "that he is entitled to a lien therefor," is not objectionable. So in Bedsole *v.* Peters, 79 Ala. 133, where the verdict found "the issues in favor of the plaintiff, $100," it was held informal but sufficient to justify the court in declaring the lien to exist as matter of law.

50. Marble Lime Co. *v.* Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164.

The effect of merely reciting the evidence on a material point without finding the fact itself is that the point must be resolved against the party who had the burden of proof as to such fact. Young *v.* Berger, 132 Ind. 530, 32 N. E. 318.

51. Warner *v.* Scottish Mortg., etc., Co., (Tex. Civ. App. 1894) 27 S. W. 817.

52. Minnich *v.* Darling, 8 Ind. App. 539, 36 N. E. 173.

53. See Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503 (where over the objection that the court did not find that defendant was indebted to plaintiff or that he was entitled to judgment against defendant but only that he was entitled to judgment generally and a lien on the premises, it was held that a finding that plaintiff furnished the contractor with materials to a certain amount, which were used in the construction of the building; that sufficient notice was given to the owner; and that the owner was indebted to the contractor in a sum exceeding the value of the said materials was sufficient); Smith *v.* Coe, 29 N. Y. 666 (holding that a finding that at the time the lien was filed there was due from the owner of the building to the contractor a larger sum than was demanded by plaintiff, and as a conclusion of law that a specified sum is due to plaintiff, for which he has a lien on the premises, is sufficient, in

such facts as the particular statute requires,[54] and the findings must show the existence of the conditions which, under the statute, justify the conclusion of the validity of the lien claimed, as furnishing under a contract with the owner,[55] that the statutory notice was given,[56] a furnishing of materials for the purpose of being used in the particular building,[57] or that they were so used,[58] and the price or value of the work or material.[59]

(B) *Responsiveness to Issues.* A verdict or finding that does not respond to the issues made in the case cannot be sustained,[60] and a request by defendant for

an action by a subcontractor, and that if the owner desired a finding of controverted facts as between him and the contractor there should have been a request for such finding).

54. See the cases cited in the notes following.

Value of land and improvements separately. — Under a statute giving the mechanic a lien superior to a prior mortgage as to the improvements and second as to the land, the court must find the value of the land and of the improvements separately. Miller *v.* Tickner, 7 Ill. App. 393.

Personal judgment. — If the lien cannot be enforced under the findings of fact relating to the lien, a personal judgment cannot be rendered if no facts are found to authorize such a judgment. Meehan *v.* Zeh, 77 Minn. 63, 79 N. W. 655.

55. Minnich *v.* Darling, 8 Ind. App. 539, 36 N. E. 173, holding that in an action for material furnished the owner, findings of fact which do not show that a contract was made between plaintiff and such owner directly, or by subsequent ratification by such owner, are insufficient to support a judgment for plaintiff.

56. Young *v.* Berger, 132 Ind. 530, 32 N. E. 318, where the parties requested special findings, and it was held that when the court, instead of finding that either notice was or was not given, made a finding containing recitals of a portion of the evidence, with certain evidentiary facts, all bearing upon the question of notice, but made no finding whatever as to the facts itself, the finding must be regarded as against plaintiff upon that subject.

57. Johnson *v.* Simmons, 123 Ala. 564, 26 So. 650; Miller *v.* Fosdick, 26 Ind. App. 293, 59 N. E. 488; Jones *v.* Hall, 9 Ind. App. 458, 35 N. E. 923, 37 N. E. 25. See also for sufficient findings Premier Steel Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876; Brigham *v.* Dewald, 7 Ind. App. 115, 34 N. E. 498; Atkins *v.* Little, 17 Minn. 342; Goodrich *v.* Gillies, 62 Hun (N. Y.) 479, 17 N. Y. Suppl. 88, holding that where in an action to foreclose an alleged lien on funds in the hands of the city of New York for materials furnished a contractor in the erection of a pier, the findings failed to show that plaintiff had furnished any materials toward the performance or completion of any contract made with the city, or that any part of the materials furnished were so used; which facts are essential to the lien under the statute, a judgment for plaintiff must be reversed, the record not containing all the evidence, and the defect cannot be supplied by a statement in the lien filed that the materials were so used.

58. Wilson *v.* Nugent, 125 Cal. 280, 57 Pac. 1008.

59. Booth *v.* Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101, holding that where the contract between the builder and owner is void because not recorded, a finding of the price of materials agreed to be paid by the builder is not sufficient upon the theory of the builder's agency for the owner, but that the value must be found.

Sufficient finding. — In Brigham *v.* Dewald, 7 Ind. App. 115, 34 N. E. 498, a finding that the value of the labor and material was, as agreed, a named amount; that a named amount had been paid, leaving a stated balance due unpaid; and that such balance was "for work done and materials furnished for defendant's house," was held sufficient to show that the materials and work were of the value agreed.

60. Goldstein *v.* Leake, 138 Ala. 573, 36 So. 458; Florence Bldg., etc., Assoc. *v.* Schall, 107 Ala. 531, 18 So. 108; Gibson *v.* Wheeler, 110 Cal. 243, 42 Pac. 810; Green *v.* Chandler, 54 Cal. 626; Scheible *v.* Schickler, 63 Minn. 471, 65 N. W. 920; Hauptman *v.* Catlin, 1 E. D. Smith (N. Y.) 729.

Sufficient findings. — McClain *v.* Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182 (where in the claim the statement was that the materials were to be paid for "in cash within sixty days from time of purchase of the item, and any item not paid for within that time was to bear interest at the rate of ten per cent per annum until paid," and the agreed account read in evidence agreed with this, and the finding was precisely to the same effect, except that it omitted reference to the rate of interest, but it was held that this was in effect found in the finding that the claim — which was attached to the complaint, and the filing of which was not denied — "'contained . . . a true statement of [the] demand,'" etc.); Orlandi *v.* Gray, 125 Cal. 372, 58 Pac. 15 (holding that a finding of fact on the issue of the validity of plaintiffs' contract with the subcontractor, created by affirmative matter set up by an answer in an action to foreclose mechanics' liens, alleging that plaintiffs performed the labor and furnished the materials for the architect, who was also a subcontractor, with knowledge that he was acting both as architect and subcontractor, is not necessary where there is no claim of actual fraud or deception, and

a finding which is not within any of the issues made by the pleadings is properly refused.[61]

(c) *Indefiniteness.* The verdict must be reasonably certain and definite in the finding of particular facts.[62] And where the right to the lien depends upon the doing of a particular thing within a definite number of days after a certain event, a finding that it was done "on or about" a certain day is held to be insufficient.[63]

(d) *Contradictory Findings.* The findings of fact upon which a foreclosure is decreed must be consistent with themselves and with the theory of the case as made by the pleadings.[64]

the pleadings admit that the owner of the building was fully conversant with the fact that the architect was also a subcontractor); Shain *v.* Peterson, 99 Cal. 486, 33 Pac. 1085 (where the findings were held not contrary to admissions of the pleadings); Northwestern Loan, etc., Assoc. *v.* McPherson, 23 Ind. App. 250, 54 N. E. 130; Cole *v.* Barron, 8 Mo. App. 509 (holding that in an action by a subcontractor against the owner and contractor a verdict stating that "plaintiffs are entitled to a lien," and we "assess their damages at the sum of $565.81," is sufficiently responsive to the issues, as under the pleadings, only one of defendants could be responsible.

Answer of jury inconsistent with defense. — Where no issue of abandonment of the contract by the contractor was submitted to the jury but it appeared that the parties agreed to the answer of the jury as to the amount due the petitioner for labor and materials, in response to the issue "what amount . . . is due the petitioner for labor performed and materials furnished," such answer is inconsistent with the alleged abandonment and justifies a decree for petitioner. Rochford *v.* Rochford, 192 Mass. 231, 78 N. E. 454.

61. Fergestad *v.* Gjertsen, 46 Minn. 369, 49 N. W. 127.

62. Tisdale *v.* Alabama, etc., Lumber Co., 131 Ala. 456, 31 So. 729, where in an action by a materialman against a contractor and owner, a verdict reciting: "We the jury find for the plaintiffs and assess the damages at $395.58. We further find that the plaintiffs have a lien on the property described in the complaint, and that W. H. Tisdale [the owner] was due the contractor Moesser . . . and do hereby condemn the said property for the payment thereof," was held too indefinite as to the amount due, the contractor from the owner, and for which the latter was liable to plaintiffs, to sustain a judgment against such owner.

Reference to answer of co-defendant. — Where the complaint alleged performance of a contract which the answer denied, and a co-defendant, in whose favor a nonsuit was granted, set out in his answer defendant's full defense, in determining the special findings of the jury, both answers may be considered. Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331.

63. Cohn *v.* Wright, 89 Cal. 86, 26 Pac. 643, where the finding was that the building was completed "on or about" a certain date, with respect to the question of the time of filing of a notice of lien, the complaint having alleged that the building was completed at a certain date which was less than thirty days before the lien was filed, which allegation was denied by the answer in which it was alleged that the building was not completed until a date prior to that set up in the complaint, and which was more than thirty days before the lien was filed. But in Sturges *v.* Green, 27 Kan. 235, the finding by the verdict of a jury that the building was completed "on or about" a certain date was held sufficient, where even if the building had been completed as many as forty-seven days earlier or as many as thirteen days later than the date mentioned, the lien would have been filed in time.

64. Cawley *v.* Day, 4 S. D. 221, 56 N. W. 749.

Findings held sufficient. — Marble Lime Co. *v.* Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164 (holding that a finding in one of several consolidated actions that "the building was completed on the 2nd day of August, 1899," is not inconsistent with a finding in another of the actions that the building "was never actually completed," it appearing that, although the building was never actually completed work on it continued until July 2, 1899, from which date there was a cessation for more than thirty days, and it being clear that the real facts found were that, although the building was never actually completed, the work on it continued until July 2, 1889, from which date there was a cessation for more than thirty days, which facts under the statute constituted a completion and no harm was done by putting the finding in both forms, although one would have been sufficient); Harlan *v.* Stufflenbeem, 87 Cal. 508, 25 Pac. 686 (holding that a finding that plaintiff substantially performed the contract, and also that some small places were left unfinished which would cost about five dollars to finish properly, are not contradictory); Bergfors *v.* Caron, 190 Mass. 168, 76 N. E. 655 (holding that findings by a jury that petitioner did not fully perform his contract and that twenty-five dollars should be deducted from the price and that the value of the labor performed and materials furnished by him was one hundred and seventy-five dollars, were not inconsistent with a finding that he had attempted in good faith to perform his contract and had substantially performed it).

(E) *Construction and Interpretation.* Findings of facts made by the trial court must be construed together in determining their sufficiency.[65] A finding will be reasonably interpreted and construed according to its evident import, although it may be informal,[66] and the answer of a jury to an issue will be considered in connection with the instruction submitting it[67] or with other findings and the conceded facts,[68] and if the finding as made is to all intents and purposes equivalent to that required it will be sufficient.[69]

b. Conclusiveness. Verdicts and findings of fact are of the same effect in lien foreclosure proceedings as in other cases,[70] and in an equitable proceeding the verdict on issues submitted is advisory only as in other chancery cases.[71]

L. Judgment or Decree — 1. Form[72] and Contents — a. In General. The judgment must conform to the requirements of the statute,[73] as the lien is dependent for operation and effect upon the rendition of a judgment such as the statute directs.[74] Under some statutes the judgment enforcing a mechanic's lien must be against the debtor, as in ordinary cases, with the addition that, if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof shall be levied on the property charged with the lien,[75] and if such addition is not embodied in the judgment it is fatally defective.[76] It has been held that the judgment must be special,[77] even though the claim arises directly upon an original contract between plaintiff and the owner of the property;[78] but there is also authority for the view that the judgment may be either general or special or both.[79] Where there is a finding showing the amount due for work and materials a repetition of the statement that the sum for which the judgment is rendered is the amount due for such work and materials is

65. El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

66. Bedsole *v.* Peters, 79 Ala. 133.

67. Burke *v.* Coyne, 188 Mass. 401, 74 N. E. 942, holding that where, in submitting an issue whether there had been a strict compliance with the contract, the court instructed that the issue meant whether petitioner substantially performed his contract, and the jury answered in the negative, the conclusion to be drawn was that the jury found that he had been guilty of material deviations.

68. Moore *v.* Dugan, 179 Mass. 153, 60 N. E. 488.

69. Atkins *v.* Little, 17 Minn. 342.

Necessary inferences from the facts found may be drawn to support the conclusion. Peterson *v.* Shain, (Cal. 1893) 33 Pac. 1086; Big Horn Lumber Co. *v.* Davis, 14 Wyo. 455, 84 Pac. 900, 85 Pac. 1048, holding that a finding that a notice claimed a lien "against the said frame house and the land upon which the said house stood" implied that the house and land were properly identified in the notice.

70. See *infra*, VIII, L, 1, b.

71. Sharkey *v.* Miller, 69 Ill. 560; Garrett *v.* Stevenson, 8 Ill. 261.

Where a jury trial may be demanded by statute the verdict is of the same effect as in other actions, although the proceeding is of an equitable nature. Bentley *v.* Davidson, 74 Wis. 420, 43 N. W. 139. But where an issue is submitted by the court of its own motion in the absence of a statutory demand for such submission, the verdict is advisory. Bartlett *v.* Clough, 94 Wis. 196, 68 N. W. 875.

72. Form of judgment or decree see Sullivan *v.* Sanders, 9 Mo. App. 75; Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657.

73. O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898; Farley *v.* Cammann, 43 Mo. App. 168; Du Bay *v.* Uline, 6 Wis. 588.

A judgment in the ordinary form of a judgment of a justice of the peace in an action on a contract is in legal effect a judgment establishing the lien as required by section 11 of the Mechanics' Lien Law of 1873. Jennings *v.* Newman, 52 How. Pr. (N. Y.) 282.

74. Porter *v.* Miles, 67 Ala. 130.

75. Horstkotte *v.* Menier, 50 Mo. 158; Farley *v.* Cammann, 43 Mo. App. 168; Fink *v.* Remick, 33 Mo. App. 624, holding that a judgment against debtor defendants, directing that if no property of the debtors sufficient to satisfy the debt and costs be found the same or the residue thereof be levied on and made out of the real estate described is sufficient.

76. Farley *v.* Cammann, 43 Mo. App. 168.

77. Lenox *v.* Yorkville Baptist Church, 2 E. D. Smith (N. Y.) 673; Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657.

78. Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657.

79. Cutter *v.* Kline, 35 N. J. Eq. 534 [*reversing* 34 N. J. Eq. 329].

A judgment obtained under the Wisconsin Mechanics' Lien Law of 1842 has the force of a common-law judgment, and the party has his option to make it a general judgment with the particular lien annexed, or to confine it to the specific subject of the lien, without binding generally the person or property

unnecessary.[80] Under some statutes it is indispensable to a subcontractor's lien that there should be a finding and a decree against both the owner and the contractor,[81] and a decree in favor of a subcontractor is defective where it does not find any amount to be due the contractor from the owner.[82] Creditors of the contractor who have no lien upon the property are entitled only to a money judgment against the contractor, and not to a judgment providing that the remainder of the fund due from the owner to the contractor after payment of liens shall be distributed between them.[83] It has been held that there should be but one judgment covering all the issues.[84]

b. Conformity to Pleadings, Lien Statement, Issues, and Verdict. The judgment must conform to the bill, petition, or complaint,[85] and should not be broader than the averments of such pleading,[86] or grant relief not thereby demanded.[87] Thus where the bill claims a lien on a particular lot it is error for the decree to extend the lien over other lots not mentioned in the bill,[88] and the judgment is erroneous where the description of the land contained therein does not correspond to the description in the petition and the exhibit made a part thereof.[89] But a direction for a deficiency judgment[90] has been held not erroneous, although the complaint did not pray for such relief.[91] The judgment is properly made to conform to the lien statement as to the property covered,[92] and cannot be rendered

of the debtor. Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

80. Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

81. Culver *v.* Elwell, 73 Ill. 536; Julin *v.* Ristow Poths Mfg. Co., 54 Ill. App. 460; Munster *v.* Doyle, 50 Ill. App. 672.

82. Julin *v.* Ristow Poths Mfg. Co., 54 Ill. App. 460 [*citing* Culver *v.* Elwell, 73 Ill. 536; Douglas *v.* McCord, 12 Ill. App. 278].

83. Kennedy-Shaw Lumber Co *v.* Priet, 113 Cal. 291, 45 Pac. 336.

84. Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 522, holding that where on the foreclosure of a mechanic's lien other lienholders have joined in the suit, only one decision and decree should be presented, covering substantially all the issues decided and declaring the priorities of the several liens. But *compare* Bowman *v.* McLaughlin, 45 Miss. 461, holding that inasmuch as the proceeding to enforce a mechanic's lien is in the nature of a suit in equity, designed to give effect in one suit to the liens of mechanics and materialmen, who have contributed to the erections and improvements on the premises, and also to conclude the interests of all persons at whose instance and for whose benefit the work is done and materials supplied, there may be several distinct judgments.

85. Porter *v.* Miles, 67 Ala. 130; Rupe *v.* New Mexico Lumber Assoc., 3 N. M. 261, 5 Pac. 730, holding that when a joint liability is charged in the pleadings judgment cannot be entered separately against one of the parties.

86. Briggs *v.* Bruce, 9 Colo. 282, 11 Pac. 204 (holding that judgment cannot be rendered for items not set forth in the pleadings); Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374 (holding that a decree cannot be entered for more than is claimed in the bill); Glos *v.* John O'Brien Lumber Co., 183 Ill. 211, 55 N. E. 712.

87. Perkins *v.* Boyd, 16 Colo. App. 266, 65 Pac. 350 (holding that where a notice of intention to claim a lien was served on defendant as owner, and the lien statement and complaint in the suit to enforce the lien set forth that the work was done on a certain lot, of which defendant was alleged to be the owner, but on it being discovered that part of the work was on an adjoining lot the complaint was amended so as to include such lot, and the referee found that the adjoining lot was owned by defendant and her husband jointly, a judgment decreeing a foreclosure was erroneous, since no facts were pleaded or proved entitling plaintiff to claim a lien against such husband's interest); Rupe *v.* New Mexico Lumber Assoc., 3 N. M. 261, 5 Pac. 730 (holding that in an action in assumpsit a judgment to enforce a mechanic's lien cannot be entered against any or all the parties).

88. Roberts *v.* Wilcoxson, 36 Ark. 355. See also Portoues *v.* Badenoch, (Ill. 1890) 23 N. E. 349.

89. Adams *v.* Cook, 55 Tex. 161.

90. See *infra*, VIII, L, 3, c.

91. Eldeman *v.* Kidd, 65 Wis. 18, 26 N. W. 116, where it is said: "Had there been no appearance by the defendant in the action in the court below, it would have been error to have granted any other or greater relief than was demanded in the complaint; but when the defendant appears and answers, 'the court may grant any relief consistent with the case made by the complaint and embraced within the issues.'"

92. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39, holding that where the labor and materials for which a mechanic's lien was claimed were furnished in the erection of three buildings, but the lien statement as filed included but one of the buildings, and the land whereon the three stood, a judgment conforming to the lien statement as filed was not erroneous.

for more than the amount claimed in the lien statement.[93] So also plaintiff can recover only for what was done or furnished between the dates stated in the lien statement, although the evidence shows that work was done or materials furnished at other times.[94] The judgment must be within the issues made in the case,[95] and must conform to the verdict.[96]

c. Description of Property. The judgment should accurately describe the property subject to the lien.[97] Where the lien is claimed upon the building with such land around the same "as may be required for the convenient use and occupation thereof" the decree should define the extent of the land subject to the lien,[98] and while a failure to do so will not invalidate the decree[99] a purchaser thereunder will probably acquire no land beyond that covered by the building.[1] Where a lien is claimed against two or more buildings the judgment should designate each building and the amount due upon it.[2]

2. JUDGMENT IN REM — a. In General. The judgment contemplated by the statute so far as it declares, establishes, and authorizes the enforcement of the lien is strictly a judgment *in rem*[3] against the specific property,[4] and a judgment *in personam* only and not *in rem* is not sufficient to establish the lien.[5] The judgment must, however, be rendered against some person as defendant and cannot be against the land alone.[6] It is no objection to the judgment that the statement of the

93. Maurer *v.* Bliss, 14 Daly (N. Y.) 150, 6 N. Y. St. 224 [*affirmed* in 116 N. Y. 665, 22 N. E. 1135]; Lutz *v.* Ey, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. 475.

94. Santa Monica Lumber, etc., Co. *v.* Hege, (Cal. 1897) 48 Pac. 69 [*following* Goss *v.* Strelitz, 54 Cal. 640].

95. Lothian *v.* Wood, 55 Cal. 159, holding that where, in a suit to enforce a mechanic's lien, defendant was defaulted, and the court adjudged plaintiff entitled to a vendor's lien for materials furnished, with the right to enter upon the premises and remove and sell the same, the judgment was outside the issues and against law, and that judgment should be entered against plaintiff's interest in the land.

96. Adams *v.* Cook, 55 Tex. 161; Du Bay *v.* Uline, 6 Wis. 588, holding that a verdict upon a count for goods sold and the common money counts does not warrant a judgment of lien. *Compare* Sharkey *v.* Miller, 69 Ill. 560, holding that where subsequent purchasers of the property sought to be charged were made parties, and the issues were submitted to a jury, who found for the petitioner and assessed the damages against all the defendants, it was not error to render a decree differing from the form of the verdict, and conforming to the testimony, requiring defendant alone, for whom the work was done, to pay the amount found by the jury, making it a lien on the premises, and declaring the subsequent purchasers' interests subject to the lien.

97. Horstkotte *v.* Menier, 50 Mo. 158; Lecoutour *v.* Peters, 57 Mo. App. 449, where rendered in a justice's court on constructive service. The judgment, if it is to operate otherwise than as *in personam*, must describe the property charged with its payment and direct that it be levied of such property. Porter *v.* Miles, 67 Ala. 130.

Descriptions held sufficient see Buckley *v.* Boutellier, 61 Ill. 293; Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

Decree held void for uncertainty of description see Munger *v.* Green, 20 Ind. 38.

An obvious clerical error in the description will not invalidate the judgment. McCoy *v.* Quick, 30 Wis. 521.

98. Tibbetts *v.* Moore, 23 Cal. 208.

99. Sidlinger *v.* Kerkow, 82 Cal. 42, 22 Pac. 932.

1. Sidlinger *v.* Kerkow, 82 Cal. 42, 22 Pac. 932; Tibbetts *v.* Moore, 23 Cal. 208.

2. Treusch *v.* Shryock, 55 Md. 330; Plummer *v.* Eckenrode, 50 Md. 225.

3. Porter *v.* Miles, 67 Ala. 130; Treusch *v.* Shryock, 55 Md. 330; Plummer *v.* Eckenrode, 50 Md. 225; Sly *v.* Pattee, 58 N. H. 102; Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657. holding that, although the owner, in an action to foreclose a mechanic's lien arising out of a contract directly with him, puts his indebtedness as well as the existence of the lien in issue so that both are determined at the trial yet the judgment cannot be against the owner generally.

It is the liability of the property which is fixed — the charge upon it which is intended to be enforced. Porter *v.* Miles, 67 Ala. 130; Ravisies *v.* Stoddart, 32 Ala. 599.

4. Lecoutour *v.* Peters, 57 Mo. App. 449 (when rendered in a justice's court on constructive service); Sly *v.* Pattee, 58 N. H. 102.

The judgment should declare the claim to be a lien on the specific premises from the proper date. Mason *v.* Heyward, 5 Minn. 74.

A decree giving a lien from too early a date is erroneous if the rights of third persons are affected by it, but otherwise the decree will not be reversed on that ground. Nibbe *v.* Brauhn, 24 Ill. 268.

5. Porter *v.* Miles, 67 Ala. 130; Treusch *v.* Shryock, 55 Md. 330; Plummer *v.* Eckenrode, 50 Md. 225.

6. Redman *v.* Williamson, 2 Iowa 488.

amount due is in the form of a personal judgment where the judgment proceeds to declare a lien and direct the taking of the proper steps to make the amount out of the property subject thereto.[7]

b. Directions For Sale and Distribution of Proceeds.[8] The judgment should provide for a sale of the property or the owner's interest therein;[9] but the court has no power to order a sale of property other than that mentioned in the petition and upon which a lien has been decreed.[10] Where there is no redemption[11] from the sale the decree should give defendant a reasonable time to pay the money and prevent the sale,[12] but this is not necessary where the statute allows a redemption.[13] The judgment should direct the payment of costs and of the liens out of the proceeds of sale,[14] but it need not direct to whom the surplus money, if any, arising from the sale, should be paid, but that may remain subject to a future order of the court.[15] The order of sale and the order of distribution are so far separate and distinct that the order of sale may be valid and effective even though the order of distribution may be invalid.[16] It is proper to order that in case of a deficiency on a sale of the property the sheriff certify the amount and plaintiff have execution therefor.[17]

7. Sullivan *v.* Sanders, 9 Mo. App. 75; Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086; Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825.

8. Sale of property see *infra*, VIII, N.

9. Riggs *v.* Stewart, 14 Daly (N. Y.) 434, 14 N. Y. St. 695, 14 N. Y. Civ. Proc. 141; Lenox *v.* Yorkville Baptist Church, 2 E. D. Smith (N. Y.) 673; Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657. See also Nordyke *v.* Dickson, 76 Ind. 188.

Property previously sold under mortgage.— Where property which is subject to a mechanic's lien has been sold under a prior mortgage, it is proper to render a decree against defendant for the amount due, to order execution thereon, and also to direct the property involved to be sold under such decree, in case it is redeemed from the mortgage sale. Stone *v.* Tyler, 67 Ill. App. 17.

Subjecting equity of redemption.— In an action to foreclose a mechanic's lien, where the owner makes default, and the evidence does not show that a trust deed prior to the lien has been foreclosed, and the owner's equity of redemption sold, plaintiff is entitled to a judgment subjecting the owner's right of redemption to the satisfaction of his debt. Schultze *v.* Alamo Ice, etc., Co., 2 Tex. Civ. App. 236, 21 S. W. 160.

Where there are outstanding interests in the property not subject to the lien, a sale of the interest subject to the lien and not a partition of the property is the proper remedy. Brown *v.* Jones, 52 Minn. 484, 55 N. W. 54.

A judgment directing a sale of the premises under execution, and providing for the distribution of the funds, was in conformity to the New York act of 1863. Meehan *v.* Williams, 2 Daly (N. Y.) 367, 36 How. Pr. 73.

A judgment directing that an execution issue for the sale of the premises to satisfy the lien, in the manner provided by law for the sale of real property under execution, is not erroneous under Dak. Code Civ. Proc. §§ 665, 666. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

10. Bassick Min. Co. *v.* Schoolfield, 10 Colo. 46, 14 Pac. 65, holding that where, in an action to enforce a mechanic's lien on defendant's entire property, several interveners also claimed liens upon the entire property, and one upon a portion only of the property, and a decree was made establishing liens in favor of the different parties in accordance with their respective claims, an order of sale of the entire property directing *pro rata* distribution of the proceeds among all said lienholders was unauthorized and void. See *supra*, VIII, L, 1, b.

11. See *infra*, VIII, N, 10.

12. Rowley *v.* James, 31 Ill. 298; Link *v.* Architectural Iron Works, 24 Ill. 551. See also Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374.

Lifetime of execution.— A sale should not be ordered within less time than ninety days, in analogy to the lifetime of an execution (James *v.* Hambleton, 42 Ill. 308; Mills *v.* Heeney, 35 Ill. 173; Bush *v.* Connelly, 33 Ill. 447; Kinzey *v.* Thomas, 28 Ill. 502; Strawn *v.* Cogswell, 28 Ill. 457; Claycomb *v.* Cecil, 27 Ill. 497; Link *v.* Architectural Iron Works, 24 Ill. 551. See also Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374; Moore *v.* Bracken, 27 Ill. 23), while if the amount of the judgment is large a longer time should be given (Kinzey *v.* Thomas, 28 Ill. 502; Strawn *v.* Cogswell, *supra*; Claycomb *v.* Cecil, *supra*); and in such case six months is not unreasonable (Strawn *v.* Cogswell, *supra*).

13. Freibroth *v.* Mann, 70 Ill. 523.

14. Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657.

Distribution of proceeds of sale see *infra*, VIII, N, 11.

15. Kelley *v.* Chapman, 13 Ill. 530, 56 Am. Dec. 474. See also Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657.

16. Dahlborg *v.* Wyzanski, 175 Mass. 34, 58 N. E. 593.

17. Decker *v.* O'Brien, 1 N. Y. App. Div.

3. Personal Judgment on Claim — a. In General. A person having a claim for labor or materials done or furnished does not lose or waive his right to a money judgment against his debtor by proceeding to acquire and enforce a mechanic's lien[18] or to recover from the owner the balance of the contract price in his hands;[19] and as a rule in an action to enforce a lien there may be both a judgment establishing the lien and providing for the foreclosure thereof and also a personal judgment in favor of the claimant against the party directly liable to him.[20] In order that the court may render a personal judgment it must of course have acquired jurisdiction of the person of defendant,[21] and the pleadings must have asked such

81, 36 N. Y. Suppl. 1079 [*affirmed* in 159 N. Y. 553, 54 N. E. 1090]; Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657. See, generally, *infra*, VIII, L, 3, c; VIII, M.

18. Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438 [*citing* Germania Bldg., etc., Assoc. *v.* Wagner, 61 Cal. 349; Brennan *v.* Swasey, 16 Cal. 140, 76 Am. Dec. 507]. See also Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218, holding that in an action against a contractor for the value of materials furnished for a building, the contractor cannot complain that plaintiff negligently allowed a mechanic's lien, filed to secure the indebtedness, to become barred by the statute relating to liens, since that does not bar the debt itself.

19. Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438 [*citing* Germania Bldg., etc., Assoc. *v.* Wagner, 61 Cal. 349; Brennan *v.* Swasey, 16 Cal. 140, 76 Am. Dec. 507].

20. *California.*— McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109.

Florida.— West *v.* Grainger, 46 Fla. 257, 35 So. 91.

Georgia.— Parish *v.* Murphy, 51 Ga. 614.

Indiana.— See Martin *v.* Berry, 159 Ind. 566, 64 N. E. 912.

Missouri.— Hill *v.* Chowning, 93 Mo. App. 620, 67 S. W. 750.

Nebraska.— McHale *v.* Maloney, 67 Nebr. 532, 93 N. W. 677; Pickens *v.* Polk, 42 Nebr. 267, 60 N. W. 566.

New York.— A. Hall Terra Cotta Co. *v.* Doyle, 133 N. Y. 603, 30 N. E. 1010 [*affirming* 16 N. Y. Suppl. 384] (personal judgment against defendant and judgment that plaintiff "had a good and valid lien . . . and but for the filing of the bond . . . would be entitled to a judgment foreclosing," etc.); Glen Cove Granite Co. *v.* Costello, 65 N. Y. App. Div. 43, 72 N. Y. Suppl. 531; Ringle *v.* Wallis Iron Works, 86 Hun 153, 33 N. Y. Suppl. 398; Kruger *v.* Braender, 3 Misc. 275, 23 N. Y. Suppl. 324 [*affirming* 1 Misc. 509, 20 N. Y. Suppl. 991]. But *compare* Murphy *v.* Watertown, 112 N. Y. App. Div. 670, 673, 99 N. Y. Suppl. 6, where it is said that under Code Civ. Proc. § 3412, "a personal judgment can be recovered by the plaintiff only in case he fails to establish a valid lien."

Ohio.— Knauber *v.* Fritz, 5 Ohio Dec. (Reprint) 410, 5 Am. L. Rec. 432, 1 Cinc. L. Bul. 362.

Washington.— Littell *v.* Miller, 8 Wash. 566, 36 Pac. 492.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 632 *et seq.*

Against whom personal judgment rendered see *infra*, VIII, L, 3, d.

The personal judgment becomes a lien on all the debtor's real estate, and may be enforced like other judgment liens. Knauber *v.* Fritz, 5 Ohio Dec. (Reprint) 410, 5 Am. L. Rec. 432, 1 Cinc. L. Bul. 362. See also Martin *v.* Berry, 159 Ind. 566, 64 N. E. 912.

A reversal of the decree of foreclosure on account of the invalidity of the lien will not affect a personal judgment against the contractor for the amount of the claim where he did not join in the appeal. Littell *v.* Miller, 8 Wash. 566, 36 Pac. 492.

21. Bombeck *v.* Devorss, 19 Mo. App. 38; Richards *v.* Lewisohn, 19 Mont. 128, 47 Pac. 645; Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 522.

Service of pleading demanding relief.— Under Mich. Rev. St. (1898) § 2656*a*, prohibiting affirmative relief in favor of one defendant against another defendant unless the pleading demanding it be served on defendant against whom it is sought, and §§ 3321–3326, regulating the foreclosure of mechanics' liens, and providing a scheme adapted to an equal sharing among lien claimants which allows one to bring an action, to which all the others are made parties, for the purpose not only of establishing and satisfying plaintiff's own claim, but also of ascertaining the amounts of the other liens with which plaintiff must share in the proceeds of the liened property, a defendant lien claimant is entitled to a judgment establishing his lien and authorizing him to share in the proceeds of the liened property, without serving on the debtor defendant an answer demanding such relief, but he is not entitled to a personal judgment against the debtor defendant unless he serves an answer on him demanding such judgment. Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144.

Submission to jurisdiction.— Where "legal service" of the summons has been made upon a non-resident builder, and such builder then appears generally in the action or makes defense upon the merits, he thereby submits himself to the jurisdiction of the court, and if the verdict goes against him, the resulting judgment is to be a "general" judgment binding upon such builder *in personam*. Smith *v.* Colloty, 69 N. J. L. 365, 55 Atl. 805. Where the equitable owner, who contracted for the erection of the buildings, appears and denies the debt, a personal judgment may be rendered against him, which is enforceable by execution. Hallahan *v.* Herbert, 4 Daly

relief.[22] A separate personal money judgment cannot be entered by default against one of two defendants who are jointly liable.[23] A personal judgment against the owner for damages for a breach of the contract cannot be recovered in an action to enforce a mechanic's lien,[24] nor can a judgment be rendered against the owner requiring the specific performance upon his part of an agreement to convey certain real estate in part payment for the work done.[25] A personal judgment against the party personally liable for the labor or materials is not necessary to support the lien;[26] but it has been held that where the claimant does not take a personal judgment against his debtors, who are parties to the suit and within the jurisdiction of the court, he cannot prosecute another and separate suit for the same demand.[27] Where the statutory proceeding is wholly *in rem* a personal judgment cannot be rendered.[28]

b. Judgment on Failure to Establish Lien. As a general rule a personal judgment in favor of the claimant against his debtor may be rendered even though the claimant fails to establish or maintain his alleged lien;[29] but where the jurisdic-

(N. Y.) 209, 11 Abb. Pr. N. S. 326 [*affirmed* in 57 N. Y. 409].

22. Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 522; Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

23. Lowe *v.* Turner, 1 Ida. 107.

24. Doll *v.* Coogan, 48 N. Y. App. Div. 121, 62 N. Y. Suppl. 627 [*affirmed* in 168 N. Y. 656, 61 N. E. 1129].

No lien for damages see *supra*, II, C, 1, c.

25. Dowdney *v.* McCullom, 59 N. Y. 367, holding that where the owner by failure to perform after demand has rendered himself liable to pay in money, the court can only determine the amount of the owner's liability in money and render judgment therefor.

26. Russ Lumber, etc., Co. *v.* Garrettson, 87 Cal. 589, 25 Pac. 747 [*distinguishing* Phelps *v.* Maxwell's Creek Gold Min. Co., 49 Cal. 336]; Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737.

27. Hill *v.* Chowning, 93 Mo. App. 620, 67 S. W. 750.

28. Norton *v.* Sinkhorn, 61 N. J. Eq. 508, 48 Atl. 822, 63 N. J. Eq. 313, 50 Atl. 505, holding that no personal judgment or decree will be made in a suit under the New Jersey act of March 30, 1892, to secure payment to laborers, etc., engaged in the performance of work, etc., upon a public improvement.

29. *Alabama.*— Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Bedsole *v.* Peters, 79 Ala. 133.

Arkansas.— Brugman *v.* McGuire, 32 Ark. 733.

California.— Miller *v.* Carlisle, 127 Cal. 327, 59 Pac. 785; Marchant *v.* Hayes, 120 Cal. 137, 52 Pac. 154; Lacore *v.* Leonard, 45 Cal. 394.

Colorado.— Cannon *v.* Williams, 14 Colo. 21, 23 Pac. 456 [*followed* in Finch *v.* Turner, 21 Colo. 287, 40 Pac. 565; St. Kevin Min. Co. *v.* Isaacs, 18 Colo. 400, 32 Pac. 822]. *Aliter* under earlier statutes. Hart, etc., Corp. *v.* Mullen, 4 Colo. 512. And see Barnard *v.* McKenzie, 4 Colo. 251.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Florida.— West *v.* Grainger, 46 Fla. 257, 35 So. 91.

Indiana.— See McDaniel *v.* Weaver, 14 Ind. 517.

Kansas.— Haight *v.* Schuck, 6 Kan. 192.

Michigan.— Koepke *v.* Dyer, 80 Mich. 311, 45 N. W. 143, holding that where a judgment was rendered for a certain amount which was declared to be a lien on defendant's real estate, and subsequently the lien law was held unconstitutional, the judgment should be vacated in so far as it created a lien, but the personal judgment against defendant should stand.

Minnesota.— Smith *v.* Gill, 37 Minn. 455, 35 N. W. 178.

Missouri.— Williams *v.* Porter, 51 Mo. 441; Patrick *v.* Abeles, 27 Mo. 184 [*followed* in Mulloy *v.* Lawrence, 31 Mo. 583]; Cahill *v.* McCornish, 74 Mo. App. 609.

Montana.— Western Plumbing Co. *v.* Fried, 33 Mont. 7, 81 Pac. 394 [*following* Aldritt *v.* Panton, 17 Mont. 187, 42 Pac. 767; Goodrich Lumber Co. *v.* Davie, 13 Mont. 76, 32 Pac. 282].

New Jersey.— Tomlinson *v.* Degraw, 26 N. J. L. 73.

New York.—The present statute (Code Civ. Proc. § 3412) establishes the rule stated in the text. See Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 [*reversing* 41 Misc. 640, 85 N. Y. Suppl. 205]; Ryan *v.* Train, 95 N. Y. App. Div. 73, 88 N. Y. Suppl. 441; Steuerwald *v.* Gill, 85 N. Y. App. Div. 605, 83 N. Y. Suppl. 396; Terwilliger *v.* Wheeler, 81 N. Y. App. Div. 460, 81 N. Y. Suppl. 173; Clapper *v.* Strong, 41 Misc. 184, 83 N. Y. Suppl. 935; New Jersey Steel, etc., Co. *v.* Robinson, 33 Misc. 361, 68 N. Y. Suppl. 577. For earlier decisions under various statutes see Thomas *v.* Stewart, 132 N. Y. 580, 30 N. E. 577 [*affirming* 10 N. Y. Suppl. 874]; Weyer *v.* Beach, 79 N. Y. 409 [*affirming* 14 Hun 231]; Burroughs *v.* Tostevan, 75 N. Y. 567 [*reversing* 2 Abb. N. Cas. 333]; Glacius *v.* Black, 67 N. Y. 563 [*reversing* 4 Hun 91], 50 N. Y. 145, 10 Am. Rep. 449; Darrow *v.* Morgan, 65 N. Y. 333; McGraw *v.* Godfrey, 56 N. Y. 610; Maltby *v.* Greene, 3 Abb. Dec. 144, 1 Keyes 548; Castelli *v.* Trahan, 77 N. Y. App. Div. 472, 78 N. Y. Suppl. 950; McDonald *v.* New York, 58 N. Y.

tion of the court in which the action is brought rests upon the fact that the action is upon the lien for the foreclosure thereof, the amount in controversy not being such as would support the jurisdiction of the court in an action founded upon the demand alone, if the lien fails the court cannot render a personal judgment on the claim.[30] Plaintiff must of course establish his claim, in order to be entitled to a personal judgment,[31] and a judgment rendered on failure to establish a lien

App. Div. 73, 68 N. Y. Suppl. 462 [*affirming* 29 Misc. 504, 62 N. Y. Suppl. 72, and *reversed* on other grounds in 170 N. Y. 409, 63 N. E. 437]; Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577, 50 N. Y. Suppl. 479; Grant *v.* Vandercook, 57 Barb. 165, 8 Abb. Pr. N. S. 455; Crouch *v.* Moll, 3 Silv. Sup. 601, 8 N. Y. Suppl. 183; Altieri *v.* Lyon, 59 N. Y. Super. Ct. 110, 13 N. Y. Suppl. 617; Donnelly *v.* Libby, 1 Sweeny 259; Childs *v.* Bostwick, 12 Daly 15, 65 How. Pr. 146; Hickey *v.* O'Brien, 11 Daly 292; Fogarty *v.* Wick, 8 Daly 166; Schaettler *v.* Gardiner, 4 Daly 56, 41 How. Pr. 243; Barton *v.* Herman, 3 Daly 320, 8 Abb. Pr. N. S. 399; Sinclair *v.* Fitch, 3 E. D. Smith 677; Grogan *v.* New York, 2 E. D. Smith 693; Nussberger *v.* Wasserman, 40 Misc. 120, 81 N. Y. Suppl. 295; Gallick *v.* Engelhardt, 36 Misc. 269, 73 N. Y. Suppl. 309; Cody *v.* White, 34 Misc. 638, 70 N. Y. Suppl. 589; Scerbo *v.* Smith, 16 Misc. 102, 38 N. Y. Suppl. 570; Jones *v.* Walker, 16 Abb. Pr. N. S. 359 note; Kelsey *v.* Rourke, 50 How. Pr. 315.

Tennessee.— Dollman *v.* Collier, 92 Tenn. 660, 22 S. W. 741.

Washington.— Spaulding *v.* Burke, 33 Wash. 679, 74 Pac. 829. See also Littell *v.* Miller, 8 Wash. 566, 36 Pac. 492. *Aliter* under earlier statutes. Hildebrandt *v.* Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; Eisenbeis *v.* Wakeman, 3 Wash. 534, 28 Pac. 923.

Wisconsin.— Ponti *v.* Eckels, 129 Wis. 26, 108 N. W. 62; More *v.* Ruggles, 15 Wis. 275.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 628 *et seq.*

Contra.— *Illinois.*— Green *v.* Sprague, 120 Ill. 416, 11 N. E. 859 [*affirming* 18 Ill. App. 476]; McCarthy *v.* Neu, 93 Ill. 455; Quinn *v.* Allen, 85 Ill. 39; Bouton *v.* McDonough County, 84 Ill. 384; District No. 3, Bd. of Education *v.* Neidenberger, 78 Ill. 58.

Iowa.— Loring *v.* Small, 50 Iowa 271, 32 Am. Rep. 136.

Mississippi.— Hursey *v.* Hassam, 45 Miss. 133.

Oregon.— Ming Yue *v.* Coos Bay, etc., R., etc., Co., 24 Oreg. 392, 33 Pac. 641.

United States.—Russell *v.* Hayner, 130 Fed. 90, 64 C. C. A. 424.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 628 *et seq.*

Against whom judgment rendered see *infra*, VIII, L, 3, d.

Statute permissive merely.—A statute providing that in suits to foreclose a mechanic's lien, if the lienor fails for any reason to establish a valid lien, he may recover judgment in such suit for such sums as are due him or which he might recover in an action on contract against any party to the action, does not require, but merely authorizes, a mechanic's lienor to litigate issues in a lien foreclosure suit with reference to claims against defendant which are not covered by the mechanic's lien. Koeppel *v.* Macbeth, 97 N. Y. App. Div. 299, 89 N. Y. Suppl. 969.

Lien claimed for public improvement.— N. Y. Code Civ. Proc. § 3412, providing that, if there is a failure to establish a valid lien in the action, the lienor may recover judgment for such sums due him which might be recovered in an action on contract against any party to the action, applies to actions to enforce liens for public as well as private improvements, and where plaintiff failed to establish his lien for materials furnished for a school-house, he was nevertheless entitled to recover a personal judgment against such of defendants as were indebted to him. Terwilliger *v.* Wheeler, 81 N. Y. App. Div. 460, 81 N. Y. Suppl. 173 [*distinguishing* McDonald *v.* New York, 29 Misc. (N. Y.) 504, 62 N. Y. Suppl. 72 (*affirmed* in 58 N. Y. App. Div. 73, 68 N. Y. Suppl. 462 [*reversed* on other grounds in 170 N. Y. 609, 63 N. E. 437])]. See also Smith *v.* New York, 32 Misc. (N. Y.) 380, 66 N. Y. Suppl. 686.

Where the account contains non-lienable items included through mistake, a personal judgment may be given for the amount thereof. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

A nonsuit as against the owner because of the insufficiency of the lien claim does not defeat the claimant's right to a personal judgment against the contractor. Kennedy, etc., Lumber Co. *v.* Dusenbery, 116 Cal. 124, 47 Pac. 1008.

Loss of lien by lapse of time.— Where subcontractors, being made defendants, appear and prove their claims without objection by the contractor, and then allow their claims to expire during the pendency of the action without an order of court continuing them, their claims should be dismissed as to the owner, with costs, as for want of prosecution, but they should have judgment against the contractor for the amount of their claims, and costs, as upon failure to answer. Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356.

30. Miller *v.* Carlisle, 127 Cal. 327, 59 Pac. 785; Cameron *v.* Marshall, 65 Tex. 7; Barnes *v.* White, 53 Tex. 628.

31. Aex *v.* Allen, 107 N. Y. App. Div. 182, 94 N. Y. Suppl. 844, holding that where, in a suit to enforce a mechanic's lien, defendant alleged non-performance by plaintiff, and the referee found that, at the time of filing the notice of lien, plaintiff had not substantially

cannot include any amount for attorney's fees or costs incident to the preparation and filing of a lien notice.[32] A statute providing that a lienor failing for any reason "to establish a valid lien," in an action to enforce a mechanic's lien may recover judgment in such action for such sums as are due him against any party to the action, does not authorize the entry of a personal judgment in proceedings to enforce a mechanic's lien in favor of one who never could have had a lien,[33] or of one who never filed a lien and made no demand for a personal judgment.[34]

c. Deficiency Judgment. It is usually held that in an action to foreclose a mechanic's lien the court may enter a personal judgment against the person directly liable to the claimant for the balance of the claim remaining unpaid after a sale of the property and distribution of the proceeds.[35]

d. Against Whom Judgment Rendered. When personal judgment is rendered it goes against the person who is directly liable to the claimant apart from the lien and against such person only.[36] So a subcontractor, materialman, or

performed the contract on his part, and plaintiff had filed no supplemental complaint, it was not competent for the referee to render a personal judgment for plaintiff on the ground that since the commencement of the action plaintiff had fulfilled his contract.

32. Spaulding *v.* Burke, 33 Wash. 679, 74 Pac. 829.

33. Thompson-Starrett Co. *v.* Brooklyn Heights Realty Co., 111 N. Y. App. Div. 358, 98 N. Y. Suppl. 128; Mowbray *v.* Levy, 85 N. Y. App. Div. 68, 69, 82 N. Y. Suppl. 959, 960, where it is said: "I construe the statute to mean that in a case where equity has jurisdiction, where a mechanic's lien was permissible and was filed, and it appears on the foreclosure trial that in consequence of some technicality or informality the lienor must be defeated on his lien, the court may, nevertheless, in the interest of substantial justice, render a personal judgment. I think that the failure 'to establish a valid lien,' which permits the lienor nevertheless to go on and to recover a money judgment, does not mean that this can be done if the plaintiff could never have had a lien at all; but that it applies to cases in which the lien has been defeated by the lapse of time, the intervention of prior liens which eat up the fund, or some occurrence of like character or import, the effect of which is to prevent the creation of a lien to which the plaintiff would otherwise be entitled."

34. Deane Steam Pump Co. *v.* Clark, 87 N. Y. App. Div. 459, 84 N. Y. Suppl. 851, 84 N. Y. App. Div. 450, 82 N. Y. Suppl. 902.

35. *California.*—Kennedy, etc., Lumber Co. *v.* Dusenbery, 116 Cal. 124, 47 Pac. 1008.

District of Columbia.— McCarthy *v.* Holtman, 19 App. Cas. 150.

Illinois.— Stone *v.* Tyler, 173 Ill. 147, 50 N. E. 688 [*reversing* 67 Ill. App. 17]; Green *v.* Sprague, 120 Ill. 416, 11 N. E. 859 [*affirming* 18 Ill. App. 476]; District No. 3 Bd. of Education *v.* Neidenberger, 78 Ill. 58; Race *v.* Sullivan, 1 Ill. App. 94.

Iowa.— Loring *v.* Small, 50 Iowa 271, 32 Am. Rep. 136.

Kansas.— Haight *v.* Schuck, 6 Kan. 192.

Mississippi.— Hursey *v.* Hassam, 45 Miss. 133.

Nebraska.— Durkee *v.* Koehler, (1905) 103 N. W. 767.

New Mexico.— Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

New York.— Gilmour *v.* Colcord, 183 N. Y. 342, 76 N. E. 273 [*modifying* 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689]; Orr *v.* Wolff, 71 N. Y. App. Div. 614, 75 N. Y. Suppl. 549; Althause *v.* Warren, 2 E. D. Smith 657.

South Dakota.— See Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

Washington.— Hildebrandt *v.* Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; Eisenbeis *v.* Wakeman, 3 Wash. 534, 28 Pac. 923.

Wisconsin.— Edleman *v.* Kidd, 65 Wis. 18, 26 N. W. 116. See also Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 627.

Contra.— Johnson *v.* Frazer, 20 S. C. 500 [*followed* in Tenney *v.* Anderson Water, etc., Co., 67 S. C. 11, 45 S. E. 111], there being no statutory provision for a deficiency judgment.

Against whom judgment rendered see *infra*, VIII, L, 3, d.

In an action to subject a balance in the owner's hands to payment of the claim a deficiency judgment may be rendered against the person directly liable to the claimant. Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438.

Time for application.— Where, on foreclosure of a lien, the property does not satisfy the amount of the claim, an application for a deficiency judgment must be made within the time when the statute would bar an action on the note or account on which the lien is based, counting from the date of the confirmation of the sale of the property. Durkee *v.* Koehler, (Nebr. 1905) 103 N. W. 767.

36. *District of Columbia.*—Emack *v.* Rusenberger, 8 App. Cas. 249.

Illinois.— Bonney *v.* Ketcham, 51 Ill. App. 321; Race *v.* Sullivan, 1 Ill. App. 94.

Iowa.— Willverding *v.* Offineer, 87 Iowa 475, 54 N. W. 592.

Missouri.— Walkenhorst *v.* Coste, 33 Mo. 401.

other person contracting with the contractor is entitled to judgment against the contractor,[37] or judgment may be entered against the owner in favor of persons who contracted directly with him or to whom he has become personally liable.[38] But a subcontractor, materialman, or workman between whom and the

Montana.— Gilliam *v.* Black, 16 Mont. 217, 40 Pac. 303.

New Mexico.—Pearce *v.* Albright, 12 N. M. 202, 76 Pac. 286.

New York.— Altieri *v.* Lyon, 59 N. Y. Super. Ct. 110, 13 N. Y. Suppl. 617.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 632 *et seq.*

The court will be guided solely by the averments of the petition in determining against whom an execution for the deficiency should be awarded, and no resort can be had to proof taken before the master to cure infirmities in the petition. Race *v.* Sullivan, 1 Ill. App. 94.

The contractor is not personally liable for materials furnished to a subcontractor because, upon the default of the subcontractor after such materials were furnished, he agreed to complete the work, but the only effect of his undertaking is to preserve the right of the materialman to claim a lien to the extent of any overplus remaining of the subcontractor's contract price after deducting the cost of completion. Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577.

Where debtor not identified by evidence.— Where, in an action by a subcontractor to enforce a lien, the evidence is vague as to who is his debtor for goods sold and delivered, a personal judgment may not be rendered. Kirschner *v.* Mahoney, 96 N. Y. Suppl. 195.

Provision for payment by husband and wife for improvement on wife's land.— In an action against a husband and wife to enforce a lien on the wife's land, it is not error to provide in the decree that the husband and wife pay the amount found due within a certain time and on default the land be sold, as this does not make the husband personally liable but merely provides a method by which a sale of the property may be avoided. Bumgartner *v.* Hall, 163 Ill. 136, 45 N. E. 168 [*affirming* 64 Ill. App. 45].

Conditions of building loan not imposing liability on lender.— The fact that a loan company, as a condition on which it would make a loan for the erection of buildings on land offered as security, required that the contemplated improvements should conform to plans submitted with the application for the loan, did not make the company a promoter of such improvements, so as to subject it to a direct liability to holders of mechanics' liens created by reason of the improvements, to the extent of an amount paid by it out of the loan for a mortgage which was a paramount lien on the land. Rogers *v.* Central L. & T. Co., 49 Nebr. 676, 68 N. W. 1048.

Personal judgment against owner and contractor jointly erroneous.— Dennistoun *v.* McAllister, 4 E. D. Smith (N. Y.) 729.

Curing error by filing disclaimer.—Error in ordering that if the property did not bring enough to satisfy the judgment execution should issue against one not shown to be personally liable is cured by the execution creditor filing a disclaimer waiving any personal judgment. Pearce *v.* Albright, 12 N. M. 202, 76 Pac. 286.

37. Marchant *v.* Hayes, 120 Cal. 137, 52 Pac. 154; Kennedy, etc., Lumber Co. *v.* Dusenbery, 116 Cal. 124, 47 Pac. 1008; McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109; Williams *v.* Porter, 51 Mo. 441; Cahill *v.* McCornish, 74 Mo. App. 609; Gilmour *v.* Colcord, 183 N. Y. 342, 76 N. E. 273 [*modifying* 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689]; Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300 [*reversing* 4 Daly 362, 14 Abb. Pr. N. S. 284].

38. *Alabama.*— Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Bedsole *v.* Peters, 79 Ala. 133.

Arkansas.— Brugman *v.* McGuire, 32 Ark. 733.

California.— See Miller *v.* Carlisle, 127 Cal. 327, 59 Pac. 785.

Colorado.— Harris *v.* Harris, 18 Colo. App. 34, 69 Pac. 309.

Kansas.— Haight *v.* Schuck, 6 Kan. 192.

Michigan.— Koepke *v.* Dyer, 80 Mich. 311, 45 N. W. 143.

Minnesota.— Smith *v.* Gill, 37 Minn. 455, 35 N. W. 178; Toledo Novelty Works *v.* Bernheimer, 8 Minn. 118.

Missouri.— Patrick *v.* Abeles, 27 Mo. 184 [*followed* in Mulloy *v.* Lawrence, 31 Mo. 583].

Montana.—Western Plumbing Co. *v.* Fried, 33 Mont. 7, 81 Pac. 394.

Nebraska.— Durkee *v.* Koehler, (1905) 103 N. W. 767.

New Jersey.— Tomlinson *v.* Degraw, 26 N. J. L. 73. See also Reeve *v.* Elmendorf, 38 N. J. L. 125.

New Mexico.— Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

New York.— Gilmour *v.* Colcord, 183 N. Y. 342, 76 N. E. 273 [*modifying* 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689]; Hubbell *v.* Schreyer, 56 N. Y. 604, 15 Abb. Pr. N. S. 300 [*reversing* 4 Daly 362, 14 Abb. Pr. N. S. 284]; Orr *v.* Wolff, 71 N. Y. App. Div. 614, 75 N. Y. Suppl. 549.

Tennessee.— Doelman *v.* Collier, 92 Tenn. 660, 22 S. W. 741.

Washington.— Spaulding *v.* Burke, 33 Wash. 679, 74 Pac. 829.

Wyoming.—Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988, holding the evidence sufficient to sustain a personal judgment.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 632 *et seq.*

owner there is no privity of contract and in whose favor no direct liability has been imposed upon the owner is not entitled to a personal judgment against the owner.[39] The personal liability of the owner to the claimant must be pleaded in order to warrant a personal judgment against him,[40] and where an action by mechanic's lien claimants against the owner is founded on the theory that all the claimants were subcontractors, a recovery cannot be had on the ground that some

Imposition of direct liability on owner by notice to retain amounts due contractor see *supra*, II, D, 7, j.

Extent of owner's liability under stop notice.— One furnishing materials for the erection of a building does not, by notice to the owner to withhold money, become entitled to a personal judgment against the owner for the sum due him in excess of the sum due the contractor. Hughes *v.* Hoover, (Cal. App. 1906) 84 Pac. 681.

Where the statute makes the contractor the agent of the owner a personal judgment can be rendered against the owner. Watson *v.* Noonday Min. Co., 37 Oreg. 287, 55 Pac. 867, 58 Pac. 36, 60 Pac. 994.

Who liable for deficiency.— Where two married women became copartners for the purchase and improvement of real estate and purchased land, the legal title being taken in the name of a third person, who appointed as his agent the husband of one of the copartners, who was also his wife's agent, and such agent had the active management in constructing buildings, purchasing materials, etc., the contracts being made in the name of the legal owner, it was held that, although the copartners and the legal owner were not technically partners, they were personally and jointly liable for any deficiency for materials arising on the foreclosure of the liens, the copartners being liable because the materials were furnished for their benefit, and the legal owner being liable because he had held himself out as the owner and through his agent contracted with the lien claimants. Orr *v.* Wolff, 71 N. Y. App. Div. 614, 75 N. Y. Suppl. 549.

Failure to finally dispose of case.— The validity of a personal judgment against the owner of the premises and a lien decreed against the premises for work performed by plaintiffs under an original contract with the owner is not affected by the failure of the court to make final disposition of the case against the person, also a defendant, with whom the owner contracted for the construction of the house on which plaintiffs put their labor. Harris *v.* Harris, 18 Colo. App. 34, 69 Pac. 309.

Recovery on order of contractor on owner.— Where suit was brought to enforce a materialman's lien against the owner, plaintiff could not recover in such action on an order given him by the contractor, which the owner had qualifiedly accepted. Page *v.* Grant, 127 Iowa 249, 103 N. W. 124.

39. *Alabama.*— May, etc., Co. *v.* McConnell, 102 Ala. 577, 14 So. 768.

California.— Madera Flume, etc., Co. *v.* Kendall, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177; Marchant *v.* Hayes, 120 Cal. 137, 52 Pac. 154; McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109; Kennedy, etc., Lumber Co. *v.* Priet, 115 Cal. 98, 46 Pac. 903; Guckow *v.* Confer, (1897) 48 Pac. 331; Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45; Southern California Lumber Co. *v.* Schmitt, 74 Cal. 625, 16 Pac. 516 [*followed* in Santa Clara Valley Mill, etc., Co. *v.* Williams, (1892) 31 Pac. 1128]; Phelps *v.* Maxwell's Creek Gold Min. Co., 49 Cal. 336.

Colorado.— Hume *v.* Robinson, 23 Colo. 359, 47 Pac. 271 (although the owner appeared and took part in the litigation); Lowrey *v.* Svard, 8 Colo. App. 357, 46 Pac. 619.

Dakota.— McMillan *v.* Phillips, 5 Dak. 294, 40 N. W. 349.

District of Columbia.— See Emack *v.* Rushinberger, 8 App. Cas. 249, where the court recognized the rule of the text but held that the peculiar circumstances of the case rendered a personal judgment proper.

Indiana.— Falkner *v.* Colshear, 39 Ind. 201; Farrell *v.* Lafayette Lumber, etc., Co., 12 Ind. App. 326, 40 N. E. 25.

Kansas.— Hodgson *v.* Billson, 12 Kan. 568.

Kentucky.— See Lingenfelser *v.* Henry Vogt Mach. Co., 67 S. W. 8, 24 Ky. L. Rep. 55, (1901) 62 S. W. 499.

Missouri.— Schmeiding *v.* Ewing, 57 Mo. 78; Williams *v.* Porter, 51 Mo. 441; Heltzell *v.* Hynes, 35 Mo. 482; Walkenhorst *v.* Coste, 33 Mo. 401.

Montana.— Gilliam *v.* Black, 16 Mont. 217, 40 Pac. 303.

Nebraska.— Frost *v.* Falgetter, 52 Nebr. 692, 73 N. W. 12, although he may be entitled to a lien.

New York.— Cox *v.* Broderick, 4 E. D. Smith 721; Quimby *v.* Sloan, 2 E. D. Smith 594, 2 Abb. Pr. 93; Siegel *v.* Ehrshowsky, 46 Misc. 605, 92 N. Y. Suppl. 733.

Tennessee.— Taylor *v.* Tennessee Lumber Co., 107 Tenn. 41, 63 S. W. 1130.

Texas.— Waldroff *v.* Scott, 46 Tex. 1.

Wisconsin.— Ponti *v.* Eckels, 129 Wis. 26, 108 N. W. 62.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 634.

The fact that the principal contract was void for want of filing does not render the owner personally liable to subcontractors and materialmen. Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45. And see California cases cited above.

40. Kane *v.* Hutkoff, 81 N. Y. App. Div. 105, 81 N. Y. Suppl. 85.

Allegations sufficient to show owner's liability see Security Nat. Bank *v.* St. Croix Power Co., 117 Wis. 211, 94 N. W. 74.

of the materials furnished were sold directly to the owner, or that he promised to pay therefor.[41] A subcontractor cannot obtain a personal judgment against the owner where he fails to prove that anything was due from the owner to the contractor either before or after the lien notice was filed.[42] But where the owner admits that he has in his hands and due the contractor an amount sufficient to pay off a subcontractor's lien, holding such amount to be paid the contractor or otherwise as the court may direct, it is proper to enter a personal judgment against both the contractor and the owner,[43] and so also where it appears that the contractor abandoned the work before completion of the building and that there remains in the owner's hands a part of the contract price more than sufficient to pay the lien claims of subcontractors a personal judgment against the owner in favor of the subcontractors is proper.[44] A personal judgment cannot be rendered against a grantee of the owner, who neither promised to pay for the labor or materials nor assumed the obligations of his grantor,[45] or against heirs of the owner who are in possession of the land.[46] Neither is one who has contracted to sell land, and put the purchaser in possession, liable to a personal judgment for building materials furnished his vendee, when the latter subsequently forfeits his contract of purchase.[47]

4. Determination as to Priorities. Where there are several mechanics' liens or other encumbrances on the property it is proper for the court to fix the order of priority and direct payment accordingly,[48] and it has been held that the court should determine the priorities before decreeing a sale, and not merely decree a sale and direct that the proceeds be brought into court.[49]

5. Time of Entry of Judgment. Where plaintiff in a scire facias upon a mechanic's lien has obtained a verdict within five years from the issuing of the writ, but is prevented from entering judgment until after the expiration of that period, by reason of the pending of a rule for a new trial or a motion in arrest of judgment, he is entitled to judgment upon the discharge of the rule or motion.[50]

6. Imposing Conditions Precedent to Entry of Judgment. Where justice requires it the court may impose conditions preeedent to the entry of judgment.[51]

7. Judgment in Favor of Subcontractor on Foreclosure of Contractor's Lien. On foreclosure of a contractor's lien for the balance due him, a subcontractor who has filed a lien is entitled to a judgment directing payment out of the moneys due the contractor under his lien.[52]

41. Page *v.* Grant, 127 Iowa 249, 103 N. W. 124.

42. Gilmour *v.* Colcord, 183 N. Y. 342, 76 N. E. 273 [*modifying* 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689]; Alexander *v.* Hollander, 106 N. Y. App. Div. 404, 94 N. Y. Suppl. 796; Schneider *v.* Hobein, 41 How. Pr. (N. Y.) 232.

43. Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888.

44. Emack *v.* Rushenberger, 8 App. Cas. (D. C.) 249.

45. Loring *v.* Flora, 24 Ark. 151; Work *v.* Hall, 79 Ill. 196; Quimby *v.* Sloan, 2 E. D. Smith (N. Y.) 594, 2 Abb. Pr. 93.

46. McGrew *v.* McCarty, 78 Ind. 496.

47. Mentzer *v.* Peters, 6 Wash. 540, 33 Pac. 1078.

48. Grundeis *v.* Hartwell, 90 Ill. 324; Lunt *v.* Stephens, 75 Ill. 507; Tracy *v.* Rogers, 69 Ill. 662; Croskey *v.* Corey, 48 Ill. 442; Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529 (holding that where a cross bill by a party to a suit to enforce a mechanic's lien asks the court to decree a sale of the property to pay a mortgage held by him, the court will determine the priority of the outstanding liens upon the property, and decree their payment in the proper order); Ogle *v.* Murray, 3 Ill. App. 343; Schultze *v.* Goodstein, 82 N. Y. App. Div. 316, 81 N. Y. Suppl. 946.

49. Lunt *v.* Stephens, 75 Ill. 507; Tracy *v.* Rogers, 69 Ill. 662; Iaege *v.* Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

50. Howes *v.* Dolan, 9 Pa. Super. Ct. 586, 44 Wkly. Notes Cas. 62.

51. Hankee *v.* Arundel Realty Co., 98 Minn. 219, 108 N. W. 842, holding that where a building contractor agreed to install in a building a patent heating plant and to furnish a license to use a patented system of heating, and the plant was installed, but no license was ever delivered, the owner was entitled to a certificate of license, and a requirement in the order for judgment, as a condition precedent to the entry of a judgment for the contractor, that such certificate of license should be delivered to the owner, was proper.

52. Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 523.

8. Offer of Judgment. Statutes relating to offers of judgment and the effect thereof are applicable to proceedings for the enforcement of mechanics' liens.[53]

9. Judgment by Confession. It is not error to enter judgment for a mechanic's lien upon a power of attorney without any motion having been made or any complaint having been filed with the power, when the statement of intention to hold a lien is made a part of the power of attorney and contains, with the averments in that instrument, all that is required.[54]

10. Judgment by Default. A default judgment may be entered in an action to foreclose a mechanic's lien upon the failure of defendant to appear or answer within the time limited by statute.[55] Where the chancery practice is established in lien cases the court may proceed to a decree upon bill confessed, with or without evidence to support the bill, as the court shall in its discretion deem best, as provided by the statute relating to chancery practice.[56] Where answers are filed denying the allegations of the complaint, defendants are entitled to a trial of the issues presented by the pleadings, even though they fail to appear when the case is regularly called for trial, and the court can only give judgment in such case on proof of the facts alleged in the complaint and denied by the answers.[57] A judgment by default, for want of an affidavit of defense against the owner, should be interlocutory only where the contractor defends on the ground that the work was done and materials furnished on his credit and not on the credit of the building, and judgment entered in such case against the owner for the debt will be opened.[58]

11. Sufficiency and Validity. A judgment against a husband only for the foreclosure of a mechanic's lien upon the homestead is not void as to the husband's interest, although the wife's interest is not foreclosed thereby.[59] A judg-

53. Kennedy *v.* McKone, 10 N. Y. App. Div. 88, 41 N. Y. Suppl. 782.

Offer not sufficient.— An offer to allow judgment fixing the lien at one thousand dollars, without providing for a deficiency judgment *in personam*, is not necessarily more favorable than a judgment fixing the lien at six hundred dollars with a personal judgment for any deficiency. Kennedy *v.* McKane, 10 N. Y. App. Div. 88, 41 N. Y. Suppl. 782.

A tender of the amount of plaintiff's claim without costs and attorney's fees is not sufficient. Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

54. Agard *v.* Hawks, 24 Ind. 276 [*citing* Veach *v.* Pierce, 6 Ind. 48; Gambia *v.* Howe, 8 Blackf. (Ind.) 133].

55. Thielmann *v.* Burg, 73 Ill. 293. See also Schultze *v.* Alama Ice, etc., Co., 2 Tex. Civ. App. 236, 21 S. W. 160. But *compare* Arata *v.* Tellurium Gold, etc., Min. Co., (Cal. 1884) 4 Pac. 195.

Assessment of damages.— Under N. Y. Laws (1873), c. 489, the damages on default could be assessed by the clerk, and an erroneous assessment would not make the judgment a nullity. Welde *v.* Henderson, 6 N. Y. Suppl. 176.

Time for entering judgment.— Under the Pennsylvania act of March 28, 1835, judgment for default of an affidavit of defense could not be entered until the third Saturday after the return-day. Ruhland *v.* Alexander, 19 Pa. Co. Ct. 577, 41 Wkly. Notes Cas. 16. The Pennsylvania act of May 25, 1887, providing for judgment by default for want of an affidavit of defense after the expiration of fifteen days from service of the statement or the return-day does not apply to a scire facias sur mechanic's lien. Johnson *v.* Scofield, 8 Pa. Dist. 410, 411, 29 Pa. Co. Ct. 536, 22 Pa. Co. Ct. 382, where the court recognized that the case of Oil City *v.* Hartwell, 164 Pa. St. 348, 30 Atl. 268, sustained a contrary contention, but said: "The question whether the Act applied does not seem to have been raised, and it was apparently assumed that it did apply. In view of the fact that the question involved here was not raised or considered in that case, I feel constrained to not consider it as binding authority upon it."

Owner served as garnishee.— Where the owner, served as a garnishee in a proceeding by a subcontractor fails to appear, plaintiff is entitled to a default without first having filed interrogatories. Parmenter *v.* Childs, 12 Iowa 22, holding further that in moving to set aside the default, or in showing cause against the issuing of execution, the garnishee must not only rebut the presumption of indebtedness, but must also show a sufficient excuse for the default, and the default so obtained will not be set aside upon the unsupported affidavit of the garnishee that he had been always ready to answer in court.

56. Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374.

57. Schlachter *v.* St. Bernard's Roman Catholic Church, (S. D. 1905) 105 N. W. 279.

58. Wethered *v.* Garrett, 7 Pa. Co. Ct. 535.

59. Kansas L. & T. Co. *v.* Phelps, etc., Windmill Co., 7 Kan. App. 469, 54 Pac. 136.

ment in substance that plaintiff has a valid lien upon the property for the sum found due him, and that the sheriff sell the property and from the proceeds pay plaintiff the sum found due him and bring the surplus money into court to abide its further order, is not unintelligible and incapable of being carried out by the sheriff because it is not stated which of the defendants shall pay the amount found due plaintiff.[60] Where suits upon several lien claims are tried together, the judgment as to one claim may be valid, although upon another claim the judgment may be wrong.[61] Where demands due at separate times were included in a mechanic's lien, and parts were due and parts not due when the action was brought, the court may render judgment for an amount which was not due when the action was brought but subsequently fell due and is unpaid when the judgment is rendered.[62] A judgment in an action to foreclose a mechanic's lien need not adjudge that the land directed to be sold is necessary for the convenient use and occupation of the building where the complaint alleges that all of the land is necessary for such purpose and the court finds the allegation to be true.[63] The failure of the judgment to adjudge that at the commencement of the action the land belonged to the person who caused the building to be constructed or that it was erected with his knowledge does not render the judgment erroneous where it is alleged and found that defendant at whose instance the building was erected was at all times mentioned the owner and entitled to the possession of the property and that the interest of the other defendants who claimed to have some interest therein was subsequent to plaintiff's lien.[64] Where the lienor dealt directly with the owner and the lien was entitled to priority over a mortgage the rights of the parties would not be affected by the fact that the judgment for the sum claimed on the mechanic's lien was rendered against the owner of the house alone where its recital embraced all parties, describing their interests and providing that if no sufficient property were found the residue should be levied out of the premises.[65] The mere fact that the judgment on the liens is taken for too much, by including interest not properly recoverable, is not of itself conclusive proof of fraud, but it cannot be sustained for this amount as against a subsequent mortgagee.[66]

12. **Operation and Effect.** The judgment in a mechanic's lien suit concludes the interest of the parties to the suit,[67] their privies,[68] and persons whose interests accrued after the suit was commenced.[69] But persons who have an interest in the property at the time the proceedings are commenced and are not made parties, are not bound or affected thereby,[70] but may go behind the foreclosure and

60. Neihaus *v.* Morgan, (Cal. 1896) 45 Pac. 255.

61. Dahlborg *v.* Wyzanski, 175 Mass. 34, 58 N. E. 593.

62. El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

The proper practice in such a case is for plaintiff to sue only for the amount due, and then subsequently, when the other amount becomes due, to file a supplemental petition asking judgment therefor also. But where no objection is made to the form of the pleadings it was not erroneous to render judgment on a petition for the entire amount, although part was not due when the petition was filed. El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

63. Dusy *v.* Prudom, 95 Cal. 646, 30 Pac. 798.

64. Dusy *v.* Prudom, 95 Cal. 646, 30 Pac. 798.

65. Reilly *v.* Hudson, 62 Mo. 383.

66. Gamble *v.* Voll, 15 Cal. 507.

67. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748; Bowman *v.* McLaughlin, 45 Miss. 461.

Defendant lien-holders.—Where plaintiff, in an action to foreclose a mechanic's lien, makes all the other lien-holders defendants, as required by N. Y. Laws (1885), c. 342, § 17, which provides that such defendants shall, by answer, set forth their claims, and the court may settle and determine the equities of all the parties, a judgment adjusting the interests of all lien claimants is conclusive on defendants, although they did not file answers. Hardwick *v.* Royal Food Co., 78 Hun (N. Y.) 52, 28 N. Y. Suppl. 1086.

68. Smith *v.* De Pontia, 8 Kan. App. 459, 54 Pac. 514.

69. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748.

70. *Illinois.*— General Fire Extinguisher Co. *v.* Lundell, 66 Ill. App. 140.

Indiana.— Union Nat. Sav., etc., Assoc. *v.*

contest the validity of the lien as well as proceedings thereon leading up to the execution of the sheriff's deed.[71] If it nowhere appears in the judgment-roll when the lien attached to the building the judgment will operate as a lien upon the premises from the time it was docketed.[72] A decree of sale does not vest in plaintiff either the title or the right of possession.[73] A decree establishing a mechanic's lien, which orders that, in default of the payment of its amount by the lessee or the owner to whom he has surrendered, the interest of all the parties therein shall be sold, will be construed as applying to the interest of the parties in the leasehold estate, including the improvements for which the lien is established.[74] Where a subcontractor who has performed work or furnished material prosecutes his claim to judgment against his debtor, and then proceeds by scire facias against the owner, the judgment recovered is binding, so far as the amount of indebtedness is concerned, upon such owner.[75] A judgment or decree establishing a mechanic's lien on the building alone, separate from the land, and ordering it sold to satisfy the lien, necessarily adjudicates the question of the nature of the improvement and in effect decrees it to be personal property.[76] If, when the proceedings to enforce a mechanic's lien are against the same person as builder and owner, the minutes of the court show a general and special judgment, which would give a lien prior to a mortgage, but the record shows a general judgment only, the court of chancery, in the absence of fraud or imposition, cannot impose the debt involved therein as a lien on the lands in question, on the ground that it ought to have been recorded as a special judgment.[77] A judgment upon a mechanic's lien claim may cure defects which, without the judgment would be fatal;[78] but where the petition is not sufficient to justify the entry of a decree fixing a lien on the premises the deficiency is not cured by a recital in the decree that the complainants gave evidence to sustain every allegation of the petition.[79] Where, in an action to enforce a mechanic's lien, tried by the court without a jury, the evidence as to whether a certain sum paid to the contractor was in full of the contract price was conflicting, and the court dismissed the complaint, such judgment was equivalent to a finding that the sum paid was all plaintiff was entitled to under the contract, and hence a dismissal on the merits, and not a nonsuit merely.[80]

13. Amendment or Vacation. The court has power to correct a clerical error in the judgment.[81] An amendment altering and correcting the description of the land in the lien statement, the complaint, and the judgment should not be made

Helberg, 152 Ind. 139, 51 N. E. 916; Deming-Colburn Lumber Co. *v.* Union Nat. Sav., etc., Assoc., 151 Ind. 463, 51 N. E. 936 [*followed* in Husted *v.* Nat. Home Bldg., etc., Assoc., 152 Ind. 698, 51 N. E. 1067].

Maryland.— McKim *v.* Mason, 3 Md. Ch. 186.

Mississippi.— Bowman *v.* McLaughlin, 45 Miss. 461.

New York.— Burnham *v.* Raymond, 64 N. Y. App. Div. 596, 72 N. Y. Suppl. 300.

Wisconsin.— Lampson *v.* Bowen, 41 Wis. 484.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 608; and Judgments, 23 Cyc. 1260 note 94.

71. Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

72. Kendall *v.* McFarland, 4 Oreg. 292.

73. Merchants' Ins. Co. *v.* Mazange, 22 Ala. 168.

74. Dobschuetz *v.* Holliday, 82 Ill. 371.

75. Emmet *v.* Rotary Mill Co., 2 Minn. 286.

76. Shull *v.* Best, 4 Nebr. (Unoff.) 212, 93 N. W. 753.

77. Cutter *v.* Kline, 35 N. J. Eq. 534 [*reversing* 34 N. J. Eq. 329].

78. Holland *v.* Garland, 13 Phila. (Pa.) 544.

79. Leslie *v.* Reed, 107 Ill. App. 248, since such recital is not a statement of facts found by the court but a conclusion of law.

80. Doll *v.* Coogan, 48 N. Y. App. Div. 121, 62 N. Y. Suppl. 627 [*affirmed* in 168 N. Y. 656, 61 N. E. 1129].

81. Mason *v.* Heyward, 5 Minn. 74; Horstkotte *v.* Menier, 50 Mo. 158.

A mistake in the judgment as to the date when the lien attached may be corrected by proper proceedings. Monroe *v.* West, 12 Iowa 119, 79 Am. Dec. 524, holding that the occurrence of such a mistake if corrected does not waive any priority to which plaintiff was entitled when the judgment was originally rendered, and that, where the amendment consists in the substitution of an earlier date for that fixed in the first judgment, a prior mortgagee who has not been in any way misled by the mistake cannot take any advantage thereof.

on an *ex parte* application,[82] but where such amendment has been made an appellate court will assume, the record being silent on the subject, that due notice was given to the adverse party.[83] A final judgment upon a petition to enforce a mechanic's lien may, at least when the petition was inserted in a writ of original summons, be the subject of a writ of review, or may without the forms of granting and suing out a writ of review be ordered to be vacated and the case brought forward on the docket for trial under a statute allowing final judgments in civil actions, when the execution has not been satisfied to be more summarily reviewed in this manner.[84] Where a judgment to establish and enforce a mechanic's lien has been taken without making the person who owned the property at the commencement of the action a party, the court by which the lien judgment is rendered may, upon motion of such owner and upon a proper showing of facts, set aside the judgment within a year after its entry and admit the moving party to defend against the claim for a lien.[85] Where in an action to foreclose a mechanic's lien, a judgment of another court establishing plaintiff's claim was given in evidence, and judgment was rendered for plaintiff, and afterward the judgment so given in evidence was reversed on appeal, defendant was not entitled to have the judgment of foreclosure annulled, but his only relief was to have such judgment opened and a new trial granted.[86] An application to the court to modify the lien decreed so that it should apply only to the premises claimed by defendant to be liable thereto, supported by affidavits, is proper as it does not ask a rehearing on the merits, which requires an opening of the judgment and a trial, but only such a change as shall make the judgment to be entered conform to law.[87] Where in an action upon an account and to foreclose a mechanic's lien there was a general finding for plaintiff, on which a personal judgment only was entered against defendant, and after the rendition of the judgment, and at the same term of court defendant filed a motion for a new trial, which at the next term was overruled, and at a later day in the term on motion of plaintiff without notice to defendant, the court set aside its former judgment and entered a like personal judgment, and a decree foreclosing the lien, it was held that this action was within the power of the court, and not erroneous.[88]

14. Collateral Attack. The judgment in mechanic's lien proceedings is not open to collateral attack[89] except on the ground of lack of jurisdiction[90] or fraud and collusion.[91]

M. Execution.[92] In some states a special execution issues against the property subject to the lien.[93] A general personal execution against defendant in the

82. Schmidt *v.* Gilson, 14 Wis. 514.
83. Schmidt *v.* Gilson, 14 Wis. 514.
84. Hubon *v.* Bonsley, 123 Mass. 368.
85. Lampson *v.* Bowen, 41 Wis. 484 [*following* Ætna Ins. Co. *v.* Aldrich, 38 Wis. 107].
86. Raven *v.* Smith, 76 Hun (N. Y.) 60, 27 N. Y. Suppl. 611 [*affirmed* in 148 N. Y. 415, 43 N. E. 63].
87. Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.
88. McClellan *v.* Binkley, 78 Ind. 503.
89. Reilly *v.* Hudson, 62 Mo. 383 (on the ground that the improvement out of which the lien arose was not a fixture); Allen *v.* Sales, 56 Mo. 28; Hendrickson *v.* Norcross, 19 N. J. Eq. 417 (holding that one who purchases land subject to a judgment for a mechanic's lien cannot dispute collaterally that the judgment was properly entered or that the land was liable); Nolt *v.* Crow, 22 Pa. Super. Ct. 113; Wrigley *v.* Mahaffey, 5 Pa. Dist. 389. See also Hill's Estate, 2 Pa. L. J. Rep. 96.
90. Allen *v.* Sales, 56 Mo. 28.
91. Nolt *v.* Crow, 22 Pa. Super. Ct. 113; Wrigley *v.* Mahaffey, 5 Pa. Dist. 389.
92. See, generally, Executions.
93. *Alabama.*— Porter *v.* Miles, 67 Ala. 130.
Iowa.— Wilson *v.* Reuter, 29 Iowa 176.
Missouri.— Milam *v.* Bruffee, 6 Mo. 635, the execution can only issue against such property, charged with the lien, as defendant owned or possessed at the time of the commencement of the suit.
New York.— Lenox *v.* Yorkville Baptist Church, 2 E. D. Smith 773.
Oregon.— Kendall *v.* McFarland, 4 Oreg. 292.
Wisconsin.— Bailey *v.* Hull, 11 Wis. 289, 78 Am. Dec. 706, holding that a judgment under the Mechanics' Lien Law must order a sale of the land on an ordinary execution, with such modification of the execution as may be necessary, and the sheriff cannot sell the property on the judgment merely without execution.

first instance is not authorized;[94] but if an amount sufficient to satisfy the lien is not realized out of the property subject thereto a general execution against the debtor may issue for the deficiency.[95] The special execution must conform to the judgment establishing the lien,[96] and specify the property to be levied on.[97] Where judgment has been rendered followed by a seizure on execution before the appointment of an assignee in insolvency of the owner no further judgment is required to make the property available to satisfy the execution.[98] A motion to quash the execution made by the landowner on the ground that the sheriff should have first made effort to satisfy the execution out of property of the debtor defendants, and, failing in that, he would then have authority to enforce it against the real estate charged with the lien, is properly overruled where it does not allege, and there is no evidence to show, that sufficient property of the debtor defendants could be found to satisfy the execution or part thereof.[99]

N. Sale[1] **— 1. In General.** The ordinary method of enforcing a mechanic's lien is by a sale of the property subject to the lien or of the right, title, and interest of the person proceeded against as owner of such property;[2] and such prop-

The Pennsylvania act of 1855, forbidding any second or other inquisition and extent, pending the first, on any writ issued on judgments existing at the date of such inquisition, does not apply to mechanics' liens. Schmidt *v.* Stetler, 2 Luz. Leg. Reg. 192, 21 Pittsb. Leg. J. 34.

94. Chicago First Baptist Church *v.* Andrews, 87 Ill. 172 [*followed* in Stone *v.* Tyler, 173 Ill. 147, 50 N. E. 688 (*reversing* 67 Ill. App. 17)]. See also *infra*, note 3. But *compare* Richardson *v.* Warwick, 7 How. (Miss.) 131, holding that the claimant may elect to abandon his special lien after judgment, and have an execution, as in the case of an ordinary judgment.

In a personal proceeding by a subcontractor against the owner of a building and the principal contractor, judgment can be enforced only by general execution. Chicago First Baptist Church *v.* Andrews, 87 Ill. 172.

95. Chicago First Baptist Church *v.* Andrews, 87 Ill. 172 [*followed* in Stone *v.* Tyler, 173 Ill. 147, 50 N. E. 688 (*reversing* 67 Ill. App. 17)]; Race *v.* Sullivan, 1 Ill. App. 94; American Sav., etc., Assoc. *v.* Campbell, 8 S. D. 170, 65 N. W. 815. See also *supra*, VIII, L, 3, c.

Owner may insist that property not exempt from execution be first subjected.— King *v.* C. M. Hapgood Shoe Co., 21 Tex. Civ. App. 217, 51 S. W. 532 [*following* Pridgen *v.* Warn, 79 Tex. 588, 15 S. W. 559].

In determining against what parties to award execution for the balance, after deducting proceeds of sale under the decree, resort can be had only to the petition, and not to the proof before the master. Race *v.* Sullivan, 1 Ill. App. 94.

Denial of writ directing sale of materials.— Where, in an action to enforce a lien for materials furnished for the erection of a hotel, the judgment declared a lien on the building and the material therein and thereabout, and on the lot, and a petition for an order commanding the issue of a second writ for the sale of the material alleged that the building and lot had been sold, but that a balance remained unpaid on the judgment, it was held that the order was properly refused because it was not shown in the petition or in the judgment that the material had any connection with the erection of the building, or was intended to be used therein, because it was not shown that in filing the claim for a lien, or in the suit or complaint in which judgment for the lien was rendered, there was any mention of or claim on the material; but, on the other hand, the verdict showed either that there was no such claim or that it was disallowed, because it was not averred of what the materials consisted, and no description was given whereby the sheriff would be informed of what he was commanded to seize, and because it was not averred who was the owner of the material. Lee *v.* King, 99 Ala. 246, 13 So. 506.

96. Porter *v.* Miles, 67 Ala. 130; Wilson *v.* Reuter, 29 Iowa 176 (holding that where the judgment established a lien against the building alone, a special execution against the building and the lot whereon it stood was unauthorized, and a sale thereunder void); Sly *v.* Pattee, 58 N. H. 102.

97. Sly *v.* Pattee, 58 N. H. 102.

98. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

99. Fink *v.* Remick, 33 Mo. App. 624.

1. See, generally, Executions; Judicial Sales.

2. Gauhn *v.* Mills, 2 Abb. N. Cas. (N. Y.) 114 (holding that on foreclosure of a mechanic's lien the court has power to direct a sale of the premises by referee as on the foreclosure of a mortgage); Pairo *v.* Bethell, 75 Va. 825.

Jurisdiction over property.— Where, in an action to enforce a mechanic's lien on defendant's entire property, in which several interveners claimed liens against the same, and one claimed a lien against a portion only, a decree was entered fixing the amount due each claimant, and adjudging that each have a lien against the property described in his complaint, and ordering the entire property to be sold to satisfy the liens, and all the parties assented to the decree, and no motion was made to set aside the sale thereunder,

erty must be exhausted before other property of the owner can be subjected to the payment of the judgment in favor of the lienor.[3] The sale may be either under the judgment as in cases of mortgage foreclosure or by execution.[4] A sale should not be made until the relative rights of the lien-holders have been definitely settled.[5] Only the estate or interest to which the lien attaches[6] should be sold,[7] and under some statutes no greater estate can be sold than is vested in the person in possession.[8] A mechanic's lien enforced against a simple equity must be confined to that, and a sale of the equitable interest must be subject to the rights of the legal owner.[9] If part of the premises can be separated from the remainder without injury to the whole and sold for an amount sufficient to satisfy the liens, such part only should be sold;[10] but it is error to decree a sale of a part

the sale was not void on the ground that by such sale the person claiming a lien against only a portion of the property shared in the proceeds from property of which his complaint did not give the court jurisdiction. Staples *v.* Ryan, 62 Fed. 635.

Property owned in common may be sold, although the lien is enforceable only upon the interests of some of the tenants in common, where the land is of such a character that it cannot be equitably partitioned. Hines *v.* Chicago Bldg., etc., Co., 115 Ala. 637, 22 So. 160.

Where owner's interest extinguished.— The provision of the Mechanics' Lien Law that, where the land is encumbered by mortgage or otherwise at the time of making the contract, the owner's equity of redemption may be sold, has no application where the equity of redemption has been destroyed or lost by sale under a trust deed. Tracy *v.* Rogers, 69 Ill. 662.

Filing away of case.— Where a judgment in a foreclosure case has been entered, and the case "filed away," subject to be redocketed, the fact that plaintiff caused the land to be sold without first having the case redocketed gives the debtor no ground of objection thereto, when he was notified that the sale would be ordered, and suffered no injury from the omission. Pittman *v.* Wakefield, 90 Ky. 171, 13 S. W. 525, 11 Ky. L. Rep. 972.

A provision against underletting in a lease does not prevent a sale of the leasehold for the enforcement of a mechanic's lien thereon. Reed *v.* Estes, 113 Tenn. 200, 80 S. W. 1086.

3. Thompson *v.* Dale, 58 Minn. 365, 59 N. W. 1086; Decker *v.* O'Brien, 1 N. Y. App. Div. 81, 36 N. Y. Suppl. 1079 [*affirmed* in 159 N. Y. 553, 54 N. E. 1090]; Marks *v.* Pence, 31 Wash. 426, 71 Pac. 1096. See also Hassett *v.* Rust, 64 Mo. 325. See also *supra*, note 94.

Judgment not authorizing general execution.— A judgment of foreclosure which directs that plaintiff recover of defendant the whole amount adjudged to be due, but which also provides for the sale of the premises, and that, if there be any deficiency remaining on the sale, plaintiff recover of defendant the amount of the deficiency, and have execution therefor, is not subject to the objection that it authorizes execution to be issued against defendant's property to the whole amount of the lien. Decker *v.* O'Brien, 1 N. Y. App. Div. 81, 36 N. Y. Suppl. 1079.

4. Suydam *v.* Holden, 11 Abb. Pr. N. S. (N. Y.) 329 note. Although it might be proper to order the sale to be made by a master or a commissioner, yet the same result is produced by the issuing of a special execution to the sheriff. The return of that officer would be a report of the sale, which, if not made in pursuance of law, might be set aside, and another sale ordered. Kelley *v.* Chapman, 13 Ill. 530, 56 Am. Dec. 474.

No order of sale need be issued to enforce a decree of foreclosure, but the decree itself is sufficient authority to the officer or other person designated in the decree to make the sale. Jarrett *v.* Hoover, 54 Nebr. 65, 74 N. W. 429.

Return of order of sale.— Nebr. Code Civ. Proc. § 510, fixing the time within which an execution shall be made returnable, is not applicable to an order of sale issued on a decree of foreclosure. Jarrett *v.* Hoover, 54 Nebr. 65, 74 N. W. 429.

5. Phelps *v.* Pope, 53 Iowa 691, 6 N. W. 42.

6. See *supra*, IV, B, 5.

7. Judson *v.* Stephens, 75 Ill. 255; Lenox *v.* Yorkville Baptist Church, 2 E. D. Smith (N. Y.) 673; Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657.

Only defendant's right, title, and interest should be ordered sold.— Smith *v.* Corey, 3 E. D. Smith (N. Y.) 642; Schmidt *v.* Gilson, 14 Wis. 514; Dewey *v.* Fifield, 2 Wis. 73. But *compare* Kidder *v.* Aholtz, 36 Ill. 478, holding that the court may, if it sees proper, direct the sale of the estate of all parties having an interest in the premises, although the better practice is not to do so if the object of the statute can be obtained by decreeing a sale of the interest of those parties only against whose interest the lien attaches.

8. Schenley's Appeal, 70 Pa. St. 98, holding that the Pennsylvania act of April 28, 1840, so providing, does not enlarge but restrains the right of the mechanic's lien creditor.

9. Wagar *v.* Briscoe, 38 Mich. 587.

10. Major *v.* Collins, 11 Ill. App. 658; Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31, holding that the parts should be sold in such order as the owner may elect.

Release of part of property.— Where after a judgment establishing a lien on a building,

only where a division would be injurious.[11] If the property exceeds the area which the statute allows to be subjected to the lien[12] the court will divide it in the way best suited to the interests of both parties.[13]

2. Where Property Mortgaged or Otherwise Encumbered[14]— a. In General. The fact that the property is subject to a prior encumbrance does not prevent a sale on foreclosure of a mechanic's lien.[15] Under some statutes the sale must in such case be made subject to the prior encumbrance,[16] unless the encumbrancer comes in and consents to be made a party;[17] but under other statutes the sale is made free of encumbrances and prior encumbrancers must look to the proceeds for satisfaction of their debts,[18] and where, in a mechanic's lien foreclosure, it appears that the liens can only be satisfied by a sale of the property, mortgagees who have been made parties cannot object that they are not seeking foreclosure and should not be compelled to accept the results thereof.[19] It has been held that where there is doubt as to the priority of the liens, the property should be sold, although it will not bring its full value, and the contest be made over the proceeds of the sale.[20]

b. Where Mechanic's Lien Prior as to Building But Not as to Land. Where a mechanic's lien arising out of the improvement of mortgaged or otherwise encumbered property is entitled to priority as to the building or improvement but not as to the land[21] the rights of the lienor are enforced by a sale of the building or improvement as distinct from the land, the purchaser having the right of removal,[22]

and the interest of the owner in certain land, and directing in general terms a sale of the property to satisfy the lien, plaintiff, by request of defendant's attorney, released from his lien a portion of the land not covered by the building or necessary to its use, and caused the residue to be sold by the sheriff, the sale was not irregular, for want of conformity to the order of sale. Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503.

11. Chicago North Presb. Church *v.* Jevne, 32 Ill. 214, 83 Am. Dec. 261, holding a decree for the sale of a church edifice without the land on which it stands to be erroneous.

12. See *supra*, IV, B, 2, b.

13. Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

14. Extinguishment of junior liens by sale see *infra*, VIII, N, 8.

15. Hughes Bros. Mfg. Co. *v.* Conyers, 97 Tenn. 274, 36 S. W. 1093.

16. Smith *v.* Shaffer, 46 Md. 573. See also Bruce Lumber Co. *v.* Hoos, 67 Mo. App. 264.

The mortgagee cannot object that the sale was decreed subject to the lien of the mortgage merely without providing for an apportionment of the proceeds, pursuant to McClain Code Iowa, § 3317, which enables a mechanic's lien claimant to secure the advantage of the increase in value of the realty resulting from the improvement. Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193.

17. Smith *v.* Shaffer, 46 Md. 573.

18. Topping *v.* Brown, 63 Ill. 348 (holding that a sale under a decree to enforce a mechanic's lien will divest the lien of a prior mortgage for purchase-money, if the mortgagee is made a party to the suit, even though the decree makes no reference to the mortgage and is silent as to the proceeds of the sale); Croskey *v.* Northwestern Mfg. Co., 48 Ill. 481.

19. Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

20. Winn *v.* Henderson, 63 Ga. 365, holding that a mere allegation that from the condition of the times the property will not bring its full value is not an equitable ground for an injunction against the sale.

21. See *supra*, IV, C, 2, c.

22. *Alabama.*— Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305; Turner *v.* Robbins, 78 Ala. 592.

Colorado.— Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519.

Iowa.— Tower *v.* Moore, 104 Iowa 345, 73 N. W. 823; Luce *v.* Curtis, 77 Iowa 347, 42 N. W. 313 (although the right of redemption be thereby cut off); Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 41, 3 N. W. 547; Conrad *v.* Starr, 50 Iowa 470. See also Shepardson *v.* Johnson, 60 Iowa 239, 14 N. W. 302.

Mississippi.— See Otley *v.* Haviland, 36 Miss. 19.

Missouri.— See Crandall *v.* Cooper, 62 Mo. 478.

Montana.— Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607.

North Dakota.— James River Lumber Co. *v.* Danner, 3 N. D. 470, 57 N. W. 343.

South Dakota.— Laird-Norton Co. *v.* Herker, 6 S. D. 509, 62 N. W. 104.

Texas.— June *v.* Doke, 35 Tex. Civ. App. 240, 80 S. W. 402, holding that where one person had a first lien on a building and lot, and another person a prior lien on machinery in the building, it was proper to order the building and lot and the machinery sold separately.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 370, 619.

The burden is on the lienor to show that a separate sale of the building would be proper

or by a separate valuation of the land and of the improvements, and a sale of the property as an entirety, and an apportionment of the proceeds into funds corresponding to the valuations made.[23]

3. STAY OF SALE. Under some statutes the sale may be stayed for a limited time by the giving of a bond with security.[24]

4. MANNER AND CONDUCT OF SALE. Notice of the sale must be given for the time and in the manner prescribed by the statute.[25] Property of value should

under all the circumstances; and a decree of the trial court giving priority to the mortgage will not be set aside where the building is a fixture and all that is made to appear is that the land is not sufficient to pay the mortgage. Miller *v.* Seal, 71 Iowa 392, 32 N. W. 391.

The fact that the decree does not provide for removal of the building does not affect the right of removal. Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607.

The character of the building does not affect the right to have it sold and removed, and this may be done even though it is of brick or stone and cannot be removed without great loss. Ambrose Mfg. Co. *v.* Gapen, 22 Mo. App. 397; Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607. But *compare* Tower *v.* Moore, 104 Iowa 345, 73 N. W. 823.

Lien claimed against both building and land.— A decree giving a lien upon the building alone and directing a sale thereof is not precluded by the fact that plaintiff filed a statement claiming a lien on both the building and the land. Bitter *v.* Mouat Lumber, etc., Co., 10 Colo. App. 307, 51 Pac. 519.

Time for removal.— The building must be removed with reasonable despatch and while what is reasonable despatch is determinable by circumstances, a delay for two years or more is *prima facie* fatal to, and in the absence of explanation conclusive against, the right to remove. Priebatsch *v.* Third Baptist Church, 66 Miss. 345, 6 So. 237. A building purchased on the foreclosure of a mechanic's lien thereon cannot be removed before the expiration of the time of redemption. Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607.

Right of purchaser to possession of land until foreclosure of mortgage.— The purchaser on foreclosure of the mechanic's lien may, as against the holder of a prior mortgage on the land, remain in possession of the land till the mortgage is foreclosed, and does not by so doing lose his right to remove the building or improvement from the land. Grand Opera House Co. *v.* Maguire, 14 Mont. 558, 37 Pac. 607.

23. *Colorado.*— Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

Illinois.— Bradley *v.* Simpson, 93 Ill. 93; Tracy *v.* Rogers, 69 Ill. 662; Howett *v.* Selby, 54 Ill. 151; Chicago North Presb. Church *v.* Jevne, 32 Ill. 214, 83 Am. Dec. 261; Raymond *v.* Ewing, 26 Ill. 329.

Iowa.— Code (1897), § 3095, subd. 4, establishes the rule stated in the text with certain limitations. See Leach *v.* Minick, 106 Iowa 437, 76 N. W. 751; Curtis *v.* Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314; Brodt *v.* Rohkar, 48 Iowa 36.

Louisiana.— Wang *v.* Field, 26 La. Ann. 349 (holding that a separate sale of the house without any reference to the land is a nullity); McDonough *v.* Le Roy, 1 Rob. 173; Cordeville *v.* Hosmer, 16 La. 590; Andry *v.* Guyol, 13 La. 8.

New Jersey.— Newark Lime, etc., Co. *v.* Morrison, 13 N. J. Eq. 133.

Texas.— Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160, where the building cannot be removed from the land without great loss. See also Owens *v.* Heidhreder, (Civ. App. 1898) 44 S. W. 1079.

United States.— Chauncey *v.* Dyke, 119 Fed. 1, 55 C. C. A. 579.

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 370, 619, 640.

In case of an addition to a building subject to a mortgage, the addition must be valued, and the whole building sold, and the value of the addition, so far as necessary to satisfy his claim, paid to the lienor out of the proceeds. Whitenack *v.* Noe, 11 N. J. Eq. 321.

Both creditors must choose appraisers, and neither can be affected by an appraisement to which he is not a party. Cordeville *v.* Hosmer, 16 La. 590.

In Virginia the values of land and improvements are not to be estimated as bearing a certain ratio to each other, in which proportion the proceeds shall be distributed but the value of the land is to be estimated at a certain fixed amount, which is to be paid to the prior encumbrancer from the proceeds before the holders of the mechanics' liens can participate therein. Fidelity L. & T. Co. *v.* Dennis, 93 Va. 504, 25 S. E. 546.

24. See Paine *v.* Putnam, 10 Nebr. 588, 7 N. W. 336, holding that defendant is not entitled to a stay upon mere request, as provided by Laws (1875), p. 49, § 2, on foreclosure of mortgages, but must give bond.

25. Wagar *v.* Briscoe, 38 Mich. 587, holding that under Comp. Laws (1871), § 6803, providing for the same notice that is prescribed for sales of real estate on execution, unless the court shall order other or different notice, and section 4629, providing, as to the latter, that notice shall be given by posting up a notice in three public places in the proper locality six weeks previous to the sale and publishing a copy in the proper newspaper once in each week for six successive weeks, where a decree provided for

ordinarily be sold on reasonable credit.[26] Where the property to be subjected to the lien consists of several separate houses on separate lots, each house and the lot on which it stands should be sold separately,[27] and if a tract is divisible it is proper to divide it into parts and sell each part separately, so that the lien may be satisfied without selling the entire tract if possible;[28] but where the building is all under one roof, although partly on one lot and partly on another, it is properly decreed to be sold as a whole.[29]

5. Setting Aside Sale. A lien-holder whose lien was not cut off by a sale under a mechanic's lien cannot bring an action to set aside such sale;[30] but the fact that a judgment creditor has treated a sale under a mechanic's lien as valid, by attempting to redeem under it, does not estop him from afterward asserting its invalidity.[31] Lienors who have become the purchasers of the property are entitled to notice of a motion to set the sale aside.[32] Inadequacy of price alone does not justify setting aside the sale;[33] but, when such inadequacy is very great, slight circumstances tending to show that interested parties were misled or prevented by mistake or accident from attending or preventing the sale may suffice to set it aside.[34] A sale to plaintiff of defendant's property will be set aside in equity where defendant had no notice of the pendency of the suit or of the sale until it was too late to protect himself and prevent the disposal of his property under the decree.[35] Where property has been sold and the proceeds distributed according to the rule laid down in the decree of sale the only equitable method of correcting an error in the decree as to the distribution is to set aside the sale and order a resale.[36]

6. Conveyance to Purchaser. Where the sale is made by the sheriff he is bound to execute to the purchaser a deed of conveyance of the owner's interest in the premises.[37]

7. Recovery of Purchase-Money. The officer who made the sale can maintain an action against the purchaser for the purchase-money.[38] When a vendor's lien

sale "twelve days after notice of the time and place of sale," the notice required by the decree was that provided by the statute for sales on execution, except that a further twelve days must intervene between the completion of the acts required by the statute and the sale, and that a sale made sixteen days after the granting of the order of sale was invalid.

A statute prohibiting a sale within a certain time after the decree was rendered does not prohibit the advertisement of the sale within such time, and if the property is advertised for the time prescribed by statute and not sold until after the expiration of the stay allowed the sale is valid. Neher *v.* Crawford, 10 N. M. 725, 65 Pac. 156.

26. Pairo *v.* Bethell, 75 Va. 825, unless under peculiar circumstances, in which case the circumstances taking the case out of the general rule should appear by the record.

Where the lien claim is but a small proportion of the value of the whole property, it is proper to decree a sale for a cash payment sufficient to pay the debt. Lester *v.* Pedigo, 84 Va. 309, 4 S. E. 703.

27. Major *v.* Collins, 11 Ill. App. 658 [*following* Culver *v.* Elwell, 73 Ill. 536].

28. Broyhill *v.* Gaither, 119 N. C. 443, 26 S. E. 31, holding that the parts should be sold in such order as the owner elects.

29. Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425 [*affirming* 83 Ill. App. 275].

30. Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454, 17 N. E. 358, as in such case he still has and may enforce his lien and the intervention of equity is needless.

31. Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503].

32. Turney *v.* Saunders, 8 Ill. 239.

33. Sheppard *v.* Messenger, 107 Iowa 717, 77 N. W. 515; Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335, (1895) 32 S. W. 1.

34. Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335, (1895) 32 S. W. 1.

35. Kizer Lumber Co. *v.* Mosely, 56 Ark. 544, 20 S. W. 409.

36. Dingledine *v.* Hershman, 53 Ill. 280, so holding on the ground that the decree could not equitably be corrected so as to compel any of the encumbrancers to refund any portion of what they had received, because if the sale were allowed to stand they would have no opportunity under a different rule of distribution reducing their proportion to protect their interests by making the property bring a higher price.

37. Randolph *v.* Leary, 3 E. D. Smith (N. Y.) 637, 4 Abb. Pr. 205 [*followed* in Smith *v.* Corey, 3 E. D. Smith 642, 4 Abb. Pr. 208 note], holding that a mere certificate of sale is insufficient.

38. Trustees', etc., Ins. Corp. *v.* Bowling, 2 Kan. App. 770, 44 Pac. 42 [*citing* Bell *v.*

is not recognized without a special agreement therefor, the claim for the purchase-money does not necessarily follow the land, and a judgment therefor should not be made a special lien on the land.[39]

8. EFFECT OF SALE. The sale conveys only the title and interest of defendant owner,[40] and does not affect the title or interest of persons not parties to the foreclosure proceedings.[41] A sale to one of the lien claimants, unredeemed from by the owner, frees the property of the lien, and from the date of the sale the purchaser's rights are those of purchaser only, independent of the lien.[42] A sale under a mechanic's lien discharges the lien of a subsequent mortgage.[43]

9. TITLE AND RIGHTS OF PURCHASER. The sale vests in the purchaser all the title and interest of defendant owner,[44] and his title relates back to the time when the lien attached.[45] The purchaser takes title free of equities of which he had no

Owen, 8 Ala. 312; Walker *v.* Braden, 34 Kan. 660, 9 Pac. 613; Armstrong *v.* Vroman, 11 Minn. 220, 88 Am. Dec. 81; Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350; Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32; Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254].

The expiration of the officer's term of office does not defeat his right to sue the purchaser for the purchase-money when he has paid the amount to which a judgment creditor is entitled from the proceeds of such sale. Trustees', etc., Ins. Corp. *v.* Bowling, 2 Kan. App. 770, 44 Pac. 42.

39. Trustees', etc., Ins. Corp. *v.* Bowling, 2 Kan. App. 770, 44 Pac. 42.

40. Lomax *v.* Dore, 45 Ill. 379.

41. *Illinois.*— Lomax *v.* Dore, 45 Ill. 379; Williams *v.* Chapman, 17 Ill. 423, 65 Am. Dec. 669; Kelley *v.* Chapman, 13 Ill. 530, 56 Am. Dec. 474.

Indiana.— Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

Missouri.— See Fink *v.* Rimick, 33 Mo. App. 624, holding that a sheriff's advertisement showing that he proposes to sell the interest of the debtor defendants in the real estate when they have no interest cannot prejudice the rights of the true owner.

Nebraska.— Portsmouth Sav. Bank *v.* Riley, 54 Nebr. 531, 74 N. W. 838.

Nevada.— *In re* Smith, 4 Nev. 254, 97 Am. Dec. 531, holding that where real estate was sold by a sheriff under a decree of foreclosure of a mortgage and was subsequently sold under a decree foreclosing a mechanic's lien on the property, in which latter proceedings the first purchaser was not made a party, the sheriff's deed under the second sale did not divest or affect the title of the first purchaser.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 622.

42. Van Buskirk *v.* Summitville Min. Co., (Ind. App. 1906) 78 N. E. 208.

43. Harbach *v.* Kurth, 131 Pa. St. 177, 18 Atl. 1062, holding further that where a mechanic's lien is filed against two adjoining lots for a building erected upon one, and both lots are sold without any previous determination of the curtilage, the mortgagee cannot allege that any portion of the ground embraced in the claim was not necessary for the proper and useful purposes of the building.

Mortgage recorded before judgment on lien. — Where there is a mechanic's lien of record prior to a mortgage, and a judgment subsequent to the mortgage is rendered, in an action to enforce such lien, a sale under a venditioni exponas on the judgment will discharge the lien of the mortgage; but, if the lien is invalid on its face, this effect will not be produced and the lien of the mortgage will remain. Goepp *v.* Gartizer, 3 Phila. (Pa.) 335.

If the junior mortgagee is not made a party to the foreclosure proceedings his rights are not affected. Deming-Colborn Lumber Co. *v.* Union Nat. Sav., etc., Assoc., 151 Ind. 463, 51 N. E. 936, 49 N. E. 28, holding further that where the time allowed for enforcing the lien has expired without a foreclosure against the mortgagee, the lien and the judgment based thereon are void as to him. See also Goodwin *v.* Cunningham, 54 Nebr. 11, 74 N. W. 315.

44. Sheppard *v.* Messenger, 107 Iowa 717, 77 N. W. 515.

Purchaser takes all the title held by owner when lien attached.— Shields *v.* Keys, 24 Iowa 298; Randolph *v.* Leary, 3 E. D. Smith (N. Y.) 637, 4 Abb. Pr. 205.

When legal title passes, although work done for equitable owner.—Where a petition to enforce a mechanic's lien states that the labor was performed for one who was the equitable owner of the lot, although the legal title was in another, and both are made defendants, and the court, after hearing evidence as to the title, renders judgment against the party for whom the labor was performed, and orders that, in default of payment thereof by him or the owner of the legal title, a special execution issue against the land, and that the same be sold, the purchaser at the sale under such execution will acquire the legal title. Lewis *v.* Rose, 82 Ill. 574.

Where a leasehold estate is sold the lessor must accept the purchaser as tenant for the remainder of the term. Koenig *v.* Mueller, 39 Mo. 165. But the purchaser acquires only the estate held by the lessee subject to the conditions of the lease. Reed *v.* Estes, 113 Tenn. 200, 80 S. W. 1086. See also Rothe *v.* Bellingrath, 71 Ala. 55.

45. Purser *v.* Cady, (Cal. 1897) 49 Pac. 180 [*citing* Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52; Porter *v.* Pico, 55 Cal. 165; Sharp

notice,[46] and has the right to defend against a mortgage on the property on the ground of its invalidity.[47] He is also subrogated to the rights of the lienors, under the statute, to have improvements contributed to by them sold to pay their claims, as against a mortgagee not a party to the foreclosure.[48] It has been held that the title of a purchaser at a sale under a mechanic's lien is purely statutory, and its validity depends upon every essential statutory step in the creation, continuance, or enforcement of the lien having been duly taken;[49] and where a subcontractor, without perfecting a lien, commences a personal action against the contractor, without making the owner a party or giving him notice of the suit, and under a judgment in such action the property is sold as the property of the contractor, the purchaser acquires no title.[50] Where the purchaser is a stranger to the record he is not chargeable with any error which may exist in the decree under which he purchases,[51] and his title is not affected by the granting of a new trial after the sale,[52] or by a subsequent reversal or vacation of the judgment directing the sale.[53] But where the lien claimant is the purchaser a subsequent reversal or vacation of the judgment defeats his title.[54] Where the judgment or decree establishes a lien on the building alone, separate from the land, and orders it sold, the purchaser has a right to remove it,[55] and if he cannot obtain possession otherwise he may maintain replevin therefor.[56] A purchaser may be put into possession by the equitable powers of the court[57] or relieved on motion from

v. Baird, 43 Cal. 577]; Van Buskirk *v.* Summitville Min. Co., (Ind. App. 1906) 78 N. E. 208, holding, however, that the purchaser is precluded by the doctrine of *caveat emptor* from recovering damages for injuries to the property by the owner between the date of the filing of the lien and the date of the sale.

46. Fahn *v.* Bleckley, 55 Ga. 81.

47. Nichols *v.* Hill, 6 Thomps. & C. (N. Y.) 335 (holding that he may also set up that an assignment of the mortgage is invalid); National Transit Co. *v.* Weston, 121 Pa. St. 485, 15 Atl. 569.

48. Owens *v.* Heidbreder, (Tex. Civ. App. 1898) 44 S. W. 1079.

49. Wagar *v.* Briscoe, 38 Mich. 587.

In suits to quiet title, founded on the validity of mechanics' liens and proceedings thereon, the complainants have the burden of showing that they were within the statutory requirements. Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

50. Rogers *v.* Klingler, 3 Whart. (Pa.) 332.

51. Dingledine *v.* Hershman, 53 Ill. 280.

52. See Bartlett *v.* Bilger, 92 Iowa 732, 61 N. W. 233, holding, however, that the provision of Iowa Code, § 2878, that the title of a purchaser, in good faith, of property sold under a judgment, shall not be affected by a new trial secured by a defendant who was served by publication, does not apply in favor of a purchaser of property at a sale on foreclosure of a mechanic's lien as against a defendant encumbrancer who was not served or included in the publication notice prior to the sale.

53. Purser *v.* Cady, (Cal. 1897) 49 Pac. 180, no order for the restitution of the property having been made.

54. Powell *v.* Rogers, 11 Ill. App. 98 [*affirmed* in 105 Ill. 318]; Sexton *v.* Alberti, 10 Lea (Tenn.) 452.

Purchase by defendant lien-holder.—Where lands encumbered by various liens are sold in judicial proceedings at the suit of one of the lien-holders, and on cross petitions of the different defendant lien-holders, and are purchased at such judicial sale by a defendant lien-holder, and the proceeds of sale are distributed among the several encumbrancers, by order of court, agreeably to their ascertained priorities, such purchaser, although a party to the suit, is entitled to the protection which the policy of the statute affords to purchasers at judicial sales, upon the reversal of the judgment or decree under which the sale was made. McBride *v.* Longworth, 14 Ohio St. 349, 84 Am. Dec. 383.

55. Priebatsch *v.* Third Baptist Church, 66 Miss. 345, 6 So. 237; Otley *v.* Haviland, 36 Miss. 19; Shull *v.* Best, 4 Nebr. (Unoff.) 212, 93 N. W. 753, holding that after confirmation of the sale defendant, who purchased the material and erected the building, cannot prevent its removal by purchasing the land. See also Dean *v.* Pyncheon, 3 Pinn. (Wis.) 17, 3 Chandl. 9. And see *supra*, VIII, N, 2, b.

The purchaser of property on demised premises, sold under execution to satisfy a mechanic's lien, succeeds to no greater interest in or higher rights to it than the lessee possessed; and, if the lessee's right of removal is conditional or limited, the purchaser's will be so likewise. Oswald *v.* Buckholz, 13 Iowa 506.

56. Shull *v.* Best, 4 Nebr. (Unoff.) 212, 93 N. W. 753 [*citing* Ellsworth *v.* McDowell, 44 Nebr. 707, 62 N. W. 1082; McDaniel *v.* Lipp, 41 Nebr. 713, 60 N. W. 81; Mills *v.* Redick, 1 Nebr. 437].

57. Suydam *v.* Holden, 11 Abb. Pr. N. S. (N. Y.) 329 note.

completing his purchase[58] as in other cases of judicial sales. The title of the purchaser may be impeached by a person not a party to the suit,[59] but on the sale being set aside the purchaser should be placed *in statu quo*.[60]

10. REDEMPTION. Under the statutes in a number of states a sale made in the enforcement of a mechanic's lien is subject to the right of redemption for a certain time.[61] Parties to the suit, or those who become interested pending the suit, have only the statutory right to redeem,[62] but persons whose rights accrued before the suit was commenced, and who are not made parties possess an equitable as well as the statutory right to redeem.[63] A junior mechanic's lien-holder may redeem from a sale under the senior lien;[64] and where a sale is made under one of two coördinate mechanics' liens, the other lien-holder has the right to redeem.[65] A junior mortgagee who was not made a party to the suit to foreclose a mechanic's lien has the right to redeem the premises from the sale,[66] and such right extends also to his assignee[67] or the purchaser at a foreclosure sale under his mortgage.[68] A simple judgment creditor has no right to redeem from

58. Suydam *v.* Holden, 11 Abb. Pr. N. S. (N. Y.) 329 note.

59. Horton *v.* St. Louis, etc., R. Co., 84 Mo. 602, holding that evidence is admissible to show that the statutory requirements to the validity of the lien have not been satisfied.

60. Charleston Lumber, etc., Co. *v.* Brockmeyer, 23 W. Va. 635, holding that where no improvements have been put on the property the purchaser must receive back his purchase-money, with interest, and be charged with the reasonable rents and profits, less the taxes paid by him.

Payment for improvements.— Where land subject to the lien of a special tax bill is leased, and afterward, at sale on execution under a judgment recovered on the tax bill, the property is purchased by a stranger, who brings ejectment against the purchaser under a sale to satisfy a mechanic's lien for work on buildings erected on the leasehold and the improvements cannot be removed, defendant will be entitled to a payment of the value of the improvements as a condition precedent to a recovery of the land. Smith *v.* Phelps, 63 Mo. 585.

Purchase and improvement of property by lienor.— Where, in a suit to enforce a mechanic's lien, it was held in the lower court that the lien was superior to a mortgage upon the land, but on writ of error the judgment was reversed, the holders of the lien, who became the purchasers at the sale under the lien proceedings, and who then made improvements upon the land, had no claim on account of such improvements. Powell *v.* Rogers, 11 Ill. App. 98 [*affirmed* in 105 Ill. 318].

61. *Illinois.*— Keller *v.* Coman, 162 Ill. 117, 44 N. E. 434.

Indiana.— Buser *v.* Shepard, 107 Ind. 417, 8 N. E. 280.

Iowa.— State *v.* Eads, 15 Iowa 114, 83 Am. Dec. 399.

Minnesota.— State *v.* Kerr, 51 Minn. 417, 53 N. W. 719; Bovey *v.* De Laittee Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038.

Wisconsin.— Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 624.

Court cannot deny statutory right of redemption.— Milner *v.* Norris, 13 Minn. 455.

No right of redemption unless provided for in decree.— Armsby *v.* People, 20 Ill. 155 [*following* West *v.* Flemming, 18 Ill. 248, 63 Am. Dec. 539, and *followed* in Link *v.* Architectural Iron Works, 24 Ill. 551]. See also Schmidt *v.* Williams, 89 Ill. 117, holding that where the decree of the court was that the premises "be sold as under executions at law to satisfy this decree," and at the time there was no right of redemption given by law from sales under decrees in such actions, but there was, by law, such right of redemption from sales upon execution under ordinary judgments at law, the court, in giving such direction, must have intended that it should only apply to the manner of advertising and making the sale, and not that it should give any right of redemption.

62. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748.

63. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748.

64. Phelps *v.* Pope, 53 Iowa 691, 6 N. W. 42; Jones *v.* Hartsock, 42 Iowa 147.

65. Phelps *v.* Pope, 53 Iowa 691, 6 N. W. 42, holding that where such right is reserved to him by the decree this precludes him from claiming that the sale was made for his benefit and that he is entitled to a *pro rata* share of the proceeds.

66. Gamble *v.* Voll, 15 Cal. 507 (by paying the money justly due, interests, costs, etc.); Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748; American Banking, etc., Co. *v.* Lynch, 10 S. D. 410, 73 N. W. 908, holding further that a junior mortgagee does not lose his right to redeem from a mechanic's lien in an action to foreclose in which he was not made a party because subsequently thereto he obtained a decree for the sale of the premises under his mortgage without being first required to redeem from the prior lien.

67. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748.

68. Whitney *v.* Higgins, 10 Cal. 547, 70 Am. Dec. 748.

a sale on foreclosure of a mechanic's lien which existed before he recovered his judgment, after the execution of sheriff's deed thereunder.[69] One who holds the legal title to property as security for a debt is not entitled to redeem from a sale under a judgment foreclosing a mechanic's lien against the holder of the equitable title.[70] A party to the foreclosure proceedings cannot redeem from his own sale,[71] but a decree foreclosing a mechanic's lien in a suit in which the judgment creditors are made parties defendant does not bar them from the right of redeeming from the sale made to enforce such decree, since, by such redemption, they do not attempt to assert a title superior to that enforced by the decree.[72] The right to redeem must be exercised within the time limited by statute or by the judgment.[73] Where the amount necessary to redeem is not known to a junior lien-holder at the time of the commencement of the action to enforce the right to redeem, a tender is not a necessary condition precedent to the enjoyment of that right.[74] A bill to redeem must show on its face that the person seeking to exercise the right has a subsisting interest in the land derived from the person out of whose contract or obligation the lien arose, or that such interest in some way springs out of such person's general equity of redemption.[75] Where a sale to foreclose a mechanic's lien is void for want of jurisdiction, judgment creditors cannot obtain any rights by redeeming from such sale.[76] If under a decree of strict foreclosure upon a mechanic's lien, with judgment for possession and stay of execution until after the day limited for redemption by the last in order of several junior encumbrancers, the latter redeems within the time limited, he cannot take any benefit from the judgment for possession.[77] An assignment of the certificate of sale by the purchaser to a person entitled to redeem will not operate as a redemption.[78]

11. Distribution of Proceeds. The proceeds of the sale are to be applied to the payment of costs properly chargeable to the fund,[79] and the liens and other encumbrances, if any, in the order of their priority;[80] and the surplus if any paid

69. Diddy *v.* Risser, 55 Iowa 699, 8 N. W. 655 [*distinguishing* Jones *v.* Hartsock, 42 Iowa 147; Evans *v.* Tripp, 35 Iowa 371].

70. Sheppard *v.* Messenger, 107 Iowa 717, 77 N. W. 515, such redemption not being necessary to the protection of his interest.

71. McCullough *v.* Rose, 4 Ill. App. 149, where A filed a petition to enforce a mechanic's lien upon certain premises, and B interpleaded, claiming a balance due him for purchase-money, C interpleaded as mortgagee, and D interpleaded, claiming a lien for work done on the premises, and the court entered a decree directing the master to sell the premises, and fixing the order in which the parties were to be paid from the proceeds, and at the sale, the premises were purchased by B for a nominal sum, and afterward the others attempted to redeem the premises from such sale, and it was held that the sale was as much the sale of one party as the other, and that a party could not redeem from his own sale, but should have been present at the sale in order that he might protect his interests.

72. Boynton *v.* Pierce, 49 Ill. App. 497, 502, where it is said: "The right to redeem, by a judgment creditor, after statutory time given to the judgment debtor of twelve months expires, is encouraged by law; it is a boon to the debtor, and pays his debts, which otherwise would remain unpaid, and his property lost."

73. Buser *v.* Shepard, 107 Ind. 417, 8 N. E. 280, holding that where, pending a suit to foreclose a mechanic's lien, a party acquires an interest in real property entitling him to redeem, he must do so within one year from the sale.

The court cannot extend the statutory time within which real property must be redeemed from a sale made in proceedings to foreclose a mechanic's lien. State *v.* Kerr, 51 Minn. 417, 53 N. W. 719.

74. Jones *v.* Hartrock, 42 Iowa 147.

75. Buser *v.* Shepard, 107 Ind. 417, 8 N. E. 280.

76. Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503].

77. Throckmorton *v.* Shelton, 68 Conn. 413, 36 Atl. 805.

78. Keller *v.* Coman, 162 Ill. 117, 44 N. E. 434 [*citing* Boynton *v.* Pierce, 151 Ill. 197, 37 N. E. 1024; Moore *v.* Hopkins, 93 Ill. 505; McRoberts *v.* Conover, 71 Ill. 524; Lloyd *v.* Karnes, 45 Ill. 62].

79. Althause *v.* Warren, 2 E. D. Smith (N. Y.) 657. See *infra*, VIII, P.

80. *Illinois.*— Buchter *v.* Dew, 39 Ill. 40.

Missouri.— See State *v.* Drew, 43 Mo. App. 362.

Nebraska.— Irish *v.* Lundin, 28 Nebr. 84, 44 N. W. 80.

New York.— Althause *v.* Warren, 2 E. D. Smith 657.

Ohio.— Ohio Sav., etc., Co. *v.* Johnson, 20 Ohio Cir. Ct. 96, 10 Ohio Cir. Dec. 752.

Pennsylvania.— Anshutz *v.* McClelland, 5 Watts 487.

Texas.— Nichols *v.* Dixon, (1905) 89 S. W.

over to the persons entitled thereto.[81] An auditor, appointed to distribute the fund arising from the sale of the property described in mechanics' liens on which judgments have been recovered, cannot restrict the liens to a portion of such property, on the ground that the curtilage designated by the claimants is more than sufficient for the necessary uses of the building.[82] Where part of the proceeds belonging to the legal owner is, pursuant to the decree, deposited in court to await its further orders, the court has power to order taxes due on the property before sale paid out of such proceeds.[83]

O. Review[84] — **1. Right of Review.** As a general rule, under the constitutions and statutes, the decision of the trial court in a proceeding to enforce a mechanic's lien is reviewable by appeal or writ of error,[85] although under some

765 [*affirming* (Civ. App. 1905) 85 S. W. 1051].

See 34 Cent. Dig. tit. "Mechanics' Liens," §§ 639, 640.

As to priorities see *supra*, IV, C.

Where affidavit for lien lost.— On a rule to distribute money between contesting laborers' and mechanics' liens, upon which it appears that the affidavit for the enforcement of the oldest lien is not attached to the execution, but it is proven that such affidavit was so attached when the papers were delivered to the sheriff, and was "lost off or worn off" while in the sheriff's hands, there is no error in ordering the execution to be paid. Yarborough *v.* Lumpkin, 52 Ga. 280.

Attacking lien on rule for distribution.— On a rule to distribute money between contesting laborers' and mechanics' liens, it is too late for a contesting creditor, after the court has pronounced its decision, unless for special cause shown, to make the issue that the creditor holding the oldest lien did not in fact do the work for which the lien was claimed. Yarborough *v.* Lumpkin, 52 Ga. 280.

Marshaling liens before sale.— In the absence of statutory authority the court has no power to marshal liens prior to a sale of the land unless this is necessary to protect equitable rights, and even in such cases the power is rarely exercised and ought never to be exercised without first obtaining jurisdiction of the persons to be affected by service of a rule or other proper process. McFarland's Estate, 16 Pa. Super. Ct. 142 [*distinguishing* White's Estate, 178 Pa. St. 280, 35 Atl. 985; *In re* Handy, 167 Pa. St. 552, 31 Atl. 983, 986].

If one creditor receives more than his pro rata share of the proceeds from the sheriff the other creditors may sue him for the excess, but the suit cannot be brought in the name of the sheriff. Buchter *v.* Dew, 39 Ill. 40.

Claim for rent.— Where a lease stipulated that at the end of the term the lessee might remove his improvements, provided the same should, if removed, be subject to distraint for the rent in like manner as personal property and as if still on the premises, and the lessee erected a building thereon for which mechanics' liens were filed, and under which the leasehold was sold and the buildings removed by the sheriff's vendee, the lessor was entitled to have his rent paid out of the proceeds of the sale. Schenley's Appeal, 70 Pa. St. 98.

81. Hampton *v.* Christensen, 148 Cal. 729, 84 Pac. 200 (holding that where a materialman filed no lien, a judgment in his favor against the contractor containing a provision that such materialman was entitled to have the judgment satisfied out of "any residue" in the hands of the owner after the claims of all the lien claimants had been satisfied was erroneous, in so far as it purported to charge the residue from the proceeds of the sale of the property with such judgment after the satisfaction of mechanics' liens); Woodburn *v.* Gifford, 66 Ill. 285 (holding that where a married woman and a stranger to the building contract are coöwners of a tract of land, on which a building was built under a contract with the female owner's husband, a decree directing that the surplus, if any, shall be paid to the husband, is erroneous).

Right of purchaser at previous attachment sale.— Where property sold for the payment of a mechanic's lien has been previously sold under attachment proceedings, the purchaser at the attachment sale will be entitled to the surplus of the proceeds arising from the lien sale, in preference to the owner of the premises. Trammell *v.* Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

In proceedings for the application of the surplus arising from a sale under the foreclosure of a mechanic's lien, the referee may hear and determine all claims, whether equitable or legal. Crombie *v.* Rosentock, 19 Abb. N. Cas. (N. Y.) 312.

82. Sicardi *v.* Keystone Oil Co., 149 Pa. St. 139, 24 Atl. 161, 163.

83. Kahler *v.* Betterton, (Tex. Civ. App. 1899) 51 S. W. 289.

84. See, generally, Appeal and Error.

85. *Indiana.*— Knowlton *v.* Smith, 163 Ind. 294, 71 N. E. 895.

Louisiana.— O'Hern *v.* Gouldy, 26 La. Ann. 371.

Massachusetts.— Hubon *v.* Bousley, 123 Mass. 368, writ of review.

Nevada.— Dickson *v.* Corbett, 10 Nev. 439, holding that where a suit to foreclose a mechanic's lien is brought in a justice's court and appealed to the district court, an appeal lies from the latter court to the supreme court.

United States.— Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177,

statutes the right of a party to an appeal in mechanic's lien proceedings is denied.[86]

2. Orders and Judgments Reviewable. In order to support an appeal or writ of error there must be a final judgment in the action,[87] for in an action to enforce a mechanic's lien as in other actions a merely interlocutory decree is not appealable.[88]

3. Who May Demand Review. One who is a party or privy to the record, or injured by the judgment and who will consequently derive advantage from its reversal, may bring a writ of error to reverse the judgment;[89] but a party cannot successfully appeal on grounds not affecting his interest,[90] or complain of alleged errors not prejudicial to him.[91] And a party cannot complain even of a decree

33 L. ed. 433 [*affirming* 2 Ida. (Hasb.) 239, 10 Pac. 620].

See 34 Cent. Dig. tit. "Mechanics' Liens," § 642.

Amount in controversy.— Ind. Acts (1903), p. 280, amending Ind. Acts (1901), p. 565, providing that "no appeal shall hereafter be taken to the Supreme Court or Appellate Court in any civil case when the amount in controversy, exclusive of interest and costs, does not exceed $50," etc., does not deny the right of appeal in an action to foreclose a mechanic's lien where the amount of recovery is less than fifty dollars, since the gravamen of such an action is the foreclosure of the lien, and such judgment was appealable under the act of 1901, and the purpose of the amendment of 1903 was to broaden and not to abridge the right of appeal. Knowlton *v.* Smith, 163 Ind. 294, 71 N. E. 895.

Leave to appeal; important question.— The question whether an employee of a subcontractor could enforce against the owner, under N. Y. Laws (1885), c. 342, a lien filed after payment by the owner to the subcontractor in full, he being entitled thereto, but before the last payment by the owner under the contract became due and was paid, was of sufficient importance to justify granting leave to appeal to the court of appeals in a case originating in a district court, although a similar question had been decided under the law previously in force. French *v.* Bauer, 16 Daly (N. Y.) 312, 11 N. Y. Suppl. 703. An appeal should be granted to the court of appeals from a decision of the general term of the common pleas that a person who had filed a mechanic's lien under N. Y. Laws (1885), c. 342, § 6, and was made a party defendant to a foreclosure suit by another lien-holder need not file a *lis pendens* in order to continue his lien, as the act was general and the question might be controverted. McAllister *v.* Case, 7 N. Y. Suppl. 600.

The proceeding for a review by the United States supreme court of the decision of a territorial court in a suit to enforce a mechanic's lien is by appeal and not by writ of error. Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433 [*affirming* 2 Ida. (Hasb.) 239, 10 Pac. 620].

86. Clark *v.* Raymond, 26 Mich. 415 (under Mich. Comp. Laws (1871), c. 215); Dunn *v.* Kanmacher, 26 Ohio St. 497 (holding that under Swan & C. St. Ohio p. 834, § 5, an action for money had and received was the only remedy between a subcontractor and the owner for the enforcement of rights under section 2 of the act, and from the judgment on the issues of fact in such action there was no appeal).

87. Pittsburg Plate Glass Co. *v.* Peper, 96 Mo. App. 595, 70 S. W. 910.

Orders with reference to striking off lien claim.— In Pennsylvania an appeal does not lie from a refusal to strike off a lien claim, as in such case there is no final judgment (Carter *v.* Caldwell, 147 Pa. St. 370, 23 Atl. 575; Keemer *v.* Herr, 2 Pennyp. (Pa.) 175), but it is otherwise if the court strikes off the claim for in such case its action is final (Carter *v.* Caldwell, *supra*). In Wisconsin an order setting aside or refusing to set aside a petition for a mechanic's lien is not appealable since the amendment of Wis. Rev. St. (1878) § 3069, by Wis. Laws (1895), c. 212. O'Connell *v.* Smith, 101 Wis. 68, 76 N. W. 1116.

A decree allowing compensation to a master and his attorney, and in default of payment being made, ordering the sale of property, thereby creating a fund out of which they are to be paid, is a final judgment or decision within the meaning of the statute, and can be appealed from. Neher *v.* Crawford, 10 N. M. 725, 740, 65 Pac. 156.

88. Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 381, 52 S. E. 473.

89. Mosier *v.* Flanner-Miller Lumber Co., 66 Ill. App. 630.

A purchaser pendente lite has a right to prosecute an appeal or writ of error. Mosier *v.* Flanner-Miller Lumber Co., 66 Ill. App. 630; Hendricks *v.* Fields, 26 Gratt. (Va.) 447.

90. Kennedy-Shaw Lumber Co. *v.* Priet, 113 Cal. 291, 45 Pac. 336; Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675.

91. *California.*—Kennedy-Shaw Lumber Co. *v.* Priet, 113 Cal. 291, 45 Pac. 336.

Florida.— Clarkson *v.* Louderback, 36 Fla. 660, 19 So. 887, holding that where a bill was filed by the assignee of a mechanic's lien to enforce the same against the owner and another party claiming an interest in the property by reason of a lien alleged to be subsequent to plaintiff's lien, and the owner admitted the amount due, and the validity

which injuriously affects his interest when the injury is the consequence of his own neglect.[92] The discharge of liens upon the filing of the contractor's bond[93] is for the benefit of the contractor as well as of the owner, and if notwithstanding such bond a lien is decreed in favor of a subcontractor, the contractor has sufficient interest in the matter to entitle him to appeal.[94] A party who has received his portion of the proceeds of property sold on the foreclosure of mechanics' liens, as distributed by the court, cannot have the decree reviewed on appeal.[95] One who has been made defendant to a suit by an administrator to enforce a mechanic's lien, and who claims the fund by reason of an assignment of the contract under which the lien was acquired, alleged to have been made by the deceased to secure money advanced by the claimant to enable him to complete the work, cannot complain of a judgment distributing the fund among other

of the lien, and a decree *pro confesso* was entered against the other defendant, declaring the latter's lien subordinate to plaintiff's lien, and a final decree was rendered adjudging the property subject to the payment of the latter, on appeal by the subordinate lienor alone, the assignment of the lien to plaintiff by the original lien claimant was not open for consideration.

Illinois.— Downey *v.* O'Donnell, 92 Ill. 559, holding that in an action against a husband and wife to enforce a mechanic's lien, the wife not being a party to the contract and having no direct interest in the property, the husband cannot complain on appeal that judgment was rendered against him without disposing of the case as to his wife.

Minnesota.—Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815, holding that where there is due a contractor a certain amount for which, less the liens allowed his subcontractors, laborers, and materialmen, he is entitled to a lien, and the court allows the liens of such subcontractors, laborers, and materialmen to an aggregate less than the amount for which the contractor would otherwise be entitled to a lien, and deducts that aggregate from such amount, allowing him a lien only for the remainder, the owner is not prejudiced by error in determining the amounts due the subcontractors, laborers, and materialmen, and cannot complain on account thereof.

Mississippi.— Sharpe *v.* Spengler, 48 Miss. 360, holding that where on the trial of a proceeding to enforce a mechanic's lien on the building and land, the jury find for plaintiff, and plaintiff waives his lien on the land, and judgment is entered for a lien on the building only, defendant has no cause to complain.

Missouri.— Hartman *v.* Sharp, 51 Mo. 29, holding that where the judgment affects only the premises charged with the lien, the contractor, against whom no personal judgment has been obtained, cannot raise the objection that new property of the owner was brought in by amendments to plaintiff's petition after the same was originally filed.

New York.— Kruger *v.* Braender, 3 Misc. 275, 23 N. Y. Suppl. 324 [*affirming* 1 Misc. 509, 20 N. Y. Suppl. 991], holding that the fact that a judgment foreclosing a mechanic's lien may be unauthorized in so far as it undertakes to adjudge the sureties on the bond given to discharge the lien liable in an action on the bond, thereafter to be instituted, although not parties to the foreclosure, cannot prejudice the owner of the property.

North Carolina.— Lookout Lumber Co. *v.* Sanford, 112 N. C. 655, 16 S. E. 849, holding that where in an action against the owner of a building and the contractor by the subcontractor to enforce his lien, the contractor admits his liability to plaintiff and the owner of the building does not resist the judgment adjudicating the lien and ordering its enforcement, defendant contractor has no right to object to the judgment because the satisfaction of the debt which he admits he owes to the subcontractor is imposed upon his co-defendant, the owner of the building.

Pennsylvania.— McFarland's Estate, 16 Pa. Super. Ct. 142, holding that a lien-holder whose claim on a fund for distribution would not be reached if costs were disallowed has no standing to complain of the allowance of costs out of the fund.

Texas.— Loonie *v.* Burt, 80 Tex. 582, 16 S. W. 439, holding that where in an action by a subcontractor for the erection of a county court-house against the contractor, in which the county was joined as a party defendant, and a lien on the court-house sought to be established, the county suffered default and a decree was entered foreclosing the lien, this did not prejudice the rights of the contractor, and was not available on his writ of error from a judgment against him also.

West Virginia.— Grant *v.* Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 646.

92. Gould *v.* Garrison, 48 Ill. 258, holding that a party against whom a petition in a proceeding to enforce a mechanic's lien prayed a discovery of his interest, but who failed to answer and was defaulted, cannot complain of a decree giving the petitioners a lien on the premises generally, not designating his interest, although a cloud is thereby cast upon his title.

93. See *supra*, VI, B, 1.

94. Martin *v.* Swift, 120 Ill. 488, 12 N. E. 201.

95. Prairie Lumber Co. *v.* Korsmeyer, (Kan. 1896) 43 Pac. 773 [*approving* Guaranty

lienors, where the evidence fails to establish an assignment of the contract, and the debt due him has not been authenticated and presented to the administrator for allowance.[96]

4. Parties to Appeal. Where a judgment places all mechanics' liens on property on an equality, and one lienor appeals, seeking to obtain priority, the other lienors are necessary parties.[97]

5. Notice of Appeal. A notice of appeal must be served on every adverse party interested in the judgment and who would be affected by its reversal, otherwise the appeal must be dismissed.[98]

6. Bond or Security on Appeal. Security for costs is sometimes required on an appeal from the judgment in an action to enforce a mechanic's lien.[99] A supersedeas bond on appeal from a judgment in a mechanic's lien case must conform to the statutory requirements.[1] An appeal with supersedeas bond from a judgment establishing a mechanic's lien merely suspends the right to enforce the judgment and does not destroy or impair the binding efficacy of the lien.[2]

7. Record and Assignment of Errors. It has been considered necessary that the evidence should be preserved in the record;[3] but it has also been held that the rule requiring that the evidence shall be preserved in the record to support the decree does not apply to mechanic's lien proceedings,[4] but it is the duty of the

Sav. Bank *v.* Butler, 56 Kan. 267, 43 Pac. 229].

96. Red River County Bank *v.* Higgins, 72 Tex. 66, 9 S. W. 745.

97. Gray *v.* Havemeyer, 53 Fed. 174, 3 C. C. A. 497, since the court cannot in their absence subordinate their liens to that of appellant.

98. Lancaster *v.* Maxwell, 103 Cal. 67, 36 Pac. 951, (1894) 37 Pac. 207 (holding that where the judgment is for a sale of the property and entry of judgment for the deficiency against the contractor, and the owner appeals, the contractor must be served with notice of the appeal); Gray's Harbor Commercial Co. *v.* Wotton, 14 Wash. 87, 43 Pac. 1095 (holding that an appeal will be dismissed where no notice has been served upon an intervening defendant who has been recognized by the court and parties as a party to the cause, even though there has been no formal order made allowing him to intervene).

Contractor as "adverse party" to appeal by owner.— In a suit by a materialman to foreclose a mechanic's lien against the owner and the contractor, the latter is not an "adverse party" to an appeal by the owner from a decree foreclosing the lien, so that notice of the appeal must be served upon him, where the answer of the owner does not claim affirmative relief against the contractor. Cooper Mfg. Co. *v.* Delahunt, 35 Oreg. 402, 51 Pac. 649, 60 Pac. 1.

99. Corcoran *v.* Desmond, 71 Cal. 100, 11 Pac. 815 (holding the undertaking filed insufficient); Sherlock *v.* Powell, 18 Ont. Pr. 312.

1. Central Lumber, etc., Co. *v.* Center, 107 Cal. 193, 40 Pac. 334 (holding that where on appeal from a judgment foreclosing a mechanic's lien and ordering a sale of the property, defendant gave an undertaking to stay execution in double the amount of the judgment, under Cal. Code Civ. Proc. § 942, which provides for appeals from judgments directing payment of money, and not under section 945, providing for appeals from judgments directing sale of real property, and it did not appear that the property upon which the lien was adjudged was not available, or that, in the absence of the undertaking, plaintiff could have levied execution as upon a mere personal judgment against defendant, the undertaking did not stay execution upon the judgment); State *v.* Snohomish County Super. Ct., 11 Wash. 366, 39 Pac. 644 (holding that under Wash. Laws (1893), p. 122, § 7, a supersedeas bond on appeal from a judgment foreclosing a mechanic's lien must be in double the amount of the judgment and costs).

On an appeal from a territorial court to the United States supreme court in an action to enforce a mechanic's lien, the bond, to act as a supersedeas, should be executed to the appellees, conditioned to prosecute the appeal to effect or be answerable in damages, and should provide for an amount to secure the liens recovered, the costs of suit, just damages for delay and detention of the property, and costs and interest on appeal. Mason *v.* Germaine, 1 Mont. 279.

An undertaking to secure the money part of the judgment is not necessary, under the Nevada Practice Act, to stay the order directing a sale of the property. Arrington *v.* Wittenberg, 11 Nev. 285.

2. Julien Gas Light Co. *v.* Hurley, 11 Iowa 520.

3. Roberts *v.* Miller, 31 Mich. 73, holding that in proceedings to enforce a lien, an appeal will not be considered if the testimony sent up is not certified to be the evidence of the cause, and does not show that it was filed in conformity to Mich. Laws (1873), pp. 464, 465, providing that "all testimony . . . shall be reduced to writing; and . . shall be filed with the register."

4. Lewis *v.* Rose, 82 Ill. 574; Jennings *v.*

party complaining of the verdict and decree to preserve the evidence in the record.[5] Where all the evidence is preserved in the record it should appear affirmatively that the decree is against the right property and no other.[6] It is the duty of the appellant to point out the error in the rulings of the court[7] with such particularity as to give information of the objections to the record upon which he intends to rely,[8] and if he fails to do so the judgment will not be reversed.[9] A joint assignment of errors by two parties cannot avail as to either unless good as to both.[10]

8. Presentation and Reservation in Lower Court of Grounds of Review. The general rule that questions not raised in the trial court will not be noticed on appeal applies in actions to enforce mechanics' liens.[11] So a party cannot raise for the first time in the appellate court an objection that the bill, petition, or complaint is insufficient;[12] that the contract was not filed in accordance with the statute;[13] that the lien notice, claim, or statement was insufficient[14] or was not filed in time;[15] that a subcontractor's notice to the owner was defective,[16] or was not properly served;[17] that the action was prematurely brought;[18] that the court authorized a sale of more land than was immediately adjacent to the build-

Hinkle, 81 Ill. 183; Croskey *v.* Northwestern Mfg. Co., 48 Ill. 481; Kidder *v.* Aholtz, 36 Ill. 478; Bonnell *v.* Lewis, 3 Ill. App. 283.

5. Lewis *v.* Rose, 82 Ill. 574; Kidder *v.* Aholtz, 36 Ill. 478; Ross *v.* Derr, 18 Ill. 245; Kelley *v.* Chapman, 13 Ill. 530, 56 Am. Dec. 474.

6. Maxwell *v.* Koeritz, 35 Ill. App. 300 [*citing* Secrist *v.* Petty, 109 Ill. 188; Carne *v.* Truman, 103 Ill. 321; Preston *v.* Hodgen, 50 Ill. 56].

7. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39; Emerson *v.* Gainey, 26 Fla. 133, 7 So. 526.

8. Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374.

9. Emerson *v.* Gainey, 26 Fla. 133, 7 So. 526.

Where the decision is in the short form authorized by N. Y. Code Civ. Proc. § 1022, and the appeal by defendant is on the judgment-roll alone, the decision that plaintiff was never entitled to a lien must stand. Mowbray *v.* Levy, 85 N. Y. App. Div. 68, 82 N. Y. Suppl. 959 [*following* Gardner *v.* New York Mut. Sav., etc., Assoc., 67 N. Y. App. Div. 141, 73 N. Y. Suppl. 604; New York City Health Dept. *v.* Weeks, 22 N. Y. App. Div. 110, 47 N. Y. Suppl. 913].

10. Vigo Real Estate Co. *v.* Reese, 21 Ind. App. 20, 51 N. E. 350, holding that joint assignments of error by a company and its receiver that the complaint did not show leave to sue the receiver and that the appointment of the receiver divested creditors of the right to a lien were unavailing.

11. *Florida.*— Emerson *v.* Gainey, 26 Fla. 133, 7 So. 526.

Georgia.— Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512.

Minnesota.—Egan *v.* Menard, 32 Minn. 273, 20 N. W. 197.

Missouri.— Hause *v.* Carroll, 37 Mo. 578; Schulenburg, etc., Lumber Co. *v.* Strimple, 33 Mo. App. 154.

Montana.— McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428.

Nebraska.— Zarrs *v.* Keck, 40 Nebr. 456, 58 N. W. 933. See also Griggs *v.* Le Poidevin, 11 Nebr. 385, 9 N. W. 557.

New York.— Rowe *v.* Gerry, 109 N. Y. App. Div. 153, 95 N. Y. Suppl. 857; Dixon *v.* La Farge, 1 E. D. Smith 722.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 643.

Objections to specific items in a mechanic's lien account on the ground that they are not lienable cannot be considered on appeal under a general objection to the account as a whole. Schulenburg, etc., Lumber Co. *v.* Strimple, 33 Mo. App. 154.

12. *California.*— Coss *v.* MacDonough, 111 Cal. 662, 44 Pac. 325; Russ Lumber, etc., Co. *v.* Garretson, 87 Cal. 589, 25 Pac. 747.

Illinois.— Brown *v.* Lowell, 79 Ill. 484; Hess *v.* Peck, 111 Ill. App. 111.

Indiana.— Lengelsen *v.* McGregor, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248.

Montana.— Duignan *v.* Montana Club, 16 Mont. 189, 40 Pac. 294, failure to recite that the material was used in the building.

New York.— D'Andre *v.* Zimmermann, 17 Misc. 357, 39 N. Y. Suppl. 1086.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 643.

13. White *v.* Fresno Nat. Bank, 98 Cal. 166, 32 Pac. 979, plans and specifications referred to in contract not attached to or made a part thereof.

14. Hause *v.* Carroll, 37 Mo. 578; Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541.

An objection that the verification of the notice is defective cannot be raised for the first time on appeal from the judgment. Moore *v.* McLaughlin, 66 Hun (N. Y.) 133, 21 N. Y. Suppl. 55; Boyd *v.* Bassett, 16 N. Y. Suppl. 10.

15. Phœnix Iron Co. *v.* The Richmond, 6 Mackey (D. C.) 180.

16. Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821.

17. Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821.

18. El Reno Electric Light, etc., Co. *v.* Jennison, 5 Okla. 759, 50 Pac. 144.

ing and necessary to its use;[19] or that it was not proved that the land involved did not exceed the statutory area.[20] The question of non-joinder of a party defendant cannot be raised on appeal, where no demurrer was interposed, and the parties went to trial without objection;[21] and where defendant fails to object to the court proceeding in equity, or to demand a trial by jury, he cannot, on appeal, complain that the court had no authority to render a personal judgment against him.[22]

9. Scope and Extent of Review. The appellate court will not consider matters not appealed from,[23] questions as to which error is not assigned,[24] or assignments of error not alluded to in appellant's brief.[25] Where the appeal concerns matters resting in the discretion of the lower tribunal the appellate court will only see that the discretion has been properly exercised and not pass upon the correctness of the action of the lower court.[26] Where the appellate jurisdiction is confined to a review of questions of law, the determination of questions of fact by the trial court is conclusive and will not be reviewed.[27] An appeal from a decree rendered upon a master's report in proceedings under the Mechanics' Lien Law does not vacate the decree by which the lien is declared and the master appointed, but only the decree establishing the master's report, and the only matters opened by the appeal are those raised by the exceptions to such report.[28] No exception lies to a refusal to give a ruling which involves a question of law immaterial in view of the facts as determined by the justice, sitting without a jury.[29] Where a subcontractor appealing from a judgment discharging his lien does not make the owner of the property a party to the appeal, the judgment cannot be reversed in so far as it adjudges that there is no lien on the property,[30] but the appellant has the right to prosecute the appeal and have the judgment reviewed in so far as it settles his account with the contractor.[31] Where the part of the judgment directing a sale of the premises under foreclosure is not expressly included in the notice of appeal it cannot be reviewed upon an appeal from the part of the judgment respecting the validity and priority of the liens.[32] Where the supreme court has

19. Fulton *v.* Parlett, (Md. 1906) 46 Atl. 58.

20. Egan *v.* Menard, 32 Minn. 273, 20 N. W. 197.

21. Duignan *v.* Montana Club, 16 Mont. 189, 40 Pac. 294.

22. Hildebrandt *v.* Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109.

23. Neher *v.* Crawford, 10 N. M. 725, 65 Pac. 156.

Special order made after final judgment.— Where judgment has been rendered for the claimant in an action to foreclose a mechanic's lien, an order subsequently made allowing the claimant an attorney's fee is a special order made after final judgment, to be reviewed on a direct appeal therefrom, and cannot be reviewed on an appeal from the judgment as modified to conform to the order. Schallert-Ganahl Lumber Co. *v.* Neal, 94 Cal. 192, 29 Pac. 622.

24. Van Slyck *v.* Arseneau, 140 Mich. 154, 103 N. W. 571; Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095, holding that where no error is assigned upon the making of a finding, the supreme court will accept the fact found as a fact, without considering whether or not it is supported by the evidence.

Where there is no specific exception to a finding of the trial court that the notice of lien was filed and complied in all respects with the provisions of the law, a general exception is not available to raise on appeal the question of the correctness of the finding. Gilmour *v.* Colcord, 183 N. Y. 342, 76 N. E. 273 [*modifying* 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689].

25. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

26. O'Brien *v.* Sylvester, 12 Pa. Super. Ct. 408 [*following* Stephan *v.* Hudock, 4 Pa. Super. Ct. 474], refusal to open judgment.

The proper extent of the curtilage to which a mechanic's lien may attach is a matter to be determined by a justice of the supreme court, whose decision cannot be reviewed in the court of errors and appeals unless erroneous in point of law. American Brick, etc., Co. *v.* Drinkhouse, 59 N. J. L. 462, 36 Atl. 1034 [*approving* Janes *v.* Falk, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 783]. See also Menner *v.* Nichols, 5 Pa. Cas. 356, 8 Atl. 647.

27. Gannon *v.* Shepard, 156 Mass. 355, 31 N. E. 296 (finding as to whether labor furnished with owner's consent); Sexton *v.* Weaver, 141 Mass. 273, 6 N. E. 367 (finding as to whether excessive claim wilfully made).

28. Sweet *v.* James, 2 R. I. 270.

29. Morse *v.* Ellis, 172 Mass. 378, 52 N. E. 540.

30. Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461.

31. Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461.

32. Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

no jurisdiction to review proceedings to enforce a mechanic's lien under the statute, except by virtue of the special act conferring such jurisdiction which specifically provides only for appeals to be taken in the same manner as in ordinary chancery cases, and enacts that the powers and duties of the appellate court in relation thereto "shall be the same as are now provided by law in relation to appeals in ordinary chancery cases," any other mode of review, or rule or course of proceeding on appeal is excluded and the finding of a jury therefore in such proceedings, instead of being considered decisive and controlling, as at common law, must be regarded as a mere provisional and assistant inquisition, analogous to a verdict on a feigned issue in a chancery cause.[33] Where the judgment in an action to foreclose a mechanic's lien is that the lien filed by plaintiff was fatally defective, and plaintiff does not appeal therefrom, he cannot, on appeal by the property-owner, apply to the appellate court for an order curing his defective lien.[34]

10. Determination and Disposition of Cause. On review all the presumptions are in favor of the regularity and validity of the judgment in the court below,[35] especially in the absence of a complete record.[36] Findings of fact made by the trial court will not be disturbed unless unsupported by competent evidence.[37] Error which is not prejudicial [38] or a clerical mistake in the rendition of the judgment which may be corrected by the lower court *nunc pro tunc* on proper appli-

33. Willard *v.* Magoon, 30 Mich. 273.

34. Morgan *v.* Taylor, 15 Daly (N. Y.) 304, 5 N. Y. Suppl. 920 [*affirmed* in 128 N. Y. 622, 28 N. E. 253].

35. Bearden *v.* Miller, 54 Mo. App. 199; Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086; Schmidt *v.* Gilson, 14 Wis. 514.

36. Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115 [*affirming* 54 Ill. App. 643]; Bowman *v.* McLaughlin, 45 Miss. 461. See also Smith *v.* Cole, 29 N. Y. 666 [*affirming* 2 Hilt. 365].

Where the decree recites that there was service by publication, and the record is not complete, the decree will not be reversed because the certificate of publication is not found in the record. Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374.

Where the record does not purport to contain all of the evidence, the appellate court will presume that there was evidence sufficient to sustain the judgment of the trial court. Johnson *v.* Otto, 105 Iowa 605, 75 N. W. 492; Richardson *v.* Warwick, 7 How. (Miss.) 131; Lonkey *v.* Wells, 16 Nev. 271; Cole *v.* Custer County Agricultural, etc., Assoc., 3 S. D. 272, 52 N. W. 1086.

Even though there are errors apparent upon the face of a fragmentary record, if there may be upon any reasonable hypothesis other portions of the record by which such apparent errors may be obviated and cured, it will be presumed in support of the judgment or decree that such portions of the record exist and have been omitted. Culver *v.* Schroth, 153 Ill. 437, 39 N. E. 115 [*affirming* 54 Ill. App. 643], holding that where the petition alleged that the materials were furnished, for the construction of one building situated on two lots, but the master found that they were furnished for two separate buildings, situated one on each lot, and the decree confirmed the master's report, found that all the material allegations of the petition were proved, and decreed a single lien on both lots, as the evidence was not in the record, it would be presumed on appeal that it showed that there was but one building situated on the two lots.

37. *California.*— Santa Monica Lumber, etc., Co. *v.* Hege, (1897) 48 Pac. 69.

Illinois.— See Stark *v.* Crismore, 100 Ill. App. 392.

Massachusetts.— Monaghan *v.* Goddard, 173 Mass. 468, 53 N. E. 895; Morse *v.* Ellis, 172 Mass. 378, 52 N. E. 540.

Nebraska.— Zarrs *v.* Keck, 40 Nebr. 456, 58 N. W. 933; Howell *v.* Wise, 28 Nebr. 756, 44 N. W. 1139.

New Mexico.— Ford *v.* Springer Land Assoc., 8 N. M. 37, 41 Pac. 541 [*affirmed* in 168 U. S. 513, 18 S. Ct. 170, 42 L. ed. 562].

New York.— See Lutz *v.* Ey, 3 E. D. Smith 621, 3 Abb. Pr. 475.

Pennsylvania.— Dunbar *v.* Washington Foundry, 210 Pa. St. 58, 59 Atl. 434; Keim *v.* McRoberts, 18 Pa. Super. Ct. 167.

Wyoming.— Wyman *v.* Quayle, 9 Wyo. 326, 63 Pac. 988.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 650.

Findings of fact by a referee will be accepted as correct where no evidence is brought upon appeal. Perkins *v.* Boyd, 16 Colo. App. 266, 65 Pac. 350.

When finding not controlling.— A finding of the court that one of the parties claimed a lien only upon two of the three lots upon which the building was erected will not be deemed to be controlling where it appears from the record, beyond any doubt, that a lien was claimed upon the entire premises. Higley *v.* Ringle, 57 Kan. 222, 45 Pac. 619.

38. *Alabama.*— McConnell *v.* Worns, 102 Ala. 587, 14 So. 849, holding that the overruling of the owner's demurrer to the com-

cation[39] is not cause for reversal. A decree against the owner will not be reversed because certain persons named as defendants were not served with process where the record does not show that such persons were necessary parties.[40] Where error can be corrected and justice done by a modification of the judgment this course is proper.[41] Where the cause is remanded to the lower court with directions to enter a certain judgment, the judgment must conform to the man-

plaint, which sought a money judgment against him, was harmless error, where the judgment merely declared a lien on the owner's premises for the amount of the money judgment rendered against the contractor.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39, holding that where the judgment directed the sale of the premises, instead of the right, title, and interest of defendant therein the error, if any, was harmless.

Illinois.— Nibbe *v.* Brauhn, 24 Ill. 268.

Indiana.— Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108, holding that where the statute required the recorder to record the notice of lien in the "Miscellaneous Record," but it was entered in what was called the "Mechanic's Lien Record," it was error to admit this entry in evidence, as no "mechanic's lien record" was authorized by law, but that the error was harmless as between the immediate parties, since the lien was acquired by filing the notice, and not by its record.

Kansas.— Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230, holding that in a suit by certain subcontractors, the court's refusal to permit the owner to show how much he had paid other subcontractors was not material error, where it was not shown that the whole amount would be more than the contract price.

Missouri.— O'Shea *v.* O'Shea, 91 Mo. App. 221, holding that where plaintiff fails to prove every other fact necessary to establish his right to a mechanic's lien, the exclusion of a lien paper presented by him is not prejudicial.

Nevada.— Lonkey *v.* Wells, 16 Nev. 271, holding that where the court proceeded to hear and determine a mechanic's lien action without proof that notice had been given to other lien claimants, as provided by statute, in the absence of any showing that there were any other lien claimants, defendant could not have been prejudiced, and was not entitled to a new trial.

Pennsylvania.— Sullivan *v.* Johns, 5 Whart. 366, holding that where to a scire facias on a mechanic's lien against A, contractor, and B, owner, the sheriff returned, "Made known" as to A, and "*nihil habet*" as to B, and a plea was entered for both defendants, the jury were sworn as to both, and the judgment was entered generally, although the proceedings were irregular, yet as B was not personally liable on the judgment, there was not sufficient cause for reversal.

South Carolina.— Murphy *v.* Valk, 30 S. C. 262, 9 S. E. 101, holding that in an application to enforce a mechanic's lien, the fact that the court orders the master to ascertain whether there are other creditors having liens of the same kind as plaintiff, although not required so to do, is harmless error, the master having reported that by the certificate of the register no other liens were found in his office, and the case having been proceeded with as if no such reference had been made.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 649.

39. Horstkotte *v.* Menier, 50 Mo. 158.

40. Branham *v.* Nye, 9 Colo. App. 19, 47 Pac. 402.

41. Schindler *v.* Green, (Cal. App. 1905) 82 Pac. 341, 631 (holding that where in a suit to enforce a mechanic's lien, the lower court found that defendants owed plaintiff a certain sum and awarded him a lien therefor, and defendants found no fault with the amount awarded plaintiff, but appealed on the ground that plaintiff was not entitled to a lien, and all the evidence and proceedings had on the trial were brought before the appellate court for review, that court, on setting aside the judgment for error in giving plaintiff a lien, would not remand the case for a new trial, but would direct the lower court to modify the judgment by striking therefrom the provisions for a lien and to enter a personal judgment in plaintiff's favor for the sum found due); Dusick *v.* Meiselbach, 118 Wis. 240, 95 N. W. 144 (holding that where the judgment in the court below erroneously gave a subcontractor a mechanic's lien on more than one acre of land used in connection with the buildings erected thereon, and it was proved without dispute that the principal building, considerably exceeding all the others in cost and value, was located on the west one acre of the entire tract, the appellate court would modify the judgment so as to limit the lien to the west one acre rather than remit the action for the taking of further evidence upon the subject); Schmidt *v.* Gilson, 14 Wis. 514 (where the judgment ordered a sale of the property subject to the lien instead of defendant's right, title, and interest therein).

Appeal not perfected as to all proper parties.— Where in an action to foreclose a mechanic's lien a judgment has been entered which does not give to a certain claim the priority over all the other claims to which it is entitled, but places it last in the order of payment and the claimant appeals, perfecting his appeal as to some of the parties, but not as to the others, the judgment should be modified, where it can be done without doing injustice to any of the parties, by giving the claimant priority over those claimants against whom he perfected his appeal. Hall *v.* New York, 176 N. Y. 293, 68 N. E. 363 [*affirming* 79 N. Y. App. Div. 102, 79 N. Y. Suppl. 979].

date.[42] Where on appeal from the decree for the sale of property to satisfy liens the decree is reversed as to a lien which is in amount the larger part of all the liens decreed and such lien held invalid and the value of the property decreed to be sold does not appear, it is proper to reverse that part of the decree directing the sale and to remand the cause, with directions to ascertain the amount of property necessary to satisfy the liens not held invalid, and, on default of payment, to order a sale of such amount.[43] Where it appears on appeal from a judgment foreclosing a mechanic's lien against community property that service was had on the wife, but not on the husband, and the time allowed by statute for bringing suit on such lien has expired, the action should be dismissed; since no new action can be brought upon the claim, it being necessary to commence the action against both of the community within the statutory period.[44] Where a judgment dismissing on the merits the complaint of a contractor for the price of a house and to foreclose a mechanic's lien is reversed on appeal, the appellate court will not enter judgment for the amount due plaintiff on the ground that the case is in equity but will remand the cause for a retrial.[45] The effect of a reversal is to vacate the entire judgment even as against parties who have not appealed.[46] Where plaintiff in an action to foreclose a mechanic's lien made materialmen parties and the materialmen answered, setting up the amount due them and claiming a lien, and the court found in favor of plaintiff and against the materialmen and rendered a decree accordingly, but the materialmen appealed and on the hearing their claim was held to be valid and the cause was remanded to the court below to enter judgment in conformity to the opinion, it was held that as the interests of the parties were inseparably connected the appeal brought up the entire case, and the court must enter a new decree and should adjust the equities between plaintiff and the materialmen and if necessary take additional evidence for that purpose.[47] Where the judgment or decree is reversed and the cause remanded to the lower court for further proceedings the parties are in the same situation as though the cause had never been tried and the court below can try the cause *de novo*.[48]

11. Statutory Damages on Dismissal of Appeal. It has been held that as a decree finding the amounts of several liens and ordering the property sold unless they are paid in three days is an alternative decree and not one for the recovery of money, statutory damages are not allowable on dismissal of an appeal therefrom.[49]

P. Costs and Fees — 1. In General. The term "costs" in these proceedings falls within the ordinary definition of the term and signifies the sums prescribed by law as charges for services enumerated in the fee bill.[50] The statutes of the various jurisdictions touching mechanics' lien proceedings in particular or the

42. See Vanriper *v.* Morton, 65 Mo. App. 429, holding the judgment rendered to be in accordance with the mandate.

43. Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 381, 52 S. E. 473.

44. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

45. Brewer *v.* Hugg, 114 Iowa 486, 87 N. W. 409, the case being in equity only because a foreclosure is asked.

46. Bruce Lumber Co. *v.* Hoos, 67 Mo. App. 264 [*following* Carthage Marble, etc., Co. *v.* Bauman, 55 Mo. App. 204, and *overruling* Deatherage *v.* Sheidley, 50 Mo. App. 490], holding that a reversal vacates the judgment against the contractor, although he did not take an appeal therefrom, and on a second trial there must be a new personal judgment against him if the issues are found for plaintiff.

47. Lepin *v.* Paine, 18 Nebr. 629, 26 N. W. 370, 15 Nebr. 326, 18 N. W. 79.

48. Badger Lumber Co. *v.* Holmes, 55 Nebr. 473, 76 N. W. 174.

Effect of reversal on rights of purchaser see *supra*, VIII, N, 9.

49. Thomas *v.* John O'Brien Lumber Co., 86 Ill. App. 181.

50. Neher *v.* Crawford, 10 N. M. 725, 65 Pac. 156. See also Costs, 11 Cyc. 1.

Charges before the suit is commenced are not to be taxed, and the commencement of a suit is the service of the notice provided for in the statute requiring the owner to appear on notice and submit to a settlement, such notice being a substitute in effect for a summons in an ordinary action, and where no such notice is served no suit is commenced. Reynolds *v.* Hamil, Code Rep. N. S. (N. Y.) 230.

forms of remedy in general through which such lien is enforced govern the subject of costs and fees.[51] As in other cases the successful party will recover his costs,[52] and except where the costs are discretionary under the statute, as is sometimes the case,[53] he will be entitled to them, and although the proceedings may be equitable in nature the statute as to costs controls and the rule which would otherwise prevail in equity does not apply.[54] The lienor who succeeds may recover against the owner or the property, the liability of the owner personally being subject to his liability for a personal judgment in any event,[55] and the costs

51. George *v.* Everhart, 57 Wis. 397, 15 N. W. 387, holding that under a statute which saves pending actions but expressly declares that subsequent proceedings in such pending actions shall conform to the provisions of the act, the costs are governed by its provisions. See also Fargo *v.* Hamlin, 5 N. Y. St. 297.

Extra allowances.—The provisions of the Mechanics' Lien Act prescribing that foreclosure thereof shall be conducted in the same manner as foreclosures of mortgages do not authorize the granting of extra allowances as in mortgage cases. Hagan *v.* American Baptist Home Mission Soc., 14 Daly (N. Y.) 131, 6 N. Y. St. 212; Ruth *v.* Jones, 1 Month. L. Bul. (N. Y.) 61. And even if allowable in a proper case, they cannot be allowed on a judgment by default and assessment damages by a jury, as such allowance is proper only on the trial of an issue. Randolph *v.* Foster, 3 E. D. Smith (N. Y.) 648, 4 Abb. Pr. 262.

Statutory scale in particular court see Hall *v.* Pilz, 11 Ont. Pr. 449; Truax *v.* Dixon, 13 Ont. Pr. 279; Gearing *v.* Robinson, 19 Ont. Pr. 192, as to the practice in Ontario.

52. Guthrie *v.* Brown, 42 Nebr. 652, 60 N. W. 939 (under a general finding for plaintiff, although no foreclosure is decreed); Woolf *v.* Schaefer, 103 N. Y. App. Div. 567, 93 N. Y. Suppl. 184 (holding that, where different claimants fail to establish their liens in the action or to recover personal judgments, costs may be awarded against all but the owner will be entitled to but one bill of costs and not a separate bill against each claimant).

53. Eagleson *v.* Clark, 2 E. D. Smith (N. Y.) 644; Fargo *v.* Hamlin, 5 N. Y. St. 297; Marryatt *v.* Riley, 2 Abb. N. Cas. (N. Y.) 119; Charles *v.* Godfrey, 125 Wis. 594, 104 N. W. 814, holding that under the statute providing that an action to foreclose a mechanic's lien shall be regarded as an equitable action, and another section providing that in equitable actions costs may be allowed in whole or in part in the discretion of the court, the court has authority to allow partial costs in an action to foreclose a mechanic's lien.

But if the action is in a court not of record so that it is like any other action so far as the jurisdiction of the court is concerned, the costs are to be allowed as in other civil cases. Faville *v.* Hadcock, 39 Misc. (N. Y.) 397, 80 N. Y. Suppl. 23.

54. Kalina *v.* Steinmeyer, 103 Ill. App. 502; Kipp *v.* Massin, 15 Ill. App. 300; George *v.* Everhart, 57 Wis. 397, 15 N. W. 387; Myer *v.* Gleisner, 7 Wis. 55, where the action was at law under the prevailing statute.

Offer of judgment.—The rule allowing costs in actions at law to the successful party may be applied in an action to foreclose a mechanic's lien, even though the judgment recovered by plaintiff is less than the amount claimed, where there was no offer of judgment by defendant, but a general denial by him and a demand for dismissal, with costs, and the litigation was severe and protracted. Valk *v.* McKeize, 16 N. Y. Suppl. 741. If the judgment obtained by plaintiff is more favorable than the offer defendant will be liable for costs. Hess *v.* Peck, 111 Ill. App. 111; Fargo *v.* Hamlin, 5 N. Y. St. 297. And if the owner serves an offer of judgment it is equivalent to an offer that the lien may be enforced for the sum specified, and if a smaller judgment is recovered defendant will recover costs accruing after the offer. Lumbard *v.* Syracuse, etc., R. Co., 62 N. Y. 290.

55. Holler *v.* Apa, 18 N. Y. Suppl. 588, holding that where the owner makes no defense he cannot be made personally liable for the costs incurred by the trial of issues between the claimant and the contractor, although the claimant is entitled to full satisfaction out of the premises subject to the lien for sums due from the owner to the contractor if sufficient to cover the lien and costs, but by failing to defend the owner takes the risk of judgment against his property in excess of what he may deem to be the amount of his indebtedness to his contractor; that if the owner defends costs may be awarded against him in the discretion of the court. To the same effect Kenney *v.* Apgar, 93 N. Y. 539 (as to costs against the owner in favor of other lienors made parties defendant with the owner as incident to the power of the court to determine the rights of the respective lienors, to be paid out of the proceeds of the sale); Fox *v.* Kidd, 77 N. Y. 489 (holding that all costs before judgment must be paid out of the proceeds of the sale of the property subject to the lien and cannot be directed to be paid by the owner); Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356 (holding that costs against the owner are chargeable against the property).

Costs in a scire facias are to be paid out of the fund raised by the sale, although the scire facias has not been prosecuted to judgment at the time of the sale. McLaughlin *v.* Smith, 2 Whart. (Pa.) 122.

The master's fees in a successful proceeding are properly charged to the owner. Man-

which may be taxed against a party to a proceeding are those only which are incident to the particular contest in which he is engaged.[56] Where one is not liable upon the issue of debt raised in a foreclosure suit, but is a proper party to the contest in respect of the right to foreclose, as one claiming an interest in the property under a lien for purchase-money, it is proper to adjudge costs against him and his co-defendant upon a judgment for foreclosure.[57]

2. COSTS OF PERFECTING LIEN AND ATTORNEY'S FEES. Under various statutory provisions the costs incurred by the lienor for filing and recording his lien,[58] and

tonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425. But the expense of a sale before the time limited for redemption of the property has expired are incurred at the master's risk, and if the liens for which the sale was to be made are paid before the expiration of the time for redemption, he cannot recover back such expenses. Neher *v.* Crawford, 10 N. M. 725, 65 Pac. 156.

Apportionment to different buildings.— Where material was furnished and used in the construction of a number of houses, and the portion used in each made definite and of fixed value, it is proper to apportion the costs of enforcing a lien against the buildings between the several houses. Manor *v.* Heffner, 15 Ind. App. 299, 43 N. E. 1011. See also Miller *v.* Diffenbach, 10 Lanc. Bar (Pa.) 144.

Costs in other proceedings, as an inquisition finding the owner of the estate upon which there is a mechanic's lien to be a habitual drunkard, are not chargeable to the fund, where the estate is held by order of the court, to the prejudice of the lien-holder but all costs connected with the sale are properly paid from the funds. Malone's Appeal, 79 Pa. St. 481.

56. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815 (holding that where the landowner as appellant prevails against one of several lien claimants, he cannot tax as against such lien claimants the cost of those parts of the return, paper-book, and brief which relate only to the controversy between the owner and the other respondents); Condon *v.* St. Augustine Church, 112 N. Y. App. Div. 168, 98 N. Y. Suppl. 253.

Suit by subcontractor — *In general.*— In a suit by a subcontractor for the enforcement of his claim against the contractor and the owner to the extent of money due by the owner to the contractor, if the owner makes default, having retained in his hands the amount claimed by the subcontractor on notice as required by statute, the owner should not be charged with the costs of litigation between the contractor and subcontractor, but being a mere stakeholder between such parties, he should be held liable only for the amount of lien and costs of judgment on default, the costs of the further litigation to be borne by the contractor. Eagleson *v.* Clark, 2 E. D. Smith (N. Y.) 644 (under the statute authorizing the court to award such costs as may be just and equitable); Holler *v.* Apa, 18 N. Y. Suppl. 588. In Hall *v.* Hogg, 14 Ont. Pr. 45, it is held that the amount due from the owner to the contractor should be paid into court by the former, less his costs, which should be taxed as to a stakeholder, and that the costs of lien-holders establishing their liens should be paid as a first charge on the fund; that costs of lien-holders subsequent to judgment of reference should be taxed on the scale appropriate to the amount due to each. So in Bourget *v.* Donaldson, 83 Mich. 478, 47 N. W. 326, it is held that where the owner, who is a co-defendant with the contractor's assignee who claims the fund, discloses the amount due and offers payment he is properly awarded his costs. Where the owner, after retaining the balance due the contractor raised a contest on every point, his liability is not limited to the amount due the contractor, but costs and counsel fees are properly allowed and made payable out of the proceeds of the property ordered to be sold to satisfy the liens. De Camp Lumber Co. *v.* Tolhurst, 99 Cal. 631, 34 Pac. 438; Kenney *v.* Apgar, 93 N. Y. 539. But it is held otherwise where the answer is not interposed for delay and the only question raised by it is decided in the owner's favor, in which case it is improper to impose a lien on the land for fees in addition to the balance due on the contract. Hooper *v.* Fletcher, 145 Cal. 375, 79 Pac. 418.

Dismissal as to owner.— In an action to foreclose a mechanic's lien, all those subcontractors parties defendant, who, after appearance and proof of their claims (there being no contest between themselves), without objection by the contractor, have allowed their liens to expire during the pendency of the action without an order of the court continuing them, should be dismissed as to the owners, with costs, as for want of prosecution, but should have judgment against the contractor for the amount of their claim, and costs as upon failure to answer. Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356.

57. Lindsley *v.* Parks, 17 Tex. Civ. App. 527, 43 S. W. 277.

But prior encumbrancers are not liable for costs (Close *v.* Hunt, 8 Blackf. (Ind.) 254); and being summoned in as required by statute and purchasing the property at the master's sale for less than the mortgage debt, a prior encumbrancer is entitled to the proceeds without deduction for any costs except the expenses of the sale (Jepherson *v.* Green, 24 R. I. 83, 52 Atl. 808).

58. Linck *v.* Johnson, (Cal. 1901) 66 Pac. 674; Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218; Thompson *v.* Wise Boy Min., etc., Co., 9 Ida. 363, 74 Pac. 958.

attorney's fees, may be recovered in the foreclosure proceeding.[59] The allowance of such fees depends entirely upon statutory authority without which such an item forms no part of the proper recovery in these proceedings.[60] The lienor is entitled to recover the costs of filing his lien only in the event of his prevailing in the suit for its enforcement,[61] and the same is true as to the right to recover attorney's fees.[62] The attorney's fee need not have been actually paid by the

59. *California.*— Linck *v.* Johnson, (1901) 66 Pac. 674; Williams *v.* Gaston, 127 Cal. 641, 60 Pac. 427; Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231; Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325.

Florida.— Gunby *v.* Drew, 45 Fla. 350, 34 So. 305; Dell *v.* Marvin, 41 Fla. 221, 26 So. 188, 79 Am. St. Rep. 171, 45 L. R. A. 201.

Idaho.— Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218.

Illinois.— Hess *v.* Peck, 111 Ill. App. 111 (propriety of allowance to petitioner); Kalina *v.* Steinmeyer, 103 Ill. App. 502 (under a mandatory statute fixing ten per cent attorney's fee against the unsuccessful party); Davis *v.* Rittenhouse, etc., Co., 92 Ill. App. 341.

Indiana.— Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

Kansas.— West *v.* Badger Lumber Co., 56 Kan. 287, 43 Pac. 239.

Minnesota.— L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143.

Montana.— Hill *v.* Cassidy, 24 Mont. 108, 60 Pac. 811; Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441; Wortman *v.* Kleinschmidt, 12 Mont. 316, 30 Pac. 280, applying a general statute as to the allowance of fees in lien proceedings to mechanics' lien cases.

New Mexico.— Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726.

Oregon.— Fitch *v.* Howitt, 32 Oreg. 396, 52 Pac. 192.

Washington.— Littell *v.* Saulsberry, 40 Wash. 550, 82 Pac. 909; Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144; Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

See 34 Cent. Dig. tit. "Mechanics' Liens," § 653.

60. Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438 (holding that the right to reach a fund in the hands of the owner where no lien can be enforced on the building, as in the case of a public building, does not entitle the claimant to filing fees and attorney's fees which the statute allows in the case of enforcing a lien on the property); Kendall *v.* Fader, 199 Ill. 294, 65 N. E. 318 (where a statutory provision was held inapplicable to a lien proceeding arising under an earlier statute); McCarthy *v.* Harvis, 23 Fla. 508, 2 So. 819 (holding that the statute providing for attorney's fees in the enforcement of liens under that act had no application to a proceeding for the enforcement of liens under an earlier act); Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475; O'Neil *v.* Taylor, 59 W. Va. 370, 53 S. E. 471.

The validity of statutes giving attorney's fees has been upheld as not in contravention of various constitutional provisions. Peckham *v.* Fox, 1 Cal. App. 307, 82 Pac. 91 (holding the provision not in violation of a constitutional provision that mechanics, etc., of every class, shall have a lien for the value of their labor, etc., and that the legislature shall provide by law for the speedy and efficient enforcement of such lien, or of any provision of the federal constitution); Dell *v.* Martin, 41 Fla. 221, 26 So. 188, 79 Am. St. Rep. 171, 45 L. R. A. 201 (sustaining the provision over the objection that it was class legislation and in contravention of the constitutional provision guaranteeing equal protection of the laws); Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218; Thompson *v.* Wise Boy Min., etc., Co., 9 Ida. 363, 74 Pac. 958; Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797 (sustaining the provision as not class legislation, and as not taking private property without compensation or without due process of law); Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454 (sustaining the provision as not in violation of the constitutional guaranty of the equal protection of the laws); Littell *v.* Saulsberry, 40 Wash. 550, 82 Pac. 909; Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571. *Contra*, Sickman *v.* Wollett, 31 Colo. 58, 71 Pac. 1107; Burleigh Bldg. Co. *v.* Merchant Brick, etc., Co., 13 Colo. App. 455, 59 Pac. 83; Los Angeles Gold Min. Co. *v.* Campbell, 13 Colo. App. 1, 56 Pac. 246; Perkins *v.* Boyd, 16 Colo. App. 266, 65 Pac. 350, where the provision for such fees in favor of the successful lienor without reference to the other party to the proceeding is considered bad as class legislation. See also CONSTITUTIONAL LAW, 8 Cyc. 1076 *et seq.*

The attorney's fees are not strictly costs but are incidental to the lien and the judgment to which the successful lienor is entitled as a part of the recovery and for which the lien is enforced as for the principal debt. Williams *v.* Gaston, 127 Cal. 641, 60 Pac. 427; McIntyre *v.* Traunter, 78 Cal. 449, 21 Pac. 15; Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325; Peckham *v.* Fox, 1 Cal. App. 307, 82 Pac. 91; Dell *v.* Marvin, 41 Fla. 221, 26 So. 188, 79 Am. St. Rep. 171, 45 L. R. A. 201; Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

61. Bates *v.* Santa Barbara County, 90 Cal. 543, 27 Pac. 438. So that a tender before bringing an action need not include such filing fees. Young *v.* Borzone, 26 Wash. 4, 67 Pac. 135, 421.

62. Stimson *v.* Dunham, etc., Co., 146 Cal. 281, 79 Pac. 968; Los Angeles Gold Mine Co. *v.* Campbell, 13 Colo. App. 1, 56 Pac. 246 (holding that such fee cannot be based on

party to whom the allowance is to be made, nor need there be any express agreement for its payment;[63] but it is fixed by the court[64] without regard to any averment in the complaint as to such fee, inasmuch as such averment is not necessary,[65] and independently of any agreement between the parties, the statute requiring the court to fix a reasonable fee,[66] and it is not necessary to show that the person appearing is an attorney, as the court will take judicial notice of its own officers.[67] If there is evidence to support the allowance it will not be disturbed,[68] and the statutory discretion in fixing the allowance will not be interfered with if it does not appear to have been abused.[69]

claims settled pending suit); Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

Final result the test.— Plaintiff in an action to foreclose a mechanic's lien is not entitled to recover attorney's fees for services rendered on an appeal to the supreme court on which he is successful, when on a retrial final judgment is rendered against him. McIntyre *v.* Trautner, 78 Cal. 449, 21 Pac. 15.

Partial success as by reducing the claim will only have the effect of reducing the sum to be allowed as attorney's fees. Hess *v.* Peck, 111 Ill. App. 111.

The lien is not "defeated" in the sense of the provision for allowing counsel fees against plaintiff if the lien is defeated, where the proceeding is abandoned or voluntarily dismissed before trial. Davis *v.* Rittenhouse, etc., Co., 92 Ill App. 341.

63. Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325.

Services embraced.— Counsel fees actually paid are to be included among the "actual disbursements" under the statute whether or not the counsel is a solicitor in the cause. Robock *v.* Peters, 13 Manitoba 124. But where the allowance under the statute is for attorney's fees "in the superior and supreme courts" it does not include the amount paid for preparing the lien claim because that is no more nearly related to the foreclosure proceeding than the drafting of a contract for the performance of the labor. Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144.

In what court.— Sometimes the allowance is confined to the proceedings in the trial court. West *v.* Badger Lumber Co., 56 Kan. 287, 45 Pac. 239; Murray *v.* Swanson, 18 Mont. 533, 46 Pac. 441. While under other provisions the allowance is for services in the lower and appellate courts. See Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Clark *v.* Taylor, 91 Cal. 552, 27 Pac. 860; Hill *v.* Cassidy. 24 Mont. 108, 60 Pac. 811.

64. Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325.

The lower court is the proper court to fix the allowance for the attorney's fees in that as well as in the appellate court. Williams *v.* Gaston, 127 Cal. 641, 60 Pac. 427; Sweeney *v.* Meyer, 124 Cal. 512, 57 Pac. 479; San Joaquin Lumber Co. *v.* Walton. 115 Cal. 1, 46 Pac. 735, 1057; Schallert-Ganahl Lumber Co. *v.* Neal, 94 Cal. 192, 29 Pac. 622; West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231; Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325; Hill *v.* Cassidy, 24 Mont. 108, 60 N. W. 811; Sweatt *v.* Hunt, 42 Wash. 96, 84 Pac. 1; Lavanway *v.* Cannon, 37 Wash. 593, 79 Pac. 1117. In Clark *v.* Taylor, 91 Cal. 552, 27 Pac. 860, upon sending a cause back to the lower court the appellate court directed the former to allow a reasonable attorney's fee for the services of an attorney in the appellate court, as a part of the costs on appeal.

65. Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726.

66. Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325.

One fee is allowed on consolidated claims as all the claimants together constitute the "prevailing party." Allis *v.* Meadow Spring Distilling Co., 67 Wis. 16, 29 N. W. 543, 30 N. W. 300. But see Sweeney *v.* Meyer, 124 Cal. 512, 57 Pac. 479; Schallert-Ganahl Lumber Co. *v.* Neal, 94 Cal. 192, 29 Pac. 622.

67. L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143.

68. Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

Necessity of proof.— In Gunby *v.* Drew, 45 Fla. 350, 34 So. 305, under a provision for a fee not to exceed ten per cent of the recovery, it is held error to allow an attorney's fee to the prevailing party without proof of the reasonableness of the amount thereof. See also Burleigh Bldg. Co. *v.* Merchant Brick, etc., Co., 13 Colo. App. 455, 59 Pac. 83. But the objection that the judgment allowed such fees without any evidence of the value cannot be sustained where the fees were stipulated to be reasonable at the trial. Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144. On the other hand the failure to hear evidence is held at most only an irregularity. Kalina *v.* Steinmeyer, 103 Ill. App. 502. And under a provision requiring the allowance of a reasonable fee it is held that no proof need be heard. Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726.

An allowance will be presumed to be reasonable where the evidence on the subject is not in the transcript. Fitch *v.* Howitt, 32 Oreg. 396, 52 Pac. 192.

69. Sweeney *v.* Meyer, 124 Cal. 512, 57 Pac. 479; Stimson Mill Co. *v.* Riley, (Cal. 1895) 42 Pac. 1072; Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726. See also Jewell *v.* McKay, 82 Cal. 144, 23 Pac. 139 (holding the fee allowed reasonable); Littell *v.* Saulsberry, 40 Wash. 550, 82 Pac. 909 (where the allowance was reduced).

MECHANISM. The arrangement and relation of the parts in a machine.[1] (See, generally, PATENTS.)

MECH'S. An abbreviation of the word "Mechanics,"[2] or of the word "Merchants."[3]

MEDAL. A piece of metal bearing devices and inscriptions, struck or cast to commemorate a person, an institution, or an event.[4]

MEDIA ANNATA. In Spanish law, half yearly profits of land,[5] the sum paid for LANZAS,[6] *q. v.*

MEDICAL. Of, pertaining to, or having to do with the art of healing disease, or the science of medicine; containing medicine; used in medicine; MEDICINAL,[7] *q. v.* (Medical: Association, Board or Society, see HEALTH; PHYSICIANS AND SURGEONS. Attendance, see APPRENTICES; MASTER AND SERVANT; PHYSICIANS AND SURGEONS. Books — As Evidence, see CRIMINAL LAW; EVIDENCE; Exemption of, see EXEMPTIONS. Jurisprudence — In General, see PHYSICIANS AND SURGEONS; Blood Stains, see CRIMINAL LAW; HOMICIDE; Death and Survivorship, see DEATH; HOMICIDE; Insanity, see INSANE PERSONS; Medical Evidence and Compensation Therefor, see CRIMINAL LAW; EVIDENCE; WITNESSES; Poison, see HOMICIDE; POISONS; Sexual Relations, see ABORTION; BASTARDS;

1. Stearns *v.* Russell, 85 Fed. 218, 225, 29 C. C. A. 121.

2. Boyd *v.* Gilchrist, 15 Ala. 849, 853; Hite *v.* State, 9 Yerg. (Tenn.) 357, 379.

3. Hite *v.* State, 9 Yerg. (Tenn.) 357, 379, where it is said that it "is, perhaps, properly speaking, the abbreviation of neither, and that what it does mean is a question of fact."

4. Century Dict.

According to the lexicographers all medals are suitable for use as prizes. The commercial meaning of "medal" is not different from the ordinary meaning. U. S. *v.* McSorley, 65 Fed. 492, 13 C. C. A. 15.

"Medals" include curious pieces of coin kept with medals, for even medals themselves were once current coin. Bridgman *v.* Dove, 3 Atk. 201, 202, 26 Eng. Reprint 917.

5. McMullen *v.* Hodge, 5 Tex. 34, 79, where it is said that *sin media annata* is incorrectly translated as "without interest."

Media annata was given in lieu of military service. McMullen *v.* Hodge, 5 Tex. 34, 80.

6. Trevino *v.* Fernandez, 13 Tex. 630, 660 [*citing* Inst. Asso. & Manual, translated by Johnson].

7. Webster Dict.

"Medical attendance" is attendance by a physician regularly licensed. People *v.* Pierson, 176 N. Y. 201, 207, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187. To constitute a medical attendance it is not requisite that a physician should attend the patient at his house. An attendance at his own office is sufficient. Cushman *v.* U. S. Life Ins. Co., 70 N. Y. 72, 78. But see Scott *v.* Winneshiek County, 52 Iowa 579, 580, 581. 3 N. W. 626, where it is said: "While the words 'medical attendance' are often used to denote the rendering of professional medical services, we do not think that their use in that respect is such as necessarily to exclude all other meanings. The efforts of the physician, however skillful or assiduous he may be, must usually be supplemented by an attendance which he cannot give. It matters not that the persons who give such attendance are usually denominated nurses. Their office is to assist the physician to obtain certain medical results." See also Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 45, 32 N. W. 18.

"Medical attendant" is one to whom the care of a sick person has been intrusted. Edington *v.* New York Mut. L. Ins. Co., 5 Hun (N. Y.) 1, 6, holding that the term would not mean a physician merely making a casual prescription for a friend.

"Medical college" is a term which refers to those schools of learning teaching medicine in its different branches at which physicians were educated, or schools of character (Nelson *v.* State, 108 Ky. 769, 776, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383); an institution in which an essential part of the instruction is teaching the nature and effects of medicine, how to compound and administer them, and for what maladies they are to be used; also surgery (Nelson *v.* State Bd. of Health, 108 Ky. 769, 776, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383, holding that the term does not include a school for teaching osteopathy, which neither teaches therapeutics, materia medica, nor surgery).

"Medical soap" is a soap used for remedial purposes. Park *v.* U. S., 66 Fed. 731, where the term is distinguished from a toilet soap, in that the latter is used as a detergent, for cleansing purposes only. See DETERGENT SOAP.

"Medical treatment" is a term which, "in its enlarged sense, includes surgery, and in a restricted sense, as used in medical parlance, may mean a division of the curative art, exclusive of surgery." Clinton County *v.* Ramsey, 20 Ill. App. 577, 579. See also Bonart *v.* Lee, (Tex. Civ. App. 1898) 46 S. W. 906. As including the services of a clairvoyant see Bibber *v.* Simpson, 59 Me. 181, 182.

"Medical treatment for disease" see Bayless *v.* Travellers' Ins. Co., 2 Fed. Cas. No. 1,138, 14 Blatchf. 143, 145.

"Medical or surgical assistance" see Honeybone *v.* Hambridge, 18 Q. B. D. 418, 421, Fox 26, 51 J. P. 103, 56 L. J. Q. B. 46, 56 L. T. Rep. N. S. 365, 35 Wkly. Rep. 520.

DIVORCE; RAPE; Wounds and Other Injuries to Person, see ASSAULT AND BATTERY; HOMICIDE.)

MEDICINAL. Having the properties of a medicine; adapted to medical use or purposes; curative; remedial.[8] (See MEDICINE; and, generally, CUSTOMS DUTIES.)

MEDICINE.[9] Properly speaking, a remedial substance;[10] any substance administered in a treatment of diseases, a remedial agent; physic;[11] any substance liquid or solid that has the property of curing or mitigating diseases or that is used for that purpose;[12] a combination of drugs in largely varying proportions.[13] In a popular sense[14] the term is sometimes employed as referring to the art of a physician, or of healing; the art and science of curing diseases;[15] the art and science of understanding diseases, and curing and relieving them when possible;[16] the science and art of preserving health and preventing and curing disease, the healing art, including also the science of obstetrics;[17] the healing art; a science, the object of which is the cure of disease and the preservation of health;[18] lucrative science or a professional science.[19] (Medicine: In General, see DRUGGISTS; PHYSICIANS AND SURGEONS. Duty or Tax on, see CUSTOMS DUTIES; INTERNAL REVENUE. Patent—In General, see DRUGGISTS; Duty on, see CUSTOMS DUTIES; Tax on, see INTERNAL REVENUE. Sale of Liquor For, see INTOXICATING LIQUORS.)

MEDITATE. As an intransitive verb, to keep the mind in a state of contemplation; to dwell on anything in thought; to think seriously; to muse; to cogitate; to reflect.[20] As a transitive verb, to contemplate; to keep the mind fixed upon; to study; to purpose; to intend; to design; to plan by revolving in the mind.[21]

8. Century Dict.

"Medicinal preparation" has been held to include: Antipyrine. Schulze-Berge *v.* U. S., 66 Fed. 748, 749. Chloral hydrate. U. S. *v.* Schering, 119 Fed. 473. Elaterium. U. S. *v.* Merck, 66 Fed. 251, 252, 13 C. C. A. 432. Guarana. Cowl *v.* U. S., 124 Fed. 475. Hyoscin hydrobromate. Schering *v.* U. S., 119 Fed. 472. Lanoline. Movius *v.* U. S., 66 Fed. 734, 735. Muriate of cocaine. Lehn *v.* U. S., 66 Fed. 748; *In re* Mallinckrodt Chemical Works, 66 Fed. 746.

9. "Derived from *medeor*—to heal." Bragg *v.* State, 134 Ala. 165, 174, 32 So. 767, 58 L. R. A. 925 [*citing* Universal Cycl. (Johnson ed.)].

10. State *v.* Mylod, 20 R. I. 632, 637, 40 Atl. 753, 41 L. R. A. 428.

11. Justice *v.* State, 116 Ga. 605, 606, 42 S. E. 1013, 59 L. R. A. 601.

12. Imperial Dict. [*quoted* in Reg. *v.* Stewart, 17 Ont. 4, 5].

The term does not embrace cigars and tobacco. Com. *v.* Marzynski, 149 Mass. 68, 71, 21 N. E. 228. To the same effect are Penniston *v.* Newnan, 117 Ga. 700, 702, 45 S. E. 65; State *v.* Ohmer, 34 Mo. App. 115, 125. Nor does the term embrace barrels of whisky, in a distillery bonded warehouse. Kloch *v.* Burger, 58 Md. 575, 578.

The term may embrace intoxicating liquors. Pollard *v.* Allen, 96 Me. 455, 456, 52 Atl. 924.

13. Stagger's Estate, 8 Pa. Super. Ct. 260, 264.

14. In its common signification the term "includes all learning having for its object the care of the health and the cure of the ills of the human body. Even, within the recollection of some of us, the practising physician or family doctor kept in his own office his drugs, compounded them himself, and not seldom maintained a dental chair wherein he seated his patients and dosed or extracted their ailing teeth. He had not only been taught dental surgery and pharmacy, but practised both under his degree from a college of medicine." *In re* Philadelphia Medico-Chirurgical College, 190 Pa. St. 121, 123, 42 Atl. 524.

15. Universal Cycl. (Johnson ed.) [*quoted* in Bragg *v.* State, 134 Ala. 165, 174, 32 So. 767, 58 L. R. A. 925].

Medicine, if a science at all, belongs to the class called "inductive sciences." Huffman *v.* Click, 77 N. C. 55, 57.

16. Bigelow [*quoted* in Bragg *v.* State, 134 Ala. 165, 174, 32 So. 767, 58 L. R. A. 925].

17. Gould [*quoted* in Bragg *v.* State, 134 Ala. 165, 174, 32 So. 767, 58 L. R. A. 925].

18. Dunglison Med. Dict. [*quoted* in Bragg *v.* State, 134 Ala. 165, 174, 32 So. 767, 58 L. R. A. 925].

19. Century Dict. [*quoted* in U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 938, 41 C. C. A. 114].

"Practice of medicine" has been held not to include "Christian Science" so called. State *v.* Mylod, 20 R. I. 632, 637, 40 Atl. 753, 41 L. R. A. 428. Nor the practice of osteopathy. Nelson *v.* State Bd. of Health, 108 Ky. 769, 776, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383; State *v.* McKnight, 131 N. C. 717, 719, 42 S. E. 580, 59 L. R. A. 187. But *compare* Eastman *v.* People, 71 Ill. App. 236, 239. And see, generally, PHYSICIANS AND SURGEONS.

20. Webster Dict. [*quoted* in Cook *v.* State, 46 Fla. 20, 67, 35 So. 665].

21. Webster Dict. [*quoted* in Cook *v.* State, 46 Fla. 20, 45, 35 So. 665], where the word "premeditate" is also defined.

MEET. As an adjective, fit or suitable.[22] As a verb, to come upon or against, front to front, as distinguished from contact by following and overtaking;[23] to come together by mutual approach; to fall in with another; to come face to face; hence to converge;[24] to come together with hostile purpose; to have an encounter or conflict;[25] to come into conformity to; to be or act in agreement with.[26] (See MEETING.)

MEETING. The coming together of persons; an ASSEMBLY,[27] *q. v.* (Meeting: Of Minds, see CONTRACTS. Right to Hold, see CONSTITUTIONAL LAW. Disturbance of, see DISTURBANCE OF PUBLIC MEETINGS. Mandamus to Compel, see MANDAMUS. Of Corporation, see BANKS AND BANKING; CORPORATIONS. Of County Boards, see COUNTIES. Of Creditors, see BANKRUPTCY; INSOLVENCY. Of Joint Stock Company, see JOINT STOCK COMPANIES. Of Jury Commissioners, see JURIES. Of Municipal Bodies, see MUNICIPAL CORPORATIONS. Of Religious Society, see RELIGIOUS SOCIETIES. Of School-Board, etc., see SCHOOLS AND SCHOOL-DISTRICTS. Of Voluntary Association, see ASSOCIATIONS. Town-Meeting, see TOWNS.)

MEETING-HOUSE. A house to meet in for religious worship.[28] (See, generally, RELIGIOUS SOCIETIES.)

MELANCHOLIA. A form of insanity, the characteristics of which are extreme mental depression, associated with delusions and hallucinations, the hallucinations being errors of eyesight, hearing and the like;[29] a disease of the mind and

"Meditated" refers to something not yet done, something in a state of incubation, yet to discover itself, something brooded over and perhaps talked about. State *v.* McDonald, 4 Port. (Ala.) 449, 455.

22. Woodburn *v.* Mosher, 9 Barb. (N. Y.) 255, 257 [*citing* Webster Dict.].

23. Webster Dict. [*quoted* in Stripling *v.* State, 114 Ga. 538, 539, 40 S. E. 733].

The terms "meet" and "pass" are used in their strict signification, and are intended to apply only where travelers are approaching each other from different directions, intending to pass on the same road. Lovejoy *v.* Dolan, 10 Cush. (Mass.) 495, 497.

"Meeting head on," or "nearly end on," in an admiralty rule in reference to vessels meeting head on or nearly end on, applies to vessels meeting in a narrow channel, where they must pass on narrow courses, not exceeding a half point apart. The F. W. Wheeler *v.* Churchill, 78 Fed. 824, 828, 24 C. C. A. 353. See COLLISION.

"Meeting end on."— Sailing ships are "meeting end on," within the meaning of the rules and regulations for preventing collisions, when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision because of their proximity, and when the vessels advance so near each other that the necessity to prevent such a disaster begins. Brown *v.* Slanson, 7 Wall. (U. S.) 656, 657, 19 L. ed. 157; The George Law, 10 Fed. Cas. No. 5,337, 3 Ben. 456, 466. See COLLISION.

24. Webster Dict. [*quoted* in Pitts *v.* State, 29 Tex. App. 374, 378, 16 S. W. 189].

"Persons meeting each other" see Riepe *v.* Elting, 89 Iowa 82, 85, 56 N. W. 285, 48 Am. St. Rep. 356, 26 L. R. A. 769.

25. Webster Dict. [*quoted* in Pitts *v.* State, 29 Tex. App. 374, 378, 16 S. W. 189]. See also Brown *v.* State, 45 Tex. Cr. 139, 141, 75 S. W. 33.

26. Century Dict.

27. Black L. Dict.

Meeting of electors see Cameron *v.* McDougall, Hodg. El. Rep. (U. C.) 376, 380.

"Meeting of the legislature" see McAffee *v.* Russell, 29 Miss. 84, 95.

"Meeting of the qualified voters" see Com. *v.* Desmond, 122 Mass. 12, 13.

Meeting of witnesses face to face see 19 Cyc. 106 note 53.

Meeting under control of mayor see *Ex p.* Danaher, 27 N. Brunsw. 554, 559.

28. Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282, 283, holding, however, that it does not require that it should be constantly used for that purpose.

It does not include a parsonage belonging to an Episcopal Church, if it is not actually annexed to the church edifice or its curtilage. Dauphin County *v.* St. Stephen's Church, 3 Phila. (Pa.) 189, 190.

As a public place.— A meeting-house may be a public place at one time and not at another time. Bishop *v.* Com., 13 Gratt. (Va.) 785, 787.

29. People *v.* Krist, 168 N. Y. 19, 28, 60 N. E. 1057, where it is said: "In melancholia the eyes are just the opposite (of staring); the melancholiac is rarely willing to look you in the face, but turns away and avoids his fellows and is exclusive."

Melancholia consists in unfounded and morbid fancies of the sufferer regarding his means of subsistence or his position in life, or in distorted conceptions of his relations to society or his family, or his rights or duties, or of dangers threatening his person, property, or reputation. "'When the melancholia hallucination has fully taken possession of the mind . . it becomes the sole object of attention, without the power of varying the impression or of directing the thoughts to any facts or considerations calculated to remove or palliate it.'" Connecticut Mut. L. Ins. Co. *v.* Groom, 86 Pa. St. 92, 97, 27 Am. Rep. 689 [*quoting* Abercrombie].

of the affections, which sometimes operates upon the power of the will.[30] (See, generally, Insane Persons.)

MELIORATIONS. Valuable and lasting improvements, made on land by one lawfully in the occupation thereof at his expense, and which he is allowed to set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession.[31] (See, generally, Estates; Improvements, and Cross-References Thereunder.)

MELIOR DABIT NEMEN REI. A maxim meaning "The better gives a name to a thing."[32]

MELIOREM CONDITIONEM SUAM FACERE POTEST MINOR, DETERIOREM NEQUAQUAM. A maxim meaning "A minor can make his condition better, but by no means worse."[33]

MELIOR EST CONDITIO POSSIDENTIS [or **DEFENDENTIS**]. A maxim meaning "The condition of the party in possession is the better one."[34]

MELIOR EST CONDITIO POSSIDENTIS, ET REI QUAM ACTORIS. A maxim meaning "The condition of the party in possession is the better one, and that of a defendant is better than that of a plaintiff."[35]

MELIOR EST CONDITIO POSSIDENTIS UBI NEUTER JUS HABET. A maxim meaning "Where neither has the right, the condition of the party in possession is the better."[36]

MELIOR EST JUSTITIA VERE PRÆVENIENS QUAM SEVERE PUNIENS. A maxim meaning "That justice which absolutely prevents [a crime] is better than that which severely punishes it."[37]

MELIUS EST DA SPATIUM TENUEMQUE MORAM; MALE CUNCTA MINISTRAT IMPETUS. A maxim meaning "It is best to always allow one's self an interval for deliberation; all things are done badly that are done with violence and precipitancy."[38]

MELIUS EST IN TEMPORE OCCURRERE, QUAM POST CAUSAM VULNERATAM REMEDIUM QUÆRERE. A maxim meaning "It is better to meet a thing in time, than after an injury inflicted, to seek a remedy."[39]

MELIUS EST JUS DEFICIENS QUAM JUS INCERTUM. A maxim meaning "Law that is deficient is better than law that is uncertain."[40]

MELIUS EST OMNIA MALA PATI QUAM MALO CONSENTIRE. A maxim meaning "It is better to suffer all wrongs, [any wrong] than to consent to wrong."[41]

MELIUS EST PETERE FONTES QUAM SECTARI RIVULOS. A maxim meaning "It is better to go to the fountain head than to follow little streamlets."[42]

30. State *v.* Reidell, (Del. 1888) 14 Atl. 551, 552, where it is said: "Its victim . . . may be entirely sound of mind in all other respects; and yet, with the knowledge of right and wrong which attends such soundness, may be unable to control his will, or resist the prompting of his disease to do what, in one having full possession of that faculty, would be not only a wrongful, but an atrociously wicked, act."

31. Green *v.* Biddle, 8 Wheat. (U. S.) 1, 82, 5 L. ed. 547.

32. Peloubet Leg. Max. [*citing* Branch Pr.].

33. Burrill L. Dict. [*citing* Coke Litt. 337*b*].

34. Black L. Dict.; Burrill L. Dict. [*citing* Fleta, lib. 6, c. 39, § 7].

Applied or quoted in Porter *v.* Seeley, 13 Conn. 564, 570; Prentiss *v.* Roberts, 49 Me. 127, 136; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 23, 9 Am. Dec. 111; Davis *v.* Coburn, 8 Mass. 299, 307; Ontario Bank *v.* Worthington, 12 Wend. (N. Y.) 593, 601; Thompson *v.* Johnston, 6 Binn. (Pa.) 68, 80; Shotzberger *v.* Bassler, 26 Pa. Co. Ct. 522, 524; Morgan *v.* Tener, 10 Phila. (Pa.) 412, 413; Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296, 308; Reshton *v.* Whatmore, 8 Ch. D. 467, 477, 47 L. J. Ch. 467, 26 Wkly. Rep. 827; Farmer *v.* Russell, 1 B. & P. 296, 298; Hodson *v.* Terrill, 1 Cromp. & M. 797, 804, 1 Dowl. P. C. 264, 2 L. J. Exch. 282, 3 Tyrw. 393; *Ex p.* Dickson, 2 Mont. & A. 99, 101; Grant *v.* Vaughan, W. Bl. 485, 489; Gidney *v.* Bates, 10 N. Brunsw. 395, 397; Day *v.* Day, 17 Ont. App. 157, 164; Grant *v.* McLean, 3 U. C. Q. B. O. S. 443, 461.

35. Burrill L. Dict. [*citing* Best Ev. 293, § 252; 4 Inst. 180].

36. Burrill L. Dict. [*citing* Jenkins Cent. 118, case 36].

37. Burrill L. Dict. [*citing* 3 Inst. Epil.].

38. Morgan Leg. Max.

39. Burrill L. Dict. [*citing* Fleta, lib. 6, c. 37, § 15; 2 Inst. 299].

40. Black L. Dict. [*citing* Lofft Max. 395].

41. Burrill L. Dict. [*citing* 3 Inst. 23 marg.].

42. Black L. Dict.

Applied in Warren *v.* Lusk, 16 Mo. 102, 109.

MELIUS EST RECURRERE QUAM MALE CURRERE. A maxim meaning "It is better to run back than to run badly; it is better to retrace one's steps than to proceed improperly."[43]

MELIUS EST UT DECEM NOXII EVADANT QUAM UT UNUS INNOCENS PEREAT. A maxim meaning "It is better that ten guilty persons escape than that one innocent person perish."[44]

MELIUS ET TUTIUS SI NON FESTINES. A maxim meaning "It is better and safer not to be in haste."[45]

MELIUS INQUIRENDUM. In old English practice, the name of a writ issued to the escheator, commanding him to make a further inquiry or to take a new inquisition respecting a matter.[46] (See, generally, ESCHEAT.)

MELTING. As applied to the reduction of ore the application of heat causing the ore to become fluid.[47] (See, generally, MINES AND MINERALS.)

MEM. An intelligible abbreviation for MEMBER,[48] *q. v.* Also often used as an abbreviation for memorandum or memoranda.[49] (See ABBREVIATIONS.)

MEMBER. A person considered in relation to any aggregate of individuals to which he belongs; particularly one who has united with or has been formally chosen as a corporate part of an association or public body of any kind.[50] In anatomy, a limb; a part appurtenant to the body;[51] a subordinate part of the main body.[52] (Member: Of Association, see ASSOCIATIONS. Of Beneficial Society, see MUTUAL BENEFIT INSURANCE. Of Club, see CLUBS. Of Congress,[53] see UNITED STATES. Of Corporation,[54] see CORPORATIONS. Of Exchange, see EXCHANGES. Of Indian Tribe, see INDIANS. Of Insurance Company,[55] see INSURANCE, and the Particular Insurance Titles. Of Joint Stock Company, see JOINT STOCK COMPANIES. Of Legislature,[56] see STATES. Of Municipal Body, see COUNTIES; MUNICIPAL CORPORATIONS; TOWNS. Of Partnership, see PARTNERSHIP. Of Religious Society,[57] see RELIGIOUS SOCIETIES. Of School-Board, see SCHOOLS AND SCHOOL-DISTRICTS.)

MEMBERSHIP. As applied to a body of persons, a term which implies, not only the enjoyment of its privileges, but subjection to the rules governing it.[58] (See MEMBER.)

43. Black L. Dict. [*citing* 4 Inst. 176].
44. Morgan Leg. Max.
45. Peloubet Leg. Max. [*citing* Tayler 316].
46. Burrill L. Dict. [*citing* Reg. Orig. 293; F. N. B. 255c].
47. Lowrey *v.* Cowles Electric Smelting, etc., Co., 68 Fed. 354, 369, where the word "smelting" is also defined.
48. Jaqua *v.* Witham, etc., Co., 106 Ind. 545, 546, 7 N. E. 314.
49. Webster Int. Dict. See MEMORANDUM, *post*, p. 470.
50. Century Dict. [*quoted* in People *v.* Hurley, 126 Cal. 351, 355, 58 Pac. 814].
"Members of the branch" see Zeiler *v.* Central R. Co., 84 Md. 304, 322, 35 Atl. 932, 34 L. R. A. 469.
"Members of the household or family" see May *v.* Smith, 48 Ala. 483, 489; Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584, 587; Blachley *v.* Laba, 63 Iowa 22, 23, 18 N. W. 658, 50 Am. Rep. 724 [*citing* Webster Dict.]. See FAMILY, 19 Cyc. 450; HOUSEHOLD, 21 Cyc. 1113.
Members of political convention see People *v* Hurley, 126 Cal. 351, 355, 58 Pac. 814.
51. Worcester Dict. [*quoted* in Godfrey *v.* People, 5 Hun (N. Y.) 369, 380 (*quoting* Johnson & Walker Dict.)].
52. Worcester Dict. [*quoted* in Godfrey *v.* People, 5 Hun (N. Y.) 369, 380].
The term may include an ear (Godfrey *v.* People, 5 Hun (N. Y.) 369, 380) or a tooth (High *v.* State, 26 Tex. App. 545, 573, 10 S. W. 238, 8 Am. St. Rep. 488).
53. "Member of congress" is a phrase synonymous with "representative in congress." Butler *v.* Hopper, 4 Fed. Cas. No. 2,241, 1 Wash. 499, 501.
54. Member of a corporation" is a term sometimes used as synonymous with "stockholder." Carlton *v.* Southern Mut. Ins. Co., 72 Ga. 371, 396, 399; People *v.* Security L., etc., Co., 78 N. Y. 114, 123, 34 Am. Rep. 522. See also Curtis *v.* Harlow, 12 Metc. (Mass.) 3, 6; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 100, 8 Am. Dec. 128; *In re* Philadelphia Sav. Inst., 1 Whart. (Pa.) 461, 468, 30 Am. Dec. 226; Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359.
55. "Member of an insurance company" is a term sometimes used as synonymous with "policy-holder." Clark *v.* Manufacturers' Mut. F. Ins. Co., 130 Ind. 332, 336, 30 N. E. 212.
56. "Members of the legislature" include both branches of the legislature. State *v.* Robinson, 1 Kan. 17, 22.
"Members elected" see Osburn *v.* Staley, 5 W. Va. 85, 94, 13 Am. Rep. 640.
57. Members of religious society see State *v.* Crowell, 9 N. J. L. 390, 411.
"Members being communicants" see Weckerly *v.* Geyer, 11 Serg. & R. (Pa.) 35, 37.
58. Field *v.* Drew Theological Seminary, 41 Fed. 371, 375.

MEMORANDUM. A note to help the memory;[59] a brief note in writing of some transaction, or an outline of some intended instrument; an instrument drawn up in brief and compendious form;[60] a MEMORIAL, *q. v.*; a record.[61] (Memorandum: Adding or Erasing, see ALTERATIONS OF INSTRUMENTS. As Evidence, see EVIDENCE. Check, see COMMERCIAL PAPER. Of Articles in Marine Policy, see MARINE INSURANCE. Of Contract, see CONTRACTS. Of Insurance Contract, see FIRE INSURANCE, and the Particular Insurance Titles. On Bill or Note, see COMMERCIAL PAPER. To Comply With Statute of Frauds, see FRAUDS, STATUTE OF. To Refresh Memory, see WITNESSES. See also MEM.)

MEMORIAL. In law, a short note, abstract, memorandum, or rough draft of the orders of the court, from which the records thereof may at any time be fully made.[62] (See MEMORANDUM; and, generally, RECORDS.)

MEMORY. A term sometimes used as synonymous with the word "mind."[63] (Memory: Of Witness, see EVIDENCE; WITNESSES. Sound and Disposing, see WILLS.)

MEN.[64] See MAN.

MENACE. As a noun, a threat;[65] a threat or threatening; the declaration or indication of a disposition or determination to inflict an evil; the indication of a probable evil or catastrophe to come;[66] the show of an intention to inflict evil.[67] As a verb, to act in a threatening manner.[68] (See, generally, ASSAULT AND BATTERY; CRIMINAL LAW; THREATS.)

MENIAL.[69] As an adjective, belonging to the retinue of servants;[70] belonging to the retinue or train of servants.[71] As a noun, the word is said to mean a domestic

"**Membership corporation**" under 2 N. Y. Rev. St. (9th ed.) p. 1433, § 2, see People *v.* Johnson, 22 Misc. (N. Y.) 150, 151, 49 N. Y. Suppl. 382.

Membership in a voluntary political association is "a privilege, which may be accorded or withheld, and not a right, which can be gained independently and then enforced." McKane *v.* Adams, 123 N. Y. 609, 612, 25 N. E. 1057, 20 Am. St. Rep. 785.

"**Membership ticket**" see People *v.* Johnson, 22 Misc. (N. Y.) 150, 152, 49 N. Y. Suppl. 382.

59. Bissell *v.* Beckwith, 32 Conn. 509, 517; Seymour *v.* Cowing, 4 Abb. Dec. (N. Y.) 200, 205, 1 Keyes 532; Barber *v.* Bennet, 58 Vt. 476, 480, 4 Atl. 231, 56 Am. Rep. 565; Hay *v.* Peterson, 6 Wyo. 419, 444, 45 Pac. 1073, 34 L. R. A. 581.

"The object of a memorandum is as frequently to help the memory of another person as that of the writer." Bissell *v.* Beckwith, 32 Conn. 509, 517.

60. Webster Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 294, 43 Pac. 896].

A single letter or initial on the wrapper of a newspaper is not a writing or memorandum. Teal *v.* Felton, 12 How. (U. S.) 284, 291, 13 L. ed. 990.

61. Bissell *v.* Beckwith, 32 Conn. 509, 517.

62. State *v.* Shaw, 73 Vt. 149, 165, 50 Atl. 863.

"**Memorial paper or minute**" see Chicago, etc., R. Co. *v.* Wingler, 165 Ill. 634, 635, 46 N. E. 712.

63. *In re* Forman, 54 Barb. (N. Y.) 274, 286, where it is said: "The use of the words mind and memory as convertible terms is not so unphilosophical as it might at first seem to be, for without memory there could be no mind, properly speaking. Without any memory, a person would be the mere recipient of a succession of present sensations, like the lowest type of animal life."

"**Time of memory**" see Ackerman *v.* Shelp, 8 N. J. L. 125, 130.

64. **May include** women see Eichorn *v.* Missouri, etc., R. Co., 130 Mo. 575, 589, 32 S. W. 993; Rackliffe *v.* Seal, 36 Mo. 317, 319.

65. Reg. *v.* Tomlinson, [1895] 1 Q. B. 706, 709, 18 Cox C. C. 75, 64 L. J. M. C. 97, 72 L. T. Rep. N. S. 155, 15 Reports 207, 43 Wkly. Rep. 544 [*citing* Johnson Dict.; Richardson Dict.; Worcester Dict.].

66. Reg. *v.* Tomlinson, [1895] 1 Q. B. 706, 709, 18 Cox C. C. 75, 64 L. J. M. C. 97, 72 L. T. Rep. N. S. 155, 15 Reports 207, 43 Wkly. Rep. 544 [*citing* Ogilvie Dict.; Webster Dict.]. See also Reg. *v.* Gibbons, 1 Can. Cr. Cas. 340, 343; Reg. *v.* Collins, 1 Can. Cr. Cas. 48, 54 note.

67. Webster Dict. [*quoted* in Cumming *v.* State, 99 Ga. 662, 665, 27 S. E. 177].

68. Webster Dict. [*quoted* in Cumming *v.* State, 99 Ga. 662, 665, 27 S. E. 177, where it is said that "any overt act of a threatening character, short of an actual assault, is a 'menace.'"

69. **Derived from** *meiny* or *many; mesnie*, old French. Note to Nicoll *v.* Greaves, 17 C. B. N. S. 27, 38, 112 E. C. L. 27.

70. Johnson Dict [*quoted* in Nicoll *v.* Greaves, 17 C. B. N. S. 27, 38 note, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12 Wkly. Rep. 961, 112 E. C. L. 27].

71 Webster Dict. [*quoted* in Nicoll *v.* Greaves, 17 C. B. N. S. 27, 38 note, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12 Wkly. Rep. 961, 112 E. C. L. 27].

servant;[72] one of the train of servants;[73] a company or retinue; the company or collected number of a household or family.[74] (See DOMESTIC; and, generally, MASTER AND SERVANT.)

MEN OF A COUNTY. A term which in common parlance may be understood to mean residents.[75]

MENSA ET THORO. From bed and board.[76] (See, generally, DIVORCE.)

MENS REA. A guilty mind.[77]

MENS TESTATORIS IN TESTAMENTIS SPECTANDA EST. A maxim meaning "The intention of the testator is to be regarded in wills."[78]

MENSURATION. A branch of pure mathematics.[79]

MENTAL. As used to describe the condition of a person, a word which refers to his senses, perceptions, consciousness, and ideas.[80] (Mental: Anguish, see DAMAGES. Capacity — In General, see INSANE PERSONS; To Commit Crime, see CRIMINAL LAW; To Contract Marriage, see MARRIAGE; To Make Contract, see CONTRACTS; To Make Will, see WILLS. Unsoundness, see INSANE PERSONS. Suffering, see DAMAGES.)

MENTION. To direct attention to; to speak briefly of; to name casually or incidentally;[81] to refer to; to notice.[82]

MERCANTILE. Pertaining to merchants or the business of merchants;[83] having to do with trade or the buying and selling of commodities;[84] having to do with trade or commerce; of or pertaining to merchants or the traffic carried on by merchants; trading; commercial.[85] (Mercantile: Agency, see MERCANTILE

72. Webster Dict. [*quoted* in Nicoll *v.* Greaves, 17 C. B. N. S. 27, 38 note, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12 Wkly. Rep. 961, 112 E. C. L. 27].

Illustrations.— A barkeeper in a tavern is a "menial servant." "In short, all the hirelings employed in service in and about the house and household affairs, or whose business it is to assist in the economy of the family; the stable-boy, the coachman, and all that class of hirelings, fall within the reason of the law. In legal phrase, they are menial servants; and whether, in common parlance, they are called servants, or whether, as that term seems degrading, courtesy gives them a less offensive appellation, as gardener, housekeeper, nurse, coachman or barkeeper, they are menial servants; are servants within the meaning of the law." Boniface *v.* Scott, 3 Serg. & R. (Pa.) 351, 354.

73. Johnson Dict. [*quoted* in Nicoll *v.* Greaves, 17 C. B. N. S. 27, 38 note, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12 Wkly. Rep. 961, 112 E. C. L. 27, where it is said, "and he refers to Termes de la Ley, p. 429, where it is said that 'menials are those servants who live within their master's walls of his house'"].

74. Richardson Dict. [*quoted* in Nicoll *v.* Greaves, 17 C. B. N. S. 27, 38 note, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12.Wkly. Rep. 961, 112 E. C. L. 27].

75. Rix *v.* Johnson, 5 N. H. 520, 526, 22 Am. Dec. 472.

76. Black L. Dict.

77. Reg. *v.* Tolson, 23 Q. B. D. 168, 185, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716. See also Reg. *v.* Dias, 1 Can. Cr. Cas. 534, 537 [*citing* Reg. *v.* Tolson, *supra*], where it was said to be too short and antithetical to be of much practical value.

78. Black L. Dict. [*citing* Jenkins Cent. 277].

79. With which the court is presumed to be acquainted, and of which it takes judicial notice. Scanlan *v.* San Francisco, etc., R. Co., (Cal. 1898) 55 Pac. 694, 695.

80. New York Mut. L. Ins. Co. *v.* Terry, 15 Wall. (U. S.) 580, 588, 21 L. ed. 236, where it is said: "When we speak of the 'mental' condition of a person, we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective."

81. Toerge *v.* Toerge, 9 N. Y. App. Div. 194, 200, 41 N. Y. Suppl. 244. See also Lacy *v.* Moore, 6 Coldw. (Tenn.) 348, 353.

82. State *v.* Bryan, 89 N. C. 531, 533.

83. *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 757; Webster Dict. [*quoted* in Garretson *v.* Merchants', etc., Ins. Co., 81 Iowa 727, 729, 45 N. W. 1047]; *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273].

84. *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 757; Webster Dict. [*quoted* in Garretson *v.* Merchants', etc., Ins. Co., 81 Iowa 727, 729, 45 N. W. 1047].

85. *In re* Surety Guarantee, etc., Co., 121 Fed. 73, 75, 56 C. C. A. 654; Century Dict. [*quoted* in *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 750].

"Mercantile business" is a term of definite meaning which refers to the buying and selling of articles of merchandise as an employment; it implies operations conducted with a view of realizing the profits which come from skilful purchase, barter, speculation, and sale. Graham *v.* Hendricks, 22 La. Ann. 523, 524.

"Mercantile character" is a term which, when used in reference to a business firm,

AGENCIES. Agent,[86] see FACTOR AND BROKERS; MERCANTILE AGENCIES. Law, see COMMERCIAL PAPER; COMMON LAW. Paper, see COMMERCIAL PAPER. Partnership,[87] see PARTNERSHIP. See also COMMERCIAL.)

means the generally received opinion in the community respecting its solvency, the probity and punctuality with which it performed its obligation, and the efficiency with which its affairs are managed. Donnell *v.* Jones, 13 Ala. 490, 513, 48 Am. Dec. 59 [*cited* in Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 312, 33 Pac. 650, 36 Am. St. Rep. 156].

"Mercantile pursuits" is a term which refers to the buying and selling of goods or merchandise, or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business. Century Dict. [*quoted* in *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 750; *In re* New York, etc., Water Co., 98 Fed. 711, 713]. See also *In re* Surety Guarantee, etc., Co., 121 Fed. 73, 75, 56 C. C. A. 654, where it is said: "The words 'mercantile pursuits' may have a little broader signification than 'trading.'" And it implies operations conducted with a view of realizing profits which come from skilful purchase, barter, speculation, and sale. Graham *v.* Hendricks, 22 La. Ann. 523, 524. The term does not include: A barber shop. Cleve *v.* Mazzoni, 45 S. W. 88, 89, 19 Ky. L. Rep. 2001. A private hospital for consumptives. *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273. An incorporated mutual fire insurance company. *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 757. A mining corporation. *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 983; *In re* Elk Park Min., etc., Co., 101 Fed. 422, 423. A restaurant. Garretson *v.* Merchants', etc., Ins. Co., 92 Iowa 293, 296, 60 N. W. 540. A corporation engaged in running a saloon and restaurant. *In re* Chesapeake Oyster, etc., Co., 112 Fed. 960, 961. A corporation conducting a public warehouse. *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 750. A water company. Com. *v.* Natural Gas Co., 32 Pittsb. Leg. J. (Pa.) 309, 310 [*citing* Norris *v.* Com., 27 Pa. St. 494]; *In re* New York, etc., Water Co., 98 Fed. 711, 713.

86. "Mercantile agent" is an agent having authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1898] 2 Q. B. 61, 64, 67 L. J. Q. B. 625, 79 L. T. Rep. N. S. 55); a person who takes orders, not from retail merchants, but from private parties (Brookfield *v.* Kitchen, 163 Mo. 546, 551, 63 S. W. 825, where the term is distinguished from a "drummer" or a "peddler"). See COMMERCIAL TRAVELER, 8 Cyc. 334; DRUMMER, 14 Cyc. 1087.

87. "Mercantile partnership" is a partnership which habitually buys and sells, or which buys for the purpose of afterward selling. Com. *v.* Natural Gas Co., 2 Lanc. L. Rev. (Pa.) 41, 42, where it is said that a business which consists in the production and transportation of natural gas issuing from the wells owned by the partnership is not a mercantile partnership, where the firm does not purchase and sell natural gas issuing from wells belonging to other people. See, generally, PARTNERSHIP.

MERCANTILE AGENCIES

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I. DEFINITION.

A mercantile or commercial[1] agency is an institution which by and with the coöperation of merchants, manufacturers, bankers, and others ascertains, registers, and makes known to parties in interest the financial standing, general business reputation, and credit ratings of individuals, firms, and corporations engaged in mercantile or industrial enterprises throughout the world.[2]

1. A "commercial agency" is the same thing as a "mercantile agency." *In re* U. S. Mercantile Reporting, etc., Assoc., 4 N. Y. Suppl. 916.

Special commercial or mercantile agencies are those which confine themselves to reporting a particular business, such as furniture, stationery, jewelry, and hardware. State *v.* Morgan, 2 S. D. 32, 52, 48 N. W. 314.

2. Standard Dict. And see Brookfield *v.* Kitchen, 163 Mo. 546, 63 S. W. 825.

Bureau of information.—A mercantile agency is merely a bureau of information acting as the agent of its employers, and its object is to collect and impart information to those who pay for it. State *v.* Morgan, 2 S. D. 32, 48 N. W. 314.

"Mercantile commercial agencies . . . are establishments which make a business of collecting information relating to the credit, character, responsibility, general reputation, and other matters affecting persons, firms, and corporations engaged in business, for the purpose of furnishing this information to its customers for a cash consideration." State *v.* Morgan, 2 S. D. 32, 51, 48 N. W. 314.

"The business of a commercial agency is to procure such information as it can relative to the business and pecuniary ability of business men and concerns, and to communicate the same to such of its patrons as might have occasion to inquire" (Irish-American Bank *v.* Ludlum, 49 Minn. 344, 348, 51 N. W. 1046 [*quoting* Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270]); "to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit, may by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit" (Eaton *v.* Avery, 83 N. Y. 31, 34, 38 Am. Rep. 389 [*quoted* in Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 169, 438, 17 N. W. 790, 18 N. W. 206]).

II. NATURE OF AGENCY.

A mercantile agency[3] or its reporter[4] is the agent of the subscribers, and not of the person whose affairs he investigates.

III. REGULATION.

Mercantile or commercial agencies, it has been held, are not such legitimate and useful instruments of commerce or commercial intercourse as to put them exclusively under the regulation of congress and free from state control; and a state statute providing for the organization of such companies and the regulation of their business within the limits of the state is not an interference with interstate commerce.[5] The agency is not a common carrier.[6]

IV. LIABILITY[7] AS BETWEEN AGENCY AND ITS SUBSCRIBERS.

A. In General. The nature of the business in which a mercantile agency is engaged is such that reliable information as to the wealth and integrity of persons

It is a collector, storer, and holder of information to be given directly to those who wish to purchase or pay for it. State *v.* Morgan, 2 S. D. 32, 54, 48 N. W. 314.

Method of doing business see State *v.* Morgan, 2 S. D. 32, 52, 48 N. W. 314, where, among other things, it is said: "Correspondents are selected, residing in the several towns and cities, whose special business is to collect information relating to the resident business firms of their respective places."

History of such agencies see State *v.* Morgan, 2 S. D. 32, 48 N. W. 314, where it is said that these agencies have become recognized and permanent adjuncts to the world of trade; that their rise and progress are of but recent date; that the mercantile and commercial agencies were originally established for the purpose of reporting the credit of buyers; that the United States and Canada are divided into districts, each district reporting its territory, but that there is a daily interchange of information between the districts.

3. State *v.* Morgan, 2 S. D. 32, 52, 48 N. W. 314.

It is the mutual agent of its subscribers. Ralph *v.* Fon Dersmith, 10 Pa. Super. Ct. 481.

4. Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct. 618, 40 Wkly. Notes Cas. 116.

5. State *v.* Morgan, 2 S. D. 32, 54, 48 N. W. 314, where it is said: "The information furnished by mercantile agencies to subscribers of their rating books is like other personal contracts between parties. It is individual in its character, and has no relation to the general public."

Commerce generally see COMMERCE, 7 Cyc. 407 *et seq.*

"Information or intelligence is not an article of 'commerce' in any proper meaning of that word. Neither are they subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities to be shipped or forwarded from one state to another, and there put up for sale." State *v.* Morgan, 2 S. D. 32, 54, 48 N. W. 314.

The business may be an adjunct of commerce and of commercial transactions, but it is a separate and distinct appliance, and does not come within the principles of law which govern or regulate either of them. State *v.* Morgan, 2 S. D. 32, 48 N. W. 314.

6. State *v.* Morgan, 2 S. D. 32, 48 N. W. 314. See also Xiques *v.* Bradstreet Co., 70 Hun (N. Y.) 334, 24 N. Y. Suppl. 48 [*affirmed* in 141 N. Y. 605, 36 N. E. 740].

7. Liability under statutes requiring representations as to credit, ability, etc., to be in writing see FRAUDS, STATUTE OF, 20 Cyc. 195 *et seq.* In Sprague *v.* Dun, 12 Phila. (Pa.) 310, 312, it was said: "One who as agent or in any other capacity undertakes to procure information with regard to the character and solvency of a third person, is secure under Lord Tenterden's act against an attempt to carry his liability beyond the limits of the agreement, but he cannot violate his contract wilfully or through negligence, and then allege that the breach occurred in the course of an oral communication, and is not proved by written evidence. If the defendants mean to rely on the statute they should either make written communications to their subscribers, or else inform them that they are not legally responsible for the truth of what they say. It may well be that the morals of the case are with Dun & Co. It was the plaintiff's act in indorsing for Getz, and enabling him to raise money which he had no means of repaying, that gave him credit at the bank, and induced the cashier to answer the inquiries made by the defendants' agents in a way to mislead them; and if the information thus obtained finally reached the plaintiff's ears, and contributed to lead him astray, he may be regarded as the moving cause of his own misfortune. Such an argument may be fairly made before the jury, and should have due weight with the court, but it does not justify the defendants in taking shelter behind a statute which was made for a very dif-

engaged in business cannot be guaranteed.[8] But such an agency is liable for negligence in securing and communicating information,[9] unless exempted by contract.[10]

B. Limitation of Liability. A mercantile agency may by contract protect itself from the consequence of errors from whatever cause in the collection and transmission of information by its agents.[11] But it has been held that a contract stipulating for exemption from liability on account of the negligence, etc., of the agency's agents, servants, etc., but not including the negligence of the agency itself, will not protect such an agency from liability for a loss occasioned by issuing its printed report with a gross error therein, where the information furnished by its agents was correct and the error occurred in the printing of the report, such error being regarded as that of the agency itself.[12] When it is stipulated that a mercantile agency shall not be liable for any loss or injury caused by neglect or other act of its officers or agents, in procuring, collecting, and communicating information, the agency cannot be held liable to subscribers for the consequences of misrepresentation, unless it is so grossly negligent in acquiring or communicating such information that its conduct in effect amounts to a fraud.[13]

V. WHO MAY RELY UPON STATEMENTS TO AGENCY.

Statements and representations made to a mercantile agency,[14] being intended as much for the patrons of the agency as for the agency, the patrons will be entitled to relief and redress when they rely and act on such statements and representations to their injury.[15] But the right to rely and act thereon is not

ferent purpose." In McLean *v.* Dun, 1 Ont. App. 153 [*reversing* 39 U. C. Q. B. 551], it was held that defendants were not liable for the loss which plaintiff had sustained, for that the action was brought upon or by reason of the representation, which was not in writing and signed by them under C. S. U. C. c. 44, § 10, and was therefore not receivable in evidence; and the fact that the representation was made in pursuance of a contract did not prevent the application of the statute.

8. Xiques *v.* Bradstreet Co., 70 Hun (N. Y.) 334, 344, 24 N. Y. Suppl. 48 [*affirmed* in 141 N. Y. 605, 36 N. E. 740], in which it is said: "All that can be demanded of such a corporation is that it shall make due and diligent inquiries and furnish the results to its customers."

9. Duncan *v.* Dunn, 8 Fed. Cas. No. 4,134, 7 Wkly. Notes Cas. (Pa.) 246. And see Xiques *v.* Bradstreet Co., 70 Hun (N. Y.) 334, 24 N. Y. Suppl. 48 [*affirmed* in 141 N. Y. 605, 36 N. E. 740].

10. See *infra*, IV, B.

11. Duncan *v.* Dunn, 8 Fed. Cas. No. 4,134, 7 Wkly. Notes Cas. (Pa.) 246, holding that an express agreement that a mercantile agency shall not be responsible for any loss to a subscriber by neglect of those collecting information will relieve it from liability even for gross negligence.

Fraudulent representation of subagent.—A mercantile agency which contracts with its subscribers to communicate on request information as to the financial responsibility of merchants and other persons, expressly stipulating that the information is to be obtained mainly by subagents of its subscribers, whose names are not to be disclosed, and that the "actual verity or correctness of the said information is in no manner guarantied," is not liable for loss occasioned to a subscriber by the wilful and fraudulent act of a subagent in furnishing false information. Dun *v.* Birmingham City Nat. Bank, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687 [*reversing* 51 Fed. 160].

12. Crew *v.* Bradstreet Co., 134 Pa. St. 161, 19 Atl. 500, 19 Am. St. Rep. 681, 7 L. R. A. 661 [*reversing* 6 Pa. Co. Ct. 360].

13. Xiques *v.* Bradstreet Co., 70 Hun (N. Y.) 334, 24 N. Y. Suppl. 48 [*affirmed* in 141 N. Y. 605, 36 N. E. 740].

14. Information furnished by other subscribers.—A subscriber to a mercantile agency has a right to rely upon the fairness and honesty of the statements of the financial condition made by other subscribers to said agency. Ralph *v.* Fon Dersmith, 10 Pa. Super. Ct. 481.

15. Irish-American Bank *v.* Ludlum, 49 Minn. 344, 348, 51 N. W. 1046 (where it is said: "Any one making statements or representations to such an agency relating to his business, or that of any concern with which he is connected, must know, or must be held to intend, that whatever he so states or represents will be communicated by the agency to any patron who may have occasion to apply for information"); Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822 [*reversing* 57 N. Y. App. Div. 450, 67 N. Y. Suppl. 1017]; Bliss *v.* Sickles, 142 N. Y. 647, 36 N. E. 1064; Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9; Eaton *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389; Nauga-

general or common to all persons who may have patronized the agency. It must be limited and confined to the persons for whom such statements and representations are intended, namely, those who have occasion to apply and who have applied and received a report relative to the party or concern in question.[16]

VI. EVIDENCE.[17]

In an action by a bank to recover money loaned in part on the faith of statements made by the borrower to commercial agencies as to his financial condition, such statements and the reports of such agencies embodying them are admissible in evidence.[18] Upon the trial of one indicted for misapplication of the funds of a bank, when the question at issue is what was the accused's knowledge and opinion of his own financial condition, evidence that a commercial agency rated him at that time at a certain amount of money is inadmissible.[19] In an action brought by a creditor of a firm to charge a person as a member of such firm, a book, published by a commercial agency, and of general use among commercial men, and noting the fact that defendant is not a member of such firm, and to which plaintiff has had access, is competent evidence to go to the jury as tending to show that plaintiff had notice of such fact.[20]

VII. MISCELLANEOUS.

Where one about whom a mercantile agency made an erroneous statement is insolvent, a subscriber who has sold him goods on the faith of the statement may bring suit against the agency without first suing the insolvent.[21] A court of

tuck Cutlery Co. *v.* Babcock, 22 Hun (N. Y.) 481 (rescinding sale for false statements for mercantile agency); Converse *v.* Sickles, 17 Misc. (N. Y.) 169, 40 N. Y. Suppl. 971. *Compare* Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270. And see ESTOPPEL, 16 Cyc. 671 *et seq.* (Tindle *v.* Birkett, *supra*, goes further than the earlier cases, for the court there holds that the person making the statements to the agency is liable not merely for his own statements, but also for the rating assigned by the agency, based upon such statements. In this case a member of a firm knowingly made false and fraudulent statements in writing to a mercantile agency, regarding the financial conditions and assets of his firm, for the purpose of obtaining a favorable rating for it in the reference books furnished by the agency to its subscribers; a subscriber to such agency, relying solely upon such rating, and without any other knowledge, sold on credit and delivered goods to such firm, the members of which were afterward adjudged bankrupts upon their own petition before the goods were paid for. It was held that such subscriber might maintain an action for obtaining the goods by fraud and deceit, although the statements were not made to the vendors personally or directly, but to the agency, and although the subscriber never saw the statements, but only the result of the statements as embodied in the rating of the agency.

16. Irish-American Bank *v.* Ludlum, 49 Minn. 344, 51 N. W. 1046. And see Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270.

Indorsee of a note.— The right of the patrons of a commercial agency to claim an estoppel, as against a person who has made statements and representations to such agency relating to his own business affairs or the affairs of any concern with which he is connected, is not general, but is limited and confined to the parties for whom such statements and representations were intended when made, namely, those patrons who have occasion to apply, and who have applied and received a report relative to the person or concern in question. If the patron who applied for and received the report was thereby induced to lend money, and accept the note of the person who made the statements, and if the lender afterward transfer the note, the indorsee will also be entitled to the estoppel. Irish-American Bank *v.* Ludlum, 49 Minn. 344, 51 N. W. 1046.

17. Evidence generally see EVIDENCE, 16 Cyc. 821 *et seq.*

Judicial knowledge of the management and conduct of commercial agencies see EVIDENCE, 16 Cyc. 877.

18. Merrill Nat. Bank *v.* Illinois, etc., Lumber Co., 101 Wis. 247, 77 N. W. 185.

Evidence of fraudulent representations made to a mercantile agency to obtain a standing which the maker was not entitled to are admissible in evidence in an action of replevin to recover goods sold on the strength of such representations, on the question of fraudulent intent. Bliss *v.* Sickles, 142 N. Y. 647, 36 N. E. 1064.

19. Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624.

20. Crosier *v.* McNeal, 17 Ohio Cir. Ct. 644, 6 Ohio Cir. Dec. 748.

21. Crew *v.* Bradstreet Co., 134 Pa. St. 161, 19 Atl. 500, 19 Am. St. Rep. 681, 7 L. R. A. 661.

equity cannot restrain the publication in the reports of a mercantile agency of representations as to a person's character and standing or as to the value of his property, although such representations may be untrue, where no breach of trust or contract is involved.[22] Where a subscription for a credit guide is for an unconditional purchase thereof, the subscriber need not accept it if such guide, when delivered, contains a printed provision that it is to remain the property of the publisher, and is to be returned in one year, although it is tendered to him, accompanied with an oral waiver of such provision.[23] In that part of Canada where the French law prevails, persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence, or want of skill false information is supplied concerning his standing, although the information be communicated confidentially to a subscriber to the agency on his application therefor.[24]

MERCHANDISE.[1] A term of a very extended meaning,[2] covering all articles of commerce;[3] the objects of commerce;[4] the subjects of commerce and traffic;[5] any article which is the object of commerce, or which may be bought or sold in trade;[6] all kinds of personal property which is bought and sold in the market;[7] all those things which merchants sell, either at wholesale or retail;[8] things which are ordinarily bought and sold;[9] whatever is usually bought and sold in trade, or market, or by merchants;[10] commodities; GOODS, *q. v.*; wares;[11]

22. Raymond *v.* Russell, 143 Mass. 295, 9 N. E. 544, 58 Am. Rep. 137.

Injunction generally see INJUNCTIONS, 22 Cyc. 724 *et seq.*

Where defendant is not a subscriber of an agency he may be enjoined from using or publishing information procured by such agency. Such information is confidential between the agency and its subscribers. Jewelers' Mercantile Agency *v.* Rothschild, 6 N. Y. App. Div. 499, 39 N. Y. Suppl. 700.

23. Barr, etc., Mercantile Agency Co. *v.* Rodick, 47 Mo. App. 298.

24. Cossette *v.* Dun, 18 Can. Sup. Ct. 222.

1. Ordinarily it is to be understood in a commercial sense, although it may not be scientifically correct. Maillard *v.* Lawrence, 16 How. (U. S.) 251, 14 L. ed. 925; Curtis *v.* Martin, 3 How. (U. S.) 106, 11 L. ed. 516; U. S. *v.* One Hundred Twenty Casks of Sugar, 8 Pet. (U. S.) 277, 279, 8 L. ed. 944 [*citing* Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373].

"Merchandise not in existence" includes future crops of fruit. Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

2. Baldwin *v.* Williams, 3 Metc. (Mass.) 365, 367; Tisdale *v.* Harris, 20 Pick. (Mass.) 9, 13.

3. State *v.* Holmes, 28 La. Ann. 765, 767, 26 Am. Rep. 110.

The term applies only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold. Indiana Bond Co. *v.* Ogle, 22 Ind. App. 593, 54 N. E. 407, 408, 72 Am. St. Rep. 326 [*citing* Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16].

4. Webster Dict. [*quoted* in Kent *v.* Liverpool, etc., Ins. Co., 26 Ind. 294, 295, 89 Am. Dec. 463; Com *v.* Keller, 9 Pa. Co. Ct. 253, 255; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 411].

5. Van Patten *v.* Leonard, 55 Iowa 520, 525, 8 N. W. 334; Tisdale *v.* Harris, 20 Pick. (Mass.) 9, 13.

6. Von Cotzhausen *v.* Nazro, 15 Fed. 891, 899; Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 53.

Does not include articles kept wholly or partially for use in and about a building, but only articles kept for sale. Burgess *v.* Alliance Ins. Co., 10 Allen (Mass.) 221, 227.

Slaves as merchandise considered in Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 506, 10 L. ed. 800.

7. Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 218, 18 Pac. 248, 9 Am. St. Rep. 199 [*citing* Cal. Civ. Code, § 1768].

8. Pearce *v.* Augusta, 37 Ga. 597, 599; Kent *v.* Liverpool, etc., Ins. Co., 26 Ind. 294, 297, 89 Am. Dec. 463; *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273 [*citing* Bouvier L. Dict.].

9. Van Patten *v.* Leonard, 55 Iowa 520, 525, 8 N. W. 334, where it is said that the fact that a thing is sometimes bought and sold does not prove that it is merchandise; that term being limited to things which are the subjects of sale and commerce. To the same effect see Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 53.

10. Webster Dict. [*quoted* in Kent *v.* Liverpool, etc., Ins. Co., 26 Ind. 294, 295, 89 Am. Dec. 463; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414].

11. Webster Dict. [*quoted* in Kent *v.* Liverpool, etc., Ins. Co., 26 Ind. 294, 295, 89 Am. Dec. 463; Hartwell *v.* California Ins. Co., 84 Me. 524, 527, 24 Atl. 954; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414].

commodities or goods to trade with.[12] The term usually conveys the idea of personalty used by merchants in the course of trade,[13] and is usually, if not universally, applied to property which has not yet reached the hands of the consumer.[14] It is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced in a commercial regulation.[15] (Merchandise: As Exempt, see EXEMPTIONS. Inspection of, see INSPECTION. Insurance of, see FIRE INSURANCE; MARINE INSURANCE. Mortgage of, see CHATTEL MORTGAGES. Taxation of, see COMMERCE; TAXATION. See also COMMODITY; GOODS; GOODS AND COMMODITIES; GOODS AND MERCHANDISE; GOODS, WARES, AND MERCHANDISE; MERCHANT.)

MERCHANDISE BROKER. A broker who buys and sells goods, and negotiates between the buyer and seller, but without having the custody of the property.[16] (See, generally, FACTORS AND BROKERS.)

MERCHANT.[17] Strictly a buyer, but, by extension, one who buys to sell, or

12. Phillips' New World of Words [*quoted* in Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 512 (*citing* Bailey Dict.; Kersey Dict.; Martin Dict.), where it is said: "It is said, in Glossographia Anglicana Nova, that the word came into use as a term to designate the goods and wares exposed to sale in fairs and markets, which is affirmed also in Cowell's Law Interpreter, edition of 1708"].

Horses in charge of drivers.— The term does not include horses or trucks when they are driven aboard a vessel in charge of their drivers, who are passengers, and remain in their charge on the trip. The Garden City, 26 Fed. 766, 770.

13. Jewell *v.* Sumner Tp., 113 Iowa 47, 50, 84 N. W. 973; The Marine City, 6 Fed. 413, 415.

Chattel imported.—The word "merchandise" imports that the things which it is used to describe are chattels. Pickett *v.* State, 60 Ala. 77, 78.

14. The Marine City, 6 Fed. 413, 415.

"'Merchandize' or 'stock in trade' include goods in the course of manufacture; and it is not pretended that the property of the defendants, which has been taxed, falls within the other descriptions of personal property enumerated in this section. The word 'merchandize' and phrase 'stock in trade' are well understood to mean goods for sale,— a stock of goods offered for sale,— and this meaning accords precisely with their derivation." Woodman *v.* American Print-Works, 6 R. I. 470, 472.

The term may be used to describe property intended for use, and not for sale. Hartwell *v.* California Ins. Co., 84 Me. 524, 527, 24 Atl. 954.

15. Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 506, 10 L. ed. 800.

The term has been held to include: Butcher's meat. Pittsburgh *v.* Kalchthaler, 114 Pa. St. 547, 549, 552, 7 Atl. 921. Carriages and wagons and other vehicles. Wynne *v.* Eastman, 105 Ga. 614, 617, 31 S. E. 737. Cement. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 424, 44 N. E. 87. A curricle. Duplanty *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 157. Hardware, china, and glassware. Pittsburgh Ins. Co. *v.* Frazee, 107 Pa St. 521, 528. Horses. Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255; U. S. *v.* One Sorrel Horse, 27 Fed. Cas. No. 15,953, 22 Vt. 655, 656. *Contra*, Jewell *v.* Sumner Tp., 113 Iowa 47, 57, 84 N. W. 973. Lumber kept for sale in a lumber yard. Washburn *v.* Oshkosh, 60 Wis. 453, 460, 19 N. W. 364; Mitchell *v.* Plover, 53 Wis. 548, 550, 11 N. W. 27. Medicines. State *v.* Holmes, 28 La. Ann. 765, 767, 26 Am. Rep. 110. Pine logs kept for sale. Eagle River *v.* Brown, 85 Wis. 76, 78, 55 N. W. 163. Silver dollars. U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464, 470. Stocks or shares in incorporated companies. Tisdale *v.* Harris, 20 Pick. (Mass.) 9, 13. Ties, poles, and posts which are kept for sale. Torrey *v.* Shawano County, 79 Wis. 152, 155, 48 N. W. 246.

The term has been held not to include: Bank-bills. Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 1,653. See also Sewall *v.* Allen, 6 Wend. (N. Y.) 335, 351. Bonds. Indiana Bond Co. *v.* Ogle, 22 Ind. App. 593, 54 N. E. 407, 408, 72 Am. St. Rep. 326. Cattle, horses, and sheep. Jewell *v.* Sumner Tp., 113 Iowa 47, 51, 84 N. W. 973. Compass of a steamship. U. S. *v.* Fry, 48 Fed. 713, 714. Farm products. Com. *v.* Gardner, 133 Pa. St. 284, 290, 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666. Linen of a farmer. Dyott *v.* Letcher, 6 J. J. Marsh. (Ky.) 541, 543. Money. Kuter *v.* Michigan Cent. R. Co., 14 Fed. Cas. No. 7,955, 1 Biss. 35, 38. Notes, bills, checks, policies of insurance, and bills of lading. Indiana Bond Co. *v.* Ogle, 22 Ind. App. 593, 54 N. E. 407, 408, 72 Am. St. Rep. 326 [*citing* Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16]. Platform scale, a cornsheller, or a bean scale. Kent *v.* Liverpool, etc., Ins. Co., 26 Ind. 294, 297, 89 Am. Dec. 463. Stallion. Myers *v.* Moulton, 71 Cal. 498, 502, 12 Pac. 505. Wearing apparel or other personal effects. The Marine City, 6 Fed. 413, 415.

16. Little Rock *v.* Barton, 33 Ark. 436, 444; Ayres *v.* Thomas, 116 Cal. 140, 143, 47 Pac. 1013 [*citing* Black L. Dict.].

Defined by statute see O'Neill *v.* Sinclair, 153 Ill. 525, 526, 39 N. E. 124.

17. **Distinguished from "manufacturer"** see State *v.* West, 34 Mo. 424, 428 [*quoted* in Kansas City *v.* Ferd Heim Brewing Co., 98 Mo. App. 590, 593, 73 S. W. 302]; Josselyn

buys and sells;[18] one whose business is to buy and sell merchandise,[19] and who does both, not occasionally or incidentally, but habitually and as a business;[20] one who is engaged in the business of buying commercial commodities, and selling them again, for the sake of profit;[21] one who is engaged in the purchase and sale of goods;[22] a person who buys goods to sell again;[23] a person who is engaged in a business requiring the purchase of articles to be sold again, either in the same or in an improved state;[24] a dealer in merchandise;[25] a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery;[26] one who deals in the purchase of goods;[27] a trader;[28] any dealer or trader;[29] one who buys and trades in anything;[30] one who is really engaged in the business of

v. Parson, L. R. 7 Exch. 127, 129, 41 L. J. Exch. 60, 25 L. T. Rep. N. S. 912, 20 Wkly. Rep. 316. Manufacturer defined see MANUFACTURES.

18. Kinney L. Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608].

19. Jewell *v.* Sumner Tp., 113 Iowa 47, 49, 84 N. W. 973; Bouvier L. Dict. [*cited* in Brown *v.* Com., 98 Va. 366, 369, 36 S. E. 485 (where it is said: "It applies to all persons who habitually trade in merchandise"); *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273.

All who buy and sell any species of movable goods for gain or profit are embraced within the term. Rosenbaum *v.* Newbern, 118 N. C. 83, 92, 24 S. E. 1, 32 L. R. A. 123. The term "merchant" including all persons, copartnerships, or corporations engaged in dealing in any kind of goods, whether kept on hand for sale or purchase, and delivered for profit, as ordered. American Steel, etc., Co. *v.* Speed, 110 Tenn. 524, 539, 75 S. W. 1037, 100 Am. St. Rep. 814.

Shopkeeper.— "At a very early period the term 'merchant' was very liberally construed — it was held to include shopkeepers." Buckley *v.* Barber, 6 Exch. 164, 180, 15 Jur. 63, 20 L. J. Exch. 114.

Place of business.— The term contemplates "that the merchant is to have a fixed place of business within a county or city,— a store or shop for the sale of goods." Brown *v.* Com., 98 Va. 366, 369, 36 S. E. 485 [*citing* Bouvier L. Dict.].

20. Jewell *v.* Sumner Tp., 113 Iowa 47, 49, 84 N. W. 973; Anderson L. Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608].

Selling as well as buying.— In order to constitute a person a merchant, it is necessary that he should be a trader, and, in order to constitute a person a trader, it is necessary that he should be engaged in selling as well as buying. Hall *v.* Cooley, 11 Fed. Cas. No. 5,928. "The business of merchandising includes both buying and selling, and a merchant may buy his goods in one place and sell them in another." Minneapolis, etc., Elevator Co. *v.* Clay County, 60 Minn. 522, 524, 63 N. W. 101.

'Not every one who buys and sells is a merchant; but, generally speaking, only those who traffic in the way of commerce, or carry on business by way of emption, vendition, barter, permutation, or exchange, and who, to make their living, buy and sell by a continued assiduity or frequent negotiation in the mystery of merchandise, are esteemed merchants." State *v.* Smith, 5 Humphr. (Tenn.) 393, 396.

21. Century Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608].

22. Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492; Minneapolis, etc., Elevator Co. *v.* Clay County, 60 Minn. 522, 524, 63 N. W. 101; Merchants', etc., Oil Co. *v.* Seeligson, 4 Tex. App. Civ. Cas. § 206, 15 S. W. 712; Webster Dict. [*quoted* in Crater *v.* Deemer, 4 Pa. Co. Ct. 375, 378; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414; Torrey *v.* Shawano County, 79 Wis. 152, 155, 48 N. W. 246].

23. Jewell *v.* Sumner Tp., 113 Iowa 47, 49, 84 N. W. 973; Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492; Merchants', etc., Oil Co. *v.* Seeligson, 4 Tex. App. Civ. Cas. § 206, 15 S. W. 712; Webster Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608; Torrey *v.* Shawano County, 79 Wis. 152, 155, 48 N. W. 246].

24. Wakeman *v.* Hoyt, 28 Fed. Cas. No. 17,051.

25. Kinney L. Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608].

26. White *v.* Com., 78 Va. 484, 485.

27. Kinney L. Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608].

28. *In re* Ragsdale, 20 Fed. Cas. No. 11,530, 7 Biss. 154, 155 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Webster Dict.]; Kinney L. Dict. [*quoted* in Kansas City *v.* Lorber, 64 Mo. App. 604, 608]; Webster Dict. [*quoted* in Crater *v.* Deemer, 4 Pa. Co. Ct. 375, 378; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414].

All sorts of traders including merchant adventurers are embraced in the term. London *v.* Wilks, 2 Salk. 445 [*citing* Hamond *v.* Jethro, 2 Brownl. & G. 97, 99].

"Merchant or tradesman" involve the idea of a dealing with merchandise in some form or other. *In re* Woodward, 30 Fed. Cas. No. 18,001, 8 Ben. 563, 565.

Contrasted with the term "tradesman" in *In re* Cote, 6 Fed. Cas. No. 3,267, 2 Lowell 374, 377.

29. Imperial Dict. [*quoted* in Merchant Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. D. 560, 565, 47 L. J. Ch. 828, 26 Wkly. Rep. 847].

30. Jacob L. Dict. [*quoted* in Lansdale *v.* Brashear, 3 T. B. Mon. (Ky.) 330, 334; State *v.* Smith, 5 Humphr. (Tenn.) 393, 396]. See also Jewell *v* Sumner Tp., 113 Iowa 47, 49, 84 N. W. 973; Norris *v.* Com., 27 Pa. St. 494, 496.

a trader;[31] a trafficker;[32] one who traffics, by way of buying and selling or bartering goods or any merchandise;[33] one who traffics in, or who buys and sells, goods and commodities;[34] one who traffics or carries on trade.[35] The term is

31. Com. *v.* McGeorge, 9 B. Mon. (Ky.) 3, 4.

32. Merchants', etc., Oil Co. *v.* Seeligson, 4 Tex. App. Civ. Cas. § 206, 15 S. W. 712; Webster Dict. [*quoted* in Crater *v.* Deemer, 4 Pa. Co. Ct. 375, 378; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414].

33. Cole *v.* Com., 8 Dana (Ky.) 31, 32 [*citing* 5 Com. Dig. 68].

34. *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 757, 2 Am. Bankr. Rep. 372, where it is said: "He would be a merchant if his business consisted in buying without selling, and he might be a merchant by simply selling."

"All persons who keep for sale and sell any kind of chattel property at a fixed place are merchants." Washburn *v.* Oshkosh, 60 Wis. 453, 455, 19 N. W. 364.

The term includes those only who traffic, in the way of commerce, by importation or exportation, who carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell by a continued vivacity or frequent negotiations in the mystery of merchandise. Dyott *v.* Letcher, 6 J. J. Marsh. (Ky.) 541, 543.

35. Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492; Kansas City *v.* Vindquest, 36 Mo. App. 584, 588; Merchants', etc., Oil Co. *v.* Seeligson, 4 Tex. App. Civ. Cas. § 236, 15 S. W. 712. See also Josselyn *v.* Parson, L. R. 7 Exch. 127, 129, 41 L. J. Exch. 60, 25 L. T. Rep. N. S. 912, 20 Wkly. Rep. 316, where it is said: "One understands a merchant of or in any merchandize to be a merchant of that merchandize generally. A wine merchant deals in wine generally, port, sherry, claret, champagne, etc. He need not deal in every wine."

The term has been held to include: A banker. Lansdale *v.* Brashear, 3 T. B. Mon. (Ky.) 330, 335. A butcher. Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414. A carriage maker. Wakeman *v.* Hoyt, 28 Fed. Cas. No. 17,051. A distiller. *In re* Eeles, 8 Fed. Cas. No. 4,302. An ex-merchant. Baldwin *v.* Rosseau, 2 Fed. Cas. No. 803. A furniture dealer. *In re* Newman, 18 Fed. Cas. No. 10,175, 3 Ben. 20, 22. Members of a firm. Leavitt *v.* Gooch, 12 Tex. 95, 96. A hotel keeper. Campbell *v.* Finck, 2 Duv. (Ky.) 107, 108 [*cited* in *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273]. An ice dealer. Kansas City *v.* Vindquest, 36 Mo. App. 584, 588. A livery-stable keeper. *In re* Odell, 18 Fed. Cas. No. 10,426, 9 Ben. 209, 210 [*cited* in *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 273]. *Compare* Hall *v.* Cooley, 11 Fed. Cas. No. 5,928. Lumber dealers. Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492 [*citing* Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486]. A lumber-yard keeper. Mitchell *v.* Plover, 53 Wis. 548, 551, 11 N. W. 27. A manufacturer. State *v.* Richeson, 45 Mo. 575, 578. A person who keeps and sells groceries. Cole *v.* Com., 8 Dana (Ky.) 31, 32. Persons who keep or handle a stock of goods which they have purchased outside of the state, and made up into clothing and sold upon orders of their customers. Murray *v.* State, 11 Lea (Tenn.) 218, 219. A pork packer. State *v.* Whittaker, 33 Mo. 457, 459. A private unincorporated commercial partnership conducting a banking business. Brown *v.* Pike, 34 La. Ann. 576, 578. A produce dealer. Kansas City *v.* Lorber, 64 Mo. App. 604, 608. A saloon keeper. *In re* Sherwood, 21 Fed. Cas. No. 12,773, 9 Ben. 66, 67. A stair builder. *In re* Garrison, 10 Fed. Cas. No. 5,254, 5 Ben. 430. A vendor of fresh meat. St. Joseph *v.* Dye, 72 Mo. App. 214, 216.

The term has been held not to include: An apothecary. Anderson *v.* Com., 9 Bush (Ky.) 569, 571. A commercial traveler or drummer. Kansas *v.* Collins, 34 Kan. 434, 437, 8 Pac. 865. A dealer in hay and straw. *In re* Kimball, 7 Fed. 461, 462. A dealer in oil paintings. *In re* Chapman, 5 Fed. Cas. No. 2,601, 9 Ben. 311, 312. A farmer. Dyott *v.* Letcher, 6 J. J. Marsh. (Ky.) 541, 543; Lansdale *v.* Brashear, 3 T. B. Mon. (Ky.) 330, 335. A person who is engaged in farming and stock raising. *In re* Ragsdale, 20 Fed. Cas. No. 11,530, 7 Biss. 154, 155. A feeder of stock for market. Jewell *v.* Sumner Tp., 113 Iowa 47, 52, 84 N. W. 973. An insolvent debtor. *Ex p.* Conant, 77 Me. 275, 277, 52 Am. Rep. 759. A speculator in stocks. *In re* Marston, 16 Fed. Cas. No. 9,142, 5 Ben. 313, 314; *In re* Woodward, 30 Fed. Cas. No. 18,001, 8 Ben. 563, 565. A steamboat manager. *In re* Merritt, 7 Fed. 853, 854. A stockbroker. *In re* Moss, 17 Fed. Cas. No. 9,877. A theatrical manager. *In re* Oriental Soc., 104 Fed. 975, 5 Am. Bankr. Rep. 219; *In re* Duff, 4 Fed. 519, 521. A vendor of produce from a wagon. Brown *v.* Com., 98 Va. 366, 371, 36 S. E. 485.

Defined by statute see State *v.* Whittaker, 33 Mo. 457, 459 [*quoted* in Kansas City *v.* Ferd Heim Brewing Co., 98 Mo. App. 590, 593, 73 S. W. 302]; Galveston County *v.* Gorham, 49 Tex. 279, 285. See also Indian Terr. Annot. St. (1899) § 4941; Iowa Code (1897), § 1318; Mo. Rev. St. (1899) § 5647; N. D. Rev. Codes (1899), § 1196; Bates Annot. St. Ohio (1904), § 2740. As used in the Chinese Exclusion Act see 32 U. S. St. at L. 176 [U. S. Comp. St. Suppl. (1905) p. 295 [*quoted* in Tom Hong *v.* U. S., 193 U. S. 517, 520, 24 S. Ct. 517, 48 L. ed. 772]. See also U. S. *v.* Lung Hong, 105 Fed. 188, 189; U. S. *v.* Wong Lung, 103 Fed. 794; U. S. *v.* Pin Kwan, 100 Fed. 609, 610, 40 C. C. A. 618; Mar Bing Guey *v.* U. S., 97 Fed. 576, 578; U. S. *v.* Wong Ah Gah, 94 Fed. 831, 832; U. S. *v.* Yong Yew, 83 Fed. 832, 837; *In re* Chu Poy, 81 Fed. 826, 828; Wong Fong *v.* U. S., 77 Fed. 168, 169, 23 C. C. A. 110 [*reversing* 71 Fed. 283]; U. S. *v.* Loo Way,

sometimes employed as an adjective.[36] (Merchant: Account — Generally, see Accounts and Accounting; Limitation of Action on, see Limitations of Actions. Bankruptcy of, see Bankruptcy. Chinese, see Aliens. Commission, see Factors and Brokers. Hawker, see Hawkers and Peddlers. Insolvency of, see Insolvency. Itinerant, see Hawkers and Peddlers. Libel of, see Libel and Slander. License of, see Internal Revenue; Licenses. Peddler, see Hawkers and Peddlers. Sale of Liquor by, see Intoxicating Liquors. Slander of, see Libel and Slander. Taxation of, see Commerce; Internal Revenue; Licenses; Taxation. See also Merchandise.)

MERCHANTABILITY. See Merchantable.

MERCHANTABLE. Salable;[37] salable and fit for the market;[38] sound and undamaged;[39] such as is generally sold in the market;[40] vendible in market.[41] However, the context[42] or the custom and usage of the trade may control the meaning of the term in the connection in which it is employed in any particular case.[43] (See Merchandise; and, generally, Sales.)

MERCHANT APPRAISER. An expert selected, as an emergency arises, on the request of an importer of goods for reappraisal, to reappraise goods imported, about which there is a dispute between the revenue department of the government and the importer as to the amount of tariff taxes that should be assessed thereon;[44] a person appointed by a customs collector to be associated with one of the general appraisers for the purpose of instituting a reëxamination of merchandise imported.[45] (See, generally, Customs Duties.)

MERCHANT'S ACCOUNTS. Accounts between merchant and merchant, which must be current, mutual, and unsettled, consisting of debts and credits for merchandise.[46] (See, generally, Accounts and Accounting; Limitations of Actions.)

68 Fed. 475, 478; Lai Moy *v.* U. S., 66 Fed. 955, 956, 14 C. C. A. 283; U. S. *v.* Wong Ah Hung, 62 Fed. 1005, 1006; Lee Kan *v.* U. S., 62 Fed. 914, 915, 10 C. C. A. 669; *In re* Quan Gin, 61 Fed. 395, 397.

36. Denison *v.* Seymour, 9 Wend. (N. Y.) 9, 15 ("merchant vessel"); London *v.* Wilks, 2 Salk. 445 ("merchant tailor").

37. Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 321, 44 Pac. 544; Riggs *v.* Armstrong, 23 W. Va. 760, 773.

38. Gentilli *v.* Starace, 59 N. Y. Super. Ct. 449, 458, 14 N. Y. Suppl. 764.

39. Crane *v.* Roberts, 5 Me. 419, 420. See also Tye *v.* Fynmore, 3 Campb. 462, 14 Rev. Rep. 809.

"**Merchantable quality**" means ordinary quality; marketable quality; bringing the average price, at least, of medium quality or goodness; good merchandize of stable quality; free from any remarkable defect. Warner *v.* Arctic Ice Co., 74 Me. 475, 478. See also Sprague *v.* Blake, 20 Wend. (N. Y.) 61, 64. See, generally, Sales.

40. Blake *v.* Hedges, 14 Ind. 566, 568.

41. Wood *v.* U. S., 11 Ct. Cl. 680, 685; Bouvier L. Dict. [*cited* in Darby *v.* Hall, 3 Pennew. (Del.) 25, 27, 50 Atl. 64].

In mercantile contracts, the term denotes the stableness of the goods, and signifies ordinary quality or medium quality of goodness, salability, etc. Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 321, 44 Pac. 544; Riggs *v.* Armstrong, 23 W. Va. 760, 773.

42. Darby *v.* Hall, 3 Pennew. (Del.) 25, 27, 50 Atl. 64.

43. King *v.* Nelson, 36 Iowa 509, 512; Tenny *v.* Mulvaney, 9 Oreg. 405, 411.

Merchantable crop of tobacco see Reed *v.* Randall, 29 N. Y. 358, 361, 86 Am. Dec. 305.

"**Merchantable glass**" see King *v.* Nelson, 36 Iowa 509, 512.

Merchantable ice see Cullen *v.* Bimm, 37 Ohio St. 236, 239. See also Walton *v.* Black, 5 Houst. (Del.) 149, 151.

Merchantable iron ore see Blake *v.* Lobb, 110 Mich. 608, 610, 68 N. W. 427; Gribben *v.* Atkinson, 64 Mich. 651, 654, 31 N. W. 570.

Merchantable logs see Tenny *v.* Mulvaney, 9 Oreg. 405, 411.

Merchantable oil barrel staves see Riggs *v.* Armstrong, 23 W. Va. 760, 772.

"**Merchantable order**" see Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204, 206.

Merchantable peaches see Darby *v.* Hall, 3 Pennew. (Del.) 25, 27, 5 Atl. 64.

Merchantable wood see Blake *v.* Hedges, 14 Ind. 566, 568.

44. Auffmordt *v.* Hedden, 30 Fed. 360, 362 [*affirmed* in 137 U. S. 310, 326, 11 S. Ct. 103, 34 L. ed. 674].

45. Oelberman *v.* Merritt, 19 Fed. 408, 409, where it is said that he occupies the position of a quasi-judicial officer and has been aptly described as a legislative referee. He is presumed to be, and in fact is, the special representative of the importer, and, quite naturally, is somewhat biased against the government, and will not be permitted to testify to his own neglect of duty in the appraisement.

46. Black L. Dict. See also Fox *v.* Fox, 6 How. (Miss.) 328, 343.

Merchant's account does not include: An attorney's demand for professional services. Mattern *v.* McDivitt, 113 Pa. St. 402, 409, 6

MERCHANT SEAMAN. See SEAMEN.

MERCHANT VESSEL. A term which may include a steamboat used to carry passengers and their baggage and small freight.[47] (See, generally, SHIPPING.)

MERCIS APPELLATIO AD RES MOBILES TANTUM PERTINET. A maxim meaning "The term merchandise belongs to movable things only."[48]

MERCIS APPELLATIONE HOMINES NON CONTINERI. A maxim meaning "Men are not included under the denomination of 'merchandise.'"[49]

MERE. Only;[50] only this, and nothing else; such and no more; simple, bare.[51]

MERGER.[52] The absorption or extinguishment of one estate or contract in another,[53] being an operation of law not depending upon the intention of the parties.[54] As applied to corporations, an act which consists in the uniting of two or more corporations by the transfer of property of all to one of them, which continues in existence; the others being swallowed up or merged therein.[55] (Merger: In Criminal Law, see CRIMINAL LAW. In Judgment, see JUDGMENTS. Of Annuity, see ANNUITIES. Of Conspiracy in Offense Committed, see CONSPIRACY. Of Contract, see CONTRACTS; DEEDS. Of Corporation, see CORPORATIONS. Of Easement, see EASEMENTS. Of Estate, see ESTATES. Of Ground-Rent, see GROUND-RENTS. Of Items of Indebtedness, see ACCOUNTS AND ACCOUNTING. Of Judgment, see JUDGMENTS. Of Landlord's Lien, see LANDLORD AND TENANT. Of Mortgage Interest in Fee, see MORTGAGES. Of Offenses, see CRIMINAL LAW. Of Previous Transaction by Payment, see PAYMENT. Of Tort in Crime, see ACTIONS. Of Trust Estate, see TRUSTS.)

MERINO YARN. Yarn which is made by carding together wool and cotton, and spinning.[56]

MERIT. A term which may be, but is not necessarily, synonymous with "fitness."[57]

Atl. 83. Contract for joint purchase of goods whereby one purchaser took the whole and agreed to account to the other purchaser. Murray *v.* Coster, 20 Johns. (N. Y.) 576, 582, 11 Am. Dec. 333.

47. Denison *v.* Seymour, 9 Wend. (N. Y.) 9, 15.

48. Burrill L. Dict. [*citing* Dig. 50, 16, 66].

49. Black L. Dict. [*citing* Dig. 50, 16, 207].

50. Marshall *v.* State, 74 Ga. 26, 32.

51. Webster Dict. [*quoted* in Grant County *v.* Sels, 5 Oreg. 243, 251].

"Mere glimmering of reason" see Terry *v.* Buffington, 11 Ga. 337, 345, 56 Am. Dec. 423.

"Mere license" see Klugherz *v.* Chicago, etc., R. Co., 90 Minn. 17, 19, 95 N. W. 586, 101 Am. St. Rep. 384.

"Mere local expediency" see Hesketh *v.* Ward, 17 U. C. C. P. 667, 700.

"Mere possibility" see Godwin *v.* Banks, 87 Md. 425, 441, 40 Atl. 268; Needles *v.* Needles, 7 Ohio St. 432, 444, 70 Am. Dec. 85.

"Merely" is a term which is to be given a reasonable construction according to the subject-matter. Campbell Mach. Co. *v.* Eppler Welt Mach. Co., 83 Fed. 208, 212. As used in an instruction in an action for negligence see Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 537, 21 S. W. 214; Foshay *v.* Glen Haven, 25 Wis. 288, 291, 3 Am. Rep. 73.

52. Distinguished from "consolidation" (see Vicksburg, etc., Tel. Co. *v.* Citizens' Tel. Co., 79 Miss. 341, 354, 30 So. 725, 89 Am. St. Rep. 656; "surrender" (see Harrison *v.* Johnston, 109 Tenn. 245, 260, 70 S. W. 414 [*citing* Fisher *v.* Edington, 12 Lea (Tenn.) 189]).

53. Burrill L. Dict. [*quoted* in Groat *v.* Pracht, 31 Kan. 656, 658, 3 Pac. 274]. *Compare* Planters' Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 194, 41 Am. Dec. 616.

Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment. When there is a confusion of rights, and the debtor and creditor become the same person, there can be no right to put in execution. Bouvier L. Dict. [*quoted* in Donk *v.* Alexander, 117 Ill. 300, 338, 7 N. E. 672]. The word is said to be the equivalent of confusion in the Roman law, and (when used with reference to demands) indicates that where the qualities of debtor and creditor become united in the same individual, there arises a confusion of rights which extinguishes both qualities; hence, also, merger is often called extinguishment. Abbott L. Dict. [*quoted* in Donk *v.* Alexander, 117 Ill. 330, 338, 7 N. E. 672].

54. Gore Bank *v.* McWhirter, 18 U. C. C. P. 293, 296.

55. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 263, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

56. Greenleaf *v.* Worthington, 26 Fed. 303, where it is said that by this process an article of commerce distinct from either wool or cotton is produced, which is known as merino, and goods made of such yarn are known as merino goods.

57. People *v.* Knauber, 43 N. Y. App. Div. 342, 345, 60 N. Y. Suppl. 298, 27 Misc.

MERITORIOUS CONSIDERATION. See CONTRACTS.

MERITS. In practice, a matter of substance, as distinguished from matter of form;[58] the real or substantial grounds of action or defense, in contradistinction to some technical or collateral matter raised in the course of the suit.[59] (Merits: Of Merits — In General, see PLEADING; To Change Venue, see VENUE; To Obtain Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; To Open or Set Aside Judgment, see JUDGMENTS. Decision on the, see APPEAL AND ERROR; JUDGMENTS. Of Cause of Action or Defense Affecting — Equitable Relief Against Judgment, see JUDGMENTS; Right to Open or Set Aside Judgment, see JUDGMENTS.)

MEROLI. The essential oil obtained from the flowers of the bitter orange.[60]

MERX EST QUICQUID VENDI POTEST. A maxim meaning "Merchandize is whatever can be sold."[61]

MESH. As used in a statute prohibiting fishing except with a net whereof every mesh or mask shall be a certain number of inches broad, a term meaning the space from thread to thread.[62] (See, generally, FISH AND GAME.)

MESNE. A term which signifies merely intervening, intermediate.[63] (Mesne:

253, 257, 57 N. Y. Suppl. 782, as employed in connection with qualification for office.

58. Ordway *v.* Boston, etc., R. Co., 69 N. H. 429, 430, 45 Atl. 243 [*quoting* Black L. Dict.; Burrill L. Dict.]; Clawson *v.* Hutchinson, 14 S. C. 517, 521; Rahn *v.* Gunnison, 12 Wis. 528, 529.

Constitutional rights.— The merits of an action do not relate to the moral and abstract rights of the case, without reference to the constitution of judicial tribunals, or their mode of investigating facts, or their well-established rules of practice. Of course, there are many things in the proceedings of courts of justice which are mere matters of form, not in any way affecting any substantial right, nor touching the real merits of the controversy; but we can hardly say that a right secured to a suitor by the constitution is an immaterial matter, to be regarded, or not, as the courts may think proper. Oatman *v.* Bond, 15 Wis. 20, 26.

Strict legal rights.— The word "merits" should be understood as meaning the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. Plano Mfg. Co. *v.* Kaufert, 86 Minn. 13, 15, 89 N. W. 1124; Holmes *v.* Campbell, 13 Minn. 66, 68; Chouteau *v.* Parker, 2 Minn. 118, 121; Hirshbach *v.* Ketchum, 79 N. Y. App. Div. 561, 564, 80 N. Y. Suppl. 143 [*citing* Tallman *v.* Hinman, 10 How. Pr. (N. Y.) 89, 90]; Cruger *v.* Douglass, 8 Barb. (N. Y.) 81, 84; Megrath *v.* Van Wyck, 3 Sandf. (N. Y.) 750, 751; Tracy *v.* New York Steam Faucet Mfg. Co., 1 E. D. Smith (N. Y.) 349, 357; St. John *v.* West, 4 How. Pr. (N. Y.) 329, 331.

In criminal proceedings.— Where the word is used in speaking of the determination of a prosecution on the merits, it implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure, or the technicalities thereof. People *v.* Lyman, 53 N. Y. App. Div. 470, 473, 65 N. Y. Suppl. 1062. "The term 'merits of the case,' applied to criminal proceedings, must mean the justice of the case in reference to the guilt or innocence of the prisoner of the offence with which he is charged; and then as to his defence on the merits being prejudiced by an amendment, this means a substantial and not a formal or technical defence to the charge." Reg. *v.* Cronin, 36 U. C. Q. B. 342, 345.

59. Ordway *v.* Boston, etc., R. Co., 69 N. H. 429, 430, 45 Atl. 243 [*quoting* Abbott L. Dict.; Anderson L. Dict.].

As used by the profession when applied to actions, the term usually denotes the subject or grounds of an action as stated in the complaint, or the grounds of the defense as stated in the answer. Bolton *v.* Donavan, 9 N. D. 575, 577, 84 N. W. 357.

A trial of the merits of an action generally means the elicitation of evidence in support of the averments of fact set out in the pleadings. Bolton *v.* Donavan, 9 N. D. 575, 577, 84 N. W. 357.

The term "merits" is not very clearly defined.— It certainly embraces more than questions of law and fact constituting a cause of action or defense. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground of privilege as the end itself. If, then, a party is entitled to an appeal, as a means of securing a proper judgment, he is presumably entitled to such an appeal in order to secure that without which the judgment could not be rightfully had. The word "merits" naturally bears the sense of including all that the party may claim of right in reference to his case Bolin *v.* Southern R. Co., 65 S. C. 222, 226, 43 S. E. 665; Blakely *v.* Frazier, 11 S. C. 122, 134.

60. Dodge *v.* Hedden, 42 Fed. 446, 447.

61. Burrill L. Dict.

Applied in Baldwin *v.* Williams, 3 Metc. (Mass.) 365, 367.

62. Thomas *v.* Evans, E. B. & E. 171, 174, 4 Jur. N. S. 710, 27 L. J. M. C. 172, 6 Wkly. Rep. 497, 96 E. C. L. 171, referring to St. 1 Eliz. c. 17, § 3, requiring a mesh of two and a half inches broad.

63. Birmingham Dry-Goods Co. *v.* Bledsoe, 113 Ala. 418, 428, 21 So. 403.

Lord, see MESNE LORD. Process, see ARREST; EXECUTIONS; PROCESS. Profits, see MESNE PROFITS.)

MESNE LORD. A term used in the English law to designate a lord holding lands immediately under the king, who grants out portions of such lands to inferior persons, and who thus becomes a lord with respect to such inferior persons.[64] (See MIDDLE LORD.)

MESNE PROCESS. See PROCESS.

MESNE PROFITS. The profits or other pecuniary benefits which one who dispossesses the true owner receives between disseizin and the restoration of possession;[65] those which are received intermediate the original entry and the restoration of possession of the premises.[66] (Mesne Profits: Liability on Appeal Bond For, see APPEAL AND ERROR. Recovery of — In Ejectment, see EJECTMENT; In Trespass to Try Title, see TRESPASS TO TRY TITLE; In Writ of Entry, see ENTRY, WRIT OF. Right to — In General, see IMPROVEMENTS; In Dowable Land, see DOWER; In Ejectment, see EJECTMENT; In Trespass to Try Title, see TRESPASS TO TRY TITLE.)

MESQUITE. An important leguminous tree, or often shrub, "*prosopis juliflora*," growing from Texas to southern California, and thence southward to Chile.[67]

MESSAGE. A communication sent by one person to another.[68] (See, generally, TELEGRAPHS AND TELEPHONES.)

MESSENGER. One who bears a message or an errand; the bearer of a verbal or written communication, notice, or invitation from one person to another or to a public body; an office servant.[69]

MESS PORK. A term which has a precise meaning in trade, and comprises only that pork which is taken from the sides of the hog, between the shoulder and hams, and no other part of the animal.[70]

MESSUAGE.[71] A house[72] or in legal acceptation, dwelling house with the

64. De Peyster *v.* Michael, 6 N. Y. 467, 498, 57 Am. Dec. 470.

65. Nash *v.* Sullivan, 32 Minn. 189, 192, 20 N. W. 144.

66. Leland *v.* Tousey, 6 Hill (N. Y.) 328, 333 [*citing* Jackson *v.* Leonard, 6 Wend. (N. Y.) 534].

67. U. S. *v.* Soto, 7 Ariz. 230, 233, 64 Pac. 419.

68. English L. Dict.

Term may include: Telegraphic (Kirby *v.* Western Union Tel. Co., 4 S. D. 105, 109, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624) and telephonic (Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428) messages.

69. Webster Dict. [*quoted* in Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 177, 11 Pac. 686, 59 Am. Rep. 404, where it is said: "The term, by its fair import and significance, does not apply to a public officer acting in an original capacity in the discharge of duties imposed upon him by law, but presupposes a superior in authority whose servant the messenger is and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior"].

"Messenger or signal company" defined by statute see Bates Annot. St. Ohio (1904), § 2780-17.

70. Hoadley *v.* House, 32 Vt. 179, 181, 67 Am. Dec. 167, holding that a contract for the sale of a certain quantity of mess pork is not complied with by furnishing pork containing the neck, rump, and shoulder pieces. See also Hale *v.* Milwaukee Dock Co., 29 Wis. 482, 488, 9 Am. Rep. 603, holding that in a receipt for fifty-four barrels of mess pork, deliverable on return of this receipt and payment of storage, the words "mess pork" were clearly words of description, being inserted for the purpose of identification.

71. "Land adjoining" distinguished from "curtilage" and "messuage" see Miller *v.* Mann, 55 Vt. 475, 479.

72. Grimes *v.* Wilson, 4 Blackf. (Ind.) 331, 333 (where it is said that it embraces within its meaning an orchard, garden, and curtilage, adjoining buildings, and other appendages of a dwelling-house); Topeka Bd. of Education *v.* State, 64 Kan. 6, 12, 67 Pac. 559 (where it is said: "The best writers represent this word as synonymous with 'house,' and as embracing an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling house"); Orrick *v.* Pratt, 34 Mo. 226, 233; Tenn *v.* Grafton, 2 Bing. N. Cas. 617, 2 Hodges 58, 3 Scott 56, 29 E. C. L. 687; Doe *v.* Collins, 2 T. R. 498, 502; Wright *v.* Wright, 16 U. C. Q. B. 184, 190.

Older authorities.— The word "messuage," as used in Magna Charta and by the older authorities, meant simply a mansion-house. It subsequently extended by later use to include other structures. But the structures which may be properly included within its meaning are such only as are useful in making the mansion-house itself more comfortable and

adjacent buildings and curtilage;[73] a dwelling house, with some adjacent land assigned to the use of it.[74] (See CURTILAGE; DWELLING-HOUSE; HOUSE. See also, generally, DEEDS.)

MESSUAGIUM. A dwelling-house with land.[75] (See MESSUAGE.)

METAL ALUMINIUM. The basis of common clay.[76]

METAL CALCIUM. The basis of lime.[77]

METALLIC. Being, containing, or having characteristics of a metal.[78] (See METALS.)

METALLIC OXIDE. An oxide composed of oxygen and a metal, as a base.[79] (See METALLIC; and, generally, CUSTOMS DUTIES.)

METALS. A term, which taken in its ordinary sense, does not include the precious metals.[80] (Metals: As Medium of Payment, see PAYMENT. Mined, see MINES AND MINERALS. Subject to Duty, see CUSTOMS DUTIES. See also COIN.)

METAPHYSICAL HEALING. See PHYSICIANS AND SURGEONS.

METEOR. See PROPERTY.

METEOROLOGICAL CONDITIONS. See EVIDENCE.

METER. An instrument for measuring.[81] (See, generally, ELECTRICITY; GAS; WATERS.)

METES AND BOUNDS. The boundary line or limit of a tract, which boundary may be pointed out and ascertained by rivers and objects, either natural or arti-

beneficial. Davis *v.* Lowden, 56 N. J. Eq. 126, 130, 38 Atl. 648. "In Sheppard Touchst. 94, it is said that 'the grant of a messuage, or a messuage with the appurtenances, passes the house and building adjoining, together with the close upon which the dwelling-house is built, and the little garden, yard, field, or piece of void ground lying near, and belonging to the messuage.' . . . Coke says: 'By the grant of a messuage, or house, the orchard, garden and curtilage do pass,' and so an acre or more may pass by the name of a house.' Coke Litt. 216." Gibson *v.* Brockway, 8 N. H. 465, 470, 31 Am. Dec. 200. "In Moore 24 pl. 82, a grant of a messuage which was formerly thought to be of more extensive signification than the word 'domus' or 'house,' was held to include and pass nothing but the house and circuit of the house." Bennet *v.* Bittle, 4 Rawle (Pa.) 339, 342.

73. Topeka Bd. of Education *v.* State, 64 Kan. 6, 12, 64 Pac. 559 [*citing* Anderson L. Dict.]; Marmet Co. *v.* Archibald, 37 W. Va. 778, 781, 17 S. E. 299.

"Messuage" consists of two things — the land and the edifice. Derby *v.* Jones, 27 Me. 357, 360.

74. Applegate *v.* Applegate, 16 N. J. L. 321, 322.

The term denotes all that is occupied together at one and the same time, and no more. Kerslake *v.* White, 2 Stark. 508, 20 Rev. Rep. 731, 3 E. C. L. 508.

It will often include land, but not necessarily so unless there is something in the conveyance to rebut such presumption. Sparks *v.* Hess, 15 Cal. 186, 196. See also Riddle *v.* Littlefield, 53 N. H. 503, 509, 16 Am. Rep. 388, holding that it is a term of large signification, always including land.

75. Spelman Glossary [*quoted* in Fenn *v.* Grafton, 2 Bing. N. Cas. 617, 619, 29 E. C. L. 688, 2 Hodges 58, 3 Scott 56].

76. Meyer *v.* Arthur, 91 U. S. 571, 577, 23 L. ed. 455.

77. Meyer *v.* Arthur, 91 U. S. 570, 577, 23 L. ed. 455.

78. Hempstead *v.* Thomas, 122 Fed. 538, 540, 59 C. C. A. 342.

"Pins, metallic," see Worthington *v.* U. S., 90 Fed. 797; U. S. *v.* Wolff, 69 Fed. 327, 328.

79. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, 519.

80. Cather *v.* Holmes, 2 B. & Ad. 592, 592, 596, 9 L. J. K. B. O. S. 280, 22 E. C. L. 249.

"All other metals" see *In re* Barre Water Co., 62 Vt. 27, 30, 20 Atl. 109, 9 L. R. A. 195 [*citing* Cather *v.* Holmes, 2 B. & Ad. 592, 596, 9 L. J. K. B. O. S. 280, 22 E. C. L. 249].

Composition metal.— So called "flitters," made from sheets of copper and zinc, and reduced to a fine condition for use in the same manner as bronze powder, is "composition metal," within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 533, 30 U. S. St. at L. 197 [U. S. Comp. St. (1901) p. 1682], admitting free of duty all composition metal of which copper is a component material of chief value. Meier *v.* U. S., 128 Fed. 472.

"Metal and improvements" see Lemar *v.* Miles, 4 Watts (Pa.) 330, 333.

That metal beads are assessable under a tariff act see Steinhardt *v.* U. S., 113 Fed. 996.

81. Webster Int. Dict.

Water meter is "a contrivance to regulate the distribution of water by adjusting the quantity and price." Red Star Line Steamship Co. *v.* Jersey City, 45 N. J. L. 246, 249. A water meter, however actuated, is not designed for exerting or transmitting power, but simply for measuring and registering fluid volume; and, as a matter of applied art, a water meter and a water motor are essentially different. National Meter Co. *v.* Neptune Meter Co., 122 Fed. 75, 78.

ficial, which are permanent in character and erection, and so situated with reference to the tract to be described that they may be conveniently used for the purpose of indicating its extent.[82] (See, generally, BOUNDARIES.)

METHOD. Properly speaking, the act of placing and performing several operations in the most convenient order, but it may signify a contrivance or device.[83] (See, generally, PATENTS.)

METHOMANIA. An irresistible craving for alcoholic or other intoxicating liquors, accompanied by peculiar symptoms described by medical authors, and manifested by the periodical recurrence of drunken debauches.[84] (See DIPSOMANIA; and, generally, DRUNKARDS; INSANE PERSONS.)

METRIC SYSTEM. A system of measures for length, surface, weight and capacity, founded on the metre as a unit.[85] (See, generally, WEIGHTS AND MEASURES.)

METUS QUEM AGNOSCUNT LEGES IN EXCUSATIONEM CRIMINIS EST TALIS QUI CADERE POSSIT IN CONSTANTEM VIRUM. A maxim meaning "The fear which the law acknowledges in the excuse of a crime is such as can fall upon a steady man."[86]

MEUM EST PROMITTERE, NON DIMITTERE. A maxim meaning "It is mine to promise, not to discharge."[87]

MEXICAN. A term which may include either a citizen, subject, or native of Mexico.[88] (Mexican: Grant, see PUBLIC LANDS. League, see LEAGUE. Onyx, see MARBLE. Pueblo, see MEXICAN PUEBLO. Shore, see MEXICAN SHORE.)

MEXICAN GRANT. See PUBLIC LANDS.

MEXICAN PUEBLO. Settlement or town under the control of the Mexican government, with alcaldes and other officers, for the administration of municipal affairs.[89]

MEXICAN SHORE. In the civil law as applied in Mexico, a term used to designate the shore line of extraordinary high tides.[90] (See, generally, BOUNDARIES.)

MICHAELMAS. There are two Michaelmasses, one, the old Michaelmas, which falls on October 11, and the other, the new Michaelmas, which falls on September 29.[91]

MICHAELMAS TERM. In England, one of the four terms of the courts of common law, beginning on the second and ending on the twenty-fifth day of November of each year.[92] (See HILARY TERM.)

MICROBE. A germ of disease so infinitesimal that it derives its name from the powerful glass by the aid of which it is claimed the germ may be detected.[93]

MIDDLE. Equally distant from the extremes or limits; mean; middling.[94]

82. People *v.* Guthrie, 46 Ill. App. 124, 128.

In strictness, it may be understood as the exact length of each line, and the exact quantity of land, in square feet, rods, or acres. Rollins *v.* Mooers, 25 Me. 192, 196 [*quoting* Buck *v.* Hardy, 6 Me. 162].

83. Hornblower *v.* Boulton, 8 T. R. 95, 106, 3 Rev. Rep. 439.

84. State *v.* Savage, 89 Ala. 1, 10, 7 So. 133, 7 L. R. A. 426.

85. Black L. Dict.

86. Morgan Leg. Max.

87. Black L. Dict. [*citing* 2 Rolle 39].

88. Baldwin *v.* Goldfrank, 88 Tex. 249, 259, 31 S. W. 1064. See also Ruis *v.* Chambers, 15 Tex. 586, 588; Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,069, McAllister 151, 195.

"Mexican grantee" see Bascomb *v.* Davis, 56 Cal. 152, 154.

89. San Francisco *v.* Le Roy, 138 U. S. 656, 664, 11 S. Ct. 364, 34 L. ed. 1096.

90. Valentine *v.* Sloss, 103 Cal. 215, 219, 37 Pac. 326, 410.

91. Doe *v.* Lea, 11 East 312, 313. See also Smith *v.* Walton, 8 Bing. 235, 2 L. J. C. P. 85, 1 Moore & S. 380, 21 E. C. L. 521.

Lady-day see 24 Cyc. 841 note 6.

Martinmas see 26 Cyc. 939.

92. Burrill L. Dict. [*citing* 3 Stephen Comm. 562].

93. Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 403, 18 Atl. 106.

"Microbe killer" see Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 127, 16 S. W. 990, 26 Am. St. Rep. 783; Alff *v.* Radam, 77 Tex. 530, 531, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

94. Century Dict.

Middle letter between the Christian and surname is very common for the purpose of distinction, and in the use and understanding of the people at large. Bowen *v.* Mulford, 10 N. J. L. 230. See Keene *v.* Meade, 3 Pet. (U. S.) 1, 7, 7 L. ed. 581. See also NAMES.

"Middle of the channel" is the space within which ships can and usually do pass, and not the thread of the deepest water.

MIDDLE LORD. In the English law a term used to designate a lord holding lands immediately under the king, but who grants out portions of such lands to inferior persons, and who thus becomes a lord with respect to such inferior persons.[95] (See MESNE LORD.)

MIDDLEMAN. A person employed to bring two or more parties together; the parties, when they meet, to do their own negotiating and make their own bargains;[96] an agent who merely brings the parties to the sale together, and upon whom does not devolve the duty of negotiating for either, and who may contract for and receive commissions from both.[97] (See, generally, FACTORS AND BROKERS.)

MIDSHIPMAN. A person who occupies a middle position between that of a superior officer and a common seaman.[98] (See, generally, ARMY AND NAVY; SHIPPING.)

MIGHT. The preterit of the word "may," and is equivalent to "had power" or "was possible."[99] (See MAY.)

MIGRANS JURA AMITTAT AC PRIVILEGIA ET IMMUNITATES DOMICILII PRIORIS. A maxim meaning "One who emigrates will lose the rights, privileges, and immunities of his former domicile."[1]

MIGRATION. As used in a constitutional provision that the migration and importation of such persons as any of the states now existing shall think proper to permit shall not be prohibited, etc., a term which means the voluntary emigration of such persons to the United States.[2] (See, generally, ALIENS; CONSTITUTIONAL LAW.)

MILCH COW. A term which may include a heifer.[3] (See Cow.)

MILE. A measure of length or distance containing eight furlongs, or one thousand seven hundred and sixty yards, or five thousand two hundred and eighty feet.[4] (See, generally, WEIGHTS AND MEASURES.)

MILEAGE. A compensation allowed by law to officers for their trouble and expenses in traveling on public business;[5] payment allowed to a public function-

Rowe *v.* Smith, 51 Conn. 266, 271, 50 Am. Rep. 16 [*cited* in Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 548, 17 N. E. 439, 5 Am. St. Rep. 545].

"Middle of the Mississippi river" see Iowa *v.* Illinois, 147 U. S. 1, 12, 13 S. Ct. 239, 37 L. ed. 55.

95. De Peyster *v.* Michael, 6 N. Y. 467, 495, 57 Am. Dec. 470.

96. Southack *v.* Lane, 32 Misc. (N. Y.) 141, 144, 65 N. Y. Suppl. 629, where it is said: "He sustains no confidential relations to either party, and his fees are always fixed by contract or stipulation, as the law does not regulate them; and, in that respect, he differs from an agent, for there the law fixes the compensation, if he acts as an agent and he is entitled to recover as such for the services performed."

97. Synnott *v.* Shaughnessy, 2 Ida. (Hasb.) 111, 122, 7 Pac. 82.

98. U. S. *v.* Cook, 128 U. S. 254, 258, 9 S. Ct. 108, 32 L. ed. 464 [*citing* Imperial Dict.].

99. Owen *v.* Kelly, 6 D. C. 191, 193. See also Illinois Cent. R. Co. *v.* Jones, (Miss. 1894) 16 So. 300, 301; Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 251, 44 Atl. 388; Monroeville *v.* Weihl, 13 Ohio Cir. Ct. 689, 703, 6 Ohio Cir. Dec. 188; Neff *v.* Harrisburg Traction Co., 192 Pa. St. 501, 506, 43 Atl. 1020, 73 Am. St. Rep. 825.

"Might have been litigated" see Earle *v.* Earle, 173 N. Y. 480, 487, 66 N. E. 398; Malloney *v.* Horan, 49 N. Y. 111, 116, 10 Am. Rep. 335; Clemens *v.* Clemens, 37 N. Y. 59, 74.

1. Black L. Dict. [*citing* 1 Kent Comm. 76].

2. People *v.* Compagnie Générale Transatlantique, 107 U. S. 59, 62, 2 S. Ct. 87, 27 L. ed. 383.

3. Nelson *v.* Fightmaster, 4 Okla. 38, 44, 44 Pac. 213, holding that in a statute exempting milch cows from execution, that term includes heifers which are being raised, kept, and intended for family use as milch cows.

4. Wharton L. Lex.

Marine, nautical, or admiralty mile see KNOT, 24 Cyc. 805. See also Rockland, etc., Steamship Co. *v.* Fessenden, 79 Me. 140, 148, 8 Atl. 550.

"The Arabs in the north of Africa consider it a mile when so far as not to be able to distinguish a man from a woman." U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodh. & M. 401, 485.

The term indicates a straight line, and not by the usual methods of travel (Macon, etc., Counties *v.* Trousdale County, 2 Baxt. (Tenn.) 1, 10; Lake *v.* Butler, 5 E. & B. 92, 99, 1 Jur. N. S. 499, 24 L. J. Q. B. 273, 3 Wkly. Rep. 458, 85 E. C. L. 92); by the shortest way of access (Woods *v.* Dennett, 2 Stark. 89, 3 E. C. L. 329).

5. Bouvier L. Dict. [*quoted* in Howes *v.* Abbott, 78 Cal. 270, 272, 20 Pac. 572; Richardson *v.* State, 19 Ohio Cir. Ct. 191, 194, 10 Ohio Cir. Dec. 458]. See also Power *v.* Choteau County, 7 Mont. 82, 88, 14 Pac. 658.

ary for the expenses of travel in the discharge of his duties, according to the number of miles passed over.[6] (Mileage: For Service of Process, see Costs. Of Constable, see Sheriffs and Constables. Of Judge, see Judges. Of Juror, see Coroners; Grand Juries; Juries. Of Marshal, see United States Marshals. Of Officer Generally, see Officers. Of Party to Suit, see Costs. Of Prosecuting Attorney, see Prosecuting Attorneys. Of Sheriff, see Sheriffs and Constables. Of Witness, see Coroners; Witnesses. Ticket or Book, see Carriers; Excursion Ticket.)

MILITARY. Pertaining to war or to the army; concerned with war; also the whole body of soldiers; an army.[7] (Military: Bounty Lands, see Public Lands. Commission, see War. Court, see Army and Navy; Militia. Expedition, see Neutrality Laws. Law, see Army and Navy; Militia; War. Reservation — Jurisdiction as to, see Courts; Withdrawal From Entry Rights, see Public Lands. Testament or Will, see Wills.)

MILITARY BOUNTY LANDS. See Public Lands.

MILITARY COMMISSION. See War.

MILITARY COURT. See Army and Navy; Militia.

MILITARY EXPEDITION. See Neutrality Laws.

MILITARY LAW. See Army and Navy; Militia.

MILITARY RESERVATION. See Mines and Minerals; Public Lands.

MILITARY STATION or POST. A place at which troops are posted or intended to be posted;[8] a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded,— where something, in short, more or less closely connected with arms or war is kept or is to be done.[9]

MILITARY WILL. See Wills.

"**Mileage** . . . is a recompense to the sheriff for the expense and labour of the travel which he has to perform in serving the process of the court. It can hardly perhaps be called a fee; it seems rather an equivalent or reimbursement for toil or travel actually undergone." Davidson *v.* Miller, 1 Can. L. J. N. S. 9, 11.

6. Richardson *v.* State, 66 Ohio St. 108, 111, 63 N. E. 593 [*citing* Bouvier L. Dict.; Century Dict.].

7. Black L. Dict.

"**Military and naval forces**" see Smith *v.* Wanser, 68 N. J. L. 249, 256, 52 Atl. 309.

"**Military departments**" as used in an order directing double rations to be allowed to officers commanding military departments means the geographical sections of country in which the two divisions of the army were divided. Parker *v.* U. S., 1 Pet. (U. S.) 293, 298, 7 L. ed. 150.

"**Military government**" denotes the dominion exercised by a general over a conquered state or province. Com. *v.* Shortall, 206 Pa. St. 165, 170, 55 Atl. 952, where it is said: "It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection; and being a right derived from war, is hardly compatible with a state of peace."

"**Military jurisdiction**" is a jurisdiction which supersedes to some extent the local law, and is exercised by a military commander under the direction of the executive. *Ex p.* Milligan, 4 Wall. (U. S.) 2, 141, 18 L. ed. 281, where it is said: "There are, under the constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and Civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise."

"**Military or usurped power**" see Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 128, 24 L. ed. 395 [*reversing* 40 Conn. 575, 584]. See also Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. (Va.) 613, 625.

"**Military service**" includes the volunteer army of the United States. *In re* Burns, 87 Fed. 796, 797. See also U. S. *v.* La Tourrette, 151 U. S. 572, 574, 14 S. Ct. 422, 38 L. ed. 274; Guttman *v.* U. S., 18 Wall. (U. S.) 84, 89, 21 L. ed. 816.

"**Military or naval service**" means only such service as will require the person entering into it to do duty as a combatant. Welts *v.* Connecticut Mut. L. Ins. Co., 48 N. Y. 34, 39, 8 Am. Rep. 518.

8. Lee *v.* Kaufman, 15 Fed. Cas. No. 8,191, 3 Hughes 139.

9. U. S. *v.* Phisterer, 94 U. S. 219, 222, 24 L. ed. 116.

MILITIA

By Major-General Charles Dick
Ohio National Guard, and United States Senator from Ohio, and
Major-General George C. Lambert
Minnesota National Guard *

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I. ORGANIZATION.

A. In General. Under the constitution of the United States,[1] congress may provide "for organizing,[2] arming, and disciplining, the militia, and for governing[3] such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." The Militia Act of 1792, enacted by congress under this constitutional provision, was based upon the theory of universal service,[4] but since the Civil war, it has been generally disregarded in its essential provisions. As a substitute, each state, acting independently, has organized a system of militia based upon

1. U. S. Const. art. 1, § 8.

Organization of companies under Act Cong. 1792.—Mathews *v.* Bowman, 25 Me. 157; Lowell *v.* Flint, 20 Me. 401; Shelton *v.* Banks, 10 Gray (Mass.) 401; *In re* Adams, 4 Pick. (Mass.) 25; Com. *v.* Allen, 16 Mass. 523; Com. *v.* Thaxter, 11 Mass. 386; People *v.* Ewen, 17 How. Pr. (N. Y.) 375; State *v.* Hopkins, Dudley (S. C.) 101.

2. **The power to determine** who shall compose the militia is vested in congress; and, after it has been exercised by congress, a state legislature cannot constitutionally provide for the enrolment of any other persons in the militia. Opinion of Justices, 14 Gray (Mass.) 614.

3. **The only instance** where governmental powers may be exercised by the United States is when the militia shall be employed in the service of the United States. At all other times the whole government of the militia is within the province of the state, and therefore any legislation which the state may adopt relating to the government of the militia in no wise contracts powers conferred upon congress, as long as it does not infringe upon the method of organization. People *v.* Hill, 13 N. Y. Suppl. 637 [*affirmed* in 126 N. Y. 497, 27 N. E. 789].

The power of governing the militia, given to congress by U. S. Const. art. 1, § 8, is of a limited nature, and confined to the objects specified, and in all other respects and for all other purposes the militia are subject to the control and government of their respective states. Ansley *v.* Timmons, 3 McCord (S. C.) 329.

4. **Militia districts under Act Cong. 1792.**—Hudson *v.* Sullivan, 93 Ga. 631, 20 S. E. 77; Crawford *v.* Glasgow, 86 Ga. 358, 12 S. E. 747; Graham *v.* Hall, 68 Ga. 354; Poole *v.* Sims, 67 Ga. 36; Williamsburg *v.* Gilman, 24 Me. 206; Stevens *v.* Foss, 18 Me. 19; Kimball *v.* Littlefield, 14 Me. 356; Morrison *v.* Witham, 10 Me. 421; Gould *v.* Hutchins, 10 Me. 145; Cate *v.* Nutter, 24 N. H. 108; Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597; State *v.* Leonard, 6 N. H. 435.

local constitutional and statutory provisions,[5] differing from each other in many respects. The obsolete law of 1792 was repealed and superseded by the more comprehensive act of January 21, 1903,[6] now in force. The bulk of judicial decisions relating to the organization of the militia are therefore of historical interest only, or are limited to the construction of local statutes.

B. The Militia of the United States. The militia of the United States consists of every able-bodied male citizen, and every able-bodied male of foreign birth who has declared his intention to become a citizen, of more than eighteen and less than forty-five years of age. It is divided into two classes, the organized militia and the reserve militia. The organized militia is composed of the national guard or organized militia of the several states and territories who have complied with the requirements of the federal law. The reserve militia includes all other persons liable to military duty and not especially exempted, by the federal or state laws.[7]

C. The State Militia. The state militia is similarly constituted, according to the constitution and laws of the several states, and is generally divided into an active or organized[8] body and a reserve body, the latter being composed of all

5. The military code (Act May 28, 1879), which provides for the organization of the state militia, does not violate any provision of the state or federal constitution, and is not repugnant to any act of congress as to the relative powers and authority of congress and the states over the militia. Dunne *v.* People, 94 Ill. 170, 34 Am. Rep. 213; State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

6. Act of Jan. 21, 1903, c. 196, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222].

7. 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222].

Exemption of office or employment.— Government officers (*In re* Strawbridge, 39 Ala. 367; Cobb *v.* Stallings, 34 Ga. 72; State *v.* Fort, R. M. Charlt. (Ga.) 272; Bringle *v.* Bradshaw, 60 N. C. 514; State *v.* Martindale, 1 Bailey (S. C.) 163; Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457 [*reversing* 30 Fed. Cas. No. 17,913, 1 Cranch C. C. 262]), fishermen (Bayley *v.* Merritt, 2 Pick. (Mass.) 597; Com. *v.* Douglas, 17 Mass. 49; Edgar *v.* Dodge, 4 Mass. 670), enginemen (Com. *v.* Smith, 14 Mass. 374; Irish *v.* Mattison, 15 Vt. 381), and schoolmasters (Stacy *v.* Lyon, 3 Pick. (Mass.) 390).

Exemption on account of physical disability see Hume *v.* Vance, 7 Me. 158; Opinion of Justices, 22 Pick. (Mass.) 571; *In re* Smith, 3 Pick. (Mass.) 386; Howe *v.* Gregory, 1 Mass. 81; Darling *v.* Bowen, 10 Vt. 148; Warner *v.* Stockwell, 9 Vt. 9.

Evidence of disability.— Hill *v.* Turner, 18 Me. 413; Frost *v.* Hill, 18 Me. 189; Hume *v.* Vance, 7 Me. 158; Dole *v.* Allen, 4 Me. 527; Pitts *v.* Weston, 2 Me. 349; Johnson *v.* Morse, 7 Pick. (Mass.) 251; Lees *v.* Childs, 17 Mass. 351; Com. *v.* Smith, 14 Mass. 374; Com. *v.* Fanning, 14 Mass. 290; Com. *v.* Smith, 13 Mass. 316; Com. *v.* Fletcher, 12 Mass. 441; Com. *v.* Smith, 11 Mass. 456; Com. *v.* Bliss, 9 Mass. 322; Howe *v.* Gregory, 1 Mass. 81; Bartlett *v.* Jenkins, 22 N. H. 53; Huntoon *v.* Kidder, 8 N. H. 482.

A conscript soldier, out on furlough, is not liable to militia duty on the call of the state. *Ex p.* Mitchell, 39 Ala. 442; *In re* Emerson, 39 Ala. 437. See also *In re* Pille, 39 Ala. 459; Jones *v.* Billingslea, 34 Ga. 205; Barber *v.* Irwin, 34 Ga. 27; White *v.* McBride, 4 Bibb (Ky.) 61; Com. *v.* Douglas, 17 Mass. 49; Matter of Wright, 34 How. Pr. (N. Y.) 207; Com. *v.* Martin, 1 Browne (Pa.) 84; State *v.* Grimke, Riley (S. C.) 10, 3 Hill 17.

Persons held not to be exempt.— Lighterman (Pratt *v.* Hall, 4 Mass. 239), hostler in mail contractor's service (Littlefield *v.* Leland, 8 Me. 185), master of vessel (Com. *v.* Newcomb, 14 Mass. 394; Brush *v.* Bogardus, 8 Johns. (N. Y.) 157; State *v.* Clarke, 2 McCord (S. C.) 47, 13 Am. Dec. 701), attorney (*In re* Bliss, 9 Johns. (N. Y.) 347; Respublica *v.* Fisher, 1 Yeates (Pa.) 350), and assistant postmaster (Slater *v.* Bates, 10 Pick. (Mass.) 153; Twombly *v.* Pinkham, 3 N. H. 370).

Presumption as to physical capacity.— Every citizen, not within any class of persons specially exempted by statute from military duty, is presumed to be able-bodied, and liable to enrolment, until he shows the contrary. Hume *v.* Vance, 7 Me. 158.

Aliens and minors see *infra*, I, G, 2, and notes.

Revocation of exemption.— The legislature has power to revoke an exemption from serving in the militia granted to a certain class of persons and to require them to do military duty. Com. *v.* Bird, 12 Mass. 443.

Waiver of exemption.—The exemption from military duty is waived by voluntary enlistment. Hamilton *v.* Shepherd, 3 Pick. (Mass.) 226; Com. *v.* Smith, 14 Mass. 374; Matter of Scheel, 54 How. Pr. (N. Y.) 478.

8. The national guard or active militia of the state, organized under the military code (Gen. Laws (1897), c. 118), the members of which, when not engaged, at stated periods, in drilling and training for military duty, are employed in their usual civil avocations, subject to call for military service when public exigencies require, are neither "troops,"

persons liable to military duty not enlisted in the active body, or exempted by law.

D. The National Guard. The organized militia of the several states and territories is established and governed by local laws. These bodies are designated as "national guard" in forty-three states and territories, as "state guard" in Arkansas and Kentucky, "state troops" in Florida, "volunteer militia" in Massachusetts, "militia" in Rhode Island, and "volunteers" in Virginia. Changes in the organization of the national guard are made by legislative enactment or by the commander-in-chief under legislative authority. The national guard is primarily a body of state troops, and, after compliance with the requirements of the federal law, becomes an integral part of the organized militia of the United States. After January 21, 1908, the organization, armament, and discipline of the organized militia or national guard must conform to that which is now or may hereafter be prescribed for the regular and volunteer armies of the United States;[9] provided that each regiment shall have one surgeon, two assistant surgeons, and one chaplain,[10] and for each battalion one hospital steward, and that battalions shall consist of not less than three companies, and regiments of not less than ten nor more than twelve companies.[11] The president may, in time of peace, fix the minimum number of enlisted men in each company.[12] The organization of the national guard must otherwise conform to that of the regular army.[13] Subject to the foregoing, the president may, in the event of a call for either volunteers or militia, accept the quotas of troops of the various states and territories as organized under their local laws.[14]

E. The Commander-in-Chief. The president is the commander-in-chief of the militia when called into the actual service of the United States.[15] With the above exception, the control of the militia, including the appointment of the officers, is reserved to the states respectively. The constitutions of the several states vest in the governor the command of the state forces. The constitutional power of the executive to command the military forces, and of the legislative branch to make regulations for their government, are distinct; the executive cannot, by military orders, evade the legislative regulations, and the legislature cannot, by laws or regulations, impair the authority of the executive as commander-in-chief.[16]

F. Commissions — Warrants. The manner of appointing or electing the

within article 1, section 10, of the federal constitution, nor a "standing army," within section 14 of the Bill of Rights of the state constitution. State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749. N. J. Pub. Laws (1900), p. 428, entitled "An act concerning the military and naval forces," was not intended to create a military force separate from the militia, but was intended to regulate the militia, and the constitutional provisions respecting the militia are applicable to it. Smith *v.* Wanser, 68 N. J. L. 249, 52 Atl. 309.

Unauthorized bodies.— See Presser *v.* Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615.

9. Act of Jan. 21, 1903, c. 196, § 3, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222]. This act mentions both the regular and volunteer armies the organization of which is not identical. Since the organized militia cannot, under any existing law, become a part of the regular army, while it is expressly provided by statute that it may be accepted as part of the volunteer army, it may be assumed that the laws providing for the organization of the volunteer army govern the organization of the militia under the act of Jan. 21, 1903.

10. Act of April 22, 1898, c. 187, § 6, 30 U. S. St. at L. 361 [U. S. Comp. St. (1901) p. 876].

11. Act of April 26, 1898, c. 191, § 3, 30 U. S. St. at L. 365 [U. S. Comp. St. (1901) p. 910].

12. Act of Jan. 21, 1903, c. 196, § 3, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222]. See also Army Regulations, par. 458, as amended by G. O. No. 3, W. D., series of 1907.

13. Act of April 22, 1898, c. 187, § 6, 30 U. S. St. at L. 361 [U. S. Comp. St. (1901) p. 876].

14. Act of April 26, 1898, c. 191, § 3, 30 U. S. St. at L. 365 [U. S. Comp. St. (1901) p. 910].

15. See ARMY AND NAVY, 3 Cyc. 818. See also Act Cong. Jan. 21, 1903, c. 196, §§ 4 to 11, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222]; U. S. Rev. St. (1878) §§ 5288, 5297, 5298, 5299 [U. S. Comp. St. (1901) pp. 3602, 3609, 3610].

16. Swaim *v.* U. S., 28 Ct. Cl. 173; McBlair *v.* U. S., 19 Ct. Cl. 528.

officers[17] of the militia is reserved to the states and cannot be regulated by congress. Under local statutory or constitutional provisions, company officers are generally elected by the members of their respective companies, field officers[18] by the line officers, and general officers by the field officers. After an examination[19] they are commissioned[20] by the governor and, in some states, must be confirmed by the senate. Staff officers are usually appointed by their commanding officers, subject to the approval of the governor. Non-commissioned officers are appointed from the ranks by the regimental commanders, and are subject to reduction by the same authority.[21]

G. Enrolment and Enlistment — **1. In General.** In regard to enrolment for military service, it appears that citizens who are liable to military duty,[22] or

17. Appointment.— *Maryland.*— McBlair *v.* Bond, 41 Md. 137, construing Const. (1874) art. 2, § 11, art. 9, § 2.

Massachusetts.— Opinion of Justices, 132 Mass. 600, construing St. (1876) c. 204; St. (1878) c. 265.

Nebraska.— State *v.* Weston, 4 Nebr. 234, construing Act Cong. May 8, 1792 (U. S. Rev. St. (1878) § 1634 [U. S. Comp. St. (1901) p. 1124]), and Act March 4, 1870 (Gen. St.) 470).

New Hampshire.— Opinion of Justices, 62 N. H. 706 (construing Gen. St. c. 87, § 19); Bixby *v.* Harris, 26 N. H. 125.

New York.— People *v.* Molyneux, 40 N. Y. 113 [*affirming* 53 Barb. 9] (construing Rev. St. c. 1, tit. 6, § 42); People *v.* Smith, 23 N. Y. 53; People *v.* Sampson, 25 Barb. 254 (construing Act April 16, 1851, § 1); People *v.* Scrugham, 25 Barb. 216.

See 34 Cent. Dig. tit. "Militia," § 23.

Oath.— See Richardson *v.* Bachelder, 19 Me. 82; Opinion of Justices, 3 Cush. (Mass.) 586; State *v.* Hunt, 2 Hill (S. C.) 1.

Promotion.— See Robinson *v.* Folger, 17 Me. 206; *Ex p.* Hall, 1 Pick. (Mass.) 261; Com *v.* Thaxter, 11 Mass. 386; Opinion of Justices, 5 R. I. 598.

18. For decisions relating to elections see Baxter *v.* Latimer, 116 Mich. 356, 74 N. W. 726; Smith *v.* Wanser, 68 N. J. L. 249, 52 Atl. 309.

19. Conclusiveness of examining board's determination as to fitness see Devlin *v.* Dalton, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379.

Power to require second examination see Devlin *v.* Dalton, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379.

Review of determination of examining board.— People *v.* Hoffman, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597 [*reversing* 55 N. Y. App. Div. 260, 66 N. Y. Suppl. 884].

Functions of board judicial in character.— People *v.* Hoffman, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597 [*reversing* 55 N. Y. App. Div. 260, 66 N. Y. Suppl. 884].

Grounds to set aside decision — Refusal of right to be represented by counsel.— People *v.* Phisterer, 66 N. Y. App. Div. 52, 73 N. Y. Suppl. 124.

20. For decisions relating to commissions see the following cases:

Connecticut.— Monson *v.* Hunt, 17 Conn. 566.

Maine.— Mathews *v.* Bowman, 25 Me. 157.

Massachusetts.— Gleason *v.* Sloper, 24 Pick. 181.

New Hampshire.— State *v.* Wilson, 7 N. H. 543.

Ohio.— Gage *v.* Payne, Wright 678.

See 34 Cent. Dig. tit. "Militia," § 26.

21. People *v.* Fackner, 44 Hun (N. Y.) 360.

For decisions relating to appointment, and warrants and certificates of appointment, of non-commissioned officers see Folsom *v.* Perkins, 21 Me. 166; Ward *v.* Dennis, 18 Me. 290; Taylor *v.* Smith, 18 Me. 288; Rollins *v.* Mudgett, 16 Me. 336; Hill *v.* Fuller, 14 Me. 121; Potter *v.* Smith, 11 Me. 31; Morrison *v.* Watham, 10 Me. 421; Avery *v.* Butters, 9 Me. 16; Tripp *v.* Garey, 7 Me. 266; Abbot *v.* Crawford, 6 Me. 214; Cutter *v.* Tole, 3 Me. 38; *In re* Lovett, 16 Pick. (Mass.) 84; *In re* Smith, 15 Pick. (Mass.) 446; Burt *v.* Dimmock, 11 Pick. (Mass.) 355; *In re* Dewey, 11 Pick. (Mass.) 265; Clapp *v.* Watson, 8 Pick. (Mass.) 449; Com. *v.* Hall, 3 Pick. (Mass.) 262; Bartlett *v.* Jenkins, 22 N. H. 53; Shattuck *v.* Gilson, 19 N. H. 296; State *v.* Leonard, 6 N. H. 435; State *v.* Dwinnell, 6 N. H. 167; Porteous *v.* Hazel, Harp. (S. C.) 332; State *v.* Cole, 2 McCord (S. C.) 117; Warner *v.* Stockwell, 9 Vt. 9; Mower *v.* Allen, 1 D. Chipm. (Vt.) 381.

22. It is not the enlistment of a citizen on the muster roll of a local militia company, but it is his residence within its limits, which renders him liable to do military duty therein. Such residence is therefore a material fact, to be proved in every action for a penalty for neglect of military duty. Whitmore *v.* Sanborn, 8 Me. 310. And see Richardson *v.* Bachelder, 19 Me. 82; Valentine *v.* True, 18 Me. 70; Stone *v.* Osgood, 16 Me. 238; Hill *v.* Fuller, 14 Me. 121; Carter *v.* Carter, 12 Me. 285; Thayer *v.* Stacy, 3 Pick. (Mass.) 506; Haynes *v.* Jenks, 2 Pick. (Mass.) 172; Com. *v.* Swan, 1 Pick. (Mass.) 194; Shattuck *v.* Maynard, 3 N. H. 123; Mower *v.* Allen, 1 D. Chipm. (Vt.) 381.

Waiver of defects in enrolment.— A private's appearance with his company pursuant to notice is a waiver of defects in his enrolment. Porter *v.* Sherburne, 21 Me. 208; Hammond *v.* Dunbar, 24 Pick. (Mass.) 172; Spaulding *v.* Bancroft, 23 Pick. (Mass.) 54; Foye *v.* Curtis, 21 Pick. (Mass.) 330; Wood *v.* Fletcher, 3 N. H. 61.

volunteering for duty, are usually first "enrolled."[23] They enter into the more solemn contract of "enlistment"[24] upon taking the prescribed oath[25] of allegiance, and signing an enlistment paper or a muster roll. The enlistment of a soldier may be proved, however, by evidence that he has received pay or performed service as such.[26]

2. Minors. The enlistment of a minor over eighteen years of age is binding on him, although made without the consent of his parent or guardian,[27] but is voidable at the instance of such parent or guardian.[28] It would seem that the enlistment of a minor under eighteen years of age is absolutely void.[29]

3. Aliens. While the authorities are not agreed that an alien is liable to military duty,[30] it is well settled that he may waive his exemption by voluntary enlistment.[31]

II. DISCHARGE, RESIGNATION, AND DISBANDMENT.

A. In General. Military jurisdiction attaches when a legal enlistment has been completed, and ceases upon discharge or expiration of term of service.[32] Since the contract of enlistment, in time of peace, is purely voluntary, an order rescinding a former order discharging a soldier is of no legal effect and does not reinstate him unless it is based upon his written application.

23. Under Act Cong. May 8, 1792, § 6, U. S. Rev. St. (1878) § 1634 [U. S. Comp. St. (1901) p. 1124], requiring the adjutant-general to furnish blanks and forms to the militia for the return of enrolments, the forms so prescribed and furnished are of the same binding force as if contained in the act itself. Sawtel *v.* Davis, 5 Me. 438. And see Mathews *v.* Bowman, 25 Me. 157; Allen *v.* Humphrey, 22 Me. 391; Lowell *v.* Flint, 20 Me. 401; Hill *v.* Turner, 18 Me. 413; Robinson *v.* Folger, 17 Me. 206; Emery *v.* Goodwin, 17 Me. 76; Gowell *v.* True, 17 Me. 32; Morrill *v.* Haywood, 16 Me. 11; Cox *v.* Stevens, 14 Me. 205; Hill *v.* Fuller, 14 Me. 121; Carter *v.* Carter, 12 Me. 285; Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Cousins *v.* Cowing, 23 Pick. (Mass.) 208; Spaulding *v.* Bancroft, 23 Pick. (Mass.) 54; Foye *v.* Curtis, 21 Pick. (Mass.) 330; Cobb *v.* Lucas, 15 Pick. (Mass.) 7; Johnson *v.* Morse, 7 Pick. (Mass.) 251; Com. *v.* Hall, 3 Pick. (Mass.) 262; Com. *v.* Clark, 11 Mass. 239; Com. *v.* Walker, 4 Mass. 556; McClung *v.* St. Paul, 14 Minn. 420; Shattuck *v.* Gilson, 19 N. H. 296; State *v.* Wilson, 7 N. H. 543; Gale *v.* Currier, 4 N. H. 169; State *v.* Hopkins, Dudley (S. C.) 101.

24. A person subject to militia duty living within the limits of one brigade cannot lawfully enlist in an artillery company belonging to another brigade. *In re* Webber, 3 Pick. (Mass.) 264; State *v.* Bates, 1 Hill (S. C.) 48.

25. Richardson *v.* Bachelder, 19 Me. 82. And see State *v.* Ross, 20 Nev. 61, 14 Pac. 827 (St. (1887) p. 102, § 2), providing that "all officers and members of the volunteer militia of this state, on becoming members and performing duty, must take and subscribe the following oath," etc., is retroactive, and binding upon all officers and members of companies organized prior to the passage of the act.

26. See Erichson *v.* Beach, 40 Conn. 283; Lebanon *v.* Heath, 47 N. H. 353; 3 Greenleaf Ev. § 483; O'Brien Mil. L. 171.

The proper evidence of enlistment, in a company raised at large, is the signature of the party enlisting himself. Bullen *v.* Baker, 8 Me. 390. If the soldier does not himself sign the book of enlistment, but gives another person the right to do it for him, by whom it is done, and he afterward performs duty in the company, the enlistment will be regarded as binding upon him. Porter *v.* Sherburne, 21 Me. 258; *In re* Giddings, 22 Pick. (Mass.) 406; Shattuck *v.* Gilson, 19 N. H. 296.

27. Thorn *v.* Case, 21 Me. 393; Porter *v.* Sherburne, 21 Me. 258; Stevens *v.* Foss, 18 Me. 19; *In re* Dewey, 11 Pick. (Mass.) 265; Com. *v.* Frost, 13 Mass. 491.

28. See Army and Navy, 3 Cyc. 838.

29. Whitcomb *v.* Higgins, 18 Me. 21. See Grace *v.* Wilber, 10 Johns. (N. Y.) 453 [*reversed* in 12 Johns. 68]. But see Com. *v.* Frost, 13 Mass. 491.

30. That an alien cannot be compelled to perform military duty see Barrett *v.* Crane, 16 Vt. 246; Slade *v.* Minor, 22 Fed. Cas. No. 12,937, 2 Cranch C. C. 139. *Contra*, see *In re* Toner, 39 Ala. 454; *In re* Finley, 60 N. C. 191; Ansley *v.* Timmons, 3 McCord (S. C.) 329; *In re* Conway, 17 Wis. 526.

31. U. S. *v.* Wyngall, 5 Hill (N. Y.) 16. See also Army and Navy, 3 Cyc. 838 note 4.

32. Mathews *v.* Bowman, 25 Me. 157; Rollins *v.* Mudgett, 16 Me. 336; *In re* Field, 9 Pick. (Mass.) 41; Hayes *v.* Palmer, 22 N. H. 94; U. S. *v.* Landers, 92 U. S. 77, 23 L. ed. 603.

Enlistment in the army does not operate as a discharge from the organized militia or national guard, and a member of the national guard in his state who enlists in the regular army repudiates his engagement in the state troops, and by so doing becomes and remains liable to such penalties as may be authorized by the laws of the state in whose military

B. Resignation. An officer who has resigned retains all his powers, and his duties continue, until the acceptance of his resignation is in due form communicated to him.[33] The acceptance of a second commission usually operates as a resignation of the former commission.[34]

C. Discharge of Enlisted Men. Enlisted men are discharged upon expiration of term of service, permanent removal from company station, and for various causes prescribed by local statutes.[35]

D. Disbandment. The governor may disband companies whenever, in his judgment, the efficiency of the state force will be thereby increased.[36]

III. ARMS AND EQUIPMENTS.

A. In General. Under various acts of congress, provision is made for issue to the organized militia of any stores, supplies, or publications which are supplied to the army by any staff department.[37] Supplementary appropriations are made by the several states for the same purpose.[38]

B. Unserviceable Arms. Unserviceable arms are examined by a surveying officer of the militia who makes report to the secretary of war through the governor.[39]

C. Armories. Under the statutes of some states the cost of erecting and maintaining armories for the several organizations of the national guard is placed

service he has been enlisted. Cir. No. 13 War Dept. A. G. O., March 30, 1903.

33. Bixby *v.* Harris, 26 N. H. 125; Mimmack *v.* U. S., 97 U. S. 426, 24 L. ed. 1067; Bennett *v.* U. S., 19 Ct. Cl. 379.

34. *In re* Martin, 60 N. C. 153; State *v.* Brown, 5 R. I. 1.

Revocation of commission.— State *v.* Jelks, 138 Ala. 115, 35 So. 60; Winslow *v.* Morton, 118 N. C. 486, 24 S. E. 417; Opinion of Justices, 5 R. I. 598.

35. Munyan *v.* Coburn, 8 Pick. (Mass.) 431; Howard *v.* Harrington, 4 Pick. (Mass.) 123; *Ex p.* Gallup, 1 Pick. (Mass.) 463; Com. *v.* Cummings, 16 Mass. 194; Com. *v.* Cutter, 8 Mass. 279; Com. *v.* Walker, 4 Mass. 556; *In re* Powers, 66 N. J. L. 570, 49 Atl. 832; People *v.* Turner, 10 Hun (N. Y.) 146; North *v.* Appleton, 12 N. Y. Suppl. 72, 25 Abb. N. Cas. 389.

36. Lewis *v.* Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510; People *v.* Hill, 13 N. Y. Suppl. 186 [*affirmed* in 126 N. Y. 497, 27 N. E. 789]. And see Gould *v.* Hutchins, 10 Me. 145; Proctor *v.* Stone, 1 Allen (Mass.) 193; *In re* Adams, 4 Pick. (Mass.) 25; State *v.* Mott, 46 N. J. L. 328, 50 Am. Rep. 424; Gilman *v.* Morse, 12 Vt. 544.

Disbandment includes officers.— People *v.* Camp, 17 N. Y. Suppl. 397; People *v.* Hill, 13 N. Y. Suppl. 186.

Dismissal and dishonorable discharge see *infra*, IV, D.

37. Act of April 23, 1808, c. 55, § 1, 2 U. S. St. at L. 490; Act of April 29, 1816, c. 135, § 1, 3 U. S. St. at L. 320; Act of March 3, 1875, c. 133, § 3, 18 U. S. St. at L. 455; Act of Feb. 12, 1887, c. 129, 24 U. S. St. at L. 402; Act of June 6, 1900, c. 805, 31 U. S. St. at L. 662; Act of Jan. 21, 1903, c. 196, § 13, 32 U. S. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222]; Act of March 2, 1903, c. 975, 32 U. S. St. at L. 942; Act of March 3, 1905, c. 1416, 33 U. S. St. at L. 946; Act of June 22, 1906, c. 3515, 35 U. S. St. at L. 449.

38. State laws not supplanted.— The aid extended to the organized militia under the act of Jan. 21, 1903, is not intended to supplant or prejudice the laws of the states governing pay, subsistence, and other supplies to their militia during an encampment or other service. Circ. War Dept., Nov. 23, 1903.

Control of brigade commandant over arms. — Under a statute providing for the distribution of public arms to the militia, and making the commandant of brigades the general custodian of such arms, the brigade commandant has complete control of the public arms issued by the state, and may fix and change the distribution of such arms in such manner as he deems proper, and in case of a refusal to return them he may maintain replevin or bring suit on the bond required from company officers. Sargent *v.* Moore, 1 Disn. (Ohio) 99, 12 Ohio Dec. (Reprint) 511.

Control of county judge over arms see Vincent *v.* Umatilla County, 14 Oreg. 375, 12 Pac. 732.

For construction of statutes relating to deficiency in equipments see Richardson *v.* Bachelder, 19 Me. 82; Robinson *v.* Folger, 17 Me. 206; Claflin *v.* Hopkinton, 4 Gray (Mass.) 502; Morley *v.* French, 2 Cush. (Mass.) 130; Hammond *v.* Dunbar, 24 Pick. (Mass.) 172; Haynes *v.* Jenks, 2 Pick. (Mass.) 172; Com. *v.* Annis, 9 Mass. 31.

Borrowing equipments see Com. *v.* Bullard, 9 Mass. 270; State *v.* Buffalo, 2 Hill (N. Y.) 434.

39. Act of Feb. 12, 1887, c. 129, § 4, 24 U. S. St. at L. 402; Act of June 22, 1906, 35 U. S. St. at L. 449.

The secretary of war cannot, as an additional requirement for the disposition of un-

on the counties and cities in which the armories are maintained,[40] notwithstanding a constitutional provision that taxes shall be equalized and uniform throughout the state.[41] Under the statutes of some jurisdictions it is held that such charges must be borne entirely by the state.[42]

IV. DISCIPLINE.

A. In General. By the term "discipline," as used in the constitution of the United States, article 1, section 8, is meant "system of drill," the training, control, and discipline of the militia being reserved to the states respectively. Under the old militia law requiring a limited training from citizens generally, delinquencies were treated in many states as civil offenses, cognizable before the civil courts.[43] With the gradual abandonment of the obsolete act of 1792, culminating in its repeal, and especially in view of the requirements of the Militia Act of 1903, a new and voluntary body, composed of a "regularly enlisted, organized and uniformed active" force was formed in each state and territory, with the consent of congress.[44] The laws of nearly all the states have been revised with a view of conforming the organization and discipline of the organized militia to that of the regular army, and violations of military laws or regulations are now generally

serviceable or unsuitable property, prescribe an inspection by officers of the United States army, without violating the provisions of this section. Op. J. A. G., card 3787, February, 1898.

40. People *v.* San Joaquin County, 28 Cal. 228; State *v.* Rogers, 93 Minn. 55, 100 N. W. 659; Bryant *v.* Palmer, 152 N. Y. 412, 46 N. E. 851 [*affirming* 15 N. Y. App. Div. 86, 44 N. Y. Suppl. 301]; Pittsburgh *v.* Biggart, 85 Pa. St. 425.

In Nevada a statute which formerly placed the expeuse of maintaining armories on the state (State *v.* La Grave, 22 Nev. 417, 41 Pac. 115) has been repealed (State *v.* Nye, 23 Nev. 99, 42 Pac. 866).

Compensation of armorers.— The constitution of 1894, art. 11, § 3, providing that it shall be the duty of the legislature to make sufficient appropriations for the maintenance of the militia was not intended to make the entire expense of the militia a state charge; and section 171 of the military code, as amended by Laws (1896), c. 953, making the compensation of certain armorers and others a county charge, is not in violation of such provision. Bryant *v.* Palmer, 152 N. Y. 412, 46 N. E. 851 [*affirming* 15 N. Y. App. Div. 86, 44 N. Y. Suppl. 301].

The certificate of the commanding officer as to the amount due an armorer, made under the authority conferred by the military code (1870), section 127, is conclusive as to the board of supervisors of the county in which the armory is situated, and nothing remains for them to do but to pay the amount fixed by the certificate. People *v.* Cayuga County, 9 Hun (N. Y.) 440.

Armory leases see Ford *v.* New York, 4 Hun (N. Y.) 587 [*affirmed* in 63 N. Y. 640]; Seventh Regiment Veterans *v.* Seventh Regiment Field Officers, 14 N. Y. Suppl. 811 [*affirming* 5 N. Y. Suppl. 391]; Wilson *v.* Cincinnati, 10 Ohio Dec. (Reprint) 123, 19 Cinc. L. Bul. 10; State *v.* Cleveland, 4 Ohio Dec. (Reprint) 107, 1 Clev. L. Rep. 31; Darling *v.* Bowen, 10 Vt. 148. A military company, formed by voluntary enlistment under the state law, is liable for rent of premises hired in their behalf and used as an armory, where the contract was expressly or impliedly authorized by them. Fox *v.* Naramore, 36 Conn. 376.

Removal of armorers.— Relator, a veteran, was armorer of a state armory, and on April 1, 1899, was discharged by the captain without cause. Laws (1899), c. 370, which took effect April 19, 1899, provided that the civil service laws and veterans' acts, under which a veteran could not be discharged except for cause, should not apply to the military service. It was held that mandamus would not lie to compel the captain to reinstate relator, since, the civil service laws and veterans' acts not applying to the military service, relator could be removed without cause. People *v.* Martin, 53 N. Y. App. Div. 19, 65 N. Y. Suppl. 457.

41. Bryant *v.* Palmer, 152 N. Y. 412, 46 N. E. 851. And see Steiner *v.* Sullivan, 74 Minn. 498, 77 N. W. 286.

42. State *v.* Dickenson, 44 Fla. 623, 33 So. 514, 60 L. R. A. 539; Knapp *v.* Kansas City, 48 Mo. App. 485; Witt *v.* Madigan, 24 Ohio Cir. Ct. 263; State *v.* Kreighbaum, 9 Ohio Cir. Ct. 619, 6 Ohio Cir. Dec. 654; Daniel *v.* Columbus, 8 Ohio Cir. Ct. 642, 4 Ohio Cir. Dec. 293; State *v.* Brinkman, 7 Ohio Cir. Ct. 165, 3 Ohio Cir. Dec. 710.

43. An action to recover the penalty for non-observance of the militia law has been held to constitute a civil proceeding. Dyer *v.* Hunnewell, 12 Mass. 271. And see Heald *v.* Weston, 2 Me. 348; Belcher *v.* Johnson, 1 Metc. (Mass.) 148; Com. *v.* Walker, 4 Mass. 556; Cate *v.* Nutter, 27 N. H. 515; Wood *v.* Fletcher, 3 N. H. 61; State *v.* Beaufort, 2 Rich. (S. C.) 496; McNulty *v.* Wilson, 4 Strobh. (S. C.) 231; Meade *v.* Deputy Marshal, 16 Fed. Cas. No. 9,372, 1 Brock. 324.

44. U. S. Const. art. 1, § 10.

dealt with by military courts within the scope of their jurisdiction as defined by the state laws.[45]

B. Military Offenses. A military offense, within the meaning of the militia laws, is a violation of the laws, rules, regulations, or orders governing the national guard or organized militia.[46] Military offenses are not criminal offenses as defined in the several state constitutions. They are not indictable offenses,[47] and are tried by military courts without a jury.[48] Military offenses are defined by statute. Examples will be found in the notes.[49]

C. Military Courts — Courts Martial — 1. In General. Courts martial are ancient institutions antedating the constitution, and their existence is expressly or impliedly recognized in the constitutions of most of the states.[50] They are executive agencies and belong to the executive, and not to the judicial, branch of the government. They are therefore not affected by the third article of the constitution of the United States, or by the several provisions in state constitutions relating to the judicial branch of the state government.[51]

2. Organization. Military courts are composed of one or more commissioned officers.[52] When composed of only one officer, they are in some states called sum-

45. Loomis *v.* Simons, 2 Root (Conn.) 454; People *v.* Daniell, 50 N. Y. 274; Mower *v.* Allen, 1 D. Chipm. (Vt.) 381. See *infra*, IV, C.

46. State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

47. People *v.* Daniell, 50 N. Y. 274; *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213; Dynes *v.* Hoover, 20 How. (U. S.) 625, 15 L. ed. 838. Violations of military discipline in the national guard, for which a punishment is provided by the military code, are not criminal offenses within section 7 of the state bill of rights, providing that no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in certain specified cases. State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

48. State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749; People *v.* Daniell, 50 N. Y. 274; Byers *v.* Com., 42 Pa. St. 89; Proffat Trial by Jury, § 84.

49. **Conduct unbecoming an officer.**—Obtaining two several advances on the faith of assignments of a check to become due for uniform allowance, and then receiving the check from the adjutant-general, and appropriating the proceeds, is conduct "unbecoming an officer and a gentleman," under Laws (1883), c. 299, § 119, subd. 18, providing that an officer convicted of such conduct may be sentenced to be cashiered. People *v.* Porter, 50 Hun (N. Y.) 161, 3 N. Y. Suppl. 35.

Insubordination.— An individual removing from the limits of his company after being warned to do military duty, and who appears and submits himself to the command of his officer, giving no notice and claiming no right of exemption, is liable to punishment by fine, if guilty of insubordination. State *v.* Dwinnell, 6 N. H. 167.

Disorders.— Privates who appear at places of rendezvous in fantastical and unusual habiliments, and thus excite disorder when a regiment is assembled for parade, are liable to be punished by fine as delinquents in duty. Rathbun *v.* Sawyer, 15 Wend. (N. Y.) 451; State *v.* Cole, 2 McCord (S. C.) 117. And see State *v.* Hungerford, 4 Day (Conn.) 383.

Non-attendance.— A person returned as a soldier on the "alarm list" of a military company, and who receives a notice from the sergeant to appear at muster, is thereby rendered liable to the penalty for non-attendance. Draper *v.* Bicknell, Quincy (Mass.) 164.

Neglect of duty.— A captain of patrol, failing to make a return on oath, is guilty of a neglect of duty, and may be returned to the court as such. *Ex p.* Biggers, 1 McMull. (S. C.) 69. The neglect or fraud of the commander of a company in making the certificate of attendance prescribed by St. (1840) c. 92, §§ 14, 15, is a military offense, which may be tried by a court martial. Washburn *v.* Phillips, 2 Metc. (Mass.) 296; Brooke *v.* Sharpless, 17 Serg. & R. (Pa.) 148.

50. People *v.* Daniell, 50 N. Y. 274. And see State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749; People *v.* Van Allen, 55 N. Y. 31.

51. See State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749; People *v.* Daniell, 50 N. Y. 274; Trask *v.* Payne, 43 Barb. (N. Y.) 569; *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213; Dynes *v.* Hoover, 20 How. (U. S.) 625, 15 L. ed. 838; Runkle *v.* U. S., 19 Ct. Cl. 396.

52. A temporary disability in one of the officers of a court martial will not make such a vacancy as is required to be filled by 1 Rev. St. p. 309, § 17. Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243. Under Rev. St. c. 73, authorizing the commissioned officers of a company, or any two of them, to meet in court martial, a court martial must be composed of at least two commissioned officers; and hence, where an execution was issued on a judgment rendered by a court martial composed of the acting captain, lieutenant, and ensign of a company, and it appeared that the captain alone had a commission, the execution was a nullity. Bell *v.* Tooley, 33 N. C. 605.

mary courts, field officers' courts, delinquency courts, etc.[53] They are established by law,[54] or convened under statutory authority, by a commanding officer.[55] They are designated general, regimental, battalion, or garrison courts martial, according to the scope or territorial limitations of their jurisdiction.[56] A judge advocate is usually detailed with a court martial.[57] Members of a court martial ordered for the trial of several complaints against several officers must be sworn for the trial of each complainant.[58]

3. JURISDICTION. The jurisdiction of courts martial is special, and is limited to military offenses[59] and persons connected with the military service.[60] Since courts martial are executive agencies, they cannot assume the functions or jurisdiction properly belonging to the civil courts,[61] except where martial law has been established.[62] And it is upon the doctrine of non-interference between coördinate branches of the government that the judgment of a court martial proceeding within

53. *In re* Leary, 27 Hun (N. Y.) 564.

54. State *v.* Wakely, 2 Nott & M. (S. C.) 412. And see State *v.* Atkinson, 9 N. J. L. 271; State *v.* Davis, 4 N. J. L. 311.

55. Brooks *v.* Davis, 17 Pick. (Mass.) 148; Porter *v.* Wainwright, 15 Pick. (Mass.) 439.

Challenges.—Where the members of a court martial were irregularly detailed, and the persons to be tried made objection in writing to the detail of one of the members, this was a sufficient challenge, under Mass. Rev. St. c. 12, § 118, permitting challenges on the ground of irregularity in the detail of any member of the court, or, if not, as being too general, this objection should have been made at the trial before the court martial. Brooks *v.* Daniels, 22 Pick. (Mass.) 498.

56. For courts of inquiry see ARMY AND NAVY, 3 Cyc. 842.

57. Opinion of Justices, 3 Cush. (Mass.) 586; Brooks *v.* Adams, 11 Pick. (Mass.) 441; Coffin *v.* Wilbour, 7 Pick. (Mass.) 149.

58. Coffin *v.* Wilbour, 7 Pick. (Mass.) 149.

59. Mills *v.* Martin, 19 Johns. (N. Y.) 7. And see Brooks *v.* Daniels, 22 Pick. (Mass.) 498; Brooks *v.* Adams, 11 Pick. (Mass.) 441; State *v.* Rogers, 37 Mo. 367; Matter of Wright, 34 How. Pr. (N. Y.) 207; Runkle *v.* U. S., 122 U. S. 543, 7 S. Ct. 1141, 30 L. ed. 1167; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; *Ex p.* Watkins, 3 Pet. (U. S.) 193, 7 L. ed. 650; Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457.

Acts which are both common-law and military offenses.—A common-law offense, committed by a soldier and cognizable by the civil courts, may also be prejudicial to military discipline, and as such be punishable by court martial, but there is no clash of jurisdiction occasioned thereby, and conviction or acquittal in one court is no bar to a trial in the other. U. S. *v.* Maney, 61 Fed. 140. A court martial is not deprived of its jurisdiction to try an officer for conduct unbecoming an officer and a gentleman, because that conduct may have resulted in a criminal offense for which the officer has not yet been tried. People *v.* Porter, 50 Hun (N. Y.) 161, 3 N. Y. Suppl. 35.

60. **Civil and military jurisdiction.**—The exact mode of transforming a citizen into a soldier is prescribed by the legislative branch of the government. It may be by voluntary enlistment or by draft, but as soon as the statutory provisions relating thereto have been complied with, he becomes subject to military jurisdiction. U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636; *In re* Davison, 21 Fed. 618; McCall's Case, 15 Fed. Cas. No. 8,669, 5 Phila. (Pa.) 259. See also Lowell *v.* Flint, 20 Me. 401; Vose *v.* Manly, 19 Me. 331; Capron *v.* Austin, 7 Johns. (N. Y.) 96; Gage *v.* Payne, Wright (Ohio) 678; Duffield *v.* Smith, 3 Serg. & R. (Pa.) 590; *Ex p.* Biggers, 1 McMull. (S. C.) 69; Barrett *v.* Crane, 16 Vt. 246; Gilman *v.* Morse, 12 Vt. 544; Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457. And see ARMY AND NAVY, 3 Cyc. 846.

61. **Soldiers retain rights of citizenship.**—As the power of congress is limited to making rules and regulations for the government of the land and naval forces and of the militia in service, it would seem to follow that these regulations cannot extend beyond what is necessary and proper for the governing of these forces as such, and in their military character. It is doubtful whether they can be subjected to trial by court martial for anything except breaches of military duty. Every soldier may be, or is, a citizen, and it would seem is as much entitled to a trial by jury for any alleged crime not committed by him in violation of his duty as a soldier, as any other person. It would be difficult to maintain that a law which subjected him to trial by a court martial for such an offense could be properly derived from the authority to provide for governing the land forces, or would have any constitutional sanction. *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; *Ex p.* Henderson, 11 Fed. Cas. No. 6,349.

62. **Martial law** is the law governing all persons within the territory covered, and supersedes all civil law conflicting with it. Military law is the general law of the land applicable to persons and affairs connected with the military service, in time of peace as well as war. Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159; Black L. Dict. Martial law has been defined as neither more nor less than the will of a military commander. *In re* Egan, 8 Fed. Cas. No. 4,303, 5 Blatchf. 319.

its jurisdiction, when approved by competent authority, is conclusive and cannot be reviewed by a civil court.[63]

4. Procedure. The proceedings of courts martial are regulated by law, and by the rules and customs of the service.[64] Charges[65] having been prepared, the accused is summoned to appear or is arrested,[66] and is entitled to counsel as in proceedings before criminal courts.[67] The rules of evidence prevailing in common-law courts of criminal jurisdiction are followed by courts martial.[68] Pleas

63. *Massachusetts.*— Washburn *v.* Phillips, 2 Metc. 296.

New York.— People *v.* Crane, 125 N. Y. 535, 26 N. E. 736 [*reversing* 9 N. Y. Suppl. 670]; People *v.* Van Allen, 55 N. Y. 31; *In re* Cross, 11 Abb. N. Cas. 230; Vanderheyden *v.* Young, 11 Johns. 150.

South Carolina.— State *v.* Stevens, 2 McCord 32; *Ex p.* Biggers, 1 McMull. 69.

Vermont.— Brown *v.* Wadsworth, 15 Vt. 170, 40 Am. Dec. 674.

United States.— Wales *v.* Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. ed. 277; *Ex p.* Vallandigham, 1 Wall. 243, 17 L. ed. 589; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396; Slade *v.* Minor, 22 Fed. Cas. No. 12,937, 2 Cranch C. C. 139; Meade *v.* Deputy Marshal, 16 Fed. Cas. No. 9,372, 1 Brock. 324.

England.— Warden *v.* Bailey, 4 Taunt. 67.

Compare Nowlin *v.* McCalley, 31 Ala. 678; Loomis *v.* Simons, 2 Root (Conn.) 454. And see Army and Navy, 3 Cyc. 845 note 11.

64. Schuneman *v.* Diblee, 14 Johns. (N. Y.) 235.

65. Requisites and sufficiency.— In courts martial the same degree of particularity in the specifications of the charges is not required as in indictments. It is enough if the charges are intelligently expressed, with the time and place of the alleged misconduct, so that the person charged shall be informed of the charges. People *v.* Porter, 50 Hun (N. Y.) 161, 3 N. Y. Suppl. 35.

Service.— Military Code, § 114, which provides that charges and specifications shall be served on accused when brought to trial before a court martial does not apply to a trial in the delinquency court. People *v.* Reed, 64 Hun (N. Y.) 453, 19 N. Y. Suppl. 877.

66. Service of summons.— Under Laws (1862), c. 477, § 220, a summons to appear before a court martial for delinquency in non-payment of fines or non-attendance at parades must be served personally, or by leaving it at the residence of the party. Service by leaving the summons at his house is not sufficient. People *v.* Crane, 125 N. Y. 535, 26 N. E. 736; Matter of Cross, 11 Abb. N. Cas. (N. Y.) 230; Matter of Lockwood, 32 How. Pr. (N. Y.) 437; Ryan *v.* Ringgold, 21 Fed. Cas. No. 12,187, 3 Cranch C. C. 5.

67. State *v.* Crosby, 24 Nev. 115, 50 Pac. 127, 77 Am. St. Rep. 786; People *v.* Van Allen, 55 N. Y. 31 [*reversing* 6 Lans. 44].

Publicity.— The provisions of Rev. St. p. 274, § 1, requiring publicity of trials in courts, is inapplicable to trials by courts martial. People *v.* Daniell, 6 Lans. (N. Y.) 44 [*affirmed* in 50 N. Y. 274].

68. Recording evidence.— Section 756 of the regulations does not require evidence before the delinquent court to be recorded; and where the proceedings show that, on trial of a delinquent, the evidence adduced was considered, it will be presumed that it was legal and sufficient. People *v.* Crane, 125 N. Y. 535, 26 N. E. 736.

Records as evidence.— Parker *v.* Currier, 24 Me. 168; Emerson *v.* Lakin, 23 Me. 384; Rawson *v.* Brown, 18 Me. 216; Vose *v.* Howard, 13 Me. 268; Gould *v.* Hutchins, 10 Me. 145; Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Cate *v.* Nutter, 24 N. H. 108; State *v.* Wilson, 7 N. H. 543; People *v.* Garling, 6 Alb. L. J. (N. Y.) 324; Governor *v.* Jeffreys, 8 N. C. 207; Governor *v.* Bell, 7 N. C. 331; Wright *v.* Munger, Wright (Ohio) 614.

Evidence of non-attendance.— Evidence that a soldier appeared with his company at the time appointed, but was afterward absent without leave of the commanding officer of the company, is sufficient to prove a complaint against him for "quitting his company without leave of an officer," since no other officer is authorized to give him leave of absence. *In re* Lovett, 16 Pick. (Mass.) 84. If the roll of a company is twice called, and the absence of a private is noted at the second call only, this furnishes *prima facie* evidence of the absence, and without countervailing proof is sufficient; and if the absence be noted on a list used at the time, and afterward that list is put in a more permanent form by the same person, it does not impair its validity. Mathews *v.* Bowman, 25 Me. 157. An orderly book of a company of militia, containing a record that the company was ordered to assemble at a time and place specified, and that certain members named were absent, is sufficient evidence of the meeting of the company, and of the non-appearance of the members so named. Cobb *v.* Lucas, 15 Pick. (Mass.) 7. On a prosecution to recover a fine for non-appearance at a regimental review, it will be sufficient if the order of the colonel to the captain be produced, as the captain is bound to obey it, and need not look beyond it. Porter *v.* Sherburne, 21 Me. 258; Stevens *v.* Foss, 18 Me. 19; Bullen *v.* Baker, 8 Me. 390; Bartlett *v.* Jenkins, 22 N. H. 53.

Evidence in actions to recover fines under old law see Mathews *v.* Bowman, 25 Me. 157; Emerson *v.* Lakin, 23 Me. 384; Bullen *v.* Baker, 8 Me. 390; Foye *v.* Curtis, 21 Pick. (Mass.) 330; Guilford *v.* Adams, 19 Pick. (Mass.) 376; *In re* Lovett, 16 Pick. (Mass.) 84; *In re* Field, 9 Pick. (Mass.) 41; *In re* Holmes, 5 Pick. (Mass.) 189; Com. *v.* Smith,

and defenses are interposed as in the case of trials of criminal offenses before courts of criminal jurisdiction.[69]

D. Sentence and Enforcement. Courts martial may punish[70] by reprimand, reduction, dismissal or dishonorable discharge,[71] fine,[72] and imprisonment.[73] The sentence, when approved, is carried out by the military authorities;[74] but more frequently in the militia by the sheriff or other civil officer[75] designated by law. It is the duty of such civil officer to carry out the lawful mandates of courts martial, and failure or neglect on his part renders him liable on his official bond.[76]

11 Mass. 456; Peabody *v.* Hayt, 10 Mass. 36; Hayes *v.* Palmer, 22 N. H. 94.

69. Right of infant to answer personally. — An infant subject to military duty may be sued for non-appearance at a military muster, and may answer personally as in case of an indictment. Winslow *v.* Anderson, 4 Mass. 376.

Defense to proceeding for non-attendance see state *v.* Ryan, 101 Iowa 18, 69 N. W. 1123; Nickerson *v.* Howard, 25 Me. 394; Lowell *v.* Flint, 20 Me. 401; Wiggin *v.* Fitch, 15 Me. 309; Cutter *v.* Toole, 2 Me. 181; Tribou *v.* Reynolds, 1 Me. 408; Cobb *v.* Lucas, 15 Pick. (Mass.) 1; Johnson *v.* Morse, 7 Pick. (Mass.) 251; Com. *v.* Allen, 16 Mass. 523; Winslow *v.* Morton, 118 N. C. 486, 24 S. E. 417; Worth *v.* Craven County, 118 N. C. 112, 24 S. E. 778.

Excuse for neglect of duty.— The provisions in Mass. St. (1821) c. 92, § 11, requiring all excuses of non-commissioned officers and privates for neglect of military duty to be made to the commanding officer of their respective companies, is not repugnant to the constitution of the United States, which gives congress exclusive power to provide for organizing and disciplining the militia. Sherman *v.* Needham, 4 Pick. (Mass.) 66; State *v.* Dwinnell, 6 N. H. 167.

70. Alden *v.* Fitts, 25 Me. 488; State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

71. A militia court martial may sentence the accused to removal from office, and also to pay a fine. McBlair *v.* Bond, 41 Md. 137; Coffin *v.* Wilbour, 7 Pick. (Mass.) 149.

72. People *v.* Crane, 125 N. Y. 535, 26 N. E. 736; People *v.* Reed, 64 Hun (N. Y.) 453, 19 N. Y. Suppl. 877. See also Scofield *v.* Lounsbury, 8 Conn. 109; Levelling *v.* Leavell, 2 Blackf. (Ind.) 163; Taylor *v.* Burriss, Litt. Sel. Cas. (Ky.) 183; Bell *v.* Allen, 2 A. K. Marsh. (Ky.) 117; Nickerson *v.* Howard, 25 Me. 394; Folsom *v.* Perkins, 21 Me. 166; Com. *v.* Sherman, 5 Pick. (Mass.) 239; Com. *v.* Hall, 3 Pick. (Mass.) 262; Com. *v.* Derby, 13 Mass. 433; Hussey *v.* Lord, 4 Mass. 378; Winslow *v.* Anderson, 4 Mass. 376; Pratt *v.* Hall, 4 Mass. 239; Savage *v.* Gulliver, 4 Mass. 171; Mountfort *v.* Hall, 1 Mass. 443; Alexander *v.* Pierce, 10 N. H. 494; Huntoon *v.* Kidder, 8 N. H. 482; State *v.* Atkinson, 9 N. J. L. 271; State *v.* Kirby, 6 N. J. L. 143; Matter of Wright, 34 How. Pr. (N. Y.) 207; People *v.* Hazard, 4 Hill (N. Y.) 207; Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243; Houston *v.* Wright, 15 Ohio St. 318; Knight *v.* Payne, Wright (Ohio) 369; Drumheller *v.* Keim, 2 Leg. Chron. (Pa.) 23; Beck *v.* Ridge, 8 Phila. (Pa.) 240; Carn *v.* Mikel, 5 Rich. (S. C.) 247; State *v.* Wakely, 2 Nott & M. (S. C.) 412; Kingsbury *v.* Whitney, 5 Vt. 470; Meade *v.* Deputy Marshal, 16 Fed. Cas. No. 9,372, 1 Brock. 324.

Costs.— Costs are but incidental to the fine, and imprisonment for a failure to pay the same does not contravene a constitutional provision against imprisonment for debt. McCool *v.* State, 23 Ind. 127. See also on the subject of costs Winslow *v.* Prince, 5 Me. 264; Com. *v.* Fitz, 11 Mass. 540; Cate *v.* Nutter, 27 N. H. 515; Anderson *v.* Walker, 3 N. H. 311.

73. The provision of the Militia Act of 1870, authorizing the arrest of a delinquent in case goods cannot be found to satisfy a fine or penalty imposed by a court martial, is constitutional. People *v.* Daniell, 50 N. Y. 274. The warrant drawn by the president of the delinquency court directing the marshal to collect fines imposed by the court properly directs the imprisonment of a man fined in the county jail under a statute providing that, in default of sufficient goods and chattels to satisfy said fines, the marshal, sheriff, or constable of any city or county shall take the body of such delinquent, and convey him to the common jail of such city or county. People *v.* Reed, 64 Hun (N. Y.) 453, 19 N. Y. Suppl. 877. And see Mallory *v.* Merritt, 17 Conn. 178; Com. *v.* Alexander, 6 Binn. (Pa.) 176; State *v.* Beaufort, 2 Rich. (S. C.) 496.

74. Warner *v.* Stockwell, 9 Vt. 9.

75. Moore *v.* Houston, 3 Serg. & R. (Pa.) 169. And see Hall *v.* Howd, 10 Conn. 514, 27 Am. Dec. 696; Com. *v.* Pearce, 7 T. B. Mon. (Ky.) 317; Poague *v.* Culver, 5 Litt. (Ky.) 132; Churchill *v.* Sanborn, 12 N. H. 543; Scribner *v.* Whitcher, 6 N. H. 63, 23 Am. Dec. 708; Hall *v.* Jackaway, 7 Hill (N. Y.) 51; Seastrunk *v.* Rice, Cheves (S. C.) 71; Cross *v.* Gabeau, 1 Bailey (S. C.) 211; State *v.* Stevens, 2 McCord (S. C.) 32; Brainard *v.* Stilphin, 6 Vt. 9, 27 Am. Dec. 532.

76. State *v.* McClane, 2 Blackf. (Ind.) 192. And see Nowlin *v.* McCalley, 31 Ala. 678; Mitchell *v.* State, 3 Blackf. (Ind.) 391; State *v.* McClane, 2 Blackf. (Ind.) 192; Boyle *v.* Com., 6 B. Mon. (Ky.) 1; Whitaker *v.* Wheeler, 4 B. Mon. (Ky.) 96; English *v.* Com., 6 Dana (Ky.) 234; Tull *v.* Geohagen, 3 J. J. Marsh. (Ky.) 377; Stith *v.* Lansdale, 2 J. J. Marsh. (Ky.) 152; Hickman *v.* Hall, 5 Litt. (Ky.) 338; Poague *v.* Culver, 5 Litt.

E. Review and Collateral Attack — **1. Proceedings Before Civil Authorities.** Where proceedings for punishment for delinquency in military duty are instituted before the civil authorities, the right to review and the method of review are matters strictly of local statutory regulation.[77]

2. Proceedings Before Military Tribunal. Civil courts will not review a judgment of a military tribunal, except in cases where it has clearly acted without jurisdiction.[78] Prohibition does not lie to restrain the proceedings of a court martial, although irregular, so long as it acts within its jurisdiction.[79] There is a conflict of authority as to whether certiorari lies under any circumstances to review the proceedings of a military tribunal.[80] Courts martial and delinquency courts being courts of special and limited jurisdiction their judgments may be attacked for want of jurisdiction in collateral proceedings.[81] These judgments are of no force and effect unless accompanied by a proof of the jurisdictional facts upon which the authority of the court to render them depends.[82]

V. SERVICE.

A. In General. The training and control of the militia are reserved to the states exclusively, but the method of training, or system of drill, is to be prescribed by congress.[83] And congress has provided that the organization, armament, and discipline of the organized militia shall be the same as that which is now or may hereafter be prescribed for the regular and volunteer armies of the United States.[84]

B. Command. The command of the organized militia in the several states devolves upon the governor and the officers commissioned by him.[85] The

(Ky.) 132; Worth *v.* Peck, 7 Pa. St. 268; Legionary Paymaster *v.* Spalding, 15 Fed. Cas. No. 8,212, 1 Cranch C. C. 387.

Irregularity of execution.— An execution from a court martial for a fine, directed to a particular sheriff, instead of "all and singular the sheriffs of the state," is irregular, not void, and a sheriff who fails to execute it is answerable for such failure. Carr *v.* Scott, Riley (S. C.) 193.

77. Certiorari has in Massachusetts been held the proper remedy for the review of proceedings before a justice of the peace to recover fines for the neglect of militia duty. Appeal and error does not lie to review such proceedings. Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Ball *v.* Brigham, 5 Mass. 406; Edgar *v.* Dodge, 4 Mass. 670; Winslow *v.* Anderson, 4 Mass. 376; Pratt *v.* Hall, 4 Mass. 239; Mountford *v.* Hall, 1 Mass. 443.

Appeal lies in Ohio to review proceedings of justices imposing a fine. Wright *v.* Munger, 5 Ohio 441.

78. Washburn *v.* Phillips, 2 Metc. (Mass.) 296. And see *supra*, IV, C, 3.

79. State *v.* Wakely, 2 Nott & M. (S. C.) 412. And see Washburn *v.* Phillips, 2 Metc. (Mass.) 296.

80. That certiorari lies to review proceedings of a military tribunal acting without jurisdiction see People *v.* Van Allen, 55 N. Y. 31; *In re* Bracket, 27 Hun (N. Y.) 605; People *v.* Townsend, 10 Abb. N. Cas. (N. Y.) 169; Rathbun *v.* Sawyer, 15 Wend. (N. Y.) 451. But not when the court had jurisdiction of the subject-matter and of the person of the accused. People *v.* Rand, 41 Hun (N. Y.) 529.

That certiorari cannot be maintained see *Ex p.* Dunbar, 14 Mass. 393 (in which it was said that parties who have legal grounds to complain of the doings of these military courts must have their remedy by action at law); Moore *v.* Houston, 3 Serg. & R. (Pa.) 169 (under a statute preventing the issuance of writs of certiorari or other writs of removal of proceedings of courts martial); *In re* Contested Election, 1 Strobh. (S. C.) 190 (under a statute authorizing appeals from courts martial).

81. Crawford *v.* Howard, 30 Me. 422; People *v.* New York County Jail Warden, 100 N. Y. 20, 2 N. E. 870; Brown *v.* Wadsworth, 15 Vt. 170, 40 Am. Dec. 674.

Illustration.— Where by a sentence of a court martial a captain is reduced to the ranks, and suit is subsequently brought against him for not performing his military duty, he may inquire into the validity of the proceedings of the court martial. Crawford *v.* Howard, 30 Me. 422.

82. Crawford *v.* Howard, 30 Me. 422; People *v.* New York County Jail Warden, 100 N. Y. 20, 2 N. E. 870.

83. U. S. Const. art. 1, § 8.

84. Act of Jan. 21, 1903, c. 196, § 3, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222]. See also People *v.* Hill, 126 N. Y. 497, 27 N. E. 789; Ansley *v.* Timmons, 3 McCord (S. C.) 329.

85. Mathews *v.* Bowman, 25 Me. 157; State *v.* Wilson, 7 N. H. 543; Cooke *v.* Cole, 22 Quebec Super. Ct. 25.

A lieutenant can issue no orders as commanding officer, if the captain has his house within the limits of his company and is at

governor may in the exercise of the discretion vested in him relieve an officer from command.[86]

C. Drills and Parades — 1. In General. The members of the militia are liable to periodical as well as special service for instruction, which may take the form of drills, parades, schools, inspections, encampments, maneuvers, marches, or other exercises. Such meetings for training are prescribed by law or ordered by the state military authorities.[87]

2. Notice or Warning. Under the old system requiring universal service, a notice or warning[88] of each meeting or parade was served[89] on the members of the company. Since liability to military duty has been restricted to a select and volunteer body of organized militia, standing orders or regulations usually prescribe the periods of duty and notices are only issued for special meetings or service.

D. Encampments. Camps of instruction,[90] or practice marches, are now gen-

the time at his home. Hayes *v.* Palmer, 22 N. H. 94. And see Cutter *v.* Tole, 2 Me. 181.

Officer de facto.— If a person accepts a military office, is commissioned, and assumes the duties of an officer, although he does not take the oath, he becomes an officer *de facto*, and his authority cannot be questioned by third persons. Bixby *v.* Harris, 26 N. H. 125.

86. Where an order by a commanding officer of the national guard, relieving an officer of a regiment from his command, is approved by the governor, and his application for a reinstatement is denied by the governor, the commanding officer had no authority, without the sanction and approval of the governor, to restore the relieved officer to his command. People *v.* Roe, 51 N. Y. App. Div. 494, 64 N. Y. Suppl. 642.

What is not a removal.— The act of the governor of a state in relieving an officer of the national guard of his command did not constitute a removal of the officer from his office, within U. S. Rev. St. (1878) § 1229 [U. S. Comp. St. (1901) p. 868], providing that no officer in the military or naval service shall in time of peace be dismissed from the service, except on and in pursuance of a sentence of a court martial. State *v.* Jelks, 138 Ala. 115, 35 So. 60.

87. Power of commanding officer.— Where the commanding officer of a company has been legally ordered to appear with his company in another town, on a day and at a place named, at seven o'clock, for review and inspections, he has power to call his company to appear there at five o'clock on the same day. Hill *v.* Fuller, 14 Me. 121. Where a captain is ordered to parade his company at eight o'clock A. M. for a regimental review in the month of September, as he may parade his company by his own order, on one day other than the third Tuesday of May, he may parade them at six o'clock A. M. of the day of the regimental review. Bartlett *v.* Jenkins, 22 N. H. 53. See also Anderson *v.* Swett, 23 Me. 440; Gowell *v.* True, 17 Me. 32; Cobb *v.* Lucas, 15 Pick. (Mass.) 7; *In re* Field, 9 Pick. (Mass.) 41; Com. *v.* Richardson, 13 Mass. 220; State *v.* Collector of Fines, 4 McCord (S. C.) 30.

Records.— The clerk of a company is not obliged to make his record of company transactions immediately as they occur, but is entitled to as great indulgence as other recording officers. Spaulding *v.* Bancroft, 23 Pick. (Mass.) 54; Jones *v.* French, 18 N. H. 190.

Substitutes.— There is no law authorizing a militiaman to send a substitute. State *v.* Wakely, 2 Nott & M. (S. C.) 412; Keys *v.* McFatridge, 6 Munf. (Va.) 18.

88. For form and sufficiency of notice see Farrington *v.* Howard, 30 Me. 235; Mathews *v.* Bowman, 25 Me. 157; Thorn *v.* Case, 21 Me. 393; Bean *v.* Sherburne, 21 Me. 260; Lowell *v.* Flint, 20 Me. 401; Robinson *v.* Folger, 17 Me. 206; Macomber *v.* Shorey, 15 Me. 466; Ellis *v.* Grant, 15 Me. 191; Hill *v.* Fuller, 14 Me. 121; Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Hammond *v.* Dunbar, 24 Pick. (Mass.) 172; Colburn *v.* Bancroft, 23 Pick. (Mass.) 57; *In re* Giddings, 22 Pick. (Mass.) 406; Whitmarsh *v.* Curtis, 21 Pick. (Mass.) 333; Pray *v.* Curtis, 21 Pick. (Mass.) 332; McDaniels *v.* Russell, 17 Pick. (Mass.) 243; Cobb *v.* Lucas, 15 Pick. (Mass.) 1; Com. *v.* Kellogg, 9 Pick. (Mass.) 557; Howard *v.* Harrington, 4 Pick. (Mass.) 123; *In re* Adams, 4 Pick. (Mass.) 25; Com. *v.* Derby, 13 Mass. 433; Cate *v.* Nutter, 24 N. H. 108; Bartlett *v.* Jenkins, 22 N. H. 53; Jones *v.* French, 18 N. H. 190; State *v.* Leonard, 6 N. H. 435; Mower *v.* Allen, 1 D. Chipm. (Vt.) 381.

89. For decisions relating to service of notice see Wood *v.* Bolton, 23 Me. 115; Howard *v.* Folger, 15 Me. 447; Colburn *v.* Bancroft, 23 Pick. (Mass.) 57; Cobb *v.* Lucas, 15 Pick. (Mass.) 7; Fiske *v.* Parker, 10 Pick. (Mass.) 134; *In re* Washburn, 9 Pick. (Mass.) 40; Com. *v.* Cutter, 8 Mass. 279; Johnson *v.* Hunt, 13 Johns. (N. Y.) 186.

For decisions relating to proof of service see Hammond *v.* Dunbar, 24 Pick. (Mass.) 172. See also Pray *v.* Curtis, 21 Pick. (Mass.) 332; Bartlett *v.* Jenkins, 22 N. H. 53; Jones *v.* French, 19 N. H. 131; Huntoon *v.* Kidder, 8 N. H. 482.

Return.— The law does not require a return to be made on an order to warn a company to do military duty. Mower *v.* Allen, 1 D. Chipm. (Vt.) 381.

90. Places of encampments.— Section 14 of the Militia Law contains no restrictions as to the place where the actual field or camp

erally held each year in the several states. They are supplemented in many states by special encampments for rifle practice and competition.[91] At least five consecutive days in each year must be devoted to such encampment by the organized militia of each state and territory which desires to participate in the allotment of funds made by congress for the militia.[92] The organized militia may partici-

service for instruction shall take place, that being an incident of such service which lies within the discretion of the governor of the state or territory. War Dept. Dec., Dec. 22, 1903.

For decisions relating to camp grounds see Brigham *v.* Edmands, 7 Gray (Mass.) 359; Moody *v.* Ward, 13 Mass. 299.

Officers ordered to a school.— Officers attending a school of instruction under orders from the governor of the state are not considered as engaged in "actual camp or field service," and their expenses cannot be paid under section 14. War Dept. Dec., Jan. 13, 1904.

Camp of selected troops.— It is within the discretion of the governor of a state or territory to determine what portion of its organized militia "shall engage in actual field or camp service for instruction," and funds accruing to such state or territory, in the operation of section 14 of the Militia Law, may properly be used in defraying the expenses of such a camp. War Dept. Dec., May 2, 1905.

Active service — When equivalent to camp of instruction.— The funds made available under the act of Jan. 21, 1903, for the payment, subsistence, and transportation of such of the organized militia as may engage in actual field or camp service for instruction, are disbursed upon the order of the governor of the state; and the character and the amount of instruction, and the manner in which it shall be imparted to the troops, are matters which rest within the sound discretion of the governor, and are fully subject to his control. If the camps are so established and conducted as to accomplish some collateral purpose, it is a matter with which the war department has no concern, so long as the proper military instruction is imparted to the troops so engaged. War Dept. Dec., Sept. 1, 1905.

Cadet companies not entitled to benefits of section 14.— The act of Jan. 21, 1903, provides that the militia shall consist of every able-bodied male citizen of the respective states and territories who is more than eighteen and less than forty-five years of age. A body composed of youths between the ages of fifteen and eighteen is obviously not a body of militia and its being organized and uniformed by or in a state cannot make it so; and such a body is therefore not entitled to receive the benefits provided for in section 14 of the Militia Law for participation in a camp of instruction. War Dept. Dec., Dec. 5, 1905.

91. What included under "actual field service."— The use of the militia by the governor of a state in aid of the civil authorities is not construed by the department as coming within the terms of the Militia Law, neither does the law provide for allowances to small details attending the rifle-range camp at intervals. The target practice which would come within the scope of "camp service for instruction" is on a broader scale, embracing competitive or general target practice in connection with camps. War Dept. Dec., Jan. 30, 1904.

Ammunition for target practice.—Ammunition for instruction and target practice may be furnished free to militia encamped at military posts; but if, on the other hand, it is to be fired away in maneuvers, although some incidental instruction might thereby be imparted, there is clearly no instruction in target practice, and the free issue of ammunition for such purpose would not fall within the scope of section 21 of the act of Jan. 21, 1903. War Dept. Dec., June 17, 1904.

Camp for rifle practice.— An encampment of selected members of the organized militia of a state for the purpose of engaging in rifle practice, under orders of a governor of a state or territory, is "actual field or camp service for instruction" within the meaning of section 14 of the act of Jan. 21, 1903. War. Dept. Dec., Aug. 23, 1905.

Title to property acquired for shooting galleries or target ranges.— The department holds that the title to property acquired by the states and territories or the District of Columbia for shooting galleries or target ranges, under the authority contained in section 1661, Revised Statutes, as amended by the act approved June 22, 1906, vests in the United States; and that the relation of the states, territories, or District of Columbia to such properties is that of a trustee vested with the use and charged with the administration of them for the purpose for which they were acquired. War Dept. Dec., June 20, 1906.

92. Act of Jan. 21, 1903, c. 196, § 18, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222].

Construction of section 18.— This section is not retrospective, and therefore the period named therein for the performance of the conditions in respect to camp of instruction and drills must elapse before it can be determined that such conditions have not been performed, the "year next preceding" relating to the calendar year. War Dept. Dec., Jan. 13, 1904.

Organizations not entitled to the benefits of the act of Jan. 21, 1903.—Independent military organizations which are not a part of the active organized militia of a state or territory are not entitled to the participation in any of the benefits conferred by the sections of the Militia Law of Jan. 21, 1903, except as to the privileges specially mentioned in

pate in the encampments and maneuvers of the regular army,[93] without prejudice, however, to the authority of the commander of either organization.

E. Active Service — 1. In Aid of Civil Authorities. The employment of the militia in active service within the state is largely governed by local constitutional and statutory provisions. In some states they are subject to the call of the mayor or other civil officer, acting merely as armed police under the exclusive control of the civil authorities.[94]

2. As a Military Force. More generally, however, the organized militia is employed as a military force acting under orders of the governor or commander-in-chief,[95] at the request of the civil authorities when the latter have exhausted their means and declared their inability to cope with the situation.[96] A body of

section 3 of the act cited. War Dept. Dec., July 31, 1905.

93. Act of Jan. 1, 1903, c. 196, § 15, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222].

Injuries incurred during participation in joint maneuvers.— As the militia forces while participating in joint maneuvers are not "called forth" in the manner or for any of the purposes prescribed in the constitution, they continue to be state forces, and do not at any time pass into the service of the United States, and claims for damages on account of injuries sustained during the participation in such maneuvers cannot be adjusted by the war department and should be presented to the state in whose service the parties were when the injuries were received. War Dept. Dec., Feb. 15, 1904.

94. The determination of the mayor of a city that a riot or mob is threatened is conclusive that the exigency exists, required by Mass. St. (1840) c. 92, § 27, to authorize him to call out the volunteer militia to aid the civil authority in enforcing the laws. Ela *v.* Smith, 5 Gray (Mass.) 121, 66 Am. Dec. 356. The volunteer militia, when called out by the mayor of a city under that section, on the ground that a riot or mob is threatened, may, before such riot or mob has actually taken place, be ordered by the mayor to repair to a particular place, and there perform any specific duty, such as clearing the streets, which in his judgment is necessary to prevent the threatened mob or riot. Ela *v.* Smith, *supra*.

Subjection of militia officers to civil authority.— Officers of militia, called out by a civil magistrate under that section to aid the civil authority in enforcing the laws, cannot be intrusted with discretionary power as to the measures to be adopted, but can only direct the details of the mode of executing specific orders received from the civil magistrate. Ela *v.* Smith. 5 Gray (Mass.) 121, 66 Am. Dec. 356. And see State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62.

Delegation of authority.— A sheriff or magistrate cannot delegate his authority to the military force which he summons to his aid, or vest in military authorities any discretionary powers to take any step or do any act to prevent or suppress a mob or riot. State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62.

95. What is not employment as regular and permanent guard.— The employment of the county reserves, by order of the governor, in guarding federal prisoners for a continuous term of three months, is not an employment as a "regular and permanent guard" for such prisoners, in violation of the act of December, 1864, such as will justify the courts in discharging a county reserve on habeas corpus. *In re* Daniel, 39 Ala. 546.

Troops ordered out by governor to quell riot.— Where, at the request of a deputy sheriff to a colonel, the governor orders out troops to quell a riot, the troops do not become a part of the sheriff's *posse comitatus*, but are in the service of the state. Chapin *v.* Ferry, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116.

By whom national guard called out.— Wash. Code (1881), § 860, which provides that, in case of riot, any justice of the peace, sheriff, deputy sheriff, constable, or marshal of a city, or mayor or alderman thereof, may command the rioters to disperse, and, if they refuse, may command sufficient aid to arrest all such persons, and, if necessary, "an armed force may be called out, and shall obey the orders of any two of the magistrates or officers," gives such officers no power to call out the national guard. Chapin *v.* Ferry, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116. The president has power to call out the military in aid of the civil authorities of the District of Columbia, Const. art. 2, § 2, U. S. *v.* Stewart, 27 Fed. Cas. No. 16,401*a*, 2 Hayw. & H. 280.

Arrest of deserters.— The governor has no authority to require the home guard to perform the service of arresting deserters and conscripts. *In re* Austin, 60 N. C. 168.

96. N. C. Code, § 3245, enacted that when there was a military organization in every county, and provides that the commanding officer of the county may call out the militia on the certificate of three justices of the peace that outlaws are depredating the county, or that it is necessary to guard the jail, and that the county shall bear the expense. Section 3246 substitutes the governor for the commanding officer, authorizes him to order out the militia under the preceding section, and provides that it shall be paid by the county for whose benefit it was called out. It was held that these sections do not apply to cases where the governor, acting under the discretionary power conferred on him by N. C.

organized militia absent on active service, or in the service of the United States, does not thereby lose its organization.[97]

F. Expense and Maintenance — 1. Military Funds. The cost of maintaining and training the militia is primarily a state charge.[98] The state funds are supplemented by a federal appropriation,[99] where the state troops have complied with the acts of congress and have become part of the organized militia of the United States.[1] Municipalities have also been allowed or required to share in the expense of quartering or maintaining state troops stationed within their respective boundaries.[2] Such laws have been upheld where special benefits accrued from the presence of the troops in the city or county.[3] Company and regimental funds[4] are raised in many states by voluntary assessments, dues, and fines imposed under local by-laws.

2. Pay and Allowance. The rate of pay of officers and enlisted men for military service is fixed by law[5] or, under statutory authority, by the governor.[6]

Const. art. 12, § 3, orders out the militia to aid a sheriff in serving legal process, on the information of such officer that he has exhausted the civil process of the county. Worth *v.* Craven County, 118 N. C. 112, 24 S. E. 778.

97. The members of the first regiment of infantry, Vermont national guard, having, according to the governor's construction of the act of April 22, 1898, section 6, as shown by his general orders, enlisted in the volunteer army of the United States in a body, as the first regiment of infantry, Vermont volunteers, and no cogent reason appearing why such construction should be held erroneous, and he having discharged from the national guard service all men of the regiment who did not enter the volunteer service, and Act No. 5 (Acts Ex. Sess., May 6, 1898) having provided that the first regiment, national guard, although giving up its name and position for the time by volunteering for service in the United States army, shall on its return from said service constitute, and be reinstated as, the first regiment, national guard, the regiment, on returning from the United States service, exclusive of the members who were not national guardsmen, when they entered that service, is constituted and reinstated as the first regiment, national guard. *In re* National Guard, 71 Vt. 493, 45 Atl. 1051.

98. Sweeny *v.* Com., 118 Ky. 912, 82 S. W. 639, 26 Ky. L. Rep. 877; State *v.* Ryland, 14 Nev. 46. And see People *v.* Swigert, 107 Ill. 494; State *v.* Anderson, 52 N. J. L. 150, 18 Atl. 584; Worth *v.* Craven County, 118 N. C. 112, 24 S. E. 778.

Special appropriations unnecessary when general appropriation fails see Sweeney *v.* Com., 118 Ky. 912, 82 S. W. 639, 26 Ky. L. Rep. 877. *Compare* Prime *v.* McCarthy, 92 Iowa 569, 61 N. W. 220.

Vouchers.— A mere written order of the governor and adjutant-general to the auditor to draw his warrant upon the military fund is insufficient as a voucher to authorize the auditor to issue his warrant in favor of the captain of a state military company under the acts of 1881 and 1883, in the absence of any showing as to the character of the expenditures or on what account the warrant is to be drawn. People *v.* Swigert, 107 Ill. 494. For other decisions relating to vouchers see Jefferson County *v.* Shannon, 51 Pa. St. 221; Com. *v.* Pierce, 4 Rand. (Va.) 432; State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

99. See *supra*, III, A.

1. Act of Jan. 21, 1903, c. 196, § 18, 32 U. S. St. at L. 775 [U. S. Comp. St. Suppl. (1905) p. 222].

2. The compensation of the city assessor of the city of St. Paul, fixed by the common council in pursuance of Laws (1865), c. 79, includes compensation for making and returning the list of persons liable to be enrolled for militia duty, which is made one of the assessor's duties by Minn. Laws (1865), c. 51. McClung *v.* St. Paul, 14 Minn. 420. See also Prime *v.* McCarthy, 92 Iowa 569, 61 N. W. 220; Wyoming County *v.* Bardwell, 84 Pa. St. 104.

Evidence of company to which soldier belonged.— Being actually present with a militia company, armed and equipped, and doing militia duty at an inspection and review, is *prima facie* evidence that the soldier belonged to the company and hence entitled to the money to be furnished by the town in lieu of rations, as required by the Militia Act of 1834. Williamsburg *v.* Gilman, 24 Me. 206.

Armories see *supra*, III, C.

3. Bryant *v.* Palmer, 152 N. Y. 412, 46 N. E. 851. And see State *v.* Rogers, 93 Minn. 55, 100 N. W. 659; Steiner *v.* Sullivan, 74 Minn. 498, 77 N. W. 286.

4. Where an order is drawn by a colonel of militia, in his official capacity, on the paymaster of his regiment, in favor of another person, the colonel is not liable. The regimental fund alone is liable. Smurr *v.* Forman, 1 Ohio 272. See also Fox *v.* Miller, 4 B. Mon. (Ky.) 469; Blackwell *v.* Irvin, 4 Dana (Ky.) 187; Howard *v.* Daniel, 6 J. J. Marsh. (Ky.) 125; Jones *v.* Rockeyfeller, 2 Penr. & W. (Pa.) 540.

5. See Riggs *v.* Pfister, 21 Ala. 469.

Non-compliance with statutes prescribing formalities in calling out militia see Chapin *v.* Ferry, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116.

6. Construction of statutes.— Ky. Gen. St. (1888) p. 955, § 35, creating a military fund,

Federal appropriations are disbursed in accordance with the acts of congress.[7] The soldier is not entitled to pay where none is provided by law.[8]

and providing for its distribution, under such regulations as the governor shall prescribe for the administration, etc., and instruction of the state guard, does not entitle militia, when called into camp for instruction, to compensation, the governor having made no provision for their compensation. Bryant *v.* Brown, 98 Ky. 211, 32 S. W. 741, 17 Ky. L. Rep. 801. Where the payment of the expenses of militia in time of war is left by the law to the discretion of the executive, a party cannot claim, as a matter of legal right, more than the executive in his discretion may choose to allow. Com. *v.* Pierce, 4 Rand. (Va.) 432.

7. **Previous service.**— In computing the pay of officers and enlisted men of the organized militia for the period passed by them in encampment, maneuvers, and field instruction, under section 15, any previous service by them in the regular volunteer forces of the United States should not be taken into account. Comp. Treas. Dec., July 7, 1903.

Time for which pay, subsistence, and transportation allowances are due.— Such portion of the organized militia as shall engage in actual field or camp service under section 14, or engage in any encampment, maneuvers, or other field exercises of any part of the regular army under section 15, are entitled under each of said sections to pay, subsistence, and transportation allowances for the entire period from the time when such organized militia shall start from their rendezvous to the time of their return thereto. Comp. Treas. Dec., Aug. 20, 1903.

Horses of officers.— Payment may be made for the transportation, from home rendezvous to place of encampment and return, of horses of officers who are required to be mounted as part of such organized militia, and which are necessary to mount them, and who take part in the actual field or camp service as part of such organized militia, as contemplated by section 14 of the act of Jan. 21, 1903. Comp. Treas. Dec., Sept. 3, 1903.

Signatures on pay-rolls.— Signatures on rolls in receipt for pay must be the genuine signature of the soldier. The signature by any other person does not furnish a valid acquittance to the United States, and payment should not be made on such signatures. If officers or men were ordered to camp in advance of period of encampment or held there subsequent thereto, the authority in each instance must appear on the roll. Comp. Treas. Dec., Oct. 14, 1903.

Temporary rank.— Line officers of miltia belonging to organizations not attending maneuvers may be assigned to duty to fill vacancies in lower grades in companies of militia of the state to which they belong and attending the maneuvers and draw pay under section 15 for such temporary rank. Comp. Treas. Dec., Oct. 19, 1903.

Certificate of governor as to time.— The certificate of the governor of the state or territory of the number of days necessarily required may be accepted to establish the facts. Comp. Treas. Dec., Nov. 4, 1903.

Pay, subsistence, and transportation while participating in the national rifle competition. — Members of the organized militia of a state are entitled to pay, under section 14 of the act of Jan. 21, 1903, while participating in the national rifle competition; but they are not entitled to increase of pay for length of service. Comp. Treas. Dec., Dec. 14, 1903.

Transportation of horses of militia.— Section 15 of the Militia Law provides that militia organizations participating in army maneuvers shall receive the same pay, subsistence, and transportation as is provided by law for the officers and men of the regular army. As mounted officers of the army would be entitled to transportation for their horses under orders directing the movements of their commands to the place of maneuver, mounted officers of the militia are similarly entitled, and the cost of transporting their horses would constitute a charge against the appropriation provided by congress for paying the expenses of the militia in such cases. War Dept. Dec., July 30, 1904.

Leave for encampment — question of pay.— An officer of the organized militia is entitled to pay only while on duty, and not while on leave, during the period of encampment of the militia of which he is a member. War Dept. Dec., Aug. 25, 1905.

Rates of pay of militia on active service.— Under section 14 of the act of Jan. 21, 1903, which provides that the organized militia of a state which "shall engage in actual field or camp service for instruction" shall be entitled to receive the same pay to which officers and enlisted men of the regular army are entitled by law, it is beyond the power of the war department to authorize payments of any other rates from appropriations provided by congress for the militia. War Dept. Dec., Sept. 11, 1905.

Pay for use of wagon transportation on practice marches.— Where troops engage in practice march for instruction, a small amount of wagon transportation being absolutely necessary to carry the rations, tentage, and bedding, it would seem that the cost of hiring such transportation would constitute a proper charge against the state's allotment. It is therefore decided that where the expenditure is reasonable and necessary to the movement of the troops that are engaged in a practice march it should be allowed. War Dept. Dec., Oct. 18, 1905.

8. Curtis *v.* Moody, 3 Ida. 860, 27 Pac. 732. Thus by Militia Act, March 8, 1834, No. 97, a surgeon is a constituent part of every regiment, with the rank of a surgeon in the United States army, and his duties are similar, and he cannot charge for professional services to a soldier wounded on parade. Harral *v.* Vanorsten, 18 La. 545. So a member of the volunteer militia cannot maintain

VI. LIABILITY OF MEMBERS OF MILITIA TO EACH OTHER.

Where a military court has jurisdiction of the person and the subject-matter it is not answerable for its sentence in an action at the suit of the party,[9] unless it acted corruptly or maliciously,[10] and the officers carrying out the sentence of the court are likewise protected.[11] If, however, the court is without jurisdiction its members[12] and the officer executing the warrant[13] are liable to a civil action. If a military officer transcends the limit of his authority, and assumes cognizance of matters not within his jurisdiction, his acts are void and afford no justification to him,[14] nor to those acting under his authority.[15]

VII. LIABILITY OF MILITIA TO CIVILIANS OR TO CIVIL AUTHORITIES.

Officers and soldiers are bound to obey an order given by their superior officer, which does not expressly and clearly show on its face its own illegality and want of authority, and such order will be a protection for acts done in accordance therewith, both against civil actions[16] and criminal prosecutions.[17] In such case the superior officer is himself answerable for all acts within the fair scope of the order,[18]

an action against the colonel of his regiment for services performed pursuant to a military order given by the latter by direction of his superior officer. Savage *v.* Gibbs, 4 Gray (Mass.) 601. And under Va. Code, c. 21, §§ 304, 305, fixing the rate of compensation to be received by officers and privates when called into the actual service of the state, and providing for the payment of officers and enlisted men for services rendered pursuant to the call of the sheriff of any county or mayor of any city in case of riot, tumult, etc., or whenever called out in the aid of the civil authorities, no compensation can be allowed an officer for service on courts martial. Simons *v.* State Military Bd., 99 Va. 390, 39 S. E. 125.

9. Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150; Shoemaker *v.* Nesbit, 2 Rawle (Pa.) 201; Macon *v.* Cook, 2 Nott & M. (S. C.) 379. *Compare* Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457 [*reversing* 30 Fed. Cas. No. 17,931, 1 Cranch C. C. 262].

Reason for rule.— "It would be most mischievous and pernicious, to subject men acting in a judicial capacity, to actions, where their conduct is fair and impartial, when they are uninfluenced by any corrupt or improper motives, for a mere mistake of judgment." Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150, 160.

Special statutory provisions.— It has been held that statutes exempting military officers from actions at law for imposing fines is not unconstitutional as in carrying the right to jury trial (Merriman *v.* Bryant, 14 Conn. 200); statutes of this character have no application to actions commenced before the enactment thereof (Duffield *v.* Smith, 3 Serg. & R. (Pa.) 590).

10. Macon *v.* Cook, 2 Nott & M. (S. C.) 379.

11. Shoemaker *v.* Nesbit, 2 Rawle (Pa.) 201; Barrett *v.* Crane, 16 Vt. 246; Slade *v.* Minor, 22 Fed. Cas. No. 12,937, 2 Cranch C. C. 139. And see Ryan *v.* Ringgold, 21 Fed. Cas. No. 12,187, 3 Cranch C. C. 5.

The officer who executes a warrant for the collection of militia fines is not bound to know that the person on whom he is directed to execute it is an exempt. Fox *v.* Wood, 1 Rawle (Pa.) 143.

12. Capron *v.* Austin, 7 Johns. (N. Y.) 96.

13. Barrett *v.* Crane, 16 Vt. 246.

14. Mallory *v.* Merritt, 17 Conn. 178; Nixon *v.* Reeves, 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506; Darling *v.* Bowen, 10 Vt. 148.

15. Darling *v.* Bowen, 10 Vt. 148.

16. Despan *v.* Olney, 7 Fed. Cas. No. 3,822, 1 Curt. 306.

17. Com. *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193; Riggs *v.* State, 3 Coldw. (Tenn.) 85, 91 Am. Dec. 272.

18. Ela *v.* Smith, 5 Gray (Mass.) 121, 66 Am. Dec. 356; Moody *v.* Ward, 13 Mass. 299; Castle *v.* Duryee, 1 Abb. Dec. (N. Y.) 327, 2 Keyes 169, 30 How. Pr. 591 note; Childress *v.* Yourie, Meigs (Tenn.) 561; Despan *v.* Olney, 7 Fed. Cas. No. 3,822, 1 Curt. 306.

Applications of rule.— If an officer go through the exercise of a military drill in the public squares and business resorts of the village it is a misfeasance and he is liable for consequential damages. Childress *v.* Yourie, Meigs (Tenn.) 561. The commanding officer of a regiment may be held liable in damages for an injury caused to a person in a crowd of spectators by a musket ball fired by one of the men under his command during a parade or drill, the order to fire not being required by his public duty, and he not being proved to have taken sufficient care to see that his intention that nothing but blank cartridges should be fired should be effectually complied with by every man. Castle *v.* Duryee, 1 Abb. Dec. (N. Y.) 327, 2 Keyes 169, 30 How. Pr. 591 note.

A militia officer has the right to make use of uninclosed land as a muster ground, until the owner objects to it; and where an uninclosed field has for many years been used for that purpose, without objection, the officer may, as an incident to its use, remove all obstructions to the exercise and drill of the troops under his command, unless forbidden

but not for acts unauthorized by the order.[19] Where an officer of the militia makes a contract without authority,[20] or where he makes a contract without holding himself out expressly or ostensibly as agent,[21] the contract imposes a personal liability on him. A military company formed by voluntary enlistment, under the state law, is liable for the rent of premises hired in its behalf and used as an armory, where the contract was expressly authorized by it.[22]

MILK. A white fluid of female mammals, secreted for the nourishment of the young.[1] (Milk: Cow, see MILCH COW. Inspection of, see INSPECTION. Regulations as to Adulteration or Sale, see ADULTERATION; FOOD.)

MILL-DAM. See MILLS.

MILLINER. In common usage, a woman who makes and sells bonnets and other headgear for women.[2]

MILL-HOUSE. See MILLS.

MILLING. See MILLS; MINES AND MINERALS.

MILL PRIVILEGE. See MILLS.

MILL PROPERTY. See MILLS

MILL RUN. See MILLS.

by the proprietor to do so. Law *v.* Nettles, 2 Bailey (S. C.) 447.

Statutes staying action.— A statute providing that no civil suit shall be commenced, or, if commenced, prosecuted against any person while in the actual military service of the state, or of the United States, does not prohibit the commencement but stays the prosecution during the time limit. Donnell *v.* Stephens, 35 Mo. 441 [*overruling* in part Burns *v.* Crawford, 34 Mo. 330].

19. Ela *v.* Smith, 5 Gray (Mass.) 121, 66 Am. Dec. 356.

20. Gillespie *v.* Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715.

21. Swift *v.* Hopkins, 13 Johns. (N. Y.) 313.

22. Fox *v.* Naramore, 36 Conn. 376.

1. Webster Dict. [*quoted* in Briffitt *v.* State, 58 Wis. 39, 43, 16 N. W. 39, 46 Am. Rep. 621], where it is said: "There are other kinds of milk, however, such as 'the white juice of plants,' which is the remote definition; or milk in the cocoanut, or that in the milky-way"].

"Milk" would include cream, or milk from which the cream has not been removed. Com. *v.* Gordon, 159 Mass. 8, 33 N. E. 709.

2. Century Dict. [*quoted* in Tuscaloosa *v.* Holczstein, 134 Ala. 636, 639, 32 So. 1007, where it is said that the distinctive feature of the business is that she is not only a dealer, but in a sense a manufacturer. A merchant may sell articles of millinery, such as hats, ribbons, artificial flowers, etc., in the form in which he purchases them, and not be a milliner].

In England the term is applied to one who furnishes bonnets and dresses, or complete outfits. Century Dict. [*quoted* in Tuscaloosa *v.* Holczstein, 134 Ala. 636, 639, 32 So. 1007, where it is said: "And this idea of fabrication is prominent in other standard definitions"].

MILLS

By Francis Dana *

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I. DEFINITIONS.

A. Mill.[1] The original purpose of mills was to comminute grain for food [2] and in this sense it has been defined as a machine for grinding or comminuting any substance as grain, by rubbing and crushing it between two hard, rough, or indented surfaces.[3] But in modern usage, the term "mill" includes various other

1. **Flouring-mill defined** see 19 Cyc. 1081.
Grist-mill defined see 20 Cyc. 1367.
Sawmill defined see 25 Cyc. 1547.

2. Imperial Dict. [*quoted* in Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 39, 36 N. W. 594]; Webster Dict. [*quoted* in State *v.* Livermore, 44 N. H. 386, 387].

3. Webster Dict. [*quoted* in Sprague *v.* Lisbon, 30 Conn. 18, 20; Southwest Missouri Light Co. *v.* Scheurich, 174 Mo. 235, 243, 73 S. W. 496; State *v.* Livermore, 44 N. H. 386, 387; Halpin *v.* Ins. Co. of N. Am., 120 N. Y. 73, 77, 23 N. E. 989, 8 L. R. A. 79; Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 38, 36 N. W. 594.

* Author of "Manufactures," 26 Cyc. 517.

machines or combinations of machinery,[4] such as sawmills, cotton-mills, or woolen mills[5] to some of which the term "manufactory" or factory is also applied.[6] But not every establishment, or structure, for the accomplishment of work by machinery is a mill.[7] The term "mill" is used to denote the building or collection of buildings with machinery by which the processes of manufacturing are carried on.[8]

B. Milling. "Milling" has been held to be synonymous with "manufacturing."[9]

C. Mill-Dam. A mill-dam is a dam[10] built for the purpose of furnishing water-power for a mill.[11]

D. Mill-House. A mill-house is a building inclosing mill machinery or used for milling purposes.[12]

E. Mill Privilege. A mill privilege has been said to embrace the right which the law gives the owner to erect a mill thereon and to hold up or let out the water at the will of the occupant for the purpose of operating the same in a reasonable and beneficial manner.[13]

F. Mill Site. A mill site is said to be the same as a mill privilege,[14] and has been held to include not only all the land the mill covers,[15] but so much land as may be necessary for the purpose of erecting and working a mill.[16]

G. Mill Run. The term "mill run" used in a lumber contract has been held to mean, in effect, the entire output of a sawmill.[17]

4. Lamborn *v.* Bell, 18 Colo. 346, 350, 32 Pac. 989, 20 L. R. A. 241; Southwest Missouri Light Co. *v.* Scheurich, 174 Mo. 235, 243, 73 S. W. 496; State *v.* Livermore, 44 N. H. 386, 387; Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 38, 36 N. W. 594. See also Sprague *v.* Lisbon, 30 Conn. 18.

5. Southwest Missouri Light Co. *v.* Scheurich, 174 Mo. 235, 243, 73 S. W. 496.

6. Lamborn *v.* Bell, 18 Colo. 346, 350, 32 Pac. 989, 20 L. R. A. 241.

A smelter has been held to come within the term "mill" as used in a statute providing for mechanics' liens. McAllister *v.* Benson Min., etc., Co., 2 Ariz. 350, 16 Pac. 271.

"Mill" as distinguished from "factory" see MANUFACTURES, 26 Cyc. 530, 531.

7. McElwaine *v.* Hosey, 135 Ind. 481, 492, 35 N. E. 272 (holding that "mill," as used in a mechanic's lien law, does not embrace a boiler, engine, shafting, beam, derrick, reel, and ropes used together in drilling wells, the court saying: "They constitute a structure, not a mill"); Southwest Missouri Light Co. *v.* Scheurich, 174 Mo. 235, 243, 73 S. W. 496 (where it is said: "But even in the modern application of the word it is not used to include all kinds of machinery; we hear the terms 'saw mill,' 'cotton mill,' 'woolen mill,' 'silk mill,' but we never hear gas mill, electricity mill; and we never hear gasworks, or electricity works or waterworks called 'mills'").

8. Webster Dict. [*quoted* in State *v.* Livermore, 44 N. H. 386, 387; Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 38, 36 N. W. 594].

9. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 97 Am. St. Rep. 76, 60 L. R. A. 383 (holding that "milling," as used in a provision of the Colorado constitution, where milling purposes are excepted from the private uses for which private property may not be taken, is synonymous with the word "manufacturing"); Lamborn *v.* Bell, 18 Colo. 346, 350, 32 Pac. 989, 20 L. R. A. 241 (where it is said: "We think the term milling, as used in that provision, should be given its modern acceptation, and held as synonymous with the word manufacturing, if not of broader signification, and including that term").

Milling as mining term defined see MINES AND MINERALS.

10. Dam defined see DAM, 12 Cyc. 1193.

11. Arimond *v.* Green Bay, etc., Canal Co., 35 Wis. 41, holding that a dam to improve navigation is not a mill-dam, within a statute providing for flowage, although the power is used to propel mills.

A reservoir dam, which supplies power to mills below, may be a dam within a mill act authorizing the erection of dams, although there be no mill upon it. Tingley *v.* Gardiner, 73 Me. 63. See also Norton *v.* Hodges, 100 Mass. 241.

12. Ford *v.* State, 112 Ind. 373, 378, 14 N. E. 241.

It is otherwise defined as "the mere covering of the substantial parts of the mill." Phœnix F. Ins. Co. *v.* Gurnee, 1 Paige (N. Y.) 278, 279, 19 Am. Dec. 431.

A sawmill need not be a building or in a building. So under a statute as to the burning of any building, etc., an indictment which charges the burning of a sawmill is bad. State *v.* Livermore, 44 N. H. 386.

13. Occum Co. *v.* A. & W. Sprague Mfg. Co., 35 Conn. 496. See also Gould *v.* Boston Dock Co., 13 Gray (Mass.) 442.

14. Occum Co. *v.* A. & W. Sprague Mfg. Co., 35 Conn. 496, 508.

Mill privilege see *supra*, I, E.

15. Crosby *v.* Bradbury, 20 Me. 61.

16. Jackson *v.* Vermilyea, 6 Cow. (N. Y.) 677.

Water-power included see WATERS.

17. Wonderly *v.* Holmes Lumber Co., 56 Mich. 412 and note, 23 N. W. 79, where the

H. Mill Tally. The term "mill tally" used in a logging contract has been held to include all that is saved and set apart as proper to be classed as lumber.[18]

I. Millwright. A millwright is an engineer who designs, constructs, and erects mills, their motors, machinery, and appurtenances, particularly flouring and grist mills.[19]

J. Mill Yard. A mill yard of a sawmill is the place appropriated for the deposit of logs to be sawn, and for the piling of lumber which has been manufactured from such logs.[20]

K. Tide-Mill. A tide-mill is a mill placed upon a dam thrown across a creek or inlet from the sea, in which the tide naturally ebbs and flows, and wherein water is raised by the flow of the tide, and at high water and the turn of the tide, the water is stopped by the dam and the sluice-gates, and kept to that height, until the tide has so far ebbed below the dam, as to create a fall, by means of which the mill is worked a few hours, until the return of the flood tide prevents it.[21]

II. MILL PROPERTY.

A. Nature of Property — Whether Realty or Personalty.[22] In general mills are *prima facie* regarded as realty,[23] and a mill is undoubtedly realty when set up as a permanent addition thereto by the owner of the land,[24] or maintained as such.[25] But a mill may, under some circumstances, be personal property.[26]

B. Property Included Under the Term "Mill." In common sense and in legal interpretation a mill does not mean merely the building in which the busi-

court interpreting a clause in a contract which read in part, "hereby agrees to sell unto said party of the second part all of the white pine lumber which has been sawed for him by the Wagar Lumber Company . . . at and for the contract purchase price of thirteen dollars per thousand feet, board measure, mill-run; said lumber shall include all grades of lumber above mill-culls," said: "The fact is that the term ['mill run'] not only indicates and specifies that the defendant was to take all the grades save the one excepted out, as they came from the mill, but also that what the lumber came to at the price agreed upon per thousand was to be determined in the same way."

18. Corneil *v.* New Era Lumber Co., 71 Mich. 350, 39 N. W. 7, holding that mill-culls were included.

19. Century Dict. [*quoted* in Cole *v.* Warren Mfg. Co., 63 N. J. L. 626, 630, 44 Atl. 647].

20. People *v.* Kingman, 24 N. Y. 559, 562.

21. Murdock *v.* Stickney, 8 Cush. (Mass.) 113.

22. Fixtures generally see FIXTURES, 19 Cyc. 1033.

23. Chatterton *v.* Saul, 16 Ill. 149 (holding that in replevin for a steam sawmill building, fixtures, and machinery, situated on a tract of land described, the complaint was insufficient for lack of allegations to show that the property was personal estate); Maddox *v.* Goddard, 15 Me. 218, 33 Am. Dec. 604 (holding that mill and gearings are real estate, and the action for the destruction of such property is in trespass *quare clausum* (even by one tenant in common against another) and not in trover or trespass to personalty); Robertson *v.* Crosett, 39 Mich. 777 (holding that *prima facie* a sawmill and all its appointments constitute part of the realty); Newhall *v.* Kinney, 56 Vt. 591 (holding that an attachment of real estate on which is a sawmill, includes a circular sawmill which is in, and is a part of, the mill, so as to support a levy on the latter under such attachment). See also Fisher *v.* Dixon, 12 Cl. & F. 312, 9 Jur. 883, 8 Eng. Reprint 1426 [*cited* in Mather *v.* Fraser, 2 Jur. N. S. 900, 2 Kay & J. 536, 26 L. J. Ch. 361, 4 Wkly. Rep. 387].

Whether sawmill passes to heir as realty see FIXTURES, 19 Cyc. 1058 note 14.

24. Markle *v.* Stackhouse, 65 Ark. 23, 44 S. W. 808, holding that a sawmill erected by the vendee of the land on which it is set up, and intended by him as a permanent addition thereto, is subject to the vendor's lien on the land for purchase-money. See also Steward *v.* Lombe, 1 B. & B. 506, 4 Moore C. P. 281, 21 Rev. Rep. 700, 5 E. C. L. 768. And see Wells *v.* Francis, 7 Colo. 396, 4 Pac. 49.

25. Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605.

26. Empire Lumber Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972 (holding that sawmills and the machinery connected therewith are "manifestly treated as personalty" in a statute granting a lien upon same for supplies); Ford *v.* State, 112 Ind. 373, 379, 14 N. E. 241 (where it is said: "A 'mill house' may, or it may not, be personal property"); Brearley *v.* Cox, 24 N. J. L. 287; Hughes *v.* Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2 (holding that a portable sawmill set up by the lessee of the land only for sawing logs into lumber and "not to promote the convenient use of land but to be used for some temporary purpose, external to the land, and the land is used only as a foundation, does not become part of the realty"). See also

ness is carried on; but includes the site,[27] dam,[28] water privileges,[29] and other things annexed to the freehold, necessary to its beneficial enjoyment,[30] as the machinery used with the mill and necessary thereto.[31]

Steward *v.* Lombe, 1 B. & B. 506, 4 Moore C. P. 281, 21 Rev. Rep. 700, 5 E. C. L. 768.

27. The term "mill," used in a deed or will, includes in itself the land upon which the mill stands, with so much of the land adjacent as is necessary for its use. Farrar *v.* Cooper, 34 Me. 394, 397 (where it is said: "A conveyance of a mill . . . will operate to convey land occupied for the purpose, unless there be in the conveyance language indicating a different intention"); Auburn Cong. Church *v.* Walker, 124 Mass. 69, 71 (where it is said that the word "mills" is "efficient to convey the mill with the land on which it stands and the adjacent land necessary to the enjoyment of it"); Forbush *v.* Lombard, 13 Metc. (Mass.) 109 (holding that the word "mill" in a conveyance passes, by implication, the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it); Gibson *v.* Brockway, 8 N. H. 465, 471, 31 Am. Dec. 200 [*cited* in Sparks *v.* Hess, 15 Cal. 186, 196; Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679] (holding that the grant of one half of a corn mill in a deed conveys "the land on which the same was situated"); Whitney *v.* Olney, 29 Fed. Cas. No. 17,595, 3 Mason 280, 281 [*cited* in Sparkes *v.* Hess, 15 Cal. 186, 196; Maddox *v.* Goddard, 15 Me. 218, 33 Am. Dec. 604] (holding that by a will the land adjacent to the mill "for the necessary use of it and commonly used with it" as well as the land under it, passed by force of the word "mill," "as parcel thereof," independently of the word "appurtenances," on which the court laid no stress, as not applying to land). See Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679; Scott *v.* Michael, 129 Ind. 250, 28 N. E. 546. *Compare* Blake *v.* Clark, 6 Me. 436, 439, holding that the fee of the land on which the mill stands including land over and upon which the slip, or any other necessary projection from the mill passes, may be carried by the term "mill" as used in a conveyance, the court saying, however, that "probably no authority can be adduced in which it has been held to convey, *ex vi termini*, any part of the adjoining land." And see DEEDS, 13 Cyc. 641 note 61.

"The property known as mill property," in a contract of sale, includes the land on which the mill stands, and adjacent thereto, necessary for its use and actually used therewith. Van Horn *v.* Richardson, 24 Wis. 245.

A mill yard not shown to be necessary to the operation of the mill does not pass under the word "mill" in a deed. Forbush *v.* Lombard, 13 Metc. (Mass.) 109.

A conveyance of a mill privilege, or of the privilege of a mill, passes the land occupied for the purpose, unless there be in the conveyance language to express a different intention. Farrar *v.* Cooper, 34 Me. 394. See also Moore *v.* Fletcher, 16 Me. 63, 33 Am. Dec. 633.

28. Scott *v.* Michael, 129 Ind. 250, 28 N. E. 546; Scheible *v.* Slagle, 89 Ind. 323, holding that the conveyance of a mill embraces the right to maintain a mill-dam at such height as will furnish the water necessary to supply power to effectually and properly propel the mill. See also WATERS.

29. See cases cited *infra*, this note.

The deed of a mill passes the water privileges without any special provision. Scott *v.* Michael, 129 Ind. 250, 28 N. E. 546; Blake *v.* Clark, 6 Me. 436; Richardson *v.* Bigelow, 15 Gray (Mass.) 154, 156 (where it is said: "The grant of a mill carries with it, by necessary implication, the right to the use of the watercourse coming to the mill and furnishing power for working it, and also to the canal or raceway which carries the water from the mill, to the full extent of the grantor's rights and power so to grant them"); Wetmore *v.* White, 2 Cai. Cas. (N. Y.) 87, 2 Am. Dec. 323. See Prescott *v.* White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266. And see WATERS.

Water-power is included with the mill as a subject of valuation, so that the owner of a mill-dam lying in two towns in one state is to be taxed on the water-power only in the town in which his mill is situated. Boston Mfg. Co. *v.* Newton, 22 Pick. (Mass.) 22. See also Bellows Falls Canal Co. *v.* Rockingham, 37 Vt. 622.

30. Scott *v.* Michael, 129 Ind. 250, 254, 28 N. E. 546 (where it is said: "The conveyance of mill property carries with it all the incidents and privileges connected with its use"); Maddox *v.* Goddard, 15 Me. 218, 224, 33 Am. Dec. 604 (where it is said: "When a conveyance speaks of the mill only, without naming the privilege, it has been decided that any easement which has been used with the mill will pass"); Blake *v.* Clark, 6 Me. 436, 439 (where it is said: "The term [mill] may embrace the free use of the head of water, existing at the time of the conveyance, as also a right of way or any other easement which has been used with the mill, and which is necessary to its enjoyment"); Whitney *v.* Olney, 29 Fed. Cas. No. 17,595, 3 Mason 280. And see Scott *v.* Stetler, 128 Ind. 385, 27 N. E. 721; Lammott *v.* Ewers, 106 Ind. 310, 6 N. E. 636, 55 Am. Rep. 746.

All incidents and appurtenances so far as the right to convey the same existed in the grantor have been held to be conveyed by the grant of an undivided half of a sawmill or grist-mill. Rackley *v.* Sprague, 17 Me. 281, 285.

31. Farrar *v.* Stackpole, 6 Me. 154, 157, 19 Am. Dec. 201 (where it was said: "These establishments have in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building, which shelters,

C. Appurtenances.[32] Although the word "appurtenances" need not be used in a conveyance or will of mill property,[33] the term when used has been held to include everything essential to the free and full enjoyment of the mill and requisite to the establishment,[34] such as the dam[35] and the water-rights.[36] So it has been held to include land, which was always used with the mill,[37] although the general rule is that the term "appurtenances" does not properly apply to any of the realty connected with a mill.[38]

III. ESTABLISHMENT AND MAINTENANCE.

At common law every citizen has the right to build and maintain a mill upon his own property,[39] yet that right must of course be exercised with due regard to

encloses, and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts or to the building; but it would be a very narrow construction, which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory"); Teaff *v.* Hewitt, 1 Ohio St. 511, 536, 59 Am. Dec. 634 (where it is said: "It is true, that where a manufactory or a mill is conveyed or delivered, by any general name or description which embraces all its essential parts as such manufactory or mill, the machinery and all the necessary parts of the establishment pass, whether affixed to the freehold or not"). See also FIXTURES, 19 Cyc. 1060 text and note 19, 1063 text and note 39.

Insurance on a mortgage interest in a mill has been held to cover "the machinery and fixtures, which, in legal contemplation, were included in the mortgage." Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343, 353, 14 Am. Rep. 271.

Sale of a rolling-mill passes the rolls, whether in place or not, and also defective iron plates used to cover the floor, although such plates are not attached to the floor, or made for the purpose, but necessary as so used to the operation of the mill. Pyle *v.* Pennock, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517.

Mortgage and sale of a rolling-mill, with the apparatus, etc., attached to the same, passes rolls used in the mill, whether in place or not. Voorhis *v.* Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490.

Separate building containing machinery.—An engine-room twenty-two feet distant from the mill building, but supplying the mill with power, is covered, with the machinery therein, by the words "planing-mill building and addition . . . on machinery, including shafting, gearing, belting, saws, tools, force-pump and hose therein," in an insurance policy. Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 36 N. W. 594.

Descent of mill machinery to heirs see House *v.* House, 10 Paige (N. Y.) 158.

As used in a tax law, "mill" has been held to include machinery. Sprague *v.* Lisbon, 30 Conn. 18. See also Patterson *v.* Delaware County, 70 Pa. St. 381.

Machinery may be separable from the fee of the mill, as where it was furnished by the lessee of the mill and so annexed by him that, although it would have become part of the realty as between a vendor and vendee, it would not as between lessee and lessor, and in such case it has been held that, when the lessee afterward acquired the fee subsequent to the mortgage executed by the lessor, the machinery did not merge, along with the lease, in the fee, so as to be subject to the mortgage. Globe Marble Mills Co. *v.* Quinn, 76 N. Y. 23, 32 Am. Rep. 259.

"Mill" as used in a statute granting a lien on sawmills for supplies, comprehends all engines, boilers, machinery of every kind, and all hardware connected with and used, or proper for use, in the mill establishment regarded as a going concern for the purposes for which it was erected, but does not include any buildings or any detached personalty, such as vehicles, draft animals, etc. Empire Lumber Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972.

32. **Construction of "appurtenances" in conveyances** generally see DEEDS, 13 Cyc. 639.

33. Scott *v.* Michael, 129 Ind. 250, 28 N. E. 546. See also *supra*, II, B, text and note 27 *et seq.*

34. Blaine *v.* Chambers, 1 Serg. & R. (Pa.) 169, devise of grist-mill and appurtenances.

35. Blaine *v.* Chambers, 1 Serg. & R. (Pa.) 169. See also WATERS.

36. Burr *v.* Mills, 21 Wend. (N. Y.) 290 (devise); Strickler *v.* Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Rep. 649 (conveyance); Pickering *v.* Stapler, 5 Serg. & R. (Pa.) 107, 9 Am. Dec. 336 (conveyance). See also WATERS.

37. Blaine *v.* Chambers, 1 Serg. & R. (Pa.) 169.

38. Leonard *v.* White, 7 Mass. 6, 5 Am. Dec. 19 (holding that the term "appurtenances" does not pass the soil of a road, used as a way to a mill, as land cannot be appurtenant, although the right of way may pass as an appurtenance); Whitney *v.* Olney, 29 Fed. Cas. No. 17,595, 3 Mason 280; Archer *v.* Bennett, 1 Lev. 131.

39. Beissell *v.* Sholl, 4 Dall. (Pa.) 211, 1 L. ed. 804, where it is said that "every man . . . has an unquestionable right to erect a mill upon his own land; and to use the water, passing through his land, as he pleases; subject only to this limitation, that his mill must not be so constructed and employed, as to injure his neighbor's mill; and that, after

the rights of others.[40] Mills, being deemed a great public convenience and necessity, have from early times been favored by the courts and the legislature,[41] and this favor, it has been said, has continued, although the reasons in which the policy originated have long since ceased to exist.[42] Accordingly for the encouragement of mills, and because of their public usefulness, general mill acts authorizing under prescribed conditions the erection of dams and the flowage of lands for milling purposes have been passed and upheld in many of the states.[43] Public aid to mills has been held to be authorized under statutes permitting municipalities to borrow money and issue bonds for internal improvements.[44]

IV. REGULATION.

Whether in the exercise of the police power[45] or of eminent domain[46] the legislature frequently provides for the regulation of mills, as for instance, by fixing tolls of grist-mills,[47] imposing a liability for a refusal on the part of a mill-owner to receive grain for grinding,[48] or by making provision for repairs of mills owned by joint tenants or tenants in common.[49]

MILL SITE. See MILLS.

MILL TALLY. See MILLS.

MILLWRIGHT. See MILLS.

MILL YARD. See MILLS.

MINATUR INNOCENTIBUS QUI PARCIT NOCENTIBUS. A maxim meaning "He threatens the innocent who spares the guilty."[1]

MIND.[2] In its legal sense, a term meaning the ability to will, to direct, to

using the water, he returns the stream to its ancient channel." And see WATERS.

"It is no nuisance or wrong for one man to erect a mill so near to another as to draw away its custom, or to enter into competition with it in any manner whatever." Binney's Case, 2 Bland (Md.) 99, 119.

Statutes requiring application to court for permission to build mill see McDougle *v.* Clark, 7 B. Mon. (Ky.) 448; Payne *v.* Taylor, 3 A. K. Marsh. (Ky.) 328; Morgan *v.* Banta, 1 Bibb (Ky.) 579; Webb *v.* Com., 2 Leigh (Va.) 721. And see WATERS.

40. Beissell *v.* Sholl, 4 Dall. (Pa.) 211, 1 L. ed. 804. See also WATERS.

Nuisances arising from mills see NUISANCES.

41. Olmstead *v.* Camp, 33 Conn. 532, 81 Am. Dec. 221; Jordan *v.* Woodward, 40 Me. 317, 323 (where it was said: "In the early history of this country, the erection of mills was deemed a great public convenience and necessity, and as such deserving the special protection of the legislative power. There were then few mills in the country, and little capital wherewith to construct them, while land was abundant, and to a great extent unoccupied, and comparatively of little value. Hence the origin of the policy and grounds of its justification or excuse"); Wolcott Woolen Mfg. Co. *v.* Upham, 5 Pick. (Mass.) 292; Strickler *v.* Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649.

42. Jordan *v.* Woodward, 40 Me. 317; Wolcott Woolen Mfg. Co. *v.* Upham, 5 Pick. (Mass.) 292. And see EMINENT DOMAIN, 15 Cyc. 597 note 37 *et seq.*

43. See EMINENT DOMAIN, 15 Cyc. 596 *et seq.*; WATERS.

44. State *v.* Clay County, 20 Nebr. 452, 30 N. W. 528 [*following* Traver *v.* Merrick County, 14 Nebr. 327, 15 N. W. 690, 45 Am. Rep. 111] (bonds issued for a grist-mill propelled by water); Burlington Tp. *v.* Beasley, 94 U. S. 310, 24 L. ed. 161 (applying Kansas statute to grist-mill operated by steam). See also Blair *v.* Cuming County, 111 U. S. 363, 4 S. Ct. 449, 28 L. ed. 457.

45. Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 504; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77. And see, generally, CONSTITUTIONAL LAW, 8 Cyc. 872 *et seq.*

46. State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 504.

47. Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221; State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 504 (holding that the proprietors of grist-mills are bound to receive and grind grain for the toll fixed by statute, and that a contract by which the customer had agreed to pay more did not excuse a breach of that duty); Traver *v.* Merrick County, 14 Nebr. 327, 15 N. W. 690, 45 Am. Rep. 111; Bellows *v.* Dewey, 9 N. H. 278. See also Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221.

48. State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 504; Merrill *v.* Cahill, 8 Mich. 55.

49. Roberts *v.* Peavey, 27 N. H. 477; Bellows *v.* Dewey, 9 N. H. 278; Webb *v.* Com., 2 Leigh (Va.) 721.

1. Black L. Dict. [*citing* 4 Coke 45].

2. "That subtle essence which we call 'mind' defies, of course, ocular inspection. It can only be known by its outward mani-

permit, or to assent;[3] a word sometimes used as convertible with the word MEMORY,[4] *q. v.* (See, generally, INSANE PERSONS.)

MINE. See MINES AND MINERALS.

MINER. See MINES AND MINERALS.

MINERAL. See MINES AND MINERALS.

MINER'S INCH. The amount of water that will pass in twenty-four hours through an opening one inch square under a pressure of six inches.[5]

festations, and they are found in the language and conduct of the man." Guiteau's Case, 10 Fed. 161, 167.

3. McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 492, 39 Am. Rep. 606, where it is said: "A corporation exerts its mind each time that it assents to the terms of the contract."

4. *In re* Forman, 54 Barb. (N. Y.) 274, 286, where it is said: "The use of the words mind and memory as convertible terms is not so unphilosophical as it might at first seem to be, for without memory there could be no mind, properly speaking. Without any memory, a person would be the mere recipient of a succession of present sensations, like the lowest type of animal life."

5. Century Dict.

The term "miner's inch" cannot be definite without the specification of the head or pressure. Longmire *v.* Smith, 26 Wash. 439, 450, 67 Pac. 246, 58 L. R. A. 308.

MINES AND MINERALS

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CROSS-REFERENCES

For Matters Relating to:
Adverse Possession of Mines, see ADVERSE POSSESSION.
Construction and Operation of Gas Works, see GAS.
Customs Duties on Metals, see CUSTOMS DUTIES.
Partition of Mining Land, see PARTITION.
Public Land Generally, see PUBLIC LANDS.
Taxation of Mine, see TAXATION.
Waters:
Generally, see WATERS.
Obstruction of Navigable Waters, see NAVIGABLE WATERS.
Water Rights For Placer and Hydraulic Mining, see WATERS.

I. INTRODUCTORY AND HISTORICAL.

A. Outline and Scope of Article. In the second section of the article are given the definitions of certain mining terms and the meaning of certain phrases employed in the law of mines and minerals, and also references to other parts of the article where some of these terms and phrases are defined or explained.[1] The third division of this article shall be confined to the consideration of the method of initiating rights and acquiring title to mines or minerals on the public domain;[2] the rights connected therewith, or accruing therefrom, and all such departures from or variations of the common law as are peculiarly applicable to the subject.[3] In the fourth division the general law of conveyances, transfers, and contracts,[4] and in the fifth division the operation of mines, and the rights and remedies attaching thereto, shall be considered.[5]

B. Historical[6] — 1. IN GENERAL. A brief reference to the genesis and development of this first branch of mining law, being *sui generis*, seems important to a full understanding and appreciation of its terms. Soon after the discovery of gold in California in 1848, thousands of men of various nations proceeded to this new El Dorado, impressed with the belief that there was gold sufficient to satisfy the desires of all, which was to be had for the mere mining of it. California had lately become the property of the United States by concession from Mexico through the treaty of Gaudalupe-Hidalgo. No distinctive government was provided, but the territory thus acquired was under the military authority of the United States. Those who came within its borders in pursuit of gold

1. See *infra*, II.
2. See *infra*, III.
3. Government mining leases see *infra*, III, B, 12.
4. See *infra*, IV.
5. See *infra*, V.
6. For a more extended history of mining law and the development thereof see 1 Lindley Mines (2d ed.), §§ 1, 13, 28 *et seq.*; 1 Snyder Mines, §§ 1, 72.

soon found that the common law with all its elasticity could not be made applicable to the various conditions which presented themselves, because the like had never been known. There was no legislative body to enact laws applicable to these conditions, and no organized courts to enforce rights and grant effective remedies. These conditions presenting themselves, there grew up at an early day certain peculiar usages and customs,[7] applicable to this new industry, which latter were reduced to writing and adopted by the miners in various localities.[8] Such customs and usages and such rules could only have the effect of positive law by virtue of voluntary obedience thereto by a majority of all.[9] A method was thus provided whereby rights to mine were initiated and protected and all rights of liberty and property recognized. Their fairness and equity[10] is best illustrated by the fact that they were recognized by the courts[11] and adopted by the legislature after the organization of a local political government; and by the United States in the enactment of the mining statutes.[12] For eighteen years after the treaty above mentioned, whereby the government acquired the title to these lands, congress remained inert and enacted no law recognizing the rights of miners to work them, or in any wise providing for their disposal. The miners, however, continued to extract the valuable metals therefrom, without leave or license. The supreme court of California at first held that all mineral land within the borders of the state belonged to the state.[13] After some years, however, and upon careful consideration, the court receded from this doctrine, and properly held that such lands belonged to the United States.[14] Because of the inaction of congress, some courts indulged a presumption of the assent of, or an implied license from, the government to take possession of and work the mineral land.[15]

2. Recognition of Rights of Miners by Congress. The first recognition of the rights of miners by congress was in the passage of the act of Feb. 27, 1865,[16] by which it was provided that "no possessory action between persons, in any court of the United States, for the recovery of any mining title or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession." Soon thereafter, and on July 4, 1866,[17] congress reserved all lands valuable for minerals from sale "except as otherwise expressly directed by law." Soon thereafter, and on July 26, 1866,[18] congress enacted the first law providing for the location and patenting of quartz lodes. This was followed by the act of July 9, 1870,[19] providing for the location and patenting of placers. On

7. Miners' usages and customs generally see *infra*, III, B, 5, a.

8. The miners organized mining districts and promulgated written rules and regulations, based upon these customs and usages, for their guidance in the acquirement of mining rights and for the protection of their lives, liberty, and property.

9. Custom and usage generally see Customs and Usages, 12 Cyc. 1001 *et seq.*

10. It is greatly to the credit of these miners that such customs and usages and rules and regulations were builded upon the foundations of natural right, equity, and justice.

11. For decisions as to miners' customs and usages and their rules and regulations in the early days of mining see Morton *v.* Solambo Copper Min. Co., 26 Cal. 527; Wolfley *v.* Lebanon Min. Co., 4 Colo. 112; Sullivan *v.* Hense, 2 Colo. 424; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Jennison *v.* Kirk, 98 U. S. 453, 25 L. ed. 240; Atchison *v.* Peterson, 20 Wall. (U. S.) 507, 22 L. ed. 414.

12. See *infra*, I, B, 2; and statutes referred to *passim* this article.

13. Hicks *v.* Bell, 3 Cal. 219 [*overruled* in Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123].

14. Doran *v.* Central Pac. R. Co., 24 Cal. 245; Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123 [*overruling* Hicks *v.* Bell, 3 Cal. 219].

15. Wolfley *v.* Lebanon Min. Co., 4 Colo. 112; Gold Hill Quartz Min. Co. *v.* Ish, 5 Oreg. 104.

16. U. S. Rev. St. (1878) § 910 [U. S. Comp. St. (1901) p. 679].

For a history of the first congressional action see 3 Wall. (U. S.) appendix 1; Congressional Globe (1866); Rockwell Spanish & Am. L. p. 409 *et seq.*; Yale Min. & Water Rights.

17. U. S. Rev. St. (1878) § 2318 [U. S. Comp. St. (1901) p. 1423].

18. 14 U. S. St. at L. 251.

19. 16 U. S. St. at L. 217.

May 10, 1872, the acts of 1866 and 1870 were revised and amended,[20] and this act, with the subsequent amendments,[21] now constitutes the general Congressional Mineral Act under which all mineral ground upon the public domain may be located and patented.

II. MINING TERMS AND PHRASES.[22]

A. "Mine." The primary meaning of the word "mine," standing alone, is an underground excavation made for the purpose of getting minerals;[23] a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging.[24] It is also extended to a quarry or place where anything is

20. 17 U. S. St. at L. 91; U. S. Rev. St. (1878) § 2318 [U. S. Comp. St. (1901) p. 1422].

21. 17 U. S. St. at L. 91; U. S. Rev. St. (1878) § 2318 *et seq.* [U. S. Comp. St. (1901) p. 1422 *et seq.*].

22. "Abandonment of claim" see *infra*, III, B, 8, a.
"Below" see *infra*, III, B, 6, d.
"Beyond" see *infra*, III, B, 6, d.
"Case" or "canister" see *infra*, V, A, 1, note 10.
"Claimant" see *infra*, III, B, 7, f, note 85.
"Cost-book mine" see *infra*, V, B, 3.
"Dead" or "sleeping" rent see *infra*, IV, C, 2, k.
"Discovery" see *infra*, III, B, 5, c, (II), (A).
"Discovery shaft" see *infra*, III, B, 5, c, (II), (D).
"Downcast" see 14 Cyc. 1061.
"Drifting in a tunnel" see 14 Cyc. 1075.
"Dummy" see 14 Cyc. 1088.
"Each year" see *infra*, III, B, 7, c.
"Explore for" see 18 Cyc. 1507.
"Face of tunnel" see *infra*, III, B, 6, e, (I).
"Final receipt" see *infra*, III, B, 10, g, (I).
"Found or produced in paying quantities" see *infra*, IV, C, 3, b, note 46; and IV, C, 3, g, (III), note 81.
"Grubstake contract" see *infra*, V, B, 1, a, (IV).
"Known lode or vein" see *infra*, III, B, 10, f, (I), (B).
"Land district" see 24 Cyc. 842.
"Lifts" see *infra*, III, B, 8, c, note 64.
"Line of tunnel" see *infra*, III, B, 6, e, (I).
"Location certificate" see *infra*, III, B, 5, d, (VI), (A).
"Mining partnership" see *infra*, V, B, 1, a, (I).
"Natural flow" see NATURAL FLOW.
"Natural slate" see NATURAL SLATE.
"Ordinary precautions" as to surface support see *infra*, V, C, 2, b, (IV), (B), (I), note 54.
"Out of mine" see *infra*, V, A, 1, note 10.
"Owner" of mine see *infra*, V, A, 8, note 27.
"Rents," "royalties," and terms in connection therewith see *infra*, IV, C, 2, k.
"Space of intersection" see *infra*, III, B, 6, c, (III); IV, A, 2, a, (I), (A), note 25.
"Washeries" see *infra*, V, A, 1, note 2.
"Working shaft" see *infra*, V, A, 1, note 9.
"Worth" as to work and improvements on claim see *infra*, III, B, 7, b.

23. Bell *v.* Wilson, L. R. 1 Ch. 303, 308, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493; Midland R. Co. *v.* Haunchwood Brick, etc., Co., 20 Ch. D. 552, 555, 51 L. J. Ch. 778, 46 L. T. Rep. N. S. 301, 30 Wkly. Rep. 640.

In leases and similar documents it is commonly used in a slightly different sense. For instance, "All that mine, vein, or seam of coal, &c." There the word includes the stratum of the minerals as well as the excavation made to win it. Midland R. Co. *v.* Haunchwood Brick, etc., Co., 20 Ch. D. 552, 555, 51 L. J. Ch. 778, 46 L. T. Rep. N. S. 301, 30 Wkly. Rep. 640.

24. Webster Dict. [*quoted* in McCurtain *v.* Grady, 1 Indian Terr. 107, 123, 38 S. W. 65; Coleman *v.* Coleman, 1 Pearson (Pa.) 470, 474; Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550]; Springside Coal Min. Co. *v.* Grogan, 53 Ill. App. 60, 65; Shaw *v.* Wallace, 25 N. J. L. 453, 462.

Other definitions are: "[As a noun] an excavation in the earth from which some useful product is extracted; a deposit of useful material." English L. Dict.

"An excavation made for obtaining minerals from the bowels of the earth." Bouvier L. Dict. [*quoted* in Coleman *v.* Coleman, 1 Pearson (Pa.) 470, 475].

Character of substance obtained — valuable deposit.—Whether any excavation in the earth be a mine or not is said to depend upon the mode in which it is worked, and not on the substance obtained from it. Rex *v.* Dunsford, 2 A. & E. 568, 1 Harr. & W. 93, 4 L. J. M. C. 59, 4 N. & M. 349, 29 E. C. L. 267. See also Rex *v.* Brettell, 3 B. & Ad. 424, 1 L. J. M. C. 46, 23 E. C. L. 192; Rex *v.* Sedgley, 2 B. & Ad. 65, 9 L. J. M. C. O. S. 61, 22 E. C. L. 37, in which cases the substances, clay in the first and limestone in the second, were procured by sinking perpendicular shafts from the surface of the land, and it was held that these were mines and not ratable for the poor. Under statute reserving mines, the federal and state courts define the term "mine" as including only mines valuable for their minerals, or, as expressed in the statute, "valuable mineral deposits." Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 123, 64 Pac. 113; Callahan *v.* James, (Cal. 1902) 71 Pac. 104, 105; Smith *v.* Hill, 89 Cal. 122, 125, 26 Pac. 644; Richards *v.* Dower, 81 Cal. 44, 50, 22 Pac. 304; Dower *v.* Richards, 151 U. S. 658, 662, 14 S. Ct. 452, 38 L. ed. 305; Davis *v.* Wiebbold, 139 U. S.

dug.[25] The term appears to be synonymous in its meaning with the term "vein" or "lode,"[26] and is used to include the bed or vein of ore into which the pit enters, so far as may be necessary to the working of the mine; and the whole series of shafts and subterranean passages and chambers connected with it.[27]

B. "Mineral."[28] A mineral is a natural body destitute of organization or life.[29] The word is evidently derived from mine, as being that which is usually obtained from a mine,[30] but mineral bodies occur in three physical conditions of solid, liquid, and gas,[31] and although the term is more frequently applied to substances containing metals, in its proper sense it includes all fossil bodies or matters dug out of mines,[32] and is not confined to metals only,[33] but primarily

507, 517, 11 S. Ct. 628, 35 L. ed. 238. See also Francoeur *v.* Newhouse, 40 Fed. 618, 43 Fed. 236. It does not include mere masses of non-mineralized rock, whether rock in place or scattered about through the soil. Wheeler *v.* Smith, 5 Wash. 704, 707, 32 Pac. 784.

Coal mine see 7 Cyc. 266.

Colliery see 7 Cyc. 298.

25. Barber L. Dict. [*quoted* in Coleman *v.* Coleman, 1 Pearson (Pa.) 470, 475]; Jacob L. Dict. [*quoted* in Coleman *v.* Coleman, *supra*; Rosse *v.* Wainman, 15 L. J. Exch. 67, 72, 14 M. & W. 859. See *infra*, V, A, 1, 2, 3, 4.

Distinguished from quarry.— It is also said to be a work for the excavation of minerals by means of pits, shafts, levels, tunnels, etc., as distinguished from a quarry where the whole excavation is open. Webster Dict. [*quoted* in Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550]; Murray *v.* Allred, 100 Tenn. 100, 110, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249. See also Rex *v.* Woodland, 2 East 164, 167.

26. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 51, 11 Pac. 515. See also *infra*, II, C, 3.

27. Shaw *v.* Wallace, 25 N. J. L. 453, 462 (holding, however, that neither in ordinary parlance, nor in strict technical language, is a mine understood to indicate the entire ore bed with which the shaft may be connected); Com. *v.* Brookwood Coal Co., 25 Pa. Co. Ct. 55, 56 (holding that under the statute in Pennsylvania regulating the operation of coal mines the term "mine" includes all underground workings and excavations, and shafts, tunnels, and other ways and openings; also all such shafts, slopes, tunnels, and other openings in the course of being sunk or driven, together with all roads, appliances, machinery, and materials connected with the same below the surface). See also *In re* Mine Foremen's Qualifications, 17 Pa. Co. Ct. 99, 100. In Tredinnick *v.* Red Cloud Consol. Min. Co., 72 Cal. 78, 81, 13 Pac. 152, and Smith *v.* Sherman Min. Co., 12 Mont. 524, 529, 31 Pac. 72, it is held that by the word "mine" was not meant "a subterranean cavity or passage, especially a pit or excavation in the earth, from which metallic ores or other mineral substances are taken by digging," as that word is defined by Webster, but the whole claim or body of mining ground.

Worked vein.— The term "mine," when applied to coal, is generally equivalent to a worked vein, for by working the vein it becomes a mine. Westmoreland Coal Co.'s Appeal, 85 Pa. St. 344, 346.

An unopened seam of coal is not a coal mine. Springside Coal Min. Co. *v.* Grogan, 53 Ill. App. 60, 65 [*quoting* Astry *v.* Ballard, 2 Morr. Min. Rep. 291].

28. **Tailings** are the refuse part of stamped ore, thrown behind the tail. Webster Int. Dict.

29. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, 519.

Other definitions are: "Anything that grows in mines and contains metals." Jacob L. Dict. [*quoted* in Coleman *v.* Coleman, 1 Pearson (Pa.) 470, 475].

"Every substance which can be got from underneath the surface of the earth for the purpose of profit." Hext *v.* Gill, L. R. 7 Ch. 699, 712, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 291, 20 Wkly. Rep. 957.

"Any inorganic species having a definite chemical composition." Webster Dict. [*quoted* in Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550].

"All the substances which now form or which once formed a part of the solid body of the earth, both external and internal, and which are now destitute of or incapable of supporting animal or vegetable life." Bainbridge Mines (4th ed.) p. 1 [*quoted* in Northern Pac. R. Co. *v.* Soderberg, 104 Fed. 425, 428, 43 C. C. A. 620].

"Those bodies which are destitute of organism, and which naturally exist within the earth or its surface." Cleveland Mineralogy, p. 1 [*quoted* in Murray *v.* Allred, 100 Tenn. 100, 113, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249].

"Any constituent of the earth's crust; more specifically an inorganic body occurring in nature, homogeneous, and having a definite chemical composition which can be expressed by a chemical formula, and, further having certain distinguishing physical characteristics." Century Dict. [*quoted* in Northern Pac. R. Co. *v.* Soderberg, 104 Fed. 425, 428, 43 C. C. A. 620].

30. Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550.

31. Ontario Natural Gas Co. *v.* Gosfield, 18 Ont. App. 626, 629.

32. Doster *v.* Friedensville Zinc Co., 140 Pa. St. 147, 151, 21 Atl. 251; Rosse *v.* Wainman, 15 L. J. Exch. 67, 72, 14 M. & W. 859.

33. Hartwell *v.* Camman, 10 N. J. Eq. 128, 136, 64 Am. Dec. 448; Murray *v.* Allred, 100 Tenn. 100, 117, 43 S. W. 355, 66 Am. St.

means all substances other than the agricultural surface of the ground which may be got for manufacturing or mercantile purposes,[34] such as stone or clay,[35] whether got from a mine, as the word would seem to imply, or by open working,[36] and whether containing metallic substances or substances entirely non-metallic.[37] So it includes all metallic ores,[38] slate and coprolites,[39] calk and calcspar,[40] coal,[41] and salt.[42] In the broadest sense, as belonging to one of the three great divisions of matter, animal, vegetable, and mineral, sand of course is a mineral. In the more restricted scientific sense sand may or may not be a mineral according to what it is composed of.[43] So where parties do not appear to have intended a different

Rep. 740, 39 L. R. A. 249; Northern Pac. R. Co. *v.* Soderberg, 99 Fed. 506, 507.

Dr. Johnson says, that "all metals are minerals, but all minerals are not metals." Rosse *v.* Wainman, 15 L. J. Exch. 67, 72, 14 M. & W. 859.

34. Handler *v.* Lehigh Valley R. Co., 209 Pa. St. 256, 260, 58 Atl. 486, 103 Am. St. Rep. 1005.

35. Hartwell *v.* Camman, 12 N. J. Eq. 128, 136, 64 Am. Dec. 448 (paint stone worked by the ordinary means of mining); Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 506, 42 N. E. 186, 49 Am. St. Rep. 683 (holding that the words "minerals and ores" in a deed, standing alone, will be construed to include granite, but where the surface rights granted are only "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores," they will be understood to include only minerals obtained by underground working); Johnston *v.* Harrington, 5 Wash. 73, 74, 31 Pac. 316 (building stone); Northern Pac. R. Co. *v.* Soderberg, 104 Fed. 425, 428, 43 C. C. A. 620 (granite); Midland R. Co. *v.* Robinson, 15 App. Cas. 19, 33, 54 J. P. 580, 59 L. J. Ch. 442, 62 L. T. Rep. N. S. 194, 38 Wkly. Rep. 577 (limestone); Hext *v.* Gill, L. R. 7 Ch. 699, 712, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 291, 20 Wkly. Rep. 957; Bell *v.* Wilson, L. R. 1 Ch. 303, 307, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493 (free stone); Loosemore *v.* Tiverton, etc., R. Co., 22 Ch. D. 25, 42, 51 L. J. Ch. 570, 47 L. T. Rep. N. S. 151, 30 Wkly. Rep. 628 (clay); Atty.-Gen. *v.* Tomline, 5 Ch. D. 750, 762, 46 L. J. Ch. 654, 36 L. T. Rep. N. S. 684, 25 Wkly. Rep. 802; Midland R. Co. *v.* Checkley, L. R. 4 Eq. 19, 25, 36 L. J. Ch. 380, 16 L. T. Rep. N. S. 260, 15 Wkly. Rep. 671; Micklethwait *v.* Winter, 6 Exch. 644, 654, 20 L. J. Exch. 313; Rosse *v.* Wainman, 15 L. J. Exch. 67, 72, 14 M. & W. 859; Tucker *v.* Linger, 46 L. T. Rep. N. S. 894, 895, 30 Wkly. Rep. 578; Atty.-Gen. *v.* Welsh Granite Co., 35 Wkly. Rep. 617, 619 (granite). See also for the construction of conveyances *infra*, IV, B, 3, c, (II).

Magnesia.— A deed conveying a tract of land in fee simple, "excepting and reserving for himself," etc., all "mineral or magnesia of any kind," etc., is not to be construed as including magnesia only within the reservation, but includes magnesia and all other minerals, since ordinarily magnesia is not considered a mineral, and apparently was used by the parties as not being. Gibson *v.* Tyson, 5 Watts (Pa.) 34, 41.

36. Midland R. Co. *v.* Robinson, 15 App. Cas. 19, 33, 54 J. P. 580, 59 L. J. Ch. 442, 62 L. T. Rep. N. S. 194, 38 Wkly. Rep. 577; Midland R. Co. *v.* Haunchwood Brick, etc., Co., 20 Ch. D. 552, 555, 51 L. J. Ch. 778, 46 L. T. Rep. N. S. 301, 30 Wkly. Rep. 640; Micklethwait *v.* Winter, 6 Exch. 644, 654, 20 L. J. Exch. 313. But see Darvill *v.* Roper, 3 Drew. 294, 24 L. J. Ch. 779, 3 Wkly. Rep. 467, 61 Eng. Reprint 915.

37. Northern Pac. R. Co. *v.* Soderberg, 99 Fed. 506, 507.

38. 2 Rapalje & L. L. Dict. 821 [*quoted* in Murray *v.* Allred, 100 Tenn. 100, 110, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249]; Gibson *v.* Tyson, 5 Watts (Pa.) 34, 37; Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550. *Compare* Doster *v.* Friedensville Zinc. Co., 140 Pa. St. 147, 21 Atl. 251.

"Ore" defined.— Ore is "the compound of a metal and some other substance, as oxygen, sulphur, or arsenic, called its mineralizer, by which its properties are disguised or lost." Webster Dict. [*quoted* in Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550]; Doster *v.* Friedensville Zinc Co., 140 Pa. St. 147, 151, 21 Atl. 251, distinguishing ore from mineral.

39. Murray *v.* Allred, 100 Tenn. 100, 111, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249; Williams *v.* South Penn Oil Co., 52 W. Va. 181, 189, 43 S. E. 214, 60 L. R. A. 795; Atty.-Gen. *v.* Tomline, 5 Ch. D. 750, 762, 46 L. J. Ch. 654, 36 L. T. Rep. N. S. 684, 25 Wkly. Rep. 802.

40. Stokes *v.* Arkwright, 61 J. P. 775, 66 L. J. Q. B. 845, 847, 77 L. T. Rep. N. S. 400.

41. Henry *v.* Lowe, 73 Mo. 96; Murray *v.* Allred, 100 Tenn. 100, 111, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249; Mullan *v.* U. S., 118 U. S. 271, 277, 6 S. Ct. 1041, 30 L. ed. 170.

"Coal" defined see 7 Cyc. 266.

"Coke" defined see 7 Cyc. 277.

42. Murray *v.* Allred, 100 Tenn. 100, 111, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249; State *v.* Parker, 61 Tex. 265, 266.

43. Hendler *v.* Lehigh Valley R. Co., 209 Pa. St. 256, 259, 58 Atl. 486, 103 Am. St. Rep. 1005, where it is said that in the language of mineralogists air and water are minerals while granite and similar rocks are not minerals but aggregations of minerals, and that so it is of sand; that it may be wholly of grains of silex or other mineral or

meaning, oil or petroleum,[44] gas,[45] and water are embraced in the term;[46] and it is said of water and oil, and still more strongly of gas, that they may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturœ*.[47]

C. "Mining Claim" — **1. In General.** A "mining claim" is a parcel of land containing precious metal in its soil or rock;[48] that portion of the public mineral land which the miner takes up and holds in accordance with mining laws, local and statutory, for mining purposes;[49] a claim asserted under the

it may be of several mixed together, and therefore in the technical sense only grains of rock; the court holding that sand was not a mineral in the commercial sense intended by the act of May 8, 1876, Pamphl. Laws 142.

44. *New York.*— Wagner *v.* Mallory, 169 N. Y. 501, 505, 62 N. E. 584, distinguished from other minerals.

Ohio.— Kelley *v.* Ohio Oil Co., 57 Ohio St. 317, 328, 49 N. E. 399, 63 Am. St. Rep. 721, 39 L. R. A. 765.

Pennsylvania.— Jennings *v.* Bloomfield, 199 Pa. St. 638, 641, 49 Atl. 135; Marshall *v.* Mellon, 179 Pa. St. 371, 374, 36 Atl. 201, 57 Am. St. Rep. 601, 35 L. R. A. 816; Blakley *v.* Marshall, 174 Pa. St. 425, 429, 34 Atl. 564; Gill *v.* Weston, 110 Pa. St. 312, 317, 1 Atl. 921; Stoughton's Appeal, 88 Pa. St. 198, 201; Funk *v.* Haldeman, 53 Pa. St. 229, 249; Thompson *v.* Noble, 3 Pittsb. (Pa.) 201, 204. *Compare* Dunham *v.* Kirkpatrick, 101 Pa. St. 36, 43, 47 Am. Rep. 696.

Tennessee.— Murray *v.* Allred, 100 Tenn. 100, 117, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249.

Texas.— Southern Oil Co. *v.* Colquitt, 28 Tex. Civ. App. 292, 296, 69 S. W. 169.

West Virginia.—Wilson *v.* Youst, 43 W. Va. 826, 834, 28 S. E. 781, 39 L. R. A. 292; Williamson *v.* Jones, 39 W. Va. 231, 256, 19 S. E. 436, 25 L. R. A. 222.

Petroleum oil is a fluid found in the porous sandrock of the earth. Wagner *v.* Mallory, 169 N. Y. 501, 505, 62 N. E. 584.

45. Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 249, 18 Atl. 724, 5 L. R. A. 731; Murray *v.* Allred, 100 Tenn. 100, 115, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249; U. S. *v.* Buffalo Natural Gas Fuel Co., 78 Fed. 110, 112, 24 C. C. A. 4 (under the Tariff Act of 1890 exempting crude minerals from duty); Ontario Natural Gas Co. *v.* Gosfield, 18 Ont. App. 626, 631.

Natural gas is a fluid mineral substance, subterraneous in its origin and location, possessing, in a restricted degree, the properties of underground waters, and resembling water in some of its habits. Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 468, 57 N. E. 912, 50 L. R. A. 768.

46. Ridgway Light, etc., Co. *v.* Elk County, 191 Pa. St. 465, 468, 43 Atl. 323; Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 249, 18 Atl. 724, 5 L. R. A. 731.

47. Jones *v.* Forest Oil Co., 194 Pa. St. 379, 383, 44 Atl. 1074, 48 L. R. A. 748; Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 249, 18 Atl. 724, 5 L. R. A. 731; Brown *v.* Vandergrift, 80 Pa. St. 142, 147.

But these are minerals "with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions." Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 249, 18 Atl. 724, 5 L. R. A. 731. See also Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768; Ridgway Light, etc., Co. *v.* Elk County, 191 Pa. St. 465, 43 Atl. 323; Wood County Petroleum Co. *v.* West Virginia Transp. Co., 28 W. Va. 210, 57 Am. Rep. 659; Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. ed. 729.

48. *Colorado.*— McFeters *v.* Pierson, 15 Colo. 201, 203, 24 Pac. 1076, 22 Am. St. Rep. 388; Poire *v.* Wells, 6 Colo. 406, 412.

Idaho.— Salisbury *v.* Lane, 7 Ida. 370, 385, 63 Pac. 383.

Montana.— Territory *v.* Mackey, 8 Mont. 168, 173, 19 Pac. 395.

Utah.— Mammoth Min. Co. *v.* Juab County, 10 Utah 232, 236, 37 Pac. 348.

United States.— St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 649, 26 L. ed. 875; Lockhard *v.* Asher Lumber Co., 123 Fed. 480, 493.

See also *infra*, III, B, 5, b, (I), 10, d, (II), (C), (8).

"Adverse claim" see *infra*, III, B, 10, d, (II).

49. Morse *v.* De Ardo, 107 Cal. 622, 623, 40 Pac. 1018 [*quoting* Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 198, 5 Pac. 85]; Berentz *v.* Kern King Oil, etc., Co., (Cal. App. 1905) 84 Pac. 45; Northern Pac. R. Co. *v.* Sanders, 49 Fed. 129, 1 C. C. A. 192; Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 454, 9 Morr. Min. Rep. 616.

As the term is used in the statutes of the United States, the word means that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. Morse *v.* De Ardo, 107 Cal. 622, 623, 40 Pac. 1018 [*quoting* Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 5 Pac. 85].

Independent of acts of congress providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of such lands to which the right of

mining laws of the United States to certain lands of the government supposed to contain mineral deposits.[50] There are two classes of mining claims comprised in the above definitions, viz., lode claims and placer claims.[51]

2. "Placer Claim." By the term "placer claim" is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling.[52]

3. "Vein," "Lode," or "Ledge"[53] — a. In General. A "vein," "lode," or "ledge," within the meaning of the act of congress, is a mineral body of rock within defined boundaries in the general mass of the mountain;[54] any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock;[55] a seam or fissure in the earth's crust filled with quartz, or some

exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, usages, or customs. Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 198, 5 Pac. 85.

The lode and the surface ground taken together constitute the claim. Cochrane *v.* Justice Min. Co., 4 Colo. App. 234, 35 Pac. 752; Talbott *v.* King, 6 Mont. 76, 9 Pac. 434. It includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines. Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 9 Morr. Min. Rep. 616.

"Location" equivalent.— The terms "mining claim" and "location" are in one sense identical and may be used indiscriminately to indicate the same thing. Thus the location which is the act of taking the parcel of mineral land became among miners synonymous with the mining claim originally appropriated, and so if the miner has only the ground covered by one location his mining claim and location are identical and the two designations may be indiscriminately used to denote the same thing, but if by purchase he acquires the adjoining location, that is, the ground which his neighbor has taken up, and adds it to his own, then his mining claim covers the ground embraced by both locations and henceforth he will speak of it as his claim. De Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 74, 18 S. Ct. 895, 43 L. ed. 72; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 648, 26 L. ed. 875. See also Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74; McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Poire *v.* Wells, 6 Colo. 406; Clipper Min. Co. *v.* Eli Min., etc., Co., 194 U. S. 220, 24 S. Ct. 632, 48 L. ed. 944.

50. Salisbury *v.* Lane, 7 Ida. 370, 374, 63 Pac. 383.

51. Sweet *v.* Webber, 7 Colo. 443, 4 Pac. 752. See also *infra*, II, C, 2, 3.

52. Wheeler *v.* Smith, 5 Wash. 704, 708, 32 Pac. 784 [*quoted* in U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571]. The term is similarly defined in Gregory *v.* Pershbaker, 73 Cal. 109, 14 Pac. 401; Moxon *v.* Wilkinson, 2 Mont. 421, 425; Clipper Min. Co. *v.* Eli Min, etc., Co., 194 U. S. 220, 227, 24 S. Ct. 632, 48 L. ed. 944; Northern Pac. R. Co. *v.* Soderberg, 188 U. S. 526, 532, 23 S. Ct. 365, 47 L. ed. 575.

Other definitions are: "A place near the bank of a river where gold-dust is found." Soane, Newman & Baretti (by Valazquez [*quoted* in Gregory *v.* Pershbaker, 73 Cal. 109, 114, 14 Pac. 401].

"A gravelly place where gold is found, especially by the side of a river or in the bed of a mountain torrent." Webster Dict. [*quoted* in Gregory *v.* Pershbaker, 73 Cal. 109, 114, 14 Pac. 401].

By federal statute placer mines include all deposits except veins of quartz or other rock in place. See Gregory *v.* Pershbaker, 73 Cal. 109, 115, 14 Pac. 401. And see *infra*, III, B, 5, e, (III). But although they are said by the statute to include all other deposits of mineral matter, such mines are those in which this mineral is generally found in the softer material which covers the earth's surface and not among the rocks beneath. Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 6 S. Ct. 601, 29 L. ed. 774.

53. "Crevice" see 12 Cyc. 67.
"Fissure" see 19 Cyc. 1030.
"Fissure vein" see 19 Cyc. 1030.

54. Stevens *v.* Williams, 23 Fed. Cas. No. 13,413, 1 McCrary 480, 488, 1 Morr. Min. Rep. 566.

55. Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 311, 9 Morr. Min. Rep. 578 [*affirmed* in 103 U. S. 839, 26 L. ed. 557].

Terms "vein" and "lode" interchangeable.— Cheesman *v.* Shreeve, 40 Fed. 787, 792; Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 311, 9 Morr. Min. Rep. 578 [*affirmed* in 103 U. S. 839, 26 L. ed. 557].

"Vein of coal," "coal bed," and "coal seam" are used as equivalent terms. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 196, 46 S. E. 262.

"Geologists, when accurately speaking, apply the terms 'vein' and 'lode' to a fissure in the earth's crust filled with mineral matter. In Von Cotta's treatise on Ore Deposits (Prime's Translation, § 16), the author says: 'Veins are aggregations of mineral matter

other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute.[56]

b. "In Place." The words, "in place," as used in the act of congress as descriptive of the lodes or veins for which mining claims may be taken out under the act, mean the general body of the country, which remains in its original state,

in fissures of rocks. Lodes are therefore aggregations of mineral matter containing ores in fissures.'" Hayes *v.* Lavagnino, 17 Utah 185, 194, 53 Pac. 1029.

Other definitions are given or those above set out are approved in Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 535, 69 S. W. 572, 91 Am. St. Rep. 87; Gregory *v.* Pershbaker, 73 Cal. 109, 113, 14 Pac. 401; Beals *v.* Cone, 27 Colo. 473, 485, 62 Pac. 948, 83 Am. St. Rep. 92; Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 900; Burke *v.* McDonald, 2 Ida. (Hasb.) 679, 682, 33 Pac. 49; Shreve *v.* Copper Bell Min. Co., 11 Mont. 309, 333, 28 Pac. 315; Foote *v.* National Min. Co., 2 Mont. 402, 403; Hayes *v.* Lavagnino, 17 Utah 185, 194, 53 Pac. 1029; Harrington *v.* Chambers, 3 Utah 94, 115, 1 Pac. 362; Wheeler *v.* Smith, 5 Wash. 704, 708, 32 Pac. 784 [*quoting* U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571]; Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 430, 12 S. Ct. 543, 36 L. ed. 201; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 534, 6 S. Ct. 481, 29 L. ed. 712; Erhardt *v.* Boaro, 113 U. S. 527, 533, 5 S. Ct. 560, 28 L. ed. 1113; Meydenbauer *v.* Stevens, 78 Fed. 787, 790; Migeon *v.* Montana Cent. R. Co., 77 Fed. 249, 255, 23 C. C. A. 156; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540, 544; Book *v.* Justice Min. Co., 58 Fed. 106, 125; Cheesman *v.* Shreeve, 40 Fed. 787, 792; Hyman *v.* Wheeler, 29 Fed. 347, 353; Iron Silver Min. Co. *v.* Cheesman, 8 Fed. 297, 301, 2 McCrary 191; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 530, 6 Sawy. 299; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380.

More than one vein in lode.— A lode may and often does contain more than one vein. U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 680, 9 S. Ct. 195, 32 L. ed. 571.

A blind vein or lode is one which does not crop out. Larkin *v.* Upton, 144 U. S. 19, 23, 12 S. Ct. 614, 36 L. ed. 330.

"Horse."— Where the lode or vein is wide, the country rock is occasionally found in large, solid bodies, extending for hundreds of feet in length, and several feet in width, forming what is technically known among miners as a "horse." Book *v.* Justice Min. Co., 58 Fed. 106, 126.

Synonymous with "mine" see *supra*, notes 27, 49.

"Blanket vein" is a term which appears to be applied to a horizontal vein or deposit. Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 400, 430, 12 S. Ct. 543, 36 L. ed. 201.

"Lot and cope" see 25 Cyc. 1630.

"Lode" and "lot" distinguished.— The term "lot" has one signification; the term "lode" another. The lot consists of a certain number of feet in length and breadth, and is easily ascertained by measurement on the surface. The lode consists of aggregations of peculiar matter, and its form can only be found, and its limits determined, by discerning and identifying the qualities and appearances of its composition. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 38, 11 Pac. 515.

"Cross veins" see *infra*, III, B, 6, c.

56. Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 675, 7 Sawy. 96.

Varying definitions—*In general.*—The term "vein" is not susceptible of an arbitrary definition applicable to every case. It must be controlled in a measure at least by the conditions of locality and deposit. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 535, 69 S. W. 572, 91 Am. St. Rep. 87; Beals *v.* Cone, 27 Colo. 473, 485, 62 Pac. 948, 83 Am. St. Rep. 92; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 533, 6 S. Ct. 481, 29 L. ed. 712; Cheesman *v.* Shreeve, 40 Fed. 787, 792. "The philologist would, in general terms, define a vein to be 'a seam or layer of any substance more or less wide, intersecting the rock or stratum, and not corresponding with the stratification, and is often limited, in the language of miners, to such a layer or course of metal or ore.' In the judgment of geologists, a fissure in the earth's crust, and openings in its rocks and strata made by some force of nature, in which the mineral is deposited, is regarded as important, if not essential; 'but,' as has been said by an eminent judge, 'to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode.'" Cheesman *v.* Shreeve, 40 Fed. 787, 792 [*quoting* Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 311, 9 Morr. Min. Rep. 578]. So it is held in Hayes *v.* Lavagnino, 17 Utah 185, 195, 53 Pac. 1029, that the statute speaking of "veins or lodes of quartz or other rock in place," etc., including cinnabar and lead ores, it would seem that it was not the intention of the framers of the act that purely scientific definitions should be applied because it is not a characteristic of cinnabar that it is found in fissures of the earth's crust or in veins or lodes as defined by geologists.

There is no conflict in the decisions; but the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state. Book *v.*

unaffected by the action of the elements, as distinguished from the superficial mass known as alluvium, *detritus*, or *débris*. It is what miners usually call the "country," or the "country rock," and a vein or lode is "in place," within the meaning of the act, when it is inclosed in the general mass of this rock.[57]

c. "Vug." A "vug" is a cavity in a lode or vein, which would imply that such cavities were in veins.[58]

d. "Apex" or "Top." The "top" or "apex" of a vein or lode is the highest point thereof, and may be at the surface of the ground or at any point below the surface;[59] the end or edge of a vein nearest the surface.[60]

e. "Dip," "Course," or "Strike."[61] The "dip" of a vein is the direction of the vein as it goes downward into the earth;[62] the "course" or "strike" is its direction across the country.[63]

Justice Min. Co., 58 Fed. 106, 121. The definition of a vein must be considered with reference to the formation of the particular district in which it is located. And where the boundaries of a vein are not sufficiently defined, the value of the material must be so in excess of the country rock as to distinguish it from such rock; and if there be found an occasional fragment of ore where it is disconnected from any ore body it does not mark the line of the vein or lode; and where a vein located in sedimentary beds of rock is formed by replacement, the limits of the deposition of ore are the limits of the vein. Grand Cent. Min. Co. *v.* Mammoth Min. Co., 29 Utah 490, 83 Pac. 648. See also Book *v.* Justice Min. Co., 58 Fed. 106.

57. Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 352, 31 Pac. 642; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 537, 6 S. Ct. 481, 29 L. ed. 712; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380; Stevens *v.* Williams, 23 Fed. Cas. Nos. 13,414, 13,413, 1 McCrary 480, 486, 1 Morr. Min. Rep. 557, 566. See also the cases cited *supra*, note 54 *et seq.*

By "rock in place" is not meant merely hard rock, or merely quartz rock, for any combination of rock, broken up, mixed up with minerals and other things, is rock, within the meaning of the statute. Stevens *v.* Williams, 23 Fed. Cas. No. 13,413, 1 McCrary 480, 484, 1 Morr. Min. Rep. 566 [*quoted* in Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 352, 31 Pac. 642].

58. Webster Dict. [*quoted* in Cheesman *v.* Shreeve, 40 Fed. 787, 794], where it is held, however, that such technical definition of the term must yield to the sense in which the witnesses employed it, and defined it, on the stand.

59. Larkin *v.* Upton, 144 U. S. 19, 23, 12 S. Ct. 614, 36 L. ed. 330.

It may include a part which stands in the solid rock below a considerable body of the superficial mass. Stevens *v.* Williams, 23 Fed. Cas. No. 13,414, 1 Morr. Min. Rep. 557.

Blind lode.— When the vein or lode does not crop out, but is what is called a blind vein or lode, the apex thereof would necessarily be below the surface of the ground. Larkin *v.* Upton, 144 U. S. 19, 23, 12 S. Ct. 614, 36 L. ed. 330.

60. Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 900, where it is said that while the definition given is no doubt correct under most circumstances, like many other definitions it is found to lack fulness and accuracy in special cases; and important questions of law are not to be determined by a slavish adherence to the letter of an arbitrary definition.

Another definition is: "The highest point . . . where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein." Iron Silver Min. Co. *v.* Murphy, 3 Fed. 368, 373, 2 McCrary 121; Stevens *v.* Williams, 23 Fed. Cas. No. 13,413, 1 McCrary 480, 489, 1 Morr. Min. Rep. 566 (holding that if a vein, at its highest point, turns over and pursues its course downward, then such point is merely a swell in the mineral matter, and not a true apex).

"Top" or "apex" and "outcrop" have been treated as synonymous, but not under all circumstances. The word "top," while including "apex," may also include a succession of points, that is, a line, so that by the "top" of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge. Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 901.

61. **"Dip right"** see *infra*, III, B, 6, b, (I), (II).

62. See 14 Cyc. 290.

The angle of departure makes no difference. Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380; Stevens *v.* Williams, 23 Fed. Cas. No. 13,414, 1 Morr. Min. Rep. 557. The true average dip of a vein is always at right angles to the lead. Gilpin *v.* Sierra Nevada Consol. Min. Co., 2 Ida. (Hasb.) 696, 718, 23 Pac. 547, 1014.

"Downward course" synonymous.— In Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 901, it is said: "I have spoken of the 'dip' or 'downward course' of the vein, treating these words as synonymous, and so I think they must be regarded. 'Dip' and 'depth' are of the same origin,— 'dip' is the direction and inclination towards the 'depth'— and it is 'throughout their depth' that veins may be followed, and that is surely their downward course."

"Inclination dip" see 22 Cyc. 61.

63. King *v.* Amy, etc., Consol. Min. Co., 9 Mont. 543, 565, 24 Pac. 200. "The strike,

f. "End Lines" and "Side Lines."[64] "End lines" are those which are crosswise of the general course of the vein on the surface.[65] "Side lines" are those which measure the extent of the claim upon each side of the middle of the vein at the surface.[66]

g. "Intraliminal," and "Extraliminal" or "Extralateral." "Intraliminal," "extraliminal," or "extralateral" are terms limiting the extent of rights conferred by a lode location, the first embracing all within its boundaries down to the center of the earth; the second, while depending upon something within such boundaries, may nevertheless be exercised under certain conditions beyond those boundaries.[67]

4. "Location."[68] A location is the act of appropriating a parcel of land which constitutes a mining claim, according to certain established rules;[69] a piece of land including the vein, sufficiently marked on the ground so that its boundaries can be readily traced.[70]

or course, of a vein is determined by a horizontal line drawn between its extremities at that depth at which it attains its greatest longitudinal extent. The dip of a vein, its 'course downward' (U. S. Rev. St. (1878) § 2322) [U. S. Comp. St. (1901) p. 1425], is at right angles to its strike; or, in other words, if a vein is cut by a vertical plane at right angles to its course, the line of section will be the line of its dip." Judge Beatty in Report of Public Land Commission 399 [*quoted* in 1 Lindley Mines, § 318].

64. "Line of tunnel" see *infra*, III, B, 6, e, (I).

65. Davis *v.* Shepherd, 31 Colo. 141, 146, 72 Pac. 57 (holding that if the end lines are not at right angles with the side lines, the width of the claim is the distance between the side lines); Flagstaff Silver Min. Co. *v.* Tarbet, 98 U. S. 463, 467, 25 L. ed. 253 [*quoted* in Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 486, 7 S. Ct. 13, 56, 30 L. ed. 1140].

66. King *v.* Amy, etc., Consol. Min. Co., 152 U. S. 222, 228, 14 S. Ct. 510, 38 L. ed. 419; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 485, 7 S. Ct. 1356, 30 L. ed. 1140.

The width of a claim, when that is the only question involved, is the distance between the side lines. Davis *v.* Shepherd, 31 Colo. 141, 146, 72 Pac. 57.

Where the course is across the claim instead of in the direction of its length the side lines become the end lines and the end lines the side lines. Southern California R. Co. *v.* O'Donnell, (Cal. App. 1906) 85 Pac. 932; Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 687, 15 S. Ct. 733, 39 L. ed. 859; King *v.* Amy, etc., Consol. Min. Co., 152 U. S. 222, 228, 14 S. Ct. 510, 38 L. ed. 419; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 486, 7 S. Ct. 1356, 30 L. ed. 1140; Flagstaff Silver Min. Co. *v.* Tarbut, 98 U. S. 463, 467, 25 L. ed. 253.

67. Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., 32 Colo. 176, 186, 75 Pac. 1070, 64 L. R. A. 925 [*citing* 1 Lindley Mines (2d ed.), § 549].

"Extralateral right" defined see *infra*, III, B, 6, b, (I).

68. Requisites and validity of location proceedings see *infra*, III, B, 5.

"Location certificate" see *infra*, III, B, 5, d, (VI).

Relocation see *infra*, III, B, 8, c.

69. McFeters *v.* Pierson, 15 Colo. 201, 203, 24 Pac. 1076, 22 Am. St. Rep. 388; Poire *v.* Wells, 6 Colo. 406, 412; McKay *v.* McDougall, 25 Mont. 258, 266, 64 Pac. 669, 87 Am. St. Rep. 395; Territory *v.* Mackey, 8 Mont. 168, 173, 19 Pac. 395; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 59, 8 Pac. 153; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 414, 5 Pac. 570; Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 74, 18 S. Ct. 895, 43 L. ed. 72; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 649, 26 L. ed. 875; Belk *v.* Meagher, 104 U. S. 279, 284, 26 L. ed. 735.

A valid location is equivalent to a contract of purchase; the location, together with the necessary work, is the purchase, and the patent is the evidence of the title so acquired. Talbott *v.* King, 6 Mont. 76, 9 Pac. 434.

70. Gleeson *v.* Martin White Min. Co., 13 Nev. 442, 456.

Including surface and vein.—"Location," as used in the acts of 1866 and 1872, relating to mining claims, and providing that mining locations should be along the lode lengthwise, refers to the surface ground as well as to the vein or lode. Walrath *v.* Champion Min. Co., 63 Fed. 552, 556. Under an act which requires certain work to hold "locations" for a year, the word "locations" means an entire mining claim irrespective of the number of locations or feet. Leet *v.* John Dare Silver Min. Co., 6 Nev. 218.

Equivalent to "mining claim" see *supra*, note 49.

"Work on a claim" means work done anywhere within the lines on the surface, and anywhere within those lines below the surface when they are carried down vertically into the earth. Mt. Diablo Mill., etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 454, 9 Morr. Min. Rep. 616.

D. "Seam." In geology a thin layer or stratum of rock is called a seam. The same term is applied to coal.[71]

E. "Bank." The word "bank" as a noun, is defined as the face of a coal vein in process of being mined; the surface immediately about the mouth of a mine. As a verb, it means to form, or lie in banks.[72]

F. "Mining District," and "Mineral District."[73] The phrase "mining district" is well known, and means a section of country usually designated by name and described or understood as being confined within certain natural boundaries, in which gold or silver or both are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein.[74] But "mineral district" has been held to apply to no particular section of the state known and defined as such a district, and therefore the term as used in the federal statute was incapable of application.[75]

G. "Mining Land," "Mining Ground," and "Mineral Land." Lands from which mineral substances are taken may be termed "mining lands."[76] And mineral lands include lands which are chiefly valuable for their deposits of a mineral character and not merely metalliferous lands.[77] "Mining ground" means that land in which the owner works in good faith, by ordinary mining processes, deposits of stone or other minerals with a view of utilizing the products for commercial purposes.[78]

71. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 196, 46 S. E. 262.

Equivalent to vein, etc., see *supra*, II, C, 3, a, note 55.

72. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 196, 46 S. E. 262 [*quoting* the standard dictionaries].

73. "Land district" see 24 Cyc. 842.

74. U. S. *v.* Smith, 11 Fed. 487, 490, 8 Sawy. 100.

75. U. S. *v.* Smith, 11 Fed. 487, 490, 8 Sawy. 100.

76. Gill *v.* Weston, 110 Pa. St. 312, 317, 1 Atl. 921. See also *supra*, II, B.

77. Northern Pac. R. Co. *v.* Soderberg, 188 U. S. 526, 530, 23 S. Ct. 365, 47 L. ed. 575; Mullan *v.* U. S., 118 U. S. 271, 277, 6 S. Ct. 1041, 30 L. ed. 170.

Known and valuable.— Mineral lands as used in grants by the United States which except such lands do not include all lands on which minerals may be found but only those where the mineral is valuable and its existence is known. Smith *v.* Hill, 89 Cal. 122, 26 Pac. 644; Hermocilla *v.* Hubbell, 89 Cal. 5, 26 Pac. 611; Davis *v.* Wiebbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170; Northern Pac. R. Co. *v.* Barden, 46 Fed. 592; Francoeur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351, 43 Fed. 236, 14 Sawy. 600; Cowell *v.* Lammers, 21 Fed. 200. See also Alford *v.* Barnum, 45 Cal. 482; Merrill *v.* Dixon, 15 Nev. 401. As used in a treaty with the Cherokee Indians by which certain lands were ceded to the United States with a provision that whenever there were improvements of a certain value made on lands other than mineral lands which were owned or personally occupied by any person for agricultural purposes, such persons should be entitled to purchase such lands, it was held that the term "mineral lands" meant lands containing deposits of lead or zinc, as it was known at the time of the treaty that such deposits existed near if not within the territory ceded, but did not include coal lands. Stroud *v.* Missouri River, etc., R. Co., 23 Fed. Cas. No. 13,547, 4 Dill. 396. So under a statute providing that lands containing valuable mineral deposits should be open to exploration and purchase, it was held that lands in which minerals of different kinds were found but not in such quantity as to justify expenditures in the effort to extract them were not "mineral lands." Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423.

Reserved from grant to railroad.— The term as used in the charter of a railroad company granting lands for the purpose of aiding in construction, with the exception of mineral lands covered by the description, should be construed to mean mineral lands not covered by the right of way, as any other construction of the grant would destroy the rights of the railroad company and nothing could be given in lieu of any of the land which might be needed for the right of way. Wilkinson *v.* Northern Pac. R. Co., 5 Mont. 538, 6 Pac. 349.

78. Johnson *v.* California Lustral Co., 127 Cal. 283, 289, 59 Pac. 595, under a statute making it unlawful for a corporation to sell, lease, or mortgage any part of its "mining ground" unless ratified by the holders of at least two thirds of the capital stock, and wherein it is held that the foundation of the decision in Byrne's Estate, 112 Cal. 176, 44 Pac. 467, is that a mine or mining ground has no necessary identity with mineral land patented as such by the United States. See also *infra*, IV, B, 2, c, (I).

An actual mine, lands subjected to the processes of mining, is "mining ground."

H. "Mining Rights," and "Mining Title." A "mining right" is a right to enter upon and occupy land for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein.[79] By "mining title" as employed in the federal statute relating to the location of mining claims[80] is meant the title which the miner obtains by his discovery and location, followed up with a compliance with the statutory regulations to preserve his right of possession.[81]

I. "Surface." "Surface" means that part of the land which is capable of being used for agricultural purposes.[82]

J. "Salt Lick." A "salt lick" was so called in the western country from the fact that deer and other wild animals resorted to it and licked or drank the brackish water.[83]

K. "Miner." A miner is one who mines; a digger for metals and other minerals.[84]

L. "Mine Manager," "Mine Foreman," or "Mine Boss." The term "mine manager" as used in a mining law is intended to mean any person who is charged with the general direction of the underground work, or of both the underground and top work, of any coal mine, and who is commonly known and designated as mine boss, or foreman, or pit boss.[85]

M. "Collier."[86] "Collier" as a noun is "one who works in a coal mine," "a coal merchant or dealer in coal,"[87] as a verb it is defined to be a digging of coal.[88]

Johnson *v.* California Lustral Co., 127 Cal. 283, 289, 59 Pac. 595.

A ditch by means of which a mine is operated is included within the term "mining ground." McShane *v.* Carter, 80 Cal. 310, 22 Pac. 178.

79. Smith *v.* Cooley, 65 Cal. 46, 47, 2 Pac. 880.

It is not a mere easement in realty. Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122. See also *infra*, IV, B, 3. And see TAXATION.

80. U. S. Rev. St. (1878) § 910 [U. S. Comp. St. (1901) p. 679], providing that "no possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

81. Gillis *v.* Downey, 85 Fed. 483, 486, 29 C. C. A. 286.

82. 2 Rapalje & L. L. Dict. 821 [*quoted* in Murray *v.* Allred, 100 Tenn. 100, 110, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249]. This meaning is given only in determining what constitutes a mine or mineral, it being held that everything except the mere surface which is used for agricultural purposes is a mineral. Midland R. Co. *v.* Checkley, L. R. 4 Eq. 19, 36 L. J. Ch. 380, 16 L. T. Rep. N. S. 260, 15 Wkly. Rep. 671.

83. Indiana *v.* Miller, 13 Fed. Cas. No. 7,022, 3 McLean 151, 154, where it was held that under an act of congress granting to the state of Indiana all salt springs within the territory, with certain restrictions, no distinction existed between a lick as the term was frequently used and a salt spring.

84. Webster Dict. [*quoted* in Watson *v.* Lederer, 11 Colo. 577, 581, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854; Coleman *v.* Coleman, 1 Pearson (Pa.) 470, 475; *In re* Mine Foremen's Qualifications, 17 Pa. Co. Ct. 99, 100]. See also *infra*, V, C, 1, b, (I), notes 28, 29.

Digging for without actually mining the mineral will bring the digger within the meaning of the term. A person might be a long time digging for minerals and yet never actually mine them. The word "miner," as used in the anthracite mining law, is not confined in its application to the person who actually mines and cuts the coal, but may include laborers, loaders, etc. *In re* Mine Foremen's Qualifications, 17 Pa. Co. Ct. 99, 100. See also *infra*, V, C, 1, b.

Learning and skill.—While men of scientific attainments, or of experience in the use of machinery, are to be found in this class, yet the word by which the class is designated imports neither learning nor skill. Watson *v.* Lederer, 11 Colo. 577, 581, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854.

85. Woodruff *v.* Kellyville Coal Co., 182 Ill. 480, 482, 55 N. E. 550 [*quoting* Laws (1891), p. 68, § 1].

"Mine foreman," as used in the acts relating to mines and mining, means the person who shall have, on behalf of the operators, immediate supervision of a coal mine. 4 Pepper & L. Dig. L. Pa. (1897) col. 1249, § 33.

86. "Colliery" defined see 7 Cyc. 298.

"Colliery" appears to include "mine" and other or additional works, appliances, buildings, etc., used in and about the preparation of coal. Com. *v.* Brookwood Coal Co., 25 Pa. Co. Ct. 55, 56.

87. Com. *v.* Brookwood Coal Co., 25 Pa. Co. Ct. 55, 56.

88. Com. *v.* Brookwood Coal Co., 25 Pa. Co. Ct. 55, 56.

N. "To Mine," "Mining and Prospecting." "To mine" is defined to dig a pit or mine, to dig in the earth for minerals, etc.[89] "Mining" and "prospecting" are generic terms, which include the whole mode of obtaining metals and minerals.[90]

O. "Shooting Off the Solid." As applied to coal mining this term has been held to mean the blasting of coal off of its solid face by boring holes into the perpendicular side of the original stratum or bed of coal, loading the same with blasting or giant powder, tamping the same, and then exploding the shot, and, by force of the explosion, dislodging the coal from its natural bed.[91]

P. "Melting," "Smelting." "Smelting," by its derivation, is synonymous with "melting," but in metallurgy and commercial manufacture it has come to have the more contracted meaning of exposing the metallic ores to heat in the presence of such reagents as develop the metal, in contradistinction to the mere application of heat causing the ore to become fluid, which is called "melting."[92]

Q. "In Sight." "In sight," as used in relation to ore body in representations to induce the purchase of a mine, has been held to mean ore-bearing rock so separated and blocked off by being worked around on two or more sides that it is subject to examination and measurement.[93]

R. "Mine-Run Coal." The words "mine-run coal," in a mining lease, mean in mining parlance all of the coal that comes out of the mine from the picks, embracing lump, nut, and slack.[94]

S. "Lump Coal." "Lump coal," in a mining lease, is that which remains after the nut, slack, and dirt have been separated from it by screening.[95]

T. "Miner's Weight." As applied to coal mining, "miner's weight" means such quantity of coal as is computed at a ton in paying the miner who mined by the ton.[96]

III. RESERVATION AND DISPOSITION OF PUBLIC MINERAL LANDS.

A. Ownership of Minerals in General.[97] According to the common law of England, mines of gold and silver were the exclusive property of the crown,[98]

89. Com. *v.* Brookwood Coal Co., 25 Pa. Co. Ct. 55, 56, where it is said the term appears to apply more especially to underground work.

90. Williams *v.* Toledo Coal Co., 25 Oreg. 426, 431, 36 Pac. 159, 42 Am. St. Rep. 799.

Mining in old times meant subterraneous excavations.— Ontario Natural Gas Co. *v.* Gosfield, 18 Ont. App. 626, 631.

Sinking gas and oil wells.— Sometimes it is declared by statute that the word "mining" shall be deemed to include the sinking of gas wells. State *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 575, 577, 22 N. E. 778, 6 L. R. A. 579. See also Williams *v.* Citizens' Enterprise Co., 153 Ind. 496, 498, 55 N. E. 425.

"Mining" and "milling" would seem to be, taken together, one industry, having for its object to obtain possession of material products in the state in which they were fashioned by nature. *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 985, 4 Am. Bankr. Rep. 327.

"Hydraulic mining" see 21 Cyc. 1719 note 7.

91. State *v.* Murlin, 137 Mo. 297, 306, 38 S. W. 923.

92. Lowrey *v.* Cowles Electric Smelting, etc., Co., 68 Fed. 354, 369.

"Electric smelting" see 15 Cyc. 481.

"Smelter returns" see *infra*, IV, C, 2, k, (II), (B).

93. Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 167, 9 C. C. A. 415.

94. Hardin *v.* Thompson, 57 S. W. 12, 22 Ky. L. Rep. 285.

95. Hardin *v.* Thompson, 57 S. W. 12, 22 Ky. L. Rep. 285.

96. Drake *v.* Lacoe, 157 Pa. St. 17, 33, 27 Atl. 538. See also *infra*, V, A, 7.

97. **Reservations** see *infra*, III, B, 2, b.

98. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123; Hicks *v.* Bell, 3 Cal. 219; Atty.-Gen. *v.* Morgan, [1891] 1 Ch. 432, 60 L. J. Ch. 126, 64 L. T. Rep. N. S. 403, 39 Wkly. Rep. 324; Case of Mines, Plowd. 310, 75 Eng. Reprint 472.

Lands ceded by France.— By the old law of France which was in force in Canada, the right to minerals did not pass by the grant of lands to the grantee without such words, but remained in the sovereign and by the cession of lands to England, the right to the minerals passed to the king who could grant the right to whomsoever he pleased, and the owners of the soil had no right except to an indemnity for any damages they might suffer by the mining operations. Reg. *v.* De Lery, 9 Quebec 225, 6 Montreal Leg. N. 402.

and did not pass in a grant of the king under a general designation of lands or mines;[99] and if metalliferous ores contained gold or silver to such an extent as to be worth extracting, but the ores could not be obtained without interfering with the gold or silver, the whole of such ores belonged to the crown,[1] and the crown had the right to work not only gold and silver mines but also all mines containing gold or silver worth extracting.[2] But in the United States neither the state nor the federal government has title, as an incident of sovereignty, to mines or minerals found within their boundaries upon the lands which belong to individuals;[3] its title is confined to public lands, and when the title to such land passes the right to the minerals passes with it unless such right is reserved;[4] and

99. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123; Hicks *v.* Bell, 3 Cal. 219; Woolley *v.* Atty.-Gen., 2 App. Cas. 163, 46 L. J. P. C. 18, 36 L. T. Rep. N. S. 121, 25 Wkly. Rep. 852. So under an order in council admitting British Columbia into the confederation, providing that the government of British Columbia agreed to convey certain lands to the dominion government, in trust in furtherance of the construction of a railway, and a statute granting to the dominion government for the purposes of the construction of said railway the public lands along the line of such railway on the main land of British Columbia to be appropriated as the dominion government may deem advisable, etc., it was held that the precious metals in, upon, and under such public lands remained vested in the crown and the conveyance of the public lands was in substance an assignment of the right of the province to appropriate the territorial revenues arising from such lands, but did not imply any transfer of its interest in revenues arising from the prerogative rights of the crown. British Columbia Atty.-Gen. *v.* Canada Atty.-Gen., 14 App. Cas. 295, 58 L. J. P. C. 88, 60 L. T. Rep. N. S. 712 [*reversing* 14 Can. Sup. Ct. 345].

As between individuals see *infra*, IV, B, 2, c, (II).

1. Atty.-Gen. *v.* Morgan, [1891] 1 Ch. 432, 60 L. J. Ch. 126, 64 L. T. Rep. N. S. 403, 39 Wkly. Rep. 324; Case of Mines, Plowd. 310, 75 Eng. Reprint 472.

2. Atty.-Gen. *v.* Morgan, [1891] 1 Ch. 432, 60 L. J. Ch. 126, 64 L. T. Rep. N. S. 403, 39 Wkly. Rep. 324, where it appears that the rights of the crown in such metals seriously obstructed the working of many of the most important mines in the kingdom; that to remedy the inconvenience produced by this state of the law two statutes were passed in the latter part of the seventeenth century, namely, 1 Wm. & M. c. 30, § 4, and 5 Wm. & M. c. 6; that the first of these acts required all gold and silver, when extracted by refiners, to be taken to the mint; but it also enacted, by section 4, that no mine of copper, tin, iron, or lead should be a royal mine, although it might contain gold or silver; that this enactment did not affect the right of the crown to gold or silver in any mine, but prevented the crown from claiming any copper, tin, iron, or lead mine on the ground that it contained gold or silver, and also abrogated the right of the crown to any copper, tin, iron, or lead ore got from any such mine, on the ground that such ore contained gold or silver; that the gold or silver (if any) remained the property of the crown; that as owners of copper, tin, iron, or lead mines containing gold or silver might still be very much embarrassed in working their mines, notwithstanding such mines were no longer royal mines, the second act, 5 Wm. & M. c. 6, was passed to remedy this state of things, in which act the legislature assumed that there was some copper, tin, iron, or lead mine worth working by the owner, and then authorized him to work it, although it contained gold or silver, but protected the crown by giving it an option to take the ore, with the gold or silver in it, at certain prices; and that under these acts if the crown did not desire to buy the ore at these prices, then the mine owner could deal with the whole ore as he pleased, although there was gold or silver in it.

3. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123 [*overruling* in effect *dicta* in Stoakes *v.* Barrett, 5 Cal. 36, and Hicks *v.* Bell, 3 Cal. 219], where it is said that the right of the crown, whatever may be the reasons assigned for its maintenance, none of which are available to sustain any claim of the state to such right, had its origin in an arbitrary exercise of the power by the king which was justified on the ground that the mines were required as a source of revenue; that the state takes no property by reason of the "excellency of the thing;" that taxation furnishes all the requisite means for the expenses of government; that while the convenience of citizens in commercial transactions may be promoted by a supply of coin, and the right of coinage appertains to sovereignty, the exercise of this right does not require the ownership of the precious metals by the state or federal government. See also *infra*, IV, A, 1.

4. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123 (holding that a patent or grant of public lands by the United States without limitation or reservation carries all the interest of the United States in everything embraced within the signification of the term "land," which includes not only the face of the earth but everything under it and over it, as in the case of a conveyance by an individual); Hill *v.* Martin, (Tex. Civ. App. 1902) 70 S. W. 430 (holding that the sale of state public lands under a law

the gold and silver which passed by the cession from Mexico to the United States were not held by the latter in trust for a future state. The ownership of the United States was not an incident of any right of sovereignty but was the same as that under which it held any other public property acquired from Mexico;[5] and although a Mexican grant did not embrace the title to gold and silver, this being reserved to the sovereign and upon the cession to the United States passing to the latter, a patent issued upon confirmation of such prior Mexican grant carried the whole interest of the United States, including the title to the gold and silver.[6] Under a constitutional provision releasing to the owner of the soil all mines and mineral substances, these were released to such owners whether they held under subsequent grants or under grants theretofore made which reserved minerals under a former policy of the state;[7] and the reservation of minerals from the laws for the sale of public lands made by any act of the legislature cannot operate as a limitation upon any subsequent legislature to enact laws authorizing the sale including such minerals, there being no constitutional limitation upon such power.[8]

B. Location and Acquisition of Mining Claims and Rights — 1. Statutory Provisions — a. General Mining Acts — (i) *In General.* This subdivision of this article shall be devoted to the acquirement of mines upon government land and rights attaching thereto, and therefore has no application in states in which there was no public domain when the acts of congress were passed authorizing the location and patenting of mines.[9]

providing for their disposition which does not reserve the minerals passes the title to the minerals to the purchaser).

Reservation as between state and United States.— Where a grant of lands under an act of congress to enable the people of a territory to form a state is modified by an act which reserves from sale all mineral lands within the state, it is competent for the grantee to accept the grant in its modified form and an acceptance of the grant with the conditions annexed is a recognition by the legislature of the state of the validity of the claim of the government of the United States to the mineral lands. Heydenfeldt *v.* Daney Gold, etc., Min. Co., 93 U. S. 634, 23 L. ed. 995.

Effect of title in government — right to win.— It has been held that even if the title to minerals in land owned by individuals is in the state or the United States, no entry can be made upon such land to search or dig for the minerals in the absence of statutory provisions protecting the rights of the landed proprietor and furnishing indemnity against damage from injury to his possession. Boggs *v.* Merced Min. Co., 14 Cal. 279; Stoakes *v.* Barrett, 5 Cal. 36. But where the statute for the location of public lands reserves certain minerals, such reservation carries with it the right to enter upon land located by individuals in which such minerals might be found and to dig and carry them away and such other incidents as may be necessary to give effect to the rights reserved. Cowan *v.* Hardeman, 26 Tex. 217, construing a provision "that no lands granted by this government shall be located on salt springs, gold or silver mines," etc., to mean merely to reserve salt springs, gold and silver mines, etc., and not to prevent the location of lands containing them. In England under an inclosure act allotting certain common lands in Wales, an allotment was made to the king as lord of the manor in respect of his right to the soil and certain commissioners were given the right to sell such allotment subject to the right of the king to the "mines, ores, minerals," etc., under which it was held that the word "minerals" included granite, and that the crown was entitled to win the granite by open workings. Atty.-Gen. *v.* Welsh Granite Co., 35 Wkly. Rep. 617.

5. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123, holding that such ownership was not lost by the admission of California as a state.

6. Ah Hee *v.* Crippen, 19 Cal. 491; Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123.

Mexican grants see *infra*, III, B, 2, c, (IV).

7. State *v.* Parker, 61 Tex. 265.

8. Heil *v.* Martin, (Tex. Civ. App. 1902) 70 S. W. 430.

9. **In the original thirteen states** it cannot of course apply, because the general government never acquired any domain within their borders, except for certain purposes expressed in grants made at the time of the formation of the government.

In Illinois, Iowa, Ohio, and Indiana, the Congressional Mining Acts were never in practical operation because of the fact that most of the public domain embraced within their borders had been disposed of prior to their enactment. See *infra*, text and note 15.

Texas is also excluded from the operation of the Mining Acts, because the government never obtained any public domain within its borders. By the terms of its admission into the Union, it retained all vacant and un-

(II) *States and Territories Expressly Excepted.* Congress has also by express provisions excepted from the mining acts the following states and territories: Michigan, Wisconsin, Minnesota,[10] Missouri, Kansas,[11] Alabama,[12] and Oklahoma.[13]

b. Acts Relating to Particular States and Minerals. The lead mines and contiguous lands in Missouri were allowed to be sold by the act of March 3, 1829,[14] and within Illinois, Arkansas, Wisconsin, and Iowa, by the act of July 11, 1846.[15] By the provisions of the act of March 1, 1847,[16] all public lands in the Lake Superior land district, the territory of Michigan, containing copper, lead, and other valuable ores, and by the act of March 1, 1847,[17] lands within the Chippewa district, the territory of Wisconsin, containing copper, lead, and valuable ores were authorized to be sold.[18] By the act of January 31, 1901,[19] public saline lands are classified as minerals and are disposed of under the mineral acts.

2. Upon What Lands Acquired — a. In General. It is self-evident from the fact that mining rights and claims are granted by congress that such rights can only attach to lands over which congress has power of disposition.[20] Therefore it follows that all lands sold, granted,[21] or reserved for any special purpose by the government[22] are not subject to location or acquisition under the mineral acts. In order to ascertain what lands are locatable under the mineral acts, brief reference seems necessary to the acts of congress by which lands may be conveyed or claims or rights may attach thereto; to the methods whereby lands may be otherwise acquired from the government; and to reservations of lands by the government for particular purposes. All of these matters will be discussed under the following heads: (1) Reservations,[23] which include Indian, military, forest, park, and reservoir reservations; (2) grants,[24] which include grants for educational purposes, grants for internal improvements, and railroad and Mexican grants; and (3) sales and entries,[25] which include entries and sales for agricultural purposes, and town-site entries.

appropriated land for the purpose of paying the debts contracted by it while an independent republic. This state has its own mining law.

10. 17 U. S. St. at L. 465; U. S. Rev. St. (1878) § 2345 [U. S. Comp. St. (1901) p. 1438].

11. 19 U. S. St. at L. 52 [U. S. Comp. St. (1901) p. 1438].

12. 22 U. S. St. at L. 487 [U. S. Comp. St. (1901) p. 1439].

13. 26 U. S. St. at L. 1026 [U. S. Comp. St. (1901) p. 1617], by declaring all land within its borders to be agricultural land.

This last exception has been modified (31 U. S. St. at L. 680) and the mining acts apply to all lands ceded by the Comanche, Kiowa, and Apache tribes of Indians within the territory of Oklahoma. See Bay *v.* Oklahoma Southern Gas, etc., Min. Co., 13 Okla. 425, 73 Pac. 936.

14. 4 U. S. St. at L. 364.

15. 9 U. S. St. at L. 37. See *supra*, note 9.

As to other minerals on the public lands within the borders of Arkansas, the land department has held that the general Congressional Mining Acts are in force. Norman *v.* Phœnix Zinc Min. Co., 28 Land Dec. 361.

16. 9 U. S. St. at L. 146.

17. 9 U. S. St. at L. 146.

18. 9 U. S. St. at L. 179.

19. 31 U. S. St. at L. 745 [U. S. Comp. St. (1901) p. 1435]. By this act the states above enumerated, which theretofore were excepted from the operation of the Mineral Act (see *supra*, III, B, 1, b), were brought under such act so far as saline lands were concerned.

20. McWilliams *v.* Winslow, 34 Colo. 341, 82 Pac. 538; Girard *v.* Carson, 22 Colo. 345, 44 Pac. 508; Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58.

Lands lying below high tide are not subject to location. Alaska Gold Min. Co. *v.* Barbridge, 1 Alaska 311.

Surface ground must be appropriated in order to make a location valid. Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58; Gleeson *v.* Martin White Min. Co., 13 Nev. 442.

21. Lands to which the rights or claims of others have attached are beyond disposal by congress, until such claims or rights have ceased to exist. Peoria, etc., Milling, etc., Co. *v.* Turner, 20 Colo. App. 474, 79 Pac. 915; Porter *v.* Tonopah North Star Tunnel, etc., Co., 133 Fed. 756.

22. Lands reserved by congress or the authorized officers of the government, for any special use or purpose, are also beyond disposal until the reservation or use is satisfied or the lands released therefrom.

23. See *infra*, III, B, 2, b.

24. See *infra*, III, B, 2, c.

25. See *infra*, III, B, 2, d.

b. Reservations — (I) *After Reservation Made* — (A) *Indian Reservations.*[26] Lands within an Indian reservation are not a part of the public domain,[27] and cannot be located or patented as mineral lands.[28] However, a party in peaceable possession of a mining claim within an Indian reservation, when the rights of the Indians are extinguished, may adopt his preceding acts of location and thus save his rights.[29] The date of the extinguishment of the rights of the Indians is dependent upon the facts in each particular case.[30]

(B) *Military Reservations.* The land included within a military reservation[31] is withdrawn from disposal. No location of mining claims can be made upon lands within subsisting military reservations.[32] The duty devolves on the government to see that the land is kept for the purposes of such reservation.[33] Any rights afterward acquired are subject to the purposes of the reservation.[34] Whenever, however, the lands reserved or any part of them are not further required for military purposes, the president of the United States places them under the control of the secretary of the interior for disposal under the general land laws; but whenever mineral lands are released they must be disposed of under the mineral acts.[35]

26. **Indian reservations** generally see INDIANS, 22 Cyc. 124.

27. **Title to and right of occupancy of Indian lands.**— It has always been held in the United States that the title to all lands within its borders occupied by Indians vested in the discoverer of the country by virtue of the discovery, subject to the right of occupancy by the Indians. This title, subject to this charge, passed to the government by its purchase or acquirement from other powers. This right of occupancy can only be extinguished by the voluntary cession of the Indians to the government. In some instances the government has made grants and conveyances to them for the surrender of other lands by them. In such cases the government retains the first right to regain the title to these lands, but until this is done the lands are not a part of the public domain. Generally the title rests in the government, and the land is reserved for the occupancy and use of the Indians, and is not subject to sale or disposal except subject to these rights, until they are extinguished by the government. Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; Beecher *v.* Wetherby, 95 U. S. 517, 24 L. ed. 440. See also INDIANS, 22 Cyc. 123 *et seq.*

Indian reservations may be created by treaty or by the action of the government. If lands are designated by treaty, they cease to be a part of the public domain. Spalding *v.* Chandler, 160 U. S. 394, 16 S. Ct. 360, 40 L. ed. 469; Missouri, etc., R. Co. *v.* Roberts, 152 U. S. 114, 14 S. Ct. 496, 38 L. ed. 377; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354.

28. Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 73 Pac. 936; Kendall *v.* San Juan Silver Min. Co., 144 U. S. 658, 12 S. Ct. 779, 36 L. ed. 583; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354. See also INDIANS, 22 Cyc. 125.

Even if it is provided in the creation of an Indian reservation that the lands included should be open to location, the actual mineral character of the land must be clearly shown. Durant *v.* Corbin, 94 Fed. 382.

29. Caledonia Gold Min. Co. *v.* Noonan, 3 Dak. 189, 14 N. W. 426 [*affirmed* in 121 U. S. 393, 7 S. Ct. 911, 30 L. ed. 106].

30. Gibson *v.* Anderson, 131 Fed. 39, 65 C. C. A. 277; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354.

31. **Military reservation defined.**— These reservations are created by the executive officers of the United States, or by acts of congress, for the purpose of establishing and maintaining forts and military posts, and include so much land as is deemed proper in order to make the purpose available. Publ. Dom. p. 249. In 7 Op. Atty.-Gen. 754 [*quoted* in Territory *v.* Burgess, 8 Mont. 57, 73, 19 Pac. 558, 1 L. R. A. 808], it is said: "A military reservation is an act of the President, under authority of law, withdrawing so many acres of the public domain from the immediate administration of the commissioner of the public lands, that is, from sale at public auction, and by pre-emption or general private entry, and appropriating it, for the time being, to some special use of the government."

32. Behrends *v.* Goldsteen, 1 Alaska 518, holding that a discovery within a reservation is without effect and void, and a location which lies partly within and partly without a reservation is entirely void.

33. Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634.

34. Thus a location of a mining claim might appropriate the waters of a stream flowing through the reservation, for mining purposes, but such appropriation could only be of such waters as had not been appropriated for the purposes of the reservation. Krall *v.* U. S., 79 Fed. 241, 24 C. C. A. 543.

35. 23 U. S. St. at L. 103 [U. S. Comp. St. (1901) p. 1607, 1610].

No preference right of entry is given by

(c) *Park Reservations.* This class of reservations has usually been created by acts of congress;[36] and whether locations of mining claims within their borders are precluded[37] or not[38] must depend upon the provisions of the act creating it. Lands thus reserved can only again become a part of the public domain by acts of congress.

(d) *Forest Reservations.* Lands in forest reservations reserved by the proclamation of the president under acts of congress,[39] like other reservations, are appropriated for a special public use and are withdrawn from the public domain.[40] Being created by proclamation, the lands reserved, or any of them, may be restored to the public domain by the exercise of the same power,[41] but congress may suspend the operation of such proclamation for a limited time.[42] Practically all mineral lands are excepted from these reservations by the act of June 4, 1897.[43] Under the provisions of the statute, whenever a forest reservation is extended over land covering an unperfected *bona fide* agricultural claim, the claimant may select other lands in lieu thereof, but such selection must be upon "surveyed non-mineral, public lands which are subject to homestead entry."[44]

(e) *Reservoir Reservations.* The first statutes providing for these reservations did not except mineral land from their operation.[45] Therefore the lands thus selected were not open to location. But the statute[46] providing for the location and purchase of reservoir sites by persons engaged in raising live stock expressly excepts mineral land.

(ii) *Before Reservation Made.* Reservations of public lands for the purposes already discussed[47] cannot be created so as to include prior mineral locations; and of course if a valid mining location is made upon public land, afterward included in a reservation, such inclusion does not affect the validity of the location.[48]

c. Grants[49]—(i) *In General.* Throughout the mining states and territories of the coast grants of public lands have been frequently made: (1) To aid railroads;[50] (2) for educational purposes;[51] and (3) for internal improvements.[52]

the act of congress of July 4, 1884, and adverse claims to any lot or lands in the reservation, as opened, must be determined by the law of possession. Walsh *v.* Ford, 1 Alaska 146.

36. See U. S. Rev. St. (1878) §§ 2474, 2475 [U. S. Comp. St. (1901) pp. 1559, 1560]; 30 U. S. St. at L. p. 993.

37. **By the act creating Yellowstone Park,** all lands within its borders were withdrawn from settlement, occupation, or sale. U. S. Rev. St. (1878) §§ 2474, 2475 [U. S. Comp. St. (1901) pp. 1559, 1560]. This statute precludes the location of mining claims within its boundaries.

38. **The act creating the Mount Ranier Park reservation** provides that "the mineral-land laws of the United States are hereby extended to the lands lying within the said reserve and said park." 30 U. S. St. at L. 993. Congress here allowed location of mining claims by giving express authority therefor.

39. By the act of congress of March 3, 1891, it was provided that the president might, by proclamation from time to time, reserve from settlement or sale any part of the public domain, wholly or partly covered with timber or undergrowth, whether of commercial value or not. 26 U. S. St. at L. 1103 [U. S. Comp. St. (1901) p. 1537]. Congress announced the purpose of such reservations in the act of June 4, 1897. 30 U. S. St. at L. 35.

40. U. S. *v.* Tygh Valley Land, etc., Co., 76 Fed. 693.

41. 30 U. S. St. at L. 36.

42. 30 U. S. St. at L. 34.

43. 30 U. S. St. at L. 36.

44. 30 U. S. St. at L. 36; 31 U. S. St. at L. 614; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230.

45. 25 U. S. St. at L. 527; 26 U. S. St. at L. 391.

46. 29 U. S. St. at L. 484.

47. See *supra*, III, B, 2, b, (i).

48. **By such location the land located is segregated** from the public domain, even as against the government.

49. **Reservation of mineral lands from public grants and patents for non-mineral purposes in general see** PUBLIC LANDS.

50. See *infra*, III, B, 2, c, (ii).

51. See *infra*, III, B, 2, c, (iii).

52. **Joint resolution No. 10 of Jan. 30, 1865,** provides that no act passed at the first session of the thirty-eighth congress, granting lands to states or corporations to aid in the construction of roads, or for other purposes, etc., shall be so construed as to embrace mineral lands which in all cases are reserved exclusively to the United States, unless specially provided in the act or acts

Herein also will be considered Mexican grants in so far as it is necessary to touch upon the rights which were acquired thereunder.[53]

(II) *FOR RAILROAD PURPOSES.*[54] Grants of public land made by congress to aid in building the great transcontinental lines of railway are only important to the subject under consideration in so far as mineral lands are concerned.[55] After the enactment of these statutes making such grants and at the thirty-eighth session of congress, a joint resolution was passed expressly reserving mineral lands, save coal and iron, from their operation.[56] As a rule these acts provide that as soon as the definite line of the road has been established and proper maps thereof filed and approved by the government, all lands within the limits of the grant upon which no claims had been initiated should be withdrawn from sale or entry until proper surveys could be made and the lands granted thereby designated. After various holdings of the federal courts[57] the rule was finally established that inasmuch as all mineral lands[58] except coal and iron were excepted from the grants, such lands were open to location until the railroad companies obtained patents to the lands granted.[59] This decision,[60] however, was only applicable to land within the limits of the original grant[61] and had no reference to grants of the right of way or lands within the indemnity limits.[62] Grants of rights of way are absolute and unconditional. True, they are floating in their character until the line of road is definitely located and the maps thereof filed and approved, whereupon the absolute title passes and relates back to the date of the grant.[63] Therefore if mineral land within the right of way is unappropriated at the time the grant attaches, it passes by the grant and cannot be afterward located.[64] If, however, the grant has become anchored, no subsequent change of the line could interfere with existing rights.[65] The grant of lands in the indemnity limits[66] does not attach until the lands have been selected and such selections are certified and approved;[67] hence until the selection is made, approved, and certified mineral lands within these limits may be located.

making the grants. 13 U. S. St. at L. 567; U. S. Rev. St. (1878) § 2346 [U. S. Comp. St. (1901) p. 1439]. See also Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992.

53. See *infra*, III, B, 2, c, (IV).

54. **Mineral land not subject** to grant for railway purposes see PUBLIC LANDS.

55. There is a great similarity in the provisions of all of these grants, and a reference to that made in aid of the Pacific railroads will be sufficient for our purpose. 12 U. S. St. at L. 489–498; 13 U. S. St. at L. 365.

56. 13 U. S. St. at L. 567.

57. See Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77.

58. **Lands valuable solely or chiefly for granite quarries** are mineral lands, within the meaning of the exception in the grant to the Northern Pacific Railway Company under the act of congress of July 2, 1864. Northern Pac. R. Co. *v.* Soderberg, 188 U. S. 526, 23 S. Ct. 365, 47 L. ed. 575 [*affirming* 104 Fed. 425, 43 C. C. A. 620].

59. Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992.

After this decision congress appointed commissioners to examine and classify the public lands within the limits of the grant. 28 U. S. St. at L. 683. But such classification has been held to be not conclusive. Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59.

Prior to the filing of a right-of-way map of definite location and the approval thereof as provided in section 4 of the Right of Way Act (18 U. S. St. at L. 482 [U. S. Comp. St. (1901) p. 1569]) lands covered by the map are free from the right of way and subject to mineral location. Southern California R. Co. *v.* O'Donnell, (Cal. App. 1906) 85 Pac. 932.

60. Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992.

61. **Odd numbered sections.**— These grants are as a rule of each odd numbered section for a distance of several miles on each side of the line of the road as definitely located.

62. **Indemnity lands.**—In some of them indemnity lands in lieu of sections within the original limits which may be lost to the company by reason of their mineral character, prior sale, reservation, or disposal are allowed to be selected within certain limits beyond the original limits.

63. St. Joseph, etc., R. Co. *v.* Baldwin, 103 U. S. 426, 26 L. ed. 578.

64. Wilkinson *v.* Northern Pac. R. Co., 5 Mont. 538, 6 Pac. 349.

65. Smith *v.* Northern Pac. R. Co., 58 Fed. 513, 7 C. C. A. 397.

66. See *supra*, note 60.

67. U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766; Wis-

(III) *For Educational Purposes.*[68] Mineral lands do not pass under grants made for educational purposes, but their character must be determined before the grants take effect.[69] These grants take effect as soon as the public surveys are completed and approved. If lands are then known to be mineral lands[70] they do not pass by the grants.[71]

(IV) *Mexican Grants.*[72] Under the Mexican law no interest in the minerals of gold and silver passed from the government by grant without express words of designation.[73] Mining rights were acquired upon denouncement or were conveyed under the mining ordinances.[74] These rights were held under conditions which did not affect the title to the land passing by ordinary conveyance. This was the law in force at the time of the treaty of Gaudalupe-Hidalgo, by the terms of which the United States agreed to protect all titles granted by Mexico within the ceded land.[75] It is sufficient to say that congress has provided a method by which the extent and validity of these grants should be determined and they are nearly all settled.[76]

d. Sales and Entries[77] — (I) *Agricultural* — (A) *Under Preëmption or Timber Culture Acts.* Mineral land has always been excepted from entries under the preëmption laws[78] or under the timber culture laws.[79]

(B) *Under Homestead Acts.* Only unappropriated, non-mineral land is subject to the homestead right.[80] A homestead may be entered upon any unoccupied or unappropriated land which has been returned by the surveyor-general as non-mineral. The effect of such claim is to withdraw the land claimed from other occupation or settlement during the time allowed by law for the homestead completion.[81]

consin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Sioux City R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928; Barney *v.* Winona R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; Kansas, etc., R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96.

68. Mineral land not subject to grant for educational purposes see PUBLIC LANDS.

69. Ivanhoe Min. Co. *v.* Keystone Consol. Min. Co., 102 U. S. 167, 26 L. ed. 126.

70. Known mineral lands.— In order to come within the designation of "known mineral lands" they must be known to contain mineral sufficient in quantity to justify the expenditure of money for its extraction. Davis *v.* Wiebbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238. See also *supra*, note 24.

71. Hermocilla *v.* Hubbell, 89 Cal. 5, 26 Pac. 611.

72. All of these grants were made by Mexico prior to the treaty of Guadalupe-Hidalgo, and attached to lands ceded to the United States under that treaty.

73. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123; Lockhart *v.* Johnson, 181 U. S. 516, 21 S. Ct. 665, 45 L. ed. 979. See also *supra*, III, A.

74. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123; U. S. *v.* San Pedro, etc., Co., 4 N. M. 225, 17 Pac. 337; Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

75. Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Peralta *v.* U. S., 3 Wall. (U. S.) 434, 18 L. ed. 221.

76. For a complete history of these grants and the law relating thereto see 1 Lindley Min. L. (2d ed.) § 113 *et seq.*

Mineral land within the limits of a Mexican grant of agricultural land is open to location. Lockhart *v.* Johnson, 181 U. S. 516, 21 S. Ct. 665, 45 L. ed. 979 [*affirming* 9 N. M. 344, 54 Pac. 336].

77. General remarks as to all entries.— Mineral lands having been reserved from sale by the mineral acts of 1866 and 1872 in any other manner than under such acts, title thereto cannot be acquired in any other manner, if the mineral character of the land is brought to the attention of the government.

78. Mineral land not open to preemption see PUBLIC LANDS.

The preëmption law was repealed by the act of March 3, 1891. 26 U. S. St. at L. 1097 [U. S. Comp. St. (1901) p. 1381].

79. 17 U. S. St. at L. 605; 20 U. S. St. at L. 113.

Repeal of statutes.— The timber culture laws enacted March 3, 1873, and June 14, 1878, were repealed by the act of March 3, 1891. 26 U. S. St. at L. 1093, 1095 [U. S. Comp. St. (1901) pp. 1531, 1535].

80. U. S. Rev. St. (1878) § 2289, as amended by 26 U. S. St. at L. 1097 [U. S. Comp. St. (1901) p. 1388]; 31 U. S. St. at L. 179 [U. S. Comp. St. (1901) p. 1618].

81. Time allowed for completion.— The supreme court of the United States has held that the land continues to be the property of the United States for the five years following the entry and until patent upon proof of the continued residence of the settler upon the land for five years, and that in the meantime such settler has the right to treat

It follows from the doctrine of Shiver *v.* United States[82] and from the statutes which prohibit the acquisition of the title to mineral land under the Homestead Law,[83] that a homestead entry will not prevent the location of the same ground of actually mineral character, if the same can be done peaceably. A mineral claimant may institute proceedings in the land department to determine the character of the land at any time before the final entry of the homestead claimant, but in order to succeed he must satisfy the department that the land contains mineral in sufficient quantities to warrant a prudent man in expending his time and money in the development thereof.[84]

(II) *TOWN SITES*—(A) *In General.* The statutes of the United States provide how town sites may be entered and acquired upon the public domain.[85] Only some sections of these statutes[86] are necessary for consideration in this article. These sections, construed with the mineral acts,[87] form the basis of town-site entries, in so far as mining claims are concerned.[88]

(B) *Effect of Patent or Final Entry.* The law is well settled at least as to two propositions: (1) When no application for a patent has been made for a town site, the land, if mineral, may be located and acquired under the Mineral Act, even though in actual occupancy for town-site purposes;[89] and (2) if a final entry for town-site purposes has been made, or patent issued, only such lands are excluded as were known to contain minerals at the date of the application for the patent, sufficient in value to warrant exploitation, and those lands then located and possessed as mineral lands.[90] If a known mining claim is included in a town-site patent, such patent is void to that extent.[91]

(C) *Mill Site.* A mill site[92] is a mining claim or possession within the above cited statute,[93] which is excepted from the operation of a town-site patent if located prior to the town-site entry.[94]

(III) *TIMBER AND STONE.* The act providing for entries of this character[95] excludes all land containing any valuable deposit of gold, silver, cinnibar, copper, and coal. The lands are not withdrawn from the public domain on the filing of

the land as his own so far as is necessary to carry out the purposes of the Homestead Act. Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231.

82. See *supra*, note 81.

83. See *supra*, note 80.

84. U. S. *v.* Copper Queen Consol. Min. Co., 7 Ariz. 80, 60 Pac. 885; Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207; Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 73 Pac. 936.

The burden of proof that the land is mineral is upon the person asserting it. Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 73 Pac. 936.

85. U. S. Rev. St. (1878) § 2380 *et seq.* [U. S. Comp. St. (1901) p. 1455 *et seq.*]; and § 16 of the act of March 3, 1891, 26 U. S. St. at L. 1101 [U. S. Comp. St. (1901) p. 1459].

86. U. S. Rev. St. (1878) §§ 2386, 2387, 2388 [U. S. Comp. St. (1901) pp. 1457, 1458]; and § 16 of the act of March 3, 1891, 26 U. S. St. at L. 1101 [U. S. Comp. St. (1901) p. 1459].

87. See U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425], and statutes cited *passim* this article.

88. See *infra*, III, B, 2, d, (II), (B), (C).

89. Martin *v.* Browner, 11 Cal. 12; Poire *v.* Wells, 6 Colo. 406; Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226.

90. *Arizona.*—Blackmore *v.* Reilly, 2 Ariz. 442, 17 Pac. 72; Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26.

California.—McCormick *v.* Sutton, 97 Cal. 373, 32 Pac. 444.

Colorado.—Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69.

Montana.—Horsky *v.* Moran, 21 Mont. 345, 53 Pac. 1064; King *v.* Thomas, 6 Mont. 409, 12 Pac. 865; Butte City Shoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570.

United States.—Dower *v.* Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305; Davis *v.* Wiebbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238; Bonner *v.* Meikle, 82 Fed. 697.

91. Talbott *v.* King, 6 Mont. 76, 9 Pac. 434; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570.

92. Mill site defined see *ante*, p. 510.

93. See *supra*, note 86.

94. Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

95. The act was first passed June 3, 1878 (20 U. S. St. at L. 89), and only applied to California, Nevada, Oregon, and Washington, but was extended to all public land by

the application,[96] and are therefore open to location as much as under the Mineral Act.

(IV) *Desert Land Entries.* The acts of March 3, 1877,[97] and March 3, 1891,[98] provided for these entries and expressly exclude mineral land from their operation.

(V) *Scrip.* Only unoccupied, non-mineral land is subject to entry and purchase by scrip.[99] When the entry is made the land is withdrawn from the public domain.[1]

3. How Initiated. Rights to mining claims are initiated by location, which is the act of appropriating the parcel of land according to certain established rules. It usually consists of making a discovery and placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that the ground is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act.[2] It is apparent from the provisions of the statute[3] that the following requisites must concur in the valid location of a lode mining claim: (1) The discovery of a valuable vein or lode containing one or more of the minerals mentioned in section 2320, must be made within the claim sought to be located;[4] (2) such discovery must be upon the unappropriated lands of the United States;[5] (3) a location can only be made by a citizen of the United States or one who has declared his intention to become such;[6] (4) the vein or lode discovered must be in place;[7] (5) the claim cannot exceed fifteen hundred feet in length along the vein or lode and six hundred feet in width, three hundred feet on each side of the vein or lode;[8] (6) the location must be distinctly marked on the ground so that its boundaries can be readily traced;[9] (7) if a record of the location is required by the local rules or customs of miners in the district or by the laws of the state or territory in which it is made, such record must be made in accordance therewith, and it must contain the name or names of the locator or locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim;[10] (8) all local rules and customs and all statutes of the state or territory[11] in which the location is made, not inconsistent with the congressional act, must be complied with.

4. By Whom Located or Acquired — a. Aliens and Citizens. Some of the earlier cases hold that an alien cannot locate a mining claim, and if he attempts so to do he acquires no rights;[12] others hold that he acquires a qualified

the amendment of Aug. 4, 1892 (27 U. S. St. at L. 348 [U. S. Comp. St. (1901) p. 1547]).

96. Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157.

97. 19 U. S. St. at L. 377.

98. 26 U. S. St. at L. 1095.

99. All scrip is issued pursuant to special acts of congress, and is received in payment for public land by surrender to the government.

1. James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

2. St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Uinta Tunnel, etc., Co. *v.* Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35.

3. U. S. Rev. St. (1878) §§ 2319, 2320, 2324 [U. S. Comp. St. (1901) p. 1424].

4. See *infra*, III, B, 5, c, (II).

5. See *infra*, III, B, 5, c, (II), (C).

6. It will appear when we consider the question of citizenship that this is true only against the government. See *infra*, III, B, 4, a.

7. "In place" defined see *supra*, II, C, 3, h.

8. See *infra*, III, B, 5, d, (II).

Local statutes or rules cannot establish a width of less than fifty feet, twenty-five on each side of the vein or lode.

9. See *infra*, III, B, 5, d, (V).

10. See *infra*, III, B, 5, d, (VI), (A), (2); III, B, 5, d, (VI), (G).

11. Want of space forbids the discussion of the various statutes of the different mining states and territories. Those requirements are various, and each being controlling only within its own territorial limits, it is sufficient to say generally that the different legislatures are given power to enact statutes governing the location of mining claims so long as they are not inconsistent with congressional acts. See the statutes of the several states.

12. Lee *v.* Justice Min. Co., 2 Colo. App. 112, 29 Pac. 1020; Tibbitts *v.* Ah Tong, 4 Mont. 536, 2 Pac. 759; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc.,

right;[13] while still others hold that he acquires all the rights that a citizen does against everyone except the United States.[14] A location made by a citizen and an alien would not be void;[15] in case the alien's interest should be attacked by the government the entire title would vest in the citizen;[16] and a conveyance by both to a qualified locator would vest the entire title.[17] However, while an alien can never acquire a patent to a location under the statute,[18] if he applies for a patent, and pending the proceedings he becomes a citizen, or declares his intention, his disabilities are removed and all his rights relate back to the initiation of the proceedings and are made valid.[19] The conclusions upon alienage are as follows: (1) If the suit be one to determine who is entitled to a patent, and one of the parties is an alien and does not then become a citizen or declare his intention, that fact will be fatal to his rights; (2) in all suits between parties with reference to the title or right to the possession of the claim, it makes no difference if the title has passed through an alien and then rests in one; (3) an alien may locate or purchase a mining claim and until "office found" may hold and dispose of the same in like manner as a citizen.[20]

b. Associations and Corporations. Associations or domestic corporations, all of whose members are qualified, may locate and patent mining claims.[21]

Min. Co., 12 Nev. 312; Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 28, 1 Morr. Min. Rep. 497.

13. Lee Doon *v.* Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; Ferguson *v.* Neville, 61 Cal. 356; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312; Gorman Min. Co. *v.* Alexander, 2 S. D. 557, 51 N. W. 346; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 2 C. C. A. 252 [*affirmed* in 52 Fed. 250, 3 C. C. A. 69].

14. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; Stewart *v.* Gold, etc., Co., 29 Utah 443, 82 Pac. 475, 110 Am. St. Rep. 719; Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

If he allows his rights to rest in location and does not seek a patent to the claim, the law protects him in such rights as against all the world except the government. The government being the owner of the land is the only power which can contest his right. It can only do so by way of office found. North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

If he sells or conveys his location to a citizen, or one who has declared his intention to become such, before the government institutes any proceedings against him, the rights of such grantee are as well established as though he had made the location himself. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; Stewart *v.* Gold, etc., Co., 29 Utah 443, 82 Pac. 475, 110 Am. St. Rep. 719; Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

15. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

16. Golden Fleece Gold, etc., Min. Co. *v.* Cable Co., 12 Nev. 312.

17. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

18. See U. S. Rev. St. (1878) § 2319 [U. S. Comp. St. (1901) p. 1424].

Proceedings to obtain a patent are in the nature of office found, and the alienage necessarily appears. See, generally, PUBLIC LANDS.

On an adverse to an application for a patent to a mining claim, the objection that the locators were aliens was properly made, it being in effect made on behalf of the government. Matlock *v.* Stone, 77 Ark. 195, 91 S. W. 553.

19. Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532 [*reversing* 9 Mont. 276, 279, 286, 23 Pac. 723]; Shea *v.* Nilima, 133 Fed. 209, 66 C. C. A. 263; Crœsus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78.

Question of citizenship is one for the jury, and not for the court. Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

20. See Lindley Mines, §§ 233, 234 [*quoted* in Matlock *v.* Stone, 77 Ark. 195, 199, 91 S. W. 553].

21. Thomas *v.* Chisholm, 13 Colo. 105, 21 Pac. 1019; Stemwinder Min. Co. *v.* Emma, etc., Consol. Min. Co., 2 Ida. (Hasb.) 456, 21 Pac. 1040 (holding, however, that where on the trial, it is not contended that a corporation made the location, an instruction that a corporation cannot make a location is not prejudicial); Dahl *v.* Montana Copper Co., 132 U. S. 264, 10 S. Ct. 97, 33 L. ed. 325; McKinley *v.* Wheeler, 130 U. S. 630, 9 S. Ct. 638, 32 L. ed. 1048; Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

An association of persons may locate a placer claim containing one hundred and sixty acres. U. S. Rev. St. (1878) § 2330 [U. S. Comp. St. (1901) p. 1432]; Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74

c. Agents. A location can be made by an agent.[22] Any recognition by the principal of the agent's act is a ratification.[23] Where one person on behalf of another locates and records a claim in his own name, the court will compel him to transfer the claim to his principal.[24]

d. Free Miners' Certificates and Prospecting Licenses. Under the British Columbia statute a person wishing to prospect or mine upon government lands is required to take out a "free miner's certificate,"[25] and a free miner has the right, during the continuance of his certificate but no longer, to enter, locate, prospect, and mine for gold and other precious metals upon government lands.[26] The

Pac. 444, 98 Am. St. Rep. 63; Kirk *v.* Meldrum, 28 Colo. 453, 65 Pac. 633. See also *infra*, III, B, 5, d, (II).

A corporation is an "association" under U. S. Rev. St. (1878) §§ 2347–2352 [U. S. Comp. St. (1901) pp. 1440, 1441], giving the right to enter and purchase coal lands. U. S. *v.* Trinidad Coal, etc., Co., 137 U. S. 160, 11 S. Ct. 57, 34 L. ed. 640.

22. *Alaska.*—Russell *v.* Dufresne, 1 Alaska 486; Moore *v.* Steelsmith, 1 Alaska 121.

Arizona.— Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

California.— Moore *v.* Hamerstag, 109 Cal. 122, 41 Pac. 805; Gore *v.* McBrayer, 18 Cal. 582.

Colorado.— Lipscomb *v.* Nichols, 6 Colo. 290; Murley *v.* Ennis, 2 Colo. 300.

Idaho.— Dunlap *v.* Pattison, 4 Ida. 473, 42 Pac. 504, 95 Am. St. Rep. 140; Schultz *v.* Keeler, 2 Ida. (Hasb.) 333, 13 Pac. 481.

Nevada.— Van Valkenburg *v.* Huff, 1 Nev. 142.

United States.—McCulloch *v.* Murphy, 125 Fed. 147; Book *v.* Justice Min. Co., 58 Fed. 106.

See 34 Cent. Dig. tit. "Mines and Minerals," § 19.

Agent for non-resident.— In the absence of any rules and regulations not allowing location by non-residents, it is no fraud on the government or third persons for a prospector to locate a mine in the name of a non-resident and receive a deed from him; and where the evidence shows that such location was made in good faith, it is error to submit to the jury the question of fraudulent evasion of the law. Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

23. *Arizona.*— Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

California.— Moritz *v.* Lavelle, 77 Cal. 10, 18 Pac. 803, 11 Am. St. Rep. 229; Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182; Morton *v.* Solambo Copper Min. Co., 26 Cal. 527; Gore *v.* McBrayer, 18 Cal. 582.

Colorado.— Murley *v.* Ennis, 2 Colo. 300.

Idaho.— Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955.

Montana.— Hirbour *v.* Reeding, 3 Mont. 15.

Nevada.— Welland *v.* Huber, 8 Nev. 203.

South Dakota.— Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943.

United States.— Book *v.* Justice Min. Co., 58 Fed. 106.

See 34 Cent. Dig. tit. "Mines and Minerals," § 20.

Presumption.— A party in whose name a location is made is presumed to assent thereto. Rush *v.* French, 1 Ariz. 99, 25 Pac. 816; Van Valkenburg *v.* Huff, 1 Nev. 142.

24. Fero *v.* Hall, 6 Brit. Col. 421.

25. British Columbia Placer Mining Act (1891), §§ 3–14; Wyman Land and Mining Laws, pp. 423–426.

26. British Columbia Placer Mining Act (1891), § 10; Wyman Land and Mining Laws, pp. 425, 426.

Location by one free miner in name of another.— Where one free miner locates and records a mineral claim, if he locates another claim on the same vein in the name of another free miner, he thereby acquires no interest in such last claim by virtue of section 29 of the Mineral Act of 1896. Alexander *v.* Heath, 8 Brit. Col. 95.

On the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location. The obtaining of a special certificate, under section 2 of the Mineral Act Amendment Act of 1901, does not revive the title if in the meantime the ground had been located as a mineral claim. Woodbury Mines *v.* Poyntz, 10 Brit. Col. 181.

Lapse of certificates of some coöwners.— Where some of the coöwners of a mineral claim allow their free miners' certificates to lapse, their interests at once vest *pro rata* in their former coöwners. McNaught *v.* Van Norman, 22 Can. L. T. Occ. Notes 341, 9 Brit. Col. 131 [*affirmed* in 32 Can. Sup. Ct. 690].

Lapse of certificate after agreement by partner to sell claim.— If a partner in a mineral claim makes an agreement for sale thereof with a third party, another partner does not forfeit his share in the proceeds of such sale merely because his free miner's certificate was allowed to lapse after the making of the agreement. McNerhanie *v.* Archibald, 6 Brit. Col. 260.

A sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under section 4 of the British Columbia Mineral Act Amendment Act of 1899, in the name of the judgment debtor; neither has the sheriff power to renew a certificate before lapse. McNaught *v.* Van Norman, 22 Can. L. T. Occ. Notes 341, 9 Brit. Col. 131 [*affirmed* in 32 Can. Sup. Ct. 690].

Nova Scotia statute[27] provides for prospecting licenses giving the licensee the right to search for minerals[28] over a designated area[29] for a limited time.[30]

5. Requisites and Validity of Location Proceedings — a. Miners' Rules and Customs. As heretofore shown,[31] these rules were the outgrowth of usage, and are the foundation of mining law on the public domain. They had been directly approved and authorized by congress in the mining acts of July 26, 1866,[32] and of May 10, 1872.[33] In most jurisdictions they have become obsolete, being superseded by state and territorial legislation.[34] However, the right still exists in the miners to adopt them,[35] but they must not conflict with the acts of congress,

27. Nova Scotia Rev. St. (1900) pp. 165 *et seq.*

28. See McColl *v.* Ross, 28 Nova Scotia 1.

Application for license.— Where the application for a prospecting license over certain mining areas defined the locus: "Beginning at a stake marked W. M. L., standing about one mile westerly from Malega Lake, in the County of Queens," but at the time the application was made there was no stake marked as described at the locality indicated, from which the description could start, but a stake marked as described was put down soon afterward, the application was bad as not accurately defining by metes and bounds the lands applied for, within the meaning of the Mines Act, 5th R. S. c. 7, § 39. *Re* Malega Barrens, 20 Nova Scotia 44.

Rights acquired under application.— Respondents made application at the office of the commissioner of mines for a license to search for coal areas. The application contained a good description of the property in respect of which the license was desired, and was accompanied by the necessary fee. Subsequently one of the applicants received a letter from the deputy commissioner, stating that he could not find the starting point, and asking for additional information. A letter was sent in reply, in which the starting point was stated incorrectly, and at a different point from that mentioned in the original application. It was held that, there having been a certain description, and the money and application having been appropriated, the license could not be removed to another locality; and that the applicants were not estopped, and could not be bound by an entry made in the registry book of the office, after the receipt of the letter sent in reply to the letter of the deputy commissioner and could not, as the result of such entry, lose the title that they had acquired by a good application. *In re* Barrington, 35 Nova Scotia 426.

License to search assignable.—*In re* Milner, 11 Nova Scotia 522.

29. See McColl *v.* Ross, 28 Nova Scotia 1.

The same party cannot have more than one license to search, with right of renewal, over the same area. Atty.-Gen. *v.* Fraser, 12 Nova Scotia 351.

Second rights on lands already covered.— On Oct. 13, 1891, W applied for and obtained a license to search for eighteen months, over an area of one square mile. While it was outstanding plaintiff applied for a license to search over an area of five square miles, including the mile covered by the above. By Nova Scotia 5th R. S. c. 7, § 84, the commissioner was forbidden to receive applications for rights over areas already covered, but by an amendment (Nova Scotia Laws (1892), c. 1, § 98), passed a few days after plaintiff's application was made, he was authorized to receive applications for licenses to search (called second rights), over lands already covered, in the case of minerals other than gold and silver. After the passing of this amendment, and two days after the expiring of W's rights, defendant applied for and obtained a license to search over that square mile. It was held that the commissioner acting under the statute then in force had rightly refused plaintiff's application, and for the same reason had rightly granted the application of defendant, and that it was immaterial that plaintiff's application covered other land than that covered by W's license. McColl *v.* Ross, 28 Nova Scotia 1.

30. See *In re* Caldwell, 28 Nova Scotia 240.

The periods covered by licenses or rights subsequent to the first commence to run, not from the dates of the applications therefor, respectively, but from the expiry of the preceding rights respectively. *In re* Caldwell, 28 Nova Scotia 240.

31. See *supra*, I, B, text and notes 7–11.

32. 14 U. S. St. at L. 253; U. S. Rev. St. (1878) § 2341 [U. S. Comp. St. (1901) p. 1437]; Robertson *v.* Smith, 1 Mont. 410.

33. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426]; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

34. See the statutes of the several states.

Miners' regulations are presumed to be in force until the contrary is shown. Riborado *v.* Quang Pang Min. Co., 2 Ida. (Hasb.) 144, 6 Pac. 125.

Whenever it falls into disuse a local custom becomes void. Harvey *v.* Ryan, 42 Cal. 626; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

35. **The manner in which local rules are adopted** is immaterial. Gore *v.* McBrayer, 18 Cal. 582.

It is not essential, however, that mining districts be organized or rules adopted in order that mining claims may be held and government titles acquired. Golden Fleece

nor with state or territorial legislation, where such legislation exists.[36] The local[37] rules and regulations must be followed when not in conflict with laws of the United States, state, or territory.[38] Local usages and customs must be uniform to be effective.[39]

b. State and Territorial Legislation. For many years the different mining states and territories have enacted laws relative to the location of mining claims, providing the different steps necessary to make a valid location. Such legislation has always been considered as synonymous with and superseding miners' rules and customs.[40] These several acts add to and expand the provisions of the Mineral Act of congress, and point out specifically the different steps necessary to complete a valid location. Of course if they conflict with the act of congress they are void.[41] If a person goes upon the mineral lands of the United States and works

Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

36. *Alaska.*— Price *v.* McIntosh, 1 Alaska 286; Butler *v.* Good Enough Min. Co., 1 Alaska 246.

California.— Original Co. *v.* Winthrop Min. Co., 60 Cal. 631; Harvey *v.* Ryan, 42 Cal. 626.

Montana.— Gropper *v.* King, 4 Mont. 367, 1 Pac. 755.

Nevada.— Gleeson *v.* Martin White Min. Co., 13 Nev. 442; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

Utah.— *In re* Monk, 16 Utah 100, 50 Pac. 810.

United States.— Northmore *v.* Simmons, 97 Fed. 386, 38 C. C. A. 211; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

See 34 Cent. Dig. tit. "Mines and Minerals," § 18. See also cases cited *infra*, this note.

Question for jury.— The question whether or not a mining law or custom is in force is beld to be one for the jury. Harvey *v.* Ryan, 42 Cal. 626; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

"Grub-stake" rules and customs are valid. Boucher *v.* Mulverhill, 1 Mont. 306. "Grub-stake" defined see 20 Cyc. 1390.

37. **Customs of miners are local,** not general. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

38. Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534; Consolidated Republican Mountain Min. Co. *v.* Lebanon Min. Co., 9 Colo. 343, 12 Pac. 212.

A mining claim may be forfeited for noncompliance with rules and regulations in force. St. John *v.* Kidd, 26 Cal. 263.

Compliance with local rules will be presumed in the absence of evidence to the contrary. Robertson *v.* Smith, 1 Mont. 410.

Locations made prior to the passage of mineral laws by congress are governed by the local rules in force at the time of location. Glacier Mountain Silver Min. Co. *v.* Willis, 127 U. S. 471, 8 S. Ct. 1214, 32 L. ed. 172; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96. A location made prior to 1872, valid under local rules not in conflict with United States laws then in force, is valid against subsequent locators. Gropper *v.* King, 4 Mont. 367, 1 Pac. 755.

Marking the boundaries of a claim in accordance with a general custom is sufficient in absence of statute. Loeser *v.* Gardiner, 1 Alaska 641.

Miners' rules are admissible in evidence.— Orr *v.* Haskell, 2 Mont. 225; Smith *v.* North American Min. Co., 1 Nev. 423. The existence of written local rules will not preclude the admission of evidence to show the existence of an unwritten custom in force of a contrary nature. Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96. See also Harvey *v.* Ryan, 42 Cal. 626. General usage may be given in evidence, whether anterior to the location or not, as being the general sense of the mining community; but local regulations, if made after location, would be an unjust criterion of action and the location need not conform to them. Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 198, 31 Cal. 387.

Judicial notice cannot be taken of the rules, usages, and customs of mining districts, and they should be proved at the trial like any other fact, by the best evidence that can be obtained respecting them. Sullivan *v.* Hense, 2 Colo. 424. Courts will, however, take judicial notice of those general methods which are common to all districts of locating and designating mines by serial number above and below a common base known as "discovery" or "No. 1." Butler *v.* Good Enough Min. Co., 1 Alaska 246.

39. Table Mountain Tunnel Co. *v.* Stranahan, 31 Cal. 387. See CUSTOMS AND USAGES, 12 Cyc. 1035 *et seq.*

Question for court.— Mining rules are to be construed by the court when introduced in evidence. Fairbanks *v.* Woodhouse, 6 Cal. 433.

40. **Miners' rules and customs** see *supra*, III, B, 5, a.

41. See cases cited *infra*, this note.

Such statutes have been held constitutional in Wolfley *v.* Lebanon Min. Co., 4 Colo. 112; Mares *v.* Dillon, 30 Mont. 117, 75 Pac. 963; Baker *v.* Butte City Water Co., 28 Mont. 222, 72 Pac. 617, 104 Am. St. Rep. 683;

thereon, without complying with the requirements of any law or local customs, and relies exclusively on his possession or work, and another person locates peaceably a mining claim covering the same ground, and in all respects complies with the requirements of the federal and district mining rules, laws, and regulations, the latter is entitled to the possession of such mineral ground as against the person in prior possession.[42]

c. Character of Ground; Discovery and Preliminary Investigation — (I) *General Characteristics of Ground Which May Be Located* — (A) *As Lode Claim.* The land must be unappropriated public land, within which exists a lode, lead, or vein in place containing one or more of the minerals described in the statute; such vein must exist within the limits of the claim sought to be located.[43]

(B) *As Placer Claim.* The land must be unappropriated public domain within which exists any form of valuable mineral deposits excepting veins of quartz or other rock in place.[44]

(II) *Discovery of Vein or Lode Necessary to Location of Lode Claim* — (A) *In General.* The first step in making a location of a lode claim is the discovery,[45] within the limits of the claim sought to be located, of a vein or

Purdum *v.* Laddin, 23 Mont. 387, 59 Pac. 153; Berg *v.* Koegel, 16 Mont. 266, 40 Pac. 605; McCowan *v.* Maclay, 16 Mont. 234, 40 Pac. 602; Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037; O'Donnell *v.* Glenn, 8 Mont. 248, 19 Pac. 302; Sisson *v.* Sommers, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815; Gleeson *v.* Martin White Min. Co., 13 Nev. 442; Wright *v.* Lyons, 45 Oreg. 167, 77 Pac. 81; Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019; Butte City Water Co. *v.* Baker, 196 U. S. 119, 25 S. Ct. 211, 49 L. ed. 409; Northmore *v.* Simmons, 97 Fed. 386, 38 C. C. A. 211; Preston *v.* Hunter, 67 Fed. 996, 15 C. C. A. 148.

The validity of such legislation has been indirectly recognized by the supreme court of the United States in Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 20 S. Ct. 726, 44 L. ed. 864; Enterprise Min. Co. *v.* Rico-Aspen Consol. Min. Co., 167 U. S. 108, 17 S. Ct. 762, 42 L. ed. 96; Kendall *v.* San Juan Silver Min. Co., 144 U. S. 658, 12 S. Ct. 779, 36 L. ed. 583; Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256, 9 S. Ct. 511, 32 L. ed. 906; Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 6 S. Ct. 1177, 30 L. ed. 98; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113. And it has been expressly sustained in Butte City Water Co. *v.* Baker, 196 U. S. 119, 25 S. Ct. 211, 49 L. ed. 409.

Repeal of state statute. — A location, valid under the laws of the United States, but not under a state statute, is left a valid location by the repeal of the state statute. Dwinnell *v.* Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. N. S. 763.

42. Horswell *v.* Ruiz, 67 Cal. 111, 7 Pac. 197; Morenhaut *v.* Wilson, 52 Cal. 263; Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280; McCormick *v.* Varnes, 2 Utah 355; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 28, 1 Morr. Min. Rep. 497.

43. U. S. Rev. St. (1878) §§ 2319, 2320 [U. S. Comp. St. (1901) p. 1424]; Zollars *v.* Evans, 5 Fed. 172, 2 McCrary 39.

The owner of an unpatented town lot within a mining claim may contest the mining location for the purpose of determining the character of the ground. Behrends *v.* Goldsteen, 1 Alaska 518.

The land department, not the courts, must determine the character of the ground. Behrends *v.* Goldsteen, 1 Alaska 518; Wright *v.* Hartville, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450.

44. U. S. Rev. St. (1878) §§ 2319–2329 [U. S. Comp. St. (1901) pp. 1424–1432]; Souter *v.* Maguire, 78 Cal. 543, 21 Pac. 183; Gregory *v.* Pershbaker, 73 Cal. 109, 14 Pac. 401.

In Canada, however, it is held that a placer claim may be located on a lode claim. Tanghe *v.* Morgan, 11 Brit. Col. 76.

45. Sharkey *v.* Candiani, (Oreg. 1906) 85 Pac. 219.

"Discovery" in the statute means the acquirement of knowledge that such vein or lode exists within the limits of the claim sought to be located. Waterloo Min. Co. *v.* Doe, 56 Fed. 685.

What constitutes discovery see Cheesman *v.* Shreeve, 40 Fed. 787.

The prospector must actually find "minerals in place" before he can locate a claim. His belief that the proposed claim contains minerals is not sufficient. Collom *v.* Manley, 32 Can. Sup. Ct. 371 [*reversing* 8 Brit. Col. 153].

A miner who assisted in surveying a claim is competent to testify as to what mark indicated the point of discovery. Strasburger *v.* Beecher, 20 Mont. 143, 49 Pac. 740.

Presumption of discovery. — The recording of a claim and marking its boundaries on the ground is not sufficient to authorize a presumption of discovery. Smith *v.* Newell, 86 Fed. 56.

Surface ground is merely an incident to

lode of quartz or other rock in place, containing one or more of the minerals mentioned in the statute.[46] The method of such acquirement is immaterial. Pay ore need not be found.[47] But it must be more than a mere guess.[48] The locator need not be the first discoverer.[49] But the loss of rights to the place where discovery has been made is fatal to the location.[50] The federal courts have held that a locator may sell that part of his claim which includes the discovery, without affecting his right to the remainder.[51] Of course if a new discovery is made upon that part of the claim remaining it will save it.[52] It has been held in California that when the point of discovery has passed under an agricultural patent, the locator, if the patentee, saves his location.[53]

(B) *When Made.* Logically discovery should precede the other acts of location, but many courts have held that if made prior to any intervening rights the location will be good at least from that date.[54] The time of making the discovery in relation to the other acts of location is immaterial, but no location is complete until the discovery is made.[55]

discovery. Wolfley *v.* Lebanon Min. Co., 4 Colo. 112.

The location dates from discovery. Tuolumne Consol. Min. Co. *v.* Maier, 134 Cal. 583, 66 Pac. 863.

46. U. S. Rev. St. (1878) § 2320 [U. S. Comp. St. (1901) p. 1424].

47. *Arizona.*— Score *v.* Griffin, (1905) 80 Pac. 331.

California.— Tuolumne Consol. Min. Co. *v.* Maier, 134 Cal. 583, 66 Pac. 863.

Colorado.— Armstrong *v.* Lower, 6 Colo. 393.

Dakota.— Golden Terra Min. Co. *v.* Mahler, 4 Morr. Min. Rep. 390.

Idaho.— Burke *v.* McDonald, 3 Ida. 296, 29 Pac. 98.

Montana.— McShane *v.* Kenkle, 18 Mont. 208, 44 Pac. 979, 56 Am. St. Rep. 579, 33 L. R. A. 851; Walsh *v.* Mueller, 16 Mont. 180, 40 Pac. 292; Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075; Shreve *v.* Copper Bell Min. Co., 11 Mont. 309, 28 Pac. 315.

Nevada.— Overman Silver Min. Co. *v.* Corcoran, 15 Nev. 147.

Oregon.— Muldrick *v.* Brown, 37 Oreg. 185, 61 Pac. 428.

United States.— Shoshone Min. Co. *v.* Rutter, 87 Fed. 801, 31 C. C. A. 223; Bonner *v.* Meikle, 82 Fed. 697; Meydenbauer *v.* Stevens, 78 Fed. 787; Book *v.* Justice Min. Co., 58 Fed. 106; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

See 34 Cent. Dig. tit. "Mines and Minerals," § 24.

48. Moore *v.* Steelsmith, 1 Alaska 121; Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019; Larkin *v.* Upton, 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330; Smith *v.* Newell, 86 Fed. 56.

49. Willeford *v.* Bell, (Cal. 1897) 49 Pac. 6; Wenner *v.* McNulty, 7 Mont. 30, 14 Pac. 643; Hayes *v.* Lavagnino, 17 Utah 185, 53 Pac. 1029; Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. 673; Book *v.* Justice Min. Co., 58 Fed. 106; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

50. Girard *v.* Carson, 22 Colo. 345, 44 Pac. 508; Miller *v.* Girard, 3 Colo. App. 278, 33 Pac. 69; Upton *v.* Larkin, 5 Mont. 600, 6 Pac. 66, 7 Mont. 449, 17 Pac. 728 [*affirmed* in 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330]; Silver City Gold, etc., Min. Co. *v.* Lowry, 19 Utah 334, 57 Pac. 11; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348.

51. Little Pittsburgh Consol. Min. Co. *v.* Amie Min. Co., 17 Fed. 57, 5 McCrary 298.

52. Silver City Gold, etc., Min. Co. *v.* Lowry, 19 Utah 334, 57 Pac. 11.

53. Richards *v.* Wolfling, 98 Cal. 195, 32 Pac. 971.

54. *Arizona.*— Field *v.* Grey, 1 Ariz. 404, 25 Pac. 793.

California.— Weed *v.* Snook, 144 Cal. 439, 77 Pac. 1023; Tuolumne Consol. Min. Co. *v.* Maier, 134 Cal. 583, 66 Pac. 863.

Colorado.— Brewster *v.* Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793; Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111.

Oregon.— Sharkey *v.* Candiani, (1906) 85 Pac. 219.

South Dakota.— Sands *v.* Cruikshank, 15 S. D. 142, 87 N. W. 589.

Washington.— Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841.

United States.— Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568; Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. 673; Erwin *v.* Perego, 93 Fed. 608, 35 C. C. A. 482; Garrard *v.* Silver Peak Mines, 82 Fed. 578; Zollars *v.* Evans, 5 Fed. 172, 2 McCrary 39.

See 34 Cent. Dig. tit. "Mines and Minerals," § 24 *et seq.*

55. Brewster *v.* Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793; Corning Tunnel Co. *v.* Pell, 4 Colo. 507; Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841; Creede, etc., Min., etc., Co. *v.* Uinta Tunnel Min., etc., Co., 196 U. S. 337, 25 S. Ct. 266, 49 L. ed. 501 [*affirming* 119 Fed. 164, 57 C. C. A. 200]; Erwin *v.* Perego, 93 Fed. 608, 35 C. C. A. 482; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; Van Zandt *v.* Argentine Min. Co., 8 Fed. 725, 2 McCrary 159; North

(c) *Where Situated.* The discovery must be within the limits of the claim sought to be located,[56] and can only be made upon lands subject to location.[57] So long as any portion of the discovery is within the limits of the claim it is sufficient.[58] But one location, however, can be made from one discovery.[59]

(d) *Discovery Shaft or Equivalent.* Each of the mining states and territories except California and Utah have supplemented congressional legislation relative to the requisites of a valid location by requiring certain development work to be done on the claim before the location is complete. This preliminary work or development is in the nature of what is called a discovery shaft, or its equivalent.[60] The purpose of this legislation undoubtedly is to demonstrate more clearly that a vein or lode exists within the limits of the claim sought to be located, and to show good faith on the part of the locator. Under the federal statutes, as we shall presently see, no work need be placed on the claim until the year after that in which the location is made, and if not done then, and the locator resumes work upon his claim, in good faith, his rights are saved.[61] Of course the discovery shaft must be within the limits of the claim,[62] but it need

Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

Discovery may be made at any time before location is completed. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63.

56. U. S. Rev. St. (1878) § 2320 [U. S. Comp. St. (1901) p. 1424]. And see the following cases:

California.— Weed *v.* Snook, 144 Cal. 439, 77 Pac. 1023; Tuolumne Consol. Min. Co. *v.* Maier, 134 Cal. 583, 66 Pac. 863.

Colorado.— Michael *v.* Mills, 22 Colo. 439, 45 Pac. 429; Girard *v.* Carson, 22 Colo. 345, 44 Pac. 508; Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69.

Idaho.— Atkins *v.* Hendree, 1 Ida. 95.

Montana.— Upton *v.* Larkin, 5 Mont. 600, 6 Pac. 66.

South Dakota.— McPherson *v.* Julius, 17 S. D. 98, 95 N. W. 428.

Utah.— Watson *v.* Mayberry, 15 Utah 265, 49 Pac. 479.

United States.— Larkin *v.* Upton, 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348.

See 34 Cent. Dig. tit. "Mines and Minerals," § 24 *et seq.*

57. *Arizona.*— Molina *v.* Luce, (1904) 76 Pac. 602.

California.— Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23; Anderson *v.* Caughey, (App. 1906) 84 Pac. 223.

Colorado.— Sullivan *v.* Sharp, 33 Colo. 346, 80 Pac. 1054; Kirk *v.* Meldrum, 28 Colo. 453, 65 Pac. 633; Brewster *v.* Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793; Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30; Michael *v.* Mills, 22 Colo. 439, 45 Pac. 429; Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69.

Montana.— Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58.

Utah.— Watson *v.* Mayberry, 15 Utah 265, 49 Pac. 479.

United States.—Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735.

58. Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98; Upton *v.* Larkin, 7 Mont. 449, 17 Pac. 728 [*affirmed* in 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330]. Thus the discovery shaft may be upon a boundary line of the claim. Larkin *v.* Upton, 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330.

59. McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759; Reynolds *v.* Pascoe, 24 Utah 219, 66 Pac. 1064. *Compare* Reiner *v.* Schroeder, 146 Cal. 411, 80 Pac. 517.

It must be upon the apex of the vein. Iron Silver Min. Co. *v.* Murphy, 3 Fed. 368, 2 McCrary 121.

60. There is quite a uniformity in this legislation, it all having been enacted subsequent to the statutes of Colorado, first passed in 1874. There are various provisions as to the size and depth of the discovery shaft, or its equivalent, and as to the time allowed for its completion after discovery, but in the main features the statutes are very similar. Want of space prevents a further reference to these various statutes. See the statutes of the several states.

A mining rule may prescribe the amount of work to be done within ninety days after a location is made, and make the claim subject to relocation in case of default. Northmore *v.* Simmons, 97 Fed. 386, 38 C. C. A. 211.

61. See *infra*, III, B, 7.

Before the enactment of this legislation, locators frequently employed one of two schemes to avoid developing the claim and still not lose it. Some would wait until the time had about expired and then "resume" work, while others would wait until the first of January of the year in which the federal statute required the work to be done, and then before other rights could be initiated would relocate the claim, thus avoiding the evident purpose and meaning of the statute, and prevent others from locating the ground. This legislation has done much to prevent such actions and has been beneficent in its purpose and effect.

62. McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652; Armstrong *v.* Lower, 6 Colo. 393; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110,

not be at any particular point on the vein.[63] It need not be at the point of original discovery, and the locator may make any shaft his discovery shaft.[64] In Colorado,[65] and in the federal courts,[66] it is held that the vein in place, upon which the location is based, must be disclosed in the discovery shaft. The original discovery may be made in the discovery shaft at any time before intervening rights accrue, and it will support the location.[67] All the precious metal bearing states, except North Dakota, require the discovery shaft to be sunk a certain depth, even though the vein in place is disclosed sooner. It must be sufficiently deep to disclose the vein in place.[68]

(III) *Discovery of Mineral or Other Deposit Necessary to Location of Placer Claim.*[69] The location of placer claims was provided for by act of congress, July 9, 1870.[70] They are now governed by the act of May 10, 1872.[71] Land containing building stone is authorized to be located under the Placer Act;[72] and prior to this statute the supreme court of Montana allowed such location;[73] but the supreme court of Washington held otherwise.[74] Lands containing petroleum and other mineral oils are also locatable under the Placer Act;[75] and prior to this statute the federal court allowed such locations.[76] Natural gas is also considered mineral.[77] Fire-clay is also allowed to be located under the Placer Act by the land department of the United States.[78] In California and Nevada tailings may also be located as placer ground.[79] In California subterranean deposits may be located as placer;[80] but the Nevada supreme court holds to the contrary.[81]

29 L. ed. 348; Tonopah, etc., Min. Co. *v.* Tonopah Min. Co., 125 Fed. 408; Ledoux *v.* Forester, 94 Fed. 600; Little Pittsburgh Consol. Min. Co. *v.* Amie Min. Co., 17 Fed. 57, 5 McCrary 298; Zollars *v.* Evans, 5 Fed. 172, 2 McCrary 39.

63. Taylor *v.* Parenteau, 20 Colo. 368, 48 Pac. 505.

64. O'Donnell *v.* Glenn, 8 Mont. 248, 19 Pac. 302; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 7 S. Ct. 1356, 30 L. ed. 1140 [*affirming* 89 Fed. 583, 5 McCrary 639].

65. McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64; Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

But the walls of the vein need not be disclosed. Fleming *v.* Daly, 12 Colo. App. 439, 55 Pac. 946.

66. Terrible Min. Co. *v.* Argentine Min. Co., 89 Fed. 583, 5 McCrary 639 [*affirmed* in 122 U. S. 478, 7 S. Ct. 1356, 30 L. ed. 1140].

67. McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652; Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111; Zollars *v.* Evans, 5 Fed. 172, 2 McCrary 39.

68. Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Gray *v.* Truby, 6 Colo. 278; Dolan *v.* Passmore, (Mont. 1906) 85 Pac. 1034; Van Zandt *v.* Argentine Min. Co., 8 Fed. 725, 2 McCrary 159.

It is a question of fact whether or not a crevice disclosed by a discovery shaft contains mineral-bearing rock. Bryan *v.* McCaig, 10 Colo. 309, 15 Pac. 413.

Instructions on the question of depth of discovery shaft see Craig *v.* Thompson, 10 Colo. 517, 16 Pac. 24.

Discovery made in a tunnel see Brewster *v.* Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793; Ellet *v.* Campbell, 18 Colo. 510, 33 Pac. 521; Electromagnetic Min., etc., Co. *v.* Van Auken, 9 Colo. 204, 11 Pac. 80; Rico-Aspen Consol. Min. Co. *v.* Enterprise Min. Co., 53 Fed. 321.

69. Discovery shaft or its equivalent.—The statutes of most of the mining states require certain excavations in lieu of the discovery shaft, required on lode claims (see *supra*, III, B, 5, c, (II), (D)); and the same rules apply with reference thereto as to the equivalent of the discovery shaft on lode locations.

70. 16 U. S. St. at L. 217; U. S. Rev. St. (1878) §§ 2329, 2330 [U. S. Comp. St. (1901) p. 1432].

71. U. S. Rev. St. (1878) § 2331 [U. S. Comp. St. (1901) p. 1432].

72. 27 U. S. St. at L. 348 [U. S. Comp. St. (1901) p. 1434].

73. Freezer *v.* Sweeney, 8 Mont. 508, 21 Pac. 20.

74. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784.

75. 29 U. S. St. at L. 526.

Oil placers are locatable under this act. Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 73 Pac. 936.

76. Gird *v.* California Oil Co., 60 Fed. 531.

77. *In re* Buffalo Natural Gas Fuel Co., 73 Fed. 191. See also cases cited *supra*, p. 534, note 45.

78. 20 Land Dec. 500; 6 Land Dec. 710.

79. Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116; Jones *v.* Jackson, 9 Cal. 237; Rogers *v.* Cooney, 7 Nev. 213.

80. Gregory *v.* Pershbaker, 73 Cal. 109, 14 Pac. 401.

81. Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642.

There must be a discovery of a valuable deposit in the ground sought to be located as a placer claim, and this deposit must not be in place; but when more than twenty acres are located as one claim one discovery is sufficient for the entire claim.[82]

(iv) *Character of Ground For Mill Site.* The location of mill sites is provided for by the Mineral Act.[83]

(v) *Time to Investigate After Discovery and Before Completing Location.* Under the acts of congress no time is mentioned, and in the absence of any provision of local rule or custom, or of state or territorial statute, fixing a certain time, the discoverer is entitled to a reasonable time, depending upon the character of the ground, within which to investigate before completing his location.[84]

d. Extent, Posting Notices, Marking Boundaries, and Recording the Claim — (i) *Possession.* Title to mineral land can only be acquired by proceedings under the Mineral Act.[85] The legal right of possession can only come from a valid location.[86] However, possession without location is valid as against a mere intruder,[87] but will not avail as against one who peaceably enters and makes a valid location.[88] Where one seeks in good faith to make a location, he is entitled to the exclusive possession of the land sought to be located for the time allowed by the statutes, customs, or rules of miners, and the state or territory, to complete

82. McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

A valid discovery of oil must precede the location of petroleum under laws relating to placers. Nevada Sierra Oil Co. *v.* Miller, 97 Fed. 681.

The discovery must be such as would justify a prudent person in the expending of money and labor in exploitation for petroleum. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 [*affirmed* in 197 U. S. 313, 25 S. Ct. 468, 49 L. ed. 770].

A location of one hundred and sixty acres of oil land by an association is but a single location. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63.

A locator is not in actual bona fide possession of an oil claim where no discovery is made. The same rule as applies to placer claims generally applies and oil must be discovered within the limits of the claim. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 [*affirmed* in 197 U. S. 313, 25 S. Ct. 468, 49 L. ed. 770].

83. U. S. Rev. St. (1878) § 2337 [U. S. Comp. St. (1901) p. 1436].

There are two kinds of mill sites provided for by the statute. One, a mill site located with a vein or a lode for mining and milling purposes; the other, located by the owner of a quartz mill or reduction works not owning a mine in connection therewith. Only non-mineral land not contiguous to the vein or lode and used or occupied by the appropriator of the vein or lode for mining and milling purposes may be located under the first class. Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

84. See *infra*, III, B, 5, d, (i), text and notes.

85. Davis *v.* Weibbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423.

Persons grading for a mill site on public land have no right to gold found by others beyond the limits of the level space graded for their mill. Burns *v.* Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233.

86. Hamilton *v.* Huson, 21 Mont. 9, 53 Pac. 101; Russell *v.* Hoyt, 4 Mont. 412, 2 Pac. 25; Belk *v.* Meagher, 3 Mont. 65 [*affirmed* in 104 U. S. 279, 26 L. ed. 735]; Bevis *v.* Markland, 130 Fed. 226.

87. Molina *v.* Luce, (Ariz. 1904) 76 Pac. 602; Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718; Bevis *v.* Markland, 130 Fed. 226; Meydenbauer *v.* Stevens, 78 Fed. 787.

One who takes stone from the public lands becomes the exclusive owner thereof, although he acquires no right to the land from which it was taken. Sullivan *v.* Schultz, 22 Mont. 541, 57 Pac. 279.

88. Garthe *v.* Hart, 73 Cal. 541, 15 Pac. 93; Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240; Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Malone *v.* Jackson, 137 Fed. 878, 70 C. C. A. 216; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; Thallmann *v.* Thomas, 111 Fed. 277, 49 C. C. A. 317.

Occupancy.— Title to mineral lands cannot be acquired by occupancy unless the occupancy is for the purpose of mining. Burrs *v.* Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233.

A contestant for a mining claim is not entitled to adverse possession against the homestead entryman. Bay *v.* Oklahoma Southern Gas, etc., Min. Co., 13 Okla. 425, 73 Pac. 936.

his location.[89] And in the absence of any such statute, local custom, or rule, a locator, after discovery, has the exclusive right to possession for a reasonable time to complete his location.[90] The right to make a location can never be based upon a trespass.[91]

(II) *Size of Claim*—(A) *In General.* By the act of 1866[92] locations were allowed to be made of only one vein. The discoverer might locate two hundred feet and an additional two hundred feet. No claim by an association of persons could exceed three thousand feet. The locators were allowed to locate a reasonable quantity of surface ground for the convenient working of the vein, as fixed by local rules.[93]

(B) *Lode Claim.* By the act of 1872,[94] a qualified locator is given the right to locate a piece of surface ground having within its boundaries a vein in place containing one or more of the minerals designated in the statute, not to exceed one thousand five hundred feet in length and three hundred feet in width on each

89. Price *v.* McIntosh, 1 Alaska 286; Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113; Erhardt *v.* Boaro, 8 Fed. 692, 2 McCrary 141.

90. *California.*— Weed *v.* Snook, 144 Cal. 439, 77 Pac. 1023; Gregory *v.* Pershbaker, 73 Cal. 109, 14 Pac. 401; Newbill *v.* Thurston, 65 Cal. 419, 4 Pac. 409.

Colorado.— Pelican, etc., Min. Co. *v.* Snodgrass, 9 Colo. 339, 12 Pac. 206; Patterson *v.* Hitchcock, 3 Colo. 533; Murley *v.* Ennis, 2 Colo. 300. *Compare* Omar *v.* Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246, seemingly *contra.*

Idaho.— Burke *v.* McDonald, 2 Ida. (Hasb.) 679, 33 Pac. 49.

Montana.— Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037.

Nevada.— Gleeson *v.* Martin White Min. Co., 13 Nev. 442; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

New Mexico.— Lincoln-Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

Oregon.— Patterson *v.* Tarbell, 26 Oreg. 29, 37 Pac. 76.

South Dakota.— Marshall *v.* Harney Peak Tin Min. Co., 1 S. D. 350, 47 N. W. 290.

Washington.— Union Min., etc., Co. *v.* Leitch, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961.

United States.— Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 6 S. Ct. 1177, 30 L. ed. 98; O'Reilly *v.* Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. ed. 669; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113; Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190 [*affirming* 55 Fed. 11].

See 34 Cent. Dig. tit. "Mines and Minerals," § 28.

Right to enjoin trespass.— A prospector who has begun prospecting shafts on a twenty-acre tract, but made no discovery, cannot enjoin a trespass on the tract. Gemmell *v.* Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570.

Sufficiency of possession to maintain ejectment see Valcalda *v.* Silver Peak Mines, 86 Fed. 90, 29 C. C. A. 591.

A prospective discovery may be assigned. — Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 73 Pac. 936.

91. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207; Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58; Clipper Min. Co. *v.* Eli Min., etc., Co., 194 U. S. 220, 24 S. Ct. 632, 48 L. ed. 944; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; Thallmann *v.* Thomas, 111 Fed. 277, 49 C. C. A. 317; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 104 Fed. 20; Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. 673.

Who not a trespasser.— Where the owners of a mining claim got permission of H, the owner of an adjoining claim, to continue across their claim a tunnel made by H on his claim, and they extended it beyond the line of their claim, and discovered a lode, they were not precluded from locating the latter, as against the assignee of H, on the ground that they were trespassers, although such discovery and location were not contemplated by their license. Hall *v.* Kearny, 18 Colo. 505, 33 Pac. 373.

92. Prior to the enactment of the statute of 1866, the size of a mining location was fixed by the miners' rules and regulations in the mining district. Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 198; Prosser *v.* Parks, 18 Cal. 47.

93. The shape and extent of the claim varied according to local rules. In many of the early locations quite an area of surface was taken in a body at some point on the vein and the remainder of the claim consisted of the vein alone.

"Mining claim" has two significations: One, the amount of land one person may locate, or the amount of land an association of persons may locate; the other the amount of land one may purchase from others and include in his holdings. St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875. See *supra*, II, C.

94. U. S. Rev. St. (1878) § 2320 [U. S. Comp. St. (1901) p. 1424].

side of the middle of the vein at the surface.[95] But by state and territorial statutes or local rules and regulations, the width may be limited to any number of feet under three hundred, but not less than twenty-five on each side of the middle of the vein at the surface.[96] Inasmuch as only unappropriated land may be located,[97] lode claims may be of various sizes and shapes, depending upon the amount of unappropriated ground susceptible of location, but it never can be greater than one thousand five hundred by six hundred feet. Lode claims within placers may be fifteen hundred feet in length, but not wider than twenty-five feet on each side of the middle of the vein on the surface.[98]

(C) *Placer Claim.* By the act of July 9, 1870,[99] the unit of placer locations is not to exceed twenty acres to each individual locator and not more than one hundred and sixty acres can be located by an association.[1] Under this statute when one locates a placer claim upon surveyed lands, such location must conform as nearly as practicable to the public surveys.[2] This requirement is mandatory only when it is reasonably practicable.[3] State or territorial statutes and local rules and regulations restricting the extent to less than twenty acres to an individual have been held valid.[4]

(D) *Tunnel Claim.* Since the act of May 10, 1872,[5] tunnel claims are governed by that statute.[6] Under this act the length of a tunnel claim may be three thousand feet, but its width is left in a somewhat conjectural situation. Under the law as announced by the supreme court of the United States, by the location of a tunnel claim and the diligent prosecution of work thereon there is withdrawn from exploitation all blind veins within a piece of land three thousand feet wide, one thousand five hundred feet on each side of the line of the tunnel.[7]

(E) *Mill Site.* The act of May 10, 1872,[8] provides that a location for a mill site shall not exceed five acres in extent.

(F) *Excessive Size.* The general rule is that the location of a claim, excessive

95. Meydenbauer *v.* Stevens, 78 Fed. 787.

But the location cannot extend beyond the limits of the lode. Terrible Min. Co. *v.* Argentine Min. Co., 89 Fed. 583, 5 McCrary 639.

When end lines become side lines see *supra*, II, C, 3, f, text and note 65.

96. U. S. Rev. St. (1878) § 2320 [U. S. Comp. St. (1901) p. 1424]; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

97. See *supra*, III, B, 2.

98. Mt. Rosa Min., etc., Co. *v.* Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289.

99. U. S. Rev. St. (1878) § 2330 [U. S. Comp. St. (1901) p. 1432].

Prior to this act the size of placer claims was determined by local rules and regulations.

1. Price *v.* McIntosh, 1 Alaska 286; Myers *v.* Spooner, 55 Cal. 257; McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Durant *v.* Corbin, 94 Fed. 382; Gird *v.* California Oil Co., 60 Fed. 531; Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 28, 1 Morr. Min. Rep. 497. See also *supra*, note 21.

It seems that where several persons locate a claim in excess of twenty acres, they must all be *bona fide* and not "dummy" locators. Durant *v.* Corbin, 94 Fed. 382; Gird *v.* California Oil Co., 60 Fed. 531.

2. U. S. Rev. St. (1878) § 2331 [U. S. Comp. St. (1901) p. 1432]; White *v.* Lee, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115.

In Alaska placers may be located without regard to public surveys. Price *v.* McIntosh, 1 Alaska 286.

3. Mitchell *v.* Hutchinson, 142 Cal. 404, 76 Pac. 55.

4. Rosenthal *v.* Ives, 2 Ida. (Hasb.) 265, 12 Pac. 904.

5. **Prior to the act of May 10, 1872,** the location of a tunnel claim was provided for by local rules and regulations.

6. U. S. Rev. St. (1878) § 2323 [U. S. Comp. St. (1901) p. 1426].

7. Enterprise Min. Co. *v.* Rico-Aspen Consol. Min. Co., 167 U. S. 108, 17 S. Ct. 762, 42 L. ed. 96.

Further consideration of this question will be taken up *infra*, III, B, 6, e.

8. 17 U. S. St. at L. 96; U. S. Rev. St. (1878) § 2337 [U. S. Comp. St. (1901) p. 1436].

Prior to the act of May 10, 1872, the location and extent of mill sites were provided for by local rules and regulations, sometimes under the name of mill sites, but more frequently as the appropriation and use of certain surface ground adjunct to located lodes for the purpose of working the minerals contained in the lode.

in size, will only be void as to the excess,[9] if the excess is not attributable to a fraudulent act of the locator but to an innocent mistake.[10]

(III). *SHAPE OF CLAIM*[11] — (A) *Lode Claim.* The shape of an ideal lode claim under the provision of the act of congress of May 10, 1872,[12] is in the form of a parallelogram, one thousand five hundred feet along the course of the vein and six hundred feet wide, three hundred feet on each side of the center of the vein at the surface. Under this act the end lines must be parallel to each other in order to give the locator any extralateral rights on the vein,[13] but not for the purpose of making a valid location of the surface ground included within its boundaries.[14] End lines must be straight lines.[15] Ideal locations are, however, the exception rather than the rule, especially when many locations are made in the same district. As we have said before, only vacant, unappropriated mining ground is subject to location,[16] and such ground may be located, whatever its shape. For the purpose of acquiring extralateral rights not belonging to other locations, the practice of locators is to stake out an ideal location even though the stakes and marks may be upon ground already appropriated, but the locator would only acquire by such location the surface ground which is open and unappropriated.[17] It is therefore apparent that the shape of a lode location may be variant *ad infinitum* and the

9. *California.*— Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Howeth *v.* Sullenger, 113 Cal. 547, 45 Pac. 841.

Colorado.— Taylor *v.* Parenteau, 23 Colo. 368, 48 Pac. 505.

Idaho.—Burke *v.* McDonald, 2 Ida. (Hasb.) 679, 33 Pac. 49; Stemwinder Min. Co. *v.* Emma, etc., Consol. Min. Co., 2 Ida. (Hasb.) 456, 21 Pac. 1040; Atkins *v.* Hendree, 1 Ida. 95.

Oregon.— Gohres *v.* Illinois Min. Co., 40 Oreg. 516, 67 Pac. 666.

South Dakota.— McPherson *v.* Julius, 17 S. D. 98, 95 N. W. 428.

United States.— Richmond Min. Co. *v.* Rose, 114 U. S. 576, 5 S. Ct. 1055, 29 L. ed. 273; McIntosh *v.* Price, 121 Fed. 716, 58 C. C. A. 136; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

See 34 Cent. Dig. tit. "Mines and Minerals," § 35.

In Montana it has been held, however, that an excessive location is void. Leggatt *v.* Stewart, 5 Mont. 107, 2 Pac. 320; Hauswirth *v.* Butcher, 4 Mont. 299, 1 Pac. 714.

If the locators resurvey and relocate the claim properly before ore is discovered within its limits by others, the original defect on account of excess in size will be cured. McPherson *v.* Julius, 17 S. D. 98, 95 N. W. 428.

Correction of location.— The location of a mineral claim is not void because as staked it exceeds the fifteen hundred feet in length provided by the statute, but it may be corrected by the provincial surveyor who makes the survey by the removal for the correction of distance of any posts except the initial post No. 1, if the alteration does not affect the previously acquired rights of adjacent owners. Granger *v.* Fotheringham, 3 Brit. Col. 590.

10. Pratt *v.* United Alaska Min. Co., 1 Alaska 95; Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Hansen *v.* Fletcher, 10 Utah 266, 37 Pac. 480.

Where a junior locator attempts to relocate the excess in area in a placer claim, he must locate some portions of it not actually located by the senior locator. Price *v.* McIntosh, 1 Alaska 286.

11. **Tunnel claims.**— There are no rulings aside from the directions of the secretary of the interior as to the shape of tunnel claims. Presumably they run in a straight line, with a varied width depending on local statutes or regulations.

12. 17 U. S. St. at L. 91, U. S. Rev. St. (1878) § 2320 [U. S. Comp. St. (1901) p. 1424].

The boundary lines of such ideal claim are two side lines, each fifteen hundred feet long, running parallel with the vein, marking the length of the claim and two end lines each six hundred feet long, crossing the vein, and at right angles with the side lines, measuring the width of the claim. When the end lines are not at right angles to the side lines they do not measure the width. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57.

13. Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 6 S. Ct. 1177, 30 L. ed. 98.

14. Doe *v.* Sanger, 83 Cal. 203, 23 Pac. 365; Horswell *v.* Ruiz, 67 Cal. 111, 7 Pac. 197; Richmond Min. Co. *v.* Eureka Consol. Min. Co., 103 U. S. 839, 26 L. ed. 557; Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 9 Morr. Min. Rep. 578.

15. Walrath *v.* Champion Min. Co., 171 U. S. 293, 18 S. Ct. 909, 43 L. ed. 170.

16. **Where situated** see supra, III, B, 5, c, (II), (C).

17. Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 591, 66 C. C. A. 99; Empire State-Idaho Min., etc., Co. *v.* Hanley, 126 Fed. 97, 61 C. C. A. 153.

claim still be valid. If the surface of the location conflicts with another, the locator may amend his location at any time before patent, so as to exclude such surface conflict and abandon the excluded ground so as to make his location in the form of a parallelogram.[18] It has also been held that the United States does not require that a location be made along the vein.[19] In British Columbia, it is held that two strips of land unconnected with each other, although within the statutory limit of one thousand five hundred feet, cannot be embraced in one location and record.[20]

(B) *Placer Claim.* Placer claims unless located by governmental subdivisions on surveyed land[21] may be of any conceivable shape desired by the locator.

(IV) *Posting Notices on Ground*—(A) *In General.* Among the early rules and regulations of miners in California was one requiring the locator to post a notice of his location on the claim.[22] The congressional acts have never required the posting of any notice to render the location valid;[23] but the rules and regulations of miners were so uniform as to this requirement and the purpose and results so beneficial that nearly all the mining states and territories have enacted statutes perpetuating the requirement in some form or other.[24]

(B) *Time of Posting.* An examination of the statutes discloses that they may be divided into three distinct general classes, viz.: (1) Those requiring the posting of a notice of location after discovery, which has no reference or relation to the record of the claim;[25] (2) those requiring a copy of the posted notice to

18. Tyler Min. Co. *v.* Sweeney, 54 Fed. 284, 4 C. C. A. 329.

19. Watervale Min. Co. *v.* Leach, 4 Ariz. 34, 33 Pac. 418.

If a lode terminates at any point within the location, or departs at any point from the side lines, it has been held that the location beyond such point is defeasible if not void before patent. Patterson *v.* Hitchcock, 3 Colo. 533.

20. Dart *v.* St. Keverne Min. Co., 7 Brit. Col. 56.

21. See 16 U. S. St. at L. 217; U. S. Rev. St. (1878) § 2329 [U. S. Comp. St. (1901) p. 1432].

22. It was usually required to be posted on a stake set at or near the discovery, or placed on or near the vein in a conspicuous place. Usually it was required to contain the name of the claim, the name of the locator, and the date of discovery. A like notice was sometimes required to be posted on each corner stake. The requirements were somewhat various, depending on the local rules and regulations of each mining district.

The object of the requirements and the purpose of the notice was to give warning to other prospectors that the ground had been appropriated. It was one of the acts of location.

Distinguished from "prospector's notice." — This notice must not be confounded with what was commonly known as a "prospector's" notice, which was allowed in many districts, the posting of which was not an act of location, but entirely preliminary to the first step therein and was only posted by prospectors to notify the world that they claimed the right to prospect the ground to the exclusion of all others.

23. Gregory *v.* Pershbaker, 73 Cal. 109, 14 Pac. 401; Allen *v.* Dunlap, 24 Oreg. 229, 33 Pac. 675; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436; Erwin *v.* Perego, 93 Fed. 608, 35 C. C. A. 482 [*affirming* 85 Fed. 904]; Meydenbauer *v.* Stevens, 78 Fed. 787; Book *v.* Justice Min. Co., 58 Fed. 106.

24. See the statutes of the several states.

New or second notice.— It is not necessary for the claimant of a mining lode location to post a new notice at the point of a second valid discovery in order to perfect his claim, as against one who has never perfected any claim. McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64. Where notice has been posted and all the preliminary work of a location done, and the location is invalid because the discovery and such preliminary work were within the lines of a patented claim, no notice need be posted at the point of subsequent discovery made outside the patented property and within the limits of the claim as against a subsequent locator. Treasury Tunnel, etc., Co. *v.* Boss, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60.

Effect to protect claim.— Where the discovery and location of a subsequent conflicting mining claim, as evidenced by a discovery notice, was made within sixty days of the date of the posting of the discovery of the claim with which it was in conflict, the claim so subsequently located was invalid, regardless of the non-performance of the assessment work on the earlier location. Sierra Blanca Min., etc., Co. *v.* Winchell, (Colo. 1905) 83 Pac. 628.

25. Of these are the statutes of Colorado, Montana, Nevada, North Dakota, South Dakota, Washington, and Wyoming.

be afterward recorded;[26] and (3) those requiring two notices to be posted; one preliminary in its character, after discovery, and another more elaborate and formal after the marking of the boundaries of the claim, a copy of which must be recorded.[27] No further reference need be made in this connection to the notices posted, copies of which are required to be recorded, but they will be further considered when we treat of the record of the claim.[28] It is sufficient to say of the other notices that the posting is one of the acts of location and the requirements of the statutes in this regard must be substantially followed. By local rules and these state and territorial statutes, some time is given after the discovery and posting of notice to complete the making of the location. The discovery and posting is an appropriation of the territory sought to be located during such time as may be allowed to complete the location and the locator is entitled to maintain his possession thereof as against all comers.[29] The fact that the notice was recorded before posting makes no difference.[30]

(c) *Place of Posting.* The place of posting the notice is generally designated by statute or local rule, the requirements of which must be complied with.[31]

(d) *Sufficiency* — (1) In General. In general the notice is sufficient if it imparts knowledge to subsequent locators.[32] Whether the notice is sufficient to apprise others of the precise location of the land claimed is a question of fact.[33]

26. Of these are the statutes of Arizona, New Mexico, Oregon, and Utah.

27. Idaho seems to be alone in this class.

28. See *infra*, III, B, 5, d, (IV), (D), (3), (d); (VI), (G).

29. *Colorado.*— Sierra Blanca Min., etc., Co. *v.* Winchell, (1905) 83 Pac. 628; Omar *v.* Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

Montana.— Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037.

South Dakota.— Marshall *v.* Harney Peak Tin Min., etc., Co., 1 S. D. 350, 47 N. W. 290.

Washington.— Union Min., etc., Co. *v.* Leitch, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961.

United States.— Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 8 S. Ct. 1117, 30 L. ed. 98; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113.

See 34 Cent. Dig. tit. "Mines and Minerals," § 37.

The decisions of the courts in states and territories having such statutes are only binding within the jurisdiction where decided, and those construing local rules and regulations are practically obsolete. Sufficient of these decisions are given *supra*, III, B, 5, a, h, notes 31–42.

30. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182.

31. A stake must be planted at discovery with the notice posted thereon, if the statute or rule so require. Cheesman *v.* Shreeve, 40 Fed. 787. See also Warnock *v.* De Witt, 11 Utah 324, 40 Pac. 205; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113.

At each end of claim.— When a local rule provides that a notice should be posted at each end of the claim and it is only posted at one, but all the other regulations were complied with, the claim will not be held invalid, unless the rule so provides. Emerson *v.* McWhirter, 133 Cal. 510, 65 Pac. 1036.

In the vicinity.— When local rules provide that the notice shall be posted in the vicinity of the vein, various methods of posting have been held a sufficient compliance. Thus it has been held sufficient if it was put in a tin can which was placed on a shelf or rock in a mound near the vein (Gird *v.* California Oil Co., 60 Fed. 531), or the like (Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Phillpotts *v.* Blasdel, 8 Nev. 61; Smith *v.* Newell, 86 Fed. 56; Cheesman *v.* Shreeve, 40 Fed. 787).

32. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869.

33. *Arizona.*— Jantzon *v.* Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93.

California.— Taylor *v.* Middleton, 67 Cal. 656, 8 Pac. 594; Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562.

Montana.— Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Dillon *v.* Bayliss, 11 Mont. 171, 27 Pac. 725; Gamer *v.* Glenn, 8 Mont. 371, 20 Pac. 654; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

New Mexico.— Seidler *v.* Lafave, 4 N. M. 369, 20 Pac. 789.

Utah.— Wells *v.* Davis, 22 Utah 322, 62 Pac. 3; Farmington Gold Min. Co. *v.* Rhymney Gold, etc., Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913.

United States.— Eilers *v.* Boatman, 111 U. S. 356, 4 S. Ct. 432, 28 L. ed. 454; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299; Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 9 Morr. Min. Rep. 616.

See 34 Cent. Dig. tit. "Mines and Minerals," § 40.

The court refused to submit the question to the jury in Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787; Pollard *v.* Shively, 5 Colo. 309; Brown *v.* Levan, 4 Ida. 794, 46 Pac. 661; Southern Cross Gold, etc.,

(2) LIBERAL CONSTRUCTION. The notices are liberally construed,[34] and may be aided by parol evidence.[35]

(3) DESCRIPTION OF PROPERTY — (a) IN GENERAL. The notice should contain a description of the premises located and the same should be marked on the ground.[36]

(b) COURSE OF VEIN. In the absence of local rules or statute requiring it, it is not necessary to designate in the posted notice the course of the vein.[37] The notice is sufficient if it substantially identifies the vein, although it does not notice all of its various bends.[38]

(c) REFERRING TO MONUMENTS, MARKINGS, ETC. These notices need not refer to a natural object or permanent monument,[39] unless such notices or copies thereof

Min. Co. *v.* Europa Min. Co., 15 Nev. 383; Faxon *v.* Barnard, 4 Fed. 702, 2 McCrary 44.

34. *Arizona.*— Wiltsee *v.* King of Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896.

California.— McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31; Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361.

Colorado.— Cullacott *v.* Cash Gold, etc., Min. Co., 8 Colo. 179, 6 Pac. 211.

Idaho.— Brown *v.* Levan, 4 Ida. 794, 46 Pac. 661.

Montana.— Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037.

Nevada.— Weill *v.* Lucerne Min. Co., 11 Nev. 200.

Utah.— Wells *v.* Davis, 22 Utah 322, 62 Pac. 3; Farmington Gold Min. Co. *v.* Rhymney Gold, etc., Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913; Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

United States.— Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155; Walsh *v.* Erwin, 115 Fed. 531; Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190; Gird *v.* California Oil Co., 60 Fed. 531; Book *v.* Justice Min. Co., 58 Fed. 106.

See 34 Cent. Dig. tit. "Mines and Minerals," § 37 *et seq.*

Claiming fifteen hundred feet in length and three hundred feet on each side of the vein is sufficient. Columbia Copper Min. Co. *v.* Duchess Min., etc., Co., 13 Wyo. 244, 79 Pac. 385.

Claiming fifteen hundred feet of the lode or vein will give the right to seven hundred and fifty feet each way from the stake and discovery. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Allen *v.* Dunlap, 24 Oreg. 229, 35 Pac. 675; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113; Eilers *v.* Boatman, 111 U. S. 356, 4 S. Ct. 432, 28 L. ed. 454.

Claiming all the privileges granted by the laws of a mining district is sufficient to hold one hundred feet of the vein if necessary. Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439.

Notices describing a placer claim as fifteen hundred feet long by six hundred feet wide are sufficient under the laws of California. McCann *v.* McMillan, 129 Cal. 350, 62 Pac.

31. See also Mt. Rosa Min., etc., Co. *v.* Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289.

35. Flavin *v.* Mattingly, 8 Mont. 242, 19 Pac. 384.

36. Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

Under the laws of Alaska a notice posted on a stump in a creek claiming fifteen hundred feet along the creek bottom and three hundred feet on each side from the center of the creek, stating that it is an extension of another claim named, and a certain distance from the first falls on the creek, is a sufficient notice of the location of a placer claim. Steen *v.* Wild Goose Min. Co., 1 Alaska 255; McKinley Creek Min. Co. *v.* Alaska United Min. Co., 183 U. S. 563, 22 S. Ct. 84, 46 L. ed. 331.

37. Erhardt *v.* Boaro, 8 Fed. 692, 2 McCrary 141.

38. Johnson *v.* Parks, 10 Cal. 446.

Illustration.—If the notice gives the course of the location as running a certain distance easterly and westerly from discovery, it reserves from other entry until the boundaries are marked, a surface area that might be included in a location so made that a line drawn through the center of the claim from end to end and passing through the point of discovery, said line will be between east forty-five degrees north and east forty-five degrees south from the point of discovery. Wiltsee *v.* Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896; Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037. *Compare*, Helena Gold, etc., Co. *v.* Boggaley, 34 Mont. 464, 87 Pac. 455.

Under the laws of Arizona a notice claiming fifteen hundred feet in length and three hundred feet on each side of the center of discovery shaft and stating that the general course of the lode is easterly and westerly is sufficient, the statute requiring the notice to contain "the number of feet in length of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim," and "the general course of the lode, deposit or premises located." Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723. See also Wiltsee *v.* Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896.

39. Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801; Poujade *v.* Ryan, 21 Nev. 449, 33 Pac. 659; Southern Cross Gold, etc., Min. Co. *v.* Europa Min. Co., 15 Nev. 383; Gleeson *v.*

are required to be recorded.[40] Markings on the ground control the courses and distances set forth in the notice.[41]

(d) WHERE RECORDING IS REQUIRED. Where the notice or a copy must be recorded the posted notice must contain the names of the locators, the date of the location, and such a description, by reference to some natural object, or permanent monument, as will identify the claim,[42] as required by statute.[43]

(e) IMMATERIAL DEFECTS. Immaterial defects do not invalidate the notice.[44]

(4) ANTEDATING NOTICE. When a locator fraudulently antedates his notice to defeat another location, it is void.[45]

(E) *Alterations and Amendments.* An amended notice is admissible in evidence in a suit to quiet title, although some of the names on the original notice have been changed.[46] The name of one locator may be erased and another substituted;[47] but all the names of several locators cannot be changed without relocation and reposting.[48] The notice may be changed by altering the words expressing the course of the vein, if done in good faith.[49]

(V) *MARKING BOUNDARIES OF CLAIM ON GROUND*—(A) *Necessity and Purpose.* The congressional act[50] requires that a mining location must be distinctly marked on the ground so that its boundaries can be readily traced. Its purpose is to notify every prospector who is seeking unoccupied mineral ground of what has been already appropriated.[51] Under the congressional act, marking

Martin White Min. Co., 13 Nev. 442; Golden Fleece Gold, etc., Min. Co. *v.* Cahle Consol. Gold, etc., Min. Co., 12 Nev. 312.

40. Malecek *v.* Tinsley, 73 Ark. 610, 85 S. W. 81.

Insufficient notice.— Posting notice on a house in which it is claimed a location is made is insufficient, if the boundaries are not so distinctly marked that they can be readily traced and the notice does not refer to some permanent monument or natural object. Malecek *v.* Tinsley, 73 Ark. 610, 85 S. W. 81.

41. Book *v.* Justice Min. Co., 58 Fed. 106.

The location is not void because of such discrepancy. Price *v.* McIntosh, 1 Alaska 286.

42. Deeney *v.* Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724; Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019.

43. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

Sufficient description.— When the local rule requires the posted notice to be recorded, it is sufficient, provided it contains such a description of the property as will render it ascertainable, when read in connection with the position of the place where posted. Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361.

44. See cases cited *infra*, this note.

Illustrations.— When the notice does not definitely locate one end of the claim and the locator, after posting the notice, changed this end eight hundred feet, such act does not make the location void. Wiltsee *v.* Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896. See also Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037. Specifying the number of acres is a sufficient description if it designates the adjoining lands on three sides, and that the lands on the fourth side are unoccupied, and the wrong insertion of the quarter section will not invalidate it. Duryea *v.* Boucher, 67 Cal. 141, 7 Pac. 421. The fact that the claim is properly marked on the ground and the markings at one end are referred to in the notice as stakes, when in fact they were trees, does not destroy the sufficiency of the notice. Upton *v.* Larkin, 7 Mont. 449, 17 Pac. 728 [*affirmed* in 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330]; Seidler *v.* Maxfield, 4 N. M. 374, 20 Pac. 794; Seidler *v.* Lafave, 4 N. M. 369, 20 Pac. 789.

45. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Muldoon *v.* Brown, 21 Utah 121, 59 Pac. 720.

46. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182.

47. Gleeson *v.* Martin White Min. Co., 13 Nev. 442.

48. Van Valkenburg *v.* Huff, 1 Nev. 142.

When one of two locators purchases the interest of the other, and erases the name of such other on the posted notice and changes the date to the date when such change is made, and remains in actual possession, working the claim in good faith, he loses no rights acquired by the prior discovery. Omar *v.* Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

49. Gleeson *v.* Martin White Min. Co., 13 Nev. 442.

50. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

51. *California.*— Willeford *v.* Bell, (1897) 49 Pac. 6.

Montana.—Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037; Upton *v.* Larkin, 7 Mont. 449, 17 Pac. 728 [*affirmed* in 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330].

Nevada.— Gleeson *v.* Martin White Min. Co., 13 Nev. 442.

Oregon.— Patterson *v.* Tarbell, 26 Oreg. 29, 37 Pac. 76.

Utah.— Bonanza Consol. Min. Co. *v.*

on the ground is one of the acts of location, and therefore until it is done no location is complete.[52]

(B) *Time For Marking.* As above stated the territorial and state statutes usually provide a certain number of days after the discovery, within which the boundaries must be marked.[53] In the absence of such statutes the locator has a reasonable time. But the time of the marking is immaterial if properly done before intervening rights of others accrue.[54]

(C) *Sufficiency of Markings.* In most of the mining states and territories, statutes have been passed supplementary to the acts of congress, providing the methods of marking the boundaries.[55] In the absence of such statutes or local rules and regulations what constitutes a sufficient marking of the boundaries is a question of fact to be determined in each particular case, upon the attendant circumstances.[56] Any marking, whether by stakes, mounds, monuments, or written

Golden Head Min. Co., 29 Utah 159, 80 Pac. 736.

United States.— Walsh *v.* Erwin, 115 Fed. 531; Gird *v.* California Oil Co., 60 Fed. 531; Book *v.* Justice Min. Co., 58 Fed. 106.

See 34 Cent. Dig. tit. "Mines and Minerals," § 40.

Immaterial defect.— A placer claim was located and the locators thought they marked correctly a whole quarter section, but in reality left a strip of land on one side, between the true line and the line as marked by such locators, and defendants entered such strip. The court held that the notices and stakes, marked as they were, were sufficient notice that plaintiff claimed the whole quarter section. Kern Oil Co. *v.* Crawford, 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. N. S. 993.

52. Willeford *v.* Bell, (Cal. 1897) 49 Pac. 6; Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; Becker *v.* Pugh, 9 Colo. 589, 13 Pac. 906; Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787; Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111; Sweet *v.* Webber, 7 Colo. 443, 4 Pac. 752; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735.

The requirement is mandatory.— Ledoux *v.* Forester, 94 Fed. 600.

Being in actual possession and working the claim without marking the boundaries is not sufficient against one who locates it in compliance with the statutes. Funk *v.* Sterrett, 59 Cal. 613.

53. See *supra*, III, b, 5, d, (I).

If one files his notice and does not mark his boundaries on the ground, he assumes the risk of the accrual of intervening rights of third parties. Brockbank *v.* Albion Min. Co., 29 Utah 367, 81 Pac. 863.

54. Sharkey *v.* Candiani, (Oreg. 1906) 85 Pac. 219; Crown Point Min. Co. *v.* Crismon, 39 Oreg. 364, 65 Pac. 87; Crœsus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

55. The Colorado statute which required that the side post, marking the boundaries, be placed in the center of the side lines, is satisfied, if substantially complied with, but a variation of one hundred and fifty feet will not do. Pollard *v.* Shively, 5 Colo. 309. The statute affords no support to one who fails to set stakes at the end of his claim when the position for them is not inaccessible, but merely difficult of access, or only approachable by a certain route. Crœsus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78. When the position for one stake fell on the top of a railway embankment, such point is not on precipitous ground within the meaning of the statute requiring a post at the nearest practical point when the true place falls on precipitous ground, and it is the duty of the locator to place the stake there in the absence of a showing that it would interfere with the passage of trains. Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. Under this same statute a post set away from the true corner of the claim and marked "W. C. 4–9005" is insufficient. Beals *v.* Cone, *supra*. The cutting of a letter in the solid rock is not a compliance with the statute, which requires a post at the nearest practicable point, when the true place falls on precipitous ground. Taylor *v.* Parenteau, 23 Colo. 368, 48 Pac. 505.

Under the laws of New Mexico the boundaries must be marked by four substantial monuments, one at each corner of the claim, and so marked as to indicate the direction of the claim from each monument. Deeney *v.* Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724.

56. Yreka Min., etc., Co. *v.* Knight, 133 Cal. 544, 65 Pac. 1091; Eaton *v.* Norris, 131 Cal. 561, 63 Pac. 856; Anderson *v.* Black, 70 Cal. 226, 11 Pac. 700; Taylor *v.* Middleton, 67 Cal. 656, 8 Pac. 594; Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562; Purdum *v.* Laddin, 23 Mont. 387, 59 Pac. 153; Russell *v.* Chumasero, 4 Mont. 309, 1 Pac. 713; Farmington Gold Min. Co. *v.* Rhymney Gold, etc., Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913; Meydenbauer *v.* Stevens, 78 Fed. 787.

Sufficient markings to satisfy the requirements of the acts of congress see Moore *v.* Steelsmith, 1 Alaska 121; Mitchell *v.* Hutch-

notices, whereby the boundaries can be readily traced, is sufficient under the acts of congress;[57] but the boundaries must be indicated by physical marks and monu-

inson, 142 Cal. 404, 76 Pac. 55; Eaton *v.* Norris, 131 Cal. 561, 63 Pac. 856; Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Howeth *v.* Sullenger, 113 Cal. 547, 45 Pac. 841; Doe *v.* Tyler, 73 Cal. 21, 14 Pac. 375; Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562; Pollard *v.* Shively, 5 Colo. 309; West Granite Mountain Min. Co. *v.* Granite Mountain Min. Co., 7 Mont. 356, 17 Pac. 547; Southern Cross Gold, etc., Min. Co. *v.* Europa Min. Co., 15 Nev. 383; Gleeson *v.* Martin White Min. Co., 13 Nev. 442; Deeney *v.* Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724; McPherson *v.* Julius, 17 S. D. 98, 95 N. W. 428; Marshall *v.* Harney Peak Tin Min., etc., Co., 1 S. D. 350, 47 N. W. 290; Brockbank *v.* Albion Min. Co., 29 Utah 367, 81 Pac. 863; Bonanza Consol. Min. Co. *v.* Golden Head Min. Co., 29 Utah 159, 80 Pac. 736; Warnock *v.* De Witt, 11 Utah 324, 40 Pac. 205; Eilers *v.* Boatman, 3 Utah 159, 2 Pac. 66; Roberts *v.* Wilson, 1 Utah 292; Oregon King Min. Co. *v.* Brown, 119 Fed. 48, 55 C. C. A. 626; Walsh *v.* Erwin, 115 Fed. 531; Smith *v.* Newell, 86 Fed. 56; Perigo *v.* Erwin, 85 Fed. 904; Book *v.* Justice Min. Co., 58 Fed. 106; Cheesman *v.* Shreeve, 40 Fed. 787; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

Insufficient markings see Funk *v.* Sterrett, 59 Cal. 613 (merely posting a notice on a quartz ledge claiming a certain number of feet along the ledge each way from the notice); Holland *v.* Mt. Auburn Gold Quartz Min. Co., 53 Cal. 149 (posting a notice on a tree at each end of the claim); Live Yankee Co. *v.* Oregon Co., 7 Cal. 40; Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; Taylor *v.* Parenteau, 23 Colo. 368, 48 Pac. 505; Sharkey *v.* Candiani, (Oreg. 1906) 85 Pac. 219; Cræsus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78.

57. Oregon King Min. Co. *v.* Brown, 119 Fed. 48, 55 C. C. A. 626.

Stakes, posts, and monuments in general.— Prominent and permanent monuments and stakes at the corners with proper notices posted (Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562), stakes or monuments at each corner and at the center of each end line (Howeth *v.* Sullenger, 113 Cal. 547, 45 Pac. 841; Southern Cross Gold, etc., Min. Co. *v.* Europa Min. Co., 15 Nev. 383), stakes at each corner, either driven in the ground or supported by piles of stones, if the location is upon open ground (Book *v.* Justice Min. Co., 58 Fed. 106), or a discovery monument and a stake at each of three corners and at the center of each end line (Warnock *v.* De Witt, 11 Utah 324, 40 Pac. 205; Walsh *v.* Erwin, 115 Fed. 531) are sufficient. The boundaries must be marked by six substantial posts, set at each corner and one in the center of each end line, which must be sunk in the ground and hewed on the sides toward the claim. Cheesman *v.* Shreeve, 40 Fed. 787. Setting posts or blazing and marking trees, one at each corner of the claim and one in the center of each end line and each side line, is sufficient. Marshall *v.* Harney Peak Tin Min., etc., Co., 1 S. D. 350, 47 N. W. 290. If the center line lengthwise be marked by a stake at each end, upon which is placed a written notice showing that there is claimed in length along the lode the distance between the stakes and a specified width on each side of said line, it is sufficient; the law not defining what marks shall be made or upon what part of the ground they shall be placed. Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299. It is a sufficient statement of the marking of the boundaries of a claim where a notice sets forth that the exterior ends of the location were marked by lawful stakes, 1, 2, 3, and 4, and that the claim was three hundred feet on each side of the center of the vein; or, when the notice sets forth that the claim is marked by lawful stakes on both ends and corners, 1, 2, 3, and 4. The proof disclosed that the description and markings on each were true, and that a stake three or four inches in diameter and four to four and a half feet in height was marked and set up on each corner, except at one corner where a stump was marked. Bonanza Consol. Min. Co. *v.* Golden Head Min. Co., 29 Utah 159, 80 Pac. 736.

Adoption of stakes already set by a prior locator in a second location, at each corner and at the center of each end line, is sufficient. Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Brockbank *v.* Albion Min. Co., 29 Utah 367, 81 Pac. 863.

One of the stakes being bound to a tree instead of being driven into the ground is immaterial. McPherson *v.* Julius, 17 S. D. 98, 95 N. W. 428.

Stakes placed on adjoining claims.— Placing all but one or two of the stakes on adjoining claims by mistake is sufficient marking to hold the vacant ground included. Doe *v.* Tyler, 73 Cal. 21, 14 Pac. 375. When the stakes are set within the statutory limit, but upon adjoining claims, it is sufficient. West Granite Mountain Min. Co. *v.* Granite Mountain Min. Co., 7 Mont. 356, 17 Pac. 547; Perigo *v.* Erwin, 85 Fed. 904.

The name of the claim need not be marked on all of the boundary stakes. Smith *v.* Newell, 86 Fed. 56.

Two adjoining locations were each marked by stakes set at the four corners, two stakes being the dividing line common to both claims. On the middle of this dividing line was a tree blazed on both sides with the notices of location posted, which described the boundaries. This was a sufficient mark-

ments sufficient to distinctly show the extent of the claim.[58] It is therefore apparent that a location in a rough and wooded country should require more extensive markings than one in the open, level country.[59] The Canadian statutes[60] prescribe with considerable particularity the method of marking the boundaries of the claim on the ground,[61] and their requirements must be complied with to secure a valid location.[62] Where the initial post of a Canadian mineral claim is in

ing, under the act of congress. Eaton *v.* Norris, 131 Cal. 561, 63 Pac. 856.

A description of a location omitted the last course and distance, describing the next to the last course as running to the place of beginning, instead of to the last monument. In an action to quiet title to the claim it was found that if a straight line was drawn from the next to the last monument to the place of beginning it would include all the land in controversy, and that if the course last given in the recorded description were followed it would reach the monument described, and from there to the place of beginning was a straight line and this would be a correct description of the claim. It was held that the inaccuracy in the description did not make the location invalid, but was sufficient under the statute. Mitchell *v.* Hutchinson, 142 Cal. 404, 76 Pac. 55.

Where the location is a relocation of another claim and practically covers the same ground, such location made by posting a notice describing the ground by courses and distances from the discovery monument, made when the snow is so deep that it is impracticable to properly mark the boundaries, is sufficient to entitle the locator to perfect it within a reasonable time, or before other parties have acquired rights in the ground, although the boundaries are not sufficiently marked on the day the notice is posted; and such a location is completed and validated by repairing the old monuments and boundaries prior to the intervention of adverse rights of others. Brockbank *v.* Albion Min. Co., 29 Utah 367, 81 Pac. 863.

That distances are a few feet out and courses a point or two wrong is immaterial if the boundaries can be readily traced, and the want of monuments on a side when the ground is inaccessible, is immaterial. Eilers *v.* Boatman, 3 Utah 159, 2 Pac. 66.

The location of a claim bounded by another raises no implication that it corresponds in size or in the direction of its lines with such other. Live Yankee Co. *v.* Oregon Co., 7 Cal. 40.

58. Roberts *v.* Wilson, 1 Utah 292.

59. Ledoux *v.* Forester, 94 Fed. 600. And if marked in such a manner in a rough and wooded country, that a man honestly looking for vacant mineral land could not see the stakes and notices, it is an insufficient marking. Moore *v.* Steelsmith, 1 Alaska 121.

60. See Brit. Col. Rev. St. (1897) c. 135, § 16.

61. See Richards *v.* Price, 5 Brit. Col. 362.

62. Sandberg *v.* Ferguson, 10 Brit. Col. 123 [*affirmed* in 35 Can. Sup. Ct. 476] (holding that the failure to write on the No. 2 post of a mineral claim the date of the location and the name of the locator is a non-observance of formalities within the meaning of section 16 (g) of the Mineral Act); Callahan *v.* George, 21 Can. L. T. Occ. Notes 600, 8 Brit. Col. 146 (holding that the requirement of section 16 of the Brit. Col. Mineral Act that posts Nos. 1 and 2 shall be of wood is imperative, and stone mounds are not to be substituted); Aldous *v.* Hall Mines, 6 Brit. Col. 394 (where it is held that in order to constitute a valid location the statutory requirements as to blazing must be complied with).

The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim. Snyder *v.* Ransom, 24 Can. L. T. Occ. Notes 41, 10 Brit. Col. 182.

Post in moving glacier.— The fact that a No. 2 post of a mineral claim is planted in a moving glacier will not invalidate the location, provided the location line is well marked and the claim is otherwise properly marked out so as to be easily identified. Sandberg *v.* Ferguson, 10 Brit. Col. 123 [*affirmed* in 35 Can. Sup. Ct. 476].

An error in the statement on the initial post of the approximate compass bearing of the No. 2 post, marking northeast and southwest instead of northwest and southeast, is fatal to the validity of the location. Francoeur *v.* English, 6 Brit. Col. 63.

A bona fide attempt to comply with the provisions of the Nova Scotia Mineral Act of 1896, which is sufficient to support a claim, does not merely mean an attempt to locate a claim of size and form as provided in section 15, but means an attempt to comply with the formalities provided by section 16 as to staking, and a locator who has staked his location by four corner posts, without any legal first and second posts, etc., has not made such an attempt. Richards *v.* Price, 5 Brit. Col. 362.

Curing of irregularities.— Where on the initial post of a person's location the "approximate compass bearing" of the No. 2 post was not given as required by the statute, the irregularity in locating was not cured by a certificate of work as Brit. Col. Rev. St. (1897) c. 135, § 28, providing that no irregularity happening previous to the date of the record of the last certificate of work shall affect the title to the claim, cures only irregularities arising after location and record and which do not go to the root of the title. Callahan *v.* Coplen, 7 Brit. Col. 422 [*reversing* 6 Brit. Col. 523].

United States territory the location is void,[63] but the fact that the initial post is on ground previously granted by the crown under the statutes does not necessarily invalidate the claim.[64]

(D) *Alteration, Change, or Obliieration.* A locator may change his boundaries and take unappropriated land in his claim at any time before the completion of his location, providing he changes his notice.[65] But he cannot interfere with other locations.[66] When a locator's rights have attached they cannot be divested by obliteration of his markings if done without his fault.[67] But when variations exist between one's boundaries and the courses and distances described in his record, he must keep up his monuments to such an extent as to give fair and reasonable notice.[68]

(E) *Particular Claims Considered*[69]—(1) TUNNEL CLAIM. Usually one line of stakes along the course of the tunnel is sufficient unless something more is required by local rules and regulations, or state or territorial statutes. The acts of congress make no requirements. No surface location of a vein discovered in the tunnel need be made, but the claimant may post a notice of claim to the vein, describing it, at the month of the tunnel and recording the same as required by law, which will make his location complete.[70]

(2) PLACER CLAIM. Usually the same rules apply as to the marking of the boundaries of quartz claims,[71] except that when several persons locate one hundred and sixty acres as one claim, they may mark the boundaries of the entire claim and are not required to mark boundaries of each twenty acres.[72] In two California cases it was held that when the location of a placer conformed to the governmental surveys the boundaries should be marked;[73] but these cases are practically overruled by the later cases.[74]

(VI) *LOCATION CERTIFICATE OR DECLARATORY STATEMENT*—(A) *Nature, Necessity, and Purpose*—(1) NATURE AND PURPOSE. The "location certificate" and the "declaratory statement" are one and the same thing. It is the formal

63. Madden *v.* Connell, 30 Can. Sup. Ct. 109 [*affirming* 6 Brit. Col. 531 (*affirming* 6 Brit. Col. 76)].

64. Clark *v.* Docksteader, 36 Can. Sup. Ct. 622 [*affirming* 11 Brit. Col. 37].

65. Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037. *Contra,* Golden Fleece, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

66. Wiltsee *v.* Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896; Crœsus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78.

67. Moore *v.* Steelsmith, 1 Alaska 121; Smith *v.* Newell, 86 Fed. 56; Book *v.* Justice Min. Co., 58 Fed. 106; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

68. Pollard *v.* Shively, 5 Colo. 309.

Monuments will prevail in case of such variation. Steen *v.* Wild Goose Min. Co., 1 Alaska 255; Meydenbauer *v.* Stevens, 78 Fed. 787.

69. Boundaries of mill sites must be marked on the ground the same as lode claims. See *supra,* III, B, 5, d, (II), (E).

70. Ellet *v.* Campbell, 18 Colo. 510, 33 Pac. 521 [*affirmed* in 167 U. S. 116, 17 S. Ct. 765, 42 L. ed. 101]. *Contra,* Rico-Aspen Consol. Min. Co. *v.* Enterprise Min. Co., 53 Fed. 321. But the locator may make his location upon the surface of the ground. Brewster *v.* Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793. The early doctrine of the Colorado courts it seems was that there should be a location of the vein on the surface. Pelican, etc., Min. Co. *v.* Snodgrass, 9 Colo. 339, 12 Pac. 206.

71. Sweet *v.* Webber, 7 Colo. 443, 4 Pac. 752.

72. McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616, under the provisions of the statute that "no location of a placer claim . . shall exceed 160 acres for any one person or association of persons."

73. Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; White *v.* Lee, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115.

Under United States statutes requiring placer claims to conform to the lines of the public survey, they will only be required to do so when practicable, but otherwise it is sufficient if they conform to them as near as is reasonably practicable. Mitchell *v.* Hutchinson, 142 Cal. 404, 76 Pac. 55.

74. Kern Oil Co. *v.* Crawford, 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. N. S. 993; Temescal Oil Min., etc., Co. *v.* Salcido, 137 Cal. 211, 69 Pac. 1010.

A fence or other inclosure is not necessary to indicate the actual possession of a saline location. Garrard *v.* Silver Peak Mines, 82 Fed. 578.

The United States statutes require the exterior limits of placer entries to conform to

instrument prepared for record, when a record of the location is required. It is the last act of location. It is the first paper of the recorded title to a mining claim. It being the completion of the location, it is the basis of the locator's rights of possession as granted by the congressional act.[75] Its purpose is to impart constructive notice to the world that the ground has been located,[76] and to publish the exact locality where it may be found. It has no relation to the notice posted on the claim,[77] unless the state or territorial statute, or local rule or regulation, so provides. Its function is a permanent one.[78]

(2) NECESSITY. In the absence of state or territorial statutes or local rule or regulation no record of the claim need be made, and in the absence of proof to the contrary it must be presumed that the United States law as to recording and posting notice of location of mining claims was in force in certain districts.[79] Whenever a record is required it is one of the acts of location and must be made.[80] If a mining district is not properly organized and rules properly established, a rule requiring a record is unenforceable.[81] Where a record is required of mining claims, it includes placers.[82] Not so, however, if the statute only prescribes a record for a quartz location.[83] However, when a one-hundred-and-sixty-acre placer claim is located, the record of it as one claim is sufficient.[84]

(B) *Requisites and Sufficiency in General.* The act of congress provides that when a record is required it shall contain the name or names of the locator or locators, the date of location[85] and such a description of the claim or claims located, by reference to some natural object or permanent monument,[86] as will identify the claim.[87] Therefore, when a record is required, it must comply with

the legal subdivision of the public lands, if such lands have been surveyed; and an attempted location of a placer claim by simply posting a notice on a tree that locator claimed the exclusive right to prospect in a certain quarter section, is insufficient, and no rights can be acquired under such notice, if no attempt had been made to properly mark the boundaries of such quarter section. Worthen *v.* Sidway, 72 Ark. 215, 79 S. W. 777.

75. Pollard *v.* Shively, 5 Colo. 309.

76. Meydenbauer *v.* Stevens, 78 Fed. 787.

77. **Notice posted on claim** see *supra*, III, B, 5, d, (IV).

78. Sanders *v.* Noble, 22 Mont. 110, 55 Pac. 1037.

79. Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; Souter *v.* Maguire, 78 Cal. 543, 21 Pac. 183; Anderson *v.* Caughey, (Cal. App. 1906) 84 Pac. 223; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436; Peters *v.* Tonopah Min. Co., 120 Fed. 587; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

80. Russell *v.* Hoyt, 4 Mont. 412, 2 Pac. 25.

81. Fuller *v.* Harris, 29 Fed. 814.

Under Hill Annot. Laws Oreg. § 3831, claims need not be recorded in unorganized districts. Payton *v.* Burns, 41 Oreg. 430, 69 Pac. 134.

82. Sweet *v.* Webber, 7 Colo. 443, 4 Pac. 752.

83. Moxon *v.* Wilkinson, 2 Mont. 421.

84. McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

85. **The date given** is material and must be correct, and not fictitious and fraudulent. Muldoon *v.* Brown, 21 Utah 121, 59 Pac. 720. But if the location was actually made on a certain day, before the rights of any other persons intervened, the mere statement in the notice that it was made on a subsequent day is immaterial. Webb *v.* Carlon, 148 Cal. 555, 83 Pac. 998.

86. **Natural object or permanent monument** see *infra*, III, B, 5, d, (VI), (C).

If it does not designate any natural object or permanent monument or mark by which the claim could be identified, it is insufficient under U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426]. Fuller *v.* Harris, 29 Fed. 814. It is insufficient if it does not describe the limits of the claim by reference to natural objects or permanent monuments, even though it describes the claim as being bounded by other claims. Baxter Mountain Gold Min. Co. *v.* Patterson, 3 N. M. 179, 3 Pac. 741.

If it fails to give the direction of the permanent monument, from the point of discovery, it is void. Clearwater Short-Line R. Co. *v.* San Garde, 7 Ida. 106, 61 Pac. 137; Brown *v.* Levan, 4 Ida. 794, 46 Pac. 661.

Giving the course of two mountain peaks from the discovery shaft is *prima facie* sufficient. Craig *v.* Thompson, 10 Colo. 517, 16 Pac. 24. But referring to "mountain peaks" without naming or describing them, and stating that the dam of a river near a certain city, and the position of the shaft on a certain creek, and the name of the state, county, and mining district, is insufficient. Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

87. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

this provision.[88] In most of the mining states and territories are found additional requirements which must be complied with if constitutional and valid.[89] In Canada also a compliance with the statutory requirements is necessary,[90] and if the description of a mining claim as recorded is so erroneous as to mislead persons locating other claims in the vicinity the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims.[91] Under the act of congress it need not show the precise boundaries of the claim as marked on the ground, but is sufficient if it contains directions which, if taken in connection with such markings, will enable a reasonably intelligent person to find the claim, and trace its boundaries.[92] When

88. *Colorado.*—Drummond *v.* Long, 9 Colo. 538, 13 Pac. 543; Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787.

Idaho.—Brown *v.* Levan, 4 Ida. 794, 46 Pac. 661.

Montana.—Dillon *v.* Bayliss, 11 Mont. 171, 27 Pac. 725; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; Russell *v.* Chumasero, 4 Mont. 309, 1 Pac. 713.

Nevada.—Poujade *v.* Ryan, 21 Nev. 449, 33 Pac. 659; Gleeson *v.* Martin White Co., 13 Nev. 442.

New Mexico.—Deeney *v.* Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724.

Utah.—Darger *v.* Le Sieur, 8 Utah 160, 30 Pac. 363, 9 Utah 192, 33 Pac. 701.

United States.—Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964; Smith *v.* Newell, 86 Fed. 56; Meydenbauer *v.* Stevens, 78 Fed. 787; Faxon *v.* Barnard, 4 Fed. 702, 2 McCrary 44; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

See 34 Cent. Dig. tit. "Mines and Minerals," § 46.

89. Purdum *v.* Laddin, 23 Mont. 387, 59 Pac. 153. See also Dolan *v.* Passmore, (Mont. 1906) 85 Pac. 1034.

Under an early Colorado statute, in addition to the requirements of the acts of congress, it must state the number of feet in length claimed on each side of the discovery shaft and the general course of the lode. Cheesman *v.* Shreeve, 40 Fed. 787.

Under the act of congress and statutes of Colorado, a certificate which describes the claim as "situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain," is insufficient. Faxon *v.* Barnard, 4 Fed. 702, 2 McCrary 44.

Under the Montana statute a declaratory statement referring to the discovery shaft only by the statement that the claim extended a certain number of feet north and south of the center thereof, and which refers to the corners and markings thereon only by the statement that the location is marked by substantial posts or stones at each corner, is insufficient. Hahn *v.* James, 29 Mont. 1, 73 Pac. 965. A declaratory statement which gives no description of the corners or the markings thereon is insufficient. Purdum *v.* Laddin, 23 Mont. 387, 59 Pac. 153.

Under the Oregon statute, where the locators of a lode claim, in marking the same, omitted to put up the center end posts or monuments, and did not cause to be attached to the copy of notice of location delivered to the clerk for record an affidavit of proof of the work required to be done, as required by statutes, it was held that such omissions were fatal to obtaining a valid title. Wright *v.* Lyons, 45 Oreg. 167, 77 Pac. 81.

When the state or territorial statute makes no special requirement as to its contents, if the declaratory statement or certificate of location contains the requirement specified in the acts of congress it would be sufficient.

90. Collom *v.* Manley, 32 Can. Sup. Ct. 371 [*reversing* 8 Brit. Col. 153, and *following* Coplen *v.* Callahan, 30 Can. Sup. Ct. 555 (*affirming* 7 Brit. Col. 422 [*reversing* 6 Brit. Col. 523])], holding that a prospector, in locating and recording his location line between No. 1 and No. 2, as running in an easterly direction, whereas it was nearly due north, does not comply with the statute requiring him to state the approximate compass bearing, and his location is void.

91. Coplen *v.* Callahan, 30 Can. Sup. Ct. 555 [*affirming* 7 Brit. Col. 422 (*reversing* 6 Brit. Col. 523)].

92. Gamer *v.* Glenn, 8 Mont. 371, 20 Pac. 654. See Wells *v.* Davis, 22 Utah 322, 62 Pac. 3, where it was held that the notice of location of a mining claim, which claimed fifteen hundred lineal feet on a certain lode, ledge, or rock in place, bearing precious metals, commencing at this monument and running three hundred feet northeasterly and twelve hundred feet southwesterly, situated between certain gulches under a prominent reef of rocks, and about two hundred and fifty or three hundred feet southwesterly from the southwesterly end of another lode survey, together with one hundred feet on each side of the lode, was sufficient to give notice to subsequent locators. If, considering everything which it contains, the claim can be identified, it is sufficient. Meydenbauer *v.* Stevens, 78 Fed. 787. But describing a claim as being situated up near the head, at the right hand fork of what is known as Tie Canyon "about five miles from" a certain railroad is insufficient. Darger *v.* Le Sieur, 8 Utah 160, 30 Pac. 363.

If by giving the language a reasonable construction, the location notice would impart notice to a subsequent locator by referring to natural objects or permanent

recording is required by local rule it is not necessary that an exact or literal copy

monuments it is sufficient. Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955.

A description giving other claims as boundaries is good if such claims are lawfully marked on the ground, and whether they are so marked is a matter of proof. Russell *v.* Chumasero, 4 Mont. 309, 1 Pac. 713. It is insufficient, however, when the claim is described as being "situated and located on the north side of North Willow creek about one-half mile from the Hurt mines, the direction being southwest. The adjoining claims are the Gem of the Woods on the north, and the Kid claim on the south and the Greyhound on the east." Brown *v.* Levan, 4 Ida. 794, 46 Pac. 661. So it is insufficient when the description begins the boundary "at the westerly end" of another claim and then running fifty feet "to the easterly end" of his property. Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787. Describing a claim as being "in Uncompahgre mining district, county of La Plata, territory of Colorado, on the southeast side of said Mount Hardin, in Portland gulch, about one thousand five hundred feet north of the Hawk Eye lode" is insufficient. Drummond *v.* Long, 9 Colo. 538, 13 Pac. 543.

"Easterly" and "westerly" need not denote due east and west. Wiltsee *v.* King of Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896.

The posted notice is sufficient as a certificate of location if it complies with the law. Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361. Under statutes of Oregon and Utah the statement or certificate is sufficient if it is a substantial copy of the notice posted. Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019.

When it refers to subdivisions of a public survey which was suspended for investigation, it is sufficient. Gird *v.* California Oil Co., 60 Fed. 531.

Substantial compliance with requirements. — When a state statute requires, if a post is used as a marker, that it must be at least four inches square and four feet six inches in length, set one foot in the ground, etc., a declaratory statement which states all statute requirements, except the length of the post, which was in fact four feet six inches long, was a substantial compliance with the statute and sufficient. Walker *v.* Pennington, 27 Mont. 369, 71 Pac. 156. Where a notice of location complied substantially with the statutes, but not literally, as where the statutes required the width of the location on each side of the center of the vein to be stated, and this provision was omitted, it was held sufficient. Zerres *v.* Vanina, 134 Fed. 610.

Immaterial defects. — Although the certificate fails to mention either the county or state in which it is located, but refers to the preliminary notice posted on the ground and duly recorded, which names the county, it is sufficient under the act of congress and the California statute. Talmadge *v.* St. John, 129 Cal. 430, 62 Pac. 79. That the recorded certificate calls for stakes as monuments marking the boundaries when they are trees cut off, blazed, and squared is immaterial. Hansen *v.* Fletcher, 10 Utah 266, 37 Pac. 480. When the certificate correctly describes the location with reference to a well-established line of another claim, and with the aid of the location stakes, the lines of the claim could be easily ascertained by applying the description set forth in the record, and it contains the other requisites prescribed by statute, it is sufficient, even though it erroneously refers to the "southeasterly" end of another claim which has no such boundary; describes a distance of four hundred feet as "4" and gives the courses of certain boundary lines as "northerly" and "southerly" where they were not due north and south. Smith *v.* Newell, 86 Fed. 56. The fact that there is stated in the certificate the words "dated on the ground" does not invalidate it if it contains the other statutory requirements. Preston *v.* Hunter, 67 Fed. 996, 15 C. C. A. 148.

Under the former Colorado statute it need not state the distance from the discovery shaft to the side lines (Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462); nor need it state that the discovery shaft had been sunk the requisite depth or so as to disclose mineral, nor that the discovery notice has been posted or boundaries marked (Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111).

Illustrations of sufficient certificates of location or declaratory statements may be found in Wiltsee *v.* King of Arizona Min., etc., Co., 7 Ariz. 95, 60 Pac. 896; Talmadge *v.* St. John, 129 Cal. 430, 62 Pac. 79; Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361; Craig *v.* Thompson, 10 Colo. 517, 16 Pac. 24; Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955; Walker *v.* Pennington, 27 Mont. 369, 71 Pac. 156; Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019; Wells *v.* Davis, 22 Utah 322, 62 Pac. 3; Zerres *v.* Vanina, 134 Fed. 610; Smith *v.* Newell, 86 Fed. 56; Meydenbauer *v.* Stevens, 78 Fed. 787; Preston *v.* Hunter, 67 Fed. 996, 15 C. C. A. 148.

Illustrations of insufficient declaratory statements or certificates of location may be found in Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918; Drummond *v.* Long, 9 Colo. 538, 13 Pac. 543; Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787; Brown *v.* Levan, 4 Ida. 794, 46 Pac. 661; Hahn *v.* James, 29 Mont. 1, 73 Pac. 965; Purdum *v.* Laddin, 23 Mont. 387, 59 Pac. 153; Baxter Mountain Gold Min. Co. *v.* Patterson, 3 N. M. 179, 3 Pac. 741; Wright *v.* Lyons, 45 Oreg. 167, 77 Pac. 81; Darger *v.* Le Sieur, 8 Utah 160, 30 Pac. 363; Fuller *v.*

of the notice posted on the claim be recorded, the description of the claim as recorded being sufficient to identify its boundaries.[93]

(c) *What Are Natural Objects or Permanent Monuments* — (1) In General. The terms "natural object" and "permanent monument" as employed in the federal statute[94] may include trees blazed and squared, rock monuments, a prospect hole,[95] any fixed natural object, a permanent post or stake firmly planted in the ground,[96] or a known mining claim[97] (at least *prima facie*).[98] Such a natural object or permanent monument as might under any circumstances identify the claim is sufficient *prima facie*.[99]

(2) Question of Fact. What are and what are not permanent monuments, and whether they are sufficient as markings, are questions of fact.[1]

(3) Burden of Proof. One attacking the validity of a notice must assume the burden of showing that a permanent monument referred to therein does not exist.[2]

(d) *Variation Between Record and Markings on Ground.* Where there is a variation between the record and the markings on the ground, the locator must keep his monuments up to the extent that gives fair and reasonable notice.[3] The markings on the ground will control when there is a variation between such markings and the location notice or record.[4]

Harris, 29 Fed. 814; Faxon *v.* Barnard, 4 Fed. 702, 2 McCrary 44.

93. Gird *v.* California Oil Co., 60 Fed. 531.

94. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

95. Hansen *v.* Fletcher, 10 Utah 266, 37 Pac. 480.

A tree, if it is marked or possesses peculiarities, by which it can be designated, is sufficient. Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462.

Where a mining claim is located by number, above or below "discovery" or "No. 1," the court will presume, in the absence of any proof to the contrary, that the adjoining claims of the system of which the one in question is a part, and described by serial number, are well-known natural objects or permanent monuments. Butler *v.* Good Enough Min. Co., 1 Alaska 246.

96. Talmadge *v.* St. John, 129 Cal. 430, 62 Pac. 79; Credo Min, etc., Co. *v.* Highland Min., etc., Co., 95 Fed. 911; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

Mountain tops.— A description that the claim is located on tops of the mountain south of Dew Drop Gulch is sufficient. Duncan *v.* Fulton, 15 Colo. App. 140, 61 Pac. 244.

"T" creek is presumptively sufficient. Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361.

97. *Arizona.*— Shattuck *v.* Costello, (1902) 68 Pac. 529; Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723.

Colorado.— Carlin *v.* Freeman, 19 Colo. App. 334, 75 Pac. 26; Duncan *v.* Fulton, 15 Colo. App. 140, 61 Pac. 244.

Idaho.— Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955.

Montana.— Riste *v.* Morton, 20 Mont. 139, 49 Pac. 656; Dillon *v.* Bayliss, 11 Mont. 171, 27 Pac. 725; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

Nevada.— Southern Cross Gold, etc., Min. Co. *v.* Europa Min. Co., 15 Nev. 383.

Utah.— Wells *v.* Davis, 22 Utah 322, 62 Pac. 3; Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

United States.— Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964; Book *v.* Justice Min. Co., 58 Fed. 106.

See 34 Cent. Dig. tit. "Mines and Minerals," § 46.

98. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87 ("El Williams 1–16," presumably in absence of contrary evidence); Gamer *v.* Glenn, 8 Mont. 371, 20 Pac. 654 (a large boulder at the west end of the "Tom" lode and the statement containing other references); Upton *v.* Larkin, 7 Mont. 449, 17 Pac. 728 [*affirmed* in 144 U. S. 19, 12 S. Ct. 614, 36 L. ed. 330].

99. McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31; Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

1. O'Donnell *v.* Glenn, 8 Mont. 248, 19 Pac. 302; Flavin *v.* Mattingly, 8 Mont. 242, 19 Pac. 384; Russell *v.* Chumasero, 4 Mont. 309, 1 Pac. 713; Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801; Bonanza Consol. Min. Co. *v.* Golden Head Min. Co., 29 Utah 159, 80 Pac. 736; Fissure Min. Co. *v.* Old Susan Min. Co., 22 Utah 438, 63 Pac. 587; Farmington Gold Min. Co. *v.* Rhymney Gold, etc., Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913.

2. Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723. Such references should be liberally construed. Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955.

3. Pollard *v.* Shively, 5 Colo. 309.

4. Steen *v.* Wild Goose Min. Co., 1 Alaska 255; Meydenbauer *v.* Stevens, 78 Fed. 787.

(E) *Amended or Additional Certificate* — (1) AUTHORITY TO MAKE. In most of the mining states and territories we find statutes allowing the recording of amended or additional certificates of location or declaratory statements. In the absence of such statutes, in our opinion, the power exists so long as intervening rights have not been instituted.[5]

(2) CERTIFICATES AMENDABLE. Erroneous certificates may be amended.[6] Of course if the original is void it cannot be given validity from the date of the amendment.[7] And if the original certificate is valid no amendment is contemplated.[8] The statute allowing the filing of such amendments applies to placers as well as quartz locations.[9]

(3) TIME OF FILING. The amended or additional certificate may be filed after suit brought concerning the claim with the same effect as if filed before.[10]

(4) SUFFICIENCY. The amendment or additional certificate need not specify for what it was filed.[11] The original and amended or additional certificate must be construed together, and if sufficient when so construed, the location record will be valid, although neither standing alone would be sufficient.[12]

(5) OPERATION AND EFFECT. When filed it relates back to the date of the original certificate, in the absence of intervening rights.[13] A cotenant who files an amended certificate, and thereby acquires additional territory, holds it in trust for his cotenants.[14]

5. See Tonopah, etc., Min. Co. *v.* Tonopah Min. Co., 125 Fed. 389; McEvoy *v.* Hyman, 25 Fed. 596.

In Nevada at an early day it was held that the name of one locator of a claim may be erased and another inserted in place thereof, as to outsiders. Gleeson *v.* Martin White Min. Co., 13 Nev. 442. See also Tonopah, etc., Min. Co. *v.* Tonopah Min. Co., 125 Fed. 389.

Rights inconsistent with the rights of others cannot be added by amendment. Bunker Hill, etc., Min., etc., Co. *v.* Empire State-Idaho Min., etc., Co., 134 Fed. 268. Where a claim was located before the ground was open to location, and after it became subject to location, but before the original locator filed an amended location, it was located by another, the original locator acquired no rights either through his original location or his amendment. Gurney *v.* Brown, 32 Colo. 472, 77 Pac. 357.

6. Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955; Wilson *v.* Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

Failure to include certain territory.— Defendant's mine was located in 1895, and in 1898 he states that his location did not include territory which plaintiff subsequently located. Thereafter defendant filed an amended certificate covering such territory. It did not appear whether plaintiff's location was prior or subsequent to the filing of the amended certificate, and it appeared that defendant was in actual possession of all the territory covered by plaintiff's location at the time it was made. Under such circumstances defendant's location was sufficient. Kirk *v.* Meldrum, 28 Colo. 453, 65 Pac. 633.

Failure to refer to natural object or permanent monument.— The federal court and the supreme court of Colorado have decided that it may be amended to cure a failure to refer to a natural object or permanent monument, although between the filing of the original and the amendment another has sought to locate the claim, and although a section of the statute (Colo. Gen. St. 2400) declares a certificate shall be void unless it contains such description as shall identify the claim with reasonable certainty, qualifying section 2400. Frisholm *v.* Fitzgerald, 25 Colo. 290, 53 Pac. 1109; McEvoy *v.* Hyman, 25 Fed. 596.

7. Sullivan *v.* Sharp, 33 Colo. 346, 80 Pac. 1054; Gurney *v.* Brown, 32 Colo. 472, 77 Pac. 357; Field *v.* Tanner, 32 Colo. 278, 75 Pac. 916; Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69.

8. Sullivan *v.* Sharp, 33 Colo. 346, 80 Pac. 1054; Porter *v.* Tonopah North Star Tunnel, etc., Co., 133 Fed. 756.

9. Kirk *v.* Meldrum, 28 Colo. 453, 65 Pac. 633.

10. Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111.

11. Johnson *v.* Young, 18 Colo. 625, 34 Pac. 173; Tonopah, etc., Min. Co. *v.* Tonopah Min. Co., 125 Fed. 389.

12. Duncan *v.* Fulton, 15 Colo. App. 140, 61 Pac. 244.

13. Craig *v.* Thompson, 10 Colo. 517, 16 Pac. 24; McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652; Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111; Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69; Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955; McEvoy *v.* Hyman, 25 Fed. 596.

The locator is not required to make a discovery on the added ground or to do assessment work thereon under an amendment enlarging the claim. Tonopah, etc., Min. Co. *v.* Tonopah Min. Co., 125 Fed. 389.

14. Hallack *v.* Traber, 23 Colo. 14, 46 Pac. 110.

(F) *Verification* — (1) NECESSITY. When a state or territorial statute[15] requires the declaratory statement or certificate of location to be verified, it must be done.[16] The fact that thirty-three per cent of the mining locations in one county are not verified does not allow the application of the maxim *communis error facit jus.*[17]

(2) BY WHOM MADE. It may be made by a locator who has never seen the claim, upon the information of an agent or joint locator.[18] An attorney or agent, who has located the claim, may verify the statement or certificate in behalf of his principal.[19]

(3) BEFORE WHOM MADE. It must be verified before someone authorized to administer oaths, and therefore, if taken before a deputy district recorder, it is void.[20]

(4) SUFFICIENCY. The verification must include the fact of discovery and location, as well as the description of the claim.[21] And if it, on its face, appears to have been sworn to a year before the location is declared to have been made, in the absence of proof that the affidavit was wrongly dated it is insufficient.[22] When the affidavit is not signed and there is no jurat showing it was sworn to, it is insufficient, and proof cannot be introduced to show that it was in fact sworn to.[23]

(G) *Filing For Record* — (1) TIME FOR FILING. Usually the local statutes require the filing for record to be done within a certain number of days after the completion of the other acts of location,[24] but a failure to comply with such statute has been held not to render the location invalid if filed before any adverse rights are acquired.[25] Whether filed within time is a question for the jury.[26]

(2) HOW ACCOMPLISHED. If the locator lodges his certificate with the proper officer and such officer notifies him that it will be recorded it is sufficient.[27]

(3) SUFFICIENCY OF RECORD — (a) IN GENERAL. A location recorded in the office of the county recorder, in compliance with territorial statutes, is sufficient

15. **The requirement of a verification by a** state or territorial statute is constitutional. Van Buren *v.* McKinley, 8 Ida. 93, 66 Pac. 936.

16. Hickey *v.* Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806; Mattingly *v.* Lewisohn, 13 Mont. 508, 35 Pac. 111; Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037; McBurney *v.* Berry, 5 Mont. 300, 5 Pac. 867; Russell *v.* Hoyt, 4 Mont. 412, 2 Pac. 25.

17. O'Donnell *v.* Glenn, 9 Mont. 452, 23 Pac. 1018, 8 L. R. A. 629.

18. Mares *v.* Dillon, 30 Mont. 117, 144, 75 Pac. 963, 969; Wenner *v.* McNulty, 7 Mont. 30, 14 Pac. 643.

19. Dunlap *v.* Pattison, 4 Ida. 473, 42 Pac. 504, 95 Am. St. Rep. 140.

20. Van Buren *v.* McKinley, 8 Ida. 93, 66 Pac. 936.

21. McCowan *v.* Maclay, 16 Mont. 234, 40 Pac. 602, holding that the statement that the locators have "fully complied with the requirements of the law and local customs regulating mining locations" is merely a conclusion of law and does not verify any fact.

A mere statement in the verification that the declaratory statement is a true copy of the original notice posted on the claim is insufficient. Hickey *v.* Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806.

22. Berg *v.* Koegel, 16 Mont. 266, 40 Pac. 605.

23. Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037.

24. Butler *v.* Good Enough Min. Co., 1 Alaska 246; Francoeur *v.* English, 6 Brit. Col. 63.

Extension of time.— It has been held that an order in council, under Brit. Col. Mineral Act (1896), § 161, extending the time for the doing and recording of assessment work on a mineral claim is *intra vires*, and that a certificate of work recorded pursuant to permission granted by a gold commissioner acting under such an order in council is a good certificate within section 28. Peters *v.* Sampson, 6 Brit. Col. 405.

25. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; Columbia Copper Min. Co. *v.* Duchess Min., etc., Co., 13 Wyo. 244, 79 Pac. 385; Last Chance Min. Co. *v.* Bunker Hill, etc., Min. etc., Co., 131 Fed. 579, 66 C. C. A. 299; Preston *v.* Hunter, 67 Fed. 996, 15 C. C. A. 148; Faxon *v.* Barnard, 4 Fed. 702, 2 McCrary 44. *Contra*, Francoeur *v.* English, 6 Brit. Col. 63.

Conspiracy as excuse.— Failure to file within the statutory time may be excused when the delay is caused by a conspiracy. Lockhart *v.* Leeds, 195 U. S. 427, 25 S. Ct. 76, 49 L. ed. 263 [*reversing* 10 N. M. 568, 63 Pac. 48].

Effect of record see *infra*, III, B, 5, d, (VI), (G), (4).

26. Marshall *v.* Harney Peak Tin Min., etc., Co., 1 S. D. 350, 47 N. W. 290.

27. Shepard *v.* Murphy, 26 Colo. 350, 58 Pac. 588.

although not recorded with the local district recorder as required by local regulations of the mining district, such regulations not providing for a forfeiture in case of non-compliance.[28] Under Revised Statutes of the United States[29] the record need not show how the claim is marked on the ground.[30]

(b) SURPLUSAGE. Where a location notice refers to a permanent monument and is recorded in the county in which the claim is actually situated, the statement in the recorded certificate that it is situated in another county will be rejected as surplusage.[31]

(4) EFFECT OF RECORD — (a) IN GENERAL. The description in the record will usually bind the locator as to the *locus* of the claim,[32] but it does not necessarily disclose title.[33] One who files his certificate for record within the time allowed by local statute is entitled to priority over one who subsequently files, although the latter is based on a discovery made four years before, but while the land was still included in an Indian reservation.[34] When, under a state statute, a locator posted his notice of location in good faith, and was entitled to twenty days to complete his location and record his statement, and another initiates and completes a location and records his statement within such twenty days, such other is not entitled to precedence over the first locator.[35] In Canada defects in the title may be cured by the recording of the certificate of work.[36]

(b) AS EVIDENCE — aa. *In General.* The location certificate when recorded is *prima facie* evidence of all the statute requires it to contain, which is sufficiently set forth therein,[37] and may be proven by the record or a certified transcript thereof without proof of the possession of the original.[38] It is not conclusive,[39] and evidence is admissible to contradict it.[40] It is presumptive evidence of discovery and the integrity of the location,[41] especially when under the location the

28. Johnson *v.* McLaughlin, 1 Ariz. 493, 4 Pac. 130.

In memorandum book.— When a mining district is organized properly and its rules require a record of the claim to be made by the district recorder, it is doubtful if an entry by such recorder, in a memorandum book which he carried around with him, would be a sufficient record of a claim located by himself. Fuller *v.* Harris, 29 Fed. 814.

29. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

30. McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31.

An omission of a portion of the description in the record of a claim by the district recorder does not avoid the location if properly marked on the ground. Myers *v.* Spooner, 55 Cal. 257; Weese *v.* Barker, 7 Colo. 178, 2 Pac. 919; Russell *v.* Chumasero, 4 Mont. 309, 1 Pac. 713.

31. Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037.

32. Meydenbauer *v.* Stevens, 78 Fed. 787.

33. Patterson *v.* Hitchcock, 3 Colo. 533.

34. Kendall *v.* San Juan Silver Min. Co., 144 U. S. 658, 12 S. Ct. 779, 36 L. ed. 583 [*affirming* 9 Colo. 349, 12 Pac. 198].

35. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869.

36. Gelinas *v.* Clark, 8 Brit. Col. 42. See also Lawr *v.* Parker, 8 Brit. Col. 223 [*affirming* 7 Brit. Col. 418]; Manley *v.* Collom, 8 Brit. Col. 153. *Aliter* where before the issue of the certificate of work another interest to the area in question intervenes. Windsor *v.* Copp, 12 Brit. Col. 213.

37. Jantzon *v.* Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93; Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111.

But not of facts stated therein which are not required by the statute see Flick *v.* Gold Hill, etc., Min. Co., 8 Mont. 298, 20 Pac. 807.

Unless required by local rules and customs or statutes one need not prove the notice posted on the claim, but merely the recorded notice. Willeford *v.* Bell, (Cal. 1897) 49 Pac. 6.

38. Willeford *v.* Bell, (Cal. 1897) 49 Pac. 6; Sullivan *v.* Hense, 2 Colo. 424.

39. Uinta Tunnel Min., etc., Co. *v.* Creede, etc., Min., etc., Co., 119 Fed. 164, 57 C. C. A. 200.

40. As for instance, to show that one could not take the description therein and by referring to the permanent monument mentioned, find the premises. Dillon *v.* Bayliss, 11 Mont. 171, 27 Pac. 725. But in the absence of all evidence upon the point, it will be presumed that the natural object mentioned in the record is sufficient to identify the claim. Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

The act of congress of May 10, 1872 (17 U. S. St. at L. 92) [U. S. Comp. St. (1901) p. 1426], gives no greater effect to the record of a mining claim than is given to the registration laws of the states, and does not exclude proof of actual possession and of its extent as *prima facie* evidence of title. Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723; Campbell *v.* Rankin, 99 U. S. 261, 25 L. ed. 435.

41. Cheesman *v.* Shreeve, 40 Fed. 787.

property has been developed to a considerable extent.[42] Evidence having been given tending to establish the existence of a location, the original and amended location certificates are admissible for the same purpose.[43] A record made by one of several co-locators is *prima facie* evidence that the written consent of the co-locator had been presented to the recorder and that he had made a minute thereof prior to record.[44]

bb. *Indefinite or Defective Record.* A record is admissible in evidence, although it does not specify the number of feet of the lode claimed, in the absence of a statute requiring that to be inserted.[45] A location certificate defective in definiteness of description is admissible in Alaska, if made prior to the act of congress of 1884,[46] which gives to parties who have occupied, improved, or exercised acts of ownership on mining claims the right to perfect their title thereto.[47]

e. When Location May Be Said to Be Complete. A location of a mining claim is complete whenever all the acts required by the statutes of the United States, state, or territorial statutes and local customs are complied with.[48]

f. Conflicting Locations. A valid location appropriates the surface included within its boundaries and so long as it remains in force it cannot be disturbed. Therefore such ground is not open to location by another, and any conflicts with a junior location will inure to the senior.[49] But this rule does not preclude a subsequent locator from including within his location portions of prior locations for the purpose of acquiring rights not in conflict with such claim.[50] It is therefore apparent that the priority of conflicting locations controls.[51]

g. Priority of Locations — (i) *The Three Conditions Which May Exist.* Questions as to the priority of locations usually arise under three conditions: (1) Where there is a surface conflict between the locations; (2) where the apex of a vein is partly within the boundaries of two or more locations; and (3) where two veins unite on their dip.[52]

(ii) *These Conditions Discussed.* Under the first condition but little difficulty is experienced in determining the law applicable thereto. It is plain, as we have seen, that the older location generally takes the ground in conflict,[53] and the priority of locations is purely a question of fact depending upon which of the parties first appropriated the ground under legal and valid proceedings.[54] But

42. Cheesman *v.* Hart, 42 Fed. 98.

43. Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018.

44. Kramer *v.* Settle, 1 Ida. 485.

45. Conner *v.* McPhee, 1 Mont. 73.

Even though the closing location line is indefinitely described, if the location is sufficient in other respects and the proof shows that all the monuments are on the ground, the record of the location certificate is admissible. Providence Gold Min. Co. *v.* Burke, (Ariz. 1899) 57 Pac. 641.

46. 23 U. S. St. at L. 24.

47. Bennett *v.* Harkrader, 158 U. S. 441, 15 S. Ct. 863, 39 L. ed. 1046.

48. Burke *v.* McDonald, 3 Ida. 296, 29 Pac. 98.

The order of the acts of location is immaterial. Heeman *v.* Griffith, 1 Alaska 264; Brockbank *v.* Albion Min. Co., 29 Utah 367, 81 Pac. 863.

An instruction to a jury defining what proof is necessary to establish a valid location must state the requirements of the law in that regard, and not leave the jury to determine the law as well as the facts. Bryan *v.* McCaig, 10 Colo. 309, 15 Pac. 413.

49. *Arizona.*— Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723.

California.— Souter *v.* Maguire, 78 Cal. 543, 21 Pac. 183; Garthe *v.* Hart, 73 Cal. 541, 15 Pac. 93.

Montana.— Belk *v.* Meagher, 3 Mont. 65.

Utah.— Argentine Min. Co. *v.* Benedict, 18 Utah 183, 55 Pac. 559.

United States.— Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355.

See 34 Cent. Dig. tit. "Mines and Minerals," § 63.

50. Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 114 Fed. 417, 52 C. C. A. 219 [*affirming* 106 Fed. 471].

51. See Crossman *v.* Pendery, 8 Fed. 693, 2 McCrary 139, holding that priority in discovery gives better title to mineral in place than priority of and continuous possession.

Priority of location see *infra*, III, B, 5, g.

52. See *infra*, III, B, 5, g, (II).

53. See *supra*, III, B, 5, f.

54. Gregory *v.* Pershbaker, 73 Cal. 109, 14 Pac. 401; Hansen *v.* Fletcher, 10 Utah 266,

under the second and third conditions, many vexatious problems may arise which must be solved in the application of the law. If both claims rest on locations no new difficulty presents itself,[55] but if one or more are patented different propositions arise. Under the second condition we shall see that extralateral rights to the entire vein belong to the prior location to the extent that any portion of such vein is within its boundaries.[56] Under the third condition we shall see that where two veins have their apices in different claims, and unite on their dip, the point of intersection and the entire vein from such point downward belongs to the older of the claims in which the apices are found.[57] Under the first condition, the question of priority usually arises upon application for patent of one or the other claims and upon adverse suits based on such application, in which instance the question of priority is forever settled by the issuance of a patent.[58] Under conditions two and three, however, that is, where the apex of a vein is partly within the boundaries of two or more locations, or where two veins unite on their dip, there is no surface conflict, and there can be no adverse suit brought or determined, and therefore the issuance of a patent is not conclusive as to the actual priority of location.[59] The still further condition may arise when there is a conflict between the priority of location of a quartz claim and a tunnel claim or site, which on its course passes through the quartz claim. As we shall see, by the location of a tunnel claim or site there is reserved from location by others all blind veins which may be discovered in the course of the tunnel, and not within any quartz location theretofore made.[60] This right attaches at the date of the location of the tunnel site or claim. Under the Mineral Act the locator of a

37 Pac. 480; U. S. Mining Co. *v.* Lawson, 134 Fed. 769, 67 C. C. A. 587; St. Laurent *v.* Mercier, 33 Can. Sup. Ct. 314; Dockstader *v.* Clark, 24 Can. L. T. Occ. Notes 43; Victor *v.* Butler, 8 Brit. Col. 100; Waterhouse *v.* Liftchild, 6 Brit. Col. 424; Atkins *v.* Coy, 5 Brit. Col. 6. See also McColl *v.* Ross, 28 Nova Scotia 1.

Priority of discovery followed by filing and recording of certificate gives priority of right, although no notice is posted as required by law. McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64.

Junior claim may prevail.—While the area in conflict is usually awarded to the senior claim, it is not always, or necessarily so, because acts or circumstances entirely consistent with the true order of location may have intervened, which require that this area be awarded to a junior claim. U. S. Mining Co. *v.* Lawson, 134 Fed. 769, 67 C. C. A. 587.

The abandonment, lapse, or forfeiture of the senior location will render the junior location good. St. Laurent *v.* Mercier, 33 Can. Sup. Ct. 314; Rammelmeyer *v.* Curtis, 8 Brit. Col. 383. See also Gelinas *v.* Clark, 8 Brit. Col. 42. But in adverse proceedings it is held that the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work. Cranston *v.* English Canadian Co., 7 Brit. Col. 266.

Rectification of grant.— Where an application to the chief commissioner of lands and works for the rectification of a crown grant of certain mineral claims was opposed by parties who had obtained a certificate of improvements covering a portion of the ground included in the grant it was held that the applicant was entitled to have the grant rectified notwithstanding the said certificate. *In re* The American Boy Mineral Claim, 7 Brit. Col. 268.

Three miners staking within the limits of a hydraulic mining concession do not acquire any right or interest in the lands or any such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the hydraulic mining lease. Hartley *v.* Matson, 32 Can. Sup. Ct. 644.

55. See *supra*, III, B, 5, f.

56. See *infra*, III, B, 6, b, (F).

57. See *infra*, III, B, 6, c.

58. See *infra*, III, B, 10, i.

59. Many times the facts upon which the conditions mentioned in the text depend are not disclosed for many years after the patents are issued. The result is that when conditions two and three (see *supra*, III, B, 5, g, (I)) arise in litigation, the question of priority of location is determined the same as though no patents had been issued for either of the claims. In one case the supreme court of Montana has gone so far as to hold that, although one claim was located first, and was patented by the United States government, if the declaratory statement or certificate of location was not properly verified under the laws of the state (then territory) of Montana, it was insufficient to give effect to the location at any date prior to the issuance of patent. Hickey *v.* Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806.

60. See *infra*, III, B, 6, e.

quartz claim is entitled to all veins which apex within the surface boundaries of his claim, and this right attaches as of the date of the location of the quartz claim.[61]

6. Effect of Valid Location and Rights or Title Acquired — a. Nature of Property in General. By virtue of a valid location, the ground included within its boundaries is segregated from the public domain, and the exclusive right of possession thereof becomes vested in the locator, and so remains as long as he complies with the acts of congress.[62] The courts have declared it property in the highest sense of that term, which may be bought, sold, and conveyed, and which passes by descent.[63] It is real property,[64] but no dower right attaches

61. The supreme court of the United States has held that the locator of a tunnel claim may contest the date of a location of a quartz claim even though such claim was patented without adverse proceedings, and that he may show that no discovery was made in the quartz claim prior to the location of the tunnel claim, although the declaratory statement of the quartz claim was dated and recorded prior to the location of the tunnel claim and site, and that upon such showing the tunnel claim is entitled to priority. Creede, etc., Min., etc., Co. *v.* Uinta Tunnel Min., etc., Co., 196 U. S. 337, 25 S. Ct. 266, 49 L. ed. 501.

62. Tyee Consol. Min. Co. *v.* Langstedt, 1 Alaska 439; Moore *v.* Steelsmith, 1 Alaska 121; Southern California R. Co. *v.* O'Donnell, (Cal. App. 1906) 85 Pac. 932; McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Argentine Min. Co. *v.* Benedict, 18 Utah 183, 55 Pac. 559; Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286; Meydenbauer *v.* Stevens, 78 Fed. 787.

A valid location excludes any subsequent location during its continued validity. Russell *v.* Dufresne, 1 Alaska 486; Hoban *v.* Boyer, (Colo. 1906) 85 Pac. 837.

Its effect is not perceptibly different from the right acquired by entrymen of agricultural land. Tyee Consol. Min. Co. *v.* Langstedt, 136 Fed. 124, 69 C. C. A. 548.

A placer mining location *ex vi termini* imports an appropriation of the waters covered by it, so far as such waters may be necessary for working the claim. Schwab *v.* Beam, 86 Fed. 41.

63. *Arkansas.*— Worthen *v.* Sidway, 72 Ark. 215, 79 S. W. 777.

California.— Hughes *v.* Devlin, 23 Cal. 501; Merritt *v.* Judd, 14 Cal. 59.

Colorado.— Keeler *v.* Trueman, 15 Colo. 143, 25 Pac. 311; Armstrong *v.* Lower, 6 Colo. 393.

Dakota.— Suessenbach *v.* Deadwood First Nat. Bank, 5 Dak. 477, 41 N. W. 662.

Washington.— O'Connell *v.* Pinnacle Gold Mines Co., 131 Fed. 106.

United States.— Sullivan *v.* Iron Silver Min. Co., 143 U. S. 431, 12 S. Ct. 555, 36 L. ed. 214; Noyes *v.* Mantle, 127 U. S. 348, 8 S. Ct. 1132, 32 L. ed. 168; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Meydenbauer *v.* Stevens, 78 Fed. 787; Oscamp *v.* Crystal River Min. Co., 58 Fed. 293, 7 C. C. A. 233; Little Pittsburgh Consol. Min. Co. *v.* Amie Min. Co., 17 Fed. 57, 5 McCrary 298; Harris *v.* Equator Min., etc., Co., 8 Fed. 863, 3 McCrary 14.

See 34 Cent. Dig. tit. "Mines and Minerals," § 66.

Even prior to the completion of the location, the locators have the right of possession against all intruders. Garthe *v.* Hart, 73 Cal. 541, 15 Pac. 93. They may defend this possession in the courts. Richardson *v.* McNulty, 24 Cal. 339. And they may sell such rights. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 [*affirmed* in 197 U. S. 313, 25 S. Ct. 468, 49 L. ed. 770].

Quieting title.—A valid location gives such title as will support an action to quiet title against an adverse claimant. Fulkerson *v.* Chisna Min., etc., Co., 122 Fed. 782, 58 C. C. A. 582.

64. *California.*— Melton *v.* Lambard, 51 Cal. 258; Spencer *v.* Winselman, 42 Cal. 479; Hughes *v.* Devlin, 23 Cal. 501; Merritt *v.* Judd, 14 Cal. 59.

Colorado.— McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Keeler *v.* Trueman, 15 Colo. 143, 25 Pac. 311; Roseville Alta Min. Co. *v.* Iowa Gulch Min. Co., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373.

Dakota.— Suessenbach *v.* Deadwood First Nat. Bank, 5 Dak. 477, 41 N. W. 662.

Idaho.— Atkins *v.* Hendree, 1 Ida. 95.

Montana.— Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1; State *v.* Second Judicial Dist. Ct., 24 Mont. 330, 61 Pac. 882; Robertson *v.* Smith, 1 Mont. 410.

Nevada.— Dall *v.* Confidence Silver Min. Co., 3 Nev. 531, 93 Am. Dec. 419; Hale, etc., Gold, etc., Min. Co. *v.* Storey County, 1 Nev. 104.

New Mexico.— Zeckendorf *v.* Hutchison, 1 N. M. 476.

Utah.— Wasatch Min. Co. *v.* Crescent Min. Co., 7 Utah 8, 24 Pac. 586.

United States.— Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532; Forbes *v.* Gracey, 94 U. S. 762, 24 L. ed. 313; Aspen Min., etc., Co. *v.* Rucker, 28 Fed. 220; Harris *v.* Equator Min., etc., Co., 8 Fed. 863, 3 McCrary 14.

See 34 Cent. Dig. tit. "Mines and Minerals," § 66 *et seq.*

Patented and unpatented claims.— In Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122, it is held that a patented mining claim is land but an unpatented claim is personalty. But see Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1.

thereto.[65] A presumption arises from a valid location that the vein located upon extends through the entire length of the location.[66] A valid location gives the right to all veins which have their apices within its surface boundaries, extended downward vertically.[67]

b. Extralateral Rights — (I) *NATURE.* An extralateral right to a vein is one given to a location having the apex of a vein within its surface boundaries, to follow such vein upon its dip beyond a plane dropped downward perpendicularly through that surface boundary of the location toward which the vein dips.[68]

(II) *EXTENT.* The right extends to the uttermost depth of the vein, unless cut off by the interference of extralateral rights belonging to prior locators; but it is confined to the vein itself,[69] and only applies to the vein in its downward course and does not authorize one to follow the vein on its course or strike after it departs from the boundaries of the claim.[70] And so extralateral rights only attach

Real property generally see PROPERTY.

Under the law of trusts a notice of location is not entitled to protection that is guaranteed to sealed instruments. Morrow *v.* Matthew, 10 Ida. 423, 79 Pac. 196. But one owning a valid location may obtain a decree declaring that another who has fraudulently obtained a patent on the same claim under the Timber Act holds legal title thereto in trust for him. Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818.

Trust relation between cotenants.— Where two or more persons are interested in a location they are tenants in common. Garside *v.* Norval, 1 Alaska 19. And the relation of mutual trust exists. Stevens *v.* Grand Cent. Min. Co., 133 Fed. 28, 67 C. C. A. 284. A purchaser from one cotenant in whose name the claim is recorded takes subject to the rights of other cotenants who are in possession and working the claim. Reedy *v.* Wesson, 1 Alaska 570.

65. Black *v.* Elkhorn Min. Co., 163 U. S. 445, 16 S. Ct. 1101, 41 L. ed. 221.

66. San Miguel Consol. Gold Min. Co. *v.* Bonner, 33 Colo. 207, 79 Pac. 1025; Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283; Armstrong *v.* Lower, 6 Colo. 393; Patterson *v.* Hitchcock, 3 Colo. 533.

67. Crown Point Min. Co. *v.* Buck, 97 Fed. 462, 38 C. C. A. 278; Book *v.* Justice Min. Co., 58 Fed. 106; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; Iron Silver Min. Co. *v.* Cheesman, 8 Fed. 297, 2 McCrary 191; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

A presumption arises from a valid location that the owner thereto is entitled to all veins existing within its boundaries dropped downward perpendicularly. Maloney *v.* King, 30 Mont. 158, 76 Pac. 4; Maloney *v.* King, 27 Mont. 428, 71 Pac. 469; Maloney *v.* King, 25 Mont. 188, 64 Pac. 351; Parrot Silver, etc., Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491. And this presumption is not overcome by the mere opinion of a mining engineer that if a vein having its apex in an adjoining location continues to dip at the same angle as where it is exposed, it will reach the point where the owner of the surface is conducting operations. Heinze *v.* Boston, etc., Consol., etc., Min. Co., 30 Mont. 484, 77 Pac. 421. But where the continuity and identity of a vein from its apex on an adjoining location is established, the presumption is overcome. Montana Ore Purchasing Co. *v.* Boston, etc., Consol., etc., Co., 27 Mont. 288, 70 Pac. 1114.

68. U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425]. See also Grand Cent. Min. Co. *v.* Mammoth Min. Co., 29 Utah 490, 83 Pac. 648.

The right is integral and no adverse rights can be acquired against it that could not be acquired against the location. Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 579, 66 C. C. A. 299.

Such right is not interfered with by veins in locations adjoining and under which the vein dips, if the apex is clearly shown to be within the surface boundaries of the location. Golden *v.* Murphy, 27 Nev. 379, 75 Pac. 625, 76 Pac. 29.

69. St. Louis Min., etc., Co. *v.* Montana Min. Co., 194 U. S. 235, 24 S. Ct. 654, 48 L. ed. 953; Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 579, 66 C. C. A. 299; St. Louis Min., etc., Co. *v.* Montana Min. Co., 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207.

This right is bounded on the course or strike of the vein by vertical planes dropped downward perpendicularly through the end lines of the location and continued in their own direction until they intersect the exterior parts of the vein. U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425].

Before congress enacted any legislation upon the subject, this right was recognized and protected by the miners under what was known as the "Dip Right." The act of congress of 1866 provided for these rights in general language, authorizing a patent to issue for a lode or vein, "together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land shall be sold subject to this condition." 14 U. S. St. at L. 251, § 2.

70. Tombstone Mill, etc., Co. *v.* Way Up Min. Co., 1 Ariz. 426, 25 Pac. 794; Southern Nevada Gold, etc., Min. Co. *v.* Holmes Min. Co., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759; Larned *v.* Jenkins, 113 Fed. 634,

to that part of the vein having its apex within the location of the party who seeks to appropriate such rights.[71]

(III) *Affected by Surface Form of Claim and Direction of Course of Vein Through Claim*—(A) *In General*—(1) Conditions Under Which Rights May Arise. The conditions under which extralateral rights may arise are as follows: (1) Where a vein on its course or strike crosses two lines of a claim which are parallel to each other;[72] (2) where a vein on its course or strike crosses two lines which converge toward each other in the direction of the dip of the vein;[73] (3) where a vein on its course or strike crosses two lines which diverge from each other in the direction of the dip of the vein;[74] (4) where a vein on its course or strike crosses one end line and one side line of the claim;[75] (5) where a vein on its course or strike crosses the same end line or side line twice;[76] and (6) where the apex of a vein is split by a boundary line of the claim, or where a vein is wider than the location.[77]

(2) Decisions Applicable. The United States supreme court has established three principles which must not be lost sight of in considering the question of extralateral rights: (1) That the end lines of a location made under the law of 1872 must be substantially parallel to each other in order that any extralateral rights should exist to veins having their apices within the boundaries of the claim;[78] (2) that end lines of a location must be straight lines;[79] and (3) that the same end lines must limit the extralateral rights of all veins having their apices within the limits of the claim.[80]

(3) Distinctions Between Acts of Congress. The acts of 1866[81] and 1872[82] differ from each other in at least three important particulars: (1) Under the law of 1866 only one vein could be located or patented;[83] (2) the amount of surface ground which could be included in the claim, or patented, was fixed by the local rules of miners, and in the absence of such rules only so much surface could be located, claimed, or patented as was reasonably necessary or convenient for the working of the vein;[84] and (3) there was no provision that the end lines should be parallel.[85]

(B) *When Vein Crosses Two Parallel Lines*—(1) Parallel End Lines. The Mining Act provides for this condition in clear, concise, and plain language,[86] and its provisions apply to locations or patents under the law of 1866 and of 1872.[87]

(2) Parallel Side Lines. The doctrine has been announced by the supreme court[88] under a condition of this kind that for the purpose of determining extra-

51 C. C. A. 344; Stevens *v.* Williams, 23 Fed. Cas. No. 13,414, 1 Morr. Min. Rep. 557.

71. Waterloo Min. Co. *v.* Doe, 82 Fed. 45, 27 C. C. A. 50; Colorado Cent. Consol. Min. Co. *v.* Turck, 50 Fed. 888, 2 C. C. A. 67.

72. See *infra*, III, B, 6, b, (III), (B).

73. See *infra*, III, B, 6, b, (III), (C), (1).

74. See *infra*, III, B, 6, b, (III), (C), (2).

75. See *infra*, III, B, 6, b, (III), (D).

76. See *infra*, III, B, 6, b, (III), (E).

77. See *infra*, III, B, 6, b, (III), (F).

78. Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 6 S. Ct. 1177, 30 L. ed. 98; Montana Co. *v.* Clark, 42 Fed. 626. See also Doe *v.* Sanger, 83 Cal. 203, 23 Pac. 365.

79. Walrath *v.* Champion Min. Co., 171 U. S. 293, 18 S. Ct. 909, 43 L. ed. 170.

80. Walrath *v.* Champion Min. Co., 171 U. S. 293, 18 S. Ct. 909, 43 L. ed. 170.

81. See 14 U. S. St. at L. 251 *et seq.*

82. See 17 U. S. St. at L. 91 *et seq.*

83. 14 U. S. St. at L. 252.

84. 14 U. S. St. at L. 252.

85. See Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333.

In fact end lines were not mentioned in the statute of 1866, but it has been said that they were inferred, because of the impossibility of locating any claim without lines bounding the extent thereof on the strike of the vein. Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 9 Morr. Min. Rep. 578, 4 Sawy. 302.

86. U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425].

87. Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 6 S. Ct. 481, 29 L. ed. 712; Flagstaff Silver Min. Co. *v.* Tarbet, 98 U. S. 463, 25 L. ed. 253; Iron Silver Min. Co. *v.* Murphy, 3 Fed. 368, 2 McCrary 121; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380.

88. See cases cited *infra*, note 89.

lateral rights, the side lines of the location become the end lines, and the end lines the side lines. The extralateral rights therefore would be bounded by planes dropped perpendicularly downward through these end side lines, and extended in their own direction until they intersected the exterior portions of the vein.[89]

(c) *Where Vein Crosses Converging or Diverging End Lines*[90] — (1) Converging in Direction of Dip. Under the law of 1866[91] the extralateral rights on veins having their apices within the surface boundaries of the claim would be bounded by planes dropped downward perpendicularly through the end lines of the claim and projected in their own direction until they intersect the exterior portions of the vein and continued until they met, because that statute did not require the end lines to be parallel.[92] Under the act of 1872,[93] it has been held that extralateral rights would exist and be bounded the same as above described.[94] But the supreme court of the United States says the end lines must be parallel in order that extralateral rights can exist.[95]

(2) Diverging in Direction of Dip. Under the law of 1866,[96] two theories of extralateral rights under this condition have been advanced: (1) That extralateral rights exist, bounded by planes dropped downward through the end lines of the location and extended in their own direction as above stated; and (2) that these rights must be limited to that part of the vein lying between two parallel planes dropped downward perpendicularly through the point where the vein crosses each end line at right angles to the general course of the vein.[97] Under the law of 1872[98] no extralateral rights can exist under this condition because the end lines are not parallel.[99]

(d) *When Vein Crosses Side Line and End Line.* Under the law of 1872[1] the doctrine has been established by the supreme court of the United States[2] that the extralateral rights of a vein would be bounded by a plane dropped downward perpendicularly through the end lines of the claim, through which the vein passes on its course, and a parallel plane dropped downward perpendicularly

89. Watervale Min. Co. *v.* Leach, 4 Ariz. 34, 33 Pac. 418; Parrot Silver, etc., Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491; King *v.* Amy, etc., Consol. Min. Co., 152 U. S. 222, 14 S. Ct. 510, 38 L. ed. 419; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 7 S. Ct. 1356, 30 L. ed. 1140; Flagstaff Silver Min. Co. *v.* Tarbet, 98 U. S. 463, 25 L. ed. 253; Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 131 Fed. 339. The courts have based these decisions on the theory that the location should be laid along the course of the vein and not across it, and therefore the lines crossing the veins are really end lines, for the purpose of determining extralateral rights, although the locator described them as side lines.

Where the apex crosses the original side lines. they become, if parallel, the end lines. Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 579, 66 C. C. A. 299.

The owner has all rights with reference to these new side lines which would have attached had he made such lines side lines of his location. Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910. But he has no extralateral rights to another vein within his location which extends transversely to the one upon which the location is based. Cosmopolitan Min. Co. *v.* Foote, 101 Fed. 518.

90. Side lines.— Under the act of 1866, the same rule as to extralateral rights would apply as stated in reference to conditions where the vein on its course crosses converging or diverging end lines, except that the side lines of the location as marked on the ground would become the end lines thereof for the purpose of defining extralateral rights. Under the law of 1872 it is very doubtful whether any extralateral rights would exist. See *supra*, note 85; *infra*, notes 91–95.

91. See 14 U. S. St. at L. 251 *et seq.*

92. Central Eureka Min. Co. *v.* East Cent. Eureka Min. Co., 146 Cal. 147, 79 Pac. 834.

93. See 17 U. S. St. at L. 91 *et seq.*

94. Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333.

95. Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 6 S. Ct. 1177, 30 L. ed. 98.

96. See 14 U. S. St. at L. 251 *et seq.*

97. Argonaut Min. Co. *v.* Kennedy Min., etc., Co., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317.

98. See 17 U. S. St. at L. 91 *et seq.*

99. Hickey *v.* Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806.

1. See 17 U. S. St. at L. 91 *et seq.*

There have been no judicial decisions of courts of last resort where this condition has been considered with reference to claims located or patented under the law of 1866.

2. See cases cited *infra*, note 3.

through a point where the vein departs from the surface boundaries of the location. These planes extended in their own direction until they cut the exterior parts of the vein bound the extralateral rights to such veins under this condition.[3]

(E) *When Vein Crosses Same Line Twice.* The supreme court of Colorado holds that in such case no extralateral rights would exist.[4] The United States circuit court of appeals for the ninth circuit has decided that extralateral rights exist under such circumstances and the extent thereof is to be determined upon the basis of whether the location having the apex of the vein within its boundaries is older than the location under the surface of which the vein dips.[5]

(F) *Split Apex.* Where the apex of a vein is split by the boundary line of a location or is wider than the location, two theories have been advanced with reference to this condition: (1) That a claim having only a portion of the apex or vein can have no extralateral rights; and (2) that the prior location takes the extralateral right to the entire vein.[6]

(IV) *Continuity and Identity of Vein.* In order to be entitled to follow the vein on its dip beyond the boundaries of the claim, the proof must show that it is the same vein and in place.[7] The vein must be continuous only in the sense that it can be traced.[8]

(V) *Limitation by Conflicts on Dip With Prior Rights.* Extralateral rights may be limited by conflicts on the dip with prior rights. If a vein on its dip passes into a prior agricultural grant, the vein cannot be followed into such grant;[9]

3. Parrot Silver, etc., Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491; Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803; Southern Nevada Gold, etc., Min. Co. *v.* Holmes Min. Co., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759; Del-mont Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Clark *v.* Fitzgerald, 171 U. S. 92, 18 S. Ct. 941, 43 L. ed. 87; Republican Min. Co. *v.* Tyler Min. Co., 79 Fed. 733, 25 C. C. A. 178; Tyler Min. Co. *v.* Last Chance Min. Co., 71 Fed. 577, 848; Del Monte Min. Co. *v.* New York, etc., Min. Co., 66 Fed. 212; Consolidated Wyoming Min. Co. *v.* Champion Min. Co., 63 Fed. 540; Colorado Cent. Consol. Min. Co. *v.* Turck, 54 Fed. 262, 4 C. C. A. 313.

And the same rule applies when the vein enters an end line and is cut off before it reaches the other end line. Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 73 Fed. 597.

4. Catron *v.* Old, 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256.

5. If the location having the apex of the vein within its boundaries is the older, the extralateral rights on the vein are bounded by planes dropped downward perpendicularly through the points where the entire vein leaves the claim and extended in their own direction until they cut the vein, while, if the senior location is the one with which the vein dips, the extralateral rights are bounded by planes dropped downward perpendicularly through the points where any part of the vein is found in the senior location. St. Louis Min., etc., Co. *v.* Montana Min. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Montana Min. Co. *v.* St. Louis Min., etc., Co., 102 Fed. 430, 42 C. C. A. 415.

6. Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 7 S. Ct. 1356, 30 L. ed. 1140; U. S. Mining Co. *v.* Lawson, 134 Fed. 769, 67 C. C. A. 587; Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 579, 66 C. C. A. 299; Bunker Hill, etc., Min., etc., Co. *v.* Empire State Idaho Min., etc., Co., 106 Fed. 471.

The junior locator takes extralateral rights to the vein only subject to the rights of the senior, where a part of the apex is in two locations. Empire State Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 114 Fed. 417, 52 C. C. A. 219 [*reversing* 106 Fed. 471].

7. Butte, etc., Min. Co. *v.* Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505; Grand Cent. Min. Co. *v.* Mammoth Min. Co., 29 Utah 490, 83 Pac. 648; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 6 S. Ct. 481, 29 L. ed. 712; Cheesman *v.* Shreeve, 40 Fed. 787; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380.

The vein must always be in place.— Tabor *v.* Dextler, 23 Fed. Cas. No. 13,723, 9 Morr. Min. Rep. 614.

8. Butte, etc., Min. Co. *v.* Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505; Pennsylvania Consol. Min. Co. *v.* Grass Valley Exploration Min. Co., 117 Fed. 509; Bunker Hill, etc., Min., etc., Co. *v.* Empire State Idaho Min., etc., Co., 106 Fed. 471; Cheesman *v.* Shreeve, 40 Fed. 787.

Where the mineral and fissure come to an end the continuity is gone. Cheesman *v.* Shreeve, 40 Fed. 787.

9. Amador Medean Gold Min. Co. *v.* South Springs Hill Gold Min. Co., 36 Fed. 668, 13 Sawy. 523.

but if the vein on its dip enters a prior patented mining claim, it may be followed.[10] Where there are two or more adjoining locations on the same vein and there is a conflict upon the dip of the vein, the priority of the location takes precedence and controls;[11] but extralateral rights belonging to a prior location may pass through the extralateral rights of the junior location; if so the rights of the junior location would again attach to the vein beyond the point of conflict.[12]

(VI) *UNAPPROPRIATED RIGHTS TO VEIN ON DIP.* Where the apex is entirely within located claims, which have end lines diverging in the direction of the dip, so that a portion of the vein on its dip is unoccupied and unappropriated, we find three classes of decisions: (1) That such portion of the vein may be divided between the adjoining locations which own the entire apex of the vein;[13] (2) that the owner of the surface under which the unappropriated part of the vein lies owns it under his common-law rights;[14] and (3) that it may be located and acquired by any locator who makes a location, the surface boundaries of which include the apex of that part of the vein, even though such locations are made by placing the stakes and marking the boundaries thereof on other locations, provided the location is made for the purpose of covering unappropriated extralateral rights.[15]

(VII) *EXTRALATERAL RIGHTS TO INCIDENTAL VEINS.* The supreme court of the United States has decided that the end lines of a claim define, bound, control, and limit the extralateral rights to all veins, both discovery and incidental, having their apices within the surface boundaries of the claim.[16] But the supreme court of Colorado has announced the doctrine that on all veins, both discovery and incidental, the owner has extralateral rights at least for so much thereof as apexes within the surface lines, whether said veins apex within the same segment of the claim or not.[17]

(VIII) *BOUNDARIES TO RIGHTS FIXED BY AGREEMENTS.* The boundaries of extralateral rights may be fixed by conveyances or contract.[18]

c. Cross Veins[19] — (I) *NATURE.* Cross veins are those which cross each other

10. Blake *v.* Butte Silver Min. Co., 2 Utah 54; Colorado Cent. Consol. Min. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128 [*affirming* 50 Fed. 888, 2 C. C. A. 67]; Cheesman *v.* Hart, 42 Fed. 98.

11. Tyler Min. Co. *v.* Sweeney, 79 Fed. 277, 24 C. C. A. 578 [*affirming* 54 Fed. 284, 4 C. C. A. 329]; Tyler Min. Co. *v.* Last Chance Min. Co., 71 Fed. 848.

12. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57; Bunker Hill, etc., Min., etc., Co. *v.* Empire State-Idaho Min., etc., Co., 134 Fed. 268; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311.

13. Champion Min. Co. *v.* Consolidated Wyoming Gold Min., Co., 75 Cal. 78, 16 Pac. 513.

14. State *v.* Second Judicial Dist. Ct., 25 Mont. 504, 65 Pac. 1020; Parrott Silver, etc., Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491.

15. Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72; Bunker Hill, etc., Min., etc., Co. *v.* Empire State-Idaho Min., etc., Co., 134 Fed. 268; Bunker Hill, etc., Min., etc., Co. *v.* Empire State-Idaho Min., etc., Co., 109 Fed. 538, 48 C. C. A. 665.

16. Walrath *v.* Champion Min. Co., 171 U. S. 293, 18 S. Ct. 909, 43 L. ed. 170 [*explained* in Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925].

17. Ajax Gold Min. Co. *v.* Hilkey, 31 Colo. 131, 72 Pac. 447, 102 Am. St. Rep. 23, 62 L. R. A. 555 [*explained* in Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925].

18. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 536, 71 Pac. 1005; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 27 Mont. 152, 69 Pac. 714; Kennedy Min., etc., Co. *v.* Argonaut Min. Co., 189 U. S. 1, 23 S. Ct. 501, 47 L. ed. 685; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 89 Fed. 529; Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 9 Morr. Min. Rep. 578.

An oral agreement between the owners of two overlapping lode claims, located on the same day, in accordance with which a monument was built, which it was agreed should be a point on the line between the two claims, cannot affect the extralateral rights appertaining to one of the claims which has passed into the hands of other owners, having no knowledge of such agreement, as against third parties owning junior claims and having no interest in the other claim or privity with the agreement. Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 591, 66 C. C. A. 99.

19. Circumstances not showing faulting of one vein by another see Star Min., etc., Co. *v.* Byron N. White Co., 12 Brit. Col. 162.

on the dip or strike, each continuing thereafter in its own course. The crossing may be at any angle and may occur on the course or strike of the vein, or on its dip.[20]

(II) *Statutory Provisions.* The ownership or right to the possession of cross veins is provided for by the Mineral Act.[21] But in consideration of this subject, reference is necessary to another provision of the same act.[22]

(III) *Decisions Applicable.* There has been quite a variety of decisions by the state and territorial courts of last resort, and the federal courts in reference to these statutory provisions.[23] Under the decision of the supreme court of the United States[24] four questions growing out of the two sections of the statute referred to are still undetermined: (1) Does section 2336[25] apply to veins located under the law of 1866, which cross each other on their course or strike within the limits of the older location? (2) If so does the "space of intersection" mean the intersection of the veins or of the claims? (3) If the "space of intersection" means the intersection of the claims, has the junior locator the right of way within the claim entirely across the location? (4) Can one locate a vein which crosses another on its strike within the surface boundaries of a valid location in such manner as to leave it entirely subdivided by the older location? Under the authorities,[26] there have been the following decisions upon the construction of

20. See cases cited *infra*, notes 23, 24.

21. U. S. Rev. St. (1878) § 2336 [U. S. Comp. St. (1901) p. 1436].

22. U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425].

Provisions compared.— If two veins cross each other on their course or strike, and a location is made upon each vein, there would usually be a surface conflict between them. Under U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425], the owner of the senior location is given the right of possession of all veins which have their apices within the surface boundaries of the location, extended downward vertically. But U. S. Rev. St. (1878) § 2336 [U. S. Comp. St. (1901) p. 1436], only gives such owner of a prior location the ore or mineral at the point of intersection of the veins, the subsequent location having the right of way through the space of intersection for the purpose of working the mine.

23. See cases cited *infra*, this note. The first case in which the questions seem to have been considered is that of Hall *v.* Equator Min. Co., 11 Fed. Cas. No. 5,931, where Judge Hallett makes reference to these sections by way of advice to the parties to the suit in their acts thereafter to be had. He indicates that there is a conflict between the provisions of the two sections above cited, and adopts the old rule of construction of statutes, that between conflicting statutes the latest in date will prevail, or between conflicting sections of the same statute the last in order of arrangement will control. The supreme court of Colorado at an early date had the same question before it, and decided that the senior location took no part in the cross veins except at the point of intersection, and that the junior location took the entire cross vein within the limits of the senior location except at the point of intersection, and that he had a right of way at that point for the purpose of working his lode. Coffee *v.* Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125; Lee *v.* Stahl, 13 Colo. 174, 22 Pac. 436; Morgenson *v.* Middlesex Min., etc., Co., 11 Colo. 176, 17 Pac. 513; Lee *v.* Stahl, 9 Colo. 208, 11 Pac. 77; Branagan *v.* Dulaney, 8 Colo. 408, 8 Pac. 669. The supreme court of Arizona held that the owner of the senior location, in case of a cross vein, took all of the ore in the cross vein within the boundaries of the senior location. Watervale Min. Co. *v.* Leach, 4 Ariz. 34, 33 Pac. 418. The supreme court of California held that a subsequent location of a lode crossing a prior location confers no right on the subsequent locator to any portion of the cross vein which lies within the boundaries of the first location. Wilhelm *v.* Silvester, 101 Cal. 358, 35 Pac. 997. After these decisions of Arizona and California, the supreme court of Colorado refused to be bound by the doctrine in the early cases of that court, and held that the cross vein within the limits of the senior location belongs to that location with all the ore contained therein, subject to a right of way through it for the subsequent locator. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209. This case was appealed to the supreme court of the United States, and the doctrine therein announced was affirmed by that court. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200. The supreme court of Montana had the question before it at an early date, but it is difficult to determine from the opinion what position the court took upon the question of the right to the veins. Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16.

24. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200.

25. See the provision of the statute cited *supra*, note 22.

26. See cases cited *supra*, note 23.

sections 2322 and 2336:[27] (1) Those holding that where veins cross each other on their strike or course, within the surface limits of an older claim, the cross vein, except the "space of intersection," belongs to the prior locator, and that the words "space of intersection" mean the intersection of the veins; (2) those holding that section 2336 only applies to veins crossing each other on the dip and those crossing each other on the strike, which were located under the act of 1866, and holding that the "space of intersection" means the intersection of the vein; (3) those holding that section 2336 only applies to veins crossing each other on the dip and on the strike when located under the law of 1866, and to those located under the law of 1872, when the crossing of the veins is outside of the surface boundaries of the older claim, and holding that the "space of intersection" means the intersection of the veins; and (4) those holding that section 2336 applies to all the veins which cross each other upon the dip or upon the strike, whenever located; that the older location takes all the cross veins within its surface boundaries; and that the "space of intersection" means either the intersection of the veins or conflicting claims, depending upon the facts before the court.

d. Veins Uniting on Dip. The Mineral Act provides that, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.[28] The courts have held that this language does not apply to veins uniting on their course or strike.[29] There can be no doubt about the correctness of these decisions. When, therefore, veins or lodes unite on their dip, the older location[30] takes all the ore at the point of intersection and the whole vein thereafter.[31]

e. Tunnel Claims and Sites — (i) *In General.* These are provided for by the Mineral Act.[32] Under the earlier Colorado,[33] Idaho,[34] and Montana[35] cases the line of a tunnel was held to be the width of the actual excavation; but in the later cases Montana[36] and Colorado[37] have departed from such narrow construction. The face of the tunnel is the point where it actually enters cover. The locator and claimant of a tunnel claim or site is given by the statute the inchoate right to the possession of fifteen hundred feet on every blind vein or lode which may be discovered in the tunnel on its extension within three thousand feet of the face thereof, which was not known to exist or the apex of which is not within the surface boundaries of a prior location, dropped downward perpendicularly, at the date of the location of the tunnel site or claim, contingent only upon the diligent prosecution of work on the tunnel.[38] The right being given to

27. U. S. Rev. St. (1878) §§ 2322, 2336 [U. S. Comp. St. (1901) pp. 1425, 1436].

28. U. S. Rev. St. (1878) § 2336 [U. S. Comp. St. (1901) p. 1436].

29. These decisions are based upon the theory that the use of the words "below the point of union" must have reference to the union of veins below the surface and extending thence downward. It is said that the word "below" cannot be construed as meaning "beyond," which would be necessary if this section included veins which united on their course or strike. Lee *v.* Stahl, 13 Colo. 174, 22 Pac. 436.

30. **What is the older location.**— If both claims rest in locations, the dates of such locations control. If there is no surface conflict between the locations the same date controls, even if patents have been issued for one or both locations. When there is a surface conflict, and either or both claims are patented, the claim first patented is conclusively presumed to be the older location.

31. Champion Min. Co. *v.* Consolidated Wyoming Gold Min. Co., 75 Cal. 78, 16 Pac. 513; Little Josephine Min. Co. *v.* Fullerton, 58 Fed. 521, 7 C. C. A. 340.

32. U. S. Rev. St. (1878) § 2323 [U. S. Comp. St. (1901) p. 1426].

Before the enactment of this statute, which only allowed a location of three thousand feet in length from the face thereof, a location of a tunnel five thousand feet in length made in accordance with miners' rules and customs was valid. Glacier Mountain Silver Min. Co. *v.* Willis, 127 U. S. 471, 8 S. Ct. 1214, 32 L. ed. 172.

33. Corning Tunnel Co. *v.* Pell, 4 Colo. 507.

34. Back *v.* Sierra Nevada Consol. Min. Co., 2 Ida. (Hasb.) 420, 17 Pac. 83.

35. Hope Min. Co. *v.* Brown, 7 Mont. 550, 19 Pac. 218.

36. Hope Min. Co. *v.* Brown, 11 Mont. 370, 28 Pac. 732.

37. Ellet *v.* Campbell, 18 Colo. 510, 33 Pac. 521 [*affirmed* in 167 U. S. 116, 17 S. Ct. 765, 42 L. ed. 101].

38. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St.

the locator to take fifteen hundred feet of such vein, he may take all of the fifteen hundred feet, or any part thereof on either side of his excavated tunnel which results in reserving from location a piece of ground three thousand feet square.[39]

(II) *Leads Acquired.* Under the Mineral Act,[40] the owner of a valid location owns all the leads having their apices within its surface boundaries dropped downward perpendicularly.[41] A tunnel claimant may always show that there was no valid discovery within the boundaries of a prior located lode claim, until after the tunnel was located.[42]

(III) *Right of Way Through Prior Location.* No right of way is given for the construction of the tunnel through prior locations.[43]

7. Labor and Improvements as Conditions of Continuance of Rights[44] — a. Historical — (I) *In General.* From the very commencement of mining in California a rule or custom[45] was in force requiring the locator, as a condition of the continuance of his rights of possession, to perform certain labor or place certain improvements on the mine tending to its development. The principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that development by working is the condition of their continued possession.[46] The law of 1866[47] made no specific provision for annual labor or representation, but left the matter to the local rules and customs of the miners and state and territorial legislation. However, it is provided for by the act of 1872.[48]

(II) *Under the Statute.* The statute of 1872[49] provides as follows: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-

Rep. 17, 50 L. R. A. 209; [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200]; Enterprise Min. Co. *v.* Rico-Aspen Consol. Min. Co., 167 U. S. 108, 17 S. Ct. 762, 42 L. ed. 96 [*affirming* 66 Fed. 200, 13 C. C. A. 390].

"Line of tunnel."— The definition of the line of a tunnel, that is, the width marked by the exterior lines or sides of the tunnel, as laid down in Corning Tunnel Co. *v.* Pell, *supra*, note 33, has been approved in so far as it relates merely to the marking of the tunnel location on the surface, although as shown in the later cases above cited such marking does not define the area within which prospecting on the surface is inhibited. See 1 Lindley Mines, § 473 *et seq.*; 1 Snyder Mines, § 298 *et seq.*

Work on the tunnel must proceed with reasonable diligence and a failure to work for six months will be considered an abandonment of the right to an undiscovered vein. U. S. Rev. St. (1878) § 2323 [U. S. Comp. St. (1901) p. 1426]. But the tunnel claim would not lose its rights already acquired. Fissure Min. Co. *v.* Old Susan Min. Co., 22 Utah 438, 63 Pac. 587.

39. Enterprise Min. Co. *v.* Rico-Aspen Consol. Min. Co., 167 U. S. 108, 17 S. Ct. 762, 42 L. ed. 96 [*affirming* 66 Fed. 200, 13 C. C. A. 390 (*reversing* 53 Fed. 321)].

40. U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425].

41. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200].

42. Creede, etc., Min., etc., Co. *v.* Uinta Tunnel Min., etc., Co., 196 U. S. 337, 25 S. Ct. 266, 49 L. ed. 501 [*affirming* 119 Fed. 164, 57 C. C. A. 200].

43. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200]; St. Louis Min., etc., Co. *v.* Montana Min. Co., 194 U. S. 235, 24 S. Ct. 654, 48 L. ed. 953 [*affirming* 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207].

Rights under several provisions.— The rights conferred by U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901), p. 1425] are not subject to the right expressed in section 2323 or limited by section 2336 of said statute and the last section merely supplements the first. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200].

44. Work on tunnel claim see *supra*, text and note 38; and *infra*, text and notes 80, 81.

45. See *infra*, III, B, 7, a, (III).

46. Consolidated Republican Mountain Min. Co. *v.* Lebanon Min. Co., 9 Colo. 343, 12 Pac. 212; O'Reilly *v.* Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. ed. 669; Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113; Jackson *v.* Roby, 109 U. S. 440, 3 S. Ct. 301, 27 L. ed. 990; Jennison *v.* Kirk, 98 U. S. 453, 25 L. ed. 240.

47. See 14 U. S. St. at L. 251 *et seq.*

48. See *infra*, III, B, 7, a, (II).

49. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditures may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."[50] Under the British Columbia statute a free miner who has located a claim is required to do or cause to be done work to the value of one hundred dollars each year to preserve his rights.[51]

(III) *PRIOR TO THE STATUTE.* Under the local rules and customs of miners prior to the enactment of the statute of 1872, certain stated work or improvements was required upon all located mining claims in order to hold the same.[52] In some instances the courts held that failure to do this work amounted to the abandonment of the claim,[53] in others that it amounted to a forfeiture,[54] even though no

50. See Chambers *v.* Harrington, 111 U. S. 350, 4 S. Ct. 428, 28 L. ed. 452; Willitt *v.* Baker, 133 Fed. 937.

Applicable to placer claims.— These requirements of the statute apply to placer claims, although such claims are not specifically named therein. Carney *v.* Arizona Gold Min. Co., 65 Cal. 40, 2 Pac. 734; Sweet *v.* Webber, 7 Colo. 443, 4 Pac. 752. But it is not necessary to do separate work of the value of one hundred dollars on each twenty acres when one hundred and sixty acres is located as one claim. McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

The purpose of this statute was "to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger." Chambers *v.* Harrington, 111 U. S. 350, 353, 4 S. Ct. 428, 28 L. ed. 452; McCulloch *v.* Murphy, 125 Fed. 147.

51. Brit. Col. Rev. St. (1897) c. 135, § 24.

Possession of official administrator; failure to work.— The official administrator administering the estate of a free miner dying intestate is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the crown. Hence, where the official administrator had not maintained the assessment work on a mineral claim, and the ground was relocated and recorded by another person under the name of the Parkside mineral claim, and assessment work done on it, and the original claim, known as the June, was, subsequently to such relocation, sold by the official administrator to plaintiff, who performed and recorded the annual assessment work, it was held, in an action brought to adverse an application for a certificate of improvements to the Parkside claim, that the June claim had elapsed, and that the ground was open to location under the Mineral Act. Windsor *v.* Copp, 12 Brit. Col. 213.

52. *California.*— Strang *v.* Ryan, 46 Cal. 33; Brundage *v.* Adams, 41 Cal. 619; Bradley *v.* Lee, 38 Cal. 362; Depuy *v.* Williams, 26 Cal. 309; Wiseman *v.* McNulty, 25 Cal. 230; Waring *v.* Crow, 11 Cal. 366; Packer *v.* Heaton, 9 Cal. 568.

Colorado.— Consolidated Republican Mountain Min. Co. *v.* Lebanon Min. Co., 9 Colo. 343, 12 Pac. 212.

Idaho.— Kramer *v.* Settle, 1 Ida. 485; Atkins *v.* Hendree, 1 Ida. 95.

Montana.— King *v.* Edwards, 1 Mont. 235.

Nevada.— Leet *v.* John Dare Silver Min. Co., 6 Nev. 218; Gottschall *v.* Melsing, 2 Nev. 185; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

See 34 Cent. Dig. tit. "Mines and Minerals," § 51 *et seq.*

In Idaho one hundred dollars' worth of work was to be performed each year, the ground was not open to location by another until the expiration of the year, and the original locator might maintain ejectment therefor. Atkins *v.* Hendree, 1 Ida. 95.

Procuring machinery or other implements to work with is considered as working the mine. Packer *v.* Heaton, 9 Cal. 568.

Work on neighboring land may be considered work upon the claim if it benefits such claim. Thus the construction of a drain on neighboring land for the use of the claim is sufficient. Packer *v.* Heaton, 9 Cal. 568.

Work upon one of several contiguous claims owned by the same party is sufficient. Bradley *v.* Lee, 38 Cal. 362.

53. Depuy *v.* Williams, 26 Cal. 309; Kramer *v.* Settle, 1 Ida. 485; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

The interest of a tenant in common cannot be considered as abandoned because he refuses to pay his part of the assessments. Waring *v.* Crow, 11 Cal. 366.

54. Brundage *v.* Adams, 41 Cal. 619; Wiseman *v.* McNulty, 25 Cal. 230; King *v.* Edwards, 1 Mont. 235.

Company.— Where several persons united

such penalty was specified in the rules, the requirements being considered as conditions subsequent for a failure to perform which the law presumed a forfeiture.[55]

b. Amount, Character, and Sufficiency of Work. It is clear under the statute that upon each claim located since May 10, 1872,[56] there must be placed one hundred dollars' worth[57] of labor or improvements for each year.[58] The labor which must be done or improvements placed upon the claim must be of such a character as will tend to develop the claim and facilitate the extraction of the metals therefrom.[59]

together for the working of mining claims calling themselves a "company" under an agreement that certain assessments shall be levied at stated times for the purpose of building a tunnel and that any member failing to pay such assessment should forfeit to the company his claim, a failure to pay the assessment did not work a forfeiture because the "company" was a body unknown to the law and incapable of taking advantage of a forfeiture. At common law "forfeiture" has no application to rights of the several persons composing such company. Wiseman *v.* McNulty, 25 Cal. 230.

One who locates and works a mining claim with others does not lose his right thereto by an absence and refusal to pay assessments for a period shorter than the statute of limitations; but such fact with other circumstances tending to show abandonment might go to the jury to establish it. Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

Partnership.—An act providing for the levying of assessments against copartners of a mining claim for the purpose of prospecting and developing applies only to persons who are copartners for the purpose of developing the claim and not the mere owners and shareholders, and therefore the rights of such owners and shareholders cannot be forfeited by a failure to pay the assessments attempted to be levied under the statute. Brundage *v.* Adams, 41 Cal. 619.

Relocation by joint locator.—Where a claim has been lost by a failure of joint locators to properly do the work, and one of the joint locators renews the location, such renewal will inure to the benefit of all the locators. Strang *v.* Ryan, 46 Cal. 33.

55. King *v.* Edwards, 1 Mont. 235; Sisson *v.* Sommers, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815. *Contra*, Rush *v.* French, 1 Ariz. 99, 25 Pac. 816; Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214.

56. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

57. "Worth."—The provisions of the statute mean that such labor or improvements shall be worth that amount and not that it enhances the value of the claim one hundred dollars. Mattingly *v.* Lewisohn, 13 Mont. 508, 35 Pac. 111.

58. The requirement of the statute as to value cannot be changed by local rules or customs. Woody *v.* Bernard, 69 Ark. 579, 65 S. W. 100; Wright *v.* Killian, 132 Cal. 56, 64 Pac. 98; Sweet *v.* Webber, 7 Colo. 443, 4 Pac. 752.

The test is the value of work, not what was paid for it, or what the contract price was (Stolp *v.* Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817), although evidence of what was paid is admissible (McCormick *v.* Parriott, 33 Colo. 382, 80 Pac. 1044).

Valid location and subsequent invalid one. — Work on a mining claim done by one making a valid location and a subsequent invalid one of the same claim will be applied to the valid location. Temescal Oil Min., etc., Co. *v.* Salcido, 137 Cal. 211, 69 Pac. 1010.

Where work is done to protect a lode under two titles, as to whose benefit the work will inure see Johnson *v.* Young, 18 Colo. 625, 34 Pac. 173.

Work performed by a company whose superintendent has a contract of purchase of the claim inures to the owner thereof. Godfrey *v.* Faust, 18 S. D. 567, 101 N. W. 718.

59. St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875. See also Smith *v.* Mountain Gulch Min., etc., Co., (Ida. 1906) 85 Pac. 918, where evidence was held sufficient to show work done for a particular year.

Not tending to develop within the rule are the following: Money expended for the completion of a house some distance from the claim, although built for the use of miners in the working of the claim. Remmington *v.* Baudit, 6 Mont. 138, 9 Pac. 819. Money expended and time in traveling about regarding matters connected with the claim. Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562. Payment for the services of a watchman upon the claim when there is no machinery or plant on the premises. Hough *v.* Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17; Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047. Services of a disbursing agent or accountant. Rara Avis Gold, etc., Min. Co. *v.* Bouscher, 9 Colo. 385, 12 Pac. 433. Taking of rock from the walls of a shaft or from the outcropping of a lead on the surface from time to time and testing it for the purpose of finding pay ore. Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936. The cost of sharpening picks in the work, in the absence of evidence to show that such work was done on the claim. Hirschler *v.* McKendricks, 16 Mont. 211, 40 Pac. 290. The extension of a flume over premises sought to be held as a mining claim and theretofore used as a place of deposit for waste material of an adjoining claim. Jackson *v.* Roby, 109 U. S. 440, 3 S. Ct. 301, 27 L. ed. 990.

Tending to develop within the rule are the

c. Time of Performance. Under the act of May 10, 1872,[60] provision was made for the performance of work each year on all claims theretofore and thereafter located. Doubtless the phrase "each year" as applied to locations, made under the act of 1866,[61] would mean each year from and after the act, but by two amendments to the section above recited,[62] the time for making the annual expenditure on such claims was extended to January 1, 1875. As to the claims located under the act of 1872, the year within which the work was required to be performed should be computed from the date of the location until after the act of January 22, 1880,[63] by which congress provided that the period within which work was to be done on the claims located under the statute of 1872 should commence on the first day of January next succeeding the date of location.[64] So that under the law, as it now exists, if one locates a claim on the first of January in any year, he does not have to perform representation work thereon for that year, but the period prescribed for the commencement of such work is January 1 of the next year, and he has the whole of the next year in which to perform the labor.[65] The amendment of 1880, above recited, does not act retrospectively so as to save the claim from forfeiture occurring before its passage;[66] nor so as to divest a right already acquired under existing laws, nor so as to shorten the time as to one already in possession.[67] Of course if the locator has the entire year in which to do the work the location is not forfeited or subject to location by another until the expiration of the year.[68] No work done on a claim prior to the date of the passage of the act of 1872 can be counted as part of the first annual representation.[69]

d. Place of Performance. Of course if the work is performed on the claim it may be upon the surface or anywhere below the surface within the boundaries of the claim dropped downward perpendicularly.[70] Where there are several con-

following: Money paid a watchman when there is machinery on the claim and the improvements are idle. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Lockhart *v.* Rollins, 2 Ida. (Hasb.) 540, 21 Pac. 413. Prospecting and building a road to the claim. Doherty *v.* Morris, 17 Colo. 105, 28 Pac. 85; Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 9 Morr. Min. Rep. 616. Services rendered in planning and superintending the development and working of a mine and the erection of a mill and machinery. Rara Avis Gold, etc., Min. Co. *v.* Bouscher, 9 Colo. 385, 12 Pac. 433. And see also where evidence was held sufficient to sustain a finding that the assessment work was done. Anderson *v.* Caughey, (Cal. App. 1906) 84 Pac. 223.

Work contributed gratuitously is to be considered in determining the question whether the necessary assessment work had been done. Anderson *v.* Caughey, (Cal. App. 1906) 84 Pac. 223.

Payment for work.— If the work is done it does not matter that it is not paid for. Coleman *v.* Curtis, 12 Mont. 301, 30 Pac. 266.

60. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

61. 14 U. S. St. at L. 251 *et seq.*

62. Act of March 1, 1873, 17 U. S. St. at L. 483; Act of June 6, 1874, 18 U. S. St. at L. 61.

63. 21 U. S. St. at L. 61 [U. S. Comp. St. (1901) p. 1426].

64. McKay *v.* McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395; Malone *v.* Jackson, 137 Fed. 878, 70 C. C. A. 216.

The evident purpose of this act of 1880 was to require uniformity in time of the representation work on all mining claims. Hall *v.* Hale, 8 Colo. 351, 8 Pac. 580; McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652.

65. Mills *v.* Fletcher, 100 Cal. 142, 34 Pac. 637; Belk *v.* Meagher, 3 Mont. 65; Thompson *v.* Jacobs, 3 Utah 246, 2 Pac. 714.

66. Slavonian Min. Co. *v.* Perasich, 7 Fed. 331, 7 Sawy. 217.

67. Hall *v.* Hale, 8 Colo. 351, 8 Pac. 580.

Relocation by another.— Where the locator of a mining claim did the assessment work for the previous year, the fact that he was absent therefrom and that during such absence some of the boundary stakes had fallen down, and that other persons had entered thereon and made a relocation, did not deprive him from reëntering to do the assessment work for the succeeding year, his prior location not having been terminated by abandonment or forfeiture. Zerres *v.* Vanina, 134 Fed. 610.

68. Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735.

69. Thompson *v.* Jacobs, 3 Utah 246, 2 Pac. 714. *Compare* Emerson *v.* McWhirter, 133 Cal. 510, 65 Pac. 1036, holding evidence to be uncontradicted that the work was done on December 31.

70. Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 9 Morr. Min. Rep. 616.

tiguous claims held in common the work may all be done upon one of such claims, provided it is of benefit to all the claims and tends to develop all of them and facilitate the extraction of ore therefrom;[71] but in order that this rule may apply the claims must be contiguous, and all must be benefited by the work done upon the one.[72] The interest in common may be an equitable as well as a legal one.[73] Under the amendment of February 11, 1875,[74] work done on a tunnel run for the development of a lode or lodes may be considered as done on such lode or lodes.

e. Proof of Performance — (1) *In General.* The burden of proof of showing a failure to perform the annual assessment work is in the first instance upon the one alleging the forfeiture.[75] Compliance with the statute may be proved by any evidence which establishes that the work done or improvements made are reasonably worth one hundred dollars.[76] Proof that the work was actually done is sufficient to save the claim no matter if it is not paid for;[77] but evidence may be received of the amount of money paid for the work done, as bearing on claimant's

71. *California.*— Yreka Min., etc., Co. *v.* Knight, 133 Cal. 544, 65 Pac. 1091; Mann *v.* Budlong, 129 Cal. 577, 62 Pac. 120.

Colorado.— Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389.

New Mexico.— Eberle *v.* Carmichael, 8 N. M. 169, 42 Pac. 95.

Utah.— Fissure Min. Co. *v.* Old Susan Min. Co., 22 Utah 438, 63 Pac. 587; Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

United States.— Jackson *v.* Roby, 109 U. S. 440, 3 S. Ct. 301, 27 L. ed. 990; Book *v.* Justice Min. Co., 58 Fed. 106; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

Canada.— See Lawr *v.* Parker, 8 Brit. Col. 223 [*affirming* 7 Brit. Col. 418].

See 34 Cent. Dig. tit. "Mines and Minerals," § 54.

Work done off claim.— Where the assessment work is on adjoining claims, it must be shown that it was intended for another certain claim and that the work done would inure to its benefit. It may be done entirely off the claim, and still be counted if it tends to develop or improve the claim. Richards *v.* Wolfling, 98 Cal. 195, 32 Pac. 971; Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389; Hall *v.* Kearny, 18 Colo. 505, 33 Pac. 373; Harrington *v.* Chambers, 3 Utah 94, 1 Pac. 362; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Book *v.* Justice Min. Co., 58 Fed. 106; Mt. Diablo Mill, etc., Co. *v.* Callison, 17 Fed. Cas. No. 9,886, 5 Sawy. 439, 9 Morr. Min. Rep. 616.

Work not on either claim through mistake as to location.— Plaintiff, owner of the Rebecca mineral claim, and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as he believed, but in reality, as shown by subsequent survey, a few feet outside the claim, but did not file the notice required by section 24 of the British Columbia Mineral Act with the gold commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. Plaintiff received in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca. It was held in ejectment that plaintiff, being misled by the gold commissioner, was protected by section 53 of the act. Lawr *v.* Parker, 8 Brit. Col. 223 [*affirming* 7 Brit. Col. 418].

72. Chambers *v.* Harrington, 111 U. S. 350, 4 S. Ct. 428, 28 L. ed. 452; Royston *v.* Miller, 76 Fed. 50; Gird *v.* California Oil Co., 60 Fed. 531; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96.

73. Eberle *v.* Carmichael, 8 N. M. 169, 42 Pac. 95.

74. 18 U. S. St. at L. 315 [U. S. Comp. St. (1901) p. 1427]; Hain *v.* Mattes, 34 Colo. 345, 83 Pac. 127; Godfrey *v.* Faust, (S. D. 1905) 105 N. W. 460.

Work on tunnel claim see *supra*, note 38, and *infra*, text and notes 80, 81.

75. *Arizona.*— Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641.

Arkansas.— Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87.

California.— Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23; Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708; Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040.

Colorado.— Johnson *v.* Young, 18 Colo. 625, 34 Pac. 173.

Montana.— Strasburger *v.* Beecher, 20 Mont. 143, 49 Pac. 740.

New Mexico.— Wills *v.* Blain, 4 N. M. 378, 20 Pac. 798.

South Dakota.— Axiom Min. Co. *v.* White, 10 S. D. 198, 72 N. W. 462; Dibble *v.* Castle Chief Gold Min. Co., 9 S. D. 618, 70 N. W. 1055.

United States.— Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964.

See 34 Cent. Dig. tit. "Mines and Minerals," § 54.

76. Whalen Consol. Copper Min. Co. *v.* Whalen, 127 Fed. 611; McCulloch *v.* Murphy, 125 Fed. 147.

When a jury is allowed to visit the premises they may consider the knowledge acquired by them. McCormick *v.* Parriott, 33 Colo. 382, 80 Pac. 1044.

77. Coleman *v.* Curtis, 12 Mont. 301, 30 Pac. 266.

good faith.[78] In an action to determine the ownership of a mining claim which has been relocated under an asserted forfeiture, the one relying on such forfeiture makes a *prima facie* case by showing that no work was performed within the limits of the claim during the preceding year, and the burden of proof then shifts to the other party to show that he performed the representation work outside the claim, which resulted in benefit to the claim.[79]

(II) *In Case of Tunnel Claim.* Where a tunnel is worked to represent the assessment work for the claim the facts should disclose that if the tunnel is continued on its course as laid it would probably intersect a vein upon the claim sought to be represented by work in the tunnel.[80] But the shifting of the original direction of the tunnel has been regarded as not sufficient in itself to indicate an absence of purpose at the inception of the work in the tunnel to intersect the vein upon the claim.[81]

f. Excuse For Non-Performance. Wrongful adverse possession by another excuses the rightful owner from doing the assessment work during the time of such adverse possession,[82] when he commences an action for its recovery within the statutory time.[83] Congress, in at least three instances, has authorized a suspension of the provision requiring annual labor,[84] and required that in lieu of such representation the claimant[85] might file an affidavit declaring his intention to hold and work the claim in good faith.

g. When Necessity For Work Ceases.[86] After final entry and payment of the purchase-price the requirement of annual labor ceases;[87] but not if the applicant is guilty of fraud in the entry,[88] and not if he fails to pay the purchase-money.[89]

h. Affidavits of Performance. In some of the states and territories statutes have been passed allowing the owner of the claim to file an affidavit showing that

78. Whalen Consol. Copper Min. Co. *v.* Whalen, 127 Fed. 611, holding that such evidence is an important factor in establishing the fact that the work was done.

79. Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389; Hall *v.* Kearny, 18 Colo. 505, 33 Pac. 373; Sherlock *v.* Leighton, 9 Wyo. 297, 63 Pac. 580, 934; Justice Min. Co. *v.* Barclay, 82 Fed. 554.

80. Hall *v.* Kearny, 18 Colo. 505, 33 Pac. 373, holding that if the work in the tunnel when continued in its course as laid would not reach the claim sought to be represented, such work could not be counted. See also Sherlock *v.* Leighton, 9 Wwo. 297, 63 Pac. 580, 934, holding that where the location of the claim and the direction pursued by the tunnel, as well as the location of the vein as disclosed by the outcroppings, showed that if the tunnel was continued on its course as laid it probably would have intersected the vein on the disputed claim, and the adverse claimant alone expressed the opinion that the tunnel did not benefit the claim, the evidence was insufficient to support a judgment of forfeiture, since the conflict in the evidence as to the benefit of the tunnel to the claim in dispute was not such as to authorize the court in refusing to disturb the judgment.

81. Sherlock *v.* Leighton, 9 Wyo. 297, 63 Pac. 580, 934.

82. Mills *v.* Fletcher, 100 Cal. 142, 34 Pac. 637; Field *v.* Tanner, 32 Colo. 278, 15 Pac. 916; Utah Min., etc., Co. *v.* Dickert, etc., Sulphur Co., 6 Utah 138, 21 Pac. 1002, 5 L. R. A. 259.

83. Trevaskis *v.* Peard, 111 Cal. 599, 44 Pac. 246.

84. 28 U. S. St. at L. 6; 28 U. S. St. at L. 114; 30 U. S. St. at L. 651 [U. S. Comp. St. (1901) p. 1428].

85. The word "claimant" under these statutes includes any one claiming in good faith to be the owner of the claim, although not an owner at law. Field *v.* Tanner, 32 Colo. 278, 75 Pac. 916; Nesbitt *v.* Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807.

86. On issuance of certificate of improvements see *infra*, III, B, 7, i.

87. Deno *v.* Griffin, 20 Nev. 249, 20 Pac. 308; Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 12 S. Ct. 877, 36 L. ed. 762 [*affirming* 2 Ariz. 362, 16 Pac. 565]; Aurora Hill Consol. Min. Co. *v.* Eighty-five Min. Co., 34 Fed. 515, 12 Sawy. 355. Where, after an application for a patent to a mining claim and full payment of the price, the purchasers received their final certificate of purchase in due form, their claims were not subject to forfeiture for non-performance of assessed labor, nor were they subject to forfeiture or to relocation as long as such certificate remained uncanceled. Southern Cross Gold Min. Co. *v.* Sexton, 147 Cal. 758, 82 Pac. 423.

88. Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439.

89. Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286.

the work was done for a particular year and make such affidavit *prima facie* evidence of the facts therein stated.[90]

i. Certificate of Improvements. Under the British Columbia statute the lawful holder of a mineral claim, upon compliance with certain specified requirements, is entitled to receive from the gold commissioner a certificate of improvements,[91] which relieves him from the necessity of doing any work on the claim while it is in force,[92] and is not impeachable on any ground except that of fraud,[93] and on such ground can be impeached only by the crown.[94]

j. Failure of Coöwner to Contribute — (i) *In General.* The law provides[95] that on the failure of a coöwner to contribute his share of annual labor or of the expenditures, those who have contributed may at the end of the year give the defaulting coöwner notice[96] either personally or by publication in a newspaper published nearest the claim once a week for ninety days, and if at the end of ninety days after such notice the delinquent fails to make proper contribution his interest becomes the property of his coöwners.[97] This right exists only in favor of one who is a coöwner during the year for which such forfeiture is claimed.[98] Of course notice will not work a forfeiture if the coöwner has in fact contributed his share.[99] The claim becomes forfeited if the work is not done,

90. See cases cited *infra*, this note.

Such statutes do not preclude the owner from making proof in any other way, and a failure to record the notice does not therefore work a forfeiture. Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075; Coleman *v.* Curtis, 12 Mont. 301, 30 Pac. 266; Murray Hill Min., etc., Co. *v.* Havenor, 24 Utah 73, 66 Pac. 762; McCulloch *v.* Murphy, 125 Fed. 147; Book *v.* Justice Min. Co., 58 Fed. 106.

The statute of Colorado in this regard does not require the affidavit to state when the assessment year will expire or prohibit anyone from embracing more than one claim, and if the affidavit states that the labor was performed within the year, as extended by the act of congress of Jan. 22, 1880 (21 U. S. St. at L. 61 [U. S. Comp. St. (1901) p. 1426]) it is sufficient. McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652.

91. Brit. Col. Rev. St. (1897) c. 135, § 36 *et seq.*

A part-owner of a mineral claim may apply for a certificate of improvements. Bentley *v.* Botsford, 21 Can. L. T. Occ. Notes 492, 8 Brit. Col. 128.

92. Brit. Col. Rev. St. (1897) c. 135, § 38.

93. Brit. Col. Rev. St. (1897) c. 135, § 37.

Certificate conclusive that holder has paid rent.— Cleary *v.* Boscowitz, 32 Can. Sup. Ct. 417 [*affirming* 8 Brit. Col. 225].

Circumstances not amounting to fraud.— Where the fraud alleged in an action by the attorney-general to set aside a certificate of improvements was a statement in an affidavit of defendant's agent, sworn to on Aug. 10, 1899, that defendant was in undisputed possession of the Pack Train mineral claim, whereas on that day an action was pending as to the title to the claim and judgment in favor of defendant was not delivered until Aug. 11, 1899, it was held that as it was after Aug. 11, 1899, when the affidavit reached the gold commissioner there was no fraud within the statute. Atty.-Gen. *v.* Dunlop, 7 Brit. Col. 312.

94. Cleary *v.* Boscowitz, 32 Can. Sup. Ct. 417 [*affirming* 8 Brit. Col. 225]. See also Hand *v.* Warren, 7 Brit. Col. 42.

The policy of the mineral acts is to compel persons claiming adversely to an applicant for a crown grant to commence action before a certificate of improvements is obtained. Nelson, etc., R. Co. *v.* Dunlop, 7 Brit. Col. 411.

95. U. S. Rev. St. § 2324 [U. S. Comp. St. (1901) p. 1426].

96. **Notice** see *infra*, III, B, 7, j, (II).

97. Badger Gold Min., etc., Co. *v.* Stockton Gold, etc., Min. Co., 139 Fed. 838.

In the absence of proceedings to forfeit the interest under the statute a mere failure to contribute does not forfeit the defaulting cotenants' rights. Faubel *v.* McFarland, 144 Cal. 717, 78 Pac. 261.

Patentees holding in trust for cotenants.— Where patentees of a mining claim received their patent with knowledge of the interests of certain cotenants with them in the claim for which the patent was issued, and with knowledge that they received title in trust for such cotenants, and the grantees of the patentees knew or had notice of the same facts, any attempted forfeiture proceedings instituted by the patentees or their grantees against the cotenants were ineffectual to defeat the latter's rights. Stephens *v.* Golob, 34 Colo. 429, 83 Pac. 381.

Payment before forfeiture.— One who buys an interest in an unpatented mining claim at a void judicial sale, and pays the portion of the assessment work due from the judgment debtor before the time to redeem has expired, taking a receipt therefor, is not subrogated to the rights of the parties seeking the forfeiture and his payment and its acceptance prevents the forfeiture as against the judgment debtor. Dye *v.* Crary, (N. M. 1906) 85 Pac. 1038.

98. Turner *v.* Sawyer, 150 U. S. 578, 14 S. Ct. 192, 37 L. ed. 1189.

99. Brundy *v.* Mayfield, 15 Mont. 201, 38 Pac. 1067.

even if the failure is due to a conspiracy of one of the locators.[1] The failure is not excused because one coöwner promises to do the work and neglects it;[2] but such coöwner cannot acquire any interest in the claim as against his coöwners.[3]

(II) *NOTICE OF FAILURE.* Under these provisions a notice published every day except Sundays from January 29 to April 2 is sufficient.[4] If the defaulting coöwner is dead, a published notice may be addressed to "his heirs, administrators and to all whom it may concern."[5] It is optional to serve personal notice or publish the same,[6] and one notice may cover delinquency for several years.[7] Such notice must specify the amount of money spent upon each claim or facts which excuse expenditures on each claim.[8]

k. Resumption of Work to Prevent Default — (I) *STATUTORY PROVISION.* The acts of congress above recited[9] declare that the location remains valid even if the work is not done, provided the original locators, their heirs, assigns, or legal representatives, have resumed work upon the claim after such failure and before another location.

(II) *GOOD FAITH.* The resumption must be in good faith with a *bona fide* intention of prosecuting the work to completion.[10]

1. Doherty *v.* Morris, 11 Colo. 12, 16 Pac. 911.

2. Doherty *v.* Morris, 11 Colo. 12, 16 Pac. 911; Saunders *v.* Mackey, 5 Mont. 523, 6 Pac. 361.

3. Royston *v.* Miller, 76 Fed. 50.

The injured cotenant's remedy is an action for breach of contract or to declare a trust. Saunders *v.* Mackey, 5 Mont. 523, 6 Pac. 361.

No record of the proceeding is required to be made or kept. Riste *v.* Morton, 20 Mont. 139, 49 Pac. 656.

The land-office cannot adjudicate rights to a mining claim, and when one is alleged to have fraudulently ousted a coöwner and has applied for a patent in his own name, such coowner can maintain a suit to determine his interest in the property without waiting for the issuance of the patent. Malaby *v.* Rice, 15 Colo. App. 364, 62 Pac. 228.

4. Elder *v.* Horseshoe Min., etc., Co., 15 S. D. 124, 87 N. W. 586, 102 Am. St. Rep. 681; Elder *v.* Horseshoe Min., etc., Co., 194 U. S. 248, 24 S. Ct. 643, 48 L. ed. 960.

The name of the coöwner whose interest is sought to be forfeited must appear in the notice. Ballard *v.* Golob, 34 Colo. 417, 83 Pac. 376.

5. Elder *v.* Horseshoe Min., etc., Co., 9 S. D. 636, 70 N. W. 1060, 62 Am. St. Rep. 895 (the fact that the heirs were not individually named being immaterial); Elder *v.* Horseshoe Min., etc., Co., 194 U. S. 248, 24 S. Ct. 643, 48 L. ed. 960.

6. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

7. Elder *v.* Horseshoe Min., etc., Co., 9 S. D. 636, 70 N. W. 1060, 62 Am. St. Rep. 895.

8. Haynes *v.* Briscoe, 29 Colo. 137, 67 Pac. 156.

9. U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426].

10. McCormick *v.* Baldwin, 104 Cal. 227, 37 Pac. 903; Lacey *v.* Woodward, 5 N. M. 583, 25 Pac. 785, holding that if one resumes work in good faith before new location is made, there is no forfeiture.

There must be a bona fide attempt to resume work before an entry by one seeking to relocate, and threats made seven miles away from the claim without any act toward carrying them out is not sufficient excuse for nonperformance. Slavonian Min. Co. *v.* Perasich, 7 Fed. 331, 7 Sawy. 217. If locators have entered into actual possession of the premises, although they have not relocated, the original locators have no right to make a forcible entry to resume work.

Going upon the claim with tools and securing samples of ore is not a resumption of work. Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936. But it is a sufficient resumption of work for a locator to commence his annual assessment work on December 26, his employees working until the night of December 30, which was Saturday, when they quit until Monday morning, January 1, and then resumed work, in the mean time, leaving their tools on the claim, having continued the work until five hundred dollars' worth had been done, although less than one hundred dollars had been done on Saturday night; and an attempted location Sunday night between twelve and one o'clock was invalid. Fee *v.* Durham, 121 Fed. 468, 57 C. C. A. 584.

Illustrations of sufficient resumption.—Defendant's claim became open to relocation Jan. 21, 1886, and at one o'clock A. M. plaintiff posted his notice thereon, but did not mark his boundaries until January 25. Defendant on January 21 at the usual hour in the morning resumed labor, did work to the amount of ten dollars up to January 25 and two hundred dollars' worth during the year. Under such facts the supreme court of California decided that the ground was not forfeited and plaintiff took no rights. Pharis *v.* Muldoon, 75 Cal. 284, 17 Pac. 70. Where locators of a claim were at work thereon on December 31 and left their tools in the cut intending to resume the work next day, which they did, their possession and work were in law continuous; and one who made a relocation during the night acquired no right and

(III) *TIME OF RESUMPTION.* The location is not forfeited by a failure to do annual labor if work is resumed before any other location is made.[11] One who has forfeited his claim by failure to do the assessment work may reënter and resume work at any time before other rights attach in favor of subsequent locators.[12] The original locator has a right to resume work before location by another even after he has failed to do the work for former years.[13]

(IV) *RIGHTS OF SECOND LOCATOR.* Mere failure to perform the annual labor does not divest the title in favor of a junior overlapping location, without relocation of such claim after such failure and before resumption of work.[14] If one resumes work after failure and is actually engaged in developing his claim, the second locator has no right to trespass upon the ground or make a relocation of the claim.[15]

8. ABANDONMENT, FORFEITURE, AND RELOCATION — a. Abandonment — (I) *QUESTION OF INTENT.* The locator of a mining claim may lose the claim and all rights therein by abandonment, which consists of an intent to desert or forsake the claim and all interest therein, not caring what becomes of it.[16]

was a trespasser. Willitt *v.* Baker, 133 Fed. 937.

Illustrations of insufficient resumption.— Sufficient resumption and prosecution of work is not shown by evidence that during the first half of the month after resuming he did certain work, but none the last half, and that notice was posted soliciting proposals for five hundred dollars' worth of work, when no excuse was shown for the cessation of work, or that efforts were made to complete the five hundred dollars' worth of work before relocation. Hirschler *v.* McKendricks, 16 Mont. 211, 40 Pac. 290. Plaintiff located a claim on Jan. 1, 1888, but did not go upon the claim until May, 1890, finding defendants in possession. On Dec. 20, 1889, plaintiff employed one B to represent the claim for the year 1889. B performed work from Dec. 22, 1889, to Jan. 12, 1890, for which plaintiff paid him one hundred dollars. The work done by B was not of the value of one hundred dollars. Defendants relocated the claim April 25, 1890. Under these facts the court decided that plaintiff had not, in good faith, resumed work on the claim and that the claim was open to relocation. Honaker *v.* Martin, 11 Mont. 91, 27 Pac. 397.

11. Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389.

Day before other location.—Where plaintiff in good faith resumed work on a mine previously located by him the day before defendant's location thereof, plaintiff has the superior right thereto. Emerson *v.* McWhirter, 133 Cal. 510, 65 Pac. 1036.

If another attempts to locate the claim, he must complete his location before resumption of work by the first locator. Worthen *v.* Sidway, 72 Ark. 215, 79 S. W. 777; Field *v.* Tanner, 32 Colo. 278, 75 Pac. 916; McKay *v.* McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395; Gonu *v.* Russell, 3 Mont. 358.

12. Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231. See Belcher Consol. Gold Min. Co. *v.* Deferrari, 62 Cal. 160, holding that where a locator defaults assessment work by doing only one hundred dollars' worth of work on two claims in 1880, but does twenty-four dollars' worth of work in January, 1881, he has resumed work as regards relocation made by others in August, 1881.

13. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87.

After failure for some years.— Work done by a locator of the amount required in a certain year, after failure for some years to do work, will be treated as a resumption. Temescal Oil Min., etc., Co. *v.* Salcido, 137 Cal. 211, 69 Pac. 1010.

14. Oscamp *v.* Crystal River Min. Co., 58 Fed. 293, 7 C. C. A. 233.

15. Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299; Little Gunnell Co. *v.* Kimber, 15 Fed. Cas. No. 8,402, 1 Morr. Minn. Rep. 536.

But work must be actually resumed, and possession alone without the resumption of work will not prevent a forfeiture and relocation. Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23.

16. *Alaska.*— Loeser *v.* Gardiner, 1 Alaska 641.

Arizona.— Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723.

California.— McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31; Trevaskis *v.* Peard, 111 Cal. 599, 44 Pac. 246; Taylor *v.* Middleton, 67 Cal. 656, 8 Pac. 594; Myers *v.* Spooner, 55 Cal. 257; Seymour *v.* Wood, 53 Cal. 303; Stone *v.* Geyser Quicksilver Min. Co., 52 Cal. 315; Morenhaut *v.* Wilson, 52 Cal. 263; Marquart *v.* Bradford, 43 Cal. 526; Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214; St. John *v.* Kidd, 26 Cal. 263; Richardson *v.* McNulty, 24 Cal. 339; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Waring *v.* Crow, 11 Cal. 366; Partridge *v.* McKinney, 10 Cal. 181; Davis *v.* Butler, 6 Cal. 510.

Colorado.— Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369; Miller *v.* Hamley, 31 Colo. 495, 74 Pac. 980; Bonner *v.* Rio Grande Southern R. Co., 31 Colo. 446, 72 Pac. 1065; Omar *v.*

(II) *NATURE, OPERATION, AND EFFECT*— (A) *In General.* Being a question of intent it operates instanter.[17] In order to be susceptible of proof this intent must be evidenced by some physical act. Because of this some courts have held that abandonment consists of an act and intent.[18] It can never arise except where there has been possession,[19] and it only arises when there has been mere naked possession without legal title.[20] It cannot be presumed from lapse of time alone, but such fact is persuasive evidence of its existence.[21] The statute of limitations has nothing to do with it.[22] Neither does it involve an estoppel.[23] It need not be specially pleaded but may be shown under a general denial or general allegation of title.[24]

(B) *Particular Acts.* Abandonment may arise from a single act or from a series of acts continued through a long space of time. It is to be determined from all the circumstances of each case.[25] The law, however, should be construed liberally so as to prevent a forfeiture where a valid location has been

Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Derry *v.* Ross, 5 Colo. 295.

Nevada.— Weill *v.* Lucerne Min. Co., 11 Nev. 200; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

South Dakota.— Marshall *v.* Harney Peak Tin Min., etc., Co., 1 S. D. 350, 47 N. W. 290.

United States.— Black *v.* Elkhorn Min. Co., 163 U. S. 445, 16 S. Ct. 1101, 41 L. ed. 221; Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532; Valcalda *v.* Silver Peak Mines, 86 Fed. 90, 29 C. C. A. 591; Justice Min. Co. *v.* Barclay, 82 Fed. 564; Migeon *v.* Montana Cent. R. Co., 77 Fed. 249, 23 C. C. A. 256; Harkrader *v.* Carroll, 76 Fed. 474; Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190.

Canada.— Nelson, etc., R. Co. *v.* Jerry, 5 Brit. Col. 396.

See 34 Cent. Dig. tit. "Mines and Minerals," § 60.

Placer claim.— A placer mining location *ex vi termini* imports an appropriation of all waters covered hy it, so far as such waters are necessary for working the claim, especially when the location covers both banks of the stream, and there can he no abandonment of the water as distinguished from the land or of the land as distinguished from the water. Schwab *v.* Beam, 86 Fed. 41.

Act and intent see *infra,* text and note 25.

Abandonment of portion of claim.— The statute providing that the owner may abandon a mineral claim inferentially permits him to abandon any portion of it upon his specifying and recording such abandonment. Granger *v.* Fotheringham, 3 Brit. Col. 590.

17. Trevaskis *v.* Peard, 111 Cal. 599, 44 Pac. 246; Davis *v.* Butler, 6 Cal. 510; Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369; Derry *v.* Ross, 5 Colo. 295.

18. Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214; Waring *v.* Crow, 11 Cal. 366; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484; Lakin *v.* Sierra Butes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231.

19. Stone *v.* Geyser Quicksilver Min. Co., 52 Cal. 315.

20. Ferris *v.* Coover, 10 Cal. 589.

21. Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Partridge *v.* McKinney, 10 Cal. 181; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

22. Davis *v.* Butler, 6 Cal. 510.

23. Marquart *v.* Bradford, 43 Cal. 526.

24. Trevaskis *v.* Peard, 111 Cal. 599, 44 Pac. 246; Morenhaut *v.* Wilson, 52 Cal. 263; Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214; Willson *v.* Cleaveland, 30 Cal. 192; Bell *v.* Brown, 22 Cal. 671; Atkins *v.* Hendree, 1 Ida. 95.

25. Myers *v.* Spooner, 55 Cal. 257; Davis *v.* Butler, 6 Cal. 510.

Acts held to constitute abandonment: Abandoning a claim because of inability to do the annual assessment work and having son relocate it as an abandoned lode, and then taking a conveyance from son claiming thereunder until another has located an interfering claim. Niles *v.* Kennan, 27 Colo. 502, 62 Pac. 360. Assenting to the location of a claim by another to which one has a right, and encouraging the making thereof. Oberto *v.* Smith, (Colo. 1906) 86 Pac. 86; Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369; Golden Terra Min. Co. *v.* Mahler, 4 Morr. Min. Rep. 390. Considering a claim to be worthless, destroying the monuments, and going away with the intention of having nothing further to do with the claim. Kinney *v.* Fleming, 6 Ariz. 263, 56 Pac. 723. Moving effects and absenting oneself from the claim for two years, allowing one claiming under a judicial sale to work the claim upon the theory that the title is invalid, and intending to reclaim it only in case it becomes valuable. Trevaskis *v.* Peard, 111 Cal. 599, 44 Pac. 246. Going away to regain health, expecting to be gone some years, and giving up all hope of returning. Harkrader *v.* Carroll, 76 Fed. 474.

When the locator has never developed or worked the claim, and others take possession and hold and develop it for a long time, equal to the period of limitations, the title to the last claimant is good as against original locators. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. [It is impossible to say from this opinion whether the court holds that the locations were abandoned or were lost hy adverse possession.]

made, the property worked in good faith, and no intent to abandon shown.[26] It does not arise when one is prevented by another from going upon the claim.[27] Neither is the omission of a portion of a claim from survey for patent by mistake of the surveyor.[28] Patenting a portion of a claim, which includes the discovery shaft, is no abandonment of the remainder of the location if the locator remains in possession thereof and works the same.[29] An affidavit by a relocator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim.[30]

(III) *QUESTION OF FACT.* An abandonment is a mixed question of law and fact. If a party intends to give up his claim and acts in pursuance of that intention, it is then an abandonment in fact,[31] the question whether such abandonment has been effected being for the determination of the jury, in a proceeding in which there is a jury trial.[32]

(IV) *PROOF OF ABANDONMENT.*[33] Evidence of a general belief of a community that one has abandoned his location is not sufficient.[34] Belief is not sufficient. Abandonment must be proved as a fact. The statement of a party that he did not intend to abandon the claim is not conclusive.[35] The uncontradicted testimony of the locator of a claim that he has abandoned it has been considered sufficient;[36] but such evidence is not conclusive.[37] Leaving tools and implements

26. Emerson *v.* McWhirter, 133 Cal. 510, 65 Pac. 1036.

Acts held not to constitute abandonment: Abandoning proceedings for a patent after an adverse ruling of the land department, and relying on the location of the claims. Peoria, etc., Milling, etc., Co. *v.* Turner, 20 Colo. App. 474, 79 Pac. 915. Being disappointed with a claim and merely deciding to abandon it, when within ten minutes thereafter and without leaving the ground the original locators relocate the claim in another's name. McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31. Being driven away from a mine by Indians, the intent to abandon being absent. Taylor *v.* Middleton, 67 Cal. 656, 8 Pac. 594. A conveyance or gift of a claim, because such act evinces an intent that a certain person should succeed to it, while abandonment excludes the existence of such intent (Richardson *v.* McNulty, 24 Cal. 339; Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1); but the supreme court of the United States has indicated by way of *dictum* that an abandonment may be proven by a conveyance (Black *v.* Elkhorn Min. Co., 163 U. S. 445, 16 S. Ct. 1101, 41 L. ed. 221). An invalid attempted relocation as to subsequent locators. Temescal Oil Min., etc., Co. *v.* Salcido, 137 Cal. 211, 69 Pac. 1010. Making a second location on the same lode with names of other locators in the notice. Weill *v.* Lucerne Min. Co., 11 Nev. 200. Quitting all work except the annual assessment work, where another enters upon the land as a homestead without the owner's consent. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. The removal of stakes or monuments and the obliteration of notices without the act or fault of the locator, after his location has once been lawfully made. Moore *v.* Steelsmith, 1 Alaska 121.

27. Mills *v.* Fletcher, 100 Cal. 142, 34 Pac. 637; Craig *v.* Thompson, 10 Colo. 517, 16 Pac. 24; Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318.

28. Basin Min., etc., Co. *v.* White, 22 Mont. 147, 55 Pac. 1049.

An amended location, because of an error as to the course of a vein when the original location was made, in consequence of which the original side lines become end lines, did not operate as an abandonment of all rights under the original location, where it was expressly stated in the amendment that such was not the intention. But the court treated as abandoned only so much of the original claim with its planes extended as lay without the extended end line planes of the amended location. Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 591, 66 C. C. A. 99.

29. Miller *v.* Hamley, 31 Colo. 495, 74 Pac. 980.

Where the original discovery shaft is included within the boundaries of a subsequent location, which is patented without adverse proceedings, and no new discovery made, discovery shaft sunk or notice posted on the unappropriated part of the location, the same is abandoned. Girard *v.* Carson, 22 Colo. 345, 44 Pac. 508; Miller *v.* Girard, 3 Colo. App. 278, 33 Pac. 69.

30. Dunlop *v.* Haney, 7 Brit. Col. 1305.

31. Oreamuno *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 215.

32. Taylor *v.* Middleton, 67 Cal. 656, 8 Pac. 594.

33. **Evidence** generally see EVIDENCE, 16 Cyc. 821 *et seq.*

34. Phœnix Mill, etc., Co. *v.* Lawrence, 55 Cal. 143.

It is insufficient to establish that the owners had abandoned the claim by producing opinion evidence that the work done was not of the required value. Moffat *v.* Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139.

35. Myers *v.* Spooner, 55 Cal. 257.

36. Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361.

37. McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31.

on the claim is evidence that there was no intention to abandon.[38] So is the employment of a watchman.[39] The mere failure of one locator to perform his share of the assessment work is not conclusive evidence of an intent to abandon, but may be considered.[40]

(v) *ABANDONMENT BY COÖWNER.* An abandonment by a cotenant of his interest in the claim inures to his cotenants if they continue to represent the claim.[41] The possession of one tenant in common is the possession of all, and no abandonment can be based on the absence of the other tenants even if those in possession make a sale of the absent tenant's interest.[42] One coöwner attempting to exclude another therefrom by a relocation does not abandon the original location.[43]

(vi) *ABANDONMENT OF PART OF CLAIM OR INTEREST.* The locator may abandon a portion of his original location without losing his rights to the balance of the claim.[44] The right acquired by discovery may be abandoned prior to the completion of the location; and if the discoverer admits another into possession with him to become jointly interested therein it is an abandonment *pro tanto*.[45]

(vii) *WHEN ABANDONED CLAIM MAY BE RELOCATED.* Abandonment operates instanter, and the ground immediately reverts to the public domain and may be located by another at once.[46]

b. Forfeiture — (i) *IN GENERAL.* The locator or owner of the mining claim may also lose his claim by forfeiture, as we have seen, by not complying with the statute of the United States, requiring annual labor or improvements to be placed upon the claim.[47]

38. Morenhaut *v.* Wilson, 52 Cal. 263.

39. Justice Min. Co. *v.* Barclay, 82 Fed. 554.

40. Waring *v.* Crow, 11 Cal. 366; Oreamuno *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 215. See also Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369, holding that where the owners of three fourths of a mining claim abandoned the same and gave another authority to locate thereon, the owner of the other one fourth interest will be regarded as having abandoned his share and to have ratified the acts of his coöwners by stating to them that he did not care to have anything more to do with the claim.

41. Worthen *v.* Sidway, 72 Ark. 215, 79 S. W. 777.

But an abandonment by a joint owner of his interest in the claim does not vest the title thereto in his joint owners. Badger Gold Min., etc., Co. *v.* Stockton Gold, etc., Min. Co., 139 Fed. 838.

42. Waring *v.* Crow, 11 Cal. 366. But where one party, as superintendent and managing partner, represented another in supervising the property, it was held that although such agent could not ordinarily, without special authority from all the cotenants, abandon any greater interest than he alone possessed, yet the kind of property in controversy and the inability to decree an undivided interest therein to defendant by reason of lack of identity in boundaries of the conflicting claims show that such superintendent possessed sufficient authority from all the cotenants to bind them by his culpable negligence in permitting defendant to take, hold possession of, and improve their property for so long a time. Sharkey *v.* Candiani, (Oreg. 1906) 85 Pac. 219.

43. Hulst *v.* Doerstler, 11 S. D. 14, 75 N. W. 270.

44. Tyler Min. Co. *v.* Sweeney, 54 Fed. 284, 4 C. C. A. 329.

45. Murley *v.* Ennis, 2 Colo. 300.

46. Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369; Derry *v.* Ross, 5 Colo. 295.

A claim may be located by the grantee of an original locator where such location was valid and the grantee abandoned the same. Miller *v.* Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63.

A conveyance by the original locator of a portion of the surface of the claim terminates upon abandonment of the location by the locator. Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369.

47. Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23; Morgan *v.* Tillottson, 73 Cal. 520, 15 Pac. 88. See also *supra*, III, B, 7.

Effect upon junior overlapping claim.— Upon forfeiture the land does not become a part of the public domain so as to enable a relocator of the forfeited location to adverse an application for a patent in behalf of a junior overlapping claim. Lavagnino *v.* Uhlig, 198 U. S. 443, 25 S. Ct. 716, 49 L. ed. 1119 [*affirming* 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808].

Distinguished from abandonment.— Unlike abandonment there is no question of intent involved in forfeiture. The only question is whether the law has been complied with. McKay *v.* McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395. Abandonment may occur at any time before the issue of patent, while forfeiture, properly speaking, can only occur at stated statutory periods upon the failure to perform the annual representation See *supra*, III, B, 7, c. Forfeiture is never

(II) *Proof of Forfeiture.* The court will construe a mining regulation or custom so as to defeat a forfeiture if it can, and every reasonable doubt will be resolved in favor of the validity of the mining claim as against the assertion of a forfeiture.[48] And one asserting such forfeiture must plead and prove it.[49]

c. Relocation — (I) *In General.* As the term indicates there must have been a prior location. Usually the state and territorial statutes provide for the relocation of abandoned and forfeited claims,[50] but in the absence of such statutes the practice of relocating such claims has been in existence since an early day.

(II) *What Subject to Relocation.* If a claim is forfeited or abandoned it is open to location,[51] even though the boundaries are still marked.[52] Where a receiver's receipt is annulled for fraud and the entryman fails to do his representation work, the claim may be relocated.[53] But the mere cancellation of the entry does not render the ground subject to relocation.[54] A relocation cannot be based upon a trespass,[55] unless such trespass is waived.[56]

(III) *By Whom Relocated.* A valid relocation may be made by the orig-

complete until adverse claims are made to the property under other locations, while abandonment operates instanter. See *supra*, text and note 17; and III, B, 7, k. By abandonment the claim reverts to the public domain, while by forfeiture it goes to a subsequent locator. See *supra*, text and note 62. Forfeiture must be specially pleaded if relied upon, while abandonment need not be. See *supra*, text and note 24; *infra*, text and note 49.

48. Loeser *v.* Gardiner, 1 Alaska 641; Colman *v.* Clements, 23 Cal. 245.

Where a claim was not recorded within the time specified by statute, and the statute did not provide for a forfeiture in such a case, failure to record such claim within the time specified was insufficient to work a forfeiture. Zerres *v.* Vanina, 134 Fed. 610.

49. *Arizona.*— Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641.

California.— Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23; Callahan *v.* James, 141 Cal. 291, 74 Pac. 853; Altoona Quick Silver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040; Morenhaut *v.* Wilson, 52 Cal. 263.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Montana.— Power *v.* Sla, 24 Mont. 243, 61 Pac. 468; Strasburger *v.* Beecher, 20 Mont. 143, 49 Pac. 740; Mattingly *v.* Lewisohn, 13 Mont. 508, 35 Pac. 111; Wulf *v.* Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723; Renshaw *v.* Switzer, 6 Mont. 464, 13 Pac. 127.

New Mexico.— See Lockhart *v.* Wills, 9 N. M. 344, 54 Pac. 336 [*modified* in 181 U. S. 516, 21 S. Ct. 665, 45 L. ed. 979].

Oregon.— Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936.

United States.— Whalen Consol. Copper Min. Co. *v.* Whalen, 127 Fed. 611; McCulloch *v.* Murphy, 125 Fed. 147.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 97, 101.

The evidence must be clear and convincing. A location will not be declared void on suspicion merely. Thomson *v.* Allen, 1 Alaska 636.

Where defendant proves a prior location, the burden is on plaintiff to prove a failure of defendant to do the required annual work; and this he has a right to do in rebuttal, without any averment to that effect in his complaint. Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23.

50. See the statutes of the several states.

Original location merely invalid.— Such statutes do not authorize a relocation where it is claimed that the original location is invalid. Cunningham *v.* Pirrung, (Ariz. 1905) 80 Pac. 329.

51. Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562; Johnson *v.* Young, 18 Colo. 625, 34 Pac. 173; South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89. The case of Lockhart *v.* Wills, 9 N. M. 344, 54 Pac. 336, is somewhat peculiar. The locators did not complete their location by the performance of the acts required by the territorial statute. After the time prescribed by such statute for the completion of location, others relocated the claim, and the original locators brought suit in ejectment, in which they failed. The supreme court of New Mexico seem to hold that the original locators forfeited their rights by not completing their location, and that therefore the land was open to location. The case was appealed to the supreme court of the United States, under the title of Lockhart *v.* Johnson, 181 U. S. 516, 21 S. Ct. 665, 45 L. ed. 979, and the judgment was modified and affirmed.

52. Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

53. Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439.

54. Rebecca Gold Min. Co. *v.* Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17.

55. Weese *v.* Barker, 7 Colo. 178, 2 Pac. 919; Lebanon Min. Co. *v.* Consolidated Republican Min. Co., 6 Colo. 371; Willitt *v.* Baker, 133 Fed. 937.

56. Moffat *v.* Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139.

A relocator is not a discoverer of the vein, but a mere appropriator thereof. Zerres *v.* Vanina, 134 Fed. 610.

inal or prior locator,[57] his agent,[58] or his cotenant,[59] or by one other than the original locator or one representing him.[60]

(iv) *Requisites and Sufficiency.* The same rule and principle apply to the making of relocations as have been announced in reference to original locations, namely, the ground must be unappropriated public domain open to location.[61] Therefore when one makes a relocation of a claim, the rights of prior locators must have expired by abandonment, forfeiture, or for other causes,[62] and the one asserting that the claim is open to relocation has the burden of proving the same.[63] In the absence of state or territorial statutes providing otherwise,[64] a

57. One who has failed to do annual representation work on his claim (Warnock *v.* De Witt, 11 Utah 324, 40 Pac. 205; Hunt *v.* Patchin, 35 Fed. 816, 13 Sawy. 304), and one who has been defeated in a contest for possession (Meyendorf *v.* Frohner, 3 Mont. 282).

Permission to relocate.— Where the holder of a mineral claim which is the subject of an adverse action causes the ground to be relocated by someone else from whom he purchases it for a small consideration, the provisions of the statute requiring permission to relocate do not apply. Snyder *v.* Ransom, 10 Brit. Col. 182. See also Granger *v.* Fotheringham, 3 Brit. Col. 590.

58. See Morton *v.* Solambo Copper Min. Co., 26 Cal. 527, holding that when a discoverer of a claim locates a claim in the name of several, although some of them had no knowledge of such fact, such discoverer cannot divest such rights without consent by taking down the notice and posting another with other names on it.

59. A cotenant who relocates a claim after failure to perform annual work will hold it as trustee for his cotenants, notwithstanding U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426]. McCarthy *v.* Speed, 11 S. D. 362, 77 N. W. 590. *Compare* Strang *v.* Ryan, 46 Cal. 33, holding that where several tenants in common locate a claim and forfeit the same for failure to comply with local rules and regulations, a portion of them with others not interested in the original location may relocate the same, thus cutting off all the original locators not named in the notice of relocation.

60. *Arizona.*—Shattuck *v.* Costello, (1902) 68 Pac. 529.

Colorado.— Armstrong *v.* Lower, 6 Colo. 393; Carlin *v.* Freeman, 19 Colo. App. 334, 75 Pac. 26.

Montana.— Wilson *v.* Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

Nevada.— See Van Valkenburg *v.* Huff, 1 Nev. 142.

Canada.— See St. Laurent *v.* Mercier, 33 Can. Sup. Ct. 314.

See 34 Cent. Dig. tit. "Mines and Minerals," § 63.

61. Sharkey *v.* Candiani, (Oreg. 1906) 85 Pac. 219; Lauman *v.* Hoofer, 37 Wash. 382, 79 Pac. 953.

An amended relocation of a mining claim, made after the land has reverted to the public domain, cannot cure the defect in the original relocation arising out of the fact that the land was not then subject to entry, where intervening rights in favor of a third person have been created. Brown *v.* Gurney, 201 U. S. 184, 26 S. Ct. 509, 50 L. ed. 717 [*affirming* 32 Colo. 472, 77 Pac. 357].

62. *Arizona.*— Shattuck *v.* Costello, (1902) 68 Pac. 529; Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; Jordan *v.* Duke, 6 Ariz. 55, 53 Pac. 197.

California.— Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708; Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040; Garthe *v.* Hart, 73 Cal. 541, 15 Pac. 93.

Colorado.— Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369; Niles *v.* Kennan, 27 Colo. 502, 62 Pac. 360; Omar *v.* Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

Idaho.— Lockhart *v.* Rollins, 2 Ida. (Hasb.) 540, 21 Pac. 413.

Montana.— Renshaw *v.* Switzer, 6 Mont. 464, 13 Pac. 127.

New Mexico.— Wills *v.* Blain, 4 N. M. 378, 20 Pac. 798.

United States.— Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Zerres *v.* Vanina, 134 Fed. 610; Neilson *v.* Champaigne Min., etc., Co., 111 Fed. 655; Justice Min. Co. *v.* Barclay, 82 Fed. 554; Book *v.* Justice Min. Co., 58 Fed. 106; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355; Slavonian Min. Co. *v.* Perasich, 7 Fed. 331, 7 Sawy. 217.

See 34 Cent. Dig. tit. "Mines and Minerals," § 63.

Premature relocation.— The filing of notice reciting that the location was made in 1895 and that the relocation was made in 1895 or 1896 is an admission that the relocation was premature. Shattuck *v.* Costello, (Ariz. 1902) 68 Pac. 529.

63. Cunningham *v.* Pirrung, (Ariz. 1905) 80 Pac. 329; Moffat *v.* Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139.

A location notice of mining property as forfeited or abandoned property, failing to state that the claim is relocated as forfeited or abandoned property, is fatally defective. Matko *v.* Daley, (Ariz. 1906) 85 Pac. 721.

64. **Under the statutes of Colorado and Montana** a claim may be relocated on a vein discovered in the discovery shaft of the former location, but the relocator must sink a new discovery shaft or sink the old one ten feet deeper. Armstrong *v.* Lower, 6 Colo. 393; Wilson *v.* Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833. But in the above statute "must" is used in a permissive not a mandatory sense. Carlin *v.* Freeman, 19

relocator must perform all the acts of location within the same time as is allowed for an original location.[65] In case one changes his boundaries and includes additional ground it is not a relocation but a new one.[66]

(v) *Operation and Effect* — (a) *In General.* A relocation of a claim has the same effect as an original location.[67] One who locates and works a claim in the name of another has no rights therein, and a relocation by him in his own name gives him only such rights as he would acquire by an original location.[68]

(b) *Relation Back.* If one abandons his location and relocates the ground, such relocation does not relate back but takes effect from its date.[69] When, however, one locates a claim by his employees under local rules which do not require any record, and subsequently relocates it so as to comply with the acts of congress, his rights date back to the first location.[70]

(c) *Estoppel*[71] *to Deny Validity of Prior Location.* By the relocation of a claim the existence of a valid prior location is admitted.[72] And the relocator is therefore estopped from attacking the validity of the original location except on the ground of abandonment or forfeiture.[73]

9. Rules Applicable to Entry of Coal Lands — a. Statutory Provisions. The first act of congress relative to coal lands was passed July 1, 1864.[74] This was succeeded by the supplementary act of March 3, 1865,[75] and in 1873 congress enacted a law which was carried into the revisal.[76]

b. Coal Lands as Mineral Lands. Coal lands are mineral lands within the meaning of the general laws which except mineral lands from entry thereunder.[77] Therefore, if coal in paying quantities is developed on lands embraced within a homestead entry, such entry cannot be completed. But to constitute the exemption contemplated in the general land laws mere surface indications of coal are insufficient.[78]

c. Entry By Whom Made. But one entry can be made by one individual.[79] Entries cannot be made by one for another,[80] and a corporation is an association of persons within the meaning of the United States statute which cannot acquire title to coal lands entered by the officers, agents, members, and employees of such corporation for its use and benefit, when the corporation itself could not

Colo. App. 334, 75 Pac. 26. The Montana statutes require the shaft to be sunk ten feet deeper, and that fact, together with the dimensions and locations of the shaft on the abandoned claim at the date of such location, must be shown in the declaratory statement or the relocation is invalid. Wilson *v.* Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833. He cannot run a tunnel into the claim sought to be located from an old shaft on an adjoining claim. Little Gunnell Co. *v.* Kimber, 15 Fed. Cas. No. 8,402, 1 Morr. Min. Rep. 536.

65. Armstrong *v.* Lower, 6 Colo. 393; Murley *v.* Ennis, 2 Colo. 300.

66. Pelican, etc., Min. Co. *v.* Snodgrass, 9 Colo. 339, 12 Pac. 206; Shoshone Min. Co. *v.* Rutter, 87 Fed. 801, 31 C. C. A. 223.

The relocator may adopt a part or all of the boundary stakes of the prior locator. Miller *v.* Taylor, 6 Colo. 41; Brockbank *v.* Albion Min. Co., 29 Utah 367, 81 Pac. 863.

67. Malone *v.* Jackson, 137 Fed. 878, 70 C. C. A. 216.

68. Van Valkenburg *v.* Huff, 1 Nev. 142.

69. Cheesman *v.* Shreeve, 40 Fed. 787.

70. Fuller *v.* Harris, 29 Fed. 814. See also *supra*, III, B, 4, c, 8, c, (III).

71. Estoppel generally see 16 Cyc. 671 *et seq.*

72. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; Wills *v.* Blain, 4 N. M. 378, 20 Pac. 798.

73. See cases cited *supra*, note 50 *et seq.*

74. 13 U. S. St. at L. 343.

75. 13 U. S. St. at L. 529.

76. U. S. Rev. St. 1878, §§ 2347–2352 [U. S. Comp. St. (1901) pp. 1440–1441]. See also *infra*, III, B, 9, c.

77. Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170.

78. There must be actual "known mines" capable of being profitably worked for their products, under the conditions then existing. Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182.

"Known mines," etc., see *supra*, III, B, 2, c, (III), note 70.

79. U. S. Rev. St. (1878) § 2350 [U. S. Comp. St. (1901) p. 1441].

An agreement to furnish money to pay for coal lands while another is to do the required work is valid. Lipscomb *v.* Nichols, 6 Colo. 290.

80. Johnson *v.* Leonhard, 1 Wash. 564, 20 Pac. 591.

make the entry because some of its members or employees had exhausted their rights of entry.[81]

d. Entry Proceedings. While the method prescribed for obtaining title to coal lands differs from that applicable to other mineral lands,[82] the rule for determining whether a given tract is subject to entry under the coal land law is analogous to that applied to the other mineral deposits.[83]

e. Right to Building Stone. It has been held that the entryman becomes the owner of all building stone found upon the land.[84]

10. PATENTS[85] — a. In General. Patents are governed by the Mineral Act.[86] The proceedings relating thereto are carried on in the several branches of the land department of the United States, and are therefore always subject to the rules and regulations of that department, which are ever subject to change, and should always be consulted.

b. Certificate of Labor or Improvements. The certificate of the value of labor expended[87] or improvements made upon the claim by claimant or his

81. U. S. *v.* Trinidad Coal, etc., Co., 137 U. S. 160, 11 S. Ct. 57, 34 L. ed. 640.

82. The entire procedure of the entry and obtaining patent for coal mines has been definitely prescribed in the directions of the general land-office of the United States. Very few decisions are found upon any of the questions relating to this statute. It has, however, been discussed by the rulings of the land-office.

83. See *supra*, III, B, 2, *a*, *et seq.*

Before entry can be made on coal lands it must be shown that coal exists thereon in paying quantities, and that the land is sufficiently valuable to be worked for such deposits, and is more valuable for that purpose than for agricultural purposes. These facts must be shown by the actual production of coal or satisfactory evidence that it exists in sufficient quantities in the land to make it more valuable for coal mining than for agricultural purposes. This showing may also be made by the testimony of geological experts, or of practical miners taken in connection with the actual production of coal from some place upon the tract. It is not necessary that proof be made as to which forty acres is included in the tract, but coal in paying quantities must be shown to actually exist in the land, and a showing that it exists in an adjoining land is insufficient.

84. Johnston *v.* Harrington, 5 Wash. 73, 31 Pac. 316. This decision was rendered prior to the act allowing land containing building stone to be located and patented as a placer claim. The rules and regulations of the land-office, together with the statute, make the proceedings very simple and plain, and therefore comment would seem unnecessary. See *supra*, III, B, 5, c, (IV).

85. Patent to land generally see PUBLIC LANDS.

86. U. S. Rev. St. (1878) §§ 2325, 2326, 2327 [U. S. Comp. St. (1901) pp. 1429, 1430, 1431]. Section 2326 relates to contested claims and proceedings thereon. See *infra*, III, B, 10, d.

Survey.— The first step in obtaining a patent under this section is the procuring of an official survey and plat of the claim sought to be patented, in order to furnish the land department with an accurate description of the property. This is procured by the claimant filing with the surveyor-general of state or territory an application for the survey of the ground, which must set forth all things required by the regulations of the land-office and must be accompanied by certified copies of the declaratory statement or certificate of location of the claim, or claims, and any amendments thereto. Upon filing this application, the surveyor-general furnishes an estimate of the fees required for the work in his office which must be deposited by the claimant in a United States depository, which issues a certificate of such deposit in triplicate, one of which is left with the surveyor-general, one sent to the secretary of the treasury of the United States, and one retained by the claimant. The claimant may designate the name of the deputy mineral surveyor to whom he desires the order of survey issued. The surveyor-general then issues the order of survey and accompanies it with copies of the notice of location and other papers filed with the application. The deputy mineral surveyor selected proceeds to the location and performs the field work. He must make a survey and mark the boundaries of the location as made, with permanent survey monuments. He must be governed by the copies of the location notice of the premises delivered to him. The survey must show the area of all surface conflicts between the claim and all prior official surveys. The deputy mineral surveyor then makes a preliminary plat and transcribes his field-notes of the survey and reports them with a description and estimate of the work and improvements he finds on the premises, if any, to the surveyor-general's office, and if found correct they are approved and the official plat prepared. Whereupon a copy of the field-notes and official plat are transmitted to the local land-office and the claimant is furnished with a copy of the same to be posted on the claim and for filing with his application for patent. U. S. Rev. St. (1878) § 2325 [U. S. Comp. St. (1901) p. 1429].

87. Any work done on the claim for the purpose of discovery or development is al-

grantors [88] is taken as conclusive against the United States where there are no fraudulent representations by the patentee.[89]

c. Application For Patent. An application for patent [90] may be amended when it does not embrace additional territory.[91]

d. Contest Upon Adverse Claim — (I) *Statutory Provisions.* Proceedings for contests upon adverse claims are provided for by the Mineral Act.[92]

(II) *Adverse Claim* — (A) *In General.* The first step is the filing of an adverse claim in the land-office where the proceedings for patent are pending.[93] In British Columbia the filing of the affidavit setting forth the nature, boundaries, and extent of the adverse claim, together with the map or plan thereof as required by the statute, is not a condition precedent to plaintiff's right to proceed with an adverse action.[94]

(B) *Nature and Scope.* An adverse claim consists of some right, or an alleged right, to all or a portion of the surface ground of a mining claim sought to be patented by another. It is some claim or holding adverse in interest to that which is claimed by the applicant for patent. Its purpose is to initiate a contest to determine who is entitled to the possession of the ground in controversy, and to aid the land-office in the issuance of a patent.[95] Adverse claims are only applicable in cases of surface conflicts.[96] Possible future conflicts beneath the surface cannot be anticipated.[97] Questions as to the character of the land, whether mineral or not, cannot be raised by the filing of an adverse claim or proceedings thereon, as the question in dispute on an adverse claim must always be tried by the courts, and the land-office has the exclusive right to determine the character of the land owned by the government.[98] If the land depart-

lowed. U. S. *v.* Iron Silver Min. Co., 24 Fed. 568 [*affirmed* in 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571].

88. The statute requires that there shall be filed with the register of the local land-office a certificate of the United States surveyor-general, that five hundred dollars' worth of labor has been expended, or improvements made upon the claim by himself or his grantors. This certificate, however, need not be filed with the application, but must be filed within the period of publication hereafter referred to. If the improvements are made upon the claim at the time the survey is made, this certificate is usually made at the time the survey is approved. U. S. Rev. St. (1878) § 2325 [U. S. Comp. St. (1901) p. 1429].

89. U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571.

Its sufficiency may be determined from the observations of the surveyor-general or his deputy, or from testimony of persons having knowledge of the subject. U. S. *v.* King, 83 Fed. 188, 27 C. C. A. 509.

90. Application for patent.— Before the application can be filed notice of the intention to file the same must be given and a copy of the plat posted in a conspicuous place upon the claim. The claimant then files in the local land-office his written application for a patent, with which must be filed an affidavit of at least two disinterested persons that the notice had been posted and a copy of the notice, copy of the plat, field-notes, notice, and affidavit and other papers required by the regulations of the land department are filed in the local land-office, whereupon the register of said land-office publishes a notice for the period of sixty days in a newspaper designated by him as nearest the claim, stating that such application has been made. He also posts a notice in his office for the same period of time. U. S. Rev. St. (1878) § 2325 [U. S. Comp. St. (1901) p. 1429].

91. McConaghy *v.* Doyle, 32 Colo. 92, 75 Pac. 419.

92. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

93. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

Retroactive effect.— The statute relative to filing adverse claims has no application to such claims as occurred before the passage of the statute. Eclipse Gold, etc., Min. Co. *v.* Spring, 59 Cal. 304.

94. Paulson *v.* Beman, 32 Can. Sup. Ct. 655 [*reversing* 9 Brit. Col. 184]. *Compare* Kilbourne *v.* McGuigan, 5 Brit. Col. 233.

95. Iron Silver Min. Co. *v.* Campbell, 135 U. S. 286, 10 S. Ct. 765, 34 L. ed. 155.

96. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641; Champion Min. Co. *v.* Consolidated Wyoming Gold Min. Co., 75 Cal. 78, 16 Pac. 513.

Such conflict must arise from different locations.— The statute does not refer to instances where there is a conflict of right between parties claiming under the same location. Davidson *v.* Fraser, (Colo. 1906) 84 Pac. 695; Suessenbach *v.* Deadwood First Nat. Bank, 5 Dak. 477, 41 N. W. 662; Turner *v.* Sawyer, 150 U. S. 578, 14 S. Ct. 192, 37 L. ed. 1189.

97. Champion Min. Co. *v.* Consolidated Wyoming Gold Min. Co., 75 Cal. 78, 16 Pac. 513; Lee *v.* Stahl, 13 Colo. 174, 22 Pac. 436.

98. Wright *v.* Hartville, 13 Wyo. 497, 81

ment issues a patent to the land to a mineral claimant it is conclusive that the land is mineral.[99]

(c) *Who May or Must File*—(1) In General. The statute is mandatory and its requirements are jurisdictional. Any conflicts with the location existing during the period of publication must be presented as an adverse claim to the first application or the rights upon which it is based are waived by the express provisions of the act of congress.[1] Under the British Columbia statute the fact that the affidavit is made by the claimant's husband does not *ipso facto* vitiate the adverse claim, but the question is one of *bona fides*.[2]

(2) Holder of Easement. The holder of an easement has no such interest in the premises as will justify the filing of an adverse claim.[3]

(3) Holder Under Prior Claim or Patent. An adverse claim need not be filed by one holding under a prior patent.[4]

(4) Joint Claimant or Coöwner. An adverse claim may be filed by one of several joint claimants in behalf of all, without a power of attorney from the others.[5] But a coöwner is not obliged to adverse an application of another coöwner, because the applicant cannot thus extinguish the title of his coöwner.[6]

(5) Lien Claimant. A lien claimant upon property sought to be patented need not adverse the application.[7] But it has been held that if another claims the entire interest of the applicant, adverse to him, under a sheriff's deed upon execution, he must adverse the application,[8] although this doctrine has been held to be incorrect because both parties claimed under the same title.[9]

(6) Lode Claimant Against Placer Claimant. The locator or owner of a "known lode" is not required to adverse an application for a placer patent, when a patent for the lode is not included in the application placer patent, because

Pac. 649, 82 Pac. 450; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226. See also South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89; Iba *v.* Central Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

99. Northern Pac. R. Co. *v.* Cannon, 49 Fed. 517.

1. See cases cited *infra*, note 13 *et seq.*

Upon the issuance of a patent in the absence of an adverse claim being filed, the patent is held equivalent to an adjudication of every fact and proposition which might have been set up by way of adverse claim to the same effect as though such claim had been filed, suit brought in support of it, and a decision of the courts against it. Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348.

Enforcement of equitable title.—But, when locators patent a claim, a grantee by conveyance, before patent, can enforce his equitable title after patent, although he filed no adverse claim; his rights come through the locators' claim and not adverse to it. Suessenbach *v.* Deadwood First Nat. Bank, 5 Dak. 477, 41 N. W. 662.

2. Aldous *v.* Hall Mines, 6 Brit. Col. 394.

3. Rockwell *v.* Graham, 9 Colo. 36, 10 Pac. 284.

4. Mantle *v.* Noyes, 5 Mont. 274, 5 Pac. 856; Iron Silver Min. Co. *v.* Campbell, 135 U. S. 286, 10 S. Ct. 765, 34 L. ed. 155.

So one who has applied for a patent upon mining property and has prosecuted his proceeding with reasonable diligence need not adverse a subsequent application of a third person for the same property, or any part thereof. Steel *v.* Gold Lead Min. Co., 18 Nev. 80, 1 Pac. 448.

5. Nesbitt *v.* Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807.

6. Brundy *v.* Mayfield, 15 Mont. 201, 38 Pac. 1067; Turner *v.* Sawyer, 150 U. S. 578, 14 S. Ct. 192, 37 L. ed. 1189; Rector *v.* Gibbon, 111 U. S. 276, 4 S. Ct. 605, 28 L. ed. 427; Hunt *v.* Patchin, 35 Fed. 816, 13 Sawy. 304. In Davidson *v.* Fraser, (Colo. 1906) 84 Pac. 695, it is held that the federal statute providing for the issuance of patents for mineral lands and the prosecution of adverse claims in mining locations applies only to adverse claims arising out of independent conflicting locations of the same kind and not to controversies between coöwners claiming under the same location, but that under the statute in Colorado, an action for possession of an interest in realty may be brought by a tenant in common against his cotenant where the latter has actually ousted the former or done some act amounting to a denial of his right as cotenant, and that by virtue of this statute an action may be maintained independent of the fact that the cotenant had filed a protest against the issue of a patent to the premises from which he had been excluded.

7. Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1.

8. Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. 562, 13 Sawy. 113.

9. Turner *v.* Sawyer, 150 U. S. 578, 14 S. Ct. 192, 37 L. ed. 1189.

under the provisions of the statute the placer patent would give no title to such lode under these circumstances.[10]

(7) Mining Claimant Against Town-Site Claimant. A mining claimant need not adverse an application for a town-site patent.[11]

(8) Tunnel Claimant. Whether tunnel claimants should adverse applications for patent to lode claims or not depends upon the *situs* of the lode claim and the date of the location of the tunnel claim and lode claim.[12]

(D) *Time of Filing*—(1) In General. An adverse claim must be filed within the period of publication of the application for a patent or else it is waived,[13] unless it can be shown that knowledge of the proceeding to procure a patent was fraudulently withheld,[14] or that the adverse claim did not arise within the statutory period and the applicant has allowed his proceeding to lie dormant.[15]

(2) Extension of Time. This time cannot be extended even by the consent and stipulation of the parties.[16] In British Columbia the time may be extended

10. Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 430, 12 S. Ct. 543, 36 L. ed. 201; Noyes *v.* Mantle, 127 U. S. 348, 8 S. Ct. 1132, 32 L. ed. 168; Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 6 S. Ct. 601, 29 L. ed. 774.

11. The reason for the rule stated in the text is that the law does not allow a patent for a town site to cover mineral land. Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Talbott *v.* King, 6 Mont. 76, 9 Pac. 434; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570; Deffeback *v.* Hawke, 115 U. S. 392, 401, 6 S. Ct. 95, 29 L. ed. 423.

An owner of a town lot in Alaska, unpatented, may adverse an application for a patent for a lode claim. Young *v.* Goldsteen, 97 Fed. 303; Bonner *v.* Meikle, 82 Fed. 697. *Contra*, Behrends *v.* Goldsteen, 1 Alaska 518.

12. See cases cited *infra*, this note.

In Colorado the court refused to allow a tunnel claimant's adverse, where the lode claim was not on the line of the tunnel, and the claimant had not discovered the lode in the course of the tunnel. Corning Tunnel Co. *v.* Pell, 4 Colo. 507. But the same court has held that where a tunnel claimant has discovered a lode in his tunnel, and subsequently another discovers the same vein on the surface, locates it and applies for a patent, the tunnel claimant may adverse such application. Ellet *v.* Campbell, 18 Colo. 510, 33 Pac. 521.

In Idaho it has been held that a tunnel claimant must adverse an application for a lode claim which was located across the line of his tunnel. Back *v.* Sierra Nevada Consol. Min. Co., 2 Ida. (Hasb.) 420, 17 Pac. 83.

In Montana it has been held that when one locates a quartz claim which crosses the line of the tunnel, and makes application for a patent thereto, the tunnel claimant may enjoin the applicant until he can extend his tunnel through the quartz claim to see whether he strikes or cuts a vein so as to have a right to initiate a surface conflict and file an adverse. Hope Min. Co. *v.* Brown, 11 Mont. 370, 28 Pac. 732.

The circuit court of appeals of the eighth circuit has held that where one locates a quartz claim upon a surface discovery of a vein, subsequent to the initiation of a tunnel claim, and applies for a patent, and the tunnel claimant cuts a blind vein within the limits of the quartz location subsequent to such location, different from the vein upon which the quartz location was made, the tunnel claimant's failure to adverse the application will not affect his rights to the blind vein. Enterprise Min. Co. *v.* Rico-Aspen Consol. Min. Co., 66 Fed. 200, 13 C. C. A. 390 [*affirmed* in 167 U. S. 108, 17 S. Ct. 762, 42 L. ed. 96].

The supreme court of the United States has also held that where the location of a lode is made across the line of a tunnel, prior to the location of the tunnel site, the tunnel claimant need not adverse the application for a patent upon the lode claim, for his interests are so uncertain they cannot be fairly litigated. Creede, etc., Min., etc., Co. *v.* Uinta Tunnel Min., etc., Co., 196 U. S. 337, 25 S. Ct. 266, 49 L. ed. 501 [*affirming* 119 Fed. 164, 57 C. C. A. 200].

13. Girard *v.* Carson, 22 Colo. 345, 44 Pac. 508; Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240; Hunt *v.* Eureka Gulch Min. Co., 14 Colo. 451, 24 Pac. 550; Marshall Silver Min. Co. *v.* Kirtley, 12 Colo. 410, 21 Pac. 492; Raunheim *v.* Dahl, 6 Mont. 167, 9 Pac. 892; Nesbitt *v.* Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807; Dahl *v.* Raunheim, 132 U. S. 260, 10 S. Ct. 74, 33 L. ed. 324; Richmond Min. Co. *v.* Rose, 114 U. S. 576, 5 S. Ct. 1055, 29 L. ed. 273; Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. 562, 13 Sawy. 113; Wight *v.* Dubois, 21 Fed. 693.

14. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200]; Kannaugh *v.* Quartette Min. Co., 16 Colo. 341, 27 Pac. 245; Lee *v.* Stahl, 9 Colo. 208, 11 Pac. 77; Lavagnino *v.* Uhlig, 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808; Richmond Min. Co. *v.* Eureka Consol. Min. Co., 103 U. S. 839, 26 L. ed. 557 [*affirming* 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 9 Morr. Min. Rep. 578].

15. Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286.

16. Mattingly *v.* Lewisohn, 8 Mont. 259, 19 Pac. 310; Steel *v.* Gold Lead Min. Co.,

by the court and may be further extended when the time first allowed has expired.[17]

(E) *Sufficiency.* An adverse claimant must show the nature of the boundaries and extent of the adverse.[18] If the adverse claimant sets forth and claims the entire tract of land mentioned in the application for a patent, with identical boundaries, no survey is required, the original survey being sufficient.[19] So, when the adverse extends to practically the entire claim sought to be patented, and when it is practically impossible to make the survey within the time allowed for filing the adverse claim on account of the depth of snow,[20] or for any other reason, or the applicant prevents a survey being made in time, the claimant may show such conditions in connection with his claim and the land-office will permit the adverse to be filed. If the claimant proposes to obtain a patent to the area in conflict, if the suit is decided in his favor, he must set forth facts which show a full compliance with the law, and which would entitle him to the patent. The adverse claim must be verified. Its sufficiency is determined by the land-office.[21] The map or plan of an adverse claim required by the British Columbia statute to be filed as a condition precedent to the bringing of an adverse action need not be based on a survey made by the provincial land surveyor who signs the plan,[22] and the fact that the jurat to an affidavit filed pursuant to the statute does not mention the date upon which the affidavit was sworn to is not a fatal defect.[23]

(F) *Effect of Filing.* The effect of the filing of an adverse claim is to stay all proceedings in the land-office upon the application for a patent, except the publication of notice and the making and filing of the affidavit thereof, until the controversy is settled by a court, or the adverse claim is waived.[24]

(G) *Waiver of Adverse Claim.* It is apparent from an examination of the statute[25] that where one claims a right to all or any part of a mining location, and another seeks to obtain a patent to all or a portion of the same ground, the right of the claimant must be contested or it will be considered as waived.[26]

18 Nev. 80, 1 Pac. 448. See also *infra*, text and note 20.

17. Murphy *v.* Star Exploring, etc., Min. Co., 8 Brit. Col. 421 [*explaining* Noble *v.* Blanchard, 7 Brit. Col. 62], holding that an order to extend the time for filing an affidavit and plan required by the statute must be made by the court, and cannot be made by a judge in chambers.

Stronger ground is required for extending time in mining cases than in other matters. Kilbourne *v.* McGuigan, 5 Brit. Col. 233.

18. See Anchor *v.* Howe, 50 Fed. 366; General Mining Reg. 81.

19. In Anchor *v.* Howe, 50 Fed. 366, it was held that the regulation of the land-office requiring an actual survey of the ground in conflict to be made and platted by a deputy United States mineral surveyor is unreasonable and void.

20. Hoffman *v.* Beecher, 12 Mont. 489, 31 Pac. 92.

21. Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040; Hoffman *v.* Beecher, 12 Mont. 489, 31 Pac. 92; Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

An appeal may be taken from the decision of the local land-office by either party dissatisfied with the ruling. 2 Lindley Mines, § 737.

An adverse claim cannot be amended after the period of publication has expired. 2 Lindley Mines, § 734 [*citing* 2 Copp Min. Dec. 156].

22. Paulson *v.* Beaman, 32 Can. Sup. Ct. 655 [*reversing* 9 Brit. Col. 184].

23. Paulson *v.* Beaman, 32 Can. Sup. Ct. 655 [*reversing* 9 Brit. Col. 184], holding that even if the defect could be considered fatal at common law, it would be cured by the "British Columbia Oaths Act" and the British Columbia supreme court rule 415 of 1890.

24. U. S. Rev. St. § 2326 [U. S. Comp. St. (1901) p. 1430]; Fox *v.* Mackay, 1 Alaska 329; Deeney *v.* Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724; Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348; Richmond Min. Co. *v.* Rose, 114 U. S. 576, 5 S. Ct. 1055, 29 L. ed. 273; Mackay *v.* Fox, 121 Fed. 487, 57 C. C. A. 439.

Notice to claimants.— Upon the filing of an adverse claim it becomes the duty of the land-office to give notice in writing to both the adverse claimant and the applicant for a patent of its filing, and to direct suit to be brought thereon within the thirty days allowed by the statute. 2 Lindley Mines, p. 1717, par. 83.

25. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

26. Lily Min. Co. *v.* Kellogg, 27 Utah 111, 74 Pac. 518; Lavagnino *v.* Uhlig, 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808; Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. 562, 13 Sawy. 113.

(III) *Procedure on Contest* — (A) *Character of Proceeding* — (1) In General. There is no hard-and-fast rule as to the form or frame of an action to enforce an adverse claim;[27] but the character of the suit depends somewhat upon the jurisdiction under which it is brought and whether the applicant or adverse claimant is in possession of the property,[28] and will be determined from the issues raised on the pleadings.[29]

(2) In Absence of Statute. In the absence of state or territorial statute providing a specific remedy in such case, if the applicant for patent is in possession of the premises ejectment will lie to determine who is entitled to the possession of the land in conflict. If the adverse claimant is in the possession he might bring a suit in equity to have the title determined. If, however, the land is unoccupied a suit should be brought, under the provisions of the act of congress, to determine the adverse claim.[30]

(3) Under Statutes. As a matter of fact, however, in almost all the mining states we find special statutes which provide a system of proceedings especially adapted to this purpose.[31] Proceedings instituted under such statutes are held to be equitable in their nature.[32]

(4) Right to and Effect of Jury Trial. The supreme court of the United States holds that a right of trial by jury does not apply to suits of this character.[33] The supreme courts of Colorado and Idaho hold that the purpose of the action being to determine which, if either, is entitled to the area in conflict, there exists a right to a jury trial, irrespective of the form of the pleadings or the character of the action.[34] The supreme court of Arizona holds that, when a jury is called to try such cases, it is such a jury as is provided by the law of the jurisdiction and not a common-law jury.[35] If the proceeding is one equitable in its character, the verdict of a jury, if one is called, has the same effect as in any other equitable action, namely, it is simply advisory to the court.[36] When both parties

27. Corbin *v.* Lookout Min., etc., Co., 5 Brit. Col. 281.

28. See *infra*, III, B, 10, d, (III), (B), (2), (b), (c).

Suit in equity.— An action on an adverse to a mining claim is a suit in equity. Kirby *v.* Higgins, 33 Mont. 518, 85 Pac. 275. See also Mares *v.* Dillon, 30 Mont. 117, 75 Pac. 963.

Adverse suits or their equivalent.— Code action see Nome-Sinook Co. *v.* Simpson, 1 Alaska 578. Ejectment see Larned *v.* Jekins, 113 Fed. 634, 51 C. C. A. 344. Ejectment or suit to quiet title see Milligan *v.* Savery, 6 Mont. 129, 9 Pac. 894; Wolverton *v.* Nichols, 5 Mont. 89, 2 Pac. 308. Possessory action see Lebanon Min. Co. *v.* Consolidated Republican Min. Co., 6 Colo. 371. Quieting title see Allen *v.* Myers, 1 Alaska 114; Jones *v.* Pacific Dredging Co., 9 Ida. 186, 72 Pac. 956.

Adverse proceedings are essentially in ejectment, and not in trespass, and plaintiff must succeed by the strength of his own title. Clark *v.* Haney, 8 Brit. Col. 130.

29. Corbin *v.* Lookout Min., etc., Co., 5 Brit. Col. 281.

30. Young *v.* Goldsteen, 97 Fed. 303.

Under special statute of New Mexico ejectment is proper. Deeney *v.* Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724.

31. Bennett *v.* Harkrader, 158 U. S. 441, 15 S. Ct. 863, 39 L. ed. 1046; Wolverton *v.* Nichols, 119 U. S. 485, 7 S. Ct. 289, 30 L. ed. 474; Rutter *v.* Shoshone Min. Co., 75 Fed. 37; Doe *v.* Waterloo Min. Co., 43 Fed. 219.

But in suits arising under U. S. Rev. St. (1878) § 2326 [**U. S. Comp. St.** (1901) p. 1430] state statutes regulating general actions in regard to real estate have no application. All suits under such section must be based on an adverse claim filed in the land-office. Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439; Lily Min. Co. *v.* Kellogg, 27 Utah 111, 74 Pac. 518.

32. Mares *v.* Dillon, 30 Mont. 117, 75 Pac. 963; Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Doe *v.* Waterloo Min. Co., 43 Fed. 219.

33. Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113.

34. Manning *v.* Streblow, 11 Colo. 451, 18 Pac. 625; Becker *v.* Pugh, 9 Colo. 589, 13 Pac. 906; McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652; Burke *v.* McDonald, 2 Ida. (Hasb.) 339, 13 Pac. 351.

35. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641.

36. Gallagher *v.* Basey, 1 Mont. 457; Smith *v.* Richardson, 2 Utah 424; Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964; Noyes *v.* Mantle, 127 U. S. 348, 8 S. Ct. 1132, 32 L. ed. 168 [*affirming* 5 Mont. 274, 5 Pac. 856]; Basey *v.* Gallagher, 20 Wall. (U. S.) 670, 22 L. ed. 452; Shoshone Min. Co. *v.* Rutter, 87 Fed. 801, 31 C. C. A. 223; Preston *v.* Hunter, 67 Fed. 996, 15 C. C. A. 148; Doe *v.* Waterloo Min. Co., 43 Fed. 219.

Under the Montana statute, providing for litigating questions of this character, the

consent to proceed with the trial by a court, the jury is deemed to be waived even if the parties are alike entitled to a jury trial.[37]

(B) *Institution of Proceedings* — (1) WITHIN WHAT TIME. The suit must be commenced in support of the adverse claim within thirty days after the filing thereof.[38] In British Columbia the court has allowed an action to adverse a location to be commenced after the expiration of the statutory time upon a sufficient showing being made.[39]

(2) IN WHAT COURT — (a) IN GENERAL. The suit must be instituted in a court of competent jurisdiction and prosecuted to a final judgment with reasonable diligence.[40] There are two classes of courts which under the proper circumstances may be courts of competent jurisdiction, namely, the federal court[41] and the state court.[42]

(b) FEDERAL COURT. The earlier decisions of the federal courts were almost uniform in maintaining the jurisdiction of that court in adverse suits on the ground that the construction of a United States statute was involved.[43] But the

case being equitable, the verdict of a jury is simply advisory. Mares *v.* Dillon, 30 Mont. 117, 75 Pac. 963.

37. Schultz *v.* Allyn, (Ariz. 1897) 48 Pac. 960; Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; Cadierque *v.* Duran, 49 Cal. 356; Woods *v.* Sawtelle, 46 Cal. 389; Marshall Silver Min. Co. *v.* Kirtley, 12 Colo. 410, 21 Pac. 492; Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Bond *v.* Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. ed. 835.

38. Steves *v.* Carson, 42 Fed. 821, even though a state statute authorizes the beginning of another suit after the expiration of the thirty days.

Filing of an amended complaint after the thirty days, if the complaint does not state facts sufficient to constitute a cause of action, does not bring the suit within the statutory time. Keppler *v.* Becker, (Ariz. 1905) 80 Pac. 334. *Contra*, Woody *v.* Hinds, 30 Mont. 189, 76 Pac. 1.

Whether the suit was instituted in time cannot be raised except by answer or special plea. Providence Gold Min. Co. *v.* Marks, 7 Ariz. 74, 60 Pac. 938.

Failure to pay fee.— Such suit is commenced by the filing of a complaint within the thirty days, although no docket or other fee is paid until afterward. Richmond Min. Co. *v.* Rose, 114 U. S. 576, 5 S. Ct. 1055, 29 L. ed. 273.

Service of summons.— Although the summons is placed in the hands of the sheriff for service within the thirty days, the suit is not commenced in time if such summons is not served for more than a year. Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19.

39. *In re* Golden Butterfly Traction, etc., Mineral Claim, 5 Brit. Col. 445, where the boundaries of the Countess and Golden Butterfly mineral claims overlapped, and the Countess having applied for a certificate of improvements was adversed on the ground of defective location by the Golden Butterfly, with a view to secure the ground common to the two claims, and the secretary of the Golden Butterfly, who had relocated the remainder of the Countess ground in his own name as a fraction, assuming that, if the adverse of the Golden Butterfly was sustained, the whole of the Countess location would be invalidated, did not bring an action attacking it on his own behalf until after the expiration of the statutory sixty days from the publication of the notice of application for the certificate of improvements to the Countess, and upon his then applying to the court for leave to bring an action, it was held that the circumstances were sufficient ground for an order extending the time.

When renewal of summons improper.— Where plaintiff in an adverse action issued a writ on Aug. 5, 1897, and not having served it, obtained on Aug. 2, 1898, upon an *ex parte* application, an order for renewal, which was set aside on the application of defendant, it was held on appeal to the full court, that no reasonable explanation of the delay being given the order for renewal was properly set aside, but that section 37 of the British Columbia Miner Act does not enable a defendant to get rid of an action by applying in a summary way when not authorized by the ordinary practice of the court. Haney *v.* Dunlop, 6 Brit. Col. 520 [*affirming* 6 Brit. Col. 451].

40. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

Upon a failure to comply with the statute the adverse claim is deemed waived and the applicant proceeds to make his proof and obtain his patent the same as if no adverse claim had been filed. See *supra*, note 38.

41. See *infra*, III, B, 10, d, (III), (B), (2), (b).

42. See *infra*, III, B, 10, d, (III), (B), (2), (c).

43. Shoshone Min. Co. *v.* Rutter, 87 Fed. 801, 31 C. C. A. 223; Wise *v.* Nixon, 78 Fed. 203; Rutter *v.* Shoshone Min. Co., 75 Fed. 37; Burke *v.* Bunker Hill, etc., Min., etc., Co., 46 Fed. 644; Frank Gold, etc., Min. Co. *v.* Larimer Min., etc., Co., 8 Fed. 724, 2 McCrary 138; Trafton *v.* Nougues, 24 Fed. Cas. No. 14,134, 4 Sawy. 178.

The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the va-

supreme court of the United States has laid down the rule that the jurisdiction of federal courts in adverse suits of this character attaches only where there is diverse citizenship of the parties, and when the jurisdictional amount is involved.[44]

(c) STATE COURT. The purpose of such suit being to determine the question of the right of possession to the area in conflict, which is real estate, the state or territorial courts always have jurisdiction to try this question and therefore these suits may always be maintained in those courts.[45]

(c) *Prosecution to Final Judgment.* The suit must be prosecuted with reasonable diligence to a final judgment[46] or the adverse is waived;[47] but the only place in which this question can be raised is in the court where the suit is pending. The land-office has no jurisdiction of such question.[48]

(D) *Parties.* Only those who have filed claims in the land-office can be made parties.[49] Such suit cannot be maintained by an administrator of a deceased locator, but must be brought by his heirs.[50] In British Columbia all claimants under the Mineral Act to any part of the ground covered by the mineral claim of a plaintiff may be made defendants to an action by him to enforce an adverse claim by him against any one of such claimants.[51]

(E) *Pleadings*—(1) IN GENERAL. The form of the pleadings depends upon the character of the suit brought.[52]

(2) COMPLAINT—(a) IN GENERAL. In any action the complainant should state facts showing that plaintiff is entitled to the possession of the premises in question,[53] not only against defendant but against the United States,[54] by virtue of compliance with the requirements of the Mineral Act and the laws of the state or territory in which the property is situated with reference to the location of the claim.[55]

lidity of an authority disputed every time an act is done under such authority. Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276.

44. Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 20 S. Ct. 726, 44 L. ed. 864; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276.

45. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312; 420 Min. Co. *v.* Bullion Min. Co., 9 Nev. 240; Iba *v.* Central Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

Removal of cause.— Of course if the suit is one which might have been instituted in a federal court and is commenced in a state court, it may be removed to a federal court in the same manner as other suits. See, generally, REMOVAL OF CAUSES.

46. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

47. See Doon *v.* Tesh, 131 Cal. 406, 63 Pac. 764.

48. Richmond Min. Co. *v.* Rose, 114 U. S. 576, 5 S. Ct. 1055, 29 L. ed. 273.

49. Mt. Blanc Consol. Gravel Min. Co. *v.* Debour, 61 Cal. 364.

But one claiming ten years' possession is an adverse claimant and may adverse an application to the ground without seeking a patent himself. Shafer *v.* Constans, 3 Mont. 369.

A municipal corporation, although not an adverse claimant, in the land-office, may intervene in an adverse suit for the purpose of protecting its property situated on the claim and may show that neither party to the suit had complied with the law. Nome-Sinook Co. *v.* Simpson, 1 Alaska 578.

One succeeding to interest of another.— One who joins other owners in filing an adverse claim, and afterward succeeds to their interests, may maintain an adverse suit in his own name. Willitt *v.* Baker, 133 Fed. 937.

Non-joinder.— An adverse suit is not subject to dismissal for non-joinder as a party plaintiff one who acquires an interest after commencement of the suit, nor because one party has sold his interest after commencement of suit. Mackay *v.* Fox, 121 Fed. 487, 57 C. C. A. 439.

50. Keeler *v.* Trueman, 15 Colo. 143, 25 Pac. 311.

51. Dunlop *v.* Haney, 6 Brit. Col. 169.

52. See *infra*, III, B, 10, d, (III), (E), (2), (3).

Character of suit see *supra*, III, B, 10, d, (III), (A).

53. Morrison *v.* Regan, 8 Ida. 291, 67 Pac. 955.

Waiver of defect.— In Bushnell *v.* Crooke Min., etc., Co., 12 Colo. 247, 21 Pac. 931, it was held that, although the statute in that state required the complaint to state that plaintiff is entitled to possession, where the pleading alleges that plaintiff is the owner and in possession of the property claiming a right to the same, and defendant answers denying these allegations, any insufficiency of the allegation as to possession is waived.

54. Keppler *v.* Becker, (Ariz. 1905) 80 Pac. 334.

55. Durgan *v.* Redding, 103 Fed. 914. See

(b) AVERMENT OF PLAINTIFF'S QUALIFICATIONS. The complaint should also allege that plaintiff is qualified to receive the title from the United States and to hold the same, by stating either that he is a citizen of the United States or has declared his intention to become such.[56]

(c) AVERMENTS AS TO DEFENDANT'S APPLICATION AND PLAINTIFF'S ADVERSE CLAIM. The complaint should further allege that defendant has made application for a patent of the ground in controversy and that within the period of publication plaintiff has filed his adverse claim in the land-office.[57] While plaintiff must institute his suit in a court of competent jurisdiction in support of this adverse claim, within thirty days after filing thereof,[58] it is questionable whether this fact must appear from the allegations of the complaint — some courts holding that such necessity exists.[59] But it is difficult to understand how such allegation can be required, especially in jurisdictions where the filing of the complaint is the commencement of the action.[60]

(d) DESCRIPTION OF PROPERTY. Of course the complaint should contain a specific description of the ground in controversy.[61]

(3) ANSWER. The answer should refute the rights of plaintiff as alleged in the complaint and allege facts disclosing that defendant is entitled to the possession of the ground in controversy by virtue of a valid location.[62]

(F) *Evidence* — (1) BURDEN OF PROOF. Each party is an actor;[63] and each must rely on the strength of his own title, not the weakness of that of his adversary.[64]

also for sufficient complaints Jackson *v.* McFall, (Colo. 1906) 85 Pac. 638; Helbert *v.* Tatem, (Mont. 1906) 85 Pac. 733.

56. *Arizona.*— Schultz *v.* Allyn, (1897) 48 Pac. 960.

California.— Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708; Lee Doon *v.* Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621.

Colorado.— Keeler *v.* Trueman, 15 Colo. 143, 25 Pac. 311; Thomas *v.* Chisholm, 13 Colo. 105, 21 Pac. 1019.

Idaho.— Bohanon *v.* Howe, 2 Ida. (Hasb.) 453, 17 Pac. 583; Rosenthal *v.* Ives, 2 Ida. (Hasb.) 265, 12 Pac. 904.

Washington.— Stolp *v.* Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817.

United States.— North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

See 34 Cent. Dig. tit. "Mines and Minerals," § 94.

57. Mt. Blanc Consol. Gravel Min. Co. *v.* Debour, 61 Cal. 364; Marshall Silver Min. Co. *v.* Kirtley, 12 Colo. 410, 21 Pac. 492; Lily Min. Co. *v.* Kellogg, 27 Utah 111, 74 Pac. 518. But see Hain *v.* Mattes, 34 Colo. 345, 83 Pac. 127.

Although it describes the adverse claim as a protest the complaint has been upheld. Woody *v.* Hinds, 30 Mont. 189, 76 Pac. 1.

Nature of defendant's claim need not be set forth. Woody *v.* Hinds, 30 Mont. 189, 76 Pac. 1.

The complaint is construed with reference to its purpose rather than by strict rule, it being a statutory proceeding. Tonopah Fraction Min. Co. *v.* Douglass, 123 Fed. 936.

58. See *supra*, note 38.

59. Cronin *v.* Bear Creek Gold Min. Co., 3 Ida. 164, 32 Pac. 204; Hopkins *v.* Butte Copper Min. Co., 29 Mont. 396, 74 Pac. 1134; Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439; McKay *v.* McDougal, 19 Mont. 488, 48 Pac. 988; Mattingly *v.* Lewisohn, 8 Mont. 259, 19 Pac. 310.

60. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Rawlings *v.* Casey, 19 Colo. App. 152, 73 Pac. 1090; Pennsylvania Min. Co. *v.* Bales, 18 Colo. App. 108, 70 Pac. 444.

61. Cronin *v.* Bear Creek Gold Min. Co., 3 Ida. 614, 32 Pac. 204, so that if plaintiff is successful in the litigation the judgment may be rendered, which would be available for him to present to the land-office and obtain patent.

62. Aldous *v.* Hall Mines, 6 Brit. Col. 394, holding that if defendant wishes to rely on defects in plaintiff's location he must set them forth specifically in his pleading.

The issue to be tried is which, if either, of the parties is entitled to the possession of the ground in controversy, and therefore each party should allege all facts necessary to show his respective rights. See PLEADING. And see *infra*, text and note 84.

63. *California.*— Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708; Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; Lee Doon *v.* Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621.

Colorado.— Thomas *v.* Chisholm, 13 Colo. 105, 21 Pac. 1019.

Montana.— Wilson *v.* Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

Wyoming.— Iha *v.* Central Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

United States.— Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348; Jackson *v.* Roby, 109 U. S. 440, 3 S. Ct. 301, 27 L. ed. 990.

See 34 Cent. Dig. tit. "Mines and Minerals," § 102 *et seq.*

64. Hahn *v.* James, 29 Mont. 1, 73 Pac. 965; Murray Hill Min., etc., Co. *v.* Havenor, 24 Utah 73, 66 Pac. 762; Sherlock *v.* Leigh-

The same rules of evidence are applicable in such suits as apply to actions generally,[65] except that with reference to the question as to which of the parties is entitled to the possession of the ground in controversy, under the statute of the United States,[66] unless it is shown that one of the parties is entitled to such possession not only against the other, but against the United States, the judgment shall not be in favor of either. The United States is therefore, while not a party in such sense that its rights can be determined adversely to it,[67] a quasi-party, and its interests must be looked after.

(2) ADMISSIBILITY. Either party may show that the location of the other was not made upon unappropriated public domain.[68] Evidence can only be considered which relates to the area in conflict.[69] There is no issue as to whether or not there has been five hundred dollars' worth of improvements placed on the land by either party.[70]

(3) WEIGHT AND SUFFICIENCY. The proof must establish a valid location under the local rules and regulations.[71] And in British Columbia a prior locator who is plaintiff in adverse proceedings makes out a *prima facie* case by proving

ton, 9 Wyo. 297, 63 Pac. 580, 934; Willitt *v.* Baker, 133 Fed. 937.

In Canada some of the cases have held that the burden of proof is on the adverse claimant who must give affirmative evidence of his own title. Caldwell *v.* Davys, 7 Brit. Col. 156. See also Pavier *v.* Snow, 7 Brit. Col. 80. But Brit. Col. Acts (1898), c. 33, § 11, established the rule that in adverse proceedings thereafter brought each party shall give affirmative evidence of title to the ground in controversy, and if such title shall not be established by either party the judge shall so find and judgment shall be entered accordingly. This provision was designed where there is a real controversy to get rid of the rule theretofore acted upon that plaintiff must succeed on the strength of his own title, and that defendant might rely on the weakness of his adversary's title and to substitute as a new rule for determining the title to mining claims that each party has to bring forward the evidence of his own title, thereby putting both parties on an equality as regards the onus of proof; but it presupposes a real controversy and not a mere challenge by a party who goes into court and admits no title in himself, and hence where, at the commencement of the trial of an action to enforce an adverse claim plaintiff, claiming in respect of two mineral claims, admitted inability to support the allegation that the boundaries of such claims embraced any part of the area within the limits of the claim sought to be adversed, and could not pretend to claim any right to any part of the land or minerals within the limits of such claim, it was open to defendants, as soon as this admission was made, to move for dismissal for the reason that there was no ground of controversy, and they were not bound in the circumstances to bring forward their title for investigation. Voigt *v.* Groves, 12 Brit. Col. 170. The statute referred to has been held to apply to all adverse proceedings coming on for trial, including those commenced before its enactment. Schomberg *v.* Holden, 6 Brit. Col. 419.

Plaintiff must affirmatively show due location of his claim.— Clark *v.* Haney, 8 Brit. Col. 130.

A party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely on the non-production of certificates of work. Cranston *v.* English-Canadian Co., 7 Brit. Col. 266.

Matters admitted by the answer need not be proved by plaintiff. Jackson *v.* White Cloud Gold Min., etc., Co., (Colo. 1906) 85 Pac. 639.

65. Evidence generally see EVIDENCE.

66. Thomas *v.* Chisholm, 13 Colo. 105, 21 Pac. 1019; Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113, which decisions are under U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430] as amended by Act Cong. March 3, 1881, c. 140 (21 U. S. St. at L. 505) [U. S. Comp. St. (1901) p. 1431] which amendment provides that if in any action brought pursuant to the amended statute "title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict," etc. See also *supra*, note 63.

67. Keppler *v.* Becker, (Ariz. 1905) 80 Pac. 334; Schultz *v.* Allyn, (Ariz. 1897) 48 Pac. 960; Butte Land, etc., Co. *v.* Merriman, 32 Mont. 402, 80 Pac. 675, 108 Am. St. Rep. 590; Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113.

68. Moffat *v.* Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139; McConaghy *v.* Doyle, 32 Colo. 92, 75 Pac. 419; Girard *v.* Carson, 22 Colo. 345, 44 Pac. 508; Porter *v.* Tonopah North Star Tunnel, etc., Co., 133 Fed. 756.

69. Mares *v.* Dillon, 30 Mont. 117, 144, 75 Pac. 903, 969.

70. Wilson *v.* Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; Stolp *v.* Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817.

71. McWilliams *v.* Winslow, 34 Colo. 341, 82 Pac. 538 (holding that plaintiff was not entitled to recover in the absence of evidence that the ground he sought to locate was unoccupied and unappropriated public

his free miner's certificate, prior location and due record, and the overlapping of the claims in dispute.[72]

(G) *Trial*[73] — (1) In General. The trial follows the usual course of procedure in the trial of other cases in the state where suit is brought,[74] including the giving or refusal of instructions[75] and the like.[76] If plaintiff wishes to attack defendant's title he must attack it while proving his own and not wait until rebuttal.[77]

(2) Following Practice of State Courts. There has been a variety of decisions upon the question of proceedings in adverse suits. Some state courts hold that the act of congress does not interfere with the jurisdiction and practice of state courts, and that when a suit is brought to determine an adverse claim the proceedings will be conducted in the same manner as suits brought to determine other adverse claims, and that the court will not consider the proceedings in the land-office, or whether the judgment entered will be of any avail therein.[78]

(3) Special Findings or Verdicts. The supreme court of Idaho has held that there must be a special verdict if a jury is called, or a special finding by the

mineral domain, subject to location prior to his attempted location); Becker *v.* Pugh, 9 Colo. 589, 13 Pac. 906; Shafer *v.* Constans, 3 Mont. 369.

Testimony which sustains the validity of a location will be preferred. Credo Min., etc., Co. *v.* Highland Min., etc., Co., 95 Fed. 911. And evidence tending to establish the senior locator's discovery will be viewed in the most favorable light such evidence will justify. Ambergris Min. Co. *v.* Day, (Ida. 1906) 85 Pac. 109.

Monuments on ground or calls in location notice.— Where the monuments are found upon the ground, or their position or location can be determined with certainty, the monuments govern rather than the location certificate; but, where the courses and distances are not defined with certainty by monuments or stakes, the calls in the location notice must govern. Treadwell *v.* Marrs, (Ariz. 1905) 83 Pac. 350.

72. Voigt *v.* Groves, 12 Brit. Col. 170; Schomberg *v.* Holden, 6 Brit. Col. 419.

73. **Right to jury trial.**— As we have seen a suit to determine the right of possession and not to regain the possession of the ground in controversy is a suit in equity and therefore the right of trial by jury is not guaranteed by the constitution of the United States or of the state. See *supra*, III, B, 10, d, (III), (A), (4.)

74. See, generally, Trial.

75. **Instructions** generally see Trials.

It is proper to instruct the jury that where the evidence is such that the jury might have found that neither party had made a valid location a verdict might be rendered accordingly. San Miguel Consol. Gold Min. Co. *v.* Bonner, 33 Colo. 207, 79 Pac. 1025.

Under a statute permitting a division of the ground in dispute, if warranted by the facts, it is error to refuse an instruction allowing such a verdict. Currency Min. Co. *v.* Bentley, 10 Colo. App. 271, 50 Pac. 920.

76. See *infra*, III, B, 10, d, (III), (G), (2), (3).

Viewing ground by jury.— In Colorado there appears to be a statute authorizing the jury to view the premises. The supreme court of Colorado has held, however, that such statute need not be complied with in case the party requesting the view had introduced no evidence to establish his case. McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64; Connolly *v.* Hughes, 18 Colo. App. 372, 71 Pac. 681. Also that where such request was granted it was proper to appoint one of the parties to the action as one of the guides. Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395. Under this statute the court properly refused to charge the jury that they were authorized to make an independent investigation. Fleming *v.* Daly, 12 Colo. App. 439, 55 Pac. 946.

77. Dunlop *v.* Haney, 7 Brit. Col. 1, 305.

78. Schroder *v.* Aden Gold Min. Co., 144 Cal. 628, 78 Pac. 20; Gruwell *v.* Rocca, 141 Cal. 417, 74 Pac. 1028; Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040; 420 Min. Co. *v.* Bullion Min. Co., 9 Nev. 240.

Dismissal and nonsuit.— In Colorado it has been held that in a trial of such actions a nonsuit may be granted, but that the judgment entered thereon would be of no avail in the land department (McWilliams *v.* Winslow, 34 Colo. 341, 82 Pac. 538; Moffat *v.* Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139; Kirk *v.* Meldrum, 28 Colo. 453, 65 Pac. 633), and that the court may dismiss the action for want of prosecution (Carnahan *v.* Connolly, 17 Colo. App. 98, 68 Pac. 836). While in Wyoming it is held that a nonsuit cannot be granted. Iba *v.* Central Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20. Whether or not a different rule would apply from that announced in the California and Colorado cases where the state legislature had enacted a statute for the express purpose of carrying into effect the provisions of U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430] has not been decided.

court where a jury does not intervene, upon the facts necessary to show the qualifications of the successful party and his compliance with the law.[79] And the earlier rulings of Colorado were to the same effect.[80] This rule was inferentially sanctioned by the supreme court of the United States.[81]

(H) *The Judgment*[82] *and Its Effect.* Under the Mineral Act,[83] when a judgment is finally entered in an adverse suit, the successful party may present to the local land-office a certified copy of the judgment-roll and procure a patent to the ground to the possession of which it has been finally decided that he is entitled. Where both parties in adverse proceedings fail to establish title to the property in question, it is proper to enter judgment accordingly, without costs to either party.[84] If the judgment is to the effect that neither party is entitled to possession of the ground in controversy, upon presentation of a certified copy of the judgment-roll to the land department, the proceedings for patent are at an end. After filing the certified copy of the judgment-roll, the proceedings in the land-office are exclusively between the party recovering such judgment and the government. The fact still remains for determination by the land department of the character of the land, and whether the conditions of the law have been complied with.[85] A judgment in an adverse action is not a judgment *in rem*.[86]

(I) *Appeal.* In British Columbia it has been held that a statutory provision that appeals from judgments of mining courts "may be in the form of a case settled and signed by the parties" is not imperative, but such appeal may be brought in the same form as in ordinary cases.[87] Owing to the nature of the subject-matter the court requires stronger grounds for extending the time for appealing in mining cases than in other matters.[88] No costs of appeal will be given to an appellant who succeeds on a point not taken below.[89]

e. Final Entry, Payment, and Issuance of Patent — (I) *In Uncontested Proceedings.* If at the expiration of sixty days no adverse claim is filed[90] and the claimant files in the land-office proof of compliance with the terms and require-

79. Burke *v.* McDonald, 2 Ida. (Hasb.) 679, 33 Pac. 49; Rosenthal *v.* Ives, 2 Ida. (Hasb.) 265, 12 Pac. 904.

80. Thomas *v.* Chisholm, 13 Colo. 105, 21 Pac. 1019; Manning *v.* Strehlow, 11 Colo. 451, 18 Pac. 625; McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652.

Responsive verdict.— When the petition alleges ownership and possession of property by plaintiff, who claims it, and the answer denies the same, a verdict that plaintiff is the owner and entitled to possession of the land in controversy is responsive to the pleadings. Bushnell *v.* Crooke Min., etc., Co., 12 Colo. 247, 21 Pac. 931.

81. Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348. See also *supra*, note 66.

82. Judgment or decree generally see Equity, 16 Cyc. 471 *et seq.*; Judgments, 23 Cyc. 623.

Amendment on appeal.— If the judgment rendered on a verdict that plaintiff is the owner and entitled to the possession of the land in controversy does not specifically describe the premises as set forth in the complaint, it may be amended in the appellate court. Bushnell *v.* Crooke, Min., etc., Co., 12 Colo. 247, 21 Pac. 931.

83. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

84. Ryan *v.* McQuillan, 6 Brit. Col. 431. Under the amendatory act of congress above referred to (*supra*, note 66), it is further provided that, where the title to the ground in controversy is not established by either party, "costs shall not be allowed to either party." See also *supra*, notes 64, 66.

Res judicata.— Where a judgment dismissing an action is stated to be without a declaration of title to either party the latter statement in it operates to prevent the plea of *res judicata* being set up by defendant in this action. Dunlop *v.* Haney, 7 Brit. Col. 307.

85. Wright *v.* Hartville, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450; Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113.

86. Fry *v.* Botsford, 9 Brit. Col. 234 [*following* Bentley *v.* Botsford, 8 Brit. Col. 128], holding that one coöwner of a mineral claim is not estopped by the result of an action instituted by an adverse claimant against another coöwner who has applied for a certificate of improvements.

87. Kinney *v.* Harris, 5 Brit. Col. 229. See also *infra*, III, B, 12, b, (VI), note 4.

88. Kinney *v.* Harris, 5 Brit. Col. 229.

89. Aldous *v.* Hall Mines, 6 Brit. Col. 394.

90. No court will enjoin the applicant from proceeding to a patent, if no adverse claim is filed and suit commenced thereunder. Brandt *v.* Wheaton, 52 Cal. 430.

ments of the statute as prescribed therein, purchases and pays for the land, receives his final receipt and, in the absence of protest, his patent will issue to him in due course of time.[91]

(II) *In Contested Proceedings.* Upon filing the certified copy of the judgment-roll, the party in whose favor the judgment has been rendered may make his proofs of the other facts necessary to entitle him to a patent, make his payment of the purchase-price, and receive his final receipt.[92]

f. Under Particular Entries and Claims — (I) *Veins in Placer Claims* — (A) *In General.* By the provisions of the Mineral Act,[93] where one is in possession of a placer claim and also of a vein or lode included within the boundaries thereof, and makes application for a patent to the placer claim, he may include the vein or lode in such application and a patent will issue for the placer claim including the vein or lode upon payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof and two dollars and fifty cents per acre for the remainder of the surface of the placer. It also provides that when a vein or lode is known to exist within the boundaries of the placer, and the applicant for patent of the placer does not include it in his application, it should be construed as a conclusive declaration that he has no right to possession thereof.[94] The statute further provides that when the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable minerals and other deposits within the boundaries thereof.[95]

(B) *Known Lode or Vein* — (1) What Constitutes. A lode located prior to the application for a patent to a placer claim is a known lode within the meaning of this section, whether known to the applicant or not;[96] but it may be known to exist without location,[97] and if such location be abandoned prior to the appli-

91. U. S. Rev. St. (1878) § 2325 [U. S. Comp. St. (1901) p. 1429], where after providing for the application and certain proceedings thereon (see *supra*, III, B, 10, c, note 90) it is further provided: "The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits."

92. U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430].

93. U. S. Rev. St. (1878) § 2333 [U. S. Comp. St. (1901) p. 1433].

94. Mt. Rosa Min., etc., Co. *v.* Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289; Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 12 S. Ct. 543, 36 L. ed. 201; U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571; Iron Silver Min. Co. *v.* Reynolds, 124 U. S. 374, 8 S. Ct. 598, 31 L. ed. 466.

95. The section therefore provides for three classes of cases: (1) For a patent of the included vein with the placer; (2) where the applicant does not include it in his application, and a vein is known to exist; and (3) where the vein is not known to exist at the time of the application for the placer patent. Iron Silver Min. Co. *v.* Reynolds, 124 U. S. 374, 8 S. Ct. 598, 31 L. ed. 466; Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 6 S. Ct. 601, 29 L. ed. 774. See the statute cited *supra*, note 93.

96. Mantle *v.* Noyes, 5 Mont. 274, 5 Pac. 856 [*affirmed* in 127 U. S. 348, 8 S. Ct. 1132, 32 L. ed. 168].

97. Sullivan *v.* Iron Silver Min. Co., 143 U. S. 431, 12 S. Ct. 555, 36 L. ed. 214; Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 12 S. Ct. 543, 36 L. ed. 201; Bevis *v.* Markland, 130 Fed. 226.

cation for the placer patent it will not be considered a known lode.[98] To be a known vein it must be clearly ascertained and be of such extent as to render the land more valuable on that account, and justify its exploitation.[99] It must either be known to the applicant for placer patent, or known to the community generally or disclosed by workings.[1] It must be a matter of actual knowledge, and cannot be based upon conjecture or belief.[2]

(2) BURDEN OF PROOF AND PRESUMPTIONS. The burden of proving the existence of a known vein is upon the person asserting it.[3] And the issuance of a patent on the lode claim subsequent to the issue of the placer patent does not create a conclusive presumption that the vein was known to exist at the date of the placer application.[4]

(3) QUESTION OF FACT. The verdict of a jury based upon substantial evidence in support of facts necessary to establish the existence or non-existence of a known vein or lode will not be disturbed, although there may be conflicting evidence.[5]

(4) WHO MAY LOCATE. If a vein or lode is known to exist within the limits of a placer claim before the application for patent on the placer claim it will be excepted from the operation of the placer patent, and may be located after such patent by any third person, but the location may not exceed twenty-five feet in width on each side of the lode.[6] But it cannot be located by any one, through the commission of a trespass upon the placer claim.[7]

(5) PROCEEDINGS FOR PATENT. Proceedings for a patent of a known lode not included in the application for a placer claim are the same as above indicated for the acquirement of a patent upon lode claims generally.[8] The only difference being that the locator is not entitled to a patent for a claim of full width, but is restricted to twenty-five feet on each side of the lode or vein. If not known at the date of the application for the placer patent, it passes by such patent.[9]

(II) *MILL SITES.* A mill site located in connection with a lode claim is patented with such claim.[10] Mill sites not located in connection with a lode claim

98. McConaghy *v.* Doyle, 32 Colo. 92, 75 Pac. 419; Migeon *v.* Montana Cent. R. Co., 77 Fed. 249, 23 C. C. A. 156.

A finding that one entered upon a prior existing valid placer location and discovered and located a lode is in effect a finding that the lode was unknown at the time of the entry. Clipper Min. Co. *v.* Eli Min., etc., Co., 29 Colo. 377, 68 Pac. 286, 93 Am. St. Rep. 89, 64 L. R. A. 209.

99. McConaghy *v.* Doyle, 32 Colo. 92, 75 Pac. 419; Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207; Casey *v.* Thieviege, 19 Mont. 341, 48 Pac. 394, 61 Am. St. Rep. 511; Butte, etc., Min., Co. *v.* Sloan, 16 Mont. 97, 40 Pac. 217; Brownfield *v.* Bier, 15 Mont. 403, 39 Pac. 461; Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 12 S. Ct. 543, 36 L. ed. 201; U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. St. 195, 32 L. ed. 571; Migeon *v.* Montana Cent. R. Co., 77 Fed. 249, 23 C. C. A. 156 [*affirming* 68 Fed. 811].

1. Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 12 S. Ct. 543, 36 L. ed. 201.

2. Sullivan *v.* Iron Silver Min. Co., 143 U. S. 431, 12 S. Ct. 555, 36 L. ed. 214; Dahl *v.* Raunheim, 132 U. S. 260, 10 S. Ct. 74, 33 L. ed. 324; Iron Silver Min. Co. *v.* Sullivan, 16 Fed. 829, 5 McCrary 274.

3. McConaghy *v.* Doyle, 32 Colo. 92, 75 Pac. 419; Montana Cent. R. Co. *v.* Migeon, 68 Fed. 811 [*affirmed* in 77 Fed. 249, 23 C. C. A. 156].

4. Iron Silver Min. Co. *v.* Campbell, 135 U. S. 286, 10 S. Ct. 765, 34 L. ed. 155.

5. Butte, etc., Min. Co. *v.* Sloan, 16 Mont. 97, 40 Pac. 217; Brownfield *v.* Bier, 15 Mont. 403, 39 Pac. 461; Dahl *v.* Raunheim 132 U. S. 260, 10 S. Ct. 74, 33 L. ed. 324. See also McConaghy *v.* Doyle, 32 Colo. 92, 75 Pac. 419, where it was held that the testimony entirely failed to establish a state of facts which would justify the conclusion that a known vein existed within the placer limits.

6. Mt. Rosa Min., etc., Co. *v.* Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289.

7. Clipper Min. Co. *v.* Eli Min., etc., Co., 29 Colo. 377, 68 Pac. 286, 93 Am. St. Rep. 89, 64 L. R. A. 209 [*affirmed* in 194 U. S. 220, 24 S. Ct. 632, 48 L. ed. 944].

But if one enters upon the placer claim peaceably and makes a valid location of a lode within its boundaries, without objection of the placer claimant, he will be entitled to receive a patent for such lode claim. See *supra*, text and note 93 *et seq.*

8. See *supra*, III, B, 10, a–e.

9. Raunheim *v.* Dahl, 6 Mont. 167, 9 Pac. 892; Montana Copper Co. *v.* Dahl, 6 Mont. 131, 9 Pac. 894.

10. U. S. Rev. St. (1878) § 2337 [U. S. Comp. St. (1901) p. 1436]. See also Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

are patented by proceedings similar to those provided for patenting lode claims, but quartz mills or reduction works are the only improvements upon which the entry may be based. Such mill sites cannot be patented by one for another.[11]

(III) *PATENTS FROM POSSESSION.* The Mineral Act[12] provides that patents may be issued by the land department based exclusively upon possession of mineral ground by the applicant without any location.

(IV) *COAL LAND ENTRIES.* Sufficient has been said with reference to the obtaining of patents on this class of claims.[13]

g. Effect of Final Receipt or Certificate — (I) *IN GENERAL.* A final receipt issued by the land-office upon an application for patent is an acknowledgment by the government that the applicant has made his proof, complied with the law, paid the purchase-price of the property, and is entitled to his patent, subject to the confirmation of the commissioner of the general land-office and the secretary of the interior. In the absence of fraud and upon a compliance with the law on the part of the applicant, the land department having jurisdiction,[14] the applicant is regarded, as to third persons and the government, the equitable owner of the land. He is treated as the owner. The entry is complete and is not subject to be set aside upon collateral attack.[15] But the land department having jurisdiction

Application for patent is made for the lode claim and mill site together, but it must be accompanied by the affidavit of two disinterested witnesses as to the non-mineral character of the mill site and as to its use.

The plat must be posted on both the lode claim and the mill site, and must contain a diagram of each. Land-Office Rules No. 73.

It must be surveyed with and tied to the lode.— A lode claim in the survey is usually designated as "Lot No. . . . A," and the mill site as "Lot No. . . . B." Land-Office Rules No. 73.

No separate receipt or certificate is issued on entry, and the lode and mill site are covered by the same patent. The improvements on the lode requisite for patent answer for the mill site also. The surface is paid for at the rate of five dollars per acre. U. S. Rev. St. (1878) §§ 2333, 2337 [U. S. Comp. St. (1901) 1433, 1436].

11. Hamburg Min. Co. *v.* Stephenson, 17 Nev. 449, 30 Pac. 1088.

Such mill site must be upon non-mineral land.— Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

And if a lode claimant adverses an application for a patent of the mill site he must show that the lands contained minerals which could have been profitably worked at the time the mill owner's rights attached. Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

12. U. S. Rev. St. (1878) § 2332 [U. S. Comp. St. (1901) p. 1433]. Where the application is made for a patent under this section the land-office requires very strict proof. The applicant must produce evidence of taking possession; copies of all conveyances and abstract of title; a duly certified copy of the statutes of limitation for mining claims in the state or territory, together with his own sworn statement giving a succinct and clear declaration of the facts and the origin of his title, and likewise as to the continuance of his possession; he must set forth the area thereof; the nature and extent of the improvements thereon; whether there has been any opposition to his possession or litigation in regard to his claim, and, if so, when the same ceased, and whether such cessation was caused by compromise, judicial decree, or otherwise. This should all be supported by corroborative testimony of disinterested persons. He must likewise file a certificate of the court having jurisdiction of mining cases within the judicial district embracing the claim that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there is no litigation before such court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in that state or territory other than that which is finally decided in favor of the applicant. Such possession and working in the absence of any adverse claim is equivalent to a location. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Cleary *v.* Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207. But such facts are not a sufficient defense to an action brought in support of an adverse against an application for a patent. Cleary *v.* Skiffich, *supra*.

13. See *supra*, III, B, 9, b.

14. **The land department must have jurisdiction** to issue it, or it will be void. McEvoy *v.* Hyman, 25 Fed. 539.

15. Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439; Brown *v.* Gurney, 201 U. S. 184, 26 S. Ct. 509, 50 L. ed. 717; Neilson *v.* Champagne Min., etc., Co., 119 Fed. 123, 55 C. C. A. 576; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355; Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. 562, 13 Sawy. 113.

One whose adverse claim has been dismissed cannot contend that the patent is void because the receiver of the public land-

of the issuance of patent has the right at any time before such issue to cancel the final receipt or the entry, on the ground of the fraud of the applicant against the government, on account of his failure to comply with the laws which give the department power to issue the patent, or because the department concludes that it has no jurisdiction in the premises to issue the patent.[16]

(II) *Cancellation*—(A) *In General.* Cancellation of a final receipt or entry may result from the filing of a protest by a third person against the issuance of a patent,[17] or from the independent action of the government.[18]

(B) *Upon Protest.* A protest is filed by a mere volunteer, acting as a friend of the government.[19] It can never be filed when an adverse claim would lie. Its purpose is simply to call the attention of the land department to some omission, irregularity, or fraud of the applicant, or want of jurisdiction of the department.[20]

(C) *Upon Action of the Government.* The land department may also of its own motion direct a hearing upon the question as to the fraud of the applicant, or his non-compliance with the law, and if after such hearing it is satisfied that the applicant has been guilty of fraud or that he has failed to comply with the law giving him the right to a patent, or if it concludes that it has no jurisdiction to issue the patent, it will, of its own motion, cancel the final receipt or entry. The grounds for cancellation of a final receipt or entry are the same in either case.[21] The only difference is the vehicle through which the fraud, or non-compliance with the law, or want of jurisdiction is presented to the land department.[22]

(D) *Effect of Cancellation.* Such cancellation, however, simply determines that the application for a patent is denied and in no way affects the location.[23]

office accepted the purchase-price and gave his receipt while the suit was pending. Deno *v.* Griffin, 20 Nev. 249, 20 Pac. 308.

16. See *infra*, III, B, 10, g, (II).

17. See *infra*, III, B, 10, g, (II), (B).

18. See *infra*, III, B, 10, g, (II), (C).

19. Beals *v.* Cone, 188 U. S. 184, 23 S. Ct. 275, 47 L. ed. 435 [*affirming* 27 Colo. 473, 62 Pac. 948].

Protestant is not given the right to a patent to the ground in question, if the protest is sutained and the final receipt or entry is canceled, although such cancellation may in some respects inure to his benefit. See Beals *v.* Cone, *supra*.

20. **A protest may be filed at any time** before the issuance of the patent when no adverse claim has been filed, but when such claim has been filed and suit instituted thereon, the land department having no jurisdiction to proceed until after the adverse is determined, of course can receive no protest during that time.

Its two purposes.— As a matter of common practice a protest is usually filed for one of two purposes: (1) To contest the question of the character of the land located, that is, whether it is mineral or agricultural; and (2) to call the attention of the department to the fact that the applicant is guilty of fraud toward the government or that he has not complied with the laws entitling him to a patent of the property.

Upon the filing of the protest, the land department considers its sufficiency in form and its efficiency in substance, and either dismisses it or orders a hearing upon its allegations.

The department has full jurisdiction over all questions pertaining to protests and the courts have nothing to do with them. If the land department orders a hearing and is satisfied of the truth of the allegation of the protest and that material fraud or non-compliance with the law is shown, it cancels the final receipt or entry.

21. See cases cited *infra*, this and succeeding note.

Cancellation is proper when lands are not mineral in character (German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206), or when there is a failure of proof of compliance with the provisions of the Mineral Act, or with the rules and regulations of the interior department (Mineral Farm Min. Co. *v.* Barrick, 33 Colo. 410, 80 Pac. 1055; Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439; Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505).

22. See cases cited *infra*, this note.

Notice and opportunity to be heard.— The cancellation can only be ordered after notice to the applicant for patent and an opportunity of being heard. Mineral Farm Min. Co. *v.* Barrick, 33 Colo. 410, 80 Pac. 1055; Rebecca Gold Min. Co. *v.* Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17. And the question whether notice was given is one of fact and its determination is within the jurisdiction of the land department. Mineral Farm Min. Co. *v.* Barrick, *supra*.

Want of an adverse claim or suit does not prevent the cancellation of the entry or final receipt by the land department. Mineral Farm Min. Co. *v.* Barrick, 33 Colo. 410, 80 Pac. 1055.

23. Rebecca Gold Min. Co. *v.* Bryant, 31 Colo. 119, 71 Pac. 1110; Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; Peoria, etc., Min., etc., Co. *v.* Turner, 20 Colo.

But if the act of cancellation by the land department is wholly unauthorized it is void.[24]

h. Validity of Patents — (i) *In General.* Where the land department has jurisdiction to issue a patent to a mining claim, and acts within such jurisdiction, and such action is not induced by the fraud of the applicant, its judgment is final and the patent is a valid transfer of the interest of the government in and to the land conveyed.[25] The want of authority which will make a patent void is a total want of authority to issue the same for the subject of the grant and not a latent impropriety in exercising the authority by reason of unknown imposition moving thereto.[26]

(ii) *Patent Including More Than One Location.* A patent is valid, although it includes several placer locations, if they are all owned by the same applicant.[27] This rule has also been extended to patents upon quartz locations,[28] and it seems that the original boundaries of the several locations need not be preserved in the patent.[29]

(iii) *Patent For Excessive Location.* It has, however, been held that a patent cannot be issued for a quartz location exceeding three hundred feet on each side of the vein and it is therefore void as to the excess.[30] But it has also been held that in an action at law the fact that the vein disclosed in the discovery shaft of a patented claim departs from the side lines, as marked upon the surface,

App. 474, 79 Pac. 915. But where it is shown that a receipt or final entry have been canceled on the ground that the applicant failed to represent the claim pending the application and prior to final payment, the ground becomes subject to relocation. Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439.

The cancellation of a receiver's receipt or of the entry adjudicates the fact that the entryman obtained no title at all by his entry, and by such act of the land-office the entryman is deprived of the ability to claim any right under his receipt. Murray *v.* Polglase, 23 Mont. 401, 59 Pac. 439.

Appeal to secretary of interior.— Where the land-office holds an entry for cancellation, and upon appeal to the secretary of the interior the judgment is affirmed, the cancellation is complete. Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505. But an order of the department or secretary of the interior that unless the applicant releases from the entry a certain portion of the ground his application shall be canceled does not make the cancellation complete until such release is perfected, whereupon the ground is abandoned and may be relocated. Gurney *v.* Brown, 32 Colo. 472, 77 Pac. 357 [*affirmed* in 201 U. S. 184, 26 S. Ct. 509, 50 L. ed. 717].

24. Rebecca Gold Min. Co. *v.* Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17.

25. See *infra*, III, B, 10, h, (II) *et seq.*

Presumption in favor of validity.— If under any circumstances a patent issued after the passage of the act of 1872 may be valid without the parallelism of end lines required by that act, the law will presume that such circumstances exist as public officers are presumed to do their duty. Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 9 Morr. Min. Rep. 578 [*affirmed* in 103 U. S. 839, 26 L. ed. 557, 560 note].

Designation in patent and application.— A patent designating the ground as a placer claim is valid, although the application designates the claim as a "placer mining or stone quarry claim." Freezer *v.* Sweeney, 8 Mont. 508, 21 Pac. 20.

26. Kahn *v.* Old Tel. Min. Co., 2 Utah 174. See also Francoeur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351.

27. Poire *v.* Leadville Imp. Co., 6 Colo. 413; Poire *v.* Wells, 6 Colo. 406; Tucker *v.* Masser, 113 U. S. 203, 5 S. Ct. 420, 28 L. ed. 979; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875 [*reversing* 21 Fed. Cas. No. 12,239*a*].

28. Peabody Gold-Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657; Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 73 Fed. 597.

29. Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 73 Fed. 597.

30. Lakin *v.* Roberts, 54 Fed. 461, 4 C. C. A. 438 [*affirming* 53 Fed. 333].

If the patent be for a consolidated claim under the act of 1866, the patent may cover ground in excess of three hundred feet in width on each side of the vein and be valid. Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657; Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333 [*affirming* 73 Fed. 597].

A mining patent was held valid which covered three hundred feet on each side of the lode, although the rules of the district at one time provided that a mining claim should not exceed one hundred feet on each side of each wall of the vein. There was uncertainty as to whether this local rule was in force or had been amended and the question of its existence was before the land-office which held that the rule in force had not been violated. Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256, 9 S. Ct. 511, 32 L. ed. 906.

cannot be shown for the purpose of invalidating the patent as to that part of the claim which lies beyond such departure.[31]

(IV) *Exceptions and Reservations.* The officers of the land department have no authority to insert any exceptions in a patent which are not provided for by the Mineral Act, and if they do such exceptions are void.[32] The reservation of a known vein in a placer patent is authorized and valid.[33] But, a certificate of purchase of a placer claim issued after the act of July 9, 1870,[34] and prior to the act of May 10, 1872,[35] confers upon the purchaser an equitable title and vested right to a patent, which is not subject to section 11 of the latter act, and a reservation made in a patent for such claim, issued after May 10, 1872, of all known lodes within the limits of the placer claim, was unauthorized and void.[36]

(V) *Pending Adverse Suit.* A patent issued by the land department, while an adverse suit commenced under the United States statute is pending, is void.[37]

(VI) *Where Two Patents to Same Lands.* Where there are two patents to the same land, and the decision as to which one is valid depends on facts not shown by the patents themselves, such facts may be shown in an action to establish the validity of one patent.[38]

i. Construction and Operation of Patents — (I) *In General.* A patent from the United States is conclusive of all the facts necessary to establish the validity thereof as against a party claiming adverse rights.[39] In construing a patent monuments control courses or distances if there is satisfactory proof of their location.[40] A patent conveys the surface and all veins beneath not reserved or otherwise granted,[41] and if coöwners procure the patent to be issued to them in their own names, omitting the names of other coöwners, the former will take the title subject to the interests of the latter and will become trustees for them to the extent of such interests.[42]

(II) *Extralateral Rights.* The owner of a patented location derives extralateral rights only from the location upon which the patent is based.[43] And such extralateral rights are determined by the actual position of the vein in the

31. Argonaut Consol. Min., etc., Co. *v.* Turner, 23 Colo. 400, 48 Pac. 685, 58 Am. St. Rep. 245.

32. Hawke *v.* Deffebach, 4 Dak. 20, 22 N. W. 480; Pierce *v.* Sparks, 4 Dak. 1, 22 N. W. 491; Weibold *v.* Davis, 7 Mont. 107, 14 Pac. 865; King *v.* Thomas, 6 Mont. 409, 12 Pac. 865; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Talbott *v.* King, 6 Mont. 76, 9 Pac. 434; Davis *v.* Wiebold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238; Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423. In Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 20 Mont. 336, 51 Pac. 159, it was held that where the area of a quartz claim as allowed was, except as to two and ninety-eight hundredths acres, embraced in a conflicting location, which was expressly excepted from the grant in the patent thereto, such patent was void in so far as it attempted to convey the lode or vein on its strike independently of the granted surface.

33. Clary *v.* Hazlitt, 67 Cal. 286, 7 Pac. 701.

34. U. S. Rev. St. (1878) §§ 2329, 2330 [U. S. Comp. St. (1901) p. 1432].

35. U. S. Rev. St. (1878) § 2333 [U. S. Comp. St. (1901) p. 1433].

36. Cranes Gulch Min. Co. *v.* Scherrer, 134 Cal. 350, 66 Pac. 487, 86 Am. St. Rep. 279.

37. Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105 [*affirmed* in 114 U. S. 576, 5 S. Ct. 1055, 29 L. ed. 273].

38. Iron Silver Min. Co. *v.* Campbell, 135 U. S. 286, 10 S. Ct. 765, 34 L. ed. 155.

39. Sharkey *v.* Candiani, (Oreg. 1906) 85 Pac. 219 [*citing* Iron Silver Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513; Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225; Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 579, 66 C. C. A. 299; Uinta Tunnel Min., etc., Co. *v.* Creede, etc., Min., etc., Co., 119 Fed. 164, 57 C. C. A. 200].

40. Cullacott *v.* Cash Gold, etc., Min. Co., 8 Colo. 179, 6 Pac. 211; Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768.

41. Kahn *v.* Old Tel. Min. Co., 2 Utah 174; Gwillim *v.* Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. ed. 348.

42. Ballard *v.* Golob, 34 Colo. 417, 83 Pac. 376.

43. New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; Del Monte Min., etc., Co. *v.* New York, etc., Min. Co., 66 Fed. 212.

ground and not by its position as marked in the patent.[44] Extralateral rights attach, although not mentioned in the patent.[45]

(III) *Patents For Locations Under Act of 1866.* A patent issued under the act of 1866,[46] although expressly attempting to convey a specific length of the discovery vein, only actually conveys so much thereof as has its apex within the surface boundaries.[47] The land department may issue a patent on several claims located under the law of 1866 (which did not require parallel end lines), as one consolidated claim, and all rights are determined by the boundary lines of the patent and not by those of the location.[48]

(IV) *Merger of Location and Relation Back.* When a patent is issued for mineral ground, the possessory title which theretofore rested in a location is merged in the full legal title, and it relates back to the inception of the right.[49] But it has been held that the patent does not relate back so as to give priority to the location upon which it is based, except when the question of priority is presented, litigated, and determined in the patent proceedings.[50]

(V) *Conclusiveness on Collateral Attack.* As we have seen[51] patents to mining claims are procured through proceedings in the land-office of the United States. If that department has jurisdiction to issue the patent it is the highest evidence of title and conclusive on collateral attack.[52] It has been held to be conclusive against collateral attacks with reference to the following facts: (1) That the ground covered by the patent is mineral in its character,[53] and known to be such;[54] (2) that a valid location of the patented claim has been

44. Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540. In Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 18 S. Ct. 895, 43 L. ed. 72, it was held that under a patent for a mining claim which excludes portions of the surface already patented or located, the patentee obtains extralateral rights not already appropriated, belonging to veins within the surface boundaries of his claim as patented.

45. Doe *v.* Waterloo Min. Co., 54 Fed. 935.

46. 14 U. S. St. at L. 251 *et seq.*

47. Walrath *v.* Champion Min. Co., 171 U. S. 293, 18 S. Ct. 909, 43 L. ed. 170.

Retroactive effect of act of 1872.— Where a claim was located under the law of 1866, and patent applied for prior to the passage of the act of 1872, and patent is issued under the latter act, it conveys all veins which have their apices within the surface boundaries of the claim, although one of such veins had been located by another under the law of 1866. New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116. It, however, appeared that the locator of such vein had applied for a patent thereon which did not include any part of the vein within the boundaries of the location in question. But it has been held in California that the act of 1872 is not retroactive and that a patent of surface ground in which is included a vein theretofore located by another does not give title to such vein. Eclipse Gold, etc., Min. Co. *v.* Spring, 59 Cal. 304.

48. Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 73 Fed. 597.

49. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Heydenfeldt *v.* Daney Gold, etc., Min. Co., 93 U. S. 634, 23 L. ed. 995; Black *v.* Elkhorn Min. Co., 49 Fed. 549; Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,548, 4 Sawy. 302, 9 Morr. Min. Rep. 578.

But this doctrine cannot be so applied as to cut off rights of an earlier patentee under a later location. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200]; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Talbott *v.* King, 6 Mont. 76, 9 Pac. 434; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570; Deno *v.* Griffin, 20 Nev. 249, 20 Pac. 308; Kahn *v.* Old Tel. Min. Co., 2 Utah 174; Richmond Min. Co. *v.* Eureka Consol. Min. Co., 103 U. S. 839, 26 L. ed. 554, 557, 560 note.

50. See *infra*, note 60.

51. See *supra*, III, B, 10, a, *et seq.*

52. Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552. See also *infra*, III, B, 10, j.

It cannot be collaterally attacked upon the ground that false testimony was used to obtain it. Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226. And the question as to the actual existence of facts found to exist upon the issuance of the patent cannot be raised. St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875.

53. Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26.

54. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57, holding also that the patent is conclusive on such attack of the fact that a vein which has its apex within the location contains mineral. But there is no presumption that such vein embraces ore without the side lines of the claim, or that the vein presumed

made;[55] (3) that all preliminary requirements have been carried out;[56] (4) that the grantees are the owners of the ground patented;[57] (5) that the amount of work required has been performed;[58] (6) as to the extent of the claim, its shape, and boundaries;[59] (7) that the ground was open to location and that the location is prior to any other, in cases where another might have adversed the application;[60] and (8) as to discovery as against a tunnel claimant whose rights were initiated after the location of the mining claim.[61] Of course one not in privity with the government and who has not initiated a right contrary to the patent cannot attack it.[62] A state patent to mineral land which has been reserved from the government for grants of land to states is void and may be attacked collaterally.[63]

j. Cancellation and Annulment — (I) *IN GENERAL.* A patent to mining land may be canceled or annuled by proceedings instituted by or in behalf of the government of the United States. Such proceedings are usually initiated through the request of the land department after an investigation.[64]

(II) *GROUNDS — MISTAKE OR FRAUD.* Such patents may be vacated on the ground of mistake or inadvertence in their issue, or where the issue was under an erroneous view of the law, or beyond the jurisdiction of the land depart-

is the one in dispute. Grand Cent. Min. Co. *v.* Mammoth Min. Co., 29 Utah 490, 83 Pac. 648.

A patent to a placer claim is conclusive that the land is mineral, but not conclusive that no lode is contained in its boundaries which was known to exist at the time of the application for the placer patent, this, because the acts of congress expressly provide that if there exists within a placer claim at the time of the application for a patent a known lode, such lode shall be excluded from the operation of the patent. See *supra*, III, B, 10, f, (I), (A).

Patents for town sites are within the same rule. See *supra*, III, B, 2, d, (II), (B).

55. Fox *v.* Mackey, 1 Alaska 329; Chambers *v.* Jones, 17 Mont. 156, 42 Pac. 758; Talbott *v.* King, 6 Mont. 76, 9 Pac. 434; Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333 [*affirming* 73 Fed. 597].

56. Galbraith *v.* Shasta Iron Co., 143 Cal. 94, 76 Pac. 901, 1127; Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., 131 Fed. 579, 66 C. C. A. 299; Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 111 Fed. 817, 49 C. C. A. 637, holding that if circumstances might have existed authorizing a patent, they are presumed to exist.

57. Mitchell *v.* Cline, 84 Cal. 409, 24 Pac. 164; Justice Min. Co. *v.* Lee, 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216 [*reversing* 2 Colo. App. 112, 29 Pac. 1020]; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333 [*affirming* 73 Fed. 597].

58. Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333 [*affirming* 73 Fed. 597].

59. Alaska Gold Min. Co. *v.* Barbridge, 1 Alaska 311; Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 111 Fed. 817, 49 C. C. A. 637; Waterloo Min. Co. *v.* Doe, 82 Fed. 45, 27 C. C. A. 50.

Rule applied where the patent describes the claim as having parallel end lines. See Golden Reward Min. Co. *v.* Buxton Min. Co., 79 Fed. 868 [*affirmed* in 97 Fed. 413, 38 C. C. A. 228]; Doe *v.* Waterloo Min. Co., 54 Fed. 935.

60. Bunker Hill, etc., Min., etc., Co. *v.* Empire State Idaho Min., etc., Co., 109 Fed. 538, 48 C. C. A. 665 [*affirming* 108 Fed. 189].

But a patent is not conclusive of the priority of the location unless that question was put in issue and determined in the patent proceedings; and the owner of another location may assert priority in a subsequent controversy concerning extralateral rights, which were not involved in the patent proceeding. U. S. Mining Co. *v.* Lawson, 134 Fed. 769, 67 C. C. A. 587, now pending before the supreme court of the United States upon certiorari. The supreme court of Montana has held that where veins unite on their dip, the date of a patent covering the claim in which the apex of one of such veins is situated is not conclusive of the priority of such location, and if the location of a patented claim is not valid under the laws of Montana (the declaratory statement not being verified), claimant is not entitled to priority from its date. Hickey *v.* Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806.

61. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200].

But not as to one whose tunnel rights were initiated prior to such quartz location. See Uinta Tunnel Min., etc., Co. *v.* Creede, etc., Min., etc., Co., 119 Fed. 164, 57 C. C. A. 200 [*affirmed* in 196 U. S. 337, 25 S. Ct. 266, 49 L. ed. 501].

62. New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116.

But one in possession of land under a valid location is in privity with the government and may attack a patent subsequently obtained by fraud. South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89.

63. Garrard *v.* Silver Peak Mines, 94 Fed. 983, 36 C. C. A. 603.

64. See *infra*, III, B, 10, j, (II)-(IV).

ment.[65] They may also be vacated when they have been procured by fraud.[66] The burden of proof, however, is upon the government,[67] and proof of the fraud must be clear and convincing.[68] It must be shown that the United States was injured.[69]

(III) *TIME TO SUE.* The action cannot be maintained until after patent is issued.[70] Since the act of congress of March 3, 1891,[71] such suits must be brought within six years after the issuance of patents.

(IV) *REIMBURSEMENT OF PATENTEE.* Upon cancellation of a patent the government need not reimburse the patentee.[72]

11. IN INSULAR AND ALASKAN POSSESSIONS — a. Hawaiian Islands and Porto Rico. There has never been any action taken by congress with reference to mining, either in the Hawaiian Islands or Porto Rico.

b. Philippine Islands. Congress has, however, enacted a mining statute applicable to the Philippine Islands. The first act with reference to mining in the Philippine Islands was passed on July 1, 1902.[73] This act was amended by the act of February 6, 1905.[74] The main differences between this act and the Mineral Act of the United States are noted below.[75]

c. Alaska. A code was adopted by congress on June 6, 1900,[76] by the terms of which the general mineral laws of the United States were extended to that territory. By this act qualified locators were allowed to explore and mine between low and mean tide and to dredge below low tide. By the terms of the act of April 28, 1904,[77] coal lands may be located by one qualified who has opened or improved the same in rectangular tracts of forty, eighty, and one hundred and sixty acres on the unsurveyed lands of the United States, by marking the boundaries with permanent monuments and recording a notice of location. Such locations may be patented at any time within three years of the date of such notice.

12. GOVERNMENT LEASES AND LICENSES — a. In General. In the United States the federal government, after issuing a patent to mining lands, reserves no further

65. U. S. *v.* Marshall Silver Min. Co., 129 U. S. 579, 9 S. Ct. 343, 32 L. ed. 734; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170; U. S. *v.* Central Pac. R. Co., 84 Fed. 218; U. S. *v.* Culver, 52 Fed. 81.

66. San Pedro, etc., Co. *v.* U. S., 146 U. S. 120, 13 S. Ct. 94, 36 L. ed. 911; U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571; Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 111 Fed. 817, 49 C. C. A. 637; U. S. *v.* King, 83 Fed. 188, 27 C. C. A. 509; U. S. *v.* Iron Silver Min. Co., 16 Fed. 810, 5 McCrary 266.

67. U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571.

68. U. S. *v.* King, 9 Mont. 75, 22 Pac. 498; U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 9 S. Ct. 195, 32 L. ed. 571 [*affirming* 24 Fed. 568].

69. Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 111 Fed. 817, 49 C. C. A. 637.

The certificate of the surveyor-general that five hundred dollars has been expended upon the land is conclusive. U. S. *v.* King, 9 Mont. 75, 22 Pac. 498.

70. Justice Min. Co. *v.* Lee, 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216 [*reversing* 2 Colo. App. 112, 29 Pac. 1020].

71. 26 U. S. St. at L. 1098, 1099 [U. S. Comp. St. (1901) p. 1521].

72. U. S. *v.* Trinidad Coal, etc., Co., 137 U. S. 160, 11 S. Ct. 57, 34 L. ed. 640.

73. 32 U. S. St. at L. 697 *et seq.*

74. 34 U. S. St. at L. 692 *et seq.*

75. Quartz claims.—(1) Quartz claims may be located and patented by citizens of the United States and citizens of the Philippine Islands. (2) Such claims must not exceed three hundred meters square and all angles must be right angles, except where the claim interferes with an older one; its boundaries must be measured horizontally, irrespective of the irregularity of the surface; all claims must be marked by two posts placed as nearly as possible on the line of the ledge or vein. Immediately after location the locator must mark the line between these posts; he must also place a discovery post at his point of discovery; all claims must be recorded and claims less than of full size must be described as fractional claims. (3) No extra-lateral rights are recognized. (4) Only one claim can be located on the same vein by the same locator or locators. (5) The locator may abandon his claim by filing written notice with the recorder. See the statutes cited *supra*, notes 73, 74.

Extent of claims.— Placer claims shall not exceed sixty-four hectares if made by an association of persons, or eight hectares if made by an individual. Mill sites shall not exceed two hectares. Coal lands shall not exceed sixty-four hectares to an individual or one hundred and twenty-eight hectares to an association. See the statutes cited *supra*, notes 73, 74.

76. 31 U. S. St. at L. 329; Carter Alaskan Code, p. 129.

77. 33 U. S. St. at L. 525 [U. S. Comp. St. Suppl. (1905) p. 332].

control over them and demands no rental or royalty.[78] In some of the states, however, where title to mineral land is vested in the state, the custom exists of executing leases thereof for such terms and upon such conditions as are prescribed by the local statutes.[79] The nearest approach to the system of licensing by the general

78. Title vested upon issuance of patent see *supra*, text and note 49.

Title to minerals in general see *supra*, III, A; *infra*, IV, A, 1.

Lead mines.— Under the act of congress of March 3, 1807, the president was given authority to lease the lead mines on the upper Mississippi river. This act was within the authority of congress, and under it the president was held to have authority to renew a lease from time to time or to make a contract for the purchasing and smelting of lead ore at the lead mines of the United States. U. S. *v.* Gratiot, 14 Pet. (U. S.) 526, 10 L. ed. 573. But the president of the United States has been held to have no authority, merely by virtue of his office, to lease the lead mines of Iowa. Lorimier *v.* Lewis, Morr. (Iowa) 253, 39 Am. Dec. 461.

79. See the cases cited *infra*, this note.

Nature of right.—Under N. Y. Laws (1890), c. 411, §§ 1, 2, providing that all mines and minerals discovered on state lands are and shall be the property of the people, subject to the provisions thereinafter made to encourage the discovery thereof, and providing that any citizen of the state who discovers any valuable mine or mineral on such lands and files the proper notice, "shall be entitled to work such mine, and he and his heirs and assigns shall have the sole benefit of all products therefrom" on payment of certain royalty to the state, a discoverer of minerals on state lands acquires no estate in such lands, but a mere right or incorporeal privilege to take out the minerals, and his grantee cannot maintain ejectment against a person in possession of such lands. Moore *v.* Brown, 139 N. Y. 127, 34 N. E. 772 [*reversing* 16 N. Y. Suppl. 592]. It has been held that a grant by the state legislature of a right to mine phosphate from the beds of navigable streams and waters within the state does not confer exclusive rights preventing the exercise of such powers by a company subsequently chartered by the legislature and given similar rights and powers. Bradley *v.* South Carolina Phosphate, etc., Min. Co., 3 Fed. Cas. No. 1,787, 1 Hughes 72.

Applications.— Applications for leases of lands belonging to the state, filed with the state land commissioner prior to the approval of the selections of the state by the secretary of the interior, are premature and of no legal effect, although recognized as valid by the commissioner; but such application may be validated by its recognition by the commissioner after the state has acquired the mineral lands. Baker *v.* Jamison, 54 Minn. 17, 55 N. W. 749. The state land commissioner, under an authority to prescribe the form of application, must prescribe and announce such reasonable rules and regulations as will promote the object of the statute, encourage honest competition, and insure the utmost fairness among those who desire to avail themselves of the statute. Whiteman *v.* Severance, 46 Minn. 495, 49 N. W. 255. Where more than one application is on file the land commissioner should award the lease to the applicant who will pay the most for it. Whiteman *v.* Severance, *supra*. And when the state land commissioner is guilty of official misconduct by being a party in interest in a favored application for a sale of mineral land, so as to avoid the application, a lease granted thereon may be adjudged to be held in trust for the other applicant. Baker *v.* Jamison, *supra*. But where priority of application gives no superior right as between several applicants, an unauthorized preference by the land commissioner of one of two applicants in the granting of a lease without affording opportunity for competitive bidding by them does not justify an adjudication charging the applicant to whom the lease is granted, as a trustee of the same for the disappointed applicant, nor can such a lease be set aside at the suit of the disappointed applicant when the state is not a party to the action. Baker *v.* Jamison, *supra*. See also Whiteman *v.* Severance, *supra*.

Duration.— A statutory regulation that leases of state land shall not exceed a certain term does not prevent the lease of mineral lands under another statute for such length of time as the board of land commissioners may determine. *In re* Leasing State Lands, 18 Colo. 359, 32 Pac. 986; Colorado Fuel, etc., Co. *v.* State Land Com'rs, 14 Colo. App. 84, 60 Pac. 367. Where a statute provided that a corporation might have the right to mine phosphate for a certain period of time, and a subsequent statute provided certain modifications of the contract upon acceptance of which the corporation should have the right "so long as, and no longer than" the new conditions were complied with, the right is not made perpetual but is limited to the original term. South Carolina *v.* Coosaw Min. Co., 47 Fed. 225 [*affirmed* in 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537].

Conflicting leases.— Where an agreement with the state land board entitles one to the execution of a lease to him of state land, its subsequent lease of the land could confer no rights on a third party to the prejudice of the prior lessee, who was rightfully entitled thereto. Colorado Fuel, etc., Co. *v.* State Land Com'rs, 14 Colo. App. 84, 60 Pac. 367.

Rescission of lease.— It is not within the power of the state land board to rescind the action of its predecessor in leasing coal lands of the state, and to make new contracts which would be of any value or validity. Colorado Fuel, etc., Co. *v.* State Land Com'rs, 14 Colo. App. 84, 60 Pac. 367.

Extension and renewal of lease see Colorado Fuel, etc., Co. *v.* State Land Com'rs, 14

government which prevails in Canada[80] and under the laws of other foreign countries, which may be found under the laws of the United States, occurs under the federal statute which permits the discoverer of a guano deposit upon an island not claimed by the United States or by any foreign government to take possession thereof and operate it for the purpose of securing the guano under the protection of the United States, his occupancy being in the nature of a license.[81]

b. In Canada — (i) *In General.* In Canada provision is made by statute for the granting of leases and licenses to search and work the mineral lands of the several provinces.[82] Leases under these statutes must be based upon a proper application[83] which has been made by a person entitled to secure a lease[84] and which contains a sufficient description of the premises sought.[85] Where the conditions of the statutes have been complied with, the granting of a lease by the commissioner of mines or other proper officer becomes a ministerial duty.[86]

Colo. App. 84, 60 Pac. 367, holding the facts sufficient to show a valid agreement for a lease and insufficient to show fraud authorizing a refusal to execute a lease.

Forfeiture.—Under a statute providing that a diversion of salt works to other purposes than the manufacture of salt shall work a forfeiture of the leasehold estate held from the state, the partial diversion of a lot, as for the erection of a dwelling-house, will not work a forfeiture. Hasbrook *v.* Paddock, 1 Barb. (N. Y.) 635.

Effect of license.— The fact that the state has granted a corporation permission to take phosphate from the bed of a navigable stream does not estop the state from suing another corporation taking phosphate from the bed of the stream. State *v.* Pacific Guano Co., 22 S. C. 50, 24 S. C. 598.

Royalty.— For the sufficiency of pleadings and evidence in an action to recover royalty from a licensee of the state to dig phosphate rock see State *v.* Seabrook, 42 S. C. 74, 20 S. E. 58.

80. See *infra*, III, B, 12, b.

81. See Duncan *v.* Navassa Phosphate Co., 137 U. S. 647, 11 S. Ct. 242, 34 L. ed. 825, holding that under Guano Islands Act, Aug. 18, 1856, c. 164, § 2 (11 U. S. St. at L. 119), as reënacted in U. S. Rev. St. (1878) tit. 72, providing that any citizen of the United States who discovers an unoccupied guano island shall have the exclusive right to occupy it, at the pleasure of congress, for the purpose of removing the guano, and that the United States shall not be obliged to retain possession after the guano is removed, a discoverer has only a revocable license to occupy the island and remove the guano, which is an estate at the will of the United States.

82. See the statutes of Canada and of the various provinces. And see also cases cited *infra*, this and succeeding notes.

Lands subject to lease.— Under Nova Scotia Rev. St. 4th ser. c. 9, both licenses and leases may be granted in all districts whether proclaimed or unproclaimed. Mott *v.* Lockhart, 8 App. Cas. 568, 52 L. J. P. C. 61; Fielding *v.* Mott, 6 Can. L. T. Occ. Notes 491, 18 Nova Scotia 339 [*affirmed* in 14 Can. Sup. Ct. 254]. Under the statute it is not necessary as a condition precedent to a lease in an unproclaimed district that the claim be occupied and staked off. Mott *v.* Lockhart, *supra*.

Shape of territory granted.— It has been held that the entire tract covered by an application for a prospecting license need not be rectangular in case the areas applied for are rectangular. *In re* Ovens, 23 Nova Scotia 376.

Extent of lease.— Under the statutes of Nova Scotia a mining lease is not invalid because it includes a greater number of areas than is provided by statute, the provision being only directory to the commissioner. Fielding *v.* Mott, 6 Can. L. T. Occ. Notes 491, 18 Nova Scotia 339 [*affirmed* in 14 Can. Sup. Ct. 254].

83. Mott *v.* Lockhart, 8 App. Cas. 568, 52 L. J. P. C. 61, holding that under Nova Scotia Rev. St. 4th ser. c. 9, applications for mining leases must be made in writing to the commissioner or deputy commissioner.

84. See Mott *v.* Lockhart, 8 App. Cas. 568, 52 L. J. P. C. 61 (holding that under Nova Scotia Rev. St. 4th ser. c. 9, a licensee is entitled to a lease); *In re* Greener, 33 Nova Scotia 406 (holding that under Nova Scotia Acts (1892), c. 1, § 103, a lease may be applied for without a previous license to search).

Priorities.— Under Nova Scotia Rev. St. 4th ser. c. 9, the first applicant, whether for a license or a lease, is entitled thereto. Mott *v.* Lockhart, 8 App. Cas. 568, 52 L. J. P. C. 61. Where, after the proclamation of a gold district, but before the areas had been laid off in a particular way, plans prepared, etc., a person without knowledge of the proclamation made application for a certain number of areas, describing them by metes and bounds, he is entitled to a lease as against prior applicants whose applications fail to comply with the provisions of the law. Atty.-Gen. *v.* McDonald, 2 Nova Scotia Dec. 125.

85. *In re* Ovens, 23 Nova Scotia 376, holding that an application in a description for a prospecting license may describe the areas by numbers as designated upon a plan in the mines office.

86. Atty.-Gen. *v.* McDonald, 2 Nova Scotia Dec. 125, holding that a commissioner of mines has no discretion as to the granting of a lease to an applicant who has made his

(II) *Construction of Lease.* In the construction of mining leases the rule that, where a description is made up of more than one part, and one part is true, then if the part which is true describes the subject with sufficient legal certainty the untrue part will be rejected and will not vitiate the lease is applicable.[87]

(III) *Operation and Effect.* The issuance of a mining lease cures any irregularities in the application for a license or in the license itself, in the absence of fraud on the part of the licensee.[88] In case a mining lease is granted over private land, the lessees must obtain from the owners of the land permission to enter, either by special agreement or in accordance with the provisions of the Mining Act.[89] Mining leases issued to a mining corporation after the execution of a mortgage by it in the state in which it is incorporated, and the laws of which do not reserve the minerals to the state, are subject to the mortgage.[90]

(IV) *Forfeiture.* A statute providing for the forfeiture of mining leases must be strictly construed.[91] Under the statutes generally, proceedings for forfeiture must be based upon notice to the owner of the lease.[92] The commissioner of mines cannot on his own motion, without investigation or notice to the lessee, set aside or disregard a lease because he thinks it has not been issued in accordance with the terms of the statute, or for alleged breaches of conditions which the lease does not contain.[93] An amendatory statute providing for forfeiture without prior formalities of leases in case of non-payment of rent does not apply to leases existing when it is passed, although the holders thereof execute an agreement under the amendatory statute to pay rent in lieu of work.[94] Where by reason of

application strictly in accordance with the provisions of the law.

87. Bartlett *v.* Nova Scotia Steel Co., 35 Nova Scotia 376. See also Fielding *v.* Mott, 6 Can. L. T. Occ. Notes 491, 18 Nova Scotia 339 [*affirmed* in 14 Can. Sup. Ct. 254, *citing* Nova Scotia Rev. St. 4th ser. c. 9], holding that where the boundaries are based upon a natural object which is sufficiently described otherwise to identify it, the description is not vitiated by errors as to distances in locating such object.

A lease of all mines in the province of Nova Scotia granted by the crown was held to include mines in the island of Cape Breton. Taylor *v.* Atty.-Gen., 8 Sim. 413, 8 Eng. Ch. 413, 59 Eng. Reprint 164.

88. Fielding *v.* Mott, 6 Can. L. T. Occ. Notes 491, 18 Nova Scotia 339 [*affirmed* in 14 Can. Sup. Ct. 254, *citing* Nova Scotia Rev. St. 4th ser. c. 9].

89. Fielding *v.* Mott, 6 Can. L. T. Occ. Notes 491, 18 Nova Scotia 339 [*affirmed* in 14 Can. Sup. Ct. 254].

90. Mineral Products Co. *v.* Continental Trust Co., 37 N. Brunsw. 140 [*affirming* 3 N. Brunsw. Eq. 28].

91. Atty.-Gen. *v.* Waverley Gold Min. Co., 35 Nova Scotia 192.

Pleading judgment of forfeiture.— For the certainty and particularity with which the judgment and forfeiture of a lease must be pleaded see Wallace *v.* Creelman, 18 Nova Scotia 546; Wallace *v.* Creellman, 17 Nova Scotia 418.

92. Atty.-Gen. *v.* Waverley Gold Min. Co., 35 Nova Scotia 192 (holding that where there has been a substantial compliance with the statute requiring a lessee, to entitle himself to notice of default of payment, to give the commissioner of mines written notice of his postoffice address, a forfeiture of the lease without notice sent to the address given by him is void); Reg. *v.* Church, 23 Nova Scotia 347 (holding that under Nova Scotia Rev. St. 5th ser. c. 7, § 107, the commissioner of works and mines cannot declare a lease forfeited without notice to the lessees upon non-payment of one of the sums annually payable by the lessee of coal areas); Reg. *v.* Elze, 16 Nova Scotia 130 (holding that where notice pursuant to the statute was addressed to defendant who was the mortgagee and not the owner, the commissioner of mines had no jurisdiction); Reg. *v.* Tobin, 14 Nova Scotia 305 (holding that in proceedings to obtain the forfeiture of a mining lease proof must be made of personal service upon the owner or evidence must be given of a *bona fide* search or that defendant was out of the province).

Sufficiency of notice.— Where the lessee of coal areas was absent from the province at the time proceedings to forfeit the lease were taken, and the only notice given to him was by means of a paper posted upon a cliff near the seashore, the areas being under water, it was held that the forfeiture should be set aside where the notice was defective for want of definiteness as to the charges against the lessee and there was no evidence whether the sheriff who posted the notice had inquired as to the existence of any agent or person upon whom the notice could have been served in the absence of the lessee, and no evidence as to the locality of the cliff upon which the paper was posted. *In re* Sword, 3 Nova Scotia Dec. 389.

93. *In re* Wier, 31 Nova Scotia 97.

94. Temple *v.* Atty.-Gen., 27 Can. Sup. Ct. 355 [*affirming* 29 Nova Scotia 279], construing 52 Vict. c. 23.

failure to pay rent and discontinuance of operations under a lease, the lessee has forfeited his rights thereunder, he cannot object to a subsequent lease to third persons;[95] but where, upon notice that his lease is forfeited, the lessee takes out a license to search covering the same property, as a matter of precaution, such acts will not be construed as a surrender of the lease.[96] The doctrine of laches does not apply to an application to set aside a forfeiture of a mining lease, where the proceeding does not seek the equitable assistance or interference of the court, but is based upon legal rights.[97]

(v) *RENTS AND ROYALTIES.* The terms of mining leases as to rents or royalties are usually prescribed by statute.[98] Under a statute providing that payments of rental in advance are to commence from the nearest recurring anniversary of the lease, the payments accrue from the next ensuing anniversary after the date of the lease,[99] and the lease will be deemed to commence upon the date when the grant is made, and not upon the date at which it is described in the lease as commencing.[1] The year for which a deposit of rent will be deemed to be made cannot be controlled by the terms of the receipt given therefor, in opposition to the effect of the statute.[2] Where, in order to avoid forfeiture of his lease, a placer miner has paid royalties under protest, he is, upon a finding that such royalties have been illegally executed, entitled to their return.[3]

(vi) *CONTESTS.* Proceedings for the determination of contested rights to mining leases must be in accord with the statutes under which they are maintained.[4]

95. Reg. *v.* Snow, 3 Nova Scotia Dec. 373.

96. Atty.-Gen. *v.* Sheraton, 28 Nova Scotia 492.

97. Atty.-Gen. *v.* Waverley Gold Min. Co., 35 Nova Scotia 192.

98. See the Canadian statutes and the statutes of the several provinces. See also Chappelle *v.* Rex, [1904] A. C. 127, 73 L. J. P. C. 18, 89 L. T. Rep. N. S. 513, 20 T. L. R. 74 [*affirming* 32 Can. Sup. Ct. 586, *reversing* 7 Can. Exch. 414] (holding that under the Dominion Lands Act, Can. Rev. St. (1886) c. 54, the governor in council has power to make regulations requiring a placer miner to pay a percentage of the proceeds realized from the grant); *In re* Wier, 31 Nova Scotia 97 (holding that a lease issued under the Nova Scotia Acts (1889), c. 23, Nova Scotia Rev. St. c. 7, § 132, without the rent clauses provided for by such statute, is not void but is to be recognized as an existing lease which Acts (1897), c. 4, § 4, renders indefeasible and forfeitable only for non-working).

99. Temple *v.* Atty.-Gen., 27 Can. Sup. Ct. 355 [*affirming* 29 Nova Scotia 279, and *following* Atty.-Gen. *v.* Sheraton, 28 Nova Scotia 492], construing 52 Vict. c. 23.

1. Atty.-Gen. *v.* Sheraton, 28 Nova Scotia 492.

2. Atty.-Gen. *v.* Sheraton, 28 Nova Scotia 492.

3. Chappelle *v.* Rex, [1904] A. C. 127, 73 L. J. P. C. 18, 89 L. T. Rep. N. S. 513, 20 T. L. R. 74 [*affirming* 32 Can. Sup. Ct. 586 (*reversing* 7 Can. Exch. 414)].

4. See the cases cited *infra*, this note.

Persons who may contest.— Where an application for a license to search contains a defective description, a party who has made a subsequent application for a license, which is defective as containing the same error in description, has no standing to attack the first application. *In re* Greener, 33 Nova Scotia 406.

Before whom proceedings may be had.— A commissioner of mines has, under the Mines Act, no authority to inquire into the validity of, or to cancel, a lease or grant of the crown. *Re* McColl, 22 Nova Scotia 17. And after a prospecting license is once issued, the commissioner has no authority to pass on its validity. *Re* Malaga Barrens, 21 Nova Scotia 391, in which also it was held that certain applications for prospecting licenses were sufficiently definite. Under the Coal Mines Act, Brit. Col. Rev. St. (1897) c. 137, § 9, an applicant for a prospecting license, upon the compliance with statutory requirements, acquires a right to such license in respect of which a dispute may be heard in the county court. Baker *v.* Smart, 12 Brit. Col. 129.

Mandamus to compel decision.— A commissioner of mines for Nova Scotia may be compelled by mandamus to decide upon an application for a lease. Drysdale *v.* Dominion Coal Co., 34 Can. Sup. Ct. 328 [*affirming* 39 Can. L. J. N. S. 795, 36 Nova Scotia 282].

Hearing.— Upon an investigation before the commissioner of mines to determine which of a number of applicants for a lease is entitled thereto, the commissioner should consider the question whether the lessee of an original lessee could do anything to defeat the title of his lessor, and should not decide the question merely as one of priority. *Re* Gold Min. Areas, 16 Nova Scotia 280.

Appeal.—An appeal will lie from the decision of a commissioner of mines awarding a lease, where a party claiming to be the first applicant for the tract was not permitted to cross-examine an adverse witness upon a question of importance. *In re* Sweet, 15 Nova Scotia 397. The supreme court of

(VII) *RENEWALS.* The right to a renewal of a license to mine is regarded as a privilege and not as a vested right, and may be taken away as to existing licenses by subsequent statute.[5]

(VIII) *TRANSFERS.* The necessity of registering and the right to register a transfer of a mining lease is a matter purely of statutory regulation.[6]

(IX) *IMPROVEMENTS.* A stamp mill erected by the licensees does not become a part of the realty, but will be regarded as a chattel or as a trade fixture removable by the licensees during the term of their lease or license.[7]

13. OFFENSES AGAINST IMPROVEMENTS. Under a statute making it a misdemeanor to remove any stake, etc., on a claim or obliterate, deface, or destroy any notice thereon, it has been held to be necessary to prove under an indictment charging the statutory offense that it was committed on a mining claim as that term is defined.[8] But it has also been held that in a prosecution for a trespass upon a mining claim under the statute for the prevention of the wanton destruction of property on such claim as well as on mineral lands in order to prevent lawless acts of parties claiming the land, it is not necessary to establish the right of the locators to the title to the land as in a contest before the officers of the government land-office.[9]

IV. TITLE, RIGHTS, CONVEYANCES, AND CONTRACTS.*

A. Rights and Remedies of Owners — 1. IN GENERAL. Mines are land,[10]

Canada has jurisdiction of appeals from the judgments of the territorial court of the Yukon territory, sitting as the court of appeal constituted by the ordinance of the governor in council of March 18, 1901, with respect to the hearing and decision of disputes affecting mineral lands in the Yukon territory. Hartley *v.* Matson, 32 Can. Sup. Ct. 575. See also *supra*, III, B, 10, d, (III), (I).

Affidavit on appeal.— Under Nova Scotia Rev. St. 5th ser. c. 107, § 5, an affidavit for an appeal from a decision of the mining commissioner upon an application for a mining lease must be made before a commissioner of the supreme court. *In re* Headley, 8 Can. L. T. Occ. Notes 376, 20 Nova Scotia 130, holding an affidavit made in Toronto before a notary public for the province of Ontario insufficient.

Appeal-bond.— Upon an appeal from a decision of the commissioner of mines accepting applications for prospecting licenses, the bond properly runs to the queen and her successors, and not to the party against whom the appeal is taken. *Re* Ovens, 23 Nova Scotia 168.

5. Reynolds *v.* Atty.-Gen., [1896] A. C. 240, 65 L. J. P. C. 16, 74 L. T. Rep. N. S. 108 [*affirming* 27 Nova Scotia 184].

Under the Revised Statutes of Canada, chapter 54, section 47, and the Mining Regulations of 1889, section 17, the holder of a grant for placer mining does not have the same privileges as to a renewal which are awarded to a holder of a quartz mining grant. The placer miner on renewal (to which he has no absolute, but only a preferential, right) holds under an annual grant in substitution for, but not in continuation of, his original grant. And a renewal grant is subject to all such regulations as may be enforced at the date when it comes into operation, whether or not it was made during the currency of an existing grant. Chappelle *v.* Rex, [1904] A. C. 127, 73 L. J. P. C. 18, 89 L. T. Rep. N. S. 513, 20 T. L. R. 74 [*affirming* 32 Can. Sup. Ct. 586 (*reversing* 7 Can. Exch. 414)].

6. See Fielding *v.* Church, 28 Nova Scotia 136, holding that under Nova Scotia Acts (1885), c. 3, § 1, the commissioner of mines is entitled to register only transfers from lessees standing as such on the books of the department, and a transferee of one holding under an unregistered transfer is not entitled to have his transfer registered.

7. Liscombe Falls Gold Min. Co. *v.* Bishop, 35 Can. Sup. Ct. 539, so holding where all the various parts of the mill were placed in position, either resting by their own weight on the soil, or steadied by bolts, and the whole installation could be removed without injury to the freehold.

8. Territory *v.* Mackey, 8 Mont. 168, 19 Pac. 395, holding that the proof must show a location of a parcel of land containing precious metal in its soil or rock. See also *supra*, II, A; II, C, 3.

9. Van Horn *v.* State, 5 Wyo. 501, 40 Pac. 964, holding further that in such prosecution for destroying a building on an oil placer mining claim, it is not error to exclude a deed of the premises where there was no effort to connect defendant either with the grantee in the deed or to show that the acts of defendant were done under claim or color of right.

10. Byers *v.* Byers, 183 Pa. St. 509, 38 Atl. 1027, 63 Am. St. Rep. 765, 39 L. R. A. 537; Caldwell *v.* Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Lone Acre Oil Co. *v.* Swayne, (Tex. Civ. App. 1903) 78 S. W. 380, holding that an open mine is included in the term "lands."

* Edward Horsky of the Montana Bar assisted Judge Clayberg in the preparation of sections IV and V.

and subject to the same laws of possession and conveyance as other lands.[11] The owner of the surface is *prima facie* entitled to the surface itself and all below it,[12] and another person claiming property in the minerals must do so by virtue of some grant, conveyance, or reservation.[13] The owner of property has a natural right to work mines therein,[14] and has a right of action against a person who mines under his land without his consent.[15] The nature of property in minerals depends on whether they are severed from the soil; minerals lying beneath the surface or on the surface unworked are real estate,[16] but when they are severed from the soil they become personal property.[17] Oil and gas are minerals, and so long as they remain in the ground are a part of the realty. They belong to the owner of the land, and are a part of it so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone.[18] We

11. Byers *v.* Byers, 183 Pa. St. 509, 38 Atl. 1027, 63 Am. St. Rep. 765, 39 L. R. A. 537; Caldwell *v.* Copeland, 37 Pa. St. 427.

Local customs.— Where a person's rights to a mining claim are fixed by the rules of property which are part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. Waring *v.* Crow, 11 Cal. 366.

Nature of property in mining claims see *supra*, III, B, 6, a.

12. Rowbotham *v.* Wilson, 8 H. L. Cas. 348, 6 Jur. N. S. 965, 30 L. J. Q. B. 409, 2 L. T. Rep. N. S. 642, 11 Eng. Reprint 463 [*affirming* 8 E. & B. 123, 3 Jur. N. S. 1297, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123]. One may show title to a mineral interest in land by showing an unrestricted title to the land wherein the mineral is contained. Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

Crown ownership of precious minerals see *supra*, III, A.

13. Rowbotham *v.* Wilson, 8 H. L. Cas. 348, 6 Jur. N. S. 965, 30 L. J. Q. B. 409, 2 L. T. Rep. N. S. 642, 11 Eng. Reprint 463 [*affirming* 8 E. & B. 123, 3 Jur. N. S. 1297, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123].

Conveyances of minerals without land or of land reserving minerals see *infra*, IV, B, 3.

14. Smith *v.* Kenrick, 7 C. B. 515, 13 Jur. 362, 18 L. J. C. P. 172, 62 E. C. L. 515.

A statute requiring a license in the case of foreigners engaged in mining applies only to mines in the public lands and not to mines contained in lands which are the private property of individuals. Ah Yew *v.* Choate, 24 Cal. 562; Ah Hee *v.* Crippen, 19 Cal. 491.

Operation of mines see *infra*, V.

15. Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326.

Actions or suits generally see *infra*, IV, A, 2.

16. Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. (Pa.) 149; Murray *v.* Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249.

Oil in place under the soil is a mineral and a part of the realty. Jennings *v.* Bloomfield, 199 Pa. St. 638, 49 Atl. 135; Marshall *v.* Mellon, 179 Pa. St. 371, 36 Atl. 201, 57 Am. St. Rep. 601, 35 L. R. A. 816; Blakley *v.* Marshall, 174 Pa. St. 425, 34 Atl. 564; Stoughton's Appeal, 88 Pa. St. 198; Funk *v.* Haldeman, 53 Pa. St. 229; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Cleaver's Estate, 23 Pittsb. Leg. J. N. S. (Pa.) 358; Murray *v.* Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249; Southern Oil Co. *v.* Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169; Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; Williamson *v.* Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

17. Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. (Pa.) 149; Murray *v.* Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249. See also Lykens Valley Coal Co. *v.* Dock, 62 Pa. St. 232.

Oil severed from the realty is personal property (Cleaver's Estate, 23 Pittsb. Leg. J. N. S. (Pa.) 358), and hence when oil is drawn from the wells by trespassers it becomes personalty, and the owner of the land may sue to recover it or its value as such (Hail *v.* Reed, 15 B. Mon. (Ky.) 479).

18. *Kansas.*— Lanyon Zinc Co. *v.* Freeman, 68 Kan. 691, 75 Pac. 995.

Ohio.— Kelley *v.* Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399, 63 Am. St. Rep. 721, 39 L. R. A. 765.

Pennsylvania.—Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; Stoughton's Appeal, 88 Pa. St. 198; Brown *v.* Vandergrift, 80 Pa. St. 142; Funk *v.* Haldeman, 53 Pa. St. 229. See also Jones *v.* Forest Oil Co., 194 Pa. St. 379, 44 Atl. 1074, 48 L. R. A. 748.

West Virginia.— Preston *v.* White, 57 W. Va. 278, 50 S. E. 236; Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; Williamson *v.* Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

United States.— Brown *v.* Spilman, 155 U. S. 665, 15 S. Ct. 245, 39 L. ed. 304 [*reversing* 45 Fed. 291].

Canada.— See Ontario Natural Gas Co. *v.* Gosfield, 18 Ont. App. 626.

See 34 Cent. Dig. tit. "Mines and Minerals," § 134. And see *infra*, note 29.

In Indiana the settled rule of property is that, although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas or oil, until these substances are actually reduced

have seen what rights and titles are given to mining claims by location and patent.[19]

2. Actions or Suits — a. For Damages — (i) *When Lies* — (a) *In General.* An action for the recovery of damages will lie where there has been a wrongful entry upon the mining property (either above or beneath the surface)[20] or for injury to,[21] or for excluding, preventing, or withholding the use or possession of a location or mine,[22] or for the wrongful extraction, or removal of ore, gold-bearing earth, coal, oil, marble, stone, or other mineral, or substances from the surface, or underneath the surface and within the boundary lines extended vertically downward,[23] or of ores and other contents of any vein underneath the surface

by him to possession he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768; Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294; Richmond Natural Gas Co. *v.* Davenport, 37 Ind. App. 25, 76 N. E. 525; Ohio Oil Co. *v.* State, 177 U. S. 190, 20 S. Ct. 576, 44 L. ed. 729 [*affirming* 150 Ind. 698, 50 N. E. 1125].

19. See *supra*, III, B, 6, 10.

20. *California.*— Maye *v.* Yappen, 23 Cal. 306; Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567; Rowe *v.* Bradley, 12 Cal. 226.

Colorado.— Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

Montana.— Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

United States.— Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228; Fuller *v.* Harris, 29 Fed. 814.

See 34 Cent. Dig. tit. "Mines and Minerals," § 137 *et seq.*

21. *California.*— Stoakes *v.* Monroe, 36 Cal. 383; Maye *v.* Yappen, 23 Cal. 306; O'Keiffe *v.* Cunningham, 9 Cal. 589.

Colorado.— Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

Indiana.— Ohio Oil Co. *v.* Griest, 30 Ind. App. 84, 65 N. E. 534; Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Maryland.— Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Missouri.—Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446.

Montana.— Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912; Lincoln *v.* Rodgers, 1 Mont. 217.

United States.— Dalton *v.* Moore, 141 Fed. 311, 72 C. C. A. 459; Fuller *v.* Harris, 29 Fed. 814.

England.— Ross *v.* Rugge-Price, 1 Ex. D. 269, 45 L. J. Exch. 777, 34 L. T. Rep. N. S. 535, 24 Wkly. Rep. 786.

See 34 Cent. Dig. tit. "Mines and Minerals," § 137 *et seq.*

22. *California.*—Meyers *v.* Farquharson, 46 Cal. 190.

Colorado.— Montrozona Gold Min. Co. *v.* Thatcher, 19 Colo. App. 371, 75 Pac. 595.

Iowa.— Chamberlain *v.* Collinson, 45 Iowa 429.

Pennsylvania.— Ege *v.* Kille, 84 Pa. St. 333.

United States.— Dalton *v.* Moore, 141 Fed. 311, 72 C. C. A. 459; Empire State-Idaho Min., etc., Co. *v.* Hanley, 136 Fed. 99, 69 C. C. A. 87; Sweeney *v.* Hanley, 126 Fed. 97, 61 C. C. A. 153.

See 34 Cent. Dig. tit. "Mines and Minerals," § 137 *et seq.*

23. *Arizona.*— Alta Min., etc., Co. *v.* Benson Min., etc., Co., 2 Ariz. 362, 16 Pac. 565.

California.— Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810; Goller *v.* Fett, 30 Cal. 481; Maye *v.* Yappen, 23 Cal. 306; Rowe *v.* Bradley, 12 Cal. 226.

Colorado.— Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283; United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045; Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240.

Illinois.— Illinois, etc., R., etc., Co. *v.* Ogle, 82 Ill. 627, 25 Am. Rep. 342; Robertson *v.* Jones, 71 Ill. 405; Donovan *v.* Consolidated Coal Co., 88 Ill. App. 589 [*affirmed* in 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206]; Rice *v.* Looney, 81 Ill. App. 537; Thomas Pressed Brick Co. *v.* Herter, 60 Ill. App. 58.

Indiana.— Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Kansas.— Williams *v.* May, 44 Kan. 179, 24 Pac. 52.

Maryland.—Atlantic, etc., Gold Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Massachusetts.— Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 6 Morr. Min. Rep. 317; Arnold *v.* Stevens, 24 Pick. 106, 35 Am. Dec. 305.

Missouri.—Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446.

Montana.— Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347; Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293.

New York.— Dyke *v.* National Transit Co., 22 N. Y. App. Div. 360, 49 N. Y. Suppl. 180.

within the boundary lines extended vertically downward, unless such vein has its apex in an adjoining claim which belongs to another person;[24] or for the wrongful extraction or removal of ores or other contents of any vein or lode after departing on its dip from the side line extended vertically downward, provided such vein has its top or apex within the boundaries of such claim and the claim was located so as to confer extralateral rights.[25] Trespass on the case is a

Pennsylvania.— Ashman *v.* Wigton, (1887) 12 Atl. 74; Freck *v.* Locust Mountain Coal, etc., Co., 86 Pa. St. 318; Jackson *v.* Gunton, 26 Pa. Super. Ct. 203; Ruttledge *v.* Kress, 17 Pa. Super. Ct. 490.

Tennessee.— Dougherty *v.* Chesnutt, 86 Tenn. 1, 5 S. W. 444.

United States.— Campbell *v.* Rankin, 99 U. S. 261, 25 L. ed. 435; Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135; Resurrection Gold Min. Co. *v.* Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180; Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740; Fuller *v.* Harris, 29 Fed. 814.

England.— Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25, 44 J. P. 392, 42 L. T. Rep. N. S. 334, 28 Wkly. Rep. 357; Jegon *v.* Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389, 19 Wkly. Rep. 365; Wood *v.* Morewood, 3 Q. B. 440 note, 43 E. C. L. 810; Trotter *v.* Maclean, 13 Ch. D. 574, 49 L. J. Ch. 256, 42 L. T. Rep. N. S. 118, 28 Wkly. Rep. 244; Ashton *v.* Stock, 6 Ch. D. 719, 25 Wkly. Rep. 862; Llynvi *v.* Brogden, L. R. 11 Eq. 188, 40 L. J. Ch. 46, 23 L. T. Rep. N. S. 518, 19 Wkly. Rep. 196; Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 941, 16 L. T. Rep. N. S. 736, 15 Wkly. Rep. 1105; Wild *v.* Holt, 1 Dowl. P. C. N. S. 876, 11 L. J. Exch. 285, 9 M. & W. 672; Brain *v.* Harris, 10 Exch. 908, 24 L. J. Exch. 177; Martin *v.* Porter, 2 H. & H. 70, 5 M. & W. 352.

See 34 Cent. Dig. tit. "Mines and Minerals," § 137 *et seq.*

A city in which is vested the fee in its streets in trust for the public can recover against one who mines coal underlying such street without its consent, for the full value of the coal so mined, although the removal of the coal does not affect the use of the land for streets. Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326; Des Moines *v.* Hall, 24 Iowa 234; Hawesville *v.* Hawes, 6 Bush (Ky.) 232.

One who knowingly assumes to grant to a mining company the right to mine coal belonging to a third party, and who receives the price for coal so mined, is a trespasser, notwithstanding he does not participate in mining the coal other than by authorizing the mining company to do so. Donovan *v.* St. Louis Consol. Coal Co., 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206.

Pennsylvania act May 8, 1876 (Pamphl. Laws 142), imposing treble damages on any person mining or digging out "any coal, iron or other minerals, knowing the same to be upon the lands of another," applies to the act of digging and carrying away building stone from an open quarry on the surface of the ground. Ruttledge *v.* Kress, 17 Pa. Super. Ct. 490.

Under the right conferred by U. S. Rev. St. (1878) § 2319 [U. S. Comp. St. (1901) p. 1424] and Act Cong. Aug. 4, 1892 (27 U. S. St. at L. 348 [U. S. Comp. St. (1901) p. 1434]), to explore and occupy for profit, public lands containing mineral deposits, including stone, one who takes granite from the public domain is not a trespasser, and by thus taking it and bestowing his labor upon it he becomes the exclusive owner thereof, although he does not acquire the exclusive right to the land from which it was taken. Sullivan *v.* Schultz, 22 Mont. 541, 57 Pac. 279.

24. Argonaut Consol. Min. Co. *v.* Turner, 23 Colo. 400, 48 Pac. 685, 58 Am. St. Rep. 245; Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; Morgenson *v.* Middlesex Min., etc., Co., 11 Colo. 176, 17 Pac. 513; St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466; Maloney *v.* King, 25 Mont. 188, 64 Pac. 351; Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16; Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228; Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540; Cheesman *v.* Shreeve, 40 Fed. 787, 37 Fed. 36. See also Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726.

25. Daggett *v.* Yreka Min., etc., Co., 149 Cal. 357, 86 Pac. 968; Argonaut Min. Co. *v.* Kennedy Min., etc., Co., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317; Kennedy Min., etc., Co. *v.* Argonaut Min. Co., 189 U. S. 1, 23 S. Ct. 501, 47 L. ed. 685; Clark *v.* Fitzgerald, 171 U. S. 92, 18 S. Ct. 941, 43 L. ed. 87; Flagstaff Silver Min. Co. *v.* Tarbet, 98 U. S. 463, 25 L. ed. 253; St. Louis Min., etc., Co. *v.* Montana Min. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Montana Min. Co. *v.* St. Louis Min., etc., Co., 102 Fed. 430, 42 C. C. A. 415; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540; Tyler Min. Co. *v.* Sweeney, 54 Fed. 284, 4 C. C. A. 329; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380.

"The space of intersection," under U. S. Rev. St. (1878) § 2336 [U. S. Comp. St. (1901) p. 1436] in determining the ownership of ore within such space, where the claims cross and intersect on the strike of the lodes, means the intersection of the claims, and not merely of the veins; hence plaintiff, who located the prior claim, is entitled to all that portion of defendant's vein within the side and end lines of its said claims extending vertically downward, and for

proper remedy to recover from an adjoining mine owner a statutory penalty for mining within a certain distance from the boundary line.[26] Where mineral has been taken by trespass and converted into money, the tort may be waived and assumpsit brought for the proceeds,[27] and an action for money had and received will lie.[28] Aside from the doctrine of extralateral rights, minerals beneath the surface are a part of the land, and if taken from the land by another, although it becomes personalty, the owner of the land may recover it or its value.[29]

(B) *Ouster Unnecessary.* No ouster is necessary to maintain trespass, but any unlawful entry is sufficient.[30]

(C) *Title or Possession Necessary.* Plaintiff must have actual or constructive possession of the *locus in quo*, at the date of the alleged trespass.[31] Mere possession is of no avail as against a valid location;[32] but a naked possessor of mineral lands is deemed in law the owner of the same until the general government or person showing title under it makes entry upon the same.[33] Possession of a mining claim in trespass *quare clausum fregit* is *prima facie* evidence of

damages for ore removed therefrom. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* on other points in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200].

26. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800.

27. Alderson *v.* Ennor, 45 Ill. 128.

An attachment is not allowed in actions of trespass to mines, under the statute of Colorado, even though plaintiff elects to waive the trespass and sue as for money had and received by defendant to his use. The implied promise in such case is a pure fiction of the law, invented to support the old action of assumpsit. Taking ore from a mine without the consent of the owner is a trespass in which none of the elements of a contract can be found. Tabor *v.* Big Pittsburg Consol. Silver Min. Co., 14 Fed. 636, 4 McCrary 299.

28. McGonigle *v.* Atchison, 33 Kan. 726, 7 Pac. 550; Dundas *v.* Muhlenberg, 35 Pa. St. 351.

29. Kelley *v.* Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399, 63 Am. St. Rep. 721, 39 L. R. A. 765; Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. (Pa.) 149; Clever's Estate, 23 Pittsb. Leg. J. N. S. (Pa.) 358.

But when oil or gas from natural causes leaves one tract of land and enters another, it becomes a part of such other tract. Kelley *v.* Ohio Oil Co., 57 Ohio St. 317, 49 N E. 399, 63 Am. St. Rep. 721, 39 L. R. A. 765.

30. Rowe *v.* Bradley, 12 Cal. 226.

An unlawful entry, or the unlawful assertion either directly or through another of dominion over another's property is enough. Rowe *v.* Bradley, 12 Cal. 226. See also Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

31. Hugunin *v.* McCunniff, 2 Colo. 367; West *v.* Lanier, 9 Humphr. (Tenn.) 762; Bracken *v.* Preston, 1 Pinn. (Wis.) 584, 44 Am. Dec. 412, 7 Morr. Min. Rep. 267.

It is not necessary in order to constitute possession that parties entering on unsurveyed government mineral lands be actually on the property at the time of the wrongful entry by strangers. Davis *v.* Dennis, (Wash. 1906) 85 Pac. 1079.

Title acquired after suit brought is of no avail since the rights of the parties must be determined by their possession at the time of the trespasses. Hugunin *v.* McCunniff, 2 Colo. 367.

Ownership of title unnecessary.— In respect to claims to mining lands in the western states and territories a system of mining customs, usages, and rights has developed, taking the form and sanction of prescriptive laws of universal recognition, which national and state legislatures later crystallized into written statutes, and in which ownership of the title is not essential to the maintenance of such an action. Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286.

Possession of the surface of a mining claim is possession of a vein or lode having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Co., 27 Mont. 288, 70 Pac. 1114, 27 Mont. 536, 71 Pac. 1005; Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311; Montana Min. Co. *v.* St. Louis Min., etc., Co., 102 Fed. 430, 42 C. C. A. 415.

32. Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484; Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280; Tibbitts *v.* Ah Tong, 4 Mont. 536, 2 Pac. 759; Noyes *v.* Black, 4 Mont. 527, 2 Pac. 769; Russell *v.* Hoyt, 4 Mont. 412, 2 Pac. 25; McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759; Hauswirth *v.* Butcher, 4 Mont. 299, 1 Pac. 714; Belk *v.* Meagher, 3 Mont. 65.

Proof of possession of the surface prior in time is prior in right as against a subsequent underground trespass by tunnel. Lincoln-Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

33. Doran *v.* Central Pac. R. Co., 24 Cal. 245.

title, and is sufficient for a recovery against a mere trespasser.[34] The title to everything within the surface lines of a mining claim to the center of the earth is *prima facie* in the patentee, or locator of the claim.[35]

(II) *WHO MAY MAINTAIN*—(A) *In General.* A lessee may maintain trespass.[36] So may the lessor.[37] But a plaintiff actually disseized cannot maintain trespass *quare clausum fregit* against defendant in adverse possession of the land.[38]

(B) *One Who Has Not Seasonably Filed Certificate.* The fact that plaintiff did not file his certificate of location within sixty days after discovery[39] does not defeat an action of trespass if defendant acquired no rights between the expiration of the sixty days and the actual filing of the certificate.[40]

(C) *Joint Action by Several.*[41] Where two persons entered into partnership for mining leased ground, the lease being to one, to whom all the stock, fixtures, capital, and property belonged exclusively, but both being in possession, a joint action of trespass by both for injury to the mines is maintainable.[42]

(III) *IN WHAT COURTS*—(A) *In General.* This action like other real actions must be brought in the county or district in which the land is situated.[43] It can always be maintained in the state courts,[44] and the United States court has jurisdiction in cases of diversity of citizenship as in other such cases.[45] But no federal question is involved necessary to give the United States courts jurisdiction.[46]

34. *California.*— Hess *v.* Winder, 30 Cal. 349; English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574; Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567; McCarron *v.* O'Connell, 7 Cal. 152; Fitzgerald *v.* Urton, 5 Cal. 308.

Colorado.— Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283.

Missouri.— Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484, 6 Morr. Min. Rep. 216.

Nevada.— Rogers *v.* Cooney, 7 Nev. 213.

Wyoming.— Columbia Copper Min. Co. *v.* Duchess Min., etc., Co., 13 Wyo. 244, 79 Pac. 385.

United States.— Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Campbell *v.* Rankin, 99 U. S. 261, 25 L. ed. 435; North Noonday Min. Co. *v.* Orient Min. Co., 11 Fed. 125, 6 Sawy. 503.

See 34 Cent. Dig. tit. "Mines and Minerals," § 137 *et seq.*

U. S. Rev. St. (1878) § 910 [U. S. Comp. St. (1901) p. 679], provides that the fact that the paramount title to mining claims lies in the United States shall make no difference in possessory actions.

Plaintiff in possession of a mining claim under paper title may recover damages for a trespass without proof of his chain of title against a party defending under a separate title, namely, a lode dipping underneath plaintiff's location. Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283.

A tax-title claimant is not a mere intruder. Stephenson *v.* Wilson, 37 Wis. 482.

35. Ophir Silver Min. Co. *v.* San Francisco Super. Ct., 147 Cal. 467, 82 Pac. 70. See also *infra*, IV, A, 2, a, (V).

36. Freer *v.* Stotenbur, 36 Barb. (N. Y.) 641 [*reversed* on other grounds in 2 Abb. Dec. 189, 2 Keyes 467, 24 How. Pr. 440]; Wesling *v.* Kroll, 78 Wis. 636, 47 N. W. 943; Ganter *v.* Atkinson, 35 Wis. 48; Attersoll *v.* Stevens, 1 Taunt. 183, 9 Rev. Rep. 731, 10 Morr. Min. Rep. 67.

37. Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 6 Morr. Min. Rep. 317.

In an action by the lessor and the lessee of a coal mine against another coal company, for trespass on the property, and for an accounting for coal alleged to have been illegally converted, the lessor and the lessee were properly joined as plaintiffs. United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045.

38. Raffetto *v.* Fiori, 50 Cal. 363.

39. See *supra*, III, B, 5, d, (VI), (G).

40. Columbia Copper Min. Co. *v.* Duchess Min., etc., Co., 13 Wyo. 244, 79 Pac. 385.

41. Action by lessor and lessee see United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045.

42. Douty *v.* Bird, 60 Pa. St. 48.

43. Venue generally see VENUE.

44. Jurisdiction generally see COURTS, 11 Cyc. 633.

An action brought in the justice's court, to recover the value of two tons of ore, in which defendant files an unverified answer, and offers proof that such ore was removed from a vein having its apex outside of plaintiff's location and plaintiff seeks in rebuttal to show that the apex of the vein was within the boundaries of his location, the question of title to real estate is not so involved as to require the case to be certified to the district court under the provisions of Code Civ. Proc. § 779 (Comp. St. 1887) of the state of Montana. Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726.

45. Diverse citizenship generally see COURTS, 11 Cyc. 866 *et seq.*

46. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626; Peabody Gold-Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657; Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 85 Fed.

(B) *In Court of Equity.* A court of equity may award damages when its jurisdiction to restrain a continuing trespass has attached,[47] and a cross action, under the code, brought to try an adverse claim to the right of possession of a mineral lode, to quiet the title thereto,[48] and enjoin the removal of ore therefrom,[49] when, for these purposes, it becomes necessary to identify the boundaries of the vein, and the relief sought, a judgment at law, would not meet the exigencies of the case is a good equitable cross action in a suit to enjoin a trespass.[50]

(IV) *PLEADING*[51] — (A) *In General.* The same rules of pleading ordinarily apply as are recognized in actions for damages for trespass generally.[52]

(B) *Declaration or Complaint* — (1) IN GENERAL. In an action for damages for an alleged trespass the facts should be alleged specifically, in order to present the issues definitely and prevent surprise.[53]

(2) AVERMENT OF INJURY OR DAMAGE. The acts causing injury to the property and the consequent damage to plaintiff should be alleged.[54] And special

867, 29 C. C. A. 462; Argonaut Min. Co. *v.* Kennedy Min., etc., Co., 84 Fed. 1.

Federal question generally see COURTS, 11 Cyc. 857 *et seq.* A federal question is not involved so as to give the circuit court jurisdiction, because in the course of the litigation it may become necessary to construe the constitution or some law of the United States. Little York Gold Washing, etc., Co. *v.* Keyes, 96 U. S. 199, 24 L. ed. 656; Wise *v.* Nixon, 78 Fed. 203. It must appear from plaintiff's statement of his cause of action. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626 [*affirming* 93 Fed. 274, 35 C. C. A. 1]. A federal question cannot be set up by an allegation anticipating a defense; but when so attempted to be pleaded, jurisdiction, if any is thereby conferred, is ousted by the answer disclaiming any intention of defendant's relying upon such defense. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., *supra.* But it has been held that where defendants seek to justify an alleged trespass under the claim of right under the mining laws of the United States, and the right to enter turns upon the construction to be given to such laws, the case is within the jurisdiction of the United States circuit court. Cheesman *v.* Shreeve, 37 Fed. 36.

47. See *infra,* IV, A, 2, e, (I), (A), note 95.

48. Ejectment generally see *infra,* IV, A, 2, b.

Quieting title generally see *infra,* IV, A, 2, d.

49. Injunction generally see *infra,* IV, A, 2, e.

50. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

51. Pleading generally see PLEADING.

52. See, generally, TRESPASS.

53. Daggett *v.* Yreka Min., etc., Co., 149 Cal. 357, 86 Pac. 968. See also Central Eureka Min. Co. *v.* East Cent. Eureka Min. Co., 146 Cal. 147, 79 Pac. 834. However in Daggett *v.* Yreka Min., etc., Co., *supra,* it was held that in an action for trespass on the extralateral dip of a vein having its apex within a valid location, plaintiffs were not bound to allege the existence of a vein having its apex within their surface boundaries, etc., in order to entitle them to prove that defendant had extracted ore from the locality in question.

Deraigning title.— In an action in the nature of trespass to try title to a mining claim, it is not necessary for plaintiff to deraign title; a cause of action is stated when the complaint alleges ownership of plaintiff and ouster. Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918; McKay *v.* McDougal, 19 Mont. 488, 48 Pac. 988. A different rule prevails in action brought, after filing of an adverse claim, to determine the right of the litigants to a United States patent to the mining claim in dispute. McKay *v.* McDougal, *supra.*

Possession, entry, and damage.— In a suit against a railroad company for damages for taking a portion of a mining claim, and cutting timber thereon, a complaint showing an entry without permission on a mining claim in plaintiff's possession, and the doing an injury to the soil and timber, sufficiently avers possession, entry, and damage. Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

Qualifications of locator.— In an ordinary civil action for injuries to a mining claim it is not necessary for plaintiff in the first instance to allege his citizenship, and compliance with the act of congress for acquiring title to such claim, but a general averment of his title or possession is sufficient in an action against a wrong-doer without right or title. McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; McKay *v.* McDougal, 19 Mont. 488, 48 Pac. 988. In an action to recover possession of unsurveyed government mineral lands the fact that defendants were in possession of the property through entry during the temporary absence of plaintiffs, who had been in possession for a number of years, did not require an allegation that plaintiffs had the necessary qualifications to enter government lands in order to state a cause of action. Davis *v.* Dennis, (Wash. 1906) 85 Pac. 1079. *Contra,* Bohanon *v.* Howe, 2 Ida. (Hasb.) 453, 17 Pac. 583.

54. Ohio Oil Co. *v.* Griest, 30 Ind. App. 84, 65 N. E. 534, holding that a complaint alleg-

damages or damages to the mine itself cannot be proved unless they have been specially pleaded.[55]

(3) JOINDER OF ACTIONS OR COUNTS.[56] Under the codes an action for trespass for past damages may be joined with an action to restrain future trespasses.[57] So a complaint may count in trespass and also ask for an accounting for mineral converted.[58]

(c) *Answer or Plea.* The answer or plea may deny plaintiff's title or ownership,[59] or set up defendant's right to do the act complained of as constituting the trespass.[60] The defense that plaintiff is not the real party in interest must be specially pleaded.[61] So an alleged forfeiture on the part of plaintiff must be specially pleaded by defendant.[62] The statute of limitations may be pleaded in bar of the action.[63]

ing that plaintiff was the owner of certain land on which was a gas well, and that the well furnished gas for plaintiff's dwelling-house, and that defendant wrongfully removed the drive-pipe, casing, and tubing from the well, cutting off the flow of gas, thereby damaging the real estate, stated a cause of action, irrespective of whether or not the gas when brought to the surface was personal property.

Surplusage.— Allegations in the complaint that defendants "with force and arms, broke and entered" upon the premises of plaintiff, and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water, do not confine the proof to the direct and immediate damage, as in the old action of trespass, and are surplusage. Darst *v.* Rush, 14 Cal. 81.

55. Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

56. **Joinder of actions** generally see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376 *et seq.*

Joinder of counts generally see PLEADING.

In Pennsylvania a claim to recover treble damages for wrongfully mining and converting coal on another's property, and single damages for injuries to the mine caused by negligence in mining the coal so removed, may be joined in one action where both grow out of the same trespass. Jackson *v.* Gunton, 26 Pa. Super. Ct. 203.

57. Hughes *v.* Dunlap, 91 Cal. 385, 27 Pac. 642.

58. United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045.

59. Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642, holding that where defendants' answer admitted plaintiffs' ownership of the mine, "except that portion hereinafter described," and alleged that defendants were the owners of a tunnel which crossed under plaintiffs' claim, and that one of the veins discovered in the tunnel had its apex outside the exterior limits of plaintiffs' claim, but dipped under the claim, and that the alleged trespass was committed on such vein, it amounted to an explicit denial of plaintiffs' title to and ownership of that portion of the mine described in the answer.

60. Cheesman *v.* Shreeve, 40 Fed. 787, holding, however, that in a suit for trespass, defendants cannot, after suit brought, unite several claims, each having a portion of the outcrop for the purpose of asserting the right to follow a vein upon its dip, when said right does not exist within the said claims, considered separately.

Adverse possession of defendant.— If, during a part of the three years next after the recording of a tax deed, the former owner of the land, by himself, his agents or tenants, openly occupy it for mining purposes, the acts of mining not being merely occasional, fugitive, and desultory, but as continuous as the nature of the business and customs of the country permit or require, this will constitute such an adverse possession as will interrupt the running of the statute of limitation in favor of the tax-title claimant. Colvin *v.* McCune, 39 Iowa 502, 1 Morr. Min. Rep. 223; Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583, 6 Morr. Min. Rep. 195; Stephenson *v.* Wilson, 37 Wis. 482, 13 Morr. Min. Rep. 408 [*overruling* Sydnor *v.* Palmer, 29 Wis. 226].

61. Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283.

62. McDonald *v.* Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616, holding that defendants in an action for trespass upon a placer mining claim cannot avail themselves of an alleged forfeiture of such claim by failure to do the necessary representation work thereon, where they do not plead such forfeiture, and fail to connect themselves with any title adverse to plaintiffs and there is no evidence of a location by any one on account of such forfeiture.

63. See, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963.

When begins to run.— There is no distinction in the application of the statute of limitations between trespass underground and on the surface, and limitation begins to run at the time of the trespass. Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583.

Effect of bar.— The bar to recovery includes all consequences resulting from the trespass. Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583. Where a right of action for breaking through the partition wall of an adjoining mine, under circumstances constituting an actionable trespass, is barred by lapse of time, there can be no recovery for damages caused by a subsequent flow of water

(D) *Cross Complaint.* Where plaintiff instituted an action to recover damages for trespass upon the lode or ore bodies described in the complaint, and defendant alleged in its cross complaint that plaintiff in the original action had set up an adverse claim to seven hundred feet of its lode, it is sufficiently shown that the original and cross action related to the same property.[64]

(E) *Amendments.* The general rules governing the amendment of pleadings are applied. And so it has been held that an entirely new cause of action cannot be introduced by amendment, especially when such new cause is barred by limitation.[65]

(V) *EVIDENCE*[66] — (A) *In General.* Ordinarily the same rules of evidence as are applicable in trespass generally are also applicable in trespass upon mining claims.[67]

(B) *Presumptions.*[68] In actions for trespass[69] upon mines or mining property, as in other actions, presumptions are indulged as to the existence of certain facts; such as presumptions as to the course and strike of a lode,[70] and as to the extent of ownership and of the property owned.[71] So the presumption is indulged

through the opening. National Copper Co. *v.* Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333.

64. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

65. Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, holding that the common-law action for damages for cutting timber is not the same cause of action as that under the statute providing for double or treble damages which is an action for a statutory penalty.

Amendment: *Generally* see PLEADING.

After bar of limitation see LIMITATIONS OF ACTIONS, 25 Cyc. 1301–1310.

66. Evidence generally see EVIDENCE, 16 Cyc. 821 *et seq.*

67. See, generally, TRESPASS.

68. Presumptions generally see EVIDENCE, 16 Cyc. 1050 *et seq.*

Burden of proof see *infra*, IV, A, 2, a, (V), (C).

69. See TRESPASS.

70. Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283, holding that the *prima facie* presumption that a lode, whose course or strike is substantially parallel with, and runs in the same direction as, the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved.

71. See cases cited *infra*, this note.

Deposits of ore.— It is to be presumed that the owner of a mining claim is the owner of all deposits of ore within the side lines of the location, until it shall be shown by a preponderance of the testimony that such deposits are part of a lode having its top or apex within the boundaries of another's claim. Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540.

Veins.— The presumption in the first instance is that the owner of a mine owns all the veins found within his boundary lines, but the presumption may be rebutted by evidence tending to prove that the vein in controversy apexes outside those lines, and as the burden of proving ownership is, when denied, always upon the party alleging it, he must also meet and overcome this evidence or he will fail in establishing his title. Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642. The following cases illustrate the proposition that one owning the surface of a mining claim is presumptively the owner of all veins within its vertical boundaries, and that the burden of proof is upon one claiming any title to, or interest in, any of such veins to show that it has its apex outside of such surface boundaries: Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 39 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 [*affirmed* in 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200]; Iron Silver Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513; Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887; Heinze *v.* Boston, etc., Consol., etc., Min. Co., 30 Mont. 484, 77 Pac. 421; State *v.* Second Judicial Dist. Ct., 28 Mont. 528, 73 Pac. 230; Montana Ore Purchasing Co. *v.* Boston, etc., Consol., etc., Min. Co., 27 Mont. 288, 70 Pac. 1114; Anaconda Copper Min. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909; Parrot Silver, etc., Co. *v.* Heinze, 24 Mont. 485, 62 Pac. 818; Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 6 S. Ct. 481, 29 L. ed. 712; Carson City Gold, etc., Min. Co. *v.* North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540; Doe *v.* Waterloo Min. Co., 54 Fed. 935; Montana Co. *v.* Clark, 42 Fed. 626; Cheesman *v.* Shreeve, 37 Fed. 36; Hyman *v.* Wheeler, 29 Fed. 347; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; Van Zandt *v.* Argentine Min. Co., 8 Fed. 725, 2 McCrary 159 [*affirmed* in 122 U. S. 478, 30 L. ed. 1140]; Zollars *v.* Evans, 5 Fed. 172, 2 McCrary 39; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380; Stevens *v.* Gill, 23 Fed. Cas. No. 13,398, 1 Morr. Min. Rep. 576.

This presumption may not be overturned by speculative conjecture or even an intelligent guess. Heinze *v.* Boston, etc., Consol., etc., Min. Co., 30 Mont. 484, 77 Pac. 421.

in favor of ownership of one in possession of a mining claim and in favor of title after long possession.[72]

(c) *Burden of Proof.* Following the rules applicable to burden of proof in civil actions generally,[73] plaintiff has the burden of proving such facts, properly within the issues made by the pleadings,[74] as are necessary to make out at least a *prima facie* case of trespass in his favor.[75] On the other hand plaintiff having established a *prima facie* case in his favor, the onus is on defendant to overcome plaintiff's contention, either by disproving plaintiff's case,[76] or by showing a valid defense thereto.[77]

(d) *Admissibility.* Subject to the general rules as to relevancy and competency,[78] which are applied as in other cases, any evidence tending to

72. Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135, holding that where a religious society had had uninterrupted possession of land in controversy for thirty years or more, using it as its own, it would be presumed, in the absence of an existing deed to the land, that plaintiff's entry was under a purchase, and that its grantor had lawful right to convey. The possessor of a mining claim in a mining district is presumed to be the owner thereof until the contrary appears, and that presumption is supported in this case by the fact that plaintiff has held, occupied, and possessed the ground in question under color of title, in pursuance of law and the local rules and regulations of the mining district, for more than twenty years prior to the attempted location of defendants' and therefore it was not public mineral land of the United States at the time of defendants' entry. Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240; Cullacott *v.* Cash Gold, etc., Min. Co., 8 Colo. 179, 6 Pac. 211; Gropper *v.* King, 4 Mont. 367, 1 Pac. 755; Risch *v.* Wiseman, 36 Oreg. 484, 59 Pac. 1111, 78 Am. St. Rep. 783.

73. **Burden of proof** generally see EVIDENCE, 16 Cyc. 926 *et seq.*

74. **Matters in issue.**—Where neither party to an action for trespass on a mining claim has acquired a perfect right to a conveyance from the government, the only question to be determined is the right of possession. Columbia Copper Min. Co. *v.* Duchess Min., etc., Co., 13 Wyo. 244, 79 Pac. 385. An averment by plaintiff that he is the owner, and in the actual possession, of the claim, describing it by name as situate in a certain mining district and duly recorded in the records of said county, giving book and page, does not necessarily import that plaintiff is the owner in fee of the claim, and he is not bound to prove his title by patent from the United States. McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388.

75. See Daggett *v.* Yreka Min., etc., Co., 149 Cal. 357, 86 Pac. 968, holding that in trespass, on the extralateral dip of a vein having its apex in plaintiff's location, plaintiff was not bound to prove the identity of the vein by an actual tracing thereof from within the surface lines of his location to the point of the alleged trespass.

Immaterial variance.—A variance between the allegations and proofs which ought not to have misled the adverse party to his prejudice is held not material. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

76. Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226, 15 Morr. Min. Rep. 655 (holding that where ore has been taken by wilful trespass from plaintiff's ground, part before and part since plaintiff became owner of the premises, the burden of proof is on defendant to show how much was taken before the change of ownership; otherwise he will be held for the whole); Maloney *v.* King, 25 Mont. 188, 64 Pac. 351 (holding that in an action for damages sustained by plaintiffs, owing to the removal of ores from their mining location, plaintiffs having shown *prima facie* the amount taken, it was then incumbent on defendants to show that they took a less quantity than plaintiff's proof tended to show); Red Wing Gold Min. Co. *v.* Clays, 30 Utah 242, 83 Pac. 841 (holding that where, in trespass for taking ore from beneath the surface of mining claims owned by plaintiff, defendant alleged that all the mineral removed was removed from a vein the apex of which was wholly within his mining claim, defendant had the burden of establishing the location of the vein and its apex).

77. Cheesman *v.* Shreeve, 37 Fed. 36, holding that parties who attempt to enter beneath the surface within the side lines of the claims of another, and to mine and take ore therefrom, are *prima facie* trespassers, and hence must assume the burden of showing that they are on one of their own veins.

Plaintiff's rebuttal.—In an action to recover ore, plaintiff proved title, by occupancy, to a certain claim, and that the ore was taken from within its boundaries. Defendants' evidence was that the apex of the vein from which the ore was taken lay outside plaintiff's boundary lines, and within another claim. It did not appear that the "discovery" of either claim was on the vein in question. It was held that it was proper rebuttal testimony for plaintiff to show that the apex of the vein was within his lines. Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726.

78. See, generally, EVIDENCE, 16 Cyc. 847 *et seq.*

establish the facts in issue is admissible.[79] And so documentary evidence is admissible.[80]

(VI) *INSPECTION.* The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings.[81]

(VII) *TRIAL.*[82] It may be stated generally that matters relating to the right to a jury trial,[83] questions of law and fact,[84] and instructions to the jury,[85] as well

To prove defendant's trespass to have been wilful, evidence that an unknown third person, after the commencement of the suit, took out ore was not competent. Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252.

79. See cases cited *infra*, this and succeeding notes.

Nature and extent of possession.— While the local record of a mining community is the best evidence of the rules and customs governing their mining interests, it is not the best or only evidence of priority or extent of actual possession. Campbell *v.* Rankin, 99 U. S. 261, 25 L. ed. 435. Where a defendant pleads title by virtue of adverse possession of a mine, evidence which tends to prove that such possession has been under a claim of ownership, and in hostility to the true owner is admissible. Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642.

Quality, quantity, and value of ore.— In an action against a mining company for trespassing upon and extracting ore from a claim owned by plaintiff, the principal issues litigated being as to the quantity and value of the ore taken by defendant from plaintiff's claim, testimony to show the total number of miners engaged in working in its mines, including several of its own claims, the total number working on plaintiff's claim, the total production from all the mines, and that each man took out about the same quantity of ore per day, on an average, in all the workings, as tending to show the quantity taken from plaintiff's claim; also the assays made of each shipment of ore at the mill, for the purpose of showing the value of plaintiff's ore, is admissible. Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228. Evidence of the average assay value of samples of ore taken from the side walls of the workings and from drifts immediately adjacent, and shown to have been of the same general character as the body of ore removed, is admissible. Golden Reward Min. Co. *v.* Buxton Min. Co., *supra*.

Where defendant denies both the existence of plaintiff's mining claim and the taking of any ore therefrom, he may show that the title to the ore claimed by plaintiff is in a third person. Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726.

80. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515, holding that it is not error to admit in evidence the patent from the United States to a mining company under section 1198, Utah code of procedure; the laws of the United States requiring all patents from the general land-office to be recorded in that office, from which exemplifications authenticated by the seal and certificate of the commissioner may be obtained as evidence. See also Bartlett *v.* Nova Scotia Steel Co., 35 Nova Scotia 376, holding that a copy of a plan from the crown lands office, as to which one of plaintiff's witnesses was cross-examined, and which was put in by defendant's counsel, without restriction, as part of his general evidence, was in for all purposes to which plaintiff might apply it, and was properly used for the purpose of proving measurements made on the ground.

81. Star Min., etc., Co. *v.* Byron N. White Co., 9 Brit. Col. 422.

82. Trial generally see TRIAL.

83. Hughes *v.* Dunlap, 91 Cal. 385, 27 Pac. 642, holding that in an action for damages for past trespasses and an injunction each remedy must be governed by the same law that would apply if the other remedy had not been asked, and in so far as damages are sought the remedy is legal and plaintiff is entitled to a jury trial.

84. Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621, holding that in an action against a mining company for the removal of coal from beneath plaintiff's adjoining land, evidence considered and held to render it a question for the jury whether defendant had taken any coal.

85. Maine Boys' Tunnel Co. *v.* Boston Tunnel Co., 37 Cal. 40 (holding that an instruction to the effect that in overlapping locations the senior locator is not divested of the part in conflict, when neither of the locators work such conflicting part, although the junior locator has been in possession of his location for five years, such possession not being adverse, is correct); Maloney *v.* King, 25 Mont. 188, 64 Pac. 351, 30 Mont. 158, 76 Pac. 4 (holding that, in an action of trespass for removal of ore from within the boundaries of plaintiff's location, an instruction that if defendants had carried away ores belonging to plaintiff, and in so doing they were mixed with other ores to which defendants were entitled, so that the amount of each could not be ascertained, plaintiff was entitled to recover the value of all ores taken with which the ores belonging to plaintiffs were mixed, was erroneous in the particular case); Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803 (holding that in charging the jury as to the value of the ore taken from plaintiff's vein by defendants while working within the boundaries of their own claim, an instruction that the jury should take as a basis therefor "the market value of such ores on the dump after deducting the cost of mining and hoisting" is not objectionable in that it does not also exclude the

as other matters of trial, are controlled by the same rules governing trials of actions for trespass in general.[86]

(VIII) *DAMAGES*[87] — (A) *In General.* The measure of damages recoverable is governed by the usual rules,[88] when they are applicable. These rules have been applied to damages for flooding mining property,[89] damages for taking ore or other mineral,[90] to damages for injury to the mineral not taken.[91] The law presumes at least nominal damages from a trespass.[92] A statute making the operator of a mine who without permission takes coal from adjoining lands liable in double damages[93] includes injuries to the surface.[94]

(B) *Innocent and Wilful Trespass Distinguished.* An innocent trespasser — one who by mistake, or unintentionally and in the honest belief that he is lawfully exercising a right which he has, enters upon the property or on the vein of another, and takes ore, coal, oil, or other substances therefrom, may limit the

cost of smelting and reducing the ore, since the "market value" is of necessity the value of the bullion less the cost of extracting it from the ore); Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252 (holding that where the evidence as to defendant's intent in taking ore from another's land adjoining his mine was conflicting, an instruction that, if defendant had been negligent in failing to discover the location of his property, he was estopped to say that the taking was not wilful or intentional, was erroneous).

An erroneous instruction is presumed to be prejudicial, and it is held that it is not cured by a correct direction in another part of the charge. Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252.

86. See, generally, TRESPASS; TRIAL.

87. Damages generally see DAMAGES, 13 Cyc. 1.

88. See, generally, DAMAGES, 13 Cyc. 1; TRESPASS.

89. Damages for flooding see *infra*, V, C, 2, b, (II).

90. Damages for taking.— The measure of damages in trespass for the removal of gold-bearing earth is its value at the time it was separated from the surrounding soil and became a chattel, but the expense of extracting the gold and separating it from the earth after it is first moved from its original location is to be deducted. Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810; Goller *v.* Fett, 30 Cal. 481; Maye *v.* Yappen, 23 Cal. 306. When in deep placer mining, earth and gravel fall from plaintiff's claim on defendant's claim, because of defendant's removal of lateral support, and defendant extracts the gold therefrom, he is liable for the value of such gold unless the cost of extraction exceeds such value. Hendricks *v.* Spring Valley Min., etc., Co., 58 Cal. 190, 41 Am. Rep. 257. Dak. Comp. Laws (1887), § 4603, fixing the measure of the damages recoverable for wrongful conversion of personal property as the value of the property at the time of conversion, with interest, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of plaintiff, governs in actions in the federal courts within the state, and is applicable to an action for trespass upon a mining claim, where the only damage claimed or litigated is the value of the ore removed therefrom and converted by defendant; the action being in effect, although not in form, one for the conversion of personal property. Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228. See also Butte, etc., Min. Co. *v.* Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 Pac. 111. Where a lessor through inadvertence causes his lessee to mine coal under an adjoining tract belonging to another, and receives the royalty thereon, the measure of damages is the value of the coal at the mouth of the pit less the cost of elevation to the surface, and if loaded on railroad cars, less the cost thereof. Donovan *v.* St. Louis Consol. Coal Co., 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206. Instructions as to value or "market value" of ore see *supra*, note 85.

Lessor may recover for ore taken from demised premises by a trespasser, at least to the extent of the royalty he should have received from the lessee. Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 6 Morr. Min. Rep. 317. So where the ore has been taken out by a lessee of defendant who received a royalty thereon, such royalty may be taken as his net profit, which plaintiff may recover, together with interest thereon from the date of conversion. New Dundenberg Min. Co. *v.* Old, 97 Fed. 150, 38 C. C. A. 89; Colorado Cent. Consol. Min. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128.

91. Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525, holding that the measure of damages in trespass for mining coal when defendant had so injured the coal left in pillars that it was difficult or impossible for plaintiff to mine the same is the value per ton in its native bed of all coal which could not be removed and the increased expense of mining that which could be removed.

92. Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810; Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567.

93. Iowa Code, § 2485.

94. Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621.

owner's recovery to the value of the substance so taken, less the actual cost of production, including digging, tramming, hoisting, transportation, and treatment;[95] but one who wilfully and intentionally does so must respond in damages for the full value of the ore in place in the mine, at the time of the removal, without any deduction whatsoever.[96] It has been held in some states that exemplary or punitive damages may be recovered in cases of wilful trespass.[97]

95. *Alabama.*— Ivy Coal, etc., Co. *v.* Alabama Coal, etc., Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; Warrior Coal, etc., Co. *v.* Mable Min. Co., 112 Ala. 624, 20 So. 918.

Arizona.—Alta Min., etc., Co. *v.* Benson Min., etc., Co., 2 Ariz. 362, 16 Pac. 565.

Colorado.— United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045; Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

Illinois.— Illinois, etc., R., etc., Co. *v.* Ogle, 92 Ill. 353; MacLean County Coal Co. *v.* Lennon, 91 Ill. 561, 33 Am. Rep. 64; Illinois, etc., R., etc., Co. *v.* Ogle, 82 Ill. 627, 25 Am. Rep. 342; McLean County Coal Co. *v.* Long, 81 Ill. 359; Robertson *v.* Jones, 71 Ill. 405; Donovan *v.* St. Louis Consol. Coal Co., 88 Ill. App. 589 [*affirmed* in 187 Ill. 28, 58 N. E. 290]; Thomas Pressed Brick Co. *v.* Herter, 60 Ill. App. 58.

Indiana.— Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Maryland.— Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280.

Massachusetts.— Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 6 Morr. Min. Rep. 317.

Michigan.— Hartford Iron Min. Co. *v.* Cambria Min. Co., 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488; Winchester *v.* Craig, 33 Mich. 205.

Minnesota.— King *v.* Merriman, 38 Minn. 47, 35 N. W. 570; Whitney *v.* Huntington, 37 Minn. 197, 33 N. W. 561.

Missouri.—Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446.

Montana.— Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347; Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293.

New York.— Dyke *v.* National Transit Co., 22 N. Y. App. Div. 360, 49 N. Y. Suppl. 180; Baker *v.* Hart, 52 Hun 363, 5 N. Y. Suppl. 345.

Pennsylvania.— Crawford *v.* Forest Oil Co., 208 Pa. St. 5, 57 Atl. 47; Ege *v.* Kille, 84 Pa. St. 333; Forsyth *v.* Wells, 41 Pa. St. 291, 80 Am. Dec. 617.

Tennessee.— Dougherty *v.* Chesnutt, 86 Tenn. 1, 5 S. W. 444; Ross *v.* Scott, 15 Lea 479; Coal Creek Min., etc., Co. *v.* Moses, 15 Lea 300, 54 Am. Rep. 415.

United States.— Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 12 S. Ct. 877, 36 L. ed. 762; Resurrection Gold Min. Co. *v.* Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180; Sweeney *v.* Hanley, 126 Fed. 97, 61 C. C. A. 153; U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303; Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228; Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252; Colorado Cent. Consol. Min. Co. *v.* Turck, 70 Fed. 294, 17 C. C. A. 128; Cheesman *v.* Shreeve, 40 Fed. 787; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355.

England.— Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 941, 16 L. T. Rep. N. S. 736, 15 Wkly. Rep. 1105.

See 34 Cent. Dig. tit. "Mines and Minerals," § 97. See also cases cited *supra*, note 85 *et seq.*

96. See cases cited *supra*, note 90 *et seq.*

Who is a wilful trespasser.— One who takes the ore from another's land without right, either recklessly or with the actual intent so to do, is a wilful trespasser. One who takes such ore without right, but inadvertently and unintentionally, or in the honest belief that he is exercising his own right, is not a wilful trespasser. Resurrection Gold Min. Co. *v.* Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180. A lessee holding over under claim of right is not a wilful trespasser. Montrozona Gold Min. Co. *v.* Thatcher, 19 Colo. App. 371, 75 Pac. 595. It is the duty of everyone to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them. Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252.

The test which determines whether one was a wilful or an innocent trespasser is not his violation of or compliance with the law, but his honest belief and actual intention at the time he committed the trespass. Montrozona Gold Min. Co. *v.* Thatcher, 19 Colo. App. 371, 75 Pac. 595; U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

97. Illinois, etc., R., etc., Co. *v.* Ogle, 92 Ill. 353; Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525; Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158.

Unauthorized use of tunnel.—The mere unauthorized use, by the owner of coal under

(IX) *APPEAL AND ERROR.* Review on appeal or error is governed by the rules relating to such review in civil actions in general.[98]

b. Ejectment[99] — (I) *WHEN LIES* — (A) *Title or Possession Necessary to Maintain.* In seeking to recover possession of mining property or claim each case must be adjudged by the law of possession.[1] Plaintiff's right to possession,[2] or his possession at the time of entry by one under no better right or title,[3] is

land of plaintiff, of his tunnel to transport coal from adjoining lands does not entitle plaintiff to punitive damages, or anything but nominal damages, and such further damages, if any, as will compensate him for any injuries resulting from the wrong. Springer *v.* J. H. Somers Fuel Co., 196 Pa. St. 156, 46 Atl. 370.

98. Appeal and error generally see APPEAL AND ERROR, 2 Cyc. 474 *et seq.*

Assignment of errors.— Where the complaint contained no averment of citizenship on the part of plaintiffs, but there was no issue, objection, or specific assignment or error in that regard by defendant below, it will not be considered on appeal. Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

Weight of evidence.— The evidence is sufficient to support the verdict for plaintiff in a case of trespass for taking coal from plaintiff's land adjoining defendant's mine, where defendant denies the trespass, and an experienced miner, who was well acquainted with defendant's mine, testified that it would take a year to remove all the coal therefrom in the way the shaft was then operated, and it was shown that defendant's lessee had worked the mine for more than a year close to plaintiff's land. Williams *v.* May, 44 Kan. 179, 24 Pac. 52.

Where, upon cross writs of error from the same judgment, a portion of such judgment is affirmed and a portion reversed, the result is to reverse the entire judgment and to remand the cause for a new trial. Montana Min. Co. *v.* St. Louis Min., etc., Co., 186 U. S. 24, 22 S. Ct. 744, 46 L. ed. 1039; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311.

A writ of error from a judgment of the circuit court of appeals affirming a judgment of a circuit court must, together with a writ of error from a separate and subsequent judgment of the circuit court of appeals on a cross writ of error, reversing the same judgment of the circuit court, and remanding the cause for a new trial on the question presented by such cross writ of error be dismissed, as the judgment of the circuit court of appeals first rendered ceased to be final by the operation of the second judgment which was itself not final. Montana Min. Co. *v.* St. Louis Min., etc., Co., 186 U. S. 24, 22 S. Ct. 744, 46 L. ed. 1039.

99. Ejectment generally see EJECTMENT, 15 Cyc. 1.

1. Meydenbauer *v.* Stevens, 78 Fed. 787; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355, which cases are under the provision of the federal statute that no possessory action between parties in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the paramount title of the United States, but each case must be adjudged by the law of possession. U. S. Rev. St. (1878) § 910 [U. S. Comp. St. (1901) p. 679].

2. See cases cited *infra*, this note.

Actual possession.— There is nothing in the act of congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant from the United States. Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735 [*affirming* 3 Mont. 65]. In the absence of a statute to the contrary prior possession must be actual. Coryell *v.* Cain, 16 Cal. 567.

The right of possession acquired by a locator of mineral ground on the public domain, by complying with the mining laws and regulations, is held to be exclusive, so long as kept alive by representation and is sufficient to maintain ejectment; an entry and relocation by any one else is void. Belk *v.* Meagher, 194 U. S. 279, 26 L. ed. 735 [*affirming* 3 Mont. 65].

3. See cases cited *infra*, this note.

Possession of a mining claim, without reference to mining rules, is sufficient to maintain ejectment as against one entering by no better title. This possession need not be evidenced by actual inclosure, but "if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries," it is enough, against one entering without title. The regular and usual way of obtaining possession of mining claims is according to the mining regulations of the vicinage, still, a possession not so taken is good against one taking possession in the same way; and the actual prior possession of the first occupant would be better than the subsequent possession of the last. No acts are required as evidence of the possession of a mining claim, other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, to build on it, to cultivate it, or to inclose it. He may be in possession by himself, or by his agents or servants. Going on the lode to work it, or even work done in proximity and in direct relation to the claim for the purpose of extracting or preparing to extract minerals from it, as for example, starting a tunnel a considerable distance off, to run into the claim, would be a possession of the claim within the meaning of the rule. Where one enters under a written claim or color of title, his possession, except as against the true owner or prior occupant, is good to the ex-

sufficient for the maintenance of the action.[4] The elementary rule that one must recover on the strength of his own and not on the weakness of the title of his adversary is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser;[5] and actual possession at the time of eviction is *prima facie* evidence of title and sufficient for a recovery as against a mere trespasser.[6] The right to maintain ejectment depends on defendant's possession of the property at the time the action was commenced, and not to "any time prior thereto" or "at any time subsequent."[7]

(B) *Necessity of Ouster.* As a general rule ejectment, being a possessory action, cannot be maintained for land of which plaintiff is in possession, but it must be affirmatively proved that there has been a disseizin of plaintiff as well as a wrongful possession by defendant.[8] An entry on the land of another under an assertion of title is an ouster; otherwise it is a mere trespass.[9] There is no distinction between an ouster upon the surface and an ouster beneath the surface,

tent of the whole limits described in the paper, although the possession be only of a part of the claim. English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

But mere occupation and working, under neither law nor custom, of mineral lands belonging to the United States confers no right to possession as against one who afterward has peaceably located a claim under the law. Horswell *v.* Ruiz, 67 Cal. 111, 7 Pac. 197.

Possession of the surface of land where the estate in the minerals has been severed from that in the surface does not carry with it the possession of the minerals beneath, so as to confer title thereto under the statute of limitations. Catlin Coal Co. *v.* Lloyd, 176 Ill. 275, 52 N. E. 144.

"Patented mines" are within the provisions of Nev. Gen. St. § 3632, providing that no action to recover "mining claims" shall be maintained unless plaintiff was "seized" or "possessed" or was the "owner" of such claim according to the laws and customs of the district embracing the same within two years before the commencement of such action, and that occupation and adverse possession of a "mining claim" shall consist in holding and working similar claims in the vicinity. South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89.

4. Scope of remedy; injunction.— Where it appears that the owner of mineral land is disseized, and that the persons in possession claim a right thereto and are working the mine thereon, ejectment is the proper remedy, with a preliminary injunction on a proper bill showing the pendency of the action at law, and after recovery therein plaintiffs may sue for mesne profits. Bracken *v.* Preston, 1 Pinn. (Wis.) 584, 44 Am. Dec. 412. See also *infra*, IV, A, 2, e.

5. Benton *v.* Hopkins, 31 Colo. 518, 74 Pac. 891; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436; Meydenbauer *v.* Stevens, 78 Fed. 787.

6. *California.*— English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

Dakota.— Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887.

Montana.— McKay *v.* McDougal, 19 Mont. 488, 48 Pac. 988.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347.

Utah.— Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

United States.— Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436; Glacier Mountain Silver Min. Co. *v.* Willis, 127 U. S. 471, 8 S. Ct. 1214, 32 L. ed. 172; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Campbell *v.* Rankin, 99 U. S. 261, 25 L. ed. 435 [*reversing* 1 Mont. 300]; Meydenbauer *v.* Stevens, 78 Fed. 787; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355.

See 34 Cent. Dig. tit. "Mines and Minerals," § 136.

In an early California case and in a Colorado case (prior to the decision in the Haws case by the United States supreme court) the elementary rule stated in the text (but without the qualifications) was apparently held to be inapplicable; however, an examination of these cases discloses that as a matter of fact the elementary rule with the qualification was actually applied. Richardson *v.* McNulty, 24 Cal. 339; Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111. The qualification was well stated in a later California case, Garthe *v.* Hart, 73 Cal. 541, 543, 15 Pac. 93, where it was said that there is "a distinction between the right of a party in possession as against mere intruders, and his right as against one who has complied with the mining laws. Possession is good as against mere intruder (Hess *v.* Winder, 30 Cal. 349; English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574; Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312); but it is not good as against one who has complied with the mining laws (Du Prat *v.* James, 65 Cal. 555, 4 Pac. 562)."

7. Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155.

8. Zerres *v.* Vanina, 134 Fed. 610.

9. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; West *v.* Lanier, 9 Humphr. (Tenn.) 762.

Intention guides the entry, and fixes its

except in cases arising under mining claims by virtue of federal statute.[10] Where the parties are tenants in common, defendant's possession is plaintiff's possession until he is ousted, and defendant has no possession adverse to plaintiff's prior to the time of such ouster.[11]

(II) *WHO MAY MAINTAIN.* The owner of a valid mining location is entitled to its exclusive possession and use as against all the world.[12] A relocator of a mining claim is not a discoverer of the mineral contained therein, but an appropriator thereof, and cannot maintain ejectment against the original locator except on proof that the latter had abandoned or forfeited his right by failure to comply with the mining laws.[13] A tenant in common with other locators of a mining claim can maintain an action for the recovery of the land without joining his cotenants; and if he improperly joins any other person objection to the misjoinder must be taken in the answer.[14] A lessee may maintain ejectment for the recovery of the leased property.[15] A person who locates a mining claim in the name of another cannot maintain ejectment for the claim in his own name.[16] Defendant, an owner of an undivided interest in a mine, is entitled to the possession of the whole thereof as against plaintiff who shows no title to any portion of the mine.[17] Where one of two joint tenants of a mining claim fraudulently surrenders possession to third parties, his cotenant cannot maintain ejectment against them.[18] An action of ejectment to recover mining property cannot be maintained on the ground that defendants have acquired it by a relocation in pursuance of a conspiracy with plaintiff's partner, whereby that partner, who was not one of the relocators, ceased to do the necessary work on the mine and abandoned its possession, since these facts, whatever equities they may raise as against defendants, give plaintiff no legal title to the mine or any part thereof.[19]

(III) *TIME FOR BRINGING ACTION.*[20] It has been held that the statute of limitations does not begin to run against one claiming a mining claim under a patent until the date of the government patent.[21] Where there are general statutes of limitations for the recovery of real estate, and special provisions applicable to placer mines and quartz lodes, the latter control.[22] A statute providing that no action for the recovery of mining claims, lode claims excepted, or for the recovery of possession thereof, shall be maintained, unless it appears that plaintiff or his assigns were seized or possessed of such mining claims within one year before the commencement of such action, is not applicable to real estate patented as placer ground, and hence it is held that adverse possession of such

character. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869.

10. Lincoln-Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330. See U. S. Rev. St. (1878) § 2322 [U. S. Comp. St. (1901) p. 1425].

11. Van Valkenburg *v.* Huff, 1 Nev. 142; Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541.

12. See *supra*, III, B, 6, a. A stranger, going thereon for the purpose of discovering veins, of cutting and removing timber, or of otherwise interfering with the locator's possession and use, is a trespasser. Iron Silver Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513; Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240. Trespass generally see *supra*, IV, A, 2, a.

Where one is entitled to possession of a mine under a patent certificate from the United States he has a legal estate in lands and his right to maintain ejectment therefor is not subject to Hill Annot. Laws, § 2178, providing that one year's adverse possession of a mine is a bar to an action for its possession. Rader *v.* Allen, 27 Oreg. 344, 41 Pac. 154.

State land see *supra*, III, B, 12, a, note 79.

13. Zerres *v.* Vanina, 134 Fed. 610.

14. Morenhaut *v.* Wilson, 52 Cal. 263.

15. Barker *v.* Dale, 2 Fed. Cas. No. 988, 3 Pittsb. (Pa.) 190.

16. Van Valkenburg *v.* Huff, 1 Nev. 142.

17. Melton *v.* Lambard, 51 Cal. 258.

18. Lockhart *v.* Johnson, 181 U. S. 516, 21 S. Ct. 665, 45 L. ed. 979, holding that his remedy is in equity.

19. Lockhart *v.* Wills, 9 N. M. 344, 54 Pac. 336; Lockhart *v.* Johnson, 181 U. S. 516, 21 S. Ct. 665, 45 L. ed. 979.

20. **Limitation of action** generally see LIMITATIONS OF ACTIONS, 25 Cyc. 963.

Adverse possession generally see ADVERSE POSSESSION, 1 Cyc. 958.

21. Mayer *v.* Carothers, 14 Mont. 274, 36 Pac. 182; Weibold *v.* Davis, 7 Mont. 107, 14 Pac. 865; King *v.* Thomas, 6 Mont. 409, 12 Pac. 865; Redfield *v.* Parks, 132 U. S. 239, 10 S. Ct. 83, 33 L. ed. 327.

22. Davis *v.* Clark, 2 Mont. 310.

land for one year after the issuance of patent is not sufficient to divest the owner of his title.[23]

(IV) *DEFENSES.* Usually under the codes an equitable defense may be set up to an action for the possession of lands, and as to such defense the case is to be tried in the same manner and on such principles as would apply to an original bill in equity.[24] A recovery by plaintiff is as effectively barred by proof of a valid outstanding title in a third party as by showing title in defendant.[25] It has been held that defendant might set up as a defense that plaintiff's patent was wrongfully procured.[26] In order to stop a locator from asserting his title against one whom he has allowed to enter and make valuable improvements on the claim, it must appear that the owner's silence amounted to a fraud on the other.[27] Where plaintiff and defendant owned adjoining mining claims, defendant's shaft being sunk partially on both claims, and defendant applied to plaintiff for leave to work through this shaft, which was granted, plaintiff stating that he did not want defendant to work on any of plaintiff's ground, this did not estop plaintiff from maintaining ejectment to assert his extralateral rights in a vein apexing in his claim, and continuing on the dip through defendant's claim.[28]

(V) *PLEADING*[29] — (A) *In General.* The ordinary rules of pleading in ejectment apply, but there are some variations depending upon the character of the property and the methods by which the right of possession or title are acquired.[30]

(B) *Complaint or Declaration.* The essential allegations necessary to an action in ejectment are the estate of plaintiff, possession by defendants at the commencement of the action, and their wrongful withholding of the same;[31] and a complaint which alleges that plaintiff is the owner in fee and entitled to the possession of the ground therein described, and that defendant wrongfully and unlawfully entered upon and is extracting ore therefrom, is sufficient.[32]

23. Horst *v.* Shea, 23 Mont. 390, 59 Pac. 364; Mayer *v.* Carothers, 14 Mont. 274, 36 Pac. 182; Weibold *v.* Davis, 7 Mont. 107, 14 Pac. 865; King *v.* Thomas, 6 Mont. 409, 12 Pac. 865; Davis *v.* Clark, 2 Mont. 310; Redfield *v.* Parks, 132 U. S. 239, 10 S. Ct. 83, 33 L. ed. 327; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541.

24. South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89.

25. Dyke *v.* Whyte, 17 Colo. 296, 29 Pac. 128.

A naked trespasser cannot show outstanding title as against one claiming by virtue of prior possession; but such trespasser can show that plaintiff, or those from whom he derived title, has parted with his right of possession by conveyance or lost it by abandonment. Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

26. Murray *v.* Montana Lumber, etc., Co., 25 Mont. 14, 63 Pac. 719, holding that where ejectment is brought to recover a mining claim which has been patented to plaintiff, defendant may show as a defense that he had purchased a prior claim thereto, and was entitled to a patent therefor, but that his vendor afterward wrongfully conveyed the same property to a third person, who relinquished the claim to the government, which enabled plaintiff to obtain title to the property, and that plaintiff's patent was wrongfully procured, although his vendor did not resist the issuance thereof. But *compare* Boggs *v.* Merced Min. Co., 14 Cal. 279, holding that in ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant cannot set up fraud in the survey or procurement of the patent to defeat the action.

27. Kelly *v.* Taylor, 23 Cal. 11.

28. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57.

29. Pleading generally see PLEADING.

30. See *infra*, IV, A, 2, b, (V), (B), (C).

31. Haggin *v.* Kelly, 136 Cal. 481, 69 Pac. 140.

32. Mauldin *v.* Ball, 5 Mont. 96, 1 Pac. 409.

It is sufficient for plaintiff to allege that he is the owner of the land in question, which carries with it all the facts essential to establish his ownership, and the means by which he became such owner would be only evidence of his ownership and should not be alleged. Contreras *v.* Merck, 131 Cal. 211, 63 Pac. 336; Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708.

Mesne conveyance need not be pleaded.— Coryell *v.* Cain, 16 Cal. 567.

Plaintiff need not set forth rules and customs of mining on which his title partly depends. Colman *v.* Clements, 23 Cal. 245.

Effect of allegation of ownership.— Under an allegation in ejectment that plaintiff is the owner in fee entitled to the possession of mining lands, subject only to the paramount title of the United States, it may be inferred that plaintiff claims under a patent certificate from the United States, after performing all the requirements to entitle him

Where the complaint alleges ownership and the answer takes issue thereon and alleges ownership in defendant, it is not necessary for plaintiff to plead a forfeiture or abandonment of a prior location made by defendant; but he may show that said location had become void, and that the land was vacant public mineral land of the United States when plaintiff's location was made.[33] A complaint states a cause of action for the protection of extralateral rights which merely alleges that defendant wrongfully entered upon plaintiff's claim on veins apexing within its boundaries.[34] It has been held that in an action of ejectment in adverse proceedings upon an application for a patent, citizenship must be alleged and proved;[35] but where the contest is between individuals, as distinguished from ejectment in support of adverse proceedings, upon application for United States patent, the question of citizenship is not in issue, and need not be either alleged or proved.[36] A general description of the property, such as will enable the sheriff in case of a recovery to execute a writ of possession, or will enable a surveyor to ascertain the exact limits of the location, is sufficient.[37]

(c) *Answer or Plea.* Defendant relying upon an equitable defense to an action of ejectment must set up in his answer the facts constituting the same or it will not be considered,[38] and it has been decided that if defendant in an action of ejectment to recover possession of mining ground relies upon a forfeiture by plaintiff such forfeiture must be specially pleaded.[39] In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the fact which, under the United States statutes,[40] precludes him from having any right of possession of the vein or lode.[41] But an answer averring "that any right that plaintiffs may have ever had to the possession," etc., "they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendant's entry," is insufficient, in not setting forth the rules and customs, and as being the statement of a legal conclusion.[42]

(d) *Amendments.* In ejectment, where it is desired to have the complaint more definite as to the point where the trespass was committed, the proper

to a patent to the mine. Rader *v.* Allen, 27 Oreg. 344, 41 Pac. 154.

33. Contreras *v.* Merck, 131 Cal. 211, 63 Pac. 336.

34. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57, holding that the complaint need not allege that the vein contains mineral, since that question cannot be raised collaterally after patent.

35. Lee Doon *v.* Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; Keeler *v.* Trueman, 15 Colo. 143, 25 Pac. 311; Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918; Bohanon *v.* Howe, 2 Ida. (Hasb.) 453, 17 Pac. 583; Sherlock *v.* Leighton, 9 Wyo. 297, 63 Pac. 580, 934. But *compare* Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708, holding that such complaint need not aver that complainant is a United States citizen, or has declared his intention to be such, although, if his ownership is based upon a location under United States laws, he must prove such citizenship or declaration.

36. Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

37. Grady *v.* Early, 18 Cal. 108; Glacier Mountain Silver Min. Co. *v.* Willis, 127 U. S. 471, 8 S. Ct. 1214, 32 L. ed. 172; Colorado Cent. Consol. Min. Co. *v.* Turck, 50 Fed. 888, 2 C. C. A. 67.

38. Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

39. Morenhaut *v.* Wilson, 52 Cal. 263; Renshaw *v.* Switzer, 6 Mont. 464, 13 Pac. 127; Sherlock *v.* Leighton, 9 Wyo. 297, 63 Pac. 580, 934.

The reason given for this rule is that "a defense based merely upon forfeiture does not involve a denial of the plaintiff's possession or right of possession at the date of the defendant's entry." Morenhaut *v.* Wilson, 52 Cal. 263, 268 [*quoted* in Steel *v.* Gold Lead Min. Co., 18 Nev. 80, 1 Pac. 448].

This rule does not apply to pleadings in an action involving an adverse claim upon application for a United States patent, when proof of forfeiture may be given, although not specially pleaded. Steel *v.* Gold Lead Min. Co., 18 Nev. 80, 1 Pac. 448.

40. U. S. Rev. St. (1878) § 2333 [U. S. Comp. St. (1901) p. 1433].

41. Sullivan *v.* Iron Silver Min. Co., 109 U. S. 550, 3 S. Ct. 339, 27 L. ed. 1028 [*reversing* 16 Fed. 829, 5 McCrary 274].

42. Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534.

practice requires a motion to that effect should be interposed before answering the complaint on the merits.[43]

(E) *Variance.* Where a complaint in ejectment for a mining claim based plaintiffs' title solely on the location of the claim, and the sole issue raised by the answer was one of forfeiture of the location for failure to perform the assessment work required by law, plaintiffs could not, after the case was before the jury, rely on adverse possession as a source of title.[44]

(VI) *EVIDENCE*[45] — (A) *Burden of Proof.* Plaintiff, to maintain ejectment against a subsequent locator, must show a valid location,[46] and if he fails to establish such location he cannot obtain any benefit from the invalidity of defendant's location, defendant having been in prior possession.[47] Where one has made a valid location, his right of possession continues until he has abandoned or forfeited it and the burden of proving forfeiture or abandonment is on him who attacks this right.[48] Either party relying upon the right to follow a vein on its dip into and within the side lines vertically extended of another's location has the burden of proving such right.[49]

(B) *Admissibility.* Plaintiff may show his title from any source;[50] but a deed for a mining claim cannot be introduced without showing that it was properly executed.[51] Mining rules of the district, although adopted after plaintiff's right attached, are admissible and competent evidence for the defense, to show the nature and extent of defendant's claim.[52] In ejectment to recover an unpatented mill-site location connected with an unpatented mining claim, where complainant relies upon his own prior possession and an ouster by defendant, a receiver's certificate to plaintiff for the purchase-money of the land is admissible in evidence, not as showing title, but as tending to show, in connection with other evidence, the good faith of plaintiff, pursuant to its location and survey.[53] Declarations by the locator of a mining claim, made during the time she claimed the title, that she expected to hold the premises because the prior locator was a non-

43. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57; Rosenfeld *v.* Rosenfeld, 21 Colo. 16, 40 Pac. 49.

Sufficiency of amended complaint.— Although an amended complaint in ejectment, in support of an adverse to a mining location, was inartificial, in that it contained averments in support of an adverse between hostile locations, instead of limiting the allegations to a statement that plaintiff had been ousted from his interest in the premises in controversy by a coöwner, on which he relied to maintain his action, it was not for that reason objectionable, because the original complaint only embraced parts of the claim which did not conflict with another claim, while the amended complaint limited the ground in controversy to the conflict between the two. Davidson *v.* Fraser, (Colo. 1906) 84 Pac. 695.

44. White River Min., etc., Co. *v.* Langston, 76 Ark. 420, 88 S. W. 971.

45. Evidence generally see EVIDENCE, 16 Cyc. 821.

46. Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280; Noyes *v.* Black, 4 Mont. 527, 2 Pac. 769; Lockhart *v.* Wills, 9 N. M. 344, 54 Pac. 336 [*overruling* Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318].

47. Benton *v.* Hopkins, 31 Colo. 518, 74 Pac. 891.

48. Harris *v.* Kellogg, 117 Cal. 484, 49 Pac. 708; Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964; Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735.

49. Iron Silver Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513; Van Valkenburg *v.* Huff, 1 Nev. 142; Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768; Tyler Min. Co. *v.* Sweeney, 54 Fed. 284, 4 C. C. A. 329.

50. Iron Silver Min. Co. *v.* Reynolds, 124 U. S. 374, 8 S. Ct. 598, 31 L. ed. 466, holding that where defendants alleged that they had entered to work a lode or vein excluded from plaintiff's patent for a placer claim, which plaintiff had introduced in evidence, and plaintiff then offered another patent and deed from the patentee to the part excepted from the placer patent, it was error to refuse to admit such patent and deed in evidence.

51. Sullivan *v.* Hense, 2 Colo. 424, holding that a deed for a mining claim executed and recorded in the district where the claim is situated before any act was passed by the territorial assembly relating to such instruments cannot be given in evidence without proof that it was executed by the grantor according to the local rules and customs of the district, or by the subscribing witnesses (if there are any), as provided in Rev. St. (1868) p. 109, § 15, and that judicial notice of such rules and customs will not be taken.

52. Roach *v.* Gray, 16 Cal. 383.

53. Valcalda *v.* Silver Peak Mines, 86 Fed. 90, 29 C. C. A. 591 [*affirming* 79 Fed. 886].

resident are admissible against her grantees, as they constitute an admission by her of a prior location, which may be valid, notwithstanding the prior locator's non-residence, because the law implies an authority in one person to locate a mining claim in the name of another from the fact of making such a location.[54] Evidence of staking the claim is competent to show the extent of plaintiff's possession.[55] Assays of rock taken from a mining claim, long after its location, are evidence tending to show that the locators had discovered a vein at the time of location.[56] Under a denial of title, evidence of abandonment is admissible without being specially pleaded.[57] To rebut evidence of abandonment, plaintiff may show that some time after he had left the claim he refused to sell it to a third person, who sought to purchase it for defendant, and the fact that it is not shown that defendant authorized the offer to purchase is immaterial.[58] Statements of miners commencing operations at a distance from the lode to be worked, and while thus engaged in work, as to the object to be accomplished by it, are admissible, as part of the *res gestæ*, in an action to recover possession.[59] Parol evidence is admissible to show that a natural object or monument referred to in the location, but not designated therein as a permanent monument, is in fact permanent.[60] Evidence of matters not material to the issues is of course inadmissible.[61]

(c) *Weight and Sufficiency.* One may show title to a mineral interest in land by showing an unrestricted title to the land wherein the mineral is contained,[62] and the legal title and a *prima facie* case are established by the introduction of a patent from the United States and mesne conveyance to plaintiff.[63] Under some statutes proof of possession and improvements is presumptive evidence of ownership.[64] In determining whether a lode extends from defendant's claim to plaintiff's location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight unless there is evidence in plaintiff's claim tending to show a crevice, or continuous ore or mineralized rock, but with such evidence it is of considerable weight.[65] Where there are two lodes or veins, distinct and divergent below, but with outcroppings so close to one another that

54. Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

55. Boardman *v.* Thompson, 3 Mont. 387, on the same grounds as a deed would have been to show boundaries.

56. Southern Cross Gold, etc., Min. Co. *v.* Europa Min. Co., 15 Nev. 383.

57. Bell *v.* Bed Rock Tunnel, etc., Min. Co., 36 Cal. 214.

Proof of defendant's abandonment of a mining claim may be given by plaintiff, in ejectment therefor, without a special allegation, where defendant pleads and relies on the defense of a location prior to that of plaintiff. Trevaskis *v.* Pearl, 111 Cal. 599, 44 Pac. 246.

58. Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214.

59. Draper *v.* Douglass, 23 Cal. 347.

60. Seidler *v.* Maxfield, 4 N. M. 374, 20 Pac. 794; Seidler *v.* Lafave, 4 N. M. 369, 20 Pac. 789 [*overruling* Baxter Mountain Gold Min. Co. *v.* Patterson, 3 N. M. 179, 3 Pac. 741].

61. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57 (holding that in ejectment to enforce plaintiff's extralateral rights in a vein apexing in his claim against defendant, who was working the vein on his location adjoining, and it appearing that a shaft had been sunk from the apex of the vein down to a stope extended from workings in defendant's location, the question as to whether or not this shaft was dangerous, was immaterial); Lakin *v.* Dolly, 53 Fed. 333 [*affirmed* in 54 Fed. 461, 4 C. C. A. 438] (holding that where a mining company paid state and county taxes from 1878 to 1888 on certain lands covered by its patent, but in respect to which the patent was void, and after 1883 certain occupying claimants paid taxes on their improvements, the payment of taxes was immaterial to establish title in either party).

62. Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

63. Iron Silver Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513; Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875.

64. De Noon *v.* Morrison, 83 Cal. 163, 23 Pac. 374, holding that where plaintiff proved the location and transfer to her of a mining claim, and annual representation work done to a certain year, and that in that year she expended more than three hundred dollars in improvements on an adjoining claim belonging to her, the title to such adjoining claim not being in dispute, she showed that the two claims were held in common under Cal. Code Civ. Proc. § 1963, making proof of possession and improvements presumptive evidence of ownership.

65. Hyman *v.* Wheeler, 29 Fed. 347.

they mingle on the surface, if the first locator thereon declares it to be his opinion that there are two veins and encourages others to come in and work on one, and states that their claims will not interfere, while he himself claims the other and works on it, this may be treated either as evidence of his abandonment of or as an estoppel against his claiming such second vein.[66]

(VII) *TRIAL*[67]—(A) *Questions For Jury.* Whether a vein exists and in what claim the apex is to be found is a question for the jury,[68] to whom should also be submitted an issue as to ownership.[69]

(B) *Instructions.*[70] The general rule that an instruction which assumes the existence of evidence which was not given, or submits a question not in the case, is erroneous applies in ejectment for mining property.[71] It is error to instruct that the occupancy of a mining claim must be "lawful" in order to protect the occupant against a subsequent locator, without explaining to the jury in what a "lawful occupancy" consists.[72] Where plaintiff has proved his location, and defendants, in proving a prior location on the same ground, show that they made two locations from the same discovery hole, only one of which could be valid, an instruction that the burden is on plaintiff to show which of the two was invalid is misleading and erroneous.[73]

(C) *Findings.*[74] Where, in ejectment to recover a mine for defendant's failure to make payments required by the contract of sale, an allegation in the complaint relating to the continued removal of gold-bearing rock from the mine, which was denied, had been inserted merely to obtain a preliminary injunction, it was not error for the court to fail to find on such issue in determining the merits of the case.[75]

(VIII) *DAMAGES.*[76] In ejectment plaintiff may recover the value of ores extracted.[77]

(IX) *APPEAL.*[78] An appeal will lie from a judgment in ejectment for mining property,[79] and execution may be stayed pending the appeal.[80] But the decision of the trial court will not be disturbed unless clearly erroneous.[81]

66. Van Valkenburg *v.* Huff, 1 Nev. 142.

67. Trial generally see TRIAL.

68. Illinois Silver Min., etc., Co. *v.* Raff, 7 N. M. 336, 34 Pac. 544.

69. Eberle *v.* Carmichael, 8 N. M. 169, 42 Pac. 95, holding that where there was evidence to show an oral agreement between plaintiff and two others that all mines located in the name of either should be owned in common by the three, and three mines were located, one in the name of each, and an amount of work for the benefit of all was done on one mine equal to that required by the mining laws to be done on all, and the interest of the others was conveyed to plaintiff, he was entitled, in an action of ejectment against persons claiming under a location made prior to the conveyance to him, to have the issue of his ownership submitted to the jury.

70. Instructions generally see TRIAL.

71. Garthe *v.* Hart, 73 Cal. 541, 15 Pac. 93 (holding that in an action of ejectment for a mining claim an instruction that if, under an oral agreement, improvements were made by one of the parties this would work an estoppel, is erroneous, when there is no evidence that any such improvements had been made); Burlock *v.* Cross, 16 Colo. 162, 26 Pac. 142; Gibbs *v.* Wall, 10 Colo. 153, 14 Pac. 216; Big Hatchet Consol. Min. Co. *v.* Colvin, 19 Colo. App. 405, 75 Pac. 605; Denver, etc., R. Co. *v.* Robinson, 6 Colo. App. 432, 40 Pac. 840.

72. Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

73. McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759.

74. Findings generally see TRIAL.

75. Williams *v.* Long, 139 Cal. 186, 72 Pac. 911.

76. Damages generally see DAMAGES, 13 Cyc. 1.

77. Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436 [*affirming* 7 Utah 515, 27 Pac. 695]; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355.

78. Appeal: In ejectment cases, see EJECTMENT, 15 Cyc. 190 *et seq.* Generally, see APPEAL AND ERROR, 2 Cyc. 474.

79. See State *v.* Second Judicial Dist. Ct., 24 Mont. 330, 61 Pac. 882.

80. State *v.* Second Judicial Dist. Ct., 24 Mont. 330, 61 Pac. 882, holding that Code Civ. Proc. § 1732, authorizing a stay of execution pending an appeal from a judgment directing the delivery of possession of real estate, applies in case of an appeal by defendant in ejectment involving an unpatented mining claim.

81. See Penn *v.* Oldhauber, 24 Mont. 287, 61 Pac. 649, holding that where, in an action of ejectment for the recovery of a mining

c. Trover and Conversion[82] — (I) *When Lies.* It may be stated as a general proposition that the usual rules of law, both substantive and as to procedure, applicable in cases of conversion of other classes of personal chattels, apply to ores and minerals and other substances of value derived from and which become personal property upon severance from mining claims, or lands yielding minerals; and any distinct act of dominion wrongfully asserted over such personal property in denial of or inconsistent with the rightful ownership is treated as and constitutes a conversion for which trover (generally termed "conversion" under the codes) will lie.[83] But trover is not an appropriate action to recover the value of mineral deposited in the earth.[84] There can be no recovery of ore in specie or of its value in trover, when it has been taken from land in possession of defendant under claim and color of title asserted in good faith, the title in such cases being fundamental and not incidental.[85]

(II) *Title Necessary to Maintain.* Under the federal statute providing that all valuable mineral deposits in lands belonging to the United States are free and open to exploration,[86] and a state statute providing that occupancy for any period confers a title sufficient as against all except the state and those having title,[87] a person finding and taking possession of gold on public land may recover it from any one who takes it away from him.[88]

(III) *Who May Maintain.* The owner of real estate from which minerals

claim, the evidence of plaintiff's compliance with the law as to doing the required amount of assessment work is conflicting, the judgment of the trial court in refusing a new trial will be affirmed.

Findings of fact on conflicting evidence, made by the court trying the case without a jury, cannot be reviewed on appeal unless a serious and important mistake appears to have been made in the consideration of the evidence or in the application of the law. Shields *v.* Mongolon Exploration Co., 137 Fed. 539, 70 C. C. A. 123.

82. See, generally, Trover and Conversion.

83. *Alabama.*— Ivy Coal, etc., Co. *v.* Alabama Coal, etc., Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46.

Arizona.—Alta Min., etc., Co. *v.* Benson Min., etc., Co., 2 Ariz. 362, 16 Pac. 565 [*affirmed* in 145 U. S. 428, 12 S. Ct. 877, 36 L. ed. 762].

California.— Maye *v.* Yappen, 23 Cal. 306.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

Illinois.— McLean County Coal Co. *v.* Lennon, 91 Ill. 561, 33 Am. Rep. 64; McLean County Coal Co. *v.* Long, 81 Ill. 359; Smoot *v.* St. Louis Consol. Coal Co., 114 Ill. App. 512.

Indiana.— Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

Michigan.— Hartford Iron Min. Co. *v.* Cambria Min. Co., 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488.

Minnesota.— King *v.* Merriman, 38 Minn. 47, 35 N. W. 570; Whitney *v.* Huntington, 37 Minn. 197, 33 N. W. 561.

Nevada.— Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293.

New York.— Baker *v.* Hart, 52 Hun 363, 5 N. Y. Suppl. 345.

Pennsylvania.— Lykens Valley Coal Co. *v.* Dock, 62 Pa. St. 232; Forsyth *v.* Wells, 41 Pa. St. 291, 80 Am. Dec. 617.

United States.— Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 12 S. Ct. 877, 36 L. ed. 762; U. S. *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355.

See 34 Cent. Dig. tit. "Mines and Minerals," § 137.

A purchaser of ore taken from a mine by a trespasser is guilty of conversion, although ignorant of the seller's want of title. Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

84. Smoot *v.* St. Louis Consol. Coal Co., 114 Ill. App. 512.

85. Ophir Silver Min. Co. *v.* San Francisco Super. Ct., 147 Cal. 467, 82 Pac. 70.

86. U. S. Rev. St. (1878) § 2319 [U. S. Comp. St. (1901) p. 1424].

87. Cal. Civ. Code, § 1006.

88. Burns *v.* Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233, holding that under U. S. Rev. St. (1878) § 2319 [U. S. Comp. St. (1901) p. 1424], title to mineral lands cannot be acquired by occupancy unless the occupancy is for the purpose of mining or abstracting the minerals, and that where plaintiff while working for defendants in grading a site for a mill on government land found and took possession of some gold which defendants took from him, claiming to own it, under Cal. Civ. Code, § 1985, providing that everything which an employee acquires by virtue of his employment except his compensation belongs to the employer, plaintiff was entitled to recover the gold, as it was not found by virtue of the employment and did

are taken by a trespasser may sue to recover the minerals or their value as personalty,[89] and one in possession of land under a mining lease for a period of years, who agrees to mine a certain quantity each year, has such interest in the unmined ores as will authorize an action of trover against the lessor who wrongfully mines any part thereof.[90]

(IV) *PLEADING.*[91] A complaint which alleges that plaintiff is the owner of a mining claim, and of all the precious metals contained in any vein or lode, through its entire depth, whose apex is within the surface lines of such claim, and that defendant, the owner of a claim which adjoins one of plaintiff's side lines has mined and removed ore from a vein which has its apex in plaintiff's claim, is sufficient, in the absence of a demurrer thereto, to support a judgment in favor of plaintiff for the conversion of such ore, although it does not specifically allege the facts which show that the boundary between the claims of the parties is a side line of plaintiff's claim, beyond which it has extralateral rights.[92] The defense that plaintiff is not the real party in interest must be specially pleaded.[93]

(V) *EVIDENCE.*[94] Where it appears that ore taken under a mistake as to ownership was mingled with ore to which defendant was legitimately entitled, so that plaintiff was unable to separate it, defendant must show how much came from plaintiff's vein and how much from his own, and in the absence of such showing plaintiff may recover the value of all the ore shown by his own evidence to have been taken out.[95] In an action to recover the value of ore wrongfully extracted by defendant from plaintiff's claim, evidence is admissible of the average assay value of samples of ore taken from the side walls of the workings and from drifts immediately adjacent, and shown to have been of the same general character as the body of ore removed.[96] Where justification is not pleaded, evidence of title in a third person is inadmissible.[97] The existence of a fault in one vein cannot be shown by evidence of other and disconnected faults in a vein which witness states is a continuation of the vein under consideration, in the absence of evidence of continuity in the fault.[98] In the case of conversion of ores from a patented mining claim, ownership of such ores is *prima facie* established by the patent and proof of possession of the mining claim embracing them.[99]

(VI) *QUESTIONS FOR JURY.* Under the rule that, when a trespasser by mis-

not belong to defendants, since the employment was not to search for gold but to excavate and throw away the earth removed. See also Burns *v.* Schoenfeld, 1 Cal. App. 121, 81 Pac. 713.

89. Hail *v.* Reed, 15 B. Mon. (Ky.) 479, holding that when oil, a part of real estate, is drawn from the wells by trespassers, it becomes personalty, and the owner of the land may sue to recover it or its value as such.

Prima facie showing of ownership.—Where in an action to recover the value of ore alleged to have been wrongfully taken from plaintiff's claim, it appeared that a location certificate of said claim was filed in 1880 by one M, that plaintiff purchased from one D and took possession in 1885, that he held the same till he sold the property in 1894, having, during that period, done considerable work on the claim, that amended certificates were filed by him in 1890 and 1891, and that defendant asserted no title to the claim, but justified his intrusion on his right to follow a vein whose apex was outside the surface boundaries, plaintiff was *prima facie* entitled to maintain the action, notwithstanding his omission to produce written conveyances from the original locator. Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283.

90. Hartford Iron Min. Co. *v.* Cambria Min. Co., 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488.

91. Pleadings generally see PLEADING.

92. Montana Min. Co. *v.* St. Louis Min., etc., Co., 102 Fed. 430, 42 C. C. A. 415.

93. Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283.

94. See, generally, EVIDENCE, 16 Cyc. 821.

95. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

96. Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228, holding that the weight and value of such evidence is to be determined by the jury in view of all the evidence.

97. Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

98. Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.

99. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626.

take enters on a vein to which he has no title, and takes ore from it, he may limit the owner's recovery in an action for the ore taken, by showing the value of the ore taken and the actual cost of digging that particular ore from that particular vein, tramming it to the shaft, and hoisting it to the surface,[1] the *bona fides* of the trespass, the value of the ore, and the actual cost of its extraction are questions for the jury, although defendant's evidence is uncontradicted.[2]

(VII) *INSTRUCTIONS.*[3] Where defendant has introduced evidence of work done and ore taken from his own vein, in order to reduce, to the extent of its value, plaintiff's recovery, the jury should be instructed to consider such evidence only so far as it may aid them in determining if possible what proportion of the ore came from defendant's vein.[4] In an issue as to whether a vein having its apex in defendant's location connects or unites on its downward course with one having its apex in plaintiff's location, it is proper to charge the jury that such connection must be made by a "continuous streak or body of quartz or ore," or by vein matter, and to refuse to charge that it can be made by "such material or indication as a practical miner would follow with the expectation of finding ore."[5] An instruction that the value of the ore converted should be determined by its "market value" on the dump of the claim, deducting the cost of mining and hoisting, is not objectionable as not allowing for the expense of smelting and reducing the ore.[6]

(VIII) *DAMAGES.*[7] As a general rule the measure of damages is the value of the minerals taken and converted,[8] less the cost of extraction.[9] In the federal courts a state statute fixing the measure of damages is followed.[10] The rule of damages is the same in trespass for breaking and entering a coal mine and carrying away coal, and trover for the coal, except where circumstances of aggravation are relied on in trespass.[11] Where, in an action for the conversion of ore, an injunction has been issued, in compliance with which defendant has stored certain ore theretofore mined, it is not entitled to have the value of such ore taken into account in reduction of damages, unless it proves such value and returns or tenders the ore to plaintiff.[12]

1. See *infra*, IV, A, 2, c, (VIII).

2. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466; Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293.

3. See, generally, TRIAL.

4. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

5. Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.

6. Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.

7. See, generally, DAMAGES, 13 Cyc. 1.

8. *Alabama.*— Ivy Coal, etc., Co. *v.* Alabama Coal, etc., Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46.

California.— Maye *v.* Yappen, 23 Cal. 306.

Colorado.— St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466.

Illinois.— Smoot *v.* St. Louis Consol. Coal Co., 114 Ill. App. 512.

Nevada.— Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293.

See 34 Cent. Dig. tit. "Mines and Minerals," § 141.

Time of valuation.— One who removes oil from land belonging to another, pending an appeal from a judgment under which the latter was entitled to the possession of the property, is liable for its value at the date when the other party is put in possession of the property after affirmance of the judgment, although that is greater than its value when taken. Southern Oil Co. *v.* Scales, (Tex. Civ. App. 1902) 69 S. W. 1033.

9. St. Clair *v.* Cash Gold Min., etc., Co., 9 Colo. App. 235, 47 Pac. 466; Smoot *v.* St. Louis Consol. Coal Co., 114 Ill. App. 512 (holding that where a defendant, under a grant from plaintiff, removed certain coal, and in removing such coal necessarily likewise removed iron pyrites, the measure of damages in an action for the conversion of such iron pyrites was the value of the pyrites at the mouth of the pit, less the cost of digging such pyrites and separating it from merchantable coal); Waters *v.* Stevenson, 13 Nev. 157, 29 Am. Rep. 293. *Contra*, Ivy Coal, etc., Co. *v.* Alabama Coal, etc., Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46, holding that one who goes upon the land of another, under a *bona fide* belief in his right, and mines coal is liable in trover for the value of the coal immediately after its severance, without deduction for the value of his labor in "knocking it down."

10. Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228.

11. McLean County Coal Co. *v.* Long, 81 Ill. 359; Robertson *v.* Jones, 71 Ill. 405.

12. Montana Min. Co. *v.* St. Louis Min., etc., Co., 102 Fed. 430, 42 C. C. A. 415.

d. Action to Quiet Title[13] — (I) *When Lies.* The object of an action to quiet title is to enable plaintiff to dispel whatever may be regarded, not only by defendant, but also by third persons, as a cloud on his title, depreciating its value; and therefore, although a formal allegation of adverse claim may be necessary in the complaint, it is immaterial whether or not defendant actually asserted such adverse claim before the commencement of the action.[14] Where defendants, deeming a mine forfeited by plaintiff, have located the same ground, and plaintiff has subsequently commenced work thereon, and a few days later defendants have also begun work, plaintiff may maintain an action under the statute to quiet the title, and need not resort to ejectment.[15] Where defendant owns a number of mining claims located on the same lode as complainant's claim, under which it claims extralateral rights in such lode adverse to those of complainant, and under one of which it has commenced to extract ore from such lode, the remedy of complainant at law by an action of ejectment is not adequate, so as to exclude the jurisdiction of equity to entertain a bill to quiet title to complainant's entire claim, including all that portion of the lode in which extralateral rights are claimed.[16]

(II) *Jurisdiction.*[17] A court of equity may take cognizance of a cross action brought to try the adverse claim to the right of possession of a mineral lode, to quiet the title thereto, and to enjoin the removal of ore therefrom, when for these purposes it becomes necessary to identify the boundaries of the vein, and the apex of the lode, and, in view of the issue involved, and the relief sought, a judgment at law would not meet the exigencies of the case.[18] In order that the courts of the United States shall have jurisdiction of an action to quiet title to mining property, a federal question or the construction of a federal statute must be involved,[19] unless of course such jurisdiction arises out of diverse citizenship of the parties.[20] Possession of the complainant is essential to the maintenance of a bill to quiet title in a federal court, even though under the state practice a person not in possession may maintain an action to quiet title.[21]

13. Actions to quiet title generally see QUIETING TITLE.

14. Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 589, 23 Pac. 1102.

The conflict as to the right of possession sufficiently appears where plaintiffs assert claim to a certain tract and defendants admit that they have applied for a patent for the same tract. Wolverton *v.* Nichols, 119 U. S. 485, 7 S. Ct. 289, 30 L. ed. 474.

15. Crown Point Min. Co. *v.* Crismon, 39 Oreg. 364, 65 Pac. 87.

16. Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311, holding that possession of the apex is sufficient. See also *infra*, text and note 21.

17. Jurisdiction of courts generally see COURTS, 11 Cyc. 633.

18. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

19. Wise *v.* Nixon, 76 Fed. 3, holding that when a case presents issues of fact merely, and does not involve the construction of U. S. Rev. St. (1878) § 2324 [U. S. Comp. St. (1901) p. 1426], requiring a certain amount of work to be done on mining claims, a federal court has no jurisdiction.

A federal question must appear from plaintiff's statement of his own cause of action, and his right to the relief sought must depend directly upon the construction of some provision of the constitution or laws of the United States. Jurisdiction cannot be sustained upon allegations that defendant does or may assert some right under such constitution or laws as a defense. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 93 Fed. 274, 35 C. C. A. 1. See also Wise *v.* Nixon, 78 Fed. 203 [*following* 76 Fed. 3].

Claim under location.— The fact that defendant claims under a location does not raise a federal question. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626; De Lamar's Nevada Gold Min. Co. *v.* Nesbitt, 177 U. S. 523, 20 S. Ct. 715, 44 L. ed. 872. Neither is such a question raised by a claim of right based upon a mere location of a mining claim, as against a patent regularly issued by the land department, for the land covered by such location. Peabody Gold-Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657.

20. Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286.

21. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626; Kellar *v.* Craig, 126 Fed. 630, 61 C. C. A. 366; California Oil, etc., Co. *v.* Miller, 96 Fed. 12; Davidson *v.* Calkins, 92 Fed. 230. But *compare* U. S. Mining Co. *v.* Lawson, 134 Fed. 769, 67 C. C. A. 587 [*reversing* 115 Fed. 1005], holding that the enlarged remedy given by Utah Rev. St. (1898) §§ 2915, 3511, which authorize a suit to quiet title to be main-

(III) *TITLE NECESSARY TO MAINTAIN.* A mining claim, duly located, is an interest in real property which, as against all but the United States, is treated as a fee, and will support an action to quiet title;[22] but a locator of a mining claim on public land can only maintain suit to quiet title as to his limited interest.[23]

(IV) *WHO MAY MAINTAIN.* One in possession of a mining claim may maintain suit to quiet title against another who is asserting title to the same ground;[24] and as a rule a bill to quiet title will not lie in favor of a party not in possession,[25] unless the land is vacant.[26] Some of the statutes, however, dispense with the necessity for possession.[27]

(V) *DEFENSES.* Under a statute providing that occupancy for any period confers title except as to those claiming by prescription, transfer, will, or succession, where plaintiffs in a suit to quiet title to a mining claim have been in possession for a number of years, a defense that a claim prior to plaintiffs' had never been abandoned cannot be urged, defendant not claiming title under such prior claimant.[28]

(VI) *PLEADINGS*[29]—(A) *In General.* If the case is not to determine who is entitled to a patent of mining land, it is to be governed and determined by the practice and rules of pleading governing in ordinary suits brought to settle disputes as to interest in land.[30]

(B) *Complaint or Declaration.* In a suit to quiet title the complainant need not do more than allege his own title,[31] and that defendant claims adversely to

tained without any previous adjudication of title in an action at law, and without reference to possession, may be enforced in a federal court of equity sitting in that state, when the complainant is in possession and defendant is out of possession, or when both parties are out of possession, as in either case there is no adequate and complete remedy at law.

22. Mt. Rosa Min., etc., Co. *v.* Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289.

23. Carter *v.* Thompson, 65 Fed. 329.

24. Gulf Coal, etc., Co. *v.* Alabama Coal, etc., Co., 145 Ala. 228, 40 So. 397; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Crown Point Min. Co. *v.* Crismon, 39 Oreg. 364, 65 Pac. 87; Fulkerson *v.* Chisna Min., etc., Co., 122 Fed. 782, 58 C. C. A. 582.

When the owner is in possession of the surface of the claim he may maintain a bill to quiet title, although he alleges that defendant through underground workings has wrongly entered upon and removed ores, and threatens to continue. U. S. Mining Co. *v.* Lawson, 134 Fed. 769, 67 C. C. A. 587.

Possessory title was sufficient, under the early California statutes, to sustain the action by a party in possession, as against one out of possession. Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30; Head *v.* Fordyce, 17 Cal. 149; Smith *v.* Brannan, 13 Cal. 107; Merced Min. Co. *v.* Fremont, 7 Cal. 317, 68 Am. Dec. 262. Such possession might be actual or constructive at the time of commencing the action. But constructive possession could only be established by the proof of three facts, to wit: (1) That there were local mining customs, rules, and regulations in force in the district embracing the claims; (2) that particular acts were required by such mining laws or customs to be performed in the location and working of claims, as authorized by such laws; and (3) that plaintiff had substantially complied with these requirements. Pralus *v.* Jefferson Gold, etc., Min. Co., 34 Cal. 558.

25. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

Conveyance to holder of adverse title in possession.—A claimant out of possession cannot convey his title to the holder of the adverse title in possession, and then sue the grantor of such adverse title in equity to cancel the title papers of such adverse title as a cloud on the title which he has conveyed to the holder of such adverse title. Zinn *v.* Zinn, 54 W. Va. 483, 46 S. E. 202.

26. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622.

27. Reiner *v.* Schroeder, 146 Cal. 411, 80 Pac. 517.

28. Ramus *v.* Humphreys, (Cal. 1901) 65 Pac. 875.

29. Pleadings generally see PLEADING.

30. Continental Bldg., etc., Assoc. *v.* Hutton, 144 Cal. 609, 78 Pac. 21.

31. Souter *v.* Maguire, 78 Cal. 543, 21 Pac. 183; California Oil, etc., Co. *v.* Miller, 96 Fed. 12; Union Mill, etc., Co. *v.* Warren, 82 Fed. 519.

Averment of successful trial at law.—A bill in a federal court to quiet title against a single adverse claimant, who is ineffectually seeking to establish a legal title by repeated actions of ejectment, must aver that complainant's title has been successfully tried at law at least once. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626.

Complaint insufficient to show title.—A complaint alleging that plaintiff had a docketed judgment against R who had received a

him;[32] and it is not necessary to set forth specifically the character of his title[33] or the nature of the adverse claim.[34] An averment of possession in the complainant is essential to the maintenance of a bill to quiet title in a federal court, although under the state practice a person not in possession may maintain such action.[35] An allegation that plaintiff is seized in fee is a sufficient allegation of possession.[36] Citizenship of plaintiff need not be alleged in an ordinary bill to quiet title.[37] When the jurisdiction of a federal court is invoked on the ground that the suit arises under the laws of the United States, such facts must be alleged in the bill as to make it affirmatively appear to the court that the proper determination of the suit really and substantially involves a dispute or controversy as to the effect or construction of such laws.[38] A bill showing that complainant owns a mine, having the apex of a vein within its boundaries, but which on its dip passes beyond the side lines of the claim, that defendants are threatening litigation on claims to the vein in various forms, and that defendants' claims, although differing between themselves, are all subordinate to plaintiff's claim, and seeking equitable relief, is sufficient.[39] Allegations that by reason of defendant's adverse claim plaintiffs were "greatly embarrassed in the use and disposition of their mining claims" and that "thereby their value was greatly depreciated" are sufficient averments of injury to sustain the action.[40] Where there is no contention as to the description of a lot in which a mining lode was situated, reasonable certainty in the description of the lode is sufficient on general demurrer.[41]

(c) *Answer or Plea.* Allegations in the answer that the lands do not contain known minerals, in lode deposits, of sufficient value to pay for working them, and that respondents are owners of said land by virtue of a certain conveyance, are statements of fact, and not conclusions of law.[42] An admission in defendant's pleading that plaintiff was the owner of the claim during certain years is an admission that he did the requisite amount of work during such years.[43] Matters

deed absolute to the property, and on the same day had quitclaimed it to F, and that the property was sold to plaintiff at judgment sale, F being in the possession of the property at the time the quitclaim deed was made, is insufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title thereto. Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1.

32. Parley's Peak Silver Min. Co. *v.* Kerr, 130 U. S. 256, 9 S. Ct. 511, 34 L. ed. 906; California Oil, etc., Co. *v.* Miller, 96 Fed. 12.

33. Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 589, 23 Pac. 1102; Union Mill, etc., Co. *v.* Warren, 82 Fed. 519.

34. California Oil, etc., Co. *v.* Miller, 96 Fed. 12.

35. Boston, etc., Consol., etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 645, 23 S. Ct. 440, 47 L. ed. 634; Keller *v.* Craig, 126 Fed. 630, 61 C. C. A. 366; California Oil, etc., Co. *v.* Miller, 96 Fed. 12; Davidson *v.* Calkins, 92 Fed. 230. See also Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256, 9 S. Ct. 511, 32 L. ed. 906.

Negativing allegation of possession.—A bill to quiet title to a mining claim, including that portion of the lode within its extralateral rights, which alleges possession of the claim by complainant, does not negative such allegation as to a portion of the lode within such extralateral right, and show possession thereof in defendant, because it alleges a trespass thereon, and the removal of ore therefrom by defendant, and prays for an injunction, the bill not recognizing possession in defendant of the ore body in dispute. Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311.

36. Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063.

37. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182; Buckley *v.* Fox, 8 Ida. 248, 67 Pac. 659.

38. Dewey Min. Co. *v.* Miller, 96 Fed. 1, holding that a suit in equity to determine conflicting claims under mining locations on public lands is not within the jurisdiction of a federal court, as involving the construction or effect of the mining laws of the United States, where, so far as appears from the averments of the bill, the only controversy between the parties may be over questions of fact.

39. Hyman *v.* Wheeler, 33 Fed. 629.

40. Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30.

41. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

42. O'Keefe *v.* Cannon, 52 Fed. 898.

43. Wright *v.* Killian, 132 Cal. 56, 64 Pac. 98.

By admitting plaintiff's legal title and setting up an equitable interest which is asked to be confirmed, defendant assumes the attitude of one seeking to enforce an equitable

constituting a forfeiture must be pleaded and proved by defendant as a defense.[44] The failure of defendants to file a counter-claim or a cross complaint will not prevent the rendition of a judgment establishing their title to the premises, where the answer alleges facts showing them entitled to affirmative relief.[45]

(VII) *EVIDENCE*[46] — (A) *Presumptions.* In the absence of evidence to the contrary, the locators of a mining claim will be presumed to be citizens of the United States, or to have declared their intention to become such.[47]

(B) *Burden of Proof.* Plaintiff must recover on the strength of his own title;[48] and where the answer puts in issue plaintiff's ownership and right of possession, plaintiff must show that he has taken the steps necessary to give a valid location.[49] Where defendants are in actual possession of mining ground, under a location the validity of which is attacked by plaintiff only on the ground of a previous location, the burden is on plaintiff to show that such previous location was made and perfected in compliance not only with the laws of the United States, but also with such provisions of the statutes of the state relating to the location of mining claims as are not inconsistent with the United States statutes.[50] When each party asks to have his title quieted, the burden is on each to prove the validity of his location, plaintiff having the duty of taking the lead in such proof.[51] If plaintiff makes out a *prima facie* case by proof of his citizenship, the discovery of mineral on the land, and a location according to law, the burden is then upon defendant to show that the location under which he claims is prior in time and superior in right, and if defendant shows a valid prior location, plaintiff may then show that the claim became subject to relocation, by reason of defendant's failure to do the required assessment work, although the complaint contains no allegations of forfeiture or abandonment.[52] Where, in a suit by a lessor in a gas lease to quiet title against the lessee, defendant relies on tenders of rentals made, the burden of proving the same is on him.[53] Where, in an action to quiet title to coal lands, the answer of defendants alleges a valid contract, entitling them to purchase at a future time the land of which petitioner was in possession, and claimed the right to have the contract continued as a cloud on his title, the burden was on defendants to establish such right.[54]

(C) *Admissibility.* Where the complaint is in the usual form in actions to quiet title, except that it does not call on defendants to set out their interest, title, or claim, and it alleges that defendants are in possession, and that title and ownership are in plaintiff, defendants can prove a valid location by them prior to plaintiff's location, under a general denial, and without setting out in their answer the facts showing their ownership, or alleging title by location.[55] A deed given by the original locator to plaintiff prior to the commencement of the action, for

as against a legal title and the situation is presented as if he were plaintiff; therefore plaintiff can protect his legal title by setting up that he was a *bona fide* purchaser for value without notice. Pheby *v.* Lake Superior, etc., Min. Co., (Ariz. 1906) 85 Pac. 952.

44. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047.

45. Perego *v.* Dodge, 9 Utah 3, 33 Pac. 221.

46. See, generally, EVIDENCE, 16 Cyc. 821.

47. Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

48. Schroder *v.* Aden Gold Min. Co., 144 Cal. 628, 78 Pac. 20; Weed *v.* Snook, 144 Cal. 439, 77 Pac. 1023.

49. Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153 [*affirmed* in 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964].

50. Copper Globe Min. Co. *v.* Allman, 23 Utah 410, 64 Pac. 1019.

51. Shattuck *v.* Costello, (Ariz. 1902) 68 Pac. 529.

52. Goldberg *v.* Bruschi, 146 Cal. 708, 81 Pac. 23.

53. Logansport, etc., Gas Co. *v.* Seegar, 165 Ind. 1, 74 N. E. 500.

54. Stamey *v.* Barkley, 211 Pa. St. 313, 60 Atl. 991 [*followed* in Stamey *v.* Waddle, 211 Pa. St. 650, 60 Atl. 995]; Stamey *v.* Templeton, 211 Pa. St. 649, 60 Atl. 995; Stamey *v.* Bowman, 211 Pa. St. 648, 60 Atl. 995; Stamey *v.* McCreery, 211 Pa. St. 648, 60 Atl. 995; Stamey *v.* McCurdy, 211 Pa. St. 648, 60 Atl. 994; Stamey *v.* Harbison, 211 Pa. St. 647, 60 Atl. 994; Stamey *v.* Dunmire, 211 Pa. St. 647, 60 Atl. 994; Stamey *v.* Dunlap, 211 Pa. St. 646, 60 Atl. 994].

55. Adams *v.* Crawford, 116 Cal. 495, 48 Pac. 488.

the purpose of correcting the description, is properly admitted, as bearing on the rights of the parties.[56] Where a mining claim was located, and thirteen years later was relocated, several other attempted locations meanwhile having been made covering a part of the claim in question, evidence of the relocation is admissible in an action to quiet title, except as against rights which may have accrued by reason of the intervening locations.[57] One may prove without having averred that a locator was a citizen of the United States, or had filed a declaration of intention to become such.[58] In an action attacking a claim to mining property based on a lost deed to defendants' predecessor in title, evidence is admissible tending to show that the prior owner, from whom both parties claim, in fear of an adverse decision in former litigation, relocated the claim, and redeeded to defendants' predecessor the same interest therein as defendants claimed under the lost deed, even though the subsequent location was abandoned.[59] An objection to the admission of the record of mining claims of a special district in evidence, without proof that there is such a district and a custom requiring a record, and that the book comes from the proper custody, is not well taken, where the pleadings admit that the claims are in the district, and the complaint alleges, and is supported by proof, that a certain person was the recorder of such district, and such person is called by both sides to produce the record of their location notices.[60] When no question is raised as to the validity of a location, the admission of an amended location, although useless, is harmless.[61]

(D) *Weight and Sufficiency.* Evidence that the discoverer of a lode of mineral had worked almost continuously on the lode from the time of discovery to the beginning of an action contesting his claim, corroborated by the witnesses and by the amount of work performed, is sufficient to establish his good faith in making a claim to the lode.[62] Where defendant claims under a prior location, evidence that at the time of such location the ground was covered by another location is sufficient to show that the ground was not open to location by defendant.[63] A decree finding that the land was chiefly valuable for its minerals, that defendant had unlawfully taken possession and ousted plaintiff, and removed from the mines gold-bearing earth and minerals, and restraining such interference, is supported by evidence of defendant's interference, although he claims that whatever ore he mined was left either in the tunnel or on the dump, and, instead of causing injury, increased the value of the mines.[64] The uncontradicted testimony of a father that his children were born in California is sufficient proof that they are citizens of the United States, for the purposes of the mining law.[65]

(VIII) *TRIAL*[66]—(A) *Right to Jury Trial.*[67] It has been held that, the action being equitable in its nature, neither party is entitled, as a matter of right, to a jury trial;[68] but there is also authority for the view that a party may be entitled to a jury trial.[69]

56. Klopenstine *v.* Hays, 20 Utah 45, 57 Pac. 712.

57. Jordan *v.* Schuerman, 6 Ariz. 79, 53 Pac. 579.

58. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047.

59. Wetzstein *v.* Largey, 27 Mont. 212, 70 Pac. 717.

60. McCann *v.* McMillan, 129 Cal. 350, 62 Pac. 31.

61. Jordan *v.* Duke, 6 Ariz. 55, 53 Pac. 197.

62. Omar *v.* Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

63. Shattuck *v.* Costello, 68 Pac. 529.

64. Reiner *v.* Schroeder, 146 Cal. 411, 80 Pac. 517.

65. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182.

66. See, generally, TRIAL.

67. See, generally for jury trial JURIES, 24 Cyc. 82.

68. Montana Ore Purchasing Co. *v.* Boston, etc., Consol., etc., Min. Co., 27 Mont. 536, 71 Pac. 1005.

69. Badger Gold Min., etc., Co. *v.* Stockton Gold, etc., Min. Co., 139 Fed. 838, holding that in a suit to quiet title and for an injunction and damages plaintiff is entitled to a jury trial under Cal. Code Civ. Proc. § 592, on the issue of ownership, when properly raised by the pleadings, and their general verdict is conclusive on the court, except that he has power to set it aside and grant a new trial.

(B) *Findings or Verdict.*[70] Findings as to merely probative facts need not be made.[71] A finding that plaintiff's claim is valid disposes of an affirmative defense setting up the elements of defendant's claim,[72] and findings that plaintiff is not the owner or entitled to possession of the premises claimed by him, and that defendant is the owner and entitled to the possession thereof, are sufficient to support a judgment for defendant.[73] A finding based upon evidence disclosing the proper location of a mining claim and the record of a proper notice will not be disturbed simply because the other party looked for but did not see any but the initial monument.[74] Where it appears that long prior to plaintiff's location defendant made a location which was confessedly invalid at the time it was made, a finding to this effect is not sufficient to dispose of the material issue as to whether defendant made a valid location before plaintiff's location was made.[75] The finding that a party had not done one hundred dollars' worth of labor each year on a mining claim will not be disturbed where, under such party's evidence, it barely reaches that amount, and the evidence of the other party makes it considerably less.[76] Where the case is tried in a court which exercises both law and equity jurisdiction, the finding of a jury, having been accepted, must be treated as the finding of the court.[77] A verdict under an instruction which allows a recovery on one of two grounds — possession and location — cannot be sustained where it does not show on which ground it is based and no evidence to establish a location was submitted to the jury.[78]

(IX) *Decree.*[79] The decree must be within the issues raised;[80] but where defendant in an action by the locator of a mining claim alleges a conflicting location, and asks to have his title quieted, the court must pass on the validity of defendant's title as well as plaintiff's, although the latter only need be determined under a general denial.[81] Where plaintiff claims ownership and right to possession and prays that he be adjudged to be such owner, and defendant denies such ownership and claims ownership in himself, the issue of ownership is presented, and the jury having found for plaintiff, judgment is properly entered accordingly.[82] Where the evidence of plaintiff's witness, who claimed to have marked out the claims, and upon which plaintiff's right of recovery depended, was contradictory, and false at least in part, a decree dismissing the action was

70. See, generally, TRIAL.

71. Adams *v.* Crawford, 116 Cal. 495, 48 Pac. 488.

72. Souter *v.* Maguire, 78 Cal. 543, 21 Pac. 183.

73. Gruwell *v.* Rocca, 141 Cal. 417, 74 Pac. 1028.

74. Adams *v.* Crawford, 116 Cal. 495, 48 Pac. 488.

75. Dwinnell *v.* Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. N. S. 763.

76. Hirschler *v.* McKendricks, 16 Mont. 211, 40 Pac. 290. See also Wagner *v.* Dorris, 43 Oreg. 392, 73 Pac. 318, holding that where the only evidence as to assessment work performed by defendants, claiming under a prior location, was that of two witnesses, that they were of the impression that they worked fifteen or sixteen days each, but kept no memorandum of the time, and that such work was worth at least one hundred dollars, but on cross-examination they could not give the date when they commenced or when they quit work, and were uncertain as to the number of days engaged in the service, and other witnesses testified that such workmen worked but nine days each, although they had been paid one hundred and eight dollars and fifty cents for the work, a finding that the value of the work performed was not greater than fifty dollars was proper.

77. Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964 [*affirming* 6 Mont. 53, 8 Pac. 153].

78. Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047.

79. See, generally, EQUITY, 16 Cyc. 1; JUDGMENTS, 23 Cyc. 623.

80. Gruwell *v.* Rocca, 141 Cal. 417, 74 Pac. 1028 (holding that in an action to quiet title to a certain mining claim, in which no issue as to the right to purchase other claims from the government of the United States was raised, a decree adjudging that defendant is entitled to purchase certain other claims from the government of the United States is erroneous); Cedar Canyon Consol. Min. Co. *v.* Yarwood, 27 Wash. 271, 67 Pac. 749 (holding that when the only issues relate to a single lode or vein, the court may refuse to quiet title to an adjoining claim, under which the vein in question dips, although each of the parties owns an interest therein).

81. Shattuck *v.* Costello, (Ariz. 1902) 68 Pac. 529.

82. Badger Gold Min., etc., Co. *v.* Stockton Gold, etc., Co., 139 Fed. 838.

proper.[83] In an action to quiet title to a mining claim brought in a state court a decree adjudging that "defendant is entitled to purchase" certain claims from the government of the United States and receive a patent therefor is void as in excess of the jurisdiction of the state court.[84] The dismissal of a bill to quiet title to a mining claim does not carry with it the dismissal of a cross bill alleging facts not alleged in the original bill, which are directly connected with the subject-matter of the original suit, and praying affirmative, equitable relief directly connected with and arising out of the matters of the original suit and germane to the same.[85] A judgment quieting title to mining lands in favor of one of the original locators and his co-claimants, as against defendant, whose relocation was invalid because the claim was not subject to forfeiture, cannot be attacked by defendant on the ground that the co-claimant's alleged title was in other parties, since that is a question to be decided among plaintiffs, which in no way affects defendant's right to the property.[86]

e. Injunction[87]— (1) *Nature of Remedy and Grounds For* — (A) *In General.* While as a general rule equity does not take jurisdiction in cases of a mere trespass, yet an exception to this rule has been permanently established in cases where the trespass is to mines or mineral rights and is of such a nature that its continuance will cause irreparable damage,[88] or result in a multiplicity of suits.[89] The solvency of defendant does not affect plaintiff's right to the injunction;[90] but it is a question to be considered when the title to property is in dispute,[91] or the trespass is of a continuous nature.[92] One in possession of a mining claim under a valid location has a *prima facie* right to all veins beneath the surface and may enjoin another from working such veins.[93] Where, in an action between adjoining mineral owners, defendant claims extralateral rights authorizing the acts sought to be enjoined, he will not be forced on to trial without

83. Payton *v.* Burns, 41 Oreg. 430, 69 Pac. 134.

84. Gruwell *v.* Rocca, 141 Cal. 417, 74 Pac. 1028.

85. Badger Gold Min., etc., Co. *v.* Stockton Gold, etc., Co., 139 Fed. 838.

86. Nesbitt *v.* Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807.

87. See, generally, INJUNCTIONS, 22 Cyc. 724.

88. Merced Min. Co. *v.* Fremont, 7 Cal. 130; Waldron *v.* Marsh, 5 Cal. 119; Irwin *v.* Davidson, 38 N. C. 311; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183.

Courts of equity exercise a greater latitude in restraining trespass in cases of mining properties than in cases of trespass on ordinary lands. Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754; Chambers *v* Alabama Iron Co., 67 Ala. 353.

The question of defendant's solvency or insolvency is immaterial.— Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754. But *compare* Rice *v.* Looney, 81 Ill. App. 537, holding that the court will not enjoin mining by a trespasser who is not shown to be insolvent as there is an adequate remedy at law.

In North Carolina an injunction will not be granted to stop the working of a gold mine; but where it appears that the party in possession is of doubtful ability to respond in damages, if he be cast in the action, a receiver should be appointed to secure the profits. Parker *v.* Parker, 82 N. C. 165.

In a dispute as to the rights between parties claiming under different leases of the same coal veins, no injunction can be granted until the questions respecting their rights are settled. Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183.

89. West Point Iron Co. *v.* Reymert, 45 N. Y. 703; Nichols *v.* Jones, 19 Fed. 855.

90. *Alabama.*— Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754; Chambers *v.* Alabama Iron Co., 67 Ala. 353.

California.— Richards *v.* Dower, 64 Cal. 62, 28 Pac. 113; Waldron *v.* Marsh, 5 Cal. 119.

Colorado.— Crisman *v.* Heiderer, 5 Colo. 589.

Montana.—Boyd *v.* Desrozier, 20 Mont. 444, 52 Pac. 53.

United States.— U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271.

See 34 Cent. Dig. tit. "Mines and Minerals," § 142.

91. Real Del Monte Consol. Gold, etc., Co. *v.* Pond Gold, etc., Co., 23 Cal. 82.

92. Halpin *v.* McCune, 107 Iowa 494, 78 N. W. 210; Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468; Keppel *v.* Lehigh Coal, etc., Co., 200 Pa. St. 649, 50 Atl. 302; Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948; Big Six Development Co. *v.* Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. N. S. 332.

93. Gilpin *v.* Sierra Nevada Consol. Min. Co., 2 Ida. (Hasb.) 696, 23 Pac. 547, 1014, holding that the burden is upon defendant to show that the apices of such veins are within the boundaries of his claim.

being given a fair opportunity of doing such development work as may be necessary to determine the position of the apex of the vein in question.[94] When the jurisdiction of a court of equity is invoked to restrain a continuing trespass, the course is to sustain the bill for the purpose of injunction, connecting it with the account, and not to compel the complainant to go into a court of law for damages.[95]

(B) *When Granted.* Usually the issuing of temporary or preliminary injunction is in the discretion of the court,[96] which is, however, not unlimited but guided and controlled by legal principles.[97] An injunction will usually be granted to restrain an irreparable injury,[98] and an injury may be irreparable either from its own nature, as where the party injured cannot be compensated in damages, or the damages cannot be measured by any certain pecuniary standard, or where it is shown that the party who must respond is insolvent.[99] It is proper to grant an injunction where the questions of law or fact are difficult, and the injury to the moving party will be material, certain, and great, if the relief is denied, while the loss to the opposing party will be comparatively small if it is granted.[1] Injunctions have been issued to restrain the digging of lead ore from lead mines on the public lands of the United States,[2] the extraction of ore from a vein by a tres-

94. Noble Five Consol. Min., etc., Co. *v.* Last Chance Min. Co., 9 Brit. Col. 514.

95. Allison's Appeal, 77 Pa. St. 221; Thomas *v.* Oakley, 18 Ves. 184. See also INJUNCTIONS, 22 Cyc. 967.

96. Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Edwards *v.* Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301; Heinze *v.* Boston, etc., Consol., etc., Co., 30 Mont. 484, 77 Pac. 421; Parrott Silver, etc., Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491; Parrott Silver, etc., Co. *v.* Heinze, 24 Mont. 485, 62 Pac. 818; Boston, etc., Consol., etc., Co. *v.* Montana Ore Purchasing Co., 23 Mont. 557, 59 Pac. 919; Heinze *v.* Boston, etc., Consol., etc., Co., 20 Mont. 528, 52 Pac. 273; Boyd *v.* Desrozier, 20 Mont. 444, 52 Pac. 53; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924; Blue Bird Min. Co. *v.* Murray, 9 Mont. 468, 23 Pac. 1022; Capner *v.* Flemington Co., 3 N. J. Eq. 467.

97. Montana Ore Purchasing Co. *v.* Boston, etc., Consol., etc., Co., 22 Mont. 159, 56 Pac. 120.

It is an abuse of discretion to deny a motion to vacate a temporary injunction where defendant is working veins in his own ground and there is a mere "chance" or "vague possibility" that these veins might have their apices within plaintiff's property. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 22 Mont. 159, 56 Pac. 120.

98. *Alabama.*— Hammond *v.* Winchester, 82 Ala. 470, 2 So. 892.

California.— Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920; Hess *v.* Winder, 34 Cal. 270; More *v.* Massini, 32 Cal. 590; People *v.* Morrill, 26 Cal. 336; Daubenspeck *v.* Grear, 18 Cal. 443; Henshaw *v.* Clark, 14 Cal. 460; Merced Min. Co. *v.* Fremont, 7 Cal. 317, 68 Am. Dec. 262.

Colorado.— Derry *v.* Ross, 5 Colo. 295.

Florida.— Brown *v.* Solary, 37 Fla. 102, 19 So. 161 [*disapproving* Woodford *v.* Alexander, 35 Fla. 333, 17 So. 658].

Kentucky.— Lindley *v.* Whittaker, 4 Ky. L. Rep. 987.

Michigan.— Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

Montana.— Boyd *v.* Desrozier, 20 Mont. 444, 52 Pac. 53.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Trotter, 38 N. J. Eq. 3.

New York.— West Point Iron Co. *v.* Reymert, 45 N. Y. 703; Spear *v.* Cutter, 5 Barb. 486; Livingston *v.* Livingston, 6 Johns. Ch. 497, 10 Am. Dec. 353.

Oregon.— Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936; Allen *v.* Dunlap, 24 Oreg. 229, 33 Pac. 675.

West Virginia.— Moore *v.* Jennings, 47 W. Va. 181, 34 S. E. 793.

United States.— Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113; Big Six Development Co. *v.* Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. N. S. 332; Dimick *v.* Shaw, 94 Fed. 266, 36 C. C. A. 347; Justice Min. Co. *v.* Barclay, 82 Fed. 554; Buskirk *v.* King, 72 Fed. 22, 18 C. C. A. 418; Oolagah Coal Co. *v.* McCaleb, 68 Fed. 86, 15 C. C. A. 270; St. Louis Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129; Montana Co. *v.* Clark, 42 Fed. 626; Lanier *v.* Alison, 31 Fed. 100; Nichols *v.* Jones, 19 Fed. 855; Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 28, 1 Morr. Min. Rep. 497; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271, 7 Morr. Min. Rep. 335.

England.— Mitchell *v.* Dors, 6 Ves. Jr. 147, 31 Eng. Reprint 984.

See 34 Cent. Dig. tit. "Mines and Minerals," § 142.

99. Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335.

Injuries arising from excavating ditches, digging up the soil, and flooding a portion of the premises are irreparable. Henshaw *v.* Clark, 14 Cal. 460.

1. Dimick *v.* Shaw, 94 Fed. 266, 36 C. C. A. 347.

2. U. S. *v.* Gear, 3 How. (U. S.) 120, 800, 11 L. ed. 523, 838.

passer,[3] the unlawful deposit of tailings,[4] the casting of *débris* upon lands,[5] the wrongful entry and holding possession of mining ground by force and threats,[6] the interference with one's mining operations by assaulting his lessee's workmen and attempting to stop up the entry of his mine,[7] the removal of ores already severed,[8] and the repeated cutting of a mining ditch, which constitutes a destructive trespass.[9] An injunction may be issued in favor of the locators of a placer claim to restrain working thereon by persons not qualified to take and hold such lands, even though they be in possession thereof;[10] after revocation of a license in favor of the licensor and against the licensee;[11] where two or more veins unite on the dip, in favor of the owner of the oldest location, against the owner of the other location to prevent the removal of ores below the point of union;[12] to restrain the use of an underground tramway, where such use may enable defendant to remove valuable ores from plaintiff's claim;[13] in favor of one tenant in common against another who assumes exclusive ownership over or destroys or threatens to destroy the value of the property held in common;[14] to restrain one of two adjacent mine owners from removing the supports which prevent the surface of his mine from caving in, when it appears that such caving will result in the destruction of

3. *California.*— Henshaw *v.* Clark, 14 Cal. 460.

Georgia.— Silva *v.* Rankin, 80 Ga. 79, 4 S. E. 756, where plaintiffs and defendants claimed title from the same grantor, and defendants connected their title with a deed conveying the surface and excepting the mineral, and plaintiffs connected their title with a legal sale of the minerals after the date of the former deed and defendants were insolvent.

Maryland.— Scully *v.* Rose, 61 Md. 408.

Montana.— Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16.

Oregon.— Muldrick *v.* Brown, 37 Oreg. 185, 61 Pac. 428.

Wisconsin.— Bracken *v.* Preston, 1 Pinn. 584, 44 Am. Dec. 412.

United States.— Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311; Barr *v.* Gratz, 4 Wheat. 213, 4 L. ed. 553.

See 34 Cent. Dig. tit. "Mines and Minerals," § 142.

Under Ida. Rev. St. § 4288, an injunction will issue to restrain the continuance of the unlawful removal of ore from plaintiff's mine without regard to whether or not the injury is irreparable. Gilpin *v.* Sierra Nevada Consol. Min. Co., 2 Ida. (Hasb.) 696, 23 Pac. 547, 1014.

The fact that the value of the ore removed could be readily ascertained does not warrant the refusal of the injunction. Anderson *v.* Harvey, 10 Gratt. (Va.) 386.

The owner of a mining claim has no right to follow a vein into an adjoining claim, unless such vein has its apex within his own side lines, and he may be enjoined from so doing. Gilpin *v.* Sierra Nevada Consol. Min. Co., 2 Ida. (Hasb.) 696, 23 Pac. 547, 1014.

4. Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 5 Pac. 490; Hobbs *v.* Amador, etc., Canal Co., 66 Cal. 161, 4 Pac. 1147; Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628; Robinson *v.* Black Diamond Coal Co., 57 Cal. 412, 40 Am. Rep. 118; Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254, 67 L. R. A. 410; Fitzpatrick *v.* Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622; Lincoln *v.* Rodgers, 1 Mont. 217; Montana Co. *v.* Gehring, 75 Fed. 384, 21 C. C. A. 414; U. S. *v.* Lawrence, 53 Fed. 632; Woodruff *v.* North Bloomfield Min. Co., 18 Fed. 753, 9 Sawy. 441.

A custom to discharge tailings into a stream does not prevent an injunction against a continuance of such discharge. Suffolk Gold Min., etc., Co. *v.* San Miguel Consol. Min., etc., Co., 9 Colo. App. 407, 48 Pac. 828; Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254, 67 L. R. A. 410.

5. See *infra*, V, C, 2, b, (III). But it has been held that leave will be given to construct efficient and durable impounding dams and the mining operations allowed to continue. York *v.* Davidson, 39 Oreg. 81, 65 Pac. 819; U. S. *v.* North Bloomfield Gravel Min. Co., 53 Fed. 625.

6. Sprague *v.* Locke, 1 Colo. App. 171, 28 Pac. 142.

7. Rankin's Appeal, (Pa. 1888) 16 Atl. 82, 2 L. R. A. 429, although he has not first established his right at law.

8. U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271, 7 Morr. Min. Rep. 335.

9. Derry *v.* Ross, 5 Colo. 295.

10. Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 28, 1 Morr. Min. Rep. 497.

11. Wheeler *v.* West, 71 Cal. 126, 11 Pac. 871; Halpin *v.* McCune, 107 Iowa 494, 78 N. W. 210; Lockwood *v.* Lunsford, 56 Mo. 68; Clark *v.* Wall, 32 Mont. 219, 79 Pac. 1052.

12. Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540.

13. Heinze *v.* Boston, etc., Consol. Copper, etc., Min. Co., 20 Mont. 528, 52 Pac. 273.

14. Connole *v.* Boston, etc., Copper, etc., Min. Co., 20 Mont. 523, 52 Pac. 263.

the other's mine;[15] after the location of a tunnel claim, to restrain a person discovering within the surface boundaries thereof a lode which crosses the line of the tunnel from prosecuting proceedings for a patent while the tunnel claimant is prosecuting his work and until he has demonstrated that the lode will not be discovered in the tunnel;[16] and to restrain one coöwner from excluding his coöwner from a tunnel through their group of claims and from preventing plaintiff working said claims where said tunnel is owned jointly and extended into an adjoining claim owned by defendant alone, and to restrain defendant from using the tunnel in working his last-mentioned claim.[17] An injunction has also been granted to prevent defendant from sinking oil wells upon property selected under the act of congress, as lieu land, prior to the issuance of the patent for such land;[18] to restrain one from sinking an incline shaft along the vein on its dip so as to cut into a tunnel of another person where the one sinking the shaft or incline had no extralateral rights;[19] to prevent a tenant for life from operating land for oil or gas or granting others a right to do so, where the owner of the fee had not previously operated the lands for such purposes or given others the right to do so;[20] to restrain a lessee from passing coal over a screen different from that provided for in the lease;[21] to restrain a lessee from mining ore on leased premises because of the breach of the lease in operating the mine, in a suit to cancel the lease;[22] to restrain the mining of ore on a vein within the perpendicular boundaries of a claim until it was shown that the vein upon which the work was being done had its apex within another claim;[23] to restrain threatened waste and trespass when plaintiffs were in possession as locators without a prior action at law to determine their title;[24] to restrain mining operations during the pendency of a suit concerning the property;[25] to restrain the owner of a mining claim from extending a tunnel from his claim into an

15. Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452.

16. Hope Min. Co. *v.* Brown, 11 Mont. 370, 28 Pac. 732.

17. People *v.* Lake County Dist. Ct., 27 Colo. 465, 62 Pac. 206.

18. Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

19. Montana Co. *v.* Clark, 42 Fed. 626.

20. Richmond Natural Gas Co. *v.* Davenport, 37 Ind. App. 25, 76 N. E. 525. See also *infra*, IV, C, 2, f, (I). And see, generally, WASTE.

21. Drake *v.* Black Diamond Coal, etc., Co., 89 S. W. 545, 28 Ky. L. Rep. 533, to prevent a multiplicity of suits.

22. Big Six Development Co. *v.* Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. N. S. 332.

23. Hess *v.* Winder, 34 Cal. 270; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158, 4 Morr. Min. Rep. 380.

24. Allen *v.* Dunlap, 24 Oreg. 229, 33 Pac. 675.

25. Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920 (holding that in an action of ejectment plaintiff is entitled to restrain defendant from doing irreparable injury to the premises by mining thereon pending the determination as to ownership, unless it plainly appears that plaintiff's title is bad or that there is no reasonable ground for his assertion of title, and the mere existence of doubt as to his title is not sufficient ground for denying the injunction); Lockhart *v.* Leeds, 195 U. S. 427, 25 S. Ct. 76, 49 L. ed. 263 [*reversing* 10 N. M. 568, 63 Pac. 48] (holding that an injunction will be granted restraining further mining during the pendency of the suit, under a complaint which seeks to enjoin, as trustees, persons, some of whom are insolvent, and who have acquired title to mining claims by a relocation made in pursuance of an alleged fraudulent and secret conspiracy with complainant's partner, whereby such partner was to fail in his duty to perfect the original location). But see St. Louis Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129, holding that the court will not restrain the removal of ores from disputed ground between mining claims pending the decision as to the title when neither the bill nor any affidavit fixed the point where defendants must stop, nor, in terms, enjoin defendant from working any vein if it apexes in complainant's claim where that would require defendants to ascertain from what acts they are enjoined.

Where the affidavits on the hearing for preliminary injunction are conflicting, the court will grant the injunction, leaving the question of title to be settled by a suit at law. Cheesman *v.* Shreeve, 37 Fed. 36.

In a federal court the legal title is not in dispute within the rule requiring the institution of an action at law, when plaintiff shows conveyance from the government patentee, and defendants merely claim under a contract to convey, made by such patentee, which is merely an equitable title; and the court may issue an interlocutory injunction pending the determination of the title by suit in equity. St. Louis Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129.

adjoining claim of another for the purpose of tapping his own vein on the dip, even though the apex was in his claim;[26] to restrain a vendee whose payments are in default from mining;[27] to protect the possession of property where a discharged agent of the owner threatened to use force to regain possession;[28] to restrain a trespass, where the damages could not be properly measured in an action at law;[29] to restrain an insolvent trespasser from digging into a mine to the injury of the owner;[30] to restrain a company from continuing to unlawfully mine phosphate deposits in beds of navigable waters belonging to the state;[31] to restrain hydraulic mining operations at the suit of the United States, where it appeared that the dam constructed in connection with the impounding works was of wood, standing in the body of a torrential mountain stream and liable to be carried away by freshets;[32] to enjoin any act of the owner of adjoining lands done to induce an unnatural flow into it through his wells;[33] and to restrain a water company furnishing water to a city in the use of the waters for placer mining, where such use unfitted the said water for domestic purposes, and the injunction did not interfere with defendant's use in the ordinary and accustomed manner.[34] An injunction may be granted for affirmative relief, restoring any person to the possession of any mining property from which he may have been ousted by fraud, force, or violence, or from which he has been kept out of possession by threats.[35] One who has acquired a tract of land with the exclusive right to bore and maintain gas wells thereon and who has the right to all the gas under an adjoining tract may enjoin one who attempts or threatens to bore wells upon such adjoining tract.[36] Where plaintiff, being the owner of the underlying granite, sought and obtained an injunction against the owner of the surface from quarrying such granite, it was proper to enjoin plaintiff from interfering with the surface property rights belonging to defendant.[37] Where, in an action by the owners of a mining claim to restrain the removal of ore by defendants who own an adjoining claim and have entered by underground workings on plaintiff's claim, the evidence is conflicting as to whether the apex of the vein is in defendants' claim and development has not progressed far enough to identify the vein in defendants' claim with that in plaintiff's claim, nor to show with certainty the location of the apex of the vein in controversy, it is proper to grant an injunction *pendente lite*.[38] When the rights of tenants in common in a mineral vein are contingent on the payment of purchase-price to the other owners, they may be enjoined from extracting ore therefrom, if they do not pay or tender such sum to the other owners and seek to oust them.[39] More than seven years' notorious, peaceable, and adverse use and occupation of gold mines, where the party has gone into possession under a deed, gives such party the right to enjoin the vendor

26. St. Louis Min., etc., Co. *v.* Montana Min. Co., 113 Fed. 900, 51 C. C. A. 530 [*affirmed* in 171 U. S. 650, 19 S. Ct. 61, 43 L. ed. 320].

27. Williams *v.* Long, 129 Cal. 229, 61 Pac. 1087.

28. Flagstaff Silver Min. Co. *v.* Patrick, 2 Utah 304.

29. Indianapolis Natural Gas Co. *v.* Kibbey, 135 Ind. 357, 35 N. E. 392; Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468; Duffield *v.* Hue, 136 Pa. St. 602, 20 Atl. 526.

30. Lockwood *v.* Lunsford, 56 Mo. 68.

31. Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537.

32. U. S. *v.* Lawrence, 53 Fed. 632.

33. Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

34. Travis Placer Min. Co. *v.* Mills, 94 Fed. 909, 37 C. C. A. 536.

35. Sprague *v.* Locke, 1 Colo. App. 171, 28 Pac. 142, holding that under Civ. Code, § 159, where it was shown that while the working of a mine by plaintiff was suspended and the shaft house fastened up, defendant by force or otherwise entered the shaft house and maintained possession with fire arms, regardless of plaintiff's title, plaintiff was entitled to an injunction, replacing him in possession.

36. Indianapolis Natural Gas Co. *v.* Kibbey, 135 Ind. 357, 35 N. E. 392; Duffield *v.* Hue, 136 Pa. St. 602, 20 Atl. 526.

37. Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

38. Maloney *v.* King, 25 Mont. 188, 64 Pac. 351.

39. Yarwood *v.* Cedar Canyon Consol. Min. Co., 37 Wash. 56, 79 Pac. 483.

from mining ore therein, even though such vendor has reserved the exclusive privilege of working the mine.[40] Under a statute authorizing a non-joining cotenant of mining property to recover his share of the net profits of the mine, or his proportionate share of all ores on the dump, on payment or tender of the costs of mining the same, where defendant, a cotenant, wrongfully worked a mine through a shaft from another mine, in which plaintiff had no interest and to which he had no right of access, plaintiff was entitled to an injunction *pendente lite*, restraining defendant from continuing to work such mine, although he failed to tender his proportionate share of the cost of mining the ore extracted therefrom, since such tender was excused by plaintiff's inability to ascertain what ores it was entitled to in order to estimate the amount of such tender.[41] An injunction may issue to enforce the right of inspection in a proper case.[42] If a person owns a ditch and the right of way for the same to conduct water for mining purposes and has acquired such right by priority of location the court should not, in an action to enjoin another person from washing away the ground over which the ditch passes, limit plaintiff's right by allowing defendant to wash away the ditch if he builds a flume or other aqueduct in place of the ditch, of sufficient capacity to carry water, and gives bond to pay the damages sustained thereby.[43]

(c) *When Refused.* An injunction will not be granted to restrain the construction of a ditch across rocky, barren, and uncultivated land;[44] the removal of coal from under complainant's land, causing damage thereto by subsidence;[45] the drilling of an oil or gas well through a part of a coal mine, from which all the coal has been extracted except what is necessary for proper support;[46] work which is merely for the purpose of exploration;[47] or the laying and maintaining of a pipe for the conveyance of oil on a bridge built for the railroad, where such pipe was laid before the bill was filed, and no irreparable injury is threatened.[48] The court will not restrain a defendant from mining upon a location if he has never mined thereon, or threatened so to do,[49] nor will it restrain defendant from discharging the water used in operating a placer mine, which is brought through a tunnel into an artificial creek flowing through plaintiff's farm, where the evidence tends to show that if the ditch was kept in proper repair it would be of sufficient size to carry the water in addition to the natural waters flowing therein without overflowing, and that defendant offered to build levees where necessary, and to keep the ditch in repair through plaintiff's land, but plaintiff refused to permit it.[50] An injunction has also been refused where a defendant had a right by deed to dig ore, and took out more than he was entitled to;[51] where nothing but a simple technical trespass was shown;[52] and where veins intersected beneath a claim, but the apices thereof were not in such claim.[53] Where complainant's

40. House *v.* Palmer, 9 Ga. 497.

41. Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 125, 60 Pac. 1039, 25 Mont. 41, 63 Pac. 825.

42. See *infra*, IV, A, 2, f.

43. Gregory *v.* Nelson, 41 Cal. 278.

44. Waldron *v.* Marsh, 5 Cal. 119; Thorn *v.* Sweeney, 12 Nev. 251.

45. Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335, as each trespass is a distinct cause of action and equity will not interfere to prevent suits between the same parties for repeated trespasses committed by one against the lands of another. See also *infra*, text and note 54. And for right to subsequent support see *infra*, V, C, 2, b, (IV), (B).

46. Rend *v.* Venture Oil Co., 48 Fed. 248.

47. Butte Consol. Min. Co. *v.* Frank, 27 Mont. 392, 71 Pac. 1129; Harley *v.* Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407; St. Louis Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129.

48. New Jersey Cent. R. Co. *v.* Standard Oil Co., 33 N. J. Eq. 127.

49. Champion Min. Co. *v.* Consolidated Wyoming Gold Min. Co., 75 Cal. 78, 16 Pac. 513.

50. McCann *v.* Wallace, 117 Fed. 936.

51. Grubb's Appeal, 90 Pa. St. 228, it being a mere matter of charge for a number of tons of ore and clearly a subject for an action at law.

52. King *v.* Mullins, 27 Mont. 364, 71 Pac. 155; McCauley *v.* McKeig, 8 Mont. 389, 21 Pac. 22; Atchison *v.* Peterson, 1 Mont. 561.

53. Roxanna Gold-Min., etc., Co. *v.* Cone, 100 Fed. 168, the owner of the claim having nothing to do with such veins below the point of union.

land was acquired subject to defendant's right to mine coal thereunder, and the evidence is conflicting as to whether or not the surface will subside or whether plaintiff will be injured, and no rule appears by which the court can specify the method in which the work shall be done, an injunction will not lie to restrain the removal of the ore, nor will the court assume charge of the operation of the work and direct the manner in which it shall be done.[54] Where a trespasser is sinking a mining shaft upon a tract of ground used for the manufacture of brick and throwing the *débris* on the surface of the ground so used, it is not irreparable injury or waste to the estate warranting an injunction.[55] The owner of coal under the surface is not entitled to an injunction restraining the owner of the surface from boring through the coal to reach gas and oil found to exist beneath it.[56] Where defendant was in possession of the mine in suit under a contract of sale from plaintiff, which provided that in case of default in payment any improvements should revert to plaintiff with the land, and defendant was also operating an adjoining mine to which the only access was through the premises in suit by means of appliances erected by defendant, it was held that on default by defendant plaintiff's claim under the contract to improvements on the premises in suit did not entitle him to an injunction restraining defendant from working on the premises.[57]

(11) *JURISDICTION.* An interlocutory injunction may issue in the federal courts to restrain mining of ores pending an action at law to determine the legal title where such title is in dispute;[58] and a federal court having jurisdiction may enjoin a trespasser from removing mineral from land, the title of which has been finally adjudicated in plaintiff's favor.[59] But the institution of a suit at law to try title is not always indispensable to the jurisdiction of a federal court to protect the property by injunction.[60] Where congress makes appropriations for the improvement of certain rivers and provides that a portion of such appropriations shall not be used until certain hydraulic mining, hurtful to navigation, has ceased on such rivers, and in the event of its continuance authorizes the secretary of war to institute legal proceedings to prevent the same, this legislation is a sufficient assumption of national jurisdiction to confer upon the federal courts the right to enjoin the continuation of such hydraulic mining.[61] A suit to enjoin defendants from trespassing on a mining claim is local in its character and not within the jurisdiction of the courts of a state other than that in which the premises are situated,[62] but where a court of equity has jurisdiction of a person, it may issue an injunction to prevent trespass upon land in another county.[63]

54. Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335.

55. King *v.* Mullins, 27 Mont. 364, 71 Pac. 155.

56. Chartiers Block Coal Co. *v.* Mellon, 152 Pa. St. 286, 25 Atl. 597, 34 Am. St. Rep. 645, 18 L. R. A. 702 [*followed* in Mansfield Coal, etc., Co. *v.* Mellon, 152 Pa. St. 286, 25 Atl. 601], holding that the owner of the coal will be protected by the decree as far as possible with due regard to the rights of both parties and then left to his remedy at law.

57. Williams *v.* Long, 129 Cal. 229, 61 Pac. 1087, so holding on the ground that plaintiff's right to improvements could only be settled on final hearing and in the meantime defendants were entitled to use the premises for access to their own property.

58. Erhardt *v.* Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. ed. 1113.

If the court is without jurisdiction to determine the question of ownership of the property, it will not, at the instance of one claimant, issue an injunction to preserve and protect the property *pendente lite*. Davidson *v.* Calkins, 92 Fed. 230.

59. Dimick *v.* Shaw, 94 Fed. 266, 36 C. C. A. 347.

60. U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271, 7 Morr. Min. Rep. 335.

61. U. S. *v.* North Bloomfield Gravel-Min. Co., 53 Fed. 625.

62. Ophir Silver Min. Co. *v.* San Francisco Super. Ct., 147 Cal. 467, 82 Pac. 70.

The fact that the necessary parties are before a court of equity does not give it jurisdiction in proceedings to enjoin trespass and waste in a mine located in a foreign jurisdiction, where there is no further ground for equitable interference. Lindsley *v.* Union Silver Star Min. Co., 26 Wash. 301, 66 Pac. 382.

63. Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948.

Equity has jurisdiction to determine the validity of defendant's claim of title where the same is founded upon fraud or mistake, and may enjoin defendant from mining and from preventing the complainant from so doing;[64] but it is beyond the power of the court in its decree to enjoin an absolute, *bona fide* sale of a mining property by defendant to any person who may, to the knowledge of defendant, have the intention to work the mine by the same process, on account of which the injunction was granted.[65] Even though plaintiff is not in possession, and the legal title has not been settled or questioned by an action at law, yet where the trespass is continuous and irreparable jurisdiction attaches.[66] Where complainant held licenses from the Cherokee nation to mine and sell coal on certain lands, and had operated thereunder, and defendants entered under a subsequent license, and mined and shipped coal, and prevented complainant from so doing, to his injury, and some of the defendants were insolvent, equity had jurisdiction to enjoin defendants from mining coal and from preventing complainant from doing so.[67] A plea to the jurisdiction does not prevent the court from issuing the injunction to stay irremediable injury pending the argument of such issue.[68]

(III) *PARTIES*.[69] Under a complaint for an injunction, alleging that a coal company, operating on an adjoining property, had extended its operations to plaintiff's premises, and that another company was working as the agent of the coal company, both companies are proper parties defendant.[70] Where the complaint alleged that a certain corporation which previously held a lease of the land under which defendants claim was a mere dummy, and that defendants for many years had owned all its capital stock and property, and managed all its corporate affairs, kept all of its accounts and the said company's charter had expired and it had never been reorganized, the bill was not inoperative for failure to make such corporation a party defendant.[71]

(IV) *PLEADING*.[72] The complaint should state the facts from which the court can learn that the injury is irreparable.[73] Removal of minerals is in itself an irreparable injury, and a complaint is sufficient to warrant injunction if it states these facts.[74] In a bill filed by a purchaser of a mining claim more than a year after the location to restrain other persons from digging minerals thereon, compliance with the steps necessary to perfect title to the claim must be alleged.[75] A complaint is sufficient on demurrer when it alleges that plaintiff is the owner of a tunnel site and that the trend of a vein being worked by defendant appears to be across the location of plaintiff's tunnel site, without a positive averment that it will cross.[76] Relief under a general prayer in the complaint in a United States court should not be denied because it is asked upon a different theory than that upon which a special prayer for relief is based, both prayers being based on the same facts clearly set forth in the bill.[77] Where it is held that natural gas does not

64. Allison's Appeal, 77 Pa. St. 221.
A court of equity may take cognizance of a cross action to try an adverse claim to quiet title thereto, and enjoin the removal of ores therefrom, when for these purposes it becomes necessary to identify the boundaries of the vein and the apex of the lode, because a judgment at law would not meet the exigencies of the case. Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

65. Yuba County *v.* Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

66. Big Six Development Co. *v.* Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. N. S. 332.

67. Oolagah Coal Co. *v.* McCaleb, 68 Fed. 86, 15 C. C. A. 270.

68. Merced Min. Co. *v.* Fremont, 7 Cal. 130.

69. See, generally, PARTIES.

70. United Coal Co. *v.* Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045.

71. Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

72. See, generally, PLEADING.

73. Leitham *v.* Cusick, 1 Utah 242, holding that a complaint is insufficient in which there is a simple allegation that it is impossible for plaintiffs to know the amount and value of the ore taken from the mine, and that the injury is irreparable, and that the facts should be stated.

74. Merced Min. Co. *v.* Fremont, 7 Cal. 317, 68 Am. Dec. 262.

75. Zeckendorf *v.* Hutchison, 1 N. M. 476.

76. Hope Min. Co. *v.* Brown, 7 Mont. 550, 19 Pac. 218.

77. Lockhart *v.* Leeds, 195 U. S. 427, 26 S. Ct. 76, 49 L. ed. 263.

become the property of the owner of the soil until reduced to actual possession, objections based upon the right of transportation and sale of such gas are not pertinent to a complaint to enjoin the use of artificial means to increase the flow thereof from gas wells.[78] The sufficiency of a complaint is not involved upon an application for a temporary injunction.[79]

(v) *EVIDENCE.*[80] Plaintiff must show clear title, or such title must be undisputed, or steps must have been taken to establish such title by an action at law or satisfactory reason shown for not doing so.[81] In an action by the owners of a mining claim to restrain the removal of ore by defendants who own an adjoining claim and have entered by underground workings on plaintiff's claim, the burden is on defendants to show that the vein they are mining in plaintiff's claim has its apex in their claim.[82] In determining questions as to whether ore bodies found in different claims are parts of a continuous vein or lode, or are separate and independent veins, a wide latitude is always permissible, for the purpose of ascertaining the reasoning upon which the conclusions of witnesses are based, as well as their general knowledge of the ground, their experience and observation, and their qualifications as practical miners or experts, derived from years of experience in the particular mining district.[83] The rule that proofs must correspond with allegations does not apply to proceedings upon a motion for injunction, when the answer is regarded simply as an affidavit.[84] A general allegation of ownership is substantiated by proof of location and possession.[85] Where plaintiff has allowed defendant to occupy a mining claim for several months and to expend money thereon, a court of equity will require very strong proof before granting an injunction to stop the work pending an action to clear the title.[86] A probate judge's certificate given under a statute that the location of a mining claim is regular, and that all the requirements have been complied with, is not conclusive evidence of such compliance.[87] Evidence sufficient to authorize a preliminary injunction or its refusal is not necessarily sufficient to obtain a like decision on the final trial on the merits.[88]

(vi) *JUDGMENT OR DECREE.*[89] In an action to restrain a trespass on a mining claim a judgment for defendant is properly rendered where the court finds that no valid discovery has been made on the lode, that it has not been located or the boundaries marked in the prescribed manner, that no valuable mineral of the required classes is within the boundaries of the property, and that defendant's title to the property is valid.[90]

(vii) *EFFECT OF INJUNCTION.* An injunction against selling ore does not prevent the mining of it.[91]

78. Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

Ownership of gas and oil see *supra*, IV, A, 1, text and note 18.

79. People's Gas Co. *v.* Tyner, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443, holding that in such case the court will grant relief where it appears that the case is a proper one for investigation.

80. See, generally, EVIDENCE, 16 Cyc. 821.

81. Old Tel. Min. Co. *v.* Central Smelting Co., 1 Utah 331.

One who claims an exclusive right to mine a tract of land under a parol lease and seeks to enjoin others from mining thereon, if they do not interfere with his development and mining, must establish such right by clear and satisfactory evidence. Clegg *v.* Jones, 43 Wis. 482.

82. Maloney *v.* King, 25 Mont. 188, 64 Pac. 351.

83. Justice Min. Co. *v.* Barclay, 82 Fed. 554. See also Illinois Silver Min., etc., Co. *v.* Raff, 7 N. M. 336, 34 Pac. 544.

84. Kahn *v.* Old Tel. Min. Co., 2 Utah 13.

85. Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322. See also Hamilton *v.* Brown, 6 Nova Scotia 260.

86. Real Del Monte Consol. Gold, etc., Min. Co. *v.* Pond Gold, etc., Min. Co., 23 Cal. 82.

87. Zechendorf *v.* Hutchison, 1 N. M. 476.

88. Colusa Parrot Min., etc., Co. *v.* Barnard, 28 Mont. 11, 72 Pac. 45; Maloney *v.* King, 25 Mont. 188, 64 Pac. 351; Buskirk *v.* King, 72 Fed. 22, 18 C. C. A. 418.

89. See, generally, EQUITY, 16 Cyc. 1; INJUNCTIONS, 22 Cyc. 724; JUDGMENTS, 23 Cyc. 623.

90. Regan *v.* Whittaker, 14 S. D. 373, 85 N. W. 863.

91. Benton *v.* Hopkins, 31 Colo. 518, 74 Pac. 891.

(VIII) *MODIFICATION OR DISSOLUTION.* The court which grants a preliminary injunction may, in the exercise of its judicial discretion, modify the same at any time before the case terminates in a final judgment.[92] A preliminary injunction preserving mining property *in statu quo* will not be dissolved, so long as the equities of neither party clearly appear,[93] nor will an injunction be dissolved on the ground that the complainant has abused the process of the court in doing the acts which it has caused defendant to be restrained from, where such acts of complainant tend to preserve the property.[94] Where a motion to dissolve the injunction is heard upon the pleadings alone, it should be granted if the answer denies all the material allegations of the complaint.[95]

(IX) *VIOLATION AND PUNISHMENT.* The violation of the injunction is a contempt[96] and is punished as such.[97]

(X) *REVIEW.*[98] The granting or refusal of an injunction rests in the sound discretion of the trial court and its decision will not be reviewed if made on conflicting evidence, unless it appears that its discretion was improvidently exercised.[99] In a suit to enjoin a continuing trespass by taking ore from a mine, the

92. Hobbs *v.* Amador, etc., Co., 66 Cal. 161, 4 Pac. 1147; Blue Bird Min. Co. *v.* Murray, 9 Mont. 468, 23 Pac. 1022, holding that notwithstanding a temporary injunction has been granted to prevent defendant from interfering with complainant following a vein on the dip under defendant's mining claim, the court may modify such injunction so as to permit defendant to enter and inspect the vein, as plaintiff is *prima facie* a trespasser. See also *infra*, IV, A, 2, f.

93. Hall *v.* Equator Min., etc., Co., 11 Fed. Cas. No. 5,931.

94. Silver Peak Mines *v.* Hanchett, 93 Fed. 76.

95. Johnson *v.* Wide West Min. Co., 22 Cal. 479; Magnet Min. Co. *v.* Page, etc., Silver Min. Co., 9 Nev. 346; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271, 7 Morr. Min. Rep. 335.

Answer not sufficient to warrant dissolution.— Where a bill in equity charged that defendant, an adjoining owner, trespassed and mined on complainant's lands, so as to throw the water from defendant's mines in and on plaintiff's mineral lands, causing great damage, which would continue unless restrained, and the answer admitted the mining on complainant's land, but averred that the water could not flood complainant's mine unless the latter should negligently and foolishly drive its entries into the opening and mines of defendant, such answer was not a sufficiently direct and positive statement to warrant the dissolution of the temporary injunction. Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754.

Matters not of nature to be denied by answer.— The complainants were the undisputed owners of all the franklinite and iron ores upon a certain tract when they were found separate from the zinc, and they claimed to own all the franklinite and iron ores whether they existed separate from the zinc or not. Defendants were the undisputed owners of all the zinc and other ores on the same premises, except franklinite and iron ores, and they claimed to own the franklinite and iron ores when they did not exist separate and distinct from zinc ores. Upon a bill filed an injunction was allowed restraining the defendants from mining, carrying away, or using any franklinite or iron ore. It appeared that the ores or minerals were found combined in such varied proportions as to render it often difficult to decide which metal preponderated in quantity or value in a given specimen and to render it difficult, if not impossible, to mine either ore without at the same time taking the other. Upon motion to dissolve the injunction on the ground that the whole equity of the bill was denied by the answer, it was held that the matters in controversy were not of such a nature that they could be met and denied by the answer so as to entitle defendants to a dissolution of the injunction as a matter of course. Boston Franklinite Co. *v.* New Jersey Zinc Co., 13 N. J. Eq. 215.

96. Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628, holding that each act violative of the commands of an injunction is a separate contempt.

97. See INJUNCTIONS, 22 Cyc. 1021 *et seq.* See also Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 8 Pac. 490; Golden Gate, etc., Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628; State *v.* Clancy, 24 Mont. 359, 61 Pac. 987 [*explaining* Forrester *v.* Boston, etc., Consol., etc., Min. Co., 23 Mont. 122, 58 Pac. 40]; Boston, etc., Consol. Copper, etc., Co. *v.* Montana Ore Purchasing Co., 24 Mont. 117, 60 Pac. 807.

98. See, generally, APPEAL AND ERROR, 2 Cyc. 474 *et seq.*

99. Yreka Min., etc., Co. *v.* Knight, 133 Cal. 544, 65 Pac. 1091; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471; Montana Ore Purchasing Co. *v.* Butte, etc., Consol. Min. Co., 25 Mont. 427, 65 Pac. 420; Parrot Silver, etc., Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311.

title to which is in dispute, an appellate court will consider as waived the objection that complainant was bound to establish his title at law before a decree for equitable relief could be granted, when such objection was not taken in the court below.[1]

(xi) *Liability on Bonds.* Under its general powers, and independent of statutory provisions, a federal court of equity may, on the dissolution of an injunction, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties on the bond as an incident to the principal suit.[2] But an injunction bond given in an action in a federal court may also be sued on in a state court.[3] Damages resulting from the injunction can be recovered,[4] but not possible profits which might or might not have been made had no injunction been issued.[5] The mere fact that an injunction has been dissolved does not authorize the recovery of damages on the bond,[6] and where an injunction merely restrained defendant from selling or disposing of any ore from mines in dispute, defendants are not entitled to damages on the theory that the injunction prevented their working the mine.[7] Where no motion was made to dissolve the injunction, but it was dissolved by a judgment on the merits, no attorney's fees can be recovered in an action on an injunction bond.[8] The general rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract applies to sureties on injunction bonds.[9]

The principal question for consideration in the appellate court is whether upon the evidence introduced at the hearing, the court below manifestly abused its discretion. Colusa Parrot Min., etc., Co. *v.* Barnard, 28 Mont. 11, 72 Pac. 45; Craver *v.* Stapp, 26 Mont. 314, 67 Pac. 937; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 23 Mont. 557, 59 Pac. 919; Heinze *v.* Boston, etc., Consol. Copper, etc., Min. Co., 20 Mont. 528, 52 Pac. 273; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924; Cotter *v.* Cotter, 16 Mont. 63, 40 Pac. 63; Blue Bird Min. Co. *v.* Murray, 9 Mont. 468, 23 Pac. 1022; Nelson *v.* O'Neal, 1 Mont. 284.

Refusal to allow work done to elucidate issues.— The Centre Star Company had been enjoined from mining in the Iron Mask claim, in which, it was alleged, was a continuation of a vein whose apex was in its own claim, and was also refused leave to do experimental or development work on the Iron Mask claim in order to determine the character or identity of the said vein. It was held by the full court, on appeal, refusing to modify said orders, that it ought to be left to the trial judge to decide whether it was necessary to have any work done to elucidate any of the issues raised. Centre Star *v.* Iron Mask, 6 Brit. Col. 355.

1. Waterloo Min. Co. *v.* Doe, 82 Fed. 45, 27 C. C. A. 50.

2. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498; Coosaw Min. Co. *v.* Farmers' Min. Co., 51 Fed. 107.

3. Montana Min. Co. *v.* St. Louis Min., etc., Co., 23 Mont. 311, 58 Pac. 870, holding that such suit may be brought without an order of the federal court, granting leave when a final disposition of the injunction suit has been made by the entry of judgment of dismissal with costs against plaintiff.

4. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498, holding that where in a suit to enjoin defendant from further working of a mine beyond the alleged limits of its claim, a temporary injunction was allowed, and by a subsequent order the court required defendant to pump the water from its workings, to permit an inspection by complainant's engineers, complainant was liable on its bond, on a final determination of the suit in favor of defendant, for the cost of such pumping, although it was continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order, and complainant itself delayed its examination, and took no steps to have the work stopped.

5. Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860, holding that where an injunction, which was issued against removing phosphate deposits, was dissolved, in an action on the bond defendants were not entitled to recover profits which they might possibly have made had they been allowed to remove the deposits, as the conditions of successful working varied from day to day, and it appeared that the price of such phosphate constantly fluctuated, and would probably have fallen considerably had they removed the deposit in question and placed the same on the market.

6. Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860, so holding where the injunction was obtained in good faith, and every consideration of equity demanded that matters remain *in statu quo* until authoritative construction of a doubtful act of assembly was had and the persons enjoined were not put to any disadvantage by the injunction.

7. Benton *v.* Hopkins, 31 Colo. 518, 74 Pac. 891.

8. Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322.

9. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498, holding that

f. Inspection and Survey of Mines — (I) *Power to Order.* In a number of states statutes have been enacted for the inspection, examination, or survey of mines, and the constitutionality of these statutes has been uniformly sustained.[10] But the right to order an inspection and survey of the mining premises in suit is within the inherent powers of a court of equity, independent of any statute,[11] and statutes purporting to give such power are held to be merely declaratory of the inherent power already existing.[12] Where, however, no suit is pending, equity has no inherent power to order an inspection,[13] although some statutes give the courts such power.[14] A statute providing for a survey of mines by the county surveyor does not authorize a survey by order of the district court of that part of a mine which is located outside of the state, even though the only means of access thereto is by a shaft located in the state.[15]

(II) *Right to Demand.* Where defendant sets up that the vein in controversy is an offshoot of one he owns, plaintiff may thereupon demand the right to inspect the latter.[16] An inspection cannot be demanded by a person who asserts no interest in the property of which inspection is sought, or through which entry is necessary to inspect adjoining property.[17]

(III) *Proceedings.* On an application to obtain an inspection, the petition need not charge the adverse party with a wrongful possession, but the wrong to be charged is the refusal to permit the inspection.[18] Where, after an application for inspection has been filed, plaintiff amends his complaint, but without changing the theory of the cause of action or the issues, the amendment does not make it necessary to begin the proceeding for inspection *de novo*.[19] An inspection will not be allowed until time is given to defendant to answer the affidavits upon which the application is based.[20]

sureties on a bond given to secure a restraining order, which order required defendant to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order, which continued such restraining order in force, but modified and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court.

10. *In re* Carr, 52 Kan. 638, 35 Pac. 818; State *v.* Second Judicial Dist. Ct., 29 Mont. 105, 74 Pac. 132; State *v.* Second Judicial Dist. Ct., 28 Mont. 528, 73 Pac. 230; State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 68 Pac. 570, 69 Pac. 103, 25 Mont. 504, 65 Pac. 1020; Blue Bird Min. Co. *v.* Murray, 9 Mont. 468, 23 Pac. 1022; Howe's Cave Lime, etc., Co. *v.* Howe's Cave Assoc., 88 Hun (N. Y.) 554, 34 N. Y. Suppl. 848; Montana Co. *v.* St. Louis Min., etc., Co., 152 U. S. 160, 14 S. Ct. 506, 38 L. ed. 398 [*affirming* 9 Mont. 288, 23 Pac. 510].

11. *Massachusetts.*— Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.

Montana.— St. Louis Min., etc., Co. *v.* Montana Co., 9 Mont. 288, 23 Pac. 510.

New Jersey.— Thomas Iron Co. *v.* Allentown Min. Co., 28 N. J. Eq. 77, injunction to permit the inspection.

United States.— Thornburgh *v.* Savage Min. Co., 23 Fed. Cas. No. 13,986, 7 Morr. Min. Rep. 667. See also Montana Co. *v.* St. Louis Min., etc., Co., 152 U. S. 160, 14 S. Ct. 506, 38 L. ed. 398.

England.— Bennitt *v.* Whitehouse, 28 Beav. 119, 6 Jur. N. S. 528, 29 L. J. Ch. 326, 2 L. T. Rep. N. S. 45, 8 Wkly. Rep. 251, 54 Eng. Reprint 311; Lonsdale *v.* Curwen, 3 Bligh 168 note, 4 Eng. Reprint 566; Bennett *v.* Griffiths, 3 E. & E. 467, 7 Jur. N. S. 284, 30 L. J. Q. B. 98, 3 L. T. Rep. N. S. 735, 9 Wkly. Rep. 332, 107 E. C. L. 467; Lewis *v.* Marsh, 8 Hare 97, 32 Eng. Ch. 97, 68 Eng. Reprint 288.

See 34 Cent. Dig. tit. "Mines and Minerals," § 143. And see *supra*, notes 99, 4.

12. State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 68 Pac. 570, 69 Pac. 103, holding further that such statutes rest upon the principle that the parties should be enabled to put the court in possession of all the facts touching the controversy, to the end that their rights may be properly adjudicated.

13. State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 68 Pac. 570, 69 Pac. 103.

14. State *v.* Second Judicial Dist. Ct., 26 Mont. 416, 68 Pac. 794, 946.

15. *In re* Carr, 52 Kan. 688, 35 Pac. 818.

16. Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887.

17. State *v.* Second Judicial Dist. Ct., 26 Mont. 433, 68 Pac. 797, under Code Civ. Proc. § 1317.

18. State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 68 Pac. 570, 69 Pac. 103.

19. State *v.* Second Judicial Dist. Ct., 30 Mont. 206, 76 Pac. 206.

20. Whaley *v.* Braucker, 10 Jur. N. S. 535, 10 L. T. Rep. N. S. 155, 12 Wkly. Rep. 570, 595.

(IV) *When Ordered.* The propriety of granting an order of inspection and survey lies very largely in the discretion of the trial court.[21] The evidence upon which an order of inspection and survey is made need go no further than would be necessary to support a search warrant in a given case;[22] and where the evidence indicates conditions to justify a well-grounded belief that the adverse party is trespassing upon applicant's rights the order should be made.[23] The fact that a temporary injunction has been issued does not preclude the issuance of the inspection order.[24]

(V) *Scope of Order.* Inspection orders are in their nature search warrants to obtain evidence,[25] and should always be limited by the necessities of the case.[26] An order granting inspection of underground workings should determine and fix the means of access,[27] and strictly limit the examination to the workings of which it is necessary for plaintiff to have knowledge in order to elucidate the issues.[28] Plaintiff may be granted access to underground workings through defendant's shaft or opening if this is necessary,[29] but not otherwise.[30] If necessary the order may require defendant to use its appliances to lower and raise plaintiff's agents in making such inspection, and provide the amount to be paid therefor.[31] Where, in a suit to determine a mining claim, operations are continued pending the action, the court may properly designate employees of the adverse party to make weekly inspection of the premises under reasonable restrictions.[32]

(VI) *Expense of Inspection.* It is error to allow an inspection of defendant's workings, requiring defendant to use its appliances to lower and raise plaintiff's agents in making such inspection, without providing for the payment by plaintiffs of the expenses incident thereto upon the presentation of a claim there-

21. State *v.* Second Judicial Dist. Ct., 29 Mont. 105, 74 Pac. 132; State *v.* Second Judicial Dist. Ct., 26 Mont. 416, 68 Pac. 794, 946.

22. State *v.* Second Judicial Dist. Ct., 26 Mont. 483, 68 Pac. 861.

23. State *v.* Second Judicial Dist. Ct., 28 Mont. 528, 73 Pac. 230; State *v.* Second Judicial Dist. Ct., 26 Mont. 483, 68 Pac. 861 (under Code Civ. Proc. § 1314, which authorizes on good cause shown an order for the inspection of a mining claim involved in litigation, even though entry must be made through lands of the adverse party); Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135 (holding that in trespass for the removal of coal from beneath the surface of the land by defendant, the excavation being in defendant's possession, the court should have granted plaintiff's application for a survey of the mining operations in order to disclose the direction of such excavation and to ascertain the quantity of mineral extracted).

24. State *v.* Second Judicial Dist. Ct., 26 Mont. 416, 68 Pac. 794.

25. State *v.* Second Judicial Dist. Ct., 26 Mont. 483, 68 Pac. 861.

26. State *v.* Second Judicial Dist. Ct., 26 Mont. 416, 68 Pac. 794, holding that where, in a suit to determine ownership of certain ore bodies, the parties base their respective claims on the asserted ownership of the apex of a vein, to determine which will necessitate a following of the vein from the surface, an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface should be limited to those openings, although examination should be allowed of all the workings made in pursuit of the vein in the direction of the strike, to determine the continuity of its direction as well as the angle of the dip.

27. State *v.* Second Judicial Dist. Ct., 30 Mont. 206, 76 Pac. 206.

28. State *v.* Second Judicial Dist. Ct., 30 Mont. 206, 76 Pac. 206; State *v.* Second Judicial Dist. Ct., 28 Mont. 528, 73 Pac. 230.

29. State *v.* Second Judicial Dist. Ct., 26 Mont. 416, 68 Pac. 794, holding that under Code Civ. Proc. § 1314, authorizing an inspection order in actions relative to mining claims, where the respective parties assert title to certain ore bodies, each basing his claim on an asserted ownership of the apex of the vein, to determine which will necessitate a following of the vein from the surface, the court may properly grant an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface, although the latter party has complete maps up to the commencement of the suit, after which it was excluded, and the work of removing the ores rapidly pushed.

30. State *v.* Second Judicial Dist. Ct., 28 Mont. 528, 73 Pac. 230, holding that where most of the workings in one of defendant's claims can be readily reached through plaintiff's shaft, it is error to allow plaintiff access to defendant's workings exclusively through defendant's shafts, and by means of the latter's appliances.

31. State *v.* Second Judicial Dist. Ct., 30 Mont. 206, 76 Pac. 206.

32. State *v.* Second Judicial Dist. Ct., 26 Mont. 416, 68 Pac. 794.

for by defendant,[33] but the court should not arbitrarily fix the amount to be paid for lowering the inspectors into and hoisting them from the mine, without hearing evidence in reference to the actual cost.[34] In a suit in which a temporary injunction was issued, and subsequently the court ordered defendant to pump out the mine to permit an inspection by complainant, defendant was allowed the cost of such pumping.[35] It has been held proper to allow the expenses of the inspection in the costs of the suit.[36]

B. Conveyances[37] — **1. Options and Executory Contracts**[38] — **a. In General.** As a prospective purchaser of mining property usually desires some time to investigate before completing the purchase, it is quite usual for such purchaser to obtain an option on the property or for the parties to make an executory contract of sale. Such options or contracts are in the main governed by the general rules of law applicable to such agreements,[39] but a few matters peculiar to agreements relative to mining property remain to be considered.[40]

b. Distinctions Between Contracts, Conveyances, and Options. A memorandum of agreement, leasing all the coal in or under a parcel of land, specifically described, the amount of which is to be determined by the actual result of the mining operations, and the liability to mine it by the quality of the coal and attendant expense, is an executory contract of sale and not a deed.[41] An agreement indorsed on a mining lease that within two years thereafter the lessee shall pay the lessor a gross sum in lieu of the rental reserved in the lease, and thereupon the lessor shall convey the mine to the lessee, is an absolute undertaking by the lessee to purchase the mine for the price named within the time stipulated, and not a mere option.[42]

c. Requisites and Validity. A agreement to convey a portion of a mining claim, executed in settlement of an adverse suit, and before the patent has issued, is valid and not against public policy;[43] but an agreement to convey an unpatented mining claim must be in writing.[44] Although a mining lease containing also an option to the lessee to purchase is not signed by the lessee, so that the part relating to the sale is *nudum pactum*, it nevertheless becomes, on payment of part of the purchase-price, converted into an enforceable contract of sale.[45] Where a bond conditioned to convey a mining claim upon payment or deposit of a certain sum within a given time is not signed by the obligee, contains no clause giving him possession during the option, and expresses no consideration for the option given, it is *nudum pactum* and subject to revocation until acceptance by the obligee or the performance of some act equivalent to an election to purchase under the terms prescribed, and taking possession under such a bond and making improvements without objection from the obligor will not render the bond irrevocable, nor can such entry be considered equivalent to an election to purchase or construed into a performance.[46]

33. State *v.* Second Judicial Dist. Ct., 28 Mont. 528, 73 Pac. 230.

34. State *v.* Second Judicial Dist. Ct., 30 Mont. 206, 76 Pac. 206.

35. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498.

36. Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.

37. See, generally, Deeds, 13 Cyc. 505.

38. See, generally, Vendor and Purchaser.

39. See, generally, Vendor and Purchaser.

40. See *infra*, IV, B, 1, b–h.

41. Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127 [*reversing* 8 N. Y. Suppl. 822]; Genet *v.* Delaware, etc., Canal Co., 2 N. Y. App. Div. 491, 37 N. Y. Suppl. 1087 [*reversing* 13 Misc. 409, 35 N. Y. Suppl. 147].

42. Suffern *v.* Butler, 21 N. J. Eq. 410.

43. Montana Min. Co. *v.* St. Louis Min., etc., Co., 20 Mont. 394, 51 Pac. 824 [*affirmed* in 171 U. S. 650, 19 S. Ct. 61, 43 L. ed. 320].

44. Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943; Snow *v.* Nelson, 113 Fed. 353.

45. Williams *v.* Eldora-Enterprise Gold Min. Co., (Colo. 1905) 83 Pac. 780.

46. Gordon *v.* Darnell, 5 Colo. 302, 307, where it is said: "It cannot be said that an entry of this character, unauthorized by the bond, and without the express assent of the plaintiffs, is such an entry as is equivalent in law to a sealing of the bond by Lawrence. Nor can it be considered equivalent to an election to purchase the mine, so far as the written contract is concerned, for that prescribes a different mode of electing, viz.,

d. Construction and Effect — (i) *In General.* An option on or contract for the sale of mineral property is construed so as to carry into effect the intentions of the parties, according to the general rules applicable to such contracts,[47] and the parties must be presumed to have contracted with respect to facts known to both, and the contract will be construed accordingly.[48] Where the crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by any law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines

the payment or deposit of the purchase-money; and it is equally difficult to comprehend how taking possession and making improvements can be construed as performance in this case, at least under the written obligation in evidence, since none of its provisions contemplate such acts."

47. See Vendor and Purchaser.

Illustrative cases.— Where one of the conditions of an option to purchase a mineral claim, and develop the same during the term of the option, was that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors . . . and to be applied in part payment to the vendors," the purchaser's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purpose of conversion and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms of the agreement above mentioned, and pending the payment of the purchase-price provided for in the option, the purchaser acquired no right of property in the ore *in situ*, and none after extraction from the mine, but the operation of developing the property was to be done by him for the owners of the property, and in shipping or dealing with the ore, he was to deal with it as a trustee for the owners, and the proceeds would be in his hands as such trustee. Grobe *v.* Doyle, 12 Brit. Col. 191. Where a contract for the sale of a whole tract of oil lands made time of the essence and provided that if known encumbrances preventing wells within three hundred feet of adjoining lands should be removed within six months, the full price should be paid, otherwise a deduction of the amount of acreage within that distance should be made at an agreed price per acre from the purchase-money, which was made for default of such removal when the deed was finally delivered without objection by the vendors, the amount of the deduction was to be regarded as liquidated damages for such default, and the vendors were thereafter under no obligation to remove the encumbrance. Bracken *v.* Sobra Vista Oil Co., 143 Cal. 678, 77 Pac. 649, holding further that where the vendors, about nine months after the deduction agreed upon and the delivery of the deed, made a voluntary payment for a release of the encumbrance, they could neither demand payment of the amount of the deduction nor compel a reconveyance of the acreage deducted nor maintain an action to quiet title to such acreage. Where, by a written contract, defendant agreed in consideration of the payment by plaintiff of his necessary expenses in developing mines in Alaska for the year, and certain payments and provisions for his wife during the year, to assign and transfer to plaintiff "an undivided one-half interest in all properties he possessed in the territory of Alaska," and it appeared from extrinsic evidence that defendant then owned nine mining claims previously located by him in Alaska, and that it was understood that the contract did not relate to any claims he might thereafter locate, and also that there was an understanding aside from the contract that defendant should do one half the assessment work on the claims while two other persons interested with plaintiff should do the other half, and the three went to Alaska together but each took his separate provisions, and after doing a small amount of work it was abandoned by all, and defendant located a number of other claims during the season, it was held that the contract was one of bargain and sale and not of partnership, or grub stake, and that it gave to plaintiff no interest in claims subsequently located by defendant. Roberts *v.* Date, 123 Fed. 238, 59 C. C. A. 242. Where in a contract for the sale of oil wells and fixtures, the purchaser promises to give vendor security on the oil produced to secure the payment of the purchase-price, equity will regard such promise as creating an equitable lien, enforceable against the party promising and those claiming under him, who are innocent purchasers. Willetts *v.* Reid, 5 N. Y. St. 175. Where a contract for the sale of a piece of land and "also a tract of coal property" provided that for the land the party of the second part "agrees to pay twenty-five hundred dollars; two thousand dollars to be paid on delivery of the deeds and possession of the property. . . . The coal is to be paid for at the rate of a half a cent per bushel . . . payment for the coal to be made at the end of each year. Party of second part agrees to use at least one thousand dollars' worth of coal at half cent per bushel each year," it was on its face a divisible contract. Graver *v.* Scott, 80 Pa. St. 88, holding that parol evidence was admissible to show that the land was necessary for the vendee's enjoyment of the coal, and that it was the understanding at its execution that the contract was entire.

48. Griffin *v.* American Gold Min. Co., 123 Fed. 283, 59 C. C. A. 301, 114 Fed. 887, 52 C. C. A. 507, in which case plaintiff contracted to sell to defendant a mining claim identified in the contract by name

and minerals as pass without express words.[49] Where a deed conveying phosphate mining rights provides that the purchaser shall have the privilege of purchasing other minerals which he may find "in working the said mines" this option can be exercised only in respect to such other minerals as are found when actually working the phosphate.[50] Where from shafts already sunk it is known that there is in a tract of land a deposit of iron ore difficult to work and of inferior quality, an agreement to give one a deed of an interest "as soon as he may have successfully developed a deposit of iron ore . . . of sufficient value to warrant other development" does not entitle him to a deed upon the development in another spot of a deposit of the same vein, lay, quantity, and quality.[51] A contract by which plaintiffs agree to deed defendant certain mining claims, naming them, and stating that they are located, is a representation that they are mining claims and not mere prospects.[52] Where the owner of mining claims enters into a valid written agreement with another to convey to him the half interest in the claims upon the performance of certain conditions, and the latter performs such conditions, expending large sums upon the property, of which the owner receives the benefit, the owner will not thereafter be permitted to deny the existence of the claim or the validity of his own title thereto.[53]

(II) *PERSONS BOUND.* A part-owner of mining claims whose interest is not of record but who assented to the bonding of the same by the record owner has no standing in equity to repudiate a conveyance of his interest by his coöwner in accordance with the terms of the bond, on the ground of a private agreement between them that such conveyance could not be made unless the purchaser also took certain other claims bonded separately.[54]

(III) *OBLIGATIONS OF VENDEE.* The vendee is bound to fulfil the obligations imposed upon him by the contract.[55] A contract giving an option to purchase a

and by reference to the government survey thereof and to a deed which plaintiff made at the same time and deposited in escrow; plaintiff had made application for a patent which was pending and which he agreed to prosecute to a determination, and the purchase-money was to be paid on delivery to defendant of the deed and the receiver's final receipt; plaintiff obtained the receipt and tendered and demanded performance within the time limited by the contract and in accordance with its terms, which was refused by defendant; at the time the contract was made defendant owned another claim for which it had applied for a patent and which was prior in location, but plaintiff's claim overlapped the same, such fact being known to both parties, and both claims having been previously surveyed and marked upon the ground; subsequently defendant having received its patent, filed a protest against the granting of a patent to plaintiff for that portion of its claim included in defendant's patent, which was sustained, it was held that the parties must be presumed to have contracted with reference to the facts which both knew, that plaintiff had therefore complied with the contract on his part when he obtained and tendered the final receipt, and his right to recover the purchase-money could not therefore be defeated by the action of defendant, and that even if the contract required that the receiver's receipt should be equivalent to a patent for the whole claim, defendant could not take advantage of plaintiff's failure to obtain such patent, which was prevented by its own act.

49. Canadian Coal, etc., Co. *v.* Reg., 3 Can. Exch. 157 [*affirmed* in 24 Can. Sup. Ct. 713].

50. Baker *v.* McLelland, 24 Can. Sup. Ct. 416.

51. Whitehead *v.* Begley, 99 Mo. 456, 12 S. W. 804.

52. La Grande Inv. Co. *v.* Shaw, 44 Oreg. 416, 72 Pac. 795, 74 Pac. 919.

53. Largey *v.* Bartlett, 18 Mont. 265, 44 Pac. 962.

54. Cline *v.* James, 101 Fed. 737, holding further that it was not material that the purchaser had knowledge of complainant's interest, the latter being bound by the terms of the bond to which he assented.

55. Beem *v.* McKusick, 10 Cal. 538 (holding that where one conveyed to another an undivided interest in certain mining claims on condition that the vendee should pay him all the dividends that should at any and all times be declared on one twelfth thereof, and also all the proceeds of his wages due him for labor in such claims, after reserving ten dollars per week for his own support, until the amount paid should equal the sum of one thousand five hundred dollars, with interest, when the bill of sale was to be given to the vendee by the person having it in his possession, thereby vesting in him full possession and control of the property, the vendee was bound to contribute his labor on the claims until his wages less ten dollars per week reserved) and the proceeds of the claim equaled one thousand five hundred dollars, the price to be paid); Flynn *v.* White Breast Coal, etc., Co., 72 Iowa

mine wherein the vendees covenant to sink a shaft of at least one hundred feet imposes on them the absolute duty of sinking the shaft to the agreed depth, although they find no evidence that the mine contains enough valuable ore to justify them in purchasing it.[56] Where a purchaser by executory contract of all the iron ore in certain lands thereafter to be conveyed agrees at the time of his purchase to test the ore before the end of the year, and if he decides that he cannot or will not mine or use the same to reconvey it to the vendors upon demand and repayment of the purchase-price with interest, he will not be compelled to reconvey upon such demand or repayment after the deed has been made and purchase-money paid, upon the allegation that he failed to make the stipulated test where he asserts that he can and will use and mine the ore when it is needed.[57] Where a person purchased certain land, giving obligations payable only in case he found good merchantable coal not less than four feet in thickness in the shaft then being sunk on such land, it was held that in sinking such shaft in search of such coal he was not bound to go to the lowest depth that such a vein of the thickness mentioned could be profitably worked unless certain to find such vein, but was only bound to exercise good faith and reasonable diligence and to use reasonable exertions to find such vein in view of all the circumstances and surroundings.[58]

(IV) *TIME AS ESSENCE OF CONTRACT.* The rule that, where the character of the property is such that it is liable to sudden fluctuations of value, time is of the essence of contracts relating thereto is especially applicable to mining property,[59] and such property requires, and of all properties perhaps the most requires, the persons interested in it to be vigilant and active in asserting their rights.[60] Hence

738, 32 N. W. 471 (holding that where plaintiff leased coal land to defendant for mining purposes with the option to purchase it at any time during the lease at a named price, and after the lease had run for some time defendant elected to purchase the land and so notified plaintiff who thereupon prepared and tendered a deed to be delivered upon the payment of the purchase-money, and although plaintiff's title was good exception was taken to the form of the deed, and the purchase-money was not tendered and no conveyance was consummated until some months later, defendants were bound to pay the stipulated rent until such time as the conveyance was consummated); Berry *v.* Frisbie, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724 (holding that where plaintiffs procured an option on the oil and mineral rights on defendant's land, which provided that plaintiffs should have four months to determine whether they would accept the grant, and two years from the date of acceptance in which to prospect for and locate minerals, oils, gases, etc., and further provided that should minerals, etc., be found on the land in such quantities as to make it profitable to explore the same defendant would make a deed to the privileges covered by the option, and plaintiffs would pay a royalty on the product as compensation for the privileges granted, the contract, on being accepted within four months of its date, bound plaintiffs to explore the land by cutting or sinking a well or wells upon it within two years from such acceptance and to operate the same so as to yield defendant his royalty, and plaintiffs were not in any event entitled to the deed provided for by the option until gas, oil, or minerals were found in paying quantities); Wasatch Min. Co. *v.* Crescent Min. Co., 7 Utah 8, 24 Pac. 586 (holding that where plaintiff while in litigation in regard to a mining claim sold the same to defendant, who gave a mortgage for the price agreeing to pay at the end of a year, but if the litigation was not then terminated to pay the money into court on a recognized order, to be paid to plaintiff if it were finally successful and to be returned to defendant if not, and the litigation was still pending at the end of the year, defendant was bound to pay the money into court and could not excuse a failure to do so on the ground that plaintiff failed to procure the order therefor, and that defendant was liable for interest from the time when the money should have been paid).

56. Davis *v.* Eames, (Cal. 1894) 35 Pac. 566, 567 [*distinguishing* Woodworth *v.* McLean, 97 Mo. 325, 11 S. W. 43], where it is said: "The obligation of appellants to sink the shaft to the agreed depth was absolute, and was the consideration for the option given them. There were no modifying terms in the contract."

57. Barnard *v.* Roane Iron Co., 85 Tenn. 139, 2 S. W. 21.

58. Skidmore *v.* Eikenberry, 53 Iowa 621, 6 N. W. 10.

59. Settle *v.* Winters, 2 Ida. (Hasb.) 215, 10 Pac. 216; Christie's Appeal, 85 Pa. St. 463, holding that where oil lands are leased with a condition for a sale at the end of the term, provided that the payments are made at the time specified, a failure to so make them results in a forfeiture of the vendee's rights and a reinvestment of the same in the vendor. See also Morton *v.* Nichols, 12 Brit. Col. 9.

60. *California.*— Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Brown *v.* Covillaud, 6 Cal. 566.

it is uniformly held that time is of the essence of the contract in the case of an option on mining property,[61] or a contract for the sale thereof,[62] even though there is no express stipulation to that effect.[63]

e. Performance of Contract. A contract to convey a half interest in a certain mining claim, in consideration of the grantee's sinking three holes to bedrock on certain lines, does not require that the entire bottom of each hole should disclose bedrock, but is complied with if any part of each hole extends to bedrock.[64] Where a vendor of a mining claim, who has entered, paid for the claim, and obtained a certificate of purchase from the government, tenders a deed in pursuance of his contract of sale, the vendee cannot refuse the deed and rescind the contract merely because the vendor has not received his patent for the claim.[65] Where the contract requires construction, it will not be so construed as to authorize a reservation in the deed which would utterly destroy the contract.[66]

f. Effect of Conveyance Pursuant to Contract. Where an agreement for the sale of coal under the surface provides that the vendees shall have a right of way for certain purposes, but the deed executed in pursuance thereof contains no covenants taking the place of or supplying such provisions in the agreement, the agreement as to the right of way is not merged in the deed.[67]

g. Rescission of Contract. An agreement for an option to purchase a mining claim cannot be rescinded, after the selling price has greatly depreciated, by demonstrating its unproductiveness, as the purchaser cannot then restore to the seller everything of value which he has received.[68] Where an agreement for an option to purchase mining claims stipulated that, if adverse claims were established to any portion of the land embraced in the agreement, the price should be

Idaho.— Idaho Gold Min. Co. *v.* Union Min., etc., Co., 5 Ida. 107, 47 Pac. 95.

Kentucky.— Magoffin *v.* Holt, 1 Duv. 95.

United States.— Johnston *v.* Standard Min. Co., 148 U. S. 360, 13 S. Ct. 585, 37 L. ed. 480; Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 34 L. ed. 479.

England.— Doloret *v.* Rothschild, 2 L. J. Ch. O. S. 125, 1 Sim. & St. 590, 24 Rev. Rep. 243, 57 Eng. Reprint 233; Prendergast *v.* Turton, 1 Y. & Coll. 98, 20 Eng. Ch. 98, 62 Eng. Reprint 807.

See 34 Cent. Dig. tit. "Mines and Minerals," § 148.

61. Merk *v.* Bowery Min. Co., 31 Mont. 298, 78 Pac. 519; Clark *v.* American Developing, etc., Co., 28 Mont. 468, 72 Pac. 978; Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Morton *v.* Nichols, 12 Brit. Col. 9. See also Emery *v.* Regester, 17 Pa. Super. Ct. 482, holding that where the owner of coal gave an option on the same and agreed to furnish an abstract, and the vendee gave notice of his intention to take the land and requested an abstract, but nothing further was done for two and one-half years, when a second request for an abstract was made and refused, and the owner sold to another person, and the evidence tends to show that the owner acted in good faith on the belief that the first purchaser had abandoned his contract, the owner was liable for nominal damages only in an action for breach of his contract.

62. Williams *v.* Long, 139 Cal. 186, 72 Pac. 911; Durant *v.* Comegys, 3 Ida. 204, 28 Pac. 425; Settle *v.* Winters, 2 Ida. (Hasb.) 215, 10 Pac. 216; Snow *v.* Nelson, 113 Fed. 353.

As a court of equity will never enforce a penalty or forfeiture, a failure of the vendee, under a contract for the sale of mining land, to pay the purchase-price in the time stipulated or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights. McCormick *v.* Rossi, 70 Cal. 474, 15 Pac. 35.

63. Morton *v.* Nichols, 12 Brit. Col. 9.

Where time is expressly made of the essence of the contract, the prospective vendee must, as a matter of course, perform his obligations within the time therein specified. Idaho Gold-Min. Co. *v.* Union Min., etc., Co., 5 Ida. 107, 47 Pac. 95.

64. Meehan *v.* Nelson, 137 Fed. 731, 70 C. C. A. 165.

65. Bash *v.* Cascade Min. Co., 29 Wash. 50, 69 Pac. 402, 70 Pac. 487.

66. Findley *v.* Armstrong, 23 W. Va. 113, where a contract to sell two hundred and thirty acres of coal contained the following provisions: "The coal and coal-privileges in the land west of Buck run, heretofore sold and deeded, are reserved. All the coal on that land has been sold and conveyed. The coal and all the coal in the land east of Buck run, and all the necessary and desired coal-privileges are hereby reserved," and it was held that when the vendor executed a deed in carrying out this contract he could not insert in it a reservation of "a right to remove on and through this tract of land sold the coals of coterminous tracts of land" owned by the vendor.

67. McGowan *v.* Bailey, 146 Pa. St. 572, 23 Atl. 387.

68. Smith *v.* Detroit, etc., Gold Min. Co., 17 S. D. 413, 97 N. W. 17.

reduced *pro rata*, and the purchaser at the time of securing the option knew that title to portions of the land was in dispute, and although the seller claimed to own all the land included in the agreement some of it was subsequently adjudged to be the property of another person, and the agreement also made mistakes in the boundaries of certain lodes, the purchaser was not entitled to rescission.[69] Where an agreement was made for the sale of certain mining areas and property necessary to the working thereof, the vendee was not entitled to rescind the agreement and recover the instalments paid upon its appearing that the vendor did not own in fee land necessary for the working of the areas included in the agreement and on which buildings and machinery included in the schedule stood, where the vendor had come to an agreement under the statute with the surface owner whereby he was in a position to make sufficient conveyance to give the vendee the right to use such property, for the agreement was made in contemplation of the business of mining, in which ownership of the fee is not customary.[70] Where a person without inspection bought certain silver mines upon the representation of the owners that the mines would yield a certain amount, the contract to be void if the purchaser should not approve the report of a selected assayer, and after the report the purchaser paid a large part of the purchase-money, but on working the mines the product was only one third of the representation, it was held that the purchaser was liable for the remainder of the purchase-money.[71] Where the owner of mining property placed a deed thereof in escrow, to be delivered on payment of certain sums before a specified time, and all payments were to be forfeited on the vendee's failure to complete the purchase, and it was also agreed that thirty-five per cent royalty on smelter returns of all ores removed by the vendee should be paid to the owners and applied on the price, it was held that while the failure of the vendee to make the payments required terminated his right of purchase, it was not a rescission of the contract and hence the owners were thereafter entitled to recover the specified royalties.[72]

h. Rights of Parties on Failure to Complete Sale. Where the contract for the sale of a mining claim provides for payment by instalments and also provides that the purchasers "can quit at any time without being liable for any other payments thereunder from such time on," the purchasers are not liable for an instalment falling due after they had notified the vendors that they have abandoned the contract;[73] but if, when an instalment falls due, the vendors extend the time of payment as a mere voluntary indulgence and without consideration, the purchasers cannot escape the payment of such instalment by giving notice of their intention to abandon the contract after the instalment became due but before the expiration of the extended time allowed for payment.[74] Where an agreement for an option to purchase mining claims stipulates that if the purchaser fails to perform his agreements, the improvements erected by him shall become the property of the seller as rent for the occupation of the premises by the purchaser and as damages sustained by reason of a breach of the contract, the word "improvements" includes removable betterments placed on the land by the purchaser and which he might, in the absence of an agreement to the contrary, take away.[75] Where the owner conveyed all the mineral, coal, iron ore, petroleum oil, and salines in, upon, and under a certain tract of land, with the right to mine and remove the same and construct necessary buildings on the land, the grantee

69. Smith *v.* Detroit, etc., Gold Min. Co., 17 S. D. 413, 417, 97 N. W. 17, where the court said: "It would do violence to the terms of this option agreement, were we to assume that facts justifying rescission ever existed; and, if such there were, the right was lost by appellant's inexcusable delay."

70. Van Meter *v.* Matheson, 21 Nova Scotia 56.

71. Weist *v.* Grant, 71 Pa. St. 95, holding that as the purchaser bargained for the report of an assayer before being bound by the contract, there was no collusion or fraud, and he was estopped from alleging misrepresentation in the inception of the contract.

72. Frank *v.* Bauer, 19 Colo. App. 445, 75 Pac. 930.

73. Webb *v.* Montgomery, 5 Brit. Col. 323.

74. Webb *v.* Montgomery, 5 Brit. Col. 323.

75. Smith *v.* Detroit, etc., Gold Min. Co., 17 S. D. 413, 97 N. W. 17.

agreeing to develop the mines and pay the grantor a stipulated sum annually, and the grant contained a clause permitting the grantee "to abandon the said lands and mining at any time and remove buildings and fixtures" the grantee's title to the minerals and all other rights conferred by the contract terminated upon his abandoning the lands and mines.[76] Where mining property was conveyed for a certain amount on the purchaser's agreement to pay certain royalties for a specified term, if possession were obtained by him, and that, on failure to pay the royalties, the vendor should be entitled to a reconveyance on payment of the cost price, and the purchaser not having acquired possession because of an outstanding lease, the contract was terminated for failure to pay royalties, the purchaser was entitled to interest on the amount paid by him.[77]

2. Conveyances of Mineral Property — a. In General. The rules of law relating to conveyances of mining property are to a very large extent practically the same as those relating to other conveyances,[78] and hence the present discussion is limited to matters peculiar to this class of property.

b. Requisites and Validity.[79] One discovering mineral may transfer his right of location by parol,[80] and under some of the earlier statutes the title to a mining claim would pass by a verbal sale, if accompanied by an actual transfer of possession;[81] but this rule has been changed,[82] and since mining locations have been held to be real estate the rule is that they can be transferred only by deed.[83] In Canada the transfer of any interest in a mining claim must be in writing,[84] and be recorded according to the statute;[85] but the failure to record a conveyance of an interest in a mining claim as required by statute does not result in the claim becoming waste lands open to location.[86] No precise form of words seems to be necessary,[87] nor need a conveyance of mining ground specifically describe the claim by its boundaries, as such property is usually transferred by name and the deed refers to the record of the claim.[88] The mere passive acquiescence of

76. Paine *v.* Griffiths, 86 Fed. 452, 30 C. C. A. 182.

77. Sharp *v.* Behr, 136 Fed. 795.

78. See Vendor and Purchaser.

79. Formerly a bill of sale of a mining claim need not be under seal. St. John *v.* Kidd, 26 Cal. 263; Draper *v.* Douglass, 23 Cal. 347.

80. Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190.

81. King *v.* Randlett, 33 Cal. 318; Goller *v.* Fett, 30 Cal. 481; Copper Hill Min. Co. *v.* Spencer, 25 Cal. 18; Patterson *v.* Keystone Min. Co., 23 Cal. 575; Antoine Co. *v.* Ridge Co., 23 Cal. 219; Gatewood *v.* McLaughlin, 23 Cal. 178; Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 198; English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574; Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567; Jackson *v.* Feather River, etc., Water Co., 14 Cal. 18; Lockhart *v.* Rollins, 2 Ida. (Hash.) 540, 21 Pac. 413; Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

82. Melton *v.* Lambard, 51 Cal. 258; Felger *v.* Coward, 35 Cal. 650; Hardenbergh *v.* Bacon, 33 Cal. 356.

83. Moore *v.* Hamerstag, 109 Cal. 122, 41 Pac. 805; Garthe *v.* Hart, 73 Cal. 541, 15 Pac. 93; Melton *v.* Lambard, 51 Cal. 258; Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280; Robertson *v.* Smith, 1 Mont. 410.

84. Alexander *v.* Heath, 8 Brit. Col. 95. The interest of a free miner in his mineral claim is an interest in land and an agreement not in writing respecting it cannot be enforced. Fero *v.* Hall, 6 Brit. Col. 421.

85. See Fielding *v.* Church, 28 Nova Scotia 136, an action against the commissioner of mines for refusing to register a transfer.

The time for recording mineral claims under the British Columbia statute is dependent upon the distance of the claim from the recorder's office, and the same rule applies to the recording of a transfer, and in the latter case it is the distance of the claim, and not of the transferee, from the recorder's office which fixes the time. Dumas Gold Mines *v.* Boultbee, 10 Brit. Col. 511.

86. Grutchfield *v.* Harbottle, 7 Brit. Col. 344 [*reversing* 7 Brit. Col. 186], holding that where in May, 1897, B located and recorded the May dam claim, and six days after location conveyed a half interest to defendant by a bill of sale, which was not recorded till April, 1898, and B's free miner's certificate lapsed in July, 1897, and in October, 1897, plaintiff, a free miner, relocated the May dam as the Equalizer claim, defendant's title should prevail against plaintiff's.

87. Meyers *v.* Farquharson, 46 Cal. 190, holding that if it be clear from the language of the instrument that the vendor intended to pass the title to the property, the law will, if possible, so construe the words used as to effectuate that intent.

88. Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361; Glacier Mountain Silver Min. Co.

partners or tenants in common of a mining claim in a sale of the interest of another partner or tenant in common by a person having no title cannot confer any title upon the vendee.[89] If one of two joint transferees of an undivided interest in a mineral claim rejects the transfer, no title passes to the other.[90]

c. Construction and Effect — (I) *In General.* The purchaser of a mining claim on public mineral land acquires what title the vendor had at the moment of sale,[91] and if the deed purports to convey a fee simple absolute a subsequent acquisition of another title by the grantor inures to the grantee's benefit.[92] Where a person conveys a mining claim he is estopped to assert that the claim was not legally located and may not set up against his grantee title under a mining location by himself on the ground that the original location was invalid;[93] but it has been held that if the grantees fail to perform the necessary annual labor the grantor may locate and set up such paramount title.[94] The words "mining ground," when used in a deed, have a technical meaning; and refer to that interest which a mere occupant of the mine has in the same; they are not the words used when a fee simple or leasehold interest in real estate is to be conveyed.[95] In an action by the grantors to recover the consideration for the transfer of abandoned mining claims, plaintiffs need not show that the claims were legally located and worked in compliance with the mining laws, since as between the contracting parties and those holding under them with knowledge of the grantor's title such title cannot be disputed.[96] Where a person sold certain mineral claims which were subsequently transferred to defendants, and afterward the original vendor as agent for plaintiff, located a fraction between two of the claims in plaintiff's name, defendants had no right to such fraction in the absence of proof of fraud by the original vendor and that plaintiff was a party thereto.[97] Where after notice of location of two mining claims was filed the owners of one claim moved the stakes at one end so as to conflict with the other claim, and then conveyed by separate deeds their interest in their claim as described in the notice of location, they were estopped to maintain under a subsequent purchase of the other claim that their deeds conveyed no part of the latter.[98] Where the owner of a tract of land in fee subject to certain undivided ore rights, of which he owned one seventh and the other six sevenths were owned by other persons, conveyed a portion of the land by metes and bounds and one seventh of the ore rights in the land conveyed, the conveyance of the ore rights was inoperative as against the other tenants in common of the easement.[99]

(II) *Property Conveyed.* At common law a general conveyance of land without an exception or reservation of the minerals therein, or language showing that the title to the minerals is not intended to pass, will carry all minerals in the

v. Willis, 127 U. S. 471, 8 S. Ct. 1214, 32 L. ed. 172; Harris *v.* Equator Min., etc., Co., 8 Fed. 863, 3 McCrary 14.

89. Waring *v.* Crow, 11 Cal. 366.

90. Cook *v.* Denholm, 8 Brit. Col. 39.

91. Waring *v.* Crow, 11 Cal. 366, and such title only.

A purchaser under a quitclaim deed takes only such title as the grantor has subject to any prior deed by the grantor to the same property. Wetzstein *v.* Largey, 27 Mont. 212, 70 Pac. 717.

92. Hitchens *v.* Nougues, 11 Cal. 28, conveyance of one-third interest.

93. Blake *v.* Thorne, 2 Ariz. 347, 16 Pac. 270.

94. Blake *v.* Thorne, 2 Ariz. 347, 16 Pac. 270. *Contra*, Drake *v.* Gilpin Min. Co., 16 Colo. 231, 27 Pac. 708, holding that the neglect of the grantee to comply with the mining laws of the government, by reason of which its possessory rights are liable to forfeiture, gives the grantor no right to enter and acquire an adverse title to the claim.

95. Hale, etc., Gold, etc., Min. Co. *v.* Storey County, 1 Nev. 104. See also *supra*, II, G.

96. Philes *v.* Hickies, 2 Ariz. 407, 18 Pac. 595.

97. Gibson *v.* McArthur, 7 Brit. Col. 59.

98. Shreve *v.* Copper Bell Min. Co., 11 Mont. 309, 28 Pac. 315.

99. Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112, holding, however, that where the other tenants in common afterward released to the grantor their interest in one seventh of the ore rights in the particular land conveyed, the infirmity of the grantor's conveyance was cured, all parties interested being estopped from denying its validity.

land without any specification thereof.[1] Mining ditches and flumes, however, do not pass as appurtenant upon a sale of the mining claim, but must be conveyed with as much formality as any other real estate.[2] A deed conveying a certain mine and mill site and containing also the following clause: "Also, all the machinery, engines, boilers . . . hereby conveying . . . all the property, real, personal, and mixed, belonging to . . . [the grantor] and located in said county," is sufficient to convey another mining claim owned by the grantor in the said county at the date of the execution of the deed.[3] Where a mine together with one thousand acres of land "around, circumjacent, and adjoining said mines" is conveyed by the owner of a larger tract, the land will be located as nearly as possible in a square form around the mine, taking the mine as the center of the location.[4] Where a person conveys all his right, title, and interest in and to certain mining ground and quartz lode described in the deed, and his interest is derived from two different notices of location which were posted upon and claimed the same lode, the conveyance of his interest in the lode necessarily conveys his interest in both locations, and it is immaterial by what particular name he designates it.[5] As in conveyances generally, a reference in the deed to another deed or record, for more particular description, incorporates that part of such deed or record,[6] and it is the duty of the grantee to examine the same.[7] When the true location of the land is in dispute, parol evidence is admissible to show the same;[8] but where the language of a deed admits of but one construction and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the ground in the deed, by courses, distances, or monuments, it cannot be controlled by any different exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known.[9] Those descriptions in the deed which do not apply to a perfect description may be regarded as false or as surplusage.[10]

1. Stinchfield *v.* Gillis, 107 Cal. 84, 40 Pac. 98 (holding that if the owner of a mining location should convey a part thereof by metes and bounds, without any reservation, such conveyance would include all ore within the ground conveyed, which was in any vein apexing within its surface lines); Montana Min. Co. *v.* St. Louis Min., etc., Co., 204 U. S. 204, 27 S. Ct. 254, 51 L. ed. 444 (holding the common-law rule to be in force in Montana). See also Richmond Min. Co. *v.* Eureka Consol. Min. Co., 103 U. S. 839, 26 L. ed. 557, 560 note (agreement as to boundary); Rutland Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955.

Precious minerals.— The prerogative right of the crown to gold and silver found in mines will not pass under a grant of land from the crown unless the intention that it shall so pass is expressed by apt and precise words (Woolley *v.* Atty.-Gen., 2 App. Cas. 163, 46 L. J. P. C. 18, 36 L. T. Rep. N. S. 121, 25 Wkly. Rep. 852), but where the title to precious metals has passed out of the crown and vested in a subject, a conveyance by the latter in the ordinary form will pass the precious metals, although not specially mentioned (*Re* St. Eugene Min. Co., 7 Brit. Col. 288). See also *supra*, III, A.

2. Noland *v.* Coon, 1 Alaska 36.

3. Idaho Gold-Min. Co. *v.* Union Min., etc., Co., 5 Ida. 107, 47 Pac. 95.

4. Santa Clara Min. Assoc. *v.* Quicksilver Min. Co., 17 Fed. 657, 8 Sawy. 330, holding that the grantor cannot, by subsequent conveyances of the larger tract in two parts to other persons, affect this right of location by the prior grantee.

5. Weill *v.* Lucerne Min. Co., 11 Nev. 200 [*following* Phillpotts *v.* Blasdel, 8 Nev. 61]. See also Mollie Gibson Consol. Min., etc., Co. *v.* Thatcher, 57 Fed. 865, 6 C. C. A. 621, holding that where after one and two-thirds acres of the territory within the exterior lines of a location of the K lode mining claim had been awarded to the S claim by a judgment of the state court, the owners of the S claim purchased the K claim, and in the contract of purchase, the deed, and an agreement to pay royalty for ores extracted, the parties described the K claim by its survey number and referred to the exterior lines of the location, and to such lines extended vertically downward as being the subject-matter of the contract, the deed and contract included the one and two-thirds acres as part of the K lode mining claim.

6. Crescent Min. Co. *v.* Wasatch Min. Co., 5 Utah 624, 19 Pac. 198.

7. Sumpter Gold Min. Co. *v.* Browder, 31 Colo. 269, 75 Pac. 38.

8. Reamer *v.* Nesmith, 34 Cal. 624; Dexter Lime-Rock Co. *v.* Dexter, 6 R. I. 353.

9. Weill *v.* Lucerne Min. Co., 11 Nev. 200.

10. Reamer *v.* Nesmith, 34 Cal. 624; Hayden *v.* Brown, 33 Oreg. 221, 53 Pac. 490.

(iii) *Extralateral Rights.*[11] All veins apexing within the surface boundaries of the land conveyed pass by a general conveyance of the land together with all extralateral rights belonging thereto;[12] but where a portion of a patented mining claim is conveyed by metes and bounds, and the end lines of the conveyed portion are not parallel with the end lines of the claim as patented, only such extralateral rights are conveyed as appertain to the portion of the apex embraced within the boundaries of the conveyed portion bounded by planes parallel with the end lines of the claim as patented.[13] Where a boundary line is agreed upon which crosses the vein on its strike, and conveyances with reference thereto are made of the properties affected, such boundary line also divides the extralateral rights on any vein involved.[14]

d. Conditions. Where a deed of land is made on condition that the grantees shall "at their own time and convenience" make a test for minerals, and provides that if minerals are found in the land the grantor shall have a share of the profits, the condition must be performed within a reasonable time, and if performance is discontinued it must be resumed in a reasonable time in order to prevent a forfeiture of the estate.[15]

e. Protection of Bona Fide Purchasers. A *bona fide* purchaser of mining property is entitled to the same protection as would be given such a purchaser of any other real property.[16] A purchaser under a quitclaim deed is not a *bona fide* purchaser without notice,[17] nor is a grantee who knew at the time of the execution of the deed that another was in possession of the property, claiming under an adverse unrecorded deed.[18]

f. Annulment of Sale — (i) *At Instance of Vendee.* The grantee may avoid a sale on the ground of fraud or misrepresentation on the part of the grantor;[19] but the sale cannot be avoided on account of statements which consist merely of an honest expression of opinion or judgment, or, except in peculiar

11. See *supra*, III, B, 6, b.

12. Stinchfield *v.* Gillis, 107 Cal. 84, 40 Pac. 98, 96 Cal. 33, 30 Pac. 839; Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 536, 70 Pac. 1114, 71 Pac. 1005.

13. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 536, 70 Pac. 1114, 71 Pac. 1005. But *compare* Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 89 Fed. 529.

14. Kennedy Min., etc., Co. *v.* Argonaut Min. Co., 189 U. S. 1, 23 S. Ct. 501, 47 L. ed. 685; Richmond Min. Co. *v.* Eureka Consol. Min. Co., 103 U. S. 839, 26 L. ed. 557, 560 note.

15. Adams *v.* Ore Knob Copper Co., 7 Fed. 634, 4 Hughes 589.

16. Mullins *v.* Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430, holding that where the record title to a mine held by the occupant of the surface was of undivided interests, without reference to any claim for separate and distinct surface rights, and one of such owners conveyed an undivided interest to M by deed, recorded in 1880, and M conveyed to H by deed recorded in 1882, and H conveyed to D by deed recorded in 1889, and in 1885 the same owner conveyed another undivided interest to N by a deed, purporting also to convey a distinct surface right thereon, the recorded deeds to M and H were sufficient to protect D and his grantees from a claim that they had notice of the claim to a distinct portion of the surface; and that even if M and H were chargeable with notice of N's claim, the title of D and his grantees was superior.

17. Wetzstein *v.* Largey, 27 Mont. 212, 70 Pac. 717; Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1.

18. Wetzstein *v.* Largey, 27 Mont. 212, 70 Pac. 717.

19. Perkins *v.* Rice, Litt. Sel. Cas. (Ky.) 218, 12 Am. Dec. 298; Leckie *v.* Stuart, 34 Nova Scotia 140. See also Syndicat Lyonnais *v.* Barrett, 36 Can. Sup. Ct. 279 [*following* Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]. See also, generally, for false representations as fraud in particular transactions, Fraud, 20 Cyc. p. 44 *et seq.*

The misrepresentation must concern a material matter and operate as a material inducement to the parties, and where the purchaser testified that the secretary of the vendor represented that the output would average between two hundred and two hundred and fifty tons of coal per day, but the secretary and counsel for the grantor were present during negotiations, and denied that such statement was made, and it further appeared that the purchaser had sent two competent persons to examine the property, and it did not appear but that the output would depend upon the force employed, the facts were not sufficient to show misrepresentation. Chamberlain *v.* Fox Coal, etc., Co., 92 Tenn. 13, 20 S. W. 345.

cases, because of statements by the vendor in respect to the value of the property.[20] The vendor cannot, however, shelter himself behind the plea that his representations were only expressions of opinion as to the value of the mine, where he "salted" the samples which the vendee took from the mine.[21] Where, by error of both parties, and without fraud or deceit, there has been a complete failure of consideration, a court of equity will rescind the contract and compel the vendor to return the purchase-money.[22]

(II) *AT INSTANCE OF VENDOR.* A purchaser is not bound to disclose that the land contains a mine;[23] but the sale may be set aside on the ground of fraud if, on being interrogated concerning the matter, he denies all knowledge,[24] or if he wilfully misstates facts and intentionally misleads and thereby induces the owner to part with his property.[25] Inadequacy of consideration alone is of course not ground for annulling the sale.[26]

3. CONVEYANCES OF LAND RESERVING MINERALS OR OF MINERALS WITHOUT LAND — a. Surface and Mineral Rights Severable. Although the owner of the surface is *prima facie* the owner of the minerals beneath the surface,[27] and a general conveyance of the land will carry the minerals,[28] it is consistent with the nature and adaptation of mineral property that different persons should own the surface and the underlying minerals,[29] and so the owner of land containing minerals may segregate one from the other, by a conveyance or instrument in writing, so that there is a complete severance of title and separate estates are created.[30]

Form of remedy.— A defrauded purchaser of mining property may either bring an action, or he may interpose the fraud as a defense in an action by the vendor for the remainder of the purchase-price or upon unpaid purchase-price notes, where the same have not passed into the hands of an innocent person before maturity. Smalley *v.* Morris, 157 Pa. St. 349, 27 Atl. 734; Blygh *v.* Samson, 137 Pa. St. 368, 20 Atl. 996; Brown *v.* Beecher, 120 Pa. St. 590, 15 Atl. 608; Bower *v.* Fenn, 90 Pa. St. 359, 35 Am. Rep. 662; Heastings *v.* McGee, 66 Pa. St. 384; Pennock *v.* Tilford, 17 Pa. St. 456; Tyson *v.* Passmore, 2 Pa. St. 122, 44 Am. Dec. 181.

Evidence of fraud sufficient for submission of case to jury see McIntyre *v.* Buell, 132 N. Y. 192, 30 N. E. 396; Dale *v.* Roosevelt, 5 Johns. Ch. (N. Y.) 174; Smalley *v.* Morris, 157 Pa. St. 349, 27 Atl. 734.

20. *California.*— Davidson *v.* Jordan, 47 Cal. 351.

Georgia.— Leonard *v.* Peeples, 30 Ga. 61.

Illinois.— Tuck *v.* Downing, 76 Ill. 71.

Massachusetts.— Cooper *v.* Lovering, 106 Mass. 77.

Michigan.— Williams *v.* Spurr, 24 Mich. 335.

New York.— McIntyre *v.* Buell, 132 N. Y. 192, 30 N. E. 396.

Ohio.— Jones *v.* Draper, 26 Ohio Cir. Ct. 785.

Oregon.— La Grande Inv. Co. *v.* Shaw, 44 Oreg. 416, 72 Pac. 795; Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Pennsylvania.— Lynch's Appeal, 97 Pa. St. 349; Weist *v.* Grant, 71 Pa. St. 95; McAleer *v.* McMurray, 58 Pa. St. 126.

United States.— Southern Development Co. *v.* Silva, 125 U. S. 247, 31 L. ed. 678 [*distinguished* in Green *v.* Turner, 80 Fed. 41]; Stratton's Independence *v.* Dines, 126 Fed. 968.

See 34 Cent. Dig. tit. "Mines and Minerals," § 151.

21. Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 9 C. C. A. 415.

22. Cole *v.* Pope, 29 Can. Sup. Ct. 291, where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money, and the contract was rescinded, although the vendor acted in good faith and the transaction was free from fraud.

23. Smith *v.* Beatty, 37 N. C. 456, 40 Am. Dec. 435; Caples *v.* Steel, 7 Oreg. 491; Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992; Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

24. Smith *v.* Beatty, 37 N. C. 456, 40 Am. Dec. 435.

25. Caples *v.* Steel, 7 Oreg. 491.

When the testimony discloses gross fraud and a conspiracy to acquire a valuable mine for a nominal consideration, the transaction will be set aside. Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

Tender back of consideration.— It is not necessary for a party seeking the cancellation of a deed upon the ground of inadequacy of consideration, and fraud and deceit in its procurement, to show, as a condition precedent to commencing the action, that he has tendered back the consideration received, but an offer in his complaint to restore the same is sufficient. Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

26. Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

27. See *supra*, IV, A, 1.

28. See *supra*, IV, B, 2, c, (II).

29. Stewart *v.* Chadwick, 8 Iowa 463.

30. *Alabama.*— Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202.

Illinois.— Brand *v.* Consol. Coal Co., 219

b. How Severance Accomplished. The severance of the surface and mineral rights is accomplished either by a conveyance of the land with an express reservation of the minerals, or by a conveyance of the minerals or mining rights,[31] and where the words "grant, bargain, and sell" are used in connection with minerals in place and words of inheritance are added, it is presumed, unless a contrary intent clearly and affirmatively appears, that the parties intended them to have their ordinary legal effect, which is to vest in the grantee the entire ownership of

Ill. 543, 76 N. E. 849; Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Manning *v.* Frazier, 96 Ill. 279.

Indiana.— Knight *v.* Indiana Coal, etc., Co., 47 Ind. 105, 17 Am. Rep. 692.

Kansas.— Tousley *v.* Galena Min., etc., Co., 24 Kan. 328.

Massachusetts.— Adam *v.* Briggs Iron Co., 7 Cush. 361; Arnold *v.* Stevens, 24 Pick. 106, 25 Am. Dec. 305.

New Jersey.— New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322; Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

New York.— Ryckman *v.* Gillis, 57 N. Y. 68, 15 Am. Rep. 464; Canfield *v.* Ford, 28 Barb. 336.

Ohio.— Edwards *v.* McClurg, 39 Ohio St. 41.

Pennsylvania.— Hosack *v.* Crill, 204 Pa. St. 97, 53 Atl. 640; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. St. 583, 1 Atl. 394, 58 Am. Rep. 743; Sanderson *v.* Scranton, 105 Pa. St. 469; Scranton *v.* Phillips, 94 Pa. St. 15; Grove *v.* Hodges, 55 Pa. St. 504; Gloninger *v.* Franklin Coal Co., 55 Pa. St. 9, 93 Am. Dec. 720; Armstrong *v.* Caldwell, 53 Pa. St. 284; Caldwell *v.* Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Grubb *v.* Guilford, 4 Watts 223, 28 Am. Dec. 700.

South Carolina.— Massot *v.* Moses, 3 S. C. 168, 16 Am. Rep. 697.

Virginia.— Interstate Coal, etc., Co. *v.* Clintwood Coal, etc., Co., 105 Va. 574, 54 S. E. 593; Virginia Coal, etc., Co. *v.* Kelly, 93 Va. 332, 24 S. E. 1020; Clayton *v.* Henley, 32 Gratt. 65.

West Virginia.— List *v.* Cotts, 4 W. Va. 543.

United States.— Grubb *v.* Bayard, 11 Fed. Cas. No. 5,849, 2 Wall. Jr. 81.

England.— Humphries *v.* Brogden, 12 Q. B. 739, 15 Jur. 124, 20 L. J. Q. B. 10, 64 E. C. L. 739.

See 34 Cent. Dig. tit. "Mines and Minerals," § 153 *et seq.*

The crown may grant lands and except the base mines and minerals therein. McMahon *v.* Berton, 7 N. Brunsw. 321.

One may sell the surface and one half the minerals underneath the same, reserving the other half to himself. Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

A tenant in common cannot convey his interest in the land and reserve his interest in the minerals underlying the land. Adam *v.* Briggs Iron Co., 7 Cush. (Mass.) 361.

Natural gas is not subject to absolute ownership in its natural state and cannot be reserved. Louisville Gas Co. *v.* Kentucky Heating Co., 117 Ky. 71, 77 S. W. 368, 25 Ky. L. Rep. 1221, 111 Am. St. Rep. 225, 70 L. R. A. 558.

A conveyance of the right to prospect and bore for oil, and remove it, grants an incorporeal hereditament in fee. Funk *v.* Haldeman, 53 Pa. St. 229.

31. *Illinois.*— McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Smoot *v.* St. Louis Consol. Coal Co., 114 Ill. App. 512.

Iowa.— Stewart *v.* Chadwick, 8 Iowa 463.

Kentucky.— Kinkade *v.* McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. L. Rep. 987, 13 L. R. A. 289.

Ohio.— Sloan *v.* Lawrence Furnace Co., 29 Ohio St. 568.

Pennsylvania.— Huss *v.* Jacobs, 210 Pa. St. 145, 59 Atl. 991; Delaware, etc., Canal Co. *v.* Hughes, 183 Pa. St. 66, 38 Atl. 568, 63 Am. St. Rep. 743, 38 L. R. A. 826; Lehigh, etc., Coal Co. *v.* Wright, 177 Pa. St. 387, 35 Atl. 919; Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 28 Atl. 853; Timlin *v.* Brown, 158 Pa. St. 606, 28 Atl. 236; Lazarus' Estate, 145 Pa. St. 1, 23 Atl. 372; Kingsley *v.* Hillside Coal, etc., Co., 144 Pa. St. 613, 23 Atl. 250; Montooth *v.* Gamble, 123 Pa. St. 240, 16 Atl. 594; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. St. 583, 1 Atl. 394, 58 Am. Rep. 743; Sanderson *v.* Scranton, 105 Pa. St. 469; Eckman *v.* Eckman, 68 Pa. St. 460; Fairchild *v.* Fairchild, 6 Pa. Cas. 231, 9 Atl. 255; Hosack *v.* Crill, 18 Pa. Super. Ct. 90; Finnegan *v.* Stineman, 5 Pa. Super. Ct. 124; Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. 149, 4 Luz. Leg. Reg. 127.

West Virginia.— Wallace *v.* Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 153, 158.

The word "surface" when specifically used as a subject of conveyance has a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purposes. Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795.

A "mineral," in the commercial sense, is an inorganic substance found in nature, having sufficient value, separated from its *situs* as part of the earth, to be mined, quarried, or dug for its own sake, or its own specific purposes; and the term is so used commonly in conveyances and leases of land, and must be presumed to be so used in a deed reserving all coal and other minerals in, under, and upon the land. Hendler *v.* Lehigh Valley R.

the minerals mentioned in the land described.[32] It is not, however, necessary that the instrument severing the surface and the mineral rights should be in the form of a conveyance, for it has been held that a written contract, although not under seal, granting the privilege of digging for minerals or ores in the vendor's land is equivalent to a conveyance of the title to the minerals or ores in fee;[33] nor is the fact that the instrument is in the form of a lease material where the character of the transaction as a sale of the minerals is apparent.[34] But where it is apparent that the intention of the parties is that the grantee shall have merely the right to enter and remove the minerals rather than the absolute title to minerals in place, there is no severance of the estates in the surface and in the minerals but the grant is a mere license,[35] and the grantee acquires absolute title to only what is removed by him.[36] So also where a reservation in a deed is merely of the right to mine, the title to the minerals passes to the grantee subject only to such right.[37]

Co., 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. Rep. 1005.

Where a deed conveyed the right to enter on land for mining purposes only and to prospect and mine the same, if the grantee should discover any gold or quartz suitable for mining, such deed was not a grant of a mere license, revocable at the will of the grantor, but conveyed an incorporeal hereditament. Woodside *v.* Ciceroni, 93 Fed. 1, 35 C. C. A. 177, so holding on the ground that the deed contained apt words of conveyance of such a right and recited a sufficient consideration which had been paid, and the grant was to the grantee and his heirs and assigns forever.

A deed conveying all mining privileges in land is not a conveyance of land, within the meaning of the statute of 1795, requiring two witnesses to a deed of land. McBee *v.* Loftis, 1 Strobh. Eq. (S. C.) 90.

An instrument which is in the terms of a conveyance of all the coal in, under, and upon a tract of land, with a right to mine and remove the same, is a sale of the coal in place, whether the sale is for a lump sum, or for a certain price for each ton mined, although the coal under the conveyance is to be taken out within a fixed term. Hosack *v.* Crill, 204 Pa. St. 97, 53 Atl. 640.

Exception of coal good even if found only in habendum clause.— Jones *v.* American Assoc., 120 Ky. 413, 86 S. W. 1111, 27 Ky. L. Rep. 804.

32. Hosack *v.* Crill, 18 Pa. Super. Ct. 90.

33. Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 28 Atl. 853; Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444; Bentley *v.* Kenyon, 2 Luz. Leg. Obs. (Pa.) 316; Hendershot *v.* Lionais, 27 Quebec Super. Ct. 292, per Dunlop, J.

34. Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 28 Atl. 853; Lazarus' Estate, 145 Pa. St. 1, 23 Atl. 372; Kingsley *v.* Hillside Coal, etc., Co., 144 Pa. St. 613, 23 Atl. 250; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. St. 583, 1 Atl. 394, 58 Am. Rep. 743; Sanderson *v.* Scranton, 105 Pa. St. 469; Hope's Appeal, 1 Pa. Cas. 307, 3 Atl. 23; Dorr *v.* Reynolds, 26 Pa. Super. Ct. 139; Lehigh, etc., Coal Co. *v.* Wright, 15 Pa. Co. Ct. 433, 7 Kulp 434; Maffet's Estate, 8 Kulp (Pa.) 184; *In re* Hancock, 7 Kulp (Pa.) 36; Plummer *v.* Hillside Coal, etc., Co., 104 Fed. 208, 43 C. C. A. 490.

35. Shepherd *v.* McCalmont Oil Co., 38 Hun (N. Y.) 37; Grubb *v.* Grubb, 74 Pa. St. 25, holding that a deed by a tenant in common to a third person of the right to raise coal for such time as a certain furnace can be carried on by charcoal conveys only a limited privilege, and no estate in the land.

A deed executed in contemplation of the construction of iron works on the land by the grantee, conveying an exclusive right to mine the ore on the land, with a right to remove the iron works, the grantee agreeing to pay the grantor a specified sum per ton for the ore, does not create divestiture of ownership in the ore prior to the erection of the iron works. Clement *v.* Youngman, 40 Pa. St. 341.

36. Kelly *v.* Keys, 213 Pa. St. 295, 62 Atl. 911, 110 Am. St. Rep. 547. See also Tiley *v.* Moyers, 43 Pa. St. 404. Where a deed conveyed "all the coal and the right to mine and remove the same," under lands described, such deed conveyed all the coal in the land, which the grantee should mine and remove by the time limited in the deed, and no more. Butler *v.* McGorrisk, 114 Fed. 300, 52 C. C. A. 212.

37. Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290 (holding that a reservation to the grantor of "the right of mining on said granted premises" a certain quantity of ore annually, at a certain duty per ton, is a mere license to enter and mine, and gives to him no title to the ore before it is mined, and does not restrict the grantee from mining at the same time, even to the exhaustion of the ore); Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262 (holding that a reservation of "the use and occupancy of any one of the coal banks on said land," which the grantor may select, with the right to use such coal for the purposes for which it is then used in that section, only reserves the right to remove coal for such purposes, and is not a sufficient reservation of title to support an action of ejectment).

c. Construction — (1) *In General.* The construction of conveyances of the class under discussion is governed by the general rules for the construction of deeds, taking into consideration the peculiar character of the property involved.[38] A grant of an exclusive right to remove iron ore and limestone on certain land does not vest in the grantee such title as will enable him to maintain ejectment for a stone quarry, but is a grant of the ore or stone.[39] A writing, giving to a gravel road company the right to enter upon the grantor's land and remove gravel, etc., for the purpose of constructing the road, is a grant, and not a license.[40] Where a deed reserves "coal and other minerals" if found on the land conveyed, a quitclaim releasing the right reserved as to coal only does not convey a fee simple in the land and minerals.[41] Where a conveyance of land reserves the right to raise ore thereon to the owners of a certain furnace, the exclusive right to such ore remains in the vendors.[42] Where minerals are reserved from the operation of a deed, but not from the contract under which the deed was given, the deed is presumed to contain the final agreement of the parties.[43] A grant of land, excepting parcels previously conveyed, will not pass the minerals in such parcels where the same were reserved by the grantor in the original conveyance of such parcels.[44] A reservation of coal, and the right to mine it for the grantor's own use, does not reserve the title to such coal; but a mere incorporeal right of mining for such purposes concurrently with the grantee.[45] A grant of the privilege of raising iron ore on the lands of the grantor does not give an exclusive right to the grantee.[46] Where the owner of platted land dedicates the streets to the public, reserving the minerals therein, with the right to mine the same, and afterward conveys the abutting lots merely by number, without reservation, the rights reserved by the deed of dedication pass to the grantee of the lots.[47] A grant to a right to mine and remove ore from certain land, and under an adjacent lot, after exhaustion of the ore in the former, means a practical and not completed exhaustion.[48] Where the owner conveys land to a person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate in the coal with

38. Griffin *v.* Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. N. S. 1115.

For instances of construction see the following cases:

Kentucky.— Jones *v.* American Assoc., 120 Ky. 413, 86 S. W. 1111, 27 Ky. L. Rep. 804.

Maine.— Rowell *v.* Bodfish, (1887) 10 Atl. 448.

Massachusetts.— Chester Emery Co. *v.* Lucas, 112 Mass. 424; Farnum *v.* Platt, 8 Pick. 339, 19 Am. Dec. 330.

New York.— Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; Genet *v.* Delaware, etc., Canal Co., 122 N. Y. 505, 25 N. E. 922; Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Fertilizer Co., 19 Hun 47.

North Carolina.—Reaves *v.* Ore Knobb Copper Co., 74 N. C. 593.

Pennsylvania.— Peart *v.* Brice, 152 Pa. St. 277, 25 Atl. 537 [*reversing* 11 Pa. Co. Ct. 606]; Stewart *v.* Northwestern Coal, etc., Co., 147 Pa. St. 612, 23 Atl. 882; Montooth *v.* Gamble, 123 Pa. St. 240, 16 Atl. 594; Ashman *v.* Wigton, (1887) 12 Atl. 74; Johnston *v.* Cowan, 59 Pa. St. 275; Grove *v.* Hodges, 55 Pa. St. 504; Benson *v.* Miners' Bank, 20 Pa. St. 370; Brandt *v.* McKeever, 18 Pa. St. 70; Barnes *v.* Berwind, 3 Pennyp. 140; Baker *v.* McDowell, 3 Watts & S. 358; Hull *v.* Delaware, etc., Canal Co., 2 Pa. Cas. 26, 4 Atl. 471.

Vermont.— Rice *v.* Ferris, 2 Vt. 62.

West Virginia.— Morrison *v.* Clarksburg Coal, etc., Co., 52 W. Va. 331, 43 S. E. 102.

Wisconsin.— Ross *v.* Heathcock, 52 Wis. 557, 9 N. W. 609.

United States.— Woodside *v.* Ciceroni, 93 Fed. 1, 35 C. C. A. 177; Brown *v.* Cranberry Iron, etc., Co., 59 Fed. 434; Grubb *v.* Bayard, 11 Fed. Cas. No. 5,849, 2 Wall. Jr. 81.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 154, 159.

39. Clement *v.* Youngman, 40 Pa. St. 341.

40. Bracken *v.* Rushville, etc., Gravel Road Co., 27 Ind. 346.

41. Adams *v.* Reed, 11 Utah 480, 40 Pac. 720.

42. Lee *v.* Bumgardner, 86 Va. 315, 10 S. E. 3.

43. Snowden *v.* Cavenaugh, 10 Kulp (Pa.) 1.

44. Kincaid *v.* McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. L. Rep. 987, 13 L. R. A. 289.

45. Algonquin Coal Co. *v.* Northern Coal, etc., Co., 162 Pa. St. 114, 29 Atl. 402.

46. Johnstown Iron Co. *v.* Cambria Iron Co., 32 Pa. St. 241, 72 Am. Dec. 783.

47. Snoddy *v.* Bolen, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507.

48. New York, etc., Iron Co. *v.* Stephens, 5 Lea (Tenn.) 468.

which he stands vested at the date of the conveyance, unless there are clear words in the deed qualifying that right of property.[49] An exclusive right to mine and convey away coal is not given by a deed of bargain and sale, with words of inheritance, granting certain lots, all gas from certain wells, and the perpetual right to mine and carry away coal from all the veins under certain land, the grantee to pay a royalty on all coal mined, there being no condition or covenant requiring him to mine.[50] Where the owner of a tract of land sells a part of it, and covenants with the grantee, his heirs and assigns, that he and they may dig, take, and carry away all iron ore to be found within the ungranted part of the tract, the right or privilege to dig and carry away the ore to be found is indivisible, and an assignee of it, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil.[51]

(II) *What Included in Reservation or Grant.* In determining what is included in a grant or reservation of minerals or mineral rights the general rules of construction apply;[52] and the old technical distinction between reservations and exceptions seems to be disregarded to a great extent, the object of the courts being to arrive at and enforce the intention of the parties.[53] The words "mines and minerals" in an exception in a grant are to be understood in their popular and ordinary and not in their scientific meaning.[54] A grant or reservation of "mines" or "minerals" includes asphaltum,[55] chromate of iron,[56] freestone,[57] granite,[58] limestone,[59] marble in place,[60] paint stone,[61] and petroleum;[62] but it has been

49. Hamilton *v.* Dunlop, 10 App. Cas. 813.

50. Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948.

51. Grubb *v.* Bayard, 11 Fed. Cas. No. 5,849, 2 Wall. Jr. 81.

52. See, generally, VENDOR AND PURCHASER.

For instances of construction of particular reservations see the following cases:

Connecticut.— New Haven *v.* Hotchkiss, 77 Conn. 168, 58 Atl. 753.

Iowa.— Bonson *v.* Jones, 89 Iowa 380, 56 N. W. 515.

Massachusetts.— Munn *v.* Stone, 4 Cush. 146.

Michigan.— Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

New Jersey.— Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 55 N. J. L. 350, 26 Atl. 920, (1893) 28 Atl. 79.

New York.— French *v.* Carhart, 1 N. Y. 96.

Pennsylvania.— Foster *v.* Runk, 109 Pa. St. 291, 58 Am. Rep. 720; Gloninger *v.* Franklin Coal Co., 55 Pa. St. 9, 93 Am. Dec. 720; Shoenberger *v.* Lyon, 7 Watts & S. 184; Grubb *v.* Grubb, 9 Lanc. Bar 111; Mansfield Coal, etc., Co. *v.* Royal Gas Co., 27 Pittsb. Leg. J. N. S. 70.

West Virginia.—Ammons *v.* Toothman, 59 W. Va. 165, 53 S. E. 13.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 155, 156, 162–164.

53. *Maine.*— Winthrop *v.* Fairbanks, 41 Me. 307.

Massachusetts.— Stockwell *v.* Couillard, 129 Mass. 231.

New York.— Ryckman *v.* Gillis, 57 N. Y. 68, 15 Am. Rep. 464; Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 358, 14 Am. Rep. 322.

Pennsylvania.— Thompson *v.* Mattern, 115 Pa. St. 501, 9 Atl. 70; Horner *v.* Watson, 79 Pa. St. 242, 21 Am. Rep. 55; Whitaker *v.* Brown, 46 Pa. St. 197; Weakland *v.* Cunningham, 3 Pa. Cas. 519, 7 Atl. 148.

West Virginia.— Harris *v.* Cobb, 49 W. Va. 350, 38 S. E. 559.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 154–156, 159, 162–164.

But *compare* Barrett *v.* Kansas, etc., Coal Co., 70 Kan. 649, 79 Pac. 150; Moore *v.* Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. N. S. 477.

54. Gesner *v.* Gas Co., 2 Nova Scotia 72.

55. Gesner *v.* Gas Co., 2 Nova Scotia 72.

56. Gibson *v.* Tyson, 5 Watts (Pa.) 34, reservation of "all mineral or magnesia of any kind."

57. Bell *v.* Wilson, L. R. 1 Ch. 303, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493.

58. Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683, holding that the words "minerals and ores" in a deed, standing alone, include granite, but where the surface rights granted are only "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores," the words will be held to include only minerals obtained by underground working, and holding further that the term "mineral ores" does not include granite.

59. Fishbourne *v.* Hamilton, 25 L. R. Ir. 483.

60. Phelps *v.* Church of Our Lady, 115 Fed. 882, 53 C. C. A. 407.

61. Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

62. *New York.*— Wagner *v.* Mallory, 169 N. Y. 501, 62 N. E. 584.

Ohio.— Kelley *v.* Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399, 63 Am. St. Rep. 721, 39 L. R. A. 765. See also Detlor *v.* Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266.

held not to include common mixed sand,[63] or natural gas.[64] A grant or reservation of certain specified minerals and all "other minerals" does not include a substance which, although a mineral in the broad sense of the term, is not similar to those mentioned, and to the production or extraction of which the easements granted or reserved in connection with the mining rights are not applicable.[65] Under a reservation of the minerals of all the precious kinds only precious metals are included.[66] An exception in a ground grant of "all coals, and all gold and silver and 'other mines and minerals'" extends to all carbonaceous minerals, and therefore a mineral, although not strictly coal, is excepted,[67] but oil and gas under a tract of land do not pass by a deed of the "coal" under such land.[68] Coal under a creek or railroad is "available coal" within the meaning of a conveyance, granting all available coal under certain surface land, whether it can be mined or not.[69] Under a grant reserving a certain proportion of all minerals or oil produced from the land, the grantor is entitled to such proportion of all the oil raised to the surface by the grantee.[70] A conveyance of an undivided interest in mining ground, expressly conditioned to convey "no other rights except a mining right," simply conveys the right to take minerals from the land,[71] and a clause in a deed conferring the privilege of mining for coal under a certain tract confers no greater right than to enter into the tract and remove the coal, and after the coal is all removed the right ceases.[72] The reservation of a right to mine sufficient ore to supply a furnace gives the right to sufficient ore to supply a furnace with all modern improvements.[73] It has been held that the word "mines" includes minerals, whether gotten by underground or by open workings,[74] but there is also authority for the contrary view.[75] A conveyance of a tunnel right through specified ground with "appurtenances" includes the right

Pennsylvania.— Hague *v.* Wheeler, 157 Pa. St. 324, 27 Atl. 714, 37 Am. St. Rep. 736, 22 L. R. A. 141; Lillibridge *v.* Lackawanna Coal Co., 143 Pa. St. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627. *Contra,* Dunham *v.* Kirkpatrick, 101 Pa. St. 36, 47 Am. Rep. 696, holding that a reservation in a deed of "all minerals" will be construed to mean only minerals of a metallic nature, such as gold, silver, copper, lead, etc., and not petroleum oil, that being the meaning placed on the word generally, although technically it would include salt, rocks, clay, sand, petroleum oil, etc.

Tennessee.— Murray *v.* Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249.

Virginia.— Virginia Coal, etc., Co. *v.* Kelley, 93 Va. 332, 24 S. E. 1020.

West Virginia.— Preston *v.* White, 57 W. Va. 278, 50 S. E. 236; Harris *v.* Cobb, 49 W. Va. 350, 38 S. E. 559; List *v.* Cotts, 4 W. Va. 543.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 155, 162.

63. Hendler *v.* Lehigh Valley R. Co., 209 Pa. St. 256, 15 Atl. 486, 103 Am. St. Rep. 1005.

64. Silver *v.* Bush, 213 Pa. St. 195, 62 Atl. 832. See *supra,* II, B.

65. Detlor *v.* Holland, 57 Ohio St. 492, 503, 49 N. E. 690, 40 L. R. A. 266, holding in the particular case that petroleum oil did not pass under a conveyance of all the coal, iron ore, fire clay, and "other valuable minerals."

66. Pearne *v.* Coal Min., etc., Co., 90 Tenn. 619, 18 S. W. 402.

67. Gesner *v.* Cairns, 7 N. Brunsw. 595.

68. Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795.

69. *In re* Red Stone Oil, etc., Co., 207 Pa. St. 125, 56 Atl. 355.

70. Union Oil Co.'s Appeal, 3 Pennyp. (Pa.) 504.

71. Smith *v.* Cooley, 65 Cal. 46, 2 Pac. 880.

72. Sholl *v.* German Coal Co., 139 Ill. 21, 28 N. E. 748.

73. Alden's Appeal, 93 Pa. St. 182; Coleman *v.* Brooke, 15 Phila. (Pa.) 302.

74. Midland R. Co. *v.* Haunchwood Brick, etc., Co., 20 Ch. D. 552, 51 L. J. Ch. 778, 46 L. T. Rep. N. S. 301, 30 Wkly. Rep. 640 (holding that therefore a bed of clay on which a railway had been made was, as a mine, excepted out of a conveyance of the land to the railway company, and might be dug and worked by the landowner unless the company was willing to make compensation to him); Fishbourne *v.* Hamilton, L. R. 25 Ir. 483 [*approving* Hext *v.* Gill, L. R. 7 Ch. 699, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 291, 20 Wkly. Rep. 957].

A reservation of coal, minerals, and metals includes an open superficial stone quarry. Snowden *v.* Cavenaugh, 10 Kulp (Pa.) 1.

75. Brady *v.* Smith, 181 N. Y. 178, 73 N. E. 963 (holding that a reservation of "all mines and minerals which may be found on the land," with a right of entry to dig and carry away the same, does not give a right to open quarrying and blasting where the ledge was known and exposed at the date of the deed); Bell *v.* Wilson, L. R. 1 Ch. 303, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493.

of a dumpage on the grantor's land.[76] A grant of "all ores on or within the lands of the grantor" does not include ores in lands held by the grantor as trustee, or in land which he has agreed to purchase, and which are afterward conveyed to him.[77] A deed conveying mineral rights and authorizing the grantee to use any timber on the land conveyed in erecting works and for cross ties for a branch railroad includes timber necessary for the construction of a tramway and ore chute and for the building of a platform for a crusher and mill house and cross ties for the branch railroad, but gives no right to wood for fuel or repairs.[78] In some instances reservations have been held to apply only to minerals known to exist in the land at the time of the deed;[79] but where a mineral known to exist in the property is specifically reserved, the reservation extends to all such mineral, whether exposed or concealed.[80] Where the owner of land conveys only the coal under the surface, he retains the title to everything beneath the coal, and has the right of access to it, although the deed does not expressly reserve such right.[81]

d. Effect of Severance. After the mineral is conveyed apart from the land, or *vice versa*, two separate estates exist, each of which is distinct;[82] the surface and the mineral right are then held by separate and distinct titles in severalty, and each is a freehold estate of inheritance separate from and independent of the other.[83]

The use of the word "mine" imports a cavern or subterranean place, containing metals or minerals, and not a quarry, and minerals mean ordinary metallic fossil bodies and not limestone; yet, where the intent is clear from a conveyance, a limestone quarry may be reserved. Darvill *v.* Roper, 3 Drew. 294, 24 L. J. Ch. 779, 3 Wkly. Rep. 467, 61 Eng. Reprint 915. See also Listollel *v.* Gibbings, 9 Ir. C. L. 223; Brown *v.* Chadwick, 7 Ir. C. L. 101.

76. Scheel *v.* Alhambra Min. Co., 79 Fed. 821.

77. Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

78. Duncan *v.* American Standard Asphalt Co., 83 S. W. 124, 26 Ky. L. Rep. 1067.

79. Deer Lake Co. *v.* Michigan Land, etc., Co., 89 Mich. 180, 50 N. W. 807 (holding that where a deed reserved "all mines and ores of metals that are now or may be hereafter found on the said lands, etc.," and the only valuable metal found or known at that time was iron, such reservation did not include marble or serpentine deposits subsequently discovered); Putnam *v.* Smith, 4 Vt. 622 (holding that a reservation of a free stone on land does not include a ledge of free stone under ground, not known to the parties at the time of the conveyance).

80. Collinsville Granite Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666, holding that where the deed conveyed realty "with the exception of all the granite on said lot of land" the owner of the granite had title to all of that mineral on the land, whether exposed or concealed, regardless of his right to disturb the soil for the purpose of removing the granite, and that when from the washing away of the soil or other causes granite previously concealed became exposed, he had the right to remove it.

81. Mansfield Coal, etc., Co. *v.* Mellon, 152 Pa. St. 286, 25 Atl. 601; Chartiers Block Coal Co. *v.* Mellon, 152 Pa. St. 286, 25 Atl. 597, 34 Am. St. Rep. 645, 18 L. R. A. 702. *Contra*, Jefferson Iron Works *v.* Gill, 9 Ohio Dec. (Reprint) 481, 14 Cinc. L. Bul. 112, denying the right to sink an oil well through the coal.

82. Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Laurier *v.* Desbarats, 9 Quebec Super. Ct. 274.

83. *Illinois.*— Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592.

New Jersey.— New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322.

New York.— West Point Iron Co. *v.* Reymert, 45 N. Y. 703.

Ohio.— Gill *v.* Fletcher, 74 Ohio St. 295, 78 N. E. 433.

Pennsylvania.— Hutchinson *v.* Kline, 199 Pa. St. 564, 49 Atl. 312.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 154, 159, 161.

Grant of minerals, and right to enter, carry away, etc., after notice.—A grant to one, his heirs and assigns, of all the minerals in a tract of land, with the right to enter and carry away ore, erect structures for preparing for market, dig wells, and build necessary roads, the grantor "to have one year's notice previous to commencing to dig upon said premises," is a grant of the present estate in fee of the ore, etc., and gives the grantee such possession as to enable him to maintain an action against a trespasser, although the grantee has given no previous notice of his intention to dig upon the premises. Chester Emery Co. *v.* Lucas, 112 Mass. 424.

Abandonment of mineral rights.— Where a deed, conveying land, reserving the coal thereunder, was duly recorded, and the grantor, some years afterward, left the state, never having mined the coal, and the taxes were paid by the owner of the surface, who took away wagon loads of coal at intervals, and there was some testimony that the owner of the coal had witnessed an agreement of sale by his grantee, without mentioning the existence of the reservation, but the agreement was not introduced in evidence, and another

Each estate may be conveyed by deed[84] in the same manner as other real estate is conveyed,[85] may be devised by will,[86] may pass by inheritance,[87] and is subject to taxation.[88] But the estate in the minerals is subject to the servitude of affording sufficient support to sustain the surface,[89] and the possession of the surface is not adverse to the title of the owner of the minerals.[90]

e. Rights of Owner of Minerals. The owner of minerals has of course the right to remove the same,[91] and a grant or reservation of minerals carries with it as incidents the right to open a mine by sinking shafts, and the right to use such lands as are necessary in getting out and removing the minerals, and generally to employ all the necessary appliances requisite to the proper working of the mines.[92] But the surface rights are limited to so much of the surface and such uses thereof as are reasonably necessary to properly get at and carry away the minerals,[93] and,

witness testified that the owner of the coal, when he left the state, had said that all he left there was a small lot, claimed by another person, the evidence was insufficient to show an abandonment of the coal by the grantor in the original deed. Huss *v.* Jacobs, 210 Pa. St. 145, 59 Atl. 991.

84. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Manning *v.* Frazier, 96 Ill. 279.

85. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 492, 28 Atl. 853, where it is said: "This underlying estate may be conveyed under the same general rules as to notice, as to recording, and as to actual possession, as the surface."

86. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Manning *v.* Frazier, 96 Ill. 279.

87. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Manning *v.* Frazier, 96 Ill. 279.

88. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592. See TAXATION.

89. See *infra*, V, C, 2, b, (IV), (B).

90. Gill *v.* Fletcher, 74 Ohio St. 295, 78 N E. 433; Algonquin Coal Co. *v.* Northern Coal, etc., Co., 162 Pa. St. 114, 29 Atl. 402; Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 28 Atl. 853; Armstrong *v.* Caldwell, 53 Pa. St. 284; Caldwell *v.* Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Wallace *v.* Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; Smith *v.* Lloyd, 2 C. L. R. 1007, 9 Exch. 562, 23 L. J. Exch. 194, 2 Wkly. Rep. 271; Seaman *v.* Vandrey, 16 Ves. Jr. 390, 10 Rev. Rep. 207, 33 Eng. Reprint 1032. *Compare* Delaware, etc., Canal Co. *v.* Hughes, 2 Lack. Leg. N. (Pa.) 215.

91. Youghiogheny River Coal Co. *v.* Allegheny Nat. Bank, 211 Pa. St. 319, 60 Atl. 924, 69 L. R. A. 637.

92. *Alabama.*— Louisville, etc., R. Co. *v.* Massey, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17; Williams *v.* Gibson, 48 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368.

California.— Dietz *v.* Mission Transfer Co., 95 Cal. 92, 30 Pac. 380, holding that a reservation of the oil in land and the right to prospect for and remove the same, together with a right of way for such purpose, includes the right to go upon any portion of the land and use all reasonable means to develop such oil.

Illinois.— Ewing *v.* Sandoval Coal, etc., Co., 110 Ill. 290.

Massachusetts.— Green *v.* Putnam, 8 Cush. 21.

Missouri.— Wardell *v.* Watson, 93 Mo. 107, 5 S. W. 605.

New York.— Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322.

Pennsylvania.— Turner *v.* Reynolds, 23 Pa. St. 199.

United States.— Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190, holding that a sale of the right to "cutting stone" includes a right of ingress and egress, but not the right to use a railroad track belonging to the vendor.

England.— Smith *v.* Darby, L. R. 7 Q. B. 716, 12 L. J. Q. B. 140, 26 L. T. Rep. N. S. 762, 20 Wkly. Rep. 982; Cardigan *v.* Armitage, 2 B. & C. 197, 3 D. & R. 414, 26 Rev. Rep. 313, 9 E. C. L. 93; Rowbotham *v.* Wilson, 8 H. L. Cas. 348, 6 Jur. N. S. 965, 30 L. J. Q. B. 49, 2 L. T. Rep. N. S. 642, 11 Eng. Reprint 463; Proud *v.* Bates, 11 Jur. N. S. 441, 34 L. J. Ch. 406, 13 L. T. Rep. N. S. 61, 6 New Rep. 92. *Compare* Hext *v.* Gill, L. R. 7 Ch. 699, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 291, 20 Wkly. Rep. 957; Harris *v.* Ryding, 8 L. J. Exch. 181, 5 M. & W. 60.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 156, 163, 164.

Compare Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666; McMahon *v.* Berton, 7 N. Brunsw. 321.

93. Williams *v.* Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368 (holding that a grant of mining rights does not convey a right to use the surface for coke ovens); Moore *v.* Price, 125 Iowa 353, 101 N. W. 91 (holding that a sale of coal underlying land and two acres of the surface for a shaft and engine-house gives the grantee no right to use a shaft constructed thereon for the purpose of mining coal on adjoining land); Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322 (holding that the mineral owner cannot justify the use of the surface for the keeping of his ore, the long continued deposit of the rubbish from the mine, or the erection of buildings for the storage of ma-

in the absence of an express grant or license, the mineral owner has no right to use appliances and facilities belonging to the surface owner,[94] even though such use will cause the latter no inconvenience.[95] What improvements are reasonably necessary for the profitable working of a mine, and to what extent the surface may be occupied for this purpose, are questions for the jury.[96] Where specified surface rights are expressly granted or reserved in connection with the mineral rights, the intention of the parties and the general rules of construction govern in determining the extent of the mineral owner's rights.[97] The grantee of a right of mining may work the mines by himself, or his servants, agents, or assignees,[98] and under a grant to remove oil and minerals the grantee may lease his right.[99]

1. Vendor's Lien.[1] Where the owner conveys all the coal and other mineral under the land, with an express license to enter and search therefor, and to dig, mine, explore, and occupy with the necessary structures, etc., and to mine and remove the coal, etc., for which grant the purchaser agrees to pay quarterly a stipulated price per ton, the grantor will have a vendor's lien on the coal and mineral not mined and removed.[2]

g. Forfeiture of Mineral Rights. Where mining rights are conveyed for a nominal consideration, the conveyance being subject to be defeated by failure to perform a condition subsequent which constitutes the real consideration, if the grantee takes no steps in a reasonable time looking to and giving promise of a compliance with the condition he will be held to have abandoned the purpose of performing it and forfeited his rights.[3]

C. Leases, Licenses, and Contracts — 1. Nature, Validity, Modification, and Rescission — a. In General. A lease has been defined as a contract for the

terials, the housing of animals, or the use of the workmen).

Under the English law the owner of the minerals has the right to use the chamber or space in which the minerals are inclosed in any manner he chooses. Ramsay *v.* Blair, 1 App. Cas. 701; Eardley *v.* Granville, 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. Rep. N. S. 609, 24 Wkly. Rep. 528; Bowser *v.* MacLean, 2 De G. F. & J. 415, 6 Jur. N. S. 1220, 30 L. J. Ch. 273, 3 L. T. Rep. N. S. 456, 9 Wkly. Rep. 112, 63 Eng. Ch. 324, 45 Eng. Reprint 682; Proud *v.* Bates, 11 Jur. N. S. 441, 34 L. J. Ch. 406, 13 L. T. Rep. N. S. 61, 6 New Rep. 92. The same doctrine has been held in Pennsylvania. Lillibridge *v.* Lackawanna Coal Co., 143 Pa. St. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627.

94. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441 [*affirmed* in 134 Fed. 64, 67 C. C. A. 190].

95. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441 [*affirmed* in 134 Fed. 64, 67 C. C. A. 190].

96. Williams *v.* Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368.

97. See the following cases:

California.— Dietz *v.* Mission Transfer Co., (1890) 25 Pac. 423.

Indiana.— Carr *v.* Huntington Light, etc., Co., 33 Ind. App. 1, 70 N. E. 552; Heller *v.* Dailey, 28 Ind. App. 555, 63 N. E. 490.

Michigan.— Erickson *v.* Michigan Land, etc., Co., 50 Mich. 604, 16 N. W. 161.

Ohio.— Harris *v.* Ohio Coal Co., 57 Ohio St. 118, 48 N. E. 502.

Pennsylvania.— Potter *v.* Rend, 201 Pa. St. 318, 50 Atl. 821; Webber *v.* Vogel, 189 Pa. St. 156, 42 Atl. 4; Webber *v.* Vogel, 159 Pa. St. 235, 28 Atl. 226; McKnight *v.* Manufacturers' Natural Gas Co., 146 Pa. St. 185, 23 Atl. 164, 28 Am. St. Rep. 790; Lillibridge *v.* Lackawanna Coal Co., 143 Pa. St. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627; McCracken *v.* Gumbert, 131 Pa. St. 36, 18 Atl. 1068; McCloskey *v.* Miller, 72 Pa. St. 151; Cubbage *v.* Pittsburg Coal Co., 29 Pa. Super. Ct. 341; Farrar *v.* Pittsburg, etc., Coal Co., 28 Pa. Super. Ct. 280; Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. 149, 4 Luz. Leg. Reg. 127.

See 34 Cent. Dig. tit. "Mines and Minerals," §§ 156, 163, 164.

98. McBee *v.* Loftis, 1 Strobh. Eq. (S. C.) 90.

Assignment of interests to different persons.— A grantee of a right to take oil from certain lands of the grantor, with a right "to subdivide said lands into suitable lots, and . . . transfer his rights . . . to be exercised . . . by his assignees . . . severally," has divisible interests, which he can assign to different persons. Funk *v.* Haldeman, 53 Pa. St. 229.

99. Bronson *v.* Lane, 91 Pa. St. 153.

1. See, generally, Vendor and Purchaser.

2. Manning *v.* Frazier, 96 Ill. 279.

3. Hawkins *v.* Pepper, 117 N. C. 407, 23 S. E. 434, so holding where by the terms of the deed, the grantee agreed that he would examine the land, and if he found valuable minerals, he would pay the grantor one half the net proceeds thereof, or if he should con-

possession and profits of land for a determinate period, with the recompense of rent, which need not be money; if reserved in kind, it is rent in contemplation of law; and this definition has been held to be applicable to a mining lease.[4] It is an established rule of law that whatsoever words are sufficient to explain the intent of the parties that the one should divest himself of the property and the other come into it for a determinate time, whether they are in the form of a license, covenant, or agreement, will, in the construction of law, amount to a lease as effectually as if the most proper and pertinent words were made use of for that purpose.[5]

b. Distinction Between Leases, Licenses, and Contracts. There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession is the possession of the owner.[6] A contract simply giving a right to take ore from a mine, no interest or estate being granted, confers a mere license, and the licensee acquires no right to the ore until he separates it from the freehold.[7] But an instrument that demises and leases certain lands for mining purposes only, for a designated term of years, at a fixed rent, and giving the right to erect all necessary buildings, etc., is a lease, and not merely a mining license.[8]

vey to third persons, he would pay the grantor two hundred dollars and one half the net proceeds of the sale, and the grantee failed for eight years to open the mine and prepare it for sale.

4. Pelton *v.* Minah Consol. Min. Co., 11 Mont. 281, 283, 28 Pac. 310; U. S. *v.* Gratiot, 14 Pet. (U. S.) 526, 531, 10 L. ed. 573; Raynolds *v.* Hanna, 55 Fed. 783, 800 [*reversed* on other grounds in 59 Fed. 923, 8 C. C. A. 370].

5. Hudepohl *v.* Liberty Hill Consol. Min., etc., Co., 80 Cal. 553, 22 Pac. 339; Paul *v.* Cragnas, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; Moore *v.* Miller, 8 Pa. St. 272; Watson *v.* O'Hern, 6 Watts (Pa.) 362.

6. Wheeler *v.* West, 71 Cal. 126, 11 Pac. 871; Clark *v.* Wall, 32 Mont. 219, 79 Pac. 1052.

7. *Alabama.*— Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202.

Louisiana.— Martel *v.* Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253.

Missouri.— Boone *v.* Stover, 66 Mo. 430, holding that an instrument in writing under seal granting permission to mine on a certain lot so long as the grantees do regular mining work on the lot is a license and a grant of an incorporeal hereditament, but it is not a lease, for the reason that it does not pass such an estate in a portion of the land as would entitle the grantee to maintain ejectment.

Montana.— Clark *v.* Wall, 32 Mont. 219, 79 Pac. 1052.

New Jersey.— Silsby *v.* Trotter, 29 N. J. Eq. 228.

Virginia.— Young *v.* Ellis, 91 Va. 297, 21 S. E. 480, holding that a parol agreement or written contract, where the licensee does not promise or undertake anything more than to pay a royalty on the ore, oil, or minerals raised from the mine or well, is a revocable license, and not a lease.

Wisconsin.— Gillett *v.* Treganza, 6 Wis. 343.

United States.— Grubb *v.* Bayard, 11 Fed. Cas. No. 5,849, 2 Wall. Jr. 81.

England.— Sutherland *v.* Heathcote, [1891] 3 Ch. 504, 60 L. J. Ch. 841, 65 L. T. Rep. N. S. 606 [*affirmed* in [1892] 1 Ch. 475, 61 L. J. Ch. 248, 66 L. T. Rep. N. S. 210]; Cheatham *v.* Williamson, 4 East 469.

Canada.— Benfield *v.* Stevens, 17 Ont. Pr. 339 [*distinguishing* Credits Gerundeuse *v.* Van Weede, 12 Q. B. D. 171, 48 J. P. 184, 53 L. J. Q. B. 142, 32 Wkly. Rep. 414]. See also Haven *v.* Hughes, 27 Ont. App. 1, where it was held that an agreement which in consideration of one dollar provided that the owner agreed "to lease and hereby does lease" certain described premises, and "hereby leases and agrees to give and convey hereby" all mineral rights on the premises, the right to quarry stone, etc., the grantee in the instrument agreeing that if he uses the property he will take therefrom the amount of fifty thousand cords of stone, and the owner agreeing that he would give no other party any rights on the premises for the said purposes on or before a specified date, was held not to be strictly a demise, although it was more than a mere personal license and amounted perhaps to an agreement as to profits *à prendre*; that under it the grantee was not entitled to exclusive possession of the land or quarry or the stone therein but only to quarry fifty thousand cords.

See 34 Cent. Dig. tit. "Mines and Minerals," § 166.

8. *Colorado.*— Cary Hardware Co. *v.* McCarty, 10 Colo. App. 200, 50 Pac. 744.

c. Agreements For Leases. The rules applying to agreements for leases generally are applicable to agreements for mining leases.[9] Although not specified,

Illinois.— St. Louis Consol. Coal Co. *v.* Peers, 150 Ill. 344, 37 N. E. 937.

Indiana.— Heywood *v.* Fulmer, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491, holding that a lease, and not a mere license, is made by a writing acknowledging the receipt of a specified amount of money in payment of a certain described sand bar for one year, with the exclusive right to all gravel and sand for the year above named, and excluding all other parties from said premises.

Missouri.— Kirk *v.* Mattier, 140 Mo. 23, 41 S. W. 253; Buchannan *v.* Cole, 57 Mo. App. 11.

New York.— Gilmore *v.* Ontario Iron Co., 22 Hun 391 [*affirmed* in 86 N. Y. 455]; Barry *v.* Smith, 1 Misc. 240, 23 N. Y. Suppl. 129 [*affirmed* in 69 Hun 88, 23 N. Y. Suppl. 261]. See also Genet *v.* Delaware, etc., Canal Co., 14 N. Y. App. Div. 177, 43 N. Y. Suppl. 584, holding that an instrument which gives the right to mine all coal contained in or under certain lands, but provides that the lessee may select the coal which he will take and pay for, is a lease and not a conveyance.

Pennsylvania.— Duke *v.* Hague, 107 Pa. St. 57; Kemble Coal, etc., Co. *v.* Scott, 90 Pa. St. 332; Harlan *v.* Lehigh Coal, etc., Co., 35 Pa. St. 287; Offerman *v.* Starr, 2 Pa. St. 394, 44 Am. Dec. 211; O'Donnell *v.* Luskin, 12 Montg. Co. Rep. 109.

South Carolina.— Massot *v.* Moses, 3 S. C. 168, 16 Am. Rep. 697.

Utah.— See Ruffatti *v.* Société Anonyme des Mines de Lexington, 10 Utah 386, 37 Pac. 591.

Virginia.— Shenandoah Land, etc., Co. *v.* Hise, 92 Va. 238, 23 S. E. 303; Young *v.* Ellis, 91 Va. 297, 21 S. E. 480.

United States.— Malcomson *v.* Wappoo Mills, 85 Fed. 907.

But see Lynch *v.* Seymour, 15 Can. Sup. Ct. 341. And see also *infra*, IV, C, 2, f, (II), (D).

Contract for division of product.— An agreement in the form of a lease of the right to work and mine certain mining ground for a designated period, the gross products to be equally divided, is not a lease, although so termed by the parties thereto, but is an agreement for the working of the mine on shares, and the parties become tenants in common of the product of the mine when taken out. Hudepohl *v.* Liberty Hill Consol. Min., etc., Co., 80 Cal. 553, 22 Pac. 339.

Not grant of minerals.— An instrument leasing and conveying the coal or other minerals under a tract of land for a stated annual rental for a term of years is not an absolute grant of the mineral, but a lease. Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446; McElwaine *v.* Brown, 7 Pa. Cas. 201, 11 Atl. 453 (holding that the right to occupy so much land as may be necessary for prospecting for and producing oil and minerals for twenty years is a lease); Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 5 S. Ct. 573, 28 L. ed. 1009. See also *infra*, IV, C, 2, f, (II), (A). And see the following cases where the agreement was held to be a lease and not a grant: Gartside *v.* Outley, 58 Ill. 210, 11 Am. Rep. 59; Lacey *v.* Newcomb, 95 Iowa 287, 63 N. W. 704; Raynolds *v.* Hanna, 55 Fed. 783 [*reversed* on other grounds in 59 Fed. 923, 8 C. C. A. 370]. See, however, Hobart *v.* Murray, 54 Mo. App. 249, holding that an agreement to lease lands for mining purposes only, which reserves the right of occupation of the surface, to remain in force until the mineral should be exhausted, is not a lease, but passes title to all minerals within the land, subject to the claim of the owner for royalties. This agreement was held not to be a lease for the reason that it had no determinate period.

When possession of a part of a mine is taken by mistake an agreement to pay for coal thereafter taken for a certain time is held not to create the relation of landlord and tenant. Wyoming Coal, etc., Co. *v.* Price, 81 Pa. St. 156.

9. See, generally, LANDLORD AND TENANT, 24 Cyc. 899. And see Cochrane *v.* Justice Min. Co., 16 Colo. 415, 26 Pac. 780, where a mining company advertised for bids for the lease of its property, in answer to which plaintiff offered to "take lease on the whole property at thirty-five per cent. royalty at eighteen months, and agreed to expend . . . at least five thousand ($5,000) dollars each and every month . . . in development work; I to have thirty (30) days to begin work, in order to make examination of property, and put machinery in place. Lease to date from time of commencing work. Settlement as usual." At a meeting of the officers of the mining company it was moved and carried that plaintiff's bid be accepted, and the president be empowered to draw up a lease in conjunction with plaintiff, and present it to the board of directors for their consideration. Thereupon the president telegraphed to plaintiff that the lease had been awarded to him, and it was held that such facts constituted a binding and concluded agreement for a lease.

For specific performance of agreements for leases see SPECIFIC PERFORMANCE.

Covenants.— Whether an agreement for a lease does or does not provide that the usual covenants shall be inserted in the lease, each party is entitled to have such covenants inserted as are incidental and necessary to protect the rights given or reserved to each. Accordingly, under an agreement for a lease of minerals, the payment to be accelerated with an increase in the quantity of work, it was held that the lessor was impliedly entitled to have a right of entry and inspection secured to him by the lease. Blakesley *v.* Whieldon, 1 Hare 176, 6 Jur. 54, 11 L. J. Ch. 164, 23 Eng. Ch. 176, 66 Eng. Reprint 996.

time is necessarily of the essence of a contract for a lease, where the subject-matter is a mining lease; and in such a case the intended lessor is bound to use his utmost diligence to complete, and in default the proposed lessee is entitled to put an end to the contract by giving reasonable notice for that purpose.[10]

d. Requisites and Validity[11] — (I) *Consideration.* As is the rule in ordinary leases, a mining lease, or an agreement therefor, must be supported by a sufficient consideration in order to be valid.[12]

(II) *Writing and Signatures.* The formalities prescribed by statute in the execution of a lease generally[13] should be substantially followed in the execution of a mining lease, and where it is required to be in writing the lease should be signed by both parties thereto.[14] However, a failure of one of several lessees to sign the lease will not destroy its binding effect on them, where they have treated it as a valid contract by going into possession and prosecuting work under it.[15] A mining lease authorizing the grantees to extract and appropriate minerals from the land is a grant of a part of the land, and must be executed in the same manner as a deed.[16]

e. Rescission For Fraud or Mistake. False representation of material facts constituting inducement to the contract, and on which a party has a right to rely, is ground for rescission in equity of a mining lease.[17] However, to rescind such contract upon the ground of a misrepresentation as to the character, capacity, or quality of the property, it ought to be made to clearly appear that such misrepresentation was concerning a material matter, and operated as a material inducement to the contract.[18] Where a mining lease is entered into by the parties through a material, honest mistake of fact, of vital importance to the validity of the contract, equity will grant relief against such mistake;[19] and in such case the proper remedy is a proceeding to rescind the lease.[20] Where a lease provides for

10. Kille *v.* Reading Iron-Works, 141 Pa. St. 440, 21 Atl. 666; Macbryde *v.* Weekes, 22 Beav. 533, 2 Jur. N. S. 918, 52 Eng. Reprint 1214.

11. Recording gas or oil lease see *infra*, IV, C, 3, a.

12. See, generally, Landlord and Tenant, 24 Cyc. 897. And see Brooks *v.* Cook, 141 Ala. 499, 38 So. 641, holding that the liability of an agent on a mining lease, signed so as to bind himself only, formed a sufficient consideration to bind the other party to the contract.

13. See Landlord and Tenant, 24 Cyc. 902.

14. Brooks *v.* Cook, 141 Ala. 499, 38 So. 641 (holding likewise that a mining lease granting the right to excavate and appropriate ores from certain land, witnessed by beneficiaries under the contract, is void); Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203.

A parol mining lease for three months is valid, where the lessee enters thereunder, and expends labor and money in preparation for mining. Ruffatti *v.* Société Anonyme des Mines de Lexington, 10 Utah 386, 37 Pac. 591. See also Sheets *v.* Allen, 89 Pa. St. 47.

15. Equator Min., etc., Co. *v.* Guanella, 18 Colo. 548, 33 Pac. 613. See also Price *v.* Nicholas, 19 Fed. Cas. No. 11,415, 4 Hughes 616, holding that a mining lease for ninety-nine years, renewable for a like term, is valid and binding on both parties, although signed only by the lessor.

16. Brooks *v.* Cook, 141 Ala. 499, 38 So. 641; Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

17. Rorer Iron Co. *v.* Trout, 83 Va. 397, 28 S. E. 713, 5 Am. St. Rep. 285. See also Hoover *v.* Beech Creek Coal, etc., Co., 29 Pa. Super. Ct. 615.

Agreement to reduce royalty.— The lessee of an iron mine under a lease by which it agreed to pay a royalty of six cents per ton did not succeed, and while negotiating a sale of its plant represented to the lessors that the sale could not be made and the mine operated unless the royalty was reduced to four cents. Relying on such representations, the lessors agreed to make such reduction. Thereupon the lessee completed the sale, and contracted with the purchaser that he should pay to it the royalty of six cents, as provided in the lease. On discovering the falsity of such representations, the lessors filed a bill against the lessee and purchaser to cancel such agreement to reduce the royalty on the ground that it was fraudulently obtained, and for an accounting for the two cents per ton for the ore mined, and it was held that the complainants were entitled to the relief prayed as against the original lessee. Lasier *v.* Appleton Land, etc., Co., 130 Mich. 588, 90 N. W. 322.

18. Chamberlain *v.* Fox Coal, etc., Co., 92 Tenn. 13, 20 S. W. 345.

19. Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Bluestone Coal Co. *v.* Bell, 38 W. Va. 297, 18 S. E. 493. See also *infra*, IV, C, 2, f, (III).

20. Harlan *v.* Lehigh Coal, etc., Co., 35 Pa. St. 287.

the rescission thereof by either party, but recites a condition precedent to the exercise of such right, the condition precedent must be complied with to entitle either of the parties to rescind the lease.[21]

f. Modification and Merger. The parties to a mining lease may at any time modify or change the terms thereof by mutual consent.[22] And where a second lease, embracing miners' houses, is by express terms made part and parcel of a prior lease of the mines, the two leases are held to constitute one demise.[23]

g. Waiver, Estoppel, and Ratification. The rules as to waiver, estoppel, and ratification applicable to leases generally[24] are applicable to mining leases.[25]

2. Construction and Operation of Mining Leases — a. In General. In constructing mining leases, the tendency of the courts is to be guided by an equitable rather than a technical construction of its provisions.[26]

b. Term[27] — (i) *In General.* Where the duration of the term is not fixed, as under a parol agreement to enter and dig for ore, build houses, etc., and to pay a certain compensation therefor, the duration of the tenancy is held to be a question of fact to be determined from the evidence under proper instructions defining tenancies at will and from year to year.[28] And where the instrument creates an estate from year to year the lessee cannot terminate it by a notice less than that required to terminate such estates generally.[29] A provision in a mining

21. McGavock *v.* Virginia-Carolina Chemical Co., 114 Tenn. 317, 86 S. W. 380.

22. Mark *v.* Bowery Min. Co., 31 Mont. 298, 78 Pac. 519 (where a contract leasing mining property provided for the payment of royalties, and of the purchase-price in instalments if the option should be exercised, and declared that if the lessee should not perform all the conditions, the agreement should be void *ab initio*, and an extension of time for the payment of instalments was given, the supplemental agreement granting it providing that, if the lessee should fail to comply with the contract as modified, such failure should cause a forfeiture, and it was held that such subsequent agreement modified the provision of the original contract that failure to perform should render it void *ab initio*); Lehigh Coal, etc., Co. *v.* Harlan, 27 Pa. St. 429. And see Letourneau *v.* Carbonneau, 35 Can. Sup. Ct. 110, where it was held under a peculiar state of facts that the lessees could not be bound by the altered provisions of the lease.

23. Spencer *v.* Kunkle, 2 Grant (Pa.) 406.

Distinct leases.— But in Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538, it is held that where a lease of a coal mine excepts from its operation a certain vein and thereafter the lessor leases the right to mine such vein to the assignee of the first lessee, the two leases were not merged.

24. See Landlord and Tenant, 24 Cyc. 910.

25. See Equator Min., etc., Co. *v.* Guanella, 18 Colo. 548, 33 Pac. 613 (where a lease of the property of a mining company, signed for it by its superintendent, provided that it should not be valid or binding upon the company until approved by its executive committee, and the lease did not receive such approval, but it was held that the lessor waived this condition by permitting the lessee to commence work under the lease, and continue the same for more than three months); Byrnes *v.* Douglass, 23 Nev. 83, 42 Pac. 798 (holding that a lessee of a mine of which a tunnel is claimed and held as a part, who enters under the lease, is estopped to deny title of his lessor to the tunnel); Turner *v.* Reynolds, 23 Pa. St. 199; Bunker Hill Min. Co. *v.* Pascoe, 24 Utah 60, 66 Pac. 574; Bicknell *v.* Austin Min. Co., 62 Fed. 432 (holding that where a mining lease, executed in the name of a corporation by its superintendent, was turned over to defendant as successor in the ownership of the mine, and the latter, with knowledge as to how the lease was executed, allowed the lessee to work for several months and received the lessor's share of the proceeds, it would be deemed to have ratified the lease, and would not question its validity because not executed under seal); Lakin *v.* Roberts, 54 Fed. 461, 4 C. C. A. 438 [*affirming* 53 Fed. 333].

26. Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127.

27. Of subtenant see *infra*, IV, C, 2, g.

28. Moore *v.* Miller, 8 Pa. St. 272. See also *infra*, IV, C, 3, b.

Sometimes the statute fixes the duration of the term where the owner of land who permits another to enter and mine thereon fails to post the terms under which the right is exercised in pursuance of the statute. Robinson *v.* Troup Min. Co., 55 Mo. App. 662, holding that upon a failure to comply with the statute as to such posting the person who enters and mines has an interest in the nature of a leasehold for a fixed term limited by the time designated in the statute.

29. Patton *v.* Axley, 50 N. C. 440, holding that a deed, granting a lease of land for the purpose of carrying on mining operations, where the rent is made payable quarterly, and a forfeiture is provided for by a non-user for a year, but with right in the lessees to discontinue operations at any time, and without any other provision as to the duration of the

lease that it should terminate on "a sale or transfer" of the property during the term relates to a transfer of title, and not to a mere transfer of possession.[30]

(II) *EXTENSION AND RENEWAL.* The same rules governing leases generally control with reference to the extension or renewal of mining leases.[31] The lessee must give notice of his renewal within the time provided in the lease, where the option to do so is purely a privilege given him without any corresponding right or privilege on the part of the lessor.[32] And when a lease is extended with the original terms and conditions, except as to particular changes expressly made, provisions in the original lease inconsistent with the new terms made in the extension contract do not apply to the latter.[33]

c. Liability For Taxes and Assessments. As in other cases,[34] the lessee is liable for all taxes on improvements placed on the land by himself for the operation of the mine.[35] But where the lease in effect creates a divided ownership between the mineral and the surface, each of the parties would be liable only for the taxes assessed against his respective property,[36] although if the parties see fit to introduce any special stipulation into the lease in regard to the payment of taxes, such stipulation must control,[37] and if under it the lessor assumes the payment of all taxes on the land leased and the lessee is obligated to pay only the taxes on his buildings and improvements, but the taxes on the minerals in place are assessed against the lessee, as upon a severance of the estates and without reference to the special stipulation, the lessee may pay such taxes and recover them by action against the lessor or deduct them from royalties which would be otherwise due to the lessor.[38] A provision for the payment of taxes by the lessee, however, does not impose upon him the obligation to pay special assessments,[39] although such liability too may be imposed by the express stipulation of the parties.[40]

lease, creates a tenancy from year to year. But see Cowan *v.* Radford Iron Co., 83 Va. 547, 3 S. E. 120.

Termination of license see *infra*, IV, C, 4.

30. Ober *v.* Schenck, 23 Utah 614, 65 Pac. 1073.

31. See LANDLORD AND TENANT, 24 Cyc. 990 *et seq.*

Extension of time to pay purchase-price instalments.— Where a lease of mining property for royalties gave the lessee an option to purchase by paying in instalments, and the time for payment of some instalments was extended by an agreement which provided that the extension applied only to the payments for purchase, and did not affect the original contract in any other respect, the lease was not extended. Merk *v.* Bowery Min. Co., 31 Mont. 298, 78 Pac. 519.

32. Dikeman *v.* Sunday Creek Coal Co., 184 Ill. 546, 56 N. E. 864 [*reversing* 84 Ill. App. 379].

33. Consolidated Coal Co. *v.* Rainey, 69 Ill. App. 182, holding that where a lease to a coal company was extended for one year "under the same terms and conditions, except that the guaranteed royalty shall not be less than six hundred (600) dollars per annum" a provision in the original lease that if any accident should happen to the mine, or if the workmen employed therein should strike, so that the mine could not be operated, the guaranteed royalty should be reduced proportionately, did not apply to the contract of renewal. See also LANDLORD AND TENANT, 24 Cyc. 1021 text and note 59.

34. See LANDLORD AND TENANT, 24 Cyc. 1075 note 65.

35. *In re* Huddell, 16 Fed. 373 [*affirmed* in 47 Fed. 207].

36. Miles *v.* Delaware, etc., Canal Co., 140 Pa. St. 623, 21 Atl. 427.

37. Woodward *v.* Delaware, etc., R. Co., 121 Pa. St. 344, 15 Atl. 622; Hecksher *v.* Sheafer, 1 Pa. Cas. 424, 4 Atl. 740, holding that where the lease creates a divided ownership between the coal and the surface improvements on the surface are a part thereof, but where by the terms of a lease the lessees are required to pay all taxes upon improvements, they are required to pay a proportionate share of the taxes assessed on the real estate as a whole, including the improvements.

Where the land contains no ore.— In Gribben *v.* Atkinson, 64 Mich. 651, 31 N. W. 570, the lease provided that the lessees should pay all taxes and assessments assessed upon the land, iron ore, and improvements, and the lands were explored by the lessees, but no iron ore found, and it was held that the lessees were nevertheless liable for taxes assessed on the land, while they were in possession of and exploring the same.

38. Miles *v.* Delaware, etc., Canal Co., 140 Pa. St. 623, 21 Atl. 427. See also Miles *v.* Delaware, etc., Canal Co., 5 Lanc. L. Rev. (Pa.) 262.

39. Pettibone *v.* Smith, 150 Pa. St. 118, 24 Atl. 693, 17 L. R. A. 423, under a provision that the lessee should pay all the United States, state, and local taxes, duties and imposts on coal mined and mining improvements, and the surface and coal land itself.

40. Delaware, etc., Canal Co. *v.* Von Storch,

d. Improvements. The general rule that in the absence of stipulation to the contrary improvements made by a tenant in furtherance of the purpose of the lease may be removed by him [41] is applied to such improvements under a mining lease.[42] And as in the case of other leases,[43] the right to improvements is often the subject of express provisions which will control, as where it is expressly stipulated that the lessee may remove improvements, although they are a part of the realty,[44] or that the improvements shall be delivered up to the lessor upon the termination of the lease,[45] or that the lessor should take the improvements and

196 Pa. St. 102, 46 Atl. 375, which turned upon the meaning of the word "reprises" in a provision stipulating for rent over and above all "taxes and reprises," under which it was held that the duty was imposed on the lease to pay such special assessments.

41. See LANDLORD AND TENANT, 24 Cyc. 1101 *et seq.*

Liability for repairs.—Where defendant, engaged in mining coal from two tracts of land through a single main entrance from which lateral galleries were constructed, leased to plaintiff, agreeing to pay one half the expense of repairing "any part of the property used or enjoyed by him, excepting the main entry," and afterward another entry was constructed, plaintiff is liable for half the expense thereof, and having paid it is not entitled to recover. Meyer *v.* Marshall, 34 W. Va. 42, 11 S. E. 730.

42. Conrad *v.* Saginaw Min. Co., 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817 (holding that engines and boilers erected by the tenant, on brick or stone foundations, and bolted down solidly to the ground, and walled in with brick arches, and dwellings erected by the tenant for miners to live in, standing on posts or dry stone walls piled together, such machinery and buildings being intended to be merely accessory to the mining operations under the lease, and there being no intention to make them accessory to the soil, and where they can be removed without material disturbance to the land, are to be regarded as "trade fixtures," and may be removed at or before the termination of the lease); Couch *v.* Welsh, 24 Utah 36, 66 Pac. 600 (holding that a lessee may remove buildings and railroad tracks placed on the premises by them, where such removal causes no material injury to the freehold and the lease is silent as to the right of removal).

Estoppel to claim against stranger.—Where a lessee of a mine surrenders his lease to enable the lessor to lease to another, who agrees to pay for the lessee's improvements, but afterward refuses to do so, and the lessee assists another to procure a lease without advising him of his claim to the improvements, he is estopped from claiming such improvements as against such new lessee. Stewart *v.* Munford, 91 Ill. 58.

43. See LANDLORD AND TENANT, 24 Cyc. 1102 *et seq.*

44. Pendill *v.* Maas, 97 Mich. 215, 56 N. W. 597, holding that the lessees were entitled to remove, not only the buildings erected and machinery placed on the property during the time of the lease, but also machinery on the land at the time of the execution of the lease, but purchased by them from the lessors.

Under a lease providing for forfeiture for non-payment of the royalty reserved, and that all buildings placed on the premises by the lessee could be removed, "unless all right thereto has been forfeited by plaintiffs by a forfeiture of this lease," the lessee has the right, notwithstanding the lease has been terminated by a forfeiture for non-payment of the royalty, to remove the buildings within a reasonable time after such termination. Mickel *v.* Douglas, 75 Iowa 78, 39 N. W. 198. But see Massachusetts Nat. Bank *v.* Shinn, 18 N. Y. App. Div. 276, 46 N. Y. Suppl. 329.

45. Merritt *v.* Judd, 14 Cal. 59 (holding that an engine and pump placed upon a leased mine is an improvement within the meaning of a lease which provides that under certain conditions the lessee should deliver up the premises with the improvements which he places thereon); Little Valeria Gold Min., etc., Co. *v.* Lambert, 15 Colo. App. 445, 62 Pac. 966 (holding that the lessee's creditors can acquire no rights to such improvements irrespective of notice of the agreement).

Improvements referring only to things leased.— Where a lease of a coal mine and improvements, exclusive of appliances for moving coal, recites that all repairs are to be made by lessees, and any improvements made by them are to remain at its expiration, they cannot be restrained from removing a hauling system, introduced instead of other appliances for removing coal, as the agreement relates to the things leased, which were to be kept in repair, and to which improvements were to be added. Beech Creek Coal, etc., Co. *v.* Mitchell, 193 Pa. St. 112, 44 Atl. 245.

A lessee's promise to give up the mine in a good, workmanlike condition does not bind him for the value of a removed derrick, which he had at first used at the shaft, but later abandoned for a slope. Timlin *v.* Brown, 158 Pa. St. 606, 28 Atl. 236. And under a lease of coal mines and iron works which contained a covenant by the lessee to yield up to the lessor all ways or other roads in or under the demised hereditaments in such good order, repair, and condition as that the coal and iron works might be continued and carried on by the lessor, it was held that tram-plates, fastened to wooden or iron sleepers, which were not let into the ground, but rested thereon, were not included in the term, "works or ways," or "roads,"

pay for them, at the termination of the lease, upon such terms or conditions as the lease prescribes.[46]

e. Trespass or Conversion by Lessee. Under a lease of particular mineral (coal) land at a fixed price per bushel for the coal mined, the lessors cannot recover in covenant for coal mined in land not embraced in the lease, the liability being in trespass.[47] While on the other hand if the lessee takes coal which under the terms of the lease he has no right to mine, he will be liable not only for the value of such coal but also for damages done to buildings by reason of such wrongful mining.[48]

f. Premises Demised and Rights Acquired[49] — (i) *RIGHT TO MINE.* If a man has land in a part of which there is an open mine, and he leases the land, the lessee may dig for the mineral; forasmuch as the mine is open at the time and he leases all the land, it is intended that his interest is as general as his lease is; that is, that he shall take the profit of the land, and by consequence of the mine in it,[50] unless restricted by the terms of his lease; but he has no right to open a new mine, unless this privilege be expressly granted;[51] but if the mine were not open, but included in the bowels of the earth at the time of the lease made in such case by leasing the land, the lessee cannot make new mines, for that shall be waste.[52] If there are open mines a lease of land with the mines will not

and consequently might be taken up, sold, or removed by the lessee. Beaufort *v.* Bates, 3 De G. F. & J. 381, 8 Jur. N. S. 270, 31 L. J. Ch. 481, 6 L. T. Rep. N. S. 82, 10 Wkly. Rep. 200, 64 Eng. Ch. 300, 45 Eng. Reprint 926.

46. White Stone Quarry Co. *v.* Belknap, etc., Stone Co., 16 S. W. 354, 17 S. W. 162, 13 Ky. L. Rep. 244, holding that where the lease provides that the lessor should take the implements and improvements placed on the leased land by the lessee at a valuation to be fixed by arbitrators, it is not necessary that the lessee should formerly tender them at the expiration of the lease.

Option cannot be exercised by taking a part.— Where the lessor has the option of taking all improvements at an appraisement to be made in a certain manner, he cannot take a part of the improvements only, but must take all or none, and on failure of the lessors to exercise such option, the lessees were entitled to a reasonable time after the expiration of the lease to remove the improvements. East Sugar-Loaf Coal Co. *v.* Wilbur, 5 Pa. Dist. 202.

Failure to exercise option.— If the lease provides that the lessee may remove the improvements, or that if the lessors desire the same they should pay the lessees a fair value therefor, and the lessors fail to exercise the option, lessees who subsequently acquired an interest in the land are entitled in a partition suit to have that part of the land on which the improvements are situated allotted to them. Brinkmeyer *v.* Rankin, 61 S. W. 1007, 22 Ky. L. Rep. 1881.

47. Lyon *v.* Miller, 24 Pa. St. 392.

48. Burgner *v.* Humphrey, 41 Ohio St. 340, as to liability for mining beneath houses under a lease, providing that no mining operations should extend to buildings, or so near them as to injure them. See also *infra*, V, C, 2, b, (IV), (B).

A continuing trespass may be enjoined and upon this ground, where a lessee was only entitled to mine soapstone on the leased premises, but took out other minerals of commercial value, equity will enjoin him from continuing to mine such other substances. Verdolite Co. *v.* Richards, 7 North. Co. Rep. (Pa.) 113.

Duty imposed to explore.— Where the lessor not only gives his tenant the power, but makes it his duty, to explore and mark a theoretical line on his own premises, the tenant cannot be treated as a trespasser, if, in an honest attempt to ascertain the line, he should chance to pass over it; for the right to do what is necessary in order to find and fix the line is implied in the grant by which it is made a boundary, and in such a case the lessor can only recover for improper mining or criminal negligence. Freck *v.* Locust Mountain Coal, etc., Co., 86 Pa. St. 318.

49. **Subjacent support** see *infra*, V, C, 2, b, (IV), (B).

50. Owings *v.* Emery, 6 Gill (Md.) 260; Harlow *v.* Lake Superior Iron Co., 36 Mich. 105; Clegg *v.* Rowland, L. R. 2 Eq. 160, 35 L. J. Ch. 396, 14 L. T. Rep. N. S. 217, 14 Wkly. Rep. 530; Saunders Case, 5 Coke 22.

51. Harlow *v.* Lake Superior Iron Co., 36 Mich. 105. See also Shaw *v.* Wallace, 25 N. J. L. 453, holding that the principle that a lease of land carries with it the mines upon the land applies only where the contract relates to the land generally, without exception or reservation.

52. Owings *v.* Emery, 6 Gill (Md.) 260 (holding that a declaration in a lease that a quarry "had been recently, or a short time ago possessed and worked by Wood & Co." cannot be understood to mean that the quarry was opened four years prior to the date of such lease); Saunders' Case, 5 Coke 12*a*.

Same rule applied to quarries and mines.— Elias *v.* Snowden Slate Quarries Co., 4 App.

extend to unopened mines;[53] but if the lease is of the land and all mines on it, then, although the mines be hidden, the lessee may dig for the minerals.[54] However, where by the terms of the lease it is for agricultural purposes only, the lessee has no right to quarry stone, although the quarry is opened when the lease is made.[55]

(II) *EXTENT OF RIGHTS AND LOCUS OF PREMISES*—(A) *In General.* The lessee may mine in any part of the premises leased to him for that purpose,[56] except as to such parts as may be reserved from the mining operations, in which parts he cannot mine;[57] and he has the exclusive right of mining on the land for

Cas. 454, 48 L. J. Ch. 811, 41 L. T. Rep. N. S. 289, 28 Wkly. Rep. 54, holding that a termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term he may continue the working. But see Mansfield *v.* Crawford, 9 Ir. Eq. 271.

What is not a new opening.— When a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, the sinking of a new pit on the same vein, or breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or a new quarry. Elias *v.* Snowden Slate Quarries Co., 4 App. Cas. 454, 48 L. J. Ch. 811, 41 L. T. Rep. N. S. 289, 28 Wkly. Rep. 54; Clavering *v.* Clavering, Mosely 219, 25 Eng. Reprint 359, 2 P. Wms. 388, 24 Eng. Reprint 780, Sel. Cas. Ch. 79, 13 Eng. Ch. 207.

53. Clegg *v.* Rowland, L. R. 2 Eq. 160, 35 L. J. Ch. 396, 14 L. T. Rep. N. S. 217, 14 Wkly. Rep. 530; Astry *v.* Ballard, 2 Lev. 185.

54. Owings *v.* Emery, 6 Gill (Md.) 260; Clegg *v.* Rowland, L. R. 2 Eq. 160, 35 L. J. Ch. 396, 14 L. T. Rep. N. S. 217, 14 Wkly. Rep. 530; Saunders' Case, 5 Coke 12*a*.

A lease of land with the privilege of mining coal or minerals gives the right to open new mines and remove coal or minerals therefrom. Proprietors' School Fund Appeal, 2 Walk. (Pa.) 37; Griffin *v.* Fellows, 5 Leg. Gaz. (Pa.) 265.

A lease of two seams of coal and all other seams of coal under the estate will authorize the opening of an unworked seam. Spencer *v.* Scurr, 31 Beav. 334, 9 Jur. N. S. 9, 31 L. J. Ch. 808, 10 Wkly. Rep. 878, 54 Eng. Reprint 1167.

Quantity of ore restricted.— Where an owner of mining land conveyed the same, reserving an undivided one-half interest in all minerals on the land, and conferring on the grantee an incorporeal, indivisible right in himself and his assigns to mine on the land for his own use or for manufacturing purposes within the county, and the grantee thereafter formed a corporation for the purpose of operating one pig-iron furnace, with two stacks, on the premises, and leased to the corporation a right to mine so much ore on the land as it should actually convert into merchantable iron in its own establishment, it was held that the rights acquired by the corporation under the lease were appurtenant to the furnace then existing and that it acquired no right to mine more ore than that necessary to supply such furnace. Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

55. Freer *v.* Stotenbur, 2 Abb. Dec. (N. Y.) 189, 2 Keyes 467, 34 How. Pr. 440 [*reversing* 36 Barb. 641].

56. Isabella Gold Min. Co. *v.* Glenn, (Colo. 1906) 86 Pac. 349 (holding that under a lease granting the lessees the right to enter upon and extract ore from all veins outcropping within and belonging to the southeasterly five hundred feet of a certain lode mining claim, the lessee was entitled to all outcropping veins and all other veins which for any reason belonged to the five hundred feet described and was not limited to veins which both belonged to and had their apices in the claim described); Sobey *v.* Thomas, 39 Wis. 317 (holding that a mining lease of an exclusive right to mine upon the "Watkins range or works," on the lessor's land, confers the right not only to mine on the said range as far as it has been actually opened and worked, but also to follow it to the limits of said land, but does not convey the exclusive right to work a vein on another portion of the tract between which and the former no connection existed within said tract, although since the lease a connection between them had been traced by a circuitous course through adjoining land of another; that this conclusion was not affected by the fact that the ores within the Watkins range were in a horizontal seam). See also Taylor *v.* Parry, 4 Jur. 967, 9 L. J. C. P. 298, 1 M. & G. 604, 1 Scott N. R. 576, 39 E. C. L. 931.

Possession of entire tract and nature of interest.— A mining lease granting the right to mine in particular land for a term of years conveys the right to all such use and possession of the entire tract as is necessary for the exercise of the mining right (Turner *v.* Reynolds, 23 Pa. St. 199; Benavides *v.* Hunt, 79 Tex. 383, 15 S. W. 396); and an interest in the land (Benavides *v.* Hunt, *supra*; Barker *v.* Dale, 2 Fed. Cas. No. 988). See also *supra*, IV, C, 1, b.

57. Oskaloosa College *v.* Western Union Fuel Co., 90 Iowa 380, 54 N. W. 152, 57 N. W. 903 (holding that the prohibiting of mining certain "ground" in a lease deals not only with the surface, but everything therennder, and reserving the ground east and south of a building from mining precludes mining to the southeast of it); Dug-

the substances specified in the lease.[58] A mining lease giving the right to use the surface in any and all ways necessary and proper in carrying on the operations of mining, etc., and with the right of way thereto over any and all other lands owned and controlled by the lessor, is held to demise the surface as well as the minerals,[59] and a lease which gives the right to take out all the coal beneath a certain surface confers the right not only to make all necessary openings to reach the coal,[60] but also to use such means and processes for mining and removing the product from the premises as may be reasonably necessary.[61]

(B) *Description of Premises.* When it is impossible to determine from the description in the lease what part of a tract was intended, the lease is void for indefiniteness.[62] The rule that, where boundaries are given with reference to known and fixed objects, they control courses and distances, applies to a lease of land for mining purposes,[63] and when the land demised is described as a particular "half" of a tract, the word "half" will be taken to refer to quantity unless the context shows a different meaning.[64]

dale *v.* Robertson, 3 Jur. N. S. 687, 3 Kay & J. 695, 69 Eng. Reprint 1289.

Provision requiring working at particular level.— Under the statute permitting qualified witnesses to testify as to the meaning of technical terms, the decision of the trial court refusing an injunction and holding that under a provision of a lease that no ore shall be stoped except at the three-hundred-foot level, stoping ore from the bottom of a sixty-foot winze sunk from the two-hundred-foot level was not a violation of the lease upon evidence that everything above the three-hundred and below the two-hundred level is called the three-hundred-foot level, and that to "stope at the three hundred foot level" meant to go "to any point between the two hundred and three hundred levels," will not be disturbed on appeal. Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816.

58. Barker *v.* Dale, 2 Fed. Cas. No. 988, under a lease of land "for the sole and only purpose of mining and excavating for petroleum, coal, rock, or carbon oil, or other valuable mineral and volatile substances," subject to the lessor's "use of the same for the purpose of tillage."

59. Rogers *v.* C. C. C. Min. Co., 75 Mo. App. 114 [*citing* Kirk *v.* Mattier, 140 Mo. 23, 41 S. W. 252].

Use of land for removal of coal.— Under a lease of coal lands giving the lessees the right to dump from various shafts the refuse on the lessor's land, and giving the right of way for railroad tracks, etc., with the privilege to continue such use after the coal is extracted, the lessee has the right to use the land to remove coal from adjoining tracts. Madison *v.* Garfield Coal Co., 114 Iowa 56, 86 N. W. 41.

60. Ingle *v.* Bottoms, 160 Ind. 73, 66 N. E. 160; Trout *v.* McDonald, 83 Pa. St. 144, holding that the fact that a spring might be injured by the working is unimportant.

Duty to restore.—Where there is an agreement between the owner and his tenant that when the mines are worked out the surface shall be restored, the owner may complain if it is not restored; but that gives no claim to anyone else. Wilson *v.* Waddell, 2 App. Cas. 95, 35 L. T. Rep. N. S. 639.

61. Ingle *v.* Bottoms, 160 Ind. 73, 66 N. E. 160, holding that this includes the right to construct such roads and railroad tracks on the surface of the land as are reasonably necessary for the transportation of supplies, machinery for the operation of the mine, and for removing the product of the mine from the mine openings.

62. South Penn Oil Co. *v.* Calf Creek Oil, etc., Co., 140 Fed. 507.

Question for jury — ambiguity.— Where a lease described what was let by the lessors as their "coal-bank, and the appurtenances thereunto belonging," and did not otherwise describe the premises leased, or the boundaries, in an action for the rent reserved, in which eviction is set up as a defense, it is for the jury to say what was the extent of the demise; it being rather a latent ambiguity to be solved than an instrument of writing to be construed. Tiley *v.* Moyers, 43 Pa. St. 404.

Reference to map.— In Taylor *v.* Parry, 4 Jur. 967, 9 L. J. C. P. 298, 1 M. & G. 604, 1 Scott N. R. 576, 39 E. C. L. 931, it was held that where a lease professed to demise all mines and minerals under all or any part of particular land "described and set forth in the map hereunto annexed," and all or any part of another tract of land designated by name "all of which are situated," etc., "and bounded," etc., the words of the demise were not intended to be controlled by the map but might have full effect and include a particular spot, the boundary of which could not be traced with strict accuracy on the map on account of the smallness of the scale upon which it was drawn.

63. Kamphouse *v.* Gaffner, 73 Ill. 453.

Where a lease gave the lessee the right to fix the boundaries without increasing the extent of the land and in pursuance of such grant he adopts a particular survey, he cannot thereafter repudiate his action to the prejudice of others who have acquired rights. McArthur *v.* Brown, 17 Can. Sup. Ct. 61.

64. Hartford Iron Min. Co. *v.* Cambria Min. Co., 80 Mich. 491, 45 N. W. 351, where plaintiff and defendant were lessees, the one of the "east half" and the other of the "west half" of a certain lot which, accord-

(c) *Use and Enjoyment* — (1) IN GENERAL. Where the land itself is demised together with the mining privileges, the lessee will not be restricted to the use of the land for merely mining purposes.[65] But under a lease which grants a specific mining privilege, the lessee has no right to any use or possession of the lands except as incident to the mining right granted and in connection with the exercise of that right.[66] In the absence of any provision to the contrary lessees of coal have the right, as the owners thereof and the space it occupies, to use the gangways and passageways cut through the coal lying under the leased premises for the purpose of going to and removing coal owned by the lessees under adjacent lands.[67] But the lessees have no right to prepare the coal mined from other lands at the lessor's breaker, or to use the timber leave, the water leave, and other surface privileges, for the purpose of such outside mining operations.[68] It is, however, competent for the parties to the lease of coal, under a certain tract of land, to agree that the mines shall not be connected with mines upon adjoining lands, or that the boundary wall shall be left, or that said boundary wall shall not be pierced for the purpose of mining and removing coal from adjoining lands and transporting the same through the lands leased.[69] Under a reservation of a portion of the demised premises for the joint use of the lessor and the lessee, an occupancy of a portion of the land reserved for the exclusive use of the lessee of adjacent premises cannot be permitted.[70] A provision that a quarry shall be worked as the face is then open does not require that every part of the face be

ing to government survey, was bounded on the north by a meandered lake which extended much further south on the east boundary than on the west boundary, and it was held that such land should be so divided as to give each an equal acreage of the land.

65. Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379; Walker *v.* Tucker, 70 Ill. 527, holding that under an agreement containing a recital that the parties of the first part were desirous of leasing, and conveying to the parties of the second part the right to mine and excavate on the premises during the continuance of the lease thereof from the owner to the parties of the first part, which demised the farming lands described and mentioned in such lease together with the rights to mine, dig, and excavate and carry away from the premises "together with use, enjoyment and occupation of so much of the surface of said lands" as might be necessary for mining coal on the premises, the party of the second part had the right to occupy the farm lands as well as the right to mine for coal.

66. Harlow *v.* Lake Superior Iron Co., 36 Mich. 105, holding a lease to be not a lease of lands with the privilege of mining thereon or together with the ore and minerals found upon the same, but to be a grant of a specific mining privilege.

67. St. Louis Consol. Coal Co. *v.* Schmisseur, 135 Ill. 371, 25 N. E. 795 (holding that an injunction against the removal of coal from adjoining lands through the shaft upon the lessor's premises would not be granted where the lessor's property was not interfered with or injured); Lillibridge *v.* Lackawanna Coal Co., 143 Pa. St. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627; Rockafellow *v.* Hanover Coal Co., 2 Pa. Dist. 108, 12 Pa. Co. Ct. 241, 6 Kulp 507. And see Wadsworth Coal Co. *v.* Silver Creek Min., etc., Co., 40 Ohio St. 559, holding that where an agreement for the lease of coal mine lands provided that "if before the term of this agreement is expired the coal should be exhausted from said land and none remains to be mined," then the lessee might remove fixtures, and also that "for any coal that the party of the second part shall remove from other lands through, over or above said described land, the said second party shall have all the rights now possessed by the party of the first part;" the lessee had a right to use the leased premises for the purpose of removing coal from other land, even after all the coal leased had been exhausted.

68. Rockafellow *v.* Hanover Coal Co., 2 Pa. Dist. 108, 12 Pa. Co. Ct. 241, 6 Kulp 507.

69. Rockafellow *v.* Hanover Coal Co., 2 Pa. Dist. 108, 12 Pa. Co. Ct. 241, 6 Kulp 507.

Injunction to enforce covenant.—A covenant to leave proper barriers in the seam against all adjoining collieries may be enforced by injunction. Mexborough *v.* Bower, 7 Beav. 127, 29 Eng. Ch. 127, 49 Eng. Reprint 1011.

70. Reliance Coal, etc., Co. *v.* Kentucky Coal, etc., Co., 93 Tenn. 191, 23 S. W. 1095.

Where the lessor has reserved rights for the purpose of the development of adjacent lands belonging to him, the extent of such reservations cannot be increased by language employed in a subsequent lease of adjoining lands to a third person. Reliance Coal, etc., Co. *v.* Kentucky Coal, etc., Co., 93 Tenn. 191, 23 S. W. 1095, holding further that where the lessor reserves such use of the premises leased as may be necessary for the profitable working of the adjacent coal lands of the lessor, the mere fact that a greater profit may be thereby obtained will not au-

worked to the same extent.[71] Under a covenant to remove rubbish and spawls contained in a general covenant to surrender the premises in as good condition as when the lease was granted, the lessee is not bound to remove rubbish and spawls which had accumulated upon the premises at the time of the execution of the lease.[72]

(2) APPURTENANCES. Those things which are appurtenant to a mine will pass under a lease of the mine as a necessary part thereof, although not mentioned in the lease.[73] But where the lease expressly declares what use may be made of the timber upon the premises its use must be confined to the purposes specified.[74]

(D) *Title to Minerals.*[75] When ore is mined under a lease, the title to it vests absolutely as personal property in the lessee as soon as it is mined and removed from its original place,[76] but a lease strictly speaking does not pass the title to the unmined minerals.[77]

(III) *KIND, QUANTITY, AND QUALITY OF MINERALS AND REFUSE.* The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted,[78] or the particular contract is such as to show that the parties entered

thorize the lessor to make an entry through and under the leased land for the purpose of reaching coal upon adjacent land; and also that where a lease reserves to the lessor the right to a joint use of such portion of the leased lands as may be necessary for roads, railways, waterways, side-tracks, and other structures necessary for the profitable working of adjacent coal lands of the lessor, the provision will not be construed to embrace underground entries through the leased land.

71. Keeler *v.* Green, 21 N. J. Eq. 27.

72. Coppinger *v.* Armstrong, 8 Ill. App. 210.

73. Consolidated Coal Co. *v.* Savitz, 57 Ill. App. 659 (as to a side-track which was a necessary part of the mine); Tiley *v.* Moyers, 25 Pa. St. 397.

Miners' houses are proper appurtenances to a coal mine, and when they are on the leased premises, and are included in the lease, they constitute a part of the estate. Spencer *v.* Kunkle, 2 Grant (Pa.) 406.

74. Lewis *v.* Virginia-Carolina Chemical Co., 69 S. C. 364, 48 S. E. 280, 104 Am. St. Rep. 806, holding that under a lease for the purpose of mining phosphate, which provides for the use of timber for the building of railroads and for fuel necessary for the machinery, the employees, and washing rock, the timber cannot be used to build houses for employees to be left on the land.

Timber for smelting.— A tenant who has leased a mine, with liberty to smelt ore, has the right to cut down and use timber for that purpose. Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

75. Title to oil and gas see *supra*, IV, A, 1.

76. Russell *v.* Howe, 30 Pa. Super. Ct. 591, notwithstanding the lease is thereafter forfeited. See also Tiley *v.* Moyers, 43 Pa. St. 404, holding that a demise of a coal bank for a term of years, in which the rent reserved is a fixed price per bushel for the coal to be taken from the bank, amounts to a sale of as many bushels as the tenant shall take during the term, for the price fixed in the lease.

Rock quarried.— So by a lease granting the privilege of doing all such quarrying as the lessees might deem requisite for carrying on their business of boat building, they acquire the property in the rock quarried. McKee *v.* Brooks, 20 Mo. 526. And see *supra*, IV, A, 1.

77. Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 37 Am. Rep. 446, holding that where the lease of a mine entitled the lessee to take all the coal he can during the term at a stipulated royalty, and he did not take possession of either the land or the coal, he acquired no title to the latter, and that a judgment obtained by the lessor for rent did not vest in the lessee the property in the coal whether the judgment had been satisfied or not.

In Pennsylvania a lease to a lessee, his executors, administrators, and assignees of all the coal under the particular land described, with the right and privilege to enter upon and mine and remove the same for a term of ninety-nine years upon consideration of the payment of a certain sum per ton on particular quantities mined, creates an ownership of the coal in the lessee or his assignee during the period of the lease as absolutely and the same in character as if it had been a lease of the surface of the land for ninety-nine years. Lance *v.* Lehigh, etc., Coal Co., 163 Pa. St. 84, 29 Atl. 755; Lillibridge *v.* Lackawanna Coal Co., 143 Pa. St. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760.

78. Abbot *v.* Smith, 19 D. C. 600 [*distinguishing* Brick Co. *v.* Pond, 38 Ohio St. 65; Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144; Clifford *v.* Watts, L. R. 5 C. P. 577, 40 L. J. C. P. 36, 22 L. T. Rep. N. S. 717, 18 Wkly. Rep. 925, in that these cases involve only contracts for the right to enter and take ore and there was no fixed rent, under which the implied condition that the thing contracted for should be there was

into it upon the assumption of the existence of the particular mineral.[79] On the other hand, where a lease permits the opening of mines, it is not a cause of forfeiture for the tenant to work them, even to exhaustion.[80] The kind of substance which the lessee may take will depend on the provisions and character of the lease.[81] A lease of all the merchantable coal under the land covers all the veins, even those which at the time it is unprofitable to work,[82] and the term "minerals" in a lease embraces everything aside from the mere surface,[83] and is not confined to such substances as can be worked for commercial profit.[84]

g. Assignments, Transfers, and Encumbrances — (I) *ASSIGNMENT OR SALE OF LEASE* — (A) *Right to Assign.* Assignments of mining leases are controlled by the rules governing leases generally.[85] Where a mining lease gives the right to mine and carry away ore for a certain time, such lease is not of a fiduciary character or in the nature of a personal confidence, and may be assigned.[86] But

held to exist]; Timlin *v.* Brown, 158 Pa. St. 606, 28 Atl. 236; Harlan *v.* Lehigh Coal, etc., Co., 35 Pa. St. 287, 27 Pa. St. 429 (holding that a lease of the right to mine coal in the land of the lessor is the grant of an interest in the land and not a mere license to take the coal, and in such a lease there is no implied warranty that the land contains coal veins); Gowan *v.* Christie, L. R. 2 H. L. Sc. 273 (holding that at common law the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes, and that there is in such a case no legal warranty on which the lessee can rely). See also *infra*, IV, C, 2, j, (III).

79. Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144. See also *infra*, IV, C, 2, j, (III).

If all the coal had been gotten by ancient workings that might be a case for equitable relief. Ridgway *v.* Sneyd, Kay 627, 69 Eng. Reprint 266.

80. Griffin *v.* Fellows, 5 Leg. Gaz. (Pa.) 265.

81. Emery *v.* Owings, 6 Gill (Md.) 191, holding that a lease granting the privilege of quarrying and removing granite at so much per cubic foot does not give the right to carry away rubble-stone which is not sold by the cubic feet, but in the mass or by the perch.

Refuse.— A lease providing for the extraction of ore and payment of royalty on ore so extracted does not entitle the lessee to the refuse resulting from the treatment of such ore. Doster *v.* Friedensville Zinc Co., 140 Pa. St. 147, 21 Atl. 251; Erwin *v.* Hoch, 7 Pa. Cas. 477, 12 Atl. 149.

Coal passing through screen.— Under a lease providing for the payment of a royalty on coal mined "that will pass over a five eighths of an inch mesh," the lessor to have "all the culm or refuse coal from the mines," the lessor is not entitled to coal which passes through the mesh except such as is rejected by the lessee and thrown upon the refuse pile. Lance *v.* Lehigh, etc., Coal Co., 163 Pa. St. 84, 29 Atl. 755. And under such a provision the right of removal and sale by the lessee is not restricted to coal that will pass over the mesh, and he is not bound to account for coal passing through such mesh and used under the boilers in mining the coal and consumed upon the premises. Hoyt *v.* Kingston Coal Co., 10 Kulp (Pa.) 15.

Covenant running with land.— Where a lease of mineral lands granting to the lessee the exclusive right of entering the lands at all times for a term of three years "to search for and dig, excavate, and carry away therefrom the soapstone only," such provision is a covenant which runs with the land, and hence a grantee of the lessor is entitled to restrain the tenant from mining other minerals found commingled with the soapstone which were of commercial value. Verdolite Co. *v.* Richards, 7 North. Co. Rep. (Pa.) 113.

82. Maffet's Estate, 9 Kulp (Pa.) 136.

Requirement to work merchantable coal.— Under a lease requiring the lessees to work all veins containing merchantable coal, a decision by arbitration that certain veins were not merchantable coal does not eliminate such veins from the grant, but simply relieves the lessees from working them. Maffet's Estate, 8 Kulp (Pa.) 184.

83. Griffin *v.* Fellows, 5 Leg. Gaz. (Pa.) 265, granite and fossils. See also *supra*, II, B.

So a reservation of "all valuable earths, clays, stones, paints and substances for the manufacture of paints" includes not only clay for the manufacture of paints, but brick-making clay. Foster *v.* Runk, 109 Pa. St. 291, 2 Atl. 25, 58 Am. Rep. 720.

Under lease giving rights of ownership in fee.— Where the lease provides that the lessee should "enjoy and use all the rights and privileges of real ownership as in fee simple" so long as he should carry on a certain iron furnace, the lessee has the right to quarry limestone on the land for use in the furnace as well as to take iron ore. Watterson *v.* Reynolds, 95 Pa. St. 474, 40 Am. Rep. 672.

84. Johnstone *v.* Crompton, [1899] 2 Ch. 190, 68 L. J. Ch. 559, 81 L. T. Rep. N. S. 165, 47 Wkly. Rep. 604, referring to a reservation of minerals in a lease of the lands.

85. See LANDLORD AND TENANT, 24 Cyc. 962.

86. Gaston *v.* Plum, 14 Conn. 344.

where the personal skill of the miners is contracted for the lease is not assignable.[87] Where by the terms of a lease it is not assignable, without the written consent of the lessor, and it is further provided that a breach of its provisions shall cause a forfeiture, an unauthorized assignment forfeits the lease.[88]

(B) *Operation and Effect.* Mining leases are controlled, with regard to the operation and effect of assignments thereof, by the rules applicable to leases generally.[89] The lessee cannot by assignment free himself from liability upon express covenants in the lease,[90] although the assignee by a second assignment is freed from all liabilities except those arising from his own express covenants.[91] The assignee of a lease, while remaining such, is bound by covenants running with the land.[92] An absolute assignment of the term and the acceptance of the assignee as tenant by the lessor discharges the assignor from all obligations arising from privity of estate.[93] A purchaser at sheriff's sale of the unexpired term of a min-

87. Hodgson *v.* Perkins, 84 Va. 706, 5 S. E. 710, where the lease conferred upon skilled miners the privilege to raise ore, so long as they should deem it worthy of searching for minerals.

88. Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288.

89. See Caley *v.* Portland, 18 Colo. App. 390, 71 Pac. 892, holding that where the lessee of a mining claim assigns his lease for a certain sum payable out of the net proceeds of the mine, and it is operated at a loss, the assignee is not personally liable for its payment, and he may make a further assignment thereof without incurring such liability. See, generally, LANDLORD AND TENANT, 24 Cyc. 979.

Consideration.— When a lease is assigned upon consideration of a note payable if the lands become worth a certain sum, such note is not payable except upon the happening of that event. Benninger *v.* Hankee, 61 Pa. St. 343. Under an assignment of a lease in consideration of certain cash, and another sum payable when two hundred and fifty flasks of quicksilver should be produced, such sum is not due without a showing that such quicksilver was produced or that the assignee could have produced it by proper effort. Ray *v.* Hodge, 15 Oreg. 20, 13 Pac. 599.

90. Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538 (holding that where the assignees of a coal lease contracted with a corporation, leasing to it the right to mine the coal at an advanced royalty, containing wholly different stipulations from those in the original lease, reserving to the assignees a right of reëntry for condition broken, and expressly assuming payment by them to the lessors of the royalty reserved in the original lease, the privity of estate between the assignees and the lessors is not at an end, so as to relieve them from paying the royalties reserved in the lease for coal mined by the corporation); Fisher *v.* Milliken, 8 Pa. St. 111, 49 Am. Dec. 497.

91. Peers *v.* St. Louis Consol. Coal Co., 59 Ill. App. 595, holding that where a person accepts a conveyance of a lessee's interest, subject to the performance by him of an express covenant to pay a royalty for the exclusive right of mining upon the demised premises, he cannot discharge himself from liability on such covenant by an assignment of the lease.

Liability of assignee on bond to perform covenants.— Where plaintiff assigned a lease of a mining claim to defendant, who gave a bond to pay certain royalties, and perform the covenants of the lease, he may, upon the non-payment of royalties, sue from time to time for such as are due, or, defendant having disabled himself from performing the conditions, he may elect to rescind the contract, and recover damages for the entire breach. Keck *v.* Bieber, 148 Pa. St. 645, 24 Atl. 170, 33 Am. St. Rep. 846.

92. McDowell *v.* Hendrix, 67 Ind. 513, holding that an assignee of an interest in a lease of coal lands is jointly liable to the extent of his interest for the stipulated rent and royalty agreed to be paid by the lessee. And see Findlay *v.* Carson, 97 Iowa 537, 66 N. W. 759, holding that under a lease of a coal mine which obligated the lessor not to lease to any other party any coal land to be operated during the life of the lease, and prevented the lessee from "dividing his time or attention with any other mine," the lessee's assignees acquired simply such rights as their assignor had under the lease, and were bound in his stead by its obligations.

Equitable assignees.— Where a lease contained a covenant against assignment without consent of the lessor, and the lessee made an agreement to transfer his rights in the lease to third persons, such agreement to be effective, although a formal conveyance was not executed, such third persons, the former conveyance not being executed and the lessor's consent not having been obtained, are mere equitable assignees, and although they have entered into possession and worked the mines are not after an assignment liable to the lessor for the rents and covenant in the original lease for the time they were in possession. Cox *v.* Bishop, 8 De G. M. & G. 815, 8 Jur. N. S. 499, 26 L. J. Ch. 389, 5 Wkly. Rep. 437, 57 Eng. Ch. 630, 44 Eng. Reprint 604.

Covenants running with the land in general see COVENANTS, 11 Cyc. 1035.

Rights and liabilities of assignee upon covenants in general see LANDLORD AND TENANT, 24 Cyc. 980.

93. Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl.

ing lease takes the lessee's place under the lease, standing upon no higher plane in any respect.[94]

(II) *ENCUMBRANCE OF TERM.* As against a mortgagee of the term the landlord's claim for royalties is entitled to priority of payment out of the proceeds of the sale of minerals mined, where the lease stipulates that such minerals shall not be removed from the premises while royalties remain unpaid.[95]

(III) *TRANSFER OF REVERSION.* The principles applicable to leases generally govern with reference to the transfer of the lessor's reversion.[96] A lessor may assign all his rights in a mining lease and thereby substitute his assignee to all his rights.[97] But the conveyance of the reversion by the lessor does not in itself carry with it the right to recover for breaches of covenants by the lessee which have already occurred.[98] Where a subtenant has purchased the interest of the lessor he may after the expiration of the original term hold the premises free from the claims of the original tenant.[99]

h. Surrender. A surrender of a mining lease may, as in the case of other leases,[1] take place by mutual agreement of the parties,[2] or it may be inferred from

538, holding, however, that an assignment for an increased consideration with wholly new stipulations, with a right of reëntry for conditions broken, with an express assumption of continuing liability of the assignors to the owners under the original lease, and a manifest intention to sublet, was not only not evidence of intention to end the privity of estate, but was a positive reaffirmance of it.

94. *In re* Huddell, 16 Fed. 373. And see Guldin *v.* Butz, 2 Woodw. (Pa.) 74, holding that where one takes a half interest in a lease by assignment from a lessee and afterward acquires the other half interest under a sheriff's sale, he is liable for the royalties stipulated in the lease.

95. Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

96. See Arkley *v.* Union Sugar Co., 147 Cal. 195, 81 Pac. 509, holding that where a lease of a quarry grants the exclusive privilege of removing lime rock therefrom, reserving to the lessor the right of quarrying thereon, and the lessor sells the land on which the quarry is located, the purchaser cannot escape liability for excluding the lessee on the ground that the covenants in the lease do not run with the land, as the purchaser took the estate of the lessor, but not that of the lessee. See, generally, LANDLORD AND TENANT, 24 Cyc. 925.

Lessee as purchaser for value.— Where a mining lease for ninety-nine years contained provisions enabling the lessor to demand at his option a royalty upon the proceeds of the mine, or four thousand dollars in lieu of such royalty, but the lessor had not exercised such option, it was held that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. Conlin *v.* Elmer, 16 Grant Ch. (U. C.) 541.

Notice of lessee's rights.—The rule that the actual possession of a tenant carrying on mining operations is notice of his interest to a purchaser from the landlord, as fully as is the tenancy of a dwelling-house, applies where the lease is of land with right to quarry minerals or dig clay. Sheets *v.* Allen, 89 Pa. St. 47. But possession by a servant of the owner does not operate as such notice, and a purchaser from such owner acquires the title, although such servant had a lease or contract with the owner for the workings of the mine. Jenkins *v.* Redding, 8 Cal. 598.

Trespass by transferee.— Where one has bought at an execution sale mining lands subject to a lease and has mined a part of the range embraced in the lease, the lessee is entitled to recover from him the value of the mineral he has taken out, with interest thereon from the time when the mineral was mined and sold, diminished by the amount of rent under the lease and the reasonable cost of mining. Chamberlain *v.* Collinson, 45 Iowa 429.

97. Thompson *v.* Brownlee, 45 S. W. 871, 20 Ky. L. Rep. 235.

98. Big Black Creek Imp. Co. *v.* Kemmerer, 162 Pa. St. 422, 29 Atl. 739, holding that the lessee might, after such conveyance of the land, recover accrued rent and also the price which the lessee had agreed to pay for buildings sold to him.

Under a deed conveying the grantor's interest in royalties under a mining lease, without the right to recover for rents past due, such rents cannot be recovered by the grantee in a suit for rents subsequently accrued. Pendill *v.* Eells, 67 Mich. 657, 35 N. W. 754.

99. Robinson *v.* Troup Min. Co., 55 Mo. App. 662.

1. See LANDLORD AND TENANT, 24 Cyc. 1366.

2. Worrall *v.* Wilson, 101 Iowa 475, 70 N. W. 619; Pendill *v.* Lucy Min. Co., 105 Mich. 221, 62 N. W. 1024, holding that where a lease of a mine provided that it should terminate sixty days after delivery of a written surrender to lessor, and payment of all royalties due, the machinery erected by lessee not to be removed before such surrender and payment, and after defendant had given notice of surrender an arrangement was made by which he was to run the pumps for a week, and his account therefor was allowed, whereupon he removed the machinery and paid up royalties due, the allowance of the

the acts of the parties or arise by operation of law.[3] A lessee in possession by relocating the ground, or setting up an adverse title in himself, ousts his lessor and forfeits all his rights under the lease.[4]

i. Eviction. In accordance with the general rules governing the relation of landlord and tenant[5] a mere trespass by the landlord will not constitute an eviction, but the act must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.[6] Where an eviction has taken place the lessee may maintain an action for damages against his lessor.[7]

pumping charge and receipt for royalties was a ratification of defendant's surrender, and that his failure to pay the royalties prior to or concurrently with the removal of the machinery was but a nominal damage to plaintiff.

Necessity of abandonment.— Where a lease gave the right to mine coal on certain land and the privilege of a right of way over land to transport coal from adjoining land, and provided that the lessee could "abandon this contract and yield up said coal mine and privileges" and the lessee delivered a deed releasing all right and interest in the coal, but continued to avail itself of the right of way, such lease was not abandoned, and the lessee was still liable for royalty. Bestwick *v.* Ormsby Coal Co., 129 Pa. St. 592, 18 Atl. 538.

3. Price *v.* Black, 126 Iowa 304, 101 N. W. 1056 (holding the circumstances insufficient to show an abandonment); Worrall *v.* Wilson, 101 Iowa 475, 70 N. W. 619 (holding that where a written lease granted the right to mine coal for ten years, and the lessee entered, but in a year ceased to operate the mine, removed all of the apparatus which was necessary to its operation, took out the curbing, and said he would do nothing more under the lease, such acts of abandonment operated as a surrender of the lease); Millie Iron Min. Co. *v.* Thalmann, 34 N. Y. App. Div. 281, 54 N. Y. Suppl. 276 (holding the facts insufficient to show a surrender); Cowan *v.* Radford Iron Co., 83 Va. 547, 3 S. E. 120.

Acceptance of subtenant.— A lease is surrendered by operation of law when the lessee sublets the premises and the lessor makes further agreements with the sublessee and does not demand payments from the original lessee for eleven years. Gingrass *v.* Mather, 127 Mich. 582, 87 N. W. 758.

Failure to operate.— Under a lease of coal for one hundred years, in consideration of a cash price and a yearly rental, the lessee's failure to pay rent or to search for coal for a number of years is not an abandonment of the lease. Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 28 Atl. 853. But where a lease is for all coal underlying the land of another, so long as it is found in paying quantities, if the lessee fails for eleven years to work the mine and the openings therein are allowed to cave in, the lessor has the right to consider the lease abandoned. Welty *v.* Wise, 5 Ohio S. & C. Pl. Dec. 223, 5 Ohio N. P. 50. A lessee of a stone quarry who, after taking out a large quantity of stone, leaves it, with his tools on the ground, does not, in the absence of intention so to do, abandon the same, so as to prevent his recovery of the value thereof from one who buys it from the lessor and takes the stone away which he has quarried. Russell *v.* Stratton, 201 Pa. St. 277, 50 Atl. 975.

Estoppel to retract surrender.— A receiver of an insolvent corporation lessee is estopped to retract a surrender of a lease where the lessor had taken steps to test his right to a forfeiture, and such steps were enjoined, and after dissolution of the injunction the attorney of the receiver notified the lessor that he would not appeal therefrom and the lessor took possession of the property, leased the same to another party, and expended considerable money in preparing for its operation. Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288.

4. Silver City Gold, etc., Min. Co. *v.* Lowry, 19 Utah 334, 57 Pac. 11 [*affirmed* in 179 U. S. 196, 21 S. Ct. 104, 45 L. ed. 151].

5. See LANDLORD AND TENANT, 24 Cyc. 1129 *et seq.*

6. Walker *v.* Tucker, 70 Ill. 527. See also Paul *v.* Cragnas, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540, holding that the refusal by the owner of an undivided interest in a mine to permit his coöowner's lessee to enter into possession thereof, or to permit him to work on a different level from where he was working, accompanied by a threat of physical violence, constitutes an ouster.

7. Muskett *v.* Hill, 5 Bing. N. Cas. 694, 9 L. J. C. P. 201, 7 Scott 855, 35 E. C. L. 371.

A lessee of an undivided interest, where the owners of the remaining interest have refused to permit him to enter into possession and work the mine or any part thereof, may maintain an action for damages based upon the loss of profits and is not confined to an action for an accounting of the profits received by the owners of the remaining undivided interest during the term of the lease. Paul *v.* Cragnas, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.

Defenses.— It is no defense to an action by a lessee of a mine to recover damages for wrongful ouster that up to that time he had not put in sufficient timbers, where no injury has occurred by reason thereof. Ruffatti *v.* Société Anonyme des Mines de Lexington, 10 Utah 386, 37 Pac. 591.

Pleading.— Where a lease granted the exclusive privilege of quarrying, and the grava-

j. Agreements to Work, Test, or Build — (i) *In General.* The obligation to work a mine is not devolved upon a lessee merely by force of the demise in the absence of a covenant therein express or necessarily implied.[8] A lease requiring the lessee to pay a certain royalty for coal mined and to annually furnish the lessor a certain amount of coal free, and not close down the mine for more than a year at a time, is not lacking in mutuality; it may be enforced against the lessee and so is enforceable against the lessor,[9] and where the right to mine ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor,[10] or the rent reserved is a certain fixed proportion of the price of the product which the lessee might get and sell,[11] or a royalty on the mineral mined, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income contemplated when the agreement was made.[12] So under a lease of mines on a fixed royalty per ton, and providing the minimum quantity to be taken in any year, a covenant will be

men of an action against a purchaser of the premises from the lessor was that it wrongfully excluded plaintiff from entering on and enjoying his interest in the quarry, it was immaterial that plaintiff alleged that a certain amount of rock was taken from the quarry, and that such an allegation did not show a violation of his right, and an allegation that by his wrongful acts plaintiff had been obliged to abandon negotiations instituted for the sale of the rock was sufficient without an averment that plaintiff was exercising the privilege of taking rock from the quarry in such quantities as he saw fit. Arkley *v.* Union Sugar Co., 147 Cal. 195, 81 Pac. 509.

Damages.— Where the lessor in a mining lease evicted the lessee and extracted a large amount of valuable ore from the leased premises, the burden was on the lessor in an action by the lessee for damages for the eviction to prove the amount and value of the ores extracted. Isabella Gold Min. Co. *v.* Glenn, (Colo. 1906) 86 Pac. 349. Where a tenant of mineral lands brought suit for damages for eviction before the expiration of the lease, which provided that the lessor should have eighty per cent of the proceeds of the ore extracted, and no proof was offered from which the court or jury could determine the extent of the injury, but the mill runs during the time the tenant had been at work had amounted to sixty-eight dollars and fifty-three cents only, a judgment of one thousand and forty dollars and sixty cents was held excessive. Hoosac Min., etc., Co. *v.* Donat, 10 Colo. 529, 16 Pac. 157.

8. Jegon *v.* Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389, 395, 19 Wkly. Rep. 365, where it is said: "There are several well known and approved methods of securing a continuous working where it is intended. One method is to take a heavy dead-rent; another, to have an express covenant; and another, to say that so much coal must be raised per annum."

Option to explore or pay cash under contract for lease.— Under a contract giving the exclusive right to enter on the lands and explore for iron ore for six months, and the right to a mining lease for fifty years, upon a consideration of three thousand dollars, defendants agreeing to enter upon the land on a certain day, and begin their explorations and prosecute the work until the six-months' term expired, and that if defendants should perform their part of the contract plaintiffs should release them from their obligation to pay the three thousand dollars, and that such performance of the exploring lease should be considered a payment of the three thousand dollars but if they failed so to do the three thousand dollars should be payable as liquidated damages and as a consideration for the exploring lease, defendants obligated themselves to pay three thousand dollars in cash or in lieu thereof to perform the specified work of exploration and testing the land for iron ore. Hollister *v.* Sweeney, 88 Minn. 100, 92 N. W. 525.

9. Ingle *v.* Bottoms, 160 Ind. 73, 66 N. E. 160.

10. Guth's Appeal, (Pa. 1886) 5 Atl. 728; Koch's Appeal, 93 Pa. St. 434.

11. Brainerd *v.* Arnold, 27 Conn. 617, 627 (involving the obligation to work a quarry under such a provision, the court saying: "The case is analogous to the letting of land upon shares, as it is termed, where it would hardly be claimed that it is optional with the lessee whether he will cultivate the land or not. The very nature of the contract in these cases implies that the property leased is to be cultivated for the mutual benefit of the lessor and lessee"); Benavides *v.* Hunt, 79 Tex. 383, 15 S. W. 396; Shenandoah Land, etc., Co. *v.* Hise, 92 Va. 238, 23 S. E. 303.

12. Price *v.* Black, 126 Iowa 304, 101 N. W. 1056; Conrad *v.* Morehead, 89 N. C. 31; Sharp *v.* Wright, 28 Beav. 150, 54 Eng. Reprint 323.

But a covenant as to the quality of work, as a covenant to work and carry on the mine in a proper and workmanlike manner, in a lease reserving a dead or sleeping rent for the premises, and also providing for a royalty on the amount of product mined, is held not to be a covenant to continue working or one from which a covenant to continue working can be implied. Jegon *v.* Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389, 19 Wkly. Rep. 365. *Compare* Walker *v.* Tucker, 70 Ill. 527.

implied that a lessee will not wilfully or negligently incapacitate himself from taking out more than the minimum quantity of coal stipulated in the lease.[13]

(II) *CHARACTER OF WORK.* The doing of any work necessary to the proper and convenient use of a pit or mine is contemplated by a provision requiring the working of such pit or mine,[14] and the lessee is bound to work in the manner required by his covenant.[15] But where a coal lease simply provides that the

13. Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127.

Provision for setting off excess of one year against deficiency of another.— Under a lease in which the lessee agrees to mine not less than a fixed number of tons per annum during particular periods of the term and providing that in case the quantity mined in any year shall fall short of the proper minimum quantity so named, the lessee should pay as rent for such year a sum equal to the amount he would have been required to pay if he had mined the full minimum quantity required, and providing further that if in any year he should mine more than the minimum quantity designated for that year the excess may be set off against the deficiency of any other year, it was held that the lessee was not bound to work the mine continuously, but only long enough to pay rent or royalties equal to the minimum amount agreed upon. McIntyre *v.* McIntyre Coal Co., 105 N. Y. 264, 11 N. E. 645.

14. Miller *v.* Chester Slate Co., 129 Pa. St. 81, 18 Atl. 565, holding that the words "working the quarry" in a provision for the forfeiture of a lease for not working the quarry for a designated period embraces the removal of water which has flooded the pit; that the making of gangways, the removal of slate and the securing of drainage before mining can be successfully done are a part of the working of the mine as a matter of fact and law.

Actual mining operations required.— A lease, reserving a royalty on the output as rent, and requiring the lessee within a specified time to commence the work of developing the coal by certain work, requires actual mining operations to be commenced within the time specified; and the mere erection and equipment of shafts and mines by which coal might be mined was insufficient. Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452. So under a provision that if the lessee should cease operations for a certain period the lease should be void, a mere entry by the lessee from time to time to clean an engine on the premises after mining operations have been suspended is not a continuance of mining operations such as is required by the provision. Davis *v.* Moss, 38 Pa. St. 346.

Adopting new ways of reaching coal.— Under a provision that the lease shall be treated as abandoned if the lessee shall let the bank lie idle for a year, while the entry or drift to the bank is a means by which to take out the coal and the lessee may use the entry, platform, and private roads leading to it, he may adopt new ways of reaching the coal. Tiley *v.* Moyers, 25 Pa. St. 397.

15. St. Louis Consol. Coal Co. *v.* Schafer, 135 Ill. 210, 25 N. E. 788 [*affirming* 31 Ill. App. 364] (holding that a covenant to "work the mine in a sound, safe and workmanlike manner, so as not to ruin the works," is broken by allowing the mine to fill with water and remain in that condition to the injury of the mine); Marker *v.* Kendrick, 13 C. B. 188, 17 Jur. 44, 22 L. J. C. P. 129, 76 E. C. L. 188 (holding that a lessor of a mine may maintain an action against his lessee for an injury to the reversion by improperly working the mine, notwithstanding the injury is also a breach of the lessee's covenant upon which the lessor might have sued). See also under provisions requiring the lessee to work in a workmanlike manner Wilms *v.* Jess, 94 Ill. 464, 34 Am. Rep. 242; Heckscher *v.* Sheafer, 10 Pa. Cas. 221, 14 Atl. 53, holding that, under a provision that the mine was to be worked in the most workmanlike manner according to the most approved manner of mining, evidence to show what the lessee understood these words to mean, and that after the execution of the lease and before and after sales of the surface lands he authorized the "robbing back" of the pillars believing that the lease called for it, was not admissible.

And a stipulation "to do no injury to the surface," and "not to spoil the coal" is held to be a covenant, the breach of which might subject the lessee to liability for damages, although not to a forfeiture of the lease where the grounds of forfeiture, not including such breach, are specifically provided for in the lease. McKnight *v.* Kreutz, 51 Pa. St. 232.

A contract to leave the mine in good working condition is broken by a removal of the pillars notwithstanding the fact that the coal is exhausted. Randolph *v.* Halden, 44 Iowa 327. See also *infra*, V, C, 2, b, (IV), (B).

Upper and lower mines and seams.— Where certain pits or mines, together with higher and intervening mines, were demised to lessees with the covenant that they should work and carry on the mines with their utmost skill and ability, and the best and most effectual manner, according to the common mode and usual practice of carrying on coal works, etc., it was held that the lessees were entitled to work any of the mines without working all, or all they had commenced to work; that according to the evidence it was a common practice in the district to work a lower seam of coal before working a higher, and that a bill to restrain the lessees from working in these ways would not lie. Ahinger *v.* Ashton, L. R. 17 Eq. 358, 22 Wkly. Rep. 582.

lessor has leased all the coal underlying his land and does not expressly require the sinking of shafts, the lessee is not bound to open the mine by means of a shaft on the lessor's land, but may do so by means of a shaft and drift from other land, provided he uses reasonable diligence.[16] On the other hand, under a lease reserving a royalty on coal taken, neither the lessee[17] nor his assignee, with notice of the contract, will be allowed to use a shaft on the premises for the purpose of mining other lands from which the lessor derives no profits.[18]

(III) *Liability and Excuse For Not Working.* Where a lessee of a coal mine covenants to work the same during the continuance of the lease, he is liable for a breach of covenant if he does not work, notwithstanding it may be beyond his power to work; but if the coal is exhausted he is excused from further performance,[19] and sometimes under the terms of the agreement the lessee is not required to work at a dead loss,[20] or to experiment further than to ascertain that

16. King *v.* Edwards, 32 Ill. App. 558. See also, holding similarly, under provisions not requiring the sinking of shafts under demised premises, Jegan *v.* Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389, 19 Wkly. Rep. 365; Lewis *v.* Fothergill, L. R. 5 Ch. 103; Wheatley *v.* Westminster Brymbo Coal Co., L. R. 9 Eq. 538, 39 L. J. Ch. 175, 22 L. T. Rep. N. S. 7, 18 Wkly. Rep. 162; James *v.* Cochrane, 7 Exch. 170, 21 L. J. Exch. 229 [*affirmed* in 8 Exch. 556, 22 L. J. Exch. 201, 1 Wkly. Rep. 232]; Whalley *v.* Ramage, 10 Wkly. Rep. 315.

Obligation to work out existing shafts.— Under a lease giving a company the exclusive right to test, open, and remove coal from certain lands, and to abandon the same if the coal should become unprofitable to work, and providing that "it is not the intention or expectation" of the company "to enter upon the surface of any of the lands covered by this lease, but to work the coal therefrom through the now existing shafts," the company "reserving the right to use any part of said surface only in case of unforeseen contingencies which may arise, rendering it necessary and profitable to do so" it was held that there was no obligation to open new shafts before exercising its judgment to abandon, but an obligation only to work out the existing shafts. Van Meter *v.* Chicago, etc., Coal Min. Co., 88 Iowa 92, 55 N. W. 106.

17. Peters *v.* Philipps, 63 Iowa 550, 19 N. W. 662.

18. Leavers *v.* Cleary, 75 Ill. 349.

19. Walker *v.* Tucker, 70 Ill. 527 (applying the principle that when the contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract, but where, from the nature of the covenant, it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance becomes impossible from the perishing of the person or thing, that shall excuse such performance); Gowan *v.* Christie, L. R. 2 H. L. Sc. 273. See also Woodward *v.* Mitchell, 140 Ind. 406, 39 N. E. 437; Simpson *v.* Ingleby, 27 L. T. Rep. N. S. 695, 20 Wkly. Rep. 993, where the court refused to enjoin an action of ejectment for breach of covenant because the question whether there was a breach could be determined in that action.

20. Garman *v.* Potts, 135 Pa. St. 506, 19 Atl. 1071 (holding that under a lease which reserves a royalty on the ore mined as rent, and provides that the lessee shall mine a certain amount of ore each year, "provided the iron ore can be advantageously mined," the lessee is not obliged to work the mine when the value of the ore at the mouth of the mine is less than the cost of mining it, since the word "advantageously," so used, is synonymous with "beneficially" or "profitably"); Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144; Jones *v.* Shears, 7 C. & P. 346, 32 E. C. L. 649, under an agreement by a tenant to work the mine so long as it was "fairly workable."

Fixed minimum quantity dependent on continued existence of merchantable coal.— In Big Stone Gap Iron Co. *v.* Olinger, 104 Va. 261, 51 S. E. 355, it was held that under a lease requiring the lessee to mine a minimum number of tons of ore a month, provided there was and continued to be that much merchantable ore on the land, capable of being mined at a reasonable cost, the burden is on the lessee to show that there was not on the land merchantable ore capable of being mined at a reasonable cost, in order to excuse his default, and that an instruction limiting the jury to a consideration of the testimony of expert witnesses as to the merchantableness of the ore was properly refused. But see also *infra*, IV, C, 2, k, (VIII), note 89.

Remediable accident.— Under a covenant in a coal lease to pay a certain proportion of the value of nine hundred weight of coal to be raised, unless prevented by unavoidable accident from working the pit, a plea that defendant was prevented by unavoidable accident will not defeat a recovery on the covenant where it appears that the accident might have been remedied although at a greater expense than the value of the coal which was to be raised. Morris *v.* Smith, 3 Dougl. 279, 20 E. C. L. 188.

Agreement to pay royalty on merchantable coal see *infra*, IV, C, 2, k.

there are no coal mines under the lands such as could or ought to be worked or as was customary or usual to work or would have defrayed the necessary expenses of working.[21]

(IV) *Forfeiture For Breach*[22] — (A) *In General.* As in the case of other leases, mining leases often contain provisions under which a forfeiture may occur or the lessor may reënter for a breach of conditions, terms, or covenants by the lessee relating to the working of the mines, as a failure to do work or conclude certain developments within a time limited, or to prosecute work continuously or with reasonable diligence.[23] But the rule that a proviso for forfeiture or reëntry upon breach of a covenant or condition must be inserted in the lease is also applied,[24] and if the instrument expresses the particular causes for which a forfeiture may be claimed it cannot be inferred that any other grounds of forfeiture existed.[25] On the other hand under contracts which bind

21. Hanson *v.* Boothman, 13 East 22, where lessees of land and of coal mines covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished, or in default to pay so much to the lessor as arbitrators should award, and the lessees gave a bond to the lessor, conditioned to perform the award which was made, and in an action on the bond it was held a sufficient answer that the lessees had proceeded to sink for coal, etc., in the words of the covenant, but that none could be found.

22. Forfeiture of lease generally see Landlord and Tenant, 24 Cyc. 1348 *et seq.*

23. *Colorado.*— Montrozona Gold Min. Co. *v.* Thatcher, 19 Colo. App. 371, 75 Pac. 595; Clear Creek Leasing, etc., Co. *v.* Comstock Gold-Silver Min., etc., Co., 17 Colo. App. 480, 68 Pac. 1060.

Illinois.— St. Louis Consol. Coal Co. *v.* Schaefer, 135 Ill. 210, 25 N. E. 788 [*affirming* 31 Ill. App. 364]; Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288.

Indiana.— Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452 (where demand and notice was held unnecessary under the lease); Woodward *v.* Mitchell, 140 Ind. 406, 39 N. E. 437 (holding that, under a provision that if the enterprise should be abandoned for a certain time the lease should become null and void, the lease is forfeited by a failure to begin operations within twelve months, over the contention that the enterprise could not be abandoned unless it had been begun, the intention of the parties being that if the operations were not entered upon it would be an abandonment of the enterprise; and also that an action in which it is alleged that the lease has become void, and prayed that it would be so declared, is as an action to quiet title and not one for the cancellation of the lease).

Massachusetts.— Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.

Missouri.— Brooks *v.* Gaffin, 196 Mo. 351, 95 S. W. 418; Brooks *v.* Gaffin, 192 Mo. 228, 90 S. W. 808 (in which cases it is held that where the lease contains a provision for forfeiture for a breach of an essential condition ejectment will lie for the possession of the premises, and that the rule in this state is that a right of reëntry need not be expressly reserved, but is a necessary incident to the condition, and if the condition is broken the right of possession immediately arises); Kirk *v.* Mattier, 140 Mo. 23, 41 S. W. 252 (holding that under a provision that a failure to perform the requirements and conditions should end the lease, and that thereupon the lessor might reënter, the lessor has a right to reenter or to bring ejectment against the lessee without demand on the latter's failure to sink a shaft and work the mine as required by the lease).

Pennsylvania.— Davis *v.* Moss, 38 Pa. St. 346; Moyers *v.* Tiley, 32 Pa. St. 267, holding that a provision in the lease of a coal bank that the lessee should put the coal bank in good working order for the rent of the first year and thereafter pay a certain sum on every bushel of coal taken from the bank, and that if the said coal bank should stand when it would yield coal, for the term of one year, that should be taken as an abandonment of the lease, did not impose a forfeiture for the standing of the coal bank the first year.

England.— Kinsman *v.* Jackson, 42 L. T. Rep. N. S. 558, 28 Wkly. Rep. 601.

See 34 Cent. Dig. tit. "Mines and Minerals," § 189.

Non-payment of royalty otherwise provided for.— A forfeiture, under a clause requiring the mining to be conducted in a fair and equitable manner, cannot arise from a failure to so develop the mines as to produce the minimum, the non-payment of the minimum being otherwise provided for. West Ridge Coal Co. *v.* Von Storch, 5 Lack. Leg. N. (Pa.) 189.

24. Vanatta *v.* Brewer, 32 N. J. Eq. 268 (under a lease which provided that exploration should commence within two months from the date of the lease, and that the lessee should have twelve months from such date to explore the premises); Hodgkinson *v.* Crowe, L. R. 10 Ch. 622, 44 L. J. Ch. 680, 33 L. T. Rep. N. S. 388, 23 Wkly. Rep. 885. *Compare* Genet *v.* Delaware, etc., Canal Co., 2 N. Y. App. Div. 491, 37 N. Y. Suppl. 1087.

25. McKnight *v.* Kreutz, 51 Pa. St. 232, where it was held that a stipulation in a lease "to do no injury to the surface of said land, and not to spoil the coal," constituted a covenant the breach of which might subject the lessee to liability for damages but

the lessee to test within a certain time and upon discovery to work the mines within a certain time or within a reasonable time, as the consideration upon which the lease is granted, and in which no rent or other compensation is reserved except that depending upon the result of the work and mining, it is held that the performance of the lessee's obligations is a condition upon which the lease depends and therefore the failure to perform the condition works a forfeiture of the lease;[26] that it is the duty of the lessee to exercise the mining rights conferred in a reasonable time and manner if no time is fixed in the instrument for such performance,[27] and upon a failure to so discharge his duty a court of equity may set aside the lease.[28]

(B) *Waiver of Forfeiture.* A forfeiture of a mining lease for failure of the lessee to perform the stipulations, covenants, or conditions as to working the mine may be waived,[29] as by receiving rent after knowledge of the acts upon which a forfeiture is claimed,[30] or by permitting a continuance of the prosecution of the enterprise and the expending of money therein by the lessee, after knowledge of the breach of a condition upon which the lease might have been forfeited.[31]

not to a forfeiture of the lease, the breach of such covenant not being included as one of the causes of forfeiture provided for.

26. Oliver *v.* Goetz, 125 Mo. 370, 28 S. W. 441; Petroleum Co. *v.* Coal, etc., Co., 89 Tenn. 381, 18 S. W. 65; Benavides *v.* Hunt, 79 Tex. 383, 15 S. W. 396, where it is considered necessary in such a case that the lessor should show a demand that the lessee go forward with the work before a right to a forfeiture would exist. See also Polk County Nat. Bank *v.* Foote Commercial Phosphate Co., 68 Fed. 845, 16 C. C. A. 23, where, however, it was held that a clause providing that the lessee should erect a phosphate plant of a certain daily capacity within a certain time, pay to the lessor a certain royalty per ton on the phosphate mine, and that on completion of the plant a certain monthly payment should begin, was not a forfeiture bearing condition but a covenant. But see Barker *v.* Dale, 2 Fed. Cas. No. 988, holding that the time fixed in a mining lease within which the lessee must commence operations is of the essence of the contract so far as to enable the lessor after its expiration to maintain an action against the lessee for the non-performance of his stipulation, but not so as to divest his interest under the lease.

For covenants and conditions generally see LANDLORD AND TENANT, 24 Cyc. 920, 1348. And for non-applicability of forfeiture clause to implied covenants see LANDLORD AND TENANT, 24 Cyc. 1349 note 8.

27. Maxwell *v.* Todd, 112 N. C. 677, 16 S. E. 926; Conrad *v.* Morehead, 89 N. C. 31; Rohrer Iron Co. *v.* Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Bluestone Coal Co. *v.* Bell, 38 W. Va. 297, 18 S. E. 493.

28. Shenandoah Land, etc., Co. *v.* Hise, 92 Va. 238, 23 S. E. 303. See also Price *v.* Nicholas, 19 Fed. Cas. No. 11,415, 4 Hughes 616, where a lessee was allowed a fixed period in which to commence operation, in default of which the lease should be canceled.

29. Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944, holding that a forfeiture arising from a failure to produce a required output is waived by a subsequent assent to the assignment of the lease.

Question for jury.— Where a lease of mining ground provides for a forfeiture if the lessee fails to work for three weeks, and there is a cessation of work for thirteen or fourteen months, after which work is resumed, the question whether the lessor consented to the cessation and allowed the lessee to retain his rights is for the jury. Wesling *v.* Kroll, 78 Wis. 636, 47 N. W. 943.

Waiver of other independent stipulations. — A waiver by the lessor of another stipulation in the lease is not a waiver of the forfeiture on account of a breach of the stipulation requiring the work to be done in a workmanlike manner. Murray *v.* Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.

30. Verdolite Co. *v.* Richards, 7 North. Co. Rep. (Pa.) 113, where the lessee removed mineral not included in his lease, and the lessor accepted rent with knowledge thereof.

Continuing breach.— Where the ground of forfeiture was the continuing failure of the lessee to work the mine in a workmanlike manner and support the ground so that it would not cave and defendant's breach of covenant in this respect continued up to the time a temporary injunction restraining further operations was issued, the fact that the lessor accepted rent or royalties due under the lease after notice of forfeiture and after suit brought to recover the property was held not to constitute a waiver of the forfeiture as the breach of the covenant was a continuing one which is not waived by acceptance of rent. Big Six Development Co. *v.* Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. N. S. 332.

31. Benavides *v.* Hunt, 79 Tex. 383, 15 S. W. 396; Presidio Min. Co. *v.* Bullis, 68 Tex. 581, 4 S. W. 860.

But mere indulgence or silent acquiescence upon the part of the lessor will not be construed as a waiver of a breach of the condition which under the terms of the lease en-

k. Rents[32] and Royalties—(i) *In General.* The terms "rent" and "royalty," as a result of usage and custom, are frequently, although not technically, accurately employed interchangeably, but "royalty" is the more appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from a mine.[33] A stipulation in a coal lease for the repayment of an improvement fund by "an additional rent of ten cents per ton upon all coal taken out" is a provision for the repayment of a loan simply, and the amount due thereunder is not rent properly so called.[34] Under a lease providing for the mining of and the payment of royalties on a certain amount of coal of a specified size and quality, it has been held that the lessee was not obliged to take coal of an inferior size and quality, but that he had the right to take such coal if he chose, in which case he was bound to pay royalty on it the same as upon other coal.[35] The receipt of royalty admits the validity of the lease.[36]

(ii) *Amount*—(a) *In General.* The amount of the rents or royalties payable by the lessee is fixed by the terms of the lease and depends upon the proper construction thereof.[37] Where one agrees to pay a royalty for all coal in the seam which could be reasonably mined, and at the expiration of the lease to pay for all coal in the seam whether mined or not, he is only liable for such coal remaining in the mine as could be mined safely.[38] The measure of damages for the lessee's failure to mine coal which he should have mined under the lease is the difference between the stipulated royalty on such coal and its value in the mine.[39] A lessor, by accepting less royalty than he is entitled to, and receipting therefor in full, waives his right to the larger royalty;[40] but such waiver during the lessor's lifetime does not upon his death operate as a waiver by his representatives in accepting the same rate as deceased in the absence of knowledge on their part that the changed conditions entitled them to larger royalties.[41]

(b) *Basis For Computation of Royalty.* Royalty is a certain percentage or proportion specifically stated, or on a graduated scale, according to the value of the ore, and based on either the "net proceeds," "smelter returns," "mill returns," or "returns evidenced by the certificate of the United States assay office," or otherwise, as the parties may agree upon. The term "net proceeds" has been held to mean the gross mill or smelter value less the charges for freight and for treatment of the ore, but without deducting the expenses of working and developing the mine.[42] "Smelter returns" are the returns from the ore less the

titles the lessor to reënter. Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452.

32. Dead or sleeping rent see *infra*, IV, C, 2, k, (x) text and note 18.

33. Reynolds *v.* Hanna, 55 Fed. 783 [*reversed* on other grounds in 59 Fed. 923, 8 C. C. A. 370].

34. Miners' Bank *v.* Heilner, 47 Pa. St. 452.

35. Genet *v.* Delaware, etc., Canal Co., 163 N. Y. 173, 57 N. E. 297 [*modifying* 14 N. Y. App. Div. 177, 43 N. Y. Suppl. 589]. See also Genet *v.* Delaware, etc., Canal Co., 13 N. Y. Suppl. 394, 58 Hun 492, 12 N. Y. Suppl. 572.

36. Burkhard *v.* Mitchell, 16 Colo. 376, 26 Pac. 657.

37. See Wolfing *v.* Ralston, 61 Cal. 288 (holding that where the lessee of a mine agreed to pay to the lessor every week twenty per cent of all the gold taken therefrom, and that if, during any week, gold more than sufficient to pay the back expenses of working should be taken, then the lessee should pay the lessor one third of the gold taken, after paying working expenses, the lessor was entitled to twenty per cent at all events, and one third of all gold in addition, when the circumstances detailed in the lease existed); Wonsetler *v.* Andrews, 58 Ohio St. 551, 51 N. E. 168, holding that in an action to recover the sum to be paid for the right to enter upon plaintiff's land to explore for coal, and to mine and remove the same, money paid by defendant as annual rent for the land prior to the commencement of mining operations, and intended by the parties as compensation for the postponement of such operations, will not be credited upon royalty for the coal actually removed).

38. Gaines *v.* Virginia, etc., Coal Co., 124 Ala. 394, 27 So. 477.

39. Lyon *v.* Miller, 24 Pa. St. 392.

40. Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 38 Atl. 491.

41. Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 38 Atl. 491.

42. Maloney *v.* Love, 11 Colo. App. 288, 52 Pac. 1029, where by the terms of the lease the royalties were to be paid "on the net proceeds from all smelter and freight charges and mill returns." See also Yank *v.* Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St.

smelter charges.[43] A royalty on "mine run" coal means the coal as it comes from the mine.[44] A stipulated royalty on coal sold for a certain price per ton, "at the breaker," means the actual selling price at the place of delivery less the cost of selling including commissions, and the freight.[45] A covenant to pay a certain royalty "for all screened coal" must be construed with reference to the state of things existing at the time the lease was made, and by "screened coal" is meant such coal as passes over a screen then in use.[46] If the size of the mesh of the screen to be used is set forth, the contract of course governs.[47] If the parties contemplate payment of royalties for only such coal as shall be marketed, the lessee is not liable for royalty on coal consumed under the boilers in carrying on the mining operations.[48] A provision in a lease of a deposit of bituminous rock, and of liquid asphaltum that the lessee shall pay a certain royalty per ton on liquid asphalt applies only to the asphalt taken from the liquid deposit.[49] When the lease provides for computing the royalty either by weight or by measure, the method uniformly adopted by the parties should be used in a final settlement.[50] A lease providing for the payment of a royalty on coal mined applies to coal mined in an entry as well as in rooms.[51] Where the royalty is according to or upon a graduated scale according to different sizes of coal mined, based on a total minimum number of tons mined, the different sizes making up the whole number should be paid for at the rate fixed in the agreement for each size mentioned.[52] Where a lessee agrees to pay "ten cents for each ton of 2,240 pounds of merchantable screened black coal, and ten cents for each ton of merchantable screened bituminous coal," he is obligated to pay ten cents on each ton of two thousand two hundred and forty pounds of bituminous coal and not on a ton of two thousand pounds.[53] Under a lease providing for the payment of royalty on the lump coal, merchantable coal is contemplated, and the lessee is authorized to

Rep. 522, where a substantially similar meaning was given to the term "net proceeds" in a mine working contract.

43. Frank *v.* Bauer, 19 Colo. App. 445, 75 Pac. 930, holding that where a deed to mining property was placed in escrow, it being agreed that thirty-five per cent royalty on "mint or smelter returns" on ores removed by the grantee should be paid to the owners and applied on the price, charges for hauling, freight, and switching, should not be deducted from the value of the ore on which the royalty was to be computed.

44. Hardin *v.* Thompson, 57 S. W. 12, 22 Ky. L. Rep. 285.

45. Shoemaker *v.* Mt. Lookout Coal Co., 177 Pa. St. 405, 35 Atl. 731.

46. Williams *v.* Summers, 45 Ind. 532.

47. Drake *v.* Black Diamond Coal, etc., Co., 89 S. W. 545, 28 Ky. L. Rep. 533, 28 L. R. A. 533 (holding that where a mining lease requires the lessee to use a bar screen of certain mesh and provides for the payment of royalty on all coal that does not pass through such screen, the lessors are entitled to have the coal pass over such screen, and the lessees cannot substitute a shaker screen of a larger mesh); Johnston *v.* Filer, 201 Pa. St. 60, 50 Atl. 940 (holding that where the lessee agrees to pay a certain sum for each ton of merchantable screened coal, "the screen used not to exceed one and one half inches, and the screenings to belong to [the lessee] free of charge," whatever passes through the one and one-half inch screen belongs to the lessee, and the fact that he rescreens it over a smaller screen, and that it passes over a smaller mesh, does not make him liable for royalty thereon).

48. Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 38 Atl. 491; Hoyt *v.* Kingston Coal Co., 10 Kulp (Pa.) 15.

49. Higgins *v.* California Petroleum, etc., Co., 109 Cal. 304, 41 Pac. 1087.

50. Reiner *v.* Cambria Steel Co., 28 Pa. Co. Ct. 13, holding that where a lease provided that all coal should be mined out in sixteen years, that the royalty should be twenty cents for each one hundred bushels, said bushels to weigh and contain eighty pounds; that all coal should be weighed or measured, and that all coal remaining unmined at the expiration of the term should be measured and paid for at twenty cents per one hundred bushels, and it was shown that a bushel of mined coal is of larger volume than its equivalent in weight of unmined coal, and that during the running of the lease coal was always measured and never weighed, the coal remaining unmined at the expiration of the term should be paid for by computing it in bushels, each containing in solid coal the equivalent of a bushel of mined or broken coal.

51. Jack *v.* Forsyth, 194 Pa. St. 227, 45 Atl. 50.

52. Schooley *v.* Butler Mine Co., 175 Pa. St. 261, 34 Atl. 639.

53. Johnston *v.* Filer, 201 Pa. St. 60, 50 Atl. 940.

change the screens so as to produce such coal.[54] Where a lease provides that the lessee should pay a certain price per ton for all coal mined of a certain size and half price for a smaller size and the lessee breaks up the large coal, he becomes liable for a royalty at the full rate for all such coal.[55] Where a contract for royalty on ore provides that the amount shall be determined by railroad shipping receipts, the burden is on defendants, seeking to discredit such receipts on an accounting, to justify the deductions claimed.[56] In coal leases there is usually no royalty paid on coal used on the premises in working the engines of the lessee.[57] An agreement to pay a sum by way of rent charge or royalty, in respect of minerals which may be raised or obtained by, from, or out of any mine or mines, pit or pits, in, upon, or under the property granted, does not entitle the person in whose favor the rent charge or royalty is created to receive payment in respect of minerals brought up at the mouth of pits upon, but not procured under the property granted.[58] Technical terms used in designating the basis of computation are presumed to be used in their technical sense,[59] but an interpretation by the parties may become binding on them.[60] Where a lease provided that the lessee should pay a royalty of one tenth on the product of the mine, "delivered at the mine or shaft in shipping order and accessible to wagons, or to pay the cost price of mining and delivery as above stated," the cost of machinery to sift and wash the ore does not enter into the cost of mining contemplated by the parties as the basis of the royalty.[61] Where the lessee is required to pay a sum for each ton of phosphate taken from the land, the same to be determined by the market price of the phosphate, afterward adopts a new method, by which the mineral is divided into two classes, selling at different prices, the royalty is to be computed by taking the combined values of the two products.[62] Where the lessor of a zinc mine has collected his royalty monthly from his lessees, to his satisfaction, knowing the quality and amount of matter taken from the mine, his administrator cannot, after his decease, recover royalty for stuff removed from the mine during his lifetime, which was treated at the time as waste, and is shown to be of no value.[63]

(c) *Leases Fixing Minimum Royalty.* It is very usual for mining leases on a royalty basis to fix a minimum amount to be mined or a minimum royalty to be paid, and in such case the amount so fixed must be paid, although the royalty at

54. Carr *v.* Whitebreast Fuel Co., 88 Iowa 136, 55 N. W. 205.

55. Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 38 Atl. 491 [*followed* in Hoyd *v.* Kingston Coal Co., 10 Kulp (Pa.) 15].

56. Sharp *v.* Behr, 136 Fed. 795, holding the evidence insufficient to establish that deductions made by defendant for dirt were justified.

57. Senhouse *v.* Harris, 5 L. T. Rep. N. S. 635, holding that where the lessee of the A mine took a lease of the B mine adjoining, from plaintiff, by which he was entitled to get the coal from the B mine at a certain rent, and also to be at liberty to bring the coal got in the A mine to the surface by way of "outstroke" through the B mine on payment of one and one-half dollars per ton for outstrokes, watercourse rent, and shaft rent, and no rent was to be paid for any coal got from the B mine which should be used or consumed on or for any engine employed in working or carrying on the mines demised, no rent was payable for coal used in working the engine of the B mine when employed in bringing up the coal from the A mine, such engine being at the same time used for keeping the B mine free from water.

58. Morgan *v.* Davey, Cab. & E. 114.

59. Crawford *v.* Oman, etc., Stone Co., 34 S. C. 90, 12 S. E. 929, 12 L. R. A. 375, holding that where a lease of a stone quarry provides for one rate of compensation for "dimension stone" shipped, and another lower rate for all other stone, it must be conclusively presumed that the parties to the lease used the term "dimension stone," in its technical sense, and as it would ordinarily be understood by quarrymen.

60. Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538, holding that where the parties have for years interpreted a specified royalty per ton, "miner's weight," as meaning "a ton of prepared coal," the lessors cannot demand an accounting based on the weight of the material as brought from the mines.

61. Nunnelly *v.* Warner Iron Co., 94 Tenn. 282, 29 S. W. 124.

62. Harlan *v.* Central Phosphate Co., (Tenn. Ch. App. 1901) 62 S. W. 614, holding further that where one class of phosphate so produced is crushed and put in bags, which was not required under the method in use when the lease was executed, the lessor is not required to have a portion of such additional expense deducted from the royalties.

63. Steer *v.* Dwyer, 104 Mo. App. 523, 79 S. W. 738.

the agreed rate on what is actually mined would be less,[64] such royalty being considered liquidated damages and not a penalty.[65] But if the aggregate royalties are more than the minimum so fixed the latter amount is to be applied on the aggregate royalties and not paid in addition thereto.[66] Where a lease fixes a minimum amount to be mined, but it is the expectation of both parties that a larger amount will be taken out, an agreement is implied that the lessee will not wilfully or negligently incapacitate himself from taking out more than the minimum quantity,[67] and the lessor's receipt of the minimum royalty provided for,

64. *Indiana.*— Watson Coal, etc., Co. *v.* Casteel, 73 Ind. 296.

Iowa.— Flynn *v.* White Breast Coal, etc., Co., 72 Iowa 738, 32 N. W. 471.

Kansas.— Swan *v.* Brown, 8 Kan. App. 505, 56 Pac. 141.

Kentucky.— Render *v.* McHenry Coal Co., 14 S. W. 678, 12 Ky. L. Rep. 571.

New York.— McIntyre *v.* McIntyre Coal Co., 105 N. Y. 264, 11 N. E. 645 [*affirming* 40 Hun 638].

Pennsylvania.— Fisher *v.* Milliken, 8 Pa. St. 111, 49 Am. Dec. 497.

United States.— Central Trust Co. *v.* Berwind-White Coal Co., 95 Fed. 391.

England.— Mellers *v.* Devonshire, 16 Beav. 252, 22 L. J. Ch. 310, 1 Wkly. Rep. 44, 51 Eng. Reprint 775.

See 34 Cent. Dig. tit. "Mines and Minerals," § 193.

Payment and renewal of lease as concurrent obligations.— Where a lease of asphalt land provided that if by July 1, 1900, the lessees should not have paid royalty on thirty-four thousand tons of asphalt at a fixed rate, they should pay to the lessor on that day royalty equal to the difference between that paid and that payable on thirty-four thousand tons, and if the lessees had performed all the conditions in the lease the lessor covenanted to renew the lease at the lessees' option, the conditions of renewal and payment were concurrent, and the lessor, having refused to renew, was not entitled to recover the payment of the difference as provided for. Warner *v.* Cochrane, 128 Fed. 553, 63 C. C. A. 207.

Provision for "surplus payments."—Where a coal lease provided that the lessee should mine each year a certain amount of coal, or pay a royalty on said quantity, and it was further stipulated that if the payments should be more than sufficient to pay for the coal actually mined in any year, the "surplus payments" were to apply on any future years' mining that might be in excess of said quantity, in an action to recover the annual royalty on the minimum amount to be mined, an averment in the answer that the "surplus payments" made in pursuance of the lease were more than sufficient to pay for the unmined coal remaining on the premises showed no defense. Tod *v.* Stambaugh, 37 Ohio St. 469.

Lien for royalty.— Where a lease of coal mines provided for a certain royalty on each ton of coal, with the proviso that the lessee should pay to the lessors three thousand dollars annually as a minimum rental, whether the royalties amounted to that much or not, five months' rental being unpaid at the time a receiver was appointed and the works were closed, the lessors are entitled to a first lien for five twelfths of the three thousand dollars. Coaldale Min., etc., Co. *v.* Clark, 43 W. Va. 84, 27 S. E. 294.

Option to mine or not.— Where a person leased land on which were beds of iron ore for such a term as would enable him to remove the ore, and agreed to mine all ore where the vein was fifteen inches thick, it being optional with him whether to mine or not where it was less, and agreed to mine at least eight thousand tons per annum and to pay twenty cents for each ton mined, he was bound to pay at least one thousand six hundred dollars each year, until he exercised his option, and so informed the lessor, and his liability was not affected by the fact that after the agreement was made, the lessee being desirous to delay mining, the lessor executed a bond conditioned to refund, if, when the lessee should have exhausted the ore, it should be found to be less than the quantity for which the royalty should have been paid, the time for the performance of the condition of the bond not having arrived. Gilmore *v.* Ontario Iron Co., 86 N. Y. 455 [*affirming* 22 Hun 391].

65. *Illinois.*— St. Louis Consol. Coal Co. *v.* Peers, 150 Ill. 344, 37 N. E. 937.

Iowa.— Flynn *v.* White Breast Coal, etc., Co., 72 Iowa 738, 32 N. W. 471.

Kansas.—Swan *v.* Brown, 8 Kan. App. 505, 56 Pac. 141.

Missouri.— Clark *v.* Midland Blast Furnace Co., 21 Mo. App. 58.

New York.— McIntyre *v.* McIntyre Coal Co., 105 N. Y. 264, 11 N. E. 645; Gilmore *v.* Ontario Iron Co., 86 N. Y. 455.

Pennsylvania.— Lehigh, etc., Coal Co. *v.* Wright, 177 Pa. St. 387, 35 Atl. 919; Powell *v.* Burroughs, 54 Pa. St. 329.

Tennessee.— Coal Creek Min., etc., Co. *v.* Tennessee Coal, etc., Co., 106 Tenn. 651, 62 S. W. 162.

United States.— Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215; Central Appalachian Co. *v.* Buchanan, 73 Fed. 1006, 20 C. C. A. 33.

See 34 Cent. Dig. tit. "Mines and Minerals," § 193.

66. Watson Coal, etc., Co. *v.* Casteel, 73 Ind. 296; Reed *v.* Beck, 66 Iowa 21, 23 N. W. 159.

67. Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127 [*followed* in Genet *v.* Delaware, etc., Canal

without any knowledge that an excess of mineral over that on which the royalty is paid has been taken out, does not estop him from subsequently collecting royalties on the excess.[68] Whether the minimum royalty should be paid each and every year regardless of the amount paid in other years, or whether the payments shall be such that the average yearly royalty shall be at least the amount fixed, depends upon the intentions of the parties as evidenced by the terms of the lease,[69] and if the lease shows that minimum average royalties were intended royalties paid in excess thereof are available to the lessee to offset minimum royalties in subsequent years when the product does not reach the minimum.[70] Where a lessee who has paid each year the minimum royalty required by the lease, and at the end of his term has paid more royalty than would have been required by the coal actually mined, at the royalty per ton provided, except for the minimum royalty provision afterward, without going out of possession, takes a new lease, he cannot set off as against royalties under the new lease the overpayment under the first lease.[71]

(D) *Objections to Account.* A party may be precluded from objecting to an erroneous payment or crediting of royalties where he acquiesces therein after knowledge of the mistake;[72] but a party who has not the means of verifying an

Co., 2 N. Y. App. Div. 491, 37 N. Y. Suppl. 1087].

68. Hoyt *v.* Kingston Coal Co., 212 Pa. St. 205, 61 Atl. 885 [*following* Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 38 Atl. 491].

69. See Render *v.* McHenry Coal Co., 14 S. W. 678, 12 Ky. L. Rep. 571 (holding the lease under consideration to have intended minimum average royalties); Chase *v.* Knickerbocker Phosphate Co., 32 N. Y. App. Div. 400, 53 N. Y. Suppl. 220 (holding that where a lease of phosphate lands provided both for royalties to the lessor payable bimonthly and a payment of one hundred and twenty-five dollars monthly, to be credited on royalty account, the meaning was that each period of two months should be taken by itself, so that any excess of royalties therefor should be paid to the lessor, but, if they fell short of the fixed payments the latter should be considered the rent for that period); Oglesby *v.* Hughes, 96 Va. 115, 30 S. E. 439 (holding the lease in question to contemplate an average amount for each year); Bishop *v.* Goodwin, 14 L. J. Exch. 290, 14 M. & W. 260 (holding that under the lease in question the excess of royalty occurring in one quarter was not to be set off against the deficiency in a previous quarter, and deducted from the sum payable to the lessor in respect of the latter quarter).

70. Render *v.* McHenry Coal Co., 14 S. W. 678, 12 Ky. L. Rep. 571; McIntyre *v.* McIntyre Coal Co., 105 N. Y. 264, 11 N. E. 645 [*affirming* 40 Hun 638]; Lehigh, etc., Coal Co. *v.* Wright, 15 Pa. Co. Ct. 433, 7 Kulp 434 [*affirmed* in 177 Pa. St. 387, 35 Atl. 919]. *Contra*, Smith *v.* Godfrey, (Tenn. Ch. App. 1898) 48 S. W. 303, holding that where by the terms of the lease the lessees were to pay not less than two hundred dollars for any year, but payment of deficits was to be in the nature of advanced royalties, and to be deducted from other royalties as they became due, whenever they exceeded the annual two hundred dollars, the intent being to pay royalties on only the marble quarried, unless it averaged less than two hundred dollars per year, the lessees could reimburse themselves for deficits paid out of future surpluses, but not out of prior ones.

71. Denniston *v.* Haddock, 200 Pa. St. 426, 50 Atl. 197.

72. Sharp *v.* Behr, 136 Fed. 795, holding that where a payment on account of royalties for ore shipped, made by mistake, was allowed to go unquestioned by defendants for nearly a year after the mistake was discovered, and in a subsequent statement plaintiff was again credited with such royalty, although at a reduced rate, and a payment was made, such acts constituted a confirmation of such royalty, precluding defendants from thereafter claiming that plaintiff was not entitled to such royalty, and that where plaintiff was credited by defendants with royalties on ore mined from two farms, and such credits, together with some cash, were permitted to remain in defendant's possession as a loan, on which interest was paid on semiannual balances, and on one occasion the account was reduced by payment of one thousand dollars, defendants were not thereafter entitled to repudiate the transaction on the ground that the royalties were not justified.

Circumstances not precluding objection.— Plaintiff being entitled by contract to a royalty of one dollar a ton on ore from certain mines, defendant wrote him, with reference to certain ore, that it would be necessary to reduce the royalty, and suggested fifty cents a ton. Plaintiff did not reply thereto, nor to that part of a subsequent account of royalties in which he was only credited at fifty cents a ton for this ore; but two and one-half months thereafter, when a check was sent in accordance with the statement, he refused to accept it in full, claiming royalty at the contract rate. It was held that plaintiff's failure to so object to the reduction was in-

account of royalties does not, by failing to object thereto, waive his right to subsequently claim that it was not proper.[73]

(III) *TIME FROM WHICH RENT OR ROYALTY PAYABLE.* Whether or not any rent or royalty is to be paid before the land is actually occupied and mining operations are commenced by the lessee depends upon the intentions of the parties as evidenced by the terms of the lease.[74]

(IV) *MODE AND SUFFICIENCY OF PAYMENT.* Where a lease provided for the payment of semiannual rentals direct to the lessor, or by depositing the same in a specified bank, subject to the lessor's order, a payment within the proper time by deposit in the bank to the order of the lessor, which was accepted by the bank, and the amount thereof credited to the lessor subject to his order, was sufficient, regardless of whether the deposit was made in legal tender.[75] Where the lessee of a coal mine is to pay rent to the lessor in coal at specified prices and there is no special agreement as to the condition in which the coal is to be delivered, it is the duty of the lessee to deliver it in a marketable condition, and if it is not so delivered the expense necessarily incurred by the lessor in preparing it for market may be charged by him to the lessee.[76]

(V) *TIME OF PAYMENT.* Where a lessee contracts to pay a certain sum yearly, if the royalties fail to equal such sum, such payment should be made annually and not postponed to the end of the term.[77] Under a lease providing that the lessee shall pay a royalty of not less than twelve hundred dollars per year, and if no coal is mined he shall pay one hundred dollars per month, the guaranteed royalty is payable monthly, not annually.[78] Where a lease of a stone quarry provides that payment shall be made when the stone is "shipped," no recovery of royalty can be had for stone ready for shipment, but not shipped.[79] A covenant in a mining lease for the payment of an additional sum out of the first six months' profits applies to the first six months in which a profit is made, and in computing such profits, the expenses of a period prior to the commencement of the six months cannot be deducted from the earnings of that period.[80]

(VI) *JOINT LEASE BY ADJOINING LANDOWNERS.* Where adjoining landowners severally owning a definite part of a mine make a joint lease reserving a royalty to be paid jointly to the lessors upon the mineral taken out, each lessor is entitled to share equally in the royalty thus reserved, regardless of what portion of the mine the mineral is taken from;[81] and where one of such lessors conveys his separate part of the demised premises to the lessee, the other lessor is thereafter entitled to receive from the lessee a portion of the royalty proportionate to

sufficient to preclude him from subsequently claiming royalty at the contract rate. Sharp *v.* Behr, 136 Fed. 795. And see generally ACCOUNTS AND ACCOUNTING, 6 Cyc. 351; ACCORD AND SATISFACTION, 1 Cyc. 305.

73. Sharp *v.* Behr, 136 Fed. 795, holding that where plaintiff was entitled to royalties on ore shipped to defendants, the amount of the shipments to be determined by the railroad shipping receipts, and defendants' statements of shipments were without any specification, except as to one shipment, and plaintiff had no figures with which to verify the account, the record of shipments being all kept at defendants' place of business, plaintiff's failure to object to the account rendered was not a waiver of his right to subsequently claim that deductions made by defendants were improper.

74. Reed *v.* Beck, 66 Iowa 21, 23 N. W. 159 (holding that no royalty or rent became due under the lease under consideration until after the shaft was opened and mining commenced); Richardson *v.* Downs, 16 S. W. 84, 13 Ky. L. Rep. 34 (holding that where the lease provides that the lessees shall begin work within a year and pay a certain annual rental so long as they continue to occupy any part of the land, no obligation to pay rent arises until some part of the land is actually occupied).

75. La Fayette Gas Co. *v.* Kelsay, 164 Ind. 563, 74 N. E. 7.

76. Audenried *v.* Woodward, 28 N. J. L. 265.

77. Bamford *v.* Lehigh Zinc, etc., Co., 33 Fed. 677.

78. St. Louis Consol. Coal Co. *v.* Peers, 150 Ill. 344, 37 N. E. 937 [*affirming* 39 Ill. App. 453].

79. Crawford *v.* Oman, etc., Stone Co., 34 S. C. 90, 12 S. E. 929, 12 L. R. A. 375, holding the provision not to be unreasonable.

80. Laing *v.* Holmes, 93 Mo. App. 231.

81. Higgins *v.* California Petroleum, etc., Co., 109 Cal. 304, 41 Pac. 1087.

the comparative value of his part of the demised premises, although the mining is done exclusively in the land conveyed to the lessee.[82]

(VII) *LIEN FOR RENT.* In the absence of a statute or an agreement between the parties the landlord has no lien for rent under a mining lease.[83] And where the lessor does not reserve a lien for the royalty and none is given by law, the lessor is confined to an action at law for its recovery and cannot maintain a bill in equity to enforce a lien.[84] The lease may, however, provide for a lien on the coal or ore mined by the lessee to secure the payment of royalty or rent.[85] Such a lien is not, as between the parties, waived or destroyed by another clause in the lease allowing the shipping of ore to the customary market in another state before payment of the royalty,[86] and the lessor may recover in an action of tort, if the lessee not only fails to pay royalties, but sells the ore without preserving the lien.[87] Where a landlord has a lien for coal rent, both on the loose personal property and also on the proceeds of the leasehold estate, he will be limited to the latter in order to allow the miners and laborers to be paid from the former, to which only their lien extends.[88]

(VIII) *ACTIONS FOR RENT.* Actions for the recovery of rents and royalties under mining leases are in general subject to the rules governing actions for the recovery of rent under ordinary leases.[89] Where the rent or royalty reserved in

82. Higgins *v.* California Petroleum, etc., Co., 109 Cal. 304, 41 Pac. 1087, holding that the value of the property of the lessor who did not convey to the lessee would be presumed to be one half, where the royalty was previously equally divided between the lessors.

83. Miners' Bank *v.* Heilner, 47 Pa. St. 452 [*distinguishing* and *doubting* Spangler's Appeal, 30 Pa. St. 277 note; Wood's Appeal, 30 Pa. St. 274, both of which held that reservation of a right of reëntry to secure the arrears of rent confers a lien upon the proceeds of the sale of the tenant's estate].

Landlord's lien in general see LANDLORD AND TENANT, 24 Cyc. 1244 *et seq.*

84. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 143 Ala. 623, 39 So. 336.

85. Iron Duke Mine *v.* Braastad, 112 Mich. 79, 70 N. W. 414; Miners' Bank *v.* Heilner, 47 Pa. St. 452; Spangler's Appeal, 30 Pa. St. 277 note.

Where the lease provides that all machinery placed on the land shall become a part of the realty, and not be removed until all rents and royalties are paid up, it gives the lessor a lien thereon for unpaid rents and royalties. Pendill *v.* Maas, 97 Mich. 215, 56 N. W. 597.

86. Iron Duke Mine *v.* Braastad, 112 Mich. 79, 70 N. W. 414.

87. Iron Duke Mine *v.* Braastad, 112 Mich. 79, 70 N. W. 414.

88. Farmers' Bank Appeal, 1 Walk. (Pa.) 33.

89. See LANDLORD AND TENANT, 24 Cyc. 1195 *et seq.*

Right to sue.— Although a lease perpetual to the exhaustion of the coal has been granted, the lessor may sue directly for royalty unpaid by one who, with the consent of both lessor and lessee, has been allowed to mine under an agreement to pay the same royalty as the lessee. Watt *v.* Dininny, 141 Pa. St. 22, 21 Atl. 519.

Burden of proof.— Under a lease of a coal seam providing that, should such seam prove faulty or unmerchantable, rendering it impracticable to mine or dispose of coal in reasonable quantity, the lessee shall have the right to abandon it, and remove all improvements, and shall forfeit all royalty paid; in order to recover rent, the lessor need not prove that it was practicable to mine merchantable coal "in reasonable quantity" from the seam, this being matter of defense. Wilson *v.* Beech Creek Cannel Coal Co., 161 Pa. St. 499, 29 Atl. 100. But to entitle a lessor to recover substantial damages for failure to operate under a mining lease and pay royalties, he must show the fact that merchantable coal existed on the land, and that it could be mined with profit, after deducting the royalty. Colorado Fuel, etc., Co. *v.* Pryor, 25 Colo. 540, 57 Pac. 51. Under a lease giving the exclusive right to test land for coal and remove the same, if discovered in sufficient quantities and quality, prospecting to be commenced within a certain time, and upon failure to commence mining within a certain time, the lessees to pay an agreed sum annually; in an action for such sums the burden is on the lessees to show that minable coal did not exist on such land. Cook *v.* Andrews, 36 Ohio St. 174.

Admissibility of evidence.— In an action for rent under a lease providing that a certain amount of ore shall be taken out each year, if the ore can be "advantageously" mined, the lessee may prove that the ore could not be mined advantageously, why it could not be done, the cost of mining and putting the ore on the bank, and that when so placed it was not merchantable. And a receipt for rent paid under the lease before the time for which suit is brought which shows that the lessee had then advanced to the lessor, in addition to the amount then due, more than the amount sued for, is also admissible. Gar-

the leasing of mineral property is dependent on the amount of mineral taken, a bill in equity will lie to compel an accounting by the operators or lessees of the mines.[90] Damages for an excessive use of the timber upon the land leased, it has been held, are not recoverable in an action for rent.[91] The complaint in an action for rent or royalty should aver the existence of a lease,[92] the amount of rent claimed,[93] and such other facts as constitute the cause of action.[94] It need not, however, negative matters of defense.[95] The tenant will not be permitted to set up that his landlord had no title when the tenancy commenced;[96] but he may show that the interest of the landlord as it then existed has terminated.[97] Defendant in an action for rent cannot recover damages resulting from an unsuccessful attempt by the lessor to enforce a forfeiture.[98]

(IX) *FORFEITURE AND REËNTRY FOR NON-PAYMENT.* As a general rule mining leases contain a provision for forfeiture in case of non-payment of rents or royalties.[99] But forfeiture will not be declared for a simple refusal to pay

man *v.* Potts, 135 Pa. St. 506, 19 Atl. 1071. In an action for unpaid royalties it is improper to permit comparison between the output of the mine in question and other mines, especially when all the material conditions and methods are not established as identical. Missouri, etc., Coal Co. *v.* Reichert, 119 Ill. App. 148.

Findings.— Where the evidence shows that by an agreed change in the methods of preparing coal used at the time of the execution of the lease the amount of coal on which a larger royalty was paid was greatly diminished and the amount of small coal and waste paying a lower royalty was increased, the court should find the proportion of coal mined which was subject to a royalty under the former method as well as that under the new method. Myers *v.* Consumers' Coal Co., 212 Pa. St. 193, 61 Atl. 825.

90. Swearingen *v.* Steers, 49 W. Va. 312, 38 S. E. 510.

91. Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

92. Central Trust Co. *v.* Berwind-White Coal Co., 95 Fed. 391, holding that an allegation that payments had become due and payable under the terms of a lease is a sufficient allegation that the lease is still in force.

93. Cook *v.* Decker, 63 Mo. 328, holding that, although in an action for rent the exact amount due must be stated in the complaint, yet, if the lease is of mineral lands, a statement that the tenants have extracted thirty-two thousand pounds of ore, and that one fourth of it is due plaintiff is sufficient.

94. St. Louis Consol. Coal Co. *v.* Peers, 150 Ill. 344, 37 N. E. 937 (holding that in an action to recover the minimum royalty under a mining lease providing for the same whether the mine is worked or not, the complaint need not aver that there is a workable vein in the leased premises, the lease containing no warranty on that point); Boydston *v.* Meacham, 28 Mo. App. 494 (holding that a petition which alleges that plaintiff leased coal land to one C for so much per bushel on all coal mined by C or his assigns; that C sold half his interest in the lease to defendant, who had notice of the terms of the lease; and that C and defendant took out a certain quantity of coal, states a cause of action against defendant).

95. McDowell *v.* Hendrix, 67 Ind. 513, holding that abandonment need not be negatived in the complaint.

96. See LANDLORD AND TENANT, 24 Cyc. 934 *et seq.*

97. Robinson *v.* Troup Min. Co., 55 Mo. App. 662.

98. Tiley *v.* Moyers, 43 Pa. St. 404, holding that where ejectment had been brought by the lessors to try the question of forfeiture under a provision of the lease which forbade the tenant to let the mine stand idle for a year, in which they failed, damages therefor could not be allowed by the jury in an action for rent; but for an estrepement brought by them which interrupted mining operations, damages were properly allowed and assessed by the jury under the charge of the court.

99. See Beedle *v.* Hilldale Min. Co., 204 Pa. St. 184, 53 Atl. 764; Walnut Run Coal Co. *v.* Knight, 201 Pa. St. 23, 50 Atl. 288; Hoch *v.* Bass, 126 Pa. St. 13, 17 Atl. 512.

Provision for arbitration.— The lessees cannot stay forfeiture after notice is given by appeal to a provision in the lease allowing certain questions to be submitted to arbitration. Acme Coal Co. *v.* Stroud, 5 Lack. Leg. N. (Pa.) 169.

Provision for repayment of the cost price to lessee.— Where a lease provides that the lessor may call for a reconveyance of the mine, upon repaying the cost price, if defendant fail to pay the royalty for ninety days after written demand, and the consideration named in the agreement was one dollar when the actual cost to the lessee was three thousand five hundred dollars, lessor must pay the lessee the latter amount before he is entitled to reconveyance. Sharp *v.* Behr, 117 Fed. 864, 136 Fed. 795.

Grantees of the reversion may take advantage of the condition under 1 N. J. Gen. St. p. 880, §§ 135, 136. Robinson *v.* Boys, 61 N. J. L. 179, 38 Atl. 813.

Purchasers of the lease are bound to take notice of the conditions for forfeiture on non-payment of royalty therein. Comegys *v.* Russell, 175 Pa. St. 166, 34 Atl. 657.

rent, where there is no open act of unmistakable hostility to the landlord's title, and where no express condition of forfeiture is contained in the lease.[1] At common law a demand for the rent or royalty due is necessary before the lessor can lawfully reënter.[2] A demand as a condition to the assertion of forfeiture may be waived by the lease;[3] and a demand for possession is not necessary where the lessors are in possession.[4] Of course forfeiture for non-payment of rent or royalties can be waived as well as if based on other violations of the lease,[5] and the question of waiver is one for the jury.[6] Where the lessor has asserted a forfeiture he cannot hold the lessee for further rent under the lease.[7] An assignment for the benefit of creditors made by the lessees after default will not deprive the lessor of the right to assert a forfeiture.[8] Equity may in a proper case give relief against a forfeiture.[9] Payments made by a lessee merely to evade a forfeiture, and not as rent or royalty, cannot be recovered.[10]

(x) *RELEASE OF LESSEE FROM LIABILITY.* Mining leases frequently contain a provision for the release of the lessee from payment of rents or royalties in case the mineral becomes exhausted or is found not to exist in paying quantities, and in such case the happening of such contingencies releases the lessee.[11] Even in

Forfeiture of leases generally see LANDLORD AND TENANT, 24 Cyc. 1347.

1. Gale *v.* Oil Run Petroleum Co., 6 W. Va. 200.

2. Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100, holding that the same necessity existed under Howell St. § 8925. But see Robinson *v.* Boys, 61 N. J. L. 179, 38 Atl. 813, in which it was said that a demand for rent and an acceptance of it would waive the forfeiture.

A demand for a greater sum than is due amounts to nothing. West Ridge Coal Co. *v.* Von Storch, 5 Lack. Leg. N. (Pa.) 189.

Putting another tenant in without demand or notice to the lessee is not a proper way to enforce a forfeiture. Kreutz *v.* McKnight, 53 Pa. St. 319; Wilcox *v.* Cartright, 1 Lack. Leg. Rec. (Pa.) 130.

3. Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452; Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100.

4. Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452.

5. Little Rock Granite Co. *v.* Shall, 59 Ark. 405, 27 S. W. 562; Wakefield *v.* Sunday Lake Min. Co., 85 Mich. 605, 49 N. W. 135 (holding that where the lessor, after giving notice, tells the lessee that if he pays the royalties within a certain time it would be all right, and such royalties are paid, there is no forfeiture); Robinson *v.* Boys, 61 N. J. L. 179, 38 Atl. 813; Wheeling *v.* Phillips, 10 Pa. Super. Ct. 634 (holding that waiver might result from a suit for rent in arrears).

Mere receipt of rent previously due will not waive a forfeiture which has been asserted. Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100.

When the lessor has hindered the lessee in the performance of the covenant to pay rent he cannot assert a forfeiture. Young *v.* Ellis, 91 Va. 297, 21 S. E. 480, holding that it is proper to give the lessee of a mine an extension of time in which to pay the rent, when it appears that he has frequently attempted to pay it, and the lessor has intentionally eluded him.

6. Cleveland, etc., Mineral Land Co. *v.* Ross, 135 Mo. 101, 36 S. W. 216, holding that it is error to direct a verdict on conflicting evidence, in a suit to recover possession of leased property on account of failure to pay royalties or work the property.

7. Sharp *v.* Behr, 136 Fed. 795; Jones *v.* Carter, 15 M. & W. 718.

8. Potter *v.* Gilbert, 177 Pa. St. 159, 35 Atl. 597, 35 L. R. A. 580.

9. Sunday Lake Min. Co. *v.* Wakefield, 72 Wis. 204, 39 N. W. 136, holding that where a court of equity is asked to relieve against a forfeiture of a mining lease for non-payment of rent, allegations in the answer that the tenants had failed to furnish monthly statements of the amount of ore mined as required by the lease; that they had wrongfully cut timber on the land; that they were insolvent, and creditors were seizing the mining apparatus, a part of which was fixtures, thus injuring the mines; and that the property was in danger of being destroyed or injured by disaffected and unpaid workmen, are all proper to be considered in determining the equities of the case.

10. Bloomfield Coal, etc., Co. *v.* Tidrick, 99 Iowa 83, 68 N. W. 570.

11. Stark *v.* Scott, 4 Luz. Leg. Reg. (Pa.) 49.

Unavoidable accident or circumstances beyond lessee's control.— A stipulation in a coal lease that the lessees shall mine and ship each year as much coal as will produce a certain amount at the rent designated "unless prevented from doing so by any unavoidable accident, or occurrences beyond their control," releases the lessees from liability for rent when the coal on the premises becomes exhausted. Bannan *v.* Graeff, 186 Pa. St. 648, 40 Atl. 805.

Construction of lease.— Where P agreed to pay T and others twenty dollars per month for all minerals underlying their land, which formed part of the mine called and known as the "P Warrior Coal Mine"; also for all timber growing thereon suitable for mining purposes, and a right of way to the mine,

the absence of such a provision it is usually held that a lessee on a royalty basis is released from payments if the mineral becomes exhausted,[12] or is found not to exist in paying quantities,[13] although the lease provides that he shall take out

wherever required, only "so long as the said mine is worked, and to an advantage," and P worked the contiguous land, which, together with the T tract, formed the P Warrior coal mine, he was liable for the rent, as the contract imposed the obligation of the monthly payments so long as the P Warrior mine was worked to advantage, and not merely during the time that the T tract was so worked. Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15.

Retention of possession.— Where a lease provided for a minimum production and a minimum rental on a royalty basis, and that the term should end when the workable coal was exhausted, but also entitled the lessee to use a part of the demised premises in connection with the mining of coal on adjoining land, the lessee could not escape the payment of the minimum rental on the ground of the exhaustion of coal, so long as he retained possession of the demised premises for any purpose under the lease. Lennox *v.* Vandalia Coal Co., 66 Mo. App. 560. Under a lease of coal lands providing a royalty or rent not to be less than a certain sum, but stipulating that such payments need not be made if no coal was found and the lease was abandoned, an inability to mine sufficient coal to make the royalty equal to the minimum rent was no defense to an action on the lease for the rent, so long as the lessees continued in possession. McDowell *v.* Hendrix, 67 Ind. 513.

Notice of termination.— Where a lease of coal land provides that it may be terminated by the lessee by notice, if it becomes impracticable to mine coal from the land, a notice reciting that the lessees terminate the contract "as provided in the lease" is sufficient notice that it had been found impracticable to continue the mining. Jenkins *v.* Clyde Coal Co., 82 Iowa 618, 48 N. W. 970.

Failure to surrender at time provided.— Where lessees agree to prospect, and that if sufficient ore be found the royalty shall not be less than a specified sum, and that failure to surrender by a certain day shall be an agreement that there is sufficient ore to pay such royalty, failure to surrender is not conclusive of the sufficiency of the ore but casts upon the lessees the burden of proving the contrary. McCahan *v.* Wharton, 121 Pa. St. 424, 15 Atl. 615.

Provision for faults in strata.— Where a coal lease provided that a certain number of tons of coal should be mined each year and for the payment of a royalty thereon, whether mined or not, unless prevented by unforeseen faults in the strata, the lessor was entitled to payment where the lessee undertook to reach the coal through an adjoining mine and was prevented by faults of the strata therein. Troxell *v.* Anderson Coal Min. Co., 213 Pa. St. 475, 62 Atl. 1083.

12. *Alabama.*— Gaines *v.* Virginia, etc., Coal Co., 124 Ala. 394, 27 So. 477.

Illinois.— Walker *v.* Tucker, 70 Ill. 527.

Iowa.— Carr *v.* Whitebreast Fuel Co., 88 Iowa 136, 55 N. W. 205.

Michigan.— Hewitt Iron Min. Co. *v.* Dessau Co., 129 Mich. 590, 89 N. W. 365.

Pennsylvania.— Boyer *v.* Fulmer, 176 Pa. St. 282, 35 Atl. 235 [*distinguishing* Timlin *v.* Brown, 158 Pa. St. 606, 28 Atl. 236]; Bannan *v.* Miller, 19 Pa. Co. Ct. 244 [*affirmed* in 186 Pa. St. 648, 40 Atl. 805].

Washington.—Adams *v.* Washington Brick, etc., Co., 38 Wash. 243, 80 Pac. 446.

United States.— Ridgely *v.* Conewago Iron Co., 53 Fed. 988.

England.— Smith *v.* Morris, 2 Bro. Ch. 311, 29 Eng. Reprint 171.

See 34 Cent. Dig. tit. "Mines and Minerals," § 194.

13. *Alabama.*— Brooks *v.* Cook, 135 Ala. 219, 34 So. 960.

Indiana.— McDowell *v.* Hendrix, 67 Ind. 513.

Michigan.— Blake *v.* Lobb, 110 Mich. 608, 68 N. W. 427; Gribben *v.* Atkinson, 64 Mich. 651, 31 N. W. 570.

Minnesota.— Diamond Iron Min. Co. *v.* Buckeye Iron Min. Co., 70 Minn. 500, 73 N. W. 507.

Ohio.— Cook *v.* Andrews, 36 Ohio St. 174.

Pennsylvania.— Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144 [*followed* in McCahan *v.* Wharton, 121 Pa. St. 424, 15 Atl. 615].

See 34 Cent. Dig. tit. "Mines and Minerals," § 194.

But *compare* Beatie *v.* Rocky Branch Coal Co., 56 Mo. App. 221, holding the lessee not relieved because the coal was so situated that it could not be mined except at unusual or extraordinary cost.

The burden of proof as to non-existence of the mineral is on the lessee. Scioto Fire Brick Co. *v.* Pond, 38 Ohio St. 65; Cook *v.* Andrews, 36 Ohio St. 174.

Where a mining lease contains an absolute and unqualified covenant of the lessee to operate the quarry as it then exists, and provides that he shall pay a certain amount as a minimum annual royalty, he cannot evade payment of the royalty by showing that the operation of the quarry would not benefit him or would not be as profitable as he expected when he made the contract. Skillen *v.* Logan, 21 Pa. Super. Ct. 106, holding that where the lease contained such provisions, and there was also a provision that the lessee should have the right to construct another switch on the leased premises, but the railroad company refused to put in a new switch or to extend the switch that was in unless the lessor would cancel a contract by which a special rate for switching cars was agreed upon, which the lessor refused to do, these facts did not relieve the lessee from liability for the royalty.

and pay royalties on a certain amount each year,[14] or that the royalties shall not be less than a fixed amount per year,[15] for by such an undertaking the lessee contracts merely for promptitude and thoroughness in taking out existing mineral.[16] But where the lessee retains possession he is not relieved of liability for the fixed rental, or royalty based on minimum production.[17] Where the lease provides for the payment of rent irrespective of product and whether the mine is worked or not, which is termed a dead or sleeping rent,[18] the lessee cannot be relieved from payment of the rent because the mineral proves not to be worth the expense of working,[19] because mineral is not found in paying quantities,[20] or even because the mine supposed to exist develops no mineral at all,[21] and such rent is payable even after the mine is exhausted.[22] The lessor can recover no rent where he takes possession of the leased property and prevents the lessee from working;[23] but where rent is reserved as an equivalent for the coal actually taken from the land and not as an equivalent for the possession of the tract, an entry by the lessor and taking coal from the tract without interrupting the lessee's actual mining operations is not such an eviction as will suspend the rent.[24] The destruction of a lime kiln on the lands does not relieve the lessee from liability to pay rent for stone quarried, although the kiln was the principal inducement and the princi-

14. Carr *v.* Whitebreast Fuel Co., 88 Iowa 136, 55 N. W. 205; Bannan *v.* Miller, 19 Pa. Co. Ct. 244 [*affirmed* in 186 Pa. St. 648, 40 Atl. 805]. But *compare* Wharton *v.* Stoutenburgh, 46 N. J. L. 151.

15. Adams *v.* Washington Brick, etc., Co., 38 Wash. 243, 80 Pac. 446.

16. Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215 [*affirming* 33 Fed. 677]; Ridgely *v.* Conewago Iron Co., 53 Fed. 988.

17. McDowell *v.* Hendrix, 67 Ind. 513; Lennox *v.* Vandalia Coal Co., 66 Mo. App. 560; Clark *v.* Midland Blast Furnace Co., 21 Mo. App. 58; Timlin *v.* Brown, 158 Pa. St. 606, 28 Atl. 236. But *compare* Carr *v.* Whitebreast Fuel Co., 88 Iowa 136, 55 N. W. 205, holding that where the lessee has no right to surrender the premises until the available coal is exhausted, it is not required to surrender them to entitle it to exemption from payment of royalty on coal not mined therefrom.

Use of land for other than mining purposes.— Where a fixed amount is to be paid by the lessee for the mining privileges and other uses of the land, he remains liable for the rent after the mineral is exhausted if he continues to use the land for other purposes. Lennox *v.* Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242, so holding where the lease provided that defendant should pay plaintiff the sum of fifty dollars per month for mining coal on plaintiff's land, and for hoisting coal mined from adjoining land through the shaft thereon, and that defendant should continue operations until all merchantable coal on plaintiff's land had been exhausted, and defendant continued to use the shaft for hoisting coal from other lands after the exhaustion of the merchantable supply on plaintiff's land. See also Beatie *v.* Rocky Branch Coal Co., 56 Mo. App. 221; Bestwick *v.* Ormsby Coal Co., 129 Pa. St. 592, 18 Atl. 538.

18. McIntyre *v.* McIntyre Coal Co., 105 N. Y. 264, 11 N. E. 645 [*affirming* 40 Hun 638]; Jegon *v.* Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389, 19 Wkly. Rep. 365; Wheatley *v.* Westminster Brymbo Coal Co., L. R. 9 Eq. 538, 39 L. J. Ch. 175, 22 L. T. Rep. N. S. 7, 18 Wkly. Rep. 162.

19. Phillips *v.* Jones, 3 Jur. 242, 9 Sim. 519, 16 Eng. Ch. 519, 59 Eng. Reprint 458 [*distinguishing* Smith *v.* Morris, 2 Bro. Ch. 311, 29 Eng. Reprint 171]; Ridgway *v.* Sneyd, Kay 627, 69 Eng. Reprint 266.

20. Palmer *v.* Wallbridge, 15 Can. Sup. Ct. 650 [*affirming* 14 Ont. App. 460], he not having terminated the lease under a proviso therein giving him the right to do so if ore was not found in paying quantities.

21. Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215 [*affirming* 33 Fed. 677]; Ridgely *v.* Conewago Iron Co., 53 Fed. 988; Jowett *v.* Spencer, 1 Exch. 647, 12 L. J. Exch. 367.

22. Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; Lehigh, etc., Coal Co. *v.* Wright, 177 Pa. St. 387, 35 Atl. 919 [*affirming* 15 Pa. Co. Ct. 433, 7 Kulp 434] (holding that where the lease provides for an annual minimum rental payable whether coal is mined or not, and for a royalty to average not less than such rental, the lessee is bound to pay the minimum rental so long as he remains in possession, although the royalties already paid amount to more than the royalty at the agreed rate on all the coal taken out or remaining in place); Rex *v.* Bedworth, 8 East 387, 9 Rev. Rep. 476; Bute *v.* Thompson, 14 L. J. Exch. 95, 13 M. & W. 487.

23. Pendill *v.* Eells, 67 Mich. 657, 35 N. W. 754.

24. Tiley *v.* Moyers, 43 Pa. St. 404, holding, however, that such entry was a breach of the lessor's implied covenant for quiet possession and that the lessee could set off the damages resulting therefrom against the claim for rent accrued under the lease.

pal source of profits.[25] Under a lease requiring the extraction of a certain yearly amount of coal unless prevented by accident or casualty or circumstances not under the lessee's control, a strike among miners or the railroad's inability to supply cars are circumstances beyond the lessee's control, and a defense to the payment of a royalty upon the amount to be removed.[26] Where a lease provides that the lessees are to have the premises until all the "merchantable" coal is exhausted, and are to pay a certain royalty, they cannot refuse to pay the royalty because the coal is rusty and otherwise inferior, if by careful cleaning and preparation the defects can be removed, although because of them the mining will not be profitable;[27] but where the contract as construed by the parties required only such coal to be gotten out as could be shipped and sold and the lessee was not liable to pay royalty on coal which it was unable to ship from circumstances not under its control, the lessee was not bound to ship or pay royalty on coal of such inferior quality that to clean it so as to make it salable as good coal in ordinary conditions of the market would cost more than it would bring.[28] Where the assignee of a lease of a colliery and of miners' houses, who had assumed payment of the rent of the miners' houses, was prevented from mining coal by causes beyond his control, and accordingly, as provided by the lease, he was relieved of paying rent for the colliery, he remained liable for the rent of the miners' houses.[29] Where the development of two certain coal veins is manifestly necessary for the production of the minimum amount required by a lease, they should both be developed, and inability as to one of them only excuses the lessees to that extent.[30] The lessor's failure to comply with independent covenants is no defense to an action for minimum royalties becoming due prior to a termination of the lease,[31] nor are the facts that the land was subject to a mortgage prior to the execution of the lease, that the lessor's estate is insolvent, and that the mortgagee is threatening to foreclose defenses to an action for the rent.[32] A lessee under a void mining lease who has done no mining is not liable for the rent reserved, although he has had possession of the land.[33]

l. Rights and Liabilities as to Third Persons. The landlord is not liable for injuries committed by the tenant in the operation of a mine, unless the acts complained of are done under his direction.[34] But he is liable for acts in which he has participated.[35] The lessee of a mere right to mine or quarry stone cannot, as

25. Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446.

26. Givens *v.* Providence Coal Co., 60 S. W. 304, 22 Ky. L. Rep. 1217.

27. Acme Coal Co. *v.* Stroud, 5 Lack. Leg. N. (Pa.) 169.

28. Givens *v.* Providence Coal Co., 60 S. W. 304, 22 Ky. L. Rep. 1217, holding also that the liability of the lessee to ship the coal would depend upon the market at the time, and not upon what it was when the contract was made.

29. Big Black Creek Imp. Co. *v.* Kremmerer, 162 Pa. St. 422, 29 Atl. 739, the covenants to mine and to pay rent for the houses not being dependent upon each other, and the only exemption from liability being for coal not actually mined for such causes.

30. West Ridge Coal Co. *v.* Von Storch, 5 Lack. Leg. N. (Pa.) 189.

31. Central Appalachian Co. *v.* Buchanan, 73 Fed. 1006, 20 C. C. A. 33.

32. McDowell *v.* Hendrix, 67 Ind. 513.

33. Capper *v.* Sibley, 65 Iowa 754, 23 N. W. 153 [*distinguishing* Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164; Franklin *v.* Twogood, 18 Iowa 515].

34. Offerman *v.* Starr, 2 Pa. St. 394, 44 Am. Dec. 211, holding that the lessor was not liable for injuries to a house upon the surface occasioned by the working of the mine by his tenant, although he had reserved in the lease a right to visit and examine the manner in which the business should be carried on in the mine, and to resume the possession should the tenant refuse to furnish statements of the amount taken out, or pay the rent.

It is not within the scope of the general authority of the manager of a mining corporation to instigate or request a trespass to be committed by the lessee of his corporation so as to make the trespass the act of the corporation, and thereby make it liable as a wilful trespasser. Orphan Belle Min., etc., Co. *v.* Pinto Min. Co., (Colo. 1906) 85 Pac. 323. But see Blair Iron, etc., Co. *v.* Lloyd, 1 Walk. (Pa.) 158.

35. Dundas *v.* Muhlenberg, 35 Pa. St. 351 (holding that the lessors of a coal vein were liable as co-trespassers for the acts of their tenant in mining coal in the land of an adjoining owner, where they had leased the particular vein of coal, authorized the sinking

owner of all the stone upon the premises, maintain an action to recover the value of stone unlawfully quarried and taken from the land by a third person.[36] But where the lessee is under a covenant to remove waste and spoil at the end of his term he has such a property in the spoil bank as will confer on him a right of action against a stranger who removes it.[37] The lessee of a coal mine, who takes subject to a lease of the right to obtain alum in the coal wastes upon the same premises, cannot remove pillars which support the roof of the coal workings, although such removal is essential to a thorough working of the coal, where by so doing he would render the mining of the alum impossible.[38] One who leases mining property with full knowledge of a prior mortgage thereon, which is contested by the lessor, takes subject to all rights of the mortgagee; and, where the validity of the mortgage is sustained, he is not entitled to claim the proceeds of the mines while operated by a receiver appointed in a foreclosure suit, as against the mortgagee, on the ground that he expended money to render them productive.[39]

3. Construction and Operation of Oil, Gas, and Salt Leases[40] — a. In General. A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases, in that owing to the peculiar nature of the mineral and the danger of loss to the owner from drainage by surrounding wells such leases are construed most strongly in favor of the lessor.[41] In an oil or gas lease, partly printed and partly written, an ambiguity arising out of inconsistency of the printed with the written parts will be controlled by the written parts.[42] Some of the statutes require all oil or gas leases and licenses to be filed for record, and provide that no such lease or license shall be of any effect or validity until so recorded, except as between the parties, or unless the parties claiming thereunder shall be in actual and open possession.[43]

b. Term of Lease.[44] A lease to operate on lands for natural gas and oil for a specified term of years, and for as much longer a period as oil or gas is produced or found in paying quantities, expires at the end of the stipulated term, unless within that time oil or gas is produced in paying quantities,[45] and at the

of the slope by which it was reached, and contributed to its expense believing that it would not extend beyond their own line, and the tenant had by means of this slope taken out coal from the adjoining property and paid for the greater part of it to his lessors a certain rent for each ton of coal mined by him); Little Schuylkill Nav., etc., Co. *v.* Tamaqua, 1 Walk. (Pa.) 468 (holding that where the owner superintended the mining of coal by his tenant he was liable for repairs to the highway rendered necessary by a cave-in caused by the work).

36. Baker *v.* Hart, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60.

37. Robinson *v.* Milne, 53 L. J. Ch. 1070.

38. Glasgow *v.* Hurlet, etc., Alum Co., 3 H. L. Cas. 25, 10 Eng. Reprint 10.

39. G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510 [*affirming* 89 Fed. 449].

40. Property in oil and gas see *supra*, IV, A, 1.

41. Venture Oil Co. *v.* Fretts, 152 Pa. St. 451, 35 Atl. 732; Brown *v.* Spillman, 155 U. S. 665, 15 S. Ct. 245, 39 L. ed. 304 [*reversing* 45 Fed. 291]; Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

42. Ft. Orange Oil Co. *v.* Wichman, 17 Ohio Cir. Ct. 57, 9 Ohio Cir. Dec. 650.

43. Allegheny Oil Co. *v.* Snyder, 106 Fed. 764, 45 C. C. A. 604, holding that a lease which by its terms gave the lessee the sole right for a term of years to drill and operate for oil and gas upon the lands described, although not witnessed as required by statute to constitute a legal lease, was yet good as a license, and entitled to record as such, and also good in equity, as an agreement to make a lease, and that when duly recorded the record was notice to third persons of all rights of the lessee thereunder. And see Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236, holding that the holders of an unrecorded oil lease, in possession, who have made valuable improvements on the land, can successfully defend ejectment by the holder of a subsequent lease taken and recorded before the first lessee went into possession and began operations on the land, unless the subsequent lessee acquired his title in good faith and without knowledge of their rights.

44. Holding over see *infra*, IV, C, 3, m, (I).

45. *Indiana.*— Indiana Natural Gas, etc., Co. *v.* Beales, (App. 1905) 74 N. E. 551; Indiana Natural Gas, etc., Co. *v.* Pierce, 34 Ind. App. 523, 68 N. E. 691, 73 N. E. 194; Chaney *v.* Ohio, etc., Oil Co., 32 Ind. App. 193, 69 N. E. 477.

New York.— Eaton *v.* Allegany Gas Co.,

expiration of the fixed period, the tenancy becomes one at will, not from year to year, and may be ended at any time by either party, provided oil is not afterward discovered in paying quantities;[46] but it has been held that where a lease is for a definite term, after which it is to continue as much longer as oil and gas is found in paying quantities, it is not terminated by the fact that the use of a well for the production of oil or gas is stopped as not yielding paying quantities, but the lessee must notify the lessor of such fact and that he has terminated and surrendered the lease.[47] The question of whether a gas or oil well is a source of profit may be readily determined by deducting the cost of production from the

122 N. Y. 416, 25 N. E. 981 [*reversing* 42 Hun 61], holding that such an instrument does not create an absolute lease for the stipulated period, but the term and the lessee's possession are limited to the time within such period while he is engaged in good faith in his search or explorations.

Ohio.— Brown *v.* Fowler, 65 Ohio St. 507, 63 N. E. 76; Northwestern Ohio Natural Gas Co. *v.* Tiffin, 59 Ohio St. 420, 54 N. E. 77; Herrington *v.* Wood, 6 Ohio Cir. Ct. 326, 3 Ohio Cir. Dec. 475. See also Griner *v.* Ohio Oil Co., 26 Ohio Cir. Ct. 521, holding that where an oil lease recites that "the terms of this grant shall not exceed twelve years," among other conditions, the whole lease terminated at the end of such period. See, however, Blair *v.* Northwest Ohio Natural Gas Co., 12 Ohio Cir. Ct. 78, 5 Ohio Cir. Dec. 619, where a lease of oil or gas was for a term of five years and as much longer as oil or gas should be found in paying quantities, and a well was drilled which produced gas in paying quantities for a number of years, and upon failure of such well it was held that the lessee was entitled to a reasonable time to drill at other locations on the premises for the purpose of finding oil or gas.

Pennsylvania.—Cassell *v.* Crothers, 193 Pa. St. 359, 44 Atl. 446; Shellar *v.* Shivers, 171 Pa. St. 569, 33 Atl. 95; Balfour *v.* Russell, 167 Pa. St. 287, 31 Atl. 570; Western Pennsylvania Gas Co. *v.* George, 161 Pa. St. 47, 28 Atl. 1004; Miller *v.* Balfour, 138 Pa. St. 183, 22 Atl. 86; Smith *v.* Hickman, 14 Pa. Super. Ct. 46; Consumer's Heating Co. *v.* American Land Co., 31 Pittsb. Leg. J. N. S. 24.

West Virginia.—Lowther Oil Co. *v.* Guffey, 52 W. Va. 88, 43 S. E. 101.

See also 34 Cent. Dig. tit. "Mines and Minerals," § 200.

A gas and oil lease is not void for uncertainty because its duration extends "so long as gas or oil may be found in paying quantities." Dickey *v.* Coffeyville Vitrified Brick, etc., Co., 69 Kan. 106, 76 Pac. 398.

An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfilment of any of its covenants on the part of the lessee, creates a mere right of entry at will which may be terminated by the lessor at any time before it is executed by the lessee. Trees *v.* Eclipse Oil Co., 47 W. Va. 107, 34 S. E. 933; Eclipse Oil Co. *v.* South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923.

46. Cassell *v.* Crothers, 193 Pa. St. 359, 44 Atl. 446; Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213. See also Guffey Petroleum Co. *v.* Oliver, (Tex. 1904) 79 S. W. 884, holding that a lease of land for oil or gas development, terminable at the will of the lessee on the payment of two dollars, is terminable also at the will of the lessor on tender or payment of the value of all labor done and services rendered by the lessee. But see Brown *v.* Fowler, 65 Ohio St. 507, 63 N. E. 76.

In Indiana by statute (Burns Rev. St. (1894) § 7089), where no time is fixed for the running of a lease it is a tenancy from year to year, and the tenant may terminate it at the end of any year by abandoning the premises. Diamond Plate Glass Co. *v.* Echelbarger, 24 Ind. App. 124, 55 N. E. 233.

The phrase "found or produced in paying quantities" means paying quantities to the lessee or operator. If a well, being down, pays a profit, even a small one, over the operating expenses, it is producing in "paying quantities," although it may never repay its cost, and the operation as a whole may result in a loss. Young *v.* Forest Oil Co., 194 Pa. St. 243, 45 Atl. 121.

"Gas" and "oil" differentiated.— Where a lease provides that if oil is not found in paying quantities within four years the lease shall be void, and no oil is produced within that time, a judgment entered by confession on the lease at the expiration of that time is good, although gas is found in the land. "Gas" and "oil" are not synonymous terms. Truby *v.* Palmer, 3 Pa. Cas. 156, 6 Atl. 74.

Discovery after expiration of lease.— A lease which expires by its own limitations upon a certain date, unless oil or gas has been found in paying quantities, is not continued by the finding of oil or gas after such date by another person operating under a different lease. Thomas *v.* Hukill, 34 W. Va. 385, 12 S. E. 522. And in case the lease provides that it shall terminate upon the cessation of the use of an oil or gas well, and it is in fact terminated for such cause, it is not revived by a subsequent discovery of oil or gas in the well in sufficient quantities for use and by the use thereof by the grantor. Shenk *v.* Stahl, 35 Ind. App. 493, 74 N. E. 538.

47. Double *v.* Union Heat, etc., Co., 172 Pa. St. 388, 33 Atl. 694. See also Nesbit *v.* Godfrey, 155 Pa. St. 251, 25 Atl. 621.

market value of the product.[48] The time for which the lessee in a gas lease was wrongfully enjoined by the lessor from operating wells on the land should not be computed in determining the term for which the lease was to run, and he is entitled at the close of the litigation to as much time to perform his contract as remained of his term when he was first enjoined.[49] When a demise for the purpose of operating for oil and gas for a given period is dependent upon the discovery of oil and gas in the search provided for, if such search is unsuccessful the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise.[50]

c. Consideration. Payment of one dollar, and the erection of valuable machinery on demised premises by the lessee, is a sufficient consideration to support a gas lease.[51] But where in a lease of oil lands, the lessee agrees to complete a second well within ninety days after the completion of the first well, but does not agree to complete or even to commence the first well, such agreement as to the second well is no consideration for the contract.[52]

d. Premises Demised and Rights Acquired. Title under a lease for the production of oil and gas is contingent, and for the purpose of search only, until the oil and gas is found, and if not found, no estate vests in the lessee; but if found, the right to produce becomes a vested right under the terms of the lease.[53] But

48. Dickey *v.* Coffeyville Vitrified Brick, etc., Co., 69 Kan. 106, 76 Pac. 398.

Arbitrary determination.— Under a lease providing that in case the lessee shall become satisfied that wells which have been put in operation are not paying he may, upon surrender of the lease and removal of the machinery from the premises, be released from further obligations, the lessee cannot arbitrarily declare that a profitable gas or oil well is not paying and thus satisfy the condition of the lease. Dickey *v.* Coffeyville Vitrified Brick, etc., Co., 69 Kan. 106, 76 Pac. 398. But see Bay State Petroleum Co. *v.* Penn Lubricating Co., 87 S. W. 1102, 27 Ky. L. Rep. 1133, where it is held that the lessee has the right to determine the time at which the production of the oil or gas ceases to be in a paying quantity. See also Summerville *v.* Apollo Gas Co., 207 Pa. St. 334, 56 Atl. 876.

Where only one of a number of wells proved unprofitable and the lessee so declares, the lease will not be avoided as to the profitable wells. Dickey *v.* Coffeyville Vitrified Brick, etc., Co., 69 Kan. 106, 76 Pac. 398. And the fact that the well which is first sunk proves unproductive will not release the lessee from his express contract to sink a specified number of wells. Ahrns *v.* Chartiers Valley Gas Co., 188 Pa. St. 249, 41 Atl. 739.

49. Stahl *v.* Van Vleck, 53 Ohio St. 136, 41 N. E. 35.

50. Murdock-West Co. *v.* Logan, 69 Ohio St. 514, 69 N. E. 984 (holding that the stipulation in a lease that the term may be continued "as much longer thereafter as oil or gas shall be found in paying quantities" requires that oil or gas shall be actually discovered and produced in paying quantities within the term); Detlor *v.* Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266 (holding that expenses incurred by the grantees in drilling wells on the lands after the expiration of the grant, and after notice not to drill such wells, cannot be recovered from the grantor); Herrington *v.* Wood, 6 Ohio Cir. Ct. 326, 3 Ohio Cir. Dec. 475; Rynd *v.* Rynd Farm Oil Co., 63 Pa. St. 397; *In re* Brunot, 29 Pittsb. Leg. J. N. S. (Pa.) 105; Harness *v.* Eastern Oil Co., 49 W. Va. 232, 38 S. E. 662; Steelsmith *v.* Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107. See also Diamond Plate Glass Co. *v.* Knote, (Ind. App. 1906) 77 N. E. 954. And see Allegheny Oil Co. *v.* Snyder, 106 Fed. 764, 45 C. C. A. 604.

51. Herrington *v.* Wood, 6 Ohio Cir. Ct. 326, 3 Ohio Cir. Dec. 475; Great Western Oil Co. *v.* Carpenter, (Tex. Civ. App. 1906) 95 S. W. 57. But see Roberts *v.* McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105.

An agreement by the lessor to reduce the annual gas rental provided for by his lease if the lessee would lay a pipe line to the well and utilize the gas is founded on sufficient consideration and will be enforced. Consumer's Heating Co. *v.* American Land Co., 31 Pittsb. Leg. J. N. S. (Pa.) 24.

52. Federal Oil Co. *v.* Western Oil Co., 112 Fed. 373.

53. *Colorado.*— Florence Oil, etc., Co. *v.* Orman, 19 Colo. App. 79, 73 Pac. 628.

Kansas.— Rawlings *v.* Armel, 70 Kan. 778, 79 Pac. 683; Dickey *v.* Coffeyville Vitrified Brick, etc., Co., 69 Kan. 106, 76 Pac. 398; Monfort *v.* Lanyon Zinc Co., 67 Kan. 310, 72 Pac. 784.

Ohio.— Murdock-West Co. *v.* Logan, 69 Ohio St. 514, 69 N. E. 984.

Pennsylvania.— Plummer *v.* Hillside Coal, etc., Co., 160 Pa. St. 483, 28 Atl. 853; Venture Oil Co. *v.* Fretts, 152 Pa. St. 451, 25 Atl. 732.

West Virginia.— Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Parish Fork Oil Co. *v.* Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; Lawson *v.* Kirchner, 50 W. Va. 344, 40 S. E. 344; Steelsmith *v.* Gartlan, 45 W. Va. 27, 29 S. E. 978, 44

a grant of the exclusive right and privilege of digging and boring for oil and other minerals for a designated period is a lease for the production of oil, and not a sale of the oil or of an interest in the land.[54] A lease for the sole purpose of boring, mining, excavating for, and piping of, petroleum and gas from a certain tract of land, excepting a specifically described portion on which no well shall be drilled, is a grant of the oil and gas privileges under the entire tract, conditioned that the lessee shall not drill wells on the excepted portion,[55] and under such a reservation or where the lessor owns adjoining land, equity will restrain the lessor, or others acting under him, from drilling outside of such leased portion, and thereby lessening the production of the wells drilled by the lessee.[56] On the other hand, where the lease specifies the particular sites at which wells may be drilled, the lessee has no right to the possession of more land than is necessary at the sites mentioned.[57] In a lease for oil and gas there is an implied covenant of

L. R. A. 107; Crawford *v.* Ritchey, 43 W. Va. 252, 27 S. E. 220.

United States.— Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

See 34 Cent. Dig. tit. "Mines and Minerals," § 201. And see *supra*, IV, C, 3, b.

A lessee acquires no title to oil until it is taken from the ground, under a lease in which the sole compensation to the lessor is a share of the product. New American Oil, etc., Co. *v.* Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; Wagner *v.* Mallory, 169 N. Y. 501, 62 N. E. 584 [*affirming* 41 N. Y. App. Div. 126, 58 N. Y. Suppl. 526]; Goodale *v.* Tuttle, 29 N. Y. 459; Shepherd *v.* McCalmont Oil Co., 38 Hun (N. Y.) 37; Duffield *v.* Hue, 136 Pa. St. 602, 20 Atl. 526; Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; Thompson's Appeal, 101 Pa. St. 225; Brown *v.* Vandergrift, 80 Pa. St. 142; Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Pa. St. 173; Funk *v.* Haldeman, 53 Pa. St. 229; Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. But where a lessee's right under his lease is to bore wells for salt, if he brings oil to the surface the oil belongs to the owner of the soil. Kier *v.* Peterson, 41 Pa. St. 357 [*reversing* 2 Pittsb. 191, on the ground that the lessee was not liable in trover for the value of the oil, since he was under no obligation to collect the oil and might let it go to waste]. So in Palmer *v.* Truby, 136 Pa. St. 556, 20 Atl. 516, it is held that a lessee of land, demised for the production of oil alone, who obtains gas but not oil, and is thereupon dispossessed by ejectment upon a forfeiture alleged, has no equity to be reimbursed for operating expenses out of the proceeds of the gas obtained. See Wood County Petroleum Co. *v.* West Virginia Transp. Co., 28 W. Va. 210, 57 Am. Rep. 659, where a tenant leased premises for the purpose of mining and taking carbon oil therefrom at a fixed value, and for no other purpose, and opened a well which produced oil and gas, issuing by its own force from the well, and it was held that the tenant was not accountable to the landlord for the gas or its value, as natural gas issuing by its own force is not absolute but qualified property, *jure naturae*, belonging to him who first appropriates it.

54. Duffield *v.* Hue, 129 Pa. St. 94, 18 Atl. 566.

55. Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; Brown *v.* Spilman, 155 U. S. 665, 15 S. Ct. 245, 39 L. ed. 304 [*reversing* 45 Fed. 291]. See, however, Guffey *v.* Deeds, 9 Pa. Co. Ct. 449, holding that a lease of a farm "for the purpose and with the exclusive right of drilling and operating for petroleum oil and gas, reserving seven acres upon which there shall be no wells drilled by" lessees, does not give the lessees the exclusive right to all the gas and oil under the farm, including the seven acres, and prevent the lessor from letting the seven acres to other parties to drill for oil and gas.

Question of fact for jury.— A lease having been made of the right of mining for "petroleum, rock, or carbon oil, or other valuable volatile substances," in certain lands, and a subsequent lease of the right of mining for "natural gas" having been made to other parties of the same land, it is a question of fact whether the privileges of the second lease had not been already granted in the first, and whether or not natural gas is a volatile substance. Ford *v.* Buchanan, 111 Pa. St. 31, 2 Atl. 339.

56. Consumers' Gas Trust Co. *v.* American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020; Lynch *v.* Burford, 201 Pa. St. 52, 50 Atl. 228; Duffield *v.* Rosenzweig, 144 Pa. St. 520, 23 Atl. 4, 150 Pa. St. 543, 24 Atl. 705 (holding, however, that the jurisdiction in equity does not oust the jurisdiction at law, and the first lessee may have the remedy at law against the lessor to recover damages actually sustained by him from such drilling, and the measure of damages is the difference in value of plaintiff's leasehold before and after the injury was committed); Duffield *v.* Hue, 136 Pa. St. 602, 20 Atl. 526; Funk *v.* Haldeman, 53 Pa. St. 229.

57. Duffield *v.* Hue, 129 Pa. St. 94, 18 Atl. 566, where a lease of land containing three oil wells was partly printed and partly written. The printed portion described the leased premises as "a certain lot or piece of land situate," etc. The written portion indicated that the premises were to be operated at certain designated "sites," which were described as follows: "Each site situated

right of entry and quiet enjoyment for the purposes of the lease.[58] But one leasing the surface of land for tenement purposes has no right to the oil underneath.[59]

e. Assignment or Sale of Lease — (i) *In General.* In the absence of statutory or contractual restrictions to the contrary, a lessee of an oil or gas lease may, without the lessor's consent, or an express provision in the lease, assign the same.[60]

(ii) *What Title Passes.* A *bona fide* purchaser and assignee of an oil or gas lease, without notice of a secret agreement or trust, takes title discharged from such trust or agreement, and can convey a good title, even though his vendee had actual notice.[61] But an assignee who takes with knowledge of a prior

on lots numbered, respectively, on map, one hundred and fifty-one Mill street, one hundred and ninety-three Center street, and one hundred and sixty and one hundred and thirty-four on Elston street; and also sites for three wells, situate per plot No. one, to be designated and mutually agreed upon by both parties." It was provided that the lessee could drill other wells on the same premises only if the lessor should determine to have more wells drilled; and it was held that the lessees had no right of possession other than was necessary for oil mining purposes at the sites mentioned, and oral evidence was not admissible to show that such was not the contract of the parties.

58. Knotts *v.* McGregor, 47 W. Va. 566, 35 S. E. 899, holding, however, that such covenant is not broken by the mere fact alone that the lessor makes another lease during the term of the same premises, whether the first lessee be in actual possession or not.

59. Isom *v.* Rex Crude Oil Co., 147 Cal. 659, 82 Pac. 317; Richmond Natural Gas Co. *v.* Davenport, 37 Ind. App. 25, 76 N. E. 525.

60. Robyn *v.* Pickard, 37 Ind. App. 161, 76 N. E. 642, where the proceedings were held to constitute a valid assignment of the lease. And see the following cases involving the validity of the assignment of such leases, and the construction of peculiar terms therein: Chaney *v.* Ohio, etc., Oil Co., 32 Ind. App. 193, 69 N. E. 477 (holding that the assignee of the lease was not liable to the lessor for the penalties specified in the lease, there being no privity of estate); Wagner *v.* Mallory, 169 N. Y. 501, 62 N. E. 584 [*affirming* 41 N. Y. App. Div. 126, 58 N. Y. Suppl. 526] (holding that under N. Y. Laws (1883), c. 372, providing that oil wells and fixtures and rights held by virtue of any lease should be deemed personal property for all purposes except taxation, the right to oil is personalty, and does not pass under a deed from the executors and devisees of the lessee conveying all the lands owned by them, or in which they have an interest); Keystone Bank *v.* Union Oil Co., 25 Ohio Cir. Ct. 464; Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992 (where, in a suit to rescind for inadequacy of consideration, a sale of a half interest in an oil lease of two hundred acres, the consideration being five hundred and fifty dollars in cash, and an additional one hundred dollars in case a well producing daily six or more barrels of oil should be found, it appeared that at the time of the sale there was only one well on the premises, the output of which was variously stated by the witnesses to be from one to eight barrels per day. There were several wells on an adjoining tract, the yield of one of which was very large. There was evidence that in the neighboring oil lands good wells and dry holes were found together, and that the value of undeveloped oil lands was always speculative; and it was held that the consideration was not inadequate); Guffey *v.* Clever, 146 Pa. St. 548, 23 Atl. 161; Carnegie Natural Gas Co. *v.* South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548 (where the owner of oil and gas assigned his gas rights to another by a written contract, and entered into a contract with the assignee, providing that the parties thereto should have the right to operate said territory under their respective interests, and, should the owner of the leases develop a gas well, the gas company should have the privilege of having such well transferred to it on payment of the cost of building it, and if the gas company should develop an oil well, the assignee should have the privilege of having the well transferred to him on paying the actual cost thereof, each party to have thirty days in which to test any such well built by the other, and it was held that on developing gas in paying quantities and drilling for oil and the election of the gas company within the time limited to pay the cost of drilling, and the other expenses, the party drilling it must deliver possession to the gas company); Dresser *v.* West Virginia Transp. Co., 8 W. Va. 553; Rice *v.* Ege, 42 Fed. 661 (where oil leases were transferred with a promise to pay the transferee a thousand dollars if the lands proved unproductive, and the agreement defined an unproductive well as one in which oil is not produced in paying quantities, and it was held that evidence that wells were drilled through the stream in which oil was found, if at all, in that county, at an expense of about three thousand dollars, and only a trace of oil discovered, was sufficient to show that the wells were unproductive).

61. Dill *v.* Fraze, (Ind. App. 1906) 77 N. E. 1147; Northwestern Ohio Natural Gas Co. *v.* Tiffin, 59 Ohio St. 420, 54 N. E. 77 (holding that a lease or license to operate upon land for natural gas or petroleum, until filed for record, as required by Ohio Rev. St. § 4121*a*, is without any effect

lease and of the facts upon which depends a question of forfeiture thereof, has no greater rights against such prior lease than his assignor;[62] and when taking an assignment, which on its face contains notice of the liability of forfeiture, an assignee is bound to ascertain at his peril whether the lease has been forfeited.[63] A contract to sell a lease does not carry with it the oil that had already been pumped from an oil well on the leased premises.[64]

f. Eviction. The exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or withholding from him the possession of the land for the purposes of the lease, amounts to eviction *eo instanti*.[65]

g. Exploration and Development of Property — (1) *Express Agreements.* It is usual to insert in oil or gas leases express provisions as to the time within which the work of development shall be begun and as to the nature and extent of such work.[66] And where the terms of such leases will permit they will be so construed as to permit development and to prevent delay and unproductiveness.[67]

either at law or in equity as against a subsequent lessee or licensee, or other third person acquiring an interest in or lien on the land, although he took with notice of such prior unrecorded lease or license, unless the person claiming thereunder was at the time in the actual possession of the land); Brown *v.* Ohio Oil Co., 21 Ohio Cir. Ct. 117, 11 Ohio Cir. Dec. 810; Aye *v.* Philadelphia Co., 193 Pa. St. 457, 44 Atl. 556; Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236. See also Indianapolis Gas Co. *v.* Pierce, 36 Ind. App. 573, 76 N. E. 173.

Defects in title.— Where one agrees to sell all his right, title, and interest in an oil or gas lease, he cannot be held liable for defects of title, in the absence of fraud or concealment on his part. Johnston *v.* Mendenhall, 9 W. Va. 112.

62. Henderson *v.* Ferrell, 183 Pa. St. 547, 38 Atl. 1018; Carnegie Natural Gas Co. *v.* Philadelphia Co., 158 Pa. St. 317, 27 Atl. 951 (holding that no title passes by an assignment of a lease, which was to continue so long as oil could be produced from the land in paying quantities, and the lessee had abandoned the well because of failure of the output, and afterward sought to renew the lease, and was refused); South Penn Oil Co. *v.* Stone, (Tenn. Ch. App. 1900) 57 S. W. 374.

63. Cole *v.* Taylor, 8 Pa. Super. Ct. 19.

64. McGuire *v.* Wright, 18 W. Va. 507.

65. Knotts *v.* McGregor, 47 W. Va. 566, 35 S. E. 899. And see the following cases where the transaction was held not to amount to an eviction: Jennings-Heyward Oil Syndicate *v.* Home Oil, etc., Co., 113 La. 383, 37 So. 1; Mathews *v.* People's Natural Gas Co., 179 Pa. St. 165, 36 Atl. 216 (holding that the act of the lessor of oil or gas lands in entering on the premises, and erecting a building in such a location as not to interfere with the future operation of a well, the site of which was found marked with a stake, is not an eviction); Horberg *v.* May, 153 Pa. St. 216, 25 Atl. 750 (holding that if a tenant goes into possession of premises which have already been leased to another for oil and gas purposes, and accepts from the lessee for oil and gas purposes a sum of money on account of damages, and also enters into an agreement with him as to compensation for giving him a right to operate for such purposes, he cannot defend against the payment of rent upon the ground of eviction by his landlord).

Constructive eviction by conveyance.— In Mathews *v.* People's Natural Gas Co., 179 Pa. St. 165, 36 Atl. 216, it was held that an absolute conveyance of oil lands by the lessor, without reserving the lessee's right of entry to drill for oil, is a constructive eviction, which terminates the lessee's liability for rent.

66. See the cases cited in the following notes.

Such agreement should be definite and certain.— Eaton *v.* Allegany Gas Co., 3 N. Y. St. 501 (holding that a covenant in an oil and gas lease, that the lessee "shall commence operations and prosecute the same [on some portion of the premises] within two years from the date of the lease, or thereafter pay to the party of the first part dollars per until the work is commenced," was void for uncertainty); Thomas *v.* Kirkbride, 15 Ohio Cir. Ct. 294, 8 Ohio Cir. Dec. 181 (holding that where a lessee agreed to complete four oil wells during a certain year, a stipulation in the lease that twenty-two acres should be forfeited for each well not so completed was void for uncertainty).

Agreement to share expenses.— Where an oil lease provided that the lessee should provide at its cost all materials of every kind necessary to do the work, and all labor, including labor and material in erecting and maintaining fixtures, and the lessor agreed to pay one half of the cost of drilling, casing, and pumping all wells which did not produce a certain amount of oil per day for the first thirty days, the lessor was chargeable with one half of the expenses of all the preliminary work of preparing the ground, erecting the derrick, placing and connecting the engine and drilling rig, including one half the reasonable value of the use of the machinery owned and furnished by the lessee. Far West Oil Co. *v.* Witmer Bros. Co., 143 Cal. 306, 77 Pac. 61.

67. Parish Fork Oil Co. *v.* Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655; Logan

So unless it is expressly so provided a lessee cannot be permitted to hold a lease without operating under it and thereby prevent the lessor from operating on the land or leasing it to others.[68] A liability imposed by an express agreement to explore the property leased cannot be avoided by the fact that explorations upon adjoining property have proved unproductive.[69] And where the lease expressly provides that, in case of failure to complete a well within a fixed time, a certain rental shall be paid, it is no defense to an action for such rent that in wells drilled on adjoining lands, or in the vicinity of the leased premises, neither oil nor gas had been found in paying quantities,[70] or that the stipulated sum is a penalty, and that the failure did not damage the lessor, because there was neither gas nor oil, in paying quantities in the land.[71] It has been held that a covenant to pay a certain sum if a well was not sunk within a certain time, and a covenant to furnish gas for the lessor's dwelling, are independent, and that a failure to perform the first will not prevent enforcement of the second.[72]

(II) *Implied Agreements.* In construing an oil and gas lease, the court will take judicial notice that oil and gas do not exist in paying quantities under all lands within a recognized district, and that to determine whether or not it does exist there is no other generally acknowledged way than putting down a well.[73] Hence, although the lease is silent, the law implies a condition on the part of the lessee for diligent exploration, development, and operation in good faith,[74] and whatever is necessary to the accomplishment of that which is expressly contracted to be done under an oil lease is part of the contract, although not speci-

Natural Gas, etc., Co. *v.* Great Southern Gas, etc., Co., 126 Fed. 623, 61 C. C. A. 359 (holding that where the lease does not specially state a date for its termination or a time for the commencement of operations thereunder, there is an implied contract that the operation shall be commenced within a reasonable time, and that a failure of the lessee to commence operations for four years will entitle the lessor to consider the lease as abandoned and to lease to other parties); Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. And see Shenk *v.* Stahl, 35 Ind. App. 493, 74 N. E. 538, where a contract "granted and leased to the grantees, their heirs and assigns, certain land for the purpose of a gas well, so long as it was used for the same," etc., and it was held that the contract was a mere lease, terminable on the parties ceasing to use the land as a gas well.

68. Parish Fork Oil Co. *v.* Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, where under a lease providing that upon consideration of the sum of fifty dollars certain lands were demised for the purpose of mining and operating for oil and gas, etc., for the period of fifteen years, and that the lessee should complete one well on the premises within one year from its date or pay the lessor a rental of fifty cents an acre for each year that the lease might remain in full force after the first year, and further providing that "it is agreed and understood that the fifty dollars paid in cash is to pay all rentals on this lease for the period of one year from the date hereof; it is further agreed that when the first well is completed on said premises, then all cash rentals shall cease," it was held that the lessee was not bound to do anything further after completing one well on the premises, and upon his abandonment of further operations for more than eighteen months, leaving the well unprotected so that it caved in and partially filled up, the lessor after waiting a year or more from the date of abandonment had the right to lease the land to another.

69. Cochran *v.* Pew, 159 Pa. St. 184, 28 Atl. 219.

70. Cochran *v.* Pew, 159 Pa. St. 184, 28 Atl. 219; Johnstown, etc., R. Co. *v.* Egbert, 152 Pa. St. 53, 25 Atl. 151.

71. Gibson *v.* Oliver, 158 Pa. St. 277, 27 Atl. 961.

72. Indiana Natural Gas, etc., Co. *v.* Hinton, 159 Ind. 398, 64 N. E. 224; Simpson *v.* Pittsburgh Plate Glass Co., 28 Ind. App. 343, 62 N. E. 753.

73. Consumers' Gas Trust Co. *v.* Littler, 162 Ind. 320, 70 N. E. 363.

74. *California.*— Acme Oil, etc., Co. *v.* Williams, 140 Cal. 681, 74 Pac. 296.

Indiana.— Gadbury *v.* Ohio, etc., Consol. Natural, etc., Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895.

North Carolina.— Conrad *v.* Morehead, 89 N. C. 31.

Ohio.— Venedocia Oil, etc., Co. *v.* Robinson, 71 Ohio St. 302, 73 N. E. 222.

Pennsylvania.— Aye *v.* Philadelphia Co., 193 Pa. St. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Colgan *v.* Forest Oil Co., 30 Pittsb. Leg. J. N. S. 68.

Tennessee.— Petroleum Co. *v.* Coal, etc., Mfg. Co., 89 Tenn. 381, 18 S. W. 65.

Texas.— J. M. Guffey Petroleum Co. *v.* Oliver, (Civ. App. 1904) 79 S. W. 884.

United States.— Barnsdall *v.* Boley, 119 Fed. 191; Allegheny Oil Co. *v.* Snyder, 106 Fed. 764, 45 C. C. A. 764; Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

See 34 Cent. Dig. tit. "Mines and Minerals," § 205.

fied,[75] and when so incorporated by implication is as effectual as if expressed.[76] An express agreement as to the manner of the development of the property will exclude implied agreements.[77] Where a non-productive well has been sunk there is no implied agreement to sink a second.[78]

(III) *WHEN WORK MUST BE BEGUN.* It is usually regarded as a sufficient compliance with the terms of a lease for the lessee to begin operations in good faith on the last day of the period fixed therein within which to commence work.[79]

75. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

76. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

77. Stoddard *v.* Emery, 128 Pa. St. 436, 18 Atl. 339, holding that where a lease provided for the drilling of one oil well in eight months, and a second at a time not specified, there was no implied covenant to drill wells as often as was customary in the absence of an express contract.

Covenants expressed in general terms.— Since in all oil and gas leases a covenant to "protect the lines" and to "well develop the land" is implied, the fact that such covenants are expressed in the same general words add nothing to the lessee's obligations. Kellar *v.* Craig, 126 Fed. 630, 61 C. C. A. 366.

78. Kenton Gas, etc., Co. *v.* Orwick, 21 Ohio Cir. Ct. 274, 11 Ohio Cir. Dec. 786, in which a renewal lease was construed not to contain an express agreement to sink a second well.

79. Duffield *v.* Russell, 19 Ohio Cir. Ct. 266, 10 Ohio Cir. Dec. 472; Henderson *v.* Ferrell, 183 Pa. St. 547, 38 Atl. 1018 (holding that it would be a question for the jury at least); Forney *v.* Ward, 25 Tex. Civ. App. 443, 62 S. W. 108.

Construction of particular leases.—A written instrument was duly executed as follows: "Do hereby grant unto second party, their heirs and assigns, the sole right to produce petroleum and natural gas from the following named tract of land . . . specifically granting to said second party for and during the term of ninety (90) days from this date and as much longer as oil and gas is found, operated and produced in paying quantities, with the exclusive right to drill and operate oil and gas wells" and it was held only a grant of the sole right to produce petroleum and natural gas for the term mentioned, and that upon failure to drill one paying well within ninety days there was no right to drill thereafter. Detlor *v.* Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266. Where a lessee of oil lands agrees to complete four wells the second year, two of them the first six months, and two of them the last six months, the completion of four wells during the second year is such a substantial compliance with the provisions of the lease as will defeat a forfeiture. Thomas *v.* Kirkbride, 15 Ohio Cir. Ct. 294, 8 Ohio Cir. Dec. 181. A forfeiture of an oil lease containing a clause that the lessee "agrees to commence operations on the . . . premises or forfeit this lease within sixty days, and complete a well on this lease in five months," is effected by the non-completion of a well within the five months. Cleminger *v.* Baden Gas Co., 159 Pa. St. 16, 28 Atl. 293. Where a lease contains a covenant to commence a gas well at a stated time, and provides that, if gas is found in sufficient quantities, a certain sum shall be paid within sixty days after the completion of the well, the breach of the covenant is complete on failure to commence the well at the stipulated time, and is not delayed until sixty days after the time fixed for completion. Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553. A five-year oil lease, requiring the lessee to complete a well within six months, or in default pay for further delay an annual rental in advance until the well should be completed, and providing that a failure to complete the well or pay rental for ten days after the time specified should render the agreement void, only to be renewed by mutual consent, and that no right of action should after such failure accrue to either party on account of the breach of any condition therein, must be construed as giving the lessee an option to put down a well within six months, and by paying the rental named, the further option for one year. Van Voorhis *v.* Oliver, 22 Pittsb. Leg. J. N. S. (Pa.) 114. Where a lease, giving a privilege to drill for oil and gas for two years, "and as much longer as oil or gas is found in paying quantities thereon, or the rental paid thereon," provided for a fixed rent; that operations should be commenced, and one well completed within one month; that, upon failure of the lessee so to complete the well, he should pay to the lessor for the delay fifteen dollars per month; and that "failure to complete one well, or to make such payments for said delay, is to render this lease null and void at the option of the lessor," the lessee having failed to begin work within two years, had no right to continue the lease by payment of the fifteen dollars per month, but the lease was ended. Bettman *v.* Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. Where an oil and gas lease gave the lessee two years to drill a well and stipulated that if no well were drilled before the expiration of that period the time for drilling could be extended by the lessee paying a specified annual rental from the expiration of the second year until the well was drilled, but provided that if no well was drilled within five years the lease was to be void, it was held that the diligence to be exercised by the lessee for five years was defined and that a well having been drilled during the fifth

Where a lease of a right to mine for oil or gas provides that the lessee shall complete a certain number of wells within a designated period after the completion of the first paying well, the obligation to continue to drill wells is fixed when the first well proves to be a paying one,[80] and not before that time.[81] In the absence of an express agreement, the obligation to explore must be performed within a reasonable time.[82] The lessee cannot be placed in default for not drilling a well until the lessor has selected the location thereof, when permitted to do so by the terms of the lease.[83]

(iv) *Where Work Must Be Done.* Where the lease requires a test well to be drilled on the demised premises, boring one on adjoining premises is not sufficient to prevent a forfeiture.[84] But a lessee of oil lands cannot, under any implied covenant, be compelled to put down a well on any certain part of the premises, on penalty of forfeiture of the lease, except on proof of fraud in fact.[85] In case the lessor reserves the right to select the location of a test well he cannot, after a well has been drilled at a place which he has selected, make a second location.[86]

(v) *Option to Develop or Pay Rent.* As a general rule a lease which provides that in case the lessee shall fail to develop the property within a stated time he shall pay a specified sum will not be construed as permitting the lessee to retain possession of the premises without development until the termination of the period of the lease upon making the payments specified.[87] And it is held that where a lease is for such time as the lessee shall pay a specified rent in advance, or until gas or oil shall be found in paying quantities, the lessee must develop the premises within a reasonable time after the lessor has refused to accept the rent at the beginning of any rent period.[88] The lessor, however, in

year and the stipulated rental paid annually after the expiration of the second year until the well was drilled, the lease was not voidable because no other wells were drilled during the five-year period. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

80. Monaghan *v.* Mount, 36 Ind. App. 188, 74 N. E. 579. And see Jones *v.* Mount, (Ind. App. 1905) 74 N. E. 1032.

81. Manhattan Oil Co. *v.* Carrell, 164 Ind. 526, 73 N. E. 1084 (holding that a provision in an oil lease that after the completion of the first well the lessee should drill a specified number of wells in case oil should be found in paying quantities did not mean that if the oil was found in the test of the first well in a sufficient quantity to be a profit, however small, in excess of the cost of producing it, excluding the cost of drilling the well and of equipment, then oil was found in paying quantities within the meaning of the contract, but meant that additional wells were to be drilled only in case oil was found in such quantities as would, taken in connection with other conditions, induce ordinarily prudent persons in a like business to expect a reasonable profit on the whole sum required to be expended, and whether oil was found in paying quantities was to be exclusively determined by the operator acting in good faith); Bryant *v.* Morgan, 34 Pittsb. Leg. J. N. S. (Pa.) 53.

82. Consumers' Gas Trust Co. *v.* Littler, 162 Ind. 320, 70 N. E. 363; Eclipse Oil Co. *v.* South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923.

83. McKnight *v.* Manufacturers' Natural Gas Co., 146 Pa. St. 185, 23 Atl. 164, 28 Am. St. Rep. 790.

84. Carnegie Natural Gas Co. *v.* Philadelphia Co., 158 Pa. St. 317, 27 Atl. 951.

85. Young *v.* Forest Oil Co., 194 Pa. St. 243, 45 Atl. 121.

86. Stahl *v.* Van Vleck, 53 Ohio St. 136, 41 N. E. 35.

87. Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, holding that such a lease must be construed as providing a penalty, intended to secure the performance of the conditions, and not an alternative condition, and that where the lessee makes no attempt to fulfil the condition and has no intention of doing so he cannot, by a tender of the penalty, retain the lease in force until the expiration of its term and thus secure an option on the property for speculative purposes, and that when by his failure to comply with the condition further performance of the contract becomes optional on his part it is also optional upon the part of the lessor. But see Houssiere Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932; Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236, holding that where the lease contains no clause of forfeiture, but provides an annual penalty for delay on the part of the lessees, neither the lessor nor one to whom the lessor has subsequently leased the land with notice can recover possession of the premises on account of such delay by the first lessees.

88. Consumers' Gas Trust Co. *v.* Worth, 163 Ind. 141, 71 N. E. 489; Consumers' Gas

order to terminate the lease must afford the lessee a reasonable time to explore or develop the premises after notice that further rentals will not be accepted.[89] It must be noted, however, that the rights of the parties to such a lease, as to its continuance and termination, are not the same under the lease before and after the development of the land for gas and oil.[90] Before the exercise of the option or right to drill, it may be terminated by a refusal to accept the stipulated rental in case the lessee is given such a reasonable notice as will afford him a fair chance to discharge his obligation.[91] But after developments have been made and gas or oil discovered, the lessor cannot arbitrarily terminate the lease by refusing to accept the rent.[92] Where under the terms of the lease the lessee is to sink a well or pay a fixed rental, he must do one or the other, although the lease provides that it shall be optional to dig the well or not, or pay the rental or not.[93] An operator may be relieved of his obligation to put down a well or to pay the sum promised for his failure upon such terms as may be agreed upon in the contract, either of benefit to the landowner, or of convenience to himself, but a mere default or nonperformance cannot be held to discharge his obligation.[94] The death of the lessor will not terminate a lease, although possession has not been taken thereunder, where the lessee has paid the rental stipulated to be paid on event of failure to drill a well upon the premises.[95] Where the lessee in an oil and gas lease has forfeited his rights by failing to pay the stipulated rent, or to complete a successful well within the stipulated time, he cannot after the expiration of such time renew his rights by entering on the land over the lessor's objections or without his consent and commencing another well.[96]

h. Operation After Discovery of Oil or Gas — (i) *In General.* In the absence of an express agreement an agreement will be implied in an oil lease that, when the existence of oil in paying quantities is made apparent the lessee shall put down as many wells as may be reasonably necessary to secure oil for the convenient advantage of both lessor and lessee, and to prevent the loss of oil by drainage into adjoining lands.[97] There is no relation of special trust or confi-

Trust Co. *v.* Littler, 162 Ind. 320, 70 N. E. 363. See also Logansport, etc., Gas Co. *v.* Seegar, 165 Ind. 1, 74 N. E. 500.

89. Indiana Natural Gas, etc., Co. *v.* Beales, (Ind. 1906) 76 N. E. 520 [*reversing* (App. 1905) 74 N. E. 551]; New American Oil, etc., Co. *v.* Troyer, (Ind. 1905) 76 N. E. 253 [*reversing* (App. 1905) 74 N. E. 37]; La Fayette Gas Co. *v.* Kelsay, 164 Ind. 563, 74 N. E. 7; Consumers' Gas Trust Co. *v.* Littler, 162 Ind. 320, 70 N. E. 363; Indiana Rolling Mill Co. *v.* Gas Supply, etc., Co., 37 Ind. App. 154, 76 N. E. 640; Northwestern Ohio Natural Gas Co. *v.* Browning, 15 Ohio Cir. Ct. 84, 8 Ohio Cir. Dec. 188. But see Kenton Gas, etc., Co. *v.* Dorney, 17 Ohio Cir. Ct. 101, 9 Ohio Cir. Dec. 604, holding that under an oil and gas lease conditioned that if no well should be completed within a year from the date of the lease it should be void unless the lessee should pay a certain sum for each year during which completion was delayed, a failure to complete the wells during the year, and an omission to pay the sum agreed avoided the lease without an election on the owner's part to terminate it.

A demand of forfeiture at a time at which the lessor is not entitled to a forfeiture is not effectual as a notice to the lessee to start operations, the claim of forfeiture being equivalent to a denial of the lessee's right thereafter to enter the premises for the purpose of conducting such operations. Consumers' Gas Trust Co. *v.* Ink, 163 Ind. 174, 71 N. E. 477.

90. Hancock *v.* Diamond Plate Glass Co., 37 Ind. App. 351, 75 N. E. 659.

91. Hancock *v.* Diamond Plate Glass Co., 37 Ind. App. 351, 75 N. E. 659. See also *supra*, IV, C, 3, b.

92. Hancock *v.* Diamond Plate Glass Co., 37 Ind. App. 351, 75 N. E. 659, in which it was held that a finding in an action for rent that the lessee after having elected to terminate the agreement furnished gas to the lessor as required by the lease did not amount to a finding of such part performance by the lessee as prevented it from exercising its right to terminate the lease.

93. Jackson *v.* O'Hara, 183 Pa. St. 233, 38 Atl. 624; McMillan *v.* Philadelphia Co., 159 Pa. St. 142, 28 Atl. 220. See also La Fayette Gas Co. *v.* Kelsay, 164 Ind. 563, 74 N. E. 7.

94. Hancock *v.* Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149.

95. Indiana Natural Gas, etc., Co. *v.* Leer, 34 Ind. App. 61, 72 N. E. 283.

96. Ohio Oil Co. *v.* Detamore, 165 Ind. 243, 73 N. E. 906; Zeigler *v.* Dailey, 37 Ind. App. 240, 76 N. E. 819.

97. Kleppner *v.* Lemon, 176 Pa. St. 502, 35 Atl. 109; McKnight *v.* Manufacturers' Natural Gas Co., 146 Pa. St. 185, 23 Atl.

dence between the lessor and lessee in oil and gas leases any more than in any other. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor, and the parties must be left as in other cases to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere.[98] It has been stated, however, that where oil or gas has been found in paying quantities the question of what further development and exploration is required under the lease is not subject to determination by either of the parties alone.[99] The object of the operations being to obtain a benefit or profit for both the lessor and the lessee, neither, in the absence of some stipulation to that effect, is made arbiter of the extent to which, or the diligence with which, the operations shall proceed, and both are bound by the standard of what is reasonable.[1] The question whether due diligence has been employed in prosecuting operations is for the jury.[2] A lessee of oil and gas lands is entitled to any collateral or incidental advantage from his leases of adjoining territory just as a stranger would be. He may operate them jointly, by having both under one management. It is only when wells on adjoining territory are being fraudulently used to drain the lessor's land that the courts have any occasion to interfere.[3] If in such a case the sinking of wells on the adjoining territory would render it necessary for the lessor to put down another well to save his own land from exhaustion, then it would be the duty of the lessee to put down

164, 28 Am. St. Rep. 790; Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

Where lease requires but one well.— There is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells as would be ordinarily required for the production of oil contained in such lands, and afford ordinary protection to the lines, notwithstanding the lease provides for the sinking of but one well within a certain time. Harris *v.* Ohio Coal Co., 57 Ohio St. 118, 48 N. E. 502. But see Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695, holding that a lessee of oil lands, who has expressly covenanted only to put down one oil well on the premises, and who has put down several on one side of the lands, cannot be compelled, under any implied covenant, to put down a well on the other half, or to surrender such half, unless it is clearly shown that he is not acting in good faith on his business judgment, but fraudulently, with an intention to obtain a dishonest advantage.

98. Baldwin *v.* Ohio Oil Co., 13 Ohio Cir. Ct. 519, 7 Ohio Cir. Dec. 50; Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695.

Unprofitable wells.— It is an implied condition of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee; but he is not bound to put down more wells than are reasonably necessary to obtain the oil of his lessor, or to put down wells that will not produce oil enough to justify the expenditure. Adams *v.* Stage, 18 Pa. Super. Ct. 308.

99. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

1. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

The rule as to diligence.— The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests as well as those of the lessor. No obligation rests on him to carry the operations beyond a point where they will be profitable to him, even if some benefit to the lessor will result therefrom. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of the oil and gas capable of being produced from the premises as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir, whether such as to permit the drainage of the area of each well, and the usages of the business. Whatever in the circumstances would be reasonably expected of operators of ordinary prudence having regard to the interests of both the lessor and the lessee is what is required. A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

2. Lane *v.* Gordon, 18 N. Y. App. Div. 438, 46 N. Y. Suppl. 57.

3. Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695.

the additional well that the lessor might get the proper royalty.[4] Where a specific period for development is named in the lease there is an implied agreement to continue the work of exploration, development, and production, with reasonable diligence after the expiration of the period, in case oil or gas, or both, shall be found in paying quantities.[5]

(II) *Distinction Between Oil and Gas Leases.* The duty imposed upon a lessee of land to be operated for gas cannot be measured by the same rule that is applied in the case of a lease of land for oil purposes, because there are important differences between oil and gas, which make it necessary to distinguish for some purposes between an oil and a gas lease.[6] Since the product of a gas well can only be transported to a market when the volume and pressure are sufficient, the sinking of another well on the premises leased may have the effect of so reducing the pressure of a producing well on the same premises as to make the product valueless.[7]

i. Remedies Upon Breach of Agreement — (I) *Action For Specific Performance.* An action for specific performance of implied covenants resting upon oral evidence of opinions cannot be sustained,[8] although relief may be granted where it appears in such an action that defendant is fraudulently evading his obligations to plaintiff.[9] Where specific performance is sought the court may, under a prayer for alternative relief, decree cancellation of the contract,[10] or an alternative decree may be rendered requiring performance and providing in event of non-performance for a forfeiture.[11]

(II) *Injunction.* The assignee of an oil lease may be compelled by injunction to permit a well to be tested by shooting where there are indications of the presence of oil, and it is not shown that the well will be so damaged that further drilling will be prevented;[12] or, where the lessee's right to continue work upon the premises has been forfeited, his further operations may be restrained.[13]

(III) *Quieting Title.* Upon the lessee's failure to drill a paying well within a specified time, the lessor at the expiration of such period is entitled to have his title quieted against the lessee's claim of the right to continue operations, without resorting to the law of forfeiture;[14] and where a forfeiture has been rightfully asserted under circumstances which does not entitle the lessee to relief in equity, the lessor may, where there is no adequate remedy at law, maintain a bill to establish the forfeiture as a matter of record and to cancel the lease as a cloud upon title.[15] Before the lessor is entitled to have his title quieted as against the lessee he must first have taken such steps as are necessary to place the lessee in default and terminate his rights under the lease.[16]

4. Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695.

5. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

6. McKnight *v.* Manufacturers' Natural Gas Co., 146 Pa. St. 185, 23 Atl. 164, 28 Am. St. Rep. 790.

7. McKnight *v.* Manufacturers' Natural Gas Co., 146 Pa. St. 185, 23 Atl. 164, 28 Am. St. Rep. 790, holding that there was no implied covenant in a gas lease that the lessee would put down other wells in addition to one which he has sunk and found to be productive, but which he has been compelled to abandon on the happening of an accident thereto.

8. Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695.

9. Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695; Kleppner *v.* Lemon, 176 Pa. St. 502, 35 Atl. 109.

10. Coffinberry *v.* Sun Oil Co., 68 Ohio St. 488, 67 N. E. 1069.

11. Young *v.* Vandergriff, 30 Pittsb. Leg. J. N. S. (Pa.) 39.

12. Douthett *v.* Rochester Tumbler Co., 32 Pittsb. Leg. J. (Pa.) 189.

13. Meek *v.* Cooney, 26 Ohio Cir. Ct. 553.

14. Detlor *v.* Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266.

15. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

16. Monaghan *v.* Mount, 36 Ind. App. 188, 74 N. E. 579, holding that where a contract granting the right to drill for oil and gas required the grantees to complete a well in every period of ninety days from the completion of the first well, or to surrender the lease, excepting ten acres for each paying well, but the contract did not further describe such ten-acre tracts to be excepted out of the one hundred acres covered by the lease, the lessor on a breach of the contract

(IV) *Cancellation of Lease.* Equity has power to cancel oil leases for delay in development.[17]

(V) *Recovery of Damages.* The remedy for a breach of an implied covenant in an oil lease is ordinarily not by way of forfeiture, but by an action for damages.[18] It is usual in oil and gas leases to provide a penalty in case the work of exploration and development is not begun or completed within a specified time.[19]

(VI) *Forfeiture*—(A) *Who May Assert.* Forfeiture clauses are for the benefit of the lessor, who may assert the forfeiture or forbear to do so.[20] Hence where it is not expressly provided that either party or that the covenantor shall have the right to avoid the lease, the right of forfeiture may be exercised by the covenantee only, and not by the covenantor,[21] and no act of the lessee can terminate the lease under the forfeiture clause without the lessor's concurrence.[22] And this

by the lessee was not entitled to arbitrarily set off such ten-acre parcels, without giving the lessees opportunity for choice, and have his title quieted as to the residue.

17. Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

Sufficiency of complaint.— Where the lessee in an oil lease is to commence operations in six months, but the only express stipulation for forfeiture is in case a test well is not completed in three years, a suit to cancel the lease, begun several months before the three years have expired, without an averment that the well cannot be completed in time, is premature, although failure to commence operations within the six months is alleged. Armitage *v.* Mt. Sterling Oil, etc., Co., 80 S. W. 177, 25 Ky. L. Rep. 2262.

Petition for cancellation as to undrilled portion.— A petition by a lessor of land alleged that in 1890 he leased it for five years, and as much longer as oil and gas should be found in paying quantities, whereby the lessee obtained exclusive right to oil and gas on the premises; that the lease provided that one well should be completed within one year, which condition was complied with and a paying well completed; that the lessee covenanted that, if the first was a paying well, he would drill a sufficient number of wells to fully develop the land; that the lessee assigned the lease to defendant, who drilled two additional wells in one corner of the premises, and two wells on one side thereof, all paying wells, and completed before 1898; that defendant refused to further develop the lands, or test for oil or gas, or permit lessor to do so; that defendant neglected to protect the exterior lines from producing oil wells already drilled on adjoining lands, and that at least twenty-six additional wells should be drilled thereon; that owing to the migratory nature of the oil plaintiff had no remedy at law, and it was held that the petition set out a good cause of action for the cancellation of the lease as to the undrilled portion of the property. Coffinberry *v.* Sun Oil Co., 68 Ohio St. 488, 67 N. E. 1069.

18. Harris *v.* Ohio Oil Co., 57 Ohio St. 118, 48 N. E. 502; Young *v.* Forest Oil Co., 194 Pa. St. 243, 45 Atl. 121; Colgan *v.* Forest Oil Co., 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. Rep. 695; Core *v.* New York Petroleum Co., 52 W. Va. 276, 43 S. E. 128; Harness *v.* Eastern Oil Co., 49 W. Va. 232, 38 S. E. 662; Ammons *v.* South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004; Kellar *v.* Craig, 126 Fed. 630, 61 C. C. A. 366.

Measure of damages.— The measure of damages for breach of contract by the lessee of a gas or oil well to test it for gas or oil before abandoning it is what the lessor's royalties would have amounted to, where the lessee left it in such condition that it could not be tested, and the failure to test it was not unavoidable, or the lessee left it in such condition that it could have been tested, and the lessor did not know this. McClay *v.* Western Pennsylvania Gas Co., 201 Pa. St. 197, 50 Atl. 978. By covenant in a lease, the lessee undertook to sink an oil well on the premises of a certain depth within a fixed time. There was a provision for reëntry on breach of the covenant, but no rent was reserved and no term of demise stated. The lessee failed to sink the well. In an action by the lessor for breach of the covenant, it was held that he could not recover the cost of sinking the well, but nominal damages only. Chamberlain *v.* Parker, 45 N. Y. 569.

19. See Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662; Bell *v.* Truit, 9 Bush (Ky.) 257 (holding that where the covenant in an oil lease was to commence operations in one year, or thereafter to pay twenty-five dollars per annum until the work was commenced, the lessor could not recover more than nominal damages for a breach of the covenant, where there was no evidence that the lessor would in any reasonable probability have been benefited by a compliance with the undertaking); May *v.* Hazelwood Oil Co., 152 Pa. St. 518, 25 Atl. 564; Shettler *v.* Hartman, 1 Pennyp. (Pa.) 279. See also *supra*, IV, C, 3, g, (I).

20. Liggett *v.* Shira, 159 Pa. St. 350, 28 Atl. 218; McMillan *v.* Philadelphia Co., 159 Pa. St. 142, 28 Atl. 220; Glasgow *v.* Chartiers Oil Co., 152 Pa. St. 48, 25 Atl. 232; Leatherman *v.* Oliver, 151 Pa. St. 646, 25 Atl. 309.

21. Hancock *v.* Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149.

22. Gibson *v.* Oliver, 158 Pa. St. 277, 27 Atl. 961; Henne *v.* South Penn Oil Co., 52 W. Va. 192, 43 S. E. 147.

is true, although the lease contains a provision that it shall be void or cease and determine on failure by the lessee to comply with the conditions specified,[23] and the legal effect of such covenants can only be changed by an express stipulation that the lease shall be voidable at the option of either party, or of the lessee.[24] It is held, however, that one who takes an oil lease, conditioned to be void, unless he shall do something in the way of development, by putting down a well within a certain time, or unless he pay so much per month in money, but without covenanting to do either, is not liable in damages for failure to perform such conditions.[25] Where the lessor has sold a part of the leased land he cannot enforce a forfeiture of the lease as to the land sold for a subsequent breach of condition.[26]

(B) *Grounds*—(1) IN GENERAL. A forfeiture of an oil or gas lease will as a general rule be enforced only on account of a breach of express condition, breach of an implied covenant not being sufficient;[27] and in equity, to enable the

Lessee cannot plead forfeiture as defense. — The forfeiture clause being inserted solely in the interest of the lessor, it is optional with him, upon a default by the lessee, to declare the forfeiture, or affirm the continuance of the contract; and if the lessor does not choose to avail himself of the forfeiture, it cannot be set up as a defense to an action by the lessor for affirmance of the lease. Evans *v.* Consumers' Gas Trust Co., (Ind. 1891) 29 N. E. 398, 31 L. R. A. 673; Mathews *v.* People's Natural Gas Co., 179 Pa. St. 165, 36 Atl. 216; Sanders *v.* Sharp, 153 Pa. St. 555, 25 Atl. 524; Leatherman *v.* Oliver, 151 Pa. St. 646, 25 Atl. 309; Phillips *v.* Vandergrift, 146 Pa. St. 357, 23 Atl. 347; Jones *v.* Western Pennsylvania Natural Gas Co., 146 Pa. St. 204, 23 Atl. 386; Ogden *v.* Hatry, 145 Pa. St. 640, 23 Atl. 334; Ray *v.* Western Pennsylvania Natural Gas Co., 138 Pa. St. 576, 20 Atl. 1065, 1067, 21 Atl. 1, 202, 21 Am. St. Rep. 922, 12 L. R. A. 290; Wills *v.* Manufacturers' Natural Gas Co., 130 Pa. St. 222, 18 Atl. 721, 5 L. R. A. 603; Galey *v.* Kellerman, 123 Pa. St. 491, 16 Atl. 474; Brown *v.* Vandergrift, 80 Pa. St. 142.

23. Woodland Oil Co. *v.* Crawford, 55 Ohio St. 197, 44 N. E. 1093, 34 L. R. A. 62; Conger *v.* National Transp. Co., 165 Pa. St. 561, 30 Atl. 1038; Liggett *v.* Shira, 159 Pa. St. 350, 28 Atl. 218; Cochran *v.* Pew, 159 Pa. St. 184, 28 Atl. 219; McMillan *v.* Philadelphia Co., 159 Pa. St. 142, 28 Atl. 220 (holding that, following the forfeiture clause, with the words, "the lessee having the option to drill the well or not or pay said rental or not as he may elect," does not give him the option to refuse to do both); Leatherman *v.* Oliver, 151 Pa. St. 646, 25 Atl. 309 (holding that the effect of such an agreement is not changed by a further clause, "and no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained;" the words, "after such failure," referring to the continued failure to make the payment after it became due, and therefore the right of action to recover it was not affected); Ogden *v.* Hatey, 145 Pa. St. 640, 23 Atl. 334; Springer *v.* Citizens' Natural Gas Co., 145 Pa. St. 430, 22 Atl. 986; Ray *v.* Western Pennsylvania Natural Gas Co., 138 Pa. St. 576, 20 Atl. 1065, 1067, 21 Atl. 1, 202, 21 Am. St. Rep. 922, 12 L. R. A. 290; Wills *v.* Manufacturers' Natural Gas Co., 130 Pa. St. 222, 18 Atl. 721, 5 L. R. A. 603; Galey *v.* Kellerman, 123 Pa. St. 491, 16 Atl. 474; Roberts *v.* Bettman, 45 W. Va. 143, 30 S. E. 95.

Evidence to show the uniform construction placed upon such leases by both lessors and lessees in similar cases is not admissible. Jones *v.* Western Pennsylvania Natural Gas Co., 146 Pa. St. 204, 23 Atl. 386. And see Glasgow *v.* Chartiers Gas Co., 152 Pa. St. 48, 25 Atl. 232.

24. Cochran *v.* Pew, 159 Pa. St. 184, 28 Atl. 219.

25. Brooks *v.* Kunkle, 24 Ind. App. 624, 57 N. E. 260; Van Etten *v.* Kelly, 66 Ohio St. 605, 64 N. E. 560; Snodgrass *v.* South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820.

26. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

27. Carr *v.* Huntington Light, etc., Co., 33 Ind. App. 1, 70 N. E. 552; Harris *v.* Ohio Oil Co., 57 Ohio St. 118, 48 N. E. 502.

A specific provision that a mining lease may be forfeited for breach of any of its conditions sufficiently indicates the intention of the parties that the lease shall be forfeitable for failure to comply with an implied covenant to continue with reasonable diligence the work of exploration, development, and production, after the expiration of the period for development named in the lease in case oil or gas, or both, is found in paying quantities. Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

A breach of an implied covenant to reasonably develop and protect lines does not have the effect to forfeit the lease in whole or in part, nor is it ground for a court to declare such forfeiture unless the lease in express terms provides that a breach of such covenant shall avoid or forfeit the lease. Harris *v.* Ohio Oil Co., 57 Ohio St. 118, 48 N. E. 502. But see Ohio Oil Co. *v.* Harris, 1 Ohio S. & C. Pl. Dec. 157, 1 Ohio N. P. 132; Brewster *v.* Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213, holding that if by necessary implication a lease contains a covenant by the lessee to exercise reasonable diligence in prosecuting the development of oil and gas, such covenant is also a condition, a substantial breach of which will entitle the lessor to avoid the lease.

lessor to declare and enforce a forfeiture, the right so to do must be distinctly reserved, promptly exercised, and the result of enforcing the forfeiture not unconscionable.[28] In case certain causes of forfeiture are expressly mentioned, additional causes will not be implied.[29] While there is an implied covenant to reasonably operate premises there is no implied covenant to forfeit a lease for the breach of such agreement,[30] and where under the terms of the lease a breach of an implied covenant to reasonably operate the premises is not a ground of forfeiture, the remedy must be sought in a proper action for a breach of such covenant.[31] But where the lease so provides, the lessor may declare it void upon failure to develop the property within a specified time.[32] And a forfeiture may be enforced for failure to commence work within the time specified, although the work is completed within the time required.[33] An alternative clause for payment of rent in case operations are not commenced within the specified time does not abrogate the provision for forfeiture, which may be enforced at the lessor's option, if operations are not begun and the rent not paid.[34]

(2) Failure to Pay Rent. By the provisions of the lease it may be rendered void through a failure of the lessee to pay rent in advance.[35] Where the consideration for a lease consists of both the payment of a certain sum in advance and the furnishing of gas for use by the lessor, the lessor cannot forfeit the lease for failure to pay the cash rent upon the day specified while he continues the use of the gas.[36]

28. Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236.

When forfeiture would be unconscionable. —A covenant in an oil lease to drill one well every two months after oil is produced, until the land is well developed, is complied with where the required number of wells have been drilled, although not at regular intervals of two months, and a court of equity will not decree a forfeiture because of such fact, especially where the lessor made no objection on that ground when they were being drilled. Kellar *v.* Craig, 126 Fed. 630, 61 C. C. A. 366.

29. Rose *v.* Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625; Harris *v.* Ohio Coal Co., 57 Ohio St. 118, 48 N. E. 502; McKnight *v.* Kreutz, 51 Pa. St. 232; Core *v.* New York Petroleum Co., 52 W. Va. 276, 43 S. E. 128.

30. Harris *v.* Ohio Coal Co., 57 Ohio St. 118, 48 N. E. 502. But see Ohio Oil Co. *v.* Harris, 1 Ohio S. & C. Pl. Dec. 157, 1 Ohio N. P. 132.

31. Harris *v.* Ohio Coal Co., 57 Ohio St. 118, 48 N. E. 502; Blair *v.* Peck, 1 Pennyp. (Pa.) 247.

As to the rule of damages in such cases see Bradford Oil Co. *v.* Blair, 113 Pa. St. 83, 4 Atl. 218, 57 Am. Rep. 442.

32. Evans *v.* Consumers' Gas Trust Co., (Ind. 1891) 29 N. E. 398, 31 L. R. A. 673; Leatherman *v.* Oliver, 151 Pa. St. 646, 25 Atl. 309; Heintz *v.* Shortt, 149 Pa. St. 286, 24 Atl. 316 (holding that where a lease provided that it should "be declared null and void unless further prosecuted after the first well drilled," four years' delay after the first well was drilled, without taking further steps, was ground of forfeiture); Hodges *v.* Brice, 32 Tex. Civ. App. 358, 74 S. W. 590.

What constitutes commencing work.—If the place of location of the well is fixed, timbers prepared, contract for the well executed, and machinery ordered, within the time, the fact that the impassable condition of the roads prevents the hauling of the machinery to the place where it is to be used until after the expiration of the time limited for commencing operations will not work a forfeiture. Fleming Oil, etc., Co. *v.* South Penn Oil Co., 37 W. Va. 645, 17 S. E. 203.

Where the lease provides for prosecution to success, with due diligence, or abandonment, and to be null and void in case "oil or gas should not be pumped or excavated in paying quantities" on or before a certain day, the mere striking of oil will not avoid the forfeiture in the event the oil is not brought to the surface, so as to be capable of division, according to the terms of the lease, and whether due diligence was used is a question for the jury. Kennedy *v.* Crawford, 138 Pa. St. 561, 21 Atl. 19.

33. Williams *v.* Fowler, 32 Pittsh. Leg. J. N. S. (Pa.) 145.

34. Evans *v.* Consumers' Gas Trust Co., (Ind. 1891) 29 N. E. 398, 31 L. R. A. 673; Brown *v.* Vandergrift, 80 Pa. St. 142.

Deposit of money to the credit of the lessor before it falls due under the lease is a sufficient payment whether the deposit be of lawful money, of a check, or of a draft. Friend *v.* Mallory, 52 W. Va. 53, 43 S. E. 114.

35. Murdock-West Co. *v.* Logan, 69 Ohio St. 514, 69 N. E. 984, holding that where the rent was to be paid monthly in advance, the lease was rendered void upon default from the first day of the month in which such payment was to be made.

36. King *v.* Morristown Fuel, etc., Co., 31 Ind. App. 476, 68 N. E. 310.

(3) Cessation of Work. It is frequently provided that the lease shall be forfeited in case work ceases for a given period.[37] Where the parties have agreed that the completion of a well shall operate as a full liquidation of rental stipulated for delay during the remainder of the lease, the lessee or his assignee, after drilling a dry well and removing the machinery, is entitled to a reasonable time within which to return and make further development under the lease before it may be terminated.[38]

(c) *Enforcement*—(1) In General. When a forfeiture for the benefit of the lessor is contracted for in case of default on the part of the lessee, the lessor must by word or deed manifest in some unequivocal way a purpose to treat the lease as forfeited, before it can be regarded as at an end.[39] The question whether or not a forfeiture has been declared is one of fact.[40]

(2) Reëntry. After a forfeiture has taken place the lessor may reënter for condition broken, as against the lessee[41] or a purchaser of the leasehold interest upon execution sale against the lessee,[42] and the lessee cannot prevent such a reëntry by a redemption from the execution sale.[43] Where the lease contains a clause of forfeiture for breach of covenant but no clause of reëntry, a forfeiture may be declared by the lessor without an actual and formal reëntry.[44] And where the grantor has never parted with possession of the premises it is not necessary for him to make a reëntry in order to assert a forfeiture.[45]

(3) Refusal of Rent. Where the lease provides for the payment of specified sums in case of delay in development, and further that a refusal to make such payments shall be construed as a surrender of the lessee's right and shall make the lease null and void, a refusal to accept rent after the date upon which it became due is a sufficient declaration of an intention to regard the lease as void.[46]

(4) Execution of Second Lease. In case of the failure by the lessee to operate, unless he is in actual possession of the premises, no actual reëntry by the lessor is necessary to terminate the lease; the lessor's execution of a new lease to another, or other equivalent act, is sufficient.[47] But giving a second oil lease on the same property, subject to a prior lease, is not an unequivocal declaration of forfeiture of the first,[48] and the execution of a second lease cannot be taken as conclusive evidence of a purpose to declare the first one forfeited when its own terms show that such is not the purpose.[49] A lease executed to a third party, intended as an act of forfeiture, is void when executed within the time for which the lessor has received a stipulated rental from the original lessee.[50]

37. See Munroe *v.* Armstrong, 96 Pa. St. 307, where it was held that the cessation of work for thirty days caused a forfeiture.

38. Henne *v.* South Penn Oil Co., 52 W. Va. 192, 43 S. E. 147.

39. Thomas *v.* Hukill, 34 W. Va. 385, 12 S. E. 522.

40. Heinouer *v.* Jones, 159 Pa. St. 228, 28 Atl. 228.

41. Acme Oil, etc., Co. *v.* Williams, 140 Cal. 681, 74 Pac. 296.

42. Acme Oil, etc., Co. *v.* Williams, 140 Cal. 681, 74 Pac. 296.

43. Acme Oil, etc., Co. *v.* Williams, 140 Cal. 681, 74 Pac. 296.

44. Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759.

45. Logansport, etc., Gas Co. *v.* Null, 36 Ind. App. 503, 76 N. E. 125; Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759; Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

46. Logansport, etc., Gas Co. *v.* Null, 36 Ind. App. 503, 76 N. E. 125.

47. Allegany Oil Co. *v.* Bradford Oil Co., 86 N. Y. 638 [*affirming* 21 Hun 26]; Kenton Gas, etc., Co. *v.* Dorney, 17 Ohio Cir. Ct. 101, 9 Ohio Cir. Dec. 604; Wolf *v.* Guffey, 161 Pa. St. 276, 28 Atl. 1117; Fennell *v.* Guffey, (Pa. 1894) 28 Atl. 1118; Ray *v.* Western Pennsylvania Natural Gas Co., 138 Pa. St. 576, 20 Atl. 1065, 1067, 21 Atl. 1, 202, 21 Am. St. Rep. 922, 12 L. R. A. 290; Steelsmith *v.* Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759.

48. Stone *v.* Marshall Oil Co., 188 Pa. St. 614, 41 Atl. 748, 1119; South Penn Oil Co. *v.* Stone, (Tenn. Ch. App. 1900) 57 S. W. 374; Henne *v.* South Penn Oil Co., 52 W. Va. 192, 43 S. E. 147; Schaupp *v.* Hukill, 34 W. Va. 375, 12 S. E. 501.

49. Thomas *v.* Hukill, 34 W. Va. 385, 12 S. E. 522 [*distinguishing* Guffy *v.* Hukill, *supra*, note 47, and *infra*, note 60].

50. Friend *v.* Mallory, 52 W. Va. 53, 43 S. E. 114.

(5) NOTICE. Written notice of forfeiture may be made essential by the lease.[51] Before the lessor may forfeit the lease upon the ground that there has not been a reasonable exploration thereunder, he must, where the lessee has entered upon the premises and expended money, give notice of his intention to insist upon greater development of the property.[52] Where the lessor has agreed not to urge a forfeiture upon condition that lessees shall carry on the work of development without cessation, the forfeiture, in case the lessees do not comply with the condition, may be enforced without a formal putting in default.[53]

(D) *Waiver.* If there has been a breach of an agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it, or acquiesces in it, he will be precluded from enforcing the forfeiture.[54] So the lessor by acquiescence in delays of payments as provided by the lease may waive the right to forfeit the lease therefor.[55] So, although it is provided that the lease shall be rendered void by a failure on the part of the lessee to comply with its conditions, the lessor may waive a forfeiture and recover the sums agreed to be paid although the land is unproductive.[56] Where a lease has been abandoned and the lessee's interest forfeited, a subsequent parol permission to the lessee to enter and resume work upon conditions similar to those imposed by the original lease does not waive a forfeiture of the lessee's interest under the original lease.[57] A waiver of the time within which operations are to commence is not necessarily a waiver of the time for completion.[58] An agreement permitting delay will not amount to a waiver of forfeiture on that account where it was procured with a fraudulent intent.[59] Waiver of forfeiture of a lease for nonpayment of rent cannot be effected by the lessor after he has granted a lease of

51. South Penn Oil Co. *v.* Stone, (Tenn. Ch. App. 1900) 57 S. W. 374.

52. Ohio Oil Co. *v.* Hurlburt, 14 Ohio Cir. Ct. 144, 7 Ohio Cir. Dec. 321 [*reversing* 6 Ohio S. & C. Pl. Dec. 305].

53. Escoubas *v.* Louisiana Petroleum, etc., Co., 22 La. Ann. 280.

54. *Indiana.*— Consumers' Gas Trust Co. *v.* Littler, 162 Ind. 320, 70 N. E. 363.

Kentucky.— Bay State Petroleum Co. *v.* Penn Lubricating Co., 87 S. W. 1102, 27 Ky. L. Rep. 1133.

Pennsylvania.— Lynch *v.* Versailles Fuel Gas Co., 165 Pa. St. 518, 30 Atl. 984; Duffield *v.* Hue, 129 Pa. St. 94, 18 Atl. 566, holding that the lessor's right to insist upon a forfeiture for failure to sink a seventh oil well in a stipulated time is waived by his acquiescence in the failure to put down two or three of the preceding six wells within the period stipulated in the lease.

West Virginia.— Hukill *v.* Myers, 36 W. Va. 639, 15 S. E. 151.

United States.— Elk Fork Oil, etc., Co. *v.* Jennings, 84 Fed. 839 [*affirmed* in 90 Fed. 178, 32 C. C. A. 560], holding that a stipulation for completing a test well in a given time, unavoidable accident excepted, on pain of forfeiture is waived by the lessor's recognition of the unavoidable character of certain accidents delaying completion coupled with acquiescence in such delay.

Canada.— Flower *v.* Duncan, 13 Grant Ch. (U. C.) 242.

See 34 Cent. Dig. tit. "Mines and Minerals," § 207.

55. Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; McCarty *v.* Mellon, 5 Pa. Dist 425. See Steiner *v.* Marks, 172 Pa. St. 400, 33 Atl. 695, where the question whether there had been a prompt payment of rent was held to be for the jury.

Acceptance of rent.— Where a gas lease is for such a period as the lessee should pay the lessor a certain sum of money annually, or so much longer as oil or gas shall be found in paying quantities, the acceptance by the lessor of an annual payment in advance is a waiver of performance in developing the property for that year. Consumers' Gas Trust Co. *v.* Ink, 163 Ind. 174, 71 N. E. 477; Consumers' Gas Trust Co. *v.* Howard, 163 Ind. 170, 71 N. E. 493; Consumers' Gas Trust Co. *v.* Worth, 163 Ind. 141, 71 N. E. 489; Consumers' Gas Trust Co. *v.* Littler, 162 Ind. 320, 70 N. E. 363; Venedocia Oil, etc., Co. *v.* Robinson, 71 Ohio St. 302, 73 N. E. 222. But the acceptance of payment for the last preceding month, the previous months remaining unpaid, does not operate as a waiver. Duffield *v.* Michaels, 97 Fed. 825.

56. Springer *v.* Citizens' Natural Gas Co., 145 Pa. St. 430, 22 Atl. 986; Ray *v.* Western Pennsylvania Natural Gas Co., 138 Pa. St. 576, 20 Atl. 1065, 1067, 21 Atl. 1, 202, 21 Am. St. Rep. 922, 12 L. R. A. 290; Wills *v.* Manufacturers' Natural Gas Co., 130 Pa. St. 222, 18 Atl. 721, 5 L. R. A. 603.

57. Ohio Oil Co. *v.* Detamore, 165 Ind. 243, 73 N. E. 906.

58. Cleminger *v.* Baden Gas Co., 159 Pa. St. 16, 28 Atl. 293.

59. J. M. Guffey Petroleum Co. *v.* Oliver, (Tex. Civ. App. 1904) 79 S. W. 884.

the same premises to another lessee, who, it has been held, may recover the property in a possessory action.[60]

(E) *Effect.* Where the lease does not contain a covenant, either express or implied, to develop the premises or pay rent, but provides that the lease shall be void unless a well shall be completed within a certain time, or unless certain sums shall be paid in event of delay in working, a failure to explore the premises simply forfeits the lease and does not impose any liability on the lessee.[61] After the lease has been forfeited there can be no recovery of further rent.[62]

(F) *Relief Against Forfeiture.* A tender of royalties by the lessee of an oil field, whose lease has been forfeited for failure to operate, does not prevent the lessor's insistence on the forfeiture in an action at law.[63] Nor will equity relieve the lessee from forfeiture upon the tender of the monthly rental which had not been paid, where the principal thing required was the sinking of the well, the failure to do which cannot be compensated in damages.[64] Where under a lease granting the right to bore for oil, but providing that the premises should be used for no other purpose, the lessees discover gas, and afterward suffer a forfeiture for breach of conditions, and are ejected, it has been held that they have no equity to be reimbursed out of the fund produced by the sale of the gas for the expense of drilling the well.[65]

j. Surrender of Lease. An oil or gas lease may, in the absence of a statute requiring a writing, be surrendered by parol.[66] A surrender of the lease will not in the absence of an express agreement amount to a cancellation of existing obligations.[67]

k. Abandonment of Lease — (I) *What Constitutes.* As a general rule the question whether or not there has been an abandonment by the lessee of his rights under the lease is regarded as one of fact,[68] although a failure to work or drill or continue explorations for varying periods, controlled to some extent by the terms of the particular lease, has been held in some cases to raise a presump-

60. Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759.

61. Glasgow *v.* Chartiers Gas Co., 152 Pa. St. 48, 25 Atl. 232; McKee *v.* Colwell, 7 Pa. Super. Ct. 607; Snodgrass *v.* South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820.

62. Wilson *v.* Goldstein, 152 Pa. St. 524, 25 Atl. 493.

63. Acme Oil, etc., Co. *v.* Williams, 140 Cal. 681, 74 Pac. 296; Armitage *v.* Mt. Sterling Oil, etc., Co., 80 S. W. 177, 25 Ky. L. Rep. 2262; Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

64. Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

65. Palmer *v.* Truby, 136 Pa. St. 556, 20 Atl. 516.

66. Hooks *v.* Forst, 165 Pa. St. 238, 30 Atl. 846 (where an oil lease for a period of years provides that the lessees shall have the right at any time to surrender the lease, and be released therefrom, the lessees can surrender the lease by parol at any time before they take actual possession); Cochran *v.* Shenango Natural Gas Co., 23 Pittsb. Leg. J. N. S. (Pa.) 82. And see May *v.* Hazelwood Oil Co., 152 Pa. St. 518, 25 Atl. 564.

In Indiana by statute an instrument conveying all gas and oil under certain lands, upon condition, is incapable of oral surrender by the acts of the parties or by operation of law. Heller *v.* Dailey, 28 Ind. App. 555, 63 N. E. 490.

67. Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662, holding that under an oil lease providing that the lessees should begin a well within a certain time, and failing in which to pay a certain sum per day until commenced, or surrender the lease, lessees to have the right "at any time to surrender the lease, and be released from all moneys due and conditions unfulfilled then, and from that time the lease to be void, and the payment which shall have been made shall be the full stipulated damages for the nonfulfillment," the lessees did not have the right to cancel back debts by surrendering the lease, such provision referring to future obligations.

68. Rawlings *v.* Armel, 70 Kan. 778, 79 Pac. 683; Dickey *v.* Coffeyville Vitrified Brick, etc., Co., 69 Kan. 106, 76 Pac. 398; Ahrns *v.* Chartiers Valley Gas Co., 188 Pa. St. 249, 41 Atl. 739; Bartley *v.* Phillips, 179 Pa. St. 175, 36 Atl. 217; Karns *v.* Tanner, 66 Pa. St. 297.

Facts held sufficient to show abandonment see Ohio Oil Co. *v.* Detamore, 165 Ind. 243, 73 N. E. 906; Rawlings *v.* Armel, 70 Kan. 778, 79 Pac. 683; Bay State Petroleum Co. *v.* Penn Lubricating Co., 87 S. W. 1102, 27 Ky. L. Rep. 1133; Stage *v.* Boyer, 183 Pa. St. 560, 38 Atl. 1035; Colgan *v.* Forest Oil Co., 30 Pittsb. Leg. J. N. S. (Pa.) 68.

Facts held insufficient to show abandonment see Baumgardner *v.* Browning, 12 Ohio Cir. Ct. 73, 5 Ohio Cir. Dec. 394; Ahrns *v.*

tion of abandonment as a matter of law.[69] Unless bound by the terms of the lease so to do, the courts will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.[70] Either a failure to commence exploration within the time specified, or, if no time is specified, within a reasonable time; or failure to continue other operations with reasonable diligence after the specified drilling has been done, or proved non-productive, in the absence of excuse, may amount to an abandonment, which will justify a reëntry, or making another lease, by the lessor.[71] Where a lessee has taken a lease from joint lessors, his subsequent acceptance of a second lease of a part of the same property, upon different terms, from one of such lessors is an abandonment of the first lease.[72]

(II) *AGREEMENTS BETWEEN THE PARTIES.* A parol agreement between the parties to an oil lease as to what shall constitute due diligence or abandonment is binding on purchasers from the lessor without notice, but with knowledge of the existence of the lease.[73] And so a subsequent purchaser is bound by a construction which has been given the contract by the parties, and of which he has knowledge.[74]

(III) *ESTOPPEL TO ASSERT.* The fact that the lessor has acquiesced in a resumption of work by the lessee under the lease after an abandonment does not estop him to assert a second abandonment.[75]

(IV) *OPERATION AND EFFECT.* Whenever an abandonment of land leased for oil and gas purposes occurs, the lease is subject to cancellation, and a subsequent tender of overdue rent will not restore the lessee's rights against the will of the lessor.[76] Where after a lease has been abandoned one of the lessors grants rights in the land to third persons, the title acquired by such persons is not affected by

Chartiers Valley Gas Co., 188 Pa. St. 249, 41 Atl. 739; Coulter *v.* Conamaugh Gas Co., 30 Pittsb. Leg. J. N. S. (Pa.) 281; Kellar *v.* Craig, 126 Fed. 630, 61 C. C. A. 366.

69. *Colorado.*— Florence Oil, etc., Co. *v.* Orman, 19 Colo. App. 79, 73 Pac. 628, four years.

Indiana.— Gadbury *v.* Ohio, etc., Consol. Natural, etc., Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895, two years.

Ohio.— Tucker *v.* Watts, 25 Ohio Cir. Ct. 320, six years.

Pennsylvania.— Calhoon *v.* Neely, 201 Pa. St. 97, 50 Atl. 967 (nine years); Barnhart *v.* Lockwood, 152 Pa. St. 82, 25 Atl. 237 (eleven years); Cole *v.* Taylor, 8 Pa. Super. Ct. 19 (two years).

West Virginia.— Parish Fork Oil Co. *v.* Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566 (eighteen months); Crawford *v.* Ritchey, 43 W. Va. 252, 27 S. E. 220 (seven years).

United States.— Tennessee Oil, etc., Co. *v.* Brown, 131 Fed. 696, 65 C. C. A. 524 (fifteen years); Logan Natural Gas, etc., Co. *v.* Great Southern Gas, etc., Co., 126 Fed. 623, 61 C. C. A. 359 (four years); Federal Oil Co. *v.* Western Oil Co., 112 Fed. 373 (eight months).

See 34 Cent. Dig. tit. "Mines and Minerals," § 204.

70. Gadbury *v.* Ohio, etc., Consol. Natural, etc., Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895; Hawkins *v.* Pepper, 117 N. C. 407, 23 S. E. 434; Conrad *v.* Morehead, 89 N. C. 31; Petroleum Co. *v.* Coal, etc., Co., 89 Tenn. 381, 18 S. W. 65; Parish Fork Oil Co. *v.* Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566.

71. Eaton *v.* Allegany Gas Co., 122 N. Y. 416, 25 N E. 981; Northwestern Ohio Natural Gas Co. *v.* Davis 9 Ohio Cir. Ct. 551, 6 Ohio Cir. Dec. 529; Calhoon *v.* Neely, 201 Pa. St. 97, 50 Atl. 867; Aye *v.* Philadelphia Co., 193 Pa. St. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Venture Oil Co. *v.* Fretts, 152 Pa. St. 451, 25 Atl. 732; Logan Natural Gas, etc., Co. *v.* Great Southern Gas, etc., Co., 126 Fed. 623, 61 C. C. A. 359; Foster *v.* Elk Fork Oil, etc., Co., 90 Fed. 178, 32 C. C. A. 560 [*affirming* 84 Fed. 839].

72. Martel *v.* Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253.

73. Bartley *v.* Phillips, 179 Pa. St. 175, 36 Atl. 217.

74. Indiana Natural Gas, etc., Co. *v.* Leer, 34 Ind. App. 61, 72 N. E. 283.

75. Bay State Petroleum Co. *v.* Penn Lubricating Co., 87 S. W. 1102, 27 Ky. L. Rep. 1133.

76. Rawlings *v.* Armel, 70 Kan. 778, 79 Pac. 683. See also Logan Natural Gas, etc., Co. *v.* Great Southern Gas, etc., Co., 126 Fed. 623, 61 C. C. A. 359, holding that the fact that under the provision of an oil and gas lease the lessee issued to the lessor "first mortgage bonds" for a certain amount per acre, with interest payable from the net profits, reserving the right to cancel the same and abandon the lease, did not affect the right of the lessor to treat the lease as abandoned, although the bonds were not returned, but the lessor had received no payments and the bonds were non-negotiable

a subsequent compromise between the lessor and the original lessee, and a recognition of the lease in a modified form.[77]

l. Rights as to Improvements Upon Termination of Lease. The casing in an oil or gas well, the derrick, and other appliances used in drilling and operating it, are usually regarded as trade fixtures[78] and can be removed by the owner or lessee during the term of the lease.[79] But in case they are not removed during the term or within a reasonable time after its expiration, they become the property of the owner of the land,[80] although the parties may by their contract modify either of the foregoing principles.[81]

m. Rent or Royalties — (i) *In General.* A person who accepts an oil or gas lease, containing a stipulation to pay a monthly rental until a well is completed, or until the expiration of a certain fixed term, is bound to pay such rental, although he does not, within such term, enter on the land and complete such well, unless he was prevented from doing so by the lessor, and his failure is not a mere personal default;[82] and as in ordinary leases where the lessee has the privilege of an additional term,[83] if he holds over he will be liable for the specified rental for a similar term.[84] So where the right of possession for operating purposes has been acquired by a

and of no validity after the termination of the lease.

77. Martel *v.* Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253.

78. Trade fixtures see, generally, FIXTURES, 19 Cyc. 1033.

79. Siler *v.* Globe Window Glass Co., 21 Ohio Cir. Ct. 284, 11 Ohio Cir. Dec. 784; Shellar *v.* Shivers, 171 Pa. St. 569, 33 Atl. 95. See also LANDLORD AND TENANT, 24 Cyc. 1101.

A landlord who recovers the right to possession by an action of ejectment under an oil and gas lease does not thereby become the owner of the lessee's tools and other personal property left by him on the premises. Sattler *v.* Opperman, 14 Pa. Super. Ct. 32; Roberts *v.* Bettman, 45 W. Va. 143, 30 S. E. 95.

80. Shellar *v.* Shivers, 171 Pa. St. 569, 33 Atl. 95, holding that the lessee could not enter to remove casings from a dry well four years after the date of the termination of the lease, and five years and six months after the well had been completed and found to be of no use.

81. Shellar *v.* Shivers, 171 Pa. St. 569, 33 Atl. 95. See also Ohio Oil Co. *v.* Griest, 30 Ind. App. 84, 65 N. E. 534 (holding that where a lease for the privilege of drilling for gas gave the lessee the right to remove machinery or fixtures, but provided that, if he abandoned the lease while there was a well furnishing gas sufficient for the lessor's residence on the premises, such well should be left in a condition to be used by the lessor, the lessee could not remove pipe, thereby cutting off the supply of gas to the residence, whether or not such pipe was personal property); Patterson *v.* Hausbeck, 8 Pa. Super. Ct. 36 (holding that a lessee who has acquired leasehold rights in oil and gas lands for the purpose of drilling and operating oil has the right to remove his machinery from the leased premises under an express covenant to that effect, irrespective of any controversy as to whether there is a legal right to abandon the lease by reason of an alleged failure on the part of the lessee to complete the work of development and operating.

Actions for fixtures.— Where an oil and gas lease gives the lessee the "right to remove any machinery, fixtures, and buildings placed on the leased premises by the lessee or those acting under him," upon the forfeiture of the lease by the lessor, the lessee may bring an action therefor upon refusal of the right to remove the fixtures. Sattler *v.* Opperman, 30 Pittsb. Leg. J. N. S. (Pa.) 205.

82. Indianapolis Gas Co. *v.* Rayle, 36 Ind. App. 706, 76 N. E. 176; Indianapolis Gas Co. *v.* Pierce, 36 Ind. App. 573, 76 N. E. 173; Kokomo Natural Gas, etc., Co. *v.* Albright, 18 Ind. App. 151, 47 N. E. 682; Lawson *v.* Kirchner, 50 W. Va. 344, 40 S. E. 344.

83. See LANDLORD AND TENANT, 24 Cyc. 1011, 1140.

84. Nesbit *v.* Godfrey, 155 Pa. St. 251, 25 Atl. 621; Coulter *v.* Conemaugh Gas Co., 14 Pa. Super. Ct. 553 [*affirming* 30 Pittsb. Leg. J. N. S. 281], holding that where an oil and gas lease provides for the payment of a stipulated sum per year for each well from which gas is used off the premises, and there is no apportionment provided for in case of the failure of the gas, when a new year is entered upon, an obligation to pay for all that year arises, subject to any stipulated right to annul by reassignment. See also Johnstown, etc., R. Co. *v.* Egbert, 152 Pa. St. 53, 25 Atl. 151, where it was stipulated in a lease that the lessees should bore for oil, but the lessor should retain possession for other purposes, and that, in the event that oil was not found, a rent should be paid for such period as the premises were "retained," and it was held that, although the lessees made no attempt to procure oil, and never took possession, they were liable for rent until they made a formal surrender of the right to operate for oil, the word "retained" being construed as referring to the right to operate for oil on the premises.

successful search for the product, the lessee becomes answerable for the stipulated rental according to the terms of the agreement, and is relieved of that liability only by showing payment or notice to the lessor, either written or verbal, of abandonment.[85] But where a lease provides that it shall be null and void if a well is not completed within a designated period, unless the lessee shall thereafter pay a fixed monthly rental for each month's delay, each payment to extend the time for completion of the well one month and no longer, the monthly payment is only a condition precedent and necessary to maintain the vitality of the lease until a well is completed, and the agreement is not a covenant to pay a designated monthly rental until the completion of a well.[86] A covenant in an oil lease to pay rent after a fixed date for each piece of land on which wells had not been drilled and operated is not affected by extensions of the time in which drilling might be commenced.[87]

(II) *Defenses.* The fact that a lease may be defective is no defense to an action for rent accruing while the lessee has the undisputed possession of the premises and the benefit of the lease;[88] nor can a lessee, while in the possession and beneficial enjoyment of the leased premises, allege in defense to an action for stipulated rent that the lessor under whom he entered had no title at the time of entry.[89] A lessee cannot evade liability for royalties by drilling and operating

85. Wilson *v.* Philadelphia Co., 210 Pa. St. 484, 60 Atl. 149.

Exhaustion of well.— After oil or gas has been discovered, or where the lease covers a then producing well, there is, even in the absence of express language, an implied agreement that such well is not only to be but to remain a gas or oil well, as the case may be, and when it ceases to produce there is no obligation to thereafter pay the stipulated annual rental. Indianapolis Gas Co. *v.* Teters, 15 Ind. App. 475, 44 N. E. 549; Williams *v.* Guffy, 178 Pa. St. 342, 35 Atl. 875; McConnell *v.* Lawrence Natural Gas Co., 30 Pittsb. Leg. J. N. S. (Pa.) 346. See also Ohio Oil Co. *v.* Lane, 59 Ohio St. 307, 52 N. E. 791, holding that under a contract granting an operating company the right to oil and gas found on the land on the stipulation that if gas only should be found the company would pay a fixed sum per year for each well "while the same is being used off the premises," and containing no stipulation inconsistent therewith, the company is not required to pay such sum for a gas well whose product is not used, even though it might be used off the premises without loss to the company.

Stipulations as to different wells.— Under a stipulation that a certain sum was to be paid the lessor for the first well drilled if it produced a specified amount of oil, and an additional sum if a second well was put down and it produced in like manner, the lessee is bound for the payment on the second well producing such amount, although the first well failed. Wichman *v.* Ft. Orange Oil Co., 6 Ohio S. & C. Pl. Dec. 540, 4 Ohio N. P. 407 (where a lease provided for the successive drilling of four wells within specified times, and provided that for each location when made the lessee should pay one hundred and fifty dollars, and it was held to require the location debt to be paid not only for the four wells expressly provided for, but for every well drilled beyond that number); Brushwood Developing Co. *v.* Hickey, (Pa. 1888) 16 Atl. 70 (holding that under a stipulation in an oil lease that if the first well produced ten barrels of oil daily for thirty days the lessor shall receive therefor five hundred dollars, and if the second well shall produce fifteen barrels "in like manner" the lessor shall be paid "the further sum" of a thousand dollars, with the subsequent explanation that in no case shall more than five hundred dollars be paid for the first well, the lessee is bound for the payment on the second well which produces fifteen barrels daily, although the first well produces nothing). And see Hunter *v.* Apollo Oil, etc., Co., 204 Pa. St. 385, 54 Atl. 274.

86. Dill *v.* Fraze, (Ind. App. 1906) 77 N. E. 1147; Van Etten *v.* Kelly, 66 Ohio St. 605, 64 N. E. 560; Hays *v.* Forest Oil Co., 213 Pa. St. 556, 62 Atl. 1072; Glasgow *v.* Chartiers Gas Co., 152 Pa. St. 48, 25 Atl. 232. See also Smith *v.* South Penn Oil Co., 59 W. Va. 204, 53 S. E. 152, holding that where a lease provides for the completion of a well by a time fixed, and that the lease shall become void at the expiration of that time unless the lessee pays a certain sum quarterly in advance for each three months thereafter that the completion is delayed, if one unproductive well is drilled and commutation money paid until the completion thereof, and the lessee is permitted to drill another without further payment, and without notice that compensation will be demanded for such further use in satisfaction, none can be recovered.

87. Rawlings *v.* Armel, 70 Kan. 778, 79 Pac. 683.

88. Kunkle *v.* People's Natural Gas Co., 165 Pa. St. 133, 30 Atl. 719, 33 L. R. A. 847.

89. MacDonald *v.* O'Neil, 21 Pa. Super. Ct. 364.

on adjoining premises which he controls in such a way as to drain the oil and gas from the leased land.[90]

(III) *LIABILITY OF ASSIGNEE.* Generally speaking the assignee of an oil or gas lease is bound by his acceptance to make good the covenants therein contained to pay rents and royalties without reference to any express obligation assumed by him in the contract of assignment.[91] However, an assignee of a lease containing a covenant to commence a gas well at a time stipulated is not liable for a breach thereof where his assignment is taken after the breach.[92]

(IV) *RIGHTS OF GRANTEE OF LAND.* Where the owner of land executes a gas or oil lease covering the same, and subsequently conveys the land by an ordinary quitclaim or warranty deed, the grantee is entitled to the rents or royalties maturing after the conveyance.[93]

(V) *RELEASE FROM LIABILITY.* One who leases oil land under an agreement to pay a certain sum for each oil well drilled is not released from liability for rent by an assignment of the lease to another person, whom the lessor recognizes as his tenant, and is not released from liability for rent of a well by the lessor's failure to demand from the assignee the rent thereof at the time boring thereon is commenced.[94] A forfeiture declared by the lessor does not release the lessee from liability for rents or royalties which were matured at the time the forfeiture became effective.[95] A purchaser cannot suspend the payment of the price of an oil lease because of danger of eviction, of which he was informed at the time of the purchase.[96]

4. LICENSES. There may be a right to dig ore in the mines of another distinct from the ownership of the mines,[97] and this right, if it be to one and his heirs, is an incorporeal hereditament.[98] But a contract simply giving a right to dig or take ore from a mine, and granting no estate or interest therein, confers merely a

90. Kleppner *v.* Lemon, 197 Pa. St. 430, 47 Atl. 353, 198 Pa. St. 581, 48 Atl. 483.

91. Indiana Natural Gas, etc., Co. *v.* Hinton, 159 Ind. 398, 64 N. E. 224; Breckenridge *v.* Parrott, 15 Ind. App. 411, 44 N. E. 66; Edmonds *v.* Mounsey, 15 Ind. App. 399, 44 N. E. 196; Burton *v.* Forest Oil Co., 204 Pa. St. 349, 54 Atl. 266 (holding that where undivided interests in a lease are assigned to two different parties and one of the assignees goes into the possession and beneficial enjoyment of the premises, he will be liable to the lessor for the whole rent, although it may be that the lessor could recover such rent in a joint action against the two assignees); Jackson *v.* O'Hara, 183 Pa. St. 233, 38 Atl. 624 (holding that under an assignment of one half of lessee's interest in the lease, together with his gas right therein, the assignee becomes a joint owner of the lease and jointly liable thereunder with the original lessee); Fennell *v.* Guffey, 155 Pa. St. 38, 25 Atl. 785, 139 Pa. St. 341, 20 Atl. 1048; Bradford Oil Co. *v.* Blair, 113 Pa. St. 83, 4 Atl. 218, 57 Am. Rep. 442; Coulter *v.* Conemaugh Gas Co., 14 Pa. Super. Ct. 553; Watt *v.* Equitable Gas Co., 8 Pa. Super. Ct. 618, 43 Wkly. Notes Cas. 215 (holding, however, that the assignee of a lease is not liable for rents and royalties accruing after an assignment by him). See, however, Heller *v.* Dailey, 28 Ind. App. 555, 63 N. E. 490; Smith *v.* Munhall, 139 Pa. St. 253, 21 Atl. 735.

92. Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553.

93. Chandler *v.* Pittsburg Plate-glass Co., 20 Ind. App. 165, 50 N. E. 400.

Assignment of royalty.— Where there has been a joint reservation of royalties and assignments by one of the persons jointly entitled to receive them, it does not amount to a severance upon which the royalties are apportioned between the co-lessors, but the assignee becomes a tenant in common with the other co-lessor and either can receipt for the royalties. Swint *v.* McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. 1021, 63 Am. St. Rep. 791. Where a conveyance reserves one sixteenth of the usual royalty in all oil under the land and the grantee leases such oil, the royalty reserved in the deed is not affected. Harris *v.* Cobb, 49 W. Va. 350, 38 S. E. 559.

94. Pittsburg Consol. Coal Co. *v.* Greenlee, 164 Pa. St. 549, 30 Atl. 489. See also Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553.

95. Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662; Woodland Oil Co. *v.* Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. See also Ray *v.* Western Pennsylvania Natural Gas Co., 138 Pa. St. 576, 20 Atl. 1065, 21 Am. St. Rep. 922, 12 L. R. A. 290.

96. Jennings-Heywood Oil Syndicate *v.* Home Oil, etc., Co., 113 La. 383, 37 So. 1.

97. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202.

98. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Grubb *v.* Guilford, 4 Watts (Pa.) 223, 28 Am. Dec. 700.

license,[99] and is not exclusive of the right of the licensor to exercise the same right, in the same mine, at the same time, or to grant permission to others to do so.[1] An exclusive mining right may, however, be conferred by license; and where it clearly appears, even by implication, that it was the mutual design of the parties to make it exclusive, it will be so considered;[2] and it has been held that the expenditure of labor and money on the land under the license makes it exclusive.[3] A mining license is in most respects similar to other licenses respecting real estate and is governed by the same rules as respects the rights and duties of the parties and the assignment or revocation of the license.[4] Under the Missouri statute a license to mine continues in force for three years and no longer unless

99. *Alabama.*— Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202.

California.— Baker *v.* Clark, 128 Cal. 181, 60 Pac. 677; Wheeler *v.* West, 71 Cal. 126, 11 Pac. 871.

Missouri.— Chynowitch *v.* Granby Min., etc., Co., 74 Mo. 173; Lunsford *v.* La Motte Lead Co., 54 Mo. 426; Desloge *v.* Pearce, 38 Mo. 588; Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484; Currey *v.* Harden, 109 Mo. App. 678, 83 S. W. 770; Jack Harvand Zinc, etc., Co. *v.* Continental Zinc, etc., Min., etc., Co., 106 Mo. App. 66, 80 S. W. 12; Arnold *v.* Bennett, 92 Mo. App. 156.

Montana.— Clark *v.* Wall, 32 Mont. 219, 79 Pac. 1052.

New Jersey.— Silsby *v.* Trotter, 29 N. J. Eq. 228; East Jersey Iron Co. *v.* Wright, 3 N. J. Eq. 248.

Ohio.— Meridian Nat. Bank *v.* McConica, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106; Herrington *v.* Wood, 6 Ohio Cir. Ct. 326, 3 Ohio Cir. Dec. 475.

Pennsylvania.— Chalfant *v.* Rocks, 212 Pa. St. 521, 61 Atl. 1105; Elk Tp. *v.* Beaver Tp., 6 Pa. Co. Ct. 562.

Canada.— See McDonald *v.* Geldert, 3 Nova Scotia Dec. 551.

See 34 Cent. Dig. tit. "Mines and Minerals," § 212.

1. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Upton *v.* Brazier, 17 Iowa 153; Silsby *v.* Trotter, 29 N. J. Eq. 228; Carr *v.* Benson, L. R. 3 Ch. 524, 18 L. T. Rep. N. S. 696, 16 Wkly. Rep. 744.

2. Upton *v.* Brazier, 17 Iowa 153; Silsby *v.* Trotter, 29 N. J. Eq. 228; Funk *v.* Haldeman, 53 Pa. St. 229.

3. Hosford *v.* Metcalf, 113 Iowa 240, 84 N. W. 1054.

4. See, generally, LICENSES, 25 Cyc. 593.

Right of licensee to use of his improvements.— A licensee who constructs a tunnel for mining purposes, under the authority of his license, with his own funds, for which he is to be reimbursed out of the licensor's share of the profits of ore mined for the joint benefit of the licensee and licensor, will be held to have an exclusive right to the use of the tunnel so far as such use is necessary to enable him to get the ore he has a right to take, provided he uses reasonable diligence in doing it. Silsby *v.* Trotter, 29 N. J. Eq. 228.

Royalties.— By a deed of grant and license the licensee was empowered to win and work all and every or any of the coal mines seam and seams of coal under certain lands, and to reimburse himself all expenses incurred in the winning out of the profits from the sale of the coal; and it was provided that after payment to the licensee of all expenses in winning the said colliery coal mines or coal mine seams or seam of coal, he should pay the grantor such royalty for the coals yearly wrought out of the said coal mines seam or seams as should from time to time be awarded by two arbitrators once in every five years whilst the said coal mines seam or seams of coal should continue to be wrought. More than one seam of coal lay under the lands. The licensee after winning one seam went on to win another. It was held that the whole colliery was not won when the first seam was won, but that the deed was to be read *separatim* as to the winning of each seam, and that the licensee was entitled to reimburse himself the expenses of winning the second seam before any royalty was payable as to that seam. Elliot *v.* Rokeby, 7 App. Cas. 43, 51 L. J. Ch. 249, 45 L. T. Rep. N. S. 769, 30 Wkly. Rep. 249 [*reversing* 13 Ch. D. 277, 41 L. T. Rep. N. S. 537, 28 Wkly. Rep. 282].

Liability under covenant of joint licensees to pay for surface damages.— Where a mining license was granted to three persons as joint tenants and the licensees covenanted jointly and severally to pay compensation in respect of damage to the surface, and two of the licensees assigned over to a third person, it was held that the covenant was one running with the subject-matter of the grant and the assignee was liable under the covenant for the whole compensation due to the grantor for damage done to the surface. Norval *v.* Pascoe, 10 Jur. N. S. 792, 34 L. J. Ch. 82, 10 L. T. Rep. N. S. 809, 4 New Rep. 390, 12 Wkly. Rep. 973.

Enforcement of license.— Where the owner of certain land granted another "the privilege of digging and moving the ore" thereon "at twenty-five cents per ton, for the privilege of ground," with leave also to build a house thereon, the materials to be gotten on the land at the licensee's expense, the grant conferred a mere privilege of digging ore, was not compulsory, and imposed no corresponding obligations on the licensee, who might refuse and could not be compelled to work the mine, and, as it contained no mutual or reciprocal engagements, could not be enforced by the licensee. Geiger *v.* Green, 4 Gill (Md.) 472.

the licensor posts rules fixing a different time.[5] The licensee is the owner of the ore actually dug by him under the license,[6] but he acquires no right to the metal or ore until he separates it from the freehold.[7]

5. Work Contracts. Contracts are frequently made for the working of a mine which resemble leases or licenses in some respects and yet are not technically such.[8] They are often mere contracts for services to be rendered in connection with the operation of the mine or well,[9] but not always so, and in construing these anomalous contracts and determining the rights of the parties thereunder[10] there appears to be nothing peculiar to require the application of other than

5. Mo. Rev. St. (1899) §§ 8766, 8767; Arbuthnot *v.* Eclipse Land, etc., Co., 115 Mo. App. 600, 92 S. W. 170; Ashcraft *v.* Englewood Min. Co., 106 Mo. App. 627, 81 S. W. 469; Robinson *v.* Troup Min. Co., 55 Mo. App. 662.

Assignment by licensee — Royalties.—Where plaintiff, whose rights were, under the statute, limited to three years, assigned his rights to defendant, in consideration of a royalty, so long as defendant "should operate," and defendant, after the expiration of three years from plaintiff's registration, mined under a registration and agreement with the owner, plaintiff's right to royalties terminated at the expiration of three years from his registration. Ashcraft *v.* Englewood Min. Co., 106 Mo. App. 627, 81 S. W. 469.

6. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Northam *v.* Bowden, 11 Exch. 70, 24 L. J. Exch. 237, holding that a licensee who has dug up soil mixed with ore has sufficient possessory title to maintain trover against a mere wrong-doer who removes the same.

7. Wheeler *v.* West, 71 Cal. 126, 11 Pac. 871; Clark *v.* Wall, 32 Mont. 219, 79 Pac. 1052; Silsby *v.* Trotter, 29 N. J. Eq. 228; Gillett *v.* Treganza, 6 Wis. 343.

8. See Haven *v.* Hughes, 27 Ont. App. 1, where contract was of the character stated.

9. Thus a contract entered into by and between the owner or lessee of a mine or well and another, whereby the latter agrees to work or develop the same or to perform some service in regard thereto in consideration of a compensation paid to him either in money or in a specified portion of the product of his operations, while it necessarily confers an authority on the contractor to enter on the premises, is essentially a contract for services, the authority to enter being a mere incident thereto. Empire Zinc Co. *v.* Freeman, 75 Mo. App. 524; Christensen *v.* Pacific Coast Borax Co., 26 Oreg. 302, 38 Pac. 127; Wando Phosphate Co. *v.* Gibbon, 28 S. C. 418, 5 S. E. 837, 13 Am. St. Rep. 690. And see cases cited *infra*, note 11.

10. See the following cases, construing various contracts:

Alabama.— Worthington *v.* Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382 (holding that where by contract plaintiff was to mine all the ore within certain limits, the fact that he mined ore without the prescribed limits equal in amount to that remaining unmined within the limits did not defeat his right to mine the latter); Lambie *v.* Sloss Iron, etc., Co., 118 Ala. 427, 24 So. 108 (holding that where the owner of a mine has the right to control the mining contractor's output and to reduce his working force according to the orders on hand, his stopping the work entirely is not a breach, unless done while he has orders on hand).

California.— Ward *v.* Eastwood, (App. 1906) 86 Pac. 742, where it was held, under a contract to mine ore at so much per ton for ore deposited in the chutes ready for hoisting, that a provision that payment should be made on the tenth of the month for the ore hoisted the preceding month, the quantity of which was to be ascertained from the number of tons hoisted, does not preclude the contractor from recovering for ore which was mined and placed in the chutes but which the mine owner failed to hoist because of the rise of water in the mine by reason of unusual rains, the contractor not having assumed any risk as to the keeping of water out of the mine.

Colorado.— No. 5 Min. Co. *v.* Bruce, 4 Colo. 293, holding that a contract to sink a mining shaft a certain number of feet at a specified sum per foot will not be construed to include the timbering, in the absence of a specific agreement therefor or a custom requiring it.

Illinois.— Lambert *v.* Fuller, 88 Ill. 260, where it appeared that a contract by F with L for boring to find coal provided that if he should "strike what is known as conglomerate or iron stone before he reaches 300 feet, he may abandon the work," but in that event receive from L only a ratable proportion of the contract price, and also provided that F, at the option of L, was to bore any number of feet, not exceeding four hundred, at the rate of four dollars per foot above three hundred feet; that F bored two hundred and eleven feet and found conglomerate; and that coal is never found under said formation, and it was held that F might abandon the work at the depth of two hundred and eleven feet and recover the ratable price, since L's option was contingent on F's not finding conglomerate before boring four hundred feet.

Missouri.— Woodworth *v.* McLean, 97 Mo. 325, 11 S. W. 43, holding that a contract, expressed to be for the purpose of developing a mining claim, binding one to cause a shaft to be sunk to "the depth of five hundred feet 'on the vein of ore,' cropping out on said claim," does not oblige him to continue to sink the shaft after the vein has given out entirely.

general principles and the courts have found it both proper and adequate for the purposes of the case to resort to the general law of contract.[11]

Montana.— Yank *v.* Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522, construing the term "net proceeds."

New Jersey.—Lehigh Zinc, etc., Co. *v.* Trotter, 43 N. J. Eq. 185, 10 Atl. 607 [*affirming* 42 N. J. Eq. 254, 7 Atl. 650], holding that a contract whereby the owner of a leasehold in a vein of ore undertakes to deliver to the company a certain number of tons of ore per month, and upon failure for a fixed period during the contract term to deliver that quantity the company might take possession of the mine, machinery, etc., and take the required amount of ore until the inability of the owner to supply the ore under the contract should be removed, gives the company the right to possession of the mine and to work the same if the owner for any reason should fail to deliver the contract amount for the period specified, and gives the owner the right to a redelivery of the possession when his inability to furnish the ore has been removed, and a court of equity may decree possession, but will not make a decree upon the right of possession where the right depends upon a legal question, unless there are special circumstances laying the foundation for equitable interposition.

Nevada.— Gerrens *v.* Huhn, etc., Silver Min. Co., 10 Nev. 137, where plaintiffs entered into a contract with defendant to run a drift a distance of one hundred and eighty feet more or less, and it was held that the contract was completed when they had run the drift one hundred and eighty feet.

Pennsylvania.— Campbell *v.* Gates, 10 Pa. St. 483, holding that where one agrees to dig a certain quantity of ore annually, clean it properly, and deliver it to another, who agrees to furnish all necessary tools and appliances, the miner is bound to cleanse the ore only so far as can, by the use of ordinary diligence, be done by the appliances furnished.

United States.— Anvil Min. Co. *v.* Humble, 153 U. S. 540, 14 S. Ct. 876, 38 L. ed. 814 (holding that where a contract provided that A should mine for B the ore contained in the first level of B's mine, such ore to contain at least fifty-six per cent metallic iron, and it was subsequently agreed that the contract should extend to the second and third levels "with the exception that the merchantable iron ore extracted under this contract shall contain at least fifty-eight (58) per cent or upwards of metallic iron," this clause only applies to the ore in the second and third levels); Empire Mill, etc., Co. *v.* Tombstone Mill, etc., Co., 131 Fed. 339 (holding that where A pays money to B under a contract by which B agrees to develop A's mine, which adjoins B's, and B expends the money in cutting drifts, inclines, etc., which either tend to develop his own mine or to aid him in its operation. A may recover the money back).

See 34 Cent. Dig. tit. "Mines and Minerals," § 214.

11. Preventing performance as breach.— Where A agreed to allow B to dig molding sand on A's premises at places to be designated by him, the work to be done during the season of navigation, and B took possession of the land at the place designated and mined thereon until the sand was exhausted, and A refused to designate other places, although there were other deposits of sand, such refusal was a violation of the contract on A's part. Hurd *v.* Gill, 45 N. Y. 341. The damages for the breach of a contract by which plaintiff was to mine a certain body of ore at a fixed price per ton, where its full performance was prevented by defendant without fault on plaintiff's part, may consist of one or the other of two items: (1) the profits that would have been realized by a full performance; and (2) if there would have been no profits, or if the proofs fail to show what would have been the amount, the reasonable expenditures made for tools, fixtures, etc., and the loss of time, less the value of the material on hand; and while both profits and necessary expenditures in preparation for carrying out the contract are not recoverable, since the profits include in their calculation the expenditures, less the value of material on hand, still both may be included and claimed in the complaint, and defendant may protect himself by a request for appropriate charges to the jury. Worthington *v.* Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382.

Severable and entire contracts.— Where by contract plaintiff obligated himself to mine all the ore within a given territory free from foreign substance and satisfactory to the furnace company receiving it, without limit in time or requirement as to the quantity mined in a given time, and defendant's obligation was merely to permit plaintiff to mine the ore and pay monthly a specified sum for each ton delivered during the previous month, the contract was severable and not entire; and the fact that in mining several thousand tons a small quantity was mined and delivered not according to the terms of the contract did not give defendant any right to forbid plaintiff to continue mining under the contract. Worthington *v.* Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382.

"Satisfactory" performance of contract.— A contract whose sole subject-matter is the mining of a described body of ore at a fixed price per ton, and which provides that "said ore is to be mined and put on board the cars free of foreign substance and in a manner satisfactory to the furnace company receiving the same," does not impose on the miner an obligation with respect to the manner in which the ore is to be taken from the ground or loaded on the cars, but simply requires him to furnish on board the cars ore free from foreign substance other than such as was contained in the vein of ore, and satisfactory in this respect alone to the furnace company to which it might be shipped; and the mere expression by the furnace company of dissatisfaction with the ore would

V. OPERATION OF MINES, QUARRIES, AND WELLS.

A. Statutory Regulations[1] — **1. Safety Regulations in General.** In the mining jurisdictions generally statutes have been enacted to preserve the health and promote the safety of persons working in, about, or in connection with mines, prescribing penalties for their violation,[2] as by requiring the fencing of mouths of shafts or other excavations;[3] providing for inspection and examination of the mines by particular persons or officers, and the payment by the mine owners of the inspection fees;[4] requiring an underground map to be prepared by the

not authorize a termination of the contract, but it is only the actual existence of dissatisfaction, regardless of its reasonableness, that can have this effect; and it is for the jury to say whether this dissatisfaction did exist as a fact or whether it was expressed as a mere pretext. Worthington *v.* Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382.

Right to terminate contract.— A contract whereby plaintiff agreed to timber the ground worked, and mine, clean, and sack the ore for twenty-three dollars per ton, and defendant agreed to haul the timber to and the ore from the mine, and not to deprive plaintiff of his contract, does not bind defendant to permit plaintiff to mine out all the ore in the mine, and to receive and pay for the same, but is a simple contract of employment for an indefinite time, determinable at defendant's pleasure, and gives plaintiff the exclusive right to work it only so long as the mine is operated. Christensen *v.* Pacific Coast Borax Co., 26 Oreg. 302, 38 Pac. 127.

Right to possession of premises.— One in possession of mines and fixtures of another under a contract to mine a certain quantity of rock each year "until the mines are exhausted" cannot, after notice to quit, retain possession and continue mining operations. The contract being merely one for personal services, his only remedy is an action for damages against the owner for breach of contract. Wando Phosphate Co. *v.* Gibbon, 28 S. C. 418, 5 S. E. 837, 13 Am. St. Rep. 690.

Title to ore mines and lien for compensation.— Where a company owning mining lands divided into lots permitted mining thereon by persons who subscribed to mining rules adopted by it pursuant to statute, and these rules provided that the company should pay the miners respectively eighty per cent of the market value of the ore mined by each, and that no interest in the lands or the ores so mined should be acquired by the miners, the latter could not, in lieu of the eighty per cent in money, maintain replevin for eighty per cent of the ores mined by them. Empire Zinc Co. *v.* Freeman, 75 Mo. App. 524. And see Granby Min., etc., Co. *v.* Turley, 61 Mo. 375. However, the miners have a lien on the ore and the right of possession until compensation is paid or tendered. Granby Min., etc., Co. *v.* Turley, *supra*. See also *infra*, V, C, 1.

1. **Master and servant** generally see Master and Servant, 26 Cyc. 1025 *et seq.*

Rights of way see Eminent Domain, 15 Cyc. 543.

2. See the statutes of the various jurisdictions, and the cases cited in this section.

Injunction.— These statutes not only provide a penalty for their violation, but some of them give to proper courts the authority to restrain by injunction, on the application of the inspector, the operation of a mine conducted in contravention of the statute. Haddock *v.* Com., 103 Pa. St. 243; Com. *v.* Wilkesbarre Coal Co., 29 Leg. Int. (Pa.) 213.

What is a mine within statute — "Washeries."— Coal operations known as "washeries" are held to be within a mine act and they are subject to its provisions requiring steam boilers to be at least one hundred feet from "any coal breaker or other structure in which persons are employed in the preparation of coal." Com. *v.* Brookwood Coal Co., 10 Pa. Dist. 253, 254, 25 Pa. Co. Ct. 55.

A slate quarry which is worked by means of underground workings, levels being driven straight into the side of the hole in which the slate is found, the workmen being divided as in other cases, into three classes, viz., miners, rockmen, and laborers, is a mine within the meaning of a mining act (20 & 21 Vict. c. 45) requiring the keeping of a register of boys, women, and children employed. Sim *v.* Evans, 23 Wkly. Rep. 730.

Information laid by agent.— An inspector of mines under the Metalliferous Mines Regulations Act of 1872 may authorize an agent to lay the information in his name for an offense which can be prosecuted in a court of summary jurisdiction, under the Summary Jurisdiction Act of 1848, which was incorporated in the Metalliferous Regulation Act. Foster *v.* Fyfe, [1896] 2 Q. B. 104, 18 Cox C. C. 364, 60 J. P. 423, 65 L. J. M. C. 184, 74 L. T. Rep. N. S. 784, 44 Wkly. Rep. 524.

3. Catlett *v.* Young, 143 Ill. 74, 32 N. E. 447; Bartlett Coal, etc., Co. *v.* Roach, 68 Ill. 174.

Question for jury.— In Springside Coal Min. Co. *v.* Grogan, 53 Ill. App. 60, which was an action for the death of an employee, it was held that whether or not a pit or hole intended to be used, when completed, as the shaft of a coal mine which the landowner designed to open at the place, is a "coal mine," within the meaning of the statute making it the duty of the operator or owner of a coal mine to fence the top of each shaft, is a question for the jury.

4. Chicago, etc., Coal Co. *v.* People, 181

owner,[5] and the use of sprags or props to support the top coal while the bottom coal is being worked;[6] various provisions looking to the proper ventilation of mines;[7]

Ill. 270, 54 N. E. 961, 48 L. R. A. 554; Com. *v.* Hutchison, 4 Pa. Co. Ct. 18 (holding that any mine on a vein of coal that is known to generate explosive gases is a "mine generating explosive gases" under a statute requiring daily examination); St. Louis Consol. Coal Co. *v.* People, 185 U. S. 203, 22 S. Ct. 616, 46 L. ed. 872; Scott *v.* Bould, [1895] 1 Q. B. 9, 18 Cox C. C. 52, 59 J. P. 390, 64 L. J. M. C. 16, 71 L. T. Rep. N. S. 577, 15 Reports 134.

Partial compliance.— Under a statute requiring an examination each morning and providing that no person shall be allowed to enter the mine until the examiner has reported all conditions safe for beginning work, the signing, by an examiner, of a printed form, reciting that the examination had been made before commencing work, and that the mine was free from dangerous gases, the air current circulating properly, and the entries in safe condition, is not a sufficient compliance with such section. Spring Valley Coal Co. *v.* Rowatt, 96 Ill. App. 248 [*affirmed* in 196 Ill. 156, 63 N. E. 649].

Office — *Qualification of inspector.*— Qualification by examination for the office of inspector of coal mines does not extend beyond the term then to be filled; a candidate for reëlection must again qualify. *In re* Coal Mine Inspector, 12 Pa. Dist. 320, 27 Pa. Co. Ct. 665.

Examiners.— Under a statute which directed that "upon the passage of this Act," the government, on the recommendation of examiners, should appoint inspectors of mines, "the examiners to be appointed by the Court of Common Pleas at the first term of the court in each year," the act having been passed after the first term, it was held that the examiners were to be appointed upon the passage of the act. Com. *v.* Conyngham, 66 Pa. St. 99.

Expense of examination.— The limitation by the general appropriation statute of Pennsylvania by which the examination of candidates for inspectors of coal mines in anthracite districts was limited to twenty days was held not to apply to the payment of the expenses of such examiners, the work of which was done prior to the date on which the act was approved *In re* Coal Mine Inspectors' Examinations, 28 Pa. Co. Ct. 559, opinion of attorney-general.

Removal of officer.— Ineligibility for appointment of a mine inspector or want of jurisdiction to appoint are grounds for ouster in quo warranto proceedings, but not for removal on petition of miners, under the Pennsylvania statute of 1901. *In re* Martin, 209 Pa. St. 266, 58 Atl. 478.

Authority of inspectors confined by statute.— Under the statute of 35 & 36 Vict. c. 76, § 46, giving the inspector of mines power in certain cases by notice in writing to call upon a mine owner to remedy any matter connected with the mine which in the inspector's opinion is dangerous and defective so as to threaten or tend to the bodily injury of any person, the inspector has no power to require the removal by the owner of a danger which is not immediately connected with his own mines. Reg. *v.* Spon Lane Colliery Co., 3 Q. B. D. 673, 48 L. J. M. C. 25, 39 L. T. Rep. N. S. 13, 27 Wkly. Rep. 46.

5. Daniels *v.* Hilgard, 77 Ill. 640, holding that where the owner fails to file the map and the inspector does it he may recover the costs of making the map in his own name, although the work was done by a deputy, and the owner cannot object to the sufficiency of the map if it is satisfactory to the inspector.

6. Donk Bros. Coal, etc., Co. *v.* Peton, 95 Ill. App. 193 [*affirmed* in 199 Ill. 41, 61 N. E. 330] (holding that an order demanding props and caps for use in a coal mine made by the miners by writing with chalk on a blackboard placed near the mouth of the shaft for that purpose, the number of props and caps wanted and the length of the props, is a sufficient demand for such props under the Miners Act); Com. *v.* Richmond, 2 C. Pl. (Pa.) 189 (holding that under the statute providing that every workman shall notify the mine foreman or his assistant at least one day in advance when such props are needed, giving the length of the props or timber required, evidence of a general refusal to cut and prepare such props without showing any specific demand is insufficient to sustain a conviction; but further, that the provision requiring that such props and timbers shall be suitably prepared is not complied with by the mine owner by furnishing props and requiring the men to cut them according to the length which they require); Gibbon *v.* Phillips, 64 L. J. M. C. 42 (holding that under a provision for the use of sprags or props requiring them to be furnished "where they are required," the words quoted mean where they are necessary, and not where the workmen think they are necessary, and that whether they are or are not necessary is a question of fact in each case as it arises).

Where the duty is imposed on the miner it cannot be shifted to the owner when an injury occurs by reason of the miner's failure. Morris Coal Co. *v.* Donley, 73 Ohio St. 298, 76 N. E. 945. See also MASTER AND SERVANT, 26 Cyc. 941.

7. Western Coal, etc., Co. *v.* Jones, 75 Ark. 76, 87 S. W. 440 (holding that the statute requiring that air shall be circulated in mines to the face of every working place throughout the mine so that it shall be free from standing gas means that the air must be carried to the extremest point where the pick falls, and that the entire mine shall be free from gas); Com. *v.* Wilkesbarre Coal Co., 29 Leg. Int. (Pa.) 213; Com. *v.* Bonnell, 8 Phila. (Pa.) 534; Deser-

requiring certain shafts, slopes, or outlets by which means of ingress and egress are always available to the persons employed in the mine,[8] and prescribing the character of the shaft in certain cases;[9] provisions for protection against fires, explosions, etc.[10] Similar provisions have been made for the purpose of conserv-

ant *v.* Cerillos Coal R. Co., 178 U. S. 409, 20 S. Ct. 967, 44 L. ed. 1127 [*reversing* 9 N. M. 495, 55 Pac. 290]; Brough *v.* Homfray, L. R. 3 Q. B. 771, 9 B. & S. 492, 37 L. J. M. C. 177, 16 Wkly. Rep. 1123, where the court, although sending a case back to be restated, intimated a strong opinion that not only the working places and roads in a colliery should be kept ventilated, but that so much of the colliery must be kept ventilated as will secure the roads and working places from becoming inundated with foul air from other parts of the mine.

Time.— A mine is still being worked within the meaning of the act on a Sunday, although nothing is being done there, and it is a breach of the rule to discontinue the ventilation on that day. Knowles *v.* Dickinson, 2 E. & E. 705, 6 Jur. N. S. 678, 29 L. J. M. C. 135, 2 L. T. Rep. N. S. 174, 8 Wkly. Rep. 411, 105 E. C. L. 705.

Crosscuts not for passways.— In Missouri it was held that the statute requiring crosscuts between the parallel entries in coal mines shows the object of such crosscuts is circulation of air in the mines, and not for passways or places of rest, and a mine owner is not required to make them safe for such purpose. Lenk *v.* Kansas, etc., Coal Co., 80 Mo. App 374.

Duty of foreman.— Where a penal statute imposes duties as to the proper ventilation of a mine upon the foreman, when by reason of gases or from other causes a coal mine has become dangerous, it is the duty of the mine foreman to compel every workman to retire from the mine and to remain out until after a proper examination of its condition has been made. Failure to do this is negligence and a disobedience of the law. Com. *v.* Coonrad, 3 Kulp (Pa.) 381. It is the duty of the mine foreman to himself see that the ventilation required by the act is furnished; and he cannot delegate the duty, nor has the foreman any discretion as to the minimum quantity of air required. Com. *v.* Hutchison, 4 Pa. Co. Ct. 18.

8. Haddock *v.* Com., 103 Pa. St. 243 (holding that a statute providing that it shall be unlawful for an owner, etc., of a mine, etc., to employ any person in working in such mine, etc., or to permit any person to be in such mine for the purpose of working unless there are in communication with every seam or stratum of coal worked therein, at least two shafts or slopes, or outlets, etc., does not prohibit the mining of coal in seams having two outlets at the time the work is being carried on by not more than twenty men in another seam for the purpose of making a gangway from the last-mentioned seam to the second outlet; that the men in the last-mentioned seam cannot be said to be working in the mine in the sense meant by the statute); Com. *v.* Wilkesbarre Coal Co., 29 Leg. Int. (Pa.) 213. But in Com. *v.* Bonnell, 8 Phila. (Pa.) 534, it was held that said statute did not authorize the production of coal for market under the pretext of "making another opening through coal." And a coal mine operated through a tunnel, and having no second outlet connected with it, is held not to be within the prohibition of the Mine Ventilation Law. Com. *v.* Connell, 2 Luz. Leg. Reg. (Pa.) 1.

9. State *v.* Anaconda Copper-Min. Co., 23 Mont. 498, 59 Pac. 854, under a statute making it unlawful to sink or work through any vertical shaft, where mining cages are used, to a greater depth than three hundred feet, unless such shaft is provided with an iron bonneted safety cage.

Working shaft.— Under 35 & 36 Vict. c. 77, § 33, which enacted that every working shaft of a certain depth should be provided with guides and proper means of signal, it was held that a "working shaft" meant a shaft worked for the purposes of the mine, but that looking at the object of the statute, viz., to protect the miners, such narrow construction would not be put upon it and it would not be restricted to a shaft only up which ore is being brought, but would apply to a shaft which was actually completed and by which men were required to descend in order to work. Foster *v.* North Hendre Min. Co., [1891] 1 Q. B. 71, 17 Cox C. C. 216, 55 J. P. 103, 60 L. J. M. C. 6, 63 L. T. Rep. N. S. 458.

10. State *v.* Murlin, 137 Mo. 297, 38 S. W. 923, under an act providing that in all dry and dusty coal mines discharging light carbonated hydrogen gas, or mines where the coal is blasted off the solid, shot-firers must be employed to fire all shots after the other employees have retired.

Proximity of breaker to shaft.— Com. *v.* Kingston Coal Co., 6 Kulp (Pa.) 241, under a statute forbidding the erection of a breaker nearer than two hundred feet to the opening of a coal mine. But in Com. *v.* Smith, 4 C. Pl. (Pa.) 1, and Com. *v.* Price-Pancoast Coal Co., 5 Lack. Jur. (Pa.) 111, it was held that the statute did not apply to the rebuilding of a breaker destroyed by fire after the passage of the act.

Standing gas.— Where a mine was free from standing gas at the point where workings were going on but the workings connected with and opened into old abandoned workings where standing gas accumulated and flowed and by frequent falling of the roof was liable to be driven into defendant's workings so as to affect the air and cause explosions, it was held that the mine was not free from danger to the lives and health of the men nor in a fit state for them to work

ing the public safety.[11] Reasonable regulations of the character of those above mentioned have been generally sustained as constitutional and as a valid exercise of police power.[12]

2. As to Employment and Conduct of Servants. Statutory provisions have been enacted also in some jurisdictions regulating the employment of particular servants designed to prevent the employment of incompetent persons, and imposing duties in that regard not only upon the master,[13] but also upon the serv-

in as required by the Ventilation Act. Com. *v.* Tompkins, 1 Luz. Leg. Reg. (Pa.) 341.

Use of gunpowder — *In general.*— Under a provision against the use of gunpowder in a mine underground only when persons ordinarily employed therein are out of the mine or out of the "part of the mine" where the gunpowder is used, "out of the mine" does not mean out of dangerous proximity to or out of the neighborhood of the firing spot, but out of the entire panel, which under the statute is deemed to be "a separate mine," and the words "as far as reasonably practicable," in that part of the statute requiring its observance, refer to a physical or mechanical difficulty in observing the rules and not to any question of more or less profit accruing to the mine owner by his observance or non-observance of the rule. Wales *v.* Thomas, 16 Q. B. D. 340, 16 Cox C. C. 128, 50 J. P. 516, 55 L. J. M. C. 57, 55 L. T. Rep. N. S. 400.

Carrying into mines in case or canister.— A conviction should be had under the statute requiring gunpowder carried into mines to be contained in "cases or canisters" where gunpowder is carried into a mine in a linen or calico bag. The word "case" means, as "canister" does, something hard, solid, and capable of conveying gunpowder in a condition of protection. Foster *v.* Diphwys Casson Slate Co., 18 Q. B. D. 428, 56 L. J. M. C. 21, 51 J. P. 470.

Form of information.— State *v.* Murlin, 137 Mo. 297, 38 S. W. 923, holding sufficient an information for blasting off the solid without having shot-firers employed to shoot the shots after the employees and others had retired from the mine.

11. Given *v.* State, 160 Ind. 552, 66 N. E. 750 (under a statute requiring the confining of gas, etc., within a fixed time after striking it); Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (under a statute prohibiting the transportation of natural gas through pipes at a greater pressure than three hundred pounds per square inch, or otherwise than by its natural flow).

Personal injuries see *infra*, V, C, 2, a.

12. *Illinois.*— Chicago, etc., Coal Co. *v.* People, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554; Catlett *v.* Young, 143 Ill. 74, 32 N. E. 447; Daniels *v.* Hilgard, 77 Ill. 640; Bartlett Coal, etc., Co. *v.* Roach, 68 Ill. 174.

Indiana.— Given *v.* State, 160 Ind. 552, 66 N. E. 750 (as to a statute prohibiting the owner of a gas well from permitting the escape of gas); Manufacturers' Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768; Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294; Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

Kentucky.— Com. *v.* Trent, 117 Ky. 34, 77 S. W. 390, 25 Ky. L. Rep. 1180, holding that the statute which was enacted for the prevention of the waste of gas, and enjoining the plugging of wells not in use, was within the legislative power to enact, as a protection of the natural resources of the state, to the rights of the public in which the rights of individual owners are subject.

Missouri.— State *v.* Murlin, 137 Mo. 297, 38 S. W. 923.

Montana.— State *v.* Anaconda Copper Min. Co., 23 Mont. 498, 59 Pac. 854.

Pennsylvania.— Com. *v.* Kingston Coal Co., 6 Kulp 241; Com. *v.* Wilkesbarre Coal Co., 29 Leg. Int. 213; Com. *v.* Bonnell, 8 Phila. 534.

United States.— St. Louis Consol. Coal Co. *v.* People, 185 U. S. 203, 22 S. Ct. 616, 46 L. ed. 872; Deserant *v.* Cerillos Coal R. Co., 178 U. S. 409, 20 S. Ct. 967, 44 L. ed. 1127 [*reversing* 9 N. M. 495, 55 Pac. 290]; Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. ed. 729.

The constitution itself sometimes enjoins legislation in the interest of miners; but this is solely as respects their personal safety, the enactment of police regulations to promote that end. Millett *v.* People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869.

13. Com. *v.* Wigton, 2 Pa. Dist. 51, 12 Pa. Co. Ct. 55 (holding that under a statute requiring the owner or agent of every coal mine to employ a competent and practical inside overseer to be called a mining boss, owners or agents of mines are not required to employ a certified mining boss for every working drift or opening, where the mine, although worked through one or more drifts, consists of territory compactly adjacent, and in its working constitutes but a single operation, and that a certified mining boss may employ assistants where the underground excavations are so extensive that he cannot personally perform all the duties prescribed by the act); Reg. *v.* Handley, 9 L. T. Rep. N. S. 827 (where it appears that by 5 & 6 Vict. c. 99, a contractor for working a mine was prohibited from allowing females to have charge of the machinery or tackle by means of which persons were brought up or passed down a vertical shaft).

Provision against employment of Chinamen — *Validity.*— In Canada a provision under the Coal Mines Regulation Act which prohibits Chinamen from employment below ground and also in certain other positions

ant,[14] and prescribing rules for the conduct of the servant while engaged in mining, which it is incumbent upon the servant to observe.[15]

3. Prevention of Waste. Statutory provisions have been enacted also regulating the operation of gas and oil wells and requiring the confinement of the gas and oil for the purpose of preventing waste.[16]

4. Artificial Pressure. A statute prohibiting the use of artificial means to produce an unnatural flow of gas from a well[17] is not violated by the use of pumps to aid transportation where the pressure is not increased beyond the legal limit.[18]

5. Fencing Abandoned Mines. By statute the duty is sometimes imposed to fence an abandoned mine, and a penalty is prescribed for a failure to do so,[19]

in and around coal mines was held in that respect *ultra vires*. Cunningham *v.* Homma, [1903] A. C. 151, 72 L. J. P. C. 23, 87 L. T. Rep. N. S. 572; Rex *v.* Priest, 8 Can. Cr. Cas. 265.

Injunction.— But in Atty.-Gen. *v.* Wellington Colliery Co., 10 Brit. Col. 397, on a motion by the attorney-general for an injunction to restrain the employment of Chinamen in contravention of the statute, it was held that the matter was not one affecting the public or liable to affect the public to such an extent as to call for the granting of the writ.

14. St. Louis Consol. Coal Co. *v.* Seniger, 79 Ill. App. 456 (under a statute prescribing certain formalities as a condition to the assumption of the duties of a hoisting engineer, as the obtaining of a certificate of a board of examiners); Com. *v.* Shaleen, 30 Pa. Super. Ct. 1 (involving a statute forbidding any person engaged as a miner in an anthracite coal mine without having obtained a certificate of competency, the court holding that, although the act applied generally to anthracite mines, it did not render ineligible to employment as miners all persons except those who had had two years' experience in anthracite mines).

Invalid discrimination.— That part of an act relating to the examination and registration of miners who had "not less than two years' practical experience as a miner or mine laborer in the mines of this commonwealth" was held to be repugnant to the constitution of the United States, because it denied to the citizen of another state "the privileges and immunities of citizens in the several states," and "the equal protection of the laws." Com. *v.* Shaleen, 30 Pa. Super. Ct. 1.

15. Ashland Coal, etc., Co. *v.* Wallace, 107 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849 (where it appears that the statute provided for the propping of the roof of working places by persons employed in mines which was held to be specially intended to apply to miners actually engaged in taking out coal and not applicable to one specially employed as a track-layer in the entrance of a mine); Voshefskey *v.* Hillside Coal, etc., Co., 21 N. Y. App. Div. 168, 47 N. Y. Suppl. 386 (applying in an action in New York for injuries sustained in Pennsylvania a statutory provision of the latter state prohibiting all persons from riding on loaded cars in any slope, shaft, or place in or about a mine, to defeat a recovery by one who was injured while violating the statute); Frecheville *v.* Souden, 47 J. P. 613, 48 L. T. Rep. N. S. 612 (under the Metalliferous Mines Regulation Act of 1872, by which every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which, in the case of an owner or agent, would be an offense against the act, was declared to be guilty of an offense against the act, and was rendered liable to a penalty). And by the act last mentioned special rules were to be established in every mine to which the act applied for the conduct of persons acting in the management of or employed in or about the mine and a penalty was imposed for a violation of such special rules. Higham *v.* Wright, 2 C. P. D. 397, 46 L. J. M. C. 223, 37 L. T. Rep. N. S. 187. Under the Mines Inspection Act, 23 & 24 Vict. c. 151, a provision similar to that last mentioned was made and it was held that service of the rule on the employee was not necessary. Higginson *v.* Hapley, 19 L. T. Rep. N. S. 690.

16. State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; Com. *v.* Trent, 117 Ky. 34, 77 S. W. 390, 25 Ky. L. Rep. 1180; Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. ed. 729. See also *infra*, V, A, 6.

Burning in flambeau lights is declared to be a waste of natural gas and a penalty is prescribed therefor in Indiana. Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

17. Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

18. Consumers' Gas Trust Co. *v.* American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020; Richmond Natural Gas Co. *v.* Enterprise Natural Gas Co., 31 Ind. App. 222, 66 N. E. 782.

"Natural flow" see Natural Flow.

19. Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434; Foster *v.* Owen, 57 J. P. 87, 62 L. J. M. C. 7, 57 L. T. Rep. N. S. 712, 5 Reports 50, 41 Wkly. Rep. 240 (holding that where there was a side entrance into the mine which was for the purposes of argument and judgment

although at common law no such obligation was cast upon the owner, such mine not being a nuisance.[20]

6. PLUGGING ABANDONED WELLS. Under various statutory provisions owners of gas and oil wells which are abandoned are required to plug them.[21]

7. AS TO WEIGHING MINED PRODUCT. Under some statutes protection has been provided for the miner in respect of payment for the amount of the product mined by him, as by a regulation requiring such payment to be estimated according to the actual weight of the mineral mined,[22] and fixing the method of

assumed not to be dangerous and the only fence around or about said entrance was a stone wall erected previous to the abandonment, which wall inclosed an area of about ten acres within which the mine and side entrance were situated, the side entrance was not securely fenced within the meaning of the statute); Reg. *v.* Gratrex, 12 Cox C. C. 157 (holding that 23 & 24 Vict. c. 151, which imposed on the owner of an abandoned mine the duty of securely fencing the same, did not apply to mines abandoned before the passage of the act); Devonshire *v.* Stokes, 61 J. P. 406, 76 L. T. Rep. N. S. 424.

Upon whom duty imposed see *infra*, V, A, 8.

20. Reg. *v.* Gratrex, 12 Cox C. C. 157, where it is said that the common law imposed no obligation because the old pit was not a nuisance, although if it had been upon the highway, or even adjoining it, so that a person could not use the road without danger, it might have been such.

21. McDonald *v.* Carlin, 163 Ind. 342, 71 N. E. 961 (holding that the statute prescribing a criminal liability is penal and must be strictly construed); Com. *v.* Trent, 117 Ky. 34, 77 S. W. 390, 25 Ky. L. Rep. 1180 (construing the statute giving to the owner of land adjacent to abandoned gas wells the right to enter and plug them); Dawson *v.* Shaw, 28 Pa. Super. Ct. 563 (holding that the act should be reasonably construed and that so construed it did not require defendant to plug the well unless there is a third sand or oil bearing rock, and, if there is a question as to the existence of such sand or rock, the case must be submitted to the jury; that defendant is not to be punished by the imposition of the penalty named in the statute if it is a physical impossibility under all reasonable and known means to pull the casing and place the two seasoned plugs as directed by the act).

What is abandonment — Pleading. — To shut down a well, leaving in the tubing and casing, is not abandoning it, or ceasing to operate it. What is meant by the statute is a permanent abandonment, or a permanent ceasing to operate, followed by pulling out the tubing, and usually, although not always, followed by drawing the casing, and a petition to recover the penalty for not filling a well about to be abandoned need not allege that the casing has been drawn. State *v.* Oak Harbor Gas Co., 53 Ohio St. 347, 41 N. E. 584 [*reversing* 18 Ohio Cir. Ct. 751].

Affidavit of defenses. — In an action to recover the penalty for not properly plugging an abandoned oil well, defendant is not required to file an affidavit of defense, the action not being *ex contractu*, and if an affidavit is filed judgment cannot be entered for want of a sufficient affidavit. Bartoe *v.* Guckert, 158 Pa. St. 124, 27 Atl. 845.

22. Jones *v.* People, 110 Ill. 590 (holding that the act of 1883 requiring operators of coal mines to furnish a track scale for weighing the coal for the purpose of computing the miners' wages on the weight of the coal mined did not apply where there was a contract between the operator and the employees for the payment of wages on a different basis but only where the weight of the coal mined was to be taken as a basis of compensation); Reinecke *v.* People, 15 Ill. App. 241 (holding that the statute did not apply where the operator paid his men by the day, in which case he was not obliged to purchase a track scale); Martin *v.* State, 143 Ind. 545, 42 N. E. 911 (holding that under a statute requiring coal mined under contracts for payment by specified quantity to be weighed before being screened, provided the payment for impurities loaded with or among the coal shall not thereby be compelled, a conviction for a failure to weigh before screening was improper where the evidence showed that the coal mined was of such nature that it was impossible to weigh before screening and credit the miner with the weight without giving him credit for impurities); Kearney *v.* Whitehaven Colliery Co., [1893] 1 Q. B. 700, 57 J. P. 645, 62 L. J. M. C. 129, 68 L. T. Rep. N. S. 690, 4 Reports 388, 41 Wkly. Rep. 594. A weighman indicted for not weighing a certain load of coal cannot defend on the ground that it is the custom not to weigh a car containing more than two thousand five hundred pounds. Smith *v.* State, 90 Tenn. 575, 18 S. W. 248.

Construction of particular provisions — *Deductions for stones or other substances.* — In Kearney *v.* Whitehaven Colliery Co., [1893] 1 Q. B. 700, 57 J. P. 645, 62 L. J. M. C. 129, 68 L. T. Rep. N. S. 690, 4 Reports 388, 41 Wkly. Rep. 594, the provision of the Coal Mines Regulation Act of 1887 as to payment according to actual weight of minerals contracted to be gotten, that the owner should not be precluded from agreeing with persons employed for deductions on account of stones or substances other than the mineral contracted to be gotten, such deductions to be determined in such special mode as may be agreed between the parties, did not justify an agreement whereby the miner should not be paid upon the actual amount of min-

weighing.[23] But it has been held that while a statute requiring a mine owner or operator to procure scales for the weighing of coal mined under a contract for the mining may be valid, an act prohibiting the making of contracts for mining coal in which the weighing shall be dispensed with is unconstitutional.[24]

8. Violation — Nature of Liability.[25] The particular condition must exist upon which the statutory liability is made to depend.[26] What persons are punishable for a violation of statutory regulations will depend upon the statute and the especial provisions with respect to the parties upon whom the particular duty is

eral gotten by him, as the deductions allowed by the proviso are those only from the weight of what is actually gotten and sent out of the mine by the miner.

Deductions for slack.— Where coal and slack are brought to the surface and weighed at the pit's mouth wages are to be paid according to the gross weight at the pit's mouth and the miner may recover the amount deducted for slack. Netherseal Colliery Co. *v.* Bourne, 14 App. Cas. 228, 58 J. P. 84, 59 L. J. Q. B. 66, 61 L. T. Rep. N. S. 125, where some of the judges were of the opinion that the men were entitled to be paid as above stated on the ground that the slack formed a part of the mineral contracted to be gotten, while others base their opinions upon the ground that the slack was not a part of the mineral but that its weight had not been ascertained as required by the statute so as to authorize deductions therefor.

Small coal.— Deductions in respect of small coal upon the ground that the mineral contracted to be gotten was large coal were held to be illegal under the statute and the miners were held to be entitled to be paid according to the actual weight of all the coal gotten by them. Brace *v.* Abercarn Colliery Co., [1891] 2 Q. B. 699, 56 J. P. 20, 60 L. J. Q. B. 706, 65 L. T. Rep. N. S. 694, 40 Wkly. Rep. 3.

23. See *supra*, note 22.

Check weigher appointed by miners — *Discharge of miners.* Where the men employed in a mine appoint and pay a check weigher under the Coal Mines Regulation Act of 1872, and are afterward all discharged, his office ceases. If they are reëngaged with others, but nothing further is done with regard to the check weigher, he is not "stationed by the persons employed in the mine" within the meaning of the act, and cannot maintain an action against the mine owner for preventing him from acting after the reengagement of the men. Whitehead *v.* Holdsworth, 4 Ex. D. 13, 48 L. J. Exch. 254, 39 L. T. Rep. N. S. 638, 27 Wkly. Rep. 94.

Employee of owner.—Under the act providing that the check weigher "shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine," such check weigher must be a person in the employment of the owner of the mine, and one who is not in his employment cannot recover for an assault and battery against servants of the mine owner who used no more force than was necessary to prevent him from entering the mine owner's premises for the purpose of performing the duties of check weigher. Hopkinson *v.* Caunt, 14 Q. B. D. 592, 49 J. P. 550, 54 L. J. Q. B. 284, 33 Wkly. Rep. 522.

Removal.— Where a check weigher misconducted himself within the meaning of the statute, on complaint before justices, they are authorized to make an order removing him. Prentice *v.* Hall, 37 L. T. Rep. N. S. 605, 26 Wkly. Rep. 237. In Tennessee a provision for the appointment of a check weigher by the miners declaring that he shall not be "interfered with or intimidated" by the agent, owner, etc., is not violated by the president of the mining company giving notice to the miners that he would shut down the mines unless the check weigher hired by them is discharged. State *v.* Jenkins, 90 Tenn. 580, 18 S. W. 249.

24. Millett *v.* People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869, holding further that the legislature could not require owners or operators of coal mines to furnish scales, etc., for the information of the public without first making compensation to the owners, such requirement being tantamount to an appropriation of private property to public use.

Constitutional guaranty against abridgment of privilege of citizens as applied to statutes regulating wages see Constitutional Law, 8 Cyc. 1043, 1044, 1100.

25. **Injuries to employees** generally see Master and Servant, 26 Cyc. 1076 *et seq.*

Injuries to person generally see *infra*, V, C, 2, a.

Injuries to property see *infra*, V, C, 2, b.

26. Com. *v.* Waddell, 6 Kulp (Pa.) 95, holding that under a statute requiring the owner, operator, or superintendent of a mine to provide proper safety holes at the bottom of slopes and planes, upon request by the inspector, criminal proceedings, at the instance of the inspector, against such owner or operator, for failure to provide safety holes, cannot be sustained in the absence of such request.

Employment of females.— To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to the 5 & 6 Vict. c. 99, §§ 8, 13, it was held that knowledge of or acquiescence in their being so employed must be brought home to him, and that evidence of females being found in charge of such machinery and tackle on one occasion only is not sufficient. Reg. *v.* Handley, 9 L. T. Rep. N. S. 827.

imposed.[27] An information will lie against one of several owners of a mine, where by his neglect or wrongful act the statutory rules have been violated;[28] and conversely, if the act provides that the owner, agent, and manager shall each be guilty of an offense for a violation of the statutory rules, the conviction and fine of one of them for a breach of such regulation will not prevent the conviction of another in respect of the same breach.[29]

27. Sholl *v.* People, 93 Ill. 129 (holding that under a provision requiring "the person in charge" of a mine to report to the mine inspector all accidents, the duty is not imposed upon the owner or his agent unless he was in charge of the mine at the time of the accident); Hall *v.* Hopwood, 49 L. J. M. C. 17, 41 L. T. Rep. N. S. 797 (holding that, although it was the duty of the owner of a mine in the first instance to provide proper ventilation, and the manager who has to share the responsibility could not reasonably be expected to expend his own funds to secure proper ventilation, if he had certain means at his disposal with which, had he chosen, he might have improved the ventilation, he is liable).

Fencing abandoned mines — *Persons interested in the minerals.*—Where by the mining customs of the county any member of the public was entitled to work the mine for lead ore subject to his paying to the crown (as duchy of Cornwall) a certain royalty on lead ore brought to the surface and the lead ore could not be got without raising calk and calc-spar, which were intermixed with it, and by the custom of the county the owner of the mine was entitled to the calk and calc-spar ore, the mine having become abandoned, although both lead ore and calk and calc-spar were still in it, it was held that the owner of the mine was liable to fence it as he was a person interested in the minerals within the statute and inasmuch as the calk and calc-spar while in the mine were his property as part of the freehold and after being taken out were his property by the custom of the county. Stokes *v.* Arkwright, 61 J. P. 775, 66 L. J. Q. B. 845, 77 L. T. Rep. N. S. 400. So where the owners in fee granted a lease for a term of years reserving a royalty on the minerals produced, with power to distrain and detain the minerals until the royalty was paid, they were held to be persons interested in the minerals and liable to fence the mine if it should become abandoned. Evans *v.* Mostyn, 2 C. P. D. 547, 47 L. J. M. C. 25, 36 L. T. Rep. N. S. 856.

Owners.— Harbor trustees having a license to take flints and chalk from a quarry at a certain time were held not thereby "owners" of the quarry within the meaning of section 41 of the Metalliferous Mines Regulation Act of 1872, so as to be liable to fence the same. Foster *v.* Newhaven Harbour Trustees, 61 J. P. 629. That statute provided that the term "owner" meant any person who was "the immediate proprietor, or lessee, or occupier of a mine," and did "not include a person who merely receives a royalty rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or license for the working thereof," etc., under which it was held that a lessee of a mine and of all the duties arising therefrom under a lease by which the lessee had to pay to the lessor by way of rent all that he might annually receive in respect of the mine, was neither the owner nor person interested in the minerals. Arkwright *v.* Evans, 49 L. J. M. C. 82.

28. Reg. *v.* Brown, 7 E. & B. 757, 3 Jur. N. S. 745, 26 L. J. M. C. 183, 5 Wkly. Rep. 625, 90 E. C. L. 757.

29. Wynne *v.* Forrester, 5 C. P. D. 361, 48 L. J. M. C. 140, 40 L. T. Rep. N. S. 524, 27 Wkly. Rep. 820. But under such a provision it was held that the owner was not liable for the penalty for the negligence of his servant in omitting to lock the lamps under a requirement that where safety lamps must be used they shall be first examined and securely locked by a person or persons duly authorized for that purpose. Dickenson *v.* Fletcher, L. R. 9 C. P. 1, 43 L. J. M. C. 25, 29 L. T. Rep. N. S. 540.

Aiding and abetting.— By a special rule made pursuant to 23 & 24 Vict. c. 151, for regulating a certain coal mine, the charter-master was to be the responsible manager of the pit, and the banksman was to take care that the persons descending the pit should in no case exceed eight. Where a banksman violated such rule by lowering more than eight persons into the pit at one time, and there was evidence that the charter-master was close to the pit and cognizant of the banksman (who was his servant) so lowering more than eight persons, it was held that such charter-master might be convicted of aiding and abetting the banksman to commit a violation of such rule. Howells *v.* Wynne, 15 C. B. N. S. 3, 9 Jur. N. S. 1041, 32 L. J. M. C. 241, 109 E. C. L. 3.

Exculpation — *Taking means to prevent violations.*— Under a provision that "in the event of any contravention or non-compliance with any of the general rules . . . by any person whomsoever, the owner, agent, and manager shall each be guilty of an offense against this act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, &c.," a managing director of a limited company did not interfere with the actual management of the mine underground, which was left in the hands of a duly certificated manager, under the act, who was the manager of the colliery, and was in charge thereof, occasionally visited the mine, but had in no way interfered with the manager in his duties, although he had authorized all neces-

B. Mining Partnerships, Companies, Associations, and Tenancies in Common — 1. PARTNERSHIPS[30] — a. Nature and Creation — (I) *IN GENERAL.* A mining partnership arises when two or more coöwners of a mining claim actually engage in working the same, and share, according to the interest of each, in the profit and loss, although there is no express agreement between them to become partners, or to share the profits and losses.[31] Such a partnership is not restricted, however, solely to cases where the mine is owned by the parties working it, if they have an interest in working it or in carrying on mining operations. It can

sary expenditure for the safety and conduct of the mine, and had duly published at the mine the rules under the Mines Act and the abstract of the act itself, and it was held that he had taken all reasonable means to prevent such contravention of the rules, and was therefore not liable to be convicted of the offense. Stokes *v.* Checkland, 17 Cox C. C. 631, 57 J. P. 232, 68 L. T. Rep. N. S. 457, 5 Reports 240. See also Bell *v.* Bruce, 55 J. P. 535.

In the case of a non-resident part-owner of a mine, taking no part in the management, the appointment of a certificated manager is evidence upon which, without proof of personal interference on the part of such owner, he may he acquitted of an offense under that section. Baker *v.* Carter, 3 Ex. D. 132, 47 L. J. M. C. 87, 26 Wkly. Rep. 497.

30. Cost-book mines see *infra*, V, B, 3.

31. *California.*— Prince *v.* Lamb, 128 Cal. 120, 127, 60 Pac. 689; Dorsey *v.* Newcomer, 121 Cal. 213, 53 Pac. 557; Berry *v.* Woodburn, 107 Cal. 504, 40 Pac. 802; Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116; Duryea *v.* Burt, 28 Cal. 569 (the leading case on the subject); Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96.

Colorado.— Meagher *v.* Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212; Charles *v.* Eshleman, 5 Colo. 107.

Missouri.— Snyder *v.* Burnham, 77 Mo. 52; Freeman *v.* Hemenway, 75 Mo. App. 611.

Montana.— Nolan *v.* Lovelock, 1 Mont. 224.

United States.— Kahn *v.* Central Smelting Co., 102 U. S. 641, 645, 26 L. ed. 266; G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510.

See 34 Cent. Dig. tit. "Mines and Minerals," § 222.

Inference from cooperation in working mine.— Sometimes it is said that from the acts of the parties (referring to the actual working of mining property owned by them in common) a mining partnership may be inferred. Slater *v.* Haas, 15 Colo. 574, 25 Pac. 1089, 22 Am. St. Rep. 440; Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

The statute defines such partnerships in several jurisdictions, substantially as defined in the above text. Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689; Ferris *v.* Baker, 127 Cal. 520, 59 Pac. 937; Hawkins *v.* Spokane Hydraulic Min. Co., 3 Ida. 241, 28 Pac. 433; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924; Hailey First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. 449 [*affirmed* in 95 Fed. 35, 35 C. C. A. 510], under the statute in Idaho.

But without the aid of statute the partnership relation will arise if the necessary elements exist. Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261. See also the cases cited generally *supra*, this note, in support of the text.

Oil wells.— In West Virginia tenants in common or joint tenants, jointly operating for oil, are held to be a mining partnership, controlled by the same rules which govern other mining partnerships. Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468. It has been held elsewhere, however, that the partnership relation between such parties cannot be assumed merely from their coöperation in working the field, but the relation must arise out of contract except as the rights of third persons may rest upon a holding out of a partnership by the parties. Baker *v.* Brennan, 12 Ohio Cir. Dec. 211; Taylor *v.* Fried, 161 Pa. St. 53, 28 Atl. 993; Butler Sav. Bank *v.* Osborne, 159 Pa. St. 10, 28 Atl. 163, 39 Am. St. Rep. 665; Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992; Dunham *v.* Loverock, 158 Pa. St. 197, 27 Atl. 990, 38 Am. St. Rep. 838; Walker *v.* Tupper, 152 Pa. St. 1, 25 Atl. 172. See also Ervin *v.* Masterman, 16 Ohio Cir. Ct. 62 [*distinguishing* the Pennsylvania cases in that in the case in hand the contract created a partnership, but the court then holds that in such a partnership many of the special rules applicable to mining partnerships so called, should be applied to the operations carried on by coöwners of oil producing property in order that the ends of justice may be reached, both as respects said coöwners, and those transacting business with them.

Contracts held to create partnerships see Henderson *v.* Allen, 23 Cal. 519; Lawrence *v.* Robinson, 4 Colo. 567; White *v.* Sayers, 101 Va. 821, 45 S. E. 747; Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 176.

One may furnish funds and another labor.— A mining partnership may exist under an agreement by which one furnishes the money and the other the labor. Lyman *v.* Schwartz, 13 Colo. App. 318, 57 Pac. 735; Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261.

Contracts held not to create partnerships see Chung Kee *v.* Davidson, 102 Cal. 188, 36 Pac. 579; Horton *v.* New Pass Gold, etc., Min. Co., 21 Nev. 184, 27 Pac. 376, 1018.

A contract of hiring to procure and work a mine for wages, and for an interest in the

be formed either to prospect for and locate mines, or to work mines belonging to other persons or to any or all of the individual members.[32] But there is nothing in the nature of mining which forbids the creation of a partnership by an ordinary partnership contract which would draw to the relation of the parties the incidents of a trading partnership,[33] and destroy the distinctions which are based upon the non-existence of the *delectus personæ* in strict mining partnerships.[34] The agreement may be by parol,[35] although it necessarily required the acquisition of an interest in land,[36] and may be implied from the acts of those sought to be charged as partners.[37]

(II) *Actual Coöperation in Working.* A mining partnership partakes of the nature of a partnership and also of a tenancy in common;[38] but a mere tenancy in common will not of itself give rise to the partnership relation; that will exist only between those who actually engage in the working of the mine or who, by some consent or understanding with each other, create the relation.[39]

mine in addition, upon certain conditions, contains no element of a mining partnership. Berry *v.* Woodburn, 107 Cal. 504, 40 Pac. 802.

32. *California.*— Settembre *v.* Putman, 30 Cal. 490.

Colorado.— Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212; Ashenfelter *v.* Williams, 7 Colo. App. 332, 43 Pac. 664; Perkins *v.* Peterson, 2 Colo. App. 242, 29 Pac. 1135.

Idaho.— Haskins *v.* Curran, 4 Ida. 573, 42 Pac. 559.

Montana.— Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

United States.— Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 176.

See 34 Cent. Dig. tit. "Mines and Minerals," § 222. See also *infra*, V, B, 1, f.

Ownership or possession.— But it would seem that the parties must be associated together in the ownership or possession of the property in some way. Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689. Where plaintiff and defendant agreed to prospect for mines, and to locate, hold, and work them for their joint benefit, and defendant put in his time in managing a claim, and expended his own funds for necessary expenses, it was held that plaintiff, in order to recover his interest in the claim, must pay his share of the expenses incurred by defendant, including compensation for managing the property. Mack *v.* Mack, 39 Wash. 190, 81 Pac. 707.

33. *California.*—.Decker *v.* Howell, 42 Cal. 636.

Colorado.— Charles *v.* Eshleman, 5 Colo. 107.

Missouri.— Freeman *v.* Hemenway, 75 Mo. App. 611.

Montana.— Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

See 34 Cent. Dig. tit. "Mines and Minerals," § 222.

For the elements of a partnership generally and the construction of contracts and agreements as creating that relation as well as for the rights, duties, and liabilities of partners as between themselves and with respect to third persons, general rules are applied and will be found treated generally in another title. See PARTNERSHIP.

A partnership for buying and selling mining lands is not a mining partnership and is subject to the rules governing other trading or commercial partnerships. Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764.

34. Decker *v.* Howell, 42 Cal. 636. See also *infra*, V, B, 1, b.

35. Shea *v.* Nilima, 133 Fed. 209, 66 C. C. A. 263, holding that an agreement between two persons to then and there become partners for the purpose of locating and operating mining property, etc., is not a partnership to deal in lands.

36. Meagher *v.* Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455, in a suit to settle the partnership affairs in working a mine under a lease, the assets including no interest in realty. But one cannot claim an interest in a mining claim, located by another, by reason of an oral partnership agreement between them to locate mining claims, such agreement being within the statute of frauds and no partnership capital being employed so as to give rise to a trust. Craw *v.* Wilson, 22 Nev. 385, 40 Pac. 1076.

37. Hurd *v.* Tomkins, 17 Colo. 394, 30 Pac. 247.

38. Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

Mining partners are tenants in common.— Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

39. Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924; Bietti *v.* Nesbitt, 22 Mo. 390, 41 Pac. 151 (holding that the making of a lease by which the common owners were to receive proportional shares does not establish any relation of partnership); Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005; Hailey First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. 449 [*affirmed* in 95 Fed. 35, 35 C. C. A. 510].

(III) *Distinguished From Commercial Partnership — Delectus Personæ.* A mining partnership, to which the parties do not by contract give the ordinary incidents of commercial partnerships, is distinguishable from the ordinary commercial or trading partnership in those characteristics which flow from the fact that in mining partnerships there is no *delectus personæ*.[40] Except as to the few peculiarities which depend upon this distinction, the law governing a mining partnership is not different from that applicable to an ordinary commercial partnership,[41] and elements of the latter are common also to the former.[42]

(IV) *Prospecting Partnerships.* An agreement made between parties, by which some of them prospect for gold, and the others furnish money and provisions, for which they are to receive interests in the mining grounds that may be discovered, is held to constitute a prospecting partnership, not governed by the technical rules of the law of commercial partnership.[43]

As to the cotenant who does not join in working the mine, the others do not render him liable for debts they incur or deprive him of his share of any resulting profits. Hailey First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. 449 [*affirmed* in 95 Fed. 35, 35 C. C. A. 510]. And where several tenants in common of a mine employ a manager to work and extract the ores therefrom and account to the owners for the proceeds, thus forming a mining copartnership, although not for a fixed or definite period, one of the owners may withdraw from such enterprise without dissolving such copartnership as to the other tenants; and if the others continue thereafter to work the mine, the withdrawing party may maintain an action in his own name for his share of the proceeds thus coming into the hands of the manager without making his cotenant parties to the action. Slater *v.* Haas, 15 Colo. 574, 25 Pac. 1089, 22 Am. St. Rep. 440.

40. *California.*— Decker *v.* Howell, 42 Cal. 636; Jones *v.* Clark, 42 Cal. 180; Duryea *v.* Burt, 28 Cal. 569; Skillman *v.* Blackman, 23 Cal. 198, 83 Am. Dec. 96.

Colorado.— Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446; Meagher *v.* Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Charles *v.* Eshleman, 5 Colo. 107.

Missouri.— Freeman *v.* Hemenway, 75 Mo. App. 611.

Montana.—Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924; Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

West Virginia.— Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468, as to cotenants of an oil lease or mine.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

United States.— Bissell *v.* Foss, 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126; Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266; G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510.

See 34 Cent. Dig. tit. "Mines and Minerals," § 222.

And see the other cases in this section of this article, as practically all the cases on the subject of mining partnership, state, hold, or recognize the distinction.

41. Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Fereday *v.* Wightwick, 1 Russ. & M. 45, 5 Eng. Ch. 45, 39 Eng. Reprint 18, Taml. 250, 48 Eng. Reprint 100, 31 Rev. Rep. 93.

42. Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261, holding that an instruction which announces as a matter of law that if parties associate themselves together for the purpose of carrying on a business and agree to contribute funds, pay losses, and share profits, such an association is a general partnership without regard to whether the business is mining or not, was not correct, for while these elements recited are those of a general partnership, they are certainly also elements of a mining partnership; that in every partnership the parties associating themselves contribute to the capital and share losses and profits.

43. Boucher *v.* Mulverhill, 1 Mont. 306; Burn *v.* Strong, 14 Grant Ch. (U. C.) 651. See also Mack *v.* Mack, 39 Wash. 190, 81 Pac. 707, where the evidence in a suit to enforce an alleged oral agreement between plaintiff and defendant was examined, and held to warrant a finding that the parties orally agreed to prospect for mines, and to locate, hold, and work them for their joint benefit.

Joint adventure in purchase of tools.— When several persons covenanted to buy jointly a set of boring tools, and each sink an oil well on his own land, at his own expense, and, if successful, to deliver to the others a certain part of the oil taken, and one sunk his well, but obtained no oil, and there was no evidence that any could be obtained in the county, it was held that he could recover no damages for failure of the others to sink wells. Hutchinson *v.* Snider, 137 Pa. St. 1, 20 Atl. 510.

A "grub stake" contract is one in which the parties enter into a common venture, one furnishing the "grub" and the other the labor, in prospecting for valuable mining properties. Such ventures are joint in their character; all valuable discoveries inure to

(v) *Questions of Law and Fact.* What a partnership is is a question of law; its existence in a given case is a question of fact depending for its solution upon inferences to be drawn from the evidence adduced.[44]

b. Rights, Duties, and Authority of Parties — (i) *In General.* The possession by one partner as tenant in common of a mining claim is the possession of all.[45] And every partner is entitled to an accounting where they work a mining claim and share the profits or loss in proportion to their interests,[46] according to the ordinary rules which govern the relation of the parties under the particular facts.[47] But the partnership relation between parties who are engaged in prospecting and exploration must exist at the time of discovery and location of a

the equal benefit of both, and the venture partakes of the character of qualified partnerships. Berry *v.* Woodburn, 107 Cal. 504, 40 Pac. 802. But no mining partnership is created where certain parties furnish a man with a grub stake, to enable him to prospect for and locate mining claims, they to have one-half interest in such claims, where there is no partnership property and no transaction of partnership business. Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689. And a partnership does not arise where parties agree to grub stake another, to prospect mines on shares, and his authority to work such mines is not proven. Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

44. Butler *v.* Hinckley, 17 Colo. 523, 30 Pac. 250; Hurd *v.* Tomkins, 17 Colo. 394, 30 Pac. 247; Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212. If there is any evidence of the fact, or evidence from which the fact of a partnership might be inferred, the question should be left to the jury. Ferris *v.* Baker, 127 Cal. 520, 59 Pac. 937; Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261, as to whether the evidence establishes a general or mining partnership.

Intention.— In determining whether the relation between the parties to an oral agreement constitutes a partnership, their intention as disclosed by the nature and effect of the whole agreement and acts done thereunder must govern. Shea *v.* Nilima, 133 Fed. 209, 66 C. C. A. 263. See also Partnership.

Sufficient evidence of partnership see Hodgson *v.* Fowler, 24 Colo. 278, 50 Pac. 1034; Hurd *v.* Tomkins, 17 Colo. 394, 30 Pac. 247 (as to evidence of mining partnership, holding that the same strictness of proof is not required by plaintiff in an action against the partners as would be required in a suit by the firm); Ashenfelter *v.* Williams, 7 Colo. App. 332, 43 Pac. 664; Perkins *v.* Peterson, 2 Colo. App. 242, 29 Pac. 1135 (holding that the instruments under which the partnership arises are admissible in evidence in an action to recover from one of the parties for partnership debts); Dale *v.* Goldenrod Min. Co., 110 Mo. App. 317, 85 S. W. 929; Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318 (mining partnership).

Insufficient evidence of partnership see Butler *v.* Hinckley, 17 Colo. 523, 30 Pac. 250; Caley *v.* Coggswell, 12 Colo. App. 394, 55 Pac. 939; Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005 (mining partnership); Thompson *v.* Walsh, 140 Fed. 83; Stuart *v.* Mott, 14 Can. Sup. Ct. 734 (mining partnership).

45. Patterson *v.* Keystone Min. Co., 30 Cal. 360; Waring *v.* Crow, 11 Cal. 366. See also, generally, Tenants in Common.

46. Hawkins *v.* Spokane Hydraulic Min. Co., 3 Ida. 241, 28 Pac. 433.

47. Allen *v.* Anderson, 13 Ill. App. 451 (holding that where a lease of a right to mine coal was made to the mining partnership, of which the lessor was a member, and the enterprise was abandoned before the term of the lease had expired, the lessor's share in the firm was chargeable with his ratable proportion of the rent); Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468 (holding that where a member of a mining partnership used boilers owned by the partnership on work in which the partners had no interest, he cannot compel the partnership to repay money advanced by him for repairs on such boilers).

Controlled by contract and construction thereof by parties.— Where two of four persons, all of whom owned a mining lease in equal proportions, transferred to their associates one half of their interest in consideration that the latter should pay all the expenses of working the mine and assume exclusive personal liability for such expenses if they exceeded the earnings, the parties were held to the construction of the contract in respect of the manner in which the profits were to be divided, by their continued acquiesence in the construction which they themselves had placed on it. Taylor *v.* Thomas, 31 Colo. 15, 71 Pac. 381, where the parties were held bound by the construction that the profits were to be divided at the end of each month when there was a profit of the entire term of the lease up to that date, and were estopped to insist that each month was to be taken as a separate period and its losses borne or profits divided without reference to any other month, under the following provision: "When on the last day of any calendar month the total receipts from the lease, after January 25, 1898 [which was the date of the contract], shall exceed the total expenses of the lease, after January 25, 1898, to said last day of the month, the surplus receipts, on hand shall be divided . . . but at any time when such receipts do not exceed such expenses, no division shall be made."

mine, in order to give the parties associated an interest in the property, and if it does not then exist, and one of the parties makes a discovery and locates a claim in his own name, he acquires such location for himself.[48] A complaint, alleging that defendant furnished plaintiff with a grub stake to go to Alaska and locate mining claims, under an agreement that each should own one half thereof, and that defendant did go to Alaska and acquire certain mining claims, but which does not allege that defendant acquired said claims by means of the grub stake so furnished, is not sufficient to show plaintiff entitled to a share thereof.[49]

(II) *Authority of Member or Manager in General to Bind Firm.* As a result flowing from the difference between an ordinary commercial partnership and a mining partnership, in that in the latter there is no *delectus personæ*, one mining partner has not the right to bind his associates to the same extent as a member of a trading partnership.[50] The law does not imply any authority either in a partner or a managing agent of the partnership to bind the company or its individual members by a promissory note or contract of indebtedness executed in the name of the company. The powers of partners or managers are limited to the performance of such acts as may be necessary to the transaction of business, or which are usual in like concerns;[51] but either partner can bind the firm by acts in the name of the partnership in such matters as may be necessary to the transaction of the business, or which is usual in like concerns,[52] unless there

48. Page *v.* Summers, 70 Cal. 121, 12 Pac. 120 (holding that where a prospecting mining partnership has been dissolved by mutual consent, there is no implied duty upon any of the partners to complete defective locations, and if they have done so they are not chargeable as trustees of the others); Jennings *v.* Rickard, 10 Colo. 395, 15 Pac. 677; Johnstone *v.* Robinson, 16 Fed. 903, 3 McCrary 42.

49. Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689.

50. *California.*— Jones *v.* Clark, 42 Cal. 180; Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96.

Colorado.—Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446; Meagher *v.* Reed, 14 Colo. 355, 24 Pac. 681, 9 L. R. A. 455; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Charles *v.* Eshleman, 5 Colo. 107.

Montana.— Harris *v.* Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

West Virginia.— Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

United States.— Bissell *v.* Foss, 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126; Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266; G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510.

See 34 Cent. Dig. tit. "Mines and Minerals," § 223.

51. *California.*— Decker *v.* Howell, 42 Cal. 636; Duryea *v.* Burt, 28 Cal. 569; Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96.

Colorado.— Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212. The employment of counsel to litigate the title to the mine does not come with the ordinary and limited authority of one of the partners. Charles *v.* Eshleman, 5 Colo. 107.

Kentucky.— Judge *v.* Braswell, 13 Bush 67, 26 Am. Rep. 185.

Montana.— Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261.

Nevada.— Chase *v.* Savage Silver Min. Co., 2 Nev. 9.

Texas.— Randall *v.* Merideth, 76 Tex. 669, 13 S. W. 576.

West Virginia.— Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118.

England.— Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63.

See 34 Cent. Dig. tit. "Mines and Minerals," § 223.

If the other members of a partnership ratify the borrowing of money by one member, the partnership will be liable therefor. Randall *v.* Meredith, (Tex. 1889) 11 S. W. 170.

52. *Colorado.*— Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212 (recognizing the authority to purchase articles necessary in carrying on the business); Charles *v.* Eshleman, 5 Colo. 107; Lyman *v.* Schwartz, 13 Colo. App. 318, 57 Pac. 735 (as to employment of labor to work the mine).

Montana.— Nolan *v.* Lovelock, 1 Mont. 224, authority to hire labor.

West Virginia.— Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468, expense of repairs.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

Canada.— Gray *v.* McCallum, 5 Brit. Col. 462.

See 34 Cent. Dig. tit. "Mines and Minerals," § 223.

is an express agreement to the contrary known to the party contracting with the firm.[53] But on the other hand, if by the terms of a contract of mining partnership it appears that the confidential relations of an ordinary partnership are established, and that the firm is not subject to the intrusion of other partners at will, the reason of the rule that restricts the powers of a single partner fails. The parties are strictly partners, not by reason of their common ownership of the mine, but as the result of their own agreement.[54]

(III) *MAJORITY CONTROL.* Those owning a major portion in a mining partnership have power to decide what is necessary and proper for carrying on the business and to control the working of the mine, where all the partners cannot agree, provided the exercise of such power is necessary and proper for the carrying on of the enterprise for the benefit of all concerned.[55]

(IV) *TRUST RELATIONSHIP.* The members of a mining copartnership are held to a strict rule of good faith and open and fair dealing with each other,[56] and one member cannot conduct the mining operations to the detriment of his associates, or acquire property which rightfully belongs to the partnership.[57]

c. Contracts With and Liability to Third Persons[58] — (I) *IN GENERAL.* All persons dealing with a mining partnership are bound to take notice of its peculiarities.[59] Every general partner is liable to third persons for the obligations of the partnership jointly with his copartners, and not merely for a *pro tanto* amount of the indebtedness.[60]

A mine superintendent has a right to expend partnership funds for necessary supplies for a mine without express authority. Stuart *v.* Adams, 89 Cal. 367, 26 Pac. 970. And the partners will be liable for the act of one held out as agent in purchasing articles necessary in carrying on the business, although such agent exceeds his authority. Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232.

Where a mine is worked on the cost-book principle, it is a question of fact for the jury whether the captain of the mine had authority to pledge the credit of the shareholders for necessaries. Newton *v.* Daly, 1 F. & F. 26.

53. Nolan *v.* Lovelock, 1 Mont. 224.

54. Decker *v.* Howell, 42 Cal. 636; Burgan *v.* Lyell, 2 Mich. 102, 55 Am. Dec. 53 (where a restriction in the articles of partnership on the authority of a member was held not to affect a third party); Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 176. But see Judge *v.* Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185. See also *infra*, V, B, 1, c.

55. *California.*— Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116.

Colorado.—Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446; Lyman *v.* Schwartz, 13 Colo. App. 318, 57 Pac. 735.

Idaho.— Hawkins *v.* Spokane Hydraulic Min. Co., 3 Ida. 650, 33 Pac. 40, 3 Ida. 241, 28 Pac. 433.

Pennsylvania.— Markle *v.* Wilbur, 200 Pa. St. 457, 50 Atl. 204.

West Virginia.— Blackmarr *v.* Williamson, 57 W. Va. 249, 50 S. E. 254; Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

See 34 Cent. Dig. tit. "Mines and Minerals," § 223.

Upon abandonment.—Where the agreement provides for the working of mines as partners, and also that the property should be disposed of as a majority of the partners should deem it advisable, and two of the partners become insolvent and a third is not, and all abandon the work and neglect the payment of instalments for the purchase-money, leaving the whole burden upon the fourth, neither of said partners can object that the fourth had disposed of the land without the concurrence of the majority. Rea *v.* Vannoy, 54 N. C. 282.

56. Gore *v.* McBrayer, 18 Cal. 582; Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633; Jennings *v.* Rickard, 10 Colo. 395, 15 Pac. 677. See also *infra*, V, B, 1, d.

57. *California.*— Settembre *v.* Putnam, 30 Cal. 490.

Colorado.— Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633.

Montana.—Hirbour *v.* Reeding, 3 Mont. 15.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

United States.— Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764.

Purchase with partnership funds.— A purchase, under a trust deed or mortgage, made by one partner with partnership funds, will not divest the interest of any of the other partners. Brown *v.* Bryan, 5 Ida. 145, 51 Pac. 995.

58. See *supra*, V, B, 1, b.

59. Lamar *v.* Hale, 79 Va. 147.

60. Stuart *v.* Adams, 89 Cal. 367, 26 Pac. 970 (holding that the statutory provision that every joint partner is liable to third persons for firm debts applies to members of a mining partnership, and that the proportion of the indebtedness for which a partner shall be bound to a third person has no relation to the fact that his associate is not one of his choice and does not legitimately flow from the absence of *delectus personæ*); Hailey First Nat. Bank *v.* G. V. B.

(11) *Liability of Retiring and Incoming Members.* An incoming partner will not be liable for the antecedent debts of the firm, as between the parties,[61] but he takes subject to the payment of the antecedent partnership debts out of the partnership property;[62] and so far as the partnership creditors are concerned, the personal liability of the retiring partner for antecedent debts continues, unless it is assumed by the new firm and the new debtor is accepted by the creditor.[63]

d. Withdrawal of Member or Sale of Interest. A member of a mining association as distinguished from an ordinary commercial partnership may withdraw from or sell his interest in the concern without consulting his associates,[64] who have no right to object to the admission of the stranger who purchases the interest.[65] There is no relation of trust or confidence between the partners which is violated by such sale and assignment,[66] nor is the seller compelled to share the proceeds of his sale, nor the buyer compelled to share his purchase with any of his associates in the absence of express contract.[67] But if the partnership arises under an express partnership agreement a new partner can no more be intruded therein without the consent of the remaining partners than in a strictly commercial partnership.[68]

e. Partnership Liens. Each member of the mining partnership has a lien upon the partnership property for the debts due the creditors of the partnership, and for moneys advanced by him for its use, which he may enforce in equity, even if there had been no agreement among the partners that such lien shall exist.[69] But this lien is only on the partnership property while it is distinctly

Min. Co., 89 Fed. 449 [*affirmed* in 95 Fed. 35, 35 C. C. A. 510].

Coöwners not partners.—To recover, under the Pennsylvania statute, which authorizes assumpsit by any person performing labor against a joint owner, joint tenant, or tenant in common, holding an interest in and operating in producing oil or gas wells, for the *pro rata* share, owing for labor done or material furnished, there must be an express or implied contract as the basis of the claim. Murtland *v.* Callihan, 2 Pa. Super. Ct. 340, 38 Wkly. Notes Cas. 512.

Partnership property see *infra*, V, B, 1, f.

61. Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446.

62. Jones *v.* Clark, 42 Cal. 180.

63. Jones *v.* Clark, 42 Cal. 180.

Subsequent debts.— Where one member assigns his stock, he is liable as a copartner for debts subsequently contracted with the person not having notice of his sale and withdrawal. Burgan *v.* Lyell, 2 Mich. 102, 55 Am. Dec. 53, under general rules, the case involving an ordinary partnership. See also PARTNERSHIP.

64. See *infra*, V, B, 1, g.

65. Blackmarr *v.* Williamson, 57 W. Va. 249, 50 S. E. 254; Bissell *v.* Foss, 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126; Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266.

Qualification by contract.— If one of the owners of an outfit of a gold company sells part of his interest, but with a specific clause that the purchaser shall not be a partner but only a purchaser of that part of the seller's interest in the metals and ores, the seller's interest in the partnership does not pass. Phillips *v.* Jones, 20 Mo. 67.

66. Nisbet *v.* Nash, 52 Cal. 540; Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Bissell *v.* Foss, 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126; Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266.

67. Harris *v.* Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475; Bissell *v.* Foss, 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126; Denver First Nat. Bank *v.* Bissell, 4 Fed. 694, 2 McCrary 73.

68. Freeman *v.* Hemenway, 75 Mo. App. 611, holding that in such a case the purchaser will be only a tenant in common unless all the parties thereafter continue to work the mine together, in which event a mining partnership arises out of that situation.

69. Duryea *v.* Burt, 28 Cal. 569; Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468; G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510. See also, generally, PARTNERSHIP.

Such lien does not give either partner the right of possession to the exclusion of the other, nor is it dependent upon possession. Morganstern *v.* Thrift, 66 Cal. 577, 6 Pac. 689.

Purchaser with notice.— If a person sells his interest in a mining company while it is engaged in working its mining ground, the purchaser will be deemed to have bought with notice of any lien resulting from the relation of the partners to each other and to the creditors of the partnership. Duryea *v.* Burt, 28 Cal. 569; Ervin *v.* Masterman, 16 Ohio Cir. Ct. 62, 8 Ohio Cir. Dec. 516.

One not joining in working a mine not being a partner has no lien on the product of a mine for his share of part profits made by his coöwners while he was excluded from the property, as against a mortgagee of the

such; for if there is a separation or division of the property, there is no lien.[70] And a party cannot accept a part interest in mining land in order to develop it, voluntarily invest his money in the scheme, and, in case of failure, have a lien against the land to reimburse him for the outlay.[71]

f. Partnership Property. The property operated may be owned by third persons, or by any or all of the individual members of the partnership, and not belong to the copartnership as such;[72] but the common interests of the partners may be converted by them into partnership property,[73] and real estate purchased by partners with partnership funds for partnership purposes is at law held by them as tenants in common, but in equity is held as a part of the partnership property, applicable to copartnership debts.[74]

g. Termination and Dissolution —(1) *IN GENERAL.* Where no time of duration is fixed for a mining partnership to continue, it is determinable under equitable restrictions at pleasure. But such determination cannot operate to defeat rights accruing under it while it was in force.[75]

interest of such partners, although he is entitled to his share of the product while the mine is operated by a receiver appointed in a suit to foreclose the mortgage. G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510.

70. Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468, under a partnership agreement to deliver the product to a pipe line, which should give each member "division orders," for his share.

71. Brunswick *v.* Winters, 3 N. M. 241, 5 Pac. 706. So no lien arises from a contract, giving the management of a mine to one part-owner and a right to reimbursement for all advances from all the proceeds, but which expressly excludes any personal liability of the other part-owner for any part of such advances, so long as the contract is not broken by the other owners. Frowenfeld *v.* Hastings, 134 Cal. 128, 66 Pac. 178.

72. Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446 (holding that if such common property is not put into the partnership for working the mines, the interest of one in the real estate who succeeds an original member in the ownership of the real estate and in the partnership is not liable for prior debts, as between the parties themselves); Patrick *v.* Weston, 21 Colo. 73, 39 Pac. 1083; Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212. See also *supra*, note 32.

But mining ground not actually worked or used in connection with the ground worked or purchased with partnership funds does not belong to the partnership. Dorsey *v.* Newcomer, 121 Cal. 213, 53 Pac. 557.

73. Duryea *v.* Burt, 28 Cal. 569, holding that whether from the manner in which the parties blended their interests in the claims with subsequent purchases, and in working the whole the parties put in as partnership property the claims originally held is a question of fact.

Mere use of property held by the members of a firm as tenants in common is not sufficient to show that it is held by the partnership. There must be some agreement to make it partnership property. Alexander *v.* Kimbro, 49 Miss. 529. And the presumption is that when the title to the property is not in the firm it does not belong to the firm, and in order to bring it into the firm it must appear that it was paid for with the firm funds, or was by agreement actually brought into the copartnership affairs. Shaffer's Appeal, 106 Pa. St. 49.

74. Duryea *v.* Burt, 28 Cal. 569; Faulds *v.* Yates, 57 Ill. 416, 11 Am. Rep. 24; Santa Clara Min. Assoc. *v.* Quicksilver Min. Co., 17 Fed. 657, 8 Sawy. 330, requiring the presence of all the owners in a suit to wind up the concern, and holding that a sale under a decree in such suit in which one of such owners is not a party will not affect his interest. See also Fereday *v.* Wightwick, 1 Russ. & M. 45, 5 Eng. Ch. 45, 39 Eng. Reprint 18, Taml. 250, 48 Eng. Reprint 100, 31 Rev. Rep. 93.

75. Lawrence *v.* Robinson, 4 Colo. 567, holding that if the partnership arises simply from a joint working of the property, it may be terminated at will by either partner. But where real property has been used for partnership purposes, or brought into the partnership, there is no method of adjusting the equities of the partners and creditors, if agreement cannot be reached, except by an action for dissolution and accounting. Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

A failure by a partner to pay his share of the expenses of the copartnership for ninety days does not invalidate his interest. Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633.

A work contract under which one party was to purchase and work a quarry and give to the other one half the net profits so long as the quarry could be profitably worked cannot be terminated by the former by a sale of the quarry before it is exhausted without subjecting himself to liability to the latter, who is not estopped from asserting that such sale is a violation of the contract by himself thereafter selling his interest to the purchaser in a railroad which was operated in connection with the quarry. Treat *v.* Hiles, 81 Wis. 280, 50 N. W. 896.

(II) *SALE OF INTEREST, DEATH, OR BANKRUPTCY.* A partner in a mining partnership may convey his interest in the mine and business without dissolving the partnership.[76] And in such case the purchaser becomes a partner in the mining venture in the place of the retiring partner.[77] Neither does the death or bankruptcy of a member dissolve such partnership.[78] Where, however, the partnership arises out of special contract, the sale of the interest of one of the members dissolves the firm, and the parties become tenants in common, unless they again work the mines, and thus create by implication of law a mining partnership between the new parties.[79]

(III) *SALE OF PARTNERSHIP PROPERTY — ABANDONMENT.* Where a mining partnership conveys all its property to a corporation it is thereby dissolved.[80] One may surrender his interest in a mining partnership;[81] such abandonment is not within the statute of frauds, and may be orally.[82] And where several partners form a mining partnership, and for a time carry on its business, but later apparently abandon the contract, and a portion of the partners enter into new arrangements with third persons, those members of the first partnership not included in the new arrangement have no interest in the partnership business or property.[83]

By bill in equity — *In general.* — A mining partnership may be dissolved by a decree in equity to sell the partnership property, upon a bill alleging good grounds therefor. Nisbet *v.* Nash, 52 Cal. 540 (holding likewise that the decree of dissolution should provide for an accounting); Blackmarr *v.* Williamson, 57 W. Va. 249, 50 S. E. 254; Santa Clara Min. Assoc. *v.* Quicksilver Min. Co., 17 Fed. 657, 8 Sawy. 330.

Parties.— Where some members of a mining partnership are not made defendants in a bill for dissolution, and the decree directs the mines and lands of the partnership to be sold and the debts paid, a sale under such decree cannot affect the partners who are not parties to the suit. Santa Clara Min. Assoc. *v.* Quicksilver Min. Co., 17 Fed. 657, 8 Sawy. 330.

76. *California.*— Taylor *v.* Castle, 42 Cal. 367; Jones *v.* Clark, 42 Cal. 180; Duryea *v.* Burt, 28 Cal. 569; Skillman *v.* Lachman, 23 Cal. 198, 83 Am. St. Rep. 96.

Colorado.— Patrick *v.* Weston, 22 Colo. 45, 43 Pac. 446; Slater *v.* Haas, 15 Colo. 574, 25 Pac. 1089, 22 Am. St. Rep. 440; Meagher *v.* Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Charles *v.* Eshleman, 5 Colo. 107.

Idaho.— Hawkins *v.* Spokane Hydraulic Min. Co., 3 Ida. 241, 28 Pac. 433.

Montana.— Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

Pennsylvania.— Markle's Estate, 5 Pa. Dist. 47, 17 Pa. Co. Ct. 337.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

West Virginia.— Blackmarr *v.* Williamson, 57 W. Va. 249, 50 S. E. 254.

Wyoming.— Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

United States.— Kohn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266; G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510.

See 34 Cent. Dig. tit. "Mines and Minerals," § 225.

Notice to third persons. — If a withdrawing partner desires to protect himself from future liability to creditors, with whom the partnership had been dealing, he must give notice to such creditors. Slater *v.* Haas, 15 Colo. 574, 25 Pac. 1089, 22 Am. St. Rep. 440. And so a statute providing that the liability of a joint partner for the acts of his copartners continues even after dissolution, in favor of persons who have had dealings with or given credit to the partnership during its existence, until they have personal notice of the dissolution, is held to apply to mining partnerships. Dellapiazza *v.* Foley, 112 Cal. 380, 44 Pac. 727.

77. Hawkins *v.* Spokane Hydraulic Min. Co., 3 Ida. 241, 28 Pac. 433; Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468.

78. Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Charles *v.* Eshleman, 5 Colo. 107; Hawkins *v.* Spokane Hydraulic Min. Co., 3 Ida. 241, 28 Pac. 433; Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005; Fereday *v.* Wightwick, 1 Russ. & M. 45, 5 Eng. Ch. 45, 39 Eng. Reprint 18, Taml. 250, 48 Eng. Reprint 100, 31 Rev. Rep. 93.

A claim arising out of a mining partnership with the deceased may be presented like any other claim, allowed, and paid, without bringing suit to establish or dissolve the partnership. *In re* Gladough, 1 Alaska 649.

79. Freeman *v.* Hemenway, 75 Mo. App. 611.

80. Dellapiazza *v.* Foley, 112 Cal. 380, 44 Pac. 727.

81. McAdams *v.* Hawes, 9 Bush (Ky.) 15, holding that a two years' lease, at a stated rental, by one mining partner to another, of all his interests in the coal mine, operated by such partnership, either dissolves the partnership absolutely, or with the assent of the members suspends it during the continuance of the lease.

82. Larsh *v.* Boyle, (Colo. 1906) 86 Pac. 1000.

83. Chadbourne *v.* Davis, 9 Colo. 581, 13 Pac. 721; Johnstone *v.* Robinson, 16 Fed. 903.

2. Corporations and Joint Stock Companies[84] — a. Incorporation. As in the case of the organization of other corporations,[85] the statutory authority for the organization of a mining corporation must be observed.[86] When the statute requires that the certificate of incorporation of a mining corporation shall state the object of its formation; that is, the particular class of business to be carried on, it cannot conduct any other business separate and distinct from and not incidental to the business for which it was incorporated.[87] The legislature, by amending the charter of a mining corporation, thereby recognizes the validity of its incorporation, and the acceptance of such amendment renders it valid *ab initio*.[88]

b. Powers of Corporation. A necessary incident of a mining corporation is that it shall have power to contract and bind itself and those dealing with it in matters within the intent of the charter, even though the charter contains no express grant or power to contract or make debts,[89] and having power to purchase

3 McCrary 42; Dunlop *v.* Nicoll, 21 Can. L. T. Occ. Notes 84.

Laches.— Where the contract provides for the joint prosecution of labor on a mine to continue until a valid location is made on a legal discovery, and one partner quits work and the other continues until he finds a vein, the one quitting is entitled to no interest therein, having lost it by his laches. McLaughlin *v.* Thompson, 2 Colo. App. 135, 20 Pac. 816. So where one partner failed to comply with the partnership agreement, and took no steps to obtain an interest in a lease, which was to be the subject of the partnership business, for several months, he was held to have lost his interest in the partnership by laches. McKenzie *v.* Coslett, 28 Nev. 65, 78 Pac. 976.

84. Associations generally see Associations, 4 Cyc. 299.

Cost-book mines see *infra*, V, B, 3.

85. See Corporations, 10 Cyc. 219 *et seq.*

86. *In re* Lancaster Min., etc., Co., 30 Pa. St. 151, holding that a mining company, desirous of being incorporated under an act providing for the incorporation of owners of mining claims, should set forth that the parties are in possession of mineral lands, describing them, and also produce evidence of the truth of such allegations.

The Pennsylvania Act of 1863 (Pamphl. Laws 1102) which authorizes the incorporation of mining companies does not require that the corporators shall be subscribers. Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43.

Omission in certificate of incorporation.— Where the certificate of incorporation contains all the statements enumerated in the statute, with the exception of the one as to the assessability of the stock of a mining corporation, such omission cannot, in the absence of fraud, invalidate a company's corporate existence. Humphreys *v.* Mooney, 5 Colo. 282.

87. Consumers' Gas Trust Co. *v.* Quimby, 137 Fed. 882, 70 C. C. A. 220, where defendant corporation was organized "to drill and mine for natural gas, petroleum, and other minerals, and to purchase, lease, and otherwise acquire gas and petroleum wells and the products thereof, and to furnish the same to its patrons for use, and by manufacture to convert the same into gas for fuel and illuminating purposes, and other articles of commerce," after which the organizers of the company procured the passage of an act defining the word "mining" as used in the former statute to "cover and include the sinking, drilling, boring, and operating of wells for petroleum and natural gas," and made it applicable to the organization in question, and it was held that such corporation had no power after the supply of natural gas was exhausted to use its assets to manufacture artificial gas and furnish the same to consumers.

88. Basshor *v.* Dressel, 34 Md. 503.

89. Wood Hydraulic Hose Min. Co. *v.* King, 45 Ga. 34; Adams Min. Co. *v.* Senter, 26 Mich. 73 (holding that a mining corporation has power to buy and sell timber, since for some purposes it is indispensable in mining operations); Merchants', etc., Sav. Bank *v.* Belington Coal, etc., Co., 51 W. Va. 60, 41 S. E. 390 (holding that under Code, c. 53, § 24, a mining corporation when fully organized may purchase real and personal estate for the use of the corporation on such terms and conditions as may be agreed upon by the stock-holders and directors of the corporation and pay for it by issuing as many shares of its capital stock to the vendor as are equal in amount at par value to the price agreed upon for such property, not to exceed its authorized capital); Ritchie *v.* Vermillion Min. Co., 4 Ont. L. Rep. 588. See also McDonald *v.* Upper Canada Min. Co., 15 Grant Ch. (U. C.) 179, 551.

Lease of corporate lands.— Under Tex. Rev. St. (1895) art. 651, conferring on corporations the power to lease lands owned by them when not inconsistent with the corporate purpose, the execution of a lease by an oil mining corporation of its land-holding to others for the purpose of mining for oil, reserving to the corporation a royalty on the product, is not *ultra vires* on the ground that it rendered it impossible for the corporation to further prosecute its corporate purposes, although the corporation had begun

property, such corporation can give promissory notes on such purchase,[90] unless expressly prohibited by statute.[91] Some of the statutes provide that mining corporations shall not have the power to sell, lease, or mortgage any part of their mining ground, unless ratified by the holders of a designated amount of the capital stock.[92]

c. Powers and Duties of Officers and Agents. Acts done in contravention of a statute which designates the minimum number of directors which a mining corporation shall have, and declares invalid all acts done by less than a majority of such directors, are held to be void.[93] On the other hand such duties as the statute imposes upon the directors, as the duty of making and posting itemized

to mine for oil itself prior to the execution of the lease. Stark *v.* J. M. Guffey Petroleum Co., (Tex. Civ. App. 1904) 80 S. W. 1080.

90. Moss *v.* Averell, 10 N. Y. 449; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Moss *v.* Rossie Lead Min. Co., 5 Hill (N. Y.) 137. See also CORPORATIONS, 10 Cyc. 1113. See, however, Gilbert *v.* McAnnany, 28 U. C. Q. B. 384, holding that a mining company incorporated under Can. Consol. St. c. 63, § 57, has not as a necessary incident the right to draw, accept, or indorse bills of exchange for the purposes of their business and the power of "selling or otherwise disposing of their ores as the company may see fit" in their articles of association will not give them such right by implication.

Purchase of choses in action.— A corporation organized for mining, smelting, and operating in mining properties cannot purchase choses in action. Salmon River Min., etc., Co. *v.* Dunn, 2 Ida (Hasb.) 26, 3 Pac. 911.

91. Granite Gold Min. Co. *v.* Maginness, 118 Cal. 131, 50 Pac. 269, holding that a statute making it unlawful for any mining corporation to purchase or obtain in any manner "additional mining ground," without the consent of the holders of two thirds of the capital stock, does not prevent such corporation from acquiring mining grounds in the first instance without such consent.

92. Lacy *v.* Gunn, 144 Cal. 511, 78 Pac. 30 (holding that under a statute declaring it unlawful for the directors of a mining corporation to dispose of mining ground owned by it without the ratification of the holders of two thirds of the capital stock, a previous consent or direction by the actual owners of such amount of stock, although purporting to have been made by them in their capacity of directors, is, at least as against creditors, equivalent to a subsequent ratification); Johnson *v.* California Lustral Co., 127 Cal. 283, 59 Pac. 595; Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679; McShane *v.* Carter, 80 Cal. 310, 22 Pac. 178 (holding that the statute applies likewise to ditches and water rights appurtenant to the ground); Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373; Anaconda Copper Min. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909; Forrester *v.* Butte, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 229, 353 (holding, however, that such statute does not authorize two thirds of the stockholders of a prosperous corporation to sell all of its property against the protest of any other stock-holder); Williams *v.* Gold Hill Min. Co., 96 Fed. 454 (holding that the statute is equally applicable to foreign corporations doing business in the state).

The Michigan statute (Howell Annot. St. § 4099) prohibiting mining corporations from alienating any part of their "mine works, real estate, or franchise," unless expressly authorized by the vote of three fifths of the capital stock, "provided that the provisions of this section shall not apply to city or village lots, nor to land not required for mining purposes from which the timber has been removed . . . which may be conveyed when authorized by a vote of a majority of the directors," was designed only to prevent such alienation of property as would disable the company from the conduct of its business as a mining company, and does not apply to a sale of non-mineral lands situated in another county, and at a distance from its mining property, or to the sale of timber therefrom. Baggaley *v.* Pittsburg, etc., Iron Co., 90 Fed. 636, 33 C. C. A. 202. See also Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395.

The Montana statute (Con. St. div. 5, § 492) provides that the officers of a mining company shall not mortgage its property except in pursuance of an order of a stock-holders' meeting, convened by publication, notice, etc., and it has been held under this statute that a mortgage executed by the unanimous order of a stock-holders' meeting of such company at which all of the stock-holders were present, but which was convened without observing the statutory requirements, was not void but voidable only. Campbell *v.* Argenta Gold, etc., Min. Co., 51 Fed. 1.

Mortgaged property.— The Pennsylvania Act of 1867 (Pamphl. Laws 1373) authorizing mining companies to mortgage their "property" for loans was not intended to authorize a mortgage of chattels. Roberts' Appeal, 60 Pa. St. 400.

93. Brown *v.* Valley View Min. Co., 127 Cal. 630, 60 Pac. 424, holding under such a statute that an act of a minority of the directors in employing a watchman to guard the corporation property was void, although there were two vacancies in the board of five directors. See also Hatch *v.* Lucky Bill Min. Co., 25 Utah 405, 71 Pac. 865.

accounts and balance sheets at stated intervals,[94] must be performed by them.[95] In several jurisdictions the amount of debts and liabilities to be incurred by a mining corporation are restricted by statute, and if any debts or liabilities are contracted exceeding that amount, the officers and directors of the company contracting the same, or assenting thereto, are made liable in their individual capacities for the whole amount of such excess.[96] The authority of a general agent in charge of mines will be recognized, without proof, as covering all the ordinary local business of the concern, and persons dealing with him have a right, in the absence of notice to the contrary, to assume that he has such power;[97] but such agent has no authority by virtue of his position, without the company's consent or knowledge, to change the terms of a written contract made by its board of trustees,[98] or to bind it by a note, or by otherwise using its credit, unless he has authority from the corporation to do so.[99]

d. Dissolution of Mining Company.[1] While a portion of a mining company cannot, contrary to the articles of association, dissolve it at their will and pleasure, yet where it is found to be impracticable to keep the company together or to prosecute the enterprise successfully under the articles of association, a dissolution should be decreed and the effects of the company distributed.[2] Under a

94. Eyre *v.* Harmon, 92 Cal. 580, 28 Pac. 779; Beal *v.* Osborne, 72 Cal. 305, 13 Pac. 871.

95. Ball *v.* Tolman, 119 Cal. 358, 51 Pac. 546 (holding that a company organized "'for the purpose of securing and working placer mines,' to deal in mines and mining claims, and the erection of plants for working the same," which built a dredging boat, and with it dredged for gold in a river at intervals for three months, is a mining company within the act of April 23, 1880, amending the act of March 30, 1874, requiring directors of mining corporations to make and post itemized monthly accounts and balance sheets, and that the fact that the dredge boat was operated in a navigable stream in no way relieved the directors from compliance with the statute; and holding likewise that such statute is remedial as well as penal in its nature, and ignorance of it will not excuse the directors for a failure to comply with it); Francais *v.* Somps, 92 Cal. 503, 28 Pac. 592 (holding that the directors of a corporation formed for the purpose of mining, which chooses officers, disburses money, incurs liabilities, etc., must make and post the itemized account required by the statute, although they never carried on or conducted the business for which the corporation was formed).

96. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204 (holding, however, that the liability imposed by the Pennsylvania statute upon the directors and officers of mining corporations was in the nature of a penalty, and could only be enforced within the limits of that state); Young *v.* Allegheny Oil Co., 10 Phila. (Pa.) 525. See also Byers *v.* Franklin Coal Co., 106 Mass. 131. And see, generally, CORPORATIONS, 10 Cyc. 852.

A manager of a company is not a laborer, servant, or apprentice within the meaning of section 8 of the Ontario Mining Companies Incorporation Act (Ont. Rev. St. c. 197). An action brought against two directors of a mining company by such manager who had recovered against the company for wages due him and payments made on their behalf to laborers and servants and had subsequently obtained assignments of the amount paid, was dismissed on motion under rule 616, on the ground that the action in which the judgment was rendered was not such an action as is contemplated by section 8. Herman *v.* Wilson, 20 Can. L. T. Occ. Notes 382, 32 Ont. 60.

97. Adams Min. Co. *v.* Senter, 26 Mich. 73; Miller *v.* Cochran Hill Gold Min. Co., 29 Nova Scotia 304.

98. Lonkey *v.* Succor Mill, etc., Co., 10 Nev. 17.

99. Carpenter *v.* Biggs, 46 Cal. 91 (holding likewise that the assignment of the note of a mining corporation, made by its superintendent, but void for want of authority of the superintendent to make it, does not carry with it the debt for which the note was given); Breed *v.* Central City First Nat. Bank, 4 Colo. 481 (holding that a mine superintendent by virtue of his employment merely, and in the absence of special authority given, has no authority to borrow money on the credit of his principal).

1. **Termination of associations** generally see ASSOCIATIONS, 4 Cyc. 315.

2. Von Schmidt *v.* Huntington, 1 Cal. 55 (where a joint stock association, formed in New York to mine in California, was divided into money shares and labor shares, and the holders of the latter had neither contributed capital toward the outfit of the company nor performed labor beneficial thereto, and besides were paid their expenses to California out of funds contributed by the holders of the money shares, and it was held, on dissolution, that the assets of the company should be distributed among the holders of the money shares alone); Consumers' Gas Trust Co. *v.* Quinby, 137 Fed. 882, 70 C. C. A. 220.

statute relating to mining companies, declaring that no consolidation shall in any way relieve such companies or the stock-holders thereof from any and all just liabilities, the consolidation of a mining company into a new company does not work a dissolution of the company consolidated.[3]

3. Cost-Book Mines in England. In England where parties form a company for the purpose of working a mine on what is known as the cost-book principle, each adventurer therein becomes a partner in the concern from the commencement, and liable as such for the goods supplied for the working of the mine.[4] A partnership to carry on a mine on the cost-book principle is in the nature of a joint stock company, and it is not a new partnership on the entry of a new member, who merely comes in in place of an old one, and puts his money into a common fund, to be employed in the ordinary course of business.[5] It is the general custom in cost-book mines that a relinquishing member should pay to the company if insolvent his share of the liabilities at the date of the relinquishment as if the concern were then being wound up, and if the company be solvent should at the same date receive an aliquot share of the surplus, if any, of the assets over the liabilities.[6] Where power in co-adventurers to forfeit the shares of one of their

3. Isom *v.* Rex Crude Oil Co., 147 Cal. 663, 82 Pac. 319.

4. Peel *v.* Thomas, 15 C. B. 714, 3 C. L. R. 397, 24 L. J. C. P. 86, 80 E. C. L. 714; Hybart *v.* Parker, 4 C. B. N. S. 209, 4 Jur. N. S. 265, 27 L. J. C. P. 120, 6 Wkly. Rep. 364, 93 E. C. L. 209 (holding that it is not competent for the shareholders in a cost-book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to the purser of the company; such a rule violating the law by agreeing that one partner may sue his copartner); Watson *v.* Spratley, 2 C. L. R. 434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627; Sibley *v.* Minton, 27 L. J. Ch. 53, 5 Wkly. Rep. 675 (holding that it is necessary, in order to have an account, that all the members should be made parties to the bill).

Proof of meaning required.— A court does not, without evidence, take judicial cognizance of the meaning of the term "cost-book principle." *In re* Bodmin United Mines Co., 23 Beav. 370, 3 Jur. N. S. 350, 26 L. J. Ch. 570, 5 Wkly. Rep. 300, 53 Eng. Reprint 145.

Rules and regulations entered in cost-book. — A company formed upon the cost-book system is only bound by the rules and regulations entered in the cost-book, and is not bound by a preliminary contract entered into before the formation of the company. Thomas *v.* Hobler, 4 De G. F. & J. 199, 8 Jur. N. S. 125, 5 L. T. Rep. N. S. 564, 65 Eng. Ch. 155, 45 Eng. Reprint 1160.

Jurisdiction of court of Stannaries.— A company formed on the cost-book principle, for the purpose of mining in Cornwall, is subject to the jurisdiction of the court of Stannaries. *In re* Penhale Consol. Silver Lead Min. Co., L. R. 2 Ch. 398, 36 L. J. Ch. 515, 16 L. T. Rep. N. S. 336, 15 Wkly. Rep. 664; *Re* East Botallack Consol. Min. Co., 34 Beav. 82, 10 Jur. N. S. 1193, 34 L. J. Ch. 81, 11 L. T. Rep. N. S. 408, 13 Wkly. Rep. 197, 55 Eng. Reprint 564; *In re* Wheal Anne Min. Co., 30 Beav. 601, 6 L. T. Rep. N. S. 38, 10 Wkly. Rep. 330, 54 Eng. Reprint 1023. See, however, *In re* Silver Valley Mines, 18 Ch. D. 472, 45 L. T. Rep. N. S. 104, 30 Wkly. Rep. 36 [*disapproving In re* East Botallack Consol. Min. Co., 34 Beav. 82, 10 Jur. N. S. 1193, 34 L. J. Ch. 81, 11 L. T. Rep. N. S. 408, 13 Wkly. Rep. 197, 55 Eng. Reprint 564], holding that in the case at point the Stannaries court did not have jurisdiction, but that it was in the high court of chancery.

5. *In re* Wrysgan Slate Quarrying Co., 5 Jur. N. S. 215, 28 L. J. Ch. 875, 7 Wkly. Rep. 335 (holding that a registered shareholder who has disposed of his shares and handed over the certificates, no other person having registered himself in respect of those shares, remains liable to be a contributory); Geake *v.* Jackson, 36 L. J. C. P. 108, 15 L. T. Rep. N. S. 509, 15 Wkly. Rep. 338; Taylor *v.* Ifill, 8 L. T. Rep. N. S. 148 (holding that a transferee of shares in a company conducted on the cost-book principle takes his shares with their past as well as with their future liability).

6. *In re* Frank Mills Min. Co., 23 Ch. D. 52, 52 L. J. Ch. 457, 49 L. T. Rep. N. S. 193, 31 Wkly. Rep. 440, holding that the amount of the share of liabilities must be ascertained, having regard to the solvency or insolvency of the continuing members at the date of relinquishment — that is the total amount of the liabilities is divided by the number of shares held by the then solvent shareholders, and the quotient multiplied by the number of shares held by the relinquishing member.

Winding up.— Where it appears that a cost-book mine is existing for the sole purpose of winding up its affairs, there being nothing to show that the liabilities have been paid, and subsequent accounts of the company show liabilities still outstanding, and calls due from other shareholders, although the petitioner alone desires an investigation, he is entitled to an order winding up the affairs of the company. *In re* Burch Torr, etc., Vitifer Co., 1 Kay & J. 204, 3 Wkly. Rep. 148, 69 Eng. Reprint 430.

number for non-payment of calls exists by agreement between the parties, it is to be treated *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring a forfeiture must be strictly observed.[7] Under the Stannaries Act, the right of inspection of the books of a cost-book mining company is personal to the shareholder, and does not extend to his solicitors or agents.[8] A transferee of shares in a cost-book mine, the rules of which require transfers to be registered, in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transaction was registered.[9] Where a shareholder in a cost-book mine has taken the proper steps to dissolve his connection with the company, the company has no right to thereafter place his name on the list of shareholders.[10]

4. Tenants in Common.[11] In the absence of statute or contract providing otherwise, one of several tenants in common of a mine, who does not exclude his cotenants, may work the mine in the usual way, and extract the ore therefrom without being chargeable with waste, or liable to the other cotenants for dam-

7. Clarke *v.* Hart, 6 H. L. Cas. 633, 5 Jur. N. S. 447, 27 L. J. Ch. 615, 10 Eng. Reprint 1443. See, however, Rule *v.* Jewell, 18 Ch. D. 660, 29 Wkly. Rep. 755 [*following* Prendergast *v.* Turton, 1 Y. & Coll. 98, 20 Eng. Ch. 98, 62 Eng. Reprint 807, and *distinguishing* Clarke *v.* Hart, 6 H. L. Cas. 633, 5 Jur. N. S. 447, 27 L. J. Ch. 615, 10 Eng. Reprint 1443], holding that even assuming that shares of parties in a cost-book mine have not been regularly forfeited, yet they cannot, after lying by for six years, successfully assert their claim to be partners.

Action to enforce call — Collusive action by creditor. Before the Stannaries Act of 1869 (32 & 33 Vict. c. 19) there was some reason why an action should be brought in the name of a creditor to enforce a call because a cost-book company not being incorporated could not bring such an action, but by that statute the purser of the company is authorized to bring such action on the company's behalf and a collusive action by a creditor which is in fact an action by the company to enforce a call should be dismissed. Escott *v.* Gray, 47 L. J. C. P. 606, 39 L. T. Rep. N. S. 121.

8. *In re* West Devon Great Consols Mine, 27 Ch. D. 106, 51 L. T. Rep. N. S. 841, 32 Wkly. Rep. 890.

9. Walker *v.* Bartlett, 18 C. B. 845, 2 Jur. N. S. 643, 25 L. J. C. P. 263, 4 Wkly. Rep. 681, 86 E. C. L. 845 (holding, however, that while there is no legal obligation on the transferee of shares in a cost-book mine to cause the shares to be registered in his name as the owner, yet there is an implied obligation on him to indemnify the transferrer against calls made during the time when he was virtually and potentially the owner of the shares); Thomas *v.* Clark, 18 C. B. 662, 25 L. J. C. P. 309, 86 E. C. L. 662; *In re* Court Grange Silver Lead Co., 2 Jur. N. S. 1203. See *In re* Great Cambrian Min., etc., Co., 2 Jur. N. S. 85, 2 Kay & J. 253, 25 L. J. Ch. 221, 4 Wkly. Rep. 224, 69 Eng. Reprint 774, where the subscriber was held to have been properly made a contributory. See, however, Matter of Pennant, etc., Consol. Lead Min. Co., 5 De G. M. & G. 837, 1 Jur. N. S. 566, 24 L. J. Ch. 353, 3 Wkly. Rep. 95, 54 Eng. Ch. 656, 43 Eng. Reprint 1095.

10. Matter of Welsh Potosi Lead, etc., Min. Co., 2 De G. & J. 69, 27 L. J. Bankr. 1, 6 Wkly. Rep. 140, 59 Eng. Ch. 55, 44 Eng. Reprint 914; Matter of Welsh Potosi Min. Co., 2 De G. & J. 10, 27 L. J. Bankr. 4, 6 Wkly. Rep. 141, 59 Eng. Ch. 9, 44 Eng. Reprint 891; Matter of Pennant, etc., Consol. Lead Min. Co., 4 De G. M. & G. 285, 22 L. J. Ch. 692, 2 Wkly. Rep. 282, 53 Eng. Ch. 222, 43 Eng. Reprint 517; *Re* Great Cambrian Min., etc., Co., 4 Wkly. Rep. 800, holding that, where a transferee of shares of stock in a cost-book mining company has accepted the transfer and signed the book in respect to his shares, the transferrer cannot be made a contributory in respect to the same shares. See also *In re* Wheal Unity Wood Min. Co., 15 Ch. D. 13, 42 L. T. Rep. N. S. 636, 28 Wkly. Rep. 897; *In re* Wrysgan Slate Quarrying Co., 28 L. J. Ch. 894, 7 Wkly. Rep. 335; *Re* Great Cambrian Min., etc., Co., 4 Wkly. Rep. 670, where the party was held to have been properly placed on the list of contributories. In Harvey *v.* Clough, 8 L. T. Rep. N. S. 324, a shareholder in an unregistered mining company, founded in 1857, carried on upon the cost-book principle, who had disposed of his shares previously to the company being registered in 1861, was held not protected from being sued for the price of goods furnished to the company before registration. To the same effect see Lanyon *v.* Smith, 3 B. & S. 938, 9 Jur. N. S. 1228, 32 L. J. Q. B. 212, 8 L. T. Rep. N. S. 312, 11 Wkly. Rep. 665, 113 E. C. L. 938.

In the winding up of an unregistered company, a person is rightfully placed on the list of contributories in respect to shares belonging to him which he, for the purpose of deluding the public into an exaggerated estimate of the number of shareholders in the company, had had registered in the names of mere nominees for him. Cox's Case, 4 De G. J. & G. 53, 9 Jur. N. S. 1184, 33 L. J. Ch. 145, 9 L. T. Rep. N. S. 493, 3 New Rep. 97, 12 Wkly. Rep. 92, 69 Eng. Ch. 41, 46 Eng. Reprint 834.

11. Partition see Partition.

ages, and an injunction will not be granted at their instance to prevent the working of the mine.[12] But a tenant in possession is liable to an excluded tenant for his proportionate share of the net profits, if any, but may deduct from the gross profits the legitimate expense of mining, but he cannot compel the other tenants in common to contribute in case of loss.[13] The rule applicable to mining partnerships that majority interests have the right to control and direct the working and management of the common property[14] has no force or effect between mere tenants in common who do not coöperate in working the mine; but a tenant in possession, whatever his interest may be, cannot bind those who do not voluntarily join him in the operation or development of the mine.[15] When the surface is owned by one and the mineral by another, the relation of tenants in common does not exist.[16]

C. Rights and Liabilities Incident to Working[17] **— 1. Liens**[18] **— a. In General.** Under various statutory provisions any person who performs work or labor in or furnishes materials for the construction or repair of a mine, or in the operation and development thereof, is given a lien for the amount of his claim.[19] The right to such lien has no existence except by statute;[20] it cannot be restricted or extended by the acts of contracting parties,[21] and will attach in no other instance than those which the statute prescribes.[22]

12. McCord *v.* Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. St. Rep. 686; Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550. And see, generally, Tenancy in Common.

By statute, a non-assenting tenant in common may stop all work or development on the mine. Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 125, 60 Pac. 1039, 25 Mont. 41, 63 Pac. 825; Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642; Connole *v.* Boston, etc., Consol. Copper, etc., Min. Co., 20 Mont. 523, 52 Pac. 263; Red Mountain Consol. Min. Co. *v.* Esler, 18 Mont. 174, 44 Pac. 523; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519, 43 Pac. 924.

Injunction against work under lease by one tenant.— In Goodenow *v.* Farquhar, 19 Grant Ch. (U. C.) 614, one of two tenants in common of land leased part of it as a stone quarry, and it was held that the other tenant in common was entitled to an injunction against further quarrying and to an account against the lessee for one moiety of what had already been quarried. And see McArthur *v.* Brown, 17 Can. Sup. Ct. 61.

13. Paul *v.* Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983; Job *v.* Potton, L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. Rep. N. S. 110, 23 Wkly. Rep. 588; Clegg *v.* Clegg, 3 Giffard 322, 8 Jur. N. S. 92, 31 L. J. Ch. 153, 5 L. T. Rep. N. S. 441, 10 Wkly. Rep. 75, 66 Eng. Reprint 433.

14. See *supra*, V, B, 1, b, (III).

15. Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98; Welland *v.* Williams, 21 Nev. 230, 29 Pac. 403; Chase *v.* Savage Silver Min. Co., 2 Nev. 9.

16. Hutchinson *v.* Kline, 199 Pa. St. 564, 49 Atl. 312; Virginia Coal, etc., Co. *v.* Kelly, 93 Va. 332, 34 S. E. 1020.

17. Regulations as to weighing product see *supra*, V, A, 7.

18. Lien for wages generally see Master and Servant, 26 Cyc. 1066.

19. See the statutes of the various states.

Under the Mechanic's Lien Law a mine is an improvement on land, and a mine or pit sunk within a mining claim is a structure. Silvester *v.* Coe Quartz Min. Co., 80 Cal. 510, 22 Pac. 217; Helm *v.* Chapman, 66 Cal. 291, 5 Pac. 352; Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 42 Fed. 106, 9 L. R. A. 67 [*affirmed* in 151 U. S. 285, 14 S. Ct. 343, 38 L. ed. 164].

20. Hunter *v.* Savage Consol. Silver Min. Co., 4 Nev. 153, holding that such lien cannot attach for work done prior to the enactment of a statute conferring it.

21. Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403.

22. Union Slate Co. *v.* Tilton, 73 Me. 207, holding that the lien does not arise in favor of one who labors in manufacturing slate at a place other than in the quarry, under a provision giving a lien to a person "who labors in mining, quarrying or manufacturing slates in any quarry," etc., for his labor "on all the slates mined, quarried and manufactured in the quarry," etc.

Lien by reason of possession of personalty. — One in charge of mining property, consisting of personal and real property, has a lien on the personal property, while in possession thereof, under a statute in Idaho providing that "every person who while lawfully in possession of an article of personal property renders any service to the owner thereof by labor or skill, employed for the protection, improvement, safe keeping or carriage thereof, has a special lien thereon dependent on possession for the compensation, if any, which is due him from the owner of such service." Idaho Comstock Min., etc., Co. *v.* Lundstrum, 9 Ida. 257, 74 Pac. 975. See also *supra*, IV, C, 5, note 11.

b. Persons Entitled to and Grounds For — (1) *In General.* The lien can be acquired only for such labor as is contemplated by the statute,[23] and only those persons to whom the statute plainly or expressly gives the right to a lien can acquire it.[24] The line is drawn between work and labor performed in the operation and development of the mine,[25] and a mere professional or supervisory employment.[26] Where the statute fixes the relation which the work and labor must sustain to the property sought to be charged the lien will not attach for other labor,[27] while under more general provisions the character of the labor is not restricted, if it is labor performed in the operation of the business,[28] or is performed in or upon the mine or mining claim in the operation or development

23. Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403; Borders *v.* Uhe, 88 Ill. App. 634, holding that a provision giving a lien for labor in "opening and developing" a mine does not give a lien to every miner who digs coal in the mine after it has been opened and developed.

24. Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403.

Assignment see *infra*, V, C, 1, f.

25. Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403, holding that the purpose of the statute is to secure to the laborer compensation for values he creates or preserves.

26. Flagstaff Silver Min. Co. *v.* Cullins, 104 U. S. 176, 26 L. ed. 704.

Mechanics' liens.— For cases on this subject relating to mechanics' liens and involving similar statutes and controlling principles see MECHANICS' LIENS, *ante*, p. 42 *et seq.*

Overseer.— One employed as an overseer doing some manual labor in the performance of his duties, whose duties are in the nature of those of a gang foreman, does work and labor within the statute for which he is entitled to a lien. Cullins *v.* Flagstaff Silver Min. Co., 2 Utah 219 [*affirmed* in 104 U. S. 176, 26 L. ed. 704].

A foreman engaged to boss the men at work in the mine, keep their time, and give them orders for their pay does work in the mine, although not with his hands, and the direct tendency of his work is to develop the property, so as to entitle him to a lien. Capron *v.* Strout, 11 Nev. 304.

A watchman's services come within the statute and are not of a professional or supervisory nature so as to deprive him of a lien. Idaho Min., etc., Co. *v.* Davis, 123 Fed. 396, 59 C. C. A. 200. But the statute implies that the labor to be performed upon any mining claim, and for which a lien is given, is labor performed in the course of the actual work of mining or development in the mining claim, and that it does not include the services of a watchman engaged in caring for the mine while it is lying idle. Williams *v.* Hawley, 144 Cal. 97, 77 Pac. 762.

A mining superintendent who does manual labor in and about the mine is entitled to a lien. Palmer *v.* Uncas Min. Co., 70 Cal. 614, 11 Pac. 666; Rara Avis Gold, etc., Min. Co. *v.* Bouscher, 9 Colo. 385, 12 Pac. 433 (recognizing the right of a superintendent to a lien for services in planning and superintending development of work upon the mines, but denying the right for services in keeping books and disbursing funds); Pendergast *v.* Yandes, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849 (recognizing the lien of the superintendent of the construction of a pipe line, who uses tools in testing wells). But a superintendent who is a general agent (Smallhouse *v.* Kentucky, etc., Gold, etc., Min. Co., 2 Mont. 443), or a general manager who performs no manual labor (Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 50 Pac. 347) is held not to be entitled to a lien.

27. Barnard *v.* McKenzie, 4 Colo. 251 (holding that a lien will not attach for hauling ore from a mine to a quartz mill under a statute giving the lien for work and labor performed "in or upon the mine"); Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403 (holding that under a mechanic's lien act, providing that a mechanic's lien shall exist on property in favor of architects, engineers, and artisans who have rendered professional services thereon, which was by an amendment made to apply to all persons who shall do work or furnish material for the working or development of any mining claim, or for such services in search of metals or minerals, a geologist and mining expert, who contracted to explore and examine certain mines and surrounding country with reference to their mineral and geological character, is not entitled to assert a lien on the property for such services); Williams *v.* Toledo Coal Co., 25 Oreg. 426, 36 Pac. 159, 42 Am. St. Rep. 799 (holding that one performing labor in building a wagon road connecting with a mine, the statute giving a lien for making shafts, drifts, etc., on a mining claim, or in searching for metals therein, is not entitled to a lien).

28. McLaren *v.* Byrnes, 80 Mich. 275, 45 N. W. 143 (holding that an overseer and custodian of a mine had a lien because the statute did not restrict the labor to any particular class of laborers or kind of labor performed, but gave the lien for any labor performed for the corporation); Farmers' Bank's Appeal, 1 Walk. (Pa.) 33 (giving the lien to one who hauls coal to a wharf and to the clerk stationed at the wharf and who ships the coal, these persons being comprehended in the terms of the statute "miner, mechanic, laborer, or clerk" employed in and about such business of mining coal); *In re* Hope Min. Co., 12 Fed. Cas. No. 6,681, 1 Sawy. 710 (holding that a teamster hauling

thereof.[29] As in the case of furnishing materials for other improvements under mechanics' lien statutes,[30] it is not enough that materials are furnished a contractor to be used on a mining claim, but they must be actually so used;[31] and if materials furnished are for use on machinery it is held that a lien for such supplies will not accrue if they are not such as become a part and enhance the value of the machinery.[32]

quartz to a mill is "performing labor for carrying on the mill," so as to give a lien on the mill). If the business about which he was engaged was one in which "clerks, miners or mechanics are employed," it is sufficient. He need not be either clerk, miner, or mechanic. Taylor *v.* Smith, 1 Chest. Co. Rep. (Pa.) 106.

29. Hines *v.* Miller, 122 Cal. 517, 55 Pac. 401 (holding that one who performs labor on a mining shaft, tunnel, level, chute, stope, upraise, crosscut, or incline, which signify the instrumentalities whereby and through which mines are opened, developed, prospected, improved and worked, is engaged in mining equally with those who extract the gravel or ore, so as to be entitled to a lien); Thompson *v.* Wise Boy Min., etc., Co., 9 Ida. 363, 74 Pac. 958 (where an amalgamator employed in a quartz mill situated in a mine was held to be entitled to a lien for services in treating the ore, the court holding that the reasoning of the cases which accord liens only because the work tended to improve the property or enhance its value, was correct under the original mechanics' lien laws which were for the protection of workmen on buildings or structures, where their labor or material actually entered into the structure, but that it was faulty as applied to mines, as the labor of the miner could not be said to add to the value of the mine and the law giving him a lien was not for the purpose of protecting the mine but rather for the protection of the laborer).

Taking out ore, or breaking down and tearing away the quartz and substance of the mine, will constitute lienable labor under a provision giving a lien for labor performed in any mining claim or in or upon any real estate worked as a mine, although it tends to destroy rather than improve the property. Higgins *v.* Carlotta Gold Min. Co., 148 Cal. 700, 84 Pac. 758; Chappius *v.* Blankman, 128 Cal. 362, 60 Pac. 925; Helm *v.* Chapman, 66 Cal. 291, 5 Pac. 352.

Exploding torpedoes, which does not produce oil but only increases the flow, comes within the provision giving a lien to "any person who shall hereafter perform any labor in or about the sinking, drilling, or completing of any oil well," etc., although the process does not produce oil. Gallagher *v.* Karns, 27 Hun (N. Y.) 375.

Where minerals are not found.— Construing the Oregon statute (Laws (1891), p. 76) which gave a lien to any person doing work or furnishing materials for the working or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, or for the working or development of any such mine, lode, etc., in search of such metals or minerals, it was held that the lien applied to claims on which minerals have not, as well as to those on which minerals have, been found. Williams *v.* Toledo Coal Co., 25 Oreg. 426, 36 Pac. 159, 42 Am. St. Rep. 799.

Work on surface.— Men who work in obtaining mineral from the ground, although working on the surface and not under ground, are miners within the act. Taylor *v.* Smith, 1 Chest. Co. Rep. (Pa.) 106.

A contractor for the labor of others in a mine at a fixed rate for each man per day, under a contract by which the contractor is to receive the agreed price, is entitled to a lien for the labor furnished by him as an original contractor, under the maxim *qui facit per alium facit per se.* Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772.

30. See MECHANICS' LIENS, *ante*, p. 45 *et seq.*

Materials for use in the mine — *Powder, steel, and candles* are, under a statute giving a lien for "timber or other material to be used in or about the mine," of the character which gives a lien. Keystone Min. Co. *v.* Gallagher, 5 Colo. 23.

Coal cars used in a mine are "material" under a provision giving a lien for "any material," etc., furnished for any improvement or building on land. Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 42 Fed. 106, 9 L. R. A. 67 [*affirmed* in 151 U. S. 285, 14 S. Ct. 343, 38 L. ed. 164].

31. Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

32. Holter Hardware Co. *v.* Ontario Min. Co., 24 Mont. 198, 61 Pac. 8, 81 Am. St. Rep. 421, holding that lubricating oil, grease for mining machinery, illuminating oil, and gasoline for fuel in a mining plant are not such materials as give a lien.

Repair of machinery must be in the nature of fixtures and not the furnishing of small parts of a machine which are constantly wearing out and require replacing, and it is held that a mechanic's lien will not lie when small articles are bought in the ordinary course of business to replace such parts of machinery, where the parts are attached to the machinery by the purchaser, and the evidence does not show that the parts bought were to be used in any particular mill or any particular place. Ripley *v.* Cochiti Gold Min. Co., 12 N. M. 186, 76 Pac. 285. Under Cal. Civ. Code, § 661, "all machinery or tools used in working or developing a mine are to be deemed affixed to the mine," and therefore are subject to lien for labor in the mine; and

(II) *CONTRACT OR CONSENT OF OWNER*—(A) *In General.* The lien attaches only by virtue of work done on or materials furnished for the mine under a contract express or implied, with the owner of the property upon which the lien is claimed, under the provisions of the statute giving a lien in such cases,[33] or with a contractor, subcontractor, or other person declared by the statute to be the agent of the owner when such person is in charge of any[34] mining or the construction, alteration, etc., of any building or improvement;[4] but it is held in some cases that such person must be in charge with the consent of the owner, and must be prosecuting or controlling the mining operations, either wholly or in part, for the benefit of the owner,[35] and a laborer who knows that his employer is not acting as agent of the mine owner is not entitled to a lien on the mine.[36]

(B) *Notice by Owner After Knowledge of Work.* Under some statutes where the work is being done with the knowledge of the owner the property is lienable unless he posts a notice as prescribed to exempt him from liability.[37]

blacksmithing and repair work done on such machinery and tools may be made a lien on the entire mining property. Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772.

33. Davidson *v.* Jennings, 27 Colo. 187, 60 Pac. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340; Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458; Folsom *v.* Cragen, 11 Colo. 205, 17 Pac. 515.

34. Jurgenson *v.* Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83; Parker *v.* Savage Placer Min. Co., 61 Cal. 348; Idaho Gold Min. Co. *v.* Winchell, 6 Ida. 729, 59 Pac. 533, 96 Am. St. Rep. 290. See, generally, MECHANICS' LIENS, *ante*, p. 50 *et seq.*, where the cases involving such statutes are collected in so far as the work consists of building, repairing, etc., the provisions not being peculiar to mines and often those relating to mines being merely a part of the general mechanics' lien law.

Laborers employed by a receiver may acquire the lien. Traylor *v.* Barry, 96 Ill. App. 644.

35. Higgins *v.* Carlotta Gold Min. Co., 148 Cal. 700, 84 Pac. 758 (holding that a lessee of a mine under a lease that he shall continually prosecute the work of exploring, developing, and mining on said premises for a share in the proceeds of the mine is a person having charge of the mine under the statute); Williams *v.* Hawley, 144 Cal. 97, 77 Pac. 762 (holding that a watchman cannot be the owner's constructive agent for the purpose of a lien); Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578; Jurgenson *v.* Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83.

Nature of benefit.— Such benefit may be direct, as where the ore extracted, or some share of it, remains the property of the owner, or it may be indirect, as where the ore when extracted is the property of the person in charge, but is to be sold by him, and a part or share of the proceeds is to be paid to the owner, or for his use or benefit. Higgins *v.* Carlotta Gold Min. Co., 148 Cal. 700, 84 Pac. 758.

Where the owner of a mine contracts for the sale thereof, and the contract provides that the deed shall remain in escrow preceding the payment of the purchase-price, and the purchaser assigns the contract and the assignee employs third persons to work on the property, with the knowledge of the owner, such third persons acquire a lien against the interest of the assignee, but not against the interests of the owner. Bogan *v.* Roy, (Ariz. 1906) 86 Pac. 13. To the same effect see also Walter C. Hadley Co. *v.* Cummings, 7 Ariz. 258, 64 Pac. 443; Maher *v.* Shull, 11 Colo. App. 322, 52 Pac. 1115. But in Hines *v.* Miller, 122 Cal. 517, 55 Pac. 401, where the owners of a mine contracted to sell it on time, and authorized the purchasers "to enter into immediate possession," and "proceed to work and develop the same in such manner as may be deemed most expedient or advisable," and one fourth of the gross product of the mine was to be paid on the purchase-price, it was held that the owners had sufficient notice of improvements put on the mine by the purchasers to entitle those who performed the labor to a mechanic's lien. See also Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378.

Where one unlawfully ousts the owner from mining claims, and in working the same creates debts, such debts are not legal claims for liens against the mining claims. Idaho Gold Min. Co. *v.* Winchell, 6 Ida. 729, 59 Pac. 533, 96 Am. St. Rep. 290.

Leased property see *infra*, V, C, 1, c, (II).

36. Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578; Jurgenson *v.* Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83.

37. Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378 (as to work enhancing the value of the property); Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751 (holding that under a statute requiring that written notice by the owner be posted in order to exempt him from liability after he has knowledge of the work being done, no other notice will do, and verbal notice is insufficient); Gould *v.* Wise, 18 Nev. 253, 3 Pac. 30; Post *v.* Fleming, 10 N. M. 476, 62 Pac. 1087.

c. Property and Interests Subject to Lien — (I) *In General.* The statute giving a lien on a "mining claim" applies to all mining claims, whether patented or unpatented.[38] A mine is an improvement, and a mine or pit sunk within a mining claim is a structure under a mechanics' lien law giving a lien on such structure or improvement and the land on which it is situated,[39] and the lien for labor performed on a mining claim, under such a statute, extends to the whole claim,[40] or to the property of the employer used in the construction or operation

California statute confined to improvements.— Code Civ. Proc. § 1192, has no application to mining work which consists of removing ore, solely by the "subtractive process." That section by its express terms applies only to "every building or other improvement," constructed upon any lands, and hence does not include or apply to "mining" work, which does not constitute for any purpose an improvement to the land. Higgins *v.* Carlotta Gold Min. Co., 148 Cal. 700, 84 Pac. 758; Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578; Jurgenson *v.* Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83.

38. Bewick *v.* Muir, 83 Cal. 368, 23 Pac. 389.

Spanish or Mexican grants.— But land, the title to which is held under a Spanish or Mexican grant, although mineral in character, is not a mining claim, and the statute is not applicable thereto. Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 5 Pac. 85.

Agricultural patent.— A statute giving a lien on mining claims for labor performed thereon does not authorize a lien for labor in working a mine on lands held under an agricultural patent from the United States, as such land is not a "mining claim" within the meaning of the statute. Morse *v.* De Ardo, 107 Cal. 622, 40 Pac. 1018.

39. Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217; Helm *v.* Chapman, 66 Cal. 291, 5 Pac. 352; Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 42 Fed. 106, 9 L. R. A. 67 [*affirmed* in 151 U. S. 285, 14 S. Ct. 343, 38 L. ed. 164].

Oil or gas well.— Under the statute in California (Code Civ. Proc. § 1183, as amended by Act (1899), c. 35), providing for a lien on the whole of a mining claim for labor performed and material furnished to be used in the construction of any building, etc., well, etc., and for labor performed in any mining claim or claims, etc., and declaring that the mine on which any building, improvement, well, or structure is constructed together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, is also subject to the lien, the mining claims referred to are held to be mines of ore, exclusive of oil wells, and hence a claimant for a lien for drilling an oil well is not entitled to foreclose the lien except as against such land as is necessary for the convenient use and occupation of the well. Berentz *v.* Kern King Oil, etc., Co., (Cal. App. 1905) 84 Pac. 45. In Ohio under a statute giving a lien upon a gas or oil well and upon the material and machinery furnished in the constructing, altering or repairing, digging or drilling, etc., of such well and upon the interest of the owner upon the lot of land upon which the same may stand, it is held that the casing of such a well is a part thereof but that a derrick used in the construction of a well is not a part thereof so as to be subject to a lien which attaches to the well for labor thereon, but that one furnishing labor and material for the derrick itself for the operation of a well obtains a lien upon the derrick as well as upon the well. Devine *v.* Taylor, 12 Ohio Cir. Ct. 723, 4 Ohio Cir. Dec. 248.

40. Williams *v.* Mountaineer Gold Min. Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388; Silvester *v.* Coe Quartz Min. Co., 80 Cal. 510, 22 Pac. 217; Helm *v.* Chapman, 66 Cal. 291, 5 Pac. 352 (holding that one who performs labor in any pit, shaft, or gallery of a mine is entitled to a lien upon the whole mining claim); Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 42 Fed. 106, 9 L. R. A. 67 [*affirmed* in 151 U. S. 285, 14 S. Ct. 343, 38 L. ed. 164]. See also *infra*, V, C, 1, d, (III).

A house built for the use of a mine, and being part of the mining property, may be sold with the mine for the purpose of enforcing a lien under the statute in favor of the builder of the house. Keystone Min. Co. *v.* Gallagher, 5 Colo. 23.

Where minerals not found.— A statute conferring a lien on mining claims for work and material applies to claims in which minerals have not, as well as those in which minerals have, been found. Williams *v.* Toledo Coal Co., 25 Oreg. 426, 36 Pac. 159, 42 Am. St. Rep. 799.

Distinct and separated plant.— But under a statute which gives a lien on a mine for labor or materials used in the construction of any building or superstructure thereon, and on a mill, manufactory, or hoisting works for machinery or labor furnished in its construction, and provides that the lien shall extend to "the land occupied by any building or other superstructure . . . together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," it is held that a contractor who furnished and installed the machinery and appliances for a mill at a mine is not entitled to a lien therefor on an electric power plant situated some miles from the mine on land not connected therewith, although power is supplied by such plant for the operation of the mill. Salt

of the mine including both the realty and personal property.[41] Several mining claims operated together by the same owner as one mine may for the purpose of the lien law be regarded as a single claim, and the lien will extend to all of them.[42] Sometimes the lien of a laborer is general against the entire property of the employer and not a special lien on any particular property.[43]

(II) *LEASED PROPERTY.* Under various statutory provisions, the owner's interest in the mine is not subject to a lien for work done or material furnished at the instance of a lessee, unless the owner is by agency or directly connected with the debt;[44] but at most the lien is extended to the interest of the lessee,[45]

Lake Hardware Co. *v.* Chainman Min., etc., Co., 137 Fed. 632.

Machinery not part of mine.— Machinery furnished for a mine, but not erected or used in its development, and merely dumped on the ground, is not subject to lien for work in the development of the mine. Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378. And a lien does not attach to leased machinery used in the mine. Jordan *v.* Myres, 126 Cal. 565, 58 Pac. 1061.

41. Mitchell *v.* Burwell, 110 Iowa 10, 81 N. W. 193.

42. Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378; Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772; Phillips *v.* Salmon River Min., etc., Co., 9 Ida. 149, 72 Pac. 886; Salt Lake Hardware Co. *v.* Chainman Min., etc., Co., 137 Fed. 632. See also *infra*, V, C, 1, d, (III), (A), (1), (2).

43. Bramblet *v.* Lumsden, 80 Ga. 707, 6 S. E. 470.

Personal estate.— The preferential lien given by the Pennsylvania statute of 1849 to miners employed in mining coal in certain counties was not restricted to the personal property of their employers at the mines, but extended to their personal estate generally. Reed's Appeal, 18 Pa. St. 235.

Interest of individual partner.— When a mining firm is the debtor, a judicial sale of the separate interest of one partner does not entitle the miners to preferred payment out of the money so made, under the act last above mentioned, but their claims are liens against the partnership property, the sale being only of the partner's interest which is still subject to the liens. Beatty's Appeal, 3 Grant (Pa.) 213.

44. Griffin *v.* Hurley, 7 Ariz. 399, 65 Pac. 147; Gates *v.* Fredericks, 5 Ariz. 343, 52 Pac. 1118; Williams *v.* Eldora-Enterprise Gold Min. Co., (Colo. 1905) 83 Pac. 780; Antlers Park Regent Min. Co. *v.* Cunningham, 29 Colo. 284, 68 Pac. 226; Wilkins *v.* Abell, 26 Colo. 462, 58 Pac. 612; Morrell Hardware Co. *v.* Princess Gold Min. Co., 16 Colo. App. 54, 63 Pac. 807; Little Valeria Min., etc., Co. *v.* Ingersoll, 14 Colo. App. 240, 59 Pac. 970; Schweizer *v.* Mansfield, 14 Colo. App. 236, 59 Pac. 843; Hopkins *v.* Hudson, 107 Ind. 191, 8 N. E. 91; Block *v.* Murray, 12 Mont. 545, 31 Pac. 550; Pelton *v.* Minah Consol. Min. Co., 11 Mont. 281, 28 Pac. 310.

Recording the lease is sometimes made necessary, but when recorded no lien can be enforced against the mining property for labor performed for the lessee thereafter. Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417.

The lessee is not an agent of the owner under statutory provisions making a person in possession and operating the mine the agent of the owner for the purposes of the lien, under express provisions contained in several of such statutes. Idaho Gold Min. Co. *v.* Winchell, 6 Ida. 729, 59 Pac. 533, 96 Am. St. Rep. 290; Block *v.* Murray, 12 Mont. 545, 31 Pac. 550; Stinson *v.* Hardy, 27 Oreg. 584, 41 Pac. 116 (holding that the holder of an irrevocable exclusive license to work a mine, who by his expenditures has acquired an interest entitling him to possession as against all persons, is a lessee within the Oregon statute (Laws (1891), p. 76) giving a lien for work and labor in developing any mine, except as against the owner of a mine worked by a lessee); United Mines Co. *v.* Hatcher, 79 Fed. 517, 25 C. C. A. 46 (under a Colorado statute). See also *supra*, note 35.

Lien to extent of increased value.— In Iowa it is held that where the owner leases a mine he does so charged with the knowledge of the statute giving a lien for labor performed in operating and developing it upon all the property of the owner or operator so used, and that the lien of the miner extends to the mine and improvements to the amount which the property has increased in value by reason of the improvements made by the lessee. Mitchell *v.* Burwell, 110 Iowa 10, 81 N. W. 193.

45. Griffin *v.* Hurley, 7 Ariz. 399, 65 Pac. 147; Hopkins *v.* Hudson, 107 Ind. 191, 8 N. E. 91; McElwaine *v.* Brown, 7 Pa. Cas. 20, 11 Atl. 453; Harley *v.* O'Donnell, 9 Pa. Co. Ct. 56, the last two cases holding that a lease of lands for so long a time as oil may be found thereon in paying quantities creates an estate within the statute giving to laborers a lien on "leasehold estates" for work and labor done in mining, etc., for the lessee. See also Rodgers *v.* Min. Co., 75 Mo. App. 114, holding an instrument under which defendant held a lease and not a license.

Contract with lessee.— But no lien can be enforced against any interest in the property in the absence of any evidence that the party who employed the lien claimant was ever authorized or directed by the lessee to dig the well. Littler *v.* Friend, (Ind. 1906) 78 N. E. 238.

Machinery part of lessee's estate.— A steam engine, machinery, and fixtures, at-

or, as under some provisions relating to liens for building and improvements or ordinary mechanics' liens, only to the improvements.[46]

d. Notice or Statement of Claim — (I) *IN GENERAL.* Under the various statutory provisions for perfecting the lien, the lienor must file a notice or statement of claim as therein prescribed;[47] but a substantial compliance with the statute is sufficient,[48] and by express provision sometimes any informality which does not tend to mislead shall not affect the validity of the statement.[49]

(II) *TIME OF FILING — LIMITATION.* The notice of claim of lien must be filed within the time limited by the statute,[50] after the services performed,[51] after the work or contract is completed,[52] or after supplies or materials are fur-

tached to the soil by a lessee thereof, remain a part of the lessee's estate, and a materialman or mechanic furnishing or erecting the same is entitled to a lien against the lessee's estate therein. Dobschuetz *v.* Holliday, 82 Ill. 371.

46. St. Clair Coal Co. *v.* Martz, 75 Pa. St. 384 (holding that the Pennsylvania Act of Feb. 17, 1858, giving mechanics' liens on improvements, etc., about mines, etc., in Luzerne and Schuylkill counties, did not extend to the real estate, but extended the lien "only to the improvements," etc., "erected," etc.); Esterley's Appeal, 54 Pa. St. 192 (holding that under the act last mentioned a railroad constructed by a lessee for mining coal in the slope of a mine is not an improvement or fixture to which a mechanic's lien will attach).

47. Malter *v.* Falcom Min. Co., 18 Nev. 209, 2 Pac. 50; Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417. See also the various statutes.

Gas or oil well.— Where a statute creating a lien for labor, specific in its terms and intended to secure to wage-earners a lien for their toil while employed in and about a shop, mill, etc., by granting them liens upon all the machinery, etc., located in and about the premises without the necessity of filing a notice of lien, is confined strictly to the particular class of laborers intended to be secured, a lien for wages in building a gas well not being within the statute cannot be obtained without filing a notice. McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272.

48. Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74 (holding that a notice which states that the claimant performed labor "on that certain copper mine situated," etc., and that he claims a miner's lien "upon said mining claim," sufficiently shows that the labor was performed "in a mining claim." Tredinnick *v.* Red Cloud Consol. Min. Co., 72 Cal. 78, 13 Pac. 152; Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458 (holding a particular statement of claim sufficient); Smith *v.* Sherman Min. Co., 12 Mont. 524, 31 Pac. 72. See also, generally, MECHANICS' LIENS, *ante*, p. 110 *et seq.*

Terms, time given, and conditions of contract.— California Powder Works *v.* Blue Tent Consol. Hydraulic Gold, etc., Mines, (Cal. 1889) 22 Pac. 391 (holding that the words "time given" meant the time of payment for the materials furnished); Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74 (holding that a notice for work performed in a mining claim, which states that the labor was performed by the day at an agreed price of two dollars and seventy-five cents per day between designated dates, and that the amount claimed was justly due, sufficiently gives the terms and conditions of the contract of employment).

49. Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

Just and true account.— A requirement of the filing of a just and true account imposes no greater duty than to honestly state the account. Smith *v.* Sherman Min. Co., 12 Mont. 524, 31 Pac. 72. But see Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417.

50. Horn *v.* U. S. Mining Co., 47 Oreg. 124, 81 Pac. 1009, holding that the time within which it must be filed is determined by excluding the first (the last day of service in the mine) and including the last day of the period prescribed.

That claimant has ceased to perform his duties at the time of his lien does not invalidate his claim. Idaho Min., etc., Co. *v.* Davis, 123 Fed. 396, 59 C. C. A. 200.

51. Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772, holding that a laborer working by the month need not file his claim for each month.

Continuous employment under different arrangements.— Where miners filed liens for work done in the development of a mine, a portion of the time being under special contracts, and a portion by the day, the work is to be considered as one continuous employment, and each miner is entitled to file his lien for all his labor within the proper time after stopping work. Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

52. See, generally, MECHANICS' LIENS, *ante*, p. 136 *et seq.*

Repair — *Several items under one contract.* — Where the contract for making several items of repair is entire, the notice of lien of a materialman given within the period prescribed by statute for filing after completion of the whole work, is in time. Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

Occasional repairs after completion of work on a quartz mill cannot be added to the work done long before, so as to render the work one continuous performance. Davis *v.* Alvord, 94 U. S. 545, 24 L. ed. 283 [*reversing* 2 Mont. 115].

nished,[53] or used,[54] or the term of credit given in the particular transaction has expired.[55]

(III) *Sufficiency*—(A) *Designation and Description of Property*—(1) In General. Under the various provisions for perfecting a lien upon a mine or mining claim, the notice must contain a description of the property to be charged sufficient for identification.[56] But a description which is reasonably certain and by which the property can be identified, as a designation by the common or customary name of the mine, is sufficient,[57] and evidence is admissible to prove that the mines are commonly known as described,[58] although if the lines and monuments are given in the notice as a particular description they will control and the notice of a claim of lien is not an instrument susceptible of reformation by expunging such matters from the description thus given.[59] Where the lien extends to the mining claim as an entirety the statement should be filed against the entire claim and not against specific structures erected, and if filed against the structures only it is invalid;[60] but when a lien attaches only to the improvements upon which claimant's labor and services are bestowed in the erection of such improvements on leased property the claim can be filed only against the specific improvement.[61]

(2) Claim Against Several Mining Claims. Where several mining claims are owned and operated as one mine, as against the parties so uniting them, they may, for the purposes of the lien law, be regarded and treated as a single claim.[62]

53. Holter Hardware Co. *v.* Ontario Min. Co., 24 Mont. 184, 61 Pac. 3, holding that purchasers of supplies for a mining enterprise from time to time, under no special agreement, cannot be considered as constituting a continuing running account, but each delivery in such case is a separate and independent contract, with due regard, however, to the principle that where the agreement is regarded as a current one for each month, and a statement is rendered monthly, the account will be deemed due each month; so that the time for bringing suit does not arise until the end of the month.

Part payment and settlement do not necessarily defeat the running nature of an account upon which a lien is filed. Fields *v.* Daisy Gold Min. Co., 25 Utah 76, 69 Pac. 528.

54. California Power Works *v.* Blue Tent Consol. Hydraulic Gold Mines, (Cal. 1889) 22 Pac. 391, where under the statute the right to a lien for materials furnished did not attach until the materials had been used, so that claimant did not lose such right by a failure to file his notice within thirty days after the materials were furnished.

55. *In re* West Norfolk Lumber Co., 112 Fed. 759, holding that a provision that no person shall be entitled to the lien given for supplies furnished a mining or manufacturing company unless within a certain time after the last item of his bill becomes due and payable he shall file his claim, etc., does not preclude a claimant who has given a term of credit for supplies furnished from filing his claim before such term of credit has expired, but merely fixes a time after which a lien claim cannot be filed.

56. Fernandez *v.* Burleson, 110 Cal. 164, 42 Pac. 566, 52 Am. St. Rep. 75.

57. Tredinnick *v.* Red Cloud Consol. Min. Co., 72 Cal. 78, 13 Pac. 152; Tibbetts *v.* Moore, 23 Cal. 208; Phillips *v.* Salmon River Min., etc., Co., 9 Ida. 149, 72 Pac. 886; Smith *v.* Sherman Min. Co., 12 Mont. 524, 31 Pac. 72.

Where the same persons own two mining claims in the same mining district, only one of which has on it improvements, and it appears that the mines are known by the names of the parties working them, a notice of lien reciting that it is for work done within a designated period of three months on a mining claim, with improvements, located in a particular mining district of a certain county, owned by the persons (naming them) who had the work done, does not identify the claim with the improvements with sufficient certainty to create a lien thereon. Fernandez *v.* Burleson, 110 Cal. 164, 42 Pac. 566, 52 Am. St. Rep. 75.

58. Phillips *v.* Salmon River Min., etc., Co., 9 Ida. 149, 72 Pac. 886, 9 Ida. 775, 76 Pac. 1128.

59. Fernandez *v.* Burleson, 110 Cal. 164, 42 Pac. 566, 52 Am. St. Rep. 75.

60. Williams *v.* Mountaineer Gold Min. Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388; Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

61. Orth *v.* West View Oil Co., 159 Pa. St. 388, 28 Atl. 180; St. Clair Coal Co. *v.* Martz, 75 Pa. St. 384.

62. Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378; Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772; Tredinnick *v.* Red Cloud Consol. Min. Co., 72 Cal. 78, 13 Pac. 152; Maynard *v.* Ivey, 21 Nev. 241, 29 Pac. 1090; Post *v.* Fleming, 10 N. M. 476, 62 Pac. 1087; Idaho Min., etc., Co. *v.* Davis, 123 Fed. 396, 59 C. C. A. 200. See also *infra*, V, C, 1, d, (III), (C).

Sufficiency of claim filed.—A statement filed in the recorder's office against several mining claims need not state that such

(B) *Name of Employer and Owner.* A lien claim which fails to state by whom the claimant was employed, under a statute requiring such a statement,[63] or the name of the owner of the property, is fatally defective,[64] but a substantial compliance with the requirement will be sufficient.[65]

(C) *Amount of Claim.* The amount is shown sufficiently in the sum specified in dollars and cents as that to which claimant's work amounted,[66] and the amount of credit is shown to be nothing by an assertion that no portion of the amount earned has yet been paid.[67] Under a statute providing that where work is done upon two or more mining claims owned by the same person, the lienor shall specify in the claim the amount due on each claim under the penalty of having his lien postponed to other liens filed against the mining claims, a failure to observe the requirement will not destroy the lien but will only postpone it to other liens.[68]

(D) *Joining Claims and Items.* It has been held that the claim is valid to the extent of lienable items, although other items are added thereto;[69] but an account containing a lump charge, in which are mingled lienable and non-lienable items unsegregated, has been held to be insufficient to support a lien, and in such cases the defect cannot be cured by oral evidence, separating the two classes of items.[70] There being no provision in the lien statute for filing joint liens where no community of interest exists, if the attempt is made to file a joint

claims are owned, claimed, or worked by the same person or persons, so as to be deemed one mine, for the purposes of the miners' lien statute; it is sufficient if such matters are established by proper averment and proof, or by proof alone, when the defect in the pleadings is waived by answering over. Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

63. Ascha *v.* Fitch, (Cal. 1896) 46 Pac. 298.

64. Steel *v.* Argentine Min. Co., 4 Ida. 505, 42 Pac. 585, 95 Am. St. Rep. 144; White *v.* Mullins, 3 Ida. 434, 31 Pac. 801; Malter *v.* Falcon Min. Co., 18 Nev. 209, 2 Pac. 50.

65. Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74 (holding that a notice which states the name of the reputed owner, who is found to be the owner in fact, and which states that the labor was performed at the request of a person named who was the superintendent of the corporation operating the mine, was sufficient); Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772 (holding it sufficient to state the name of the company by which the claimant was employed without naming its agent); Ascha *v.* Fitch, (Cal. 1896) 46 Pac. 298 (holding that stating the name of the owner of the claim, and that the claimant performed the labor under an agreement with such owner, is sufficient). But in Steel *v.* Argentine Min. Co., 4 Ida. 505, 42 Pac. 585, 95 Am. St. Rep. 144, it is held that a statement that materials were furnished and work was performed on a certain mining claim, "the property of defendant," is not a sufficient statement of such ownership.

Relation between occupier and owner.— The statute not requiring it, the lien claimant need not state in his notice the relation that exists between the person occupying and in possession of the property and the owner. Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74.

66. Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

67. Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

Stating a balance due is not a compliance with a provision requiring an abstract showing the whole amount of debt, the whole amount of credit, and the balance due or to become due. Cannon *v.* Williams, 14 Colo. 21, 23 Pac. 456.

A failure to give credit for a sum received was held to vitiate a lien notice in Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417.

Excessive claim.— A miner who is entitled to a lien for his services does not lose his lien for the amount actually due by claiming a lien for a sum in excess of that to which he is entitled, unless there is fraud connected with the transaction. Nolan *v.* Lovelock, 1 Mont. 224. See also *infra*, text and notes 69, 70.

68. Phillips *v.* Salmon River Min., etc., Co., 9 Ida. 149, 72 Pac. 886.

Such statute applies only to different mining claims owned by the same person, and against which one claim for lien is filed, and not to a case where all of the work was performed on one and the same piece of property, although on different portions of it. Dickenson *v.* Bolyer, 55 Cal. 285.

69. Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772.

70. Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 50 Pac. 347; Williams *v.* Toledo Coal Co., 25 Oreg. 426, 36 Pac. 159, 42 Am. St. Rep. 799.

Lien against several mining claims operated as one see *supra*, text and note 62.

lien, it does not prevent the several lien claimants from filing valid individual liens.[71]

e. Waiver, Loss, or Discharge.[72] The lien of a miner for labor is not lost by giving an order on the owner of the mine for a portion of the amount due, where the order was not received by the payee in payment of any claim against the miner, or paid or accepted by the drawee, but was returned to the miner before the filing of his claim of lien,[73] nor is such lien lost by taking a note as evidence of the amount due.[74] It has been held that the repeal of the statute, after the lien has attached by performance of the work, does not defeat the lien.[75] Where one of the holders of two concurrent liens purchases under execution sales the property subject to the liens, his own lien is not merged in the title thus purchased.[76]

f. Assignment. Miners' and mechanics' liens are assignable and may be enforced in the name of the assignee[77]

g. Priority. The lien relates back to the date of the first item of labor or material furnished,[78] and generally, under the various statutes such liens have priority over other claims and over mortgages covering the same property executed and recorded after the beginning of work or furnishing material, and over attachments levied subsequently thereto;[79] but in order to give the statutory preference

71. Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

72. Excessive claim see *supra*, text and notes 67, 69, 70.

73. Palmer *v.* Uncas Min. Co., 70 Cal. 614, 11 Pac. 666.

74. Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

75. *In re* Hope Min. Co., 12 Fed. Cas. No. 6,681, 1 Sawy. 710.

76. M. C. Bullock Mfg. Co. *v.* Sunday Lake Iron Min. Co., 132 Mich. 285, 93 N. W. 611.

77. Mitchell *v.* Burwell, 110 Iowa 10, 81 N. W. 193; Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219. See also Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74.

Assignment of debt.— A claim for a lien for supplies furnished for the operation of a mine may be filed by an assignee of the debt. *In re* West Norfolk Lumber Co., 112 Fed. 759. But see also in this connection MECHANICS' LIENS, *ante*, p. 255 *et seq.*

Assignability of liens generally see LIENS, 25 Cyc. 678.

78. Keystone Min. Co. *v.* Gallagher, 5 Colo. 23; Mott *v.* Wissler Min. Co., 135 Fed. 697, 68 C. C. A. 335, holding that under a provision giving a lien for supplies furnished a mining or manufacturing company and requiring the filing and recording of a sworn statement of the claim within ninety days after the maturity of the last item of the bill, the lien attaches at the time the supplies are furnished and not at the time the claim is filed, and an adjudication in bankruptcy against the debtor between the date of maturity of the last item of the account and the filing and recording of the claim does not destroy the right to priority in the distribution of the bankrupt's estate. see also MECHANICS' LIENS, *ante*, pp. 215, 236.

79. Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378 (as to priority of the lien of persons performing labor for a mining company over an unrecorded mortgage executed by the owners before commencement of the work of improvement by the company); McLaren *v.* Byrnes, 80 Mich. 275, 45 N. W. 143 (holding that one who has performed labor for a mining corporation before the levy of a writ of attachment on its property is entitled to priority over the attaching creditor, although he has filed no notice of his lien); Sutton *v.* Consolidated Apex Min. Co., 15 S. D. 410, 89 N. W. 1020, 14 S. D. 33, 84 N. W. 21 (holding that where the manager and superintendent of a mining company, who was also a stock-holder and director, took part in procuring loans secured by mortgages on the property, and expended the money received in and about the same without informing the mortgagees that he claimed a miner's lien for his services, he was not estopped from asserting that such lien was prior to the mortgages, where it did not affirmatively appear that the mortgagees were in any manner misled to their prejudice by his conduct). But a mortgage recorded before the contract is made or work thereunder commenced has priority over the miner's lien under the mechanics' lien statute. Folsom *v.* Cragen, 11 Colo. 205, 17 Pac. 515. See also MECHANICS' LIENS, *ante*, p. 236.

Superior to prior mortgage — *In general.*— Sometimes the statute provides that a labor lien is superior to a mortgage lien, although the latter is prior in time. Atlantic Dynamite Co. *v.* Ropes Gold, etc., Co., 119 Mich. 260, 77 N. W. 938.

On improvements.—And sometimes the statute extends a lien for labor and materials to the land upon which the building or improvement is situated and gives it precedence over any mortgage made subsequent to the commencement of the work, and provides that the lien shall attach to the improvement in

to the lien of laborers working in or about a mine over other claims, the statutory requirements in that behalf must be observed.[80] As between those who have concurrent liens of the same character there is no priority.[81]

h. Enforcement — (i) *In General.* The nature of the proceedings for the enforcement of the liens of laborers in mines or mechanics or materialmen depends upon the particular statute.[82] A suit to enforce a mechanic's lien for work done on a mine is a proceeding in equity, although according to the procedure in many of the states a personal judgment also may be rendered,[83] and sometimes it is expressly provided by statute that the lien given for labor upon a mine may be enforced in the same manner and with the same effect as mechanics' liens.[84] The action should be brought in the county where the mining claim is situated,[85] and within the period after the lien claim is filed which the statute creating the lien fixes as the limit of its life.[86]

preference to any prior mortgage on the land and permits the enforcement of the lien by the sale of the improvement under execution and its removal within a reasonable time. Under such statute the lien of a mechanic as to the improvement is superior to a prior mortgage on the land, but as to the land itself the prior mortgage retains precedence, and therefore, where a lien claimant has not erected a building or placed such an improvement upon a mining claim, as is susceptible of severance, or removal, his lien must yield to a prior mortgage upon the premises. Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337. See also in this connection MECHANICS' LIENS, *ante*, p. 236.

Lien for fixed time on granite quarried.— The lien given by Me. St. (1876) c. 90, to one who has labored in quarrying granite, upon all granite quarried by himself and his fellow workmen for thirty days after such granite is cut and dressed, and as much longer as it remains unsold and not shipped on board a vessel, will, if enforced by attachment within said thirty days, have precedence of all other claims, including sales made within that period. A laborer's attachment made after that period has expired will prevail against prior claims only when made before the stone is sold or shipped on board a vessel. Collins Granite Co. *v.* Devereux, 72 Me. 422.

80. Stichler *v.* Malley, 94 Pa. St. 82, where it was held that, under the Pennsylvania statute of 1872, notice in writing of the claims of such laborers must be given to the sheriff before the sale of the property under a judgment confessed for such claims, in order to give them precedence over mechanics' liens on the distribution of the proceeds.

81. M. C. Bullock Mfg. Co. *v.* Sunday Lake Iron Min. Co., 132 Mich. 285, 93 N. W. 611 (under a statute giving a lien to every person who shall perform any labor or furnish any material, etc., and holding that where the former, who was a judgment creditor, applied the proceeds of a sale under execution to his judgment, upon an accounting between him and the concurrent lienholders, such proceeds should be deducted from his *pro rata* share under the lien); Devine *v.* Taylor, 12 Ohio Cir. Ct. 723, 4 Ohio Cir. Dec. 248 (holding that the construction of an oil well is a "job" under a statute providing that, where liens are obtained by several persons on the same job, they have no priority among each other).

82. See the statutes of the several states for the particular provisions.

Action.—Under N. Y. Laws (1880), c. 440, the remedy provided for foreclosing the lien for labor in sinking, drilling, etc., an oil or gas well, etc., was by an action as distinguished from a special proceeding. Gallagher *v.* Karns, 27 Hun (N. Y.) 375.

Appointment of receiver see MECHANICS' LIENS, *ante*, p. 419.

83. Davis *v.* Alvord, 94 U. S. 545, 24 L. ed. 283. See also MECHANICS' LIENS, *ante*, p. 317 *et seq.*

84. See Flagstaff Silver Min. Co. *v.* Cullins, 104 U. S. 176, 26 L. ed. 704, showing such a provision in the Utah statute.

Parties — *Enforcement by assignee* see *supra*, V, C, 1, f.

Defendant.— Under a statute making the lessors of mining property liable for the claims of miners under certain conditions, the further requirement that persons who are personally liable shall be made parties to the suit for the foreclosure of a miner's lien is for the benefit of the mine owner, and if a lessee is not joined in such suit the lessor waives the non-joinder by failing to demand that he be brought in, the requirement being designed to enable the lessor in such a case to have a judgment over against the lessee. Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417. Where the legal title to a mine is held by one of several partners in trust for the remaining partners he alone is a necessary party defendant in a suit against him to subject his interest only, although the others may be proper parties. Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751.

Joinder of causes see *infra*, text and notes 97, 98.

85. Fields *v.* Daisy Gold Min. Co., 26 Utah 373, 73 Pac. 521.

86. Burns *v.* White Swan Min. Co., 35 Oreg. 305, 57 Pac. 637, holding that a general statute providing that the running of the statute of limitations shall be suspended during the absence of defendant from the state does not apply to suits foreclosing

(II) *Process.*[87] A defendant against whom the relief is sought is brought in by summons as in other cases,[88] and under proper conditions as prescribed by the statutes providing for the service of process by publication such service will be sufficient to support a judgment establishing the lien and ordering the sale of the property.[89] And under a statute contemplating the adjudication of all lien claims in one action, if defendant in a mechanic's lien suit is regularly served with process others claiming liens for labor may come in under the notice published in accordance with the statute in that behalf and prove their liens without issuing summonses.[90]

(III) *Pleading*[91] — (A) *In General.* Plaintiff's pleading in a proceeding to enforce a lien on a mine or mining claim must allege all the facts which entitle him to a lien,[92] consistently with the lien claim or statement filed in order to perfect the lien,[93] and against the particular party whose property is sought to be charged;[94] and an answer must deny these material allegations of fact in order to raise an issue thereon.[95]

(B) *To Enforce Lien on Adjoining Mining Claims.* Mining claims severally located on the same ledge and consolidated in one mining company

such statutory liens. See also Union Slate Co. *v.* Tilton, 73 Me. 207.

Foreclosure of mechanics' liens see Mechanics' Liens, *ante*, p. 335.

Limitation of actions: *Generally* see Limitation of Actions, 25 Cyc. 963.

87. For process: *Generally* see Process.

In foreclosure of mechanics' liens see Mechanics' Liens, *ante*, p. 362.

88. Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351.

89. Keystone Min. Co. *v.* Gallagher, 5 Colo. 23, holding that such service will be sufficient, although before the commencement of the suit defendant had parted with his interest, and did not appear in the suit.

Sufficiency.— It is unnecessary to state whether the right to the money sought to be recovered accrued from work and labor, or from goods sold and delivered, or to state the kind of lien, or on what property the lien attached. All these things appear in the complaint on file. Bewick *v.* Muir, 83 Cal. 368, 23 Pac. 389.

Service on foreign corporations.— Notice to other lienors under a statute providing for the publication of a notice, notifying all persons claiming liens against the property to appear on a certain day specified and exhibit proof of the liens, is not sufficient service upon a foreign corporation, but the summons must be served personally or constructively as required by the statute in such cases. Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351.

90. Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351.

91. Enforcement of mechanics' liens generally see Mechanics' Liens, *ante*, p. 367 *et seq.*

92. Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403 (holding that it must be pleaded that the labor performed was for one or more of the purposes specified in the statute, in order that it may be made the foundation of a lien); Borders *v.* Uhe, 88 Ill. App. 634 (holding that under a statute giving a lien for labor only in "opening and developing a coal mine," a bill for the enforcement of a claim of lien, which nowhere avers that the work performed was in "opening and developing" the mine, is insufficient on demurrer).

Filing of claim.—A complaint which shows that the claim of lien was not filed until after the expiration of the statutory term in which to file it is demurrable. Alesina *v.* Stock, 8 Mont. 416, 20 Pac. 642.

A substantial compliance with the statute is sufficient. Nolan *v.* Lovelock, 1 Mont. 224 (holding that the complaint need not allege affirmatively that the labor was performed under an express or implied contract if the facts set up show an implied contract); Skyrme *v.* Occidental Mill, etc., Co., 8 Nev. 219.

93. Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772, holding that if the contract pleaded is not in all essential matters the same as that stated in the lien claim the complaint is bad on demurrer for ambiguity.

94. Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578, holding that plaintiff's pleading must allege that the labor was performed at the instance of the owner or of one who was the owner's agent, within the definition of that term as used in the statute.

A complaint showing employment by and services rendered for lessees of the owner of property states no cause of action against the owner. Little Valeria Min., etc., Co. *v.* Ingersoll, 14 Colo. App. 240, 59 Pac. 970; Schweizer *v.* Mansfield, 14 Colo. App. 236, 59 Pac. 843. See also Wilkins *v.* Abell, 26 Colo. 462, 58 Pac. 612.

95. Bradbury *v.* Cronise, 46 Cal. 287, holding that a denial that plaintiff had a lien is a conclusion of law, and that to an allegation of a complaint that plaintiff performed labor on the mine at the request of defendant, an answer denying that the labor was performed at defendant's request was not a denial that the work was performed on the mine.

and worked by it as one mine, may, for the purpose of the lien law, be regarded and treated as a single claim, and declared on as such.[96]

(c) *Joinder of Causes.* Two lienors may join in one action, their causes being stated separately as required by the statute,[97] and where several mining claims adjoin each other, and are owned by the same company and worked as one mine, the liens of different claimants upon different portions of the property may be joined in the same action, the causes being separately stated.[98]

(iv) *Issues — Variance.*[99] The lien claimant must recover, if it all, upon the theory of liability as made by his pleading,[1] and a material variance between the allegations and proof will be fatal.[2]

(v) *Evidence and Burden of Proof.*[3] The burden of proof is on the claimant of a lien on a mine or mining claim to show by legally sufficient evidence the accrual of the lien under the terms and conditions of the statute creating it,[4] as well as under the terms and conditions of the particular contract governing the

96. Hamilton *v.* Delhi Min. Co., 118 Cal. 148, 50 Pac. 378. See also *infra*, text and notes 97, 98.

Sufficiency of pleading.— An allegation in a complaint that the claim was adjacent to another claim, also held by defendant, and together operated as a group, and which was not denied, authorized the court to include both claims in its decree; the allegation sufficiently showing that the materials and labor were furnished for the joint improvement of both claims. Sly *v.* Palo Alto Gold Min. Co., 28 Wash. 485, 68 Pac. 871.

97. See Venard *v.* Green, 4 Utah 67, 6 Pac. 415, 7 Pac. 408.

98. Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772, where it was held that in an action by an assignee to foreclose various liens for labor performed in a mining claim there is no misjoinder of causes of action from the fact that several of the claims were filed against a claim of forty acres, a part only of the entire property of the company, which consisted of several distinct claims, aggregating in all five hundred acres, and that other claims were made against the entire tract.

99. **Issue as to title** in actions to enforce liens for labor and materials under mechanics' lien statutes see MECHANICS' LIENS, *ante*, p. 331.

1. Eaton *v.* Rocca, 75 Cal. 93, 16 Pac. 529, holding that if the complaint proceeds upon the theory and with the allegation that plaintiff's work was done at the instance of one alleged to be the agent of another sued as owner, no relief can be obtained upon the theory that the one named as agent was the owner, the debt being claimed to be due from the owner as designated in the pleading.

2. Malone *v.* Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772, holding that where a notice of mechanic's lien sets out a contract for a fixed rate of compensation per month, and the complaint in the action to foreclose, to which the claim is attached as an exhibit, sets up a contract for labor "to the extent and value of" a sum named, without alleging any specific promise, not only is the complaint bad for ambiguity, but the lien claim should be rejected as evidence on the ground of a variance.

3. **Evidence and burden of proof** generally see EVIDENCE, 16 Cyc. 821.

4. Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578 (burden of showing that claimant's employer was the agent of defendant mine owner, within the definition of the statute); Lindemann *v.* Belden Consol. Min., etc., Co., 16 Colo. App. 342, 65 Pac. 403 (as to the burden of claimant to show that the labor performed was for one or more of the purposes specified in the statute); Davis *v.* Alvord, 94 U. S. 545, 24 L. ed. 283.

Admissibility of declaration of agent.— While an agency may not generally be established by the declarations and acts of the alleged agent, under a lien statute giving a miner a lien for labor which provides that every contractor, etc., "or other person having charge" of the mine, etc., "shall be held to be the agent of the owner," evidence of such acts and declarations is permitted to establish *prima facie* such agency and such acts and declarations are admissible to show the person in charge of the mine. Donohoe *v.* Trinity Consol. Gold, etc., Min. Co., 113 Cal. 119, 45 Pac. 259.

Sufficiency — *Agency.*— Proof that the laborer was employed by a foreman, appointed by one acting as superintendent of a vein owned by a foreign corporation, is *prima facie* sufficient to support a finding of agency. Donohoe *v.* Trinity Consol. Gold, etc., Min. Co., 113 Cal. 119, 45 Pac. 259.

Filing of notice of lien is shown *prima facie* by the recorder's indorsement thereon. Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

Furnishing on credit of colliery.— In scire facias on a mechanic's lien against a leasehold estate of a mining right and improvements erected thereon, to recover the price of screens claimed to have been made for a coal breaker at the colliery of defendant, it is not error to charge that the fact that screens were furnished to a colliery is evidence that they were furnished on the credit of the colliery; it is *prima facie* evidence and sufficient in the absence of explanation or evidence to the contrary. East Mount Laffee Coal Co. *v.* Schuyler, 1 Walk. (Pa.) 342.

rights of the parties,[5] for a subsisting debt for the satisfaction of which the particular interest is liable;[6] and where the question of priority of a mortgage is involved he must show that the work was actually commenced before the mortgage was executed, as this fact will not be presumed in the absence of proof.[7]

(VI) *FINDINGS.* In order to support a judgment of foreclosure, the findings must embrace a finding of every fact material to a recovery under the issues raised by the pleadings,[8] and a finding outside of such issues or foreign to those which may be properly raised under the particular statute will not support a judgment establishing the lien.[9]

(VII) *JUDGMENT OR DECREE*[10] — (A) *In General.* Where one action is brought to foreclose two miners' liens, owned separately, on the same property, a separate decree as to each lien may be rendered.[11] But the judgment should not establish the lien for work done before the passage of the statute creating such lien.[12] And a mere irregularity in that part of the decree ordering a sale of

Identity of property.— Where no issue was raised as to the identity of the property in question, it was not necessary to introduce in evidence the record of mining claims referred to in the lease of the property given by defendants and in the notice of lien, nor certified copies of the mining journals of the county relating to the property, but a sufficiently certain decree could be rendered by referring to the volume and page of the records in question, as specified in the lease and notice of lien. Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417.

5. Skym *v.* Weske Consol. Co., (Cal. 1896) 47 Pac. 116, where labor was performed under a contract which provided that the laborers should receive certain supplies in part payment, and that the balance of income remaining should be divided *pro rata* to the extent of each laborer's wages at three dollars per day, and that in case of failure of profits the personal property of the mine should be sold to pay the wages due, and it was held that in the absence of anything to show a profit an action would not lie to enforce a lien for wages unless a request for a sale of the personal property, and a refusal on the part of the owner, were alleged and proved.

6. Lewis *v.* Beeman, 46 Oreg. 311, 80 Pac. 417, holding that where the owner may be liable for debts contracted by a lessee the burden is on the lien claimants to show, as against the lessors, that no payments have been made on account of their liens since they were filed.

7. Davis *v.* Alvord, 94 U. S. 545, 24 L. ed. 283.

8. Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578 (holding that in an action to foreclose a miner's lien for work done at the instance of an agent of the owner, a finding that the person at whose instance the work was done was in possession of the premises is not a finding that he was the owner's agent); Donohoe *v.* Trinity Consol. Gold, etc., Min. Co., 113 Cal. 119, 45 Pac. 259; Bewick *v.* Muir, 83 Cal. 368, 373, 23 Pac. 389, 390.

Findings not conflicting.— Where, under a particular statute, contractors having control of and operating a mining claim are to be considered the owner's agent, findings of a jury first, that one entered into a contract with the owner to take out ore from the latter's mine and second, that while so engaged the foreman was the owner's agent in the management of the mine are not inconsistent, the first being the result of disputed testimony without reference to the statute, and the second resulting from the fact, also undisputed, that plaintiff performed his labor at the instance and under the employment of the person who had charge and control of the mine and who for that reason, under the statute, was to be considered the owner's agent. Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751.

9. Reese *v.* Bald Mountain Consol. Gold Min. Co., 133 Cal. 285, 65 Pac. 578, holding that the statute providing that a building or improvement shall be held to have been constructed at the owner's instance, etc., unless he gives a certain notice after obtaining knowledge of the construction, alteration, etc., does not apply to a claim by a miner for labor in a mine and that therefore the finding that the owner had notice of the work being done was not a finding of a material fact, and further that even where the statute is applicable, a complaint containing no allegation that any building or other improvement was constructed upon the mining ground with the knowledge of the owner would render a finding that the owner had knowledge and notice of all work being done outside of the issues.

10. Decrees generally see EQUITY, 16 Cyc. 471.

In foreclosure of liens generally see LIENS, 25 Cyc. 685.

Judgments generally see JUDGMENTS, 23 Cyc. 623.

11. Venard *v.* Green, 4 Utah 67, 6 Pac. 415, 7 Pac. 408, holding that where in such action the case is dismissed as to one plaintiff, the lien of the other foreclosed and property sold, the court is still authorized to vacate the order of dismissal, decree the foreclosure of the second lien, and order the sale of the same property to satisfy such decree.

12. Hunter *v.* Savage Consol. Silver Min. Co., 4 Nev. 153.

the property will not be material where the record shows that the sale was made in strict conformity with the statute.[13]

(B) *Personal and Deficiency Judgments.*[14] Under a statute permitting the granting of such relief as plaintiff may be entitled to under the pleadings and issues,[15] or providing for a personal judgment as well as the establishment of a lien, if there is personal liability, a personal judgment may be rendered, although the lien cannot be established.[16] But under a statute providing for a deficiency judgment in the event that the amount derived from the sale of the property should be insufficient to pay the claim, a personal judgment for the whole claim should not be docketed against defendant until after a sale and a proper return to show a deficiency of proceeds.[17]

(C) *Interest and Attorney's Fees.* The court may probably allow interest upon claims of lien from the date of filing of the lien, where the respective sums claimed were then past due by the terms of payment agreed upon.[18] And a provision for the recovery of attorney's fees upon establishing the lien operates in favor of an assignee of the lien.[19]

2. **Liability For Injuries**[20]**— a. In General.** The owner or operator of a mine or a gas or oil well will be liable for injuries of which his negligence is the proximate cause,[21] and while a failure to obey a statutory requirement made for

13. Keystone Min. Co. *v.* Gallagher, 5 Colo. 23, holding that as the statute provided for a sale within the time and in the manner provided for sales on executions issued out of any court of record, and the sale in question was made in accordance with the statute, an objection could not be made to the decree on account of an irregularity as to the time of sale as ordered.

14. **Deficiency judgments:** *Generally* see Liens, 25 Cyc. 685.

In foreclosure of mechanics' liens see Mechanics' Liens, *ante*, p. 435.

15. Ascha *v.* Fitch, (Cal. 1896) 46 Pac. 298, where the lien claimant failed to establish the lien because of a fatal defect in his lien claim as filed, and it was held that a personal judgment was proper and a nonsuit was erroneously entered.

16. Cannon *v.* Williams, 14 Colo. 21, 23 Pac. 456. See also Hunter *v.* Savage Consol. Silver Min. Co., 4 Nev. 153. Under an earlier statute wherein no provision was made for a personal judgment, none could be rendered upon failure to establish the lien. Barnard *v.* McKenzie, 4 Colo. 251.

17. Hines *v.* Miller, 126 Cal. 683, 59 Pac. 142, where a judgment foreclosing laborers' liens, which provided that judgment be entered for plaintiffs in certain specified sums, that the liens of plaintiffs be foreclosed against defendants, and that the property be sold by the sheriff, and, if the proceeds be not sufficient to pay plaintiffs in full, then, on the coming in of the sheriff's return on such sale, the clerk shall docket the judgment for such deficiency against defendants, was held not a personal judgment except for such deficiency as might be shown by the sheriff's return on the sale, and not reversible upon the ground that the court was not authorized to render a personal judgment except for the deficiency.

18. Hines *v.* Miller, 126 Cal. 683, 59 Pac. 142.

19. Mitchell *v.* Burwell, 110 Iowa 10, 81 N. W. 193. See also Castagnetto *v.* Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74, where the recovery was by an assignee and it was held that the appellate court should not disturb the allowance as to the amount which the trial court had fixed in the exercise of its discretion. And see Mechanics' Liens, *ante*, p. 462.

20. **Injuries to servants** see Master and Servant, 26 Cyc. 1076.

21. *Kansas.*— Coffeyville Min., etc., Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635.

Missouri.—Green *v.* Kansas, etc., Coal Co., 53 Mo. App. 606, where defendant worked a mine so negligently that a part of the surface fell in leaving a hole into which plaintiff's horse fell and was killed, the mining operations having been conducted beneath plaintiff's pasture, and the appellate court refused to say that plaintiff was guilty of contributory negligence, not being advised as to the size of the pasture or the hole, as to whether there was anything about the opening in the ground to attract a horse, such as pasturage or food of any kind, and having no information except that the horse was turned into a pasture, a part of the surface of which had fallen in, as there might have been many circumstances or facts which would relieve the act of negligence or make it at least a matter of questionable propriety.

West Virginia.—Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896, holding that the owner of a gas well situated near a highway may allow gas to blow the water out of it, although the noise is such as to frighten horses on the highway, if he uses care, as by warning those upon the highway and near the well, and that the persons using horses on such highway have a right to presume that the owner will not open the well without warning and are not guilty of contribu-

the protection of animals is not conclusive of liability for a personal injury, yet where the requirement imposes a public duty its breach is evidence of negligence sufficient to fix liability for a personal injury which in a substantial sense resulted from such breach.[22] But the owner of a mine will not be liable for an injury to one who with knowledge of dangerous conditions assumes the risks incident to his presence at the place of danger.[23]

b. Injury to Real Property — (I) *IN GENERAL.* Generally speaking persons operating mines or gas or oil wells are governed by the same rules as to injuries to the adjoining property as are applicable to other uses of real estate.[24] All incidental rights to that of getting minerals under a grant or reservation thereof must be exercised with a due regard to the rights of the surface owner without any permanent damage thereto not necessary for the beneficial enjoyment of the mine,[25] and if one knowingly mines beyond his boundaries without right he is liable as a trespasser.[26] So a mining company is liable for injury to real property because of inadequate appliances to control dust from its coal breaker;[27] and where the owner of the surface stands in no relation of contract or privity with the owner of the minerals beneath, he may recover damages for injury to the surface caused by negligence in mining underneath.[28] But where the right to mine is separated from the ownership of the surface, the owner of the minerals is not liable because of the destruction of a spring when caused by the ordinary working of the mine.[29]

(II) *FLOODING MINES.*[30] While land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally,

tory negligence in failing to give warning of their presence or in failing to turn and fly from it when they are close to it and have a right to assume that it will not be opened until they have passed.

United States.— Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434 [*affirming* 42 Fed. 579], where defendant was held liable for leaving an unguarded burning slack pit of a coal mine close to a narrow path leading to the mine near which children were in the habit of playing, whereby a child was injured.

England.— Williams *v.* Groucott, 4 B. & S. 149, 9 Jur. N. S. 1237, 32 L. J. Q. B. 237, 8 L. T. Rep. N. S. 458, 11 Wkly. Rep. 886, 11 E. C. L. 149, where defendant was held liable for leaving a shaft so covered as not to afford proper and effectual protection for horses in the field over the mine.

See 34 Cent. Dig. tit. "Mines and Minerals," § 240 *et seq.*

22. Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434.

23. Sloss Iron, etc., Co. *v.* Knowles, 129 Ala. 410, 30 So. 584, where plaintiff at the time of the injury was at work in defendant's mine by the latter's invitation and consent but not as a servant or employee, with knowledge of the dangerous condition of the mine at the place where the injury occurred by reason of props not being put under the roof.

24. **Adjoining landowners** generally see ADJOINING LANDOWNERS, 1 Cyc. 766.

Proper use of quarry as against grantor. — In an action for damages resulting from rocks being thrown upon plaintiff's land by blasting in defendant's quarry, and for injury from water pumped from the quarry and allowed to flow over plaintiff's land, plaintiff having conveyed the premises occupied by defendant, to be used as a quarry, was estopped from claiming damages from a proper use of the quarry. Wilkins *v.* Monson Consol. Slate Co., 96 Me. 385, 52 Atl. 755.

25. Hooper *v.* Dora Coal Min Co., 95 Ala. 235, 10 So. 652. See also *infra*, V. C, 2, b, (III). And see *supra*, IV, B, 3.

26. See *supra*, IV, A, 2, a.

27. Harvey *v.* Susquehanna Coal Co., 201 Pa. St. 63, 50 Atl. 770, 88 Am. St. Rep. 800, holding that the measure of damages is the cost of restoring such injured premises to their condition before such injury, not exceeding the value thereof and the decreased rental value during the time the wrong has continued, and that it was error to submit to the jury the question, "Could the defendant by any other device than the one that it has in use there have prevented the injury to plaintiff's property?" since the question does not confine the jury to known devices, but calls on them to decide whether a more effective device could be invented.

28. Brown *v.* Torrence, 88 Pa. St. 186, holding that the mere fact that one man sells land to another cannot of itself justify any use the vendee afterward chooses to apply his land to. He stands to his vendor without a contract, or some relation of privity, just as he does to others, and the maxim applies *sic utere tuo, ut alienum non lædas.*

29. Williams *v.* Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368; Coleman *v.* Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93. See also Rabe *v.* Schoenberger Coal Co., 213 Pa. St. 252, 62 Atl. 854, 3 L. R. A. N. S. 782.

30. Trespass see *supra*, IV, A, 2, a.

and therefore injuries to the lower proprietor caused by the natural flow of water from higher lands is *damnum absque injuria*, when one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to flow at different times and in greater quantities than it would naturally flow, by the breaking down or removal of a barrier, natural or otherwise, he is liable for the ensuing damages;[31] and the principle that one cannot bring upon his own land anything which would not naturally come upon it and which is in itself dangerous if not kept under proper control without becoming liable for such damage occasioned thereby, is applied to render liable one who builds a reservoir upon land over old passages of disused mines adjoining a mine then worked without blocking shafts communicating with the mine above, where the reservoir breaks through the shaft and floods the adjoining mine.[32] And where one, after ceasing work in his mine, is about to reduce the supporting pillars and thus endanger the falling in of the roof which would let into his mine swamp waters of the surface that would run into and flood another's mine, an injunction will lie to prevent the threatened injury.[33] But it has been held that where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coal field, the injuries being entirely from gravitation and percolation are not a valid ground for any claim of damages.[34]

(III) *TAILINGS AND DÉBRIS.* The dumping of tailings and *débris* upon the land of another may be enjoined and the latter may recover the damages occasioned by such acts,[35] and the reservation or grant of minerals severed from the

31. *Alaska.*— Alaska Gold Min. Co. *v.* Barbridge, 1 Alaska 311.

Illinois.— Bannon *v.* Mitchell, 6 Ill. App. 17.

Michigan.—National Copper Co. *v.* Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333.

New Jersey.— Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452.

Ohio.— Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583.

Pennsylvania.—Locust Mountain Coal, etc., Co. *v.* Gorrell, 9 Phila. 247.

United States.—Prevost *v.* Gorrell, 19 Fed. Cas. No. 11,404, 5 Wkly. Notes Cas. (Pa.) 149.

England.— Wilson *v.* Waddell, 2 App. Cas. 95, 35 L. T. Rep. N. S. 639; Clegg *v.* Dearden, 12 Q. B. 576, 17 L. J. Q. B. 233, 64 E. C. L. 576; Baird *v.* Williamson, 15 C. B. N. S. 376, 10 Jur. N. S. 152, 33 L. J. C. P. 101, 9 L. T. Rep. N. S. 412, 12 Wkly. Rep. 150, 109 E. C. L. 376.

See 34 Cent. Dig. tit. "Mines and Minerals," § 245.

Breaking of dam.— The owner of a mine is not liable to the owner of an adjoining one simply because he has built a dam to stop the accumulation of water in his own mine, which, although well constructed and taken care of, gives way and precipitates a large quantity of water on the other's mine. Jones *v.* Robertson, 116 Ill. 543, 6 N. E. 890, 56 Am. Rep. 786.

Workings on same level; notice of abandonment.—While adjoining owners operating on the same level and the same vein owe no special duty to each other with respect to the flow of water, yet, if one owner abandons his workings so that the accumulation of water will fall on the other, he should be required to give reasonable notice, depending on the work to be performed to provide against the accumulation of water which would follow such abandonment, and two weeks' notice is not sufficient. Philadelphia, etc., Coal, etc., Co. *v.* Taylor, 1 Leg. Chron. (Pa.) 361, 5 Leg. Gaz. 392.

Measure of damage.— In an action for flooding a coal mine by damming up a stream, the measure of damages is the actual injury sustained in delay, loss of time, damage to machinery, etc., and, if the mine was irreclaimable, then the value of the estate and property; but merely speculative profits supposed to have been lost cannot be included. McKnight *v.* Ratcliff, 44 Pa. St. 156. But the measure of damages is not the amount expended by lessees for machinery and other equipment, there being no evidence of injury to the machinery, but is the value of the use of the claim during the time work was prevented. Dalton *v.* Moore, 141 Fed. 311, 72 C. C. A. 459. Evidence of the amount each miner would produce and of the expense of keeping mules while the mine could not be worked is admissible on the question of damages. Douty *v.* Bird, 60 Pa. St. 48.

32. Rylands *v.* Fletcher, L. R. 3 H. L. 330.

33. Thomas Iron Co. *v.* Allentown Min. Co., 28 N. J. Eq. 77.

34. Wilson *v.* Waddell, 2 App. Cas. 95, 35 L. T. Rep. N. S. 639.

35. McLaughlin *v.* Del Re, 71 Cal. 230, 16 Pac. 881 (holding that the right to an injunction against the dumping of tailings and *débris* on one's land and damages for prior dumping is supported by a finding that plaintiff has been for more than ten years in the open, notorious, exclusive, and adverse pos-

ownership of the surface does not carry as an incidental right the privilege of using the surface for the deposit of refuse matter taken from the mine.[36] As respects the use of water for mining purposes, in the precious metal states, it has been held that the doctrines of the common law declaratory of the rights of riparian owners were applicable, if at all, only to a limited extent.[37] But the rule deducible from the authorities generally is that one may use the channel of a running stream to carry away his tailings, if he uses the same in a reasonable manner; that no use is reasonable which prevents a proprietor lower down from using his land for the purposes for which he has acquired it,[38] and that miners, although entitled to the free use of the channel of a stream so that the waters will flow from their ground, have no right to fill the channel with tailings that will float down upon the claims or property of others.[39] The owner of a mine should

session of the land even though it was originally claimed for a dumping ground under miners' law, by the predecessors in interest of defendant); Harvey *v.* Sides Silver Min. Co., 1 Nev. 539, 90 Am. Dec. 510 (where damages were claimed for depositing a large quantity of earth on plaintiff's premises, and it was held that the cost of removing it which would exceed the value of the premises, was not the proper measure of damages, although if such cost does not exceed the value of the property it might furnish the measure of damages).

Falling of sand and clay.— And where a party who is engaged in mining coal causes water, sand, and clay to descend upon the land of another, so as to destroy its value and such descent is not merely the result of the law of gravitation, the person whose land is thus injured may recover damages and enjoin the future commission of said acts. Robinson *v.* Black Diamond Coal Co., 50 Cal. 460.

36. Hooper *v.* Dora Coal Min. Co., 95 Ala. 235, 10 So. 652.

37. Atchison *v.* Peterson, 20 Wall. (U. S.) 507, 22 L. ed. 414. And see WATERS. At an early day it was held in California that each person mining along the same stream had the right to work his claim and use in a proper and reasonable manner both the channel of the stream and the waters flowing therein, and that where from the situation of the different claims, the workings of some would necessarily result in injury to others, if the injury arose from the natural and necessary consequences of the exercise of this right, it would be *damnum absque injuria*. Esmond *v.* Chew, 15 Cal. 137. But it was held that a junior locator of a mining claim could not be allowed to so operate his claim as to destroy the value of a senior location by depositing tailings and *débris* thereon; that he is entitled to work his claim in a lawful manner, but no working is lawful which precludes the senior locator from the enjoyment of his rights. Logan *v.* Driscoll, 19 Cal. 623, 81 Am. Dec. 90. After these decisions it was held in Montana that a prior locator of a mining claim has no right to dump his tailings in a stream to the destruction of the mining rights of a subsequent locator further down the stream, and that a custom of "fire tailings" was void. Lincoln *v.* Rodgers, 1 Mont. 217. And later it was held that where the head of a ditch was about fifteen miles below certain mining ground, the owners of the ditch could not enjoin the working of a mine in such manner as to compel such ditch owners to construct and maintain a sand gate, and to use the waters ten minutes daily to clean it, and thus prevent the ditch filling up, although they were the prior appropriators. Atchison *v.* Peterson, 1 Mont. 561 [*affirmed* in 20 Wall. (U. S.) 507, 22 L. ed. 414]. See also Hill *v.* Smith, 27 Cal. 476.

38. Levaroni *v.* Miller, 34 Cal. 231, 91 Am. Dec. 692, as to one who has a prior right of habitation below the place of mining operations.

39. Hobbs *v.* Amador, etc., Canal Co., 66 Cal. 161, 4 Pac. 1147; Fitzpatrick *v.* Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622; Nelson *v.* O'Neal, 1 Mont. 284; Carson *v.* Hayes, 39 Oreg. 97, 65 Pac. 814.

Evidence of ineffective system.— Where a defendant conducted mining operations upon plaintiff's premises on a gulch tributary to a creek flowing through plaintiff's land and in the conduct of such operations deposits tailings, silt, or *débris* on the land, injurious to it, and evidence is introduced to show that the deposit came from defendant's impounding dams, and that saud came down every time defendant turned on a reservoir head, and defendant had two dams, both carrying all the tailings they would hold, and a slight freshet had recently caused the breach in the lower one, carrying away about one fourth of the tailings, such evidence showed that defendant's system was not secure and effective in preventing the *débris* from being carried on plaintiff's land and its use could be enjoined. York *v.* Davidson, 39 Oreg. 81, 65 Pac. 819.

Ore mills operated on same stream.— In Otaheite Gold, etc., Min., etc., Co. *v.* Dean, 102 Fed. 929, two ore mills were operated on the same stream and it was said that water was too scarce and valuable and the necessity of its use in milling, crushing, and reducing gold and silver ores too great in Nevada to allow either an upper or lower proprietor to absorb it or to pursue such a course as to prevent its reasonable use by the other, provided it can be used by both by ordinary care

deposit the refuse therefrom upon his own land where it will be safe from encroachment by ordinary floods, and if he deposits it in a stream or in a place where ordinary floods will carry it down upon the land of another, he will be liable for the injury occasioned thereby,[40] unless he has acquired a legal right to so use his neighbor's land.[41] If the injury is occasioned by the acts of several, independently of each other, each is liable only for his own acts.[42]

(IV) *REMOVAL OF LATERAL AND SUBJACENT SUPPORT* — (A) *Lateral Support.* The owner of land carrying on mining operations and depriving an adjoining owner of lateral support is liable for injuries to the land thereby occasioned; but he is not liable for injuries to buildings placed on the land in the

and caution and without unusual expense or material injury to either, although in the case in hand the upper proprietor had constructed a series of reservoirs by which he impounded the tailings, and prevented any injurious matter flowing from his mill into the creek, and it was held that the lower proprietor is not entitled to an injunction restraining the upper one from polluting the stream.

40. Robinson *v.* Black Diamond Coal Co., 57 Cal. 412, 40 Am. Rep. 118; Darst *v.* Rush, 14 Cal. 81; Hindson *v.* Markle, 171 Pa. St. 138, 33 Atl. 74; Elder *v.* Lykens Valley Coal Co., 157 Pa. St. 490, 27 Atl. 545, 37 Am. St. Rep. 742, holding further that if an extraordinary flood should reach and carry away any portion of the refuse so left on the owner's land, he will not be liable for the injury sustained by another upon whose lands the refuse is washed.

By statute in Colorado it was provided that a miner must take care of his tailings on his own ground, and it was held that evidence of a custom of miners to dump their tailings upon their own ground and let them take care of themselves was insufficient to prevent the issuance of an injunction against the washing down of tailings on plaintiff's claim without his consent. Fuller *v.* Swan River Placer Min. Co., 12 Colo. 12, 19 Pac. 836.

Tail race or sluicing flume on another's claim.— In the absence of custom, agreement, or regulation, one has no right to run his tail race or sluicing flume on to the dumping ground of another having a prior right; and if the latter fills up the race or flume in such manner as to prevent the former from dumping on his own ground damages are recoverable against him. Ralston *v.* Plowman, 1 Ida. 595. And even the rule that if from the situation of two claims in a stream the working of one necessarily results in injury to the other, arising from the natural consequences of the exercise of the right, it is *damnum absque injuria,* does not give to one the right to construct a flume from his own claim to and upon that of the other, through which tailings are deposited on the latter's claim. Esmond *v.* Chew, 15 Cal. 137.

Allegation "with force and arms."— In California it was held that in an action for damages averring that defendants "with force and arms, broke and entered," upon the premises of plaintiff, and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water, the words "with force and arms broke and entered," do not confine the proof to the direct and immediate damage, as in the old action of trespass; that the facts, being clearly set out in the complaint, the addition of these words was surplusage. Darst *v.* Rush, 14 Cal. 81.

41. Bushnell *v.* Proprietors Salisbury Ore Bed, 31 Conn. 150, holding that one is not liable for damage to a pasture lot resulting naturally from the discharge off a meadow lot, when the owner thereof has conveyed to the former the right of washing ore on a small stream that ran through his lot and of discharging the dirt on his meadow lot lying below on the stream, the dirt accumulating on the meadow lot filling the bed of the stream and raising the lot on adjoining land so that the dirt washed off the meadow lot spread and was carried on plaintiff's pasture lot adjoining.

License.— Where one claims the right to allow tailings and *débris* to go on another's land by virtue of a license, and that on the strength thereof he had made valuable improvements, but does not show that he paid anything for the license, or that he had not been repaid for his improvements by the operation of his own mine, the license was revocable, and did not constitute a defense to the action. Miser *v.* O'Shea, 37 Oreg. 231, 62 Pac. 491, 82 Am. St. Rep. 751.

42. Little Schuylkill Nav., etc., Co. *v.* Richards, 57 Pa. St. 142, 98 Am. Dec. 209, holding that where a dam is filled up by deposits of coal dirt from different mines on the stream above it, it is error to charge that if at the time defendants were engaged in throwing the coal dirt into the river the same thing was being done at the other collieries, defendants knew it, they were liable for the combined results of all the deposits, as the foundation of the liability is not the deposit of the dirt by the stream in the basin of the dam, but the negligent throwing of the dirt into the stream. But in Bell *v.* Shultz, 18 Cal. 449, it was held that while defendants in a similar case are not responsible for the acts of others, a question "what effect did the running of slum, etc., by defendants and other miners above, have upon plaintiff's race," was proper, as the cross-examination would easily bring out the facts and appropriate instructions would protect

absence of proof of negligence,[43] the support to which a landowner is entitled from the adjacent land being confined to such an extent of adjacent land as in its natural undisturbed state is sufficient to afford the requisite support,[44] and the measure of damage is confined to the actual damage done to the land itself.[45] But on the other hand it has been held that, when the working of mines has occasioned the subsidence of the land of another, damages may be recovered in respect of the injury to buildings thereon provided their weight did not occasion or contribute to the subsidence.[46] The doctrine of lateral support does not apply, as between owners of adjoining gold mining claims, where the process of working is to tear down the soil and wash it.[47]

(B) *Subjacent Support*[48] — (1) IN GENERAL. Where one person owns land or upper soil subject to the right of another to mine under it, the latter has the right to take the coal from the land, but not to destroy or injure the superincumbent soil, and in removing the coal he must leave support sufficient to maintain the surface in its natural state.[49] A license from the crown to dig minerals in granted

defendants from any responsibility except what they had incurred by their own acts.

43. McGuire *v.* Grant, 25 N. J. L. 365, 67 Am. Dec. 49 (where the excavation was for gravel and not greater than would be required for the ordinary purposes of building); Matulys *v.* Philadelphia, etc., Coal, etc., Co., 201 Pa. St. 70, 50 Atl. 823; Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410; McGettigan *v.* Potts, 149 Pa. St. 155, 24 Atl. 198.

An injunction will issue to prevent one of two adjoining mine owners from removing the supports which prevent the surface from caving in when it appears that such removal will result in the destruction of his neighbor's mine. Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452. But a mine owner who in conducting his operations has omitted to leave pillars or other supports necessary to insure the safety of the superincumbent surface upon which he has erected heavy structures and operates machinery is not entitled to lateral support from adjoining land, and cannot enjoin the owner thereof from mining with ordinary care up to the dividing line where the character of the soil is such that it will sustain its own weight and the natural pressure thereon by the power of its own coherence, without the aid of the support of the surrounding soil. Victor Min. Co. *v.* Morning Star Min. Co., 50 Mo. App. 525.

Rights covered by conveyance.— But where one conveys land to another, reserving the right to enter on a portion thereof particularly described, "at all times thereafter, so long as the clay and sand may last or be used for brick-making purposes," and to dig and take therefrom the clay and sand which might be found thereon fit for brick-making purposes, the doctrine of lateral support incident to and affecting adjoining land owned by different proprietors does not apply, and the grantee cannot be enjoined from taking so much of the soil as is covered by his conveyance. Ryckman *v.* Gillis, 57 N. Y. 68, 15 Am. Rep. 464.

A railway company is entitled to the vertical and lateral supports of the adjoining lands of the proprietor from whom the lands or easements required for the railway were purchased; and such proprietor is not at liberty to work the minerals adjoining the railway in such a way as to cause damage to it. North Eastern R. Co. *v.* Crosland, 4 De G. F. & J. 550, 32 L. J. Ch. 353, 7 L. T. Rep. N. S. 765, 1 New Rep. 72, 11 Wkly. Rep. 83, 68 Eng. Ch. 429, 45 Eng. Reprint 1297; Caledonian R. Co. *v.* Belhaven, 3 Jur. N. S. 573, 3 Macq. H. L. 56; Caledonian R. Co. *v.* Sprot, 2 Jur. N. S. 623, 2 Macq. H. L. 449, 4 Wkly. Rep. 659. *Compare* London, etc., R. Co. *v.* Ackroyd, 8 Jur. N. S. 911, 31 L. J. Ch. 588, 6 L. T. Rep. N. S. 124, 10 Wkly. Rep. 367, as to the right to support under the railway acts of 1845, from the grantor of a right to make, maintain, and use a tunnel.

44. Birmingham Corp. *v.* Allen, 6 Ch. D. 284, 46 L. J. Ch. 673, 38 L. T. Rep. N. S. 207, 25 Wkly. Rep. 810. See also ADJOINING LANDOWNERS, 1 Cyc. 775 et seq.

45. See the cases cited *supra*, note 43.

46. Stroyan *v.* Knowles, 6 H. & N. 454, 30 L. J. Exch. 102, 3 L. T. Rep. N. S. 746, 9 Wkly. Rep. 615; Hunt *v.* Peake, Johns. 705, 70 Eng. Reprint 603. See also ADJOINING LANDOWNERS, 1 Cyc. 785.

47. Hendricks *v.* Spring Valley Min., etc., Co., 58 Cal. 190, 41 Am. Rep. 257.

48. Statutory regulations requiring propping see *supra*, V, A, 1.

49. *Alabama.*— Hooper *v.* Dora Coal Min. Co., 95 Ala. 235, 10 So. 652.

Georgia.— Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

Illinois.— Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335 [*affirming* 109 Ill. App. 122]; Ames *v.* Ames, 160 Ill. 599, 43 N. E. 592; Wilms *v.* Jess, 94 Ill. 464, 34 Am. Rep. 242; Perry County Coal Min. Co. *v.* Maclin, 70 Ill. App. 444.

Indiana.— Yandes *v.* Wright, 66 Ind. 319, 32 Am. Rep. 109; Western Indiana Coal Co. *v.* Brown, 36 Ind. App. 44, 74 N. E. 1027.

Iowa.— Mickle *v.* Douglass, 75 Iowa 78, 39 N. W. 198; Livingston *v.* Moingona Coal Co., 49 Iowa 369, 31 Am. Rep. 150.

Missouri.—Chicago, etc., R. Co. *v.* Brandau,

land where the mines are excepted out of the grant will not justify an injury to the surface soil;[50] and where one grants the minerals underneath the surface with the privilege of mining such minerals, the support of the surface is a part of the estate reserved in the grantor;[51] while on the other hand if one sells the surface

81 Mo. App. 1, holding that where damages would be inadequate the removal of the mineral beneath may be enjoined.

New York.— Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322.

Ohio.— Burgner *v.* Humphrey, 41 Ohio St. 340.

Pennsylvania.— Madden *v.* Lehigh Valley Coal Co., 212 Pa. St. 63, 61 Atl. 559; Robertson *v.* Youghiogheny River Coal Co., 172 Pa. St. 566, 33 Atl. 706; Pringle *v.* Vesta Coal Co., 172 Pa. St. 438, 33 Atl. 690; McGowan *v.* Bailey, 155 Pa. St. 256, 25 Atl. 648; Williams *v.* Hay, 120 Pa. St. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Carlin *v.* Chappel, 101 Pa. St. 348, 47 Am. Rep. 722; Coleman *v.* Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93; Gumbert *v.* Kilgore, 4 Pa. Cas. 84, 6 Atl. 771 (liability for failure to support the surface in a condition in which it could sustain an ordinary house put upon it); Allshouse's Estate, 23 Pa. Super. Ct. 146; Nelson *v.* Hoch, 14 Phila. 655.

England.— Consett Waterworks Co. *v.* Ritson, 22 Q. B. D. 318, 53 J. P. 373, 60 L. T. Rep. N. S. 360; Smart *v.* Morton, 3 C. L. R. 1004, 5 E. & B. 30, 1 Jur. N. S. 825, 24 L. J. Q. B. 260, 85 E. C. L. 30; Roberts *v.* Haines, 6 E. & B. 643, 88 E. C. L. 643; Harris *v.* Ryding, 5 M. & W. 60, 8 L. J. Exch. 181; New Sharlston Collieries Co. *v.* Westmorland, 82 L. T. Rep. N. S. 725.

See 34 Cent. Dig. tit. "Mines and Minerals," § 243.

Custom and prescription.— The violation of the duty announced in the text cannot be justified upon the ground of a prescriptive right because such prescription is bad as unreasonable (Hilton *v.* Granville, 5 Q. B. 701, Dav. & M. 614, 8 Jur. 310, 13 L. J. Q. B. 193, 48 E. C. L. 701); nor upon the ground of custom because such custom cannot exist (Coleman *v.* Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93; Horner *v.* Watson, 79 Pa. St. 242, 21 Am. Rep. 55; Hilton *v.* Granville, *supra*). See also Jones *v.* Wagner, 66 Pa. St. 429, 5 Am. Rep. 385, where it was held that a usage to mine without observing the rule requiring surface support must be so ancient and uniform in the region in which the property is situated as to amount to a custom or usage controlling the common-law rule.

No liability for act of prior occupiers.— There is no right of action against the owner of a mine or his lessee in respect to damages caused by the working of the mine by a predecessor in title, although such subsidence and damages occur when such owner or lessee is in possession. Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722. 55 L. R. A. 410; Hall *v.* Norfolk, [1900] 2 Ch. 493, 64 J. P. 710, 69 L. J. Ch. 571, 82 L. T. Rep. N. S. 836, 48 Wkly. Rep. 565; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165, 66 L. J. Q. B. 643, 76 L. T. Rep. N. S. 759; Stellarton *v.* Acadia Coal Co., 31 Nova Scotia 261.

Liability of lessor for negligence of lessee. — The lessor of coal lands is *prima facie* not liable to the owner of the surface for damages caused by the lessee's negligence in mining and taking out coal. Hill *v.* Pardee, 143 Pa. St. 98, 22 Atl. 815. But where the evidence disclosed that one having the right to mine coal leased this right to another upon royalty, but gave frequent and explicit directions as to the digging of coal from pillars and supports, this was held sufficient evidence of his liability for the injury to go to the jury. Kistler *v.* Thompson, 158 Pa. St. 139, 27 Atl. 874.

Damages — *Measure of damages.*—In Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322, it was held that under a grant or reservation of minerals the owner of the surface is entitled to sufficient support of the surface in its natural state, which is the extent of his right where there are no buildings upon the land at the time of the conveyance nor the erection of any in contemplation of the parties at that time; and that the rights and relations of adjacent owners and those of superjacent and subjacent owners are alike so that the right to support of the surface means the support of the surface in its natural state in both cases and not with additions to it in buildings not ancient. But in Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410, it was held that the measure of damages for the subsidence of the surface by reason of the removal of surface support is the actual loss to the land including the buildings and that the rule confining the damages to the injury to the land only in the case of the removal of lateral support did not apply. See also Penn *v.* Taylor, 24 Ill. App. 292, holding that an instruction to the effect that if plaintiff can or could sell his land for as much as he paid for it, since the supposed injuries occurred, then he has not sustained any substantial damages, is erroneous.

50. Gesner *v.* Cairns, 1 N. Brunsw. 595.

51. *Iowa.*—Mickle *v.* Douglas, 75 Iowa 78, 39 N. W. 198.

New York.— Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322.

Ohio.— Burgner *v.* Humphrey, 41 Ohio St. 340.

Pennsylvania.— Youghiogheny River Coal Co. *v.* Allegheny Nat. Bank, 211 Pa. St. 319, 60 Atl. 924, 69 L. R. A. 637; Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410; Robertson *v.* Youghiogheny River Coal Co., 172 Pa. St. 566, 33 Atl. 706; Carlin *v.* Chappel, 101 Pa.

reserving the minerals, the grantor in removing the minerals reserved must leave or provide sufficient support for the surface to prevent its subsidence,[52] unless in either case there is some additional statutory or unequivocal contract authority therefor.[53] The right to surface support may be controlled by contract, however, as where the right to such support is excepted from the grant or reservation by apt words.[54]

St. 348, 47 Am. Rep. 722; Barnes *v.* Berwind, 3 Pennyp. 140.

England.— Hodgson *v.* Moulson, 18 C. B. N. S. 332, 114 E. C. L. 332; Dugdale *v.* Robertson, 3 Kay & J. 395, 3 Jur. N. S. 687, 69 Eng. Reprint 1289; New Sharlston Collieries Co. *v.* Westmoreland, 82 L. T. Rep. N. S. 725.

See 34 Cent. Dig. tit. "Mines and Minerals," § 243.

An injunction will be granted to restrain the grantor of the surface who reserves the minerals from getting the minerals in such a way as to destroy the surface. Hext *v.* Gill, L. R. 7 Ch. 699, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 291, 20 Wkly. Rep. 957. And where the owner of land containing several strata of coal demises some and reserves in himself the right to work any coal not included in the demise, he cannot work the other strata so as to destroy the security of the first strata demised where he did not in plain terms reserve rights in derogation of his grant, and an injunction will be granted to restrain the working of the under strata in such manner as to threaten the security of the strata first demised. Mundy *v.* Rutland, 23 Ch. D. 81, 31 Wkly. Rep. 510.

Covenant to pay for injury runs with the land, and where three licensees of a right to dig minerals, jointly and severally covenanted with the grantor of the license to pay him compensation for injury to surface and two of them assigned their right under the license it was held that the covenant bound the assignee, and that the covenant of the three licensees being joint and several, the grantor was entitled to recover the whole compensation from the assignee of two of them. Norval *v.* Pascoe, 10 Jur. N. S. 792, 34 L. J. Ch. 82, 10 L. T. Rep. N. S. 809, 4 New Rep. 390, 12 Wkly. Rep. 973.

Under ordinary conveyance of all the coal, reserving the surface, the coal must be so mined as to leave proper and sufficient support for the surface, although by so doing the coal cannot all be removed. Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410; Nelson *v.* Hoch, 14 Phila. (Pa.) 655. So also under a lease of coal under the surface. Mickle *v.* Douglas, 75 Iowa 78, 39 N. W. 198; Burgner *v.* Humphrey, 41 Ohio St. 340; Nelson *v.* Hoch, 14 Phila. (Pa.) 655. But see Griffin *v.* Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. N. S. 1115; Eadon *v.* Jeffcock, L. R. 7 Exch. 379, 42 L. J. Exch. 36, 28 L. T. Rep. N. S. 273, 20 Wkly. Rep. 1033.

52. Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Williams *v.* Hay, 120 Pa. St. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Carlin *v.* Chappel, 101 Pa. St. 348, 47 Am. Rep. 722; Coleman *v.* Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93; Jones *v.* Wagner, 66 Pa. St. 429, 5 Am. Rep. 385; Dixon *v.* White, 8 App. Cas. 833; Hext *v.* Gill, L. R. 7 Ch. 699, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 291, 20 Wkly. Rep. 957; Humphries *v.* Brogden, 12 Q. B. 739, 64 E. C. L. 739; Caledonian R. Co. *v.* Belhaven, 3 Jur. N. S. 573, 3 Macq. H. L. 56; Caledonian R. Co. *v.* Sprot, 2 Jur. N. S. 623, 2 Macq. H. L. 449, 4 Wkly. Rep. 659; Richards *v.* Jenkins, 18 L. T. Rep. N. S. 437, 17 Wkly. Rep. 30.

53. Erickson *v.* Michigan Land, etc., Co., 50 Mich. 604, 16 N. W. 161; Burgner *v.* Humphrey, 41 Ohio St. 340; Davis *v.* Treharne, 6 App. Cas. 460, 50 L. J. Q. B. 665, 29 Wkly. Rep. 869; Dixon *v.* White, 8 App. Cas. 833; Mundy *v.* Rutland, 23 Ch. Div. 81, 31 Wkly. Rep. 510. See also cases cited *supra*, notes 50, 51, 52. The Inclosure Act in England providing that the lord of the manor should enjoy all the mines and minerals without paying damages, etc., for so doing, etc., was held not to give a right to work the mines in such a manner as to let down the surface. Consett Waterworks Co. *v.* Ritson, 22 Q. B. D. 318, 53 J. P. 373, 60 L. T. Rep. N. S. 360; Roberts *v.* Haines, 6 E. & B. 643, 88 E. C. L. 643.

54. Madden *v.* Lehigh Valley Coal Co., 212 Pa. St. 63, 61 Atl. 559; Scranton *v.* Phillips, 94 Pa. St. 15; Jones *v.* Wagner, 66 Pa. St. 429, 5 Am. Rep. 385; Dixon *v.* White, 8 App. Cas. 833; Aspden *v.* Seddon, L. R. 10 Ch. 394, 44 L. J. Ch. 359, 32 L. T. Rep. N. S. 415, 23 Wkly. Rep. 580; Smith *v.* Darby, L. R. 7 Q. B. 716, 42 L. J. Q. B. 140, 26 L. T. Rep. N. S. 762, 20 Wkly. Rep. 982.

Obligation runs with land.— The obligation of the grantor who grants the right to tear down the surface will run with the land. Rowbotham *v.* Wilson, 8 E. & B. 123, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123.

Conveyance of surface prior to mineral lease.— Where a conveyance of the surface of land was executed two years prior to the execution of a mineral lease by the grantor, stipulations in the lease as to the lessee's right to mine without liability for damages to the surface could not affect the grantee. Western Indiana Coal Co. *v.* Brown, 36 Ind. App. 44, 74 N. E. 1027.

Language not necessarily importing such result will not relieve of the burden of supporting the surface. Madden *v.* Lehigh Valley Coal Co., 212 Pa. St. 63, 61 Atl. 559; Coleman *v.* Chadwick, 80 Pa. St. 81, 21 Am.

(2) ACTION. The date of the cause of action for such caving in is held to be the time when the coal is removed without leaving proper support, and not the time of the cave-in, and the statute of limitations runs accordingly.[55] And a recovery for a failure of duty to furnish subjacent support cannot be had under a pleading alleging improper mining under adjoining lands, or for a removal of lateral support,[56] although under proper allegations covering both causes of action it may be shown that the injuries resulted from negligent mining as well as from a failure to provide surface support.[57] The removal of subjacent support is *prima facie* proof of the cause of the subsequent subsidence of the surface, and the surface owner need not show affirmatively that the subsidence did not occur by reason of the weight of his house over the place where the collapse occurred.[58]

c. **Injury by Operation of Gas or Oil Well.** Oil and gas wells are not nuisances *per se*;[59] but persons operating oil or gas wells are liable for the commission of a nuisance from the escape of the oil or gas when it reaches the surface, or arising from any other cause, to the same extent as others are for similar nuisances.[60] One owning the right to operate an oil well has the right to use the most effective machinery in connection therewith, although by so doing he may draw oil and gas from adjoining land. He will therefore not be liable for such acts.[61] And

Rep. 93; Davis *v.* Treharne, 6 App. Cas. 460, 50 L. J. Q. B. 665, 29 Wkly. Rep. 869. "Ordinary precautions" in mining coal mean proper support to the overlying surface. Youghiogheny River Coal Co. *v.* Hopkins, 198 Pa. St. 343, 48 Atl. 19. And a provision in the deed that the grantor, his heirs and assigns, in mining and removing the coal, iron ore and minerals aforesaid, shall do as little damage to the surface as possible, applies only to damages incident to the grantor's right to go upon the land, bore holes, sink shafts, etc., and does not waive the absolute right to surface support. Williams *v.* Hay, 120 Pa. St. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Fairview Coal Co. *v.* Hay, (Pa. 1888) 14 Atl. 383.

55. Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410. But see Backhouse *v.* Bonomi, 9 H. L. Cas. 503, 7 Jur. N. S. 809, 34 L. J. Q. B. 181, 4 L. T. Rep. N. S. 754, 9 Wkly. Rep. 769, 11 Eng. Reprint 825. See also LIMITATIONS OF ACTIONS, 25 Cyc. 1135, 1222 note 35.

56. Noonan *v.* Pardee, 200 Pa. St. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410.

57. Pringle *v.* Vesta Coal Co., 172 Pa. St. 438, 33 Atl. 690.

All damages in one action.— Where injury has been occasioned to land and buildings by mining operations under the land of an adjoining owner, plaintiff is entitled to recover, in an action founded upon such injury, compensation, not only for the damage that has actually occurred at the time of action brought, but also for the prospective damage resulting from defendant's act. As the cause of action is complete at the moment that the first damage accrued to him, plaintiff must recover once for all in one and the same action for all damages past, present, and future, resulting from that one cause of action — for the reason that no occurrence of damage subsequently, as the result of the original act of defendant, would give a fresh cause of action. Lamb *v.* Walker, 3 Q. B. D. 389, 47 L. J. Q. B. 451, 38 L. T. Rep. N. S. 643, 25 Wkly. Rep. 775. And therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. Nicklin *v.* Williams, 2 C. L. R. 1304, 10 Exch. 259, 23 L. J. Exch. 335.

58. Wilms *v.* Jess, 94 Ill. 464, 34 Am. Rep. 242; Western Indiana Coal Co. *v.* Brown, 36 Ind. App. 44, 74 N. E. 1027.

Survey.— In an action of trespass against a mine owner for removal of surface support, upon the petition of plaintiff, alleging that he is unable to prove, by the best evidence of which the subject is susceptible, the extent of defendant's negligent working of its mines, the court will make an order appointing a civil engineer to enter the mines of defendant, and make a full and accurate survey thereof, so far as the same are within the property lines of plaintiff or as the necessities of the case may require. Heath *v.* Walton, 9 Pa. Dist. 206. See also *supra*, IV, A, 2, f.

59. McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936, holding that whether such wells are nuisances to dwelling-houses and their appurtenances depends upon their location, capacity, and management; but if they diminish the value of the dwelling-house as a home and seriously interfere with its ordinary comfort and enjoyment, it is a nuisance; that if, however, there is any way in which the well can be operated so as not to make it a nuisance, only the unlawful operation thereof will be enjoined.

60. **Nuisances** generally see NUISANCES.

61. Jones *v.* Forest Oil Co., 194 Pa. St. 379, 44 Atl. 1074, 48 L. R. A. 748.

Explosion to increase flow.— It is further held that one who has a natural gas well on his own premises has a right to explode nitro-glycerine therein for the purpose of increasing the flow, although such explosion

the drilling of wells by each owner of adjoining oil lands along the division line, so that each may obtain the amount of oil contained in his lands, affords ample remedy to prevent one operating from obtaining more than his share of oil.[62] The drilling of a well for natural gas near a dwelling will not be enjoined on account of the noise, stench, pollution of the air and danger from fire, explosion, and lightning that would result from its operation, or on account of the danger of the overflow of water or oil, it not being certain that oil or gas will be found in the well, or if found, that it would not be managed so as to cause more than a slight or possible danger of annoyance;[63] but where the upper landowner by drilling a well and pumping increases the aggregate quantity of water discharged, and changes its character from fresh to salt, whereby it becomes more injurious to the lower land, he is liable for such injuries unless he could not prevent the same by reasonable care and expenditure;[64] and if one negligently allows oil or gas to escape whereby another is injured, the former will be liable in damages for the injury.[65]

may have such effect as to draw gas from the well of another. Greenfield Gas Co. *v.* People's Gas Co., 131 Ind. 599, 31 N. E. 61; People's Gas Co. *v.* Tyner, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443.

Stoppage of flow insufficient for use.— A landowner, who has sunk a gas well on his own premises, without malice or negligence, will not be compelled to stop the flow of the gas therefrom, which has proven insufficient in quantity to enable him to utilize it, in a suit by adjoining owners whose wells yield gas in sufficient quantities to enable them to utilize and market it, although defendant's well drains the common reservoir and will ultimately reduce the flow from plaintiffs' wells. Hague *v.* Wheeler, 157 Pa. St. 324, 27 Atl. 714, 37 Am. St. Rep. 736, 22 L. R. A. 141.

Nature of property under oil and gas leases see *supra*, IV, B, 3.

Statutory regulation as to pressure see *supra*, V, A, 3.

62. Kelley *v.* Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399, 63 Am. St. Rep. 721, 39 L. R. A. 765.

63. Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381.

To prevent escape into mines.— Where the owner of all the coal under a tract of land has removed all the coal from a certain portion thereof and allowed the roof to fall in, he is not entitled to an injunction restraining others from boring for gas or oil in the abandoned portion of the tract, provided mechanical appliances can be used which will securely prevent the escape of gas or oil in the mines which are still being worked. But the burden of proof is on defendants in such case to show that the appliances they propose to use will accomplish their purpose. Armstrong *v.* Auen, 21 Pittsb. Leg. J. N. S. (Pa.) 395. And a preliminary injunction will not be issued against the drilling of an oil or gas well through a part of a coal mine from which all the coal has been extracted except what is necessary for props, even though affidavits of miners, engineers, and chemists are filed, disclosing that there may be great danger of explosion in the mines from escape of gas from leaks in the casing likely to be caused by the falling of rocks or the slipping of the earth, or from corrosion thereof by sulphur water, when these averments are contradicted by numerous affidavits equally entitled to credit; especially so in view of the fact that special precautions are to be taken to prevent the leaks, and the further fact that there is much doubt as to the respective rights of the miner and the owner of the fee. Rend *v.* Venture Oil Co., 48 Fed. 248.

64. Pfeiffer *v.* Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660, holding that even though the water is discharged in the lawful use of his land, where the expense of preventing the drainage is small in proportion to the gain to the well owner by his act, it is reasonable in regard to the injured parties' rights, however large it may be in actual amount, and the well owner should pay such expense or respond in damages for the injury.

65. Coffeyville Min., etc., Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635 (liability for personal injury from an explosion of gas negligently allowed to escape); Hauck *v.* Tide Water Pipe Line Co., 153 Pa. St. 366, 26 Atl. 644, 34 Am. St. Rep. 710, 20 L. R. A. 642 (liability of pipe line company for negligently allowing escape of oil). See also Lee *v.* Vacuum Oil Co., 54 Hun (N. Y.) 156, 7 N. Y. Suppl. 426; Clements *v.* Philadelphia Co., 184 Pa. St. 28, 38 Atl. 1090, 39 L. R. A. 532.

Proximate cause.— But where plaintiff's house was on the bank of a run and a pipe line was laid in the run up to the oil wells above the house and a branch line from the wells across the run connected with the main line near plaintiff's house and oil tanks on the main line caught fire and the burning oil flowed down the run till it reached a dam built to prevent its descent into the village, and the heat from the burning oil in the dam caused the branch line to burst and consume plaintiff's house, the laying of the pipe line in the run was not the proximate cause of burning plaintiff's house. Behling *v.* Southwest Pennsylvania Pipe Lines, 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. Rep. 724.

MINIMA PŒNA CORPORALIS EST MAJOR QUALIBET PECUNIARIA. A maxim meaning "The smallest corporal punishment is greater than any pecuniary one."[1]

MINIME MUTANDA SUNT QUÆ CERTAM HABUERUNT INTERPRETATIONEM. A maxim meaning "Things which have had a certain interpretion [whose interpretation has been settled, as by common opinion] are not to be altered."[2]

MINIMUM. The smallest amount or degree.[3] (See MAXIMUM.)

MINIMUM EST NIHILO PROXIMUM. A maxim meaning "The smallest is next to nothing."[4]

MINING CLAIM. See MINES AND MINERALS.

MINING COMPANY. See MINES AND MINERALS.

MINING DÉBRIS. See MINES AND MINERALS.

MINING DISTRICT. See MINES AND MINERALS.

MINING GROUND. See MINES AND MINERALS.

MINING LEASE. See MINES AND MINERALS.

MINING LOCATION. See MINES AND MINERALS.

MINING PARTNERSHIP. See MINES AND MINERALS.

MINING PRIVILEGES. See MINES AND MINERALS.

MINING PURPOSES. See MINES AND MINERALS.

MINING RIGHT. See MINES AND MINERALS.

MINING TITLE. See MINES AND MINERALS.

MINISTER. To ADMINISTER,[5] *q. v.* (Minister: Foreign, see AMBASSADORS AND CONSULS. Of Religious Society, see RELIGIOUS SOCIETIES.)

MINISTERIAL.[6] Acting at the commands of another, or acting as the agent for another or under superior authority;[7] CLERICAL,[8] *q. v.*; of or pertaining to ministry or service;[9] a term sometimes used as synonymous with the word administrative.[10] (Ministerial: Act, see MINISTERIAL ACT. Business, see HOLIDAYS; SUNDAY. Duty, see MINISTERIAL DUTY. Office, see MINISTERIAL OFFICE. Officer, see MINISTERIAL OFFICER.)

MINISTERIAL ACT.[11] An act which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done.[12] (Ministerial Act: Mandamus to Compel, see MANDAMUS. Of

1. Burrill L. Dict. [*citing* 2 Inst. 220].

2. Black L. Dict. [*citing* Coke Litt. 365; Wingfield Max. p. 748, max. 202].

Applied in Pultney *v.* Darlington, 7 Bro. P. C. 530, 564, 3 Eng. Reprint 344.

3. Century Dict.

Used in an instruction that damages were reduced to the minimum in a certain fund, does not mean that the damages are nominal damages, but that they are the least damages which the party has suffered. Austin *v.* Hyndman, 119 Mich. 615, 620, 78 N. W. 663.

"Minimum car-load" see Corporation Commission *v.* Seaboard Air Line System, 127 N. C. 283, 287, 37 S. E. 266.

4. Black L. Dict.

5. Webster Dict. [*quoted* in State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915].

6. Compared with or distinguished from: "Execution" see 17 Cyc. 1579. "Judicial" see 23 Cyc. 1613. "Legislative" see 25 Cyc. 181.

7. Worcester Dict. [*quoted* in State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915].

8. Webster Dict. [*quoted* in Maynard *v.* Kent County First Representative Dist., 84 Mich. 228, 247, 47 N. W. 756, 11 L. R. A. 332].

9. Webster Dict. [*quoted* in State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915].

10. State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915, where it is said: "It seems that the two words are so closely allied in meaning that they may be, and frequently are, used interchangeably."

11. Compared with or distinguished from: "Judgment" see JUDGMENTS, 23 Cyc. 666. "Judicial act" see 23 Cyc. 1614. "Legislative act" see 25 Cyc. 181.

12. Grider *v.* Tally, 77 Ala. 422, 425, 54 Am. Rep. 65; *Ex p.* Batesville, etc., R. Co., 39 Ark. 82, 85; State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924; American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 460, 22 Atl. 494, 25 Am. St. Rep. 337; Pennington *v.* Streight, 54 Ind. 376, 377; Flournoy *v.* Jeffersonville, 17 Ind. 169, 174, 79 Am. Dec. 468; Lemoine *v.* Ducote, 45 La. Ann. 857, 860, 12 So. 939 [*citing* Bouvier L. Dict.]; State *v.* Le Clair, 86 Me. 522, 528, 30 Atl. 7; State *v.* Meier, 143 Mo. 439, 447, 448, 45 S. W. 306; Matter of Harris, 12 Misc. (N. Y.) 223, 229, 33 N. Y. Suppl. 1102; State *v.* Nash, 66 Ohio St. 612, 618, 64 N. E. 558; Marcum *v.* Lincoln, etc., Counties Ballot Com'rs, 42 W. Va. 263, 265, 26 S. E. 281, 36 L. R. A. 296.

Clerk, see CLERKS OF COURTS. Of Constable, see SHERIFFS AND CONSTABLES. Of Judge, see JUDGES. Of Justice of the Peace, see JUSTICES OF THE PEACE. Of Officer, see OFFICERS. Of Sheriff, see SHERIFFS AND CONSTABLES.)

MINISTERIAL DUTY.[13] A duty in which nothing is left to discretion;[14] a duty performed by one acting under superior authority, or not with unlimited control;[15] a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law;[16] an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment.[17] (See MINISTERIAL; MINISTERIAL ACT.)

MINISTERIAL LAND. Land of which for the time being a minister is seized in the right of his parish.[18] (See, generally, RELIGIOUS SOCIETIES.)

MINISTERIAL OFFICE.[19] An office which gives the officer no power to judge of the matter to be done, and requires him to obey the mandates of a superior;[20]

The term has been held to include: Administration of an oath. Betts *v.* Dimon, 3 Conn. 107, 109; *In re* Golding, 57 N. H. 146, 149, 24 Am. Rep. 66. Filling vacancy in an office. State *v.* Nash, 66 Ohio St. 612, 618, 64 N. E. 558. Filing of a complaint and issuance of a summons thereon. Havens *v.* Stiles, 8 Ida. 250, 252, 67 Pac. 919, 101 Am. St. Rep. 195, 56 L. R. A. 736. Issuance and revocation of licenses. State *v.* Doyle, 40 Wis. 175, 188, 22 Am. Rep. 692. Issuance of an execution. *In re* Rourke, 13 Nev. 253, 255; Tompkins *v.* Sands, 8 Wend. (N. Y.) 462, 468, 24 Am. Dec. 46. Issuance of a precept for the collection of assessments for the grading and graveling of streets. Flournoy *v.* Jeffersonville, 17 Ind. 169, 174, 79 Am. Dec. 468. Issuance of process. Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468, 473. Issuance or service of legal process. Whipple *v.* Hill, 36 Nebr. 720, 726, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313. Issuing of summons. Smith *v.* Ihling, 47 Mich. 614, 615, 11 N. W. 408. Official action. Grider *v.* Tally, 77 Ala. 422, 425, 54 Am. Rep. 65; Multnomah County School Dist. No. 2 *v.* Lambert, 28 Oreg. 209, 224, 42 Pac. 221. Passage of ordinance or resolution. People *v.* New York, 5 Barb. (N. Y.) 43, 45; Seitzinger *v.* Tamaqua, 187 Pa. St. 539, 543, 41 Atl. 454. Refusal of land commissioners to repay purchase-money on failure of title to the land granted. Matter of Harris, 12 Misc. (N. Y.) 223, 229, 33 N. Y. Suppl. 1102. Signing an ordinance. State *v.* Meier, 143 Mo. 439, 447, 45 S. W. 306. Taxation of costs. Ward *v.* Rees, 11 Wyo. 459, 463, 72 Pac. 581.

13. Distinguished from: "Executive duty" see Gledhill *v.* Governor, 25 N. J. L. 331, 351. See also 17 Cyc. 1579. "Judicial duty" see 23 Cyc. 1618.

14. Sullivan *v.* Shanklin, 63 Cal. 247, 251; State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924; State *v.* McGrath, 92 Mo. 355, 357, 5 S. W. 29 [*citing* Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 498, 18 L. ed. 437]; State *v.* Rotwitt, 15 Mont. 29, 37, 37 Pac. 845; People *v.* Rosendale, 5 Misc. (N. Y.) 378, 380, 381, 25 N. Y. Suppl. 769; State *v.* Lord, 28 Oreg. 498, 524, 43 Pac. 471, 31 L. R. A. 473; State *v.* Cunningham, 81 Wis. 440, 502, 51 N. W. 724, 15 L. R. A. 561; Enterprise Sav. Assoc. *v.* Zumstein, 64 Fed. 837, 840. See also Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 498, 18 L. ed. 437.

Element of discretion is wholly excluded. People *v.* Jerome, 36 Misc. (N. Y.) 256, 257, 73 N. Y. Suppl. 306.

A duty is ministerial when the law exacting its discharge prescribes and defines a time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion on the part of him required to perform such duty. Grider *v.* Tally, 77 Ala. 422, 425, 54 Am. Rep. 65.

A ministerial duty arises when an individual has such a legal interest in its performance that neglect of performance of such duty becomes a wrong to such individual. Morton *v.* Comptroller-Gen., 4 Rich. (S. C.) 430, 473.

15. State *v.* Governor, 25 N. J. L. 331.

16. State *v.* McGrath, 92 Mo. 355, 357, 5 S. W. 29; State *v.* Rotwitt, 15 Mont. 29, 37, 37 Pac. 845; State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915; Jackson *v.* State, 57 Nebr. 183, 187, 77 N. W. 662, 42 L. R. A. 792; People *v.* Rosendale, 5 Misc. (N. Y.) 378, 380, 381, 25 N. Y. Suppl. 769; State *v.* Lord, 28 Oreg. 498, 524, 43 Pac. 471, 31 L. R. A. 473; State *v.* Cunningham, 81 Wis. 440, 502, 51 N. W. 724, 15 L. R. A. 561; Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 498, 18 L. ed. 437.

17. Henkel *v.* Millard, 97 Md. 24, 30, 31, 54 Atl. 657; Duval *v.* Swann, 94 Md. 608, 617, 51 Atl. 617; Wailes *v.* Smith, 76 Md. 469, 477, 25 Atl. 922.

The term has been held to include: Approval of official bond. *Ex p.* Candee, 48 Ala. 386, 399. Ascertaining result of election. Bourgeois *v.* Fairchild, 81 Miss. 708, 710, 33 So. 495. Assessment of land. State *v.* Herrald, 36 W. Va. 721, 728, 15 S. E. 974. Canceling land entry. Gaines *v.* Thompson, 7 Wall. (U. S.) 347, 353, 19 L. ed. 62. Granting liquor license. Harlan *v.* State, 136 Ala. 150, 154, 33 So. 858. Issuance of insurance certificate. People *v.* Rosendale, 5 Misc. (N. Y.) 378, 380, 25 N. Y. Suppl. 769.

18. Austin *v.* Thomas, 14 Mass. 333, 337.

19. Distinguished from: "Executive office" see State *v.* Loechner, 65 Nebr. 814, 818, 91 N. W. 874, 59 L. R. A. 915. "Judicial office" see 23 Cyc. 1619. "Legislative office" see 25 Cyc. 181.

20. Waldoe *v.* Wallace, 12 Ind. 569, 572 [*citing* Bouvier L. Dict.; Jacob L. Dict.]; State *v.* Womack, 4 Wash. 19, 27, 29 Pac. 939 [*citing* Bouvier L. Dict.]; Fitzpatrick *v.* U. S., 7 Ct. Cl. 290, 293.

an office which is distinguished from an executive or judicial office.[21] (See MINISTERIAL; MINISTERIAL ACT; MINISTERIAL DUTY; MINISTERIAL OFFICER.)

MINISTERIAL OFFICER.[22] An officer whose duty it is to execute the mandates lawfully issued by his superiors.[23] (See MINISTERIAL; MINISTERIAL ACT; MINISTERIAL DUTY; MINISTERIAL OFFICE.)

MINISTERIA RECIPIUNT VICARIUM, SED NON ITEM PLERAQUE JUDICARIA. A maxim meaning "The office of a judge, as a rule, does not admit of a substitute, as do purely ministerial offices."[24]

MINIUS EST ACTIONEM HABERE QUAM REM. A maxim meaning "It is only less to have an action therefor than to have the property itself.[25]

MINOR.[26] See INFANTS.

MINOR ANTE TEMPUS AGERE NON POTEST IN CASU PROPRIETATIS NEC ETIAM CONVENIRE; DIFFERETUR USQUE ÆTATEM; SED NON CADIT BREVE. A maxim meaning "A minor before majority cannot act in a case of property, nor even agree; it should be deferred until majority; but the writ does not fail.[27]

MINORITY. The state or condition of a minor; infancy;[28] a personal privilege allowed to an infant, by operation of law, to pursue his right.[29] Also the smaller number of votes of a deliberative assembly; opposed to majority.[30] (See, generally, INFANTS; PARENT AND CHILD. See also MAJORITY.)

MINOR JURARE NON POTEST. A maxim meaning "A minor cannot make oath."[31]

MINOR MINOREM CUSTODIRE NON DEBET, ALIOS ENIM PRÆSUMITUR MALE REGERE QUI SEIPSUM REGERE NESCIT. A maxim meaning "A minor ought not to be guardian to a minor, for he who knows not how to govern himself, is presumed to be unfit to govern others."[32]

MINOR NON TENETUR PACITARE SUPER HÆREDITATE. A maxim meaning "The minor is not bound to defend himself on account of his inheritance."[33]

21. State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915.

22. **Distinguished from:** "Executive officer" see State *v.* Loechner, 65 Nebr. 814, 818, 91 N. W. 874, 59 L. R. A. 915. "Judicial officer" see 23 Cyc. 1619. "Legislative officer" see 25 Cyc. 181.

23. Mechem Public Officers, § 21 [*quoted* in State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915].

The essential and characteristic distinction between a judicial and a ministerial officer is that the former is to give judgment, which requires perfect freedom of opinion, but the latter is to execute, which supposes obedience to some mandate prescribing what is to be done, and leaving nothing to opinion. Reid *v.* Hood, 2 Nott & M. (S. C.) 168, 169, 10 Am. Dec. 582.

The test of whether a person is or is not a ministerial officer depends, not on the character of the particular acts which he may be called upon to perform, or whether he exercises judgment or discretion with reference to such acts, but whether the general nature and scope of the duty devolving upon him is of a ministerial character, as distinguished from other classes of officers, such as executive, judicial, etc. State *v.* Loechner, 65 Nebr. 814, 818, 91 N. W. 874, 59 L. R. A. 915.

The term has been held to include: An auditor of canal department. People *v.* Schoonmaker, 13 N. Y. 238, 248. A constable. Com. *v.* O'Cull, 7 J. J. Marsh. (Ky.) 149, 150, 23 Am. Dec. 393. A county solicitor. Diggs *v.* State, 49 Ala. 311, 320. A justice of the peace. People *v.* Bush, 22 N. Y. App. Div. 363, 365, 48 N. Y. Suppl. 13. A member of board of education. State *v.* Loechner, 65 Nebr. 814, 820, 91 N. W. 874, 59 L. R. A. 915. A sheriff. Campbell *v.* Parker, 59 N. J. Eq. 342, 346, 45 Atl. 116; Thomasson *v.* Kennedy, 3 Rich. Eq. (S. C.) 440, 446. *Compare* State *v.* Loechner, 65 Nebr. 814, 821, 91 N. W. 874, 59 L. R. A. 915. *Contra*, Merrill *v.* Gorham, 6 Cal. 41, 42.

24. Morgan Leg. Max.

25. Morgan Leg. Max.

26. **"Minor children"** does not include grandchildren who are minors, or those who are of age, or any other descendants more remote. Walker *v.* Vicksburg, etc., R. Co., 110 La. 718, 721, 34 So. 749. See also CHILDREN, 7 Cyc. 123.

"Minor heirs" see Anderson *v.* Peterson, 36 Minn. 547, 548, 32 N. W. 861, 1 Am. St. Rep. 698. See also HEIR, 21 Cyc. 408.

27. Black L. Dict. [*citing* 2 Inst. 291].

28. Black L. Dict.

"During his, her, or their minority" see Milroy *v.* Milroy, 8 Jur. 234, 13 L. J. Ch. 266, 14 Sim. 48, 37 Eng. Ch. 48, 60 Eng. Reprint 274.

"During their minority or the minority of either of them" see Maddison *v.* Chapman, 4 Kay & J. 709, 724, 70 Eng. Reprint 294.

29. Rose *v.* Daniel, 2 Treadw. (S. C.) 549, 563.

30. Black L. Dict.

"Minority member" see *In re* Manning, 71 Hun (N. Y.) 236, 245, 24 N. Y. Suppl. 1039.

31. Black L. Dict.

32. Burrill L. Dict. [*citing* Coke Litt. 88*b*].

33. Morgan Leg. Max.

MINOR NON TENETUR RESPONDERE DURANTE MINORI ÆTATE, NISI IN CAUSA DOTIS, PROPTER FAVOREM. A maxim meaning "A minor is not bound to reply during his minority, except as a matter of favor in a cause of dower."[34]

MINOR QUI INFRA ÆTATEM 12 ANNORUM FUERIT ULTAGARI NON POTEST, NEC EXTRA LEGEM PONI. A maxim meaning "A minor who is under twelve years of age cannot be outlawed, nor placed without the law."[35]

MINOR SEPTEMDECIM ANNIS NON ADMITTITUR FORE EXECUTOREM. A maxim meaning "A person under seventeen years is not admitted to be an executor."[36]

MINOR TENETUR IN QUANTUM LOCUPLETIOR FACTUS. A maxim meaning "A minor is bound to the extent to which he has been enriched or benefited."[37]

MINSTRELSY. See THEATERS AND SHOWS.

MINT. See UNITED STATES.

MINTAGE. See UNITED STATES.

MINUS SOLVIT, QUI TARDIUS SOLVIT. A maxim meaning "He does not pay who pays too late."[38]

MINUS SOLVIT, QUI TARDIUS SOLVIT; NAM ET TEMPORE MINUS SOLVITUR. A maxim meaning "He pays little who pays late, for from the delay he is judged not to pay."[39]

MINUTE. As a noun, a small portion;[40] the sixtieth part of an hour or degree.[41] As a verb, to set down a short sketch or note of; to jot down; to make a brief summary of.[42] (See, generally, RECORDS; WEIGHTS AND MEASURES. See also MINUTES.)

MINUTES. In practice, memoranda of what takes place in court, made by authority of the court.[43] In business law, memoranda of notes of a transaction or proceeding.[44] (Minutes: Of Corporation, see CORPORATIONS. Of County Board, see COUNTIES. Of Court — Generally, see COURTS; As Evidence, see EVIDENCE. Of Grand Jury Proceeding, see GRAND JURIES. Of Municipal Board, see MUNICIPAL CORPORATIONS.)

MIS. A syllable which added to another word signifies some fault or defect.[45]

MISADVENTURE. An accident by which injury results to another.[46]

MISAPPLICATION.[47] Improper, illegal, wrongful, or corrupt use or application of funds, property, etc.;[48] a term which does not of itself import wilful-

34. Black L. Dict.
Applied in Harbent *v.* Bynion, 3 Bulstr. 134, 143.

35. Black L. Dict. [*citing* Coke Litt. 128].

36. Black L. Dict.

37. Morgan Leg. Max.

38. Black L. Dict. [*citing* Dig. 50, 16, 12, 1].

39. Peloubet Leg. Max. [*citing* Dig. 50, 16, 12, 1].

40. Webster Dict. [*quoted* in Hinshaw *v.* State, 147 Ind. 334, 377, 47 N. E. 157].

41. Black L. Dict.

42. Webster Dict. [*quoted* in Hinshaw *v.* State, 147 Ind. 334, 377, 47 N. E. 157].

43. Bouvier L. Dict. [*quoted* in Gregory *v.* Frothingham, 1 Nev. 253, 260; Moore *v.* State, 3 Heisk. (Tenn.) 493, 509]. See also Hinshaw *v.* State, 147 Ind. 334, 377, 47 N. E. 157.
"Minutes of the trial" see State *v.* Larkin, 11 Nev. 314, 321.

44. Black L. Dict.

45. Cowell Int. [*quoted* in Lovett *v.* Pell, 22 Wend. (N. Y.) 369, 375].

46. Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492.
When applied to homicide it denotes the act of a man who, in the performance of a lawful act without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492. "Misadventure always happens in consequence of a lawful act; involuntary manslaughter, in consequence of an unlawful act." 4 Blackstone Comm. 192 [*quoted* in Johnson *v.* State, 94 Ala. 35, 40, 10 So. 667]. See also HOMICIDE.

47. **Distinguished from "embezzlement."** The terms "embezzlement" and "misapplication," used with reference to funds, are not convertible terms. "Misapplication" is the broader, and covers "embezzlement." Jewett *v.* U. S., 100 Fed. 832, 840, 41 C. C. A. 88, 53 L. R. A. 568. See also U. S. *v.* Youtsey, 91 Fed. 864, 867 (where it is said that an abstraction and misapplication of funds means a conversion to his own use of funds intrusted to a person's care); U. S. *v.* Taintor, 28 Fed. Cas. No. 16,428, 11 Blatchf. 374 (construing the term "embezzle, abstract, and willfully misapply"). The word "misapply" was intended to include acts not covered by the previous words "embezzle" or "abstract," as used in the National Banking Act of 1864. U. S. *v.* Fish, 24 Fed. 585, 591.

48. Black L. Dict.

ness.[49] (Misapplication: Of Funds — Generally, see EMBEZZLEMENT; Liability of Officer For, see OFFICERS.)

MISAPPROPRIATION. A term which does not necessarily mean peculation, although it may mean that.[50] (See, generally, EMBEZZLEMENT. See also MISAPPLICATION.)

MISBEHAVIOR. Ill conduct; improper or unlawful behavior.[51] (Misbehavior: As Contempt, see CONTEMPT. Of Arbitrator, see ARBITRATION AND AWARD. Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Attorney — Generally, see ATTORNEY AND CLIENT; Effect Upon Judgment, see JUDGMENTS; Ground For New Trial, see CRIMINAL LAW; NEW TRIAL; Harmless Error, see APPEAL AND ERROR. Of Constable, see SHERIFFS AND CONSTABLES. Of Court as Harmless Error, see APPEAL AND ERROR. Of Election Officer, see ELECTIONS. Of Husband — Affecting Curtesy, see CURTESY; Affecting Divorce, see DIVORCE. Of Judge, see JUDGES. Of Juror or Jury — Generally, see CRIMINAL LAW; TRIAL; Ground For Arrest of Judgment, see JUDGMENTS; Ground For New Trial, see CRIMINAL LAW; NEW TRIAL; Harmless Error, see APPEAL AND ERROR. Of Justice of the Peace, see JUSTICES OF THE PEACE. Of Officer, see OFFICERS. Of Partner, see PARTNERSHIP. Of Party — Effect Upon Judgment, see JUDGMENTS; Ground For New Trial, see NEW TRIAL. Of Sheriff, see SHERIFFS AND CONSTABLES. Of Wife — Affecting Divorce, see DIVORCE; Affecting Dower, see DOWER. Of Witness, as Ground For New Trial, see CRIMINAL LAW; NEW TRIAL. See also MISCONDUCT.)

MISCARRIAGE. A term sometimes used as synonymous with abortion.[52] As used in the statute of frauds, a word which is said to have a broader meaning than either "debt" or "default," and to include the failure by a third party to succeed in a proposed business.[53] (See, generally, ABORTION; FRAUDS, STATUTE OF.)

49. Carpenter *v.* Mason, 12 A. & E. 629, 10 L. J. M. C. 1, 4 P. & D. 439, 40 E. C. L. 314.

"Wilful misapplication" see U. S. *v.* Britton, 107 U. S. 655, 666, 668, 2 S. Ct. 512, 27 L. ed. 520; U. S. *v.* Lee, 12 Fed. 816, 818.

"Wilfully misapply" distinguished from embezzle see U. S. *v.* Northway, 120 U. S. 327, 332, 7 S. Ct. 580, 30 L. ed. 664. See also Batchelor *v.* U. S., 156 U. S. 426, 15 S. Ct. 446, 39 L ed. 478; U. S. *v.* Britton, 107 U. S. 655, 669, 2 S. Ct. 512, 27 L. ed. 520.

50. Hanna *v.* De Blaquiere, 11 U. C. Q. B. 310, 314.

"Misappropriated," as used in a constitutional provision, making the directors of corporations jointly and severally liable for moneys embezzled or misappropriated by an officer of such corporation, being used in connection with the word "embezzle," does not mean merely applying money in a manner unauthorized by law, but rather the misapplication of funds intrusted to an officer for particular purposes by devoting them to some unauthorized purposes. Winchester *v.* Howard, 136 Cal. 432, 450, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. See also Frey *v.* Torrey, 70 N. Y. App. Div. 166, 75 N. Y. Suppl. 40. And see MISAPPLICATION.

Misappropriation of negotiable paper implies a fraudulent perversion of the original object or design. Jackson *v.* Jersey City First Nat. Bank, 42 N. J. L. 177, 179.

51. Black L. Dict.

"Gross misbehavior" see Stevens *v.* Stevens, 8 R. I. 557, 561.

"Manifest misbehavior" see Kirkpatrick *v.* Stewart, 19 Ark. 695, 700.

Applied to arbitrators the term means acts which evince unfairness or a violation of all the principles of a just proceeding, and not mere error of judgment however great (Turnbull *v.* Martin, 2 Daly (N. Y.) 428, 430, 37 How. Pr. 20); and is used to imply a wrongful intention, and not a mere error of judgment, on the part of the arbitrators (Smith *v.* Cutler, 10 Wend. (N. Y.) 589, 590, 25 Am. Dec. 580).

52. See ABORTION, 1 Cyc. 170 note 1.

53. Gansey *v.* Orr, 173 Mo. 532, 545, 73 S. W. 477.

MISCEGENATION

By Herman Kahn

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I. DEFINITION.

The term "miscegenation" is variously employed to indicate the intermarriage, or the cohabitation or sexual intercourse, between persons of the opposite

sex who belong to different races, or both marriage and cohabitation between them.[1]

II. HISTORY.

Miscegenation, as an offense against law, is entirely a statutory creation.[2] Statutes against miscegenation have existed in most of the United States, at some time or other, when the non-Caucasian element in their population was such as to make it a matter of practical importance. As this element disappeared, the statutes were repealed.[3]

III. CONSTITUTIONALITY OF STATUTES.

A. Marriage Subject to Exclusive Control of State. Marriage is more than a contract, it is an institution, left by the federal constitution solely to the discretion of the several states under their general power to regulate their domestic affairs. State laws against miscegenation do not discriminate against non-Caucasian races, but are equally prohibitive against the white races, and therefore are not in conflict with the federal constitution, and the fourteenth and fifteenth amendments thereto, or with the state constitutions and laws, abolishing slavery and conferring upon the negro race equal rights and privileges with other races. The making of race or color an element of an offense is nowhere prohibited.[4]

B. No Discrimination in Laws Against Cohabitation. The statutes which inflict upon persons of different races cohabiting with each other eqnal punishment, although that is severer than where the offense is committed by persons of the same race, are not in conflict with the federal constitution and laws, as there is no discrimination in favor of the white person, either in capacity to enter into the relation or in the punishment.[5]

1. See Anderson L. Dict.; Black L. Dict.

Another definition is: "Mixture or amalgamation of races: applied especially to sexual union between individuals of the black and white races." Century Dict.

Derivation. — Miscegenation is from the Latin, *miscere*, to mix, and *genere*, to beget; meaning, therefore, a mixture of races, as in the case of the intermarriage of persons belonging to the white and black races. Bouvier L. Dict.

2. While the offense is generally known as "miscegenation," and is so termed in the statutes of a number of the states, yet in the statutes of most of the states it is unnamed. In the statutes of Georgia and Kentucky it is named "amalgamation." See the statutes of the several states.

It exists almost exclusively in those states of the Union in which non-Caucasian races form a considerable element of the population, as, in the southern states, the African or black race, in the western states, the Mongolian or yellow race, in the states of the middle or southwest, the Indian. It is the public policy of these states to maintain separate marital relations between these races and the white race, based upon the belief that the offspring of cohabitation between them are inferior in physical development and strength to the full blood of either race. Scott *v.* State, 39 Ga. 321.

3. State *v.* Ross, 76 N. C. 242, 247, 22 Am. Rep. 678.

"Such, also, were the laws of the British Colonies in this country, reënacted after the separation by the thirteen States. In Massachusetts, the Colonial act of 1707, entitled 'An Act for the better preventing of a spurious and mixed issue,' was reënacted under the State government in 1786, forbidding the intermarriage of the black and white races. . . . And long after the abolition of slavery in that State, in the carefully revised Code of 1836, this 'mark of degradation,' says Taney, C. J., 'was again impressed upon the race.' Scott *v.* Sandford, 19 How. (U. S.) 393, 413, 15 L. ed. 691. And such, indeed, we believe, was the law of every state." Lonas *v.* State, 3 Heisk. (Tenn.) 287, 311.

4. *Alabama.*— Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739 [*overruling* Burns *v.* State, 48 Ala. 195, 17 Am. Rep. 34]; Ford *v.* State, 53 Ala. 150.

Arkansas.— Dodson *v.* State, 61 Ark. 57, 31 S. W. 977.

Indiana.— State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42.

North Carolina.— State *v.* Reinhardt, 63 N. C. 547; State *v.* Hairston, 63 N. C. 451.

Tennessee.— Lonas *v.* State, 3 Heisk. 287.

Texas.— Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

United States.— *In re* Hobbs, 12 Fed. Cas. No. 6,550, 1 Woods 537; *Ex p.* Kinney, 14 Fed. Cas. No. 7,825, 3 Hughes 9.

See CONSTITUTIONAL LAW, 8 Cyc. 1049, 1074.

5. Pace *v.* State, 69 Ala. 231, 44 Am. Rep. 513 [*affirmed* in 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207]; Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739.

C. Marriage in Another State. Marriage is not a contract within the provisions of the United States constitution, prohibiting states from impairing the obligation of contracts, and so a marriage in another state, valid there, is no defense to a prosecution for miscegenation in the state where the parties are domiciled.[6]

D. Punishment of White Alone. The fact that a statute imposes a penalty only upon a white person who is guilty of miscegenation does not invalidate the law.[7]

E. "Social Status." The law against miscegenation has been held not to be inconsistent with the Georgia state constitution, which provides that "the social status of the citizen shall never be the subject of legislation."[8]

IV. NATURE AND ELEMENTS OF OFFENSE.

A. In General. Miscegenation, as an offense against law, being a statutory creation, its nature and elements vary in the different states, and are always subject to change by legislation. In some of the states the marriage alone between members of different races is declared to be a crime, in some cohabitation or sexual intercourse alone, and in others both marriage and cohabitation are necessary to constitute an offense.[9]

B. Particular Elements — 1. MARRIAGE. Where the offense charged or an element thereof is a marriage, it must appear that a marriage was actually entered into between the parties, and celebrated by a person duly authorized and qualified thereto; or that the parties consummated the marriage in the *bona fide* belief that the person celebrating it was legally authorized and qualified thereto.[10]

2. COHABITATION. Where the offense charged or an element thereof is cohabitation, one act of sexual intercourse is not sufficient in and of itself to constitute the offense, but it must appear that the parties cohabited with each other, although it may be for a single day only, intending to continue that relation.[11]

3. ADULTERY OR FORNICATION. In some states the marriage between members of different races is simply prohibited, or is declared to be null and void and unlawful; but it is not declared to be a crime, and no punishment is prescribed. In these states cohabitation between members of different races comes within the statutes against adultery, fornication, or illicit intercourse; and this is also the case in those states in which only the marriage is made a distinct offense.[12]

C. Persons Who May Commit the Offense. The offense of miscegenation is essentially one which can be committed only by the concurrence of a male and female, each of whom is a member of a different race. The statutes of the states which have legislated upon the subject prohibit miscegenation between the Caucasian or white race, on the one hand; and, on the other, either the first

6. State *v.* Tutty, 41 Fed. 753, 7 L. R. A. 50; *Ex p.* Kinney, 14 Fed. Cas. No. 7,825, 3 Hughes 9.

7. Francois *v.* State, 9 Tex. App. 144; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131; *Ex p.* Francois, 9 Fed. Cas. No. 5,047, 3 Woods 367.

8. Scott *v.* State, 39 Ga. 321.

9. See the statutes of the several states.

10. Moore *v.* State, 7 Tex. App. 608; Jones *v.* Com., 79 Va. 213.

11. See Linton *v.* State, 88 Ala. 216, 7 So. 261, where it was held that the intention to continue the illicit relationship need not be evidenced by an agreement to that effect, if the circumstances of the case clearly indicate such intention. See also Love *v.* State, 124 Ala. 82, 27 So. 217; McAlpine *v.* State, 117 Ala. 93, 23 So. 130, where it was held that it is not error to refuse to give a charge to the jury, requested by defendant, which ignores all reference to any intention that existed on the part of defendants to continue the illicit acts. In Smith *v.* State, 39 Ala. 554, it was held that one act of criminal intimacy is not sufficient to constitute the offense of "living in adultery or fornication," although that one act "was the result of previous arrangement and understanding between the parties." See also Hall *v.* State, 53 Ala. 463.

12. In these states, in prosecutions of persons of different races for adultery or fornication, the difference in race is not an element of the offense and need not be charged in the indictment or proved upon the trial. Where, however, the defense of valid marriage between the parties is interposed, the prosecution may show the difference in race, and that therefore the marriage is void and no defense. Mulling *v.* State, 74 Ga. 10; State *v.* Hooper, 27 N. C. 201; State *v.* Fore, 23 N. C. 378.

alone, or that and one or both of the other two, of the following three races: The African, or black race;[13] the Indian race; and the Mongolian race.[14] Under some statutes the white person only is punishable.[15]

V. DEFENSES.

A. Marriage — 1. In Same State. Where the marriage between members of different races is penalized, or simply prohibited and declared null and void, it is no defense to a prosecution for marriage, or for cohabitation, that a marriage was duly entered into and solemnized.[16]

2. In Another State. Where both parties left the state of their domicile, where marriage between them was unlawful, and went to another jurisdiction, where such marriages were not against the law, in order to avoid the law of their domicile, and there married, and then returned, it was held that such marriage was no defense to a prosecution in the state of their domicile for miscegenation.[17] And so it has been held even where it did not affirmatively appear that the parties left the state of their domicile in order to avoid its laws against miscegenation.[18] However, in a prosecution in North Carolina for unlawful cohabitation, where it appeared that defendant, a white woman, being a resident of that state, left the state in order to evade its laws against intermarriage between white and black persons, and went to South Carolina, and there married a negro resident of South Carolina, the marriage not being unlawful there, and after living there for several months returned to North Carolina, where they continued to live as man and wife, it was held that there was a valid marriage, which was a defense to the prosecution, as the domicile of a wife becomes that of the husband on marriage.[19] Where the statute expressly states that a marriage, although solemnized in another state, shall be invalid and no defense, the court will give it effect.[20]

B. Ignorance of Law. In a prosecution for miscegenation, ignorance of the law is no defense, and therefore it is no defense that the parties did not know that marriage between members of different races was prohibited.[21]

13. This race and the members thereof are variously described in the statutes upon the subject. Few of the states limit the offense to the full blood of the race; but on the contrary, most of the states expressly extend it, either in general terms to the mixed blood descended from negro ancestry to various degrees or generations, or specifically to mulattoes, etc. This varied language has given rise to judicial construction not always reconcilable. See Linton *v.* State, 88 Ala. 216, 7 So. 261; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131; and *infra*, VII, B, 5, a, note 43.

14. See the statutes of the several states.

15. State *v.* Brady, 9 Humphr. (Tenn.) 74, where it was held that only a white person can be punished for violating a statute which provides that "if any white man or woman shall presume to live with any negro, mustee, or mulatto man or woman, as man and wife, each and every of the parties so offending shall be liable to be . . . indicted and punished," etc.

16. Hoover *v.* State, 59 Ala. 57; State *v.* Hooper, 27 N. C. 201; State *v.* Fore, 23 N. C. 378.

17. Kinney *v.* Com., 30 Gratt. (Va.) 858, 32 Am. Rep. 690. See also State *v.* Kennedy, 76 N. C. 251, 22 Am. Rep. 683; *Ex p.* Kinney, 14 Fed. Cas. No. 7,825, 3 Hughes 9.

18. State *v.* Bell, 7 Baxt. (Tenn.) 9, 32 Am. Rep. 549.

19. State *v.* Ross, 76 N. C. 242, 22 Am. Rep. 678. *Compare* State *v.* Kennedy, 76 N. C. 251, 22 Am. Rep. 683, in which both defendants were residents of North Carolina and went to South Carolina to marry, in order to avoid the laws of their domicile, and returned at once, and it was held that they had not *bona fide* acquired a domicile in South Carolina, and therefore the marriage was invalid and no defense.

20. State *v.* Tutty, 41 Fed. 753, 7 L. R. A. 50.

21. Thus it was held that it was no defense that at the time of the marriage a decision of the highest court of the state was in effect which held the law against marriages in question unconstitutional, where that decision had since been overruled as erroneous; or that the probate judge, at the time the marriage license was issued, stated to the parties that a marriage between them was lawful. Hoover *v.* State, 59 Ala. 57. And in another case it was held no defense that the last compilation of the laws of the state published prior to the marriage omitted the statute forbidding marriages between members of different races, since that did not operate as a repeal of the statute. Dodson *v.* State, 61 Ark. 57, 31 S. W. 977.

VI. INDICTMENT OR INFORMATION.[22]

The indictment or information must charge affirmatively all the elements which by statute coustitute the offense.[23] All the facts and circumstances must be stated with certainty, in a positive form and not by way of argument, and without any intendment to the contrary.[24] Where the statute is in the alternative as to any element of the offense, it is sufficient to charge one only of the alternatives.[25] It is also permissible to charge such alternative in a separate count;[26] but, by the weight of authority, it is not good to charge in the alternative in one count.[27] An indictment which follows the language of the statute is generally sufficient.[28]

VII. EVIDENCE.

A. In General. The prosecution has the burden of establishing affirmatively every essential element of the offense as charged in the indictment.[29] The charge, and every element thereof, must be established by the best evidence at hand,[30] and the proof must be certain.[31] Proof of immaterial facts is properly excluded.[32]

22. See, generally, INDICTMENTS AND INFORMATIONS.

23. Cohabitation, or adultery or fornication.— Where the language of the statute was, "If any white person or negro . . . intermarry, or live in adultery or fornication with each other, each of them must be imprisoned," etc., an indictment which charged that defendants "did live together in a state of adultery or fornication" was held sufficient, although it omitted the words "with each other." Love *v.* State, 124 Ala. 82, 27 So. 217; Pace *v.* State, 69 Ala. 231, 44 Am. Rep. 513.

Knowledge.— Under a statute, which in one section forbade the intermarriage of white persons with negroes, etc., and in a subsequent section provided that persons "knowingly violating" the same should be deemed guilty of a felony, it was held that the word "knowingly" was not necessary in the indictment, as it was used in reference to proof only. Robeson *v.* State, 3 Heisk. (Tenn.) 266.

Name of paramour.— It has been held that the failure to allege the name of the paramour is good ground for a motion to quash the indictment, but is no ground for arrest of judgment. Frasber *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

24. Marriage.—Thus, where the statute was in the following language: "If any white person shall . . . marry a negro . . . or, having so married . . . shall continue . . . to cohabit with such negro," etc., an indictment charging that defendant "did continue to cohabit with a negro, having married him," was held bad, even after judgment. Moore *v.* State, 7 Tex. App. 608.

25. Thus where a statute provided: "If any white person shall . . . knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person," etc., and the indictment charged that defendant knowingly married a negro; a motion to quash the indictment on the ground that it did not allege that defendant married a negro within the third generation inclusive, was held to have been properly denied. Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

26. Robeson *v.* State, 3 Heisk. (Tenn.) 266.

27. Under the Tennessee act of June 29, 1870, chapter 39 (Shank St. p. 602), an indictment, which charged that defendant, "being a negro, mulatto, or person of mixed blood to the third generation inclusive," cohabited with a white woman, was held bad as charging, in one paragraph in one count, three offenses in the alternative. Robeson *v.* State, 3 Heisk. (Tenn.) 266. In Linton *v.* State, 88 Ala. 216, 7 So. 261, where an indictment, which charged "that John Blue, a negro man, and Martha Ann Linton, a white woman, did intermarry, or live in adultery or fornication with each other," was based upon a statute providing that if "any white person or negro . . . intermarry or live in adultery with each other," etc., the court held that the indictment sufficiently charged the offense of miscegenation under said statute. It does not appear what the objection raised against the indictment was; but if it was that the indictment charged in the alternative, then the decision is against the great weight of authority in this country. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 296.

28. Jones *v.* Com., 79 Va. 213. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 339.

29. Moore *v.* State, 7 Tex. App. 608.

30. Jones *v.* Com., 79 Va. 213.

31. Thus, where one element of the offense charged is that defendant was a white woman, it is not established by the testimony of one witness to the effect "that she looks like a white woman." Moore *v.* State, 7 Tex. App. 608.

32. Thus, it has been held that the acquittal of defendant's paramour upon a previous trial is entirely immaterial, and proof thereof is inadmissible, as in these prosecutions one party may be innocent and the

B. Miscellaneous Facts — 1. Criminal Intent. The prosecution need not prove that defendant, by the forbidden act, intended to violate the law; if the forbidden act be knowingly and intentionally committed, the criminality necessarily follows.[33]

2. Character For Chastity. It is not proper for the prosecution to attack the character of defendant for chastity.[34] But where defendant produces witnesses to testify to good character, they may be cross-examined by the prosecution, with a view of showing that defendant's reputation for virtue is bad.[35]

3. Marriage. Every element of valid marriage must be shown, including the fact that the person celebrating the marriage was authorized and qualified thereto under the laws of the state.[36] The marriage may be testified to by any person who was present and saw it,[37] or it may be shown by the marriage certificate with the proper indorsements.[38]

4. Cohabitation. Every element which goes to make up the offense of cohabitation, adultery, or fornication must be affirmatively shown to warrant a conviction.[39] Whether defendant was married or not is immaterial, and no evidence upon that point need be given.[40]

5. The Color — a. In General. It is an element of the offense of miscegenation that the parties are of different race; and the race or color of both parties must therefore be affirmatively shown by the prosecution, as charged, and by the best evidence at hand.[41] Until this is shown, there is, if necessary, a presumption that the parties are not of the race or color charged.[42] And if a party is charged to be of a particular color, or of a particular degree thereof, the proof must support the charge in that particular.[43] The charge that defendant was a white woman is not established by the testimony of a witness to the effect "that she looks like a white woman.[44]

b. Particular Degree. Where the statute extends to a particular degree or generation of color, less than the full blood, and it appears that the party is not of the full blood, he should be shown to be within the furthest degree. Where there is a failure to show the degree,[45] or where it appears that the party has less color than the furthest degree,[46] there can be no conviction.

c. How Color Proven. The color may properly be established by statement

other guilty. Bell *v.* State, 33 Tex. Cr. 163, 25 S. W. 769. So in a prosecution for cohabitation, proof of marriage is properly excluded, where the marriage is unlawful, null and void. State *v.* Hooper, 27 N. C. 201; State *v.* Fore, 23 N. C. 378.

33. Hoover *v.* State, 59 Ala. 57.

34. Linton *v.* State, 88 Ala. 216, 7 So. 261.

35. Cauley *v.* State, 92 Ala. 71, 9 So. 456, holding, however, that while it was proper to ask defendant's character witness, on cross-examination, what the "general character of defendant about women" was, the answer that defendant was "foolishly fond of women" was *prima facie* irrelevant and illegal, and that the witness should have explained in what sense he used the expression, as "fondness for women" does not *ex vi termini* convey the meaning of lustful desire and its unlawful gratification.

36. Jones *v.* Com., 79 Va. 213.

37. Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131; Jones *v.* Com., 79 Va. 213.

38. Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

39. McAlpine *v.* State, 117 Ala. 93, 23 So. 130; Linton *v.* State, 88 Ala. 216, 7 So. 261.

40. Love *v.* State, 124 Ala. 82, 27 So. 217.

41. Jones *v.* Com., 79 Va. 213.

42. Moore *v.* State, 7 Tex. App. 608; Jones *v.* Com., 80 Va. 538.

43. Thus where the statute provided: "If any white person shall . . . knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive," etc., and the indictment charged that defendant, a white man, married a negro woman, it was held that it was insufficient to show that the woman was of mixed blood. Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131. But see Linton *v.* State, 88 Ala. 216, 7 So. 261, where the statute provided: "If any white person or negro, or the descendant of any negro, to the third generation inclusive, though one ancestor of each generation was a white person, intermarry," etc., and it was held that an indictment which charged cohabitation with a negro, was sufficiently established by evidence of cohabitation with a mulatto, because by another statute, the term "negro" was made to include the term "mulatto."

44. Moore *v.* State, 7 Tex. App. 608.

45. State *v.* Melton, 44 N. C. 49; Jones *v.* Com., 80 Va. 538.

46. McPherson *v.* Com., 28 Gratt. (Va.) 939.

and admissions of the parties, either at the time of committing the offense or at some previous time.[47] It has been held that proof that defendant's first husband was a white man is inadmissible as tending to show that defendant was recognized as a white woman.[48] The color of the paramour may be shown by profert of his person upon the trial.[49]

VIII. TRIAL AND JUDGMENT.

A. Instructions. An instruction to the jury should present every element of the offense, and no more; and it is proper to refuse to charge contrary to the law or the evidence.[50]

B. Verdict and Judgment. Where the charge is that defendant lived in adultery or fornication with a member of a different race, and there is a failure to prove the parties of different races, it has been held that there can be a conviction as for adultery and fornication between members of the same race.[51]

MISCELLANEOUS. Consisting of a mixture; diversified; promiscuous.[1]

MISCHIEF. See MALICIOUS MISCHIEF.

MISCHIEVOUS PROPENSITY. See ANIMALS.

MISCONCEPTION. Erroneous conception; false opinion; misunderstanding.[2]

MISCONDUCT. In usual parlance, a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand.[3] (Misconduct: Of Administrator or Executor, see EXECUTORS AND ADMINISTRATORS. Of Arbitrator, see ARBITRATION AND AWARD. Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Attorney, see APPEAL AND ERROR; ATTORNEY AND CLIENT; CRIMINAL LAW; JUDGMENTS; NEW TRIAL. Of Court, see APPEAL AND ERROR. Of Election Officer or Officers, see ELECTIONS. Of Husband, see CURTESY; DIVORCE. Of Judge, see JUDGES. Of Jury or Jurors, see APPEAL AND ERROR; CRIMINAL LAW; JUDGMENTS; NEW TRIAL; TRIAL. Of Justice of the Peace, see JUSTICES OF THE PEACE. Of Officer in General, see OFFICERS. Of Parent, see PARENT AND CHILD. Of Party, see JUDGMENTS; NEW TRIAL. Of Partner, see PARTNERSHIP. Of Sheriff or Constable, see SHERIFFS AND CONSTABLES. Of Wife, see DIVORCE. Of Witness, see NEW TRIAL. See CONTEMPT.)

MISCONTINUANCE. See DISCONTINUANCE.

MISDELIVERY.[4] See CARRIERS.

MISDEMEANOR. See CRIMINAL LAW.[5] (Misdemeanor: Arrest For Without Warrant, see ARREST. Bail For, see BAIL. Compounding, see COMPOUNDING FELONY. Conspiracy to Commit, see CONSPIRACY. Conviction of on Charge of Felony, see INDICTMENTS AND INFORMATIONS. Distinction Between Misdemeanor

47. Parker *v.* State, 118 Ala. 655, 23 So. 664 (where defendant, a negro, was indicted for intermarrying with a white woman, and it was held competent for the state to prove that defendant and his brother, when applying for a license for the marriage, stated that the woman was a "creole," since that statement would be an admission by defendant that he was a negro or mulatto); Bell *v.* State, 33 Tex. Cr. 163, 25 S. W. 769.

48. Bell *v.* State, 33 Tex. Cr. 163, 25 S. W. 769.

49. Linton *v.* State, 88 Ala. 216, 7 So. 261.

50. McAlpine *v.* State, 117 Ala. 93, 23 So. 130; Linton *v.* State, 88 Ala. 216, 7 So. 261, both of which are referred to *supra*, IV, B, 2, note 11.

51. Bryant *v.* State, 76 Ala. 33.

1. Century Dict.

"Miscellaneous class" see Edwards *v.* Great Western R. Co., 11 C. B. 588, 648, 21 L. J. C. P. 72.

"Miscellaneous expenses" see Dunwoody *v.* U. S., 22 Ct. Cl. 269, 280.

2. Century Dict. See also Safe Deposit, etc., Co. *v.* Berry, 93 Md. 560, 570, 49 Atl. 401, construing the term when used in a hypothetical question.

3. Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386, 394, where the term is distinguished from "carelessness," the court saying: "Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite."

It implies a wrongful intention, and not a mere error of judgment. Smith *v.* Cutler, 10 Wend. (N. Y.) 589, 590, 25 Am. Dec. 580; U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463, 468.

4. See Forbes *v.* Boston, etc., R. Co., 133 Mass. 154, 156.

5. See 12 Cyc. 131 *et seq.*, where felonies and misdemeanors are defined and distinguished.

and Felony, see CRIMINAL LAW; INDICTMENTS AND INFORMATIONS. In Office, see OFFICERS. Extradition For, see EXTRADITION (INTERNATIONAL); EXTRADITION (INTERSTATE). Fine For, see FINES. Joinder of Counts For Felony and Misdemeanor, see INDICTMENTS AND INFORMATIONS. Merger of Civil Injury, see ACTIONS. Presence of Accused in Prosecution For, see CRIMINAL LAW. Principals, Accessaries, and Accomplices in Commission of, see CRIMINAL LAW. Punishment For, see CRIMINAL LAW. Right to Trial by Jury, see JURIES. Violation of Municipal Ordinance, see MUNICIPAL CORPORATIONS. Waiver of Right to Trial by Jury, see JURIES.)

MISDIRECTION OF JURY. See CRIMINAL LAW; TRIAL.

MIS-DOCERE. Mis-teaching, *i. e.* to teach amiss.[6]

MISERA EST SERVITUS, UBI JUS EST VAGUM AUT INCERTUM. A maxim meaning "It is a wretched state of slavery which subsists where the law is vague or uncertain."[7]

MISERICORDIA DOMINI REGIS EST QUA QUIS PER JURAMENTUM LEGALIUM HOMINUM DE VICINETO LATENUS AMERCIANDUS EST, NE ALIQUID DE SUO HONORABILI CONTENEMENTO AMITTAT. A maxim meaning "The mercy of our lord the king is that every one should be amerced by a jury of good men from his immediate neighborhood, lest he should lose any part of his own honorable tenement."[8]

MISFEASANCE.[9] The improper doing of an act which a person might lawfully do;[10] a wrongful and injurious exercise of lawful authority, or the doing of the lawful act in an unlawful manner;[11] the performance of an act which might lawfully be done in an improper manner, by which another person receives injury;[12] default in not doing a lawful act in a proper manner, or omitting to do it as it should be done;[13] in law, a trespass; a wrong done; also the improper performance of some lawful act.[14] (See MALFEASANCE, and Cross-References Thereunder.)

MISFORTUNE. Ill luck; ill fortune; calamity; evil or cross-accident;[15] any instance of adverse fortune; an unlucky accident; a calamity, mishap, or mischance.[16] (Misfortune: As Ground For New Trial, see CRIMINAL LAW; TRIAL.

6. For example as used in the Latin phrase *"Presbyter populum non mis-doceat."* Lovett *v.* Pell, 22 Wend. (N. Y.) 369, 376.

7. Black L. Dict. [*citing* Broom Leg. Max. 150].

8. Morgan Leg. Max.

9. **Distinguished from "nonfeasance"** see Gregor *v.* Cady, 82 Me. 131, 136, 19 Atl. 108, 17 Am. St. Rep. 466; Minkler *v.* State, 14 Nebr. 181, 183, 15 N. W. 330.

10. Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741; Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 443, 27 N. Y. Suppl. 499.

Misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as, for instance, when he does not exercise that care which a due regard to the rights of others may require. Ellis *v.* McNaughton, 76 Mich. 237, 242, 42 N. W. 1113, 15 Am. St. Rep. 308; Lough *v.* Davis, 30 Wash. 204, 215, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802.

A servant's careless or negligent act is called a "misfeasance." In its nature it is or becomes a trespass. Cincinnati, etc., R. Co. *v.* Robertson, 115 Ky. 858, 860, 74 S. W. 1061, 25 Ky. L. Rep. 265 [*citing* Murray *v.* Usher, 117 N. Y. 542, 23 N. E. 564; Burns *v.* Pethcal, 75 Hun (N. Y.) 442, 27 N. Y. Suppl. 499].

11. Dudley *v.* Flemingsburg, 115 Ky. 5, 9, 72 S. W. 327, 24 Ky. L. Rep. 1804, 103 Am. St. Rep. 253, 60 L. R. A. 575.

12. Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 69, 60 N. E. 890; Com. *v.* Williams, 79 Ky. 42, 47, 42 Am. Rep. 204; People *v.* Auburn, 85 Hun (N. Y.) 601, 608, 33 N. Y. Suppl. 165.

13. Coite *v.* Lynes, 33 Conn. 109, 114; Minkler *v.* State, 14 Nebr. 181, 183, 15 N. W. 330; Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 231, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439.

14. Imperial Dict. [*citing* Wharton L. Lex., and *quoted* in People *v.* Auburn, 85 Hun (N. Y.) 601, 608, 33 N. Y. Suppl. 165].

15. Anthony *v.* Karbach, 64 Nebr. 509, 512, 90 N. W. 243, 97 Am. St. Rep. 662. See also Ahearn *v.* Mann, 63 N. H. 330, 331; Wadleigh *v.* Eaton, 59 N. H. 574; Holton *v.* Olcott, 58 N. H. 598, 599; *In re* Moulton, 50 N. H. 532, 537; *In re* French, 17 N. H. 472, 475.

"Accident, mistake, or misfortune" see Couillard *v.* Seaver, 64 N. H. 614, 9 Atl. 724.

16. Ennis *v.* Fourth St. Bldg. Assoc., 102 Iowa 520, 522, 71 N. W. 426 [*citing* Standard Dict.].

As Ground For Opening or Vacating Judgment, see JUDGMENTS. Homicide by, see HOMICIDE. See also ACCIDENT; ACTIONS; ACT OF GOD; INEVITABLE ACCIDENT; IRRESISTIBLE SUPERHUMAN CAUSE.)

MISJOINDER. The improper joining together of parties to a suit as plaintiffs or defendants, or of different causes of action.[17] (Misjoinder: Of Actions — Generally, see JOINDER AND SPLITTING OF ACTIONS; PLEADING; Ground For Arrest of Judgment, see JUDGMENTS; In Admiralty, see ADMIRALTY. Of Counter-Claims, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Of Counts, see PLEADING. Of Errors, see APPEAL AND ERROR. Of Offenses, see INDICTMENTS AND INFORMATIONS. Of Parties, see ADMIRALTY; APPEAL AND ERROR; EQUITY; INDICTMENTS AND INFORMATIONS; PARTIES.)

MISLAY. To lay in the wrong place; to lay in a place not recollected; to lose.[18] (To Mislay: Goods, see FINDING LOST GOODS. Instrument, see LOST INSTRUMENTS. Pleading, see INDICTMENTS AND INFORMATIONS; PLEADING. Record, see RECORDS.)

MISMANAGEMENT. Wrong or bad management.[19] (See MANAGEMENT.)

MISNOMER. A mistake in a name, the giving an incorrect name to a person in a pleading, deed, or other instrument.[20] (Misnomer: Generally, see NAMES. In Indictment or Information, see INDICTMENTS AND INFORMATIONS. In Judgment, see JUDGMENTS. In Pleading — Generally, see PARTIES; PLEADING; Ground For Dismissal, see DISMISSAL AND NONSUIT; Harmless Error, see APPEAL AND ERROR; Plea in Abatement For, see CRIMINAL LAW. In Process, see FALSE IMPRISONMENT; PROCESS. In Verdict, see TRIAL. Of Juror, see CRIMINAL LAW; JURIES. Of Offense, see BAIL.)

MISPLEADING. According to its etymology and natural meaning, pleading amiss, or pleading wrongly;[21] in its immediate and more usual sense, it signifies essential errors or omissions in defendant's defense; and it is also expressly defined to comprehend any mistakes or omissions, essential either to the action or defense, occurring either in the declaration or the subsequent pleadings.[22] (See, generally, PLEADING.)

MISPRISION. The act of misprising; MISAPPREHENSION, *q. v.*; MISCONCEPTION, *q. v.*; MISTAKE, *q. v.*[23] (See, generally, COMPOUNDING FELONY; CRIMINAL LAW; TREASON.)

MISREADING. See FRAUD.

MISREPRESENTATION. See FALSE PRETENSES; FRAUD.

MISS. A term commonly used to designate a woman who has never been married.[24]

MISSED HOLE. As used in connection with blasting, a hole charged with dynamite which has failed to explode.[25]

MISSION. An association which sends teachers into heathen countries to

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Like its synonym, "casualty" or "accident," "misfortune" may proceed or result from negligence or other cause, known or unknown. McCarty *v.* New York, etc., R. Co., 30 Pa. St. 247, 251.

"Misfortune" as used in a guaranty see Grant *v.* Hotchkiss, 15 How. Pr. (N. Y.) 292, 293.

17. Black L. Dict.

18. Webster Dict. [*quoted* in Shehane *v.* State, 13 Tex. App. 533, 535].

19. Webster Int. Dict. See Brooks *v.* Blanshard, 1 Cromp. & M. 779, 793, 2 L. J. Ex. 275, 3 Tyrw. 844, where this term is distinguished from "inattention."

20. Black L. Dict. See also State *v.* Timmens, 4 Minn. 325, 331; Petrie *v.* Woodworth, 3 Cai. (N. Y.) 219.

21. Lovett *v.* Pell, 22 Wend. (N. Y.) 369, 376 [*quoted* in Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462, 466, 64 N. E. 1011].

"Misjoinder of issue" compared with "mispleading" in Lovett *v.* Pell, 22 Wend. (N. Y.) 369, 377.

22. Lovett *v.* Pell, 22 Wend. (N. Y.) 369, 376 [*quoted* in Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462, 466, 64 N. E. 1011].

23. Merrill *v.* Miller, 28 Mont. 134, 145, 72 Pac. 423.

Failure to prevent a felony was at common law a misdemeanor, called "misprision of felony." Carpenter *v.* State, 62 Ark. 286, 308, 36 S. W. 900.

24. State *v.* Buck, 43 Mo. App. 443, 447.

25. Stearns *v.* Reidy, 33 Ill. App. 246, 247 [*affirmed* in 135 Ill. 119, 124, 25 N. E. 762].

christianize, civilize, and educate the natives.[26] (See, generally, RELIGIOUS SOCIETIES.)

MISSIONARY. A person who is sent upon a mission, especially one sent to propagate religion.[27]

MISSISSIPPI RIVER. The largest river of North America.[28]

MISS MAILS. As used in a contract to carry the mails, wherein the contractor agrees to be responsible for any miss mails which occur on the part of the mail route on which he has to transport the mails, a term which means that the parties were stipulating for the accidental or casual omissions to deliver the mail within the prescribed period.[29] (See, generally, POST-OFFICE.)

MISSPELLING. See NAMES.

MISSPEND. To spend amiss; to make a bad or useless expenditure of; to waste.[30]

MISTAKE.[31] An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or a belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such thing which has not existed;[32] some intentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence;[33] in a legal sense, the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done;[34] an erroneous mental condition, conception, or conviction

26. Domestic, etc., Missionary Soc.'s Appeal, 30 Pa. St. 425, 435, where it is said: "'Mission' is well understood in common language. For more than forty years, the different American churches have been engaged in establishing and maintaining missions in various parts of the heathen world. . . . The purpose is to civilize, christianize, and educate the natives of those countries where the missions are established. This is accomplished by preaching, by oral instructions, and by schools. . . . The whole machinery of the work at the selected spot in a foreign land is called a 'mission.' It is, in fine, a christian school."

27. Webster Dict. [*quoted* in *In re* Fuller, 75 Wis. 431, 436, 44 N. W. 304].

The term missionary society does not include a society organized for the purpose of carrying on medical or other colleges, or any institution whatever which is primarily and exclusively educational, and especially one in which a compensation is demanded for the instruction furnished. People *v.* Cothran, 27 Hun (N. Y.) 344, 345.

28. Century Dict.

The words "Mississippi river" will be held to include only that body or stream of water which is popularly known as that river, and will not include lakes and streams which, although connected with the main body of water known as the Mississippi river, yet form no part of the river proper. State *v.* Haug, 95 Iowa 413, 418, 64 N. W. 398, 29 L. R. A. 390.

29. Davis *v.* Wade, 4 Ala. 208, 211.

30. Century Dict.

As used in a statute providing a penalty for all persons who misspend what they earn and do not provide for the support of themselves and their families, "misspend" does not mean a morally improper expenditure of the earnings, but it is the appropriation of the earnings to other purposes than the support of their families, with an intention to leave their families unprovided for. Misspending money is spending it differently from what he ought. State *v.* Ransell, 41 Conn. 433, 441.

31. The term has a technical meaning.—Matador Land, etc., Co. *v.* State, (Tex. Civ. App. 1899) 54 S. W. 256, 258.

Distinguished from: Accident (see Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 504, 10 N. E. 29; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 116 Fed. 1, 7, 53 C. C. A. 513); error (see Russell *v.* Colyar, 4 Heisk. (Tenn.) 154, 158); forgetfulness (see Barrow *v.* Isaacs, [1891] 1 Q. B. 417, 420, 55 J. P. 517, 60 L. J. Q. B. 179, 64 L. T. Rep. N. S. 686, 39 Wkly. Rep. 338); fraud (see Matador Land, etc., Co. *v.* State, (Tex. Civ. App. 1899) 54 S. W. 256, 258); ignorance (see State *v.* Boyd, 35 S. C. 233, 243, 14 S. E. 496); latent ambiguity (see Donehoo *v.* Johnson, 120 Ala. 438, 445, 24 So. 888); misrepresentation (see Chamberlain *v.* New Hampshire F. Ins. Co., 55 N. H. 249, 264).

32. Peasley *v.* McFadden, 68 Cal. 611, 616, 10 Pac. 179. See also Pomeroy Eq. § 854 [*quoted* in State *v.* Boyd, 35 S. C. 233, 243, 14 S. E. 496].

33. Allen *v.* Elder, 76 Ga. 674, 677, 2 Am. St. Rep. 63; Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5 [*citing* Anderson L. Dict.]; 1 Story Eq. Jur. § 110 [*quoted* in Vose *v.* Bradstreet, 27 Me. 156, 162; Russell *v.* Colyar, 4 Heisk. (Tenn.) 154, 182]. See also Ward *v.* Philadelphia, 3 Pa. Cas. 233, 238, 6 Atl. 263.

The term "mistake," in the sense of a court of equity, is that result of ignorance of law or of fact which has so misled a person as to cause him to commit that which, if he had not been in error, he would not have done. Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 504, 10 N. E. 29; Bruse *v.* Nelson, 35 Iowa 157, 160; Christy *v.* Scott, 31 Mo. App. 331, 337.

34. Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5; Cummins *v.* Bulgin, 37 N. J. Eq. 476, 477.

induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time;[35] that result of ignorance of law or of fact which has misled a person to commit that which if he had not been in error he would not have done.[36] (Mistake: Affecting Acquisition or Loss of Property — Abandonment, see ABANDONMENT; Accession, see ACCESSION; Adverse Possession, see ADVERSE POSSESSION; Annexation of Fixtures, see FIXTURES; Boundary Located by, see BOUNDARIES. Affecting Custom or Usage, see CUSTOMS AND USAGES. Affecting Estoppel, see ESTOPPEL. Affecting Liability For — Conversion, see TROVER AND CONVERSION; False Imprisonment, see FALSE IMPRISONMENT; Negligence, see NEGLIGENCE; Trespass, see TRESPASS. Affecting Liability of Carrier, see CARRIERS; SHIPPING. Affecting Limitation of Action, see LIMITATIONS OF ACTIONS. Affecting Matters of Practice and Validity and Regularity of Judicial Proceeding — Election of Remedy, see ELECTION OF REMEDIES; Failure to File Record on Appeal in Time, see APPEAL AND ERROR; Ground For Equitable Relief Against Judgment, see JUDGMENTS; JUSTICES OF THE PEACE; Ground For New Trial — In Civil Action, see NEW TRIAL; In Criminal Prosecution, see CRIMINAL LAW; In Directions For Return of Writ of Attachment, see ATTACHMENT; In Indictment or Information, see INDICTMENTS AND INFORMATIONS; In Jury Panel, see JURY; In Pleading, see PLEADING; In Statement For Mechanic's Lien, see MECHANICS' LIENS; In Verdict — In Civil Action, see TRIAL; In Criminal Prosecution, see CRIMINAL LAW; HOMICIDE. Affecting Validity of Particular Acts or Contracts — Accord and Satisfaction, see ACCORD AND SATISFACTION; Account, see ACCOUNTS AND ACCOUNTING; Acknowledgment, see ACKNOWLEDGMENTS; Alteration of Instrument, see ALTERATIONS OF INSTRUMENTS; Assignment, see ASSIGNMENTS; Attornment, see LANDLORD AND TENANT; Award, see ARBITRATION AND AWARD; Bill of Lading, see CARRIERS; Bills and Notes, see COMMERCIAL PAPER; Bond in General, see BONDS; Bond of Guardian, see GUARDIAN AND WARD; Certificate of Acknowledgment, see ACKNOWLEDGMENT; Charters of Vessels, see SHIPPING; Compromise and Settlement, see COMPROMISE AND SETTLEMENT; Contract in General, see CONTRACTS; Contract of Broker, see BROKERS; Contract of Sale, see VENDOR AND PURCHASER; Conveyance in Fraud of Creditors, see FRAUDULENT CONVEYANCES; Deed, see DEEDS; Express Trust, see TRUSTS; Gift, see GIFTS; Guaranty, see GUARANTY; Insurance Contracts and Policies, see FIRE INSURANCE; LIFE INSURANCE, and other Insurance Titles; Judgment, see JUDGMENTS; Lease, see LANDLORD AND TENANT; Marriage, see MARRIAGE; Mortgage, see MORTGAGES; Partnership Agreement, see PARTNERSHIP; Release, see RELEASE; Sale, see SALES; VENDOR AND PURCHASER. As Defense to Criminal Prosecution, see CRIMINAL LAW. As Defense to Particular Actions — Against Bona Fide Purchaser of Negotiable Instrument, see COMMERCIAL PAPER; For Divorce, see DIVORCE; For Specific Performance, see SPECIFIC PERFORMANCE; On Bail-Bond, see BAIL; On Subscription to Corporate Stock, see CORPORATIONS. As Excuse For Laches, see EQUITY. As Ground For Opening or Vacating Judgment, see JUDGMENTS. As Ground or Cause For — Action For Money Paid by, see MONEY RECEIVED; PAYMENT; Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS; Equitable Relief, see EQUITY; Opening, Vacating, or Setting Aside — Account Stated, see ACCOUNTS AND ACCOUNTING; Execution Sale, see EXECUTIONS; Judgment, see JUDGMENTS; JUSTICES OF THE PEACE; Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS; Settlement, see COMPROMISE AND SETTLEMENT. As to Age of Female, see ABDUCTION. Confusion of Goods, see CONFUSION OF GOODS. Entries and Claims on Public Lands, see PUBLIC LANDS. Fences Placed by, see FENCES. Improvements on Lands of Another by, see EJECTMENT; IMPROVEMENTS. In Award, see ARBITRATION AND AWARD. In Ballot, see ELECTIONS. In

35. 2 Pomeroy Eq. Jur. § 839 [*quoted* in Lott *v.* Kaiser, 61 Tex. 665, 669].

36. 1 Story Eq. Jur. § 111 [*quoted* in Christy *v.* Scott, 31 Mo. App. 331, 337].

Name, see MISNOMER. In Payment, see PAYMENT. In Pleading, see PLEADING. In Statute, see STATUTES. In Telegram, see TELEGRAPHS AND TELEPHONES. Recovery — Of Chattel Delivered by, see DETINUE; Of Money Paid by, see MONEY RECEIVED; PAYMENT. Reformation of Instrument, see REFORMATION OF INSTRUMENTS. Relating to Rules of Evidence, see EVIDENCE. Wife's Property Conveyed to Husband by, see HUSBAND AND WIFE.)

MISTAKEN CHARITABLE USE. One which is repugnant to that sound constitutional policy which controls the interest, wills, and wishes of individuals when they clash with the interest and safety of the whole community.[37] (See, generally, CHARITIES. See also INDEFINITE.)

MISTAKE OF FACT. A mistake which takes place when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist;[38] one not caused by the neglect of a legal duty on the part of the person making the mistake;[39] an unconscious ignorance or forgetfulness of a fact past or present material to the contract;[40] a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in an unconscious ignorance or forgetfulness of a fact past or present material to the contract or belief in the present existence of a thing material to the contract which does not exist or in the past existence of a thing which has not existed.[41] (See MISTAKE.)

MISTAKE OF LAW. A mistake which occurs when a person having full knowledge of facts comes to an erroneous conclusion as to their legal effect.[42] (See MISTAKE.)

MISTERY. A trade or calling.[43] (See MYSTERY.)

MISTREAT. To treat badly; to maltreat; to ABUSE,[44] *q. v.*

MISTRESS.[45] A woman who illicitly occupies the place of a wife.[46]

MISTRIAL. An erroneous trial on the ground of some defect in the persons trying;[47] an erroneous, invalid, or nugatory trial; a trial which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite.[48] (Mistrial: In Civil Action, see NEW

37. Latter-Day Saints *v.* U. S., 136 U. S. 1, 55, 10 S. Ct. 792, 34 L. ed. 481.

38. Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5. See also Drake *v.* Wild, 70 Vt. 52, 59, 39 Atl. 248.

39. Cal. Civ. Code, § 1577 [*quoted* in San Diego Land, etc., Co. *v.* La Presa School Dist., 122 Cal. 98, 100, 54 Pac. 528]. To the same effect see Simmons *v.* Looney, 41 W. Va. 738, 742, 24 S. E. 677.

The term includes a mistake of foreign laws. N. D. Rev. Codes (1899), §§ 3853, 3855; Okla. Rev. St. (1903) § 750; S. D. Civ. Code (1903), §§ 1206, 1208.

40. Cal. Civ. Code, § 1577 [*quoted* in White *v.* Stevenson, 144 Cal. 104, 110, 77 Pac. 828].

To say of a testator that he acted under a "mistake of fact" as to the existence of an heir at law is the equivalent of saying that he acted in ignorance of such existence. Young *v.* Mallory, 110 Ga. 10, 12, 35 S. E. 278.

41. 2 Pomeroy Eq. Jur. § 839 [*quoted* in Purvines *v.* Harrison, 151 Ill. 219, 224, 37 N. E. 705].

42. Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5 [*citing* Anderson L. Dict.]; Davis *v.* Pryor, 3 Indian Terr. 396, 407, 58 S. W. 660; Hurd *v.* Hall, 12 Wis. 112, 125. See also Drake *v.* Wild, 70 Vt. 52, 39 Atl. 248.

Distinguished from ignorance of law see Culbreath *v.* Culbreath, 7 Ga. 64, 70, 50 Am. Dec. 375; Jordan *v.* Stevens, 51 Me. 78, 80, 81 Am. Dec. 556; Alabama, etc., R. Co. *v.* Jones, 73 Miss. 110, 121, 19 So. 105, 55 Am. St. Rep. 488; Champlin *v.* Laytin, 18 Wend. (N. Y.) 407, 423, 31 Am. Dec. 382; Hall *v.* Reed, 2 Barb. Ch. (N. Y.) 500, 505; Munroe *v.* Long, 35 S. C. 354, 357, 14 S. E. 824, 28 Am. St. Rep. 851 [*quoted* in Brock *v.* O'Dell, 44 S. C. 22, 41, 21 S. E. 976]; Lawrence *v.* Beaubien, 2 Bailey (S. C.) 623, 649, 23 Am. Dec. 155.

43. Black L. Dict.

44. Century Dict.

"Mistreating with violence" see High *v.* State, 26 Tex. App. 545, 573, 10 S. W. 238, 8 Am. St. Rep. 488.

45. In England the proper style of the wife of an esquire or gentleman. Black L. Dict.

46. Century Dict.

Mistress.—"Mistress," as used in a statute prohibiting unlawful cohabitation with a mistress, etc., does not include a pupil who allows her teacher during a short period of time to commit a few acts of sexual intercourse with her openly in the schoolroom. Brown *v.* State, (Miss. 1890) 8 So. 257.

47. Bouvier L. Dict. [*quoted* in Wilbridge *v.* Case, 2 Ind. 36, 37].

48. Black L. Dict.

TRIAL; TRIAL. In Criminal Prosecution — In General, see CRIMINAL LAW; Affecting Former Jeopardy, see CRIMINAL LAW.)

MISUSE. To use amiss.[49] (See ABUSE; MISUSER.)

MISUSER. An abuser of any liberty or benefit;[50] abuse of an office or franchise.[51] (Misuser: Of Corporate Franchise, see CORPORATIONS; MUNICIPAL CORPORATIONS; QUO WARRANTO. See also ABUSE; MISUSE.)

MITIGATE. To reduce in amount or degree.[52] (See also MITIGATING CIRCUMSTANCES; MITIGATION.)

MITIGATING CIRCUMSTANCES. Such as do not amount to a justification or excuse of the offense or act in question but may properly be considered in mitigation of the punishment[53] or damages.[54] (See also MITIGATE; MITIGATION.)

MITIGATION. Diminution in degree, amount, or severity; moderation; a reduction in punishment or penalty.[55] (Mitigation: Of Damages, see DAMAGES and Cross References Thereunder. Of Punishment of Crime — Generally, see CRIMINAL LAW; On Restitution of Property Stolen, see LARCENY; Under Pardoning Power, see PARDON. Pleading Matters in Mitigation, see PLEADING.)

MITIORES PŒNÆ NOBIS SEMPER PLACUERE. A maxim meaning "It is more pleasing to the law to inflict a light than a severe punishment."[56]

MITIUS IMPERANTI MELIUS PARETUR. A maxim meaning "The more mildly one commands, the better is he obeyed."[57]

MITTIMUS. A warrant by which a justice of the peace commits a defendant to prison;[58] a precept or warrant granted by a justice for committing to prison a party charged with crime; a warrant of commitment to prison;[59] a precept in writing, issuing from a court or magistrate, directed to the sheriff or other officer, commanding him to convey to the prison the person named therein, and to the jailer, commanding him to receive and safely keep such person until he shall be delivered by due course of law;[60] a writ used in sending a record or its tenor

A "mistrial" equivalent to no trial.— Baird *v.* Chicago, etc., R. Co., 61 Iowa 359, 368, 13 N. W. 731, 16 N. W. 207.

Discharge of jury.— The term "mistrial" is aptly applied to a case in which a jury is discharged without a verdict. Fisk *v.* Henarie, 32 Fed. 417, 427, 13 Sawy. 38.

Trial without an issue is a mistrial whether the judgment is for plaintiff or defendant. Wilbridge *v.* Case, 2 Ind. 36, 37.

Unauthorized trial of a criminal case without a jury is a mistrial whether defendant is convicted or acquitted. State *v.* Mead, 4 Blackf. (Ind.) 309, 30 Am. Dec. 661.

49. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287, 318.

"Misuse" of corporate franchises may be defined as any positive act in violation of the charter or in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287, 318; Baltimore *v.* Pittsburg, etc., R. Co., 3 Pittsb. (Pa.) 20, 23.

50. English L. Dict.

51. Black L. Dict. [*citing* 2 Blackstone Comm. 153].

52. Century Dict.

Facts tending to "mitigate" plaintiff's damages mean such facts as tend to disprove malice, and so diminish or reduce the punitive or exemplary damages. Wandell *v.* Edwards, 25 Hun (N. Y.) 498, 500.

53. Black L. Dict.; Bouvier L. Dict. See also Lancaster *v.* State, 91 Tenn. 267, 287, 18 S. W. 777.

54. Black L. Dict.; Bouvier L. Dict. See also Wandell *v.* Edwards, 25 Hun (N. Y.) 498, 500; Heaton *v.* Wright, 10 How. Pr. (N. Y.) 79, 82.

Such facts as tend to disprove malice.— Morse *v.* Press Pub. Co., 63 N. Y. App. Div. 61, 64, 71 N. Y. Suppl. 348 [*citing* Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270]; Gorton *v.* Keeler, 51 Barb. (N. Y.) 475, 481.

55. English L. Dict.

56. Morgan Leg. Max.

57. Burrill L. Dict. [*citing* 3 Inst. 24].

58. Worcester Dict. [*quoted* in Saunders *v.* U. S., 73 Fed. 782, 786].

59. Webster Int. Dict. [*quoted* in Saunders *v.* U. S., 73 Fed. 782, 786].

The ordinary employment of the term "mittimus" is merely a matter of brevity. The mittimus must be in writing, and under hand and seal of the court. It must be properly directed, and must set forth the crime alleged. In Hale P. C., the mittimus is constantly styled a "warrant." Saunders *v.* U. S., 73 Fed. 782, 786.

60. Black L. Dict. 781 [*citing* Mass. Pub. St. (1882) p. 1293].

A "mittimus" after conviction is, in criminal cases, similar to an execution after judgment in a civil case. It is final process. It is carrying into effect the judgment of the court. Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262.

In strictness the term imports that the party to be committed is in the presence of the court, and within the reach of the officer. Connolly *v.* Anderson, 112 Mass. 60, 62.

from one court to another.[61] (Mittimus: After Conviction of Crime, see CRIMINAL LAW. By Justice or Magistrate, see JUSTICES OF THE PEACE. Commitment—For Contempt, see CONTEMPT; For Costs, see COSTS; For Fine, see FINES; Of Witness on Failure to Give Undertaking, see WITNESSES; On Arrest in Civil Action, see ARREST. See also COMMITMENT.)

MITTO. To forbear.[62]

MIXED. Formed by mixing; united; mingled; blended.[63] (See, generally, CUSTOMS DUTIES; INTOXICATING LIQUORS.)

MIXED ACTION. See ACTIONS.

MIXED BLOOD. As the term is used in its ordinary signification, a person in whose veins is some portion of African blood.[64] (See COLORED PERSONS; MULATTO; NEGRO; and, generally, MARRIAGE; MISCEGENATION.)

MIXED CONDITION. A condition that depends on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event.[65]

MIXED INTERPRETATION. Where the words, although they do express a person's intention when they are rightly understood, yet are in themselves of doubtful meaning, and we are forced to have recourse to conjectures to find out in what sense they are used.[66] (See CONSTRUCTION; INTERPRETATION; LITERAL INTERPRETATION.)

MIXED JURY. See JURIES.

MIXED LARCENY. See LARCENY.

MIXED LAWS. A name sometimes given to those which concern both persons and property.[67]

MIXED MARRIAGE. See, generally, MARRIAGE; MISCEGENATION.

MIXED NUISANCE. Nuisances which are both public and private in their effects.[68] (See, generally, NUISANCES.)

MIXED POLICY. As the term is used in marine insurance, a policy on a vessel for a certain designated time, while engaged in voyages at and between certain ports.[69] (See, generally, MARINE INSURANCE.)

MIXED PRESUMPTION. A presumption which consists chiefly of certain inferences which, from their strength, importance, and frequent occurrence, track, as it were, the observations of the law, and they, being constantly recommended by judges and acted on by juries, become in time as familiar to the courts, and occupy nearly as important a place, as a presumption of law itself.[70] (See, generally, EVIDENCE.)

MIXED PROPERTY. Property which is personal in its essential nature, but is invested with certain of the characteristics and features of real property, such as HEIRLOOMS, *q. v.*, tombstones, monuments in a church, and title deeds to an estate.[71] (See, generally, PROPERTY; WILLS.)

61. Black L. Dict. [*citing* Tidd Pr. 745].
62. Buckly *v.* Turner, 1 Mod. 43.
63. Webster Dict.
"Mixed liquor" see State *v.* Bennet, 3 Harr. (Del.) 565, 566; Com. *v.* Morgan, 149 Mass. 314, 315, 21 N. E. 369; State *v.* Townley, 18 N. J. L. 311, 321.
"Mixed materials" see Solomon *v.* Arthur, 102 U. S. 208, 211, 26 L. ed. 147.
64. Hopkins *v.* Bowers, 111 N. C. 175, 178, 16 S. E. 1.
65. La. Civ. Code (1900), art. 2025.
66. Rutherford 2 Inst. 314 [*cited* in Tallman *v.* Tallman, 3 Misc. (N. Y.) 465, 478, 23 N. Y. Suppl. 734].
67. Black L. Dict.
68. Public, because they injure many persons or all the community; and private, in that they also produce special injuries to private rights. Kelly *v.* New York, 6 Misc. (N. Y.) 516, 519, 27 N. Y. Suppl. 164.
69. Wilkins *v.* Tobacco Ins. Co., 30 Ohio St. 317, 339, 27 Am. Rep. 455. See also Da Costa *v.* Firth, 4 Burr. 1966, 1969.
70. Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 59, 11 L. ed. 491.
71. Black L. Dict. [*citing* 2 Blackstone Comm. 428].
"That kind of property which is not altogether real, nor personal, but a compound of both. Heirlooms, tombstones, monuments in a church, and title deeds to an estate are of this nature." Bouvier L. Dict. [*quoted* in Miller *v.* Worrall, 62 N. J. Eq. 776, 780, 48 Atl. 586, 90 Am. St. Rep. 480].
The term "mixed property" in a will in which testator gave all his estate and property, real, personal, and mixed, to a certain

MIXED QUESTION OF LAW AND FACT. One mixed of law and fact.[72] (See, generally, TRIAL.)

MIXED QUESTIONS. A phrase which may mean either those which arise from the conflict of foreign and domestic laws, or questions arising on a trial involving both law and fact.[73]

MIXED TITHES. Tithes taken from secondary, not immediate, produce of the land.[74] (See TITHES.)

MIXED WAR. That which is made on one side by public authority, and on the other by mere private persons;[75] a contest between a nation, as such, and its external enemies coming in the form of pirates, or robbers; associates who act together occasionally, and are not united into civil society.[76] (See, generally, WAR.)

MIXTURE. That which is mixed or mingled; a mass or compound consisting of different ingredients blended together;[77] that which results from mixing, a mixed mass, body, or assembly; a compound or combination of different ingredients, parts, or principles.[78] (See COMPOUND; COMPOUNDED; MIXED.)

MOB. An assemblage of many people acting in a tumultuous and riotous manner, calculated to put good citizens in fear and endanger their persons and property;[79] a riotous assemblage; a crowd of persons gathered for mischief or attack; a promiscuous multitude of rioters;[80] an unorganized assemblage of many persons intent on unlawful violence;[81] a disorderly crowd; a promiscuous assemblage of rough, riotous persons; a rabble;[82] a tumultuous rout or rabble; a crowd excited to some violent or wrongful act;[83] a turbulent or lawless crowd; a disorderly or riotous gathering or assembly; a rabble, throng;[84] a word which is prac-

beneficiary, in trust to pay over the net income to certain beneficiaries, was construed not to include a leasehold estate, though the testator left no mixed property properly so called. "The language of the will shows that the testator had in view not only the property which he then had, but whatever property he might afterwards acquire during his life, and intended to leave no doubt that it should pass to the trustees, whatever it might be. By the use of the word 'mixed' he removed such doubt. It is not necessary, therefore, to suppose that he used it in any unnatural or unusual sense, for the purpose of designating property which is clearly personalty." Minot *v.* Thompson, 106 Mass. 583, 585.

Mixed subjects of property are "such as fall within the definition of things real, but which are attended nevertheless with some of the legal qualities of things personal, as emblements, fixtures, and shares in public undertakings, connected with land. Besides these, there are others which, though things personal in point of definition, are, in respect of some of their legal qualities, of the nature of things real; such as animals *feræ naturæ*, charters and deeds, court rolls and other evidences of the land, together with the chests in which they are contained, ancient family pictures, ornaments, tombstones, coats of armor, with pennons and other ensigns, and especially heirlooms." Wharton L. Lex.

72. Bennett *v.* Eddy, 120 Mich. 300, 306, 79 N. W. 481. Thus the question of probable cause in an action for false imprisonment involves the consideration of what the facts are, and what the reasonable deductions from the facts are, and is hence a mixed question of law and fact.

73. Black L. Dict.

74. As one tenth of the chickens or milk or eggs raised. Abbott L. Dict.

75. Grotius [*quoted* in People *v.* McLeod, 1 Hill (N. Y.) 377, 415, 37 Am. Dec. 328].

76. Rutherforth, bk. 2, c. 9, § 9 [*quoted* in People *v.* McLeod, 1 Hill (N. Y.) 377, 415, 37 Am. Dec. 328].

77. Webster Dict. [*quoted* in Rose *v.* State, 11 Ohio Cir. Ct. 87, 91, 5 Ohio Cir. Dec. 72].

78. Century Dict. [*quoted* in Rose *v.* State, 11 Ohio Cir. Ct. 87, 91, 5 Ohio Cir. Dec. 72].

The phrase "mixture and compound" as used in a statute relative to the adulteration of foods means something resulting from the putting together of parts or ingredients other than as nature has put together in the fruits of the earth, and an article of food which is produced by abstracting from a natural fruit a valuable part is not a compound or mixture. Rose *v.* State, 11 Ohio Cir. Ct. 87, 91, 5 Ohio Cir. Dec. 72.

79. Rapalje & L. L. Dict. [*quoted* in Alexander *v.* State, 40 Tex. Cr. 395, 410, 49 S. W. 229, 50 S. W. 716].

80. Century Dict. [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411].

81. Abbott L. Dict. [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 150, 64 N. Y. Suppl. 411].

82. Alexander *v.* State, 40 Tex. Cr. 395, 411, 49 S. W. 229, 50 S. W. 716.

83. Bouvier L. Dict. [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411].

84. Standard Dict. [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 144, 153, 64 N. Y. Suppl. 411].

tically synonymous with RIOT,[85] *q. v.* (Mob: Confession of Accused Made Under Fear of Mob Violence, see CRIMINAL LAW. Criminal Responsibility of Members For Homicide, see HOMICIDE. Liability For Injuries by Mob — Of Carrier, see CARRIERS; Of County, see COUNTIES; Of Municipal Corporation, see MUNICIPAL CORPORATIONS. See, generally, AFFRAY; RIOT; UNLAWFUL ASSEMBLY. See also MOB VIOLENCE.)

MOBILIA. Movables; movable things; otherwise called *res mobiles.*[86]

MOBILIA NON HABENT SITUM. A maxim meaning "Movables have no *situs* or local habitation."[87]

MOBILIA PERSONAM SEQUUNTUR, IMMOBILIA SITUM. A maxim meaning "Movable things follow the person, immovables their site or locality."[88]

MOBILIA SEQUUNTUR PERSONAM. A maxim meaning "Movables follow the [law of the] person."[89]

MOB VIOLENCE. The infliction of some physical injury on a person by a multitude of people acting in a riotous and unlawful manner.[90] (See MOB.)

MOCK. To deride; to laugh at; to ridicule; to treat with scorn and contempt.[91]

MODE. The customary manner; prevailing style;[92] the manner in which a thing is done.[93] As applied to trials, it means the place as well as the manner of trial.[94]

85. Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411, where it is said that the word "riot" is the more correct term.

Defined in connection with "lynching" see Caldwell *v.* Cuyahoga County Com'rs, 15 Ohio Cir. Ct. 167, 168, 8 Ohio Cir. Dec. 56.

86. Black L. Dict.

87. Black L. Dict.

Applied in: Wyeth Hardware, etc., Co. *v.* Lang, 54 Mo. App. 147, 153 [*affirmed* in 127 Mo. 242, 29 S. W. 1010, 48 Am. St. Rep. 626, 27 L. R. A. 656]; Holmes *v.* Remsen, 4 Johns. Ch. (N. Y.) 460, 472, 8 Am. Dec. 581; Hog *v.* Lashley, 6 Bro. P. C. 577, 578, 2 Eng. Reprint 1278.

88. Burrill L. Dict.

89. Black L. Dict. [*citing* Broom Leg. Max. 522; Story Confl. L. § 378].

Applied in: Fisher *v.* Rush County, 19 Kan. 414, 415; Wilcox *v.* Ellis, 14 Kan. 588, 602, 19 Am. Rep. 107; Baltimore City App. Tax Ct. *v.* Patterson, 50 Md. 354, 371; Adams *v.* Colonial, etc., Mortg. Co., 82 Miss. 263, 401, 34 So. 482, 100 Am. St. Rep. 633; Plattsburg *v.* Clay, 67 Mo. App. 497, 499; Corn *v.* Cameron, 19 Mo. App. 573, 581; State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450, 453; People *v.* Tax Com'rs, 23 N. Y. 224, 228; People *v.* Barker, 23 N. Y. App. Div. 524, 525, 48 N. Y. Suppl. 553; Hornthal *v.* Burwell, 109 N. C. 10, 13, 13 S. E. 721, 26 Am. St. Rep. 556, 13 L. R. A. 740; Loftus *v.* Farmers, etc., Nat. Bank, 6 Pa. Co. Ct. 340, 344; Lewis' Estate, 10 Kulp (Pa.) 441, 446; Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 205, 26 S. Ct. 36, 50 L. ed. 150; Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 36, 11 S. Ct. 876, 35 L. ed. 613; Blackwood *v.* Reg., 8 App. Cas. 82, 93, 52 L. J. P. C. 10, 48 L. T. Rep. N. S. 441, 31 Wkly. Rep. 645; Duncan *v.* Lawson, 41 Ch. D. 394, 397, 53 J. P. 532, 58 L. J. Ch. 502, 60 L. T. Rep. N. S. 732, 37 Wkly. Rep. 524; Freke *v.* Carbery, L. R. 16 Eq. 461, 466, 21 Wkly. Rep. 835; Hoy *v.* Lashley, 6 Bro. P. C. 577, 578, 2 Eng. Reprint 1278; Thomson *v.* Advocate-Gen., 12 Cl. & F. 1, 26, 9 Jur. 217, 8 Eng. Reprint 1294; Stanley *v.* Bernes, 3 Hagg. Eccl. 373, 435; *In re* Capdevielle, 2 H. & C. 985, 1012, 10 Jur. N. S. 1155, 33 L. J. Exch. 306, 5 New Rep. 15, 12 Wkly. Rep. 1110; Crookenden *v.* Fuller, 5 Jur. N. S. 1222, 1225, 29 L. J. P. & M. 1, 1 L. T. Rep. N. S. 70, 1 Swab. & Tr. 441, 8 Wkly. Rep. 49; Ross *v.* Ross, 25 Can. Sup. Ct. 307, 362; Atty.-Gen. *v.* Newman, 31 Ont. 340, 345, 347 [*affirmed* in 1 Ont. L. Rep. 511]; Jones *v.* Canada Cent. R. Co., 46 U. C. Q. B. 250, 258; Nickle *v.* Douglas, 35 U. C. Q. B. 126, 145; Lambe *v.* Manuel, 18 Quebec Super. Ct. 184, 187.

90. Alexander *v.* State, 40 Tex. Cr. 395, 411, 49 S. W. 229, 50 S. W. 716.

"Murder by mob violence" see Augustine *v.* State, 41 Tex. Cr. 59, 52 S. W. 77, 82, 96 Am. St. Rep. 765.

91. State *v.* Warner, 34 Conn. 276, 279 [*citing* II Kings, c. 2, v. 23].

92. Century Dict. [*quoted* in Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 193, 41 N. Y. Suppl. 289].

93. Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 193, 41 N. Y. Suppl. 289; Hanks Dental Assoc. *v.* International Tooth Crown Co., 194 U. S. 303, 308, 24 S. Ct. 700, 48 L. ed. 989.

The term is said to be broader than "method" or "system." State *v.* Luther, 56 Minn. 156, 160, 57 N. W. 464.

"In the mode" see Jones *v.* U. S., 48 Wis. 385, 406, 4 N. W. 519.

Mode of contesting elections see Glidewell *v.* Martin, 51 Ark. 559, 571, 11 S. W. 882; Campbell *v.* Com., 84 Pa. St. 187, 199; Cathcart *v.* Com., 37 Pa. St. 108, 114.

Mode of the commission of a crime see Campbell *v.* Com., 84 Pa. St. 187, 199; Cathcart *v.* Com., 37 Pa. St. 108, 114.

94. Glidewell *v.* Martin, 51 Ark. 559, 571, 11 S. W. 882.

"Practice, pleadings, and forms and modes of proceeding" see Beardsley *v.* Littell, 2 Fed. Cas. No. 1,185, 14 Blatchf. 102. See

MODEL. A copy or imitation of the thing to be represented;[95] a fac simile in three dimensions, a reproduction in miniature of objects under consideration.[96] (See, generally, PATENTS.)

MODE OF PROCESS. A term which is equivalent to "mode of proceeding" or "mode and manner of proceeding."[97]

MODERATE. Restrained; temperate; keeping within somewhat restricted limits in action or opinion.[98]

MODERATE SPEED. In navigation, a term which means moderate speed, reduced speed, less than usual speed;[99] such speed as would admit of the boat coming to a full stop within her share of the distance that separates her from another steamboat after the latter's whistle is audible;[1] that rate which will permit a vessel to stop, after hearing a fog signal, in time to avoid the vessel which has complied with the law in giving such signal;[2] such a speed as is consistent with the utmost caution, requiring the vessel to be under complete control.[3] (See COLLISION.)

MODERATOR. A chairman or president of an assembly; a person appointed to preside at a popular meeting.[4] As used in administration of the government of the New England towns, the presiding officer at a town meeting called for the transaction of general business.[5]

MODICA CIRCUMSTANTIA FACTI JUS MUTAT. A maxim meaning "A small circumstance attending an act may change the law."[6]

MODIFICATION.[7] A change; an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the

also Nudd *v.* Burrows, 91 U. S. 426, 442, 23 L. ed. 286.

95. State *v.* Fox, 25 N. J. L. 566, 602.

96. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Co., 27 Mont. 288, 324, 70 Pac. 1114, where it is held that a miniature of the underground workings of a mine, showing the shafts, tunnels, drifts, cross-cuts, etc., in all their details, is a model, and does not fall within any definition of the word "map."

97. Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 27, 6 L. ed. 253; U. S. *v.* Martin, 17 Fed. 150, 155, 9 Sawy. 90; U. S. *v.* Rundlett, 27 Fed. Cas. No. 16,208, 2 Curt. 41, 44. See also Duncan *v.* Darst, 1 How. (U. S.) 301, 306, 11 L. ed. 139; Koning *v.* Bayard, 14 Fed. Cas. No. 7,924, 2 Paine 251.

98. Century Dict.

"Moderate cash value" per acre as used in a statute providing for the assessment of taxes on farm lands see Dean *v.* Gleason, 16 Wis. 1, 17.

"On moderate terms" in an order for goods as a sufficient statement of the price to satisfy the statute of frauds see Ashcroft *v.* Morrin, 6 Jur. 783, 4 M. & G. 450, 43 E. C. L. 236.

99. The Atlanta, 26 Fed. 456, 461; Clare *v.* Providence, etc., Steamship Co., 20 Fed. 535, 536.

The term does not mean a speed of fifteen miles an hour (The Rhode Island, 17 Fed. 554, 557), or twelve knots an hour (The Martello, 39 Fed. 505, 509), or nine or ten miles an hour (Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793, 797).

1. The Lepanto, 21 Fed. 651, 659.

2. The Michigan, 63 Fed. 295, 297.

The term is difficult to define with mathematical precision. The Nacoochee, 137 U. S. 330, 338, 11 S. Ct. 122, 34 L. ed. 687; The Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 135, 22 L. ed. 148; The Saale, 63 Fed. 478, 480, 11 C. C. A. 302 [*citing* The City of New York, 147 U. S. 72, 73, 13 S. Ct. 211, 37 L. ed. 84].

It depends upon the circumstances of the particular case. The Oceanic, 61 Fed. 338, 355; The Normandie, 43 Fed. 151, 156; The Allianca, 39 Fed. 476, 480; The City of New York, 35 Fed. 604, 609; The Blackstone, 3 Fed. Cas. No. 1,473, 1 Lowell 485, 487; Dolner *v.* The Monticello, 7 Fed. Cas. No. 3,971. A moderate speed is not a fixed rate for all vessels, or for all occasions. It has reference to all the circumstances which affect the ability of the steamer to keep out of the way. The State of Alabama, 17 Fed. 847, 952.

3. The Eleanora, 8 Fed. Cas. No. 4,335, 17 Blatchf. 88. It has reference to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other so as to avoid danger. The City of New York, 15 Fed. 624, 628, where it is said that it is at least something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation, and that to continue at full speed until in sight of another vessel is not going at a moderate speed.

4. Black L. Dict.

5. Wheeler *v.* Carter, 180 Mass. 382, 386, 62 N. E. 471.

6. Black L. Dict.

7. Distinguished from "amendment."—"Modification" is not exactly synonymous with "amendment," for the former term denotes some minor changes in the substance of the thing, without reference to its improvement or deterioration thereby, while the latter word imports an amelioration of the thing (as by changing the phraseology of an

subject-matter intact.[8] (Modification: Of Bill of Exceptions — Generally, see APPEAL AND ERROR; In Criminal Prosecution, see CRIMINAL LAW. Of Bill of Exchange or Note, see COMMERCIAL PAPER. Of Contract — Generally, see CONTRACTS; By Custom or Usage, see CUSTOMS AND USAGES; Of Municipality, see MUNICIPAL CORPORATIONS. Of Decision of One Court by Another of Concurrent Jurisdiction, see COURTS. Of Deed of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Guaranty, see GUARANTY. Of Injunction, see INJUNCTIONS. Of Instructions — In Civil Action, see TRIAL; In Criminal Prosecution, see CRIMINAL LAW. Of Judgment or Decree — In General, see EQUITY; JUDGMENTS; Of Appellate Court, see APPEAL AND ERROR; On Appeal From Justice of the Peace, see JUSTICES OF THE PEACE; On Appeal in Admiralty, see ADMIRALTY. Of License in General, see LICENSES. Of Notice of Lis Pendens, see LIS PENDENS. Of Special Interrogatories, see TRIAL. Of Submission to Arbitrators, see ARBITRATION AND AWARD. Of Subscription, see CORPORATIONS; SUBSCRIPTIONS. Power of Judge to Modify Decision of Coördinate Judge, see JUDGES.)

MODIFY.[9] To CHANGE,[10] *q. v.*, or vary, to qualify or reduce.[11] Ordinarily, to change the mode in which a subject is dealt with rather than to change the subject itself;[12] sometimes importing an authority to amend;[13] to substitute.[14] (See MODIFICATION.)

MODUS. An immemorial payment in lieu of tithes.[15]

MODUS DEBET ESSE CERTUS, RATIONABILIS, ET PERANTIQUUS. A maxim meaning "A custom ought to be reasonable, certain, and very ancient."[16]

MODUS DECIMANDI. A particular mode or manner of tithing which custom or prescription has substituted for the ordinary common law mode of rendering tithes in kind.[17]

MODUS DE NON DECIMANDO NON VALET. A maxim meaning "A *modus* (prescription) not to pay tithes is void."[18]

MODUS ET CONVENTIO VINCUNT LEGEM. A maxim meaning "The form of agreement and the convention of parties overrule the law."[19]

instrument, so as to make it more distinct or specific) without involving the idea of any change in substance or essence. Black L. Dict.

Modification of contracts differs from novation, which imports a substitution of a substantially new engagement from the old one. Abbott L. Dict.

8. Black L. Dict.

9. **Distinguished from "equalize" or "discharge"** in State *v.* Ormsby County, 7 Nev. 392, 397.

10. Lucas County *v.* Fulton County, 3 Ohio S. & C. Pl. Dec. 159, 163, 2 Ohio N. P. 47; State *v.* Tucker, 36 Oreg. 291, 301, 61 Pac. 894, 51 L. R. A. 246; State *v.* Lawrence, 12 Oreg. 297, 299, 7 Pac. 116.

11. State *v.* Tucker, 36 Oreg. 291, 301, 61 Pac. 894, 51 L. R. A. 246; State *v.* Lawrence, 12 Oreg. 297, 7 Pac. 116, where it is said: "A power given to modify or abolish implies the existence of the subject-matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers, or duties, purposes or objects, of the subject-matter to be modified, without touching the mode of creation. The word implies no power to create or bring into existence, but only the power to change or vary in some particular an already created or legally existing thing," and is so used in Const. art. 7, § 18, providing that the legislature may modify or abolish grand jurors.

12. Central R., etc., Co.'s Appeal, 67 Conn. 197, 210, 35 Atl. 32.

13. As power to amend a charter of a corporation. Wiley *v.* Bluffton, 111 Ind. 152, 156, 12 N. E. 165.

14. Astor *v.* L'Amoreaux, 4 Sandf. (N. Y.) 524, 538.

15. Manby *v.* Curtis, 1 Price 225, 231.

16. Morgan Leg. Max.

17. Champneys *v.* Buchan, 4 Drew. 104, 107, 62 Eng. Reprint 41.

18. Black L. Dict. [*citing* 2 Blackstone Comm. 31; Lofft 427].

19. Broom Leg. Max.

Applied in: Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 467, 3 S. W. 808, 3 Am. St. Rep. 245; Andrews *v.* Callender, 13 Pick. (Mass.) 484, 491; Mandlebaum *v.* McDonell, 29 Mich. 78, 91, 18 Am. Rep. 61; Ordelheide *v.* Wabash R. Co., 80 Mo. App. 357, 367; Kneettle *v.* Newcomb, 22 N. Y. 249, 252, 78 Am. Dec. 186; Leiter *v.* Beecher, 2 N. Y. App. Div. 577, 581, 37 N. Y. Suppl. 1114; Bowen *v.* Newell, 2 Duer (N. Y.) 584, 596; Thomson *v.* Erskine, 36 Misc. (N. Y.) 202, 203, 73 N. Y. Suppl. 166; Equitable Gen. Providing Co. *v.* Potter, 22 Misc. (N. Y.) 124, 126, 48 N. Y. Suppl. 647; Mass *v.* McEntegart, 21 Misc. (N. Y.) 462, 47 N. Y. Suppl. 673, 27 N. Y. Civ. Proc. 15; For-

MODUS LEGEM DAT DONATIONI. A maxim meaning "Custom gives law to the gift."[20]

M. OF GOSPEL. See D.D.; M.

MOHAMMEDAN. A person who believes in the religion of Mohammed, and in Mohammed as a true prophet.[21]

MOHAMMEDANISM. The religion of those who acknowledge Mohammed to be the true prophet.[22]

MOIETY. A half;[23] half part.[24]

MOLD.[25] A receptacle into which a softer material is injected to take its shape when hardened.[26] (See COIN; COUNTERFEITING.)

MOLESTATION. The act of molesting.[27]

MOLLIE. A term which is sometimes used as a diminutive of "Mary."[28]

MOLLITER MANUS IMPOSUIT. Literally, "He gently laid hands upon." Formal words in the old Latin pleas in actions of trespass and assault where a defendant justified laying hands upon the plaintiff, as where it was done to keep the peace, etc.[29]

MOLTEN. Melted; in a state of fusion or solution; made or produced by means of melting.[30]

MOMENTUM. The quantity of motion in a moving body, being always proportionate to the quantity of matter multiplied into its velocity.[31] In the civil law, an instant; an indivisible portion of time.[32]

MONETA EST JUSTUM MEDIUM ET MENSURA RERUM COMMUTABILIUM, NAM PER MEDIUM MONETÆ FIT OMNIUM RERUM CONVENIENS ET JUSTA ÆSTIMATIO. A maxim meaning "Money is the just medium and measure of commutable things, for by the medium of money a convenient and just estimation of all things is made."[33]

tunato *v.* Patten, 5 Misc. (N. Y.) 234, 238, 25 N. Y. Suppl. 333; Bower *v.* Newell, 12 N. Y. Leg. Obs. 231, 240; East Sugar-Loaf Coal Co. *v.* Wilbur, 5 Pa. Dist. Ct. 202, 204; Harrison *v.* Mora, 20 Phila. (Pa.) 283, 284; Sprague *v.* Dun, 12 Phila. (Pa.) 310, 311; James *v.* Harper, 7 Wkly. Notes Cas. (Pa.) 58, 59; Baltimore, etc., R. Co. *v.* McCullough, 12 Gratt. (Va.) 595, 599; Rowbotham *v.* Wilson, 8 E. & B. 123, 149, 3 Jur. N. S. 1297, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123; Barrett *v.* Bedford, 8 T. R. 602, 605; Doe *v.* Carter, 8 T. R. 57, 60, 4 Rev. Rep. 586; Hamilton Provident, etc., Soc. *v.* Steinhoff, 23 Ont. App. 184, 188; Molson's Ban *v.* McDonald, 2 Ont. App. 102, 108, 1 U. C. Q. B. O. S. 194 [*citing* Cowper *v.* Andrewes, Hob. 54].

20. Black L. Dict. [*citing* Broom Leg. Max. 459; Coke Litt. 19].

21. Hale *v.* Everett, 53 N. H. 9, 82, 16 Am. Rep. 82.

22. Hale *v.* Everett, 53 N. H. 9, 54, 16 Am. Rep. 82.

23. Sutton *v.* Harvey, 24 Tex. Civ. App. 26, 29, 57 S. W. 879.

24. Doe *v.* Fawcet, 3 C. B. 274, 282, 54 E. C. L. 274, construing the term "my moiety of the house."

"One full moiety" see Reed *v.* Williams, 5 Taunt. 257, 14 Rev. Rep. 748.

An inaccurate use of the word is that in which it signifies merely part, share, or portion, whether equal or unequal. Brown L. Dict.

25. The words "mold" and "mould" have the same meaning. In the Century Dictionary it is said the proper spelling is "mold," like gold (which is exactly parallel phonetically), but "mould" has long been in use, and is still commonly preferred in Great Britain. McCarty *v.* U. S., 101 Fed. 113, 115, 41 C. C. A. 242.

26. Rubber-Coated Harness Trimming Co. *v.* Welling, 97 U. S. 7, 10, 24 L. ed. 942.

27. Century Dict.

"Hurt, molested, or restrained" in religious sentiments or persuasions see Frolickstein *v.* Mobile, 40 Ala. 725, 727. See also Thurston *v.* Whitney, 2 Cush. (Mass.) 104, 110.

May import damage only.— Gilbert *v.* Wiman, 1 N. Y. 550, 563, 49 Am. Dec. 359.

28. State *v.* Watson, 30 Kan. 281, 288, 1 Pac. 770.

29. Black L. Dict. [*citing* 3 Blackstone Comm. 21; 1 Chitty Pl. 501, 502].

Applied in: McLeod *v.* Bell, 3 U. C. Q. B. 61, 65.

30. Century Dict.

"Molten metal," as used in an application for a patent claiming that the process of refining iron applied to the art of mixing "molten metal," includes the treatment of all molten metal, whether drawn from furnace or cupola. Cambria Iron Co. *v.* Carnegie Steel Co., 96 Fed. 850, 851, 37 C. C. A. 593.

31. Webster Dict. [*quoted* in American Road Mach. Co. *v.* Pennock, etc., Co., 45 Fed. 252, 253], where it is said: "All revolving wheels possess this quality, proportioned to their weight and velocity; and are capable of use as 'momentum' wheels — the term signifying those whose momentum is utilized in working machinery."

32. Black L. Dict.

33. Black L. Dict.

MONETANDI JUS COMPREHENDITUR IN REGALIBUS QUÆ NUNQUAM A REGIO SCEPTRO ABDICANTUR. A maxim meaning "The right of coining money is comprehended among those royal prerogatives which are never relinquished by the royal scepter."[34]

MONEY.[35] In its most general signification, a representative of value;[36] a medium of payment,[37] of COMMERCE,[38] *q. v.*; and exchange;[39] the circulating medium;[40] a sign which represents the value of all commodities bearing the impress of the authority by which it was issued and made a standard of value;[41] a denomination or designation of value whether represented in the coinage or not;[42] the universal medium or common standard by comparison with which the value of all merchandise may be ascertained.[43] In common acceptation, a generic term,[44] embracing according to the subject-matter of the discourse or writing every species of coin or currency;[45] everything which by consent is made to represent property, and passes as such currently from hand to hand;[46] circulating medium of every description recognized by common consent as a representative of value in effecting exchanges of property or payment of debts;[47] any matter

34. Black L. Dict.

35. "Money at interest," in ordinary parlance, has reference more to money loaned than to interest bearing notes and accounts received for property sold. Wasson *v.* Indianapolis First Nat. Bank, 107 Ind. 206, 212, 8 N. E. 97. See also People *v.* Whartenby, 38 Cal. 461, 465; Hale *v.* Hampshire County Com'rs, 137 Mass. 111, 115.

"Lawful money" see Dorrance *v.* Stewart, 1 Yeates (Pa.) 348, 349.

"Moneyed interests" see Vœgtly *v.* Alleghany School Directors, 1 Pa. St. 330, 332.

"Money of England" see Armstrong *v.* Hemstreet, 22 Ont. 336, 340.

"Moneys due" see Union Co. *v.* Whitely, 15 R. I. 27, 28, 29, 23 Atl. 34.

"Moneys upon mortgages" see Doe *v.* Bennett, 6 Exch. 892, 896.

36. Jones *v.* Overstreet, 4 T. B. Mon. (Ky.) 547, 550; Symonds *v.* Cincinnati, 14 Ohio 147, 183, 45 Am. Dec. 529; Juilliard *v.* Greenman, 110 U. S. 421, 455, 4 S. Ct. 122, 28 L. ed. 204.

Money imports value.— People *v.* Spencer, 27 Misc. (N. Y.) 491, 493, 58 N. Y. Suppl. 1127; State *v.* Hyde, 22 Wash. 551, 568, 61 Pac. 719.

37. Symonds *v.* Cincinnati, 14 Ohio 147, 183, 45 Am. Dec. 529.

38. Jones *v.* Overstreet, 4 T. B. Mon. (Ky.) 547, 550.

39. Jones *v.* Overstreet, 4 T. B. Mon. (Ky.) 547, 550; Juilliard *v.* Greenman, 110 U. S. 421, 463, 4 S. Ct. 122, 28 L. ed. 204, where it is said: "Nothing can be such standard which has not intrinsic value, or which is subject to frequent changes in value. From the earliest period in the history of civilized nations, we find pieces of gold and silver used as money. These metals are scattered over the world in small quantities; they are susceptible of division, capable of easy impression, have more value in proportion to weight and size, and are less subject to loss by wear and abrasion than any other material possessing these qualities."

40. Black L. Dict.

41. Curcier *v.* Pennock, 14 Serg. & R. (Pa.) 51, 61 (where it is said: "It may be in metal, in leather, or in paper; metal is the most proper for a common measure"); Wills *v.* Allison, 4 Heisk. (Tenn.) 385, 392.

42. Imperial Dict. [*quoted* in *Re* Cypress Election, 8 Manitoba 581, 595].

43. Wills *v.* Allison, 4 Heisk. (Tenn.) 385, 392 [*citing* Pickard *v.* Bankes, 13 East 20].

44. *Connecticut.*— State *v.* Griswold, 73 Conn. 95, 98, 46 Atl. 829.

Florida.— Hendry *v.* Benlisa, 37 Fla. 609, 621, 20 So. 800, 34 L. R. A. 283.

Indiana.— State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670.

Nebraska.— State *v.* Hill, 47 Nebr. 456, 537, 66 N. W. 541.

Tennessee.— Miller *v.* McKinney, 5 Lea 93, 96; Burford *v.* Memphis Bulletin Co., 9 Heisk. 691, 694; Whiteman *v.* Childress, 6 Humphr. 303, 306; Hopson *v.* Fountain, 5 Humphr. 140, 141; Graham *v.* State, 5 Humphr. 40, 41; Crutchfield *v.* Robins, 5 Humphr. 15, 17, 42 Am. Dec. 417.

Wisconsin.—Klauber *v.* Biggerstaff, 47 Wis. 551, 557, 3 N. W. 357, 32 Am. Rep. 773.

United States.— Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261. See also U. S. *v.* Beebe, 122 Fed. 762, 767, 58 C. C. A. 562.

45. As for instance, guilders, guineas, napoleons, eagles, and bank-notes, as well as dollars. Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140, 141.

46. Hendry *v.* Benlisa, 37 Fla. 609, 621, 20 So. 800, 34 L. R. A. 283; Crutchfield *v.* Robins, 5 Humphr. (Tenn.) 15, 17, 42 Am. Dec. 417 [*quoted* in Burford *v.* Memphis Bulletin Co., 9 Heisk. (Tenn.) 691, 694], where Turley, J., speaking for the court said: "Whether it be the iron of the Spartans, the cowry of the African, the gold and silver of the World, or the paper of modern Europe and America."

47. Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303, 306.

According to the context or intent *the term may include:* Bank-stock. Fulkeron *v.* Chitty, 57 N. C. 244, 245. Bonds. Fulkeron *v.* Chitty, *supra*; Paul *v.* Ball, 31 Tex. 10, 16. Ready cash at call. Smith *v.* Burch, 28 Hun (N. Y.) 331, 332. A certificate of deposit. Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261. *Contra*, State

has currency as a medium in commerce;[48] that which may be given in exchange for commodities;[49] a term which designates not only a class or genus of property, but includes therein every kind or species of that class;[50] BANK-NOTES,[51]

v. Hill, 47 Nebr. 456, 552, 66 N. W. 541. A credit. Pullman State Bank *v.* Manring, 18 Wash. 250, 254, 51 Pac. 464; Dawson *v.* Gaskin, 1 Jur. 669, 2 Keen 14, 6 L. J. Ch. 295, 15 Eng. Ch. 14, 48 Eng. Reprint 538. A debt, whether due by bond or otherwise. Skinner *v.* Moore, 19 N. C. 138, 153, 30 Am. Dec. 155. See also Sargeant *v.* Leland, 2 Vt. 277, 280; Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60. Deposits in bank. Gray *v.* Boston St. Com'rs, 138 Mass. 414, 415; Beatty *v.* Lalor, 15 N. J. Eq. 108, 109; Smith *v.* Burch, 28 Hun (N. Y.) 331, 332 [*citing* Parker *v.* Marchant, 6 Jur. 292, 11 L. J. Ch. 223, 1 Y. & Coll. 290, 62 Eng. Reprint 893]; Beck *v.* McGillis, 9 Barb. (N. Y.) 35, 59 [*citing* Mann *v.* Mann, 1 Johns. Ch. (N. Y.) 231]; Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 318, 47 N. E. 54; Collett *v.* Springfield Sav. Soc., 13 Ohio Cir. Ct. 131, 138, 7 Ohio Cir. Dec. 146; Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60; Dabney *v.* Cottrell, 9 Gratt. (Va.) 572, 579; Manning *v.* Purcell, 7 De G. M. & G. 55, 67, 3 Eq. Rep. 387, 24 L. J. Ch. 522, 3 Wkly. Rep. 273, 56 Eng. Ch. 42, 44 Eng. Reprint 21; Ala. Civ. Code (1896), § 3906, sub. 3; Hurd Rev. St. Ill. (1901) p. 1493, c. 120, § 292, subs. 8; Indian Terr. Annot. St. (1899) § 4900; Minn. Gen. St. (1894) § 1511; Cobbey Annot. St. Nebr. (1903) § 10,403; N. D. Rev. Codes (1899), § 1176; Tex. Rev. St. (1895) art. 5064; Ballinger Annot. Codes & St. Wash. (1897) § 1658; W. Va. Code (1899), p. 199, c. 29, § 47. Gold and silver certificates. Ballinger Annot. Codes & St. Wash. (1897) § 1658. Funds due on notes. Morton *v.* Perry, 1 Metc. (Mass.) 446, 449. Officers' fees and sheriff's poundage. Slade *v.* Hawley, 13 M. & W. 757, 764. Profits. Collett *v.* Springfield Sav. Soc., 13 Ohio Cir. Ct. 131, 138, 7 Ohio Cir. Dec. 146. Railroad stock not specifically disposed of. Jenkins *v.* Fowler, 63 N. H. 244, 246. Securities. Hinckley *v.* Primm, 41 Ill. App. 579, 581; Matter of Stone, 15 Misc. (N. Y.) 317, 320, 37 N. Y. Suppl. 583; Paul *v.* Ball, 31 Tex. 10, 16. Table fees or drinks. Stone *v.* State, 3 Tex. App. 675, 676.

So it may not include: Bonds. Hancock *v.* Lyon, 67 N. H. 216, 217, 29 Atl. 638; Mann *v.* Mann, 1 Johns. Ch. (N. Y.) 231, 236. Checks. Griffen *v.* Train, 40 Misc. (N. Y.) 290, 296, 81 N. Y. Suppl. 977; Lytle *v.* Etherly, 10 Yerg. (Tenn.) 389, 393; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 16, 20 L. R. A. 223. But see State *v.* Griswold, 73 Conn. 95, 98, 46 Atl. 829; Walton *v.* State, 14 Tex. 381. Choses in action. Hancock *v.* Lyon, 67 N. H. 216, 217, 29 Atl. 638; Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60; Dabney *v.* Cottrell, 9 Gratt. (Va.) 572, 579. Gold in bars. Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 72. Government stock. Com. *v.* Howe, 132 Mass. 250, 258; Dabney *v.* Cottrell, 9 Gratt. (Va.) 572, 579; Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261 [*citing* State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223]; Lowe *v.* Thomas, 5 De G. M. & G. 315, 317, 2 Eq. Rep. 742, 18 Jur. 563, 23 L. J. Ch. 616, 2 Wkly. Rep. 499, 27 Eng. L. & Eq. 238, 54 Eng. Ch. 251, 43 Eng. Reprint 891; Ommanney *v.* Butcher, Turn. & R. 260, 272, 24 Rev. Rep. 42, 12 Eng. Ch. 260, 37 Eng. Reprint 1098; Hotham *v.* Sutton, 15 Ves. Jr. 319, 327, 10 Rev. Rep. 83, 33 Eng. Reprint 774. Money loaned, or due on notes. Hancock *v.* Lyon, 67 N. H. 216, 217, 29 Atl. 638. Mortgages. Hancock *v.* Lyon, *supra*; Mann *v.* Mann, 1 Johns. Ch. (N. Y.) 231, 236; State *v.* Patillo, 11 N. C. 348, 349; Dabney *v.* Cottrell, 9 Gratt. (Va.) 572, 579; State *v.* McFetridge, 84 Wis. 473, 514, 54 N. W. 1, 998, 20 L. R. A. 223. *Contra*, Paul *v.* Ball, 31 Tex. 10, 16; Dabney *v.* Cottrell, 9 Gratt. (Va.) 572, 579; Va. Code (1887), § 489. Produce. Colson *v.* State, 7 Blackf. (Ind.) 590, 592. Securities. Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60. Shares in the capital stock of corporations. Graydon *v.* Graydon, 23 N. J. Eq. 229, 231. Surplus and undivided profits. Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 318, 47 N. E. 54.

48. Wharton L. Lex. [*quoted* in Borie *v.* Trott, 5 Phila. (Pa.) 366, 403].

Tobacco has been considered as money. Crain *v.* Yates, 2 Harr. & G. (Md.) 332, 336.

49. Imperial Dict. [*quoted* in *Re* Cypress Elections, 8 Manitoba 581, 595].

50. State *v.* White, 12 Wash. 417, 420, 41 Pac. 182 [*citing* Endlich Interpretation St. § 409].

51. *Alabama.*— Noble *v.* State, 59 Ala. 73, 80; Civ. Code (1896), § 3906, subs. 3.

Illinois.— Tazewell County *v.* Davenport, 40 Ill. 197, 199.

Indian Territory.— Indian Terr. St. (1899) § 4900.

Kentucky.— Pryor *v.* Com., 2 Dana 298.

Minnesota.— Gen. St. (1894) § 1511; Rev. St. (1905) § 798.

Mississippi.— Carter *v.* Cox, 44 Miss. 148, 157.

New Jersey.— Beatty *v.* Lalor, 15 N. J. Eq. 108, 109.

New York.— Judah *v.* Harris, 19 Johns. 144, 145.

North Dakota.— Rev. Codes (1899), § 1176.

Ohio.— Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 318, 47 N. E. 54; Collett *v.* Springfield Sav. Soc., 13 Ohio Cir. Ct. 131, 138, 7 Ohio Cir. Dec. 146.

South Carolina.— Civ. Code (1902), § 265.

Texas.— Pen. Code (1895), art. 945.

Virginia.— Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60; Dabney *v.* Cottrell, 9 Gratt. 572, 579.

q. v.; CASH,[52] *q. v.*, or its equivalent used as a circulating medium;[53] CURRENCY,[54] *q. v.*; lawful currency of a country;[55] the currency of the United States;[56] that which is by the acts of congress of the United States made a legal tender, whether coin or currency;[57] that which is legal tender;[58] legal tender notes of the United States;[59] treasury notes;[60] that which is the lawful currency of the country; that which may be tendered and must be received in discharge of a subsisting debt;[61] legal tender currency of the United States;[62] that which is legal tender for the payment of debts;[63] that kind of currency which is a legal tender in payment of debts, or which is convertible at par into legal tender currency;[64] that currency which constitutes the basis of the general business of the

Washington.— Ballinger Annot. Codes & St. (1897) § 1658.

Wisconsin.— Klauber *v.* Biggerstaff, 47 Wis. 551, 557, 3 N. W. 357, 32 Am. Rep. 773; State *v.* Kube, 20 Wis. 217, 227, 91 Am. Dec. 390.

United States.— U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483.

England.— Miller *v.* Race, 1 Burr. 452, 457.

Canada.— *Re* Cypress Election, 8 Manitoba 581, 595; Armstrong *v.* Hemstreet, 22 Ont. 336, 340.

Bank-notes are public tokens as much so as weights and measures or the alnager's seal. In practice, they represent the coin of our country, and pass currently as money. State *v.* Patillo, 11 N. C. 348, 349.

That the contrary opinion is often held see State *v.* Hoke, 84 Ind. 137, 139 [*citing* Boyd *v.* Olvey, 82 Ind. 294; Hamilton *v.* State, 60 Ind. 193, 28 Am. Rep. 653]; Pryor *v.* Com., 2 Dana (Ky.) 298; Hevener *v.* Kerr, 4 N. J. L. 58, 59; Dowdle *v.* Corpening, 32 N. C. 58, 60; State *v.* Jim, 7 N. C. 3, 5; Johnson *v.* State, 11 Ohio St. 324, 325; Turner *v.* State, 1 Ohio St. 422, 426; Hale *v.* State, 8 Tex. 171, 172; Lewis *v.* State, 28 Tex. Cr. App. 140, 142, 12 S. W. 736; Ross *v.* Burlington Bank, 1 Aik. (Vt.) 43, 49, 15 Am. Dec. 664; U. S. *v.* Wells, 28 Fed. Cas. No. 16,661, 2 Cranch C. C. 143.

The term does not include state bank-notes, etc. Lange *v.* Kohne, 1 McCord (S. C.) 115, 116.

52. *Illinois.*— Decker *v.* Decker, 121 Ill. 341, 348, 12 N. E. 750.

Nebraska.— See State *v.* Hill, 47 Nebr. 456, 537, 66 N. W. 541.

New Hampshire.— Hancock *v.* Lyon, 67 N. H. 216, 217, 29 Atl. 638.

New York.— Smith *v.* Burch, 28 Hun 331, 332 [*citing* Byron *v.* Brandreth, L. R. 16 Eq. 475, 42 L. J. Ch. 824, 21 Wkly. Rep. 942; Collins *v.* Collins, L. R. 12 Eq. 455, 40 L. J. Ch. 541, 24 L. T. Rep. N. S. 780, 19 Wkly. Rep. 971]; Beck *v.* McGillis, 9 Barb. 35, 60; Mann *v.* Mann, 14 Johns. 1, 12, 7 Am. Dec. 416.

Pennsylvania.— *In re* Price, 169 Pa. St. 294, 299, 32 Atl. 455; Jacob's Estate, 140 Pa. St. 268, 274, 21 Atl. 318, 23 Am. St. Rep. 230, 11 L. R. A. 717; Smith *v.* Davis, 1 Grant 158; Carr's Estate, 13 Pa. Co. Ct. 643, 645.

Tennessee.— Thompson *v.* Woodruff, 7 Coldw. 401, 414.

Texas.— See Colter *v.* State, 37 Tex. Cr. 284, 293, 39 S. W. 576.

Vermont.— Sargeant *v.* Leland, 2 Vt. 277, 280.

Virginia.— See Dillard *v.* Dillard, 97 Va. 434, 439, 34 S. E. 60 [*citing* Dabney *v.* Cottrell, 9 Gratt. 572, 579].

53. Hancock *v.* Lyon, 67 N. H. 216, 217, 29 Atl. 638.

54. Shackleford *v.* Cunningham, 41 Ala. 203, 205; State *v.* Hill, 47 Nebr. 456, 538, 66 N. W. 541; State *v.* McFetridge, 84 Wis. 473, 513, 54 N. W. 1, 998, 20 L. R. A. 223; Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261; Ala. Civ. Code (1896), § 3906, subs. 3; Hurd Rev. St. Ill. (1901) p. 1493, c. 120, § 292, subs. 8; Mo. Rev. St. (1899) § 9123; Cobbey Annot. St. Nebr. (1903) § 10,403; S. C. Civ. Code (1902), § 265; Tex. Pen. Code (1895), art. 941; W. Va. Code (1899), p. 189, c. 29, § 47.

55. Jacobs' Estate, 9 Pa. Co. Ct. 40, 48.

56. Anderson *v.* Ewing, 3 Litt. (Ky.) 245. 247; Beatty *v.* Lalor, 15 N. J. Eq. 108, 109; Burries *v.* State, 36 Tex. Cr. 13, 16, 36 S. W. 164.

57. Thompson *v.* State, 35 Tex. Cr. 511, 523, 34 S. W. 629.

58. Taylor *v.* State, 29 Tex. App. 466, 499, 16 S. W. 302.

May include Confederate money.— Hendry *v.* Benlisa, 37 Fla. 609, 621, 20 So. 800, 34 L. R. A. 283. *Contra*, McNeill *v.* Shaw, 62 N. C. 91; Kennedy *v.* Briere, 45 Tex. 305, 309.

59. Carpentier *v.* Atherton, 25 Cal. 564, 569; Taylor *v.* State, 29 Tex. App. 466, 499, 16 S. W. 302; U. S. *v.* Johnson, 26 Fed. Cas. No. 1,862.

60. Maynard *v.* Newman, 1 Nev. 271, 278; Borie *v.* Trott, 5 Phila. (Pa.) 366, 403; U. S. *v.* Smythe, 120 Fed. 30, 33; Minn. Gen. St. (1894) § 1571; Ballinger Annot. Codes & St. Wash. (1897) § 1658. *Contra*, Foquet *v.* Hoadley, 3 Conn. 534, 536.

61. Morris *v.* Edwards, 1 Ohio 189, 204.

62. Colter *v.* State, 37 Tex. Cr. 284, 293, 39 S. W. 576; Thompson *v.* State, 35 Tex. Cr. 511, 523, 34 S. W. 629; Jackson *v.* State, 34 Tex. Cr. 90, 91, 29 S. W. 265; Menear *v.* State, 30 Tex. App. 475, 476, 17 S. W. 1082; Otero *v.* State, 30 Tex. App. 450, 455, 17 S. W. 1081; Lewis *v.* State, 28 Tex. App. 140, 142, 12 S. W. 736.

63. Murphy *v.* Smith, 49 Ark. 37, 39, 3 S. W. 891.

64. Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401, 414.

country, and is a legal tender for the payment of debts;[65] hence, any currency usually and lawfully employed in buying and selling as the equivalent of money;[66] and also paper issued by the government, or by banks by lawful authority, and intended to pass and circulate as a circulating medium.[67] The word may be employed to designate the whole volume of the medium of exchange, regardless of its character or denomination;[68] recognized by the custom of merchants and the laws of the country, just as land designates all real estate;[69] and it may also mean any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value.[70] The term is used in a specific, and also in a general and more comprehensive sense,[71] meaning in the former what is coined or stamped by public authority, and has its determinate value fixed by governments,[72] and in the latter wealth,[73] the representative of commodities of all kinds, of lands, and of everything that can be transferred in commerce.[74] In its widest and popular sense, it is frequently employed as synonymous with PROPERTY,[75] *q. v.*; estate;[76] including, when the context so indicates, any kind of property,[77] even land.[78] Sometimes it includes the whole personal estate, and often the proceeds of realty.[79] The meaning of the word, when used in a will, depends upon the context, and may be affected by the condition of the testator's property and the surrounding circumstances;[80] but a construction broad enough to give it a meaning which includes real estate can only be sustained where the intention is so clear and plain as to be in effect compulsory.[81] The term is sometimes used as the equivalent of income;[82] but it can never have that effect when the text of the testament clearly shows that it was not so intended.[83] In its strict, technical sense, it means coined metal;[84] COIN,[85] *q. v.*; legal tender

65. Woodruff *v.* State, 66 Miss. 298, 309, 6 So. 235.

66. Webster Dict. [*quoted* in Carter *v.* Cox, 44 Miss. 148, 156].

67. Bartley *v.* State, 53 Nebr. 310, 356, 73 N. W. 744.

68. State *v.* Downs, 148 Ind. 324, 327, 47 N. W. 670.

69. Allibone *v.* Ames, 9 S. D. 74, 81, 68 N. W. 165, 33 L. R. A. 585; U. S. *v.* Beebe, 122 Fed. 762, 767, 58 C. C. A. 562; Taylor *v.* Robinson, 34 Fed. 678, 681 [*quoted* in State *v.* McFetridge, 84 Wis. 473, 514, 54 N. W. 1, 998, 20 L. R. A. 223].

70. Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261 [*citing* State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223].

71. Paul *v.* Ball, 31 Tex. 10, 16.

72. Paul *v.* Ball, 31 Tex. 10, 16.

73. Paul *v.* Ball, 31 Tex. 10, 16; Imperial Dict. [*quoted* in *Re* Cypress Election, 8 Manitoba 581, 595].

74. Paul *v.* Ball, 31 Tex. 10, 16.

75. *In re* Miller, 48 Cal. 165, 171, 22 Am. Rep. 422 [*citing* 2 Redfield Wills 437]; Jacobs' Estate, 9 Pa. Co. Ct. 40, 48.

The satisfaction of an execution is a payment of the debt in money, although land is taken on the execution, and accepted in satisfaction at its value. Randall *v.* Rich, 11 Mass. 494, 498.

Distinguished from "property" in Alexander *v.* Miller, 7 Heisk. (Tenn.) 65, 76.

76. *In re* Miller, 48 Cal. 165, 175, 22 Am. Rep. 422; Decker *v.* Decker, 121 Ill. 341, 348, 12 N. E. 750; Jacobs' Estate, 9 Pa. Co. Ct. 40, 48; Paul *v.* Ball, 31 Tex. 10, 16; Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60.

77. Levy's Estate, 161 Pa. St. 189, 194, 28 Atl. 1068 [*cited* in Metz *v.* Metz, 7 Pa. Dist. 194, 195]; Jacobs' Estate, 140 Pa. St. 268, 274, 21 Atl. 318, 23 Am. St. Rep. 230, 11 L. R. A. 767.

78. Levy's Estate, 161 Pa. St. 189, 194, 28 Atl. 1068.

79. Dillard *v.* Dillard, 97 Va. 434, 438, 34 S. E. 60 [*citing In re* Miller, 48 Cal. 165, 22 Am. Rep. 422; Dabney *v.* Cottrell, 9 Gratt. (Va.) 572; 1 Jarman Wills 724–732].

80. Sweet *v.* Burnett, 136 N. Y. 204, 210, 32 N. E. 628 [*citing* Smith *v.* Burch, 92 N. Y. 228]; Gillen *v.* Kimball, 34 Ohio St. 352, 363.

"All my moneys" see Jenkins *v.* Fowler, 63 N. H. 244, 245.

81. Sweet *v.* Burnett, 136 N. Y. 204, 210, 32 N. E. 628. The word "moneys," as used in wills containing bequests of moneys, "has but seldom been held to apply to real estate." Widener *v.* Beggs, 118 Pa. St. 374, 379, 12 Atl. 311. But the word will be construed to include both personal and real property, if it appears from the context and on the face of the instrument that such was the intention of the testator. *In re* Miller, 48 Cal. 165, 171, 22 Am. Rep. 422.

82. Ellicott *v.* Ellicott, 90 Md. 321, 328, 45 Atl. 183, 48 L. R. A. 58.

83. Levy's Estate, 161 Pa. St. 189, 194, 28 Atl. 1068.

84. State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670; Kennedy *v.* Briere, 45 Tex. 305, 309.

85. *Alabama.*— Civ. Code (1896), § 3906, subs. 3.

Illinois.— Tazewell County *v.* Davenport, 40 Ill. 197, 199; Hurd Rev. St. (1901) p. 1493, c. 120, § 292, subs. 8.

Indian Territory.—Annot. St. (1899) § 4900.

Kentucky.— Pryor *v.* Com., 2 Dana 298.

Minnesota.— Gen. St. (1894) § 1511.

coin;[86] metallic coin[87] of all descriptions used as money;[88] stamped metal;[89] GOLD,[90] *q. v.*; silver;[91] or COPPER,[92] *q. v.*, upon which the government stamp has been impressed,[93] and used as the medium of commerce.[94] But in general and popular use and understanding it has a much broader meaning and imports any current

Mississippi.— Carter *v.* Cox, 44 Miss. 148, 156 [*quoting* Webster Dict.].
Missouri.— Rev. St. (1899) § 9123.
Nebraska.— Colbey Annot. St. (1903) § 10,403.
Nevada.— Maynard *v.* Newman, 1 Nev. 271, 278.
North Dakota.—Rev. Codes (1899), § 1176.
Ohio.— White *v.* Richmond, 16 Ohio 5, 8.
Pennsylvania.— Jacobs' Estate, 9 Pa. Co. Ct. 40, 48.
South Carolina.— Civ. Code (1902), § 265.
Texas.— Colter *v.* State, 37 Tex. Cr. 284, 293, 39 S. W. 576; Menear *v.* State, 30 Tex. App. 475, 476, 17 S. W. 1082; Otero *v.* State, 30 Tex. App. 450, 455, 17 S. W. 1081.
Virginia.— Code (1887), § 489.
Washington.— Ballinger Annot. Codes & St. (1897) § 1658.
West Virginia.— Code (1899), p. 199, c. 29, § 47.
Wisconsin.— Klauber *v.* Biggerstaff, 47 Wis. 551, 561, 3 N. W. 357, 32 Am. Rep. 773.
United States.— U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483.
Canada.— *Re* Cypress Election, 8 Manitoba 581, 595 [*quoting* Imperial Dict.]; Gore Bank *v.* Hodge, 2 U. C. C. P. 359, 366.

Distinguished from "coin."— Coin differs from money as the species differs from the genus. Coin is a particular species, always made of metal, and struck according to a certain process called "coining." Money is any matter which has currency as a medium in commerce. Borie *v.* Trott, 5 Phila. (Pa.) 366, 403. "Money" is a generic term. It is not the synonym of "coin." It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. The common term "paper money" is, in a legal sense, quite as accurate as the term "coin money." Klauber *v.* Biggerstaff, 47 Wis. 551, 561, 3 N. W. 357, 32 Am. Rep. 773.

86. Bartley *v.* State, 53 Nebr. 310, 356, 73 N. W. 744; State *v.* Hill, 47 Nebr. 456, 538, 66 N. W. 541; Thompson *v.* State, 35 Tex. Cr. 511, 523, 34 S. W. 629; Jackson *v.* State, 34 Tex. Cr. 90, 91, 29 S. W. 265; Taylor *v.* State, 29 Tex. App. 466, 499; Lewis *v.* State, 28 Tex. App. 140, 142, 12 S. W. 736; State *v.* McFetridge, 84 Wis. 473, 513, 54 N. W. 1, 998, 20 L. R. A. 223; Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261.

87. Block *v.* State, 44 Tex. 620, 622; Taylor *v.* State, 29 Tex. App. 466, 499, 16 S. W. 302.

88. Taylor *v.* State, 29 Tex. App. 466, 499, 16 S. W. 302.

89. Jacobs' Estate, 9 Pa. Co. Ct. 40, 48; Imperial Dict. [*quoted* in *Re* Cypress Election, 8 Manitoba 581, 595]; Webster Dict. [*quoted* in Carter *v.* Cox, 44 Miss. 148, 156].

90. *Alabama.*— Civ. Code (1896), § 3906, subs. 3.
California.— Carpentier *v.* Atherton, 25 Cal. 564, 569.
Illinois.— Tazewell County *v.* Davenport, 40 Ill. 197, 199; Hurd Rev. St. (1901) p. 1493, c. 120, § 292, subs. 8.
Indiana.— State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670.
Indian Territory.—Annot. St. (1899) § 4900.
Kentucky.— Pryor *v.* Com., 2 Dana 298.
Minnesota.— Gen. St. (1894) § 1511.
Mississippi.— Carter *v.* Cox, 44 Miss. 148, 156 [*quoting* Webster Dict.].
Missouri.— Rev. St. (1899) § 9123.
New Jersey.— Beatty *v.* Lalor, 15 N. J. Eq. 108, 109.
North Dakota.—Rev. Codes (1899), § 1176.
Ohio.— White *v.* Richmond, 16 Ohio 5, 8; Collett *v.* Springfield Sav. Soc., 13 Ohio Cir. Ct. 131, 138, 7 Ohio Cir. Dec. 146.
South Carolina.— Civ. Code (1902), § 265.
Texas.—Kennedy *v.* Briere, 45 Tex. 305, 309.
Virginia.— Code (1887), § 489.
Washington.— Ballinger Annot. Codes & St. (1897) § 1658.
Canada.— *Re* Cypress Election, 8 Manitoba 581, 595 [*quoting* Imperial Dict.].

91. *Alabama.*— Civ. Code (1896), § 3906, subs. 3.
California.— Carpentier *v.* Atherton, 25 Cal. 564, 569.
Illinois.— Tazewell County *v.* Davenport, 40 Ill. 197, 199; Hurd Rev. St. (1901) p. 1493, c. 120, § 292, subs. 8.
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Minnesota.— Gen. St. (1894) § 1511.
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Missouri.— Rev. St. (1899) § 9123; Rev. St. (1889) § 7510-f.
New Jersey.— Beatty *v.* Lalor, 15 N. J. Eq. 108, 109.
North Dakota.—Rev. Codes (1899), § 1176.
Ohio.— White *v.* Richmond, 16 Ohio 5, 8; Collett *v.* Springfield Sav. Soc., 13 Ohio Cir. Ct. 131, 138, 7 Ohio Cir. Dec. 146.
South Carolina.— Civ. Code (1902), § 265.
Texas.— Kennedy *v.* Briere, 45 Tex. 305, 309.
Virginia.— Code (1887), § 489.
Washington.— Ballinger Annot. Codes & St. (1897) § 1658.
Canada.—*Re* Cypress Election, 8 Manitoba 581, 595 [*quoting* Imperial Dict.].

92. Webster Dict. [*quoted* in Carter *v.* Cox, 44 Miss. 148, 156]; Va. Code (1887), § 489.

93. State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670; Imperial Dict. [*quoted* in *Re* Cypress Election, 8 Manitoba 581, 595].

94. Kennedy *v.* Briere, 45 Tex. 305, 309; Webster Dict. [*quoted* in Carter *v.* Cox, 44 Miss. 148, 156]; Imperial Dict. [*quoted* in *Re* Cypress Election, 8 Manitoba 581, 595].

token, bank-note, or other circulating medium in general use as the measure and representative of values which serves the purpose of coin in its absence or in connection with it;[95] and includes whatever is lawfully and actually current in commercial transactions as the equivalent of legal tender coin and currency;[96] anything which by law, usage, or common consent becomes a general medium by which the value of other commodities is measured and denominated;[97] anything which passes current as the common medium of exchange and measure of value for other articles, whether it be the bills of private or incorporated banks, or government bills of credit;[98] any equivalent or circulating medium readily used for the exchange of surplus goods or services;[99] notes of hand, letters of credit, accepted bills on mercantile firms, etc., all representing coin.[1] In law the term has a technical meaning according to which it is to be interpreted, when used in statutes unless there is something in the context to show that a wider meaning is intended.[2] When used in judicial proceedings, it is always to be taken in its technical sense.[3] (Money: Averments as to Value in Indictment or Information For Larceny, see LARCENY. Bills or Notes to Circulate as Money — Power of Corporation to Issue, see BANKS AND BANKING; Power of Municipal Corporation to Issue, see MUNICIPAL CORPORATIONS; Prohibition Against Issuance by State, see STATES. Contract to Pay Money, Measure of Damages For Breach, see DAMAGES. Counterfeiting, see COUNTERFEITING. Counts in Pleading, see ASSUMPSIT, ACTION OF. Debt on Obligations Payable in Bank-Notes or Currency, see DEBT, ACTION OF. Deposit in Court, see DEPOSITS IN COURT. Description in Indictment, see INDICTMENTS AND INFORMATIONS; LARCENY. Embezzlement, see EMBEZZLEMENT. Exemption, see EXEMPTIONS. Finder of Lost Money, Duty and Liability of, see FINDING LOST GOODS. Garnishment, see GARNISHMENT. Interest — In General, see INTEREST; As Damages for the Detention of Money, see DAMAGES. Judicial Notice of Nature of Circulating Medium, see EVIDENCE. Larceny, see LARCENY. Legal Tender, see PAYMENT. Levy on Money or Coin, see EXECUTION. Liability of Carrier For Loss of Money, see CARRIERS. Orders, see POST-OFFICE. Medium of Payment or Kind of Money — In General, see PAYMENT; Depreciated Currency — As Accord and Satisfaction, see ACCORD AND SATISFACTION; Loss by Executor or Administrator by Depreciation, see EXECUTORS AND ADMINISTRATORS; Designation — In Judgment, see JUDGMENTS; On Negotiable Instrument, see COMMERCIAL PAPER; On Collection of Assets by Guardian, see GUARDIAN AND WARD; On Payment of Rent, see LANDLORD AND TENANT. Tender, see TENDER. See also CONFEDERATE MONEY; LAWFUL MONEY; MONEY LENT; MONEY PAID; MONEY RECEIVED.)

MONEY BILL. A bill imposing a direct tax on the people.[4]

95. Kennedy *v.* Briere, 45 Tex. 305, 309. To the same effect see State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670; State *v.* Hill, 47 Nebr. 456, 538, 66 N. W. 541; State *v.* McFetridge, 84 Wis. 473, 513, 54 N. W. 1, 998, 20 L. R. A. 223.

Any matter, whether metal, paper, beads, shell, etc., which has currency as a medium in commerce. Borie *v.* Trott, 5 Phila. (Pa.) 366, 403. See also W. Va. Code (1899), p. 199, c. 29, § 47.

96. State *v.* Hill, 47 Nebr. 456, 538, 66 N. W. 541; State *v.* McFetridge, 84 Wis. 473, 513, 54 N. W. 1, 998, 20 L. R. A. 223 [*quoted* in State *v.* Hill, 47 Nebr. 456, 537, 66 N. W. 541].

97. Maynard *v.* Newman, 1 Nev. 271, 278.

98. Maynard *v.* Newman, 1 Nev. 271, 278.

99. Armstrong *v.* Hemstreet, 22 Ont. 336, 340.

1. Imperial Dict. [*quoted* in Armstrong *v.* Hemstreet, 22 Ont. 336, 340; *Re* Cypress Election, 8 Manitoba 581, 595].

2. *Re* Cypress Election, 8 Manitoba 581, 595.

3. Pryor *v.* Com., 2 Dana (Ky.) 298.

"Money" as used in an indictment charging the betting of money does not include United States treasury notes, such notes not being money in the legal acceptation. Williams *v.* State, 12 Sm. & M. (Miss.) 58, 63.

A count for money loaned should not be construed to allege the loan of a United States bond, and hence such a count is not sustained by evidence of the loan of such a bond. Waterman *v.* Waterman, 34 Mich. 490, 492.

4. *In re* Opinion of Justices, 126 Mass. 547, 549. See also *In re* Opinion of Justices, 126 Mass. 557, 590.

A bill for raising revenue was technically called a "money bill" at common law. Northern Counties Inv. Trust *v.* Sears, 30 Oreg. 388, 403, 41 Pac. 931, 35 L. R. A. 188.

MONEY BROKER. A MONEY CHANGER, *q. v.*; one who lends to or raises money for others.[5]

MONEY CHANGER. A broker who deals in money or exchanges.[6]

MONEY COUNTS. In pleading, a species of common counts, so called from the subject-matter of them; embracing the indebitatus assumpsit count for money lent and advanced, for money paid and expended, and money had and received, together with the insimul computassent count, or count for money due on an account stated.[7] (See, generally, ACCOUNTS AND ACCOUNTING; ASSUMPSIT, ACTION OF; MONEY LENT; MONEY PAID; MONEY RECEIVED.)

MONEY DECREE. See MONEY JUDGMENT.

MONEY DEMAND. A demand for a fixed amount of money, contradistinguished from damages;[8] any demand arising out of contract, express or implied, which from its nature may enable a litigant to make affidavit that the amount sued for is actually due;[9] a demand arising out of contract where the relief demanded is a recovery of money.[10] (See, generally, DEBT, ACTION OF.)

MONEYED CAPITAL. Money employed in the carrying on of a business, the object of which is the making of profit by its use as money;[11] capital employed in a business in which the stock in trade from which profits are expected to accrue is money;[12] either money itself, or negotiable securities readily convertible into money, and having a quotable market value;[13] ready money or capital invested in private banking.[14] (See, generally, TAXATION. See also CAPITAL.)

MONEYED CORPORATIONS. All corporations which deal in money and in the

5. Bouvier L. Dict.

6. Webster Dict. [*quoted* in Hinckley *v.* Belleville, 43 Ill. 183, 184, where Lawrence, J., speaking for the court said: "The buying and selling of uncurrent funds, and the exchanging of one kind of money for another, are equally the practice of the money-changer and the banker"].

7. Burrill L. Dict. [*citing* 1 Burrill Pr. 132].

8. Bouvier L. Dict.

9. Mills *v.* Long, 58 Ala. 458, 460.

Is more comprehensive than "debt."— The term "money demand" is much more comprehensive than "debt," and includes all rightful claims, whether founded upon contract, tort, or penalties given by statute. Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 210, 24 So. 847.

10. Roberts *v.* Nodwift, 8 Ind. 339, 341; Brock *v.* Parker, 5 Ind. 538; Horner Rev. St. Ind. (1901) § 1285.

11. Baltimore Nat. Bank *v.* Baltimore, 100 Fed. 24, 29, 40 C. C. A. 254.

12. Richmond First Nat. Bank *v.* Turner, 154 Ind. 456, 462, 57 N. E. 110.

13. Richmond First Nat. Bank *v.* Richmond, 39 Fed. 309, 310.

14. Utica First Nat. Bank *v.* Waters, 7 Fed. 152, 156, 19 Blatchf. 242.

As used in U. S. Rev. St. (1878) § 5219 [U. S. Comp. St. (1901) p. 3502], this term has a more limited meaning than the term "personal property," and applies only to such capital as is readily solvable into money. Mercantile Nat. Bank *v.* New York, 28 Fed. 776, 785. And it refers only to capital which comes into competition with the business of national banks. Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 346, 61 Pac. 560, 56 L. R. A. 346; Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 214, 19 S. Ct. 407, 43 L. ed. 669.

This term includes: Bonds, stocks, and money loaned, as well as "all credits and demands of every character in favor of the taxpayer." Wasson *v.* Indianapolis First Nat. Bank, 107 Ind. 206, 214, 8 N. E. 97. Capital employed in national banks and capital employed by individuals when the object of their business is the making of profit by the use of their money. Bressler *v.* Wayne County, 32 Nebr. 834, 838, 49 N. W. 787, 13 L. R. A. 614; Aberdeen First Nat. Bank *v.* Chehalis County, 6 Wash. 64, 73, 32 Pac. 1051; Talbot *v.* Silver Bow County, 139 U. S. 438, 447, 11 S. Ct. 594, 35 L. ed. 210; Palmer *v.* McMahon, 133 U. S. 660, 668, 10 S. Ct. 324, 33 L. ed. 772; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 156, 7 S. Ct. 826, 30 L. ed. 895. Money employed as such in trade. Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 453, 18 Atl. 406, 410. Shares in national banks. Bressler *v.* Wayne County, 32 Nebr. 834, 837, 49 N. W. 787, 13 L. R. A. 614; Aberdeen First Nat. Bank *v.* Chehalis County, 166 U. S. 440, 457, 17 S. Ct. 629, 41 L. ed. 1069; Wilmington First Nat. Bank *v.* Herbert, 44 Fed. 158, 159. Shares of stock in railroad companies, insurance companies, etc. Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 113, 118, 46 Atl. 586. Shares of stock, or other interests owned by individuals, in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. Bressler *v.* Wayne County, *supra*; Washington Nat. Bank *v.* King County, 9 Wash. 607, 611, 38 Pac. 219.

This term does not include: Bank-notes. Hunter's Appeal, (Pa. 1886) 10 Atl. 429, 433. The interests of individuals in insurance and trust companies. Redemption Nat. Bank *v.* Boston, 125 U. S. 60, 68, 8 S. Ct. 772, 31 L. ed. 689.

business of loaning money;[15] all corporations of a private nature organized for pecuniary profit;[16] every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances.[17] (See, generally, CORPORATIONS; TAXATION.)

MONEYED MAN. A term commonly used to designate a person having large possessions.[18]

MONEY HAD AND RECEIVED. In pleading, the technical designation of a form of declaration in assumpsit, wherein the plaintiff declares that the defendant had and received certain money, etc.[19] (See MONEY RECEIVED.)

MONEY IN HAND.[20] Money which is subject to one's control;[21] ready money.[22]

MONEY JUDGMENT. One which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred;[23] a legal demand or a record debt upon which suit may be brought.[24] (See, generally, JUDGMENTS.)

MONEY LAND. A phrase sometimes applied to money held upon trust to be laid out in the purchase of land.[25] (See, generally, CONVERSION.)

15. Buffalo Mut. Ins. Co. *v.* Erie County, 4 N. Y. 442, 445.

16. Winter *v.* Iowa, etc., R. Co., 30 Fed. Cas. No. 17,890, 2 Dill. 487, 489.

17. Platt *v.* Wilmot, 193 U. S. 602, 611, 24 S. Ct. 542, 48 L. ed. 809.

The term includes: A banking association. Robinson *v.* Attica Bank, 21 N. Y. 406, 409; Gillet *v.* Moody, 3 N. Y. 479, 487. An insurance company. Hill *v.* Reed, 16 Barb. (N. Y.) 280, 287. A railroad. *In re* California Pac. R. Co., 4 Fed. Cas. No. 2,315, 3 Sawy. 240, 246; Winter *v.* Iowa, etc., R. Co., 30 Fed. Cas. No. 17,890, 2 Dill. 487, 489. A trust company. Hobbs *v.* National Bank of Commerce, 101 Fed. 75, 76, 41 C. C. A. 205.

18. Jacobs' Appeal, 140 Pa. St. 268, 274, 21 Atl. 318, 23 Am. St. Rep. 230, 11 L. R. A. 767.

19. Black L. Dict.

20. "Money in the hands of an attorney-at-law, sheriff, or other officer" in a statute relating to attachment see Pruitt *v.* Armstrong, 56 Ala. 306, 309.

21. English L. Dict.

22. Parker *v.* Marchant, 12 L. J. Ch. 385, 387.

"Moneys in hand," as used by a testator in bequeathing all his moneys on hand, includes a cash balance in the hands of his bankers, although it carries interest, but does not include money out on securities. Vaisey *v.* Reynolds, 6 L. J. Ch. O. S. 172, 5 Russ. 12, 29 Rev. Rep. 4, 5 Eng. Ch. 12, 38 Eng. Reprint 931. See also Parker *v.* Marchant, 12 L. J. Ch. 385, 387.

23. Black L. Dict.

The term "money judgment" includes a decree allowing a certain sum to a commissioner in partition for services and expenses. Cortez *v.* San Francisco Super. Ct., 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37.

"Money decree" includes a decree awarding preliminary alimony. Harding *v.* Harding, 180 Ill. 592, 593, 54 N. E. 604.

A "judgment for the recovery of money" or "money judgment" is one "which adjudges a defendant either as an individual or in a representative capacity absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant paying into court the amount adjudged, with interest and costs"; and the fact that the judgment does not involve the personal liability of defendant is immaterial. Fuller *v.* Aylesworth, 75 Fed. 694, 701, 21 C. C. A. 505, holding that a judgment rendered against a county for the amount of certain drain warrants, with a provision for mandamus to compel the levy of assessments according to law upon the lands benefited by the drains, was a judgment for the recovery of money.

24. *In re* Kelsey, 12 Utah 393, 407, 43 Pac. 106.

25. Bouvier L. Dict.

MONEY LENT

By J. Breckinridge Robertson *

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CROSS-REFERENCES

For Matters Relating to:
Assumpsit Generally, see Assumpsit, Action of.
Book Debt, see Accounts and Accounting.
Loan:
Creating Insurable Interest, see Marine Insurance.
Debt For, see Debt, Action of.
Defined, see Loan, and Cross-References Thereunder.
Distinguished From Gift, see Gifts.
Express Contract to Repay, see Contracts.
Fraud in Obtaining, see Fraud.
Induced by False Representation, see False Pretenses; Larceny.
On Mortgage, see Chattel Mortgages; Mortgages.
On Policy, see Life Insurance, and Particular Insurance Titles.
Payment of, see Payment.
Society, see Banks and Banking; Building and Loan Societies.
Loan For:
Benefit of Homestead, see Homesteads.
Gambling Purposes, see Gaming.
Recovery of Payment, see Payment.

* Author of "Boundaries," 5 Cyc. 861; "Covenants," 11 Cyc. 1035; "Embezzlement," 15 Cyc. 486; "Justices of the Peace," 24 Cyc. 383; and joint author of "Champerty and Maintenance," 6 Cyc. 847; "Master and Servant," 26 Cyc. 941.

I. RIGHT OF ACTION.[1]

As a general rule an action for money lent will lie wherever one loans or advances money at the request of another, the law implying a contract to pay therefor, where there is no express contract.[2] Where, however, money is lent for the express purpose of enabling the borrower to do some act prohibited by law, the lender cannot recover it;[3] but money loaned on a contract made void by statute, the defect being in the form of the contract, and not in the essence of the transaction, may be recovered on the money counts.[4] An action for money lent cannot

1. **Definition.**— *Indebitatus assumpsit* for money lent is one of the common counts at common law. Martin Civ. Pr. § 56. See also 8 Cyc. 341; 4 Cyc. 317 *et seq.* It is the technical name of a declaration in an action of assumpsit for that the defendant promised to pay the plaintiff for money lent. Black L. Dict.

Liability to lender of person to whose use borrowed money has been applied see MONEY RECEIVED.

2. Levy *v.* Gillis, 1 Pennew. (Del.) 119, 39 Atl. 785. And see the following illustrative cases:

California.— Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98 (in which the notes on which the loan to a corporation was made were void because unauthorized); Allen *v.* Citizens' Steam Nav. Co., 22 Cal. 28; Bagley *v.* Eaton, 10 Cal. 126.

Connecticut.— Hamilton *v.* Starkweather, 28 Conn. 138 (money paid to B at the request of A and on A's promise to repay it); Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37 (in which the indorsee of a promissory note gave it up through a mistaken belief that it had been paid); Newson *v.* Storrs, 2 Root 441 (request in letter to let another have a sum of money).

Georgia.— Hart *v.* Conner, 21 Ga. 384, holding that assumpsit lies on a receipt for money as an advance on merchandise to be delivered to the party advancing at a time fixed. *Compare* Farrar *v.* Baber, Ga. Dec. Pt. II, 125, holding that assumpsit will not lie for the loan of script.

Illinois.— Dickerson *v.* Merriman, 100 Ill. 342, where money was loaned under an agreement that a mortgage should be given to secure repayment, which the borrower subsequently refused to do.

Indiana.— Russell *v.* Metzgar, 2 Ind. 345.

Maine.— Perkins *v.* Dunlap, 5 Me 268.

Maryland.— Badart *v.* Toulon, 80 Md. 579, 31 Atl. 513.

Massachusetts.— Baxter *v.* Paine, 16 Gray 273 (holder of promissory note, who gives it up under mistaken belief that it has been paid, may recover unpaid balance); Leonard *v.* Taunton First Cong. Soc., 2 Cush. 462; Marston *v.* Boynton, 6 Metc. 127; Charlton *v.* Lathe, 7 Pick. 44.

Michigan.— Murphy *v.* Dalton, 139 Mich. 79, 102 N. W. 277, in which plaintiff made advances on a contract which was subsequently abandoned by mutual agreement. In case of non-abandonment, the action would not lie, where plaintiff had violated the contract.

Missouri.— Binion *v.* Browning, 26 Mo. 270; Henderson *v.* Skinner, 13 Mo. 99.

New Hampshire.— Hilliard *v.* Bothell, 64 N. H. 313, 8 Atl. 826, loan of check equivalent to loan of money.

New York.—Tesler *v.* Stevens, 11 Barb. 485 (in which an indorsee of a note guaranteed its payment by a separate instrument at the time of transferring it for a valuable consideration); Westcott *v.* Keeler, 4 Bosw. 564; Jerome *v.* Morgan, 13 Daly 225 (money received by a broker for his principal, and left on deposit with the broker); Beal *v.* American Diamond Rock-Boring Co., 16 Misc. 540, 38 N. Y. Suppl. 743 [*affirming* 15 Misc. 493, 37 N. Y. Suppl. 25]; Parker *v.* Newland, 1 Hill 87; Utica Ins. Co. *v.* Cadwell, 3 Wend. 296.

Ohio.— State *v.* Battles, 1 Ohio Dec. (Reprint) 520, 10 West. L. J. 309, distinguishing between a loan and a simple deposit.

Pennsylvania.— Brown *v.* Campbell, 1 Serg. & R. 176. *Compare* Groome's Estate, 4 Wkly. Notes Cas. 250.

Texas.— Emerson *v.* Mills, 83 Tex. 385, 18 S. W. 805.

Wisconsin.— Whitman *v.* Lake, 32 Wis. 189.

United States.— Gibson *v.* Stevens, 10 Fed. Cas. No. 5,401, 3 McLean 551 [*reversed* on the facts in 8 How. 384, 12 L. ed. 1123], holding that where a loan was obtained by fraudulent representations, *indebitatus assumpsit* may be maintained to recover it before the note given as security has become due.

England.— Shepherd *v.* Philips, 2 C. & K. 722, 61 E. C. L. 722; Pott *v.* Cleg, 11 Jur. 289, 16 L. J. Exch. 210, 16 M. & W. 321 (money deposited with banker); Stevenson *v.* Hardie, W. Bl. 872 (loan to wife at request of husband).

See 35 Cent. Dig. tit. "Money Lent," § 1.

3. Cannan *v.* Bryce, 3 B. & Ald. 179, 22 Rev. Rep. 342, 5 E. C. L. 111; McKinnell *v.* Robinson, 7 L. J. Exch. 149, 3 M. & W. 434.

Money lent for the purpose of gambling in a country where the game is not illegal may be recovered. Quarrier *v.* Colston, 6 Jur. 147, 12 L. J. Ch. 57, 1 Phil. 147, 19 Eng. Ch. 147, 41 Eng. Reprint 587. See also King *v.* Kemp, 8 L. T. Rep. N. S. 255. See GAMING.

4. Vanatta *v.* State Bank, 9 Ohio St. 27.

be maintained upon a collateral undertaking to guarantee advances to be made to a third person,[5] nor, in some jurisdictions, where there is a want of privity between plaintiff and defendant.[6] So too, where one party to a contract advances money on the contract, supposing that the other is able to perform his part, when at that time performance was impossible, the money cannot be recovered back in an action for money lent.[7]

II. CONDITIONS PRECEDENT.[8]

A loan of money is payable on demand where no time for payment is fixed,[9] and where one lends money to be repaid or applied as he may direct, if no direction be given, the promise to repay may be enforced without a demand.[10] Where money is advanced on the faith of a contract for the delivery of a crop, and only a part of it is delivered, plaintiff may recover on the money counts the amount received by defendant over and above the value of the part delivered, without a return or offer to return such part.[11]

III. DEFENSES.

Since assumpsit is an equitable action,[12] almost any defense to which defendant may be entitled in equity and good conscience is admissible in an action to recover money lent.[13]

IV. PERSONS LIABLE.

In an action for money lent the person or persons to whom the credit was given,[14] and also the person receiving the benefit of the loan,[15] are liable; and where a joint promise may be implied, the liability is joint.[16] Where a note taken for a loan, made by issuing checks in the shape of bank-notes, is void, the money loaned cannot be recovered on the common counts in an action against sureties on the note.[17]

V. NATURE AND FORM OF REMEDY.

The proper form of action for money lent is assumpsit, even though another remedy may be given by statute.[18]

5. Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626.

6. Rogers *v.* Coit, 6 Hill (N. Y.) 322. And see as to the necessity of privity in actions of assumpsit generally ASSUMPSIT, ACTION OF, 4 Cyc. 322. But see Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37.

7. Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

8. Conditions precedent generally see ACTIONS, 1 Cyc. 692 *et seq.*

9. Colborn *v.* Monroe First Baptist Church, 60 Mich. 198, 26 N. W. 878.

10. Clute *v.* McCrea, 1 N. Y. Suppl. 96.

11. Arthur *v.* Saunders, 9 Port. (Ala.) 626.

12. See ASSUMPSIT, ACTION OF, 4 Cyc. 320.

13. See ASSUMPSIT, ACTION OF, 4 Cyc. 335. For instances of various special defenses held invalid see Hall *v.* King, 2 Colo. 711 (holding insufficient a plea that the promise to pay was made on a sale of goods exceeding fifty dollars in value and was not in writing); Hinsdale *v.* Eells, 3 Conn. 377; Salsbury *v.* Falk, 28 Ill. App. 297 (holding insufficient a plea to an action for money advanced alleging that the advances were made for performing certain illegal services in procuring an entry of timber land on a written application signed by plaintiff but not sworn to as required by law, because the facts alleged fail to involve either plaintiff or defendant in any wilful fraud on the government); Baltimore City Bank *v.* Bateman, 7 Harr. & J. (Md.) 104; Smith *v.* Van Tine, 39 Mich. 491; Wintermute *v.* Stinson, 16 Minn. 468 (holding that it is no defense that the money loaned was received from a third person on an illegal contract); Williams *v.* Carr, 80 N. C. 294 (holding that a lender may recover from the borrower money paid at his request in discharge of an illegal contract).

14. Boetge *v.* Landa, 22 Tex. 105. *Compare* Painter *v.* Abel, 2 H. & C. 113, 9 Jur. N. S. 540, 33 L. J. Exch. 60, 8 L. T. Rep. N. S. 287, 11 Wkly. Rep. 651, in which there was no evidence of an implied promise on the part of the person sought to be charged.

15. See Mechanics' Bank *v.* Woodward, 74 Conn. 689, 51 Atl. 1084.

16. Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461; Buck *v.* Hurst, L. R. 1 C. P. 297, 12 Jur. N. S. 704.

17. Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296.

18. Betts *v.* Hilliard, 2 Root (Conn.) 131.

VI. PLEADING.[19]

A. Declaration, Petition, or Complaint. As in other actions, the declaration, petition, or complaint in an action for money lent must contain all that is necessary for plaintiff to prove in order to recover;[20] but generally it is sufficient to allege an indebtedness for money loaned at defendant's request, a promise to repay, and a refusal so to do.[21] The time at which the money was loaned need not be definitely set out, in the absence of a motion to make more definite and certain,[22] nor is it necessary expressly to aver that the debt is due.[23]

B. Plea or Answer.[24] In an action for money lent, the defense that the money was borrowed for an illegal purpose must be specially pleaded,[25] and it must be averred that the money was in fact used for such purpose.[26] After issue joined on a plea of never indebted defendant will not be permitted to substitute a plea that the money was lent to be used for an illegal purpose.[27]

C. Issues, Proof, and Variance — 1. ISSUES AND PROOF. In an action for money lent plaintiff may prove under his declaration, petition, or complaint any matters which tend to establish his cause of action;[28] while defendant may introduce any evidence which tends to support his defense, provided it has been

19. Pleading generally see PLEADING.

20. See Harnett *v.* Holdrege, 5 Nebr. (Unoff.) 114, 97 N. W. 443, holding insufficient a petition which charged defendant with no other liability than that of indorser of a promissory note.

Cancellation of bill.— Where an action is brought for money loaned by taking up a bill of exchange drawn by defendant, the declaration must aver that plaintiff canceled and delivered up the bill. Lambert *v.* Slade, 3 Cal. 330.

21. Williams *v.* Glasgow, 1 Nev. 533.

Complaints held sufficient see Lemmon *v.* Reed, 14 Ind. App. 655, 43 N. E. 454; Cudlipp *v.* Whipple, 4 Duer (N. Y.) 610.

22. Wagoner *v.* Wilson, 108 Ind. 210, 8 N. E. 925.

Allegation of time held surplusage see Baxter *v.* Paine, 16 Gray (Mass.) 273.

23. Wagoner *v.* Wilson, 108 Ind. 210, 8 N. E. 925.

24. Affidavit of defense.— In Pennsylvania judgment cannot be given by default in an action for money lent for the insufficiency or want of an affidavit of defense, unless the transaction amounted to a loan within the meaning of the statute. Landis *v.* Kirk, 1 Pearson (Pa.) 77; Peebles *v.* Kerr, 1 Pearson (Pa.) 69; Fleitman *v.* Welthall, 8 Wkly. Notes Cas. (Pa.) 73. For sufficient affidavits of defense see Knight *v.* Somerton Hills Cemetery, 205 Pa. St. 552, 55 Atl. 535; Raible *v.* Schall, 5 Wkly. Notes Cas. (Pa.) 149.

25. De Bautte *v.* Curiel, 2 Misc. (N. Y.) 170, 21 N. Y. Suppl. 617 [*affirmed* in 142 N. Y. 635, 37 N. E. 506].

26. Edman *v.* Charleston State Bank, 101 Ill. App. 83.

27. Ritchie *v.* Van Gulden, 9 Exch. 762, 18 Jur. 385, 2 Wkly. Rep. 418.

28. Evidence admissible under declaration, petition, or complaint.— *Connecticut.*— Dean *v.* Mann, 28 Conn. 352, memorandum check.

Kentucky.— Peniston *v.* Wall, 3 J. J. Marsh. 37, holding that the action was supported by a writing in these words: "Lent Robert P. Peniston fifty-six dollars, I say received by me Robert P. Peniston."

Massachusetts.— Currier *v.* Davis, 111 Mass. 480 (check given by borrower, which was to be held as evidence of loan, and not to be presented to drawee); Cushing *v.* Gore, 15 Mass. 69 (check given by borrower on a bank where he was known to have no funds).

Michigan.— Hough *v.* Comstock, 97 Mich. 11, 55 N. W. 1011.

Mississippi.— Coor *v.* Grace, 10 Sm. & M. 421, holding that a count for money loaned is supported by the written acknowledgment of defendant of the receipt of a certain sum for the sale of a slave, which sale was to be void on the repayment of the money in the time stated.

Montana.— Clarkson *v.* Kennett, 17 Mont. 563, 44 Pac. 88, holding that the fact that the money was paid to creditors of defendant, by his express direction, supports an allegation that the money was loaned and advanced to him.

New York.— Mack *v.* Spencer, 4 Wend. 411, holding that a promissory note made by one partner in the name of the firm is admissible in an action against the firm.

Vermont.— Hay *v.* Hide, 1 D. Chipm. 214, holding the action supported by a writing: "Due to Francis Hay eighty dollars on demand, 19th June, 1819. A. W. Hide."

See 35 Cent. Dig. tit. "Money Lent," § 9.

The loan of a United States bond cannot be given in evidence to support an action for money lent. Waterman *v.* Waterman, 34 Mich. 490.

Evidence of money paid out without request from defendant will not support an action for money lent. Cummings *v.* Long, 25 Minn. 337.

In an action by indorsee against maker, a promissory note cannot be given in evidence under a count for money lent. Rockefeller *v.* Robison, 17 Wend. (N. Y.) 206.

properly pleaded.[29] Defendant may also show, not as a bar to the action, but for his future protection, that the money was loaned him in a representative, not an individual, capacity.[30]

2. VARIANCE. As in other actions, an immaterial variance between the pleadings and proof will be disregarded as harmless.[31]

VII. EVIDENCE.[32]

A. Presumptions and Burden of Proof — 1. PRESUMPTIONS. Money paid by one person to another is presumed, in the absence of any explanation as to the cause of payment, to be paid because due, and not by way of a loan ;[33] and where plaintiff gives another money which some time previously he received from that other, and the circumstances strongly tend to show that it was put in plaintiff's hands for safe-keeping, it is not material error to charge that plaintiff's possession does not raise the presumption of ownership.[34] Where upon a loan two promissory notes are given, one with security and the other without, the legal presumption is that the aggregate sum was loaned to the maker of the notes, and that the lender agreed to look to him exclusively for the payment of the second note.[35] An action for money lent cannot be maintained upon an instrument merely acknowledging the receipt of money, without other evidence.[36]

2. BURDEN OF PROOF. The burden of proof is on plaintiff until shifted.[37]

B. Admissibility. Within the rule as to relevancy, competency, and materiality, any evidence is admissible in an action for money lent which tends to prove or disprove plaintiff's cause of action.[38]

Evidence held not to support action see Groneweg *v.* Kusworm, 75 Iowa 237, 39 N. W. 288.

29. **Under the general issue or general denial** defendant may show the illegality of the transaction (Dodge *v.* McMahan, 61 Minn. 175, 63 N. W. 487), or that the money was given under an agreement to take care of plaintiff (Tompkins *v.* Tompkins, 78 Hun (N. Y.) 220, 28 N. Y. Suppl. 903), or that the amount sued for was not lent to intestate, but was paid out of his funds in plaintiff's hands (Johnson *v.* Jennings, 10 Gratt. (Va.) 1, 60 Am. Dec. 323).

Under a plea of payment defendant may show that he pledged collateral security for the debt, and that plaintiff sold part of the same and refused to account. Simes *v.* Zane, 1 Phila. (Pa.) 501.

Proof of illicit relations.— In an action against administrators, where they allege that the claim is fraudulent, evidence showing illicit relations between plaintiff and deceased is admissible. Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355.

30. Bond *v.* Corbett, 2 Minn. 248.

31. **For instances of immaterial variances** see Fravell *v.* Nett, 46 Minn. 31, 48 N. W. 446; Kitchen *v.* Holmes, 42 Oreg. 252, 70 Pac. 830.

Variance aided by judgment see Mulhall *v.* Mulhall, 3 Okla. 304, 41 Pac. 109.

32. **Evidence** generally see EVIDENCE.

Right to bring assumpsit on note or give it in evidence under money counts in general see COMMERCIAL PAPER, 8 Cyc. 17, 18.

33. Gerding *v.* Walter, 29 Mo. 426; Sayles *v.* Olmstead, 66 Barb. (N. Y.) 590; Black *v.* White, 42 N. Y. Super. Ct. 446; Matter of Delaney, 27 Misc. (N. Y.) 398, 58 N. Y. Suppl. 924.

34. Ray *v.* Jackson, 90 Ala. 513, 7 So. 747.

35. Underhill *v.* Crawford, 29 Barb. (N. Y.) 664, where it is said that the presumption is rebuttable.

36. McFarland *v.* Shipp, 17 Ark. 41.

37. Jones *v.* Durham, 94 Mo. App. 51, 67 S. W. 976, in which defendant testified that he had borrowed the amount sued for, but had repaid it. Plaintiff claimed that this was not the sum for which the action was brought, and defendant testified that he had no recollection of borrowing other money from plaintiff. It was held that such testimony was not an admission of having borrowed the money, so as to relieve plaintiff of the burden of proving that fact.

Where the only evidence of the loan is drafts of defendant on plaintiff, and it appears that the drafts were drawn for goods consigned by defendant to plaintiff, and defendant sets up a counter-claim for a balance due on the goods, the case turns on the price agreed to be paid for the goods, and the burden of proving this is on plaintiff. Doyle *v.* Unglish, 143 N. Y. 556, 38 N. E. 711 [*affirming* 21 N. Y. Suppl. 650].

Burden shifted.—Where plaintiff introduced a written acknowledgment by defendant that he has received a specified sum for the sale of a chattel, the sale to be void on repayment in a stated time, the burden is on defendant to show an actual repayment or a delivery of the chattel to plaintiff. Coor *v.* Grace, 10 Sm. & M. (Miss.) 434.

38. **Evidence admissible to establish cause of action.**— *California.*— Bacome *v.* Black,

C. Weight and Sufficiency. What evidence will be sufficient to establish a loan necessarily depends upon the facts and circumstances of the individual case, and is a question for the jury, whose determination will only be interfered with when clearly erroneous.[39]

VIII. AMOUNT OF RECOVERY.

The amount of recovery in an action for money lent is the sum received by the borrower,[40] with interest.[41]

(1902) 70 Pac. 620, evidence of subsequent loan to make up the amount necessary to defendant.

Connecticut.— Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112.

Georgia.— Mayes *v.* Power, 79 Ga. 631, 4 S. E. 681, holding that evidence that plaintiff's intestate had before lent money to defendant in the manner alleged was competent, but that evidence that he was accustomed to lend money in such manner was irrelevant.

Missouri.— Prewitt *v.* Martin, 59 Mo. 325.

Oregon.— Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461, holding that, although the action is on the original indebtedness, the note given therefor being altered, the note is competent on the question of whether the alteration was innocent or fraudulent.

Pennsylvania.— Huntzinger *v.* Jones, 60 Pa. St. 170.

United States.— Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274.

England.— Enthoven *v.* Hoyle, 13 C. B. 373, 16 Jur. 272, 21 L. J. C. P. 100, 76 E. C. L. 373; Tyte *v.* Jones, 1 East 58 note; Pentreguinny Fuel Co. *v.* Young, 12 Jur. N. S. 56.

See 35 Cent. Dig. tit. "Money Lent," § 12.

Evidence admissible to establish defense.— Sager *v.* St. John, 109 Ill. App. 358 (holding that, where the testimony of the parties is conflicting evidence that the financial circumstances of defendant were such that he did not need the money at the time is competent); Avery *v.* Mattice, 9 N. Y. Suppl. 166 [*affirmed* in 132 N. Y. 601, 30 N. E. 1152]; Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355 (evidence that plaintiff was without property); Dowling *v.* Dowling, 10 Ir. C. L. 236 (evidence of the poverty of the alleged lender).

For instances of incompetent evidence see Burke *v.* Kaley, 138 Mass. 464 (evidence that defendant had money in bank); Ford *v.* McLane, 131 Mich. 371, 91 N. W. 617; Moynahan *v.* Connor, 30 Mich. 136; Tague *v.* John Caplice Co., 28 Mont. 51, 72 Pac. 297; Roe *v.* Nichols, 5 N. Y. App. Div. 472, 38 N. Y. Suppl. 1100 (evidence as to the simple and inexpensive habits of defendant); Mills *v.* McMullen, 4 N. Y. App. Div. 27, 38 N. Y. Suppl. 705 (entries on stubs in plaintiff's check books); Avery *v.* Mattice, 9 N. Y. Suppl. 166 [*affirmed* in 132 N. Y. 601, 30 N. E. 1152].

39. Evidence held sufficient to establish loan see the following cases:

Georgia.— Mayes *v.* Power, 79 Ga. 631, 4 S. E. 681.

Illinois.— Grist *v.* Pollock, 58 Ill. App. 429.

Iowa.— Miles *v.* Wikel, 74 Iowa 712, 39 N. W. 95.

Missouri.— St. Louis Trust Co. *v.* Rudolph, 136 Mo. 169, 37 S. W. 519.

New Hampshire.— Cox *v.* Cox, 72 N. H. 561, 58 Atl. 504.

New York.— Barnes *v.* McDonald, 13 N. Y. Suppl. 440 [*affirmed* in 133 N. Y. 620, 30 N. E. 1150]. *Compare* Beal *v.* American Diamond Rock Boring Co., 16 Misc. 540, 38 N. Y. Suppl. 743 [*affirming* 15 Misc. 493, 37 N. Y. Suppl. 25].

Texas.— See Lipscomb *v.* Parker, 5 Tex. Civ. App. 162, 23 S. W. 1006, in which the findings were by the court.

England.— See Howard *v.* Danbury, 2 C. B. 803, 52 E. C. L. 803.

See 35 Cent. Dig. tit. "Money Lent," § 13.

Evidence held insufficient to establish loan see Carsey *v.* Farmer, 117 Ky. 826, 79 S. W. 245, 25 Ky. L. Rep. 1965; Clippinger *v.* Starr, 130 Mich. 463, 90 N. W. 280; Kraft *v.* Coykendall, 4 Silv. Sup. (N. Y.) 75, 7 N. Y. Suppl. 140; Siefke *v.* Siefke, 5 Misc. (N. Y.) 406, 25 N. Y. Suppl. 762; Stebbins *v.* Hume, 1 N. Y. Suppl. 131; Lowrey *v.* Robinson, 141 Pa. St. 189, 21 Atl. 513; Dimmitt *v.* Robbins, 74 Tex. 441, 12 S. W. 94; Morgan *v.* Jones, 1 Cromp. & J. 162, 9 L. J. Exch. O. S. 41, 1 Tyrw. 21; Cary *v.* Gerrish, 4 Esp. 9; Welch *v.* Seaborn, 1 Stark. 474, 2 E. C. L. 182.

An I O U is sufficient *prima facie* evidence in an action for money lent, although it is not addressed, and no proof be given that U means plaintiff, except his producing the writing. Douglas *v.* Holme, 12 A. & E. 641, 10 L. J. Q. B. 43, 4 P. & D. 685, 40 E. C. L. 320. *Contra*, Fesenmayer *v.* Adcock, 16 M. & W. 449.

40. Boetge *v.* Landa, 22 Tex. 105, in which A, upon the representations of B and C, advanced money on B's draft, and it was held that if C, although he made no wilfully false representations to induce the advance, yet received part of the money from B by way of division of the money, he would be liable for the amount so received.

41. Henderson *v.* Skinner, 13 Mo. 99, holding that if A furnishes B with money with which to enter land, and B uses only a part for that purpose and converts the remainder to his own use, A is entitled to recover interest on the amount not used.

IX. TRIAL.

A. Examination of Witnesses. In an action for money lent, defendant may properly cross-examine plaintiff as to his understanding as to the use to which the money was to be put.[42]

B. Questions For Jury. As in other actions, where there is any evidence upon a disputed question of fact in an action for money lent, it should be submitted to the jury.[43]

C. Instructions. The general rules of law governing instructions in civil actions apply to actions for money lent.[44]

D. Verdict and Findings. A verdict in an action for money lent should be in the form of so much debt and damages for the detention, and not for the debt and interest.[45] As in other cases, findings by the jury must be consistent, in order to support a judgment.[46] A referee's findings that plaintiff lent a certain sum of money to defendant with the expectation that defendant would repay him, and that defendant is bound to make repayment, implies an assumpsit, and will support a judgment, even though he does not find in express terms that defendant undertook to pay plaintiff the money.[47]

MONEY-ORDER. See POST-OFFICE.

42. Avery *v.* Mattice, 9 N. Y. Suppl. 166 [*affirmed* in 132 N. Y. 601, 30 N. E. 1152].

43. Waterbury Brass Co. *v.* Pritchard, 34 Conn. 417; Union Trust Co. *v.* Whiton, 9 Hun (N. Y.) 657; Boehringer *v.* Hirsch, 86 N. Y. Suppl. 726; Morse *v.* Bogert, 4 Den. (N. Y.) 108 [*affirmed* in 1 N. Y. 377]; Huber *v.* Miller, 41 Oreg. 103, 68 Pac. 400.

44. **Necessity of evidence to support instruction** see Moynahan *v.* Connor, 30 Mich. 136.

Aider of defective instruction by subsequent instruction see Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112.

45. North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

46. See Bacome *v.* Black, (Cal. 1902) 70 Pac. 620, holding that a finding that the money was loaned defendant and another jointly, and that defendant promised to pay the same, was not inconsistent.

47. Nugent *v.* Nugent, 48 Mich. 362, 12 N. W. 490.

MONEY PAID

By J. Breckinridge Robertson *

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* Author of "Boundaries," 5 Cyc. 861; "Bribery," 5 Cyc. 1038; "Covenants," 11 Cyc. 1035; "Embezzlement," 15 Cyc. 486; "Justices of the Peace," 24 Cyc. 383; "Money Lent," 27 Cyc. 825; and joint author of "Champerty and Maintenance," 6 Cyc. 847; "Master and Servant," 26 Cyc. 941.

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Bill or Note, see COMMERCIAL PAPER.
Bond, see BONDS.
Contribution Between Obligors, see CONTRIBUTION.
Equity Jurisdiction, see EQUITY.
Money Paid by:
Principal or Agent, see PRINCIPAL AND AGENT.
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For Support of Pauper, see PAUPERS.
For Taxes, see TAXATION.
On Strength of Another's Subscription, see SUBSCRIPTIONS.
To Discharge Common Obligation or Liability, see CONTRIBUTION.
Rights and Liabilities:
Against Third Persons, see PRINCIPAL AND AGENT.
Between:
Principal and Agent, see PRINCIPAL AND AGENT.
Principal and Surety, see PRINCIPAL AND SURETY.

I. NATURE AND GROUNDS OF OBLIGATION.[1]

A. In General. An action for money paid is maintainable in every case in which there has been a payment of money by plaintiff to a third party, at the request of defendant, express or implied,[2] with an undertaking, express or implied, to repay the amount,[3] and it is immaterial whether defendant is relieved from a

1. Recovery of money paid as bribe see ACTIONS, 1 Cyc. 678 note 79.
Recovery of money from the payee see PAYMENT.

2. See infra, I, B, 1; I, G.

3. Brittain *v.* Lloyd, 15 L. J. Exch. 43, 14 M. & W. 762 [*explaining* Spencer *v.* Parry, 3 A. & E. 331, 1 Harr. & W. 179, 4 L. J. K. B. 186, 4 N. & M. 771, 30 E. C. L. 166]. See also the following cases:
Connecticut.— McNerney *v.* Barnes, 77 Conn. 155, 58 Atl. 714; Bailey *v.* Bussing, 28 Conn. 455.
Florida.— Chamberlain *v.* Lesley, 39 Fla. 451, 22 So. 736.
Indiana.— Woodford *v.* Leavenworth, 14 Ind. 311; Conklin *v.* Smith, 3 Ind. 284, opinion by Blackford, J.
Minnesota.— Foster *v.* Gordon, 96 Minn. 142, 104 N. W. 765; Powers Mercantile Co. *v.* Blethen, 91 Minn. 339, 97 N. W. 1056; Johnson *v.* Krassin, 25 Minn. 117.
Nebraska.— Wright *v.* Morse, 53 Nebr. 3, 73 N. W. 211.
New York.— Graham *v.* Dunigan, 2 Bosw. 516; Conlon *v.* Green, 2 Cai. 153.
Pennsylvania.— Keim *v.* Robeson, 23 Pa. St. 456.
West Virginia.— Nutter *v.* Sydenstricker, 11 W. Va. 535.
United States.— Schofield *v.* Denver State Nat. Bank, 97 Fed. 282, 38 C. C. A. 179.
England.— Pulbrook *v.* Lawes, 1 Q. B. D. 284, 45 L. J. Q. B. 178, 34 L. T. Rep. N. S. 95; Dawson *v.* Linton, 5 B. & Ald. 521, 1 D. & R. 117, 7 E. C. L. 285; Carter *v.* Carter, 5 Bing. 406, 7 L. J. C. P. O. S. 141, 2 M. & P. 732, 30 Rev. Rep. 677, 15 E. C. L. 643; Lewis *v.* Campbell, 8 C. B. 541, 14 Jur. 396, 19 L. J. C. P. 130, 65 E. C. L. 541; Pelly *v.* Sidney, 5 C. B. N. S. 679, 5 Jur. N. S. 793, 28 L. J. C. P. 182, 94 E. C. L. 679; Griffinhoofe *v.* Daubeez, 5 E. & B. 746, 2 Jur. N. S. 392, 25 L. J. Q. B. 237, 85 E. C. L. 746; Gregory

liability by the payment or not.[4] The request to pay and the payment acccording to it constitute the debt; and whether the request be direct as where the party is expressly desired by defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference.[5]

B. Payment For Self-Protection[6] — **1. In General.** Although no assumpsit will be raised by the mere voluntary payment of the debt of another person,[7] yet if one person, in order to protect his own interests, pays a debt for which another is legally and personally liable, the law will imply an assumpsit on the part of the latter to the former.[8] A request will be implied where the consideration consists in plaintiffs having been compelled to do that to which defendant was legally compellable.[9]

2. Discharge of Outstanding Encumbrance. Where, in order to protect his property, real or personal, the owner pays off an outstanding encumbrance thereon, which another has undertaken or is legally liable to pay, he may recover from such other the amount so paid by him in an action for money paid.[10]

v. Stanway, 2 F. & F. 309; Alexander *v.* Vane, 2 Gale 57, 5 L. J. Exch. 187, 1 M. & W. 511; Alcenbrook *v.* Hall, 2 Wils. C. P. 309.

See 35 Cent. Dig. tit. "Money Paid," § 1.

Otherwise expressed, the rule is that, in general, where plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money which defendant ought to have paid, the count for money paid will be supported. Nutter *v.* Sydenstricker, 11 W. Va. 535.

4. Lewis *v.* Campbell, 8 C. B. 541, 14 Jur. 396, 19 L. J. C. P. 130, 65 E. C. L. 541; Brittain *v.* Lloyd, 15 L. J. Exch. 43, 14 M. & W. 762. See also Emery *v.* Hobson, 62 Me. 578, 16 Am. Rep. 513; Hassinger *v.* Solms, 5 Serg. & R. (Pa.) 4.

5. Brittain *v.* Lloyd, 15 L. J. Exch. 43, 14 M. & W. 762.

6. Liability of commissioners of public buildings to repay amounts paid for articles for use in his office see States.

Lien of party paying taxes on land, with *bona fide* belief of title, when land adjudged to another see Taxation.

Recovery of assessment for improvement by municipal corporation in assumpsit see Municipal Corporations.

Recovery of payment by grantee to discharge encumbrance against which grantor covenanted see Covenants, 11 Cyc. 1165, 1166.

7. See *infra*, I, H.

8. Hogg *v.* Longstreth, 97 Pa. St. 255. See also the following cases:

Alabama.— Walker *v.* Smith, 28 Ala. 569.

California.— Treat *v.* Craig, 135 Cal. 91, 67 Pac. 7; Logan *v.* Talbot, 59 Cal. 651; Lawson *v.* Wormes, 6 Cal. 365.

Illinois.— Henderson *v.* Welch, 8 Ill. 340, action by assignor to recover costs which he was obliged to pay in an action brought in his name by the equitable assignee.

Indiana.— Union Tp. *v.* Anthony, 26 Ind. 487.

Kentucky.— Hunt *v.* Sanders, 1 A. K. Marsh. 552.

Maine.— Ticonic Bank *v.* Smiley, 27 Me. 225, 46 Am. Dec. 593.

Massachusetts.— Nichols *v.* Bucknam, 117 Mass. 488, to the effect that one who to save his property from selling on legal process pays a debt which another is legally bound to pay may maintain an action against him on an implied assumpsit.

Pennsylvania.— Pratt *v.* Harding, 30 Pa. St. 525.

Tennessee.— Wilson *v.* Gilliam, 7 Yerg. 474.

Vermont.— Forbes *v.* Webster, 2 Vt. 58.

West Virginia.— Nutter *v.* Sydenstricker, 11 W. Va. 535.

United States.— Irvine *v.* Angus, 93 Fed. 629, 35 C. C. A. 501 [*reversing* 84 Fed. 127].

England.— Johnson *v.* Royal Mail Steam Packet Co., L. R. 3 C. P. 38, 37 L. J. C. P. 33, 17 L. T. Rep. N. S. 445; The Orchis, 15 P. D. 38, 59 L. J. Adm. 31, 62 L. T. Rep. N. S. 407, 38 Wkly. Rep. 472; Murphy *v.* Davey, L. R. 14 Ir. 28.

See 35 Cent. Dig. tit. "Money Paid," § 2.

9. Nutter *v.* Sydenstricker, 11 W. Va. 535.

10. *California.*— Lovejoy *v.* Chandler, 93 Cal. 376, 28 Pac. 935; Ebel *v.* Chandler, 93 Cal. 372, 28 Pac. 934, encumbrance on land sold by defendant to plaintiff.

Massachusetts.— Hale *v.* Huse, 10 Gray 99 (mechanic's lien); Gleason *v.* Dyke, 22 Pick. 390 (payment of mortgage by purchaser of equity of redemption, who afterward released his rights to the mortgagor); Keith *v.* Easton Cong. Parish, 21 Pick. 261; Goodrich *v.* Lord, 10 Mass. 483 (payment by owners of vessel of seamen's wages due from master, who had received funds from the charterers for their payment); Taylor *v.* Porter, 7 Mass. 355. *Compare* Bock *v.* Gallagher, 114 Mass. 28.

Michigan.— Post *v.* Campau, 42 Mich. 90, 3 N. W. 272; Norton *v.* Colgrove, 41 Mich. 544, 3 N. W. 159, in both of which the vendee of land was obliged to pay off encumbrances.

Mississippi.—Dyer *v.* Britton, 53 Miss. 270; Kirkpatrick *v.* Miller, 50 Miss. 521, removal of encumbrances by vendee with general warranty.

New Hampshire.— The buyer of personal property may maintain assumpsit against the seller for the amount paid to remove an encumbrance (Sargent *v.* Currier, 49 N. H. 310, 6 Am. Rep. 524), but assumpsit will not lie

3. Taxes Paid. Where a person has been compelled for the protection of his interests to pay taxes for which another is legally and personally liable, he may recover the amount so paid from him whose duty it was to pay such taxes;[11] and in some jurisdictions it is held that where the title to land is in dispute, and the taxes thereon are paid by one of the claimants, and the claims of the other party to the title are ultimately established, the successful party must refund the money paid as taxes, with interest.[12] Where a remainder-man voluntarily causes the property of the owner of the life-estate to be assessed to him, and pays the taxes without the authority of such life-tenant before they become delinquent, and without any compulsion through such life-tenant, he cannot recover the amount as for money paid to the latter's benefit.[13]

C. Payment by One Under Legal Liability Primarily on Another.[14] Where one, although himself under a legal liability to make a payment, pays a

for moneys paid by plaintiff to remove an encumbrance on land which defendant has represented and undertaken to be free from encumbrances (Conant *v.* Dewey, 21 N. H. 353).

New York.— Hoadley *v.* Dumois, 11 Misc. 52, 31 N. Y. Suppl. 853; Douglass *v.* Warr, Anth. N. P. 179 (payment by covenantee); Hunt *v.* Amidon, 4 Hill 345, 40 Am. Dec. 283; Wells *v.* Porter, 7 Wend. 119.

Ohio.— Wade *v.* Comstock, 11 Ohio St. 71.

Pennsylvania.— Kearney *v.* Tanner, 17 Serg. & R. 94, 17 Am. Dec. 648.

Vermont.— McIntyre *v.* Ward, 18 Vt. 434.

England.— Exall *v.* Partridge, 3 Esp. 8, 8 T. R. 308, 4 Rev. Rep. 656.

See 35 Cent. Dig. tit. "Money Paid," § 3.

11. *Illinois.*— Smith *v.* Rountree, 185 Ill. 219, 56 N. E. 1130 [*affirming* 85 Ill. App. 161], holding that where taxes are paid by a person on lands conveyed to him by another, and the conveyance is afterward set aside at the suit of the grantor, the amounts so paid can be recovered in an action for money paid.

Kansas.— Greer *v.* McCarter, 5 Kan. 17, construing the act of March 6, 1862, section 12 (Comp. Laws 880).

Michigan.— Curtis *v.* Flint, etc., R. Co., 32 Mich. 291, holding that assumpsit will lie, notwithstanding the duty of defendant to pay the tax arose on his contract under seal for the sale of the land to plaintiff.

New Hampshire.— Dana *v.* Colby, 63 N. H. 169, holding that a vendee of lands, who has been compelled to pay taxes thereon in order to prevent the enforcement of the lien, may maintain assumpsit for money paid against the vendor, to whom the land was rightly taxed.

New York.— Lageman *v.* Kloppenburg, 2 E. D. Smith 126.

Ohio.— Creps *v.* Baird, 3 Ohio St. 277.

Pennsylvania.— Iron City Tool Works *v.* Long, 4 Pa. Cas. 57, 7 Atl. 82 (in which the lessees of different parts of a lot of ground, against which taxes were assessed as a whole, were bound by their leases to pay taxes, and one paid the whole tax, and it was held that he might recover a proportional part from the other tenant); Rawle *v.* Renshaw, 15 Pa. Super. Ct. 488.

Tennessee.— Childress *v.* Vance, 1 Baxt. 406.

See 35 Cent. Dig. tit. "Money Paid," § 4.

12. Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465; Goodnow *v.* Burrows, 74 Iowa 251, 256, 758, 23 N. W. 251, 253, 322, 326; Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226, 67 Iowa 691, 25 N. W. 882; Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; Goodnow *v.* Wells, 54 Iowa 326, 6 N. W. 527, 67 Iowa 654, 25 N. W. 864; Goodnow *v.* Plumbe, 52 Iowa 711, 2 N. W. 400; Goodnow *v.* Moulton, 51 Iowa 555, 2 N. W. 395; Semple *v.* McCrary, 46 Iowa 37. *Contra*, Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 17 Wall. (U. S.) 153, 167, 21 L. ed. 622, where it is said: "It is true, in accordance with our decision, the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments." And see Garrigan *v.* Knight, 47 Iowa 525 (Beck, J., dissenting); Bryant *v.* Clark, 45 Vt. 483.

Where both claimants pay taxes for certain years, the unsuccessful claimant cannot be allowed to recover from the other claimant the amount of taxes so paid, but he may recover for taxes paid by him for the years which the successful claimant failed to pay. Montgomery County *v.* Severson, 68 Iowa 451, 27 N. W. 377.

The rule will not be enforced in favor of a defendant in an action to quiet title as to payments made before plaintiff became the owner of the premises. Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111.

13. Huddleston *v.* Washington, 136 Cal. 514, 69 Pac. 146, in which payment was demanded of the life-tenant, and he knowing the property was assessed to the remainderman, and that he was about to pay the taxes, interposed no objection.

14. Contribution between accommodation indorsers and between the indorsers and makers and accepters see Contribution, 9 Cyc. 796.

sum for which another is primarily liable, he may recover from the latter the amount so paid. Nor is it necessary that the payment should have been coerced by actual legal proceedings, the legal liability being of itself sufficient to take it out of the class of voluntary payments.[15]

D. Payment Under Legal Liability Caused by Act of Another. Where one person is compelled to make a payment by reason of the act of another, for which he would not have been liable but for such act, he may recover from such other person as for money paid to his benefit.[16]

E. Money Paid as Result of Plaintiff's Own Default. Where, by reason of his own default or wrong, a person has paid out money, such payment inuring to the benefit of another, no action for money paid can be maintained against the latter.[17]

F. Nature of Payment — 1. In General. It is not indispensable to an action for money paid that the payment should have been in money. A payment in any medium which the parties regard as equivalent to money, such as goods, chattels, securities, lands, credits, or services, is sufficient to support the action.[18] It is necessary, however, that the payment, however made, should have

Contribution between coöbligors on notes or bonds see CONTRIBUTION, 9 Cyc. 796.

Contribution between joint judgment debtors see CONTRIBUTION, 9 Cyc. 797.

Contribution between sureties see PRINCIPAL AND SURETY.

Recovery in assumpsit by mortgagor who has paid money against his grantee who assumed the debt see MORTGAGES.

Rights of indorsers on payment see COMMERCIAL PAPER, 7 Cyc. 1020.

15. *Alabama.*— Griel *v.* Pollak, 105 Ala. 249, 16 So. 704; Beard *v.* Horton, 86 Ala. 202, 5 So. 207.

California.— Treat *v.* Craig, 135 Cal. 91, 67 Pac. 7.

Connecticut.— Meriden Britannia Co. *v.* Rogers, 55 Conn. 496, 13 Atl. 405.

Illinois.— Harvey *v.* Drew, 82 Ill. 606; Buckmaster *v.* Grundy, 8 Ill. 626; Elliot *v.* Sneed, 2 Ill. 517; Crain *v.* Hutchinson, 8 Ill. App. 179.

Indiana.— Laidla *v.* Loveless, 40 Ind. 211.

Kentucky.— Armstrong *v.* Keith, 3 J. J. Marsh. 153, 20 Am. Dec. 131; Stanford *v.* Lincoln County, 61 S. W. 463, 22 Ky. L. Rep. 1744.

Massachusetts.— Shrewshury *v.* Boylston, 1 Pick. 105.

Missouri.— Lindsay *v.* Moore, 9 Mo. 176; Maupin *v.* Boyd, 5 Mo. 106.

Nebraska.— Grand Island Mercantile Co. *v.* McMeans, 60 Nebr. 373, 83 N. W. 172.

New Hampshire.— Sanborn *v.* Emerson, 12 N. H. 57.

New Jersey.— Ferrell *v.* Rogers, 1 N. J. L. 228.

New York.— Van Santen *v.* Standard Oil Co., 81 N. Y. 171 [*affirming* 17 Hun 140]; Hunt *v.* Amidon, 4 Hill 345, 40 Am. Dec. 283; Forsyth *v.* Ganson, 5 Wend. 558, 21 Am. Dec. 241.

Ohio.— Scoles *v.* Wright, Wright 92.

Pennsylvania.— Horback *v.* Reeside, 6 Whart. 47; Trevor *v.* Perkins, 5 Whart. 244.

Vermont.— Morrill *v.* Derby, 34 Vt. 440.

Virginia.— Young *v.* Thweatt, 12 Gratt. 1.

West Virginia.—Nutter *v.* Sydenstricker, 11 W. Va. 535.

Wisconsin.— Saveland *v.* Green, 36 Wis. 612; Allyn *v.* Boorman, 30 Wis. 684.

United States.— Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

England.— Bate *v.* Pyne, 13 Q. B. 900, 13 Jur. 609, 18 L. J. Q. B. 273, 66 E. C. L. 900; Exall *v.* Partridge, 3 Esp. 8, 3 T. R. 308, 4 Rev. Rep. 656.

See 35 Cent. Dig. tit. "Money Paid," § 5.

16. De Bard *v.* Smith, 9 Ala. 788; Edmunds *v.* Deppen, 97 Ky. 661, 31 S. W. 468, 17 Ky. L. Rep. 417; Van Santen *v.* Standard Oil Co., 81 N. Y. 171 [*affirming* 17 Hun 140].

17. Pharr *v.* Broussard, 106 La. 59, 30 So. 296; Harris *v.* Champion, 4 N. J. L. 152 (holding that a constable cannot maintain an action against an execution debtor to recover money which he has been compelled to pay for neglecting to serve the execution); Duvall *v.* St. James English Evangelical Lutheran Church, 53 N. Y. 500 [*affirming* 35 N. Y. Super. Ct. 505]; Barmon *v.* Lithauer, 1 Abb. Dec. (N. Y.) 99, 4 Keyes 317; Mattlage *v.* Lewi, 6 Misc. (N. Y.) 150, 26 N. Y. Suppl. 17 (payment by mistake); Hungerford *v.* Scott, 37 Wis. 341.

18. *Illinois.*— Pollock *v.* McClurken, 42 Ill. 370.

Kentucky.— Stone *v.* Porter, 4 Dana 207; Greathouse *v.* Throckmorton, 7 J. J. Marsh. 16, in which defendant being indebted to S, and S to plaintiff in the same amount, defendant requested plaintiff to pay his debt to S, which plaintiff did by canceling his charge against S.

Maine.— Garnsey *v.* Allen, 27 Me. 366, payment of note by indorser in property, instead of money.

New Jersey.— Cook *v.* Brister, 19 N. J. L. 73.

New York.— Ainslie *v.* Wilson, 7 Cow. 662, 17 Am. Dec. 532, payment in land. *Compare* Coulon *v.* Green, 2 Cai. 153.

Pennsylvania.— Craig *v.* Craig, 5 Rawle 91.

been made before suit brought,[19] unless at that time plaintiff has become legally bound to pay.[20]

2. Bill, Note, or Bond. The giving of a bill of exchange or negotiable note for the debt of another may be regarded as payment, and an action for money paid, laid out, and expended for defendant's use will lie in such case.[21] But, since a mere obligation to pay is not the same as payment, a bond given for the debt of another is not such a payment as will support an action for money paid.[22]

G. Previous Request or Subsequent Assent by Defendant. An action for money paid does not lie except upon a previous request or a subsequent ratification[23] on the part of defendant or his authorized agent.[24] But where money or its equivalent has been paid for the use of another the request or ratification may be either expressed or implied;[25] and the request, as well as the promise, will be implied where the consideration consists in plaintiff's having been

Vermont.— Dorwin *v.* Smith, 35 Vt. 69.

England.— Edmunds *v.* Wallingford, 14 Q. B. D. 811, 49 J. P. 549, 54 L. J. Q. B. 305, 52 L. T. Rep. N. S. 720, 33 Wkly. Rep. 647; Fahey *v.* Frawley, L. R. 26 Ir. 78.

See 35 Cent. Dig. tit. "Money Paid," § 8.

19. Whiting *v.* Aldrich, 117 Mass. 582; Gardner *v.* Cleveland, 9 Pick. (Mass.) 334; Connecticut, etc., R. Co. *v.* Newell, 31 Vt. 364; Schofield *v.* Denver State Nat. Bank, 97 Fed. 282, 38 C. C. A. 179, mere agreement to pay.

20. Pawlet *v.* Sandgate, 19 Vt. 621.

21. *Alabama.*— Beard *v.* Horton, 86 Ala. 202, 5 So. 207.

Maine.— Clark *v.* Foxcraft, 7 Me. 348; McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Doolittle *v.* Dwight, 2 Metc. 561; Cornwall *v.* Gould, 4 Pick. 444; Douglas *v.* Moody, 9 Mass. 548.

New Hampshire.— Pearson *v.* Parker, 3 N. H. 366.

New York.— Hoogland *v.* Wight, 7 Bosw. 394; Douglass *v.* Baer, Anth. N. P. 179; Witherby *v.* Mann, 11 Johns. 518; Cumming *v.* Hackley, 8 Johns. 202.

Pennsylvania.— Slaymaker *v.* Gundacker, 10 Serg. & R. 75.

Vermont.— Houston *v.* Fellows, 27 Vt. 634; Lapham *v.* Barnes, 2 Vt. 213.

England.— Barclay *v.* Gooch, 2 Esp. 571.

See 35 Cent. Dig. tit. "Money Paid," § 9.

But see Dedman *v.* Williams, 2 Ill. 154; Pursel *v.* Ellis, 5 Watts & S. (Pa.) 525.

Renewal note not payment see Wright *v.* Lawton, 37 Conn. 167.

Void note not payment see Perkins *v.* Cummings, 2 Gray (Mass.) 258.

22. Whitwell *v.* Vincent, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Cumming *v.* Hackley, 8 Johns. (N. Y.) 202; Morrison *v.* Berkey, 7 Serg. & R. (Pa.) 238 (new bond given by surety); Maxwell *v.* Jameson, 2 B. & Ald. 51; Taylor *v.* Higgins, 3 East 169.

23. *Illinois.*— North *v.* North, 63 Ill. App. 129.

Indiana.— Woodford *v.* Leavenworth, 14 Ind. 311; Conklin *v.* Smith, 3 Ind. 284.

Minnesota.— Helm *v.* Smith-Fee Co., 76 Minn. 328, 79 N. W. 313.

Missouri.— Asbury *v.* Flesher, 11 Mo. 610.

New York.— Hathaway *v.* Delaware County, 103 N. Y. App. Div. 179, 93 N. Y. Suppl. 436.

England.— Tappin *v.* Broster, 1 C. & P. 112, 12 E. C. L. 75.

See 35 Cent. Dig. tit. "Money Paid," § 10.

24. Little Bros. Fertilizer, etc., Co. *v.* Wilmott, 44 Fla. 166, 32 So. 808; Allen *v.* Bobo, 81 Miss. 443, 33 So. 288.

25. *Alabama.*— Ross *v.* Pearson, 21 Ala. 473, in which the payment was afterward sanctioned and adopted by the debtor.

Florida.— Meinhardt *v.* Mode, 22 Fla. 279.

Georgia.— Birmingham Lumber Co. *v.* Brinson, 94 Ga. 517, 20 S. E. 437 (parol request to purchase checks of third person); Howard *v.* Behn, 27 Ga. 174 (holding that if a factor pays the draft of a planter on the faith of produce which he never receives, he is entitled to recover the amount as money paid).

Illinois.— Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116; Rees *v.* Eames, 20 Ill. 282, 71 Am. Dec. 267.

Iowa.— Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863; Bruguier *v.* Goewey, 39 Iowa 190, express promise to repay.

Louisiana.— Powell *v.* Lawhead, 13 La. Ann. 627, holding that an action is maintainable where defendant, without funds in plaintiffs' hands, draws a bill, which they accept and pay for his accommodation.

Maine.— Atkins *v.* Brown, 59 Me. 90.

Maryland.— Wyeth *v.* Walze, 43 Md. 426, in which defendant authorized plaintiff in writing to purchase land for him, part of the price to be paid in cash.

Massachusetts.— Wheeler *v.* Wheeler, 111 Mass. 247; Mirick *v.* French, 2 Gray 420.

Michigan.— Van Ness *v.* Hadsell, 54 Mich. 560, 20 N. W. 585; Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904.

Missouri.— Hallock *v.* Brier, 80 Mo. App. 331; Wolff *v.* Matthews, 39 Mo. App. 376, ratification after payment.

New Jersey.— York *v.* Janes, 43 N. J. L. 332; Leming *v.* Giberson, 3 N. J. L. 719, payment of execution by constable at request of execution defendant.

New York.— Smith *v.* Farnworth, 6 Hun 593.

Pennsylvania.— Oliphant *v.* Patterson, 56 Pa. St. 368 (subsequent recognition equivalent to previous request); Hassinger *v.* Solms, 5 Serg. & R. 4 (benefit to person making request not essential).

[I, G]

compelled to do that to which defendant was legally compellable,[26] or where defendant has adopted and enjoyed the benefit of the payment.[27] A request to one person to pay a sum of money will not authorize another, who advances the money, to recover it in an action for money paid brought in the name of the person to whom the request was made.[28]

H. Voluntary Payment[29] — **1. In General.** A voluntary payment for the benefit of another gives the payer no right of action against the one for whose benefit the payment was made, unless he subsequently ratifies it.[30]

2. By Sheriffs and Constables. A sheriff or constable who pays off an execu-

Tennessee.— Crutcher *v.* Nashville Bridge Co., 8 Humphr. 403.

Texas.— Lee *v.* Stowe, 57 Tex. 444 (holding that where a third person pays the debt of a firm after its dissolution, in pursuance of a request made before dissolution by the partners, they are liable to him for the money paid); Ware *v.* Galveston, etc., R. Co., 2 Tex. App. Civ. Cas. § 740.

Vermont.— Darwin *v.* Smith, 35 Vt. 69.

Washington.— Dibble *v.* De Mattos, 8 Wash. 542, 36 Pac. 485.

West Virginia.— Nutter *v.* Sydenstricker, 11 W. Va. 535.

United States.—Riggs *v.* Lindsay, 7 Cranch 500, 3 L. ed. 419 (in which defendants ordered plaintiff to purchase certain goods for them, and to draw for the price, but did not pay the draft); Sioux Nat. Bank *v.* Cudahy Packing Co., 63 Fed. 805.

England.— Pawle *v.* Gun, Arn. 200, 4 Bingh. N. Cas. 445, 7 L. J. C. P. 206, 6 Scott 286, 33 E. C. L. 797; Roberts *v.* Champion, 5 L. J. K. B. O. S. 44.

See 35 Cent. Dig. tit. "Money Paid," §§ 10, 11.

Evidence held insufficient to show request or assent see Kenna *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162 (holding that an acknowledgment by defendant to a stranger that she owes plaintiff for money which he had voluntarily paid for her without a previous request, and that she is in honor bound to reimburse him, and intends to do so, will not support assumpsit for money paid); Winsor *v.* Savage, 9 Metc. (Mass.) 346 (in which plaintiff paid defendant's debt without a previous request, and the only evidence of ratification was that the latter merely asked plaintiff why he paid it); Bay City Bank *v.* Lindsay, 94 Mich. 176, 54 N. W. 42; Knox *v.* Martin, 8 N. H. 154; Berchorman *v.* Murken, 2 E. D. Smith (N. Y.) 98; Hart *v.* Maney, 12 Wash. 266, 40 Pac. 987.

26. See *supra*, I, C.

27. *Alabama.*—Evans *v.* Billingsley, 32 Ala. 395; Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Roundtree *v.* Holloway, 13 Ala. 357; Roundtree *v.* Weaver, 8 Ala. 314.

Colorado.— Pracht *v.* Daniels, 20 Colo. 100, 36 Pac. 845.

Iowa.— Goodnow *v.* Wells, 78 Iowa 760, 38 N. W. 172; Goodnow *v.* Stryker, 61 Iowa 261, 16 N. W. 486.

Kentucky.—Young *v.* Dobyns, 12 B. Mon. 7.

Louisiana.— Didier *v.* Angé, 15 La. Ann. 393.

Maine.— Plummer *v.* Sherman, 29 Me. 555.

Maryland.— Norwood *v.* Norwood, 3 Harr. & J. 57.

Massachusetts.— Holbrook *v.* Clapp, 165 Mass. 563, 43 N. E. 508; Packard *v.* Lienow, 12 Mass. 11.

New Hampshire.— Greenland *v.* Weeks, 49 N. H. 472; Clarke *v.* Little, Smith 100.

New York.— Ely *v.* Norton, 2 Abb. Dec. 19; Graves *v.* Harwood, 9 Barb. 477; Allen *v.* Coit, 6 Hill 318. *Compare* Berchorman *v.* Murken, 2 E. D. Smith 98. But see Ingraham *v.* Gilbert, 20 Barb. 151.

Pennsylvania.— Cone *v.* Donaldson, 47 Pa. St. 363.

Virginia.— Barnett *v.* Watson, 1 Wash. 372.

West Virginia.— Nutter *v.* Sydenstricker, 11 W. Va. 535.

United States.— White *v.* Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250.

See 35 Cent. Dig. tit. "Money Paid," § 12.

28. Cook *v.* Davis, Dudley (S. C.) 67.

29. Recovery of contribution for debt barred by limitation see Contribution, 9 Cyc. 795.

30. *Alabama.*— Stephens *v.* Brodnax, 5 Ala. 258; Weakley *v.* Brahan, 2 Stew. 500.

Arkansas.— Earl *v.* Westfall Commission Co., 70 Ark. 61, 66 S. W. 148.

California.— McGlew *v.* McDade, 146 Cal. 553, 80 Pac. 695; Curtis *v.* Parks, 55 Cal. 106.

Connecticut.— Mix *v.* Muzzy, 28 Conn. 186. *Compare* Simpson *v.* Hall, 47 Conn. 417.

Florida.— Williams *v.* Miller, 2 Fla. 71; Williams *v.* McGehee, 2 Fla. 58.

Illinois.— Durant *v.* Rogers, 71 Ill. 121; Owen *v.* Apel, 68 Ill. 391; Briscoe *v.* Power, 64 Ill. 72; Francisco *v.* Wright, 7 Ill. 691; Fowler *v.* Hall, 7 Ill. App. 332.

Indiana.— Smith *v.* Husted, 28 Ind. App. 168, 62 N. E. 454.

Iowa.— Lindley *v.* Snell, 80 Iowa 103, 45 N. W. 726.

Kentucky.— Oden *v.* Elliott, 10 B. Mon. 313.

Maine.— Richardson *v.* Williams, 49 Me. 558; Smith *v.* Poor, 37 Me. 462; Eustis *v.* Hall, 21 Me. 375.

Maryland.— Hearn *v.* Cullin, 54 Md. 533; Baltimore *v.* Hughes, 1 Gill & J. 480, 19 Am. Dec. 243.

Massachusetts.— Bicknell *v.* Bicknell, 111 Mass. 265; Bancroft *v.* Abbott, 3 Allen 524; South Scituate *v.* Hanover, 9 Gray 420; Middleborough *v.* Taunton, 2 Cush. 406; Bowman *v.* Blodgett, 2 Metc. 308; Roxbury *v.* Worcester Turnpike Corp., 2 Pick. 41.

tion in his hands cannot sue defendant therefor, unless he requested such payment or promised to repay.[31]

3. By Tax-Collectors. A tax-collector who voluntarily pays over a tax to the treasurer, without the request of the person taxed, and without his subsequent promise to repay it, has no remedy by action for money paid.[32]

I. Conditions Precedent. An action for money paid may be maintained without a previous demand for repayment;[33] nor need the vendee in a general warranty deed wait for an actual eviction before buying in a paramount title or lien in order to maintain assumpsit against the vendor for the money so paid.[34] So too a person may sue to recover money advanced at the request of the owner of land to redeem it from a tax-sale, without offering to convey to the owner of the land such title as the lender acquired under a deed from the purchaser at

Minnesota.— See Freeman *v.* Etter, 21 Minn. 3.

Missouri.— Handlin *v.* Morgan County, 57 Mo. 114; Watkins *v.* Richmond College, 41 Mo. 302; Carson *v.* Ely, 23 Mo. 265; Duval *v.* Laclede County, 21 Mo. 396; Mansur *v.* Murphy, 49 Mo. App. 266.

New Hampshire.— Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797; Rumney *v.* Ellsworth, 4 N. H. 138.

New Jersey.— Mendham Tp. *v.* Losey, 2 N. J. L. 347; Dougbty *v.* Miller, 50 N. J. Eq. 529, 25 Atl. 153. *Compare* Stothoff *v.* Dunham, 19 N. J. L. 181, construing a statute.

New York.— Haynes *v.* Rudd, 83 N. Y. 251 [*reversing* 17 Hun 477]; Thorp *v.* Ross, 4 Abb. Dec. 416, 4 Keyes 546; Hathaway *v.* Delaware County, 103 N. Y. App. Div. 179, 93 N. Y. Suppl. 436; Eppig *v.* New York, 57 N. Y. App. Div. 114, 68 N. Y. Suppl. 41; Matter of Hotchkiss, 44 N. Y. App. Div. 615, 60 N. Y. Suppl. 168; Ingraham *v.* Gilbert, 20 Barb. 151; Gould *v.* Phœnix, 3 Thomps. & C. 797; Hearne *v.* Keene, 5 Bosw. 579; Ross *v.* Rubin, 25 Misc. 479, 54 N. Y. Suppl. 1036; Ross *v.* Silverman, 24 Misc. 762, 53 N. Y. Suppl. 901; Owen *v.* Sell, 13 Misc. 272, 34 N. Y. Suppl. 176; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587. *Compare* Davies *v.* New York Concert Co., 13 N. Y. Suppl. 739.

Pennsylvania.— Hehn *v.* Hehn, 23 Pa. St. 415; Kennedy *v.* Carpenter, 2 Whart. 344; Breneman's Appeal, 22 Wkly. Notes Cas. 391.

South Carolina.— Lewis *v.* Lewis, 3 Strobh. 530; Mathews *v.* Colburn, 1 Strobh. 258; McCray *v.* Richardson, 1 Mill 102; Postell *v.* Ramsay, 3 Brev. 381.

Vermont.— See Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

Washington.— Williams *v.* Miller, 1 Wash. Terr. 88.

West Virginia.— Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

Wisconsin.— Sanderson *v.* Cream City Brick Co., 110 Wis. 618, 86 N. W. 169; Clancy *v.* McEnery, 17 Wis. 177; Portage County *v.* Waupaca County, 15 Wis. 361.

England.— Leigh *v.* Dickeson, 15 Q. B. D. 60, 54 L. J. Q. B. 18, 52 L. T. Rep. N. S. 791, 33 Wkly. Rep. 539; England *v.* Marsden, L. R. 1 C. P. 529, 35 L. J. C. P. 259, 12 Jur. N. S. 706, 14 L. T. Rep. N. S. 405, 14 Wkly. Rep. 650; Stokes *v.* Lewis, 1 T. R. 20, in which the money was paid against the express consent of defendant.

See 35 Cent. Dig. tit. "Money Paid," § 13.

Voluntary payments may be divided into two classes.— Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed him to adopt or decline the benefit; in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended, but if he declines the benefit he will not be liable. But sometimes money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit, in fact that he is bound to accept it; in this case he has no opportunity of exercising any option, and he will be under no liability. Leigh *v.* Dickeson, 15 Q. B. D. 60, 64, 54 L. J. Q. B. 18, 52 L. T. Rep. N. S. 791, 33 Wkly. Rep. 539, per Lord Esher, M. R.

An administrator who advances his own funds to pay debts of the estate cannot maintain assumpsit against the heirs or next of kin for reimbursement of the amounts so paid, in the absence of a request for such payment or a subsequent asset thereto. Bishop *v.* O'Conner, 69 Ill. 431; McClure *v.* McClure, 19 Ind. 185; Turner *v.* Egerton, 1 Gill & J. (Md.) 434. *Contra*, Wherry *v.* Bell, 2 Rob. (La.) 225; Lafon *v.* White, 8 La. 497.

31. Evans *v.* Billingsley, 32 Ala. 395; Bailey *v.* Gibbs, 9 Mo. 45; Little *v.* Gibbs, 4 N. J. L. 211; Leonard *v.* Ware, 4 N. J. L. 150; Wooley *v.* Desberry, 2 N. J. L. 383; Menderback *v.* Hopkins, 8 Johns. (N. Y.) 436; Jones *v.* Wilson, 3 Johns. (N. Y.) 434. See also Lawrence *v.* Jones, 5 N. J. L. 825. *Compare* Rees *v.* Eames, 20 Ill. 282, 71 Am. Dec. 267.

See 35 Cent. Dig. tit. "Money Paid," § 14.

32. Smith *v.* Crocker, 2 Root (Conn.) 84; Wallkill *v.* Mamakating, 14 Johns. (N. Y.) 87; Beach *v.* Vandenburgh, 10 Johns. (N. Y.) 361. *Contra*, Ott *v.* Chapline, 3 Harr. & M. (Md.) 323. And see West Caln Tp. *v.* Gibbs, 4 Pa. Dist. 149, construing Pa. Act of 1834.

33. Perkins *v.* Davis, 109 Mass. 239; Hale *v.* Huse, 10 Gray (Mass.) 99; Brackett *v.* Evans, 1 Cush. (Mass.) 79.

34. Kirkpatrick *v.* Miller, 50 Miss. 521.

the tax-sale;[35] and in an action to recover money advanced in the purchase of stocks at the request of defendant, plaintiff need not produce the certificate at the trial where there is evidence of the purchase, and that the certificate is in plaintiff's possession.[36]

II. EFFECT OF EXPRESS CONTRACT FOR REIMBURSEMENT.

Where a special agreement to repay contains nothing more than what the law would have implied from the facts, an action for money paid may be sustained on the implied agreement;[37] and where the contract between plaintiff and defendant has been rescinded, an action for money paid will lie to recover disbursements made in reliance thereon.[38] So it is believed this action will lie in any event, notwithstanding the existence of an express promise to pay.[39] While the general rule is that no action can be brought on an implied contract, where there is an express contract covering the same subject-matter,[40] the action under consideration clearly seems to fall within an exception to the general rule which is that if an express contract has been completely performed on the part of plaintiff and nothing remains on the part of defendant but to pay in money the consideration price, an action can be maintained for it on an implied assumpsit or on the express contract at the option of plaintiff.[41]

III. DEFENSES.

A. In General. Generally speaking, a defense to an action for money paid, to be valid, must be such as to show that in equity and good conscience plaintiff is not entitled to recover.[42]

B. Invalidity of Demand Paid. One who pays money at the request of

35. Copeland *v.* Young, 21 S. C. 275.

36. Esser *v.* Linderman, 71 Pa. St. 76.

37. White *v.* Merrell, 32 Ill. 511; Gibbs *v.* Bryant, 1 Pick. (Mass.) 118; Sanborn *v.* Emerson, 12 N. H. 57; McWilliams *v.* Willis, 1 Wash. (Va.) 199.

38. Kidder *v.* Hunt, 1 Pick. (Mass.) 328, 11 Am. Dec. 183. See also Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222.

39. Boylston *v.* Chase, 2 Colo. 612. See also *supra*, I, A, text and notes. But *compare* Carney *v.* O'Neil, 27 Mich. 495, which adheres to the general rule that where there is a special contract between the parties there can be no recovery upon a general count for money paid to the use of defendant.

40. See ASSUMPSIT, 4 Cyc. 326 *et seq.*

41. Martin Civ. Proc. 342; ASSUMPSIT, 4 Cyc. 328.

42. See ASSUMPSIT, ACTION OF, 4 Cyc. 335. And see the following cases:

Colorado.— Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13, holding that a denial that plaintiff expended his own money is no defense to an action on an express contract for money expended.

Connecticut.— Miller *v.* East School Dist., 26 Conn. 521, in which it was pleaded that the liability of defendant was caused by plaintiff's own unauthorized act, and it was held that in order to sustain such a defense it must appear that the debt was so far a specific debt of plaintiff that, if defendant had paid it, it could have recovered the amount as money paid to plaintiff's use.

Illinois.— King *v.* Hannah, 6 Ill. App. 495, in which the payee of a note transferred it with guaranty of payment, and the transferee recovered a judgment on the note against the maker, and another judgment against the guarantor on his guaranty. In an action for money paid, brought by the guarantor against the maker, it was held that the former recovery on the note by the transferee was no defense, the cause of action not being the same.

Indiana.— Lucas *v.* Jarrell, 55 Ind. 41, holding that it is immaterial whether the demand against defendant, which plaintiff paid at his request, could have been enforced against him.

Massachusetts.— Kingman *v.* School Dist. No. 13, 2 Cush. 426; Long *v.* Greene, 7 Mass. 268.

New Hampshire.— Hayes *v.* Morrison, 38 N. H. 90, holding that, in action by one of several joint judgment debtors to recover the amount he has paid on a judgment more than his proportion, it is no defense that at the time of such payment all parties supposed that he was paying only his due proportion.

New York.— Gossler *v.* Lau, 59 N. Y. Super. Ct. 354; Bang *v.* Dovey, 11 Misc. 350, 32 N. Y. Suppl. 154, holding that, in an action to recover a certain sum of money paid out and expended at defendant's request to bind an agreement or contract for the sale of land to defendant, the fact that plaintiff was to receive commissions from the vendor is immaterial.

another has a right to recover it back, irrespective of the validity of the claim paid, unless the payment was itself contrary to law.[43]

IV. PERSONS LIABLE.

In order to hold a person liable in an action for money paid, the payment must have been made to his use, and at his request, express or implied.[44]

V. ACTIONS.[45]

A. Nature and Form of Remedy.[46] While assumpsit for money paid will lie in every case in which there has been a payment of money by a plaintiff to a third party, at the request of defendant, express or implied, on a promise, express or implied, to repay the amount,[47] assumpsit for money had and

43. *Indiana.*— Lucas *v.* Jarrell, 55 Ind. 41.
Kentucky.— Greathouse *v.* Throckmorton, 7 J. J. Marsh. 16.
Missouri.— Soulard *v.* Peck, 49 Mo. 477.
Nevada.— Martin *v.* Victor Mill, etc., Co., 19 Nev. 180, 8 Pac. 161.
North Carolina.— Williams *v.* Carr, 80 N. C. 294.
Tennessee.— McElroy *v.* Melear, 7 Coldw. 140.
Texas.— Lee *v.* Stowe, 57 Tex. 444; Mills *v.* Johnston, 23 Tex. 308.
See 35 Cent. Dig. tit. "Money Paid," § 19.

44. *Georgia.*— Goodson *v.* Cooley, 19 Ga. 599.
Indiana.— Chrisman *v.* Long, Smith 121, holding that the payment of a joint judgment by a stranger to it, at the request of one of the judgment debtors, does not raise an implied promise by the others to refund the amount paid.
Maine.— Mercantile Bank *v.* Cox, 38 Me. 500.
Maryland.— Turner *v.* Egerton, 1 Gill & J. 434.
Massachusetts.— Stone *v.* Crocker, 19 Pick. 292.
New York.— Gager *v.* Babcock, 48 N. Y. 154, 8 Am. Rep. 532; Mapelsden *v.* Shea, 6 Misc. 60, 26 N. Y. Suppl. 84; Peters *v.* Sanford, 1 Den. 224; Elmendorph *v.* Tappen, 5 Johns. 176. *Compare* Pearce *v.* Wilkins, 2 N. Y. 469 [*affirming* 5 Den. 541].
North Carolina.— Osborn *v.* Cunningham, 20 N. C. 559.
Pennsylvania.—Buehler *v.* Rapp, 2 Woodw. 443, holding that where, in a settlement, one partner agreed to pay a firm debt, but on his failure to do so the other partner was compelled to pay it, the latter could not recover of the former on a count for money paid, as it was not paid for the other partner's, but for the firm's, use.
Vermont.— Dyer *v.* Graves, 37 Vt. 369.
United States.— The Cynosure, 6 Fed. Cas. No. 3,529, 1 Sprague 88.
See 35 Cent. Dig. tit. "Money Paid," § 20.
A pauper cannot be held liable for money paid for his relief by a town. Deer Isle *v.* Eaton, 12 Mass. 328; Bennington *v.* McGennes, N. Chipm. (Vt.) 45.
One may recover against a partnership, for money paid to its use, the amount which he is obliged to pay as indorser of a note for the accommodation of the firm, signed by one member in his own name as maker and by the other as indorser. Thayer *v.* Smith, 116 Mass. 363.
Where several are indebted as partners, and a third person pays the creditor at the request of one of them, all may be sued for money paid. Tradesman's Bank *v.* Astor, 11 Wend. (N. Y.) 87.
Where a bill of exchange was drawn by several, one of whom joined in it as surety for the others, who procured the bill to be discounted before acceptance, for their own benefit, and the drawee, with knowledge of these facts, accepted and paid the bill, without having funds of any of the drawers in his hands, it was held that he might recover against all the drawers in an action for money paid. Suydam *v.* Westfall, 2 Den. (N. Y.) 205 [*reversing* 4 Hill 211].

45. Set-off in actions for money paid see SET-OFF AND COUNTER-CLAIM.

46. Definition.— *Indebitatus assumpsit* for money paid is one of the common counts at common law. Martin Civ. Proc. § 56. See also 4 Cyc. 317 *et seq.*; 8 Cyc. 341. It is the technical name of a declaration in assumpsit, in which plaintiff declares for money paid for the use of defendant. Black L. Dict.
Recovery of payments made on rescinded contracts see MONEY RECEIVED.

47. *Connecticut.*— Betts *v.* Hilliard, 2 Root 131.
Maine.— Emery *v.* Hobson, 62 Me. 578, 16 Am. Rep. 513.
Maryland.— Baltimore *v.* Hughes, 1 Gill & J. 480, 19 Am. Dec. 243; Turner *v.* Egerton, 1 Gill & J. 430, 19 Am. Dec. 235.
Massachusetts.— Wetherbee *v.* Potter, 99 Mass. 354.
Missouri.— Cassatt *v.* Vogel, 14 Mo. App. 317.
New Jersey.— Williams *v.* Sheppard, 13 N. J. L. 76.
New York.— Tradesman's Bank *v.* Astor, 11 Wend. 87; Ramsey *v.* Gardner, 11 Johns. 439.
Tennessee.— Planters' Bank *v.* Douglass, 2 Head 699; Irhy *v.* Brigham, 9 Humphr. 750.
Vermont.— See Pawlet *v.* Sandgate, 19 Vt. 621; Middlebury *v.* Hubbardton, 1 D. Chipm. 205.

received[48] is a proper form of action in which one of several joint debtors may enforce contribution from his co-debtors.[49] But assumpsit for money paid will not lie where plaintiff relies on a deed to prove his contract;[50] nor to recover expenses occasioned by the tortious act of defendant;[51] nor for money due to plaintiff, and improperly received by defendant;[52] nor to recover, from grantors fraudulently representing themselves to be the sole owners of an estate, money subsequently paid by the grantee to obtain the release of others interested therein;[53] nor to recover on a premium note;[64] and where one party to a contract advances money thereon, supposing that the other is able to perform his part, when, at that time, performance was impossible, the money cannot be recovered in an action for money paid.[55]

B. Accrual of Right. The right of action to recover money paid to the use of another accrues immediately upon the payment,[56] and not before.[57]

C. Parties.[58] Where two persons from their common funds have paid a debt of another, they may maintain a joint action of assumpsit for the money paid;[59] but where a judgment against a firm, which a third person has agreed to satisfy in consideration of the receipt of the full amount thereof, but fails to do so, is paid off by one partner individually, he may recover from such third person in an action for money paid without joining his partner as a party plaintiff.[60] The proper party defendant in an action for money paid is he at whose request, express or implied, the money was paid, and it is unnecessary to join the person whose debt has been satisfied.[61]

D. Pleading[62] — **1. Declaration, Petition, or Complaint**[63] — **a. In General.** The declaration, petition, or complaint in an action for money paid must state facts, not conclusions of law;[64] but need not allege mere matters of evidence.[65] While an assignee for value of a mortgage can, in equity, enforce a promise to pay the mortgage by the grantee of the mortgagor, he cannot enforce it in his own right in assumpsit without a prayer for equitable relief or a statement of some element of equity in his complaint.[66]

United States.— Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222.

England.— Brittain *v.* Lloyd, 15 L. J. Exch. 43, 14 M. & W. 762.

See 35 Cent. Dig. tit. "Money Paid," § 21.

48. See Money Received.

49. *Connecticut.*— Findley *v.* Adams, 2 Day 369.

Kentucky.— Dupuy *v.* Johnson, 1 Bibb 562.

Maryland.— Carroll *v.* Bowie, 7 Gill 34.

Massachusetts.— McGregory *v.* McGregory, 107 Mass. 543.

New Hampshire.— Hayes *v.* Morrison, 38 N. H. 90.

New York.— Norton *v.* Coons, 3 Den. 130 [*affirmed* in 6 N. Y. 33].

Pennsylvania.— Steckel *v.* Steckel, 28 Pa. St. 233; Craig *v.* Craig, 5 Rawle 91.

See 35 Cent. Dig. tit. "Money Paid," § 21.

50. Kimball *v.* Tucker, 10 Mass. 192.

51. Foster *v.* Dupre, 5 Mart. (La.) 6, 12 Am. Dec. 466.

52. Conklin *v.* Smith, 3 Ind. 284.

53. King *v.* Hoxie, (Me. 1886) 5 Atl. 264.

54. Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

55. Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

56. Wolff *v.* McGavock, 29 Wis. 290.

57. Wharton *v.* Callan, 2 Gill (Md.) 173.

58. Parties generally see Parties.

Proper parties in an action for money fraudulently obtained see Menefee *v.* Arnold, 55 Mo. 368.

59. Pearson *v.* Parker, 3 N. H. 366.

60. Taylor *v.* Gould, 57 Pa. St. 152.

61. Ware *v.* Galveston, etc., R. Co., 2 Tex. App. Civ. Cas. § 748.

62. Pleading generally see Pleading.

63. For instances of sufficient complaints see the following cases:

California.— De Witt *v.* Porter, 13 Cal. 171.

Colorado.— Campbell *v.* Shiland, 14 Colo. 491, 23 Pac. 324.

Indiana.— Lupton *v.* Nichols, 28 Ind. App. 539, 63 N. E. 477.

Minnesota.— Spottswood *v.* Herrick, 22 Minn. 548, on demurrer.

New York.— Cudlipp *v.* Whipple, 4 Duer 610 (construing Code, § 158); Schepeler *v.* Eisner, 3 Daly 11 [*affirmed* in 54 N. Y. 675] (on demurrer).

64. Booth *v.* Cass County Com'rs, 84 Ind. 428.

65. Woodstock *v.* Hancock, 62 Vt. 348, 19 Atl. 991, construing Rev. Laws, § 2818, as amended by Acts (1886), No. 42, § 4, and holding that the notice required by the statute, being a matter of evidence only, need not be averred in the complaint.

66. Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362.

b. Allegation of Request. The declaration, petition, or complaint in an action for money paid must allege the payment to have been made at the request of defendant.[67]

c. Allegations of Use and Benefit to Defendant. It must be averred, in an action for money paid, that the money was laid out and expended for the use and benefit of defendant; but it is sufficient if this plainly appears from the complaint, although not necessarily in express words.[68]

d. Allegation of Promise to Repay. A declaration, petition, or complaint which alleges that plaintiff paid money for the use of defendant and at his request, and that defendant refuses to pay the same, sufficiently states a cause of action, without averring a promise by defendant to repay.[69]

e. Allegation of Time. Under the Massachusetts practice an allegation of time in a declaration on the money counts is surplusage.[70]

f. Amendment. It is within the discretion of the court to allow an informal pleading for money had and received to be amended into a count for moneys paid.[71]

g. Aider by Verdict and Judgment. An allegation, otherwise too general, will be deemed sufficient after verdict and judgment.[72]

2. Bill of Particulars. Where a bill of particulars is required, it is sufficient if it gives information of the nature of plaintiff's claim with such certainty that defendant cannot be misled or deceived.[73]

3. Plea. In assumpsit for money paid, a plea that the alleged payment was of a judgment rendered against defendant and others on a warrant of attorney executed while defendant was a minor is a sufficient answer, although it does not aver infancy at the time of the promise alleged in the declaration.[74]

4. Issues, Proof, and Variance — a. Issues and Proof. The action of assumpsit for money paid is equitable in its nature, and of a liberal character, and nothing will prevent a party from showing the whole truth, except an estoppel by which he has concluded himself.[75] To support the action, plaintiff may prove facts from which a request may be implied,[76] or may show a special contract under which the moneys were expended;[77] and it is admissible, instead of proving the payment of money, to prove the payment of its equivalent.[78] But an action for

67. Wharton *v.* Franks, 9 Port. (Ala.) 232; Massachusetts Mut. L. Ins. Co. *v.* Green, 185 Mass. 306, 70 N. E. 202; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1; Taylor *v.* Cotten, 28 N. C. 69; Fox *v.* Easter, 10 Okla. 527, 62 Pac. 283.

68. Hugurt *v.* Owen, 1 Nev. 464. See also Murray *v.* Estes, 19 N. Y. App. Div. 209, 45 N. Y. Suppl. 1002 (necessary implication); Fox *v.* Easter, 10 Okla. 527, 62 Pac. 283.

Clerical misprision.— The omission of the words "use of," in the common count for money paid to the use of defendant, is a mere clerical misprision, which may be corrected on the trial; and such an omission, if of any consequence in any view, can only be reached by demurrer. Brown *v.* McHugh, 35 Mich. 50.

69. Kraner *v.* Halsey, 82 Cal. 209, 22 Pac. 1137; Ball *v.* Beaumont, 59 Nebr. 631, 81 N. W. 858.

70. Baxter *v.* Paine, 16 Gray (Mass.) 273.

71. Foster *v.* Gordon, 96 Minn. 142, 104 N. W. 765.

72. Wilson *v.* Kelly, 58 Ind. 586.

73. **Instance of sufficient bill** see Landon *v.* Sage, 11 Conn. 302.

Effect of demurrer see Cape Elizabeth *v.* Lombard, 70 Me. 396.

Amendment.— Where, in assumpsit against several for money paid on a note, plaintiff filed a bill of particulars, claiming as indorser, he could not, after trial, amend so as to charge one of them alone for contribution as cosurety. Chaffee *v.* Jones, 19 Pick. (Mass.) 260.

74. Finn *v.* Finn, 3 Ill. App. 615.

75. Allyn *v.* Boorman, 30 Wis. 684.

A note given by defendant, and secured by chattel mortgage upon horses plaintiff had purchased of him, and which plaintiff, to save his property, had to pay, taking an assignment of the debt and security, is admissible as evidence under a count for money paid. Brown *v.* McHugh, 35 Mich. 50.

76. Taylor *v.* Cotten, 28 N. C. 69.

A subsequent express promise by defendant to pay a sum paid by plaintiff for his benefit is not the equivalent of a previous request, so as to support a count for money paid. Massachusetts Mut. L. Ins. Co. *v.* Green, 185 Mass. 306, 70 N. E. 202.

77. **Proof of special contract admissible** see Chapman *v.* Frank, 12 Daly (N. Y.) 402.

78. **A bill of exchange or negotiable note,** given and received in satisfaction of the debt of a third person, will support a count for money paid. Clark *v.* Foxcroft, 7 Me. 348;

money paid is not supported by proof of payment after promise [79] or after action brought;[80] nor can an indorsement in blank of a promissory note be given in evidence under the money counts;[81] and in an action to recover advances made on the faith of certain chattels, plaintiff cannot prove title to the chattels as mortgagee.[82] In assumpsit for money paid for defendant's intestate, defendant may show that the amount sued for was not advanced for his intestate, but was paid out of the intestate's funds in plaintiff's hands, although no account in set-off was filed.[83]

b. Variance. Immaterial allegations need not be proved as laid,[84] nor will an immaterial variance between the allegations and the proof be fatal.[85]

E. Evidence [86] — **1. Presumptions.** In the absence of all proof, it will not be presumed that a person who pays the debt of another does so at his request,[87] nor are acceptance and payment by the drawee of a bill of exchange evidence *per se* of money paid to the drawer's use.[88] But where, in an action brought by an administrator, it appears that his intestate and defendant gave their joint notes, and that the notes were found among his intestate's papers after his death, the possession of the notes by the intestate is *prima facie* evidence that he paid the whole of them.[89] Payment of a note given in discharge of the indebtedness of a third person may be inferred from lapse of time.[90]

2. Burden of Proof. To recover on a complaint that plaintiff was compelled to pay his note, which defendant had assumed, plaintiff must show that the note was paid by him, since the suit is for reimbursement, and not merely to recover on the agreement to pay the note.[91]

3. Admissibility. Generally speaking, any evidence which is competent, relevant, and material, and which tends to establish or disprove plaintiff's cause of action, is admissible in an action for money paid for the use of defendant.[92] But

McLellan *v.* Crofton, 6 Me. 307; Cornwall *v.* Gould, 4 Pick. (Mass.) 444; Witherby *v.* Mann, 11 Johns. (N. Y.) 518; Slaymaker *v.* Gundacker, 10 Serg. & R. (Pa.) 75.

A bond not being negotiable, nor treated as money in the ordinary transaction of business, if given for the debt of another, will not support an action for money paid to the use of that other. Cumming *v.* Hackley, 8 Johns. (N. Y.) 202. See also Morrison *v.* Berkey, 7 Serg. & R. (Pa.) 238.

Conveyance of land.— Evidence that plaintiff paid a debt of defendant, for which he was responsible, by the conveyance of land, which was accepted in satisfaction of the debt, will support an action for money paid. Bonney *v.* Seely, 2 Wend. (N. Y.) 481. But see Lucket *v.* Bohannon, 3 Bibb (Ky.) 378, holding that proof of property transferred will not support assumpsit for money paid. And see Doebler *v.* Fisher, 14 Serg. & R. (Pa.) 179.

Credit to defendant.— A count for money paid to B by A, at the request and for the use of C, is supported by proof of the sale of a bond by A to B, and that B credited C with the amount. Jones *v.* Cooke, 14 N. C. 112.

79. Benden *v.* Manning, 2 N. H. 289.

80. Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

81. Cottrell *v.* Conklin, 4 Duer (N. Y.) 45, where it is held that the indorsement of the note is no proof that the holder in fact advanced or extended money for the benefit of the indorser.

82. Warner *v.* Beebe, 47 Mich. 435, 11 N. W. 258.

83. Johnson *v.* Jennings, 10 Gratt. (Va.) 1, 60 Am. Dec. 323.

84. Searing *v.* Butler, 69 Ill. 575.

85. **For instances of immaterial variance** see Beers *v.* Botsford, 3 Day (Conn.) 159; Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98; Wyckoff *v.* Swan, 47 N. Y. App. Div. 627, 62 N. Y. Suppl. 139.

86. **Evidence** generally see Evidence.

87. Stephens *v.* Brodnax, 5 Ala. 258.

88. Chittenden *v.* Hurlburt, 2 Aik. (Vt.) 133.

89. Chandler *v.* Davis, 47 N. H. 462.

90. Hommell *v.* Gamewell, 5 Blackf. (Ind.) 5.

91. Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815.

92. **Evidence held admissible** see the following cases:

Illinois.— McFerran *v.* Chambers, 64 Ill. 118 (holding that, in assumpsit for money paid as surety on a sealed note, the note is admissible in evidence of the amount paid and to whom); Baum *v.* Parkhurst, 26 Ill. App. 128 (actual payment provable by plaintiff).

Maryland.— Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Myers *v.* Smith, 27 Md. 91, defendant, whose crop was sold to plaintiff, and afterward distrained for rent and bought in by plaintiff, may show that, at the time of the original sale, and at the date of the levy, there was no rent in arrear.

it is error to admit proof of items which are purely elements of damage for breach of an invalid contract, and which constitute losses sustained by plaintiff, instead of money actually paid out and expended;[93] and where the payment has been made in property taken at a money valuation, evidence that the property was in fact of less value than the valuation is inadmissible.[94] So too in an action for money paid to an attorney for defendant's use, the value of the attorney's services is immaterial.[95] Parol evidence is inadmissible to show a lawful seizure of property under legal process, without laying a proper foundation for the introduction of secondary evidence.[96]

4. Weight and Sufficiency. Where, in an action for money paid at defendant's request, plaintiff testifies to the making of such a request by defendant, and defendant denies it, and a number of witnesses testify that plaintiff's reputation for truth is bad, a judgment for plaintiff will be reversed as against the evidence.[97] To entitle plaintiff to recover money claimed to have been paid for defendant in obedience to a telegram, which defendant testifies that he did not authorize to be sent, plaintiff should produce the original message, signed and delivered by defendant to the operators, or prove by some of them that such message, now lost, was signed by defendant, and directed to be sent.[98]

F. Amount of Recovery — 1. In General. The measure of damages in an action for money paid for the use and benefit of another is the sum actually paid by plaintiff;[99] and where plaintiff has applied his own property to the discharge of the debt of another, at his request, he cannot recover more than he actually paid;[1] or, in the case of the discharge of a mortgage by the conveyance of land, the amount supposed to have been due on the mortgage at the date of the conveyance.[2] Where joint debtors have received equal benefits, or have been relieved of equal burdens, neither can recover against the other, except for the excess paid by him beyond his due proportion.[3]

2. Interest. In an action for money paid interest from the time of payment is recoverable.[4]

3. Damages and Costs. Where one person defends an action at the request, express or implied, of another, he is entitled to recover, in an action for money paid, the amount of the judgment paid by him,[5] or the amount for which he compromised the action by the authority of defendant,[6] together with the costs incurred by him.[7]

4. Expenses of Bail. Where a person becomes bail above for another, he is

Massachusetts.— Priest *v.* Hale, 155 Mass. 102, 29 N. E. 197.

Missouri.— Sauer *v.* Brinker, 77 Mo. 289, holding that plaintiff may show that the person making the request was defendant's agent.

Montana.— Farrell *v.* Gold Flint Min. Co., 32 Mont. 416, 80 Pac. 1027.

Tennessee.— Nichol *v.* Ridley, 5 Yerg. 63, 26 Am. Dec. 254, holding that the return of a sheriff is admissible against a purchaser of land under execution in an action by the sheriff to recover the sum bid, which he has paid to the execution creditor.

Wisconsin.— Allyn *v.* Boorman, 30 Wis. 684.

United States.— Radel *v.* Lesher, 137 Fed. 719, 70 C. C. A. 411.

See 35 Cent. Dig. tit. "Money Paid," § 28.

93. Fox *v.* Easton, 10 Okla. 527, 62 Pac. 283.

94. Garnsey *v.* Allen, 27 Me. 366.

95. McNerney *v.* Barnes, 77 Conn. 155, 58 Atl. 714.

96. Myers *v.* Smith, 27 Md. 91.

97. Enright *v.* Seymour, 4 Misc. (N. Y.) 597, 24 N. Y. Suppl. 704.

98. Fox *v.* Pedigo, 40 S. W. 249, 19 Ky. L. Rep. 271.

99. Rawlings *v.* Poindexter, 14 Sm. & M. (Miss.) 66, 53 Am. Dec. 125.

1. Linn *v.* Cook, 19 N. J. L. 11.

Recovery limited to amount realized from sale of property see Farrell *v.* Gold Flint Min. Co., 32 Mont. 416, 80 Pac. 1027.

2. Child *v.* Pierce, 37 Mich. 155.

3. Boardman *v.* Paige, 11 N. H. 431; Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497.

4. Goodnow *v.* Plumbe, 64 Iowa 672, 21 N. W. 133; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

5. Williamson *v.* Healey, 6 Bing. 299, 3 M. & P. 731, 19 E. C. L. 140.

6. Pettman *v.* Keble, 9 C. B. 701, 15 Jur. 38, 19 L. J. C. P. 325, 67 E. C. L. 701.

7. Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 66 E. C. L. 815; Garrard *v.* Cottrell, 10 Q. B. 679, 59 E. C. L. 679; Howes *v.* Martin, 1 Esp. 162; Blyth *v.* Smith, 12 L. J.

entitled to recover all the expenses to which he has been put by reason of it in an action for money paid.[8]

G. Questions of Law and Fact. Where there is evidence to sustain the cause of action,[9] controverted questions of fact are properly left to the jury,[10] whose finding will not be disturbed, unless clearly erroneous.[11]

H. Judgment. In an action to recover taxes paid by a remainder-man for the owner of the life-estate, the former is not entitled to a judgment decreeing a lien on the property, and that it be sold to satisfy the judgment, since the action is merely at law for money paid for defendant's benefit.[12]

C. P. 203, 6 Scott N. R. 199, 5 M. & G. 405, 44 E. C. L. 217. See also Gillett *v.* Rippon, M. & M. 406, 22 E. C. L. 551. But see Seaver *v.* Seaver, 6 C. & P. 673, 25 E. C. L. 632.

The expenses of a suit improperly defended are not recoverable by bail. Fisher *v.* Fallows, 5 Esp. 171, 8 Rev. Rep. 843.

8. The expenses of sending after the principal, in order to render him, are recoverable by the bail. Fisher *v.* Fallows, 5 Esp. 171, 8 Rev. Rep. 843. But *compare* Hector *v.* Carpenter, 1 Stark. 190, 2 E. C. L. 79, holding that *prima facie* the charges of the bail for putting in bail above are due from the bail to the sheriff.

No recovery for trouble and loss of time in going to a place to become bail see Reason *v.* Wirdnam, 1 C. & P. 434, 12 E. C. L. 254.

9. Evidence held insufficient to sustain action see Gossett *v.* Hollingsworth, 5 Blackf. (Ind.) 394; Linn *v.* Cook, 19 N. J. L. 11.

10. Hassinger *v.* Solms, 5 Serg. & R. (Pa.) 4.

11. Sweet *v.* Colleton, 96 Mich. 391, 55 N. W. 984.

12. Huddleston *v.* Washington, 136 Cal. 514, 69 Pac. 146.

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* Author of "Boundaries," 5 Cyc. 861; "Bribery," 5 Cyc. 1038; "Covenants," 11 Cyc. 1035; "Embezzlement," 15 Cyc. 486; "Justices of the Peace," 24 Cyc. 383; "Money Lent," 27 Cyc. 825; "Money Paid," 27 Cyc. 832; and joint author of "Champerty and Maintenance," 6 Cyc. 847; "Master and Servant," 26 Cyc. 941.
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I. NATURE AND GROUNDS OF OBLIGATION.[1]

A. In General. An action for money had and received is an equitable action, governed by equitable principles,[2] and in it plaintiff waives all torts, trespasses, and damage.[3] It may in general be maintained whenever one has money in his hands belonging to another, which, in equity and good conscience, he ought to pay over to that other.[4] But where money is paid to a person, who receives it

1. **Definition.**— *Indebitatus assumpsit* for money had and received is one of the common law counts. Martin Civ. Proc. § 56. See also 8 Cyc. 341; 4 Cyc. 317 *et seq.* It is the technical designation of a form of declaration in assumpsit, wherein the plaintiff declares that defendant had and received certain money, etc. Black L. Dict.

Recovery by son in assumpsit of wages assigned by parent see PARENT AND CHILD.

Right to waive tort and sue in assumpsit see ASSUMPSIT.

2. **Regarded as substitute for bill in equity** see the following cases:

Delaware.— Guthrie *v.* Hyatt, 1 Harr. 446; Farmers' Bank *v.* Brown, 1 Harr. 330.

Illinois.— Law *v.* Uhrlaub, 104 Ill. App. 263.

Kentucky.— Tevis *v.* Brown, 3 J. J. Marsh. 175.

Maryland.— Murphy *v.* Barron, 1 Harr. & G. 258.

Massachusetts.— Wiseman *v.* Lyman, 7 Mass. 286.

Michigan.— Atkinson *v.* Scott, 36 Mich. 18.

New York.— Eddy *v.* Smith, 13 Wend. 488; Wright *v.* Butler, 6 Wend. 284, 21 Am. Dec. 323.

Pennsylvania.— Zacharias *v.* Zacharias, 23 Pa. St. 452; Irvine *v.* Hanlin, 10 Serg. & R. 219; Bogart *v.* Nevins, 6 Serg. & R. 361; Haldane *v.* Duche, 2 Dall. 176, 1 L. ed. 338, 1 Yeates 121; Barr *v.* Craig, 2 Dall. 151, 1 L. ed. 327; Morris *v.* Tarin, 1 Dall. 147, 1 L. ed. 76, 1 Am. Dec. 233.

See 35 Cent. Dig. tit. "Money Received," § 1.

Plaintiff can only recover as upon a bill in equity; and if, for any reason, a court of law cannot apply the same principles in the statement of an account between the parties which a court of equity would apply, and secure to each party his rights as effectually as a court of equity could, the action will not lie. Rathbone *v.* Stocking, 2 Barb. (N. Y.) 135.

Originally actions for money had and received were purely of equitable cognizance, but now courts of law exercise such jurisdiction, except in cases where adequate relief can only be obtained in equity. Arn *v.* Arn, 81 Mo. App. 133.

3. Anonymous, Lofft 320.

4. *Alabama.*— Hudson *v.* Scott, 125 Ala. 172, 28 So. 91; Lanford *v.* Lee, 119 Ala. 248, 24 So. 578, 72 Am. St. Rep. 914; Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Levinshon *v.* Edwards, 79 Ala. 293; Sherrod *v.* Hampton, 25 Ala. 652; Wilson *v.* Sergeant, 12 Ala. 778.

Arkansas.— Snapp *v.* Stanwood, 65 Ark. 222, 45 S. W. 546.

with a good conscience, and uses no deceit or unfairness in obtaining it, assumpsit for money had and received will not lie to recover it, even though it was paid by

California.— Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. 783; Lutz *v.* Rothschild, (1894) 38 Pac. 360; Stanwood *v.* Sage, 22 Cal. 516.

Colorado.— Cheney *v.* Woodworth, 13 Colo. 176, 56 Pac. 979; Mumford *v.* Wright, 12 Colo. 214, 55 Pac. 744; Ph. Zang Brewing Co. *v.* Bernheim, 7 Colo. App. 528, 44 Pac. 380.

Connecticut.— Post *v.* Clark, 35 Conn. 339; Hawley *v.* Sage, 15 Conn. 52.

District of Columbia.— Campbell *v.* Wilson, 2 Mackey 497.

Florida.— Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287; Gordon *v.* Camp, 2 Fla. 422.

Georgia.— Bates-Farley Sav. Bank *v.* Dismukes, 107 Ga. 212, 33 S. E. 175.

Illinois.— Springfield First Nat. Bank *v.* Gatton, 172 Ill. 625, 50 N. E. 121 [*affirming* 71 Ill. App. 323]; Wilson *v.* Turner, 164 Ill. 398, 45 N. E. 820; Laflin *v.* Howe, 112 Ill. 253; Newcomb *v.* Launtz, 89 Ill. 144; Barnes *v.* Johnson, 84 Ill. 95; Belden *v.* Perkins, 78 Ill. 449; Allen *v.* Stenger, 74 Ill. 119; Sangamon County *v.* Springfield, 63 Ill. 66; Lewis *v.* Harsh, 54 Ill. 383; Alderson *v.* Ennor, 45 Ill. 128; Watson *v.* Woolverton, 41 Ill. 241; Foresters' Bldg., etc., Assoc. *v.* Quinn, 119 Ill. App. 572; Law *v.* Uhrlaub, 104 Ill. App. 263; Norris *v.* Jameson, 99 Ill. App. 32; Gentle *v.* Stephens, 87 Ill. App. 190; Slaughter *v.* Fay, 80 Ill. App. 105; Hubbart *v.* Nichols, 64 Ill. App. 683 (construing Rev. St. c. 79, § 80); Brady *v.* Horvath, 64 Ill. App. 254.

Indiana.— Winings *v.* Wood, 53 Ind. 187; McQueen *v.* State Bank, 2 Ind. 413; Glover *v.* Foote, 7 Blackf. 293.

Iowa.— Ridgeway *v.* Jewell, (1903) 95 N. W. 410; Norway Dist. Tp. *v.* Clear Lake Dist. Tp., 11 Iowa 506.

Kentucky.— Sanders *v.* Hamilton, 3 Dana 550; Dupuy *v.* Johnson, 1 Bibb 562; Gray *v.* Overby, 37 S. W. 159, 18 Ky. L. Rep. 531.

Maine.— Pease *v.* Bamford, 96 Me. 23, 51 Atl. 234; Whitlock Mach. Co. *v.* Holway, 92 Me. 414, 42 Atl. 799; Calais *v.* Whidden, 64 Me. 249; Stevens *v.* Whittier, 43 Me. 376; Gilman *v.* Cunningham, 42 Me. 98; Chamberlain *v.* Reed, 13 Me. 357, 29 Am. Dec. 506.

Maryland.— Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780; Vrooman *v.* McKaig, 4 Md. 450, 59 Am. Dec. 85; Hertle *v.* Schwartze, 3 Md. 366; Keene *v.* Thompson, 4 Gill & J. 463.

Massachusetts.— Appleton *v.* Crowninshield, 8 Mass. 340.

Michigan.— Moore *v.* Mandlebaum, 8 Mich. 433; Bearce *v.* Fahrnow, 109 Mich. 315, 67 N. W. 318.

Missouri.— Robbins *v.* Alton M. & F. Ins. Co., 12 Mo. 380; York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968; Quarles *v.* Hall, 100 Mo. App. 523, 74 S. W. 883.

Nebraska.— Devries *v.* Hawkins, 70 Nebr. 656, 97 N. W. 792; McCormick Harvesting Mach. Co. *v.* Stires, 68 Nebr. 432, 94 N. W. 629; Thayer County School Dist. No. 34 *v.* Thompson, 51 Nebr. 857, 71 N. W. 728.

New Hampshire.— McDonald *v.* Metropolitan L. Ins. Co., 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548; Lockwood *v.* Kelsea, 41 N. H. 185.

New Jersey.— Brady *v.* Franklin Sav. Inst., (Sup. 1905) 62 Atl. 277; Spengekan *v.* Palestine Bldg. Assoc., 60 N. J. L. 357, 37 Atl. 723.

New York.— Mason *v.* Prendergast, 120 N. Y. 536, 24 N. E. 806; Causidiere *v.* Beers, 1 Abb. Dec. 333; Sawatsch *v.* Cooney, 20 N. Y. App. Div. 470, 47 N. Y. Suppl. 54; Port Richmond *v.* Richmond County, 11 N. Y. App. Div. 217, 43 N. Y. Suppl. 147; Lestrade *v.* Burroughs, 74 Hun 502, 26 N. Y. Suppl. 561; Mulligan *v.* Harlan, 46 Misc. 571, 92 N. Y. Suppl. 765; Villias *v.* Stern, 24 Misc. 380, 53 N. Y. Suppl. 267; Bittiner *v.* Goldman, 19 Misc. 146, 43 N. Y. Suppl. 389; Buel *v.* Boughton, 2 Den. 91. *Compare* Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 59 N. Y. App. Div. 103, 69 N. Y. Suppl. 82.

North Carolina.— Bahnsen *v.* Clemmons, 79 N. C. 556.

North Dakota.— Logan *v.* Freerks, (1905) 103 N. W. 426; Krump *v.* Hankinson First State Bank, 8 N. D. 75, 76 N. W. 995.

Ohio.— See Joseph Ringmann, Jr., Co. *v.* Broxtermann, 21 Ohio Cir. Ct. 776, 11 Ohio Cir. Dec. 368.

Oregon.— Peterson *v.* Foss, 12 Oreg. 81, 6 Pac. 397.

Pennsylvania.— Humbird *v.* Davis, 210 Pa. St. 311, 59 Atl. 1082; Zacharias *v.* Zacharias, 23 Pa. St. 452; Cunningham *v.* Garvin, 10 Pa. St. 366; McAvoy *v.* Commonwealth Title Ins., etc., Co., 27 Pa. Super. Ct. 271; Steelman *v.* Doughty, 5 Wkly. Notes Cas. 166.

South Carolina.— Griffin *v.* Griffin, 20 S. C. 486.

Vermont.— Babcock *v.* Granville, 44 Vt. 325.

Virginia.— Baltimore, etc., R. Co. *v.* Burke, 102 Va. 643, 47 S. E. 824.

West Virginia.— Thompson *v.* Thompson, 5 W. Va. 190.

United States.— Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527; Leete *v.* Pacific Mill, etc., Co., 88 Fed. 957; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504. *Compare* Barry *v.* Law, 89 Fed. 582.

England.— Griffin *v.* Weatherby, L. R. 3 Q. B. 753, 9 B. & S. 726, 37 L. J. Q. B. 280, 18 L. T. Rep. N. S. 881, 17 Wkly. Rep. 8; Hurst *v.* Orbell, 8 A. & E. 107, 2 Jur. 840, 7 L. J. Q. B. 138, 3 N. & P. 237, 1 W. W. & H. 156, 35 E. C. L. 503; Hoy *v.* Reynolds, 1 A. & E. 159, 28 E. C. L. 95; Litt *v.* Martindale, 18 C. B. 314, 4 Wkly. Rep. 465, 86 E. C. L. 314; Wells *v.* Ross, 7 Taunt. 403, 2 E. C. L. 420; Fenner *v.* Meares, 4 W. Bl. 1269.

See 35 Cent. Dig. tit. "Money Received," § 1.

The action has been likened to a bill in equity.— It may, in general, be maintained

mistake;[5] nor will the action lie where plaintiff, upon the same transaction, would be liable to a cross action to recover damages to an equal amount.[6]

B. Money or Its Equivalent[7]**—1. In General.** While the general rule is that an action for money had and received lies only where money has been received by defendant,[8] the action may nevertheless be sustained where no money has actually passed, but something has been received as money, or has been really or presumptively converted into money before suit brought.[9]

2. Bank-Notes. Bank-notes or treasury notes, if received as money, will support an action for money had and received as well as if money itself had been received.[10]

3. Negotiable Paper. An action for money had and received will lie against one who has received negotiable paper as the equivalent of money, to which, *ex æquo et bono*, another is entitled.[11] But the giving of a note is not, as between the maker and the payee, a payment of money, authorizing a recovery in an action

by any legal evidence showing that defendant has received or obtained possession of money of plaintiff, which, in equity and good conscience, he ought to pay over to plaintiff. It is a liberal action, in which plaintiff waived all tort, trespass, and damages, and claims only the money which defendant has actually received. Law *v.* Uhrlaub, 104 Ill. App. 263.

Necessity of express or implied contract see Whitehead *v.* Peck, 1 Ga. 140.

A mere liability arising from an official act cannot be enforced in assumpsit for money had and received. There must be money in the hands of defendant to which plaintiff has an immediate right. Maddox *v.* Kennedy, 2 Rich. (S. C.) 102.

5. Taylor *v.* Beaver County Com'rs, 3 Penr. & W. (Pa.) 112.

6. Simpson *v.* Swan, 3 Campb. 291, 13 Rev. Rep. 805.

7. **Necessity that tort-feasor should convert property into money** see Assumpsit.

8. *Delaware.*— Cannon *v.* Maull, 4 Harr. 223.

Illinois.— Knickerbocker Ice Co. *v.* Murphy, 59 Ill. App. 39.

Kentucky.— Dana *v.* Barrett, 3 J. J. Marsh. 6.

New Hampshire.— Fogg *v.* Towle, 59 N. H. 117; Child *v.* Eureka Powder Works, 44 N. H. 354; Wilson *v.* George, 10 N. H. 445.

New York.— Allen *v.* Brown, 51 Barb. 86; Moyer *v.* Shoemaker, 5 Barb. 319; Beardsley *v.* Root, 11 Johns. 464, 6 Am. Dec. 386.

Vermont.— Burnap *v.* Partridge, 3 Vt. 144.

Virginia.— Baltimore, etc., R. Co. *v.* Burke, 102 Va. 643, 47 S. E. 824.

England.— McLachlan *v.* Evans, 1 Y. & J. 380.

Canada.— Craig *v.* Matheson, 32 Nova Scotia 452.

See 35 Cent. Dig. tit. "Money Received," § 2.

9. *Alabama.*— Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Huckabee *v.* May, 14 Ala. 263; Cameron *v.* Clarke, 11 Ala. 259.

Illinois.— Town *v.* Wood, 37 Ill. 512; Farson *v.* Hutchins, 62 Ill. App. 439.

Indiana.— Muir *v.* Rand, 2 Ind. 291; Hatten *v.* Robinson, 4 Blackf. 479.

Maine.— Hathaway *v.* Burr, 21 Me. 567, 38 Am. Dec. 278.

Maryland.— Shanks *v.* Dent, 8 Gill 120; Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655; Hook *v.* Boteter, 3 Harr. & M. 348.

Massachusetts.— Com. *v.* Haupt, 10 Allen 38; Miller *v.* Miller, 7 Pick. 133, 19 Am. Dec. 264; Arms *v.* Ashley, 4 Pick. 71; Randall *v.* Rich, 11 Mass. 494.

New York.— Allen *v.* Brown, 51 Barb. 86; Moyer *v.* Shoemaker, 5 Barb. 319; Risdon *v.* Lutgarda Angarica de la Rua, 51 N. Y. Super. Ct. 63; Haskins *v.* Dunham, Anth. N. P. 111; Hess *v.* Fox, 10 Wend. 436; Beardsley *v.* Root, 11 Johns. 464, 6 Am. Dec. 386.

North Carolina.— Hall *v.* Whitaker, 29 N. C. 353.

Texas.— Baker *v.* Kennedy, 53 Tex. 200.

England.— See Ehrensperger *v.* Anderson, 3 Exch. 148, 18 L. J. Exch. 132; Harington *v.* Macmorris, 1 Marsh. 33, 5 Taunt. 228, 1 E. C. L. 123, in which foreign money had been received by defendant.

See 35 Cent. Dig. tit. "Money Received," § 2.

10. *Alabama.*— Hill *v.* Kennedy, 32 Ala. 523.

Florida.— Gordon *v.* Camp, 2 Fla. 422.

Massachusetts.— Mason *v.* Waite, 17 Mass. 560. But see Barnard *v.* Whiting, 7 Mass. 358.

Mississippi.— Green *v.* Sizer, 40 Miss. 530, treasury notes.

Missouri.— State Bank *v.* Benoist, 10 Mo. 520.

North Carolina.— Anderson *v.* Hawkins, 10 N. C. 568. But see Filgo *v.* Penny, 6 N. C. 182.

See 35 Cent. Dig. tit. "Money Received," § 3.

Contra.— Lunderman *v.* Lunderman, 2 J. J. Marsh. (Ky.) 597; Wickliffe *v.* Davis, 2 J. J. Marsh. (Ky.) 69. Unless the bank-note is expressly received as money. Murray *v.* Pate, 6 Dana (Ky.) 335.

11. *Alabama.*— Hughes *v.* Stringfellow, 15 Ala. 324; Stewart *v.* Conner, 9 Ala. 803. *Compare* Owen *v.* Ashlock, 9 Port. 417.

California.— Ehrman *v.* Rosenthal, 117 Cal. 491, 49 Pac. 460.

Kentucky.— Gray *v.* Gray, 2 J. J. Marsh.

for money had and received on failure of the consideration.[12] Where a stakeholder receives of one party a certain sum, and from the other his note for an equal sum, and agrees to account for it to the first party as money, the second party cannot sue him for money had and received, upon an occurrence entitling both to withdraw their stakes.[13]

4. Credit on Account or in Settlement. Where, whether through wrong, inadvertence, or mistake, one person is wrongfully credited on account or in settlement of accounts, with the payment of money to which another is, in equity and good conscience, entitled, the latter may maintain an action for money had and received to his use against the person so credited.[14] Thus an agent who has settled an account with his principal, in which he has credited himself with the amount of a debt owed by the principal, as having been paid by himself to the creditor, is liable to the latter as for money received to his use;[15] and where an agent to collect a debt credits it to the principal as paid, with the consent of the debtor, and charges it to the debtor on his own books, he may maintain an action for money had and received against the debtor, although no money was actually paid

21. But see Phelps *v.* Hart, 1 J. J. Marsh. 505.

Maine.— Hinkley *v.* Fowler, 15 Me. 285; Chapman *v.* Shaw, 5 Me. 59. And see Carver *v.* Hayes, 47 Me. 257, where it was held that a writing containing these words "Due A. B., or order, twenty dollars on demand," was admissible to sustain a count for money had and received in a suit by the indorsee against the signer thereof.

Massachusetts.— Fairbanks *v.* Blackington, 9 Pick. 93; Hemmenway *v.* Bradford, 14 Mass. 121; Floyd *v.* Day, 3 Mass. 403, 3 Am. Dec. 171. See also Brown *v.* Cowell, 116 Mass. 461, in which a trustee got discounted a mortgage note received on the sale of his beneficiary's land, and used the proceeds himself.

New Hampshire.— Burnham *v.* Ayer, 36 N. H. 182.

New York.— Jaycox *v.* Cameron, 49 N. Y. 645; Townsend *v.* Olin, 5 Wend. 207; Armstrong *v.* Garrow, 6 Cow. 465. But *compare* Wilson *v.* Scott, 3 Lans. 308; Mercer *v.* Sayer, Anth. N. P. 162.

Pennsylvania.— Smith *v.* Austin, 4 Brewst. 89.

Vermont.— Doon *v.* Ravey, 49 Vt. 293; Thompson *v.* Babcock, Brayt. 24. *Compare* Beach *v.* Dorwin, 12 Vt. 139.

See 35 Cent. Dig. tit. "Money Received," § 4.

A promissory note not negotiable on its face, but made so by statute, is admissible in evidence under the common count for money had and received. King *v.* Wall, 1 Morr. (Iowa) 187.

12. Reed *v.* Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529. See also Martin *v.* Chambers, 84 Ill. 579, in which the note remained unpaid in the hands of an assignee at the time of the bringing of the action. And see Dean *v.* Mason, 4 Conn. 428, 10 Am. Dec. 162, in which the failure of consideration was partial only.

13. Andrews *v.* Cheney, 16 N. H. 597.

14. Credits as money received see the following cases:

Alabama.— Smith *v.* Seaton, Minor 75, in which plaintiff, a public receiver, allowed to defendant, as paid to him as receiver, a sum that ought not to have been allowed. *Compare* Smith *v.* Rowland, 18 Ala. 665.

Massachusetts.— Putnam *v.* Field, 103 Mass. 556; Harrington *v.* Curtis, 13 Metc. 469; Wheelock *v.* Hastings, 4 Metc. 504; Emerson *v.* Baylies, 19 Pick. 55.

Michigan.— Coon *v.* Anderson, 101 Mich. 295, 59 N. W. 607. *Compare* Barden *v.* Briscoe, 36 Mich. 254.

Minnesota.— Dakota County Com'rs *v.* Parker, 7 Minn. 267.

Missouri.— Schuster *v.* Kansas City, etc., R. Co., 60 Mo. 290; Jacoby *v.* O'Hearn, 32 Mo. App. 566.

New Hampshire.— Jones *v.* Woodman, 25 N. H. 311; Danforth *v.* Dewey, 3 N. H. 79.

New York.— Haddock *v.* Kelsey, 3 Barb. 100; Beardsley *v.* Root, 11 Johns. 464, 6 Am. Dec. 386. *Compare* Wolff *v.* Flatow, 4 Silv. Sup. 370, 7 N. Y. Suppl. 416.

North Carolina.—Houser *v.* McGinnas, 108 N. C. 631, 13 S. E. 139.

Pennsylvania.— Milligan *v.* Dick, 107 Pa. St. 259; Comly *v.* McBride, 4 Whart. 526; Porter *v.* Brown, Add. 37.

Tennessee.— Dickson *v.* Cunningham, Mart. & Y. 203.

See 35 Cent. Dig. tit. "Money Received," § 5.

Compare Libby *v.* Robinson, 79 Me. 168, 9 Atl. 24.

Where, after a settlement of mutual accounts, in which the value of certain property then in defendant's possession was allowed to him, and it was agreed that such property should be at plaintiff's disposal, defendant refused to turn it over, and converted it to his own use, it was held that assumpsit would lie for the value of the property. Danforth *v.* Dewey, 3 N. H. 79.

If a county charges a tax-collector, in a settlement with him, with the amount of a tax improperly collected, in a suit therefor against the county, it should be held to have received the same to the use of plaintiff. Dakota County Com'rs *v.* Parker, 7 Minn. 267.

15. Putnam *v.* Field, 103 Mass. 556.

in the transaction.[16] So too, where an attorney or agent has discharged a debt due to his principal, and applied that debt to pay his own debt, the amount of the debt so discharged may be recovered of him.[17]

5. Account Stated. Proof of an account stated, it has been held, supports a count for money had and received,[18] although it is said that the earlier authorities are against such a doctrine.[19] In support of the rule it is said that when the parties have stated an account and found a balance due which is payable in money it must be considered as an express agreement that the articles constituting this balance are to be regarded by such settlement as having been received as money. The consideration of the account stated is as much a money consideration as if a note had been given.[20]

C. Property Other Than Money or Its Proceeds.[21] An action for money had and received will not lie to recover the value of property alleged to have gone into defendant's possession,[22] unless it had been sold[23] or otherwise converted into

16. Emerson *v.* Baylies, 19 Pick. (Mass.) 55.

17. Beardsley *v.* Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386.

18. Lincoln *v.* Butler, 14 Gray (Mass.) 129; Morse *v.* Allen, 44 N. H. 33; Filer *v.* Peebles, 8 N. H. 226.

19. See Filer *v.* Peebles, 8 N. H. 226.

20. Filer *v.* Peebles, 8 N. H. 226.

21. **Necessity of proof that tort-feasor has converted property into money** see Assumpsit.

22. *Alabama.*— Snodgrass *v.* Coulson, 90 Ala. 347, 7 So. 736.

California.— McCreery *v.* Wells, 94 Cal. 485, 29 Pac. 877.

Connecticut.— Carter *v.* First Ecclesiastical Soc., 3 Conn. 455.

Georgia.— Barlow *v.* Stalworth, 27 Ga. 517.

Illinois.— Green *v.* Lepley, 88 Ill. App. 543.

Kentucky.— Johnson *v.* Haggin, 6 J. J. Marsh. 581; Pritchard *v.* Ford, 1 J. J. Marsh. 543; Lucket *v.* Bohannon, 3 Bibb 378; Duncan *v.* Littell, 2 Bibb 424.

Massachusetts.— Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073; Pitlock *v.* Wells, 109 Mass. 452, money in sealed package.

Michigan.— Lesher *v.* Loudon, 85 Mich. 52, 48 N. W. 278.

New Hampshire.— Carleton *v.* Brooks, 14 N. H. 149; Wheat *v.* Norris, 13 N. H. 178; Wilson *v.* George, 10 N. H. 445.

Pennsylvania.— Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573; App *v.* Lutheran Cong., 6 Pa. St. 201; Doebler *v.* Fisher, 14 Serg. & R. 179 (a horse); Morrison *v.* Berkey, 7 Serg. & R. 238.

Rhode Island.— Wilder *v.* Aldrich, 2 R. I. 518.

Vermont.— Kidney *v.* Persons, 41 Vt. 386, 98 Am. Dec. 595 [*cited* in Saville *v.* Welch, 58 Vt. 683, 5 Atl. 491].

Wisconsin.— Blewitt *v.* McRae, 100 Wis. 153, 75 N. W. 1003.

See 35 Cent. Dig. tit. "Money Received," § 6.

A contract for a specific thing cannot be recovered on as for money. Morrison *v.* Berkey, 7 Serg. & R. (Pa.) 238. See also Tibbets *v.* Gerrish, 25 N. H. 41, 47, 57 Am. Dec. 307 [*following* Wilson *v.* George, 10 N. H. 445], where it is said: "It is settled in this State, that a count for money had and received cannot be sustained by a note or contract like the one in suit [a note to pay forty dollars on demand, to be paid in hard wood at the market price at the time of payment]. Even were the action brought by Wentworth, the payee . . . a recovery could not be had upon a general declaration for money had and received." But *compare* Hassell *v.* Hoit, 17 N. H. 39; Perry *v.* Smith, 22 Vt. 301, holding that the action will lie upon a promissory note expressing a consideration other than money.

The value of goods sold to be paid for in merchandise cannot be recovered in assumpsit for money had and received. Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573.

23. *Alabama.*— Burton Lumber Co. *v.* Wilder, 108 Ala. 669, 18 So. 552. *Compare* Snodgrass *v.* Coulson, 90 Ala. 347, 7 So. 736.

Georgia.— Southern R. Co. *v.* Bore Steel Range Co., 122 Ga. 658, 50 S. E. 488; Barlow *v.* Stalworth, 27 Ga. 517.

Illinois.— Green *v.* Lepley, 88 Ill. App. 543.

Maryland.— Owings *v.* Nicholson, 4 Harr. & J. 66.

Michigan.— Nelson *v.* Kilbride, 113 Mich. 637, 71 N. W. 1089; Lesher *v.* Loudon, 85 Mich. 52, 48 N. W. 278; Watson *v.* Stever, 25 Mich. 386.

Mississippi.— Glass *v.* Lobdell, Walk. 105, in which the property was received by permission of law.

New Hampshire.— Smith *v.* Hatch, 46 N. H. 146.

Pennsylvania.— Whitney *v.* Bruner, 10 Wkly. Notes Cas. 239.

Rhode Island.— Wilder *v.* Aldrich, 2 R. I. 518.

South Carolina.— Glascow *v.* Martin, 1 Strobh. 87; Bours *v.* Watson, 1 Mill 393.

South Dakota.— Finch *v.* Park, 12 S. D. 63, 80 N. W. 155, 76 Am. St. Rep. 588.

Vermont.— Kidney *v.* Persons, 41 Vt. 386, 98 Am. Dec. 595.

England.— Wells *v.* Ross, 7 Taunt. 403, 2 E. C. L. 420.

See 35 Cent. Dig. tit. "Money Received," § 6.

Necessity of evidence of sale see Lesher *v.* Loudon, 85 Mich. 52, 48 N. W. 278; Blewitt *v.* McRae, 100 Wis. 153, 75 N. W. 1003.

money, or its equivalent,[24] even though the property has been consumed by defendant.[25]

II. NATURE OF RIGHT TO MONEY.

A. In General. The question, in an action for money had and received, is, to which party does the money, in equity, justice, and law, belong. All that plaintiff need show is that defendant holds money which, in equity and good conscience, belongs to him;[26] but if he fails to show such superior right he cannot recover.[27]

B. Necessity That Claim Be For Determinate Amount.[28] As appears from the numerous decisions on the subject, in order to sustain an action for money had and received, plaintiff's claim must be for a determinate amount,[29] unless

24. Money drawn on bank-books fraudulently obtained see Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073.

Damages received from railroad for killing animal see Toomer *v.* Coleman, 72 Ga. 213.

Where an attorney in collection receives in payment debts on himself or on others without authority from his principal, an action for money had and received will lie against him. Houx *v.* Russell, 10 Mo. 246.

A payment made in goods, under a mistake of fact, will sustain assumpsit, if the payment was in fact not due. Davis *v.* Krum, 12 Mo. App. 279.

25. Barlow *v.* Stalworth, 27 Ga. 517.

26. *Alabama.*— Rushton *v.* Davis, 127 Ala. 279, 28 So. 476; Boyett *v.* Potter, 80 Ala. 476, 2 So. 534, holding that a mere legal right in defendant will be disregarded where it does not carry a legal right to retain the money.

Kansas.— People's Nat. Bank *v.* Myers, 65 Kan. 122, 69 Pac. 164, holding that one who, through design or misdirection of another, receives money belonging to a third person, cannot retain it to apply on his own debt, due from the one who gave it to him.

Maryland.— Johnson *v.* Evans, 8 Gill 155, 50 Am. Dec. 669.

Massachusetts.— Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40.

Mississippi.— McGehee *v.* Fitts, 65 Miss. 357, 4 So. 93.

New York.— Phelps *v.* Bostwick, 22 N. Y. 242.

West Virginia.— Thompson *v.* Thompson, 5 W. Va. 190.

United States.— U. S. *v.* Clark, 25 Fed. Cas. No. 14,807, 1 Paine 629.

See 35 Cent. Dig. tit. "Money Received," § 7.

27. *Alabama.*— Turner *v.* Stetts, 28 Ala. 420.

California.— Hallidan *v.* Hearst, (1900) 62 Pac. 1063.

Connecticut.— Wolcott *v.* Reed, 16 Conn. 240.

Georgia.— Estes *v.* Thompson, 90 Ga. 698, 17 S. E. 98.

Illinois.— Stone *v.* Mulvaine, 119 Ill. App. 443 [*affirmed* in 217 Ill. 40, 75 N. E. 44]; Richolson *v.* Moloney, 96 Ill. App. 254.

Maryland.— White *v.* Coombs, 27 Md. 489.

Massachusetts.— Cole *v.* Bates, 186 Mass. 584, 72 N. E. 333; Gibbs *v.* Swift, 12 Cush. 393; Ross *v.* Tremaine, 2 Metc. 495.

Minnesota.—McClure *v.* Bradford, 39 Minn. 118, 38 N. W. 753.

Missouri.— Roemer Comm. Co. *v.* Annan, 81 Mo. App. 572.

New Hampshire.— Farnum *v.* Davis, 32 N. H. 302.

New York.— Shaffer *v.* Bacon, 35 N. Y. App. Div. 248, 54 N. Y. Suppl. 796 [*affirmed* in 161 N. Y. 635, 57 N. E. 1124].

North Carolina.— Monday *v.* Siler, 47 N. C. 389, holding that the action will not lie in favor of the equitable owner of a chose in action against a legal owner who has received the money on it.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Commonwealth Title Ins., etc., Co., 166 Pa. St. 558, 31 Atl. 344.

South Carolina.— Maxwell *v.* Swindle, 1 Brev. 467.

Wisconsin.— Erickson *v.* McGeehan Constr. Co., 107 Wis. 49, 82 N. W. 694 [*distinguishing* Sterling *v.* Ryan, 72 Wis. 36, 37 N. W. 572, 7 Am. St. Rep. 818].

England.— Garbett *v.* Veale, 5 Q. B. 408, D. & M. 458, 8 Jur. 335, 13 L. J. Q. B. 98, 48 E. C. L. 406.

See 35 Cent. Dig. tit. "Money Received," § 7.

28. Partial failure of consideration see *infra*, II, C, 2.

29. *Alabama.*— Vincent *v.* Rogers, 30 Ala. 471, 33 Ala. 224.

Connecticut.— Douglass *v.* Skinner, 44 Conn. 338 (in which the sum held by defendant was also to the use of other creditors, and was insufficient to pay the whole); Collins *v.* Phelps, 3 Day 506.

Georgia.— See Niles *v.* Groover, 78 Ga. 461, 3 S. E. 899.

Illinois.— Maxwell *v.* Longenecker, 82 Ill. 308; Davenport *v.* Gear, 3 Ill. 495.

Maine.— Varney *v.* Hathorn, 65 Me. 481; Gilman *v.* Waterville, 59 Me. 491 (unliquidated damages); Banks *v.* Adams, 23 Me. 259.

Massachusetts.— Murray *v.* McHugh, 9 Cush. 158; Fitch *v.* Chandler, 4 Cush. 254.

Michigan.— See Harrison *v.* Ingersoll, 56 Mich. 36, 22 N. W. 268, holding that one who sues for his share of a payment can sue as for money had and received, if he can show by any evidence how much belongs to him, notwithstanding defendant has lumped

in those cases in which defendant has expressly promised to pay a particular sum.[30]

C. Failure of Consideration For Payment[31] — **1. In General.** The rule is well settled that an action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed,[32]

the whole amount, so that there is no direct way of showing it.

Minnesota.— Van Hoesen *v.* Minnesota Baptist State Convention, 16 Minn. 96.

New York.— Pattison *v.* Blanchard, 5 N. Y. 186 [*affirming* 6 Barb. 537]; Peters *v.* Peters, 3 Misc. 264, 22 N. Y. Suppl. 764.

North Carolina.— Glasscock *v.* Hazell, 109 N. C. 145, 13 S. E. 789.

England.— Harvey *v.* Archbold, 3 B. & C. 626, 10 E. C. L. 285, 5 D. & R. 500, R. & M. 184, 21 E. C. L. 729; Rohson *v.* Andrade, 2 Chit. 263, 18 E. C. L. 624, 1 Stark. 372, 2 E. C. L. 145.

See 35 Cent. Dig. tit. "Money Received," § 8.

30. Collins *v.* Phelps, 3 Day (Conn.) 506.

31. **Money received by railroad on unauthorized municipal bonds** see MUNICIPAL CORPORATIONS.

Right of holder of invalid municipal bonds to sue on original consideration see MUNICIPAL CORPORATIONS.

32. *Alabama.*— Maddern *v.* Smith, 3 Stew. 119.

Arkansas.— Murray *v.* Clay, 9 Ark. 39, 47 Am. Dec. 731.

California.— Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39; Dashaway Assoc. *v.* Rogers, 79 Cal. 211, 21 Pac. 742; Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78; Reina *v.* Cross, 6 Cal. 29.

Connecticut.— Perry *v.* Bissell, 26 Conn. 23; Lyon *v.* Annable, 4 Conn. 350; Pettibone *v.* Roberts, 2 Root 258.

Delaware.— Morrison *v.* Larrison, 1 Marv. 211, 40 Atl. 1107.

Illinois.— Drennan *v.* Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; Laflin *v.* Howe, 112 Ill. 253; Raney *v.* Boyce, 39 Ill. 24; Steele *v.* Hobbs, 16 Ill. 59; Lord *v.* Wichita Bd. of Trade, 62 Ill. App. 526.

Indiana.— Weatherly *v.* Higgins, 6 Ind. 73.

Kentucky.— Woodward *v.* Fels, 1 Bush 162; Watson *v.* Cresap, 1 B. Mon. 195, 36 Am. Dec. 572.

Massachusetts.— Parker *v.* Tainter, 123 Mass. 185; Hotchkiss *v.* Judd, 12 Allen 447; Brown *v.* Harris, 2 Gray 359; Spring *v.* Coffin, 10 Mass. 31. See also Claflin *v.* Godfrey, 21 Pick. 1. *Compare* Woodward *v.* Cowing, 13 Mass. 216.

Michigan.— Ripley *v.* Case, 86 Mich. 261, 49 N. W. 46; McGoren *v.* Avery, 37 Mich. 120; Friend *v.* Dunks, 37 Mich. 25.

Minnesota.— Taylor *v.* Read, 19 Minn. 372.

Missouri.— Magoffin *v.* Muldrow, 12 Mo. 512; Harris *v.* Dougherty, 68 Mo. App. 105; Winningham *v.* Fancher, 52 Mo. App. 458; Sharp *v.* Carthage, 48 Mo. App. 26.

Nebraska.— Warder, etc., Co. *v.* Myers, 70 Nebr. 15, 96 N. W. 992; Rogers *v.* Walsh, 12 Nebr. 28, 10 N. W. 467.

Nevada.— Davis *v.* Thompson, 1 Nev. 17.

New Hampshire.— Lebanon *v.* Heath, 47 N. H. 353.

New Jersey.— Wood *v.* Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Smith *v.* Smith, 28 N. J. L. 208, 78 Am. Dec. 49.

New York.— Martin *v.* McCormick, 8 N. Y. 331 [*reversing* 4 Sandf. 366]; Eno *v.* Woodworth, 4 N. Y. 249, 53 Am. Dec. 370; Bier *v.* Bash, 107 N. Y. App. Div. 429, 95 N. Y. Suppl. 281; Churchill *v.* Stone, 58 Barb. 233; Briggs *v.* Vanderbilt, 19 Barb. 222; Gould *v.* Oneonta, 6 Thomps. & C. 43 [*affirmed* in 71 N. Y. 298]; Bean *v.* Carleton, 12 N. Y. Suppl. 519 [*affirmed* in 126 N. Y. 642, 27 N. E. 852]; Kinney *v.* Winter, 1 Edm. Sel. Cas. 109 [*affirmed* in 1 N. Y. 365]; King *v.* Brown, 2 Hill 485; Murray *v.* Richards, 1 Wend. 58; Wheeler *v.* Board, 12 Johns. 363; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23. *Compare* Jospe *v.* Lighte, 22 Misc. 146, 48 N. Y. Suppl. 645.

North Carolina.— Braswell *v.* American L. Ins. Co., 75 N. C. 8; White *v.* Green, 50 N. C. 47.

Pennsylvania.— Wharton *v.* Hudson, 3 Rawle 390.

South Carolina.— Duncan *v.* Bell, 2 Nott & M. 153; Wharton *v.* O'Hara, 2 Nott & M. 65; Lacoste *v.* Flotard, 1 Mill 467.

Tennessee.— Cardin *v.* Boyd, 11 Heisk. 176.

Virginia.— Newberry Land Co. *v.* Newberry, 95 Va. 111, 27 S. E. 897; Buena Vista Co. *v.* McCandlish, 92 Va. 297, 23 S. E. 781; Garber *v.* Armentrout, 32 Gratt. 235; McWilliams *v.* Smith, 1 Call 123.

West Virginia.— Hughes *v.* Frum, 41 W. Va. 445, 23 S. E. 604 [*overruling* Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 507]; Bier *v.* Smith, 25 W. Va. 830.

United States.— Jones *v.* Mutual Fidelity Co., 123 Fed. 506; Richardson *v.* Peyton, 20 Fed. Cas. No. 11,794, 1 Cranch C. C. 418; Riggs *v.* Taylor, 20 Fed. Cas. No. 11,832, 2 Cranch C. C. 687 [*reversed* on another point in 1 Pet. 591, 7 L. ed. 275].

England.— Leeds, etc., Bank *v.* Walker, 11 Q. B. D. 84, 47 J. P. 502, 52 L. J. Q. B. 590; Gingell *v.* Glascock, 8 Bing. 86, 1 L. J. C. P. 41, 1 Moore & S. 125, 21 E. C. L. 456; Young *v.* Cole, 3 Bing. N. Cas. 724, 3 Hodges 126, 6 L. J. C. P. 201, 4 Scott 489, 32 E. C. L. 334; Devaux *v.* Conolly, 8 C. B. 640, 19 L. J. C. P. 71, 65 E. C. L. 640; Gurney *v.* Womersley, 3 C. L. R. 3, 4 E. & B. 133, 1 Jur. N. S. 328, 24 L. J. Q. B. 46, 82 E. C. L. 133; Gompertz *v.* Bartlett, 2 C. L. R. 395, 2 E. & B. 849, 18 Jur. 266, 23 L. J. Q. B. 65, 2 Wkly. Rep. 43, 75 E. C. L. 849; Strickland *v.* Turner, 7 Exch. 208, 22 L. J. Exch. 115; Hooper *v.* Treffry, 1 Exch. 17, 16 L. J. Exch. 233; Bostock *v.* Jardine, 3 H. & C. 700, 11 Jur. N. S. 586, 34 L. J. Exch. 142, 12 L. T.

unless the failure of consideration is due to some fault on the part of plaintiff himself.[33]

2. Partial Failure. While it has been broadly stated that, to sustain an action for money had and received on the ground of failure of consideration, the failure must be total,[34] the better view seems to be that where a contract fails in part, if it be a precise and definite part, capable of being ascertained by computation, a corresponding part of the money paid may be recovered back, although the bargain or contract is in form entire.[35]

D. Right to Share in Money Received as Indemnity. Where one person has received money as an indemnity in which another has a right to share, the latter may maintain an action for money had and received for his portion.[36]

E. Right to Recover Condemnation Money From Person to Whom It Has Been Paid. An action for money had and received may be maintained by one who is legally or equitably entitled to money accruing upon the condemnation of property, but which has been paid to another.[37]

F. Right of Tenant in Common to Recover His Share of Proceeds of Common Property. An action for money had and received may be maintained by one tenant in common to recover his share of the proceeds of the common property, real or personal, from his cotenant, by whom they have been received,[38]

Rep. N. S. 577, 13 Wkly. Rep. 970; Knowles *v.* Bovill, 22 L. T. Rep. N. S. 70; Bruce *v.* Bruce, 1 Marsh. 165, 5 Taunt. 495 note, 15 Rev. Rep. 566 note, 1 E. C. L. 256; Jones *v.* Ryde, 1 Marsh. 157, 5 Taunt. 488, 15 Rev. Rep. 561, 1 E. C. L. 252.

See 35 Cent. Dig. tit. "Money Received," § 9.

Money paid on an uncertain contingency, which both the payer and payee expected would happen, but which did not, may be recovered in an action for money had and received. Riggs *v.* Taylor, 20 Fed. Cas. No. 11,832, 2 Cranch C. C. 687 [*reversed* on other points in 1 Pet. 59, 7 L. ed. 275].

Money paid under a mutual mistake as the price of that which has no legal existence or validity may be recovered back as paid without consideration, where the vendor is responsible for the mistake or represents a person so responsible. McGoren *v.* Avery, 37 Mich. 120.

Effect of impossibility of performance at time of contract see Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

Recovery of money paid for void county warrants see Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78; Rogers *v.* Walsh, 12 Nebr. 28, 10 N. W. 467.

Recovery of money paid for counterfeit bill see Watson *v.* Cresap, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572.

Recovery of money paid for forged bills or notes see White *v.* Green, 50 N. C. 47; Gurney *v.* Womersley, 3 C. L. R. 3, 4 E. & B. 133, 1 Jur. N. S. 328, 24 L. J. Q. B. 46, 82 E. C. L. 133.

33. McKee *v.* Miller, 4 Blackf. (Ind.) 222.

34. *Connecticut.*— Dean *v.* Mason, 4 Conn. 428, 10 Am. Dec. 162.

Missouri.— Templeton *v.* Jackson, 13 Mo. 78.

New Hampshire.— Smart *v.* Gale, 62 N. H. 62; Stevens *v.* Cushing, 1 N. H. 17, 8 Am. Dec. 27.

Texas.— Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109.

England.— Wright *v.* Newton, 2 C. M. & R. 124; Barber *v.* Pott, 4 H. & N. 759, 28 L. J. Exch. 381; Colton *v.* Dorrell, 17 Wkly. Rep. 672.

See 35 Cent. Dig. tit. "Money Received," § 10.

35. Hill *v.* Rewee, 11 Metc. (Mass.) 268 [*citing* Miner *v.* Bradley, 22 Pick. (Mass.) 457; Parish *v.* Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; Johnson *v.* Johnson, 3 B. & P. 162, 6 Rev. Rep. 736], per Shaw, C. J. See also Knox *v.* Abercrombie, 11 Ala. 997; Lafferty *v.* Day, 7 Ark. 258; Underhill *v.* Gaff, 48 Ill. 198; Hoover *v.* Senseman, 3 Cent. Rep. (Pa.) 540.

36. Cutler *v.* Rand, 8 Cush. (Mass.) 89; Smith *v.* Hicks, 1 Wend. (N. Y.) 202, 5 Wend. 48; Gochenauer *v.* Good, 3 Penr. & W. (Pa.) 274.

37. Harris *v.* Howes, 75 Me. 436 (landlord and tenant); Tamm *v.* Kellogg, 49 Mo. 118 (rival claimants); McAllister *v.* Reel, 53 Mo. App. 81 (landlord and tenant); Brinckerhoff *v.* Wemple, 1 Wend. (N. Y.) 470 (tenants in common); Coutant *v.* Catlin, 2 Sandf. Ch. (N. Y.) 485 (landlord and tenant); State *v.* Meiley, 22 Ohio St. 534 (action for money paid into probate court and wrongfully retained by probate judge).

Where the assignee of mortgagee did not intervene in the condemnation proceedings, or present his claim for the award until it was paid by the county treasurer, with whom it was deposited, to the owner, to whom it was made, he could not recover the amount due on his mortgage from the treasurer and his bondsmen. Armstrong *v.* Moore, 1 Kan. App. 450, 40 Pac. 834.

38. *Alabama.*— King *v.* Martin, 67 Ala. 177.

Illinois.— Gottschalk *v.* Smith, 156 Ill. 377, 40 N. E. 937 [*affirming* 54 Ill. App. 341].

if the question of title to the land held in common is not raised, but not otherwise.[39]

III. PRIVITY BETWEEN PARTIES.

A. In General. To support an action for money had and received there must be some privity existing between the parties in relation to the money sought to be recovered.[40] This privity may, however, be either implied or express;[41] the great preponderance of authority is to the effect that no further privity is required than that which results from one person's having another's money, which he has no right conscientiously to keep. In such cases the law implies a promise that he will pay it over.[42]

Maine.— Gardiner Mfg. Co. *v.* Heald, 5 Me. 381, 17 Am. Dec. 248.

Massachusetts.— Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353; Miller *v.* Miller, 7 Pick. 133, 19 Am. Dec. 289; Stiles *v.* Campbell, 11 Mass. 321; Jones *v.* Harraden, 9 Mass. 540 note; Brigham *v.* Eveleth, 9 Mass. 538.

New York.— Coles *v.* Coles, 15 Johns. 159, 8 Am. Dec. 231.

Pennsylvania.— Brubaker *v.* Robinson, 3 Penr. & W. 295.

See 35 Cent. Dig. tit. "Money Received," § 13.

39. Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264.

40. *Alabama.*— Illinois L. Ins. Co. *v.* Jaffe, 145 Ala. 676, 40 So. 47.

Indiana.— Salmon *v.* Brown, 6 Blackf. 347.

Massachusetts.— Vrancx *v.* Ross, 98 Mass. 591; Denny *v.* Lincoln, 5 Mass. 385.

Michigan.— Ryan *v.* O'Neil, 49 Mich. 281, 13 N. W. 591.

Minnesota.— Van Hoesen *v.* Minnesota Baptist State Convention, 16 Minn. 96.

New Hampshire.— Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 248; Warren *v.* Batchelder, 15 N. H. 129.

New York.— Kane *v.* Aldridge, 78 Hun 606, 29 N. Y. Suppl. 444; Dickey *v.* Dickey, 39 Barb. 386; Fox *v.* McComb, 18 N. Y. Suppl. 611.

Oregon.—Eugene First Nat. Bank *v.* Hovey, 34 Oreg. 162, 55 Pac. 535.

South Carolina.— Smith *v.* Ehrick, 1 Mill 349.

Utah.— Mader *v.* Taylor, etc., Co., 15 Utah 161, 49 Pac. 255.

United States.— St. Louis Second Nat. Bank *v.* Grand Lodge, F. & A. M., 98 U. S. 123, 25 L. ed. 75.

England.— Howell *v.* Balt, 5 B. & Ad. 504, 3 L. J. K. B. 49, 2 N. & M. 381, 27 E. C. L. 216; Baron *v.* Husband, 4 B. & Ad. 611, 1 N. & M. 728, 24 E. C. L. 269; Yates *v.* Bell, 3 B. & Ald. 643, 5 E. C. L. 370; Watson *v.* Russell, 5 B. & S. 968, 34 L. J. Q. B. 93, 11 L. T. Rep. N. S. 641, 13 Wkly. Rep. 231, 117 E. C. L. 968; Barlow *v.* Browne, 16 L. J. Exch. 62, 16 M. & W. 126 [*distinguishing* Meert *v.* Moessard, 6 L. J. C. P. O. S. 3, 1 M. & P. 8, 17 E. C. L. 587]; Coles *v.* Wright, 2 Rose 110, 4 Taunt. 213; Haverson *v.* Cole, 6 Wkly. Rep. 17.

See 35 Cent. Dig. tit. "Money Received," § 14.

41. Sergeant *v.* Stryker, 16 N. J. L. 464, 32 Am. Dec. 404. And see cases cited in the following note.

Privity is express, where defendant has received the money as agent or bailiff for plaintiff, or where he consents or agrees to appropriate money in his hands belonging to another, to the payment of plaintiff, at the owner's request. Sergeant *v.* Stryker, 16 N. J. L. 464, 32 Am. Dec. 404.

42. *Alabama.*— Levinshon *v.* Edwards, 79 Ala. 293; Harper *v.* Claxton, 62 Ala. 46; Thompson *v.* Merriman, 15 Ala. 166.

California.— Kreutz *v.* Livingston, 15 Cal. 344.

Colorado.— Mumford *v.* Wright, 12 Colo. 214, 55 Pac. 744; Ph. Zang Brewing Co. *v.* Bernheim, 7 Colo. App. 528, 44 Pac. 380.

Connecticut.—Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37.

Georgia.— Bates-Farley Sav. Bank *v.* Dismukes, 107 Ga. 212, 33 S. E. 175; Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383; Fischesser *v.* Heard, 42 Ga. 531; Whitehead *v.* Peck, 1 Ga. 140.

Illinois.— Springfield First Nat. Bank *v.* Gatton, 172 Ill. 625, 50 N. E. 121 [*affirming* 71 Ill. App. 323]; Alderson *v.* Ennor, 45 Ill. 128; Taylor *v.* Taylor, 20 Ill. 650; Dorsey *v.* Williams, 48 Ill. App. 386. But see Bloomer *v.* Denman, 12 Ill. 240.

Indiana.— McFadden *v.* Wilson, 96 Ind. 253.

Maine.— Calmis *v.* Whidden, 64 Me. 249; Lewis *v.* Sawyer, 44 Me. 332; Todd *v.* Tobey, 29 Me. 219.

Maryland.— Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780; Penn *v.* Flack, 3 Gill & J. 369.

Massachusetts.— Hall *v.* Marston, 17 Mass. 575; Mason *v.* Waite, 17 Mass. 560.

Michigan.— Walker *v.* Conant, 65 Mich. 194, 31 N. W. 786.

Minnesota.— Brand *v.* Williams, 29 Minn. 238, 13 N. W. 42.

Missouri.— Richardson *v.* Moffet-West Drug Co., (App. 1902) 69 S. W. 398.

Nevada.— White Pine County Bank *v.* Sadler, 19 Nev. 98, 6 Pac. 941.

New Hampshire.— Fogg *v.* Worster, 49 N. H. 503.

New York.— Causidiere *v.* Beers, 1 Abb. Dec. 333, 2 Keyes 198; Pierce *v.* Crafts, 12 Johns. 90.

B. Recipient of Money and Person Entitled Thereto.[43] Such privity exists between one who receives money or its equivalent under a promise or duty to pay it over to a third person, and such third person as will support an action for money had and received;[44] and when the money to be paid on a contract under seal is, by the terms of the contract, made payable to one not a party

North Carolina.— Houser *v.* McGinnas, 108 N. C. 631, 13 S. E. 139.

Ohio.— Slaughter *v.* Hamm, 2 Ohio 271.

Pennsylvania.— Rapalje *v.* Emory, 2 Dall. 51, 1 L. ed. 285; McAvoy & McMichael *v.* Commonwealth Title, etc., Co., 27 Pa. Super. Ct. 271.

South Carolina.— Link *v.* Barksdale, 70 S. C. 487, 50 S. E. 189; Madden *v.* Watts, 59 S. C. 81, 37 S. E. 209.

South Dakota.—Finch *v.* Park, 12 S. D. 63, 80 N. W. 155, 76 Am. St. Rep. 588; Siems *v.* Pierre Sav. Bank, 7 S. D. 338, 64 N. W. 167.

Tennessee.— Dickson *v.* Cunningham, Mart. & Y. 203; Boyd *v.* Logan, Cooke 394.

Vermont.— State *v.* St. Johnsburg, 59 Vt. 332, 10 Atl. 531; Penniman *v.* Patchin, 5 Vt. 346; Colgrove *v.* Tillmore, 1 Aik. 347.

Virginia.— Baltimore, etc., R. Co. *v.* Burke, 102 Va. 643, 47 S. E. 824.

Washington.— Soderberg *v.* King County, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A. 670.

Wisconsin.— Ela *v.* American Merchant's Union Express Co., 29 Wis. 611, 9 Am. Rep. 619.

United States.— Gaines *v.* Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. ed. 466; Raborg *v.* Peyton, 2 Wheat. 385, 4 L. ed. 268; Leete *v.* Pacific Mill, etc., Co., 88 Fed. 957; Metropolis Bank *v.* Jersey City First Nat. Bank, 19 Fed. 301.

England.— Grant *v.* Vaughn, 3 Burr. 1516; Atty.-Gen. *v.* Perry, Comyns 481; Kitchen *v.* Campbell, 3 Wils. C. P. 304.

See 35 Cent. Dig. tit. "Money Received," § 14.

Contra.— Triplett *v.* Helm, 5 J. J. Marsh. (Ky.) 651.

Privity can be implied "only where the defendant has received money of the plaintiff, or money belonging to the plaintiff, by mistake, or fraud, or duress, or has come into possession of it *mala fides*, or on a consideration which has failed, or has tortiously converted the plaintiff's property into money. In other words, the money sought to be recovered in this action upon an implied promise must either be identically the money of the plaintiff, of which the defendant has improperly possessed himself; or the proceeds of some property, or issuing out of some fund, or emoluments belonging to the plaintiff." Sergeant *v.* Stryker, 16 N. J. L. 464, 470, 32 Am. Dec. 404.

43. Right of person receiving money for special purpose not carried out to recover see *infra*, IV, G.

44. *Alabama.*— Potts *v.* Gadsden First Nat. Bank, 102 Ala. 286, 14 So. 663; Shields *v.* Sheffield, 79 Ala. 91; Garrett *v.* Garrett, 27 Ala. 687; Thompson *v.* Merriman, 15 Ala. 166; Hitchcock *v.* Lukens, 8 Port. 333.

Arkansas.— Bender *v.* Wooten, 35 Ark. 31; Dawson *v.* Gurley, 22 Ark. 381.

California.— Kreutz *v.* Livingston, 15 Cal. 344.

Connecticut.— Davis *v.* Benton, 24 Conn. 555; Camp *v.* Tompkins, 9 Conn. 545.

Illinois.—Whitton *v.* Barringer, 67 Ill. 551; Snydacker *v.* Magill, 24 Ill. 138; Drovers' Nat. Bank *v.* O'Hare, 18 Ill. App. 182 [*affirmed* in 119 Ill. 646, 10 N. E. 360].

Indiana.— Kennedy *v.* Gruell, 84 Ind. 133; Miller *v.* Billingsley, 41 Ind. 489; Bush *v.* Seaton, 4 Ind. 522.

Iowa.— Johnson *v.* Collins, 14 Iowa 63; Norway Dist. Tp. *v.* Clear Lake Dist. Tp., 11 Iowa 506.

Maine.— Keene *v.* Sage, 75 Me. 138; Vose *v.* Treat, 58 Me. 378; Goodwin *v.* Bowdea, 54 Me. 424; Schillinger *v.* McCann, 6 Me. 364; Dearhorn *v.* Parks, 5 Me. 81, 17 Am. Dec. 206.

Maryland.— O'Neal *v.* Washington County School Com'rs, 27 Md. 227; Owings *v.* Owings, 1 Harr. & G. 484; Chapman *v.* Williams, 7 Harr. & J. 157. But see Eichelberger *v.* Murdock, 10 Md. 373, 69 Am. Dec. 140, where it is said that the action cannot be maintained without some act on the part of defendant by which he binds himself to plaintiff.

Massachusetts.— Fiske *v.* Fisher, 100 Mass. 97; Sullivan *v.* Fitzgerald, 12 Allen 482; Hills *v.* Bearse, 9 Allen 403; Lee *v.* Thorndike, 2 Metc. 313; Hardy *v.* Peters, 19 Pick. 370; Hall *v.* Marston, 17 Mass. 575; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154. But *compare* Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469; Patch *v.* Loring, 17 Pick. 336, in which actual privity of contract seems to have been required. And see ASSUMPSIT, 4 Cyc. 322.

Michigan.— Liesemer *v.* Burg, 106 Mich. 124, 63 N. W. 999; Fay *v.* Sanderson, 48 Mich. 259, 12 N. W. 161; Hosford *v.* Kanouse, 45 Mich. 620, 8 N. W. 567; Donkersley *v.* Levy, 38 Mich. 54.

Missouri.— Utley *v.* Tolfree, 77 Mo. 307; Frost *v.* Redford, 54 Mo. App. 345; Price *v.* Reed, 38 Mo. App. 489.

New Hampshire.— Wentworth *v.* Gove, 45 N. H. 160; Holderness *v.* Baker, 44 N. H. 414. But see Hutchins *v.* Gilman, 9 N. H. 359.

New York.— Williams *v.* Fitch, 18 N. Y. 546; McCafferty *v.* Decker, 3 Hun 604; Ross *v.* Curtis, 30 Barb. 238 [*affirmed* in 31 N. Y. 606]; Haddock *v.* Kelsey, 3 Barb. 100; Holthausen *v.* Pondir, 55 N. Y. Super. Ct. 73, 18 N. Y. St. 360; General Mut. Ins. Co. *v.* Benson, 5 Duer 168; Berry *v.* Mayhew, 1 Daly 54; Smith *v.* Woodruff, 1 Hilt. 462; Spingara *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Suppl. 733; National Temperance Soc., etc., House *v.* Anderson, 2 N. Y. Suppl. 49; Nearing *v.* Brown, 10 N. Y. St. 637; Fisher *v.* Martin, 6 N. Y.

thereto, such person may sue in assumpsit for money had and received, using the sealed instrument as evidence of his right to recover.[45]

C. Conflicting Claimants of Same Fund. Where there are two claimants for the same money, and one of them is recognized as being entitled to it by the person from whom it is due, and is paid, the other cannot sue him to recover the money, for the reason that, having received the money under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other claimant, or to pay it over to him, and therefore there is not, under the circumstances, any privity of contract on which to found the action.[46] Where, however, the liability of the person from whom the money was due has been discharged by payment to one claimant who does not assert any hostile claim to the whole amount, it has been held that another claimant, who is rightfully entitled to share in the money, may maintain an action for money had and received against the claimant so paid.[47]

St. 102; Judson *v.* Gray, 17 How. Pr. 289; Delaware, etc., Canal Co. *v.* Westchester County Bank, 4 Den. 97; Weston *v.* Barker, 12 Johns. 276, 7 Am. Dec. 319; Neilson *v.* Blight, 1 Johns. Cas. 205. But *compare* Martin *v.* Graham, 63 Hun 628, 17 N. Y. Suppl. 710; Bigelow *v.* Davis, 16 Barb. 561; Seaman *v.* Whitney, 24 Wend. 260, 35 Am. Dec. 618.

North Carolina.— White *v.* Hunt, 64 N. C. 496; Winslow *v.* Fenner, 61 N. C. 565; Draughan *v.* Bunting, 31 N. C. 10.

Pennsylvania.— Benner *v.* Weeks, 159 Pa. St. 504, 28 Atl. 355; Grim *v.* Thomas Iron Co., 115 Pa. St. 611, 8 Atl. 595; Wynn *v.* Wood, 97 Pa. St. 216; Robertson *v.* Reed, 47 Pa. St. 115; Stoudt *v.* Hine, 45 Pa. St. 30; Aycinena *v.* Peries, 6 Watts & S. 245; Kelly *v.* Evans, 3 Penr. & W. 387, 24 Am. Dec. 325; Fleming *v.* Alter, 7 Serg. & R. 295; Hoopes *v.* Stoll, 2 Chest. Co. Rep. 40; Scott *v.* Pilling, 2 Phila. 134.

South Carolina.— Mann *v.* Mann, 2 Rich. 123; Duncan *v.* Moon, Dudley 332.

Texas.— Johnson *v.* Patterson, (Civ. App. 1896) 33 S. W. 1038.

Vermont.— Phelps *v.* Conant, 30 Vt. 277; Buck *v.* Albee, 27 Vt. 190; Crampton *v.* Ballard, 10 Vt. 251; Penniman *v.* Patchin, 5 Vt. 346.

Virginia.— Taylor *v.* Cooper, 10 Leigh 317, 34 Am. Dec. 737.

Wisconsin.— Sterling *v.* Ryan, 72 Wis. 36, 37 N. W. 572, 7 Am. St. Rep. 818; Hamlin *v.* Height, 32 Wis. 237; Silkman *v.* Milwaukee, 31 Wis. 555.

United States.— U. S. *v.* Mechanics' Bank, 26 Fed. Cas. No. 15,756, Gilp. 51.

See 35 Cent. Dig. tit. "Money Received," § 15.

Limitation of rule.— The rule that plaintiff is entitled to recover money to which he has an equitable title, and which he can trace in equity into the hands of defendant, in an action for money had and received, is confined to money received for plaintiff by some one standing toward him in a fiduciary capacity. Cole *v.* Bates, 186 Mass. 584, 72 N. E. 333.

45. Clark *v.* Walker, 9 Houst. (Del.) 287, 32 Atl. 646.

46. *California.*— Edmondson *v.* Mason, 16 Cal. 386.

Illinois.— Carpen *v.* Hall, 29 Ill. 512; Hall *v.* Carpen, 27 Ill. 386, 81 Am. Dec. 233; Trumbull *v.* Campbell, 8 Ill. 502; Charleston *v.* Charleston, 52 Ill. App. 41; Rushville *v.* Rushville, 39 Ill. App. 503; Atteberry *v.* Jackson, 15 Ill. App. 276.

Indiana.— Shultz *v.* Boyd, 152 Ind. 166, 52 N. E. 750; Conklin *v.* Smith, 7 Ind. 107, 63 Am. Dec. 416 [*explaining* 3 Ind. 284, and *citing* Britzell *v.* Fryberger, 2 Ind. 176; Farlow *v.* Kemp, 7 Blackf. 544; Salmon *v.* Brown, 6 Blackf. 347].

Massachusetts.— Rand *v.* Smallidge, 130 Mass. 337; Moore *v.* Moore, 127 Mass. 22; Wilson *v.* Hill, 3 Metc. 66.

Michigan.— Hosmer *v.* Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504; Corey *v.* Webber, 96 Mich. 357, 55 N. W. 982.

New Jersey.— Nolan *v.* Manton, 46 N. J. L. 231, 50 Am. Rep. 403; Sergeant *v.* Stryker, 16 N. J. L. 464, 32 Am. Dec. 404.

New York.— Decker *v.* Saltzman, 59 N. Y. 275; Hathaway *v.* Homer, 54 N. Y. 655 [*reversing* 5 Lans. 267]; Rowe *v.* Auburn Bank, 51 N. Y. 674; Butterworth *v.* Gould, 41 N. Y. 450; Patrick *v.* Metcalf, 37 N. Y. 332; Dumois *v.* Hill, 2 N. Y. App. Div. 525, 37 N. Y. Suppl. 1093 [*affirming* 11 Misc. 242, 32 N. Y. Suppl. 164]; Getty *v.* Campbell, 2 Rob. 664. *Compare* Tiemann *v.* Post, 42 N. Y. App. Div. 198, 58 N. Y. Suppl. 1029; Angel *v.* Smith, 6 N. Y. App. Div. 251, 39 N. Y. Suppl. 1115.

Pennsylvania.— Real Estate Sav. Inst. *v.* Linder, 74 Pa. St. 371; Diechman *v.* Northampton Bank, 1 Rawle 54; Messier *v.* Amery, 1 Yeates 533, 1 Am. Dec. 316; Rapalje *v.* Emory, 2 Dall. 51, 231, 1 L. ed. 285, 361. But see Durdon *v.* Gaskill, 2 Yeates 268.

Virginia.— Burton *v.* Burton, 10 Leigh 597.

Wisconsin.— Dent *v.* Cotzhausen, 23 Wis. 120, 99 Am. Dec. 111.

England.— Vaughan *v.* Matthews, 13 Q. B. 187, 13 Jur. 470, 18 L. J. Q. B. 191, 66 E. C. L. 187.

See 35 Cent. Dig. tit. "Money Received," § 16.

But see State *v.* St. Johnsbury, 59 Vt. 332, 10 Atl. 531.

47. Webb *v.* Meyers, 64 Hun (N. Y.) 11, 18 N. Y. Suppl. 711.

D. Separate Principals of Common Agent. Where an agent is employed by several principals, the common employment creates a relation and privity between the principals such as will sustain an action for money had and received by one against another to recover money belonging to the former, and paid over by the agent to the latter.[48]

E. Recipient of Money Fraudulently Obtained by Third Person and Owner of Money. No such privity as will sustain an action for money had and received exists between one who receives from a third person money fraudulently obtained by the latter and the owner,[49] unless the recipient of the money was aware of the fraud.[50]

F. Lender of Money and Third Person to Whose Use It Has Been Applied.[51] One in whose behalf money is borrowed without authority, but to whose use it is applied by the borrower, is not liable to the lender as for money had and received.[52]

IV. CONSIDERATION OR PURPOSE FOR WHICH MONEY WAS RECEIVED.

A. In General. To sustain an action for money had and received, it must appear that the money in question belonged to plaintiff; that it was secured by defendant without plaintiff's consent, and without giving any valid consideration; or, if with plaintiff's consent, upon a consideration which has failed.[53]

B. Necessity of Actual Receipt of Money by Defendant. To maintain an action for money had and received, plaintiff must show that defendant actually received his money, or prove such facts as to raise a fair presumption that he received it.[54]

48. Chase *v.* Willman Mercantile Co., 63 Mo. App. 482; Ackerman *v.* Cobb Lime Co., 125 N. Y. 361, 26 N. E. 455 [*reversing* 51 Hun 310, 3 N. Y. Suppl. 892]; Hathaway *v.* Cincinnatus, 62 N. Y. 434.

49. Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; Young *v.* Dibrell, 7 Humphr. (Tenn.) 270.

50. Hight *v.* Walker, 78 Ill. App. 451; Erie R. Co. *v.* Vanderbilt, 5 Hun (N. Y.) 123.

51. **Right of holder of invalid municipal bonds the consideration for which has been applied to city purposes to recover on original consideration** see MUNICIPAL CORPORATIONS.

52. Otis *v.* Stockton, 76 Me. 506; Kelley *v.* Lindsey, 7 Gray (Mass.) 287; Stephens *v.* Brooklyn Bd. of Education, 79 N. Y. 183. But see Leonard *v.* Burlington Mut. L. Assoc., 55 Iowa 594, 8 N. W. 463; Billings *v.* Monmouth, 72 Me. 174.

53. *Colorado.*— Morgan Brokerage Co. *v.* Shumwell, 16 Colo. App. 185, 64 Pac. 379.
Illinois.— Bothwell *v.* Brown, 51 Ill. 234.
Maine.— Raymond *v.* Lowe, 87 Me. 329, 32 Atl. 964; Lane *v.* Smith, 68 Me. 178.
Massachusetts.— Stone *v.* Knight, 23 Pick. 95; Raynham *v.* Rounseville, 9 Pick. 44.
New Hampshire.— Leighton *v.* Twombly, 9 N. H. 483.
New York.— Guarantee Sav., etc., Co. *v.* Moore, 35 N. Y. App. Div. 421, 54 N. Y. Suppl. 787; Thorne *v.* Dillingham, 1 Den. 254.
United States.—Olmstead *v.* Distilling, etc., Co., 77 Fed. 265.
See 35 Cent. Dig. tit. "Money Received," § 21.

54. *Alabama.*— St. Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Moody *v.* Walker, 89 Ala. 619, 7 So. 246; Calvert *v.* Marlow, 6 Ala. 337.
Arkansas.— Hutchinson *v.* Phillips, 11 Ark. 270.
California.—Herrick *v.* Hodges, 13 Cal. 431.
Georgia.— Lary *v.* Hart, 12 Ga. 422.
Illinois.— Grayville, etc., R. Co. *v.* Burns, 92 Ill. 302; Stahl *v.* Ansley, 7 Ill. 32; Neill *v.* Chessen, 15 Ill. App. 266; Gallagher *v.* Frarer, 4 Ill. App. 330.
Indiana.— Markle *v.* Steele, 2 Blackf. 344.
Kentucky.— Madison *v.* Wallace, 7 J. J. Marsh. 98; Gaines *v.* Scott, 3 Ky. L. Rep. 418.
Maine.— Rand *v.* Nesmith, 61 Me. 111. *Compare* Fletcher *v.* Belfast, 77 Me. 334.
Maryland.— Brent *v.* Davis, 9 Md. 217; Parker *v.* Fassett, 1 Harr. & J. 337.
Massachusetts.— Reitenbach *v.* Johnson, 129 Mass. 316; Stowe *v.* Bowen, 99 Mass. 194.
Michigan.—Anderson *v.* Corcoran, 92 Mich. 628, 52 N. W. 1025.
Mississippi.— Fox *v.* Fisk, 6 How. 328; White *v.* White, 2 How. 931.
Missouri.— Kemp *v.* Foster, 22 Mo. App. 643.
New Jersey.— Budd *v.* Hiler, 27 N. J. L. 43.
New York.— New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503; National Trust Co. *v.* Gleason, 77 N. Y. 400, 33 Am. Rep. 632; Phœnix Bridge Co. *v.* New Jersey, Steel, etc., Co., 30 N. Y. App. Div. 614, 52 N. Y. Suppl. 275; Husson *v.* Sire, 78 Hun 613, 28 N. Y. Suppl. 866; Artcher *v.* McDuffie, 5 Barb. 147; Billington *v.* Richters, 28 Misc. 769, 59 N. Y.

C. Surplus Arising on Sale of Security For Debt. Any surplus arising on the sale of a security for a debt may be recovered in an action for money had and received by the person entitled thereto, whether the original debtor or a subsequent mortgagee.[55]

D. Surplus in Hands of Agent or Trustee. An action for money had and received will lie against one with whom accounts were left for collection, he to pay creditors from the proceeds, on his refusal to account for the balance.[56] So where property is conveyed by a debtor to a trustee to be sold for the benefit of creditors who sells the property for more than enough to satisfy all claims, a creditor for whose benefit the trust was created may maintain an action against the trustee for money had and received. He need not go into equity to enforce the trust.[57]

E. Proceeds of Property Converted by Defendant. Where one sells the property of another and receives the price in money or its equivalent, the owner may waive the tort, and maintain an action for money had and received to recover it.[58]

Suppl. 60; American Preservers Co. *v.* Wiltsie, 10 Misc. 463, 31 N. Y. Suppl. 451; Haskins *v.* Dunham, Anth. N. P. 111; Osborn *v.* Bell, 5 Den. 370, 49 Am. Dec. 275.

North Carolina.— Winslow *v.* Fenner, 61 N. C. 565.

Pennsylvania.— Hopkins *v.* Beebe, 26 Pa. St. 85; Rush *v.* Good, 14 Serg. & R. 226; Hualsecker *v.* Heiney, 11 Serg. & R. 250; Farnesly *v.* Murphy, Add. 22; Ralston *v.* Bell, 2 Dall. 242, 1 L. ed. 365; Eastwick *v.* Hagg, 1 Dall. 222, 1 L. ed. 109.

South Carolina.— Hall *v.* Wright, 9 Rich. 392.

Vermont.— Page *v.* Baxter Nat. Bank, 55 Vt. 51; Lemington *v.* Stevens, 48 Vt. 38; Burnap *v.* Partridge, 3 Vt. 144.

Virginia.— Isom *v.* Johns, 2 Munf. 272.

Wisconsin.— J. V. Le Clair Co. *v.* Rogers-Ruger Ct., 124 Wis. 44, 102 N. W. 346; Hassard *v.* Tomkins, 108 Wis. 186, 84 N. W. 174; Blewitt *v.* McRae, 100 Wis. 153, 75 N. W. 1003; Matheson *v.* Mazomanie, 20 Wis. 191.

United States.— Lamar *v.* McCay, 109 U. S. 235, 3 S. Ct. 167, 27 L. ed. 919 [*reversing* 12 Fed. 367, 20 Blatchf. 474]; Douglass *v.* Reynolds, 7 Pet. 113, 8 L. ed. 626; Kimberly *v.* Butler, 14 Fed. Cas. No. 7,777; Read *v.* Bertrand, 20 Fed. Cas. No. 11,601, 4 Wash. 514.

England.— Prince *v.* Oriental Bank Corp., 3 App. Cas. 325, 47 L. J. P. C. 42, 38 L. T. Rep. N. S. 41, 26 Wkly. Rep. 543.

See 35 Cent. Dig. tit. "Money Received," § 22.

Money received by a wife in the lifetime of her husband is in legal effect received by the husband, whether paid over to him or not, and cannot be recovered from her by his administrator in an action for money had and received. White *v.* White, 2 How. (Miss.) 931.

A tax-collector who, in his official capacity, wrongfully seizes and sells property, and pays the proceeds into the public treasury, is not liable in assumpsit for the money received. Osborn *v.* Bell, 5 Den. (N. Y.) 370, 49 Am. Dec. 275.

55. *Alabama.*— Hayes *v.* Woods, 72 Ala. 92; Webster *v.* Singley, 53 Ala. 208, 25 Am. Rep. 609.

Illinois.— Mason *v.* Showalter, 85 Ill. 133; Lewis *v.* Harsh, 54 Ill. 383.

Massachusetts.— Johnson *v.* Cobleigh, 152 Mass. 17, 25 N. E. 73; Cook *v.* Basley, 123 Mass. 396; Hancock *v.* Franklin Ins. Co., 114 Mass. 155; Jackson *v.* Stevens, 108 Mass. 94; Hunt *v.* Nevers, 15 Pick. 500, 26 Am. Dec. 616; Arms *v.* Ashley, 4 Pick. 71; Randall *v.* Rich, 11 Mass. 494.

Missouri.— White *v.* Quinlan, 30 Mo. App. 54.

New York.—Cope *v.* Wheeler, 41 N. Y. 303; King *v.* Van Vleck, 40 Hun 68 [*affirmed* in 109 N. Y. 363, 16 N. E. 547]; Hess *v.* Fox, 10 Wend. 436; Gilchrist *v.* Cunningham, 8 Wend. 641.

Pennsylvania.— Kellam *v.* Kellam, 94 Pa. St. 225; Miller *v.* Caldwell, 4 Pa. St. 160; Stoever *v.* Stoever, 9 Serg. & R. 434.

Wisconsin.— Flanders *v.* Thomas, 12 Wis. 410.

United States.— Jewett *v.* Cunard, 13 Fed. Cas. No. 7,310, 3 Woodh. & M. 277.

See 35 Cent. Dig. tit. "Money Received," § 23.

56. Hitchcock *v.* Lukens, 8 Port. (Ala.) 333.

57. Tanner *v.* Page, 106 Mich. 155, 63 N. W. 993.

58. *Alabama.*— Sanford *v.* Lee, 119 Ala. 248, 24 So. 578, 72 Am. St. Rep. 914; Planters', etc., Ins. Co. *v.* Tunstall, 72 Ala. 142.

Connecticut.— Minor *v.* Rogers, 40 Conn. 512, 16 Am. Rep. 69; Underhill *v.* Morgan, 33 Conn. 105.

District of Columbia.— Stiles *v.* Selinger, 2 Mackey 429.

Illinois.— Harris *v.* Miner, 28 Ill. 135; Dickinson *v.* Whitney, 9 Ill. 406; Gentle *v.* Stephens, 87 Ill. App. 190.

Iowa.— Shaw *v.* Gardner, 30 Iowa 111; Goodenow *v.* Snyder, 3 Greene 599.

Louisiana.— Fellows *v.* Frelson, 6 La. Ann. 477.

Maine.— Scott *v.* Williamson, 24 Me. 343.

Minnesota.— Libby *v.* Johnson, 37 Minn. 220, 33 N. W. 783.

F. Double Payment. An action for money had and received will lie against one who has received double payment to recover the overplus.[59]

G. Money Received For Special Purpose Not Carried Out. Where one receives money from another for a particular purpose, and neglects or refuses to apply it to such purpose, it may be recovered in an action for money had and received;[60] and the same rule has been held to apply where money is

New York.— Reed *v.* Hayward, 82 N. Y. App. Div. 416, 81 N. Y. Suppl. 608.

North Carolina.— Long *v.* Spruill, 52 N. C. 96.

Pennsylvania.— Roberts *v.* Bye, 30 Pa. St. 375, 72 Am. Dec. 710 [*affirming* 14 Leg. Int. 212]; Simpson *v.* Snyder, 4 Pa. Dist. 641.

South Carolina.— Clark *v.* King, Rice 178.

Tennessee.— Alsbrook *v.* Hathaway, 3 Sneed 454.

Texas.— Ketelson *v.* Groos, 21 Tex. Civ. App. 31, 50 S. W. 591.

Vermont.— Hutchinson *v.* Ford, 62 Vt. 97, 18 Atl. 1044.

See 35 Cent. Dig. tit. "Money Received," § 25.

59. *Alabama.*— Overstreet *v.* Mean, 36 Ala. 666.

Indiana.— Catterlin *v.* Somerville, 22 Ind. 482. *Compare* Gossett *v.* Hollingsworth, 5 Blackf. 394, holding that assumpsit will not lie to recover money paid on a note merely because the payment was not, at the time when made, indorsed on the note. It must appear that it was not afterward indorsed, or that a demand was made that the amount be paid again.

Kentucky.— Hale *v.* Passmore, 4 Dana 70.

Maine.— Moore *v.* Marshall, 76 Me. 353; Greer *v.* Greer, 18 Me. 16.

Massachusetts.— Fowler *v.* Shearer, 7 Mass. 14; Selfridge *v.* Gill, 4 Mass. 95.

Minnesota.— Spottswood *v.* Herrick, 22 Minn. 548.

Missouri.—Missouri Pac. R. Co. *v.* McLiny, 32 Mo. App. 166.

New York.— Graves *v.* Harwood, 9 Barb. 477; Wisner *v.* Bulkley, 15 Wend. 321; Brown *v.* Williams, 4 Wend. 360; Mosher *v.* Hubbard, 13 Johns. 510.

North Carolina.— See Houser *v.* McGinnas, 108 N. C. 631, 13 S. E. 139.

South Carolina.—Anderson *v.* Gage, Dudley 319.

Virginia.— Langhorne *v.* McGhee, 103 Va. 281, 49 S. E. 44.

Wisconsin.— Harris *v.* Wicks, 28 Wis. 198.

See 35 Cent. Dig. tit. "Money Received," § 26.

60. *Connecticut.*— Wales *v.* Wetmore, 3 Day 252.

Delaware.— Guthrie *v.* Hyatt, 1 Harr. 446.

Georgia.— Minor *v.* Ozier, 84 Ga. 476, 10 S. E. 1088.

Illinois.— Parker *v.* Fisher, 39 Ill. 164; Critzer *v.* McConnel, 15 Ill. 172; Loretta Gold, etc., Min. Co. *v.* American Exch. Nat. Bank, 60 Ill. App. 626 [*affirmed* in 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233].

Indiana.— Ferguson *v.* Dunn, 28 Ind. 58.

Iowa.— Messenger *v.* Votaw, 75 Iowa 225, 39 N. W. 280.

Kentucky.— Yewell *v.* Bradshaw, 2 Duv. 573; Stockdon *v.* Bayless, 2 Bibb 60.

Louisiana.— Lambert *v.* Short, 36 La. Ann. 477.

Maine.— Clements *v.* Mason, 75 Me. 462; Norton *v.* Kidder, 54 Me. 189; Waite *v.* Delesdernier, 15 Me. 144. *Compare* Burbank *v.* Gould, 15 Me. 118, holding that if a grantor of land places money in the hands of the grantee, who promises to pay off and take up a subsisting mortgage, and afterward refuses, the grantor cannot recover such money, but only nominal damages, unless he has first paid off the mortgage.

Massachusetts.— Clark *v.* Jenness, 188 Mass. 297, 74 N. E. 343; Henchey *v.* Henchey, 167 Mass. 77, 44 N. E. 1075; Brown *v.* Cowell, 116 Mass. 461; Ely *v.* Wolcott, 4 Allen 506; Andrews *v.* Suffolk Bank, 12 Gray 461; Strong *v.* Bliss, 6 Metc. 393; Baring *v.* Clark, 19 Pick. 220.

Michigan.— O'Donnell *v.* Perrin, 77 Mich. 173, 43 N. W. 774; Catlin *v.* Birchard, 13 Mich. 110.

Minnesota.— Dennis *v.* Pabst Brewing Co., 80 Minn. 15, 82 N. W. 978.

Missouri.— Henderson *v.* Skinner, 13 Mo. 99; Deal *v.* Mississippi County Bank, 79 Mo. App. 262; Ghio *v.* Beard, 11 Mo. App. 21; Keane *v.* Beard, 11 Mo. App. 10.

New Hampshire.— Auburn School Dist. No. 7 *v.* Sherburne, 48 N. H. 52; Lebanon *v.* Heath, 47 N. H. 353; Pierce *v.* Duncan, 22 N. H. 18.

New York.— Priest *v.* Price, 3 Abb. Dec. 622; Todd *v.* Vaughan, 90 Hun 70, 35 N. Y. Suppl. 457; Darragh *v.* Ross, 5 Silv. Sup. 323, 7 N. Y. Suppl. 864 [*affirmed* in 130 N. Y. 641]; Burgess *v.* Eaton, 1 Thomps. & C. addenda 4; Odell *v.* Buckart, 6 N. Y. St. 45; Bailey *v.* Belmont, 10 Abb. Pr. N. S. 270; Hays *v.* Stone, 7 Hill 128; McNeilly *v.* Richardson, 4 Cow. 607.

North Carolina.— Dunn *v.* Johnson, 115 N. C. 249, 20 S. E. 390.

Oregon.— Stewart *v.* Phy, 11 Oreg. 335, 3 Pac. 443.

Pennsylvania.— Millingar *v.* Hartupee, 53 Pa. St. 362; Duncan *v.* Lawrence, 24 Pa. St. 154; Pennock *v.* Freeman, 1 Watts 401.

South Carolina.— O'Neall *v.* McBride, 4 Rich. 343; Ulmer *v.* Ulmer, 2 Nott & M. 489.

South Dakota.— Gillespie *v.* Evans, 10 S. D. 234, 72 N. W. 576.

Texas.— Wiseman *v.* Baylor, 69 Tex. 63, 6 S. W. 743; Gatewood *v.* Laughlin, 2 Tex. App. Civ. Cas. § 149.

Vermont.— Hicks *v.* Cottrill, 25 Vt. 80.

Virginia.— Lawson *v.* Lawson, 16 Gratt. 230, 80 Am. Dec. 702.

Wisconsin.— Burke *v.* Milwaukee, etc., R. Co., 83 Wis. 410, 53 N. W. 692; Douville *v.*

received for a purpose which is afterward abandoned or which cannot be accomplished.[61]

H. Money Received Under Claim of Right. An action for money had and received cannot be maintained against one who has received money under a claim of right, and in ignorance of its true ownership.[62]

I. Recovery of Emoluments of Office From Wrongful Occupant. The right to the salary and emoluments of a public office attaches to the true, and not to the mere colorable, title, and the party rightfully entitled to an office, although he has not been in possession thereof, may maintain an action for money had and received against a wrongful occupant of such office, to recover the salary or fees incident thereto.[63] This action lies, although it may involve the trial of the title to office.[64]

J. Money Wrongfully Obtained. An action for money had and received will lie where one has obtained money from another by oppression, imposition, extortion, or deceit; and the law implies a promise from such person to return it to the lawful owner, whose title to it cannot be annulled by the fraudulent or unjust dispossession.[65]

Merrick, 25 Wis. 688; Rogers *v.* Bradford, 1 Pinn. 418.

United States.— U. S. *v.* Mitchell, 26 Fed. 607; Baker *v.* Root, 2 Fed. Cas. No. 780, 4 McLean 572.

See 35 Cent. Dig. tit. "Money Received," § 27.

61. Kempson *v.* Saunders, 4 Bing. 5, 13 E. C. L. 373, 2 C. & P. 366, 12 E. C. L. 621, 5 L. J. C. P. O. S. 6, 12 Moore C. P. 44; Johnson *v.* Goslett, 18 C. B. 728, 25 L. J. C. P. 274, 4 Wkly. Rep. 655, 86 E. C. L. 728 [*affirmed* in 3 C. B. N. S. 69, 4 Jur. N. S. 50, 27 L. J. C. P. 122, 6 Wkly. Rep. 127, 91 E. C. L. 569]; Mowatt *v.* Londesborough, 2 C. L. R. 1181, 4 E. & B. 1, 18 Jur. 1094, 23 L. J. Q. B. 38, 2 Wkly. Rep. 568, 82 E. C. L. 1; Ashpitel *v.* Sercombe, 5 Exch. 147, 19 L. J. Exch. 82, 6 R. & Can. Cas. 224.

62. *California.*— McKee *v.* Preston, 66 Cal. 522, 6 Pac. 379.

Connecticut.—Alsop *v.* Magill, 4 Day 42.

Maine.— Hearne *v.* Hearne, 55 Me. 445; Dwinel *v.* Sawyer, 53 Me. 24; Gammon *v.* Butler, 48 Me. 344.

Massachusetts.— Le Breton *v.* Peirce, 2 Allen 8; Adams *v.* Nickerson, 1 Allen 427; Lime Rock Bank *v.* Plimpton, 17 Pick. 159, 28 Am. Dec. 286. *Compare* Lazell *v.* Miller, 15 Mass. 207.

New Hampshire.— Burnham *v.* Holt, 14 N. H. 367.

New York.— Newhall *v.* Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712 [*reversing* 68 Hun 1, 22 N. Y. Suppl. 828]; Dodge *v.* Lean, 13 Johns. 508.

Pennsylvania.— Wampole *v.* Thomas, 13 Leg. Int. 21, holding that where plaintiff's son stole money from his father and spent it for goods at defendant's store, an action for money had and received would not lie to recover it.

Vermont.— Sweet *v.* Tucker, 43 Vt. 355.

See 35 Cent. Dig. tit. "Money Received," § 28.

But *compare* Milwaukee *v.* Milwaukee County, 114 Wis. 374, 90 N. W. 447.

Receipt by a creditor of money in payment of a debt, without knowledge or means of knowledge that it did not belong to the debtor, does not make him liable therefor to the true owner. Newhall *v.* Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712 [*reversing* 68 Hun 1, 22 N. Y. Suppl. 828].

Money paid under judicial process cannot be recovered in an action for money had and received. Dewing *v.* Traen, Quincy (Mass.) 339. See also Sweet *v.* Tucker, 43 Vt. 355.

63. Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52; Glascock *v.* Lyons, 20 Ind. 1, 83 Am. Dec. 299; Nichols *v.* McLean, 63 How. Pr. (N. Y.) 448; Allen *v.* McKean, 1 Fed. Cas. No. 229, 1 Sumn. 276. See also Rowland *v.* Hall, 1 Hodges 539, 1 Scott 539; Boytoe *v.* Dodsworth, 6 T. R. 681, 3 Rev. Rep. 315. But see Lawlor *v.* Alton, Ir. R. 8 C. L. 160; Powell *v.* Milbank, 1 T. R. 399 note.

64. Allen *v.* McKean, 1 Fed. Cas. No. 229, 1 Sumn. 276. See also Glascock *v.* Lyons, 20 Ind. 1, 83 Am. Dec. 299.

65. McQueen *v.* State Bank, 2 Ind. 413. See also the following cases:

Alabama.—Southern Express Co. *v.* Tupelo Bank, 108 Ala. 517, 18 So. 664; Southern Express Co. *v.* Jasper Trust Co., 99 Ala. 416, 14 So. 546; Pawling *v.* Watson, 26 Ala. 205; Montgomery Branch Bank *v.* Parrish, 20 Ala. 433; Mobile Branch Bank *v.* Scott, 7 Ala. 107; Mobile Branch Bank *v.* Collins, 7 Ala. 95.

California.— Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. 783.

Georgia.— Bates-Farley Sav. Bank *v.* Dismukes, 107 Ga. 212, 33 S. E. 175.

Illinois.— McDonald *v.* Brown, 16 Ill. 32 (money taken by force); Sturgeon *v.* Birkey, 86 Ill. App. 489; Zink *v.* Wells, 72 Ill. App. 605 (stolen money).

Indiana.— McCammock *v.* Clark, 16 Ind. 320.

Maine.— Foster *v.* Fifield, 29 Me. 136.

Massachusetts.— Peabody *v.* Tarbell, 2 Cush. 226; Bliss *v.* Thompson, 4 Mass. 488.

Michigan.— Barnard *v.* Colwell, 39 Mich. 215; Johnson *v.* Continental Ins. Co., 39 Mich.

K. Money Received From Third Person. In an action for money had and received it is immaterial how the money may have come into defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner;[66] and to sustain the action it is not necessary that a payment made to defendant by a third person with plaintiff's money should have been involuntary,

33; Young *v.* Taylor, 36 Mich. 25. *Compare* Finn *v.* Adams, 138 Mich. 258, 101 N. W. 533; Anderson Carriage Co. *v.* Pungs, 134 Mich. 79, 95 N. W. 985.

Minnesota.— Eliason *v.* Sidle, 61 Minn. 285, 63 N. W. 730.

Mississippi.— Philips *v.* Hines, 33 Miss. 163.

Missouri.— Dohson *v.* Winner, 26 Mo. App. 329.

New Hampshire.— Burnham *v.* Holt, 14 N. H. 367.

New Jersey.— Bocchino *v.* Cook, 67 N. J. L. 467, 51 Atl. 487, a case of extortion.

New Mexico.— Socorro Bd. of Education *v.* Robinson, 7 N. M. 231, 34 Pac. 295.

New York.— Sarasohn *v.* Miles, 169 N. Y. 573, 61 N. E. 1134 [*affirming* 52 N. Y. App. Div. 628, 65 N. Y. Suppl. 108]; Teall *v.* Syracuse, 120 N. Y. 184, 24 N. E. 450; Holtz *v.* Schmidt, 59 N. Y. 253; Mikles *v.* Hawkins, 59 N. Y. App. Div. 253, 69 N. Y. Suppl. 557; Richardson *v.* Crandall, 47 Barb. 335 [*affirmed* in 48 N. Y. 348]; Ross *v.* West, 2 Bosw. 360; Mulligan *v.* Harlam, 46 Misc. 571, 92 N. Y. Suppl. 765; Oppenheim *v.* West Side Bank, 22 Misc. 722, 50 N. Y. Suppl. 148; Stanton *v.* Thomas, 24 Wend. 70, 35 Am. Dec. 595; Tucker *v.* Ives, 6 Cow. 193. *Compare* Barrett *v.* Smith, 37 Misc. 825, 76 N. Y. Suppl. 907, in which the action did not lie because the parties were *in pari delicto*.

North Dakota.— Krump *v.* Hankinson First State Bank, 8 N. D. 75, 76 N. W. 995.

Pennsylvania.— Humbird *v.* Davis, 210 Pa. St. 311, 59 Atl. 1082; Sheffer *v.* Montgomery, 65 Pa. St. 329; Lestapies *v.* Ingraham, 5 Pa. St. 71; Bank of North America *v.* McCall, 3 Binn. 338.

South Carolina.— Gilbert *v.* Ross, 1 Strobh. 287, holding that *indebitatus assumpsit* will lie to recover money paid on a contract under seal which proves to be fraudulent, provided plaintiff has received no benefit under it, and by the recovery the parties will be placed *in statu quo*.

South Dakota.— Gillespie *v.* Evans, 10 S. D. 234, 72 N. W. 576.

Texas.— Larned First State Bank *v.* McGaughey, (Civ. App. 1905) 86 S. W. 55.

Vermont.— Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830; Colgrove *v.* Fillmore, 1 Aik. 347.

Wisconsin.— St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

United States.— Newton First Nat. Bank *v.* U. S., 16 Ct. Cl. 54; Boston State Nat. Bank *v.* U. S., 10 Ct. Cl. 519.

England.— Bavins *v.* London, etc., Bank, [1900] 1 Q. B. 270, 5 Com. Cas. 1, 69 L. J. Q. B. 164, 81 L. T. Rep. N. S. 655, 48 Wkly. Rep. 211; Abbotts *v.* Barry, 2 B. & B. 369, 5 Moore C. P. 98, 6 E. C. L. 186; Martin *v.* Morgan, 1 B. & B. 289, Gow 122, 3 Moore C. P. 635, 21 Rev. Rep. 603, 5 E. C. L. 640; Rothschild *v.* Corney, 9 B. & C. 388, 7 L. J. K. B. O. S. 270, 17 E. C. L. 178; Moses *v.* Macferlan, 2 Burr. 1005, W. Bl. 219; Crackford *v.* Winter, 1 Campb. 124; Clarke *v.* Shee, Cowp. 197, 334, Dougl. (3d ed.) 698 note; Holt *v.* Ely, 1 E. & B. 795, 17 Jur. 892, 72 E. C. L. 795; Jeudwine *v.* Slade, 2 Esp. 572, 5 Rev. Rep. 754; Hogan *v.* Shee, 2 Esp. 522; Bristow *v.* Eastman, 1 Esp. 172, 1 Peake N. P. 223, 5 Rev. Rep. 728; Neate *v.* Harding, 6 Exch. 349, 20 L. J. Exch. 250; Atkinson *v.* Denby, 7 H. & N. 934, 8 Jur. N. S. 1012, 31 L. J. Exch. 362, 7 L. T. Rep. N. S. 93, 10 Wkly. Rep. 389; Harrison *v.* Walker, 1 Peake N. P. 111.

Canada.— Ellis *v.* Power, 20 N. Brunsw. 40.

See 35 Cent. Dig. tit. "Money Received," § 30.

Money paid on a raised check may be recovered, where the one seeking recovery has not by negligence prejudiced the rights of the person from whom recovery is sought. Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148.

Fraudulent overcharge.— Assumpsit lies to recover the amount of the overpayment, where a purchaser, who had agreed to pay what the property had cost his vendor, found, after paying, that the latter had deceived him as to the amount. Barnard *v.* Colwell, 39 Mich. 215.

Where an excessive attorney's fee is charged on foreclosure of a mortgage, the owner may recover it from the mortgagee or his representative, after the expiration of the time for redemption, as money had and received to his use. Eliason *v.* Sidle, 61 Minn. 285, 63 N. W. 730.

66. *Alabama.*—Smith *v.* Wiley, 22 Ala. 396, 58 Am. Dec. 262, in which an administrator, without authority of law, received the rents of lands in another state belonging to the heirs.

Georgia.— Bates-Farley Sav. Bank *v.* Dismukes, 107 Ga. 212, 33 S. E. 175.

Illinois.— Hight *v.* Sanner, 71 Ill. App. 183 (in which defendant knowingly received the proceeds of property unlawfully sold by another, and it was held immaterial whether he knew who was the owner, or how much was due, or whether he promised to pay the proceeds to the owner); State Nat. Bank *v.* Payne, 56 Ill. App. 147.

Indiana.— Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222, in which the payee of a note received in payment thereof money which in fact belonged

but only that it should have been made without plaintiff's consent.[67] Where, however, one who has embezzled money transfers it to another in due course of business, mere ground of suspicion of defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the transferee, will not defeat his title as against the owner; the test being honesty and good faith on the part of the transferee, and not diligence.[68]

L. Money Paid For Defendant's Use. An action for money had and received does not lie to recover money paid for the use of defendant. The proper form of action is for money paid.[69]

M. Rent. An action for money had and received cannot be maintained against one who receives the rent of land while in possession under claim of title adverse to plaintiff,[70] although a suit in equity was at the time pending to charge him as trustee of the lands for the benefit of plaintiff.[71] Nevertheless it is held that where the possession is not adverse the true owner is entitled to recover the rents which have been received by another,[72] and a party entitled to an appor-

to another, and which the maker misappropriated to meet the note.

Iowa.— Homire *v.* Rodgers, 74 Iowa 395, 37 N. W. 972.

Kentucky.— Metropolitan L. Ins. Co. *v.* Monohan, 102 Ky. 13, 42 S. W. 924, 19 Ky. L. Rep. 992, in which a wife, without the husband's knowledge, procured a policy on his life for her benefit, and used his money in paying the premiums.

Minnesota.— Brand *v.* Williams, 29 Minn. 238, 13 N. W. 42.

Mississippi.— Legard *v.* Gholson, 24 Miss. 691.

New York.— Heidenheimer *v.* Boyd, 162 N. Y. 603, 57 N. E. 1112 [*affirming* 15 N. Y. App. Div. 580, 44 N. Y. Suppl. 687] (holding that one who receives from a third person money of another in payment of a debt due from such third person is liable therefor, unless he had no notice that it was plaintiff's money); Tugman *v.* National Steamship Co., 76 N. Y. 207 [*affirming* 13 Hun 332]; Dechen *v.* Dechen, 59 N. Y. App. Div. 166, 68 N. Y. Suppl. 1043; Walsh *v.* National Broadway Bank, 11 Misc. 249, 32 N. Y. Suppl. 734 [*affirmed* in 13 Misc. 3, 33 N. Y. Suppl. 998] (bank liable to owner for money deposited by third person in his own name).

Pennsylvania.—Hindmarch *v.* Hoffman, 127 Pa. St. 284, 18 Atl. 14, 14 Am. St. Rep. 842, 4 L. R. A. 368, in which money stolen from plaintiff was deposited by the thief with defendant.

Rhode Island.— Fottori *v.* Vesella, 27 R. I. 177, 61 Atl. 143.

South Carolina.—Ashe *v.* Livingston, 2 Bay 80.

South Dakota.— Siems *v.* Pierre Sav. Bank, 7 S. D. 338, 64 N. W. 167.

United States.— Holly *v.* Domestic, etc., Missionary Soc., 85 Fed. 249, holding that money intrusted to another, and by him wrongfully paid out, may be recovered by the true owner, so long as it is traceable, if its possession, with liability of its recovery, has wrought no disadvantage to those to whom it has been paid.

England.— Rainford *v.* James Keith, etc., Co., [1905] 2 Ch. 147, 74 L. J. Ch. 531, 92 L. T. Rep. N. S. 786, 12 Manson 278, 21 T. L. R. 582; Seal *v.* Dent, 5 Moore Indian App. 328, 18 Eng. Reprint 920, 8 Moore P. C. 319, 14 Eng. Reprint 122.

See 35 Cent. Dig. tit. "Money Received," § 31.

67. Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120 [*affirmed* in 153 N. Y. 331, 47 N. E. 593].

68. Merchants' L. & T. Co. *v.* Lamson, 90 Ill. App. 18.

69. Claycomb *v.* McCoy, 48 Ill. 110. Thus assumpsit for money had and received is not the proper form of action in which a surety may recover of his principal money paid on account of his liability for such principal. The proper action is for money paid. Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4; Child *v.* Eureka Powder Works, 44 N. H. 354.

70. *Alabama.*— Lockard *v.* Barton, 78 Ala. 189; Price *v.* Pickett, 21 Ala. 741. But see Mobile Branch Bank *v.* Fry, 23 Ala. 707.

Illinois.— King *v.* Mason, 42 Ill. 223, 89 Am. Dec. 426.

Missouri.— O'Fallon *v.* Boismenu, 3 Mo. 405, 26 Am. Dec. 678.

Nebraska.— Phœnix Ins. Co. *v.* Hoyt, 3 Nebr. (Unoff.) 94, 91 N. W. 186.

New York.— Carpenter *v.* Stilwell, 3 Abb. Pr. 459.

North Carolina.— Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

See 35 Cent. Dig. tit. "Money Received," § 48.

Reason for rule.— The reason for the rule is that the title to lands cannot be tried collaterally in a personal action of this nature (Lockard *v.* Barton, 78 Ala. 189; Carpenter *v.* Stilwell, 3 Abb. Pr. (N. Y.) 459); the law affording an easy remedy to plaintiff by ejectment with incidental damages for mesne profits and compensation for the unlawful detention of the premises (Lockard *v.* Barton, *supra*). And see Stringfellow *v.* Curry, 76 Ala. 394; Cooper *v.* Watson, 73 Ala. 252.

71. Lockard *v.* Barton, 78 Ala. 189.

72. Price *v.* Pickett, 21 Ala. 741, 743, in

tionment of rent under a statute in reference to the sale of lands can recover his share of the rent from a person to whom the tenant has paid it in an action for money received to his use. He is not confined to an action for use and occupation unless the demise is by deed.[73]

V. MONEY PAID BY MISTAKE.[74]

An action for money had and received is a proper form of action for the recovery of money paid under a mistake of facts.[75]

VI. MONEY PAID UNDER PROTEST OR BECAUSE OF DURESS, FRAUD, OR UNDUE ADVANTAGE.

Money paid under protest may be recovered back in an action for money had and received,[76] and this form of action lies for the recovery of money obtained through fraud, duress, extortion, imposition, or any other taking of an undue advantage of plaintiff's situation.[77]

VII. QUESTIONS COGNIZABLE ONLY IN COURTS OF EQUITY.

Although an action for money had and received is equitable in its nature, it will not lie in cases where the rights of the parties can be properly adjusted only in a court of equity, and this is especially true where the rights of third parties are involved.[78]

VIII. DETERMINATION OF CONFLICTING TITLES TO REAL ESTATE.

An action for money had and received cannot be maintained for the purpose of determining conflicting titles to real estate.[79]

which it was said: "In such case, it is money had and received for the use of the owner; and, as the person to whom the rent was paid would be compelled to account in equity, he may also be held responsible in the equitable action for money had and received."

For instance a mere naked trespasser or intruder who has collected rent on land owned by plaintiff. O'Conley *v.* Natchez, 1 Sm. & M. (Miss.) 31, 40 Am. Dec. 87. And see Baltimore *v.* White, 2 Gill (Md.) 444.

73. Wright *v.* Wright, 2 Harr. (Del.) 350.

74. For circumstances under which money paid by mistake may be recovered see PAYMENT.

75. *Alabama.*— Smith *v.* Seaton, Minor 75.

Delaware.— West *v.* Houston, 4 Harr. 170.

Georgia.— Logan *v.* Sumter, 28 Ga. 242, 73 Am. Dec. 755.

Maryland.— Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655.

Massachusetts.— Garland *v.* Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

New Hampshire.— Manchester *v.* Burns, 45 N. H. 482.

Washington.— Soderberg *v.* King County, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A. 670.

76. Whitlock Mach. Co. *v.* Holway, 92 Me. 414, 42 Atl. 799; Chamberlin *v.* Reed, 13 Me. 357, 29 Am. Dec. 506.

77. Pritchard *v.* Sweeny, 109 Ala. 651, 19 So. 730; Baldwin *v.* Hutchinson, 18 Ind. App. 454, 35 N. E. 711; Gordon *v.* Camp, 2 Fla. 422; Humbird *v.* Davis, 210 Pa. St. 311, 59 Atl. 1082.

78. Bulkley *v.* Stewart, 1 Day (Conn.) 130, 2 Am. Dec. 57; Lane *v.* Lane, 76 Me. 521; Ramsdell *v.* Butler, 60 Me. 216; Hilton *v.* Homans, 23 Me. 136; Rathbone *v.* Stocking, 2 Barb. (N. Y.) 135; Gaither *v.* Hetrick, 32 N. C. 114. And see White *v.* Sheldon, 4 Nev. 280; Henry *v.* Arms, Smith (N. H.) 39.

Applications of rule.— Money voluntarily paid in pursuance of an award of arbitrators cannot be recovered back in an action for money had and received. The remedy is in equity (Bulkley *v.* Stewart, 1 Day (Conn.) 130, 2 Am. Dec. 57); so an action will not lie where the liability of defendant to pay the sum claimed by plaintiff depends upon and is involved with a complex question between the parties and others which can be properly taken and finally adjusted in a manner to conclude all parties only in a court of equity (Rathbone *v.* Stocking, 2 Barb. (N. Y.) 135); and it has been held that a husband after a divorce decree between his wife and himself cannot recover from her rents for property conveyed to her during the existence of the marital relation on an oral understanding that she was to hold the property for their joint benefit; his recovery must be by suit in equity and not at law (Lane *v.* Lane, 76 Me. 521).

79. Pickman *v.* Trinity Church, 123 Mass. 1, 25 Am. Rep. 1; Brigham *v.* Winchester, 6 Metc. (Mass.) 460; Miller *v.* Miller, 7 Pick.

IX. EFFECT OF EXPRESS CONTRACT.

An action for money had and received cannot be resorted to where there is a special contract open and unexecuted and the breach of the contract is the basis of the action.[80] While a contract is subsisting the action can only be brought on the agreement.[81] But notwithstanding the existence of a special contract if it has been completely executed so that only the duty to pay money remains a recovery may be had in an action for money had and received;[82] so the action lies where money is deposited upon a contract by which the depositee undertakes to do something and the contract is wholly unperformed.[83] It has also been held that an action for money received for plaintiff's use will lie notwithstanding the existence of an express contract, if the contract contains nothing more than the law will imply.[84] And where a contract under which one has paid money has been

(Mass.) 133, 19 Am. Dec. 264; Lewis *v.* Robinson, 10 Watts (Pa.) 338; Baker *v.* Howell, 6 Serg. & R. (Pa.) 476. And see *supra*, IV, M.

Application of rule.— An action for money had and received will not lie for the price of sand taken from a sand bar to which both parties claim title, and which was sold by defendant. Baker *v.* Howell, 6 Serg. & R. (Pa.) 476.

Cases held not to involve question of title. — Where plaintiff agreed to buy land from defendant at so much a square foot and the deed covered a strip of land not owned by defendant and against the consideration, he may recover as money had and received. The objection that questions of title to land cannot be tried in such action not being applicable. Pickman *v.* Trinity Church, 123 Mass. 1, 25 Am. Rep. 1.

Exceptions to rule.— It has been held that in assumpsit to recover payments made on a contract under seal which was fraudulent and under which plaintiff received no benefit, it is no objection that the contract was for the conveyance of land and that a question of title is raised. Gilbert *v.* Ross, 1 Strobh. (S. C.) 287.

80. *Alabama.*— Vincent *v.* Rogers, 30 Ala. 471.

California.— Barrera *v.* Somps, 113 Cal. 97, 45 Pac. 177.

Illinois.— Rollins *v.* Duffy, 14 Ill. App. 69.

Michigan.—Atkinson *v.* Scott, 36 Mich. 18.

New York.— Peltier *v.* Sewall, 3 Wend. 269.

United States.— Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222.

Damages for breach of a bond cannot be recovered in an action for money had and received. Charles *v.* Dana, 14 Me. 383; Field *v.* Banks, 177 Mass. 36, 58 N. E. 155. See also Avery *v.* Kinsman, Kirby (Conn.) 354; Richards *v.* Killam, 10 Mass. 239, holding that assumpsit will not lie for the fraudulent assignment of a bond, although the bond be forged, if the assignment contains special covenants respecting the recovery of the money supposed to be due on the assigned bond. And a declaration in assumpsit alleging that defendant received money for plaintiff's use and promised to account to him is demurrable, the promise to account excluding any implied promise.

Money paid in consideration of surrender of interest in real estate.— An action for money had and received cannot be maintained upon a contract for money paid in consideration of the surrender of an interest in real estate. Clark *v.* Sherman, 5 Wash. 681, 32 Pac. 771. And see Distler *v.* Dabney, 3 Wash. 200, 28 Pac. 335.

81. Middleport Woolen Mills Co. *v.* Titus, 35 Ohio St. 253.

82. *Alabama.*— Vincent *v.* Rogers, 30 Ala. 471.

Illinois.— Larminie *v.* Carley, 114 Ill. 196, 29 N. E. 382; Jones *v.* Marks, 40 Ill. 313; Rollins *v.* Duffy, 14 Ill. App. 69.

Massachusetts.— Tebbetts *v.* Pickering, 5 Cush. 83, 51 Am. Dec. 48; Baker *v.* Corey, 19 Pick. 496. See also State Bank *v.* Hurd, 12 Mass. 172.

Missouri.— Suddoth *v.* Bryan, 30 Mo. App. 37; Fox *v.* Pullman Palace Car Co., 16 Mo. App. 122.

West Virginia.— Jackson *v.* Hough, 38 W. Va. 236, 18 S. E. 575; Davisson *v.* Ford, 23 W. Va. 617; Moore *v.* Wetzel County, 18 W. Va. 630.

United States.— Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35.

See 35 Cent. Dig. tit. "Money Received," § 46.

Illustration.— Where a broker disobeys instructions in selling grain which he has bought for his principal deposits made by his principal as security may be recovered under the common counts in assumpsit (Larminie *v.* Carley, 114 Ill. 196, 29 N. E. 382); so money deposited with another as security against loss from any decline in the value of goods to be purchased for the depositor may be recovered under the common counts in an action in assumpsit if the party purchasing the goods neglects to sell them according to instructions of the depositor (Jones *v.* Marks, 40 Ill. 313).

83. Suddoth *v.* Bryan, 39 Mo. App. 652; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222.

84. Phippen *v.* Morehouse, 50 Mich. 537, 15 N. W. 895. See also Pettibone *v.* Pettibone, 4 Day (Conn.) 324; Marshall *v.* Lewark, 117 Ind. 377, 20 N. E. 253.

rescinded under circumstances which entitle him to a return of the money or a part thereof, he may recover the same in an action for money had and received.[85]

X. PERSONS ENTITLED AND LIABLE.

A. Persons Entitled. It is only one having the legal title to the money in whose favor the law raises a promise to pay, and who may maintain an action for money had and received; the fact that the money belongs to plaintiff is the theory on which such action is maintainable.[86] Thus the action does not lie in favor of an agent because he has not the legal title to the money.[87] So it has been held that the action does not lie in favor of an assignee of a chose in action,[88] unless the debtor assents to the transfer and promises to make payment to the assignee, in which case the action will lie in the latter's favor.[89] The action may

85. *Alabama.*— White *v.* Wood, 15 Ala. 358; Pharr *v.* Bachelor, 3 Ala. 237; Hancock *v.* Tanner, 4 Stew. & P. 262. And see Harper *v.* Claxton, 62 Ala. 46.

California.— Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39.

Florida.— Evans *v.* Givens, 22 Fla. 476; Nassau County Bd. of Public Instruction *v.* Billings, 15 Fla. 686.

Indiana.— Scott *v.* Wallick, 24 Ind. 124; Bales *v.* Weddle, 14 Ind. 349; Harris *v.* Bradley, 9 Ind. 166.

Kentucky.— Hunt *v.* Sanders, 1 A. K. Marsh. 552.

Maine.— Concord *v.* Delaney, 58 Me. 309.

Maryland.— Rayner *v.* Wilson, 43 Md. 440; Maryland Hospital *v.* Foreman, 29 Md. 524.

Massachusetts.— Dix *v.* Marcy, 116 Mass. 416; Shaw *v.* Lowell First M. E. Soc., 8 Metc. 223; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

Michigan.— Wright *v.* Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; Davis *v.* Strobridge, 44 Mich. 157, 6 N. W. 205; Atkinson *v.* Scott, 36 Mich. 18.

Minnesota.— Taylor *v.* Read, 19 Minn. 372.

Mississippi.— Pevey *v.* Jones, 71 Miss. 647, 16 So. 252, 42 Am. St. Rep. 486.

Missouri.— Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444; Gwin *v.* Smur, 49 Mo. App. 361.

New Hampshire.— Foster *v.* Bartlett, 62 N. H. 617; Manahan *v.* Noyes, 52 N. H. 232; Pierce *v.* Duncan, 22 N. H. 18; Jenkins *v.* Thompson, 20 N. H. 457; Randlet *v.* Herren, 20 N. H. 102.

New Jersey.— Byard *v.* Holmes, 33 N. J. L. 119.

New York.— Smith *v.* McCluskey, 45 Barb. 610; Kruger *v.* Galewski, 13 Misc. 56, 34 N. Y. Suppl. 66 [*affirming* 10 Misc. 233, 30 N. Y. Suppl. 1060]; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. 285; Gillet *v.* Maynard, 5 Johns. 85, 4 Am. Dec. 329; Weaver *v.* Bentley, 1 Cai. 47.

Ohio.— Middleport Woolen Mills Co. *v.* Titus, 35 Ohio St. 253; French *v.* Millard, 2 Ohio St. 44.

Pennsylvania.— Crossgrove *v.* Himmelrich, 54 Pa. St. 203.

South Carolina.— Byers *v.* Bostwick, 2 Mill 75.

Vermont.— Whitcomb *v.* Denio, 52 Vt. 382; Groot *v.* Story, 41 Vt. 533.

Virginia.— Johnson *v.* Jennings, 10 Gratt. 1, 60 Am. Dec. 323.

West Virginia.— Bier *v.* Smith, 25 W. Va. 830.

Wisconsin.— Simmons *v.* Putnam, 11 Wis. 193; Tollenson *v.* Gunderson, 1 Wis. 113.

See 33 Cent. Dig. tit. "Money Received," § 49.

Applications of rule.— It has been held that where a contract for the sale of land, on which a part of the purchase-money has been paid, is afterward rescinded by mutual consent, in the absence of any agreement to the contrary the law implies a promise on the part of the vendor to refund to the vendee the money thus received by him (White *v.* Wood, 15 Ala. 358); so where a principal has repudiated his agent's unauthorized contract, an action for money had and received is the proper form of action in which to recover payments made thereon (Nassau County Bd. of Public Instruction *v.* Billings, 15 Fla. 686).

86. Montgomery Branch Bank *v.* Sydnor, 7 Ala. 308; Mileham *v.* Eicke, 1 H. & H. 102, 7 L. J. Exch. 151, 3 M. & W. 407; Clark *v.* Dignam, 3 M. & W. 478. *Compare* Tevis *v.* Brown, 3 J. J. Marsh. (Ky.) 175.

Persons held to have legal title.— Where plaintiff placed money in defendant's hands with which to purchase land for plaintiff's brother, and defendant failed to get the land, he is liable to plaintiff, rather than his brother, for the money. The transaction did not take the form of a loan by plaintiff to his brother. Koopman *v.* Cahoon, 47 Mo. App. 357.

87. Montgomery Branch Bank *v.* Sydnor, 7 Ala. 308. And see Pinson *v.* Schmalz, 94 Cal. 651, 30 Pac. 3.

88. Chitty Pl. (17th Am. ed.) 366; Butler *v.* Frank, 128 Mass. 29; Wharton *v.* Walker, 4 B. & C. 163, 6 D. & R. 288, 3 L. J. K. B. O. S. 183, 10 E. C. L. 527; Cuxon *v.* Chadley, 3 B. & C. 591, 5 D. & R. 417, 3 L. J. K. B. O. S. 63, 27 Rev. Rep. 423, 10 E. C. L. 270; Wedlake *v.* Hurley, 1 Cromp. & J. 83. But see Rose *v.* O'Brien, 50 Me. 188.

89. Lang *v.* Fiske, 11 Me. 385; Austin *v.* Walsh, 2 Mass. 401; Wilson *v.* Coupland, 5 B. & Ald. 228, 7 E. C. L. 131; Fairlie *v.* Denton, 8 B. & C. 395, 15 E. C. L. 198, 3 C. & P. 103, 14 E. C. L. 472, 2 M. & R. 353; Tatlock *v.* Harris, 3 T. R. 174.

be maintained by a trustee,[90] and lies in favor of a personal representative, either in his own name or in his representative capacity, where the cause of action accrued after his decedent's death, and the money if recovered would be assets.[91] So an administrator who has paid to a distributee an amount in excess of what was due him, and has made a final settlement of his accounts, may maintain an action for the excess in his own name, since he is personally chargeable with the excess.[92] The action may be maintained by a mortgagee of a portion of a cargo to recover his share of the proceeds of a sale by an agent appointed subsequent to the mortgage to sell the whole cargo.[93] One who purchased real estate subject to an encumbrance which he supposed to be valid, and who afterward paid it off, cannot maintain an action to recover back the amount of such payments upon discovering that the encumbrance was procured by fraud, as he was not the party defrauded.[94] One who at another's request advances money for him, being entitled to look to the latter or his estate for reimbursement, cannot maintain an action for money had and received against the person to whom the money was advanced.[95] An action for money had and received cannot be maintained by a corporation to recover a sum received by a former director as a bribe for resigning his office and procuring control of the corporation to be turned over to the purchaser for corrupt purposes.[96]

B. Persons Liable.[97] An action lies against one into whose hands money actually belonging to plaintiff can be traced, as well as where he received the money in the first instance.[98] But the recovery must be limited to cases where money is received for plaintiff by someone standing in a fiduciary capacity to plaintiff.[99] An action for money had and received may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over.[1] And in some cases such action has been sustained where no notice was given, if it appeared that the money had not actually been paid over.[2] But if it is paid over with intent to pass it to the credit of the principal, before notice is given to the agent, no action will ordinarily lie against the latter for its recovery.[3] If a debtor places money which he owes his creditor

90. Beardslee *v.* Horton, 3 Mich. 560, money had and received for rents of the *cestui que trust* collected and in the hands of the trustee's agent. And see Spencer *v.* Towles, 18 Mich. 9.

91. Teegarden *v.* Lewis, (Ind. 1893) 35 N. E. 24; Mowry *v.* Adams, 14 Mass. 327; Lawson *v.* Lawson, 16 Gratt. (Va.) 230, 80 Am. Dec. 702; Hutchinson *v.* Ford, 62 Vt. 97, 18 Atl. 1044. And see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 874, 895.

92. Sellers *v.* Smith, 11 Ala. 264.

93. Milton *v.* Mosher, 7 Metc. (Mass.) 244.

94. Maguire *v.* Hall, 27 Mo. 146, to permit plaintiff to recover would be taking so much from those who are really defrauded and giving to plaintiff who has no right to it.

95. Stephani *v.* Lent, 30 Misc. (N. Y.) 346, 63 N. Y. Suppl. 471.

96. McClure *v.* Trask, 20 N. Y. App. Div. 466, 47 N. Y. Suppl. 89; McClure *v.* Law, 20 N. Y. App. Div. 459, 47 N. Y. Suppl. 84, both holding that the only remedy of the corporation in such case is an action to recover damages for the fraud practised upon it by the director.

97. Liability of sheriff in assumpsit for money received by deputy see SHERIFFS AND CONSTABLES.

98. Cole *v.* Bates, 186 Mass. 584, 72 N. E. 333.

99. Cole *v.* Bates, 186 Mass. 584, 72 N. E. 333.

1. Houston *v.* Frazier, 8 Ala. 81; Garland *v.* Salem Bank, 9 Mass. 408, 6 Am. Dec. 86; Butler *v.* Livermore, 52 Barb. (N. Y.) 570; Hearsey *v.* Boyd, 7 Johns. (N. Y.) 183.

2. Sellers *v.* Smith, 11 Ala. 264; Hearsey *v.* Boyd, 7 Johns. (N. Y.) 183.

3. *Alabama.*— Houston *v.* Frazier, 8 Ala. 81.

Kentucky.— Pool *v.* Adkisson, 1 Dana 110.

Massachusetts.— Fowler *v.* Shearer, 7 Mass. 14.

New York.— Frye *v.* Lockwood, 4 Cow. 454.

Tennessee.— Dickins *v.* Jones, 6 Yerg. 483, 27 Am. Dec. 488.

United States.— Elliott *v.* Swartwout, 10 Pet. 137, 9 L. ed. 373.

England.— Edwards *v.* Hodding, 1 Marsh. 377, 5 Taunt. 815, 15 Rev. Rep. 662, 1 E. C. L. 416.

See 35 Cent. Dig. tit. "Money Received," § 42.

Fraudulent representations by agent.— Where money is paid to an agent for the purpose of being paid over to his principal, and has actually been so paid over, an action for money had and received will not lie

in the hands of his servant or agent to discharge the debt, the creditor may maintain an action against the servant or agent if he retains the money.[4] But if, after money has been placed by the debtor in the hands of an agent to be paid a creditor, the creditor fails to sue the agent until the debtor recalls the money in his hands, the creditor can maintain no action against the agent.[5] If a debtor makes an overpayment to the creditor's agent, through mistake superinduced by the conduct of the agent, and the money is transmitted by the agent to the principal, the agent is liable to the debtor for the excess in an action for money had and received.[6] Where money is sent to the treasurer of a corporation for stock which is never delivered, the corporation, and not its treasurer, is liable to an action.[7] One of several joint tort-feasors who has received no benefit from the tort is not liable in an action for money had and received.[8] If money is paid by an agent to one not authorized to receive it the latter is liable therefor to the principal.[9] If money is paid through mistake to plaintiff's wife, in his presence, with his consent and approval, and he knew that she was not entitled to it, he is liable therefor in an action for money had and received.[10] An administrator who has paid money through mistake to the administrator *de bonis non* who succeeds him cannot recover it in assumpsit from a successive administrator *de bonis non*.[11] So where a debtor transferred to the administrator of his creditor expenses of a third person, with directions to apply so much as might be needed of the proceeds to discharge his debt, and the administrator as such recovered judgment against the third party and applied to the payment of the debt a sum larger than was actually due from the debtor, the administrator was responsible individually to the debtor for the balance so misapplied as money received by defendant to plaintiff's use.[12]

XI. ACTIONS.[13]

A. Nature of Remedy. The nature of the remedy has already been considered in a previous section.[14]

B. Conditions Precedent — 1. Restoration of Consideration. The general rule is that in order to enable a party who is entitled to rescind a contract on account of failure of consideration or non-performance of the other party to bring an action for the money which he has paid on account of it, he must

against the agent to recover the same, on the ground of such payment to the agent having been induced by false and fraudulent representations made by him. Butler *v.* Livermore, 52 Barb. (N. Y.) 570.

If the money is obtained by the agent by compulsion or extortion, it seems that an action will lie against him, although it has been paid over to his principal, unless the payment was made expressly for the use of the principal. Butler *v.* Livermore, 52 Barb. (N. Y.) 570. And see Ripley *v.* Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; Snowdon *v.* Davis, 1 Taunt. 359.

4. Lewis *v.* Sawyer, 44 Me. 332; Denny *v.* Lincoln, 5 Mass. 385.

5. Lewis *v.* Sawyer, 44 Me. 332. And see Denny *v.* Lincoln, 5 Mass. 385.

6. Metcalf *v.* Denson, 4 Baxt. (Tenn.) 565.

7. Loring *v.* Frue, 104 U. S. 223, 26 L. ed. 713.

8. Ward *v.* Hood, 124 Ala. 376, 27 So. 245, 52 Am. St. Rep. 205; Limited Inv. Assoc. *v.* Glendale Inv. Assoc., 99 Wis. 54, 74 N. W. 633.

Reason for rule.— The rule is quite elementary that to enable a person to maintain an action for money had and received it is necessary for him to establish that the person sought to be charged had received money belonging to him or to which he is entitled; that is the fundamental fact upon which the right of action depends. Limited Inv. Assoc. *v.* Glendale Inv. Assoc., 99 Wis. 54, 74 N. W. 633.

9. Van Dyke *v.* State, 24 Ala. 81.

10. Northrop *v.* Graves, 19 Conn. 548, 50 Am. Dec. 264.

11. Weeks *v.* Love, 19 Ala. 25, 26, in which it was said: "The money overpaid through mistake was not an asset of the estate, and that the estate could not be made chargeable on account of its receipt by the administrator *de bonis non*, but the party who has it in possession has money which, *ex æquo et bono*, belongs to the party, who, through mistake, has paid it, and is liable, not as administrator, but in his individual capacity, to refund it to the plaintiff."

12. Cronan *v.* Cotting, 99 Mass. 334.

13. Right to abandon contract on breach and sue in assumpsit see ASSUMPSIT, 4 Cyc. 329.

14. See *infra*, I, A.

restore or tender what he has received in part performance,[15] unless the right is waived.[16] The action for money had and received proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange.[17] And the other party to the contract must be placed in as good a position as he was before the contract was entered into.[18] An exception to the rule has been recognized in some cases where the thing received was of no value.[19] But this exception is by no means operative under all circumstances when the consideration received is worthless. Thus the weight of authority is that counterfeit or forged notes should be returned within a reasonable time,[20] although there are decisions to the contrary.[21] Where the thing delivered as part performance was not what was contemplated, but a different thing, suit may be brought without a redelivery or tender of what was so delivered.[22] And the rule requiring restoration of consideration on rescission of the contract has no application, where the purchaser of property is deprived thereof by paramount title in a stranger.[23]

2. NOTICE. In an action to recover money paid for a promissory note, notice of the forgery, after discovery, must be given.[24]

3. DEMAND — a. Necessity[25] — (i) *INTRODUTORY STATEMENT.* There is considerable diversity of opinion as to the necessity of a demand as a condition precedent to an action for money had and received. The doctrine is broadly stated in some decisions that the commencement of suit is a sufficient demand.[26] This

15. *Kentucky.*— Watson *v.* Cresap, 1 B. Mon. 195, 36 Am. Dec. 572.

Maine.— Cushman *v.* Marshall, 21 Me. 122; Ayers *v.* Hewett, 19 Me. 281.

Massachusetts.— Bradlee *v.* Warren Five Cents Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351; Coolidge *v.* Brigham, 1 Metc. 547; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

New Hampshire.— Evans *v.* Gale, 21 N. H. 240.

New York.— Colville *v.* Besly, 2 Den. 139.

South Carolina.— Carter *v.* Walker, 2 Rich. 40.

Compare Peters *v.* Gooch, 4 Blackf. (Ind) 515.

See 35 Cent. Dig. tit. "Money Received," § 35.

For cases in which tender was held sufficient see Griggs *v.* Morgan, 9 Allen (Mass.) 37; Lewis *v.* Andrews, 3 Silv. Sup. (N. Y.) 165, 6 N. Y. Suppl. 247 [*affirmed* in 127 N. Y. 673, 27 N. E. 1044].

16. Roth *v.* Crissy, 30 Pa. St. 145.

17. Watson *v.* Cresap, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572.

18. Stelwagon *v.* Wilmington Coal-Gas Co., 2 Marv. (Del.) 184, 42 Atl. 449; Evans *v.* Gale, 21 N. H. 240; Rick *v.* Kelly, 30 Pa. St. 527; Hunt *v.* Silk, 5 East 449, 2 Smith K. B. 15, 7 Rev. Rep. 739; Beed *v.* Blandford, 2 Y. & J. 278.

19. Paul *v.* Kenosha, 22 Wis. 266, 94 Am. Dec. 598 (sale of bonds void for want of power to issue); Terry *v.* Allis, 16 Wis. 478 (void city order).

20. Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Roth *v.* Crissy, 30 Pa. St. 145; Raymond *v.* Baar, 13 Serg. & R. (Pa.) 318, 15 Am. Dec. 603; U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334. And see Coolidge *v.* Brigham, 1 Metc. (Mass.) 547.

21. Watson *v.* Cresap, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; Kent *v.* Bornstein, 12 Allen (Mass.) 342.

What is a reasonable time.— In Thomas *v.* Todd, 6 Hill (N. Y.) 340, some time less than two months was held too long. In Raymond *v.* Baar, 13 Serg. & R. (Pa.) 318, 15 Am. Dec. 603, a delay of six months was pronounced gross negligence.

22. Colville *v.* Besly, 2 Den. (N. Y.) 139, holding that where defendant had sold and agreed to deliver to plaintiff a promissory note held by defendant as indorsee, the makers of which had been discharged under the Bankrupt Act, but the indorser upon which was liable, and defendant after the contract settled the note with the indorser and canceled the indorsement and then sent the note to plaintiff, the latter could maintain assumpsit for money had and received to recover what he had paid on account of the contract, without returning or offering to return the note.

23. Terry *v.* Allis, 16 Wis. 478.

24. Rick *v.* Kelly, 30 Pa. St. 527.

25. Necessity of demand on sheriff for money made on execution see SHERIFFS AND CONSTABLES.

26. Rutherford *v.* McIvor, 21 Ala. 750; Looney *v.* Looney, 116 Mass. 283; Com. *v.* Haupt, 10 Allen (Mass.) 38. See also Hunt *v.* Nevers, 15 Pick. (Mass.) 500, 505, 26 Am. Dec. 616, where it was said by Chief Justice Shaw: "It is a familiar general rule, that on the common money counts, proving the money had and received to the plaintiff's use, and laid out and expended at the defendant's request, raises an implied promise to pay on demand, and as matter of form the count closes with a *sæpe requisitus*, but no proof of demand is necessary to support this averment, and the service of the writ is deemed a demand."

statement, however, is inaccurate, as it is obvious that under some circumstances a demand is necessary.[27]

(II) *DUTY TO PAY MONEY PRESENTLY.* The doctrine is stated in a number of decisions and text-books that, where there is a debt or duty to pay money presently, not dependent on any contingency, an action may be brought to recover without any previous demand; or, as it is otherwise expressed, where there is a precedent debt or duty no request is in general necessary.[28]

(III) *MONEY RIGHTFULLY IN DEFENDANT'S POSSESSION.* Where one has money belonging to another rightfully and lawfully in his possession, the law requires that it should first be demanded of him before an action can be maintained against him therefor.[29] Thus where one receives money as trustee and does nothing amounting to an abuse of the trust or inconsistent with the understanding or agreement of the parties, he is not liable in an action for money had and received without a previous demand.[30] Where, however, there has been an abuse of the trust no demand is necessary.[31]

27. See *infra*, XI, B, 3, a, (III), (IV), (VII).

28. *Connecticut.*—Hawley *v.* Sage, 15 Conn. 52.

Illinois.— Paris *v.* Hunter, 10 Ill. App. 230.

Maine.— See Waite *v.* Delesdernier, 15 Me. 144.

Massachusetts.— Robinson *v.* Williams, 8 Metc. 454; Dill *v.* Wareham, 7 Metc. 438; Wait *v.* Gibbs, 7 Pick. 146.

New Hampshire.— Wentworth *v.* Gove, 45 N. H. 160.

New York.— Howard *v.* France, 43 N. Y. 593; Stacy *v.* Graham, 14 N. Y. 492.

See 35 Cent. Dig. tit. "Money Received," § 36; Chitty Contr. 733; 1 Swift Dig. 699; ACTIONS, 1 Cyc. 695; and ASSUMPSIT, 4 Cyc. 336.

Applications of rule.— One who receives money in advance on a contract which he is without authority to make, and which he afterward refuses to fulfil, is liable without any demand. Dill *v.* Wareham, 7 Metc. (Mass.) 438. So where a seaman having performed a fishing voyage demanded his share of the fish, but offered no security for his share of the expenses, and the ship-owners refused and afterward sold the fish, it was held that he might recover the balance due to him in an action for money had and received, without any demand. Wait *v.* Gibbs, 7 Pick. (Mass.) 146. And where A, having a draft on a bank in New York for one thousand dollars, two thirds of which belonged to himself and one third to B, put such draft into the hands of B, to receive the money thereon and to divide the avails in that proportion, and B received the money, and, after a reasonable time had elapsed, A sought to recover his share in an action of *indebitatus assumpsit* for money had and received, against B, without previous demand or request, it was held that no such demand or request was necessary. Hawley *v.* Sage, 15 Conn. 52.

29. Babcock *v.* Granville, 44 Vt. 325; Hinsdill *v.* White, 34 Vt. 558; Stocks *v.* Sheboygan, 42 Wis. 315. And see Sturgis *v.* Preston, 134 Mass. 372.

30. *Massachusetts.*— French *v.* Merrill, 132 Mass. 525; Jones *v.* McDermott, 114 Mass. 400.

Minnesota.— Williams *v.* McGrade, 13 Minn. 174.

New York.— Walrath *v.* Thompson, 6 Hill 540 [*affirmed* in 2 N. Y. 185]; Cooley *v.* Betts, 24 Wend. 203; Sears *v.* Patrick, 23 Wend. 528; Rathbun *v.* Ingals, 7 Wend. 320; Taylor *v.* Bates, 5 Cow. 376; Ferris *v.* Paris, 10 Johns. 285.

United States.— Gardner *v.* Peyton, 9 Fed. Cas. No. 5,234, 5 Cranch C. C. 561.

England.— Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610.

See 35 Cent. Dig. tit. "Money Received," § 36.

And see Sanford School Dist. No. 2 *v.* Tebbetts, 67 Me. 239.

Applications of rule.— Where a claim has been placed in the hands of an attorney for collection, assumpsit will not lie against defendant to recover the amount collected until the money has been demanded by the one to whom it is due. Taylor *v.* Bates, 5 Cow. (N. Y.) 376; Gardner *v.* Peyton, 9 Fed. Cas. No. 5,234, 5 Cranch C. C. 561. Where defendant's foreign factors have rendered an account of goods consigned to them for sale, it was held that an action against them for the proceeds of the goods would not lie until they were shown to be in default by proving a demand or improper disregard of the instructions to remit the money. Ferris *v.* Paris, 10 Johns. (N. Y.) 285; Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610. The inconvenience of sending abroad to make a demand cannot alter the nature of the factor's trust, and if other agents are not in default until after request there can be no principle which will subject the foreign factor to an action without demand. Cooley *v.* Betts, 24 Wend. (N. Y.) 203. *Compare* Dodge *v.* Perkins, 9 Pick. (Mass.) 368; Clark *v.* Moody, 17 Mass. 145.

31. Ferguson *v.* Dunn, 28 Ind. 58, in this case the money sued for was sent by plaintiff to defendant with directions to loan it, and defendant converted it to his own use.

(iv) *Fraud, Duress, or Mistake.* Where one has wrongfully obtained the money of another by duress,[32] or has by fraudulent means induced another to pay him money,[33] no demand is necessary as a prerequisite to an action for money had and received. When the money is paid over by consent, but such consent is obtained by fraud, it is the same as if no consent had been given.[34] No demand is necessary where money is paid by plaintiff by mistake superinduced by fraud on the part of defendant,[35] or where defendant, instead of acting innocently and under an honest mistake, consciously receives what does not belong to him, taking advantage of the mistake or oversight of the other party and claiming to hold the money thus obtained as his own.[36] So it has been held that no demand is necessary where the person receiving the money subsequently discovers the mistake, for in such case the duty is then cast on him to rectify the mistake and repay the money.[37] According to a number of decisions, where one has received money of another by mistake, without fault on his own part, no action can be maintained against him to recover it back without a previous demand.[38] On the other hand there are a number of decisions in which the contrary view is maintained,[39] the view being taken that the money is immediately due and that the bringing of the action is a special demand, or rather no demand need be made before the suit is brought to entitle the party to a recovery.[40]

(v) *Waiving Tort and Suing in Assumpsit.* There is a conflict of authority as to whether a demand is necessary where plaintiff waives a tort and sues as for money had and received.[41]

(vi) *Miscellaneous.* No demand is necessary to recover back money paid

32. Baldwin *v.* Hutchison, 18 Ind. App. 454, 35 N. E. 711; Hinsdill *v.* White, 34 Vt. 558.

33. Baldwin *v.* Hutchison, 18 Ind. App. 454, 35 N. E. 711; Malone *v.* Harris, 6 Mo. 451 (a case where one had advanced money by reason of fraudulent representations respecting the subject-matter of the contract); Hinsdill *v.* White, 34 Vt. 558.

34. Hinsdill *v.* White, 34 Vt. 558.

35. Lyon *v.* Annable, 4 Conn. 350; Bishop *v.* Brown, 51 Vt. 330.

36. Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161, in which it was said that in such case he cannot assume the office of bailee or trustee for he holds the money as his own and his duty to return it arises at the instant of the wrongful receipt of the overpayment. And see Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Varnum *v.* Highgate, 65 Vt. 416, 26 Atl. 628.

37. Bishop *v.* Brown, 51 Vt. 330.

38. Thompson *v.* Doty, 72 Ind. 336; Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420; Abbott *v.* Draper, 4 Den. (N. Y.) 51; Gillett *v.* Brewster, 62 Vt. 312, 20 Atl. 105; Bishop *v.* Brown, 51 Vt. 330; Hinsdill *v.* White, 34 Vt. 558; Stocks *v.* Sheboygan, 42 Wis. 315; Lawton *v.* Howe, 14 Wis. 241. See also Stoddard *v.* Chapin, 15 Vt. 443.

Reason for rule.— "There is much reason for holding that, where there is a mutual mistake, an action will not lie until the party receiving the money is put in default by notice and demand. There is no wrong in receiving the money, for there is neither breach of contract nor of duty. The wrong does not arise until notice of the mistake, and refusal or neglect to refund the money received by mistake. Bare justice requires that one who has been paid money by mistake should have an opportunity of making reparation before he is vexed and harassed by litigation. The mistake was as much the fault of the one party as of the other, and both are upon the same footing. To destroy this equilibrium, something ought to be done by him who seeks to maintain an action." Worley *v.* Moore, 77 Ind. 567, 569; Thompson *v.* Doty, 72 Ind. 336.

39. *Alabama.*— Rutherford *v.* McIvor, 21 Ala. 750.

Massachusetts.— Sturgis *v.* Preston, 134 Mass. 372.

New York.— Utica Bank *v.* Van Gieson, 18 Johns. 485.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342.

England.— Bree *v.* Holbech, 3 Dougl. (3d ed.) 655.

Illustrations.— If a bank upon which a check is drawn payable to a particular person or order pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, a right of action to recover back the money accrues at the date of the payment, and the statute of limitations begins to run from that date. Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342.

40. Rutherford *v.* McIvor, 21 Ala. 750.

41. That demand is necessary see Babb *v.* Babb, 89 Ind. 281.

That demand is unnecessary see Gordon *v.* Camp, 2 Fla. 422; Fuller *v.* Tuska, 13 N. Y. Suppl. 580. And see Ferguson *v.* Dunn, 28 Ind. 58.

on a contract, where there is a failure of title.[42] As a general rule where money is deposited in bank in the usual course of business a previous demand is necessary before suing to recover it back, but where money is deposited in bank under an agreement made illegal by statute, it may be recovered back without any previous demand.[43] Where money is paid under a contract void under the statute of frauds, the vendee not receiving possession, no demand is necessary before suit to recover the money paid.[44] Where, however, the vendee has received possession, the contract is not utterly void, and in order to recover back the money paid he must first restore possession and demand repayment of the money.[45]

b. Requisites and Sufficiency.[46] No particular form of demand is necessary.[47] Thus, in case of money paid by mistake, it is sufficient that the one who received it should have notice of the mistake, and be requested, and have a reasonable opportunity to correct it.[48]

c. Excuse For Failure to Make Demand. When a demand is necessary, the failure to make demand is not excused by showing that defendant would probably not have complied therewith.[49] No demand is necessary on a party who has received the money on a contract and has put it out of his power to fulfil the obligations thereby created,[50] or who denies that he made the contract on which the money sought to be recovered was paid,[51] or where he has afterward, by his conduct, prevented a demand.[52]

C. Time to Sue. Where one receives money of another to hold upon a condition or for the accomplishment of a certain purpose, and no time is fixed for the happening of such condition, or the accomplishment of such purpose, it is held by law to be a reasonable time, and after such reasonable time has elapsed an action for money had and received lies to recover back the money so received.[53] Where money is deposited in bank under an agreement that it should be repaid at a future day certain, such agreement being forbidden by statute the money may be recovered back in an action brought before the expiration of the time limited.[54]

D. Defenses — 1. In General. As a defense to an action for money had and received defendant may show any fact that entitles him to retain the money on either legal or equitable grounds.[55] The main principle by which to test the

42. *Illinois.*— Farson *v.* Hutchins, 62 Ill. App. 439 [*affirmed* in 163 Ill. 445, 45 N. E. 297].

Massachusetts.— Earle *v.* Bickford, 6 Allen 549, 82 Am. Dec. 651.

Vermont.— Varnum *v.* Highgate, 65 Vt. 416, 26 Atl. 628.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342.

England.— Bree *v.* Holbech, Dougl. (3d ed.) 655.

43. White *v.* Franklin Bank, 22 Pick. (Mass.) 181.

44. Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116, in which it was said that in such cases there is no binding obligation upon either party, "the vendor has parted with nothing, and the vendee has received nothing and money in the vendor's hands belongs to the vendee."

45. Abbott *v.* Draper, 4 Den. (N. Y.) 51. And see Marsh *v.* Wyckoff, 10 Bosw. (N. Y.) 202, holding that when a party to a contract, which is void by the statute of frauds for not being in writing, refuses to perform, placing his refusal solely upon the ground of inability to do so, and the other party is not in default, the former cannot maintain an action against the latter to recover back money paid under the contract, without making a demand for its repayment before suit.

46. Particular demands held sufficient see Houston *v.* Frazier, 8 Ala. 81; Heimbach *v.* Weinberg, 18 Mich. 48.

47. Bishop *v.* Brown, 51 Vt. 330.

48. Bishop *v.* Brown, 51 Vt. 330.

49. Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420.

50. Trinkle *v.* Reeves, 25 Ill. 197, 76 Am. Dec. 793; Way *v.* Raymond, 16 Vt. 371.

51. Griggs *v.* Morgan, 9 Allen (Mass.) 37.

52. Wylie *v.* Grundysen, 51 Minn. 360, 53 N. W. 805, 38 Am. St. Rep. 509, 19 L. R. A. 33, holding that where a sheriff collects money, due on a judgment for the wrongful levy of execution on exempt property, which is therefore itself exempt therefrom, and applies it upon execution in his hands against a judgment creditor, before a lawful levy thereon, and without notice to the creditor, or opportunity for him to make any demand, no subsequent demand is necessary before suit to recover the money.

53. Carter *v.* Carter, 14 Pick. (Mass.) 424.

54. Atlas Bank *v.* Nahant Bank, 3 Metc. (Mass.) 581; White *v.* Franklin Bank, 22 Pick. (Mass.) 181.

55. 4 Wait Actions and Defenses 511. And see the following decisions: Meredith *v.*

matters is whether in equity and good conscience, in view of the special facts of the case, defendant is entitled to retain the money as against plaintiff. Not necessarily whether he has an absolute right to the money as against any person, but whether his right thereto is equal to plaintiff's right. It need not necessarily be better. It is enough if he has an equal right thereto.[56]

2. Illegality of Transaction in Which Money Received.[57] It is a good defense to an action for money had and received that the recovery of the money would require the enforcement of any of the unexecuted provisions of an illegal contract. Courts of law will not lend their aid to those who found their claims upon an illegal transaction.[58] Nevertheless where the contract has been fully executed its illegality is no defense to an action to recover money paid on the contract by one of the parties to a third person for the use of the other,[59] to an action upon a

Richardson, 10 Ala. 828; Stephenson County *v.* Manny, 56 Ill. 160; Gehr *v.* Hagerman, 26 Ill. 438; Morris *v.* Jamieson, 99 Ill. App. 32; Kingston Bank *v.* Eltinge, 66 N. Y. 625 [*affirming* 5 Hun 563]; Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30; Barr *v.* Craig, 2 Dall. (Pa.) 151, 1 L. ed. 327.

For cases in which the facts were held not within the rule stated see the following cases:

Arkansas.— Huyck *v.* Meador, 24 Ark. 191.

Illinois.— Chemical Nat. Bank *v.* Portage City Bank, 156 Ill. 149, 40 N. E. 328 [*affirming* 55 Ill. App. 251].

Indiana.— Bailey *v.* Briant, 117 Ind. 362, 20 N. E. 278; Criswell *v.* Whitney, 13 Ind. App. 67, 41 N. E. 78.

Kentucky.— Clift *v.* Stockdon, 4 Litt. 215; Maize *v.* Bradley, 64 S. W. 655, 23 Ky. L. Rep. 993.

Maine.— Jenks *v.* Manson, 53 Me. 209; Snow *v.* Snow, 49 Me. 159; Giddings *v.* Dudley, 47 Me. 51.

Maryland.— O'Neal *v.* Washington County, 27 Md. 227; Lewis *v.* Kramer, 3 Md. 265; Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655; Chapman *v.* Williams, 7 Harr. & J. 157; Baltimore City Bank *v.* Bateman, 7 Harr. & J. 104.

Michigan.— Little *v.* Derby, 7 Mich. 325.

Minnesota.— Brand *v.* Williams, 29 Minn. 238, 13 N. W. 42.

Missouri.— Fox *v.* Pullman Palace Car Co., 16 Mo. App. 122.

New Hampshire.— Knapp *v.* Hobbs, 50 N. H. 476; Holderness *v.* Baker, 44 N. H. 414; Frost *v.* Martin, 29 N. H. 306.

New Mexico.— Socorro Bd. of Education *v.* Robinson, 7 N. M. 231, 34 Pac. 295.

New York.— De Peyster *v.* Mali, 92 N. Y. 262 [*reversing* 27 Hun 439]; Holtz *v.* Schmidt, 59 N. Y. 253; Eckert *v.* Clark, 16 Misc. 67, 37 N. Y. Suppl. 685; Eddy *v.* Stanton, 21 Wend. 255; McNeilly *v.* Richardson, 4 Cow. 607.

See 35 Cent. Dig. tit. "Money Received," § 38.

56. 4 Wait Actions and Defenses 511.

57. **Right to sue in assumpsit on rescission of contract** see Assumpsit, 4 Cyc. 329.

58. Woodworth *v.* Bennett, 43 N. Y. 273, 3 Am. Rep. 706; English *v.* Rumsey, 32 Hun (N. Y.) 486; Bettinger *v.* Bridenbecker, 63 Barb. (N. Y.) 395; Belding *v.* Pitkin, 2 Cai. (N. Y.) 147; Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58; Lanahan *v.* Pattison, 14 Fed. Cas. No. 8,036, 1 Flipp. 410. And see Wilson *v.* Strugnell, 7 Q. B. D. 548, 14 Cox C. C. 624, 45 J. P. 831, 50 L. J. M. C. 145, 45 L. T. Rep. N. S. 218; Web *v.* Bishop, Buller N. P. 132; Drummond *v.* Deey, 1 Esp. 152.

Applications of rule.— Plaintiff, as the owner of a lottery scheme, employed defendant as his agent to sell tickets, and receive and retain the proceeds until satisfied that the drawing was fairly conducted, and then account therefor. The sale of lottery tickets being unlawful, it was held that plaintiff could not recover on a note of defendant for the amount of the proceeds of tickets sold by him. Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58. Money deposited with a third person to be paid to plaintiff when he has compounded a felony cannot be recovered by plaintiff, as the transaction is void. English *v.* Rumsey, 32 Hun (N. Y.) 486; Bettinger *v.* Bridenbecker, 63 Barb. (N. Y.) 395.

59. Woodworth *v.* Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Merritt *v.* Millard, 3 Abb. Dec. (N. Y.) 291, 4 Keyes 208 [*affirming* 5 Bosw. 645]; Owen *v.* Davis, 1 Bailey (S. C.) 315; Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58; Farmer *v.* Russell, 1 B. & P. 296; Tenant *v.* Elliott, 1 B. & P. 3, 4 Rev. Rep. 755. And see Willson *v.* Owen, 30 Mich. 474.

Reason for rule.— "This principle is based upon the undoubted right of a person to waive the illegality, and pay the money; and that when once paid, either to the other party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defence which his principal saw fit to waive." Woodworth *v.* Bennett, 43 N. Y. 273, 276, 3 Am. Rep. 706.

Application of rule.— An agent of plaintiff, who had sold lottery tickets for him, paid over to defendant, another agent for the sale of such tickets, money received on such sales, with directions to pay over to plaintiff. It was held that defendant could not set up the illegality of the transaction, in which the money was received by the agent, who paid

new promise to recover a balance on account of moneys received thereunder,[60] or to an action upon a new promise to pay part of the loss, the whole of which was paid by one of the parties.[61] So where parties to an illegal contract mutually rescind and agree that money paid on the contract shall be restored, an action to recover money may be maintained upon the agreement of rescission;[62] and a further limitation of the general rule is recognized in the case of one seeking contribution from a joint tort-feasor, where the tort was committed by persons acting in good faith, without any unlawful design or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of others.[63] So where one without another's consent pays over the latter's money to a third person in furtherance of an illegal contract the owner's right to recover it back is in no way affected by the illegality of the contract.[64]

E. Parties. If an agent by mistake pays to a third party money in his possession belonging to his principal, he may maintain in his own name an action for money had and received to recover it.[65] The general rules relating to joinder of parties plaintiff apply in actions for money had and received,[66] and where the implied promise which is the basis of the action is to two or more persons jointly, the action must be brought by them jointly.[67] On the other hand if several parties unite as plaintiffs, and the complaint shows on its face that some of them are not entitled to recover, the complaint is ill.[68] The general rules relating to joinder of parties defendant apply in actions for money had and received.[69] Where money is received on the joint account of several defendants, they are jointly liable.[70] But in order to maintain an action for money had and received against several defendants jointly, it must appear that the money was jointly received by all the defendants.[71] Where one advances money to several persons in further-

defendant the money, as a defense. Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58.

60. Hamilton *v.* Canfield, 2 Hall (N. Y.) 526; De Leon *v.* Trevino, 49 Tex. 88, 30 Am. Rep. 101; McDonald *v.* Lund, 13 Wash. 412, 43 Pac. 348; Planters Bank *v.* Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473; Walker *v.* Kremer, 29 Fed. Cas. No. 17,076, 4 Wkly. Notes Cas. (Pa.) 544.

61. De Leon *v.* Trevino, 49 Tex. 88, 30 Am. Rep. 101; Faikney *v.* Reynous, 4 Burr. 2069; Petrie *v.* Hannay, 3 T. R. 418.

62. Lea *v.* Cassen, 61 Ala. 312, it is an independent agreement founded upon a new consideration and not affected by the illegality of the original contract. And see Taylor *v.* Bowers, 1 Q. B. D. 291, 46 L. J. Q. B. 39, 34 L. T. Rep. N. S. 938, 24 Wkly. Rep. 499.

63. Jacobs *v.* Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105. In this case plaintiff in good faith took up cattle damage feasant, and defendant, a field driver, at plaintiff's request sold them at auction and received the money. The proceedings were so far irregular as to render plaintiff and defendant joint trespassers. It was held nevertheless that plaintiff could recover from defendant the money received for the sale of the cattle.

64. John G. Morgan Brokerage Co. *v.* Shemwell, 16 Colo. App. 185, 60 Pac. 379.

65. Parks *v.* Fogleman, 97 Minn. 157, 105 N. W. 560, 4 L. R. A. N. S. 363. See also Kent *v.* Bornstein, 12 Allen (Mass.) 342.

66. See McIntyre *v.* Ward, 18 Vt. 434; and cases cited in subsequent notes.

67. Welles *v.* Gaty, 9 Mo. 565.

What does not amount to a joint interest. — Where one advances money for the purchase of property, to be owned jointly by all who subscribe, and the party intrusted with the purchase takes the title in his own name, the other subscribers need not be made parties to an action for money had and received. Ghio *v.* Beard, 11 Mo. App. 21; Keane *v.* Beard, 11 Mo. App. 10.

Delivery on note to agent by one of two parties having joint interest. — Where a note payable to A, or bearer, but really belonging to B and C, is placed by B in the hands of an agent for collection, and is collected, an action will lie against the agent by B alone to recover the amount so collected. The law implies a promise to pay the money if collected to B. Atcherson *v.* Talbot, 5 Dana (Ky.) 324.

68. Headrick *v.* Brittain, 83 Ind. 188.

69. See, generally, PARTIES. And see Payne *v.* Hathaway, 3 Vt. 212.

70. Cobb *v.* Dows, 10 N. Y. 335.

71. Murphy *v.* Bidwell, 52 Mich. 487, 18 N. W. 230; Manahan *v.* Gibbons, 19 Johns. (N. Y.) 427 [*affirming* 19 Johns. 109]; Shepardson *v.* Rowland, 28 Wis. 108; Simmons *v.* Spencer, 9 Fed. 581, 3 McCrary 48.

Application of rule. — Deeds were left with a bank to be delivered on payment of a specified sum of money, which the bank was instructed to place to plaintiff's credit. When the money was paid in, the bank turned it over to a third party. It was held that an action for money had and received would not lie against the bank and the third party jointly. Simmons *v.* Spencer, 9 Fed. 581, 3

ance of an engagement in which they represent themselves to be jointly interested they may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested. He is estopped to deny his interest.[72]

F. Pleading[73] — **1. Declaration, Petition, or Complaint.**[74] The declaration at common law is very simple — merely a statement that defendant owes or is indebted to plaintiff in a certain sum received by defendant for plaintiff's use, a promise of payment by defendant and a prayer for judgment.[75] And although under the code system of pleading it is of course proper to set forth the special facts creating the liability,[76] in most jurisdictions which have adopted that system a petition or complaint in the form of the common-law count for money had and received is sufficient,[77] notwithstanding this practice has sometimes been criticized on the ground that the use of the common counts is inconsistent with the code provisions which require a party in his pleading to state the facts constituting his

McCrary 48. So a member who pays to a mutual benefit society moneys which, according to the scheme of the society, are to be paid out to the various members, cannot join two of the members in a suit against the society as for money had and received. Murphy *v.* Bidwell, 52 Mich. 487, 18 N. W. 230.

72. Murphy *v.* Bidwell, 52 Mich. 487, 18 N. W. 230.

73. Pleadings in assumpsit see Assumpsit, 4 Cyc. 339 *et seq.*

74. Whether declaration, petition, or complaint is for money had and received or some other cause of action see Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590; Mardis *v.* Shackleford, 4 Ala. 493; Wendt *v.* Ross, 33 Cal. 650; Collins *v.* Phelps, 3 Day (Conn.) 506; Martin *v.* Richardson, 94 Ky. 183, 21 S. W. 1039, 14 Ky. L. Rep. 847, 42 Am. St. Rep. 353, 19 L. R. A. 692; Pearce *v.* Watkins, 68 Md. 534, 13 Atl. 376; Dobson *v.* Winner, 26 Mo. App. 329; Everitt *v.* Conklin, 90 N. Y. 645; Cohn *v.* Beckhardt, 63 Hun (N. Y.) 333, 18 N. Y. Suppl. 84; Waters *v.* Whittemore, 22 Barb. (N. Y.) 593; Quimby *v.* Carhart, 57 N. Y. Super. Ct. 452, 9 N. Y. Suppl. 307; Dieckerhoff *v.* Alder, 12 Misc. (N. Y.) 445, 33 N. Y. Suppl. 698; Logan *v.* Freerks, (N. D. 1905) 103 N. W. 426; Park *v.* Mighell, 3 Wash. 737, 29 Pac. 556; Potter *v.* Van Norman, 73 Wis. 339, 41 N. W. 524.

Forms of complaint.— Kelley *v.* Osborn, 86 Mo. App. 239; Villias *v.* Stern, 24 Misc. (N. Y.) 380, 53 N. Y. Suppl. 267; Knott *v.* Kirby, 10 S. D. 30, 71 N. W. 138; Johnston *v.* Charles Abresch Co., 109 Wis. 182, 85 N. W. 348.

75. Richardson *v.* Moffitt-West Drug Co., 92 Mo. App. 515, 69 S. W. 398.

Count under special statute.— A count: "For money payable to the plaintiff. For money had and received by the defendant for the use of the plaintiff" is a sufficient compliance with Pub. Gen. Laws, art. 75, § 23, providing that the words, "For money payable by the defendant to the plaintiff," should precede money counts. Littleton *v.* Wells, etc., Council, No. 14, Jr. O. U. A. M., 98 Md. 453, 456, 56 Atl. 798.

Exhibits.— A copy of an instrument is only required to be filed with the declaration where it is specially declared on and made the foundation of the action; but it may be offered in evidence under a count for money had and received without filing a copy. Parker *v.* Brooks, 16 Ill. 64. So where land has been conveyed by a deed absolute on its face, but in fact a mortgage, and the grantee has resold for a sum in excess of the debt secured, an action by the mortgagor to recover such excess is not founded on the deed, and no copy thereof need be set out with the complaint. Crane *v.* Buchanan, 29 Ind. 570.

76. American Nat. Bank *v.* Wheelock, 45 N. Y. Super. Ct. 205.

77. *Arkansas.*— Ball *v.* Fulton County, 31 Ark. 379.

California.— McDonald *v.* Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090; Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. 783; Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998 (good on general demurrer); Quimby *v.* Lyon, 63 Cal. 394; Abadie *v.* Carrillo, 32 Cal. 172. And see Downing *v.* Mulcahy, (1899) 56 Pac. 466, holding that it is not essential to a complaint in an action for money received that it recite every detail out of which the cause of action arises, since, under Code Civ. Proc. § 454, defendant can demand a bill of particulars, if the complaint is too general.

Indiana.— Terrell *v.* Butterfield, 92 Ind. 1, good on general demurrer.

Missouri.— Richardson *v.* Moffitt-West Drug Co., 92 Mo. App. 515, 69 S. W. 398.

New York.— American Nat. Bank *v.* Wheelock, 45 N. Y. Super. Ct. 205; Betts *v.* Bache, 9 Bosw. 615, 14 Abb. Pr. 279, 23 How. Pr. 197 [*affirmed* in 14 Abb. Pr. 285]; Hodge *v.* Drake, 14 N. Y. Suppl. 355.

Oregon.— Keene *v.* Eldriedge, (1905) 82 Pac. 803; Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034; Stewart *v.* Phy, 11 Oreg. 335, 3 Pac. 443. *Contra*, Buchanan *v.* Beck, 15 Oreg. 563, 16 Pac. 422; Bowen *v.* Emmerson, 3 Oreg. 452.

Wisconsin.— Thomson *v.* Elton, 109 Wis. 689, 85 N. W. 425; Burke *v.* Milwaukee, etc., R. Co., 83 Wis. 410, 53 N. W. 692; McKinnon *v.* Vollman, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121; Grannis *v.* Hooker, 29 Wis. 65.

See 35 Cent. Dig. tit. "Money Received," §§ 55, 56.

Contra.— California State Tel. Co. *v.* Patterson, 1 Nev. 150.

cause of action.[78] It is necessary to allege that the money was had and received for plaintiff's use.[79] But it is not necessary to allege from whom the money was received for plaintiff's use,[80] nor that there was an understanding that defendant was to hold the money received for plaintiff, nor that defendant received it in trust for plaintiff.[81] At common law it is usual, and perhaps necessary, in a count for money had and received, to allege a promise.[82] But under the code it has been held that no promise need be alleged,[83] the facts being stated out of which the cause of action arose.[84] An allegation of demand, it is said, is usual;[85] but, according to a number of decisions, it is unnecessary.[86] The failure of defendant to pay the money must be alleged.[87] It has been held not essential to the jurisdiction of the parties, or of the subject-matter of the action, to allege where the cause of action accrued.[88] It is not necessary to claim interest in a count for money had and received in order to make such interest recoverable.[89] As in other forms of pleadings, the addition of surplusage in a count for money had and received, which is otherwise good, will not vitiate the count;[90] but being in,

78. See Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. 783; Abadie *v.* Carrillo, 32 Cal. 172; Richardson *v.* Moffitt-West Drug Co., 92 Mo. App. 515, 69 S. W. 398.

79. State *v.* Sims, 76 Ind. 328; California State Tel. Co. *v.* Patterson, 1 Nev. 150; Brannin *v.* Voorhees, 14 N. J. L. 590; Hutchinson *v.* Targee, 14 N. J. L. 386; Roldan *v.* Power, 14 Misc. (N. Y.) 480, 35 N. Y. Suppl. 697.

What allegations sufficient.— A complaint alleging that defendants are indebted to plaintiff for money had at their special instance and request in the sum of one hundred dollars, which is due and unpaid, for which he demands judgment and other relief, is sufficient. This allegation is equivalent to an allegation that it was received by the former for the use of the latter. Koons *v.* Williamson, 90 Ind. 599. So a complaint which alleged that defendant, an attorney, had received for the use and benefit of plaintiff, from a certain person, a certain sum of money, sufficiently showed that defendant had money in his hands belonging to plaintiff. Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034.

Allegations held insufficient.—An allegation that the money was received from plaintiff by defendant, at the special instance and request of the latter, is insufficient. State *v.* Sims, 76 Ind. 328.

It is not necessary to allege in terms that plaintiff is the legal owner of the money.— It is sufficient if he alleges that defendant is indebted to him for money received to his use. Alexander *v.* Gaar, 15 Ind. 89.

80. Hurd *v.* Hall, 1 Root (Conn.) 372; Lawrence *v.* Clark, 1 Root (Conn.) 348.

81. Boos *v.* Lang, 163 Ind. 445, 71 N. E. 120.

82. See ASSUMPSIT, 4 Cyc. 340. See also Richardson *v.* Moffitt-West Drug Co., 92 Mo. App. 515, 69 S. W. 398; Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034. But see Maddox *v.* Brown, 9 Port. (Ala.) 118, holding that the omission to aver, in a general count for money had and received, the promise to pay on request, is not matter of substance, especially after verdict, as the promise to pay is a mere legal inference arising from the fact of indebtedness, and, in point of fact, has no existence in most cases.

83. Mumford *v.* Wright, 12 Colo. App. 214, 55 Pac. 744; Tamm *v.* Kellogg, 49 Mo. 118.

84. Byxbie *v.* Wood, 24 N. Y. 607; Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034; Stewart *v.* Phy, 11 Oreg. 335, 3 Pac. 443.

85. Quimby *v.* Lyon, 63 Cal. 394.

What allegations sufficient.— A complaint by a member of a building association to recover dues and instalments paid, which alleges that the association failed, neglected, and refused to return the sums paid, sufficiently alleges a demand. People's Bldg., etc., Assoc. *v.* Reynolds, (Ind. App. 1896) 45 N. E. 522.

86. Quimby *v.* Lyon, 63 Cal. 394 [*disproving* the *dictum* in Reina *v.* Cross, 6 Cal. 29]; Field *v.* Brown, 146 Ind. 293, 45 N. E. 464; Spears *v.* Ward, 48 Ind. 541; Warder *v.* Nolan, 10 Ind. App. 334, 37 N. E. 821. But see Anderson *v.* Hulme, 5 Mont. 295, 5 Pac. 865.

87. London, etc., F. Ins. Co. *v.* Liebes, 105 Cal. 203, 38 Pac. 691; Mumford *v.* Wright, 12 Colo. App. 214, 55 Pac. 744. And see Eugene First Nat. Bank *v.* Hovey, 34 Oreg. 162, 55 Pac. 535.

88. Downing *v.* Mulcahy, (Cal. 1899) 56 Pac. 466.

89. Marvin *v.* McRae, Cheves (S. C.) 61.

90. York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968; Antonelli *v.* Basile, 93 Mo. App. 138; Koopman *v.* Cahoon, 47 Mo. App. 357; Yeater *v.* Hines, 24 Mo. App. 619; Reed *v.* Hayward, 82 N. Y. App. Div. 416, 81 N. Y. Suppl. 608; Lindskog *v.* Schouweiler, 12 S. D. 176, 80 N. W. 190. And see Woodbury *v.* Jones, 3 Gray (Mass.) 261.

Applications of rule.— In an action for money had and received against a fiduciary who has failed to use the money as directed, an allegation that the money was retained by the fiduciary by fraud may be rejected as surplusage. Koopman *v.* Cahoon, 47 Mo. App. 357. In an action for money had and received, an averment that defendant had converted the money is surplusage, since the

plaintiff cannot use it to change the real substance of his action in order to meet a new aspect of his case on the evidence as disclosed at the trial.[91]

2. PLEA OR ANSWER. Where under the code a common-law count for money had and received is used, defendant need not deny the allegations in any more specific language than that in which they are set forth in the complaint.[92] If defendant claims the money as due him under a contract with plaintiff, he should plead the facts showing the right to retain the same.[93] If the complaint alleges that defendant received money to plaintiff's use and refused to pay it on demand, defendant, although admitting the allegations of the complaint, may set up as new matter payment of the demand before suit brought.[94] Where a complaint alleges that defendants sold plaintiff's property for a certain sum, and that they have had the use and interest of the fund in money since it was received for plaintiff's use, an answer denying that defendants sold plaintiff's property or received therefor any money whatever to plaintiff's use is sufficient.[95] If immaterial matter is alleged in the declaration, it is not to be deemed admitted by defendant by his omission to deny it.[96]

3. REPLICATION. In this as in other forms of action it is not the province of a reply to introduce a new cause of action.[97] Where a statute provides that a replication shall not be required except by order of court, but that plaintiff may file a replication without such order stating new facts in reply to new matter in the answer, and the answer to a declaration for money had and received contains a general denial of an allegation that defendant had duly accounted, plaintiff may reply alleging that the accounts were fraudulent.[98] A reply setting up fraud and mistake as a defense to allegations of accounting and settlement in the answer pleaded as a bar to plaintiff's recovery in an action for money had and received is a departure.[99] And where defendants pleaded as set-off the sums credited as profits, a reply setting up the repayment of such sums to defendants is a departure.[1] So, where plaintiff alleges the payment of certain sums to defendant for investment, which the latter had retained to his use, and defendant answered that the money had been invested and sundry profits therefrom paid to plaintiff, which were pleaded as a set-off, a reply stating that all the profits had been returned to defendant for reinvestment, and praying judgment for the amount of the original investment, is a departure.[2]

4. AMENDMENTS. The general rules governing amendment of pleadings in civil actions apply.[3]

action can be maintained whether trover would lie or not. Antonelli *v.* Basile, 93 Mo. App. 138; Lindskog *v.* Schouweiler, 12 S. D. 176, 80 N. W. 190. In an action of *indebitatus assumpsit*, the mention in the declaration from whom the money was received, for which defendant was indebted, does not vitiate the declaration. Hurd *v.* Hall, 1 Root (Conn.) 372.

91. Woodbury *v.* Jones, 3 Gray (Mass.) 261.

92. McDonald *v.* Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090. In this case the court held that an answer to a complaint of the kind mentioned which denies that defendant was indebted to the person in question in the sum alleged, or any other sum, for money had and received for the use and benefit of such person, or upon any count at all, was sufficient.

93. Smith *v.* Wigton, 35 Nebr. 460, 53 N. W. 374.

94. McDonald *v.* Davidson, 30 Cal. 173.

95. Robinson *v.* Corn Exch., etc., Ins. Co., 1 Abb. Pr. N. S. (N. Y.) 186.

96. Woodbury *v.* Jones, 3 Gray (Mass.) 261.

97. Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241.

98. Todd *v.* Bishop, 136 Mass. 386.

99. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

1. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

2. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

3. Pickering *v.* De Rochemont, 45 N. H. 67; Brackett *v.* Crooks, 24 N. H. 173 (holding that in assumpsit for money had and received an amendment to the declaration adding a special count on a promissory note, which was the foundation of the general count, does not change the cause of action and may be properly allowed); Pierce *v.* Wood, 23 N. H. 519 (holding that where, under a count for money had and received, a specification was filed of a claim for the amount of three notes, and these three notes were taken up and a new note given, plaintiff may amend his specifications by adding a

5. Bill of Particulars. Where the declaration in assumpsit contains only a count for money had and received, a bill of particulars should always be filed or some other proper notice of the demand given, for otherwise the generality of the count will be a surprise to defendant.[4] Where, however, reference to another count may be taken to furnish a sufficient bill of particulars, a bill of particulars need not be filed.[5] And a common count without a bill of particulars is good where it alleges the amount and day on which the money was received.[6]

6. Waiver of Objections and Aider by Verdict or Judgment. A count for money had and received, defective for failure to state that it was received to plaintiff's use, is cured by verdict;[7] and so is a count which is defective for failure to state the sum,[8] or a count which is defective for failure to contain a promise to pay.[9] After judgment it cannot be objected that no account was filed with the declaration.[10] Defects in the pleadings may be waived by agreement of parties.[11]

G. Issues, Proof, and Variance — 1. Matters to Be Proved. In actions for money had and received as in other civil actions plaintiff must prove all matters material to the issue.[12] But matters not material to the issue need not be proved.[13]

2. Evidence Admissible Under Pleadings — a. In General. In support of a common-law count for money had and received any evidence is admissible which tends to show that defendant has possession of money of plaintiff which in equity and good conscience he ought to pay over to plaintiff.[14] Nevertheless plaintiff should not be permitted to turn the generality of the count into a surprise upon defendant by deserting the ground which defendant is led to believe is the only matter to be tried and resorting to another of which he cannot be apprised by the declaration and may have no suspicion.[15]

claim for the balance due on the new note, the cause of action being the same); Flower *v.* Garr, 20 Wend. (N. Y.) 668; Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30, holding that in an action for money had and received, amending a complaint charging the receipt of money to be used in the purchase and sale of "grain, namely, wheat," so as to read "grain or pork," to conform to the facts proved on the trial, was not erroneous, as introducing a new cause of action.

4. Smyth *v.* Lehie, 1 Mill (S. C.) 240, holding that plaintiff's cause will be stricken from the docket on failure to do so.

5. Dorr *v.* McKinney, 9 Allen (Mass.) 359.

6. Spears *v.* Ward, 48 Ind. 541.

7. Judson *v.* Eslava, Minor (Ala.) 2.

8. Hall *v.* Smith, 3 Munf. (Va.) 550.

9. Demesmey *v.* Gravelin, 56 Ill. 93.

10. Louisiana State Bank *v.* Ballard, 7 How. (Miss.) 371.

11. Adams *v.* Farnsworth, 15 Gray (Mass.) 423, holding that, in an action by a principal against his agent for money had and received, after plaintiff's counsel has offered to allow defendant to prove any sums paid by him and not credited on his books, evidence of such a payment before the bringing of the action cannot be rejected as not specified in the answer.

12. Union Nat. Bank *v.* Baldenwick, 45 Ill. 375; Dorr *v.* McKinney, 9 Allen (Mass.) 359; Lawrence *v.* Simons, 4 Barb. (N. Y.) 354.

13. Prout *v.* Chisolm, 89 Hun (N. Y.) 108, 34 N. Y. Suppl. 1066; Harlow *v.* Mills, 58 Hun (N. Y.) 391, 12 N. Y. Suppl. 197 [*affirmed* in 128 N. Y. 650, 29 N. E. 148]; Martin *v.* Williams, 12 N. C. 386; U. S. Express Co. *v.* Jenkins, 73 Wis. 471, 41 N. W. 957.

14. *Alabama.*— Prichard *v.* Sweeney, 109 Ala. 651, 19 So. 730.

Arkansas.— Murray *v.* Clay, 9 Ark. 39, 47 Am. Dec. 731.

Florida.— Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287; Gordon *v.* Camp, 2 Fla. 422.

Illinois.— Law *v.* Uhrlaub, 104 Ill. App. 263.

Michigan.— Freehling *v.* Ketchum, 39 Mich. 299.

Pennsylvania.— D'Utricht *v.* Melchor, 1 Dall. 428, 1 L. ed. 208.

Vermont.— Cummings *v.* Gassett, 19 Vt. 308.

Wisconsin.— Grannis *v.* Hooker, 29 Wis. 65.

See 35 Cent. Dig. tit. "Money Received," § 66.

Money received by defendant as factor.— A count for money had and received will permit evidence of any dealings whereby money due to plaintiff came into defendant's hands as factor through sales on commission. Freehling *v.* Ketchum, 39 Mich. 299.

15. *Missouri.*— State Bank *v.* Scott, 1 Mo. 744.

Nebraska.— Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241.

New Hampshire.— Johnson *v.* Kendall, 20 N. H. 304.

New York.— McClung *v.* Foshour, 47 Hun 421 [*affirmed* in 113 N. Y. 640, 21 N. E. 414].

South Carolina.— Frazer *v.* Sanders, 3 Brev. 13; Fowler *v.* Williams, 2 Brev. 304, 4 Am. Dec. 579.

b. Evidence Admissible Under General Issue or General Denial. The general issue, that is, that defendant did not promise in the manner and form alleged by plaintiff, puts in issue not only the receipt by defendant of the money claimed by plaintiff, but also the existence of all those facts which make his receipt of it a receipt to the use of plaintiff, and under it defendant is entitled to establish any facts which would disprove plaintiff's case.[16] Under the general issue or general denial it has been held that payment[17] or set-off[18] is not admissible, and that defendant is likewise not entitled to show an assignment to himself by plaintiff of money collected by him as agent, to be applied on an indebtedness from plaintiff to him, neither the offer nor other evidence making it appear that such an arrangement was made before the collection.[19] Nor can defendant show the recovery of a judgment by plaintiff, since the commencement of his action in an action brought by plaintiff against defendant in another state.[20] Under the general issue plaintiff may prove that defendant agreed to work for him for a stipulated time and that defendant's wages were paid in advance but that the services were not rendered and the contract had been rescinded.[21]

3. Variance Between Pleadings and Proofs. As in other actions a material variance between pleadings and proofs in an action for money had and received will be fatal to a recovery.[22] Objection that there is a variance may be raised by

See 35 Cent. Dig. tit. "Master and Servant," § 66.

Applications of rule.— A count for money received is not supported by evidence of money loaned (State Bank *v.* Scott, 1 Mo. 744); so in assumpsit for not paying over money received by defendant as a trustee plaintiff cannot introduce evidence of a loss of part of the money through the neglect of the trustee to collect it seasonably (Johnson *v.* Kendall, 20 N. H. 304).

16. *Georgia.*— Buchannon *v.* Jones, 1 Ga. 256.

Illinois.— Harris *v.* Pearce, 5 Ill. App. 622.

Kentucky.— Dupuy *v.* Johnson, 1 Bibb 562.

Maine.— Sturtevant *v.* Randall, 53 Me. 149.

Massachusetts.— Hawks *v.* Hawks, 124 Mass. 457.

New York.— See Eddy *v.* Smith, 13 Wend. 488.

Vermont.— Harlow *v.* Dyer, 43 Vt. 357.

United States.— Peck Colorado Co. *v.* Stratton, 95 Fed. 741.

England.— Moses *v.* Macferlan, 2 Burr. 1005, W. Bl. 219; Clark *v.* Dignam, 3 M. & W. 478.

See 35 Cent. Dig. tit. "Money Received," § 67.

Applications of rule.— Under the general issue in assumpsit for money had and received, defendant may prove that, pursuant to an agreement with plaintiff, he retained the money from the proceeds of a judgment obtained in an action in which he and his deceased partner rendered attorneys' services for plaintiff. Harris *v.* Pearce, 5 Ill. App. 622. So in an action brought by a principal against his agent to recover sums not included in his account, defendant may show other errors in the account, tending to balance the omission, without pleading them in his answer or set-off. Adams *v.* Farnsworth, 15 Gray (Mass.) 423. And in assumpsit for money had and received to recover money paid by plaintiff on a contract for defendant's performance of certain work, the latter may prove, under the general issue, a part performance of his contract. Chance *v.* Clay County, 5 Blackf. (Ind.) 441, 35 Am. Dec. 131. And in an action to recover money alleged to have been deposited with defendant's intestate upon his promise to repay on demand, defendant may show, under the general issue, that the claim is for a gambling debt. Frank *v.* Pennie, 117 Cal. 254, 49 Pac. 208.

17. Jackson *v.* Kansas City Packing Co., 42 Minn. 382, 44 N. W. 126. But see Marley *v.* Smith, 4 Kan. 183; Ames *v.* Townsend, 27 Nebr. 816, 44 N. W. 32.

18. Donoho *v.* Witherspoon, 29 N. C. 351. But see Dennis *v.* Graf, 31 Wis. 105.

19. Jackson *v.* Kansas City Packing Co., 42 Minn. 382, 44 N. W. 126.

20. Child *v.* Eureka Powder Works, 44 N. H. 354.

21. Wheelock *v.* Wright, 4 Stew. & P. (Ala.) 163.

22. *Alabama.*— Hudson *v.* Scott, 125 Ala. 172, 28 So. 91.

Connecticut.— Shepard *v.* Palmer, 6 Conn. 95.

Indiana.— Kyser *v.* Wells, 60 Ind. 261.

Massachusetts.— Dickinson *v.* Lane, 107 Mass. 548.

Michigan.— Dustin *v.* Radford, 57 Mich. 163, 23 N. W. 715.

New Hampshire.— Pickering *v.* De Rochemont, 45 N. H. 67.

New York.— Decker *v.* Saltsman, 1 Hun 421, 3 Thomps. & C. 589 [*affirmed* in 59 N. Y. 275].

Virginia.— Minor *v.* Minor, 8 Gratt. 1.

See 35 Cent. Dig. tit. "Master and Servant," § 68.

Applications of rule.— The following evidence has been held a material variance: Proof of a loan of money (Scarborough *v.* Blackman, 108 Ala. 656, 18 So. 735), proof

motion for nonsuit. It was so held in a case of material variance between the complaint and the proof.[23]

H. Evidence — 1. Burden of Proof. In an action for money had and received the burden is on plaintiff to prove that the money has been received by defendant,[24] or at least some proof must be made from which such inference can be drawn.[25] So the burden is on plaintiff to show that he is legally entitled to the money.[26] It is not enough to show that defendant has no right to the money; he is answerable to the true owner and to him only.[27] If money of plaintiff is shown to have come into the hands of defendant, the burden is on defendant to show how he disposed of it.[28] If any facts exist which take the case out of the general rule and exempt defendant from liability, the burden is on him to show these facts.[29]

2. Presumptions. After the lapse of a reasonable time for converting chattels into money the presumption is that it has been done.[30] Presumptions of demand may be drawn from evidence introduced by plaintiff that he had requested defendant several months previous to the commencement of the action to settle with him in respect to an alleged mistake in the settlement, and that defendant expressed a willingness to do so but that nothing further was then done.[31] So where defendant had transferred to a third person a draft belonging to plaintiff, evidence that the amount of the draft was paid by such person at the bank in the presence of defendant and with his assent authorizes the inference that the money was obtained for the benefit of defendant or that a like amount had been paid to him for a draft.[32] The fact that plaintiff gave defendant's testator his checks and that the latter received the amount thereof from plaintiff's bank-account raises no presumption that the receipt of the money by defendant was a loan, to be repaid, rather than a payment of a debt by plaintiff.[33]

of agreement to pay a certain sum in specific articles or labor (Wilson *v.* George, 10 N. H. 445), proof of a special contract (Barrere *v.* Somps, 113 Cal. 97, 45 Pac. 177), and proof of a rescission of the contract and return of the consideration (Dickinson *v.* Lane, 107 Mass. 548).

What does not amount to a variance.— In assumpsit after an accounting for money had and received and an account stated, evidence of a written contract under which the account is proved is proper and not a variance (Marshall *v.* Lewark, 117 Ind. 377, 20 N. E. 253), and the fact that more is claimed than is due presents no obstacle to a recovery (Smith *v.* Fellows, 58 Ala. 467; Tuttle *v.* Ridgeway, 62 Ill. 515. But see Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30).

23. Barrere *v.* Somps, 113 Cal. 97, 45 Pac. 177.

24. Nelson *v.* Montgomery First Nat. Bank, 139 Ala. 578, 36 So. 707, 101 Am. St. Rep. 52; Baskin *v.* Sample, 6 Ala. 255; Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. St. 88.

25. Baskin *v.* Sample, 6 Ala. 255.

26. Hungerford *v.* Moore, 65 Ala. 232; Allen *v.* Brown, 5 Mo. 323; Weiss *v.* Mendelson, 24 Misc. (N. Y.) 692, 53 N. Y. Suppl. 803; Dutchess County *v.* Sisson, 24 Wend. (N. Y.) 387; New York *v.* Scott, 1 Cai. (N. Y.) 543; Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. St. 88. And see Denver, etc., R. Co. *v.* Loveland, 16 Colo. App. 146, 64 Pac. 381.

The burden of proving non-performance of services for which payment was made in advance is on plaintiff. Wheeler *v.* Board, 12 Johns. (N. Y.) 363.

A lessee who seeks to recover rent paid by him, on the ground that defendant was not authorized to collect it, assumes the burden of proving such want of authority. Weiss *v.* Mendelson, 24 Misc. (N. Y.) 692, 53 N. Y. Suppl. 803.

27. Hungerford *v.* Moore, 65 Ala. 232; Dutchess County *v.* Sisson, 24 Wend. (N. Y.) 387.

28. Andrews *v.* Moller, 37 Hun (N. Y.) 480.

29. Walker *v.* Conant, 65 Mich. 194, 31 N. W. 786; Logan *v.* Freerks, (N. D. 1905) 103 N. W. 426; Means *v.* Jeffries, Tapp. (Ohio) 280.

Illustration.— In assumpsit for money had and received to recover money received by defendant in trust for plaintiff's use and benefit, under a special contract which authorized him to retain money for certain probable expenses to be incurred on plaintiff's behalf, the burden of proof as to incurring such expenses is on defendant. Vincent *v.* Rogers, 30 Ala. 471.

30. Barfield *v.* McCombs, 89 Ga. 799, 15 S. E. 666. Thus after a lapse of three years county orders received by a county treasurer and which he has failed to account for may be presumed to have been converted into money. Helvey *v.* Huntington County, 6 Blackf. (Ind.) 317.

31. Muir *v.* Rand, 2 Ind. 291.

32. Bullard *v.* Hascall, 25 Mich. 132.

33. Fall *v.* Haines, 65 N. H. 118, 23 Atl. 79.

3. ADMISSIBILITY. Within the rule as to competency, relevancy, and materiality, any evidence is admissible in an action for money had and received to prove or disprove plaintiff's cause of action.[34]

4. WEIGHT AND SUFFICIENCY. Questions relating to the weight and sufficiency of evidence in actions for money had and received are governed by the general rules relating to the weight and sufficiency of evidence in civil actions generally.[35]

34. **Evidence admissible to establish cause of action.**— *Alabama.*— Talladega Ins. Co. *v.* Landers, 43 Ala. 115 (holding that a certificate of a deposit of money issued by a corporation authorized to receive money on deposit and give certificates therefor is competent evidence under a count for money had and received); Stewart *v.* Conner, 9 Ala. 803.

Arkansas.— Waters *v.* Grace, 23 Ark. 118.

California.— Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98, holding that the unauthorized notes of a corporation, although not evidence of liability on the express contract appearing on the face thereof, were admissible to show that the money which they represent was furnished by plaintiff.

Indiana.— Copeland *v.* Koontz, 125 Ind. 126, 25 N. E. 174.

Kentucky.— Atcherson *v.* Talbot, 5 Dana 324.

New Hampshire.—Pierce *v.* Wood, 23 N. H. 519, holding that in an action for money had and received, a contract which might be the foundation of an action may be offered as evidence of fraud by proving which the plaintiffs should be entitled to recover the money.

Pennsylvania.— Cummings *v.* Cummings, 5 Watts & S. 553 (holding that in an action to recover money which defendant received on an assignment obtained by fraud, it is competent to show that plaintiff in making the assignment acted in belief of the truth of defendant's representation); Gochenauer *v.* Good, 3 Penr. & W. 274.

Texas.— Nashville First Nat. Bank *v.* Edwards, (Civ. App. 1904) 81 S. W. 541.

Virginia.— Buena Vista Co. *v.* McCandlish, 92 Va. 297, 23 S. E. 781, holding that in assumpsit to recover a payment made on a contract under seal in which plaintiff's claim had been rescinded by the action of defendant, a contract is admissible in evidence, although not signed by plaintiffs, proof of its terms being material to plaintiff's case.

Wisconsin.— J. V. Le Clair Co. *v.* Rogers-Ruger Co., 124 Wis. 44, 102 N. W. 346.

Evidence admissible to establish defense.— *Alabama.*— Rutherford *v.* McIvor, 21 Ala. 750, holding that in an action to recover money overpaid by plaintiff to defendant, the fact of overpayment being contested, defendant may show plaintiff's inability to make it.

California.— Bradbury *v.* McClure, 93 Cal. 133, 28 Pac. 777; Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. 657, holding that where plaintiff offers evidence that defendant received moneys growing out of adventures of plaintiff and defendant, whether as joint owners or copartners, defendant is entitled to show that such moneys were disbursed in the due course of business.

Connecticut.—Hawley *v.* Sage, 15 Conn. 52.

Florida.— Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287, holding that any evidence is admissible on behalf of defendant which tends to show that he in good faith received the fund sought to be recovered as money due to himself and not to plaintiff.

Indiana.—Allen *v.* Jones, 1 Ind. App. 63, 27 N. E. 116.

Massachusetts.— Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451.

New York.— Andrews *v.* Moller, 37 Hun 480 (holding that where the defense consists merely of a claim for the payment of a sum in satisfaction of claims held against plaintiff, it is error to exclude any testimony going to prove the circumstances of the payment and the existence of the claims); Barney *v.* Fuller, 15 N. Y. Suppl 694 [*affirmed* in 133 N. Y. 605, 30 N. E. 1007].

North Carolina.— Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

Texas.— Rogers *v.* Patterson, 31 Tex. 605, holding that in a suit for money had and received by one firm for the use and benefit of another, defendant should be allowed to introduce proof to show what amount in value was had and received by defendants for their use.

Evidence held inadmissible see Brady *v.* Horvath, 167 Ill. 610, 47 N. E. 757 [*affirming* 64 Ill. App. 254]; Andrews *v.* Kramer, 77 Miss. 151, 25 So. 156; Mulligan *v.* Harlam, 46 Misc. (N. Y.) 571, 92 N. Y. Suppl. 765.

35. **For decisions in which questions as to the weight and sufficiency of evidence were considered** see the following cases:

Alabama.— Lytle *v.* Bowdon, 107 Ala. 361, 18 So. 130; Tankersley *v.* Childers, 23 Ala. 781.

California.— Petersen *v.* Taylor, (1893) 33 Pac. 436; Wallace *v.* Hopkins, (1888) 18 Pac. 673; Wendt *v.* Ross, 33 Cal. 650.

Colorado.— John G. Morgan Brokerage Co. *v.* Shemwell, 16 Colo. App. 185, 64 Pac. 379.

Georgia.— Cole *v.* Alexander, 113 Ga. 1154, 39 S. E. 477.

Iowa.— Johnson *v.* Leffingwell, 74 Iowa 114, 37 N. W. 10.

Kentucky.— Metropolitan L. Ins. Co. *v.* Monohan, 102 Ky. 13, 42 S. W. 924, 19 Ky. L. Rep. 992.

Louisiana.— Foote *v.* Godwin, 42 La. Ann. 517, 7 So. 844.

Maine.— Hewett *v.* Hurley, 88 Me. 431, 34 Atl. 274.

Massachusetts.— Cranson *v.* Ockington, 118 Mass. 409; Cutter *v.* Demmon, 111 Mass. 474; Hemenway *v.* Hemenway, 5 Pick. 389.

I. Amount of Recovery — **1. In General.** In an action for money had and received plaintiff can recover only such sum as in equity belongs to him,[36] and aside from interest which is considered in the following section,[37] he cannot in any event recover more than the sum actually received for his use by defendant.[38] Where defendant collects money for plaintiff the expenses of the collection may be deducted from the amount recovered,[39] unless he does so without authority;[40] but the amount recovered cannot be reduced by an amount which plaintiff orally requested defendant to pay to a third person, where defendant did not promise to comply with the request nor make the payment.[41] If money is contributed for illegal purposes only the unexpended balance of the amount so contributed is recoverable.[42] If the value of property taken in payment upon a contract is fixed at a certain amount and accepted as payment to that extent, in an action to recover back the amount paid, the actual value is the measure of recovery and *prima facie* the actual and stipulated value are identical.[43]

2. Interest. There is some conflict of opinion as to whether interest may be allowed in an action for money had and received; some of the English decisions hold that interest was not allowable.[44] This view was adopted by one American decision which held that interest was not allowable except in cases specially provided for by statute.[45] These decisions, however, are against the clear weight of authority, at least one decision holding without qualification that interest is allowable in an action for money had and received,[46] and the majority of Ameri-

New York.— Spear *v.* American Service Union, 179 N. Y. 582, 72 N. E. 1151; Mason *v.* Prendergast, 120 N. Y. 536, 24 N. E. 806; Groh *v.* Groh, 80 N. Y. App. Div. 851, 80 N. Y. Suppl. 438; Spear *v.* American Service Union, 76 N. Y. App. Div. 624, 78 N. Y. Suppl. 493; Oaksmith *v.* Baird, 19 N. Y. App. Div. 334, 46 N. Y. Suppl. 262; Crosby *v.* Clark, 80 Hun 426, 30 N. Y. Suppl. 329 [*affirmed* in 145 N. Y. 622, 40 N. E. 163]; Stacy *v.* Graham, 3 Duer 444 [*affirmed* in 14 N. Y. 492]; Barrett *v.* Smith, 37 Misc. 825, 76 N. Y. Suppl. 907; Gauld *v.* Lipman, 4 Misc. 78, 23 N. Y. Suppl. 778 [*reversing* 1 Misc. 475, 21 N. Y. Suppl. 464]; Glettner *v.* Blauner, 85 N. Y. Suppl. 374; Fox *v.* McComb, 18 N. Y. Suppl. 611; Murray *v.* Judah, 6 Cow. 484; Tuttle *v.* Mayo, 7 Johns. 132.

North Carolina.— Bond *v.* Hall, 53 N. C. 14.

North Dakota.— Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916.

Rhode Island.— Brady *v.* Messler, 27 R. I. 373, 62 Atl. 511.

Texas.— Basse *v.* Denniston, 39 Tex. 293.

Utah.—Tripler *v.* Mt. Pleasant Commercial, etc., Bank, 21 Utah 313, 61 Pac. 25.

Vermont.— Walker *v.* Taylor, 43 Vt. 612; Cummings *v.* Gassett, 19 Vt. 308.

West Virginia.— Riley *v.* Riley, 38 W. Va. 283, 18 S. E. 569.

Wisconsin.— J. V. Le Clair Co. *v.* Rogers-Ruger Co., 124 Wis. 44, 102 N. W. 346; Wilkinson *v.* Martin, 29 Wis. 471.

United States.— Turner *v.* Green, 24 Fed. Cas. No. 14,256, 2 Cranch C. C. 202.

36. Bennett *v.* Connelly, 103 Ill. 50. And see cases cited *infra*, note 38 *et seq.*

37. See *infra*, XI, I, 2.

38. *Illinois.*— Belden *v.* Perkins, 78 Ill. 449.

Maine.— Rand *v.* Nesmith, 61 Me. 111.

New Hampshire.— Frothingham *v.* Moore, 45 N. H. 545.

New York.— Robinson *v.* Corn Exch. Fire, etc., Nav. Ins. Co., 1 Rob. 14.

Rhode Island.— Fattori *v.* Vesella, 27 R. I. 177, 61 Atl. 143.

South Carolina.— Deens *v.* Neel, 1 Nott & M. 210.

United States.— Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504.

See 35 Cent. Dig. tit. "Money Received," § 73.

Application of rule.— In assumpsit for money had and received, brought for wrongfully selling property of plaintiff, he can recover only the sum received by defendant, not what the property converted was worth (Rand *v.* Nesmith, 61 Me. 111. And see Belden *v.* Perkins, 78 Ill. 449); so in assumpsit by a pledgor to recover the amount received by the pledgee for property of the pledgor sold by the pledgee and converted to his own use, plaintiff can only recover the surplus received by the pledgee over the amount with interest for which the pledge was made (Stiles *v.* Selinger, 2 Mackey (D. C.) 429).

39. Robinson *v.* Corn Exch. Fire, etc., Nav. Ins. Co., 1 Rob. (N. Y.) 14.

40. Hardie *v.* Turner, 9 Ala. 110.

41. Reed *v.* Foote, 36 Mo. App. 470.

42. Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327.

43. Bennett *v.* Phelps, 12 Minn. 326.

44. Tattenden *v.* Randall, 2 B. & P. 472; Walker *v.* Constable, 1 B. & P. 306, 2 Esp. 659. And see De Bernales *v.* Fuller, 2 Campb. 426, 14 East 590 note, 11 Rev. Rep. 755; De Haviland *v.* Bowerbank, 1 Campb. 50.

45. Hawkins *v.* Johnson, 4 Blackf. (Ind.) 21.

46. Barelli *v.* Brown, 1 McCord (S. C.) 449, 10 Am. Dec. 683.

can decisions recognizing the right to recover interest but attaching some qualifications to this right. The better view seems to be that whether interest shall be recovered must depend upon the justice and equity of the case.[47] Thus it has been held that interest is allowable where money was obtained by fraud, oppression, or extortion,[48] or in case a count is based on an interest bearing demand.[49] So it has been held that interest is recoverable on a claim against an agent for money received from the time of demand by the owner and neglect or refusal on his part to pay,[50] but only from that time;[51] and if money be paid to a lawyer for services to be performed at a future day, interest on the amount paid is recoverable from the time he neglects or refuses to perform the services.[52]

J. Trial, Judgment, and Review — 1. Reception of Evidence. Under a count for money had and received, money fraudulently taken from plaintiff by defendant may be recovered, although not designated as such in plaintiff's specification of claim, if no objection be made on that ground by defendant, until all the evidence in the case has been introduced.[53]

2. Questions For Jury. In actions for money had and received, as in other civil actions, questions of law are for the court and questions of fact for the jury.[54]

3. Instructions. The general rules governing instructions in civil actions apply in actions for money had and received.[55] Thus instructions should not be given where there is no evidence on which to base them,[56] or which are based on theories inapplicable to the case as made,[57] or which place the burden of proof on the wrong party.[58] Where there is any evidence to go to the jury, the court should not direct a verdict;[59] a verdict, however, should be directed where a different verdict would be set aside as contrary to the evidence.[60]

4. Verdict and Judgment. The general rules relating to the requisites and

47. Pease *v.* Barber, 3 Cai. (N. Y.) 266, 267, in which it was said: "There may be cases in which the defendant ought to refund the principal merely, and there may be other cases where he ought, *ex æquo et bono*, to refund the principal with interest. Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed on the trial." And see cases cited in subsequent notes in this section.

48. Bulow *v.* Goddard, 1 Nott & M. (S. C.) 45, 9 Am. Dec. 663; Gillespie *v.* Evans, 10 S. D. 234, 72 N. W. 576.

Refusal to pay except on release of suit.— Defendant refused to pay over to plaintiff a sum of money received for plaintiff's use unless he would release a suit then pending against defendant for a distinct matter. It was held that plaintiff was entitled to recover interest from the time of the demand. Black *v.* Goodman, 1 Bailey (S. C.) 201.

49. Marvin *v.* McRae, Cheves (S. C.) 61.

50. Benton *v.* Craig, 2 Mo. 198; Pearse *v.* Green, 1 Jac. & W. 135, 20 Rev. Rep. 258, 37 Eng. Reprint 327; Harsant *v.* Blaine, 56 L. J. Q. B. 511.

51. Hunt *v.* Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616.

52. Benton *v.* Craig, 2 Mo. 198.

53. Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83.

54. **Decisions holding that facts were properly submitted to jury.**— *Illinois.*— Level *v.* Chadhourne, 99 Ill. App. 171.

Iowa.— House *v.* Bowman, 97 Iowa 223, 66 N. W. 165.

Maine.— Hathaway *v.* Burr, 21 Me. 567, 38 Am. Dec. 278.

Massachusetts.— Bradley *v.* Poole, 98 Mass. 169, 93 Am. Dec. 144.

Michigan.— Shouldice *v.* McLeod, 130 Mich. 444, 90 N. W. 288.

New York.— Rosenberg *v.* Block, 118 N. Y. 329, 23 N. E. 190 [*reversing* 54 N. Y. Super. Ct. 537]; Seeber *v.* People's Bldg., etc., Assoc., 54 N. Y. App. Div. 626, 66 N. Y. Suppl. 1144 [*affirming* 36 N. Y. App. Div. 312, 55 N. Y. Suppl. 364]; Barney *v.* Fuller, 15 N. Y. Suppl. 694 [*affirmed* in 133 N. Y. 605, 30 N. E. 1007].

Pennsylvania.— Steele *v.* Wisner, 141 Pa. St. 63, 21 Atl. 527; Hart *v.* Girard, 56 Pa. St. 23; Hoop *v.* Anderson, 7 Pa. Cas. 501, 11 Atl. 544.

See 35 Cent. Dig. tit. "Money Received," § 76.

55. See, generally, Trial.

56. Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. 783.

57. Feiertag *v.* Feiertag, 73 Mich. 297, 41 N. W. 514.

58. See Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83, holding, however, that the instruction in that case was not objectionable for so doing.

59. Donovan *v.* Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. N. S. 176 [*affirming* 119 Ill. App. 116]; Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

60. Gulager *v.* Splitnose, 3 Indian Terr. 372, 58 S. W. 576; Levy *v.* Terwilliger, 10

sufficiency of verdicts and judgments in civil actions apply in actions for money had and received.[61]

5. REVIEW. The general rules relating to appellate review apply in actions for money had and received.[62]

MONEYS ADVANCED. See ADVANCES.[1]

MONEY SCRIVENER. In England a person, usually an attorney or solicitor, whose business it was to look up investments, see to perfecting the securities, and generally collect the interest.[2]

MONGOLIAN. A term applied to the yellow race occupying Tartary, China, Japan, etc.[3] (See ALIENS.)

MONITION. A summons or citation;[4] a process in the nature of a summons.[5] In English ecclesiastical law, a species of penalty applicable to clergymen and laymen.[6] (Monition: In General, see PROCESS. In Admiralty, see ADMIRALTY.)

MONOMANIA. Mania on one subject;[7] a derangement of mental faculties which is confined to some particular idea or object of desire or aversion;[8] a derangement of a single faculty of the mind or with regard to a particular subject only;[9] a form of insanity in which the subject may be sane on every topic but one, but is insane on some particular topic;[10] a mental or moral perversion, or both, in regard to some particular subject or class of subjects, while in regard to others the person seems to have no such morbid affection;[11] a perversion of the understanding in regard to a single object or a small number of objects, with the predominance of mental excitement, as distinguished from mania.[12] (See INSANE PERSONS, and Cross-References Thereunder.)

MONOMANIAC. A person who is deranged in a single faculty of his mind, or in regard to a particular subject only;[13] a person who is insane upon one or more

Daly (N. Y.) 194; Chamberlin *v.* Leslie, 65 Vt. 62, 25 Atl. 904.

61. See, generally, JUDGMENTS; VERDICTS. And see Pells *v.* Snell, 130 Ill. 379, 23 N. E. 117 [*reversing* 31 Ill. App. 158]; Metropolitan L. Ins. Co. *v.* Trende, 53 S. W. 412, 21 Ky. L. Rep. 909; Byxbie *v.* Wood, 24 N. Y. 607; Quimby *v.* Carhart, 57 N. Y. Super. Ct. 452, 9 N. Y. Suppl. 307; Aycinena *v.* Peries, 6 Watts & S. (Pa.) 243.

62. **Objections not raised below not considered on appeal.**— Dick *v.* Eddings, 42 Ill. App. 488.

Judgment not reversed for technical errors which are harmless.— Lewis *v.* Andrews, 3 Silv. Sup. (N. Y.) 165, 6 N. Y. Suppl. 247 [*affirmed* in 127 N. Y. 673, 27 N. E. 1044]; Gould *v.* Baker, 12 Tex. Civ. App. 669, 35 S. W. 708.

Where court equally divided judgment affirmed.— Tranter *v.* Porter, 207 Pa. St. 279, 56 Atl. 539.

Conclusiveness of verdict on question of fact.— On appeal in an action for money had and received by defendant for plaintiff's use, the court, after a verdict for the latter for the amount asked, must conclude that the allegations of the complaint are true. Peterson *v.* Foss, 12 Oreg. 81, 6 Pac. 397.

1. See 1 Cyc. 966. See also Tyson *v.* Halifax Tp., 51 Pa. St. 9, 21.

2. Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325, 328, where it is said: "And are oftentimes intrusted with the possession of the securities and the receipt of the principal loaned."

3. Webster Dict. [*quoted* in *In re* Ah Yup, 1 Fed. Cas. No. 104, 5 Sawy. 155, 6 Cent. L. J. 387, 17 Alb. L. J. 385, holding that the term does not include a white person].

4. Wharton L. Lex.

5. Bouvier L. Dict. [*cited* in St. Louis *v.* Richeson, 76 Mo. 470, 484].

6. Mackonochie *v.* Penzance, 6 App. Cas. 424, 437, 45 J. P. 584, 50 L. J. Q. B. 611, 44 L. T. Rep. N. S. 479, 29 Wkly. Rep. 633.

7. Hopps *v.* People, 31 Ill. 385, 390, 83 Am. Dec. 231.

Distinguished from "eccentricity" in Ekin *v.* McCracken, 11 Phila. (Pa.) 534, 535.

8. Owings' Case, 1 Bland (Md.) 370, 388, 17 Am. Dec. 311.

9. Schuff *v.* Ransom, 79 Ind. 458, 464; Freed *v.* Brown, 55 Ind. 310, 317; People *v.* Lake, 2 Park. Cr. (N. Y.) 215, 218; State *v.* John, 30 N. C. 330, 337, 49 Am. Dec. 396. See also Dunham's Appeal, 27 Conn. 192, 206; Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 2 Abb. 507, 4 Sawy. 672.

10. Merritt *v.* State, 39 Tex. Cr. 70, 78, 45 S. W. 21.

11. *In re* Black, Myr. Prob. (Cal.) 24, 28, where it is said: "The degrees of monomania are very various. In many cases the person is entirely capable of transacting any matters of business out of the range of his peculiar infirmity; and as to those matters out of that range, he may be entirely sound, while as to matters within the range of the infirmity he may be quite unsound."

12. Matter of Gannon, 2 Misc. (N. Y.) 329, 333, 21 N. Y. Suppl. 960.

13. Young *v.* Miller, 145 Ind. 652, 653, 44 N. E. 757.

subjects, whether it relates to one or more persons or things, and is apparently sane upon all others;[14] a person who is rational on all subjects except one, and with respect to that subject exhibits the ordinary deportment and sagacity of a weakened mind.[15] (See INSANE PERSONS, and Cross-References Thereunder.)

MONOPOLIA DICITUR, CUM UNUS SOLUS ALIQUOD GENUS MERCATURÆ UNIVERSUM EMIT, PRETIUM AD SUUM LIBITUM STATUENS. A maxim meaning "It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure."[16]

14. Colhoun *v.* Jones, 2 Redf. Surr. (N. Y.) 34, 37, where the competency of such a person to make a will is discussed.

15. Thompson *v.* Thompson, 21 Barb. (N. Y.) 107, 120.

16. Black L. Dict.

MONOPOLIES

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Validity of Grant of Privilege or Immunity, see CONSTITUTIONAL LAW.

I. INTRODUCTION.

A. In General. As limited in this article, the subject of monopolies divides itself into two general problems depending upon whether the monopoly in question is a special franchise granted by the state[1] or whether it was brought about by private parties.[2] And as will be seen later monopolization, however created, has generally been regarded in modern times as opposed to the best interests of the whole people, depriving them, as it may, of their livelihood and enhancing, as is its tendency, the prices they must pay.[3]

B. Historical — 1. MEDIEVAL FRANCHISES. The medieval system was based upon the establishment of special privileges for certain persons which enabled

1. See *infra*, II.
2. See *infra*, III.
3. See *infra*, II; III; IV.

Strong language against monopolization may be found in the following cases:

Alabama.— Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110, 28 So. 669, 85 Am. St. Rep. 125, 50 L. R. 175.

California.— Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102.

Illinois.— Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200.

Louisiana.— India Bagging Assoc. *v.* Kock, 14 La. Ann. 168.

Massachusetts.— Alger *v.* Thacher, 19 Pick. 51, 31 Am. Dec. 119. But see Perkins *v.* Lyman, 9 Mass. 522.

Michigan.— Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

Nebraska.— State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155.

New York.— People *v.* Duke, 19 Misc. 292, 44 N. Y. Suppl. 336.

Ohio.— State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

United States.— Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136.

England.— Darcey *v.* Allen, 11 Coke 84.

See 35 Cent. Dig. tit. "Monopolies," § 1 *et seq.*

But see Jones *v.* Fell, 5 Fla. 510; Presbury *v.* Fisher, 18 Mo. 50; West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

those who possessed them to exclude others from defined activities. Thus, various franchises accompanied the manorial system — frankfold and park, warren and piscary, smithy and bake-house, mill and market.[4] While in the towns were the gild merchant with its monopoly of trading and the various craft gilds, having special rights in various manufactures.[5] These general arrangements by special franchises were well accepted at the time, so in accordance were they with medieval ideals.

2. Patents of Monopoly. Toward the end of the sixteenth century the grant of special patents of monopoly by the crown, originally instituted as a method of encouragement of new industries and large enterprises, as glass and steel, was felt to become a so great abuse when patents were granted for ordinary trades and commodities, as oil and leather, that all monopolies were decried.[6]

3. Monopolization by Individuals. Under the early law it was punishable to bring about monopoly either by combined action or by individual initiative.[7] Attempts to gain control of the market whether by forestalling[8] and regrating[9] or by engrossing[10] were opposed to the common law, it seems;[11] at all events, there was much legislation[12] declaring them criminal.[13]

4. Conspiracies Against Trade.[14] From the earliest times[15] it was considered a serious matter if several combined to control trade or enhance price,[16] whether or not the conspiracy was carried out or individuals were harmed.[17]

5. Contracts in Restraint of Trade.[18] In consequence of all this, from the

4. See Y. B. 11 Hen. VI, 19; Hix *v.* Gardiner, 2 Bulstr. 195; Fermor *v.* Brooke, Cro. Eliz. 203; Fitzwalter's Case, 3 Keb. 242, all early English cases.

5. See other early cases such as London's Case, 5 Coke 126; Freemantle *v.* Silk Throwsters, 1 Lev. 229; Davenant *v.* Hurdis, Moore K. B. 576, 72 Eng. Reprint 769; London Gunmakers *v.* Fell, Willes 384.

6. Case of Monopolies, 11 Coke 84*b*. The court resolved in this case that the granting the exclusive privilege of making cards within the realm was a monopoly and against the common law for four reasons: (1) That all trades by which men maintained themselves and increase their substance are profitable for the commonwealth and therefore a grant of an exclusive privilege in one of them is against the common law as a restriction of liberty; (2) that a monopoly is a prejudice to all subjects, for there are three inseparable incidents to every monopoly, viz., (*a*) that the price of the same commodity will be raised, (*b*) that the commodity will not be so good and merchantable as before, and (*c*) that it tends to the impoverishment of those excluded; (3) the queen was deceived in her grant, for the grant recites that it is for the public weal; (4) that the grant was *prima impressionis* without authority of law or reason.

7. 4 Bacon Abr. 335*a*; and Hawkins P. C. c. 80.

8. **Forestalling** consisted of buying up necessaries on their way to market, or contracting for the control of anything coming toward market, or even of holding out inducements to producers to raise their prices or to withhold their commodities from the market. See Botelor *v.* Washington, 3 Fed. Cas. No. 1,685, 2 Cranch C. C. 676.

9. **Regrating** consisted of buying up necessaries after they had reached market with intent to resell in the same market at an enhanced price, or even the contracting for the delivery of goods in advance of the market with like intent. See Rex *v.* Rusby, 2 Peake N. P. 189.

10. **Engrossing** was the most comprehensive of these offenses, covering all buying of necessaries at markets or elsewhere with intent to sell again, and especially much buying of this sort with intent to control the market. See Rex *v.* Maynard, Cro. Car. 231.

11. Rex *v.* Waddington, 1 East 143, 6 Rev. Rep. 238.

12. See 5 & 6 Edw. VI, c. 14, repealed by 7 & 8 Vict. c. 24.

13. See discussion of the influence of this early law upon the later law in Meredith *v.* New Jersey Zinc, etc., Co., 55 N. J. Eq. 211, 37 Atl. 539; Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant Ch. (U. C.) 540.

14. **Conspiracy against trade** see CONSPIRACY, 8 Cyc. 634, 651 *et seq.*

15. See the Lombard's Case, Lib. Assiz. 276 Pl. 38, an indictment for promoting the enhancing of the price of merchandise.

16. In Anonymous, 12 Mod. 248, leave was granted to file an information against several plate button makers for combining by covenants not to sell under a set rate, and Lord Holt said: "It is fit that all confederacies, by those of trade to raise their rates, should be suppressed."

17. In the leading case of Rex *v.* Cambridge Journeymen-Taylors, 8 Mod. 10, one Wise and others were indicted for a conspiracy among themselves to raise their wages, and were found guilty. Upon motion for arrest of judgment the court held that it was proper to indict for the conspiracy itself, regardless of whether it had been carried out.

18. **Contract in restraint of trade** see CONTRACTS, 9 Cyc. 523 *et seq.*

earliest times[19] contracts or arrangements in restraint of trade or labor[20] were held unenforceable as against public policy.[21]

II. MONOPOLIES CREATED BY FRANCHISES.[22]

A. Capacity to Grant Franchises — 1. When Granted by Legislatures. It is generally held that state legislatures may grant exclusive franchises even despite general or special constitutional provisions against deprivation of liberty and property, where this is shown in the particular case to be justified as a measure for the safety or interest of the public.[23] But in some few decisions exclusive franchises

19. See Y. B. 2 Hen. V, f. 5, pl. 26, where in an action of debt on an obligation with a condition against the use of the art of dyer's craft within a town for a certain time, Hull interrupted counsel with: "In my opinion you might have demurred upon him, that the obligation is void, for that the obligation is against the common law, and by God if the plaintiff were here, he should go to prison until he paid a fine to the king." See also Jelliet *v.* Broad, Noy 98, 74 Eng. Reprint 1064.

20. In Claygate *v.* Batchelor, Owen 143, 74 Eng. Reprint 961, a bond against using the trade of haberdasher within certain cities was put in issue "and all the justices agreed that the condition was against law, and then all is voyd, for it is against the liberty of a free-man, and against the statute of Magna Carta, cap. 20, and is against the commonwealth." See also Clerke *v.* Comer, Cas. t. Hardw. 53.

21. The modern distinctions have their beginning in Mitchel *v.* Reynolds, 1 P. Wms. 181, 24 Eng. Reprint 347. See CONTRACTS, 9 Cyc. 523 *et seq.*, for elaborate citation of cases.

22. Franchise generally see 19 Cyc. 1451 *et seq.*

Monopoly as franchise or privilege defined see *Ex p.* Levy, 43 Ark. 42, 53, 51 Am. Rep. 550; San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 559, 41 Pac. 495, 29 L. R. A. 839; Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19, 38; Barbee *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 262, 268; State *v.* Haworth, 122 Ind. 462, 482, 23 N. E. 946, 7 L. R. A. 240 [*citing* Black L. Dict.]; Darcantel *v.* People's Slaughterhouse, etc., Co., 44 La. Ann. 632, 642, 11 So. 239; Wright *v.* State, 88 Md. 436, 443, 41 Atl. 795; Davenport *v.* Kleinschmidt, 6 Mont. 502, 529, 13 Pac. 249 [*quoting* Bouvier L. Dict.; Rapalje & L. L. Dict.]; Thrift *v.* Elizabeth City Town Com'rs, 122 N. C. 31, 37, 30 S. E. 349, 44 L. R. A. 427; Patterson *v.* Wollmann, 5 N. D. 608, 615, 67 N. W. 1040, 33 L. R. A. 536; Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 689, 41 Pac. 635; Leeper *v.* State, 103 Tenn. 500, 514, 53 S. W. 962, 48 L. R. A. 167; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495, 529; U. S. *v.* E. C. Knight Co., 156 U. S. 1, 9, 15 S. Ct. 249, 39 L. ed. 325; Butchers' Union Slaughter-House Co. *v.* Crescent City Live-Stock Landing Co., 111 U. S. 746, 755, 4 S. Ct. 652, 28 L. ed. 585 [*quoted* in Marshall, etc., Co. *v.* Nashville, 109 Tenn. 495, 508, 71 S. W. 815]; New Orleans Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 533, 20 L. ed. 33; Charles River Bridge *v.* Warren Bridge, 13 Pet. (U. S.) 420, 567, 9 L. ed. 773, 938; International Tooth Crown Co. *v.* Hanks Dental Assoc., 111 Fed. 916, 917; Bartholomew *v.* Austin, 85 Fed. 359, 364, 29 C. C. A. 568; Laredo *v.* International Bridge, etc., Co., 66 Fed. 246, 248, 14 C. C. A. 1; U. S. *v.* Trans-Missouri Freight Assoc., 53 Fed. 440, 452 [*affirmed* in 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 (*reversed* in 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007)]; *In re* Greene, 52 Fed. 104, 115; Atty.-Gen. *v.* Rumford Chemical Works, 32 Fed. 608, 617; Allen *v.* Hunter, 1 Fed. Cas. No. 225, 6 McLean 303, 305; Camblos *v.* Philadelphia, etc., Co., 4 Fed. Cas. No. 2,331, 4 Brewst. (Pa.) 563, 9 Phila. (Pa.) 411; Thompson *v.* Haight, 23 Fed. Cas. No. 13,957; Case of Monopolies, 11 Coke 84*b*, 86.

23. *Connecticut.*— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Illinois.—People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244.

Indiana.—Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238.

Iowa.— Brady *v.* Mattern, 125 Iowa 158, 100 N. W. 358, 106 Am. St. Rep. 291.

Louisiana.— Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239; Crescent City Gaslight Co. *v.* New Orleans Gaslight Co., 27 La. Ann. 138.

Maryland.— Broadway, etc., Ferry Co. *v.* Hankey, 31 Md. 346.

Minnesota.— Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

Mississippi.— B. T. Johnson Pub. Co. *v.* Mills, 79 Miss. 543, 31 So. 101; Martin *v.* O'Brien, 34 Miss. 21.

New York.— People *v.* City Prison Warden, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718.

North Carolina.— Guy *v.* Cumberland County, 122 N. C. 471, 29 S. E. 771. But see Washington Toll Bridge Co. *v.* Beaufort, 81 N. C. 491; McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

North Dakota.— State *v.* Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420.

South Carolina.— State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; McCul-

have been said to be unconstitutional as monopolies, since opposed either to general or special constitutional provisions.[24]

2. When Created by Subordinate Bodies — a. By Ordinance. The authorities are divided upon the question whether a municipality or other subordinate governmental body may grant exclusive franchises in the exercise of general powers. Where it is a question of the public health and safety it is generally held that exclusive rights may be given by ordinance,[25] although in some cases it is intimated that such provisions are invalid upon the ground that monopolies are thereby created in derogation of common rights.[26] If exclusive rights may be given, *a fortiori* it may be provided that those who wish to pursue such special callings must obtain licenses from the proper authorities.[27] But where it is a question simply of the public benefit and convenience, the weight of authority seems to be that a municipality or other subordinate governmental body may not, unless specially authorized by the state legislature, grant exclusive franchises;[28] however, there are cases both in the state and federal courts which

lough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

Tennessee.— Memphis *v.* Memphis Water Co., 5 Heisk. 495.

United States.—Olsen *v.* Smith, 195 U. S. 332, 25 S. Ct. 52, 49 L. ed. 224; New Orleans Butchers Benev. Assoc. *v.* Crescent City Live-stock Landing, etc., Co., 16 Wall. 36, 21 L. ed. 394; Lowenstein *v.* Evans, 69 Fed. 908; Barthet *v.* New Orleans, 24 Fed. 563.

See 35 Cent. Dig. tit. "Monopolies," § 2.

Unconstitutionality because of discrimination.— A statute confining the business of banking to corporations is unconstitutional as discrimination against individuals. State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477. *Contra*, Com. *v.* Vrooman, 164 Pa. St. 306, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250.

24. *Connecticut.*— Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

Iowa.— State *v.* Santee, 111 Iowa 1, 82 N. W. 445, 82 Am. St. Rep. 489, 53 L. R. A. 763.

Kentucky.— Com. *v.* Bacon, 13 Bush 210, 26 Am. Rep. 189.

Missouri.— St. Louis Gaslight Co. *v.* St. Louis Gas, etc., Co., 16 Mo. App. 52.

South Dakota.— State *v.* Sougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

Texas.— Brenham *v.* Becker, I Tex. App. Civ. Cas. § 1243.

See 35 Cent. Dig. tit. "Monopolies," § 2; and, generally, Constitutional Law, 8 Cyc. 1036 *et seq.*; and, generally, Statutes.

Judicial reports.— The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens, and it is against sound public policy to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices, by an exclusive arrangement with any publisher. Nash *v.* Lathrop, 142 Mass. 29, 6 N. E. 559.

25. *Connecticut.*— State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

Indiana.— Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Kentucky.— Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605, 8 Ky. L. Rep. 361.

Maine.— State *v.* Robb, 100 Me. 180, 60 Atl. 874.

Michigan.— Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269.

Missouri.— State *v.* Fisher, 52 Mo. 174.

Nebraska.—Coombs *v.* MacDonald, 43 Nebr. 632, 62 N. W. 41.

Virginia.— Roanoke Cemetery Co. *v.* Goodwin, 101 Va. 605, 44 S. E. 769.

United States.— California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 26 S. Ct. 100, 50 L. ed. 204; National Fertilizer Co. *v.* Lambert, 48 Fed. 458.

See 35 Cent. Dig. tit. "Monopolies," § 2. See also Constitutional Law, 8 Cyc. 1036 *et seq.*; and, generally, Municipal Corporations.

26. Bloomington *v.* Wahl, 46 Ill. 489; Danville *v.* Moone, 103 Ill. App. 290; *In re* Lowe, 54 Kan. 757, 39 Pac. 710, 27 L. R. A. 545; Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895; Barthet *v.* New Orleans, 24 Fed. 563.

27. *Colorado.*— Ouray *v.* Corson, 14 Colo. App. 345, 59 Pac. 876.

Connecticut.— State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 24 L. R. A. 279.

Louisiana.— State *v.* Payssan, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. Rep. 390.

Maryland.— Boehm *v.* Baltimore, 61 Md. 259.

Massachusetts.— *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351.

Michigan.—People *v.* Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524.

License generally see Licenses, 25 Cyc. 593 *et seq.*

28. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616, *semble*.

Connecticut.— Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

Iowa.—Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261.

North Carolina.— Thrift *v.* Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.

Ohio.— Morrow County Illuminating Co. *v.* Mt. Gilead, 10 Ohio S. & C. Pl. Dec. 235, 8 Ohio N. P. 669.

hold that such franchises may be granted by a municipality or such like body without explicit powers.[29]

b. By Contract. A contract between a municipality or other subordinate governmental body and private parties for the supply of something or the performance of some service is not generally held invalid as creating a monoply, although the governmental body is to that extent disabled from making the same arrangement with other parties;[30] but some courts object even to such contracts at times as exclusive.[31]

B. For What Franchises May Be Granted — 1. Public Health — a. Removal of Offal. It is generally agreed that in providing for the removal of house offal and like matter dangerous to health exclusive powers may be given to one concern.[32] But as to other waste matter not particularly dangerous, such as ashes and cinders, the rule seems to be that the owners should be permitted, if they choose, to make other arrangements than those provided by the municipal authorities.[33] And as to more valuable property such as the bodies of dead animals which are not immediately noxious, the distinction is established that while the owner must be allowed a reasonable time to dispose of them in his own way, the public authorities may give to one concern exclusive power to remove them thereafter.[34]

Oklahoma.— Territory *v.* De Wolfe, 13 Okla. 454, 74 S. W. 98.

Texas.— Edwards County *v.* Jennings, 89 Tex. 618, 38 S. W. 1053; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383; Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143.

United States.— Illinois Trust, etc., Bank *v.* Arkansas City Water Co., 67 Fed. 196.

29. Grant *v.* Davenport, 36 Iowa 396; St. Joseph Plank Road Co. *v.* Kline, 106 La. 325, 30 So. 854; Laredo *v.* International Bridge, etc., Co., 66 Fed. 246, 14 C. C. A. 1.

Non-exclusive franchises.— If by proper construction the franchise granted is not exclusive, but leaves the possibility of authorizing others to perform the same services, it will more often be held that the municipality has not exceeded its powers in granting the franchise. Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239.

30. *Alabama.*— Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345.

California.— People *v.* State Bd. of Education, 49 Cal. 684.

Colorado.— Denver *v.* Huhbard, 17 Colo. App. 346, 68 Pac. 993.

Illinois.— Lake View Schools *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

Indiana.— Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240.

Iowa.— Davenport Gas, etc., Co. *v.* Davenport, 124 Iowa 22, 98 N. W. 892.

Michigan.— Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309.

Mississippi.— Reid *v.* Trowbridge, 78 Miss. 542, 29 So. 167.

Montana.— Campana *v.* Calderhead, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277.

Ohio.—State *v.* Columbus Bd. of Education, 35 Ohio St. 368.

Pennsylvania.— Baily *v.* Philadelphia, 184 Pa. St. 594, 39 Atl. 494, 63 Am. St. Rep. 812, 39 L. R. A. 837.

Tennessee.— Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

Washington.—Rand *v.* Hartranft, 29 Wash. 591, 70 Pac. 77.

United States.—Bartholomew *v.* Austin, 85 Fed. 359, 29 C. C. A. 568.

Canada.— Taylor *v.* Montreal Harbour Com'rs, 17 Quebec Super. Ct. 275.

See, generally, Municipal Corporations.

31. Morrow County Illuminating Co. *v.* Mt. Gilead, 10 Ohio S. & C. Pl. Dec. 235, 8 Ohio N. P. 669; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.

32. *Connecticut.*— State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

District of Columbia.— Dupont *v.* District of Columbia, 20 App. Cas. 477.

Indiana.—Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. Rep. 222, 28 L. R. A. 679, 683.

Maine.— State *v.* Robb, 100 Me. 180, 60 Atl. 874.

Massachusetts.— *In re* Vandine, 6 Pick. 187, 17 Am. Dec. 351.

Michigan.— Grand Rapids *v.* De Vries, 123 Mich. 570, 82 N. W. 269.

Nebraska.—Coombs *v.* MacDonald, 43 Nebr. 632, 62 N. W. 41.

Ohio.— Morgan *v.* Cincinnati, 9 Ohio Dec. (Reprint) 280, 12 Cinc. L. Bul. 41.

United States.— California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 26 S. Ct. 100, 50 L. ed. 204; National Fertilizer Co. *v.* Lambert, 48 Fed. 458.

But see *In re* Lowe, 54 Kan. 757, 39 Pac. 710, 27 L. R. A. 545.

Garbage defined see 20 Cyc. 967.

33. Iler *v.* Ross, 64 Nebr. 710, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895; Kussel *v.* Erie, 8 Pa. Dist. 105.

34. *Kentucky.*— Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605, 8 Ky. L. Rep. 361.

b. Slaughtering of Animals. Upon similar principles the slaughtering of animals may be confined to defined places, the proprietors of which may be given special rights.[35]

2. Public Safety — a. Sale of Liquor.[36] In pursuance of general police powers legislation which restricts to the state itself or to its licensees the sale of intoxicating liquors is not held to be invalid as creating monopoly.[37]

b. Fiduciary Businesses. It is generally assumed that the banking business may for the protection of the public be confined to certain kinds of institutions,[38] and for similar reasons restrictions may be placed upon the business of issuing insurance policies,[39] entering into bonds of guaranty,[40] or selling tickets.[41]

c. Skilled Employments. It has been often decided that the police power of the state justifies the limitation of skilled employments to those who have demonstrated their fitness to engage in them.[42] Such restrictions are very rarely held unconstitutional as creating monopolies, although the point has been raised as to doctors,[43] druggists,[44] pilots,[45] and plumbers,[46] to cite prominent examples. But if there is no peculiar need of such regulation, as for instance in the making of cigars,[47] baiting animals,[48] shoeing horses,[49] or selling merchandise,[50] the legislation will be declared unconstitutional as tending to create monopoly.

Louisiana.—State *v.* Morris, 47 La. Ann. 1660, 18 So. 710.

Missouri.— River Rendering Co. *v.* Behr, 77 Mo. 91, 46 Am. Rep. 6; State *v.* Fisher, 52 Mo. 174.

New York.— Underwood *v.* Green, 42 N. Y. 140.

United States.— Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631.

35. Boyd *v.* Montgomery, 117 Ala. 677, 23 So. 663; Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239 [*qualifying* doctrine of Howell *v.* Butchers' Union Slaughterhouse, etc., Co., 36 La. Ann. 63]; New Orleans Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394. *Contra,* Bloomington *v.* Wahl, 46 Ill. 489.

36. **Intoxicating liquor** generally see Intoxicating Liquors, 23 Cyc. 43 *et seq.*

37. *Arkansas.*— *Ex p.* Levy, 43 Ark. 42, 51 Am. Rep. 550.

Georgia.— Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.

North Carolina.— Guy *v.* Cumberland County, 122 N. C. 471, 29 S. E. 771.

South Carolina.— State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345 [*overruling* McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410].

United States.— Lowenstein *v.* Evans, 69 Fed. 908.

38. People *v.* San Francisco, 100 Cal. 105, 34 Pac. 492; Brady *v.* Mattern, 125 Iowa 158, 100 N. W. 358, 106 Am. St. Rep. 291; State *v.* Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420. *Contra,* State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

39. The business of issuing insurance may be limited to corporations organized under strict limitations. Com. *v.* Vrooman, 164 Pa. St. 306, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250. See also Exempt Firemen's Benev. Fund. *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 317.

40. The business of guaranty and surety companies may also be restricted by law. Johnson *v.* Johnson, 88 Ky. 275, 11 S. W. 5, 10 Ky. L. Rep. 860; Holmes *v.* Tennessee Coal, etc., R. Co., 49 La. Ann. 1465, 22 So. 403.

41. Statutes may properly confine the business of buying and selling tickets to the authorized agents of the issuing company without creating illegal monopoly.

Illinois.— Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 41 Am. St. Rep. 329, 24 L. R. A. 152.

Indiana.— Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238.

Minnesota.— State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.

New York.—People *v.* City Prison Warden, 26 N. Y. App. Div. 228, 50 N. Y. Suppl. 56.

Texas.— Jannin *v.* State, 42 Tex. Cr. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821.

42. See Constitutional Law, 8 Cyc. 889 *et seq.*

43. See State *v.* Wilcox, 64 Kan. 789, 68 Pac. 634.

Doctor generally see Physicians and Surgeons.

44. See State *v.* Forcier, 65 N. H. 42, 17 Atl. 577.

Druggist or pharmacist generally see Druggists.

45. Olsen *v.* Smith, 195 U. S. 332, 25 S. Ct. 52, 49 L. ed. 224.

Pilot generally see Pilots.

46. See People *v.* City Prison Warden, 144 N. Y. 529, 30 N. E. 686, 27 L. R. A. 718.

47. *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

48. Com. *v.* Bacon, 13 Bush (Ky.) 210, 26 Am. Rep. 189.

49. Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

50. Thousand Island Park Assoc. *v.* Tucker, 173 N. Y. 203, 65 N. E. 975.

3. Public Institutions — a. Public Schools.[51] In the management of public institutions, such as schools are, exclusive contracts may be made for the provision of school-books, which will not be held unconstitutional as fostering monopoly, even when exclusive arrangements are made with certain publishers.[52]

b. Public Works. Upon similar principles governmental bodies may make such special arrangements as they please in the construction of public works,[53] or the management of public properties.[54]

4. Public Services — a. Transportation. In regulating those public services which have to do with transportation, it is undoubtedly permissible to grant exclusive franchises, notwithstanding legal monopolies are thereby created. This applies to common carriers by land and water, as railways[55] and ferries,[56] to turnpikes[57] and toll bridges,[58] and to wharves and landings.[59]

b. Public Utilities. It is equally true of other public utilities that exclusive franchises do not create illegal monopolies. Thus no illegal monopolies are created by exclusive franchises for gas[60] and electric lighting[61] or for water and

51. Public schools generally see Colleges and Universities; Schools and School-Districts.

52. *Alabama.*— Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345.

California.— People *v.* Oakland Bd. of Education, 55 Cal. 331.

Illinois.— Lake View Schools *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

Indiana.— State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240.

Maryland.— Baltimore City School Com'rs *v.* State Bd. of Education, 26 Md. 505.

Michigan.— Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309.

Minnesota.— Curryer *v.* Merrill, 25 Minn. 1, 33 Am. Rep. 450.

Mississippi.— B. T. Johnson Pub. Co. *v.* Mills, 79 Miss. 543, 31 So. 101.

Montana.— Campana *v.* Calderhead, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277.

Nevada.— State *v.* State Bd. of Education, 18 Nev. 173, 1 Pac. 844.

Ohio.— State *v.* Columbus Bd. of Education, 35 Ohio St. 368.

Tennessee.— Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

Washington.—Rand *v.* Hartranft, 29 Wash. 591, 70 Pac. 77.

United States.— Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

53. See *infra*, this note.

Asphalting streets.— The specification by a municipal council, in its resolutions and ordinances for street improvements, that Trinidad lake asphalt shall be the material used does not constitute a monopoly because this particular kind of asphalt is a product of a foreign country, and there are deposits in several of the United States from which suitable asphalt can be had. Verdin *v.* St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 22 S. W. 490; Barber Asphalt Paving Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110; Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. ed. 1142.

54. See *infra*, this note.

Grave-digging.— The rules of a cemetery association giving its superintendent a practical monopoly of the opening of graves in the cemetery are not in restraint of trade. Roanoke Cemetery Co. *v.* Goodwin, 101 Va. 605, 44 S. E. 769.

55. Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Chicago Gen. R. Co. *v.* Chicago City R. Co., 62 Ill. App. 502; Pontchartrain R. Co. *v.* Orleans Nav. Co., 15 La. 404; Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

Carrier generally see Carriers; Shipping.

Railroad generally see Railroads.

56. Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390; Broadway, etc., Ferry Co. *v.* Hankey, 31 Md. 346; Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536; Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

Ferry generally see Ferries.

57. St. Joseph Plank Road Co. *v.* Kline, 106 La. 325, 30 So. 854. But see State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155.

Turnpike or toll-road generally see Toll-Roads.

58. Fortain *v.* Smith, 114 Cal. 494, 46 Pac. 381; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Laredo *v.* International Bridge, etc., Co., 66 Fed. 246, 14 C. C. A. 1. *Contra*, Washington Toll Bridge Co. *v.* Beaufort, 81 N. C. 491.

Toll bridge generally see Bridges.

59. Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Martin *v.* O'Brien, 34 Miss. 21; Hecker *v.* New-York Balance Dock Co., 13 How. Pr. (N. Y.) 549; Taylor *v.* Montreal Harbour Com'rs, 17 Quebec Super. Ct. 275.

Wharf generally see Wharves.

60. People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; Crescent City Gaslight Co. *v.* New Orleans Gaslight Co., 27 La. Ann. 138; State *v.* Milwaukee Gaslight Co., 29 Wis. 454, 9 Am. Rep. 598.

Gas generally see Gas.

61. Davenport Gas, etc., Co. *v.* Davenport, 124 Iowa 22, 98 N. W. 892; Territory *v.* De Wolfe, 13 Okla. 454, 74 Pac. 98.

irrigation[62] and telephone and telegraph.[63] There are some cases apparently to the contrary, most of which go upon special grounds which show in the particular case lack of authority to make the grant in question, although the language in them often shows fear of monopoly.[64]

C. Construction of Franchises — 1. Character of the Franchise. A franchise will not, by reason of the policy against monopolies, be construed to be exclusive unless the grant is explicit to that effect.[65]

2. Extent of the Franchise. By a universal rule also all franchises are strictly construed and the presumption is against the extension of the grant, as all monopolies are regarded as in derogation of common rights.[66]

D. Revocation of Franchise[67] — 1. Rule Against Revocation. The rule is clear that a franchise once granted and accepted is in the nature of a contract, which a state must not impair by revocation.[68]

Electricity for light generally see Electricity.

62. Grant *v.* Davenport, 36 Iowa 396; Ludington Water-Supply Co. *v.* Ludington, 119 Mich. 480, 78 N. W. 558; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495; Bartholomew *v.* Austin, 85 Fed. 359, 29 C. C. A. 568.

Water generally see Waters.

63. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

Telegraph or telephone generally see Telegraphs and Telephones.

64. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; St. Louis Gaslight Co. *v.* St. Louis Gas, etc., Co., 16 Mo. App. 52; Edwards County *v.* Jennings, 89 Tex. 618, 35 S. W. 1053; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383; Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143; Illinois Trust, etc., Bank *v.* Arkansas City Water Co., 67 Fed. 196.

65. *Florida.*— Capitol City Light, etc., Co. *v.* Tallahassee, 42 Fla. 462, 28 So. 810.

Illinois.— Danville *v.* Noone, 103 Ill. App. 290.

Indiana.— Vincennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

Louisiana.— Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239.

Massachusetts.— Nash *v.* Lathrop, 142 Mass. 29, 6 N. E. 559.

New York.— People *v.* Bowen, 30 Barb. 24 [*reversed* on other grounds in 21 N. Y. 517].

United States.— Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150, 24 S. Ct. 43, 48 L. ed. 127; Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 22 S. Ct. 400, 46 L. ed. 585; Bienville Water Supply Co. *v.* Mobile, 175 U. S. 109, 20 S. Ct. 40, 44 L. ed. 92, 186 U. S. 212, 22 S. Ct. 820, 46 L. ed. 1132; Bartholomew *v.* Austin, 85 Fed. 359, 29 C. C. A. 568. See also Franchises, 19 Cyc. 1459.

Construction to permit competition.— In the leading case, Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938, the rights of a former toll bridge company under the charter creating it were held not to extend so far as to prevent the legislature from granting a right to the later toll bridge company to build a bridge within a few rods.

Competition by the grantor.— No contract will be implied by the municipality which has granted a privilege to a private concern by which it will be disabled from engaging in the business itself. Joplin *v.* Southwest Missiouri Light Co., 191 U. S. 150, 24 S. Ct. 43, 48 L. ed. 127.

66. *Illinois.*— Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314.

Mississippi.— Gaines *v.* Coates, 51 Miss. 335.

Pennsylvania.— Westfall *v.* Mapes, 3 Grant 198.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

United States.— Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938; Bartholomew *v.* Austin, 85 Fed. 359, 29 C. C. A. 568.

See also Franchises, 19 Cyc. 1460 *et seq.*

Substitutes not excluded.— It has been held in several cases that even if an exclusive franchise has been granted for one service, another grant may be made for a service which furnishes a direct substitute. See Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324; Parrot *v.* Lawrence, 18 Fed. Cas. No. 10,772, 2 Dill. 332.

Direct infringement of an exclusive franchise constitutes an actionable wrong even if the infringer has a grant from the legislature, since this latter grant is void. See Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. (U. S.) 51, 18 L. ed. 137. As to what constitutes infringement see Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1.

67. On the whole subject of revocability see Constitutional Law, 8 Cyc. 959 *et seq.*

68. See *infra*, this note.

Grants as contracts.— The leading case as to the general principle is of course Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. As applied to exclusive franchises, the leading case is New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. See also Walla Walla *v.* Walla

2. Exception Where Public Safety Is Involved. Where public health or safety is involved an exclusive franchise once granted is still revocable.[69]

3. Reservation of Right to Revoke. And it is not uncommon to find that the constitution or statutes in force at the time provide that charters shall not be taken as contracts or in the particular charter the right to alter or amend may be reserved.[70]

III. Monopolies Created by Combinations.[71]

A. Monopolization of Commodities — 1. Cornering the Market.[72] Any scheme to corner the market by getting control of the available supply is illegal; and so all contracts made in promotion of such a scheme are unenforceable.[73]

2. Monopolizing Supplies. Whatever device may be used to get control of supplies, whether by option[74] or by lease,[75] may be held to have the taint of monopolization if the intent is to regain control of the market thereby.

B. Elements of Monopolization — 1. Degree of Monopolization Requisite. The general rule seems to be that the scheme in question must have direct effect in bringing about conditions of monopoly. Complete monopoly is not essential;[76] but some degree of monopolization is requisite.[77] But provided that the scheme of monopolization has proceeded far enough to gain some control of the market,

Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; Louisville Gas Co. *v.* Citizens' Gas Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510 [*reversing* 81 Ky. 263].

69. The leading case to this effect is New Orleans Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585.

70. New Orleans *v.* Hoyle, 23 La. Ann. 740; Gorrell *v.* Town of Newport, 1 Tenn. Ch. App. 120.

71. Conspiracy generally see Conspiracy, 8 Cyc. 615 *et seq.*

Monopoly as combination defined see Herriman *v.* Menzies, 115 Cal. 16, 21, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; Rafferty *v.* Buffalo City Gas Co., 37 N. Y. App. Div. 618, 622, 56 N. Y. Suppl. 288; Norton *v.* Thomas, (Tex. 1906) 91 S. W. 780, 781; State *v.* Missouri, etc., R. Co., (Tex. 1906) 91 S. W. 214, 218; Queen Ins. Co. *v.* State, 86 Tex. 250, 269, 24 S. W. 397, 22 L. R. A. 483; U. S. *v.* E. C. Knight Co., 156 U. S. 1, 9, 15 S. Ct. 249, 39 L. ed. 325; U. S. Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946, 950; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 82, 7 C. C. A. 15, 24 L. R. A. 73 [*affirming* 53 Fed. 440, 452]; *In re* Corning, 51 Fed. 205, 212.

Trade union generally see Labor Unions, 24 Cyc. 815 *et seq.*

72. "Corner" defined and explained see 9 Cyc. 978.

73. *Illinois.*— Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39.

Massachusetts.— Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327.

Michigan.— Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170.

New York.— Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 558, 23 Am. Rep. 190.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

United States.— *Ex p.* Young, 30 Fed. Cas. No. 18,145, 6 Biss. 53.

See 35 Cent. Dig. tit. "Monopolies," § 10 *et seq.*

Cornering commodities.— In Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39, a scheme for cornering "regular" pork by buying all in the Chicago market and changing it to "irregular" by sawing the ribs thereafter, and then getting options for future delivery, was held illegitimate and no recovery between the participants was allowed.

Cornering stocks.— An agreement to make a corner in stock by buying it up so as to control the market, and then purchasing for future deliveries, is illegal, and the parties thereto are not partners and accountable as such; but in an action for money had and received, any balance not expended or appropriated may be recovered. Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327.

74. Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102.

75. Clark *v.* Needham, 125 Mich. 84, 83 N. W. 1027, 84 Am. St. Rep. 559, 31 L. R. A. 785.

76. Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770; Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 655, 52 L. R. A. 262.

77. Francis *v.* Taylor, 31 Misc. (N. Y.) 187, 65 N. Y. Suppl. 28; Phillips *v.* Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19.

Reasonableness of arrangement.— In some extreme decisions it is held immaterial whether the arrangement is reasonable or unreasonable. See U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007. In other decisions equally extreme it is held that combinations between individuals or firms for the regulation of prices and competition in business are not monopolies in restraint of trade so long as they are reasonable and do not include all of

it is immaterial that there has been no actual increase in price as yet,[78] or diminution of production.[79]

2. To What Kind of Commodities Applicable. It may be said in general that monopolization of anything which the public needs is against public policy.[80] This certainly applies, to cite prominent examples, to provisions and condiments,[81] to drugs and proprietary medicines,[82] to fuel and illuminants,[83] to stone and metal,[84] and to machinery and implements.[85]

C. Restraint of Trade[86] — 1. Agreements Suppressing Competition. All arrangements in whatever form which are designed to suppress competition are in restraint of trade both at common law and under statute.[87]

2. Agreements For Division of Business. There is considerable authority to

the commodity or trade or create such restrictions as to materially affect the freedom of commerce. Over *v.* Byram Foundry Co., (Ind. App. 1906) 77 N. E. 302.

78. A combination by an association of persons which has a tendency to diminish production, to limit competition, and to increase prices, was and is a common-law offense and so punishable, notwithstanding the prices fixed by such association be fair and reasonable, and notwithstanding, further, such association may not in fact have advanced the price of the product involved in such illegal combination. Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770.

79. See *infra*, this note.

Present benefits immaterial.— It is no defense to an action to dissolve such a combination as illegal under the anti-trust law that it has not in fact been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field. U. S. *v.* Chesapeake, etc., Fuel Co., 105 Fed. 93.

80. See cases cited *infra*, notes 81–85.

81. Barataria Canning Co. *v.* Joulian, 80 Miss. 555, 31 So. 961. See Botelor *v.* Washington, 3 Fed. Cas. No. 1,685, 2 Cranch C. C. 676.

82. Loder *v.* Jayne, 142 Fed. 1010.

83. State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

84. MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428, 75 Pac. 89; Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 655, 52 L. R. A. 262.

85. National Harrow Co. *v.* Bement, 21 N. Y. App. Div. 290, 47 N. Y. Suppl. 462; Indiana Mfg. Co. *v.* J. I. Case Threshing Mach. Co., 148 Fed. 21.

86. For matters relating to contract in restraint of trade generally see Contracts, 9 Cyc. 523 *et seq.*

87. *California.*— Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102.

District of Columbia.— Leonard *v.* Abner-Drury Brewing Co., 25 App. Cas. 161.

Georgia.— Brown *v.* Jacobs' Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547.

Illinois.— Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171.

Iowa.— Chapin *v.* Brown, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428.

Kansas.— State *v.* Wilson, (1906) 84 Pac. 737, (1905) 80 Pac. 639.

Louisiana.— India Bagging Assoc. *v.* Koch, 14 La. Ann. 168.

Michigan.— Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

Mississippi.— Fire Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99.

Nebraska.— Cleland *v.* Anderson, 66 Nebr. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. N. S. 136. See also State *v.* Omaha Elevator Co., (1906) 106 N. W. 979.

New York.— Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 558, 23 Am. Rep. 190.

Ohio.— Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

Texas.— Texas Standard Oil Co. *v.* Adoue, 83 Tex. 650, 19 S. W. 274, 29 Am. St. Rep. 690, 15 L. R. A. 598.

United States.— See Swift *v.* U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518; Loder *v.* Jayne, 142 Fed. 1010; Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co., 142 Fed. 531.

See 35 Cent. Dig. tit. "Monopolies," § 10 *et seq.*

Reasonable agreements between competitors regulating their dealings to some extent but leaving a real competition should not be held invalid as in restraint of trade. Stovall *v.* McCutcheon, 107 Ky. 577, 54 S. W. 969, 21 Ky. L. Rep. 1317, 92 Am. St. Rep. 373, 47 L. R. A. 287; Bowling *v.* Taylor, 40 Fed. 404.

Unreasonable agreements.— An agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the Anti-Trust Act of 1890. Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136.

the effect that an arrangement between competitors for the division of business between themselves is not invalid if they remain otherwise independent;[88] but there are strong decisions to the effect that such arrangements are in restraint of trade.[89]

D. Legal Arrangements — 1. SALE OF GOOD-WILL.[90] As agreements entered into by the seller of a business with the buyer not to compete within reasonable limits against the business sold are not considered invalid as in restraint of trade at common law, they are properly held not to be within the meaning of statutes directed against restraint of trade.[91] But if the purpose of the buyer in getting such contracts is to procure monopoly, it would seem that such agreements should be held illegal.[92]

2. FACTORS' AGREEMENTS.[93] Similarly agreements between principal and agent, or seller and buyer, that the agent or buyer shall have exclusive territory within which to operate or to resell are not within statutes against combinations when properly construed in accordance with common-law principles.[94] But certain cases hold that such agreements between buyer and seller, at all events, will not be supported if designed to monopolize.[95]

88. *California.*— Herriman *v.* Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 81, 35 L. R. A. 318.
Florida.— Jones *v.* Fell, 5 Fla. 510.
Iowa.— Willson *v.* Morse, 117 Iowa 581, 91 N. W. 823.
Massachusetts.— Gloucester Isinglass, etc., Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 26 Am. St. Rep. 214, 12 L. R. A. 563.
Michigan.— Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1.
Minnesota.— National Ben. Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437.
Missouri.— Gladish *v.* Kansas City Live Stock Exch., 113 Mo. App. 726, 89 S. W. 77.
United States.— Fechteler *v.* Palm, 133 Fed. 462, 66 C. C. A. 336.
England.— Collins *v.* Locke, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. Rep. N. S. 292, 28 Wkly. Rep. 189; Wickens *v.* Evans, 3 Y. & J. 318.
See 35 Cent. Dig. tit. "Monopolies," § 10 *et seq.*

89. Detroit *v.* Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Texas, etc., Coal Co. *v.* Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; Pratt *v.* Tapley, 16 N. Brunsw. 163.

90. Good-will generally see GOOD-WILL, 20 Cyc. 1275 *et seq.*

91. *Minnesota.*— Espenson *v.* Koepke, 93 Minn. 278, 101 N. W. 168.
Nebraska.— Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842.
New York.— Brett *v.* Ebel, 29 N. Y. App. Div. 256, 51 N. Y. Suppl. 573.
Texas.— Crump *v.* Ligon, (Civ. App. 1904) 84 S. W. 250.
United States.—Metcalf *v.* American School Furniture Co., 122 Fed. 115.

92. Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 49 N. E. 1030, 63 Am. St. Rep. 736, 41 L. R. A. 185; Comer *v.* Burton-Lingo Co., 24 Tex. Civ. App. 251, 58 S. W. 969. *Contra*, Trenton Potteries Co. *v.* Olyphant, 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639.

93. Factor generally see FACTORS AND BROKERS, 19 Cyc. 109 *et seq.*

94. *Illinois.*— Lanyon *v.* Garden City Sand Co., 223 Ill. 616, 79 N. E. 313; Heimbuecher *v.* Goff, etc., Co., 119 Ill. App. 373.
Mississippi.— Houck *v.* Wright, 77 Miss. 476, 27 So. 616.
Missouri.— Clark *v.* Frank, 17 Mo. App. 602.
New Jersey.— New York Trap Rock Co. *v.* Brown, 61 N. J. L. 536, 43 Atl. 100.
New York.— Van Marter *v.* Babcock, 23 Barb. 633.
South Carolina.— W. Wood Mowing, etc., Co. *v.* Greenwood Hardware Co., (1906) 55 S. E. 973.
Vermont.— Clark *v.* Croshy, 37 Vt. 188.
United States.— Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works, 142 Fed. 531; Christie Grain, etc., Co. *v.* Chicago Bd. of Trade, 125 Fed. 161, 61 C. C. A. 11.

95. Com. *v.* Grinstead, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, 21 Ky. L. Rep. 1444, 22 Ky. L. Rep. 377; Barataria Canning Co. *v.* Joulian, 80 Miss. 555, 31 So. 961.
In Texas a distinction is sometimes taken in enforcing the statute. Agreements when between principal and agent are held valid without question (Welch *v.* Phelps, etc., Wind Mill Co., 89 Tex. 653, 36 S. W. 71; Clark *v.* Cyclone Woven Wire Fence Co., 22 Tex. Civ. App. 41, 54 S. W. 392), but not always when it is one of sale and purchase (Gates *v.* Hooper, 90 Tex. 563, 39 S. W. 1079; Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288). See, however, Norton *v.* W. H. Thomas, etc., Co., (Tex. Civ. App. 1905) 93 S. W. 711; Vandeweghe *v.* American Brewing Co., (Tex. Civ. App. 1901) 61 S. W. 526; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804.

IV. PARTICULAR COMBINATIONS.

A. Forms of Combinations — **1. Partnership and Pool.**[96] The commonest type of combination has been that of pool of some sort, in which the participants agree to suppress the competition between themselves to some extent without surrendering altogether their right to conduct their own business.[97]

2. License or Lease. Upon similar principles any device or arrangement by way of license or lease whereby competition is suppressed is illegal, both by common law and statute.[98]

3. Trusts and Similar Devices.[99] Agreements by way of trust or otherwise whereby competition between concerns is suppressed are held illegal both under common law and statute. In the typical scheme of this kind the majority of the shares in each of the constituent corporations is made over to a board of trustees who thereafter conduct all the business without competition.[1]

4. Holding Corporation.[2] An arrangement by which the stocks of various corporations are held by another with design to suppress competition is illegal both at common law and under statute.[3]

5. Consolidating Corporation.[4] By the weight of authority it seems to be illegal to bring about monopoly by the formation of a consolidating corporation

96. Partnership generally see Partnership.

97. *California.*— Getz *v.* Federal Salt Co., 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114.

District of Columbia.— Leonard *v.* Abner-Drury Brewing Co., 25 App. Cas. 161.

Illinois.— Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171.

Louisiana.— India Bagging Assoc. *v.* Kock, 14 La. Ann. 168.

Mississippi.— Fire Ins. Cos. *v.* State, 75 Miss. 24, 22 So. 99.

Missouri.— State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

New York.— Judd *v.* Harrington, 139 N. Y. 105, 34 N. E. 790.

Ohio.— Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

Wisconsin.— Fairbank *v.* Leary, 40 Wis. 637.

United States.— Swift *v.* U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518; Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136; U. S. *v.* Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. ed. 259; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007.

98. *Alabama.*— Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110, 28 So. 669, 85 Am. St. Rep. 125, 50 L. R. A. 175.

Illinois.— American Strawboard Co. *v.* Peoria Strawboard Co., 65 Ill. App. 502.

Michigan.— Clark *v.* Needham, 125 Mich. 84, 83 N. W. 1027, 84 Am. St. Rep. 559, 51 L. R. A. 785.

New York.— National Harrow Co. *v.* Bement, 21 N. Y. App. Div. 290, 47 N. Y. Suppl. 462.

Texas.— Clark *v.* Cyclone Woven Wire Fence Co., 22 Tex. Civ. App. 41, 54 S. W. 392.

United States.— U. S. Consolidated Seeded Raisin Co. *v.* Griffin, etc., Co., 126 Fed. 364, 61 C. C. A. 334; National Harrow Co. *v.* Hench, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299; National Harrow Co. *v.* Quick, 67 Fed. 130; Oliver *v.* Gilmore, 52 Fed. 562.

99. Trust generally see Trusts.

1. *Georgia.*— Georgia Trust Co. *v.* State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520.

Louisiana.— State *v.* American Cotton Oil Trust, 40 La. Ann. 8, 3 So. 409.

Nebraska.— State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155.

New York.— People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 9 L. R. A. 33.

Ohio.— State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 140.

United States.— Gould *v.* Head, 38 Fed. 886.

But see Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant Ch. (U. C.) 540.

2. Corporation generally see Corporations, 10 Cyc. 1 *et seq.*

3. *Illinois.*—Dunbar *v.* American Tel., etc., Co., 224 Ill. 9, 79 N. E. 423; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497.

Montana.— MacGinniss *v.* Boston, etc., Copper, etc., Co., 29 Mont. 428, 75 Pac. 89.

New York.— People *v.* Nussbaum, 32 Misc. 1, 66 N. Y. Suppl. 129.

South Carolina.— State *v.* Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

United States.— Northern Securities Co. *v.* U. S., 193 U. S. 197, 24 S. Ct. 436, 48 L. ed. 679; Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. 306.

4. Corporation generally see Corporations, 10 Cyc. 1 *et seq.*

to acquire existing competing concerns by outright purchase of their properties;[5] but there are strong decisions to the contrary.[6]

B. Subjects of Restraint — 1. Dealers. All combinations between dealers to suppress competition between themselves are tainted by monopoly. This applies to agreements between dealers in bagging,[7] cattle dealers,[8] coal dealers,[9] druggists,[10] grain dealers,[11] produce dealers,[12] salt dealers,[13] tile dealers,[14] to select some prominent illustrations.

2. Manufacturers.[15] Generally speaking all agreements between manufacturers of all sorts to suppress competition between themselves are obnoxious as monopolies.[16] This applies for example to brewers,[17] to candle makers,[18] to distillers of spirits,[19] to fertilizer manufacturers,[20] to iron founders,[21] to lumber manufacturers,[22] to oil refiners,[23] to sugar refiners,[24] to publishers,[25] to manufacturers of foods,[26] and to watch manufacturers.[27]

3. Transportation.[28] All combinations between carriers of passengers or

5. *Illinois.*— Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; Ford *v.* Chicago Milk Shippers' Assoc., 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298.

Michigan.—Atty.-Gen. *v.* Booth, 143 Mich. 89, 106 N. W. 868; Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

Missouri.— National Lead Co. *v.* S. E. Grote Paint Store Co., 80 Mo. App. 247.

New York.— People *v.* Milk Exchange, 145 N. Y. 267, 39 N. E. 1062, 45 Am. St. Rep. 609, 27 L. R. A. 437; People *v.* Duke, 19 Misc. 292, 44 N. Y. Suppl. 336.

Texas.— San Antonio Gas Co. *v.* State, 22 Tex. Civ. App. 118, 54 S. W. 289.

United States.— McCutcheon *v.* Werz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415.

6. Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639.

The dissolution of a corporation to avoid competition is not prevented by a statute declaring void all arrangements with a view to lessen competition in manufacture. Chilhowee Woolen Mills *v.* State, (Tenn. 1905) 89 S. W. 741, 2 L. R. A. N. S. 493.

7. Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; India Bagging Assoc. *v.* Kock, 14 La. Ann. 168.

8. State *v.* Wilson, (Kan. 1906) 84 Pac. 737; Greer *v.* Payne, 4 Kan. App. 153, 46 Pac. 190; Judd *v.* Harrington, 139 N. Y. 105, 34 N. E. 790; Swift *v.* U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518.

9. Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770; Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 559, 23 Am. Rep. 190; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; U. S. *v.* Chesapeake, etc., Fuel Co., 105 Fed. 93.

10. Brown *v.* Jacobs' Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547; Loder *v.* Jayne, 142 Fed. 1010.

11. Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499; Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171; State *v.* Omaha Elevator Co., (Nebr. 1906) 106 N. W. 979; Fairbank *v.* Leary, 40 Wis. 637.

12. Chapin *v.* Brown, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428; Ertz *v.* Minneapolis Produce Exch., 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90.

13. Getz *v.* Federal Salt Co., 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114; Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666.

14. Montague *v.* Lowry, 193 U. S. 38, 24 S. Ct. 307, 48 L. ed. 608.

15. Manufacturer defined see Manufactures, 26 Cyc. 517.

16. See cases cited *infra*, note 17 *et seq.*

Laundrymen are not within the designation of manufacturer. Downing *v.* Lewis, 56 Nebr. 386, 76 N. W. 900.

17. Leonard *v.* Abner-Drury Brewing Co., 25 App. Cas. (D. C. 161; Nester *v.* Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 41 Am. St. Rep. 894, 24 L. R. A. 247.

18. Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819.

19. Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155.

20. State *v.* Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

21. Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136; Atlanta *v.* Chattanooga Foundry, etc., 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721.

22. Gibbs *v.* McNeeley, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152.

23. Coquard *v.* National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563; State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145.

24. People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 9 L. R. A. 33.

25. Mines *v.* Scribner, 147 Fed. 927.

26. Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639.

27. Dueber Watch Case Mfg. Co. *v.* E. Howard Watch, etc., Co., 55 Fed. 851.

28. Transportation generally see Carriers; Shipping.

goods, by land or sea, formed to suppress competition to any extent between themselves, whether by pooling agreement or diversion of traffic, are illegal.[29]

4. Insurance.[30] Agreements between insurance companies or agents of insurance companies to fix rates of insurance or otherwise to suppress competition are usually held illegal as monopolistic.[31]

29. *Georgia.*— Georgia Trust Co. *v.* State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; Logan *v.* Central R. Co., 74 Ga. 684.

Michigan.— White Star Line *v.* Star Line of Steamers, 141 Mich. 604, 105 N. W. 135.

New Hampshire.— Morrill *v.* Boston, etc., R. Co., 55 N. H. 531. But see Manchester, etc., R. Co. *v.* Concord, etc., R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

New York.— Stanton *v.* Allen, 5 Den. 434, 49 Am. Dec. 282.

South Carolina.— Edwards *v.* Southern R. Co., 66 S. C. 277, 44 S. E. 748.

Texas.— Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849. See also State *v.* Missouri, etc., R. Co., (1906) 91 S. W. 214.

United States.— U. S. *v.* Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. ed. 259; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Tift *v.* Southern R. Co., 138 Fed. 753; U. S. *v.* Cassidy, 67 Fed. 698; Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659; Hamilton *v.* Savannah, etc., R. Co., 49 Fed. 412; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 30 Fed. 2.

Extraterritorial operation.—A statute which prohibits any railroad company within the state from owning, operating, or managing any other parallel or competing railroad within the state applies only where both the roads are situated within the state; and the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on rates. Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

Division of territory.—A contract between two railroad companies whose lines of road are parallel, by which certain naturally tributary territory is preserved to each, within which it shall prosecute the work of extending its branch lines, etc., without interference with or from the other, designed to prevent an unprofitable war of construction, is not contrary to public policy. Ives *v.* Smith, 8 N. Y. Suppl. 46.

Indirect effect.— The interference, if any, with interstate commerce, contemplated by a contract for the sale of certain river craft, which permits a suspension of payment of instalments of the purchase-price in case of serious competition in the freight and passenger traffic over a route between two named Ohio ports on the Ohio river, and requires the vendors to withdraw from such competition for five years, is too insignificant to render the contract invalid as imposing a restraint on interstate commerce. Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 26 S. Ct. 208, 50 L. ed. 428.

Dependent services.—Arrangements between carriers and dependent services, although they foster monopoly and are often held illegal at common law, seem not unusually to be held within the provisions of monopoly statutes. See Ft. Worth, etc., R. Co. *v.* State, (Tex. 1905) 87 S. W. 336, 70 L. R. A. 950, sleeping-car companies. And see Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, express companies. But see *contra*, Snyder *v.* Union Depot Co., 9 Ohio S. & C. Pl. Dec. 63, 7 Ohio N. P. 64 (hackmen); State *v.* Missouri, etc., R. Co., (Tex. 1906) 91 S. W. 214, 5 L. R. A. N. S. 783 (express companies).

30. Insurance generally see Insurance, 22 Cyc. 1380 *et seq.*

31. *Iowa.*— Beechley *v.* Mulville, 102 Iowa 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657.

Mississippi.—American F. Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99.

Missouri.— State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

Pennsylvania.— *In re* Insurance Policies, 7 Pa. Dist. 17.

See 35 Cent. Dig. tit. "Monopolies," § 14.

Interpretation of statutes.— Combinations between companies or agents to fix rates of insurance are in violation of a statute prohibiting the formation of combinations to regulate or fix the price of specified articles of merchandise "or any other commodity" (Beechley *v.* Mulville, 102 Iowa 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479); or prohibiting "combinations in restraint of trade" (State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657. *Contra*, Ætna Ins. Co. *v.* Com., 106 Ky. 864, 51 S. W. 624, 21 Ky. L. Rep. 503, 45 L. R. A. 355; Queen Ins. Co. *v.* State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483).

Extraterritorial action.— Subjecting any foreign or domestic corporation entering into any pool or combination for regulating the premiums to be paid for fire insurance to a penalty does not apply to pools and combinations effected outside of the state, not intended to affect the prices of insurance in the state; and a foreign insurance company, doing business in the state, is not subject to such penalty for having, in another state, entered into a combination for fixing the premiums on insurance to be effected outside of the state. State *v.* Lancashire F. Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348.

Boards of underwriters.— Under a statute authorizing boards of fire underwriters, it is held that associations not providing that their members should be composed of those engaged in the business of fire insurance or

5. Labor.[32] Combinations of laborers are generally held to be acting illegally when they attempt to monopolize their trades.[33]

V. Proceedings Involving Combinations.

A. Suits Between Members of Combinations — 1. Direct Suits — a. For Breach of the Agreement. By a universal rule one party to an agreement in restraint of trade can bring no suit against another for any breach of the agreement — the contract being regarded as against public policy, and the parties being considered *in pari delicto*.[34]

b. For Share of the Profits. Being thus *in pari delicto* no suit will be permitted to proceed for the division of the profits of the illegal enterprise.[35]

that others engaged in that business in the same city should be entitled to become members were not within the statute. Huston *v.* Reutlinger, 91 Ky. 333, 15 S. W. 867, 12 Ky. L. Rep. 925, 34 Am. St. Rep. 225; Childs *v.* Firemen's Ins. Co., 66 Minn. 393, 69 N. W. 141, 35 L. R. A. 99.

32. Combination of laborers generally see Conspiracy, 8 Cyc. 615 *et seq.*; Labor Unions, 24 Cyc. 815 *et seq.*

33. *Maine.*— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

Maryland.— Lucke *v.* Clothing Cutters', etc., Assembly No. 7507 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

Massachusetts.— Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339.

New Jersey.— O'Brien *v.* Musical Mut. Protective, etc., Union, 64 N. J. Eq. 525, 54 Atl. 150.

Pennsylvania.— Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534.

Tennessee.— Bailey *v.* Masters Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.

Wisconsin.— Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 17, 49 L. R. A. 475; Milwaukee Masons', etc., Assoc. *v.* Niezerowski, 95 Wis. 129, 70 N. W. 166, 60 Am. St. Rep. 97, 37 L. R. A. 127.

United States.— Union Trust Co. *v.* Atchison, etc., R. Co., 64 Fed. 724; U. S. *v.* Elliott, 64 Fed. 27; *In re* Grand Jury, 62 Fed. 840; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; Waterhouse *v.* Comer, 55 Fed. 149, 19 L. R. A. 403; U. S. *v.* Workingmen's Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158 [*affirmed* in 57 Fed. 85, 6 C. C. A. 258]. But see Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367; Hunt *v.* Riverside Co-Operative Club, 140 Mich. 538, 104 N. W. 40; National Steam Fitters, etc., Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135; Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

34. *Alabama.*— Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110, 28 So. 669, 85 Am. St. Rep. 125, 50 L. R. A. 175.

California.— Getz *v.* Federal Salt Co., 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114; Santa Clara Valley Mill, etc., Co. *v.* Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211.

Illinois.— More *v.* Bennett, 140 Ill. 69, 29 N. E. 888, 33 Am. St. Rep. 216, 15 L. R. A. 361.

Iowa.— Chapin *v.* Brown, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428.

Louisiana.— India Bagging Assoc. *v.* Kock, 14 La. Ann. 168.

Michigan.— Clark *v.* Needham, 125 Mich. 84, 83 N. W. 1027, 84 Am. St. Rep. 559, 51 L. R. A. 785; Western Wooden Ware Assoc. *v.* Starkey, 84 Mich. 76, 47 N. W. 604, 22 Am. St. Rep. 686, 11 L. R. A. 503.

New York.— Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 655, 52 L. R. A. 262; Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 558, 23 Am. Rep. 190.

Tennessee.— Bailey *v.* Master Plumbers Assoc., 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561; Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 8 S. W. 396.

Texas.— Texas Standard Oil Co. *v.* Adoue, 83 Tex. 650, 19 S. W. 274, 29 Am. St. Rep. 675, 15 L. R. A. 598.

Wisconsin.— Milwaukee Masons', etc., Assoc. *v.* Niezerowski, 95 Wis. 129, 70 N. W. 166, 60 Am. St. Rep. 97, 37 L. R. A. 127; Fairbank *v.* Leary, 40 Wis. 637.

United States.— Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979; McCutcheon *v.* Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415.

England.— Leighton *v.* Wales, 7 L. J. Exch. 145, 3 M. & W. 545; Urmston *v.* Whitelegg, 63 L. T. Rep. N. S. 455; Toby *v.* Major, 43 Sol. Jur. 778; Cousins *v.* Smith, 13 Ves. Jr. 542, 9 Rev. Rep. 217, 33 Eng. Reprint 397.

See also Contracts, 9 Cyc. 546 *et seq.*

35. *Illinois.*— Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39; Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171.

Kansas.— Barton *v.* Mulvane, 59 Kan. 313, 52 Pac. 883.

Massachusetts.— Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327.

Michigan.— Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

New York.— Gray *v.* Oxnard Bros. Co., 59 Hun 387, 13 N. Y. Suppl. 86.

Ohio.— Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819;

2. Collateral Suits — a. Independent Matters. If a suit is entirely independent of the illegal scheme there is, it seems, no defense, even if the parties to it are participants in the illegal enterprise.[36] The decisions are divided as to whether the right of membership in an association which is in restraint of trade is an independent matter within this principle.[37]

b. Collateral Matters — (I) *Preservation of Property Rights.* Generally speaking the fact that a person is a member of a combination in restraint of trade does not altogether deprive him of the right to have his share in the property preserved upon dissolution of the combination.[38]

(II) *Recovery Quantum Meruit.* And some courts permit recovery *quantum meruit* by one participant in a combination against another to prevent unjust enrichment.[39]

B. Liabilities of Persons Dealing With Combinations — 1. Suits Involving Monopolization — a. Suits at Law. Generally speaking, if a suit is brought by a member of a combination against an outside party for the breach of some agreement, the performance of which was an essential part of a scheme to control the market, defendant may make out a complete defense upon grounds of public policy by showing this.[40]

b. Proceedings in Equity.[41] The same policy leads courts of equity to refuse to decree against any one specific performance of any agreement, which is part of an attempt to monopolize or will promote the monopoly.[42]

2. Suits as to Independent Matters — a. Suits at Law. It should be clear that those who buy goods or receive services from members of a combination

Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666.

Pennsylvania.—Nester *v.* Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 41 Am. St. Rep. 894, 24 L. R. A. 247.

United States.— Cravens *v.* Carter-Crume Co., 92 Fed. 479, 34 C. C. A. 479.

36. California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320; Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 26 S. Ct. 208, 50 L. ed. 428. See also Hadley-Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. 242.

37. See *infra*, this note.

Membership in a trade union.— If a member of a trade union is injured by the union, his right to recover from the union for damages arising out of his right to retain employment exists independent of the unlawful agreement and is not withdrawn by the operation of the maxim "*in pari delicto.*" Brennan *v.* United Hatters of North America, Local No. 17, (N. J. 1906) 65 Atl. 165.

Reinstatement in benefit association.— Where the by-laws of a mutual benefit trade association impose on its members a most slavish observance of the most stringent regulations in restraint of trade, which are so far-reaching that no musician unless he is a member of the association can get employment, such association is a trust, and hence the court will not entertain a bill by a member claimed to have been expelled therefrom to compel his reinstatement. Froelich *v.* Musicians' Mut. Ben. Assoc., 93 Mo. App. 383.

38. Barton *v.* Mulvane, 59 Kan. 313, 52 Pac. 883; Rice *v.* Rockefeller, 134 N. Y. 174, 31 N. E. 907, 30 Am. St. Rep. 658, 17 L. R. A. 237; Cameron *v.* Havemeyer, 12 N. Y. Suppl. 126, 25 Abb. N. Cas. 438; Harriman *v.* Northern Securities Co., 197 U. S. 244, 25 S. Ct. 493, 49 L. ed. 739. *Contra*, Levin *v.* Chicago Gaslight, etc., Co., 64 Ill. App. 393.

39. Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327; White Star Line *v.* Star Line of Steamers, 141 Mich. 604, 105 N. W. 135. *Contra*, Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819; Nestor *v.* Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 41 Am. St. Rep. 894, 24 L. R. A. 247.

Quantum meruit generally see Work and Labor.

Accounting will seldom be granted where plaintiff is bound to rely upon the combination contract to sue. Continental Wall Paper Co. *v.* Lewis Voight, etc., Co., 148 Fed. 939. See, generally, Accounts and Accounting, 1 Cyc. 364 *et seq.*

40. See Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 49 N. E. 1030, 63 Am. St. Rep. 736, 41 L. R. A. 185. But see Trenton Potteries Co. *v.* Olyphant, 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.

41. Equity generally see Equity, 16 Cyc. 1 *et seq.*

42. McCutcheon *v.* Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415. See Seattle Electric Co. *v.* Snoqualmie Falls Power Co., 40 Wash. 380, 82 Pac. 713, 1 L. R. A. N. S. 1032, holding that an injunction to dissolve a combination will not be granted immediately when the result will be to deprive the public of a necessary service.

must pay the price or compensation fixed by the contract between them, and cannot interpose the defense that plaintiffs are parties to an arrangement in restraint of trade,[43] unless, as in some few states, there is an explicit statutory provision creating such a defense.[44]

b. Proceedings in Equity.[45] Likewise a complainant who is seeking to vindicate his rights in equity will not usually be thrown out of court upon a showing by defendants that he is a member of a combination in restraint of trade,[46] although the contrary is sometimes suggested.[47]

VI. SUITS AGAINST COMBINATIONS.

A. Private Actions For Damages From Combinations — 1. At Common Law — a. Combinations of Capital. By the weight of authority a person whose business is injured by the action of a combination in restraint of trade which interferes with his relations with those who might otherwise deal with him has a common-law action for conspiracy against the members of the combination.[48] But in several jurisdictions it is held that even such interference is justifiable if the motive is a business one.[49]

43. *Illinois.*— Bishop *v.* American Preservers Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Wiley *v.* National Wall Paper Co., 70 Ill. App. 543.

Kansas.— Crystal Ice Co. *v.* Wylie, 65 Kan. 104, 68 Pac. 1086.

Mississippi.— Houck *v.* Wright, 77 Miss. 476, 27 So. 616.

Ohio.— McBirney, etc., White Lead Co. *v.* Consolidated Lead Co., 8 Ohio Dec. (Reprint) 762, 9 Cinc. L. Bul. 310.

Texas.— Springfield F. & M. Ins. Co. *v.* Cannon, (Civ. App. 1898) 46 S. W. 375.

United States.— Chicago Wall Paper Mills *v.* General Paper Co., 147 Fed. 491; Hadley-Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. 242; Harrison *v.* Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; The Charles E. Wiswall *v.* Scott, 86 Fed. 671, 30 C. C. A. 339. See Lafayette Bridge Co. *v.* Streator, 105 Fed. 729.

England.— Jones *v.* North, L. R. 19 Eq. 426, 44 L. J. Ch. 388, 32 L. T. Rep. N. S. 149, 23 Wkly. Rep. 468.

44. National Lead Co. *v.* S. E. Grote Paint Store Co., 80 Mo. App. 247; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804.

An agent for one of two parties to a combination in restraint of trade can interpose no defense when called upon to account for money received. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140.

45. Equity generally see EQUITY, 16 Cyc. 1 *et seq.*

46. Kinner *v.* Lake Shore, etc., R. Co., 69 Ohio St. 339, 69 N. E. 614; Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160.

47. Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689.

Infringements of patents.— The fact that complainant is a member of a combination in restraint of trade does not give third persons the right to infringe a patent of which complainant is owner, nor preclude complainant from maintaining a suit. General Electric Co. *v.* Wise, 119 Fed. 922; American Soda-Fountain Co. *v.* Green, 69 Fed. 333; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; National Harrow Co. *v.* Quick, 67 Fed. 130; Strait *v.* National Harrow Co., 51 Fed. 819.

48. *Georgia.*— Brown *v.* Jacobs' Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547.

Illinois.— Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802.

Indiana.— Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588.

Kentucky.— Standard Oil Co. *v.* Doyle, 82 S. W. 271, 26 Ky. L. Rep. 544, 111 Am. St. Rep. 331.

Maryland.— Klingel's Pharmacy *v.* Sharp, (1906) 64 Atl. 1029.

Massachusetts.— Martell *v.* White, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 64 L. R. A. 260.

Minnesota.— Ertz *v.* Minneapolis Produce Exch. Co., 82 Minn. 173, 84 N. W. 743, 83 Am. St. Rep. 419, 51 L. R. A. 825.

Missouri.— Walsh *v.* Master Plumbers Assoc., 97 Mo. App. 280, 71 S. W. 455.

New Jersey.— Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

Tennessee.— Bailey *v.* Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.

Texas.— Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

Vermont.— Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 802.

Wisconsin.— Hawarden *v.* Youghiogheny, etc., Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

Conspiracy generally see CONSPIRACY, 8 Cyc. 615 *et seq.*

49. *Colorado.*— Master Builders' Assoc. *v.* Domascio, 16 Colo. App. 25, 63 Pac. 782.

Kentucky.— Brewster *v.* Miller, 101 Ky. 368, 41 S. W. 301, 19 Ky. L. Rep. 593, 38 L. R. A. 505.

b. Combinations of Labor.[50] There is a like conflict of authority as to the legality of the action of a combination of labor in procuring the discharge of other workmen. In the majority of jurisdictions this is held to constitute an actionable conspiracy for which the injured workmen may recover damages,[51] while by a considerable minority unionizing is held justifiable in itself.[52]

2. Under Statutes — a. Interference by Combinations. In so far as combinations in restraint of trade injure one in his trade by interference with his business relations, they are generally held within the clauses of statutes which provide for suits by private parties for their individual injuries by such combinations,[53] although even this is not undisputed.[54]

b. Indirect Damage From Monopolization. It is unsettled whether the consequential damages to various individuals as the result of monopolization are within the remedial clauses of such statutes; while some decisions seem to permit recovery for refusal to supply or for enhanced prices[55] there are others which plainly do not.[56]

B. Restraint of Unlawful Combinations by the State — 1. By Extraordinary Legal Remedies — a. By Official Action. If a corporation is shown to be engaged in monopolizing an industry, quo warranto[57] or similar proceedings

Minnesota.— Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

Rhode Island.— Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455.

West Virginia.— West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

England.— Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25, 7 Aspin. 120, 56 J. P. 101, 61 L. J. Q. B. 295, 66 L. T. Rep. N. S. 1, 40 Wkly. Rep. 337; Scottish Cooperative Society *v.* Glasgow Fleshers' Assoc., 35 Sc. L. Rep. 645.

50. Combination of laborers see Conspiracy, 8 Cyc. 615 *et seq.*; Labor Unions, 24 Cyc. 815 *et seq.*

51. *Connecticut.*— March *v.* Bricklayers, etc., Union No. 1, 79 Conn. 7, 63 Atl. 291.

Maine.— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

Maryland.— My Maryland Lodge No. 186 of Machinists *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; Lucke *v.* Clothing Cutters', etc., Assembly No. 7,507 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

Massachusetts.— Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753; Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

New York.— Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802.

Pennsylvania.— Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534.

Wisconsin.— Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475.

United States.— Loewe *v.* California State Federation of Labor, 139 Fed. 71.

52. *Indiana.*—Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367.

Missouri.— Marx Jeans, etc., Clothing Co. *v.* Watson, 168 Mo. 133, 67 S. W. 391, 90 Am. St. Rep. 440.

New Jersey.— Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

New York.— Steam Fitters, etc., Nat. Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135.

England.— Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258, *semble.*

53. Purington *v.* Hinchliff, 219 Ill. 159, 76 N. E. 47, 109 Am. St. Rep. 322, 2 L. R. A. N. S. 824; Cleland *v.* Anderson, 66 Nebr. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. N. S. 136; Straus *v.* American Publishers' Assoc., 177 N. Y. 473, 69 N. E. 1107, 101 Am. St. Rep. 819, 64 L. R. A. 701; Aikens *v.* Wisconsin, 195 U. S. 194, 25 S. Ct. 3, 49 L. ed. 154; Montague *v.* Lowry, 193 U. S. 38, 24 S. Ct. 307, 48 L. ed. 608; Mines *v.* Scribner, 147 Fed. 927; Loder *v.* Jayne, 142 Fed. 1010; Bobbs-Merrill Co. *v.* Straus, 139 Fed. 155.

54. Brewster *v.* Miller, 101 Ky. 368, 41 S. W. 301, 19 Ky. L. Rep. 593, 38 L. R. A. 505; Dueber Watch-Case Mfg. Co. *v.* E. Howard Watch, etc., Co., 66 Fed. 637, 14 C. C. A. 14.

55. Aikens *v.* Wisconsin, 195 U. S. 194, 25 S. Ct. 3, 49 L. ed. 154; Atlanta *v.* Chattanooga Foundry, etc., 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721.

56. Thomson *v.* Union Castle Mail Steamship Co., 149 Fed. 933; Phillips *v.* Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19; Whitwell *v.* Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689; Ellis *v.* Inman, 124 Fed. 956; Bishop *v.* American Preservers' Co., 51 Fed. 272.

57. Quo warranto generally see Quo Warranto.

may be begun by the attorney-general or other proper officer and judgment may be rendered either dissolving the corporation altogether or ousting it from its present course.[58]

b. By Private Initiative. Upon general principles these extraordinary writs are not at the disposal of private parties,[59] although some cases refuse to go to this extreme.[60]

2. By Special Statutory Processes — a. By Officials. It is common to provide in statutes directed against combinations that the government may bring equitable proceedings to enjoin their continuance.[61]

b. By Private Parties. The initiation of these processes is generally held to be confined to the proper officers of the government, private citizens not having the right of initiative,[62] unless the statute expressly so provides.

VII. PROCEDURE IN SUITS AGAINST COMBINATIONS.

A. Civil Proceedings[63] **— 1. Declaration of Wrong.** There are few particulars necessary as to civil suits against members of a combination in restraint of trade. The declaration must sufficiently set forth the conspiracy which is the gist of the action.[64]

58. *Georgia.*— State Trust Co. *v.* State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520.

Illinois.— Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497.

Nebraska.— State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155.

New Jersey.— See Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

New York.— People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 9 L. R. A. 33.

Ohio.— State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145.

Texas.— Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849; San Antonio Gas Co. *v.* State, 22 Tex. Civ. App. 118, 54 S. W. 289.

59. Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738.

Stock-holders' right.— So far as the participation of a corporation and its officers in an unlawful combination to create a monopoly subjects its property and franchises to forfeiture, and thus imperils the property rights of a minority stock-holder, he may, through the medium of equity, compel it and them to abandon such unlawful connection, and return to a performance of their charter obligations, to wit, the accomplishment by lawful means of the purposes for which the corporation was formed. MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428, 75 Pac. 89.

60. Detroit *v.* Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039.

61. For examples see State *v.* Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464; Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136; U. S. *v.* Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. ed. 259; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Chesapeake, etc., Fuel Co. *v.* U. S., 115 Fed. 610, 53 C. C. A. 256; U. S. *v.* Jellico Mountain Coal, etc., Co., 46 Fed. 432, 12 L. R. A. 753.

62. Leonard *v.* Abner-Drury Brewing Co., 25 App. Cas. (D. C.) 161; MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428, 75 Pac. 89; Post *v.* Southern Ry. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; Southern Indiana Express Co. *v.* U. S. Express Co., 92 Fed. 1022, 35 C. C. A. 172; Gulf, etc., R. Co. *v.* Miami Steamship Co., 86 Fed. 407, 30 C. C. A. 142; Greer *v.* Stoller, 77 Fed. 1.

63. **Evidence** generally see Evidence. The burden of proving a combination and conspiracy between manufacturers and wholesale and retail dealers of proprietary medicines and drugs in restraint of trade, in violation of an anti-trust act injurious to plaintiff, and that defendants were engaged and took part in such conspiracy, was on plaintiff. Loder *v.* Jayne, 142 Fed. 1010.

Parties generally see Parties. One of two persons who have made an unlawful combination is amenable to the law, whether his co-contractor is within the reach of the law or not, and in quo warranto proceedings against a corporation, respondent cannot object that its co-contractors are not made parties defendant. Atty.-Gen. *v.* Booth, 143 Mich. 89, 106 N. W. 868.

Pleading generally see Pleading.

Trial generally see Trial.

64. As to necessary elements in such a declaration see especially Rice *v.* Standard Oil Co., 134 Fed. 464, holding the declaration in question void for duplicity.

In construing a code which declared that a trust and combine is a combination, contract, understanding, or agreement between two or more persons, etc., in restraint of trade; to limit, increase, or reduce the production or output of a commodity is inimical to the

2. Allegation of Damage. So too damages must be sufficiently alleged, as this is an essential part of the case.[65]

B. Criminal Prosecution[66] — **1. Indictment, or Information.**[67] The indictment must sufficiently set forth the conspiracy to monopolize with such particularity as to show conclusively a scheme intended to control the market.[68] It is usually stated that it is necessary to show a scheme to gain control of the disposition of some commodity, some cases going so far as to require that a design to get exclusive control must be shown,[69] others holding it sufficient if the design is to get some degree of control.[70] It must contain enough to negative the possibility that those concerned in the combination are free to act according to their own will in spite of the understanding between themselves.[71] And although it is unnecessary to allege what has been done in pursuance of the conspiracy it is not irrelevant.[72]

2. Action to Recover Penalty.[73] Although a prosecution for violation of the anti-trust statute will usually be by indictment,[74] it may often at the election of the government take the form of an action to recover the penalty prescribed by such statute.[75]

3. Jurisdiction[76] **and Venue.**[77] The venue for the prosecution of a trust for criminal conspiracy may be laid in the county where any overt act in pursuance of the original conspiracy was committed.[78] And in a prosecution for a violation of the Anti-Trust Act it is not necessary to allege and prove the place of organization of the corporation defendant.[79]

4. Evidence.[80] The existence of an unlawful combination may be established by circumstantial evidence.[81]

public welfare, unlawful, and a criminal conspiracy. It was held that the words, "and is inimical to the public welfare, unlawful and a criminal conspiracy," are mere declaration of the effect of a trust, and not an added element of definition attaching to each of the elements specified. Barataria Canning Co. *v.* Joulian, 80 Miss. 555, 31 So. 961.

65. See especially Loder *v.* Jaynes, 142 Fed. 1010, holding that the burden is upon plaintiff to establish real actual damage to his business, uncertain allegations being ignored. In Purington *v.* Hinchliff, 219 Ill. 159, 76 N. E. 47, 109 Am. St. Rep. 322, 2 L. R. A. N. S. 824, it was held that when injuries have been done by a combination in restraint of trade, a defendant who did not directly perform the unlawful act complained of will not be exonerated; it is enough if the act was done by other members of the combination with whom he confederated.

66. Criminal law generally see Criminal Law, 12 Cyc. 70 *et seq.*

67. Indictment or information generally see Indictments and Informations.

68. See *infra*, this and note 69 *et seq.*

Forms of indictment see American F. Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99; People *v.* Sheldon, 139 N. Y. 251, 34 N. E. 785, 36 Am. St. Rep. 690, 23 L. R. A. 221; Gage *v.* State, 24 Ohio Cir. Ct. 724; State *v.* Witherspoon, 115 Tenn. 138, 90 S. W. 852; U. S. *v.* Debs, 63 Fed. 436.

69. State *v.* Witherspoon, 115 Tenn. 138, 90 S. W. 852; U. S. *v.* Patterson, 55 Fed. 605; U. S. *v.* Nelson, 52 Fed. 646; *In re* Greene, 52 Fed. 104.

70. Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770; Com. *v.* Strauss, 188 Mass. 229, 74 N. E. 308.

71. U. S. *v.* Nelson, 52 Fed. 646; *In re* Corning, 51 Fed. 205.

72. American F. Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99; U. S. *v.* Patterson, 55 Fed. 605.

73. Recovery of penalty generally see Penalties.

74. See *supra*, VII, B, 1.

75. State *v.* Ætna F. Ins. Co., 66 Ark. 480, 51 S. W. 638; Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770; American F. Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99; State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

Sufficiency of allegations.— In an action by the state to recover penalties for a violation of an Anti-Trust Act, an allegation of the petition that, after the passage of the law, defendants "continued to treat such contract as a valid and binding contract, and executed and carried it out" was a sufficient allegation that the features of the contract constituting the unlawful combination were carried out after the statute went into effect, at least as against a general demurrer. State *v.* Missouri, etc., R. Co., (Tex. 1906) 91 S. W. 214.

76. Jurisdiction generally see Courts; Criminal Law, 12 Cyc. 196 *et seq.*

77. Venue generally see Criminal Law, 12 Cyc. 229 *et seq.*; Venue.

78. American F. Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99.

79. Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770.

80. Evidence generally see Criminal Law, 12 Cyc. 379 *et seq.*; Evidence, 16 Cyc. 821 *et seq.*

81. State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

VIII. CONSTITUTIONALITY OF REGULATION OF MONOPOLIES.[82]

A. Anti-Trust Statutes. It is generally agreed that statutes directed against combinations in restraint of trade are not in violation of the constitutional provisions guaranteeing liberty and property, since the regulation of monopolies as dangerous to society has always been a recognized part of the police power of the state.[83] But whether such statutes will be supported if they are retrospective in their operation[84] or discriminating in their application[85] is doubtful.

B. Division of Power Between the United States and the States. Upon general principles of constitutional law the federal government only has power to deal with combinations of capital or labor in so far as they are affecting or restraining interstate or foreign commerce by suppressing competition and establishing monopoly;[86] while the several states alone have power to legislate as to combinations seeking to restrict and monopolize industries or occupations in so far as they are conducted or pursued wholly within the boundaries of the states.[87]

MONTH. A word which may refer either to the calendar month or to the lunar month.[1] (Month: In Computation of Time, see TIME. Tenancy From Month to Month, see LANDLORD AND TENANT.)

MONTHLY. Once a month.[2]

MONUMENT. Something designed and constructed to perpetuate the memory

82. Constitutionality of statute generally see CONSTITUTIONAL LAW, 8 Cyc. 695 *et seq.* See also, generally, STATUTES.

83. *Massachusetts.*— Com. *v.* Strauss, 191 Mass. 545, 78 N. E. 136.

Mississippi.— American F. Ins. Co. *v.* State, 75 Miss. 24, 22 So. 99.

Nebraska.— Downing *v.* Lewis, 56 Nebr. 386, 76 N. W. 900.

Ohio.— State *v.* Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464; State *v.* Jacobs, 10 Ohio S. & C. Pl. Dec. 252, 7 Ohio N. P. 261.

South Carolina.—State *v.* Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

Tennessee.— State *v.* Witherspoon, 115 Tenn. 138, 90 S. W. 852.

Texas.— Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936.

United States.— Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 167.

84. See Sterling Remedy Co. *v.* Wyckoff, 154 Ind. 437, 56 N. E. 911; Crump *v.* Ligon, (Tex. Civ. App. 1904) 84 S. W. 250. *Compare* State *v.* Missouri, etc., R. Co., (Tex. 1906) 91 S. W. 214.

85. See Chicago, etc., Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770.

86. State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657; White Star Line *v.* Star Line of Steamers, 141 Mich. 604, 105 N. W. 135; State *v.* Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455; Swift *v.* U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518; Northern Securities Co. *v.* U. S., 193 U. S. 197, 24 S. Ct. 436, 48 L. ed. 679; Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 49 L. ed. 1007; Chesapeake, etc., Fuel Co. *v.* U. S., 115 Fed. 610, 53 C. C. A. 256; U. S. *v.* Coal Dealers' Assoc., 85 Fed. 252; *In re* Grand Jury, 62 Fed. 834. See also Hadley-Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. 242.

87. State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657; Anderson *v.* U. S., 171 U. S. 604, 19 S. Ct. 50, 43 L. ed. 300; U. S. *v.* E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. ed. 325; Phillips *v.* Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19; Gibbs *v.* McNeeley, 107 Fed. 210; The Charles E. Wiswall *v.* Scott, 86 Fed. 671, 30 C. C. A. 339; *In re* Greene, 52 Fed. 104.

Patent rights.— A corporation organized for the purpose of acquiring patents and granting licenses thereunder, and which has acquired many, if not all, of the valuable patents covering machines relating to a certain art, is not subject to the anti-trust laws of Illinois; for to subject patents to the operation of state laws of this description would be inconsistent with the rights acquired under the patent laws. Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302. Patents generally see PATENTS.

1. See TIME.

2. Webster Int. Dict.

"Monthly estimates" see Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 2080, 28 So. 217; Davis *v.* New York Steam Co., 33 N. Y. App. Div. 401, 403, 54 N. Y. Suppl. 78.

"Monthly meeting" see Earle *v.* Wood, 8 Cush. (Mass.) 430, 449.

"Monthly trip" see Pacific Mail Steamship Co. *v.* U. S., 18 Ct. Cl. 30, 38.

of some particular person or event.[3] As used in respect to boundaries, the visible mark or indication left on natural or other objects indicating a line or boundary of a survey.[4] (See, generally, Boundaries; Cemeteries.)

MONUMENTA QUÆ NOS RECORDA VOCAMUS SUNT VERITATIS ET VETUSTATIS VESTIGIA. A maxim meaning "Monuments, which we call 'records,' are the vestiges of truth and antiquity."[5]

MOONSHINE BUSINESS. A term which refers to the unlawful manufacture or sale of spirituous liquors, like the common-law offense of owling, applied to the unlawful exportation of wool.[6] (See, generally, Intoxicating Liquors.)

MOOR. In navigation, to fix or secure a vessel in a particular place by casting anchor, or by fastening with cables or chains;[7] to tie or fasten a vessel to the shore or to a buoy or some other stationary object.[8] (See, generally, Marine Insurance; Wharves.)

MOORAGE. A sum due by law or usage for mooring or fastening of ships to trees or posts at the shore or to a wharf.[9] (See, generally, Wharves.)

MOOT-CASE. A case which seeks to determine an abstract question which does not arise upon existing facts or rights.[10]

MORAL. Of or pertaining to the rules of right conduct; concerning the distinction of right from wrong.[11] (Moral: Certainty, see Criminal Law; Evidence. Evidence, see Moral Evidence. Fraud, see Fraud. Hazard, see Marine Insurance. Insanity, see Insane Persons.[12] Law, see Moral Law. Marriage, see Marriage; Moral Marriage. Necessity, see Moral Necessity. Obligation as Consideration For Contract, see Contracts.[13] Power, see Moral Power. Turpitude, see Moral Turpitude. See also Immoral.)

MORAL CERTAINTY. See Criminal Law; Evidence.

MORAL EVIDENCE. As opposed to "mathematical" or "demonstrative" evidence, a term which denotes that kind of evidence which, without developing an absolute and necessary certainty, generates a high degree of probability or persuasive force.[14] (See, generally, Evidence. See also Demonstrative Evidence; Mathematical Evidence.)

MORAL FRAUD. See Fraud.

MORAL HAZARD. See Marine Insurance.

MORAL INSANITY. See Criminal Law; Homicide; Insane Persons.

MORALITY.[15] The rule which teaches us to live soberly and honestly;[16] that

3. Mead *v.* Case, 33 Barb. (N. Y.) 202, 204.

In common usage, when it relates to a memorial for the dead, the word means a shaft, column, or some structure more imposing than a mere gravestone. *In re* Ogden, 25 R. I. 373, 374, 55 Atl. 933. See also Cooke *v.* Millard, 65 N. Y. 352, 363, 22 Am. Rep. 619.

4. Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 95, 18 Atl. 480.

5. Black L. Dict.

6. State *v.* Tuten, 131 N. C. 701, 703, 42 S. E. 443, where it is said: "It derives its name from the fact that it is carried on principally at night, or at least in secret."

7. Webster Dict. [*quoted* in Flandreau *v.* Elsworth, 9 Misc. (N. Y.) 340, 342, 29 N. Y. Suppl. 694].

8. Walsh *v.* New York Floating Dry Dock Co., 8 Daly (N. Y.) 387, 389.

"Moored . . . in safety" see Bramhall *v.* Sun Mut. Ins. Co., 104 Mass. 510, 516, 6 Am. Rep. 261; Meigs *v.* Mutual Mar. Ins. Co., 2 Cush. (Mass.) 439, 453; Bill *v.* Mason, 6 Mass. 313, 315.

9. Wharf Case, 3 Bland (Md.) 361, 373.

10. Adams *v.* Union R. Co., 21 R. I. 134, 140, 42 Atl. 515, 79 Am. St. Rep. 801, 44 L. R. A. 273.

11. Century Dict.

"Moral and mental improvement of men and women" see Kings County Medical Soc. *v.* Neff, 34 N. Y. App. Div. 83, 86, 53 N. Y. Suppl. 1077.

"Moral character of his act" see Ritter *v.* New York Mut. L. Ins. Co., 69 Fed. 505, 506.

"Moral or benevolent object" see State *v.* Gager, 28 Conn. 232, 236.

12. See 22 Cyc. 1113. See also 12 Cyc. 170.

13. **"Moral consideration"** distinguished from "moral obligation" in Kern's Estate, 171 Pa. St. 55, 62, 33 Atl. 129.

14. Black L. Dict.

15. **Compared with "knowledge" and "religion"** in Cincinnati Bd. of Education *v.* Minor, 23 Ohio St. 211, 241, 13 Am. Rep. 233. See Knowledge, 24 Cyc. 806.

16. 6 Horne's Works, Charge to Clergy of Norwich [*quoted* in Lyon *v.* Mitchell, 36 N. Y. 235, 237, 93 Am. Dec. 502, where it is said: "It hath for chief virtues, justice, prudence, temperance and fortitude"].

science which teaches men their duty, and the reason of it.[17] (Morality: Contract Against, see CONTRACTS.)

MORAL LAW. The eternal and indestructible sense of justice and of right written by God on the living tablets of the human heart, and revealed in his Holy Word.[18] (See LAW.)

MORAL MARRIAGE. A term applied to domestic conditions sometimes existing between slaves.[19] (See, generally, MARRIAGE.)

MORAL NECESSITY. That necessity which arises where there is a duty incumbent on a rational being to perform.[20]

MORAL OBLIGATION. See CONTRACTS.

MORAL POWER. Words which may mean threats, duress of imprisonment, or an assault imperiling life, which is the usual sense of the phrase, or it may mean some supernatural agency.[21] (See DURESS.)

MORAL TURPITUDE. Anything done contrary to justice, honesty, principle, or good morals;[22] an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.[23] (Moral Turpitude: Affecting Legality of Contract, see CONTRACTS. Imputation of, see LIBEL AND SLANDER. Infamy and Infamous Crime, see CRIMINAL LAW.)

MORA REPROBATUR IN LEGE. A maxim meaning "Delay is reprobated in law."[24]

MORBID DELUSION. See WILLS.

17. 1 Paley Mor. Ph. c. 1 [*quoted* in Lyon *v.* Mitchell, 36 N. Y. 235, 238, 33 Am. Dec. 502].

18. Moore *v.* Strickling, 46 W. Va. 515, 521, 33 S. E. 274, 50 L. R. A. 279 [*citing* Dillon Laws Eng. & Am.].

19. Lloyd *v.* Rawl, 63 S. C. 219, 236, 41 S. E. 312.

20. The Yarkand, 117 Fed. 336. "It presupposes a power of volition and action, under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming, superior force. Indeed, I hardly know how a case of physical necessity can correctly be said to exist in cases where an agent is called upon to exercise judgment and discretion, to act, or not to act. Take the case of the master of a ship in a storm of eminent peril, where a jettison seems required, or masts are to be cut away to save the ship from foundering at sea. The master is called upon to act; but even in such an extremity he has a choice; and when he acts, he acts, properly speaking, upon his judgment, under a moral, rather than a physical necessity. But in ordinary cases, where a master orders repairs or supplies for the ship, it would be an entire deflection from the true use of the language to call it a case of physical necessity. So far as the master is concerned, it is his duty to procure suitable repairs and supplies, in order to enable him to save the ship and prosecute the voyage; and this sense of duty, when it becomes imperative by its urgency upon his conscience and judgment, constitutes what is most appropriately called a moral necessity. No one can correctly say, in such a case, that the master is under a physical necessity to make the repairs, or to procure the supplies." The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228, 248 [*quoted* in The Yarkand, 117 Fed. 336, 341].

21. State *v.* Brandon, 53 N. C. 463, 467.

22. Bouvier L. Dict. [*quoted* in Matter of Coffey, 123 Cal. 522, 524, 56 Pac. 448, where it is said that the crime of extortion involves a moral turpitude].

A term not clearly defined.— What constitutes moral turpitude, or what will be held such, is not entirely clear. A contract to promote public wrong, short of crime, may or may not involve it. If parties intend such wrong, as where they conspire against the public interests by agreeing to violate the law or some rule of public policy, the act doubtless involves moral turpitude. When no wrong is contemplated, but is unintentionally committed, through error of judgment, it is otherwise. Pullman's Palace Car Co. *v.* Central Transp. Co., 65 Fed. 158, 161.

Everything done contrary to justice, honesty, modesty, or good morals is done with turpitude, so that embezzlement involves moral turpitude. *In re* Kirby, 10 S. D. 322, 328, 414, 73 N. W. 92, 907, 39 L. R. A. 856, 859.

It is not a charge of moral turpitude to charge another with being a dirty, drunken cur, lying drunk around the house more than half the time, and to have poisoned all the cats and dogs in the neighborhood, and to have scalded defendant's cat and kicked his dog, and to have persecuted a poor woman and robbed her of her rights. Baxter *v.* Mohr, 37 Misc. (N. Y.) 833, 76 N. Y. Suppl. 982.

23. Blackburn *v.* Clark, 41 S. W. 430, 19 Ky. L. Rep. 659; Newell Sl. & L. (2d ed.) § 12 [*quoted* in Baxter *v.* Mohr, 37 Misc. (N. Y.) 833, 76 N. Y. Suppl. 982; State *v.* Mason, 29 Oreg. 18, 21, 43 Pac. 651, 54 Am. St. Rep. 772].

24. Burrill L. Dict. [*citing* Jenkins Cent. 51, case 97].

MORE. Greater in amount, extent, number or degree.[25]

MORE OR LESS. Generally in its plain and most obvious meaning an expression which shows that the parties were to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity;[26] words of safety and precaution and intended to cover some slight or unimportant inaccuracy;[27] words used in contracts or conveyances, to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of deficiency or surplus.[28] (More or Less: In Contract For Sale — Of Personalty, see SALES; Of Realty, see VENDOR AND PURCHASER. In Deed, see DEEDS.)

MOREOVER. Beyond what has been said; FURTHER, *q. v.*; BESIDES, *q. v.*; ALSO, *q. v.*; LIKEWISE, *q. v.*[29]

MORES. When applied to an individual a word always used to signify morals; and where clearly used with reference to a large body it includes all that larger circle that for want of a more precise and distinct term we call manners.[30]

MORMON.[31] See BIGAMY.

MORNING. A term meaning any time from sunrise till twelve o'clock.[32] (See AFTERNOON; EVENING.)

MORPHINE. An alkaloid, the most important narcotic principle of opium.[33] (See, generally, POISONS.)

MORS DICITUR ULTIMUM SUPPLICIUM. A maxim meaning "Death is called the 'last punishment,' the 'extremity of punishment.'"[34]

MORS OMNIA SOLVIT. A maxim meaning "Death dissolves all things."[35]

MORS ULTIMA LINEA RERUM EST. A maxim meaning "Death is the closing limit of human transactions."[36]

MORTALITY. In the law of insurance, a term which refers to a death arising

25. Century Dict. See also Mersbon *v.* Williams, 62 N. J. L. 779, 782, 42 Atl. 778; Morris *v.* Eighth Ave. R. Co., 68 Hun (N. Y.) 39, 43, 22 N. Y. Suppl. 666.

Context and approved usage should be considered see Culbertson *v.* Kinevan, 73 Cal. 68, 71, 14 Pac. 364.

Used in connection with other words see the following phrases: "More favorable judgment" see Baxter *v.* Scoland, 2 Wash. Terr. 86, 90, 3 Pac. 638. "More hazardous" see FIRE INSURANCE; LIFE INSURANCE; and other Insurance Titles. "More interior part" see U. S. *v.* Bearse, 24 Fed. Cas. No. 14,552, 4 Mason 192. "More than eight miles" see Cleveland, etc., R. Co. *v.* Wells, 65 Ohio St. 313, 319, 62 N. E. 332, 58 L. R. A. 651. "More than fifteen days" see Pedreck *v.* Shaw, 2 N. J. L. 57, 59. "More than five years" see Bauserman *v.* Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316. "More than ninety days" see Lang *v.* Phillips, 27 Ala. 311, 314. "More than one subject" see STATUTES. "More than three single strands or cords" see Wertheimer *v.* U. S., 68 Fed. 186.

26. Harrison *v.* Talbot, 2 Dana (Ky.) 258, 261.

27. Oakes *v.* De Lancey, 133 N. Y. 227, 230, 30 N. E. 974, 28 Am. St. Rep. 628.

28. Stebbins *v.* Eddy, 22 Fed. Cas. No. 13,342, 4 Mason 414, 421 [*quoted* in Jones *v.* Plater, 2 Gill (Md.) 125, 128, 41 Am. Dec. 408]. See also Frederick *v.* Youngblood, 19 Ala. 680, 682, 54 Am. Dec. 209.

As used in contracts relating to personalty, and as applied to quantity, the term is to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically stipulated in the contract. Chicago *v.* Galpin, 183 Ill. 399, 408, 55 N. E. 731; Cabot *v.* Winsor, 1 Allen (Mass.) 546, 550 [*quoted* in Hackett *v.* State, 103 Cal. 144, 150, 37 Pac. 156]; Hardy *v.* U. S., 9 Ct. Cl. 244, 252.

29. Century Dict.

The term "item," or "further," or "moreover" as used in a will see Burr *v.* Sim, 1 Whart. (Pa.) 252, 264, 29 Am. Dec. 48.

"Moreover" as used in a lease see Ingle *v.* Wallach, 1 Wall. (U. S.) 61, 65, 17 L. ed. 680.

30. *Ex p.* Wrangham, 2 Ves. Jr. 609, 622, 30 Eng. Reprint 803.

31. Calling another person a "Mormon" held to be libelous see Witcher *v.* Jones, 17 N. Y. Suppl. 491, 493.

32. Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 697, 7 S. W. 77, construing the term as used in a statute.

33. Century Dict.

Morphine is both an opiate and a narcotic, which is so successfully and beneficially used in the modern practice of medicine and surgery for the alleviation of pain and suffering in so many of the ills to which flesh is heir. Dezell *v.* Fidelity, etc., Co., 176 Mo. 253, 257, 75 S. W. 1102.

34. Black L. Dict. [*citing* 3 Inst. 212].

35. Black L. Dict. [*citing* Jenkins Cent. p. 160, case 2]

36. Morgan Leg. Max.

from natural causes, and not a violent death.[37] (See, generally, LIFE INSURANCE; and the Insurance Titles.)

MORTALITY TABLES. An account kept for a great number of consecutive years of the ages at which men and women die, and taking the average of all such ages.[38] (Mortality Tables: As Evidence — Generally, see EVIDENCE; In Action For Death, see DEATH; In Action For Personal Injury, see DAMAGES. See also CARLISLE TABLES.)

MORTALLY. In a mortal manner so as to cause death.[39] (See, generally, HOMICIDE.)

MORTAL WOUND. A term which may apparently be used to designate a wound calculated and adequate to produce death, as well as one which is necessarily mortal.[40] (See, generally, HOMICIDE.)

MORTE LEGATARII, PERIT LEGATUM. A maxim meaning "By the death of the legatee during the life of the testator, the legacy lapses."[41]

MORTE MANDATORIS, PERIT MANDATUM. A maxim meaning "A mandate fails on the death of the mandant."[42]

MORTGAGEE. He that takes or receives a mortgage.[43] (See, generally, CHATTEL MORTGAGES; MORTGAGES.)

MORTGAGEE IN POSSESSION. One who takes possession of the mortgaged land by virtue of an agreement between him and the mortgagor.[44] See, generally, MORTGAGES.)

37. Lawrence *v.* Aberdein, 5 B. & Ald. 107, 110, 24 Rev. Rep. 299.

38. Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 286, 31 Atl. 272, where it is said: "By this means the probable number of years any man or woman of a given age and of ordinary health will live may be arrived at with reasonable certainty."

39. Webster Int. Dict. [*quoted* in U. S. *v.* Barber, 20 D. C. 79, 93].

40. State *v.* Hambright, 111 N. C. 707, 712, 16 S. E. 411, holding that one inflicting such a wound cannot exonerate himself by showing that the conduct of deceased or his agencies, after the wound was inflicted, lessened the chances of his recovery and thus caused death.

41. Morgan Leg. Max.

42. Morgan Leg. Max. [*citing* Trayner Leg. Max. 350].

43. Black L. Dict. See also May *v.* State, 115 Ala. 14, 17, 22 So. 611 (under Alabama code); Wilder *v.* Davenport, 58 Vt. 642, 648, 5 Atl. 753.

The term may include an assignee, or personal representative. People *v.* Edwards, 56 Hun (N. Y.) 377, 380, 10 N. Y. Suppl. 335; Vt. St. (1894) 1346. To the same effect see N. H. Pub. St. (1901) p. 63, c. 2, § 17.

"Mortgagee in possession" is a person who takes possession of the mortgaged land by virtue of an agreement between him and the mortgagor. Freeman *v.* Campbell, 109 Cal. 360, 362, 42 Pac. 35. To constitute one a mortgagee in possession, he must be in possession by reason of the agreement or assent of the mortgagor or his assigns that he may have possession under the mortgage and because of it. Rogers *v.* Benton, 39 Minn. 39, 43, 38 N. W. 765, 12 Am. St. Rep. 613. See also Kelso *v.* Norton, 65 Kan. 778, 783, 70 Pac. 896, 93 Am. St. Rep. 308. The term does not include a lien-holder living in the family of a homestead claimant, who is in possession of the property as a homestead. Baker *v.* Grand Island Banking Co., 4 Nebr. (Unoff.) 100, 93 N. W. 428.

"Mortgagee of record" see *In re* Lancy, 177 Mass. 431, 433, 59 N. E. 115; Hawes *v.* Howland, 136 Mass. 267, 269.

44. Freeman *v.* Campbell, 109 Cal. 360, 362, 42 Pac. 35, holding that one taking such possession and recognizing the relation between the parties must, on a bill to redeem brought by the mortgagor, account for the income of the property.

To constitute one a mortgagee in possession he must be in possession by reason of the agreement or assent of the mortgagor or his assignee, that he may have possession under the mortgage and because of it. Kelso *v.* Norton, 65 Kan. 778, 782, 70 Pac. 896, 93 Am. St. Rep. 308; Rogers *v.* Benton, 39 Minn. 39, 43, 38 N. W. 765, 12 Am. St. Rep. 613. A right to take possession under his mortgage being taken away, nothing remains but to foreclose or to make some arrangement for his better security with the owner of the fee. Having no right to take possession under his mortgage, the mortgagee can get none except by agreement or assent of one who owns that right, which need not necessarily be express, but may be implied from the circumstances. The assent, express, or implied, of the mortgagor that the mortgagee may take possession under, or because of his mortgage, is the essence of a mortgagee in possession. Rogers *v.* Benton, 39 Minn. 39, 43, 38 N. W. 765, 12 Am. St. Rep. 613. It is the legal right of the mortgagor to retain possession of the mortgaged premises until a valid decree foreclosing his equity of redemption is entered, a valid sale made, and deed issued thereunder; but this legal right may be waived or surrendered by consent or agreement of the parties, either express or implied. Thus when a mortgagor surrenders possession to a purchaser at a

MORTGAGEE OF RECORD. A term which may include an assignee of a mortgage which has been recorded, although the assignment is not of record.[45] (See, generally, MORTGAGES.)

void foreclosure sale, who enters under the rights he supposed he had acquired under the sale, believing himself to be the owner of the premises, the mortgagor will be deemed to have waived his legal right to retain possession thus taken, and the purchaser will thenceforth be deemed to be the mortgagee in possession. Kelso *v.* Norton, 65 Kan. 778, 782, 70 Pac. 896, 93 Am. St. Rep. 308.

A lien-holder living in the family of a homestead claimant who is in possession of the property as a homestead is not to be deemed a mortgagee in possession, accountable for rents and profits or liable to pay taxes as such. Baker *v.* Grand Island Banking Co., 4 Nebr. (Unoff.) 100, 93 N. W. 428, 429.

45. Hawes *v.* Howland, 136 Mass. 267, 269, within the meaning of Mass. Gen. St. c. 12, § 36, cl. 4, authorizing a mortgagee of record to redeem from a tax-sale.

After going into possession of the premises a mortgagee is still a mortgagee of record within Mass. St. (1888) c. 390, § 57, giving a mortgagee of record two years after notice of the tax-sale to redeem therefrom. Lancy *v.* Abington Sav. Bank, 177 Mass. 431, 433, 59 N. E. 115.

MORTGAGES

By Henry Campbell Black*

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I. DEFINITION AND NATURE OF MORTGAGES.

A. Legal and Equitable Doctrines — 1. MORTGAGES AT COMMON LAW. At common law a mortgage of realty may be defined as an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money or the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. It is therefore an estate defeasible by the performance of a condition subsequent.[1] By the strict doctrine of the com-

1. 2 Washburn Real Prop. (5th ed.) 36. And see Mitchell *v.* Burnham, 44 Me. 286; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71; Hoffman *v.* Mackall, 5 Ohio St. 124, 130, 64 Am. Dec. 637; Loyd *v.* Currin, 3 Humphr. (Tenn.) 462; 2 Blackstone Comm. 157.

Kent's definition.— "A mortgage is the conveyance of an estate by way of pledge for the security of a debt, and to become void on payment of it." 4 Kent Comm. 133. This definition has been quoted, adopted, or approved in the following cases:

Connecticut.— Ansonia Nat. Bank's Appeal, 58 Conn. 257, 261, 18 Atl. 1030, 20 Atl. 394; De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282, 318.

Dakota.— Everett *v.* Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31.

Idaho.— Brown *v.* Bryan, 5 Ida. 145, 151, 51 Pac. 995.

Illinois.— Eldridge *v.* Pierce, 90 Ill. 474, 483.

Iowa.— Babcock *v.* Hoey, 11 Iowa 375, 385.

Maine.— Goddard *v.* Coe, 55 Me. 385, 388; Brookings *v.* White, 49 Me. 479, 485; Smith *v.* People's Bank, 24 Me. 185, 195.

Mississippi.— Gothard *v.* Flynn, 25 Miss. 58, 62.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 597, 19 Pac. 281, 1 L. R. A. 240.

New York.— Murray *v.* Walker, 31 N. Y. 399, 400; Reich *v.* Dyer, 91 N. Y. App. Div. 240, 248, 86 N. Y. Suppl. 544; Weeks *v.* Weeks, 16 Abb. N. Cas. 143, 151.

North Carolina.— Cheatham *v.* Jones, 68 N. C. 153, 155; Robinson *v.* Willoughby, 65 N. C. 520, 522.

Pennsylvania.— Helfenstein's Estate, 135 Pa. St. 293, 294, 20 Atl. 151.

South Carolina.— Homestead, etc., Loan Assoc. *v.* Enslow, 7 S. C. 1, 8.

Tennessee.— Greenfield *v.* Dorris, 1 Sneed 548, 551.

Texas.— Poarch *v.* Duncan, (Civ. App. 1906) 91 S. W. 1110; Taylor *v.* Hudgins, 42 Tex. 244; Jordan *v.* Peak, 38 Tex. 429, 442; Stephens *v.* Sherrod, 6 Tex. 294, 298, 55 Am. Dec. 776.

Vermont.— Wing *v.* Cooper, 37 Vt. 169, 179.

West Virginia.— Sandusky *v.* Faris, 49 W. Va. 150, 176, 38 S. E. 563; Nease *v.* Capehart, 8 W. Va. 95, 124.

United States.— *In re* Bloom, 3 Fed. Cas. No. 1,557.

But *compare* Moore *v.* Wade, 8 Kan. 380, 388, holding that it is not necessary that a mortgage should always be given to secure the payment of a debt; it may be given to secure the performance of any other act which the law permits to be performed.

Other definitions are: "[A mortgage is] a deed whereby one grants to another lands, upon condition that if the mortgagor shall pay a certain sum of money or do some other act therein specified, at a certain day, the grant shall be void. Formerly this was a deed of feoffment, accompanied by actual livery of seizin; now it is usually a deed of bargain and sale to the use of the mortgagee, which use is executed by the statute without such actual livery. By this conveyance the mortgagee becomes seized of the mortgaged lands, and the mortgagor, if he remains in possession, is a mere tenant at will, or rather quasi-tenant at will, for he has not all the privileges of such tenant; and the estate having thus passed to the mortgagee *in presenti*, and being defeasible only upon a condition subsequent, the mortgagee may, at any time, even before the day of payment, enter upon the mortgagor, or bring his ejectment against him and turn him out of possession." Montgomery *v.* Bruere, 4 N. J. L. 300, 310.

"A mortgage is a conveyance of lands, upon a condition in the deed, or a defeasance out of it, that on the grantor's paying a sum of money, or doing some other act, the conveyance shall be void; and performance of the condition, without any other act, puts an end to all title and interest in the grantee." Baker *v.* Thrasher, 4 Den. (N. Y.) 493, 495. And see Rue *v.* Dole, 107 Ill. 275, 281; Hawley *v.* James, 16 Wend. (N. Y.) 61 [*quoted* in Hascall *v.* King, 162 N. Y. 134, 149, 56 N. E. 515, 76 Am. St. Rep. 302]; Stewart *v.* Kerrison, 3 S. C. 266, 275; Marvin *v.* Titsworth, 10 Wis. 320, 326; Walton *v.* Cody, 1 Wis. 420, 435.

"A mortgage is but a conveyance with a clause of defeasance. It is something more than a lien; it is the grant of an estate as specific security for the money loaned." Datesman's Appeal, 127 Pa. St. 348, 17 Atl. 1086, 1100. And see Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905; Willamette Woolen Mfg. Co. *v.* British Columbia Bank, 119 U. S. 191, 7 S. Ct. 187, 30 L. ed. 384.

"A mortgage is a deed whereby one grants to another lands upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified, at a day certain, the grant shall be void." Flagg *v.* Walker, 113 U. S. 659, 677, 5 S. Ct. 697,

mon law, unmodified by the intervention of equity for the protection of the debtor, a mortgage was regarded as passing the whole legal title to the estate pledged to the mortgagee, who became the owner of it, although his title was liable to be defeated on a condition subsequent. He was also entitled at all times to the possession of the estate, and could maintain ejectment against the mortgagor, before as well as after default, unless he had agreed that the latter might remain in possession. The time fixed for the payment of the debt or other performance of the condition was called the "law day," and if the debtor punctually performed his part of the contract at the appointed time, the estate of the mortgagee, by performance of the condition, determined and ceased. But as the legal title was in him, the estate was not revested in the mortgagor by the mere act of payment or other performance, but it was necessary that the mortgagee should reconvey to him by deed. On the other hand, if the debtor failed to pay or perform at the stipulated time, that is, if there was a breach of the condition, the title of the mortgagee became absolute and indefeasible, and the mortgagor ceased to have any right or interest in the estate.[2]

2. **Mortgages in Equity.** The English courts of equity began at an early day to look with great disfavor upon the strict common-law doctrine of the absolute forfeiture of the estate upon non-payment of the mortgage debt. Accordingly they established the rule that in equity the debtor should still have a right to redeem after breach of the condition at law. This right to save the estate in equity after the forfeiture at law was called the equity of redemption, and the same designation came to be applied to the interest or estate retained by the debtor after conveying the legal title to the mortgagee by the mortgage deed.[3] In equity a mortgage of lands is regarded as a mere lien or security for a debt, the debt being considered as the principal thing and the mortgage as accessory

28 L. ed. 1072. And see Dahl *v.* Pross, 6 Minn. 89; Lowell *v.* North, 4 Minn. 32, 40.

"A conveyance of real estate, or of some interest therein, defeasible upon the payment of money, or the performance of some other condition." And see Bayley *v.* Bailey, 5 Gray (Mass.) 505, 509; Aiken *v.* Kilburne, 27 Me. 252.

"The conveyance of lands with a proviso that such conveyance shall be void on the payment of a sum of money." Croft *v.* Bunster, 9 Wis. 503, 508. And see Hall *v.* Byrne, 2 Ill. 140.

"A transfer of property, which the person transferring may have again, by paying the sum for which the property was mortgaged or pledged; and although there may be other means or remedies for recovering this sum, yet these may be entirely lost and the pledge remain good." Hunt *v.* Fay, 7 Vt. 170, 181.

Etymology.— In the older English law there were two forms of pledging real property as security for a debt called respectively *vadium vivum* and *vadium mortuum*. In course of time the *vadium vivum* practically disappeared from use, and the *vadium mortuum* became transformed into the common-law mortgage. From the French equivalent *mort gage* of this Latin term the modern word "mortgage" is derived. 2 Blackstone Comm. 157; 2 Coke Litt. 205*a*; Littleton Ten. bk. 3, c. 5, § 332; 1 Powell Mortg. 3; 2 Washburn Real Prop. (4th ed.) 37. And see Hardy *v.* Ruggles, 1 Hawaii 457.

2. *Mississippi.*— Pickett *v.* Buckner, 45 Miss. 226.

Nebraska.— South Omaha Sav. Bank *v.* Levy, 1 Nebr. (Unoff.) 255, 95 N. W. 603.

North Carolina.— Whitehurst *v.* Gaskill, 69 N. C. 449, 12 Am. Rep. 655.

South Carolina.— Simons *v.* Bryce, 10 S. C. 354.

Texas.— East Texas F. Ins. Co. *v.* Clarke, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293; Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

Virginia.— Washington Bank *v.* Hupp, 10 Gratt. 23.

United States.— Brobst *v.* Brock, 10 Wall. 519, 19 L. ed. 1002; Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

England.— Harrison *v.* Owen, 1 Atk. 520, 26 Eng. Reprint 328.

Mortgagee in possession.— By the common law, the mortgagee of real estate, for the purpose of enforcing his lien against the mortgagor, has the remedies of an owner; but except as to such remedies, and as to all persons except the mortgagee, the mortgagor in possession is to be regarded and treated as the owner of the estate, subject to a mere lien or charge. Clark *v.* Reyburn, 1 Kan. 281.

At law a mortgage is not merely a lien on property for the payment of a debt but a transfer of the property itself as a security for the debt. Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

3. Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145. And see Coote Mortg. 14; Jones Mortg. (6th ed.) § 6.

thereto. Until foreclosure the mortgagor continues to be the real owner of the fee. His equity of redemption may be granted, devised, taken in execution, or give rise to estates in dower or by the curtesy; and it is therefore regarded as the real and beneficial estate tantamount to the fee at law.[4]

3. Modern Rules as to Mortgages. In many of the American states the common-law doctrine of mortgages prevails, although more or less extensively modified by the equitable principles just adverted to.[5] As the result of express

4. *Arkansas.*— Hannah *v.* Carrington, 18 Ark. 85.

District of Columbia.— Vowell *v.* Thompson, 28 Fed. Cas. No. 17,023, 3 Cranch C. C. 428.

Illinois.— Schumann *v.* Sprague, 189 Ill. 425, 59 N. E. 945; Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331.

Indiana.— Ætna L. Ins. Co. *v.* Broecker, (1906) 77 N. E. 1092.

Maine.— Hussey *v.* Fisher, 94 Me. 301, 47 Atl. 525.

Maryland.— Timms *v.* Shannon, 19 Md. 296, 81 Am. Dec. 632.

New York.— Watkins *v.* Vrooman, 51 Hun 175, 5 N. Y. Suppl. 172; Woodward *v.* Republic F. Ins. Co., 32 Hun 365.

North Carolina.— Killebrew *v.* Hines, 104 N. C. 182, 10 S. E. 159, 17 Am. St. Rep. 672; Capehart *v.* Dettrick, 91 N. C. 344.

Pennsylvania.— Craft *v.* Webster, 4 Rawle 242.

South Carolina.— Williams *v.* Beard, 1 S. C. 309.

Texas.— Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

Virginia.—Hale *v.* Horne, 21 Gratt. 112.

England.— Casborne *v.* Scarfe, 1 Atk. 603, 26 Eng. Reprint 377; Blake *v.* Foster, 2 Ball & B. 402; Rex *v.* St. Michael, Dougl. (3d ed.) 630; Burgess *v.* Wheate, 1 Eden 225, W. Bl. 121, 28 Eng. Reprint 652.

Common-law and equitable doctrines concurrent.— The establishment by the courts of equity of their peculiar doctrine of mortgages was not an endeavor to reverse or destroy the theory of the common-law courts. There was no encroachment of either jurisdiction upon the other. Although differing widely in their views of the nature and incidents of the mortgage relation, the two doctrines were always regarded as mutually consistent and equally authoritative. Coote Mortg. 14. "These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was, of course, necessary, to make his title available in a court of law." Barrett *v.* Hinckley, 124 Ill. 32, 43, 14 N. E. 863, 7 Am. St. Rep. 331. And see Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

5. *Alabama.*— In equity a mortgage is regarded as a mere security, but at law it conveys an estate to the mortgagee which entitles him to the immediate possession of the property, unless otherwise stipulated in the conveyance. Cotton *v.* Carlisle, 85 Ala. 175, 4 So. 670, 7 Am. St. Rep. 29; Coffey *v.* Hunt, 75 Ala. 236; Toomer *v.* Randolph, 60 Ala. 356; Woodward *v.* Parsons, 59 Ala. 625; Welsh *v.* Phillips, 54 Ala. 309, 25 Am. Rep. 679; Mansony *v.* U. S. Bank, 4 Ala. 735. But, as against all persons except the mortgagee, the mortgagor is regarded as the owner of the estate. The legal rights and remedies of others may be enforced, subject to the lien of the mortgage, as if the property were unencumbered. The mortgagor, if dispossessed, may maintain an action to recover the property, and a defendant in such action cannot set up the outstanding legal title in the mortgagee. Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478; Cotton *v.* Carlisle, 85 Ala. 175, 4 So. 670, 7 Am. St. Rep. 29; Allen *v.* Kellam, 69 Ala. 442; Denby *v.* Mellgrew, 58 Ala. 147; Knox *v.* Easton, 38 Ala. 345; Doe *v.* McLoskey, 1 Ala. 708. But after breach of condition the legal title to the mortgaged premises vests absolutely in the mortgagee, and he may convey it to another, even though not in possession. There remains in the mortgagor nothing but a mere equity of redemption which the courts of law cannot notice, but which may be asserted and protected in equity until duly foreclosed. High *v.* Hoffman, 129 Ala. 359, 29 So. 658; Fields *v.* Clayton, 117 Ala. 538, 23 So. 530, 67 Am. St. Rep. 189; Lomb *v.* Pioneer Sav., etc., Co., 106 Ala. 591, 17 So. 670; Downing *v.* Blair, 75 Ala. 216; Scott *v.* Ware, 65 Ala. 174; Toomer *v.* Randolph, 60 Ala. 356; Denby *v.* Mellgrew, 58 Ala. 147; Welsh *v.* Phillips, 54 Ala. 309, 25 Am. Rep. 679; Barker *v.* Bell, 37 Ala. 354; Paulling *v.* Barron, 32 Ala. 9. And see Hayes *v.* Banks, 132 Ala. 354, 31 So. 464.

Arkansas.— Whittington *v.* Flint, 43 Ark. 504, 51 Am. Rep. 572; Terry *v.* Rosell, 32 Ark. 478; Turner *v.* Watkins, 31 Ark. 429; Kannady *v.* McCarron, 18 Ark. 166; Crittenden *v.* Johnson, 11 Ark. 94; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260. And see Dyer *v.* Jacoway, 76 Ark. 171, 88 S. W. 901.

Connecticut.— Cook *v.* Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452; New Haven Sav. Bank, etc., Bldg. Assoc. *v.* McPartlan, 40 Conn. 90; Clinton *v.* Westbrook, 38 Conn. 9; Mills *v.* Shepard, 30 Conn. 98; Savage *v.* Dooley, 28 Conn. 411, 73 Am. Dec. 680; Jarvis *v.* Woodruff, 22 Conn. 548; Lacon *v.* Davenport, 16 Conn. 331; Cooper *v.* Davis, 15 Conn. 556; Smith *v.* Vincent, 15 Conn. 1,

statutory provisions in some states further variations are introduced. Thus by the

38 Am. Dec. 59; Porter *v.* Seeley, 13 Conn. 564; Middletown Sav. Bank *v.* Bates, 11 Conn. 519; Bates *v.* Coe, 10 Conn. 280; Chamberlain *v.* Thompson, 10 Conn. 243, 26 Am. Dec. 390; Beach *v.* Clark, 6 Conn. 354; Wakeman *v.* Banks, 2 Conn. 445; Rockwell *v.* Bradley, 2 Conn. 1; Gunn *v.* Scovil, 4 Day 234.

Delaware.— A mortgage, although in form a conveyance of the land, is a mere security for the payment of the debt; the mortgagor in possession is regarded as the real owner, and the mortgagee, before breach of condition, has only a chattel interest; but after default the mortgagee has a right to the possession, and the only right of the mortgagor is to redeem the premises by paying the debt. Walker *v.* Farmers' Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819; Doe *v.* Tunnell, 1 Houst. 320; Cooch *v.* Gerry, 3 Harr. 280; Fox *v.* Wharton, 5 Del. Ch. 200; Cornog *v.* Cornog, 3 Del. Ch. 407.

Illinois.— The right of possession does not vest in the mortgagee until there has been a breach of the condition of the mortgage, and non-payment of the mortgage debt does not invest the mortgagee with any absolute title, but only gives a right to foreclose. Kranz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239; Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221; Seaman *v.* Bisbee, 163 Ill. 91, 45 N. E. 208; Stewart *v.* Fellows, (1888) 128 Ill. 480, 20 N. E. 567; Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Emory *v.* Keighan, 88 Ill. 482; Johnson *v.* Watson, 87 Ill. 535; Oldham *v.* Pfleger, 84 Ill. 102; Moore *v.* Titman, 44 Ill. 367; Nelson *v.* Pinegar, 30 Ill. 473; Hall *v.* Byrne, 2 Ill. 140; Peterson *v.* Lindskoog, 93 Ill. App. 276; Frankenthal *v.* Mayer, 54 Ill. App. 160; Dayton *v.* Dayton, 7 Ill. App. 136.

Maine.— Brastow *v.* Barrett, 82 Me. 456, 19 Atl. 916; Anderson *v.* Robbins, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; Hadley *v.* Hadley, 80 Me. 459, 15 Atl. 47; Bragdon *v.* Hatch, 77 Me. 433, 1 Atl. 140; Jewett *v.* Mitchell, 72 Me. 28; Gilman *v.* Wills, 66 Me. 273; Howard *v.* Houghton, 64 Me. 445; Mitchell *v.* Burnham, 44 Me. 286; Huckins *v.* Straw, 34 Me. 166; Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595; Wilkins *v.* French, 20 Me. 111; Blaney *v.* Bearce, 2 Me. 132. But see Covell *v.* Dolloff, 31 Me. 104, holding that so long as the right of redeeming mortgaged property exists the title cannot become absolute in the mortgagee, nor can he appropriate it in payment of his debts; and until his title is perfected the law will not so appropriate it.

Maryland.— Chelton *v.* Green, 65 Md. 272, 4 Atl. 271; Baltimore City Appeal Tax Ct. *v.* Rice, 50 Md. 302; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Sumwalt *v.* Tucker, 34 Md. 89; Timms *v.* Shannon, 19 Md. 296, 81 Am. Dec. 632; Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. 225. *Compare* Leighton *v.* Preston, 9 Gill 201; Evans *v.* Merriken, 8 Gill & J. 39; Jamieson *v.* Bruce, 6 Gill & J. 72, 26 Am. Dec. 557; Brown *v.* Stewart, 1 Md. Ch. 87.

Massachusetts.— As between the parties, a mortgage is regarded as a conveyance in fee, for the protection of the rights of the creditor, and entitles him to the immediate possession. But in all other respects, until foreclosure, the mortgage is to be considered as a mere lien or security, subject to which the estate may be conveyed, attached, or otherwise dealt with as the estate of the mortgagor. Norcross *v.* Norcross, 105 Mass. 265; Steel *v.* Steel, 4 Allen 417; Hapgood *v.* Blood, 11 Gray 400; Murdock *v.* Chapman, 9 Gray 156; Buffum *v.* Bowditch Mut. F. Ins. Co., 10 Cush. 540; Page *v.* Robinson, 10 Cush. 99; Curtis *v.* Francis, 9 Cush. 427; Howard *v.* Robinson, 5 Cush. 119; Barnard *v.* Eaton, 2 Cush. 294; White *v.* Whitney, 3 Metc. 81; Ipswich Mfg. Co. *v.* Story, 5 Metc. 310; Ewer *v.* Hobbs, 5 Metc. 1; Bradley *v.* Fuller, 23 Pick. 1; Fay *v.* Cheney, 14 Pick. 399; Hunt *v.* Hunt, 14 Pick. 374, 25 Am. Dec. 400; Blanchard *v.* Brooks, 12 Pick. 47; Eaton *v.* Whiting, 3 Pick. 484; Fay *v.* Brewer, 3 Pick. 203; Green *v.* Kemp, 13 Mass. 515, 7 Am. Dec. 169; Goodwin *v.* Richardson, 11 Mass. 469; Taylor *v.* Porter, 7 Mass. 355; Willington *v.* Gale, 7 Mass. 138; Taylor *v.* Weld, 5 Mass. 109; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

Missouri.—A mortgage is only security for the debt, and remains so even after condition broken; but upon default in the payment of the debt the mortgagee may recover in ejectment against the mortgagor, because he is then in law regarded as the owner of the estate; but the legal title vests in him for no other purpose than the protection of his debt. Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045; Siemers *v.* Schrader, 88 Mo. 20; Barnett *v.* Timberlake, 57 Mo. 499; Pease *v.* Pilot Knob Iron Co., 49 Mo. 124; Johnson *v.* Houston, 47 Mo. 227; Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Kennett *v.* Plummer, 28 Mo. 142; Logan *v.* Wabash Western R. Co., 43 Mo. App. 71.

New Hampshire.— Morse *v.* Whitcher, 64 N. H. 591, 15 Atl. 207; Perkins *v.* Eaton, 64 N. H. 359, 10 Atl. 704; Fletcher *v.* Chamberlin, 61 N. H. 438; Tripe *v.* Marcy, 39 N. H. 439; Orr *v.* Hadley, 36 N. H. 575; Furbush *v.* Goodwin, 29 N. H. 321; Chellis *v.* Stearns, 22 N. H. 312; Great Falls Co. *v.* Worster, 15 N. H. 412; Rigney *v.* Lovejoy, 13 N. H. 247; Hobart *v.* Sanborn, 13 N. H. 226, 38 Am. Dec. 483; Sanders *v.* Reed, 12 N. H. 558; Ellison *v.* Daniels, 11 N. H. 274; Smith *v.* Moore, 11 N. H. 55; Glass *v.* Ellison, 9 N. H. 69; Moore *v.* Esty, 5 N. H. 479; Southerin *v.* Mendum, 5 N. H. 420; Pettengill *v.* Evans, 5 N. H. 54; McMurphy *v.* Minot, 4 N. H. 251; Brown *v.* Cram, 1 N. H. 169; Hutchins *v.* King, 1 Wall. (U. S.) 53, 17 L. ed. 544.

New Jersey.— The courts separate the

statutes in Mississippi[6] and Vermont[7] the mortgagor has the legal right to the possession of the premises as against the mortgagee, until default or breach of condition; but as to the dual nature of a mortgage, and the rights of the mortgagee after default, the modified common-law doctrine prevails in these states also.[8] In Virginia and West Virginia trust deeds have practically superseded the older form of mortgages; but in so far as the latter are still employed, the common law governs as to their nature and effect, subject to the equitable principles administered by the chancery courts.[9] In a majority of the states in the Union, partly by force of statutes, and partly by the decisions of the courts, the common-law doctrine of mortgages has been abrogated, and has given place to the purely equitable theory, according to which a mortgage is nothing more than a mere lien or security for a debt, passing no title or estate to the mortgagee, and giving

estate of the mortgagor from that of the mortgagee, and recognize an actual and distinct legal estate in each, that of the former investing him with almost all the qualities and concomitants of ownership, and that of the latter being only such as is necessary for the realization of the debt due, the only dominion he can exercise over the land being either to appropriate it, or have it appropriated, to the satisfaction of the mortgage debt. Devlin *v.* Collier, 53 N. J. L. 422, 22 Atl. 201; Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170; Woodside *v.* Adams, 40 N. J. L. 417; Kircher *v.* Schalk, 39 N. J. L. 335; Shields *v.* Lozear, 34 N. J. L. 496, 3 Am. Rep. 256; Wade *v.* Miller, 32 N. J. L. 296; Osborne *v.* Tunis, 25 N. J. L. 633; Montgomery *v.* Bruere, 4 N. J. L. 300; Marshall *v.* Hadley, 50 N. J. Eq. 547, 25 Atl. 325; Verner *v.* Betz, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630.

North Carolina.— Kiser *v.* Combs, 114 N. C. 640, 19 S. E. 664; Coor *v.* Smith, 101 N. C. 261, 7 S. E. 669; Fraser *v.* Bean, 96 N. C. 327, 2 S. E. 159; State *v.* Ragland, 75 N. C. 12; Hemphill *v.* Ross, 66 N. C. 477; Cunningham *v.* Davis, 42 N. C. 5. And see Hinson *v.* Smith, 118 N. C. 503, 24 S. E. 541; Parker *v.* Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231.

Ohio.— Brown *v.* National Bank, 44 Ohio St. 269, 6 N. E. 648; Martin *v.* Alter, 42 Ohio St. 94; Allen *v.* Everly, 24 Ohio St. 97; McArthur *v.* Franklin, 16 Ohio St. 193; Swartz *v.* Leist, 13 Ohio St. 419; Harkrader *v.* Leiby, 4 Ohio St. 602; Frische *v.* Kramer, 16 Ohio 125, 47 Am. Dec. 368; Rands *v.* Kendall, 15 Ohio 671; Moore *v.* Burnet, 11 Ohio 334; Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97; Phelps *v.* Butler, 2 Ohio 224; Ely *v.* McGuire, 2 Ohio 223; Baxter *v.* Roelofson, 3 Ohio Dec. (Reprint) 250, 5 Wkly. L. Gaz. 110. And see Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846.

Pennsylvania.— McIntyre *v.* Velte, 153 Pa. St. 350, 25 Atl. 739; Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375; Tryon *v.* Munson, 77 Pa. St. 250; Soper *v.* Guernsey, 71 Pa. St. 219; Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Horstman *v.* Gerker, 49 Pa. St. 282, 88 Am. Dec. 501; Britton's Appeal, 45 Pa. St. 172; Michener *v.* Cavender, 38 Pa. St. 334, 80 Am. Dec. 486; Wilson *v.* Shoenberger, 31 Pa. St. 295; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Asay *v.* Hoover, 5 Pa. St. 21, 45 Am. Dec. 713; Wethrill's Appeal, 3 Grant 281; Clawson *v.* Eichbaum, 2 Grant 130; Bury *v.* Hartman, 4 Serg. & R. 175; Sheaffer's Estate, 6 Pa. Co. Ct. 147; Talbot *v.* Chester, 2 Chest. Co. Rep. 57; Hoffsomer *v.* Smith, 1 Kulp 348; Atterbury *v.* Jifkins, 1 Lack. Leg. Rec. 491; Brobst *v.* Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002. And see Bonstein *v.* Schweyer, 212 Pa. St. 19, 61 Atl. 447. "For some purposes a mortgage is something more than a mere security for a debt. It is a pledge of specific property. It gives to a creditor the exceptional remedy of ejectment." Twitchell *v.* McMurtrie, 1 Wkly. Notes Cas. 407, 410. And see Datesman's Appeals, 24 Wkly. Notes Cas. 353, construing Pamphl. Laws (1849), p. 677.

Rhode Island.— Reynolds *v.* Hennessy, 15 R. I. 215, 2 Atl. 701; Carpenter *v.* Carpenter, 6 R. I. 542; Waterman *v.* Matteson, 4 R. I. 539; Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531.

Tennessee.— Lincoln Sav. Bank *v.* Ewing, 12 Lea 598; Carter *v.* Taylor, 3 Head 30; Vance *v.* Johnson, 10 Humphr. 214; Henshaw *v.* Wells, 9 Humphr. 568.

See 35 Cent. Dig. tit. "Mortgages," § 273.

6. Miss. Rev. Code, § 1204.

7. Vt. Rev. Laws, § 1258.

8. Buck *v.* Payne, 52 Miss. 271; Buckley *v.* Daley, 45 Miss. 338; Carpenter *v.* Bowen, 42 Miss. 28; Heard *v.* Baird, 40 Miss. 793; Hill *v.* Robertson, 24 Miss. 368; Stark *v.* Mercer, 3 How. (Miss.) 377; Jefferson College *v.* Dickson, Freem. (Miss.) 474; Brunswick-Balke-Collender Co. *v.* Herrick, 63 Vt. 286, 21 Atl. 918; Fuller *v.* Eddy, 49 Vt. 11; Walker *v.* King, 44 Vt. 601; Hagar *v.* Brainerd, 44 Vt. 294; Wright *v.* Lake, 30 Vt. 206; Pierce *v.* Brown, 24 Vt. 165; Langdon *v.* Paul, 22 Vt. 205; Lull *v.* Matthews, 19 Vt. 322; Wilson *v.* Hooper, 13 Vt. 653; Hooper *v.* Wilson, 12 Vt. 695; Morey *v.* McGuire, 4 Vt. 327; Briggs *v.* Fish, 2 D. Chipm. (Vt.) 100.

9. Faulkner *v.* Brockenbrough, 4 Rand. (Va.) 245; Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362. And see Grant *v.* Cumberland Valley Cement Co. 58 W. Va. 162, 52 S. E. 36.

him no right or claim to the possession of the property.[10] In Florida, both at law and in equity, a mortgage is merely a specific lien on the property described in

10. *Alaska.*— Lewis *v.* Wells, 85 Fed. 896. Act Cong. May 17, 1884, 23 U. S. St. at L. 24, § 7, provides that "the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

California.— Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866; Healy *v.* O'Brien, 66 Cal. 517, 6 Pac. 386; Frink *v.* Le Roy, 49 Cal. 314; Harp *v.* Calahan, 46 Cal. 222; Carpentier *v.* Brenham, 40 Cal. 221; Mack *v.* Wetzlar, 39 Cal. 247; Jackson *v.* Lodge, 36 Cal. 28; Bludworth *v.* Lake, 33 Cal. 265; Grattan *v.* Wiggins, 23 Cal. 16; Kidd *v.* Teeple, 22 Cal. 255; Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Fogarty *v.* Sawyer, 17 Cal. 589; Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561; Goodenow *v.* Ewer, 16 Cal. 461, 76 Am. Dec. 540; Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Haffley *v.* Maier, 13 Cal. 13; Nagle *v.* Macy, 9 Cal. 426; McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655; Peters *v.* Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134; Godeffroy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

Colorado.— Pueblo, etc., R. Co. *v.* Beshoar, 8 Colo. 32, 5 Pac. 639; Drake *v.* Root, 2 Colo. 685; Eyster *v.* Gaff, 2 Colo. 228; Longan *v.* Carpenter, 1 Colo. 205.

Georgia.— Thomas *v.* Morrisett, 76 Ga. 384; Gibson *v.* Hough, 60 Ga. 588; Vason *v.* Ball, 56 Ga. 268; Burnside *v.* Terry, 45 Ga. 621; Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255; Jackson *v.* Carswell, 34 Ga. 279; Elfe *v.* Cole, 26 Ga. 197; Ragland *v.* Justices Inferior Ct., 10 Ga. 65; Davis *v.* Anderson, 1 Ga. 176; Seals *v.* Cashin, Ga. Dec. Pt. II, 76; U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344.

Indiana.— Fletcher *v.* Holmes, 32 Ind. 497; Grable *v.* McCulloh, 27 Ind. 472; Morton *v.* Noble, 22 Ind. 160; Francis *v.* Porter, 7 Ind. 213; Reasoner *v.* Edmundson, 5 Ind. 393. *Compare* Givan *v.* Tout, 7 Blackf. 210.

Iowa.— Harrington *v.* Foley, 108 Iowa 287, 79 N. W. 64; Grether *v.* Clark, 75 Iowa 383, 39 N. W. 655, 9 Am. St. Rep. 491; Sigworth *v.* Meriam, 66 Iowa 477, 24 N. W. 4; White *v.* Rittenmyer, 30 Iowa 268; Hall *v.* Savill, 3 Greene 37, 54 Am. Dec. 485.

Kansas.— Beckman *v.* Sikes, 35 Kan. 120, 10 Pac. 592; Seckler *v.* Delfs, 25 Kan. 159; Robbins *v.* Sackett, 23 Kan. 301; Waterson *v.* Devoe, 18 Kan. 223; Lenox *v.* Reed, 12 Kan. 223; Chick v. Willetts, 2 Kan. 384; Clark *v.* Reyburn, 1 Kan. 281.

Michigan.— Dawson *v.* Peter, 119 Mich. 274, 77 N. W. 997; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 115, 51 N. W. 787, 16 L. R. A. 59; Taggart *v.* Sanilac County, 71 Mich. 16, 38 N. W. 639; Byers *v.* Byers, 65 Mich. 598, 32 N. W. 831; Morse *v.* Byam, 55 Mich. 594, 22 N. W. 54; Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691; Livingston *v.* Hayes, 43 Mich. 129, 5 N. W. 78; Brink *v.* Freoff, 40 Mich. 610; Lee *v.* Clary, 38 Mich. 223; Wagar *v.* Stone, 36 Mich. 364; Albright *v.* Cobb, 34 Mich. 316; Hoffman *v.* Harrington, 33 Mich. 392; Newton *v.* McKay, 30 Mich. 380; Humphrey *v.* Hurd, 29 Mich. 44; Gorham *v.* Arnold, 22 Mich. 247; Newton *v.* Sly, 15 Mich. 391; Ladue *v.* Detroit, etc., R. Co., 13 Mich. 380, 87 Am. Dec. 759; Caruthers *v.* Humphrey, 12 Mich. 270; Dougherty *v.* Randall, 3 Mich. 581.

Minnesota.— Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923; Buse *v.* Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464; Humphrey *v.* Buisson, 19 Minn. 221; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243; Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233; Adams *v.* Corriston, 7 Minn. 456; Donnelly *v.* Simonton, 7 Minn. 167; Pace *v.* Chadderdon, 4 Minn. 499.

Montana.— Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512; Wilson *v.* Pickering, 28 Mont. 435, 72 Pac. 821; Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553; Butte First Nat. Bank *v.* Bell Silver, etc., Min. Co., 8 Mont. 32, 19 Pac. 403; Fee *v.* Swingly, 6 Mont. 596, 13 Pac. 375; Gallatin County *v.* Beattie, 3 Mont. 173.

Nebraska.— Clark *v.* Missouri, etc., Trust Co., 59 Nebr. 53, 80 N. W. 257; Orr *v.* Broad, 52 Nebr. 490, 72 N. W. 850; Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939; Miles *v.* Stehle, 22 Nebr. 740, 36 N. W. 142; McHugh *v.* Smiley, 17 Nebr. 620, 626, 20 N. W. 296, 24 N. W. 277; Davidson *v.* Cox, 11 Nebr. 250, 9 N. W. 95; Union Mut. L. Ins. Co. *v.* Lovitt, 10 Nebr. 301, 4 N. W. 986; Hurley *v.* Estes, 6 Nebr. 386; Tootle *v.* White, 4 Nebr. 401; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; Kyger *v.* Ryley, 2 Nebr. 20.

Nevada.— Orr *v.* Ulyatt, 23 Nev. 134, 43 Pac. 916; Winnemucca First Nat. Bank *v.* Kreig, 21 Nev. 404, 32 Pac. 641.

New York.— Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402; Barry *v.* Hamburg-Bremen F. Ins. Co., 110 N. Y. 1, 17 N. E. 405; Shriver *v.* Shriver, 86 N. Y. 575; Trimm *v.* Marsh, 54 N. Y. 599, 13 Am. Rep. 623; Merritt *v.* Bartholick, 36 N. Y. 44; Power *v.* Lester, 23 N. Y. 527; Packer *v.* Rochester, etc., R. Co., 17 N. Y. 283; Bolton *v.* Brewster, 32 Barb. 389; Bryan *v.* Butts, 27 Barb. 503; Campbell *v.* Parker, 9 Bosw. 322; Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458; Jackson *v.* Bronson, 19 Johns. 325; Runyan *v.* Mersereau, 11 Johns. 534, 6 Am. Dec. 393; Hitchcock *v.* Harrington, 6 Johns. 290, 5 Am. Dec. 229; Jackson *v.* Willard, 4 Johns. 41; Waters *v.* Stewart, 1 Cai. Cas. 47; Waring *v.* Smyth, 2 Barb. Ch. 119, 47 Am. Dec. 299; Morris *v.* Mowatt, 2 Paige 586, 22 Am. Dec. 661; Astor *v.* Miller, 2 Paige 68; Aymar *v.* Bill, 5 Johns. Ch. 570; *In re* Kellogg, 113

it, and not a conveyance of the legal title or of the right of possession.[11] And a similar doctrine obtains in Texas.[12] In Kentucky a mortgage is considered a mere security for a debt, and substantially, both at law and in equity, the mortgagor is the real owner of the property mortgaged.[13]

B. Civil Law of Mortgages — 1. Roman Law. In the latter period of the imperial Roman law, certain early forms of pledging property having then become obsolete, two distinct forms of security, known respectively as *pignus* and *hypotheca*, were in general use. The former was a contract by which a lien was created upon specific property as security for the payment of a debt or the performance of some other obligation, and the possession of the property pledged was delivered to the creditor, to be retained until he should receive satisfaction. In the contract of *hypotheca*, on the other hand, the possession remained with

Fed. 120. And see Union College *v.* Wheeler, 61 N. Y. 88; Van Rensselaer *v.* Dennison, 35 N. Y. 393; Lewis *v.* Duane, 69 Hun 28, 23 N. Y. Suppl. 433; Syracuse City Bank *v.* Tallman, 31 Barb. 201; Weeks *v.* Ostrander, 52 N. Y. Super. Ct. 512; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273.

North Dakota.— McClory *v.* Ricks, 11 N. D. 38, 88 N. W. 1042.

Oklahoma.— Yingling *v.* Redwine 12 Okla. 64, 69 Pac. 810; Balduff *v.* Griswold, 9 Okla. 438, 60 Pac. 223.

Oregon.— Kaston *v.* Storey, 47 Oreg. 150, 80 Pac. 217; Adair *v.* Adair, 22 Oreg. 115, 29 Pac. 193; Thompson *v.* Marshall, 21 Oreg. 171, 27 Pac. 957; Cooke *v.* Cooper, 18 Oreg. 142, 22 Pac. 945, 17 Am. St. Rep. 709, 7 L. R. A. 273; Watson *v.* Dundee Mortg., etc., Co., 12 Oreg. 474, 8 Pac. 548; Sellwood *v.* Gray, 11 Oreg. 534, 5 Pac. 196; Stephens *v.* Allen, 11 Oreg. 188, 3 Pac. 168; Roberts *v.* Sutherlin, 4 Oreg. 219; Anderson *v.* Baxter, 4 Oreg. 105; Besser *v.* Hawthorn, 3 Oreg. 129; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 6 Reporter 9, 5 Sawy. 88; Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232.

South Carolina.—See Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552; Patterson *v.* Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; Hardin *v.* Hardin, 34 S. C. 77, 12 S. E. 936, 27 Am. St. Rep. 786; Bredenberg *v.* Landrum, 32 S. C. 215, 10 S. E. 956; Seignious *v.* Pate, 32 S. C. 134, 10 S. E. 880, 17 Am. St. Rep. 846; Anderson *v.* Pilgram, 30 S. C. 499, 9 S. E. 587, 14 Am. St. Rep. 917, 4 L. R. A. 205; Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636; Navassa Guano Co. *v.* Richardson, 26 S. C. 401, 2 S. E. 307; Warren *v.* Raymond, 17 S. C. 163; Reeder *v.* Dargan, 15 S. C. 175; Annely *v.* De Saussure, 12 S. C. 488; Simons *v.* Bryce, 10 S. C. 354; Williams *v.* Beard, 1 S. C. 309; Nixon *v.* Bynum, 1 Bailey 148; Drayton *v.* Marshall, Rice Eq. 373, 33 Am. Dec. 84; Thayer *v.* Cramer, 1 McCord Eq. 395; *In re* Bennett, 3 Fed. Cas. No. 1,313, 2 Hughes 156.

South Dakota.— Yankton Bldg., etc., Assoc. *v.* Dowling, 10 S. D. 535, 74 N. W. 436.

Utah.— Azzalia *v.* St. Claire, 23 Utah 401, 64 Pac. 1106; Dupee *v.* Rose, 10 Utah 305, 37 Pac. 567; Neslin *v.* Wells, 104 U. S. 428, 26 L. ed. 802.

Washington.— State *v.* Kittitas County Super. Ct., 21 Wash. 564, 58 Pac. 1065; Norfor *v.* Busby, 19 Wash. 450, 53 Pac. 715; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666; Parker *v.* Dacres, 2 Wash. Terr. 439, 7 Pac. 893.

Wisconsin.— Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014; Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837; Cawley *v.* Kelley, 60 Wis. 315, 19 N. W. 65; Mason *v.* Beach, 55 Wis. 607, 13 N. W. 884; Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124; Brinkman *v.* Jones, 44 Wis. 498; Seatoff *v.* Anderson, 28 Wis. 212; Roche *v.* Knight, 21 Wis. 324; Avery *v.* Judd, 21 Wis. 262; Hennesy *v.* Farrell, 20 Wis. 42; Hitchcock *v.* Merrick, 18 Wis. 357; Jones *v.* Costigan, 12 Wis. 677, 78 Am. Dec. 771; Mowry *v.* Wood, 12 Wis. 413; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709; Wood *v.* Trask, 7 Wis. 566, 76 Am. Dec. 230; Tallman *v.* Ely, 6 Wis. 244; Gillett *v.* Eaton, 6 Wis. 30; Russell *v.* Ely, 2 Black (U. S.) 575, 17 L. ed. 258.

See 35 Cent. Dig. tit. "Mortgages," § 273.

11. Coe *v.* Finlayson, 41 Fla. 169, 26 So. 704; Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823; Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329; Berlack *v.* Halle, 22 Fla. 236, 1 Am. St. Rep. 185; McMahon *v.* Russell, 17 Fla. 698.

12. Kerr *v.* Galloway, 94 Tex. 641, 64 S. W. 858; Walker *v.* Johnson, 37 Tex. 127; Mann *v.* Falcon, 25 Tex. 271; Duty *v.* Graham, 12 Tex. 427, 62 Am. Dec. 534; Wright *v.* Henderson, 12 Tex. 43; Holland *v.* Frock, 2 Tex. Unrep. Cas. 566; Williamson *v.* Wright, 1 Tex. Unrep. Cas. 711; Smith *v.* Frio County, (Tex. Civ. App. 1899) 50 S. W. 958; Denison, etc., Suburban R. Co. *v.* Smith, 19 Tex. Civ. App. 114, 47 S. W. 278; Parker *v.* Benner, 1 Tex. App. Civ. Cas. § 64. And see McCammant *v.* Roberts, 87 Tex. 241, 27 S. W. 86; Stitzle *v.* Evans, 74 Tex. 596, 12 S. W. 326; Ross *v.* Mitchell, 28 Tex. 150.

13. Bullock *v.* Grinstead, 95 Ky. 261, 24 S. W. 867, 15 Ky. L. Rep. 663; Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Taliaferro *v.* Gay, 78 Ky. 496; Woolley *v.* Holt, 14 Bush (Ky.) 788; Bartlett *v.* Borden, 13 Bush (Ky.) 45; Douglass *v.* Cline, 12 Bush (Ky.) 608. *Compare* Patterson *v.* Carneal, 3 A. K. Marsh. (Ky.) 618, 13 Am. Dec. 208.

the owner, and the lien was created by the mere agreement of the parties without tradition of the property.[14]

2. **Modern Civil Law.** The modern civil law of mortgages closely follows the Roman law, as just described. A mortgage creates a lien or charge upon the property, but is not a sale of it; the title to the property as well as the right of possession remains in the owner; and default in the payment of the debt secured does not give the creditor an absolute title to the property, but only a right to have it sold and applied in satisfaction of his claims.[15]

3. **Antichresis.** In the Roman and modern civil law "antichresis" is a contract by which the debtor surrenders possession of the property to the creditor, in order that the latter may receive the rents, issues, and profits, and apply them on the interest of the debt, the surplus, if any, going in reduction of principal. The creditor is also bound to pay taxes and make necessary repairs. He can always return the property to the debtor, if he finds it onerous instead of profitable; but the debtor cannot reclaim the property without full payment of the debt. The creditor does not become the owner of the property on failure of payment at the stated time, but may obtain an order or decree of court for the sale of the property pledged.[16]

4. **Vente à Réméré.** This is a form of security in the civil law which closely resembles a conditional sale of real property, the vendor reserving the right to redeem or repurchase the property on the payment of a stipulated sum on or before a designated day. Unlike a mortgage it passes both the title and the right of possession to the creditor; but courts enforce the equity of redemption.[17]

5. **Law of Louisiana and New Mexico.** In Louisiana the civil law of mortgages, as explained in the preceding section, is in force. Property pledged as security for a debt does not vest in the creditor, even on default of payment; on breach of condition the property must be sold on judicial process, and the proceeds, after paying the debt secured, be paid to the debtor.[18] In New Mexico the qualities and incidents of a mortgage, in all respects in which these are not fixed by stat-

14. Codex 8, 35, 3; 2 Kent Comm. 583; Mackeldey Rom. L. § 334 *et seq.*; Thompson & J. Mod. Rom. L. p. 181 *et seq.*

Influence of civil law.— In Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 615, 23 L. ed. 405, Justice Swayne, speaking of the effect of certain mortgages, said: "The civil law is the spring-head of the English jurisprudence upon the subject of these securities." So in Longwith *v.* Butler, 8 Ill. 32, 36, it was remarked by Koerner, J.: "It will be conceded by all, who have any knowledge of the Roman law, that the equitable doctrines now universally prevailing in regard to mortgages, have been derived from that source. The civil law, in this as in many other instances, has been the great armory from which the courts of equity in England have supplied themselves with the most efficient weapons to ward off the severities of the stern and unrelenting common law."

15. Duclaud *v.* Rousseau, 2 La. Ann. 168; McNair *v.* Lott, 25 Mo. 182; Eglauch *v.* Labadie, 21 Quebec Super. Ct. 481; Marchand *v.* Chaput, 19 Quebec Super. Ct. 322; Hamel *v.* Proteau, 15 Quebec Super. Ct. 619.

"By the civil law of Spain and Mexico, mortgage is defined to be 'a contract by which one binds his property to secure the payment of some other obligation.' . . . A mortgage . . . in the civil law, was considered a species of alienation, vesting in the creditor at the time when made . . . a right in the thing pledged, which would enable him to sell the pledge in default of payment of the debt." Coles *v.* Perry, 7 Tex. 109, 146.

16. Marquise De Portes *v.* Hurlbut, 44 N. J. Eq. 517, 14 Atl. 891; Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746; Merlin Répert. tit. "Antichrèse."

17. To acquire title to the property under a *vente à réméré*, it is necessary that the vendee should give a real and reasonably adequate consideration, and take actual possession of the property, or else that such explanation be forthcoming, when required, of the continued possession of the vendor, as will exclude the idea of his still existing ownership. Marbury *v.* Colbert, 105 La. 467, 29 So. 871. A contract purporting to be a *vente à réméré*, which divides the price, which was for an antecedent debt, to be returned in two instalments, and declares the forfeiture of the right to redeem on a failure to pay the first instalment due, is pignorative in character, and is properly an antichresis. Payne *v.* Habbard, 42 La. Ann. 395, 7 So. 572.

18. Marbury *v.* Colbert, 105 La. 467, 29 So. 871; Randolph *v.* Stark, 51 La. Ann. 1121, 26 So. 59; Miller *v.* Shotwell, 38 La. Ann. 890; Duclaud *v.* Rousseau, 2 La. Ann. 168; Conrad *v.* Prieur, 5 Rob. (La.) 49; Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746.

Possession of mortgaged property.— It is not of the essence, although of the nature, of

ute, are to be determined by reference to the Spanish and Mexican law, as it stood at the time of the Treaty of Guadalupe Hidalgo.[19]

C. Varieties of Mortgages — 1. In General. Common-law mortgages[20] and equitable mortgages[21] are defined elsewhere in this article. A statutory mortgage is one drawn in the condensed and abbreviated form authorized by the statutes in several of the states.[22] And in several jurisdictions statutes or judicial decisions have adopted the equitable principle, so far as to declare that every transfer or conveyance of an interest or estate in realty, made to secure the payment of money or the performance of some other act, and subject to be defeated by compliance with the conditions stated, shall be a mortgage.[23]

2. Welsh Mortgages. This is a species of security very rarely used in the United States, but not uncommon in England and the British colonies, which partakes of the nature of a mortgage, as there is a debt due and an estate is given as security for its repayment, but differs from it in the circumstance that the mortgagee takes possession and occupies the property, and receives the rents and profits as a substitute for interest on the debt, and holds the estate until both principal and interest are paid off, either out of the rents or by payment by the mortgagor.[24] Further, in the case of a Welsh mortgage, there is a perpetual power of redemption in the mortgagor, which he may enforce by a bill in equity without any regard to the lapse of time;[25] but the mortgagee has no power to enforce payment of the debt, or redemption, or to foreclose the security.[26] If the mortgagee in possession refuses to give a statement of the rents received or information as to the amount due, the mortgagor may have an account on a bill in equity, the costs of the proceeding falling upon the mortgagee, even though, on taking the account, a balance is found due him.[27]

3. Mortgages With Power of Sale. These securities differ from ordinary mortgages in that they contain a clause authorizing and empowering the mortgagee himself, upon default, to make public sale of the property affected, and to convey the title to the purchaser at such sale, free from all right or equity of redemption, thus avoiding the necessity of resorting to the courts for a foreclosure.[28] Such a power is legal and valid, being within the contractual rights of

the contract of mortgage, that the mortgagor should remain in possession. Hutchings *v.* Field, 10 La. 237.

A mortgage and privilege may coexist on the same thing. They are distinct rights, not exclusive of each other. Citizens' Bank *v.* Cuny, 12 Rob. (La.) 279; Delor *v.* Montegut's Syndics, 5 Mart. (La.) 468.

19. Moore *v.* Davey, 1 N. M. 303.

20. See *supra*, I, A, 1.

21. See *infra*, II.

22. See the statutes of the different states.

23. Fitch *v.* Wetherbee, 110 Ill. 475; Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375 (holding that as a mortgage conveys no estate but merely creates a lien, an instrument properly executed, describing the parties, the land, and the debt, and evidencing an intention to charge the debt as a lien upon the land is sufficient to constitute a mortgage. Words of conveyance, being inoperative, are unnecessary); Bradley *v.* Helgerson, 14 S. D. 593, 86 N. W. 634; Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. 814 (construing New Hampshire statute). See, however, Woodard *v.* Hennegan, 128 Cal. 293, 60 Pac. 769.

24. Black L. Dict.; 1 Powell Mortg. 373*a*; 2 Washburn Real Prop. (4th ed.) 37. And see O'Neill *v.* Gray, 39 Hun (N. Y.) 566; Howell *v.* Price, Prec. Ch. 423, 477, 24 Eng. Reprint 189, 214, 1 P. Wms. 291, 2 Vern. Ch. 701, 23 Eng. Reprint 1055.

25. Yates *v.* Hambly, 2 Atk. 360, 26 Eng. Reprint 618; Orde *v.* Heming, 1 Vern. Ch. 418, 23 Eng. Reprint 559 (holding that a bill to redeem from a Welsh mortgage would lie even sixty years after its creation); Longuet *v.* Scawen, 1 Ves. 402, 30 Eng. Reprint 1106. But *compare* Fenwick *v.* Reed, 1 Merv. 114, 35 Eng. Reprint 618, where it was thought that redemption might be barred twenty years after principal and interest were paid by perception of the rents and profits.

26. Jortin *v.* Southeastern R. Co., 6 De G. M. & G. 270, 3 Eq. Rep. 281, 1 Jur. N. S. 433, 24 L. J. Ch. 343, 3 Wkly. Rep. 190, 55 Eng. Ch. 213, 43 Eng. Reprint 1237; O'Connell *v.* Cummins, 2 Ir. Eq. 251; Teulon *v.* Curtis, 2 L. J. Exch. 17, Younge 610.

27. Morrison *v.* Nevins, 5 Grant Ch. (U. C.) 577.

28. See Brisbane *v.* Stoughton, 17 Ohio 482 (holding that a power of attorney executed by a mortgagor to a third person, on the same day with the mortgage, authorizing him to sell the mortgaged premises on default of payment for the benefit of the mortgagee, is a valid power for such purpose; and after a *bona fide* sale made under the

the parties, and may be lawfully exercised by the mortgagee in the emergency provided for; and a sale fairly made in accordance with the directions of the power will pass a good and complete title to the purchaser when followed by a proper deed.[29]

4. Trust Deeds in Nature of Mortgages — a. Nature and Essentials. A trust deed in the nature of a mortgage is a conveyance of the property intended to be pledged, in fee simple, to one or more trustees, who are to hold the same for the benefit of the lawful holder of the note, bond, or other obligation secured, permitting the grantor to retain the possession and enjoy the rents and profits of the estate until default shall be made in the payment of the obligation secured, and with a power in the trustee or trustees, upon such default, to make a sale of the premises and satisfy the holder of the debt out of the net proceeds, returning the surplus, if any, to the grantor.[30] Of this character are deeds made by railroad and other corporations to secure the payment of their bonds, vesting the title to their property in trustees, with provisions for defeasance on payment of the bonds, and for sale of the property on default. Such an instrument, although executed to trustees, instead of directly to the bondholders, and although in form a conveyance in trust, is essentially a mortgage, and will be construed and enforced

power, proper notice having been given by advertisement, no equity of redemption remains in the mortgagor or those claiming under him); Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636 (holding that a clause in a mortgage empowering the mortgagee to grant, bargain, and sell the premises at public auction, at which sale he shall have the right himself to become the purchaser, and to execute to the purchaser a conveyance in fee of the premises free and discharged from all equity of redemption, does not have the effect of conveying the legal title to the premises away from the mortgagor and his heirs, but only gives a power of sale, which can be executed only in the name of the principal). And see Levy *v.* Burkle, (Cal. 1887) 14 Pac. 564; Bartels *v.* Benson, 21 U. C. Q. B. 143.

29. *California.*— Sacramento Bank *v.* Alcorn, 121 Cal. 379, 53 Pac. 813; Fogarty *v.* Sawyer, 17 Cal. 589.

Dakota.— Robinson *v.* McKinney, 4 Dak. 290, 29 N. W. 658.

Illinois.— Strother *v.* Law, 54 Ill. 413; Bloom *v.* Van Rensselaer, 15 Ill. 503; Longwith *v.* Butler, 8 Ill. 32.

Iowa.— Fanning *v.* Kerr, 7 Iowa 450.

Minnesota.— Webb *v.* Lewis, 45 Minn. 285, 47 N. W. 803.

Mississippi.— Dibrell *v.* Carlisle, 48 Miss. 691; Hyde *v.* Warren, 46 Miss. 13.

Missouri.— Destrehan *v.* Scudder, 11 Mo. 484; Carson *v.* Blakey, 6 Mo. 273, 35 Am. Dec. 440.

Montana.— Butte First Nat. Bank *v.* Bell Silver, etc., Min. Co., 8 Mont. 32, 19 Pac. 403 [*affirmed* in 156 U. S. 470, 15 S. Ct. 440, 39 L. ed. 497].

Nevada.— Evans *v.* Lee, 11 Nev. 194; Bryant *v.* Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403.

New Hampshire.— Very *v.* Russell, 65 N. H. 646, 23 Atl. 522.

New York.— Elliott *v.* Wood, 45 N. Y. 71.

North Carolina.— Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122; Hyman *v.* Devereux, 63 N. C. 624.

Pennsylvania.— Bradley *v.* Chester Valley R. Co., 36 Pa. St. 141.

South Carolina.— Mitchell *v.* Bogan, 11 Rich. 636.

United States.— Etna Coal, etc., Co. *v.* Marting Iron, etc., Co., 127 Fed. 32, 61 C. C. A. 396; Bowen *v.* Kendall, 3 Fed. Cas. No. 1,724, Brunn. Col. Cas. 704; Platt *v.* McClure, 19 Fed. Cas. No. 11,218, 3 Woodb. & M. 151.

See 35 Cent. Dig. tit. "Mortgages," § 27. And see *infra*, XX, H, 5.

In Nebraska and Oregon it is otherwise. Wheeler *v.* Sexton, 34 Fed. 154 [*citing* Comstock *v.* Michael, 17 Nebr. 288, 22 N. W. 549; Hurley *v.* Estes, 6 Nebr. 386; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; Kyger *v.* Ryley, 2 Nebr. 20]; Thompson *v.* Marshall, 21 Oreg. 171, 27 Pac. 957, by statute.

In Louisiana, it has been held that a power of sale to a mortgagee is incompatible with the hypothecary system there in vogue; although, under the Roman law, a power to the mortgagee to sell extrajudicially would have been valid, and a sale in due form, after public advertisement and notice to the debtor, would have given a good title to a *bona fide* purchaser. Erwin *v.* Greene, 5 Rob. 70; Baron *v.* Phelan, 4 Mart. 88.

30. See McDonald *v.* Kellogg, 30 Kan. 170, 172, 2 Pac. 507 (holding that "where a deed of trust is executed with the understanding between the parties that the title is to be transferred forever from the grantor to the grantee and his heirs or grantees, then such deed of trust is not a mortgage. But where the deed of trust is executed with the understanding between the parties that it is a mere security for a debt, and that when the debt is paid the title shall be again placed in the grantor, such deed of trust is a mere mortgage"); Martin *v.* Alter, 42 Ohio St. 94 (holding that a deed of trust to secure a debt to a third person,

as such.[31] It does not change the character of a deed of trust in the nature of a mortgage that the mortgagee is a trustee for himself as well as for other parties.[32] Nor is it material that the trust is to be executed by the creditor secured, leaving nothing for the trustee to do in case of default.[33]

b. Legal Effect. A deed of trust of real estate executed for the purpose of securing a debt, conditioned to be void upon payment of the debt, and containing a power of sale upon default, is essentially a mortgage, and does not differ, in its legal operation and effect, from an ordinary mortgage with power of sale.[34] Like a mortgage, such a deed is a mere security for a debt or for the performance of certain undertakings by the grantor. It is a mere incident to the debt which it secures, upon which it depends, and which it follows, and will pass with an assignment of the debt to the holder.[35] But there is no right of redemption from a sale under a deed of trust, when the deed conveys the absolute title to the trustees on a declared trust.[36]

c. Validity. Trust deeds in the nature of mortgages are valid and lawful securities; on a just consideration of the rights and interests of the parties, they

conditioned to be void on payment of the debt, but that otherwise the trustee might sell at public sale to pay the debt, is in the nature of a mortgage, and is not an absolute conveyance in trust, the legal title remaining in the mortgagor in possession after default, subject to the trustee's right of sale).

A conveyance having all the essential characteristics of a mortgage is none the less a mortgage, and subject to the laws governing mortgages as to foreclosure, etc., because the parties have chosen to designate it a deed of trust. Langmaack *v.* Keith, (S. D. 1905) 103 N. W. 210.

Distinguished from absolute conveyance in trust.— The distinction is well settled between an absolute deed of trust and a deed of trust in the nature of a mortgage. The latter is conditional and defeasible; the former, for the trust purposes, unconditional and indefeasible. Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637. And see Grant *v.* Burr, 54 Cal. 298.

Distinguished from ordinary mortgage.— The chief practical difference between a deed of trust with power of sale and a plain mortgage is that the former may be foreclosed according to its terms by the trustee without the authority of the court, whereas a simple mortgage can be foreclosed only under the decree of the court. Axman *v.* Smith, 156 Mo. 286, 57 S. W. 105. And see Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912.

Consideration.— A deed of trust, being under seal and reciting a consideration, is presumed to be given for a valuable consideration; and the obligation of the trustee therein, being based on the transfer to him of the property therein described, rests upon a valuable consideration. Jones *v.* Shepley, 90 Mo. 307, 2 S. W. 400.

31. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Flint, etc., R. Co. *v.* Auditor-Gen., 41 Mich. 635, 2 N. W. 835; Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837; Southern Pac. R. Co. *v.* Doyle, 11 Fed. 253, 8 Sawy. 60.

32. Cormerais *v.* Genella, 22 Cal. 116.

33. Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

34. *Arkansas.*— Turner *v.* Watkins, 31 Ark. 429.

California.— See Levy *v.* Burkle, (1887) 14 Pac. 564.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282.

District of Columbia.— Wood *v.* Grayson, 22 App. Cas. 432.

Georgia.— Brantley *v.* Wood, 97 Ga. 755, 25 S. E. 499; McGuire *v.* Barker, 61 Ga. 339.

Idaho.— Brown *v.* Bryan, 6 Ida. 1, 51 Pac. 995, 5 Ida. 145, 51 Pac. 995.

Illinois.— Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67; Smith *v.* Sheldon, 65 Ill. 219.

Massachusetts.— Harriman *v.* Woburn, Electric Light Co., 163 Mass. 85, 39 N. E. 1004.

Nebraska.— Hurley *v.* Estes, 6 Nebr. 386.

North Carolina.— Wright *v.* Fort, 126 N. C. 615, 36 S. E. 113.

Oregon.— Thompson *v.* Marshall, 21 Oreg. 171, 27 Pac. 957.

Pennsylvania.— Talbot's Appeal, 2 Chest. Co. Rep. 413.

Texas.— McLane *v.* Paschal, 47 Tex. 365.

Utah.— Dupee *v.* Rose, 10 Utah 305, 37 Pac. 567.

Wisconsin.— New York Cent. Trust Co. *v.* Burton, 74 Wis. 329, 43 N. W. 141.

United States.— Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967; Bartlett *v.* Leah, 1 Fed. 768, 1 McCrary 176.

Canada.— See Barlets *v.* Benson, 21 U. C. Q. B. 143.

In Louisiana a deed of trust, executed in another state, on property in Louisiana, to secure the payment of promissory notes, will be enforced as a conventional mortgage. Pickett *v.* Foster, 36 Fed. 514.

35. Stiger *v.* Bent, 111 Ill. 328; Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67; New York Cent. Trust Co. *v.* Burton, 74 Wis. 329, 43 N. W. 141.

36. Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328.

are not contrary to any sound principle of public policy, nor are they invalid because providing the remedies for their own enforcement.[37]

d. Position and Duties of Trustee. If the person designated as trustee in a deed of trust in the nature of a mortgage takes action under it, as by advertising the property for sale, this will be an acceptance of the trust, although he may not have the instrument in his possession.[38] He is the representative and trustee of both the parties to the deed, not of the creditor alone; and his relations must be absolutely impartial as between them; he must act fairly toward both parties, and in the best interest of both, not exclusively for the benefit of either.[39] But his trust is not of that nature which can make him a proper representative of the creditor in litigation entirely extraneous to the subject of the trust; and hence his joinder as a party in such litigation will not dispense with the necessity of joining the creditor also.[40] The trustee cannot lawfully delegate to another person the powers granted to him by the deed, although he may employ an agent to perform the merely mechanical parts of a foreclosure under the deed.[41] When in doubt as to the proper performance of his duties under the deed, or as to the manner of exercising the powers thereby conferred on him, it is his right and duty to apply to a court of equity for its aid and direction.[42]

D. Mortgages Distinguished From Other Transactions — 1. In General — a. Essential Criteria of Mortgage. As distinguished from other transactions, the term "mortgage" has a technical signification in the law, and imports a defeasance and an equity of redemption; and no instrument can be construed as a mortgage in which there does not exist both the right to foreclose and the reciprocal right to redeem.[43] Further, a mortgage is always created by the act

37. Weld *v.* Rees, 48 Ill. 428; Butte First Nat. Bank *v.* Bell Silver, etc., Min. Co., 8 Mont. 32, 19 Pac. 403 [*affirmed* in 156 U. S. 470, 15 S. Ct. 440, 39 L. ed. 497].

38. Crocker *v.* Lowenthal, 83 Ill. 579.

39. Smith *v.* Olcott, 19 App. Cas. (D. C.) 61; Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248; Williamson *v.* Stone, 128 Ill. 129, 22 N. E. 1005; Ventres *v.* Cobb, 105 Ill. 33; Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889.

40. Clark *v.* Manning, 4 Ill. App. 649.

41. Flower *v.* Elwood, 66 Ill. 438; Taylor *v.* Hopkins, 40 Ill. 442; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328; Dunton *v.* Sharpe, 70 Miss. 850, 12 So. 800; Tyler *v.* Herring, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. 263; Johns *v.* Sergeant, 45 Miss. 332; St. Louis *v.* Priest, 88 Mo. 612; Whittelsey *v.* Hughes, 39 Mo. 13; Morriss *v.* Virginia State Ins. Co., 90 Va. 370, 18 S. E. 843.

42. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132; Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889.

43. *California.*— Purser *v.* Eagle Lake Land, etc., Co., 111 Cal. 139, 43 Pac. 523.

Florida.— Chaires *v.* Brady, 10 Fla. 133.

Michigan.— See Ellis *v.* Brown, 29 Mich. 259; Campau *v.* Chene, 1 Mich. 400.

Pennsylvania.— See McKinney *v.* Rheem, 4 Leg. Gaz. 85.

Wisconsin.— Walton *v.* Cody, 1 Wis. 420.

See 35 Cent. Dig. tit. "Mortgages," § 4.

Effect of default as test.— The quality or attribute which distinguishes a mortgage from any different kind of security is the condition that if the debt which it is given to secure be paid at a day specified the conveyance is to be void, or if not, that it becomes, as conveyance, absolute at law, although subject in equity to the right of redemption. Breese *v.* Bange, 2 E. D. Smith (N. Y.) 474. And see Fairchild *v.* Fairchild, 5 Hun (N. Y.) 407.

Mortgage and pledge distinguished.— "A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time: a pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation or the course of trade to be a lien upon them." Jones *v.* Smith, 2 Ves. Jr. 372, 378, 30 Eng. Reprint 679. And see Brownell *v.* Hawkins, 4 Barb. (N. Y.) 491; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Smith *v.* Acker, 23 Wend. (N. Y.) 653; Brown *v.* Bement, 8 Johns. (N. Y.) 96; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200. See also CHATTEL MORTGAGES, 6 Cyc. 986.

Pledge of rents.— A contract with a mechanic that he shall receive rents and profits of an estate in consideration of labor to be performed thereon is a grant of an incorporeal hereditament, not a mere security. Watkins *v.* Wassell, 15 Ark. 73. An instrument in writing which "granted, bargained, and sold" a ditch, and also the entire proceeds derived from the sale thereof, with authority to collect the rents and profits thereof and contained a proviso that upon payment of a debt the conveyance should be void, and that in default of payment grantee might sell, etc., has been held a mortgage. Kidd *v.* Teeple, 22 Cal. 255.

Pledge of stocks.— A pledge of stocks to secure collaterally a note given for the purchase-money of land agreed to be conveyed

or agreement of the parties. A decree of a court finding the title to land to be in a given person, and awarding possession to him charged with the payment of a sum of money to another, does not make the latter a mortgagee of the land.[44]

b. Operative Words. Any form of words which clearly shows the intention of the parties to pledge land as security for a debt, with a defeasance upon payment, and with the rights of redemption and foreclosure, thus including the essential characteristics of a mortgage, will suffice to stamp the character of a mortgage upon the transaction.[45]

2. Mortgage or Conditional Sale — a. In General. A mortgage of real property is distinguished from a conditional sale by the fact that the former is merely a security for the payment of a debt, or for the performance of some other condition, while the latter is a purchase of the land for a price paid or to be paid, to become absolute on the occurrence of a particular event, or is a purchase of the property accompanied by an agreement to resell to the grantor in a given time and for a stipulated price.[46]

b. Intention of Parties to Govern. Whether a deed of land, executed with an agreement to reconvey on stipulated terms, shall be construed as a sale or as a mortgage depends upon the actual intention of the parties at the time, and this intention is to be gathered from the facts and circumstances attending the transaction and the situation of the parties, as well as from the written evidences of the contract between them. When the intention is manifested, or is clearly ascertained, it will control the form of the instrument, and the courts will give effect to the deed in accordance with it.[47] But where the instrument contains the exact terms agreed on by the parties, and does express their intent and meaning, the

does not amount to a mortgage. Wright *v.* Holbrook, 2 Rob. (N. Y.) 516, 18 Abb. Pr. 202.

An agreement to purchase land does not constitute a mortgage. Greene *v.* Cook, 29 Ill. 186.

44. Davenport *v.* Bartlett, 9 Ala. 179.

45. Newlin *v.* McAfee, 64 Ala. 357; Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786; Snyder *v.* Bunnell, 64 Ind. 403; Gambril *v.* Doe, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; Strouse *v.* Cohen, 113 N. C. 349, 18 S. E. 323. *Compare* Rogers *v.* James, 33 Ark. 77 (holding that a note given for the purchase-money of land, reciting that the land is "to stand as collateral security" for its payment, is not a mortgage, nor in the nature of one); Gibson *v.* Hough, 60 Ga. 588.

Original intention of parties.— To constitute a mortgage the conveyance must be originally intended between the parties as a security for money or as an encumbrance merely. Lokerson *v.* Stillwell, 13 N. J. Eq. 357; Crane *v.* Bonnell, 2 N. J. Eq. 264.

46. Slutz *v.* Desenberg, 28 Ohio St. 371. And see Rose *v.* Gandy, 137 Ala. 329, 34 So. 239; Martin *v.* Martin, 123 Ala. 191, 26 So. 525; Land *v.* May, 73 Ark. 415, 84 S. W. 489; Hyman *v.* Bogue, 135 Ill. 9, 26 N. E. 40; Frost Mfg. Co. *v.* Springfield Foundry, etc., Co., 79 Mo. App. 652; Blake *v.* Lowry, (Tex. Civ. App. 1906) 93 S. W. 521; Perry *v.* Meadowcroft, 4 Beav. 197, 12 L. J. Ch. 104, 49 Eng. Reprint 314.

Distinction between mortgage and conditional sale.— "A mortgage and a conditional sale are said to be nearly allied to each other, the difference between them being defined to consist in this: that the former is a 'security for a debt,' while the latter is a purchase accompanied by an agreement to re-sell on particular terms." Turner *v.* Kerr, 44 Mo. 429, 431 [*quoted* in Holladay *v.* Willis, 101 Va. 274, 279, 43 S. E. 616]. And see Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

Illustrations.—Where B conveyed his equity of redemption in certain real estate to A, and the attorney of the latter gave B a memorandum in writing that he would procure from A an agreement to sell B the premises on payment of a specified sum, but no such agreement was executed, it was held that this transaction was not a mortgage, but at most an agreement to sell, and subject to the incidents of such an agreement. Chapman *v.* Ogden, 30 Ill. 515. But where certain trustees conveyed to A, and took back from him a covenant to erect buildings on the property of a certain value, or, in default thereof, that he would reconvey, it was held to be a mortgage for the amount stipulated as the value of the buildings, and that subsequent purchasers and encumbrancers were entitled to redeem. O'Reilly *v.* Wilkes, 8 Can. L. J. 135.

47. *Alabama.*— Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352; Adams *v.* Pilcher, 92 Ala. 474, 8 So. 757; Eiland *v.* Radford, 7 Ala. 724, 42 Am. Dec. 610.

Illinois.— Jeffery *v.* Robbins, 167 Ill. 375, 47 N. E. 725.

Iowa.— Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700; Hughes *v.* Sheaff, 19 Iowa 335.

Kansas.— Yost *v.* Hays City First Nat. Bank, 66 Kan. 605, 72 Pac. 209.

Minnesota.— King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648.

fact that they thought it a mortgage, while it was in fact a conditional sale, will not change its character or effect.[48] And where, by the original intention of the parties, the transaction was a conditional sale, no subsequent event short of a new agreement between them can convert it into a mortgage.[49] And while a contract for repurchase, made contemporaneously with a conveyance of real estate, absolute in form, is sometimes strong evidence tending to show that the conveyance was intended to be a mortgage, yet where it appears that the parties really intended an absolute sale and a contract allowing the vendor to repurchase the property, that intention must control.[50]

c. Presumption From Face of Papers. There is always a presumption that a deed conveying land was intended by the parties to have just the legal effect which appears on its face. Hence, where the papers show on their face a purchase of land and an agreement for a resale, it is necessary, in order to change the effect of the transaction to that of a mortgage, that the evidence afforded by the face of the papers should be overcome by testimony showing that it was not designed to be a sale.[51]

d. Evidence Admissible. On a question whether a deed of land, accompanied by an agreement between the parties for a reconveyance on certain terms or conditions, is to be considered a mortgage or a conditional sale, it is permissible, in searching out the real intention of the parties, to receive evidence of all facts and circumstances attending the transaction, or connected with it, which have a tendency to disclose the real meaning and design of the parties at the time the conveyance was made.[52]

e. Tests For Determining Character of Transaction — (i) *Existence of Debt or Loan.* Since there can be no mortgage without a debt or some other obligation to be secured by it, if the evidence shows that there was no debt or loan of money existing between the parties at the time of the conveyance, or created contemporaneously with it, or if it appears that a preëxisting debt was regarded and treated by the parties as extinguished or discharged by the conveyance, this is strong proof that the transfer of the land was intended as a conditional sale and not by way of mortgage.[53] On the other hand, if the evidence

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Tennessee.— Bennet *v.* Holt, 2 Yerg. 6, 24 Am. Dec. 455.

Virginia.—Holladay *v.* Willis, 101 Va. 274, 43 S. E. 616.

Wisconsin.— Smith *v.* Crosby, 47 Wis. 160, 2 N. W. 104.

United States.— Horbach *v.* Hill, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670; Russell *v.* Southard, 12 How. 139, 13 L. ed. 927.

See 35 Cent. Dig. tit. "Mortgages," § 5. And see *infra*, III, C, 2.

48. Hershey *v.* Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6. And see Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

49. Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

50. Hanford *v.* Blessing, 80 Ill. 188.

51. *Illinois.*— Silsbe *v.* Lucas, 36 Ill. 462.

Kentucky.— See Sheffield *v.* Day, 90 S. W. 545, 28 Ky. L. Rep. 754.

Minnesota.— Buse *v.* Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95.

Mississippi.— Reddy *v.* Aldrich, (1892) 11 So. 828.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Virginia.— Chapman *v.* Turner, 1 Call 280, 1 Am. Dec. 514.

England.—Alderson *v.* White, 2 De G. & J. 97, 4 Jur. N. S. 125, 6 Wkly. Rep. 242, 59 Eng. Ch. 77, 44 Eng. Reprint 924; Williams *v.* Owen, 5 Jur. 114, 12 L. J. Ch. 207, 5 Myl. & C. 303, 46 Eng. Ch. 274, 41 Eng. Reprint 386; O'Reilly *v.* O'Donoghue, Ir. R. 10 Eq. 73.

Canada.— Bostwick *v.* Phillips, 6 Grant Ch. (U. C.) 427.

52. *Alabama.*— Eiland *v.* Radford, 7 Ala. 724, 42 Am. Dec. 610.

Illinois.— Jeffery *v.* Robbins, 167 Ill. 375, 47 N. E. 725; Silsbe *v.* Lucas, 36 Ill. 462.

Indiana.— Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

United States.— Russell *v.* Southard, 12 How. 139, 13 L. ed. 927.

53. *Illinois.*— Carroll *v.* Tomlinson, 192 Ill. 398, 61 N. E. 484; Crane *v.* Chandler, 190 Ill. 584, 60 N. E. 826; Eames *v.* Hardin, 111 Ill. 634. And see Rue *v.* Dole, 107 Ill. 275.

Iowa.— Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217.

Kansas.— Fabrique *v.* Cherokee, etc., Coal, etc., Co., 69 Kan. 733, 77 Pac. 584.

Michigan.— Stahl *v.* Dehn, 72 Mich. 645, 40 N. W. 922.

shows the creation of a debt between the parties at the time of the conveyance, which they recognize as a subsisting liability, or that a preëxisting debt or obligation on the part of the grantor was not intended to be satisfied or canceled by the transfer of the land, but only to be secured by it, the conveyance should be held and treated as a mortgage.[54]

(II) *Obligation or Option to Pay Money.* The absence of a personal obligation on the part of the grantor to pay the money which will entitle him to a reconveyance of the property does not furnish a conclusive test to determine whether the transaction was a mortgage or a conditional sale.[55] But the fact that there was no covenant or promise or undertaking on his part to make such payment is evidence, entitled to considerable weight, that the conveyance was not intended as security for a debt or obligation.[56] Hence as a general rule, if the arrangement between the parties left it optional with the grantor to pay the money and recover his land, or to abandon it to the grantee, the transaction should be held a conditional sale; but if it imposed on the grantor an obligation to make the payment, such as the grantee could enforce by an action at law or by foreclosure proceedings, it must be taken as a mortgage.[57]

(III) *Possession and Management of Property.* In cases of doubt, the fact that the grantor continues in the possession and enjoyment of the premises may be taken as an indication that the conveyance was intended as a mortgage, while the transfer of possession to the grantee will tend to show that it was meant as a sale.[58] But this is not a conclusive circumstance. The transaction may be held a mortgage, on other sufficient evidence, although the grantee was put into possession.[59] It has also been held that if, after the expiration of the time during which the grantor had a right of repurchase, he allows the grantee to sell the property to a stranger, and sees the latter enter and improve, without any claim

Mississippi.—Thomas *v.* Holmes County, 67 Miss. 754, 7 So. 552.

Missouri.— Worley *v.* Dryden, 57 Mo. 226.

Ohio.— Slutz *v.* Desenberg, 28 Ohio St. 371.

Tennessee.— Hickman *v.* Quinn, 6 Yerg. 96.

Texas.— Howard *v.* Kopperl, 74 Tex. 494, 5 S. W. 627; Hubby *v.* Harris, 68 Tex. 91, 3 S. W. 558; Alstin *v.* Cundiff, 52 Tex. 453.

United States.— Conway *v.* Alexander, 7 Cranch 218, 3 L. ed. 321.

And see *infra*, III, C, 3.

54. *Alabama.*— Parmer *v.* Parmer, 88 Ala. 545, 7 So. 657 [*distinguishing* Moseley *v.* Moseley, 86 Ala. 289, 5 So. 732; Micou *v.* Ashurst, 55 Ala. 607]; Vincent *v.* Walker, 86 Ala. 333, 5 So. 465.

Illinois.— Harbison *v.* Houghton, 41 Ill. 522.

Indiana.— Greenwood Bldg., etc., Assoc. *v.* Stanton, 28 Ind. App. 548, 63 N. E. 574.

Kentucky.— Oldham *v.* Halley, 2 J. J. Marsh. 113; Jenkins *v.* Stewart, 16 S. W. 356, 13 Ky. L. Rep. 112.

Michigan.— Sowles *v.* Wilcox, 127 Mich. 166, 86 N. W. 689.

Virginia.— Earp *v.* Boothe, 24 Gratt. 368.

Canada.— Peterkin *v.* McFarlane, 9 Ont. App. 429; Fink *v.* Patterson, 8 Grant Ch. (U. C.) 417.

55. Russell *v.* Southard, 12 How. (U. S.) 139, 13 L. ed. 927. And see *infra*, III, C, 4.

56. Heaton *v.* Darling, 66 Minn. 262, 68 N. W. 1087; Smyth *v.* Reed, 28 Utah 262, 78 Pac. 478; Conway *v.* Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321. *Compare* Decker *v.* Leonard, 6 Lans. (N. Y.) 264; Wing *v.* Cooper, 37 Vt. 169, both holding that even without a covenant or promise to repay the money, the transaction may be held to be a mortgage, if other circumstances in the case show that to have been the intention of the parties.

57. Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530; Gibbs *v.* Union Mut. L. Ins. Co., 123 Ill. 136, 13 N. E. 842; Ranstead *v.* Otis, 52 Ill. 30; Stroup *v.* Haycock, 56 Iowa 729, 10 N. W. 257; Berryman *v.* Schumaker, 67 Tex. 312, 3 S. W. 46; Calhoun *v.* Lumpkin, 60 Tex. 189; Hawke *v.* Milliken, 12 Grant Ch. (U. C.) 236.

58. Hunter *v.* Maanum, 78 Wis. 656, 48 N. W. 51; Decker *v.* Leonard, 6 Lans. (N. Y.) 264; Neal *v.* Morris, Beatty 597; Fallon *v.* Keenan, 12 Grant Ch. (U. C.) 388. And see *infra*, III, C, 10.

Possession taken by grantee.— A conveyance will be considered a conditional sale, with right of the grantor to repurchase on payment of what he owed the grantee, as claimed by the latter, and not a mortgage, as claimed by the grantor, the grantor retaining no possession or control of the premises, but the grantee selecting the tenants, paying taxes, making repairs and improvements, and keeping no account, and there being no recognition of a continuing debt, payment, or offer of or demand for payment, of principal or interest. Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

59. Clark *v.* Landon, 90 Mich. 83, 51 N. W. 357.

of a right to redeem on his part, this will be evidence that he considered the original transaction as a sale and not a mortgage.[60]

(IV) *Financial Circumstances of Grantor.* If the grantor was severely pressed for money at the time of the transfer, so as not to be able to exercise a perfectly free choice as to the disposition of his property, and raised the sum needed by conveying the property in fee with a right of repurchase, his necessitous condition, especially in connection with the inadequacy of the price, will go far to show that a mortgage was intended.[61]

(V) *Mutual Remedies of Parties.* To determine whether a given transaction was a mortgage or a conditional sale, it is proper to inquire whether the remedies of the parties are mutual and reciprocal. If the grantor has all the remedies of a mortgagor, including the right to redeem, and the grantee all the remedies of a mortgagee, including the right to enforce payment of the debt and to foreclose, the deed operates as a mortgage, whatever may be its form.[62]

(VI) *Previous Negotiations of the Parties.* If it is shown that the negotiations between the parties which culminated in the giving of a deed, with an agreement for reconveyance, contemplated the creation of a mere security for a debt, and especially if the grantee explicitly consented to take a mortgage on the property, this will be strong evidence that the transaction was not intended as a conditional sale.[63] On the other hand, if it appears that there was no negotiation between the parties respecting a loan of money, and no proposition made with regard to a mortgage, this helps to establish the character of the conveyance as a conditional sale.[64]

(VII) *Inadequacy of Price.* When property is conveyed by a deed, absolute on its face, with an agreement for a reconveyance on the payment of a stipulated sum, if it appears that the consideration passing between the parties, or the amount agreed on as the condition of a repurchase, would be fairly proportioned to the value of the property, if considered as a debt secured by a mortgage thereon, but grossly inadequate as a price for the land on an outright sale, this fact, especially in connection with other circumstances, tends to show that a mortgage was intended, and not a conditional sale, but is not conclusive.[65]

f. Rule in Cases of Doubt. In the case of a deed of land claimed, on the one hand, to operate as a mortgage, and, on the other hand, alleged to have been meant as a conditional sale of the property, if the evidence leaves a substantial doubt as to what was the actual intention and understanding of the parties, the

60. Conway *v.* Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321. And see Stratton *v.* Sabin, 9 Ohio 28, 39 Am. Dec. 418.

61. Conway *v.* Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321. And see *infra*, III, C, 8.

62. Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251; Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74; Goodman *v.* Grierson, 2 Ball & B. 275, 12 Rev. Rep. 82.

63. *Illinois.*—Ewart *v.* Walling, 42 Ill. 453.

Missouri.— Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177; Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

New York.— Robinson *v.* Cropsey, 6 Paige 480.

Pennsylvania.— Reeder *v.* Trullinger, 151 Pa. St. 287, 24 Atl. 1104.

Texas.— Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809. *Compare* Hubby *v.* Harris, 68 Tex. 91, 3 S. W. 558.

West Virginia.— Davis *v.* Demming, 12 W. Va. 246.

United States.— Morris *v.* Nixon, 1 How. 118, 11 L. ed. 69.

See 35 Cent. Dig. tit. "Mortgages," § 84.

64. Rich *v.* Doone, 35 Vt. 125; Conway *v.* Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321. And see Bullen *v.* Renwick, 8 Grant Ch. (U. C.) 342, 9 Grant Ch. (U. C.) 202.

Refusal to take mortgage.— Evidence that the grantee in a quitclaim deed refused to take a mortgage on the property when approached upon the subject tends to show that the deed and his agreement to resell were not intended by him merely as a mortgage. Bacon *v.* National German-American Bank, 191 Ill. 205, 60 N. E. 846.

65. Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217; Fulwiler *v.* Roberts, 80 S. W. 1148, 26 Ky. L. Rep. 297; Mooney *v.* Byrne, 163 N. Y. 86, 57 N. E. 163; Conway *v.* Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321. *Compare* Blumberg *v.* Beekman, 121 Mich. 647, 80 N. W. 710; Hodge *v.* Weeks, 31 S. C. 276, 9 S. E. 953; Cowell *v.* Craig, 79 Fed. 685. And see *infra*, III, C, 7.

courts will generally hold that the instrument is a mortgage.[66] But while this rule will be applied in doubtful cases, yet the intention of the parties at the time of the transaction is the only true test; and when a conditional sale is clearly established, it will be enforced.[67] And it is also a settled rule of equity to adopt that construction which will uphold an instrument rather than destroy it, and which will work equity between the parties and not injustice. Hence if the instrument construed as a mortgage would be void, and the grantee would lose his money, and the grantor recover his property without repaying money justly due, the court, if in doubt on the evidence, will hold the transaction to have been a conditional sale.[68]

3. Mortgage or Assignment For Creditors. The distinction between a mortgage and an assignment for the benefit of creditors is discussed elsewhere in this work.[69]

4. Mortgage or Lease. A mortgage cannot result from a mere contract or agreement to pay a certain rent.[70] And where a lease is made for a price, it will not be converted into a mortgage because the rent is to go in satisfaction of a debt.[71] But a lease, recorded as such, containing a stipulation that the building erected by the lessee "is mortgaged as security" for rent is good as a mortgage.[72] And where land is conveyed in fee, and the grantee, at the same time, by indenture, leases the premises to the grantor, for the purpose of securing to the latter his maintenance during his life, it is considered that the indenture amounts to a mortgage.[73] A provision in a deed of defeasance, relative to the use of the prem-

66. *Alabama.*— Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157; Cosby *v.* Buchanan, 81 Ala. 574, 1 So. 898; Douglass *v.* Moody, 80 Ala. 66; Turner *v.* Wilkinson, 72 Ala. 361; McNeill *v.* Norsworthy, 39 Ala. 156; Crews *v.* Threadgill, 35 Ala. 334.

Arkansas.— Gibson *v.* Martin, 38 Ark. 207.

Illinois.— Jeffery *v.* Robbins, 167 Ill. 375, 47 N. E. 725; Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149 [*affirming* 47 Ill. App. 102]; Dwen *v.* Blake, 44 Ill. 135; Rankin *v.* Rankin, 111 Ill. App. 403; Landreth *v.* Massey, 61 Ill. App. 147.

Iowa.— Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178; Trucks *v.* Lindsey, 18 Iowa 504.

Kentucky.— Honore *v.* Hutchings, 8 Bush 687.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275.

Michigan.— Cornell *v.* Hall, 22 Mich. 377.

Minnesota.— Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

Missouri.— Brant *v.* Robertson, 16 Mo. 129; King *v.* Greves, 42 Mo. App. 168.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

New Jersey.— Roddy *v.* Brick, 42 N. J. Eq. 218, 6 Atl. 806; Crane *v.* Bonnell, 2 N. J. Eq. 264.

Wisconsin.— Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Rogers *v.* Burrus, 53 Wis. 530, 9 N. W. 786.

United States.— Russell *v.* Southard, 12 How. 139, 13 L. ed. 927; Conway *v.* Alexander, 7 Cranch 218, 3 L. ed. 321; Pioneer Gold Min. Co. *v.* Baker, 23 Fed. 258, 10 Sawy. 539; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

England.— Longuet *v.* Scawen, 1 Ves. 402, 27 Eng. Reprint 1106.

See 35 Cent. Dig. tit. "Mortgages," §§ 5, 95.

Reason for the rule.— The inclination of courts of equity to lean against conditional sales, and to construe the instrument as a mortgage rather than as a conditional sale, in cases of doubt, is based upon the consideration that an error which converts a conditional sale into a mortgage is not as injurious as one which changes a mortgage into a conditional sale; and it is believed that such a rule of construction will be most apt to promote the ends of justice and prevent fraud and oppression, especially as it will ordinarily save a forfeiture of the estate. Locke *v.* Palmer, 26 Ala. 312. And see Honore *v.* Hutchings, 8 Bush (Ky.) 687; Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

67. Hughes *v.* Sheaff, 19 Iowa 335.

68. Vincent *v.* Walker, 86 Ala. 333, 5 So. 465.

69. See Assignments For Benefit of Creditors, 4 Cyc. 128 *et seq.*

70. Bourk *v.* Cormier, 16 Quebec Super. Ct. 295. And see Dougherty *v.* Thompson, 7 Blackf. (Ind.) 277; Packard *v.* Protestant Episcopal Church Corp., etc., 77 Md. 240, 26 Atl. 411; Stadden *v.* Hazzard, 34 Mich. 76; Stewart *v.* Murray, 13 Minn. 426; Stockton *v.* Dillon, 66 N. J. Eq. 100, 57 Atl. 487; Purvis *v.* Hume, 8 N. Brunsw. 299. But *compare* Posner *v.* Bayless, 59 Md. 56, holding that a ground-rent payable at a definite future time is in effect a mortgage to secure a principal sum, interest on which is in the form of annual rent.

71. Halo *v.* Schick, 57 Pa. St. 319.

72. Barroilhet *v.* Battelle, 7 Cal. 450.

73. Lanfair *v.* Lanfair, 18 Pick. (Mass.) 299. And see Nugent *v.* Riley, 1 Metc. (Mass.) 117, 35 Am. Dec. 355.

ises conveyed, does not change the character of the instrument from a mortgage to a lease, or change the relation of the parties to it from that of mortgagor and mortgagee to that of lessor and lessee.[74]

5. MORTGAGE OR TRUST. A mortgage is merely an encumbrance created to pay a debt, and not a conveyance in trust.[75] It is essentially a pledge or security, and is distinguishable from a trust in this only, that the property described in it is to revert to the mortgagor on the discharge of the obligation for the performance of which it was pledged.[76] Hence a deed conveying a debtor's property in trust by way of security for his debts is a mortgage if it contains a provision for the avoidance of the instrument and the restoration of the property to the grantor, on his paying the debts secured.[77] A deed of trust in the nature of a mortgage is distinguished from an absolute deed of trust, the conveyance being given to secure debts of the grantor or to provide a fund for their payment, in the circumstance that in the former case a right or equity of redemption is reserved to the grantor, while in the latter case the property is placed absolutely out of his control.[78] Whether a conveyance is to be treated as a mortgage or as a deed of trust depends on its essential character as shown by its terms, and not on whether the grantee is a creditor whose debt is to be paid out of the proceeds arising from the execution of a trust therein declared.[79]

E. Once a Mortgage Always a Mortgage. It is a settled rule of equity that "what is once a mortgage is always a mortgage," which means that no agreement in advance to waive the equity of redemption can be valid, and that, when once a conveyance of land is established in the character of a mortgage, the right to redeem will continue until the debt is paid or barred, or until the equity of

74. Graham *v.* Way, 38 Vt. 19.

75. Seals *v.* Cashin, Ga. Dec. Pt. II, 76; Fowler *v.* Rice, 17 Pick. (Mass.) 100, holding that a mortgage does not *per se* create a trust, within the meaning of a statute giving equity jurisdiction in cases of trusts arising under deed. And see Tontaine *v.* Schulenburg, etc., Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648.

76. Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375.

77. *Alabama.*—Elmes *v.* Sutherland, 7 Ala. 262.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282.

Illinois.— See Fitch *v.* Wetherbee, 110 Ill. 475.

Michigan.— Comstock *v.* Howard, Walk. 110. But where a deed of land in trust to sell for the benefit of creditors provides that any surplus over the debts provided for shall be paid over to the grantor, the conveyance is not a mortgage. Geer *v.* Canada Traders' Bank, 132 Mich. 215, 93 N. W. 437.

Pennsylvania.— Myers' Appeal, 42 Pa. St. 518.

Rhode Island.— Union Co. *v.* Sprague, 14 R. I. 452.

England.— Locking *v.* Parker, L. R. 8 Ch. 30, 42 L. J. Ch. 257, 27 L. T. Rep. N. S. 635, 21 Wkly. Rep. 113.

See 35 Cent. Dig. tit. "Mortgages," § 7.

Compare Charles *v.* Clagett, 3 Md. 82.

78. *Arkansas.*—Turner *v.* Watkins, 31 Ark. 429.

California.—Bateman *v.* Burr, 57 Cal. 480; Koch *v.* Briggs, 14 Cal. 256, 73 Am. Dec. 651.

Florida.— Soutter *v.* Miller, 15 Fla. 625.

Illinois.— Cushman *v.* Stone, 69 Ill. 516.

Mississippi.— Pinson *v.* McGehee, 44 Miss. 229.

New Jersey.— Lance *v.* Bonnell, 58 N. J. Eq. 259, 43 Atl. 288.

New York.— Cooper *v.* Whitney, 3 Hill 95.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

England.— Sampson *v.* Pattison, 1 Hare 533, 23 Eng. Ch. 533, 66 Eng. Reprint 1143.

See 35 Cent. Dig. tit. "Mortgages," § 7.

Illustration.— Where a declaration of trust executed by a solvent person contemporaneously with an absolute deed recited that whereas the maker was in a state of mortal illness, and desired to provide for the payment of his debts, he had conveyed his real estate to plaintiff, in trust to pay his debts, with the desire to avoid proceedings in the courts, it being declared that the deed was a conveyance in trust, with full power to sell, the balance, after payment of debts, to be returned to the maker, his heirs, executors, or assigns, it was held that the deed and agreement did not constitute a mortgage, but passed the absolute legal title to the land. Ladd *v.* Johnson, 32 Oreg. 195, 49 Pac. 756.

79. More *v.* Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128. And see McClelland *v.* Remsen, 36 Barb. (N. Y.) 622, 14 Abb. Pr. 331, 23 How. Pr. 175; McVay *v.* Tousley, (S. D. 1905) 105 N. W. 932. But *compare* Marvin *v.* Titsworth, 10 Wis. 320, holding that where a conveyance was to a trustee, conditioned that, if the grantor paid a third party, the land should be reconveyed, but that, if he did not, the trustee should sell, pay the debt, and return the surplus to the grantor, this was not a mortgage because

redemption is foreclosed, barred, or duly and sufficiently released.[80] For the same reason it is not competent for parties to make a conveyance of land, absolute in form, a security for the payment of money by a given day, with the further agreement that if payment is not then made the instrument shall be treated as an absolute sale; if the instrument is a mortgage when delivered, it will so continue until the right of redemption is cut off in some of the modes recognized by law.[81] But a deed, intended as security by way of mortgage, may be converted into an unconditional conveyance of the title by the subsequent voluntary agreement of the parties, if fair and free from fraud or oppression and founded on a good consideration.[82]

F. What Law Governs. The validity of a mortgage of real estate and its construction and effect are to be tested and determined by the laws of the state where the mortgaged property is situated, although the mortgage itself is executed and the parties reside in another state.[83] And although the mortgage may be good and valid by the laws of the state where it is executed, yet if it does not comply with the laws of the state where the mortgaged land is situated, it cannot be enforced there.[84] As to the obligations secured by the mortgage, they are independent of the statutory forms for its execution, and are to be governed by the general principles of the law of contracts.[85]

not made to a creditor, but to an agent not interested in it.

80. *Illinois.*— Tennery *v.* Nicholson, 87 Ill. 464; Willets *v.* Burgess, 34 Ill. 494; Tillson *v.* Moulton, 23 Ill. 648; Wynkoop *v.* Cowing, 21 Ill. 570; Essley *v.* Sloan, 16 Ill. App. 63.

Indiana.— Loeb *v.* McAlister, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378.

Maine.— McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Reed *v.* Reed, 75 Me. 264.

New Jersey.— Vanderhaize *v.* Hugues, 13 N. J. Eq. 244.

New York.— Macauley *v.* Smith, 28 Abb. N. Cas. 276.

North Carolina.— Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951.

Ohio.— Wilson *v.* Giddings, 28 Ohio St. 554.

Pennsylvania.— Tompkins *v.* Merriman, 6 Kulp 543.

United States.—Richmond *v.* Richmond, 20 Fed. Cas. No. 11,801.

England.— Noakes *v.* Rice, [1902] A. C. 24, 66 J. P. 147, 71 L. J. Ch. 139, 86 L. T. Rep. N. S. 62, 50 Wkly. Rep. 305; Goodman *v.* Grierson, 2 Ball & B. 275, 12 Rev. Rep. 82; Newcomb *v.* Bonham, Freem. 67, 22 Eng. Reprint 1063, 2 Vent. 364, 1 Vern. Ch. 7, 214, 232, 23 Eng. Reprint 422, 435.

81. Bearss *v.* Ford, 108 Ill. 16; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

82. Carpenter *v.* Carpenter, 70 Ill. 457; Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321; Richmond *v.* Richmond, 20 Fed. Cas. No. 11,801.

83. *Illinois.*—Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Dawson *v.* Hayden, 67 Ill. 52.

Kentucky.— Bramblet *v.* Commonwealth, Land, etc., Co., 83 S. W. 599, 26 Ky. L. Rep. 1176.

Louisiana.— Howe *v.* Austin, 40 La. Ann. 323, 4 So. 315; Miller *v.* Shotwell, 38 La. Ann. 890; Frelson *v.* Tiner, 6 La. Ann. 18; Ricks *v.* Goodrich, 3 La. Ann. 212. And see *In re* Immanuel Presb. Church, 112 La. 348, 36 So. 408 [*explaining* Thibodaux *v.* Anderson, 34 La. Ann. 797]. A common-law mortgage, or a deed of trust, executed in another state, between citizens resident there, intended to operate as a lien or charge on lands in Louisiana, to secure the payment of a debt, will be given operation and effect as a conventional mortgage in the latter state. Gates *v.* Gaither, 46 La. Ann. 286, 15 So. 50; Tillman *v.* Drake, 4 La. Ann. 16; Pickett *v.* Foster, 36 Fed. 514.

Maine.— Holt *v.* Knowlton, 86 Me. 456, 29 Atl. 1113.

Massachusetts.— Goddard *v.* Sawyer, 9 Allen 78.

Nebraska.— People's Bldg., etc., Assoc. *v.* Parish, 1 Nebr. (Unoff.) 505, 96 N. W. 243.

New Hampshire.— Fessenden *v.* Taft, 65 N. H. 39, 17 Atl. 713.

New Jersey.— Griffin *v.* Griffin, 18 N. J. Eq. 104. But see Campion *v.* Kille, 14 N. J. Eq. 229; Dolman *v.* Cook, 14 N. J. Eq. 56, both holding that in a suit to foreclose a mortgage, where it appears that both the parties to the mortgage reside in another state, and that the contract was made there, the laws of that state must determine the validity of the instrument, notwithstanding the land affected by it lies in New Jersey.

Pennsylvania.— Beso *v.* Eastern Bldg., etc., Assoc., 16 Pa. Super. Ct. 222.

South Dakota.— Bowdle *v.* Jencks, 18 S. D. 80, 99 N. W. 98.

United States.— Dow *v.* Memphis, etc., R. Co., 20 Fed. 260. And see Fitch *v.* Remer, 9 Fed. Cas. No. 4,836, 1 Biss. 337, 1 Flipp. 15.

See 35 Cent. Dig. tit. "Mortgages," § 2. And see *infra*, XI, A, 2.

84. Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303.

85. Barry *v.* Snowden, 106 Fed. 571. And see Cubbedge *v.* Napier, 62 Ala. 518.

II. EQUITABLE MORTGAGES.

A. Nature and Incidents. Courts of equity are not governed by the same rules as courts of law in determining whether a mortgage has been created; and generally, whenever a transaction resolves itself into a security, or an offer or attempt to pledge land as security for a debt or liability, equity will treat it as a mortgage, without regard to the form it may assume.[86] Although the conveyance in question may lack the formal requisites of a mortgage at law, or be expressed in inapt or untechnical language, equity will look to the substance and give effect to the intentions of the parties.[87] But an equitable mortgage can arise only from a specific agreement between the parties in interest.[88] And there must be clear and unequivocal proof of the intention to create a mortgage and of the sum which it was to secure.[89] A debt, obligation, or liability to be secured is absolutely essential to every mortgage, no less to those which are recognized only in equity than to such as are enforceable at law.[90] But it is not necessary in equity that the debt secured should be evidenced by notes, bonds, or any other written obligation or promise to pay.[91]

B. Transactions Constituting Equitable Mortgages — 1. In General. An equitable mortgage may be constituted by any writing from which the intention to do so may be gathered.[92] Thus a contract in writing to secure a debt

86. *Missouri.*— Carter *v.* Holman, 60 Mo. 498.

Oregon.—Marquam *v.* Ross, (1905) 83 Pac. 852, (1906) 86 Pac. 1.

Tennessee.— Webb *v.* Patterson, 7 Humphr. 431.

Texas.— See Armstrong *v.* Burkitt, (Civ. App. 1896) 34 S. W. 759.

West Virginia.— Wayt *v.* Carwithen, 21 W. Va. 516.

United States.—Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

See 35 Cent. Dig. tit. "Mortgages," § 43.

Equitable mortgages defined.— Equitable mortgages are a form of mortgage in addition to those formal instruments which are properly entitled to the designation of "mortgages," being deeds and contracts which are wanting in one or more of the characteristics of a common-law mortgage, and often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Jones Mortg. § 162. And see Hall *v.* Mobile, etc., R. Co., 58 Ala. 10; Gessner *v.* Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; Cummings *v.* Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999.

"An equitable mortgage results from different forms of transactions in which there is present an intent of the parties to make a mortgage, to which intent, for some reason, legal expression is not given in the form of an effective mortgage; but in all such cases the intent to create a mortgage is the essential feature of the transaction." Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 620, 46 Atl. 960.

Deed fraudulent as to creditors.— When a grantee of land purchases the same without any actual notice of an intention on the part of the grantor to defraud his creditors, but for a consideration so inadequate that it would be inequitable to allow the deed to stand as a conveyance, a court of equity may set it aside, so far as it purports to be an absolute conveyance, but permit it to stand as security only for the money advanced. Shepherd *v.* Fish, 78 Ill. App. 198.

Where an equitable mortgagee covenants to reconvey, free from encumbrances, and by good and sufficient deed, he must be understood as referring to the same title which he received from the mortgagor, and is not bound to convert an imperfect title received into an estate in fee simple. Parmelee *v.* Lawrence, 44 Ill. 405.

87. Brown *v.* Brown, 103 Ind. 23, 2 N. E. 233, holding that notwithstanding the obscurity and inartificiality with which a contract is drawn, if it is fairly open to the construction that it is an equitable mortgage, a court will so treat it, and decree a sale in accordance with the apparent intent, and a repayment, from the proceeds, of the money lent and which the instrument was given to secure. And see *infra*, II, E.

"No precise form of words is necessary to constitute a mortgage; and every contract for the security of money, by the conveyance of real estate, will in equity be holden as such." Baldwin *v.* Jenkins, 23 Miss. 206, 210.

88. Cotten *v.* Blocker, 6 Fla. 1. And see Iowa State Sav. Bank *v.* Coonrod, 97 Iowa 106, 66 N. W. 78.

89. Williams *v.* Stratton, 10 Sm. & M. (Miss.) 418.

90. Mix *v.* White, 36 Ill. 484. And see McLaren *v.* Clark, 80 Ga. 423, 7 S. E. 230.

91. Bradley *v.* Merrill, 88 Me. 319, 34 Atl. 160.

92. Payne *v.* Wilson, 74 N. Y. 348. And see Piper *v.* Sawyer, 73 Minn. 332, 76 N. W. 57; Ruffners *v.* Putney, 12 Gratt. (Va.) 541.

specified therein, in which the parties expressly declare their intention to create a lien, by way of mortgage, upon real estate particularly described, upon the failure of conditions fully set forth, is an equitable mortgage, which, on non-payment and breach of the conditions, may be foreclosed in the ordinary way in a court of equity.[93] And ordinarily a deed of land, with a bond conditioned to reconvey on the payment of a certain sum, will constitute an equitable mortgage, if the intention of the parties to create a mere security is shown.[94] An equitable mortgage may also be created by a conveyance, legal in its form, of an equitable estate, as security for the payment of money.[95] And in some circumstances a pledge of the

Illustration.— A written agreement by the owner to pay the occupant of certain land a given sum, conditioned that when the land was sold, to enable the owner to realize the amount, the occupant should surrender his possession, and meantime giving him the occupancy in lieu of paying him interest on this sum has been held to constitute an equitable mortgage on the land. Blackburn *v.* Tweedie, 60 Mo. 505.

Form of words immaterial.— Any formula of words which plainly shows the intention to transfer property by way of security will suffice to raise a mortgage in equity. It was so held in a case where the contract between the parties undertook to "pledge the real and personal estate" of one as security for the payment of a sum of money to the other. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472. So where A, having received the property of B, to invest it for B's advantage, gave a paper, not in form of a mortgage, acknowledging the receipt of the property, and declaring that certain specified property of his own was mortgaged to secure B, it was held that this would operate as a mortgage upon the death of A, insolvent. Menude *v.* Delaire, 2 Desauss. Eq. (S. C.) 564. Where a husband and wife made a release deed of their real estate, containing the following clause: "On condition that, whereas the said grantees have lent us one thousand dollars to be paid three years from this date, without interest, they taking in lieu thereof the rents and profits of said land, if we shall pay said money, this deed shall be void, else valid; if not paid and a forfeiture occurs, the land shall be taken in full payment of debt and interest, without further claim upon us, or either of us," and the grantees took possession, it was adjudged to constitute an equitable mortgage. Jarvis *v.* Woodruff, 22 Conn. 548.

Intention of parties to govern.— In equity, in determining whether or not a given transaction is to be treated as a mortgage, the form of the transaction is not regarded, but the substance must control. The intention of the parties, to be gathered in the light of surrounding circumstances, must give character to the contract in that regard. It is not necessary, in order to constitute a mortgage, that it should be so expressed in the conveyance, but it may appear by a separate instrument, in the nature of a defeasance. Nor is it necessary that the deed and the defeasance should refer to each other. Their connection may be shown by parol. And the defeasance need not even be in writing. Preschbaker *v.* Feaman, 32 Ill. 475.

An agreement to convey by good and sufficient deed an estate in which the grantor had a vested remainder, or else to pay a designated sum of money within a limited time, with a provision that on default of such payment the obligation to convey the land aforesaid should be absolute, was held to be a mortgage to secure the payment of the money, with the right of redemption belonging to mortgages in the usual form. Cotterell *v.* Long, 20 Ohio 464.

Intent to give security as distinguished from payment.— To constitute an equitable mortgage on property for the payment of a debt there must be manifest an intent to create a security as distinguished from an intent to apply to the payment of the debt the proceeds of a sale of the property. Pearson *v.* Dancer, 144 Ala. 427, 39 So. 474; Smith *v.* Rainey, (Ariz. 1906) 83 Pac. 463.

Parol agreement.— Where a person pays off encumbrances on the land of another, taking title in fee thereto in his own name, a parol agreement with the owner that the deed to such person shall be considered a mortgage, and that the owner shall have the right to redeem, is not enforceable. McKee *v.* Griggs, 51 N. J. Eq. 178, 26 Atl. 158.

A consent judgment, declaring that defendant "has an equity to redeem" certain land on the payment to plaintiff of a specified sum, and in case of failure to pay the same within the time limited "defendant shall stand debarred absolutely" of all equity in the premises, establishes the relation of mortgagor and mortgagee between the parties. Bunn *v.* Braswell, 139 N. C. 135, 51 S. E. 927.

93. Cummings *v.* Jackson, 55 N. J. Eq. 805, 38 Atl. 763. And see Clarke *v.* Sibley, 13 Metc. (Mass.) 210; *In re* Dimond, 14 Pa. St. 323.

Common-law lien distinguished.— Where, by the terms of a contract, expressly giving a lien on certain property, such property is not to remain in the possession of the one to whom the lien is given, the contract will be construed to amount to an equitable mortgage, and not to a common-law lien. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

94. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486. *Compare* Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.

95. Jarvis *v.* Dutcher, 16 Wis. 307. But *compare* Hymann *v.* Bogue, 135 Ill. 9, 26 N. E. 40, where it was held that a transfer by a

rents and profits of an estate as security for a debt will create an equitable lien, in the nature of a mortgage, on the body of the estate.[96]

2. PURCHASE AT JUDICIAL SALE FOR BENEFIT OF DEBTOR. When the owner of property which is about to be sold at judicial sale procures a stranger to agree to become the purchaser at such sale, bidding in the property for the benefit and accommodation of the debtor, with a provision that such purchaser shall hold the title until repaid the amount of his advances and then convey it to the debtor, the purchaser, fulfilling such agreement, takes the title to the property in the character of an equitable mortgagee.[97] Courts of equity in fact strongly incline to treat all securities for money, or for indemnity, as mortgages. Hence when a promise is made by a purchaser, at or before a judicial sale, to extend the time for redemption beyond the time allowed by law, they will treat the transaction as a mortgage on the land sold, the real right of the creditor extending no further than to receive full satisfaction of his debt.[98] But in the absence of an explicit written

cestui que trust to his creditor of his interest in the proceeds of land held in trust for himself and others does not constitute a mortgage of the land.

96. *Ex p.* Edwards, 1 Deac. 611, 38 E. C. L. 792; Abbott *v.* Stratten, 9 Ir. Eq. 233, 3 J. & L. 609; *In re* Parkinson, 13 L. T. Rep. N. S. 26. And see Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

Lease with pledge of rents and profits.— The purchaser of land, in fulfilment of an agreement on his part to reconvey the property as security for the unpaid purchase-money, if it was not paid in a certain time, gave to the vendor a lease of the property, with the right to apply the net profits and proceeds from year to year on the purchase-money notes. It was held that, the agreement to give security being in equity a mortgage, the lease, with a pledge of the rents and profits, was accepted as a fulfilment of the agreement, and the agreement and lease, taken together, created a lien on the body of the property, which could be enforced in equity as a mortgage, in case the rents and profits were not sufficient to pay the debt. Gest *v.* Packwood, 39 Fed. 525. And see Providence, etc., Steamboat Co. *v.* Fall River, 187 Mass. 45, 72 N. E. 338.

97. *Illinois.*— Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Klock *v.* Walter, 70 Ill. 416. But *compare* Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919 (holding that a contract whereby a grantee in a master's deed gives the former owner the right to repurchase within a certain time, at a stated price, does not convert the master's deed into a mortgage, where there is no debt which such a mortgage could secure, and the contract expressly declares that the former owner has no interest in the land except the right to repurchase); Stephenson *v.* Thompson, 13 Ill. 186.

Indiana.— Beatty *v.* Brummett, 94 Ind. 76.

Iowa.— Roberts *v.* McMahan, 4 Greene 34. See, however, Stroup *v.* Haycock, 56 Iowa 729, 10 N. W. 257.

Kentucky.— Guenther *v.* Wisdom, 84 S. W. 771, 27 Ky. L. Rep. 230.

Massachusetts.— Potter *v.* Kimball, 186 Mass. 120, 71 N. E. 308.

Michigan.— Anderson *v.* Smith, 103 Mich. 446, 61 N. W. 778.

Minnesota.— Wenzel *v.* Weigand, 92 Minn. 152, 99 N. W. 633.

New Jersey.— English *v.* Rainear, (Ch. 1903) 55 Atl. 41; Barkelew *v.* Taylor, 8 N. J. Eq. 206. But *compare* Merritt *v.* Brown, 19 N. J. Eq. 286.

New York.— Sahler *v.* Signer, 37 Barb. 329; Umfreville *v.* Keeler, 1 Thomps. & C. 486; Moore *v.* Nye, 21 N. Y. Suppl. 94.

North Carolina.— Williams *v.* Avery, 131 N. C. 188, 42 S. E. 582.

Ohio.— Wilson *v.* Giddings, 28 Ohio St. 554.

Pennsylvania.— Gaines *v.* Brockerhoff, 136 Pa. St. 175, 19 Atl. 958; Hiester *v.* Maderia, 3 Watts & S. 384.

Tennessee.— Guinn *v.* Locke, 1 Head 110.

West Virginia.— See Liskey *v.* Snyder, 56 W. Va. 610, 49 S. E. 515.

Wisconsin.— Beebe *v.* Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103; Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614; Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322.

See 35 Cent. Dig. tit. "Mortgages," § 45.

See, however, Price *v.* Evans, 26 Mo. 30, holding that, where on the day of a sheriff's sale on execution plaintiff and defendant executed a written agreement under which plaintiff agreed to purchase in the property to be sold, and to reconvey that, and other property bought by him at similar sales, to defendant, this was, under the circumstances of the case, only a temporary privilege to defendant, and plaintiff could not be held to hold the lands so bought by way of mortgage.

Encumbrance as against creditor.— Where property is sold under execution to a stranger to the execution, there is no reason why the latter and the execution debtor could not, as against the creditor, create, by parol agreement, an encumbrance on the property on account of a debt, which the debtor owed the purchaser under the execution; the title to the property having been made to the purchaser before the creditor acquired any lien on it. Monarch *v.* Jones, 8 Ky. L. Rep. 612.

98. Pensoneau *v.* Pulliam, 47 Ill. 58.

agreement between the parties, clear and convincing evidence will be required to convert a sheriff's deed, under these circumstances, into a mere mortgage for the benefit of the debtor.[99]

3. Redemption For Benefit of Debtor. When property has been sold at judicial sale, and a stranger, at the request of the debtor, advances the money necessary to effect a redemption from such sale, taking to himself an assignment of the sheriff's deed or certificate of purchase, with an agreement to convey the property back to the debtor on being reimbursed for the amount of his advances, if the parties meant to treat the advance made by the stranger as a loan to the debtor, and intended that he should hold the land simply as security for the payment of the debt thus created, it will be regarded and treated in equity as a mortgage of the land;[1] but if the arrangement between the parties does not create the relation of debtor and creditor, but leaves it optional with the original owner to repay the stranger's advances or not, it is merely a sale with a right of repurchase.[2]

4. Advance of Purchase-Money For Vendee's Benefit. If a person who has contracted for the purchase of land procures another to lend him the money necessary to make the payments, or to advance it for him, and has the deed made to the latter, with an agreement that he will convey the title to the former on repayment of the amount advanced, the transaction will amount to an equitable mortgage if it was the understanding and intention of the parties that the one should become debtor to the other for the money advanced, and that the land should be held merely as security for this debt.[3] If this was their contract, the form in

99. Downing *v.* Woodstock Iron Co., 93 Ala. 262, 9 So. 177; Jones *v.* Pierce, 134 Pa. St. 533, 19 Atl. 689.

1. *Connecticut.*— Lounsbury *v.* Norton, 59 Conn. 170, 22 Atl. 153.

Illinois.— Trogdon *v.* Trogdon, 164 Ill. 144, 45 N. E. 575. And see Smith *v.* Doyle, 46 Ill. 451.

Iowa.— Byers *v.* Johnson, 89 Iowa 278, 56 N. W. 449; Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178.

Kentucky.— Brey *v.* Barbour, 20 S. W. 899, 14 Ky. L. Rep. 655.

Minnesota.— See Staughton *v.* Simpson, 69 Minn. 314, 72 N. W. 126.

Pennsylvania.— Sweetzer's Appeal, 71 Pa. St. 264.

South Dakota.— Wilson *v.* McWilliams, 16 S. D. 96, 91 N. W. 453.

West Virginia.— Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340.

See 35 Cent. Dig. tit. "Mortgages," § 46.

Redemption from tax-sale.— Complainant, at the request of defendants, purchased the title to their land from the purchaser thereof at a tax-sale, which was afterward found to have been void, under an agreement by which defendants were to remain in possession, and repay him the amount he had expended, and, on default, he was to become absolute owner of the land. It was held that complainant's right amounted only to an equitable lien, with a right of redemption in defendants, and equity will not specifically enforce the stipulation that on default the land should become his property absolutely. Nelson *v.* Kelly, 91 Ala. 569, 8 So. 690.

2. Eames *v.* Hardin, 111 Ill. 634; Stisbe *v.* Lucas, 36 Ill. 462.

No promise to pay.—Land having been sold under a deed of trust, a third party, at the request of the original owner, bought from the purchaser, giving his note for the purchase-money, and took a written contract for the conveyance of the land to him upon payment of his note, and then agreed, verbally, with the original owner, that, if he would pay the note when due, he might have the land; but the original owner made no promise to pay, and did not, in fact, pay, and the deed was executed to the purchaser. It was held that his title was absolute, and was not held as a security for the payment of the money paid by him. Magnusson *v.* Johnson, 73 Ill. 156.

3. *Alabama.*— Hughes *v.* McKenzie, 101 Ala. 415, 13 So. 609; Sims *v.* Gaines, 64 Ala. 392; Eutaw Bank *v.* Alabama State Bank, 87 Ala. 163, 7 So. 91. *Compare* Moseley *v.* Moseley, 86 Ala. 289, 5 So. 732 (where a purchaser of lands, unable to make the deferred payment, borrows money from a third person, to whom he procures the title to be conveyed by his vendor, the third person agreeing to convey to the purchaser on repayment of advances, the relation between the parties is that of vendor and vendee, and the remedy for the breach of the agreement is a bill, in the nature of a bill for specific performance, to enforce the trust, and not a bill to have the deed declared a mortgage); Micou *v.* Ashurst, 55 Ala. 607.

California.— Campbell *v.* Freeman, 99 Cal. 546, 34 Pac. 113; Purdy *v.* Bullard, 41 Cal. 444; Hidden *v.* Jordan, 21 Cal. 92.

Florida.— Lindsay *v.* Matthews, 17 Fla. 575.

Georgia.— Doris *v.* Story, 122 Ga. 611, 50 S. E. 348; Fleming *v.* Georgia R. Bank, 120 Ga. 1023, 48 S. E. 420.

which they may have cast the agreement is immaterial.[4] It is not necessary that the agreement to reconvey should be under seal,[5] or even that it should be in writing; a mere oral agreement will be sufficient in equity, if fully established.[6] While it is necessary, as stated, that the transaction should be intended as a security for a debt or loan, no promise or personal covenant on the part of the borrower to repay the money is required to make it a mortgage in equity.[7] And conversely the fact that the one party gave to the other a note or other evidence of debt, for the amount advanced, will not establish the relation of mortgagor and mortgagee between them, if all the other facts in the case show an intention merely to give an option to purchase the land from the person taking the title.[8] The question of the intention of the parties, if not indisputably established by the face of the papers, is one of fact, which must be determined on the testimony of witnesses and evidence of pertinent circumstances.[9] And if it thus appears that there was no design to pledge the land as security for a loan, but merely that the person who advanced the money to make the purchase should take the title absolutely to himself, with an option or privilege to the original purchaser to acquire the title, or to take the property off the other's hands, within a limited time, on paying a certain amount of money, then the transaction is not a mortgage

Illinois.— Stewart *v.* Fellows, 128 Ill. 480, 20 N. E. 657; Smith *v.* Cremer, 71 Ill. 185; Smith *v.* Sackett, 15 Ill. 528; Davis *v.* Hopkins, 15 Ill. 519.

Iowa.— Rogers *v.* Davis, 91 Iowa 730, 59 N. W. 265.

Kansas.— Weekly *v.* Ellis, 30 Kan. 507, 2 Pac. 96.

Maine.— McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Stinchfield *v.* Milliken, 71 Me. 567.

Minnesota.— Holton *v.* Meighen, 15 Minn. 69.

Nebraska.—Malloy *v.* Malloy, 35 Nebr. 224, 52 N. W. 1097.

Nevada.— Leabigh *v.* White, 8 Nev. 147.

New York.— Carr *v.* Carr, 52 N. Y. 251; Hemans *v.* Lucy, 1 Thomps. & C. 523.

Pennsylvania.—Fessler's Appeal, 75 Pa. St. 483; Houser *v.* Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Hewitt *v.* Huling, 11 Pa. St. 27; McClintock *v.* McClintock, 3 Brewst. 76. And see Sterck *v.* Germantown Homestead Co., 27 Pa. Super. Ct. 336.

Tennessee.—Robinson *v.* Lincoln Sav. Bank, 85 Tenn. 363, 3 S. W. 656.

Texas.— Lucia *v.* Adams, 36 Tex. Civ. App. 454, 82 S. W. 335.

Virginia.— Pennington *v.* Hanby, 4 Munf. 140.

Wisconsin.— Beebe *v.* Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103; Jourdain *v.* Fox, 90 Wis. 99, 62 N. W. 936; Schriber *v.* Le Clair, 66 Wis. 579, 29 N. W. 570, 889; Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322. But *compare* Forest Lawn Co. *v.* Hanley, 94 Wis. 23, 68 N. W. 413.

United States.— Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

Canada.— McIlroy *v.* Hawke, 5 Grant Ch. (U. C.) 516.

See 35 Cent. Dig. tit. "Mortgages," § 48.

Purchase on joint account.—An instrument executed by one of two joint purchasers of land for speculative purposes, to the other, who furnished all the purchase-money, promising to pay within a given time a stated sum, recited therein as being for the purchase-money of his interest in certain lands jointly purchased by them, is an equitable mortgage. Leiweke *v.* Jordan, 59 Mo. App. 619. And see Ratliff *v.* Groom, 44 S. W. 968, 19 Ky. L. Rep. 1998. But where two or more purchase an estate, and one pays the money, and the estate is conveyed to them both, the one who pays the money gains neither a lien nor a mortgage. Brown *v.* Budd, 2 Ind. 442.

4. Brownlee *v.* Martin, 28 S. C. 364, 6 S. E. 148 (agreement for reconveyance styled a conditional sale); Walling *v.* Aiken, McMull. Eq. (S. C.) 1; Watts *v.* Kellar, 56 Fed. 1, 5 C. C. A. 394.

Accidental omission of right to redeem.— Defendant, having purchased land at a master's sale, arranged with the complainant that the latter should advance for defendant the money to pay for the land so purchased, and should have the use of the land for the interest thereon until such time as defendant would be able to refund the money, and that when he could do so he should have the land back. The written contract drawn up in accordance with this agreement stated by its terms an absolute sale, making no mention of the right to redeem. It appeared, however, that the person who drew up the writing intended to include such right, and supposed he had done so. It was held that the evidence was sufficient to justify a finding that the transaction was a mortgage, and not an absolute sale. Jones *v.* Jones, 1 Head (Tenn.) 105.

5. Stinchfield *v.* Milliken, 71 Me. 567.

6. Campbell *v.* Freeman, 99 Cal. 546, 34 Pac. 113.

7. Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

8. Micou *v.* Ashurst, 55 Ala. 607; Forest Lawn Co. *v.* Hanley, 94 Wis. 23, 68 N. W. 413.

9. Hughes *v.* McKenzie, 101 Ala. 415, 13 So. 609; Rogers *v.* Davis, 91 Iowa 730, 59 N. W. 265; Mason *v.* Hearne, 45 N. C. 88.

of the land, as in that case an essential element of mortgages is lacking, viz., a debt or obligation to be secured.[10]

5. Contract of Purchase or Bond For Title. Where a vendor of real estate executes his bond, conditioned to make title on the payment of the purchase-money, the contract is considered by a court of equity in the nature of a mortgage, with all its equitable rights and incidents.[11] A contract for the sale of lands, containing an agreement that they shall be held as security for future advancements to the purchaser, becomes a mortgage as soon as such advancements are made.[12]

6. Deed to Take Effect on Payment of Price. A deed of land containing a stipulation that the title shall not vest in the grantee until the purchase-money is fully paid,[13] or that, on payment of a designated sum to the grantor, the grantee shall be seized in fee simple,[14] or conditioned to be null and void unless a certain amount is paid by a day fixed,[15] is regarded and treated by courts of equity as a mortgage in favor of the grantor.

7. Deed Reserving Lien For Benefit of Third Person. An agreement in a deed, executed and acknowledged by both grantor and grantee, that the land shall be held subject to the lien of a third person for money loaned, is a declaration of trust by the grantee for the benefit of the lender, and, upon recording, the instrument becomes in effect a mortgage upon the land for the debt.[16]

8. Deed Conditioned For Support of Grantor. Where a conveyance of land is made subject to a condition, evidenced by a clause in the deed itself or by a separate written agreement, that the grantee shall furnish support and maintenance to the grantor during his life, or pay him an annuity, the condition converts the instrument into an equitable mortgage in favor of the grantor.[17]

9. Assignment of Contract or Bond to Convey. Where a contract for the purchase of real estate, or a bond for a deed, is assigned to a third person as security for a debt, and with an agreement to reassign on payment of the debt, this constitutes in equity a mortgage on the assignor's equitable title to the land in question.[18] But here, as in other cases, the question whether the transaction

10. *Illinois.*—Caprez *v.* Trover, 96 Ill. 456; Carr *v.* Rising, 62 Ill. 14; Greene *v.* Cook, 29 Ill. 186; Stephenson *v.* Thompson, 13 Ill. 186.

Kentucky.— Benge *v.* Benge, 23 S. W. 668, 15 Ky. L. Rep. 514; Morton *v.* Woodford, 16 S. W. 528, 13 Ky. L. Rep. 150.

Massachusetts.—Spaulding *v.* Jennings, 173 Mass. 65, 53 N. E. 204; Fowler *v.* Rice, 17 Pick. 100.

New York.— Hill *v.* Grant, 46 N. Y. 496; Loomis *v.* Loomis, 60 Barb. 22.

South Carolina.— Nesbitt *v.* Cavender, 27 S. C. 1, 2 S. E. 702. And see Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421.

Texas.— Hubby *v.* Harris, 68 Tex. 91, 3 S. W. 558.

Virginia.— Walker *v.* Mason, (1896) 24 S. E. 231.

See 35 Cent. Dig. tit. "Mortgages," § 48.

11. *Alabama.*— Conner *v.* Banks, 18 Ala. 42, 52 Am. Dec. 209.

California.— Merritt *v.* Judd, 14 Cal. 59.

Illinois.— Hutchinson *v.* Crane, 100 Ill. 269; Wright *v.* Troutman, 81 Ill. 374.

Iowa.— Blair *v.* Marsh, 8 Iowa 144.

Rhode Island.— See McCrillis *v.* Cole, 25 R. I. 156, 55 Atl. 196, 105 Am. St. Rep. 875.

Washington.— Wood *v.* Mastick, 2 Wash. Terr. 64, 3 Pac. 612.

United States.— Longworth *v.* Taylor, 15 Fed. Cas. No. 8,490, 1 McLean 395 [*affirmed* in 14 Pet. 172, 10 L. ed. 405].

See 35 Cent. Dig. tit. "Mortgages," § 49.

But *compare* Johnson *v.* Worthy, 17 Ga. 420.

12. Campbell *v.* Worthington, 6 Vt. 448.

13. Pugh *v.* Holt, 27 Miss. 461. And see Miskelly *v.* Pitts, 9 Baxt. (Tenn.) 193.

Possession retained by vendor.—A sale and conveyance of land, the vendor agreeing to hold and use the property till the vendee shall sell, and then to give up the premises in as good repair as when they were purchased, upon the payment of a balance of the purchase-money, is unconditional. The agreement is, in effect, a mortgage; and the failure to make payment within a reasonable time will authorize a foreclosure against the vendee. Gibson *v.* Eller, 13 Ind. 124.

14. Lucas *v.* Hendrix, 92 Ind. 54.

15. Carr *v.* Holbrook, 1 Mo. 240; Austin *v.* Downer, 25 Vt. 558. And see Adams *v.* Cooty, 60 Vt. 395, 15 Atl. 150.

16. Mitchell *v.* Wade, 39 Ark. 377. And see William and Mary College *v.* Powell, 12 Gratt. (Va.) 372. *Compare* Smith *v.* Rainey, (Ariz. 1906) 83 Pac. 463.

17. Hiatt *v.* Parker, 29 Kan. 765; Price *v.* Hobbs, 47 Md. 359; Doescher *v.* Spratt, 61 Minn. 326, 63 N. W. 736; Chase *v.* Peck, 21 N. Y. 581. But see Bethlehem *v.* Annis, 40 N. H. 34, 77 Am. Dec. 700.

18. *Alabama.*— Hays *v.* Hall, 4 Port. 374, 30 Am. Dec. 530.

creates an equitable mortgage depends upon the intention of the parties in that behalf, and this is to be determined by a consideration of the circumstances attending it.[19]

10. ASSIGNMENT OF CERTIFICATE OF ENTRY OR PURCHASE. An agreement by one holding a certificate of purchase or entry of lands from a state or the United States by which he assigns such certificate to another, as security for a debt which he owes to the latter, with the understanding that the latter shall take a deed in his own name, holding the title as security, is an equitable mortgage of the lands.[20]

C. Reservation of Vendor's Lien. It is generally held that the implied lien which equity raises in favor of the vendor of real property, to secure the payment of the purchase-money, is personal and not assignable and does not amount to a mortgage.[21] But where a lien for the unpaid purchase-money is expressly reserved in the vendor's conveyance, this constitutes in equity a mortgage of the land as security for the price, which may be assigned and transferred, and which may be enforced by bill or action for foreclosure.[22] And it seems that

California.—Commercial Bank *v.* Pritchard, 126 Cal. 600, 59 Pac. 130.

Illinois.— Hunter *v.* Hatch, 45 Ill. 178.

Indiana.— Semour *v.* Freeman, Smith 25.

Michigan.— Sibley *v.* Ross, 88 Mich. 315, 50 N. W. 379.

Nebraska.— Durrows *v.* Hobland, 40 Nebr. 464, 58 N. W. 947.

New York.— Brockway *v.* Wells, 1 Paige 617.

Oregon.— Lovejoy *v.* Chapman, 23 Oreg. 571, 32 Pac. 687.

Pennsylvania.— Rhines *v.* Baird, 41 Pa. St. 256.

Canada.— Doe *v.* Roe, 5 U. C. Q. B. O. S. 484.

See 35 Cent. Dig. tit. "Mortgages," § 54.

Contingent liability.— An assignment of a contract for the purchase of realty, conditioned that if the assignee should be obliged to pay any of certain liabilities, and the assignor should fail to repay by a specified time, the assignee should own the contract absolutely, but if repaid, he should surrender all claim, is a mortgage. Meigs *v.* McFarlan, 72 Mich. 194, 40 N. W. 246.

19. Morris *v.* Nyswanger, 5 S. D. 307, 58 N. W. 800.

Presumption against mortgage.—An assignment of a bond for a deed, purporting to convey absolutely the assignor's interest, will be presumed not to be a mortgage, in the absence of any showing as to the intention of the parties. Morris *v.* Nyswanger, 5 S. D. 307, 58 N. W. 800.

Proof that transaction a mortgage necessary.— Where an equitable owner under an agreement for the purchase of real estate, upon which he has erected buildings, assigns his contract, and afterward permits his assignee to take an absolute deed from the owner, he cannot be allowed to redeem upon an allegation, without proof, that the transaction was in fact a mortgage, and was consented to by him upon the confidence that it would be so treated by his creditor. Hogarty *v.* Lynch, 6 Bosw. (N. Y.) 138.

Proof of agreement unnecessary.— If an assignment of an interest in land was intended as a security for a debt then due, or for future advances, it was a mortgage, whether an agreement to that effect is proved or not. Rhines *v.* Baird, 41 Pa. St. 256.

Defective allegations as to agreement.— When a bill prays that certain assignments of contracts for the sale of lands may be decreed as mortgages, the right to such decree will be considered without reference to alleged defects in the formal statements of the bill, viz., that the allegations of the bill treated the transactions in the light of conditional sales rather than as mortgages. Winton *v.* Mott, 4 Luz. Leg. Reg. (Pa.) 71.

Direction to pay creditor of purchaser.— Where a purchaser of land, who would become entitled to a conveyance on making certain further payments, directed his grantor, before making title, to see that a certain creditor of the purchaser was paid, it was held that this order was not an equitable mortgage nor an assignment of the contract. Gilkerson *v.* Connor, 24 S. C. 321.

20. *Illinois.*— Dwen *v.* Blake, 44 Ill. 135.

Indiana.— Combs *v.* Nelson 91 Ind. 123; Crumbaugh *v.* Smock, 1 Blackf. 305.

Michigan.— Gunderman *v.* Gunnison, 39 Mich. 313.

New York.— Murray *v.* Walker, 31 N. Y. 399.

Ohio.— Stover *v.* Bounds, 1 Ohio St. 107.

Wisconsin.— See Mowry *v.* Wood, 12 Wis. 413.

See 35 Cent. Dig. tit. "Mortgages," § 55.

21. Markoe *v.* Andras, 67 Ill. 34; Kimble *v.* Esworthy, 6 Ill. App. 517; Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829.

22. *Alabama.*— Hall *v.* Mobile, etc., R. Co., 58 Ala. 10.

Arkansas.— Smith *v.* Robinson, 13 Ark. 533.

California.— Dingley *v.* Ventura Bank, 57 Cal. 467.

Illinois.— Wright *v.* Troutman, 81 Ill. 374; Markoe *v.* Andras, 67 Ill. 34; Robinson *v.* Appleton, 22 Ill. App. 351; Kimble *v.* Esworthy, 6 Ill. App. 517.

Mississippi.— Davis *v.* Hamilton, 50 Miss. 213.

the reservation of such a lien may be as effectually made in the note given for the purchase-money as in the conveyance itself.[23]

D. Agreement to Give a Mortgage — 1. As Equitable Mortgage. On the well-settled doctrine that a court of equity will regard that as done which ought to have been done, it is held that a contract or agreement whereby a party promises in the future to execute and give a mortgage on specific property, if it is unambiguous and founded on a sufficient consideration, and identifies the property to be charged with due certainty, will be treated in equity as equivalent to the creation of the mortgage itself, and will be enforced as a specific lien on the property described.[24] But in order to have this effect there must be a complete

Tennessee.— Cleveland *v.* Martin, 2 Head 128.

Texas.— West End Town Co. *v.* Grigg, 93 Tex. 451, 56 S. W. 49.

United States.— Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829.

See 35 Cent. Dig. tit. "Mortgages," § 50.

Reservation of right to foreclose.— An executory contract for the sale of land, with a clause reserving to the vendor the privilege, in case of non-payment of the agreed sums as they fall due, of foreclosing all the rights of the vendee, is in effect an equitable mortgage. Wood *v.* Mastick, 2 Wash. Terr. 64, 3 Pac. 612.

23. Smith *v.* Hiles-Carver Co., 107 Ala. 272, 18 So. 37; Bell *v.* Pelt, 51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247; Courtney *v.* Scott, Litt. Sel. Cas. (Ky.) 457. *Compare* Prickett *v.* Sibert, 71 Ala. 194 (holding that the fact that a note given for the purchase-price of land contains a description of the land does not render it an equitable mortgage); Tedder *v.* Steele, 70 Ala. 347 [*overruling* Bryant *v.* Stephens, 58 Ala. 636] (holding that a recital in a purchase-money note, describing the land, that the purchase is a consideration therefor, does not create an express charge on the land in the nature of an equitable mortgage).

24. *Alabama.*— O'Neal *v.* Siexas, 85 Ala. 80, 4 So. 745.

Arkansas.— King *v.* Williams, 66 Ark. 333, 50 S. W. 695; Richardson *v.* Hamlett, 33 Ark. 237.

California.— Remington *v.* Higgins, 54 Cal. 620; Racouillat *v.* Sansevain, 32 Cal. 376; Daggett *v.* Rankin, 31 Cal. 321.

Connecticut.— Hall *v.* Hall, 50 Conn. 104.

Illinois.— Chadwick *v.* Clapp, 69 Ill. 119; Peckham *v.* Haddock, 36 Ill. 38.

Indiana.— Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535.

Iowa.— Whiting *v.* Eichelberger, 16 Iowa 422. See, however, Humphreys *v.* Snyder, Morr. 263.

Kansas.— Foster Lumber Co. *v.* Harlan County Bank, 71 Kan. 158, 80 Pac. 49.

Maryland.— Wickes *v.* Hynson, 95 Md. 511, 52 Atl. 747; Textor *v.* Orr, 86 Md. 292, 38 Atl. 939; Carson *v.* Phelps, 40 Md. 73; Nelson *v.* Hagerstown Bank, 27 Md. 51; Triebert *v.* Burgess, 11 Md. 452; Gill *v.* McAttee, 2 Md Ch 255.

Michigan.— Whitney *v.* Foster, 117 Mich. 643, 76 N. W. 114; Osgood *v.* Osgood, 78 Mich. 290, 44 N. W. 325.

Mississippi.— Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682.

Missouri.— Carter *v.* Holman, 60 Mo. 498; McQuie *v.* Peay, 58 Mo. 56; White *v.* University Land Co., 49 Mo. App. 450.

New York.— Atlantic Trust Co. *v.* Holdsworth, 167 N. Y. 532, 60 N. E. 1106; Payne *v.* Wilson, 74 N. Y. 348; Chase *v.* Peck, 21 N. Y. 581; Burdick *v.* Jackson, 7 Hun 488; Otis *v.* Sill, 8 Barb. 102; Kendall *v.* Niebuhr, 45 N. Y. Super. Ct. 542; Thornton *v.* St. Paul, etc., R. Co., 45 How. Pr. 416; Lynch *v.* Utica Ins. Co., 18 Wend. 236; Hurd *v.* Everett, 1 Paige 124, 19 Am. Dec. 395.

North Carolina.— Miller *v.* Moore, 56 N. C. 431.

South Carolina.— Dow *v.* Ker, Speers Eq. 413; Massey *v.* McIlwain, 2 Hill Eq. 421; Welsh *v.* Usher, 2 Hill Eq. 167, 29 Am. Dec. 63; Delaire *v.* Keenan, 3 Desauss. Eq. 74, 4 Am. Dec. 604; Menude *v.* Delaire, 2 Desauss. Eq. 564. But see Creech *v.* Long, 72 S. C. 25, 51 S. E. 614, holding that an agreement to execute an agricultural lien is not an equitable mortgage.

Tennessee.— Cook *v.* Cook, 3 Head 719.

Texas.— Boehl *v.* Wadgymar, 54 Tex. 589.

Vermont.— Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

Virginia.— Ott *v.* King, 8 Gratt. 224; Alexander *v.* Newton, 2 Gratt. 266.

West Virginia.— Wayt *v.* Carwithen, 21 W. Va. 516.

Wisconsin.— Starks *v.* Redfield, 52 Wis. 349, 9 N. W. 168.

United States.— Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999; Biebinger *v.* Continental Bank, 99 U. S. 143, 25 L. ed. 271; Bridgeport Electric, etc., Co. *v.* Meader, 72 Fed. 115, 18 C. C. A. 451; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539; Gest *v.* Packwood, 39 Fed. 525; Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

England.— *In re* Hurley, [1894] 1 Ir. 488; Rolleston *v.* Morton, 1 C. & L. 252, 2 Dru. & War. 171, 4 Ir. Eq. 149; Whitworth *v.* Gaugain, 3 Hare 416, 8 Jur. 374, 13 L. J. Ch. 288, 25 Eng. Ch. 416, 67 Eng. Reprint 444; Eyre *v.* McDowell, 9 H. L. Cas. 619, 11 Eng. Reprint 871; Kirwan *v.* Gorman, 9 Ir. Eq. 154; Carew *v.* Arundell, 8 Jur. N. S. 71, 5 L. T. Rep. N. S. 498; Parish *v.* Poole, 53 L. T. Rep. N. S. 35; Card *v.* Jaffray, 2 Sch. & Lef. 374; Burn *v.* Burn, 3 Ves. Jr. 573, 30 Eng. Reprint 1162.

Canada.— Rooker *v.* Hoofstetter, 26 Can. Sup. Ct. 41; Miller *v.* Stitt, 17 U. C. C. P.

and binding agreement for the giving of a mortgage,[25] and a mere proposal or offer to give a mortgage, not accepted or assented to by the other party, nor acted upon by him, will not amount to a mortgage in equity.[26] And so an agreement to give a mortgage on land when required by the creditor does not create a lien on the land in the absence of any demand by the creditor.[27] Although a few cases are found in which the courts have given effect to a contract to make a mortgage, resting merely in parol,[28] yet the weight of authority declares that such an agreement especially in view of the statute of frauds cannot be enforced unless reduced to writing.[29]

2. Identification of Property. In order that the contract should create a lien in equity, it is necessary that it should clearly describe or point out the particular property to which the lien is to attach; and parol evidence is not admissible to add to an imperfect contract, or to vary its terms, for the purpose of making out a specific description of the property meant to be covered.[30]

3. As Against Third Persons. An equitable mortgage arising from a specific unexecuted agreement to give a mortgage on particular property will not be enforceable as against subsequent purchasers or encumbrancers of the property, without notice,[31] unless the agreement, being in writing, is entitled to record and

559. And see Chute *v.* Gratten, 32 N. Brunsw. 549.

See 35 Cent. Dig. tit. "Mortgages," § 56.

25. Gill *v.* McAttee, 2 Md. Ch. 255.

Ignorance of legal consequences.— The fact that the owner of the property was ignorant of, or did not fully understand, the effect which his agreement would have, under the rules and principles of equity, by way of creating a present lien on the property, is not sufficient to release him from his contract. Dow *v.* Ker, Speers Eq. (S. C.) 413.

Taking other security.— Where an agreement to give a mortgage has been made, and not executed, the creditor's right to enforce performance of the agreement is not affected by the fact of his taking the debtor's note for a part of the money. Cole *v.* Cole, 41 Md. 301.

26. Hart *v.* Maguire, 18 Nova Scotia 541.

27. Williams *v.* Lucas, 2 Cox Ch. 160, 30 Eng. Reprint 73.

Conditional agreement.— A written agreement to execute a bond and mortgage to secure a certain debt, in case certain foreclosure proceedings are discontinued and the creditor then demands such a mortgage, is a mere executory contract to give a mortgage on the happening of a future event and not an equitable mortgage. Mathews *v.* Damainville, 100 N. Y. App. Div. 311, 91 N. Y. Suppl. 524 [*reversing* 43 Misc. 546, 89 N. Y. Suppl. 493]. But *compare* People *v.* Woodruff, 75 N. Y. App. Div. 90, 77 N. Y. Suppl. 722.

28. Coster *v.* Georgia Bank, 24 Ala. 37; McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997.

29. Washington Brewery Co. *v.* Carry, (Md. 1892) 24 Atl. 151; Clabaugh *v.* Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575. And see Dean *v.* Anderson, 34 N. J. Eq. 496; Burdick *v.* Jackson, 7 Hun (N. Y.) 488; Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

30. Day *v.* Griffith, 15 Iowa 104; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284; Langley *v.* Vaughn, 10 Heisk. (Tenn.) 553; Boehl *v.* Wadgymar, 54 Tex. 589.

Descriptions held sufficient.— An equitable lien may arise under an agreement to give a mortgage on one of several houses built on the premises, although the particular house is not specified at the time of the agreement. Payne *v.* Wilson, 74 N. Y. 348, 352, in which it is said: "The agreement . . . was not for a mortgage on the whole premises, nor for any part of it with specific indication of that part. It was for a mortgage on one of the houses then going up, but without pointing out the particular house. Such a designation of the property to be charged, though indefinite to some degree, does not impair the effect of the equitable mortgage. . . . Doubtless, there must be an identification of the property, so that the equitable mortgagee may say, with a reasonable degree of certainty, what it is that is subject to his lien. In this case, it was certain that one building and its lot, out of a number, were the subject of the equitable lien." An agreement by which a railroad company "pledges the real and personal estate of said company" as security for a debt will in equity operate as a mortgage upon all the property, real and personal, of the company; and it is not sufficient to avoid the contract that the property intended to be covered is not more specifically described. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472. Where the covenant under which the equitable mortgage was claimed included all of the covenantor's property, both real and personal, and especially a certain house and lot, describing it, it was held to be valid. Oliva *v.* Bunaforza, 31 N. J. Eq. 395.

31. Atlantic Trust Co. *v.* Holdsworth, 167 N. Y. 532, 60 N. E. 1106 [*affirming* 50 N. Y. App. Div. 623, 63 N. Y. Suppl. 756]; Insurance Co. of North America *v.* Union Canal Co., 2 Pa. L. J. 65.

Effectual as against wife of purchaser.— Where a purchaser of land paid the entire price and erected buildings thereon with

is duly recorded, in which case it will furnish constructive notice to all parties in interest.[32] But the lien of an equitable mortgage of this character is entitled to preference over the claims of subsequent judgment creditors,[33] and against all parties, whatever their interest in the property, who have actual notice of it.[34]

4. ENFORCING SPECIFIC PERFORMANCE. An unexecuted written agreement to give a mortgage on particular real property is a contract of which equity in a proper case may decree specific performance, if the creditor prefers to insist on having the agreement carried out according to its terms, rather than to have it enforced as an equitable mortgage.[35] But a bill for this purpose cannot be sustained where the terms of the agreement are not sufficiently clear and specific to enable the court to give effect to the understanding of the parties,[36] or where the agreement rests merely in parol, unless in the latter case it has been taken out of the statute of frauds by a part performance.[37]

E. Informal or Defective Mortgages — 1. EFFECT IN EQUITY. Where parties intend and attempt to create a mortgage on real property, but the instrument as drawn up cannot be recognized or enforced at law as a mortgage, because it is imperfect, or lacks some formality, form of words, or other requisites prescribed by the common law or a statute, or because it includes provisions foreign to a mortgage, it will be regarded nevertheless as an equitable mortgage, and enforced as such by the courts of chancery, provided it shows the intention to

money advanced by plaintiff, which he orally agreed to secure by mortgage on the land, and thereafter he married, and afterward executed the mortgage under the agreement, but his wife refused to join, it was held effectual as against the wife's interest, which was not one acquired for a valuable consideration, but by operation of law, as the mortgage should have been executed at the time the advances were made, and equity would regard it as made at that time. Ulrich *v.* Ulrich, 1 N. Y. Suppl. 777.

32. O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745, holding that an instrument in the nature of a mortgage agreeing to convey land to be sold in payment of a debt conveys an equitable interest in the land, and is entitled to record, under Ala. Code, § 1810, providing that "instruments in the nature of a mortgage of real property" are void as to purchasers, mortgagees, and judgment creditors, having no notice, unless recorded within thirty days from their date.

33. Payne *v.* Wilson, 74 N. Y. 348; Robinson *v.* Williams, 22 N. Y. 380; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284; Matter of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; Lake *v.* Doud, 10 Ohio 415; Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616; The Vigilancia, 68 Fed. 781; Whitworth *v.* Gaugain, 3 Hare 416, 8 Jur. 374, 13 L. J. Ch. 288, 25 Eng. Ch. 416, 67 Eng. Reprint 444. *Contra*, Price *v.* Cutts, 29 Ga. 142, 74 Am. Dec. 52.

34. Racouillat *v.* Sansevain, 32 Cal. 376.

35. Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; Hermann *v.* Hodges, L. R. 16 Eq. 18, 43 L. J. Ch. 192, 21 Wkly. Rep. 571; Matthews *v.* Goodday, 8 Jur. N. S. 90, 31 L. J. Ch. 282, 5 L. T. Rep. N. S. 572, 10 Wkly. Rep. 148; Hunter *v.* Langford, 2 Molloy 272; McKay *v.* Reed, 1 Ch. Chamb. (U. C.) 208.

An agreement merely to borrow a sum of money and secure it by mortgage is not such a contract as can be enforced by decree for specific performance. Rogers *v.* Challis, 27 Beav. 175, 29 L. J. Ch. 240, 7 Wkly. Rep. 710, 54 Eng. Reprint 68.

Absolute power of sale.— When a person had agreed to execute a mortgage of leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage, it was held proper to make a decree for specific performance. Ashton *v.* Corrigan, L. R. 13 Eq. 76, 41 L. J. Ch. 96.

Opportunity to pay creditor.— It has been held proper, before making a decree for specific performance, to give the debtor an opportunity to avoid the execution of a mortgage on his property by paying the creditor what is presently due him, or reimbursing him for his advances made. Chinnock *v.* Sainsbury, 6 Jur. N. S. 1318, 3 L. T. Rep. N. S. 258, 9 Wkly. Rep. 7.

36. Nelson *v.* Hagerstown Bank, 27 Md. 51; McClintock *v.* Laing, 22 Mich. 212.

37. Dean *v.* Anderson, 34 N. J. Eq. 496; Burdick *v.* Jackson, 7 Hun (N. Y.) 488; Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

Payment of money as part performance.— Where defendant borrowed money to make payment of the purchase-price of land, and orally agreed to secure the lender by a mortgage on the land so purchased, it was held in a suit for specific performance that the contract came within the statute of frauds, and that the payment of the money by the lender was not such part performance of the contract as would take it out of the statute and justify a decree for specific performance. Washington Brewery Co. *v.* Carry, (Md. 1892) 24 Atl. 151.

charge a particular property as security for a debt, and contains nothing impossible or contrary to law.[38]

2. DEFECTIVE EXECUTION. An instrument intended to operate as a mortgage of lands, but which fails of its intended effect at law by reason of some defect or informality in its execution, may nevertheless be recognized and enforced as an equitable mortgage.[39] This rule applies where the defect in the mortgage is that it lacks a seal,[40] that it was not signed by the mortgagor, provided it is otherwise

38. *California.*— Remington *v.* Higgins, 54 Cal. 620; Racouillat *v.* Sansevain, 32 Cal. 376.

Illinois.— Edwards *v.* Hall, 93 Ill. 326; Vaniman *v.* Gardner, 99 Ill. App. 345.

Massachusetts.— Gilson *v.* Gilson, 2 Allen 115.

Missouri.— Hayden *v.* Lauffenburger, 157 Mo. 88, 57 S. W. 721; McClurg *v.* Phillips, 49 Mo. 315; Davis *v.* Clay, 2 Mo. 161.

New Jersey.— Gale *v.* Morris, 29 N. J. Eq. 222.

New York.— Payne *v.* Wilson, 74 N. Y. 348.

Ohio.— Dodson *v.* Dodson, 9 Ohio Dec. (Reprint) 201, 11 Cinc. L. Bul. 198.

West Virginia.— Knott *v.* Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. W. 266; Wayt *v.* Carwithen, 21 W. Va. 516.

England.— Burgh *v.* Francis, 1 Eq. Cas. Abr. 320, 21 Eng. Reprint 1074.

See 35 Cent. Dig. tit. "Mortgages," § 57.

No words of conveyance.— An instrument may thus operate as a mortgage in equity, although it would not be good at law because it contains no words of conveyance. Newlin *v.* McAfee, 64 Ala. 357; Cradock *v.* Scottish Provident Inst., 63 L. J. Ch. 15, 69 L. T. Rep. N. S. 380.

Defective description of property—Although the instrument is not a legal mortgage on the land in question, for failure to give such a description of the property conveyed as would suffice to bind it at law, still it may be good as an equitable mortgage. *Ex p.* Rucker, 3 Deac. & C. 704, 1 Mont. & A. 481.

Part of land omitted.— Where a landowner agrees to give a mortgage on all his land, but by mistake of the scrivener a parcel is omitted, the agreement will be considered, against the mortgagor, an equitable mortgage, so as to entitle the mortgagee to include in a foreclosure the land omitted, without the necessity of a reformation of the mortgage. Sprague *v.* Cochran, 144 N. Y. 104, 38 N. E. 1000 [*reversing* 70 Hun 512, 24 N. Y. Suppl 369].

Defect as to names of parties.— A deed of trust, otherwise complete, but not containing the name of the trustee, will be enforced in equity as an equitable mortgage. McQuie *v.* Peay, 58 Mo. 56. A mortgage upon real estate, made by the owner to a partnership in its firm-name, to secure an indebtedness to it, duly executed and recorded, as required by statute, constitutes a valid lien upon the property in favor of the firm as a security for the indebtedness to it. New Vienna Bank *v.* Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614. Where a stockholder in a manufacturing corporation indorsed notes of the corporation upon an agreement that he should be secured by a mortgage, but through mistake the mortgage was made in the names of the stockholders instead of in the name of the corporation, it was held that the mortgage was a valid equitable mortgage. Bundy *v.* Ophir Iron Co., 38 Ohio St. 300. But where a written instrument, which recites that a corporation has mortgaged certain property, but which does not state the names of the officers of the corporation, nor that it has authorized the execution of such an instrument, is executed by one B, president, and one C, secretary and treasurer, sealed with their seals and acknowledged by them as their act, such instrument will not be held to be an equitable mortgage, in the absence of allegations and proof that it was attempted to be executed by the corporation, or its authorized agents, as security for an obligation of the corporation. Brown *v.* Farmers' Supply Depot Co., 23 Oreg. 541, 32 Pac. 548.

39. Racouillat *v.* Sansevain, 32 Cal. 376; Margarum *v.* J. S. Christie Orange Co., 37 Fla. 165, 19 So. 637; Sanders *v.* McDonald, 63 Md. 503; Dyson *v.* Simmons, 48 Md. 207; Tiernan *v.* Poor, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225.

An instrument intended to revive a mortgage previously existing but afterward discharged, but which fails to accomplish that purpose at law, by reason of its defective or insufficient execution, may be considered as an agreement to give a mortgage on the lands, and hence may be enforced as an equitable mortgage. Peckham *v.* Haddock, 36 Ill. 38.

40. *California.*— Racouillat *v.* Sansevain, 32 Cal. 376.

Kentucky.—Portwood *v.* Outton, 3 B. Mon. 247.

Maine.— Lewis *v.* Small, 71 Me. 552.

Michigan.— Abbott *v.* Godfroy, 1 Mich. 178.

Minnesota.— Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

Missouri.— Harrington *v.* Fortner, 58 Mo. 468; Jones *v.* Brewington, 58 Mo. 210; Dunn *v.* Raley, 58 Mo. 134.

New York.— Watkins *v.* Vrooman, 51 Hun 175, 5 N. Y. Suppl. 172.

Rhode Island.— Westerly Sav. Bank *v.* Stillman Mfg. Co., 16 R. I. 497, 17 Atl. 918; Bullock *v.* Whipp, 15 R. I. 195, 2 Atl. 309.

South Carolina.— Bryce *v.* Massey, 35 S. C. 127, 14 S. E. 768.

West Virginia.—Holley *v.* Curry, 56 W. Va. 70, 51 S. E. 135; Atkinson *v.* Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544.

See 35 Cent. Dig. tit. "Mortgages," § 58.

regular and was duly acknowledged by him,[41] that it was not attested or witnessed as required by the statute,[42] or that it has not been acknowledged according to the requirements of the law.[43]

3. Informal Writings Creating a Lien. As a general rule any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common-law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a charge on the property, will constitute an equitable mortgage and be enforced as such in a court of equity.[44]

F. Deposit of Title Deeds — 1. English Doctrine — a. In General. In England, and according to the doctrine of the common law, a deposit of the title deeds of an estate in the hands of a creditor as security for a debt, under an agreement that the creditor is to retain possession of the same until the debt is paid, creates a lien on the estate, which is considered as an equitable mortgage.[45] But this

41. Martin *v.* Nixon, 92 Mo. 26, 4 S. W. 503. And see Dennistoun *v.* Fyfe, 11 Grant Ch. (U. C.) 372.

42. *Michigan.*— Abbott *v.* Godfroy, 1 Mich. 178.

New York.— Watkins *v.* Vrooman, 51 Hun 175, 5 N. Y. Suppl. 172.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

South Carolina.— Bryce *v.* Massey, 35 S. C. 127, 14 S. E. 768.

Vermont.— Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659.

See 35 Cent. Dig. tit. "Mortgages," § 58.

43. Racouillat *v.* Sansevain, 32 Cal. 376; Price *v.* McDonald, 1 Md. 403, 54 Am. Dec. 657; Watkins *v.* Vrooman, 51 Hun (N. Y.) 175, 5 N. Y. Suppl. 172.

44. *Arkansas.*— Bell *v.* Pelt, 51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247.

Illinois.— Edwards *v.* Hall, 93 Ill. 326; Vaniman *v.* Gardner, 99 Ill. App. 345.

Indiana.— Brown *v.* Brown, 103 Ind. 23, 2 N. E. 233.

South Carolina.— Delaire *v.* Keenan, 3 Desauss. Eq. 74, 4 Am. Dec. 604.

Virginia.— Dulaney *v.* Willis, 95 Va. 606, 29 S. E. 324, 63 Am. St. Rep. 815.

West Virginia.— Feely *v.* Bryan, 55 W. Va. 586, 47 S. E. 307.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

England.— Baynard *v.* Woolley, 20 Beav. 583, 52 Eng. Reprint 729; *Ex p.* Linden, 5 Jur. 57, 10 L. J. Bankr. 22, 1 Mont. D. & De G. 428; *Ex p.* Langston, 1 Rose 26.

See, however, Loyd *v.* Guthrie, 131 Ala. 65, 31 So. 506, holding that where plaintiff, having a mechanic's lien on a building, took a note from the debtor, payable after the time limited by law for the institution of proceedings on the lien, and the note, after reciting the consideration to be for money, material, and labor furnished by plaintiff in the building, added, "And a mechanic's lien is held on this building to secure the payment of this note," such statement merely prevented the existing lien from being waived by the taking of the note, and did not create an equitable mortgage or lien of any sort on the building.

Illustrations.— A clause in a lease giving the lessor a lien for rent on the buildings and machinery to be erected by the lessee on the leased land constitutes an equitable mortgage on such buildings and machinery when erected. Joliet First Nat. Bank *v.* Adam, (Ill. 1890) 25 N. E. 576, 138 Ill. 483, 28 N. E. 955. Where the equitable owner of land assents in writing that the holder of the legal title to the same may hold the title as security for the payment of money borrowed by such owner from a third person, this will be sufficient to create an equitable lien on the land for the benefit of the creditor. Chadwick *v.* Clapp, 69 Ill. 119. A debenture bond recited that "the company hereby charges with such payment [of the debentures] its undertaking, all its property whatsoever and wheresoever, both present and future." It was held that, as between the parties, an equitable mortgage was thereby created. Howard *v.* Minnesota Iron, etc., Co., 62 Minn. 298, 64 N. W. 896.

Impossible condition.— Where the defeasance in a mortgage is for the payment of the debt according to the condition of a bond recited in the mortgage, the mortgage will not be avoided in equity because the day on which the bond is made payable had already passed at the time of the execution of the mortgage; but such mortgage is to be considered as intended as security merely, and will be treated in equity as an ordinary mortgage, although absolute at law, by reason of the impossibility of the condition. Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

Power of attorney to sell.— A power of attorney given to a creditor, authorizing him to sell and convey specific real property of the debtor, if the latter does not pay the debt intended to be secured within a limited time, may operate in equity as a mortgage of the property. Reed *v.* Welsh, 11 Bush (Ky.) 450; Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122. *Compare* Mix *v.* White, 36 Ill. 484; *Ex p.* Greenhill, 3 Deac. & C. 334.

45. Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Shaw *v.* Foster, L. R. 5

form of security is not favored, especially when it is in conflict with, or contradictory of, a written instrument.[46] And although a memorandum or an agreement showing an intention to deposit deeds by way of equitable mortgage, or to charge the property comprised in those deeds with the payment of the debt, is sufficient to create an equitable charge without an actual deposit;[47] and a written order on a third person, presently in possession of the deeds, to deliver them to the creditor to be secured is equally valid for this purpose,[48] yet there must be a deposit, actual or constructive, and a mere order or direction to a third person to deliver to the creditor a deed or lease, not yet executed, is not sufficient.[49] Where a mortgage is thus created, the rights of subsequent encumbrancers of the property are the same as when the mortgage is by deed in the usual form.[50]

b. Deposit to Prepare Legal Mortgage. When a mortgagor deposits the title deeds of his estate with a solicitor, his own or the creditor's, to stand by way of equitable security to the mortgagee, until a legal mortgage on the same estate shall have been drawn and executed, the solicitor is thereby constituted trustee for the mortgagee, and an equitable charge upon the estate will be created by such deposit.[51] But this applies only where there is an intention to create a present and immediate security, not where the deeds are delivered merely for the purpose of having a mortgage prepared, and with no purpose of creating a lien on the estate until such mortgage is executed.[52]

c. What Deeds Required. To constitute a good equitable mortgage, it is not necessary that the deeds deposited should show a complete title in the depositor, provided they are material to the title, so that he could not establish his title without producing them.[53] Nor is it necessary that all the title deeds, or even all the material title deeds, should be deposited. It is sufficient if the deeds depos-

H. L. 321, 42 L. J. Ch. 49, 27 L. T. Rep. N. S. 281, 20 Wkly. Rep. 907; *Ex p.* Kensington, Coop. 96, 10 Eng. Ch. 96, 35 Eng. Reprint 491, 2 Rose 138, 2 Ves. & B. 79, 35 Eng. Reprint 249, 13 Rev. Rep. 32; Hankey *v.* Vernon, 2 Cox Ch. 12, 30 Eng. Reprint 6; *Ex p.* Langston, 17 Ves. 227, 11 Rev. Rep. 66, 34 Eng. Reprint 88; *Ex p.* Mountfort, 14 Ves. Jr. 606, 9 Rev. Rep. 359, 33 Eng. Reprint 653.

No right to legal mortgage.— A simple deposit of deeds is a charge enforceable in equity, but gives no right to have a legal mortgage made, although, in the view of a court of equity, it is a contract to charge the land, and the remedies are the same. Matthews *v.* Goodday, 8 Jur. N. S. 90, 31 L. J. Ch. 282, 5 L. T. Rep. N. S. 572, 10 Wkly. Rep. 148.

An intention of charging an estate may be presumed, where the proprietor deposits all or part of the title deeds. Richards *v.* Borrett, 3 Esp. 102.

Evidence.— In order to constitute an equitable mortgage by deposit of deeds, there must be proof, either of the actual deposit or of the loan being made. Kebell *v.* Philpot, 2 Jur. 739, 7 L. J. Ch. 237. And the mere fact that a bond creditor has possession of, and produces, the title deeds to the obligor's estate, without explanation, is not of itself sufficient to constitute an equitable mortgage. Chapman *v.* Chapman, 13 Beav. 308, 15 Jur. 265, 20 L. J. Ch. 465, 51 Eng. Reprint 119.

As against strangers.— A mere deposit of deeds, even without a word, may constitute an equitable mortgage, but it can only occur, as against strangers, in cases where the possession of the title deeds can be accounted for in no other manner, except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the lands. Bozon *v.* Williams, 3 Y. & J. 150.

46. *Ex p.* Coombe, 1 Rose 268, 17 Ves. Jr. 369, 34 Eng. Reprint 142.

47. *Ex p.* Sheffield Union Banking Co., 13 L. T. Rep. N. S. 477.

48. Daw *v.* Terrell, 33 Beav. 218, 3 New Rep. 285, 55 Eng. Reprint 351; *Ex p.* Heathcoat, 6 Jur. 1001, 2 Mont. D. & De G. 711.

49. *Ex p.* Coombe, 4 Madd. 249, 20 Rev. Rep. 294, 56 Eng. Reprint 698; *Ex p.* Perry, 3 Mont. D. & De G. 252.

50. Kerr *v.* Bebee, 12 Grant Ch. (U. C.) 204.

51. Edge *v.* Worthington, 1 Cox Ch. 211, 1 Rev. Rep. 20, 29 Eng. Reprint 1133; Lloyd *v.* Attwood, 3 De G. & J. 614, 5 Jur. N. S. 1322, 29 L. J. Ch. 97, 60 Eng. Ch. 475, 44 Eng. Reprint 1405; Bulfin *v.* Dunne, 11 Ir. Ch. 198; Keys *v.* Williams, 2 Jur. 611, 7 L. J. Exch. 59, 3 Y. & C. Exch. 55; *Ex p.* Bruce, 1 Rose 374; *Ex p.* Wright, 19 Ves. Jr. 256, 34 Eng. Reprint 513.

52. *Ex p.* Bulteel, 2 Cox Ch. 243, 2 Rev. Rep. 39, 30 Eng. Reprint 113; Norris *v.* Wilkinson, 12 Ves. Jr. 192, 33 Eng. Reprint 73.

53. Dixon *v.* Muckleston, 26 L. T. Rep. N. S. 752, 20 Wkly. Rep. 619. But see Roberts *v.* Croft, 24 Beav. 223, 53 Eng. Reprint 343.

ited are material evidences of title, and are shown to have been deposited with the intention of creating a mortgage.[54]

d. Who May Deposit. Generally speaking, a person can give a lien on real estate, by deposit of the title deeds, only as against himself and to the extent of his own interest in the land.[55] But a trustee having a partial beneficial interest in the trust property may, by deposit of the title deeds for a debt of his own, create a good equitable mortgage.[56] And it appears that this may also be done by an executor to secure money borrowed to pay off debts of the estate,[57] and that an equitable mortgage thus made by an heir at law or a devisee of a legal estate would be good as against creditors of the decedent who had not obtained judgments binding the land before the mortgage was made.[58]

e. Extent of Security and Charge. A deposit of title deeds is presumed, in the absence of evidence to the contrary, to create an equitable mortgage upon the whole of the property to which the deeds relate,[59] but not upon any property or estate not comprised within the purview of the deeds, however it may be connected with the estate intended to be pledged.[60] And where a written memorandum accompanies the deposit, it is to be taken as expressing the final and entire understanding of the parties as to the extent of the security to be granted.[61] But under an equitable mortgage by the simple deposit of a lease, unaccompanied by any memorandum, or accompanied by a memorandum not mentioning fixtures, the tenant's fixtures will be included.[62] From such memorandum also, if any, must be determined exclusively the amount of the charge intended to be created by the deposit.[63] Where mortgages are deposited as security for advances, and the depositor subsequently acquires the equity of redemption, the lien of the property is not confined to the amount of the mortgages.[64]

f. As Security For Further Advances. An equitable mortgage, created by the deposit of title deeds, may be extended beyond its original purpose, and made to secure further loans or advances, by a subsequent parol agreement of the parties or by necessary implication from their conduct with reference to it.[65]

54. Lacon *v.* Allen, 3 Drew. 579, 26 L. J. Ch. 18, 4 Wkly. Rep. 693, 61 Eng. Reprint 1024; *Ex p.* Arkwright, 3 Mont. D. & De G. 129; *Ex p.* Haigh, 11 Ves. Jr. 403, 8 Rev. Rep. 189, 32 Eng. Reprint 1143; *Ex p.* Wetherell, 11 Ves. Jr. 398, 32 Eng. Reprint 1141. And see Dixon *v.* Muckleston, L. R. 8 Ch. 155, 42 L. J. Ch. 210, 27 L. T. Rep. N. S. 804, 21 Wkly. Rep. 178; *Ex p.* Pearse, Buck 525; *Ex p.* Chippendale, 1 Deac. 67, 2 Mont. & A. 299, 38 E. C. L. 545.

Failure to deposit partition deed.— On a deposit of deeds by way of equitable mortgage, made by a joint tenant after a partition, it was held that the omission of the partition deed, as it did not belong to him solely, did not invalidate the security. *Ex p.* Farley, 5 Jur. 512, 10 L. J. Bankr. 55, 1 Mont. D. & De G. 683.

55. Turner *v.* Letts, 20 Beav. 185, 1 Jur. N. S. 1057, 24 L. J. Ch. 638, 52 Eng. Reprint 573.

Deed wrongfully deposited by stranger.—A person who advances money in good faith on the deposit of title deeds, made by one who has no right to them or to the estate to which they relate, will be protected in equity as a purchaser for value without notice, and may retain the deeds, although the person making the deposit was not in possession of the property, if it be an incorporeal hereditament. Joyce *v.* De Moleyns, 8 Ir. Eq. 215, 2 J. & L. 374.

56. *Ex p.* Smith, 6 Jur. 610, 11 L. J. Bankr. 16, 2 Mont. D. & De G. 587.

57. Ball *v.* Harris, 3 Jur. 140.

58. British Mutual Inv. Co. *v.* Smart, L. R. 10 Ch. 567, 44 L. J. Ch. 695, 32 L. T. Rep. N. S. 849, 23 Wkly. Rep. 800.

59. Ashton *v.* Dalton, 2 Coll. 565, 10 Jur. 451, 33 Eng. Ch. 565, 63 Eng. Reprint 863; *Ex p.* Glynn, 4 Jur. 395, 9 L. J. Bankr. 41, 1 Mont. D. & De G. 29.

60. Wardle *v.* Oakley, 36 Beav. 27, 55 Eng. Reprint 1066; Jones *v.* Williams, 24 Beav. 47, 3 Jur. N. S. 1066, 5 Wkly. Rep. 775, 53 Eng. Reprint 274.

61. *Ex p.* Leathes, 3 Deac. & C. 112; Pryce *v.* Bury, 2 Drew. 11, 18 Jur. 967, 23 L. J. Ch. 676, 61 Eng. Reprint 622; *Ex p.* Price, 6 Jur. 327, 11 L. J. Bankr. 27, 2 Mont. D. & De G. 518; *Ex p.* Hunt, 4 Jur. 342, 1 Mont. D. & De G. 139.

62. Williams *v.* Evans, 23 Beav. 239, 53 Eng. Reprint 94; *Ex p.* Tagart, 1 De Gex 531; *Ex p.* Cowell, 12 Jur. 411, 17 L. J. Bankr. 16.

63. Shaw *v.* Foster, L. R. 5 H. L. 321, 42 L. J. Ch. 49, 27 L. T. Rep. N. S. 281, 20 Wkly. Rep. 907. And see *Ex p.* Smith, 6 Jur. 610, 11 L. J. Bankr. 16, 2 Mont. D. & De G. 587; Royal Canadian Bank *v.* Cummer, 15 Grant Ch. (U. C.) 627.

64. Jones *v.* Upper Canada Bank, 13 Grant Ch. (U. C.) 74.

65. *Ex p.* Kensington, Coop. 96, 10 Eng.

g. Submortgage by Redeposit. An equitable submortgage may be created by the redeposit of deeds originally deposited by way of equitable mortgage, and if a written memorandum accompanied the first transaction, it is not necessary that it should be deposited with the deeds in the second transaction.[66]

h. Care and Return of Deeds. There is no implied covenant on the part of the mortgagee to take reasonable care of the title deeds during the continuance of the security; but if he loses or destroys them, or fails to return them in good order when the mortgage debt is paid, equity may decree indemnity or compensation to the mortgagor.[67] And if the creditor lets the deeds go out of his custody, not intending an assignment of the debt and security, before receiving satisfaction of his claim, he will lose his lien.[68]

2. American Doctrine — a. In General. The English doctrine of an equitable mortgage created by the deposit of the title deeds of an estate, as security for a debt, has not been generally adopted in this country. In the United States it is commonly considered that this doctrine would conflict with the system created by the registration laws and also with the statute of frauds, and it is therefore generally rejected.[69] But in a few of the states the doctrine prevails that a valid mortgage, recognized and enforceable in equity, may be created by the mere deposit of title deeds as security for a debt or loan.[70]

b. Agreement Accompanying Deposit. It has been decided that where the parties enter into a written agreement, stating the purpose of the deposit of the title deeds, and that it is intended to secure a debt thereby, and this is deposited with the deeds, this course will obviate the objections above referred to, and the transaction will amount, in equity, to a mortgage of the lands.[71]

Ch. 96, 35 Eng. Reprint 491, 2 Rose 138, 2 Ves. & B. 79, 35 Eng. Reprint 249, 13 Rev. Rep. 32; *Ex p.* Nettleship, 5 Jur. 733, 10 L. J. Bankr. 67, 2 Mont. D. & De G. 124; Fector *v.* Philpott, 12 Price 197, 26 Rev. Rep. 650. *Compare Ex p.* Whitbead, 19 Ves. Jr. 209, 34 Eng. Reprint 496; *Ex p.* Cooper, 9 Ves. Jr. 477, 13 Rev. Rep. 244, 34 Eng. Reprint 593. And see Kebell *v.* Philpott, 2 Jur. 739, 7 L. J. Ch. 237.

66. *Ex p.* Barnett, De Gex 194; *Ex p.* Smith, 6 Jur. 610, 11 L. J. Bankr. 16, 2 Mont. D. & De G. 587. But *compare* Hopper *v.* Conyers, L. R. 2 Eq. 549, 12 Jur. N. S. 328, 14 Wkly. Rep. 628; *Ex p.* Baine, 5 Jur. 105, 10 L. J. Bankr. 16, 1 Mont. D. & De G. 492.

67. Gilligan *v.* National Bank, [1901] 2 Ir. 513 [*distinguishing* Brown *v.* Sewell, 11 Hare 49, 17 Jur. 708, 22 L. J. Ch. 1063, 45 Eng. Ch. 49, 68 Eng. Reprint 1182].

68. *In re* Driscoll, Ir. R. 1 Eq. 285; Masuret *v.* Mitchell, 26 Grant Ch. (U. C.) 435.

69. *Georgia.*— Pierce *v.* Parrish, 111 Ga. 725, 37 S. E. 79; Davis *v.* Davis, 88 Ga. 191, 14 S. E. 194; English *v.* McElroy, 62 Ga. 413.

Maine.— See Hall *v.* McDuff, 24 Me. 311.

Minnesota.— Gardner *v.* McClure, 6 Minn. 250.

Nebraska.— Bloomfield State Bank *v.* Miller, 55 Nebr. 243, 75 N. W. 569, 70 Am. St. Rep. 831, 44 L. R. A. 387.

Ohio.— Probasco *v.* Johnson, 2 Disn. 96.

Pennsylvania.— Shitz *v.* Dieffenbach, 3 Pa. St. 233. But a court of equity will not enforce a return of the title papers to the debtor until he has complied with his part of the agreement. Sidney *v.* Stevenson, 11 Phila. 178.

South Carolina.— Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888. There are earlier cases which seem to admit the possibility of creating an equitable mortgage in this manner. Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; Boyce *v.* Shiver, 3 S. C. 515; Welsh *v.* Usher, 2 Hill Eq. 167, 29 Am. Dec. 63; Harper *v.* Barsh, 10 Rich. Eq. 149.

Vermont.— See Bicknell *v.* Bicknell, 31 Vt. 498.

See 35 Cent. Dig. tit. "Mortgages," § 59.

70. Bullowa *v.* Orgo, 57 N. J. Eq. 428, 41 Atl. 494; Rockwell *v.* Hobby, 2 Sandf. Ch. (N. Y.) 9; Hackett *v.* Reynolds, 4 R. I. 512; Jarvis *v.* Dutcher, 16 Wis. 307.

In Alabama, it has been held that there is an enforceable equitable mortgage, not arising from the mere deposit of title deeds, where the assignee of a mortgage, having purchased at his sale under power in the mortgage, but not having received a deed, but merely a certificate of purchase, from the auctioneer, and thus having the right to compel conveyance to him by the mortgagor, borrows money, and as security delivers the mortgage and note secured thereby and the auctioneer's certificate indorsing each of them. Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515.

71. *California.*— Higgins *v.* Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192.

Illinois.— Where a purchaser of real estate delivers to his creditor his deed for the same, and also executes a writing, under seal, stating, in substance, that he has borrowed a certain amount from him, and delivered to

III. ABSOLUTE DEEDS AS MORTGAGES.[72]

A. In General — 1. ABSOLUTE DEED GIVEN AS SECURITY. A deed of conveyance of land, absolute and unconditional on its face, but intended and understood by the parties to be merely a security for the payment of a debt or the performance of some other condition, will be regarded and treated in equity as a mortgage, giving to the parties the relative rights and remedies of mortgagor and mortgagee, and nothing more.[73] It is a settled doctrine of equity that the form of a transaction will never preclude inquiry into its real nature, but in all cases the intention of the parties must control, irrespective of the form. And consequently, if a conveyance is made as a security for money, in whatever form the conveyance is made, or whatever cover may be used to disguise the transaction and hide its real character from others, as between the parties and as to all persons who have notice that the property is merely held as collateral security, it

him the deed, to be held in escrow, and not to be recorded till said amount should be repaid, within three years, binding himself, his heirs and assigns, so to do, such agreement, together with the warranty deed conveying the title of the premises for the purpose of securing the indebtedness, constitutes in equity a mortgage. Mallory *v.* Mallory, 86 Ill. App. 193.

Massachusetts.— Carey *v.* Rawson, 8 Mass. 159.

Missouri.— Hackett *v.* Watts, 138 Mo. 502, 40 S. W. 113.

New Jersey.— Martin *v.* Bowen, 51 N. J. Eq. 452, 26 Atl. 823.

Pennsylvania.— Edwards *v.* Trumbull, 50 Pa. St. 509; Luch's Appeal, 44 Pa. St. 519.

United States.— See First Nat. Bank *v.* Caldwell, 9 Fed. Cas. No. 4,798, 4 Dill. 314.

See 35 Cent. Dig. tit. "Mortgages," § 59.

Contra.— Gardner *v.* McClure, 6 Minn. 250.

72. Statutory provisions.—Under the statutes in California, which define a mortgage as a contract by which specific property is hypothecated for the performance of any act, and provide that every transfer of an interest in property, other than in trust, made only as a security for another act, is to be deemed a mortgage, a conveyance so intended must be held a mortgage, although it is on its face an absolute transfer of the title. Renton *v.* Gibson, 148 Cal. 650, 84 Pac. 186; Banta *v.* Wise, 135 Cal. 277, 67 Pac. 129 (both construing Cal. Civ. Code, §§ 2920, 2924). And the same rule applies under the statute of Illinois, which declares that "every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage." See Rubo *v.* Bennett, 85 Ill. App. 473 (construing Rev. St. c. 95, § 12). In Florida, by statute, a deed absolute, made for the purpose or with the intention of securing the payment of money, is deemed to be merely a mortgage. Equitable Bldg., etc., Assoc. *v.* King, 48 Fla. 252, 37 So. 181. In New Hampshire, however, it is provided by law that no title or estate in fee simple shall be defeated or encumbered by any agreement or writing of defeasance, unless the same is made part of the condition in the conveyance, and states the sums to be secured or things to be performed. Boody *v.* Davis, 20 N. H. 140, 51 Am. Dec. 210 (construing Gen. Laws, c. 136, § 2).

73. *Arkansas.*— Blakemore *v.* Byrnside, 7 Ark. 505.

California.— Adams *v.* Hopkins, (1902) 69 Pac. 228; Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957; Moisant *v.* McPhee, 92 Cal. 76, 28 Pac. 46; Broughton *v.* Vasquez, 73 Cal. 325, 11 Pac. 806, 14 Pac. 885; Combs *v.* Hawes, (1885) 8 Pac. 597; Bettis *v.* Townsend, 61 Cal. 333. And see Kyle *v.* Hamilton, (1902) 68 Pac. 484.

Connecticut.— Sheldon *v.* Bradley, 37 Conn. 324; French *v.* Burns, 35 Conn. 359.

Illinois.— Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418; Westlake *v.* Horton, 85 Ill. 228; Hallesy *v.* Jackson, 66 Ill. 139; Shays *v.* Norton, 48 Ill. 100; Shaver *v.* Woodward, 28 Ill. 277; De Wolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 371; Tillson *v.* Moulton, 23 Ill. 648; Bishop *v.* Williams, 18 Ill. 101; Delahay *v.* McConnel, 5 Ill. 156; Wilson *v.* Rehm, 117 Ill. App. 473; Howat *v.* Howat, 101 Ill. App. 158; Bernhard *v.* Bruner, 65 Ill. App. 641; Angell *v.* Jewett, 58 Ill. App. 596.

Indiana.— Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98; Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782; Graham *v.* Graham, 55 Ind. 23.

Iowa.— Dunton *v.* McCook, 93 Iowa 258, 61 N. W. 977; Otto *v.* Doty, 61 Iowa 23, 15 N. W. 578; New York Piano Forte Co. *v.* Mueller, 42 Iowa 467; Johnson *v.* Smith, 39 Iowa 549; Wilson *v.* Patrick, 34 Iowa 362; Holliday *v.* Arthur, 25 Iowa 19; Richardson *v.* Barrick, 16 Iowa 407. See also Grapes *v.* Grapes, 106 Iowa 316, 76 N. W. 796.

Kentucky.— Garvin *v.* Vincent, 87 S. W. 804, 27 Ky. L. Rep. 1076; Oberdorfer *v.* White, 78 S. W. 436, 25 Ky. L. Rep. 1629; Davis *v.* Starks, 6 Ky. L. Rep. 442.

Louisiana.— *In re* Schmidt, 114 La. 78, 38 So. 26; Ware *v.* Morris, 23 La. Ann. 665; Wolf *v.* Wolf, 12 La. Ann. 529.

Maine.— Reed *v.* Reed, 75 Me. 264; Howe

will be held and treated as a mortgage.[74] Every deed therefore, whether absolute or conditional on its face, and whether made to a trustee or not, if made for the sole purpose of securing a debt, is a mortgage, and can be enforced only as such.[75] Further a deed from a debtor to a third person, if made to secure the payment of money, is as much a mortgage as if made to the creditor himself for the same

v. Russell, 36 Me. 115. And see Libby *v.* Clark, 88 Me. 32, 33 Atl. 657.

Maryland.— Brown *v.* Reilly, 72 Md. 489, 20 Atl. 239; Artz *v.* Grove, 21 Md. 456; Dougherty *v.* McColgan, 6 Gill & J. 275; Thompson *v.* Banks, 2 Md. Ch. 430, 3 Md. Ch. 138; Westminster Bank *v.* Whyte, 1 Md. Ch. 536.

Massachusetts.— McDonough *v.* Squire, 111 Mass. 217; Bodwell *v.* Webster, 13 Pick. 411; Parks *v.* Hall, 2 Pick. 206.

Michigan.— Flynn *v.* Holmes, 145 Mich. 606, 108 N. W. 685; Darling *v.* Darling, 123 Mich. 307, 82 N. W. 48; Sibley *v.* Ross, 88 Mich. 315, 50 N. W. 379; Stahl *v.* Dehn, 72 Mich. 645, 40 N. W. 922; McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737; Hurst *v.* Beaver, 50 Mich. 612, 16 N. W. 165; Cowles *v.* Marble, 37 Mich. 158; Emerson *v.* Atwater, 7 Mich. 12; Wadsworth *v.* Loranger, Harr. 113.

Minnesota.— Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539; Everest *v.* Ferris, 16 Minn. 26; Holton *v.* Meighen, 15 Minn. 69; Phœnix *v.* Gardner, 13 Minn. 430.

Mississippi.— Littlewort *v.* Davis, 50 Miss. 403.

Missouri.— Schradski *v.* Albright, 93 Mo. 42, 5 S. W. 807; O'Neill *v.* Capelle, 62 Mo. 202; Turner *v.* Kerr, 44 Mo. 429; Wilson *v.* Drumrite, 21 Mo. 325.

Montana.— Morrison *v.* Jones, 31 Mont. 154, 77 Pac. 507.

Nebraska.— Kemp *v.* Small, 32 Nebr. 318, 49 N. W. 169; Tower *v.* Fetz, 26 Nebr. 706, 42 N. W. 884, 18 Am. St. Rep. 795; Eiseman *v.* Gallagher, 24 Nebr. 79, 37 N. W. 941.

Nevada.— Bingham *v.* Thompson, 4 Nev. 224.

New Jersey.— Platt *v.* McClong, (Ch. 1901) 49 Atl. 1125; Judge *v.* Reese, 24 N. J. Eq. 387; Crane *v.* Decamp, 21 N. J. Eq. 414 [*reversing* 19 N. J. Eq. 166]; Van Keuren *v.* McLaughlin, 21 N. J. Eq. 163; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Clark *v.* Condit, 18 N. J. Eq. 358; Vanderhaize *v.* Hugues, 13 N. J. Eq. 244.

New York.— Odell *v.* Montross, 68 N. Y. 499; Matter of Holmes, 79 N. Y. App. Div. 264, 79 N. Y. Suppl. 592; Kerrigan *v.* Fielding, 47 N. Y. App. Div. 246, 62 N. Y. Suppl. 115; Bocock *v.* Phipard, 1 Silv. Sup. 407, 5 N. Y. Suppl. 228; Faulkner *v.* Cody, 45 Misc. 64, 91 N. Y. Suppl. 633; Cooper *v.* Whitney, 3 Hill 95; Whittick *v.* Kane, 1 Paige 202; James *v.* Johnson, 6 Johns. Ch. 417 [*reversed* on other grounds in 2 Johns. 246, 14 Am. Dec. 475].

Ohio.— Cotterell *v.* Long, 20 Ohio 464; Miami Exporting Co. *v.* U. S. Bank, Wright 249.

Oklahoma.— Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810.

Oregon.— Adair *v.* Adair, 22 Oreg. 115, 29 Pac. 193.

Pennsylvania.— Todd *v.* Campbell, 32 Pa. St. 250; Cole *v.* Bolard, 22 Pa. St. 431; Pattison *v.* Horn, 1 Grant 301; Perry *v.* Perry, 31 Leg. Int. 372; Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

Rhode Island.— Nichols *v.* Reynolds, 1 R. I. 30, 36 Am. Dec. 238.

Tennessee.— Hinson *v.* Partee, 11 Humphr. 587; Yarbrough *v.* Newell, 10 Yerg. 376.

Texas.— McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Loving *v.* Milliken, 59 Tex. 423; Mann *v.* Falcon, 25 Tex. 271; Hamilton *v.* Flume, 2 Tex. Unrep. Cas. 694; Butler *v.* Carter, (Civ. App. 1900) 58 S. W. 632; Lapowski *v.* Smith, 1 Tex. Civ. App. 391, 20 S. W. 957.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264; Catlin *v.* Chittenden, Brayt. 163.

Virginia.— Chowning *v.* Cox, 1 Rand. 306, 10 Am. Dec. 530.

Washington.— Plummer *v.* Ilse, 41 Wash. 5, 82 Pac. 1009, 111 Am. St. Rep. 997, 2 L. R. A. N. S. 627.

West Virginia.— Hoffman *v.* Ryan, 21 W. Va. 415; Zane *v.* Fink, 18 W. Va. 693; Klinck *v.* Price, 4 W. Va. 4, 6 Am. Rep. 268.

Wisconsin.— Rogan *v.* Walker, 1 Wis. 527.

United States.— Russell *v.* Southard, 12 How. 139, 13 L. ed. 927; Hughes *v.* Edwards, 9 Wheat. 489, 6 L. ed. 142; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523.

Canada.— McIlroy *v.* Hawke, 5 Grant Ch. (U. C.) 516.

See 35 Cent. Dig. tit. "Mortgages," § 60.

74. Taintor *v.* Keys, 43 Ill. 332; Smith *v.* Sackett, 15 Ill. 528; Roddy *v.* Brick, 42 N. J. Eq. 218, 6 Atl. 806; Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375; Houser *v.* Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Campbell *v.* Worthington, 6 Vt. 448.

75. McDonald *v.* Kellogg, 30 Kan. 170, 2 Pac. 507.

Deed in trust.— A deed executed by a trustee and his *cestui que trust* to secure the payment of money lent to the latter, and conveying the premises to the grantee in trust to allow the debtor to occupy the premises until default; to hold after payment to such trusts as the debtor should direct, or, failing a direction, in trust to convey to him; and to sell the land on default of payment and render the surplus above the debt to the grantor, wants no essential of a mortgage. Lawrence *v.* Farmers' L. & T. Co., 13 N. Y. 200. On the other hand where lands are conveyed by a corporation to trustees for the sole benefit of the stock-holders named in a schedule to the deed, in proportion to the amounts due to each of them, as appearing

purpose.[76] Nor need the deed even be made by the debtor; it is sufficient if the debtor, who claims to occupy the position of a mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title acquired it by the act and assent of the debtor and as security for his debt.[77]

2. DEED GIVEN ON JUDICIAL SALE. The rule which converts an absolute deed into a mortgage, in accordance with the intention of the parties that it should be held only as a security, applies not only to conveyances, voluntarily made by the grantor, but also to deeds received by purchasers at judicial sales, when the purchase was made under an agreement or arrangement with the debtor that the title should be held only as security for a debt or loan, and should be defeasible on payment of the money due.[78]

3. CONVERSION OF MORTGAGE INTO ABSOLUTE SALE. Although a conveyance of land, absolute on its face, was meant by the parties to be merely a security for a debt, and therefore is in equity a mortgage, it may afterward be converted into an unconditional transfer of the title to the property, releasing the debtor's equity of redemption; but its effect can be changed only by a new contract between them, founded on an adequate consideration, and so reasonable and fair in itself as to relieve it from any suspicion of fraud, undue influence, or unconscientious advantage.[79] If these conditions are met, the conversion of the mortgage into an

by the sums attached to their several names, such deed containing no words of defeasance, and no direction as to how the trust should be executed, or the property conveyed used by the beneficiaries, the trustees take an absolute title, and the deed cannot be considered in the light of a mortgage. Catlett *v.* Starr, 70 Tex. 485, 7 S. W. 844.

Quitclaim deed.— A quitclaim cannot be considered as a final surrender of all the grantor's interest, where the intention was in fact to secure the grantee for a debt due him from the grantor, and enable him to dispose of the property the more readily for the satisfaction of the debt. Curtiss *v.* Sheldon, 47 Mich. 262, 11 N. W. 151. And see Union Sav. Bank *v.* Pool, 143 Mass. 203, 9 N. E. 545; Huston *v.* Canfield, 57 Nebr. 345, 77 N. W. 763.

Indemnity.— A deed absolute in its terms, given to indemnify the grantee for moneys agreed to be paid on the debts of grantor, is an equitable mortgage, to the extent of the payments made by the grantee according to the agreement, with accrued interest; and the grantor has all the rights of a mortgagor as to redemption, etc. Roberts *v.* Richards, 36 Ill. 339. A conveyance for the purpose of indemnifying a replevin bail is a mortgage. Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98.

Deed instead of mortgage when debt uncertain.— A deed, instead of a mortgage, may be properly taken as security, when the amount to be secured is uncertain and depends on future advances. Abbott *v.* Gregory, 39 Mich. 68. And see Anglin *v.* Conley, 114 Ky. 741, 71 S. W. 926, 24 Ky. L. Rep. 1551.

Not proof of fraud.— Where a security is given for the payment of a debt, it is not necessarily invalid as a mortgage merely because it took the form of an absolute deed and was made when the debtor was insolvent; for this circumstance is not *per se* proof of fraud upon the grantor's creditors. Doswell *v.* Adler, 28 Ark. 82.

76. Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

77. Balduff *v.* Griswold, 9 Okla. 438, 60 Pac. 223. And see Fisk *v.* Stewart, 24 Minn. 97; Weed *v.* Stevenson, Clarke (N. Y.) 166; Robinson *v.* Lincoln Sav. Bank, 85 Tenn. 363, 3 S. W. 656; Thacker *v.* Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928.

78. San Jose Safe-Deposit Sav. Bank *v.* Madera Bank, 121 Cal. 539, 54 Pac. 83; Klock *v.* Walter, 70 Ill. 416; Smith *v.* Doyle, 46 Ill. 451; Gaines *v.* Brockerhoff, 136 Pa. St. 175, 19 Atl. 958; Jones *v.* Pierce, 134 Pa. St. 533, 19 Atl. 689; Thacker *v.* Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928.

79. *Alabama.*— McMillan *v.* Jewett, 85 Ala. 476, 5 So. 145.

Illinois.— Cramer *v.* Wilson, 202 Ill. 83, 66 N. E. 869; Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Carpenter *v.* Carpenter, 70 Ill. 457.

Kansas.— Le Comte *v.* Pennock, 61 Kan. 330, 59 Pac. 641.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275.

Nebraska.— A deed absolute will be treated as a mortgage, when given to secure a debt, although the parties may have agreed that on default of payment the deed should become absolute. Fahay *v.* O'Neill State Bank, 1 Nebr. (Unoff.) 89, 95 N. W. 505.

Ohio.— Wilson *v.* Giddings, 28 Ohio St. 554.

West Virginia.— Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583. A mere agreement of sale between the parties, made long after the original transaction and without any new consideration, does not convert the mortgage into an absolute transfer of title. Hursey *v.* Hursey, 56 W. Va. 148, 49 S. E. 367.

absolute sale may be accomplished by a mere parol agreement of the parties, provided the right of redemption was not reserved by a written instrument,[80] by a surrender of the possession of the premises to the grantee with an explicit agreement that he shall thereby become the absolute owner,[81] or by the surrender and cancellation of the written instrument of defeasance, on an agreement of the parties that this shall be taken as a renunciation of all interest in the premises by the grantor and as vesting the unconditional title in the grantee.[82] According to some decisions, however, it is the rule that an instrument which, by its own provisions or by an agreement contemporaneously made, conveys property as security for a debt, cannot be converted into an absolute deed, except by such means as would have been adequate to convey the absolute estate in the first instance,[83] and consequently that the surrender and cancellation of the instrument of defeasance will not convert a mortgage into an absolute deed.[84]

B. Defeasances — 1. Nature and Effect of Defeasance — a. In General. Where a deed of land, absolute and unconditional on its face, is accompanied by an instrument of defeasance, providing for the reconveyance of the property to the grantor, or the revesting of title in him, on his paying a debt or performing some other act intended to be secured thereby, the two instruments will be taken together and held to constitute a mortgage.[85] At the same time an instrument of

80. McMillan *v.* Jewett, 85 Ala. 476, 5 So. 145; Shaw *v.* Walbridge, 33 Ohio St. 1.

If the alleged parol agreement for a release of the equity of redemption is denied, it must be established by clear and satisfactory evidence. If the evidence is conflicting, the court will treat the deed as still a mortgage, and allow a redemption on payment of the debt and interest in full. Marshall *v.* Williams, 21 Oreg. 268, 28 Pac. 137.

81. See Caruthers *v.* Hunt, 18 Iowa 576. *Compare* Boothe *v.* Feist, (Tex. 1892) 19 S. W. 398, holding that where the land covered by a deed absolute in form, but intended as a mortgage, belonged to the wife of the grantor, a subsequent agreement by the husband alone that the creditor may take the land in satisfaction of the debt secured will not be sufficient to change the original character of the transaction.

82. Falis *v.* Conway Mut. F. Ins. Co., 7 Allen (Mass.) 46; Waters *v.* Randall, 6 Metc. (Mass.) 479; Trull *v.* Skinner, 17 Pick. (Mass.) 213; Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722. *Compare* Tennery *v.* Nicholson, 87 Ill. 464.

Substitution of new defeasance.— A mortgage is not rendered absolute by a subsequent settlement of all accounts between the parties, accompanied by a surrender of the contract to reconvey, when it is at the same time expressly agreed that the premises shall be deeded back to the original grantor (mortgagor) on the payment of the amount then estimated to be due, including usurious interest, within a specified time. Clark *v.* Finlon, 90 Ill. 245.

The existence of a second instrument of defeasance, or bond to reconvey, is not of itself proof that the original defeasance had been canceled by the agreement of the parties, with the intent to render the deed to which it related an absolute conveyance. Stetson *v.* Gulliver, 2 Cush. (Mass.) 494.

83. Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187; Vanderhaize *v.* Hugues, 13 N. J. Eq. 244.

84. Thompson *v.* Mack, Harr. (Mich.) 150; Brinkman *v.* Jones, 44 Wis. 498; Sage *v.* McLaughlin, 34 Wis. 550.

85. *Arkansas.*— Scott *v.* Henry, 13 Ark. 112.

California.— Halsey *v.* Martin, 22 Cal. 645.

District of Columbia.— Peugh *v.* Davis, 2 MacArthur 14.

Illinois.— Smith *v.* Cremer, 71 Ill. 185; Ruckman *v.* Alwood, 71 Ill. 155; Snyder *v.* Griswold, 37 Ill. 216.

Iowa.— Byington *v.* Fountain, 61 Iowa 512, 14 N. W. 220, 16 N. W. 534.

Kentucky.— Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145.

Maine.— Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Clement *v.* Bennett, 70 Me. 207; Warren *v.* Lovis, 53 Me. 463; Brown *v.* Holyoke, 53 Me. 9; Shaw *v.* Erskine, 43 Me. 371. And see Hurd *v.* Chase, 100 Me. 561, 62 Atl. 660.

Massachusetts.— Moors *v.* Albro, 129 Mass. 9.

Mississippi.— Freeman *v.* Wilson, 51 Miss. 329.

Nebraska.— Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939.

New Jersey.— Essex County Nat. Bank *v.* Harrison, 57 N. J. Eq. 91, 40 Atl. 209.

New York.— Brown *v.* Dean, 3 Wend. 208; White *v.* Moore, 1 Paige 551; Dey *v.* Dunham, 2 Johns. Ch. 182 [*reversed* on other grounds in 15 Johns. 555, 8 Am. Dec. 282].

Pennsylvania.— Guthrie *v.* Kahle, 46 Pa. St. 331; Manufacturers', etc., Bank *v.* Commonwealth Bank, 7 Watts & S. 335, 42 Am. Dec. 240; Friedley *v.* Hamilton, 17 Serg. & R. 70, 17 Am. Dec. 638; Johnston *v.* Gray, 16 Serg. & R. 361, 16 Am. Dec. 577.

Virginia.— Breckenridge *v.* Auld, 1 Rob. 148.

Wisconsin.— Green *v.* Pierce, 60 Wis. 372, 19 N. W. 427.

defeasance, executed by the grantee in an absolute deed contemporaneously with the latter, for reconveyance to the grantor on his paying a sum of money, does not always make the transaction a mortgage. Its character depends on the inquiry whether the contract is a security for the repayment of money. If so, it is a mortgage; otherwise it may be a conditional sale.[86] And conversely the question whether a conveyance amounts to a mortgage does not turn on the question whether or not there is a defeasance, but rather on the actual intention and understanding of the parties.[87]

b. Clause of Forfeiture on Default. When a deed of land, absolute in form, is given and intended as a mortgage only, its legal effect is not changed by an express stipulation of the parties that the title of the grantee shall become absolute and unredeemable on the failure of the grantor to pay the debt secured on the day fixed for such payment. No effect will be given to such an agreement; for the parties cannot thus avoid the necessity of a foreclosure, or restrict or prevent the debtor's right of redemption.[88]

2. Forms of Defeasance — a. In General. For the purpose of reducing a deed, absolute and unconditional in its terms, to the character of a mortgage, it is entirely immaterial whether the contract which constitutes the defeasance be incorporated in the same instrument or in a separate instrument contemporaneously executed.[89] And when a deed absolute is given, and at the same time a separate defeasance is executed, parol evidence is admissible to connect the two writings and to show that they were parts of the same transaction, and that the whole amounted to and was intended to be a mortgage.[90] To make a good and

United States.— Lanahan *v.* Sears, 102 U. S. 318, 26 L. ed. 180; Dubuque Nat. Bank *v.* Weed, 57 Fed. 513.

See 35 Cent. Dig. tit. "Mortgages," § 67.

86. Hicks *v.* Hicks, 5 Gill & J. (Md.) 75.

87. Jewell *v.* Walker, 109 Ga. 241, 34 S. E. 337; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486. See, however, Payne *v.* Patterson, 77 Pa. St. 134, holding that a defeasance, either written in the instrument, or in a separate writing, or established by parol, is essential to a mortgage; and without a valid agreement binding the grantee to reconvey or yield up to the grantor when the condition shall have been performed, it is not a mortgage, for the mortgagor must be a party having an interest in the land at the time of the transaction.

88. *California.*— Hodgkins *v.* Wright, 127 Cal. 688, 60 Pac. 431.

Illinois.— Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Bearss *v.* Ford, 108 Ill. 16; Barlow *v.* Cooper, 109 Ill. App. 375; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

Missouri.— Reilly *v.* Cullen, 159 Mo. 322, 60 S. W. 126.

Nebraska.— David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296; Fahay *v.* State Bank, 1 Nebr. (Unoff.) 89, 95 N. W. 505.

New Jersey.— Van Wagner *v.* Van Wagner, 7 N. J. Eq. 27; Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722.

North Carolina.— Anonymous, 3 N. C. 26.

Pennsylvania.— Halo *v.* Schick, 57 Pa. St. 319; Johnston *v.* Gray, 16 Serg. & R. 361, 16 Am. Dec. 577; Talbot *v.* Chester, 2 Chest. Co. Rep. 57; Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

Tennessee.— Ebert *v.* Chapman, 8 Baxt. 27.

Texas.— Jefferies *v.* Hartel, (Civ. App. 1899) 51 S. W. 653. And see Beale *v.* Ryan, 40 Tex. 399.

See 35 Cent. Dig. tit. "Mortgages," § 60.

But see Luesenhop *v.* Einsfeld, 93 N. Y. App. Div. 68, 87 N. Y. Suppl. 268.

89. *Connecticut.*— Rowan *v.* Sharps' Rifle Mfg. Co., 31 Conn. 1.

Illinois.— Lynch *v.* Jackson, 123 Ill. 360, 14 N. E. 697; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

North Carolina.— Porter *v.* White, 128 N. C. 42, 38 S. E. 24.

Pennsylvania.— Wilson *v.* Shoenberger, 31 Pa. St. 295.

United States.— Dubuque Nat. Bank *v.* Weed, 57 Fed. 513.

See 35 Cent. Dig. tit. "Mortgages," § 68.

In New Hampshire it is provided by statute (Gen. Laws, c. 136, § 2) that no title or estate in fee simple, etc., shall be defeated or encumbered by any agreement or writing of defeasance, not made part of the condition in the conveyance, stating the sums to be secured or things to be performed. If the condition do not sufficiently describe the thing to be done, etc., the same is void, and the conveyance is absolute. Boody *v.* Davis, 20 N. H. 140, 51 Am. Dec. 210. And see Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22; Bassett *v.* Bassett, 10 N. H. 64.

90. Gay *v.* Hamilton, 33 Cal. 686; Preschbaker *v.* Feaman, 32 Ill. 475; Turner *v.* Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024.

When parol evidence unnecessary.— Where the instruments connect themselves, and show that the purpose was to secure the payment of money, no parol proof is necessary. Flor-

sufficient defeasance, it need not be shown that any particular time for the payment of the secured debt or any rate of interest was specified.[91]

b. Defeasance Clause in Deed — (I) *Terms in General.* When a clause of defeasance is inserted in the deed itself, no particular form of words is necessary to be used; but if it can be gathered from the whole of the deed that it was intended only as a security for the performance of a particular act or duty, it will be considered as a mortgage, although there is no express provision that, upon the fulfilment of the condition, the deed shall be void.[92] It has been remarked that an agreement to reconvey on stipulated terms may suffice of itself to make a deed absolute in its terms in effect a mortgage; but a limitation which permits the absolute title to vest only on the happening of the contingency of a failure to make the stipulated payment can hardly be construed to be other than a mortgage.[93]

(II) *Statement of Conditions.* When a conveyance of land, intended as security for the payment of money or the performance of some other obligation, contains a proviso that it shall be effectual only on the non-payment of the money or the non-performance of the obligation, it is a mortgage, no matter what other conditions may be attached to it.[94] So, when the deed contains a provision that it shall be null and void on the payment of a certain sum of money at a specified time, but otherwise shall be and remain in full force and virtue, such defeasance constitutes it a mortgage.[95] So where the consideration for the conveyance is the assumption and payment by the grantee of certain debts of the

ida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

91. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737.

92. Walbridge *v.* Hammack, 7 Mackey (D. C.) 154; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Steel *v.* Steel, 4 Allen (Mass.) 417; Thacker *v.* Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928. *Compare* Carter *v.* Gunn, 64 Ga. 651; Kaphan *v.* Toney, (Tenn. Ch. App. 1899) 58 S. W. 909.

Void upon stipulated payment.— A paper in the usual form of a warranty deed, but containing a clause providing that, should the grantor pay to the grantee a stated sum of money by a given date, the instrument "shall be void, otherwise of full force," is a mortgage, and not a deed. Scott *v.* Hughes, 124 Ga. 1000, 53 S. E. 453.

93. Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

94. Woodruff *v.* Robb, 19 Ohio 212. And see Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22.

Impossible condition.— Where a mortgage deed contains a defeasance that the mortgagor shall pay the debt according to the condition of a bond recited in the deed, by which it was payable on a day already passed, the circumstance did not avoid the mortgage deed, but it would be considered as a conveyance absolute, intended as a security merely, and to be treated in the same manner as an ordinary mortgage. Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

95. *Alabama.*— Pearson *v.* Seay, 38 Ala. 643.

California.— Ferguson *v.* Miller, 4 Cal. 97.

Connecticut.— Bacon *v.* Brown, 19 Conn. 29; Page *v.* Green, 6 Conn. 338.

Georgia.— Holliday *v.* Lowry Banking Co., 92 Ga. 675, 10 S. E. 28. But in this state a provision that the deed shall be surrendered to the grantor and canceled if the grantor shall pay a specified sum to the grantee by a designated time does not convert the instrument into a mortgage, if it was originally framed so as to pass title, and especially if the payment by the grantor is optional and not obligatory. Pirkle *v.* Equitable Mortg. Co., 99 Ga. 524, 28 S. E. 34; McLaren *v.* Clark, 80 Ga. 423, 7 S. E. 230; Jay *v.* Welchel, 78 Ga. 786, 3 S. E. 906.

Louisiana.— Howe *v.* Austin, 40 La. Ann. 323, 4 So. 315. But see Singleton *v.* Kelly, 11 La. Ann. 647, where, it appearing that an instrument, purporting to be a sale, was executed in Mississippi by the ancestor of plaintiff to defendant, and reciting as a condition that, the vendee having furnished the vendor divers sums of money, the repayment thereof should defeat the sale, and that if the vendor died without refunding said sums, the vendee should be exonerated from liability for any further sum to the vendor or his heirs, an absolute title to the slaves sold then to vest in the vendee, it was held that the contract was a sale defeasible on certain acts by the grantor during his lifetime, and, he not having performed them, the deed was absolute.

Ohio.— Columbus Nat. Bank *v.* Tennessee Coal, etc., Co., 62 Ohio St. 564, 57 N. E. 450.

West Virginia.— Thacker *v.* Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928.

Wisconsin.— Knowlton *v.* Walker, 13 Wis. 264; Rogan *v.* Walker, 1 Wis. 527.

See 35 Cent. Dig. tit. "Mortgages," § 71.

In Maine a deed whose proviso does not contain the words, "then this deed shall be null and void," or their equivalent, cannot

grantor, a proviso that the deed shall be null and void if the grantee omits, neglects, or refuses to make the stipulated payments will suffice to convert it into a mortgage.[96]

(III) *Certainty Required.* Where an absolute conveyance of lands is intended as a mortgage, being made to secure the performance of some act or duty, but the thing to be performed is so defectively stated in the condition of the deed that such condition is void for uncertainty, the conveyance is at law absolute, at least as between the parties and their privies.[97]

(IV) *Reservation of Right to Redeem.* Where a deed absolute in form contains a clause reserving to the grantor a right to "redeem" the premises by the payment of a specified sum within a limited time, this will generally convert the transaction into a mortgage, being taken as manifesting the intention of the parties to create a security only.[98] But it is not conclusive; and if other circumstances attending the transaction clearly show that the parties actually intended a conditional sale, the word "redeem" may be construed as equivalent to "repurchase," and the conveyance will not operate as a mortgage.[99]

(V) *Agreement to Reconvey.* An agreement to reconvey the property upon stipulated terms will not of itself suffice to convert a deed which is absolute and unconditional in its terms into a mortgage;[1] but it may have this effect if other clauses of the instrument, or other circumstances attending the transaction, show the intention of the parties that the land should merely be pledged as security for a debt.[2]

(VI) *Reservation of Right to Sell or Purchase.* A deed of land, absolute in form but intended by the parties as a mortgage, is not deprived of that character by the fact that it also contains a clause giving to the grantee the option to purchase the property, before the time fixed for repayment of the debt, or to take it at an appraised value, in lieu of exacting repayment.[3] But it seems that

operate as a mortgage. Adams *v.* Stevens, 49 Me. 362; Freeman's Bank *v.* Vose, 23 Me. 98.

96. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270. And see Stewart *v.* Hutchins, 13 Wend. (N. Y.) 485 [*affirmed* in 6 Hill 143]. *Compare* Hancock *v.* Carlton, 6 Gray (Mass.) 39, holding that an absolute conveyance of land, "subject to" certain mortgages thereon, which by the terms of the deed "are to be assumed and paid by the grantee, his heirs and assigns, the same making part of the consideration," and expressed to be "on condition" that the grantor and his representatives shall be forever indemnified and saved harmless from the payment of said mortgages, is a grant on condition, and *prima facie* forfeited by breach of the condition, and not in the nature of a mortgage from the grantee to the grantor, with a right of redemption for three years after such breach.

97. Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22.

98. *Arkansas.*—Stryker *v.* Hershy, 38 Ark. 264.

Louisiana.— Matthews *v.* Wilson, 5 La. Ann. 691; Hutchings *v.* Field, 10 La. 237.

New Jersey.— Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722.

New York.— Simon *v.* Schmidt, 41 Hun 318.

Ohio.— Wilson *v.* Giddings, 28 Ohio St. 554.

United States.— Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967.

See 35 Cent. Dig. tit. "Mortgages," § 79.

99. Levy *v.* Ward, 32 La. Ann. 784; Robinson *v.* Cropsey, 2 Edw. (N. Y.) 138 [*affirmed* in 6 Paige 480]; Henry *v.* Bell, 5 Vt. 393; Gossip *v.* Wright, 21 L. T. Rep. N. S. 271, 17 Wkly. Rep. 1137.

Illustration.— A married woman executed a deed of her statutory separate estate, absolute on its face, and the grantee agreed that the grantor might "redeem" on paying the amount of the consideration and interest, and that thereupon he would "reconvey." The grantee had been advised that a mortgage on such estate would be void, but that a conveyance with a reservation of the right to repurchase would be good, and declined to lend money to the grantor on a mortgage. On a bill to cancel the conveyance as a mortgage, and therefore void, it was held that the transaction was a conditional sale, and that such construction of it was not affected by an addendum to the agreement, written by a third person without the grantee's knowledge or special authority, reciting the amount the grantor "owes." Vincent *v.* Walker, 86 Ala. 333, 5 So. 465.

1. Pitts *v.* Maier, 115 Ga. 281, 41 S. E. 570; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Mitchell *v.* McKibbin, 17 Fed. Cas. No. 9,666.

2. Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951; Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151; Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014.

3. Rowan *v.* Sharps' Rifle Mfg. Co., 31

a provision giving the grantee the right to sell and convey the property to any purchaser is hardly consistent with the theory that it was meant as a mortgage.[4] And a stipulation that the grantor may sell the land to a third person, if he can do so to better advantage, paying to the grantee the sum specified as the consideration of the deed, will not make it a mortgage, where it does not otherwise appear that such was the original intention.[5]

(VII) *Place of Defeasance in Deed.* A proper and sufficient clause of defeasance will have the effect of converting an absolute deed into a mortgage without regard to the question in what part of the deed it is found. It is not even necessary that it should be inserted in the body of the deed; it is sufficient if it is added below the signature of the grantor,[6] or indorsed on the back of the deed.[7]

c. Separate Written Defeasanee — (I) *Form and Sufficiency in General.* An absolute deed of land, when accompanied by a separate written instrument of defeasance, conditioned on the payment of a debt or the performance of some other act, becomes a mortgage; and it is not necessary that the defeasance should be in any particular form, provided it clearly shows the intention of the parties to defeat and terminate the mortgagee's title upon performance of the conditions secured by the deed.[8]

(II) *Lease Back With Right of Redemption.* Where land is conveyed by warranty deed, and as a part of the same transaction the grantee leases the premises to the grantor, with the privilege of redeeming or of purchasing the same during the term for an amount equal to a sum loaned by the grantee to the grantor, the transaction is regarded as a mortgage, especially when it appears that the rent was to be applied in reduction of the debt or to keep down interest.[9]

(III) *Contract For Redemption and Reconveyance.* When the grantor in an absolute deed at the same time takes back from the grantee a written contract giving the former a certain length of time in which to redeem the premises, by paying the amount of the debt or consideration for the deed, and binding the latter to reconvey on such redemption, the two papers together constitute a mort-

Conn. 1; Turpie *v.* Lowe, 114 Ind. 37, 15 N. E. 834; Wheeler *v.* Ruston, 19 Ind. 334; McGan *v.* Marshall, 7 Humphr. (Tenn.) 121.

4. Seeligson *v.* Singletary, 66 Tex. 271, 17 S. W. 541; Floyd *v.* Harrison, 2 Rob. (Va.) 161.

5. Baker *v.* Thrasher, 4 Den. (N. Y.) 493; Stratton *v.* Sabin, 9 Ohio 28, 39 Am. Dec. 418.

6. Kent *v.* Allbritain, 4 How. (Miss.) 317; Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

7. Stocking *v.* Fairchild, 5 Pick. (Mass.) 181; Graham *v.* Way, 38 Vt. 19; Whitney *v.* French, 25 Vt. 663.

8. *Illinois.*— Walsh *v.* Brennan, 52 Ill. 193; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

Kentucky.— Marshall *v.* Lewis, 4 Litt. 140.

New York.— Bloodgood *v.* Zeily, 2 Cai. Cas. 124.

Tennessee.— Kelton *v.* Brown, (Ch. App. 1897) 39 S. W. 541.

United States.— Teal *v.* Walker, 111 U. S. 242, 4 S. Ct. 420, 28 L. ed. 415.

Compare Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.

In Pennsylvania, by statute, a written defeasance, signed by the grantee but not acknowledged or recorded, although contemporaneous with the execution of a deed absolute on its face, will not be admitted to convert the deed into a mortgage. Rockhill's Estate, 29 Pa. Super. Ct. 28.

9. *Alabama.*— Hammett *v.* White, 128 Ala. 380, 29 So. 547.

Maryland.— Grand United Order of Odd Fellows Joint Stock Assoc. *v.* Merklin, 65 Md. 579, 5 Atl. 544.

New Jersey.— Vliet *v.* Young, 34 N. J. Eq. 15.

Ohio.— Patrick *v.* Littell, 36 Ohio St. 79, 38 Am. Rep. 552; Coleman *v.* Miller, 8 Ohio Dec. (Reprint) 179, 6 Cinc. L. Bul. 199.

Vermont.— Sowles *v.* Butler, 71 Vt. 271, 44 Atl. 355.

Wisconsin.— Ragan *v.* Simpson, 27 Wis. 355.

See 35 Cent. Dig. tit. "Mortgages," § 74.

Assignment of lease.— Where persons conveyed land to defendant to secure a loan, receiving back redemption lease thereof, providing for a yearly rent, and stipulating that at the end of the loan defendant should reconvey the land to them, their "heirs and assigns," a breach by them of a condition that they should not assign the lease does not render their conveyance to defendant absolute, but their assignee, on payment of the loan in the manner prescribed, is entitled to a conveyance of the land by defendant, by a deed with warranty against his own acts.

gage.[10] And the effect of the transaction is not altered by the fact that the contract specifically limits the time for redemption and makes the time an essential element in the right to redeem.[11] But if the contract leaves it entirely optional with the grantor to redeem or not, and does not bind him to effect a redemption according to the agreement, it is rather to be held a conditional sale than a mortgage.[12] The transaction will be none the less a mortgage because the bond for the reconveyance is given to a third person, and the obligation is to convey the land to him when the debt is paid, if the latter has no interest in the transaction and is simply to receive the equitable title in trust for the debtor.[13]

(iv) *Deed and Defeasance Must Correspond.* To constitute a mortgage, the deed and the written defeasance accompanying it must correspond to each other in all essential particulars, so as to show that they constitute parts of the same transaction and relate to the same property, although a trifling discrepancy will not be material, if it does not raise a reasonable doubt as to their connection.[14]

(v) *Execution and Delivery.* At law a defeasance must be of as high a nature as the deed which it is intended to affect; and consequently a separate written defeasance will not convert a deed in fee simple into a mortgage unless it is signed and sealed by the grantee.[15] But in equity, where even a parol

Shields *v.* Russell, 142 N. Y. 290, 36 N. E. 1061.

10. *Alabama.*— Turner *v.* Wilkinson, 72 Ala. 361.

California.— Rogers *v.* Jones, 92 Cal. 80, 28 Pac. 97; Booth *v.* Hoskins, 75 Cal. 271, 17 Pac. 225.

Idaho.—Kelley *v.* Leachman, 2 Ida. (Hasb.) 1112, 29 Pac. 849.

Maine.— Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101; Snow *v.* Pressey, 82 Me. 552, 20 Atl. 78.

North Carolina.— See Porter *v.* White, 128 N. C. 42, 38 S. E. 24.

Oregon.— Security Sav. etc., Co. *v.* Loewenberg, 38 Oreg. 159, 62 Pac. 647.

See *infra*, III, B, 4.

Payment of debt out of proceeds of land.— Claimants executed an absolute conveyance to decedent. At the same time decedent executed a written defeasance referring to the deed, reciting that he held claims against those and other lands for taxes and tax deeds, and providing that the grantor should become his agent to sell the lands and account for the proceeds and that if, at any time within five years, these proceeds should be sufficient to satisfy the claims specified, with interest, and all other similar claims, the grantor should be entitled to a reconveyance of the remaining lands. It was held that the instruments would be construed together, as constituting a mortgage, and that the conveyance was not made in payment of the claims secured. Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946.

Payment out of rents.— Where a woman conveyed her interest in land to another by deed absolute in form, but the grantee at the same time executed to her a written agreement binding himself to reconvey the land to her as soon as he might realize from the rents a sum sufficient to repay him what he had paid out in redeeming the land from a purchaser at execution sale, it was held that the two instruments should be considered together, and, being so considered, constituted a mortgage. Frey *v.* Campbell, 3 S. W. 368, 8 Ky. L. Rep. 772.

11. Ackerman *v.* Begrisch, (N. J. Ch. 1901) 50 Atl. 673; Rempt *v.* Geyer, (N. J. Ch. 1895) 32 Atl. 266.

12. Haynie *v.* Robertson, 58 Ala. 37; Fuller *v.* Pratt, 10 Me. 197. *Compare* Wiggins *v.* Wiggins, 16 Tex. Civ. App. 335, 40 S. W. 643, holding that the grantor in a deed absolute on its face may show that it was intended to secure a debt, although a contemporaneous written agreement between the parties provided merely for a repurchase of the property by the grantor, and did not provide that the transaction should constitute a mortgage.

13. Hunter *v.* Hatch, 45 Ill. 178.

14. Brown *v.* Holyoke, 53 Me. 9; Turner *v.* Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024.

15. French *v.* Sturdivant, 8 Me. 246; Scituate *v.* Hanover, 16 Pick. (Mass.) 222; Kelleran *v.* Brown, 4 Mass. 443; Runlet *v.* Otis, 2 N. H. 167.

Indorsement on deed.—A writing, in the usual form of a condition to a mortgage, without date, signature, or seal, on the back of a deed apparently absolute, dated and duly executed, has been held to be a part of the deed. Stocking *v.* Fairchild, 5 Pick. (Mass.) 181.

In Pennsylvania it is provided by statute that no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of the statute, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made, and is in writing, signed, sealed, acknowledged, and delivered by the grantee in the deed to the grantor, and is recorded within sixty days from the execution thereof. Pamphl. Laws (1881), p. 84 [*construed* in Lohrer *v.* Russell, 207 Pa. St. 105, 56 Atl. 333; Cretzer *v.* Bittenbender, 199 Pa. St. 504, 49 Atl. 266; Sankey *v.* Hawley, 118 Pa. St.

defeasance is sufficient to convert the transaction into a mortgage,[16] a written instrument of defeasance is not deprived of its intended effect because it lacks the seal of the party executing it, or even his signature, if it can be otherwise authenticated.[17] The defeasance may be made or executed for the grantee by his agent, but not, it seems, without a power of attorney in that behalf.[18] And it must be delivered to the grantor in the deed, or to someone authorized to receive it for him.[19]

(VI) *Time of Execution With Reference to Deed.* In order that a deed and a separate instrument of defeasance should operate together and so constitute a mortgage, it is necessary that they should be executed contemporaneously, and as parts of the same transaction; for the defeasance, if made later than the deed, is a mere *nudum pactum* unless supported by a new consideration, and no rights can arise under it.[20] But this objection is removed where both the deed and the defeasance are made in the performance of, and according to the terms of, one and the same prior agreement. In that case they are properly regarded as parts of the same transaction, and the defeasance, although executed at a later time than the deed, will relate back to it and convert it into a mortgage.[21] And parol evidence

30, 13 Atl. 208; Rockhill's Estate, 29 Pa. Super. Ct. 28].

16. See *infra*, III, B, 9.

17. Kyle *v.* Hamilton, (Cal. 1902) 68 Pac. 484; Lewis *v.* Small, 71 Me. 552; Enos *v.* Sutherland, 11 Mich. 538.

18. Gratz *v.* Phillips, 1 Penr. & W. (Pa.) 333.

19. Kyle *v.* Hamilton, (Cal. 1902) 68 Pac. 484.

Delivery in escrow.— A writing of defeasance, never delivered to the grantor in a deed, but deposited with a third person, to be delivered on a condition which the grantor never performed, does not render the deed a mortgage. Bickford *v.* Daniels, 2 N. H. 71.

20. *Alabama.*— Ingram *v.* Illges, 98 Ala. 511, 13 So. 548; Bryan *v.* Cowart, 21 Ala. 92; Freeman *v.* Baldwin, 13 Ala. 246.

Maine.— Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Clement *v.* Bennett, 70 Me. 207; Warren *v.* Lovis, 53 Me. 463; Shaw *v.* Erskine, 43 Me. 371; Bennock *v.* Whipple, 12 Me. 346, 28 Am. Dec. 186.

Massachusetts.— Trull *v.* Skinner, 17 Pick. 213.

New Hampshire.— Emerson *v.* Murray, 4 N. H. 171, 17 Am. Dec. 407.

New York.— Griswold *v.* Fowler, 6 Abb. Pr. 113.

North Carolina.— Waters *v.* Crabtree, 105 N. C. 394, 11 S. E. 240.

Pennsylvania.— Potter *v.* Langstrath, 151 Pa. St. 216, 25 Atl. 76; Plumer *v.* Guthrie, 76 Pa. St. 441; Wilson *v.* Shoenberger, 31 Pa. St. 295; Kelly *v.* Thompson, 7 Watts 401; Murray *v.* McCarthy, 3 Pa. Cas. 383, 6 Atl. 243.

See 35 Cent. Dig. tit. "Mortgages," § 70.

But see Scott *v.* Henry, 13 Ark. 112; Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200.

Illustrations.— A bond given by the grantee three years after the delivery of the absolute deed, conditioned to reconvey to the grantor the same land, does not constitute an instrument of defeasance and thereby render the conveyance a mortgage. Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684. And so an acknowledgment under seal, made by the grantee more than a year after the execution of the deed, that he held the land as security for a note, and that after payment of the note he had no further right to the land, does not prove the deed a mortgage, where it is not shown that the acknowledgment was made under an agreement entered into at the time of the execution of the deed. Waters *v.* Crabtree, 105 N. C. 394, 11 S. E. 240. On the other hand it is said that the lapse of one day between the execution of a deed and the execution of an agreement for a reconveyance is not sufficient to deprive the transaction of the character of a mortgage. Gubbings *v.* Harper, 7 Phila. (Pa.) 276.

Date of delivery.— In order to create a mortgage by an absolute deed and a deed of defeasance, it is not necessary that the dates of the two instruments should be the same. It is sufficient if both be delivered at the same time. McIntier *v.* Shaw, 6 Allen (Mass.) 83; Newhall *v.* Burt, 7 Pick. (Mass.) 157; Harrison *v.* Phillips Academy, 12 Mass. 456. And see Kraemer *v.* Adelsberger, 122 N. Y. 467, 25 N. E. 859. And so where a deed and alleged defeasance are of different dates, and in the latter there is a recital that they were delivered the same day, evidence to explain the discrepancy is admissible. Haines *v.* Thomson, 70 Pa. St. 434.

Date of acknowledgment.— A deed dated July 20, and a bond for reconveyance dated July 30, both being acknowledged July 31, were concurrently executed as parts of one and the same transaction. Lentz *v.* Martin, 75 Ind. 228.

21. *Alabama.*— Cosby *v.* Buchanan, 81 Ala. 574, 1 So. 898.

California.— Sears *v.* Dixon, 33 Cal. 326.

Massachusetts.— Lovering *v.* Fogg, 18 Pick. 540.

North Carolina.— Waters *v.* Crabtree, 105 N. C. 394, 11 S. E. 240.

Pennsylvania.— Reitenbaugh *v.* Ludwick, 31 Pa. St. 131.

See 35 Cent. Dig. tit. "Mortgages," § 70.

is admissible to connect papers which together constitute a deed and a defeasance, or a mortgage, and to show that an instrument bearing a subsequent date to the deed was either executed at the same time, or that its terms or substance were in fact agreed upon at the same time, and, although subsequently reduced to writing, constitutes a part of the same transaction.[22] But the agreement on which the two instruments rest must antedate them both; and a parol agreement, made at the time the deed is executed, that the grantee will in the future give a bond for reconveyance to the grantor, will not make the conveyance a mortgage, although such a bond is afterward given.[23]

3. Agreement to Give Defeasance. As intimated in the section next preceding, a mere promise or agreement to give a defeasance, if made at the time of the execution of the deed, and not performed, will not make the transaction a mortgage.[24] But if the grantee gives such a promise before the making of the deed, and evades its performance after receiving his deed, equity will relieve against the fraud and enforce the agreement,[25] or the grantor may resort to law, and maintain an action to recover the value of the premises.[26]

4. Agreement or Bond to Reconvey — a. When Equivalent to Mortgage. It is a general rule that a deed of land, absolute and unconditional on its face, but intended only as security for a debt, and accompanied by a contemporaneous agreement or bond, on the part of the grantee, to reconvey the property to the grantor on payment or satisfaction of the debt, is a mortgage, and not an absolute or conditional sale.[27] It is not material to the character of the transaction whether the consideration for the conveyance is a preëxisting debt, or advances to be made in the future, or an assumption by the grantee of specified debts of

22. Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665; Nicolls *v.* McDonald, 101 Pa. St. 514; Umbenhower *v.* Miller, 101 Pa. St. 71.

23. Lund *v.* Lund, 1 N. H. 39, 8 Am. Dec. 29.

24. See Chapman *v.* Ogden, 30 Ill. 515.

25. Peck *v.* Baldwin, 1 Root (Conn.) 455; Butcher *v.* Stultz, 60 Ind. 170.

26. Long *v.* Woodman, 65 Me. 56.

27. *Alabama.*— Parmer *v.* Parmer, 88 Ala. 545, 7 So. 657.

Arkansas.— Sherrer *v.* Harris, (1890) 13 S. W. 730.

California.— Malone *v.* Roy, 134 Cal. 344, 66 Pac. 313; Booth *v.* Hoskins, 75 Cal. 271, 17 Pac. 225; Daubenspeck *v.* Platt, 22 Cal. 330.

Colorado.— Walker *v.* Tiffin Gold, etc., Min. Co., 2 Colo. 89.

Connecticut.— Mills *v.* Mills, 26 Conn. 213; French *v.* Lyon, 2 Root 69.

Idaho.— Wilson *v.* Thompson, 4 Ida. 678, 43 Pac. 557; Kelley *v.* Leachman, 2 Ida. (Hasb.) 1112, 29 Pac. 849.

Illinois.— Helbreg *v.* Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Tennery *v.* Nicholson, 87 Ill. 464; Carr *v.* Rising, 62 Ill. 14; Parmelee *v.* Lawrence, 44 Ill. 405; Snyder *v.* Griswold, 37 Ill. 216; Preschbaker *v.* Feaman, 32 Ill. 475; Miller *v.* Thomas, 14 Ill. 428; Barlow *v.* Cooper, 109 Ill. App. 375; Tedens *v.* Clark, 24 Ill. App. 510.

Indiana.— Lentz *v.* Martin, 75 Ind. 228; Heath *v.* Williams, 30 Ind. 495; Crassen *v.* Swoveland, 22 Ind. 427; Cross *v.* Hepner, 7 Ind. 359; Watkins *v.* Gregory, 6 Blackf. 113; Harbison *v.* Lemon, 3 Blackf. 51, 23 Am. Dec. 376.

Iowa.— Radford *v.* Folsom, 58 Iowa 473, 12 N. W. 536; Brush *v.* Peterson, 54 Iowa 243, 6 N. W. 287; Scott *v.* Mewhirter, 49 Iowa 487; Clinton Nat. Bank *v.* Manwarring, 39 Iowa 281; Caruthers *v.* Hunt, 18 Iowa 576; Montgomery *v.* Chadwick, 7 Iowa 114.

Kansas.— Overstreet *v.* Baxter, 30 Kan. 55, 1 Pac. 825.

Kentucky.— Skinner *v.* Miller, 5 Litt. 84; Spicer *v.* Holbrook, 66 S. W. 180, 23 Ky. L. Rep. 1812; Frey *v.* Campbell, 3 S. W. 368, 8 Ky. L. Rep. 772.

Maine.— Snow *v.* Pressey, 82 Me. 552, 20 Atl. 78; Mills *v.* Darling, 43 Me. 565; McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646.

Massachusetts.— Gaffney *v.* Hicks, 131 Mass. 124; Murphy *v.* Calley, 1 Allen 107; Bayley *v.* Bailey, 5 Gray 505; Nugent *v.* Riley, 1 Metc. 117, 35 Am. Dec. 355; Eaton *v.* Green, 22 Pick. 526; Lanfair *v.* Lanfair, 18 Pick. 299; Flagg *v.* Mann, 14 Pick. 467; Bodwell *v.* Webster, 13 Pick. 411; Stocking *v.* Fairchild, 5 Pick. 181; Rice *v.* Rice, 4 Pick. 349; Eaton *v.* Whiting, 3 Pick. 484; Scott *v.* McFarland, 13 Mass. 309; Harrison *v.* Phillips Academy, 12 Mass. 456; Carey *v.* Rawson, 8 Mass. 159; Taylor *v.* Weld, 5 Mass. 109; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

Michigan.— Enos *v.* Sutherland, 11 Mich. 538.

Minnesota.— Benton *v.* Nicoll, 24 Minn. 221; Archambau *v.* Green, 21 Minn. 520; Weide *v.* Gehl, 21 Minn. 449; Hill *v.* Edwards, 11 Minn. 22.

the grantor to third persons,[28] or how the secured debt is to be repaid, whether by annual or other instalments,[29] or by the usufruct of the property, the grantee being put in possession and allowed to apply the net profits in payment of the debt,[30] or even by the appropriation of specific portions of the land to the reimbursement of the grantee for the amount paid in liquidation of specific debts of the grantor assumed by the former as a part of the transaction.[31] Neither is the character of the transaction altered by the reservation of a right to sell the whole or a part of the property to third persons, either on behalf of the grantor,[32] or of

Missouri.— Sharkey *v.* Sharkey, 47 Mo. 543; Tibeau *v.* Tibeau, 22 Mo. 77.

Montana.— Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211.

Nebraska.— Nelson *v.* Atkinson. 37 Nebr. 577, 56 N. W. 313; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638.

New Jersey.— Venderhaize *v.* Hugues, 13 N. J. Eq. 244; Kintner *v.* Blair, 8 N. J. Eq. 485; Cornell *v.* Pierson, 8 N. J. Eq. 478.

New York.— Draper *v.* Draper, 71 Hun 349, 24 N. Y. Suppl. 1127; Peterson *v.* Clark, 15 Johns. 205; Jackson *v.* Green, 4 Johns. 186.

North Carolina.— Watkins *v.* Williams, 123 N. C. 170, 31 S. E. 388; Robinson *v.* Willoughby, 65 N. C. 520.

Ohio.— Marshall *v.* Stewart, 17 Ohio 356.

Oklahoma.— Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464.

Pennsylvania.— Huston *v.* Regn, 184 Pa. St. 419, 39 Atl. 208; Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151; Kellum *v.* Smith, 33 Pa. St. 158; Brown *v.* Nickle, 6 Pa. St. 390; Colwell *v.* Woods, 3 Watts 188, 27 Am. Dec. 345; Stoever *v.* Stoever, 9 Serg. & R. 434; Dimond *v.* Enoch, Add. 356.

South Carolina.— Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720; Campbell *v.* Linder, 50 S. C. 169, 27 S. E. 648.

South Dakota.— Wilson *v.* McWilliams, 16 S. D. 96, 91 N. W. 453.

Tennessee.— Hammonds *v.* Hopkins, 3 Yerg. 525.

Texas.— Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89.

Vermont.—Herrick *v.* Teachout, 74 Vt. 196, 52 Atl. 432; Graham *v.* Stevens, 34 Vt. 166, 80 Am. Dec. 675; Davis *v.* Hemenway, 27 Vt. 589.

Washington.— Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642.

Wisconsin.— Wells *v.* Scanlan, 124 Wis. 229, 102 N. W. 571; Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014; Yates *v.* Yates, 21 Wis. 473; Plato *v.* Roe, 14 Wis. 453; Second Ward Bank *v.* Upmann, 12 Wis. 499.

England.— Waters *v.* Mynn, 14 Jur. 341.

Canada.— Livingston *v.* Wood, 27 Grant Ch. (U. C.) 515; Fink *v.* Patterson, 8 Grant Ch. (U. C.) 417; Bostwick *v.* Phillips, 6 Grant Ch. (U. C.) 427.

See 35 Cent. Dig. tit. "Mortgages," § 73.

Sale with right to redeem.— An agreement by which a creditor, who has bought his debtor's property, stipulates to reconvey it to the debtor, on condition that the latter pays a certain price within a certain time, is a sale with the right to redeem; and, if the debtor fails to pay the price in accordance with the terms of said contract, his right of redemption will be forfeited, and the title of the property will vest absolutely in the purchaser. Soulié *v.* Ranson, 29 La. Ann. 161; Carter *v.* Williams, 23 La. Ann. 281.

Not a mortgage at law.—Where an absolute conveyance of land was made as security for the payment of money, the grantee giving a bond to reconvey, the contents of which, however, were not shown, it was held that, although in equity the deed might be treated as a mortgage, it could not be so treated at law. Farley *v.* Goocher, 11 Iowa 570.

In Georgia it is provided that whenever any person conveys land by deed to secure money loaned, taking back a bond for title to said vendor upon the payment of such debt, the conveyance shall pass title to the vendee, provided the consent of the wife has first been obtained, till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be an absolute conveyance, with the right reserved to the vendor to have said property reconveyed to him upon payment of the debt or debts intended to be secured, and not a mortgage. Ga. Code, § 1969 [*construed* in Walker *v.* Quitman Bank, 100 Ga. 88, 26 S. E. 84; Brice *v.* Lane, 90 Ga. 294, 15 S. E. 823; Thaxton *v.* Roberts, 66 Ga. 704; Allen *v.* Frost, 62 Ga. 659; Gibson *v.* Hough, 60 Ga. 588; Woodson *v.* Veal, 60 Ga. 562; West *v.* Bennett, 59 Ga. 507; Woodward *v.* Jewell, 140 U. S. 247, 11 S. Ct. 784, 35 L. ed. 478].

28. Hays *v.* Carr, 83 Ind. 275; Loeb *v.* McAlister, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378; Waters *v.* Riggin, 19 Md. 536.

29. Schierl *v.* Newburg, 102 Wis. 552, 78 N. W. 761; Kilgour *v.* Scott, 86 Fed. 39.

Pledge of grantor's salary.— A conveyance by a person of his homestead, by deed absolute on its face, to secure a debt, on condition that he shall be employed by the mortgagee at a salary, out of which the debt shall be paid, whereupon the property shall be reconveyed to him, is not a conditional sale, but a mortgage of the homestead for debts. Williams *v.* Chambers, (Tex. Civ. App. 1894) 26 S. W. 270.

30. Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Ferris *v.* Wilcox, 51 Mich. 105, 16 N. W. 252, 47 Am. Rep. 551.

31. Waters *v.* Randall, 6 Metc. (Mass.) 479.

32. Alderson *v.* Caskey, 24 S. W. 629, 15 Ky. L. Rep. 589; Sellers *v.* Sellers, (Tenn.

the grantee.[36] And it is not material that the agreement or bond is for a conveyance of the estate, on redemption, to the grantor's wife, instead of to the grantor himself.[34] But an agreement to reconvey must be clear, satisfactory, and honest, to secure its enforcement as against a deed absolute on its face, and must be supported by a sufficient consideration.[35]

b. When Not a Mortgage. The mere execution of a deed absolute on its face and of a bond for the reconveyance of the premises upon certain conditions does not of itself stamp the transaction as a mortgage. That character attaches to it only when it was intended as a form of security for a debt or loan. If it is shown that the parties intended an absolute sale of the property, with a mere right of repurchase, that intention must govern.[36] Such intention may be manifested on the face of the papers, or inferred from circumstances. If the agreement for reconveyance expressly recites that the transaction is not intended as a mortgage, this is conclusive.[37] In the absence of such a declaration, the test must be found in the character of the consideration. If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed of the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance or not to do so, he has not the rights of a mortgagor, but only a privilege of repurchasing the property.[38] And if it appears that the deed was accepted in payment and satisfaction of an existing debt, the agreement for a reconveyance on payment of a given sum cannot convert it into a mortgage.[39]

5. Conveyance With Right to Repurchase. Where a deed is made for a consid-

Ch. App. 1899) 53 S. W. 316; Dow *v.* Chamberlin, 7 Fed. Cas. No. 4,037, 5 McLean 281.

33. Thompson *v.* People's Bldg., etc., Co., 114 Iowa 481, 87 N. W. 438. *Compare* Robertson *v.* Moline Milburn-Stoddard Co., 106 Iowa 414, 76 N. W. 736. And see *infra*, III, B, 6, 7.

Trust to sell and apply proceeds.— An instrument concurrently executed by the grantee in a deed absolute on its face, stating that the deed is taken as security for the grantor's note and that the grantee will indorse thereon all moneys received by him from sales of the land, and will reconvey the remainder after full payment of the note, is not merely a mortgage, but creates a trust in the grantee's favor, and vests the legal title in the grantee during the continuance of the trust. Vance *v.* Lincoln, 38 Cal. 586.

34. Pardee *v.* Treat, 18 Hun (N. Y.) 298 [*reversed* on other grounds in 82 N. Y. 385].

35. Sewell *v.* Lovett, 8 Ohio Dec. (Reprint) 157, 6 Cinc. L. Bul. 63.

36. *California.*— Hickox *v.* Lowe, 10 Cal. 197, holding that an absolute deed and an attendant agreement for a reconveyance upon payment of the amount of the consideration and interest do not of themselves, in the absence of other circumstances, create a mortgage, but only a defeasible purchase.

Idaho.— Felland *v.* Vollmer Milling, etc., Co., 6 Ida. 120, 53 Pac. 268.

Illinois.— Conkey *v.* Rex, 212 Ill. 444, 72 N. E. 370; Heald *v.* Wright, 75 Ill. 17; Pitts *v.* Cable, 44 Ill. 103.

Kansas.— Eckert *v.* McBee, 27 Kan. 232.

Louisiana.— Bermudez *v.* Ibanez, 3 Mart. 168.

New York.— Braun *v.* Vollmer, 89 N. Y. App. Div. 43, 85 N. Y. Suppl. 319; Bowery Sav. Bank *v.* Belt, 66 Hun 57, 20 N. Y. Suppl. 746; Glover *v.* Payn, 19 Wend. 518.

North Carolina.— Gorrell *v.* Alspaugh, 120 N. C. 362, 27 S. E. 85.

North Dakota.— McGuin *v.* Lee, 10 N. D. 160, 86 N. W. 714; Devore *v.* Woodruff, 1 N. D. 143, 45 N. W. 701.

Ohio.— Bates *v.* Sherwood, 24 Ohio Cir. Ct. 146.

Oregon.—Wilhelm *v.* Woodcock, 11 Oreg. 518, 5 Pac. 202.

Pennsylvania.— Haines *v.* Thomson, 70 Pa. St. 434; Pennsylvania L. Ins. Co. *v.* Austin, 42 Pa. St. 257; Callahan's Estate, 13 Phila. 391.

Texas.— Pumilia *v.* De George, (Civ. App. 1903) 74 S. W. 813.

Washington.— Dignan *v.* Moore, 8 Wash. 312, 36 Pac. 146.

Canada.— Doe *v.* Roe, 5 U. C. Q. B. O. S. 484.

See 35 Cent. Dig. tit. "Mortgages," § 73.

37. Vance *v.* Anderson, 113 Cal. 532, 45 Pac. 816.

38. *California.*— Sears *v.* Dixon, 33 Cal. 326.

Illinois.— Bearss *v.* Ford, 108 Ill. 16.

Iowa.— Chandler *v.* Chandler, 76 Iowa 574, 41 N. W. 319.

Kentucky.— Allen *v.* Brown, 62 S. W. 726, 23 Ky. L. Rep. 217.

Michigan.— Reed *v.* Bond, 96 Mich. 134, 55 N. W. 619.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

United States.— Wallace *v.* Johnstone, 129 U. S. 58, 9 S. Ct. 243, 32 L. ed. 619.

See 35 Cent. Dig. tit. "Mortgages," § 73.

39. Woods *v.* Jansen, 130 Cal. 200, 62 Pac. 473.

eration paid at the time, whether the payment is made in cash or by the surrender and satisfaction of a precedent debt, an agreement on the part of the vendee to allow the vendor to repurchase the property at a future day, for the same or an advanced price, does not convert the transaction into a mortgage.[40] For generally a conveyance of land between parties who do not bear the relation of debtor and creditor, made upon a stipulation that the grantor may repurchase, is a conditional sale and not a mortgage.[41]

6. AGREEMENT TO ACCOUNT FOR SURPLUS ON RESALE. Where the grantee of land under a deed in fee, at the time of receiving the deed and paying the stipulated consideration, agrees in writing, as part of the transaction, to account to the grantor for the whole or a part of the profits which may be realized on a resale of the premises, such resale being authorized to be made by the grantee within a specified time and for a specified price, such agreement is not inconsistent with the vesting of title in the grantee, and does not make the conveyance a mortgage.[42]

7. AGREEMENT TO SELL, PAY DEBTS, AND ACCOUNT FOR SURPLUS. If land is conveyed by absolute deed, but with an agreement that the grantee shall effect a sale of it, and out of the proceeds satisfy an existing debt due to him from the grantor, or repay himself for advances then made to the grantor, and also pay other creditors of the grantor, and account to the latter for any surplus remaining after the payment of such debts and the expenses, it is generally held that the transaction is in the nature of a mortgage, and may be enforced as such in equity.[43] But

40. *Alabama.*— West *v.* Hendrix, 28 Ala. 226.

Arkansas.— Hays *v.* Emerson, 75 Ark. 551, 87 S. W. 1027.

California.— Henley *v.* Hotaling, 41 Cal. 22.

Georgia.—McElmurray *v.* Blodgett, 120 Ga. 9, 47 S. E. 531; Felton *v.* Grier, 109 Ga. 320, 35 S. E. 175.

Kansas.— Martin *v.* Allen, 67 Kan. 758, 74 Pac. 249.

Mississippi.— Mason *v.* Moody, 26 Miss. 184.

Missouri.— Bailey *v.* St. Louis Union Trust Co., 188 Mo. 483, 87 S. W. 1003. And see Stowe *v.* Banks, 123 Mo. 672, 27 S. W. 347.

New York.— Braun *v.* Vollmer, 89 N. Y. App. Div. 43, 85 N. Y. Suppl. 319; Brown *v.* Dewey, 2 Barb. 28.

North Carolina.— King *v.* Kincey, 36 N. C. 187, 36 Am. Dec. 40.

Texas.— Kirby *v.* National Loan, etc., Co., 22 Tex. Civ. App. 257, 54 S. W. 1081.

Washington.— Dabney *v.* Smith, 38 Wash. 40, 80 Pac. 199; Reed *v.* Parker, 33 Wash. 107, 74 Pac. 61.

Wisconsin.— Glendenning *v.* Johnston, 33 Wis. 347.

United States.— Wallace *v.* Johnstone, 129 U. S. 58, 9 S. Ct. 243, 32 L. ed. 619.

See 35 Cent. Dig. tit. "Mortgages," § 78.

In Michigan, where the courts seem especially disposed to construe all such transactions as mortgages, if that can be done without violence to the actual intention of the parties, such arrangements have several times been held to be mortgages instead of conditional sales. Clark *v.* Landon, 90 Mich. 83, 51 N. W. 357; Jeffery *v.* Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Batty *v.* Snook, 5 Mich. 231.

41. Robinson *v.* Cropsey, 6 Paige (N. Y.) 480; Slutz *v.* Desenberg, 28 Ohio St. 371. And see *supra*, I, D, 2, e, (I); and *infra*, III, C, 3.

42. *California.*— Schultz *v.* McLean, (1890) 25 Pac. 427; Manasse *v.* Dinkelspiel, 68 Cal. 404, 9 Pac. 547.

Indiana.— See Rogers *v.* Beach, 115 Ind. 413, 17 N. E. 609.

New York.— Wilson *v.* Parshall, 129 N. Y. 223, 29 N. E. 297; Macaulay *v.* Porter, 71 N. Y. 173. And see Ford *v.* David, 1 Bosw. 569.

Oregon.— Duclos *v.* Walton, 21 Oreg. 323, 28 Pac. 1.

Pennsylvania.—Moran *v.* Munhall, 204 Pa. St. 242, 53 Atl. 1094.

United States.—Cadman *v.* Peter, 118 U. S. 73, 6 S. Ct. 957, 30 L. ed. 78.

England.— Heather *v.* O'Neill, 4 Jur. N. S. 957, 27 L. J. Ch. 512, 6 Wkly. Rep. 484. See, however, *In re* Alison, 11 Ch. D. 284, 40 L. T. Rep. N. S. 234, 27 Wkly. Rep. 537.

See 35 Cent. Dig. tit. "Mortgages," § 80.

But see Gillis *v.* Martin, 17 N. C. 470, 25 Am. Dec. 729.

43. *Alabama.*— Robinson *v.* Gassoway, (1905) 39 So. 1023; Cannon *v.* McNab, 48 Ala. 99.

Indiana.— Turpie *v.* Lowe, 114 Ind. 37, 15 N. E. 834.

Kentucky.— Trimble *v.* McCormick, 15 S. W. 358, 12 Ky. L. Rep. 857; Ogden *v.* Grant, 6 Dana 473.

Massachusetts.— Eaton *v.* Whiting, 3 Pick. 484.

Michigan.— Bay City State Bank *v.* Chapelle, 40 Mich. 447. And see Malone *v.* Danforth, 137 Mich. 227, 100 N. W. 445.

New York.— Kraemer *v.* Adelsberger, 122 N. Y. 467, 25 N. E. 859; Farmers' Loan, etc.,

there are some decisions to the effect that such a transaction, while it creates a trust, is not to be regarded or treated as a mortgage.[44]

8. Declaration of Trust. Where land is conveyed by a deed absolute in form to a grantee who at the same time executes a written declaration of trust, acknowledging that he holds the title simply as security for a debt and setting forth the terms and conditions on which it is to be reconveyed to the grantor, the two documents, being taken together, constitute a mortgage.[45]

9. Parol Defeasances. It is generally held that an absolute deed of land with a parol defeasance may be treated as a mortgage; that is, where a conveyance of realty, although absolute and unconditional in its terms, was understood and intended by the parties to be a mere security for the payment of a debt, it will be considered as a mortgage, with a consequent right in the grantor to redeem, although the provision for defeasance was not reduced to writing, but rests wholly in their mere verbal agreement.[46] But such a parol agreement must

Co. *v.* Carroll, 5 Barb. 613; Palmer *v.* Gurnsey, 7 Wend. 248.

Oregon.— Stephens *v.* Allen, 11 Oreg. 188, 3 Pac. 168.

Tennessee.— McLanahan *v.* McLanahan, 6 Humphr. 99; Simpson *v.* Mitchell, 8 Yerg. 417.

Texas.— National Bank *v.* Lovenberg, 63 Tex. 506.

Wisconsin.— Brinkman *v.* Jones, 44 Wis. 498.

Canada.— Bartels *v.* Benson, 21 U. C. Q. B. 143.

See 35 Cent. Dig. tit. "Mortgages," § 81.

44. Hall *v.* Linn, 8 Colo. 264, 5 Pac. 641; Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375; *In re* Miller, 26 Pittsb. Leg. J. N. S. (Pa.) 344; Flagg *v.* Walker, 113 U. S. 659, 5 S. Ct. 697, 28 L. ed. 1072.

Agreement not a defeasance.— A grantee in a deed absolute in form executed an instrument reciting that, in consideration of the deed, he would endeavor to sell the premises conveyed within one year, and after paying a debt due from the grantor to one who held a trust deed upon the property, and also a debt due to the grantee himself, he would repay to the grantor the surplus remaining from the sale and also any rent received by the grantee during the year. It was held that as the writing did not amount to a defeasance, it not being under seal or purporting to defeat the estate conveyed by the deed, the property was not to revert to the grantor, and his only claim was for an account from the grantee for the proceeds of the sale and for the payment of any surplus there might be; and therefore the grantor, upon payment of the amount secured by such deed, was not entitled to a reconveyance of the property from a *bona fide* purchaser from such grantee without notice of the trust relation. Walsh *v.* Brennan, 52 Ill. 193.

Surplus held in trust.— Upon a bill seeking to have a deed, absolute on its face, treated as if it were a mortgage, the evidence showed that it was intended to divest the grantor of all interest in the property, to secure the grantee against certain debts of the grantor, named in the deed, and which it was therein agreed that the grantee should pay as part of the consideration, and perhaps any other debts of the grantor which the grantee might pay, and that the balance of the land should be held in trust for the benefit of the grantor's wife and children. It was held that the bill could not be sustained. Zane *v.* Fink, 18 W. Va. 693.

45. *Nevada.*—Winnemucca First Nat. Bank *v.* Kreig, 21 Nev. 404, 32 Pac. 641.

New York.— Connor *v.* Atwood, 4 N. Y. Suppl. 561; Norris *v.* Schuyler, 4 N. Y. Suppl. 558.

North Carolina.— Skinner *v.* Cox, 15 N. C. 59.

Ohio.— Irwin *v.* Longworth, 20 Ohio 581.

England.— Hampton *v.* Spencer, 2 Vern. Ch. 287, 23 Eng. Reprint 785.

See 35 Cent. Dig. tit. "Mortgages," § 82.

But *compare* Potter *v.* Langstrath, 151 Pa. St. 216, 25 Atl. 76; Frick's Appeal, 87 Pa. St. 327.

46. *Alabama.*— Wells *v.* Morrow, 38 Ala. 125. But *compare* Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71, construing Code (1896), § 1041, providing that no parol trust concerning land can be created, except such as result by implication of law.

Arkansas.— Anthony *v.* Anthony, 23 Ark. 479.

California.— Lodge *v.* Turman, 24 Cal. 385.

Illinois.— Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418; Halleay *v.* Jackson, 66 Ill. 139; Tillson *v.* Moulton, 23 Ill. 648; Whitcomb *v.* Sutherland, 18 Ill. 578; Hovey *v.* Holcomb, 11 Ill. 660; Angell *v.* Jewett, 58 Ill. App. 596.

Indiana.— Smith *v.* Brand, 64 Ind. 427; Butcher *v.* Stultz, 60 Ind. 170; Crane *v.* Buchanan, 29 Ind. 570.

Mississippi.— Fultz *v.* Peterson, 78 Miss. 128, 28 So. 829; Prewett *v.* Dobbs, 13 Sm. & M. 431.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62.

Nebraska.— Decker *v.* Decker, 64 Nebr. 239, 89 N. W. 795.

New Jersey.— Kline *v.* McGuckin, 24 N. J. Eq. 411.

North Carolina.— Crudup *v.* Thomas, 126 N. C. 333, 35 S. E. 602.

North Dakota.— See Little *v.* Braun, 11 N. D. 410, 92 N. W. 800.

be precise, definite, and certain. A vague and indefinite conversation, uncertain as to time and price, had between the parties after the execution of the deed, as to a reconveyance, will not make a contract binding on the grantee.[47]

C. Circumstances Determining Character of Transaction — 1. In General. When it does not appear from the face of the papers whether a deed, absolute in form, was intended by the parties as an absolute conveyance, a conditional sale, or a mortgage, this intention must be sought in the circumstances surrounding the transaction, and it is proper to inquire into the relative situation of the parties at the time, their preceding negotiations, and generally all pertinent facts having a tendency to fix and determine the real nature of their design and understanding.[48] In this connection the name they have chosen to give to the instrument is not conclusive. Although it is expressly recited that the transaction is a "conditional sale," yet if the deed and accompanying papers contain all the essential elements of a mortgage, it will be established in that character and effect given to the debtor's right to redeem.[49] And the fact that the instruments may be recorded together in the records of mortgages is not conclusive proof that they were so intended by the parties, nor will this circumstance alone change the character of the transaction.[50] Generally the facts and circumstances which may be considered in determining whether a mortgage was intended are only those which existed at the time the instrument was executed; for it is the intention of

Tennessee.— Ruggles *v.* Williams, 1 Head 141.

Vermont.— Wright *v.* Bates, 13 Vt. 341.

Washington.— Borrow *v.* Borrow, 34 Wash. 684, 76 Pac. 305.

Wisconsin.— Spencer *v.* Fredendall, 15 Wis. 666.

United States.— Jackson *v.* Lawrence, 117 U. S. 679, 6 S. Ct. 915, 29 L. ed. 1024.

See 35 Cent. Dig. tit. "Mortgages," § 83.

But see Butler *v.* Catling, 1 Root (Conn.) 310; Crutcher *v.* Muir, 90 Ky. 142, 13 S. W. 435, 29 Am. St. Rep. 366; Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Want of consideration.—A subsequent parol promise to reconvey land conveyed by a deed absolute in form to satisfy and pay the mortgage lien existing thereon will not sustain an action to declare such deed a mortgage, there being no consideration for such promise. Samuelson *v.* Mickey, (Nebr. 1906) 106 N. W. 461.

In Pennsylvania it is provided by statute that "no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made, and is in writing, signed, sealed, acknowledged, and delivered by the grantee in the deed to the grantor, and is recorded . . . within sixty days from the execution thereof." Pa. Pub. Laws (1881), p. 84 [*construed* generally in O'Donnell *v.* Vandersaal, 213 Pa. St. 551, 63 Atl. 60; McDonald *v.* Sturtevant, 195 Pa. St. 648, 46 Atl. 142; Grove *v.* Kase, 195 Pa. St. 325, 45 Atl. 1054; Huston *v.* Regn, 184 Pa. St. 419, 39 Atl. 208; Fuller *v.* East End Homestead L. & T. Co., 157 Pa. St. 646, 28 Atl. 148; Potter *v.* Langstrath, 151 Pa. St. 216, 25 Atl. 76; Sankey *v.* Hawley, 118 Pa. St. 30, 13 Atl. 208]. This statute is not retroactive and does not impair the obligation of contracts. Felts' Appeal, (1889) 17 Atl. 195. In consequence of this statute, it is held that an action for damages for the breach of a parol contract to convey land cannot be sustained, when it appears that such contract was merely a parol defeasance of an absolute deed. Molly *v.* Ulrich, 133 Pa. St. 41, 19 Atl. 305. But before the enactment of this statute, and as to all deeds made before its passage, the rule in Pennsylvania was in accord with that prevailing in most of the other states, and a parol defeasance was held good. Danzeisen's Appeal, 73 Pa. St. 65; Grove *v.* Kase, 2 Dauph. Co. Rep. 125.

47. Bass *v.* Bell, 64 S. C. 177, 41 S. E. 893.

48. *California.*— Malone *v.* Roy, 94 Cal. 341, 29 Pac. 712.

Illinois.— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; Whitcomb *v.* Sutherland, 18 Ill. 578; Williams *v.* Bishop, 15 Ill. 553; Mann *v.* Jobusch, 70 Ill. App. 440.

Michigan.— Cornell *v.* Hall, 22 Mich. 377.

Mississippi.— Prewett *v.* Dobbs, 13 Sm. & M. 431.

New Jersey.— Gothainer *v.* Grigg, 32 N. J. Eq. 567; Crane *v.* Bonnell, 2 N. J. Eq. 264.

Wisconsin.— Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394. And see Schneider *v.* Reed, 123 Wis. 488, 101 N. W. 682, holding that where persons who have no interest in premises other than possession convey such premises as security for a loan, the transaction is a mortgage.

See 35 Cent. Dig. tit. "Mortgages," § 63.

That a deed is referred to as a collateral security will not conclusively stamp the transaction as a security transaction. Wisner *v.* Field, (N. D. 1905) 106 N. W. 38.

49. Wilcox *v.* Tennant, 13 Tex. Civ. App. 220, 35 S. W. 865.

50. Morrison *v.* Brand, 5 Daly (N. Y.) 40 [*affirmed* in 56 N. Y. 657].

the parties, as then formed, which fixes the nature of the transaction. Subsequent developments may throw a light on the original meaning of the parties; but the legal character of the transaction cannot be made to depend on what the parties would or might have intended if they had foreseen the course of events. Hence the fact that afterward, on account of a change in the situation, it would be to the grantor's interest to have the transaction declared a sale rather than a mortgage cannot be considered.[51] But, in pursuance of the general disposition of equity to construe the transaction as a mortgage rather than a conditional sale, in cases of doubt,[52] it is held that slight circumstances will warrant a finding that the instrument constitutes a mortgage, provided no violence is done to the understanding of the parties.[53]

2. Intention of Parties. The question whether a deed which is absolute in form is to be taken as a mortgage depends upon the intention of the parties in regard to it at the time of its execution. It is this which must be sought for, whether in the papers themselves or by the aid of extraneous evidence, and which, when clearly ascertained, will govern the decision. Whatever form they may have given to the transaction, the design and understanding of the parties will fix the character of the instrument.[54] But in order to convert a deed absolute in its terms into a mortgage, it is necessary that the understanding and intention of both parties, grantee as well as grantor, to that effect should be concurrent and the same.[55] A mere secret intention on the part of one of the parties, not dis-

51. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737; Herrick *v.* Teachout, 74 Vt. 196, 52 Atl. 432.

52. See *supra*, I, D, 2, f.

53. Hickox *v.* Lowe, 10 Cal. 197.

54. *Alabama.*— Parish *v.* Gates, 29 Ala. 254; Robinson *v.* Farrelly, 16 Ala. 472.

Arkansas.— McCarron *v.* Cassidy, 18 Ark. 34.

California.— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Baker *v.* Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

Florida.— Shear *v.* Robinson, 18 Fla. 379.

Idaho.— Winters *v.* Swift, 2 Ida. (Hasb.) 61, 3 Pac. 15.

Illinois.— Greig *v.* Russell, 115 Ill. 483, 4 N. E. 780; Workman *v.* Greening, 115 Ill. 477, 4 N. E. 385; Pitts *v.* Cable, 44 Ill. 103; Bishop *v.* Williams, 18 Ill. 101; Williams *v.* Bishop, 15 Ill. 553; Reece *v.* Allen, 10 Ill. 236, 48 Am. Dec. 336; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

Iowa.— Kuline *v.* Clark, (1906) 106 N. W. 257; Laub *v.* Romans, (1905) 105 N. W. 102.

Kentucky.— Dillon *v.* Dillon, 69 S. W. 1099, 24 Ky. L. Rep. 781.

Louisiana.— Wilkins *v.* Durio, 45 La. Ann. 1119, 13 So. 740; Henkel *v.* Mix, 38 La. Ann. 271; Ware *v.* Morris, 23 La. Ann. 665; Calderwood *v.* Calderwood, 23 La. Ann. 658.

Maryland.— Miller *v.* Miller, 101 Md. 600, 61 Atl. 210.

Michigan.— Sanborn *v.* Sanborn, 104 Mich. 180, 62 N. W. 371; McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737; Cornell *v.* Hall, 22 Mich. 377; Swetland *v.* Swetland, 3 Mich. 482.

Minnesota.— King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648.

Nebraska.— Sanders *v.* Ayres, 63 Nebr. 271, 88 N. W. 526.

New Hampshire.— Page *v.* Foster, 7 N. H. 392.

New Jersey.—Lokerson *v.* Stillwell, 13 N. J. Eq. 357; Crane *v.* Bonnell, 2 N. J. Eq. 264.

New York.— Shields *v.* Russell, 142 N. Y. 290, 36 N. E. 1061; Luesenhop *v.* Einsfeld, 93 N. Y. App. Div. 68, 87 N. Y. Suppl. 268; Lane *v.* Shears, 1 Wend. 433.

North Carolina.— Glisson *v.* Hill, 55 N. C. 256.

North Dakota.— Devore *v.* Woodruff, 1 N. D. 143, 45 N. W. 701.

Oregon.— Stephens *v.* Allen, 11 Oreg. 188, 3 Pac. 168.

South Carolina.— Brown *v.* Sumter Bank, 55 S. C. 51, 32 S. E. 816.

Texas.— Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Davis *v.* Brewster, 59 Tex. 93; Carter *v.* Carter, 5 Tex. 93.

Virginia.— King *v.* Newman, 2 Munf. 40; Robertson *v.* Campbell, 2 Call 421.

Washington.— Miller *v.* Ausenig, 2 Wash. Terr. 22, 3 Pac. 111.

West Virginia.— Hursey *v.* Hursey, 56 W. Va. 148, 49 S. E. 367; Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

See 35 Cent. Dig. tit. "Mortgages," § 85.

Grantor's understanding.— That a person to whom money has been advanced to pay off a lien on lands, which lands he immediately conveys to the lender, regards the money so advanced as a loan, is a fact entitled to weight, in determining whether such conveyance is an absolute conveyance or a mortgage only. Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

Purpose of grantee.— A deed absolute on its face cannot be converted by parol evidence into a mortgage, where circumstances indicate a sale, and the grantee took the property with a view of speculating therein. Whelan *v.* Tobener, 71 Mo. App. 361.

55. West *v.* Hendrix, 28 Ala. 226; Holmes *v.* Fresh, 9 Mo. 201; Jones *v.* Brittan, 13 Fed. Cas. No. 7,455, 1 Woods 667.

closed or communicated to the other, will not have the effect of changing the character of the transaction.[56] Still less of course will this result where the parties testify to directly contradictory intentions.[57] And the intention of the parties, in order to change the character of the instrument appearing on its face, must be clearly established by the evidence.[58] When it is doubtful whether the deed, accompanied by a contract for reconveyance, was intended as a mortgage, the intention of the parties as expressed in the contract should have some weight.[59] A covenant to reconvey does not necessarily convert an absolute deed into a mortgage, but it may be one among other facts showing that the parties intended the deed to operate as a security.[60]

3. EXISTENCE OF DEBT TO BE SECURED. No conveyance can be a mortgage unless made for the purpose of securing the payment of a debt or the performance of a duty, either existing at the time of execution or to be created or to arise in the future. Hence a deed which is absolute in its terms cannot be converted into a mortgage without proof of an obligation to be secured by it, either in the form of an antecedent debt between the parties, or a loan, debt, assumption of liability, or contract for future advances contemporaneously made.[61] Given a debt to be

56. Phœnix *v.* Gardner, 13 Minn. 430; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Haney *v.* Clark, 65 Tex. 93.

57. Focke *v.* Buchanan, (Tex. Civ. App. 1900) 59 S. W. 820.

58. Sewell *v.* Price, 32 Ala. 97; Strong *v.* Strong, 126 Ill. 301, 18 N. E. 665; Vasser *v.* Vasser, 23 Miss. 378; Brown *v.* Carson, 45 N. C. 272.

59. People *v.* Irwin, 14 Cal. 428.

60. Henley *v.* Hotaling, 41 Cal. 22.

61. *Alabama.*— Knaus *v.* Dreher, 84 Ala. 319, 4 So. 287; Mitchell *v.* Wellman, 80 Ala. 16; Peeples *v.* Etalla, 57 Ala. 53; Pearson *v.* Seay, 35 Ala. 612; Crews *v.* Threadgill, 35 Ala. 334.

California.—Heney *v.* Hotaling, 41 Cal. 22; People *v.* Irwin, 14 Cal. 428.

Connecticut.— Hillhouse *v.* Dunning, 7 Conn. 139.

Illinois.— Crane *v.* Chandler, 190 Ill. 584, 60 N. E. 826; Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206; Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Batcheller *v.* Batcheller, 144 Ill. 471, 33 N. E. 24; Freer *v.* Lake, 115 Ill. 662, 4 N. E. 512; Westlake *v.* Horton, 85 Ill. 228; Hanford *v.* Blessing, 80 Ill. 188; Ennor *v.* Thompson, 46 Ill. 214; Stephen *v.* Cushman, 35 Ill. 186.

Indiana.— Mott *v.* Fiske, 155 Ind. 597, 58 N. E. 1053; Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74, holding that where a deed, absolute on its face, and a written agreement, are contemporaneously executed, they should be construed together; and if it then appears that there was a preëxisting indebtedness, on payment of which the debtor and grantor will be entitled to a reconveyance of the property, and that the grantee surrenders no remedies before available for the collection of his debt, but merely obtains the additional right to retain the title to such property until the debt is actually paid, such deed and agreement will constitute a mortgage, and not a conditional sale.

Iowa.— Baird *v.* Reininghaus, 87 Iowa 167, 54 N. W. 148.

Kansas.— McNamara *v.* Culver, 22 Kan. 661.

Missouri.— Edwards *v.* Ferguson, 14 Mo. 469.

Montana.— Morrison *v.* Jones, 31 Mont. 154, 77 Pac. 507.

New Jersey.— See Doying *v.* Chesebrough, (Ch. 1897) 36 Atl. 893.

Ohio.— Slutz *v.* Desenberg, 28 Ohio St. 371.

Pennsylvania.— Fisher *v.* Witham, 132 Pa. St. 488, 19 Atl. 276; Pearson *v.* Sharp, 115 Pa. St. 254, 9 Atl. 38. And see Steinruck's Appeal, 70 Pa. St. 289.

South Dakota.— Jones *v.* Jones, (1906) 108 N. W. 23.

Texas.— Seeligson *v.* Singletary, 66 Tex. 271, 17 S. W. 541.

Vermont.— Rich *v.* Doane, 35 Vt. 125.

West Virginia.— Fridley *v.* Somlerville, (1906) 54 S. E. 502; Ogle *v.* Adams, 12 W. Va. 213.

United States.— Conway *v.* Alexander, 7 Cranch 218, 3 L. ed. 321; Reavis *v.* Reavis, 103 Fed. 813 [*affirmed* in 118 U. S. 73, 6 S. Ct. 957, 30 L. ed. 78]; Cadman *v.* Peter, 12 Fed. 363.

See 35 Cent. Dig. tit. "Mortgages," § 61. And see *supra*, I, D, 2, e, (1).

Illustrations.— Defendant conveyed land to plaintiff by a deed absolute, and plaintiff executed a contemporaneous agreement to reconvey upon the payment of a specified sum of money on a given date. While the consideration for the deed was inadequate, there was no mention of a debt in either instrument, nor was any evidence of indebtedness included in the transaction. Two days thereafter defendant accepted a lease of the same land from plaintiff, upon the expiration of which plaintiff brought this action. It was held that the instruments did not, as a matter of law, constitute a mortgage. Bogk *v.* Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. ed. 631 [*following* Wallace *v.* Johnstone, 129 U. S. 58, 9 S. Ct. 243, 32 L. ed. 619]. That the parties to a deed agreed that the land might be redeemed is not sufficient to prove that the deed was a mortgage, where there is no evi-

secured, its nature or form is not very material.[62] And it is not necessary that the debt should be evidenced by a separate written instrument; it is sufficient if it appears from recitals in the deed.[63] Nor is it necessary to show that any particular time for payment of the debt, or any rate of interest, was agreed upon; these details will be implied.[64] And parol evidence is admissible to show the existence of a debt between the parties to be secured by the conveyance alleged to be intended as a mortgage.[65] But of course the mere fact of a preëxisting debt between the parties does not prove conclusively that the conveyance was intended as a mortgage; for this fact does not exclude the hypothesis that the grantor intended to convey the land in satisfaction of the debt, and without intending to reserve any right of redemption, and this clearly may be shown by the grantee.[66]

4. Obligation or Promise to Pay Debt. Where an absolute deed is given as security for a debt, no personal covenant or promise on the part of the grantor

dence of the existence of any mortgage debt. Fisher *v.* Green, 142 Ill. 80, 31 N. E. 172.

Agreement for lease as evidence of debt.— That defendants conveyed to plaintiffs for a money consideration, and on the same day plaintiffs agreed to lease the land to defendants, is only *prima facie* evidence that there was a loan of money and giving of security for its repayment. Mears *v.* Strobach, 12 Wash. 61, 40 Pac. 621.

Taking a judgment for the amount of the consideration mentioned in a deed absolute on its face is evidence that it is a mortgage. Hamet *v.* Dundass, 4 Pa. St. 178.

62. Clark *v.* Seagraves, 186 Mass. 430, 71 N. E. 813; Meeker *v.* Warren, 66 N. J. Eq. 146, 57 Atl. 421, both holding that a deed absolute in form may be shown to have been given as a security, although the debt is not due to the grantee but to a third person.

Liability as indorser.— An absolute deed by a firm to a creditor, intended as a mortgage, was made in good faith to secure the grantee against loss on account of his indorsement of notes, which indorsements were made at the time of the execution of the deed, and which the grantee afterward paid. It was held that the deed was valid and effectual as a mortgage. Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873.

Fiduciary debt.—Where a trustee sells trust property, and diverts the proceeds to payment of a mortgage on his own land, and afterward deeds such land in trust for defrauded beneficiaries, they may treat the transaction as a loan secured by the trust deed. Kaphan *v.* Toney, (Tenn. Ch. App. 1899) 58 S. W. 909.

Existing mortgage debt.— Where a deed, absolute in form, with a clause for repurchase, is given in consideration of an existing mortgage indebtedness, the court is more inclined to treat it as a mortgage than when given upon an original advance; and when so treated the new mortgage will not be regarded as a substitute for the former security, unless the intention to that effect is manifest; and in such cases the original mortgage may be foreclosed notwithstanding the giving of the new one. Bearss *v.* Ford, 108 Ill. 16.

Unliquidated demand.— A deed upon condition is not a mortgage unless it is a security for a debt or a demand in the nature of a debt. If the demand, on breach of the condition, would be for unliquidated damages, it is not a mortgage. Bethlehem *v.* Annis, 40 N. H. 34, 77 Am. Dec. 700.

Contingent liability.— Evidence that a creditor took a deed of land in payment of his debt, and acknowledged that the debt was paid, and that afterward the debtor gave the creditor another conveyance, absolute in form, for the purpose of securing him from loss arising in case the land should turn out to be worth less than the debt, is insufficient to show that the second conveyance was a mortgage, since, at the time it was given, there was no existing debt to be secured by it. Batcheller *v.* Batcheller, 144 Ill. 471, 33 N. E. 24.

63. Brant *v.* Robertson, 16 Mo. 129; Graham *v.* Stevens, 34 Vt. 166, 80 Am. Dec. 675.

64. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737.

No time of payment specified.— Where a father advanced a sum of money to his daughter, and took from her a deed to property which was worth much more, and there was no agreement to repay the sum advanced at any definite time, but the father intimated that there would be enough coming to her from his estate to cancel the debt, and said that the land would all come back to her, and that he only took the deed in order to have a little jurisdiction over it, it was held, as between the daughter and one claiming under the father with notice, that the deed was a mortgage. Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85.

65. Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957; People *v.* Irwin, 14 Cal. 428; McNamara *v.* Culver, 22 Kan. 661. But *compare* Thomas *v.* McCormack, 9 Dana (Ky.) 108, holding that where there is no admission in an answer that a deed absolute on its face was conditional, or in trust for any purpose, the fact that the answer stated a larger consideration than was expressed in the deed, and admitted that the whole of it had not been paid until some time after the date of the deed, will not authorize the introduction of parol evidence contradicting both the deed and the answer, as to the question whether the contract was a sale or a mortgage only.

66. See *infra*, III, C, 5.

to pay the debt is necessary to make it a mortgage. The want of such an obligation may be important and weighty evidence on the question of the intention of the parties, but it is not conclusive; and other circumstances in the case may be sufficient to overcome the presumption arising from this fact and establish the deed in the character of a mortgage.[67] This is the case where the deed expressly recites that it is given for the purpose of securing a loan from the grantee to the grantor,[68] or where gross inadequacy in the price is shown.[69] Yet if the transaction appears on its face to be a conditional sale, or a sale with a mere privilege to the vendor to repurchase, and its alleged character as a mortgage is not sustained by competent extraneous evidence, the lack of any binding obligation on the grantor to pay the sum fixed on as the condition for a reconveyance is generally accepted as decisive proof that it was not meant as a mortgage.[70]

5. Satisfaction or Survival of Debt. A definitive test to determine whether an absolute deed, executed in consideration of a precedent debt, with an attendant agreement to reconvey the premises to the grantor on payment of the consideration, constitutes a mortgage or a conditional sale is found in the question whether the debt was discharged by the deed or subsisted afterward. On the one hand, if the conveyance satisfied and extinguished the obligation, so that no debt remained due from the grantor to the grantee, it cannot be held a mortgage, since there cannot be a mortgage without something to be secured by it. And in that case the grantor's privilege of refunding the consideration, and so entitling himself to a reconveyance, is not to be regarded as an equity of redemption, but is a badge of a conditional sale.[71] But on the other hand, if the conveyance leaves the debt still due and owing, the grantor being bound to pay it at some future time, and being entitled to receive back his property when he does pay it, then the whole transaction amounts to a mortgage, whatever form the parties may

67. *California.*— Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957; Hickox *v.* Lowe, 10 Cal. 197.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275.

New Jersey.— Rempt *v.* Geyer, (Ch. 1895) 32 Atl. 266; Pace *v.* Bartles, 47 N. J. Eq. 170, 20 Atl. 352.

New York.— Horn *v.* Keteltas, 46 N. Y. 605, 42 How. Pr. 138; Brown *v.* Dewey, 2 Barb. 28.

Virginia.— Tuggle *v.* Berkeley, 101 Va. 83, 43 S. E. 199.

Wisconsin.— Schreiber *v.* Le Clair, 66 Wis. 579, 29 N. W. 570, 889.

United States.— Russell *v.* Southard, 12 How. 139, 13 L. ed. 927; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

68. Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997.

69. Coleman *v.* Miller, 8 Ohio Dec. (Reprint) 179, 6 Cinc. L. Bul. 199; Wharf *v.* Howell, 5 Binn. (Pa.) 499.

70. *California.*— Henley *v.* Hotaling, 41 Cal. 22.

Illinois.— Magnusson *v.* Johnson, 73 Ill. 156; Baum *v.* Gaffy, 45 Ill. App. 138.

Indiana.— Reynolds *v.* Davidson, 27 Ind. 296.

New York.— Greenwood Lake Imp. Co. *v.* New York, etc., R. Co., 5 Silv. Sup. 522, 8 N. Y. Suppl. 711.

Virginia.— Ransone *v.* Frayser, 10 Leigh 592.

Wisconsin.— Smith *v.* Crosby, 47 Wis. 160, 2 N. W. 104.

United States.— Horbach *v.* Hill, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670.

See 35 Cent. Dig. tit. "Mortgages," § 63.

71. *Alabama.*— Perdue *v.* Bell, 83 Ala. 396, 3 So. 698; West *v.* Hendrix, 28 Ala. 226.

California.— Holmes *v.* Warren, 145 Cal. 457, 78 Pac. 954; Pendergrass *v.* Burris, (1888) 19 Pac. 187; Hickox *v.* Lowe, 10 Cal. 197.

Illinois.— Carroll *v.* Tomlinson, 192 Ill. 398, 61 N. E. 484, 85 Am. St. Rep. 344; Kerting *v.* Hilton, 152 Ill. 658, 38 N. E. 941; Freer *v.* Lake, 115 Ill. 662, 4 N. E. 512; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Mann *v.* Jobusch, 70 Ill. App. 440; Glass *v.* Doane, 15 Ill. App. 66.

Iowa.— Hughes *v.* Sheaff, 19 Iowa 335.

Kansas.— Elston *v.* Chamberlain, 41 Kan. 354, 21 Pac. 259.

Minnesota.— Shultes *v.* Stivers, 66 Minn. 517, 69 N. W. 639.

Mississippi.— Hoopes *v.* Bailey, 28 Miss. 328.

Missouri.— Turner *v.* Kerr, 44 Mo. 429; Slowey *v.* McMurray, 27 Mo. 113, 72 Am. Dec. 251.

Nebraska.— Samuelson *v.* Mickey, (1905) 103 N. W. 671; Tannyhill *v.* Pepperl, 70 Nebr. 31, 96 N. W. 1005.

New Jersey.— Doying *v.* Chesebrough, (Ch. 1897) 36 Atl. 893; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Kearney *v.* Macomb, 16 N. J. Eq. 189.

New York.— Blazy *v.* McLean, 129 N. Y. 44, 29 N. E. 6; Randall *v.* Sanders, 87 N. Y. 578; Whitney *v.* Townsend, 2 Lans. 249;

have given to it.[72] On this question, the fact that the grantor's note or bond, or other instrument by which the existing debt was evidenced, was canceled by the grantee, or was surrendered to the grantor without any new evidence of debt being taken in its place, is very strong evidence that the parties regarded the debt as wiped out, and the deed as a conditional sale.[73] But this circumstance is not conclusive; although the evidence of the debt may be canceled or destroyed, still the other circumstances of the case may show the intention of the parties to regard the obligation as still subsisting, and so convert the deed into a mortgage.[74] Conversely the fact that the grantee retains in his possession, without cancellation, the written evidences of the existing debt raises a strong presumption that the debt was not extinguished by the conveyance, and that a mortgage was intended,[75] although it does not conclusively prove that the debt still continues or that the

Morrison *v.* Brand, 5 Daly 40 [*affirmed* in 56 N. Y. 657]; Eckford *v.* De Kay, 8 Paige 89 [*affirmed* in 26 Wend. 29]; Robinson *v.* Cropsey, 2 Edw. 138 [*affirmed* in 6 Paige 480].

Oregon.— Duclos *v.* Walton, 21 Oreg. 323, 28 Pac. 1.

Pennsylvania.— Null *v.* Fries, 110 Pa. St. 521, 1 Atl. 551.

Rhode Island.— Tripler *v.* Campbell, 22 R. I. 262, 47 Atl. 385.

South Carolina.— Creswell *v.* Smith, 61 S. C. 575, 39 S. E. 757; Brown *v.* Sumter Bank, 55 S. C. 51, 32 S. E. 816; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310.

Texas.— Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206; Calhoun *v.* Lumpkin, 60 Tex. 185.

West Virginia.— Hursey *v.* Hursey, 56 W. Va. 148, 49 S. E. 367; Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

See 35 Cent. Dig. tit. "Mortgages," § 88.

Illustrations.— Where a mortgage debt nearly equaled the value of the land, and there had been much litigation concerning the property, and the mortgagor conveyed the land by absolute deed to the mortgagee, both parties intending not only to settle the pending litigation, but also to satisfy and extinguish the mortgage debt, the fact that at the time of the conveyance the mortgagee gave back an agreement to reconvey within a certain time on payment of an amount that equaled the mortgage debt did not render the instrument a mortgage. Whitney *v.* Townsend, 2 Lans. (N. Y.) 249. And where a mortgagor quitclaims premises to the mortgagee, and they enter into an agreement whereby the mortgagor is to purchase and the mortgagee to sell on payment of a certain sum on or before a certain date, time being expressly stipulated as the essence of the contract, failure to pay the agreed sum at the specified time precludes the mortgagor from redeeming or purchasing thereafter, since the relation of mortgagor and mortgagee ceased on giving the deed and entering into the contract. Tripler *v.* Campbell, 22 R. I. 262, 47 Atl. 385. So, where a party deeded his property to another, who held a mortgage upon it nearly equal to its value, in order to avoid the expense of foreclosure, and the grantee made his written promise that if he should sell the land for a greater sum than his debt and the expenses he would pay the grantor all sums of money in excess of the same, it was held that the transaction was not a mortgage with power of sale, so as to make the grantee a trustee, but that he was liable on his promise in an action at law or for money had and received, when there was such a surplus. Duclos *v.* Walton, 21 Oreg. 323, 28 Pac. 1.

72. *California.*— Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; Montgomery *v.* Spect, 55 Cal. 352; People *v.* Irwin, 14 Cal. 428.

Illinois.— Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85.

Iowa.— Hughes *v.* Sheaff, 19 Iowa 335.

Nebraska.— Riley *v.* Starr, 48 Nebr. 243, 67 N. W. 187.

New Jersey.— Budd *v.* Van Orden, 33 N. J. Eq. 143.

Pennsylvania.— Todd *v.* Campbell, 32 Pa. St. 250; Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

Texas.— Ruffler *v.* Womack, 30 Tex. 332; Hamilton *v.* Flume, 2 Tex. Unrep. Cas. 694.

See 35 Cent. Dig. tit. "Mortgages," § 88.

73. Adams *v.* Pilcher, 92 Ala. 474, 8 So. 757; Locke *v.* Palmer, 26 Ala. 312; Waite *v.* Dimick, 10 Allen (Mass.) 364; Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4; Kahn *v.* Weill, 42 Fed. 704.

Cancellation without delivery.— That a grantor's notes, canceled, and exhibited to him as canceled and paid, were not delivered to him at the time he executed a deed in payment thereof does not make the deed a mortgage. Miller *v.* Green, 37 Ill. App. 631 [*affirmed* in 138 Ill. 565, 28 N. E. 837].

Leave to grantor to sell.— A debtor conveyed to his creditor a lot of land, in fee, in satisfaction of the debt, which was equal to the cash value of the land, and the notes and securities for the debt were delivered to the debtor. Afterward the grantee gave to the grantor written permission to sell the land, and to retain the excess of the proceeds over the debt and interest. It was held that this permission to sell did not change the absolute conveyance to a mortgage, although it was given at the time of the execution of the conveyance. Holmes *v.* Grant, 8 Paige (N. Y.) 243.

74. Conant *v.* Riseborough, 139 Ill. 383, 28 N. E. 789; Sanders *v.* Ayres, 63 Nebr. 271, 88 N. W. 526.

75. Ennor *v.* Thompson, 46 Ill. 214;

parties may not have intended to make a conditional sale.[76] If on all the evidence there is still doubt as to whether the debt subsists or has been extinguished, a court of equity will lean in favor of the right of redemption, and will construe the transaction as constituting a mortgage rather than a conditional sale.[77]

6. Previous Negotiations of Parties. On the question whether a deed, absolute in form, was intended as a mortgage, it is proper to receive evidence of the previous negotiations of the parties, their agreements and conversations, and the course of dealings between them prior to and leading up to the deed in question.[78] The effect of showing that such negotiations contemplated a mere security for debt and that the grantee consented to take a mortgage,[79] or that during such negotiations nothing was said as to a loan and no proposition as to a mortgage was made,[80] has been previously stated. Evidence that the grantee in the deed positively refused to take a mortgage on the property, when approached on the subject, shows that the deed to him and his agreement to resell were not intended by him merely as a mortgage.[81]

7. Inadequacy of Price. When the question at issue is whether a deed of land, with an agreement for reconveyance, was made as an absolute conveyance of the property, or simply as a security for a debt or loan, in the nature of a mortgage, evidence of the value of the property at the time the deed was made is pertinent and material.[82] For if it shall be shown that the consideration passing between the parties, or the amount to be paid by the grantor on exercising his right to repurchase, would be fairly proportioned to the value of the property, if considered as a debt or loan secured by a mortgage thereon, but grossly inadequate if regarded as the price of the land on an outright sale, this will tend strongly to show that a sale could not have been intended, but that the transaction should rather be treated as a mortgage.[83] It is true inadequacy of price is not by

Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112; McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737.

76. Baxter *v.* Willey, 9 Vt. 276, 31 Am. Dec. 623; Healey *v.* Daniels, 14 Grant Ch. (U. C.) 633.

77. Hickox *v.* Lowe, 10 Cal. 197; Spence *v.* Steadman, 49 Ga. 133. And see *supra*, I, D, 2, f.

78. Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486; Toledo First Nat. Bank *v.* Central Chandelier Co., 17 Ohio Cir. Ct. 443, 9 Ohio Cir. Dec. 807; Lewie *v.* Hallman, 53 S. C. 18, 30 S. E. 601.

79. See *supra*, I, D, 2, e, (VI).

80. See *supra*, I, D, 2, e, (VI).

81. *Illinois.*— Bacon *v.* National German-American Bank, 191 Ill. 205, 60 N. E. 846; Bentley *v.* O'Bryan, 111 Ill. 53.

Massachusetts.— Flagg *v.* Mann, 14 Pick. 467.

Texas.— Gazley *v.* Herring, (1891) 17 S. W. 17.

Washington.— Conner *v.* Clapp, 37 Wash. 299, 79 Pac. 929.

Wisconsin.— Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755.

Canada.— Bullen *v.* Renwick, 8 Grant Ch. (U. C.) 342.

Loan refused.— Where the evidence shows that a conveyance, with a right to repurchase, originated in an application for a loan, but that the application for a loan was repeatedly declined, and, after the negotiations were broken off, defendant's proposal of a conditional sale was accepted, and that, although the price paid was much less than the value of the property, yet at the time of the transaction its value was prospective and speculative, and the subsequent advance was due to unforeseen circumstances, it is insufficient to show that the transaction was a mortgage, and not a conditional sale. Douglass *v.* Moody, 80 Ala. 61. Where a deed, absolute on its face, conveyed a married woman's statutory separate estate, and it was shown that the grantee had been advised that a mortgage on such estate would be void, but that a conveyance with a reservation of the right to repurchase would be good, and that he had declined to lend money to the grantor on a mortgage, it was held that the transaction was a conditional sale and not a mortgage, although there was also an agreement that the grantor might "redeem" on paying the amount of the consideration, and that the grantee would thereupon reconvey the estate. Vincent *v.* Walker, 86 Ala. 333, 5 So. 465.

82. Rodgers *v.* Moore, 88 Ga. 88, 13 S. E. 962; Wallis *v.* Randall, 16 Hun (N. Y.) 33 [*affirmed* in 81 N. Y. 164]. *Compare* Butterfield *v.* Kirtley, 114 Iowa 520, 87 N. W. 407.

What evidence of value admissible.— Evidence of the value of the land may be offered by either party; but it must be independent testimony. The party's own estimate of its value is not admissible. "He could not give character to his deed by showing what he had thought or said as to the worth of his land." Pope *v.* Marshall, 78 Ga. 635, 4 S. E. 116.

83. *Alabama.*— Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71, 82 Am. St. Rep. 225;

itself alone enough to justify a finding that the deed was intended as a mortgage, contrary to the presumption arising from the face of the papers;[84] but it is entitled to great weight, especially when supported by proof that the grantor was an illiterate man, or a person of feeble intelligence, and ignorant of the value of property;[85] that he was under the pressure of debt and threatened with litigation;[86] or that he was in the power of the grantee, and that the latter took advantage of his necessities or exercised undue influence or imposition upon him.[87]

Crews *v.* Threadgill, 35 Ala. 334; English *v.* Lane, 1 Port. 328.

California.— Husheon *v.* Husheon, 71 Cal. 407, 12 Pac. 410.

Georgia.— Chapman *v.* Ayer, 95 Ga. 581, 23 S. E. 131.

Illinois.— Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Rubo *v.* Bennett, 85 Ill. App. 473.

Indiana.— Davis *v.* Stonestreet, 4 Ind. 101.

Iowa.— Conlee *v.* Heying, 94 Iowa 734, 62 N. W. 678; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112; Wilson *v.* Patrick, 34 Iowa 362.

Kentucky.— Burch *v.* Nicholas, 80 S. W. 1132, 26 Ky. L. Rep. 264; Gossman *v.* Gossman, 15 S. W. 1057, 13 Ky. L. Rep. 243. And see Oldham *v.* Halley, 2 J. J. Marsh. 113.

Louisiana.— Howe *v.* Powell, 40 La. Ann. 307, 4 So. 450. And see Bonnette *v.* Wise, 111 La. 855, 35 So. 953.

Missouri.— Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

New York.— Brown *v.* Dewey, 2 Barb. 28; Holmes *v.* Grant, 8 Paige 243.

North Carolina.— Kemp *v.* Earp, 42 N. C. 167; McLaurin *v.* Wright, 37 N. C. 94.

Texas.— Temple Nat. Bank *v.* Warner, 92 Tex. 226, 47 S. W. 515; Gibbs *v.* Penny, 43 Tex. 560; Schultze *v.* Schultze, (Civ. App. 1901) 66 S. W. 56.

Vermont.— Rich *v.* Doane, 35 Vt. 125.

Washington.— Miller *v.* Ausenig, 2 Wash. Terr. 22, 3 Pac. 111.

West Virginia.— Thacker *v.* Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928; Furguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Davis *v.* Demming, 12 W. Va. 246; Ogle *v.* Adams, 12 W. Va. 213.

United States.— Russell *v.* Southard, 12 How. 139, 13 L. ed. 927; Bentley *v.* Phelps, 3 Fed. Cas. No. 1,331, 2 Woodb. & M. 426.

See 35 Cent. Dig. tit. "Mortgages," § 86. And see *supra*, I, D, 2, e, (VII).

Consideration less than half value of property.— When a mortgagor transfers to his mortgagee by the same transaction large portions of his real and personal property, by a deed of the real estate and by a bill of sale of a part and a pledge as collateral security of another portion of his personal property, and the considerations recited in the deed and the bill of sale are less than one half of the value of the property described in them, the presumption is that the relation of mortgagor and mortgagee continued, and that the conveyances were made by way of security; and the burden rests upon a creditor, who claims that the deed and the bill of sale evidence absolute sales, to overcome this presumption, and establish that fact by substantial and persuasive evidence. Simpson *v.* Denver First Nat. Bank, 93 Fed. 309, 35 C. C. A. 306.

Showing additional consideration.— Where it is attempted to show that an absolute deed was intended as a mortgage, and plaintiff relies on the inadequacy of the consideration, it is open to defendant to show additional considerations moving from him to plaintiff, beside that recited in the deed, such as board and lodging furnished, or services rendered; but if he fails to establish his contention, plaintiff will be entitled to redeem from the deed. Newman *v.* Edwards, 22 Nebr. 248, 34 N. W. 382.

84. *Illinois.*— Story *v.* Springer, 155 Ill. 25, 39 N. E. 570; Rubo *v.* Bennett, 85 Ill. App. 473.

Iowa.— Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217.

Louisiana.— Bonnette *v.* Wise, 111 La. 855, 35 So. 953.

New York.— Brown *v.* Dewey, 2 Barb. 28.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Tennessee.— Lane *v.* Dickerson, 10 Yerg. 373.

Texas.— Coles *v.* Perry, 7 Tex. 109.

See 35 Cent. Dig. tit. "Mortgages," § 86.

Inference rebutted.— The inference that a deed absolute on its face was intended as a mortgage, arising from a gross inadequacy of the consideration, will not control, when the accompanying circumstances tend to show that it was the intention that the grantee should have a share in the profits expected to be realized from a subsequent sale of the premises. Story *v.* Springer, 155 Ill. 25, 39 N. E. 570.

85. Williams *v.* Reggan, 111 Ala. 621, 20 So. 614; Franklin *v.* Ayer, 22 Fla. 654.

Illustration.— A conveyance of lands worth six thousand dollars, by an old man intellectually feeble and unable to read or write, to a woman with whom he boarded and in whom he reposed great confidence, at a time when he was in need of money by reason of being under a guardianship, will be declared a mortgage, and a reconveyance will be ordered, when the evidence is clear that he made the conveyance merely to enable the grantee to obtain for him a loan of three thousand dollars, and that he paid her two hundred dollars for obtaining it. Reilly *v.* Brown, 87 Mich. 163, 49 N. W. 557.

86. Husheon *v.* Husheon, 71 Cal. 407, 12 Pac. 410; Reed *v.* Reed, 75 Me. 264; Steel *v.* Black, 56 N. C. 427; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

87. Richardson *v.* Barrick, 16 Iowa 407;

But the disproportion between the consideration of the deed and the fair value of the land must be marked; a slight inadequacy of the price will not be considered as of importance.[88]

8. FINANCIAL CONDITION OF GRANTOR. If the grantor in a deed absolute in form, but alleged to have been intended as a security, was financially embarrassed at the time of its execution, being sorely pressed for money, and therefore at the mercy of his creditor and unable freely to dictate the terms of the security, this circumstance will be considered, as tending to show the intention to create a mortgage.[89]

9. MISTAKE, SURPRISE, OR FRAUD. A deed absolute on its face may be adjudged in equity to be a mortgage, on the ground of accident, fraud, or mistake in obtaining such deed, contrary to the parol agreement of the parties that it should be a mortgage only, provided the facts are sufficiently proved and the grantor was not a party to any fraud.[90]

10. POSSESSION AND MANAGEMENT OF PROPERTY. The fact that the grantor in a deed absolute in form, but alleged by him to have been given only as a security, remained in the possession, use, and control of the property after the conveyance, is evidence tending to show that the transaction was in fact a mortgage, as it is on its face inconsistent with the vesting of title in the grantee.[91] But this circumstance is not conclusive; notwithstanding the fact that there was no change

Sellers *v.* Stalcup, 42 N. C. 13; Lewis *v.* Wells, 85 Fed. 896.

88. Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700; Edwards *v.* Wall, 79 Va. 321; Mattheney *v.* Sandford, 26 W. Va. 386.

89. Montgomery *v.* Beecher, (N. J. Ch. 1895) 31 Atl. 451; Steel *v.* Black, 56 N. C. 427; Blackwell *v.* Overby, 41 N. C. 38; Streator *v.* Jones, 10 N. C. 423; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371. *Compare* Butler *v.* Butler, 46 Wis. 430, 1 N. W. 70. See *supra*, I, D, 2, e, (IV).

Conveyance to indemnify bail.— If a person under arrest on a criminal charge procures another to execute a bail-bond for him, and, as a means of indemnifying the latter, conveys his property to him by deed, the conveyance will be held to be a mortgage, when other evidence, such as inadequacy of price, declarations of the parties, parol testimony of their intentions, or the like, helps to show that the design was merely to create a security. Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Nichols *v.* Cabe, 3 Head (Tenn.) 92.

90. English *v.* Lane, 1 Port. (Ala.) 328; Hall *v.* Waller, 66 Ga. 483; Bowman *v.* Felts, (Tenn. Ch. App. 1897) 42 S. W. 810; Spurgeon *v.* Collier, 1 Eden 55.

Fraud not presumed.— In a suit to declare an absolute deed a mortgage, fraud in procuring the deed will not be presumed, but must be proved. Flint *v.* Jones, 5 Wis. 424.

Conveyance to solicitor.— An absolute conveyance of property to a solicitor may be reduced in equity to a mortgage, where it is shown that he stood in a quasi, although not absolute, relation of trustee and solicitor to the grantor, and he fails to prove that the transaction was clearly understood and that full value was given. Denton *v.* Donner, 23 Beav. 285, 53 Eng. Reprint 112.

Fraud of solicitor.— Where the solicitor employed by both parties to prepare the papers knows that the grantor's object is to borrow money and give a mortgage, but fraudulently betrays the grantor's interest, and makes himself the tool of the grantee to obtain the execution of an absolute deed at an inadequate price, the conveyance may be declared a mortgage and the grantor let in to redeem. Douglas *v.* Culverwell, 3 Giff. 251, 31 L. J. Ch. 65, 5 L. T. Rep. N. S. 484, 10 Wkly. Rep. 189.

91. *Alabama.*— Parks *v.* Parks, 66 Ala. 326; Crews *v.* Threadgill, 35 Ala. 334.

California.— See Prefumo *v.* Russell, 148 Cal. 451, 83 Pac. 810.

Illinois.— Clark *v.* Finlon, 90 Ill. 245; Strong *v.* Shea, 83 Ill. 575.

Iowa.— Ingalls *v.* Atwood, 53 Iowa 283, 5 N. W. 160. And see McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171.

Maine.— Jameson *v.* Emerson, 82 Me. 359, 19 Atl. 831.

Michigan.— Stevens *v.* Hulin, 53 Mich. 93, 18 N. W. 569.

Minnesota.— See Dodsworth *v.* Sullivan, 95 Minn. 39, 103 N. W. 719.

New Jersey.— Pidcock *v.* Swift, 51 N. J. Eq. 405, 27 Atl. 470.

New York.— Luesenhop *v.* Einsfeld, 93 N. Y. App. Div. 68, 87 N. Y. Suppl. 268.

North Carolina.— Robinson *v.* Willoughby, 65 N. C. 520; Streator *v.* Jones, 10 N. C. 423.

South Carolina.— Lewie *v.* Hallman, 53 S. C. 18, 30 S. E. 601. And see McGill *v.* Thorne, 70 S. C. 65, 48 S. E. 994.

Tennessee.— Lewis *v.* Bayliss, 90 Tenn. 280, 16 S. W. 376.

Utah.— Azzalia *v.* St. Claire, 23 Utah 401, 64 Pac. 1106.

Vermont.— Wright *v.* Bates, 13 Vt. 341.

West Virginia.— Hursey *v.* Hursey, 56 W. Va. 148, 49 S. E. 367; Furguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371; Hoffman *v.* Ryan, 21 W. Va. 415; Lawrence *v.* Du Bois, 16 W. Va. 443; Davis *v.* Demming,

of possession, other pertinent considerations may show that an absolute or conditional sale was intended.[92] If the grantor retains the possession under a lease from the grantee, executed at the same time, the two instruments will be construed together; and generally the arrangement will be held to be a mortgage if it is shown that the rent reserved in such lease was to be applied on the principal or interest of a precedent debt between the parties, but a conditional sale if the rent was received by the grantee in the character of an owner of the property.[93] On the other hand, where the grantee in an absolute deed takes possession of the premises and assumes the management and control of the same, a presumption arises that no mortgage was intended, but at most a conditional sale; and especially is this the case where such possession continues for a long time without protest or claim of ownership on the part of the grantor, and where the grantee is allowed without objection to make valuable improvements.[94] Still it may be shown, notwithstanding the change of possession, that the deed was meant only as a mortgage, as, by evidence that the grantee took possession under an agreement to account for the rents and profits.[95]

11. Payment of Taxes. In this connection it is proper to inquire who has paid the taxes on the land in question since the execution of the deed. If the grantor has made such payment, it is evidence in support of his contention that the deed was intended only as a mortgage,[96] while the payment of the taxes by the grantee shows that he considered himself the owner of the property, and tends to negative the idea of a mortgage.[97] Evidence that the grantee did not

12 W. Va. 246; Ogle *v.* Adams, 12 W. Va. 213.

United States.— Bentley *v.* Phelps, 3 Fed. Cas. No. 1,331, 2 Woodb. & M. 426; Richmond *v.* Richmond, 20 Fed. Cas. No. 11,801.

England.— Harris *v.* Horwell, Gilb. 11, 25 Eng. Reprint 8.

Canada.— Fallon *v.* Keenan, 12 Grant Ch. (U. C.) 388.

See 35 Cent. Dig. tit. "Mortgages," § 89. And see *supra*, I, D, 2, e, (III).

License to cut timber.— As security for a loan, plaintiff gave defendant an absolute deed to land, with authority to remove timber, defendant agreeing to reconvey on repayment of the money within a certain time, which time was twice extended. Afterward defendant wrote plaintiff that if she could raise a stated amount she could have the land, and that if the logs cut amounted to more than the balance he would pay her the difference. Plaintiff continuously resided on the land, and defendant exercised no ownership other than to remove timber. It was held that the deed was in effect a mortgage. Timmons *v.* Center, 43 S. W. 437, 19 Ky. L. Rep. 1424.

92. Buffum *v.* Porter, 70 Mich. 623, 38 N. W. 600; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310; Matheney *v.* Sandford, 26 W. Va. 386.

Understanding of parties.— Where the grantor in a deed, absolute on its face, was told, at the time he executed it, that it conveyed all his property, it was held that the facts that the grantor remained in possession for some time after the conveyance, and that the price paid was a little less than the real value of the property, would not constitute it a mortgage. Edwards *v.* Wall, 79 Va. 321.

93. Bearss *v.* Ford, 108 Ill. 16; Woodward *v.* Pickett, 8 Gray (Mass.) 617; Woodward *v.* Carlisle, 1 Ohio S. & C. Pl. Dec. 422, 7 Ohio N. P. 197; Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720.

94. *Alabama.*— McCoy *v.* Gentry, 73 Ala. 105.

Iowa.— Woodworth *v.* Carman, 43 Iowa 504.

Michigan.— Abbott *v.* Gruner, 121 Mich. 140, 79 N. W. 1065.

North Carolina.— Frazier *v.* Frazier, 129 N. C. 30, 39 S. E. 634.

South Carolina.— Petty *v.* Petty, 52 S. C. 54, 29 S. E. 406.

Tennessee.— Slawson *v.* Denton, (Ch. App. 1898) 48 S. W. 350.

Vermont.— Rich *v.* Doane, 35 Vt. 125.

See 35 Cent. Dig. tit. "Mortgages," § 90.

In Mississippi it is provided by statute (Annot. Code, § 4233) that a conveyance absolute on its face shall not be shown to be a mortgage by parol evidence, if the maker parts with the possession of the property conveyed by it. A bill filed to have a deed absolute on its face adjudged a mortgage is not demurrable under this statute if it does not show that defendant took possession of the property under the deed. Schwartz *v.* Lieber, 79 Miss. 257, 30 So. 649.

95. Murdock *v.* Clarke, 90 Cal. 427, 27 Pac. 275; Clark *v.* Landon, 90 Mich. 83, 51 N. W. 357; Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

96. Parks *v.* Parks, 66 Ala. 326; Boocock *v.* Phipard, 1 Silv. Sup. (N. Y.) 407, 5 N. Y. Suppl. 228; O'Toole *v.* Omlie, 8 N. D. 444, 79 N. W. 849.

97. Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517; Petty *v.* Petty, 52 S. C. 54, 29 S. E. 406; Slawson *v.* Denton, (Tenn. Ch. App. 1898) 48 S. W. 350.

pay any taxes on the land to which he holds a deed, although negative in its character, is admissible as tending to rebut his claim of ownership, and to show that the deed was given as a mortgage.[98]

12. Claim of Ownership or Right to Redeem. The fact that the grantor permits the grantee in an absolute deed to assert title to the property and to exercise acts of ownership over it, without setting up any claim of a right to redeem or to a reconveyance, especially if this continues for a long time, is strong evidence that the conveyance was not intended as a mortgage.[99] Conversely, the fact that the grantor kept up a continual claim of a right to redeem the premises, accompanied by offers to pay the alleged debt, helps to show that the conveyance was in reality a mortgage,[1] especially where such claim is not denied or repudiated by the grantee,[2] or where the latter, by his admissions and acquiescence in acts of ownership by the grantor, impliedly acknowledges that the conveyance was not a sale.[3]

13. Declarations of Parties. The declarations and statements of the parties made pending the negotiations, and at the time of the final execution of a deed and contract or bond to reconvey, are admissible to show that the deed, although absolute in form, was taken and intended as a mortgage or security for a debt.[4] Also it is held that declarations made by a party to a deed, or letters or other written admissions by him, after the execution of the deed, are competent against him to show that the deed was intended as a mortgage notwithstanding its form, or *vice versa*.[5] But such evidence is admissible only in so far as it tends to prove

98. Stevens *v.* Hulin, 53 Mich. 93, 18 N. W. 569.

Failure to return for taxation.— It is permissible to introduce in evidence tax books showing the return of other lands for taxation by one holding an absolute deed to the premises in dispute, such return not including the disputed property, for this tends to prove that he did not believe himself to be the owner of the property. Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

99. Abbott *v.* Gruner, 121 Mich. 140, 79 N. W. 1065; Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310; Hodge *v.* Weeks, 31 S. C. 276, 9 S. E. 953; Hesser *v.* Brown, 40 Wash. 688, 82 Pac. 934. And see Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517.

Failure of bankrupt to schedule.— Where the grantor in a deed absolute in form was adjudged a bankrupt, on his own petition, and in his schedule in the bankruptcy proceedings he made no reference to the premises in question nor any claim to an interest therein, it was held that the deed could not be construed as a mortgage; for to do so would require the court not only to disregard the form in which the parties had put their agreement but also to fix on the grantor the stigma of perjury in swearing to his schedule in the bankruptcy proceeding. Reddy *v.* Aldrich, (Miss. 1892) 11 So. 828.

1. Dougherty *v.* McColgan, 6 Gill & J. (Md.) 275.

2. Blackwell *v.* Overby, 41 N. C. 38.

3. Bailey *v.* Bailey, 115 Ill. 551, 4 N. E. 394.

4. *California.*—Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

District of Columbia.— Peugh *v.* Davis, 2 MacArthur 14.

Georgia.— Burnside *v.* Terry, 45 Ga. 621.

Illinois.— Helbreg *v.* Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 887; Bartling *v.* Brasuhn, 102 Ill. 441; Ruckman *v.* Alwood, 71 Ill. 155; Reigard *v.* McNeil, 38 Ill. 400; Whitcomb *v.* Sutherland, 18 Ill. 578; Williams *v.* Bishop, 15 Ill. 553; Purviance *v.* Holt, 8 Ill. 394.

Iowa.— McLaughlin *v.* Royce, 108 Iowa 254, 78 N. W. 1105; Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486.

Kentucky.— Hoskins *v.* Hoskins, 87 S. W. 320, 27 Ky. L. Rep. 980.

Minnesota.— Phœnix *v.* Gardner, 13 Minn. 430.

Mississippi.— Freeman *v.* Wilson, 51 Miss. 329.

Missouri.— Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118.

New York.— Haussknecht *v.* Smith, 161 N. Y. 663, 57 N. E. 1112.

Oregon.— Wollenberg *v.* Minard, 37 Oreg. 621, 62 Pac. 532.

Pennsylvania.— Tompkins *v.* Merriman, 6 Kulp 543.

Texas.— Dupree *v.* Estelle, 72 Tex. 575, 10 S. W. 666.

West Virginia.— Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583. And see Hursey *v.* Hursey, 56 W. Va. 148, 49 S. E. 367.

See 35 Cent. Dig. tit. "Mortgages," § 101. And see *infra*, III, D, 3, b.

Contra.— Sowell *v.* Barrett, 45 N. C. 50; Allen *v.* McRae, 39 N. C. 325.

5. *California.*— Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28; Ross *v.* Brusie, 64 Cal. 245, 30 Pac. 811.

Iowa.— Froud *v.* Merritt, 99 Iowa 410, 68 N. W. 728.

the original intention of the parties, as formed and entertained at the time the deed was made.[6] And no great reliance should be placed on this kind of evidence unless the declarations or statements shown were very explicit and positive.[7] It seems that declarations made by the agent of the grantee, who had charge of the negotiations and attended to the execution of the deed, are admissible in evidence for this purpose.[8]

14. Subsequent Dealings of Parties. A grantor in a deed absolute in form cannot claim to redeem from it, as from a mortgage, when he has allowed the grantee to sell the property to a third person, as a means of paying the debt, especially if he has received a portion of the purchase-money passing on such sale.[9] But what was originally intended as a mortgage is not converted into a conditional sale by a new settlement between the parties, including a surrender of the instrument of defeasance or bond for reconveyance, when it is at the same time agreed that the land shall be held as security for the amount then estimated to be due.[10] And taking a lease of the premises from the grantee does not preclude the grantor from showing that the deed was in fact a mortgage.[11] But a grantor who takes a defeasance conditioned for the repayment of the real consideration, which is less than the consideration named in the deed, cannot treat the transaction as a sale, instead of a mortgage, and recover the excess of the expressed over the real consideration.[12] But a conditional sale may be converted into a mortgage by a subsequent valid agreement of the parties that the sale, as such, shall be rescinded, and the title held by the grantee simply as security for the payment of a debt.[13]

D. Evidence to Prove a Mortgage — 1. Presumptions. Deeds and written contracts are deemed to express the real intention of the parties, until the contrary is established by convincing proof; and a party alleging that a deed, absolute and unconditional in form, was in effect a mortgage, must meet and overcome the presumption which the law raises from the face of the papers, viz., that the instrument is in legal effect just what it purports to be.[14] And this presumption is strengthened by lapse of time, so that if a very long period elapses before the grantor sets up his claim that the instrument should be considered as a mortgage, the clearness and weight of the evidence which is required of him will

Kentucky.— Runyon *v.* Pogue, 42 S. W. 910, 19 Ky. L. Rep. 940.

Mississippi.— Schwartz *v.* Lieber, 79 Miss. 257, 30 So. 649.

New York.— Farmers', etc., Bank *v.* Smith, 61 N. Y. App. Div. 315, 70 N. Y. Suppl. 536; McIntyre *v.* Humphreys, Hoffm. 31.

North Dakota.— McGuin *v.* Lee, 10 N. D. 160, 86 N. W. 714.

Pennsylvania.— Couch *v.* Sutton, 1 Grant 114.

England.— Vernon *v.* Bethell, 2 Eden 110, 28 Eng. Reprint 838; Willis *v.* Latham, Lloyd & G. t. Pl. 69.

Canada.— Malloch *v.* Pinhey, 9 Grant Ch. (U. C.) 550.

Sec 35 Cent. Dig. tit. "Mortgages," § 101.

6. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737.

7. Lindauer *v.* Cummings, 57 Ill. 195.

8. Queen City Bank *v.* Hood, 15 Misc. (N. Y.) 237, 36 N. Y. Suppl. 981. But *compare* Kirby *v.* National Loan, etc., Co., 22 Tex. Civ. App. 257, 54 S. W. 1081.

9. Wamsley *v.* Crook, 3 Nebr. 344; Henderson *v.* Comeau, Russ. Eq. Dec. (Nova Scotia) 87. And see Tuggle *v.* Berkeley, 101 Va. 83, 43 S. E. 199.

10. Clark *v.* Finlon, 90 Ill. 245; Davis *v.* Hemenway, 27 Vt. 589; Brinkman *v.* Jones, 44 Wis. 498.

11. Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321; Wright *v.* Bates, 13 Vt. 341; Marshall *v.* Steel, Russ. Eq. Dec. (Nova Scotia) 116.

12. Long *v.* Reed, 4 Pa. Dist. 71, 16 Pa. Co. Ct. 110.

13. Heald *v.* Wright, 75 Ill. 17. *Compare* Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246c, Hempst. 251.

14. *Illinois.*— Heaton *v.* Gaines, 198 Ill. 479, 64 N. E. 1081; Williams *v.* Williams, 180 Ill. 361, 54 N. E. 229; Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206; Eames *v.* Hardin, 111 Ill. 634; Bentley *v.* O'Bryan, 111 Ill. 53; Sharp *v.* Smitherman, 85 Ill. 153; Mann *v.* Jobusch, 70 Ill. App. 440.

Iowa.— Betts *v.* Betts, (1906) 106 N. W. 928.

Michigan.— Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230.

South Carolina.— Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310.

Texas.— McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394.

Answer as evidence.— Where a bill in equity alleges that a deed, absolute on its face, was a security for a loan of money,

be correspondingly increased.[15] But when competent and substantial evidence has been presented, showing the deed to have been intended as a mortgage, then the presumption arising from the face of the instrument is rebutted, and it is incumbent on the grantee to prove that the deed was intended as an absolute conveyance.[16] And the rule is not inconsistent with the principle that, in cases of real doubt as to the intention of the parties, the courts will incline to construe the transaction as a mortgage rather than as a sale.[17]

2. BURDEN OF PROOF. The burden of proof rests upon the party who alleges that a deed absolute in form was really intended as a mortgage.[18] It is immaterial which of the parties sets up this claim. If the grantee in an instrument which purports to be an absolute deed contends that it was in fact a mortgage, the burden of showing the character of the instrument is on him.[19] If, on the other hand, he claims that it was an absolute conveyance and brings suit for possession or to try title, it is true in a general sense that the burden of proof on the whole case rests on him; but still, if the grantor defends on the ground that the instrument was a mortgage it is he who must assume the burden of proving that contention.[20]

3. ADMISSIBILITY OF EVIDENCE — a. In General. In determining the question

and the answer, under oath, clearly and distinctly denies this averment, and insists that it was a sale, the answer is evidence, and must be overcome by preponderating evidence before relief will be granted. Taintor *v.* Keys, 43 Ill. 332.

15. Hancock *v.* Harper, 86 Ill. 445; Cotterell *v.* Purchase, Cases t. Talbot, 61.

16. Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310.

17. Mitchell *v.* Wellman, 80 Ala. 16; Scott *v.* Henry, 13 Ark. 112; Turner *v.* Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024; Rogers *v.* Burrus, 53 Wis. 530, 9 N. W. 786; Russell *v.* Southard, 12 How. (U. S.) 139, 13 L. ed. 927; Eglauch *v.* Labadie, 21 Quebec Super. Ct. 481. And see *supra*, I, D, 2, f.

18. *Alabama.*— Jones *v.* Kennedy, 138 Ala. 502, 35 So. 465.

Arkansas.— Hays *v.* Emerson, 75 Ark. 551, 87 S. W. 1027.

California.— Bryant *v.* Broadwell, 140 Cal. 490, 74 Pac. 33.

Illinois.— Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763; Gannon *v.* Moles, 209 Ill. 180, 70 N. E. 689; Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Heaton *v.* Gaines, 198 Ill. 479, 64 N. E. 1081; Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206; Eames *v.* Hardin, 111 Ill. 634; Bentley *v.* O'Bryan, 111 Ill. 53; Knowles *v.* Knowles, 86 Ill. 1.

Iowa.— Wright *v.* Wright, (1904) 98 N. W. 137; Allen *v.* Fogg, 66 Iowa 229, 23 N. W. 643.

Louisiana.— Mulhaupt *v.* Youree, 35 La. Ann. 1052.

Michigan.— Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230; Tilden *v.* Streeter, 45 Mich. 533, 8 N. W. 502.

New Jersey.— Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15.

New York.— Fullerton *v.* McCurdy, 55 N. Y. 637.

North Dakota.— Northwestern F. & M. Ins. Co. *v.* Lough, 13 N. D. 601, 102 N. W. 160.

Pennsylvania.— Haines *v.* Thomson, 70 Pa. St. 434; Todd *v.* Campbell, 32 Pa. St. 250.

South Carolina.— Miller *v.* Price, 66 S. C. 85, 44 S. E. 584.

Texas.— Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206; Johnson *v.* Scrimshire, (Civ. App. 1906) 93 S. W. 712.

West Virginia.— Fridley *v.* Somerville, (1906) 54 S. E. 502.

See 35 Cent. Dig. tit. "Mortgages," § 96.

As to separate defeasance.— Where the claim of the grantor is that the deed is reduced to a mortgage by the effect of a separate written instrument of defeasance, the burden is on him to show that the two papers were executed at the same time or as parts of the same transaction. Cotton *v.* McKee, 68 Me. 486.

Exception where grantee occupies position of trust.— Where one holding the relation of a confidential agent and adviser claims that a deed from his principal to himself absolute in form was absolute in fact, while the principal claims it to be a mortgage, a court of equity will closely scrutinize the transactions between the parties, and will throw upon the agent the burden of proving the validity and good faith of his dealings, and will make such order as equity demands. Tappan *v.* Aylsworth, 13 R. I. 582.

Effect of grantee's admission.— A vendee's admission, in a suit to declare an absolute deed a mortgage, that he had agreed to permit his vendor to repurchase the land, before its sale was made, did not remove the burden of proof from the vendor, but relaxed the rule requiring stringent proof that an absolute deed was intended as a mortgage, and inclined the law to favor the right of redemption, since it amounted to an admission that the writings did not evidence the whole agreement. Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71, 82 Am. St. Rep. 225.

19. Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473.

20. McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394.

whether a deed absolute on its face was in reality intended as a mortgage, extraneous evidence being admitted, the court is not restricted to any particular kind of evidence, but may take into consideration almost any pertinent matters which tend to prove the real intention and understanding of the parties and the true nature of the transaction in question.[21] Thus records and deeds or other writings passing between the parties, or throwing light upon their relations or the real nature of the disputed transaction, are admissible.[22] Evidence as to the mental capacity of the grantor is relevant to show the relations of the parties and the

21. *Arizona.*— Rees *v.* Rhodes, 3 Ariz. 235, 73 Pac. 446.

Maine.— Hurd *v.* Chase, 100 Me. 561, 62 Atl. 660.

Minnesota.— Philips *v.* Missouri, 91 Minn. 311, 97 N. W. 969.

North Carolina.— See Blackwell *v.* Overby, 41 N. C. 38, holding that, although a deed absolute on its face cannot be shown to have been intended as a mortgage, merely by parol evidence of an agreement to that effect, made by the parties at the time of its execution, yet it may be so shown by proof *dehors* of facts and circumstances which, to the apprehension of men versed in business and judicial minds, are incompatible with the idea of a purchase, and leave no fair doubt that a security only was intended.

United States.— See Bentley *v.* Phelps, 3 Fed. Cas. No. 1,331, 2 Woodb. & M. 426, holding that where a deed is absolute on its face, it is competent to show, in a bill in equity, that it was a mortgage, by proving confessions of the grantee that it was a mortgage, and that a deed of defeasance was to be given and filed with it, so as to constitute the transaction a mortgage; by proving receipts of money subsequently from the grantor and her representatives, for interest, and in amounts corresponding to interest rather than rent; by possession, long after the conveyance, retained by the grantor; by the relation of debtor and creditor, admitted to have then and long before existed between them; and by the value of the property being larger than the consideration advanced.

See 35 Cent. Dig. tit. "Mortgages," § 97.

See, however, Wallace *v.* Town, 8 Wash. 244, 35 Pac. 1080, holding that on the issue whether a deed from a client to his attorney was intended as absolute, in payment for his services, or as a mortgage to secure him a reasonable fee, subsequent negligence of the attorney in the service for which he was employed is immaterial.

Mental capacity of grantor.— In an action to have a deed declared a mortgage, evidence as to the mental capacity of the grantor was relevant to show the relations of the parties and the nature of the transaction. Reilly *v.* Brown, 87 Mich. 163, 49 N. W. 557.

When understanding inadmissible.— In a suit to have a deed declared a mortgage, evidence of the grantor's wife to the effect that when she signed the deed she did not understand it to be a conveyance, that she signed it simply for the purpose of securing the grantee for his money, that it was the understanding all the time that it was to be a security, and that she was not examined apart from her husband, as stated in the certificate of acknowledgment, is inadmissible. Bray *v.* Shelby, 83 Tex. 405, 18 S. W. 809. And so where the question in issue is whether a deed absolute on its face is in effect a mortgage, evidence that the grantee understood, at the time of the transaction, that he was buying land, and not loaning money, is not admissible. Zimmerman *v.* Marchland, 23 Ind. 474.

Misrepresentations of official taking wife's acknowledgment inadmissible.— Where defendant contends that a deed to plaintiffs, executed by herself and husband, was a mortgage, evidence that the officer before whom she acknowledged the deed told her that she could redeem from the sale is inadmissible, in the absence of evidence that the grantees had knowledge of the misrepresentations. Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

Certificate of acknowledgment as evidence of wife's intention.—Evidence that the grantor's wife signed the deed with the intention of executing a mortgage and not a sale is not admissible, where no fraud on the part of the grantee is alleged, the notary's certificate being in that case conclusive as to her intention. Claflin *v.* Harrington, 23 Tex. Civ. App. 345, 56 S. W. 370.

The Florida statute providing that all deeds of conveyance made with the intention of securing the payment of money shall be treated as mortgages does not change the rules of evidence in regard to proof that a deed absolute on its face was intended as a mortgage. Chaires *v.* Brady, 10 Fla. 133, construing Thompson Dig. 376.

22. Hall *v.* Savill, 3 Greene (Iowa) 37, 54 Am. Dec. 485; Sloan *v.* Becker, 31 Minn. 414, 18 N. W. 143; Littlewort *v.* Davis, 50 Miss. 403.

Copy of a lease.— On an issue whether a deed absolute on its face is a mortgage to secure performance of covenants in a lease, a copy of such lease is admissible. Angel *v.* Simmonds, 7 Tex. Civ. App. 331, 26 S. W. 910.

Deed executed in blank.— Where a loan of money was contracted for, and a deed to secure the same executed in blank, and deposited in escrow, to be filled in with the name of the mortgagee and delivered to him on payment of the loan, it was admissible in evidence, as bearing on the question whether the transfer was a mortgage or an absolute sale. Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92.

Deeds to strangers.— Where it is alleged

true nature of the transaction.[23] And evidence may be received of all the facts and circumstances surrounding or attending the transaction in question, in so far as they tend to disclose its true significance and the actual design of the parties.[24] The grantor is a competent witness to testify against his grantee that the absolute conveyance was but an equitable mortgage.[25] And an attorney employed by both the parties to draw up the deed may testify as to communications made to him in that capacity, when the litigation concerning the deed is between the original parties, although not when the controversy is between one of such parties and a stranger.[26] While the search is for the true understanding of the parties, a witness, a stranger to the transaction, should not be permitted to give his opinion as to what the parties understood.[27] And it has been held that in the absence of direct proof a deed absolute upon its face should not be held to be a mortgage upon mere inferences and arguments drawn from other evidence in the case.[28]

b. Parol Evidence — (i) *Admissibility in General.* Unless it is otherwise provided by statute[29] as a general rule parol evidence is admissible to prove that a deed, absolute and unconditional in its terms, was understood and intended by

that plaintiff's intestate, who made the deed in question, was aged, infirm, and mentally feeble at the time of its execution, and much embarrassed by debts, it is permissible to receive in evidence deeds given by him to various third persons, and relating to transactions in which defendant was not at all concerned, not indeed upon the issue whether the deed in controversy was or was not a mortgage, but upon the issue of the intestate's mental capacity, as showing that he was in the habit of giving absolute deeds as security for debts. Jackson *v.* Jones, 74 Tex. 104, 11 S. W. 1061.

Contract of sale.— On an issue whether a deed was an absolute conveyance or a mortgage, it is proper to admit in evidence a contract between the parties whereby the grantee agreed to sell the land to the grantor for a certain price before a specified date. Holmes *v.* Warren, 145 Cal. 457, 78 Pac. 954.

23. Reilly *v.* Brown, 87 Mich. 163, 49 N. W. 557; Jackson *v.* Jones, 74 Tex. 104, 11 S. W. 1061.

24. *Indiana.*— Loeb *v.* McAlister, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378.

Iowa.— Butterfield *v.* Kirtley, 114 Iowa 520, 87 N. W. 407.

Michigan.— Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381.

Minnesota.— Phœnix *v.* Gardner, 13 Minn. 430.

New York.— Blazy *v.* McLean, 129 N. Y. 44, 29 N. E. 6.

Pennsylvania.— Wheeland *v.* Swartz, 1 Yeates 579.

Tennessee.— Overton *v.* Bigelow, 3 Yerg. 513.

Vermont.— Rich *v.* Doane, 35 Vt. 125.

See 35 Cent. Dig. tit. "Mortgages," § 97.

That the land was the grantor's homestead and that he was holding it as such is not a material circumstance. Ashton *v.* Ashton, 11 S. D. 610, 79 N. W. 1001.

25. Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295.

26. Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

27. Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

28. Falk *v.* Wittram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184.

29. See the statutes of the different states.

In Georgia by statute (Code, § 3809) parol evidence is not admissible to convert an absolute deed into a mortgage, at the instance of the parties thereto, where possession has passed to the grantee, unless fraud in its procurement is the issue to be tried. Mitchell *v.* Fullington, 83 Ga. 301, 9 S. E. 1083; New England Mortg. Security Co. *v.* Tarver, 60 Fed. 660, 9 C. C. A. 190. Before the passage of this statute it was otherwise. Hopkins *v.* Watts, 27 Ga. 490; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553.

In Mississippi by statute (Code (1892), § 4233), parol evidence is admissible to convert an absolute deed into a mortgage only when the grantor has not parted with the possession of the property; if possession has been transferred to the grantee, such evidence cannot be received. Schwartz *v.* Lieber, (1902) 32 So. 954; Culp *v.* Wooten, 79 Miss. 503, 31 So. 1; Fultz *v.* Peterson, 78 Miss. 128, 28 So. 829; Heirmann *v.* Stricklin, 60 Miss. 234. For earlier decisions on the subject see Klein *v.* McNamara, 54 Miss. 90; Freeman *v.* Wilson, 51 Miss. 329; Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658; Blake *v.* Morrisson, 33 Miss. 123; Vasser *v.* Vasser, 23 Miss. 378; Watson *v.* Dickens, 12 Sm. & M. 608.

In Pennsylvania, since the enactment of a prohibitory statute in 1881, parol evidence is not admissible to convert an absolute deed into a mortgage, unless it be with regard to deeds made before that year, the law not being retrospective. O'Donnell *v.* Vandersaal, 213 Pa. St. 551, 63 Atl. 60 [*affirming* 36 Pittsb. Leg. J. N. S. 82]; Gaines *v.* Brockerhoff, 136 Pa. St. 175, 19 Atl. 958; Hartley's Appeal, 103 Pa. St. 23; Huoncker *v.* Merkey, 102 Pa. St. 462; Nicolls *v.* McDonald, 101 Pa. St. 514; Umbenhower *v.* Miller, 101 Pa. St. 71; Whelen *v.* Whelen, 11 Pa. Dist. 14; Selby's Estate, 7 Pa. Dist. 171, 20 Pa. Co. Ct.

the parties to operate as a mortgage only.[80] So parol evidence as to whether a

634; Eley *v.* Eley, 10 Kulp 545; Sprague *v.* Johnson, 31 Pittsb. Leg. J. N. S. 59. Before this statute it was otherwise. Maffitt *v.* Rynd, 69 Pa. St. 380; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; Horn *v.* Pattison, 1 Grant 304; Kunkle *v.* Wolfersberger, 6 Watts 126; Hacker's Estate, 5 Pa. Co. Ct. 586.

A statute providing that no parol trust concerning land can be created except such as result by implication of law does not prevent the introduction of parol evidence. Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71, 82 Am. St. Rep. 225; Brown *v.* Follette, 155 Ind. 316, 58 N. E. 197.

30. *Alabama.*— Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71, 82 Am. St. Rep. 225; Bryan *v.* Cowart, 21 Ala. 92. *Compare* Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157, holding that parol proof is not admissible to show that an absolute conveyance was intended to operate as a conditional sale or a sale with a right to repurchase.

Arkansas.— Reynolds *v.* Blanks, (1906) 94 S. W. 694; Harman *v.* May, 40 Ark. 146; Anthony *v.* Anthony, 23 Ark. 479; Blakemore *v.* Byrnside, 7 Ark. 505.

California.— Anglo-Californian Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077; Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; Farmer *v.* Grose, 42 Cal. 169; Raynor *v.* Lyons, 37 Cal. 452; Jackson *v.* Lodge, 36 Cal. 28; Hopper *v.* Jones, 29 Cal. 18; Cunningham *v.* Hawkins, 27 Cal. 603; Lodge *v.* Turman, 24 Cal. 385; Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Pierce *v.* Robinson, 13 Cal. 116.

Colorado.— Townsend *v.* Peterson, 12 Colo. 491, 21 Pac. 619; Hall *v.* Linn, 8 Colo. 264, 5 Pac. 641; Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286.

Connecticut.— Bacon *v.* Brown, 19 Conn. 29; Brainerd *v.* Brainerd, 15 Conn. 575; Washburn *v.* Merrills, 1 Day 139, 2 Am. Dec. 59.

District of Columbia.—Peugh *v.* Davis, 2 MacArthur 14.

Florida.— State First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665; Walls *v.* Endel, 20 Fla. 86; Lindsay *v.* Matthews, 17 Fla. 575.

Illinois.— Merriman *v.* Schmitt, 211 Ill. 263, 71 N. E. 986; Moffett *v.* Hanner, 154 Ill. 649, 39 N. E. 474; Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Workman *v.* Greening, 115 Ill. 477, 4 N. E. 385; Bearss *v.* Ford, 108 Ill. 16; Wright *v.* Gay, 101 Ill. 233; Hancock *v.* Harper, 86 Ill. 445; Knowles *v.* Knowles, 86 Ill. 1; Sharp *v.* Smitherman, 85 Ill. 153; Low *v.* Graff, 80 Ill. 360; Smith *v.* Cremer, 71 Ill. 185; Ruckman *v.* Alwood, 71 Ill. 155; Klock *v.* Walter, 70 Ill. 416; Lindauer *v.* Cummings, 57 Ill. 195; Sutphen *v.* Cushman, 35 Ill. 186; Shaver *v.* Woodward, 28 Ill. 277; Tillson *v.* Moulton, 23 Ill. 648; Miller *v.* Thomas, 14 Ill. 428; Hovey *v.* Holcomb, 11 Ill. 660; Ferguson *v.* Sutphen, 8 Ill. 547; Purviance *v.* Holt, 8 Ill. 394; Delahay *v.* McConnel, 5 Ill. 156; Ætna Ins. Co. *v.* Jacobson, 105 Ill. App. 283; Mann *v.* Jobusch, 70 Ill. App. 440; Bernhard *v.* Bruner, 65 Ill. App. 641.

Indiana.— Brown *v.* Follette, 155 Ind. 316, 58 N. E. 197; Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5; Cravens *v.* Kitts, 64 Ind. 581; Caress *v.* Foster, 62 Ind. 145; Crane *v.* Buchanan, 29 Ind. 570; Matchett *v.* Knisely, 27 Ind. App. 664, 62 N. E. 87.

Iowa.— Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486; Ingalls *v.* Atwood, 53 Iowa 283, 5 N. W. 160; Key *v.* McCleary, 25 Iowa 191; Trucks *v.* Lindsey, 18 Iowa 504; Roberts *v.* McMahan, 4 Greene 34. And see McElroy *v.* Allfree, (1906) 108 N. W. 116.

Kansas.— Moore *v.* Wade, 8 Kan. 380; Barnes *v.* Crockett, 4 Kan. App. 777, 46 Pac. 997.

Kentucky.—Davis *v.* Eastham, 81 Ky. 116; Green *v.* Ball, 4 Bush 586; Lewis *v.* Robards, 3 T. B. Mon. 406; Cline *v.* Fallis, 1 Ky. L. Rep. 325. But *compare* Munford *v.* Green, 103 Ky. 140, 44 S. W. 419, 19 Ky. L. Rep. 1791.

Maine.— Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295; Reed *v.* Reed, 75 Me. 264; Stinchfield *v.* Milliken, 71 Me. 567; Lewis *v.* Small, 71 Me. 552; Rowell *v.* Jewett, 69 Me. 293; Whitney *v.* Batchelder, 32 Me. 313. *Compare* Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767; Ellis *v.* Higgins, 32 Me. 34; Hale *v.* Jewell, 7 Me. 435, 22 Am. Dec. 212.

Maryland.— Miller *v.* Miller, 101 Md. 600, 61 Atl. 210; Booth *v.* Robinson, 55 Md. 419; Baugher *v.* Merryman, 32 Md. 185.

Massachusetts.— Alexander *v.* Grover, 190 Mass. 462, 77 N. E. 487; Cullen *v.* Carey, 146 Mass. 50, 15 N. E. 131; Hassam *v.* Barrett, 115 Mass. 256; Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671. *Compare* Waite *v.* Dimick, 10 Allen 364; Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162.

Michigan.— McArthur *v.* Robinson, 104 Mich. 540, 62 N. W. 713; Emerson *v.* Atwater, 7 Mich. 12; Fuller *v.* Parrish, 3 Mich. 211; Wadsworth *v.* Loranger, Harr. 113.

Minnesota.— Stitt *v.* Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561; Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459; Meighen *v.* King, 31 Minn. 115, 16 N. W. 702; Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539; Phœnix *v.* Gardner, 13 Minn. 430.

Missouri.— Johnson *v.* Huston, 17 Mo. 58; Zittlosen Tent Co. *v.* Exchange Bank, 57 Mo. App. 19; Quirk *v.* Turner, 26 Mo. App. 29; Spalding *v.* Taylor, 1 Mo. App. 34.

Nebraska.— Dickson *v.* Stewart, 71 Nebr. 424, 98 N. W. 1085; Morrow *v.* Jones, 41 Nebr. 867, 60 N. W. 369; Tower *v.* Fetz, 26 Nebr. 706, 42 N. W. 884, 18 Am. St. Rep. 795.

Nevada.— Saunders *v.* Stewart, 7 Nev. 200; Bingham *v.* Thompson, 4 Nev. 224.

New Jersey.— Vanderhoven *v.* Romaine, 56 N. J. Eq. 1, 39 Atl. 129; Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15; Phillips *v.* Hulsizer,

deed was in fact a mortgage, when such fact appears on the face of the papers,

20 N. J. Eq. 308; Condit *v.* Tichenor, 19 N. J. Eq. 43; Vandegrift *v.* Herbert, 18 N. J. Eq. 466.

New Mexico.—Alexander *v.* Cleland, (1906) 86 Pac. 425; King *v.* Warrington, 2 N. M. 318.

New York.— Bork *v.* Martin, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570; Meehan *v.* Forrester, 52 N. Y. 277; Carr *v.* Carr, 52 N. Y. 251; Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416; Farmers', etc., Bank *v.* Smith, 61 N. Y. App. Div. 315, 70 N. Y. Suppl. 536; Spencer *v.* Richmond, 46 N. Y. App. Div. 481, 61 N. Y. Suppl. 397; Mooney *v.* Byrne, 1 N. Y. App. Div. 316, 37 N. Y. Suppl. 388; Tibbs *v.* Morris, 44 Barb. 138; Taylor *v.* Baldwin, 10 Barb. 582 [*affirmed* in 10 Barb. 626]; Ricketts *v.* Wilson, 6 N. Y. St. 508; Swart *v.* Service, 21 Wend. 36, 34 Am. Dec. 211; Walton *v.* Cronly, 14 Wend. 63; Van Buren *v.* Olmstead, 5 Paige 8; Whittick *v.* Kane, 1 Paige 202; Slee *v.* Manhattan Co., 1 Paige 48; Strong *v.* Stewart, 4 Johns. Ch. 167; Marks *v.* Pell, 1 Johns. Ch. 594. *Compare* Cook *v.* Eaton, 16 Barb. 439.

Ohio.— Slutz *v.* Desenberg, 28 Ohio St. 371; Matthews *v.* Leaman, 24 Ohio St. 615; Stall *v.* Cincinnati, 16 Ohio St. 169.

Oklahoma.— Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810; Balduff *v.* Griswold, 9 Okla. 438, 60 Pac. 223; Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464; Stith *v.* Peckham, 4 Okla. 254, 46 Pac. 664.

Oregon.— Swegle *v.* Belle, 20 Oreg. 323, 25 Pac. 633.

South Carolina.— Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551; Nesbitt *v.* Cavender, 27 S. C. 1, 2 S. E. 702; Brownlee *v.* Martin, 21 S. C. 392; Walker *v.* Walker, 17 S. C. 329; Arnold *v.* Mattison, 3 Rich. Eq. 153.

Tennessee.— Guinn *v.* Locke, 1 Head 110; Jones *v.* Jones, 1 Head 105.

Texas.— White *v.* Harris, 85 Tex. 42, 19 S. W. 1077; McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394; Brewster *v.* Davis, 56 Tex. 478; Mann *v.* Falcon, 25 Tex. 271; Hannay *v.* Thompson, 14 Tex. 142; Mead *v.* Randolph, 8 Tex. 191; Carter *v.* Carter, 5 Tex. 93; Stamper *v.* Johnson, 3 Tex. 1; Stafford *v.* Stafford, 29 Tex. Civ. App. 73, 71 S. W. 984; Lehman *v.* Chatham Mach. Co., 28 Tex. Civ. App. 228, 66 S. W. 796; Hexter *v.* Urwitz, 6 Tex. Civ. App. 580, 25 S. W. 1101. And see Harrington *v.* Claflin, 28 Tex. Civ. App. 100, 66 S. W. 898.

Vermont.— See Crosby *v.* Leavitt, 50 Vt. 239. *Compare* Mussey *v.* Bates, 60 Vt. 271, 14 Atl. 457.

Virginia.— Edwards *v.* Wall, 79 Va. 321; Snavely *v.* Pickle, 29 Gratt. 27; Phelps *v.* Seely, 22 Gratt. 573; Ross *v.* Norvell, 1 Wash. 14, 1 Am. Dec. 422.

Washington.— Ross *v.* Howard, 31 Wash. 393, 72 Pac. 74.

West Virginia.— Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340; McNeel *v.* Auldridge, 34 W. Va. 748, 12 S. E. 851; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371; Vangilder *v.* Hoffman, 22 W. Va. 1; Davis *v.* Demming, 12 W. Va. 246.

Wisconsin.— Beebe *v.* Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103; Brown *v.* Johnson, 115 Wis. 430, 91 N. W. 1016; Schierl *v.* Newburg, 102 Wis. 552, 78 N. W. 761; Parish *v.* Reeve, 63 Wis. 315, 23 N. W. 568; Wilcox *v.* Bates, 26 Wis. 465; Kent *v.* Agard, 24 Wis. 378; Sweet *v.* Mitchell, 15 Wis. 641; Plato *v.* Roe, 14 Wis. 453; Rogan *v.* Walker, 1 Wis. 527.

United States.— Jackson *v.* Lawrence, 117 U. S. 679, 6 S. Ct. 915, 29 L. ed. 1024; Peugh *v.* Davis, 96 U. S. 332, 24 L. ed. 775; Morgan *v.* Shinn, 15 Wall. 105, 21 L. ed. 87; Babcock *v.* Wyman, 19 How. 289, 15 L. ed. 644; Russell *v.* Southard, 12 How. 139, 13 L. ed. 927; Lewis *v.* Wells, 85 Fed. 896; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523; Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516; Dow *v.* Chamberlin, 7 Fed. Cas. No. 4,037, 5 McLean 281; Sprigg *v.* Mt. Pleasant Bank, 22 Fed. Cas. No. 13,257, 1 McLean 384.

Canada.— Rose *v.* Hickey, Cass. Dig. 535; Boardman *v.* Handley, 4 Terr. L. Rep. 267.

See 35 Cent. Dig. tit. "Mortgages," § 98.

But see Bernardy *v.* Colonial, etc., Mortg. Co., (S. D. 1905) 105 N. W. 737, holding that a deed absolute in form and without limitation or qualifications as to the interest intended to be conveyed and containing covenants cannot be varied by parol evidence as to the intention of the parties as to the interest to be conveyed.

In Louisiana no other evidence is admissible to establish the simulation of a sale of immovables between the parties to the act of sale, that is, to convert an absolute sale into a mortgage, than a counter letter or other evidence in writing equivalent to a counter letter. Mulhaupt *v.* Youree, 35 La. Ann. 1052; Janney *v.* Ober, 28 La. Ann. 281; West *v.* Hickman, 14 La. Ann. 610; Theurer *v.* Schmidt, 10 La. Ann. 125; Ranaldson *v.* Hamilton, 5 La. Ann. 203; Dabadie *v.* Poydras, 3 La. Ann. 153. But *compare* Ker *v.* Evershed, 41 La. Ann. 15, 6 So. 566; Crozier *v.* Ragan, 38 La. Ann. 154; Newman *v.* Shelly, 36 La. Ann. 100. The rule applies only as between the original parties; a creditor of one who has made a simulated sale of his land has a right to prove the simulation by parol evidence, and is not restricted to a counter letter as a means of proof. Testart *v.* Belot, 31 La. Ann. 795; Frost *v.* Bebout, 14 La. 104.

In North Carolina parol testimony that a deed absolute on its face is a mortgage can only be acted on when there has been a mistake or fraud in making the written conveyance different from the original contract. McLaurin *v.* Wright, 37 N. C. 94; Kimborough *v.* Smith, 17 N. C. 558. And see Hall *v.* Lewis, 118 N. C. 509, 24 S. E. 209.

Deeds given on judicial sale.— The rule admitting parol evidence to convert an absolute deed into a mortgage applies not only to

although unnecessary, is admissible.[31] But the rule which allows the introduction of such evidence is not to be enlarged, but should be strictly construed.[32] Hence, to determine whether a deed absolute on its face should be regarded in equity as a mortgage, parol evidence is admissible, so far as it conduces to show the relations between the parties, or any other fact or circumstance of a nature to control the deed and establish such an equity as would give a right of redemption, but no further.[33] And such evidence is receivable only so far as it discloses the intention of the parties as established at the time of the execution of the deed.[34] Moreover it has been held that parol evidence is not admissible to show that a conveyance which, on its face and by its terms, is a mortgage was intended to operate as an absolute or conditional sale.[35]

(II) *Effect of Statute of Frauds.* The statute of frauds does not stand in the way of treating an absolute deed as a mortgage, when such was the intention of the parties, although the agreement for redemption or defeasance rests wholly in parol, or is proved by parol evidence. The courts will not permit the statute to be used as a shield for fraud, or as a means for perpetrating fraud.[36]

(III) *Rule Prohibiting Contradiction of Written Documents.* The admission of parol testimony to prove that a deed absolute in form was in fact given and accepted as a mortgage does not violate the rule against the admission of oral evidence to vary or contradict the terms of a written instrument.[37]

(IV) *In Actions at Law.* According to the doctrine prevailing in most of the states, it is only in equity that parol evidence can be received for the purpose of converting an apparently absolute deed into a mortgage. Since the reason for its admission is purely equitable, it is not cognizable in a court of law. And hence such testimony cannot be introduced in an action at law.[38] But in some

deeds voluntarily made by the grantor, but also to deeds received by purchasers of the property at judicial sales, such as a sale on execution or a mortgage foreclosure sale, when the effect of the evidence is to show an agreement between the owner and such purchaser that the latter should hold the title thus received only as security for the money advanced by him to bid in the property or for some other debt. Trogdon *v.* Trogdon, 164 Ill. 144, 45 N. E. 575; Reigard *v.* McNeil, 38 Ill. 400; Foster *v.* Rice, 126 Iowa 190, 101 N. W. 771; Ryan *v.* Dox, 34 N. Y. 307, 90 Am. Dec. 696; Logue's Appeal, 104 Pa. St. 136; Guinn *v.* Locke, 1 Head (Tenn.) 110. And see *supra*, III, A, 2.

31. Baker *v.* Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

32. Howland *v.* Blake, 12 Fed. Cas. No. 6,792, 7 Biss. 40 [*affirmed* in 97 U. S. 624, 24 L. ed. 1027].

33. Sutphen *v.* Cushman, 35 Ill. 186.

34. Barrett *v.* Carter, 3 Lans. (N. Y.) 68.

35. Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Woods *v.* Wallace, 22 Pa. St. 171; Brown *v.* Nickle, 6 Pa. St. 390; Kunkle *v.* Wolfersberger, 6 Watts (Pa.) 126; Eckford *v.* Berry, 87 Tex. 415, 28 S. W. 937. *Compare* Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509.

36. *California.*— Byers *v.* Locke, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212.

Illinois.— Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67.

Ohio.— Mathews *v.* Leaman, 24 Ohio St. 615.

Pennsylvania.— Pattison *v.* Horn, 1 Grant 301.

Utah.— Wasatch Min. Co. *v.* Jennings, 5 Utah 385, 16 Pac. 399.

Compare Sweet *v.* Mitchell, 15 Wis. 641.

37. *Florida.*— Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

Illinois.— Northern Assur. Co. *v.* Chicago Mut. Bldg., etc., Assoc., 198 Ill. 474, 64 N. E. 979; Bearss *v.* Ford, 108 Ill. 16.

Maryland.— Pickett *v.* Wadlow, 94 Md. 564, 51 Atl. 423; Booth *v.* Robinson, 55 Md. 419. In these cases the ground of the decision is that parol evidence may be received in such a case, not as contradicting or varying the terms of the instrument, but for the purpose of raising an equity paramount to the mere form of the conveyance.

Texas.—Grier *v.* Casares, (Civ. App. 1903) 76 S. W. 451.

Wisconsin.— Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014; Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673; Butler *v.* Butler, 46 Wis. 430, 1 N. W. 70.

United States.— Brick *v.* Brick, 98 U. S. 514, 25 L. ed. 256, holding that the rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties, but does not forbid an inquiry into the object of the parties in executing and receiving the instrument.

See 35 Cent. Dig. tit. "Mortgages," § 98.

38. *Alabama.*— Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82.

Connecticut.— Benton *v.* Jones, 8 Conn. 186; Reading *v.* Weston, 8 Conn. 117, 20 Am. Dec. 97.

Kentucky.— Staton *v.* Com., 2 Dana 397.

jurisdictions such evidence is always admissible, no less in actions at law than in suits in equity.[39]

(v) *As Against Third Persons.* Parol evidence is admissible to show that an absolute deed was intended as a mortgage, not only as between the original parties, but where third persons are concerned, provided they have not been misled by the form of the transaction, or have not reposed trust or confidence on the strength of the absolute deed,[40] but not as against a subsequent purchaser of the property for value without notice.[41]

4. Weight and Sufficiency — a. In General. The presumption being that a deed of conveyance is just what it purports on its face to be, it will not be adjudged to operate merely as a mortgage on vague, uncertain, or contradictory evidence; and when there is a substantial conflict in the evidence, a mere preponderance is not enough to warrant the court in changing the legal purport and effect of the deed.[42] Thus a deed absolute on its face should not be decreed to be a mortgage on the mere testimony of the grantor, not supported by witnesses or by facts or circumstances consistent with his theory, and contradicted by the grantee.[43] But such testimony may be effective when corroborated by the evidence of one or more independent witnesses.[44] And when the evidence presented to the trial

Maine.— Bailey *v.* Knapp, 79 Me. 205, 9 Atl. 356; Thomaston Bank *v.* Stimpson, 21 Me. 195.

Michigan.— Gates *v.* Sutherland, 76 Mich. 231, 42 N. W. 1112.

Minnesota.— McClane *v.* White, 5 Minn. 178.

Missouri.— Hogel *v.* Lindell, 10 Mo. 483.

New York.— Taylor *v.* Baldwin, 10 Barb. 582 [*affirmed* in 10 Barb. 626]; Webb *v.* Rice, 6 Hill 219. But *compare* Swart *v.* Service, 21 Wend. 36, 34 Am. Dec. 211.

West Virginia.— Billingsley *v.* Stutler, 52 W. Va. 92, 43 S. E. 96.

See 35 Cent. Dig. tit. "Mortgages," § 98.

In an action of ejectment, it is not permissible to show by parol evidence that the deed under which plaintiff claims was intended and understood by the parties to operate only as a mortgage, such a defense being purely equitable in its character. Finlon *v.* Clark, 118 Ill. 32, 7 N. E. 475; Gates *v.* Sutherland, 76 Mich. 231, 42 N. W. 1112; McClane *v.* White, 5 Minn. 178. *Contra*, Cunningham *v.* Hawkins, 27 Cal. 603.

In a petition for partition, the respondent is not entitled to plead and prove that an absolute deed, under which the petitioner claims a part of his title, was given as an equitable mortgage, and that the debt secured thereby has been paid; his remedy must be sought in equity. Bailey *v.* Knapp, 79 Me. 205, 9 Atl. 356.

Action for rent.— A lessor, who has conveyed the reversion by a deed absolute on its face, cannot show by parol that such deed was intended as a mortgage, in order to maintain an action for the rent. Abbott *v.* Hanson, 24 N. J. L. 493.

39. Jackson *v.* Lodge, 36 Cal. 28; Cunningham *v.* Hawkins, 27 Cal. 603; McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

In Illinois parol evidence is admissible to convert an absolute deed into a mortgage, not only in equity, but also in any action at law where the title to the property is not directly in issue. German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490; Northern Assur. Co. *v.* Chicago Mut. Bldg., etc., Assoc., 98 Ill. App. 152; Gillespie *v.* Hughes, 86 Ill. App. 202.

40. Walton *v.* Cronly, 14 Wend. (N. Y.) 63. And see Carter *v.* Hallahan, 61 Ga. 314, holding that, where a debtor, afterward deceased, gave to a creditor an absolute deed, but remained in possession of the land, in a contest between other creditors and the widow, parol evidence was admissible to show that the conveyance was only a mortgage.

41. Hills *v.* Loomis, 42 Vt. 562; Conner *v.* Chase, 15 Vt. 764. And see *infra*, III, E, 4.

42. *Alabama.*— Knaus *v.* Dreher, 84 Ala. 319, 4 So. 287. And see Rose *v.* Gandy, 137 Ala. 329, 34 So. 239.

Colorado.— Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Armor *v.* Spalding, 14 Colo. 302, 23 Pac. 789; Townsend *v.* Petersen, 12 Colo. 491, 21 Pac. 619; Bohm *v.* Bohm, 9 Colo. 100, 10 Pac. 790; Whitsett *v.* Kershow, 4 Colo. 419.

Delaware.— Walker *v.* Farmers' Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819.

Illinois.— May *v.* May, 158 Ill. 209, 42 N. E. 56.

Louisiana.— In the absence of written evidence of proof of error or fraud, the court will not hold that an authentic act is a mortgage, where on its face it is an absolute sale. Franklin *v.* Sewall, 110 La. 292, 34 So. 448.

Michigan.— Nickodemus *v.* Nickodemus, 45 Mich. 385, 8 N. W. 86.

Missouri.— Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

Nebraska.— Stall *v.* Jones, 47 Nebr. 706, 66 N. W. 653.

See 35 Cent. Dig. tit. "Mortgages," § 108.

43. Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41; Blake *v.* Taylor, 142 Ill. 482, 32 N. E. 401; Strong *v.* Strong, 126 Ill. 301, 18 N. E. 665; Barber *v.* Lefavour, 176 Pa. St. 331, 35 Atl. 202. *Compare* Bogenschultz *v.* O'Toole, 70 Ark. 253, 67 S. W. 400.

44. McCormick *v.* Herndon, 86 Wis. 449, 56 N. W. 1097.

court might fairly warrant a finding that the presumption arising on the face of the deed had been overcome, as well as the adverse testimony, a judgment declaring the deed a mortgage will not be disturbed on an appeal.[45] The finding of a master on conflicting evidence that a deed absolute on its face was in fact a mortgage is conclusive.[46]

b. Degree of Proof Required. To justify a court in adjudging that a deed which is absolute on its face was intended to operate and shall operate as a mortgage only, the proof to that effect must be clear, consistent, unequivocal, satisfactory, and convincing.[47] If the parties have deliberately chosen to give to the transaction all the forms of a sale of the property, the character of the instrument should not be changed without very clear and strong proof that their intention was contrary to their acts. Slight, indefinite, and inconclusive evidence is not sufficient for this purpose; and while it is not required that the testimony should

45. Hanks *v.* Rhoades, 128 Ill. 404, 21 N. E. 774; Haas *v.* Nanert, 2 N. Y. Suppl. 723.

46. Howard *v.* Scott, 50 Vt. 48.

47. *Alabama.*— Rose *v.* Gandy, 137 Ala. 329, 34 So. 239; Tennessee Coal, etc., Co. *v.* Wheeler, 125 Ala. 538, 28 So. 38; Giddens *v.* Powell, 108 Ala. 621, 19 So. 21; Downing *v.* Woodstock Iron Co., 93 Ala. 262, 9 So. 177; Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352; Knaus *v.* Dreher, 84 Ala. 319, 4 So. 287; Phillips *v.* Croft, 42 Ala. 477; Bryan *v.* Cowart, 21 Ala. 92; Freeman *v.* Baldwin, 13 Ala. 246.

Arizona.— Sullivan *v.* Woods, 5 Ariz. 196, 50 Pac. 113.

Arkansas.— Reynolds *v.* Blanks, (1906) 94 S. W. 694.

California.— Renton *v.* Gibson, 148 Cal. 650, 84 Pac. 186; Emery *v.* Lowe, 140 Cal. 379, 73 Pac. 981; Rawlins *v.* Ferguson, 133 Cal. 470, 65 Pac. 957; De Carrion *v.* De Aguayo, (1901) 65 Pac. 618; Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473; Garwood *v.* Wheaton, 128 Cal. 399, 60 Pac. 961; Blair *v.* Squire, (1899) 59 Pac. 211; Peres *v.* Crocker, (1897) 47 Pac. 928; Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92; Henley *v.* Hotaling, 41 Cal. 22; Hickox *v.* Lowe, 10 Cal. 197.

Colorado.— Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Armor *v.* Spalding, 14 Colo. 302, 23 Pac. 789.

District of Columbia.— Hayward *v.* Mayse, 1 App. Cas. 133.

Florida.— Matthews *v.* Porter, 16 Fla. 466; Chaires *v.* Brady, 10 Fla. 133.

Idaho.— Fountain *v.* Lewiston Nat. Bank, 11 Ida. 451, 83 Pac. 505.

Illinois.— Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763; Gannon *v.* Moles, 209 Ill. 180, 70 N. E. 689; Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Heaton *v.* Gaines, 198 Ill. 479, 64 N. E. 1081; Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206; May *v.* May, 158 Ill. 209, 42 N. E. 56; Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Conant *v.* Riseborough, 139 Ill. 383, 28 N. E. 789; Miller *v.* Green, 138 Ill. 565, 28 N. E. 837; Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; Strong *v.* Strong, 126 Ill. 301, 18 N. E. 665; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Bartling *v.* Brasuhn, 102 Ill. 441; Maher *v.* Farwell, 97 Ill. 56; Clark *v.* Finlon, 90 Ill. 245; Hancock *v.* Harper, 86 Ill. 445; Low *v.* Graff, 80 Ill. 360; Purington *v.* Akhurst, 74 Ill. 490; Magnusson *v.* Johnson, 73 Ill. 156; Smith *v.* Cremer, 71 Ill. 185; Remington *v.* Campbell, 60 Ill. 516; Alwood *v.* Mansfield, 59 Ill. 496; Price *v.* Karnes, 59 Ill. 276; Knockamus *v.* Shepard, 54 Ill. 500; Shays *v.* Norton, 48 Ill. 100; Dwen *v.* Blake, 44 Ill. 135; McCorkle *v.* Richards, 112 Ill. App. 495; Steele *v.* Steele, 112 Ill. App. 409; Rankin *v.* Rankin, 111 Ill. App. 403; Gannon *v.* Moles, 111 Ill. App. 19; Gaines *v.* Heaton, 100 Ill. App. 26; Carpenter *v.* Plagge, 93 Ill. App. 445; Strong *v.* Strong, 27 Ill. App. 148.

Indiana.— Rogers *v.* Beach, 115 Ind. 413, 17 N. E. 609; Stevens *v.* Hays, 8 Ind. 277; Conwell *v.* Evill, 4 Blackf. 67.

Iowa.— McElroy *v.* Allfree, (1906) 108 N. W. 116; Betts *v.* Betts, (1906) 106 N. W. 928; Kelline *v.* Clark, (1906) 106 N. W. 257; Laub *v.* Romans, (1905) 105 N. W. 102; England *v.* England, 94 Iowa 716, 61 N. W. 920; Caldwell *v.* Meltveldt, 93 Iowa 730, 61 N. W. 1090; Langer *v.* Meservey, 80 Iowa 158, 45 N. W. 732; Ensminger *v.* Ensminger, 75 Iowa 89, 39 N. W. 208, 9 Am. St. Rep. 462; Corliss *v.* Conable, 74 Iowa 58, 36 N. W. 891; Knight *v.* McCord, 63 Iowa 429, 19 N. W. 310; Kibby *v.* Harsh, 61 Iowa 196, 16 N. W. 85; Boomer *v.* Stone, 38 Iowa 685; Sinclair *v.* Walker, 38 Iowa 575; Hyatt *v.* Cochran, 37 Iowa 309; Gardner *v.* Weston, 18 Iowa 533; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Kansas.— Winston *v.* Burnell, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289.

Kentucky.— Stapp *v.* Phelps, 7 Dana 296.

Louisiana.— Franklin *v.* Sewall, 110 La. 292, 34 So. 448.

Maryland.— Watkins *v.* Stockett, 6 Harr. & J. 435. And see Miller *v.* Miller, 101 Md. 600, 61 Atl. 210; Day *v.* Davis, 101 Md. 259, 61 Atl. 576.

Massachusetts. — Crowell *v.* Keene, 159 Mass. 352, 34 N. E. 405.

Michigan.— Dean *v.* Radford, 137 Mich. 617, 101 N. W. 598; Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381; Etheridge *v.* Wisner, 86 Mich. 166, 48 N. W. 1087; Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265; Gunderman *v.* Gunnison, 39 Mich. 313.

Minnesota.—Dwyer Pine Land Co. *v.* White-

be all one way, yet in case of conflict the balance should incline very markedly

man, 92 Minn. 55, 99 N. W. 362; Philips *v.* Missouri, 91 Minn. 311, 97 N. W. 969; Evans *v.* Thompson, 89 Minn. 202, 94 N. W. 692; Sloan *v.* Becker, 34 Minn. 491, 26 N. W. 730. Equity will not convert a deed absolute on its face into a mortgage on mere conjecture or unsubstantial evidence. Minneapolis Threshing Mach. Co. *v.* Jones, 95 Minn. 127, 103 N. W. 1017. The evidence to show that an absolute deed was in fact a mortgage must be clear and positive, but need not amount to proof beyond a reasonable doubt. Stitt *v.* Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561.

Missouri.— Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118; Bobb *v.* Wolff, 148 Mo. 335, 49 S. W. 996; Book *v.* Beasly, 138 Mo. 455, 40 S. W. 101; Quick *v.* Turner, 26 Mo. App. 29.

Nebraska.— Wilde *v.* Homan, 58 Nebr. 634, 79 N. W. 546; Newman *v.* Edwards, 22 Nebr. 248, 34 N. W. 382; Fahay *v.* State Bank, 1 Nebr. (Unoff.) 89, 95 N. W. 505. And see Falkner *v.* Powell, (1904) 100 N. W. 937.

Nevada.— Pierce *v.* Traver, 13 Nev. 526; Bingham *v.* Thompson, 4 Nev. 224.

New Jersey.— Condit *v.* Tichenor, 19 N. J. Eq. 43. And see Wilson *v.* Terry, (Ch. 1905) 62 Atl. 310.

New York.— *In re* Holmes, 176 N. Y. 603, 68 N. E. 1118; Farmers', etc., Bank *v.* Smith, 61 N. Y. App. Div. 315, 70 N. Y. Suppl. 536; Barton *v.* Lynch, 69 Hun 1, 23 N. Y. Suppl. 217; Shattuck *v.* Bascom, 55 Hun 14, 9 N. Y. Suppl. 934; Erwin *v.* Curtis, 43 Hun 292 [*affirmed* in 112 N. Y. 600, 20 N. E. 412]; Sidway *v.* Sidway, 4 Silv. Sup. 124, 7 N. Y. Suppl. 421; Faulkner *v.* Cody, 45 Misc. 64, 91 N. Y. Suppl. 633; Clifford *v.* Gates, 23 N. Y. Suppl. 1085; Ensign *v.* Ensign, 14 N Y. St. 181 [*affirmed* in 120 N. Y. 655, 24 N. E. 942]; Coburn *v.* Anderson, 62 How. Pr. 268. These decisions must be taken as discrediting certain earlier rulings in New York to the effect that there is no fixed rule, nor any certain standard, as to the evidence necessary to prove a deed a mortgage; and that it is sufficient if the evidence clearly shows the fact alleged and rebuts the presumption arising from the face of the deed. See Haas *v.* Nanert, 2 N. Y. Suppl. 723; Miller *v.* McGuckin, 15 Abb. N. Cas. 204; Marks *v.* Pell, 1 Johns. Ch. 594.

North Carolina.— Egerton *v.* Jones, 107 N. C. 284, 12 S. E. 434; Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 401; McNair *v.* Pope, 100 N. C. 404, 6 S. E. 234; Smiley *v.* Pearce, 98 N. C. 185, 3 S. E. 631; Williams *v.* Hodges, 95 N. C. 32; Leggett *v.* Leggett, 88 N. C. 108; Moore *v.* Ivey, 43 N. C. 192; Lewis *v.* Owen, 36 N. C. 290.

North Dakota.— Patnode *v.* Deschenes, (1906) 106 N. W. 573; Wells *v.* Geyer, 12 N D. 316, 96 N. W. 289; Forester *v.* Van Auken, 12 N. D 175, 96 N. W. 301; Little *v.* Braun, 11 N. D. 410 92 N. W. 800; McGuin *v.* Lee, 10 N. D. 160, 86 N. W. 714.

Ohio.— Stall *v.* Cincinnati, 16 Ohio St. 169.

Oregon.— Baer *v.* Ballingall, 37 Oreg. 416, 61 Pac. 852; Osgood *v.* Osgood, 35 Oreg. 1, 56 Pac. 1017; Albany, etc., Water Ditch Co. *v.* Crawford, 11 Oreg. 243, 4 Pac. 113.

Pennsylvania.— Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868; Fisher *v.* Witham, 132 Pa. St. 488, 19 Atl. 276; Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67; Lance's Appeal 112 Pa. St. 456, 4 Atl. 375; Null *v.* Fries, 110 Pa. St. 521, 1 Atl. 551; Todd *v.* Campbell, 32 Pa. St. 250; Guckavan *v.* Kenney, 4 Kulp 411.

South Carolina.— Miller *v.* Price, 66 S. C. 85, 44 S. E. 584; Arnold *v.* Mattison, 3 Rich. Eq. 153.

South Dakota.— Larson *v.* Dutiel, 14 S. D. 476, 85 N. W. 1006; Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687. And see Jones *v.* Jones, (1906) 108 N. W. 23.

Tennessee.— Haynes *v.* Swann, 6 Heisk. 560; Spicer *v.* Johnson, (Ch. App. 1901) 61 S. W. 1041; Blair *v.* McMillan, (Ch. App. 1900) 59 S. W. 788; Maney *v.* Morris, (Ch. App. 1900) 57 S. W. 442.

Virginia.— Holladay *v.* Willis, 101 Va. 274, 43 S. E. 616.

Washington.— Reynolds *v.* Reynolds, 42 Wash. 107, 84 Pac. 579.

West Virginia.— Way *v.* Mayhugh, 57 W. Va. 175, 50 S. E. 724; Vangilder *v.* Hoffman, 22 W. Va. 1; Troll *v.* Carter, 15 W. Va. 567. But *compare* Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371, holding that if, on the parol evidence, it is doubtful whether the conveyance should be regarded by a court of equity as an absolute deed or as a mortgage, the court will incline to hold it to be a mortgage.

Wisconsin.— Allen *v.* Ellis, 125 Wis. 565, 104 N. W. 739; Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303; Schriber *v.* Le Claire, 66 Wis. 579, 29 N. W. 570, 889; Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479; McClellan *v.* Sanford, 26 Wis. 595; Kent *v.* Lasley, 24 Wis. 654.

United States.—Cadman *v.* Peter, 118 U. S. 73, 6 S. Ct. 957, 30 L. ed. 78; Coyle *v.* Davis, 116 U. S. 108, 6 S. Ct. 314, 29 L. ed. 583; Howland *v.* Blake, 97 U. S. 624, 24 L. ed. 1027 [*affirming* 12 Fed. Cas. No. 6,792, 7 Biss. 40]; Satterfield *v.* Malone, 35 Fed. 445, 1 L. R. A. 35; Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516.

Canada.— McMicken *v.* Ontario Bank, 20 Can. Sup. Ct. 548; Sampson *v.* McArthur, 8 Grant Ch. (U. C.) 72.

See 35 Cent. Dig. tit. "Mortgages," § 109.

In Georgia it has been held that, on a bill in equity alleging the complainant's deed, absolute in form, to have been intended as a mortgage, and praying a decree for reconveyance, an instruction that he must show the principal point in dispute by "clear and conclusive" proof, where defendant denies the right claimed, is erroneous. De Laigle *v.* Denham, 65 Ga. 482.

in favor of the contestant claiming the deed to be a mortgage.[48] Indeed several cases have gone so far as to hold that the evidence must establish this fact beyond a reasonable doubt.[49] But where it is admitted or shown by a separate written instrument that a transaction claimed to be an absolute conveyance was not an unconditional sale, as the deed imports, but either a mortgage or a sale with a right to repurchase, it is said that a less degree of proof will be required to show the former than the latter, as the court will favor the construction of the deed as a mortgage.[50]

c. Number of Witnesses. As a general rule the testimony of a single witness not corroborated by circumstances, whether that witness be the grantor or another, is not sufficient to convert an absolute deed into a mortgage, where the allegation in that behalf is positively denied by the pleadings of the opposite party.[51] But there is also authority for the proposition that the evidence of one of the parties

In Texas it has been held that a mere preponderance of the evidence is sufficient to warrant a finding that the deed was intended as a mortgage, and that it is error to instruct the jury that the evidence must "clearly" show the fact in dispute, or to require "clear and convincing proof" or "clear and satisfactory" evidence, because this is exacting a higher degree of proof than the law requires in such cases. Wallace *v.* Berry, 83 Tex. 328, 18 S. W. 595; Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206; Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252. *Compare* Gazley *v.* Herring, (Tex. 1891) 17 S. W. 17; Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038.

Written admission by grantee.— On a bill filed to have a deed absolute on its face declared a mortgage, a writing executed by the grantee several months after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that, if the latter repaid to him by a specified day the amount of the consideration money expressed in the deed, then he would reconvey to him all the property therein mentioned, and binding himself to reconvey accordingly, is evidence of the highest character against the grantee; and, although it may not be sufficient of itself to show that the parties intended the deed to operate as a mortgage, yet if the other evidence in the case, taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage. Locke *v.* Palmer, 26 Ala. 312.

On redemption from foreclosure.— While evidence to show that a deed absolute in form was intended as a mortgage must be clear and convincing, the same degree of proof is not required to show that one who redeemed from a foreclosure sale held the land only as security for the payment to him by the mortgagor of the amount required to redeem, and occupied the position of mortgagee. Wilson *v.* McWilliams, 17 S. D. 96, 91 N. W. 453.

48. May *v.* May, 158 Ill. 209, 42 N. E. 56; Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; Howland *v.* Blake, 12 Fed. Cas. No. 6,792, 7 Biss. 40 [*affirmed* in 97 U. S. 624, 24 L. ed. 1027].

49. *Colorado.*— Townsend *v.* Petersen, 12 Colo. 491, 21 Pac. 619.

Michigan.— Tilden *v.* Streeter, 45 Mich. 533, 540, 8 N. W. 502, where it is said that there must be "evidence clear and convincing beyond a reasonable douht."

Missouri.— Worley *v.* Dryden, 57 Mo. 226. In order to show that a deed absolute in form was intended to be a mortgage the evidence must be satisfactory as to its credibility, unequivocal as to its terms and meaning, and clear and convincing beyond a reasonable doubt. Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

New York.— Farmers', etc., Bank *v.* Smith, 61 N. Y. App. Div. 315, 70 N. Y. Suppl. 536.

Pennsylvania.— Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375. Where it is attempted to be shown by parol evidence that an absolute deed is a mortgage, the court and jury exercise the functions of a chancellor, and the evidence should be such as would satisfy his conscience. McGinity *v.* McGinity, 63 Pa. St. 38.

United States.— Satterfield *v.* Malone, 35 Fed. 445, 1 L. R. A. 35.

See 35 Cent. Dig. tit. "Mortgages," § 109.

50. Cosby *v.* Buchanan, 81 Ala. 574, 1 So. 898; Mitchell *v.* Wellman, 80 Ala. 16.

51. Hubbard *v.* Stetson, 3 MacArthur (D. C.) 113; Blake *v.* Taylor, 142 Ill. 482, 32 N. E. 401; Arnold *v.* Mattison, 3 Rich. Eq. (S. C.) 153; Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038; Hamilton *v.* Flume, 2 Tex. Unrep. Cas. 694. And see Beckett *v.* Allison, 188 Pa. St. 279, 314, 41 Atl. 623, 117, holding that a parol agreement that an absolute conveyance should be a mortgage cannot be established by the testimony of a single witness, who would know, he being contradicted by three witnesses, and the attendant circumstances consistent with his claim being just as consistent with an arrangement claimed by the others to have been made. *Compare* Pierce *v.* Fort, 60 Tex. 464.

Two witnesses.— A deed absolute in form may be shown to have been really a mortgage by the oral testimony of two witnesses against the denials of the answer, where those denials are not satisfactory in them-

to the transaction is sufficient, if very clear and decisive, particularly if not positively contradicted by the testimony of the other.[52]

d. Declarations of Parties. Mere verbal declarations of the parties are not in general sufficient to authorize a court to declare that a deed absolute on its face is a mortgage, but corroborating facts and circumstances are necessary.[53] Thus, declarations of the grantee in regard to the character of the conveyance, or in regard to his intentions as to the property, are to be received with great caution, are not entitled to much weight, and should not be permitted to control where there are circumstances raising a contrary presumption.[54] On the other hand the grantor's admission that the instrument in dispute is an absolute deed is very strong evidence of that fact,[55] although his casual statement that it was intended only as a mortgage is not by itself sufficient to warrant a court in so holding at the instance of a creditor.[56]

5. Questions For Jury. If the question whether a given transaction amounts to a mortgage or to a conditional or absolute sale depends on written instruments alone, as, on the legal effect of a deed with a contract or bond for reconveyance, it is a question of law for the court.[57] But if extraneous evidence is required and received, for the purpose of ascertaining the real intention of the parties, the question becomes one of mixed law and fact, and the issue should be submitted to the jury, under proper instructions from the court as to the effect in law of the written documents in the case.[58] It has been held that, unless the testimony offered to convert a deed absolute in form into a mortgage by a parol defeasance is clear, precise, and indubitable, the question should not be submitted to the

selves, and are accompanied with admissions that some confidential relations existed between the parties, not consistent with the terms of the deed. Babcock *v.* Wyman, 19 How. (U. S.) 289, 15 L. ed. 644 [*affirming* 30 Fed. Cas. No. 18,113, 2 Curt. 386].

Corroborating circumstances.— An answer under oath was filed to a bill to redeem, denying the transaction to be a mortgage. It was held that the testimony of a single witness that the money was advanced by the grantee in the deed to relieve the grantor from his embarrassments, taken in connection with the facts that the bond to reconvey was executed at the same time that the deed was passed, and that it stipulated that the grantee should not pay rent, the grantor not paying interest on the sum advanced, was sufficient to establish a mortgage. Preschbaker *v.* Feaman, 32 Ill. 475.

52. Lipscomb *v.* Jack, (Miss. 1896) 20 So. 883.

Uncontradicted witness.— Where defendant explicitly testifies that a deed received by him from plaintiff was intended as a mortgage, and plaintiff does not contradict such testimony, a finding in accordance therewith is justified. Banta *v.* Wise, 135 Cal. 277, 67 Pac. 129.

53. Kelly *v.* Bryan, 41 N. C. 283; Todd *v.* Campbell, 32 Pa. St. 250.

54. *Illinois.*— Lindauer *v.* Cummings, 57 Ill. 195.

Indiana.— Conwell *v.* Evill, 4 Blackf. 67; Gilly *v.* Breckenridge, 2 Blackf. 100.

North Carolina.—Allen *v.* McRae, 39 N. C. 325.

Pennsylvania.—De France *v.* De France, 34 Pa. St. 385.

United States.— Howland *v.* Blake, 12 Fed. Cas. No. 6,792, 7 Biss. 40 [*affirmed* in 97 U. S. 624, 24 L. ed. 1027].

See 35 Cent. Dig. tit. "Mortgages," § 111.

55. Hartnett *v.* Ball, 22 Ill. 43. And see Braun *v.* Vollmer, 89 N. Y. App. Div. 43, 85 N. Y. Suppl. 319; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303.

56. Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

57. Kieth *v.* Catchings, 64 Ga. 773; Smith *v.* Jones, 35 N. C. 442; Beale *v.* Ryan, 40 Tex. 399; Boatright *v.* Peck, 33 Tex. 68; Carter *v.* Carter, 5 Tex. 93; Munro *v.* Watson, 8 Grant Ch. (U. C.) 60.

58. *Minnesota.*— Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

Mississippi.— Culp *v.* Wooten, 79 Miss. 503, 31 So. 1.

New York.— Morris *v.* Budlong, 78 N. Y. 543; Brown *v.* Clifford, 7 Lans. 46.

Pennsylvania.— McClurkan *v.* Thompson, 69 Pa. St. 305.

Texas.— Ullman *v.* Jasper, 70 Tex. 446, 7 S. W. 763; Alstin *v.* Cundiff, 52 Tex. 453; Bradford *v.* Malone, 33 Tex. Civ. App. 349, 77 S. W. 22.

Vermont.— Bemis *v.* Phelps, 41 Vt. 1.

See 35 Cent. Dig. tit. "Mortgages," § 112.

See, however, Fridley *v.* Somerville, (W. Va. 1906) 54 S. E. 502.

Applications of rule.— It appeared that defendant had conveyed land to plaintiff by a deed absolute in form, and plaintiff at the same time executed an agreement to reconvey upon the payment of a specified sum of money by a given day. In addition, evidence was introduced showing that the consideration for the deed was not adequate, that there was no mention of a debt in either instrument, that no evidence of an indebtedness

jury.[59] But according to other decisions if there is any evidence in the case from which the jury might legitimately infer an intention of the parties to create a mortgage, it should be submitted to them, under proper instructions as to the weight of evidence required for such purpose.[60]

E. Rights of Parties — 1. Rights of Grantor — a. In General. When it is established that a deed absolute in form was in fact intended as a mortgage, the relative right of the parties will be determined by the law governing the relations of mortgagor and mortgagee.[61] The grantor will have the right to redeem, by paying the amount intended to be secured, with interest, and may claim this right at any time before his equity is cut off by a foreclosure or other proper proceedings, and even after the time fixed in the deed as the day for payment, and notwithstanding the conveyance contains a clause of forfeiture for non-payment at such time.[62] He may also sell and convey or mortgage his equity of redemption; and subsequent purchasers or encumbrancers will be entitled to redeem from the deed.[63] In the absence of an agreement between the parties in regard to possession of the premises, it has been held in some jurisdictions that the grantor is not entitled to hold the possession against the demand of the grantee; for an absolute deed, although intended as a security, differs from an ordinary mortgage in this particular, and must be regarded as vesting both the legal title and the right of possession in the grantee.[64] The grantee, like any mortgagee in possession,

was included in the transaction, and that two days afterward defendant accepted a lease of the same premises from plaintiff. It was held that the instruments did not, as a matter of law, constitute a mortgage, and that their effect was a question for the jury upon all the evidence in the case. Bogk *v.* Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. ed. 631. So it was held that there was no error where the court charged that a deed absolute in form from H to G, and the bond to reconvey, reciting that the debt was extinguished by the conveyance, must be construed together; and that, when so construed, the instruments showed on their face a conditional sale, but left it to the jury to decide whether, upon all the evidence, these instruments were intended as a mortgage to secure a preëxisting debt. Howard *v.* Kopperl, 74 Tex. 494, 5 S. W. 627. And where the grantor in a deed, absolute on its face, but intended to be a mortgage, afterward made a warranty deed of the property to the original grantee, who executed a cancellation of the debt and also a contract for reconveyance to the grantor on the payment of the amount of the debt within one year, it was held to be error, in an action to declare the warranty deed a mortgage, to direct a verdict for plaintiff, as the question of the intention of the parties was for the jury. Kunert *v.* Strong, 103 Wis. 70, 79 N. W. 32.

Where a third person advances money for the purchase of property at judicial sale, or for redemption from such sale, and takes a conveyance directly to himself, the question whether the transaction was meant as a loan, the title to be held as security therefor, or as a sale of the property, is for the jury. Henderson *v.* Irvine, 1 Am. L. J. (Pa.) 269; Braddock *v.* Derisley, 1 F. & F. 60.

Where a deed is introduced to show chain of title in fee, and there is cause for doubt whether it was intended to operate as a conditional sale or a mortgage, it is proper to admit it in evidence, and leave it to the jury, under all the circumstances, to say whether it was intended to be a conditional sale or a mortgage. Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306.

59. Munger *v.* Casey, (Pa. 1889) 17 Atl. 36; Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67; Baisch *v.* Oakeley, 68 Pa. St. 92; Rhines *v.* Baird, 41 Pa. St. 256.

60. Tappen *v.* Eshelman, 164 Ind. 338, 73 N. E. 688; Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509; Reich *v.* Dyer, 180 N. Y. 107, 72 N. E. 922; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303.

61. Carr *v.* Carr, 52 N. Y. 251; Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810.

62. *Georgia.*— Carter *v.* Gunn, 64 Ga. 651; Allen *v.* Frost, 62 Ga. 659; Phinizy *v.* Clark, 62 Ga. 623; West *v.* Bennett, 59 Ga. 507.

Illinois.— Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Roberts *v.* Richards, 36 Ill. 339; Keithley *v.* Wood, 47 Ill. App. 102 [*affirmed* in 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265].

Maryland.— Thompson *v.* Banks, 3 Md. Ch. 138.

Oklahoma.— Balduff *v.* Griswold, 9 Okla. 438, 60 Pac. 223.

England.— England *v.* Codrington, 1 Eden 169, 28 Eng. Reprint 649.

Canada.— Kerr *v.* Murray, 6 Grant Ch. (U. C.) 343.

See 35 Cent. Dig. tit. "Mortgages," § 60. And see *infra*, VIII, H, 1.

63. Hillock *v.* Frizzle, 10 N. Brunsw. 655; O'Reilly *v.* Wilkes, 8 Can. L. J. 135. And see Moore *v.* Universal Elevator Co., 122 Mich. 48, 80 N. W. 1015.

64. Richards *v.* Crawford, 50 Iowa 494; Burdick *v.* Wentworth, 42 Iowa 440; Jeffery *v.* Hursh, 42 Mich. 563, 4 N. W. 303; Bennett *v.* Robinson, 27 Mich. 26. *Contra*, Le Comte *v.* Pennock, 61 Kan. 330, 59 Pac.

must account to the grantor for the rents and profits of the property.[65] And on payment of the debt, or full satisfaction of the other conditions intended to be secured, the grantor will be entitled to a reconveyance of the estate from the grantee.[66]

b. Suit to Declare Deed a Mortgage. If the grantee refuses to recognize the instrument as a mortgage, claiming it to be an absolute sale and conveyance to himself, and therefore declines to receive payment of the debt, or performance of the other conditions, by way of redemption, the remedy of the grantor is by bill in equity, praying that the deed shall be decreed to be a mortgage, and that he may be allowed to redeem from the same, and the grantee ordered to reconvey to him on such redemption being made.[67] And the costs of such suit properly fall upon the grantee, who wrongfully refuses to recognize the conveyance as a mortgage.[68] But since it is only by the aid of equity that the grantor in such an instrument can show that it was intended as a mortgage, he becomes subject to the rule that "he who seeks equity must do equity"; and hence he must fulfil, or offer to fulfil, all the obligations which would rest upon him as a mortgagor.[69]

641; Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939; Murray *v.* Walker, 31 N. Y. 399. And see *infra*, XV, B, 1, e.

In Indiana it has been held that while the holder of an absolute deed to land has *prima facie* a right to the possession of the property, yet it is a good defense to an action to enforce such right that the instrument is merely a mortgage made to secure a debt or a loan to defendant. Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5.

65. Haworth *v.* Taylor, 108 Ill. 275; Tedens *v.* Clark, 24 Ill. App. 510; Fultz *v.* Peterson, 78 Miss. 128, 28 So. 829.

66. Farris *v.* King, 27 Ark. 404.

Interest to be reconveyed.— When a mortgage is given in the form of an absolute deed, with a separate clause of defeasance reciting that the legal title will be reconveyed on payment of the debt secured, the mortgagor, or those claiming under him, can require no more than a reconveyance of the interest originally conveyed by the mortgage. Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200.

Reconveyance unnecessary.— Where a deed absolute in form has been given, which was really intended as a mortgage, and the condition has been duly performed, a reconveyance by the grantee to the grantor is not necessary to reinvest the latter with the absolute title; it is necessary only to clear up the record title. Shattuck *v.* Bascom, 105 N. Y. 39, 12 N. E. 283.

What constitutes satisfaction.— Title will not be divested out of one to whom land has been conveyed by absolute deed, as security, until not only the particular amount intended to be secured, but other amounts due to the grantee from the grantor, shall have been paid. Saunders *v.* Savage, (Tenn. Ch. App. 1900) 63 S. W. 218.

Ejectment by grantee enjoined.— When the conditions secured by such a deed have been duly and fully performed, an action of ejectment brought by the grantee, claiming under the deed, may be enjoined. Cayley *v.* McDonald, 14 Grant Ch. (U. C.) 540.

67. Micou *v.* Ashurst, 55 Ala. 607, holding that a court of equity will not entertain a bill for the sole purpose of ascertaining whether the relation of mortgagor and mortgagee exists, but only when it can afford full relief.

Reformation of deed unnecessary.— Since a deed absolute, given to secure the payment of a debt, is in effect a mortgage, it is not necessary to ask a reformation thereof before filing a bill to redeem therefrom. Rogan *v.* Walker, 1 Wis. 527.

Specific performance.— Where land is conveyed by deed absolute in form, but intended as a mortgage, although the grantee, by a defeasance, agrees to convey the title to the grantor on payment of the debt, a bill for specific performance will not lie, since, by a decree for plaintiff thereon, he would not obtain the title which defendant agreed to convey. Adair *v.* Adair, 22 Oreg. 115, 29 Pac. 193.

No bill when right to foreclose barred.— A bill to have a deed absolute on its face declared a mortgage will not lie after the right to foreclose is barred by the statute of limitations, since the right to redeem and the right to foreclose are reciprocal. Green *v.* Capps, 142 Ill. 286, 31 N. E. 597.

Decree need not provide for foreclosure.— It is no objection to a decree on a bill to declare a deed a mortgage that it does so without making provision for foreclosure in case of default. Roelofs *v.* Wever, 119 Mich. 334, 78 N. W. 136.

Where it is not necessary to reform a deed, the fact that it is in legal effect a mortgage may be shown in an action at law. Barchent *v.* Snyder, 128 Wis. 423, 107 N. W. 329.

68. Spicer *v.* Johnson, (Tenn. Ch. App. 1901) 61 S. W. 1041; Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539, 29 N. W. 559.

69. Cowing *v.* Rogers, 34 Cal. 648; Heacock *v.* Swartwout, 28 Ill. 291.

Decree for payment of sum due by a time certain erroneous.— Where an absolute deed was held to be a mortgage, in a suit brought for that purpose, a judgment cutting off the mortgagor's equity, unless he paid the sum found due by a time certain, is erroneous, since title remains in the mortgagor until

But it is not considered necessary, to entitle him to relief, that he should include in his bill a tender or offer to pay the money admitted to be due, or which may be found to be due on an accounting.[70]

c. Loss or Relinquishment of Equity of Redemption. A party who has the right to treat a deed absolute on its face as a mortgage, and to redeem from it, must be reasonably prompt in asserting such right. Very long delay, amounting to gross laches on his part, will defeat his right of redemption, especially if interests of third persons have intervened, or if the grantee has been allowed to deal with the property in such manner that a redemption would seriously prejudice him.[71] Further, although the deed may amount in equity to a mere mortgage, yet afterward, if the parties both agree thereto, it may lose its character as an equitable mortgage, and become what it purports to be, an unconditional conveyance.[72]

2. Creditors of Grantor. The conveyance of an estate by an absolute deed, although accompanied by an agreement for reconveyance or other form of defeasance, leaves the grantor, at law, without any interest in the land; he has nothing but an equity to redeem on performing the conditions of the agreement; and this equity is not an estate in the land to which the lien of a judgment can attach, and it cannot be sold on an execution at law against him.[73] But the right to show that the deed was in fact intended as a mortgage may be claimed in equity by creditors of the grantor, for the purpose of rendering the equity of redemption

divested by foreclosure and sale. Byrne *v.* Hudson, 127 Cal. 254, 59 Pac. 597. But *compare* Decker *v.* Patton, 120 Ill. 464, 11 N. E. 897.

70. Taylor *v.* Dillenburg, 168 Ill. 235, 48 N. E. 41; Dwen *v.* Blake, 44 Ill. 135; Barnard *v.* Cushman, 35 Ill. 451; Brown *v.* Follette, 155 Ind. 316, 58 N. E. 197; Marvin *v.* Prentice, 49 How. Pr. (N. Y.) 385. *Compare* Bone *v.* Lansden, 85 Ala. 562, 6 So. 611.

71. King *v.* Wilder, 75 Ill. 275.

What constitutes laches.— Where a bill to redeem from a deed, absolute in form but claimed to have been intended as a mortgage, is not filed until thirteen years after the date of the transaction, and more than seven years after the grantee had distinctly refused to recognize the rights claimed by the complaint, and no sufficient excuse is offered for the delay, complainant's right to relief will be barred by his laches. Maher *v.* Farwell, 97 Ill. 56. And where the grantor in such a deed, during the six years following his conveyance, paid no taxes on the land, nor set up any claim to its ownership, but encouraged third persons to buy the property, and allowed them to make improvements thereon without any protest, it was held too late for him to seek the aid of equity in establishing the claim that the deed was only meant as a mortgage. Schradski *v.* Albright, 93 Mo. 42, 5 S. W. 807. And even a delay of one year was considered enough to defeat the grantor's action for redemption, where his only competent evidence merely showed that he had been allowed to retain the possession after the conveyance, and where he had allowed valuable improvements to be made on the premises by the occupant and apparent owner, and he presented no reasonable excuse for the delay. Buffum *v.* Porter, 70 Mich. 623, 38 N. W. 600.

Time fixed by statute of limitations.— It has been broadly stated that, where one loans money to another and takes an absolute deed of property for his security, the title is held in trust for the borrower; and no lapse of time short of that fixed by the statute of limitations can bar or forfeit the right of redemption in the borrower or defeat his interest. Coates *v.* Woodworth, 13 Ill. 654. But if there is such a change in the relations of the parties or in the subject-matter of the suit as to make it inequitable to grant the relief, or if the delay is so great in asserting the right to redeem as to justify the presumption that such right has been abandoned, relief will be denied in equity without reference to any statutory period. Turner *v.* Littlefield, 46 Ill. App. 169 [*affirmed* in 142 Ill. 630, 32 N. E. 522].

72. Carpenter *v.* Carpenter, 70 Ill. 457; Richmond *v.* Richmond, 20 Fed. Cas. No. 11,801.

Technical conveyance of mortgagor's estate unnecessary.— It is not essential to the proper extinguishment of the right of redemption, by an arrangement between the parties themselves, that it should be done by an instrument which will operate as a technical conveyance of the mortgagor's estate in the land. If such transactions have occurred between the parties as would render it inequitable that the grantor should be permitted to redeem, that of itself, without a technical release, will operate as a cancellation of the agreement for defeasance, or instrument of defeasance, and give to the deed the effect of an original, absolute conveyance as between the parties. West *v.* Reed, 55 Ill. 242.

73. Loring *v.* Melendy, 11 Ohio 355; Baird *v.* Kirtland, 8 Ohio 21; McCabe *v.* Thompson, 6 Grant Ch. (U. C.) 175; McDonald *v.* Mc-

available as assets for the satisfaction of their demands.[74] It has been held that one who takes a mortgage in the form of an absolute deed must, if questioned by a creditor of the mortgagor, or by any other person having an interest in knowing the fact, carefully and truly disclose the true nature of his security. An untruthful statement touching a material fact in relation to such security, or a failure to make a full and true disclosure when required, will postpone such security to that of a subsequent attaching creditor.[75] Moreover, such a conveyance, although valid between the parties, may work such a fraud upon other creditors of the grantor, by putting his property beyond their reach or hindering them in the collection of their claims, as to be voidable at their instance.[76] But where a deed is made with a fraudulent purpose as toward creditors, the right to avoid it will be confined to the creditors. Equity will give no aid to the grantor himself, but will refuse to declare the deed a mortgage at his instance and give him a right of redemption.[77]

3. RIGHTS OF GRANTEE. Where land is conveyed by an absolute deed, although intended as a security, the entire legal title vests in the grantee, and no action on his part is required to divest the grantor of his equitable right to redeem.[78] But the right to come into a court of equity for the purpose of having the deed declared a mortgage belongs to the grantee no less than to the grantor.[79] The grantee may maintain an action for the foreclosure of the deed in the character of a mortgage.[80] And it is immaterial that the conveyance was recorded as a deed rather than as a mortgage.[81]

4. PURCHASERS FROM GRANTEE. Where an absolute conveyance of lands is designed as a mortgage, it will retain its character in the hands of each subse-

Donell, 2 Grant Err. & App. (U. C.) 393. See, however, Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068, holding that land held by an absolute deed as security for a debt is liable to a judgment against the grantee, and it is immaterial whether or not the judgment creditor gave credit on the faith of the property so held.

74. De Wolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 371; Allen *v.* Kemp, 29 Iowa 452; Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997; Milwaukee Manufacturers' Bank *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

The grantee cannot be compelled by other creditors of the grantor to treat it as a deed, in the absence of circumstances creating an estoppel. Andrus *v.* Burke, 61 N. J. Eq. 297, 48 Atl. 228.

75. Geary *v.* Porter, 17 Oreg. 465, 21 Pac. 442.

76. Fuller, etc., Co. *v.* Gaul, 85 Ill. App. 500 [*affirmed* in 185 Ill. 43, 56 N. E. 1077]. And see Lynch *v.* Raleigh, 3 Ind. 273. See FRAUDULENT CONVEYANCES, 20 Cyc. 566 *et seq.*

77. Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401; Patnode *v.* Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095. And see Mundell *v.* Tinkis, 6 Ont. 625. But *compare* Livingston *v.* Ives, 35 Minn. 55, 27 N. W. 74.

Fraud induced by grantee.— Where a person conveys all his real estate to his legal adviser, for the purpose of placing it beyond the reach of his creditors as well as to secure a debt due to the grantee, and is induced to do so by the advice and artifice of the grantee, equity will not refuse to treat the deed as a mortgage, but will allow the grantor to redeem, notwithstanding the fraud attending the transaction, since the parties are not *in pari delicto*. Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221.

78. Smith *v.* Murphy, 58 Ala. 630; Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650; West *v.* Frederick, 62 Ill. 191; Brophy Min. Co. *v.* Brophy, etc., Gold, etc., Min. Co., 15 Nev. 101. But *compare* Moisant *v.* McPhee, 92 Cal. 76, 28 Pac 46; Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549 (holding that where the evidence in ejectment shows that the deed under which plaintiff claims, although absolute on its face, was in fact given to secure a debt, and is therefore merely a mortgage, he has failed to show either title or right of possession); Jackson *v.* Lodge, 36 Cal. 28; State First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

79. Bryan *v.* Cowart, 21 Ala. 92; Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230; McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737, holding that a deed absolute on its face may be declared a mortgage at the instance of the grantee's executors.

Waste.— The grantee in such a deed is entitled to restrain the grantor, by injunction or other proper action, from cutting timber or committing waste upon the premises in such a manner as to impair the value of the security or render it inadequate to protect the debt. Starks *v.* Redfield, 52 Wis. 349, 9 N. W. 168.

80. Reid *v.* McMillan, 189 Ill. 411, 59 N. E. 948; Herron *v.* Herron, 91 Ind. 278; Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810.

81. Scobey *v.* Kinningham, 131 Ind. 552, 31 N. E. 355; Kemper *v.* Campbell, 44 Ohio St. 210, 6 N. E. 566.

quent purchaser who takes the property with notice of the rights of the parties; and therefore if a purchaser from the original grantee had knowledge of the nature of the original transaction, or knowledge of facts sufficient to put him upon inquiry, he cannot claim to be the unconditional owner of the estate, but the mortgagor will have the same right to redeem from him as from the original grantee.[82] But where a third person has in good faith purchased the property from the grantee in the original deed, for a valuable consideration, relying on the apparently perfect legal title of his vendor, and without any notice, actual or constructive, of the agreement or understanding between the original parties, he takes an indefeasible title, and as against him the original grantor has no right of redemption.[83] Where a third person thus acquires an irredeemable title to the land, the remedy of the original grantor is by action against his grantee, for a breach of his legal duty by the latter, in dealing as absolute owner with property which was only conveyed to him by way of pledge.[84]

F. Grounds of Equity Jurisdiction. According to the earlier doctrine prevailing both in England and America, it was held that a party applying to chancery for the relief implied in turning an absolute deed into a mortgage must

82. Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Smith *v.* Knoebel, 82 Ill. 392; Shaver *v.* Woodward, 28 Ill. 277; Brown *v.* Gaffney, 28 Ill. 149; Howat *v.* Howat, 101 Ill. App. 158; Hurst *v.* Beaver, 50 Mich. 612, 16 N. W. 165; Eiseman *v.* Gallagher, 24 Nebr. 79, 37 N. W. 941; Rose *v.* Peterkin, 13 Can. Sup. Ct. 677 [*affirming* 9 Ont. App. 429]; Knolan *v.* Dunn, Russ. Eq. Cas. (Nova Scotia) 504.

Fraudulent concealment by grantor.— One who deeds his property as security for a debt, receiving a contract from the grantee to reconvey upon payment, and who afterward makes an assignment for the benefit of his creditors, but fails to schedule the equity of redemption as assets, is not barred from asserting such equity as against a subsequent purchaser with notice, even though his purpose was to defraud creditors. Over *v.* Carolus, 171 Ill. 552, 49 N. E. 514.

Purchaser as assignee of mortgage.—Where one having notice that an absolute deed is only a mortgage to secure a debt procures a deed from the mortgagee, he will occupy the position of an assignee of the mortgage, and his title will not be subjected, on creditors' bill, to the payment of a judgment against the mortgagor, when no redemption from the mortgage is sought. The creditor will be required to pay him the mortgage debt before divesting him of his title. De Clerq *v.* Jackson, 103 Ill. 658.

Mortgage by grantee in absolute deed see *infra*, IV, B, 2.

83. *Illinois.*— Jenkins *v.* Rosenberg, 105 Ill. 157; Maxfield *v.* Patchen, 29 Ill. 39. *Compare* Miller *v.* Thomas, 14 Ill. 428.

Massachusetts.— Tufts *v.* Tapley, 129 Mass. 380.

Nebraska.— Kemp *v.* Small, 32 Nebr. 318, 49 N. W. 169.

Nevada.— Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

South Dakota.— Murphy *v.* Plankinton Bank, 13 S. D. 501, 83 N. W. 575.

Canada.— Cherry *v.* Morton, 8 Grant Ch. (U. C.) 402.

See, however, Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381, holding that the existence of an innocent purchaser who has made improvements will not prevent the court from declaring a warranty deed to be a mortgage, as the purchaser can be allowed for the improvements on an accounting.

Want of consideration.— Where the grantee in a deed testified that the grantor was indebted to him in a sum which was afterward paid, and that he, the grantee, never exercised any control or ownership over the land, but afterward conveyed it without consideration to a person who claimed it, this is sufficient to support a finding that the original conveyance was only by way of security for the debt, and that the latter conveyance passed no title to the grantee's grantee. Jameson *v.* Emerson, 82 Me. 359, 19 Atl. 831.

84. See, generally, cases cited *infra*, this note.

Measure of damages.— According to some decisions the rule is that if no actual fraud on the part of the grantee is shown he is chargeable with the full value of the land at the time he sold it, without regard to the price actually received. Gibbs *v.* Meserve, 12 Ill. App. 613; Enos *v.* Sutherland, 11 Mich. 538; Wilson *v.* Drumrite, 24 Mo. 304; Haussknecht *v.* Smith, 11 N. Y. App. Div. 185, 42 N. Y. Suppl. 611; Bissell *v.* Bozman, 17 N. C. 229. *Compare* Van Dusen *v.* Worrell, 4 Abb. Dec. (N. Y.) 473, 3 Keyes 311, 1 Transcr. App. 224. But according to others the rule is that defendant in such an action will be required to account to the owner of the equity of redemption for all that he actually received over and above the amount of the debt originally secured by the deed. Sheldon *v.* Bradley, 37 Conn. 324; Crassen *v.* Swineland, 22 Ind. 427; Linnell *v.* Lyford, 72 Me. 280; Cornell *v.* Pierson, 8 N. J. Eq. 478; Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967. And in Texas it has been decided that the measure of the grantor's recovery should be the value of the land at the time of the trial of the action, less the debt, with in-

bring his application under some already recognized head of equity jurisdiction, as, by showing fraud or deceit, or that a separate defeasance was intended to be executed but was omitted through accident, mistake, or fraud, or that there was a verbal agreement for a defeasance, which for similar reasons was not carried into effect; and the courts were not disposed to exercise their powers on this class of cases except on the well-known grounds of fraud, accident, or mistake.[85] But the modern doctrine is that courts having equity powers will treat a deed absolute on its face as a mortgage, upon being convinced by proper evidence that such was the real intention of the parties, and that it would be contrary to equity to refuse to carry into effect such intention; and this they will do without requiring the applicant to show fraud, accident, mistake, or deceit, and without being obliged to assume an intended instrument of defeasance, and even where such defeasance was intentionally omitted on an understanding between the parties.[86] The theory of these decisions is that fraud sufficient to support the jurisdiction of equity is found in the mere conduct of the grantee in refusing to recognize the instrument as a security and to allow a redemption; for it is fraudulent to attempt to hold and use, as an absolute conveyance, a deed which was executed and accepted as a defeasible instrument or mortgage.[87]

IV. MORTGAGEABLE INTERESTS IN REALTY.

A. Nature of Property Mortgageable — 1. IN GENERAL. As a general rule all property which is assignable or of such a nature that it may be made the subject of a contract, whether it be real or personal, corporeal or incorporeal, movable or immovable, is capable of being mortgaged.[88]

terest. Boothe *v.* Fiest, 80 Tex. 141, 15 S. W. 799.

85. English *v.* Lane, 1 Port. (Ala.) 328; Jordan *v.* Fenno, 13 Ark. 593; Stewart *v.* Murray, 13 Minn. 426; Belote *v.* Morrison, 8 Minn. 87; McClane *v.* White, 5 Minn. 178; Morris *v.* Nixon, 1 How. (U. S.) 118, 11 L. ed. 69; 4 Kent Comm. 142; Story Eq. Jur. § 1018.

In North Carolina, it has been several times decided that a deed absolute on its face cannot be converted into a mortgage unless it is shown that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. Hall *v.* Lewis, 118 N. C. 509, 24 S. E. 209; Sprague *v.* Bond, 115 N. C. 530, 20 S. E. 709; Egerton *v.* Jones, 107 N. C. 284, 12 S. E. 434, 102 N. C. 278, 9 S. E. 2; Green *v.* Sherrod, 105 N. C. 197, 10 S. E. 986; Norris *v.* McLane, 104 N. C. 159, 10 S. E. 140; Brothers *v.* Harrill, 55 N. C. 209; Cook *v.* Gudger, 55 N. C. 172; Brown *v.* Carson, 45 N. C. 272; Sellers *v.* Stalcop, 42 N. C. 13; Streator *v.* Jones, 5 N. C. 449. But in a late case it was held that where it is agreed between the grantor and grantee at the time a deed is delivered that it should operate as a mortgage, the grantor is entitled to have the deed declared a mortgage, although the redemption clause was not omitted by ignorance, mistake, fraud, or undue advantage. Fuller *v.* Jenkins, 130 N. C. 554, 51 S. E. 706.

86. *Alabama.*— Richter *v.* Noll, 128 Ala. 198, 30 So. 740. *Compare* English *v.* Lane, 1 Port. 328; Hudson *v.* Isbell, 5 Stew. & P. 67.

California.— Pierce *v.* Robinson, 13 Cal. 116. *Compare* Low *v.* Henry, 9 Cal. 538; Lee *v.* Evans, 8 Cal. 424.

Delaware.— Walker *v.* Farmers' Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819.

Illinois.— Ruckman *v.* Alwood, 71 Ill. 155; Sutphen *v.* Cushman, 35 Ill. 186; Tillson *v.* Moulton, 23 Ill. 648; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Gillespie *v.* Hughes, 86 Ill. App. 202.

Iowa.— Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700.

Maryland.— See Thompson *v.* Banks, 2 Md. Ch. 430.

South Carolina.— Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720.

87. Ruckman *v.* Alwood, 71 Ill. 155; Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868; Houser *v.* Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946; Lincoln *v.* Wright, 4 De G. & J. 16, 5 Jur. N. S. 1142, 7 Wkly. Rep. 350, 61 Eng. Ch. 12, 45 Eng. Reprint 6.

88. *Illinois.*— Curtis *v.* Root, 20 Ill. 518, 522, in which it is said: "The doctrine is understood to be that everything which may be considered as property, whether in the technical language of the law denominated real or personal property, may be the subject of mortgage, as advowsons, rectories, tithes. Reversions and remainders being capable of grant from man to man, and possibilities also being assignable, are mortgageable, a mortgage of them being only a conditional assignment. Rents, also, and franchises may be made the subject of mortgage."

Kentucky.— Louisville Bank *v.* Baumeister, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845.

Nebraska.— Dorsey *v.* Hall, 7 Nebr. 460.

New Jersey.— Neligh *v.* Michenor, 11 N. J. Eq. 539.

2. Personalty Attached to Freehold. Things attached to the freehold, whether artificial structures or natural products, may be mortgageable, either in the character of chattels real or as interests in realty, or as carrying an interest in the soil.[89] And it has been decided that personal property, which by being attached to land by the owner has become a part of the realty may still be capable of being mortgaged separately from the land itself; and such a mortgage, when properly recorded, is enforceable against a subsequent purchaser of the realty.[90]

B. Title or Interest of Mortgagor — 1. In General. As a general rule, in order to make a good mortgage on real property, the mortgagor must have a present valid title to the estate to be encumbered or to that interest or share therein which the mortgage purports to convey,[91] although an imperfect title afterward confirmed by legislative act may inure to the benefit of the mortgagee.[92] A grantor who has parted with his title to the property, by a conveyance abso-

Tennessee.— Watkins *v.* Wyatt, 9 Baxt. 250, 40 Am. Rep. 90.

United States.— Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23, 26, in which it is said: "In equity, whatever property, real or personal, is capable of an absolute sale may be the subject of a mortgage. Therefore, rights in remainder, and reversions, possibilities coupled with an interest, rents, franchises, and choses in action, are capable of being mortgaged. 2 Story Eq. Jur. § 1021. And courts of equity support assignments of, or contracts pledging property, or contingent interests therein, and also things which have no present, actual, potential existence, but rest in mere possibility."

See 35 Cent. Dig. tit. "Mortgages," § 9.

Real and appreciable interest necessary.— Whatever may be the subject of the mortgage, the mortgagor must have a real and appreciable interest in the land affected. Glos *v.* Furman, 66 Ill. App. 127 [*affirmed* in 164 Ill. 585, 45 N. E. 1019].

A mortgage may be made to cover both real and personal property; and the validity of a mortgage on real estate is not affected by the fact that it also pledges personal property and is recorded in the records of chattel mortgages. Long *v.* Cockern, 29 Ill. App. 304; Harriman *v.* Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004. Thus a mortgage may validly be made to cover the land, machinery, income, issues, and profits arising from and out of the mortgaged property and its operations as a business plant. Funk *v.* Mercantile Trust Co., 89 Iowa 264, 56 N. W. 496.

In Louisiana, under the provisions of Civ. Code, art. 3256, property which is not subject to alienation cannot be mortgaged. Miller *v.* Michoud, 11 Rob. 225. The word "immovables" as employed in this statute, which specifies the objects which alone are susceptible of mortgage. was intended to embrace only such things as are immovable by their nature, such as land or buildings. An "action for the recovery of an immovable estate or an entire succession," although by legal intendment considered as an incorporeal immovable, is not capable of being mortgaged. An entire succession, disregarding the elements which enter into its composition, is not an object susceptible of mortgage. Voorhies *v.* De Blanc, 12 La. Ann. 864.

89. Gibson *v.* Brockway, 8 N. H. 465, 31 Am. Dec. 200; Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795. And see Knapp *v.* Jones, 143 Ill. 375, 32 N. E. 382.

An aqueduct constructed over the land of another constitutes a right in real estate which may be mortgaged. Garant *v.* Gagnon, 17 Quebec Super. Ct. 145.

A mortgage on standing timber is a mortgage on an interest in land. Williams *v.* Hyde, 98 Mich. 152, 57 N. W. 98.

90. Brodrick *v.* Kilpatrick, 82 Fed. 138.

91. Pierce *v.* Emery, 32 N. H. 484; Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507. And see Berryhill *v.* Kirchner, 96 Pa. St. 489. *Compare* Snyder *v.* Ackerman, 37 N. J. Eq. 442; Briggs *v.* Davis, 20 N. Y. 15, 75 Am. Dec. 363.

Outstanding equitable title.— A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage affects to convey, passes only his legal right, although he had a power from the person who held the residue of the legal, although not of the equitable, estate in the land, to sell and convey his right also, the mortgagor not having affected to convey any part of it under his power from such other person, although his deed purported to mortgage the whole, and the equitable title not being in the person who gave the power. Shirras *v.* Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260.

Mortgagor disseized.— In Maine, prior to Rev. St. (1841), a mortgage of land, of which the mortgagor was at the time disseized, conveyed no title, and the subsequently acquired possession of the mortgagee or his assignee would not give the mortgage effect. Williams *v.* Buker, 49 Me. 427.

92. Massey *v.* Papin, 24 How. (U. S.) 362, 16 L. ed. 734, holding that where one having an imperfect title to lands situated in Missouri, under a Spanish grant or concession, mortgaged the property to another, and afterward congress confirmed the claim to the mortgagor or his legal representatives, the confirmation inured to the benefit of the mortgagee rather than to the heirs of the mortgagor.

lute and not defeasible, and duly recorded, cannot pass any interest in the premises, nor create any lien thereon, by his subsequent mortgage.[93]

2. **Defeasible Legal Title.** A mortgage executed by one who has a valid, although defeasible, title to the property affected, will be good against him and those claiming under him, and also against all persons of whose interests in the premises the mortgagee had no notice.[94] Thus, where the owner of property conveys it to another by deed absolute in form, but intended only as a security, and hence constituting an equitable mortgage, and the grantee executes a mortgage on the same premises, such mortgage will be a good and valid security in the hands of any one taking it without notice of the rights of the grantor; and even if he has such notice, he can enforce his security to the extent of the debt secured by the original deed.[95] But where the title set up by a mortgagor is not merely defeasible but absolutely void, his mortgage creates no interest in the premises.[96]

3. **Title Fraudulently Acquired.** If the real owner of property allows it to stand recorded in the name of another, by a title such as to pass the fee, he puts it in the power of that other to create a valid mortgage upon it.[97] And the lien of a mortgage will prevail against the right of any third person to impeach and divest the mortgagor's title as having been obtained by fraud or false representations, where the mortgagee relied on the clear record title of his mortgagor and had no notice actual or constructive of the rights of the stranger.[98] It seems that where a deed to the premises in question was forged, a mortgage given by the grantee in such forged deed will not create any lien on the land in favor of the mortgagee.[99]

4. **Equitable Title.** One holding an equitable title to real estate may give a valid mortgage or deed of trust thereon to secure a creditor, although of course the conveyance will pass only the title which is vested in him.[1]

93. Beronio *v.* Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118.

Prior deed unrecorded.— A mortgagee taking in good faith and for value is not affected by a prior conveyance of the property, of which he has no actual notice, when such conveyance is not recorded. Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32; McKeen *v.* Sultenfuss, 61 Tex. 325; Hays *v.* Tilson, (Tex. Civ. App. 1896) 35 S. W. 515.

Prior encumbrances.— The validity of a mortgage, aside from the question of its rank and priority, is of course not affected by a prior conveyance of the same estate merely by way of mortgage, nor by the existence of prior judgment liens upon it. Fitzgerald *v.* Beebe, 7 Ark. 310.

94. Robbins *v.* Moore, 129 Ill. 30, 21 N. E. 934; Bradley *v.* Luce, 99 Ill. 234. And see Brooke *v.* Bordner, 125 Pa. St. 470, 17 Atl. 467.

Title subject to mortgage for support of grantor.— The owner of a farm conveyed it to his son, and at the same time took a mortgage to himself and wife, with a condition by which the son and his heirs, executors, and administrators were to provide for the maintenance of his parents during their lives. It was held that the son could make a valid mortgage of the premises to creditors, but such mortgage would not give the mortgagees power to perform the condition of the former mortgage, or to take possession of the land during the lives of the parents. Eastman *v.* Batchelder, 36 N. H. 141, 72 Am. Dec. 295.

95. Turman *v.* Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Croft *v.* Bunster, 9 Wis. 503. And see *supra*, III, E, 4.

96. Kerslake *v.* Cummings, 180 Mass. 65, 61 N. E. 760.

Title under erroneous decree.— In Louisiana, where the property of a succession is adjudicated to the surviving husband, as being community property, but the adjudication is erroneous, the property being the wife's exclusive estate, but it is ratified by her heirs on receiving their shares in the succession, third persons taking a mortgage on the property from the husband, on the faith of these public acts, will acquire a good title. Foutelet *v.* Dugas, 11 La. 49; Foutelet *v.* Murrell, 9 La. 291.

Where an option to purchase certain land within a specified time was not complied with, and by mutual consent the parties to the agreement adjusted their rights under it and the contract was abandoned, a mortgage executed two years thereafter by the person who had acquired the option gave the mortgagee no right in the land. Jefferson Loan, etc., Assoc. *v.* McHugh, 208 Pa. St. 246, 57 Atl. 577.

97. Hunter *v.* Buckner, 29 La. Ann. 604. And see *infra*, XII, A, 2, b.

98. Bradley *v.* Luce, 99 Ill. 234; Shorten *v.* Drake, 38 Ohio St. 76. And see Northrup *v.* Hottenstein, 38 Kan. 263, 16 Pac. 445.

99. Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108. And see Williams *v.* Ketcham, (Ind. App. 1906) 77 N. E. 285.

1. *Alabama.*— Christian *v.* American Freehold Land Mortg. Co., 92 Ala. 130, 9 So. 219.

C. Titles Under Executory Contract of Sale — 1. VENDOR'S TITLE. Where a contract for the sale and conveyance of lands remains executory, and no deed has passed, each of the parties has an interest in the premises which may be made the subject of a mortgage. A mortgage by the vendor in such circumstances will pass to the mortgagee exactly the rights which remained in the vendor and no others, that is, the right to require execution of the contract of purchase on the part of the vendee, and to receive from him any unpaid balance of the purchase-money until the debt secured by the mortgage is discharged.[2]

2. VENDEE'S TITLE. The purchaser under an executory contract for the sale of land, or a bond for title, being in possession and having partly performed his part of the contract, although the legal title remains in the vendor, has an interest in the premises which he may mortgage to a third person.[3] But his mortgagee will take no other or greater rights than the vendee had; that is, he will acquire simply a right to purchase the property for the consideration stipulated in the contract of purchase, or to require a conveyance of the estate from the vendor according to the terms of the agreement, on completing the payment of the purchase-price.[4] A subsequent rescission of the contract of sale, agreed on by the

Georgia.— Wilson *v.* Wright, 91 Ga. 774, 18 S. E. 546.

Kansas.— Morgan *v.* Field, 35 Kan. 162, 10 Pac. 448.

Massachusetts.—Lovering *v.* Fogg, 18 Pick. 540.

Ohio.— Leydon *v.* Malloy, 10 Ohio Cir. Ct. 442, 6 Ohio Cir. Dec. 820.

South Carolina.— Lipscomb *v.* Goode, 57 S. C. 182, 35 S. E. 493.

Virginia.— Lambert *v.* Nanny, 2 Munf. 196.

United States.— Toledo, etc., Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905; Augusta, etc., R. Co. *v.* Kittel, 52 Fed. 63, 2 C. C. A. 615.

See 35 Cent. Dig. tit. "Mortgages," § 11.

Title under incomplete condemnation proceedings.— A mortgage by a corporation of their property, franchises, and effects, given after their entry upon lands, which they had a right to take, and before judgment for damages for such taking, will bind their equitable interest therein, subject to the payment of the judgment for purchase-money. Easton's Appeal, 47 Pa. St. 255.

Title in name of guardian.— A ward, on attaining his majority, may encumber by mortgage his interest in any real estate held in the name of his guardian for his benefit. Shoop *v.* Stewart, 66 Kan. 631, 72 Pac. 219.

2. Trammell *v.* Simmons, 17 Ala. 411; Ranney *v.* Hardy, 43 Ohio St. 157, 1 N. E. 523; Wright *v.* Kentucky, etc., R. Co., 117 U. S. 72, 6 S. Ct. 697, 29 L. ed. 821. And see Doolittle *v.* Cook, 75 Ill. 354; Rose *v.* Watson, 10 Jur. N. S. 297, 10 H. L. Cas. 672, 33 L. J. Ch. 385, 10 L. T. Rep. N. S. 106, 3 New Rep. 673, 12 Wkly. Rep. 585, 11 Eng. Reprint 1187, holding that in the absence of a special authority conferring it, a grantor has no power to encumber land after the execution and delivery of a deed. *Compare* Ewers *v.* Smith, 98 N. Y. App. Div. 289, 90 N. Y. Suppl. 575.

Assignee of vendor.— Where a party acquires the legal title to lots from one who had previously made contracts for their sale and conveyance, together with an assignment of the contracts, he has such an interest in the lots as may be the subject of sale or transfer by mortgage. In such case he does not hold the title in trust for the purchasers. Chickering *v.* Fullerton, 90 Ill. 520.

3. *California.*— Houghton *v.* Allen, (1887) 14 Pac. 641.

Illinois.— Baker *v.* Bishop Hill Colony, 45 Ill. 264; Curtis *v.* Root, 20 Ill. 518.

Kansas.— Laughlin *v.* Braley, 25 Kan. 147; Jones *v.* Lapham, 15 Kan. 540.

Maryland.—Alderson *v.* Ames, 6 Md. 52.

Minnesota.— Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369; Randall *v.* Constans, 33 Minn. 329, 23 N. W. 530.

New Jersey.— Sinclair *v.* Armitage, 12 N. J. Eq. 174; Neligh *v.* Michenor, 11 N. J. Eq. 539.

New York.— Muehlberger *v.* Schilling, (1888) 3 N. Y. Suppl. 705; Stoddard *v.* Whiting, 46 N. Y. 627; Titcomb *v.* Fonda, etc., R. Co., 38 Misc. 630, 78 N. Y. Suppl. 226.

North Carolina.— Greensboro Bank *v.* Clapp, 76 N. C. 482.

Ohio.— Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Wiggins *v.* Campbell, 2 Clev. L. Rep. 122.

South Carolina.— Roddy *v.* Elam, 12 Rich. Eq. 343.

Wisconsin.— Bull *v.* Sykes, 7 Wis. 449.

See 35 Cent. Dig. tit. "Mortgages," § 12.

Compare Bright *v.* Buckman, 39 Fed. 243.

Where a person erects improvements on real estate under a parol contract for its purchase, he thereby acquires an interest in the land to the extent of such improvements; and this interest may be mortgaged. White *v.* Butt, 32 Iowa 335.

The prior mortgagee of an executory land contract, although the mortgage was given to secure an antecedent debt, has rights paramount to those of a subsequent mortgagee under a mortgage made after the acquisition of the legal title by the mortgagor. Edwards *v.* McKernan, 55 Mich. 520, 22 N. W. 20.

4. Alden *v.* Garver, 32 Ill. 32.

vendor and vendee, or a quitclaim from the latter to the former, will not affect the rights of the mortgagee.[5] And although a bond for a deed to land may provide for a forfeiture for non-payment, yet if the vendor does not declare a forfeiture the holder under the bond has such an equitable estate as may be mortgaged by him.[6]

D. Particular Estates or Interests — 1. Inchoate Title to Public Lands.[7] Under the act of congress relating to the preëmption of the public lands and the alienation of their interests by preëmption claimants,[8] the preponderance of authority is to the effect that such a claimant may lawfully mortgage his interest after his right to a patent has become fully fixed, by his complete compliance with the law in all respects, so that nothing remains but the mere issuance of the patent to invest him with the complete legal title to the land; but that a mortgage given before his right to a patent becomes vested in this manner is prohibited by the statute.[9] And similar rulings[10] have been made under the law relating to homestead entries on the public lands,[11] as also under state statutes regulating the disposition of their own public domain.[12]

2. Undivided Interests in Land. An undivided interest in land, such as that held by a joint tenant or tenant in common, may be made the subject of a mortgage.[13] Where a mortgage on such an interest is given pending an action for partition, it is only an incident to that interest, and after the partition is limited to the portion allotted to the tenant in common who executed it,[14] or if the property is sold under the partition, the lien of the mortgage will attach to the mort-

5. Davis *v.* Milligan, 88 Ala. 523, 6 So. 908; Alden *v.* Garver, 32 Ill. 32; McCauley *v.* Coe, 51 Ill. App. 284 [*reversed* on other grounds in 150 Ill. 311, 37 N. E. 232].

6. Irish *v.* Sharp, 89 Ill. 261; Sheen *v.* Hogan, 86 Ill. 16.

7. **As to mortgages on unpatented crown lands or Indian lands in Canada** see Stephens *v.* Twining, Russ. Eq. Cas. (Nova Scotia) 176; Reed *v.* Wilson, 23 Ont. 552; Watson *v.* Lindsay, 27 Grant Ch. (U. C.) 253 [*affirmed* in 6 Ont. App. 609].

8. U. S. Rev. St. (1878) § 2262.

9. *Arkansas.*— Whitlock *v.* Cohn, 72 Ark. 83, 80 S. W. 141.

California.— Cochran *v.* O'Keefe, 34 Cal. 554; Kirkaldie *v.* Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Whitney *v.* Buckman, 13 Cal. 536. *Compare* Bull *v.* Shaw, 48 Cal. 455.

Illinois.— Robbins *v.* Bunn, 54 Ill. 48, 5 Am. Rep. 75.

Kansas.— Reasoner *v.* Markley, 25 Kan. 635. *Compare* Mellison *v.* Allen, 30 Kan. 382, 2 Pac. 97; Brewster *v.* Madden, 15 Kan. 249.

Minnesota.— Jones *v.* Tainter, 15 Minn. 512 [*overruling* Woodbury *v.* Dorman, 15 Minn. 338].

Montana.— Norris *v.* Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581 [*disapproving* Bass *v.* Buker, 6 Mont. 442, 12 Pac. 922].

United States.— Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. ed. 219; Myers *v.* Croft, 13 Wall. 291, 20 L. ed. 562; Webster *v.* Bowman, 25 Fed. 889.

See 35 Cent. Dig. tit. "Mortgages," § 10.

10. Lewis *v.* Wetherell, 36 Minn. 386, 31 N. W. 356, 1 Am. St. Rep. 674. And see Seymour *v.* Sanders, 21 Fed. Cas. No. 12,690, 3 Dill. 437.

11. U. S. Rev. St. (1878) § 2296 [U. S. Comp. St. (1901) p. 1398].

12. Bibbler *v.* Walker, 69 Ind. 362; Craig *v.* Tappin, 2 Sandf. Ch. (N. Y.) 78; Dodge *v.* Silverthorn, 12 Wis. 644. *Compare* Penn *v.* Ott, 12 La. Ann. 233.

13. Baker *v.* Shephard, 30 Ga. 706; Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312.

Extent of lien.— A mortgage executed on a tract of land by the owner of an undivided half interest therein will not create any lien on the undivided half owned by another. Jolliffe *v.* Maxwell, 3 Nebr. (Unoff.) 244, 91 N. W. 563. But it has been held that a mortgage of real estate by one tenant in common will carry with it, on the principle of subrogation, the lien which the mortgagor had upon the shares of his cotenants for improvements made upon the common mortgaged property. Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312.

Foreclosure.— Where a mortgage is given on the undivided interest of the mortgagor in land which he owns jointly with another, and a foreclosure becomes necessary, the undivided interest so mortgaged may be sold. Baker *v.* Shephard, 30 Ga. 706. And the purchaser at the foreclosure sale will become a tenant in common in the place of the mortgagor, and will take subject to the same duties and relations to the cotenants; and consequently his possession and payment of taxes on the entire tract will not, in the absence of actual notice that it is adverse, give title as against his cotenants, where the record disclosed the state of the title. McMahill *v.* Torrence, 163 Ill. 277, 45 N. E. 269.

14. Loomis *v.* Riley, 24 Ill. 307. And see Rochester Loan, etc., Co. *v.* Morse, 181 Ill. 64, 69, 54 N. E. 628, where it was said that

gagor's share of the proceeds.[15] And on similar principles it has been held that a mortgage by a widow on the land of her deceased husband is effective as to her interest therein, although her dower has not yet been assigned or set apart.[16]

3. Estates in Remainder and Reversion. A vested estate in remainder or reversion is such an interest in realty as may be conveyed by a mortgage.[17] And the same is true of an executory devise,[18] and of a possibility coupled with an interest.[19]

4. Interests of Devisees. The interest of a devisee of land before settlement of the estate is mortgageable, although the mortgagee could not by foreclosure deprive the administrator of the possession necessary for liquidating the affairs of the estate.[20]

5. Estates For Life. An estate for life in lands is such an interest as may be mortgaged, the mortgage conveying, however, only the rights of the life-tenant without affecting the interests of those in remainder or reversion.[21] And the

"the effect of a partition, in which a mortgagee is joined as a party, is to substitute for an undivided interest in the whole land the portion set off to the mortgagor in severalty; and the lien of the mortgage, which was therctofore upon an undivided interest, falls upon the particular portion so set off and aparted to the mortgagor." And see *infra*, XII, A, 3.

15. Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; Huffman *v.* Darling, 153 Ind. 22, 53 N. E. 939.

16. Clark *v.* Deutsch, 101 Ind. 491; Pattison *v.* Smith, 93 Ind. 447; New York Mut. L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177; Ferry *v.* Burnell, 14 Fed. 807, 5 McCrary 1.

17. *Illinois.*— Curtis *v.* Root, 20 Ill. 518. And see Springer *v.* Savage, 143 Ill. 301, 32 N. E. 520.

Kentucky.— Davis *v.* Willson, 115 Ky. 639, 74 S. W. 696, 25 Ky. L. Rep. 21. And see Spalding *v.* Wayne, 45 S. W. 517, 770, 20 Ky. L. Rep. 147, holding that where a testator directed that land should be sold at the death of the life-tenant by his executor, and the proceeds divided between his children, the latter have such an interest in the land as can be mortgaged before the death of the life-tenant.

New Hampshire.— Flanders *v.* Greely, 64 N. H. 357, 10 Atl. 686.

New York.— *In re* John St., 19 Wend. 659.

United States.— Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

Canada.— Lawson *v.* Tobin, Russ. Eq. Dec. (Nova Scotia) 111.

See 35 Cent. Dig. tit. "Mortgages," § 14.

Interest contingent upon death of a prior remainder-man.— A testator devised real estate to his wife for life, with directions to his executors, on the death of the wife, to sell the property, and pay the proceeds to a daughter, or, if the latter were dead, to the children of such daughter. During the life of the life-tenant the daughter and her children executed an instrument purporting to mortgage all their interest in the property. It was held that as the interest of the children in the testator's estate subject to the power of sale was a mere chose in action, the instrument could not, as against them, be construed as a mortgage which could be foreclosed before the death of the daughter, but only as an agreement to give a mortgage which could be enforced against the children only in equity on their acquisition of the property. Jacobson *v.* Smith, 73 N. Y. App. Div. 412, 77 N. Y. Suppl. 49.

18. Wilson *v.* Wilson, 32 Barb. (N. Y.) 328.

19. Curtis *v.* Root, 20 Ill. 518; Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

20. Dreyfus *v.* Richardson, 33 La. Ann. 602; Horst *v.* Dague, 34 Ohio St. 371; *Re* McMillan, 24 Ont. 181.

The interest in remainder of a residuary devisee, vested in him upon the death of the testator subject to the payment of debts and legacies, is one which may be conveyed and passed by mortgage. Flanders *v.* Greely, 64 N. H. 357, 10 Atl. 686.

Direction to sell and divide proceeds.— Where a testator directed his executor to sell his real estate and divide the proceeds among his children, it was held that a mortgage, after the testator's death and before the sale of the real estate by one of the children, of his interest therein to secure a loan, operated as an equitable assignment to the mortgagee of the mortgagor's interest in the proceeds of the sale of the real estate by the executor. Horst *v.* Dague, 34 Ohio St. 371. But *compare* Wood *v.* Reeves, 23 S. C. 382, holding that where a will directs the executors to sell land and divide the proceeds one of the beneficiaries has not any interest in the land which he can mortgage.

21. Penny *v.* Weems, 139 Ala. 270, 35 So. 883; Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; Bryan *v.* Howland, 98 Ill. 625; McKibbon *v.* Williams, 24 Ont. App. 122. *Compare* Rathbone *v.* Nooney, 58 N. Y. 463.

A vested equitable life-estate is such an interest in land as will pass by a mortgage of the same; and where such estate is conveyed or encumbered by the *cestui que trust* without the concurrence of the trustee holding the legal title, it will become the duty of the trustee to recognize the rights of the grantee or mortgagee. But the purchaser un-

same principle applies to a mortgage given by a tenant in fee tail, which does not prejudice future contingent interests.[22]

6. Leasehold Interests. A mere term of years, or leasehold interest in land, is also mortgageable as realty. But the lien created by such a mortgage will be coextensive with the term, and will be extinguished by mere lapse of time whenever the term ends, and cannot be foreclosed, as against the reversioner, after the expiration of the term.[23] So also a lessee may include in a mortgage of his term any buildings or other improvements erected on the leased ground which he will have a right to remove at the end of the term.[24] And where the lease is accompanied by special privileges or advantages to the lessee, such as an option to purchase, the act of the lessee, after mortgaging his interest, in surrendering and conveying all rights remaining in him to the lessor, will not affect or prejudice the rights of the mortgagee.[25]

E. Rents and Profits. Rents and profits are as much property as the estate out of which they arise, and as such they are equally the subject of a mortgage.[26]

F. After-Acquired Property. A mortgage may be made to cover future-acquired property of the mortgagor, when an intention to that effect clearly appears from the face of the instrument, and it will be enforced in equity against the mortgagor, and all others except purchasers for value without notice.[27] A mortgage therefore, founded on adequate consideration, is not invalid merely

der such a mortgage will take only such right as the mortgagor had, that is, a life-estate and no more. Bryan *v.* Howland, 98 Ill. 625.

22. Hosmer *v.* Carter, 68 Ill. 98; Lipscomb *v.* Hammett, 56 S. C. 549, 35 S. E. 194. *Compare Re* Dolsen, 4 Ch. Chamb. (U. C.) 36.

23. *California.*— McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924.

Illinois.— McCauley *v.* Coe, 150 Ill. 311, 37 N. E. 232; Rogers *v.* Heron, 92 Ill. 583; Griffin *v.* Chicago Mar. Co., 52 Ill. 130.

Kentucky.— Louisville Bank *v.* Baumeister, 87 Ky. 61, 7 S. W. 170, 9 Ky. L. Rep. 845.

Nevada.—Adams *v.* Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353.

Ohio.— Dodson *v.* Dodson, 9 Ohio Dec. (Reprint) 201, 11 Cinc. L. Bul. 198.

Pennsylvania.— *In re* Speer, 10 Pa. Super. Ct. 518, holding that leasehold mortgages are wholly dependent on the acts of assembly for their validity as liens, and, unless there is a substantial compliance with their requirements, the mortgagee acquires no right as a lien creditor.

Canada.— Jameson *v.* London, etc., Loan, etc., Co., 27 Can. Sup. Ct. 435.

See 35 Cent. Dig. tit. "Mortgages," § 14.

24. McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924; Barroilhet *v.* Battelle, 7 Cal. 450; Cross *v.* Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902; Knapp *v.* Jones, 143 Ill. 375, 32 N. E. 382; Hagar *v.* Brainerd, 44 Vt. 294. *Contra,* Miller *v.* Michoud, 11 Rob. (La.) 225.

Building which may not be removed.— A lessee may mortgage to the extent of his leasehold interest a building which he has erected, but may not remove. French *v.* Prescott, 61 N. H. 27.

25. McCauley *v.* Coe, 150 Ill. 311, 37 N. E. 232.

26. Curtis *v.* Root, 20 Ill. 518; Ortengren *v.* Rice, 104 Ill. App. 428; Ryan *v.* Illinois Trust, etc., Bank, 100 Ill. App. 251 [*affirmed* in 199 Ill. 76, 64 N. E. 1085]; Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

27. Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946; Stevens *v.* Watson, 45 How. Pr. (N. Y.) 104; Maxwell *v.* Wilmington Dental Mfg. Co., 77 Fed. 938; Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350.

Grant of mere expectancy.— Where a deed as security does not undertake to convey an existing estate, and the subject of the grant is only an expectancy, the deed is executory only, and nothing more than a covenant for future conveyance; for the grant and the covenant contemplate the assurance of an estate which might possibly be thereafter acquired, either by descent or will, an assurance necessarily future, and inoperative at law. Baylor *v.* Com., 40 Pa. St. 37, 80 Am. Dec. 551.

In Georgia a mortgage purporting to create a lien on any interest in the described realty which the mortgagor might acquire after the time of its execution is invalid as to any such after-acquired interest, under Civ. Code, § 2723, limiting the subject-matter on which a mortgage can operate to "property in possession or to which the mortgagor has the right of possession." Durant *v.* D'Auxy, 107 Ga. 456, 33 S. E. 478.

In Louisiana by statute (Civ. Code, art. 3304) a mortgage granted on the property of another is valid when the mortgagor subsequently acquires the ownership. For cases construing this statute see Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; Levy *v.* Lane, 38 La. Ann. 252; Amonett *v.* Annis, 16 La. Ann. 225; State *v.* New Orleans, etc., R. Co., 4 Rob. 231; State *v.* Mexican Gulf R. Co., 3 Rob. 513. As to rule before statute see Deshautel *v.* Parkins, 1 Mart. N. S. 547.

because it covers after-acquired property as well as that already owned by the mortgagor.[28]

G. Effect of Failure of Title. Subsequent failure of title in the mortgagor may invalidate the mortgage,[29] if attributable to facts, circumstances, or previous transactions of which the mortgagee had actual or constructive notice, or if the infirmity of the title was apparent at the time of the execution of the mortgage.[30] But on the other hand, where the record shows a clear title in the mortgagor, the mortgagee lending his money in good faith will be protected against any equities in the premises claimed by third persons, which were latent or concealed, and of which he had no notice, actual or constructive.[31]

V. PARTIES TO MORTGAGES.

A. In General. It is essential to the validity of a mortgage that there should be proper parties as mortgagor and mortgagee. They may be natural or artificial persons, but both must be in existence and capable of contracting.[32] And the same person cannot be both mortgagor and mortgagee; and it is immaterial that in the one character he appears as an individual, and in the other in some representative capacity.[33] A mortgage is not necessarily invalid because made in the name of a fictitious person as mortgagor,[34] and a conveyance by way of mortgage to or by a person under an assumed name will pass the title.[35]

B. Mortgagors — 1. Legal Title and Control of Property. Generally speaking, ownership of the legal title, with the right of control of the property in

28. Hirshkind *v.* Israel, 18 S. C. 157.

29. Delano *v.* Wilde, 11 Gray (Mass.) 17, 71 Am. Dec. 687 (holding that the reversal of a judgment which has been satisfied by levy on real estate, and the recovery of possession by writ of entry against the judgment creditor, will avoid a mortgage on the premises made by the latter to one who took it in good faith); Taylor *v.* Foster, 22 Ohio St. 255 (holding that where tenants in common held real estate under a will devising it to them in fee simple, but subject to a contingency that, if either died without issue, the survivor should take the whole estate, and one of them, with knowledge of the character of the title, mortgaged his interest, but died without issue, the land could not be subjected under the mortgage to the payment of the mortgage debt, the mortgagor's title having failed).

30. Sanford *v.* Davis, 181 Ill. 570, 54 N. E. 977; Doolittle *v.* Cook, 75 Ill. 354.

31. Robbins *v.* Moore, 129 Ill. 30, 21 N. E. 934; Bradley *v.* Luce, 99 Ill. 234; Shorten *v.* Drake, 38 Ohio St. 76; Whelchel *v.* Lucky, 41 Fed. 114.

Title under invalid conveyance.— A man conveyed certain realty to his wife, and while she and her husband resided on the property, and the record title stood in her name, she negotiated a mortgage on it. The deed to the wife was set aside as invalid. It was held that, in the absence of an allegation and proof of fraud in the inception of the mortgage, it was error to set it aside as void. Reilly *v.* Reilly, 63 N. Y. App. Div. 169, 71 N. Y. Suppl. 287.

32. Noble County Nat. Bank *v.* Dondna, 7 Ohio Dec. (Reprint) 532, 3 Cinc. L. Bul. 789, holding that a mortgage executed to a man after his death is void.

33. Rackliffe *v.* Seal, 36 Mo. 317, holding that a court of law will not construe a mortgage executed by the mortgagor in terms to himself, so as to make it a mortgage to the person for whose security it was intended.

Mortgage to self as administrator.— An administrator became indebted to the estate of his decedent, and for the purpose of securing such indebtedness he executed a note for the amount, payable to himself as administrator, and in like manner executed a mortgage to secure the same. The note and mortgage were retained by the administrator, and were found among his papers after his decease, but the mortgage had not been recorded. It was held that the mortgage was invalid for want of contracting parties. Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

34. Blackman *v.* Henderson, 116 Iowa 578, 87 N. W. 655, holding that a mortgage on real estate, executed by the owner thereof in the name of a fictitious person, to whom such owner had made a fictitious conveyance, is valid as between the mortgagor and mortgagee. And see David *v.* Williamsburgh City F. Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418.

35. Wilson *v.* White, 84 Cal. 239, 242, 24 Pac. 114, where it was said: "If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called. He may assume a name for the occasion, and a conveyance to and by him under such name will pass the title." *Compare* Pinckard *v.* Milmine, 76 Ill. 453, holding that the fact that the grantee in a mortgage is described by a wrong name will not invest him with the right to sue for foreclosure in a fictitious name; he must sue in his proper name, aver-

question, will carry the right to execute a valid mortgage upon it, whatever interests third persons may have in the premises.[36]

2. MENTAL CAPACITY OF MORTGAGOR. If it is shown that a mortgagor had not sufficient mental capacity to contract, or to dispose of his property, the mortgage will be invalid, and equity will refuse to enforce it.[37] And to constitute such unsoundness of mind as should invalidate a mortgage, it is not necessary that the person executing the instrument should be totally bereft of reason, but he must be incapable of understanding and acting in the ordinary affairs of life.[38] Mere weakness of mind in the mortgagor will not avoid the mortgage, where it does not appear that his memory or reasoning faculties were seriously impaired, or that he was unable to understand the common business affairs of life, or to comprehend the nature of the contract of mortgage and the probable consequences flowing from its execution.[39] The burden of proving that a mortgagor was insane

ring in his bill that defendant made the mortgage to him by the name mentioned therein. If, on the other hand, he sues in the name given in the mortgage, the mortgagor will not be estopped from pleading the misnomer in abatement.

Unauthorized use of name of real person.— Where the evidence shows that there was such a person as was named in a note as payee, and in a mortgage as mortgagee, but that such person was entirely ignorant of the transaction, and never ratified it, nor claimed any interest in it, the payee and mortgagee are fictitious; although the person whose name is used had authorized the person receiving the instruments and paying the consideration to lend money for him, which authority had been previously revoked. Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273.

36. Seaman *v.* Huffaker, 21 Kan. 254; Farnum *v.* Burnett, 21 N. J. Eq. 87, holding that a mortgage given by the legal owner of the fee, with the consent of others interested in the property, for the avowed purpose of raising money on it, is a perfectly valid security. See also Pellerin *v.* Sanders, 116 La. 616, 40 So. 917.

Land worked on joint account.— Where land was purchased on time by one of two brothers, and both went on to the land with the understanding that they should work it on joint account, the other brother cannot question the former's right to execute a mortgage for the price, nor the mortgagee's right to reënter on condition broken. Henderson *v.* Grewell, 8 Cal. 581.

Trustee with power to sell.— Where land was conveyed to A in trust for B, with power in the trustee to sell, and other land was at the same time conveyed to A in trust for C, with similar power, and A mortgaged back the whole of the land to secure that part of the purchase-money of both parcels which remained unpaid, it was held that the mortgage was valid. Coutant *v*, Servoss, 3 Barb. (N. Y.) 128.

Where a trustee to pay debts makes a conveyance of his grantor's land to a creditor simply as security, and after the death of the original grantor, his heirs unite with the trustee in a quitclaim deed to release the equity of redemption to the grantee of the trustee, such heirs and all privies in estate will be estopped to deny that the conveyance by the trustee was made in the due execution of the trust imposed. Vallette *v.* Bennett, 69 Ill. 632.

37. Brigham *v.* Fayerweather, 144 Mass. 48, 10 N. E. 735; Boyd *v.* Mulvihill, 61 Nebr. 878, 86 N. W. 922; Brothers *v.* Kaukauna Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932.

Mental capacity when mortgage made.— A mortgage or trust deed may be foreclosed and the property sold while the owner of the equity of redemption is insane, if he was sane when the mortgage was made. Meyer *v.* Kuechler, 10 Mo. App. 371. It seems, however, that, as affecting the validity of a mortgage, it is immaterial whether the mortgagor was or was not of sound mind at the time the mortgage was executed, where it appears that it was executed in strict accordance with a prior written agreement made by the mortgagor when he was of sound mind. Equity will treat that as done which ought to have been done, and which the parties intended should be done, and will give effect to the prior contract as an equitable mortgage. Bevin *v.* Powell, 83 Mo. 365 [*affirming* 11 Mo. App. 216].

38. Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34 [*citing* Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73; Ball *v.* Mannin, 3 Bligh N. S. 1, 4 Eng. Reprint 1241, 1 Dow. & C. 380, 6 Eng. Reprint 568].

Senile dementia.— Notes and mortgages executed by a man nearly eighty years of age, and who was too enfeebled in body and mind to protect himself from imposition, are invalid and will be set aside. Coleman *v.* Frazer, 3 Bush (Ky.) 300.

39. *Alabama.*— White *v.* Farley, 81 Ala. 563, 8 So. 215 [*citing In re* Carmichael, 36 Ala. 514; Stubbs *v.* Houston, 33 Ala. 555; Rawdon *v.* Rawdon, 28 Ala. 565].

Arkansas.— Seawel *v.* Dirst, 70 Ark. 166, 66 S. W. 1058.

California.— Jacks *v.* Estee, 139 Cal. 507, 73 Pac. 247.

Florida.— Endel *v.* Walls, 16 Fla. 786.

Illinois.— Burnham *v.* Kidwell, 113 Ill. 425; Scanlan *v.* Cobb, 85 Ill. 296.

Iowa.— Baldrick *v.* Garvey, 66 Iowa 14, 23 N. W. 156; Marmon *v.* Marmon, 47 Iowa 121.

or incapable of contracting at the time the mortgage was executed is on the person who denies its validity and seeks to avoid it.[40]

3. Agents and Attorneys. The owner of real estate may invest an agent or attorney with power and authority to encumber the same by mortgage, by giving him a power of attorney sufficiently explicit in its terms to warrant the placing of a mortgage on the property.[41] But an ordinary power of attorney to sell land does not embrace any implied authority to mortgage such land,[42] although the principal may ratify a mortgage executed by his agent without due authority, as by accepting the money advanced under it and admitting its validity.[43] But an attorney in fact cannot give a mortgage on his principal's land to secure his own

Michigan.— Holmes *v.* Martin, 123 Mich. 155, 81 N. W. 1072; Tomlinson *v.* Gates, 98 Mich. 49, 56 N. W. 1050. And see Gates *v.* Cornett, 72 Mich. 420, 40 N. W. 740.

Nebraska.— Farmers' Bank *v.* Normand, 3 Nebr. (Unoff.) 643, 92 N. W. 723.

New York.— Merritt *v.* Merritt, 32 Misc. 21, 66 N. Y. Suppl. 123 [*affirmed* in 62 N. Y. App. Div. 617, 71 N. Y. Suppl. 1142] (holding that in order that a mortgage may be held void on the ground of the insanity of the mortgagor, he must be totally unable to understand the nature of the transaction; it is not enough that he does not understand or comprehend the transaction and its details, but he must lack the capacity to understand and comprehend its nature); Hirsch *v.* Trainer, 3 Abb. N. Cas. 274.

South Carolina.— Team *v.* Bryant, 71 S. C. 331, 51 S. E. 148.

Virginia.— Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184.

Wisconsin.— Encking *v.* Simmons, 28 Wis. 272.

United States.— Stockmeyer *v.* Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. ed. 123.

England.— Campbell *v.* Hooper, 3 Eq. Rep. 727, 1 Jur. N. S. 670, 24 L. J. Ch. 644, 3 Smale & G. 153, 3 Wkly. Rep. 528, 65 Eng. Reprint 603.

See 35 Cent. Dig. tit. "Mortgages," § 174.

Melancholia and loss of memory.— In an action to foreclose a mortgage, defended on the ground of want of mental capacity of the mortgagor, it was shown that he had long been subject to mental aberrations, which consisted mainly in fits of emotional weeping and temporary forgetfulness, indicating a failure of his powers of mind, and that he was greatly disturbed by business embarrassments. On the other hand, it appeared that, when the mortgage was executed, he was carrying on an extensive business, and he subsequently bought land, wrote his will, which was duly admitted to probate, audited the accounts of a business concern, made payments on the mortgage, drew up statements of the amount due, and took receipts in his own handwriting, all of which were accurate and manifested a full understanding thereof, and attended to all of his ordinary affairs. There was no proof that he was suffering from one of his temporary lapses of memory at the time of the execution of the mortgage, and no medical or other expert testimony as to the condition of his mind at that time. It was held that the evidence was not sufficient to invalidate the mortgage on the ground of want of capacity in the mortgagor. Griffiths *v.* Howell, 48 N. J. Eq. 648, 25 Atl. 20.

Mental and physical decline.— Intestate, some time before his death, was injured, and became feeble and emaciated, and gradually failed until his death. He had no affection of the brain, but his mental faculties became weak as his physical powers failed. There was a conflict in the opinions of the witnesses on the question of mental capacity, but the facts on which the opinions were based tended to show capacity. It was held that a mortgage given shortly before his death was not shown to have been executed while he was incompetent to transact business. Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386.

Illness and eccentricity.— In a suit to foreclose a mortgage, where defendant alleged want of capacity to execute the instrument, evidence merely that she was ill several months before the mortgage was made, and acted queerly at times not specified, did not show a general derangement, shifting the burden of proof on complainant to show her legal capacity to contract when the deed was executed. Artrip *v.* Rasnake, 96 Va. 277, 31 S. E. 4.

Business folly and improvidence.— The mere fact that the mortgagor had not a high order of intellect, or that he had entered into imprudent and disastrous business ventures, is not sufficient to show that he was incapable of contracting. Hall *v.* Kentucky Mut. L. Ins. Co., 43 S. W. 194, 19 Ky. L. Rep. 1240.

40. Hall *v.* Kentucky Mut. L. Ins. Co., 43 S. W. 194, 19 Ky. L. Rep. 1240; Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225; Youn *v.* Lamont, 56 Minn. 216, 57 N. W. 478; Jacobs *v.* Richards, 18 Beav. 300, 52 Eng. Reprint 118, 5 De G. M. & G. 55, 54 Eng. Ch. 46, 43 Eng. Reprint 790, 2 Eq. Rep. 299, 18 Jur. 527, 23 L. J. Ch. 557, 2 Wkly. Rep. 174.

41. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373; Eaton *v.* Dewey, 79 Wis. 251, 48 N. W. 523.

42. Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312; Reed *v.* Kimsey, 98 Ill. App. 364; Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Bloomer *v.* Waldron, 3 Hill (N. Y.) 361.

43. Fitch *v.* Lewiston Steam-Mill Co., 80 Me. 34, 12 Atl. 732; McAdow *v.* Black, 4 Mont. 475, 1 Pac. 751; Nacogdoches First Nat. Bank *v.* Hicks, 24 Tex. Civ. App. 269,

debt, although he had authority to borrow money and mortgage the land of the principal.[44]

4. RECEIVERS. Although it is unusual for a receiver to give a mortgage on the property in his charge to secure money loaned to him, yet this may be authorized or directed by the court having jurisdiction of the receivership, in a proper case, the power to mortgage being in principle the same as the power to issue receiver's certificates and make them a lien on the property.[45]

5. JOINT MORTGAGORS. Owners of separate lands may unite in a mortgage on their holdings, and joint owners of land may pledge the estate, as an entirety, by their joint mortgage upon it.[46] Where two persons unite in mortgaging their lands, owned in severalty, each is presumptively liable for half the debt, and his lands are primarily chargeable to that extent.[47] But if the mortgagors owned the land as tenants in common, the entire property is liable for the debt and for every part of it.[48]

6. PERSONS LIABLE AS MORTGAGORS. One who does not sign the mortgage but who signs the notes secured thereby and obligates himself as one of the makers of the notes with special reference to the mortgage by which their payment is secured cannot urge that he is not a party to the mortgage.[49] The granting clause of the mortgage does not alone furnish the means of identifying the parties liable. Although it names only one of the persons who joined in the execution of the mortgage, yet all will be held liable if that intention and meaning can be gathered from the instrument considered as a whole.[50] A mortgagor will be personally liable for the debt secured, although the consideration moved to him in a representative capacity as, in the capacity of a trustee, if he signs merely his individual name without additions.[51]

C. Mortgagees— 1. JOINT MORTGAGEES. A mortgage may be made to several persons jointly as security for separate debts due to them individually.[52] And where a mortgage is given to mortgagees jointly, but to secure the amount of the separate indebtedness of the mortgagor to each of them, they do not take as joint tenants, but as tenants in common, each having an undivided interest in proportion to his claim; and therefore the fact that the mortgage may be void as to one of the mortgagees, as against creditors of the mortgagor, will not affect its validity as to the others.[53] The mortgagees will take in proportion to the actual amounts

59 S. W. 842; Perry *v.* Holl, 2 De G. F. & J. 38, 6 Jur. N. S. 661, 29 L. J. Ch. 677, 2 L. T. Rep. N. S. 585, 8 Wkly. Rep. 570, 63 Eng. Ch. 30, 45 Eng. Reprint 536.

44. Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824.

45. Brown *v.* Schintz, 98 Ill. App. 452; Burroughs *v.* Gaither, 66 Md. 171, 7 Atl. 243.

46. Stroud *v.* Casey, 27 Pa. St. 471. And see Bowen *v.* May, 12 Cal. 348; Preston *v.* Compton, 30 Ohio St. 299.

47. Hoyt *v.* Doughty, 4 Sandf. (N. Y.) 462. And see Cumming *v.* Williamson, 1 Sandf. Ch. (N. Y.) 17.

48. Schoenewald *v.* Dieden, 8 Ill. App. 389.

49. Roehl *v.* Porteous, 47 La. Ann. 1582, 18 So. 645.

50. Main *v.* Ray, 57 S. W. 7, 22 Ky. L. Rep. 250. But see *infra*, VIII, E, 1.

51. Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552.

52. Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719.

Conveyance in trust.—A mortgage of lands, made to a trustee to secure the payment of several bonds of the mortgagor given to different persons, is valid. King *v.* Merchants' Exch. Co., 5 N. Y. 547.

In Michigan 2 Howell Annot. St. § 5560, providing that grants to two or more persons shall be construed to create estates in common, is subject to the exception of section 5561, which excludes mortgages; but this does not prevent the execution of a mortgage with covenants which are several, but leaves the rule as at common law. Cooley *v.* Kinney, 109 Mich. 34, 66 N. W. 674. And see Walker *v.* White, 60 Mich. 427, 27 N. W. 554.

53. Bates *v.* Coe, 10 Conn. 280; Gilson *v.* Gilson, 2 Allen (Mass.) 115; Burnett *v.* Pratt, 22 Pick. (Mass.) 556; Roberts *v.* McWilliams, 3 Ohio Dec. (Reprint) 152, 4 Cinc. L. Bul. 97; Farwell *v.* Warren, 76 Wis. 527, 45 N. W. 217.

A mortgage executed to the mortgagees in lieu of their heirship interests in the mortgagor's estate, which is conditioned upon the payment of a specified sum to each, does not, at the common law, create an estate in joint tenancy, so as to permit the survivor to foreclose for the full amount. Cooley *v.* Kinney, 109 Mich. 34, 66 N. W. 674.

of their respective claims against the mortgagor.[54] And the fact that a mortgage and the notes which it secures are made payable in the alternative to one or the other of two definitely named payees does not render them void.[55]

2. Parties Benefiting by Mortgage Security — a. In General. The provisions of a mortgage are not personal to the party named in it as mortgagee, but are for the benefit and security of the real owner of the debt thereby secured.[56] And while as a general rule the mortgage is available only to the formal and legal holder of such debt, whether it be the original mortgagee or his assignee, or to one subrogated to the rights of the mortgagee, it may in some circumstances inure to the benefit of a third person, not answering either of these descriptions.[57] Moreover an agreement made at the time of the execution of a mortgage that it shall be held to secure a person not named in it, either for a contemporary loan to the mortgagor or for future advances, is valid and binding.[58]

b. Mortgage to Pay Debts. Where land is conveyed by mortgage or deed of trust on an undertaking by the mortgagee to pay the debts of the mortgagor, or to pay specified debts, the mortgage security will inure to the benefit of the creditors, holders of such debts, although they are not named in the conveyance.[59]

c. Mortgage to Surety or Indorser. When the purpose of a mortgage given by a debtor to his surety or indorser is personal, and it is intended only to indemnify the mortgagee, the holder of the debt can avail himself of such mortgage only by subrogation, claiming through the surety, and hence cannot proceed under the mortgage until a remedy has accrued to the surety; but if the mortgage is given for the better security of the debt itself, or to provide the surety with means to pay it in case of the principal's default, then, although the purpose is to indemnify the surety, a trust also attaches to the mortgage for the benefit of the creditor which the courts will enforce.[60] But mortgages given by cosureties, each

A mortgage due to two or more persons jointly, on the death of any of them, passes to the survivor or survivors, and not to the personal representatives of the deceased. Cote *v.* Dequindre, Walk. (Mich.) 64.

54. Lewis *v.* De Forest, 20 Conn. 427. And see Adams *v.* Robertson, 37 Ill. 45.

55. Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425.

56. New England L. & T. Co. *v.* Robinson, 56 Nebr. 50, 76 N. W. 415, 71 Am. St. Rep. 657. And see Hanrion *v.* Hanrion, (Kan. 1906) 84 Pac. 381; Fenton *v.* Fenton, 208 Pa. St. 358, 57 Atl. 758.

Mortgagee not the real creditor. — A mortgage given to the cashier of a bank in his individual name, but to secure a debt due to the bank, is a valid security in favor of the bank. Lawrenceville Cement Co. *v.* Parker, 15 N. Y. Suppl. 577 [*affirmed* in 133 N. Y. 622, 30 N. E. 1150]. So a mortgage given to an administrator to secure a note given in renewal of a note which had been secured by the debtor's mortgage of a part of the same premises to the intestate is a conveyance to the administrator, not as an individual, but in his representative character. Wilkins *v.* Sorrells, 45 Ala. 272.

57. Chadwell *v.* Wheless, 6 Lea (Tenn.) 312, holding that where it appeared that the owner of land conveyed it to another, receiving notes for the purchase-money, the deed being absolute in form, but amounting only to a mortgage, as it was accompanied by a secret agreement for a reconveyance upon the payment of the notes and the notes were indorsed to the person who really advanced the purchase-money, the latter was entitled to the security provided by the mortgage. And see Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006.

58. Tapia *v.* Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288. *Compare* Boney *v.* Williams, 55 N. J. Eq. 691, 38 Atl. 189, holding that where a person has loaned money to a mortgagor, and claims an equitable right to share in the security of the mortgage, to which he is not a party, he must establish, by the weight of the evidence, that all the persons interested as mortgagors and mortgagees agreed, at the time he advanced the money or before, that he also should be secured by the mortgage.

59. Montgomery *v.* Culton, 18 Tex. 736; Vanmeter *v.* Vanmeter, 3 Gratt. (Va.) 148. But see Cummings *v.* Consolidated Mineral Water Co., 27 R. I. 195, 61 Atl. 353, holding that where a mortgage given by a corporation to secure bonds provided that the mortgagor should pay all liens on the property, and that if, on its failure to do so, the trustee should pay them, he should be reimbursed, these provisions did not in equity inure to the benefit of holders of mechanics' liens.

60. Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145; Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311; Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525.

Mortgage to accepter of bills of exchange. — A deed of trust for the benefit of a party who has given and intends to give letters of

to the other as security to indemnify him against any claim against his proportion assumed, are not in equity securities for the payment of the principal debt which inure to the benefit of creditors on the principle of subrogation.[61]

D. Parties to Trust Deeds — 1. Who Are Competent as Trustees — a. In General. Generally speaking, any responsible person competent to hold and convey the title to real estate may be selected to act as the trustee in a deed of trust. Interest in the debt secured is no disqualification,[62] nor is the fact that the trustee was not solvent,[63] or that he failed to comply with a statute requiring trustees to give bond for the faithful performance of their duties.[64]

b. Non-Residents and Foreign Corporations. There is no legal necessity that the trustee in a deed of trust should be a resident of the state where the land lies.[65] And foreign corporations are eligible as trustees.[66]

2. Removal and Substitution of Trustees — a. By Act of Parties. It is competent for the person executing a deed of trust with power of sale, in the nature of a mortgage, to nominate and appoint a successor in the trust, who is to act in case of the death, absence, disability, or refusal of the trustee first named; and such successor, taking the place of the first trustee, in one of the emergencies con-

credit to the grantor, and upon whom the latter has drawn and intends to draw bills of exchange, providing that it shall be void if the grantor shall pay on a certain day the amount of the bills so drawn, and that otherwise the trustee shall proceed to sell and pay the amount remaining unpaid, is not a mortgage security for the payment of the bills as such, and for the benefit of the holders thereof, but only for the indemnity of the drawee; and such holders cannot maintain a suit to have a deed of release of part of the trust property, made when the drawee was insolvent, and subsequent deeds thereof to innocent third parties, set aside, and to have such part sold for their benefit. St. Louis Bldg., etc., Assoc. *v.* Clark, 36 Mo. 601. And see Ketchum *v.* Jauncey, 23 Conn. 123; Durrive *v.* Key, 20 La. Ann. 154.

61. Hampton *v.* Phipps, 108 U. S. 260, 2 S. Ct. 622, 27 L. ed. 719. And see Seward *v.* Huntington, 26 Hun (N. Y.) 217 [*reversed* on other grounds in 94 N. Y. 104 (*distinguishing* Burr *v.* Beers, 24 N. Y. 178; Lannen *v.* Fox, 20 N. Y. 268)]. *Compare* U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525.

62. Foster *v.* Latham, 21 Ill. App. 165 [*citing* Darst *v.* Bates, 95 Ill. 492; Longwith *v.* Butler, 8 Ill. 38], holding that there is no legal reason why the holder of the notes secured by a deed of trust should not be constituted the trustee therein, and act in that capacity.

Officer of creditor corporation. — A trust deed is not invalidated by the fact that the person named in it as trustee was an officer, director, or stock-holder of the corporation whose claim it was given to secure, such fact being known to the debtor at the time; nor does this circumstance invalidate a sale made under the deed by such trustee, if in conformity to the deed and free from fraud. Copsey *v.* Sacramento Bank, 133 Cal. 659, 66 Pac. 7, 85 Am. St. Rep. 238; Clark *v.* Eaton, 100 U. S. 149, 25 L. ed. 573.

Attorney or agent of creditor. — One is not rendered incompetent to act as trustee in a deed of trust to secure the purchase-money of land by reason of his having acted as attorney in fact in the sale of the property to the mortgagor. Sternberg *v.* Valentine, 6 Mo. App. 176.

63. Cohn *v.* Ward, 32 W. Va. 34, 9 S. E. 41, holding that the appointment of an insolvent or untrustworthy person as trustee, although done with a fraudulent purpose on the part of the grantor, will not render the deed void, and will not affect the rights of *bona fide* creditors secured by the deed, at least in the absence of any actual notice on their part of the intended fraud. And see Harden *v.* Wagner, 22 W. Va. 356.

64. Gardner *v.* Brown, 21 Wall. (U. S.) 36, 22 L. ed. 527.

65. Roby *v.* Smith, 131 Ind. 342, 30 N. E. 1093, 31 Am. St. Rep. 439, 15 L. R. A. 792 (holding that a statute which provided that it should not be lawful to nominate or appoint any person as trustee in a deed or mortgage, nor for any person to act in that capacity, unless he was a *bona fide* resident of the state, was unconstitutional and void, because in conflict with that provision of the constitution of the United States which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states); Bryant *v.* Richardson, 126 Ind. 145, 25 N. E. 807.

66. See Farmers' Loan, etc., Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

In Illinois a foreign corporation cannot act as the trustee in a deed of trust to secure corporate bonds, where it has any active duties to perform in the capacity of trustee, such as to certify the bonds and superintend their sale and application, without complying with the statutes regulating trust companies and requiring the deposit of securities with the auditor of public accounts. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55. And see Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369 [*affirming* 84 Ill. App. 84].

templated by the deed, may lawfully exercise the power.[67] Or the maker of the deed may confer upon the beneficiary, or holder of the obligation secured, the right and power to appoint a new trustee in case the first fails for any cause.[68] Or a similar power of appointing his successor may be conferred upon the original trustee, in which case the power of appointment is personal to the trustee and cannot be delegated to another.[69] It is also usual, in case the deed is made to joint trustees, to provide that, in case of the death, resignation, or removal of either of them, the powers granted shall vest in the surviving or remaining trustees, with or without power to fill vacancies. This is a perfectly valid provision.[70] In the absence of such a provision, it seems that the surviving trustee

67. Irish *v.* Antioch College, 126 Ill. 474, 18 N. E. 768, 9 Am. St. Rep. 638; Clark *v.* Wilson, 53 Miss. 119.

Absence of trustee.— A clause in a trust deed providing that B shall act as trustee in case A, the original trustee, shall be "absent from the state" contemplates a permanent absence on the part of A, not a mere temporary removal from the state. Equitable Trust Co. *v.* Fisher, 106 Ill. 189.

Imprisonment of trustee.— Where a trust deed provided that in case of removal of the trustee from the county a corporation designated was appointed successor to the trust, and the title should vest in it, and in case of the trustee's temporary absence from the county at any time when his action should be required such corporation should have authority to exercise all his powers, the fact that the trustee, before bringing action of ejectment, had been confined in the penitentiary in another county, did not divest him of title, and vest it in the corporation, as the title was not to change on temporary absence, but only on "removal," and a temporary imprisonment is not a change of domicile. Ware *v.* Schintz, 190 Ill. 189, 60 N. E. 67.

Effect of release of power by trustee.— After the trustee in a deed of trust has released his power of sale by a formal deed of release, the party named as his successor, to exercise the power in case of his death or absence, has no authority to make a sale of the land conveyed by the trust deed. Porter *v.* McNabney, 77 Ill. 235.

68. Cummings *v.* Parish, 39 Miss. 412; Gooch *v.* Addison, 13 Tex. Civ. App. 76, 35 S. W. 83.

Appointment without authority.—After defendants had given a deed of trust, with plaintiff as trustee, to secure a note for the price of land, the note was assigned to plaintiff, who, without authority, appointed a trustee in his place, purchased the land at a sale by such trustee, and subsequently gave defendants a credit on the note for the amount he was to pay for the land, defendants agreeing to give plaintiff a deed thereof. It was held that, on defendants' refusal to convey, plaintiff was entitled to treat the agreement as at an end, and to enforce the deed of trust, which had never been legally foreclosed. Leake *v.* Caffey, (Miss. 1896) 19 So. 716.

Cannot appoint while original trustee acts. — Where a trust deed gives the power to appoint a substituted trustee in case the original trustee refuses or fails to act, the appointment of a substituted trustee while the original trustee is advertising the property for sale under the trust deed confers no title on the substitute. Chestnutt *v.* Gann, 76 Tex. 150, 13 S. W. 274.

Request to act necessary.— Where a deed of trust authorizes the trustee to sell in case of default, and provides that the beneficiary may substitute another trustee in case the trustee named in the deed fails or refuses to execute it, a sale made by a substituted trustee, where the original trustee has never been asked to make the sale, is invalid, since the trustee could not be said to "fail" to act until he had been requested to act and had omitted to do so. Stallings *v.* Thomas, 55 Ark. 326, 18 S. W. 184.

Where a deed of trust provides that, upon the death of the trustees named therein, the same titles and powers vested in them shall vest in their successors, it is not necessary that there should be any additional written conveyance of the property to new trustees, lawfully appointed to fill the place of the original trustees, since deceased, in order to enable them to execute the power of sale contained in the deed. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132.

Resignation of trustee.— A written resignation by the trustee in a deed of trust, which provides for the appointment of a successor on the trustee's refusal to act, duly signed and acknowledged, and the written appointment of a successor, also signed and acknowledged, constitute such appointee the lawful successor in trust, and clothe him with the same powers and authority as were possessed by the original trustee. Lake *v.* Brown, 116 Ill. 83, 4 N. E. 773.

Appointment by deed.—Where a trust deed provides that, in the event of the death, disqualification, etc., of the trustee, the grantee shall have power to appoint, "by a duly-executed deed of appointment, duly recorded in the county in which the land" is situated, another trustee, evidence that a substituted trustee was appointed "in writing" does not show the lawful exercise of the power of appointment, so as to authorize such substituted trustee to sell the property. Polle *v.* Rouse, 73 Miss. 713, 19 So. 481.

69. Hartley *v.* O'Brien, 70 Miss. 825, 13 So. 241.

70. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1. And see *supra*, I, C, 4, c.

or trustees may lawfully exercise the power of sale, being vested by operation of law with authority for that purpose.[71]

b. By Order of Court. If the trust deed does not vest the power of appointing a new trustee in either of the parties, a court of chancery having jurisdiction may, on a proper application, appoint a competent person to act as trustee in the place of the original trustee, when the latter is dead,[72] or if the designated trustee unwarrantably neglects or refuses to act, the court may remove him and appoint a successor in his place.[73] And if the trustee is absent from the state, and neglects his duties under the trust, he may be removed and a substitute appointed.[74] And similar action is properly taken where the trustee proves himself an unfit person to exercise the power, as by manifesting personal hostility to either of the parties, in place of that absolute impartiality which it is his duty to maintain.[75]

3. Beneficiaries. The security afforded by a deed of trust in the nature of a mortgage is not personal to the original creditor, but inures to the benefit of the legal holder, for the time being, of the debt secured; and he may be identified by his lawful possession and ownership of the evidences of the debt, if any.[76] And a trust deed, perfect in other respects, is not rendered void by the omission of the name of the beneficiary, but may be enforced by the real party in interest, whose name is supplied by the trustee.[77] Nor is it avoided by an uncertainty or indefiniteness in the description of the person or persons to be secured.[78]

71. Hannah *v.* Carrington, 18 Ark. 85.

72. Lake *v.* Brown, 116 Ill. 83, 4 N. E. 773; Clark *v.* Wilson, 53 Miss. 119; Wilson *v.* Towle, 36 N. H. 129; Pitzer *v.* Logan, 85 Va. 374, 7 S. E. 385. And see Smith *v.* Davis, 90 Cal. 25, 27 Pac. 26, 25 Am. St. Rep. 92.

Necessity for new trustee.— A power of sale given by a trust deed cannot be executed after the death of the trustee named therein without the appointment of a new trustee, although the deed might be foreclosed by a bill in equity without such appointment. Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197.

Parties to application.— Where a bill in equity is filed after the death of the trustee named in a deed of trust given to secure a debt, praying for the appointment of a new trustee to sell the land under the power in the deed, the heirs of the deceased trustee are necessary parties, the legal title having been in him. Fresh *v.* Million, 9 Mo. 315; Williamson *v.* Wickersham, 3 Coldw. (Tenn.) 52. And the person who created the trust, that is, the grantor in the trust deed, is also a necessary party to such an application (Holden *v.* Stickney, 2 MacArthur (D. C.) 141), unless he has sold and conveyed his equity of redemption to a grantee who has assumed the payment of the secured debt (Marsh *v.* Green, 79 Ill. 385).

73. Moore *v.* Isbel, 40 Iowa 383; Clark *v.* Wilson, 53 Miss. 119; Wilson *v.* Towle, 36 N. H. 129; Machir *v.* Sehon, 14 W. Va. 777.

Refusal to act inequitably.— A trustee under a deed of trust will not be removed for a refusal to act under the deed, if it would have been inequitable for him to do the particular act demanded of him. Machir *v.* Sehon, 14 W. Va. 777.

Where the debt secured by the deed of trust is barred by the statute of limitations, and the trustee refuses to exercise his power of sale, a plea of the statute of limitations is a good defense to a suit to appoint a substitute trustee. Fuller *v.* O'Neal, 82 Tex. 417, 18 S. W. 479, 481.

74. Lill *v.* Neafie, 31 Ill. 101, holding that the mere absence of the trustee from the state, although it may cause inconvenience to the parties, will not of itself constitute sufficient ground for his removal; but when, in addition to his absence, it is shown that he neglects to give attention to his duties as trustee, a court is fully warranted in removing him and appointing a suitable person to carry out the provisions of the trust.

75. *In re* Mayfield, 17 Mo. App. 684; McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746.

76. Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253, holding that evidence is admissible to show who furnished the money secured by a deed of trust, and for whom the trustee was acting, when the deed of trust does not show these facts. And see Middleton Sav. Bank *v.* Dubuque, 19 Iowa 467.

Indorsee of note as beneficiary.— Where a deed of trust is given by the maker of a promissory note drawn payable to his own order, to secure its payment, he cannot be treated as being in his own person the mortgagee. The note being operative and binding only after he has indorsed it, the indorsee becomes the mortgagee, the same as if the note had been made payable to him in the first instance. Hosmer *v.* Campbell, 98 Ill. 572.

77. Sleeper *v.* Iselin, 62 Iowa 583, 17 N. W. 922.

78. Elgin First Nat. Bank *v.* Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174, holding that where the owner of a butter and cheese factory, run on the "dividend plan," executed a deed of trust to secure the farmers and dairymen who were furnishing him milk, **the description of the beneficiaries,**

VI. CONSIDERATION OF MORTGAGES.

A. Necessity of Consideration — 1. IN GENERAL. It is essential to the validity of a mortgage and to the right of the mortgagee to enforce it that it should be supported by a consideration.[79] If it is shown that the transaction was merely an accommodation between the parties, with no real consideration passing, the mortgage cannot be foreclosed.[80] But although the want of consideration will prevent the mortgagee from enforcing his security, it is no ground in equity for setting aside or canceling the instrument; the courts will not undo the grantor's own voluntary act.[81] It is not, however, necessary that the consideration should pass at the time of the execution of the mortgage; it may be given prior or subsequent thereto.[82] When the mortgage is given to secure a note, the two papers being executed contemporaneously and as parts of one transaction, the consideration sustaining the note will also support the mortgage.[83] And conversely, if the note is shown to be without consideration, the mortgage will fail with it.[84]

as "sundry persons or patrons," without naming them, did not render the deed void for indefiniteness, but it should be held to be for the security of any person who might become a patron of the factory.

79. *Georgia.*— Hall *v.* Davis, 73 Ga. 101.

Illinois.— Kerting *v.* Hatcher, 216 Ill. 232, 74 N. E. 783; Bacon *v.* National German-American Bank, 191 Ill. 205, 60 N. E. 846; Scott *v.* Magloughlin, 133 Ill. 33, 24 N. E. 1030; Rue *v.* Dole, 107 Ill. 275; Miller *v.* Marckle, 21 Ill. 152; Gaines *v.* Heaton, 100 Ill. App. 26; Stone *v.* Palmer, 68 Ill. App. 338.

Indiana.— Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106.

Michigan.— Fisher *v.* Meister, 24 Mich. 447, holding that a note and mortgage, given for a fixed sum and payable absolutely, but with no consideration, except an undertaking to furnish goods, which the mortgagee afterward fails to furnish, cannot be enforced.

New Jersey.— Perkins *v.* Trinity Realty Co., (Ch. 1905) 61 Atl. 167; Knorr *v.* Lloyd, (Ch. 1900) 47 Atl. 53. *Compare* Risley *v.* Parker, 50 N. J. Eq. 284, 23 Atl. 424, where it is said that a mortgage, given without consideration, and merely to protect the mortgagor against an anticipated judgment, although having no priority over a subsequent mortgage, is valid as between the parties.

New York.— Wood *v.* O'Brien, 17 N. Y. Suppl. 746. See, however, Bucklin *v.* Bucklin, 1 Abb. Dec. 242, 1 Keyes 141, holding that a mortgage is an executed conditional transfer of the land mortgaged, and a suit for foreclosure is a proceeding to cut off the right to redeem, and not an action to enforce a contract, and hence may be maintained, although the mortgage was without consideration.

Ohio.— Yoder *v.* Ford, 10 Ohio Dec. (Reprint) 675, 23 Cinc. L. Bul. 54.

Wisconsin.— McCourt *v.* Peppard, 126 Wis. 326, 105 N. W. 809; Beebe *v.* Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103 (holding that it is not necessary that the indebtedness should be created by an express promise); Cawley *v.* Kelley, 60 Wis. 315, 19 N. W. 65.

See 35 Cent. Dig. tit. "Mortgages," § 29.

Not a lien.— A mortgage without any debt or obligation to be secured by it has no effect as a lien, and it can take effect only from the time when some debt or liability secured by it is created. Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874.

Partial want of consideration.— Where a deed of trust secures many debts in separate classes or to different persons, the fact that a part of the debts secured are invalid or voluntary will not make the deed invalid as a security for other and genuine debts, secured thereby. Cohn *v.* Ward, 32 W. Va. 34, 9 S. E. 41.

80. Morris *v.* Davis, 83 Va. 297, 8 S. E. 247. And see Long *v.* Steele, 10 Kan. App. 160, 63 Pac. 280.

81. Fitzgerald *v.* Forristal, 48 Ill. 228; Fisher *v.* Walter, 3 Ohio S. & C. Pl. Dec. 161.

82. Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161. And see *infra*, VII, D. *Contra*, Peets *v.* Wilson, 19 La. 478, holding that a mortgage based on a consideration not existing at the time of its execution is an absolute nullity.

Connecting mortgage and consideration.— Where a person gave his note due in one year, and two months later his wife gave a mortgage on her separate estate to secure the note, there being no extension of the time of payment nor any new consideration, it was held that the mortgage could not be enforced as against a plea of want of consideration. Kansas Mfg. Co. *v.* Gandy, 11 Nebr. 448, 9 N. W. 569, 38 Am. Rep. 370. But where one signed a note as surety on a certain date, and three days later the debtor and his wife gave him a mortgage of indemnity, it was held that it could not be presumed, from that lapse of time, that the mortgage was without consideration. Forbes *v.* McCoy, 15 Nebr. 632, 20 N. W. 17.

83. Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412.

84. Saunders *v.* Dunn, 175 Mass. 164, 55 N. E. 893.

2. SEAL AS IMPORTING CONSIDERATION. A mortgage under seal imports a consideration.[85] But it is generally held that the presumption of consideration arising from the seal is rebuttable by competent evidence.[86]

3. WHO MAY IMPEACH CONSIDERATION. The validity of a mortgage may be impeached, on the ground of want of consideration, not only by the mortgagor himself, but also by third persons having an interest in the property, as creditors, purchasers, or encumbrancers not having notice of the defect.[87]

B. Sufficiency of Consideration — 1. IN GENERAL. When a mortgage purports to secure a debt, it is necessary to its validity, so far as concerns the question of sufficient consideration, that there should be such a debt or obligation in existence at the time its enforcement is sought.[88] But the debt or obligation need not be due or payable at the time of the execution of the mortgage; it is no objection that it matures in the future.[89] Nor is it essential to support the mortgage that the consideration should move directly to the mortgagor himself, it being generally sufficient if a valuable consideration passes from the mortgagee to a third person.[90] And provided there is a real debt or obligation to be secured by the mortgage, its nature or the kind of liability which it imposes is not material.[91]

85. Best *v.* Thiel, 79 N. Y. 15; Calkins *v.* Long, 22 Barb. (N. Y.) 97.

86. Feldman *v.* Gamble, 26 N. J. Eq. 494; Best *v.* Thiel, 79 N. Y. 15; Torry *v.* Black, 58 N. Y. 185; Wood *v.* Travis, 24 Misc. (N. Y.) 589, 54 N. Y. Suppl. 60. And see Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24.

87. Mossop *v.* His Creditors, 41 La. Ann. 296, 6 So. 134; Smith *v.* Conrad, 15 La. Ann. 579.

Purchasers.— A purchaser in good faith may show, in an action to stay the foreclosure of a mortgage given by his vendor on the land purchased, that such mortgage was fraudulent and without consideration. Briggs *v.* Langford, 107 N. Y. 680, 14 N. E. 502. But a subsequent purchaser of the mortgaged property who took with notice of the existence of the mortgage cannot, as against the assignee of the note secured by the mortgage, who acquired it after maturity, plead want of consideration for the note, and that it was given for the purpose of defrauding the creditors of the mortgagor. Blake *v.* Koons, 71 Iowa 356, 32 N. W. 379; Crosby *v.* Tanner, 40 Iowa 136.

Subsequent mortgagee with notice.— "A man may give a voluntary mortgage if he chooses, and it is fraudulent only as to those who are or would be defrauded by it. . . . And no one would be defrauded, in contemplation of law, who was merely a subsequent mortgagee with notice, actual or constructive, of the voluntary instrument." Brigham *v.* Brown, 44 Mich. 59, 6 N. W. 97 [*citing* Gale *v.* Gould, 40 Mich. 515].

88. Collier *v.* His Creditors, 12 Rob. (La.) 398; Wade *v.* Donau Brewing Co., 10 Wash. 284, 38 Pac. 1009, holding that a deed of trust executed to secure bonds does not become operative until the bonds have been negotiated, as there is no debt to secure in existence until that time.

In New Hampshire under statute (Pub. St. c. 139, § 3) providing that a mortgage given to secure a debt not in existence shall not be valid, a mortgage to secure an indorsement by the mortgagee of the mortgagor's note is not invalid where the indorsement is made on the following day, and as part of the same transaction. Stavers *v.* Philbrick, 68 N. H. 379, 36 Atl. 16.

89. Miller *v.* Blitch, 74 Ga. 360.

90. Rockafellow *v.* Peay, 40 Ark. 69; Parkes *v.* Barker, 2 Metc. (Mass.) 423; Birdsall *v.* Wheeler, 62 N. Y. App. Div. 625, 71 N. Y. Suppl. 67.

91. Fitch *v.* Wetherbee, 110 Ill. 475 (holding that a deed of trust given by a corporation to trustees, conveying its real property, to secure the performance of an undertaking which the company has made to pay dividends, or interest, on its guaranteed preferred stock issued and sold, and ultimately to pay for the stock itself, is supported by a sufficient consideration, and is in the strictest sense a mortgage); Battershall *v.* Davis, 31 Barb. (N. Y.) 323 (holding that a subscription for stock of a company is a legal obligation, which can be enforced by action and by forfeiture for non-payment, and is therefore a good consideration for a mortgage to secure the payment of the amount subscribed).

Mortgage to secure alimony.— In a divorce suit the decree was that the husband pay the costs and alimony weekly. He executed a mortgage to the former wife to secure the costs and charges and the alimony to be paid quarterly. It was held that there was a good consideration for the mortgage, as it included "charges," construed to mean counsel fees, besides costs, as the alimony was to be paid quarterly, which might be more beneficial to the woman than weekly payments, and as it amounted to a settlement of litigation, as without it the mortgagor had still a right of appeal, etc. Blake *v.* Blake, 7 Iowa 46.

A conveyance of land, by the purchaser at a foreclosure sale, to a person who had a contract for the land before the sale, is consideration for a mortgage, whether or not the latter was made a party to the foreclosure suit; for, if his right under his contract was not cut off by the suit, the conveyance at

It may be a contemporary loan or advance of money to the mortgagor,[92] a liability created by the act of the mortgagor in appropriating to his own use money of the mortgagee coming to his hands,[93] a claim for compensation for services rendered to the mortgagor,[94] the assignment to the mortgagor of other debts or securities,[95] the release or surrender of valuable rights by the mortgagee,[96] indulgence or forbearance shown to the mortgagor, or any collateral advantage accruing to him therefrom,[97] or any loss, expense, or detriment suffered by the mortgagee for or on account of the mortgagor or his property.[98]

2. PREËXISTING DEBT. A preëxisting debt is a sufficient consideration to support a mortgage given as security therefor; it is not necessary that there should be a new consideration contemporary with the making of the mortgage.[99] But, according to the doctrine generally prevailing, a creditor who takes a mortgage to secure a preëxisting debt without surrendering securities previously held, divesting himself of any rights, or furnishing any new consideration, is not regarded as a *bona fide* purchaser for value, and therefore cannot be accorded the priorities and superior equities which attach to that character.[1] So far as regards the

least assigned the mortgage debt. Wilson *v.* White, 84 Cal. 239, 24 Pac. 114.

92. Grimball *v.* Mastin, 77 Ala. 553; Farnum *v.* Burnett, 21 N. J. Eq. 87. And see Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563.

Agricultural advances.— In an action to foreclose a real estate mortgage which, with a chattel mortgage on certain crops and live stock, was given to secure "agricultural advances," it appeared that payments were afterward made thereon, and that the mortgagor gave his note for the balance agreed to be still due. It was held that a subsequent judgment creditor of the mortgagor could not object that they were not agricultural advances, that the payments were improperly applied, or that the amount of the note was excessive. Smith *v.* Smith, 33 S. C. 210, 11 S. E. 761.

93. Griffin *v.* Chase, 36 Nebr. 328, 54 N. W. 572.

Restitution for stolen property.— Where a bond and a mortgage of the separate real estate of a married woman were executed by her and her husband to secure to the mortgagees payment for goods which had been stolen from them by the husband and a nephew of the wife, and placed in the stock of a business carried on by the husband and wife, in the name of the wife, but managed by the husband, the wife having no knowledge of the criminal transactions, it was held that there was a good consideration for the obligations on her part. Weber *v.* Barrett, 125 N. Y. 18, 25 N. E. 1068.

94. Robinson *v.* Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; Dempsey *v.* McKenna, 18 N. Y. App. Div. 200, 45 N. Y. Suppl. 973. *Compare* Spargur *v.* Hall, 62 Iowa 498, 17 N. W. 743.

95. Fox *v.* Gray, 105 Iowa 423, 75 N. W. 339.

96. Wall *v.* Stapleton, 72 Ill. App. 614; Mapes *v.* Snyder, 59 N. Y. 450.

Release of void levy.— Where a writ of execution, issued against the execution debtor, is wrongfully levied upon the property of a third person, there being no color of right for such levy, its release will not constitute such a consideration as will support a mortgage executed by the owner of the property. Harris *v.* Cassaday, 107 Ind. 158, 8 N. E. 29.

97. Hopkins *v.* Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731.

98. De Celis *v.* Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120; Norton *v.* Pattee, 68 N. Y. 144; Ruffners *v.* Putney, 12 Gratt. (Va.) 541.

99. *Georgia.*—Usina *v.* Wilder, 58 Ga. 178.

Indiana.— Hewitt *v.* Powers, 84 Ind. 295; Evans *v.* Pence, 78 Ind. 439; McLaughlin *v.* Ward, 77 Ind. 383; Wright *v.* Bundy, 11 Ind. 398.

Iowa.— Rea *v.* Wilson, 112 Iowa 517, 84 N. W. 539; Reynolds *v.* Morse, 52 Iowa 155, 2 N. W. 1070; Cooley *v.* Hobart, 8 Iowa 358.

Michigan.— Laylin *v.* Knox, 41 Mich. 40, 1 N. W. 913.

Montana.— Laubenheimer *v.* McDermott, 5 Mont. 512, 6 Pac. 344.

Nebraska.— Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117; Turner *v.* Killian, 12 Nebr. 580, 12 N. W. 101.

New Jersey.—Perkins *v.* Trinity Realty Co., (Ch. 1905) 61 Atl. 167.

North Dakota.— Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

Ohio.— Noble County Nat. Bank *v.* Dondna, 7 Ohio Dec. (Reprint) 532, 3 Cinc. L. Bul. 789; Collins *v.* Nugent, 7 Ohio Dec. (Reprint) 485, 3 Cinc. L. Bul. 519.

Oregon.— Moore *v.* Fuller, 6 Oreg. 272, 25 Am. Rep. 524.

See 35 Cent. Dig. tit. "Mortgages," § 31.

Overdraft.— Where a president of a bank, at the time of the execution of certain notes and mortgages to the bank, was indebted to it in an overdraft to the amount of such notes, and it appears from an examination of the evidence that the notes and mortgages were made and received for the purpose of securing the overdraft, and not as accommodation paper, there is a sufficient consideration to sustain their validity. Bray *v.* Comer, 82 Ala. 183, 1 So. 77.

1. See *infra*, XIV, C, 4, b.

creditor's own rights, however, the fact that the note representing the indebtedness was executed after the mortgage is of no consequence, where the indebtedness, although in another form, existed prior to that time.[2]

3. SETTLEMENT OF CLAIMS. A settlement of claims and accounts, made by parties competent to contract, no fraud being shown, is sufficient consideration for a mortgage executed by the one to the other for the balance found due to him, or for an amount covering such balance and also an additional sum for forbearance.[3] And a mortgage executed in settlement of a suit or controversy in litigation between the parties is supported by a sufficient consideration.[4]

4. EXTENSION OF TIME. An extension of time for the payment of a debt already due, or presently maturing, or of the accrued interest thereon, and the creditor's forbearance to sue or resort to other legal remedies for its collection, constitute a good and sufficient consideration for a mortgage given by the debtor to secure the debt.[5]

Rule in bankruptcy proceedings.— A mortgage given to secure either prior advances or future advances, that is, anything except a contemporaneous consideration, is not to be considered as in the usual course of business; and although it may be a valid security in the hands of the mortgagee, yet, in proceedings in bankruptcy against the mortgagor, it is *prima facie* fraudulent and evidence of a fraudulent intent as respects creditors, and may therefore constitute an act of bankruptcy. *In re* Holland, 12 Fed. Cas. No. 6,603, 2 Hask. 90.

2. Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303.

3. *Florida.*— McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

Kentucky.— Greathouse *v.* Moredock, 55 S. W. 890.

Michigan.— Litchfield *v.* Tunnicliff, 118 Mich. 383, 76 N. W. 760.

New Jersey.— Griffiths *v.* Howell, 48 N. J. Eq. 648, 25 Atl. 20.

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795.

See 35 Cent. Dig. tit. "Mortgages," § 33.

Claim against estate of decedent.— Where a note and mortgage are executed by devisees for the debt of their testator, pursuant to an agreement that the mortgagee shall accept the same in lieu of his "claim and demand" against the estate of the testator, represented by a note and mortgage, which, being lost, are canceled by delivery of a receipt to the devisees reciting that the amount of the new note and mortgage is received as full satisfaction of the original note and mortgage, there is a sufficient consideration to support the note and mortgage made by the devisees. Otto *v.* Long, 127 Cal. 471, 59 Pac. 895.

The settlement of a family dispute is held in equity to be a sufficient consideration for a promise; and where, by a valid will, a testator leaves his whole estate to his three daughters, and one of them executes a mortgage to her brother as security for a share of the property given him in settlement of a dispute arising between two of the daughters as to the right of one of them to a share of the property, such note and mortgage are given for a sufficient consideration. Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795.

Accord and satisfaction.— Since the acceptance of a note secured by a mortgage for an unsecured debt of a large amount is a good accord and satisfaction, such mortgage is given for valuable consideration. Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978 [*affirming* 38 Ill. App. 259].

4. Commercial Exch. Bank *v.* McLeod, 67 Iowa 718, 25 N. W. 894; Randall *v.* Reynolds, 61 N. J. Eq. 334, 48 Atl. 768.

The compromise of an action to foreclose a mortgage, brought by one who is in position to claim that he is an equitable assignee of the mortgagee by reason of having paid the debt at the instance of the mortgagor's lessees, who had agreed with the mortgagor to pay, is a good consideration for the giving of a new note and mortgage by the mortgagor to such assignee for the debt, with interest and costs. Bank of Commerce *v.* Scofield, 126 Cal. 156, 58 Pac. 451.

5. *Arkansas.*— Hill *v.* Yarborough, 62 Ark. 320, 35 S. W. 433; Magruder *v.* State Bank, 18 Ark. 9.

California.— Burkle *v.* Levy, 70 Cal. 250, 11 Pac. 643.

Indiana.— Huffman *v.* Darling, 153 Ind. 22, 53 N. E. 939, holding that a mortgage on land, given to stay the levy of an execution and secure an extension of time for the payment of the judgment, is founded on a valid consideration. And see Mayer *v.* Grottendick, 68 Ind. 1.

Iowa.— Sullivan Sav. Inst. *v.* Young, 55 Iowa 132, 7 N. W. 480, holding that a mortgage to secure an existing debt is upon sufficient consideration where it is given in consideration of the creditor's agreement to extend the time of payment of interest due, although such extension is only for a single day.

Missouri.— Martin *v.* Nixon, 92 Mo. 26, 4 S. W. 503.

New Jersey.— Price *v.* Gray, (Ch. 1896) 34 Atl. 678, holding that the abandonment of a right of action by capias for moneys appropriated to his own use by a mortgagor, the extension of time for a year, and the extinguishment of the simple contract liability, are valuable considerations for a mortgage.

New York.— Maclaren *v.* Percival, 102 N. Y. 675, 6 N. E. 582; Dempsey *v.* McKenna,

5. Substitution of Securities. If a creditor cancels or releases and surrenders to the debtor any obligation or form of security which he then holds for the existing debt, this furnishes a sufficient consideration for the execution of a mortgage by the debtor to secure the same debt, especially if there is a reduction in the amount of the creditor's claim, an extension of the time for its payment, or a new loan.[6] A mortgage intended to secure a certain debt is valid in equity for that purpose, whatever form the debt may assume, if it can be traced.[7] But if the original security, which is released or surrendered, was invalid, then equity will hold the creditor to proof that there was good consideration for the mortgage which he takes in its place.[8]

6. Unenforceable Claims. A real and unsatisfied debt existing between the parties will constitute sufficient consideration for a mortgage to secure its payment, although for reasons other than illegality, it is not presently enforceable by suit or action,[9] or although the judgment, note, bond, or other writing by which it is evidenced is fatally defective.[10]

7. Debt of Another. One person may assume the debt of another, or make

18 N. Y. App. Div. 200, 45 N. Y. Suppl. 973; New York Mut. L. Ins. Co. *v.* Smith, 23 Hun 535. And see Forrester *v.* Parker, 14 Daly 208, 6 N. Y. St. 274, holding that an extension of time granted to a debtor is sufficient consideration to support a mortgage given by a third person, and a covenant by him to pay the debt.

Ohio.— Farmers', etc., Nat. Bank *v.* Wallace, 45 Ohio St. 152, 12 N. E. 439; Muskingum Bank *v.* Carpenter, Wright 729. But *compare* Welbon *v.* Webster, 89 Minn. 177, 94 N. W. 550.

See 35 Cent. Dig. tit. "Mortgages," § 37.

6. Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; U. S. Deposit Fund Com'rs *v.* Chase, 6 Barb. (N. Y.) 37; Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55.

No money need pass.— San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 58 Pac. 914.

Release of building lien.—A mortgage given by an owner of a building to a materialman, who had furnished materials to a contractor, to procure a release of a lien in favor of a materialman, is supported by a sufficient consideration, although the owner was not owing the contractor anything when the mortgage was executed. Haden *v.* Buddensick, 67 Barb. (N. Y.) 188.

Where the mortgagee released a part of the mortgaged premises from the lien of its mortgage on condition that the mortgagor would obtain another mortgage for it as additional security, and a third party executed such mortgage at the request of the mortgagor, there was a sufficient consideration for the execution of the latter mortgage. Security L. & T. Co. *v.* Mattern, 131 Cal. 326, 63 Pac. 482.

Former security not surrendered.— Where a note secured by trust deed was given with the intention of taking up other notes similarly secured, and under a promise of the payee to surrender the other notes for cancellation, one to whom the new notes and trust deed were transferred without any surrender of the old ones acquired no equitable rights under the deed, since there was no consideration therefor. Martina *v.* Muhlke, 186 Ill. 327, 57 N. E. 954.

7. Sampson *v.* Neely, 106 Ill. App. 129; Patterson *v.* Johnston, 7 Ohio 225.

8. Perrine *v.* Perrine, 11 N. J. Eq. 142.

9. Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645, holding that a debt from which the debtor has been released by the insolvency laws is a valuable and legal consideration to sustain a mortgage or deed of trust. But *compare* Rosenberg *v.* Ford, 85 Cal. 610, 24 Pac. 779, holding that a mortgage is without consideration in so far as it undertakes to secure a promissory note made by a debtor, since deceased, and which has become barred by statute because not presented for allowance against his estate within the time limited by law.

Where the claim of the creditor never had any legal existence, being a mere unjustifiable demand on his part, as, a demand for the return of a partial payment on a land purchase, which has become forfeited for failure to make the deferred payments, in accordance with the express agreement of the parties, the mortgage is not supported by such consideration as will justify a decree for its foreclosure. Miexsell *v.* Walton, 49 Kan. 255, 30 Pac. 410.

10. Osborn *v.* Segras, 29 La. Ann. 291, holding that a mortgage given to secure a real debt, on which a judgment has been rendered, will be sustained, although it appears that the judgment was void for want of jurisdiction in the court which rendered it.

Note invalidated by alteration.— A mortgage on real estate, given to secure a debt, the amount and terms of which sufficiently appear therein, is valid, and may be enforced against the estate of the maker, although the note representing the same debt is declared void because of a material alteration made therein by the payee after the death of the maker. Smith *v.* Smith, 27 S. C. 166, 3 S. E. 78, 13 Am. St. Rep. 633; Plyler *v.* Elliott, 19 S. C. 257. And see Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80.

himself answerable for it, and give a valid mortgage to secure its payment.[11] A mortgage may be given to secure a debt or liability by a person who is secondarily liable therefor, in the character of a surety or guarantor for the principal debtor, and the contingent liability of the mortgagor will constitute a sufficient consideration; but the actual debt must correspond with that recited in the mortgage, and any particular limitations set forth in the mortgage must be strictly followed.[12]

8. Relationship of Parties. It appears to be the rule that a sufficient consideration to support a mortgage may be deduced from the mere relationship of the parties, or the mutual interest of members of the same family, or the natural love and affection existing between relatives, although there is no actual debt or obligation to be secured.[13]

9. Subsequent Consideration Relating Back. A mortgage made to secure promissory notes or other evidences of debt, which are intended to be negotiated or assigned and transferred by the mortgagee to third persons, is valid, although no money passes at the time of its execution; consideration subsequently furnished by the purchasers of the notes will relate back and sustain the mortgage.[14]

C. Payment of Consideration — 1. In General. Although a mortgage recites a loan of money as its consideration, and although the money was actually paid out by the mortgagee, yet if it never reached the hands of the mortgagor, having been paid over to a person not authorized to receive it, or embezzled by an agent of the mortgagee, the mortgage is without consideration and cannot be enforced.[15] Where a loan of money which is the consideration for a mortgage is paid partly in cash and partly by a due-bill, accepted as cash, the consideration of

11. Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375; Lee *v.* Kirkpatrick, 14 N. J. Eq. 264; Birdsall *v.* Wheeler, 173 N. Y. 590, 65 N. E. 1114; Talley *v.* Buchanan, (Tenn. Ch. App. 1898) 46 S. W. 542. And see Chadbourn *v.* Durham, 140 N. C. 501, 53 S. E. 348.

Where a mortgage is given to secure a pre-existing debt of a third person to the mortgagee, as well as a present loan, it will be presumed, in the absence of anything to the contrary, that the new loan is made for the purpose of obtaining the security for the antecedent debt; so that the new loan is sufficient consideration to support the entire mortgage. Mayherry *v.* Nichol, (Tenn. Ch. App. 1896) 39 S. W. 881.

Mortgage of homestead by debtor's wife.— A mortgage executed by the wife of a debtor jointly with him upon their homestead, to secure the payment of new notes given by him as collateral to old notes on which he was liable as maker, was sustained by a valid consideration, although it would not have been binding upon the homestead interest of the wife, and would therefore have been void *in toto*, if it had been given to secure the old notes without any new consideration. Hastings First Nat. Bank *v.* Lamont, 5 N. D. 393, 67 N. W. 145. And see Edwards *v.* Schoeneman, 104 Ill. 278.

Mortgage by corporation for debt of sole stock-holder.— Where the stock of a corporation is practically all owned by one man, although others are nominal stock-holders, and by authority of a resolution of the board of directors, in payment of an indebtedness contracted in the owner's name, but on account of the corporation, and in consideration of the surrender of capital stock of the corporation pledged as collateral, notes are issued in the name of the corporation and a mortgage is given on the corporate property to secure the notes, said notes and mortgage are not invalid, as being without consideration. Fernald *v.* Highland Hall Co., 59 Kan. 534, 53 Pac. 861.

12. Galesburg First Nat. Bank *v.* Davis, 108 Ill. 633; Thomas *v.* Olney, 16 Ill. 53; Ryan *v.* Shawneetown, 14 Ill. 20.

13. Cotton *v.* Graham, 84 Ky. 672, 2 S. W. 647, 8 Ky. L. Rep. 658 (holding that a recital in a bond, and in the mortgage securing it, that it is given "for value received, and in consideration of love and affection" for the mortgagee, a deceased brother's widow, imports a valuable consideration, and is sufficient to support the mortgage); Calhoun *v.* Calhoun, 49 N. Y. App. Div. 520, 63 N. Y. Suppl. 601 (holding that love and affection are an adequate consideration to support a mortgage given by a son to his mother, obligating himself to support her for her natural life); Ray *v.* Hallenbeck, 42 Fed. 381 (holding that the relationship existing between father and daughter is sufficient to uphold a mortgage given by her to him as security for her deceased husband's debts, although they could not have been enforced as against her). But see Brooks *v.* Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492.

14. Croft *v.* Bunster, 9 Wis. 503; *In re* York, 30 Fed. Cas. No. 18,138. And see Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874; Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161.

15. Security Co. *v.* Kent, 83 Iowa 30, 48 N. W. 1047; Cady *v.* Jennings, 17 Hun (N. Y.) 213; Sergeant *v.* Martin, 133 Pa. St. 122, 19 Atl. 568. But *compare* Thompson

the mortgage is properly stated as the total amount of the cash and the due-bill.[16] It has been held that where it was agreed that the consideration of a mortgage was to be repaid in coal at a certain price but the supply became exhausted, the mortgagee was entitled to the balance in money.[17]

2. Duty to See to Application of Proceeds. There is a rule requiring a mortgagee dealing with a trustee, in some circumstances, to see to the application of the money loaned. But this does not apply to a case of agency, where the owner of the property has executed a mortgage and placed it in the hands of his agent to negotiate the loan and receive the money, nor where, in the case of a trust, the trustee must apply the money in a manner requiring deliberation, time, and discretion on his part.[18]

D. Evidence as to Consideration. In the absence of any evidence to the contrary a mortgage is presumed to rest on a sufficient consideration.[19] In the absence of direct evidence of the consideration of a mortgage, the mortgagor having absconded and the mortgagee being dead, it will be inferred from the fact of the indebtedness from the mortgagor to the mortgagee at the date of the mortgage, and its continuance and increase, that the mortgage was given to secure such indebtedness and such future indebtedness as might arise.[20] Extraneous evidence is admissible to identify the debt intended to be secured by a mortgage, and to show the real nature of the consideration, notwithstanding the recitals of the mortgage itself.[21] Want of consideration may also be shown contrary to the recitals of the mortgage. But where this is alleged in defense to a suit for foreclosure, the proof should be as clear and convincing as that required for the reformation of a written instrument.[22]

E. Failure of Consideration. A mortgage, originally supported by an adequate consideration, ceases to be an enforceable security when the consideration fails.[23] This is the case where the mortgage was given in consideration of advances to be made to the mortgagor, or a credit to be given to him, which is never furnished,[24] or for money to be paid out on the mortgagor's account, which

v. Humboldt Safe Deposit, etc., Co., 6 Pa. Cas. 450, 9 Atl. 511.

16. Beach *v.* Osborne, 74 Conn. 405, 50 Atl. 1019, 1118.

17. New York, etc., Constr. Co. *v.* Winton, 208 Pa. St. 467, 57 Atl. 955.

18. Seaverns *v.* Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079, 64 Am. St. Rep. 125 [*affirming* 64 Ill. App. 463]. And see Dart *v.* Minnesota L. & T. Co., 74 Minn. 426, 77 N. W. 288.

19. Waterloo First Nat. Bank *v.* Bennett, 215 Ill. 398, 74 N. E. 405.

Mortgage executed after note.— The court will not presume that there was no consideration for a mortgage to indemnify the surety on a note from the mere fact that the mortgage was executed three days after the execution of the note. Forbes *v.* McCoy, 15 Nebr. 632, 20 N. W. 17.

20. U. S. Trust Co. *v.* Lanahan, 50 N. J. Eq. 796, 27 Atl. 1032; Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476.

21. *Illinois.*— Babcock *v.* Lisk, 57 Ill. 327.

Michigan.— Ruloff *v.* Hazen, 124 Mich. 570, 83 N. W. 370.

Mississippi.— Wimberly *v.* Wortham, (1888) 3 So. 459.

Missouri.— Harwood *v.* Toms, 130 Mo. 225, 32 S. W. 666.

South Carolina.— See McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966 [*citing* Kaphan *v.* Ryan, 16 S. C. 352].

Identifying real debtor.— Parol evidence is admissible to show that a mortgage, apparently given to secure the debt of an individual, was really given to secure the debt of a corporation. Jones *v.* Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030.

Evidence of paying interest with second mortgage.— Where a second mortgage was executed by a mortgagor to the holder of the first mortgage, proof was admissible to show that, although the second mortgage contained no reference to the first, it was in fact given as a payment of the interest due thereon. Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790.

22. Bray *v.* Comer, 82 Ala. 183, 1 So. 77. And see Lefmann *v.* Brill, 142 Fed. 44, 73 C. C. A. 230.

23. Sheats *v.* Scott, 133 Ala. 642, 32 So. 573. *Compare* Smith *v.* Krueger, (N. J. Ch. 1906) 63 Atl. 850.

Partial failure of consideration see Otis *v.* McCaskill, (Fla. 1906) 41 So. 458.

24. Mizner *v.* Kussell, 29 Mich. 229; McDowell *v.* Fisher, 25 N. J. Eq. 93.

Partial payment of consideration.— Where a mortgagee agrees to advance a certain sum, and as security takes a mortgage on the debtor's property, but fails to advance the amount stipulated, he may still enforce his security for the sum actually advanced, subject to the right of the debtor to have a reduction to the extent of any loss chargeable

is not in fact so paid,[25] or for goods to be furnished to the mortgagor, which he never receives,[26] or for services to be rendered to him, which are never performed,[27] or where there is a failure to make a conveyance of land to the mortgagor, such conveyance being the consideration for the mortgage.[28] But a mortgagor in possession of land cannot set up, as a defense to a mortgage for the purchase-money thereof, failure of consideration in that the title to the mortgaged lands is defective.[29]

VII. DEBTS OR OBLIGATIONS SECURED.

A. In General — 1. Description of Debt in Mortgage — a. Effect in General. It is not necessary to the validity of a mortgage that it should truly state or describe the debt which it is intended to secure. It may stand as security for the real equitable claim of the mortgagee, if it appears to be genuine and honest and is satisfactorily proved to be the debt which the parties in fact designed to secure by the mortgage.[30] Thus a mortgage purporting on its face to secure, and substantially describing, a promissory note or a bond, as the evidence of the debt to be secured, may be valid, although no such note or bond was ever executed or delivered, provided a real indebtedness existed to the amount for which the note or bond was to have been given.[31]

to the breach of contract. Watts *v.* Bonner, 66 Miss. 629, 6 So. 187; Coleman *v.* Galbreath, 53 Miss. 303.

Paying debts of mortgagor.— Where it was agreed between the mortgagor and mortgagee that the money to be secured by the mortgage should be applied by the mortgagor to complete the payment of purchase-money on the mortgaged property and to pay for improvements, the fact that none of the proceeds of the mortgage ever came directly into the hands of the mortgagor did not constitute a failure of consideration, where all of the proceeds were paid out on bills and other indebtedness, as contemplated by the original agreement. Ball *v.* Marske, 202 Ill. 31, 66 N. E. 845.

Retention of part of consideration until stipulated improvements are made.— Where the mortgagee retains part of the mortgage money under an agreement providing that it shall not be paid over until improvements have been erected to the value of the money retained, the mortgagor cannot defend on the ground that the mortgagee has money of the former in his possession with which to pay overdue interest, where it appears that, although the improvements have been made, the mortgagee has had no opportunity to ascertain their value. Norristown Trust Co. *v.* Allen, 28 Pa. Co. Ct. 477.

25. Kramer *v.* Williamson, 135 Ind. 655, 35 N. E. 388.

26. Fisher *v.* Meister, 24 Mich. 447.

27. Falcon *v.* Boucherville, 1 Rob. (La.) 337. And see Nelson *v.* McPike, 24 Ind. 60, holding that a mortgagee cannot maintain a suit to foreclose his mortgage when the note which it was given to secure was made in consideration of the mortgagee's serving nine months in the army as a substitute for the mortgagor who had been drafted, when it appears that the mortgagee deserted a few weeks after he was mustered into the service and never returned thereto.

28. Akerly *v.* Vilas, 21 Wis. 88. *Compare* Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466.

29. Sunderland *v.* Bell, 39 Kan. 21, 17 Pac. 600; Merchants' Nat. Bank *v.* Snyder, 52 N. Y. App. Div. 606, 65 N. Y. Suppl. 994 [*affirmed* without opinion in 170 N. Y. 565, 62 N. E. 1097]; Shire *v.* Plimpton, 50 N. Y. App. Div. 117, 63 N. Y. Suppl. 568; Baum *v.* Raley, 53 S. C. 32, 30 S. E. 713.

30. McCaughey *v.* McDuffie, (Cal. 1903) 74 Pac. 751; Huber *v.* Jennings-Haywood Oil Syndicate, 111 La. 747, 35 So. 889; Riggs *v.* Armstrong, 23 W. Va. 760; Shirras *v.* Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260. And see *infra*, VIII, G, 2. *Compare* Whiting *v.* Beebe, 12 Ark. 421, holding that in an equitable point of view the security afforded by a deed of trust or mortgage extends only to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged.

31. Lee *v.* Fletcher, 46 Minn. 49, 48 N. W. 456, 12 L. R. A. 171; Eacho *v.* Cosby, 26 Gratt. (Va.) 112. And see Mitchell *v.* Burnham, 44 Me. 286; Hodgdon *v.* Shannon, 44 N. H. 572; Burger *v.* Hughes, 5 Hun (N. Y.) 180 [*affirmed* in 63 N. Y. 629].

Whether the debt or the note is secured.— A distinction has been made between the case where the mortgage professes to secure the debt itself, and the case where it purports only to secure the note or bond by which the debt is evidenced. Thus, in Baldwin *v.* Raplee, 2 Fed. Cas. No. 801, 4 Ben. 433, where the mortgage purported on its face to have been executed to secure the payment of ten thousand dollars, according to the condition of a certain bond, and it appeared that no such bond was ever executed, it was held that that fact was not of itself fatal to the claims of the mortgagee, and that parol evidence might be received to sustain the mortgage. On the other hand, in Ogden *v.* Ogden, 180 Ill. 543, 54 N. E. 750, it was ruled that, where a mortgage does not purport to secure

b. Mistake or Misdescription. Apparent discrepancies in a mortgage, which are mere clerical errors not material to the issue, will be disregarded; and a mistake or misdescription in the recital of the debt secured will not vitiate it, if the debt can be otherwise clearly identified.[32] But it is otherwise if the description is so defective as to be unmeaning and is not capable of explanation.[33]

c. Construction in General. In determining the character, terms, or amount of the indebtedness secured by a mortgage, the elementary rule is to ascertain from the instrument, as an entirety and in all its parts, the actual intention of the parties, giving meaning and effect, if possible, to all the words and clauses used.[34] General terms should receive a general construction, unless restrained by the context, by their association with specific terms or provisions, or by plain inferences from the language of the whole instrument.[35] It is also a general rule that, when a mortgage is given to secure the payment of a note or bond, the two instruments being made at the same time, they are to be construed together as if they were parts of one and the same document, together constituting one contract, and thus either may qualify the terms of the other, in relation to the debt secured.[36] But

an existing indebtedness, but merely the payment of a certain note, and there was no such note in existence at the time the mortgage was made, it cannot be foreclosed as drawn, to the prejudice of the intervening rights of third persons, although an indebtedness actually existed and a note corresponding to that described in the mortgage was afterward drawn.

32. Pepper *v.* Dunlap, 16 La. 163.

Misdescription of note.— A mortgage described the debt as evidenced by two notes, each due in four years. On suit to redeem, one note produced was due in four and another in five years. On the latter note an indorsement had been made when the mortgage was delivered. It was held that the note was properly admitted, the description in the mortgage being clearly a mistake. Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499.

Mistake as to date.— On "July" 16, 1866, a conveyance was made by warranty deed which reserved a mortgage lien "to secure a certain note of this date," and which gave a description of the note that was fully answered by a note having the word "June," instead of "July," upon which note certain payments were made to a party to whom the grantee had assigned it. It was held that a court of equity would identify this note as the one so secured. Blackburn University *v.* Weer, 21 Ill. App. 29.

Error as to time of paying interest.— In a mortgage given to secure the payment of two promissory notes, the recital of the indebtedness correctly stated that the interest thereon was payable "annually," but the provision for foreclosure on default stated that the interest was payable "quarterly." It was held that the word "quarterly" was used by mistake, and did not invalidate the security. Fowler *v.* Woodward, 26 Minn. 347, 4 N. W. 231.

33. Bowen *v.* Ratcliff, 140 Ind. 393, 39 N. E. 860, 49 Am. St. Rep. 203, holding that where a mortgage purported to secure "any notes that may be given for renewal of said notes," and also "any future advances or other indebtedness due," but no notes which could answer to the description of "said notes" were anywhere described in the mortgage, it could not stand as security for any original or renewal notes between the parties; and that the words "other indebtedness" must be restricted to mean indebtedness other than for future advances or other than indebtedness evidenced by promissory notes.

34. Clark *v.* Brenneman, 86 Ill. App. 416. See also Ballenger *v.* Oswalt, 26 Ind. 182.

Application of rule.—A mortgage expressed to be void in case certain payments should be made upon a certain executory contract for the delivery of malt, "the terms and method to be by notes of hand," but to remain in force if default should be made "in the payment of the money above mentioned, or any of said notes," is a security, not only for the giving of the notes, but also for their payment on maturity. Blood *v.* White, 100 Mass. 357.

35. See Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6; De Armas' Succession, 3 Rob. (La.) 342; Hunter *v.* Beach, 80 Va. 361.

Restriction of general terms.— A person being indebted to a bank executed to it a mortgage conditioned that, if he should pay unto the bank all notes, checks, or bills of exchange "which have been or shall be at any time hereafter made, drawn, indorsed, or accepted by the said (mortgagor), and which have been or shall at any time be discounted by the said bank for his benefit, and shall pay all overdrafts made by him, and all balances of account, and all sums of money due or owing by him to the said bank upon any account whatever, then this conveyance shall be void." It was held that this mortgage did not cover the indebtedness of a firm of which defendant subsequently became a member. Buffalo Bank *v.* Thompson, 121 N. Y. 280, 24 N. E. 473.

36. Phelps *v.* Mayers, 126 Cal. 549, 58 Pac. 1048; Boley *v.* Lake St. El. R. Co., 64 Ill. App. 305; Garnett *v.* Meyers, 65 Nebr. 280, 91 N. W. 400, 94 N. W. 803; Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207.

if there are contradictory or irreconcilable provisions in the two instruments, then the note or bond, being the principal thing, must govern, and the mortgage, which is a mere accessory or security, must give way, and the terms employed in the note or bond will override and control those found in the mortgage.[37]

d. Presumptions and Burden of Proof. Where a note and a mortgage pass between the same parties and bear the same date, and the mortgage recites that it is given to secure a sum which is equal to the amount of the note, it will be presumed that the note is secured by the mortgage.[38] And where a defeasance provides for a reconveyance on payment of what the debtor owes to the named mortgagee and another creditor, it will be presumed that the two creditors are to share *pro rata* in the proceeds of the security.[39]

e. Recital in Mortgage Not Conclusive. Recitals in the mortgage are not conclusive, at least as between the parties, in respect to the amount or character of the debt to be secured, but may be contradicted by competent evidence showing the true state of the case and the real equities of the parties.[40] Thus, where the money actually advanced on a mortgage was less than the sum mentioned as the consideration thereof, it is competent for the mortgagor to show how much was loaned to him, in order to reduce his liability.[41]

f. Parol Evidence as to Debt. Although a written contract cannot be contradicted or varied by parol evidence, yet such evidence is admissible to apply a written contract to its proper subject-matter. Hence, in the case of a mortgage, it is competent to show by parol what was the debt, or who was the creditor, really intended to be secured thereby.[42] Thus evidence is admissible, as between the parties and all persons subsequently becoming interested in the property with notice, that a mortgage which recites a promissory note or other existing debt as its consideration was really intended and given as security for future advances to

And see Minchrod *v.* Ullmann, 163 Ill. 25, 44 N. E. 864.

37. New England Mortg. Security Co. *v.* Casebier, 3 Kan. App. 741, 45 Pac. 452; Indiana, etc., Cent. R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554.

Note imported into mortgage.— Where a mortgage is conditioned for the payment of a certain sum, with interest, "according to the tenor of" the note to secure which the mortgage was given, and the note provides for payment of interest annually, the terms of such note are imported into the mortgage, and a failure to pay interest as provided in the note is a breach of the condition of the mortgage. Scheibe *v.* Kennedy, 64 Wis. 564, 25 N. W. 646.

38. Bailey *v.* Fanning Orphan School, 14 S. W. 908, 12 Ky. L. Rep. 644; Pepper *v.* Dunlap, 16 La. 163.

Burden of proof to show greater amount secured.—Where the mortgagee admitted that he required an absolute deed as security for a debt, without any recital to show what the debt was, and the mortgagor testified that the consideration expressed in the deed was the debt it was intended to secure, the burden of proof was on the mortgagee to show that the deed was given as security for a greater amount, if he claimed so. Freytag *v.* Hoeland, 23 N. J. Eq. 36.

39. Adams *v.* Robertson, 37 Ill. 45.

40. Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48; Babcock *v.* Lisk, 57 Ill. 327; McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538.

41. Penn *v.* Lockwood, 1 Grant Ch. (U. C.) 547.

42. Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538.

Explaining purpose of mortgage.— Where a note is given for a sum certain, secured by mortgage, but no money passes, and the object of the transaction does not appear from the note or mortgage, it may be shown by parol what the agreement was and what the mortgage was intended to secure. McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966. And parol evidence that a mortgage, although expressed in absolute terms to be for the use of the mortgagee, was in fact given in consideration of an indorsement of a note delivered to plaintiff, and as security therefor, does not contradict or invalidate the mortgage, and is admissible. Peterson *v.* Willing, 3 Dall. (Pa.) 506, 1 L. ed. 698.

Identifying debt secured.—A mortgage was given by a husband and wife on her land to A as security for sales of goods to be made by him to the husband. It was held that parol evidence was admissible to show that the liabilities which the mortgage was intended to secure were those to be incurred by the husband to a firm of which A was a member. Hall *v.* Tay, 131 Mass. 192. And evidence to show that a mortgage securing "all other legal claims due said A. and B." was meant to include the individual debts due A, as well as the joint debts due A and B, is competent on the principles stated in the text. Snow *v.* Pressey, 85 Me. 408, 27 Atl. 272.

be made to the mortgagor.[43] And several mortgages, appearing on their face to be for distinct debts, may be shown in equity to be merely additional evidence of, and security for, the same debt.[44] And so a creditor of the grantor in a deed of trust may present evidence to connect himself with the deed and show that his debt was one of those intended to be secured.[45]

2. Restriction to Debts of Specified Kind. A mortgage which is expressly stated to be given as security for debts of a particular and specified class or kind cannot be made to cover obligations or liabilities not falling within the designated class.[46]

3. Blanket Mortgage. A mortgage may be given as security for an unliquidated claim, or for whatever sum may be due from the mortgagor to the mortgagee at a given time, or for all and every kind of indebtedness which may exist between the parties or be thereafter contracted, without any specification or limitation as to amount; and in such cases it may be enforced for whatever sum the holder of the mortgage may prove to be due and payable.[47]

4. Ascertainment of Amount Due. An uncertainty caused by the failure to state in the defeasance clause of a mortgage the amount intended to be secured may be removed by a reference to the consideration clause, it being presumed, in the absence of other evidence, that the latter clause correctly represents the sum to be secured.[48] And a vague or indefinite description of the debt in the mortgage may be made certain by evidence of the relations and dealings of the parties.[49] But if the amount is unliquidated, and the parties themselves have

43. Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48; Cady *v.* Merchants' Bank, 14 N. Y. St. 99; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538; Walker *v.* Walker, 17 S. C. 329.

44. Anderson *v.* Davies, 6 Munf. (Va.) 484.

45. Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

46. Gilchrist *v.* Gilmer, 9 Ala. 985; Holliday *v.* Snow, 129 Mich. 494, 89 N. W. 443; Evenson *v.* Bates, 58 Wis. 24, 15 N. W. 837. But see Campbell *v.* Perth Amboy Shipbuilding, etc., Co., (N. J. Ch. 1905) 62 Atl. 319; Scott *v.* Thomas, 104 Va. 330, 51 S. E. 829.

Written obligations.—A mortgage was conditioned to pay the just and full sum which the maker might owe the mortgagee either as maker or indorser of any notes or bills, bonds, checks, overdrafts, or securities of any kind, given by him, according to the conditions of any such writings obligatory executed by him to the mortgagees as collateral security. It was held that the instrument called for written evidences of debt, signed by the mortgagor, and could not be made available as a security for a debt not in writing. Walker *v.* Paine, 31 Barb. (N. Y.) 213.

Liability as surety or guarantor.— If A give to B a mortgage, to secure a gross sum, which may be furnished in materials toward the erection of a house for the mortgagor, it will not cover a collateral liability assumed by B as surety or guarantor for A. Doyle *v.* White, 26 Me. 341, 45 Am. Dec. 110.

Individual and partnership debts.— Where the covenant in the mortgage is to pay the joint debt of two named parties, and any individual debt of either of them, it will not cover a copartnership obligation of a firm composed of those two parties and a third person. *In re* Shevill, 11 Fed. 858. And see Lauderdale *v.* Hallock, 7 Sm. & M. (Miss.) 622.

47. Anglo-Californian Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077; Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145; Wall *v.* Boisgerard, 11 Sm. & M. (Miss.) 574; Commercial Bank *v.* Weinberg, 25 N. Y. Suppl. 235; Holley *v.* Curry, 58 W. Va. 70, 51 S. E. 135. *Compare* Hach *v.* Hill, 106 Mo. 18, 16 S. W. 948.

All or any indebtedness.— A mortgage conditioned to pay "all indebtedness of every name and nature, now incurred or to be hereafter incurred, or which is now due or may hereafter become due" from the mortgagor to the mortgagee, includes the mortgagor's liability as indorser or surety for others, and is not restricted by the use of the word "indebtedness" to his personal debts. Rochester Commercial Bank *v.* Weinberg, 25 N. Y. Suppl. 235. A defalcation having been discovered by the officers of a bank, the secretary confessed that he had appropriated a part of the missing money, which he claimed to have restored; stated his willingness to make good anything for which he was directly or indirectly responsible; and executed a mortgage to secure a written agreement that if, after further investigation, there should be found to exist any "indebtedness" from him to the bank, he would pay the same. It was held that the security covered the mortgagor's liability to the bank for money stolen by employees through his connivance or culpable negligence. Latimer *v.* Veader, 20 N. Y. App. Div. 418, 46 N. Y. Suppl. 823.

Contingent liability.— A security to be held so long as any debt shall be due or growing due cannot be retained to answer the contingent liability of the mortgagor as drawer or indorser of a current bill. Merchants' Bank *v.* Maud, 18 Wkly. Rep. 312.

48. Burnett *v.* Wright, 135 N. Y. 543, 32 N. E. 253.

49. Parsons *v.* Clark, 132 Mass. 569.

stipulated the mode in which it is to be ascertained, a court of equity has no jurisdiction to compel the parties to adopt any other mode.[50]

5. LIMITATION OF AMOUNT SECURED. As between the parties and their representatives, the consideration named does not determine the amount of a mortgage given for both present and future indebtedness; but the mortgage stands as security for the liabilities incurred under the contract set forth in the condition, and is not, when of record, notice of the amount due upon it, nor a limitation of the amount secured thereby.[51] A mortgage given to secure an unliquidated demand, or debts of a specified kind or contracted for a particular purpose, and containing a limitation as to the total amount for which it is to stand as security, must be strictly construed in this respect and cannot be enlarged.[52] And when the debt is described as being "about" a certain amount, no indebtedness, however fair and just, can be brought within its terms which is materially in excess of the sum mentioned.[53] And a mortgage for a certain sum, divided, in specific items, to each of several creditors, containing no personal covenant, cannot be held to secure to a creditor a sum greater than that mentioned.[54] But the amount recited in the mortgage may be reduced, for the purpose of its enforcement and collection, when this is required by equitable considerations growing out of the relations and dealings of the parties.[55]

6. PURCHASE-MONEY. A mortgage to secure the purchase-money of realty [56] is the same in legal effect whether given directly to the vendor or to a third person who advances the money with which to make the purchase.[57] But to have the priority accorded to purchase-money mortgages it is necessary that it should be executed simultaneously with the deed, or else that it should be given in pursuance of a previous contract or to secure a note for the purchase-money made at the same time with the deed.[58] When the mortgagor has completed his payments

50. Emery *v.* Owings, 7 Gill (Md.) 488, 48 Am. Dec. 580, amount ascertained by arbitration.

51. Keyes *v.* Bump, 59 Vt. 391, 9 Atl. 598.

52. Ryan *v.* Shawneetown, 14 Ill. 20; Syracuse State Bank *v.* Lighthall, 46 N. Y. App. Div. 396, 61 N. Y. Suppl. 794; White *v.* City of London Brewery, 42 Ch. D. 237, 58 L. J. Ch. 855, 61 L. T. Rep. N. S. 741, 38 Wkly. Rep. 82.

Illustrations.— At the time a mortgage for two thousand two hundred dollars was given, the parties made an agreement under seal, by which the mortgagor agreed to finish a house on the land, pay one thousand one hundred dollars for the land, and pay the cost of the material, which the mortgagee was to furnish; and it was then provided that the cost of the estate and of the material, "whether more or less than said two thousand two hundred dollars," should be received in discharge of the mortgage. It was held that a payment of two thousand two hundred dollars would discharge the mortgage, although the sum due under the agreement was greater. Ford *v.* Davis, 168 Mass. 116, 46 N. E. 435. A coupon bond secured by a real estate mortgage contained a provision that "it is secured by a first mortgage on real estate in Douglas county, Nebraska, which mortgage secures this note only to the aggregate amount of $1,500." This was held to be a limitation upon the amount of the mortgage lien. Home F. Ins. Co. *v.* Fitch, 52 Nebr. 88, 71 N. W. 940.

53. Storms *v.* Storms, 3 Bush (Ky.) 77.

54. Shelden *v.* Erskine, 78 Mich. 627, 44 N. W. 146.

55. See Ahbe *v.* Newton, 19 Conn. 20; Rood *v.* Winslow, Walk. (Mich.) 340; Williams *v.* Thorn, 11 Paige (N. Y.) 459.

Failure to advance amount stipulated.— Where a mortgage and bond were in the sum of three thousand dollars, under an agreement that the mortgagee would advance that sum, no money being actually advanced at the time, and the mortgagee subsequently advanced at different times to the amount of one thousand one hundred dollars, and then refused to advance any more, the mortgagor, having accepted the amounts as they were advanced without insisting on the advance of the entire sum, was not entitled to have the bond and mortgage canceled, but they became operative and a security for the amount advanced. Dart *v.* McAdam, 27 Barb. (N. Y.) 187.

56. Harrow *v.* Grogan, 219 Ill. 288, 76 N. E. 350, holding that a mortgage by a grantee to his grantor, executed, acknowledged, and recorded on the same day as the deed from the grantor to the grantee, will be presumed to be a purchase-money mortgage where there is no evidence to the contrary.

57. Stewart *v.* Fellows, (Ill. 1888) 17 N. E. 476; Wheadon *v.* Mead, 72 Minn. 372, 75 N. W. 598; Commonwealth Title Ins., etc., Co. *v.* Ellis, 8 Pa. Dist. 5, 22 Pa. Co. Ct. 86; Jones *v.* Parker, 51 Wis. 218, 8 N. W. 124.

58. Reynolds *v.* Morse, 52 Iowa 155, 2

And see Hightower *v.* Wray, 106 Tenn. 336, 61 S. W. 83.

or otherwise becomes entitled to specific performance of the contract to convey to him, the mortgage ceases to be supported by a consideration.[59] Entire failure of the title of the vendor will also destroy the consideration of the mortgage; but it cannot be said that there has been a total failure of consideration so long as the mortgagor remains in undisturbed possession of the property and is not ousted by any superior title.[60]

7. Support and Maintenance. A mortgage may be given to secure the performance of a contract or undertaking on the part of the mortgagor to furnish support and maintenance to the mortgagee, or to another person, during life or for a term of years, either in the form of an annuity, or by providing a home and a living for the person to be benefited, with or without the payment of money.[61]

B. Interest[62] **— 1. Right to Interest on Mortgage Debt.** Where a mortgage makes no provision for interest and the mortgagee agrees upon the payment of the principal sum to reconvey, the mortgage carries no interest.[63] And if non-interest bearing notes are the only debt secured by a mortgage, the amount of the mortgage debt will be the amount due on them, notwithstanding a recital in the mortgage that they bore interest before maturity.[64] But it is not necessary that there should be express words in the mortgage requiring the payment of interest; it is sufficient if the intention of the parties to that effect is clearly apparent from the whole instrument.[65] And although the mortgage does not describe the rate of interest or the times of its payment, if it clearly shows that the secured note bore

N. W. 1070; La Fayette Bldg., etc., Assoc. *v.* Erb, 5 Pa. Cas. 40, 8 Atl. 62; Robertson *v.* Parrish, (Tex. Civ. App. 1897) 39 S. W. 646.

59. Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49, holding that where, prior to the giving of a mortgage for the purchase-money of realty, a contract existed between the mortgagor and mortgagee whereby the latter promised to convey the property to the former on the performance of certain acts by the mortgagor, and he performed such acts and went into possession of the farm with the consent of the mortgagee, and made improvements thereon, he was entitled to specific performance of the contract to convey, and hence the mortgage was without consideration.

Agreement for partial release.—At the time of the execution of a purchase-money mortgage, the mortgagee executed an agreement providing that, on payment of a certain sum per acre, he would release a proportionate amount of the land during the pendency of the mortgage. It was held that, although the agreement was part of the sale, it did not apply to the amount paid when the sale was made. Baldwin *v.* Benedict, 111 Iowa 741, 82 N. W. 956.

60. Sunderland *v.* Bell, 39 Kan. 21, 17 Pac. 600; Smith *v.* Fiting, 37 Mich. 148. And see Shire *v.* Plimpton, 50 N. Y. App. Div. 117, 63 N. Y. Suppl. 568, holding that it is no defense to the foreclosure of a purchase-money mortgage that the mortgagor, in executing it, relied on a title search furnished in good faith by the mortgagee, purporting to show good title, when there was a partial defect of record title, where the mortgagor is in undisturbed possession, and there has been no breach of the covenant of warranty in the deed, and the deed contains no covenant of seizin, breach of which could be pleaded as a counter-claim.

61. *Connecticut.*—Cook *v.* Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452.

Michigan.— French *v.* Case, 77 Mich. 64, 43 N. W. 1056.

Minnesota.— Bachmeier *v.* Bachmeier, 69 Minn. 472, 72 N. W. 710.

New Jersey.— Hann *v.* Crickler, (Ch. 1899) 43 Atl. 1063.

Vermont.— Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517.

Bond for support and reconveyance not a mortgage.— A bond made by a grantee of real estate to his grantor, in consideration of the conveyance, and conditioned to support his grantor for life, and, in case of neglect, to reconvey the land, does not constitute a mortgage. Robinson *v.* Robinson, 9 Gray (Mass.) 447, 69 Am. Dec. 301.

Place of furnishing support.— Where the condition of a mortgage on land conveyed to the mortgagors by the mortgagee is that the former shall furnish support for the latter, without any limitation as to the place where it is to be furnished, it is the right of the mortgagee to appoint such place, and the condition of the mortgage is broken by failure to furnish it at such place, it being a reasonable place. Powers *v.* Mastin, 62 Vt. 433, 20 Atl. 105.

Security for repayment in instalments see Credit Foncier Franco-Canadien *v.* Andrew, 9 Manitoba 65.

62. See, generally, Interest.

63. Thompson *v.* Drew, 20 Beav. 49, 52 Eng. Reprint 521.

64. Hampden Cotton Mills *v.* Payson, 130 Mass. 88.

65. Purcell *v.* Purcell, 1 C. & L. 371, 2 Dr. & War. 217, 4 Ir. Eq. 558. And see Spencer *v.* Pierce, 5 R. I. 63, holding that a mort-

interest, this is sufficient to put a subsequent encumbrancer upon inquiry, and he can take no advantage of the omission.[66] When a simple contract debt has been secured by a deposit of title deeds unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of the right to recover interest can be inferred, the mortgagee is entitled to interest on the debt.[67]

2. TIME OF ACCRUAL. When a mortgage is given to secure a loan or advance of money, the right to interest thereon accrues, not necessarily from the date of the mortgage, but from the time the money is actually advanced or paid out by the mortgagee.[68]

3. RATE OF INTEREST — a. Contract Rate — (I) *IN GENERAL.* If there is no violation of the laws against usury,[69] and no circumstances rendering the rate of interest agreed upon by the parties to a mortgage unfair or inequitable, interest at that rate will be allowed on redemption or foreclosure.[70] And although the mortgage states the rate of interest on the debt only by reference to the note thereby secured, the mortgagor is liable for the rate specified, since the mortgage gives notice sufficient to put persons dealing with the property on inquiry as to the rate.[71]

(II) *EXCESSIVE OR UNFAIR INTEREST.* Aside from the question of usury, courts of equity will not permit a creditor to collect interest on his mortgage debt at the full rate stipulated for, where that rate is so excessive and unfair as to show that it was obtained by undue influence or by taking an unconscionable advantage of the inexperience, improvidence, or necessities of the debtor.[72]

b. In Absence of Contract. If a mortgage requires the payment of interest on the mortgage debt, but does not specify the rate, interest will be allowed at the statutory rate of legal interest.[73] And where the note or bond secured does not bear interest on its face, but the mortgage describes it as bearing interest at a certain rate, interest at that rate will be allowed.[74]

c. Subsequent Agreements Concerning Interest — (I) *TO INCREASE INTEREST.* Although the parties to a mortgage may, so far as concerns their own

gage by a calico printer providing that the trustee should pay all sums now due from the mortgagor to the trustee, and to all other persons employed in his print works, included interest on all sums due, from the time they became due by agreement, although such interest was not expressly stipulated for.

66. Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304. And see Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354, holding that where it appeared that the notes, payable in five years, described the interest as payable annually, and the mortgage securing them described them as "bearing interest at six per cent. per annum," the description in the mortgage charged the purchaser with knowledge of the fact that interest was payable annually according to the tenor of the notes themselves.

67. *In re* Kerr, L. R. 8 Eq. 331; Carey *v.* Doyne, 5 Ir. Ch. 104.

68. Edmonds *v.* Hamilton Provident, etc., Soc., 18 Ont. App. 347. And see Olcott *v.* Davis, 67 Vt. 685, 32 Atl. 813; Baxter *v.* Blodgett, 63 Vt. 629, 22 Atl. 625.

Advance by instalments.— One agreed to loan a certain sum of money to be paid in instalments at certain times, for which the borrowers gave their notes secured by mortgage, promising to pay the full amount in a certain time from date, with interest. The first instalment was not payable for more than a month, and no payment was to be made after foreclosure of the mortgage. The mortgage was foreclosed before the full amount was advanced. It was held that the lender was entitled to interest on the full amount of the note from the date thereof to the date of foreclosure. Bangs *v.* Fallon, 179 Mass. 77, 60 N. E. 403.

69. See, generally, USURY.

70. Joiner *v.* Enos, 23 Ill. App. 224. And see Citizens' State Bank *v.* Chambers, 129 Iowa 414, 105 N. W. 692; Rauch *v.* Serp, 112 Mich. 612, 71 N. W. 144.

71. Bangs *v.* Fallon, 179 Mass. 77, 60 N. E. 403.

72. Brown *v.* Hall, 14 R. I. 249, 51 Am. Rep. 375; Chapple *v.* Mahon, Ir. R. 5 Eq. 225; Readdy *v.* Pendergast, 56 L. T. Rep. N. S. 790. And see Macleod *v.* Jones, 53 L. J. Ch. 534, 50 L. T. Rep. N. S. 358, 32 Wkly. Rep. 660.

Interest as counsel fees.— The court will not suffer counsel, who happens to be a mortgagee, to insist on more than legal interest, under a pretense of a gratuity for business formerly done in the way of counsel. Thornhill *v.* Evans, 2 Atk. 330, 9 Mod. 331, 26 Eng. Reprint 601.

73. Mallory *v.* Aspinwall, 2 Day (Conn.) 280; Eaton *v.* Truesdail, 40 Mich. 1.

74. Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373.

rights, make a valid and binding subsequent agreement that the debt secured by the mortgage shall bear a higher rate of interest than that specified in the mortgage as originally given,[75] yet such an agreement is not effectual to charge the extra interest as a lien on the land mortgaged,[76] nor can it operate to the prejudice of the intervening rights of third persons, such as a junior mortgagee seeking to redeem from the prior mortgage by paying off the debt secured.[77]

(II) *To Reduce Interest.* A mere verbal agreement by the mortgagee, made after the execution of the mortgage, to reduce the rate of interest specified therein, is not valid, unless supported by a new and independent consideration.[78]

d. Rate Depending on Punctual Payment — (I) *Augmentation For Delay.* A stipulation in a mortgage that failure to pay the instalments of interest promptly as they fall due, or a failure to pay such instalments within a given limited time after their maturity, shall cause the whole mortgage debt to bear interest at a higher rate than it would otherwise bear, is in the nature of a penalty, and will not be enforced by a court of equity.[79]

(II) *Reduction For Prompt Payment.* Where the mortgage provides that the debt secured shall bear interest at a certain rate, not excessive or illegal, but that the mortgagee will accept a smaller sum if each instalment of interest is paid promptly when due, or within a limited time after it falls due, the contract is valid and binding, and the mortgagor cannot be relieved against the payment of the higher interest, if he has not fulfilled the condition as to punctual payment.[80]

e. After Maturity and Default. Where a mortgage fixes the rate of interest to be paid on the debt secured after its maturity and default in its payment, or provides that the debt shall bear interest at a certain rate "until paid," the rate

75. Smith *v.* Graham, 34 Mich. 302. And see Grahame *v.* Anderson, 15 Grant Ch. (U. C.) 189 (holding that a bargain for extra interest made between a derivative mortgagee and the mortgagor inures to the benefit of the original mortgagee); Brown *v.* Deacon, 12 Grant Ch. (U. C.) 198 (holding that a written promise by a mortgagor, after default, to allow more than six per cent interest reserved by the mortgage, was binding, although there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise).

76. Davis *v.* Jewett, 3 Greene (Iowa) 226; McGregor *v.* Mueller, 1 Cinc. Super. Ct. 486; Matson *v.* Swift, 5 Jur. 645; *In re* Houston, 2 Ont. 84; Totten *v.* Watson, 17 Grant Ch. (U. C.) 233; Murchie *v.* Theriault, 1 N. Brunsw. Eq. 588.

77. Gardner *v.* Emerson, 40 Ill. 296; Smith *v.* Graham, 34 Mich. 302.

78. Harris *v.* Creveling, 80 Mich. 249, 45 N. W. 85; Tousey *v.* Moore, 79 Mich. 564, 44 N. W. 958. But *compare* Milton *v.* Edgworth, 5 Bro. P. C. 313, 2 Eng. Reprint 700.

On renewal or extension.— Of course this rule has no application to an agreement to reduce the rate of interest, made upon the renewal of the mortgage at its maturity or upon an extension of the time for its payment, especially when such reduction is indorsed on the mortgage or the note secured; for this is substantially the making of a new contract, as much so as if the old mortgage were canceled and a new one made in its place, and the parties may incorporate such terms as they please. Roberts *v.* Doan, 180 Ill. 187, 54 N. E. 207.

79. Connecticut Mut. L. Ins. Co. *v.* Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101. And see Upton *v.* O'Donahue, 32 Nebr. 565, 49 N. W. 267; Nicholls *v.* Maynard, 3 Atk. 519, 26 Eng. Reprint 1100; Strode *v.* Parker, 2 Vern. Ch. 316, 23 Eng. Reprint 804; Holles *v.* Wyse, 2 Vern. Ch. 289, 23 Eng. Reprint 787. But *compare* Hallifax *v.* Higgens, 2 Vern. Ch. 134, 23 Eng. Reprint 694. *Contra*, Downey *v.* Parnell, 2 Ont. 82; Waddell *v.* McColl, 14 Grant Ch. (U. C.) 211.

80. Nicholls *v.* Maynard, 3 Atk. 519, 26 Eng. Reprint 1100; Stanhope *v.* Manners, 2 Eden 197, 28 Eng. Reprint 873; Jory *v.* Cox, Prec. Ch. 160, 24 Eng. Reprint 77; Brown *v.* Barkham, 1 P. Wms. 652, 24 Eng. Reprint 555; Strode *v.* Parker, 2 Vern. Ch. 316, 23 Eng. Reprint 804; Holles *v.* Wyse, 2 Vern. Ch. 289, 23 Eng. Reprint 787.

How far default applies.— Where there is a proviso for reduction of the interest payable on a mortgage debt, in case of punctual payment, a failure in such punctual payment only affects the rate of interest payable for the half-year in which such condition was not fulfilled. Wayne *v.* Lewis, 3 Eq. Rep. 1021, 3 Wkly. Rep. 600.

Receipt of reduced rate after default.— A mortgagor, who was liable to pay interest at the rate of five per cent unless paid within a certain time after it became due, when it was to be reduced to four per cent, frequently paid interest to the executor of the mortgagee at the rate of four per cent after the time limited for the lesser rate of interest. It was held that the executor was justified in receiving the lesser rate of interest, and that

so specified will generally be allowed on redemption or foreclosure.[81] Where no rate of interest is fixed by the mortgage to be paid after maturity there is a conflict of authority;[82] some of the cases hold that interest should be allowed at the same rate specified in the mortgage as payable before default, unless it is shown to be excessive or illegal,[83] while in others it has been decided that interest after default can be charged only at the statutory rate applicable to agreements in which the parties have not fixed the rate of interest, if that be less than the rate mentioned in the mortgage.[84] After default the mortgagor is not relieved from paying interest before he tenders both principal and interest, or is ready and willing to pay, being prevented from so doing by circumstances which would be equivalent to a tender.[85]

f. Mortgagee in Possession. Where a mortgagee takes possession under an abortive attempt to foreclose, but in good faith and in the belief that the proceedings have been effective, and a redemption is subsequently made, he is not restricted to the interest specified in the mortgage, but is entitled to legal interest from the time of taking possession under the supposed foreclosure.[86]

4. Separate Interest Notes or Coupons. Where a mortgage is given to secure the payment of a note or bond, separate notes or coupons may be executed for the successive instalments of the interest reserved. Each of these is a separate obligation, and may itself bear interest after its maturity; but all depend for their validity and effect upon the main obligation secured.[87]

the accounts were not to be reopened. Booth *v.* Alington, 3 Jur. N. S. 49, 26 L. J. Ch. 138.

Mortgagee in possession.— A proviso in a mortgage for a reduction of interest on punctual payment does not apply to the case of the mortgagee taking possession and receiving the rents, whether he does so by arrangement with the mortgagor or otherwise; and accordingly the mortgagee will be allowed, in his accounts as mortgagee in possession, the higher rate of interest, even though there was no interest in arrear at the time of taking possession. Bright *v.* Campbell, 41 Ch. D. 388, 60 L. T. Rep. N. S. 731, 37 Wkly. Rep. 745.

81. Capen *v.* Crowell, 66 Me. 282; Yarnal *v.* Hupp, 3 Nebr. (Unoff.) 1, 90 N. W. 645. But *compare* Peoples Loan, etc., Co. *v.* Grant, 18 Can. Sup. Ct. 262, holding that where a mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied," the mortgage carried interest at the rate of ten per cent to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent on the unpaid principal.

Illustration.—A mortgage provided for payment of the whole principal money in two years from the date of the mortgage with interest in the meantime half-yearly at the rate of nine per cent per annum; that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable, and that on default of payment of any of the instalments secured at the times provided, interest at the said rate should be paid on all sums so in arrear. It was held that the principal money was an instalment within the meaning of the proviso and that interest at the rate of nine per cent per annum was chargeable upon it after the expiration of the two years. Biggs *v.* Freehold Loan, etc., Co., 26 Ont. App. 232.

Reduction by court.— Where a mortgage bond drew interest at six per cent per annum from date until maturity, and ten per cent per annum after maturity, a decree based on the bond, drawing interest at seven per cent, cannot be complained of by the mortgagor. Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932.

82. See Interest, 22 Cyc. 1532 *et seq.*

83. Etnyre *v.* McDaniel, 28 Ill. 201; Joiner *v.* Enos, 23 Ill. App. 224; U. S. Mortgage Co. *v.* Sperry, 26 Fed. 727 [*modified* in 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969]; Muttlebury *v.* Stevens, 13 Ont. 29; Simonton *v.* Graham, 8 Ont. Pr. 495. *Compare* Conant *v.* Riseborough, 139 Ill. 383, 28 N. E. 789.

84. Brewster *v.* Wakefield, 22 How. (U. S.) 118, 16 L. ed. 301; *In re* Roberts, 14 Ch. D. 49, 42 L. T. Rep. N. S. 666, 28 Wkly. Rep. 870; Wallington *v.* Cook, 47 L. J. Ch. 508.

85. Adams *v.* Greig, 126 Mich. 582, 85 N. W. 1078.

86. Bell *v.* New York, 10 Paige (N. Y.) 49. But *compare* Stains *v.* Banks, 9 Jur. N. S. 1049; London Union Bank *v.* Ingram, 16 Ch. D. 53, 50 L. J. Ch. 74, 43 L. T. Rep. N. S. 659, 29 Wkly. Rep. 209.

87. Kleis *v.* McGrath, 127 Iowa 459, 103 N. W. 371, 109 Am. St. Rep. 396, 69 L. R. A. 260; Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 178 N. Y. 588, 70 N. E. 1102.

Interest notes subsequently executed.— Where a bond providing for the payment of interest annually was secured by a deed of trust, and afterward, for several years, when the interest was due and payable, interest

5. Interest as Debt Secured. A mortgage securing an existing debt or a written obligation for the payment of money, on which interest is reserved, will likewise secure such interest as it accrues, both in respect to the extent of its lien and for purposes of foreclosure or redemption; and this, although the interest is not specially mentioned as being a part of the obligation secured by the mortgage.[88]

C. Indemnity Mortgages — 1. Validity. It is well settled that a mortgage given by way of indemnity, that is, not founded on a present debt, but meant to secure the mortgagee against loss or damage in consequence of a contingent liability or responsibility which he has assumed or agreed to assume for and on behalf of the mortgagor, as surety, bail, indorser, or otherwise, is valid and enforceable.[89]

2. Consideration. A sufficient consideration to support such a mortgage of indemnity is found in the detriment suffered by the mortgagee in assuming such a liability or responsibility for another, in the advantage accruing to the mortgagor from being able to use the credit of the mortgagee, and in the desire of the mortgagor to save the mortgagee harmless from the consequences of his accommodation.[90] But the responsibility to be assumed by the mortgagee must be

notes were executed, bearing the same rate as the original bond, as between the parties, the deed of trust will secure the interest on these new interest notes, but such interest cannot avail as against subsequent creditors or purchasers. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

Effect of default as to interest.— A mortgage bond, with coupons attached, covering interest for five years, contained the provision "that, if either principal or interest remain unpaid ten days after due . . . the whole of the principal and interest may be declared immediately due and payable." It was held that, on default, simply the principal and the interest accrued up to the time of default became due, and not future interest covered by the coupons. Bird *v.* Olmstead, (Tenn. Ch. App. 1899) 53 S. W. 978.

Detached coupons.— Where a mortgage contains a provision that the bond secured thereby shall not be valid until the certificate indorsed thereon shall have been signed by the trustee, interest coupons detached from the bond prior to the certification of the bond by the trustee, and sold and delivered, are not within the protection of the mortgage lien. Holland Trust Co. *v.* Thomson-Houston Electric Co., 170 N. Y. 68, 62 N. E. 1090.

88. Exchange, etc., Co. *v.* Walden, 15 La. 431; Mason *v.* Mason, 12 La. 589; Caldwell *v.* His Creditors, 9 La. 265; Barbarin *v.* Daniels, 7 La. 479; Newton *v.* Manwarring, 10 N. Y. Suppl. 347; Spencer *v.* Pierce, 5 R. I. 63. See, however, McCormick *v.* Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120.

89. Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161; Collier *v.* His Creditors, 12 Rob. (La.) 398; Goddard *v.* Sawyer, 9 Allen (Mass.) 78; Williams *v.* Silliman, 74 Tex. 626, 12 S. W. 534; Planters', etc., Nat. Bank *v.* Robertson, (Tex. Civ. App. 1905) 86 S. W. 643.

Future indorsements.— A mortgage given to indemnify a person against loss or damage growing out of indorsements thereafter to be made by the mortgagee for the mortgagor is valid, and constitutes a lien preferable to the lien of a judgment rendered after such indorsements have been made. Kramer *v.* Farmers', etc., Bank, 15 Ohio 253. And see Linton *v.* Purdon, 9 Rob. (La.) 482; Brander *v.* Bowmar, 16 La. 370; Bauduc *v.* His Creditors, 4 La. 247; Roussel *v.* Dukeylus, 4 Mart. (La.) 218.

Mortgage to secure bail.—A mortgage given by a principal to his bail, to indemnify the latter against loss on account of his liability in case of forfeiture, is valid. Simpson *v.* Robert, 35 Ga. 180. A mortgage executed by parties living in Illinois, to be used in Ohio, to indemnify any person who might become bail for a person who had been indicted in the latter state for a criminal offense, which mortgage is assigned to the person who so became bail, is valid, and may be enforced to the extent of the loss suffered by the bail on the recognizance. Stevens *v.* Hay, 61 Ill. 399.

Indemnification of bondsmen.—A deed made by a defaulting state treasurer, in trust to indemnify the sureties on his official bond, is valid, and takes precedence of any lien the state may subsequently acquire by judgment against him. State *v.* Hemingway, 69 Miss. 491, 10 So. 575.

90. *Arkansas.*—Magruder *v.* State Bank, 18 Ark. 9.

Georgia.— Simpson *v.* Robert, 35 Ga. 180.

Iowa.— Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161.

Missouri.— Brooks *v.* Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492.

New Jersey.— Uhler *v.* Semple, 20 N. J. Eq. 288.

New York.— Haden *v.* Buddensick, 49 How. Pr. 241.

Oregon.— Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Texas.— Williams *v.* Silliman, 74 Tex. 626, 12 S. W. 534.

See 35 Cent. Dig. tit. "Mortgages," § 40.

actually fastened upon him in such a manner as to constitute a legally enforceable liability, else there is no consideration for the mortgage.[91]

3. WHAT LIABILITIES SECURED — a. In General. The security of an indemnity mortgage is not limited to the formal money consideration recited, but extends to the full amount for which the mortgagee ultimately proves to be liable or to be damnified.[92] And conversely the fact that a note is made to the mortgagee, absolute in its terms and for a certain amount, will not authorize the enforcement of the mortgage to the full amount of the note, if the mortgage was intended merely as indemnity, but the mortgagee's recovery will be restricted to the amount actually paid by him, or the loss actually sustained, with interest and other proper charges.[93] But in any case, the security of the mortgage will be strictly confined to the particular debt or liability, or class of debts or liabilities, specified in the condition; it cannot be diverted to other purposes, or held as security for other debts, at least without the consent of the mortgagor.[94] Where the mortgage is given to secure a debt already due to the mortgagee, and also to indemnify him as surety on certain claims, his right to hold the mortgage as an indemnity will not be affected by the discharge or loss of the debt due to him personally.[95]

b. Future Liabilities. An indemnity mortgage may be given to secure the

Guaranty of preëxisting debt.—A mortgage given to secure the guarantor of the mortgagor's note is not void for want of consideration, although given after the debt accrued, without new consideration, and before the surety paid the debt. Steen *v.* Stretch, 50 Nebr. 572, 70 N. W. 48.

91. Peets *v.* Wilson, 19 La. 478, holding that a mortgage by the maker of a note indorsed after maturity to secure the indorsers, who had been discharged by want of notice, was null and void, for want of consideration. And see Fagan *v.* Thompson, 38 Fed. 467, holding that where the mortgagee had agreed to become surety on a certain indemnity bond, but never in fact signed it, the creditor acquired no rights in the mortgaged property by virtue of the mortgage.

92. Smith *v.* Hamilton, 48 Ga. 467; Harlan County *v.* Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. Rep. 610. But *compare* Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311.

Indorsement on mortgage note.— A statement indorsed on a note, and signed by the maker, was, in substance, that the note was secured by a mortgage, and was given to the payee as security for the payment by the maker of all that he owed to a certain company, of which he was agent, and to which he had given a bond with the payee as surety. The bond secured all his indebtedness to the company growing out of his agency. It was held that the mortgage given to secure the note operated to secure the mortgagee from all liability by reason of his having signed such bond, and not merely to the amount of the note and interest. Hellyer *v.* Briggs, 55 Iowa 185, 7 N. W. 490.

Costs of collection, as being an incident of the debt, are embraced in and secured by a mortgage given to indemnify a surety. Williams *v.* Silliman, 74 Tex. 626, 12 S. W. 534.

93. Fernandez *v.* Tormey, 121 Cal. 515, 53 Pac. 1119.

94. Mercantile Trust Co. *v.* Hensey, 21 App. Cas. (D. C.) 38; Carlisle *v.* Chambers, 4 Bush (Ky.) 268, 96 Am. Dec. 304; Price *v.* Gover, 40 Md. 102; Barker *v.* Barker, 62 N. H. 366; Taylor *v.* Skiles, 113 Tenn. 288, 81 S. W. 1258. *Compare* Nelson *v.* Boyce, 7 J. J. Marsh. (Ky.) 401, 23 Am. Dec. 411.

Applications of rule.—A mortgage to secure the mortgagee from all liability that he may incur by reason of his becoming surety or indorser on the notes of the mortgagor does not secure notes given to the mortgagee for money lent by him to the mortgagor, and as evidence of such loan. Clark *v.* Oman, 15 Gray (Mass.) 521. And a bond and mortgage made for accommodation to raise money for A is diverted by being used with other securities to obtain a stay of proceedings for B, besides the raising of the money for A. Craver *v.* Wilson, 14 Abb. Pr. N. S. (N. Y.) 374. So also a mortgage securing all obligations that the mortgagee may assume or become liable for by reason of paper indorsements or obligations he may make for the mortgagor does not secure a liability of the mortgagee arising from his payment of an outstanding note of the mortgagor not indorsed by him. Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261. On the other hand a mortgage to secure "all sums that the mortgagee may become liable to pay by signing or otherwise" was held to cover the amount of a judgment against him as trustee, paid by him, and which the mortgagor had agreed to pay, in case the trustee should be held; the evidence showing that the mortgage was intended to cover this liability. Soule *v.* Albee, 31 Vt. 142. And an indemnity mortgage, conditioned to save the mortgagee harmless and to pay the note on which he is surety, covers a liability incurred by the mortgagee jointly with the mortgagor for money borrowed to pay the first note, and with which it was paid. Nesbit *v.* Worts, 37 Ohio St. 378.

95. Reinhard *v.* Kentucky Bank, 6 B. Mon. (Ky.) 252.

mortgagee not only as against debts or liabilities for which he has already assumed responsibility or liability, but also to protect him against loss or damage on indorsements, suretyships, or other liabilities which he may in the future enter into for the benefit of the mortgagor; and when this intention is apparent, the mortgage will cover such future obligations as soon as they are incurred or become fixed.[96] And the condition of the mortgage may be such as to restrict it solely to future debts or liabilities, in which case it cannot be made to cover past obligations of whatever sort.[97] When the mortgage is given to secure a person who is bound to accept drafts, the lien of the mortgage attaches from the date of the negotiation or acceptance of the drafts.[98]

c. Restriction as to Time. An indemnity mortgage may by appropriate words be restricted to the securing of indorsements made, or other liabilities contracted, for the mortgagor within a certain limited time after its execution; and in that case it will be a continuing security during the specified time, but will not cover any obligations incurred after the end of the designated period.[99]

d. Renewals and Substituted Debts. A mortgage given to indemnify the mortgagee for a given debt or liability assumed by him for the mortgagor's benefit will cover any renewal thereof, if effected within the time limited.[1] And a mortgage to secure future advances, or future liability of the mortgagee as surety for the mortgagor, constitutes a continuing security for the time and to the amount fixed; so that, when a particular advance or liability is incurred and paid off, wholly or in part, the mortgage, if so intended by the parties, will continue as a security for new advances or new liabilities made within the limit fixed.[2]

4. When Enforceable. A mortgage given to indemnify the mortgagee against loss or damage by reason of a liability which he has assumed for the benefit of the mortgagor, as guarantor, surety, indorser, or otherwise, cannot be enforced by foreclosure or sale of the property pledged until the mortgagee has been actually damnified, by paying the debt or obligation assumed,[3] or at least until he has

96. Hubbard *v.* Savage, 8 Conn. 215; Rice *v.* Groves, 70 Hun (N. Y.) 74, 23 N. Y. Suppl. 936. *Compare* Miller *v.* Lucas, 5 N. C. 228.

Future indorsements.— A mortgage upon land, given to secure indorsements upon negotiable paper, to be made by the mortgagee for the benefit of the mortgagor, becomes operative only upon the indorsements being made. *In re* Essex Land, etc., Co., 21 Ont. 367. Where an indemnity mortgage is expressed to secure the mortgagee against loss or damage arising out of indorsements already made by him, and also indorsements to be made by him in the future, for the mortgagor, the security afforded by the mortgage in respect to the indorsements made before its execution is a valid consideration for the mortgagee's agreement to make such future indorsements. Brinkmeyer *v.* Brownneller, 55 Ind. 487. And see Farr *v.* Doxtater, 9 N. Y. Suppl. 141.

97. Stokes *v.* Howerton, 67 N. C. 50.

98. Choteau *v.* Thompson, 2 Ohio St. 114.

99. Usher *v.* Raymond Skate Co., 163 Mass. 1, 39 N. E. 416. And see Vaughn *v.* Grotenkemper, 3 Tenn. Ch. 93, holding that a mortgage reciting that the mortgagees have agreed, for the accommodation of the mortgagors, to accept drafts to a given amount, either as renewals or originals, "within a period of one year from the date hereof," covers all liabilities by acceptances within the year prescribed, although renewed afterward.

Limitation by date fixed for payment.— A deed and defeasance securing (1) the payment of a certain sum within ninety days, and (2) all obligations that the mortgagee may assume or become liable for by reason of paper indorsements or obligations he may make for the mortgagor, and providing that "upon the payment of such sum or sums for which the said Burt [the mortgagee] shall or may become liable within the time aforesaid, the said Burt agrees to reconvey," etc., only secures such liabilities as are incurred by the mortgagee within the ninety days. Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261.

1. Bobbitt *v.* Flowers, 1 Swan (Tenn.) 511, holding that if, after the execution of a mortgage by a guardian to indemnify his surety, he and his surety execute a new bond, the indemnity of the mortgage applies as well to the new bond as to that under which the mortgage was executed. And see Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006.

2. Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614.

3. *Illinois.*— Constant *v.* Matteson, 22 Ill. 546.

Louisiana.— Amonett *v.* Fisk, 2 La. Ann. 263.

Michigan.— Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261.

Mississippi.— Lewis *v.* Starke, 10 Sm. & M. 120.

become immediately and absolutely liable for its payment to a fixed amount, so that the fact and the extent of the injury sustained by him are definitely fixed.[4] But if the mortgagor undertakes to discharge the primary liability, or to do some specific act, the neglect or omission of which will cast a liability upon the mortgagee, the latter need not wait until he has expended money in consequence of the former's failure to perform, but there is a breach of the condition of the mortgage, with a consequent right to enforce it, as soon as the mortgagor's omission or refusal to perform becomes certain.[5] Where a surety holds a note and mortgage for purposes of indemnity, and assigns the same, his assignee cannot enforce the mortgage until the mortgagee has paid the debt for which he was

Nebraska.— Forbes *v.* McCoy, 15 Nebr. 632, 20 N. W. 17.

Wisconsin.— Learned *v.* Bishop, 42 Wis. 470.

Exchange of mortgages by cosureties.— Where mortgages are given by cosureties, each to the other to indemnify him for an overpayment, unless one of them has been compelled to pay and has in fact paid an excess beyond his agreed share of the debt, there can have been no breach of the conditions of the mortgage and consequently no right to a foreclosure and sale of the mortgaged premises. Hampton *v.* Phipps, 108 U. S. 260, 2 S. Ct. 622, 27 L. ed. 719.

4. Warner *v.* Helm, 6 Ill. 220; Grant *v.* Ludlow, 8 Ohio St. 1; Burgoyne *v.* Clarkson, 1 Ohio Dec. (Reprint) 119, 2 West. L. J. 325.

Liquidation of damages.— If the mortgage is given to secure against liability on a note or bond, or otherwise so that the extent of the mortgagee's liability becomes fixed immediately upon default, it is not necessary to his right to foreclose that the amount of damages should first have been determined in an action at law. This is required only where the damages are unliquidated. Haskell *v.* Burdette, 32 N. J. Eq. 422; Lewis *v.* Duane, 141 N. Y. 302, 36 N. E. 322; Rodgers *v.* Jones, 1 McCord Eq. (S. C.) 221.

Payment by indorser before protest.— A payment by an indorser of a note, before protest, but in order to save the note from going to protest, the maker having informed him that he could not and would not pay it, will be within the purview of the condition of a mortgage to pay the indorser all money he may be compelled to pay, and might pay, on account of the indorsement. Newark Nat. State Bank *v.* Davis, 24 Ohio St. 190.

Payment by accommodation indorsers at maturity.— Accommodation indorsers, having a mortgage indemnifying them against loss from their indorsement, may pay the note at its maturity by giving their individual obligation therefor, and they do not lose the security of the mortgage thereby. Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 899.

Debt past due.— A sale of land under a trust deed given to indemnify a surety will not be enjoined where the debt is past due, and the parties have agreed that the trustee may advertise in time to sell by a certain day, although the surety has not yet paid the debt. Brower *v.* Buxton, 101 N. C. 419, 8 S. E. 116.

Foreclosure at maturity of mortgage.— A mortgage, executed in consideration of the mortgagee's agreement to discharge judgment liens on the mortgaged land and to indemnify the mortgagee on his indorsements for the mortgagor, may be foreclosed at maturity for its face if the sums then advanced by the mortgagee, in discharge of liens and on the indorsements, together with outstanding liens for which the mortgagee is liable, amount to more than the mortgage. Lewis *v.* Duane, 141 N. Y. 302, 36 N. E. 322 [*affirming* 69 Hun 28, 23 N. Y. Suppl. 433].

5. Goff *v.* Hedgecock, 144 Ind. 415, 43 N. E. 644; Malott *v.* Goff, 96 Ind. 496. And see Lathrop *v.* Atwood, 21 Conn. 117, holding that, although, where the contract is one of indemnity merely, no action thereon will lie for the liability or exposure to loss, until actual damage capable of appreciation has been sustained by plaintiff, yet where the contract is to perform some act for plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of non-performance, the neglect to perform the act, being a breach of contract, will give an immediate right of action.

Right of surety on note before payment.— A mortgage was given to secure the mortgagee from loss by reason of his having become surety on a promissory note executed by one of the mortgagors; and the mortgage stipulated that the mortgagors would "pay the sum of money above secured." It was held that, on the failure of the maker to pay the note at maturity, a right of action accrued to the mortgagee without his having first paid the note, and that he could recover as damages actual compensation for his probable loss. Gunel *v.* Cue, 72 Ind. 34.

Right of surety of judgment debtor.— Where a judgment debtor executed a mortgage to indemnify his sureties for the payment of a judgment, with the understanding that if the debtor should pay the judgment, and save the sureties harmless from all costs, trouble, and expense, the mortgage should be canceled, they may foreclose immediately on failure to pay the judgments at the expiration of the stay of execution, without waiting until they have been actually damnified. Thurston *v.* Prentiss, 1 Mich. 193.

Indemnity for failure of title to land sold.— Where an indemnity mortgage was given by a vendor to his vendee, on land other than that sold, and was conditioned to save the vendee harmless from all suits, decrees, judg-

surety or has in some way been damnified.[6] Payment of the debt or obligation against which the mortgage was given as indemnity by the mortgagor will of course extinguish its effect as an enforceable security; and the same result follows when it becomes certain that there can never be a breach of the condition of the mortgage by reason of the illegality of the claim against which the mortgagee was to be indemnified.[7] The right to enforce such a mortgage may be limited by conditions and stipulations inserted in the instrument itself.[8]

5. Subrogation of Creditor. When the purpose of a mortgage given by a debtor to his surety is personal, and it is intended solely to indemnify the surety, the creditor can avail himself of such mortgage only by subrogation claiming through the surety, and therefore he cannot proceed until a remedy accrues to the surety by his being actually damnified or becoming liable for the debt. But when the mortgage is given for the better security of the debt, or to provide the surety with means to pay it in case of the principal's default, then, although the purpose is to indemnify the surety, a trust also attaches to the mortgage for the benefit of the creditor, which the courts will enforce.[9]

D. Future Advances — 1. Validity — a. In General. A mortgage may be made as well to secure future advances or loans of money to be made by the mortgagee to the mortgagor as for a present debt or liability, and if executed in good faith it will be a valid security.[10] It may also be made to cover the value of

ments, orders of sale, executions, and all damages growing out of a breach of warranty, it was held that an eviction from possession was not necessary as prerequisite to a suit to foreclose the mortgage, it having been shown that the title to the land sold had been transferred by the foreclosure of another mortgage, to indemnify against which the mortgage in suit was given. Murray *v.* Porter, 26 Nebr. 288, 41 N. W. 1111.

6. Stevens *v.* Hurlburt, 25 Ill. App. 124.

7. Hopple *v.* Hipple, 33 Ohio St. 116.

8. See Patterson *v.* Johnston, 7 Ohio 225, holding that a mortgage to secure indorsers on a note to be discounted at a particular bank, and so expressed in the deed, is valid, to secure the same indorsers, although the discount took place in a different bank from the one named, and was subsequently transferred to a third bank, with the same indorsers. *Compare* Burnett *v.* Sledge, 129 N. C. 114, 39 S. E. 775, holding that where a surety on unsecured notes was himself secured by a mortgage, and he paid the notes, the fact that the debt discharged and the mortgage were not assigned to a trustee for the benefit of the surety as required as to existing security for the debt paid did not render him a simple contract creditor and release the mortgage.

9. Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145; Hampton *v.* Phipps, 108 U. S. 260, 2 S. Ct. 622, 27 L. ed. 719. And see Subrogation.

10. *Alabama.*— Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48; Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; Collier *v.* Faulk, 69 Ala. 58; Forsyth *v.* Preer, 62 Ala. 443.

Arkansas.— Brewster *v.* Clamfit, 33 Ark. 72; Jarratt *v.* McDaniel, 32 Ark. 598.

Connecticut.— Hubbard *v.* Savage, 8 Conn. 215.

Illinois.— Preble *v.* Conger, 66 Ill. 370; Collins *v.* Carlisle, 13 Ill. 254; Frye *v.* State Bank, 11 Ill. 367.

Indiana.— Bowen *v.* Ratcliff, 140 Ind. 393, 39 N. E. 860, 49 Am. St. Rep. 203.

Kentucky.— Louisville Banking Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. L. Rep. 917.

Louisiana.— Merchants', etc., Bank *v.* Hervey Plow Co., 45 La. Ann. 1214, 14 So. 139; Chaffe *v.* Whitfield, 40 La. Ann. 631, 4 So. 563; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Richardson *v.* Cramer, 28 La. Ann. 357; Gardner *v.* Maxwell, 27 La. Ann. 561; De Meza *v.* Generes, 22 La. Ann. 285; Collins *v.* His Creditors, 18 La. Ann. 235; Hubbard *v.* Griffin, 10 Rob. 383; Linton *v.* Purdon, 9 Rob. 482.

Maine.— Bunker *v.* Barron, 93 Me. 87, 44 Atl. 372.

Maryland.— Brooks *v.* Lester, 36 Md. 65. *Compare* Matter of Young, 3 Md. Ch. 461.

Massachusetts.— Taft *v.* Stoddard, 142 Mass. 545, 8 N. E. 586.

Michigan.— Citizens' Sav. Bank *v.* Kock, 117 Mich. 225, 75 N. W. 458; Newkirk *v.* Newkirk, 56 Mich. 525, 23 N. W. 206; Brackett *v.* Sears, 15 Mich. 244.

New Jersey.— Reed *v.* Rochford, 62 N. J. Eq. 186, 50 Atl. 70; Bell *v.* Fleming, 12 N. J. Eq. 13; Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49.

New York.— Ackerman *v.* Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Thomas *v.* Kelsey, 30 Barb. 268; Esterly *v.* Purdy, 50 How. Pr. 350; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475; Craig *v.* Tappin, 2 Sandf. Ch. 78.

North Dakota.— Union Nat. Bank *v.* Moline, etc., Co., 7 N. D. 201, 73 N. W. 527.

Oregon.— Nicklin *v.* Betts Spring Co., 11 Oreg. 406, 5 Pac. 51, 50 Am. Rep. 477; Hendrix *v.* Gore, 8 Oreg. 406.

United States.— Jones *v.* New York Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030;

goods thereafter to be sold to the mortgagor,[11] or for the payment of future accruing accounts between the parties,[12] and is equally valid, although the advances are to be made in building materials in lieu of money.[13] Nor is it essential that the mortgagee should be absolutely bound to make the contemplated advances; between the original parties at least the mortgage will be a valid security, although the making of the advances was left to his option or discretion.[14] And the validity of the mortgage is not necessarily impaired by the fact that it does not show upon its face the real character of the transaction, although it recites an existing debt as its consideration, it may be shown that it was intended to cover future advances, and the mortgagee can recover the amount actually advanced up to the time of enforcing the security.[15] The question of good faith is always open to inquiry, but the mere fact that the mortgage was given to secure future advances, while it recites a present debt, or that it was given for a larger amount than was loaned at the time, and with a view of covering future loans, is not conclusive of fraud.[16]

b. Partial Invalidity. A mortgage is not invalid as security for an existing debt because intended also to secure future advances, contrary to a statute; that is, although it may be invalid by statute in so far as it was meant to apply to future loans, it will stand as a valid security for a debt actually due from the mortgagor to the mortgagee at the time of its execution.[17]

c. Oral Agreement. An oral agreement between a mortgagor and mortgagee to allow the mortgage to stand as security for additional advances to be made by the mortgagee to the mortgagor will be enforced by a court of equity, no rights of third persons being prejudiced thereby.[18]

d. As Against Third Persons. A mortgage for a sum certain, given in good faith as security for future advances is valid, as against general creditors of the

Lawrence *v.* Tucker, 23 How. 14, 16 L. ed. 474; Schuelenburg *v.* Martin, 2 Fed. 747, 1 McCrary 348; Leeds *v.* Cameron, 15 Fed. Cas. No. 8,206, 3 Sumn. 488; Ripley *v.* Harris, 20 Fed. Cas. No. 11,853, 3 Biss. 199.

England.— Burgess *v.* Eve, L. R. 13 Eq. 450, 41 L. J. Ch. 515, 26 L. T. Rep. N. S. 540, 20 Wkly. Rep. 311; Hopkinson *v.* Rolt, 9 H. L. Cas. 514, 7 Jur. N. S. 1209, 34 L. J. Ch. 468, 5 L. T. Rep. N. S. 90, 9 Wkly. Rep. 900, 11 Eng. Reprint 829.

See 35 Cent. Dig. tit. "Mortgages," § 18.

In **New Hampshire** mortgages to secure future advances are prohibited by statute. Rev. St. c. 131, § 3 [*construed* in Staniels *v.* Whitcher, 72 N. H. 451, 57 Atl. 678; Fessenden *v.* Taft, 65 N. H. 39, 17 Atl. 713; Abbott *v.* Thompson, 58 N. H. 255; Stearns *v.* Bennett, 48 N. H. 400; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Weed *v.* Barker, 35 N. H. 386.

11. Marvin *v.* Chambers, 16 Fed. Cas. No. 9,179, 12 Blatchf. 495.

12. McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512.

13. Brooks *v.* Lester, 36 Md. 65.

14. Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539.

15. Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48; Collier *v.* Faulk, 69 Ala. 58; Forsyth *v.* Preer, 62 Ala. 443; Collins *v.* Carlile, 13 Ill. 254; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

Rights of third persons.— This rule will not be allowed to operate to the prejudice of third persons who have been misled or deceived by the misrepresentation of the consideration in the mortgage, such as subsequent purchasers or mortgagees or judgment creditors. Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; Collier *v.* Faulk, 69 Ala. 58; Collins *v.* Carlile, 13 Ill. 254.

16. Allen *v.* Fuget, 42 Kan. 672, 22 Pac. 725; Newkirk *v.* Newkirk, 56 Mich. 525, 23 N. W. 206; Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539.

17. Stavers *v.* Philbrick, 68 N. H. 379, 36 Atl. 16; Johnson *v.* Richardson, 38 N. H. 353; New Hampshire Bank *v.* Willard, 10 N. H. 210; Woods *v.* Peoples' Nat. Bank, 83 Pa. St. 57; Leeds *v.* Cameron, 15 Fed. Cas. No. 8,206, 3 Sumn. 488.

18. Stone *v.* Lane, 10 Allen (Mass.) 74; Ede *v.* Knowles, 2 Y. & Coll. 172, 21 Eng. Ch. 172, 63 Eng. Reprint 76. And see *infra*, VII, E, 2.

Future partnership debts.— A parol agreement that a mortgage shall cover the indebtedness for goods acquired afterward will not also cover the debts of a partnership subsequently entered into; for that a written extension would be necessary. Parkes *v.* Parker, 57 Mich. 57, 23 N. W. 458.

If, after breach of the condition of a mortgage, the mortgagee makes further advances under an oral agreement that the mortgage shall stand as security for them, a court of equity will not aid the mortgagor to redeem without requiring repayment of such advances in addition to the amount due on the original debt. A court of equity will impose

mortgagor, for advances not exceeding the sum specified in the mortgage,[19] and also as against third persons acquiring an interest in the mortgaged premises, by mortgage, conveyance, or judgment lien, at least up to the time their interest attaches and notice thereof is given to the mortgagee.[20]

e. Construction. Whether a mortgage covers future advances or not is a question determinable in the first instance from the face of the instrument; and if it is silent or ambiguous on this point, extraneous evidence will be admissible to show the real meaning and intention of the parties.[21] But where it is plainly apparent from the terms of the mortgage that it was intended to secure future advances, the terms will control a contrary understanding of the mortgagor.[22]

2. Advances or Debts Secured — a. In General. A mortgage expressly providing that it shall secure future indebtedness of the mortgagor of any kind will protect the mortgagee for advancements made, or liabilities incurred, on different accounts or of a different nature from those specially mentioned in the mortgage.[23] But if the security of the mortgage is limited to advancements of a particular

this condition on the mortgagor to prevent circuity of action, and also on the principle that he who seeks equity must do equity. But "this doctrine . . . is . . . limited to cases where the mortgagee is invested with the legal title to the property, and makes further advances, in addition to the original debt secured, upon the credit of the land to which the title is held; and where the title held is made available to secure the further advances by a legal contract between the parties; and where the rights of subsequent encumbrancers, or persons who have acquired junior liens are not prejudiced thereby. Debts created, or advances made to a mortgagor subsequent to the mortgage, cannot be tacked to the mortgage debt to the prejudice of third persons, who have acquired junior liens upon the mortgaged property." Carpenter *v.* Plagge, 192 Ill. 82, 95, 61 N. E. 530.

19. Louisville Banking Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. L. Rep. 917.

20. Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476. And see Robock *v.* Peters, 13 Manitoba 124.

21. Frisbee *v.* Poole, 32 Minn. 411, 21 N. W. 470.

Where a mortgage of a homestead contains no provisions for future advances, and there is no agreement nor consent by the wife of the mortgagor that it should cover such advances, it will be held to have been made to secure past indebtedness alone, if there was any to which it could apply. Dunn *v.* Buckley, 56 Wis. 190, 14 N. W. 67.

22. Citizens' Sav. Bank *v.* Kock, 117 Mich. 225, 75 N. W. 458.

23. Hamilton *v.* Rhodes, 72 Ark. 625, 83 S. W. 351; Huntington *v.* Knecland, 102 N. Y. App. Div. 284, 92 N. Y. Suppl. 944; Freiberg *v.* Magale, 70 Tex. 116, 7 S. W. 684; Court *v.* Holland, 4 Ont. 688.

Unauthorized payment.— In order that a payment by a mortgagee on the mortgagor's account shall constitute an advancement within the meaning of a clause in the mortgage securing "further advances" by the mortgagee, such payment must involve a contract relation, express or implied, and a payment made without the knowledge of the mortgagor cannot constitute such an advancement. Provident Mut. Bldg., etc., Assoc. *v.* Shaffer, 2 Cal. App. 216, 83 Pac. 274.

Advance for purchase of other property.— When a present indebtedness is for money hired upon the security of a farm, other money, subsequently hired by the mortgagor of the mortgagee, with which to purchase other land for the enlargement of the farm, is covered by a clause in the mortgage that it shall secure "also all other debts which the mortgagor may contract with the mortgagee." Bunker *v.* Barron, 93 Me. 87, 44 Atl. 372.

Proceeds of mortgagee's personalty.— In an action to foreclose a mortgage executed as security for all sums then due or thereafter to be due, the mortgagee is entitled to be allowed, as part of the sum due, certain moneys received by the mortgagor from the sale of the machinery of a sawmill, formerly the property of the mortgagor, but at the time of the sale owned by the mortgagee, as purchaser from an execution creditor of the mortgagor. Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208.

Claims bought up by mortgagee.— Where a debtor, owing others than the mortgagee, conveys property by a conditional deed containing a clause providing that the property shall be reconveyed on the payment to the grantee of a "sum of money equal to all claims and evidences of indebtedness that the grantee shall have against plaintiff (the mortgagor)," such clause covers future advances, and the mortgagee is entitled to hold the property as security for claims against the mortgagor which he subsequently purchases. Collins *v.* Gregg, 109 Iowa 506, 80 N. W. 562.

Protection and improvement of property.— A trust deed securing bonds, and providing for primary payment, out of the proceeds of a sale of the property, of expenses of the trust, "including all moneys advanced for insurance, taxes, or for any money paid by the party of the third part," included future advances for the purpose of paying taxes, and for making repairs and improvements.

kind,[24] as, for future indorsements or acceptances, it will be strictly confined to obligations of the sort mentioned.[25] Where it is given for future "advances" generally, it is a question of construction whether the claim sought to be collected comes fairly within its terms.[26]

b. Amount Recoverable. Whatever may be the debt or consideration recited in a mortgage, when it was given to secure future advances, the mortgagee can recover no more than the amount he has actually advanced under it up to the time of redemption or foreclosure.[27] But successive advances, made in good faith and according to the terms of the mortgage, become a part of the mortgage debt, and are actually and to the same extent secured by the mortgage.[28]

c. Restriction as to Amount. The consideration named does not limit the security for which a mortgage may stand, if the intent to secure future indebtedness is apparent from the whole instrument.[29] But a mortgage to secure future advances may specifically limit the amount for which it shall stand as security, as, by providing that such advances shall not exceed a certain named sum; and in that case the lien of the mortgage will be limited, as against subsequent encumbrancers, to the designated amount, although, as against the mortgagor, it may be good for the whole amount actually advanced.[30] Such a mortgage does not inva-

Coon *v.* Bosque Bonita Land, etc., Co., 8 N. M. 123, 42 Pac. 77.

24. Horton *v.* Barlow, 108 Ala. 417, 18 So. 890.

25. Farr *v.* Nichols, 132 N. Y. 327, 30 N. E. 834.

26. Appleby *v.* Sewards, 168 N. Y. 664, 61 N. E. 1127; Glenn *v.* Seeley, 25 Tex. Civ. App. 523, 61 S. W. 959.

Illustrations.— A mortgage given to secure future advances to the mortgagor may embrace a sum for which the mortgagor gave to the mortgagee, on the day of the execution of the mortgage, a note under seal, payable in four years, containing a clause, "being part of the amount secured by" said mortgage. Farabee *v.* McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734. A mortgage securing, in addition to the principal sum named, "all further advances to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof," does not cover a subsequent note, indorsed by the mortgagor, and by him transferred to the mortgagee. Moran *v.* Gardemeyer, 82 Cal. 96, 23 Pac. 6.

Costs.— A mortgage to secure future advances will not operate as a security for costs subsequently incurred. Shaw *v.* Neale, 6 H. L. Cas. 581, 4 Jur. N. S. 695, 27 L. J. Ch. 444, 6 Wkly. Rep. 635, 10 Eng. Reprint 1422.

27. Collins *v.* Carlile, 13 Ill. 254; Brant *v.* Hutchinson, 40 Ill. App. 576; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Robinson *v.* Cromelein, 15 Mich. 316; Freeman *v.* Auld, 44 N. Y. 50.

28. Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.

Partial failure of advances.— Where a merchant agrees to advance a certain sum, and, as security, takes a mortgage on the property of the debtor, and then fails to advance the amount stipulated, he may enforce his security for the sum actually advanced, subject to the right of the debtor to have a reduction to the extent of any loss chargeable to the breach of contract. Watts *v.* Bonner, 66 Miss. 629, 6 So. 187; Coleman *v.* Galbreath, 53 Miss. 303.

Continuing security.— A mortgage to secure a bond for advances to be made under a contract is a continuing security, and is therefore not discharged by a repayment of the amount named in the bond and mortgage. Shores *v.* Doherty, 65 Wis. 153, 26 N. W. 577.

29. Citizens' Sav. Bank *v.* Kock, 117 Mich. 225, 75 N. W. 458.

30. Wagner *v.* Breed, 29 Nebr. 720, 46 N. W. 286.

Interest included.— Where a mortgage is given to secure the commercial paper of the mortgagor, or paper on which his name appears as maker or indorser, then held by the mortgagee, or which shall afterward be discounted or held by such mortgagee, and contains a provision that "this mortgage is not to be security for over three thousand dollars at any one time, and not to extend to any paper received or discounted after three years from date of this mortgage," it secures the sum of three thousand dollars and accrued interest thereon. Mowry *v.* Sanborn, 68 N. Y. 153.

Existing debt in excess of amount named.— A debtor mortgaged his property to secure past and also future indebtedness up to a certain limited sum, and was at the time indebted to the mortgagee in an amount exceeding that sum, it was held that advances made afterward were to be taken as made upon the faith of the mortgage, and therefore that it was good security therefor, notwithstanding that it was given to secure also the past indebtedness which had not been paid. Fassett *v.* Smith, 23 N. Y. 252.

Partial repayment.— Where a mortgage given to secure future advances is limited to a certain sum, but a much larger amount is actually advanced, partial repayments, although aggregating as much as the face of the mortgage, will not extinguish it, but it will remain as a security for the balance due from the mortgagor on the sums advanced,

riably bind the mortgagee to make the advances to the full amount specified, for it may be restricted, in this particular, by other provisions of the instrument.[31]

d. Limitation as to Time. A mortgage to secure advances and credits to be made within a certain limited time will not be available as a security for any made after the time designated.[32] But under a mortgage thus expressed, although the full amount is loaned and repaid within the limited time, yet fresh loans made within the specified period will be equally covered by the mortgage.[33] Where no time is limited, but the mortgage is given to secure loans thereafter to be made, or the price of goods thereafter to be sold, to the mortgagor, this will give an implied authority to continue to advance money or sell goods, trusting to the security, as in the case of a continuing guaranty, although the authority will be revoked by the death of the mortgagor.[34]

e. Security For Floating Balance. A mortgage may be given not only as security for future advances to a specified amount, but also as a general security for a general balance of accounts between the parties or for balances which may become due from time to time from the mortgagor.[35]

E. Extension of Security to Other Debts or Liabilities — 1. General Rule. A mortgage given to secure a particular debt, whether present or prospective, cannot be enforced as security for another and different debt.[36] And the common-law doctrine of "tacking," in so far as it would permit the holder of

such balance not exceeding the amount limited in the mortgage. *In re* York, 30 Fed. Cas. No. 18,138. And see Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645. But see Johnson *v.* Bourne, 2 Y. & Coll. 268, 21 Eng. Ch. 268, 63 Eng. Reprint 118.

Advances for specified purpose.— A mortgage given for a certain amount, and reciting that it was to secure advances necessary to enable the mortgagor to enter on a certain business, is security to the amount of its face for sums advanced, and the assignee in bankruptcy of the mortgagor and his creditors cannot, on foreclosure, set up as a defense that the amount advanced was more than was necessary to enable the mortgagor to engage in the proposed business. Lewis *v.* Hartford Silk Mfg. Co., 56 Conn. 25, 12 Atl. 637.

31. Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563.

32. Miller *v.* Whittier, 36 Me. 577. And see Flower *v.* O'Bannon, 43 La. Ann. 1042, 10 So. 376, holding that a mortgage, given to secure "two thousand five hundred dollars for money advanced and acceptances made and to be made during the present year," cannot be extended to cover advances made after the expiration of the year, by any implication from the subsequent dealings between the parties, since this would involve the creation of a mortgage by parol or implication.

33. Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645.

34. Hyland *v.* Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174, 6 L. R. A. 383. And see Louisville Banking Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. L. Rep. 917; Jordan *v.* Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Bryce *v.* Massey, 35 S. C. 127, 14 S. E. 768.

35. *Louisiana.*— Durrive *v.* Key, 20 La. Ann. 154.

Missouri.— Foster *v.* Reynolds, 38 Mo. 553.

New York.— Utica Bank *v.* Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175.

Vermont.— See McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512.

England.— City Bank *v.* Luckie, L. R. 5 Ch. 773, 23 L. T. Rep. N. S. 376, 18 Wkly. Rep. 1181.

See 35 Cent. Dig. tit. "Mortgages," § 230.

Evidence of intention.— Where it appeared that a trader, being indebted to a wholesale merchant for goods supplied, executed a mortgage in favor of the creditor, securing a certain sum, and the creditor having entered into a new partnership, the firm continued to make further advances for several years, during which time the debtor made several payments, much more than would have been sufficient to pay off his indebtedness, and the firm, in rendering their accounts to the mortgagor, did not bring in the old debt, it was held that these circumstances were sufficient to show that the security was intended to cover a floating balance. Russell *v.* Davey, 7 Grant Ch. (U. C.) 13.

Nature of balances secured.— A mortgage given to a bank to secure a payment of ten thousand dollars in six months contained a proviso as follows: "This mortgage being given to secure whatever amount of indebtedness may at any time thereafter exist from the said J. to the First National Bank," etc. It was held that the mortgage was not restricted by the proviso to the indebtedness of the mortgagor to the bank, arising from direct dealings between them, but was security also for the amount of notes made by the mortgagor to the order of a third person, and by him indorsed to the bank and discounted for him. Paterson First Nat. Bank *v.* Byard, 26 N. J. Eq. 255.

36. *Alabama.*— Morris *v.* Alston, 92 Ala. 502, 9 So. 315.

a mortgage given for the express purpose of securing a particular debt, to add to his claim any other debt or demand against the mortgagor, and stretch the security of the mortgage to cover it also, is not recognized in this country, and such tacking is not permitted either on redemption or foreclosure of the mortgage.[37] And so a bond and mortgage for a sum certain cannot be shown by parol to have been intended to cover a balance on settlement of accounts, there being no allegation of fraud or other ground of equitable interposition.[38] But an agreement to let a mortgage, which had been delivered to the mortgagee, but not used, being returned without having been either recorded or canceled, stand as security for a subsequent loan, is valid and binding, and the mortgage will take effect upon its redelivery and the negotiation of the new loan.[39]

2. AGREEMENT OF PARTIES. It is competent for the parties to a mortgage to agree that it shall stand as security for a different debt or claim than that described in the mortgage, or for a debt subsequently contracted, and when such an agreement is reduced to writing, and the good faith of the arrangement is not impeached, the mortgage will be a valid security for the new debt.[40] So the parties to a mortgage given to secure an existing debt for a sum certain may

Arkansas.— Butler *v.* Adler-Goldman Commission Co., 62 Ark. 445, 35 S. W. 1110.

California.— Neumann *v.* Moretti, 146 Cal. 25, 79 Pac. 510.

Florida.— Lewter *v.* Price, 25 Fla. 574, 6 So. 439.

Georgia.— Fleming *v.* Georgia Railroad Bank, 120 Ga. 1023, 48 S. E. 420.

Illinois.— Stone *v.* Palmer, 68 Ill. App. 338.

Louisiana.— Schadel *v.* St. Martin, 11 La. Ann. 175.

Maryland.— Harris *v.* Hooper, 50 Md. 537.

Michigan.— Woodin *v.* Sparta Furniture Co., 59 Mich. 58, 26 N. W. 504; Parkes *v.* Parker, 57 Mich. 57, 23 N. W. 458.

New Jersey.— Lambertville Nat. Bank *v.* McCready Bag, etc., Co., (Ch. 1888) 15 Atl. 388, 1 L. R. A. 334.

New York.— Powell *v.* Harrison, 88 N. Y. App. Div. 228, 85 N. Y. Suppl. 452.

Texas.— Norris *v.* W. C. Belcher Land Mortg. Co., 98 Tex. 176, 82 S. W. 500, 83 S W. 799 [*reversing* 34 Tex. Civ. App. 111, 78 S. W. 390].

Wisconsin.— Beardsley *v.* Tuttle, 11 Wis. 74.

United States.— *In re* Shevill, 11 Fed. 858; Baldwin *v.* Raplee, 2 Fed. Cas. No. 801, 4 Ben. 433. *Compare* Furbish *v.* Sears, 9 Fed. Cas. No. 5,160, 2 Cliff. 454.

See 35 Cent. Dig. tit. "Mortgages," § 237.

Illustrations.— A mortgage which expressly recites that it is given to secure the prompt payment of rent according to the terms of a certain written lease, and names the amount secured, which amount corresponds with the amount agreed in the lease to be paid as rent, does not secure rents which become due after the expiration of such lease under a tenancy arising by implication of law from holding over after such lease expired. Fields *v.* Mott, 9 N. D. 621, 84 N. W. 555. It was error to include in a judgment, on the foreclosure of a mortgage securing present indebtedness and advances, a note given by a firm of which the mortgagor was a member, where it did not appear that the amount evidenced thereby was either a present debt of the mortgagor at the time such mortgage was given or an advance. London, etc., Bank *v.* Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179.

37. *Alabama.*— Parmer *v.* Parmer, 74 Ala. 285.

Arkansas.— Cohn *v.* Hoffman, 56 Ark. 119, 19 S. W. 233.

Maryland.— Chase *v.* McDonald, 7 Harr. & J. 160.

Michigan.— Wing *v.* McDowell, Walk. 175.

Minnesota.— Bacon *v.* Cottrell, 13 Minn. 194.

New York.— James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475 [*reversing* 6 Johns. Ch. 417]; Burnet *v.* Denniston, 5 Johns. Ch. 35; McKinstry *v.* Mervin, 3 Johns. Ch. 466. *Compare* Robinson *v.* Ryan, 25 N. Y. 320.

Pennsylvania.— Dorrow *v.* Kelly, 1 Dall. 142, 1 L. ed. 73.

Virginia.— Siter *v.* McClanachan, 2 Gratt. 280, a prior mortgagee cannot tack debts due from the mortgagor to his prior mortgage, to the prejudice of a subsequent mortgagee without notice.

See 35 Cent. Dig. tit. "Mortgages," § 237.

38. Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399.

39. Durfee *v.* Knowles, 2 N. Y. Suppl. 466. But *compare* Stone *v.* Palmer, 166 Ill. 463, 46 N. E. 1080.

40. *Georgia.*— McClure *v.* Smith, 115 Ga. 709, 42 S. E. 53; Wylly *v.* Screven, 98 Ga. 213, 25 S. E. 435.

Idaho.— Burke Land, etc., Co. *v.* Wells, 7 Ida. 42, 60 Pac. 87.

Massachusetts.— Whitney *v.* Metallic Window Screen Mfg. Co., 187 Mass. 557, 73 N. E. 663, such an agreement, although valid as between the parties, may be void as to a subsequent attaching creditor without notice.

Minnesota.— Steele *v.* Bond, 28 Minn. 267, 9 N. W. 772.

New Jersey.— Ferry *v.* Meckert, 32 N. J. Eq. 38; Flanagan *v.* Westcott, 11 N. J. Eq. 264.

agree to make the mortgage a security for future advances to be made.[41] But it is generally held that a mortgage of land cannot, by any mere parol agreement of the parties, be made to cover any other debt or any fresh advances or any larger amount, than that expressed in the mortgage itself, certainly not to the prejudice of third persons acquiring rights in the property or liens upon it.[42]

3. Claims Purchased by Mortgagee. A mortgagee, buying up claims held by third persons against his mortgagor, cannot include them in his mortgage and compel their settlement as a condition to redemption, or have them included in a foreclosure decree, unless with the consent of the mortgagor and in cases where no subsequent purchaser or lien creditor would be prejudiced.[43]

4. Renewals. A mortgage intended to secure a particular debt is valid in equity for that purpose, whatever form the debt may assume, if it can be traced; hence the mortgage will cover any renewals of the note, bond, or other evidence of the original debt secured.[44] So where the debt secured by the mortgage has

New York.— Huntington *v.* Kneeland, 102 N. Y. App. Div. 284, 92 N. Y. Suppl. 944.

Canada.—Edinburgh L. Assur. Co. *v.* Allen, 23 Grant Ch. (U. C.) 230.

See 35 Cent. Dig. tit. "Mortgages," § 238.

But see McCaughrin *v.* Williams, 15 S. C. 505.

Recital in defeasance not conclusive.— Although the defeasance contained in the mortgage itself provides that the instrument shall be discharged upon the payment of a certain fixed sum, it may be shown, by a separate written agreement between the parties, that the mortgage was to stand as security for whatever sum should be found to be due on a future accounting and settlement between them; and if the sum so ascertained as due is less than the amount named in the mortgage, it is only for the smaller sum that the mortgagee can foreclose. Stacey *v.* Randall, 17 Ill. 467.

Sufficiency of contract of extension.—Where a deed securing a debt was extended by written contract so as to secure another debt subsequently contracted by the grantor in favor of the grantee, it was not necessary that the contract of extension should in terms describe the property covered by the deed, a reference to the deed itself being sufficient. Wylly *v.* Screven, 98 Ga. 213, 25 S. E. 435.

Extension by mortgagor's administrator.— Although the mortgagor himself may increase the amount due upon the mortgage, by agreeing that additional advances made to him by the mortgagee shall have the benefit of the mortgage security and be included in the mortgage debt, yet the administrator of the mortgagor cannot do this, having no power to create a mortgage on the land, and having, in fact, no interest in the land, except in so far as it may be necessary for the purposes of the administration, save possibly in cases where it might be shown that the additional advances were for the benefit of the estate mortgaged, and were so applied. Percival *v.* Gale, 40 N. J. Eq. 440, 4 Atl. 437.

41. Esterly *v.* Purdy, 50 How. Pr. (N. Y.) 350; Walker *v.* Walker, 17 S. C. 329, holding that an agreement that an existing mortgage shall cover future advances may be implied from the conduct of the parties.

42. *Alabama.*— Morris *v.* Alston, 92 Ala. 502, 9 So. 315.

Arkansas.— Hughes *v.* Johnson, 38 Ark. 285; Johnson *v.* Anderson, 30 Ark. 745.

Illinois.— Union Nat. Bank *v.* International Bank, 22 Ill. App. 652 [*affirmed* in 123 Ill. 510, 14 N. E. 859], holding that where a deed of trust specified that it was given to secure all indebtedness of the grantor as maker and indorser of notes and drafts held by the beneficiary, a bank, or negotiated with it through the trustee, parol evidence was not admissible to show that, at the time of making the deed, the grantor verbally agreed that it should be held as security for any debts due by him to the trustee individually.

New York.— Stoddard *v.* Hart, 23 N. Y. 556. *Compare* Durfee *v.* Knowles, 2 N. Y. Suppl. 466, holding that an agreement to let a mortgage, which had been delivered to the mortgagee, but not used, stand as security for a subsequent loan, is not a mere parol extension of the contract so as to cover a new obligation, as the mortgage has no legal inception until delivered as security for a debt.

South Carolina.— O'Neill *v.* Bennett, 33 S. C. 243, 11 S. E. 727; Lindsay *v.* Garvin, 31 S. C. 259, 9 S. E. 862, 5 L. R. A. 219. But *compare* Walker *v.* Walker, 17 S. C. 329.

See 35 Cent. Dig. tit. "Mortgages," § 238.

43. Provident Mut. Bldg., etc., Assoc. *v.* Shaffer, 2 Cal. App. 216, 83 Pac. 274; Perrin *v.* Kellogg, 38 Mich. 720; Benton *v.* Kent, 61 N. H. 124; Maner *v.* Wilson, 16 S. C. 469.

Even where the mortgage is so drawn as to cover any demands which the mortgagee may hold against the mortgagor, it cannot authorize the mortgagee to buy up claims against the mortgagor and enforce them, unless clearly expressed in the instrument. Lashbrooks *v.* Hatheway, 52 Mich. 124, 17 N. W. 723.

44. *Illinois.*— Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Bond *v.* Liverpool, etc., Ins. Co., 106 Ill. 654; Rogers *v.* School Tp. 23, 46 Ill. 428.

Iowa.—Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118.

been reduced by partial payments, a new note given in settlement of the balance remaining due will be equally covered by the security.[45]

5. Taxes and Assessments. Where the mortgagor of realty neglects to pay taxes or assessments levied on the property during the continuance of the mortgage lien, the mortgagee has the right to pay the same, for his own protection; and on making such payment, he is entitled to add the amount to the principal of the mortgage debt and bring it within the security of the mortgage, and to be reimbursed therefor, either on redemption or foreclosure.[46] And it will be presumed that a mortgagee who pays the taxes does so for the benefit or protection of

Louisiana.— Linton *v.* Purdon, 9 Rob. 482, holding that a mortgage given to secure indorsements previously made will secure paper given to renew that originally indorsed by the mortgagee.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96.

North Carolina.— Wachovia Nat. Bank *v.* Ireland, 122 N. C. 571, 29 S. E. 835; Kidder *v.* McIlhenny, 81 N. C. 123; Hyman *v.* Devereux, 63 N. C. 624.

Ohio.— Patterson *v.* Johnston, 7 Ohio 225.

United States.— Jones *v.* New York Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030.

Correcting mistake.— Where new notes are given and accepted to correct a mistake in notes previously given and secured by mortgage, the old notes will be canceled, and the mortgage securing them will stand as security for the new notes. Granger *v.* Bissonnette, 68 Ill. App. 235.

Mortgagor as surety.— Where the note originally secured by the mortgage was not made by the mortgagor himself, but by a third person, the mortgagor merely assuming the position of a surety with reference to it, the mortgage cannot be enforced as security for a new note given in renewal of the old one, or substituted for it, without the consent of the mortgagor. Ayres *v.* Wattson, 57 Pa. St. 360.

Under the California statute (Civ. Code, § 2922), which provides that "a mortgage can be created, renewed or extended only by writing," etc., the term "extended" refers to a broadening of the security to cover additional advances, and does not apply to a mortgage securing present debt and advances for which new notes were given after the execution thereof. London, etc., Bank *v.* Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179.

45. Bray *v.* First Ave. Coal Min. Co., 148 Ind. 599, 47 N. E. 1073; Seymour *v.* Darrow, 31 Vt. 122; Inglis *v.* Gilchrist, 10 Grant Ch. (U. C.) 301.

46. *Florida.*— Jackson *v.* Relf, 26 Fla. 465, 8 So. 184.

Illinois.—Loughridge *v.* Northwestern Mut. L. Ins. Co., 180 Ill. 267, 54 N. E. 153; Stinson *v.* Connecticut Mut. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262; Abbott *v.* Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; Brown *v.* Miner, 128 Ill. 148, 21 N. E. 223; Wright *v.* Langley, 36 Ill. 381; McCasland *v.* Allen, 60 Ill. App. 285.

Indiana.— West *v.* Hayes, 117 Ind. 290, 20 N. E. 155.

Iowa.— Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178.

Kansas.— Sharp *v.* Barker, 11 Kan. 381; Stanclift *v.* Norton, 11 Kan. 218.

Maine.— Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729.

Massachusetts.— Worcester *v.* Boston, 179 Mass. 41, 60 N. E. 410; Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499.

Minnesota.—Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653; Spencer *v.* Levering, 8 Minn. 461.

Nebraska.— National L. Ins. Co. *v.* Butler, 61 Nebr. 449, 85 N. W. 437, 87 Am. St. Rep. 462 (holding that special paving assessments are "assessments" within the meaning of a clause in a mortgage imposing on the mortgagor the duty of making prompt payment of "all taxes and assessments" lawfully charged against the mortgaged property); Townsend *v.* J. I. Case Threshing-Mach. Co., 31 Nebr. 836, 48 N. W. 899; Johnson *v.* Payne, 11 Nebr. 269, 9 N. W. 81.

New Jersey.— Stonington Sav. Bank *v.* Davis, 14 N. J. Eq. 286.

New York.— Equitable L. Assur. Soc. *v.* Von Glahn, 107 N. Y. 637, 13 N. E. 793; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Burr *v.* Veeder, 3 Wend. 412; Eagle F. Ins. Co. *v.* Pell, 2 Edw. 631.

Wisconsin.—See Sands *v.* Kaukauna Water Power Co., 115 Wis. 229, 91 N. W. 679.

United States.— Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086; Hicklin *v.* Marco, 56 Fed. 549, 6 C. C. A. 10.

See 35 Cent. Dig. tit. "Mortgages," § 242.

Special paving assessment.— Where the mortgage provided that any tax or assessment paid by the mortgagee should be included in the debt secured, and a special paving assessment was levied against the property, which the mortgagor neglected to pay, taking no steps to contest its validity, and the property was sold therefor, and redeemed by the mortgagee when the time for redemption had nearly expired, it was held that the court should not refuse to include the amount so paid in a decree of foreclosure, on a claim by the mortgagor that the sale of the property was not authorized, or that it could have been defeated on account of a defect in the proceedings. American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. 610, 32 C. C. A. 275.

As to express provisions for payment of taxes see Ukiah Bank *v.* Reed, 131 Cal. 597,

his security, and not on the personal liability of the owner of the premises.[47] And although the mortgagee has no right to intervene and pay the tax until it has been returned as delinquent, and it is evident that the mortgagor will not pay it,[48] still the mortgagee is by no means obliged to wait until the premises have been sold for the delinquent tax, before paying it.[49]

6. INSURANCE. Where the mortgage requires the mortgagor to keep the premises insured for the benefit of the mortgagee, which he neglects or refuses to do, the mortgagee may thereupon take out such insurance, and add the cost thereof to the principal sum secured by the mortgage.[50]

7. COSTS AND FEES. The amount covered by the security of a mortgage, and recoverable on foreclosure, includes expenses and costs properly and necessarily incurred by the mortgagee in making his lien effective and in enforcing collection of his claim, including the costs of a proceeding to foreclose,[51] and the cost of recording the mortgage, when this can be brought within a stipulation of the mortgage to reimburse the mortgagee for costs and expenses,[52] and a commission to the trustee or other person making a sale of the property for purposes of foreclosure.[53]

8. BONUS TO MORTGAGEE. Unless restrained by the statutes against usury, a mortgagor may lawfully agree to pay a bonus to the mortgagee, in consideration of the unsatisfactory nature of the security offered, or the difficulty of obtaining money, or in return for some special privilege or advantage, or to pay a bonus or commission to the agent or intermediary who negotiates the loan; and if it is so stipulated in the mortgage, the bonus or commission so agreed to be paid becomes a part of the mortgage debt and is covered by the security of the mortgage and is recoverable as a part of it.[54] And where the lender of money neither takes nor contracts to take anything beyond the legal interest, the loan is not rendered usurious by what the borrower may do in procuring it or in using its pro-

63 Pac. 921; Rauch *v.* Seip, 112 Mich. 612, 71 N. W. 144.

47. Kortright *v.* Cady, 23 Barb. (N. Y.) 490.

48. Pond *v.* Drake, 50 Mich. 302, 15 N. W. 466.

49. Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163.

50. Mix *v.* Hotchkiss, 14 Conn. 32; Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178; Leland *v.* Collver, 34 Mich. 418; Neale *v.* Albertson, 39 N. J. Eq. 382. And see *infra*, XV, G, 2, b.

51. Pettibone *v.* Stevens, 15 Conn. 19, 38 Am. Dec. 57; Exchange, etc., Co. *v.* Walden, 15 La. 431; Rawson *v.* Hall, 56 Me. 142; Hurd *v.* Coleman, 42 Me. 182; Williams *v.* Silliman, 74 Tex. 626, 12 S. W. 534.

Fines due building association.— Where a woman unites with her husband in executing a mortgage on her separate property to secure a loan which he, as a stock-holder, procures from a building association, the mortgage is valid as to her said property, and under the act of 1859 covers the premiums due by him as such stock-holder, and the fines incurred by reason of his default in the payment of dues, as well as the actual loan. Citizens' Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733; Juniata Bldg., etc., Assoc. *v.* Mixell, 84 Pa. St. 313.

Attorney's fees see Gordon *v.* Decker, 19 Wash. 188, 52 Pac. 856.

52. Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450; Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375. See, however, Simon *v.* Sewell, 64 Ala. 241, holding that the registration of a mortgage is intended solely for the benefit and protection of the mortgagee, and rests wholly in his election; so that, in the absence of any agreement, express or implied, or stipulation in the mortgage, binding the mortgagor to bear the cost, the mortgagee cannot hold him liable for the fees paid for registration.

53. Dorsey *v.* Omo, 93 Md. 74, 48 Atl. 741.

54. Stein *v.* Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234; Yankton Bldg., etc., Assoc. *v.* Dowling, 10 S. D. 540, 74 N. W. 438; Watson *v.* Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43. See, however, More *v.* Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128.

In England and Canada the rule is that where, in the negotiations for a loan to be secured by a mortgage, the mortgagee stipulates for a bonus or special commission, or other charge in consideration of advancing the money and in addition to the interest, he may retain it if he deducts the amount at the time from the loan and only advances the balance, or in case the amount is afterward paid and settled, but otherwise such bonus or special advantage cannot be recovered or allowed in equity. Mainland *v.* Upjohn, 41 Ch. D. 126, 58 L. J. Ch. 361, 60 L. T. Rep. N. S. 614, 37 Wkly. Rep. 411; Potter *v.* Edwards, 26 L. J. Ch. 468; Phillips *v.* Prout, 12 Manitoba 143; Gardiner *v.* Munro, 28 Ont. 375.

ceeds. Hence the fact than an agent in arranging the loan exacts a bonus or commission for himself, which would be unlawful in view of the usury laws, does not affect the mortgagee, if the latter is free from all knowledge and participation in the illegal act, and derives no benefit from it.[55]

VIII. FORM AND CONTENTS OF MORTGAGES.

A. Formal Requisites — 1. In General. No particular form is necessary to constitute a mortgage of land, nor is the employment of any precise formula of words essential to it. It is only requisite that the instrument should evince a present purpose on the part of the grantor or mortgagor to convey the title to specified real estate, sufficiently described, to a designated person as mortgagee, to be held by the latter as security for the payment of a certain sum of money or for the performance of some other act on the part of the mortgagor.[56] It is immaterial for example that a conveyance clearly intended to mortgage the interest of the grantor in certain described real property is written upon a form intended for chattel mortgages, or that it is acknowledged in the character of a chattel mortgage.[57] Nor is a mortgage invalid because not all written on the same sheet of paper, provided the completeness of the instrument is not destroyed by the separation.[58] Nor is its effect impaired, at least as between the parties, because it is expressed in a foreign language, although the statutes may prevent the recording of any instrument not in the English language.[59] And so an instrument which recites the execution and recording of a mortgage on land, the destruction of the record by fire, and its reëstablishment according to law, and which admits a specified sum to be due on the mortgage, which sum the parties agree to pay, is itself a mortgage and entitled to be recorded as such.[60] In equity, almost any instrument in writing, intended by the parties to pledge land as security for a debt, will be considered and treated as a mortgage, although it may lack the formal requisites of a mortgage, and be insufficient to constitute a mort-

55. Riley *v.* Olin, 82 Ga. 312, 9 S. E. 1095; Hughes *v.* Griswold, 82 Ga. 299, 9 S. E. 1092; Merck *v.* American Freehold Land Mortg. Co., 79 Ga. 213, 7 S. E. 265; Brigham *v.* Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140; Jordan *v.* Humphrey, 31 Minn. 495, 18 N. W. 450; Washington L. Ins. Co. *v.* Lane, (N. J. Ch. 1889) 19 Atl. 617.

56. *California.*— Woodworth *v.* Guzman, 1 Cal. 203.

Illinois.— Cross *v.* Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902.

Kansas.— McDonald *v.* Kellogg, 30 Kan. 170, 2 Pac. 507; Overstreet *v.* Baxter, 30 Kan. 55, 1 Pac. 825.

Kentucky.— Bray *v.* Ellison, 83 S. W. 96, 26 Ky. L. Rep. 1039.

Mississippi.— Baldwin *v.* Jenkins, 23 Miss. 206.

Nebraska.— Iodence *v.* Peters, 64 Nebr. 425, 89 N. W. 1041.

Ohio.— Cotterell *v.* Long, 20 Ohio 464.

South Carolina.— Bredenberg *v.* Landrum, 32 S. C. 215, 10 S. E. 956.

Wisconsin.— Schriber *v.* Le Clair, 66 Wis. 579, 29 N. W. 570, 889. And see Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322; Starks *v.* Redfield, 52 Wis. 349, 9 N. W. 168; Howe *v.* Carpenter, 49 Wis. 697, 6 N. W. 357.

United States.— New Orleans Nat. Banking Assoc. *v.* Adams, 109 U. S. 211, 3 S. Ct. 161, 27 L. ed. 910.

Canada.— Dundas *v.* Desjardins Canal Co., 17 Grant Ch. (U. C.) 27, holding that a bond executed by an incorporated company, and evidently intended to give a lien on the property of the company, will be held sufficient for that purpose, although it contains no direct words of charge. And see Hoofstetter *v.* Rooker, 22 Ont. App. 175 [*affirmed* in 26 Can. Sup. Ct. 41].

See 35 Cent. Dig. tit. "Mortgages," § 116.

A conveyance made as collateral security for the payment of money or the performance of some other obligation, to be effectual only on the non-payment of the money or the non-performance of the obligation, is a mortgage, no matter to whom the conveyance may be made, or what other condition may be attached to it. Woodruff *v.* Robb, 19 Ohio 212. And see Hurd *v.* Robinson, 11 Ohio St. 232; Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

57. Cross *v.* Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902.

58. Norman *v.* Shepherd, 38 Ohio St. 320, construing a statute requiring that the certificate of acknowledgment shall be "on the same sheet on which the deed, mortgage, or other instrument, may be printed or written."

59. Tilghman *v.* Dias, 12 Mart. (La.) 691.

60. Hunt *v.* Innis, 12 Fed. Cas. No. 6,892, 2 Woods 103.

gage at common law or under the statute, although it be so defectively executed as to be invalid as a legal instrument, or although it amount to no more than an unexecuted agreement to give a mortgage.[61]

2. STATUTORY FORMS. In several of the states, brief and condensed forms have been set forth by statute, and authorized to be used in the creation of mortgages, with the declaration that they shall be considered and treated as equivalent to the full common-law form of mortgage.[62] A mortgage in such a statutory form does not differ materially from the common-law form of mortgage in respect to the relative rights and interests of the parties.[63] And a statute providing such a form is not exclusive of the common law, so that a mortgage which would be good and sufficient if tested by the common-law standards is not invalid merely because it does not conform to the statute.[64] In California by statute mortgages are required to be in writing and to be executed with the formalities required in the case of grants of real property.[65]

3. NECESSITY OF SEAL. At law a mortgage requires a seal, and an unsealed instrument cannot constitute a valid mortgage of realty,[66] except in those states where it is otherwise provided by statute.[67] But equity will give effect to a mortgage which is defective only for the want of a seal.[68]

4. DATE. The date of a mortgage, if material at all, is material only as fixing the time for the payment of the debt secured.[69] Post-dating the mortgage does

61. White Water Valley Canal Co. *v.* Vallette, 21 How. (U. S.) 414, 16 L. ed. 154, holding that bonds of a corporation which pledge the real and personal property of the corporation for the payment of the debt and interest will be treated and enforced by a court of equity as a mortgage. And see Beebe *v.* Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103. See *supra*, II, B, C, D, E.

62. See the statutes of the several states. And see Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946, holding that a mortgage in the statutory form, which contains the words "and warrants," is equivalent to a mortgage containing all the covenants of warranty; and when such a mortgage is given, a title subsequently acquired by the mortgagor inures to the benefit of the mortgagee.

63. Esker *v.* Heffernan, 159 Ill. 38, 41 N. E. 1113.

64. Haffley *v.* Maier, 13 Cal. 13.

65. Eikelman *v.* Perdew, 140 Cal. 687, 74 Pac. 291 (holding that under this statute (Civ. Code, § 2922) an oral agreement between a mortgagor and two holders of notes secured thereby, whereby one of the latter is to make advances to the mortgagor for which he is to have priority, amounts to an attempt to create a parol mortgage on the premises, which is void); Porter *v.* Muller, 53 Cal. 677.

66. *California.*—Racouillat *v.* Rene, 32 Cal. 450; Racouillat *v.* Sansevain, 32 Cal. 376.

Illinois.— Butler *v.* Meyer, 49 Ill. App. 176.

Kentucky.— Portwood *v.* Outton, 3 B. Mon. 247.

Missouri.— Martin *v.* Nixon, 92 Mo. 26, 4 S. W. 503.

New Hampshire.— Hebron *v.* Centre-Harbor, 11 N. H. 571.

North Carolina.— Duke *v.* Markham, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889.

Ohio.— Erwin *v.* Shuey, 8 Ohio St. 509; Bloom *v.* Noggle, 4 Ohio St. 45; White *v.* Denman, 16 Ohio 59.

South Carolina.—Arthur *v.* Screven, 39 S. C. 77, 17 S. E. 640.

West Virginia.— Shattuck *v.* Knight, 25 W. Va. 590; Pratt *v.* Clemens, 4 W. Va. 443.

See 35 Cent. Dig. tit. "Mortgages," §§ 115, 146.

Detachment of seal.— The validity of a mortgage is not impaired by the accidental detachment of the seal after the mortgage has been left for record; and, where the preponderance of evidence indicates that it was signed and sealed at the time of its execution and acknowledgment, the absence of the seal afterward does not avoid the mortgage. Van Riswick *v.* Goodhue, 50 Md. 57.

Presumption of seal in case of ancient document.— Where a document forty-five years old, in terms a mortgage of real estate, was without a seal, and had no trace, mark, or impression of any seal, but contained the usual testatum clause before the signature of the parties, and the usual statement that it was "signed, sealed, and delivered" before that of the witnesses, it was held, in an action for foreclosure, that the existence of a seal to the mortgage at the time of its signature might be presumed. Martin *v.* Barnes, 5 Nova Scotia 291.

Extra seal.— That a mortgage has an extra seal on it does not affect its validity by raising a presumption that it was not signed by all the parties thereto. Kyger *v.* Sipe, 89 Va. 507, 16 S. E. 627.

67. See the statutes of the different states. And see Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Woods *v.* Wallace, 22 Pa. St. 171; Ames *v.* Holderbaum, 44 Fed. 224.

68. See *supra*, II, E, 2.

69. Woolsey *v.* Jones, 84 Ala. 88, 4 So. 190,

not prevent its becoming operative immediately upon its delivery. It creates a present charge upon the property, of which subsequent purchasers or encumbrancers are bound to take notice if the instrument is recorded.[70]

B. Operative Words — 1. Words of Grant. Operative words of conveyance are not necessary to the creation of a charge or trust which a court of equity will enforce as a mortgage; if the intention of the parties to create an encumbrance in the nature of a mortgage is apparent, equity will give it effect against all persons except purchasers for value without notice.[71] At law, words of grant are necessary to convey the legal title to the mortgagee. But no precise formula is requisite. The word "convey" is sufficient for this purpose, without the addition of any synonymous terms.[72] And where the instrument as a whole shows the intention to pledge the land as security for a debt, the word "mortgage" is held sufficient as a word of grant, with or without the addition of the words "assign" or "transfer."[73]

2. Words of Perpetuity. As a general rule the use of the word "heirs" or other appropriate words of perpetuity in the *habendum* clause of a mortgage is essential to pass a fee-simple estate.[74] But this rule is not inflexible, and may give way in cases where the intention that the mortgage should pass the fee is plainly apparent.[75] And in those states where a mortgage is not a conveyance or alienation of the property, the use of the word "heirs" is not necessary to create a lien on the fee-simple estate of the mortgagor.[76]

3. Habendum. The *habendum* clause of a mortgage describes the quantity and nature of the title or estate to be passed by it,[77] and may limit the property affected by the mortgage to that described in it, although other clauses of the instrument would warrant the inference that other property was intended to be included.[78]

C. Covenants — 1. Covenant to Pay Debt. It is competent for the parties to insert in a mortgage a covenant binding the mortgagor to pay the debt secured, and such a covenant is valid and binding.[79] In the absence of express words to that effect in a mortgage, it seems that a covenant for payment of the debt cannot

holding that a mortgage not dated, given to secure a note bearing a certain date, which note bears interest on its face "from this date," and is incorporated in the mortgage as a part thereof, and referred to therein as "bearing interest from this date," imports the date of its execution to be coincident with that of the note.

70. Jacobs *v.* Denison, 141 Mass. 117, 5 N. E. 526.

71. Newlin *v.* McAfee, 64 Ala. 357. And see Tatum *v.* Tatum, 81 Ala. 388, 1 So. 195, holding that where an instrument intended as a mortgage used the words "grant, bargain, sell, and convey," described the property conveyed as certain horses, mules, plantations, implements, etc., and also specified certain lands, and the *habendum* clause was similar to that used in conveyances of realty, the instrument was good as a mortgage of land.

72. Strouse *v.* Cohen, 113 N. C. 349, 18 S. E. 323.

73. De Leon *v.* Higuera, 15 Cal. 483; Snyder *v.* Bunnell, 64 Ind. 403; Gambril *v.* Doe, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; Marsh *v.* Wade, 1 Wash. 538, 20 Pac. 578; Vandelinder *v.* Vandelinder, 14 U. C. C. P. 129. *Compare* Doe *v.* Papst, 8 U. C. Q. B. 574.

74. Clearwater *v.* Rose, 1 Blackf. (Ind.) 137; Sedgwick *v.* Laflin, 10 Allen (Mass.) 430, holding that a mortgage which does not expressly convey the estate to the mortgagee "and his heirs" can pass no more than an estate for the life of the mortgagee.

75. Brown *v.* Hamilton First Nat. Bank, 44 Ohio St. 269, 6 N. E. 648, holding that, where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument cannot otherwise be carried into effect, it will be construed to pass such estate, although the word "heirs" is not employed, nor any other formal word of perpetuity.

76. Bredenberg *v.* Landrum, 32 S. C. 215, 10 S. E. 956.

77. Strother *v.* Law, 54 Ill. 413, holding that the *habendum* clause of a mortgage, containing a power of sale in the mortgagee, passing "all the right, title, interest, claim, demand, and equity" of the mortgagors in the premises, embraced all possible interest the mortgagors could have, including their equity of redemption, so that a sale under the power would operate to cut off their right to redeem.

78. Mortgage Bank, etc., Co. *v.* Hanson, 3 N. D. 465, 57 N. W. 345.

79. Brown *v.* Cascaden, 43 Iowa 103; Lee

be implied therefrom.[80] And in some of the states statutes have been enacted expressly declaring this rule.[81] Such a covenant is not a necessary part of a mortgage; its absence will not affect the validity of the mortgage as a security, nor impair the right of the holder to enforce it against the land pledged to the full extent of the debt secured.[82] Its importance lies in its effect upon the personal liability of the mortgagor. If the mortgage contains a covenant to pay the debt secured, although there be no note, bond, or other separate evidence or acknowledgment of the debt, the mortgagor is personally liable, and an action of debt will lie on the covenant.[83] But if there is no such covenant in the mortgage and no collateral obligation in the way of a note, bond, or other separate evidence of the debt, the mortgagee has no personal remedy against the mortgagor, but the property alone is charged with the lien and must be looked to by the mortgagee as the sole source out of which he is to make good his claim.[84]

2. COVENANT OF TITLE AND WARRANTY. Covenants of title inserted in a mortgage, or read into it by force of a statute, have the same operation and effect, so

v. Rook, Moseley 318, 25 Eng. Reprint 415. And see Stuyvesant *v.* Western Mortg., etc., Co., 22 Colo. 28, 43 Pac. 144, holding that an agreement to pay a mortgage, when the mortgage is given to secure a note, is an agreement to pay the note.

Usual covenant.— Where a debtor covenanted to execute a mortgage on certain property to secure a debt, and covenanted that the deed should contain all the covenants usually inserted in a mortgage, and the instrument of charge was under seal, it was held that, as a covenant to pay is a usual covenant in a mortgage deed, the debt became a specialty debt. Saunders *v.* Milsome, L. R. 2 Eq. 573, 14 L. T. Rep. N. S. 788, 15 Wkly. Rep. 2.

Not covenant running with the land.— A borrowed money of B, to be expended in erecting houses on land, and executed to B a mortgage of the land, by which he covenanted for himself, his representatives, and assigns to pay the mortgage debt; and it was expressly declared in the mortgage that this, with certain other covenants, should run with the land. In an action upon this covenant to pay the mortgage debt, brought against an assignee of the mortgagor, it was held that the covenant was not a covenant running with the land. Glenn *v.* Canby, 24 Md. 127.

Effect of covenant upon limitation of actions.— Where a covenant to pay the debt is incorporated in the mortgage, which is under seal, but the debt to secure which it was given is not evidenced by a sealed instrument, a bar to the recovery of the debt, if of a shorter period than a bar to a sealed instrument, cannot affect the remedy on the covenant in the mortgage. If the statutory period necessary to bar an unsealed instrument is of shorter duration than in the case of a sealed instrument, a mortgage containing such a covenant, given to secure the payment of a debt evidenced by an unsealed note, will be governed by the longer period. Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259.

Necessity of demand for payment.— Where a mortgage contained joint and several covenants by a surety and the mortgagor to pay the debt "on demand," and "in the mean time, from the date" of the deed, to pay interest, and a proviso for redemption if the mortgagor should pay the debt and interest "on demand," it was held that the demand was a condition precedent, and that no right of action accrued against the surety until demand made. *In re* Brown, [1893] 2 Ch. 300, 62 L. J. Ch. 695, 69 L. T. Rep. N. S. 12, 3 Reports 463, 41 Wkly. Rep. 440.

80. Weed *v.* Covill, 14 Barb. (N. Y.) 242; Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535; Scott *v.* Fields, 7 Watts (Pa.) 360; Drummond *v.* Richards, 2 Munf. (Va.) 337; Jackson *v.* Yeomans, 19 U. C. C. P. 394. *Contra*, King *v.* King, Moseley 192, 25 Eng. Reprint 344, 3 P. Wms. 358, 24 Eng. Reprint 1100.

81. See the statutes of the different states. And see Mack *v.* Austin, 95 N. Y. 513; Hone *v.* Fisher, 2 Barb. Ch. (N. Y.) 559; Demond *v.* Crary, 9 Fed. 750.

82. *California.*— Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957.

Maine.— Brookings *v.* White, 49 Me. 479; Mitchell *v.* Burnham, 44 Me. 286; Smith *v.* People's Bank, 24 Me. 185.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275.

Minnesota.— Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

New Jersey.— Rempt *v.* Geyer, (Ch. 1895) 32 Atl. 266.

New York.— Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997.

Pennsylvania.— Wharf *v.* Howell, 5 Binn. 499.

United States.— Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

England.— Goodman *v.* Grierson, 2 Ball & B. 278, 12 Rev. Rep. 82.

See 35 Cent. Dig. tit. "Mortgages," § 121.

83. O'Haver *v.* Shidler, 26 Ind. 278; Brown *v.* Cascaden, 43 Iowa 103; Couger *v.* Lancaster, 6 Yerg. (Tenn.) 477; Newby *v.* Forsyth, 3 Gratt. (Va.) 308; Frank *v.* Pickle, 2 Wash. Terr. 55, 3 Pac. 584.

84. *California.*— Shafer *v.* Bear River, etc., Water, etc., Co., 4 Cal. 294.

Illinois.— Hoag *v.* Starr, 69 Ill. 362.

Indiana.— Smith *v.* Stewart, 6 Blackf. 162.

Kansas.— Halderman *v.* Woodward, 22 Kan. 734.

Maryland.— Barrell *v.* Glover, 2 Gill 171.

far as the nature of the conveyance admits, as in an ordinary deed in fee simple.[85] A covenant for further assurance may compel the mortgagor to supply defects in the mortgage.[86] That of seizin and special warranty will prevent the mortgagor from setting up a prior and paramount equitable title in himself.[87] And the effect of the usual covenants of warranty is that a title subsequently acquired by the mortgagor will inure to the benefit of the mortgagee.[88]

3. COVENANT AS TO BUILDINGS. A covenant in a mortgage providing that no buildings should be erected thereafter on the granted premises more than two stories high, that this covenant should run with the land, for the benefit of the adjoining grantees, and that upon payment the deed should be void, with the exception of this and other like covenants is intended by the parties to the mortgage to be in force after its discharge.[89]

D. Recitals and Conditions — 1. RECITALS. The recitals of a mortgage afford presumptive evidence of the truth of the facts recited, and may also operate by way of estoppel, but are open to explanation or contradiction by parol.[90]

2. CONDITION AND DEFEASANCE. The condition of a mortgage is the statement in it of the terms on which it is to become inoperative or be defeated, that is, the recital of the payment, performance, or other act on the part of the mortgagor, which the mortgage is intended to secure, and which, when duly made or per-

Massachusetts.— Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26.

Minnesota.—Van Brunt *v.* Mismer, 8 Minn. 232.

New York.— Spencer *v.* Spencer, 95 N. Y. 353; Gaylord *v.* Knapp, 15 Hun 87; Weed *v.* Covill, 14 Barb. 242; Coleman *v.* Van Rensselaer, 44 How. Pr. 368.

Pennsylvania.— Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535; Fidelity Ins., etc., Co. *v.* Miller, 89 Pa. St. 26; Scott *v.* Fields, 7 Watts 360.

United States.— Pioneer Gold Min. Co. *v.* Baker, 23 Fed. 258, 10 Sawy. 539.

England.— Lloyd *v.* Thursby, 9 Mod. 463.

Canada.— McKay *v.* Howard, 6 Ont. 135.

See 35 Cent. Dig. tit. "Mortgages," § 566.

Parol promise to pay.— Although the mortgage does not contain any promise to pay the amount thereof, and no bond or other personal obligation in writing is given therefor, the mortgagee may still prove that the mortgagor, by parol, promised to pay the mortgage debt. Tonkin *v.* Baum, 114 Pa. St. 414, 7 Atl. 185. But *compare* Van Brunt *v.* Mismer, 8 Minn. 232.

85. Lockwood *v.* Sturdevant, 6 Conn. 373; Blanchard *v.* Haseltine, 79 Mo. App. 248; Weed *v.* Covill, 14 Barb. (N. Y.) 242.

86. Burgh *v.* Francis, 3 Swanst. 536 note, 19 Rev. Rep. 275. And see Pye *v.* Daubuz, 3 Bro. Ch. 595, 29 Eng. Reprint 719 (holding that where a tenant in tail makes a mortgage, containing the covenant for further assurance, and becomes bankrupt, his assignee in bankruptcy is bound by the covenant); Davis *v.* Tollemache, 2 Jur. N. S. 1181 (where it is said that, unless there are words in a conveyance to show that it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the court will not resort to its extraordinary jurisdiction for specific performance, to compel the grantor to execute an assurance of a kind that was not contemplated when the grant was made).

87. McManness *v.* Paxson, 37 Fed. 296.

88. *Connecticut.*— Hoyt *v.* Dimon, 5 Day 479.

Dakota.— Yerkes *v.* Hadley, 5 Dak. 324, 40 N. W. 340, 2 L. R. A. 363.

Illinois.— Bowen *v.* McCarthy, 127 Ill. 17, 18 N. E. 757; Holbrook *v.* Debo, 99 Ill. 372; Elder *v.* Derby, 98 Ill. 228; Pratt *v.* Pratt, 96 Ill. 184; Gibbons *v.* Hoag, 95 Ill. 45; Gochenour *v.* Mowry, 33 Ill. 331; Wells *v.* Somers, 4 Ill. App. 297.

Iowa.— Iowa L. & T. Co. *v.* King, 58 Iowa 598, 12 N. W. 595.

Virginia.— Doswell *v.* Buchanan, 3 Leigh 365, 23 Am. Dec. 280.

89. Brown *v.* O'Brien, 168 Mass. 484, 47 N. E. 195.

90. *Kentucky.*— Watts *v.* Parks, 78 S. W. 1125, 25 Ky. L. Rep. 1908; Evans *v.* English, 10 S. W. 626, 10 Ky. L. Rep. 742, holding that a mortgagee is not estopped by an incidental recital of his place of residence to show what was his actual place of residence at the time the mortgage was executed.

Nebraska.—Morris *v.* Linton, 61 Nebr. 537, 85 N. W. 565, holding that a claim, in a suit to foreclose a mortgage, that there was no consideration for it, cannot be sustained where the instrument itself acknowledges that it was given for money actually loaned, and there is no evidence showing such recital to be untrue.

Ohio.— Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238, holding that in the case of a mortgage given by a corporation, the mortgagee is not estopped to show that the authority to execute the mortgage was greater than that erroneously recited in the mortgage.

Wisconsin.— Rowell *v.* Williams, 54 Wis. 636, 12 N. W. 86 (holding that the recital

formed, will entitle him to release or satisfaction of the mortgage.[91] The defeasance clause in a common-law mortgage is that which provides that, upon payment of the debt secured or performance of the other conditions, the instrument shall become void and of no effect, or that the estate thereby granted shall cease and determine, or shall revest in the mortgagor. The defeasance may be inserted in the mortgage itself, or be by a separate instrument, or even, in equity, by parol.[92] If incorporated in the mortgage, the language of the defeasance is not deemed very important, in the sense that it must follow any established form of words; it is enough if the clause plainly shows the intention of the parties to terminate the estate of the mortgagee, upon performance of the conditions, and reinvest the mortgagor with the full legal title.[93] But the defeasance clause is of importance in the construction of the instrument, when there is any doubt or ambiguity as to its meaning; for this is considered as the part which furnishes the plainest indications of the intention of the parties.[94]

3. Specification of Time of Payment. Although it is usual and proper for a mortgage to specify the time or times for the payment of the debt secured, yet it is not rendered void by the fact that no time of payment is set forth; in that case, if the debt is already due and payable, it is the right of the mortgagor to redeem, or of the mortgagee to foreclose, at any time or at once.[95] Nor is the mortgage invalidated by the fact that the time when the debt is to become due is left vague and indefinite, or that it is expressed to be payable on the happening of a certain contingency, but at no specified time.[96] On the other hand, although the mortgage fixes a definite time for the payment of the debt secured, it may be controlled in this respect by a preëxisting agreement of the parties concerning the conditions of payment of the same debt.[97] When the mortgage

in a mortgage that it was given to secure a note of the mortgagor shows a consideration for the instrument); Catlin *v.* Henton, 9 Wis. 476 (holding that the fact that the mortgage recites that the note, which was indorsed by a debtor who did not join in the mortgage, was collateral to the mortgage, does not affect its negotiability nor change the essential character of the instruments, as the mortgage is the incident, notwithstanding the recital).

United States.— Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456, holding that a clause merely reciting the expectation of the mortgagor that the mortgaged property would realize the amount of the debt does not estop the mortgagee to show that the contrary was the fact.

See 35 Cent. Dig. tit. "Mortgages," § 119.

91. Youngs *v.* Wilson, 27 N. Y. 351, holding that it is not essential that the condition of a mortgage should be so completely certain as to exclude the necessity of resorting to extraneous inquiry.

92. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737; Jeffery *v.* Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7. And see *supra*, III, B, 2, b; III, B, 2, c; III, B, 9.

93. Mellon *v.* Lemmon, 111 Pa. St. 56, 2 Atl. 56, holding that a deed, otherwise absolute on its face, but containing a clause in the words, "subject, nevertheless, to the right of redemption of the property by the grantor," is a good mortgage. And see Pearce *v.* Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243, holding that a conveyance of land, with an agreement or stipulation therein that, on payment of certain money, the same shall become void or cease and determine, or that the estate granted shall be reconveyed, is a mortgage, and the form of the defeasance, if in writing, is immaterial.

Defeasance rejected for uncertainty.—A recital in a power of sale contained in a mortgage that the instrument is intended as security for a debt due from the grantor is sufficient to show it to have been in fact a mortgage, although the defeasance clause be entirely rejected for uncertainty. Thus the mortgage is not rendered void or unenforceable by the fact that the defeasance clause leaves blank the amount of the debt secured, for parol evidence is admissible to supply the defect. Burnett *v.* Wright, 135 N. Y. 543, 32 N. E. 253.

94. Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145.

95. Carnall *v.* Duval, 22 Ark. 136; Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23; Balfe *v.* Lord, 1 C. & L. 519, 2 Dr. & War. 480, 4 Ir. Eq. 468; Higgins *v.* McLachlan, Ritch. Eq. Cas. (Nova Scotia) 441.

Due on demand.— Where a mortgage does not specify when it is payable, it is due on demand, and a scire facias to foreclose may be issued a year and a day afterward. Saving Fund *v.* Henneberg, 2 Leg. Rec. (Pa.) 150.

96. Presbyterian Church Erection Fund *v.* Seattle First Presb. Church, 19 Wash. 455, 53 Pac. 671.

97. Rees *v.* Logsdon, 68 Md. 93, 11 Atl. 708, holding that where a mortgage reciting a money indebtedness, payable at a definite time, was in fact given to secure payment for property purchased under a preëxisting

otherwise describes the consideration fully and fairly, but does not state when the interest on the notes which it secures is payable, this is to be regarded as a mere omission, and does not amount to a false description.[98]

E. Description of Parties — 1. In General. The mortgage should identify the parties who respectively fill the positions of mortgagor and mortgagee. Any one who is to be bound as a grantor or mortgagor should be named and described as a party in the efficient and operative parts of the instrument. Thus it is a rule that when a mortgage is signed by several persons, and the names of some of them are not set forth in the body of the instrument or granting clause, it is not the deed of those whose names are omitted from the *corpus* of the instrument and appear only among the signatures.[99] But it is different where no names of grantors appear at all in the body of the instrument, as, where the mortgagors are described simply as the "undersigned" or the "subscribers." In this case, if the real mortgagors all sign, seal, and acknowledge the conveyance, it is a sufficient execution, and the mortgage is binding on those who sign.[1] The omission of the name of the mortgagee from the granting clause will invalidate the mortgage if nothing else appears to identify the party to whom the conveyance is supposed to be made; but not if the party intended as mortgagee is plainly identified by other parts of the instrument, as, by being explicitly named in the recital of the indebtedness or in the *habendum* clause.[2] In the case of a deed of trust in the nature of a mortgage, it is not necessary that the beneficiary should be named or described therein. If the trustee is properly named, an uncertainty or indefiniteness in the description of the party to be secured, or even the entire omission of his name, will not invalidate the instrument.[3] A mortgage intended to secure a

agreement which allowed payment to be made in material, and was silent as to time, and both parties afterward continued to act under the terms of the agreement, and not under those of the mortgage, as between the parties, the mortgage was merely collateral security, and that the agreement was not merged. And see Pittsburgh Plate-Glass Co. *v.* Millville Imp. Co., 59 N. J. Eq. 527, 46 Atl. 211.

Election as to time of payment.— An agreement for the sale of real estate contained a stipulation that a certain amount should be paid to bind the bargain, another amount when the deed was made, "and the balance to be paid as the purchaser chooses." The purchaser gave a purchase-money mortgage, payable in one year. In a suit on the mortgage, defendant's affidavit alleged that, through mistake of the scrivener or fraud of the mortgagee, the mortgage was written payable in one year, instead of at the purchaser's option, as provided in the contract. It was held that the words, "payable as the purchaser chooses," meant at a time and in a manner to be designated by the purchaser when the transaction was concluded, and that the execution of the mortgage payable in one year was an election by the purchaser of the time and manner in which the amount was to be paid. Moore *v.* Blanchette, 14 Montg. Co. Rep. (Pa.) 35.

98. Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354. And see Stanton *v.* Caffee, 58 Wis. 261, 16 N. W. 601.

99. Davidson *v.* Alabama Iron, etc., Co., 109 Ala. 383, 19 So. 390; Sheldon *v.* Carter, 90 Ala. 380, 8 So. 63; Harrison *v.* Simons, 55 Ala. 510; Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486; Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Mississippi Agricultural Bank *v.* Rice, 4 How. (U. S.) 225, 11 L. ed. 949. But *compare* Hadley *v.* Clark, 8 Ida. 497, 69 Pac. 319, holding that where, in the case of a mortgage given by a husband and wife, the husband's name appeared only as a signer of the instrument, but its execution was duly acknowledged by him, the mortgage was as valid as though his name appeared wherever the wife's name appeared.

1. Frederick *v.* Wilcox, 119 Ala. 355, 24 So. 582; Sheldon *v.* Carter, 90 Ala. 380, 8 So. 63; Madden *v.* Floyd, 69 Ala. 221; Withers *v.* Pugh, 91 Ky. 522, 16 S. W. 277, 13 Ky. L. Rep. 104.

2. Simmons *v.* Spratt, 20 Fla. 495; Richey *v.* Sinclair, 167 Ill. 184, 47 N. E. 364; Menage *v.* Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. Rep. 235; Wakefield *v.* Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. *Compare* Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273.

Transposition of names.— Where the name of the mortgagee is by mistake written in the blank left for the name of the mortgagor, and the name of the mortgagor in that designed for the mortgagee, but the instrument is signed by the right party, and purports to secure a debt due from the party signing to the other, and is acknowledged by the signer, the mistake in the transposition of the names being evident, the mortgage will not be invalidated thereby, and its record will be notice to subsequent purchasers from the mortgagor. Beaver *v.* Slanker, 94 Ill. 175.

3. Elgin First Nat. Bank *v.* Kilbourne, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; Sleeper *v.* Iselin, 62 Iowa 583, 17 N. W. 922;

debt due to a corporation is not invalidated because the manager of the corporation, instead of the corporation itself, is named as the grantee.[4]

2. Married Women. A wife joining in a mortgage is sufficiently named therein if her first name is given and she is described as the wife of the other grantor.[5] And a mortgage is not invalid because made out to the mortgagee, a married woman, in her maiden name.[6]

3. Partnerships. In the case of a mortgage made to or by a partnership, it is the generally accepted doctrine that it is not necessary that the names of the individual partners should be separately set out, but it is sufficient if the mortgage runs in the firm-name, parol evidence being admissible to show who are the persons composing the firm.[7]

4. Effect of Misnomer. Where an error occurs in the name of a party to a deed or mortgage, apparent upon its face and susceptible of correction by reference to the other contents of the instrument, so as to identify the party with certainty, the misnomer does not affect the validity of the instrument.[8]

5. Assumed and Fictitious Names. A conveyance to or by a person under an assumed name passes the title. A mortgage made to a real person, although under a false or assumed name, is not for that reason invalid, if he is clearly identified and delivery is made to him.[9] But a mortgage executed to a merely

Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253. And see *supra*, V, D, 3.

4. Anglo-Californian Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077.

5. Edgell *v.* Hagens, 53 Iowa 223, 5 N. W. 136, where the mortgagors were named as "James Hagens and Margaret, wife of James Hagens," and this description was held sufficient.

6. Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

7. *Arkansas.*— Carpenter *v.* Zarbuck, 74 Ark. 474, 86 S. W. 299, holding that a mortgage to a partnership without giving the names of the individual partners may be foreclosed in a court of equity, although it would not be enforceable at law for want of a sufficient designation of the mortgagees.

Iowa.— Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551.

Maryland.— Bernstein *v.* Hobelman, 70 Md. 29, 16 Atl. 374.

Minnesota.— Menage *v.* Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. Rep. 235, holding that a mortgage of real estate made to "Farnham & Lovejoy," a partnership, was sufficient as a mortgage to Sumner W. Farnham and James A. Lovejoy, the individual members of the firm, and that a foreclosure by "Farnham & Lovejoy" under a power of sale contained in the mortgage was valid and effective. And see Foster *v.* Johnson, 39 Minn. 378, 40 N. W. 255. *Compare* Gille *v.* Hunt, 35 Minn. 357, 29 N. W. 2; Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497, early cases considering only the effect of the mortgage at law, and leaving untouched the question how it would operate in a court of equity.

North Carolina.— Murray *v.* Blackledge, 71 N. C. 492.

Oregon.— Kelley *v.* Bourne, 15 Oreg. 476, 16 Pac. 40.

Wisconsin.— Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252.

England.— Maughan *v.* Sharpe, 17 C. B. N. S. 443, 10 Jur. N. S. 989, 34 L. J. C. P. 19, 10 L. T. Rep. N. S. 870, 12 Wkly. Rep. 1057, 112 E. C. L. 443.

8. Dodd *v.* Bartholomew, 44 Ohio St. 171, 5 N. E. 866, holding that a mortgage is not invalidated by the fact that the mortgagor and his wife are described by christian names or initials which do not belong to them, in the granting, defeasance, and testatum clauses, and in the certificate of acknowledgment, if they sign the mortgage in their true and proper names. The mortgage is valid, not only between the parties, but also as against subsequent encumbrancers. And see Fisher *v.* Milmine, 94 Ill. 328, holding that a mortgage given to two partners to secure a debt to the firm is not rendered inadmissible in evidence, in an action of ejectment founded thereon, by a mistake of the scrivener in writing the first name of one of the mortgagees as "Edwin," instead of "Edward," it being otherwise correctly given in full.

As to effect of a mistake in the surname of the mortgagor see Swan *v.* Vogel, 31 La. Ann. 38.

Misnomer of corporation.— Where a mortgage was made to the Germantown Farmers' Mutual Insurance Company, but by mistake the name was written "Germantown Farmers' Mutual Fire Insurance Company," it was held, upon a suit for foreclosure, that the discrepancy was too trifling to require a reformation of the instrument, the error being merely clerical and apparent at first sight, and there being no mistake as to the identity of the mortgagee. Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 57 Wis. 521, 15 N. W. 840.

9. Wilson *v.* White, 84 Cal. 239, 24 Pac. 114; Pinckard *v.* Milmine, 76 Ill. 453; Scanlon *v.* Grimmer, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326 (holding that the fact that a mortgagee, with no fraudulent or criminal purpose in so doing, took the mortgage

fictitious person, having no real existence, or to the mortgagee under a name which is not his own and which he has never assumed nor authorized to be used as his name, is of no effect whatever.[10]

6. Name of Mortgagee Left Blank. It does not affect the validity of a mortgage that a blank is left in the place where the name of the mortgagee ordinarily appears, if he is distinctly named and clearly identified in other parts of the instrument.[11] But if the instrument is entirely blank in this respect, that is, if no person is named as mortgagee in any part of it, it is null and void, and incapable of foreclosure, at least so long as the blank remains unfilled.[12] But the mortgagor may authorize the blank in the name of the mortgagee to be filled; and it is generally held that if it is filled up in accordance with his instructions, and comes to the hands of an innocent and *bona fide* holder for value, it will be a valid security, without reference to whether such instructions were oral or in writing, or whether the name was inserted before or after delivery, or in the presence or absence of the mortgagor.[13] But if the instrument is filled up contrary to the directions of the mortgagor, and to his injury, with knowledge on the part of the person who takes and holds under it, it is null and void as to him.[14] Where the mortgage or deed of trust is given to a third person to hold as security for the benefit of the creditor, the fact that the name of the latter is left blank does not impair its validity, for the conveyance does not lack proper and sufficient parties, and the beneficiary can be identified by parol.[15]

F. Description of Property — 1. Sufficiency in General. In order to be effective as a lien on land, and to be enforceable by foreclosure, a mortgage should contain a reasonably certain description of the premises intended to be covered by it.[16] If the description is so indefinite that the property cannot be identified,

under an assumed name, does not invalidate the mortgage; and it is immaterial that the mortgagors were induced to believe that they were dealing with a person bearing the assumed name, and would not have entered into such a transaction with the real mortgagee); Thomas *v.* Wyatt, 31 Mo. 188, 77 Am. Dec. 640. See, however, David *v.* Williamsburgh City F. Ins. Co., 83 N. Y. 256, 38 Am. Rep. 418.

10. Wilson *v.* White, 84 Cal. 239, 24 Pac. 114; Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273; Burton *v.* Dougall, 30 Ont. 543. And see *supra*, V, A.

11. Richey *v.* Sinclair, 167 Ill. 184, 47 N. E. 364.

12. Chauncey *v.* Arnold, 24 N. Y. 330; Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273; Pennsylvania Co. *v.* Dovey, 64 Pa. St. 260.

13. *Iowa.*— McClain *v.* McClain, 52 Iowa 272, 3 N. W. 60.

Kansas.— State *v.* Matthews, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308; Chapman *v.* Veach, 32 Kan. 167, 4 Pac. 100; Knaggs *v.* Martin, 9 Kan. 532.

Minnesota.— Pence *v.* Arbuckle, 22 Minn. 417.

Missouri.— Field *v.* Stagg, 52 Mo. 534, 14 Am. Rep. 435.

New York.— Hemmenway *v.* Mulock, 56 How. Pr. 38.

Ohio.— Langhorst *v.* Shutteldryer, 7 Ohio Dec. (Reprint) 333, 2 Cinc. L. Bul. 125.

Texas.— Ragsdale *v.* Robinson, 48 Tex. 379.

Wisconsin.— Schintz *v.* McManamy, 33 Wis. 299; Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 486.

See 35 Cent. Dig. tit. "Mortgages," § 149.

But see Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273, holding that an executed instrument in the form of a mortgage, but containing the name of no mortgagee, cannot be rendered valid by the subsequent filling in of the name of a mortgagee by an agent to whom the mortgagor had delivered the instrument, with instructions to fill the blank and obtain money upon the instrument from whomsoever he could.

14. Upton *v.* Archer, 41 Cal. 85, 10 Am. Rep. 266; Wilson *v.* South Park Com'rs, 70 Ill. 46; State *v.* Matthews, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308; Ayres *v.* Probasco, 14 Kan. 175; Schintz *v.* McManamy, 33 Wis. 299.

15. Boyd *v.* Parker, 43 Md. 182; Dulaney *v.* Willis, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815. And see *supra*, VIII, E, 1.

16. Godfrey *v.* White, 32 Ind. App. 265, 69 N. E. 688; Edmonston *v.* Carter, 180 Mo. 515, 79 S. W. 459; Holley *v.* Curry, 58 W. Va. 70, 51 S. E. 135.

As to effect of errors and defects in the description in limiting the lien or priority of the mortgage as against subsequent encumbrancers see *infra*, XIV, B, 1, d.

Mistakes in application for loan.— It is not essential to the validity of a mortgage that there should be any written application for the loan which it is to secure, and if such an application is made, the validity of the mortgage is not affected by errors or omissions in the description of the property in the application. Pickett *v.* Gleed, (Tex. Civ. App. 1905) 86 S. W. 946.

or if it calls for premises which have no existence or which cannot possibly be found, the mortgage will be invalid.[17] But the office of the description is not so much to identify the property conveyed as to furnish the means of its identification; and although it be vague or indefinite, it will not render the mortgage inoperative, if it contains data from which a certain description can be made out, or if, by the aid of extraneous evidence, it can be amplified and applied with certainty to its intended subject.[18]

2. General Words of Description. The fact that the description of property in a mortgage is expressed only in broad general terms, instead of being specific, will not necessarily invalidate it; such a description may afford the means of positive identification, and that is all that is necessary. On this principle a mortgage conveying "all the lands" or "all the property" or "all the estate" of the mortgagor may be good and valid.[19]

17. Carter *v.* Barnes, 26 Ill. 454.

Description left blank.— Where a mortgage contained a blank space in the place where the description of the property should have been inserted, but the mortgagor authorized a third person to fill up the blank with a description of certain lands, it was held that this was not alone sufficient to give the mortgagee a lien on the said lands, the blank not being so filled. Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24.

18. Caston *v.* McCord, 130 Ala. 318, 30 So. 431; Works *v.* State, 120 Ind. 119, 22 N. E. 127; Thomson *v.* Madison Bldg., etc., Assoc., 103 Ind. 279, 2 N. E. 735; Rucker *v.* Steelman, 73 Ind. 396; Roberts *v.* Bauer, 35 La. Ann. 453; Baker *v.* Louisiana Bank, 2 La. Ann. 371; People *v.* Storms, 97 N. Y. 364.

In Connecticut it has been decided that the policy of the law with regard to mortgages requires that they should give definite information, not only as to the debt secured, but also as to the property encumbered. De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282; Herman *v.* Deming, 44 Conn. 124; North *v.* Belden, 13 Conn. 376, 35 Am. Dec. 83.

When adjudged insufficient.— The court can adjudge the description in a mortgage insufficient as a matter of law only when it is too meager or uncertain to serve as adequate means of identification. Broach *v.* O'Neal, 94 Ga. 474, 20 S. E. 113. And see Patterson *v.* Evans, 91 Ga. 799, 18 S. E. 31.

Sufficiency for purpose of foreclosure.— As against the mortgagor, the description of real estate conveyed by a mortgage may be sufficient to convey such realty, and yet may, if unaided by proper averments in the complaint, be insufficient to authorize a decree for foreclosure. Halstead *v.* Lake County, 56 Ind. 363.

19. *Indiana.*— Leslie *v.* Merrick, 99 Ind. 180, holding that a mortgage of "all the lands owned by" the mortgagor is good, for it can be made certain; and a foreclosure can be based on it.

Kentucky.— Albertson *v.* Prewitt, 49 S. W. 196, 20 Ky. L. Rep. 1309, holding that a mortgage on all the lands the mortgagor holds "on the Dry Fork of Otter Creek" is not void for uncertainty. And see Fields *v.* Fish, 82 S. W. 376, 26 Ky. L. Rep. 659 (holding a mortgage valid which described the property as "my entire undivided one-tenth interest in about two hundred and sixty-five acres of land . . . the personalty of E. J. Rawlings, deceased"); Starling *v.* Blair, 4 Bibb 288 (holding that a mortgage of "all the lots that he [the mortgagor] then owned in the town of Frankfort, whether he had a legal or equitable title thereto," is sufficient to convey all the lots which can be identified as having belonged to the mortgagor at the date of the deed).

Louisiana.— City Nat. Bank *v.* Barrow, 21 La. Ann. 396. But see Edwards *v.* Caulk, 5 La. Ann. 123, holding that a mortgage on all the property held in common in a certain succession is void for uncertainty.

Massachusetts.— Drew *v.* Carroll, 154 Mass. 181, 28 N. E. 148; Fitzgerald *v.* Libby, 142 Mass. 235, 7 N. E. 917.

New Hampshire.— Woodman *v.* Lane, 7 N. H. 241.

New York.— Jackson *v.* De Lancey, 13 Johns. 537, 7 Am. Dec. 403, holding that a mortgage of lands in the patent of B, and of all other lands belonging to the mortgagor in the Province of New York, will pass the residue of his lands in New York.

North Carolina.— Strouse *v.* Cohen, 113 N. C. 349, 18 S. E. 323, holding that the words "my real and personal estate, all of which is situated in the city of Newbern," constitute a sufficient description in a mortgage of the property covered.

Virginia.—Florence *v.* Morien, 98 Va. 26, 34 S. E. 890, holding that where a deed of trust described the land conveyed as "all the right, title, and interest of the said [grantor] and wife in and to the real estate lying in H. county, of which [the grantor's father] died seised and possessed," it was sufficient, under the registry laws, to give notice to subsequent purchasers.

United States.— Wilson *v.* Boyce, 92 U. S. 320, 325, 23 L. ed. 608, where it was said: "The generality of its language forms no objection to the validity of the mortgage. A deed 'of all my estate' is sufficient. So a deed 'of all my lands wherever situated' is good to pass title. . . . A mortgage 'of all my property,' like the one we are considering, is sufficient to transfer title." And see Mallory *v.* Maryland Glass Co., 131 Fed. 111.

England.— *In re* Kelcey, [1899] 2 Ch. 530,

3. Particular Terms Controlling General. The effect of general terms in the description of property in a mortgage may be limited and controlled by particular and specific terms associated with them.[20]

4. Location as to State and County. Omitting to name the state and county, in the description of premises in a mortgage, will not invalidate the instrument, where other adequate elements of identification exist.[21] Thus, if the parties describe themselves in the mortgage as residing in a certain state and county, or if the fact of such residence appears from the certificate of acknowledgment or from other parts of the instrument, it will be presumed that the land lies in the state and county named, although it is not so stated in the description, and the omission will not invalidate the mortgage.[22]

5. Description of Tract by Popular Name. If an estate, farm, or tract of land is commonly known and called in the vicinity by a popular name, it may be described by that name in a mortgage, provided the exact extent and location of the property can be rendered certain by extrinsic evidence or by reference to the title deeds of the mortgagor or other recorded documents.[23]

68 L. J. Ch. 742, 81 L. T. Rep. N. S. 354, 48 Wkly. Rep. 59.

See 35 Cent. Dig. tit. "Mortgages," § 125.

In Connecticut, where the only description of the property conveyed by a deed of mortgage is "all the property" of the grantor, real and personal, in certain towns in that state, named in such conveyance, the description is insufficient, and the deed conveys no title to the Connecticut lands. Stafford Nat. Bank *v.* Sprague, 17 Fed. 784, 21 Blatchf. 473.

20. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35, holding that where a mortgage, in describing the property, employs at first general terms, and afterward proceeds to describe particularly each thing mortgaged, the latter will control the former if there be a repugnancy. And see St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410; Alabama *v.* Montague, 117 U. S. 602, 6 S. Ct. 911, 29 L. ed. 1000, holding that where the mortgage, which was given by a railroad company to a state, following the language of the statute requiring it, embraced all lands granted by the United States, all machine shops, and "all other property" of the company, the term "all other property" should not be construed to embrace lands not granted by the United States.

Where the particular description in a mortgage of the mortgaged premises appears definite and certain, such description will govern a general reference to the land as being in a certain city. Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013.

21. Slater *v.* Breese, 36 Mich. 77.

22. Mann *v.* State, 116 Ind. 383, 19 N. E. 181; Noland *v.* State, 115 Ind. 529, 18 N. E. 26; White *v.* Stanton, 111 Ind. 540, 13 N. E. 48; Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107; Stockwell *v.* State, 101 Ind. 1; Brown *v.* Ogg, 85 Ind. 234; Dutch *v.* Boyd, 81 Ind. 146; Parker *v.* Teas, 79 Ind. 235; Smith *v.* Green, 41 Fed. 455. But *compare* Keiffer *v.* Starn, 27 La. Ann. 282, holding that a mortgage of land, which does not designate the state, parish, or town where the property lies, is void.

23. *Alabama.*— Tranum *v.* Wilkinson, 81 Ala. 408, 1 So. 201, holding that where the land was described in a mortgage as "320 acres of land known as the Middlebrooks place, where the said Hurston lived last year, and where Henry Tally now lives," this was not void for uncertainty, but parol evidence might be received to show what lands were so known.

Georgia.— Johnson *v.* McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. Rep. 166.

Kentucky.—Cruikshanks *v.* Wilmer, 93 Ky. 19, 18 S. W. 1018, 13 Ky. L. Rep. 888, holding a description of land in a mortgage as "the John Green farm" to be sufficient when other means of identification existed. And see Watts *v.* Parks, 78 S. W. 1125, 25 Ky. L. Rep. 1908.

Mississippi.—Eggleston *v.* Watson, 53 Miss. 339, holding that a mortgage which describes the property as the mortgagor's interest in a plantation in Holmes county known as "Wanalaw" is not void for uncertainty, since it refers to extrinsic facts, and it may be shown what plantation in that county is called "Wanalaw."

Missouri.— Bollinger County *v.* McDowell, 99 Mo. 632, 13 S. W. 100, holding parol evidence to be admissible in aid of a description in a mortgage which referred to the property mortgaged simply as "Henry Yount's land." And see Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83; Cravens *v.* Pettit, 16 Mo. 210, in which the only descriptive words in the conveyance were "Cedar Cabin," but other evidence disclosed that a definite tract of land was generally known in the vicinity by that name.

Tennessee.— Grace *v.* Noel Mill Co., (App. 1901) 63 S. W. 246, holding that a description of property in a mortgage, and in the advertisement for the foreclosure sale, as "the Noel Mill property situated in the seventeenth civil district of Franklin County," is sufficient.

England.— Ricketts *v.* Turquand, 1 H. L. Cas. 472, 9 Eng. Reprint 842, holding that it was sufficient to describe the property in a mortgage as "all my estate in Shropshire called 'Ashford Hall.'"

See 35 Cent. Dig. tit. "Mortgages," § 125.

6. By Township, Section, Etc. The property intended to be covered by a mortgage may properly be described by the numbers and geographical position of the meridian, range, township, section, and quarter section, together with a statement of the quantity of land comprised and the state and county in which it lies.[24] And an error in the numbers or directions will not invalidate the mortgage if merely clerical and explainable by parol, or if the property is otherwise described in the mortgage with such certainty as to identify it clearly.[25] But a description in these terms must include all the elements necessary to certainty. If it describes the land by sections or quarter sections, but without giving the number of the township or the range, it is too indefinite to be enforced.[26] And if the property is described merely by subdivisions, without naming the county or state wherein it lies, the description will be insufficient,[27] unless the county and state can be made out from the recitals of the mortgage, the certificate of acknowledgment, or other parts of the instrument.[28]

7. By Numbers of Lot and Block. Lands in a city, where the form of description common in conveyances is by the number of the lot and of the block or square, corresponding to recorded plats or maps of the city or its divisions, may be adequately described in this manner in a mortgage.[29] And an error in the number of the lot or block will not vitiate the mortgage, if merely clerical and explainable by extrinsic evidence, or if the property is otherwise sufficiently described.[30] But both particulars of description must be included, and a descrip-

24. McGehee *v.* State, 39 Ark. 57; Collins *v.* Dresslar, 133 Ind. 290, 32 N. E. 883; Hannon *v.* Hilliard, 101 Ind. 310.

Where the owner of a Mexican grant has surveyed and subdivided it in the same way as the United States public lands are subdivided, a description in a mortgage by such subdivision is sufficient. San Diego County Sav. Bank *v.* Daley, 121 Cal. 199, 53 Pac. 420.

Inconsistent descriptions.— Where the land is described by the numbers of the section, township, range, and meridian, and also by the name of the county in which it is supposed to lie, the former description will prevail over the latter, if the two are inconsistent. Sickmon *v.* Wood, 69 Ill. 329.

Erection of new township.— When a mortgage correctly describes the property, except in reciting it as situate in a township of which it was once a part, although prior to its being recorded that part of the township in which the property was situated had been erected into a new township, the record thereof is sufficient notice to a subsequent judgment creditor of the mortgagor. Mohr *v.* Scherer, 30 Pa. Super. Ct. 509 [*affirming* 2 Lehigh Val. L. Rep. 240].

25. Casler *v.* Byers, 28 Ill. App. 128 [*affirmed* in 129 Ill. 657, 22 N. E. 507]; Hannon *v.* Hilliard, 101 Ind. 310; Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155; Thornhill *v.* Burthe, 29 La. Ann. 639; Scott *v.* Gordon, 109 Mo. App. 695, 83 S. W. 550. But *compare* Hurst *v.* Beaver, 50 Mich. 612, 16 N. W. 165, holding that where a mortgage described the premises as "the southeast quarter of the quarter of section thirty-two," containing forty acres, and the mortgagor owned the entire half of a quarter-section, being eighty acres, and the mortgagee, supported by the testimony of the scrivener who drew the mortgage, claimed that it was meant to cover this whole parcel, this construction would contradict the terms of the mortgage, and the lien must be confined to a quarter of the quarter-section.

26. Boyd *v.* Ellis, 11 Iowa 97; Wilson *v.* Calder, (Kan. App. 1898) 55 Pac. 552; Martin *v.* Kitchen, 195 Mo. 477, 93 S. W. 780. But see Planters Consol. Assoc. *v.* Mason, 24 La. Ann. 518, holding that a mortgage given on a tract of land is sufficiently descriptive if it is reasonably accurate and full in itself, so as to inform the public what property is covered by it, without stating the township, range, and section in which it lies.

Inadvertent omission of township.—A mortgage of lands properly on file in the recorder's office, from the descriptions of the lands in which the "township" was inadvertently omitted by the scrivener who drew it, is nevertheless sufficient to put judgment creditors of the mortgagor upon inquiry as to what particular lands the parties to the mortgage in question intended to have it apply. Myers *v.* Perry, 72 Ill. App. 450.

27. Murphy *v.* Hendricks, 57 Ind. 593; Cochran *v.* Utt, 42 Ind. 267.

28. Mann *v.* State, 116 Ind. 383, 19 N. E. 181; Smith *v.* Green, 41 Fed. 455.

29. Bowen *v.* Galloway, 98 Ill. 41; Reynolds *v.* Spencer, 66 Ind. 145; Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84; Glenn *v.* Seeley, 25 Tex. Civ. App. 523, 61 S. W. 959.

30. *Alabama.*— Whitehead *v.* Lane, etc., Co., 72 Ala. 39.

Georgia.— Johnson *v.* McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. Rep. 166.

Illinois.— See Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61.

Iowa.— Blake *v.* McCosh, 91 Iowa 544, 60 N. W. 127.

Louisiana.— New Orleans City Bank *v.* Denham, 7 Rob. 39.

Michigan.— Cooper *v.* Bigly, 13 Mich. 463.

tion of the property as unspecified lots in a designated block, or as certain numbered lots without giving the number of the block, is insufficient.[31]

8. By Metes and Bounds.[32] A correct and specific description of the land covered by a mortgage, by its metes and bounds, or courses and distances,[33] will not be vitiated by the addition of an erroneous statement of the quantity included, but will overrule and control such statement.[34] While such a description should be free from ambiguity, it is not required to be literally exact; the question is one of identification, not of mathematical precision. A merely approximate statement of the boundaries or courses will be sufficient to give effect to the instrument, if it furnishes the means of identifying with reasonable certainty the land intended to be mortgaged.[35] A misdescription or omission will not vitiate the mortgage, if it can be corrected from other parts of the instrument or other deeds referred to, or by reference to the true geographical position of the lines given, as in the case of an obvious misplacement of a natural boundary.[36] It is also sufficient to describe the premises as bounded on one or more of the several sides by certain tracts of land belonging to named proprietors, when such a description points out the particular property covered with reasonable certainty or furnishes data for its identification.[37]

9. Portion of Larger Tract. Where a mortgage is intended to cover a certain tract of land to be carved out of a larger tract owned by the mortgagor, the premises must be described in such a manner as will definitely locate some particular and separable portion of the larger tract. Thus a description of the property simply as "the west part" or the "southern portion" of a designated tract or parcel of land is too vague and indefinite to give any effect to the conveyance.[38] But where, in addition to such a general geographical description, there is added a statement of the quantity of land included, the two elements together may be

Pennsylvania.— Cake *v.* Cake, 127 Pa. St. 400, 17 Atl. 984.

Texas.— Mervin *v.* Murphy, 35 Tex. 787.

See 35 Cent. Dig. tit. "Mortgages," § 132.

31. Borel *v.* Donohoe, 64 Cal. 447, 1 Pac. 894; Stead *v.* Grosfield, 67 Mich. 289, 34 N. W. 871.

32. See Boundaries, 5 Cyc. 867 *et seq.*; Deeds, 13 Cyc. 543 *et seq.*

33. Travelers' Ins. Co. *v.* Yount, 98 Ind. 454, holding that a creek may be referred to as one of the boundaries of the tract covered by a mortgage.

34. Maguire *v.* Bissell, 119 Ind. 345, 21 N. E. 326; Steele *v.* Williams, 15 S. W. 49, 12 Ky. L. Rep. 770; Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709; Early *v.* Rathbone, 57 L. J. Ch. 652, 58 L. T. Rep. N. S. 517.

35. Westmoreland *v.* Carson, 76 Tex. 619, 13 S. W. 559, holding that where the land mortgaged was described as five hundred acres of a certain known and described tract of land, beginning at the west boundary thereof, and extending east sufficiently far to embrace five hundred acres, this was sufficient. And see Parker *v.* Teas, 79 Ind. 235; Lee *v.* Woodworth, 3 N. J. Eq. 36.

Illustration.— Where the description in a mortgage stated two east and west lines to run at "nearly right angles" to a certain section line, this merely implied that the east and west lines of the section did not run due north and south; and there was no uncertainty in the description which would render the mortgage void. Teetshorn *v.* Hull, 30 Wis. 162.

36. Bent *v.* Coleman, 89 Ill. 364; Boon *v.* Pierpont, 32 N. J. Eq. 217; Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305, in this case a certain canal, which really ran north and south, was erroneously given as the southern boundary of the tract, but it was held that, by reference to its known geographical position, it should be taken as the eastern boundary.

37. Ells *v.* Sims, 2 La. Ann. 251; Edwards *v.* Bowden, 99 N. C. 80, 5 S. E. 283, 6 Am. St. Rep. 487; American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377. See, however, Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057, holding that a description in a mortgage designating the mortgaged premises as "all that certain tract or parcel of land adjoining the lands of John Summerville on the east, Peter Speece on the south, and Hiram Allen on the north, being a portion of the north end of the upper half of the lower half of the upper section of Conner's reservation" did not locate the land with sufficient certainty to warrant a decree of foreclosure.

38. Merchants', etc., Bldg. Assoc. *v.* Scanlan, 144 Ind. 11, 42 N. E. 1008; Armstrong *v.* Short, 95 Ind. 326; Hill *v.* Hite, 79 Fed. 826 [*affirmed* in 85 Fed. 268, 29 C. C. A. 549]. But see Kemp *v.* Moir, 45 Ill. App. 490, holding that the words "the east side" of a certain quarter section will be construed to mean the "east half," and a greater amount cannot be sold under a mortgage containing such description, in the absence of an allegation of mistake and a prayer for reformation in the bill.

sufficient to locate and limit the particular premises to be mortgaged.[39] But a statement merely of the number of acres, or square feet, without anything to show from which portion of the larger tract it is to be taken will not suffice,[40] unless in cases where a particular parcel, containing the named quantity, is shown to have been the only portion the mortgagor owned or could have intended to mortgage.[41] When the mortgage purports to convey "one acre of land" or a designated number of acres lying in a certain corner of a tract or division of land which is accurately described, it will not be void for the want of a more particular description of the shape of the parcel conveyed, but will be taken as passing the designated quantity of land in the form of a square.[42]

10. Surplusage in Description. A mortgage of real estate will not be invalidated by error in the description of the property conveyed, if, rejecting the erroneous part as surplusage, the remainder of the description is sufficiently definite to enable the land to be located with certainty.[43]

11. Designation of Interest Mortgaged. It is held that the words "such an interest," in property already described, as will secure the debt, constitute a sufficient description in a mortgage of the interest mortgaged.[44] But the restriction of the grant to the "right, title and interest" of the mortgagor may so limit the interest of the mortgagee that he will have no redress against a defect of title.[45]

12. Evidence to Aid Ambiguous Description. Mere indefiniteness in the description of land in a mortgage, or an error of description, although it may be such as to render the instrument *prima facie* inoperative, does not necessarily invalidate it; but evidence of extrinsic facts relative to the situation of the parties and the circumstances attending the transaction may be received to impart cer-

39. Mettart *v.* Allen, 139 Ind. 644, 39 N. E. 239. And see Cook *v.* Baecher, 79 Ind. 388 (holding the description sufficient where the mortgage described the property as "all that part of lot two hundred and thirty-five described as follows: Fifty-five feet off of the southeast side of lot two hundred and thirty-five," with the addition of boundaries, on two sides by streets and on the others by designated lots); Vaughn *v.* Schmalsle, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411 (holding that a description of mortgaged premises as "sixteen feet of the north end of lots one and two in block forty-four" in a given town, county, and state is not so uncertain as to render the mortgage void). See, however, Freed *v.* Brown, 41 Ark. 495 (where a mortgage of "a portion of the northeast quarter of section twenty-two, in township six, range twenty, containing twenty acres" was held void for uncertainty); Osborne *v.* Rice, 107 Ga. 281, 33 S. E. 54.

40. Atkins *v.* Paul, 67 Ga. 97; Harris *v.* Woodard, 130 N. C. 580, 41 S. E. 790. *Compare* Schenck *v.* Evoy, 24 Cal. 104; Jewett *v.* Foster, 14 Gray (Mass.) 495; Brown *v.* Maury, 85 Tenn. 358, 3 S. W. 175, holding that where a mortgage described the lands as "being 200 acres of a tract . . . [described by metes and bounds] containing 1,600 acres more or less. Said 200 acres lies west of the Hillsboro turnpike," and there were in fact nine hundred acres belonging to the mortgagor lying west of the pike, the description was sufficient to convey an undivided two ninths of the whole tract west of the pike.

41. Hinzie *v.* Robinson, 21 Tex. Civ. App. 9, 50 S. W. 635 (holding that a mortgage conveying a number of acres out of a larger survey will not be held void for want of description where the petition on foreclosure alleges that the mortgagor owned a certain described tract in the survey containing the same number of acres, and proved his ownership); Vanvalkenberg *v.* American Freehold Land Mortg. Co., 87 Fed. 617, 31 C. C. A. 145 (holding that where the only property owned by the mortgagor in a certain quarter section is the portion lying south of a creek, which portion contains about thirty acres, a mortgage describing the land as "thirty acres in" said quarter section is not so vague and indefinite as to be incapable of being aided by parol proof).

42. Richey *v.* Sinclair, 167 Ill. 184, 47 N. E. 364 [*reversing* 67 Ill. App. 580]; Bybee *v.* Hageman, 66 Ill. 519.

43. Myers *v.* Ladd, 26 Ill. 415; Carpenter Paper Co. *v.* Wilcox, 50 Nebr. 659, 70 N. W. 228; School Land Com'rs *v.* Wiley, 10 Oreg. 86; Gerald *v.* Gerald, 31 S. C. 171, 9 S. E. 792.

Erroneous statement of quantity.— Mere enumeration of quantity at the end of a particular description of the premises, where there is no fraud or gross mistake, is matter of description only, and not of the essence of the contract, and in such case there will not be deduction made from the amount of the mortgage given to secure the purchase-money. Melick *v.* Dayton, 34 N. J. Eq. 245. And see Kruse *v.* Scripps, 11 Ill. 98.

44. Strouse *v.* Cohen, 113 N. C. 349, 18 S. E. 323. And see Gilmore *v.* Black, 11 Me. 485.

45. Van Rensselaer *v.* Bull, 133 N. Y. 625, 30 N. E. 1147 [*affirming* 17 N. Y. Suppl. 117].

tainty to the description.[46] According to the general rule as to the reception of parol evidence in explanation of written documents, a latent ambiguity in a mortgage, in respect to the description of the property conveyed, may be cleared up by such extraneous evidence, that is, an ambiguity not arising from any lack of precision or intelligibility in the language employed, but from the fact that the description given does not fit the property meant to be mortgaged, or that outside facts show its different parts to be inconsistent or contradictory.[47] But if the ambiguity is patent, that is, if it arises from the want of intelligible meaning in the language employed in the description of the property, it cannot be explained by parol.[48]

13. Reference to Recorded Deed or Plat. Where a mortgage, in describing the property intended to be covered, refers to a previous deed or other conveyance of the same property, which contains a full description of it, with such particulars as to the parties to the deed and the place of its record as will enable any person in interest readily to find and consult it, this will cure any defect or uncertainty in the rest of the description.[49] And the same rule applies where the reference is to a recorded map or plat of the city or other civil division containing the property in question.[50] But the reference must be specific, that is, to a deed

46. Caston *v.* McCord, 130 Ala. 318, 30 So. 431; Boon *v.* Pierpont, 28 N. J. Eq. 7; Slater *v.* Breese, 36 Mich. 77.

Parol evidence is admissible to aid in locating land by the description contained in the mortgage; but parol testimony as to what the records show as to land owned by a mortgagor at the time he executed the mortgage is not admissible, for the original deed, or the record thereof, if the original deed cannot be produced, would be the best evidence. Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415; Cornwell *v.* Cornwell, 91 Ill. 414.

Vague description aided by proof showing what land mortgagor owned. — Where the terms of the description, although not devoid of intelligible meaning, are not sufficiently precise to identify the particular land meant to be included, or are defective in failing to include some of the elements of a perfect description the same rule applies. Here also parol evidence may be introduced to show that the description, so far as it goes, is applicable to a certain parcel of land owned by the mortgagor at the time, and would not be applicable to any other property of which he was the owner. O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745. And see Turner *v.* Cochran, (Tex. Civ. App. 1901) 63 S. W. 151.

47. Denison *v.* Gambill, 81 Ill. App. 170; Bowen *v.* Wood, 35 Ind. 268; Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744; Ashland Bldg., etc., Assoc. *v.* Jones, 41 S. W. 437, 19 Ky. L. Rep. 615. And see Vanvalkenberg *v.* American Freehold Land Mortg. Co., 87 Fed. 617, 31 C. C. A. 145.

Illustration. — A mortgage described the property mortgaged as "one acre and a half in the north-west corner of section five (5), together with the brewery . . . contained therein," situated in a designated county in Illinois, but without giving any township and range. There being several sections in that county bearing the same number, the ambiguity was held to be a latent one, and to be susceptible of explanation by evidence outside the mortgage, to show in what township and range the land was situated, and therefore the mortgage was not void for uncertainty. The ambiguity was removed by evidence showing that, at the time the mortgage was made, the mortgagor was living on a tract of land in the northeast quarter of section 5, township 6 north, range 1 west, and had a dwelling-house and brewery there, and had no brewery anywhere else. As to the particular description of the land as "one acre and a half," it was held that this was not so uncertain as to render the mortgage void, for it would be taken to embrace the given number of acres in the form of a square. Bybee *v.* Hageman, 66 Ill. 519.

48. Carter *v.* Barnes, 26 Ill. 454, holding that where the description of the property is so indefinite that it cannot be identified, or if the description calls for premises which have no existence, or which cannot possibly be found, the mortgage must then be considered void, and the court cannot receive extraneous evidence to explain the intention of the parties, or reform the mortgage. And see Carter *v.* Holman, 60 Mo. 498.

49. *Georgia.* — Derrick *v.* Sams, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309.

Illinois. — Clark *v.* Wallick, 56 Ill. App. 30.

Indiana. — Burkam *v.* Burk, 96 Ind. 270, holding that the description in a mortgage may be thus aided by reference to a deed not recorded but delivered in escrow.

Maine. — Willard *v.* Moulton, 4 Me. 14.

Massachusetts. — Fitzgerald *v.* Libby, 142 Mass. 235, 7 N. E. 917; Coogan *v.* Burling Mills, 124 Mass. 390; Robinson *v.* Brennan, 115 Mass. 582, holding that deeds referred to in a mortgage are admissible in evidence to make the description certain, although not on record when the mortgage was executed.

Ohio. — Dodd *v.* Groll, 19 Ohio Cir. Ct. 718, 8 Ohio Cir. Dec. 334.

Texas. — Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296; Rankin *v.* McCarthy, (Civ. App. 1896) 37 S. W. 979.

See 35 Cent. Dig. tit. "Mortgages," § 128.

50. Doom *v.* Holmes, 9 Kan. App. 520, 60

or other document clearly described or so particularized as to be identified with certainty.[51] And it seems that resort cannot thus be had to a conveyance which is not mentioned or referred to in the mortgage.[52]

14. Effect of Mistake or Misdescription. A mistake or misdescription, or a defective or uncertain description, of the property intended to be conveyed by a mortgage will not necessarily avoid the instrument. If the property is nevertheless capable of identification, and is clearly identified, the mortgagee may have the mortgage reformed or corrected.[53] And a foreclosure and sale under it will pass title as against all persons who have not been deceived or misled by the mistake, or who cannot show equities superior to those of the purchaser.[54] The equity of a mortgagee in a tract of land intended to be mortgaged to him, but which is misdescribed in the mortgage, is superior to the lien of a general judgment against the mortgagor rendered before the mistake in the description had been corrected, but not to the lien of an attachment judgment against the particular tract of land, rendered before correction of the faulty description and before plaintiff in attachment had notice of the mortgagee's equity therein.[55] Where the mortgage is by mistake made to cover land which the mortgagor does not own, instead of land which he does own and which was meant to be mortgaged, the mortgagee has no right or equity in the land erroneously described in the mortgage; his remedy is to have the mortgage reformed so as to apply to the land really intended and then to foreclose.[56]

15. Exceptions and Reservations. Where certain portions of the property covered by a mortgage are intended to be reserved to the mortgagor or excepted from its operation, they should be described with the same particularity and certainty that are required in the description of the premises to be included in

Pac. 1096; Rochat *v.* Emmett, 35 Minn. 420, 29 N. W. 147.

51. Nolte *v.* Libbert, 34 Ind. 163, holding that where a mortgage describes the premises simply as a certain number of acres "this day deeded" to the mortgagor, it is fatally defective for vagueness and uncertainty.

52. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

53. *Illinois.*— Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Everett *v.* Boardman, 58 Ill. 429.

Indiana.— Burkam *v.* Burk, 96 Ind. 270; Pence *v.* Armstrong, 95 Ind 191.

Maine.— Vose *v.* Handy, 2 Me. 322, 11 Am. Dec. 101.

Michigan.— Beyschlag *v.* Van Wagoner, 46 Mich. 91, 8 N. W. 693; Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 699.

Missouri.— Schwickerath *v.* Cooksey, 53 Mo. 75; Rhodes *v.* Outcalt, 48 Mo. 367.

New Jersey.— Lewis *v.* Ferris, (Ch. 1901) 50 Atl. 630; Redfields *v.* Redfields, (Ch. 1888) 13 Atl. 600; Potts *v.* Arnow, 8 N. J. Eq. 322.

New York.— People *v.* Storms, 97 N. Y. 364.

Ohio.—Adams *v.* Stutzman, 6 Ohio Dec. (Reprint) 612, 7 Am. L. Rec. 76.

Pennsylvania.— Cake *v.* Cake, 127 Pa. St. 400, 17 Atl. 984.

Virginia.— Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305.

Washington.— Rogers *v.* Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20.

Wisconsin.— Rowell *v.* Williams, 54 Wis. 636, 12 N. W. 86.

United States.— Berry *v.* Northwestern, etc., Bank, 93 Fed. 44, 35 C. C. A. 185.

England.— *In re* Boulter, 4 Ch. D. 241, 46 L. J. Bankr. 11, 35 L. T. Rep. N. S. 673, 25 Wkly. Rep. 100.

See 35 Cent. Dig. tit. "Mortgages," § 132.

54. Pence *v.* Armstrong, 95 Ind. 191; Willson *v.* Brown, 82 Ind. 471; Laforest *v.* Barrow, 12 La. Ann. 148; Grant *v.* Huston, 105 Mo. 97, 16 S. W. 680.

Mortgagor cannot complain.— In an action to foreclose a mortgage, the mortgagor cannot complain of an indefinite description in the mortgage, whatever might be the effect of a sale under such description. Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555.

Record as constructive notice.— The record of a mortgage operates as constructive notice to subsequent purchasers or encumbrancers only so far as the property is correctly described in the mortgage and record, unless it is apparent from the record itself that there is a misdescription. Slocum *v.* O'Day, 174 Ill. 215, 51 N. E. 243.

Notice of mistake.— Where a lot intended to be conveyed is by mistake omitted from a mortgage, but public notice of the mistake and of the mortgagee's claim is given, the mortgagee's claim on the lot which is omitted is superior to that of a subsequent purchaser under execution against the mortgagor. Ilse *v.* Seinsheimer, 76 Tex. 459, 13 S. W. 329.

55. Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380. And see Chadron Bldg., etc., Assoc. *v.* Hamilton, 45 Nebr. 369, 63 N. W. 808.

56. Northrup *v.* Hottenstein, 38 Kan. 263, 16 Pac. 445. *Compare* Nix *v.* Williams, 110 Ind. 234, 11 N. E. 36.

the mortgage, as otherwise it could not be clearly seen which portions were conveyed.[57]

G. Description of Debt or Liability Secured — 1. In General. To render a mortgage valid as a lien upon the land conveyed, as against third persons claiming interests, and to make it enforceable by foreclosure, it is necessary that it should contain a description or identification of the debt intended to be secured.[58]

2. False or Inaccurate Description. It is not essential to the validity of a mortgage or deed of trust that it should describe the debt intended to be secured with perfect truth or literal exactness.[59] It will be presumed as a matter of fact that the sum mentioned in the mortgage as the consideration thereof is correctly stated and is the whole consideration.[60] And a misdescription or misrecital of the debt intended to be secured, especially if only a clerical error, will not invalidate the mortgage.[61] If the mortgage is given in good faith and for a valuable consideration, its validity is not affected, as to creditors or subsequent purchasers, by the fact that it is expressed to be for a larger sum than is really due to the mortgagee.[62] When the mortgage describes the debt as evidenced by a note or bond, and there is actually no such obligation in existence, the weight of authority inclines to the view that the mortgage may nevertheless stand as security for the amount really due from the mortgagor to the mortgagee.[63] In regard to indem-

57. *Alabama.*— Morris *v.* Giddens, 101 Ala. 571, 14 So. 406.

Michigan.— Caple *v.* Switzer, 122 Mich. 636, 81 N. W. 560.

Minnesota.— Lawrence *v.* London, etc., Mortg. Co., 71 Minn. 535, 74 N. W. 892.

Texas.— American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

Wisconsin.— Eaton *v.* White, 18 Wis. 517, holding that a clause in a mortgage of certain tracts of land, "excepting therefrom so much of said tracts as have been conveyed [by the mortgagor] by deed to different individuals," does not reserve from the operation of the mortgage a portion of said lands covered by a prior unrecorded mortgage.

United States.— Breed *v.* Glasgow Inv. Co., 92 Fed. 760 [*affirmed* in 101 Fed. 863, 42 C. C. A. 61].

But *compare* Wallace *v.* Furber, 62 Ind. 103.

Reservation of homestead.— A mortgage reserved to the mortgagor his homestead, but in fact the homestead was invalid. It was held that the intent was that the mortgage should operate only on the excess of the value of the premises over the statutory exemption. Grogan *v.* Thrift, 58 Cal. 378.

58. *Connecticut.*—Hart *v.* Chalker, 14 Conn. 77, holding that if the mortgage is given to secure an ascertained debt, the amount of the debt must be stated; and if it is given to secure an existing or future liability, the foundation of such liability must be set forth. And see Shepard *v.* Shepard, 6 Conn. 37; Stoughton *v.* Pasco, 5 Conn. 442; 13 Am. Dec. 72; Pettibone *v.* Griswold, 4 Conn. 158, 10 Am. Dec. 106.

Georgia.— Gibson *v.* Hough, 60 Ga. 588.

Indiana.— Brick *v.* Scott, 47 Ind. 299.

Kentucky.— Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585.

New York.— Griffin *v.* Cranston, 1 Bosw. 281.

West Virginia.— Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

See 35 Cent. Dig. tit. "Mortgages," § 133. And see *supra*, VII, A, 1.

59. *California.*— Ricketson *v.* Richardson, 19 Cal. 330.

Kentucky.— Morris *v.* Murray, 82 Ky. 36.

New Hampshire.— Hodgdon *v.* Shannon, 44 N. H. 572.

New York.— Durfee *v.* Knowles, 2 N. Y. Suppl. 466.

Vermont.— Keyes *v.* Bump, 59 Vt. 391, 9 Atl. 598.

West Virginia.— Riggs *v.* Armstrong, 23 W. Va. 760.

United States.— Shirras *v.* Caig, 7 Cranch 34, 3 L. ed. 260.

See 35 Cent. Dig. tit. "Mortgages," § 133.

In Connecticut a mortgage must truly describe the debt intended to be secured; and it is not sufficient that the debt is of such a character that it might have been secured by the mortgage had it been truly described. Bramhall *v.* Flood, 41 Conn. 68; Hart *v.* Chalker, 14 Conn. 77; Townsend *v.* Todd, 91 U. S. 452, 23 L. ed. 413.

In Illinois a mortgage must disclose with as much certainty as possible the real character of the indebtedness, and if it is given to secure an existing or future liability, the foundation of such liability should be set forth. Bullock *v.* Battenhousen, 108 Ill. 28; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Ogden *v.* Ogden, 79 Ill. App. 488; Bergman *v.* Bogda, 46 Ill. App. 351.

In Louisiana a mortgage to secure a claim stated to be the mortgagee's, but proved not to be, is void. Freeland *v.* Briscoe, 3 La. Ann. 255.

60. Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833; Wiswall *v.* Ayres, 51 Mich. 324, 16 N. W. 667.

61. Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Tousley *v.* Tousley, 5 Ohio St. 78.

62. Miller *v.* Rouser, 25 Ill. App. 88; Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359; Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

63. Ogden *v.* Ogden, 180 Ill. 543, 54 N. E.

nity mortgages, the rules are somewhat more strictly drawn; and it appears to be required that the recital of the debt in the mortgage should correspond closely with the actual facts,[64] although a statement of the consideration as an absolute debt from the mortgagor to the mortgagee, whereas it was really a contingent liability, will not necessarily vitiate the mortgage.[65]

3. Degree of Certainty Required. While a mortgage or deed of trust given to secure a debt should state the amount thereof, in order to charge subsequent purchasers or encumbrancers with notice of the amount,[66] yet as between the parties no great degree of particularity in the description of the debt is required, provided it is capable of identification and the amount is ascertained.[67] And if the mortgage is meant to cover several different debts, it is not essential that they should be itemized or separately described, or that the total amount should be apportioned between them.[68]

4. Means of Identifying Debt. A mortgage is not invalid, even as to third persons, on account of uncertainty in the description of the debt intended to be secured, when the description is capable of being rendered certain by extrinsic evidence, on the ordinary principle allowing the use of such evidence to apply a written contract to its proper subject-matter.[69] The description will be sufficient if it states the subject-matter of the mortgage in general and contains such references, or furnishes such data, concerning the debt secured, as will put interested parties upon inquiry, and, when followed up with due care and diligence, inform them of the exact extent of the encumbrance.[70] Incorrect particulars in the

750; Whiting Paper Co. *v.* Busse, 95 Ill. App. 288; Goodhue *v.* Berrien, 2 Sandf. Ch. (N. Y.) 630; Porter *v.* Smith, 13 Vt. 492; Baldwin *v.* Raplee, 2 Fed. Cas. No. 801, 4 Ben. 433. And see *supra*, VII, A, 1, a.

64. Thomas *v.* Olney, 16 Ill. 53; Blandy *v.* Benedict, 42 Ohio St. 295. But *compare* Stevens *v.* Hampton, 46 Mo. 404, holding that the fact that a deed of trust purported to be given to secure a note due the beneficiary, whereas it was given to indemnify him as surety upon a note to a third person, does not amount to such a misdescription as should affect the validity of the deed.

65. Bishop *v.* Warner, 19 Conn. 460. *Compare* Stearns *v.* Porter, 46 Conn. 313.

66. Bullock *v.* Battenhousen, 108 Ill. 28; Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

Illustration.— Where a mortgage recited that the mortgagor was indebted to D in a specified amount, and that he was to be credited for such an amount as D might be owing him for brick, it was held that the description of the mortgage debt was too indefinite to render the mortgage sufficient as against a subsequent mortgage. Morris *v.* Murray, 82 Ky. 36.

67. Utley *v.* Smith, 24 Conn. 290, 63 Am. Dec. 163; Lewis *v.* De Forest, 20 Conn. 427; Chester *v.* Wheelwright, 15 Conn. 562; Barker *v.* Barker, 62 N. H. 366.

68. *Iowa.*— Clark *v.* Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160, holding that a description of the indebtedness secured by a mortgage as a certain gross amount was sufficiently specific where such indebtedness was in fact upon several promissory notes, which, with accrued interest, aggregated the amount stated.

Michigan.— Michigan Ins. Co. *v.* Brown, 11 Mich. 265, holding that a mortgage to secure all existing debts, without specifying them, is not invalid for want of certainty in the amount secured.

Missouri.— See Winn *v.* Lippincott Inv. Co., 125 Mo. 528, 28 S. W. 998, holding that where deeds of trust are taken on distinct portions of the land conveyed, to secure a certain amount of the bonds given for the purchase-price, the fact that the deeds fail to state which of the bonds are secured by each deed does not render the deeds invalid, but they will all be marshaled as security for all the bonds.

Pennsylvania.— Reed *v.* Kimble, 1 Del. Co. 461, holding that it is not necessary that a mortgage given partly for purchase-money of lands and partly for money loaned should set out on its face how much was for purchase-money and how much for money lent.

Texas.— Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689, holding that a description of that which a trust deed is given to secure as "claims in the hands of P" against the grantor is sufficient.

Virginia.— See Vanmeter *v.* Vanmeter, 3 Gratt. 148, holding that a mortgage purporting to be made to secure all the debts due from the grantor to the grantee and all suretyships of the grantee for the grantor is valid to secure all such debts existing at the time of the execution of the mortgage, although not more particularly described.

See 35 Cent. Dig. tit. "Mortgages," § 133.

69. Booth *v.* Barnum, 9 Conn. 286, 23 Am. Dec. 339; Williams *v.* Moniteau Nat. Bank, 72 Mo. 292; Gill *v.* Pinney, 12 Ohio St. 38; Hurd *v.* Robinson, 11 Ohio St. 232.

70. Stoughton *v.* Pasco, 5 Conn. 442, 13 Am. Dec. 72; Fetes *v.* O'Laughlin, 62 Iowa 532, 17 N. W. 764.

Reference to other recorded mortgage.— A mortgage which provides that, upon the full payment of the notes described in a certain

description may be rejected as surplusage, if enough remains to identify the debt or obligation to be secured.[71] And when a note and the mortgage given to secure it mutually refer to each other, they must be construed together.[72]

5. DESCRIPTION OF NOTE SECURED. A mortgage given to secure the payment of a promissory note is not rendered invalid by errors, inaccuracies, or lack of particularity in the description of the note, if the intention of the parties is apparent, or the note is capable of identification from other parts of the instrument or by the aid of extrinsic evidence.[73] This rule applies where there is a misrecital as to the amount of the note secured, or a failure to state the amount at all, but the note is otherwise fully and properly described;[74] where the description of the note indicates that it bears interest, but fails to specify its rate or the time of payment;[75] or where there is a mistake in reciting the date of the note,[76] or its maturity, or in specifying the time and manner of its payment;[77] but such error is merely clerical, and the note is nevertheless clearly identified. Nor will the mortgage be avoided by a mistake in setting forth the names of the parties to the note which is intended to be secured.[78] And the omission to set forth, in the description of

other mortgage executed upon a given date, and recorded upon a given page of a specified volume of the records of another county, it shall be void, sufficiently indicates the amount secured to put subsequent purchasers upon inquiry. Kellogg *v.* Frazier, 40 Iowa 502.

71. Gilman *v.* Moody, 43 N. H. 239.

72. Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680. And see *supra*, VII, A, 1, c.

73. *California.*— Security L. & T. Co. *v.* Mattern, 131 Cal. 326, 63 Pac. 482, holding a mortgage to be valid which was given as security for a note "according to its terms," which terms were set forth in another recorded mortgage, to which reference was made.

Connecticut.— Frink *v.* Branch, 16 Conn. 260, holding that where a mortgage described the note as one for the penal sum of seven hundred and eighty-seven dollars, and the note produced was for that sum but without any penalty, it was held that the mortgage was not void for want of reasonable certainty.

Iowa.— Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

Kentucky.— Bailey *v.* Fanning Orphan School, 14 S. W. 908, 12 Ky. L. Rep. 644, holding that where a note and mortgage are executed to the same party, and bear the same date, and the mortgage recites that it is given to secure a sum equal to the amount of the note, it will be presumed that the note is secured by the mortgage.

Minnesota.— Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

Missouri.— Deuser *v.* Walkup, 43 Mo. App. 625.

New Hampshire.— Prescott *v.* Hayes, 43 N. H. 593; Sheafe *v.* Gerry, 18 N. H. 245.

Wisconsin.— Palmeter *v.* Carey, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586, holding that where a note is made payable for one thousand dollars, and the consideration of the mortgage given to secure it is stated to be "one thousand," the word "dollars" being omitted therefrom, in an action brought to reform and foreclose the mortgage the omitted words will he supplied, agreeably to the understanding and meaning of the parties.

See 35 Cent. Dig. tit. "Mortgages," § 134.

Illustration.—Where a note was made payable to a named person "or order," and in the description of it in a mortgage given to secure it the words "or order" were omitted, this was held to be no misdescription, but only an imperfect description and not destructive. Hough *v.* Bailey, 32 Conn. 288. And see Aull *v.* Lee, 61 Mo. 160.

74. *Arkansas.*— Curtis *v.* Flinn, 46 Ark. 70.

Illinois.— Gardner *v.* Cohn, 191 Ill. 553, 61 N. E. 492. *Compare* Bullock *v.* Battenhousen, 108 Ill. 28; Bergman *v.* Bogda, 46 Ill. App. 351.

Iowa.— Fetes *v.* O'Laughlin, 62 Iowa 532, 17 N. W. 764.

Missouri.— Schroeder *v.* Bobbitt, 108 Mo. 289, 18 S. W. 1093.

North Carolina.— Harper *v.* Edwards, 115 N. C. 246, 20 S. E. 392.

Texas.— Clementz *v.* M. T. Jones Lumber Co., 82 Tex. 424, 18 S. W. 599.

See 35 Cent. Dig. tit. "Mortgages," § 134.

But see Hart *v.* Chalker, 14 Conn. 77, holding that a mortgage given to secure a note is not a valid security, as against subsequent purchasers or encumbrancers, unless the amount of the note is stated.

75. Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354; Merrill *v.* Elliott, 55 Ill. App. 34.

76. Snow *v.* Holmes, 71 Cal. 142, 11 Pac. 856; St. Lawrence University *v.* Farmer, 32 Misc. (N. Y.) 410, 66 N. Y. Suppl. 584; First Nat. Bank *v.* Tamble, (Tenn. Ch. App. 1900) 62 S. W. 308; Thompson *v.* Cobb, 95 Tex. 140, 65 S. W. 1090, 93 Am. St. Rep. 820.

77. King *v.* Kilbride, 58 Conn. 109, 19 Atl. 519; Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499.

78. Moore *v.* Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166 (holding that if the mortgage correctly describes the note, except that the word "administrator" is erroneously inserted after the name of the payee, this will not vitiate the mortgage); Lawton *v.* Adams, 13 Ohio Cir. Ct. 233, 7 Ohio Cir. Dec. 129 (holding that where a mortgage is given to secure four notes,

the note, a nugatory or unimportant clause therein, not essential to its identification, will not be regarded as material.[79]

6. Unliquidated or Contingent Claims. If the amount of the debt secured by a mortgage is not ascertained or liquidated, such descriptive facts should be set out in the mortgage as are within the knowledge of the parties, and as will tend to put interested parties upon the track leading to a discovery.[80]

7. Liability of Mortgagee as Indorser. If the mortgage is given to secure the mortgagee for liabilities assumed by him as indorser of the mortgagor's notes, such particulars concerning the notes indorsed should be given in the mortgage as will inform interested third persons of the nature and extent of the obligation covered by the mortgage.[81] If the mortgagee is to be secured against loss on indorsements to be made by him in the future, the fact should be so stated, with a limitation as to the time and amount of the indorsements.[82]

8. Future Advances. Where a mortgage is given to secure future advances, or as a general security for balances which shall be due from time to time from the mortgagor, it may be taken in the form of a mortgage for a specific sum of money large enough to cover the amount of the floating debt intended to be secured; and it is not invalid merely because it does not show on its face that it is for advances yet to be made.[83] It seems sufficient if the mortgage describes the advances to be made, in respect to their nature and amount, with reasonable cer-

described as made to the mortgagee, the description in the mortgage will be sufficient to cover four notes, two of which were executed to the mortgagee and two to his wife, it being shown that these were the notes intended to be secured.

Omitting name of maker.— Where a mortgage described the note secured by giving the date, amount, time of payment, rate of interest, and payee, but omitted to mention the name of the maker, it was held that the description was sufficiently definite to justify a decree of foreclosure. Ogborn *v.* Eliason, 77 Ind. 393.

79. Hill *v.* Banks, 61 Conn. 25, 23 Atl. 712; Hoskins *v.* Cole, 34 Ill. App. 541.

80. Hart *v.* Chalker, 14 Conn. 77; Stoughton *v.* Pasco, 5 Conn. 442, 13 Am. Dec. 72; Pearce *v.* Hall, 12 Bush (Ky.) 209.

In Louisiana under Rev. Civ. Code, art. 3309, providing that "to render a conventional mortgage valid, it is necessary that the exact sum for which it is given shall be declared in the act," it is essential for the validity of a mortgage "that some exact sum, agreed on between the debtor and creditor, as the limit of the security, shall be declared in the act." State *v.* Citizens' Bank, 33 La. Ann. 705.

81. Robinson *v.* Sharp, 32 S. W. 416, 761, 17 Ky. L. Rep. 736; Linton *v.* Purdon, 9 Rob. (La.) 482; Goddard *v.* Sawyer, 9 Allen (Mass.) 78. *Compare* McCaughrin *v.* Williams, 15 S. C. 505.

Misrecital as to indorsement.— A misrecital in a mortgage that the mortgagees were indorsers on two bills of exchange, when in fact they were indorsers on one only, and paid the other for the honor of the drawer before the mortgage was made, will not avoid the mortgage. Fetter *v.* Cirode, 4 B. Mon. (Ky.) 482.

Where particulars of notes cannot be stated. — Two partners made a mortgage of real and personal property to secure the mortgagee against certain liabilities incurred for them. It recited that he was an accommodation indorser and signer for them on sundry notes, drafts, and bills of exchange of theirs to sundry persons and banks, to the amount of fifty thousand dollars, which obligations were then maturing, but of which they were not able to give a particular description. It was necessary, in order to secure the mortgagee, that the mortgage should be given at once, and before a more accurate description of the notes and drafts could be made, as they were not then in the possession of either of the parties. It was held that the mortgage was not void for uncertainty, even as against subsequent encumbrancers. Lewis *v.* De Forest, 20 Conn. 427.

82. Utley *v.* Smith, 24 Conn. 290, 63 Am. Dec. 163; Ketchum *v.* Jauncey, 23 Conn. 123; Roussel *v.* Dukeylus' Syndics, 4 Mart. (La.) 218.

83. *Alabama.*— Forsyth *v.* Preer, 62 Ala. 443.

Connecticut.— Mix *v.* Cowles, 20 Conn. 420; Hubbard *v.* Savage, 8 Conn. 215; Crane *v.* Deming, 7 Conn. 387.

Illinois.— Collins *v.* Carlile, 13 Ill. 254.

Louisiana.— Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

Mississippi.— Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653.

Missouri.— Foster *v.* Reynolds, 38 Mo. 553.

New Jersey.— Bell *v.* Fleming, 12 N. J. Eq. 13; Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49.

New York.— Utica Bank *v.* Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175.

Oregon.— Hendrix *v.* Gore, 8 Oreg. 406.

See 35 Cent. Dig. tit. "Mortgages," § 136.

But see Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148; Young's Estate, 3 Md. Ch. 461.

tainty, without naming the exact amount,[84] or where the amount is by nature indeterminate, and therefore is not specified, or where it can readily be ascertained outside the mortgage.[85] It is not essential to the validity of a mortgage given to secure future advances to be made to two persons named therein that it should state separately the particular items to be received by each.[86]

H. Special Conditions and Stipulations — 1. Waiver of Equity of Redemption. A mortgagor's equity of redemption is a privilege of which he cannot divest himself by any agreement or stipulation in the mortgage itself. This equity is a necessary part of every mortgage, or necessarily incident to it. Hence the mortgagor's solemn covenant or agreement, inserted in the mortgage, that, if prompt payment is not made, the estate shall be forfeited and the title shall vest absolutely in the mortgagee, will be entirely disregarded in equity, and will not be allowed to bar a redemption properly offered.[87] And the same rule applies in the case of a deed, absolute in form, but given and intended as a mortgage only. An express stipulation of the parties, incorporated in the deed, that the title of the grantee shall become absolute and irredeemable on the grantor's failure to pay the debt secured by a designated day, will not be allowed to limit or cut off the right of redemption.[88] But although a transaction of this kind was originally meant as a mortgage, it may afterward be converted into an absolute transfer of the title, releasing the debtor's equity of redemption, provided this is done by a new contract between the parties, founded on an adequate consideration, and fair

84. Collier *v.* Faulk, 69 Ala. 58. And see Miller *v.* Lockwood, 32 N. Y. 293. *Compare* Truscott *v.* King, 6 N. Y. 147, holding that the mortgage should so limit the amount for which it is to stand as security that junior encumbrancers may know with certainty what is the extent of the lien claimed by the mortgagee.

85. Brewster *v.* Clamfit, 33 Ark. 72.

86. Walker *v.* Walker, 17 S. C. 329.

87. *Alabama.*— Parmer *v.* Parmer, 74 Ala. 285.

Arkansas.— Quartermous *v.* Kennedy, 29 Ark. 544.

California.—See Corcoran *v.* Hinkel, (1893) 34 Pac. 1031.

Illinois.— Bearss *v.* Ford, 108 Ill. 16; Tennery *v.* Nicholson, 87 Ill. 464; Willets *v.* Burgess, 34 Ill. 494; Tillson *v.* Moulton, 23 Ill. 648; Wynkoop *v.* Cowing, 21 Ill. 570; Barlow *v.* Cooper, 109 Ill. App. 375; Essley *v.* Sloan, 16 Ill. App. 63.

Kansas.—Lender *v.* Caldwell, 4 Kan. 339.

Maine.— Baxter *v.* Child, 39 Me. 110.

New Jersey.— Vliet *v.* Young, 34 N. J. Eq. 15; Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722.

New York.— Faulkner *v.* Cody, 45 Misc. 64, 91 N. Y. Suppl. 633; Clark *v.* Henry, 2 Cow. 324.

North Carolina.— Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951.

Ohio.— Stover *v.* Bound, 1 Ohio St. 107.

Pennsylvania.— Johnston *v.* Gray, 16 Serg. & R. 361, 16 Am. Dec. 577; Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

South Carolina.— Walling *v.* Aikin, 1 McMull. Eq. 1.

Washington.— Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

United States.— Peugh *v.* Davis, 96 U. S. 332, 24 L. ed. 775.

England.— Santley *v.* Wilde, [1899] 2 Ch. 474, 68 L. J. Ch. 681, 80 L. T. Rep. N. S. 154, 47 Wkly. Rep. 297; Mellor *v.* Lees, 2 Atk. 494, 26 Eng. Reprint 698; Goodman *v.* Grierson, 2 Ball & B. 278, 12 Rev. Rep. 82; East India Co. *v.* Atkyns, Comyns 348; Price *v.* Perrie, Freem. 258, 22 Eng. Reprint 1195; Newcombe *v.* Bonham, Freem. 67, 22 Eng. Reprint 1063, 2 Ventr. 364, 1 Vern. Ch. 7, 214, 232, 23 Eng. Reprint 266, 422, 435; Howard *v.* Harris, 1 Vern. Ch. 190, 23 Eng. Reprint 406.

Canada.— Leger *v.* Fournier, 14 Can. Sup. Ct. 314; Fallon *v.* Keenan, 12 Grant Ch. (U. C.) 388.

See 35 Cent. Dig. tit. "Mortgages," § 23. And see *infra*, XXII, A, 4.

Vente à réméré.— Where plaintiff executed a paper purporting to be a sale *à réméré*, reserving to himself the right of redemption within a specified time and in default of such redemption vesting ownership in the purchaser, and the property was not redeemed, and after the delay had expired the purchaser, with the knowledge of the vendor, who remained silent, treated the property as his own, borrowing money and securing the loan by mortgage upon it, it was held that the purchaser could not be held liable in damages. Moniotte *v.* Lieux, 41 La. Ann. 224, 6 So. 126.

88. See *supra*, III, B, 1, b, text and notes.

Although it may have been the very purpose and intention of the parties, in giving and taking a deed absolute in form instead of the usual form of a mortgage, to create a security which would cut off the right of redemption and save the expense of foreclosure, yet the courts rule that if it appears to have been intended as a mortgage the right of redemption cannot be thus relinquished, this matter being beyond their control. Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

and reasonable in itself.[89] And it appears that a mortgagor's statutory right to redeem after a foreclosure sale as distinguished from his equitable right to redeem after breach of condition, but before foreclosure may be waived or released in advance, or pending the time allowed for it, especially upon a consideration.[90]

2. CLOGGING MORTGAGOR'S CONTROL OF PROPERTY. It is competent for the parties to insert in a mortgage any conditions or stipulations intended for the better securing of the mortgage debt, or to make the security more effective, provided they are not so oppressive as to be unconscionable; and such agreements are not invalid, as fettering the equity of redemption, although they may hinder the mortgagor in the free use or disposition of the premises.[91] But it is a general rule in regard to all such conditions that they cannot extend beyond the life of the mortgage, that is to say, when the mortgage debt is fully paid and discharged, the land, and its owner in the use of it, must be as free as if no mortgage had been made, and any provision in the mortgage, or collateral thereto, inconsistent with this right, cannot be enforced.[92]

3. COLLATERAL ADVANTAGE TO MORTGAGEE. In regard to stipulations in a mortgage securing to the mortgagee a collateral advantage or benefit, beside the payment of interest, as a condition or inducement to his making the loan, the English cases rule that such a bargain is valid and enforceable, provided that it is not unconscionable or oppressive, and provided that it does not place any absolute better on the right of the mortgagor to redeem the premises on full payment of the debt secured.[93] In America such collateral agreements are very unusual, but

89. Carpenter *v.* Carpenter, 70 Ill. 457; Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321; Richmond *v.* Richmond, 20 Fed. Cas. No. 11,801; Lisle *v.* Reeve, [1902] 1 Ch. 53, 71 L. J. Ch. 42, 85 L. T. Rep. N. S. 464, 50 Wkly. Rep. 231. And see *supra*, III, A, 3.

Necessity of new contract.— A mortgagee is not allowed, at the time of making the mortgage, to enter into a contract for the purchase of the mortgaged property, or to take an option on the property. Samuel *v.* Jarrah Timber, etc., Paving Co., [1904] A. C. 323, 73 L. J. Ch. 526, 90 L. T. Rep. N. S. 731, 11 Manson 276, 20 T. L. R. 536, 52 Wkly. Rep. 673.

90. *Alabama.*— Fields *v.* Helms, 82 Ala. 449, 3 So. 106.

California.— Corcoran *v.* Hinkel, (1893) 34 Pac. 1031.

Colorado.— Nippel *v.* Hammond, 4 Colo. 211.

Massachusetts.— Tenney *v.* Blanchard, 8 Gray 579.

Minnesota.— Armstrong *v.* Sanford, 7 Minn. 49.

Tennessee.— Woods *v.* McGavock, 10 Yerg. 133.

See 35 Cent. Dig. tit. "Mortgages," § 1743.

91. McIntyre *v.* Whitfield, 13 Sm. & M. (Miss.) 88; Edwards *v.* Wray, 12 Fed. 42, 11 Biss. 251, both holding that it is competent for the parties to stipulate in the mortgage that the mortgagee may take and hold possession of the premises before default, and when this is done, and possession accordingly surrendered, the mortgagee will be entitled to retain the possession and to collect the rents and profits until the mortgage debt is paid.

Lease to mortgagor.— The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor, for the *bona fide* purpose of further securing the debt, and is not necessarily a fraud upon creditors. Trust, etc., Co. *v.* Lawrason, 6 Ont. App. 286 [*affirmed* in 10 Can. Sup. Ct. 679].

Agreement for purchase by mortgagee.— Where the mortgagor, by a proviso inserted in the mortgage, agreed in a certain event to sell to the mortgagee, for a fixed price, a portion of the mortgaged premises, it was held that the proviso was totally void, as being an onerous engagement entered into at the time of the mortgage. *In re* Edward, 11 Ir. Ch. 367.

92. Browne *v.* Ryan, [1901] 2 Ir. 653.

93. Santley *v.* Wilde, [1899] 2 Ch. 474, 68 L. J. Ch. 681, 80 L. T. Rep. N. S. 154, 47 Wkly. Rep. 297; *In re* Edwards, 11 Ir. Ch. 367; Jennings *v.* Ward, 2 Vern. Ch. 520, 23 Eng. Reprint 935.

Illustrations.—A collateral bargain that the mortgagee shall, for a term of years, act as commission agent or consignee in London of all the products of the mortgagor's foreign plantation is valid, at least if the term provided for does not extend beyond the full payment and discharge of the mortgage. Bunbury *v.* Winter, 1 Jac. & W. 255, 37 Eng. Reprint 372; Sayers *v.* Whitfield, 1 Knapp 133, 12 Eng. Reprint 271. The same is true of a bargain that the mortgagor will use his best endeavors to secure to the mortgagee the exclusive privilege of acting as broker for the sale of the products of a company in which the mortgagor is a shareholder. Carritt *v.* Bradley, [1901] 2 K. B. 550, 70 L. J. K. B. 832, 85 L. T. Rep. N. S. 197, 49 Wkly. Rep. 593. But the purchase of a piece of land at an exorbitant price will not be allowed to stand when made the condition of a loan of money to a party whose necessities compelled him to borrow. Cockell *v.* Taylor, 15 Beav. 103, 21 L. J. Ch. 545, 51 Eng. Reprint 475.

seem to be governed in the rare instances of their occurrence by the same rule.[94]

4. Payment of Taxes. A stipulation in a mortgage that the mortgagor shall pay all taxes and assessments lawfully assessed against the mortgaged premises, and that in default thereof the mortgagee may pay the same and add the amount to his mortgage lien is valid,[95] and so is a covenant that, upon failure of the mortgagor to pay such taxes, the principal debt secured by the mortgage shall immediately become due and payable.[96] Agreements that the mortgagor shall also pay taxes assessed upon the mortgage itself, or the mortgage debt, are not generally invalid, unless they bring the case within the usury laws, or unless expressly prohibited by statute.[97]

5. Insurance of Property. A covenant in a mortgage to the effect that the mortgagor will keep the buildings on the mortgaged premises insured for the benefit of the mortgagee is as binding and effective as any other condition of the mortgage.[98]

Covenant to use and sell mortgagee's beer. — Where a mortgage of a licensed public house, by the publican to a brewer, provided that the loan should continue for a period of five years, and contained a covenant that the mortgagor, during the continuance of the security, would not sell on the premises any other beer than that made and supplied by the mortgagee, it was held that this covenant was valid and could be enforced by injunction. John Brothers Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188, 64 J. P. 153, 69 L. J. Ch. 149, 81 L. T. Rep. N. S. 771, 48 Wkly. Rep. 236; Biggs *v.* Hoddinott, [1898] 2 Ch. 307, 67 L. J. Ch. 540, 79 L. T. Rep. N. S. 201, 47 Wkly. Rep. 84. But where, under the same conditions, the mortgagor covenanted, so as to bind the land, that he would not, during the continuance of his lease of the premises, whether any principal money or interest should or should not be owing on the mortgage, sell any beer except that purchased from the mortgagee, it was held that the covenant, so far as it purported to tie the public house after payment of the mortgage debt, was an attempt to clog the equity of redemption and was void. Rice *v.* Noakes, [1900] 2 Ch. 445, 69 L. J. Ch. 635, 82 L. T. Rep. N. S. 784, 48 Wkly. Rep. 629.

Solicitor as mortgagee. — Stipulations in a mortgage for collateral advantages to the mortgagee will be closely scrutinized when the parties occupy the relation of solicitor and client, but although unusual, they will be allowed to stand if fully explained to the mortgagor, and not unconscionable. Jones *v.* Linton, 44 L. T. Rep. N. S. 601.

94. Gescheidt *v.* Drier, 17 N. Y. Suppl. 741, holding that a contract that the mortgagor shall pay the interest on the mortgage, and attend to and take care of the mortgagee when she shall be sick, in the future, and that when she dies the mortgage shall be the property of the mortgagor, is valid.

95. Bonner Springs Lodge, etc., Co. *v.* McClelland, 59 Kan. 778, 53 Pac. 866; Farwell *v.* Bigelow, 112 Mich. 285, 70 N. W. 579; Fuller *v.* Kane, 110 Mich. 549, 68 N. W. 267, 64 Am. St. Rep. 362, 34 L. R. A. 308; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265; Lee *v.* Green, 33 Can. L. J. N. S. 622.

96. Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248; Stanclift *v.* Norton, 11 Kan. 218; Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Plummer *v.* Park, 62 Nebr. 665, 87 N. W. 534.

97. Banks *v.* McClellan, 24 Md. 62, 87 Am. Dec. 594; Hammond *v.* Lovell, 136 Mass. 184.

In California it is provided by the constitution that a mortgage, for the purpose of taxation, shall be deemed and treated as an interest in the property affected thereby, and the value of the security shall be assessed and taxed to the owner thereof; and that "every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." Cal. Const. art. 13, §§ 4, 5. This provision has been construed in Matthews *v.* Ormerd, 134 Cal. 84, 66 Pac. 67, 210; Cortelyou *v.* Jones, (1900) 61 Pac. 918; Hotaling *v.* Monteith, 128 Cal. 550, 61 Pac. 95; London, etc., Bank *v.* Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179; California State Bank *v.* Webber, 110 Cal. 538, 42 Pac. 1066; Harrelson *v.* Tomich, 107 Cal. 627, 40 Pac. 1032; Daw *v.* Niles, 104 Cal. 106, 37 Pac. 876; Garms *v.* Jensen, 103 Cal. 374, 37 Pac. 337; Harralson *v.* Barrett, 99 Cal. 607, 34 Pac. 342; Burbridge *v.* Lemmert, 99 Cal. 493, 32 Pac. 310; Hewett *v.* Dean, 91 Cal. 5, 27 Pac. 423; Marye *v.* Hart, 76 Cal. 291, 18 Pac. 325; Sanford *v.* Savings, etc., Soc., 80 Fed. 54.

In Michigan a statute requires taxes on the debt secured by a mortgage to be assessed to the holder thereof, and provides that if the same are paid by the mortgagor, such payment shall be treated as a payment on interest due, or, if no interest is in arrear, on the principal debt. The validity of this act has been sustained by the courts. Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

98. Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638. And see *infra*, XV, G, 1.

6. Stipulations as to Remedies. A provision in a mortgage that upon default the mortgagee may take immediate possession and collect the rents and profits, and that on beginning foreclosure proceedings he shall have an absolute right to the appointment of a receiver, is valid as to the parties and as to all others having notice, and will be enforced unless the particular circumstances would render it inequitable.[99] In the case of a deed of trust, the parties may also stipulate that the beneficiary shall have the right to change the trustee or appoint a new trustee,[1] or that the trustee shall receive a certain percentage of the mortgage debt as compensation for his services, provided the amount is not so excessive as to be unconscionable.[2] But it is not competent to provide that in case of foreclosure the mortgagor shall pay not only the debt, interest, and costs, but also a fixed sum as liquidated damages for the foreclosure.[3] Where there are several remedies on a mortgage, it is competent for the parties to stipulate to forego one of such remedies without destroying the character of the instrument.[4]

7. Acceleration of Maturity on Partial Default. A stipulation in a mortgage to the effect that the entire principal sum shall become due and payable, or that the mortgagee may at his option declare it to be due and payable, if the mortgagor shall fail to make due and prompt payment of any instalment or part of the principal or interest as it falls due, is legal and valid, and will be enforced by courts of equity as well as of law. Such a provision is not objectionable as creating a penalty or forfeiture, but is merely an acceleration of the time of payment.[5] But such a provision in a mortgage is permissive only, and does not of itself cause the unpaid instalments to mature, upon a partial default, so as to start the statute

99. Felino *v.* K. S. Newcomb Lumber Co., 64 Nebr. 335, 89 N. W. 755; Bryson *v.* James, 55 N. Y. Super. Ct. 374. But *compare* Hazeltine *v.* Granger, 44 Mich. 503, 7 N. W. 74, holding that any provision in a mortgage of lands which permits ejectment on a mere default in payment, or allows an *ex parte* order for a receiver of the rents and profits, or destroys in advance the equity of redemption, is contrary to equity and will not be enforced by a court of chancery.

1. Balfour-Guthrie Inv. Co. *v.* Woodworth, 124 Cal. 169, 56 Pac. 891.

2. Donelson *v.* Posey, 13 Ala. 752.

3. Foote *v.* Sprague, 13 Kan. 155. *Compare In re* Nelson, 15 Quebec Super. Ct. 368.

4. Winton *v.* Mott, 4 Luz. Leg. Reg. (Pa.) 71.

Covenant not to foreclose within limited time.— Where the owner of property executed a first and second mortgage upon it, the second mortgagee covenanting not to bring any action or suit to foreclose or to obtain possession within ten years, it was held that this agreement would preclude the second mortgagee from redeeming from the first mortgage, within the ten years. Ramsbottom *v.* Wallis, 5 L. J. Ch. 92.

5. *Alabama.*— Parker *v.* Olliver, 106 Ala. 549, 18 So. 40.

California.— Beal *v.* Stevens, 72 Cal. 451, 14 Pac. 186.

Illinois.— Curran *v.* Houston, 201 Ill. 442, 66 N. E. 228 [*affirming* 101 Ill. App. 203]; Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Magnusson *v.* Williams, 111 Ill. 450; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336.

Indiana.— Jones *v.* Schulmeyer, 39 Ind. 119.

Iowa.— Clayton *v.* Whitaker, 68 Iowa 412, 27 N. W. 296.

Maryland.— Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Mobray *v.* Leckie, 42 Md. 474; Schooley *v.* Romain, 31 Md. 574, 100 Am. Dec. 87.

Missouri.— Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223.

New York.— Rubens *v.* Prindle, 44 Barb. 336; Valentine *v.* Van Wagner, 37 Barb. 60.

Ohio.— Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

Pennsylvania.— Holland *v.* Sampson, 4 Pa. Cas. 164, 6 Atl. 772.

United States.— Olcott *v.* Bynum, 17 Wall. 44, 21 L. ed. 570; Ruggles *v.* Southern Minnesota R. Co., 20 Fed. Cas. No. 12,121. *Compare* Howell *v.* McAden, 94 U. S. 463, 24 L. ed. 254.

England.— Wallingford *v.* Mutual Society, 5 App. Cas. 685, 50 L. J. Q. B. 49, 43 L. T. Rep. N. S. 258, 29 Wkly. Rep. 81; Thompson *v.* Hudson, L. R. 4 H. L. 1, 38 L. J. Ch. 431; General Credit, etc., Co. *v.* Glegg, 22 Ch. D. 549, 52 L. J. Ch. 297, 48 L. T. Rep. N. S. 182, 31 Wkly. Rep. 421; *Ex p.* Cochrane, 9 Ch. D. 698, 48 L. J. Bankr. 31, 38 L. T. Rep. N. S. 820, 26 Wkly. Rep. 818; Sterne *v.* Beck, 1 De G. J. & S. 595, 32 L. J. Ch. 682, 8 L. T. Rep. N. S. 588, 2 New. Rep. 346, 11 Wkly. Rep. 791, 66 Eng. Ch. 462, 46 Eng. Reprint 236; Roddy *v.* Williams, 3 J. & L. 1. *Compare* Carroll *v.* O'Connor, 11 Ir. Eq. 200.

Canada.— Wilson *v.* Campbell, 15 Ont. Pr. 254; Knapp *v.* Cameron, 6 Grant Ch. (U. C.) 559. And see Todd *v.* Linklater, 1 Ont. L. Rep. 103.

See 35 Cent. Dig. tit. "Mortgages," § 22.

of limitations running against the mortgage debt.[6] And the negotiability of a note secured by a mortgage is not affected by a provision in the mortgage that the note may be declared due before the day fixed for its payment, upon the happening of some contingency.[7]

8. Power of Sale. It is competent for the parties to insert in a mortgage a clause giving to the mortgagee the right, in case of default or breach of condition, to make a public sale of the premises, without the aid of a court, and satisfy the mortgage debt out of the proceeds. Such a provision is perfectly valid and binding, this method of foreclosure *in pais* not being prohibited by law.[8] Such a power of sale does not destroy or impair the redeemable character of the mortgage.[9] And it is not necessary to its effective execution that the mortgagee should accept it or undertake its exercise, by joining in the mortgage or by any indorsement upon it.[10] But such a power will not be recognized as contained in a mortgage unless it is given by express grant and in clear and explicit terms.[11] A power of sale, however, is not an essential part of a mortgage, and its omission will simply limit the mode of foreclosure to that by action or suit,[12] and if inserted in the mortgage it need not be coextensive with the conditions of the mortgage.[13]

9. Stipulation as to Attorney's Fee. In most jurisdictions it is held that a mortgage may lawfully contain a stipulation on the part of the mortgagor to pay a reasonable sum to cover the fee of the mortgagee's attorney in case of foreclosure, and that such sum shall be a lien on the land, or shall be included in the judgment or decree of foreclosure;[14] but in a few such a stipulation is held to be contrary to public policy, and therefore to be void and incapable of enforce-

6. Watts *v.* Hoffman, 77 Ill. App. 411.

7. Hunter *v.* Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160.

8. See *supra*, I, C, 3, and cases there cited.

As to exercise of power after mortgagee's death see *infra*, XX, A, 4, b.

Defect in power.— The validity of a mortgage is not affected by a defect in the power of sale. Bay City State Bank *v.* Chapelle, 40 Mich. 447.

Condition limiting power.— A condition, attached to a power of sale in a trust deed, that the trustees shall only sell by and with the consent of the grantor, to be manifested by his uniting with them in the conveyance, is valid. Kissam *v.* Dierkes, 49 N. Y. 602.

Unnamed donee of power.— Where a statute authorizes the insertion of a clause in a mortgage empowering the mortgagee, "or any other person to be named therein," to sell the premises, a power of sale to a corporation or its attorney, without naming the latter, is not valid. Madigan *v.* Workingmen's Permanent Bldg., etc., Assoc., 73 Md. 317, 20 Atl. 1069; Queen City Perpetual Bldg. Assoc. *v.* Price, 53 Md. 397.

Mortgage ordered by court.— Where a vendor of land brings a suit for specific performance, and in decreeing accordingly the court orders him to execute a deed, and the vendee to give a mortgage, it seems that it would not be proper to direct a power of sale to be incorporated in such mortgage. McKay *v.* Reed, 1 Ch. Chamb. (U. C.) 208.

9. Turner *v.* Bouchell, 3 Harr. & J. (Md.) 99; Dibrell *v.* Carlisle, 48 Miss. 691.

10. Leffler *v.* Armstrong, 4 Iowa 482, 68 Am. Dec. 672.

11. Wing *v.* Cooper, 37 Vt. 169.

As to the language sufficient to create a power of sale see Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122; Hyman *v.* Devereux, 63 N. C. 624.

Reference to non-existent statute.— Under a mortgage authorizing the mortgagee to sell at public auction in case of default, and to convey to the purchaser, "agreeably to the statute in such case made and provided," the power of sale is a valid common-law power, capable of execution even in the absence of any statute regulating the manner of its exercise. Webb *v.* Lewis, 45 Minn. 285, 47 N. W. 803.

12. Cowles *v.* Marble, 37 Mich. 158.

13. Butler *v.* Ladue, 12 Mich. 173.

14. *Alabama.*— Bailey *v.* Butler, 138 Ala. 153, 35 So. 111; American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630; American Freehold Land Mortg. Co. *v.* McCall, 96 Ala. 200, 11 So. 288; Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375; Thomas *v.* Jones, 84 Ala. 302, 4 So. 270.

California.—A mortgage may lawfully contain a clause binding the mortgagor to pay an attorney's fee, but such fee will not be a lien on the land, within the security of the mortgage, unless the mortgage expressly purports to secure it. Luddy *v.* Pavkovich, 137 Cal. 284, 70 Pac. 177; Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115; Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468; San Luis Obispo County Bank *v.* Goldtree, 129 Cal. 160, 61 Pac. 785; Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796; Irvine *v.* Perry, 119 Cal. 352, 51 Pac. 544, 949; Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; O'Neal *v.* Hart, 116 Cal. 69, 47 Pac. 926.

ment.[15] In respect to the validity or invalidity of a stipulation of this kind, the courts of the United States will decide in accordance with the laws of the state wherein they sit.[16]

Dakota.— Hovey *v.* Edmison, 3 Dak. 449, 22 N. W. 594; Danforth *v.* Charles, 1 Dak. 285, 46 N. W. 576.

Florida.— Durham *v.* Stephenson, 41 Fla. 112, 25 So. 284; Kellogg *v.* Singer Mfg. Co., 35 Fla. 99, 17 So. 68; Taylor *v.* Brown, 32 Fla. 334, 13 So. 957; Long *v.* Herrick, 26 Fla. 356, 8 So. 50.

Georgia.— McCall *v.* Walter, 71 Ga. 287.

Idaho.— Jones *v.* Stoddart, 8 Ida. 210, 67 Pac. 650; Warren *v.* Stoddart, 6 Ida. 692, 59 Pac. 540; Broadbent *v.* Brumback, 2 Ida. 336, 16 Pac. 555. But *compare* Fidelity Sav. Assoc. *v.* Shea, 6 Ida. 405, 55 Pac. 1022.

Illinois.— Henke *v.* Gunzenhauser, 195 Ill. 130, 62 N. E. 896; Culver *v.* Brinkerhoff, 180 Ill. 548, 54 N. E. 585; Abbott *v.* Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; Sweeney *v.* Kaufmann, 168 Ill. 233, 48 N. E. 144; Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702; Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569; Haldeman *v.* Massachusetts Mut. L. Ins. Co., 120 Ill. 390, 11 N. E. 526 [*affirming* 21 Ill. App. 146]; McIntire *v.* Yates, 104 Ill. 491; Healy *v.* Protection Mut. F. Ins. Co., 107 Ill. App. 632; Nathan *v.* Brand, 67 Ill. App. 540; Piasa Bluffs Imp. Co. *v.* Evers, 65 Ill. App. 205; Buckley *v.* Jones, 58 Ill. App. 357; Wright *v.* Jacksonville Ben. Bldg. Assoc., 48 Ill. App. 505; Barnett *v.* Davenport, 40 Ill. App. 57.

Indiana.— Oghorn *v.* Eliason, 77 Ind. 393; Jones *v.* Schulmeyer, 39 Ind. 119; Barry *v.* Snowden, 106 Fed. 571.

Iowa.— Guaranty Sav., etc., Assoc. *v.* Ascherman, 108 Iowa 150, 78 N. W. 823; Steckel *v.* Standley, 107 Iowa 694, 77 N. W. 489; Brigham *v.* Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140; Weatherby *v.* Smith, 30 Iowa 131, 6 Am. Rep. 663; Nelson *v.* Everett, 29 Iowa 184.

Kansas.— Tholen *v.* Duffy, 7 Kan. 405. But *compare* Lender *v.* Caldwell, 4 Kan. 339.

Louisiana.— Hayward *v.* Hayward, 114 La. 476, 38 So. 424; Foster's Succession, 51 La. Ann. 1670, 26 So. 568; Hansen *v.* Creditors, 49 La. Ann. 1731, 22 So. 923; Duhe's Succession, 41 La. Ann. 209, 6 So. 502; State *v.* Citizens' Bank, 33 La. Ann. 705.

Maryland.— Maus *v.* McKellip, 38 Md. 231.

Minnesota.— Murray *v.* Chamberlain, 67 Minn. 12, 69 N. W. 474; Griswold *v.* Taylor, 8 Minn. 342.

Nevada.— McLane *v.* Abrams, 2 Nev. 199.

New York.— Bowery Bank *v.* Hart, 37 Misc. 412, 75 N. Y. Suppl. 781.

Pennsylvania.— Robinson *v.* Loomis, 51 Pa. St. 78; Gallagher *v.* Stern, 8 Pa. Super. Ct. 628; Lesher *v.* Brown, 3 Del. Co. 69. *Compare* Daly *v.* Maitland, 88 Pa. St. 384, 32 Am. Rep. 457.

South Carolina.— Branyan *v.* Kay, 33 S. C. 283, 11 S. E. 970.

Utah.— McClure *v.* Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. Rep. 938.

Washington.— Vermont Loan, etc., Co. *v.* Greer, 19 Wash. 611, 53 Pac. 1103; Gordon *v.* Decker, 19 Wash. 188, 52 Pac. 856; Scholey *v.* De Mattos, 18 Wash. 504, 52 Pac. 242. *Compare* Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

Wisconsin.— Pierce *v.* Kneeland, 16 Wis. 672, 84 Am. Dec. 726; Hitchcock *v.* Merrick, 15 Wis. 522; Rice *v.* Cribb, 12 Wis. 179; Boyd *v.* Sumner, 10 Wis. 41.

See 35 Cent. Dig. tit. "Mortgages," § 26.

Statement of rule.— A mortgage may contain a stipulation to pay a reasonable sum for the fee of the complainant's solicitor, in case of a foreclosure or a bill filed for that purpose, to be included in the decree. But if the fee so promised is intended as a mere gratuity, it is without consideration; and if it is intended as a cover for usurious interest, it is prohibited by the statute and for that reason cannot be enforced. If it is intended to indemnify the mortgagee against the expense of a foreclosure, it will be allowed to the extent of the attorney's proper and necessary services, but will not embrace useless and superfluous services on the part of the solicitor, however extensive or laborious they may have been. Soles *v.* Sheppard, 99 Ill. 616. And see Balfour *v.* Davis, 14 Oreg. 47, 12 Pac. 89.

In nature of a penalty.— The attorney's commission stipulated for in the mortgage is in the nature of a penalty, and its enforcement is within the court's control, in the exercise of its equity powers. Wilson *v.* Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767.

15. *Kentucky.*— Kentucky Trust Co. *v.* Louisville Third Nat. Bank, 106 Ky. 232, 50 S. W. 43, 20 Ky. L. Rep. 1797; Thomasson *v.* Townsend, 10 Bush 114; Southern Warehouse, etc., Co. *v.* Mechanics' Trust Co., 56 S. W. 162, 21 Ky. L. Rep. 1734; Pryse *v.* People's Bldg., etc., Assoc., 41 S. W. 574, 19 Ky. L. Rep. 752.

Michigan.— Kittermaster *v.* Brossard, 105 Mich. 219, 63 N. W. 75, 55 Am. St. Rep. 437; Louder *v.* Burch, 47 Mich. 109, 10 N. W. 129; Vosburgh *v.* Lay, 45 Mich. 455, 8 N. W. 91; Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553; Van Marter *v.* McMillan, 39 Mich. 304; Sage *v.* Riggs, 12 Mich. 313; Bendey *v.* Townsend, 109 U. S. 665, 3 S. Ct. 482, 27 L. ed. 1065.

Nebraska.— Hartford Security Co. *v.* Eyer, 36 Nebr. 507, 54 N. W. 838, 38 Am. St. Rep. 735; Dow *v.* Updike, 11 Nebr. 95, 7 N. W. 857.

North Carolina.— Turner *v.* Boger, 126 N. C. 300, 35 S. E. 592, 49 L. R. A. 590.

Ohio.— Leavans *v.* Ohio Nat. Bank, 50 Ohio St. 591, 34 N. E. 1089.

See 35 Cent. Dig. tit. "Mortgages," § 26.

16. Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501; Fowler *v.* Equita-

IX. EXECUTION, ACKNOWLEDGMENT, AND DELIVERY OF MORTGAGES.

A. Execution — 1. In General. A mortgage is generally required to be executed in the same manner and with the same formalities as an absolute conveyance of the land.[17] If the execution of the mortgage, and of the note which it is given to secure and which it describes, is denied, the note and mortgage, apparently properly executed, make a *prima facie* case,[18] and the burden of proving that the instrument was not duly executed is on him who denies its validity.[19] The acknowledgment of a bond for the payment of money, and a recitation thereof in a mortgage duly acknowledged and recorded, are evidence that the instruments were executed and delivered.[20] Whether or not a mortgage has been properly executed and acknowledged is a question of law for the court; it is error to leave it to the jury.[21] A recital in a deed of the existence of a mortgage upon the premises, and that the grantee is to pay the debt, is sufficient evidence, as against the grantee, of the execution of the mortgage.[22] And the assignee of a mortgage is estopped to deny its due execution and delivery.[23] A party to proceedings for the foreclosure of a mortgage, who has no right whatever to the premises, cannot assail the mortgage.[24]

2. Defective Execution. A radical defect in the execution of a mortgage — not a trifling informality, but the lack of some essential — may prevent it from being recorded,[25] or deprive it of all effect as against subsequent encumbrancers without notice,[26] but will not destroy its validity as between the parties. For a court of equity will consider it as an ineffectual attempt to carry out the previous agreement of the parties, and, regarding that as done which ought to have been done, will enforce it as a mortgage, in accordance with their contract and intention.[27]

3. Execution by Part of Grantors. A mortgage intended to be executed by joint mortgagors is not binding upon any who fail to sign and acknowledge it; but it may, if the circumstances permit, be held valid against those who do execute it.[28] And if the other mortgagors join in the execution at a later time, it

ble Trust Co., 141 U. S. 411, 12 S. Ct. 8, 35 L. ed. 794; Bendey *v.* Townsend, 109 U. S. 665, 3 S. Ct. 482, 27 L. ed. 1065; American Mortg. Co. *v.* Downing, 17 Fed. 660; Burns *v.* Scoggin, 16 Fed. 734, 9 Sawy. 73; Pacific Rolling-Mill *v.* Dayton, etc., R. Co., 5 Fed. 852, 7 Sawy. 61.

17. See Deeds, 13 Cyc. 553 *et seq.*

In Louisiana a conventional mortgage, that is, one created by the contract or agreement of the parties, as distinguished from such as result from the operation of the law or from a judgment, may be executed by a private act. Ells *v.* Sims, 2 La. Ann. 251.

18. Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587.

19. Crutchfield *v.* Hewett, 2 App. Cas. (D. C.) 373. And see Citizens' Bank *v.* Jones, 117 Wis. 446, 94 N. W. 329.

20. Ward *v.* Ward, 144 Fed. 308.

21. Bullock *v.* Narrott, 49 Ill. 62.

22. Cram *v.* Ingalls, 18 N. H. 613.

23. Loomis *v.* Stuyvesant, 10 Paige (N. Y.) 490.

24. Carleton *v.* Byington, 18 Iowa 482.

25. See *infra*, XIII, C, 2.

26. White *v.* Denman, 1 Ohio St. 110. And see *infra*, XIV, B, 1, d.

27. Alabama Warehouse Co. *v.* Lewis, 56 Ala. 514; White *v.* Denman, 16 Ohio 59. And see *supra*, II, E, 2.

Defective execution by agent.— A mortgage of realty made by an agent, although inoperative for want of formal execution in the principal's name, is binding in equity, if the agent had authority and his failure to execute in the name of the principal resulted from accident or mistake. Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602. And see Beatty *v.* Clark, 20 Cal. 11.

Enforceable against junior creditors.— A mortgage defective by reason of some informality or omission, such as failure to record in due time, defective acknowledgment or the like, will be enforced not only as against the parties but as against junior judgment creditors unless it is otherwise provided by statute. Dyson *v.* Simmons, 48 Md. 207.

28. See Taylor *v.* Riddle, (Tenn. 1900) 57 S. W. 158; East Texas F. Ins. Co. *v.* Clarke, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293.

Agreement that all shall sign.—Where it is mutually stipulated and agreed by the several parties who are to join in the giving of a mortgage that it shall not become binding unless it is signed by all the parties named as mortgagors, and this is not done, it will not become operative as to two of their number who execute it. Brown *v.* McCreight, 187 Pa. St. 181, 41 Atl. 45.

Signing mortgage notes.— A party who

will become binding upon them also as of the later date.[29] Where the security takes the form of a deed of trust, it is not necessary to its validity that it should be signed by the beneficiary. Its execution by the grantor and the trustee is sufficient.[30] A mortgage executed by one representing himself to be an unmarried man is not invalid as to him because he was in fact married at the time of its execution, where the person making the loan secured relies upon such representation.[31]

4. Time of Execution. In case of uncertainty as to the time when a mortgage was executed, it will be presumed, in the absence of evidence to the contrary, that it was executed and delivered on the day of its date.[32] And there is also a presumption, in the absence of inconsistent facts, that the mortgage was executed at a time when the mortgagor held the title to the property affected.[33] Where an undated mortgage refers to a dated note the date of the mortgage will be taken to be the same as that of the note.[34]

5. Place of Execution. A mortgage is presumed to have been executed in the state where the acknowledgment is taken, or in the state which is named in the certificate as the place where it was signed, sealed, and delivered by the grantor.[35] And in the absence of proof to the contrary, a mortgage of lands in another state will be presumed to have been executed in the place where the lands are situated.[36]

6. Signature or Subscription — a. In General. A mortgage is not valid or effectual without the signature of the mortgagor.[37] If a mortgage is duly witnessed and acknowledged, this affords presumptive evidence that it was signed by the mortgagor.[38]

b. Form of Signature. While a mortgage should be signed by the mortgagor in his true and proper name, yet a person executing a conveyance by a certain name will not be permitted to take advantage of the fact that it is not his true name.[39] The name signed to the mortgage should correspond exactly with that used in the granting clause of the mortgage and in the acknowledgment. But a discrepancy in the form of the name as occurring in these several places will not affect the validity of the mortgage, if there is no doubt as to the identity of the person, or if he can be certainly identified by evidence.[40]

c. Signature by Mark. Where a mortgagor cannot write, it is a valid execu-

signs mortgage notes as one of the makers, with reference therein to the mortgage securing their payment, will be bound as a party to the mortgage, although he does not sign the mortgage itself. Roehl *v.* Porteous, 47 La. Ann. 1582, 18 So. 645.

29. Mix *v.* Hotchkiss, 14 Conn. 32; Warren *v.* White, 52 Vt. 46.

30. Wiswall *v.* Ross, 4 Port. (Ala.) 321; Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

31. Canadian, etc., Mortg., etc., Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34.

32. Lyon *v.* McIlvaine, 24 Iowa 9; South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58.

33. Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937, holding that where a purchaser of property, on the same day on which he received his deed, executed a deed of trust on the land for the benefit of his grantor, it will be presumed that the trust deed was not executed until after the delivery of the deed for the land.

34. Woolsey *v.* Jones, 84 Ala. 88, 4 So. 190.

35. Sullivan *v.* Vernon, 121 Ala. 393, 25 So. 600; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; Franklin *v.* Thurston, 8 Blackf. (Ind.) 160.

36. Thayer *v.* Marsh, 11 Hun (N. Y.) 501 [*affirmed* in 75 N. Y. 340].

37. Goodman *v.* Randall, 44 Conn. 321; Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

When enforceable in equity.— A mortgage or deed of trust which is otherwise regular in form, and is properly acknowledged, but lacks the grantor's signature, which was omitted by mistake, will be regarded in equity as a mortgage and enforced as such. Martin *v.* Nixon, 92 Mo. 26, 4 S. W. 503. And see Dennistoun *v.* Fyfe, 11 Grant Ch. (U. C.) 372.

38. Goulet *v.* Dubreuille, 84 Minn. 72, 86 N. W. 779; Greeley State Bank *v.* Line, 50 Nebr. 434, 69 N. W. 966.

39. Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232. And see *supra*, VIII, E, 5.

40. Fincher *v.* Hanegan, 59 Ark. 151, 26 S. W. 821, 24 L. R. A. 543 (holding that the record of a mortgage executed by H. N. W. under the name of "H. M. W." is constructive notice thereof to a subsequent mortgagee, the second mortgage being executed under the mortgagor's true name, where there is no evidence that there was any other person in the county of the same name, so as to render the middle name necessary for

tion of the mortgage if another person writes the name for him, and the mortgagor then in person makes his mark, a witness attesting the mark, if that is required by the statute.[41]

d. Forged Signature. If the pretended signature of the mortgagor to a mortgage is a forgery the instrument is invalid for every purpose, and will pass no title or rights to any one,[42] unless the spurious document is ratified and accepted by the mortgagor.[43] But in the case of joint mortgagors, although the mortgage is void as to any one whose signature is forged, it appears that it may still be valid as against the mortgagor who really executed it, or against such portion of the property covered as may be owned by the latter in severalty.[44]

7. Seal. As has been already stated, at law a mortgage must possess all the formal requisites of a deed, and cannot be created by an instrument which is not under seal;[45] but in equity a mortgage which is defective in lacking the seal of the mortgagor will be enforced in accordance with the agreement and intention of the parties.[46] Where a mortgage purports to have been signed and sealed, and has a scrawl attached, the burden of proving that it was executed without a seal devolves upon him who asserts that fact.[47] A mortgage given by a corporation must be executed under the seal of the company, and it is necessary that the seal should be affixed by some person having lawful authority so to do.[48]

identification); Hill *v.* Banks, 61 Conn. 25, 23 Atl. 712 (holding that the fact that a mortgage is signed "F. S. Banks" and the acknowledgment "Frederick S. Banks" does not preclude the admission thereof in evidence as the deed of Frederick S. Banks, in connection with testimony that the two signatures were made by the same person).

Christian name only.— The signing of a mortgage by a married woman by her christian name only is sufficient, where her name appeared in full, with that of her husband, in the premises and in the certificate of acknowledgment. Zann *v.* Haller, 71 Ind. 136, 36 Am. Rep. 193.

41. Meazles *v.* Martin, 93 Ky. 50, 18 S. W. 1028, 13 Ky. L. Rep. 958.

Mortgagee signing mortgagor's name.— A mortgage is properly signed where the mortgagee writes the mortgagor's name at the foot of the instrument, and the mortgagor then affixes his mark, and a disinterested witness attests the subscriptions. Johnson *v.* Davis, 95 Ala. 293, 10 So. 911 [*distinguishing* Carlisle *v.* Campbell, 76 Ala. 247, where it appeared that the mortgagee not only signed the mortgagor's name, but also made the mark for him].

42. Livings *v.* Wiler, 32 Ill. 387; Finley *v.* Babb, 144 Mo. 403, 46 S. W. 165. And see Deeds; Forgery, 576.

Burden of proof.— If defendant in an action to foreclose a mortgage files a duly verified answer denying that he ever executed the note and mortgage and averring that the signatures thereto are forgeries, the burden of proving the signatures is on the party claiming them to be valid. Ellis *v.* Hof, 123 Wis. 201, 101 N. W. 368. And see Bennett *v.* Edgar, 46 Misc. (N. Y.) 231, 93 N. Y. Suppl. 203.

43. Livings *v.* Wiler, 32 Ill. 387, holding that if the mortgagor, with full knowledge of the forged mortgage, and of the circumstances attending its execution, receives and appropriates the proceeds, this will amount to such an adoption of the spurious document as will make it fully binding upon him, as though he had in fact originally executed it himself. See, however, Finley *v.* Babb, 144 Mo. 403, 46 S. W. 165, holding that a mortgagor can ratify a forged mortgage only by the execution of a new mortgage, and this will not affect any intervening rights.

44. North American Trust Co. *v.* Lanier, 78 Miss. 418, 28 So. 804, holding that where a husband gave a mortgage on land, which purported to have been signed by his wife, and was taken in good faith by the mortgagee, but the wife's signature was forged, the mortgage was a lien on all the land which was not included in the homestead, and where afterward the mortgagee paid off a prior vendor's lien on the land, and the husband then delivered to him a second forged mortgage to secure the amount of the first mortgage and also the amount of the vendor's lien, such second mortgage was a lien on the entire land, including the homestead, for the amount of the vendor's lien discharged with the mortgagee's money, because the mortgagee was entitled to be subrogated to such vendor's lien.

45. See *supra*, VIII, A, 3.

46. See *supra*, II, E, 2.

47. Growning *v.* Behn, 10 B. Mon. (Ky.) 383.

48. Koehler *v.* Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. ed. 339. And see Corporations, 10 Cyc. 1004 *et seq.*

A mortgage by a corporation by its attorney in fact is sufficient if executed in the name of the corporation, under the attorney's own hand and seal; and it is no objection that the seal of the corporation was not affixed thereto, when it appears that the power of attorney under which the attorney in fact acted was duly sealed. Salem First Nat. Bank *v.* Salem Capital Flour Mills Co., 39 Fed. 89.

8. AFFIXING REVENUE STAMPS. The United States War Revenue Act of 1898,[49] providing that mortgages not stamped as thereby required should not be admitted in evidence in any court, applies only to the federal courts, and the want of a stamp on a mortgage, or its insufficient stamping, is not a ground for excluding it as evidence in a proceeding in a state court.[50] In the absence of an intention to defraud the government, the failure to affix stamps to the proper amount as required by that act to a mortgage did not render it entirely null and void.[51]

9. FILLING BLANKS. When a mortgage is duly and properly executed, but contains blank spaces for the name of the mortgagee, the description of the property to be covered, or the amount and conditions of the debt to be secured, and the blanks are afterward filled up in accordance with the directions of the mortgagor and with his consent, it is a valid mortgage and binding upon him;[52] but it is otherwise if the blanks are filled up without his authority or consent, or contrary to his direction.[53]

10. AFFIDAVIT ACCOMPANYING INSTRUMENT. A statute in Maryland[54] requires a mortgage to be accompanied by an affidavit of the mortgagee or his agent that the consideration is true and *bona fide*.[55] The want of this affidavit is fatal to the validity of the mortgage as against third persons, whether it be assailed by a creditor or by a subsequent purchaser in good faith.[56] But although it lacks the affidavit, the mortgage will be good against the mortgagor and any one claiming under him with notice.[57] The statute applies only to technical mortgages, and not to deeds which are absolute in form, although intended as security, nor to deeds in trust to pay creditors of the grantor.[58]

11. RATIFICATION OF FAULTY EXECUTION. A defect in the execution of a mortgage may be cured by the subsequent act of the mortgagor in ratifying it and acknowledging its validity,[59] although not, it appears, to the prejudice of the

49. 30 U. S. St. at L. 455, U. S. Comp. St. (1901) p. 2296. And see INTERNAL REVENUE, 22 Cyc. 1624 *et seq.*

50. Dillingham *v.* Parks, 30 Ind. App. 61, 65 N. E. 300; Wade *v.* Foss, 96 Me. 230, 52 Atl. 640; Sulpho-Saline Bath Co. *v.* Allen, 66 Nebr. 295, 92 N. W. 354.

51. Bates *v.* Bailey, 57 Ala. 73; First Nat. Bank *v.* Stone, (Iowa 1902) 91 N. W. 1076; Wilson *v.* Reuter, 29 Iowa 176; Morris *v.* Linton, (Nebr. 1905) 104 N. W. 927; Patton *v.* Irvin, 8 Baxt. (Tenn.) 453. *Compare* Hoppock *v.* Plato, 30 How. Pr. (N. Y.) 120; Miller *v.* Morrow, 3 Coldw. (Tenn.) 587.

52. Langhorst *v.* Shuttledryer, 7 Ohio Dec. (Reprint) 333, 2 Cinc. L. Bul. 125; Brown *v.* Maury, 85 Tenn. 358, 3 S. W. 175; Adsetts *v.* Hives, 33 Beav. 52, 9 Jur. N. S. 1063, 9 L. T. Rep. N. S. 110, 2 New Rep. 474, 11 Wkly. Rep. 1092, 55 Eng. Reprint 286; Stewart *v.* Boak, Rich. Eq. Cas. (Nova Scotia) 467. See also Fox *v.* Palmer, 25 N. J. Eq. 416. And see *supra*, VIII, E, 6.

As evidence of fraudulent purpose.— It has been held that the delivery of a deed of trust in blank, by which to obtain money from one who is not informed of the fact that it is in blank, affords strong evidence that a gross and palpable fraud was intended, which will make all the parties to the fraud liable in an action for the damages resulting. Wilson *v.* South Park Com'rs, 70 Ill. 46.

53. Stebbins *v.* Watson, 71 Mich. 467, 39 N. W. 721. And see *supra*, VIII, E, 6.

Burden of proof.— Where an action is brought in equity to have a mortgage canceled and set aside, on the ground that, at the time of its execution and delivery, it contained no description of any property mortgaged, and that the description appearing in the mortgage was filled in after its delivery, and that therefore it is null and void, the complainant is met by the presumption that the document has not been altered, and it is incumbent on him to establish his contention by a preponderance of proof; and if he fails to do this — if the evidence is conflicting and evenly balanced — he cannot have the relief asked. Harding *v.* Des Moines Nat. Bank, 81 Iowa 499, 46 N. W. 1071.

54. Md. Code, art. 24, § 29.

55. Reiff *v.* Eshleman, 52 Md. 582 (holding that the indorsement of this affidavit on the mortgage is essential to its validity, and it cannot be proved by parol); Smith *v.* Myers, 41 Md. 425.

Sufficiency of affidavit.— The requirement that the mortgagee shall make oath "that the consideration is true and *bona fide*" is sufficiently complied with by an affidavit that the consideration is *bona fide* as therein set forth. Marlow *v.* McCubbin, 40 Md. 132.

Affidavit made by agent.— Where the affidavit is made by an agent, it must also aver that he is the agent of the mortgagee. Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831.

56. Cockey *v.* Milne, 16 Md. 200.

57. Phillips *v.* Pearson, 27 Md. 242.

58. Snowden *v.* Pitcher, 45 Md. 260; Charles *v.* Clagett, 3 Md. 82.

59. Alexander *v.* Caldwell, 61 Ala. 543; Livings *v.* Wiler, 32 Ill. 387; Carr *v.* McCol-

rights of third persons or other creditors which have vested before the ratification.[60]

B. Attestation — 1. Necessity of Witnesses. In many of the states the laws require the execution of a mortgage to be attested by subscribing witnesses.[61] The number of witnesses required is generally two,[62] although in some states one is sufficient.[63] But it is the generally accepted rule that, although a mortgage may be defective in respect to the attestation, it is nevertheless valid and binding as between the parties, and also as against any third persons acquiring interests in the property or liens upon it with actual notice of the defective mortgage.[64] But a mortgage defectively attested, or not attested at all, is not generally entitled to be recorded, and therefore, even though it is placed on the record, it is not to be taken as imparting notice to interested parties, and so it is not effective against subsequent purchasers or encumbrancers who have no actual knowledge of it.[65]

2. Qualification of Witnesses. The subscribing witnesses to a mortgage

gan, 100 Md. 462, 60 Atl. 606; Case *v.* Kinney, 7 Ohio Dec. (Reprint) 178, 1 Cinc. L. Bul. 277; Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893.

60. Baker *v.* Lee, 49 La. Ann. 874, 21 So. 588.

61. See the statutes of the different states. And see Deeds, 13 Cyc. 577 *et seq.*

In Alabama a mortgage which is not duly attested by witnesses is not operative to vest any title to the land in question in the mortgagee. Watson *v.* Herring, 115 Ala. 271, 22 So. 28; Dugger *v.* Collins, 69 Ala. 324. Attestation is essential to the validity of a mortgage executed by one partner, in the partnership name, to secure a partnership debt, of land constituting part of the assets of the firm, in equity as well as at law. Long *v.* Slade, 121 Ala. 267, 26 So. 31. The sufficiency of the certificate or proof of subscribing witnesses that the grantor executed the mortgage to which it is attached becomes material only when the certificate is relied on as a substitute for proof by the subscribing witnesses, or, in other words, only when it is claimed that the mortgage is self-proving. Tranum *v.* Wilkinson, 81 Ala. 408, 1 So. 201.

In Maryland an attestation is not, under the law, essential to the validity of a mortgage of real estate. Carrico *v.* Farmers', etc., Nat. Bank, 33 Md. 235.

62. Thompson *v.* Morgan, 6 Minn. 292 (holding that a mortgage of lands with only one witness is not entitled to record, and passes no interest in the land); White *v.* Denman, 1 Ohio St. 110 (holding that where only one witness attests the execution of a mortgage, the official signature of the justice to the certificate of acknowledgment will not supply the deficiency).

Where grantor signs by mark.— Under Ala. Code, § 982, providing that if one making a conveyance is not able to sign his name the conveyance must be attested by two witnesses; a mortgage executed by a husband and wife by their marks, and witnessed by one person only, is void. Henderson *v.* Kirkland, 127 Ala. 185, 28 So. 674.

63. See the statutes of the different states.

64. *Georgia.*— Pulliam *v.* Hudson, 117 Ga. 127, 43 S. E. 407; Benton *v.* Baxley, 90 Ga. 296, 15 S. E. 820; Gardner *v.* Moore, 51 Ga. 268. The validity of a mortgage is not affected by the fact that the attesting witness, who was also a justice of the peace, omitted to affix his official signature. Janes *v.* Penny, 76 Ga. 796.

Michigan.— Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225, holding that a mortgage need not be witnessed to be valid as between the parties.

Minnesota.— Johnson *v.* Sandhoff, 30 Minn. 197, 14 N. W. 889.

Nebraska.— Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241, both holding that a mortgage on realty other than the homestead, executed and delivered by the mortgagor, is valid between the parties and those knowing of its existence, although not lawfully acknowledged or witnessed.

New Hampshire.— Sanborn *v.* Robinson, 54 N. H. 239 (holding that a mortgage of real estate witnessed by only one witness is sufficient to convey the title, as between the parties and all others who had actual notice of the existence of such mortgage); Hastings *v.* Cutler, 24 N. H. 481.

Wyoming.— Conradt *v.* Lepper, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2; Jubb *v.* Thorpe, 1 Wyo. 356.

See 35 Cent. Dig. tit. "Mortgages," § 153.

Invalid as to third parties with notice.— Where an instrument, in form a mortgage, has only one subscribing witness, equity will treat it, as between the parties only, as a good and valid mortgage, on the principle that equity will consider that as done which the parties agreed to do; but as regards all third persons, such as subsequent judgment creditors, purchasers, and the like, it cannot be given the effect of a mortgage, even though they had actual notice of its existence. White *v.* Denman, 16 Ohio 59; Kane *v.* Moulton, 1 Ohio S. & C. Pl. Dec. 410, 7 Ohio N. P. 293.

65. White *v.* Denman, 16 Ohio 59; Harper *v.* Barsh, 10 Rich. Eq. (S. C.) 149; Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659.

should be personally acquainted with the mortgagor,[66] and should be disinterested persons.[67] Where the witnesses are interested and disqualified, the defect in the attestation will prevent the record of the mortgage from giving constructive notice to subsequent purchasers or attaching creditors, but still it will be a good mortgage as between the original parties.[68]

3. CURATIVE STATUTES. In several states statutes have been enacted validating mortgages previously made, and which were defective because attested by only one witness where two were required, or for other reasons not conforming to the laws in force; and these curative acts, although retrospective, are held to be valid and effectual for their purpose.[69]

C. Acknowledgment[70] — 1. IN GENERAL. The acknowledgment of a mortgage is important not only as a prerequisite to its record, but also as fixing the date of its taking effect. It is presumed, in the absence of direct evidence, that the instrument was executed and delivered on the day of its acknowledgment, and the date of the acknowledgment will prevail against a different date appearing in the mortgage itself.[71] The acknowledgment should of course be made by the person executing the mortgage, whether he be the owner of the land or an agent acting in his behalf.[72] And any provisions of the statutes in regard to taking the acknowledgment of persons in a particular situation, as married women, should be strictly observed.[73]

2. NECESSITY OF ACKNOWLEDGMENT.[74] As a general statutory rule, a mortgage is not entitled to be recorded until it has been acknowledged. But even without

66. Goodhue *v.* Berrien, 2 Sandf. Ch. (N. Y.) 630, holding that a mortgage attested by a witness who was not previously acquainted with the mortgagor is not an "unattested conveyance" within the meaning of 1 N. Y. Rev. St. p. 738, § 137.

67. Amick *v.* Woodworth 58 Ohio St. 86, 50 N. E. 437, holding that the grantee in a mortgage is not qualified to be an attesting witness to its execution.

An attorney who is intrusted with the business of preparing a mortgage and superintending its execution is a competent attesting witness thereto, although such mortgage provides for the payment of attorney's fees incurred in the collection of the debt secured thereby. Chastain *v.* Porter, 130 Ala. 410, 30 So. 492; Marable *v.* Mayer, 78 Ga. 710, 3 S. E. 429.

Employee of corporation mortgagee.— The attestation of a mortgage to a corporation by an employee of the corporation, together with one other witness, is sufficient proof of its execution to admit it to record or in evidence, and the record is therefore notice to a subsequent purchaser. Conley *v.* Campbell Printing-Press, etc., Co., 78 Ga. 569, 3 S. E. 335.

Stock-holders of corporation.— A mortgage is not impeachable, in the absence of fraud, because the attesting witnesses and the notary taking the acknowledgment are stockholders of the corporation which is the mortgagee. Read *v.* Toledo Loan Co., 68 Ohio St. 280, 67 N. E. 729. And see Gilbert *v.* Garber, 69 Nebr. 419, 95 N. W. 1030.

68. Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659. And see Read *v.* Toledo Loan Co., 23 Ohio Cir. Ct. 25.

69. See the statutes of the different states. And see Morris *v.* Grinnell, 51 Conn. 481; Edmunds *v.* Leavell, 3 S. W. 134, 8 Ky. L. Rep. 694; Moreland *v.* Lawrence, 23 Minn. 84; Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95.

70. See, generally, ACKNOWLEDGMENTS.

71. Wyckoff *v.* Remsen, 11 Paige (N. Y.) 564; Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249; Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305.

72. McAdow *v.* Black, 6 Mont. 601, 13 Pac. 377, holding that an attorney in fact, being duly authorized to make and execute a mortgage on his principal's land, may acknowledge the same; but it should appear from the certificate, with reasonable clearness, that he made the acknowledgment for and in behalf of the principal, and as recognizing the instrument as the principal's deed.

73. Hexter *v.* James, 1 Leg. Rec. (Pa.) 194.

A mortgagee without notice is not affected by the fact that the married woman who signed the mortgage was not privily examined, as recited in the certificate of the officer taking the acknowledgment. Pennsylvania Trust Co. *v.* Kline, 192 Pa. St. 1, 43 Atl. 401.

In Alabama a wife who joins in a mortgage of her husband's land, not a part of the homestead, need not be examined separate and apart from him, as required by Code, § 2508, in case of homesteads; and a defective recital of a separate examination in the acknowledgment may be rejected as surplusage, without affecting the sufficiency of the remainder, where that complies with the form perscribed by Code, § 1802. Orr *v.* Blackwell, 93 Ala. 212, 8 So. 413.

74. **Statutes requiring acknowledgment** of mortgages, as essential to their validity or to proceedings for their enforcement, are not open to objection on the ground of being obnoxious to the constitutional provisions

any acknowledgment, or with a defective or imperfect acknowledgment, a mortgage duly executed will be a valid and binding obligation, enforceable by appropriate action, between the original parties, and as against any third persons who have not acquired a specific interest in the property or a valid subsequent lien upon it.[75] But without an acknowledgment the mortgage cannot be held to impart notice to persons afterward acquiring interests in the property, and therefore its lien is not enforceable to the prejudice of subsequent purchasers or encumbrancers.[76] Statutes imperatively requiring the acknowledgment to be taken when the mortgage is made by a married woman,[77] or in case the mortgage covers the homestead of the mortgagor,[78] cannot be disregarded; their due observance is essential to the validity of the mortgage.

3. Officer Taking Acknowledgment — a. Authority in General. The statutes of the several states enumerate the officers who are qualified to take acknowledgments of mortgages; it being generally provided that such an acknowledgment may be taken by a notary public, a justice of the peace, a justice, judge, or clerk of any court of record; by a United States commissioner; or by a justice or judge of a federal court.[79]

b. Territorial Restriction of Authority. The authority of a local magistrate or officer, such as a justice of the peace, in respect to taking acknowledgments, is generally restricted to his own county, and if he performs an act of this kind beyond the limits of his territory it is not a valid acknowledgment.[80] It is generally provided that if the acknowledgment is taken in a county other than that in which the mortgaged land lies, the official character of the officer taking it shall be certified by the clerk of a court of record.[81] Lacking such certificate, the mortgage will not operate as constructive notice to subsequent purchasers or encumbrancers.[82]

c. Acknowledgment Taken Beyond the State. The acknowledgment of a mortgage may be made by the mortgagor in a state other than that in which the mortgaged property is situated, the official character of the person taking the acknowledgment being duly certified; and in that case it will be considered to be

against laws impairing the obligation of contracts. Parrott *v.* Kumpf, 102 Ill. 423.

75. *Arkansas.*— Haskill *v.* Sevier, 25 Ark. 152.

Illinois.— Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246. While an unacknowledged mortgage may be foreclosed in this state by bill in equity, it cannot be foreclosed on scire facias. The statutes relating to the latter method of foreclosure relate only to mortgages "duly executed and recorded," and for this purpose the acknowledgment is a part of the execution. Kenosha, etc., R. Co. *v.* Sperry, 14 Fed. Cas. No. 7,712, 3 Biss. 309.

Indiana.— Perdue *v.* Aldridge, 19 Ind. 290.

Iowa.— Carleton *v.* Byington, 18 Iowa 482.

Missouri.— Hannah *v.* Davis, 112 Mo. 599, 20 S. W. 686 (holding that a deed of trust defectively acknowledged is valid between the immediate parties and those having actual notice); Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24.

Nebraska.— Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241, both holding that a mortgage on realty other than the homestead, executed and delivered by the mortgagor, is valid between the parties and those having actual knowledge of its existence, although not lawfully acknowledged.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

Pennsylvania.— Gilmore *v.* Boyd, 4 L. T. N. S. 1.

Washington.— Lynch *v.* Cade, 41 Wash. 216, 83 Pac. 118.

See 35 Cent. Dig. tit. "Mortgages," § 155.

Contra.— Dugger *v.* Collins, 69 Ala. 324.

76. Haskill *v.* Sevier, 25 Ark. 152.

77. Perdue *v.* Aldridge, 19 Ind. 290; Hait *v.* Houle, 19 Wis. 472. And see Husband and Wife, 21 Cyc. 1330.

78. Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241. And see Homesteads, 21 Cyc. 543 *et seq.*

79. See Acknowledgments, 1 Cyc. 544 *et seq.*

In Florida, under a statute empowering notaries public to take the acknowledgment of deeds and other instruments for record, a notary can take proof by subscribing witnesses of the execution of a mortgage of real estate for record. Edwards *v.* Thom, 25 Fla. 222, 5 So. 707.

In Louisiana an act of mortgage passed before a justice of the peace is not an authentic act. Harrod *v.* Voorhies, 16 La. 254.

80. New England Mortg. Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164.

81. See the statutes of the different states.

82. Sitler *v.* McComas, 66 Md. 135, 6 Atl. 527; Dyson *v.* Simmons, 48 Md. 207.

in due form and sufficient if the manner and style of the acknowledgment conform to the laws of the state where taken, and it is so certified,[83] unless it is otherwise by statute.[84]

d. Disqualification of Officer. An acknowledgment of a mortgage is not valid or effectual if taken before an officer who is disqualified from acting officially in relation to it, whether the disqualification arises from his being a party to the conveyance,[85] or the attorney for one of the parties,[86] or by reason of his financial interest in the debt secured.[87] It has been held that a mortgage is invalid when the acknowledgment was taken by an officer who was an officer in the corporation to which the mortgage was given.[88]

e. De Facto Officer. An acknowledgment of a mortgage in regular form, taken before a person claiming to act as an officer qualified to take it, and acting under color of his office, will not be invalidated by a defect or failure in his title to his office.[89]

4. Requisites of Certificate. Where the acknowledgment of a mortgage is properly taken, it is not necessary that the certificate should be in the exact form

83. Brannon *v.* Brannon, 2 Disn. (Ohio) 224; Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

In Illinois, where a mortgage or deed of trust on lands in Illinois is executed and acknowledged in another state, it is immaterial whether the acknowledgment is taken in conformity with the laws of the state where taken, if it conforms to the laws of Illinois; that is sufficient to make it admissible in evidence in the courts of Illinois. Dawson *v.* Hayden, 67 Ill. 52.

84. See the statutes of the different states.

85. Mortgagee.— Although the mortgagee may be a notary public or justice of the peace, he cannot lawfully take the mortgagor's acknowledgment of the mortgage; his action in that behalf is void. West *v.* Krebaum, 88 Ill. 263. And it is immaterial that there is no other justice or other officer in the county or town who is competent to take the acknowledgment. This fact will not remove the disqualification of the mortgagee to act in that capacity, and the acknowledgment taken by him will have no effect as to third persons; the instrument will have no greater efficacy than one not acknowledged at all. Hammers *v.* Dole, 61 Ill. 307.

Trustee in deed of trust.— Where the security takes the form of a deed of trust, the trustee named therein, being a party to the conveyance, is disqualified from taking the acknowledgment. Rothschild *v.* Daugher, 85 Tex. 332, 20 S. W. 142, 34 Am. St. Rep. 811, 16 L. R. A. 34; Nicholson *v.* Gloucester Charity School, 93 Va. 101, 24 S. E. 899. And it is immaterial that the trustee has not accepted the trust; for the deed being for his benefit, his acceptance will be presumed until his dissent is shown, and such dissent will not be implied from the fact of his taking the acknowledgment. Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873 [*citing* Davis *v.* Beazley, 75 Va. 491].

Joint trustees.— The acknowledgment of a deed of trust, taken by one of the trustees therein, renders the deed void as to that trustee, but it does not affect the validity of the deed as to the other trustees, as they have no community of interest, and the disqualification of one will not render the others incompetent; and if the execution of the deed is sufficiently proved, by evidence outside the acknowledgment, this will cure the defect. Darst *v.* Gale, 83 Ill. 136.

Beneficiary in trust.— A notary public is competent to take the acknowledgment of a deed of trust, although he is interested as one of the beneficiaries in the trust. Fredericksburg Nat. Bank *v.* Conway, 17 Fed. Cas. No. 10,037, 1 Hughes 37.

86. Southwestern Mfg. Co. *v.* Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684. And see Havemeyer *v.* Dahn, 48 Nebr. 536, 67 N. W. 489, 58 Am. St. Rep. 706, 33 L. R. A. 332.

87. Ogden Bldg., etc., Assoc. *v.* Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330.

88. Monroe *v.* Arthur, 126 Ala. 362, 28 So. 476, 85 Am. St. Rep. 36. But see Ogden Bldg., etc., Assoc. *v.* Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330, holding that a notary public is not disqualified to take the acknowledgment of a mortgage given to a private corporation by the fact that he is a director, officer, or agent of the corporation, provided he is not a stock-holder; but if he is the owner of stock in the corporation, his act is void.

89. Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61, acknowledgment taken by a deputy clerk, verbally appointed, and who never took oath or gave bond. *Compare* Parker *v.* Wood, 1 Dall. (Pa.) 436, 1 L. ed. 212.

Alien.— An acknowledgment of a mortgage is valid where the person taking it was duly commissioned as a notary public, and had given bond and was acting as such, although he was not eligible to office by reason of his being an alien. Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24.

Person holding incompatible offices.— A mortgage is not rendered invalid because the justice taking the acknowledgment held at the same time another office, and the law declared the two offices to be incompatible, it

prescribed by the statute; it is sufficient if it complies substantially with the statutory directions and contains all the essential elements of a good certificate.[90] It is, however, absolutely necessary that the certificate should show who was the person who made the acknowledgment and clearly identify him,[91] and that he appeared in person before the officer taking the acknowledgment and was personally known to him, or identified to him, as the statute may direct, as the individual who executed the instrument.[92] It is also a usual requirement of the statutes that the certificate of acknowledgment should show that the mortgagor "voluntarily" executed the instrument.[93] Any special provisions of the statute in regard to the examination and acknowledgment of married women should be strictly followed.[94] Further, the certificate should show the place at which

not being declared which should be forfeited. Adam *v.* Mengel, 5 Pa. Cas. 402, 8 Atl. 606.

90. Edwards *v.* Schoeneman, 104 Ill. 278; Livingston *v.* Kettelle, 6 Ill. 116, 41 Am. Dec. 166; Wilson *v.* Quigley, 107 Mo. 98, 17 S. W. 891; Hughes *v.* McDivitt, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756; Kley *v.* Geiger, 4 Wash. 484, 30 Pac. 727.

Illustration.— Where a mortgage was properly acknowledged before a deputy clerk, who made a proper indorsement on the mortgage, but the clerk, in certifying it, omitted to copy the indorsement as required by the statute, but the pleadings, on bill to foreclose, admitted these facts, and the original mortgage was filed with the pleadings, and it sufficiently appeared that the clerk's omission was a mistake, it was held that the mortgage lien should be enforced. Chaney *v.* American German Nat. Bank, 5 S. W. 551, 9 Ky. L. Rep. 521.

Effect of defective certificate as to subsequent purchaser.— A mortgage properly executed and acknowledged, although the certificate of acknowledgment is defective, is valid against a subsequent purchaser having knowledge of it as recorded, although not of its proper acknowledgment, where he parted with no value, and incurred no liability. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

In Arkansas it is provided by statute that the certificate of acknowledgment of a mortgage shall state that it was executed for the consideration therein expressed. This requirement is imperative, and a certificate that the mortgage was executed for the "uses and purposes" therein specified is not sufficient, the word "uses" not being of similar import, or substantially the same, as the word "consideration" required by the statute; and hence where the acknowledgment is certified in this form, the mortgage is valid only between the parties thereto, and creates no lien and affords no notice to third persons, being void as to all others, with or without notice. Conner *v.* Abbott, 35 Ark. 365; Martin *v.* O'Bannon, 35 Ark. 62.

91. Smith *v.* Hunt, 13 Ohio 260, 42 Am. Dec. 201, holding that a mortgage in which the magistrate's certificate of acknowledgment does not show by whom the instrument was acknowledged, leaving a blank space where the name ought to be, vests no legal interest in the mortgagee. And see Livingston *v.* Dick, 1 La. Ann. 323.

A trifling error in the spelling of the name of the mortgagor will not vitiate the certificate in this respect, if it appears to be merely a clerical mistake, and if the certificate as a whole clearly identifies the person making the acknowledgment as the same person who signed the mortgage. Rodes *v.* St. Anthony, etc., Elevator Co., 49 Minn. 370, 52 N. W. 27 [*citing* Rogers *v.* Manley, 46 Minn. 403, 49 N. W. 194].

A mortgage executed in behalf of a corporation, and complete and formal in every other respect, is not vitiated as between the parties by an informality in the certificate of its acknowledgment, whereby the treasurer of the corporation is represented as having acknowledged the instrument as his own "free act and deed." Fitch *v.* Lewiston Steam-Mill Co., 80 Me. 34, 12 Atl. 732.

92. Gage *v.* Wheeler, 129 Ill. 197, 21 N. E. 1075; Garnett *v.* Stockton, 7 Humphr. (Tenn.) 84. And see Rogers *v.* Adams, 66 Ala. 600, holding that a certificate of acknowledgment of a mortgage, which fails to recite that the grantor was known to the officer, but does recite that the grantor signed in the officer's presence, is good as an attestation, although defective as an acknowledgment. *Compare* Wilson *v.* Quigley, 107 Mo. 98, 17 S. W. 891, holding that where a certificate recited that the mortgagor, naming him, "whose name is signed to the above writing personally appeared before me and acknowledged the same," but did not state that the grantor was "personally known" to the officer, was not so defective as to render the mortgage inadmissible as evidence.

93. See the statutes of the different states. And see Keeling *v.* Hoyt, 31 Nebr. 453, 48 N. W. 66; Spitznagle *v.* Vanhessch, 13 Nebr. 338, 14 N. W. 417; Becker *v.* Anderson, 11 Nebr. 493, 9 N. W. 640.

In Washington, where a form of certificate is suggested by the statute, but not made exclusive, a certificate conforming to the requirements of the statute, although not following the statutory form, is good; and hence it need not state that the mortgagor "voluntarily" executed the instrument, although a recital to that effect is found in the statutory form. Kley *v.* Geiger, 4 Wash. 484, 30 Pac. 727.

94. Bollinger *v.* Manning, 79 Cal. 7, 21

the acknowledgment was taken,[95] and the official character of the officer taking it.[96]

5. Impeaching Certificate. The impeachment of certificates of acknowledgment is fully treated elsewhere in this work.[97]

6. Probate. Where a mortgage or deed of trust has not been acknowledged, it is generally necessary to its being admitted to record that probate of it should be taken.[98] This is a method of establishing the due execution of the instrument by the evidence of the attesting witnesses as to the fact of the mortgagor's having signed and sealed it.[99]

D. Delivery and Acceptance — 1. Delivery in General. Delivery of a mortgage makes it operative as between the parties. When a mortgage is duly executed and delivered to the mortgagee, nothing further is necessary to its validity as a complete transaction.[1] The fact as well as the date of the delivery is important in its bearing on the rights of the parties, because every deed takes effect from its delivery, and its character becomes fixed by such delivery, and, if it is then a mortgage, it will so continue until the right of redemption is in some legal way extinguished.[2] It is a presumption that a mortgage was delivered on the day of its date, but evidence to the contrary is always admissible.[3] Where the fact of delivery is disputed or denied, it may be shown by any pertinent evidence, this being rather a question of fact than of law, and depending upon the intent of the mortgagor.[4] The fact of the acknowledgment and proof of a mort-

Pac. 375; Hutchinson *v.* Ainsworth, 63 Cal. 286. See also Gable's Appeal, 3 Pa. Cas. 76, 7 Atl. 52. And see, generally, Acknowledgments.

95. Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22 (holding that the fact that the name of the county is omitted from the caption of the certificate will not invalidate the acknowledgment, where it can be supplied, with certainty, from other parts of the instrument, or from the judicial knowledge which the court has of the names of magistrates and the location of their offices); Beckel *v.* Petticrew, 6 Ohio St. 247; Fuhrman *v.* Louden, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608.

96. Colby *v.* McOmber, 71 Iowa 469, 32 N. W. 459.

97. See Acknowledgments, 1 Cyc. 618 *et seq.*

98. Herbert *v.* Hanrick, 16 Ala. 581; Hobson *v.* Kissam, 8 Ala. 357, both holding the form of probate immaterial.

99. Coleman *v.* State, 79 Ala. 49 (holding that when there are two attesting witnesses to a mortgage, its execution must be proved by one or both of them, and the admission of the mortgagor, not made *in judicio*, does not dispense with the necessity of such proof); Stanley *v.* Suggs, 23 Ga. 137 (holding that it is not a sufficient attestation to admit a mortgage to probate that one of the witnesses swore that "he saw the maker of the same assign it; and also saw the other subscribing witnesses assign it").

Discrepancy as to date.— A deed of mortgage may properly be admitted to record, on proof by the subscribing witness that he saw the same signed, sealed, and delivered on the fourth day after its date. When it is not shown that any fraud was intended, nor that any injury was done or attempted, by the wrong date, the probate will be held a substantial compliance with the statute, although it does not strictly accord with the form prescribed by it. Harbinson *v.* Harrell, 19 Ala. 753.

Variance in names of witnesses.— In an action to recover land claimed by plaintiffs by virtue of a mortgage, where the fact of the execution of the mortgage, or of its probate, is not denied, an objection to the sufficiency of the probate, on the ground of a variance in the name of a subscribing witness as attached to the mortgage, and as it appears in the certificate of probate, is properly overruled. Simpson *v.* Simpson, 107 N. C. 552, 12 S. E. 447.

Presumption that probate properly taken.— Although the probate of a mortgage merely recites that the mortgagee "procured the same to be proved by this court," and fails to state that it was acknowledged by the grantor, or its execution proved by the witness thereto, it will be presumed that the probate was properly taken, subject to proof to the contrary. Quinnerly *v.* Quinnerly, 114 N. C. 145, 19 S. E. 99.

That the probate of a trust deed is void is no defense in a suit by the grantee against the grantor to foreclose it, where defendant admits the execution of the deed. McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209.

1. Curry *v.* McCauley, 20 Fed. 583.

2. Bearss *v.* Ford, 108 Ill. 16; Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260. And see Mix *v.* Cowles, 20 Conn. 420.

3. Banning *v.* Edes, 6 Minn. 402.

4. Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359. And see Dodsworth *v.* Sullivan, 95 Minn. 39, 103 N. W. 719.

Conduct and statements of mortgagor.— To establish the fact that a trust deed was delivered to a third person, with intent to secure the creditors therein, as in case of a

gage does not raise a conclusive presumption of its delivery.[5] When the mortgage secures a note or bond, delivery of both is generally necessary to the complete efficacy of the transaction.[6] The return of the mortgage to the mortgagor may annul it or simply suspend its operation, according to the intention of the parties; in the latter case it may take effect as a new security upon its redelivery.[7]

2. NECESSITY OF DELIVERY. A mortgage, like any other deed, to be valid and operative, must not only be duly executed, but it must be delivered by the mortgagor and accepted by the mortgagee, or by someone legally acting for him; without delivery, it cannot take effect as a transfer of title or as a security.[8] And the same rule applies to a deed of trust in the nature of a mortgage; although it may have been duly executed, acknowledged, and recorded, it has no force as a conveyance until it has been delivered.[9]

3. SUFFICIENCY OF DELIVERY. No particular form of ceremony is necessary to constitute a sufficient delivery of a mortgage. It may be by words without acts, or by acts without words, or by both combined. Manual transfer of the document from the hands of the mortgagor to those of the mortgagee is not essential. It is only required that there should be manifested a clear intention of the parties that the instrument shall become operative as a mortgage, and that the mortgagor shall lose, and the mortgagee acquire, the absolute control over it.[10] The fact

deed executed in Virginia in 1862, just before a removal of the county records from peril of war, proof of the grantor's previous anxiety and subsequent expressions of satisfaction at the act is admissible. Gunnell *v.* Cockerill, 84 Ill. 319. But the delivery of a mortgage, proved to have been signed and acknowledged, is not established by proof of statements made by the mortgagor that he had bought the land from the mortgagee and had a long time to pay for it, in which statements no reference was made to a mortgage. Baker *v.* Updike, 155 Ill. 54, 39 N. E. 587.

Possession of papers.— Where an administrator became indebted to the estate, and for the purpose of securing such indebtedness he executed a note and mortgage for the amount, payable to himself as administrator, it was held that the fact that the note and mortgage had been duly executed and were found among the administrator's papers is insufficient to show a delivery, and the subsequent recording of the mortgage by his successor in trust could not give it validity. Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

5 Bell *v.* Farmers' Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

6. Garroch *v.* Sherman, 6 N. J. Eq. 219. *Compare* Phillips's Succession, 49 La. Ann. 1019, 22 So. 202.

7. McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268; Durfee *v.* Knowles, 2 N. Y. Suppl. 466.

8. *Arkansas.*— Freeman *v.* Peay, 23 Ark. 439.

Florida.— Edwards *v.* Thom, 25 Fla. 222, 5 So. 707.

Illinois.— Hawes *v.* Hawes, 177 Ill. 409, 53 N. E. 78; Baker *v.* Updike, 155 Ill. 54, 39 N. E. 587.

Indiana.— Woodbury *v.* Fisher, 20 Ind. 387, 83 Am. Dec. 325.

Iowa.— Foley *v.* Howard, 8 Iowa 56.

Kentucky.— Bell *v.* Farmers' Bank, 11 Bush 34, 21 Am. Rep. 205.

Minnesota.— Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

New Jersey.— Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631.

New York.— Durfee *v.* Knowles, 2 N. Y. Suppl. 466; Munoz *v.* Wilson, 6 N. Y. St. 66.

Oregon.— Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273.

South Carolina.— Stokes *v.* Hodges, 11 Rich. Eq. 135.

Vermont.— Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

Washington.— Ault *v.* Blackman, 8 Wash. 624, 36 Pac. 694.

Wisconsin.— Harmon *v.* Myer, 55 Wis. 85, 12 N. W. 435.

See 35 Cent. Dig. tit. "Mortgages," § 161.

9. Lanphier *v.* Desmond, 187 Ill. 370, 58 N. E. 343. *Compare* Walker *v.* Johnson, 37 Tex. 127.

10. *Illinois.*— Hawes *v.* Hawes, 177 Ill. 409, 53 N. E. 78; Knapstein *v.* Tinnette, 156 Ill. 322, 40 N. E. 947; Crocker *v.* Lowenthal, 83 Ill. 579.

Iowa.— Foley *v.* Howard, 8 Iowa 56.

Minnesota.— Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

Nebraska.— Brittain *v.* Work, 13 Nebr. 347, 14 N. W. 421.

New Jersey.— Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638.

New York.—Congregational Nunnery *v.* McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184.

Ohio.— Catholic Inst. *v.* Gibbons, 7 Ohio Dec. (Reprint) 516, 3 Cinc. L. Bul. 581.

Oregon.— Flint *v.* Phipps, 16 Oreg. 437, 19 Pac. 543.

Vermont.— Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676; Tucker *v.* Bradley, 33 Vt. 324.

United States.— *In re* Goldville Mfg. Co., 118 Fed. 892.

See 35 Cent. Dig. tit. "Mortgages," § 162.

that the mortgage, after having been actually delivered to the mortgagee, is returned to the mortgagor for safe-keeping does not undo the delivery or destroy its effect.[11] But the delivery must have been made to the recipient in the character of a mortgagee and for the purpose of becoming operative as a security in his hands;[12] and a mere promise, never fulfilled, to give the mortgage to the mortgagee is no delivery;[13] neither is the transfer of the instrument to the mortgagee effective, when done by an agent or custodian in disobedience to the positive orders of the mortgagor.[14]

4. Delivery in Case of Joint Parties. Where several persons join in the execution of a mortgage, all must join in the delivery of it to the mortgagee, unless it can be shown that the one making a delivery was authorized to act for the others.[15] Where a husband and wife agree to give a mortgage on their land, and the former signs and delivers it, and afterward the wife signs and acknowledges the instrument, there is no legal delivery, even as against the husband, until the transaction is completed by the wife's joining in the execution.[16] It is not necessary that a separate delivery should be made to each of several joint mortgagees; but a good and sufficient delivery made to one of them, for the benefit of all, and with the intent that the instrument should at once become operative, is a delivery to all the mortgagees, unless some good reason to the contrary is shown.[17]

5. Delivery to Third Person. Delivery of a mortgage to a third person, who is authorized to receive it for the benefit of the mortgagee or to act as his agent in the transaction, is as effectual as if made to the mortgagee in person.[18] This rule applies where the mortgage is left with the notary or justice who took the acknowledgment, if the circumstances show the intention that he should hand it

11. Carpenter *v.* O'Dougherty, 67 Barb. (N. Y.) 397 [*affirmed* in 2 Thomps. & C. 427]; Bradtfeldt *v.* Cooke, 27 Oreg. 194, 40 Pac. 1, 50 Am. St. Rep. 701. And see William Firth Co. *v.* South Carolina L. & T. Co., 122 Fed. 569, 59 C. C. A. 73.

12. Goodwin *v.* Owen, 55 Ind. 243 (holding that where the owner of land executes a mortgage on it, and places the same in the hands of A, as an agent or intermediary, for the purpose of raising money on it from an intended mortgagee, and the latter refuses to make the loan, whereupon A himself advances the amount of the mortgage, it is inoperative as a security, for the want of a sufficient delivery to A); Gadsden *v.* Thrush, 56 Nebr. 565, 76 N. W. 1060, 45 L. R. A. 654. And see Nolan *v.* King, 4 Pa. Dist. 156, holding that where a mortgage, lost before delivery, was pledged with the mortgagee, by the finder, to secure a preëxisting debt of the latter, the mortgagee cannot recover as against the maker.

13. Ruckman *v.* Ruckman, 6 Fed. 225.

14. Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459.

15. Williamson *v.* Carskadden, 36 Ohio St. 664, holding that, in an action to enforce a mortgage on land purporting to have been executed and acknowledged as required by law, where it appears that the delivery of such instrument was made by one of several persons who signed the same, it may be shown by the others that the delivery as to them was unauthorized and fraudulent.

Delivery by husband.— Where a husband and wife execute a mortgage on their homestead, and the wife permits the husband to take it and use it according to his judgment, she cannot afterward claim that it is not operative as against her rights because it was never delivered by her. Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893.

Implied authority.— Where two persons execute a joint and several mortgage bond, each has implied authority to act for the other; and where one allows the other to take the bond, after both have executed it, his possession of it gives him authority to deliver it, and to receive the consideration from the mortgagee. Driggs *v.* Wolfe, 50 N. J. Eq. 795, 27 Atl. 1032; Wolf *v.* Driggs, 44 N. J. Eq. 363, 14 Atl. 480.

16. Powell *v.* Banks, 146 Mo. 620, 48 S. W. 664; Hoagland *v.* Green, 54 Nebr. 164, 74 N. W. 424; Brackett *v.* Barney, 28 N. Y. 333.

17. Breathwit *v.* Fordyce Bank, 60 Ark. 26, 28 S. W. 511; Conwell *v.* McCowan, 81 Ill. 285; Shelden *v.* Erskine, 78 Mich. 627, 44 N. W. 146.

18. *Arkansas.*— Rhea *v.* Planters' Mut. Ins. Assoc., 77 Ark. 57, 90 S. W. 850.

Illinois.— Gunnell *v.* Cockerill, 79 Ill. 79.

Indiana.— Merritt *v.* Temple, 155 Ind. 497, 58 N. E. 699.

New York.— Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; De Kay *v.* Bliss, 4 N. Y. St. 728.

North Carolina.— Myrover *v.* French, 73 N. C. 609.

United States.— Ray *v.* Hallenbeck, 42 Fed. 381.

England.— Grugeon *v.* Gerrard, 4 Y. & C. Exch. 115.

See 35 Cent. Dig. tit. "Mortgages," § 166.

to the mortgagee,[19] or where it is given to the mortgagee's attorney,[20] or to the parent or guardian of an infant mortgagee.[21] And it is not necessary that authority to receive the instrument on behalf of the mortgagee should have been given in advance to the third person; it is sufficient if the mortgagee ratifies his action, or acquiesces in it and accepts its results.[22]

6. Record and Filing For Record as Delivery. In some states it is held that the act of the mortgagor in filing the mortgage for record in the proper office, or causing it to be there recorded, constitutes a delivery of the instrument to the mortgagee.[23] But the doctrine generally prevailing is that such act amounts to no more than *prima facie* evidence of a delivery to the mortgagee.[24] If the mortgage is made in pursuance of a previous agreement of the parties to place a mortgage on the specific property, which the mortgagee has agreed to accept, then the act of the mortgagor in filing it for record in the proper office is a sufficient delivery of it, its acceptance by the mortgagee being implied from the previous agreement, if the mortgage does in fact conform to that agreement.[25] And the same result follows if the mortgagor files the instrument for record in pursuance of a direction from the mortgagee so to do;[26] if, after delivering it to the recorder, he notifies the mortgagee that it has been filed for record and the latter approves or acquiesces in the action taken;[27] if the mortgagee obtains possession of the instrument from the recorder's office after it is recorded, and retains it;[28] or generally, if the mortgagee does any act showing his ratification of the manner of delivery and his acceptance of the instrument.[29] And when a sufficient delivery

19. Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795, holding that the notary will be presumed to have authority to deliver the mortgage to the mortgagee, in the absence of special instructions to the contrary. And see Greene *v.* Conant, 151 Mass. 223, 24 N. E. 44; Brittain *v.* Work, 13 Nebr. 347, 14 N. W. 421.

20. Morgan *v.* Morgan, 11 Montg. Co. Rep. (Pa.) 210. *Compare* Nichols *v.* Rosenfeld, 181 Mass. 525, 63 N. E. 1063, holding that where the mortgagee's attorney had possession of the mortgage and note for a day before the time appointed for their delivery, he did not hold them, as operative instruments or in the mortgagee's name, and there was no delivery until the time fixed.

21. Jennings *v.* Jennings, 104 Cal. 150, 37 Pac. 794; Cerney *v.* Pawlot, 66 Wis. 262, 28 N. W. 183.

22. Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315; Knapstein *v.* Tinnette, 156 Ill. 322, 40 N. E. 947.

23. Elsberry *v.* Boykin, 65 Ala. 336; Carnall *v.* Duval, 22 Ark. 136; Doerner *v.* Nieberding, 3 Ohio Dec. (Reprint) 519.

24. Walton *v.* Burton, 107 Ill. 54; Connard *v.* Colgan, 55 Iowa 538, 8 N. W. 351 (holding that, where a mortgagor has received his money, his leaving the mortgage for record will constitute a good delivery thereof, which will not be affected by his subsequently obtaining possession of the mortgage); Cobb *v.* Chase, 54 Iowa 253, 6 N. W. 300; Foley *v.* Howard, 8 Iowa 56; Geissmann *v.* Wolf, 46 Hun (N. Y.) 289; Foster *v.* Beardsley Scythe Co., 47 Barb. (N. Y.) 505; Ford *v.* McCarthy, 29 N. Y. Suppl. 786.

The mere execution of a mortgage and the recording of it do not constitute a delivery of the instrument to the mortgagee, where it is not actually placed in his hands, or in the possession of someone authorized to receive it for him, and where the money loaned is not paid over by the mortgagee. There can be no legal delivery of the mortgage until the mortgagee is willing to accept it and does accept it and pay over the consideration. Stiles *v.* Probst, 69 Ill. 382; Kingsbury *v.* Burnside, 58 Ill. 310, 11 Am. Rep. 67; Houfes *v.* Schultze, 2 Ill. App. 196.

25. *Illinois.*— Lawrence *v.* Lawrence, 181 Ill. 248, 54 N. E. 918.

Indiana.— Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256.

Iowa.— Reid *v.* Abernathy, 77 Iowa 438, 42 N. W. 364; *In re* Guyer, 69 Iowa 585, 29 N. W. 826; Cobb *v.* Chase, 54 Iowa 253, 6 N. W. 300.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 289.

United States.— Capital City Bank *v.* Hodgin, 24 Fed. 1.

See 35 Cent. Dig. tit. "Mortgages," § 167.

26. Lawrence *v.* Lawrence, 181 Ill. 248, 54 N. E. 918. And see Wheeler *v.* Young, 76 Conn. 44, 55 Atl. 670.

27. Parkhurst *v.* Berdell, 1 Silv. Sup. (N. Y.) 386, 5 N. Y. Suppl. 328; Farmers', etc., Bank *v.* Drury, 38 Vt. 426.

28. Haskill *v.* Sevier, 25 Ark. 152.

Possession wrongfully obtained.— The possession of a mortgage obtained from the clerk's office by the person named therein as mortgagee, without the consent of the mortgagor, and after he had refused to deliver the bond, to secure which the mortgage was drawn, is no evidence of the delivery of the mortgage. Commercial Bank *v.* Reckless, 5 N. J. Eq. 430.

29. Kinney *v.* Wells, 59 Ill. App. 271, holding that where a deed of real estate is exe-

has thus been effected, it is not counteracted by the fact that the mortgagor obtains the possession of the mortgage from the recorder's office, after it is recorded, and retains it.[30] Where a party executed a mortgage on real estate to a person who was not present by himself or agent, and left the same for record, with directions, when recorded, to be sent to the mortgagee by mail, which was done, there was no delivery before the time it was mailed.[31]

7. Conditional or Absolute Delivery. When a mortgage is placed in the hands of a third person in escrow, or to be delivered to the mortgagee on the happening of a certain contingency, or on the performance by him of certain conditions, the delivery is conditional and not absolute; and if the mortgagee gets possession of the instrument before the happening of the contingency, or without complying with the conditions, there is no such delivery to him as will make the mortgage operative and valid in his hands,[32] unless indeed the mortgagor waives his rights and ratifies the unauthorized delivery, and recognizes the mortgage as a binding security.[33] On the other hand, on due performance of the conditions, the mortgagee becomes entitled to a delivery of the instrument, and its possession cannot be withheld from him.[34]

8. Acceptance by Mortgagee. To constitute a complete legal delivery of a mortgage, so as to make it operative, it is necessary that it should be accepted by the mortgagee.[35] But the acceptance need not be express. When the mortgage

cuted and placed on the record, and the grantee subsequently conveys the estate to another, he will be deemed to have accepted the delivery of the deed by ratification and to be bound by its covenants.

Illustration.— A person executed a mortgage to a non-resident, to whom he was indebted, to secure a note therein described, for an amount in excess of his actual indebtedness, which was never executed. He gave the mortgage to the register of deeds to record, and then killed himself. The mortgagee at the time knew nothing of the existence of the instrument, which was duly recorded, but afterward procured it from the administrator. It was held that the delivery was sufficient, and to the amount of actual indebtedness the mortgage was valid. Lee *v.* Fletcher, 46 Minn. 49, 48 N. W. 456, 12 L. R. A. 171.

30. Connard *v.* Colgan, 55 Iowa 538, 8 N. W. 351; Parkhurst *v.* Berdell, 1 Silv. Sup. (N. Y.) 386, 5 N. Y. Suppl. 328.

31. Partridge *v.* Chapman, 81 Ill. 137.

32. *California.*— McDonald *v.* Huff, (1888) 18 Pac. 243. But *compare* Alexander *v.* Welcker, 141 Cal. 302, 74 Pac. 845.

Connecticut.— Humiston *v.* Preston, 66 Conn. 579, 34 Atl. 544.

Iowa.— Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459.

Massachusetts.— Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311.

Michigan.— Belding Sav. Bank *v.* Moore, 118 Mich. 150, 76 N. W. 368; Cressinger *v.* Dessenburg, 42 Mich. 580, 4 N. W. 269.

Minnesota.— Smith *v.* Garwood, 73 Minn. 311, 76 N. W. 54.

New York.— Rapps *v.* Gottlieb, 67 Hun 115, 22 N. Y. Suppl. 52 [*affirmed* in 142 N. Y. 164, 36 N. E. 1052].

North Dakota.— See Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

See 35 Cent. Dig. tit. "Mortgages," § 168.

33. Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499; Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

34. Schmidt *v.* Deegan, 69 Wis. 300, 34 N. W. 83.

35. *Arkansas.*— Freeman *v.* Peay, 23 Ark. 439.

Indiana.— Woodbury *v.* Fisher, 20 Ind. 387, 83 Am. Dec. 325.

Iowa.— Foley *v.* Howard, 8 Iowa 56.

Louisiana.— Yates *v.* Phipps, 5 La. Ann. 124; French *v.* Mechanics', etc., Bank, 4 La. Ann. 152.

Mississippi.— Adams *v.* Johnson, 41 Miss. 258.

New Jersey.— Heller *v.* Groves, (Ch. 1887) 8 Atl. 652.

New York.— Foster *v.* Beardsley Scythe Co., 47 Barb. 505.

Tennessee.— Hoss *v.* Crouch, (Ch. App. 1898) 48 S. W. 724.

Washington.— Ault *v.* Blackman, 8 Wash. 624, 36 Pac. 694.

United States.— Clark *v.* Kansas City Nat. Bank, 66 Fed. 404, 13 C. C. A. 545.

See 35 Cent. Dig. tit. "Mortgages," § 170.

Sufficiency of acceptance.— It appeared that mortgagors had executed and filed mortgages to secure certain debts which had matured, and were owing by them to personal friends, and informed the mortgagees thereof, and the latter signified their acceptance. Attachments were subsequently levied against the property of defendants, and the mortgagees then for the first time learned that the mortgages purported to secure new notes which had been drawn by defendants for the same debts, but which had a year to run. It was held that, prior to the attachments, there had been no such acceptance of the mortgages as would constitute a delivery, and the lien of the attachments was entitled to priority. Burlington Nat. State Bank *v.* Morse, 73 Iowa 174, 34 N. W. 803, 5 Am. St. Rep. 670.

Effect of non-acceptance.— Where a note

is beneficial to the mortgagee, his acceptance of it will be presumed in the absence of evidence to the contrary,[36] or it may be made out by implication from circumstances, or from such conduct on his part as necessarily supposes an acceptance of the mortgage by him.[37] And where one has expressly or impliedly authorized a third person to receive a mortgage for him, as his agent, its delivery to the agent will be sufficient, without a further acceptance of it by the principal.[38]

9. Acceptance of Trust Deed. It is not essential to the validity of a deed of trust given as security for a debt that the trustee named therein should accept or assent to it. The instrument need not be delivered to him in order to become operative; and if he refuses to accept or to execute the trust, another trustee may be substituted, or the trust executed under the direction of a court of equity.[39] A delivery of the trust deed to the beneficiary, together with the note or other security which it is to protect, will be sufficient to give it vitality.[40] And while acceptance by the beneficiary is necessary to complete the delivery, as in the case of any other deed, his assent to it may be presumed or implied from circumstances, where it is beneficial to his interests.[41]

E. Execution of Mortgage Note. A mortgage executed to secure a note attached to it is valid and binding, although the note was not signed, and the note may be read in evidence in a suit to foreclose the mortgage.[42] Where a note

and mortgage are placed in the hands of a third person to be delivered to the mortgagee upon the payment of the consideration money therein mentioned, and the mortgagee refuses to accept the same, and advance such sum, no lien is created upon the land mentioned in said mortgage; and the assignment and delivery thereof by such third person to a stranger to the transaction, without the consent of the mortgagor, and without any indorsement thereof by the mortgagee, conveys no title to or vests no interest in said mortgage in the assignee. Bailey *v.* Gilliland, 2 Kan. App. 558, 44 Pac. 747.

A creditor, by bringing suit on a debt, releases the debtor from the obligations of an inchoate mortgage previously tendered but not accepted. Dickson *v.* Dickson, 32 La. Ann. 272.

36. *Arkansas.*—Breathwit *v.* Fordyce Bank, 60 Ark. 26, 28 S. W. 511.

Iowa.— Mills *v.* Miller, 109 Iowa 688, 81 N. W. 169.

Louisiana.—*In re* Immanuel Presb. Church, 112 La. 348, 36 So. 408; Huber *v.* Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

Missouri.— Ensworth *v.* King, 50 Mo. 477.

Nebraska.— Atwood *v.* Marshall, 52 Nebr. 173, 71 N. W. 1064.

New Hampshire.— Whitney *v.* Hale, 67 N. H. 385, 30 Atl. 417.

Tennessee.— Washington *v.* Ryan, 5 Baxt. 622.

See 35 Cent. Dig. tit. "Mortgages," § 170.

Not presumed when beneficiaries burdened with conditions.— Where an insolvent corporation mortgaged its property in favor of certain creditors, and preferred stock-holders were fraudulently included therein as creditors, and subsequently the corporation executed a second mortgage in favor of other creditors, subordinate to the payment of the first, including the claims of the preferred stock-holders, it was held that the beneficiaries under the second mortgage were burdened with such conditions that their acceptance thereof would not be presumed. Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

37. Ely *v.* Stannard, 44 Conn. 528; Citizens' Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728; Bundy *v.* Ophir Iron Co., 38 Ohio St. 300.

Acceptance of note secured.— A mortgage may be accepted by the transfer, delivery, and receipt of the note secured thereby. Citizens' Bank *v.* Ferry, 32 La. Ann. 310. See also Roberts *v.* Bauer, 35 La Ann. 453.

Bringing action to foreclose.— Where a mortgage is recorded at the instance of the mortgagor for the benefit of the mortgagee without his knowledge, an action by the mortgagee to foreclose the mortgage, brought after learning the facts, is sufficient proof of acceptance of the constructive delivery evidenced by the record. Ford *v.* McCarthy, 29 N. Y. Suppl. 786.

38. Lewis *v.* Farrell, 51 Conn. 216; Reynolds *v.* Black, 91 Iowa 1, 58 N. W. 922.

39. Martin *v.* Paxson, 66 Mo. 260; Field *v.* Arrowsmith, 3 Humphr. (Tenn.) 442, 39 Am. Dec. 185.

Constructive acceptance by trustee.— If the trustee in a deed of trust, given to secure the payment of notes, acts under it by advertising the property for sale, this will be an acceptance of the trust by him, although he may not have the instrument in his possession. Crocker *v.* Lowenthal, 83 Ill. 579.

40. Stewart *v.* Fowler, 3 Ala. 629; Williams *v.* Jones, 2 Ala. 314; Crocker *v.* Lowenthal, 83 Ill. 579.

41. Wiswall *v.* Ross, 4 Port. (Ala.) 321.

Subsequent assent.— A trust deed executed without the knowledge of the creditor for whose security it was made will be valid if afterward assented to by him. Cochran *v.* Paris, 11 Gratt. (Va.) 348.

42. McFadden *v.* State, 82 Ind. 558.

is destroyed and a new one executed several days thereafter, referring to the mortgage, the delivery does not invalidate the mortgage.[43] A note lent to one who grants a mortgage to secure it is not to be marked "*ne varietur*" by the notary.[44]

X. VALIDITY OF MORTGAGES.[45]

A. Capacity and Assent of Parties — 1. In General. As has already been stated it is essential to the validity of a mortgage that there should be competent parties to it, capable of contracting, and yielding an intelligent assent to the bargain, and in particular that the mortgagor should have sufficient mental capacity to understand the nature and consequences of the transaction.[46]

2. Intoxication. According to some decisions a mortgage is void if the mortgagor, at the time of executing it, was so far intoxicated as to be without consenting capacity, or, in other words, if he was too drunk to understand the nature and consequences of his action.[47] But according to others to justify the setting aside of a mortgage on account of the maker's intoxication, it must appear that undue advantage was taken of his condition, or that such intoxication was caused by the mortgagee, or at least that the latter knew of it at the time of the execution of the mortgage.[48]

B. Mistake. A genuine mistake as to the nature of a contract embodied in a mortgage, or as to the property covered by it or the debt secured, may be ground for setting it aside, or restricting its lien, even in the absence of fraud or false representations, if the mortgagor acted with due care and prudence.[49]

43. Parks *v.* Frahm, 54 Kan. 676, 39 Pac. 185.

44. Rousseau *v.* His Creditors, 8 Mart. N. S. (La.) 384.

45. Validity of mortgages as affected by: Champerty see CHAMPERTY AND MAINTENANCE. Forgery see *supra*, IX, A, 6, d. Fraud as to creditors of mortgagor, see FRAUDULENT CONVEYANCES. Usury, see USURY.

46. See *supra*, V, B, 2.

47. Hale *v.* Stery, 7 Colo. App. 165, 42 Pac. 598; Reinskopf *v.* Rogge, 37 Ind. 207. *Compare* Hawley *v.* Howell, 60 Iowa 79, 14 N. W. 199, holding that, although a party, at the time of executing a note and mortgage, in consummation of a negotiation for a loan, may not be able, by reason of drunkenness, to understand what he is doing, yet if he is fully aware of the nature of the contract when he receives the money, and directs the disposal thereof, he is legally responsible.

48. Youn *v.* Lamont, 56 Minn. 216, 57 N. W. 478; Beam *v.* Hamilton, 10 Lanc. Bar (Pa.) 69.

Intoxication caused by mortgagee.— To set aside a contract or conveyance on account of intoxication, it is not sufficient that the party was under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding. But where one of the parties to the transaction so manages and contrives that the other becomes intoxicated, and does this for the purpose of procuring an unconscionable advantage over him in the settlement of their accounts, and thereby succeeds in getting from him a note for an amount too large, and a mortgage to secure it, both the note and mortgage are to be treated as fraudulent and void. Willcox *v.* Jackson, 51 Iowa 208, 1 N. W. 513. An injunction to prevent the sale of mortgaged premises will be made perpetual where it appears that the party executing the mortgage was rendered imbecile by habitual drunkenness, and reduced to a condition verging upon insanity by the mortgagee, who had obtained complete power over him, the mortgagee not being able to show that he had given any valid consideration for the mortgage. Van Horn *v.* Keenan, 28 Ill. 445.

49. Barrow *v.* Grant, 113 La. 291, 36 So. 970; Nourse *v.* Jennings, 180 Mass. 592, 62 N. E. 974.

Mistake as to mortgagee.— Where one borrows money from a bank to pay for land, gives his note to the bank for money, and executes a mortgage on the land to the president of the bank as security, it is no cause for setting the mortgage aside that the borrower intended that it should be made to the bank, instead of to the president, and that to this extent the transaction was on his part a mistake, the bank being satisfied with the security as it stood, and therefore the mistake not being mutual. Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

Secret intention of mortgagor.— The law requires very strong proof to support a real charge of mistake in a deed, and it has never gone so far as to convict a mortgage of embracing lands which ought not to have been put in, although in a condition to be so mortgaged and deliberately included by the mortgagor himself, on the naked ground that the mortgagor swears he entertained a secret design to exclude such lands from the description. Shepard *v.* Shepard, 36 Mich. 173.

Extreme illness of mortgagor not proof of mistake.— That a person executes a mortgage while he is in the last stages of a certain

But if he acts under competent advice, with full knowledge of all material facts, and with all necessary papers before him, equity will be very reluctant to relieve him on the mere ground of mistake.[50] If the mortgagor relied on information or advice received from his agent or attorney, and did not understand what he was doing, or was misled, this may be sufficient to defeat the mortgage, but only where it appears that the mortgagee had knowledge of the facts.[51]

C. Fraud — 1. In General. A mortgage executed with a fraudulent intent is void, and cannot be regarded in equity as a valid security for any purpose.[52] This is the rule, for example, where the mortgage is made to secure his individual debt by an agent who had merely a power of attorney to convey the land,[53] or where one falsely personates the individual appearing as the mortgagor, taking fraudulent advantage of the fact that they bear the same name.[54] So if the parties fraudulently antedate a mortgage, for the purpose of overreaching a prior lien or a marriage settlement, the mortgage is void.[55]

2. Fraud Practised on Mortgagor. Where the owner of land has been induced, by means of fraud practised upon him by the mortgagee or at the latter's instance, to execute a mortgage on the property, he may on that ground procure its cancellation or defend against its foreclosure.[56] But fraud, to have this effect, must be concurrent with the execution of the mortgage. A promise

disease does not show that the execution was procured through mistake or fraud, especially where the instrument was executed in his own house, and in the absence of the mortgagee. Johnston *v.* Derr, 110 N. C. 1, 14 S. E. 641.

Mutuality of mistake.— In order to avoid the effect of a deed of trust, on the ground of the grantor's ignorance of certain provisions thereof, it must be shown that the beneficiary had knowledge of that ignorance, and that the mistake in its execution was mutual, or that such execution was procured by fraud. McGaughey *v.* American Nat. Bank, (Tex. Civ. App. 1906) 92 S. W. 1003.

50. Wooden *v.* Haviland, 18 Conn. 101.

51. Beattie *v.* Keller, (Tex. Civ. App. 1899) 49 S. W. 408; Hagan *v.* Conn, (Tex. Civ. App. 1897) 40 S. W. 18. *Compare* Rushout *v.* Turner, 5 Wkly. Rep. 670.

Mortgagor's ignorance of English.— In the absence of fraud, the mere fact that a mortgage, drawn by the agent of the mortgagor, contained an unauthorized stipulation, would not avail as a defense to its foreclosure, although the mortgagor could not read the mortgage, not understanding the English language, and the same was not read to him before execution. Wilson *v.* Winter, 6 Fed. 16.

52. Weeden *v.* Hawes, 10 Conn. 50.

Mortgage by fraudulent grantee.— Where property is conveyed in fraud of the grantor's creditors, a mortgage given back at the same time, by the grantee, to secure the purchase-price or part thereof, cannot be enforced by the grantor. Rowland *v.* Martin, 3 Pa. Cas. 162, 6 Atl. 223.

Who may complain of fraud.— Where a mortgage is executed to a director of an association to discharge a mortgage to the association, in a suit to foreclose, the mortgagors cannot claim the mortgage was invalid because such director, who was a creditor of the association, obtained an undue advantage over other creditors and stock-holders, when no complaint is made by them and it appears that the purpose for which they executed the mortgage to the director was attained. Beatty *v.* Somerville, 102 Ill. App. 487. And see Cook *v.* Meyers, 166 Ill. 282, 46 N. E. 765.

Mortgagee acting in good faith.— A fraudulently procured property to be sold for a municipal lien, in order to cut off a testamentary charge. He had the purchaser convey the property to himself after the sale, and then mortgaged it to B for value. B acted in good faith. It was held that his mortgage was valid and not affected by A's fraud. Bryan's Appeal, 101 Pa. St. 389.

53. Shirk *v.* Williamson, 50 Ark. 562, 9 S. W. 307.

54. *In re* Cooper, 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. Rep. N. S. 89, 30 Wkly. Rep. 648.

55. Osborn *v.* Lea, 9 Mod. 96.

56. *Illinois.*— Harris *v.* Dumont, 207 Ill. 583, 69 N. E. 811; Melendy *v.* Keen, 89 Ill. 395; Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537.

Iowa.— Johnson *v.* Dilenbeck, (1899) 80 N. W. 516.

Kentucky.— Outten *v.* Grinstead, 4 J. J. Marsh. 608; Evans *v.* English, 10 S. W. 626, 10 Ky. L. Rep. 742.

Michigan.— Sackner *v.* Sackner, 39 Mich. 39.

Missouri.— Stine *v.* Wilkson, 10 Mo. 75.

New Hampshire.— Angier *v.* Ash, 26 N. H. 99.

New York.— Roscoe *v.* Safford, 61 N. Y. App. Div. 289, 70 N. Y. Suppl. 309.

North Carolina.— Daniels *v.* Fowler, 123 N. C. 35, 31 S. E. 598.

Pennsylvania.— Beam *v.* Hamilton, 10 Lanc. Bar 69.

Tennessee.— Wright *v.* Morgan, 4 Baxt. 385.

Texas.— McGaughrey *v.* American Nat. Bank, (Civ. App. 1906) 92 S. W. 1003.

Wisconsin.— Bennett *v.* Keehn, 57 Wis. 582, 15 N. W. 776.

by the mortgagee to do something for the benefit of the mortgagor in the future, which promise he does not keep, and even, it seems, although he has no present intention of keeping it, is not such fraud as will avoid the mortgage.[57] Fraud in obtaining a mortgage is not to be presumed, and although it is not required to be proved by direct and positive testimony, yet the circumstances from which its existence is to be inferred should lead plainly and directly, and by strong implication, to that conclusion.[58] The mortgagee, to be affected by the fraud, must either have participated in it or have knowledge of it; but constructive notice of the fraud may be brought home to him by circumstances.[59]

3. Deceit and Misrepresentation. Where a mortgagor is induced by deceit, artifice, or misrepresentation to execute a mortgage which he would not have given if fully and truly informed of the circumstances, the fraud thus practised upon him will be fatal to the validity of the instrument.[60] This rule applies where the mortgagor is deceived as to the nature of the paper he is signing, being induced to believe that it is not a mortgage,[61] or where he is similarly misled as to the property to be affected by the encumbrance.[62] And misrepresentations as to matters of law, as well as those relating to matters of fact, may constitute fraud, if the person making them knew them to be false.[63] But a deception which causes no injury is not actionable fraud; and therefore if the mortgage, when given, accomplishes what the parties actually intended, or what the mortgagor was legally bound to do, it is valid, although the mortgagor was misled as to its nature or effect.[64] And although the original mortgage may have been voidable on this ground, yet a substitute or confirmatory mortgage, freely given and without any fraud, will be valid.[65] Further, in order to invalidate a mort-

England.— Douglas *v.* Culverwell, 3 Giffard 251, 8 Jur. N. S. 29, 31 L. J. Ch. 65, 10 Wkly. Rep. 189, 66 Eng. Reprint 403.

See 35 Cent. Dig. tit. "Mortgages," § 178.

Compare Stockton Sav., etc., Soc. *v.* Saddlemire, (Cal. App. 1906) 86 Pac. 723.

Person drawing mortgage not presumed mortgagee's agent.—The scrivener who wrote the mortgage will not be presumed to be the mortgagee's agent, so as to charge him with fraud in not informing the mortgagor what sort of a paper he was signing. Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514.

57. Johnson *v.* Murphy, 60 Ala. 288 (holding that if a creditor procures the execution by his debtor of a mortgage to cover past advances, by promising to make additional advances during the current year, the breach of this agreement on his part, although it may support an action at law or a plea of set-off to the extent of the injury actually sustained, will not support a bill in equity for the cancellation of the mortgage on the ground of fraud); Catlin *v.* Fletcher, 9 Minn. 85 (holding that a mortgage was not invalid for fraud where the debtor was induced to execute the mortgage by the creditor's promise that he would not enforce it but would collect his debt from the indorser on a note which had been given for the amount thereof).

58. Duvall *v.* Coale, 1 Md. Ch. 168; Beam *v.* Hamilton, 10 Lanc. Bar (Pa.) 69. And see Emerson-Newton Implement Co. *v.* Cupps, (N. D. 1906) 108 N. W. 796.

Declarations of the mortgagor as to his intention in executing the mortgage are not admissible in evidence to impeach the title of the mortgagee by showing fraud, unless they were previously brought to his knowledge. Prior *v.* White, 12 Ill. 261.

59. Rea *v.* Croessman, 95 Ill. App. 70; Moyer *v.* Dodson, 212 Pa. St. 344, 61 Atl. 937; Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699, 40 Eng. Reprint 266.

60. Dutch *v.* Anderson, 75 Ind. 35; Joice *v.* Taylor, 6 Gill & J. (Md.) 54, 25 Am. Dec. 325; Lassall *v.* Pati, 25 Misc. (N. Y.) 561, 55 N. Y. Suppl. 1084, 28 N. Y. Civ. Proc. 328; Greenewalt *v.* Dixon, 194 Pa. St. 363, 45 Atl. 45.

61. Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434; Winfield Nat. Bank *v.* Croco, 46 Kan. 620, 26 Pac. 939; Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60; Marden *v.* Dorthy, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694.

62. Evans *v.* English, 10 S. W. 626, 10 Ky. L. Rep. 742; Grewing *v.* Minneapolis Threshing-Mach. Co., 12 S. D. 127, 80 N. W. 176. And see De Roux *v.* Girard, 105 Fed. 798 [*affirmed* in 112 Fed. 89, 50 C. C. A. 136].

63. Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Catlin *v.* Fletcher, 9 Minn. 85.

Illustration.— A mortgagee, who fraudulently induces the owner of the land to believe that the mortgage is a valid lien on his land, and procures a new mortgage to be executed in consideration of the release of the old one, is not entitled to foreclose. Phillips *v.* McGrath, 62 Wis. 124, 22 N. W. 169.

64. Feller *v.* McKillip, 100 Mo. App. 660, 75 S. W. 379; Marsh *v.* Cook, 32 N. J. Eq. 262; White *v.* Williams, 3 N. J. Eq. 376; McMullen *v.* Griggs, 23 Ohio Cir. Ct. 417; Hays *v.* Hays, 179 Pa. St. 277, 36 Atl. 311.

65. Harris *v.* Kiel, (Tex. Civ. App. 1902) 70 S. W. 226.

gage on the ground of fraud and deceit, it must appear that the mortgagor was not guilty of negligence in the premises. If he could read the mortgage or have it read to him, and had an opportunity to become acquainted with its contents, but neglected to do so, carelessly relying on the statements of interested parties as to its nature and terms, he cannot claim that he was deceived or defrauded.[66] But the mortgagor is justified in relying on representations made to him by his own attorney,[67] and even by third persons, not interested in the conveyance, where the circumstances rebut the presumption of negligence on his part in failing to read the mortgage or to have it explained to him.[68]

4. FRAUDULENT REPRESENTATIONS. False and fraudulent representations as to alleged matters of fact which have no existence, made to a mortgagor to induce him to execute the mortgage, will be equally fatal to its validity as misrepresentations concerning actual facts.[69] False representations as to the nature, extent, or value of the consideration which is given for the mortgage may cause the mortgage to be invalid.[70] In the case of a purchase-money mortgage, it has been held that false representations by the vendor as to the value of the property, or as to the price he paid for it, inducing the mortgagee to give a mortgage for more than it is really worth, will invalidate the mortgage.[71] But the weight of authority is that this is a matter of which the mortgagor must judge for himself, that he has no right to rely on the statements of the mortgagee, and that the rule of *caveat emptor* applies.[72] And generally a mortgagor cannot complain of false representations made to him, when he had full knowledge of the facts, or equal opportunities of learning them, or when he did not actually rely on the representations.[73] Conversely, false representations made by the mortgagor to the mortgagee, to induce him to take the mortgage, may deprive the former of an equitable standing to contest it or be relieved against it, or furnish ground for relief to the latter; as, where the mortgagor makes false statements as to his title to the property or as to the existence of other persons having an interest in it,[74] or as to the exist-

66. King *v.* Foltz, (Kan. 1900) 59 Pac. 640; Medlin *v.* Buford, 115 N. C. 260, 20 S. E. 463; Snelgrove *v.* Earl, 17 Utah 321, 53 Pac. 1017. And see Frank *v.* Schloss, 37 Misc. (N. Y.) 140, 74 N. Y. Suppl. 839; Hull *v.* Schachter, (Tenn. Ch. App. 1899) 53 S. W. 1004.

67. Ogilvie *v.* Jeaffreson, 2 Giffard 353, 6 Jur. N. S. 970, 8 Wkly. Rep. 745, 66 Eng. Reprint 147; Vorley *v.* Cooke, 1 Giffard 230, 4 Jur. N. S. 3, 27 L. J. Ch. 185, 65 Eng. Reprint 898; Favell *v.* Wright, 64 L. T. Rep. N. S. 85.

68. Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434.

69. Gaither *v.* Slack, 89 Md. 727, 43 Atl. 915; Lomerson *v.* Johnston, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410; Lee *v.* Angus, 15 L. T. Rep. N. S. 380, 15 Wkly. Rep. 119.

70. Carlton *v.* Hulett, 49 Minn. 308, 51 N. W. 1053, false representations as to title to property which is part of the consideration for the mortgage.

False representations as to value of stock. — Where a party subscribed for stock in a corporation and gave his note, secured by mortgage, in payment for the same, and it was shown that he was induced to take this action by false and fraudulent representations made by the officers of the company, and by others on its behalf, in regard to its financial condition and as to the value of the stock and probable dividends, it was held that the fraud so practised upon him was a good defense to a bill to foreclose the mortgage. Melendy *v.* Keen, 89 Ill. 395. *Compare* Simpson *v.* Post, 40 Conn. 321. Renton *v.* Maryott, 21 N. J. Eq. 123, holding that, where a mortgagee agrees to take a note for six thousand dollars, advance five thousand dollars in cash, and transfer six hundred and twenty-five shares of mining stock, if the mortgagor will take them at one thousand dollars, the price which he states that he paid for them, and the mortgagor does so, there is no such misrepresentation or fraud as to the actual value of the stock as will avoid the rule of *caveat emptor*.

71. Fairchild *v.* McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701 [*affirming* 20 N. Y. Suppl. 31].

72. Richardson *v.* Noble, 77 Me. 390; Sanborn *v.* Osgood, 16 N. H. 112; Morrison *v.* Koch, 32 Wis. 254.

73. O'Farrall *v.* Kennedy, 5 Ida. 401, 49 Pac. 313; Randall *v.* Reynolds, 61 N. J. Eq. 334, 48 Atl. 768.

74. Hitchcock *v.* Sedgwick, 2 Vern. Ch. 156, 23 Eng. Reprint 707. *Compare* Sheridan *v.* Nation, 159 Mo. 27, 59 S. W 972, holding that where a trust deed executed in favor of defendant recited that it was given by the widow and sole surviving heirs of deceased, but at the time defendant was informed that there was another son living out of the state, the failure to have the son join in the trust

ence or extent of encumbrances on the land, which affect the mortgagee's security, or the value of the property.[75]

5. Ignorant or Illiterate Mortgagor. Where no fraud or undue advantage is charged, the mere fact that a mortgagor could not read is no ground for contesting the validity of the mortgage.[76] But if the mortgagee practises upon the ignorance of the mortgagor by false representations, or takes advantage of his illiteracy to deceive him and drive a hard or unconscionable bargain with him, it will be ground for setting aside the mortgage, or refusing to allow its foreclosure, as the case may be.[77]

6. Fraud of Mortgagor's Husband. A wife, who is induced by the fraud or artifice of her husband to execute a mortgage conveying away her interests in property, may allege the invalidity of the mortgage so procured and have it set aside.[78] But in order to be entitled to this relief, she must show that she used due diligence in endeavoring to ascertain her rights in the matter and inform herself of the nature and consequences of the action demanded of her,[79] or that the mortgagee participated in the alleged fraud, or was in some way privy to it and cognizant of it.[80]

D. Duress — 1. In General. The validity of a mortgage may be impeached, and its foreclosure prevented, when it was extorted from the mortgagor by means of duress practised upon him by the mortgagee.[81] Threats, not only of bodily harm, but of other irremediable injury to the mortgagor, may constitute duress; but they must be of such a character as to coerce his mind, subjugate his will, and entirely deprive his act of all freedom and choice.[82] And menaces do not constitute duress where the only threat is to take some civil action, or seek some redress in the civil courts, which is the fair legal right and privilege of the mortgagee.[83] Further, it is necessary, to constitute duress, that the threats or pressure

deed was not a fraud on defendant, since he had accepted the deed with knowledge of the son's existence, and hence it did not deprive plaintiffs of an equitable standing in court.

75. Brown *v.* Stepney, Beatty 588. See McMullen *v.* Griggs, 23 Ohio Cir. Ct. 417.

76. Leslie *v.* Merrick, 99 Ind. 180.

77. *Alabama.*— Foster *v.* Johnson, 70 Ala. 249.

District of Columbia.— Lyon *v.* Smith, 2 App. Cas. 37.

Indiana.— Kramer *v.* Williamson, 135 Ind. 655, 35 N. E. 388. And see Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619.

Mississippi.— Dickerson *v.* Thomas, 67 Miss. 777, 7 So. 503.

England.— Prees *v.* Coke, L. R. 6 Ch. 645; *In re* Slater, 11 Ch. D. 227, 48 L. J. Ch. 473, 40 L. T. Rep. N. S. 184, 27 Wkly. Rep. 448.

See 35 Cent. Dig. tit. "Mortgages," § 180.

78. Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Ristine *v.* Clements, 31 Ind. App. 338, 66 N. E. 924.

79. Spurgin *v.* Traub, 65 Ill. 170; Ætna L. Ins. Co. *v.* Franks, 53 Iowa 618, 6 N. W. 9; Roach *v.* Karr, 18 Kan. 529, 26 Am. Rep. 788; Frickee *v.* Donner, 35 Mich. 151.

80. Mohr *v.* Griffin, 137 Ala. 456, 34 So. 378; Pacific Guano Co. *v.* Anglin, 82 Ala. 492, 1 So. 852; Riggan *v.* Sledge, 116 N. C. 87, 20 S. E. 1016; Paxton *v.* Marshall, 18 Fed. 361 [*affirmed* in 124 U. S. 552, 31 L. ed. 518].

Innocent mortgagee.— Where one in good faith and without fraud takes a mortgage from a husband and wife to secure a just debt, the court will hesitate long to set it aside, even on proof that the husband procured her execution thereof by fraudulent representations, and that she used due diligence to ascertain its contents. Spurgin *v.* Traub, 65 Ill. 170. And see Roach *v.* Karr, 18 Kan. 529, 26 Am. Rep. 778.

81. Bogue *v.* Franks, 199 Ill. 411, 65 N. E. 346; Bane *v.* Detrick, 52 Ill. 19; Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357. And see cases cited in four following sections.

82. Detroit Nat. Bank *v.* Blodgett, 115 Mich. 160, 73 N. W. 120, 885, holding that where the mortgagor lived with his father and was dependent upon him for the support of himself and his wife, and stood in fear of him, and signed a mortgage shortly after reaching his majority, to secure money loaned to the father which was used in improving the child's property, it is not enough to show duress invalidating the mortgage that he executed it at the command of the father and that the latter threatened to turn him out of doors unless he signed it); Tooker *v.* Sloan, 30 N. J. Eq. 394 (holding that where a wife, in order to settle a suit in which her husband was involved, and which he was very desirous of compromising, and which disturbed and perhaps distressed him, gave a mortgage on her separate property, the circumstances did not amount to duress).

83. Dispeau *v.* Pawtucket First Nat. Bank, 24 R. I. 508, 53 Atl. 868.

should have proceeded in some way from the party to be benefited by the resulting action. If the mortgagee had no share in it, and did not seek to influence the action of the mortgagor, the security is not invalid in his hands.[84]

2. EXERTED BY HUSBAND UPON WIFE. Duress exerted by a husband upon his wife, to compel her to join with him in the execution of a mortgage, or to give a mortgage upon her separate property, may be ground for impeaching its validity or setting it aside at her instance.[85] But the mortgagee must be in some way connected with the unlawful coercion of the wife. His rights cannot be affected thereby, if he was innocent of all participation in it, or remained entirely ignorant of it.[86] As against a mortgagee, however, who is chargeable with sharing in the pressure exerted upon the wife, or of being cognizant of it and consenting to it, it is not necessary that duress in the strictest sense of the term should be shown. Harsh importunity, continued persecution, or terrifying threats on the part of the husband, breaking down the woman's powers of resistance and coercing her into submission, will be enough to invalidate the mortgage.[87]

3. ARREST AND THREATS OF ARREST — a. In General. It is duress to extort a mortgage from the mortgagor, as a condition of releasing him from an unlawful imprisonment, or of forbearing to have him arrested or prosecuted on a pretended

A threat to foreclose a mortgage or trust deed already due, and which the party has a legal right to foreclose, and thereby to turn the mortgagor "out of house and home," does not constitute duress as to the execution of another mortgage to prevent the threatened foreclosure. Hart *v.* Strong, 183 Ill. 349, 55 N. E. 629; Buck *v.* Axt, 85 Ind. 512.

Threat of suit.— A married woman gave a mortgage on her separate estate to secure to the mortgagees payment for goods stolen from them by her husband and a nephew. The stolen goods had been placed in the stock of a business carried on by the husband and wife in the name of the wife, but she had no knowledge of the crime. It was held that the mortgage was not void for duress because of threats to sue her for the value of the goods, or to prosecute criminally the husband and nephew. Weber *v.* Barrett, 125 N. Y. 18, 25 N. E. 1068.

Threat of lawful arrest.— "It is not duress for an officer to threaten to take an execution debtor to jail unless he secures the debt by a mortgage of personal property, when the officer has in his hands proper process requiring him to do so. He merely threatens to do what he should do." Bunker *v.* Steward, (Me. 1886) 4 Atl. 558, 559.

84. Bogue *v.* Frank, 199 Ill. 411, 65 N. E. 346; Marston *v.* Brittenham, 76 Ill. 611.

85. Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537.

86. *Alabama.*— Moog *v.* Strang, 69 Ala. 98.

Illinois.— Marston *v.* Brittenham, 76 Ill. 611.

Indiana.— Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36; Line *v.* Blizzard, 70 Ind. 23.

Iowa.— Ætna L. Ins. Co. *v.* Franks, 53 Iowa 618, 6 N. W. 9; Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447.

New York.— Wallach *v.* Hoexter, 17 Abb. N. Cas. 267.

North Carolina.— Butner *v.* Blevins, 125 N. C. 585, 34 S. E. 629.

Tennessee.— Shell *v.* Holston Nat. Bldg., etc., Assoc., (Ch. App. 1899) 52 S. W. 909.

United States.— Beals *v.* Neddo, 2 Fed. 41, 1 McCrary 206.

See 35 Cent. Dig. tit. "Mortgages," § 182.

But *compare* Berry *v.* Berry, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351; Edgerton *v.* Jones, 10 Minn. 427, holding that a mortgage of real estate executed and acknowledged by the wife in the presence of her husband, he having previously used threats and harsh language to induce her to execute the same, is not binding on her, even in favor of a mortgagee who did not know of such threats, or of the presence of her husband.

87. Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Sharpe *v.* McPike, 62 Mo. 300; McCandless *v.* Engle, 51 Pa. St. 309.

Threat of desertion.— A threat by the husband to withdraw himself from the society of his wife and to abandon her amounts to a species of moral coercion sufficient to invalidate the mortgage, if the mortgagee knew of the means taken to enforce her submission, but not otherwise. Marston *v.* Brittenham, 76 Ill. 611; Line *v.* Buzzard, 70 Ind. 23; Wallach *v.* Hoexter, 17 Abb. N. Cas. (N. Y.) 267. And see Edwards *v.* Bowden, 107 N. C. 58, 12 S. E. 58.

Threat of suicide.— A mortgage executed by a husband and wife will not be set aside, on the ground that the wife signed under duress, on the unsupported testimony of the husband and wife that she signed it because of his threat to kill himself if she did not. Grotenkemper *v.* Carver, 9 Lea (Tenn.) 280. And see Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180.

Evidence of duress insufficient.— Where a wife alleges that her signature to a mortgage on the homestead was procured by threats of personal violence by her husband, and sets up the defense of duress in an action to foreclose, but the evidence shows nothing more than an angry command by the husband to the wife to "dry up that crying and go

or groundless criminal charge,[88] provided the mortgagor, being a person of ordinary intelligence and firmness of mind, is really imposed upon and placed in fear.[89] But if the party is lawfully imprisoned, or is threatened with arrest on a criminal charge of which he really is guilty, it is no duress to require him, as a condition to release or forbearance, to execute a mortgage in fair satisfaction of the mortgagee's claims upon him,[90] although even in these circumstances the mortgage will be void if given without consideration or for a debt which the mortgagor does not owe.[91] To constitute duress by threats of arrest or imprisonment, it is necessary that they should proceed from the mortgagee; but it is immaterial by whom they are communicated to the mortgagor.[92]

b. Threat to Arrest Mortgagor's Husband. Where the wife is forced against her will to execute a mortgage on her property, in order to obtain the release of her husband from an existing arrest, or by the threats of the mortgagee to cause the arrest and prosecution of the husband on a criminal charge, it is generally held that the security so extorted from her is voidable for duress.[93] Some of the decisions, however, limit this rule to cases where the arrest was unlawful or the threatened prosecution was groundless or illegal.[94] And in any case it is necessary that the threats should have proceeded from the mortgagee, or that he should have been in some way connected with the intended prosecution,[95] and it must be shown that they intimidated the wife and overcame her free will in the matter.[96]

c. Threat to Arrest Mortgagor's Child. Where a parent is induced to execute

sign your name," not accompanied by any threats of personal violence or any attempt to exercise it, it is not sufficient to establish the defense of duress. Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866.

88. Winfield Nat. Bank *v.* Croco, 46 Kan. 620, 26 Pac. 939; Coveney *v.* Pattullo, 130 Mich. 275, 89 N. W. 968; James *v.* Roberts, 18 Ohio 548; Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

89. Post *v.* First Nat. Bank, 38 Ill. App. 259; Fry *v.* Piersol, 166 Mo. 429, 66 S. W. 171.

90. Bates *v.* Butler, 46 Me. 387; Page *v.* Cranford, 43 S. C. 193, 20 S. E. 972; Plant *v.* Gunn, 19 Fed. Cas. No. 11,205, 2 Woods 372.

Restitution of stolen property.—If one who has stolen or embezzled money or goods gives a mortgage to secure restitution or repayment, it is not void, as having been obtained by duress, because he was imprisoned on the criminal charge, or because threats of arrest were employed in influencing him to give the security. Bodine *v.* Morgan, 37 N. J. Eq. 426; Smillie *v.* Titus, 32 N. J. Eq. 51.

Constitutes abuse of legal process.—In some cases it has been held that a mortgage procured to be executed under a threat of arrest or imprisonment, although on a lawful and well-grounded charge, is void because it is against public policy to permit such an abuse of legal process, and no person should have the aid of a court of equity to profit by it. Bane *v.* Detrick, 52 Ill. 19; Taylor *v.* Jaques, 106 Mass. 291; Hackett *v.* King, 6 Allen (Mass.) 58; Seiber *v.* Price, 26 Mich. 518.

91. Williams *v.* Walker, 18 S. C. 577.

92. Chatham State Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443.

93. *Indiana.*— Brooks *v.* Berryhill, 20 Ind. 97.

Iowa.—Singer Mfg. Co. *v.* Rawson, 50 Iowa 634.

Michigan.— Bentley *v.* Robson, 117 Mich. 691, 76 N. W. 146; Benedict *v.* Roome, 106 Mich. 378, 64 N. W. 193.

Nebraska.—Hargreaves *v.* Korcek, 44 Nebr. 660, 62 N. W. 1086.

New Jersey.— Lomerson *v.* Johnston, 44 N. J. Eq. 93, 13 Atl. 8.

Pennsylvania.— McGrory *v.* Reilley, 14 Phila. 111, 8 Wkly. Notes Cas. 104.

Wisconsin.— Mack *v.* Prang, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848, 45 L. R. A. 407.

See 35 Cent. Dig. tit. "Mortgages," § 184.

94. Russell *v.* Durham, 29 S. W. 635, 17 Ky. L. Rep. 35; Mundy *v.* Whittemore, 15 Nebr. 647, 19 N. W. 694; Kittel *v.* Schmieder, 89 N. Y. App. Div. 618, 85 N. Y. Suppl. 977; Herbst *v.* Manss, 8 Ohio Dec. (Reprint) 215, 6 Cinc. L. Bul. 336. And see Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447, holding that a mortgage executed by a wife from fear excited by threats made to her by the mortgagee, of an illegal criminal prosecution against her husband, would not be valid; but if the criminal accusations were well founded, or, upon reasonable grounds, believed to be so by the mortagee, and the mortgage was deliberately executed to secure a debt actually due without undue influence of the mortgagee, it would be valid, unless given under circumstances rendering it illegal as an agreement to compound a felony, or stifle a prosecution.

95. Bogue *v.* Franks, 199 Ill. 411, 65 N. E. 346.

96. Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978.

a mortgage, under the pressure of threats to prosecute and imprison his son or grandson for a crime which the latter is alleged to have committed, his fears and affections being so worked upon as to deprive him of the free exercise of his will, and is made to believe there is no other way of escape, the mortgage may be set aside, or its foreclosure prevented, on the ground of duress in obtaining it.[97] And it has been decided that the question of the son's guilt or innocence is immaterial.[98] But it must appear that the threats actually intimidated the mortgagor and coerced his mind, and that they were the sole reason which induced him to give the mortgage.[99]

E. Undue Influence. Undue influence exerted upon a mortgagor by the mortgagee, although not constituting actual duress, may be sufficient to invalidate the instrument, where it amounts to that kind of persuasion — equivalent to a sort of moral coercion — which may be exercised by one having authority and control over another, or by a superior intelligence and masterful will playing upon a feeble mind and pliant disposition, the free agency and choice of the mortgagor, in either case, being dominated and controlled to his prejudice.[1] And where one who occupies the position of a confidential agent and adviser of another uses the influence of his position to secure the execution of a mortgage, beneficial to himself, but detrimental to the interests of his dependent, equity will relieve against it.[2] But in any case it must be shown that the pressure or per-

97. *Georgia.*— Small *v.* Williams, 87 Ga. 681, 13 S. E. 589.

Illinois.— Bradley *v.* Irish, 42 Ill. App. 85.

Massachusetts.— Harris *v.* Carmody, 131 Mass. 51, 41 Am. Rep. 188.

Michigan.— Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383.

Missouri.—Turley *v.* Edwards, 18 Mo. App. 676.

New York.— Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741; National Bank of Republic *v.* Cox, 47 N. Y. App. Div. 53, 62 N. Y. Suppl. 314; Strang *v.* Peterson, 56 Hun 418, 10 N. Y. Suppl. 139.

Ohio.— Western Ave. Bldg. Assoc. *v.* Walters, 7 Ohio Cir. Ct. 202, 3 Ohio Cir. Dec. 728.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Texas.— Gray *v.* Freeman, (Civ. App. 1905) 84 S. W. 1105; Perkins *v.* Adams, 17 Tex. Civ. App. 331, 43 S. W. 529.

Wisconsin.— McCormick Harvesting-Mach. Co. *v.* Hamilton, 73 Wis. 486, 41 N. W. 727.

England.— Williams *v.* Bayley, L. R. 1 H. L. 200, 12 Jur. N. S. 875, 35 L. J. Ch. 717, 14 L. T. Rep. N. S. 802; Bayley *v.* Williams, 4 Giffard 638, 11 Jur. N. S. 110, 13 Wkly. Rep. 533, 66 Eng. Reprint 862.

See 35 Cent. Dig. tit. "Mortgages," § 185.

Mortgagee ignorant of threats.— A mother impressed with the fear that her son, who had drawn money from a bank on forged checks, would be prosecuted criminally, and assured by the statements of her son's friend that such steps would be taken, and that they would result in imprisonment, executed a mortgage to the bank to secure the amount of the forgeries, believing that there was no other way to prevent the prosecution. It was held that the mortgage was executed under duress, and was voidable, although neither the bank nor its attorneys ever authorized the statements, or knew anything about them. National Bank of Republic *v.* Cox, 47 N. Y. App. Div. 53, 62 N. Y. Suppl. 314.

98. Beindorff *v.* Kaufman, 41 Nebr. 824, 60 N. W. 101.

99. Dodd *v.* Averill, 7 N. Y. App. Div. 290, 39 N. Y. Suppl. 1097; Loud *v.* Hamilton, (Tenn. Ch. App. 1898) 51 S. W. 140, 45 L. R. A. 400.

1. *Alabama.*— Noble *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175.

Illinois.— Van Horn *v.* Keenan, 28 Ill. 445.

Iowa.— Richardson *v.* Barrick, 16 Iowa 407.

Michigan.— Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383; Bowe *v.* Bowe, 42 Mich. 195, 3 N. W. 843.

Missouri.—Sims *v.* Sims, 101 Mo. App. 407, 74 S. W. 449; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

New Jersey.— Thorp *v.* Smith, 63 N. J. Eq. 70, 51 Atl. 437 [*affirmed* in 65 N. J. Eq. 400, 54 Atl. 412].

Tennessee.—Connelly *v.* Fisher, 3 Tenn. Ch. 382.

Virginia.— Kane *v.* Quillin, 104 Va. 309, 51 S. E. 353.

England.— Tabor *v.* Cunningham, 24 Wkly. Rep. 153.

See 35 Cent. Dig. tit. "Mortgages," § 186.

Protection of subsequent mortgagee.— Although a conveyance may be void as between the parties, on account of undue influence, yet the *bona fide* mortgagee of a subsequent purchaser for value, and without notice, will be protected. Valentine *v.* Lunt, 115 N. Y. 496, 22 N. E. 209.

2. Wartemberg *v.* Spiegel, 31 Mich. 400; Mullins *v.* McCandless, 57 N. C. 425.

Where the parties to a mortgage occupied the position of attorney and client at the

suasion brought to bear upon the mortgagor controlled his will or forced him to do something which he would not otherwise have consented to,[3] that it amounted to a dominating influence, more than mere solicitation or request, however importunate,[4] that the resulting action was harmful or prejudicial to the best interests of the mortgagor,[5] and that the constraining influence proceeded from the mortgagee himself, or that he was the moving cause behind it, or was in some way cognizant of it, and privy to it.[6] And the facts alleged to vitiate the mortgage must be clearly alleged and proved by satisfactory and convincing evidence.[7]

F. Illegality — 1. In General. A mortgage which is illegal may be set aside, or its enforcement prevented, whether the illegality consists in its being contrary to public policy or the policy of the law,[8] or because in direct disobedience to the positive commands or prohibitions of a statute.[9]

time it was given, the client executing the mortgage and the attorney receiving it, and undue influence or fraud is set up as a defense to its foreclosure, the burden of proof rests upon the attorney to show that the transaction was fair and consistent with equity and founded on an adequate consideration, and if he fails to make satisfactory proof in this regard, equity will treat the case as one of constructive fraud. Faris *v.* Briscoe, 78 Ill. App. 242; Prees *v.* Coke, L. R. 6 Ch. 645; Vorley *v.* Cooke, 1 Giffard 230, 4 Jur. N. S. 3, 27 L. J. Ch. 185, 65 Eng. Reprint 898. And see Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399; Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241.

Collateral advantage to mortgagee.— A mortgagee may in the mortgage stipulate for a collateral advantage to himself, provided that the bargain is not unconscionable or oppressive; and there is no presumption that, where a mortgagee has stipulated for such a collateral advantage, it has been obtained by undue influence or pressure. Santley *v.* Wilde, [1899] 2 Ch. 474, 68 L. J. Ch. 681, 81 L. T. Rep. N. S. 393, 48 Wkly. Rep. 90.

3. Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795.

4. Lefebvre *v.* Dutruit, 51 Wis. 326, 8 N. W. 149, 37 Am. Rep. 833. And see Johnston *v.* Derr, 110 N. C. 1, 14 S. E. 641.

5. Dailey *v.* Kastell, 56 Wis. 444, 453, 14 N. W. 635, where it is said that "it is not unlawful to influence a weak-minded person to do that which is just and for the best good of such person. Such influence is not undue,— in other words, is not fraudulent,— and does not necessarily vitiate the act produced by it."

6. Walker *v.* Nicrosi, 135 Ala. 353, 33 So. 161. And see Jeneson *v.* Jeneson, 66 Ill. 259.

7. Wooden *v.* Haviland, 18 Conn. 101; Lacy *v.* Rollins, 74 Tex. 566, 12 S. W. 314; Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155.

8. Gilbert *v.* Holmes, 64 Ill. 548 (holding that where an original bargain is contrary to the policy of the law because champertous, a mortgage given to secure its performance will not be enforced in a court of equity); Cruger *v.* Jones, 18 Barb. (N. Y.) 467. *Compare* Reynolds *v.* Britton, 184 N. Y. 551, 76 N. E. 1106.

Subornation of witnesses.— A mortgage given to the mortgagee in consideration of his undertaking to procure witnesses to testify to given facts, in a pending or expected litigation, is illegal as tending to interfere with the course of justice, and contrary to morality, and cannot be enforced. Patterson *v.* Donner, 48 Cal. 369.

Preventing bidding at judicial sale.— Agreements to stifle competition or prevent bidding at judicial sales are generally illegal. But an agreement to secure a creditor, by giving him a mortgage for the amount of his claim, on condition that he will abstain from bidding at a judicial sale and allow the mortgagor to purchase the property, is not necessarily illegal, if there was no actual fraudulent purpose, although incidentally it may have the effect of reducing or preventing competition at such sale. Hopkins *v.* Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731.

To escape taxes.— The fact that a lender of money causes the note and mortgage taken as security therefor to be made payable to an alien or a non-resident for the purpose of escaping local taxation thereon does not invalidate the mortgage itself or prevent its foreclosure. Callicott *v.* Allen, 31 Ind. App. 561, 67 N. E. 196; Nichols *v.* Weed Sewing Mach. Co., 27 Hun (N. Y.) 200; McKinnon *v.* Waterbury, 136 Fed. 489. *Contra*, Drexler *v.* Tyrrell, 15 Nev. 114.

To escape military service.— A mortgage given by the owner of a farm to his mother, who already held claims against him, conditioned for her future support, with the design on his part to escape military service by this means, is not void, where the parties were not *in pari delicto*. Harrington *v.* Grant, 54 Vt. 236.

9. Denny *v.* McCown, 34 Oreg. 47, 54 Pac. 952, holding that under a statute (Hill Annot. Laws, § 2736) providing that all mortgages or deeds of trust whereby land situated in more than one county is made security for the payment of a debt shall be void, the word "void" is used in its ordinary sense, and does not mean "voidable"; since the statute was designed to promote the public welfare by securing to the state the revenues from the assessment and taxation of real estate mortgages.

Mortgage of homestead.— A mortgage of the mortgagor's homestead, contrary to a statute providing that such homestead shall

2. ILLEGALITY OF CONSIDERATION. Illegality of the consideration upon which it is founded will so far taint a mortgage that the courts will refuse their aid for its enforcement.[10] But a mortgagor may be permitted to redeem, although the mortgage was given to secure notes founded on a consideration which was illegal or in violation of public policy.[11]

3. AGREEMENT TO STOP CRIMINAL PROSECUTION.[12] Where the consideration for a note or other obligation for the payment of money was an agreement on the part

not be encumbered for the payment of debts, is void. Williams *v.* Chambers, (Tex. Civ. App. 1904) 26 S. W. 270. See Smith *v.* Miller, 31 Ill. 157; Wildes *v.* Vanvoorhis, 15 Gray (Mass.) 139.

A mortgage given to secure a loan of school funds upon land on which there is a prior encumbrance, known to the auditor who had charge of the fund, is valid as against the borrower, although a statute provides that such funds shall be loaned only on mortgages of unencumbered land. Deming *v.* State, 23 Ind. 416.

Mortgage to national bank.— Although the National Banking Act provides that a bank organized under it may hold real estate "mortgaged to it in good faith by way of security for debts previously contracted," and therefore, on the face of the statute, such a bank has no power or authority to take a mortgage on lands as security for a loan of money made at the same time with the mortgage or as security for future advances, yet the statute does not declare that contracts made in excess of the permission which it grants shall be void. Hence a mortgage taken by a national bank on real estate, to secure a contemporary loan or as security for future advances, if voidable at all, is so only at the suit of the government. Disobedience to the law may lay the bank open to proceedings against it at the instance of the United States, but will not release the mortgagor from his liability, nor avoid the mortgage as against subsequent purchasers or lienors. Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305; Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 541, 3 N. W. 547; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764; Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188.

Mortgage to unlicensed lender.— Under a statute requiring all persons engaged in the business of loaning money at interest to pay a license-tax and obtain a license before commencing such business, making it a misdemeanor to fail to obtain such license, and providing that suit may be instituted to recover the license-tax, with stated damages, one who engages in such business without obtaining the required license, loans money at interest, and takes notes secured by mortgage may recover on such instruments, the act of loaning money being neither *malum in se* nor *malum prohibitum*. Vermont L. & T. Co. *v.* Hoffman, 5 Ida. 376, 49 Pac. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509.

10. Norris *v.* Norris, 9 Dana (Ky.) 317, 35 Am. Dec. 138; Dierkes *v.* Wideman, 143 Mich. 181, 106 N. W. 735; Feldman *v.* Gamble, 26 N. J. Eq. 494; Nelson *v.* Trigg, 3 Tenn. Cas. 733. And see Reynolds *v.* Nichols, 12 Iowa 398.

Liquor sold unlawfully.— Where the consideration for a note or other evidence of debt was the price of intoxicating liquors sold in violation of the laws of the state, the illegality of the transaction may be set up in defense to an action to foreclose a mortgage given as security for the payment of the note or debt. Ressegieu *v.* Van Wagenen, 77 Iowa 351, 42 N. W. 318; Baker *v.* Collins, 9 Allen (Mass.) 253.

Slaves.— A mortgage given by an heir on her individual property to secure her one-fifth part of an annuity created by her father for the purchase of a lot of slaves, of which she inherited the one fifth, is accessary to the principal obligation — the price of slaves — and cannot be enforced. Lefevre *v.* Haydel, 21 La. Ann. 663.

Confederate money.— A mortgage given to secure the payment of a note which was in fact made in consideration of a loan of treasury notes of the Confederate states cannot be enforced, the contract being illegal and against public policy. Seuzeneau *v.* Saloy, 21 La. Ann. 305; Stillman *v.* Looney, 3 Coldw. (Tenn.) 20. *Compare* Scheible *v.* Bacho, 41 Ala. 423.

Fraud as to creditors.— That a conveyance is held fraudulent and void as against creditors does not necessarily render void mortgages taken by the vendor on the property conveyed, as consideration therefor, which have passed into the hands of an assignee for value without notice. Logan *v.* Brick, 2 Del. Ch. 206.

Agreement to defraud wife of alimony.— It is a sufficient defense to a suit to foreclose a mortgage that the note which it secures was given without consideration, for the purpose of defrauding the maker's wife of her claim for alimony, since equity will not enforce a fraudulent agreement. Scott *v.* Magloughlin, 133 Ill. 33, 24 N. E. 1030.

What law governs.— Where a mortgage on land in Wyoming was given in California to secure a note executed there, and all the parties resided there, and no place of payment was designated in the note or mortgage, the law of California governs in determining the legality of the consideration, in a suit to foreclose in Wyoming. Conradt *v.* Lepper, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2.

11. Cowles *v.* Raguet, 14 Ohio 38.

12. See CONTRACTS, 9 Cyc. 505.

of the payee to compound a felony, or to stifle, settle, or abandon a criminal prosecution begun by him against the maker, the obligation is void, as being illegal and contrary to public policy; and if a mortgage was given to secure the payment of the same, a court of equity will not permit its foreclosure.[13] It is doubtful, however, how far equity will be disposed in such a case to give relief to the mortgagor, as by canceling the mortgage or setting it aside as a cloud on his title. In some jurisdictions the doctrine prevails that the parties are *in pari delicto*, and that the courts should not aid either of them, but should leave them where they stand.[14] But elsewhere it is held that, even if the parties must be held equally in fault, still the highest considerations of public policy require that the vicious bargain should not be allowed to stand, but that relief should be granted to the party upon whom coercion has been exercised.[15] But the person injured by a crime may receive from the accused private satisfaction for his private injury, as in the case of embezzlement or theft, and the fact that he thereafter forbears to prosecute will not of itself invalidate a mortgage given upon such settlement.[16]

4. Gambling Contracts.[17] By force of the statutes in the several states against gaming,[18] a mortgage given to secure a debt for money lost at cards or in any form of gambling or wagering is invalid and incapable of enforcement.[19] But where the mortgage was given for a valid debt, the mortgagor cannot defend against a suit for its foreclosure, brought by an assignee of the mortgage, on the ground that the consideration for the assignment was a gambling debt between the assignee and assignor.[20]

5. Immoral Purposes.[21] Contracts which are contrary to good morals being devoid of legal efficacy, a mortgage which is given to secure the performance of such a contract, or a debt founded thereon or growing out of it, is void and the courts will not lend their assistance for its enforcement.[22]

13. *Georgia.*— Small *v.* Williams, 87 Ga. 681, 13 S. E. 589.

Illinois.— Bane *v.* Detrick, 52 Ill. 19.

Kentucky.— Owens *v.* Green, 103 Ky. 342, 45 S. W. 84, 20 Ky. L. Rep. 44.

New York.— Maxfield *v.* Hoecker, 2 N. Y. Suppl. 77.

Ohio.— See Herbst *v.* Manss, 8 Ohio Dec. (Reprint) 215, 6 Cinc. L. Bul. 336. *Compare* Williams *v.* Englebrecht, 37 Ohio St. 383.

14. Atwood *v.* Fisk, 101 Mass. 363, 100 Am. Dec. 124; Williams *v.* Englebrecht, 37 Ohio St. 383. See also Phelan *v.* Wilson, 114 La. 813, 38 So. 570. But see James *v.* Roberts, 18 Ohio 548.

15. Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Bradley *v.* Irish, 42 Ill. App. 85; Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383.

16. Schommer *v.* Farwell, 56 Ill. 542; Loud *v.* Hamilton, (Tenn. Ch. App. 1898) 51 S. W. 140, 45 L. R. A. 400. And see Henry *v.* Dickie, 27 Ont. 416.

The giving of a mortgage or deed of trust by a defaulting county treasurer to cover the amount of his defalcation is not contrary to public policy. Territory *v.* Golding, 3 Utah 39, 5 Pac. 546.

17. See Gaming, 20 Cyc. 938.

18. See the statutes of the different states.

19. Chicago International Bank *v.* Vankirk, 39 Ill. App. 23; Luetchford *v.* Lord, 132 N. Y. 465, 30 N. E. 859; Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

Broker's commissions.— Unless a statute specifically provides otherwise, a mortgage given to a broker in consideration of commissions earned by him in the purchase and sale of futures, or on option contracts, and for advances made by him in carrying on such transactions, is valid, if he has no interest in the transactions. Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45. And see Krake *v.* Alexander, 86 Va. 206, 9 S. E. 991.

Burden of proof.— On a bill filed to set aside a sale of complainant's land under decree of foreclosure of a mortgage, on the ground that the mortgage was given to secure money won by gambling, the burden of proof is on him to establish by a preponderance of evidence not only that he lost money while gambling with defendant but that all or some part of the money so lost was money for which the note and mortgage were given, either in whole or in part. Patterson *v.* Scott, 142 Ill. 138, 31 N. E. 433.

20. Reed *v.* Bond, 96 Mich. 134, 55 N. W. 619.

Validity of assignment.— An assignment of a mortgage being an executed contract, transferring the title of the mortgagor to the assignee, equity will not cancel the same because it was made to secure a gambling debt. Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165.

21. See Contracts, 9 Cyc. 516.

22. W. *v.* B., 32 Beav. 574, 9 Jur. N. S. 1115, 33 L. J. Ch. 461, 9 L. T. Rep. N. S.

6. VIOLATION OF SUNDAY LAWS.[23] Under the statutes prohibiting labor or the transaction of business or work on Sunday it is generally held that a mortgage executed on that day is invalid.[24] But it has been held that a note and mortgage which are invalid for this reason may nevertheless be ratified, so as to become thenceforth valid obligations, by a new and express acknowledgment of their validity, or a new promise to pay, or by a payment on account on a secular day.[25]

7. VIOLATION OF INJUNCTION. Where a party executes a mortgage on his property, in disobedience to an injunction whereby he is prohibited from transferring or encumbering his property until the further order of the court, it is not valid as against the party at whose instance or for whose benefit the injunction was granted, at least in the hands of any one who had actual notice of the injunction at the time the mortgage was made.[26]

G. Partial Invalidity. Where a mortgage is given partly upon a good consideration, and partly upon an invalid or illegal consideration, but the one is clearly separable from the other, it may be held valid as to the valid consideration and void as to the residue.[27] So where the mortgage is given to secure debts due

216, 11 Wkly. Rep. 506, 55 Eng. Reprint 226, mortgage to secure money loaned in order to gain opportunity for illicit intercourse with mortgagor's daughter.

Rule inapplicable to executed contracts.— The rule of law which holds contracts made upon immoral consideration to be invalid is confined to executory agreements, and therefore to an action for foreclosure of a mortgage given to secure part of the purchase-money of a house it is no defense to show that the house has been purchased, to the vendor's knowledge, for use as a house of ill-fame. Plaintiff being able to make out the right to relief by production of the mortgage without disclosing the illegal transaction, defendant cannot set up the illegality as a defense. Hager *v.* O'Neil, 20 Ont. App. 198 [*affirmed* in 22 Can. Sup. Ct. 510].

23. See SUNDAY.

24. Hanchett *v.* Jordan, 43 Minn. 149, 45 N. W. 617; Hill *v.* Hite, 85 Fed. 268, 29 C. C. A. 549. *Compare* Wilt *v.* Lai, 7 U. C. Q. B. 535; Lai *v.* Stall, 6 U. C. Q. B. 506.

A parol agreement extending the time of payment of a debt secured by mortgage is void if entered into on Sunday. Rush *v.* Rush, (N. J. Ch. 1889) 18 Atl. 221.

Loan and note made on Sunday.— A mortgage given to secure the payment of borrowed money, and dated on a secular day of the week, may be enforced, although the money was borrowed and the note made and executed on Sunday. The original consideration of the mortgage was the obligation to return the money, and this was neither immoral nor illegal. The promise to pay alone was tainted with illegality, and although such promise could not afterward be ratified so as to impart validity to it, yet a new promise founded on such obligation and relieved of the illegality would be legal; and the mortgage is such a new promise. Gwinn *v.* Simes, 61 Mo. 335.

25. Russell *v.* Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. Rep. 348.

26. Seaman *v.* Galligan, 8 S. D. 277, 66 N. W. 458. See also Bissell *v.* Besson, 47 N. J. Eq. 580, 22 Atl. 1077, holding that a mortgage, executed by a debtor corporation to certain creditors in violation of a temporary injunction granted in a suit by those creditors for the appointment of a receiver, is an absolute nullity, and acquires no validity from the subsequent dismissal of the suit with the consent of such creditors.

27. *Connecticut.*— Weeden *v.* Hawes, 10 Conn. 50.

Florida.— State First Nat. Bank *v.* Ashmead, 33 Fla. 416, 14 So. 886.

Louisiana.— Osborn *v.* Osborn, 23 La. Ann. 496.

Mississippi.—Carradine *v.* Wilson, 61 Miss. 573.

New York.— McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431.

United States.— Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403; *In re* Stowe, 23 Fed. Cas. No. 13,513.

England.— Crenver, etc., Min. Co. *v.* Willyams, 35 Beav. 353, 14 L. T. Rep. N. S. 93, 14 Wkly. Rep. 444, 1003, 55 Eng. Reprint 932; Lake *v.* Brutton, 8 De G. M. & G. 440, 2 Jur. N. S. 839, 25 L. J. Ch. 842, 57 Eng. Ch. 343, 44 Eng. Reprint 460.

See 35 Cent. Dig. tit. "Mortgages," § 191.

Excessive amount.—Where, in a conditional pardon, the person pardoned was required to secure the payment of one thousand dollars to the county, and the county commissioners obtained a mortgage for one thousand one hundred and fifty dollars, the mortgage was held good as to the one thousand dollars, and void as to the residue. Rood *v.* Winslow, 2 Dougl. (Mich.) 68.

Compounding felony.— It appears that if a part of the consideration for a mortgage was the settlement or stifling of a criminal prosecution, the whole is void, and it cannot be allowed to stand as security for a proper and valid debt which also entered into the consideration. In such case it is held that the illegality taints the whole, and neither the mortgage nor the consideration is divisible. Small *v.* Williams, 87 Ga. 681, 13 S. E. 589; Pearce *v.* Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243.

individually to several creditors, the fact that one of such debts is feigned, illegal, or fraudulent will not affect the validity of the security as to the other creditors, if there was no combination between them.[28] Again, a mortgage covering several species of property may be invalid as to one, but a good and enforceable security as to the others.[29] And again some of the clauses, conditions, or stipulations of a mortgage may be invalid without affecting the validity of the whole instrument, if the parts are separable and independent.[30]

H. Right to Contest Validity — 1. Who May Allege Invalidity. The right to set up illegality or other invalidating cause, against a mortgage, in opposition to its enforcement, belongs not only to the mortgagor or persons claiming under him,[31] but also to third parties whose rights or interests are injuriously affected by the mortgage, such as junior mortgagees,[32] execution or attachment creditors,[33] or purchasers of the equity of redemption, provided the cause of invalidity set up is not a defense personal to the mortgagor.[34] The validity of a mortgage fraudulently made by the ostensible owner may be questioned by the real owner of the property.[35]

2. Estoppel. Although a mortgage may have been voidable in its inception, on account of fraud, illegality, or deception or imposition practised upon the mortgagor, yet he may be held estopped to deny its effect or contest its foreclosure, as, by his recognition of the mortgage and acquiescence in it on full understanding of its conditions and consequences;[36] by long-continued neglect to set up any defense to it, and permitting the property to be sold on foreclosure and pass to the hands of innocent purchasers;[37] by accepting the proceeds of the

28. McNeill *v.* Riddle, 66 N. C. 290; Farwell *v.* Warren, 76 Wis. 527, 45 N. W. 217. And see Fraudulent Conveyances, 20 Cyc. 510.

29. Lavillebeuvre *v.* Frederic, 20 La. Ann. 374, holding that a mortgage on land and slaves, executed while slavery was recognized, is not wholly vitiated by the abolition of slavery, but will remain valid as a mortgage of land.

Where a mortgage covers a homestead and also other lands, the fact that it is not executed or acknowledged in the manner required for conveyances of the homestead will not affect its validity as a lien on the other property. McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30; McMurray *v.* Connor, 2 Allen (Mass.) 205; Roby *v.* Bismarck Nat. Bank, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633; Morrison *v.* Bean, 15 Tex. 267.

A mortgage covering both real and personal property may be valid as a lien on the former, although, in consequence of some defect in its execution, or a failure to record it in the manner required for chattel mortgages, it may be void, and even presumptively fraudulent, in the character of a mortgage of personalty. Chemung Canal Bank *v.* Payne, 164 N. Y. 252, 58 N. E. 101. And see Long *v.* Cockern, 29 Ill. App. 304.

30. Willis *v.* Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229 (holding that the fact that a deed of trust only required one notice of sale to be published will not affect its validity, but only the validity of the power of sale sought to be conferred); Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412 (holding that a mortgage taken by a foreign corporation, which has not made a deposit of money with a state officer, as required by a statute as a prerequisite to the right of such company to do business in the state, is not invalid, and that this is true notwithstanding it contains provisions for the execution of trusts which are within the prohibition of the statute).

31. Brewster *v.* Madden, 15 Kan. 249. And see Hall *v.* Westcott, 15 R. I. 373, 5 Atl. 629. But *compare* Beatty *v.* Somerville, 102 Ill. App. 487.

A mortgagor's trustee in bankruptcy may in a suit to foreclose question the validity of the mortgage. Carlsbad Water Co. *v.* New, 33 Colo. 389, 81 Pac. 34.

Where a husband fraudulently gives a mortgage to defeat his wife's dower right, the fraud cannot be set up by him or his personal representative after his death, although as to the dower right the mortgage is void. Killinger *v.* Reidenhauer, 6 Serg. & R. (Pa.) 531.

32. Dillaway *v.* Butler, 135 Mass. 479; Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580; Rosenbaum *v.* Foss, 4 S. D. 184, 56 N. W. 114.

33. McWhorter *v.* Huling, 3 Dana (Ky.) 348; Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148; Webb *v.* Roff, 9 Ohio St. 430.

34. West *v.* Miller, 125 Ind. 70, 25 N. E. 143. And see More *v.* Deyoe, 22 Hun (N. Y.) 208.

35. Hillard *v.* Taylor, 114 La. 883, 38 So. 594.

36. Kinnear *v.* Silver, Ritch. Eq. Cas. (Nova Scotia) 101. And see Jennette *v.* Meloche, 106 Ill. App. 351; Bishop *v.* Allen, 55 Vt. 423.

37. Rummel *v.* Butler County, 93 Fed. 304.

mortgage and employing them for his own purposes;[38] or where the mortgagor was himself a participant in the fraud which is alleged to invalidate the mortgage.[39] But payment of interest on a loan secured by mortgage by one who claims title to the property adversely to the mortgagor, pending an adjudication of their rights, does not estop such claimant from contesting the validity of the mortgage.[40]

3. RATIFICATION OF INVALID MORTGAGE. A mortgagor may, either expressly, or by implication from his subsequent conduct, ratify and validate a mortgage which was originally invalid.[41]

I. Cancellation For Invalidity — 1. IN GENERAL. A court of equity may decree the cancellation of a mortgage when it appears that it was obtained by fraud or is otherwise invalid.[42] But he who seeks equity must do equity; and relief of this kind will not be granted without requiring the applicant to do all that justice and fair dealing demand of him. If any sum of money has been received from the mortgagee and enjoyed and not returned, its repayment will be made a condition precedent to the decree for the cancellation of the mortgage.[43] If the court, on such a bill, decides that the mortgage is valid, it is proper to decree a foreclosure and sale of the premises, and payment of the amount found due.[44]

2. PLEADING. The facts constituting the fraud, false representations, or other ground on which the validity of the mortgage is attacked must be pleaded specifically and in detail, general allegations in this respect not being sufficient.[45] But it is not necessary to incorporate the mortgage in the bill or complaint.[46]

3. EVIDENCE. A mortgagor, suing for the cancellation of the mortgage on the ground of its invalidity, must assume the burden of proving, by a fair preponderance of evidence, the fraud, deceit, false representations, forgery, or other circumstances on which his claim to relief is based.[47]

38. Ellis *v.* Baker, 116 Ind. 408, 19 N. E. 193; State *v.* Shaw, 28 Iowa 67; Sloan *v.* Holcomb, 29 Mich. 153; Sing Sing First Nat. Bank *v.* Knevals, 21 N. Y. Suppl. 1058.

39. Lewis *v.* Meier, 14 Fed. 311, 4 McCrary 286.

40. Whitlock *v.* Cohn, 72 Ark. 83, 80 S. W. 141.

41. Dispeau *v.* Pawtucket First Nat. Bank, 24 R. I. 508, 53 Atl. 868; Loud *v.* Hamilton, (Tenn. Ch. App. 1898) 51 S. W. 140, 45 L. R. A. 400; Harris *v.* Kiel, (Tex. Civ. App. 1902) 70 S. W. 226; Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

42. *Alabama.*— Jenkins *v.* Jonas Schwab Co., 138 Ala. 664, 35 So. 649.

Missouri.— See Lappin *v.* Crawford, 186 Mo. 462, 85 S. W. 535.

New Jersey.—Brown *v.* Mutual Ben. L. Ins. Co., 32 N. J. Eq. 809. *Compare* Black *v.* Purnell, 50 N. J. Eq. 365, 24 Atl. 548.

North Carolina.— Hill *v.* Gettys, 135 N. C. 373, 47 S. E. 449.

Oklahoma.— Garretson *v.* Witherspoon, 15 Okla. 473, 83 Pac. 415.

South Dakota.— See Rosenbaum *v.* Foss, 4 S. D. 184, 56 N. W. 114.

And see CANCELLATION OF INSTRUMENTS, 6 Cyc. 286.

Parties.— The trustee in a deed of trust having been made defendant to an action to cancel or set aside the deed, the beneficiaries are not necessary parties. Winslow *v.* Minnesota, etc., R. Co., 4 Minn. 313, 77 Am. Dec. 519.

43. Martin *v.* Martin, 164 Ill. 640, 45 N. E. 1007, 56 Am. St. Rep. 219; Miller *v.* Ford, 1 N. J. Eq. 358. And see CANCELLATION OF INSTRUMENTS, 6 Cyc. 306 *et seq.*

44. Newaygo County Mfg. Co. *v.* Stevens, 79 Mich. 398, 44 N. W. 852; Padley *v.* Neill, 134 Mo. 364, 35 S. W. 997; Darvin *v.* Hatfield, 4 Sandf. (N. Y.) 468.

45. Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909. See also Stevens *v.* Moore, 73 Me. 559, holding that where a bill in equity to set aside a mortgage alleges that defendant made fraudulent representations, which are relied upon as constituting the fraud, it should also allege that the representations were false, and made with the knowledge of their want of truth, or made by the party as of his own knowledge when he had none.

46. Johnson *v.* Moore, 112 Ind. 91, 13 N. E. 106; Marley *v.* National Bldg., etc., Assoc., 28 Ind. App. 369, 62 N. E. 1023.

47. *Colorado.*— Wilson *v.* Morris, 4 Colo. App. 242, 36 Pac. 248.

Iowa.— Kreck *v.* Pitzelberger, 64 Iowa 108, 19 N. W. 874.

New Jersey.— Black *v.* Purnell, 50 N. J. Eq. 365, 24 Atl. 548.

New York.— Chrimes *v.* Squier, 4 N. Y. App. Div. 611, 38 N. Y. Suppl. 996; Arnoux *v.* Phyfe, 87 Hun 401, 34 N. Y. Suppl. 312.

North Carolina.— Blackwell *v.* Cummings, 68 N. C. 121.

Pennsylvania.— Powell *v.* Blair, 133 Pa. St. 550, 19 Atl. 559.

XI. CONSTRUCTION OF MORTGAGES.

A. Rules of Construction — 1. IN GENERAL. The elementary rule in the construction of mortgages is to ascertain from the instrument the intention of the parties, giving meaning to all the words and clauses used, if possible, and then to give effect to the intention thus ascertained.[48] Where a mortgage is made in pursuance of a special statute, the statute may be resorted to in construing the mortgage.[49]

2. WHAT LAW GOVERNS. In accordance with the general rule that a mortgage is governed by the law of the state where the mortgaged property is situated,[50] it is generally held that its interpretation, in respect to its effect and the rights and liabilities of the parties under it, is to be in accordance with that law, although the contract may have been executed in another state, or the action for the enforcement of the mortgage is brought elsewhere.[51] But there are cases which hold that the construction of a mortgage depends upon the law of the state of its execution; and although the land may lie in a different jurisdiction, or suit on the mortgage be brought in another state, still the law of the state where the contract was made will govern and be applied,[52] except in so far as it may offend the positive law, or violate the public policy, of the state where its enforcement is sought.[53] In determining what is the place of the contract, the law of which is to be applied to its construction, various factors are to be taken into account, such as the question where the mortgage was executed and where delivered, where the money was paid over to the mortgagor, and where the loan is to be repaid.[54] In the courts of the United States the question of the validity and effect of a mortgage will depend upon the laws of the state where the mortgaged property is situated.[55] Further, the character and legal effect of a mortgage, and the rights, duties, and liabilities of the parties under it, are fixed by the law in force at the time of its execution, and cannot be affected by statutes subsequently passed, except in so far as they relate merely to the remedy or to matters of procedure.[56]

South Carolina.— Montgomery *v.* Scott, 9 S. C. 20, 30 Am. Rep. 1.

Texas.— Rand *v.* Davis, (Civ. App. 1894) 27 S. W. 939. And see Jinks *v.* Moppin, (Civ. App. 1904) 80 S. W. 390.

See 35 Cent. Dig. tit. "Mortgages," § 197.

48. Killgore *v.* Cranmer, (Colo. 1906) 84 Pac. 70; Clark *v.* Brenneman, 86 Ill. App. 416; Stamm *v.* Esterly, 8 Pa. Dist. 330.

The question whether a mortgage secures an annuity only, or a debt and interest thereon, must be determined from the intention of the parties as shown by the instrument, considered in connection with the attending circumstances. Northern Cent. R. Co. *v.* Hering, 93 Md. 164, 48 Atl. 461.

49. Northern Cent. R. Co. *v.* State, 17 Md. 8.

50. See *supra*, I, F.

51. Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194; Miller *v.* Shotwell, 38 La. Ann. 890; Klinck *v.* Price, 4 W. Va. 4, 6 Am. Rep. 268. But *compare* Chappell *v.* Jordine, 51 Conn. 64.

52. Cubbedge *v.* Napier, 62 Ala. 518; Caldwell *v.* Edwards, 5 Stew. & P. (Ala.) 312; Talbot *v.* Chester, 2 Chest. Co. Rep. (Pa.) 57; Newman *v.* Kershaw, 10 Wis. 333.

Lex loci a question of intention.— In the foreclosure of a mortgage made in one state on land situated in another, the question of the *lex loci* is one of intention, to be decided upon all the facts of the case, among which may be the place of payment and the location of the land mortgaged to secure the debt, and these are not conclusive evidence upon this point. But where a mortgage to secure a loan is made in the state where both the parties reside, and the money loaned is to be used and repaid there, the law of that state will govern, although the land lies in another state. Newman *v.* Kershaw, 10 Wis. 333.

53. Cubbedge *v.* Napier, 62 Ala. 518.

A provision in a mortgage authorizing a judgment for attorney's fees will not be enforced in Kentucky, although such a clause would be valid and legal in the state in which the mortgage was made. Johnston *v.* Rogers, 43 S. W. 234, 19 Ky. L. Rep. 1272.

54. Ashurst *v.* Ashurst, 119 Ala. 219, 24 So. 760; American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; Dakota Bldg., etc., Assoc. *v.* Bilan, 59 Nebr. 458, 81 N. W. 308; Varick *v.* Crane, 4 N. J. Eq. 128.

55. Bendey *v.* Townsend, 109 U. S. 665, 13 S. Ct. 482, 27 L. ed. 1065; *In re* Kellogg, 113 Fed. 120; Gray *v.* Havemeyer, 53 Fed. 174, 3 C. C. A. 497.

56. Lease *v.* Owen Lodge No. 146 I. O. O. F., 83 Ind. 498; McGlothlin *v.* Pollard, 81 Ind. 228. And see Barnitz *v.* Beverly, 163

3. LANGUAGE OF THE INSTRUMENT — a. In General. The primary purpose of judicial construction being to ascertain the intention of the parties to the contract, this intention must be sought first of all in the language of the instrument; and in considering it the whole of the mortgage must be construed together, and significance and effect must be given, if possible, to all of its words and clauses.[57] And any reservation or waiver in favor of the mortgagor, or condition for the benefit of the mortgagee, must be interpreted in the light of the other provisions of the mortgage.[58]

b. Recitals and Conditions. A recital of facts in a mortgage, incidental or introductory to the operative parts of the instrument, does not generally estop the mortgagor to dispute the truth of the facts recited,[59] unless it operates as a covenant for the benefit of the mortgagee.[60] And generally conditions and stipulations in favor of the owner of the debt secured are to be construed according to the natural and reasonable import of their terms.[61]

4. REPUGNANT PARTS OR CLAUSES. In the interpretation of a mortgage, the endeavor must be made to give effect to all of its parts and clauses, and to that end a construction must be adopted, if possible, which will reconcile apparent contradictions or inconsistencies.[62] But if there are repugnancies which cannot

U. S. 118, 16 S. Ct. 1042, 41 L. ed. 93; Clark *v.* Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354; Bronson *v.* Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Smith *v.* Green, 41 Fed. 455.

57. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483; Clark *v.* Brenneman, 86 Ill. App. 416.

58. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

Reservation of right to sell.— Where a mortgage provided that if the mortgagor should raise, or be able to raise, money to pay off the indebtedness, by selling or re-mortgaging the premises, the mortgagees should reconvey to him, to enable him to do so, this proviso did not confer on the mortgagor a power of sale, as he had that already by law as the owner of the equity, but only operated as a covenant to reconvey to the mortgagor, to enable him to convey to new parties. Coffing *v.* Taylor, 16 Ill. 457.

Default in payment of interest.— A stipulation in a trust deed as to a note payable five years after date, with an interest coupon attached for each year, that "on the failure of the borrower to pay said note or either of said coupons . . . the whole sum of money secured thereby may without notice to the borrower, at the option of the lender or his assigns, and at his option only, become due and payable at once," does not mean that coupons for unearned interest shall become payable on a default by the borrower. Dugan *v.* Lewis, 79 Tex. 246, 14 S. W. 1024, 23 Am. St. Rep. 332, 12 L. R. A. 93.

Direction as to application of bonds secured.— A corporation conveyed its land to secure a specified number of bonds, which, as provided in the deed, were to be used to take up the company's outstanding debts, including liens on the land, by whomsoever placed there, so far as possible, giving preference to the liens. It was held that the deed did not make taking up all prior liens a condition which, unless complied with, would make the release of their prior liens by those who had accepted bonds void; that the only limitation imposed by the deed was that lien creditors should be preferred in issuing the bonds; and that the bonds could be rightfully used in taking up any debts of the company. Stribling *v.* Splint Coal Co., 31 W. Va. 82, 5 S. E. 321.

59. Mershon *v.* Mershon, 9 Bush (Ky.) 633, holding that an introductory recital in a mortgage that the grantor was the owner of only one third of the tract of land described in the mortgage does not contain a binding recognition of any right in any other person to any part of the land.

Recital of receipt of consideration.— The recital in a mortgage that the mortgagor has borrowed from the mortgagee the amount of the bond which the mortgage secures does not prevent the mortgagor, even as against an assignee of the bond and mortgage, from showing that the money was not in fact paid and that the bond was without consideration. Ritchie *v.* Cralle, 108 Ky. 483, 56 S. W. 963, 22 Ky. L. Rep. 160; Waggoner *v.* German American Title Co., 56 S. W. 961, 22 Ky. L. Rep. 215. So also a recital that the mortgagor "is indebted" to the mortgagee in a certain sum, for which "he has given his checks," etc., does not imply that the mortgage was given for an antecedent debt. Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231. *Compare* Jerome *v.* Hopkins, 2 Mich. 96.

60. Ayer *v.* Philadelphia, etc., Face Brick Co., 157 Mass. 57, 31 N. E. 717.

61. See Newhall *v.* Sherman, 124 Cal. 509, 57 Pac. 387; Lesher *v.* Brown, 3 Del. Co. (Pa.) 69.

62. Clark *v.* Brenneman, 86 Ill. App. 416; Long *v.* Long, 79 Mo. 644.

Illustrations.— A mortgage contained a stipulation by which the mortgagor promised to give C and S "five hundred dollars each to be paid, at the end of the litigation, out of the land; said amount to be equally divided between them." It was held that, to harmonize the two clauses, a comma should be read before the word "each," so that C and S should recover only five hundred dollars in all,

be reconciled, the court will regard the general scope and purpose of the mortgage, and endeavor to carry out the general intention of the parties,[63] adopting a construction which will sustain the mortgage as an operative and effective instrument, rather than one which would defeat or destroy it,[64] and resolving ambiguities or contradictory clauses rather against the mortgagor than against the mortgagee.[65]

5. Writing and Printing. In case of an irreconcilable difference between the written and printed parts of a mortgage, the written will prevail and the printed portion be considered as superseded by it.[66]

6. Construing Instruments Together — a. In General. Where a deed, lease, or other written instrument is incorporated in a mortgage by reference, or is given as a part of the same transaction, the two instruments should be read and construed together, and the terms of the mortgage may be modified by the contents of the other paper.[67] And where a deed of trust and a mortgage are executed at the same time to secure the same notes, they should be considered as one instrument.[68] But separate mortgages on land in different counties, executed at the same time, by and to the same parties, to secure the same indebtedness, cannot be construed as constituting a single instrument.[69]

b. Mortgage and Note. Where a mortgage is given to secure the payment of a note or bond, the two instruments being made at the same time, they are to be read and construed together, as parts of the same transaction, and hence the terms of the one may explain or modify the other;[70] and a stipulation or condi-

and not that sum to each severally. Jackson *v.* Carswell, 34 Ga. 279. A reservation in a mortgage, to the mortgagor, of the right to pay off a portion of the principal on any interest day, "so that the principal shall not be reduced to a sum less than five hundred dollars," is not inconsistent with a further provision that such payment "may include the whole of the principal," as it was merely intended that an unpaid balance of less than five hundred dollars should not be left. Likes *v.* Polk, 88 Iowa 298, 55 N. W. 328.

63. Coleman *v.* Hill, 10 Ont. 172. And see Gray *v.* Bennett, (Iowa 1905) 105 N. W. 377, holding that a recital in the consideration clause of a mortgage cannot control the express recital of the amount of indebtedness which the mortgage is given to secure.

64. People *v.* Storms, 97 N. Y. 364.

65. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483; De Armas' Succession, 3 Rob. (La.) 342; Jameson *v.* London, etc., Loan, etc., Co., 27 Can. Sup. Ct. 435. *Compare* Kline *v.* McGuckin, 25 N. J. Eq. 433.

66. Bolman *v.* Lohman, 79 Ala. 63; Likes *v.* Polk, 88 Iowa 298, 55 N. W. 328; McKay *v.* Howard, 6 Ont. 135.

67. Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676; Cressey *v.* Webb, 17 Ind. 14; Abele *v.* McGuigan, 78 Mich. 415, 44 N. W. 393; Evenson *v.* Bates, 58 Wis. 24, 15 N. W. 837; Foxcroft *v.* Mallett, 4 How. (U. S.) 353, 11 L. ed. 1008.

Deed and purchase-money mortgage.— Where it appears that a mortgage was given to secure the purchase-money of land conveyed by deed, the mortgage and deed are to be considered as parts of one transaction and construed together. South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35; Bell *v.* New York, 10 Paige (N. Y.) 49.

68. Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. 741.

69. McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011.

70. *Alabama.*—Chambers *v.* Marks, 93 Ala. 412, 9 So. 74.

California.— San Gabriel Valley Bank *v.* Lake View Town Co., (1906) 86 Pac. 727.

Illinois.— Boley *v.* Lake St. El. R. Co., 64 Ill. App. 305.

Indiana. — Zekind *v.* Newkirk, 12 Ind. 544.

Iowa.— McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Clayton *v.* Whitaker, 68 Iowa 412, 27 N. W. 296; Dobbins *v.* Parker, 46 Iowa 357.

Kansas.— Muzzy *v.* Knight, 8 Kan. 456; Evans *v.* Baker, 5 Kan. App. 68, 47 Pac. 314; Kansas L. & T. Co. *v.* Gill, 2 Kan. App. 488, 43 Pac. 991.

Missouri.— Noell *v.* Gaines, 68 Mo. 649. *Compare* Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

Nebraska.— Garnett *v.* Meyers, 65 Nebr. 280, 91 N. W. 400, 94 N. W. 803; Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207.

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867, holding that Rev. Codes, § 3900, providing that several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together, establishes a rule of interpretation merely, and does not unite several contracts into a single contract; and hence a realty mortgage and the note secured thereby do not constitute a single contract, but remain as separate contracts, except for the purpose of interpretation.

Wisconsin.— Scheibe *v.* Kennedy, 64 Wis. 564, 25 N. W. 646; Schoonmaker *v.* Taylor, 14 Wis. 313.

tion inserted in the one is an effective part of the contract of the parties, although not found in the other, provided there is no necessary inconsistency.[71] But in respect to the terms of the debt or interest, or the time for its payment, if the note and mortgage contain conflicting provisions, the note will govern, as being the principal obligation.[72]

B. Evidence to Aid Construction.[73] Parol evidence is not admissible to contradict or vary the terms of a mortgage.[74] When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it; and parol evidence as to their negotiations or conversations prior to its execution is not admissible to vary or explain it.[75] But such testimony is admissible to identify the subject-matter referred to in the mortgage in general terms, or to show the situation, condition, and mutual relations of the parties, in order to make clear the meaning of language used which would otherwise be uncertain or ambiguous.[76] The meaning and effect of the instrument, as determined by construction from its language, are matters for the decision of the court, and should not be referred to a jury.[77]

C. Time of Taking Effect. In general a mortgage takes effect from the date of its execution and delivery.[78] But in the case of a conveyance of lands and the giving of a mortgage to secure the purchase-money, the two instruments may take effect simultaneously, although not executed on the same day, if intended by the parties to constitute parts of one and the same continuous transaction.[79] Where the mortgage is given to secure a loan to be made in the future,

United States.— Brewer *v.* Penn Mut. L. Ins. Co., 94 Fed. 347, 36 C. C. A. 289; Low *v.* Blackford, 87 Fed. 392, 31 C. C. A. 15; Gregory *v.* Marks, 10 Fed. Cas. No. 5,802, 8 Biss. 44.

See 35 Cent. Dig. tit. "Mortgages," § 215.

Compare White *v.* Miller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673; McClelland *v.* Bishop, 42 Ohio St. 113.

71. Clayton *v.* Whitaker, 68 Iowa 412, 27 N. W. 296; Evans *v.* Baker, 5 Kan. App. 68, 47 Pac. 314; Scheibe *v.* Kennedy, 64 Wis. 564, 25 N. W. 646; Schoonmaker *v.* Taylor, 14 Wis. 313.

72. Kansas L. & T. Co. *v.* Thayer, (Kan. App. 1899) 58 Pac. 238; New England Mortg. Security Co. *v.* Casebier, 3 Kan. App. 741, 45 Pac. 452; Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207; Rothschild *v.* Rio Grande Western R. Co., 84 Hun (N. Y.) 103, 32 N. Y. Suppl. 37; Bastin *v.* Schafer, 15 Okla. 607, 85 Pac. 349.

73. As to evidence concerning the property intended to be covered by the mortgage see *supra*, VIII, F, 12.

As to the admissibility of evidence to identify or limit the debts or liabilities secured see *supra*, VII, A, 1, f.

74. Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145; Martin *v.* Rapelye, 3 Edw. (N. Y.) 229, holding that parol evidence is inadmissible to show that the parties to a mortgage, at the time of its execution, agreed upon a time of payment different from that expressed in the mortgage. And see EVIDENCE, 17 Cyc. 626 *et seq.*

75. Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437 [*affirmed* in 195 Ill. 101, 62 N. E. 813]. And see Crippen *v.* Comstock, 17 Colo. App. 89, 66 Pac. 1074. But see Walker *v.* Walker, 17 S. C. 329, holding that, where parol testimony is received for the purpose of showing a deed absolute in form to have been intended as a mortgage, the conditions may likewise be proved by parol testimony, including conditions superadded by the parties after the execution of the mortgage, as well as those contemporaneous with its execution.

76. Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145.

Object of transaction.— Where a note is given, secured by mortgage, but no money passes, and the object of the transaction does not appear from the note or mortgage, it may be shown by parol what the agreement was. McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

77. Price *v.* Mazange, 31 Ala. 701; Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Bartley *v.* Phillips, 114 Ind. 189, 16 N. E. 508.

78. Desmond *v.* Lanphier, 86 Ill. App. 101 [*affirmed* in 187 Ill. 370, 58 N. E. 343]; Krutsinger *v.* Brown, 72 Ind. 466; Watson *v.* Dickens, 12 Sm. & M. (Miss.) 608. See also Weed *v.* Barker, 35 N. H. 386, holding that where the parties to a mortgage, who resided out of the county where the land lay, being within that county temporarily, executed, delivered, and recorded the mortgage, and, within a short and reasonable time thereafter, made the loan and note pursuant to the agreement, the mortgage took effect from the latter date. The loan and the mortgage are to be regarded as parts of the same transaction; the latter having effect as a security from the date of the loan.

79. Stewart *v.* Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651. See also Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246. (1885) 2 N. E. 501; Holmes *v.* Winler, 47 Fed. 257.

or liabilities to be afterward incurred by the mortgagee, it takes effect from the time when the money is advanced or the liabilities attach.[80]

XII. PROPERTY MORTGAGED AND ESTATES OF PARTIES.

A. Property Covered by Mortgage — 1. Description in Mortgage. The nature, location, and extent of the property covered by a mortgage must be determined by the description of it contained in the mortgage itself, interpreted according to the established rules of construction, and aided by extrinsic evidence, for purposes of identification and limitation, where that is necessary by reason of the uncertainty or ambiguity of the description,[81] and subject to correction or reformation in case of mutual mistake,[82] the actual intention of the parties in this respect being the controlling factor, when thus ascertained and made clear.[83] In case of conflict as to the land covered, the clause creating the lien will control

80. Langfitt *v.* Brown, 5 La. Ann. 231; Meeker *v.* Clinton, etc., R. Co., 2 La. Ann. 971; Choteau *v.* Thompson, 2 Ohio St. 114. But *compare* Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852, holding that a mortgage executed by a purchaser of land to secure the purchase-price and future advances is valid from its date, the purchase-price constituting a sufficient consideration therefor.

81. *Alabama.* — O'Conner *v.* Nadel, 117 Ala. 595, 23 So. 532.

Arkansas.— Polk *v.* Simon, 63 Ark. 569, 39 S. W. 1045.

Connecticut.—Herman *v.* Deming, 44 Conn. 124.

District of Columbia.— Wood *v.* Grayson, 22 App. Cas. 432.

Georgia.— Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507; Usina *v.* Wilder, 58 Ga. 178.

Kentucky.— Short *v.* Russell, 60 S. W. 720, 22 Ky. L. Rep. 1526.

Maine.— Smith *v.* Sweat, 90 Me. 528, 38 Atl. 554.

Maryland.— Early *v.* Dorsett, 45 Md. 462.

Massachusetts.— Wentworth *v.* Daly, 136 Mass. 423; Stearns *v.* Rice, 14 Pick. 411.

Missouri.— Carter *v.* Foster, 145 Mo. 383, 47 S. W. 6.

New Hampshire.— Bell *v.* Sawyer, 32 N. H. 72.

New Jersey.— Lee *v.* Woodworth, 3 N. J. Eq. 36. See also Holmes *v.* Abrahams, 31 N. J. Eq. 415.

Pennsylvania.— Waits *v.* Bailey, 192 Pa. St. 562, 44 Atl. 262.

South Carolina.— Reid *v.* McGowan, 28 S. C. 74, 5 S. E. 215.

Texas.— Ferguson *v.* Connally, 33 Tex. Civ. App. 245, 76 S. W. 609.

Vermont.— Carpenter *v.* Millard, 38 Vt. 9.

United States.— Brobst *v.* Brock, 10 Wall. 519, 19 L. ed. 1002; Maxwell *v.* Wilmington Dental Mfg. Co., 77 Fed. 938.

See 35 Cent. Dig. tit. "Mortgages," § 248.

As to sufficiency and effect of description in mortgage see *supra*, VIII, F, 1, 12.

Reference to maps, records, etc.— Where the mortgage refers, for a more particular description of the property, to maps, plats, deeds, or court records, the location and extent, as ascertained by the instruments referred to, will control the generality of the descriptive words. Chaffee *v.* Browne, 109 Cal. 211, 41 Pac. 1028; Dubois *v.* Fagan, 32 N. J. Eq. 183.

Lots abutting on unopened streets.— A mortgage of city lots described as bounded by certain streets, which have not in fact been opened, conveys the land to the middle line of the street as laid out on the city plan. Patterson *v.* Harlan, 3 Pa. Co. Ct. 560 [*affirmed* in 124 Pa. St. 67, 16 Atl. 496].

Mineral lode.— A mortgage of a specifically described tract of land in which is a vein or lode of mineral on which some mining has been done, with all the mines, minerals, mining rights, privileges, and appurtenances belonging or appertaining to the same, does not cover an undeveloped portion of the lode contained in land adjoining the tract described, and in which also is the *situs* of the lode. Staples *v.* May, 87 Cal. 178, 25 Pac. 346.

Where a street was vacated and reverted to the owners of the abutting property, and the owner of lots adjoining the vacated street mortgaged them by definite description, but made no mention of the adjoining strip acquired by reversion, the mortgage did not create a lien thereon. Southern Kansas R. Co. *v.* Sharpless, 62 Kan. 841, 62 Pac. 662.

82. *In re* Boulter, 4 Ch. D. 241, 46 L. J. Bankr. 11, 35 L. T. Rep. N. S. 673, 25 Wkly. Rep. 100; Metropolitan Counties Assur. Soc. *v.* Brown, 26 Beav. 454, 5 Jur. N. S. 378, 28 L. J. Ch. 581, 7 Wkly. Rep. 303, 53 Eng. Reprint 973; Fullerton *v.* Ibbitson, 12 Nova Scotia 225; Lundy *v.* McKamis, 11 Grant Ch. (U. C.) 578. And see *supra*, VIII, F, 14.

83. *Georgia.*— Broach *v.* O'Neal, 94 Ga. 474, 20 S. E. 113.

Iowa.— Barton *v.* Beno, 84 Iowa 543, 51 N. W. 36.

New Hampshire.—Morse *v.* Morse, 58 N. H. 391.

New York.— Smyth *v.* Rowe, 33 Hun 422 [*affirmed* in 98 N. Y. 665].

Vermont.— Pierce *v.* Brown, 24 Vt. 165.

See 35 Cent. Dig. tit. "Mortgages," § 248.

Intention to include all mortgagor's lands. — A court will not extend a mortgage, by inserting two additional tracts of land, merely on evidence that the mortgagor had expressed an intention to include all his lands, and had a list of them before the scrivener, and that there is a repetition in the description

that describing the lands,[84] and words merely expressive of quantity must yield to a particular description by metes and bounds or by subdivisions of the government survey.[85]

2. TITLE OR INTEREST CONVEYED — a. In General. Unless restricted to some particular interest or estate,[86] a mortgage conveys all the title which the mortgagor then had in the premises in question,[87] and even though it purports to convey a greater estate than he owned, it is not void, but passes so much as he had a right to convey.[88] On the other hand the mortgage will give the mortgagee no greater rights or interests than the mortgagor possessed, and will bind only the latter's actual interest or estate,[89] as, in case his title is conditional, expectant, or defeasible,[90] or merely equitable,[91] or subject to prior encumbrances;[92] and if

of two other lots, inserting them twice. Bartlett *v.* Patterson, 9 Ohio Dec. (Reprint) 73, 10 Cinc. L. Bul. 367.

84. Ripley *v.* Harris, 20 Fed. Cas. No. 11,853, 3 Biss. 199.

85. Kruse *v.* Scripps, 11 Ill. 98; Maguire *v.* Bissell, 119 Ind. 345, 21 N. E. 326; Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709.

86. Hauft *v.* Duncan, 40 Iowa 254; Mitchell *v.* Black, 64 Me. 48; McPherson *v.* Snowden, 19 Md. 197; Doe *v.* Donelly, 5 N. Brunsw. 238.

87. *Alabama.*— Chapman *v.* Abrahams, 61 Ala. 108.

California.— Ramsbottom *v.* Bailey, 124 Cal. 259, 56 Pac. 1036; Chaffee *v.* Browne, 109 Cal. 211, 41 Pac. 1028.

Louisiana.— Potts *v.* Blanchard, 19 La. Ann. 167.

Massachusetts.— Murdock *v.* Chapman, 9 Gray 156.

New York.— Wilson *v.* Wilson, 32 Barb. 328.

Pennsylvania.— Sweetzer *v.* Atterbury, 137 Pa. St. 188, 20 Atl. 569.

Wisconsin.— Hathaway *v.* Juneau, 15 Wis. 262.

England.— Sheldon *v.* Cox, 2 Eden 224, 28 Eng. Reprint 884.

Canada.— Kelly *v.* Imperial Loan, etc., Co., 11 Can. Sup. Ct. 516.

See 35 Cent. Dig. tit. "Mortgages," § 254.

Joinder of the wife of a judgment debtor in a duly recorded mortgage of lands conveys her inchoate interest therein, and on the death of the debtor renders the same subject to foreclosure regardless of her subsequent conveyance thereof. Graves *v.* Braden, 62 Ind. 93.

Undivided interest of heir.— A mortgage by an heir on his undivided interest in his father's land includes any and all interest which he owns therein, whether in possession, reversion, or remainder. Carter *v.* McDaniel, 94 Ky. 564, 23 S. W. 507, 15 Ky. L. Rep. 349.

Omission of words of perpetuity.— Where the language employed in a mortgage plainly evidences an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument cannot otherwise be carried into effect, it will be construed to pass such estate, although the word "heirs" or other formal word of perpetuity is not employed. Brown *v.* Hamilton First Nat. Bank, 44 Ohio St. 269, 6 N. E. 648.

88. Risch *v.* Jensen, 92 Minn. 107, 99 N. W. 628 (holding that a mortgage, duly executed, purporting to convey a full section of land, transfers a fraction thereof, which is all that the mortgagor owns); French *v.* Prescott, 61 N. H. 27.

89. *Alabama.*— Butler *v.* Gazzam, 81 Ala. 491, 1 So. 16.

Arkansas.— Fitzgerald *v.* Beebe, 7 Ark. 310.

Connecticut.— Mills *v.* Shepard, 30 Conn. 98.

Illinois.— Irwin *v.* Brown, 145 Ill. 199, 34 N. E. 43; Griffin *v.* Griffin, 141 Ill. 373, 31 N. E. 131.

Kentucky.— Davis *v.* Willson, 115 Ky. 639, 74 S. W. 696, 25 Ky. L. Rep. 21.

Michigan.— Schafer *v.* Hauser, 111 Mich. 622, 70 N. W. 136, 66 Am. St. Rep. 403, 35 L. R. A. 835. See also Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

New Jersey.— Parsons *v.* Lent, 34 N. J. Eq. 67.

New York.— Tarbel *v.* Bradley, 7 Abb. N. Cas. 273 [*affirmed* in 86 N. Y. 280].

Pennsylvania.— Brooke *v.* Bordner, 125 Pa. St. 470, 17 Atl. 467; Berryhill *v.* Kirchner, 96 Pa. St. 489.

Wisconsin.— Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512.

United States.— Shirras *v.* Caig, 7 Cranch 34, 3 L. ed. 260.

England.— *In re* Evans, [1897] 1 Ir. 410; Woodburn *v.* Grant, 22 Beav. 483, 52 Eng. Reprint 1194; Kensington *v.* Bouverie, 7 H. L. Cas. 559, 6 Jur. N. S. 105, 29 L. J. Ch. 537, 11 Eng. Reprint 222; Green *v.* Mortimer, 3 L. T. Rep. N. S. 642.

See 35 Cent. Dig. tit. "Mortgages," § 254.

Joint mortgages.— A single mortgage securing obligations for the price, given by joint purchasers of distinct undivided portions of land, covers, as against each, his interest only. Walton *v.* Lizardi, 15 La. 588.

90. L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Rathbone *v.* Hooney, 58 N. Y. 463; Baltimore, etc., R. Co. *v.* Ralston, 41 Ohio St. 573; Foxcroft *v.* Mallett, 4 How. (U. S.) 353, 11 L. ed. 1008.

91. Lincoln Bldg., etc., Assoc. *v.* Hass, 10 Nebr. 581, 7 N. W. 327; Williams *v.* Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191.

92. Wiswall *v.* Ross, 4 Port. (Ala.) 321; Bock *v.* Bock, 24 W. Va. 586, both holding that a second deed of trust, or a mortgage, executed after the creation of a prior charge

he has no title at all the mortgage is void,[93] except in the case where the mortgage is so framed that an after-acquired title may inure to the benefit of the mortgagee.[94]

b. Property Fraudulently Acquired. Where one executes a mortgage upon land to which he holds the legal title by a fraud, either because the deed to him was obtained from the grantor by fraud or because it was voluntarily executed by such grantor with a purpose to defraud his creditors, it is generally held that the mortgage is nevertheless good so far as to protect the rights of an innocent mortgagee, parting with value, and having no notice of the fraud.[95]

c. Interest Under Contract of Purchase. A mortgage given by one holding land under an executory contract for its purchase covers his interest, whatever it may be, at the date of the mortgage,[96] giving the mortgagee the right to complete the purchase if his mortgagor refuses to do so,[97] and the mortgagee cannot be ousted of his rights by a rescission of the contract of sale by the original parties to it.[98] When a conveyance is made to the mortgagor pursuant to the contract, the mortgage then attaches upon the legal title thus vested in him.[99]

d. After-Acquired Title. Where a mortgage contains full covenants of warranty, a title to the premises, acquired by the mortgagor after its execution, inures to the benefit of the mortgagee and is bound by the mortgage.[1] And this

by mortgage or deed of trust, conveys only the grantor's equity of redemption, not the legal title.

93. Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507; Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295. *Compare* Doherty *v.* Hogan, 1 N. Brunsw. Eq. 113.

Where the wrong lot was mortgaged through error, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title, it was held that he should be ordered to account for the proceeds of the sale, not exceeding the mortgage, with interest and costs. Lundy *v.* McKamis, 11 Grant Ch. (U. C.) 578.

94. See *infra*, XII, A, 2, d.

95. State *v.* Matthews, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308; Cline *v.* Wixson, 128 Mich. 255, 87 N. W. 207; Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199; Oakley *v.* Macrum, 8 Pa. Cas. 523, 11 Atl. 320. And see *supra*, IV, B, 3. But *compare* Vica Valley, etc., R. Co. *v.* Mansfield, 84 Cal. 560, 24 Pac. 145.

Possession of real owner as notice to mortgagee.— Where a party fraudulently obtains a deed of conveyance, without consideration, from the owner of lands, and surreptitiously places it on the record, and afterward mortgages the land to a third person, the owner in the meantime being in the open and visible possession of the land, such possession will be notice to the mortgagee of the fraud perpetrated upon the owner and of his rights, and the mortgage will not be a valid lien on the property. Rea *v.* Croessman, 95 Ill. App. 70.

96. *Georgia.*— Harvill *v.* Lowe, 47 Ga. 214.

Illinois.—Alden *v.* Garver, 32 Ill. 32.

Michigan.— Balen *v.* Mercier, 75 Mich. 42, 42 N. W. 666; Wing *v.* McDowell, Walk. 175.

Ohio.— Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316.

England.— Rose *v.* Watson, 10 H. L. Cas. 672, 10 Jur. N. S. 297, 33 L. J. Ch. 385, 10 L. T. Rep. N. S. 106, 3 New Rep. 673, 12 Wkly. Rep. 585, 11 Eng. Reprint 1187.

97. Sinclair *v.* Armitage, 12 N. J. Eq. 174; Greensboro Bank *v.* Clapp, 76 N. C. 482.

98. Alden *v.* Garver, 32 Ill. 32; Sinclair *v.* Armitage, 12 N. J. Eq. 174.

99. Kline *v.* Ragland, 47 Ark. 111, 14 S. W. 474; Louisville Bank *v.* Baumeister, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845.

1. *Alabama.*— Howze *v.* Dew, 90 Ala. 178, 7 So. 239, 24 Am. St. Rep. 783.

Connecticut.— Hoyt *v.* Dimon, 5 Day 479.

Dakota.— Yerkes *v.* Hadley, 5 Dak. 324, 40 N. W. 340.

Illinois.— Gochenour *v.* Mowry, 33 Ill. 331.

Iowa.— Iowa L. & T. Co. *v.* King, 58 Iowa 598, 12 N. W. 595; Rice *v.* Kelso, 57 Iowa 115, 7 N. W. 3, 10 N. W. 335; Warburton *v.* Mattox, Morr. 367.

Kansas.— Watkins *v.* Houck, 44 Kan. 502, 24 Pac. 361.

Michigan.—Caple *v.* Switzer, 122 Mich. 636, 81 N. W. 560.

New Hampshire.— Parsons *v.* Little, 66 N. H. 339, 20 Atl. 958.

United States.— Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34.

See 35 Cent. Dig. tit. "Mortgages," § 256. And see *supra*, VIII, C, 2.

If the owner of an estate in remainder executes a mortgage on the property, containing the usual covenants of warranty, the mortgage will attach to his after-acquired estate, after the termination of the life-estate on which the remainder was limited, and may be enforced against his interest thus acquired. Iowa L. & T. Co. *v.* King, 58 Iowa 598, 12 N. W. 595.

Subsequent interest as mortgagee.— Where one who has no title to property gives a mortgage upon it, and afterward himself takes a mortgage from the real owner, his interest thereunder does not vest in his mortgagee, as such interest is not real estate, but only a personal asset. Turman *v.* Sanford, 69 Ark. 95, 61 S. W. 167.

is true where a statute[2] attributes a like effect to any deed or mortgage which purports to convey the property in fee simple;[3] provides that the use of the words "grant, bargain and sell" shall operate as a covenant of title;[4] or generally that a mortgage shall vest in the mortgagee all the title and interest of the mortgagor, whether acquired before or after its execution.[5] And in equity a mortgage will be held to bind an after-acquired title, on the ground of an executory agreement attaching to the title when acquired, or on the ground of an estoppel of the mortgagor to defeat or impair the security which he has given by the hostile use of a subsequently acquired right or title.[6] But this rule does not

Necessity of covenants of warranty.— In Arkansas, by the aid of a statute, an after-acquired title inures to the benefit of a mortgagee without any covenant of warranty. Kline *v.* Ragland, 47 Ark. 111, 14 S. W. 474. But in other states it has been held that this cannot result without the aid of covenants in the mortgage. Jones *v.* Wilson, 57 Ala. 122; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280. In New York a mortgage given before the acquisition by the mortgagor of the property therein described, and without covenants of seizin or warranty, has no greater effect than a quitclaim deed and is not operative on a title subsequently acquired by the mortgagor. Donovan *v.* Twist, 85 N. Y. App. Div. 130, 83 N. Y. Suppl. 76. And see Jackson *v.* Littell, 56 N. Y. 108; Sparrow *v.* Kingman, 1 N. Y. 242; Jackson *v.* Hubble, 1 Cow. 613; Jackson *v.* Wright, 14 Johns. 193.

Mortgage of right, title, and interest.— A mortgage or deed of trust which does not purport to convey an estate in fee simple absolute in the lands, but which merely quitclaims all the right, estate, title, and demand which the grantor has or ought to have in the property, is not such a conveyance as that an after-acquired title of the mortgagor will inure to the mortgagee. Bowen *v.* McCarthy, 127 Ill. 17, 18 N. E. 757; Holbrook *v.* Debo, 99 Ill. 372. And see Cook *v.* Prindle, (Iowa 1895) 63 N. W. 187.

Subsequent title fraudulently acquired.— Where a mortgagor, after the execution of the mortgage, obtains judgment fraudulently quieting his title to the mortgaged land against one who is the owner thereof, and the judgment is subsequently vacated, with the consent of all the parties thereto, on account of the fraud, neither the mortgagor nor the mortgagee acquires any benefit or title under the judgment. Watkins *v.* Houck, 44 Kan. 502, 24 Pac. 361.

Subsequent title expressly excepted.— Where a second mortgage is given with a covenant against "the lawful claims and demands of all persons except those claiming under the prior mortgage," and the property is sold under the prior mortgage and eventually comes into the ownership of the mortgagor, he is not estopped to claim the fee unencumbered as against the junior mortgagee, since he now holds under the first mortgage, which was expressly excepted in his covenants. Huzzey *v.* Heffernan, 143 Mass. 232, 9 N. E. 570.

Where manifest injustice would result from the application of the rule that a mortgagor's after-acquired title inures to the benefit of the mortgagee, it will not be applied; as, where it would result in cutting out an unpaid vendor of the land. Hawkins *v.* Harlan, 68 Cal. 236, 9 Pac. 108.

2. See the statutes of the different states.

3. Stewart *v.* Powers, 98 Cal. 514, 33 Pac. 486; Trope *v.* Kerns, 83 Cal. 553, 23 Pac. 691; Orr *v.* Stewart, 67 Cal. 275, 7 Pac. 693; Vallejo Land Assoc. *v.* Viera, 48 Cal. 572; Gibbons *v.* Hoag, 95 Ill. 45; Stambach *v.* Fox, 16 Ohio Cir. Ct. 427, 8 Ohio Cir. Dec. 625.

4. Elder *v.* Derby, 98 Ill. 228; Pratt *v.* Pratt, 96 Ill. 184; Boyd *v.* Haseltine, 110 Mo. 203, 19 S. W. 822.

5. Campbell *v.* Wambole, 3 Dak. 184, 13 N. W. 567; Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; Brayton *v.* Merithew, 56 Mich. 166, 22 N. W. 259.

6. *California.*— Henderson *v.* Grammar, 66 Cal. 332, 5 Pac. 488; Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449.

Colorado.— Hubbard *v.* Mulligan, 13 Colo. App. 116, 57 Pac. 738.

Georgia.— Hill *v.* O'Bryan, 104 Ga. 137, 30 S. E. 996.

Illinois.— Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946; Taylor *v.* Kearn, 68 Ill. 339; Bybee *v.* Hageman, 66 Ill. 519; Hitchcock *v.* Fortier, 65 Ill. 239; Wells *v.* Somers, 4 Ill. App. 297.

Michigan.— Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130; Brayton *v.* Merithew, 56 Mich. 166, 22 N. W. 259; Toms *v.* Boyes, 50 Mich. 352, 15 N. W. 506.

Minnesota.— Swedish-American Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 83 Minn. 377, 86 N. W. 420.

Missouri.— Cockrill *v.* Bane, 94 Mo. 444, 7 S. W. 480.

New Jersey.— Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277.

New York.— Judd *v.* Seekins, 62 N. Y. 266; Griswold *v.* Atlantic Dock Co., 21 Barb. 225.

Pennsylvania.— Rauch *v.* Dech, 116 Pa. St. 157, 9 Atl. 180, 2 Am. St. Rep. 598; Tryon *v.* Munson, 77 Pa. St. 250; Clark *v.* Martin, 49 Pa. St. 299.

Washington.— Osborn *v.* Scottish-American Co., 22 Wash. 83, 60 Pac. 49.

Wisconsin.— Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507; Spiess *v.* Neuberg, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; Bull *v.* Sykes, 7 Wis. 449.

United States.— Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A.

apply to a purchase-money mortgage given as a part of the same transaction whereby the land is sold.[7]

e. After-Acquired Property. A mortgage may be so framed as to cover property which the mortgagor does not own, an equitable lien attaching immediately upon his acquisition of it, or to include, in addition to the property specifically described, other property afterward acquired by the mortgagor.[8] But no lien will attach to after-acquired property unless it is mentioned in the mortgage or referred to in terms clearly showing an intention to bind it.[9] And the lien of the mortgage can attach to such property only in the condition in which

350; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,369, 2 Woods 263; Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

England.— Noel *v.* Bewley, 3 Sim. 103, 6 Eng. Ch. 103, 57 Eng. Reprint 938.

Canada.— Mackenzie *v.* Building, etc., Assoc., 28 Can. Sup. Ct. 407 [*affirming* 24 Ont. App. 599].

See 35 Cent. Dig. tit. "Mortgages," § 256.

7. Randall *v.* Lower, 98 Ind. 255; Morgan *v.* Graham, 35 Iowa 213; Brown *v.* Phillips, 40 Mich. 264; Pitman *v.* Henry, 50 Tex. 357.

8. *Illinois.*— Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23.

Indiana.— Pennsylvania Mortg. Trust Co. *v.* Moore, 150 Ind. 465, 50 N. E. 72.

Maryland.— Brady *v.* Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737.

Massachusetts.—Harriman *v.* Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004, such property not charged as against an assignee in insolvency, unless possession is taken under the mortgage.

Michigan.— Curtis *v.* Wilcox, 49 Mich. 425, 13 N. W. 803.

Missouri.— Johnston *v.* Morrow, 60 Mo. 339.

New Jersey.— Monmouth County Electric Co. *v.* McKenna, 68 N. J. Eq. 160, 60 Atl. 32; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377. A mortgage covering after-acquired property of the mortgagor does not include chattels delivered to him under a conditional contract of sale. General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101.

New York.— Central Trust Co. *v.* West India Imp. Co., 169 N. Y. 314, 62 N. E. 387; Metropolitan Trust Co. *v.* Dolgeville Electric Light, etc., Co., 35 Misc. 467, 71 N. Y. Suppl. 1055.

Pennsylvania.— Bailey *v.* Allegheny Nat. Bank, 104 Pa. St. 425.

Rhode Island.— Cummings *v.* Consolidated Mineral Water Co., 27 R. I. 195, 61 Atl. 353.

South Carolina.— Eason *v.* Miller, 25 S. C. 555.

Wisconsin.—Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114.

Wyoming.— Frank *v.* Hicks, 4 Wyo. 502, 35 Pac. 475, 1025, an equitable mortgage may take effect on after-acquired property.

United States.— Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014; Beall *v.* White, 94 U. S. 382, 24 L. ed. 173; New England Water Works Co. *v.* Farmers' L. & T. Co., 136 Fed. 521, 69 C. C. A. 297; Knowles Loom Works *v.* Ryle, 97 Fed. 730, 38 C. C. A. 494; Harris *v.* Youngstown Bridge Co., 93 Fed. 355, 35 C. C. A. 341; National Waterworks Co. *v.* Kansas City, 78 Fed. 428; Boston Safe-Deposit, etc., Co. *v.* Bankers', etc., Tel. Co., 36 Fed. 288; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,369, 2 Woods 263.

England.— *In re* Clarke, 36 Ch. D. 348, 56 L. J. Ch. 981, 57 L. T. Rep. N. S. 823, 36 Wkly. Rep. 293; Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171, 11 Eng. Reprint 999.

Canada.— Imrie *v.* Archibald, 25 Can. Sup. Ct. 368.

See 35 Cent. Dig. tit. "Mortgages," § 255.

Restriction to particular property.— A mortgage purporting to convey all after-acquired lands in a certain county, but containing covenants for further conveyance, and assurance of property afterward acquired for the business of the mortgagor, will cover the latter only. Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350.

As to whether a mortgage by a railroad includes after-acquired property see Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014; Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279; Shaw *v.* Bill, 95 U. S. 10, 24 L. ed. 333; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693 [*reversed* in 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 667]; Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793; Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442; Scott *v.* Clinton, etc., R. Co., 21 Fed. Cas. No. 12,527, 6 Biss. 529.

9. *Colorado.*— Crippen *v.* Comstock, 17 Colo. App. 89, 66 Pac. 1074.

Connecticut.— Adams *v.* Manning, 51 Conn. 5.

Massachusetts.—Brace *v.* Yale, 4 Allen 393.

New York.— Mutual L. Ins. Co. *v.* Voorhis, 71 Hun 117, 24 N. Y. Suppl. 529.

Texas.— Ross *v.* Lafferty, (Civ. App. 1906) 95 S. W. 18.

Vermont.— Paddock *v.* Potter, 67 Vt. 360, 31 Atl. 784; Kendall *v.* Hathaway, 67 Vt. 122, 30 Atl. 859.

Washington.— Commercial Nat. Bank *v.* Johnson, 16 Wash. 536, 48 Pac. 267.

United States.— Maxwell *v.* Wilmington Dental Mfg. Co., 77 Fed. 938.

See 35 Cent. Dig. tit. "Mortgages," § 255.

it comes into the mortgagor's hands; so that if it is already subject to vendor's liens, mortgages, or other encumbrances, the general mortgage does not displace them, although they may be junior in point of time.[10]

3. UNDIVIDED INTEREST. An undivided interest in realty may be made the subject of a mortgage.[11] But where a partition of the land is effected by judicial proceedings, resulting in the allotment of a portion of the land to the mortgagor, the lien of the mortgage is lifted from the whole tract and settles upon the portion so set off.[12] But if no portion of the land is allotted to the mortgagor, the lien of the mortgage is entirely divested from the land, but it attaches to the owelty to which the mortgagor is entitled, and if the land is sold at judicial sale under the partition, the lien attaches to the proceeds of the sale in proportion to the interest of the mortgagor.[13] Where two tenants in common of land, which is subject as a whole to the lien of a mortgage, divide the land equally between them by deed of partition, the whole land will continue equally liable to the mortgage, in the absence of any written agreement by the mortgagee to restrict it to one of the halves.[14]

4. EXTENSION TO OR SUBSTITUTION OF OTHER PROPERTY. Although the lien of a mortgage cannot generally be extended or shifted to any other property than that particularly described in it, by any arrangement of the parties short of the making of a new mortgage, at least as against interested third parties,[15] yet if the property is sold at judicial sale, to the displacement of the mortgage, its lien may be transferred to the proceeds of the sale;[16] and so, if the property is taken

10. New York, etc., R. Co. *v.* Daly, 57 N. J. Eq. 347, 45 Atl. 1092; Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277; Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, 60 C. C. A. 588; Venner *v.* Farmers' L. & T. Co., 90 Fed. 348, 33 C. C. A. 95; Harris *v.* Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69; Frank *v.* Denver, etc., R. Co., 23 Fed. 123; Loomis *v.* Davenport, etc., R. Co., 17 Fed. 301, 3 McCrary 489.

11. Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247, holding that where five sixths of a tract of land owned by two tenants in common is subject to a vendor's lien, a mortgage executed by one of the tenants in common on his undivided half of the land will embrace one half of the unencumbered one sixth, as well as one half of the encumbered five sixths. And see *supra*, IV, D, 2.

12. *Alabama.*— Espalla *v.* Touart, 96 Ala. 137, 11 So. 219.

Illinois.— Rochester L., etc., Co. *v.* Morse, 181 Ill. 64, 54 N. E. 628; Cheney *v.* Ricks, 168 Ill. 533, 48 N. E. 75; Loomis *v.* Riley, 24 Ill. 307.

Maine.— Randell *v.* Mallett, 14 Me. 51; Williams College *v.* Mallett, 12 Me. 398.

Massachusetts.— Bradley *v.* Fuller, 23 Pick. 1.

Missouri.— Watson *v.* Priest, 9 Mo. App. 263.

New York.— Jackson *v.* Pierce, 10 Johns. 414.

Pennsylvania.— Reed *v.* Fidelity Ins., etc., Co., 113 Pa. St. 574, 6 Atl. 163; Long's Appeal, 77 Pa. St. 151.

See 35 Cent. Dig. tit. "Mortgages," § 258.

Protection of mortgagee.— Where a tenant in common gives a mortgage on a specific part of the common property, describing it by metes and bounds, under a belief that he owns the whole in severalty, the mortgagee has an equity to require, when partition is sought by the other cotenants, that it shall be so made as to allot the specific portion covered by the mortgage as the share of the mortgagor, and thereby save the lien of the mortgage, if this can be done without prejudice to the rights of the other tenants. Kennedy *v.* Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 851.

13. Reed *v.* Fidelity Ins., etc., Co., 113 Pa. St. 574, 6 Atl. 163.

14. Johnston *v.* McCartney, 12 N. Brunsw. 220.

15. *Illinois.*— Hardin *v.* Eames, 5 Ill. App. 153.

Pennsylvania.— Cake's Estate, 157 Pa. St. 457, 27 Atl. 773.

South Carolina.— McLure *v.* Melton, 34 S. C. 377, 13 S. E. 615, 27 Am. St. Rep. 820, 13 L. R. A. 723.

Washington.— Kelso *v.* Russell, 33 Wash. 474, 74 Pac. 561.

West Virginia.— Smith *v.* Patton, 12 W. Va. 541.

Canada.— Bourk *v.* Cormier, 16 Quebec Super. Ct. 295.

See 35 Cent. Dig. tit. "Mortgages," § 259.

Where a mortgagee of certain land conveyed another piece of land, and in the conveyance described the property conveyed as subject to his mortgage, it was held that, as against the grantee and all persons claiming under him, the land conveyed was as effectually charged with the encumbrance of the mortgage debt as if it had been expressly mortgaged therefor. Sweetzer *v.* Jones, 35 Vt. 317, 82 Am. Dec. 639.

16. Stockett *v.* Taylor, 3 Md. Ch. 537; Reed *v.* Fidelity Ins., etc., Co., 113 Pa. St.

under the power of eminent domain, the damages awarded become a substitute therefor and the mortgage is a specific lien on the fund.[17] Moreover a covenant in the mortgage to insure the property for the mortgagee's benefit creates a specific equitable lien on the insurance money.[18]

5. APPURTENANCES. A mortgage of land with the "appurtenances" covers both the incorporeal hereditaments annexed to the realty, and also such physical property, or rights to or in connection with it, as are used with and for the benefit of the land and are reasonably necessary for its proper enjoyment.[19] And a mortgage of a building, such as a mill, store, or manufacturing plant may cover, as appurtenant, the land on which it stands and which is necessary to its proper use.[20]

6. ACCRETIONS. Land added to mortgaged property, which is bounded on a lake or stream, either by alluvial formation or by the recession of the waters, becomes subject to the lien of the mortgage.[21]

7. PERSONAL PROPERTY IN GENERAL. A mortgage of realty will not ordinarily cover personal property found or placed in or upon the mortgaged premises or used in connection therewith,[22] nor will it embrace the rents, issues, and profits

574, 6 Atl. 163. *Compare* Myers *v.* Pierce, 86 Ga. 786, 12 S. E. 978.

17. Keller *v.* Bading, 169 Ill. 152, 48 N. E. 436, 61 Am. St. Rep. 159; Union Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 146 Ill. 320, 34 N. E. 948; Calumet River R. Co. *v.* Brown, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84; Sherwood *v.* La Fayette, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414; Sawyer *v.* Landers, 56 Iowa 422, 9 N. W. 341; Utter *v.* Richmond, 112 N. Y. 610, 20 N. E. 554; Auburn Bank *v.* Roberts, 44 N. Y. 192; Astor *v.* Miller, 2 Paige (N. Y.) 68 [*reversed* on other grounds in 5 Wend. 603].

18. *In re* Sands Ale Brewing Co., 21 Fed. Cas. No. 12,307, 3 Biss. 175.

19. Frey *v.* Drahos, 6 Nebr. 1, 29 Am. Rep. 353; Washington Trust Co. *v.* Morse Iron Works, etc., Co., 106 N. Y. App. Div. 195, 94 N. Y. Suppl. 495.

Right of access to land mortgaged included. Putnam *v.* Putnam, 77 N. Y. App. Div. 554, 78 N. Y. Suppl. 987.

Easement of light and air included.— Wood *v.* Grayson, 22 App. Cas. (D. C.) 432.

Dam and water power included.— Lanoue *v.* McKinnon, 19 Kan. 408; Babcock *v.* Utter, 1 Abb. Dec. (N. Y.) 27, 1 Keyes 115, 397, 32 How. Pr. 439. *Compare* Purdy *v.* Ridgefield, 74 Conn. 74, 49 Atl. 865 (holding that where the owner of a tract of land on which a mill was situated, and who also owned another tract covered by a pond from which water was conducted to such mill, mortgaged the mill tract, but did not include the pond, a purchaser on foreclosure did not acquire title to the land covered by the pond); Bass *v.* Buker, 6 Mont. 442, 12 Pac. 922.

Right to draw water from reservoir included.— Hankey *v.* Clark, 110 Mass. 262.

Irrigation ditch included.— Visalia Bank *v.* Smith, 146 Cal. 398, 81 Pac. 542.

Riparian rights included.— Boon *v.* Kent, 42 N. J. Eq. 131, 7 Atl. 344. *Compare* Book *v.* West, 29 Wash. 70, 69 Pac. 630.

Right to work mines included.— Gloucester County Bank *v.* Rudry Merthyr Steam, etc., Colliery Co., [1895] 1 Ch. 629, 64 L. J. Ch. 451, 72 L. T. Rep. N. S. 375, 2 Manson 223, 12 Reports 183, 4 Wkly. Rep. 486. See also Staples *v.* May, 87 Cal. 178, 25 Pac. 346.

Pole line.— A mortgage of real estate and an electric light plant in one borough, with its appurtenances, covers a pole line in another borough, physically and continuously attached to the plant and constituting an essential part of it. Dreisbach *v.* Ross, 195 Pa. St. 278, 45 Atl. 722.

Good-will.— A mortgage of premises used for trade does not ordinarily pass the good-will of the business (*In re* Bennett, [1899] 1 Ch. 316, 68 L. J. Ch. 104, 47 Wkly. Rep. 406; *Ex p.* Punnett, 16 Ch. D. 226, 50 L. J. Ch. 212, 44 L. T. Rep. N. S. 226, 19 Wkly. Rep. 129); certainly not where the good-will depends on the personal skill of the owner (Cooper *v.* Metropolitan Bd. of Works, 25 Ch. D. 472, 53 L. J. Ch. 109, 50 L. T. Rep. N. S. 602, 32 Wkly. Rep. 709).

20. *Alabama.*— Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241.

Connecticut.— Frink *v.* Branch, 16 Conn. 260.

Indiana.— Wilds *v.* Ward, 138 Ind. 373, 37 N. E. 974.

Massachusetts.— Auburn Cong. Church *v.* Walker, 124 Mass. 69; Greenwood *v.* Murdock, 9 Gray 20, 69 Am. Dec. 272.

Wisconsin.— Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795.

See 35 Cent. Dig. tit. "Mortgages," § 260.

21. *Illinois.*— Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415.

Kentucky.— Cruikshanks *v.* Wilmer, 93 Ky. 19, 18 S. W. 1018, 13 Ky. L. Rep. 888.

Louisiana.— Hollingsworth *v.* Chaffe, 33 La. Ann. 547.

Ohio.— Rhoades *v.* Raymer, 6 Ohio Cir. Ct. 68, 3 Ohio Cir. Dec. 353.

Pennsylvania.— Lorkin *v.* Dyer, 1 Del. Co. 338.

See 35 Cent. Dig. tit. "Mortgages," § 261.

22. Bofenschen's Succession, 29 La. Ann. 711; McKeage *v.* Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471.

Where the owners of land leave thereon personal property until after the foreclosure of a mortgage on the land, the mortgagee or

arising from the property unless these are expressly made subject to it.[23] But personal property may be brought within the scope of a mortgage either by specific description or by the use of such general terms as "all the property real and personal."[24] In case, however, a description of certain items of real and personal property is followed by a general grant of "all other personal property" or "all personal effects of every nature," the general terms will include only such property as is *ejusdem generis* with that enumerated.[25] It has been held that an abstract of title, delivered by the owner to the mortgagee's attorney, is part of the security and cannot be reclaimed until the mortgage is paid.[26]

8. CROPS AND TIMBER.[27] Crops growing on mortgaged land are covered by the mortgage, whether planted before or after its execution, and until they are severed the mortgage attaches as well to the crops as to the land.[28] And if the land be sold for condition broken before severance, the purchaser is entitled to the growing crops, not only as against the mortgagor, but against all persons claiming in any manner through or under him subsequent to the recording of the mortgage.[29] Growing timber constitutes a portion of the realty and is

foreclosure purchaser is entitled to the possession and use thereof, as against one who has not acquired the personalty from the original owners, but claims under a conveyance of the land made after the execution of the mortgage. O'Donnell *v.* Burroughs, 55 Minn. 91, 56 N. W. 579.

A mortgage on a plantation covers the animals, implements, and machinery used in its cultivation. Townsend *v.* Payne, 42 La. Ann. 909, 8 So. 626; Weil *v.* Lapeyre, 38 La. Ann. 303; Dougherty's Succession, 32 La. Ann. 412. *Contra*, Vason *v.* Ball, 56 Ga. 268.

In a mortgage of mining property the term "equipments" includes the pit mules. Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159. *Compare* Kansas L. & T. Co. *v.* Electric R., etc., Co., 116 Fed. 904.

23. *Alabama.* — Alabama Nat. Bank *v.* Mary Lee Coal, etc., Co., 108 Ala. 288, 19 So. 404.

Illinois.— Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140, 51 N. E. 200; Ryan *v.* Illinois Trust, etc., Bank, 100 Ill. App. 251.

Iowa.— Funk *v.* Mercantile Trust Co., 89 Iowa 264, 56 N. W. 496.

Kentucky.— Guill *v.* Corinth Deposit Bank, 68 S. W. 870, 24 Ky. L. Rep. 482.

Pennsylvania.— Sheaff's Appeal, 55 Pa. St. 403.

United States.— Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339.

See 35 Cent. Dig. tit. "Mortgages," § 262. And see *supra*, IV, E.

Resorting to corpus of estate.— Although a mortgage is expressly declared to be upon the "rents, issues and profits" only, yet if these prove insufficient to satisfy the mortgage debt, recourse may be had to the *corpus* of the estate. Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

24. Central Trust Co. *v.* West India Imp. Co., 48 N. Y. App. Div. 147, 63 N. Y. Suppl. 853; New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 30 N. Y. App. Div. 89, 51 N. Y. Suppl. 749; Feckheimer *v.* Norfolk Nat. Exch. Bank, 79 Va. 80; Andrews *v.* National Foundry, etc., Works, 61 Fed. 782, 10 C. C. A. 60.

25. Bellamy *v.* Bellamy, 6 Fla. 62.

26. Equitable Trust Co. *v.* Burley, 110 Ill. App. 538.

27. As to relative rights of parties before breach of condition as to crops and cutting timber see *infra*, XV, D.

As to rights of foreclosure purchaser as to growing crops and standing timber see *infra*, XX, D, 4.

28. Yates *v.* Smith, 11 Ill. App. 459; Rankin *v.* Kinsey, 7 Ill. App. 215.

Fruits of mortgaged property are subject to the mortgage while in the mortgagor's hands, but they cease to be so after its transfer to a *bona fide* purchaser. Bludworth *v.* Hunter, 9 Rob. (La.) 256; Skillman *v.* Lacy, 5 Mart. N. S. (La.) 50.

In California a mortgage of land together with the "rents, issues and profits thereof" is a lien on the crops then growing on the premises (Montgomery *v.* Merrill, 65 Cal. 432, 4 Pac. 414); but such a mortgage will not create a lien on a crop subsequently raised, unless it is executed in the manner required for the execution of chattel mortgages (Modesto Bank *v.* Owens, 121 Cal. 223, 53 Pac. 552).

Seizure and sale under execution as severance.— Although, as between the parties to a judgment, the seizure and sale of growing crops on execution issued on the judgment will constitute a severance of the crops from the realty, this is not so as against a mortgagee whose mortgage was made before the execution became a lien. Anderson *v.* Strauss, 98 Ill. 485.

29. Yates *v.* Smith, 11 Ill. App. 459; Sugden *v.* Beasley, 9 Ill. App. 71; Harmon *v.* Fisher, 9 Ill. App. 22; Rankin *v.* Kinsey, 7 Ill. App. 215. *Compare* Knox *v.* Oswald, 21 Ill. App. 105.

Crops on homestead.— A purchaser at a sale under a mortgage is entitled to the crops growing on the mortgaged premises; but where, by a defect in the acknowledgment, the mortgage deed does not convey the homestead right, such purchaser is not entitled to that portion of the growing crops sown upon the homestead. Brock *v.* Leighton, 11 Ill. App. 361.

embraced by a mortgage on the land,[30] unless by the terms of the mortgage it is excepted.[31]

9. Improvements on the Land. Buildings or other improvements of a permanent character, placed on real estate by the mortgagor while the property is encumbered by the mortgage, become a part of the mortgaged estate and subject to the lien of the mortgage.[32] And the lien of the mortgage is not necessarily impaired by the removal of a building from the premises without the consent of the mortgagee.[33]

10. Machinery. When machinery is placed in a mill, foundry, or factory by the owner of the land, and either actually or constructively attached to the building, and is of such a character that it is suitable only for use in that connection, and is necessary for the prosecution of the business for which the plant was erected, it must be regarded as a fixture which will pass with the realty under a mortgage thereon.[34]

Mortgage of crop as severance.— A mortgage of the crops made by the mortgagor of the realty, in possession, is a sale of the crop and operates such a severance that they do not pass under a subsequent sale under the mortgage on the realty. White *v.* Pulley, 27 Fed. 436.

30. Maples *v.* Millon, 31 Conn. 598 (trees and shrubs planted temporarily in a nursery included); Adams *v.* Beadle, 47 Iowa 439, 29 Am. Rep. 487; Hutchins *v.* King, 1 Wall. (U. S.) 53, 17 L. ed. 544; *In re* Bruce, 4 Fed. Cas. No. 2,045, 9 Ben. 236.

31. Moisant *v.* McPhee, 92 Cal. 76, 28 Pac. 46; Mercantile Trust Co. *v.* Southern States Land, etc., Co., 86 Fed. 711, 30 C. C. A. 349.

32. *California.*— Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Illinois.— Baird *v.* Jackson, 98 Ill. 78; Wood *v.* Whelen, 93 Ill. 153; Dorr *v.* Dudderar, 88 Ill. 107; Matzon *v.* Griffin, 78 Ill. 477; Martin *v.* Beatty, 54 Ill. 100; Mann *v.* Mann, 49 Ill. App. 472; Powell *v.* Rogers, 11 Ill. App. 98; Asher *v.* Mitchell, 9 Ill. App. 335.

Kentucky.— Louisville Bank *v.* Baumiester, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845.

Louisiana.— New Orleans Nat. Bank *v.* Raymond, 29 La. Ann. 355, 29 Am. Rep. 335.

Michigan.— Morley *v.* Quimby, 132 Mich. 140, 92 N. W. 943; Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604; Miles *v.* McNaughton, 111 Mich. 350, 69 N. W. 481.

New York.— Gibson *v.* American L. & T. Co., 58 Hun 443, 12 N. Y. Suppl. 444.

Tennessee.— Grosvenor *v.* Bethell, 93 Tenn. 577, 26 S. W. 1096.

Texas.— Citizens' Nat. Bank *v.* Strauss, 29 Tex. Civ. App. 407, 69 S. W. 86; Bermea Land, etc., Co. *v.* Adoue, 20 Tex. Civ. App. 655, 50 S. W. 131.

West Virginia.— Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

England.— Turner *v.* Dickenson, 3 C. & F. 593, 6 Eng. Reprint 1559.

See 35 Cent. Dig. tit. "Mortgages," § 264.

Railroad hotel.— A railroad company, having given a mortgage on one of its lines, "as said railroad now is or may be hereafter constructed, maintained, operated, or acquired, together with all the . . . appurtenances thereunto belonging," bought a lot of land and built a hotel thereon, for the benefit of the company, in furtherance of its business, and for the convenience and accommodation of its employees and passengers, and it was held that the building was appurtenant to the railroad and was covered by the mortgage. U. S. Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 480.

House built by stranger on mortgaged land.— Where a third party, without the consent of the mortgagee, puts a house on mortgaged land, the right of the mortgagee to sell it as part of the mortgaged property is not affected by the fact that it was put on under an agreement with the mortgagor that it should be and remain the personal property of the third party. Meagher *v.* Hayes, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819.

Temporary structure.— The rule making buildings subsequently erected on the mortgaged land subject to the lien of the mortgage does not apply to a merely temporary structure, built by the mortgagor and his partner with firm money and designed and used for the business purposes of the firm. Kelly *v.* Austin, 46 Ill. 156, 92 Am. Dec. 243.

Mortgagor without title.— Where money was advanced upon a mortgage, and it proved that another than the mortgagor was the beneficial owner of the property, of which the mortgagee was notified at the time of taking the mortgage, it was held, on a bill to quiet title, that the beneficial owner should pay for the improvements which had been made upon the property by the expenditure of the money which the mortgage was given to secure. Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166.

33. As to effect of removal of buildings on lien of mortgage see *infra*, XIV, A, 2, f, (IV).

As to relative rights of parties to mortgage as to removal of buildings see *infra*, XV, D, 4.

34. *California.*—Lavenson *v.* Standard Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147.

Illinois.— Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166; Kloess *v.* Katt, 40 Ill. App. 99; Calumet Iron, etc., Co. *v.* Lathrop, 36 Ill. App. 249; McKinley *v.* Smith, 29 Ill. App. 106.

11. Mortgages of Leaseholds. A mortgage on a leasehold can have no duration beyond the term of the lease, and a mortgagee in possession thereunder can acquire no greater rights by virtue of his possession than the lessee.[35] Nor will it pass to the mortgagee an option to purchase the property at a fixed time, granted to the lessee.[36] But such a mortgage may cover a new term or renewal of the lease,[37] or the rents derived from a sublease joined in by mortgagor and mortgagee,[38] or buildings or other improvements of a permanent character erected by the lessee.[39]

B. Estates and Interests of Parties — 1. In General. It has been previously stated that at common law a mortgage is regarded as passing the legal title to the mortgagee, although in equity it is a mere security for the debt,[40] and that in a majority of the states the latter view has come to prevail, to the exclusion of the common-law theory, either by force of statutes or the ascendancy of equitable principles.[41] Although a mortgage is usually so framed as to convey an estate in fee, nominally or legally, this is not necessarily the case;[42] and where, for want of the word "heirs" or other words of perpetuity, it cannot be held to pass the fee, it may still take effect as creating an estate for the life of the mortgagee.[43] The mortgagee is privy in estate with the mortgagor, in respect to the estate, as it is when he takes the mortgage, and not as it may afterward become, unless that which afterward happens to change the estate is the legal outcome

Kansas.—Cook *v.* Condon, 6 Kan. App. 574, 51 Pac. 587.

Massachusetts.—Allen *v.* Woodard, 125 Mass. 400, 28 Am. Rep. 250; Thompson *v.* Vinton, 121 Mass. 139.

Minnesota.— Beaupre *v.* Dwyer, 43 Minn. 485, 45 N. W. 1094.

New Jersey.— Roddy *v.* Brick, 42 N. J. Eq. 218, 6 Atl. 806.

New York.— Phœnix Mills *v.* Miller, 42 Hun 654.

Pennsylvania.— Kisterbock *v.* Lanning, 4 Pa. Cas. 506, 7 Atl. 596; Lorkin *v.* Dyer, 1 Del. Co. 388.

United States.— Hill *v.* Farmers, etc., Nat. Bank, 97 U. S. 450, 24 L. ed. 1051.

Canada.— McCosh *v.* Barton, 1 Ont. L. Rep. 229.

Property of stranger.— A mortgage covering machinery in a factory and such as may be added thereto will not embrace machinery placed on the mortgaged premises for exhibition by a stranger to the mortgage. Stell *v.* Paschal, 41 Tex. 640. A provision in a trust deed that "all machinery now upon, or which may hereafter be put upon said premises, whether attached or detached" shall be covered by the deed does not apply to machinery afterward put upon the land by a tenant. Polle *v.* Rouse, 73 Miss. 713, 19 So. 481.

Machinery sent out from factory.—A mortgage of certain real estate, together with all the plant and machinery at present in use in the factory situated thereon, does not cover patterns made at the factory, but used in different foundries to which they had been sent for that purpose. McCosh *v.* Barton, 2 Ont. L. Rep. 77.

35. Conn *v.* Tonner, 86 Iowa 577, 53 N. W. 320; Halsted *v.* Colvin, 51 N. J. Eq. 387, 26 Atl. 928; Miller *v.* Warren, 94 N. Y. App. Div. 192, 87 N. Y. Suppl. 1011 [*affirmed* in 182 N. Y. 539, 75 N. E. 1131]. See also Newell *v.* Whigham, 102 N. Y. 20, 6 N. E. 673; Sheldon *v.* Ferris, 45 Barb. (N. Y.) 124.

As to leasehold as mortgageable interest see *supra*, IV, D, 6.

Amounts only to assignment of rents.— A mortgage of a leasehold estate described by metes and bounds is only an assignment of the rents, and, as a mortgage does not confer a power of sale, only the annual rent can be received by the mortgagee, and his debt may be enforced upon the other securities in the mortgage. Hulett *v.* Soullard, 26 Vt. 295.

36. Conn *v.* Tonner, 86 Iowa 577, 53 N. W. 320.

37. Hughes *v.* Howard, 25 Beav. 575, 53 Eng. Reprint 756; Rakestraw *v.* Bruyer, Moseley 189, 25 Eng. Reprint 342, 2 P. Wms. 511, 24 Eng. Reprint 839. See Nesbitt *v.* Tredennick, 1 Ball & B. 29, 46, 12 Rev. Rep. 1.

38. Edwards *v.* Jones, 1 Coll. 247, 8 Jur. 416, 13 L. J. Ch. 371, 63 Eng. Reprint 404.

39. Cross *v.* Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902; Knapp *v.* Jones, 143 Ill. 375, 32 N. E. 382.

40. See *supra*, I, A.

41. See *supra*, I, A.

The mortgaged property may be sold on execution before default in payment as the property of the mortgagor. Wilkins *v.* Wright, 29 Fed. Cas. No. 17,666, 6 McLean 340.

42. "As a man may make a feoffment in fee in mortgage, so a man may make a gift in tail in mortgage, and a lease for term of life, or for term of years, in mortgage; and all such tenants are called 'tenants in mortgage' according to the estates which they have in the land." Littleton Ten. bk. 3, c. 5, § 333.

43. Sedgwick *v.* Laflin, 10 Allen (Mass.) 430; Wheeler *v.* Kirtland, 24 N. J. Eq. 552;

of that which existed when the mortgage was made.[44] A mortgagee for the benefit of creditors is regarded as standing in the position of an assignee, and as representing the rights of the mortgagor only.[45]

2. AFTER DEFAULT OR BREACH OF CONDITION. At common law, on default of payment of the debt secured or other breach of condition of a mortgage, the estate of the mortgagee becomes absolute, although in equity it is subject to redemption before foreclosure.[46] Hence in those states which adhere mainly to the common-law doctrine the effect of a breach of condition is to vest the legal title in the mortgagee,[47] although elsewhere, where the doctrines of equity mainly prevail, the legal title is not divested from the mortgagor, even after default, until foreclosure and sale.[48]

3. AS BETWEEN JOINT MORTGAGEES. Where a mortgage is given to two mortgagees jointly, but to secure separate debts, they do not take as joint tenants but as tenants in common,[49] and they will take, not necessarily by moieties, but undivided interests proportioned to their respective claims.[50]

4. UNDER TRUST DEEDS. Where a trust deed in the nature of a mortgage is given as security for a debt, it is held in some states that the legal title remains in the grantor, and the trustee takes only an interest in the property in the nature of a security for the benefit of the creditor secured.[51] But in others it is considered that the legal title vests in the trustee,[52] in such sense that it will pass by his con-

Smith *v.* Haskins, 22 R. I. 6, 45 Atl. 741. *Contra,* Brown *v.* Hamilton First Nat. Bank, 44 Ohio St. 269, 6 N. E. 648. And see *supra,* VIII, B, 2.

44. Mathes *v.* Cover, 43 Iowa 512.

45. Spackman *v.* Ott, 65 Pa. St. 131.

46. Howe *v.* Lewis, 14 Pick. (Mass.) 329; Frische *v.* Kramer, 16 Ohio 125, 47 Am. Dec. 368. And see *supra,* I, A.

47. Ohio L. Ins., etc., Co. *v.* Winn, 4 Md. Ch. 253; Johnson *v.* Houston, 47 Mo. 227; Doe *v.* Pendleton, 15 Ohio 735; Jaquess *v.* Hamilton County, 1 Disn. (Ohio) 121, 12 Ohio Dec. (Reprint) 524; Soper *v.* Guernsey, 71 Pa. St. 219.

48. Mack *v.* Wetzlar, 39 Cal. 247; Chick *v.* Willetts, 2 Kan. 384; Thayer *v.* Cramer, 1 McCord Eq. (S. C.) 395.

49. Gilson *v.* Gilson, 2 Allen (Mass.) 115; Burnett *v.* Pratt, 22 Pick. (Mass.) 556; Farwell *v.* Warren, 76 Wis. 527, 45 N. W. 217. *Compare* Goodwin *v.* Richardson, 11 Mass. 469. *Contra,* Johnson *v.* Brown, 31 N. H. 405 (the interest of the mortgagees being one of mere security, they are not tenants in common of the land); New York Mut. L. Ins. Co. *v.* Sturges, 32 N. J. Eq. 678 (the tenancy is joint).

50. Donnels *v.* Edwards, 2 Pick. (Mass.) 617.

51. *District of Columbia.*— Wood *v.* Grayson, 22 App. Cas. 432. See, however, Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 23 App. Cas. 587, holding that a trustee who is vested with the legal title to land can pass the same by a conveyance even when made in breach of his trust; and the general power of a trustee to sell and convey the estate is coextensive with his ownership of the legal title; and this general power over the legal title is entirely distinct from the execution of a special power given in respect to the sale of an estate.

Iowa.— Ingle *v.* Culbertson, 43 Iowa 265.

Louisiana.— Tillman *v.* Drake, 4 La. Ann. 16; Hopkins *v.* Lacouture, 4 La. 64.

Missouri.— Chouteau *v.* Riddle, 110 Mo. 366, 19 S. W. 814; Pullis *v.* Kalb, 62 Mo. App. 27.

Ohio.— Martin *v.* Alter, 42 Ohio St. 94.

Texas.— Texas Loan Agency *v.* Gray, 12 Tex. Civ. App. 430, 34 S. W. 650.

See 35 Cent. Dig. tit. "Mortgages," § 277.

Effect of power of sale.— A clause in a mortgage empowering and authorizing the mortgagee to sell the premises at public auction and to execute to the purchaser a conveyance in fee of the premises free and discharged from all equity of redemption does not have the effect of conveying the legal title to the premises away from the mortgagor and his heirs, but only gives a power of sale, which can only be executed in the name of the principal. Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

52. *California.*— Weber *v.* McCleverty, (1906) 86 Pac. 706; Sacramento Bank *v.* Alcorn, 121 Cal. 379, 53 Pac. 813, holding that, although the title passes under a trust deed given to secure a debt, none of the incidents of ownership attach, except that the trustees are deemed to have such estate as will enable them to convey.

Colorado.— Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

Illinois.— Ware *v.* Schintz, 190 Ill. 189, 60 N. E. 67; Farrar *v.* Payne, 73 Ill. 82.

Virginia.— Taylor *v.* King, 6 Munf. 358, 8 Am. Dec. 746. The fact that the owner of a building has given a deed of trust thereon to secure a debt does not make the *cestui que trust* a joint owner of the property. Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. 389, 26 Am. Rep. 364.

United States.— Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83.

See 35 Cent. Dig. tit. "Mortgages," § 277.

veyance, even though made in violation of the terms of the trust,[53] and that his release of the trust deed to the grantor therein, although made without authority and without payment of the debt secured, will restore the legal title to the grantor, as concerns any parties subsequently dealing with the property without notice of the breach of trust.[54] Where this view obtains, the grantor is regarded as retaining an equitable title, or equity of redemption, together with the right to possess and enjoy the estate, unless, as to the latter, there is a different provision in the trust deed.[55]

5. Under Absolute Deed Given as Mortgage. A deed absolute in form, although intended by the parties merely as security for a debt, vests the legal title to the land in the grantee.[56] If he conveys it by deed in fee to a third person, who has no notice of the character of the transaction between the original parties, such purchaser will take the legal title, freed from the right of redemption belonging to the original grantor,[57] although it is otherwise as to a purchaser

53. Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 23 App. Cas. (D. C.) 587; Wilson *v.* South Park Com'rs, 70 Ill. 46. And see Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222. *Contra*, Pierce *v.* Grimley, 77 Mich. 273, 43 N. W. 932.

Unless the terms and conditions of the trust are complied with, the trustee's deed will not pass the equitable estate of the grantor in the trust deed. Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

54. Lennartz *v.* Quilty, 191 Ill. 174, 60 N. E. 913, 85 Am. St. Rep. 260; Stiger *v.* Bent, 111 Ill. 328; Williams *v.* Jackson, 107 U. S. 478, 2 S. Ct. 814, 27 L. ed. 529.

55. Anderson *v.* Strauss, 98 Ill. 485; Meacham *v.* Steele, 93 Ill. 135. *Compare* Crittenden *v.* Johnson, 11 Ark. 94.

Judgments are liens upon the residuary interest of a party who executes a deed of trust to secure a creditor; but to make the liens available they should be enforced against the trust property by a levy and sale subject to the encumbrance of the trust deed. Pahlman *v.* Shumway, 24 Ill. 127; Holland *v.* Frock, 2 Tex. Unrep. Cas. 566.

56. *California.*—Wilber *v.* Sanderson, 43 Cal. 496; Espinosa *v.* Gregory, 40 Cal. 58. See also Anglo-Californian Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077; Meeker *v.* Shuster, (1897) 47 Pac. 580. But see Moisant *v.* McPhee, 92 Cal. 76, 28 Pac. 46; Murdock *v.* Clarke, (1890) 24 Pac. 272; Jackson *v.* Lodge, 36 Cal. 28.

Georgia.—Coleman *v.* Maclean, 101 Ga. 303, 28 S. E. 861; Williamson *v.* Orient Ins. Co., 100 Ga. 791, 28 S. E. 914; McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687; Oellrich *v.* Georgia R. Co., 73 Ga. 389; Groves *v.* Williams, 69 Ga. 614; Thaxton *v.* Roberts, 66 Ga. 704; Carter *v.* Gunn, 64 Ga. 651; Allen *v.* Frost, 62 Ga. 659; Braswell *v.* Suber, 61 Ga. 398; Woodson *v.* Veal, 60 Ga. 562; West *v.* Bennett, 59 Ga. 507; Woodward *v.* Jewell, 140 U. S. 247, 11 S. Ct. 784, 35 L. ed. 478. The grantee in a security deed holds the legal title for the benefit of the owner, and as long as he holds the debt he holds for his own benefit; but if he transfers the debt, but not the title, he holds for the benefit of the transferee. Shumate *v.* McLendon, 120 Ga. 396, 48 S. E. 10.

Indiana.—Speakman *v.* Speakman, 4 Ind. 420.

Iowa.—Baxter *v.* Pritchard, 122 Iowa 590, 98 N. W. 372, 101 Am. St. Rep. 282; Richards *v.* Crawford, 50 Iowa 494; Burdick *v.* Wentworth, 42 Iowa 440.

Michigan.—Jeffery *v.* Hursh, 42 Mich. 563, 4 N. W. 303; Bennett *v.* Robinson, 27 Mich. 26.

Nebraska.—Plattsmouth First Nat. Bank *v.* Tighe, 49 Nebr. 299, 68 N. W. 490. *Compare* Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939.

New Hampshire.—Hebron *v.* Centre-Harbor, 11 N. H. 571.

Rhode Island.—Knowles *v.* Knowles, 25 R. I. 464, 56 Atl. 775.

Virginia.—Jones *v.* Hubbard, 6 Call 211.

See 35 Cent. Dig. tit. "Mortgages," § 278.

Contra.—Davis *v.* Kendall, 50 La. Ann. 1121, 24 So. 264; Howe *v.* Austin, 40 La. Ann. 323, 4 So. 315; Crozier *v.* Ragan, 38 La. Ann. 154; Kraemer *v.* Adelsberger, 122 N. Y. 467, 25 N. E. 859; Fiedler *v.* Darrin, 50 N. Y. 437; Berdell *v.* Berdell, 33 Hun (N. Y.) 535; Swart *v.* Service, 21 Wend. (N. Y.) 36, 34 Am. Dec. 211; Snyder *v.* Parker, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726.

57. *California.*—Carpenter *v.* Lewis, 119 Cal. 18, 50 Pac. 925.

Illinois.—Maxfield *v.* Patchen, 29 Ill. 39.

Michigan.—Hurst *v.* Beaver, 50 Mich. 612, 16 N. W. 165.

Nebraska.—Kemp *v.* Small, 32 Nebr. 318, 49 N. W. 169.

Nevada.—Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

New York.—Hogarty *v.* Lynch, 6 Bosw. 138; Whittick *v.* Kane, 1 Paige 202.

Texas.—Mann *v.* Falcon, 25 Tex. 271; Lynn *v.* Sims, (Civ. App. 1897) 43 S. W. 554.

See 35 Cent. Dig. tit. "Mortgages," § 278.

As to rights of purchaser from grantee see *supra*, III, E, 4.

Grantor entitled to surplus proceeds.—When the grantee in a deed absolute on its face, but intended to operate as a mortgage, sells the land, he must account to the grantor for the proceeds over and above the amount due him under the mortgage. Vanderhoven *v.* Romaine, 56 N. J. Eq. 1, 39 Atl. 129. And see Gibbs *v.* Meserve, 12 Ill. App. 613;

from the grantee who takes with knowledge that the original deed was in the nature of a mortgage.[58] As against the grantee in such a deed, the estate or interest remaining in the grantor is simply a right to redeem the property on complying with the conditions of the agreement of defeasance.[59] And a deed in the nature of a mortgage, given by a tenant in common on his undivided interest in lands, leaves in him an estate which entitles him to apply for partition.[60] The grantor has such a title as will enable him to maintain ejectment against a mere intruder.[61]

6. Under Purchase-Money Mortgage. Where a mortgage to secure the purchase-money of land is executed simultaneously with the deed to the vendee, the legal title remains in the mortgagee or vendor of the land.[62]

7. Under Mortgage by Tenants in Common. Where two tenants in common make a joint mortgage for a joint and several debt, the mortgagee is entitled to a foreclosure of the whole estate, and he cannot be compelled, in equity, to receive from one of the mortgagors his share of the debt and to proceed against the other for the other half.[63]

C. Adverse Possession and Acquisition of Outstanding Title — 1. Adverse Possession[64] — a. By Mortgagor. The possession of the premises by the mortgagor, continuing after the execution of the mortgage, is subordinate to the title and rights of the mortgagee, and is not hostile or adverse in any way which may result in defeating those rights,[65] unless it is turned into an adverse

Boothe *v.* Fiest, 80 Tex. 141, 15 S. W. 799; Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967.

58. *Illinois.*— Over *v.* Carolus, 171 Ill. 552, 49 N. E. 514; Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; De Clerq *v.* Jackson, 103 Ill. 658; Smith *v.* Knoebel, 82 Ill. 392; Shaver *v.* Woodward, 28 Ill. 277; Brown *v.* Gaffney, 28 Ill. 149; Howat *v.* Howat, 101 Ill. App. 158.

Indiana.— Graham *v.* Graham, 55 Ind. 23.

Michigan.— Wadsworth *v.* Loranger, Harr. 113.

Nebraska.—Eiseman *v.* Gallagher, 24 Nebr. 79, 37 N. W. 941.

Pennsylvania.— Cole *v.* Bolard, 22 Pa. St. 431.

West Virginia.— Zane *v.* Fink, 18 W. Va. 693.

See 35 Cent. Dig. tit. "Mortgages," § 278.

Record as notice.— Where a deed absolute is accompanied by a simultaneous written agreement in the nature of a defeasance, and both are recorded, a purchaser from the grantee is charged with notice of the defeasible character of the deed, and will take subject to the grantor's right to a reconveyance on redemption. Baker *v.* Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

Deed with power to sell.— Where a deed absolute on its face was executed to one who was to have the power to sell the lands for the purpose of paying the grantor's indebtedness to him, and an alleged oral defeasance has not been proved, a purchaser from the grantee, although having full notice of all the transactions between the original parties, takes an absolute title to the lands. Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375.

Rights of creditors of grantee.— Where one conveyed land to another by deed absolute in form, but in fact by way of mortgage, it was held that a creditor of the grantee, selling the land on execution, could obtain no better title than that of the grantee, that is, a defeasible one. Leech *v.* Hillsman, 8 Lea (Tenn.) 747.

59. Williams *v.* E. E. Foy Mfg. Co., 111 Ga. 856, 36 S. E. 927; Daniel *v.* Wilson, 91 Ga. 238, 18 S. E. 134; Roberts *v.* Richards, 36 Ill. 339; Kerr *v.* Davidson, 32 N. C. 269.

60. Kline *v.* McGuckin, 24 N. J. Eq. 411.

61. McCormick *v.* Herndon, 78 Wis. 661, 47 N. W. 939.

62. Baker *v.* Clepper, 26 Tex. 629, 84 Am. Dec. 591. And see Wright *v.* Tukey, 3 Cush. (Mass.) 290; Dunlap *v.* Wright, 11 Tex. 597, 62 Am. Dec. 506.

63. Frost *v.* Frost, 3 Sandf. Ch. (N. Y.) 188. See Mason *v.* Scott, 50 N. Y. App. Div. 463, 64 N. Y. Suppl. 68.

64. See, generally, Adverse Possession.

65. *Florida.*— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329, this is true, although the mortgage is simply a lien on the land and gives no right of possession.

Iowa.— Watts *v.* Creighton, 85 Iowa 154, 52 N. W. 12; Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Jordan *v.* Brown, (1880) 6 N. W. 278; Crawford *v.* Taylor, 42 Iowa 260.

Maine.— Conner *v.* Whitmore, 52 Me. 185; Sweetser *v.* Lowell, 33 Me. 446; Noyes *v.* Sturdivant, 18 Me. 104.

Massachusetts.—Sheridan *v.* Welch, 8 Allen 166; Colton *v.* Smith, 11 Pick. 311, 22 Am. Dec. 375; Hicks *v.* Bingham, 11 Mass. 300; Perkins *v.* Pitts, 11 Mass. 125; Gould *v.* Newman, 6 Mass. 239.

Missouri.— Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937; Chouteau *v.* Riddle, 110 Mo. 366, 19 S. W. 814; Benton County *v.* Czarlinsky, 101 Mo. 275, 14 S. W. 114; Cape Girardeau County *v.* Harbison, 58 Mo. 90.

possession by the mortgagor's distinct and positive disavowal and repudiation of the claims of the mortgagee,[66] with knowledge brought home to the mortgagee that the mortgagor intends to claim title adversely to him.[67] A mortgagor's possession of mortgaged premises after foreclosure and sale will not become adverse until notice to the purchaser that he is holding in hostility to his title.[68]

b. By Mortgagee. A mortgagee in possession of the premises does not hold adversely to the mortgagor before breach of condition,[69] nor even after payment of the debt secured,[70] although he may become vested with the absolute title if his possession continues until the mortgagor's right to redeem is barred by lapse of time,[71] or if he converts his tenancy into a hostile possession by an explicit disavowal of the mortgage and the assertion of an absolute title in himself,[72] these facts being made actually known to the mortgagor.[73]

c. By Third Persons. No adverse possession by the consent or connivance of a mortgagor can affect the mortgagee, unless it be so open as to give the latter notice that his rights are invaded.[74] And generally no person claiming a title or interest in the land through or under the mortgagor can be considered as holding adversely to the mortgagee. This is the case in regard to a junior encumbrancer,[75] or a purchaser of the mortgagor's equity of redemption at a sale on execution,[76] although it has been held otherwise as to an heir of the mortgagor, being in possession and claiming the property in his own right.[77] The possession of one who

New York.— Kneller *v.* Lang, 137 N. Y. 589, 33 N. E. 555.

North Carolina.— Murray *v.* Blackledge, 71 N. C. 492; Joyner *v.* Vincent, 20 N. C. 652.

Ohio.— Allen *v.* Everly, 24 Ohio St. 97.

Rhode Island.— Glezen *v.* Haskins, 23 R. I. 601, 51 Atl. 219.

See 35 Cent. Dig. tit. "Mortgages," § 281.

66. Coyle *v.* Wilkins, 57 Ala. 108; Whittington *v.* Flint, 43 Ark. 504, 51 Am. Rep. 572; Jamison *v.* Perry, 38 Iowa 14; Bowie *v.* Westmoreland Poor School Soc., 75 Va. 300.

67. Ringo *v.* Woodruff, 43 Ark. 469; Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; Bentley *v.* Callaghan, 79 Miss. 302, 30 So. 709; Tripe *v.* Marcy, 39 N. H. 439. But see Bush *v.* White, 85 Mo. 339, holding that the statute runs against a mortgagee and in favor of the mortgagor who has acquired an outstanding title without regard to knowledge on the mortgagee's part.

Constructive notice.— The mortgagor's possession under a claim of title adverse to the mortgagee may raise an implication of notice if asserted openly and notoriously. Elsberry *v.* Boykin, 65 Ala. 336.

68. Tainter *v.* Abrams, (Nebr. 1906) 107 N. W. 225.

69. *Alabama.*— McGuire *v.* Shelby, 20 Ala. 456.

Delaware.— See Doe *v.* Tunnell, 1 Houst. 320.

Iowa.— Crawford *v.* Taylor, 42 Iowa 260.

Mississippi.— Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658.

Nebraska.— McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614.

New York.— Stoddard *v.* Weston, 3 Silv. Sup. 13, 6 N. Y. Suppl. 34; Borst *v.* Boyd, 3 Sandf. Ch. 501.

See 35 Cent. Dig. tit. "Mortgages," § 282.

See, however, Nash *v.* Northwest Land Co., (N. D. 1906) 108 N. W. 792.

70. Green *v.* Turner, 38 Iowa 112.

71. *Alabama.*— Dawson *v.* Hoyle, 58 Ala. 44.

Kentucky.—Reynolds *v.* White, 94 Ky. 156, 21 S. W. 754, 14 Ky. L. Rep. 825.

Minnesota.— Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613.

New York.— Haley *v.* Steves, 7 N. Y. St. 698.

United States.— Cromwell *v.* Pittsburg Bank, 6 Fed. Cas. No. 3,409, 2 Wall. Jr. 569.

See 35 Cent. Dig. tit. "Mortgages," § 282.

72. Morgan *v.* Morgan, 10 Ga. 297; McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Borden *v.* Clow, 21 Nev. 275, 30 Pac. 821, 37 Am. St. Rep. 511.

Deed given by mortgagee.— The mere assumption of a mortgagee, evidenced by his giving a deed, that he has the title in fee, cannot bar the equity of redemption, nor can any occupation under such deed short of a continuous and notorious one, adverse to the mortgagor, give it that effect. Humphrey *v.* Hurd, 29 Mich. 44.

73. Yarbrough *v.* Newall, 10 Yerg. (Tenn.) 376, holding that where one constitutes another his agent, for the purpose of tendering redemption money due on a mortgage, the fact that the mortgagee denies to the agent the mortgagor's right to redeem is not such notice to the mortgagor as will constitute an adverse holding by the mortgagee.

74. Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489.

75. Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257.

76. Chouteau *v.* Riddle, 110 Mo. 366, 19 S. W. 814; Lewis *v.* Schwenn, 15 Mo. App. 342; McNeill *v.* Riddle, 66 N. C. 290. *Compare* Gilliam *v.* Moore, 44 N. C. 95.

77. Drayton *v.* Marshall, Rice Eq. (S. C.) 373, 33 Am. Dec. 84.

had, while land was held by a pledgee as security, purchased the absolute title of the pledgee in possession, and held such absolute title and occupied and claimed the land as his own, was adverse to the pledgor from the discharge of the pledge.[78]

d. By Mortgagor's Grantee. A grantee of the mortgagor's equity of redemption takes in subordination to the title of the mortgagee, if he has notice of the mortgage, and not in hostility to the rights of the latter, and therefore his possession of the premises is not adverse to the mortgagee,[79] although it may be turned into an adverse possession by an open disclaimer of holding in subordination to the mortgage, and the assertion of a distinct title, brought home to the knowledge of the mortgagee.[80]

2. Acquisition of Outstanding Title — a. By Mortgagor. It has been stated broadly that a mortgagor is not estopped from acquiring an outstanding title against the mortgagee.[81] But this rule is subject to important limitations,[82] and clearly has no application to a tax title. For it is well settled that where a mortgagor suffers the mortgaged premises to be sold for delinquent taxes, and buys the land in at the tax-sale, he does not thereby defeat the lien of the mortgage, nor can he be permitted to set up the tax title in opposition to the rights of the mortgagee, but his purchase is regarded merely as a payment of the taxes.[83] And the same rule applies where the tax title is taken in the name of a third person, by collusion with the mortgagor and really for his benefit; it cannot

78. Morton *v.* Lawson, 1 B. Mon. (Ky.) 45.

79. *Alabama.*— Herbert *v.* Hanrick, 16 Ala. 581.

Illinois.— Harding *v.* Durand, 36 Ill. App. 238.

Iowa.— Grether *v.* Clark, 75 Iowa 383, 39 N. W. 655, 9 Am. St. Rep. 491; Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257.

Mississippi.— Benson *v.* Stewart, 30 Miss. 49.

Missouri.— Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885; Wilkerson *v.* Allen, 67 Mo. 502.

North Carolina.— Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Parker *v.* Banks, 79 N. C. 480. *Compare* Baker *v.* Evans, 4 N. C. 417, holding that where a mortgagor remains in possession, and, after the mortgage is forfeited, sells to another, who has no notice, and he continues in possession seven years, he acquires title.

Rhode Island.— Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709.

Virginia.— Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766.

Wisconsin.—Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

See 35 Cent. Dig. tit. "Mortgages," § 284.

80. Palmer *v.* Snell, 111 Ill. 161; Medley *v.* Elliott, 62 Ill. 532; Brown *v.* Devine, 61 Ill. 260; Harding *v.* Durand, 36 Ill. App. 238 (holding that the grantee of mortgaged land cannot begin an adverse possession by permitting the land to be sold for taxes and then buying it in); Tripe *v.* Marcy, 39 N. H. 439.

81. Bush *v.* White, 85 Mo. 339.

82. As to after-acquired title of mortgagor inuring to benefit of mortgagee see *supra*, XII, A, 2, d.

83. *California.*— Barnard *v.* Wilson, 74 Cal. 512, 16 Pac. 357.

Connecticut.— Goodrich *v.* Kimberly, 48 Conn. 395; Middletown Sav. Bank *v.* Bacharach, 46 Conn. 513.

Florida.— Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823.

Illinois.— McAlpine *v.* Zitzer, 119 Ill. 273, 10 N. E. 901; Medley *v.* Elliott, 62 Ill. 532 [*affirmed* in 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262]; Ralston *v.* Hughes, 13 Ill. 469; Voris *v.* Thomas, 12 Ill. 442; Frye *v.* State Bank, 11 Ill. 367; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Connecticut Mut. L. Ins. Co. *v.* Stinson, 62 Ill. App. 319.

Indiana.— Cooper *v.* Jackson, 99 Ind. 566; Travellers Ins. Co. *v.* Patten, 98 Ind. 209.

Iowa.— Dayton *v.* Rice, 47 Iowa 420; Fair *v.* Brown, 40 Iowa 209; Stears *v.* Hollenbeck, 38 Iowa 550; Porter *v.* Lafferty, 33 Iowa 254.

Kansas.— Sbrigley *v.* Black, 66 Kan. 213, 71 Pac. 301; McLaughlin *v.* Darlington, 6 Kan. App. 212, 50 Pac. 507.

Louisiana.— Beltram *v.* Villere, (1888) 4 So. 506; Magner *v.* Hibernia Ins. Co., 30 La. Ann. 1357; Renshaw *v.* Stafford, 30 La. Ann. 853.

Maine.— Phinney *v.* Day, 76 Me. 83; Dunn *v.* Snell, 74 Me. 22; Fuller *v.* Hodgdon, 25 Me. 243; Gardiner *v.* Gerrish, 23 Me. 46.

Michigan.— Fells *v.* Barbour, 58 Mich. 49, 24 N. W. 672.

Minnesota.— MacEwen *v.* Beard, 58 Minn. 176, 59 N. W. 942; Allison *v.* Armstrong, 28 Minn. 276, 9 N. W. 806, 41 Am. Rep. 281.

Missouri.— Davis *v.* Evans, 174 Mo. 307, 73 S. W. 512.

New Hampshire.— Kezer *v.* Clifford, 59 N. H. 208; Woodbury *v.* Swan, 59 N. H. 22.

North Carolina.—Ryan *v.* Martin, 103 N. C. 282, 9 S. E. 197.

South Carolina.— Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

Wisconsin.— Newton *v.* Marshall, 62 Wis. 8, 21 N. W. 803; Avery *v.* Judd, 21 Wis. 262.

See 35 Cent. Dig. tit. "Mortgages," § 285.

Part-owner of equity of redemption.— The rule is the same where the person who makes

defeat the lien or rights of the mortgagee.[84] But when a mortgage containing no covenant of warranty has been foreclosed, and the relation of mortgagor and mortgagee extinguished by a sale of the mortgaged premises, the former is under no duty to protect the title of the purchaser, nor is he precluded from subsequently acquiring and claiming under an outstanding and paramount title.[85]

b. By Purchaser of Mortgaged Premises. One whose duty it is to pay the taxes on land subject to a mortgage cannot, as against the mortgagee, acquire title thereto by purchase at tax-sale or from the holder of a tax deed.[86] And the rule is the same as to buying in an outstanding title under a judgment senior to the mortgage which the purchaser was bound to pay.[87]

c. By Junior Encumbrancer. A junior mortgagee is not allowed to divest the lien of the elder mortgage by buying at a tax-sale; his attempt to do so will not give him a new title, but will merely operate as a payment of the tax.[88]

d. By Mortgagee or His Grantee. The general rule is that a mortgagee cannot make such a purchase of the property covered by his mortgage, at a tax-sale, as will cut off the title of the mortgagor or the rights of other parties beneficially interested,[89] and the same rule is applied to the mortgagee's grantee or assignee

the pretended purchase is the owner of only a small undivided interest in the equity of redemption. Whatever his interest may be, it will disqualify him from buying the property at a tax-sale as against the mortgagee. Middletown Sav. Bank *v.* Bacharach, 46 Conn. 513.

The wife of a mortgagor may purchase a tax title to the land, using her separate estate, and hold it against the mortgagee, if she does not act in collusion with the mortgagor. Wood *v.* Armour, 88 Wis. 488, 60 N. W. 791, 43 Am. St. Rep. 918.

84. *Illinois.*— McAlpine *v.* Zitzer, 119 Ill. 273, 10 N. E. 901.

Iowa.— Connolly *v.* Connolly, 63 Iowa 202, 18 N. W. 868; Equitable L. Ins. Co. *v.* Wright, 54 Iowa 606, 7 N. W. 93.

Louisiana.— Austin *v.* Citizens' Bank, 30 La. Ann. 689.

Michigan.— Chamberlain *v.* Forbes, 126 Mich. 86, 85 N. W. 253.

Mississippi.— Carter *v.* Bustamente, 59 Miss. 559.

New Hampshire.— Drew *v.* Morrill, 62 N. H. 565.

United States.— Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

See 35 Cent. Dig. tit. "Mortgages," § 286.

85. Jackson *v.* Littell, 56 N. Y. 108.

86. *Illinois.*— Hagan *v.* Parsons, 67 Ill. 170; Harding *v.* Durand, 36 Ill. App. 238.

Iowa.— Stears *v.* Hollenbeck, 38 Iowa 550.

Kansas.— Leppo *v.* Gilbert, 26 Kan. 138.

Maine.— Phinney *v.* Day, 76 Me. 83.

Michigan.— Brown *v.* Avery, 119 Mich. 384, 78 N. W. 331.

Minnesota.— MacEwen *v.* Beard, 58 Minn. 176, 59 N. W. 942.

Wisconsin.—Fallass *v.* Pierce, 30 Wis. 443; Edgerton *v.* Schneider, 26 Wis. 385. And see Dana *v.* Duluth Trust Co., 99 Wis. 663, 75 N. W. 429.

See 35 Cent. Dig. tit. "Mortgages," § 287.

87. White *v.* Butler, 13 Ill. 109; Birke *v.* Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474.

88. *Connecticut.*— Goodrich *v.* Kimberly, 48 Conn. 395.

Indiana.—Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153.

Iowa.— Eck *v.* Swennumson, 73 Iowa 423, 35 N. W. 503, 5 Am. St. Rep. 690; Frank *v.* Arnold, 73 Iowa 370, 35 N. W. 453; Strong *v.* Burdick, 52 Iowa 630, 3 N. W. 707; Garrettson *v.* Schofield, 44 Iowa 35; Fair *v.* Brown, 40 Iowa 209.

Michigan.— Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113, 7 N. W. 707; Horton *v.* Ingersoll, 13 Mich. 409.

Minnesota.—Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539. And see American Baptist Missionary Union *v.* Weeks, 72 Minn. 484, 75 N. W. 713, 77 N. W. 36. *Compare* Wilson *v.* Jamison, 36 Minn. 59, 29 N. W. 887, 1 Am. St. Rep. 635.

Mississippi.— McLaughlin *v.* Green, 48 Miss. 175.

Missouri.— Davis *v.* Evans, 174 Mo. 307, 73 S. W. 512.

New Hampshire.— Woodbury *v.* Swan, 59 N. H. 22.

South Dakota.— Safe Deposit, etc., Co. *v.* Wickhem, 9 S. D. 341, 69 N. W. 14, 62 Am. St. Rep. 873.

Tennessee.— Boyd *v.* Allen, 15 Lea 81.

Wisconsin.— Newton *v.* Marshall, 62 Wis. 8, 21 N. W. 803; Smith *v.* Lewis, 20 Wis. 350.

United States.— Horner *v.* Dellinger, 18 Fed. 495.

See 35 Cent. Dig. tit. "Mortgages," § 288.

But *compare* Gwinn *v.* Smith, 55 Ga. 145.

89. *California.*— Ward *v.* Matthews, 80 Cal. 343, 22 Pac. 187.

Florida.— Jackson *v.* Relf, 26 Fla. 465, 8 So. 184. But *compare* Spratt *v.* Price, 18 Fla. 289.

Illinois.— Stinson *v.* Connecticut Mut. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262 [*affirming* 62 Ill. App. 319]; Moore *v.* Titman, 44 Ill. 367; Chickering *v.* Failes, 26 Ill. 507; Ragor *v.* Lomax, 22 Ill. App. 628.

of the mortgage.[90] It has been held, however, that a mortgagee may acquire a valid tax title where he is under no legal or contractual obligation to pay the taxes, on the mortgagor's failure to do so,[91] and that a mortgagee not in possession is not bound to pay the taxes and does not hold a fiduciary relation to the mortgagor such as to disqualify him from buying at tax-sale,[92] although it is otherwise if he is in possession and receiving the rents and profits.[93] In other cases, as, where the land is sold on execution under a judgment constituting an elder lien to that of the mortgage, there is nothing to prevent the mortgagee from acquiring and asserting a paramount title;[94] and it has been held that a first mortgagee owes no duty to the other lien-holders, and may cut off the lien of a second mortgage by purchasing the property at a tax-sale.[95]

D. Estoppel to Dispute Title.[96] As a general rule the parties to a mortgage are estopped on equitable principles to deny the recitals and assertions of title therein contained.[97] The mortgagor is estopped to acquire and set up an out-

Indiana.— Schenck *v.* Kelley, 88 Ind. 444.

Michigan.— Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225; Maxfield *v.* Willey, 46 Mich. 252, 9 N. W. 271; Taylor *v.* Snyder, Walk. 490.

Mississippi.— Martin *v.* Swofford, 59 Miss. 328; McLaughlin *v.* Green, 48 Miss. 175.

Rhode Island.— Hall *v.* Westcott, 15 R. I. 373, 5 Atl. 629.

South Dakota.— Rapid City First Nat. Bank *v.* McCarthy, 18 S. D. 218, 100 N. W. 14.

Tennessee.— Watson *v.* Ryan, 3 Tenn. Ch. 40.

Canada.— Scholfield *v.* Dickenson, 10 Grant Ch. (U. C.) 226; Smart *v.* Cottle, 10 Grant Ch. (U. C.) 59.

See 35 Cent. Dig. tit. "Mortgages," § 289.

Contra.— Gwinn *v.* Smith, 55 Ga. 145.

Mortgagor's title fraudulent.— A person who has innocently and in good faith taken a mortgage on real property from one holding the legal title under a conveyance, which, however, is fraudulent and void as to the creditors of the grantor, upon subsequently acquiring knowledge of the fraud, may lawfully buy in an outstanding paramount title, such as a tax title, for his own benefit. Gjerness *v.* Fladeland, 27 Minn. 320, 7 N. W. 355.

90. Ragor *v.* Lomax, 22 Ill. App. 628.

91. McLaughlin *v.* Acom, 58 Kan. 514, 50 Pac. 441; Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Cornell *v.* Woodruff, 77 N. Y. 203; Ten Eyck *v.* Craig, 62 N. Y. 406; Williams *v.* Townsend, 31 N. Y. 411; Miller *v.* McCuaig, 6 Manitoba 539.

92. Waterson *v.* Devoe, 18 Kan. 223; Eastman *v.* Thayer, 60 N. H. 408; Beckwith *v.* Seborn, 31 W. Va. 1, 5 S. E. 453; Summers *v.* Kanawha County, 26 W. Va. 159.

93. *Indiana.*— Schenck *v.* Kelley, 88 Ind. 444.

Kansas.— Miller *v.* Ziegler, 31 Kan. 417, 2 Pac. 601.

New Hampshire.— Brown *v.* Simons, 44 N. H. 475.

New York.— Ten Eyck *v.* Craig, 62 N. Y. 406.

Pennsylvania.— Shoemaker *v.* Bank, 15 Phila. 297.

Wisconsin.— Burchard *v.* Roberts, 70 Wis. 111, 35 N. W. 286, 5 Am. St. Rep. 148. And see Wright *v.* Sperry, 25 Wis. 617, 21 Wis. 331.

See 35 Cent. Dig. tit. "Mortgages," § 289.

A mortgagee who has become the absolute owner by foreclosure, and then buys at a tax-sale, only in legal effect pays the tax, and has no remedy if the sale is invalid. Home Sav. Bank *v.* Boston, 131 Mass. 277. *Compare* Walsh *v.* Wilson, 130 Mass. 124.

94. *Alabama.*— Junkins *v.* Lovelace, 72 Ala. 303; Walthall *v.* Rives, 34 Ala. 91; Duval *v.* Planters', etc., Bank, 10 Ala. 636.

Arkansas.— Dennis *v.* Tomlinson, 49 Ark. 568, 6 S. W. 11.

Florida.— Harrison *v.* Roberts, 6 Fla. 711.

New York.— Trimm *v.* Marsh, 54 N. Y. 599, 13 Am. Rep. 623.

Wisconsin.— Sturdevant *v.* Mather, 20 Wis. 576.

Where one or more of several bond-holders or beneficiaries under a mortgage or trust deed purchase at an execution sale under a judgment prior to the mortgage, a portion of the lands mortgaged, or buy in an outstanding title, such purchase inures to the benefit of all the beneficiaries of the mortgage, at their election, made within a reasonable time and upon a proportionate contribution. Knox *v.* Randall, 24 Minn. 479; Booker *v.* Crocker, 132 Fed. 7, 65 C. C. A. 627.

95. Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113, 7 N. W. 707. But *compare* Anson *v.* Anson, 20 Iowa 55, 89 Am. Dec. 514; Devereux *v.* Taft, 20 S. C. 555.

96. As to acquisition of outstanding title by mortgagor see *supra*, XII, C, 2, a.

As to after-acquired title of mortgagor inuring to benefit of mortgagee see *supra*, XII, A, 2, d.

As to estoppel of mortgagor's grantee to contest validity of mortgage see *infra*, XVII, E, 1.

As to estoppel of mortgagor's grantee to set up outstanding title see *infra*, XVII, E, 3.

As to estoppel of mortgagor to dispute validity of mortgage on grounds of acquiescence, recognition, etc., see *supra*, X, H, 2.

As to want of title in mortgagor as defense to foreclosure suit see *infra*, XXI, C, 2.

97. *Arkansas.*— Benson *v.* Files, 70 Ark. 423, 68 S. W. 493.

standing title as against the mortgagee,[98] or to deny that his title to the premises is such as the mortgage asserts and purports to convey;[99] and this estoppel extends also to the mortgagor's grantee.[1] The mortgagee is estopped to deny the recitals of the mortgage;[2] but this does not apply to an assignee of the mortgage, who does not claim title thereunder,[3] nor to the beneficiaries under a deed of trust in the nature of a mortgage,[4] nor to any stranger to the mortgage.[5] A mortgagor, from the nature of the mortgage contract, must preserve the property pledged for the purposes of the original security, and is therefore estopped, independently of covenants of warranty, from denying the mortgagee's title or the existence of the lien which he has created, or from defeating its enforcement against the property on which it was placed.[6] And the acceptance and enforcement of a mort-

Georgia.— Marable *v.* Mayer, 78 Ga. 60.

Illinois.— Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350; Brokaw *v.* Field, 33 Ill. App. 138.

Indiana.— Mallett *v.* Page, 8 Ind. 364.

New York.— Todd *v.* Eighmie, 4 N. Y. App. Div. 9, 38 N. Y. Suppl. 304.

Tennessee.— Morgan *v.* Cooper, 1 Head 430.

Texas.— Willis *v.* Lockett, (Civ. App. 1894) 26 S. W. 419.

West Virginia.— Coal River Nav. Co. *v.* Webb, 3 W. Va. 438.

98. *Illinois.*— Gochenour *v.* Mowry, 33 Ill. 331; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

Iowa.— Jones *v.* Jones, 20 Iowa 388.

Michigan.— Gorton *v.* Roach, 46 Mich. 294, 9 N. W. 422; Wanzer *v.* Blanchard, 3 Mich. 11.

Missouri.— Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

New York.— Tefft *v.* Munson, 57 N. Y. 97; Pelletreau *v.* Jackson, 11 Wend. 110 [*affirmed* in 13 Wend. 178].

Pennsylvania.— Rauch *v.* Dech, 116 Pa. St. 157, 9 Atl. 180, 2 Am. St. Rep. 598; Hirsch *v.* Tillman, 13 Pa. Co. Ct. 251.

99. *Alabama.*— Wilson *v.* Alston, 122 Ala. 630, 25 So. 225.

California.— Trope *v.* Kerns, 83 Cal. 553, 23 Pac. 691, (1888) 20 Pac. 82; Simson *v.* Eckstein, 22 Cal. 580; Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449.

Connecticut.— King *v.* Kilbride, 58 Conn. 109, 19 Atl. 519; Cross *v.* Robinson, 21 Conn. 379.

Georgia.— Atlas Tack Co. *v.* Exchange Bank, 111 Ga. 703, 36 S. E. 939; Usina *v.* Wilder, 58 Ga. 178.

Illinois.— Woods *v.* Soucy, 184 Ill. 568, 56 N. E. 1015; Fisher *v.* Milmine, 94 Ill. 328.

Indiana.— Scobey *v.* Kinningham, 131 Ind. 552, 31 N. E. 355; Boone *v.* Armstrong, 87 Ind. 168; Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172; French *v.* Blanchard, 16 Ind. 143.

Iowa.— Findlay *v.* Kettleman, 14 Iowa 173.

Kentucky.— Mitchell *v.* Kinnaird, 29 S. W. 309, 34 S. W. 226, 17 Ky. L. Rep. 1250.

Louisiana.— Robinson *v.* Atkins, 105 La. 790, 30 So. 231.

Massachusetts.— Bridge *v.* Wellington, 1 Mass. 219.

Michigan.— Dodge *v.* Kennedy, 93 Mich. 547, 53 N. W. 795; Smith *v.* Graham, 34 Mich. 302.

Minnesota.— Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130.

Missouri.— Taylor *v.* Saugrain, 1 Mo. App. 312.

New Hampshire.— Fletcher *v.* Chamberlain, 61 N. H. 438; Gotham *v.* Gotham, 55 N. H. 440.

New York.— Union Dime Sav. Inst. *v.* Wilmot, 94 N. Y. 221, 46 Am. Rep. 137; Parkinson *v.* Sherman, 74 N. Y. 88, 30 Am. Rep. 268; Freeman *v.* Auld, 44 N. Y. 50; Wilson *v.* Wilson, 32 Barb. 328; Barber *v.* Harris, 15 Wend. 615. But *compare* Jackson *v.* Marsh, 5 Wend. 44.

A mortgagor who has not covenanted or made representations may show what estate he had when the mortgage was delivered. National F. Ins. Co. *v.* McKay, 5 Abb. Pr. N. S. (N. Y.) 445.

One who gives a purchase-money mortgage containing a like covenant of warranty as the conveyance which he receives is not estopped to allege a defect of title. Hubbard *v.* Norton, 10 Conn. 422; Hardy *v.* Nelson, 27 Me. 525.

1. Fleming *v.* Reed, 20 Ind. App. 462, 49 N. E. 1087; Johnson *v.* Thompson, 129 Mass. 398; Doe *v.* Stone, 3 C. B. 176, 10 Jur. 480, 15 L. J. C. P. 234, 54 E. C. L. 176; Robinson *v.* Cook, 6 Ont. 590.

2. Sumner *v.* Bryan, 54 Ga. 613; Kelley *v.* Stanbery, 13 Ohio 408; Brown *v.* Combs, 29 N. J. L. 36; Heath *v.* Crealock, L. R. 10 Ch. 22, 44 L. J. Ch. 157, 31 L. T. Rep. N. S. 650, 23 Wkly. Rep. 95.

3. Johnson *v.* Houston, 47 Mo. 227; Great Falls Co. *v.* Worster, 15 N. H. 412; Gordon *v.* Proctor, 20 Ont. 53; McKay *v.* McKay, 25 U. C. Q. B. 133. See Colvin *v.* Shaw, 79 Hun (N. Y.) 56, 29 N. Y. Suppl. 644.

Estoppel of mortgagee as to assignee.—The mortgagee cannot deny the title of his assignee. Pierce *v.* Odlin, 27 Me. 341.

4. Starr *v.* Dugan, 22 Md. 58; Greenwood *v.* Fontaine, (Tex. Civ. App. 1896) 34 S. W. 826.

5. Doe *v.* Brown, 8 N. Brunsw. 433.

6. *Alabama.*— Chapman *v.* Abrahams, 61 Ala. 108.

California.— Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449.

Kansas.—Madaris *v.* Edwards, 32 Kan. 284, 4 Pac. 313.

Vermont.— Wires *v.* Nelson, 26 Vt. 13.

Wisconsin.— Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507.

gage will estop the mortgagee from setting up a claim of title to the mortgaged property adverse to that of the mortgagor, of which claim he had knowledge before he took the mortgage.[7]

XIII. RECORDING AND REGISTRATION.[8]

A. Statutory Provisions.[9] The statutes do not generally make the recording or registration of a mortgage an essential prerequisite to its validity, at least as between the original parties,[10] their sole purpose being to charge persons subsequently dealing with the property with notice, actual or constructive, of what the records disclose.[11] Such a statute, in relation to the necessity, time, place, or manner of recording, may include mortgages executed before its passage, if the intention to make it retroactive clearly appears;[12] but this effect will not be given to a law validating previous defective records where it would result in the destruction of rights already vested.[13] If a recording act refers to all "deeds of conveyance" or "instruments passing title to real estate," or is expressed in other terms of equally general import, it will include mortgages;[14] but a statute relating explicitly to "mortgages" will be confined strictly to instruments having the common-law characteristics of a mortgage.[15]

B. Necessity of Recording — 1. As Between Mortgagor and Mortgagee — a. In General. A mortgage which is otherwise valid, but has not been recorded, is binding and effective as between the original parties to it, and creates a lien on

United States.—Willison *v.* Watkins, 3 Pet. 43, 7 L. ed. 596.

See 35 Cent. Dig. tit. "Mortgages," § 280.

Purchase-money mortgage.— A grantee of land who has given back a purchase-money mortgage is estopped from disputing the grantor's title for the purpose of defeating the payment of the mortgage. Townsend *v.* Kreigh, 133 Mich. 243, 94 N. W. 732, 97 N. W. 46, 98 N. W. 388.

7. Upchurch *v.* Anderson, (Tenn. Ch. App. 1898) 52 S. W. 917.

8. See, generally, Recording Acts.

9. See the statutes of the different states.

Mortgages of leasehold interests.— In Missouri and New York the statutes relating to the recording of mortgages of real estate include mortgages of leasehold interests in realty (Jennings *v.* Sparkman, 39 Mo. App. 663; State Trust Co. *v.* Casino Co., 19 N. Y. App. Div. 344, 46 N. Y. Suppl. 492; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603); but in New Jersey it is otherwise (Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 7 Atl. 873). In Pennsylvania there is a special statute regarding the recording of leasehold mortgages. See *In re* Speers, 10 Pa. Super. Ct. 518.

Foreign mortgages.— A statute giving validity to mortgages only after their filing for record does not apply to mortgages executed out of the state, the subject of which is also out of the state. Prewett *v.* Dobbs, 13 Sm. & M. (Miss.) 431.

A bond for the support of the mortgagee, to secure which the mortgage is given, is not within a statute requiring the recording of a "bond, deed, or other instrument of defeasance." Noyes *v.* Sturdivant, 18 Me. 104.

A mortgage given to the state is within the statutes relating to the registration of mortgages of realty. Clement *v.* Bartlett, 33 N. J. Eq. 43.

Indexing mortgages.— The general act of March 18, 1875, relating to the indexes of deeds and mortgages, repeals the special act of March 7, 1873, "regulating the indexing of mortgages in the county of Lehigh." Mohr *v.* Scherer, 30 Pa. Super. Ct. 509 [*affirming* 2 Lehigh Val. L. Rep. 240].

10. See Hardaway *v.* Semmes, 24 Ga. 305; Finley *v.* Spratt, 14 Bush (Ky.) 225. And see *infra*, XIII, B, 1.

11. Munro *v.* Merchant, 26 Barb. (N. Y.) 383 [*reversed* on other grounds in 28 N. Y. 9].

Not evidence of execution.— The registry of a mortgage under the statute is not evidence of its execution. Munroe *v.* Merchant, 26 Barb. (N. Y.) 383 [*reversed* on other grounds in 28 N. Y. 9]. But see *contra*, Den *v.* Wade, 20 N. J. L. 291.

12. Labry's Succession, 23 La. Ann. 361; Jackson *v.* Van Valkenburg, 8 Cow. (N. Y.) 260.

13. Lowry *v.* Mayo, 41 Minn. 388, 43 N. W. 78; Campbell *v.* Nonpareil Fire-Brick, etc., Co., 75 Va. 291.

14. Cornish *v.* Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598.

Land title acts.— Statutes relating to the "registration of land titles" include mortgages. People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801; Australasia Nat. Bank *v.* United Hand-in-Hand, etc., Co., 4 App. Cas. 391, 40 L. T. Rep. N. S. 697, 27 Wkly. Rep. 889; Bucknam *v.* Stewart, 11 Manitoba 491.

15. Shidy *v.* Cutter, 54 Md. 674 (a deed of trust made to secure the payment of a note is not within a statute relating to the recording of "deeds of mortgage"); Weed *v.* Lyon, Harr. (Mich.) 363; Beals *v.* Hale, 4 How. (U. S.) 37, 11 L. ed. 865.

the property affected, and may be foreclosed by proper proceedings;[16] and being binding on the mortgagor, it is equally effective against his administrator,[17] and against his heirs or devisees.[18]

b. Absolute Deed as Mortgage. It is generally held that a deed of land, absolute in its form, but intended by the parties as a mere security for a debt, is not deprived of its validity, as between the original parties, nor changed in its character, by the omission to record an accompanying bond or other instrument of defeasance.[19] Under some statutes, however, no benefit is derived from recording such a deed unless the defeasance is recorded therewith.[20] And it is sometimes provided that such a deed shall not be construed as a mortgage unless the defeasance, or other writing explanatory of its character, is recorded.[21]

16. *Arkansas.* — Rhea *v.* Planters' Mut. Ins. Assoc., 77 Ark. 57, 90 S. W. 850.
California.— Downing *v.* Le Du, 82 Cal. 471, 23 Pac. 202.
Georgia.— Janes *v.* Penny, 76 Ga. 796.
Illinois.— Alvis *v.* Morrison, 63 Ill. 181, 14 Am. Rep. 117.
Indiana.— Kirkpatrick *v.* Caldwell, 32 Ind. 299; Perdue *v.* Aldridge, 19 Ind. 290.
Iowa.— Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161; Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Horseman *v.* Todhunter, 12 Iowa 230.
Kansas.— Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705.
Louisiana.— Mills *v.* East Feliciana, 25 La. Ann. 142; Boissac *v.* Downs, 16 La. Ann. 187; Haines *v.* Verret, 11 La. Ann. 122; Callard *v.* Matthews, 10 La. Ann. 233; Duncan *v.* Elam, 1 Rob. 135; Lanusse *v.* Lanna, 6 Mart. N. S. 103; Lafon *v.* Saddler, 4 Mart. 476; Dreux *v.* Dreux, 3 Mart. N. S. 239; Miller *v.* Mercier, 3 Mart. N. S. 229. But *compare* Berwin *v.* Weiss, 28 La. Ann. 363; Gravier *v.* Hodge, 14 La. 101; Roche *v.* Groysilliere, 13 La. 238. Under Civ. Code, art. 3369, an unrecorded mortgage ceases to have any effect after ten years, even between the parties thereto. Tilden *v.* Morrison, 33 La. Ann. 1067.
Maine.— See Putnam *v.* White, 76 Me. 551.
Maryland.— Snowden *v.* Pitcher, 45 Md. 260.
Massachusetts.— Howard Mut. Loan, etc., Assoc. *v.* McIntyre, 3 Allen 571.
Michigan.—See Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392.
Nebraska.— McKenzie *v.* Beaumont, 70 Nebr. 179, 97 N. W. 225.
New Mexico.— Moore *v.* Davey, 1 N. M. 303, the Spanish and Mexican law, prevailing in this territory at the time of the Treaty of Guadalupe Hidalgo, declared a mortgage to be inoperative upon the property affected unless duly recorded.
New York.— Forrester *v.* Parker, 14 Daly 208, 6 N. Y. St. 274; Clute *v.* Robison, 2 Johns. 595.
North Carolina.— Williams *v.* Jones, 95 N. C. 504; Leggett *v.* Bullock, 44 N. C. 283.
Ohio.— Stewart *v.* Hopkins, 30 Ohio St. 502; Sidle *v.* Maxwell, 4 Ohio St. 236; Bloom *v.* Noggle, 4 Ohio St. 45; Fosdick *v.* Barr, 3 Ohio St. 471; Snyder *v.* Betz, 2 Ohio Cir. Ct. 485, 1 Ohio Cir. Dec. 602.
Oregon.— Moore *v.* Thomas, 1 Oreg. 201.
Pennsylvania.— Girard Trust Co. *v.* Baird, 212 Pa. St. 41, 61 Atl. 507, 1 L. R. A. N. S. 405; Levine *v.* Will, 1 Dall. 430, 1 L. ed. 209.
Tennessee.— Herman *v.* Clark, (Ch. App. 1896) 39 S. W. 873.
Texas.— Cavanaugh *v.* Peterson, 47 Tex. 197.
United States.— Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258, 9 S. Ct. 787, 33 L. ed. 128.
See 35 Cent. Dig. tit. "Mortgages," § 199.
Mortgage covering both realty and personalty.— Although the failure to file a mortgage covering both real and personal property may invalidate it as a chattel mortgage, it does not affect its validity as a lien on real estate. Hardin *v.* Dolge, 46 N. Y. App. Div. 416, 61 N. Y. Suppl. 753; Ward *v.* Ward, 131 Fed. 946.

17. Andrews *v.* Burns, 11 Ala. 691; Sanders *v.* Barlow, 21 Fed. 836.

18. Gill *v.* Pinney, 12 Ohio St. 38; McLaughlin *v.* Ihmsen, 85 Pa. St. 364; Literer *v.* Huddleston, (Tenn. Ch. App. 1898) 52 S. W. 1003, holding that a creditor of an heir stands in no better position than the heir himself.

19. *Maine.*— Bailey *v.* Myrick, 50 Me. 171; Jackson *v.* Ford, 40 Me. 381. And see Smith *v.* Monmouth Mut. F. Ins. Co., 50 Me. 96, holding that a bond of defeasance will convert a deed absolute in its terms into a mortgage, if such bond is seasonably recorded; and the recording is seasonable if done before it is introduced in evidence, and before any change of title has taken place or rights of any third persons have attached.
Maryland.— Harrison *v.* Morton, 87 Md. 671, 40 Atl. 897; Owens *v.* Miller, 29 Md. 144.
Massachusetts.— Moors *v.* Albro, 129 Mass. 9. *Compare* Stetson *v.* Gulliver, 2 Cush. 494.
Michigan.—See Russell *v.* Waite, Walk. 31.
Minnesota.— Marston *v.* Williams, 45 Minn. 116, 47 N. W. 644, 22 Am. St. Rep. 719; Butman *v.* James, 34 Minn. 547, 27 N. W. 66.
See 35 Cent. Dig. tit. "Mortgages," § 200.

20. Clark *v.* Condit, 18 N. J. Eq. 358; Macaulay *v.* Porter, 71 N. Y. 173.

21. Safe Deposit, etc., Co. *v.* Linton, 213 Pa. St. 105, 62 Atl. 566; Friedley *v.* Hamilton, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638.

2. As Against Third Persons. An unrecorded mortgage is invalid as against third persons acquiring interests in the property, as purchasers, or liens upon it, as mortgagees or judgment creditors, subsequent to the execution of the mortgage,[22] unless the want of record is supplied by their actual knowledge of the existence of the mortgage;[23] and this rule applies in favor of attaching creditors[24] and assignees for the benefit of creditors;[25] but the failure to record the mortgage does not render it invalid as to general creditors of the mortgagor or creditors who have not acquired a specific lien upon or interest in the property,[26] unless they can impeach it for fraud, and in this connection the withholding of the mortgage from record may be an evidence of fraud.[27]

C. Instruments Entitled to Record — 1. In General. The recording acts apply to all mortgages duly proved or acknowledged,[28] including deeds of trust in

22. *Illinois.*— Alvis *v.* Morrison, 63 Ill. 181, 14 Am. Rep. 117.

Indiana.— Schmidt *v.* Zahrndt, 148 Ind. 447, 47 N. E. 335.

Kansas.— Jackson *v.* Reid, 30 Kan. 10, 1 Pac. 308, holding that the fact that an unrecorded mortgage is for the purchase-money gives it no priority over a later recorded mortgage.

New Jersey.— McCrea *v.* Newman, 46 N. J. Eq. 473, 19 Atl. 198.

Ohio.— Ramsey *v.* Jones, 41 Ohio St. 685; Doherty *v.* Stimmel, 40 Ohio St. 294; Mayham *v.* Coombs, 14 Ohio 428; Stansell *v.* Roberts, 13 Ohio 148, 42 Am. Dec. 193.

Texas.— Stephens *v.* Keating, (1891) 17 S. W. 37.

Vermont.—Passumpsic Sav. Bank *v.* Buck, 71 Vt. 190, 44 Atl. 93.

West Virginia.— Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256.

United States.— Ridings *v.* Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401; Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 26 L. ed. 1215; McCormack *v.* James, 36 Fed. 14.

Canada.— Gray *v.* Coughlin, 18 Can. Sup. Ct. 553. And see Oxley *v.* Culton, 32 Nova Scotia 256; Gould *v.* McGregor, 13 Nova Scotia 339; McMillan *v.* Munro, 25 Ont. App. 288; Boucher *v.* Smith, 9 Grant Ch. (U. C.) 547.

23. Sternbach *v.* Leopold, 50 Ill. App. 476 [*affirmed* in 156 Ill. 44, 41 N. E. 51]; Stroud *v.* Lockart, 4 Dall. (Pa.) 153, 1 L. ed. 779; Patterson *v.* De la Ronde, 8 Wall. (U. S.) 292, 19 L. ed. 415.

In Louisiana an unrecorded mortgage is void as to third persons not parties to the mortgage. Ridings *v.* Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401.

In North Carolina no notice, however clear, of an unrecorded mortgage operates to the prejudice of creditors and purchasers for value. Hinton *v.* Leigh, 102 N. C. 28, 8 S. E. 890.

In West Virginia an unrecorded mortgage is void as to creditors with or without notice, but is good as against purchasers with notice or who did not purchase for value. Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256.

24. Wicks *v.* McConnell, 102 Ky. 434, 43 S. W. 205, 20 Ky. L. Rep. 84; Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876.

25. Kellogg *v.* Kelley, 69 Minn. 124, 71 N. W. 924; Alexandria Bank *v.* Herbert, 8 Cranch (U. S.) 36, 3 L. ed. 479.

26. *Kentucky.*— Clift *v.* Williams, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821, 20 Ky. L. Rep. 1261, 21 Ky. L. Rep. 551.

Nebraska.— Blair State Bank *v.* Stewart, 57 Nebr. 58, 77 N. W. 370.

Ohio.— Gill *v.* Pinney, 12 Ohio St. 38.

Tennessee.— Herman *v.* Clark, (Ch. App. 1896) 39 S. W. 873.

Texas.— Oak Cliff College *v.* Armstrong, (Civ. App. 1899) 50 S. W. 610.

27. Heathman *v.* Rogers, 54 Ill. App. 592 (holding that an unrecorded mortgage is a secret lien and not favored either at law or in equity); Belcher *v.* Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376 (holding that a mortgage which was not recorded because it would impair the mortgagor's credit is fraudulent as against a subsequent judgment creditor, who extended credit on the faith of the mortgagor's apparently unencumbered title to the land).

Badge of fraud.— The mere fact that the mortgagee withholds the mortgage from record, even where it is done at the request of the mortgagor or under a secret agreement with him, although it is a badge of fraud, does not necessarily and of itself make the mortgage fraudulent and void as to subsequent creditors. Haas *v.* Sternbach, 156 Ill. 44, 41 N. E. 51; Sternbach *v.* Leopold, 50 Ill. App. 476 [*affirmed* in 156 Ill. 44, 41 N. E. 51]; Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537. And see Hord *v.* Harlan, 143 Mo. 469, 45 S. W. 274. And see Fraudulent Conveyances, 20 Cyc. 446 *et seq.*

28. See the statutes of the different states. And see Herbert *v.* Hanrick, 16 Ala. 581.

Mortgage made by recording officer.— A recorder who, being himself the mortgagor, must know his own signature, may properly admit it to registry, and his certificate will be admissible. Haines *v.* Verret, 11 La. Ann. 122.

Instrument executed in lieu of destroyed mortgage.— An instrument which is executed and acknowledged in due form by the holders of the legal title to real estate, which recites the execution and recording of a mortgage of

the nature of mortgages,[29] conveyances to a trustee with power to sell the land and pay debts,[30] and agreements in the nature of a mortgage or promising to execute a mortgage.[31] Any subsequent written agreement of the parties which materially changes the terms or conditions of the mortgage may and should be recorded.[32]

2. Defective Instruments. A mortgage which is not duly acknowledged or proved according to law,[33] or which is defective for want of attesting witnesses[34] or for want of a seal,[35] is not entitled to be recorded, and if nevertheless it is placed on the record it will not operate as constructive notice to third persons acquiring interests in or liens upon the property.[36]

D. Place of Record. To constitute a valid lien a mortgage must be recorded in the county in which the land affected lies.[37] If such county is unorganized, the record should be made in the county to which it is attached for judicial purposes.[38]

such property, the destruction of the record of the mortgage by fire, and the reëstablishment of the record according to law, and which admits a specified sum to be due on the mortgage, which sum the parties thereby agree to pay in instalments, is itself a mortgage, and its recording is effectual to preserve the lien upon the property. Hunt *v.* Innis, 12 Fed. Cas. No. 6,892, 2 Woods 103.

A mortgage upon an equitable estate in land, duly executed and acknowledged, is such an instrument affecting the title to lands as may be recorded. O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745; General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174; Balen *v.* Mercier, 75 Mich. 42, 42 N. W. 666; Crane *v.* Turner, 67 N. Y. 437; Jarvis *v.* Dutcher, 16 Wis. 307. See 35 Cent. Dig. tit. "Mortgages," § 201.

A mortgage of a leasehold interest in realty, the lease running ten years, together with the buildings erected thereon, is a mortgage affecting land within the recording acts. Miller *v.* Toledo Bank, 1 Ohio Dec. (Reprint) 392, 8 West. L. J. 536.

29. Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

30. Woodruff *v.* Robb, 19 Ohio 212. *Contra*, McMenomy *v.* Murray, 3 Johns. Ch. (N. Y.) 435.

31. Cantrell *v.* Ford, (Tenn. Ch. App. 1898) 46 S. W. 581. But *compare* Fash *v.* Ravesies, 32 Ala. 451.

32. Munson *v.* Ensor, 94 Mo. 504, 7 S. W. 108; Gooch *v.* Addison, 13 Tex. Civ. App. 76, 35 S. W. 83. *Compare* Gillig *v.* Maass, 28 N. Y. 191.

33. Edwards *v.* Thom, 25 Fla. 222, 5 So. 707; New England Mortg. Security Co. *v.* Ober, 84 Ga. 294, 10 S. E. 625; Reed *v.* Coale, 4 Ind. 283.

Probate by mortgagor.— The admission of an instrument to probate is a judicial act, and where a clerk of court is a party to a mortgage or deed of trust, his adjudication that its acknowledgment, made before a justice of the peace, is in due form, and his act in admitting the instrument to probate and ordering its registration are ineffectual to pass title as against third parties. White *v.* Connelly, 105 N. C. 65, 11 S. E. 177.

Privy examination of married woman not taken.— A mortgage on lands purchased by a married woman, given by her and her husband to secure part of the purchase-money, although void as to the wife because she was not examined apart from her husband on its acknowledgment, is properly recorded in order to give the debt priority on the estate which might vest in the husband on the death of the wife. Armstrong *v.* Ross, 20 N. J. Eq. 109.

34. Thompson *v.* Morgan, 6 Minn. 292; Harper *v.* Barsh, 10 Rich. Eq. (S. C.) 149. *Compare* Johnson *v.* Sandhoff, 30 Minn. 197, 14 N. W. 889, holding that where a mortgage with only one attesting witness is nevertheless recorded, it will be valid as against the mortgagor and his grantee of the land, and any others taking an interest with notice of the mortgage.

Variance in name of subscribing witness.— Where the fact of the execution of the mortgage or of its probate is not denied, an objection cannot be taken to the sufficiency of the probate on the ground of a variance in the name of a subscribing witness as attached to the mortgage and as it appears in the certificate of probate. Simpson *v.* Simpson, 107 N. C. 552, 12 S. E. 447.

35. Racouillat *v.* Sansevain, 32 Cal. 376. But see Atkinson *v.* Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544.

36. See *infra*, XIV, E, 2, h.

37. *Arkansas.*— Beaver *v.* Frick County, 53 Ark. 18, 13 S. W. 134.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96.

New York.— Jencks *v.* Smith, 1 N. Y. 90, 3 Den. 592.

Pennsylvania.— Oberholtzer's Appeal, 124 Pa. St. 583, 17 Atl. 143, 144.

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460.

Virginia.— Blackford *v.* Hurst, 26 Gratt. 203.

See 35 Cent. Dig. tit. "Mortgages," § 203.

Mistake as to county.— Where a mortgage has been recorded in the county where the land is supposed to be situated, its validity is not affected by the subsequent discovery, made in running the boundary line, that the land lies in an adjoining county. Stewart *v.* Walsh, 23 La. Ann. 560.

38. Thayer *v.* Herrick, 23 Fed. Cas. No. 13,868; Starr & C. Rev. St. Ill. c. 30, § 30.

If the property lies in two or more counties, the mortgage should be recorded in each; for the record of it in one county will affect only that portion of the premises which lies within that county.[39] But if the instrument is duly recorded, its lien will not be affected by the subsequent division of the county into two or more, and the fact that the land falls within one of the new counties, nor will it be necessary to have the mortgage recorded anew in such new county.[40] A mortgage of standing timber is a mortgage of an interest in land, and must be recorded as such; and filing it as a chattel mortgage in the town-clerk's office will not give notice to a subsequent purchaser.[41]

E. Time of Record. Statutes as to recording mortgages usually prescribe a time within which they are to be recorded;[42] but usually the failure to comply with such a provision invalidates the mortgage only as to subsequent purchasers or lienors.[43] Generally it is held that a mortgage is to be deemed "recorded" from the time it is filed for record in the proper office, or delivered for that purpose to the officer having authority to record it,[44] although in some states it takes

39. Woodbury *v.* Manlove, 14 Ill. 213; Starr & C. Rev. St. Ill. c. 30, § 29; Van Meter *v.* Knight, 32 Minn. 205, 20 N. W. 142; Wells *v.* Wells, 47 Barb. (N. Y.) 416.

Railroad mortgage.— Where a mortgage by a railroad company, on its road, which passes through several counties, is recorded in one of those counties before judgment recovered against the company by a stranger, but is not recorded in the other counties, it has priority of lien over the judgment upon the part of road lying within that particular county, but not upon such portions of it as lie in the other counties. Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25.

40. Ellison *v.* Iler, 22 La. Ann. 470; Hayden *v.* Nutt, 4 La. Ann. 65; Davidson *v.* Root, 11 Ohio 98, 37 Am. Dec. 411. *Contra*, Ollendike's Petition, 9 Pa. Dist. 95.

41. Williams *v.* Nyde, 98 Mich. 152, 57 N. W. 98.

42. See the statutes of the different states. And see the following cases:

Delaware.— Hall *v.* Tunnell, 1 Houst. 320.

Indiana.— Rev. St. (1894) § 3350, provides that a conveyance not recorded within forty-five days after its execution shall be deemed fraudulent and void as against any subsequent purchaser, lessee, or mortgagee. Under this, it is not necessary to show fraud in fact, in a suit by a subsequent *bona fide* mortgagee against the first mortgagee. Schmidt *v.* Zahrndt, 148 Ind. 447, 47 N. E. 335. But this statute does not apply in favor of creditors of the mortgagor whose claims had accrued before the execution of the mortgage. Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537.

Kentucky.— Kentucky Bank *v.* Vance, 4 Litt. 168.

New Mexico.— Moore *v.* Davey, 1 N. M. 303.

Pennsylvania.— Ridgway *v.* Stewart, 4 Watts & S. 383. Mortgages given for the purchase-money of the lands mortgaged are liens from the time of their execution provided they are recorded within sixty days thereafter. Parke *v.* Neeley, 90 Pa. St. 52; Bratton's Appeal, 8 Pa. St. 164. A written defeasance, executed contemporaneously with a deed, must be recorded within sixty days from its date, in order to have the effect of reducing the deed to a mortgage. Rathfon *v.* Specht, 18 Pa. Co. Ct. 19.

South Carolina.— Bloom *v.* Simms, 27 S. C. 90, 3 S. E. 45. A mortgage recorded after the time prescribed by the recording acts is nevertheless a lien from the date of its actual record, and will take priority over the claims of all creditors who have not previously established a lien, where there is no question as to the honesty of the debt secured by the mortgage. South Carolina Loan, etc., Co. *v.* McPherson, 26 S. C. 431, 2 S. E. 267.

United States.— Kurtz *v.* Hollingshead, 14 Fed. Cas. No. 7,953, 4 Cranch C. C. 180. And see Cocke *v.* Halsey, 16 Pet. 71, 10 L. ed. 891.

See 35 Cent. Dig. tit. "Mortgages," § 204.

43. Levinz *v.* Will, 1 Dall. (Pa.) 430, 1 L. ed. 209.

44. *Alabama.*— Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443.

Indiana.— Kessler *v.* State, 24 Ind. 313; Reasoner *v.* Edmundson, 5 Ind. 393.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545; Breckenridges *v.* Todd, 3 T. B. Mon. 52, 16 Am. Dec. 83.

Michigan.— Sinclair *v.* Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235.

Ohio.— Brown *v.* Kirkman, 1 Ohio St. 116; Magee *v.* Beatty, 8 Ohio 396.

Pennsylvania.— Woods' Appeal, 82 Pa. St. 116.

Virginia.—Pownal *v.* Taylor, 10 Leigh 172, 34 Am. Dec. 725.

Wisconsin.— Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962, holding that in the absence of proof to the contrary, it will be presumed that the entry in the general index and the actual recording of the mortgage were simultaneous.

See 35 Cent. Dig. tit. "Mortgages," § 204.

Fees not paid.—Where a mortgage was presented to the register and left in his office, and he refused to receive it officially because his fees were not tendered, but he indorsed

effect only from the time of its actual registration, and not from the time it is handed to the recorder.[45]

F. Sufficiency of Record. The due "recording" of a mortgage includes spreading it at large upon the record,[46] and filing it or depositing it in the proper office is not sufficient if done with instructions not to spread it on the record or if it is withdrawn before recording.[47] The record, once written out at large, cannot be altered by the recorder, even with the consent of the parties.[48] The accidental destruction of the record by fire or other cause after the mortgage has been duly recorded will not invalidate it or deprive the mortgagee of priorities or other rights already accrued.[49] The record is generally held sufficient if it gives notice, with reasonable certainty, of the real state of the encumbrance and the essential particulars of the mortgage, not being vitiated by mere clerical errors,[50] and statutes requiring mortgages to be recorded in separate books or books of a particular kind or with a particular title are held to be merely directory.[51] Where the law requires a certificate of the recording of a mortgage to be indorsed on the instrument by the recording officer, such indorsement is evidence of the due recording

on the mortgage that it was "filed" on that date "subject to the annexed facts," namely, that the fees were not paid, and it remained in his office for five months, when the fees were paid and the mortgage was then recorded, it was held that it was not "filed for record" until the later date. Cunninggim *v.* Peterson, 109 N. C. 33, 13 S. E. 714.

Where there is a discrepancy between the date of actual record of a mortgage as it appears on the record book and the constructive record shown by the indorsement made upon the instrument when deposited, the former must prevail, unless in the case of those having notice and knowledge of the latter. Donald *v.* Beals, 57 Cal. 399.

45. Benson *v.* Green, 80 Ga. 230, 4 S. E. 851; State *v.* Rogillio, 30 La. Ann. 833. *Compare* Way *v.* Levy, 41 La. Ann. 447, 6 So. 661, holding that where the execution of a mortgage was completed on Saturday, just about the hour of the legal closing of the office of the recorder of mortgages, and the paper was filed by him for record and the record was made on the Monday morning following, without delay, the mortgage would take effect, with reference to other liens, as of Saturday.

46. Sherman *v.* Fitch, 98 Mass. 59, holding that, where a mortgage requiring ratification to give it validity is recorded, no new record is necessary after the ratification.

47. Bowen *v.* Fassett, 37 Ark. 507; Kiser *v.* Heuston, 38 Ill. 252; Yerger *v.* Barz, 56 Iowa 77, 8 N. W. 769.

48. Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26.

49. Hall *v.* Shannon, 85 Ill. 473; Shannon *v.* Hall, 72 Ill. 354, 22 Am. Rep. 146.

50. Turman *v.* Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35 [*limiting* Oats *v.* Walls, 28 Ark. 244]; Meherin *v.* Oaks, 67 Cal. 57, 7 Pac. 47; Ogden *v.* Ogden, 79 Ill. App. 488; Hopeston Bldg. Assoc. *v.* Green, 16 Ill. App. 204; Poutz *v.* Reggio, 25 La. Ann. 637.

Part printed.— The record of a mortgage is not defective merely because a portion of it is printed, instead of being written with pen and ink. Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

An immaterial misspelling or variance in the name of the mortgagor will not vitiate the record. Muehlberger *v.* Schilling, 3 N. Y. Suppl. 705.

51. *Ohio.*— Smith *v.* Smith, 13 Ohio St. 532.

Oregon.— Haseltine *v.* Espey, 13 Oreg. 301, 10 Pac. 423.

Pennsylvania.— Clader *v.* Thomas, 89 Pa. St. 343; Glading *v.* Frick, 88 Pa. St. 460. *Compare* Downing *v.* Glen Rock Oil Co., 207 Pa. St. 455, 56 Atl. 995; Luch's Appeal, 44 Pa. St. 519.

South Carolina.— Armstrong *v.* Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772.

Tennessee.— Swepson *v.* Exchange, etc., Bank, 9 Lea 713.

In Louisiana the rule is otherwise. Willis *v.* Wasey, 41 La. Ann. 694, 6 So. 730; Fisher *v.* Tunnard, 25 La. Ann. 179; Robertson *v.* Brown, 5 La. Ann. 154; Perot *v.* Chambers, 2 La. Ann. 800; Falconer's Succession, 4 Rob. 5.

A deed which is absolute in form, although intended by the parties only as a security for a debt or loan, is properly recorded in the book of deeds, and will be valid against purchasers and creditors, although the statute may require the recording of mortgages in a separate book. Kent *v.* Williams, 146 Cal. 3, 79 Pac. 527; Benton *v.* Nicoll, 24 Minn. 221; Haseltine *v.* Espy, 13 Oreg. 301, 10 Pac. 423; Kennard *v.* Mabry, 78 Tex. 151, 14 S. W. 272; Knowlton *v.* Walker, 13 Wis. 264.

A mortgage of both real and personal property is properly recorded in the book for the records of real property, although there is also a separate book for chattel mortgages. Boyle Ice-Mach. Co. *v.* Gould, 73 Cal. 153, 14 Pac. 609; Anthony *v.* Butler, 13 Pet. (U. S.) 423, 10 L. ed. 229.

Recording a mortgage among the records of assignments of mortgages is not constructive notice. Parsons *v.* Lent, 34 N. J. Eq. 67.

of the instrument.[52] The fact that the entries in the record are not made in consecutive order, either as to number or date of receipt, as required by the statute, does not necessarily impeach the index so as to destroy the validity of the registry.[53]

G. Reinscription. The statute of Louisiana providing that the effect of a mortgage shall cease if it is not reinscribed within ten years relates only to the effect of the inscription, not of the mortgage, so that, while the failure to reinscribe will cause the mortgage to lose its priority and any other effect as against third parties, it will still remain a valid obligation as against the mortgagor and his heirs.[54] In Mississippi it is provided by statute that a trust deed shall cease to be a lien on property as to subsequent creditors unless a renewal thereof is entered on the record within six months after the remedy to enforce it appears on the record to be barred by the statute of limitations.[55]

XIV. LIEN AND PRIORITY.

A. Lien in General — 1. Nature, Extent, and Duration of Lien — a. Nature and Existence of Lien. A mortgage raises a specific lien upon the particular property included in its terms, to the extent of the mortgagor's interest or title therein,[56] subject to existing rights, liens, and encumbrances of third persons,[57] which lien is created and defined by the acts and agreements of the parties, as distinguished from the act of the law.[58] The interest which it vests in the mortgagee, at least before breach of condition, is not generally regarded as real estate.[59]

b. Scope and Extent of Lien. The lien of a mortgage in respect to its amount is coextensive with the real debt secured or the sum actually advanced on the security of the mortgage,[60] the amount of the consideration named being usually indicative of this sum and overriding any previous negotiations or agreements of the parties as to the amount.[61] As to the property covered, the lien is, as already

52. Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163; Jakway *v.* Jenison, 46 Mich. 521, 9 N. W. 836.

53. Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

54. Norres *v.* Hays, 44 La. Ann. 907, 11 So. 462; Myrick's Succession, 43 La. Ann. 884, 9 So. 498; Gagneux's Succession, 40 La. Ann. 701, 4 So. 869; Factors', etc., Ins. Co. *v.* Warren, 37 La. Ann. 85; Adams *v.* Daunis, 29 La. Ann. 315; Villavaso *v.* Walker, 28 La. Ann. 775; Thompson *v.* Simmons, 22 La. Ann. 450; Liddell *v.* Rucker, 13 La. Ann. 569; Letaste *v.* Beraud, 2 La. Ann. 768; Bethany *v.* His Creditors, 7 Rob. (La.) 61; Lejeune *v.* Hébert, 6 Rob. (La.) 419; Minor *v.* Alexander, 6 Rob. (La.) 166; Pickett *v.* Foster, 149 U. S. 505, 13 S. Ct. 998, 37 L. ed. 829; Shields *v.* Shiff, 124 U. S. 351, 8 S. Ct. 510, 31 L. ed. 445; Bondurant *v.* Watson, 103 U. S. 281, 26 L. ed. 447; Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322; Patterson *v.* De la Ronde, 8 Wall. (U. S.) 292, 19 L. ed. 415; Pickett *v.* Foster, 36 Fed. 514. And see *infra*, XIV, F, 1, d.

Effect of reinscription.—The reinscription of a mortgage, after the lapse of the ten years, only entitles it to rank as a mortgage from the date of such reinscription. Gegan *v.* Bowman, 22 La. Ann. 336; Flower's Succession, 12 La. Ann. 216.

Where a registered judgment rendered on a mortgage note does not contain the information necessary for the purpose of reinscription, its registry is not a sufficient reinscription of the mortgage. Miltenberger *v.* Dubroca, 34 La. Ann. 313.

55. See Klaus *v.* Moore, 77 Miss. 701, 27 So. 612, construing Code, § 2462.

56. Rider *v.* Regan, 114 Cal. 667, 46 Pac. 820; Robrecht *v.* Reid, 114 Cal. 356, 46 Pac. 101; Fay, etc., Co. *v.* Brown, 96 Wis. 434, 71 N. W. 895. And see *supra*, XII, A, 2, a.

57. Seeley *v.* Sharrer, 112 Mich. 267, 70 N. W. 551; Saginaw Bldg., etc., Assoc. *v.* Tennant, 111 Mich. 515, 69 N. W. 1118; Smith *v.* McWhorter, 74 Miss. 400, 20 So. 870.

58. National Hudson River Bank *v.* Reynolds, 57 Hun (N. Y.) 307, 10 N. Y. Suppl. 669. And see Griggs *v.* Strippling, 59 Ga. 500; Stevens *v.* McCoy, 60 Ohio St. 540, 54 N. E. 517.

59. Dougherty *v.* Randall, 3 Mich. 581. And see *supra*, I, A, 3.

60. Peters *v.* Goodrich, 3 Conn. 146; Atlantic Trust Co. *v.* Holdsworth, 167 N. Y. 532, 60 N. E. 1106 [*affirming* 50 N. Y. App. Div. 623, 63 N. Y. Suppl. 756]; Freeman *v.* Auld, 44 Barb. (N. Y.) 14 [*reversed* on other grounds in 44 N. Y. 50].

Medium of payment.—Where a contract for the sale of land specifies that the price is payable in gold, a mortgage given to secure the purchase-money will include in its lien the premium on gold, if any. Nutt *v.* Summers, 78 Va. 164.

61. Turnbull *v.* Thomas, 24 Fed. Cas. No. 14,243, 1 Hughes 172.

stated, determined primarily by the description contained in the mortgage itself.[62] It may attach to an undivided or undetermined interest,[63] and be subject to exceptions and reservations in favor of the mortgagor.[64] In a jurisdiction where a mortgage is regarded as passing the legal title, the lien of a second mortgage is merely equitable.[65]

c. Time When Lien Attaches. As between the parties, the lien of a mortgage attaches from the time of its execution and delivery;[66] but as against third persons, from the time it is recorded or filed for record.[67] In the case of a mortgage given to indemnify the mortgagee against a future or contingent liability, some of the decisions maintain that its lien begins upon its execution and delivery, and not upon the payment of the debt indemnified against;[68] but others refuse to accord any lien to the mortgage until the debt or liability has at least become fixed and absolute.[69] A mortgage to secure a future loan or advance becomes a lien from the day the loan advance is made.[70] Where one executes a mortgage with covenants of warranty on property which he does not then own, but to which he subsequently acquires title, the mortgage attaches from the moment the title is acquired.[71] A deed left by a mortgagor as an escrow, to be delivered upon default in payment by him of a sum fixed upon in satisfaction of all indebtedness, does not become operative until default, and creates no lien on the land.[72]

d. Duration of Lien. The lien of a mortgage, once attached to land, continues in force until the mortgagee has received payment or satisfaction of the debt secured,[73] unless he previously releases it,[74] or a merger takes place by his acquisition of the legal title to the property mortgaged,[75] or until the debt has become barred by the statute of limitations,[76] or the mortgagee's interest defeated by an

62. See *supra*, XII, A, 1.

63. Hosford *v.* Merwin, 5 Barb. (N. Y.) 51; Dodson *v.* Dodson, 9 Ohio Dec. (Reprint) 201, 11 Cinc. L. Bul. 198. But see Hidden *v.* Jordan, 21 Cal. 92, holding that, where a person employed to buy land for another advances part of the purchase-money, and takes the deed in his own name, he occupies the position of a mortgagee, and his lien is upon the whole land, and not merely upon an undivided interest proportioned to the amount advanced by him.

Mortgage on distributive share in decedent's estate.— Where a recorded instrument seeks to charge the "shares" of the obligors in a decedent's estate with a lien for the payment of a note given by them, the word "shares" will not be held to include the interest which the obligors have as creditors of the estate, at least where the rights of third parties have intervened. Chisholm *v.* Cissell, 13 App. Cas. (D. C.) 203.

64. Albany Ins. Co. *v.* Lansing, 7 Johns. Ch. (N. Y.) 142; Sands *v.* Kaukauna Water Power Co., 115 Wis. 229, 91 N. W. 679.

65. Commonwealth Bank *v.* Vance, 4 Litt. (Ky.) 168.

66. Ker *v.* Ker, 42 La. Ann. 870, 8 So. 595, holding that where there are several mortgages in favor of the same person covering the same piece of property, and the debts secured are consolidated into one sum, and a new mortgage given for its security, the lien begins from the date of such new mortgage.

67. Berwin *v.* Weiss, 28 La. Ann. 363; Stewart *v.* Hopkins, 30 Ohio St. 502; Tousley *v.* Tousley, 5 Ohio St. 78; Brown *v.* Kirkman, 1 Ohio St. 116; Woodruff *v.* Robb, 19 Ohio 212; Holliday *v.* Franklin Bank, 16 Ohio 533; Magee *v.* Beatty, 8 Ohio 396; Brooke's Appeal, 64 Pa. St. 127; Foster's Appeal, 3 Pa. St. 79; South Carolina L. & T. Co. *v.* McPherson, 26 S. C. 431, 2 S. E. 267.

68. Krutsinger *v.* Brown, 72 Ind. 466; Watson *v.* Dickens, 12 Sm. & M. (Miss.) 608.

69. Choteau *v.* Thompson, 2 Ohio St. 114; Taylor *v.* Cornelius, 60 Pa. St. 187; Bank of Commerce Appeal, 44 Pa. St. 423; Montgomery County Bank's Appeal, 36 Pa. St. 170. But *compare* Smith *v.* Harry, 91 Pa. St. 119.

70. Langfitt *v.* Brown, 5 La. Ann. 231; Meeker *v.* Clinton, etc., R. Co., 2 La. Ann. 971. And see *infra*, XIV, B, 3, a.

71. Rice *v.* Kelso, 57 Iowa 115, 7 N. W. 3, 10 N. W. 335. And see *supra*, XII, A, 2, d.

72. McDonald *v.* Huff, (Cal. 1888) 18 Pac. 243.

73. Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373; Rice *v.* Dewey, 54 Barb. (N. Y.) 455.

Judgment on debt secured.— In the absence of any statutory provision to the contrary, the lien of a mortgage continues, notwithstanding the debt has been reduced to a judgment, which, by lapse of time, has ceased to be a lien. Priest *v.* Wheelock, 58 Ill. 114.

74. McMillan *v.* McMillan, 184 Ill. 230, 56 N. E. 302; Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Mutual Mill Ins. Co. *v.* Gordon, 20 Ill. App. 559.

75. See *infra*, XIV, A, 2, f, (II).

76. *Illinois.*— Murray *v.* Emery, 187 Ill. 408, 58 N. E. 327; Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579; Pollock *v.* Maison, 41 Ill. 516; Jones *v.* Lander, 21 Ill. App. 510.

adverse possession, well founded and continued for the necessary time.[77] But the lien of the mortgage is not divested either by the destruction of the paper writing evidencing it[78] or by the death of the mortgagor.[79]

2. Waiver or Loss of Lien — a. Express Waiver. It is perfectly competent for a mortgagee to waive or release his lien in favor of a junior encumbrancer; and this will not extinguish the elder mortgage, but will merely postpone it to the junior.[80] So also he may waive his lien in favor of a person who advances money to the mortgagor to enable him to improve the property or replace burned buildings, the enhanced value of the security being a sufficient consideration,[81] or he may release the lien wholly, in order to enable the mortgagor to sell the property with a clear title,[82] or release a portion of the premises affected, retaining his lien for the whole indebtedness upon the remainder.[83]

b. Implied Waiver. The lien of a mortgage may be waived or released by implication; and this implication arises where the mortgagee has so dealt with the property, or with his claims or security, or with other persons acquiring an interest in or lien upon the property, that he is equitably estopped from asserting his lien to the prejudice of such persons, they having relied on the implied or apparent purport of his acts.[84]

c. Change of Securities. Where a mortgage is renewed or extended, at or

Kansas.— Jackson *v.* King, 9 Kan. App. 160, 58 Pac. 1013.

Maryland.— Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99.

Mississippi.— Klaus *v.* Moore, 77 Miss. 701, 27 So. 612.

Texas.— Ross *v.* Mitchell, 28 Tex. 150.

See 35 Cent. Dig. tit. "Mortgages," § 292.

Revival.— A mortgage barred by the statute of limitations may be revived by the mortgagor, as, by partial payments on the debt or by an acknowledgment or new promise in writing, and thus its lien will be continued in force. Ætna L. Ins. Co. *v.* McNeely, 166 Ill. 540, 46 N. E. 1130; Kerndt *v.* Porterfield, 56 Iowa 412, 9 N. W. 322; Curtis *v.* Renneker, 34 S. C. 468, 13 S. E. 664.

77. Fry *v.* Shehee, 55 Ga. 208; Wills *v.* Field, 62 N. J. Eq. 271, 49 Atl. 1128.

78. Sloan *v.* Holcomb, 29 Mich. 153.

79. Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Jones *v.* Null, 9 Nebr. 57, 1 N. W. 867.

80. *Alabama.*— Bolling *v.* Roman, 95 Ala. 518, 10 So. 553.

Illinois.— Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Beasley *v.* Henry, 6 Ill. App. 485.

Louisiana.— Loucks *v.* Union Bank, 2 La. Ann. 617.

Pennsylvania.— Thomas *v.* Equitable Bldg., etc., Assoc., 215 Pa. St. 259, 64 Atl. 531.

Washington.— Packard *v.* Delfel, 9 Wash. 562, 38 Pac. 208.

Wisconsin.—Clason *v.* Shepherd, 6 Wis. 369.

See 35 Cent. Dig. tit. "Mortgages," § 293.

81. Godfrey *v.* Rogers, 3 Cal. 101; Darst *v.* Bates, 95 Ill. 493.

82. McMillan *v.* McMillan, 184 Ill. 230, 56 N. E. 302; Bridges *v.* Cooper, 98 Tenn. 381, 39 S. W. 720.

83. Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Dooly *v.* Eastman, 28 Wash. 564, 68 Pac. 1039.

Release of one of two mortgages.— The execution and delivery of a quitclaim deed in the usual form to a mortgagor by a mortgagee holding two mortgages on the land conveyed will not operate as a release of both mortgages, where the deed recites that the only purpose for which it was given was to release the second mortgage. Donlin *v.* Bradley, 119 Ill. 412, 10 N. E. 11.

84. *Arkansas.*— Bell *v.* Radcliff, 32 Ark. 645.

Connecticut.— Pond *v.* Clarke, 14 Conn. 334.

Michigan.— Sibley *v.* Ross, 102 Mich. 158, 60 N. W. 460, 88 Mich. 315, 50 N. W. 379.

Missouri.—Kansas City Sav. Assoc. *v.* Mastin, 61 Mo. 435.

Wisconsin.— Clason *v.* Shepherd, 10 Wis. 356.

See 35 Cent. Dig. tit. "Mortgages," § 294.

Compare Nelson *v.* Ratliff, 72 Miss. 656, 18 So. 487, holding that where the legal title to land is conveyed in trust to pay a prior mortgage, the acceptance by the mortgagee of interest on his mortgage from the trustee is not a waiver of his mortgage lien.

The presentation, in insolvency proceedings, of a claim secured by mortgage is not, in the absence of evidence showing intention, a waiver of the mortgage. Drew *v.* McDaniel, 60 N. H. 480.

Making mortgagor executor.— A mortgagee does not extinguish the mortgage or release its lien merely by making the mortgagor his executor. Miller *v.* Donaldson, 17 Ohio 264.

Extension of time of payment.— Where the holder of a mortgage grants to the debtor an extension of the time for payment, it is not a waiver or release of the lien in favor of junior creditors or purchasers, in the absence of special equities. Russell *v.* Martin, 35 S. W. 536, 18 Ky. L. Rep. 125; Offutt *v.* Hendsley, 9 La. 1; Colby *v.* Place, 11 Nebr. 348, 9 N. W. 564.

before its maturity, or the evidence of the debt secured is changed, by the substitution of new notes or otherwise, the lien of the mortgage is not affected, in respect either to its continuity or its priority,[85] unless it clearly appears to have been the intention to make an absolute payment and cancellation of the mortgage and to create an entirely new security.[86]

d. Failure to Assert Claim. Where a mortgagee permits the mortgaged property to be levied on, without asserting his claim thereto, he is barred from claiming title to it as against the execution purchaser.[87] But it is otherwise as regards the estate of a deceased mortgagor. The mortgagee is under no obligation to file his claim for allowance against the estate, and his omission to do so will not affect his lien or his right to foreclose.[88]

e. Resort to Other Remedy. A mortgagee does not waive his lien by suing and recovering judgment on the note or bond secured,[89] or attaching the property of the mortgagor in an action on the mortgage debt.[90]

f. Loss of Lien — (1) *In General.* The lien of a mortgagee is lost if the mortgagor loses his title to the mortgaged premises, otherwise than by his voluntary alienation of the estate, or if his title is avoided or canceled in proceedings hostile to himself and to the mortgagee.[91] This is so also if the debt secured by the mortgage is paid,[92] or if it is extinguished or avoided by the act of the parties or

85. See *infra*, XVIII, B, 3.

86. *Alabama.*— New England Mortg. Security Co. *v.* Hirsch, 96 Ala. 232, 11 So. 63.

California.— Dingman *v.* Randall, 13 Cal. 512.

Illinois.— Bond *v.* Liverpool, etc., Ins. Co., 106 Ill. 654.

Maryland.— Neidig *v.* Whiteford, 29 Md. 178.

North Carolina.— Joyner *v.* Stancill, 108 N. C. 153, 12 S. E. 912.

See 35 Cent. Dig. tit. "Mortgages," § 295.

87. Grace *v.* Mercer, 10 B. Mon. (Ky.) 157.

88. Smith *v.* Gillam, 80 Ala. 296; Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Jones *v.* Null, 9 Nebr. 57, 1 N. W. 867.

89. Priest *v.* Wheelock, 58 Ill. 114; Cannon *v.* McDaniel, 46 Tex. 303.

A decree for the foreclosure of the mortgage does not merge or extinguish its lien, if it is never executed. Roberts *v.* Lawrence, 16 Ill. App. 453.

Allowance of claim in probate court.— The presentation and allowance by an administrator of a judgment, which is a lien on the judgment debtor's property, as a claim against his estate, does not destroy the lien. Morton *v.* Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53.

90. Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476. *Contra*, Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

91. White *v.* Gurney, 92 Minn. 271, 99 N. W. 889, holding that a mortgagee's interest in the mortgaged land may be defeated by the subsequent vacation of a judgment which vested the title in the mortgagor.

Termination of mortgagor's estate.—Where the mortgagor has only an estate for life in the premises, or a leasehold interest, the lien of the mortgage is lost by his death, in the one case, or by the end of the term, in the other case. Bryan *v.* Howland, 98 Ill. 625; Rogers *v.* Herron, 92 Ill. 583; Griffin *v.* Chicago Mar. Co., 52 Ill. 130.

Abandonment.— The owner of a mining claim, who has mortgaged it, may not abandon it, so as to permit the lands to be located as unoccupied mineral lands, and defeat the mortgage lien thereby. Alexander *v.* Sherman, 2 Ariz. 326, 16 Pac. 45.

Rescission of sale.— A mortgage created by a purchaser during his ownership, while subject to the right of the vendor to rescind the sale for non-payment of the price, operates upon any residue derived from the property after the claim of the vendor is satisfied. Phillips' Succession, 49 La. Ann. 1019, 22 So. 202.

Forfeiture for taxes.— The lien of a mortgage is not extinguished by a forfeiture of the land to the state for unpaid taxes, so long as a right to redeem still exists. Annely *v.* De Saussure, 12 S. C. 488.

Probate proceedings.— A statutory provision that, if an intestate's estate shall not exceed a certain sum, the whole of it shall be set apart for the support of the widow and minor heirs, after a rule against parties in interest to show cause against such action, cannot so operate as to divest the rights of a purchase-money mortgagee in real estate forming part of the intestate estate. Fairbanks *v.* Robinson, 64 Cal. 250, 30 Pac. 812.

Allowance of alimony.— Where mortgaged property is assigned to the mortgagor's wife as alimony, the lien of the mortgage is not divested if the mortgagee was not made a party to the divorce suit. Worsham *v.* Freeman, 34 Ark. 55.

Sale by tenants in common.— A mortgagee is not bound or affected by the action of tenants in common who sell the land and set aside the share of one of them in the proceeds to be applied on the mortgage debt, the mortgage covering his undivided interest in the premises. Annely *v.* De Saussure, 12 S. C. 488.

92. Cussen *v.* Brandt, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762, holding that where

the judgment of a court.[93] Where a building and machinery are mortgaged, the destruction of the building by fire, thereby severing the machinery and converting it into chattels, does not discharge the lien of the mortgage on the machinery.[94]

(II) *Acquisition of Title to Mortgaged Premises.* If the mortgagee acquires a title in fee simple to the mortgaged premises, the lien of the mortgage may be extinguished by reason of the merger of estates.[95]

(III) *Judicial Sale of Property.* Where a mortgagee sues at law on the debt secured, recovers judgment, and sells the property on execution thereunder, this will extinguish the lien of the mortgage.[96] If a judgment against the mortgagor is held by a third person, and its lien is prior to that of the mortgage, an execution sale under the judgment will divest the lien of the mortgage;[97] but otherwise if the judgment is junior to the mortgage.[98] Where a sale is made in partition proceedings, the lien of a mortgage on a tenant's undivided interest is divested

the debt secured by a mortgage is paid by a third person who was under no obligation to pay it, it becomes a question of fact, depending on the intention of the parties, whether his act was intended as a payment or as a purchase of the debt; and in the latter case the lien of the mortgage is not extinguished.

Proceeds of sale applied to debt.— Where a decree of foreclosure has been executed by the sale of the mortgaged premises and the application of the proceeds to the mortgage debt, the mortgage has expended its force and is no longer an encumbrance on the property Davis *v.* Dale, 150 Ill. 239, 37 N. E. 215.

Although the mortgagee's agent unjustifiably refuses to accept an instalment due, except upon conditions, the lien of the mortgage will not be divested as to that instalment where no bad faith is shown and the mortgagee might have honestly believed he was entitled to insist upon the conditions. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90.

Agreement to continue lien after payment. —An agreement between parties to a mortgage to continue its lien, notwithstanding payment in full, is valid between them; and where future advances are made, subsequent creditors with notice of the agreement are bound thereby. Girard Trust Co. *v.* Baird, 212 Pa. St. 41, 61 Atl. 507, 1 L. R. A. N. S. 405.

93. Ft. Wayne Trust Co. *v.* Sihler, 34 Ind. App. 140, 72 N. E. 494.

Discharge of surety.— Where one of two joint mortgagors is a surety for the other, and the mortgagee so deals with the security or with the other debtor as to release the surety, the lien of the mortgage will be restricted to the interest in the estate held by the other debtor. White *v.* Life Assoc. of America, 63 Ala. 419, 35 Am. Rep. 45.

Detaching interest coupons.— Where interest coupons are secured by a mortgage, their detachment from the bonds does not deprive the holder of the security of the mortgage, which will protect them until paid, without regard to their physical attachment to the bonds. Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 178 N. Y. 588, 70 N. E. 1102 [*affirming* 85 N. Y. App. Div. 36, 82 N. Y. Suppl. 644].

94. Steed *v.* Knowles, 79 Ala. 446.

95. See *infra*, XVII, G, 2. And see Gage *v.* McDermid, 150 Ill. 598, 37 N. E. 1026; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Shinn *v.* Fredericks, 56 Ill. 439. *Compare* Fouche *v.* Swain, 80 Ala. 151.

96. Cottingham *v.* Springer, 88 Ill. 90. And see Berger *v.* Hiester, 6 Whart. (Pa.) 210, holding that where bonds are made payable at different dates, and a mortgage given to secure the whole amount, a sale on execution obtained on a judgment on the bond first coming due divests the lien of the mortgage on the property sold.

Reacquisition of title by mortgagor.— Where the lien of a mortgage is discharged by a judicial sale, the reacquisition of the title by the mortgagor will not inure to the benefit of the mortgagee as a revivor of the mortgage lien. Elder *v.* Derby, 98 Ill. 228; Bradford *v.* Russell, 79 Ind. 64; Jackson *v.* Littell, 56 N. Y. 108; Rauch *v.* Dech, 116 Pa. St. 157, 9 Atl. 180, 2 Am. St. Rep. 598.

97. Williams *v.* Gilbert, 37 N. J. Eq. 84; Hill *v.* Pixley, 63 Barb. (N. Y.) 200; McCammon *v.* Worrall, 11 Paige (N. Y.) 99. And see Wiley *v.* Lawson, 7 Rich. (S. C.) 152. *Compare* Corbett *v.* Howell, 10 S. W. 653, 10 Ky. L. Rep. 793. See also Judicial Sales, 24 Cyc. 61 *et seq.*

98. Hocker *v.* Reas, 18 Cal. 650; De Blanc *v.* Dumartrait, 3 La. Ann. 542. See also Osborne *v.* Hill, 91 Ga. 137, 16 S. E. 965; Henderson *v.* Trimmier, 32 S. C. 269, 11 S. E. 540. *Compare* Ramsdell *v.* Tama Water-Power Co., 84 Iowa 484, 51 N. W. 245. And see Executions, 17 Cyc. 1294 *et seq.*; Judicial Sales, 24 Cyc. 61 *et seq.*

In Pennsylvania prior to the statute on the subject the rule was that a sale under execution divested all liens on the property sold. Hoover *v.* Shields, 2 Penr. & W. 135; Stackpole *v.* Glassford, 16 Serg. & R. 163. But the act of April 6, 1830 (Pamphl. Laws 293), provides that "when the lien of a mortgage upon real estate is or shall be prior to all other liens upon the same property . . . the lien of such mortgage shall not be destroyed . . . by any sale made by virtue or authority of any writ of venditioni exponas." As to the construction of the statute see *In re* McFadden, 191 Pa. St. 624, 43 Atl. 383 (holding that the act was made for the benefit

from the land and attaches to his distributive share,[99] as generally a sale of a decedent's realty under orders of the probate court will divest liens on the property,[1] but not a sale by a receiver appointed in proceedings to which the mortgagee was not a party.[2]

(iv) *Removal of Buildings.* Where a mortgagor, without the knowledge or consent of the mortgagee, removes a building from the premises, leaving the land inadequate as security for the mortgage debt, the lien of the mortgage upon such building is not impaired or lost[3] as against any one having notice.[4]

3. Priority of Debts Secured by Same Mortgage — a. In General. There is in general no priority between several debts secured by one and the same mortgage, and which are all concurrent, whether they are all owned by the same mortgagee, or are severally held by joint mortgagees,[5] unless one of the creditors can show equities entitling him to a preference over the others.[6] Where the payee of a mortgage note gives it up and takes a new one for a different amount, without any agreement to show that it is still to be secured by mortgage, he loses his right to this security as against other creditors secured by the same mortgage.[7] Where an agent, with the assent of his principal, included in a mortgage executed by a third person to the principal, upon the sale of land, a debt due to himself, the debt to the principal must be first paid out of the mortgage, in the absence of any agreement to the contrary.[8]

b. Agreements as to Priority. It is competent for the parties to a mortgage securing several debts to agree upon and recite in the mortgage the order in

of the mortgagee, and he may waive his right, and consent that the sale be made free of the lien); Meigs *v.* Bunting, 141 Pa. St. 233, 21 Atl. 588, 23 Am. St. Rep. 273; Helfrich *v.* Weaver, 61 Pa. St. 385; Com. *v.* Wilson, 34 Pa. St. 63; Perry *v.* Brinton, 13 Pa. St. 202; Byers *v.* Hoch, 11 Pa. St. 258; Kuhn's Appeal, 2 Pa. St. 264; Knaub *v.* Esseck, 2 Watts 282; Shultze *v.* Diehl, 2 Penr. & W. 273; Goepp *v.* Gartizer, 3 Phila. 335.

99. Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; Offutt *v.* Hendsley, 9 La. 1; United New Jersey R. Co. *v.* Long Dock Co., 42 N. J. Eq. 547, 9 Atl. 586; Reed *v.* Fidelity Ins., etc., Co., 113 Pa. St. 574, 6 Atl. 163; Wright *v.* Vickers, 81 Pa. St. 122. *Compare* Lecarpentier *v.* Lecarpentier, 5 La. Ann. 497. And see *supra*, XII, A, 3.

1. Michel *v.* Delaporte, 14 La. Ann. 91; Moore *v.* Shultz, 13 Pa. St. 98, 53 Am. Dec. 446. *Contra*, Bloomer's Estate, 11 Phila. (Pa.) 92.

2. McLaughlin *v.* Taylor, 115 Ga. 671, 42 S. E. 30.

3. Partridge *v.* Hemenway, 89 Mich. 454, 50 N. W. 1084, 28 Am. St. Rep. 322; Turner *v.* Mehane, 110 N. C. 413, 14 S. E. 974, 28 Am. St. Rep. 697; Dakota L. & T. Co. *v.* Parmalee, 5 S. D. 341, 58 N. W. 811. *Contra*, Stowell *v.* Waddingham, 100 Cal. 7, 34 Pac. 436; Buckout *v.* Swift, 27 Cal. 433, 87 Am. Dec. 90; Harris *v.* Bannon, 78 Ky. 568.

4. Hamlin *v.* Parsons, 12 Minn. 108, 90 Am. Dec. 284; Betz *v.* Muench, (N. J. Ch. 1888) 13 Atl. 622.

5. *Indiana.*— Chaplin *v.* Sullivan, 128 Ind. 50, 27 N. E. 425; Shaw *v.* Newsom, 78 Ind. 335; Zook *v.* Clemmer, 44 Ind. 15.

Maryland.— Cross *v.* Cohen, 3 Gill 257.

Michigan.— Burhans *v.* Mitchell, 42 Mich. 417, 4 N. W. 178.

New Hampshire.— See Passumpsic Sav. Bank *v.* Weeks, 59 N. H. 239.

Pennsylvania.— Hodge's Appeal, 84 Pa. St. 359.

West Virginia.— Farmers' Bank *v.* Woodford, 34 W. Va. 480, 12 S. E. 544.

See 35 Cent. Dig. tit. "Mortgages," § 303.

6. Union Bank *v.* Edwards, 1 Gill & J. (Md.) 346; Cussen *v.* Brandt, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762.

Negotiation of spurious notes.— Where the maker of a deed of trust securing a series of notes places them with a lender, on the strength of the recorder's receipt for the deed of trust, and afterward prepares another set of notes corresponding in all particulars with those described in the deed of trust and sells them to another person, on the strength of the deed itself, neither creditor having any knowledge of his dealings with the other, the one first advancing his money and taking the genuine notes is entitled to the security of the deed of trust. Southern Commercial Sav. Bank *v.* Slattery, 166 Mo. 620, 66 S. W. 1066. And see Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373.

Junior claimant obtaining receivership.— Where the trustee and the senior beneficiary in a trust deed, given for the benefit of himself and others, failed for four years, pending foreclosure, to take any steps to reach the rents of the mortgaged property through the appointment of a receiver, a junior beneficiary who moved for the appointment of the receiver was held entitled to the rents accruing during the foreclosure, although the amount realized on the foreclosure sale was not sufficient to satisfy the senior beneficiary. Faison *v.* Hicks, 127 N. C. 371, 37 S. E. 511.

7. Wilhelmi *v.* Leonard, 13 Iowa 330.

8. Philips *v.* Belden, 2 Edw. (N. Y.) 1.

which they shall be paid out of the proceeds of the mortgaged property, which order may be different from that fixed by the law in the absence of such an agreement, and a stipulation of this kind is binding upon them and their assignees with notice.[9]

c. Order of Maturity of Debts. Where a mortgage is given to secure several notes, debts, or instalments, due or maturing at different times, they are to be paid in the order of their maturity, in the absence of any contrary agreement of the parties or of any equities which should vary the rule.[10]

B. Priorities of Mortgages — 1. Priorities Between Mortgages — a. In General. Aside from the question of priority as determined by the date of record,[11] it is a rule that mortgages of equitable titles are subject to the general rules of equity with reference to priority,[12] and that in the most general terms successive mortgages on the same estate are entitled to priority of payment out of its proceeds in the order in which they have attached as liens upon it,[13] unless there are exceptional circumstances which render it equitably fair that a junior lien should have the precedence.[14] The relative date of the debts secured is not

9. *Indiana.*— Walters *v.* Ward, 153 Ind. 578, 55 N. E. 735.

Michigan.— Dunham *v.* W. Steele Packing, etc., Co., 100 Mich. 75, 58 N. W. 627.

Missouri.— Ellis *v.* Lamme, 42 Mo. 153.

New Mexico.— Coon *v.* Bosque Bonita Land, etc., Co., 8 N. M. 123, 42 Pac. 77.

Ohio.— Wohlgemuth *v.* Standard Drug Co., 14 Ohio Cir. Ct. 316, 8 Ohio Cir. Dec. 9, holding that assignees of notes maturing at different times, secured by the same mortgage, are not affected by an agreement, of which they have no knowledge, providing that the notes shall be paid otherwise than in the order of their maturity.

United States.— Richards *v.* Holmes, 18 How. 143, 15 L. ed. 304.

See 35 Cent. Dig. tit. "Mortgages," § 304.

10. *Florida.*— Wilson *v.* Hayward, 6 Fla. 171.

Illinois.— Funk *v.* McReynolds, 33 Ill. 481; Chandler *v.* O'Neil, 62 Ill. App. 418.

Indiana.— Horn *v.* Bennett, 135 Ind. 158, 34 N. E. 321, 24 L. R. A. 800; Gerber *v.* Sharp, 72 Ind. 553; Murdock *v.* Ford, 17 Ind. 52; Harris *v.* Harlan, 14 Ind. 439; Hough *v.* Osborne, 7 Ind. 140.

Iowa.— Walker *v.* Schreiber, 47 Iowa 529; Sangster *v.* Love, 11 Iowa 580.

Kansas.— Aultman-Taylor Co. *v.* McGeorge, 31 Kan. 329, 2 Pac. 778.

New Jersey.— Speer *v.* Whitfield, 10 N. J. Eq. 107.

New York.— Bridenbecker *v.* Lowell, 32 Barb. 9.

Wisconsin.— Buffalo Mar. Bank *v.* International Bank, 9 Wis. 57; Wood *v.* Trask, 7 Wis. 566, 76 Am. Dec. 230.

See 35 Cent. Dig. tit. "Mortgages," § 305.

Contra.— Wilcox *v.* Allen, 36 Mich. 160; McCurdy *v.* Clark, 27 Mich. 445; Cooper *v.* Ulmann, Walk. (Mich.) 251.

Bequest of notes.— Where one holding several notes maturing at different times, secured by a mortgage, bequeaths those last falling due, such notes, in foreclosure proceedings, are entitled to priority of payment over those retained by the testator. Wilber *v.* Buchanan, 85 Ind. 42.

11. See *infra*, XIV, D, 1.

12. Commonwealth Bank *v.* Vance, 4 Litt. (Ky.) 168, holding that where the equity of mortgagees is equal, he who has the legal title must be preferred.

A mortgage of the equitable title, made by the vendee in possession, under a contract of purchase, and recorded, has as full force and effect against a subsequent mortgagee as it has against the original vendor. Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316.

13. Goodbar *v.* Dunn, 61 Miss. 618; Ayers *v.* Staley, (N. J. Ch. 1889) 18 Atl. 1046; Lavalette *v.* Thompson, 13 N. J. Eq. 274; Central Trust Co. *v.* West India Imp. Co., 169 N. Y. 314, 62 N. E. 387 [*reversing* 48 N. Y. App. Div. 147, 63 N. Y. Suppl. 853]; Florence Bank *v.* Gregg, 46 S. C. 169, 24 S. E. 64.

Pending foreclosure of a first mortgage, the mortgagor created a second mortgage on the same property, and it was held that the second mortgagee took subject to the *lis pendens*, even though service of the bill had not then been effected; and a bill filed by him to redeem the prior encumbrance, after a final decree of foreclosure, was dismissed. Robson *v.* Argue, 25 Grant Ch. (U. C.) 407.

Senior mortgagee as surety for junior debt. — That a mortgagee joins with his mortgagor as surety on a bond to a party taking a second mortgage on the property, and that such obligors are insolvent, gives the second mortgagee no lien upon the interest which the prior mortgagee had in the premises, in the absence of fraud on the part of the prior mortgagee. Brant *v.* Clark, 27 N. J. Eq. 234.

14. Brown *v.* Baker, 22 Nebr. 708, 36 N. W. 273; McConnell *v.* Muldoon, 24 N. Y. Suppl. 902, 30 Abb. N. Cas. 352; Bank of Ireland *v.* Cogry Spinning Co., [1900] 1 Ir. 219.

Mortgagor losing title and then buying first mortgage.— Where a mortgagor has sold his equity of redemption in the land, and has also been discharged in bankruptcy from all personal liability under the mortgages affecting the land, and thereafter purchases

such a circumstance; that is, the mere fact that a mortgage is given to secure preëxisting debts will not entitle it to cut off prior equities.[15] The fact that the elder mortgage has become barred by the statute of limitations will postpone it to a junior lien.[16] The recitals in a subsequent mortgage cannot prejudice the rights of a prior mortgagee, acquired before its execution.[17] While partnership property is ordinarily liable in the first instance to firm creditors, yet real estate of a firm, if mortgaged by one of the partners, the mortgagee having no notice of partnership debts, is liable to the mortgagee before partnership creditors can satisfy their claims out of it.[18]

b. Mortgages Given Before and After Acquisition of Title. Where one gives a mortgage on property which he does not then own but to which he subsequently acquires title, such mortgage covers only the interest which he takes when the title vests in him, and therefore does not displace the lien of mortgages on the same land given by the prior owner.[19] And a mortgage executed before the mortgagor acquired title to the mortgaged premises is superior in right to one given by him after the title vested in him.[20]

c. Nature of Claim Secured. Where the same person holds two mortgages, the elder securing a debt due to himself, the younger securing a loan of trust funds made by him, the junior lien is first entitled to satisfaction.[21] The same rule applies where the first mortgage represents a debt really due from the mortgagor in one capacity to himself in another capacity, while the second secures money actually advanced by a third person.[22] But a second mortgagee cannot base a claim to priority on any such circumstance without showing that he has actually parted with value.[23]

d. Defective or Partially Invalid Mortgage. A mortgage which is so defective that it cannot be sustained in law as a valid encumbrance on the property will be postponed to the lien of a junior mortgage, free from objections, and taken in good faith and without notice.[24] This is the case for instance where there was a

the first mortgage, he will be regarded as a stranger to the estate, and the equities in favor of junior encumbrancers which might otherwise have existed against him as such mortgagor will not be revived by his subsequent repurchase of the lands. *In re* Howard, L. R. 29 Ir. 266.

15. Warford *v.* Hankins, 150 Ind. 489, 50 N. E. 468. But *compare* Kaehler *v.* Dibblee, 32 Wis. 19, holding that a mortgage given by a son to his father, who was in equity the real owner of the land, to secure the payment to him of a certain annual sum for his support, is posterior in equity to a mortgage of later date given to secure payment of joint notes of the son and the father for debts due when the prior mortgage was given.

16. Lord *v.* Morris, 18 Cal. 482, holding that a revival indorsed on the first mortgage note, after the execution of the second mortgage, will not restore the first mortgage to priority. But see Mackie *v.* Lansing, 2 Nev. 302, holding that a second mortgage, executed after the statute of limitations has barred a suit on the note secured by the first mortgage, but before suit to foreclose the first mortgage is barred, does not take precedence of such first mortgage.

17. Clabaugh *v.* Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575.

18. McDermot *v.* Laurence, 7 Serg. & R. (Pa.) 438, 10 Am. Dec. 468. And see Frink *v.* Branch, 16 Conn. 260; Frothingham *v.* Shephard, 1 Aik. (Vt.) 65.

19. *Alabama.*— Austin *v.* Bean, 101 Ala. 133, 16 So. 41.

Maryland.— Gaither *v.* Clarke, 67 Md. 18, 8 Atl. 740.

Michigan.— Johnson *v.* Bratton, 112 Mich. 319, 70 N. W. 1021.

New Jersey.— Daly *v.* New York, etc., R. Co., 55 N. J. Eq. 595, 38 Atl. 202; Dugan *v.* Lyman, (Ch. 1892) 23 Atl. 657.

New York.— Matthews *v.* Damainville, 43 Misc. 546, 89 N. Y. Suppl. 493.

Washington.— Hitchcock *v.* Nixon, 16 Wash. 281, 47 Pac. 412.

See 35 Cent. Dig. tit. "Mortgages," § 308.

20. Louisville Bank *v.* Baumeister, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845; Alderson *v.* Ames, 6 Md. 52; Edwards *v.* McKernan, 55 Mich. 520, 22 N. W. 20. *Compare* Ryder *v.* Cobb, 68 Iowa 235, 26 N. W. 91. But see Jarvis *v.* Hannan, 40 Ohio St. 334; Maher *v.* Smead Heating, etc., Co., 11 Ohio Cir. Ct. 381, 5 Ohio Cir. Dec. 159.

21. Shuey *v.* Latta, 90 Ind. 136; Tappan *v.* Ricamio, 16 N. J. Eq. 89.

22. Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429.

23. Hooper *v.* Union Bank, 10 Rob. (La.) 63.

24. Allen West Commission Co. *v.* Brown, 69 Ark. 163, 61 S. W. 913; Livingstone *v.* Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; Cass County *v.* Oldham, 75 Mo. 50; Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876.

want of authority in the mortgagor to convey,[25] or where there is a total misdescription of the property or a description so vague as to be void for uncertainty.[26] But no such claim to precedence can be set up by a junior mortgagee whose lien was expressly made subject to the prior mortgage,[27] or who, at the time of taking his mortgage, has actual notice of the facts affecting the senior mortgage.[28] Nor can the elder lien be attacked and overthrown on account of mere irregularities in its execution,[29] nor on the ground that it is fraudulent as to creditors of the mortgagor generally.[30]

e. Agreements Affecting Priority. The lien of a senior mortgage will be subordinated to that of a junior encumbrance, where an agreement to that effect is made between the parties to the first mortgage, or between the two mortgagees.[31] It is not necessary that the second mortgagee should be directly a party

25. Haynes *v.* Seachrest, 13 Iowa 455, holding that where one member of a firm gives a mortgage on the firm property without any authority from his copartner, and both afterward join in a second mortgage on the same property, the first mortgage is entitled to priority only as to the interest in the firm property of the one partner who executed it.

26. Stead *v.* Grosfield, 67 Mich. 289, 34 N. W. 871; Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26; Merchants' Bank *v.* Morrison, 19 Grant Ch. (U. C.) 1.

Correction of misdescription.— Where the misdescription is corrected by the parties so as to make the mortgage cover the land intended to be described, the correction will date back to the time of execution of the mortgage, so as to cut out an intervening attachment. Rea *v.* Wilson, 112 Iowa 517, 84 N. W. 539.

27. *Arkansas.*— Clapp *v.* Halliday, 48 Ark. 258, 2 S. W. 853.

Indiana.— Old Nat. Bank *v.* Heckman, 148 Ind. 490, 47 N. E. 953.

New York.— Hardin *v.* Hyde, 40 Barb. 435; Lanier *v.* Milliken, 25 Misc. 59, 54 N. Y. Suppl. 424.

Ohio.— Bundy *v.* Ophir Iron Co., 38 Ohio St. 300; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

United States.— Central Trust Co. *v.* Columbus, etc., R. Co., 87 Fed. 815.

See 35 Cent. Dig. tit. "Mortgages," § 311.

28. Mutual L. Ins. Co. *v.* Doherty, 77 Fed. 853, 23 C. C. A. 144.

Record as notice.— A junior mortgagee cannot claim priority because of a misnomer of the mortgagor in the elder mortgage, when such mortgagor was also misnamed in the deed under which he claims title, and which was recorded, because the junior mortgagee, if he had examined the record, would have discovered that his mortgagor apparently had no title to the property. Glenovich *v.* Zurich, (S. D. 1904) 101 N. W. 1103.

Possession as notice.— Where a mortgage of a mining lease was executed and filed with the town-clerk as a chattel mortgage, instead of being executed and recorded as a real estate mortgage, it is nevertheless valid as against the mortgagor, and as against third persons after the mortgagee has taken possession under it. Acklin *v.* Waltermier, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629.

29. Hamilton Trust Co. *v.* Clemes, 17 N. Y. App. Div. 152, 45 N. Y. Suppl. 141.

30. Nichols *v.* Weed Sewing Mach. Co., 27 Hun (N. Y.) 200 [*affirmed* in 97 N. Y. 650]; Cohn *v.* Ward, 36 W. Va. 516, 15 S. E. 140; Warren *v.* Taylor, 9 Grant Ch. (U. C.) 59. *Contra*, Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580.

31. *Connecticut.*—Beers *v.* Hawley, 2 Conn. 467.

Florida.— Herring *v.* Fitts, 43 Fla. 54, 30 So. 804, 99 Am. St. Rep. 108.

Illinois.— Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Darst *v.* Bates, 95 Ill. 493; Beasley *v.* McGhee, 6 Ill. App. 489; Beasley *v.* Henry, 6 Ill. App. 485.

Indiana.— McCaslin *v.* Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67; Wayne International Bldg., etc., Assoc. *v.* Moats, 149 Ind. 123, 48 N. E. 793; Randall *v.* White, 84 Ind. 509; Claypool *v.* German F. Ins. Co., 32 Ind. App. 540, 70 N. E. 281; Rose *v.* Provident Sav., etc., Assoc., 28 Ind. App. 25, 62 N. E. 293.

Louisiana.— Fudickar *v.* Monroe Athletic Club, 49 La. Ann. 1457, 22 So. 381; Lehman *v.* Godberry, 40 La. Ann. 219, 4 So. 316; Loucks *v.* Union Bank, 2 La. Ann. 617.

Maryland.— See Clabaugh *v.* Byerly, 7 Gill 354, 48 Am. Dec. 575.

Minnesota.— Dye *v.* Forbes, 34 Minn. 13, 24 N. W. 309.

Mississippi.— Union Mortg., etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829.

Missouri.— Hasenritter *v.* Kirchhoffer, 79 Mo. 239.

Nebraska.— Ryan *v.* West, 63 Nebr. 894, 89 N. W. 416; Rogers *v.* Central L., etc., Co., 49 Nebr. 676, 68 N. W. 1048; Brown *v.* Baker, 22 Nebr. 708, 36 N. W. 273.

New Hampshire.—Shaw *v.* Abbott, 61 N. H. 254.

New Jersey.— Stover *v.* Hellyer, 68 N. J. Eq. 446, 59 Atl. 470; Asbury Park Bldg., etc., Assoc. *v.* Shepherd, (Ch. 1901) 50 Atl. 65; Cressman *v.* Piggott, 56 N. J. Eq. 634, 39 Atl. 698; McInnes *v.* McInnes Brick Mfg. Co., (Ch. 1897) 38 Atl. 182; New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328.

New York.—Taylor *v.* Wing, 84 N. Y. 471;

to such an arrangement; he may take advantage of a bargain of this kind made for his benefit by the mortgagor and the first mortgagee.[32] But the mortgagee whose lien is to be postponed must of course be a party to the agreement; he cannot be affected by a contract of which he was ignorant or to which he did not assent;[33] and the same rule has been applied in favor of an assignee of the first mortgage, who took it in good faith for value, and without any notice, actual or constructive, of an existing agreement to postpone it to a subsequent mortgage.[34] So if the agreement to postpone the first mortgage is made upon certain conditions which are not fulfilled it is *ipso facto* restored to its priority.[35]

f. Priority of Execution and Delivery. Independently of recording acts,[36] and as between mortgagees having equal equities, the mortgage first executed and delivered will have priority of lien.[37] Where two mortgages are executed at the

Jackson *v.* Nicol, 23 N. Y. App. Div. 139, 48 N. Y. Suppl. 974; Lane *v.* Nickerson, 17 Hun 148; Morse *v.* Brockett, 67 Barb. 23, 3 Thomps. & C. 773 [*affirmed* in 64 N. Y. 645]; Freeman *v.* Schroeder, 43 Barb. 618; Peters *v.* Eden, 36 Misc. 490, 73 N. Y. Suppl. 936; Squire *v.* Greene, 52 N. Y. Suppl. 1013, 5 N. Y. Annot. Cas. 356.

North Carolina.— Raleigh Nat. Bank *v.* Moore, 94 N. C. 734.

South Carolina.— Parker *v.* Parker, 52 S. C. 382, 29 S. E. 805.

United States.— American Bldg., etc., Assoc. *v.* Carter, 99 Fed. 7, 39 C. C. A. 393.

England.— Farrow *v.* Rees, 4 Beav. 18, 4 Jur. 1028, 49 Eng. Reprint 243; South Eastern R. Co. *v.* Jortin, 6 H. L. Cas. 425, 4 Jur. N. S. 467, 27 L. J. Ch. 145, 10 Eng. Reprint 1360. And see *In re* Castell, [1898] 1 Ch. 315, 67 L. J. Ch. 169, 78 L. T. Rep. N. S. 109, 46 Wkly. Rep. 248.

See 35 Cent. Dig. tit. "Mortgages," § 312.

Sufficiency of agreement.—Where two mortgages stand on an equal footing and are to be paid out of the same fund, the written promise of one mortgagee that he will see the other paid postpones the former mortgage and gives priority to the latter. Sanders *v.* Barlow, 21 Fed. 836. But one who loans money on property which he supposes to be unencumbered cannot, when he finds a prior mortgage, claim to be preferred to it merely because the money which he advanced was used in improving the property. Clarke *v.* Calvert, 72 N. Y. App. Div. 630, 78 N. Y. Suppl. 17.

Parol agreement.— A stipulation between two mortgagees of the same property that the junior mortgage shall take precedence is binding between the parties, although not in writing. Bender *v.* Siegel, 1 Lehigh Val. L. Rep. (Pa.) 62.

Consideration.— A loan to the mortgagor to enable him to build on the land is a sufficient consideration to support an agreement by a first mortgagee to hold his mortgage subject to a mortgage given to secure such loan. Loewen *v.* Forsee, (Mo. 1896) 35 S. W. 1138.

Extent of priority.— Where a prior mortgagee consents to postpone his mortgage to a second, in consideration that the proceeds of the second loan shall be applied in paying off an encumbrance senior to both and in improving the property, the second mortgagee is entitled to priority only in so far as his money is actually used for the purposes named. Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

32. Rose *v.* Provident Sav., etc., Assoc., 28 Ind. App. 25, 62 N. E. 293; Stover *v.* Hellyer, 68 N. J. Eq. 734, 62 Atl. 698; Cummings *v.* Consolidated Mineral Water Co., 27 R. I. 195, 61 Atl. 353.

33. Montrose Hardware Co. *v.* Montrose Inv. Co., 10 Colo. App. 161, 50 Pac. 204; Fine *v.* King, 33 N. J. Eq. 108; Gillig *v.* Maass, 28 N. Y. 191.

34. New York Sav. Bank *v.* Frank, 56 How. Pr. (N. Y.) 403 [*affirmed* in 45 N. Y. Super. Ct. 404].

35. Cummings *v.* Jackson, 55 N. J. Eq. 805, 38 Atl. 763.

36. See RECORDING ACTS.

37. *Illinois.*— Schimberg *v.* Waite, 93 Ill. App. 130; Houfes *v.* Schultze, 2 Ill. App. 196 [*affirmed* in 96 Ill. 335].

Indiana.— Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; Union Mut. L. Ins. Co. *v.* Abbott, 95 Ind. 238; McFadden *v.* Hopkins, 81 Ind. 459; Krutsinger *v.* Brown, 72 Ind. 466; Hoadley *v.* Hadley, 48 Ind. 452.

Kentucky.— Growning *v.* Behn, 10 B. Mon. 383; Spaulding *v.* Scanland, 6 B. Mon. 353.

Louisiana.— Ker *v.* Ker, 42 La. Ann. 870, 8 So. 595.

Michigan.— Wing *v.* McDowell, Walk. 175.

New Jersey.— Westervelt *v.* Voorhis, 42 N. J. Eq. 179, 6 Atl. 665.

Virginia.— Naylor *v.* Throckmorton, 7 Leigh 98, 30 Am. Dec. 492.

United States.— Bragg *v.* Lamport, 96 Fed. 630, 38 C. C. A. 467.

It is the date of delivery rather than that of execution which determines the relative priority of the mortgages. Koevenig *v.* Schmitz, 71 Iowa 175, 32 N. W. 320.

Priority of acknowledgment.— A second mortgage duly acknowledged is entitled to priority over a first mortgage which is ineffective because acknowledged before a disqualified officer. Fugman *v.* Jiri Washington Bldg., etc., Assoc., 209 Ill. 176, 70 N. E. 644.

After-acquired property.— Where several mortgages have been given, all binding property which the mortgagor did not then own, but which he subsequently acquires, they

same time, but to secure the payment of two notes which mature at different times, that is the prior lien which secures the payment of the note first falling due.[38]

g. Mortgages Executed Simultaneously. Two mortgages executed and delivered on the same day will rank as equal liens, without priority or preference to either,[39] unless one of the mortgagees can show superior equities to the other;[40] unless an intention of the parties to give one mortgage precedence over the other can be shown, in which case such intention will be absolutely controlling;[41] unless one mortgage is recorded before the other;[42] or unless, dividing the day of execution into fractions, it is shown that one mortgage was executed at a hour earlier than the other.[43]

h. Cumulative Mortgages. The lien of a mortgage is not affected or postponed by the taking of another mortgage to secure the same debt, which is intended to be merely cumulative to the first and not in substitution for it.[44] And where a new mortgage is taken and recorded to secure the same debt, and the fact is so stated in the mortgage, it has priority over intervening encumbrances.[45]

2. Priorities Between Mortgages and Other Liens or Claims — a. In General. As between a mortgage of real property and other liens or claims which may attach as liens on the premises, the general rule is that that which is first in time is first in right,[46] except as to certain varieties of liens specially favored by the

attach as liens on such property, from the moment of its acquisition, in the order of their execution. Boston Safe-Deposit, etc., Co. *v.* Bankers', etc., Tel Co., 36 Fed. 288.

Mortgage without debt to be secured.— Where a mortgage is given, purporting to secure a note of even date, but no indebtedness exists from the mortgagor to the mortgagee, and no note is executed until six years afterward, and is then dated back to the date of the mortgage, it will be postponed to a second mortgage, executed after the making of the first mortgage but before the signing of the note. Ogden *v.* Ogden, 180 Ill. 543, 54 N. E. 750.

Subsequent ratification.— Plaintiff took a mortgage, signed by a husband and wife, subject to any rights defendant might have under a first mortgage. At that time the first mortgage had been signed by the husband alone and had not been ratified by the wife. After suit was begun on plaintiff's mortgage, defendant's mortgage was ratified by the wife. But it was held that such ratification could not relate back so as to give defendant any right over plaintiff. Nicholson *v.* Aney, 127 Iowa 278, 103 N. W. 201.

38. Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572.

39. *Georgia.*— Russell *v.* Carr, 38 Ga. 459.

Nebraska.— Sanely *v.* Crapenhoft, (1901) 95 N. W. 352.

New Jersey.— Swayze *v.* Schuyler, 59 N. J. Eq. 75, 45 Atl. 347.

New York.— Granger *v.* Crouch, 86 N. Y. 494; Eleventh Ward Sav. Bank *v.* Hay, 55 How. Pr. 444.

Pennsylvania.— Perry's Appeal, 22 Pa. St. 43, 60 Am. Dec. 63.

See 35 Cent. Dig. tit. "Mortgages," § 314.

40. Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874 (holding that a mortgage to secure an absolute loan will have priority over another which was given conditionally and to take effect later); Utley *v.* Dunkelberger, 86 Iowa 469, 53 N. W. 408 (holding that a mortgage taken on the faith of an understanding with the mortgagor that it is to be a first lien on the property is preferred to one executed simultaneously, but accepted by its holder with knowledge of the first mortgage and without investigation as to the right of priority); Abrams *v.* Wingo, 9 Kan. App. 884, 59 Pac. 661.

Rights of assignees.— Where two mortgages are given concurrently to the same person, and he assigns one of them with a representation that it is a first lien, it will be regarded as such as against him, although not as against a subsequent assignee of the other without notice of such representation. Vredenburgh *v.* Burnet, 31 N. J. Eq. 229.

41. Coleman *v.* Carhart, 74 Ga. 392; Iowa College *v.* Fenno, 67 Iowa 244, 25 N. W. 152; Pomeroy *v.* Latting, 15 Gray (Mass.) 435; Jones *v.* Phelps, 2 Barb. Ch. (N. Y.) 440.

42. Kohn *v.* Warner, 105 Ill. App. 321. And see Recording Acts.

43. Wood *v.* Lordier, 115 Ind. 519, 18 N. E. 34; Gibson *v.* Keyes, 112 Ind. 568, 14 N. E. 591 [*distinguishing* Moffitt *v.* Roche, 76 Ind. 75; Cain *v.* Hanna, 63 Ind. 408]. But see Russell *v.* Carr, 38 Ga. 459.

44. Dial *v.* Gary, 27 S. C. 171, 3 S. E. 84; Canaday *v.* Boliver, 25 S. C. 547.

45. Hardin *v.* Emmons, 24 Nev. 329, 53 Pac. 854.

46. *California.*— Valley Lumber Co. *v.* Wright, 2 Cal. App. 288, 84 Pac. 58.

Connecticut.— Page *v.* Green, 6 Conn. 338.

Georgia.— Burckhalter *v.* Planters' Loan, etc., Bank, 100 Ga. 428, 28 S. E. 236.

Louisiana.— Ker *v.* Ker, 42 La. Ann. 870, 8 So. 595; Delor *v.* Montegut, 5 Mart. 468.

Maryland.— Conkling *v.* Washington University, 2 Md. Ch. 497.

law,[47] or as to liens given preference by the agreement of the parties.[48] But a mortgage given by a mortgagor who is not insolvent, and without fraud, will outrank the claims of general creditors which are unsecured, although older.[49]

b. Liens Existing Before Mortgagor Acquired Title. Valid liens and encumbrances binding a property at the time of its sale follow it into the hands of a purchaser, and outrank a mortgage given by such purchaser, even where the mortgage was made before the transfer of title and was intended to bind the property on its acquisition,[50] unless where the lien-holder is estopped by his laches

Mississippi.— Watson *v.* Dickens, 12 Sm. & M. 608.

Nebraska.— Hahn *v.* Bonacum, (1906) 107 N. W. 1001, 109 N. W. 368.

New York.—Stevens *v.* Watson, 4 Abb. Dec. 302; Schad *v.* Schad, 7 N. Y. St. 635; Brockway *v.* Tayntor, 5 N. Y. St. 73.

Oregon.— See Marquam *v.* Ross, 47 Oreg. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1.

Pennsylvania.— Kimberly's Appeal, 3 Pa. Cas. 528, 7 Atl. 75; McIlvain *v.* Barton, 2 Del. Co. 1.

Wisconsin.— Morgan *v.* Hammett, 34 Wis. 512.

United States.— Ray *v.* Hallenbeck, 42 Fed. 381; Salem First Nat. Bank *v.* Salem Capital Flour Mills Co., 39 Fed. 89.

See 35 Cent. Dig. tit. "Mortgages," § 316.

The rules of the law merchant governing the transfer of negotiable paper do not affect the question of priority between a mortgage by which such paper is secured and other liens. Butler *v.* Mazeppa Bank, 94 Wis. 351, 68 N. W. 998.

Where a right of way is reserved in a deed executed subsequently to a mortgage of the lands over which it runs, the right is subject to the mortgage. King *v.* McCully, 38 Pa. St. 76.

Expenditures for improvements made by the mortgagor upon the mortgaged premises, subsequent to the mortgage, have no lien prior to that of the mortgage. Martin *v.* Beatty, 54 Ill. 100.

Chattel mortgage on crops.— A general mortgage on land attaches as a lien on crops growing thereon, and is superior to a junior chattel mortgage of the crops, at least so long as they remain unsevered. Thompson *v.* Union Warehouse Co., 110 Ala. 499, 18 So. 105; Treat *v.* Dorman, 100 Cal. 623, 35 Pac. 86; Rankin *v.* Kinsey, 7 Ill. App. 215. And see *supra*, XII, A, 8.

47. **As to priority of mechanics' liens** see Seely *v.* Neill, (Colo. 1906) 86 Pac. 334; Anglo-American Sav., etc., Assoc. *v.* Campbell, 13 App. Cas. (D. C.) 581, 43 L. R. A. 622; Pacific States Sav., etc., Co. *v.* Dubois, 11 Ida. 319, 83 Pac. 513; Porch *v.* Agnew Co., (N. J. Ch. 1905) 61 Atl. 721; Eckels *v.* Stuart, 212 Pa. St. 161, 61 Atl. 820. And see MECHANICS' LIENS.

As to priority of landlord's lien for rent see Abrams *v.* Sheehan, 40 Md. 446; Abernethy *v.* Green, (Miss. 1891) 11 So. 186; Bacon *v.* Howell, 60 Miss. 362; Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682. And see LANDLORD AND TENANT, 24 Cyc. 1262.

Labor liens.— Stone quarried by an insolvent corporation on mortgaged premises, after a decree of foreclosure and the issuing of an execution, and remaining on the ground, is subject, as between the quarrymen and the mortgagee, to a lien for the quarrymen's wages. American Trust Co. *v.* North Belleville Quarry Co., 31 N. J. Eq. 89. A statute which gives to an employee of an insolvent corporation a lien for his services on the assets in the receiver's hands does not entitle him to priority over a mortgage executed and recorded before the services were rendered. Hinkle *v.* Camden Safe Deposit, etc., Co., 47 N. J. Eq. 333, 21 Atl. 861.

The lien of an arbitrator for his fees, on land which is the subject of his award, is superior to a mortgage executed by the person in whose favor the award is made, after the date of the award, but before it is entered on the minutes of the court. Miller *v.* Fisk, 47 Ga. 270.

A statute making the lien for seed grain furnished superior to a mortgage executed before the passage of such statute is unconstitutional as impairing the obligation of a contract. Yeatmon *v.* Foster County, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797.

48. Phœnix Mills *v.* Miller, 4 N. Y. St. 787, holding that where land is subject to a mortgage and machinery is placed thereon, under an agreement that the purchase-price shall be a lien thereon, such lien is paramount to that of the mortgage.

49. Seaboard Air-Line R. Co. *v.* Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138; Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; Homer *v.* Grosholz, 38 Md. 520. And see Vallely *v.* Grafton First Nat. Bank, (N. D. 1906) 106 N. W. 127.

Corporation creditors.—Where, on the transfer of all the assets of one corporation to another, the transferee mortgages its property to secure the payment of bonds, the lien of creditors of the old corporation upon the property transferred will be prior in right to that of bond-holders with notice. Blair *v.* St. Louis, etc., R. Co., 22 Fed. 36.

Partnership creditors are preferred to lien of mortgage on firm property given to secure individual debts see Johnson *v.* Clark, 18 Kan. 157; McConihe *v.* Fales, 107 N. Y. 404, 14 N. E. 285. And see PARTNERSHIP.

50. *California.*— Austin *v.* Pulschen, (1895) 42 Pac. 306.

Illinois.— Root *v.* Curtis, 38 Ill. 192.

Kansas.— Hawley *v.* Smeiding, 3 Kan. App. 159, 42 Pac. 841.

Kentucky.—Louisville Bldg. Assoc. *v.* Korb, 79 Ky. 190.

or other causes to assert his priority.[51] So the liens of judgments and other claims existing against the purchaser at the time of his acquiring title will take precedence of his mortgage of the premises, except in the case where his deed is taken and his mortgage given as parts of the same transaction, so that his seizin of the legal title is but momentary and incapable of supporting other liens.[52]

c. Vendor's Lien. The lien of a vendor of land for the unpaid purchase-money, if expressly reserved, will take precedence of a mortgage given by the vendee,[53] unless it has been waived or is postponed to the mortgage by an agreement of the parties in interest,[54] or unless the vendor has sold and assigned the notes given for the price.[55] But it is otherwise as to an implied vendor's lien[56] of which the mortgagee has no notice.[57]

d. Judgments and Decrees. By the common law, the priority of liens, whether by mortgage or judgment, is governed exclusively by the date of their acquisition, the first in time being first in right.[58] And if a judgment is rendered

New Jersey.— Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204.

United States.— Hobbs *v.* State Trust Co., 68 Fed. 618, 15 C. C. A. 604.

See 35 Cent. Dig. tit. "Mortgages," § 317.

A mortgage given by partners on partnership realty to secure a loan made to pay debts of the firm takes priority over a judgment against one of the partners which existed before the land was purchased. Morton *v.* Higgins, 7 N. J. L. J. 343.

51. Price *v.* Gray, (N. J. Ch. 1896) 34 Atl. 678.

52. *Iowa.*— Ryder *v.* Cobb, 68 Iowa 235, 26 N. W. 91.

Kansas.— Ransom *v.* Sargent, 22 Kan. 516.

New Jersey.— Bradley *v.* Bryan, 43 N. J. Eq. 396, 13 Atl. 806.

New York.— Tallman *v.* Farley, 1 Barb. 280.

Pennsylvania.— Devor's Appeal, 13 Pa. St. 413.

See 35 Cent. Dig. tit. "Mortgages," § 317.

53. *Alabama.*— Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 56.

Kentucky.— Mosely *v.* Garrett, 1 J. J. Marsh. 212.

Louisiana.— Pedesclaux *v.* Legaré, 32 La. Ann. 380.

Missouri.— See Eubank *v.* Finnell, 118 Mo. App. 535, 94 S. W. 591.

Texas.— Equitable Mortg. Co. *v.* Kempner, 84 Tex. 102, 19 S. W. 358.

Virginia.— Beverley *v.* Ellis, 10 Leigh 1.

See 35 Cent. Dig. tit. "Mortgages," § 318.

And see VENDOR AND PURCHASER.

54. Balkum *v.* Owens, 47 Ala. 266; Watson *v.* Bane, 7 Md. 117.

55. Gann *v.* Chester, 5 Yerg. (Tenn.) 205; Kempner *v.* Jordan, 3 Tex. Civ. App. 129, 22 S. W. 1001.

56. Jones *v.* Ragland, 4 Lea (Tenn.) 539; Russell *v.* Dodson, 6 Baxt. (Tenn.) 16; Ridings *v.* Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401.

57. Franklin *v.* McDonald, 58 Ill. App. 230 [*affirmed* in 163 Ill. 139, 45 N. E. 212]; Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94.

58. *Arkansas.*— Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338.

Georgia.— Marshall *v.* Hodgkins, 99 Ga. 592, 27 S. E. 748; Horne *v.* Seisel, 92 Ga. 683, 19 S. E. 709; Osborne *v.* Hill, 91 Ga. 137, 16 S. E. 965; McAlpin *v.* Bailey, 76 Ga. 687.

Illinois.— Tyrrell *v.* Ward, 102 Ill. 29; Spalding *v.* Heideman, 96 Ill. App. 405.

Indiana.— Paxton *v.* Sterne, 127 Ind. 289, 26 N. E. 557; Morton *v.* White, 2 Ind. 663.

Iowa.— Weare *v.* Williams, 85 Iowa 253, 52 N. W. 328.

Kansas.— Markson *v.* Buchan, 33 Kan. 739, 7 Pac. 578.

Kentucky.— Portwood *v.* Outton, 3 B. Mon. 247.

Maryland.— Reigle *v.* Leiter, 8 Md. 405.

Michigan.— Chandler *v.* Parsons, 100 Mich. 313, 58 N. W. 1011.

Minnesota.— Talbot *v.* Barager, 37 Minn. 208, 34 N. W. 23.

Mississippi.— Marlow *v.* Johnson, 31 Miss. 128.

New Jersey.— Sayre *v.* Coyne, (Ch. 1895) 33 Atl. 300; Tichenor *v.* Tichenor, 45 N. J. Eq. 664, 18 Atl. 301; Lambertville Nat. Bank *v.* Boss, (Ch. 1888) 13 Atl. 18; Westervelt *v.* Voorhis, 42 N. J. Eq. 179, 6 Atl. 665.

New York.— People *v.* Bacon, 99 N. Y. 275, 2 N. E. 4; Stevens *v.* Watson, 45 How. Pr. 104.

North Dakota.— McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W. 608.

Ohio.— Porter *v.* Barclay, 18 Ohio St. 546; Kramer *v.* Farmers', etc., Bank, 15 Ohio 253.

Pennsylvania.— Fleek *v.* Zilhaver, 117 Pa. St. 213, 12 Atl. 420; Kelso *v.* Kelly, 14 Pa. St. 204; Moore's Appeal, 7 Watts & S. 298; Lynch *v.* Dearth, 2 Penr. & W. 101; Febiger *v.* Craighead, 2 Yeates 42.

South Carolina.— Coleman *v.* Hamburg Bank, 2 Strobh. Eq. 285, 49 Am. Dec. 671.

Virginia.— Blose *v.* Bear, 87 Va. 177, 12 S. E. 294, 11 L. R. A. 705; Nutt *v.* Summers, 78 Va. 164.

United States.— Bronson *v.* La Crosse, etc., R. Co., 2 Wall. 283, 17 L. ed. 725; McArthur *v.* Scott, 31 Fed. 521; First Nat. Bank *v.* Caldwell, 9 Fed. Cas. No. 4,798, 4 Dill. 314.

England.— Badeley *v.* Consolidated Bank, 38 Ch. Div. 238, 57 L. J. Ch. 468, 59 L. T. Rep. N. S. 419, 36 Wkly. Rep. 745; *Re* Bell,

and a mortgage given on the same day, they will stand equal in rank unless there is something to show an actual priority.[59] Under the statutes on this subject, if a judgment is duly docketed, or otherwise made a matter of public record by compliance with the forms required to give it a lien on land, before the recording of a mortgage on the same land made by the judgment debtor, the lien of the judgment will be superior to that of the mortgage, and *vice versa*.[60] But this rule is

54 L. T. Rep. N. S. 370, 34 Wkly. Rep. 363; Whitworth *v.* Gaugain, 1 Phil. 728, 10 Jur. 531, 15 L. J. Ch. 433, 19 Eng. Ch. 728, 41 Eng. Reprint 809.

See 35 Cent. Dig. tit. "Mortgages," § 320.

Compare Buchanan *v.* Kimes, 2 Baxt. (Tenn.) 275, holding that, where land is conveyed in trust to secure certain specified debts, the beneficiaries of such trust deed will have a lien on the land so conveyed superior to that of ordinary judgment creditors.

The rule stated in the text applies in the case of an equitable mortgage (Cayce *v.* Stovall, 50 Miss. 396), and of a deed absolute on its face but intended to operate as a mortgage (Edler *v.* Clark, 51 Fed. 117), and is not varied by the fact that the mortgage, being junior in point of time, was to secure a debt due to the United States (Hoppock *v.* Shober, 69 N. C. 153), that the judgment was for the cost and expense of repairing and securing the foundation wall of a building, by the superintendent of buildings, under a statute (Mitchell *v.* Smith, 53 N. Y. 413), or that the mortgage applied to after-acquired property (Rice *v.* Kelso, 57 Iowa 115, 7 N. W. 3, 10 N. W. 335).

Judgments against receivers.— A statute providing that a judgment against a receiver for a cause of action arising during the receivership shall be a superior lien to a prior mortgage does not give such judgments a preference over mortgages executed prior to the passage of the statute. Fordyce *v.* Du Bose, 87 Tex. 78, 26 S. W. 1050.

Judgments recovered against a railroad company by owners of abutting property, for damages to their land caused by the construction and operation of the road, are entitled to priority of payment over mortgage bonds out of the fund produced by a sale of the road on foreclosure of the mortgage; because the right of the owners of private property, taken or damaged for public use, to receive compensation therefor, as guaranteed by the constitution, cannot be defeated by mortgaging the property of the corporation which appropriates or damages the property. Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273.

Judgment under Dram-Shop Act.— The lien of a prior mortgage upon property is not postponed to that of a subsequent judgment recovered under the Illinois Dram-Shop Act (Ill. Rev. St. c. 43, § 10) for damages arising in consequence of the sale of intoxicating liquors on the mortgaged premises by or with the permission of the owner. Bell *v.* Cassem, 158 Ill. 45, 41 N. E. 1089, 29 L. R. A. 571.

Merger of judgment lien.— A judgment lien upon mortgaged lands is not merged in a subsequent deed thereof to the lienor, who purchased the lands at a sale in bankruptcy, where the effect would be to destroy his sole security, and let in the lien of a prior mortgage to the extent of lands omitted therefrom by mistake, and sought to be included by reforming the mortgage. Hewitt *v.* Powers, 84 Ind. 295.

Mortgage by equitable owner.— Judgments against the holder of the legal title to land, who merely holds it in trust for another, are subordinate to subsequent mortgages executed by the equitable owner. Seeberger *v.* Campbell, 88 Iowa 63, 55 N. W. 20.

Where there are three liens on the property, a first mortgage, then a second mortgage, and then a judgment which is also held by the owner of the first mortgage, and he sells under the judgment and purchases the equity of redemption, he can compel the second mortgagee to pay the amount of the first mortgage, or be foreclosed, but not the judgment. Haines *v.* Beach, 3 Johns. Ch. (N. Y.) 459.

Where a mortgage is reformed in equity, so as to include property inadvertently omitted from it, its lien on such property after the reformation is superior to that of a judgment recovered after the execution of the mortgage, although before its reformation. Phillips *v.* Roquemore, 96 Ga. 719, 23 S. E. 855.

Mortgage pending new trial.— Where A recovered judgment against B for money only, and B then obtained a new trial, pending which he gave a mortgage to C, and A again prevailed, recovering a larger amount than at first, and levied execution on the mortgaged premises, and C brought an action to foreclose and to marshal liens, it was held that the lien of A's original judgment was first, then the mortgage, and then the second judgment to the extent to which it exceeded the first. Loomis *v.* Second German Bldg. Assoc., 37 Ohio St. 392.

Mortgage debt barred by limitations.— Where the debt secured by a mortgage has become barred by the statute of limitations, a junior judgment will rise to a rank superior to that of the mortgage (Miller *v.* Cox, 38 W. Va. 747, 18 S. E. 960), although it seems that it may be displaced again by the tolling of the statute by a new promise (Bowmar *v.* Peine, 64 Miss. 99, 8 So. 166).

59. *Ex p.* Stagg, 1 Nott & M. (S. C.) 405; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232. And see JUDGMENTS, 23 Cyc. 1383.

60. *Illinois.*— Warner *v.* Helm, 6 Ill. 220.

Kansas.— Kirkwood *v.* Koester, 11 Kan. 471.

Minnesota.— Dunwell *v.* Bidwell, 8 Minn. 34.

subject to the right of either party to impeach the lien of the other, the mortgagee being permitted to show that the judgment is void,[61] and the judgment creditor being allowed to attack the mortgage for fraud or other invalidating cause,[62] or to show that the consideration of the mortgage has failed, or that it failed to pass, or passed only in part, before the recovery of the judgment.[63]

e. Executions. An execution levied on land, under a judgment which is junior to a mortgage on the same property, will bind only the debtor's equity of redemption, and the purchaser at an execution sale will take the premises subject to the lien of the mortgage;[64] and it has been held that a mortgage placed on the land in the interval between the issuing of a first execution, which is stayed by order of plaintiff or allowed to lapse, and the issuing of an alias execution, will prevail over the lien of such alias writ.[65] On the other hand a sale under a senior execution will divest the lien of a junior mortgage, although the mortgagee will have a right in equity to have the liens marshaled so that the execution may be satisfied out of personalty.[66]

f. Attachments. The lien of a mortgage is superior to that of an attachment subsequently levied on the land,[67] provided the mortgage has been duly

New Jersey.— Jersey *v.* Demarest, 27 N. J. Eq. 299.

New York.— Brooks *v.* Wilson, 53 Hun 173, 6 N. Y. Suppl. 116 [*reversed* on other grounds in 125 N. Y. 256, 26 N. E. 258].

North Carolina.— Gulley *v.* Thurston, 112 N. C. 192, 17 S. E. 13.

Ohio.— Tolerton *v.* Williard, 30 Ohio St. 579. The lien of a senior judgment which has not been levied within the year will not be defeated by a decree of foreclosure of a junior mortgage and a sale and confirmation within a year from the rendition of the decree. Myers *v.* Hewitt, 16 Ohio 449.

Pennsylvania.— Eckert *v.* Lewis, 4 Phila. 422.

Canada.— Yorkshire Guarantee, etc., Co. *v.* Edmonds, 7 Brit. Col. 348, holding that a registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment.

See 35 Cent. Dig. tit. "Mortgages," § 320.

Unrecorded mortgage.— The general rule is that the lien of a judgment will prevail over that of a prior but unrecorded mortgage. Andrews *v.* Mathews, 59 Ga. 466. And see JUDGMENTS, 23 Cyc. 1385. *Compare* Vaughn *v.* Schmalsle, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411; Snyder *v.* Botkin, 37 W. Va. 355, 16 S. E. 591.

61. Stanley *v.* Stanley, 35 S. C. 94, 584, 14 S. E. 675.

62. Baldwin *v.* Little, 64 Miss. 126, 8 So. 168; Simon *v.* Openheimer, 20 Fed. 553.

63. Rice *v.* Southern Pennsylvania Iron, etc., Co., 32 Leg. Int. (Pa.) 431; Hoffman *v.* Ryan, 21 W. Va. 415; Peterson *v.* Oleson, 47 Wis. 122, 2 N. W. 94. *Compare* Whitney *v.* Traynor, 74 Wis. 289, 42 N. W. 267, holding that the violation of an agreement by which the proceeds of crops raised on the mortgaged lands were to be applied in reduction of the mortgage debt is not enough to postpone the lien of the mortgage to that of a junior judgment, although the sums so diverted from their intended use would have discharged the whole mortgage.

64. *Connecticut.*— Newberry *v.* Bulkley, 5 Day 384.

Georgia.— Johnston *v.* Crawley, 22 Ga. 348.

Illinois.— Knapp *v.* Jones, 143 Ill. 375, 32 N. E. 382; Meacham *v.* Steele, 93 Ill. 135.

Indiana.— Morton *v.* White, 2 Ind. 663.

Louisiana.— De Blanc *v.* Dumartrait, 3 La. Ann. 542.

Missouri.— Nulsen *v.* Wishon, 68 Mo. 383.

New Jersey.— Lovejoy *v.* Lovejoy, 31 N. J. Eq. 55.

Pennsylvania.— Febeiger *v.* Craighead, 4 Dall. 151, 1 L. ed. 778.

South Carolina.—Bennett *v.* Calhoun Loan, etc., Assoc., 9 Rich. Eq. 163.

Texas.— Willis *v.* Heath, (1891) 18 S. W. 801.

Vermont.— Jewett *v.* Brock, 32 Vt. 65; Benton *v.* McFarland, 26 Vt. 610.

See 35 Cent. Dig. tit. "Mortgages," § 322.

Absolute deed as mortgage.—After the execution of an absolute deed as security for a debt, a judgment creditor of the grantor, whose judgment was subsequent to the deed, cannot levy on the land until title is reinvested by redemption. Groves *v.* Williams, 69 Ga. 614.

Judgment on mechanic's lien.— Where a mechanic's lien is duly filed, then a mortgage on the land given to a third person, and then suit brought, judgment recovered, and execution issued on the mechanic's lien, the title of a purchaser at the execution sale is superior to that of the mortgagee. Spence *v.* Etter, 8 Ark. 69.

65. Gamble *v.* Fowler, 58 Ala. 576; Bates *v.* Bailey, 57 Ala. 73.

66. Gadberry *v.* McClure, 4 Strobh. Eq. (S. C.) 175.

67. Iowa L. & T. Co. *v.* Mowery, 67 Iowa 113, 24 N. W. 747; Western Union Tel. Co. *v.* Caldwell, 141 Mass. 489, 6 N. E. 737; Longstreet *v.* Shipman, 5 N. J. Eq. 43. And see ATTACHMENT, 4 Cyc. 634.

Effect of statute of limitations.— In attachment against a non-resident, a mortgagee

recorded,[68] unless there is a defect in the elder lien or the mortgagee has so conducted himself as to be estopped to assert his priority.[69] On the other hand an attachment validly levied cannot be defeated by a mortgage subsequently executed.[70]

g. Taxes and Assessments. Taxes and assessments levied upon land which is already subject to a mortgage do not displace or outrank the lien of the mortgage in the absence of an express legislative declaration that they shall constitute a paramount lien.[71] But it is entirely competent for the legislature to give them this effect; and where the statute so declares, the lien of a mortgage will be subordinated to that of taxes subsequently assessed;[72] and this is true also of munici-

intervened and asked foreclosure. It appeared that if defendant had not removed from the state, the attaching creditor's claim would have been barred by limitations more than four years at the commencement of his action, and an action on the mortgage would have been barred for ten months. It was held that defendant's absence arrested the statute as to the mortgage as well as to plaintiff's claim, and hence the lien of the mortgage was superior to that of the attachment. Perkins *v.* Bailey, 38 Wash. 46, 80 Pac. 177, 107 Am. St. Rep. 831.

68. Beamer *v.* Freeman, 84 Cal. 554, 24 Pac. 169; Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12, mortgage was defectively recorded.

In Kansas the lien of a mortgage executed before, but not recorded until after, the levying of an attachment is the prior lien, although the attaching creditor had no notice of the mortgage. Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705.

In New Jersey the levy of an attachment upon mortgaged premises, after the execution and delivery of the mortgage, but before it is recorded, creates no lien upon the prior estate of the mortgagee, if the mortgage is recorded before judgment under the attachment. Campion *v.* Kille, 14 N. J. Eq. 229.

Where the attaching creditor has full knowledge of the rights of the mortgagee, but proceeds by stealth and at an unusual hour to get his attachment levied before the mortgage can be placed on the record, he will take no advantage from his act. Temple *v.* Hooker, 6 Vt. 240. And see Newton First Nat. Bank *v.* Jasper County Bank, 71 Iowa 486, 32 N. W. 400.

69. Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609.

70. Stephenson *v.* Lee, 6 La. Ann. 758.

The release from attachment of one tract of land by the attaching creditor, who had no notice of the mortgage of another tract made subsequent to its attachment by him, will not entitle the mortgagee to priority over the attachment to the extent of the value of the land released. Johnson *v.* Bell, 58 N. H. 395.

71. Pierce *v.* Ætna L. Ins. Co., 131 Ind. 284, 31 N. E. 68; State *v.* Ætna L. Ins. Co., 117 Ind. 251, 20 N. E. 144; O'Neill *v.* Dringer, 31 N. J. Eq. 507; Dows *v.* Drew, 27 N. J. Eq. 442; Barclay *v.* Leas, 9 Pa. Co. Ct. 314.

The legislative intention to make taxes a paramount lien, displacing prior mortgages and other liens, must be plainly expressed; such a construction of the statute will not be favored. Finn *v.* Haynes, 37 Mich. 63; Lydecker *v.* Palisade Land Co., 33 N. J. Eq. 415; Yeatman *v.* Foster County, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797; Black Tax Titles, § 186.

72. *Delaware.*— Rhoads *v.* Given, 5 Houst. 183.

Illinois.— People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Cooper *v.* Corbin, 105 Ill. 224; Mix *v.* Ross, 57 Ill. 121; Dunlap *v.* Gallatin County, 15 Ill. 7.

Louisiana.— *In re* Douglas, 41 La. Ann. 765, 6 So. 675.

New Jersey.— Pennington *v.* Mendes, 38 N. J. Eq. 336; Hand *v.* Startup, 38 N. J. Eq. 115; Lydecker *v.* Palisade Land Co., 33 N. J. Eq. 415; Howell *v.* Essex County Road Bd., 32 N. J. Eq. 672; Paterson *v.* O'Neill, 32 N. J. Eq. 386.

New York.— Ruyter *v.* Reid, 121 N. Y. 498, 24 N. E. 791, holding that tax-sales in Albany displace lien of prior mortgage, provided purchaser gives mortgagee a notice of sale requiring him to redeem within six months.

Pennsylvania.— Pottsville Lumber Co. *v.* Wells, 157 Pa. St. 5, 27 Atl. 408; Parker's Appeal, 8 Watts & S. 449. *Compare* Cadmus *v.* Jackson, 52 Pa. St. 295.

United States.— Walker *v.* Mississippi Valley, etc., R. Co., 29 Fed. Cas. No. 17,079.

See 35 Cent. Dig. tit. "Mortgages," § 324.

Justification of rule.— Statutory provisions in force at the time of the execution of a mortgage enter into and become part of the contract, and where they provide that liens of a certain class shall be paramount and have priority over all others, the mortgagee takes his lien subject to such liens of the kind specified as may be afterward acquired under the statute. Warren *v.* Sohn, 112 Ind. 213, 13 N. E. 863.

Exception in favor of state.— The rule does not apply as against a mortgage given to state officers to secure a loan of state funds. Public School Trustees *v.* Shotwell, 45 N. J. Eq. 106, 16 Atl. 308; Rahway *v.* New Jersey Sinking Fund Com'rs, 44 N. J. Eq. 296, 18 Atl. 56.

Mortgage to court officer.— A mortgage made to an officer of the court, designated by the chancellor, brings the fund as much within the custody of the law as if it were made directly to the chancellor; and hence the lien of such a mortgage on the premises covered is superior to municipal taxes and

pal taxes and assessments for local improvements.[78] Moreover a lien may attach to one piece of land for the taxes upon all of the owner's property, so as to take precedence of any preëxisting mortgage;[74] and it has been decided that the lien of a personal tax or tax on personal property may be made to attach to any real property of the debtor to the exclusion of a prior mortgage lien.[75] And further, this priority of the tax lien may inure to the benefit, not only of a purchaser at tax-sale, but also of one paying the taxes.[76]

h. Defective or Partially Invalid Mortgage. A defective mortgage may be enforced in equity against a junior judgment.[77] Thus where the mortgage by accident or mistake misdescribes the property intended to be covered it is not subordinated to the lien of a later judgment but may be reformed.[78] The omission in a mortgage to recite the amount of the note secured thereby will not subordinate it to the claim of creditors having no actual notice of the mortgage.[79]

i. Rights of Subsequent Purchasers. As a general rule a purchaser of property which is already under mortgage takes only the mortgagor's equity of redemption and holds subject to the mortgage.[80] It is not material in this con-

assessments. Jersey City *v.* Foster, 32 N. J. Eq. 825.

Failure to subject personalty to taxes.— Where by statute city and county taxes are made liens upon the real estate upon which they are assessed, and given priority over all other liens, the fact that the tax-collector is in default in failing to make the taxes out of personal property found on the premises during the life of his warrant does not postpone the tax lien to a mortgage on the premises. Germania Sav. Bank's Appeal, 91 Pa. St. 345.

73. Hand *v.* Jersey City, 41 N. J. Eq. 663, 7 Atl. 565; Vreelaud *v.* Jersey City, 37 N. J. Eq. 574 [*affirming* 36 N. J. Eq. 399]; Thompson *v.* Thorp, 33 N. J. Eq. 401; Hardenbergh *v.* Converse, 31 N. J. Eq. 500; Toledo *v.* Barnes, 8 Ohio Cir. Ct. 684, 4 Ohio Cir. Dec. 195; Clifton *v.* Cincinnati, 5 Ohio Dec. (Reprint) 570, 6 Am. L. Rec. 687; Seattle *v.* Hill, 14 Wash. 487, 45 Pac. 17, 35 L. R. A. 372. But see Pittsburgh's Appeal, 40 Pa. St. 455.

74. Albany Brewing Co. *v.* Meriden, 48 Conn. 243. But *compare* Meyer *v.* Burritt, 60 Conn. 117, 22 Atl. 501.

75. Miller *v.* Anderson, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317. *Contra*, Cooper *v.* Corbin, 105 Ill. 224; Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278 [*overruling* New England L. & T. Co. *v.* Young, 81 Iowa 732, 39 N. W. 116, 46 N. W. 1103, 10 L. R. A. 478].

76. Kaiser *v.* Lembeck, 55 Iowa 244, 7 N. W. 519; Roosevelt Hospital *v.* Dowley, 57 How. Pr. (N. Y.) 489; Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, 60 C. C. A. 588. *Compare* Robbins *v.* Bunn, 54 Ill. 48, 5 Am. Rep. 75.

77. Glen Morris-Glyndon Supply Co. *v.* McColgan, 100 Md. 479, 60 Atl. 608; Lake *v.* Doud, 10 Ohio 415.

Unsealed instrument.— A paper purporting to be a deed of trust, but not under the seal of the grantor, is merely a contract or agreement to give a lien, and is inoperative as against a subsequent judgment creditor. Pratt *v.* Clemens, 4 W. Va. 443.

78. *Illinois.*— Dayton *v.* Citizens' Nat. Bank, 11 Ill. App. 501.

Iowa.— Welton *v.* Tizzard, 15 Iowa 495.

Kansas.— Swarts *v.* Stees, 2 Kan. 236, 85 Am. Dec. 588.

Missouri.— Martin *v.* Nixon, 92 Mo. 26, 4 S. W. 503.

Ohio.— Adams *v.* Stutzman, 6 Ohio Dec. (Reprint) 612, 7 Am. L. Rec. 76.

See 35 Cent. Dig. tit. "Mortgages," § 328.

Contra.— Wentz's Appeal, 10 Wkly. Notes Cas. (Pa.) 284.

79. Wilson *v.* Vaughan, 61 Miss. 472. But see Pearce *v.* Hall, 12 Bush (Ky.) 209.

80. *Georgia.*— Carter *v.* Monroe, 65 Ga. 542. And see Linder *v.* Whitehead, 116 Ga. 206, 42 S. E. 358.

Illinois.— Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Pratt *v.* Pratt, 96 Ill. 184; Kruse *v.* Scripps, 11 Ill. 98.

Iowa.— Bosworth *v.* Farenholz, 3 Iowa 84.

North Carolina.— Gordon *v.* Collett, 102 N. C. 532, 9 S. E. 486.

Wisconsin.— Bull *v.* Sykes, 7 Wis. 449.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682; Vitrified Paving, etc., Co. *v.* Snead, etc., Iron Works, 56 Fed. 64, 5 C. C. A. 418.

England.— *In re* Burke, L. R. 9 Ir. 24.

Canada.— West *v.* Matheson, 3 Nova Scotia Dec. 429; Gill *v.* Gamble, 13 Grant Ch. (U. C.) 169.

See 35 Cent. Dig. tit. "Mortgages," § 329.

Exceptional cases.— Where a riparian owner executed a mortgage covering both the upland and the land lying under water in front of it, and then sold all the land under water to a corporation, which pursuant to law leased it from the state and expended large sums of money in filling up and reclaiming the land, it was considered, on foreclosure of the mortgage, that the corporation had a right to be paid the price of its purchase and the value of its improvements, superior to the rights of the mortgagee. Point Breeze Ferry, etc., Co. *v.* Bragaw, 47 N. J. Eq. 298, 20 Atl. 967. Where a mortgage is given to two sureties jointly to secure them, and one of them afterward joins with the mortgagor

nection that the conveyance to such purchaser was made in satisfaction of a pre-existing debt.[81] But the rule is otherwise if the mortgage is not recorded and the purchaser has no actual notice of it.[82]

j. Agreements Affecting Priority. The legal order of priority as between mortgages and other liens or claims may be reversed or modified by an agreement of the parties or by a waiver or release on the part of the senior lien-holder.[83]

3. Priorities of Mortgages to Secure Advances or Contingent Liabilities — a. Mortgages to Secure Future Advances — (i) *In General.* A mortgage may legally be given to secure future advances to be made to the mortgagor, and may become a prior lien for the amount actually loaned or paid, although the advancements are not made until after subsequent mortgages or other liens have come into force.[84] But it is essential that the mortgage should show the amount of the

in making a sale of the land, giving a bond for title, and the purchaser, with the knowledge and consent of the mortgagor, pays the full price of the land on the understanding that the mortgage is to be satisfied out of the money so paid, such purchaser acquires an equity in the land superior to that of the other mortgagee. Wright *v.* Ware, 58 Ga. 150.

The mortgagee of an assignor of a bond for the conveyance of land has a superior equity to a subsequent assignee of the bond. Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475.

81. Summers *v.* Brice, 36 S. C. 204, 15 S. E. 374.

82. Bettis *v.* Allen, 10 Bush (Ky.) 40; Watkins *v.* Reynolds, 123 N. Y. 211, 25 N. E. 322; Preston *v.* Nash, 75 Va. 949. And see *infra*, XIV, E, 1.

Purchaser with notice from purchaser without notice.— Where by a mistake of the parties a mortgage omitted a portion of the premises intended to be covered, and such omitted lands are afterward sold to a purchaser in good faith who has no notice of the omission, and he in turn sells to another, the last purchaser takes free from the lien of the mortgage, notwithstanding the fact that he himself has notice of the mistake. Rutgers *v.* Kingsland, 7 N. J. Eq. 178.

83. *Iowa.*— Ritter *v.* Doerr, 25 Iowa 121.

Louisiana.— Citizens' Bank *v.* Ferry, 32 La. Ann. 310.

New Jersey.— Skillman *v.* Teeple, 1 N. J. Eq. 232.

New York.— Taylor *v.* Wing, 84 N. Y. 471. And see Pennsylvania Steel Co. *v.* Title Guarantee, etc., Co., 50 Misc. 51, 100 N. Y. Suppl. 299.

Pennsylvania.— Maze *v.* Burke, 12 Phila. 335.

England.— Eland *v.* Eland, 1 Beav. 235, 2 Jur. 852, 17 Eng. Ch. 235, 48 Eng. Reprint 930.

See 35 Cent. Dig. tit. "Mortgages," § 330.

84. *California.*— Oroville Bank *v.* Lawrence, (1894) 37 Pac. 936; D'Oyly *v.* Capp, 99 Cal. 153, 33 Pac. 736; Tapia *v.* Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288.

Illinois.— Schimberg *v.* Waite, 93 Ill. App. 130.

Iowa.— Bellamy *v.* Cathcart, 72 Iowa 207, 33 N. W. 636.

Kentucky.— Nelson *v.* Boyce, 7 J. J. Marsh. 401, 23 Am. Dec. 411.

Mississippi.— Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653.

New Jersey.— Reeves *v.* Evans, (Ch. 1896) 34 Atl. 477; Farnum *v.* Burnett, 21 N. J. Eq. 87.

New York.— Hyman *v.* Hauff, 138 N. Y. 48, 33 N. E. 735; Truscott *v.* King, 6 N. Y. 147; Murray *v.* Barney, 34 Barb. 336.

South Carolina.— Smith *v.* Smith, 33 S. C. 210, 11 S. E. 761; Seaman *v.* Fleming, 7 Rich. Eq. 283; Emonds *v.* Crenshaw, 1 McCord Eq. 252.

Texas.— Willis *v.* Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229.

West Virginia.— McCarty *v.* Chalfant, 14 W. Va. 531.

Wisconsin.— Wisconsin Planing-Mill Co. *v.* Schuda, 72 Wis. 277, 39 N. W. 558.

United States.— New Orleans Nat. Banking Assoc. *v.* Le Breton, 120 U. S. 765, 7 S. Ct. 772, 30 L. ed. 821.

England.— *In re* O'Byrne, L. R. 15 Ir. 373.

Canada.— Pierce *v.* Canada Permanent Loan, etc., Co., 25 Ont. 671 [*affirmed* in 23 Ont. App. 516]; Street *v.* Commercial Bank, 1 Grant Ch. (U. C.) 169.

See 35 Cent. Dig. tit. "Mortgages," § 332.

In Pennsylvania the rule appears to be that such a mortgage to secure future advances is a lien, as against intervening encumbrancers, only from the date when the advances are actually made, and not from the date of the mortgage. Montgomery County Bank's Appeal, 36 Pa. St. 170, holding that the mortgagee holding such a mortgage is bound to take notice of intervening encumbrances in the same manner as if he were about to take a new mortgage from the mortgagor, independent of the prior mortgage. See also Bank of Commerce's Appeal, 44 Pa. St. 423 (holding that a bank, to which a mortgage was given "as collateral security for notes discounted, or hereafter to be discounted," cannot, as against a lien creditor whose judgment was subsequently entered up, claim the proceeds of a sale of the mortgaged property, where the notes on which its claim is based were not given or discounted until after the entry of the judgment); Parker *v.* Jacobs, 3 Grant 300. But see Pennock *v.* Copeland, 1 Phila. 29.

advances stipulated to be made or which may be brought within its security, and it cannot take precedence of valid junior liens for any excess over that amount;[85] nor can debts created or advances made to the mortgagor subsequent to the mortgage be tacked to the mortgage debt, to the prejudice of junior lienors, when the mortgage does not expressly provide for such subsequent advances.[86] And further, when all the stipulated advances have been made and repaid, it is doubtful whether the parties can keep the mortgage alive, as security for new advances, as against intervening rights of third persons.[87]

(II) *Liability to Make Advances Optional or Absolute.* Many of the decisions make the effectiveness of such a mortgage depend upon the character of the liability assumed by the mortgagee with reference to making the advances, holding that if it is optional with him to make or refuse such advances, he will be protected by the security of his mortgage only as to advances made before the attaching of a junior lien, while if he is under a binding obligation to make the advances in any event, the mortgage will cover advances made after, as well as before, the junior lien.[88]

(III) *Advances Made Before Notice of Other Liens.* According to many of the decisions, the mortgagee holding a mortgage to secure future advances may safely continue making advances until he has notice of the attaching of a junior lien, and will be protected in such advances, even where it was optional with him to make them, before such notice.[89]

(IV) *Advances Made After Notice of Other Lien.* After notice of the

85. Balch *v.* Chaffee, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155; Wagner *v.* Breed, 29 Nebr. 720, 46 N. W. 286, holding that the lien of the mortgage is limited to the amount specified in it, as against other lienors, although, as to the mortgagor himself, it may be good for all that has been actually advanced. *Compare* Witczinski *v.* Everman, 51 Miss. 841, holding that a mortgage to secure future advances need not specify any particular or definite sum which it is to secure.

86. Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530; Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247; Hughes *v.* Worley, 1 Bibb (Ky.) 200.

87. Norwood *v.* Norwood, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875, holding that as against junior liens the mortgage cannot be thus continued for the security of new advances, after the repayment of the advances originally contemplated. But *compare* Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645.

88. *Connecticut.*— Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169, holding that where two successive mortgages are given on the same property, both to secure future advances, and each making it optional with the mortgagee to make the advances or not to do so, the optional or conditional character of the second mortgage is immaterial in determining its rank as a lien, provided only that advances under it are actually made before the advances under the senior mortgage over which they claim precedence.

Indiana.— Brinkmeyer *v.* Browneller, 55 Ind. 487.

Michigan.— Ladue *v.* Detroit, etc., R. Co., 13 Mich. 380, 87 Am. Dec. 759.

New Jersey.— Williams *v.* Gilbert, 37 N. J. Eq. 84; Heintze *v.* Bentley, 34 N. J. Eq. 562.

New York.— Scheurer *v.* Brown, 67 N. Y. App. Div. 567, 73 N. Y. Suppl. 877; Hyman *v.* Hauff, 138 N. Y. 48, 33 N. E. 735. And see Ackerman *v.* Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621.

North Carolina.— Weathersbee *v.* Farrar, 97 N. C. 106, 1 S. E. 616.

United States.— Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6.

England.— West *v.* Williams, [1898] 1 Ch. 488, 67 L. J. Ch. 213, 78 L. T. Rep. N. S. 147, 46 Wkly. Rep. 362.

See 35 Cent. Dig. tit. "Mortgages," § 333.

89. *California.*— Tapia *v.* Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288.

Connecticut.— Rowan *v.* Sharps' Rifle Mfg. Co., 29 Conn. 282.

Kentucky.—Nelson *v.* Boyce, 7 J. J. Marsh. 401, 23 Am. Dec. 411.

New Jersey.— U. S. Trust Co. *v.* Lanahan, 50 N. J. Eq. 796, 27 Atl. 1032; Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476; Sayre *v.* Hewes, 32 N. J. Eq. 652; Ward *v.* Cooke, 17 N. J. Eq. 93; Bell *v.* Fleming, 12 N. J. Eq. 13.

New York.— Robinson *v.* Williams, 22 N. Y. 380; Huntington *v.* Kneeland, 102 N. Y. App. Div. 284, 92 N. Y. Suppl. 944; Reynolds *v.* Webster, 71 Hun 378, 24 N. Y. Suppl. 1133; Bissell *v.* Kellogg, 60 Barb. 617. And see Ackerman *v.* Hunsicker, 21 Hun 53 [*reversed* on other grounds in 85 N. Y. 43, 39 Am. Rep. 621].

North Dakota.— Merchants' State Bank *v.* Tufts, (1905) 103 N. W. 760.

South Carolina.— Chester Nat. Bank *v.* Gunhouse, 17 S. C. 489.

Vermont.— McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512.

Virginia.—Alexandria Sav. Inst. *v.* Thomas, 29 Gratt. 483.

See 35 Cent. Dig. tit. "Mortgages," § 334.

attaching of a junior lien, the senior mortgagee will not be protected in making further advances under his mortgage, at least where he was under no binding engagement to make such advances,[90] and even, according to the English rule, where he was so bound.[91] Constructive notice is sufficient for this purpose, and the recording of the junior encumbrance will charge him with such notice.[92]

b. Mortgages to Secure Contingent Liabilities. A mortgage given to indemnify the mortgagee or to secure him against a secondary or contingent liability, such as that of an indorser or surety, may take precedence over liens created subsequent to its execution, although before liabilities were incurred, under the same limitations as those above stated with reference to mortgages to secure future advances.[93] But the mortgagee must show that he has actually paid or become legally liable to pay the claim or debt indemnified against.[94]

4. Priority of Purchase-Money Mortgages — a. In General. A mortgage given for the unpaid balance of purchase-money on a sale of land, simultaneously with a deed of the same and as a part of the same transaction, takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor, to the extent of the land sold,[95] thus outranking a mortgage previously given by the same mortgagor, before he took

90. *California.*— Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922, (1894) 37 Pac. 180.

Illinois.— Frye *v.* State Bank, 11 Ill. 367.

Indiana.— Brinkmeyer *v.* Browneller, 55 Ind. 487.

Minnesota.— Finlayson *v.* Crooks, 47 Minn. 74, 49 N. W. 398, 645.

New Jersey.— Heintze *v.* Bentley, 34 N. J. Eq. 562; Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49.

New York.— Scheurer *v.* Brown, 67 N. Y. App. Div. 567, 73 N. Y. Suppl. 877; Craig *v.* Tappin, 2 Sandf. Ch. 78.

North Dakota.— Merchants' State Bank *v.* Tufts, (1905) 103 N. W. 760.

South Carolina.— Seaman *v.* Fleming, 7 Rich. Eq. 283.

United States.— Ripley *v.* Harris, 20 Fed. Cas. No. 11,853, 3 Biss. 199.

England.— Union Bank of Scotland *v.* Scotland Nat. Bank, 12 App. Cas. 53, 56 L. T. Rep. N. S. 208; Freeman *v.* Laing, [1899] 2 Ch. 355, 68 L. J. Ch. 586, 81 L. T. Rep. N. S. 167, 48 Wkly. Rep. 9; *In re* O'Byrne, L. R. 15 Ir. 373; Hopkinson *v.* Rolt, 9 H. L. Cas. 514, 7 Jur. N. S. 1209, 34 L. J. Ch. 468, 5 L. T. Rep. N. S. 90, 9 Wkly. Rep. 900, 11 Eng. Reprint 829.

See 35 Cent. Dig. tit. "Mortgages," § 335.

A knowledge of the existence of the later mortgage is enough to affect the prior mortgagee, as to his future advances, even though he is not notified of the advances actually made under the later mortgage. Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169. But this is not true of a mere knowledge on the part of the senior mortgagee that his mortgagor intends to give a second mortgage on the premises. Craig *v.* Tappin, 2 Sandf. Ch. (N. Y.) 78.

91. West *v.* Williams, [1899] 1 Ch. 132, 68 L. J. Ch. 127, 79 L. T. Rep. N. S. 575, 47 Wkly. Rep. 308.

92. Frye *v.* State Bank, 11 Ill. 367; Spader *v.* Lawler, 17 Ohio 371, 49 Am. Dec. 461; Parker *v.* Jacoby, 3 Grant (Pa.) 300. *Compare* Longworth *v.* Bonsall, 1 Ohio Dec. (Reprint) 85, 2 West. L. J. 70.

93. *Indiana.*— Brinkmeyer *v.* Helbling, 57 Ind. 435; Brinkmeyer *v.* Browneller, 55 Ind. 487.

Kentucky.— Burdett *v.* Clay, 8 B. Mon. 287.

New Jersey.— Jones *v.* State Banking Co., 34 N. J. Eq. 543.

New York.— Ackerman *v.* Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Goodhue *v.* Berrien, 2 Sandf. Ch. 630.

Pennsylvania.— Lyle *v.* Ducomb, 5 Binn. 585.

Texas.— Freiberg *v.* Magale, 70 Tex. 116, 7 S. W. 684.

Virginia.— Bowman *v.* Reinhart, 89 Va. 435, 16 S. E. 279.

See 35 Cent. Dig. tit. "Mortgages," § 336.

94. Hooper *v.* Union Bank, 10 Rob. (La.) 63; Huntington *v.* Cotton, 31 Miss. 253; Man *v.* Elkins, 10 N. Y. Suppl. 488.

95. *Alabama.*— Threefoot *v.* Hillman, 130 Atl. 244, 30 So. 513, 89 Am. St. Rep. 39; Cochran *v.* Adler, 121 Ala. 442, 25 So. 761; McRae *v.* Newman, 58 Ala. 529.

California.— Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743; Guy *v.* Carriere, 5 Cal. 511.

Georgia.— Scott *v.* Warren, 21 Ga. 408.

Idaho.—Kneen *v.* Halin, 6 Ida. 621, 59 Pac. 14.

Illinois.— Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246, (1885) 2 N. E. 501; Elder *v.* Derby, 98 Ill. 228; Wright *v.* Troutman, 81 Ill. 374; Christie *v.* Hale, 46 Ill. 117; Fitts *v.* Davis, 42 Ill. 391; Austin *v.* Underwood, 37 Ill. 438, 87 Am. Dec. 254; Curtis *v.* Root, 20 Ill. 53; Spitzer *v.* Williams, 98 Ill. App. 146.

Indiana.— Fletcher *v.* Holmes, 32 Ind. 497.

Iowa.— Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243; Parsons *v.* Hoyt, 24 Iowa 154.

Maryland.— Hooper *v.* Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; Ahern *v.* White, 39 Md. 409.

Minnesota.— Jacoby *v.* Crowe, 36 Minn. 93,

title to the property, but expressed to cover after-acquired property.[96] If such be the real character of the transaction, it is not necessary that the mortgage should recite or otherwise show on its face that it is given for purchase-money;[97] but the contrary fact may be shown against it, as also any actual fraud which should postpone it to other liens.[98] The lien of such a mortgage having attached, it is not displaced by any change in the form of the security,[99] although it may be subordinated, by the agreement of the parties, to an encumbrance which it would otherwise outrank.[1] While a purchase-money mortgage, like any other, must be put on the record, and proper diligence is required of the mortgagee in doing this, yet the priority of such a mortgage is not lost by the mere fact that the owner of it allows a junior mortgage to be first recorded, if there are no other circumstances to show his agreement or acquiescence in the postponing of his security.[2] Where a mortgage is given to secure money advanced for the purchase of an outstanding tax title to the mortgaged premises, of which the validity

30 N. W. 441; Bolles *v.* Carli, 12 Minn. 113; Banning *v.* Edes, 6 Minn. 402.

Mississippi.— Bainbridge *v.* Woodburn, 52 Miss. 95.

Missouri.— Morris *v.* Pate, 31 Mo. 315.

New Hampshire.— Chamberlain *v.* Meeder, 16 N. H. 381.

New Jersey.— Henry McShane Mfg. Co. *v.* Kolb, 59 N. J. Eq. 146, 45 Atl. 533; Bradley *v.* Bryan, 43 N. J. Eq. 396, 13 Atl. 806.

New York.— Boies *v.* Benham, 127 N. Y. 620, 28 N. E. 657, 14 L. R. A. 55; Pope *v.* Mead, 99 N. Y. 201, 1 N. E. 671; Wilson *v.* Smith, 52 Hun 171, 4 N. Y. Suppl. 915; Card *v.* Bird, 10 Paige 426; Frelinghuysen *v.* Colden, 4 Paige 204.

Ohio.— Martin *v.* Vandeveer, 41 Ohio St. 437; Jarvis *v.* Hannan, 40 Ohio St. 334; Ward *v.* Carey, 39 Ohio St. 361; Stephenson *v.* Haines, 16 Ohio St. 478.

Pennsylvania.— Coleman *v.* Reynolds, 181 Pa. St. 317, 37 Atl. 543; City Nat. Bank's Appeal, 91 Pa. St. 163; Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328; Bratton's Appeal, 8 Pa. St. 164; Chew *v.* Barnet, 11 Serg. & R. 389; Weldon *v.* Gibbon, 2 Phila. 176.

Texas.— Glaze *v.* Watson, 55 Tex. 563.

Virginia.— Straus *v.* Bodeker, 86 Va. 543, 10 S. E. 570; Utterback *v.* Cooper, 28 Gratt. 233.

Washington.— Bisbee *v.* Carey, 17 Wash. 224, 49 Pac. 220.

United States.— Wright *v.* Phipps, 98 Fed. 1007, 38 C. C. A. 702.

See 35 Cent. Dig. tit. "Mortgages," §§ 337, 339. And see JUDGMENTS, 23 Cyc. 1385.

Compare Libbey *v.* Tidden, 192 Mass. 175, 78 N. E. 313.

Mistake in description.—A purchase-money mortgage which by mistake describes the wrong property is not entitled to priority over a subsequent mortgage correctly describing it, given to a third person, for a valuable consideration, who has no notice, actual or constructive, of the rights of the prior mortgagee. Davis *v.* Lutkiewiez, 72 Iowa 254, 33 N. W. 670.

Extent of security.— A purchase-money mortgage is not entitled to priority, as against an existing judgment creditor of the mortgagor, except in so far as it is really for purchase-money; if it also includes security for borrowed money, rent, and usurious interest, it will not have precedence as to these claims. Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1.

96. Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743; Wendler *v.* Lambeth, 163 Mo. 428, 63 S. W. 684; Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, 60 C. C. A. 588. But see Houston *v.* Houston, 67 Ind. 276.

97. Commonwealth Title Ins., etc., Co. *v.* Ellis, 192 Pa. St. 321, 43 Atl. 1034, 73 Am. St. Rep. 816. *Compare* Boies *v.* Benham, 127 N. Y. 620, 28 N. E. 657, 14 L. R. A. 55, holding that where two mortgages are executed and recorded at the same time, and the equities of the holders are apparently equal, the fact that one mortgage recites that it is given to secure purchase-money may determine its priority as against the other, not containing such a recital.

98. Preston *v.* Wolfshafer, 30 Pittsb. Leg. J. N. S. (Pa.) 103; Thomas *v.* Davis, 3 Phila. (Pa.) 171.

99. Austin *v.* Underwood, 37 Ill. 438, 87 Am. Dec. 254; Kimble *v.* Esworthy, 6 Ill. App. 517.

1. Mutual Loan, etc., Assoc. *v.* Elwell, 38 N. J. Eq. 18; Crombie *v.* Rosentock, 19 Abb. N. Cas. (N. Y.) 312; Herron *v.* Herron, 19 Ohio Cir. Ct. 160, 10 Ohio Cir. Dec. 525.

2. *Illinois.*— Continental Inv., etc., Soc. *v.* Wood, 168 Ill. 421, 48 N. E. 221; Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246; Brainard *v.* Hudson, 103 Ill. 218; Elder *v.* Derby, 98 Ill. 228; Moshier *v.* Knox College, 32 Ill. 155. *Compare* Young *v.* Austin, 100 Ill. App. 248.

Iowa.— Phelps *v.* Fockler, 61 Iowa 340, 14 N. W. 729, 16 N. W. 210.

Maine.— McKecknie *v.* Hoskins, 23 Me. 230.

Michigan.— Heffron *v.* Flanigan, 37 Mich. 274.

Minnesota.— Jacoby *v.* Crowe, 36 Minn. 93, 30 N. W. 441; Oliver *v.* Davy, 34 Minn. 292, 25 N. W. 629.

See 35 Cent. Dig. tit. "Mortgages," § 337.

In Pennsylvania by statute a purchase-money mortgage, in order to be entitled to priority over other liens, must be recorded within sixty days after its execution. Allen *v.* Oxnard, 152 Pa. St. 621, 25 Atl. 568.

is not questioned, it is entitled to priority over liens existing at the time of the sale for taxes and divested thereby.[3]

b. Time of Execution of Mortgage. To constitute a purchase-money mortgage, it is not necessary that the deed and mortgage should be in fact executed at the same moment, or even on the same day, provided the execution of the two instruments constituted part of one continuous transaction and was so intended.[4] But if the mortgage is not made until a considerable time after the deed, and they cannot be said to be even constructively simultaneous, the mortgage will be subordinated to intervening valid liens.[5]

c. Mortgage to Third Person Advancing Purchase-Money. Where a purchaser of land, at the same time he receives a conveyance, executes a mortgage to a third person, who advances the purchase-money for him, such mortgage is entitled to the same preference over other liens existing against the mortgagor as it would have had if it had been made to the vendor himself.[6] But the money must have been loaned with the express purpose and intention that it should be used in paying the purchase-price of the land; the mere fact that it was so used, without any understanding to that effect, will give the lender no superior equity.[7] And if the purchaser of land is already indebted to the vendor for the price of the same, and then borrows money from a third person for the purpose of discharging this debt, and gives the latter a mortgage on the land, this mortgage is not entitled to the standing of a purchase-money mortgage.[8]

d. Mortgage For Balance of Purchase-Money and Mortgage For Money Borrowed to Make Cash Payment. A purchase-money mortgage, executed when the title to the land passes, will take precedence of one previously given to secure money borrowed by the purchaser to make the cash payment on the land, although the latter was first recorded,[9] at least where the vendor of the land had no knowledge of the previous mortgage.[10]

3. Kaiser *v.* Lembech, 55 Iowa 244, 7 N. W. 519.

4. Stewart *v.* Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651; Banning *v.* Edes, 6 Minn. 402; Demeter *v.* Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422; Spring *v.* Short, 90 N. Y. 538; Pascault *v.* Cochran, 34 Fed. 358.

5. Cohn *v.* Hoffman, 50 Ark. 108, 6 S. W. 511; Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246, (1885) 2 N. E. 501; Ansley *v.* Pasahro, 22 Nebr. 662, 35 N. W. 885.

6. *Arkansas.*— See Cohn *v.* Hoffman, 50 Ark. 108, 6 S. W. 511.

Georgia.—Achey *v.* Coleman, 92 Ga. 745, 19 S. E. 710; Hill *v.* Cole, 84 Ga. 245, 10 S. E. 739.

Illinois.— Steinkemeyer *v.* Gillespie, 82 Ill. 253; Magee *v.* Magee, 51 Ill. 500, 99 Am. Dec. 571; Curtis *v.* Root, 20 Ill. 53.

Iowa.— Laidley *v.* Aikin, 80 Iowa 112, 45 N. W. 384, 20 Am. St. Rep. 408; Kaiser *v.* Lembeck, 55 Iowa 244, 7 N. W. 519.

Minnesota.— Jacoby *v.* Crowe, 36 Minn. 93, 30 N. W. 441; Stewart *v.* Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651.

New Jersey.— Hopler *v.* Cutler, (Ch. 1896) 34 Atl. 746.

New York.— Boies *v.* Benham, 127 N. Y. 620, 28 N. E. 657, 14 L. R. A. 55; Haywood *v.* Nooney, 3 Barb. 643; Jackson *v.* Austin, 15 Johns. 477.

North Carolina.— Moring *v.* Dickerson, 85 N. C. 466.

Ohio.— Neff *v.* Crumbaker, 40 Ohio St. 85.

Pennsylvania.— Butterfield's Appeal, 77 Pa. St. 197; Hiser *v.* Hiser, 13 Montg. Co. Rep. 49.

See 35 Cent. Dig. tit. "Mortgages," § 341.

But see Fontenot *v.* Soileau, 2 La. Ann. 774; Heuisler *v.* Nickum, 38 Md. 270.

7. Van Loben Sels *v.* Bunnell, 120 Cal. 680, 53 Pac. 266; Gilman *v.* Dingeman, 49 Iowa 308; Mutual Aid Bldg., etc., Co. *v.* Gashe, 18 Ohio Cir. Ct. 681, 6 Ohio Cir. Dec. 779; Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130.

8. Small *v.* Stagg, 95 Ill. 39; Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Austin *v.* Underwood, 37 Ill. 438, 87 Am. Dec. 254; Nicholson *v.* Aney, 127 Iowa 278, 103 N. W. 201; Donovan *v.* Twist, 105 N. Y. App. Div. 171, 93 N. Y. Suppl. 990.

9. *Indiana.*— Brower *v.* Witmeyer, 121 Ind. 83, 22 N. E. 975.

Iowa.— Koevenig *v.* Schmitz, 71 Iowa 175, 32 N. W. 320.

Missouri.— Truesdale *v.* Brennan, 153 Mo. 600, 55 S. W. 147; Turk *v.* Funk, 68 Mo. 18, 30 Am. Rep. 771.

New Jersey.— Protection Bldg., etc., Assoc. *v.* Chickering, 55 N. J. Eq. 822, 41 Atl. 1116; Protection Bldg., etc., Assoc. *v.* Knowles, 54 N. J. Eq. 519, 34 Atl. 1083; Brasted *v.* Sutton, 29 N. J. Eq. 513.

South Carolina.— Frazier *v.* Center, 1 McCord Eq. 270.

See 35 Cent. Dig. tit. "Mortgages," § 342.

10. Schoch *v.* Birdsall, 48 Minn. 441, 51 N. W. 382.

C. Mortgagees as Bona Fide Purchasers — 1. Rights of Mortgagee — a. In General. A mortgagee of realty is regarded as a purchaser thereof; and if his mortgage is supported by an actual present consideration, and is given and taken in good faith and without fraud, he is to be treated as a *bona fide* purchaser for value, and as such protected against adverse claims of which he had no notice, actual or constructive,[11] including not only prior deeds or other conveyances of the premises,[12] but also all other liens upon it or claims of interests in it.[13]

11. *Alabama.*—Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515; Rogers *v.* Adams, 66 Ala. 600; Wells *v.* Morrow, 38 Ala. 125.

Arkansas.— Turman *v.* Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35.

Connecticut.— Bush *v.* Golden, 17 Conn. 594.

Georgia.— Scott *v.* Atlas Sav., etc., Assoc., 114 Ga. 134, 39 S. E. 942; Lane *v.* Partee, 41 Ga. 202.

Illinois.— Erwin *v.* Hall, 18 Ill. App. 315.

Indiana.— Lehman *v.* Hawks, 121 Ind. 541, 23 N. E. 670; Herff *v.* Griggs, 121 Ind. 471, 23 N. E. 279.

Iowa.— Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243; Hewitt *v.* Rankin, 41 Iowa 35.

Louisiana.— Thompson *v.* Whitbeck, 47 La. Ann. 49, 16 So. 570.

Maine.— Pierce *v.* Faunce, 47 Me. 507.

Massachusetts.—Dana *v.* Newhall, 13 Mass. 498.

Michigan.— Shepard *v.* Shepard, 36 Mich. 173.

Missouri.— Masterson *v.* West End Narrow Gauge R. Co., 72 Mo. 342.

Nevada.— Fair *v.* Howard, 6 Nev. 304.

New York.—Werner *v.* Franklin Nat. Bank, 166 N. Y. 619, 59 N. E. 1132; Drake *v.* Paige, 127 N. Y. 562, 28 N. E. 407; La Farge F. Ins. Co. *v.* Bell, 22 Barb. 54.

Oregon.— Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Pennsylvania.— Lancaster *v.* Dolan, 1 Rawle 231, 18 Am. Dec. 625.

South Carolina.— Haynsworth *v.* Bischoff, 6 S. C. 159.

Texas.— Brigham *v.* Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358.

United States.— Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83.

England.— Wallwyn *v.* Lee, 9 Ves. Jr. 24, 7 Rev. Rep. 142, 32 Eng. Reprint 509.

See 35 Cent. Dig. tit. "Mortgages," § 344.

Trust deeds.— The trustee and the beneficiaries in a deed of trust to secure a debt are regarded as purchasers of the estate. Gilbert *v.* Lawrence, 56 W. Va. 281, 49 S. E. 155; Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83.

Equitable title.— The doctrine of *bona fide* purchasers does not apply to an encumbrancer of a merely equitable title or estate. Shoufe *v.* Griffiths, 4 Wash. 161, 30 Pac. 93, 31 Am. St. Rep. 910.

After-acquired property.— Where land is conveyed to a corporation which has given a mortgage covering after-acquired property, such mortgage does not become a first lien on the land, but is subject to the vendor's lien for unpaid purchase-money, and as to such land the mortgagee is not a purchaser for value. Loomis *v.* Davenport, etc., R. Co., 17 Fed. 301, 3 McCrary 489.

Adverse claimant of patent to land.— A mortgagee without notice will be protected as against a third person claiming a right to have the patent for the land set aside and a new patent issued to him on account of his prior entry. Robbins *v.* Moore, 129 Ill. 30, 21 N. E. 934.

Protected against an unpaid vendor.— Patterson *v.* Johnston, 7 Ohio 225.

12. *Alabama.*— Kindred *v.* New England Mortg. Security Co., 116 Ala. 192, 23 So. 56.

Kentucky.— Harding *v.* Tate, 68 S. W. 17, 23 Ky. L. Rep. 1918. Although a mortgagee had no actual notice of a prior sale of a part of the land to one who was in possession under a bond for title when the mortgage was given, the mortgagee has no lien on the unpaid purchase-money, as against an assignee for the benefit of creditors of the mortgagor. Ross *v.* Sweeney, 15 S. W. 357, 12 Ky. L. Rep. 861.

Missouri.— Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32.

Pennsylvania.— Farmer *v.* Fisher, 197 Pa. St. 114, 46 Atl. 892.

South Carolina.— Summers *v.* Brice, 36 S. C. 204, 15 S. E. 374.

South Dakota.— Parrish *v.* Mahany, 10 S. D. 276, 73 N. W. 97, 66 Am. St. Rep. 715.

Texas.—McKeen *v.* Sultenfuss, 61 Tex. 325; Hays *v.* Tilson, (Civ. App. 1896) 35 S. W. 515.

See 35 Cent. Dig. tit. "Mortgages," § 361.

Rights of mortgagee's vendee.— A purchaser with notice of a prior lease, not recorded within the time fixed by the statute, from a mortgagee without notice of such lease, will be protected in his title, although the lease was recorded after the mortgage and before the time of the purchase. Charleston *v.* Page, Speers Eq. (S. C.) 159.

Although a conveyance may be void as between the parties, on account of undue influence, the *bona fide* mortgagee of a subsequent purchaser for value and without notice will be protected. Valentine *v.* Lunt, 115 N. Y. 496, 22 N. E. 209.

13. *Arkansas.*— Gerson *v.* Pool, 31 Ark. 85.

California.— Austin *v.* Pulschen, 112 Cal. 528, 44 Pac. 788; Salter *v.* Baker, 54 Cal. 140.

Florida.— Edwards *v.* Thom, 25 Fla. 222, 5 So. 707.

Illinois.— Robbins *v.* Moore, 129 Ill. 30, 21 N. E. 934.

Kentucky.— Clark *v.* Hunt, 3 J. J. Marsh. 553.

b. As Against Secret Equities. A person who takes a mortgage in good faith and for a valuable consideration, the record showing a clear title in the mortgagor, will be protected against any equitable titles to the premises, or equitable claims upon the title, in favor of third persons, of which he had no notice actual or constructive.[14] It is otherwise as to a mortgagee who has notice of such titles or claims when taking his mortgage.[15]

c. As Against Claim of Fraud. Although a conveyance of land may be voidable for fraud in the hands of the original grantee, yet if he has given a mortgage on the premises to one advancing his money in good faith and without notice of the fraud, such claim of fraud cannot be set up against the mortgagee;[16] but it is otherwise, if knowledge of the fraud can be brought home to the mortgagee.[17]

2. Good Faith. To entitle a mortgagee to protection, his mortgage must have been taken in good faith; and it is sufficient if such good faith exists at the time of the execution of the mortgage, without reference to his subsequent discoveries of material facts.[18] He will generally be justified in relying on an apparently

Mississippi.— Mairs *v.* Oxford Bank, 58 Miss. 919.

Missouri.— Cornet *v.* Bertelsmann, 61 Mo. 118.

New York.— Drake *v.* Paige, 52 Hun 292, 5 N. Y. Suppl. 466 [*affirmed* in 127 N. Y. 562, 28 N. E. 407]; Newton *v.* McLean, 41 Barb. 285.

Ohio.— Patterson *v.* Johnston, 7 Ohio 225.

Texas.— Moran *v.* Wheeler, 87 Tex. 179, 27 S. W. 54.

Virginia.— Shurtz *v.* Johnson, 28 Gratt. 657.

See 35 Cent. Dig. tit. "Mortgages," § 362.

14. *Alabama.*—Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515.

California.—Doe *v.* Culverwell, 35 Cal. 291.

Illinois.— Bradley *v.* Luce, 99 Ill. 234.

Indiana.— Lehman *v.* Hawks, 121 Ind. 541, 23 N. E. 670; Fitzpatrick *v.* Papa, 89 Ind. 17.

Iowa.— Patton *v.* Eberhart, 52 Iowa 67, 2 N. W. 954.

Louisiana.—Bach *v.* Abbott, 6 La. Ann. 809.

Missouri.— Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784.

Nevada.— Rickards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

Ohio.— Shorten *v.* Drake, 38 Ohio St. 76.

South Dakota.— Horswill *v.* Farnham, 16 S. D. 414, 92 N. W. 1082.

Tennessee.— Yates *v.* Yates, (Ch. App. 1899) 54 S. W. 1002.

Virginia.— Yancey *v.* Blakemore, 95 Va. 263, 28 S. E. 336.

England.— Thompson *v.* Hudson, L. R. 2 Ch. 255, 36 L. J. Ch. 388, 15 Wkly. Rep. 697; Boyd *v.* Belton, 1 J. & L. 730.

Canada.—Imperial Loan, etc., Co. *v.* O'Sullivan, 8 Ont. Pr. 162; Watson *v.* Dowser, 28 Grant Ch. (U. C.) 478.

See 35 Cent. Dig. tit. "Mortgages," § 366.

A resulting trust cannot be set up to defeat the right of a mortgagee without notice of the trust. Flynt *v.* Hubbard, 57 Miss. 471; Fessenden *v.* Taft, 65 N. H. 39, 17 Atl. 713.

Wife's secret equity.— While, as to lands bought by a husband with the money of his wife, to which he takes title in his own name, a resulting trust immediately arises in favor of the wife, she cannot assert ownership as against a third person who, without notice of her secret equity, and in reliance on the husband's apparent title, makes to him in good faith a loan secured by a mortgage covering the lands so held in trust. Warner *v.* Watson, 35 Fla. 402, 17 So. 654; Dill *v.* Hamilton, 118 Ga. 208, 44 S. E. 989; Parker *v.* Barnesville Sav. Bank, 107 Ga. 650, 34 S. E. 365; Johnston *v.* Johnston, 173 Mo. 91, 73 S. W. 202, 16 Am. St. Rep. 486, 61 L. R. A. 166; Whelchel *v.* Lucky, 41 Fed. 114.

The equity of a co-executor to reimbursement out of a misappropriating executor's share of the estate, for a sum which the former has been compelled to pay on account of the misappropriation, is inferior to that of a subsequent mortgagee of the misappropriating executor's share of the estate, who became such for value, in good faith and without notice. Drake *v.* Paige, 127 N. Y. 562, 28 N. E. 407.

A contractor who builds a railroad and thereby gives value to the property does not acquire an equitable lien superior to that of mortgages given before his contract was made. Reed's Appeal, 122 Pa. St. 565, 16 Atl. 100.

15. Sanford *v.* Davis, 181 Ill. 570, 54 N. E. 977; Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; Arnold *v.* Whitcomb, 83 Mich. 19, 46 N. W. 1029.

16. Parsons *v.* Crocker, 128 Iowa 641, 105 N. W. 162; State *v.* Matthews, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308; Testart *v.* Belot, 31 La. Ann. 795; Brusle *v.* Hamilton, 26 La. Ann. 144; Makler *v.* McClelland, 21 La. Ann. 579; Stockton *v.* Craddick, 4 La. Ann. 282; Foster *v.* Foster, 11 La. 401; Hedden *v.* Cowell, 37 N. J. Eq. 89; Simpson *v.* Del Hoyo, 94 N. Y. 189.

17. Brummond *v.* Krause, 8 N. D. 573, 80 N. W. 686.

18. Davis *v.* Greve, 32 La. Ann. 420.

Meaning of good faith.— As applied to a mortgagee, "good faith" means actual reliance on the ownership of the vendor or mortgagor, in ignorance or without notice of an existing encumbrance on the property. Milton *v.* Boyd, 49 N. J. Eq. 142, 22 Atl. 1078.

perfect legal title in his mortgagor, as shown by the records.[19] But he cannot claim the protection of a *bona fide* purchaser if he rashly relies on a title which he knows, or ought to know, is liable to be defeated,[20] nor if there are any circumstances of fraud or illegality in the transaction in which the mortgage is given.[21]

3. Notice — a. In General. Where a mortgagee at the time of taking his mortgage has knowledge or legal notice of a prior conveyance, mortgage, or other lien on the property, he takes subject thereto, and is not entitled to the protection of a *bona fide* purchaser.[22] And if he once knew the facts regarding the

"Good faith . . . is the *tabula in naufragia* of the mortgagees who claim in hostility to the vendor's otherwise superior rights." Berner *v.* Kaye, 14 Misc. (N. Y.) 1, 3, 35 N. Y. Suppl. 181. And see *Ex p.* Knott, 11 Ves. Jr. 609, 8 Rev. Rep. 254, 32 Eng. Reprint 1225.

The burden of proof is on one who accepted a mortgage from a husband on land which in fact belonged to the wife, the deed to the same having been by mistake made out to the husband and wife jointly, to show as against the wife that he accepted the mortgage in good faith and without notice of the true state of the title. Bates *v.* Frazier, 85 S. W. 757, 27 Ky. L. Rep. 576.

19. Boyer *v.* Joffrion, 40 La. Ann. 657, 4 So. 872; Phœnix Mut. L. Ins. Co. *v.* Brown, 37 Nebr. 705, 56 N. W. 488; Doye *v.* Carey, 3 Okla. 627, 41 Pac. 432. *Compare* Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830 (holding that an intending mortgagee of real estate relies upon a recital in an abstract of title to the land at his peril); Equitable Mortg. Co. *v.* Kempner, 84 Tex. 102, 19 S. W. 358.

20. Cunningham *v.* Whitford, 74 Hun (N. Y.) 273, 26 N. Y. Suppl. 575, holding that as before the expiration of the time within which creditors may proceed to charge the real estate of a decedent with payment of debts, no presumption arises that the debts have been paid, one who takes a mortgage from a devisee of decedent is not a *bona fide* encumbrancer.

Mortgage operating as assignment for benefit of creditors.— A mortgagee whose mortgage operates under the statute as an assignment of all the mortgagor's property for the benefit of his creditors is not a *bona fide* purchaser whether he knew of the mortgagor's insolvency or not. Drake *v.* Ellman, 80 Ky. 434.

New trial of action in which judgment obtained.— A statute providing that "the result of the new trial, if application therefor is made after the close of the term at which the judgment is rendered, shall in no case affect the interests of third persons, acquired in good faith, for a valuable consideration, since the former trial," does not apply to a mortgagee who, with actual notice, took his mortgage after the first judgment and before the new trial. Griswold *v.* Ward, 128 Ind. 389, 27 N. E. 751; Smith *v.* Cottrell, 94 Ind. 379.

21. Clark *v.* Johnson, 133 Ala. 432, 31 So. 960 (mortgage tainted with usury); Laprad *v.* Sherwood, 79 Mich. 520, 44 N. W. 943 (mortgage obtained by fraud or forgery of mortgagee's agent).

22. *California.*—Kent *v.* Williams, 146 Cal. 3, 79 Pac. 527; De Leonis *v.* Hammel, 1 Cal. App. 390, 82 Pac. 349.

Colorado.— Patterson *v.* De Long, 11 Colo. App. 103, 52 Pac. 687.

Connecticut.— Norton *v.* Birge, 35 Conn. 250.

District of Columbia.—Slater *v.* Hamacher, 15 App. Cas. 558.

Georgia.— Goodwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275.

Iowa.— Boyd *v.* Boyd, 128 Iowa 699, 104 N. W. 798; Glassburn *v.* Wireman, 126 Iowa 478, 102 N. W. 421; Heively *v.* Matteson, 54 Iowa 505, 6 N. W. 732.

Kentucky.— Averill *v.* Guthrie, 8 Dana 82; Bates *v.* Frazier, 85 S. W. 757, 27 Ky. L. Rep. 576.

Maryland.— Gore *v.* Condon, 82 Md. 649, 33 Atl. 261; McMechen *v.* Maggs, 4 Harr. & J. 132.

Michigan.— Arnold *v.* Whitcomb, 83 Mich. 19, 46 N. W. 1029; Jackson, etc., R. Co. *v.* Davison, 65 Mich. 437, 37 N. W. 537.

New Jersey.— Gothainer *v.* Grigg, 32 N. J. Eq. 567.

New York.— Olyphant *v.* Phyfe, 166 N. Y. 630, 60 N. E. 1117; Spears *v.* New York, 10 Hun 160; Newton *v.* McLean, 41 Barb. 285; King *v.* Wilcomb, 7 Barb. 263.

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Rhode Island.— Babcock *v.* Wells, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848.

South Carolina.— Kuker *v.* Jarrott, 61 S. C. 265, 39 S. E. 530; Messervey *v.* Barelli, 2 Hill Eq. 567.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Spurlock *v.* Sullivan, 36 Tex. 511; Rogers *v.* Tompkins, (Civ. App. 1905) 87 S. W. 379; Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Smith *v.* Smith, 23 Tex. Civ. App. 304, 55 S. W. 541; Patterson *v.* Tuttle, (Civ. App. 1894) 27 S. W. 758.

Washington.— Bank *v.* Doherty, 42 Wash. 317, 84 Pac. 872, 4 L. R. A. N. S. 1191.

West Virginia.— Scott *v.* Isaacsen, (1904) 49 S. E. 254.

Wisconsin.— Gall *v.* Gall, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. N. S. 603; John *v.* Larson, 28 Wis. 604.

United States.— German Sav., etc., Soc. *v.* Tull, 136 Fed. 1, 69 C. C. A. 1; Camp *v.* Peacock, etc., Co., 129 Fed. 1005, 64 C. C. A. 490.

prior encumbrance or claim, it is immaterial that he may have forgotten them at the time his mortgage was made.[23] Nor can he escape such consequences by pleading a mistake of law as to whether a lien would result from the given facts, knowledge of the facts being sufficient to charge him.[24] But where the lien of the mortgage has once attached in good faith, it is not divested by the mortgagee's subsequent discovery of facts which would have affected its priority.[25] Where the mortgage is given to two persons jointly, notice to one of them of an outstanding equity will not affect the other.[26] Whether the mortgagee had actual notice of prior liens or claims is a question of fact, and may be determined upon any sufficient evidence, parol or otherwise.[27]

b. Constructive Notice. Constructive as well as actual notice of prior conveyances or encumbrances will postpone the lien of the mortgage to the rights of their holders;[28] and the mortgagee is chargeable with such notice where he is shown to have had knowledge of facts which should have put a reasonably careful man upon inquiry, and where such an inquiry, carefully prosecuted in the right quarter, would have led to a discovery of the facts concerning the prior conveyance or encumbrance.[29] He must therefore in order to protect himself make an investigation where the existence of an earlier deed or lien is indicated by recitals

England.— Eyre *v.* Dolphin, 2 Ball & B. 290, 12 Rev. Rep. 94; Hennessey *v.* Bray, 33 Beav. 96, 55 Eng. Reprint 302; De Witte *v.* Addison, 80 L. T. Rep. N. S. 207.

See 35 Cent. Dig. tit. "Mortgages," § 346.

Notice to an attorney or agent of the mortgagee may be imputed to the latter if acquired while acting in the capacity of agent or attorney in the particular transaction. Foy *v.* Armstrong, 113 Iowa 629, 85 N. W. 753; Low *v.* Low, 177 Mass. 306, 59 N. E. 57; Sponable *v.* Hanson, 87 Mich. 204, 49 N. W. 644; Bigley *v.* Jones, 114 Pa. St. 510, 7 Atl. 54. *Compare* Farmer *v.* American Mortg. Co., 116 Ala. 410, 22 So. 426. An attorney's knowledge of an unrecorded deed to land cannot be imputed to his client, a subsequent mortgagee, if it was not acquired by him while transacting business for the mortgagee. Slattery *v.* Schwannecke, 118 N. Y. 543, 23 N. E. 922.

Notice to the proper officer of a corporation mortgagee may be imputed to the corporation. Wilson *v.* McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Kirklin *v.* Atlas Sav., etc., Assoc., (Tenn. Ch. App. 1900) 60 S. W. 149.

The beneficiary in a deed of trust is not generally chargeable with the knowledge possessed by the trustee. Willis *v.* Vallette, 4 Metc. (Ky.) 186; Gritchell *v.* Kreidler, 12 Mo. App. 497; Morrison *v.* Bausemer, 32 Gratt. (Va.) 225.

Duty of claimant as to giving notice.— Where defendant in an action of ejectment mortgages the lands and with the proceeds erects improvements thereon, and the ejectment suit results in his eviction, the mortgagee cannot then maintain a suit in equity to subject the land in the possession of the true owner to an equitable lien for the value of such improvements, on the ground that he had constructve notice by the record of the mortgage that it was the mortgagee's money that was used in making the improvements, and that he failed to notify the mortgagee of his title or warn him of the fraud that was being perpetrated upon him by the mortgagor. Armstrong *v.* Ashley, 22 App. Cas. (D. C.) 368.

23. Hunt *v.* Clark, 6 Dana (Ky.) 56.

24. Willis *v.* Vallette, 4 Metc. (Ky.) 186; Ledos *v.* Kupfrian, 28 N. J. Eq. 161.

25. Davis *v.* Greve, 32 La. Ann. 420; Barrett *v.* Eastham, (Tex. Civ. App. 1905) 86 S. W. 1057.

26. Secley *v.* Neill, (Colo. 1906) 86 Pac. 334; Babcock *v.* Wells, 25 R. I. 30, 54 Atl. 599.

27. Hodges *v.* Winston, 94 Ala. 576, 10 So. 535; Wittenbrock *v.* Cass, 110 Cal. 1, 42 Pac. 300.

28. Glidden *v.* Hunt, 24 Pick. (Mass.) 221.

29. *California.*— Stockton Bldg., etc., Assoc. *v.* Chalmers, 65 Cal. 93, 3 Pac. 101.

Georgia.— Goodwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275.

Illinois.— Garrett *v.* Simpson, 115 Ill. App. 62; Slocum *v.* Slocum, 9 Ill. App. 142.

Maryland.— Border State Sav. Inst. *v.* Wilcox, 63 Md. 525.

Michigan.— Gordon *v.* Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142.

New Jersey.— Kellogg *v.* Randolph, (1906) 63 Atl. 753; Parker *v.* Parker, (Ch. 1904) 56 Atl. 1094; Ledos *v.* Kupfrian, 28 N. J. Eq. 161.

New York.— Hoyt *v.* Hoyt, 17 Hun 192 [*affirmed* in 85 N. Y. 142]; Howard Ins. Co. *v.* Halsey, 4 Sandf. 565.

North Carolina.— Patton *v.* Cooper, 132 N. C. 791, 44 S. E. 676; Branch *v.* Griffin, 99 N. C. 173, 5 S. E. 393, 398.

Ohio.— Hibbs *v.* Union Cent. L. Ins. Co., 40 Ohio St. 543.

Pennsylvania.— Flitcraft *v.* Commonwealth Title, etc., Trust Co., 211 Pa. St. 114, 60 Atl. 557; Dunning *v.* Reese, 7 Kulp 201.

Tennessee.— Wolfe *v.* Citizens' Bank, (Ch. App. 1897) 42 S. W. 39.

Texas.— Ramirez *v.* Smith, 94 Tex. 184, 59 S. W. 258; Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Smith *v.* Smith, 23 Tex. Civ. App. 304, 55 S. W. 541.

in the mortgage offered to him,[30] or by recitals in the deed to his mortgagor,[31] or in judgments or decrees affecting the property which come under his notice,[32] as also where he has knowledge of facts *in pais* — or not of record — which suggest the same thing.[33] He is also chargeable with notice where he improvidently relies on unofficial or insufficient evidence as to the state of the title.[34] There is nothing in the mere relation of mortgagor and mortgagee to charge the latter with notice of facts known to the former.[35]

c. Notice of Claim For Purchase-Money. Where a mortgagee knows that his mortgagor has not fully paid for the premises on which he gives the mortgage, the lien thereof will be subordinate to the lien of the unpaid vendor, whether such knowledge was derived from recitals in the mortgagor's deed or from direct personal information.[36]

d. Possession as Notice — (i) *In General.* Where, at the time of the execution of a mortgage, a person other than the mortgagor is in the actual possession of the mortgaged premises, such possession is sufficient to put the mortgagee upon inquiry as to the rights of the person in possession, and he takes the mortgage subject to such rights.[37] But to have this effect the possession by a stranger must

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 546.

See 35 Cent. Dig. tit. "Mortgages," § 347.

30. Bell *v.* Twilight, 22 N. H. 500; Dailey *v.* Kestell, 56 Wis. 444, 14 N. W. 635.

31. Babcock *v.* Wells, 25 R. I. 30, 54 Atl. 599, holding that a mortgagee is not chargeable with notice of an outstanding equity merely because the conveyance under which his mortgagor claims title was in the form of a quitclaim rather than a warranty deed.

32. Ramirez *v.* Smith, 94 Tex. 184, 59 S. W. 258, holding that a mortgagee is not chargeable with constructive notice of an equitable title to the premises claimed by a third person, merely by reason of recitals in a judgment obtained by the mortagor's grantor which would indicate that the mortgagor had received the legal title as trustee, where the mortgagor's legal title is complete and in no way depends on that judgment. And see Boyer *v.* Joffrion, 40 La. Ann. 657, 4 So. 872, holding generally that a *bona fide* mortgagee is not bound by judicial proceedings involving the title, to which he was no party.

33. France *v.* Holmes, 84 Iowa 319, 51 N. W. 152 (holding that a mortgagee is put on inquiry by his knowledge of the fact that a dispute exists between the owner of the property and his grantor as to the *bona fides* of the owner's title); Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390 (holding that a mortgage taken with knowledge that the construction of a building on the mortgaged premises has been begun is subject to liens arising from such construction).

As to effect of mortgagee's knowledge that mortgagor is married as charging the former with constructive notice of liens or claims growing out of or depending on the marital status see Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Cleaveland *v.* Boston Five Cents Sav. Bank, 129 Mass. 27.

34. Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862, holding that where a mortgagee makes a loan on the strength of an abstract of title, which recites a guardian's deed conveying the mortgaged premises to the mortgagor, and fails to make an examination of the records of the probate court in relation to such sale, which would have shown it to be fraudulent, he is chargeable with notice thereof.

35. Tritch *v.* Norton, 10 Colo. 337, 15 Pac. 680.

36. Whitfield *v.* Riddle, 78 Ala. 99; Montgomery *v.* Keppel, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125; Haywood *v.* Shaw, 16 How. Pr. (N. Y.) 119; Brewster *v.* Clough, 4 Ohio Dec. (Reprint) 25, 4 Clev. L. Rec. 28; Brooks *v.* Lange, 2 Ohio Dec. (Reprint) 178, 2 West. L. Month. 12.

The recent date of the conveyance to the mortgagor is not of itself notice to the mortgagee that the purchase-money has not been paid. Wood *v.* Commonwealth Bank, 5 T. B. Mon. (Ky.) 194.

Knowledge as to amount unpaid.— The lien of a mortgage on land does not take precedence of a prior vendor's lien because the mortgagee did not know the amount of the vendor's lien, nor how much of the purchase-money was unpaid, his knowledge of the fact that some of the purchase-money was unpaid being sufficient to put him on inquiry as to the amount. Jordan *v.* Wimer, 45 Iowa 65.

37. *Alabama.*— Kent *v.* Dean, 128 Ala. 600, 30 So. 543; Reynolds *v.* Kirk, 105 Ala. 446, 17 So. 95; Anthe *v.* Heide, 85 Ala. 236, 4 So. 380.

Arkansas.— Jowers *v.* Phelps, 33 Ark. 465.

California.—Austin *v.* Pulschen, (1895) 39 Pac. 799. See also Huntley *v.* San Francisco Sav. Union, 130 Cal. 46, 62 Pac. 255.

District of Columbia.— Waters *v.* Williamson, 21 D. C. 24.

Georgia.— Linder *v.* Whitehead, 116 Ga. 206, 42 S. E. 358.

Illinois.— Sanford *v.* Davis, 181 Ill. 570, 54 N. E. 977; Joiner *v.* Duncan, 174 Ill. 252, 51 N. E. 323; Brainard *v.* Hudson, 103 Ill. 218; Weber *v.* Shelby, 116 Ill. App. 31; Griffin *v.* Haskins, 22 Ill. App. 264.

Iowa.— Crooks *v.* Jenkins, 124 Iowa 317,

be open, notorious, and visible,[38] actual and not merely constructive,[39] and unequivocally hostile to the mortgagor,[40] and generally, the mortgagee is not charged with any notice arising from a mixed possession or joint occupancy shared in by the mortgagor, as where husband and wife, brother and sister, parent and child, or persons occupying other family relations, live together on the same premises, although in fact the person sharing the tenancy with the mortgagor may have liens or claims upon the estate prior in time to the mortgage.[41]

100 N. W. 82, 104 Am. St. Rep. 326; Schafer *v.* Wilson, 113 Iowa 475, 85 N. W. 789; Humphrey *v.* Moore, 17 Iowa 193.

Maine.— Boggs *v.* Anderson, 50 Me. 161; McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646.

Michigan.— Van Baalen *v.* Cotney, 113 Mich. 202, 71 N. W. 491; Hubbard *v.* Smith, 2 Mich. 207.

Minnesota.— Jellison *v.* Halloran, 44 Minn. 199, 46 N. W. 332; New *v.* Wheaton, 24 Minn. 406.

New York.— Abbey *v.* Taber, 134 N. Y. 615, 32 N. E. 649; Shneider *v.* Mahl, 84 N. Y. App. Div. 1, 82 N. Y. Suppl. 27; Bassett *v.* Wood, 55 Hun 587, 9 N. Y. Suppl. 79; Lawrence *v.* Conklin, 17 Hun 228; Union College *v.* Wheeler, 5 Lans. 160; Braman *v.* Wilkinson, 3 Barb. 151; Swanstrom *v.* Day, 46 Misc. 311, 93 N. Y. Suppl. 192; New York L. Ins., etc., Co. *v.* Cutler, 3 Sandf. Ch. 176.

Ohio.— Ranney *v.* Hardy, 43 Ohio St. 157, 1 N. E. 523.

South Carolina.— Sweatman *v.* Edmunds, 28 S. C. 58, 5 S. E. 165.

Texas.— Ramirez *v.* Smith, 94 Tex. 184, 59 S. W. 258; Pride *v.* Whitfield, (Civ. App. 1899) 51 S. W. 1100; Compton *v.* Seley, (Civ. App. 1894) 27 S. W. 1077.

Wisconsin.— Gall *v.* Gall, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. N. S. 603; Mateskey *v.* Feldman, 75 Wis. 103, 43 N. W. 733.

United States.— Dennis *v.* Atlanta Nat. Bldg., etc., Assoc., 136 Fed. 539, 69 C. C. A. 315; Bright *v.* Buckman, 39 Fed. 243; Ferguson *v.* Dent, 24 Fed. 412 [*reversed* on other grounds in 132 U. S. 50, 10 S. Ct. 13, 38 L. ed. 42].

See 35 Cent. Dig. tit. "Mortgages," §§ 350, 389.

Inquiries of person in possession.—The person of whom inquiries should be made in the first instance is the person in possession; and the mortgagee is chargeable with notice of all facts affecting the validity of the mortgage which he could have ascertained by making proper inquiries of such person. Collins *v.* Moore, 115 Ga. 327, 41 S. E. 609.

The mortgagee can disprove his knowledge of the claims of a third person in possession by showing that he made every proper inquiry in respect to the rights of the possessor and failed to obtain information. Hellman *v.* Levy, 55 Cal. 117.

38. *California.*— Hellman *v.* Levy, 55 Cal. 117.

Minnesota.—Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539.

Ohio.— Williams *v.* Sprigg, 6 Ohio St. 585; Railroad Employees Bldg., etc., Assoc. *v.* Dawson, 5 Ohio S. & C. Pl. Dec. 583, 7 Ohio N. P. 601.

South Carolina.— Ellis *v.* Young, 31 S. C. 322, 9 S. E. 955.

Tennessee.— Curry *v.* Williams, (Ch. App. 1896) 38 S. W. 278.

United States.— Adams-Booth Co. *v.* Reid, 112 Fed. 106.

Possession of tenement-house.— Where one claimed the mortgaged premises as owner in actual, visible, and exclusive possession, under a prior deed, unrecorded when the mortgage was given, and the property was a tenement-house occupied by many persons, it was held that, to make his possession sufficiently open and visible to defeat a mortgage, he need not post his name and address on the door as owner, as required by the health regulations relating to tenement-houses. Phelan *v.* Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211 [*affirming* 1 N. Y. Suppl. 626].

39. Merritt *v.* Northern R. Co., 12 Barb. (N. Y.) 605, holding that where the mortgagor had previously granted to a third person a right of way over the premises, the grant not being recorded, and the latter had surveyed his road and staked it out and set posts for the fences, but the mortgagee had no actual notice that he was doing anything on the land, it was held that such possession on the part of the third person was not sufficient to charge the mortgagee with constructive notice.

Chopping timber on the land and cultivating the clearing, the property lying in a densely timbered and sparsely settled country, may be such acts of possession as to charge a subsequent mortgagee with notice. Wickes *v.* Lake, 25 Wis. 71.

Inclosing an eighty-acre tract with other land, with a post and wire fence, and using the same for pasturing cattle constitutes notice. Millard *v.* Wegner, 68 Nebr. 574, 94 N. W. 802.

Possession of part of land may be sufficient to give notice to mortgagee of the occupant's claim of title to the whole tract. Watters *v.* Connelly, 59 Iowa 217, 13 N. W. 82. But see Hodges *v.* Winston, 94 Ala. 576, 10 So. 535.

40. Hammond *v.* Paxton, 58 Mich. 393, 25 N. W. 321; Phillips *v.* Owen, 99 N. Y. App. Div. 18, 90 N. Y. Suppl. 947.

41. *Illinois.*— Roderick *v.* McMeekin, 204 Ill. 625, 68 N. E. 473.

Indiana.— Paulus *v.* Latta, 93 Ind. 34.

Iowa.— Elliot *v.* Lane, 82 Iowa 484, 48 N. W. 720, 31 Am. St. Rep. 504; Iowa L. & T. Co. *v.* King, 58 Iowa 598, 12 N. W. 595.

Michigan.— See Allen *v.* Cadwell, 55 Mich. 8, 20 N. W. 692.

(II) *Possession by Vendee.* The actual possession of land by a purchaser holding a deed, even though not recorded, or a contract for the purchase, is notice of his rights to one taking a mortgage on the land from the vendor, so that the lien of the mortgage can cover nothing more than the vendor's remaining rights or interests.[42]

(III) *Possession by Tenant.* A mortgagee is chargeable with notice of the claims of a third person upon the property, although it is not in the possession of such person, if it is in the actual possession of his tenant.[43] So also the possession of leased premises by a tenant is constructive notice to a subsequent mortgagee of the tenant's legal and equitable rights under his lease.[44]

e. Notice From Record. A mortgagee of land is charged with notice of, and must take in subordination to, any conveyance or encumbrance of the premises which has been placed on the records before the execution of his mortgage,[45] and

New Hampshire.—Bell *v.* Twilight, 22 N. H. 500.

New Jersey.— Rankin *v.* Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661.

New York.— Cary *v.* White, 7 Lans. 1 [*reversed* on other grounds in 52 N. Y. 138].

North Carolina.— Patterson *v.* Mills, 121 N. C. 258, 28 S. E. 368.

Washington.—Attebery *v.* O'Neil, 42 Wash. 487, 85 Pac. 270.

United States.— Atlanta Nat. Bldg., etc., Assoc. *v.* Gilmer, 128 Fed. 293.

See 35 Cent. Dig. tit. "Mortgages," § 350.

42. *Alabama.*— Sawyers *v.* Baker, 66 Ala. 292.

Illinois.— Tillotson *v.* Mitchell, 111 Ill. 518; Doolittle *v.* Cook, 75 Ill. 354.

Kansas.— School Dist. No. 82 *v.* Taylor, 19 Kan. 287.

Kentucky.— See Wood *v.* Davis, 4 Bibb 47.

Michigan.— Weisberger *v.* Wisner, 55 Mich. 246, 21 N. W. 331.

New York.— Phelan *v.* Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211; Orleans Bank *v.* Flagg, 3 Barb. Ch. 316. See also Johnson *v.* Strong, 65 Hun 470, 20 N. Y. Suppl. 392; Gouverneur *v.* Lynch, 2 Paige 300.

Ohio.— Ranney *v.* Hardy, 43 Ohio St. 157, 1 N. E. 523; Williams *v.* Sprigg, 6 Ohio St. 585. See also Jaeger *v.* Hardy, 48 Ohio St. 335, 27 N. E. 863.

Wisconsin.— Cunningham *v.* Brown, 44 Wis. 72.

United States.— Bright *v.* Buckman, 39 Fed. 243.

See 35 Cent. Dig. tit. "Mortgages," § 351.

Lessee with option to purchase.—After seasonable acceptance of an option to purchase contained in a lease, the lessee's possession becomes that of owner, and gives notice of his rights as such to the subsequent mortgagee of the vendor or lessor, who takes his mortgage subject thereto. Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360.

43. *Georgia.*— Collins *v.* Moore, 115 Ga. 327, 41 S. E. 609.

Iowa.— Wrede *v.* Cloud, 52 Iowa 371, 3 N. W. 400.

Minnesota.— Morrison *v.* March, 4 Minn. 422.

New Jersey.— Baldwin *v.* Johnson, 1 N. J. Eq. 441.

New York.— Welsh *v.* Schoen, 59 Hun 356, 13 N. Y. Suppl. 71.

Pennsylvania.— Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489.

See 35 Cent. Dig. tit. "Mortgages," § 352.

44. Kerr *v.* Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; Toland *v.* Corey, 6 Utah 392, 24 Pac. 190; Allen *v.* Gates, 73 Vt. 222, 50 Atl. 1092. *Compare* Bell *v.* Twilight, 18 N. H. 159, 45 Am. Dec. 367; Staples *v.* Fenton, 5 Hun (N. Y.) 172.

45. *Alabama.*— Harden *v.* Darwin, 77 Ala. 472; Harris *v.* Brown, 30 Ala. 401.

Iowa.— Paige *v.* Lindsey, 69 Iowa 593, 29 N. W. 615.

Michigan.— Hannah *v.* Carnahan, 65 Mich. 601, 32 N. W. 835.

New York.— Cole *v.* Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615.

South Dakota.— Bernardy *v.* Colonial, etc., Mortg. Co., 17 S. D. 637, 98 N. W. 166, 106 Am. St. Rep. 791.

See 35 Cent. Dig. tit. "Mortgages," § 353.

Filing a deed properly executed and acknowledged with the proper officer for record operates as constructive notice to a subsequent mortgagee, although the officer fails to comply with the requirements of the statute with respect to recording it. Deming *v.* Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464.

Destruction of record.— The record of a trust deed is constructive notice to a subsequent mortgagee of its terms, although the record has been destroyed; but when a lawful decree has been subsequently rendered, which declares the terms of the deed, but incorrectly, the destroyed record ceases to be notice and is superseded by the decree. Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55.

What notice given by record of prior mortgage.— The record of a mortgage affords notice only of its existence and ownership thereof by the mortgagee named therein, and not of its assignment to another; and a person taking a mortgage on realty may rely on the record of a satisfaction of a prior mortgage by the record owner thereof, if he has no actual or constructive knowledge that such prior mortgage is in fact owned by a third person. Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1

also any agreement or judicial proceeding affecting the title to the land or creating a charge upon it,[46] providing the recording of the same is regular, correct, and sufficient;[47] but he is not chargeable with notice of any conveyance or lien recorded after his mortgage, not being bound to keep the run of the records after placing his own mortgage there.[48]

4. Consideration — a. In General. To entitle a mortgagee to the protection accorded to a *bona fide* purchaser, his mortgage must be supported by a valid consideration, either in the nature of a contemporaneous loan or other advance or surrender of value,[49] or a binding agreement to make advances in the future.[50]

L. R. A. N. S. 891. But see Vohmann *v.* Michel, 109 N. Y. App. Div. 659, 96 N. Y. Suppl. 309.

46. Meyer *v.* Portis, 45 Ark. 420 (a decree recorded in an equity suit avoiding and annulling the mortgagor's title); Singer *v.* Scheible, 109 Ind. 575, 10 N. E. 616 (a commissioner's deed reciting that it is made by order and judgment of the court in a certain case, the title of which is given, entered in a certain record); Paige *v.* Lindsey, 69 Iowa 593, 29 N. W. 615 (a recorded agreement reserving to the mortgagor's grantor a contingent interest in the land); Duclaud *v.* Rousseau, 2 La. Ann. 168 (a recorded marriage contract affecting the title to the property); Polk *v.* Foster, 7 Baxt. (Tenn.) 98 (a registered lien on future crops for payment of purchase-money).

Records not notice.— A mortgagee is not charged with notice of rights in the land arising from a judgment which, so far as appears from the records, was rendered against a party who had never owned the land. Reed *v.* Rice, 48 Nebr. 586, 67 N. W. 459. And a sheriff's certificate of an execution sale is not constructive notice to prior mortgagees, although regularly filed in the register's office. Woods *v.* Love, 27 Mich. 308. The record of an agreement to sell certain land, if it should be thereafter acquired by the promisor, and to divide the proceeds with another, is not notice to one taking a mortgage after the title was acquired. Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980.

An unrecorded attachment levied on an equitable interest in the land which does not appear on the records does not charge with notice. Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252.

Unrecorded defeasance.— Where a conveyance is absolute in form, although intended as a mortgage, and is recorded, but the defeasance rests in parol, or, if written, is not recorded, one taking a mortgage from the grantee is justified in relying on his apparently complete legal title, and is not affected by the defeasance unless he has actual notice of it. Payne *v.* Morey, 144 Cal. 130, 77 Pac. 831; Maxfield *v.* Patchen, 29 Ill. 39; Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

47. Ray *v.* Bush, 1 Root (Conn.) 81.

Indexing record.— In some states a record cannot operate as constructive notice to a subsequent mortgagee unless properly indexed. Travellers' Ins. Co. *v.* Patten, 98 Ind. 209. But in others the index is not an essential part of the record for this purpose. Stockwell *v.* McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Schell *v.* Stein, 76 Pa. St. 398, 18 Am. Rep. 416. And see *infra*, XIV, E, 2, l.

48. *Colorado.*— Tritch *v.* Norton, 10 Colo. 337, 15 Pac. 680.

Illinois.— Heaton *v.* Prather, 84 Ill. 330.

Michigan.— Cooper *v.* Bigly, 13 Mich. 463.

New York.— Ackerman *v.* Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Howard Ins. Co. *v.* Halsey, 4 Bosw. 565.

Ohio.— Sharp *v.* Myers, 2 Ohio Cir. Ct. 82, 1 Ohio Cir. Dec. 374.

49. *Alabama.*— Craft *v.* Russell, 67 Ala. 9; Whelan *v.* McCreary, 64 Ala. 319; Watts *v.* Burnett, 56 Ala. 340; Coleman *v.* Smith, 55 Ala. 368; Short *v.* Battle, 52 Ala. 456; Doe *v.* Reeves, 10 Ala. 137.

Maryland.— General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174.

Missouri.— Brooks *v.* Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492.

New Jersey.— Wheeler *v.* Kirtland, 24 N. J. Eq. 552.

New York.— Towanda First Nat. Bank *v.* Robinson, 105 N. Y. App. Div. 193, 94 N. Y. Suppl. 767.

Texas.— Halbert *v.* Paddleford, (Civ. App. 1896) 33 S. W. 592.

See 35 Cent. Dig. tit. "Mortgages," § 354.

Indemnity mortgage.— When a mortgage is given to indemnify a surety against a liability contemporaneously assumed, the mortgagee is a purchaser for valuable consideration, and entitled to protection against latent equities of which he had no notice. Bartlett *v.* Varner, 56 Ala. 580.

Surrendering title to personalty as consideration.— A vendor of machinery who under the contract of sale is to retain the title until the execution of a real estate mortgage by the purchasers as security for the price parts with something of value, as well as with a prior security, in surrendering such title on the execution of the mortgage, and hence is entitled to the protection of a purchaser for value. Outterson *v.* Dilts, 21 N. Y. Suppl. 163.

50. Simons *v.* Union Springs First Nat. Bank, 93 N. Y. 269. And see *supra*, VII, D, 1.

As to priority of mortgage given to secure future advances see *supra*, XIV, B, 3, a.

A deed of trust, made as security for bonds to be thereafter issued, is inoperative as a security, unless the bonds are actually issued to *bona fide* creditors, before the liens of

But although part of the consideration may fail, may be based on a preëxisting debt, or be otherwise insufficient to support the character of a *bona fide* purchaser, the mortgage may be a valid security as to the remainder and entitled to priority.[51]

b. Preëxisting Debt. A creditor who takes a mortgage on realty merely as security for the payment of a debt or demand already due to him, and without giving any new consideration or being induced to change his condition in any manner, is not entitled to the protection accorded to a *bona fide* purchaser for value, as against prior liens or equities,[52] although it is otherwise if a new or contemporaneous consideration is joined with the antecedent debt in the security of the mortgage.[53] Where the mortgage is to secure the mortgagee against a liability already incurred on behalf of the mortgagor, it stands on the same footing with a mortgage for a preëxisting debt.[54]

other creditors attach to the property conveyed. Allen *v.* Montgomery R. Co., 11 Ala. 437.

51. Wells *v.* Morrow, 38 Ala. 125; Klaes *v.* Klaes, 103 Iowa 689, 72 N. W. 777; Gibson *v.* Hutchins, 43 S. C. 287, 21 S. E. 250; Bass *v.* Wheless, 2 Tenn. Ch. 531.

52. *Alabama.*— Anthe *v.* Heide, 85 Ala. 236, 4 So. 380; Banks *v.* Long, 79 Ala. 319; Craft *v.* Russell, 67 Ala. 9; Alexander *v.* Caldwell, 55 Ala. 517; Wells *v.* Morrow, 38 Ala. 125. *Compare* Thurman *v.* Stoddard, 63 Ala. 336.

Connecticut.— Salisbury Sav. Soc. *v.* Cutting, 50 Conn. 113.

Georgia.— Collins *v.* Moore, 115 Ga. 327, 41 S. E. 609.

Indiana.— Adams *v.* Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; Martinsville First Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 129 Ind. 241, 28 N. E. 695; Durham *v.* Craig, 79 Ind. 117; Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250. *Compare* Babcock *v.* Jordan, 24 Ind. 14; Work *v.* Brayton, 5 Ind. 396.

Iowa.— Smith *v.* Moore, 112 Iowa 60, 83 N. W. 813; Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243; Phelps *v.* Fockler, 61 Iowa 340, 14 N. W. 729, 16 N. W. 210.

Kentucky.— Holmes *v.* Stix, 104 Ky. 351, 47 S. W. 243, 20 Ky. L. Rep. 593.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508.

Mississippi.— Schumpert *v.* Dillard, 55 Miss. 348.

New Jersey.— Reeves *v.* Evans, (Ch. 1896) 34 Atl. 477; Martin *v.* Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Lamb *v.* Lamb, (Ch. 1892) 23 Atl. 1009; Wheeler *v.* Kirtland, 24 N. J. Eq. 552. *Compare* Uhler *v.* Semple, 20 N. J. Eq. 288.

New York.— Breed *v.* Auburn Nat. Bank, 171 N. Y. 648, 63 N. E. 1115; Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; Young *v.* Guy, 87 N. Y. 467; De Lancey *v.* Stearns, 66 N. Y. 157; Cary *v.* White, 52 N. Y. 138; Hiscock *v.* Phelps, 49 N. Y. 97; O'Brien *v.* Fleckenstein, 86 N. Y. App. Div. 140, 83 N. Y. Suppl. 499; Shadbolt *v.* Bassett, 1 Lans. 121; White *v.* Knapp, 8 Paige 173; Manhattan Co. *v.* Evertson, 6 Paige 457; Westervelt *v.* Haff, 2 Sandf. Ch. 98. *Compare* Union Dime Sav. Inst. *v.* Duryea, 67 N. Y. 84. But see Korneman *v.* Fred Hower Brewing Co., 4 Misc. 299, 24 N. Y. Suppl. 103.

North Carolina.— Small *v.* Small, 74 N. C. 16; Donaldson *v.* State Bank, 16 N. C. 103, 18 Am. Dec. 577.

Ohio.— Lewis *v.* Anderson, 20 Ohio St. 281.

South Carolina.— Marsh *v.* Ramsay, 57 S. C. 121, 35 S. E. 433.

Tennessee.— Brown *v.* Vanlier, 7 Humphr. 239. Where land is conveyed by deed absolute upon its face, payment of the full consideration being acknowledged, the vendor, before bill filed, can claim no lien for unpaid purchase-money as against a creditor of the vendee claiming under a deed of trust executed by the vendee to secure an antecedent debt to such creditor. Sharp *v.* Fly, 9 Baxt. 4.

Texas.— Spurlock *v.* Sullivan, 36 Tex. 511; Stacey *v.* Henke, 32 Tex. Civ. App. 462, 74 S. W. 925.

United States.— People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754; Hill *v.* Hite, 79 Fed. 826; Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 176. *Compare* Partridge *v.* Smith, 18 Fed. Cas. No. 10,787, 2 Biss. 183.

See 35 Cent. Dig. tit. "Mortgages," § 355.

See, however, Herbage *v.* Moodie, 51 Nebr. 837, 71 N. W. 778; Dorr *v.* Meyer, 51 Nebr. 94, 70 N. W. 543; Fair *v.* Howard, 6 Nev. 304; Gilbert *v.* Lawrence, 56 W. Va. 281, 49 S. E. 155.

As to inapplicability of rule as between two mortgagees see *infra*, XIV, D, 4.

Note for past debt.— A note payable one day after date, given for an ascertained balance on a settlement of preëxisting demands, and contemporaneously with the execution of a mortgage securing the same, is not such a consideration as will make the mortgagee a purchaser for value. Sweeney *v.* Bixler, 69 Ala. 539.

Renewal note.— Where an antecedent debt is evidenced by promissory notes, a new note given for the same aggregate amount, on taking up the old ones, is not such a consideration as to make the mortgagee a purchaser for value. Busenbarke *v.* Ramey, 53 Ind. 499.

53. Whitfield *v.* Riddle, 78 Ala. 99; Cook *v.* Parham, 63 Ala. 456; Douglas *v.* Miller, 102 N. Y. App. Div. 94, 92 N. Y. Suppl. 514; Branch *v.* Griffin, 99 N. C. 173, 5 S. E. 393, 398.

54. Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237. And see Uhler *v.* Semple, 20 N. J. Eq. 288.

c. Extension of Time of Payment. Although a mortgage is given to secure an antecedent debt, yet if, at the time and in consideration of the giving of the mortgage, the creditor grants a definite extension of the time of payment, this is such a new consideration as will give him the character of a purchaser for value.[55]

d. Surrender of Prior Security. Although a mortgage is given to secure a preëxisting debt, yet if the mortgagee, at the same time and in consideration of the giving of the mortgage, surrenders some security for the same debt which he already held, such as a vendor's lien, a mechanic's lien, or a note with a good indorser, this will be a sufficient new consideration to give him the rights of a purchaser for value.[56]

D. Priority of Record — 1. In General. In the absence of countervailing equities, the order of priority as between persons claiming liens on the same property by mortgage or otherwise depends on the respective dates when they were recorded or filed for record, rather than upon the time of their execution.[57]

2. As Between Mortgage and Judgment. Where judgments attach as liens upon the real estate of the debtor from the date of their entry or docketing, the order of priority as between a judgment lien and the lien of a mortgage depends upon the order in which they are respectively entered or recorded,[58] at least in

55. *Alabama.*— Randolph *v.* Webb, 116 Ala. 135, 22 So. 550; Alston *v.* Marshall, 112 Ala. 638, 20 So. 850; Jones *v.* Robinson, 77 Ala. 499; Downing *v.* Blair, 75 Ala. 216; Craft *v.* Russell, 67 Ala. 9.

Indiana.— Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250.

Iowa.— Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243; Port *v.* Embree, 54 Iowa 14, 6 N. W. 83.

Michigan.— De Mey *v.* Defer, 103 Mich. 239, 61 N. W. 524.

Mississippi.— Schumpert *v.* Dillard, 55 Miss. 348.

New York.— Cary *v.* White, 7 Lans. 1 [*reversed* on other grounds in 52 N. Y. 138].

Ohio.— Farmers', etc., Nat. Bank *v.* Wallace, 45 Ohio St. 152, 12 N. E. 439.

Texas.— Farmers' Nat. Bank *v.* James, 13 Tex. Civ. App. 550, 36 S. W. 288; Watts *v.* Corner, 8 Tex. Civ. App. 588, 27 S. W. 1087. A mortgagee is not placed in the position of a purchaser for value merely because the result of the mortgage may be to extend the time of payment. Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310.

United States.— See Missouri Broom Mfg. Co. *v.* Guymon, 115 Fed. 112, 53 C. C. A. 16.

See 35 Cent. Dig. tit. "Mortgages," § 356.

56. Wilson *v.* Knight, 59 Ala. 172; Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; O'Brien *v.* Fleckenstein, 86 N. Y. App. Div. 140, 83 N. Y. Suppl. 499; Norwalk Nat. Bank *v.* Lanier, 7 Hun (N. Y.) 623; Lane *v.* Logue, 12 Lea (Tenn.) 681.

57. *Illinois.*— Huebsch *v.* Scheel, 81 Ill. 281; Jones *v.* Jones, 16 Ill. 117.

Louisiana.— Givanovitch *v.* Baton Rouge Hebrew Cong., 36 La. Ann. 272; Ogle *v.* King, 22 La. Ann. 391.

Minnesota.— Dunwell *v.* Bidwell, 8 Minn. 34.

Nebraska.— Rumery *v.* Loy, 61 Nebr. 755, 86 N. W. 478.

Vermont.— Day *v.* Clark, 25 Vt. 397.

United States.— Ridings *v.* Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401; Pickett *v.* Foster, 36 Fed. 514; Sheffey *v.* Lewisburg Bank, 33 Fed. 315 [*affirmed* in 140 U. S. 445, 11 S. Ct. 755, 35 L. ed. 493].

England.— Ball *v.* Riversdale, Beatty 500.

See 35 Cent. Dig. tit. "Mortgages," § 368.

Copy of instrument registered.— Under a law providing only for the registration of original instruments, the registration of a mere copy of a marriage contract, creating a charge upon lands, does not entitle it to priority over a duly registered mortgage. Murchie *v.* Theriault, 1 N. Brunsw. Eq. 588.

58. *Alabama.*—Martinez *v.* Lindsey, 91 Ala. 334, 8 So. 787.

Arkansas.— Snell *v.* Cummins, 67 Ark. 261, 54 S. W. 342.

Georgia.— Cabot *v.* Armstrong, 100 Ga. 438, 28 S. E. 123.

Illinois.— Bell *v.* Cassem, 158 Ill. 45, 41 N. E. 1089, 29 L. R. A. 571; Warner *v.* Helm, 6 Ill. 220.

Iowa.— Wood *v.* Young, 38 Iowa 102.

North Carolina.—Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483.

Oregon.— Laurent *v.* Lanning, 32 Oreg. 11, 51 Pac. 80.

Pennsylvania.— Britton *v.* Bean, 4 Phila. 289.

South Carolina.— Carraway *v.* Carraway, 27 S. C. 576, 5 S. E. 157.

Virginia.— Hill *v.* Rixey, 26 Gratt. 72.

United States.— Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25.

Canada.— Raymond *v.* Richards, Ritch. Eq. Cas. (Nova Scotia) 423.

See 35 Cent. Dig. tit. "Mortgages," § 369. And see Judgments, 23 Cyc. 1383 *et seq.*

A mortgage in favor of the United States is no lien as against a *bona fide* purchaser under a judgment revived after the mortgage was given, but before it was recorded. Benton *v.* Woolsey, 12 Pet. (U. S.) 27, 9 L. ed. 987.

the absence of any countervailing equities growing out of actual notice.[59] In the case where a judgment is entered or docketed on the same day on which a mortgage is recorded, the rules for determining their priority vary in the different states.[60]

3. As Between Mortgage and Conveyance. As between a mortgage and a deed of conveyance of the same land, the one first recorded takes precedence, notwithstanding the fact that it may have been executed after the other;[61] and although

Effect of want of delivery to or assent by mortgagee.— Where a mortgage is made and executed without any knowledge of it on the part of the mortgagee, and is delivered by the mortgagor to the proper officer for record and duly recorded, it is not entitled to priority against the lien of a judgment recovered against the mortgagor after the recording of the mortgage, but before the mortgagee had accepted or assented to the mortgage. Goodsell *v.* Stinson, 7 Blackf. (Ind.) 437. And see *infra*, XIV, D, 5, c.

A mortgage defectively registered is nevertheless a good equitable mortgage, and its lien is superior to that of a subsequent judgment. Lake *v.* Doud, 10 Ohio 415; Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616.

In Missouri a mortgage deed unrecorded before a judgment is good against the judgment if recorded before a sale on execution under the judgment. Shaw *v.* Padley, 64 Mo. 519; Valentine *v.* Havener, 20 Mo. 133.

59. Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 7 Atl. 873.

60. **In Delaware** a judgment duly entered is a lien during the entire day of its entry, and has priority over a mortgage recorded at any specified hour of the same day. Hollingsworth *v.* Thompson, 5 Harr. 432.

In Ohio the lien of a judgment relates back to the first day of the term of court at which the judgment was rendered and to the hour of that day when, by statute or rule of court, the court is to convene. There is a presumption of law that the court did actually convene at the hour so fixed, and consequently a mortgage recorded at a later hour on the same day will be postponed to the lien of the judgment, and the mortgagee will not be permitted to show that in point of fact the court did not convene until an hour later than that in which the mortgage was delivered to the recorder. Hemminway *v.* Davis, 24 Ohio St. 150; Davis *v.* Messenger, 17 Ohio St. 231. But where the law fixes merely the day on which the term of court is to commence, making no provision as to the hour, a mortgage handed in for record on the first day of the term of court, but before the court actually convenes, will prevail against the lien of a judgment recovered at the same term. Follett *v.* Hall, 16 Ohio 111, 47 Am. Dec. 365.

In Pennsylvania there is no priority as between a judgment entered and a mortgage recorded on the same day; they are entitled to distribution *pro rata* as equal liens. Hendrickson Appeal, 24 Pa. St. 363; Claason's Appeal, 22 Pa. St. 359; Clawson *v.* Eichbaum, 2 Grant 130; Maze *v.* Burke, 12 Phila. 335; Doolittle *v.* Beary, 2 Phila. 354. But see Magaw *v.* Garrett, 25 Pa. St. 319. But this rule does not apply where the contest is between two mortgages. Hence, where two mortgages are recorded on the same day, one of them being given to secure, and being accompanied by, a bond with warrant of attorney to confess judgment, the actual time of their recording is to be ascertained, and a difference of even five minutes will give the one mortgage priority over the other, the mortgage with its accompanying bond being but one instrument, and the time of entry of the judgment being conclusively established by the record evidence of the entry of the mortgage. Miller *v.* Fluck, 8 Pa. Co. Ct. 585.

61. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Illinois.— Miller *v.* Shaw, 103 Ill. 277.

Indiana.— Reasoner *v.* Edmundson, 5 Ind. 393.

Kansas.— Ogden *v.* Walters, 12 Kan. 282.

Louisiana.— Boyer *v.* Joffrion, 40 La. Ann. 657, 4 So. 872.

Massachusetts.— Somes *v.* Skinner, 3 Pick. 52.

Mississippi.— Harrington *v.* Allen, 48 Miss. 492.

New York.— Westbrook *v.* Gleason, 89 N. Y. 641, 79 N. Y. 23; Frost *v.* Peacock, 4 Edw. 678.

North Carolina.— Cowan *v.* Green, 9 N. C. 384.

Pennsylvania.— Hulett *v.* Mutual L. Ins. Co., 114 Pa. St. 142, 6 Atl. 554.

Tennessee.— Whiteside *v.* Watkins, (Ch. App. 1900) 58 S. W. 1107.

Texas.— Hays *v.* Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479.

United States.— North *v.* Knowlton, 23 Fed. 163; Ferry *v.* Burnell, 14 Fed. 807, 5 McCrary 1.

England.— Stuart *v.* Ferguson, Hayes 452; Lee *v.* Clutton, 46 L. J. Ch. 48, 35 L. T. Rep. N. S. 84, 24 Wkly. Rep. 942; Scrafton *v.* Quincey, 2 Ves. 413, 28 Eng. Reprint 264.

See 35 Cent. Dig. tit. "Mortgages," § 370.

A sheriff's deed, if not recorded, does not affect a mortgagee, who may seize the property as if in the mortgagor's possession. Lee *v.* Darramon, 3 Rob. (La.) 160.

A power of sale, in a mortgage, is a part of the security, and an interest in the land, and as such is protected by the statute against a prior unregistered deed. Bell *v.* Twilight, 22 N. H. 500.

Mortgage improperly recorded.— A mortgage actually recorded, but improperly admitted to the records because the acknowledgment, taken abroad, is not sufficiently proven, does not take the rank to which its priority

this rule may be changed by a statute making a mortgage or deed void as against subsequent purchasers or mortgagees if it is not recorded within a limited time after its execution,[62] such a statute does not apply where neither of the contesting instruments was recorded within the time limited; in that event priority of record gives priority of right.[63]

4. As Between Two Mortgages. In the absence of special equities growing out of questions of notice, good or bad faith, want of consideration, or the like, the rule of priority as between two independent mortgages on the same property, given at different times to different mortgagees, is that the one first recorded is a superior lien to the other, whether it was executed before or after such other.[64]

of record would otherwise entitle it. Evans *v.* Etheridge, 99 N. C. 43, 5 S. E. 386.

62. See the statutes of the different states. And see Turpin *v.* Sudduth, 53 S. C. 295, 31 S. E. 245, 306. See *supra*, XIII, A.

In Pennsylvania the statute provides that every deed or conveyance which shall not be recorded within six months after its execution shall be void against any subsequent purchaser or mortgagee unless recorded before the recording of the deed under which such purchaser or mortgagee shall claim. Hence, a mortgage actually recorded before a deed of the same premises is recorded has priority over the deed, although the deed was recorded within six months from its execution and the mortgage was not. Fries *v.* Null, 154 Pa. St. 573, 26 Atl. 554.

63. Souder *v.* Morrow, 33 Pa. St. 83. But *compare* Myers *v.* Picquet, 61 Ga. 260.

64. *California.*— Odd Fellows' Sav. Bank *v.* Banton, 46 Cal. 603.

Georgia.— Myers *v.* Picquet, 61 Ga. 260, holding that a senior mortgage not recorded in time has precedence over a junior mortgage, recorded before the senior one, but not in time.

Illinois.— Schultze *v.* Houfes, 96 Ill. 335; Huebsch *v.* Scheel, 81 Ill. 281; Brookfield *v.* Goodrich, 32 Ill. 363.

Indiana.— Carson *v.* Eickhoff, 148 Ind. 596, 47 N. E. 1067; McFadden *v.* Hopkins, 81 Ind. 459; Krutsinger *v.* Brown, 72 Ind. 466.

Iowa.— Nicholson *v.* Aney, 127 Iowa 278, 103 N. W. 201.

Kentucky.— Spaulding *v.* Scanland, 6 B. Mon. 353.

Louisiana.— Hart *v.* Caffery, 39 La. Ann. 894, 2 So. 788; Berwin *v.* Weiss, 28 La. Ann. 363; Byrne *v.* Citizens' Bank, 23 La. Ann. 275; Silliman *v.* Mills, 23 La. Ann. 206; Harang *v.* Plattsmier, 21 La. Ann. 426; Peychaud *v.* Citizens' Bank, 21 La. Ann. 262; Liddell *v.* Rucker, 13 La. Ann. 569; Hutchings' Succession, 11 Rob. 512; Conrad *v.* Prieur, 5 Rob. 49.

Maine.— Marshall *v.* Dunham, 66 Me. 539.

Maryland.— Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25.

Michigan.—Hoffman *v.* McMorran, 52 Mich. 318, 17 N. W. 928.

Minnesota.— Potter *v.* Marvin, 4 Minn. 525.

Mississippi.— Pomet *v.* Scranton, Walk. 406.

Missouri.— Ladd *v.* Anderson, 133 Mo. 625, 34 S. W. 872.

Nebraska.— Burrows *v.* Hovland, 40 Nebr. 464, 58 N. W. 947; Clarke *v.* Forbes, 9 Nebr. 476, 4 N. W. 58.

New Jersey.— Taylor *v.* Thomas, 5 N. J. Eq. 331.

New York.— O'Brien *v.* Fleckenstein, 180 N. Y. 350, 73 N. E. 30, 105 Am. St. Rep. 768; Hoschke *v.* Hoschke, 42 Misc. 125, 85 N. Y. Suppl. 1006; Grant *v.* Bissett, 1 Cai. Cas. 112; Douglass *v.* Peele, Clarke 563.

North Carolina.— Commercial, etc., Bank *v.* Vass, 130 N. C. 590, 41 S. E. 791; Gordon *v.* Collett, 102 N. C. 532, 9 S. E. 486.

Ohio.— Ramsey *v.* Jones, 41 Ohio St. 685; Bercaw *v.* Cockerill, 20 Ohio St. 163; Paine *v.* Mason, 7 Ohio St. 198.

South Carolina.— Boyce *v.* Boyce, 6 Rich. Eq. 302.

Tennessee.— Smith *v.* Neilson, 13 Lea 461.

Utah.— Wells *v.* Smith, 2 Utah 39.

Vermont.— Beeman *v.* Cooper, 64 Vt. 305, 23 Atl. 794.

United States.— Neslin *v.* Wells, 104 U. S. 428, 26 L. ed. 802; Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Beals *v.* Hale, 4 How. 37, 11 L. ed. 865; Balfour *v.* Parkinson, 84 Fed. 855; Sheffey *v.* Lewisburg Bank, 33 Fed. 315; Ripley *v.* Harris, 20 Fed. Cas. No. 11,853, 3 Biss. 199; Sturgess *v.* Cleveland Bank, 23 Fed. Cas. No. 13,571, 3 McLean 140.

England.— Moore *v.* Culverhouse, 27 Beav. 639, 6 Jur. N. S. 115, 29 L. J. Ch. 419, 54 Eng. Reprint 254; Essex *v.* Baugh, 6 Jur. 1030, 11 L. J. Ch. 374, 1 Y. & Coll. 620, 20 Eng. Ch. 620, 62 Eng. Reprint 1043; Webb *v.* Blessington, 1 Molloy 74.

Canada.— Fraser *v.* Sutherland, 2 Grant Ch. (U. C.) 442.

See 35 Cent. Dig. tit. "Mortgages," § 371.

Qualification of rule.— Although it is generally true that of two mortgages the one first recorded is entitled to priority, yet this rule must be so qualified as to allow every grantee a reasonable time to get his deed recorded; and all mortgages recorded within such reasonable time will take effect according to the time of execution. Beers *v.* Hawley, 2 Conn. 467.

The record of an executory agreement to give a mortgage on the happening of a future event is not notice to a subsequent purchaser or mortgagee. Mathews *v.* Damainville, 100 N. Y. App. Div. 311, 91 N. Y. Suppl. 524.

Want of consideration.— Where a mortgage is executed and placed on the record, but no money is advanced on it, the negotiations for

And this rule is not affected by the fact that one mortgage contains covenants of warranty, while the other does not,[65] nor by the fact that the mortgage first recorded was given to secure a preëxisting debt, while the other was for a present consideration.[66] If, however, the first mortgage was not entitled to be recorded, because of defective execution, or other cause, the record of it is of no avail as against another mortgage, in due form and duly recorded at a later date;[67] and so also if the mortgage first recorded was improperly or insufficiently recorded, as by being recorded in the wrong office or in the wrong book.[68]

5. Circumstances Affecting Priority by Record — a. Good Faith. Priority of record will not give superiority of lien to a mortgage which is marked by fraud or bad faith, as against a later recorded mortgage which is free from such objections.[69] It is an indication of bad faith that no money has been advanced or paid under the mortgage claiming superiority;[70] but if there is no actual fraud, and a portion of the consideration is advanced or paid before the recording of the other mortgage, it is not sufficient to postpone the elder lien merely that the rest of the money is not paid over at the time.[71] Further, to entitle himself to the consideration due to a purchaser in good faith, a mortgagee must have parted with his money in reliance on an apparent record title or possession, and not merely on false representations made to him by the debtor.[72]

b. Agreement as to Priority. The order of priority between two mortgages which would ordinarily result from their relative positions on the records may be reversed by an agreement of the parties to that effect;[73] and where two mortgages are given at the same time, under an agreement that one of them shall be the first lien, the other gains no priority by being first recorded.[74]

c. Time of Execution or Delivery. Where two mortgages on the same prop-

a loan being broken off and abandoned, and a second mortgage to a different party, who advances his money under it, is then executed and recorded, such second mortgage is the prior lien, and is not displaced by the subsequent advance of money under the first. Security Bldg., etc., Assoc. *v.* Ambrose, 187 Pa. St. 178, 41 Atl. 28.

Time of acceptance.— A mortgage executed and registered, although not accepted by the mortgagee, takes precedence of a later mortgage accepted and registered before the acceptance of the first. Hill *v.* Barlow, 6 Rob. (La.) 142; Millaudon *v.* Allard, 2 La. 547. But see *infra*, XIV, D, 5, c.

Conditional recording.—A mortgagee whose mortgage was recorded after a prior one may show that the first was recorded conditionally, and that his own mortgage was delivered before the condition was fulfilled, and this will give him priority. Freeman *v.* Schroeder, 43 Barb. (N. Y.) 618.

65. Vandercook *v.* Baker, 48 Iowa 199.

66. *California.*— Frey *v.* Clifford, 44 Cal. 335.

Kansas.— Hayner *v.* Eberhardt, 37 Kan. 308, 15 Pac. 168.

Ohio.— Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

South Carolina.— Summers *v.* Brice, 36 S. C. 204, 15 S. E. 374, holding that it is otherwise if the later mortgagee has actual notice of the prior unrecorded mortgage.

United States.— Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443.

Compare supra, XIV, C, 4, b.

67. White *v.* Wheaton, 16 Conn. 530; Keeling *v.* Hoyt, 31 Nebr. 453, 48 N. W. 66; Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753; Barry *v.* Hovey, 30 Ohio St. 344; Van Thorniley *v.* Peters, 26 Ohio St. 471; Cumberland Bldg., etc., Assoc. *v.* Sparks, 111 Fed. 647, 49 C. C. A. 510.

68. Verges *v.* Prejean, 24 La. Ann. 78; Thompson *v.* Mack, Harr. (Mich.) 150; Connoly *v.* Stewart, 2 Bay (S. C.) 509; Ruggles *v.* Williams, 1 Head (Tenn.) 141.

69. Willard *v.* Ramsburg, 22 Md. 206; General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174; Clabaugh *v.* Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; Dusenbury *v.* Hulbert, 59 N. Y. 541.

70. Brigham *v.* Brown, 44 Mich. 59, 6 N. W. 97.

71. Ledyard *v.* Butler, 9 Paige (N. Y.) 132, 37 Am. Dec. 379.

72. Dusenbury *v.* Hulbert, 59 N. Y. 541.

73. *California.*— Wallace *v.* McKenzie, 104 Cal. 130, 37 Pac. 859.

Iowa.— Higgins *v.* Dennis, 104 Iowa 605, 74 N. W. 9.

New Jersey.— New York Chemical Mfg. Co. *v.* Peck, 6 N. J. Eq. 37; Lovett *v.* Demarest, 5 N. J. Eq. 113.

Pennsylvania.— Maze *v.* Burke, 12 Phila. 335.

Wisconsin.— Trompczynski *v.* Struck, 105 Wis. 437, 81 N. W. 650.

Canada.— McDougall *v.* Campbell, 6 Can. Sup. Ct. 502.

See 35 Cent. Dig. tit. "Mortgages," § 376.

74. Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145; Chadbourn *v.* Rahilly, 28 Minn. 394, 10 N. W. 420; Rigler *v.* Light, 90 Pa. St. 235.

Rights of assignees.— A parol agreement, made upon the delivery of two mortgages as

erty are executed and delivered simultaneously, to parties having knowledge of each other's rights, and securing debts which stand on an equal footing, and there is nothing to show an intention of the parties that one mortgage should be preferred to the other, they are equal and concurrent liens, and the fact that one is recorded before the other does not give it priority.[75] The rule that where mortgages are executed at different times the one first recorded, not necessarily the one first executed, takes precedence[76] is subject to this qualification, that recording a mortgage before it is a completed conveyance gives it no superior rights, so that if it has not been delivered to the mortgagee or accepted or assented to by him, its record gives it no priority over a subsequent mortgage which is executed, delivered, and recorded before the delivery or acceptance of the first;[77] and so, if the first mortgage is to become operative only upon the performance of a condition, which is not fulfilled until after the recording of the second.[78]

d. Purchase-Money Mortgage. The fact that an unrecorded mortgage is for the purchase-money of the land gives it no priority over a later recorded mortgage,[79] unless the second mortgage was given before the mortgagor acquired title, to the knowledge of the mortgagee therein,[80] or was taken with knowledge of the rights and claims of the purchase-money mortgagee.[81]

6. Instruments Recorded at Same Time. Where two mortgages covering the same property, but given to different mortgagees, are recorded or filed for record at the same time, there is no priority between them, but they are equal liens.[82]

security for a debt, that one of them shall have priority over the other, and the recording of the former mortgage by the mortgagee five minutes before the other, in pursuance of such agreement, do not give such former mortgage priority as between two parties without notice of the agreement, to whom the mortgages are respectively assigned. Lane *v.* Davis, 14 Allen (Mass.) 225.

75. Walker *v.* Buffandeau, 63 Cal. 312; Daggett *v.* Rankin, 31 Cal. 321; Lampkin *v.* Cartersville First Nat. Bank, 96 Ga. 487, 23 S. E. 390; Cain *v.* Hanna, 63 Ind. 408; Rhoades *v.* Canfield, 8 Paige (N. Y.) 545.

Where two mortgages are given by and to the same person at the same time, priority of record will not give a right of preference in payment out of the mortgaged property. Vredenburgh *v.* Burnet, 31 N. J. Eq. 229; Gausen *v.* Tomlinson, 23 N. J. Eq. 405.

Earlier acknowledgment.—Where two mortgages bear even date, it cannot be claimed that the earlier acknowledgment of the one latest recorded would necessarily show that it was intended or given as a first security. Van Aken *v.* Gleason, 34 Mich. 477.

76. See *supra*, XIV, D, 1.

77. *Georgia.*— Evans *v.* Coleman, 101 Ga. 152, 28 S. E. 645.

Illinois.— Lanphier *v.* Desmond, 187 Ill. 370, 58 N. E. 343.

Indiana.—Goodsell *v.* Stinson, 7 Blackf. 437.

New York.— Wilcox *v.* Drought, 71 N. Y. App. Div. 402, 75 N. Y. Suppl. 960.

Rhode Island.— Cook *v.* Cook, (1898) 43 Atl. 537.

United States.— Parmelee *v.* Simpson, 5 Wall. 81, 18 L. ed. 542.

Contra.— Hill *v.* Barlow, 6 Rob. (La.) 142; Millaudon *v.* Allard, 2 La. 547.

Effect of assignment.— This rule does not apply where the mortgage first recorded, although not accepted until after the recording of the second mortgage, has been sold to a third person, taking it for value, in good faith, and without knowledge of the facts. Muir *v.* Dunnet, 11 Grant Ch. (U. C.) 85.

78. Beers *v.* Hawley, 2 Conn. 467; Crozier *v.* Grayson, 4 J. J. Marsh. (Ky.) 514; Freeman *v.* Schroeder, 43 Barb. (N. Y.) 618.

79. Jackson *v.* Reid, 30 Kan. 10, 1 Pac. 308; Trigg *v.* Vermillion, 113 Mo. 230, 20 S. W. 1047; Rogers *v.* Tucker, 94 Mo. 346, 7 S. W. 414; Corning *v.* Murray, 3 Barb. (N. Y.) 652; Quinnerly *v.* Quinnerly, 114 N. C. 145, 19 S. E. 99.

In **Pennsylvania** a purchase-money mortgage has priority of lien if recorded within sixty days from its execution. Dungan *v.* American L. Ins., etc., Co., 52 Pa. St. 253; La Fayette Bldg., etc., Assoc. *v.* Erb, 5 Pa. Cas. 40, 8 Atl. 62; Eckert *v.* Lewis, 4 Phila. 422; Eldridge *v.* Christy, 4 Phila. 102.

80. Gould *v.* Adams, 108 Cal. 365, 41 Pac. 408; Ely *v.* Pingry, 56 Kan. 17, 42 Pac. 330; Boyd *v.* Mundorf, 30 N. J. Eq. 545.

81. Young *v.* Wood, 11 B. Mon. (Ky.) 123; McKecknie *v.* Hoskins, 23 Me. 230; Hillary *v.* Parvin, 2 Phila. (Pa.) 346. *Contra*, Quinnerly *v.* Quinnerly, 114 N. C. 145, 19 S. E. 99.

82. Koevenig *v.* Schmitz, 71 Iowa 175, 32 N. W. 320 (the mere act of handing one mortgage to the recorder an instant before the other does not give it priority); Terry *v.* Moran, 75 Minn. 249, 77 N. W. 777; Jones *v.* Phelps, 2 Barb. Ch. (N. Y.) 440. See also Mason *v.* Daily, (N. J. Ch. 1899) 44 Atl. 839.

Date of execution.— Hatch *v.* Haskins, 17 Me. 391, holding that where two mortgages are filed for record on the same day, with nothing to show which was actually filed first, precedence must be given to that first executed.

Where two mortgages are filed upon the same day they have priority according to the hour and minute when filed.[83] When both are filed at the same moment neither has priority over the other.[84] Even where it cannot be shown that there was any actual difference in the time of recording, a priority may be given to one mortgage over the other where an actual agreement and understanding of the parties to that effect is disclosed,[85] or where there are circumstances which give to one mortgage an equitable right to precedence over the other.[86] But the mere order in which they are entered on the record is not evidence to show that one was filed before the other;[87] and while, in some states, the order in which they are numbered by the recording officer, on their being filed, or in the record book, is *prima facie* evidence of the order in which they were received, so that the one bearing the lesser or earlier number is presumed to be the first lien,[88] it is not in the power of the recorder, either accidentally or by design, to determine the priority of the instruments by the order in which he numbers them, both being handed to him at the same time.[89]

7. Relation Back. If a mortgage duly filed for record, and so marked or indorsed, remains unrecorded, through no fault or design on the part of the mortgagee, until after subsequent liens have attached upon the property, it is not postponed to such liens.[90] So if a mortgage, as originally made and recorded, misdescribes the property, and is corrected by the execution and record of a second mortgage, it is not subordinated to intervening liens in the hands of per-

83. Fischer *v.* Tuohy, 87 Ill. App. 574; Bonstein *v.* Schweyer, 212 Pa. St. 19, 61 Atl. 447. See also Lemon *v.* Staats, 1 Cow. (N. Y.) 592.

84. Bonstein *v.* Schweyer, 212 Pa. St. 19, 61 Atl. 447.

85. Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145; Gilman *v.* Moody, 43 N. H. 239. *Compare* Naylor *v.* Throckmorton, 7 Leigh (Va.) 98, 30 Am. Dec. 492.

A mere undisclosed wish or intention on the part of the mortgagor to give precedence to one mortgage over the other will not be sufficient for this purpose. Koevenig *v.* Schmitz, 71 Iowa 175, 32 N. W. 320.

86. Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874 [*affirming* 95 Ill. App. 500]; Stafford *v.* Van Rensselaer, 9 Cow. (N. Y.) 316.

Consideration as affecting priority.— Priority of one mortgage over another recorded simultaneously with it may be predicated on the fact that the former is given to secure purchase-money (Clark *v.* Brown, 3 Allen (Mass.) 509), or on the fact that one mortgage secures a present consideration while the other is given as security for an antecedent debt (Wilcox *v.* Drought, 36 Misc. (N. Y.) 351, 73 N. Y. Suppl. 587), or that, on the day when the mortgages were recorded, there existed a present indebtedness to support the one, but none to support the other (Fischer *v.* Tuohy, 186 Ill. 143, 57 N. E. 801). So, where three mortgages are filed for record simultaneously, it may be shown, on the question of priority, that the money secured by two of them was to be advanced certainly and without conditions, for the purpose of erecting buildings, for building purposes at all events, while the third was not to become effective unless it became necessary to draw the money under it to pay the interest on the other two, and that the money was not so drawn until after the money had been advanced under the two mortgages. Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874.

Priority of maturity.— The fact that the debt secured by one mortgage falls due before that secured by the other is not sufficient to give the former priority, both being recorded at the same time. Gilman *v.* Moody, 43 N. H. 239; Collerd *v.* Huson, 34 N. J. Eq. 38. But see Fischer *v.* Tuohy, 186 Ill. 143, 57 N. E. 801.

Mistake in description.— Where two mortgages are simultaneously delivered and recorded, a mistake in the description of the property in one of them will not give the other priority, there being no question of notice on the part of the person secured by such other. Koevenig *v.* Schmitz, 71 Iowa 175, 32 N. W. 320.

Mortgage and judgment.— Where a judgment is recovered against a debtor on the same day on which a mortgage given by him to another person is recorded, the judgment takes precedence. Magaw *v.* Garrett, 25 Pa. St. 319.

87. Hatch *v.* Haskins, 17 Me. 391. And see Bonstein *v.* Schweyer, 212 Pa. St. 19, 61 Atl. 447.

88. Madlener *v.* Ruesch, 91 Ill. App. 391; Connecticut Mut. L. Ins. Co. *v.* King, 72 Minn. 287, 75 N. W. 376; Neve *v.* Pennell, 2 Hem. & M. 170, 33 L. J. Ch. 19, 9 L. T. Rep. N. S. 285, 11 Wkly. Rep. 986, 71 Eng. Reprint 427.

89. Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874.

90. Judd *v.* Woodruff, 2 Root (Conn.) 298; Franklin *v.* Cannon, 1 Root (Conn.) 500; Hartmyer *v.* Gates, 1 Root (Conn.) 61; McDonald *v.* Leach, Kirby (Conn.) 72; Buckner *v.* Davis, 43 S. W. 445, 19 Ky. L. Rep. 1349; Jarvis *v.* Aikens, 25 Vt. 635; Mercantile Co-operative Bank *v.* Brown, 96 Va. 614, 32 S. E. 64.

sons having notice of the original mortgage and the mistake in it.[91] And the record of a deed given by the mortgagor after the execution of the mortgage does not constitute notice to the mortgagee.[92] But where a mortgage is recorded before its delivery to the mortgagee, the delivery does not relate back to the recording to the prejudice of intervening liens.[93] The accurate registration of a deed of trust, originally defectively registered, after a levy made on the property by a judgment creditor of the grantor, does not give the grantee priority over such judgment creditor.[94]

E. Notice Affecting Priority — 1. Notice in General — a. Actual Notice. It is a settled rule that one who takes a mortgage or other lien upon property, or a conveyance of it, with actual knowledge of an earlier, although unrecorded, conveyance of it or lien upon it, takes it subject thereto, and will not be permitted by placing his mortgage first on the record to gain priority over the earlier lien.[95]

91. Peters *v.* Ham, 62 Iowa 656, 18 N. W. 296; Brown *v.* Morrill, 45 Minn. 483, 48 N. W. 328. *Compare* Reid *v.* Kleyenstauber, 7 Ariz. 58, 60 Pac. 879, holding that the correction of the mortgage does not relate back to the recording of the original, as against an intervening judgment creditor.

92. Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223. And see Knell *v.* Green St. Bldg Assoc., 34 Md. 67.

93. Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389.

94. Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437, 58 S. W. 234.

95. *Alabama.*— Garrard *v.* Webb, 4 Port. 73.

Arkansas.— Bogenschultz *v.* O'Toole, 70 Ark. 253, 67 S. W. 400.

California.— San Luis Obispo County Bank *v.* Fox, 119 Cal. 61, 51 Pac. 11; Woodworth *v.* Guzman, 1 Cal. 203; De Leonis *v.* Hammel, 1 Cal. App. 390, 82 Pac. 349.

Georgia.— Neal *v.* Kerrs, 4 Ga. 161.

Illinois.— Inter-State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342; Kehl *v.* Burgener, 106 Ill. App. 336; Aurora Nat. Loan Assoc. *v.* Spencer, 81 Ill. App. 622.

Indiana.— Mann *v.* State, 116 Ind. 383, 19 N. E. 181; Sparks *v.* Indiana State Bank, 7 Blackf. 469.

Iowa.— Council Bluffs Lodge No. 49 I. O. O. F. *v.* Billups, 67 Iowa 674, 25 N. W. 846; Clark *v.* Bullard, 66 Iowa 747, 24 N. W. 561; Hall *v.* Savill, 3 Greene 37, 54 Am. Dec. 485.

Kansas.— Foster Lumber Co. *v.* Harlan County Bank, 71 Kan. 158, 80 Pac. 49.

Maine.— Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295.

Massachusetts.— See McCormack *v.* Butland, 191 Mass. 424, 77 N. E. 761.

Mississippi.— Harrington *v.* Allen, 48 Miss. 492.

New Hampshire.— Rogers *v.* Jones, 8 N. H. 264.

New Jersey.— Essex County Nat. Bank *v.* Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Perrine *v.* Newell, 49 N. J. Eq. 57, 23 Atl. 492; Hendrickson *v.* Woolley, 39 N. J. Eq. 307; Bingham *v.* Kirkland, 34 N. J. Eq. 229; Matthews *v.* Everitt, 23 N. J. Eq. 473.

New York.— Ellis *v.* Horrman, 90 N. Y. 466; Lapham *v.* Lapham, 63 N. Y. App. Div. 597, 71 N. Y. Suppl. 666; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. 603.

Ohio.— Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846. But see Mayham *v.* Coombs, 14 Ohio 428; Stansell *v.* Roberts, 13 Ohio 148, 42 Am. Dec. 193.

Pennsylvania.— Uhler *v.* Hutchinson, 23 Pa. St. 110.

Tennessee.— McGavock *v.* Deery, 1 Coldw. 265; Myers *v.* Ross, 3 Head 59.

Wisconsin.— Erwin *v.* Lewis, 32 Wis. 276.

United States.— Adams-Booth Co. *v.* Reid, 112 Fed. 106; Lord *v.* Doyle, 15 Fed. Cas. No. 8,505, 1 Cliff. 453.

England.— Lloyd's Bank *v.* Pearson, [1901] 1 Ch. 865, 70 L. J. Ch. 422, 84 L. T. Rep. N. S. 314; West *v.* Williams, [1899] 1 Ch. 132, 68 L. J. Ch. 127, 79 L. T. Rep. N. S. 575, 47 Wkly. Rep. 308; Meux *v.* Bell, 1 Hare 73, 6 Jur. 123, 11 L. J. Ch. 77, 23 Eng. Ch. 73, 66 Eng. Reprint 955; Braithwaite *v.* Britain, 1 Keen 206, 15 Eng. Ch. 206, 48 Eng. Reprint 285; Grainge *v.* Warner, 12 L. T. Rep. N. S. 564, 13 Wkly. Rep. 833; Willoughby *v.* Willoughby, 1 T. R. 763, 1 Rev. Rep. 397; Pomfret *v.* Windsor, 2 Ves. 472, 28 Eng. Reprint 302; Sheldon *v.* Cox, 2 Eden 224, 28 Eng. Reprint 884; Blades *v.* Blades, 1 Eq. Cas. Abr. 358, 21 Eng. Reprint 1100. See also Hopkins *v.* Hemsworth, [1898] 2 Ch. 347, 67 L. J. Ch. 526, 78 L. T. Rep. N. S. 832, 47 Wkly. Rep. 26; Cator *v.* Cooley, 1 Cox Ch. 182, 29 Eng. Reprint 1119.

See 35 Cent. Dig. tit. "Mortgages," §§ 375, 383. And see *supra*, XIII, B.

Contra.— Hinton *v.* Leigh, 102 N. C. 28, 8 S. E. 890; Fleming *v.* Burgin, 37 N. C. 584.

Absolute deed as mortgage.— One purchasing land with knowledge that the absolute deed which had been given to his grantor was intended as a mortgage is not an innocent purchaser. Bristow *v.* Rosenberg, 45 S. C. 614, 23 S. E. 957.

Notice of contents of instrument.— Actual notice of the existence of certain debentures constituting a prior lien on the land is not constructive notice of their contents, so as to affect a subsequent mortgagee, having such notice, with knowledge of restrictive clauses which they contain. English, etc., Mercantile Inv. Co. *v.* Brunton, [1892] 2 Q. B. 700, 62 L. J. Q. B. 136, 67 L. T. Rep. N. S. 406, 4 Reports 58, 41 Wkly. Rep. 133.

This rule is not altered by the fact that the prior instrument is imperfect in itself or is defectively executed.[96] Of course to have this effect the notice or knowledge must be acquired prior to the attaching of the rights of the party to be affected by it.[97] But notice, in this sense, does not mean a formal written warning served upon a party. It means actual knowledge of the fact in question, and it is immaterial how such knowledge was acquired,[98] or from whom the information comes;[99] and the knowledge of one of two parties jointly interested may be imputed to the other.[1] But it must be knowledge of the actual existence of the prior conveyance or encumbrance, and not merely information of a purpose or agreement on the part of the grantor to make or give it.[2]

b. Defective Description of Property. Although a mortgage contains an imperfect or erroneous description of the property intended to be conveyed, or omits portions of it, it is still a valid lien as against a subsequent purchaser or encumbrancer having notice of the mortgage and of the mistake in it, so that, as against such a person, it may be reformed in equity or corrected by a new mortgage, without losing its priority of lien.[3]

c. Constructive Notice — (i) *In General.* Constructive notice of a prior deed or mortgage will have the same effect as actual notice in postponing to it the

Notice of debt no notice of mortgage.— A mortgagee's knowledge of the existence of bonds issued by the mortgagor does not charge him with knowledge of a mortgage made to secure them. Johnson *v.* Valido Marble Co., 64 Vt. 337, 25 Atl. 441.

96. Gardner *v.* Moore, 51 Ga. 268; Russum *v.* Wanser, 53 Md. 92; Johnston *v.* Canby, 29 Md. 211.

Void encumbrance.— Notice of a prior encumbrance which is void in point of law will not affect the right of a creditor. Hubbard *v.* Savage, 8 Conn. 215.

97. Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695.

98. Schmidt *v.* Hedden, (N. J. Ch. 1897) 38 Atl. 843, holding that a verbal communication of the fact that there is a judgment lien on the property will charge a mortgagee with notice thereof.

Where one signs as a witness to a deed or mortgage, and afterward takes a conveyance of the same property, he is charged with actual notice. McDaniel *v.* Stoval, 25 La. Ann. 495; Mocatta *v.* Murgatroyd, 1 P. Wms. 393, 24 Eng. Reprint 440.

Where a judgment creditor is joined as a defendant in an action to foreclose a mortgage on the property, he cannot deny actual notice of the mortgage. Newhall *v.* Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673.

Casual or accidental knowledge.— Some of the cases restrict the rule stated in the text to instances where the party has acquired knowledge of the prior conveyance or encumbrance while making inquiries for the protection of his own interests, or in dealing in some way with the property or the title to it in his own interest and behalf. See Arden *v.* Arden, 29 Ch. D. 702, 54 L. J. Ch. 655, 52 L. T. Rep. N. S. 610, 33 Wkly. Rep. 593. And see Goodwin *v.* Dean, 50 Conn. 517. Here it appeared that the party in question, as an attorney at law, drew up and attested a mortgage on the property, and also, as a magistrate, took the acknowledgment. Nine years later, the mortgage remaining unrecorded, he took a mortgage on the same property for himself from the same grantor. But it was held that the law would not presume that he continued to have knowledge of the prior mortgage, as mere casual knowledge, without his interests being then affected, imposed on him no duty to remember.

99. Willcox *v.* Hill, 11 Mich. 256; Jaeger *v.* Hardy, 48 Ohio. St. 335, 27 N. E. 863.

1. Haven *v.* Emery, 33 N. H. 66 (notice to a trustee in a mortgage securing an issue of bonds is notice to the bond holders); Freeman *v.* Laing, [1899] 2 Ch. 355, 68 L. J. Ch. 586, 81 L. T. Rep. N. S. 167, 48 Wkly. Rep. 9 (joint tenants).

2. Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243; Butler *v.* Stevens, 26 Me. 484; Cushing *v.* Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; Brewster *v.* Clough, 4 Ohio Dec. (Reprint) 25, Clev. L. Rec. 27. But see Dye *v.* Forbes, 34 Minn. 13, 24 N. W. 309; Blackburn *v.* Tweedie, 60 Mo. 505, holding that a person buying land, with notice of an existing agreement between the vendor and another, amounting to an equitable mortgage on the land, takes subject to the rights of the equitable mortgagee.

3. *California.*— Woodworth *v.* Guzman, 1 Cal. 203.

Illinois.— Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380; Milmine *v.* Burnham, 76 Ill. 362.

Iowa.— Warburton *v.* Lauman, 2 Greene 420.

Michigan.— Kimble *v.* Harrington, 91 Mich. 281, 51 N. W. 936; Hunt *v.* Hunt, 38 Mich. 161.

Minnesota.— Brown *v.* Morrill, 45 Minn. 483, 48 N. W. 328.

Missouri.— Cox *v.* Esteb, 81 Mo. 393; Young *v.* Cason, 48 Mo. 259.

Texas.— Ilse *v.* Seinsheimer, 76 Tex. 459, 13 S. W. 329.

Wisconsin.— McLaughlin *v.* Job, 41 Wis. 465.

See 35 Cent. Dig. tit. "Mortgages," § 385.

rights of a subsequent grantee or encumbrancer taking with such notice, the notice here meant being such as is imputable from an opportunity to acquire knowledge coupled with the duty to seek it in the exercise of a reasonable degree of care and prudence.[4] Thus a grantee or mortgagee always takes with notice of whatever appears in the conveyances constituting his chain of title, and therefore is chargeable with knowledge of a mortgage or other encumbrance which is recited or referred to distinctly in a deed under which he must claim.[5] So also he is bound by pending foreclosure or other suits affecting the property or the adjudications made therein.[6] But constructive notice cannot arise out of merely suspicious circumstances or facts from which no inference of a prior lien can reasonably be drawn.[7]

(II) *NOTICE TO ATTORNEY OR AGENT.* A mortgagee is chargeable with notice of a prior conveyance of the property or encumbrance upon it, when knowledge of the same has been communicated to or acquired by his agent[8] or attorney,[9] provided such knowledge came to the agent or attorney after his

4. *California.*— Montgomery *v.* Keppel, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125.
Illinois.— Russell *v.* Ranson, 76 Ill. 167.
Iowa.— Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161.
Massachusetts.— Livingstone *v.* Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400.
New Hampshire.— Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685.
Vermont.— See Beeman *v.* Cooper, 64 Vt. 305, 23 Atl. 794.
West Virginia.— Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.
See 35 Cent. Dig. tit. "Mortgages," § 386.
Not conclusive evidence of bad faith.— Constructive notice of a valid and properly registered mortgage is not conclusive evidence of *mala fides* in a subsequent mortgagee, although actual notice is. Paine *v.* Mason, 7 Ohio St. 198.

5. *Georgia.*— Talmadge *v.* Interstate Bldg., etc., Assoc., 105 Ga. 550, 31 S. E. 618.
Illinois.— Ætna L. Ins. Co. *v.* Ford, 89 Ill. 252.
Indiana.— Rose *v.* Provident Sav., etc., Assoc., 28 Ind. App. 25, 62 N. E. 293.
Iowa.—Ætna L. Ins. Co. *v.* Bishop, 69 Iowa 645, 29 N. W. 761; Clark *v.* Bullard, 66 Iowa 747, 24 N. W. 561. See also Patton *v.* Eberhart, 52 Iowa 67, 2 N. W. 954.
Kansas.— Prest *v.* Black, 63 Kan. 682, 66 Pac. 1017.
Kentucky.—Farmers', etc., Bank *v.* German Ins. Bank, 66 S. W. 280, 23 Ky. L. Rep. 2008.
Louisiana.—Mounot *v.* Williamson, 7 Mart. N. S. 381.
Michigan.— Michigan Mut. L. Ins. Co. *v.* Conant, 40 Mich. 530; Baker *v.* Mather, 25 Mich. 51.
Nebraska.— Hubbard *v.* Knight, 52 Nebr. 400, 72 N. W. 473.
New Jersey.— Westervelt *v.* Wyckoff, 32 N. J. Eq. 188.
New York.— Bentley *v.* Gardner, 45 N. Y. App. Div. 216, 60 N. Y. Suppl. 1056; Newton *v.* Manwarring, 10 N. Y. Suppl. 347. *Compare* Peck *v.* Mallams, 10 N. Y. 509; Crofut *v.* Wood, 3 Hun 571, 6 Thomps. & C. 314.
North Carolina.— Hinton *v.* Leigh, 102 N. C. 28, 8 S. E. 890.
Pennsylvania.— La Fayette Bldg., etc., Assoc. *v.* Erb, 5 Pa. Cas. 40, 8 Atl. 62; Hiser *v.* Hiser, 13 Montg. Co. Rep. 49.
United States.— Bragg *v.* Lamport, 96 Fed. 630, 38 C. C. A. 467; Foster *v.* Jett, 74 Fed. 678, 20 C. C. A. 670.
England.— Greenwood *v.* Churchill, 6 Beav. 314, 12 L. J. Ch. 400, 49 Eng. Reprint 846; Farrow *v.* Rees, 4 Beav. 18, 4 Jur. 1028, 49 Eng. Reprint 243, holding that a general recital in a deed that there are mortgages on the estate will affect parties claiming under the deed with notice of a mortgage not specified therein.
See 35 Cent. Dig. tit. "Mortgages," §§ 386, 388.
Contemporaneous mortgages.— A recital in a mortgage that, in case the property should be sold, the proceeds of sale are to be applied first in payment of the amount secured by another mortgage on the same premises is not constructive notice of the contents of the mortgage referred to, where both mortgages are executed on the same day, and there is nothing to show which was first executed. Ponder *v.* Scott, 44 Ala. 241.

6. Hoole *v.* Atty.-Gen., 22 Ala. 190; People's Bank *v.* David, 49 La. Ann. 136, 21 So. 174; Hammond *v.* Paxton, 58 Mich. 393, 25 N. W. 321; Locker *v.* Riley, 30 N. J. Eq. 104. But see Piester *v.* Piester, 22 S. C. 139, 53 Am. Rep. 711, holding that where a probate court directed that land be sold and a mortgage taken, and the mortgage was taken but not recorded, the order of the court did not impart constructive notice of it.

7. Peters *v.* Ham, 62 Iowa 656, 18 N. W. 296; Protection Bldg., etc., Assoc. *v.* Knowles, 54 N. J. Eq. 519, 34 Atl. 1083; Allen *v.* Allen, 121 N. C. 328, 28 S. E. 513; Fleming *v.* Burgin, 37 N. C. 584.

8. Sowler *v.* Day, 58 Iowa 252, 12 N. W. 297; Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; Nixon *v.* Hamilton, 2 Dr. & Wal. 364, 1 Ir. Eq. 46. See also Lindley *v.* Martindale, 78 Iowa 379, 43 N. W. 233.

9. Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744; Bunker *v.* Gordon, 81 Me. 66, 16 Atl. 341; Westervelt *v.* Haff, 2 Sandf. Ch.

employment or retainer had commenced,[10] and while he was acting in that capacity in behalf of the mortgagee in the very transaction or negotiation in which the giving of the mortgage was in question.[11] But a mortgagor, to whom the mortgage is intrusted for record, does not thereby become the agent of the mortgagee in such sense that his knowledge of a prior encumbrance is imputable to the mortgagee.[12]

(III) *Facts Putting on Inquiry.* A person taking a conveyance or mortgage of real property is chargeable with notice of the existence of a prior mortgage or deed, where, without actually discovering it, he becomes acquainted with facts pointing to it, such as would raise a doubt in the mind of a man of ordinary prudence, not to be satisfied without an investigation, and where his inquiries, if pursued diligently and in the right quarter, would have led to the discovery of the true state of the title.[13] This applies not only where the prior charge is recited or referred to in a conveyance in his chain of title,[14] but also where his knowledge of the suspicious circumstances is derived from other than documen-

(N. Y.) 98; Berwick *v.* Price, [1905] 1 Ch. 632, 74 L. J. Ch. 249, 92 L. T. Rep. N. S. 110; Tweedale *v.* Tweedale, 23 Beav. 341, 53 Eng. Reprint 134. See also *In re* Cousin, 31 Ch. D. 671, 55 L. J. Ch. 662, 54 L. T. Rep. N. S. 376, 34 Wkly. Rep. 393.

Solicitor party to a fraud.— Notice of a trust through his solicitor is not imputable to a mortgagee where the solicitor was a party to a fraud. Cave *v.* Cave, 15 Ch. D. 639, 49 L. J. Ch. 505, 42 L. T. Rep. N. S. 730, 28 Wkly. Rep. 793.

Solicitor acting for both parties.— A mortgagee is none the less chargeable with knowledge of a prior encumbrance acquired by his solicitor because the latter was the only attorney employed in the transaction and acted for both parties. Atterbury *v.* Wallis, 8 De G. M. & G. 454, 2 Jur. N. S. 117, 25 L. J. Ch. 792, 4 Wkly. Rep. 734, 57 Eng. Ch. 353, 44 Eng. Reprint 465. But the mortgagor's solicitor, who prepares the papers and is the only attorney employed, will not be considered the attorney of the mortgagee unless there is some consent on the part of the latter to constitute the relation. Espin *v.* Pemberton, 2 De G. & J. 547, 5 Jur. N. S. 157, 28 L. J. Ch. 311, 7 Wkly. Rep. 221, 60 Eng. Ch. 425, 44 Eng. Reprint 1380.

10. Yerger *v.* Barz, 56 Iowa 77, 8 N. W. 769; Caughman *v.* Smith, 28 S. C. 605, 5 S. E. 362.

11. Slattery *v.* Schwannecke, 118 N. Y. 543, 23 N. E. 922; Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; Connell *v.* Connell, 32 W. Va. 319, 9 S. E. 252; Hoppock *v.* Johnson, 14 Wis. 303; Lloyd *v.* Attwood, 3 De G. & J. 614, 5 Jur. N. S. 1322, 29 L. J. Ch. 97, 60 Eng. Ch. 475, 44 Eng. Reprint 1405.

12. Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

13. *California.*— Prouty *v.* Devin, 118 Cal. 258, 50 Pac. 380.

Georgia.— Simms *v.* Freiherr, 100 Ga. 607, 28 S. E. 288.

Illinois.— Clark *v.* Plumstead, 11 Ill. App. 57.

Iowa.— Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

Minnesota.— Lindauer *v.* Younglove, 47 Minn. 62, 49 N. W. 384.

Nebraska.— McWaid *v.* Blair State Bank, 58 Nebr. 618, 79 N. W. 620; Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

New Jersey.— Kline *v.* Grannis, 61 N. J. Eq. 397, 48 Atl. 566; Jackson *v.* Condict, 57 N. J. Eq. 522, 41 Atl. 374; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

Texas.— Keyser *v.* Clifton, (Civ. App. 1899) 50 S. W. 957; Brown *v.* Wilson, (Civ. App. 1895) 29 S. W. 530.

England.— Pilcher *v.* Rawlins, L. R. 11 Eq. 53, 40 L. J. Ch. 105, 23 L. T. Rep. N. S. 756, 19 Wkly. Rep. 217; Birch *v.* Ellames, Anstr. 427, 3 Rev. Rep. 601; Montefiore *v.* Browne, 7 H. L. Cas. 241, 4 Jur. N. S. 1201, 11 Eng. Reprint 96.

See 35 Cent. Dig. tit. "Mortgages," § 388.

Whatever is notice enough to excite attention, and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion and prescribes inquiry. Russell *v.* Ranson, 76 Ill. 167.

Knowledge of an ordinary business man.— In order to give precedence to a prior charge upon lands, it must be shown that the subsequent encumbrancer has such knowledge, however acquired, of the former transaction as an ordinary man of business would act upon, but it is not necessary that formal notice should be given to him. Lloyd *v.* Banks, L. R. 3 Ch. 488, 37 L. J. Ch. 881, 16 Wkly. Rep. 988.

Mortgage lacking consideration.— A mortgage given without present consideration, for the purpose of having it sold by the mortgagee to raise money for the mortgagor, is not available against subsequent lien creditors from its date, but only from the time money is advanced upon it; and accordingly, an assignee having notice that it was without consideration when executed is put upon inquiry as to whether there were liens intervening between its date and his purchase. *In re* Mullison, 68 Pa. St. 212.

14. See *supra*, XIV, E, 1, c, (I).

tary sources, or however it may be acquired.[15] And it is an essential part of the rule that an inquiry, once suggested or started, should be prosecuted with care and diligence. Thus, if the person knows that some paper has been executed which may or may not affect the title to the property, it is his business to find out what it was and what was its effect;[16] and so also, if he knows that there are some liens on the property, he must ascertain how many and what they are.[17]

(iv) *Possession as Notice.* As has been heretofore stated constructive notice of a prior deed or mortgage may arise from the open and visible possession of the premises by a third person.[18] The fact that a grantor remains in possession of the land after conveying the same by a deed absolute on its face does not amount to constructive notice to purchasers of a judgment against the grantee that the grantor has the right to have such deed treated as a mortgage.[19] Where a grantor who is in possession of land, after exchanging it for another tract and after a full recorded conveyance, takes a mortgage from his grantee subsequent to one given to another creditor of the grantee and first recorded such creditor does not take with constructive notice of any right reserved in the land by the grantor.[20]

d. Notice Affecting Subsequent Purchasers. The general rules as to notice apply as between a prior mortgagee and a subsequent purchaser of property; that is, such a purchaser will take the property subject to the lien of the mortgage, although it is unrecorded, if he takes with actual or constructive notice of the existence of the mortgage and its terms, or with knowledge of facts which should have put him upon inquiry.[21] But this does not apply where such notice

15. Balfour *v.* Parkinson, 84 Fed. 855. And see Overall *v.* Taylor, 99 Ala. 12, 11 So. 738.

Reliance on cancellation of prior mortgage.— Where a grantor of lands produced a mortgage thereon with the seals torn off, and gave it to the purchaser, stating that it had been paid and satisfied, and that he could have it canceled and discharged of record, the fact that no receipt of payment was indorsed on the mortgage and that the bond secured by it was not produced is not sufficient to raise a suspicion in the mind of the grantee, such as ought to put him upon inquiry. Harrison *v.* Johnson, 18 N. J. Eq. 420.

16. Rixstine's Estate, 3 Pa. Dist. 227. *Compare* W. C. Belcher Land Mortg. Co. *v.* Norris, 29 Tex. Civ. App. 361, 68 S. W. 548.

17. Jones *v.* Williams, 24 Beav. 47, 3 Jur. N. S. 1066, 5 Wkly. Rep. 775, 53 Eng. Reprint 274.

18. See *supra*, XIV, C, 3, d.

19. Tuttle *v.* Churchman, 74 Ind. 311. And see Newhall *v.* Pierce, 5 Pick. (Mass.) 450.

20. Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243.

21. *Connecticut.*— Hartford, etc., Transp. Co. *v.* Hartford First Nat. Bank, 46 Conn. 569; Hamilton *v.* Nutt, 34 Conn. 501.

Illinois.— English *v.* Lindley, 194 Ill. 181, 62 N. E. 522; Erickson *v.* Rafferty, 79 Ill. 209; Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120. The record of a mortgage given by one having only an equitable title under a bond for a deed which is not recorded is not notice to a subsequent purchaser of the legal title from one in possession of the land, as such purchaser's title is not derived through the title of the mortgagor, and he will not take subject to the mortgage, even though it is recorded. Irish *v.* Sharp, 89 Ill. 261.

Iowa.— Jones *v.* Bamford, 21 Iowa 217.

Kansas.— Short *v.* Fogle, 42 Kan. 349, 22 Pac. 323.

Massachusetts.— Livingstone *v.* Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400.

Michigan.— Boxheimer *v.* Gunn, 24 Mich. 372; Fitzhugh *v.* Barnard, 12 Mich. 104.

Missouri.— Seiberling *v.* Tipton, 113 Mo. 373, 21 S. W. 4; Knox County *v.* Brown, 103 Mo. 223, 15 S. W. 382; Whitman *v.* Taylor, 60 Mo. 127; Beatie *v.* Butler, 21 Mo. 313, 64 Am. Dec. 234.

New Jersey.— Chancellor *v.* Bell, 45 N. J. Eq. 538, 17 Atl. 684.

New York.— McPherson *v.* Rollins, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. Rep. 826; Farmers' L. & T. Co. *v.* Walworth, 1 N. Y. 433; Fort *v.* Burch, 6 Barb. 60; Stoddard *v.* Rotton, 5 Bosw. 378; Frost *v.* Beekman, 1 Johns. Ch. 288.

Ohio.— Wiggins *v.* Campbell, 4 Ohio Dec. (Reprint) 410, 2 Clev. L. Rep. 122. But see Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846.

Pennsylvania.— Hall *v.* Donagan, 186 Pa. St. 300, 40 Atl. 493. See also Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67.

South Carolina.— See Jones *v.* Hudson, 23 S. C. 494.

South Dakota.—Parker *v.* Randolph, 5 S. D. 549, 59 N. W. 722, 29 L. R. A. 33.

Tennessee.— Grotenkemper *v.* Carver, 9 Lea 280.

Texas.— Hoffman *v.* Blume, 64 Tex. 334; Hicks *v.* Hicks, (Civ. App. 1894) 26 S. W. 227.

Vermont.— Buzzell *v.* Still, 63 Vt. 490, 22

or knowledge is not acquired until after his purchase is complete,[22] where there is a total misdescription of the property in the mortgage,[23] or where the mortgage, although recorded, was not entitled to record on account of its defective execution.[24] Further, notice of the mortgage is notice only of such rights or equities of the parties to it as could be ascertained from an inspection of the instrument.[25] And although the purchaser of the property has notice of the lien upon it, his vendee will generally take it free of such lien, if he, the vendee, has no notice or knowledge of it.[26]

e. As Between Senior and Junior Mortgagees. A second or junior mortgagee will take subject to a senior mortgage of which he has notice, actual or constructive,[27] if such notice is acquired before the completion of his contract or before he has paid over his money under it,[28] although the estate in his hands will be free from the lien of a prior unrecorded mortgage of which he has no notice.[29] On the other hand the senior mortgagee is usually under no obligation to give notice of his rights to the junior encumbrancer,[30] and is not generally affected by his knowledge or want of knowledge of the younger lien, except in regard to making further advances under his security after such notice,[31] and except that he may

Atl. 619, 25 Am. St. Rep. 777. Knowledge of a parol contract of defeasance between a prior grantor and grantee will not affect a party who purchases from one having both the legal title and possession, unless he purchases fraudulently and with intent to defeat the equitable title of the first grantor. Conner *v.* Chase, 15 Vt. 764.

Wisconsin.— Reichert *v.* Neuser, 93 Wis. 513, 67 N. W. 939; Rowell *v.* Williams, 54 Wis. 636, 12 N. W. 86.

England.— Carter *v.* Carter, 4 Jur. N. S. 63, 3 Kay & J. 617, 27 L. J. Ch. 74, 69 Eng. Reprint 1256; Carlisle City, etc., Banking Co. *v.* Thompson, 33 Wkly. Rep. 199. An equitable mortgage by deposit of title deeds will be preferred to a subsequent purchase with notice. Hiern *v.* Mill, 13 Ves. Jr. 114, 9 Rev. Rep. 149, 33 Eng. Reprint 1256.

See 35 Cent. Dig. tit. "Mortgages," § 390.

Deed without consideration.— A deed for which no valuable consideration has been given is not entitled to take precedence of a prior unrecorded mortgage, even though the grantee had no actual notice of it. Fisk *v.* Osgood, 58 Nebr. 486, 78 N. W. 924.

22. Syer *v.* Bundy, 9 La. Ann. 540; Watkins *v.* Reynolds, 123 N. Y. 211, 25 N. E. 322.

23. Stewart *v.* Huff, 19 Iowa 557.

24. Sitler *v.* McComas, 66 Md. 135, 6 Atl. 527.

25. Davison *v.* Waite, 2 Munf. (Va.) 527, holding that a purchaser of land, with notice of a prior mortgage, takes it subject to the mortgage debt, but not to other debts or claims of the mortgagee against the mortgagor.

Conditions of an unrecorded bond.— A purchaser will not be charged with notice of the conditions of an unrecorded bond to which the mortgage is collateral, unless the same are expressed in the mortgage. Payne *v.* Avery, 21 Mich. 524.

Knowledge of extension of operation of statute of limitations.— A purchaser of mortgaged premises with knowledge of the mortgage, but without knowledge of a new promise extending the operation of the statute of limitations, takes subject to the mortgage thus extended, although by the record it appears barred. Plant *v.* Shryock, 62 Miss. 821.

26. Rutgers *v.* Kingsland, 7 N. J. Eq. 178. See, however, Huling *v.* Abbott, 86 Cal. 423, 25 Pac. 4.

27. *Alabama.*— Nelson *v.* Dunn, 15 Ala. 501.

Illinois.— Ennesser *v.* Hudek, 169 Ill. 494, 48 N. E. 673.

Iowa.— Council Bluffs Lodge *v.* Billups, 67 Iowa 674, 25 N. W. 846.

Kansas.— Mutual Benefit L. Ins. Co. *v.* Huntington, 57 Kan. 744, 48 Pac. 19.

New Jersey.— Morris *v.* White, 36 N. J. Eq. 324.

New York.— La Farge F. Ins. Co. *v.* Bell, 22 Barb. 54; Fort *v.* Burch, 6 Barb. 60.

England.— Power *v.* Standish, 8 Ir. Eq. 526; Evans *v.* Bicknell, 6 Ves. Jr. 174, 5 Rev. Rep. 245, 31 Eng. Reprint 998.

See 35 Cent. Dig. tit. "Mortgages," § 382.

Contra.— McAllister *v.* Purcell, 124 N. C. 262, 32 S. E. 715.

Defective first mortgage.— A second mortgagee will take subject to a first mortgage, of which he had actual knowledge at the time of taking his lien, and which he then believed to be a mortgage in fee, and which was so intended as between the parties to it, although in fact for want of words of inheritance it only conveys an estate for life. Gale *v.* Morris, 30 N. J. Eq. 285.

Notice of improper discharge of prior mortgage.— A second mortgagee, with notice that a prior mortgage has been improperly discharged without being satisfied, takes no better title than his mortgagor. Morgan *v.* Chamberlain, 26 Barb. (N. Y.) 163.

28. Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; English *v.* Waples, 13 Iowa 57; Balfour *v.* Parkinson, 84 Fed. 855.

29. Young *v.* Wood, 11 B. Mon. (Ky.) 123; Green *v.* Morgan, (N. J. Ch. 1891) 21 Atl. 857.

30. U. S. Bank *v.* Lee, 2 Fed. Cas. No. 922, 5 Cranch C. C. 319.

31. Omaha Coal, etc., Co. *v.* Suess, 54 Nebr.

be prevented from doing acts, otherwise open to him, which would impair the security of a junior lien of which he has notice,[32] and may be obliged in certain circumstances to join the junior mortgagee, if he knows of his rights, in his own action to foreclose.[33]

2. Record as Notice — a. In General. Although one taking a deed or mortgage of land has no actual notice of a prior mortgage upon it, yet, if such mortgage is duly recorded at the time, he will be charged with notice of the existence and terms of the mortgage, and of the lien which it creates, and will take subject thereto,[34] and this, notwithstanding a change in the form or time of payment of the debt secured, or even in the mortgage itself, within certain defined limits;[35]

379, 74 N. W. 620; Ketcham *v.* Wood, 22 Hun (N. Y.) 64; Union Nat. Bank *v.* Moline, etc., Co., 7 N. D. 201, 73 N. W. 527. And see *supra*, XIV, B, 3, a, (III), (IV).

32. Blair *v.* Ward, 10 N. J. Eq. 119. And see *infra*, XIV, G, 2.

33. Shackleton *v.* Allen Chapel African M. E. Church, 25 Mont. 421, 65 Pac. 428.

34. *Alabama.*— Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443; Minell *v.* Reed, 26 Ala. 730.

Connecticut.— Peters *v.* Goodrich, 3 Conn. 146.

Florida.— Rogers *v.* Munnerlyn, 36 Fla. 591, 18 So. 669.

Illinois.— Continental Inv., etc., Soc. *v.* Wood, 168 Ill. 421, 48 N. E. 221; Buchanan *v.* International Bank, 78 Ill. 500; Elgin City Banking Co. *v.* Center, 83 Ill. App. 405.

Indiana.— Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250; Lasselle *v.* Barnett, 1 Blackf. 150, 12 Am. Dec. 217.

Louisiana.— Sauvinet *v.* Landreaux, 1 La. Ann. 219; Gravier *v.* Baron, 4 La. 239; Morrison *v.* Trudeau, 1 Mart. N. S. 384.

Massachusetts.—Eastman *v.* Foster, 8 Metc. 19; Flynt *v.* Arnold, 2 Metc. 619.

Michigan.— Webber *v.* Ramsey, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429.

Minnesota.— Jellison *v.* Halloran, 44 Minn. 199, 46 N. W. 332.

Mississippi.— Dean *v.* De Lezardi, 24 Miss. 424.

Nebraska.— Whitney *v.* Lowe, 59 Nebr. 87, 80 N. W. 266; Steen *v.* Stretch, 50 Nebr. 572, 70 N. W. 48.

New York.— Tarbell *v.* West, 86 N. Y. 280; Johnson *v.* Stagg, 2 Johns. 510.

Pennsylvania.— Jeanes *v.* Hizer, 186 Pa. St. 523, 40 Atl. 785; Evans *v.* Jones, 1 Yeates 172.

Tennessee.— Hickman *v.* Perrin, 6 Coldw. 135.

Texas.— Turner *v.* Cochran, 94 Tex. 480, 61 S. W. 923.

Wisconsin.— Dodge *v.* Silverthorn, 12 Wis. 644.

United States.— Dick *v.* Balch, 8 Pet. 30, 8 L. ed. 856; North *v.* Knowlton, 23 Fed. 163.

See 35 Cent. Dig. tit. "Mortgages," § 392. And see *supra*, XIV, C, 3, e.

Mortgage of leasehold.— The statute requiring the registration of mortgages applies to a mortgage of a term of years, and such registration is notice to all subsequent purchasers and mortgagees. Johnson *v.* Stagg, 2 Johns. (N. Y.) 510.

Crops growing on mortgaged land are covered by the mortgage and the record of the mortgage is notice to subsequent purchasers of the crops. Rankin *v.* Kinsey, 7 Ill. App. 215.

A deed of trust in the nature of a mortgage is technically a deed, and when executed with the formalities required for the registration of a deed may properly be recorded, and its registry will be constructive notice to all parties in interest. Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

Where a vendor's deed of land is not recorded, the record of a mortgage given back to him by the vendee to secure unpaid purchase-money will not be notice to subsequent purchasers. Pierce *v.* Taylor, 23 Me. 246; Losey *v.* Simpson, 11 N. J. Eq. 246. *Contra*, Van Diviere *v.* Mitchell, 45 S. C. 127, 22 S. E. 759.

Reinscription as notice.— The object of reinscribing a mortgage, under the laws of Louisiana, is to obviate the necessity of searching for mortgages more than ten years back. Hence a description of the property is essential in a reinscription, and a reference to previous mortgages will not cure the omission. Shepherd *v.* Orleans Cotton Press Co., 2 La. Ann. 100. And see Conté *v.* Cain, 33 La. Ann. 965.

35. Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

Revival of debt secured.— In the absence of controlling equities, a second mortgagee, finding a prior mortgage on the record uncanceled, although the debt which it secures appears to have been overdue for more than ten years, must find out at his peril whether the cause of action on such debt has not been revived. Sigourney First Nat. Bank *v.* Woodman, 93 Iowa 668, 62 N. W. 28, 57 Am. St. Rep. 287.

Changing terms of payment.— Where a mortgage is executed to secure the payment of a note made payable in money generally, and a supplement is afterward added, but not recorded, which makes the note payable in gold, the mortgage can be enforced by a sale for gold, as against a subsequent encumbrancer whose lien attached after the addition of the supplement. Poett *v.* Stearns, 31 Cal. 78.

Substitution of lost mortgage.— Where defendant purchases a mortgage expressly made subject to a prior lost and unrecorded mortgage, payment and satisfaction of which appears of record before his purchase, the record of another mortgage of the same amount

and the mortgage having been once duly recorded, the constructive notice which it imparts is not affected by the subsequent accidental destruction of the record, nor the rights of the mortgagee diminished thereby.[36] It is otherwise where the mortgage is canceled of record. In this case a person subsequently dealing with the property is ordinarily justified in relying on the cancellation, and the record imparts no constructive notice.[37] But a party charged with constructive notice of the contents of a recorded instrument, creating a lien, is bound only by what is contained in the record, and is not required to go outside of the record to determine whether the rights of the parties to the instrument are greater or less than those expressed in the instrument itself.[38] And further the record of a mortgage is notice only to subsequent purchasers or encumbrancers, not to any whose rights may have attached before it is placed on the record.[39]

b. Record as Notice to Subsequent Purchasers. One who purchases and takes a deed of land, although actually ignorant of the existence of a prior mortgage on the premises, is nevertheless charged with notice of it if it was at the time duly recorded, and will take the property subject to the rights of the mortgagee,[40] unless the mortgage has been canceled, released, or discharged on the record,[41] or unless the mortgagee has in some way waived his rights or estopped himself to claim them.[42] Such a purchaser is bound to keep himself informed of

as the lost mortgage, to the same mortgagee, is not sufficient to put defendant on inquiry as to whether the recorded mortgage was not substituted for the lost one, where no reference is made therein to the latter. Morris *v.* Beecher, 1 N. D. 130, 45 N. W. 696.

36. Heaton *v.* Prather, 84 Ill. 330; Shannon *v.* Hall, 72 Ill. 354, 22 Am. Rep. 146; Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55.

37. Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250.

38. Chisholm *v.* Cissell, 13 App. Cas. (D. C.) 203; Powers *v.* Lafler, 73 Iowa 283, 34 N. W. 859.

Reformation of mortgage.— Under a statute providing that mortgages not recorded within six months shall not be notice to subsequent creditors, a mortgage reformed long after its recordation, so as to include property not originally covered by it, cannot be enforced as against the rights of subsequent creditors attaching to such property. Cissel *v.* Henderson, 88 Md. 574, 41 Atl. 1068.

39. *California.*— McCabe *v.* Grey, 20 Cal. 509.

Illinois.— Doolittle *v.* Cook, 75 Ill. 354.

Missouri.— Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223.

New York.— Reynolds *v.* Webster, 71 Hun 378, 24 N. Y. Suppl. 1133; Stuyvesant *v.* Hall, 2 Barb. Ch. 151.

Ohio.— Zeller *v.* Marquardt, 4 Ohio Dec. (Reprint) 323, I Clev. L. Rep. 312.

United States.— Bright *v.* Buckman, 39 Fed. 243.

40. *Alabama.*— Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229; McMullen *v.* Neal, 60 Ala. 552; McRae *v.* Newman, 58 Ala. 529.

California.— Jones *v.* Marks, 47 Cal. 242; Odd Fellows' Sav. Bank *v.* Banton, 46 Cal. 603; Swift *v.* Kraemer, 13 Cal. 526, 73 Am. Dec. 603.

Illinois.— Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350.

Indiana.— Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250; Lasselle *v.* Barnett, 1 Blackf. 150, 12 Am. Dec. 217.

Kansas.— Leppo *v.* Gilbert, 26 Kan. 138.

Maine.— Humphreys *v.* Newman, 51 Me. 40.

Massachusetts.—Eastman *v.* Foster, 8 Metc. 19.

Nebraska.— Pleasants *v.* Blodgett, 39 Nebr. 741, 58 N. W. 423, 42 Am. St. Rep. 624; Lincoln Bldg., etc., Assoc. *v.* Hass, 10 Nebr. 581, 7 N. W. 327.

New Jersey.— Semon *v.* Terhune, 40 N. J. Eq. 364, 2 Atl. 18; Ackens *v.* Winston, 22 N. J. Eq. 444.

New York.— Rice *v.* Dewey, 54 Barb. 455; Truscott *v.* King, 6 Barb. 346; Johnson *v.* Stagg, 2 Johns. 510; Parkist *v.* Alexander, 1 Johns. Ch. 394.

North Carolina.— Ijames *v.* Gaither, 93 N. C. 358.

Ohio.— Kuhns *v.* McGeah, 38 Ohio St. 468. See also Doherty *v.* Stimmel, 40 Ohio St. 294.

Pennsylvania.— Johnson *v.* McCurdy, 83 Pa. St. 282; Journeay *v.* Gibson, 56 Pa. St. 57. See Collins *v.* Aaron, 162 Pa. St. 539, 29 Atl. 724.

South Carolina.— Interstate Bldg., etc., Assoc. *v.* McCartha, 43 S. C. 72, 20 S. E. 807; Annely *v.* De Saussure, 12 S. C. 488.

United States.— McCormack *v.* James, 36 Fed. 14; Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,556, 5 Sawy. 336.

See 35 Cent. Dig. tit. "Mortgages," § 393.

The recording of a mortgage of an equitable title to land is not constructive notice to purchasers of the land from a holder of the legal title. Halstead *v.* Commonwealth Bank, 4 J. J. Marsh. (Ky.) 554; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280. But *compare* Jarvis *v.* Dutcher, 16 Wis. 307.

41. Bullock *v.* Battenhousen, 108 Ill. 28.

42. See *infra*, XIV, H, 1.

the state of the recorded title up to the completion of his purchase, and therefore, if a mortgage is placed on the record after the contract for his purchase is made, but before it is completed by the payment of the money and delivery of the deed, he will take subject to the mortgage.[43] On the other hand the mortgagee may rest upon his rights under the recording acts; and he is under no obligation to give personal notice of his mortgage to one who purchases the premises from the mortgagor, even though such purchaser, having no actual notice of the mortgage, buys in the belief that the property is unencumbered and proceeds to erect improvements on the land.[44] But such notice, drawn from the record of the mortgage, is only coextensive with the contents of the instrument as recorded; and it cannot be reformed in a material particular after a *bona fide* purchase and sale of the property, the purchaser having no other notice of the rights of the parties than such as the record would give him.[45]

c. Record as Notice to Prior Mortgagees. The record of a subsequent deed or mortgage is not notice to the prior mortgagee, nor is he required to search the records for subsequent encumbrances; and the junior encumbrancer, desiring to protect himself, must bring home to the prior mortgagee actual notice of his equities.[46]

d. Record of Absolute Deed and Defeasance. Where a deed absolute in form and a bond or other instrument of defeasance constitute in fact a mortgage, their proper record is constructive notice of the nature of the transaction;[47] and it has been held that where the deed is recorded, although not the defeasance, it is at least sufficient to put persons subsequently dealing with the property on inquiry as to the rights of the grantee, and so to charge them with notice of the facts which an inquiry would have developed.[48]

43. Kyle *v.* Thompson, 11 Ohio St. 616.

44. Mayo *v.* Cartwright, 30 Ark. 407; Dick *v.* Balch, 8 Pet. (U. S.) 30, 8 L. ed. 856.

That the mortgagor remained in possession of the mortgaged premises, paying the taxes thereon, and informed the one to whom he sold it that there were no encumbrances on the property, will not affect the rights of a mortgagee whose mortgage was properly recorded. Hall *v.* Shannon, 85 Ill. 473.

45. Wilson *v.* King, 27 N. J. Eq. 374.

46. *Arkansas.*— Birnie *v.* Main, 29 Ark. 591.

California.— Dennis *v.* Burritt, 6 Cal. 670.

Illinois.—Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Doolittle *v.* Cook, 75 Ill. 354; Iglehart *v.* Crane, 42 Ill. 261.

Iowa.— Powers *v.* Lafler, 73 Iowa 283, 34 N. W. 859.

Maryland.— Annan *v.* Hays, 85 Md. 505, 37 Atl. 20.

Massachusetts.— Morse *v.* Curtis, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456.

New Jersey.— Boyd *v.* Mundorf, 30 N. J. Eq. 545; Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Vanorden *v.* Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254; Blair *v.* Ward, 10 N. J. Eq. 119.

New York.— Truscott *v.* King, 6 Barb. 346; Kendall *v.* Niebuhr, 58 How. Pr. 156; Wheelwright *v.* Loomer, 4 Edw. 232; King *v.* McVickar, 3 Sandf. Ch. 192.

South Carolina.— Lake *v.* Shumate, 20 S. C. 23.

Vermont.— Johnson *v.* Valido Marble Co., 64 Vt. 337, 25 Atl. 441; McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512.

Virginia.—Lynchburg Perpetual Bldg., etc., Co. *v.* Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851.

Wisconsin.— Deuster *v.* McCamus, 14 Wis. 307.

Record as notice of rights of assignee.—The record of a junior mortgage is so far notice to the senior mortgagee that the latter's foreclosure of his mortgage will not be effective against an assignee of the junior mortgage who is not joined as a defendant, although the assignment was not recorded. Holliger *v.* Bates, 43 Ohio St. 437, 2 N. E. 841.

47. Hill *v.* Edwards, 11 Minn. 22; Merchants' State Bank *v.* Tufts, (N. D. 1905) 103 N. W. 760.

Deed and defeasance executed and recorded at different times.— The recording of a bond to reconvey executed three days after a deed absolute where neither instrument refers to the other is not sufficient to put a purchaser upon notice that the transaction was intended as a mortgage. Weide *v.* Jehl, 21 Minn. 449.

48. *Florida.*— Equitable Bldg., etc., Assoc. *v.* King, 48 Fla. 252, 37 So. 181.

Georgia.— Mattlage *v.* Mulherin, 106 Ga. 834, 32 S. E. 940.

Iowa.— Clemons *v.* Elder, 9 Iowa 272.

Kansas.— Young *v.* Thompson, 2 Kan. 83. But see Holmes *v.* Newman, 68 Kan. 418, 75 Pac. 501.

Nevada.— Grellet *v.* Heilshorn, 4 Nev. 526.

Oregon.— Security Sav., etc., Co. *v.* Loewenberg, 38 Oreg. 159, 62 Pac. 647.

e. Record of Mortgage Made Before Acquisition of Title. Where one gives a mortgage on property to which he has not yet acquired title, the record of it is not constructive notice to a purchaser in good faith, since the mortgage, in this case, will not appear in the chain of title, but will appear to have been made by a stranger,[49] nor will it be notice to his vendor, who, on giving a deed, takes back a purchase-money mortgage.[50]

f. Instruments Not Entitled to Record. As the doctrine of constructive notice applies only to instruments duly and legally recorded, a subsequent purchaser or encumbrancer cannot be charged with notice of a mortgage which, for lack of a seal, imperfect acknowledgment, or other defect, was not entitled to be placed on the record, although actually recorded;[51] and a retroactive statute legalizing prior defective acknowledgments of mortgages will not affect the rights of a purchaser in good faith and for value, attaching before the passage of the law.[52] But a mortgage thus improperly recorded will be effective as against the mortgagor himself and as against any one subsequently dealing with the property with actual knowledge of it,[53] and also as against a purchaser who does not show

Texas.— Long *v.* Fields, 31 Tex. Civ. App. 241, 71 S. W. 774.

Wisconsin.— Cumps *v.* Kiyo, 104 Wis. 656, 80 N. W. 937.

See 35 Cent. Dig. tit. "Mortgages," § 395.

Contra.— Jaques *v.* Weeks, 7 Watts (Pa.) 261.

Deed void for usury.— The record of an absolute deed which fails to pass the legal title on account of usury is not notice of the deed as an equitable mortgage, so as to postpone a junior judgment lien. Johnson *v.* Wheelock, 63 Ga. 623.

49. Bingham *v.* Kirkland, 34 N. J. Eq. 229; Farmers' L. & T. Co. *v.* Maltby, 8 Paige (N. Y.) 361; Calder *v.* Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Bright *v.* Buckman, 39 Fed. 243. But see Tefft *v.* Munson, 57 N. Y. 97. It seems that where, at the date of a mortgage, the mortgagor is in possession under a parol contract of sale, the mortgage may be legally recorded, although the mortgagor has not then acquired the absolute fee, and the holder of a subsequent mortgage is bound thereby. Crane *v.* Turner, 7 Hun (N. Y.) 357 [*affirmed* in 67 N. Y. 437].

A recorded mortgage or deed of trust given by a homesteader, at any time after his entry, is notice to a subsequent grantee, although given prior to the issuance of a patent for the land. Dickerson *v.* Bridges, 47 Mo. 235, 48 S. W. 825.

50. Schoch *v.* Birdsall, 48 Minn. 441, 51 N. W. 382. And see Turman *v.* Sanford, 69 Ark. 95, 61 S. W. 167.

51. *Alabama.*— Dufphey *v.* Frenaye, 5 Stew. & P. 215.

Arizona.— Reid *v.* Kleyenstauber, 7 Ariz. 58, 60 Pac. 879.

Arkansas.— Haskill *v.* Sevier, 25 Ark. 152.

California.— Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955; Racouillat *v.* Sansevain, 32 Cal. 376.

Florida.— McKeown *v.* Collins, 38 Fla. 276, 21 So. 103.

Illinois.— St. Louis Iron, etc., Works *v.* Kimball, 53 Ill. App. 636.

Iowa.— Blackman *v.* Henderson, 116 Iowa 578, 87 N. W. 655.

Kentucky.— Portwood *v.* Outton, 3 B. Mon. 247.

Louisiana.— Thibodaux *v.* Anderson, 34 La. Ann. 797.

Massachusetts.— Clark *v.* Watson, 141 Mass. 248, 5 N. E. 298.

Michigan.— Farmers', etc., Bank *v.* Bronson, 14 Mich. 361; Wing *v.* McDowell, Walk. 175.

Minnesota.— Cogan *v.* Cook, 22 Minn. 137.

Mississippi.— Work *v.* Harper, 24 Miss. 517.

Nebraska.— Keeling *v.* Hoyt, 31 Nebr. 453, 48 N. W. 66.

Ohio.— Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 437; Van Thorniley *v.* Peters, 26 Ohio St. 471.

Pennsylvania.— Stewart *v.* Dampman, 4 Pa. Super. Ct. 540.

South Carolina.— Arthur *v.* Screven, 30 S. C. 77, 17 S. E. 640; Wood *v.* Reeves, 23 S. C. 382.

Tennessee.— Galt *v.* Dibrell, 10 Yerg. 146.

Virginia.— Nicholson *v.* Gloucester Charity School, 93 Va. 101, 24 S. E. 899.

West Virginia.— Sands *v.* Beardsley, 32 W. Va. 594, 9 S. E. 925; Cox *v.* Wayt, 26 W. Va. 807.

United States.— Cumberland Bldg., etc., Assoc. *v.* Sparks, 111 Fed. 647, 49 C. C. A. 510; Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

See 35 Cent. Dig. tit. "Mortgages," §§ 397, 402.

Disqualification of officer taking acknowledgment.— Where the only defect in the mortgage is that the acknowledgment was taken by a disqualified officer, and this is not apparent on the face of the mortgage or in the certificate of acknowledgment, the recording of the mortgage will charge subsequent purchasers or lienors with constructive notice. Ogden Bldg., etc., Assoc. *v.* Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330; Southwestern Mfg. Co. *v.* Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684.

52. Blackman *v.* Henderson, 116 Iowa 578, 87 N. W. 655.

53. Johnson *v.* Sandhoff, 30 Minn. 197, 14 N. W. 889.

that he has paid over his money or incurred definite liabilities in consideration of his purchase.[54]

g. Facts of Which Record Is Notice — (i) *In General.* A person affected by the constructive notice which the record of a mortgage affords is chargeable with knowledge of all such facts as are specifically set forth or recited in the mortgage,[55] including the legal consequences and effect of its various provisions,[56] and also, according to some of the authorities, of all such facts as would have been disclosed by a proper investigation, starting from the mortgage as a point of departure, on the theory that, although a material circumstance may not be discoverable from the mortgage itself, yet the existence of such an instrument on the record is sufficient to put a purchaser or subsequent lienor on inquiry as to all the rights and equities of the parties.[57] But an entry in the index or "entry book" is not notice of the whole contents of the instrument recorded, but only of the special facts therein required to be stated.[58]

(ii) *Amount of Debt Secured.* If the record of a mortgage wholly fails to disclose the nature or amount of the debt which it is given to secure, it is not notice to subsequent purchasers or encumbrancers.[59] If it states specifically the sum which it is given to secure, it is notice to such persons only to the extent of the debt so stated, and cannot, as against them, be made to include any other debts or claims not specified.[60] If it gives an imperfect or ambiguous description of the debt, or merely refers to some other document wherein the amount is shown, it is sufficient to put purchasers or lienors on inquiry as to the real consideration.[61] But the record itself must be searched; the entry in the index,

54. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

55. *Alabama.*— Center *v.* Planters', etc., Bank, 22 Ala. 743.

Connecticut.—Osborn *v.* Carr, 12 Conn. 195, holding that constructive notice by the record of a mortgage is limited in its effect to the specific encumbrance recorded, and cannot affect a party taking security on other lands in another place.

Iowa.— Clark *v.* Holland, 72 Iowa 34, 33 N. W. 350, 2 Am. St. Rep. 230. A record of a mortgage affords notice only as to property described in the index of the record. Stewart *v.* Huff, 19 Iowa 557.

Kentucky.— Beavin *v.* Hardin, 11 B. Mon. 331.

United States.— *In re* Sands Ale Brewing Co., 21 Fed. Cas. No. 12,307, 3 Biss. 175, holding that a covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee, where the mortgage is recorded, runs with the land, and is notice to all persons.

See 35 Cent. Dig. tit. "Mortgages," § 400.

56. Randolph *v.* New Jersey West Line R. Co., 28 N. J. Eq. 49.

57. See Bolles *v.* Chauncey, 8 Conn. 389; Murphy *v.* Coates, 33 N. J. Eq. 424; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510.

58. Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250.

59. Battenhausen *v.* Bullock, 11 Ill. App. 665 [*affirmed* in 108 Ill. 28]; Lacour *v.* Carrie, 2 La. Ann. 790; Whittacre *v.* Fuller, 5 Minn. 508. And see *supra*, XIII, F; XIV, B, 1, c.

60. *Connecticut.*—Bacon *v.* Brown, 19 Conn. 29.

Louisiana.— Walden *v.* Grant, 8 Mart. N. S. 565.

Michigan.— Hinchman *v.* Town, 10 Mich. 508.

Minnesota.— Mills *v.* Kellogg, 7 Minn. 469; Whittacre *v.* Fuller, 5 Minn. 508.

New York.— Ketcham *v.* Wood, 22 Hun 64; Beekman *v.* Frost, 18 Johns. 544, 9 Am. Dec. 246. And see Babcock *v.* Bridge, 29 Barb. 427.

Texas.— Hall *v.* Read, 28 Tex. Civ. App. 18, 66 S. W. 809.

See 35 Cent. Dig. tit. "Mortgages," § 401.

Contra.— Keyes *v.* Bump, 59 Vt. 391, 9 Atl. 598.

Mistake as to amount.— Where there is a mistake in the record of a mortgage, as to the amount secured thereby, the registry is notice only to the extent expressed in the registry. Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288 [*affirmed* on this point in 18 Johns. 544, 9 Am. Dec. 246].

Unlimited amount.— A recorded mortgage for an unlimited sum is notice to a subsequent encumbrancer as to all sums advanced on it before the subsequent lien attached. Robinson *v.* Williams, 22 N. Y. 380.

Future advances.— The record of a mortgage for a specified amount to secure future advances, although it does not state that it is given to secure future advances, is a valid notice of the encumbrance to an amount not exceeding that named in the mortgage, for any advances made pursuant to the mortgage. Bell *v.* Fleming, 12 N. J. Eq. 13.

61. Booth *v.* Barnum, 9 Conn. 286, 23 Am. Dec. 339; Babcock *v.* Lisk, 57 Ill. 327; Gardner *v.* Cohn, 95 Ill. App. 26.

Where a recorded mortgage mentions the bond which it is given to secure, although

although it specifies the amount, is not notice of the consideration of the mortgage.[62]

h. Record of Defective Instrument. A mortgage defectively executed, in that the attestation is insufficient, is not notice, although recorded;[63] or where the instrument itself is so defective as to be void in law; as where it wholly omits the name of the mortgagee.[64] It is otherwise if the defect is not fatal to its validity and enough remains to show the nature of the encumbrance and the intention of the parties in regard to it.[65]

i. Erroneous Description of Property. If the description of the property in a mortgage wholly fails to identify that intended to be encumbered, or by mistake is so expressed as to be applicable only to a different tract or lot, so that it could not be enforced without invoking the aid of a court of equity to reform it, the record of it is not notice to subsequent purchasers or lienors.[66] But if the description is merely ambiguous or incomplete, it is sufficient to put such persons on inquiry;[67] and if it is apparent from the face of the record that there is a mistake or misdescription, which is capable of being corrected from other parts of the same instrument, or other details of the same description, it operates as constructive notice.[68]

j. Sufficiency of Record. In order that the record of a mortgage should charge subsequent purchasers or encumbrancers with notice, it is essential that it should have been recorded by an officer having authority to do so,[69] in the proper place or book,[70] and in accordance with any statutory directions as to the manner

without specifying its contents, subsequent purchasers are chargeable with notice of its provisions. Pike *v.* Collins, 33 Me. 38; Clementz *v.* M. T. Jones Lumber Co., 82 Tex. 424, 18 S. W. 599.

62. Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250.

63. Harper *v.* Barsh, 10 Rich. Eq. (S. C.) 149; Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659. But see Markham *v.* Wallace, (Ala. 1906) 41 So. 304.

64. Disque *v.* Wright, 49 Iowa 538.

65. Beaver *v.* Slanker, 94 Ill. 175; Morrison *v.* Brown, 83 Ill. 562; Bunker *v.* Anderson, 32 N. J. Eq. 35; Tryon *v.* Munson, 77 Pa. St. 250.

66. *California.*— Davis *v.* Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29.

Illinois.— Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87; Cunningham *v.* Thornton, 28 Ill. App. 58.

Indiana.— Rinehardt *v.* Reifers, 158 Ind. 675, 64 N. E. 459.

Iowa.— Peters *v.* Ham, 62 Iowa 656, 18 N. W. 296; Stewart *v.* Huff, 19 Iowa 557; Scoles *v.* Wilsey, 11 Iowa 261.

Kentucky.— Johnson *v.* Hughart, 85 Ky. 657, 4 S. W. 348, 9 Ky. L. Rep. 208.

Michigan.— Barrows *v.* Baughman, 9 Mich. 213.

Minnesota.— Ada Bank *v.* Gullikson, 64 Minn. 91, 66 N. W. 131; Simmons *v.* Fuller, 17 Minn. 485.

Mississippi.— Simmons *v.* Hutchinson, 81 Miss. 351, 33 So. 21.

Nebraska.— Galway *v.* Malchow, 7 Nebr. 285.

Oregon.— Meier *v.* Kelly, 22 Oreg. 136, 29 Pac. 265.

Tennessee.— Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437, 58 S. W. 234.

Texas.— McLouth *v.* Hurt, 51 Tex. 115.

See 35 Cent. Dig. tit. "Mortgages," § 404.

Insertion of omitted part.— Where the description of the granted premises in a mortgage is imperfect, but authority is given in the mortgage to the recorder to insert the portion omitted, when obtained, this authority is equivalent to a power of attorney to the recorder to make such addition, and a subsequent encumbrancer cannot object that the recorder executed the authority conferred on him. Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

67. Bent *v.* Coleman, 89 Ill. 364; Lee *v.* Woodworth, 3 N. J. Eq. 36; Mohr *v.* Scherer, 30 Pa. Super. Ct. 509.

Illustration.— Where, by a mistake, the description in the mortgage so reads that it applies equally well to either of two parcels of land, as, where it states that it is both the east and the west half of a certain lot, the record imparts such notice, that a person buying either parcel is bound to investigate, and omits to do so at his own peril. Carter *v.* Hawkins, 62 Tex. 393.

68. Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87; Slocum *v.* O'Day, 174 Ill. 215, 51 N. E. 243; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Hoopeston Bldg. Assoc. *v.* Green, 16 Ill. App. 204; Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 699; Kennedy *v.* Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838.

69. Parker *v.* Wood, 1 Dall. (Pa.) 436, 1 L. ed. 212.

70. Cady *v.* Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; Ivey *v.* Dawley, 50 Fla. 537, 39 So. 498; Baker *v.* Lee, 49 La. Ann. 874, 21 So. 588; Grand Rapids Nat. Bank *v.* Ford, 143 Mich. 402, 107 N. W. 76; Gordon *v.* Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142. And see *supra*, XIII, D.

of making such records,[71] and that any paper accompanying the mortgage, and necessary to its completeness, or necessary to authorize its record, should also be recorded.[72] The record should follow the mortgage exactly as it stands; and it is said that the spirit of the recording system requires that the record of a mortgage should disclose, with as much certainty as the nature of the case will admit, the real state of the encumbrance.[73] But a mortgage defectively recorded is still a good equitable mortgage, and its lien may be superior to that of subsequent judgment creditors.[74]

k. Errors in Record. Where third persons are charged with notice of a mortgage from the time it is filed or entered for record, a mistake made by the recorder in transcribing the instrument at large upon the record will not invalidate the constructive notice already given by the filing of the mortgage.[75] But where such notice is derived only from the full record of the instrument, a mistake in the names of the parties, the amount of the debt, the description of the property, or other material particular will deprive the record of its intended effect,[76] except where the mistake is plainly apparent, and can be corrected from other parts of the instrument, and therefore is not such as would mislead a careful investigator.[77]

l. Indexing Record. Unless there be a statute expressly so providing,[78] the index to the records of mortgages is no part of the record, and is not essential to make it effective as constructive notice to third persons.[79] Where there is such a

Registration in personalty records.— The registration of a mortgage covering both realty and personalty in the records of mortgages of personalty alone is not constructive notice of the mortgage, so far as it affects the land, to one subsequently dealing with the real estate. Hunt *v.* Allen, 73 Vt. 322, 50 Atl. 1103.

A mortgage of a ten-year leasehold is a mortgage of realty, and should be recorded as such; it is not necessary to record it as a chattel mortgage. Lembeck, etc., Brewing Co. *v.* Kelly, 63 N. J. Eq. 401, 51 Atl. 794.

Recording extension in another part of record.— An extension of the mortgage to cover other debts may be recorded in another part of the record book than that containing the original mortgage without recording the original again, provided the subsequent record refers intelligibly to the first. Choteau *v.* Thompson, 2 Ohio St. 114.

71. Weed *v.* Lyon, Harr. (Mich.) 363; Edwards *v.* Maeder, 11 N. Y. Suppl. 285.

72. See Prudhomme's Estate, 35 La. Ann. 984; Simon's Succession, 23 La. Ann. 533; Jewell *v.* Read, 10 La. Ann. 144; Lefevre *v.* Boniquet, 5 Mart. (La.) 481.

A power of attorney contained in a power-of-sale mortgage need not be recorded among powers of attorney when the mortgage is properly recorded. Fogarty *v.* Sawyer, 23 Cal. 570. *Compare* Carnall *v.* Duval, 22 Ark. 136.

73. *Connecticut.*— Hart *v.* Chalker, 14 Conn. 77.

Illinois.— Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

Minnesota.— Gerdine *v.* Menage, 41 Minn. 417, 43 N. W. 91.

New Jersey.— Lambert *v.* Hall, 7 N. J. Eq. 410.

New York.— Peck *v.* Mallams, 10 N. Y. 509.

Texas.— Hart *v.* Patterson, 17 Tex. Civ. App. 591, 43 S. W. 545.

See 35 Cent. Dig. tit. "Mortgages," § 405.

74. Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616.

75. *Alabama.*— Mims *v.* Mims, 35 Ala. 23.

Kansas.— Zear *v.* Boston Safe-Deposit, etc., Co., 2 Kan. App. 505, 43 Pac. 977.

Michigan.— Sinclair *v.* Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235.

Mississippi.— Mangold *v.* Barlow, 61 Miss. 593, 48 Am. Rep. 84.

Ohio.— Brown *v.* Kirkman, 1 Ohio St. 116.

Wisconsin.— Shove *v.* Larsen, 22 Wis. 142.

See 35 Cent. Dig. tit. "Mortgages," § 407.

76. Taylor *v.* Hotchkiss, 2 La. Ann. 917; Hill *v.* McNichol, 76 Me. 314; Thompson *v.* Morgan, 6 Minn. 292; Parret *v.* Shaubhut, 5 Minn. 323, 80 Am. Dec. 424; Peck *v.* Mallams, 10 N. Y. 509.

77. *Iowa.*— Dargin *v.* Beeker, 10 Iowa 571.

Minnesota.— Thorwarth *v.* Armstrong, 20 Minn. 464.

New York.— Muehlberger *v.* Schilling, (1888) 3 N. Y. Suppl. 705.

North Carolina.—Royster *v.* Lane, 118 N. C. 156, 24 S. E. 796.

Ohio.— Stanbery *v.* O'Neil, 9 Ohio Dec. (Reprint) 238, 11 Cinc. L. Bul. 260; Noble County Nat. Bank *v.* Dondna, 7 Ohio Dec. (Reprint) 532, 3 Cinc. L. Bul. 789. But see Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26.

South Carolina.— Kennedy *v.* Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838.

See 35 Cent. Dig. tit. "Mortgages," § 407.

78. See the statutes of the different states. And see Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; Noyes *v.* Horr, 13 Iowa 570.

79. *Georgia.*—Chatham *v.* Bradford, 50 Ga. 327, 15 Am. Rep. 692.

Indiana.— Nichol *v.* Henry, 89 Ind. 54. But

statute it has been held that if the mortgage is indexed under a wrong name it is not notice to third persons,[80] although other defects are not considered fatal, provided the index contains enough to direct a searcher to the particular mortgage in which he is interested, and provided the record itself is complete and correct.[81] And one who takes a deed or mortgage with constructive notice of a prior encumbrance on the property, derived from other sources than the record, as where it is recited in the deed to his grantor, cannot complain of the want of notice because such encumbrance was not indexed.[82] In the absence of proof to the contrary, it will be presumed that the entry in the general index and the actual recording of the mortgage were simultaneous.[83]

m. Time When Record Gives Notice. A mortgage begins to operate as notice to third persons from the time it is delivered to the recorder or filed for record, although some time may elapse before it is actually recorded at length;[84] but it does not impart such notice if, after being so filed, it is withdrawn from the files by the mortgagee or with his consent, and kept out until after the rights of third persons have attached.[85]

F. Failure to Record Mortgage — 1. Necessity of Record and Effect of Failure to Record — a. In General. Although an unrecorded mortgage, if duly executed, creates a lien on the property and is valid as between the parties,[86] yet

see Travellers Ins. Co. *v.* Patten, 98 Ind. 209.

Louisiana.— Swan *v.* Vogel, 31 La. Ann. 38.

Missouri.— Ryan *v.* Carr, 46 Mo. 483; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 553.

Nebraska.— Lincoln Bldg., etc., Assoc. *v.* Hass, 10 Nebr. 581, 7 N. W. 327.

New Jersey.— Semon *v.* Terhune, 40 N. J. Eq. 364, 2 Atl. 18.

New York.— Mutual L. Ins. Co. *v.* Dake, 1 Abb. N. Cas. 381 [*affirmed* in 87 N. Y. 257].

North Carolina.— Davis *v.* Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793.

Ohio.— Green *v.* Garrington, 16 Ohio St. 548, 91 Am. Dec. 103; Yarrington *v.* Green, 2 Ohio Dec. (Reprint) 721, 4 West. L. Month. 651.

Oregon.— School Land Com'rs *v.* Babcock, 5 Oreg. 472.

Pennsylvania.— Stockwell *v.* McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Schell *v.* Stein, 76 Pa. St. 398, 18 Am. Rep. 416; Speer *v.* Evans, 47 Pa. St. 141.

South Carolina.— Armstrong *v.* Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772.

Vermont.— Barrett *v.* Prentiss, 57 Vt. 297; Curtis *v.* Lyman, 24 Vt. 338, 58 Am. Dec. 174. If a town-clerk records a deed in a book which has for some years ceased to be used for that purpose, and omits to enter it in the index, for the purpose of concealment, such copying is not deemed to operate as a recording so as to charge third persons with notice. Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459.

United States.— Hampton Lumber Co. *v.* Ward, 95 Fed. 3.

See 35 Cent. Dig. tit. "Mortgages," § 408.

80. Howe *v.* Thayer, 49 Iowa 154; Congregational Church Bldg. Soc. *v.* Scandinavian Free Church, 24 Wash. 433, 64 Pac. 750.

81. Barney *v.* Little, 15 Iowa 527; White *v.* Hampton, 13 Iowa 259; Malbon *v.* Grow, 15 Wash. 301, 46 Pac. 330; Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962; St. Croix Land, etc., Co. *v.* Ritchie, 73 Wis. 409, 41 N. W. 345, 1064.

Order of entries.— Entries in the grantee's index need not be made in the order in which the instruments were received, the statute not expressly so providing. Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

82. Ætna L. Ins. Co. *v.* Bishop, 69 Iowa 645, 29 N. W. 761.

83. Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962. And see Hay *v.* Hill, 24 Wis. 235.

84. *Illinois.*— Kiser *v.* Heuston, 38 Ill. 252.

Massachusetts.— Tracy *v.* Jenks, 15 Pick. 465, holding that the original certificate of a register of deeds, as to when a mortgage was received and recorded, is conclusive as between the mortgagee and a creditor attaching the premises subsequent to the time stated in such certificate.

New Jersey.— Von Schuller *v.* Commercial Inv. Bldg., etc., Assoc., 63 N. J. Eq. 388, 51 Atl. 932.

Tennessee.— Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437, 58 S. W. 234.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264. Leaving a mortgage which covers both realty and personalty in the town-clerk's office for record is not constructive notice of its existence as a real estate mortgage, unless it was left there to be recorded as such, and not merely as a chattel mortgage. Hunt *v.* Allen, 73 Vt. 322, 50 Atl. 1103.

United States.— Hudson *v.* Randolph, 66 Fed. 216, 13 C. C. A. 402.

85. Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Kiser *v.* Heuston, 38 Ill. 252; Yerger *v.* Barz, 56 Iowa 77, 8 N. W. 769; Webh *v.* Austin, 58 S. W. 808, 22 Ky. L. Rep. 764. *Compare* Commonwealth Bank *v.* Haggin, 1 A. K. Marsh. (Ky.) 306.

86. Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705; Nice's Ap-

the general effect of the recording acts is that a mortgage does not constitute a valid charge or encumbrance on the land, as against any third persons not having actual notice of it, unless and until it is duly recorded or filed for record.[87]

b. Absolute Deed as Mortgage.[88] The same principles apply to a deed absolute in form but intended by the parties as a mortgage. Whatever may be its effect between the original parties, it cannot operate as a mortgage, so far as concerns third persons without actual notice, unless the instrument of defeasance, bond to reconvey, or declaration of trust is duly recorded as well as the deed.[89]

peal, 54 Pa. St. 200. And see *supra*, XIII, B, 1, a.

An admission by a mortgagor of the due execution of an unrecorded mortgage, which was not acknowledged or certified, although sufficient as against himself, is no evidence as against a third person claiming an interest in the land. Dugger *v.* Collins, 69 Ala. 324.

87. *Alabama.*— Ohio L. Ins., etc., Co. *v.* Ledyard, 8 Ala. 866.

Delaware.— Deakyne *v.* Lore, 5 Harr. 354.

Indiana.— Routh *v.* Spencer, 38 Ind. 393.

Kentucky.— Webb *v.* Austin, 58 S. W. 808, 22 Ky. L. Rep. 764.

Louisiana.— Cordeviolle *v.* Dawson, 26 La. Ann. 534; Carpenter *v.* Allen, 16 La. Ann. 435; Cassidy *v.* His Creditors, 2 Rob. 47; Gilbert *v.* His Creditors, 6 La. 145; Martinez *v.* Layton, 4 Mart. N. S. 368.

Maine.— Bunker *v.* Barron, 93 Me. 87, 44 Atl. 372.

New Mexico.— Moore *v.* Davey, 1 N. M. 303.

New York.— Johnson *v.* Stagg, 2 Johns. 510; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. 603.

North Carolina.— See King *v.* Portis, 77 N. C. 25.

Ohio.— Fosdick *v.* Barr, 3 Ohio St. 471.

Pennsylvania.— Nice's Appeal, 54 Pa. St. 200; Clawson *v.* Eichbaum, 2 Grant 130.

South Carolina.— Boyce *v.* Shiver, 3 S. C. 515; Ross *v.* State Bank, 3 Strobh. Eq. 245.

West Virginia.— Atkinson *v.* Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544.

See 35 Cent. Dig. tit. "Mortgages," §§ 410, 412.

Mortgage executed in another state.— That a mortgage on real property was executed in another state does not dispense with the necessity of registration, in order to give it validity as against creditors and subsequent purchasers. Dearing *v.* Lightfoot, 16 Ala. 28.

A mortgage made before the cession of California to the United States, although valid under the Mexican laws, is void as against a subsequent encumbrancer unless duly recorded. Call *v.* Hastings, 3 Cal. 179.

Subordination to rights of junior lienors.— Where a senior mortgagee has neglected to record his mortgage, and a complication of liens has resulted, so that the property cannot be sold subject to the mortgage without interfering with the rights of others, he cannot resist a foreclosure sale of the entire property, to satisfy all the liens in their proper order, although his mortgage is not yet due. Miller *v.* Stoddard, 54 Minn. 486, 56 N. W. 131.

In **Maryland** the provisions of the statute relating to the execution and recording of mortgages are not applicable to deeds of trust. Stanhope *v.* Dodge, 52 Md. 483.

In **Pennsylvania,** under the act of April 27, 1855, section 8, where a mortgage is given on a leasehold estate, it is necessary, in order to give it priority as against an execution creditor of the mortgagor, that the lease should be recorded with the mortgage. Sturtevant's Appeal, 34 Pa. St. 149.

As against assignee for creditors.— An unrecorded mortgage of realty is not a valid lien on the property as against an assignee for the benefit of the creditors of the mortgagor. Betz *v.* Snyder, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235; Snyder *v.* Betz, 2 Ohio Cir. Ct. 485, 1 Ohio Cir. Dec. 602; Alexandria Bank *v.* Herbert, 8 Cranch (U. S.) 36, 8 L. ed. 479. But see Haug *v.* Detroit Third Nat. Bank, 95 Mich. 249, 54 N. W. 888; Nice's Appeal, 54 Pa. St. 200.

88. See *supra*, XIV, E, 2, d.

89. *Connecticut.*— Ives *v.* Stone, 51 Conn. 446.

Kentucky.—Graham *v.* Samuel, 1 Dana 166.

Maine.— Bailey *v.* Myrick, 50 Me. 171; Purrington *v.* Pierce, 38 Me. 447.

Maryland.—Hoffman *v.* Gosnell, 75 Md. 577, 24 Atl. 28; Owens *v.* Miller, 29 Md. 144.

Massachusetts.— Newhall *v.* Burt, 7 Pick. 157; Newhall *v.* Pierce, 5 Pick. 450; Harrison *v.* Phillips Academy, 12 Mass. 456.

Minnesota.—Marston *v.* Williams, 45 Minn. 116, 47 N. W. 644, 22 Am. St. Rep. 719; Butman *v.* James, 34 Minn. 547, 27 N. W. 66; Blakeley *v.* Le Duc, 25 Minn. 448.

Nevada.— Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

New York.— Stoddard *v.* Rotton, 5 Bosw. 378; White *v.* Moore, 1 Paige 551; Dey *v.* Dunham, 2 Johns. Ch. 182 [*reversed* on the facts in 15 Johns. 555, 8 Am. Dec. 282].

Ohio.— Kemper *v.* Campbell, 44 Ohio St. 210, 6 N. E. 566.

Pennsylvania.— Corpman *v.* Baccastow, 84 Pa. St. 363; Manufacturers', etc., Bank *v.* State Bank, 7 Watts & S. 335, 42 Am. Dec. 240; Friedley *v.* Hamilton, 17 Serg. & R. 70, 17 Am. Dec. 638.

Texas.— Stephens *v.* Keating, (1891) 17 S. W. 37.

Washington.— Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680.

United States.— Hubbard *v.* Turner, 12 Fed. Cas. No. 6,819, 2 McLean 519.

See 35 Cent. Dig. tit. "Mortgages," § 423.

Compare Mobile Bank *v.* Tishomingo Sav. Inst., 62 Miss. 250.

c. Effect of Delay in Recording. Where a statute provides that a mortgage shall be "void" as to subsequent purchasers or creditors, unless recorded within a limited time, its subsequent recordation is of no avail,[90] at least as against third persons whose rights have attached in the mean time.[91] Independently of such a statute, the mortgage will be inoperative as against any liens or claims attaching after its execution and before it is recorded,[92] although the delay cannot be taken advantage of by general creditors of the mortgagor, not having acquired specific liens,[93] nor by any one not prejudiced thereby, that is, whose rights did not attach

A bond for a deed in the ordinary form is not an instrument of defeasance, within the meaning of Kan. Gen. St. (1901) § 4217, providing that a deed, purporting to be an absolute conveyance but intended to be defeasible, shall not be effective as against any person other than the grantee or persons with actual knowledge, unless an "instrument of defeasance" shall be recorded with the register of deeds. Holmes *v.* Newman, 68 Kan. 418, 75 Pac. 501.

The continued possession of land by the grantor, who has made a conveyance thereof, duly recorded, and taken back a bond of defeasance, which is not recorded, is not notice to third persons of the defeasible character of the deed. Hennessey *v.* Andrews, 6 Cush. (Mass.) 170.

As against attaching creditor.— Where a debtor's land, subject to an unrecorded defeasance given to his grantor, is attached, the attaching creditor is not a "purchaser" without notice of the defeasance, unless he subsequently buys at the execution sale. Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

In North Dakota it is provided by statute that when a deed purports to be an absolute conveyance but is intended to be defeasible, the grant is not effective as against a third person, unless an instrument of defeasance duly executed is recorded therewith. N. D. Rev. Codes (1899), § 4730 [*construed* in Patnode *v.* Deschenes, (1906) 106 N. W. 573; Vallely *v.* Grafton First Nat. Bank, (1906) 106 N. W. 127].

90. *Alabama.*— Steiner *v.* Clisby, 95 Ala. 91, 10 So. 240, 11 So. 294.

Louisiana.— See Jumonville *v.* Sharp, 27 La. Ann. 461.

Maryland.— Harding *v.* Allen, 70 Md. 395, 17 Atl. 377; Sixth Ward Bldg. Assoc. No. 5 *v.* Willson, 41 Md. 506.

North Carolina.— Ridley *v.* McGehee, 13 N. C. 40.

Pennsylvania.— Woodrow *v.* Blythe, 2 Del. Co. 18.

South Carolina.— Mowry *v.* Crocker, 33 S. C. 436, 12 S. E. 3; Bloom *v.* Simms, 27 S. C. 90, 3 S. E. 45; Williams *v.* Beard, 1 S. C. 309.

United States.— Alexandria Bank *v.* Herbert, 8 Cranch 36, 3 L. ed. 479.

See 35 Cent. Dig. tit. "Mortgages," § 419.

Delay as fraud.— The mere failure to record a mortgage within the statutory time, in reliance on the mortgagor's promise to pay the same within such time, does not render the mortgage fraudulent as to existing or subsequent creditors. Terre Haute Nat. State Bank *v.* Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699.

91. *Kentucky.*— Tolle *v.* Alley, (1893) 24 S. W. 113.

Louisiana.— Porche *v.* Le Blanc, 12 La. Ann. 778.

Maryland.— Stanhope *v.* Dodge, 52 Md. 483; Pfeaff *v.* Jones, 50 Md. 263.

New Jersey.— Plume *v.* Bone, 13 N. J. L. 63 note.

Pennsylvania.— Fries *v.* Null, 158 Pa. St. 15, 27 Atl. 867.

South Carolina.— South Carolina L. & T. Co. *v.* McPherson, 26 S. C. 431, 2 S. E. 267.

United States.— Wyman *v.* Russell, 30 Fed. Cas. No. 18,115, 4 Biss. 307.

See 35 Cent. Dig. tit. "Mortgages," § 419.

92. *California.*— Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Georgia.— Parker *v.* Jones, 57 Ga. 204.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508.

New Mexico.— Moore *v.* Davey, 1 N. M. 303.

North Carolina.— Davidson *v.* Beard, 9 N. C. 520.

Pennsylvania.— Foster's Appeal, 3 Pa. St. 79.

United States.— Truman *v.* Weed, 67 Fed. 645, 14 C. C. A. 595.

See 35 Cent. Dig. tit. "Mortgages," § 419. And see *supra*, XIV, F, 1, a.

As against execution creditor.— The lien of an execution levied on land is superior to that of a prior unrecorded mortgage, although the mortgage is subsequently recorded before the execution sale. Hawkins *v.* Files, 51 Ark. 417, 11 S. W. 681; Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 26 L. ed. 1215. *Contra*, Holden *v.* Garrett, 23 Kan. 98.

As against attachment.— The lien of a mortgage executed before the levying of an order of attachment, but not recorded until afterward, is prior to the lien of the attachment, although the attaching creditor may not, at the time of the levy, have had any notice of the mortgage. Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705.

93. *Connecticut.*— Haskell *v.* Bissell, 11 Conn. 174.

Michigan.— Cutler *v.* Steele, 93 Mich. 204, 53 N. W. 521.

Ohio.— Gill *v.* Pinney, 12 Ohio St. 38.

South Carolina.— King *v.* Fraser, 23 S. C. 543.

Virginia.— McCandlish *v.* Keen, 13 Gratt. 615.

See 35 Cent. Dig. tit. "Mortgages," § 419.

until after the recording, because as to such a person the delay in recording the mortgage cannot found a new right.[94]

d. Reinscription. By statute[95] in Louisiana, a mortgage, to be effective against third persons, must not only be duly inscribed (recorded), but must be reinscribed within the period of ten years from the original inscription, failing which, it loses its rank and priority as a lien as against intervening liens or rights of third persons.[96] The reinscription must be made strictly in accordance with the provisions of the statute,[97] and the necessity of it is not dispensed with by the pendency of an action to foreclose the mortgage,[98] nor by such circumstances as would ordinarily stop the running of a statute of limitations.[99] But the failure to reinscribe does not cancel or discharge the mortgage as between the original parties or as to any persons who have not in the mean time acquired adverse rights,[1] nor can it be taken advantage of by a purchaser from the mortgagor who has expressly assumed the payment of the mortgage debt.[2]

2. Lien of Unrecorded Mortgage — a. As Against Subsequent Purchasers or Mortgagees — (i) *In General.* A mortgage which has not been recorded, although it may be a valid security given for a real debt, does not attach as a lien upon the land to the prejudice of subsequent purchasers or encumbrancers in good faith, for value, and without actual notice of the mortgage;[3] and it has

94. Elder *v.* Derby, 98 Ill. 228; Scott *v.* McMurran, 7 Blackf. (Ind.) 284.

95. La. Civ. Code, art. 3367.

96. Fillastre *v.* St. Amand, 32 La. Ann. 352; De St. Romes *v.* Blanc, 31 La. Ann. 48; Byrne *v.* Citizens' Bank, 23 La. Ann. 275; Levy *v.* Mentz, 23 La. Ann. 261; Johnson *v.* Lowry, 22 La. Ann. 205; Kohn *v.* McHatton, 20 La. Ann. 223; Robinson *v.* Haynes, 19 La. Ann. 132; Liddell *v.* Rucker, 13 La. Ann. 569; Lovell *v.* Cragin, 136 U. S. 130, 10 S. Ct. 1024, 34 L. ed. 372. And see *supra*, XIII, G.

Minor's mortgage.— The inscription of a minor's mortgage preserves the mortgage during the tutorship, although it should continue for more than ten years, but if it is not reinscribed within ten years after the end of the tutorship the mortgage will perempt. Lemelle *v.* Thompson, 34 La. Ann. 1041. And see Ynogos' Succession, 13 La. Ann. 559.

The death of the mortgagor does not obviate the necessity for reinscription. Gagneux's Succession, 40 La. Ann. 701, 4 So. 869.

Fraud as to second mortgagee.— La. Civ. Code, art. 3329, provides that, if a person who has given a mortgage on his property takes advantage of the neglect to register the mortgage and engages the same property to another person without informing him of the first mortgage, he shall be considered guilty of fraud and subject to damages. But this does not apply where the first mortgage was duly recorded, but has not been reinscribed within ten years. Liddell *v.* Rucker, 13 La. Ann. 569.

Statute retroactive.— The provisions of the code relating to the necessity of reinscribing mortgages applied to mortgages executed before its promulgation. Roche *v.* Groysilliere, 13 La. 238. See also Morrison *v.* Citizens' Bank, 27 La. Ann. 401.

97. Batey *v.* Woolfolk, 20 La. Ann. 385.

The mere recital in an act of sale or mortgage of a prior mortgage, inscribed more than ten years before, is not equivalent to a reinscription of it and cannot supply the want of such reinscription. Batey *v.* Woolfolk, 20 La. Ann. 385; Gremillon's Succession, 4 La. Ann. 411. See also Hart *v.* Caffery, 39 La. Ann. 894, 2 So. 788.

98. Watson *v.* Bondurant, 30 La. Ann. 1; Barelli *v.* Delassus, 16 La. Ann. 280; Young *v.* New Orleans City Bank, 9 La. Ann. 193; Hyatt *v.* Gallier, 6 La. Ann. 321; Pickett *v.* Foster, 149 U. S. 505, 13 S. Ct. 998, 37 L. ed. 829.

99. Johnson *v.* Lowry, 22 La. Ann. 205 (record office closed for two or three years); Kohn *v.* McHatton, 20 La. Ann. 223 (suspension of prescription during the Civil war).

Possession by mortgage creditor under voidable title.— Peremption of a mortgage by failure to reinscribe cannot take place pending the possession of the mortgaged property by the mortgage creditor, who holds under a voidable tax-sale; and if such sale should be annulled the mortgage will revive with the same rank it held at the date of the sale. New Orleans Ins. Assoc. *v.* Labranche, 31 La. Ann. 839.

1. Norres *v.* Hays, 44 La. Ann. 907, 11 So. 462; Myrick's Succession, 43 La. Ann. 884, 9 So. 498; Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322. *Compare* Roche *v.* Groysilliere, 13 La. 238.

2. McDaniel *v.* Guillory, 23 La. Ann. 544; Batey *v.* Woolfolk, 20 La. Ann. 385; Dupuy *v.* Dashiell, 17 La. 60; Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322.

3. *Alabama.*— Wood *v.* Lake, 62 Ala. 489; De Vendal *v.* Malone, 25 Ala. 272.

Alaska.— Nestor *v.* Holt, 1 Alaska 567.

Arkansas.— Fry *v.* Martin, 33 Ark. 203; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

Illinois.— English *v.* Lindley, 194 Ill. 181, 62 N. E. 522.

Iowa.—Brazleton *v.* Brazleton, 16 Iowa 417.

Kentucky.— Louisville Bldg., etc., Assoc. *v.* Greene, 59 S. W. 508, 22 Ky. L. Rep. 959.

been held that a *bona fide* purchaser will be protected against a prior unrecorded mortgage, although the mortgage is subsequently registered before the registration of the deed to the purchaser.[4] But the rule does not apply where two mortgages are made and executed simultaneously, since neither of them, although first recorded, can be called a "subsequent" conveyance.[5]

(II) *Who Are Bona Fide Purchasers.* To constitute one a *bona fide* purchaser, within the rule just stated, he must have taken without actual notice of the unrecorded mortgage,[6] for a valuable consideration,[7] under some form of deed or conveyance purporting to grant him a title to or interest in the property or a lien upon it.[8] Even if the recording acts are not so framed as expressly to include junior mortgagees within their protection against prior unrecorded mortgages, still a mortgagee is a purchaser and his mortgage is a conveyance under such statutes,[9] and the rule also applies in favor of an assignee of the subsequent

Louisiana.— White *v.* Union Bank, 6 La. Ann. 162.

Michigan.— Belding Sav. Bank *v.* Moore, 118 Mich. 150, 76 N. W. 368; Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924.

New Jersey.— Pancoast *v.* Duval, 26 N. J. Eq. 445.

New York.— Ward *v.* Isbill, 73 Hun 550, 26 N. Y. Suppl. 141; Riley *v.* Hoyt, 29 Hun 114; Jackson *v.* McChesney, 7 Cow. 360, 17 Am. Dec. 521; Jackson *v.* Campbell, 19 Johns. 281; Gouverneur *v.* Lynch, 2 Paige 300.

Pennsylvania.— Burke *v.* Allen, 3 Yeates 351.

South Carolina.— Williams *v.* Beard, 1 S. C. 309; Barnwell *v.* Porteus, 2 Hill Eq. 219.

Virginia.— Hunton *v.* Wood, 101 Va. 54, 43 S. E. 186; Preston *v.* Nash, 76 Va. 1.

Washington.— Coolidge *v.* Schering, 32 Wash. 557, 73 Pac. 682.

West Virginia.— Cox *v.* Wayt, 26 W. Va. 807.

Wisconsin.— Allison *v.* Manzke, 118 Wis. 11, 94 N. W. 659.

England.— Battison *v.* Hobson, [1896] 2 Ch. 403, 65 L. J. Ch. 695, 74 L. T. Rep. N. S. 689, 44 Wkly. Rep. 615; Credland *v.* Potter, L. R. 10 Ch. 8, 44 L. J. Ch. 169, 31 L. T. Rep. N. S. 522, 23 Wkly. Rep. 36; *In re* Wight, L. R. 16 Eq. 41, 43 L. J. Ch. 66, 28 L. T. Rep. N. S. 491, 21 Wkly. Rep. 667.

Canada.— Vansickler *v.* Pettit, 5 Can. L. J. 41.

See 35 Cent. Dig. tit. "Mortgages," § 413.

Courts of equity, notwithstanding the recording acts, will control and dispose of so much of the purchase-money of land as remains unpaid, so as to protect a previous *bona fide* purchaser by an unrecorded mortgage, so far as this can be done without infringing upon the equitable rights of the subsequent purchaser or of third persons. Wynn *v.* Carter, 20 Wis. 107.

4. Hawley *v.* Bennett, 5 Paige (N. Y.) 104. And see McGuire *v.* Barker, 61 Ga. 339, construing Code, § 1957.

5. Greene *v.* Warnick, 64 N. Y. 220.

6. Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64.

Purchaser from purchaser with notice.— A purchaser of land, without notice of a prior unrecorded mortgage, who takes from a purchaser with notice of it, will not be affected by the notice to his vendor. Varick *v.* Briggs, 6 Paige (N. Y.) 323. And see Ward *v.* Isbill, 73 Hun (N. Y.) 550, 26 N. Y. Suppl. 141.

7. Schultze *v.* Houfes, 96 Ill. 335; Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118; Merriman *v.* Hyde, 9 Nebr. 113, 2 N. W. 218.

Part payment.— Where a purchaser of land receives notice of a prior unrecorded mortgage on it, after he has paid part of the purchase-money, but not all, he cannot claim the protection of a purchaser without notice as to the unpaid balance. Warner *v.* Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Thomas *v.* Stone, Walk. (Mich.) 117.

Payment of preëxisting debt as consideration.— An absolute payment and discharge in whole or in part of a preëxisting debt is sufficient to make the creditor a *bona fide* purchaser for a valuable consideration. Sipley *v.* Wass, 49 N. J. Eq. 463, 24 Atl. 233. But see Zorn *v.* Savannah, etc., R. Co., 5 S. C. 90, holding that the protection accorded to a purchaser for value cannot be claimed where the consideration consisted merely in giving credit for the amount of the purchase-money on claims held by the purchaser against the vendor.

8. Mellon's Appeal, 32 Pa. St. 121, holding that an assignee for the benefit of creditors is not a "purchaser" within the meaning of these rules. And see Garner *v.* Boyle, 97 Tex. 460, 79 S. W. 1066.

A grantee who takes merely a quitclaim deed is not a *bona fide* purchaser under the recording acts, and his rights are subordinate to a prior unrecorded mortgage. Snow *v.* Lake, 20 Fla. 656, 51 Am. Rep. 625.

Execution purchaser.— In the absence of notice, an unrecorded mortgage is void as against a purchaser at a sale under execution against the mortgagor (Barker *v.* Bell, 37 Ala. 354); but not, it seems, where the mortgage, although unrecorded at the time the writ issued, was recorded before the sale (Sappington *v.* Oeschli, 49 Mo. 244).

9. *Iowa.*— Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139; Porter *v.* Green, 4 Iowa 571.

New Jersey.— The ancient statutes of this state did not extend this protection to junior mortgagees, and it was considered that they were not purchasers. Low *v.* Goldtrap, 1 N. J. L. 272.

mortgage,[10] and in favor of the trustee in a deed of trust and the creditor secured by it.[11]

b. As Against Subsequent Creditors — (i) *In General.* As the laws are framed in some states, an unrecorded mortgage is invalid as against subsequent creditors of any rank or class;[12] but in others only against creditors who have acquired a specific lien or charge upon the property, not including general unsecured creditors,[13] attaching creditors,[14] or creditors by writ of elegit.[15]

(ii) *Judgment and Execution Creditors.* In most jurisdictions a creditor who obtains a judgment and has the same duly entered or docketed, without notice of an unrecorded mortgage previously given by his debtor on land to which the lien of the judgment attaches, will take precedence of the mortgage, and as to him the mortgage will not be enforceable against the land until he is satisfied.[16]

North Carolina.— Moore *v.* Ragland, 74 N. C. 343.

Wisconsin.— Allison *v.* Manzke, 118 Wis. 11, 94 N. W. 659; Rowell *v.* Williams, 54 Wis. 636, 12 N. W. 86.

United States.—Coonrod *v.* Kelly, 113 Fed. 378, construing N. J. Rev. St. § 22.

See 35 Cent. Dig. tit. "Mortgages," § 413.

Second mortgage not recorded.— A second mortgagee who has not had his mortgage recorded is not to be regarded as a subsequent *bona fide* purchaser. Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603.

10. Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924.

11. Davis *v.* Beazley, 75 Va. 491; Cox *v.* Wayt, 26 W. Va. 807.

12. *Kentucky.*— Helm *v.* Logan, 4 Bibb 78.

Maryland.— Sixth Ward Bldg. Assoc. No. 5 *v.* Willson, 41 Md. 506.

Pennsylvania.— Nice's Appeal, 54 Pa. St. 200, holding that a debt secured by an unrecorded mortgage, without possession under it taken in the lifetime of the mortgagor, cannot, upon his death, take precedence of his general debts, but must come in for its share as one of them.

South Carolina.— Armstrong *v.* Carwile, 56 S. C. 463, 35 S. E. 196.

Tennessee.— Henderson *v.* McGhee, 6 Heisk. 55.

See 35 Cent. Dig. tit. "Mortgages," § 417.

13. Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537; Kirkpatrick *v.* Caldwell, 32 Ind. 299; Sappington *v.* Oeschli, 49 Mo. 244; Dulaney *v.* Willis, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815.

14. Rea *v.* Wilson, 112 Iowa 517, 84 N. W. 539; Campion *v.* Kille, 15 N. J. Eq. 476 [*affirming* 14 N. J. Eq. 229]; Murphy *v.* Plankinton Bank, 13 S. D. 501, 83 N. W. 575. *Contra,* Beamer *v.* Freeman, 84 Cal. 554, 24 Pac. 169. *Compare* Wheaton *v.* Dyer, 15 Conn. 307.

15. Childers *v.* Smith, Gilm. (Va.) 196.

16. *Alabama.*— Chadwick *v.* Carson, 78 Ala. 116; Barker *v.* Bell, 37 Ala. 354; De Vendell *v.* Hamilton, 27 Ala. 156.

Arkansas.— Cleveland *v.* Shannon, (1889) 12 S. W. 497; Hawkins *v.* Files, 51 Ark. 417, 11 S. W. 681.

Florida.— Eldridge *v.* Post, 20 Fla. 579.

Georgia.— New England Mortg. Security Co. *v.* Ober, 84 Ga. 294, 10 S. E. 625; Holst *v.* Burrus, 79 Ga. 111, 4 S. E. 108; Richards *v.* Myers, 63 Ga. 762; Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

Minnesota.— A judgment lien takes precedence of an unrecorded mortgage only when the judgment is against the person in whose name the title appears of record, prior to the recording of the mortgage. Golcher *v.* Brisbin, 20 Minn. 453. And see Dutton *v.* McReynolds, 31 Minn. 66, 16 N. W. 468.

Mississippi.— Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 846.

New Jersey.— Sipley *v.* Wass, 49 N. J. Eq. 463, 24 Atl. 233; Voorhis *v.* Westervelt, 43 N. J. Eq. 642, 12 Atl. 533, 3 Am. St. Rep. 315 [*affirming* 42 N. J. Eq. 179, 6 Atl. 665]. It appears from the two cases last cited that the statutory provision making an unrecorded mortgage void as against a subsequent judgment creditor without notice does not apply to a mortgage given by an ancestor as against a judgment recovered against his heir.

New York.— Thomas *v.* Kelsey, 30 Barb. 268, holding that a subsequent judgment will not be preferred over a prior unrecorded mortgage given to secure future advances, unless the mortgage was left unrecorded with an actual fraudulent intent on the part of the mortgagee. A mortgage not registered has a preference over a subsequent judgment not docketed. Jackson *v.* Dubois, 4 Johns. 216. And see Schmidt *v.* Hoyt, 1 Edw. 651.

North Carolina.— Tarboro *v.* Micks, 118 N. C. 162, 24 S. E. 729; Bostic *v.* Young, 116 N. C. 766, 21 S. E. 552.

Ohio.— Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846; Tousley *v.* Tousley, 5 Ohio St. 78; White *v.* Denman, 1 Ohio St. 110; Jackson *v.* Luce, 14 Ohio 514; Mayham *v.* Coombs, 14 Ohio 428; Acklin *v.* Waltermier, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629.

Oregon.— See Meier *v.* Kelly, 22 Oreg. 136, 29 Pac. 265.

Pennsylvania.— Lahr's Appeal, 90 Pa. St. 507; Jaques *v.* Weeks, 7 Watts 261.

Texas.— Barnett *v.* Squyres, 93 Tex. 193, 54 S. W. 241, 77 Am. St. Rep. 854.

Virginia.— Hunton *v.* Wood, 101 Va. 54, 43 S. E. 186; Heermans *v.* Montague, (1890) 20 S. E. 899; McCance *v.* Taylor, 10 Gratt. 580; McCullough *v.* Sommerville, 8 Leigh 415.

United States.— Lash *v.* Hardick, 14 Fed. Cas. No. 8,097, 5 Dill. 505, 5 Reporter 552.

See 35 Cent. Dig. tit. "Mortgages," § 418.

In some, however, the contrary rule prevails, and the judgment is a lien on the equity of redemption.[17]

c. As Between Two Unrecorded Mortgages. As between the holders of successive mortgages on the same property, neither of whom has notice of the other's lien, where neither mortgage is recorded and the equities are otherwise equal, the one first in time is superior in right.[18]

3. Effect of Actual Notice. As the object of the registry laws usually is only to give notice of conveyances or encumbrances of land to persons subsequently dealing with it, actual knowledge of the existence of a prior unrecorded mortgage will have the same effect upon such persons as if the mortgage had been duly recorded.[19] This rule applies alike to persons subsequently taking a deed of conveyance of the premises,[20] to junior mortgagees,[21] and to persons afterward

Execution levied before notice.— Such a creditor's position is even stronger if he has caused execution on his judgment to be levied on the land before notice of the mortgage. Tate *v.* Brittain, 10 N. C. 55; Davidson *v.* Beard, 9 N. C. 520; Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 26 L. ed. 1215. And in Kentucky it has been held that execution must be sued out before notice. Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606.

17. *California.*— Ukiah Bank *v.* Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170.

Iowa.— Sigworth *v.* Meriam, 66 Iowa 477, 24 N. W. 4; Hays *v.* Thode, 18 Iowa 51; Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139.

Kansas.— Swarts *v.* Stees, 2 Kan. 236, 85 Am. Dec. 588.

Kentucky.— See Righter *v.* Forrester, 1 Bush 278.

Montana.— Vaughn *v.* Schmalsle, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411.

South Carolina.— Carraway *v.* Carraway, 27 S. C. 576, 5 S. E. 157; Coleman *v.* Hamburg Bank, 2 Strobh. Eq. 285, 49 Am. Dec. 671; Ashe *v.* Livingston, 2 Bay 80; Barnwell *v.* Porteus, 2 Hill Eq. 219.

See 35 Cent. Dig. tit. "Mortgages," § 418.

18. Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603. But *compare* Coster *v.* Georgia Bank, 24 Ala. 37, holding that an unrecorded mortgage is void, under the laws of Alabama, as to a subsequent mortgagee without notice, although the latter's mortgage is also unrecorded.

19. *Alabama.*— Wyatt *v.* Stewart, 34 Ala. 716; Dearing *v.* Watkins, 16 Ala. 20; Allen *v.* Montgomery R. Co., 11 Ala. 437.

Connecticut.— Mead *v.* New York, etc., R. Co., 45 Conn. 199.

Florida.— Thompson *v.* Maxwell, 16 Fla. 773.

Kentucky.— King *v.* Huni, 118 Ky. 450, 81 S. W. 254, 25 Ky. L. Rep. 2266, 85 S. W. 723.

Maine.— Copeland *v.* Copeland, 28 Me. 525.

Pennsylvania.— Solms *v.* McCulloch, 5 Pa. St. 473.

South Carolina.— Barr *v.* Kinard, 3 Strobh. 73; Martin *v.* Sale, Bailey Eq. 1.

United States.— Lord *v.* Doyle, 15 Fed. Cas. No. 8,505, 1 Cliff. 453.

See 35 Cent. Dig. tit. "Mortgages," § 425.

In Louisiana and North Carolina it is otherwise. Adams *v.* Daunis, 29 La. Ann. 315; Hinton *v.* Leigh, 102 N. C. 28, 8 S. E. 890; Robinson *v.* Willoughby, 70 N. C. 358; Ridings *v.* Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401. As to rule under earlier statutes see Smith *v.* Nettles, 13 La. Ann. 241; Noble *v.* Cooper, 7 Rob. (La.) 44; Rachal *v.* Normand, 6 Rob. (La.) 88; Georgia Planters Bank *v.* Allard, 8 Mart. N. S. (La.) 136; Parker *v.* Walden, 6 Mart. N. S. (La.) 713; Pike *v.* Armstead, 16 N. C. 110.

The burden of proving that a party had knowledge of the existence of a prior unrecorded mortgage is upon the party asserting such knowledge. Lindley *v.* English, 89 Ill. App. 538 [*affirmed* in 194 Ill. 181, 62 N. E. 522].

20. *California.*— May *v.* Borel, 12 Cal. 91.

Illinois.— Ætna L. Ins. Co. *v.* Ford, 89 Ill. 252; Aurora Nat. Loan Assoc. *v.* Spencer, 81 Ill. App. 622.

Maryland.— Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25.

New Jersey.— Smallwood *v.* Lewin, 15 N. J. Eq. 60.

New York.— Butler *v.* Viele, 44 Barb. 166; Dunham *v.* Dey, 15 Johns. 556, 8 Am. Dec. 282.

Pennsylvania.— Hibberd *v.* Bovier, 1 Grant 266; Stroud *v.* Lockart, 4 Dall. 153, 1 L. ed. 779.

Texas.— Griffin *v.* Stone River Nat. Bank, (Civ. App. 1904) 80 S. W. 254.

Virginia.— Rootes *v.* Holliday, 6 Munf. 251.

Wisconsin.— Reichert *v.* Neuser, 93 Wis. 513, 67 N. W. 939.

England.— Greaves *v.* Tofield, 14 Ch. D. 563, 50 L. J. Ch. 118, 43 L. T. Rep. N. S. 100, 28 Wkly. Rep. 840; Lee *v.* Clutton, 46 L. J. Ch. 48, 35 L. T. Rep. N. S. 84, 24 Wkly. Rep. 942; Wormald *v.* Maitland, 35 L. J. Ch. 69, 12 L. T. Rep. N. S. 535, 6 New Rep. 218, 13 Wkly. Rep. 832.

See 35 Cent. Dig. tit. "Mortgages," § 425.

But see Butler *v.* Wheeler, 6 Ky. L. Rep. 477; Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846.

21. *Iowa.*— Bell *v.* Thomas, 2 Iowa 384.

Kentucky.— Underwood *v.* Ogden, 6 B. Mon. 606; Flowers *v.* Moorman, 86 S. W. 545, 27 Ky. L. Rep. 728.

New Jersey.— Conover *v.* Van Mater, 18

acquiring specific liens on the premises, such as subsequent judgment creditors.[22]

G. Transactions Subsequent to Mortgage Affecting Priority — 1. In General. The holder of a valid lien or encumbrance on land cannot be deprived of his security, nor postponed to junior liens, by any act of his debtor subsequent to the attaching of his lien, to which he is not a consenting party,[23] unless power to do such act was expressly reserved in the mortgage;[24] nor by any agreement or arrangement between his debtor and the junior lienors,[25] although such a result may follow from his own fraudulent conduct toward the later lienors, or from his negligence in failing to assert or rely upon his security when he is bound to do so,[26]

N. J. Eq. 481; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

New York.— Jackson *v.* Van Valkenburgh, 8 Cow. 260. See also Fort *v.* Burch, 5 Den. 187.

Tennessee.— Kirkpatrick *v.* Ward, 5 Lea 434.

Virginia.— Nat. Mut. Bldg., etc., Assoc. *v.* Blair, 98 Va. 490, 36 S. E. 513; Beverley *v.* Brooke, 2 Leigh 425.

England.— Rolland *v.* Hart, L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. Rep. N. S. 191, 19 Wkly. Rep. 962; Bradley *v.* Riches, 9 Ch. D. 189, 47 L. J. Ch. 811, 38 L. T. Rep. N. S. 810, 26 Wkly. Rep. 910; Punchard *v.* Tomkins, 31 Wkly. Rep. 286.

See 35 Cent. Dig. tit. "Mortgages," § 425.

22. *Illinois.*— Williams *v.* Tatnall, 29 Ill. 553.

Indiana.— Sinking Fund Com'rs *v.* Wilson, 1 Ind. 356.

Maine.— Bunker *v.* Gordon, 81 Me. 66, 16 Atl. 341.

Minnesota.— Lamberton *v.* Winona Merchants' Nat. Bank, 24 Minn. 281.

New Jersey.— Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 7 Atl. 873.

Pennsylvania.— Britton's Appeal, 45 Pa. St. 172. *Compare* Hulings *v.* Guthrie, 4 Pa. St. 123; Hibbard *v.* Bovier, 1 Grant 266.

See 35 Cent. Dig. tit. "Mortgages," § 425.

Time of notice.— According to some of the authorities a creditor is not postponed to a prior unrecorded mortgage unless he had notice of the same at or before the recovery of his judgment, notice acquired after the judgment, although before execution or levy, is not sufficient. Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Uhler *v.* Hutchinson, 23 Pa. St. 110. And see Davidson *v.* Cowan, 16 N. C. 470.

The mere statement of a debtor to his creditor, who is inquiring after the debtor's property with a view to compelling payment of his debt out of it, that his property or any particular part of it is mortgaged for all it is worth, is not notice of the existence of any particular mortgage, so as to give an unrecorded mortgage precedence over a judgment subsequently obtained by the creditor. Condit *v* Wilson, 36 N. J. Eq. 370.

23. New Orleans Nat. Bank *v.* Raymond, 29 La. Ann. 355, 29 Am. Rep. 335; Chew *v.* Maryland Farmers' Bank, 2 Md. Ch. 231; Washburn *v.* Hammond, 151 Mass. 132, 24 N. E. 33.

Dedication of land for a street by a mortgagor does not affect the rights of a prior mortgagee. McMannis *v.* Butler, 49 Barb. (N. Y.) 176. And see Alton *v.* Fishback, 181 Ill. 396, 55 N. E. 150; Elson *v.* Comstock, 150 Ill. 303, 37 N. E. 207; Smith *v.* Heath, 102 Ill. 130; Gridley *v.* Hopkins, 84 Ill. 528.

A mortgagor's confession of judgment, after the execution of the mortgage and the maturity of the debt, does not affect the mortgage security. Flanagan *v.* Westcott, 11 N. J. Eq. 264.

Payment of usury.— Where a voluntary payment of an excessive rate of interest is made on a debt secured by mortgage, subsequent purchasers of the mortgaged premises, unless they show some special equity peculiar to themselves, have no greater rights in that respect than the mortgagor. Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130.

24. Sands *v.* Kaukauna Water Power Co., 115 Wis. 229, 91 N. W. 679.

25. New York Store Mercantile Co. *v.* Thurmond, 186 Mo. 410, 85 S. W. 333; Frost *v.* Yonkers Sav. Bank, 8 Hun (N. Y.) 26 [*reversed* on other grounds in 70 N. Y. 553, 26 Am. Rep. 627]; Cathcart's Appeal, 13 Pa. St. 416.

26. See State *v.* Lake, 17 Iowa 215; Gillam *v.* Barnes, 123 Mich. 119, 82 N. W. 38; Bloomer *v.* Burke, 94 Minn. 15, 101 N. W. 974.

Judgment lien becoming dormant.— Where real estate is subject to two liens, the elder a judgment and the younger a mortgage, if the judgment lies dormant for five years, its priority is lost. Miner *v.* Wallace, 10 Ohio 403.

After a mortgage note has expired by prescription, it is not within the power of the parties to revive the mortgage, so far as it would affect property in the hands of third persons. McDaniel *v.* Lalanne, 28 La. Ann. 661.

Insolvency of mortgagor.— Where the mortgagor takes the benefit of the insolvency law, the failure of the mortgagee to prove his debt in the insolvency proceedings does not forfeit his lien on the land. Bennett *v.* Calhoun Loan, etc., Assoc., 9 Rich. Eq. (S. C.) 163.

Failure to issue an order of sale on a decree of foreclosure within a year does not postpone the mortgagee's lien to other judgment liens, whereon execution has been issued within the year and levied on the mort-

as also from his explicit waiver or release of his lien in favor of junior encumbrancers,[27] from his receiving satisfaction by full payment or other performance of the condition of his mortgage,[28] or from the revesting of the title in the mortgagor.[29] And conversely, a junior mortgagee cannot be prejudiced in respect to his security by an agreement of the debtor with the senior lienor to which he is no party,[30] although he may be postponed to a claim which defeats or displaces the first encumbrance.[31]

2. Senior Mortgagee Impairing Security of Junior. To give a junior mortgage precedence over a senior one, there must be either an agreement to that effect or a superior equity in the junior mortgagee.[32] Such an equity, however, arises from anything done by the first mortgagee to the prejudice of the second, or to the impairment of his security, with actual knowledge of the existence of the second mortgage.[33] Thus, if the second mortgage covers only a portion of the lands embraced in the first mortgage, and the first mortgagee releases from his mortgage that portion of the property on which the second is not a lien, he will not be allowed to enforce his security against the premises common to both mortgages, unless he will first deduct the value of the land so released.[34] The same

gaged premises. Jackson *v.* King, 10 Kan. App. 576, 63 Pac. 297.

Settlement fraudulent as to creditors.— The fact that a mortgage is taken subject to a settlement, which proves to be fraudulent as to creditors, does not render the mortgagee a party to the fraud, so as to estop him from asserting his mortgage as a lien prior to the settlement. Case *v.* Hewitt, 10 Ohio S. & C. Pl. Dec. 365, 7 Ohio N. P. 609.

27. Baker *v.* Wimpee, 22 Ga. 69; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Barnum *v.* Bobb, 68 Mo. 619; Hill *v.* West, 8 Ohio 222, 31 Am. Dec. 442.

28. Desmond *v.* Lanphier, 86 Ill. App. 101 [*affirmed* in 187 Ill. 370, 58 N. E. 343]; National L. Ins. Co. *v.* Ayres, 111 Iowa 200, 82 N. W. 607; Conlon *v.* Minor, 94 N. Y. App. Div. 458, 88 N. Y. Suppl. 224. And see Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177; Bowling *v.* Garrett, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377.

29. See Johnston *v.* Lemond, 109 N. C. 643, 14 S. E. 86.

30. Leech *v.* Karthaus, 141 Ala. 509, 37 So. 696; Hoyt *v.* Doughty, 4 Sandf. (N. Y.) 462. See Phillips *v.* Thompson, 2 Johns. Ch. (N. Y.) 418, 7 Am. Dec. 535.

Agreement that deed intended as mortgage shall become indefeasible.— Where a deed absolute in form is given to secure the payment of money, a subsequent parol agreement that the deed shall become indefeasible on the payment of a certain sum will not release the equity of redemption from the lien of a judgment entered between the agreement and the payment of the money. Van Keuren *v* McLaughlin, 19 N. J. Eq. 187.

31. Sayre *v.* Hewes, 32 N. J. Eq. 652 (holding that where a third encumbrancer acquires a right of priority over the first, but the act or omission from which such right flows does not change his relative position toward the second; yet, as it is impossible to put him in advance of the first without advancing him also over the second, his lien must necessarily be advanced over both); Simon *v.* Openheimer, 20 Fed. 553 (holding that a second mortgage encumbers only the remnant left after satisfying the first; and the holder of a judgment who, as against himself, defeats the first mortgage, comes in before the second mortgage, up to the amount of the first mortgage). *Compare* Oliver *v.* Stevens, 1 Rob. (La.) 86, holding that the revocation of a first mortgage in favor of a third on property previously sold under the second cannot affect the latter nor the purchaser; its only effect is to give the third mortgage a priority on the proceeds over the first up to its amount.

32. Brown *v.* Baker, 22 Nebr. 708, 36 N. W. 273. And see Houfes *v.* Schultze, 2 Ill. App. 196 [*affirmed* in 96 Ill. 335], holding that where first and second mortgagees receive notice, each of the other's equities, concurrently, the equities being of equal merit, the oldest in point of time will prevail.

Promise to see other mortgagee paid.— Where two mortgages stand on equal footing and are to be paid out of the same fund, the written promise of one mortgagee that he will see the other paid will postpone the former's mortgage and give priority to the latter. Sanders *v.* Barlow, 21 Fed. 836.

33. Bailey *v.* Gould, Walk. (Mich.) 478.

34. *California.*— Dennis *v.* Burritt, 6 Cal. 670.

Connecticut.— Brooks *v.* Benham, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87; Lewis *v.* Hinman, 56 Conn. 55, 13 Atl. 143.

Florida.— Ellis *v.* Fairbanks, 38 Fla. 257, 21 So. 107.

Illinois.— Ames *v.* Witbeck, 179 Ill. 458, 53 N. E. 969; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Hawhe *v.* Snydaker, 86 Ill. 197.

Michigan.— Dewey *v.* Ingersoll, 42 Mich. 17, 3 N. W. 235.

Minnesota.— Howard *v.* Burns, 73 Minn. 356, 76 N. W. 202.

Nebraska.— Anderson *v.* McCloud-Love-Live-Stock Commission Co., 58 Nebr. 670, 79 N. W. 613.

result follows where the first mortgagee, receiving the rents or profits of the land or the proceeds of crops, fails to apply them in reduction of his mortgage debt,[35] or where he commits acts of waste, depreciating the property and so impairing the security of the junior mortgagee.[36] But ordinarily the senior mortgagee is not required to see to the application of the proceeds of his loan, although it was agreed that they should be used in erecting buildings, which, if done, would enhance the security of the junior encumbrancer.[37] Again the senior may be postponed to the junior lien if the holder of the former fraudulently concealed its existence, but his mere silence when he knows a second mortgage is about to be made is not enough.[38]

3. Displacement of Mortgage Lien by Receiver's Certificates. Where a court of equity takes charge of business property, through its receiver, and authorizes the continuance of the business or the expenditure of money, as a means of preserving the estate for those entitled, it is competent to make the receiver's certificates of indebtedness a charge upon the property superior to the lien of a mortgage already existing; but this is a power exercised sparingly and with great caution,[39] and there is good authority for stating that it should be exercised only in the case of railroads, or other public service corporations, and not in the case of corporations of a purely private nature.[40]

4. Transactions Affecting Amount of Lien. After a second mortgage has attached to property, the first mortgagee will not be allowed to increase the debt secured by his mortgage, to the prejudice of the second, as by extending it to cover debts not originally included, or fixing a higher rate of interest or compounding interest,[41] or changing the medium of payment.[42]

New Jersey.— Ward *v.* Hague, 25 N. J. Eq. 397; Blair *v.* Ward, 10 N. J. Eq. 119. And see Longstreet *v.* Brown, (Ch. 1897) 37 Atl. 56.

North Dakota.— Sarles *v.* McGee, 1 N. D. 365, 48 N. W. 231, 26 Am. St. Rep. 633.

Virginia.—Lynchburg Perpetual Bldg., etc., Assoc. *v.* Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851.

Wisconsin.— Straight *v.* Harris, 14 Wis. 509.

Canada.— Canada Trust, etc., Co. *v.* Boulton, 18 Grant Ch. (U. C.) 234; Beck *v.* Moffatt, 17 Grant Ch. (U. C.) 601.

Security sufficient for both.— A first mortgagee having knowledge of a subsequent mortgage on a part of the premises may release the property exclusively covered by his mortgage, when the remaining portion is sufficient to secure both mortgages. Blanchette *v.* Farsch, 18 S. D. 20, 99 N. W. 79.

Actual notice necessary.— But this rule applies only where the first mortgagee has actual notice of the second, and such constructive notice as may arise merely from the recording of the second mortgage will not be sufficient. Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Sherman *v.* Foster, 158 N. Y. 587, 53 N. E. 504. And see cases cited *supra*, this note.

35. Hitchcock *v.* Fortier, 65 Ill. 239; Wigram *v.* Buckley, [1894] 3 Ch. 483, 63 L. J. Ch. 689, 71 L. T. Rep. N. S. 287, 7 Reports 469, 43 Wkly. Rep. 147; Bank of British North America *v.* Heaton, 1 Ch. Chamb. (U. C.) 175. *Compare* Lehman *v.* Godberry, 40 La. Ann. 219, 4 So. 316; Whitney *v.* Traynor, 74 Wis. 289, 42 N. W. 267.

36. Whorton *v.* Webster, 56 Wis. 356, 14 N. W. 280.

37. Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

38. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Paine *v.* French, 4 Ohio 318; Meyers *v.* Harrison, 1 Grant Ch. (U. C.) 449.

39. Makeel *v.* Hotchkiss, 190 Ill. 311, 60 N. E. 524, 82 Am. St. Rep. 131 [*affirming* 87 Ill. App. 623]. And see Humphreys *v.* Allen, 101 Ill. 490.

40. Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603.

41. *Iowa.*— Crooks *v.* Jenkins, 124 Iowa 317, 100 N. W. 82, 104 Am. St. Rep. 326.

Maryland.— Brown *v.* Hardcastle, 63 Md. 484; Fitzhugh *v.* McPherson, 9 Gill & J. 51.

New York.— St. Andrew's Church *v.* Tompkins, 7 Johns. Ch. 14.

Vermont.— Pettis *v.* Darling, 57 Vt. 647. And see Ottaquechee Sav. Bank *v.* Holt, 58 Vt. 166, 1 Atl. 485.

West Virginia.— Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

Wisconsin.— Bassett *v.* McDonel, 13 Wis. 444.

United States.— *In re* Hutchinson, 12 Fed. Cas. No. 6,954, 2 Hughes 245.

See 35 Cent. Dig. tit. "Mortgages," § 427.

42. See Belloc *v.* Davis, 38 Cal. 242, holding that intervening encumbrancers cannot be affected by a subsequent agreement of the mortgagor to pay the mortgage debt in gold, when it was originally made payable in legal tender notes.

5. Doctrine of Tacking. It is a settled rule of the English equity courts that a first mortgagee of land who acquires by purchase a third encumbrance on the same property may "tack" or attach the latter to his original mortgage debt, so as to require that both shall be paid on a redemption from him, or out of the proceeds of a foreclosure, although the effect is to cut out the second lien, or at least to postpone it to the third as well as to the first,[43] provided the first mortgagee had no notice of the second lien, for if he knew of it, this cannot be done.[44] On the same principle, and under the same circumstances, the first mortgagee may tack to his mortgage debt a judgment against the mortgagor of which he becomes the owner,[45] or a bond in which the mortgagor is obligor,[46] and possibly even a simple contract debt.[47] By the same rule, where the third mortgagee pays off the first encumbrance and takes an assignment of it, he may require satisfaction of both his claims, in preference to the second mortgage, provided he had no notice of the latter.[48] But the doctrine of tacking does not apply in those districts or provinces where registry acts are in force,[49] and is not recognized or allowed at all in the United States, being not only harsh and unreasonable, but entirely contrary to the spirit and purpose of the recording laws.[50] The rule of equity which allows the holder of several mortgages, created by the same mortgagor on separate properties, to consolidate the debts and insist on being redeemed in respect to all before releasing any of his securities, is not tacking.[51]

6. Junior Mortgagee Paying Off Senior. Where a junior encumbrancer, for

43. Lloyd *v.* Attwood, 3 De G. & J. 614, 5 Jur. N. S. 1322, 29 L. J. Ch. 97, 60 Eng. Ch. 614, 44 Eng. Reprint 1405; *Ex p.* Berridge, 7 Jur. 1141, 3 Mont. D. & De G. 464. *Compare* Frere *v.* Moore, 8 Price 475, 22 Rev. Rep. 759, holding that where several mortgagees all have equal equity, and the legal estate is obtained by none of them, but remains in trustees throughout, the encumbrances are available according to their several dates only, and there can be no preference between them, so that the first mortgagee, holding also the third, cannot tack the two securities to the exclusion of the second.

Applicable only in the case of an existing debt.— *In re* Kirkwood, L. R. 1 Ir. 108.

Where the equity of redemption belongs to different persons at the time when the mortgagee's title to both estates accrued the doctrine is inapplicable. White *v.* Hillacre, 4 Jur. 102, 3 Y. & Coll. 597.

44. Toulmin *v.* Steere, 3 Meriv. 210, 17 Rev. Rep. 67, 36 Eng. Reprint 81.

45. Godfrey *v.* Watson, 3 Atk. 517, 26 Eng. Reprint 1098; Shepherd *v.* Titley, 2 Atk. 348, 26 Eng. Reprint 612; *Ex p.* Knott, 11 Ves. Jr. 609, 8 Rev. Rep. 254, 32 Eng. Reprint 1225.

46. Peers *v.* Baldwyn, 2 Eq. Cas. Abr. 611, 22 Eng. Reprint 513. But *compare* Hamerton *v.* Rogers, 1 Ves. Jr. 513, 30 Eng. Reprint 464.

47. Uppington *v.* Bullen, 1 C. & L. 291, 2 Dr. & War. 184; Gordon *v.* Lothian, 2 Grant Ch. (U. C.) 293. *Compare* Ferguson *v.* Frontenac, 21 Grant Ch. (U. C.) 188.

Against whom.— The better doctrine appears to be that a mortgagee may tack a simple contract debt as against the heir or devisee of the mortgagor, but not as against an intervening lien creditor. Thomas *v.* Thomas, 22 Beav. 341, 25 L. J. Ch. 391, 4 Wkly. Rep. 345, 52 Eng. Reprint 1139; Rolfe *v.* Chester, 20 Beav. 610, 25 L. J. Ch. 244, 52 Eng. Reprint 739.

48. Spencer *v.* Pearson, 24 Beav. 266, 53 Eng. Reprint 360; Belchier *v.* Renforth, 5 Bro. P. C. 292, 2 Eng. Reprint 686; Brace *v.* Marlborough, Moseley 50, 25 Eng. Reprint 264, 2 P. Wms. 491, 24 Eng. Reprint 829; Hasket *v.* Strong, 2 Str. 689. *Contra*, McMurray *v.* Burnham, 2 Grant Ch. (U. C.) 289.

Tacking judgment.— Where a third mortgagee, without notice, buys in the first encumbrance, being a satisfied judgment, he may have the benefit of it. Edmunds *v.* Povey, 1 Vern. Ch. 187, 23 Eng. Reprint 404.

49. Tenison *v.* Sweeney, 7 Ir. Eq. 511, 1 J. & L. 710; Latouche *v.* Dunsany, 1 Sch. & Lef. 137 (6 Anne, c. 2); McDonald *v.* McDonald, 14 Grant Ch. (U. C.) 133. *Compare* McLaren *v.* Fraser, 17 Grant Ch. (U. C.) 533, holding that a mortgagor's devisee will not be entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor, this not being such tacking as the registry act forbids.

50. *Connecticut.*— Farrell *v.* Lewis, 56 Conn. 280, 14 Atl. 931; Orvis *v.* Newell, 17 Conn. 97.

Louisiana.— Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762.

Michigan.— Wing *v.* McDowell, Walk. 175.

New York.— Grant *v.* U. S. Bank, 1 Cai. Cas. 112.

Ohio.— Fitch *v.* Mendenhall, 17 Ohio 578; Towner *v.* Wells, 8 Ohio 136.

Virginia.— Siter *v.* McClanachan, 2 Gratt. 280; Colquhoun *v.* Atkinson, 6 Munf. 550.

51. Scottish American Inv. Co. *v.* Tennant, 19 Ont. 263; Fraser *v.* Nagle, 16 Ont. 241; Johnston *v.* Reid, 29 Grant Ch. (U. C.) 293; Brower *v.* Canadian Permanent Bldg. Assoc.,

his own protection, pays off the senior lien on the property, it is not necessarily an extinguishment of the elder lien, but he will be entitled to an assignment of it, or to be subrogated to the rights of the original holder of such senior lien,[52] and to its full amount, irrespective of the sum he may have paid for it.[53] But if there are intervening liens, he cannot tack his third or later encumbrance to the first. He will indeed succeed to the rights of the first mortgagee, but only in respect to the debt secured by such mortgage, and cannot take satisfaction also of his inferior lien to the prejudice of such intervening lienors.[54]

7. Extension of Time For Payment. Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgage merely on the ground of such extension,[55] unless perhaps where he occupies the position of a surety for the first mortgage debt, and the extension is made without his consent.[56]

8. Substitution or Renewal of Mortgages. Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor,[57] especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to

24 Grant Ch. (U. C.) 509; Dominion Sav. Soc. *v.* Kittridge, 23 Grant Ch. (U. C.) 631.

52. Cullum *v.* Mobile Branch Bank, 23 Ala. 797; Wahl *v.* Zoelck, 178 Ill. 158, 52 N. E. 870; Ebert *v.* Gerding, 116 Ill. 216, 5 N. E. 591; Tyrrell *v.* Ward, 102 Ill. 29; Mosier *v.* Norton, 83 Ill. 519; Pursley *v.* Forth, 82 Ill. 327; Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295]; Loeb *v.* Fleming, 15 Ill. App. 503; Bell *v.* Sunderland Bldg. Soc., 24 Ch. D. 618, 53 L. J. Ch. 509, 49 L. T. Rep. N. S. 555; Watts *v.* Symes, 1 De G. M. & G. 240, 16 Jur. 114, 50 Eng. Ch. 240, 42 Eng. Reprint 544; Thompson *v.* Warwick, 21 Ont. App. 637; Fleming *v.* McDougall, 8 Ont. Pr. 200.

53. Pease *v.* Benson, 28 Me. 336; Knox *v.* Galligan, 21 Wis. 470; Darcy *v.* Hall, 1 Vern. Ch. 49, 23 Eng. Reprint 302.

54. Magilton *v.* Holbert, 52 Hun (N. Y.) 444, 5 N. Y. Suppl. 507; Brace *v.* Marlborough, Moseley 50, 25 Eng. Reprint 264, 2 P. Wms. 491, 24 Eng. Reprint 829; McMillan *v.* McMillan, 21 Ont. App. 343; Box *v.* Bridgman, 6 Ont. Pr. 234. See Fraser *v.* Gunn, 29 Grant Ch. (U. C.) 13; Campbell *v.* McDougall, 26 Grant Ch. (U. C.) 280; Forrester *v.* Campbell, 26 Grant Ch. (U. C.) 212.

55. *Georgia.*— Fry *v.* Shehee, 55 Ga. 208.

Illinois.— Kraft *v.* Holzmann, 206 Ill. 548, 69 N. E. 574.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508.

Virginia.—Farmers' Bank *v.* Mutual Assur. Soc., 4 Leigh 69.

Wyoming.— Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925.

See 35 Cent. Dig. tit. "Mortgages," § 431.

56. Willett *v.* Johnson, 84 Ky. 411, 1 S. W. 674, 8 Ky. L. Rep. 398. But see Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154, holding that the extension of the time of payment of the first maturing of two notes secured by the same mortgage, without the consent of one bound as surety on both notes, while it releases him from personal liability on the note extended, does not operate to defeat its preference over the second note as to the proceeds of the mortgaged property.

57. *Alabama.*—Higman *v.* Humes, 127 Ala. 404, 30 So. 733.

California.— Dillon *v.* Byrne, 5 Cal. 455.

Illinois.— Roberts *v.* Doan, 180 Ill. 187, 54 N. E. 207; Campbell *v.* Trotter, 100 Ill. 281; Shaver *v.* Williams, 87 Ill. 469; Christie *v.* Hale, 46 Ill. 117; McChesney *v.* Ernst, 89 Ill. App. 164 [*affirmed* in 186 Ill. 617, 58 N. E. 399].

Indiana.— Pouder *v.* Ritzinger, 119 Ind. 597, 20 N. E. 654; Calvert *v.* Landgraf, 34 Ind. 388; Matchett *v.* Knisely, 27 Ind. App. 664, 62 N. E. 87.

Iowa.— St. Croix Lumber Co. *v.* Davis, 105 Iowa 27, 74 N. W. 756; Young *v.* Shaner, 73 Iowa 555, 35 N. W. 629, 5 Am. St. Rep. 701. *Compare* Washington County *v.* Slaughter, 54 Iowa 265, 6 N. W. 291.

Kentucky.— Rowe *v.* Simmons, 21 S. W. 872, 14 Ky. L. Rep. 780.

Michigan.— Eggeman *v.* Eggeman, 37 Mich. 436.

Mississippi.— Drane *v.* Newsom, 73 Miss. 422, 19 So. 200; Bramlett *v.* Wetlin, 71 Miss. 902, 15 So. 934; Sledge *v.* Obenchain, 58 Miss. 670.

New Jersey.— Van Duyne *v.* Shann, 41 N. J. Eq. 311, 7 Atl. 429.

New York.— Northeastern Permanent Sav., etc., Assoc. *v.* Barker, 21 N. Y. Suppl. 832; Flagler *v.* Malloy, 9 N. Y. Suppl. 573. *Compare* U. S. *v.* Crookshank, 1 Edw. 232.

release the lien of the mortgage.[58] But this rule is strictly limited, and will not be applied where there is any sufficient evidence of an intention of the parties to waive the lien of the prior mortgage or that its discharge should operate as a payment,[59] nor can it be invoked where the new mortgage is given to a different person, from whom the debtor borrowed the money to pay off the old,[60] nor where the new mortgage secures a different debt from the old, or an additional debt,[61] nor where the mortgagee, although otherwise within the rule, has so conducted himself toward the junior encumbrancer that he should be equitably estopped from asserting his priority,[62] although it is said that the benefit of the

Pennsylvania.— Benson *v.* Maxwell, 10 Pa. Cas. 380, 14 Atl. 161.

South Carolina.— Parker *v.* Parker, 52 S. C. 382, 29 S. E. 805.

Texas.— Mass *v.* Tacquard, 33 Tex. Civ. App. 40, 75 S. W. 350.

United States.— Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429.

England.—*In re* Jennings, L. R. 15 Ir. 277; Milne *v.* Walton, 7 Jur. 892, 2 Y. & Coll. 354, 21 Eng. Ch. 354, 63 Eng. Reprint 156.

See 35 Cent. Dig. tit. "Mortgages," § 432.

See, however, Stearns *v.* Godfrey, 16 Me. 158; Woollen *v.* Hillen, 9 Gill (Md.) 185, 52 Am. Dec. 690; Traders' Nat. Bank *v.* Woodlawn Mfg. Co., 100 N. C. 345, 5 S. E. 81; Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363; Union, etc., Bank *v.* Smith, 107 Tenn. 476, 64 S. W. 756; Atkinson *v.* Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

Reciting fact of renewal.— Where the new mortgage expressly recites the fact that it is given in renewal of the old, this will strengthen the position of the holder, in respect to preserving his priority of lien; but the failure to recite this fact will not necessarily affect the right to priority, where it cannot be disputed that it was actually a renewal, and the junior mortgagee knew it. Roberts *v.* McNeal, 80 Ill. App. 536.

Simultaneity of transaction.— To warrant the application of the rule stated in the text, it is necessary that the release or discharge of the old mortgage and the giving of the new should be parts of the same transaction, or so nearly simultaneous as to evidence clearly the intention of the parties to make the latter a mere renewal or continuation of the former. The priority of lien is lost if any considerable interval of time elapses. Lester *v.* Richardson, 69 Ark. 198, 62 S. W. 62; Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190, 20 So. 255.

New mortgage merging others.— Where a mortgage, in which have been merged several prior mortgages on the same land to the same person, is bequeathed, the legatee cannot claim privileges springing from the prior mortgages which were merged, but must claim upon the mortgage bequeathed to him. Ker *v.* Ker, 42 La. Ann. 870, 8 So. 595.

58. *Arkansas.*— Wooster *v.* Cavender, 54 Ark. 153, 15 S. W. 192, 26 Am. St. Rep. 31.

Indiana.— Sidener *v.* Pavey, 77 Ind. 241.

Maryland.— Drury *v.* Briscoe, 42 Md. 154.

New Hampshire.— Laconia Sav. Bank *v.* Vittum, 71 N. H. 465, 52 Atl. 848, 93 Am. St. Rep. 561.

New Jersey.— Hutchinson *v.* Swartsweller, 31 N. J. Eq. 205.

New York.— Barnes *v.* Camack, 1 Barb. 392.

Ohio.— Turner Bau Verein No. 3 *v.* Dahlheimer, 1 Ohio S. & C. Pl. Dec. 237, 2 Ohio N. P. 248.

Oregon.— Pearce *v.* Buell, 22 Oreg. 29, 29 Pac. 78.

South Dakota.— Upton *v.* Hugos, 7 S. D. 476, 64 N. W. 523.

Tennessee.— Workingman's Bldg., etc., Assoc. *v.* Williams, (Ch. App. 1896) 37 S. W. 1019.

See 35 Cent. Dig. tit. "Mortgages," § 432.

Examination of records.— The mortgagee, when about to release his mortgage and take a new one, by way of renewal, should examine the records to ascertain whether other liens have not attached, and if he omits this precaution he cannot claim that his new mortgage was taken in ignorance of intervening rights, so as to be entitled to retain his priority. Mather *v.* Jenswold, 72 Iowa 550, 32 N. W. 512, 34 N. W. 327. See also Seeley *v.* Bacon, (N. J. Ch. 1896) 34 Atl. 139. But if the senior mortgagee does cause an examination of the record to be made, with reference to junior liens, he is justified in acting on what he finds there. Pritchard *v.* Kalamazoo College, 82 Mich. 587, 47 N. W. 31.

Where a prior mortgagee, knowing the facts but mistaking the law, discharges his mortgage, and acknowledges the satisfaction and takes a new mortgage on the same land for the same debt, but loses the lien of the old mortgage, the new mortgage must be postponed to intervening liens. Gerrish *v.* Bragg, 55 Vt. 329.

59. Brown *v.* Dunckel, 46 Mich. 29, 8 N. W. 537; St. Albans Trust Co. *v.* Farrar, 53 Vt. 542.

60. Holt *v.* Baker, 58 N. H. 276; Banta *v.* Garmo, 1 Sandf. Ch. (N. Y.) 383. But *compare* Elliott *v.* Tainter, 88 Minn. 377, 93 N. W. 124; Chetwynd *v.* Allen, [1899] 1 Ch. 353, 68 L. J. Ch. 160, 80 L. T. Rep. N. S. 110, 47 Wkly. Rep. 200.

61. Edwards *v.* Thom, 25 Fla. 222, 5 So. 707; Brown *v.* Dunckel, 46 Mich. 29, 8 N. W. 537; McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195; Smith *v.* Bynum, 92 N. C. 108. *Compare* Buzzell *v.* Still, 63 Vt. 490, 22 Atl. 619, 25 Am. St. Rep. 777.

62. McLeod *v.* Wadland, 25 Ont. 118.

rule may be claimed as against a junior creditor who has not done or omitted anything in reliance on the cancellation of record of the elder lien.[63]

9. Release or Satisfaction — a. In General. A formal entry of release or satisfaction of a mortgage on the record, whatever may be its effect upon the rights or equities of the original parties, will inure to the benefit of a junior lienor who had no notice of any such rights or equities, raising his lien to priority,[64] unless the release or satisfaction was made for a particular purpose only, not contemplating the displacement of the lien of the mortgage, of which fact the junior encumbrancer was cognizant.[65] Similarly the first mortgagee, having knowledge of subsequent liens, has no right to release his mortgage to the injury of such liens.[66] And a payment or other actual satisfaction of the elder lien may be insisted on by the junior encumbrancer, so as to secure for his lien the priority to which it has become entitled,[67] and so also as to prevent the parties to the senior mortgage from agreeing upon its reinstatement, to his prejudice.[68] A senior mortgagee who impairs the security of the junior mortgagee by releasing the mortgagor from his personal liability subordinates his lien to that of the second mortgage.[69]

63. International Trust Co. *v.* Davis, etc., Mfg. Co., 70 N. H. 118, 46 Atl. 1054. And see Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923.

64. *California.*— Persons *v.* Shaeffer, 65 Cal. 79, 3 Pac. 94. See also Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743.

Illinois.— Havighorst *v.* Bowen, 214 Ill. 90, 73 N. E. 402; Oliver *v.* Gill, 48 Ill. App. 424.

Indiana.— Smith *v.* Lowry, 113 Ind. 37, 15 N. E. 17.

Iowa.— Valley Nat. Bank *v.* Des Moines Nat. Bank, 116 Iowa 541, 90 N. W. 342; Stanbrough *v.* Daniels, 88 Iowa 314, 55 N. W. 466; Indiana Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390.

Kansas.— Marple *v.* Marple, 63 Kan. 426, 65 Pac. 645.

Louisiana.— Golding *v.* Golding, 43 La. Ann. 555, 9 So. 638.

Michigan.— Moran *v.* Roberge, 84 Mich. 600, 48 N. W. 164; Ferguson *v.* Glassford, 68 Mich. 36, 35 N. W. 820.

New Jersey.—Harrison *v.* Johnson, 18 N. J. Eq. 420.

New York.— New York Co-operative Bldg., etc., Assoc. *v.* Brennan, 62 N. Y. App. Div. 610, 70 N. Y. Suppl. 916. See also Barnes *v.* Mott, 64 N. Y. 397, 21 Am. Rep. 625; Warner *v.* Blakeman, 36 Barb. 501.

North Carolina.— Traders' Nat. Bank *v.* Woodlawn Mfg. Co., 100 N. C. 345, 5 S. E. 81.

North Dakota.— Morris *v.* Beecher, 1 N. D. 130, 45 N. W. 696.

Pennsylvania.— Steele *v.* Walter, 204 Pa. St. 257, 53 Atl. 1097.

South Carolina.—Quattlebaum *v.* Black, 24 S. C. 48.

Virginia.— Evans *v.* Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323.

Wisconsin.— Conner *v.* Welch, 51 Wis. 431, 8 N. W. 260. See also Jamison *v.* Gjemenson, 10 Wis. 411.

A partial release of the senior mortgage will inure *pro tanto* to the benefit of the junior mortgagee, and the elder lien cannot be reinstated by agreement of the parties, as to such released part, to the prejudice of the junior encumbrancer. Warner *v.* Blakeman, 36 Barb. (N. Y.) 501. See also Emery *v.* Vaughan, 36 S. W. 9, 18 Ky. L. Rep. 281.

Release of collateral.— That an assignor of a mortgage and note as collateral security enters satisfaction of the mortgage on the record while it still stands in his name does not give a subsequent mortgagee with notice a priority of claim, but the assignee can recover only to the extent of his actual interest in the mortgage. Gibson *v.* Miln, 1 Nev. 526.

Unexecuted agreement to release. — A junior mortgagee cannot claim priority over the senior mortgage merely on account of an agreement between the mortgagor and the senior mortgagee for the release of the latter's mortgage, which was never executed, unless perhaps where he has parted with rights or put himself in a worse position in the expectation that the agreement would be fulfilled. Rappanier *v.* Bannon, (Md. 1887) 8 Atl. 555; McKnight *v.* Clark, 29 N. J. Eq. 105; Fisler *v.* Stewart, 191 Pa. St. 323, 43 Atl. 396, 71 Am. St. Rep. 769. See Simonds *v.* Brown, 18 Vt. 231.

65. Farmers' Bank *v.* Butterfield, 100 Ind. 229; Edwards *v.* Weil, 99 Fed. 822, 40 C. C. A. 105.

66. McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587. See also Turner *v.* Parker, 10 Rob. (La.) 154.

67. Cowley *v.* Shelby, 71 Ala. 122; Redin *v.* Branhan, 43 Minn. 283, 45 N. W. 445; Conlon *v.* Minor, 94 N. Y. App. Div. 458, 88 N. Y. Suppl. 224; Sawyer *v.* Senn, 27 S. C. 251, 3 S. E. 298.

Debt barred by limitations. — A junior mortgagee, out of possession, may maintain a suit in equity against the senior mortgagee, also out of possession, and the mortgagor, in possession, to have the first mortgage canceled, after the senior mortgagee has lost all right to proceed on his mortgage by the running of the statute of limitations applicable thereto. Fox *v.* Blossom, 9 Fed. Cas. No. 5,008, 17 Blatchf. 352.

68. Angel *v.* Boner, 38 Barb. (N. Y.) 425.

69. Sexton *v.* Pickett, 24 Wis. 346.

b. Unauthorized or Fraudulent Satisfaction. Where an entry of satisfaction of a mortgage is procured by fraud or a trick, or is made without the mortgagee's consent by a person not having authority, the lien of the mortgage is not displaced or postponed to a junior encumbrance, but may be restored or the satisfaction canceled,[70] at least where the junior encumbrancer had notice, actual or constructive, of the rights of the senior mortgagee.[71] But the senior mortgagee has no equity to claim the application of this rule where the false or unauthorized entry of satisfaction was attributable to his own negligence, carelessness, or laches.[72] Similar principles govern the case of the execution of a deed of release by the trustee in a trust deed without receiving satisfaction, or with fraud.[73]

H. Estoppel Affecting Priority — 1. In General. A mortgagee of land may be estopped to assert the priority of his lien, as against subsequent purchasers or encumbrancers, by any conduct or omission on his part which operates as a forfeiture of his rights or which would render it unconscionable to enforce his security to their prejudice,[74] as where it would involve a violation of his agree-

70. *Colorado.*— Appelman *v.* Gara, 22 Colo. 397, 45 Pac. 366.

Illinois.— Stanley *v.* Valentine, 79 Ill. 544.

Iowa.— Foster *v.* Paine, 63 Iowa 85, 18 N. W. 699, 56 Iowa 622, 10 N. W. 214; Bruse *v.* Nelson, 35 Iowa 157.

Kansas.— Wiscomb *v.* Cubberly, 51 Kan. 580, 33 Pac. 320.

Louisiana.— Horton *v.* Cutler, 28 La. Ann. 331; De St. Romes *v.* Blanc, 20 La. Ann. 424, 96 Am. Dec. 415.

Maine.— Robinson *v.* Sampson, 23 Me. 388.

Michigan.— Sheldon *v.* Holmes, 58 Mich. 138, 24 N. W. 795; Keller *v.* Hannah, 52 Mich. 535, 18 N. W. 346.

Nebraska.— Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15.

New Jersey.— Collignon *v.* Collignon, 52 N. J. Eq. 516, 28 Atl. 794; Lockard *v.* Joines, (Ch. 1892) 23 Atl. 1075; Heyder *v.* Excelsior Bldg., etc., Assoc., 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49; Young *v.* Hill, 31 N. J. Eq. 429; Harris *v.* Cook, 28 N. J. Eq. 345; Harrison *v.* New Jersey R., etc., Co., 19 N. J. Eq. 488.

New York.— Waterman *v.* Webster, 108 N. Y. 157, 15 N. E. 380; Fassett *v.* Smith, 23 N. Y. 252; Weaver *v.* Edwards, 39 Hun 233 [*affirmed* in 121 N. Y. 653, 24 N. E. 1092]; Lambert *v.* Leland, 2 Sweeny 218; King *v.* McVickar, 3 Sandf. Ch. 192.

Oregon.— Kern *v.* A. P. Hotaling Co., 27 Oreg. 205, 40 Pac. 168, 50 Am. St. Rep. 710.

Pennsylvania.— Independent Bldg., etc., Assoc. *v.* Real Estate Title Ins. Co., 156 Pa. St. 181, 27 Atl. 62; Brown *v.* Henry, 106 Pa. St. 262.

Wisconsin.— Wilton *v.* Mayberry, 75 Wis. 191, 43 N. W. 901, 17 Am. St. Rep. 193, 6 L. R. A. 61.

See 35 Cent. Dig. tit. "Mortgages," § 436.

But *compare* Layne *v.* Bone, 12 Lea (Tenn.) 667, holding that a senior mortgage cannot be reinstated as against junior encumbrancer, if the latter was not a party to the fraud in the cancellation of the first lien.

71. *District of Columbia.*— Eldridge *v.* Connecticut Gen. L. Ins. Co., 3 MacArthur 301.

Indiana.— Etzler *v.* Evans, 61 Ind. 56; Howe *v.* White, (App. 1903) 67 N. E. 203.

Michigan.— Ferguson *v.* Glassford, 68 Mich. 36, 35 N. W. 820.

Pennsylvania.— Pierie *v.* Metz, 9 Pa. Dist. 341.

United States.— Connecticut Gen. L. Ins. Co. *v.* Burnstine, 131 U. S. Appendix cliii, 24 L. ed. 706.

See 35 Cent. Dig. tit. "Mortgages," § 436.

Where a recorded mortgage is discharged by a person not the mortgagee, a subsequent encumbrancer is bound to inquire what authority he had to discharge it, and is chargeable with notice of such facts as an inquiry would have disclosed. Swartout *v.* Curtis, 5 N. Y. 301, 55 Am. Dec. 345.

72. Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; Robbins *v.* Todman, 28 Kan. 491; Heyder *v.* Excelsior Bldg., etc., Assoc., 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49; Harris *v.* Cook, 28 N. J. Eq. 345; Charleston *v.* Ryan, 22 S. C. 339, 53 Am. Rep. 713.

73. Jackson *v.* Blackwood, 4 MacArthur & M. (D. C.) 188; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Barbour *v.* Scottish-American Mortg. Co., 102 Ill. 121; Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237; Evans *v.* Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323; Connecticut Gen. L. Ins. Co. *v.* Eldredge, 102 U. S. 545, 26 L. ed. 245. See also Havighorst *v.* Bowen, 214 Ill. 90, 73 N. E. 402.

74. *Iowa.*— Weare *v.* Williams, 85 Iowa 253, 52 N. W. 328.

Louisiana.— Walmsley *v.* Resweber, 105 La. 522, 30 So. 5.

Missouri.— Nave *v.* Hamilton, (1888) 8 S. W. 799; Nave *v.* Smith, 95 Mo. 596, 8 S. W. 796, 6 Am. St. Rep. 79.

New York.— See Central Trust Co. *v.* West India Imp. Co., 48 N. Y. App. Div. 147, 63 N. Y. Suppl. 853.

Pennsylvania.— Ackla *v.* Ackla, 6 Pa. St. 228.

Canada.— James *v.* McGibney, 24 U. C. Q. B. 155.

See 35 Cent. Dig. tit. "Mortgages," § 442.

Taking second mortgage with covenants of warranty.— A mortgagee under a first mortgage, who receives a second mortgage to in-

ment with a junior lienor,[75] where his own security originated in fraud or a breach of trust,[76] where he has, either intentionally or recklessly, placed it in the power of the owner of the property to deceive a third person, who subsequently deals with the property in ignorance of the mortgage, by representing it as unencumbered,[77] where he fails to assert and insist upon the priority of his lien under circumstances which impose upon him a duty in that respect toward third persons,[78] or where he has received satisfaction of his debt by the recovery of a judgment and a sale on execution.[79] But generally speaking mere carelessness or want of prudence in guarding his own interests will not be enough to postpone the senior mortgage, when not accompanied by fraud or a lack of good faith toward others.[80]

2. ESTOPPEL TO DENY PRIOR LIEN. Although the validity or consideration of a prior mortgage may ordinarily be contested by a third person having interest,[81] this cannot be done by a second mortgagee whose mortgage expressly recites the first mortgage or declares that it is taken subject thereto,[82] except perhaps

demnify him as surety to creditors of the mortgagor, which has the usual covenants of warranty, and does not mention the first mortgage, is not thereby estopped from claiming the security of the first mortgage as against any claims of the creditors to the benefit of the second mortgage. Gerrish *v.* Gerrish, 62 N. H. 397.

75. Burke *v.* Dillin, 92 Iowa 557, 61 N. W. 370.

76. Drake *v.* Paige, 52 Hun 292, 5 N. Y. Suppl. 466 [*affirmed* in 127 N. Y. 562, 28 N. E. 407]; McEachern *v.* Stewart, 114 N. C. 370, 19 S. E. 702.

77. Union College *v.* Wheeler, 61 N. Y. 88; Stafford *v.* Ballon, 17 Vt. 329; Northern Counties of England F. Ins. Co. *v.* Whipp, 26 Ch. D. 482, 53 L. J. Ch. 629, 51 L. T. Rep. N. S. 806, 32 Wkly. Rep. 626. See Dodd *v.* Lee, 57 Mo. App. 167.

Inadvertent cancellation of note.— Where the purchaser of property subject to a recorded deed of trust received with his deed the note secured by the trust deed, which note had been inadvertently canceled, but he did not show that he ever knew of the existence of the trust deed, or was misled or induced to act by the cancellation of the note, the owner of the note is not estopped to enforce the trust deed. Griffith *v.* Wright, 6 Colo. 248.

Deed absolute.— This rule has been applied against the right of redemption of the grantor in a deed absolute in form but intended as a mortgage, who has permitted the grantee, acting as the apparent owner of the property, to encumber it by a mortgage taken by one who has no knowledge of the defeasible character of the deed. Turman *v.* Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Fair *v.* Howard, 6 Nev. 304.

78. Ducros *v.* Fortin, 8 Rob. (La.) 165, holding that if a mortgagee is cited to show cause why the property should not be sold free of encumbrance, and suffers the rule to be made absolute, he cannot afterward set up his mortgage against one purchasing in good faith on the strength of his apparent acquiescence. *Compare* Dugan *v.* Lyman, (N. J. Ch. 1892) 23 Atl. 657, holding that where a mere volunteer, claiming to act for the mortgagee, consents to a sale of the property free from the mortgage, the buyer at such sale cannot claim to be an innocent purchaser so long as the mortgage remains uncanceled of record.

Neglect to foreclose.— The mere failure of a mortgagee to avail himself of his remedies under the terms of the mortgage, upon default in the payment of an instalment of interest, does not amount to a waiver of his lien as against debts subsequently contracted by the mortgagor. Blair *v.* St. Louis, etc., R. Co., 22 Fed. 471.

Notifying purchaser.— One who holds a duly recorded mortgage is not bound to give notice thereof to a subsequent purchaser without actual notice, although he sees the purchaser proceeding to erect valuable improvements. The record being constructive notice, no presumption of acquiescence can arise from the silence of the mortgagee, unless there is actual fraud. Mayo *v.* Cartwright, 30 Ark. 407. And see Boyles *v.* Knight, 123 Ala. 289, 26 So. 939.

79. Delaware, etc., Canal Co. *v.* Bonnell, 46 Conn. 9; Exline *v.* Lowery, 46 Iowa 556.

80. Northern Counties of England F. Ins. Co. *v.* Whipp, 26 Ch. D. 482, 53 L. J. Ch. 629, 51 L. T. Rep. N. S. 806, 32 Wkly. Rep. 626. And see Martin *v.* Central L. & T. Co., 78 Iowa 504, 43 N. W. 301; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603, holding that the mere circumstance of a mortgagee's leaving the title deeds with the mortgagor is not of itself sufficient to postpone the first mortgagee to a second, who takes the title deeds with his mortgage, and without notice of the prior encumbrance; but there must be fraud or gross negligence to defeat the prior lien.

81. Mossop *v.* Creditors, 41 La. Ann. 296, 6 So. 134; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; Stambach *v.* Fox, 5 Ohio N. P. 31.

82. *Alabama.*—Pratt *v.* Nixon, 91 Ala. 192, 8 So. 751.

Arkansas.— Clapp *v.* Halliday, 48 Ark. 258, 2 S. W. 853.

Colorado.— Colorado L. & T. Co. *v.* Grand Valley Canal Co., 3 Colo. App. 63, 32 Pac. 178.

where there is a fraudulent concealment of the want or illegality of consideration of the first mortgage or of the fact that it has been paid.[83] Where a mortgage is given to secure two notes, executed to different persons on different considerations, the holder of one is not estopped to contest the validity of the other.[84]

3. FRAUD. Where a mortgagee assists in or connives at the fraud whereby the mortgagor induces an innocent third person to buy the property, or lend money on it, as unencumbered, such conduct will estop him to insist upon the lien of his mortgage.[85] And conversely, third persons having an interest, whether as owners, lien-holders, or creditors, who practise fraud upon a mortgagee with a view to invalidating his security or postponing it to their own claims, will be estopped to contest the validity and priority of the mortgage.[86] An attempt to set up an absolute conveyance as a purchase, when it was in fact given and intended as a mortgage, will prevent the holder from claiming as a *bona fide* mortgagee.[87] But an implied covenant against encumbrances contained in a second mortgage by a corporation does not amount to a fraudulent representation that there is no previous mortgage, so as to preclude the holder of the first mortgage from insisting on the priority of his lien.[88]

4. CONCEALMENT. Where a mortgagee falsely denies the existence of his mortgage or fraudulently conceals it, thereby inducing a third person to believe that the title is clear and accordingly to buy the property or lend money on a second mortgage, the first mortgagee will be estopped to assert his lien.[89] But the mere

New Hampshire.— McMurphy *v.* Adams, 67 N. H. 440, 39 Atl. 333.

New York.— Hardin *v.* Hyde, 40 Barb. 435.

Ohio.— Riley *v.* Rice, 40 Ohio St. 441.

Texas.— Schwab, etc., Co. *v.* Claunch, (Civ. App. 1895) 29 S. W. 922.

See 35 Cent. Dig. tit. "Mortgages," § 443.

Inconsistent positions.— A party cannot affirm a mortgage in part, by seeking foreclosure, and disaffirm it in part, by asking that liens established by prior mortgages, and recognized in the mortgage sought to be foreclosed, be set aside. Gow *v.* Collin, etc., Lumber Co., 109 Mich. 45, 66 N. W. 676.

Senior mortgage canceled.— Recitals in a mortgage that it is subject to a prior mortgage do not estop the second mortgagee from claiming priority over the senior mortgage, after a judgment has been entered canceling the latter. Atchison Sav. Bank *v.* Wyman, 65 Kan. 314, 69 Pac. 326.

Validity of prior mortgage denied by mortgagor.— A mere recital in a mortgage that it is subject to a prior mortgage will not estop the mortgagee from denying the validity of the senior mortgage, when the mortgagor himself denies its validity. Ault *v.* Blackman, 8 Wash. 624, 36 Pac. 694. And see Nicholson *v.* Aney, 127 Iowa 278, 103 N. W. 201.

Excepting lien from covenant against encumbrances.— A mortgagee is not estopped from contesting the validity of an apparently senior lien by a mere exception from the mortgagor's covenant against encumbrances of a class of liens which would include that attacked if it were valid. Livingstone *v.* Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; Gadsden *v.* Thrush, 56 Nebr. 565, 76 N. W. 1060, 45 L. R. A. 654.

83. See Farmers', etc., Bank *v.* Berchard, 32 Nebr. 785, 49 N. W. 762; Trusdell *v.* Dowden, 47 N. J. Eq. 396, 20 Atl. 972; Morris *v.* Beecher, 1 N. D. 130, 45 N. W. 696.

84. Coleman *v.* Witherspoon, 76 Ind. 285.

85. Dennis *v.* Burritt, 6 Cal. 670; Wight *v.* Prescott, 2 Barb. (N. Y.) 196; Northern Counties of England F. Ins. Co. *v.* Whipp, 26 Ch. D. 482, 53 L. J. Ch. 629, 51 L. T. Rep. N. S. 806, 32 Wkly. Rep. 626. See also Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268.

86. *Massachusetts.*— Grimes *v.* Kimball, 8 Allen 153.

Michigan.— Corey *v.* Alderman, 46 Mich. 540, 9 N. W. 844; Waldo *v.* Richmond, 40 Mich. 380.

New Hampshire.— Buswell *v.* Davis, 10 N. H. 413.

New Jersey.— Neligh *v.* Michenor, 11 N. J. Eq. 539.

Ohio.— Schurtz *v.* Colvin, 55 Ohio St. 274, 45 N. E. 527.

Vermont.— Woodbury *v.* Bruce, 59 Vt. 624, 11 Atl. 52.

England.— London Freehold, etc., Property Co. *v.* Suffield, [1897] 2 Ch. 608, 66 L. J. Ch. 790, 77 L. T. Rep. N. S. 445, 46 Wkly. Rep. 102.

See 35 Cent. Dig. tit. "Mortgages," § 446.

Compare Jones *v.* Levering, 116 Mo. App. 377, 91 S. W. 980.

87. Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

88. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

89. *Alabama.*— Chapman *v.* Hamilton, 19 Ala. 121.

Kentucky.— Webb *v.* Austin, 58 S. W. 808, 22 Ky. L. Rep. 764.

Massachusetts.— Short *v.* Currier, 153 Mass. 182, 26 N. E. 444.

New Hampshire.— Tucker *v.* Jackson, 60 N. H. 214.

fact that the first mortgagee, being present at the execution of the second, keeps silence as to his own lien, will not have this effect, where the second mortgagee has actual notice of the first encumbrance, or such constructive notice as the record of it imports,[90] or according to some of the authorities, irrespective of such notice, where the first mortgagee is not put under the duty of making a disclosure by being interrogated, or is guilty of no actual fraud.[91]

5. Representations or Admissions. A mortgagee is estopped to assert his lien as against a subsequent purchaser or encumbrancer to whom, when questioned, he made deceptive or misleading statements in regard to the payment of the debt secured by his mortgage, or the amount remaining due on it, the property covered by the mortgage, its rank relative to other liens, or other material particulars.[92]

I. Proceedings to Establish Rights — 1. Demand For Accounting. It is sometimes provided by statute that a creditor holding a valid and *bona fide* demand against a mortgagor of property may serve on the mortgagee a formal notice requiring him to render an account to date of the amount due under his mortgage,[93] and unless this demand is complied with by rendering a true and sufficient account within a limited time, the lien of the mortgage is discharged as to that particular creditor.[94]

2. Action or Suit — a. In General. The relative priority of two mortgages or other liens on land may be determined on a bill in equity, filed by one of the

Tennessee.— Chester *v.* Greer, 5 Humphr. 26.

Virginia.— Green *v.* Price, 1 Munf. 449.

England.— Ibbottson *v.* Rhodes, 2 Vern. Ch. 554, 23 Eng. Reprint 958.

See 35 Cent. Dig. tit. "Mortgages," § 447.

Disclosing that absolute deed intended as mortgage.— One who takes a mortgage in the form of an absolute deed must, if questioned by a creditor of the mortgagor or other person having an interest in knowing the fact, carefully and truly disclose the true nature of his security. An untruthful statement touching a material fact in relation to such security, or a failure to make a full and true disclosure when required, will postpone such security to that of a subsequent attaching creditor. Geary *v.* Porter, 17 Oreg. 465, 21 Pac. 442.

Failure of agent to disclose.— That an agent of a mortgagee was present at a receiver's sale of the mortgaged property, and witnessed the same without disclosing the mortgagee's title, and without objection, does not estop the mortgagee to object to the sale, where it appears that he was not a party to the proceeding, and had a paramount title, and it is not shown that the agent was authorized to waive or sacrifice his principal's rights. Lorch *v.* Aultman, 75 Ind. 162.

As to unsecured creditor.— Where money is loaned to the mortgagor on the faith of the declarations of the mortgagee, denying that he has a mortgage, but no security is taken on the property itself, the mortgage cannot be avoided for fraud in making the false declarations. Chester *v.* Greer, 5 Humphr. (Tenn.) 26.

Failure to disclose at public sale of mortgaged property see Markham *v.* O'Connor, 52 Ga. 183, 21 Am. Rep. 249.

90. Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695; Clabaugh *v.* Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; Palmer *v.* Palmer, 48 Vt. 69.

91. Clabaugh *v.* Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; Collier *v.* Miller, 137 N. Y. 332, 33 N. E. 374; Paine *v.* French, 4 Ohio 318; Lipscomb *v.* Goode, 57 S. C. 182, 35 S. E. 493.

92. *Alabama.*— Freeman *v.* Brown, 96 Ala. 301, 11 So. 249; Hendricks *v.* Kelly, 64 Ala. 388.

Connecticut.— Broome *v.* Beers, 6 Conn. 198.

Indiana.— Lasselle *v.* Barnett, 1 Blackf. 150, 12 Am. Dec. 217.

Louisiana.— Pickersgill *v.* Brown, 7 La. Ann. 297.

Massachusetts.— Platt *v.* Squire, 12 Metc. 494.

Nebraska.— Newman *v.* Mueller, 16 Nebr. 523, 20 N. W. 843.

New York.— Bissel *v.* Reiss, 3 Alb. L. J. 302. See also Wells *v.* Pierce, 4 Abb. Dec. 559, 3 Keyes 112.

See 35 Cent. Dig. tit. "Mortgages," § 448.

Statement to his attorneys taking subsequent mortgage.— A mortgagee is not estopped to assert his priority over a subsequent mortgage taken by his attorneys, who had full knowledge of the facts, by his statement to them that he had no lien and did not intend to claim one on the property or to enforce it; the first statement being an expression of an opinion as to his rights, on which his attorneys had no right to rely, and the latter being an assertion as to which he had a right to change his mind, and as to which it was his attorneys' duty to advise him. Mitchell *v.* Fisher, 94 Ind. 108.

93. See the statutes of the different states. And see Farr *v.* Dudley, 21 N. H. 372.

94. Ricker *v.* Blanchard, 45 N. H. 39; Bryant *v.* Morrison, 44 N. H. 288; Kimball *v.* Morrison, 40 N. H. 117; Duncklee *v.* Gay, 39 N. H. 292.

claimants against the other, asking a decree establishing his lien as the prior claim,[95] or on a suit by a mortgagee to have his mortgage recorded and for a sale of the land,[96] or in a cross complaint filed in a suit for foreclosure,[97] or by means of an action to cancel or set aside the alleged conflicting lien,[98] or to enjoin its assertion or enforcement,[99] or to rescind a sale of the premises[1] or to recover the proceeds of such a sale on the ground of their having been paid over by mistake.[2] Whatever be the form of the proceeding, the special grounds relied on for relief must be distinctly and positively pleaded,[3] and proved by sufficient evidence, the party demanding the postponement of a lien apparently superior to his own being obliged to assume the burden of proving the facts on which he relies for the relief asked.[4]

b. Parties. In an action of this character, whatever be its form, all persons should be joined as parties of record whose rights may come in question or whose interests in the land may be affected by the judgment or decree prayed for,[5] including the owner of the equity of redemption,[6] and the trustee, as well as the beneficiary, in a deed of trust.[7]

XV. RIGHTS AND LIABILITIES OF PARTIES.

A. In General — 1. Relation of Parties. The relation of mortgagor and mortgagee is not technically of a fiduciary character; properly speaking, neither

95. *Georgia.*— Coleman *v.* Maclean, 101 Ga. 303, 28 S. E. 861; Brumby *v.* Bell, 65 Ga. 116.

New Jersey.— Leonard *v.* Cook, (Ch. 1890) 21 Atl. 47.

North Dakota.—See Merchants' State Bank *v.* Tufts, (1905) 103 N. W. 760.

Pennsylvania.— See Eckels *v.* Stuart, 212 Pa. St. 161, 61 Atl. 820.

Rhode Island.— Blackmar *v.* Sharp, 23 R. I. 412, 50 Atl. 852.

United States.—Coonrod *v.* Kelly, 113 Fed. 378; Thomas *v.* American Freehold Land, etc., Co., 47 Fed. 550, 12 L. R. A. 681; Alexander *v.* Scotland Mortg. Co., 47 Fed. 131; New England Mortg. Security Co. *v.* Gay, 33 Fed. 636.

See 35 Cent. Dig. tit. "Mortgages," §§ 450, 451.

Compelling assignment.— A court of equity will not compel a first mortgagee to assign his mortgage to a second, where there are judgments prior to the second mortgage, and such assignment would place the control of such mortgage in the power of the subsequent encumbrancer, who might, at any time, proceed to sell the property to the prejudice of the owners of the intermediate judgments. Bishop *v.* Ogden, 2 Leg. Rec. (Pa.) 355.

96. Sprigg *v.* Lyles, 2 Gill & J. (Md.) 446.

97. Rose *v.* Provident Sav., etc., Assoc., 28 Ind. App. 25, 62 N. E. 293.

98. Lindley *v.* English, 89 Ill. App. 538 [*affirmed* in 194 Ill. 181, 62 N. E. 522]; Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580.

Where a junior mortgagee does not dispute the validity of the senior mortgage, but only claims that his security, although later in date, is equitably entitled to priority, a decree canceling the senior mortgage would not be proper. Bell *v.* Clark, 71 Miss. 603, 14 So. 318.

99. See Philadelphia Mortg., etc., Co. *v.* Omaha, 65 Nebr. 93, 90 N. W. 1005, 57 L. R. A. 150.

1. See Hudson *v.* Bodin, 11 La. 348.

2. Ashe *v.* Livingston, 2 Bay (S. C.) 80.

3. Taylor *v.* Thomas, 5 N. J. Eq. 331; Goodwin *v.* Sheppard, 3 Phila. (Pa.) 441.

4. *Colorado.*— Chittenden *v.* Charles H. Sieg Mfg. Co., 16 Colo. App. 549, 66 Pac. 1077.

Indiana.— Howe *v.* White, (App. 1903) 67 N. E. 203.

Iowa.— Vaughn *v.* Eckler, 69 Iowa 332, 28 N. W. 624.

Kentucky.— Harris *v.* Tuttle, 114 Ky. 882, 72 S. W. 16, 24 Ky. L. Rep. 1668.

Missouri.— Truesdale *v.* Brennan, 153 Mo. 600, 55 S. W. 147.

Nebraska.— Upton *v.* Betts, 59 Nebr. 724, 82 N. W. 19.

New Jersey.— Stover *v.* Hellyer, 68 N. J. Eq. 446, 59 Atl. 470.

New York.— O'Brien *v.* Fleckenstein, 86 N. Y. App. Div. 140, 83 N. Y. Suppl. 499.

South Dakota.— Parrish *v.* Mahany, 12 S. D. 278, 81 N. W. 295, 76 Am. St. Rep. 604.

5. Low *v.* Low, 177 Mass. 306, 59 N. E. 57; Cumberland Trust Co. *v.* Padgett, (N. J. Ch. 1905) 61 Atl. 837; Central Trust Co. *v.* West India Imp. Co., 48 N. Y. App. Div. 147, 63 N. Y. Suppl. 853; Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091.

Representative of deceased joint mortgagee.— To a bill affecting interests under a mortgage, it is not sufficient to make a surviving mortgagee alone a party, but the representatives of deceased joint mortgagees must also be joined. Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

6. Tichenor *v.* Tichenor, 46 N. J. Eq. 664, 18 Atl. 301. *Compare* Lambert *v.* Nanny, 2 Munf. (Va.) 196.

7. Helm *v.* Barnes, 1 Lea (Tenn.) 388; Massachusetts Mut. L. Ins. Co. *v.* Chicago,

is a trustee for the other;[8] and therefore they may validly make new contracts or arrangements with each other in regard to the subject of the mortgage or the indebtedness between them, which generally are not subject to special scrutiny or to any disfavor, but are regarded and treated as any other contracts would be.[9] Nor is their relation that of landlord and tenant, unless there be some special provision in the mortgage to that effect.[10] On general equitable principles, the mortgagor is precluded from doing any act in relation to the mortgaged property which would destroy or impair the mortgagee's security upon it or prevent the latter from enforcing his full rights.[11] On the contrary it is the mortgagor's duty to protect the title and rights of the mortgagee.[12] The relation of the parties is not, unless under exceptional circumstances, that of principal and surety.[13]

etc., R. Co., 13 Fed. 857. *Compare* Rogers *v.* Tucker, 94 Mo. 346, 7 S. W. 414.

8. Taylor *v.* Russell, [1892] A. C. 244, 61 L. J. Ch. 657, 66 L. T. Rep. N. S. 565, 41 Wkly. Rep. 43; Warner *v.* Jacob, 20 Ch. D. 220, 51 L. J. Ch. 642, 46 L. T. Rep. N. S. 656, 30 Wkly. Rep. 721; Cholmondeley *v.* Clinton, 4 Bligh 1, 22 Rev. Rep. 83, 4 Eng. Reprint 721; Dobson *v.* Land, 4 De G. & Sm. 575, 64 Eng. Reprint 963, 8 Hare 216, 32 Eng. Ch. 216, 68 Eng. Reprint 337, 14 Jur. 288, 19 L. J. Ch. 484.

Mortgagee buying at execution sale.— A mortgagee of land sold on execution may purchase the land from the one who bids it in at the execution sale, provided he does so in good faith and without taking any unconscionable advantage. Dennis *v.* Tomlinson, 49 Ark. 568, 6 S. W. 11.

9. *Alabama.*— Harper *v.* Weeks, 89 Ala. 577, 8 So. 39.

Maine.— Rich *v.* Hayes, 99 Me. 51, 58 Atl. 62.

Maryland.— *In re* Young, 3 Md. Ch. 461.

Michigan.— Dutton *v.* Merritt, 41 Mich. 537, 2 N. W. 806; Clark *v.* Stilson, 36 Mich. 482.

New Jersey.— Pollock *v.* Keasbey, 24 N. J. Eq. 94.

North Carolina.— Bowers *v.* Strudwick, 59 N. C. 288; Chapman *v.* Mull, 42 N. C. 292.

Tennessee.— Cocke *v.* Hatcher, (1887) 4 S. W. 170.

Washington.— Peterson *v.* Philadelphia Mortg., etc., Co., 33 Wash. 464, 74 Pac. 585.

See 35 Cent. Dig. tit. "Mortgages," § 465.

Compromise and settlement.— Where a mortgagor and mortgagee, after suit brought to foreclose, made an agreement by which the mortgagee, in consideration of immediate payment of the principal and the costs of foreclosure, agreed to accept a smaller sum than was due to him, the mortgage to remain as security for the debt, and accordingly the foreclosure suit was dismissed without prejudice, it was held, when the mortgagor afterward made default, that the new agreement took the place of the old, and his liability must be determined by it. Renshaw *v.* Taylor, 7 Oreg. 315.

Agreement for possession after payment.— An agreement by a borrower upon a mortgage to allow the lender to retain part of the land mortgaged, after being repaid the principal and interest on the loan, may be enforced, if made independently of the loan and mortgage, and capable of being sustained without reference to them, either as a sale on consideration or as a gift. Gleason *v.* Burke, 20 N. J. Eq. 300.

10. Morse *v.* Stafford, 95 Me. 31, 49 Atl. 45; Pioneer Sav., etc., Co. *v.* Powers, 47 Minn. 269, 50 N. W. 227; Hobbs *v.* Ontario Loan, etc., Co., 18 Can. Sup. Ct. 483; Canada Trust, etc., Co. *v.* Sawrason, 10 Can. Sup. Ct. 679. *Compare* Partridge *v.* Bere, 5 B. & Ald. 604, 1 D. & R. 272, 24 Rev. Rep. 487, 7 E. C. L. 330.

11. Davis *v.* Kendall, 50 La. Ann. 1121, 24 So. 264. See also Hazeldine *v.* McVey, 67 N. J. Eq. 275, 63 Atl. 165.

Illustrations.— The owner of a mining claim, after giving a mortgage on it, cannot abandon it, so as to throw it open to location by a stranger as unoccupied mineral lands (Alexander *v.* Sherman, 2 Ariz. 326, 16 Pac. 45); nor can a mortgagor abandon an easement appurtenant to the mortgaged land and expressly included in the mortgage (Duval *v.* Becker, 81 Md. 537, 32 Atl. 308); nor can he, by grant, create an easement in the land to the prejudice of the mortgagee (Murphy *v.* Welch, 128 Mass. 489). And a subsequent contract with a stranger, permitting him to inclose and use a part of the land, is void as against the mortgagee or a purchaser at his sale. Sims *v.* Field, 66 Mo. 111. But in such a case as this due regard must be given to the reasonable rights of the third person. Thus, it is inequitable to permit a mortgagee to lie by, after the default of the mortgagor, and see a valuable and costly improvement erected on the mortgaged premises by a third party in good faith, under a license from the owner of the land, making no objection, and when the structure is completed deprive such party of its enjoyment. In such a case the license of the owner should be held to be that of the mortgagee also. Masterson *v.* West End Narrow Gauge R. Co., 72 Mo. 342.

A deed from a corporation to a receiver appointed in proceedings against it can in no way affect the rights of a mortgagee of the corporate property. Meeker *v.* Sprague, 5 Wash. 242, 31 Pac. 628.

12. Maxon *v.* Lane, 102 Ind. 364, 1 N. E. 796; Madaris *v.* Edwards, 32 Kan. 284, 4 Pac. 313; Goodtitle *v.* Bailey, Cowp. 597; Roe *v.* Pegge, 4 Dougl. 309, 26 E. C. L. 493.

13. Magill *v.* Brown, 20 Tex. Civ. App. 662, 50 S. W. 143, 642, holding that where

2. Right to Muniments of Title. The lawful owner of the debt secured by a mortgage is entitled to the possession of the mortgage deed, and may maintain trover for it.[14] But the mortgagee is not generally entitled to possession of the mortgagor's title deeds, except in the case of an equitable mortgage by deposit of such deeds.[15]

3. Liability For Fees For Recording Mortgage. The recording of a mortgage being exclusively for the benefit and protection of the mortgagee, he cannot require the mortgagor to pay the fees, or hold him liable for the amount thereof, unless it has been expressly so agreed, in which case the amount paid for such fees becomes a part of the debt secured by the mortgage.[16]

4. Application of Proceeds of Mortgage. One who lends money on the security of a mortgage is ordinarily justified in paying over the money to the mortgagor, in the absence of notice of any superior right to it on the part of a third person,[17] and is required to pay over the whole consideration, not being permitted to retain any part of it for the purpose of applying it on other debts or obligations,[18] although he may, by agreement, use part of it in paying off a prior encumbrance,[19] and may, if he discovers fraud before the whole of the money has been paid, refuse the balance, and hold the mortgage as security for that already advanced.[20] Once the money is in the mortgagor's hands, the mortgagee is ordinarily under no kind of duty to see to its application.[21] If, however, the mortgagee agrees to apply the proceeds for a certain purpose he is liable for a failure to do so.[22]

5. Effect of Judgments Against Mortgagor on Mortgagee's Rights. Mortgagees are not bound or affected by judgments or decrees rendered against the mortgagor, and affecting the mortgaged premises, in suits begun by third persons subsequent to the execution of the mortgage, unless the mortgagees are made parties to the action, either personally, or by someone authorized to represent them, such as the trustee for mortgage bondholders.[23] But a mortgagee is not a terre-tenant

a mortgagor sells the property, with an agreement to discharge the mortgage, and gives to his grantee, as security for this agreement, another mortgage on other property, the grantee is, as to the mortgagor, to the extent of the interest conveyed by the latter mortgage, a surety for the debt secured by the earlier mortgage. And see Kinney *v.* McCullough, 1 Sandf. Ch. (N. Y.) 370.

Mortgage by joint tenants.—In the case of a mortgage by joint tenants to secure a debt which they all owe jointly, each is a surety for the others for the portion of the debt beyond his individual share of it. Randolph *v.* Stark, 51 La. Ann. 1121, 26 So. 59.

14. Gleason *v.* Owen, 35 Vt. 590; Riorden *v.* Brown, 1 U. C. C. P. 199.

15. Griffin *v.* Griffin, 18 N. J. Eq. 104.

Abstract of title.—Where the owner of land, about to execute a mortgage, delivers to the mortgagee's attorney, for the purpose of decreasing the expenses of searching the title, an abstract of title to the premises, such abstract becomes a part of the security for the loan, and the mortgagor is not entitled to possession of it until the mortgage debt is paid. Holm *v.* Wust, 11 Abb. Pr. N. S. (N. Y.) 113.

16. Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450; Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375; Simon *v.* Sewell, 64 Ala. 241.

17. Franklin *v.* McDonald, 163 Ill. 139, 45 N. E. 212 [*affirming* 58 Ill. App. 230].

18. Herr *v.* Sullivan, 25 Colo. 190, 54 Pac. 637; Tyson *v.* Farm, etc., Sav., etc., Assoc., 156 Mo. 588, 57 S. W. 740; Hoffman *v.* Wanner, 29 N. J. Eq. 135.

On a distribution by a trustee under a mortgage securing bonds, it is proper to allow him to retain a portion of the funds pending final settlement, to meet contingent expenses, where it appears that the mortgaged property is unimproved and that the trustee had previously advanced considerable sums for the purpose of paying taxes, etc. Real Estate Trust Co. *v.* Union Trust Co., 102 Md. 41, 61 Atl. 228.

19. Hill *v.* Helton, 80 Ala. 528, 1 So. 340; Sergeant *v.* Aberle, 134 Pa. St. 613, 19 Atl. 739.

20. Farmers' State Bank *v.* Pennsylvania Inv. Co., 54 Kan. 386, 38 Pac. 477.

21. *In re* Freud, 131 Cal. 667, 63 Pac. 1080. And see *supra*, VI, C, 2.

If a mortgage is given for a specific purpose, the money must be exclusively applied to that purpose, and any other disposition thereof is a fraudulent misappropriation against which the mortgagor will be entitled to relief in equity. Andrews *v.* Torrey, 14 N. J. Eq. 355. And see Beckley *v.* Munson, 22 Conn. 299.

22. Bullis *v.* Farmers' State Bank, 143 Mich. 632, 107 N. W. 700.

23. *Alabama.*—Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375.

Illinois.— Bennitt *v.* Wilmington Star Min.

in such sense as to be entitled to notice of proceedings to revive a judgment against the mortgagor.[24]

6. MORTGAGEE'S RIGHT TO PROTECT TITLE. A mortgagee of land has a right to bring and maintain such actions as are necessary to protect his title or interests,[25] including a suit to impeach a prior mortgage on the premises on the ground of fraud,[26] or an action to set aside an illegal tax-sale of the property or part of it.[27] But it has been held that he cannot maintain a creditor's bill to set aside a subsequent voluntary conveyance of other property by the mortgagor, as a fraud upon creditors, although the value of the land mortgaged has declined below the level of security for the mortgage debt.[28]

7. SALE OF MORTGAGED ESTATE ON EXECUTION.[29] As against all persons except the mortgagee, the mortgagor is to be regarded as the real and beneficial owner of the estate, and the equity of redemption remaining in him is subject to be levied on and sold under execution.[30] On the other hand, the mortgagee's interest in the estate is not of such a nature as to be subject to levy or attachment.[31]

8. DUTIES AND LIABILITIES OF MORTGAGE TRUSTEES. A mortgage trustee, or trustee for mortgage bondholders, to qualify himself properly, should expressly accept the trust, although this may be implied from his acting under it.[32] He may renounce or refuse the trust, or resign from it;[33] but has no power to appoint a successor,[34] or to delegate the powers granted to him by the deed of trust, except as to merely mechanical or clerical matters.[35] Being the agent or trustee of both parties, debtor and creditor, his relations must be absolutely impartial as between them, and he must act with entire fairness toward both parties and not exclusively in the interest of either.[36] Within the limitations imposed by the mortgage or deed

Co., 18 Ill. App. 17, suit to enforce mechanic's lien.

Kansas.— Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901, attachment.

Missouri.— Harbison *v.* Sanford, 90 Mo. 477, 3 S. W. 20, action for partition and sale of real estate of a decedent and distribution of the proceeds among his heirs, one of whom had given a mortgage on his interest.

New Jersey.— Den *v.* Fen, 6 N. J. L. 478, ejectment.

United States.— Coiron *v.* Millaudon, 19 How. 113; Secor *v.* Singleton, 41 Fed. 725; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

24. Fox *v.* Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774.

25. Milmine *v.* Bass, 29 Fed. 632.

Injunction.—A court of equity has no jurisdiction, at the instance of one occupying merely the position of a mortgagee in possession under a recorded mortgage, to enjoin a sale of the mortgaged real estate under an execution issued upon a junior judgment against the mortgagor. American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489, 22 So. 751.

26. Baldwin *v.* Bordelon, 49 La. Ann. 1088, 22 So. 196.

27. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932.

28. Crombie *v.* Young, 26 Ont. 194. *Compare* Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870.

29. See EXECUTIONS, 17 Cyc. 964 *et seq.*

30. *Connecticut.*— Chamberlain *v.* Thompson, 10 Conn. 243, 26 Am. Dec. 390.

Florida.— Harrison *v.* Roberts, 6 Fla. 711.

Illinois.— Vallette *v.* Bennett, 69 Ill. 632; Moffett *v.* Sheehey, 52 Ill. App. 376.

Indiana.— Heimberger *v.* Boyd, 18 Ind. 420.

Maine.— Bodwell Granite Co. *v.* Lane, 83 Me. 168, 21 Atl. 829.

Massachusetts.— North *v.* Dearborn, 146 Mass. 17, 15 N. E. 129.

United States.— Piatt *v.* Oliver, 19 Fed. Cas. No. 11,115, 2 MacLean 267 [*affirmed* in 3 How. 333, 11 L. ed. 622].

Two distinct equities of redemption in different parcels of land, under mortgages to different persons, cannot be sold together on execution against the mortgagor; and it is immaterial that such equities cannot be sold separately to any good advantage. McCone *v.* Courser, 64 N. H. 506, 15 Atl. 129.

31. Swan *v.* Yaple, 35 Iowa 248; Courtney *v.* Carr, 6 Iowa 238.

32. Crocker *v.* Lowenthal, 83 Ill. 579.

As to giving bond by trustee see Real Estate Trust Co. *v.* Union Trust Co., 102 Md. 41, 61 Atl. 228.

33. Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740; Marshall *v.* Kraak, 23 App. Cas. (D. C.) 129.

34. Keith *v.* Harbison, (Tenn. Ch. App. 1899) 52 S. W. 1109.

35. Taylor *v.* Hopkins, 40 Ill. 442; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328.

36. *District of Columbia.*—Smith *v.* Olcott, 19 App. Cas. 61.

Illinois.— Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248; Williamson *v.* Stone, 128 Ill. 129, 22 N. E. 1005; Ventres *v.* Cobb, 105 Ill. 33.

Missouri.— Charles Green Real Estate Co. *v.* St. Louis Mut. House Bldg. Co. No. 3, 196 Mo. 358, 93 S. W. 1111.

of trust and with reference to the subject of the trust, he may be said to represent both parties, but not in any such sense as to have power to waive their rights or to bind them by outside contracts.[37] He is bound to protect and preserve the subject of the trust, being authorized, for that purpose, to invoke the aid of the courts, and to incur necessary expense,[38] and he is not at liberty to deal with the property in such a manner as to gain any advantage for himself at the cost of the grantor or the beneficiary.[39] He is liable if he wastes or loses the property,[40] or fails to apply it, or its proceeds, according to the directions of the deed,[41] as also for any fraud or gross negligence.[42] Such a trustee is ordinarily not entitled to collect or receive the amount of the debt secured, except upon a sale,

North Carolina.— Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321.

West Virginia.— Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

Until the bonds to be secured by a mortgage are sold or pledged, the trustee in the mortgage is the agent of the maker of the bonds and mortgage, and is bound to dispose of the bonds as the maker may direct. Peninsular Iron Co. *v.* Eells, 68 Fed. 24, 15 C. C. A. 189.

37. Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63; Barrett *v.* Twin City Power Co., 118 Fed. 861; Moran *v.* Hagerman, 64 Fed. 499, 12 C. C. A. 239. *Compare* Clark *v.* Manning, 4 Ill. App. 649, holding that the trustee is not the "representative" of the beneficiary in such a sense that making the trustee a party to a suit to enforce a mechanic's lien on the mortgaged premises will make the judgment binding on the beneficiary; both must be joined as parties.

Extension of time of payment.—If the legal holder of the note secured intrusts the note to the possession of the trustee after its maturity, he is bound by the trustee's extension of the time of payment, especially when the agreement for the extension was acted upon by the parties. Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239.

38. Robeson *v.* Dunn, 17 S. D. 310, 96 N. W. 104; Jones *v.* Hamlet, 2 Sneed (Tenn.) 256; Old Colony Trust Co. *v.* Wichita, 123 Fed. 762; Illinois Trust, etc., Bank *v.* Minton, 120 Fed. 187.

Recording mortgage.— A mortgage trustee is liable in damages for the loss caused to a bond-holder by his failure to record the mortgage, thereby letting in a subsequent duly recorded mortgage. Miles *v.* Vivian, 79 Fed. 848, 25 C. C. A. 208.

Defending title.—The trustee is authorized, and it is his duty, to employ counsel and incur expenses in defending a suit assailing the trust deed, and he is entitled to reimbursement from the trust estate for such expenses. Read *v.* Memphis Gaslight Co., 107 Tenn. 433, 64 S. W. 769.

Avoiding illegal tax-sale.— He may file a bill in equity to avoid an illegal tax-sale of the land affected. Burlew *v.* Quarrier, 16 W. Va. 108.

Taking advice of court.— Such a trustee may always apply to a court of equity for its aid and direction when in doubt as to the extent of his powers and duties, the proper manner of exercising them, or the relative rights of parties in interest. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132; Rutland Trust Co. *v.* Sheldon, 59 Vt. 374, 10 Atl. 90; Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889.

39. Gunn *v.* Brantley, 21 Ala. 633; Miles *v.* Roberts, 76 Fed. 919.

Purchase of note secured.— The trustee in a deed of trust may become the purchaser and *bona fide* holder for value of the note secured by the deed, his duty as trustee concerning only the security, and not the debt; and the rule which forbids his buying the trust property has no application to his acquisition of the note in a transaction with its owner, otherwise untainted. Brewer *v.* Slater, 18 App. Cas. (D. C.) 48. And see Brady *v.* Dilley, 27 Md. 570.

40. Bellville First Nat. Bank *v.* Wheeler, 12 Tex. Civ. App. 489, 33 S. W. 1093; Kirby *v.* Goodykoontz, 26 Gratt. (Va.) 298. And see Moses *v.* Philadelphia Mortg., etc., Co., 131 Ala. 554, 32 So. 612.

41. *Illinois.*—National Park Bank *v.* Halle, 30 Ill. App. 17.

Iowa.— Williams *v.* Des Moines L. & T. Co., 114 Iowa 334, 86 N. W. 366.

Michigan.— Michigan Trust Co. *v.* Lansing Lumber Co., 121 Mich. 438, 80 N. W. 281.

Missouri.— Wallrath *v.* Bohnenkamp, 97 Mo. App. 242, 70 S. W. 1112.

New York.— Hadley *v.* Chapin, 11 Paige 245.

North Carolina.— Goodyear *v.* Cook, 131 N. C. 3, 42 S. E. 332. Where a debt, intended to be included in a deed of trust, is not correctly described in the deed, the creditor, by identifying it, may recover it out of the trust fund, while any of that fund remains; but if the trustee has in good faith paid out the whole of the trust fund in the discharge of other debts, without any notice of the mistake being given to him by the creditor, the latter cannot hold the trustee personally liable. Allmand *v.* Russell, 40 N. C. 183.

Tennessee.—Loughmiller *v.* Harris, 2 Heisk. 553.

See 35 Cent. Dig. tit. "Mortgages," § 468.

42. Smith *v.* Vertrees, 2 Bush (Ky.) 63; Tennent Shoe Co. *v.* Birdseye, 105 Mo. App. 696, 78 S. W. 1036; Polhemus *v.* Holland Trust Co., 61 N. J. Eq. 654, 47 Atl. 417; Merrill *v.* Farmers' L. & T. Co., 4 N. Y. St. 122.

or under the specific directions of the deed,[43] and he is responsible for a failure to exercise the utmost fairness and good faith in making a sale of the property,[44] or in releasing it from the encumbrance of the trust.[45]

B. Possession and Use of Property — 1. Right of Possession Before Default — a. In General. By the strict doctrine of the common law a mortgagee is entitled to the immediate possession of the mortgaged premises, in the character of the legal owner, and therefore, unless his right in this respect is waived or controlled by stipulation in the mortgage, he may, even before breach of condition, maintain ejectment and oust the mortgagor.[46] But according to the modern equitable doctrine, which regards the mortgage as nothing more than a lien or security, the mortgagor is entitled to remain in the possession and enjoyment of the estate at least until breach of condition, even without the clause now commonly inserted in mortgages securing this right to him.[47] A mortgagor of one undivided

43. Leon *v.* McIntyre, 88 Ill. App. 349. But see Yarnal's Appeal, 3 Pa. St. 363; Gasquet *v.* Fidelity Trust Co., 75 Fed. 343, 21 C. C. A. 382.

Accepting conveyance instead of money.— It is not a breach of trust for the trustee to accept an absolute conveyance of the land covered, in the form of a deed from the debtor to the creditor, instead of requiring payment in money, especially where the transaction, although made originally without the knowledge of the creditor, was afterward assented to by him. Matheney *v.* Sandford, 26 W. Va. 386.

44. *Massachusetts.*— Foster *v.* Boston, 133 Mass. 143.

Michigan.—Bradley *v.* Tyson, 33 Mich. 337.

Minnesota.— Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96.

United States.—Walker *v.* Teal, 5 Fed. 317, 7 Sawy. 39 [*reversed* on other grounds in 111 U. S. 242, 4 S. Ct. 420, 28 L. ed. 415].

See 35 Cent. Dig. tit. "Mortgages," § 466.

45. Stiger *v.* Bent, 111 Ill. 328. *Compare* Chicago, etc., Land Co. *v.* Peck, 112 Ill. 408.

Release without payment.— The trustee is bound at his peril to know that the indebtedness secured by the trust deed has been paid before he executes a release, and if he unwarrantably releases a lien imposed by such instrument he is liable to the holder of the indebtedness for the damages which necessarily flow from his wrongful act. Lennartz *v.* Popp, 118 Ill. App. 31.

46. *Alabama.*— Woodward *v.* Parsons, 59 Ala. 625; Duval *v.* McLoskey, 1 Ala. 708. *Compare* Smith *v.* Taylor, 9 Ala. 633.

Georgia.— Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Maine.— Morse *v.* Stafford, 95 Me. 31, 49 Atl. 45; Gilman *v.* Wills, 66 Me. 273; Howard *v.* Houghton, 64 Me. 445; Webster *v.* Calden, 56 Me. 204; Allen *v.* Bicknell, 36 Me. 436; Brown *v.* Leach, 35 Me. 39; Allen *v.* Parker, 27 Me. 531; Blaney *v.* Bearce, 2 Me. 132.

Maryland.— Hagerstown *v.* Groh, 101 Md. 560, 61 Atl. 467; Commercial Bldg., etc., Assoc. *v.* Robinson, 90 Md. 615, 45 Atl. 449; Brown *v.* Stewart, 1 Md. Ch. 87.

Massachusetts.— Lackey *v.* Holbrook, 11 Metc. 458; Fay *v.* Cheney, 14 Pick. 399.

Missouri.— Walcop *v.* McKinney, 10 Mo. 229.

New Hampshire.— Furbush *v.* Goodwin, 29 N. H. 321; Wheeler *v.* Bates, 21 N. H. 460; Brown *v.* Cram, 1 N. H. 169.

Pennsylvania.— Tryon *v.* Munson, 77 Pa. St. 250.

England.— Evans *v.* Elliot, 9 A. & E. 342, 8 L. J. Q. B. 51, 1 P. & D. 256, 36 E. C. L. 193; Booth *v.* Booth, 2 Atk. 343, 26 Eng. Reprint 609; Davies *v.* Williams, 7 Jur. 663; Garforth *v.* Bradley, 2 Ves. 675, 30 Eng. Reprint 430; Penrhyn *v.* Hughes, 5 Ves. Jr. 99, 31 Eng. Reprint 492.

Canada.— Dunn *v.* Miller, 3 Nova Scotia Dec. 347; Wafer *v.* Taylor, 9 U. C. Q. B. 609; Doe *v.* Smith, 8 U. C. Q. B. 139.

See 35 Cent. Dig. tit. "Mortgages," § 469.

The consent of a mortgagee gives another person no right to the possession of the premises, to the exclusion of the owner of the equity of redemption, before any actual entry made or suit for possession brought by the mortgagee. Silloway *v.* Brown, 12 Allen (Mass.) 30.

Effect of invalidity of mortgage.— Where a mortgage to secure purchase-money was void, for the reason that there was only one subscribing witness, it was held that the mortgagee could not maintain a writ of entry to recover the land from his grantee. Rundlett *v.* Hodgman, 16 N. H. 239.

Mortgage by tenant at will.— One who takes a mortgage in fee from a tenant at will, and takes possession thereunder, is a trespasser, since the execution of the mortgage determined the tenant's estate. Little *v.* Palister, 4 Me. 209.

Right of second mortgagee.— It seems that a second mortgagee may maintain ejectment against the mortgagor to recover possession of the mortgaged premises, although he is liable in turn to be ejected by the first mortgagee. Reid *v.* McBean, 8 U. C. C. P. 246.

47. *Arkansas.*— Mooney *v.* Brinkley, 17 Ark. 340.

Delaware.— Fox *v.* Wharton, 5 Del. Ch. 200.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329; Brown *v.* Snell, 6 Fla. 741.

Illinois.—Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239; Davis *v.* Dale, 150 Ill. 239,

moiety of land cannot have partition against his mortgagee, who is the absolute owner of the other moiety.[48] But a mortgagor in fee is entitled to possession against the grantee of the mortgagee.[49]

b. Statutory Provisions. In several states it is provided by statute that a mortgage shall not be deemed a conveyance, whatever its terms, so as to entitle the mortgagee to recover possession otherwise than by foreclosure and sale.[50] Such a statute may apply retroactively to the right of possession under mortgages executed prior to its passage.[51] If the mortgagee is in possession, the statute gives the mortgagor the right to oust him, at any time before foreclosure.[52] But the benefit of its provisions may be waived by contract.[53]

c. Mortgage For Support and Maintenance. Where an estate is conveyed by deed, with a mortgage back conditioned to support and maintain the grantor, there is an implied agreement that the mortgagor shall continue in possession of the premises, at least until breach of condition.[54]

d. Under Deed of Trust. Although a deed of trust in the nature of a mortgage conveys the title in fee to the trustee,[55] the right of possession of the premises vests neither in the trustee[56] nor in the beneficiary or holder of the debt secured,[57] but remains in the grantor,[58] at least until default in payment or other breach of condition.[59]

e. Under Absolute Deed as Mortgage. It is generally held that one who is in reality a mortgagee, although the conveyance to him is in the form of an absolute deed, has no greater rights than a mortgagee under a mortgage in the usual form,

37 N. E. 215; Carroll *v.* Haigh, 97 Ill. App. 576 [*reversed* on other grounds in 197 Ill. 193, 64 N. E. 375]; Cohn *v.* Franks, 96 Ill. App. 206; Bartlett *v.* Amberg, 92 Ill. App. 377. See also Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221.

Louisiana.— Baron *v.* Phelan, 4 Mart. 88. It is not of the essence of a mortgage that the mortgagor should remain in possession. Moore *v.* Boagni, 111 La. 490, 35 So. 716.

Nebraska.— Union Mut. L. Ins. Co. *v.* Lovitt, 10 Nebr. 301, 4 N. W. 986.

New Jersey.— Marshall *v.* Hadley, 50 N. J. Eq. 547, 25 Atl. 325.

Ohio.— Allen *v.* Everly, 24 Ohio St. 97.

Texas.— Duty *v.* Graham, 12 Tex. 427, 62 Am. Dec. 534. See also McCamant *v.* Roberts, (Civ. App. 1894) 25 S. W. 731.

Vermont.— Hooper *v.* Wilson, 12 Vt. 695.

United States.—Souter *v.* La Crosse R. Co., 22 Fed. Cas. No. 13,180, Woolw. 80; Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232.

See 35 Cent. Dig. tit. "Mortgages," § 469.

48. Bradley *v.* Fuller, 23 Pick. (Mass.) 1.

49. Jackson *v.* Bronson, 19 Johns. (N. Y.) 325.

50. See the statutes of the different states. And see the following cases:

California.— Skinner *v.* Buck, 29 Cal. 253; Kidd *v.* Teeple, 22 Cal. 255.

Indiana.— Reed *v.* Ward, 51 Ind. 215; Jones *v.* Thomas, 8 Blackf. 428; Grimes *v.* Doe, 8 Blackf. 371. But see Doe *v.* Grimes, 7 Blackf. 1, decided before the statute.

Michigan.— Michigan Trust Co. *v.* Lansing Lumber Co., 103 Mich. 392, 61 N. W. 668; Wagar *v.* Stone, 36 Mich. 364; Hoffman *v.* Harrington, 33 Mich. 392; Newton *v.* McKay, 30 Mich. 380. *Compare* Schwarz *v.* Sears, Walk. 170.

Minnesota.— Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464.

New York.— Becker *v.* McCrea, 48 Misc. 341, 94 N. Y. Suppl. 20.

See 35 Cent. Dig. tit. "Mortgages," § 470. And see *supra*, I, A, 3.

51. Doe *v.* Countryman, 1 Ind. 493; Doe *v.* Woodward, 1 Ind. 446. *Contra*, Mundy *v.* Monroe, 1 Mich. 68.

52. Humphrey *v.* Hurd, 29 Mich. 44.

53. Edwards *v.* Woodbury, 3 Fed. 14, 1 McCrary 429, construing Minnesota statute.

54. Davis *v.* Poland, 99 Me. 345, 59 Atl. 520; Ridley *v.* Ridley, 87 Me. 445, 32 Atl. 1005; Norton *v.* Webb, 35 Me. 218; Brown *v.* Leach, 35 Me. 39; Lamb *v.* Foss, 21 Me. 240 [see Mason *v.* Mason, 67 Me. 546]; McKim *v.* Mason, 3 Md. Ch. 186; Wales *v.* Mellen, 1 Gray (Mass.) 512; Flagg *v.* Flagg, 11 Pick. (Mass.) 475 [*compare* Colman *v.* Packard, 16 Mass. 39]; Rhoades *v.* Parker, 10 N. H. 83.

55. Ware *v.* Schintz, 190 Ill. 189, 60 N. E. 67.

56. Anderson *v.* Strauss, 98 Ill. 485; Barnett *v.* Timberlake, 57 Mo. 499; Southern Pac. R. Co. *v.* Doyle, 11 Fed. 253, 8 Sawy. 60.

57. *Illinois.*— Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239.

Massachusetts.— Somes *v.* Skinner, 16 Mass. 348.

Missouri.— Siemers *v.* Schrader, 88 Mo. 20.

Montana.— Fee *v.* Swingly, 6 Mont. 596, 13 Pac. 375.

Texas.— Kerr *v.* Galloway, 94 Tex. 641, 64 S. W. 858.

See 35 Cent. Dig. tit. "Mortgages," § 473.

58. Crittenden *v.* Johnson, 11 Ark. 94. And see cases cited in two preceding notes.

59. Cameron *v.* Phillips, 60 Ga. 434; Walker *v.* Teal, 5 Fed. 317, 7 Sawy. 39.

and therefore is not entitled to possession of the premises, if not voluntarily surrendered to him by the grantor.[60] But there are cases holding that, in the absence of any agreement on the subject, he will be entitled to recover possession of the property at any time, whether before or after breach of condition, unless the grantor interposes his equitable defense by an offer to redeem.[61]

2. **Right of Possession After Default.** After default in the payment of the debt secured or other breach of condition, the mortgagee is entitled to the possession of the premises, and may enter peaceably or by means of a judgment in ejectment;[62] and when he has gained possession he cannot be ousted by the mortgagor or any one claiming under him, in ejectment or otherwise, without full payment of the amount due to him under the mortgage.[63] And it has been

60. *Indiana.*— Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5.

Iowa.— Radford *v.* Folsom, 58 Iowa 473, 12 N. W. 536. *Compare* Richards *v.* Crawford, 50 Iowa 494; Burdick *v.* Wentworth, 42 Iowa 440.

Kansas.— Le Comte *v.* Pennock, 61 Kan. 330, 59 Pac. 641.

Minnesota.— Meighen *v.* King, 31 Minn. 115, 16 N. W. 702.

Nebraska.— Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939.

New York.— Murray *v.* Walker, 31 N. Y. 399; Van Vleck *v.* Enos, 88 Hun 348, 34 N. Y. Suppl. 754.

See, however, Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957; Pico *v.* Gallardo, 52 Cal. 206.

See 35 Cent. Dig. tit. "Mortgages," § 474.

61. Jeffery *v.* Hursh, 42 Mich. 563, 4 N. W. 303; Bennett *v.* Robinson, 27 Mich. 26; Sutton *v.* Mason, 38 Mo. 120; Walcop *v.* McKinney, 10 Mo. 229; Baker *v.* Collins, 4 Tex. Civ. App. 520, 23 S. W. 493.

62. *Alabama.*— Stanley *v.* Johnson, 113 Ala. 344, 21 So. 823; Coker *v.* Pearsall, 6 Ala. 542.

Arkansas.— Gilchrist *v.* Patterson, 18 Ark. 575; Fitzgerald *v.* Beebe, 7 Ark. 310.

California.— Keller *v.* Berry, 62 Cal. 488.

Illinois.— Barchard *v.* Kohn, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; Johnson *v.* Watson, 87 Ill. 535; Oldham *v.* Pfleger, 84 Ill. 102; Pollock *v.* Maison, 41 Ill. 516; Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354; Peterson *v.* Lindskoog, 93 Ill. App. 276. *Compare* Waite *v.* Dennison, 51 Ill. 319 (holding that where a mortgagee, on condition broken, converts the property to his own use, without foreclosure, he is liable for its value); Ortengren *v.* Rice, 104 Ill. App. 428.

Maine.— Pratt *v.* Skolfield, 45 Me. 386.

Maryland.— Ahern *v.* White, 39 Md. 409.

Massachusetts.— Green *v.* Kemp, 13 Mass. 515, 7 Am. Dec. 169. *Compare* Coughlin *v.* Gray, 131 Mass. 56.

Michigan.— Stevens *v.* Brown, Walk. 41.

Missouri.— Allen *v.* Ransom, 44 Mo. 263, 100 Am. Dec. 282.

New Hampshire.— Bellows *v.* Stone, 14 N. H. 175; Hobart *v.* Sanborn, 13 N. H. 226, 38 Am. Dec. 483.

New Jersey.— Mershon *v.* Castree, 57 N. J. L. 484, 31 Atl. 602; Shields *v.* Lozear, 34 N. J. L. 496, 3 Am. St. Rep. 256; Hart *v.* Stockton, 12 N. J. L. 322; Price *v.* Armstrong, 14 N. J. Eq. 41.

New York.— Bolton *v.* Brewster, 32 Barb. 389; Randall *v.* Raab, 2 Abb. Pr. 307; Phyfe *v.* Riley, 15 Wend. 248, 30 Am. Dec. 55.

Ohio.— Ely *v.* McGuire, 2 Ohio 223.

South Carolina.— Mitchell *v.* Bogan, 11 Rich. 636.

Vermont.— Harris *v.* Haynes, 34 Vt. 220; Pierce *v.* Brown, 24 Vt. 165; Lull *v.* Matthews, 19 Vt. 322; Stedman *v.* Gassett, 18 Vt. 346.

Wisconsin.— Gillett *v.* Eaton, 6 Wis. 30.

United States.—Walker *v.* Teal, 5 Fed. 317, 7 Sawy. 39.

England.— Hall *v.* Comfort, 18 Q. B. D. 11, 56 L. J. Q. B. 185, 55 L. T. Rep. N. S. 550, 35 Wkly. Rep. 48.

Canada.— Brethour *v.* Brooke, 23 Ont. 658; Delaney *v.* Canadian Pac. R. Co., 21 Ont. 11. But see Eglauch *v.* Labadie, 21 Quebec Super. Ct. 481, holding that the pledgee of an immovable does not become the owner on failure to pay the debt, but only has a right to have the possession of the property pledged in order to receive the products and apply their value, first on the interest and afterward on the principal of the debt.

See 35 Cent. Dig. tit. "Mortgages," § 476.

In **Montana**, although by statute (Code Civ. Proc. § 359) a mortgagee cannot recover possession without foreclosure and sale, he may after default by permission of the mortgagor enter and hold possession until the debt is paid. Fee *v.* Swingly, 6 Mont. 596, 13 Pac. 375.

In **Texas**, since the mortgagor remains the real owner of the land and is entitled to the possession, after as well as before a breach of the condition, the mortgagee cannot dispossess him by an action of trespass to try title. Mann *v.* Falcon, 25 Tex. 271.

An assignee of the purchaser of lands, under an executory contract of sale, who takes the assignment as security for the payment of a debt, cannot, on default of payment, recover possession of his assignor. Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

63. *Illinois.*— Holt *v.* Rees, 44 Ill. 30.

Kansas.— Walters *v.* Chance, (1906) 85 Pac. 779.

Maryland.— Beall *v.* Harwood, 2 Harr. & J. 167, 3 Am. Dec. 532.

Missouri.— Hubble *v.* Vaughan, 42 Mo. 138.

New York.— Bolton *v.* Brewster, 32 Barb. 389; Randall *v.* Raab, 2 Abb. Pr. 307.

Texas.— Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.

held that a tender of performance by a mortgagor after condition broken does not entitle him to maintain an action at law to recover possession.[64]

3. Agreement as to Possession. It is competent for the parties to a mortgage to make an arrangement as to the possession or the right of possession of the premises other than that which the law would determine in the absence of an agreement,[65] and even where the mortgage contains no explicit provision in that regard, an agreement of the parties may be implied from other clauses of the instrument clearly evidencing their intention,[66] from a separate instrument given at the same time with the mortgage, although not referred to in the mortgage,[67] or from a parol agreement contemporaneous with the mortgage or subsequent to it.[68] In this way the right which the law would give to the mortgagee to enter upon the possession may be postponed until the happening of a certain event,[69] or so long as the mortgagor shall comply with certain terms and conditions.[70]

4. Rights and Liabilities of Mortgagee in Possession. The term "mortgagee in possession" is applied to one who has lawfully[71] acquired actual or con-

Wisconsin.— Tallman *v.* Ely, 6 Wis. 244; Gillett *v.* Eaton, 6 Wis. 30.

United States.— Kibbe *v.* Dunn, 14 Fed. Cas. No. 7,753, 5 Biss. 233 [*affirmed* in 93 U. S. 674, 23 L. ed. 1005].

See 35 Cent. Dig. tit. "Mortgages," § 476.

64. Doton *v.* Russell, 17 Conn. 146; Bigelow *v.* Willson, 1 Pick. (Mass.) 485; Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91. *Compare* Wade *v.* Howard, 11 Pick. (Mass.) 289. See, however, Morgan *v.* Davis, 2 Harr. & M. (Md.) 9.

65. *Illinois.*— Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239; Loughridge *v.* Haugan, 79 Ill. App. 644.

Maryland.— State *v.* Brown, 73 Md. 484, 21 Atl. 374.

Michigan.— See Newton *v.* Sly, 15 Mich. 391, holding that no agreement to which a widow was not a party can give a right of possession before foreclosure under a purchase-money mortgage executed by her late husband, as against her possessory claims.

Minnesota.— See Cullen *v.* Minnesota L. & T. Co., 60 Minn. 6, 61 N. W. 818.

New York.— Becker *v.* McCrea, 48 Misc. 341, 94 N. Y. Suppl. 20.

United States.— Farmers' L. & T. Co. *v.* American Waterworks Co., 107 Fed. 23.

Canada.— Canada Permanent Bldg., etc., Soc. *v.* Byers, 19 U. C. C. P. 473; Toronto Permanent Bldg. Soc. *v.* McCurry, 12 U. C. C. P. 532; Ford *v.* Jones, 12 U. C. C. P. 358; James *v.* McGibney, 24 U. C. Q. B. 155; Dundas *v.* Arthur, 14 U. C. Q. B. 521.

66. Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239; Wilkinson *v.* Hall, 3 Bing. N. Cas. 508, 3 Hodges 56, 6 L. J. C. P. 82, 4 Scott 301, 32 E. C. L. 237; Superior Sav., etc., Soc. *v.* Lucas, 44 U. C. Q. B. 106.

Provision for possession until a certain date.— A provision in a mortgage that the mortgagor shall have possession without paying rent until a fixed date does not necessarily imply that thereafter the mortgagee shall have the right of possession. Morrow *v.* Morgan, 48 Tex. 304.

Provision as to sale or lease.— A redemise will not be inferred from a covenant that the mortgagor will not sell or lease the premises until after notice. Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. 225.

67. Clay *v.* Wren, 34 Me. 187.

68. Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666; Edwards *v.* Wray, 12 Fed. 42, 11 Biss. 251.

69. Grandin *v.* Hurt, 80 Ala. 116.

70. Bean *v.* Mayo, 5 Me. 89; Flagg *v.* Flagg, 11 Pick. (Mass.) 475.

71. Kerr *v.* Galloway, 94 Tex. 641, 64 S. W. 858; Russell *v.* Ely, 2 Black (U. S.) 575, 17 L. ed. 258.

Consent of mortgagor.— Possession taken by consent of the mortgagor or under an agreement by which he constitutes the mortgagee his agent to manage the estate gives the latter the rights of a mortgagee in possession. Jones *v.* Rigby, 41 Minn. 530, 43 N. W. 390; Walker *v.* Alexander, 24 Pa. Co. Ct. 345.

Deed of mortgagor.— Where a mortgagor, in settlement of the debt, gives the mortgagee a deed of the premises, under which the latter enters upon the possession, he is entitled to the rights of a mortgagee in possession, although the deed is afterward canceled by a decree in equity. Dickerson *v.* Thomas, 68 Miss. 156, 8 So. 465.

Possession taken before default.— When the mortgage debt matures and is unpaid, the mortgagee, who acquired possession of the property before the debt became due, and has since held it, is entitled to the position of a mortgagee in possession, if his original acquisition of possession was lawful. Winslow *v.* McCall, 32 Barb. (N. Y.) 241.

Defective foreclosure.— Where possession was gained under foreclosure proceedings, the mortgagee occupies the position of a "mortgagee in possession," although such proceedings were defective or even voidable for irregularity (Blain *v.* Rivard, 19 Ill. App. 477; Bryan *v.* Brasius, 162 U. S. 415, 16 S. Ct. 803, 40 L. ed. 1022; Stevens *v.* Lord, 2 Jur. 92); but not where the foreclosure was entirely unlawful (McClory *v.* Ricks, 11 N. D. 38, 88 N. W. 1042).

Mortgage barred by limitations.— After the expiration of the time within which a mortgage may be enforced by foreclosure, the

structive possession of the premises mortgaged to him,[72] standing upon his rights as mortgagee and not claiming under another title,[73] for the purpose of enforcing his security upon such property or making its income help to pay his debt.[74] Although his possession is not one which can ripen into an adverse title,[75] it is his unquestioned right to retain the possession so gained until he has received full satisfaction of his mortgage debt,[76] and this possession he may defend by appropriate actions,[77] transfer or assign to a third person,[78] or voluntarily sur-

mere entering into possession by the mortgagee, without objection from the mortgagor, does not restore the mortgage to efficacy nor entitle the mortgagee to the rights of a mortgagee in possession. Banning *v.* Sabin, 45 Minn. 431, 48 N. W. 8.

72. Yglesias *v.* Dewey, 60 N. J. Eq. 62, 47 Atl. 59; Flint *v.* Walker, 12 Jur. 1, 5 Moore P. C. 179, 13 Eng. Reprint 459; Sloane *v.* Mahon, Dr. & Wal. 189; Frost *v.* Hines, 12 Ont. 669.

Character of possession. — To give the rights of a "mortgagee in possession" it is not necessary that the possession should be so visible, notorious, and exclusive as would be required to acquire a title by disseizin. Holbrook *v.* Greene, 98 Me. 171, 56 Atl. 659.

Possession of part. — A mortgagee in possession of part, allowing the mortgagor to retain the rest, is not chargeable, at the suit of a subsequent encumbrancer, as constructively in possession of the whole. Soar *v.* Dalby, 15 Beav. 156, 51 Eng. Reprint 496.

As to possession by taking attornment of tenants see Noyes *v.* Pollock, 32 Ch. D. 53, 55 L. J. Ch. 513, 54 L. T. Rep. N. S. 473, 34 Wkly. Rep. 383; Simmins *v.* Shirley, 6 Ch. D. 173, 46 L. J. Ch. 875, 37 L. T. Rep. N. S. 121, 26 Wkly. Rep. 25.

Giving notice. — A mortgagee taking possession in the absence of the mortgagor is not required to give personal notice thereof to the mortgagor or his assigns. Holbrook *v.* Greene, 98 Me. 171, 56 Atl. 659.

73. *California.* — Davenport *v.* Turpin, 41 Cal. 100.

Illinois. — Rogers *v.* Herron, 92 Ill. 583; Cable *v.* Ellis, 86 Ill. 525.

Iowa. — Barnett *v.* Nelson, 46 Iowa 495.

Kansas. — Morford *v.* Wells, 68 Kan. 122, 74 Pac. 615.

England. — Blennerhassett *v.* Day, 2 Ball & B. 125; Page *v.* Linwood, 4 Cl. & F. 399, 7 Eng. Reprint 154.

See 35 Cent. Dig. tit. "Mortgages," § 480.

Taking lease from mortgagor. — As between mortgagor and mortgagee, there is nothing to prevent the latter from taking possession as tenant of the mortgagor at a fair and reasonable rent agreed upon; and in such a case, he is not a "mortgagee in possession" in the technical sense of the term. But a junior mortgagee is not bound by such an agreement, and at his instance the senior mortgagee may be charged with a fair occupation rent, although it exceeds that stipulated for. Gregg *v.* Arrott, Ll. & G. t. S. 246; Court *v.* Holland, 29 Grant Ch. (U. C.) 19.

74. Parkinson *v.* Hanbury, L. R. 2 H. L. 1, 36 L. J. Ch. 292, 16 L. T. Rep. N. S. 243, 15 Wkly. Rep. 642; Noyes *v.* Pollock, 32 Ch. D. 53, 55 L. J. Ch. 513, 54 L. T. Rep. N. S. 473, 34 Wkly. Rep. 383.

75. French *v.* Goodman, 167 Ill. 345, 47 N. E. 737. *Compare* Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.

76. *Georgia.* — Dottenheim *v.* Union Sav. Bank, etc., Co., 114 Ga. 788, 40 S. E. 825.

Illinois. — Emory *v.* Keighan, 88 Ill. 482; Kilgour *v.* Gockley, 83 Ill. 109; Harper *v.* Ely, 70 Ill. 581; Springer *v.* Lehman, 50 Ill. App. 139.

Kansas. — Kelso *v.* Norton, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308.

Maine. — Jewett *v.* Hamlin, 68 Me. 172.

Michigan. — Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691.

Minnesota. — Pace *v.* Chadderdon, 4 Minn. 499.

Mississippi. — Dickerson *v.* Thomas, 68 Miss. 156, 8 So. 465.

New Hampshire. — Salvage *v.* Haydock, 68 N. H. 484, 44 Atl. 696.

New Jersey. — Wright *v.* Wright, 7 N. J. L. 175, 11 Am. Dec. 546.

New York. — Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 73 N. Y. 82; Barson *v.* Mulligan, 66 N. Y. App. Div. 486, 73 N. Y. Suppl. 262; Dunning *v.* Fisher, 20 Hun 178 [*affirmed* in 85 N. Y. 30, 39 Am. Rep. 617]; Sahler *v.* Signer, 44 Barb. 606; Becker *v.* McCrea, 48 Misc. 341, 94 N. Y. Suppl. 20; Fox *v.* Lipe, 24 Wend. 164; Watson *v.* Spence, 20 Wend. 260; Phyfe *v.* Riley, 15 Wend. 248, 30 Am. Dec. 55.

Oregon. — Cooke *v.* Cooper, 18 Oreg. 142, 22 Pac. 945, 17 Am. St. Rep. 709, 7 L. R. A. 273; Roberts *v.* Sutherlin, 4 Oreg. 219.

Texas. — Bateson *v.* Choate, 85 Tex. 239, 20 S. W. 64.

Wisconsin. — Brinkman *v.* Jones, 44 Wis. 498; Hennesy *v.* Farrell, 20 Wis. 42; Stark *v.* Brown, 12 Wis. 572, 78 Am. Dec. 762; Tallman *v.* Ely, 6 Wis. 244; Gillett *v.* Eaton, 6 Wis. 30.

United States. — Bryan *v.* Kales, 162 U. S. 411, 16 S. Ct. 802, 40 L. ed. 1020; Brobst *v.* Brock, 10 Wall. 519, 19 L. ed. 1002; Russell *v.* Ely, 2 Black 575, 17 L. ed. 258; Moulton *v.* Leighton, 33 Fed. 143; Edwards *v.* Wray, 12 Fed. 42, 11 Biss. 251.

England. — Davy *v.* Barker, 2 Atk. 2, 26 Eng. Reprint 399.

Canada. — Mahon *v.* Gannon, 18 Nova Scotia 218.

See 35 Cent. Dig. tit. "Mortgages," § 480.

77. Miner *v.* Stevens, 1 Cush. (Mass.) 482; Frizzle *v.* Dearth, 28 Vt. 787.

78. *Alabama.* — Duval *v.* McLoskey, 1 Ala. 708.

Illinois. — See Union Mut. L. Ins. Co. *v.*

render;[79] but he cannot be deprived of it by any act of the mortgagor or one claiming under him,[80] short of a redemption or complete satisfaction of the mortgage debt,[81] or a valid and sufficient tender thereof,[82] or by a judgment creditor or purchaser at execution sale.[83] Generally, so long as any sum remains due the mortgagee, he will not be deprived of the possession, at the instance of the mortgagor or a creditor of the latter by the appointment of a receiver.[84] A mortgagee so in possession is bound to manage the property in a reasonably prudent and careful manner, so as to keep it in a state of good preservation and make it productive.[85] He may carry on a business for a reasonable time.[86] He is responsible for waste or gross mismanagement,[87] as also for his own tortious acts against third per-

Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Gillett *v.* Hickling, 16 Ill. App. 392.

Missouri.— Pickett *v.* Jones, 63 Mo. 195.

Montana.—Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576.

England.— De Verges *v.* Sandeman, [1901] 1 Ch. 70, 70 L. J. Ch. 47, 83 L. T. Rep. N. S. 706, 49 Wkly. Rep. 167.

Canada.— Doe *v.* Hanson, 8 N. Brunsw. 427.

See 35 Cent. Dig. tit. "Mortgages," § 480.

79. Beer *v.* Haas, 40 La. Ann. 413, 4 So. 326. *Compare In re* Prytherch, 42 Ch. D. 590, 59 L. J. Ch. 79, 61 L. T. Rep. N. S. 799, 38 Wkly. Rep. 61.

80. Spect *v.* Spect, 88 Cal. 437, 26 Pac. 203, 22 Am. St. Rep. 314, 13 L. R. A. 137; Townshend *v.* Thomson, 139 N. Y. 152, 34 N. E. 891; Stedman *v.* Gassett, 18 Vt. 346; James *v.* Biou, 3 Swanst. 234, 19 Rev. Rep. 200, 36 Eng. Reprint 844.

Regaining possession.— A mortgagee in possession, who has been wrongfully deprived of the possession by the owner of the equity of redemption, may again peaceably enter into possession, and thus be restored to his rightful position. Townshend *v.* Thomson, 139 N. Y. 152, 34 N. E. 891.

81. Duke *v.* Reed, 64 Tex. 705; Brine *v.* Hartpoole, 15 Vin. Abr. 467.

Mortgagee in under another title.— Where a mortgagee has taken possession, not simply under his mortgage, but under a valid sheriff's deed on execution against the mortgagor for an independent debt, there can be no redemption. Freiknecht *v.* Meyer, 38 N. J. Eq. 315.

Foreclosure barred.— Where a mortgagee is in possession, and foreclosure is barred by limitations, resort must be had to an action to redeem from the mortgage debt. Kelso *v.* Norton, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308.

Amount payable.— Where mortgagees are in possession for condition broken, the owner of the equity will save the effect of a foreclosure by paying the sum then due on the mortgage, but will not be let into possession unless he pays or secures the amount not yet due. Wood *v.* Goodwin, 49 Me. 260, 77 Am. Dec. 259.

82. Bailey *v.* Metcalf, 6 N. H. 156; Sanderson *v.* Phinney, 2 Walk. (Pa.) 526.

Where the rents and profits received by the mortgagee while in possession have amounted to a sum equal to the principal and interest of the mortgage debt, the mortgagor may bring ejectment without producing the money in court. Wharf *v.* Howell, 5 Binn. (Pa.) 499.

83. Doe *v.* Tunnell, 1 Houst. (Del.) 320; Dickason *v.* Dawson, 85 Ill. 53; Shepard *v.* Pratt, 15 Pick. (Mass.) 32. *Compare* Wilson *v.* Shoenberger, 34 Pa. St. 121.

84. Peterson *v.* Lindskoog, 93 Ill. App. 276. See, however, Quarrell *v.* Beckford, 13 Ves. Jr. 377, 33 Eng. Reprint 335, holding it to be otherwise where the mortgagee refuses to swear that anything remains due him.

Exception to rule.— It is otherwise, however, where it is shown that there is danger that the income from the property may be lost and dissipated, and that the mortgagee is insolvent or not financially responsible, or if it appears that he is committing waste upon the property or injuring it in material respects. In such a state of affairs it will be proper, as a means of securing justice and fair play for all parties, to appoint a receiver to take charge of the property until satisfaction of the mortgage debt is made. Springer *v.* Lehman, 50 Ill. App. 139; Bolles *v.* Duff, 35 How. Pr. (N. Y.) 481. And see Berney *v.* Sewell, 1 Jac. & W. 647, 21 Rev. Rep. 265, 37 Eng. Reprint 515; Hanson *v.* Derby, 2 Vern. Ch. 392, 23 Eng. Reprint 852.

85. Murdock *v.* Clarke, 90 Cal. 427, 27 Pac. 275; Wann *v.* Coe, 31 Fed. 369; Marriott *v.* Anchor Reversionary Co., 2 Giffard 457, 66 Eng. Reprint 191; Strode *v.* Blackburne, 3 Ves. Jr. 222, 30 Eng. Reprint 979.

86. Cook *v.* Thomas, 24 Wkly. Rep. 427. And see Briggs *v.* Neal, 120 Fed. 224, 56 C. C. A. 572.

Interest on sums paid by or due to mortgagee.— Where, pursuant to a mortgage, the mortgagee assumed charge of the mortgagor's business, it was equitable that he should receive interest paid by him and interest upon the indebtedness owed to himself. Pomeroy *v.* Noud, 145 Mich. 37, 108 N. W. 498.

87. *Alabama.*— Perdue *v.* Brooks, 85 Ala. 459, 5 So. 126.

Arkansas.— Harrill *v.* Stapleton, 55 Ark. 1, 16 S. W. 474.

Iowa.— Barnett *v.* Nelson, 54 Iowa 41, 6 N. W. 49, 37 Am. Rep. 183.

New York.— Robinson *v.* Guaranty Trust Co., 51 N. Y. App. Div. 134, 64 N. Y. Suppl. 525.

North Carolina.— Morrison *v.* McLeod, 37 N. C. 108.

sons.[88] After notice he is liable for a continuance on the mortgaged premises of a nuisance erected by the mortgagor.[89]

5. Actions For Possession — a. Between Parties to Mortgage — (i) *Nature and Form of Remedy.* A mortgagee entitled to the possession of the mortgaged premises may ordinarily recover it in an action of ejectment, on the strength of his legal title;[90] but forcible entry and detainer is not generally a proper proceeding for this purpose.[91] So if the mortgagee has been in possession, and the condition of the mortgage is duly performed, the mortgagor may maintain ejectment to recover possession, the estate of the mortgagee being then terminated;[92] but default in payment or other breach of condition makes the title of the mortgagee indefeasible at law, whatever may be his rights in equity, so that thereafter, even though the mortgage is fully satisfied, the mortgagor is not entitled to ejectment or any other action at law so long as the mortgage remains formally undischarged, his remedy being by bill in equity,[93] or, if the rents and profits received by the mortgagee have amounted to enough to discharge the mortgage debt, by an action for an accounting.[94]

(ii) *Right of Action.* In most jurisdictions when a mortgagee becomes entitled to the possession of the demised premises, whether before or after breach of condition, he will have a right of action against the mortgagor or any person claiming under him, as tenant or otherwise, in ejectment or other appropriate form of action, to recover such possession,[95] and so also will an assignee of the

England.—Palmer *v.* Hendrie, 27 Beav. 349, 54 Eng. Reprint 136; Hood *v.* Easton, 2 Giffard 692, 2 Jur. N. S. 729, 4 Wkly. Rep. 575, 66 Eng. Reprint 290. And see *infra* XV, I, 3.

88. Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49.

89. Ferman *v.* Lombard Inv. Co., 56 Minn. 166, 57 N. W. 309.

90. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673. And see *supra*, XV, B, 1, a.

91. Bragdon *v.* Hatch, 77 Me. 433, 1 Atl. 140; Reed *v.* Elwell, 46 Me. 270; Boyle *v.* Boyle, 121 Mass. 85; Walker *v.* Thayer, 113 Mass. 36. See also Mooney *v.* Brinkley, 17 Ark. 340; Roach *v.* Cosine, 9 Wend. (N. Y.) 227.

When maintainable.— Forcible entry and detainer may be maintained by an equitable mortgagee against the equitable mortgagor. Jewett *v.* Mitchell, 72 Me. 28. And see Lawton *v.* Savage, 136 Mass. 111. And a mortgagee who has entered to foreclose, and thus obtained the actual possession, may thereupon maintain forcible entry and detainer against a third person. Mitchell *v.* Shanley, 15 Gray (Mass.) 319. And after such entry the mortgagor can no longer maintain the action. Chamberlain *v.* Perry, 138 Mass. 546.

92. Blanchard *v.* Kenton, 4 Bibb (Ky.) 451; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

93. *Kansas.*— Kelso *v.* Norton, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308.

Maine.— Woods *v.* Woods, 66 Me. 206; Conner *v.* Whitmore, 52 Me. 185; Dyer *v.* Toothaker, 51 Me. 380; Hill *v.* More, 40 Me. 515; Wilson *v.* Ring, 40 Me. 116.

Massachusetts.— New England Jewelry Co. *v.* Merriam, 2 Allen 390; Hill *v.* Payson, 3 Mass. 559.

New Hampshire.— Johnson *v.* Elliot, 26 N. H. 67.

North Dakota.— Nash *v.* Northwest Land Co., (1906) 108 N. W. 792.

Wisconsin.— Stark *v.* Brown, 12 Wis. 572, 78 Am. Dec. 762.

See 35 Cent. Dig. tit. "Mortgages," § 482.

94. Hubbell *v.* Moulson, 53 N. Y. 225, 13 Am. Rep. 519.

95. *Connecticut.*— Middletown Sav. Bank *v.* Bates, 11 Conn. 519; Wakeman *v.* Banks, 2 Conn. 445.

Illinois.— Johnson *v.* Watson, 87 Ill. 535; Oldham *v.* Pfleger, 84 Ill. 102.

Maine.— Hadley *v.* Hadley, 80 Me. 459, 15 Atl. 47.

Massachusetts.— Blanchard *v.* Brooks, 12 Pick. 47.

Michigan.— See Stevens *v.* Brown, Walk. 41.

Missouri.—Allen *v.* Ranson, 44 Mo. 263, 100 Am. Dec. 282.

New Jersey.— Den *v.* Stockton, 12 N. J. L. 322.

North Carolina.—Kiser *v.* Combs, 114 N. C. 640, 19 S. E. 664.

Vermont.— Pierce *v.* Brown, 24 Vt. 165.

See 35 Cent. Dig. tit. "Mortgages," § 484.

Effect of filing bill to foreclose.— A mortgagee does not divest himself of the right to maintain ejectment by filing a bill to foreclose, in connection with a second mortgagee procuring an order of sale, and accepting the sheriff's deed for the premises; for if the sheriff's deed is valid, the mortgagee, having become the purchaser, can recover by virtue of the purchase and conveyance, and if the sale is not valid, his mortgage title remains. Den *v.* Stockton, 12 N. J. L. 322.

Statute requiring foreclosure.— A mortgagee may maintain ejectment, notwithstanding the statute requiring a foreclosure as the first proceeding in the collection of the debt. Mershon *v.* Castree, 57 N. J. L. 484, 31 Atl. 602.

mortgage, on proving his title to the mortgage;[96] but in a few no right of action is recognized, the mortgagee's only remedy being by suit to foreclose.[97] On the other hand, although in theory the legal title may be vested in the mortgagee, no action of ejectment will lie against him unless he has entered on the premises or exercised some claim of ownership.[98]

(III) *NOTICE TO QUIT.* When a mortgagee has become entitled to immediate possession of the premises, and allows the mortgagor to remain, the latter is a tenant by sufferance only, and hence is not entitled to the notice to quit usually given to tenants, as a prerequisite to the mortgagee's right of entry or to bring ejectment.[99] And the same rule applies where the property is in the possession of a grantee or vendee of the mortgagor.[1]

(IV) *DEFENSES.* In ejectment by a mortgagee to recover the premises after default, as his title is a legal one, only legal defenses can be interposed,[2] including full performance of the conditions of the mortgage,[3] payment of the debt secured,[4] but not, at common law, after the law day,[5] a waiver of the default,[6] the statute of limitations,[7] the infancy, insanity, coverture, or other disqualifying dis-

Right of foreclosure barred.— A mortgagee who has never asserted his right of entry upon the mortgaged premises cannot do so for the first time after the right of foreclosure is barred by the statute of limitations. Benton *v.* Nicoll, 24 Minn. 221.

Effect of payment.— Where land is conveyed in trust with power to sell and apply the proceeds in payment of a debt, the payment of the debt does not divest the trustee of the legal estate, so as to prevent him from maintaining ejectment. Moore *v.* Burnet, 11 Ohio 334.

Demand as prerequisite.—Where the breach of condition alleged as a foundation for ejectment to recover possession is the non-payment of an annual instalment of interest, which was expressed to be payable annually "if lawfully demanded," the mortgagee must prove a demand of interest, or at least that he sought defendant on the mortgaged premises for the purpose of making a demand. Lawson *v.* Tilden, 2 Hen. & M. (Va.) 95.

Statutory action against mortgagor as tenant.— If the mortgagor has agreed to pay rent to the mortgagee, the latter, on breach of the agreement, may maintain a statutory action to recover possession in the character of a landlord. Murray *v.* Riley, 140 Mass. 490, 6 N. E. 512.

96. Farley *v.* Whitehead, 63 Ala. 295.

97. Fox *v.* Wharton, 5 Del. Ch. 200; Sahler *v.* Signer, 37 Barb. (N. Y.) 329; Duty *v.* Graham, 12 Tex. 427, 62 Am. Dec. 534; Brinkman *v.* Jones, 44 Wis. 498. See also Campbell *v.* Swan, 48 Barb. (N. Y.) 109; Van Slyke *v.* Shelden, 9 Barb. (N. Y.) 278. But see Jackson *v.* Dubois, 4 Johns. (N. Y.) 216.

98. Lyman *v.* Hibbard, 18 N. H. 233.

99. *Arkansas.*—Smith *v.* Robinson, 13 Ark. 533.

Connecticut.— Wakeman *v.* Banks, 2 Conn. 445; Rockwell *v.* Bradley, 2 Conn. 1.

Illinois.— Jackson *v.* Warren, 32 Ill. 331; Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354.

North Carolina.— Williams *v.* Bennett, 26 N. C. 122; Fuller *v.* Wadsworth, 24 N. C. 263, 38 Am. Dec. 692.

England.— Doe *v.* Tom, 4 Q. B. 615, 12 L. J. Q. B. 264, 45 E. C. L. 615; Doe *v.* Maisey, 8 B. & C. 767, 3 M. & R. 107, 15 E. C. L. 377; Doe *v.* Day, 2 Q. B. 147, 2 G. & D. 757, 6 Jur. 913, 12 L. J. Q. B. 86, 42 E. C. L. 612; Doe *v.* Davies, 7 Exch. 89, 16 Jur. 44, 21 L. J. Exch. 60.

Canada.— Doe *v.* Cunard, 4 N. Brunsw. 193; Canada Permanent Bldg., etc., Soc. *v.* Byers, 19 U. C. C. P. 473; Stevenson *v.* Culbertson, 12 U. C. C. P. 79; Konkle *v.* Maybee, 23 U. C. Q. B. 274. It has been held that where the mortgage itself provided that no means should be taken to obtain possession of the mortgaged premises until after a month's notice in writing, after default, demanding payment, a suit in ejectment will not lie until after such notice has been given after default made. Copp *v.* Holmes, 6 U. C. C. P. 373; Keyworth *v.* Thompson, 16 U. C. Q. B. 178.

See 35 Cent. Dig. tit. "Mortgages," § 485.

In New York.— By an early statute it was provided that the mortgagor should be entitled to six months' notice to quit before the mortgagee could bring ejectment against him. See Jackson *v.* Stafford, 2 Cow. 547; Jackson *v.* Hopkins, 18 Johns. 487; Jackson *v.* Lamson, 17 Johns. 300; Jackson *v.* Green, 4 Johns. 186; Jackson *v.* Laughhead, 2 Johns. 75.

1. Kruse *v.* Scripps, 11 Ill. 98; Den *v.* Wade, 20 N. J. L. 291; Jackson *v.* Hopkins, 18 Johns. (N. Y.) 487; Jackson *v.* Fuller, 4 Johns. (N. Y.) 215; Jackson *v.* Chase, 2 Johns. (N. Y.) 84.

2. Lomb *v.* Pioneer Sav., etc., Co., 106 Ala. 591, 17 So. 670.

3. Mason *v.* Mason, 67 Me. 546.

4. Watson *v.* Herring, 115 Ala. 271, 22 So. 28. And see Carter *v.* McLaurin, 8 U. C. C. P. 460.

5. Cross *v.* Robinson, 21 Conn. 379; Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Goodeve *v.* Wallace, 24 U. C. Q. B. 31. And see *supra*, XV, B, 2.

6. Langridge *v.* Payne, 2 Johns. & H. 423, 7 L. T. Rep. N. S. 23, 10 Wkly. Rep. 726, 70 Eng. Reprint 1124.

7. Lawrence *v.* Bridleman, 3 Yerg. (Tenn.)

ability of the mortgagor,[8] or the invalidity of the consideration for the mortgage.[9] Where the defense set up is that an absolute deed was intended as a mortgage, the grantor, suing for a reconveyance, must offer to redeem or tender the full amount due.[10] And where the equitable right to redeem from a mortgage in the form of an absolute deed has become barred by limitations, so that no affirmative relief could be predicated on it, it cannot be interposed as a defense to the grantee's action to recover possession.[11]

(v) *Parties.* An action for possession of mortgaged premises, when the mortgagee is dead, should be brought by his executor or administrator, not the heir,[12] although a devisee of the mortgage may sue, joining with him the executor of the devisor.[13] Where the action is against the grantee or vendee of the mortgagor, the latter should be made a defendant, unless a non-resident;[14] and if the mortgagor is dead, the suit should be against his heirs, not his personal representatives.[15]

(vi) *Pleading, Evidence, and Procedure.* In ejectment by a mortgagee for possession, plaintiff must allege and prove his title by mortgage, and, if necessary, a breach of the condition.[16] If he sues upon a deed which is absolute in form, proof that it is in fact a mortgage will defeat his recovery.[17] It is not generally necessary in this form of action to produce or prove the note, bond, or other evidence of the debt secured.[18] It has been held that, in ejectment upon a mortgage, the consideration upon which it was given cannot be inquired into,[19] and that, where such action is brought by an assignee of a mortgage, it is only the amount of the mortgage debt which can be put in issue, not the amount of the debt from the mortgagee to the assignee.[20] Proof that the mortgagor tendered what he claimed was the balance due on the mortgage debt, without showing that the sum tendered was the full amount remaining due, is insufficient to show that the mortgagee's right to possession has terminated.[21] In some jurisdictions defendant may obtain a perpetual stay of proceedings in the ejectment suit by paying or tendering the full amount of the mortgage debt.[22] Failing this, the judgment may be either absolute or conditional in form, providing, in the latter case, for the surrender of possession to plaintiff unless defendant shall, within a limited time, discharge the mortgage debt.[23] Where the suit is founded on a deed

496; Pugh *v.* Heath, 7 App. Cas. 235, 51 L. J. Q. B. 367, 46 L. T. Rep. N. S. 321, 30 Wkly. Rep. 553.

8. New Brunswick State Bank *v.* Moore, 5 N. J. L. 551 (insanity of mortgagor); Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500 (infancy of mortgagor).

9. See *supra*, X, F, 2 *et seq.* But see Williams *v.* Englebrecht, 37 Ohio St. 383, holding that, in the mortgagee's action to recover possession, the fact that the mortgage was given to compound a felony is not a defense.

10. Hughes *v.* Davis, 40 Cal. 117; Robinson *v.* Alexander, 65 Ga. 406; Roberts *v.* Trammell, 55 Ga. 383; Lackey *v.* Bostwick, 54 Ga. 45. But see Bradbury *v.* Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92, holding that a tender of the amount of the mortgage debt is not necessary where the estate is embarrassed, and unable to raise the money except by a sale of the mortgagor's interest.

11. Richards *v.* Crawford, 50 Iowa 494.

12. Dewey *v.* Van Deusen, 4 Pick. (Mass.) 19.

13. Gibbes *v.* Holmes, 10 Rich. Eq. (S. C.) 484.

14. Baker *v.* Collins, 4 Tex. Civ. App. 520, 23 S. W. 493.

15. Golder *v.* Golder, 95 Me. 259, 49 Atl. 1050. *Compare* Gibbes *v.* Holmes, 10 Rich. Eq. (S. C.) 484.

16. Brookover *v.* Hurst, 1 Metc. (Ky.) 665, holding that if the suit is brought before breach of condition, and a breach occurs while it is pending, plaintiff may allege it by a supplemental pleading and recover on the strength of such breach, without beginning a new suit.

17. Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549. See Parker *v.* Hubble, 75 Ind. 580.

18. Den *v.* Wade, 20 N. J. L. 291. And see Morse *v.* Stafford, 95 Me. 31, 49 Atl. 45.

19. Raguet *v.* Roll, 7 Ohio 76.

20. Sanders *v.* Cassady, 86 Ala. 246, 5 So. 503.

21. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17.

22. Tichenor *v.* Collins, 45 N. J. L. 123; Dowle *v.* Neale, 10 Wkly. Rep. 627; Hay *v.* McArthur, 8 Ont. Pr. 321; Trust, etc., Co. *v.* McGillvray, 7 Ont. Pr. 318; McDonald *v.* Doray, 11 U. C. Q. B. 318; Doe *v.* Rutherford, 1 U. C. Q. B. 172; Doe *v.* McLean, 4 U. C. Q. B. O. S. 1. See, however, Abbe *v.* Goodwin, 7 Conn. 377.

23. Darling *v.* Chapman, 14 Mass. 101.

which is absolute in form, but found by the court to have been intended as a mortgage, the court may order a reconveyance of the premises on payment of the debt secured,[24] or a sale of the property to satisfy plaintiff's lien.[25] In ejectment for land which defendant conveyed to plaintiff as security for a liability incurred by plaintiff for defendant, plaintiff cannot recover mesne profits, except pending the action, and to be applied to the payment of the debt.[26] Ejectment against a tenant in possession cannot be defeated by the mortgagor alienating the premises; and all persons coming in under the mortgage after suit so commenced will be bound by the judgment.[27]

b. Against Third Persons. As against all persons except the mortgagee or those claiming under him, the mortgagor remains the real owner of the property, and is entitled to maintain ejectment or trespass,[28] and this is true in the case of a deed absolute in form but intended as a mortgage.[29] It seems that the trustee or grantee in a deed of trust may be entitled to proceed against strangers,[30] and a right of action against trespassers has also been recognized as existing in the mortgagee,[31] where he is in actual possession,[32] or is entitled to the possession on account of a breach of the condition of the mortgage.[33]

c. Actions by Third Persons. An action to recover mortgaged premises may be maintained by the heirs of the mortgagor only under the same circumstances which would have sustained such a suit if brought by the mortgagor himself;[34] and the same is true of the mortgagor's grantee or vendee.[35] The purchaser at execution sale under a judgment junior to the mortgage cannot maintain ejectment against the mortgagee lawfully in possession;[36] but a purchaser at a sheriff's

Nominal damages and costs may be allowed, although the mortgagee obtains possession of the premises by surrender, and they are equal in value to the amount due him. Barnes *v.* Beach, 18 Vt. 146.

24. Montgomery *v.* Spect, 55 Cal. 352.

25. Meredith *v.* Meredith, 54 Kan. 150, 37 Pac. 974.

26. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

27. Hunt *v.* Hunt, 17 Pick. (Mass.) 118.

28. *Alabama.*—Allen *v.* Kellam, 69 Ala. 442.

Florida.— Brown *v.* Snell, 6 Fla. 741.

Illinois.— Emory *v.* Keighan, 88 Ill. 482; Hall *v.* Lance, 25 Ill. 277.

Maine.— Stinson *v.* Ross, 51 Me. 556, 81 Am. Dec. 591; Huckins *v.* Straw, 34 Me. 166; Chadbourne *v.* Rackliff, 30 Me. 354.

Maryland.— Morgan *v.* Davis, 2 Harr. & M. 9.

New Hampshire.— Ellison *v.* Daniels, 11 N. H. 274.

South Carolina.— Laffan *v.* Kennedy, 15 Rich. 246.

Wisconsin.— See Hennesy *v.* Farrell, 20 Wis. 42.

United States.— See Southern Pac. R. Co. *v.* Doyle, 11 Fed. 253, 8 Sawy. 60.

Canada.— Doe *v.* Hanson, 11 N. Brunsw. 340.

See 35 Cent. Dig. tit. "Mortgages," §§ 492,

See, however, Dougherty *v.* Kercheval, 1 A. K. Marsh. (Ky.) 52, holding that a mortgagor cannot maintain ejectment against a third person if the mortgage debt is unpaid.

29. Parker *v.* Hubble, 75 Ind. 580.

30. Pennington *v.* Woodall, 17 Ala. 685; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729.

31. *Connecticut.*— Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Massachusetts.— Hall *v.* Bell, 6 Metc. 431; Somes *v.* Skinner, 3 Pick. 52; Partridge *v.* Gordon, 15 Mass. 486; Darling *v.* Chapman, 14 Mass. 101; Green *v.* Kemp, 13 Mass. 515, 7 Am. Dec. 169.

New Hampshire.— Marsh *v.* Smith, 18 N. H. 366; Rundlett *v.* Hodgman, 16 N. H. 239.

New Jersey.— Smallwood *v.* Bilderback, 16 N. J. L. 497.

Vermont.— Appleton *v.* Edson, 8 Vt. 239.

United States.— Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531.

Canada.— Canada Permanent Bldg., etc., Soc. *v.* Rowell, 19 U. C. Q. B. 124.

See 35 Cent. Dig. tit. "Mortgages," §§ 492, 496.

32. Haven *v.* Adams, 4 Allen (Mass.) 80; Todd *v.* Davis, 32 Mich. 160; Blackwood *v.* Van Vleet, 11 Mich. 252; Mundy *v.* Monroe, 1 Mich. 68; Bennett *v.* Williamson, 50 N. C. 307.

33. Esker *v.* Heffernan, 159 Ill. 38, 41 N. E. 1113; Dougherty *v.* Kercheval, 1 A. K. Marsh. (Ky.) 52; Doe *v.* Fish, 5 U. C. Q. B. 295.

34. Oldham *v.* Pfleger, 84 Ill. 102.

35. Spect *v.* Spect, 88 Cal. 437, 26 Pac. 203, 22 Am. St. Rep. 314, 13 L. R. A. 137; Butler *v.* Rockafellar, 7 Blackf. (Ind.) 247; Lane *v.* Sleeper, 18 N. H. 209.

36. *Arkansas.*— Cohn *v.* Hoffman, 45 Ark. 376.

Illinois.— Dickason *v.* Dawson, 85 Ill. 53.

Indiana.— Jewett *v.* Tomlinson, 137 Ind. 326, 36 N. E. 1106, if the mortgagee is in possession after default, the purchaser must redeem the premises by paying the mortgage.

sale of an equity of redemption may recover in an action of ejectment against the mortgagor in possession.[37] One who has paid to the person entitled thereto the amount due on a mortgage, under a claim of having attached the right of redemption, and who has received a release of the mortgagee's interest in the premises, may maintain a writ of entry for possession against the owner of the equity of redemption, although the attachment was void.[38]

C. Control and Disposition of Property — 1. Rights of Mortgagor — a. In General. Where a mortgage is regarded only as a security, as it now generally is, the mortgagor remains to all intents and purposes the beneficial owner of the estate, and may control, manage, and dispose of it as he wills,[39] so far as concerns all persons except the mortgagee,[40] and subject to the condition that he must do nothing to destroy or impair the mortgagee's security.[41] He is a freeholder, as regards all the rights and privileges, both civil and political, which the possession of a freehold confers,[42] and cannot be deprived of his title, even after breach of condition, except by a voluntary surrender or conveyance or by a due and regular foreclosure.[43]

b. Sale of Premises. Notwithstanding the existence of a mortgage on land, the owner thereof may sell and convey his interest, that is, the equitable title or equity of redemption, to a third person, transferring to the latter all his own rights in the premises,[44] and the mortgagee has no right to interfere in the sale or prevent it.[45] But of course such a sale does not prejudice the rights of the mortgagee; the grantee succeeds to the mortgagor's estate, occupies his position, takes subject to the encumbrance, and is subject to the same equities.[46]

c. Lease of Premises. A mortgagor, remaining in possession, has the right to lease the premises to a tenant,[47] and to enforce against the latter all the reme-

Massachusetts.—Poignard *v.* Smith, 6 Pick. 172.

Rhode Island.— See Chedel *v.* Millard, 13 R. I. 461.

See 35 Cent. Dig. tit. "Mortgages," § 493.

Compare Bosse *v.* Johnson, 73 Tex. 608, 11 S. W. 860.

37. Davis *v.* Evans, 27 N. C. 525.

38. Hammond *v.* Reynolds, 72 Me. 513.

39. *Illinois.*—"The mortgagor's interest in the land may be sold upon execution; his widow is entitled to dower in it; it passes as real estate by devise; it descends to his heirs, by his death, as real estate; he is a freeholder by virtue of it; he may maintain an action for the land against a stranger and the mortgage cannot be set up as a defense." Lightcap *v.* Bradley, 186 Ill. 510, 520, 58 N. E. 221.

Maine.— Wilkins *v.* French, 20 Me. 111.

Michigan.— Ladue *v.* Detroit, etc., R. Co., 13 Mich. 380, 87 Am. Dec. 759; Crippen *v.* Morrison, 13 Mich. 23.

New Hampshire.— Donation Trustees *v.* Streeter, 64 N. H. 106, 5 Atl. 845; Orr *v.* Hadley, 36 N. H. 575.

North Carolina.— Watkins *v.* Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983. The equitable owner of land may compel a conveyance of the legal title to him and surrender of possession, although he has given a mortgage on it to a third person. Lackey *v.* Martin, 120 N. C. 391, 27 S. E. 35.

United States.— Norton *v.* Phelps, 105 U. S. 393, 26 L. ed. 1072; Western Union Tel. Co. *v.* Ann Arbor R. Co., 90 Fed. 379, 33 C. C. A. 113 [*reversed* on other grounds in 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052].

See 35 Cent. Dig. tit. "Mortgages," § 497.

40. Wilkins *v.* French, 20 Me. 111; Orr *v.* Hadley, 36 N. H. 575. And see Beach *v.* Royce, 1 Root (Conn.) 244, holding that a mortgagor, remaining in possession, is to be considered as holding under the mortgagee, and not against him.

41. Moore *v.* Little Rock, 42 Ark. 66 (mortgagor cannot annex land to a city, without the consent of the mortgagee, so as to prevent the latter from enjoining the collection of taxes thereon); Bell *v.* Cassem, 158 Ill. 45, 41 N. E. 1089, 29 L. R. A. 571 (mortgagor liable for waste); Bull's Petition, 15 R. I. 534, 10 Atl. 484.

42. Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; White *v.* Rittenmyer, 30 Iowa 268.

43. Peninsular Trading, etc., Co. *v.* Pacific Steam Whaling Co., 123 Cal. 689, 56 Pac. 604; Hull *v.* McCall, 13 Iowa 467; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62. See also Hume *v.* Fleet, 23 N. Y. App. Div. 185, 48 N. Y. Suppl. 889.

44. See *infra*, XVII, A, 1, a.

45. Denham *v.* Kirkpatrick, 64 Ga. 71. *Compare* McCoy *v.* Mt. Pleasant First Nat. Bank, 50 Iowa 577, holding that a mortgagee is not liable in damages for a failure of sale of the land through his agent's warning those present at the attempted auction that the purchaser would buy a lawsuit.

46. Medley *v.* Elliott, 62 Ill. 532; Ellithorp *v.* Dewing, 1 D. Chipm. (Vt.) 141.

47. Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Medley *v.* Elliott, 62 Ill. 532; Kennett *v.* Plummer, 28 Mo. 142; Brown *v.* Peto, [1900] 2 Q. B. 653, 69 L. J. Q. B. 869, 83 L. T. Rep. N. S. 303, 49 Wkly. Rep. 324;

dies usually given by the law or stipulated for in their agreement,[48] although no such lease can operate to the prejudice of the mortgagee's title, or interfere with his right to enter on breach of condition or to recover the possession by suit when he becomes entitled to it.[49] There is no privity of estate or contract between the mortgagee and the tenant of the mortgagor, and consequently the mortgagee is neither liable upon the covenants of the lease to the tenant;[50] nor, unless he puts himself in position to do so by accepting the occupant as his tenant, is he entitled to claim the benefits of the lease or its covenants, or to distrain for or otherwise collect the rent.[51]

2. Rights and Liabilities of Mortgagee — a. In General. A mortgagee who has not taken possession of the premises[52] is not entitled to exercise acts of dominion or control over them, not being in any proper sense the owner or proprietor.[53] A mortgagee of land including a mill-dam is not liable for damages caused by the flowage of adjoining lands or by the breaking of the dam, if he is not in possession of the premises by himself or a tenant;[54] but it is otherwise where he is in possession.[55]

b. Sale of Premises. Where a deed of conveyance is executed by one whose only title to the land is that of a mortgagee, it will operate to transfer nothing more than his possessory right to the land, together with the ownership of the debt secured, if intended as an assignment thereof,[56] unless the mortgage contains a power of sale, in which case, if it is lawfully exercised, a valid title will be transferred to the vendee.[57]

Wilson *v.* Queen's Club, [1891] 3 Ch. 522, 60 L. J. Ch. 698, 65 L. T. Rep. N. S. 42, 40 Wkly. Rep. 172; O'Loughlin *v.* Fitzgerald, Ir. R. 7 Eq. 483; Bevan *v.* Habgood, 1 Johns. & H. 222, 7 Jur. N. S. 41, 30 L. J. Ch. 107, 8 Wkly. Rep. 703, 70 Eng. Reprint 728; *Re* Nugent, 49 L. T. Rep. N. S. 132.

Pending foreclosure.— A mortgagor cannot make a valid lease of the premises after the filing of a bill for foreclosure. Perry *v.* Keane, 6 L. J. Ch. 67; Mansfield *v.* Hamilton, 2 Sch. & Lef. 28.

Lease before mortgage.— Where, before the mortgage was given, defendant became tenant of the mortgagor for a year, it was held that at the end of that time his right ceased, and the mortgagee could eject him without notice. Canada Permanent Bldg., etc., Soc. *v.* Rowell, 19 U. C. Q. B. 124.

48. Fairclough *v.* Marshall, 4 Ex. D. 37, 48 L. J. Exch. 146, 39 L. T. Rep. N. S. 389, 27 Wkly. Rep. 145; Snell *v.* Finch, 13 C. B. N. S. 651, 9 Jur. N. S. 333, 32 L. J. C. P. 117, 7 L. T. Rep. N. S. 747, 11 Wkly. Rep. 341, 106 E. C. L. 651; Cuthbertson *v.* Irving, 4 H. & N. 742, 5 Jur. N. S. 740, 28 L. J. Exch. 306; Hickman *v.* Machin, 4 H. & N. 716, 5 Jur. N. S. 576, 28 L. J. Exch. 310; Thwaites *v.* McDonough, 2 Ir. Eq. 97; Reece *v.* Strousberg, 50 J. P. 292, 54 L. T. Rep. N. S. 133. See Bayly *v.* Went, 51 L. T. Rep. N. S. 764.

49. *California.*— McDermott *v.* Burke, 16 Cal. 580.

Illinois.— Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837.

Massachusetts.— Colton *v.* Smith, 11 Pick. 311, 22 Am. Dec. 375; Hicks *v.* Bingham, 11 Mass. 300; Perkins *v.* Pitts, 11 Mass. 125; Gould *v.* Newman, 6 Mass. 239.

England.— Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734. A mortgagee in possession, who appears upon the pleadings to be paid off, and has given security for the payment of the rents into court, will be restrained by injunction from ejecting the tenants in occupation of the lands, although the answer claims a sum to be still due. Robinson *v.* Maguire, 9 Ir. Eq. 269.

Canada.— McKay *v.* Davidson, 13 Grant Ch. (U. C.) 498.

See 35 Cent. Dig. tit. "Mortgages," § 498.

50. Tilden *v.* Greenwood, 149 Mass. 567, 22 N. E. 45; Cargill *v.* Thompson, 57 Minn. 534, 59 N. W. 638.

51. Anderson *v.* Robbins, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; Moran *v.* Pittsburgh, etc., R. Co., 32 Fed. 878; Woolston *v.* Ross, [1900] 1 Ch. 788, 64 J. P. 264, 69 L. J. Ch. 363, 82 L. T. Rep. N. S. 21, 48 Wkly. Rep. 556; Corbett *v.* Plowden, 25 Ch. D. 678, 54 L. J. Ch. 109, 50 L. T. Rep. N. S. 740, 32 Wkly. Rep. 667; Carter *v.* Salmon, 43 L. T. Rep. N. S. 490; Costegan *v.* Hastlar, 2 Sch. & Lef. 166; Caverhill *v.* Orvis, 12 U. C. C. P. 392.

52. As to rights and duties of mortgagee in possession see *supra*, XV, B, 4.

53. Norwich *v.* Hubbard, 22 Conn. 587.

Under highway acts.— A mortgagee of land adjoining a highway is one of the persons in whom the "ownership" of it is vested for the purposes of a statute relating to the closing of highways and the rights of adjoining owners. Broun *v.* Bushey, 25 Ont. 612.

54. Oakham *v.* Holbrook, 11 Cush. (Mass.) 299.

55. Lowell *v.* Shaw, 15 Me. 242; Fuller *v.* French, 10 Metc. (Mass.) 359.

56. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Bright *v.* McMurray, 1 Ont. 172.

57. Shepard *v.* Jones, 21 Ch. D. 469, 47

c. Lease of Premises. A mortgagee who has neither the possession nor the right of possession of the mortgaged premises has no interest therein which he can lease to a third person.[58] But if he is in possession, he may make a valid lease, although it will necessarily be terminated by the redemption of the mortgage, unless there was some express or implied authority from the mortgagor to lease for a given time.[59]

D. Timber, Crops, Mines, and Improvements — 1. Right to Cut Timber — a. In General. Although the lien of a mortgage covers standing timber on the mortgaged premises,[60] it has been held that the mortgagor, remaining in possession before default, may cut and sell the timber,[61] and that the mortgagee cannot pursue it into the hands of purchasers who have acquired it in good faith and without notice of his rights, by trover or trespass or an action for its value.[62] It is unlawful, however, for the mortgagor, or those who act under his license or contract, to strip the land to such an extent as to destroy or seriously impair its value as security for the mortgage debt.[63] The rights of the mortgagor in this respect may also be limited by his covenant in the mortgage not to cut the timber without the mortgagee's permission or by a restriction as to the amount to be cut,[64] and

L. T. Rep. N. S. 604, 31 Wkly. Rep. 308; Mayer *v.* Murray, 8 Ch. D. 424, 47 L. J. Ch. 605, 26 Wkly. Rep. 690; Thompson *v.* Hudson, L. R. 10 Eq. 497, 40 L. J. Ch. 28, 23 L. T. Rep. N. S. 278, 18 Wkly. Rep. 1081.

Surrender to sheriff holding execution.— Where a mortgage given to sureties to indemnify them contained a power authorizing them to sell the property, if necessary to save themselves, a surrender by them of the property to the sheriff under an execution on the debts secured and other debts was valid. Porter *v.* Scobie, 5 B. Mon. (Ky.) 387.

A statute providing that no power of sale shall be granted in a mortgage does not prevent the mortgagee from acting as the agent of the mortgagor in the sale of the mortgaged premises, if by an authority independent of the mortgage. Farley *v.* Eller, 29 Ind. 322.

58. Union Mut. L. Ins. Co. *v.* Lovitt, 10 Nebr. 301, 4 N. W. 986; Ball *v.* Riversdale, Beatty 550; Franklinski *v.* Ball, 10 Jur. N. S. 606, 34 L. J. Ch. 153, 10 L. T. Rep. N. S. 446, 12 Wkly. Rep. 845; Hungerford *v.* Clay, 9 Mod. 1. *Compare* Sahler *v.* Signer, 37 Barb. (N. Y.) 329; Cramton *v.* Tarbell, 6 Fed. Cas. No. 3,349.

59. Holt *v.* Rees, 46 Ill. 181; Curtiss *v.* Sheldon, 91 Mich. 390, 51 N. W. 1057; Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576; Bolles *v.* Duff, 4 Abb. Pr. N. S. (N. Y.) 330 [*reversed* on other grounds in 54 Barb. 215].

60. See *supra*, XII, A, 8.

61. Angier *v.* Agnew, 98 Pa. St. 587, 42 Am. Rep. 624. See also Stewart *v.* Scott, 54 Ark. 187, 15 S. W. 463; Adams *v.* Corriston, 7 Minn. 456; Moore *v.* Southern States Land, etc., Co., 83 Fed. 399.

62. Webber *v.* Ramsey, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429; Wilson *v.* Maltby, 59 N. Y. 126. *Compare* Atkinson *v.* Hewett, 63 Wis. 396, 23 N. W. 889, where the purchaser knew of the mortgage and the only real value of the land consisted of the timber on it.

Cases holding otherwise.— As between the mortgagor and mortgagee, the property in timber cut on the mortgaged premises is in the latter, and a purchaser from the mortgagor takes it subject to the paramount rights of the mortgagee (Gore *v.* Jenness, 19 Me. 53; Howe *v.* Wadsworth, 59 N. H. 397. *Compare* Banton *v.* Shorey, 77 Me. 48); unless the mortgagee has waived his right to the timber by coöperating with the mortgagor in selling it (Kimball *v.* Lewiston Steam Mill Co., 55 Me. 494). And timber trees wrongfully cut by the mortgagor or a stranger cannot be replevied from the mortgagee by a purchaser thereof from the one who cut them. Mosher *v.* Vehue, 77 Me. 169.

63. *Massachusetts.*— Ingell *v.* Fay, 112 Mass. 451.

New Hampshire.— Lawrence *v.* Lawrence, 42 N. H. 109.

New Jersey.—Emmons *v.* Hinderer, 24 N. J. Eq. 39.

Wisconsin.— Scott *v.* Webster, 50 Wis. 53, 6 N. W. 363.

Canada.— McLeod *v.* Avey, 16 Ont. 365; Mann *v.* English, 38 U. C. Q. B. 240.

See 35 Cent. Dig. tit. "Mortgages," § 503.

As to cutting of timber on mortgaged land as waste see *infra*, XV, I, 1.

Right to cut timber as question of fact.— Whether the cutting of timber on mortgaged land is wrongful or not depends upon the nature of the land and the circumstances of the particular case, and is a question for the jury. Searle *v.* Sawyer, 127 Mass. 491, 34 Am. Rep. 425.

64. Moisant *v.* McPhee, 92 Cal. 76, 28 Pac. 46; Wood *v.* Lester, 29 Barb. (N. Y.) 145; Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373; Mann *v.* English, 38 U. C. Q. B. 240.

Sale to pay taxes and insurance.— Permission given by a mortgagee to the mortgagor to cut and remove timber to pay taxes and insurance on the property and interest on the mortgage does not authorize the mortgagor to use the timber to pay debts to other parties. Holbrook *v.* Greene, 98 Me. 171, 56 Atl. 659.

directing the application of the proceeds on the mortgage debt.[65] A mortgagee in possession may cut and sell timber, although only for the purpose of enforcing his security and not to the permanent injury of the property, and must account for the proceeds as profits received.[66] When the mortgage is paid off and discharged, its lien is lifted from the standing timber, as also from that which may have been severed, and the title thereto reverts to the mortgagor or his vendee.[67]

b. Firewood and Timber For Repairs. A mortgagor of a farm in possession even after breach of condition may cut firewood and timber for repairs, for use upon the premises, and for other ordinary purposes, according to the well-known and existing usages of good husbandry.[68]

2. Crops, Emblements, Etc. While growing crops are considered for some purposes as a part of the realty and may be covered by the lien of a mortgage,[69] yet the mortgagor is the owner of all crops sown, grown, and harvested before foreclosure, with full power to sell or mortgage the same,[70] unless the crops are specially pledged by the mortgage or the disposition of their proceeds expressly governed by it,[71] and this right continues until foreclosure, entry for the purpose of foreclosure, or the appointment of a receiver, whereupon the right to the unsevered crops or other products of the land passes to the mortgagee as a part of the property liable to the satisfaction of his claims,[72] not only as against the mort-

65. Howe *v.* Russell, 36 Me. 115; Fredonia Nat. Bank *v.* Perrin, 172 Pa. St. 15, 33 Atl. 351.

66. Place *v.* Sawtell, 142 Mass. 477, 8 N. E. 343; Carson *v.* Griffin, 11 N. Brunsw. 244.

Nursery trees.— A mortgagee in possession before foreclosure has no right to sell nursery trees regarded by the parties as a part of the realty covered by the mortgage. Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067.

Accounting for proceeds.— Where a mortgagee in possession recovers against a trespasser for cutting timber on the mortgaged premises, the remedy of the mortgagor is against the mortgagee for the timber cut and carried away, as for profits received by him. Guthrie *v.* Kahle, 46 Pa. St. 331.

67. Barron *v.* Paulling, 38 Ala. 292; Hutchins *v.* King, 1 Wall. (U. S.) 53, 17 L. ed. 544.

68. Judkins *v.* Woodman, 81 Me. 351, 17 Atl. 298, 3 L. R. A. 607; Hapgood *v.* Blood, 11 Gray (Mass.) 400; Wright *v.* Lake, 30 Vt. 206.

Estovers.— The rule stated in the text is analogous to, and perhaps derived from, the common-law rule allowing estovers to a tenant for life or for years, that is, a sufficient allowance of wood to be cut from the estate to be burned in the house or for repairing the house, or for making and repairing instruments of husbandry, or for repairing hedges and fences. See Smith *v.* Jewett, 40 N. H. 530; 2 Blackstone Comm. 35; 1 Washburn Real Prop. *99.

69. See *supra*, XII, A, 8.

70. *California.*— Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Simpson *v.* Ferguson, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 53 Am. St. Rep. 201.

Connecticut.— Toby *v.* Reed, 9 Conn. 216.

Illinois.— Rankin *v.* Kinsey, 7 Ill. App. 215.

Indiana.— Favorite *v.* Deardorff, 84 Ind. 555.

Iowa.— Lanning *v.* Seaton, 68 Iowa 156, 26 N. W. 51.

Kansas.— Caldwell *v.* Alsop, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782.

Maryland.— Chelton *v.* Green, 65 Md. 272, 4 Atl. 271.

New York.— Sexton *v.* Breese, 135 N. Y. 387, 32 N. E. 133; Wood *v.* Lester, 29 Barb. 145.

North Carolina.— Killebrew *v.* Hines, 104 N. C. 182, 10 S. E. 159, 251, 17 Am. St. Rep. 672 [*overruling* Coor *v.* Smith, 101 N. C. 261, 7 S. E. 669; Brewer *v.* Chappell, 101 N. C. 251, 7 S. E. 670].

Texas.— Willis *v.* Moore, 59 Tex. 628, 46 Am. Rep. 284.

England.— *Ex p.* Temple, 1 Glyn & J. 216.

Canada.— Baxter *v.* Johnston, 10 N. Brunsw. 350.

See 35 Cent. Dig. tit. "Mortgages," § 508.

Compare Gilman *v.* Wills, 66 Me. 273.

71. Mix *v.* Creditors, 39 La. Ann. 624, 2 So. 391.

72. *Illinois.*— Rankin *v.* Kinsey, 7 Ill. App. 215.

Maine.— Holbrook *v.* Greene, 98 Me. 171, 56 Atl. 659; Perley *v.* Chase, 79 Me. 519, 11 Atl. 418.

Massachusetts.— Porter *v.* Hubbard, 134 Mass. 233.

New York.— O'Dougherty *v.* Felt, 65 Barb. 220.

Vermont.— Hamblet *v.* Bliss, 55 Vt. 535.

United States.— White *v.* Pulley, 27 Fed. 436.

England.— Bagnall *v.* Villar, 12 Ch. D. 812, 48 L. J. Ch. 695, 28 Wkly. Rep. 242 (demand of possession sufficient to fix rights of mortgagee); *Ex p.* Barnes, 3 Deac. 223, 2 Jur. 329, 7 L. J. Bankr. 37, 3 Mont. & A. 497; *Ex p.* Bignold, 2 Deac. & C. 398, 1 L. J. Bankr. 100.

Canada.— Bloomfield *v.* Hellyer, 22 Ont. App. 232; Hamilton Provident, etc., Soc. *v.*

gagor, but also as against a tenant in possession under a lease made subsequent to the mortgage.[73] A mortgagee and purchaser on foreclosure sale of ice-houses and of the right to cut ice from a pond does not acquire title to the ice cut and stored in the ice-houses by a lessee of the mortgagor before the foreclosure sale.[74] A trustee under a deed of trust, before foreclosure, cannot maintain an action for crude turpentine taken from trees on the land before his possession was acquired, and sold to a third person.[75] A mortgagor in possession, on vacating a farm, has no right to remove or sell manure made thereon in the usual course of husbandry; the title thereto vests in the mortgagee as owner of the freehold.[76]

3. Mines and Quarries. The mortgagor remaining in possession has the right to work a mine or quarry and to take and enjoy the income derived from the sale of the products, unless it unreasonably impairs the security of the mortgagee.[77] And a mortgagee in possession may work a mine or quarry, being allowed his reasonable expenses, and required to account for the profits over and above the mortgage debt.[78]

4. Buildings and Other Improvements. A mortgagor has no right to remove buildings from the mortgaged premises, as they are a part of the security of the mortgagee.[79] In case of removal the mortgagee may maintain an appropriate action for the recovery of possession of the building itself, if it has not been permanently affixed to the soil of another freehold,[80] or an action for damages against

Campbell, 12 Ont. App. 250; McDowall *v.* Phippen, 1 Ont. 143.

Mortgagee in possession.— One whose relation to land is that of a mortgagee in possession is entitled to the crops sown, raised, and harvested by him, and is accountable for the rents and profits. Holton *v.* Bowman, 32 Minn. 191, 19 N. W. 734.

73. Downard *v.* Groff, 40 Iowa 597; Lane *v.* King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105.

In Missouri a statute (Rev. St. (1889) § 7091, as amended by Laws (1893), p. 210) exempts a tenant's interest in growing crops on mortgaged premises from sale of the premises under the mortgage; but it is not retrospective. Missouri Trust Co. *v.* Cunningham, 81 Mo. App. 262.

74. Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832.

75. Farmers' L. & T. Co. *v.* Avera, (Miss. 1890) 7 So. 358.

76. Chase *v.* Wingate, 68 Me. 204, 28 Am. Rep. 86. See also Vehue *v.* Mosher, 76 Me. 469.

77. Vanderslice *v.* Knapp, 20 Kan. 647; Vervalen *v.* Older, 8 N. J. Eq. 98; Young *v.* Northern Illinois Coal, etc., Co., 13 Fed. 806, 9 Biss. 300. But see Righter *v.* Hamilton, 10 Pa. Co. Ct. 260; Elias *v.* Snowdon Slate Quarries Co., 4 App. Cas. 454, 48 L. J. Ch. 811, 41 L. T. Rep. N. S. 289, 28 Wkly. Rep. 54.

Royalties on coal lease.— Where the coal under land is the most valuable part of it, royalties paid for an exclusive lease are part of the *corpus* of the estate, and not a profit; and as between the owner or his assignee in bankruptcy and the owner of a mortgage executed prior to the lease, such royalties go to the latter. Duff *v.* Hopkins, 10 Pa. Cas. 483, 14 Atl. 364.

78. Irwin *v.* Davidson, 38 N. C. 311 (mine previously opened and operated); Millett *v.* Davey, 31 Beav. 470, 9 Jur. N. S. 92, 32 L. J. Ch. 122, 7 L. T. Rep. N. S. 551, 11 Wkly. Rep. 176, 54 Eng. Reprint 1221; Hood *v.* Easton, 2 Giffard 692, 2 Jur. N. S. 729, 4 Wkly. Rep. 575, 66 Eng. Reprint 290; Rowe *v.* Wood, 2 Jac. & W. 553, 22 Rev. Rep. 208, 37 Eng. Reprint 740; Thorneycroft *v.* Crockett, 12 Jur. 1081, 16 Sim. 445, 39 Eng. Ch. 445, 60 Eng. Reprint 946; Norton *v.* Cooper, 25 L. J. Ch. 121.

79. *Illinois.*— Dorr *v.* Dudderar, 88 Ill. 107.

Kansas.— State *v.* Decker, 52 Kan. 193, 34 Pac. 780, construing Gen. St. (1899) § 3900, which makes it unlawful to remove buildings from land on which there is an unsatisfied mortgage, duly recorded, without the written permission of the mortgagee.

Louisiana.— New Orleans Nat. Bank *v.* Raymond, 29 La. Ann. 355, 29 Am. Rep. 335.

Massachusetts.— Tarbell *v.* Page, 155 Mass. 256, 29 N. E. 585.

Pennsylvania.— Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907.

See 35 Cent. Dig. tit. "Mortgages," § 512.

Stranger's right to remove.— If a stranger, by permission of the mortgagor, given during the pendency of a foreclosure suit, erects a barn on the premises, he has the right to remove the same, as against the mortgagee, who comes into possession by virtue of a decree of foreclosure. Preston *v.* Briggs, 16 Vt. 124.

Trespass cannot be maintained by a mortgagee for the removal of a building from the land, unless he can show a deficiency on a regular and legal foreclosure and sale. Taylor *v.* McConnell, 53 Mich. 587, 19 N. W. 196.

80. Dorr *v.* Dudderar, 88 Ill. 107; Partridge *v.* Hemenway, 89 Mich. 454, 50 N. W. 1084, 28 Am. St. Rep. 322. And see Clark *v.*

the mortgagor,[81] or against the purchaser of the building, unless the latter acted in good faith and without notice of the rights of the mortgagee.[82] On the other hand a mortgagee in possession may lawfully take down and carry away buildings erected by him on the mortgaged land, the materials of which were his own and not so connected with the soil that they cannot be removed without prejudice to it.[83]

E. Rents and Profits — 1. Right to Rents in General. A mortgage which does not expressly pledge the rents and profits of the mortgaged premises as security for the payment of the debt gives the mortgagee no lien or claim on them, and so long as the mortgagor remains in possession he is entitled to receive them to his own use or to assign them, without liability to account to the mortgagee for them,[84] and this right continues not only until default but even after

Reyburn, 1 Kan. 281; Reynolds *v.* Dechman, 14 Nova Scotia 459.

81. Lavenson *v.* Standard Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147; Tarbell *v.* Page, 155 Mass. 256, 29 N. E. 585; Wilmarth *v.* Bancroft, 10 Allen (Mass.) 348; Dutro *v.* Kennedy, 9 Mont. 101, 22 Pac. 763; Verner *v.* Betz, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630.

82. Tomlinson *v.* Thompson, 27 Kan. 70; Beck *v.* Zimmerman, 75 N. C. 60.

83. Cooke *v.* Cooper, 18 Oreg. 142, 22 Pac. 945, 17 Am. St. Rep. 709, 7 L. R. A. 273.

84. *Alabama.* — Robinson *v.* Gassoway, (1905) 39 So. 1023; Coffey *v.* Hunt, 75 Ala. 236; McMillan *v.* Otis, 74 Ala. 560; Scott *v.* Ware, 65 Ala. 174. *Compare* Coleman *v.* Smith, 55 Ala. 368.

California. — Mahoney *v.* Bostwick, 90 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175.

Connecticut. — Cooper *v.* Davis, 15 Conn. 556.

District of Columbia. — Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. 304; Keyser *v.* Hitz, 4 Mackey 179.

Florida. — Pasco *v.* Gamble, 15 Fla. 562.

Georgia. — Vason *v.* Ball, 56 Ga. 268.

Illinois. — Cross *v.* Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322; Mississippi Valley, etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534; Moore *v.* Titman, 44 Ill. 367; Keeley Brewing Co. *v.* Mason, 116 Ill. App. 603; West *v.* Adams, 106 Ill. App. 114; McLester *v.* Rose, 104 Ill. App. 433; Silverman *v.* Northwestern Mut. L. Ins. Co., 5 Ill. App. 124.

Indiana. — Johnson *v.* Miller, Wils. 416.

Kentucky. — Georgetown Water Co. *v.* Fidelity Trust Co., 117 Ky. 325, 78 S. W. 113, 25 Ky. L. Rep. 1739; Hounshell *v.* Clay F. Ins. Co., 81 Ky. 304; Woolley *v.* Holt, 14 Bush 788; Douglass *v.* Cline, 12 Bush 608.

Maine. — Chase *v.* Palmer, 25 Me. 341.

Maryland. — Commercial Bldg., etc., Assoc. *v.* Robinson, 90 Md. 615, 45 Atl. 449; Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. 225.

Massachusetts. — Shepard *v.* Richards, 2 Gray 424, 61 Am. Dec. 473; Mayo *v.* Fletcher, 14 Pick. 525; Boston Bank *v.* Reed, 8 Pick. 459; Wilder *v.* Houghton, 1 Pick. 87; Gibson *v.* Farley, 16 Mass. 280; Fitchburg Cotton Mfg. Corp. *v.* Melven, 15 Mass. 268. *Compare* Northampton Paper Mills *v.* Ames, 8 Metc. 1, holding that where a person in possession of mortgaged premises, claiming under the mortgagor, refuses to yield the possession to the mortgagee upon his entry after condition broken, the mortgagee may maintain an action of trespass against him for mesne profits, although the entry may not have been sufficient, under the statute, for the purpose of a foreclosure.

Minnesota. — Spencer *v.* Levering, 8 Minn. 461.

Mississippi. — Myers *v.* Estell, 48 Miss. 372; Whitehead *v.* Wooten, 43 Miss. 523.

Missouri. — Baker *v.* Cunningham, 162 Mo. 134, 62 S. W. 445; St. Louis Nat. Bank *v.* Field, 156 Mo. 306, 56 S. W. 1095; Davis *v.* Bessehl, 88 Mo. 439; Armour Packing Co. *v.* Wolff, 59 Mo. App. 665; Simpson *v.* Keane, 39 Mo. App. 635.

Nebraska. — Huston *v.* Canfield, 57 Nebr. 345, 77 N. W. 763; Renard *v.* Brown, 7 Nebr. 449.

New Jersey. — Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795.

New York. — Syracuse City Bank *v.* Tallman, 31 Barb. 201; Ogdensburg Bank *v.* Arnold, 5 Paige 38.

North Carolina. — Dunn *v.* Tillery, 79 N. C. 497.

Pennsylvania. — Talbot's Appeal, 2 Chest. Co. Rep. 413; Talbot *v.* Chester, 2 Chest. Co. Rep. 57.

Rhode Island. — Doty *v.* Oriental Print Works, 24 R. I. 102, 52 Atl. 802.

South Carolina. — Reeder *v.* Dargan, 15 S. C. 175.

Tennessee. — Easley *v.* Tarkington, 5 Baxt. 592. See also Bennet *v.* Holt, 2 Yerg. 6, 24 Am. Dec. 455.

Texas. — Johnson *v.* Lasker Real Estate Assoc., 2 Tex. Civ. App. 494, 21 S. W. 961.

Vermont. — Walker *v.* King, 44 Vt. 601. It is, however, the duty of the mortgagor to surrender possession to the mortgagee on demand, and if he refuses to do so he becomes a trespasser, and liable to pay over the rents and profits to the mortgagee. Wires *v.* Nelson, 26 Vt. 13.

Virginia. — Clarke *v.* Curtis, 1 Gratt. 289.

West Virginia. — Cox *v.* Horner, 43 W. Va. 786, 28 S. E. 780; Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

United States. — Freedman's Sav., etc., Co. *v.* Shepherd, 127 U. S. 494, 8 S. Ct. 1250, 32 L. ed. 163; Teal *v.* Walker, 111 U. S. 242, 4 S. Ct. 420, 28 L. ed. 415; Gilman *v.* Illinois,

foreclosure, where the mortgagor remains in possession during the statutory period allowed for redemption.[85] If, however, the mortgagee has lawfully obtained possession of the estate, without foreclosure or before a foreclosure, it is his right to collect the rents and profits, although he is bound to apply them on the mortgage debt and to account for the surplus.[86] It is also competent for the parties to agree that the rents shall be collected by the mortgagee or a trustee and applied in reduction of the debt secured by the mortgage,[87] and the mortgage may be so drawn as to pledge the rents and profits specifically as security, in which case they become, equally with the land, a primary security.[88] When this is done, the mortgagee's security may be made effective, pending foreclosure, by the appointment of a receiver, as also, even without such a provision in the mortgage, when he has

etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405; Thomson *v.* Shirley, 69 Fed. 484; Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332; Dow *v.* Memphis, etc., R. Co., 20 Fed. 768; Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143; Hunter *v.* Hays, 12 Fed. Cas. No. 6,906, 7 Biss. 362. *Compare* Latimer *v.* Moore, 14 Fed. Cas. No. 8,114, 4 McLean 110.

England.— Mead *v.* Orrery, 3 Atk. 235, 26 Eng. Reprint 937; Higgins *v.* York Bldg. Co., 2 Atk. 107, 26 Eng. Reprint 467; Hele *v.* Bexley, 20 Beav. 127, 52 Eng. Reprint 551; *Ex p.* Bignold, 4 Deac. & C. 259, 4 L. J. Bankr. 58, 2 Mont. & A. 214; *Ex p.* Carr, 6 Jur. 588, 2 Mont. D. & De G. 534; Anderson *v.* Butler's Wharf Co., 48 L. J. Ch. 824; *Ex p.* Wilson, 1 Rose 444, 2 Ves. & B. 252, 13 Rev. Rep. 75, 35 Eng. Reprint 315; Thomas *v.* Brigstocke, 4 Russ. 64, 28 Rev. Rep. 4, 4 Eng. Ch. 64, 38 Eng. Reprint 729; Gresley *v.* Adderley, 1 Swanst. 573, 18 Rev. Rep. 146, 36 Eng. Reprint 510; Colman *v.* St. Albans, 3 Ves. Jr. 25, 30 Eng. Reprint 874.

See 35 Cent. Dig. tit. "Mortgages," § 513.

85. Stevens *v.* Hadfield, 178 Ill. 532, 52 N. E. 875; Wilson *v.* Equitable Trust Co., 98 Ill. App. 81; Carroll *v.* Haigh, 97 Ill. App. 576 [*reversed* on other grounds in 197 Ill. 193, 64 N. E. 375]; Joliet First Nat. Bank *v.* Illinois Steel Co., 72 Ill. App. 640; Talcott *v.* Peterson, 63 Ill. App. 421; Hutchinson *v.* First Nat. Bank *v.* Kansas Grain Co., 63 Kan. 343, 65 Pac. 676.

86. *California.*— Cummings *v.* Cummings, 75 Cal. 434, 17 Pac. 442.

Illinois.— Rooney *v.* Crary, 11 Ill. App. 213.

Iowa.— See Keeline *v.* Clark, (1906) 106 N. W. 257.

Michigan.— Weise *v.* Anderson, 134 Mich. 502, 96 N. W. 575.

Missouri.— Benton Land Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94.

New Jersey.— Moffett *v.* Trent, 66 N. J. Eq. 143, 56 Atl. 1035; Wait *v.* Savage, (Ch. 1888) 15 Atl. 225.

Pennsylvania.— Mellon *v.* Lemmon, 111 Pa. St. 56, 2 Atl. 56.

United States.— Huguley Mfg. Co. *v.* Galeton Cotton Mills, 94 Fed. 269, 36 C. C. A. 236.

And see *infra*, XXII, G, 4, c.

No compensation for collecting.— A mortgagee in possession, collecting the proceeds of the premises in payment of the mortgaged debt, is not entitled to compensation, in the absence of an express agreement or of evidence from which one may be implied. Gilluly *v.* Shumway, 144 Mich. 668, 108 N. W. 88.

Recovery upon payment of debt.— Where one gives a deed of land and takes an agreement to reconvey on the payment of a certain sum, and the grantee collects rent on the land, and the grantor pays the amount named when due, he is entitled to recover in equity the amount of the rent collected by the grantee, there being no adequate remedy at law therefor. Thomas *v.* Livingston, (Ala. 1906) 40 So. 504.

Accountable for proceeds received.— A mortgagee in possession because of the default of the mortgagor is only liable to account for the proceeds actually received, in the absence of wilful wrong, neglect, or fraud. Watson *v.* Perkins, (Miss. 1906) 40 So. 643.

87. *Michigan.*— Ionia First Nat. Bank *v.* Gillam, 123 Mich. 112, 81 N. W. 979.

Missouri.— White *v.* Smith, 174 Mo. 186, 73 S. W. 610.

New York.— White *v.* Wagner, 31 Misc. 408, 65 N. Y. Suppl. 541.

Pennsylvania.— Gallagher *v.* Stern, 8 Pa. Super. Ct. 628.

Rhode Island.— Doty *v.* Oriental Print Works, 24 R. I. 102, 52 Atl. 802.

Washington.— Clark *v.* Eltinge, 29 Wash. 215, 69 Pac. 736.

United States.— Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,462, 5 Biss. 237.

An assignment of rents of mortgaged property, to be recovered by the mortgagee and applied on the mortgage is valid. Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836. And see Farmers' Trust Co. *v.* Prudden, 84 Minn. 126, 86 N. W. 887.

A provision in a mortgage authorizing the mortgagee to collect the rents of the mortgaged premises and apply them on the note secured does not compel him to collect the rents nor render him chargeable with them unless actually received. Goodwin *v.* Keney, 49 Conn. 563.

88. Woodland Bank *v.* Christie, (Cal. 1900) 62 Pac. 400; McLester *v.* Rose, 104 Ill. App. 433; Ortengren *v.* Rice, 104 Ill. App. 428; Oakford *v.* Robinson, 48 Ill. App. 270; American Bridge Co. *v.* Heidelbach, 94 U. S. 798, 24 L. ed. 144.

an equitable lien on the rents by reason of the insufficiency of the land as security and the danger of wasting the income of the estate.[89]

2. Right to Recover Rent From Mortgagor's Tenant — a. In General. A mortgagee is not entitled to claim the benefits of a lease made by the mortgagor, or collect the rent stipulated therein, until he has put himself in position to do so by gaining the actual possession of the demised premises,[90] or entering upon breach of condition as for the purposes of a foreclosure,[91] or taking an attornment from the lessee and accepting him as his tenant,[92] or procuring the appointment of a receiver.[93]

b. Notice to Tenant. When a mortgagee becomes entitled to the rents of the property, either under the terms of the mortgage or by taking steps to have them applied on his debt, he must give notice of his claims to the tenant in possession; until he does so, the tenant will be protected in paying the rent to the mortgagor.[94]

3. As Between Senior and Junior Mortgagees. A second mortgagee may obtain control of the rents and profits by filing his bill for foreclosure and procuring the appointment of a receiver; but in this case the first mortgagee will ordinarily be entitled to have the receivership extended to the protection of his

89. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Cross *v.* Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322; Ortengren *v.* Rice, 104 Ill. App. 428; Ball *v.* Marske, 100 Ill. App. 389; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905; Tatham *v.* Parker, 1 Jur. N. S. 992, 3 Wkly. Rep. 347; Walker *v.* Bell, 2 Madd. 21, 17 Rev. Rep. 174, 56 Eng. Reprint 243.

90. Stevens *v.* McCurdy, 124 Ga. 456, 52 S. E. 762; Massachusetts Hospital L. Ins. Co. *v.* Wilson, 10 Metc. (Mass.) 126; Field *v.* Swan, 10 Metc. (Mass.) 112; Byers *v.* Byers, 65 Mich. 598, 32 N. W. 831; Turner *v.* Cameron's Coalbrook Steam Coal Co., 5 Exch. 932, 20 L. J. Exch. 71. See Harrold *v.* Whitaker, 11 Q. B. 147, 10 Jur. 1004, 15 L. J. Q. B. 345, 63 E. C. L. 147.

Payment of rent in advance.— A tenant of a mortgagor, the mortgage being duly recorded, and therefore charging him with notice, has no right to pay a year's rent in advance to the mortgagor; and if he does so, the court may, on a bill for foreclosure by the mortgagee, compel the payment of the rent again to a receiver. Henshaw *v.* Wells, 9 Humphr. (Tenn.) 568. And see Gilmour *v.* Roe, 21 Grant Ch. (U. C.) 284.

Estoppel to deny lease.— Where the mortgagee and those claiming under him have always recognized the validity of a lease made by the mortgagor when he had the equitable title to the premises, but not the legal title, they are estopped to deny the lease on an interplea to determine whether the assignee of the mortgagee or the assignee of the mortgagor is entitled to the rent. White *v.* Wear, 4 Mo. App. 341.

91. Forlouf *v.* Bowlin, 29 Ill. App. 471; Long *v.* Wade, 70 Me. 358; Hill *v.* Jordan, 30 Me. 367; Knowles *v.* Maynard, 13 Metc. (Mass.) 352; Armour Packing Co. *v.* Wolff, 59 Mo. App. 665.

92. *Illinois.*— Gartside *v.* Outley, 58 Ill. 210, 11 Am. Rep. 59; Fourlouf *v.* Bowlin, 29 Ill. App. 471.

Massachusetts.— Adams *v.* Bigelow, 128 Mass. 365.

United States.— Moran *v.* Pittsburgh, etc., R. Co., 32 Fed. 878.

England.— Doe *v.* Mainby, 10 Q. B. 473, 10 Jur. 109, 15 L. J. Q. B. 79, 59 E. C. L. 473; Burrowes *v.* Gradin, 1 D. & L. 213, 7 Jur. 942, 12 L. J. Q. B. 333.

Canada.— Forse *v.* Sovereen, 14 Ont. App. 482; McLennan *v.* Hannum, 31 U. C. C. P. 210; Canada Permanent Bldg., etc., Soc. *v.* Byers, 19 U. C. C. P. 473; Fairbairn *v.* Hilliard, 27 U. C. Q. B. 111; Denholm *v.* Commercial Bank, 1 U. C. Q. B. 369. And see Lambert *v.* Marsh, 2 U. C. Q. B. 39.

See 35 Cent. Dig. tit. "Mortgages," § 515.

93. Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133.

94. *Alabama.*— Johnston *v.* Riddle, 70 Ala. 219; Marx *v.* Marx, 51 Ala. 222; Mobile Branch Bank *v.* Fry, 23 Ala. 770; Hutchinson *v.* Dearing, 20 Ala. 798; Smith *v.* Taylor, 9 Ala. 633; Coker *v.* Pearsall, 6 Ala. 542.

Connecticut.— King *v.* Housatonic R. Co., 45 Conn. 226.

Maryland.— Clark *v.* Abbott, 1 Md. Ch. 474.

Massachusetts.— Lucier *v.* Marsales, 133 Mass. 454.

New Hampshire.— Cavis *v.* McClary, 5 N. H. 529.

South Carolina.— Stoney *v.* Shultz, 1 Hill Eq. 465, 27 Am. Dec. 429.

Vermont.— Stedman *v.* Gassett, 18 Vt. 346; Babcock *v.* Kennedy, 1 Vt. 457, 18 Am. Dec. 695.

England.— Municipal Permanent Bldg. Soc. *v.* Smith, 22 Q. B. D. 70, 58 L. J. Q. B. 61, 37 Wkly. Rep. 42; Underhay *v.* Read, 20 Q. B. D. 209, 57 L. J. Q. B. 129, 58 L. T. Rep. N. S. 457, 36 Wkly. Rep. 298; Wilton *v.* Dunn, 17 Q. B. 294, 15 Jur. 1104, 21 L. J. Q. B. 60, 79 E. C. L. 294; Evans *v.* Elliot, 9 A. & E. 342, 8 L. J. Q. B. 51, 1 P. & D. 256, 36 E. C. L. 193; *Ex p.* Living, 1 Deac. 1, 2 Mont. & A. 223, 38 E. C. L. 513; Cook *v.* Moylan, 5 D. & L. 101, 1 Exch. 67; Partington *v.* Woodcock, 4 L. J. K. B. 239.

Canada.— Brock *v.* Forster, 34 N. Brunsw.

claims, by intervening in the suit or filing his own bill to foreclose.[95] Although the first mortgagee in possession has the superior claim to the rents, he will be required, at the instance of the junior encumbrancer, to account for the money so received,[96] and can neither pay it over to the mortgagor[97] nor apply it on debts not secured by his mortgage.[98] And if he has been in possession personally, and not by a tenant, he will be chargeable in this way with a reasonable rent for the premises,[99] although it is necessary to show for this purpose that his possession has been actual and taken and held in the character of a mortgagee.[1] The junior encumbrancer, on the other hand, may be authorized by his mortgage to receive the rents and profits;[2] but he is bound to apply them in reduction of his mortgage debt, and will be accountable to the senior mortgagee for a failure to do so or for any surplus.[3] Where several debts of equal rank to different persons are all secured by the same mortgage, any mortgagee who goes into possession under the mortgage is accountable to the others for their proportionate share of the rents and profits.[4]

4. As Between Mortgagee and Other Creditors. A mortgagee in possession and in receipt of the rents and profits of the estate may be required to account for the same to judgment or other creditors of the mortgagor,[5] more especially if he is bound by agreement to apply the income or a portion of it to the payment

262; McFarlane *v.* Buchanan, 12 U. C. C. P. 591.

See 35 Cent. Dig. tit. "Mortgages," § 516.

95. Cross *v.* Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322; Lismore *v.* Chamley, Hayes 329; Abbott *v.* Stratten, 9 Ir. Eq. 233, 3 J. & L. 603. But see Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. 210, holding that a receiver of the rents and profits of mortgaged premises will not be appointed at the instance of a second mortgagee as against the first mortgagee in possession.

96. *Alabama.*—Falkner *v.* Campbell Printing Press, etc., Co., 74 Ala. 359. *Compare* Cook *v.* Parham, 63 Ala. 456.

Kentucky.— Goring *v.* Shreve, 7 Dana 64.

Nebraska.— Hatch *v.* Falconer, 67 Nebr. 249, 93 N. W. 172.

New Jersey.— Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795.

United States.— Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143.

See 35 Cent. Dig. tit. "Mortgages," § 523.

Assignment of rents to first mortgagee.— A specific assignment to a first mortgagee of a certain portion of the rents of the premises monthly till his debt is paid will give him a claim to the rents superior to the rights of a second mortgagee, although the second mortgage was made before the assignment. Harris *v.* Taylor, 35 N. Y. App. Div. 462, 54 N. Y. Suppl. 864.

Where the holders of the first, third, and fourth mortgages on land obtain from the mortgagor a demise of the premises, to hold until their said mortgages shall be satisfied out of the rents and profits, they are entitled, as against the second mortgagee, to apply the rents to the third and fourth mortgages, as well as to the first, notwithstanding the second mortgagee files a bill for foreclosure, if he does not therein seek to recover the possession or ask for a receiver. Leach *v.* Curtin, 123 N. C. 85, 31 S. E. 269.

97. Hitchcock *v.* Fortier, 65 Ill. 239; Parker *v.* Calcraft, 6 Madd. 11, 56 Eng. Reprint 992.

98. Watford *v.* Oates, 57 Ala. 290.

An agreement between the mortgagor and the first mortgagee, for an application of the rents upon a debt not secured by the mortgage, will be binding on a second mortgagee whose rights did not accrue until after such agreement. Mitchell *v.* Saylor, 1 Ont. L. Rep. 458.

A decree making application of the rents and profits received by a mortgagee in possession, as between him and another mortgagee, does not preclude him, as between himself and the mortgagor, from applying them on another indebtedness. Holabird *v.* Burr, 17 Conn. 556.

99. Dawson *v.* Drake, 30 N. J. Eq. 601; Moore *v.* Degraw, 5 N. J. Eq. 346.

1. Harrison *v.* Wyse, 24 Conn. 1, 63 Am. Dec. 151; Kellogg *v.* Rockwell, 19 Conn. 446; Rogers *v.* Herron, 92 Ill. 583; Gray *v.* Nelson, 77 Iowa 63, 41 N. W. 566; Charles *v.* Dunbar, 4 Metc. (Mass.) 498.

2. Anderson *v.* Minnesota L. & T. Co., 68 Minn. 491, 71 N. W. 665, 819; Best *v.* Schermier, 6 N. J. Eq. 154; Wires *v.* Nelson, 26 Vt. 13; Little *v.* Brown, 2 Leigh (Va.) 353.

3. Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Holabird *v.* Burr, 17 Conn. 556. *Compare* Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Washington Bank *v.* Hupp, 10 Gratt. (Va.) 23.

4. Holabird *v.* Burr, 17 Conn. 556.

5. Lewis *v.* De Forest, 20 Conn. 427; Patton *v.* Varga, 75 Iowa 368, 39 N. W. 647; Lockard *v.* Hendrickson, (N. J. Ch. 1892) 25 Atl. 512; Mallalieu *v.* Wickham, 42 N. J. Eq. 297, 10 Atl. 880; Green *v.* Cauchon, 3 Manitoba 248, garnishing creditor. *Compare* Van Duyne *v.* Shann, 41 N. J. Eq. 311, 7 Atl. 429, holding that one whose occupancy of the premises is not in the character of a "mortgagee in possession" cannot be so charged.

of their particular debts;[6] but his accountability only extends to the application of such income to his mortgage debt, and he cannot be required to pay it over except as to a surplus after satisfying himself,[7] and equity will not appoint a receiver, at the instance of a judgment creditor, when the mortgagee in possession has not been fully paid and is able to respond for what he may receive.[8]

F. Taxes and Assessments — **1. Taxes on Mortgagee's Interest.** A tax assessed upon a mortgage as a security or evidence of debt, or upon the mortgagee's interest in the mortgaged premises, as distinct from the equity of redemption, is chargeable to the mortgagee, and he cannot recover from the mortgagor the amount paid for such tax;[9] but on the other hand, if the mortgagor has paid it, he may deduct the amount from the mortgage debt,[10] unless he has bound himself by covenant in the mortgage to pay the taxes on the mortgagee's interest as well as his own,[11] which, however, is in some states forbidden by constitutional or statutory provisions.[12]

2. Taxes on Mortgaged Premises — **a. Rights and Duties of Parties in General.** A mortgagor in possession is considered as the owner of the land, and it

6. Spring Brook R. Co. *v.* Lehigh Coal, etc., Co., 1 Lack. Leg. N. (Pa.) 31; New Orleans Nat. Banking Assoc. *v.* Le Breton, 120 U. S. 765, 7 S. Ct. 772, 30 L. ed. 821.

7. Hutchinson *v.* Straub, 16 Ohio Cir. Ct. 452, 9 Ohio Cir. Dec. 171; Edwards *v.* Wray, 12 Fed. 42, 11 Biss. 251.

Paying off elder liens.— A mortgagee, who is charged in favor of creditors of the mortgagor with the rent of the mortgaged property, will be allowed for payments made by him to protect himself in the extinguishment of paramount liens. Arnold *v.* Foot, 7 B. Mon. (Ky.) 66.

8. Peterson *v.* Lindskoog, 93 Ill. App. 276.

9. Pond *v.* Causdell, 23 N. J. Eq. 181.

10. San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470; Hamill *v.* Littner, (Cal. 1885) 7 Pac. 707; Hay *v.* Hill, 65 Cal. 383, 4 Pac. 378; Blythe *v.* Luning, 14 Fed. 281, 7 Sawy. 504.

In Michigan it is provided by statute (Laws (1891), Act 200) that the mortgagor may pay the tax assessed against the mortgagee's interest in case of the latter's failure to pay it, and that a payment so made by the mortgagor shall be treated as payment on interest due, or, if no interest is due, then as payment of so much of the principal sum of the mortgage. See Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

In New Jersey it is provided by statute that, when the mortgagee lives in a different township from that in which the mortgaged premises lie, the tax on the money secured by the mortgage shall be paid by the mortgagor and deduction made therefor by the mortgagee. The effect of this is that payment of such tax by the mortgagor operates as a legal payment of interest due or accruing, but not of principal or of interest to accrue in the future. Cook *v.* Smith, 30 N. J. L. 387; Keeney *v.* Atwood, 16 N. J. Eq. 35. The mortgagor may prove payment of interest on the mortgage debt by producing the receipt of the tax-collector for taxes so paid by him. Cook *v.* Smith, *supra*.

11. Banks *v.* McClellan, 24 Md. 62, 87 Am. Dec. 594; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59, both holding that an agreement by the mortgagor to pay the taxes on the mortgage debt or the mortgagee's interest is not usurious.

Sufficiency of covenant.— A mortgagor is bound to pay the tax on the mortgage when he has covenanted to pay all assessments "upon or on account of the mortgage or the debt secured thereby" (Green *v.* Grant, 134 Mich. 462, 96 N. W. 583), or "all taxes and assessments on the granted premises" (Hammond *v.* Lovell, 136 Mass. 184). But on the other hand it has been held that a stipulation in a mortgage requiring payment of the debt and interest "without any deduction, defalcation, or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever" does not bind the mortgagor to pay the mortgagee's tax, or prevent him, if he pays it, from deducting the amount thereof from interest. Clopton *v.* Philadelphia, etc., R. Co., 54 Pa. St. 356; Haight *v.* Pittsburgh, etc., R. Co., 11 Fed. Cas. No. 5,903, 1 Abb. 81, 3 Pittsb. 105 [*affirmed* in 6 Wall. (U. S.) 15, 18 L. ed. 818].

12. See the constitutions and statutes of the different states.

In California it is provided that every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void. Const. art. 13 [*construed* in Matthews *v.* Ormerd, 134 Cal. 84, 66 Pac. 67, 210; California State Bank *v.* Webber, 110 Cal. 538, 42 Pac. 1066; Harrelson *v.* Tomich, 107 Cal. 627, 40 Pac. 1032; Daw *v.* Niles, 104 Cal. 106, 37 Pac. 876; Garms *v.* Jensen, 103 Cal. 374, 37 Pac. 337; Harralson *v.* Barrett, 99 Cal. 607, 34 Pac. 342; Burbridge *v.* Lemmert, 99 Cal. 493, 32 Pac. 310; Hewitt *v.* Dean, 91 Cal. 5, 27 Pac.

is his duty to pay the taxes and assessments levied thereon.[13] If he neglects or refuses to do so, it becomes the right of the mortgagee to pay them and be reimbursed therefor.[14] But a mortgagee not in possession is under no legal obligation whatever to pay taxes,[15] although it is otherwise when he is in possession and receives the rents and profits.[16]

b. Effect of Tax Clause in Mortgage. A covenant in a mortgage that the mortgagor will pay all taxes assessed on the mortgaged premises during the life of the mortgage, with a provision that his default in so doing shall authorize the mortgagee to pay such taxes and add the amount to the debt secured by the mortgage, is valid and enforceable,[17] and it may further stipulate for interest to be paid on the amount advanced for taxes[18] and for the repayment of expenses incurred by the mortgagee in clearing the property from such taxes.[19] Moreover, it is competent for such a covenant to provide that a default on the part of the mortgagor to pay the taxes shall constitute a breach of the condition of the mortgage,

423; Blythe *v.* Luning, 14 Fed. 281, 7 Sawy. 504.

In Pennsylvania by statute (Act June 1, 1889) contracts to pay the state tax on mortgages, in addition to interest, are unlawful; but this is not retrospective. Gourley *v.* Thompson, 11 Pa. Dist. 174.

13. Medley *v.* Elliott, 62 Ill. 532; Ralston *v.* Hughes, 13 Ill. 469; Morrison *v.* Hampton, 49 S. W. 781, 20 Ky. L. Rep. 1573; Beltram *v.* Villeré, (La. 1888) 4 So. 506; Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729; Fuller *v.* Hodgdon, 25 Me. 243. And see Norwich *v.* Hubbard, 22 Conn. 587.

Absolute deed as mortgage.—The duty of a mortgagor to pay the taxes on the premises is not altered by the fact that the security took the form of an absolute deed. Harvie *v.* Banks, 1 Rand. (Va.) 408. But see Davis *v.* Hall, 52 Md. 673.

Deed of trust.— Where the security takes the form of a deed of trust, it is the duty of the grantor, and not the trustee or the beneficiary, to see to the payment of taxes. Parsons *v.* East St. Louis Gas Light, etc., Co., 108 Ill. 380; Vance *v.* Shreveport First Nat. Bank, 51 La. Ann. 89, 24 So. 607.

A second mortgagee in possession is entitled to money paid for taxes and repairs. Keeline *v.* Clark, (Iowa 1906) 106 N. W. 257.

14. Wright *v.* Langley, 36 Ill. 381; Leitzbach *v.* Jackman, 28 Kan. 524; Stanclift *v.* Norton, 11 Kan. 218; Townsend *v.* J. I. Case Threshing-Mach. Co., 31 Nebr. 836, 48 N. W. 899.

When right accrues.— A mortgagee has the right to assume, and ought to assume, until the tax is returned as delinquent, that it will be paid by the mortgagor; and he has no right to intervene and pay the tax himself until it is manifest that the mortgagor will not do so. Pond *v.* Drake, 50 Mich. 302, 15 N. W. 466.

15. Hood *v.* Clark, 141 Ala. 397, 37 So. 550; Waterson *v.* Devoe, 18 Kan. 223; Tinslar *v.* Davis, 12 Allen (Mass.) 79; Eastman *v.* Thayer, 60 N. H. 408.

16. Strang *v.* Allen, 44 Ill. 428; Moore *v.* Titman, 44 Ill. 367; O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203; Shoemaker *v.* The Bank, 15 Phila. (Pa.) 297; McAbee *v.* Harrison, 50 S. C. 39, 27 S. E. 539.

17. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265.

What taxes included.— A tax clause in the mortgage in the usual form applies to a tax already assessed on the property, as well as to those to be assessed in the future. Stevens *v.* Cohen, 170 Mass. 551, 49 N. E. 926. And a provision for the payment of "taxes and assessments" will include special assessments by a city, which, by law, are made liens on the mortgaged property, and for which it might be sold as for general taxes. Northwestern Mut. L. Ins. Co. *v.* Butler, 57 Nebr. 198, 77 N. W. 667.

A married woman may bind herself by her mortgage to keep the mortgaged premises free from legal taxes and charges. Jones *v.* Schulmeyer, 39 Ind. 119.

Application of rents to pay taxes.—A mortgagee in possession, under a mortgage binding the mortgagor to pay the taxes as they become due, has the right to apply the rents received by him from the property to the discharge of taxes which the mortgagor neglects to pay. Harper *v.* Ely, 70 Ill. 581.

Prior lien for taxes.— Where a deed of trust on railroad property provides that the mortgagor shall pay the taxes on the property, a creditor secured by the deed may, in the character of a mortgagee, pay the taxes when the mortgagor fails to do so, and in such case he will, as to the taxes so paid, have a prior lien in equity upon the mortgaged premises or on the fund raised by a foreclosure. Humphreys *v.* Allen, 100 Ill. 511; Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61. But *compare* Dickinson *v.* White, 64 Iowa 708, 21 N. W. 153, holding that the mortgagee paying taxes, or the holder of the tax certificates, cannot claim a superior lien to the purchaser at foreclosure sale.

18. Cleaver *v.* Burcky, 17 Ill. App. 92.

19. Equitable L. Assur. Soc. *v.* Von Glahn, 107 N. Y. 637, 13 N. E. 793, holding a mortgagee entitled to be reimbursed for money paid to an expert tax-examiner for examining the books of the tax assessors, and obtaining a reduction of the taxes assessed on the premises.

so as to authorize a foreclosure, although there be no default in the payment of the mortgage debt or interest.[20]

c. Payment of Taxes by Mortgagor. It being the duty of a mortgagor in possession to pay the taxes on the property, he will not be entitled to any deduction or credit on the mortgage debt on account of taxes so paid,[21] and the same rule applies to his assignee in insolvency[22] and to his lessee in possession.[23] And in general, neither the mortgagor nor his grantee, when in possession, can acquire any rights hostile to the mortgagee by paying the taxes on the premises.[24]

3. Right of Mortgagee to Recover Taxes Paid — a. In General. A mortgagee is entitled to be reimbursed for money expended by him in paying delinquent taxes on the mortgaged premises, for his own protection, which taxes it was the mortgagor's duty to pay either under a covenant in the mortgage or in pursuance of his general duty to protect and preserve the mortgage security.[25] But

20. *California.*— Brickell *v.* Batchelder, 62 Cal. 623.

Illinois.— Cheltenham Imp. Co. *v.* Whitehead, 128 Ill. 279, 21 N. E. 569.

Iowa.— Pope *v.* Durant, 26 Iowa 233.

Kansas.— Stanclift *v.* Norton, 11 Kan. 218. Failure to pay the taxes will not authorize a foreclosure in the absence of a definite and positive provision therefor. Noble *v.* Greer, 48 Kan. 41, 28 Pac. 1004.

Maryland.— Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Gustav Adolph Bldg. Assoc. No. 1 *v.* Kratz, 55 Md. 394.

Minnesota.— Northwestern Mut. L. Ins. Co. *v.* Allis, 23 Minn. 337.

New York.— O'Connor *v.* Shipman, 48 How. Pr. 126. But see Williams *v.* Townsend, 31 N. Y. 411, holding that, under such a clause in the mortgage, there is no right to foreclose merely because the taxes are in default, but such right does not accrue until the mortgagee has actually paid the taxes.

21. Kilpatrick *v.* Henson, 81 Ala. 464, 1 So. 188; Mann *v.* Mann, 49 Ill. App. 472; Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163. See, however, Iowa Loan, etc., Co. *v.* King, 66 Iowa 322, 23 N. W. 686.

22. Brown *v.* Massachusetts Mut. L. Ins. Co., 157 Mass. 280, 32 N. E. 2.

23. Gormley's Appeal, 27 Pa. St. 49.

24. Medley *v.* Elliott, 62 Ill. 532.

25. *California.*— Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254; Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Marye *v.* Hart, 76 Cal. 291, 18 Pac. 325.

Florida.— Jackson *v.* Relf, 26 Fla. 465, 8 So. 184.

Georgia.— Athens Nat. Bank *v.* Danforth, 80 Ga. 55, 7 S. E. 546.

Illinois.— Loughridge *v.* Northwestern Mut. L. Ins. Co., 180 Ill. 267, 54 N. E. 153; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Brown *v.* Miner, 128 Ill. 148, 21 N. E. 223; Wright *v.* Langley, 36 Ill. 381; McCasland *v.* Allen, 60 Ill. App. 285.

Indiana.— Miller *v.* Curry, 124 Ind. 48, 24 N. E. 219, 374.

Iowa.— Devin *v.* Eagleson, 79 Iowa 269, 44 N. W. 545; Butterfield *v.* Hungerford, 68 Iowa 249, 26 N. W. 136; Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178.

Kansas.— Seaman *v.* Huffaker, 21 Kan. 254; Stanclift *v.* Norton, 11 Kan. 218.

Kentucky.— Allen *v.* Brown, 62 S. W. 726, 23 Ky. L. Rep. 217.

Maine.— Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729.

Maryland.— Young *v.* Omohundro, 69 Md. 424, 16 Atl. 120; Tuck *v.* Calvert, 33 Md. 209.

Minnesota.— American Baptist Missionary Union *v.* Hastings, 72 Minn. 484, 75 N. W. 713, 77 N. W. 36; Cullen *v.* Minnesota L. & T. Co., 60 Minn. 6, 61 N. W. 818.

Missouri.— Gooch *v.* Botts, 110 Mo. 419, 20 S. W. 192.

Nebraska.— Leavitt *v.* Bell, 59 Nebr. 595, 81 N. W. 614; Northwestern Mut. L. Ins. Co. *v.* Butler, 57 Nebr. 198, 77 N. W. 667; New England L. & T. Co. *v.* Robinson, 56 Nebr. 50, 76 N. W. 415, 71 Am. St. Rep. 657; Townsend *v.* J. I. Case Threshing-Mach. Co., 31 Nebr. 836, 48 N. W. 899; McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996; Johnson *v.* Payne, 11 Nebr. 269, 9 N. W. 81.

New York.— Eagle F. Ins. Co. *v.* Pell, 2 Edw. 631.

North Carolina.— Exum *v.* Baker, 115 N. C. 242, 20 S. E. 448, 44 Am. St. Rep. 449.

Pennsylvania.— Hogg *v.* Longstreth, 97 Pa. St. 255; Landreth *v.* McCaffrey, 17 Pa. Super. Ct. 272; Fidelity Ins., etc., Co. *v.* Second Phœnix Bldg., etc., Assoc., 17 Pa. Super. Ct. 270.

Texas.—Cassidy *v.* Scottish-American Mortg. Co., 27 Tex. Civ. App. 211, 64 S. W. 1023.

Wisconsin.—Wilmarth *v.* Johnson, 124 Wis. 320, 102 N. W. 562.

United States.— Windett *v.* Union Mut. L. Ins. Co., 144 U. S. 581, 12 S. Ct. 751, 36 L. ed. 551; Hicklin *v.* Marco, 56 Fed. 549, 6 C. C. A. 10.

See 35 Cent. Dig. tit. "Mortgages," § 529.

Request of mortgagor unnecessary.— It is a part of the mortgage contract, whether mentioned in the deed or not, that the property shall be kept up and preserved as security for the debt, and if the payment of delinquent taxes by the mortgagee becomes necessary for that purpose, he has a right to pay them, whether or not he is requested to do so by the mortgagor. Robinson *v.* Sulter, 85 Ga. 875, 11 S. E. 887.

Proof of payment.— A mortgagee cannot recover as for taxes paid by him without clear proof that the taxes were actually paid,

this rule does not enable him to pay the taxes on any property not covered by his mortgage, whatever interest he may have in its preservation,[26] nor to pay taxes on the mortgaged premises after his right to enforce the mortgage has become barred by the statute of limitations.[27] And generally his right to such reimbursement must be enforced through the mortgage, by claiming it as a part of the debt secured, and not by a personal action against the mortgagor.[28]

b. Right to Lien. It has been held in a few cases that a mortgagee paying delinquent taxes on the land will be subrogated to the lien of the state or municipality therefor.[29] But the doctrine obtaining in most jurisdictions is that such a payment extinguishes the original tax lien, and that a new lien comes into existence, either by force of statute, or of covenants in the mortgage, or on general principles of equity independent of either, which is a charge upon the mortgaged premises additional to the original mortgage lien and of the same grade and rank.[30] This lien therefore must be enforced with and through the mortgage, and there can be no separate or subsequent proceeding to enforce it after the receipt of satisfaction of the mortgage debt.[31] And after the mortgage itself has become merged in a

with the amounts and years stated. Brady *v.* His Creditors, 43 La. Ann. 165, 9 So. 59.

Water-rates.— A sum paid by a mortgagee for water-rates due, to prevent the supply of water from being cut off, is properly chargeable to the mortgagor. Donohue *v.* Chase, 139 Mass. 407, 2 N. E. 84.

Taxes paid after a sale on foreclosure and during the running of the period allowed for redemption, by the mortgagee or foreclosure purchaser, must be added to the redemption money. New Haven Sav. Bank *v.* Atwater, 51 Conn. 429.

When mortgagee dead.— It is the duty of an executor or administrator to pay the taxes on property mortgaged to the estate, when the mortgagor neglects to pay them; and if he omits to so so, or if there is no representative of the estate, a creditor of the estate may pay them, to protect his interest, and be reimbursed out of the proceeds of the sale on foreclosure of the mortgage. Whittaker *v.* Wright, 35 Ark. 511.

Invalidity of tax.— It is no defense to a petition by a mortgagee to have certain taxes on the property, paid by him to protect his security, added to the mortgage debt, that the taxes were void because some of the formalities necessary to make a tax deed valid had not been complied with. Southard *v.* Dorrington, 10 Nebr. 119, 4 N. W. 935.

Rights of assignee of mortgage.— In the absence of a statute or a special agreement between the parties, the assignee of a mortgage cannot pay taxes accrued prior to his assignment, or, having paid them, add the amount to the mortgage debt. Macomb *v.* Prentis, 78 Mich. 255, 44 N. W. 324.

26. Weed *v.* Hornby, 35 Hun (N. Y.) 580, holding that if the mortgagee of an undivided half of land pays the taxes assessed on the whole tract he can recover only one half from his mortgagor.

Rights of junior mortgagee.— A junior mortgagee whose lien covers one certain tract of land, while the senior mortgage covers that tract and also a second, will be interested in preserving the title to such second tract and the lien of the senior mortgage on it, because, when it comes to a foreclosure, he will have a right to have the tracts so marshaled that the senior lien shall be first satisfied out of the tract not covered by the junior; but this interest does not give him the right to pay taxes on the tract not covered by his own mortgage and add the same to the amount of his mortgage debt. Crane *v.* Aultman-Taylor Co., 61 Wis. 110, 20 N. W. 673.

27. Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653.

28. Spencer *v.* Levering, 8 Minn. 461; Horrigan *v.* Wellmuth, 77 Mo. 542; Kersenbrock *v.* Muff, 29 Nebr. 530, 45 N. W. 778.

29. Lester *v.* Richardson, 69 Ark. 198, 62 S. W. 62; Pratt *v.* Pratt, 96 Ill. 184.

30. *California.*— Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922.

Connecticut.— Mix *v.* Hotchkiss, 14 Conn. 32.

Georgia.— Athens Nat. Bank *v.* Danforth, 80 Ga. 55, 7 S. E. 546.

Indiana.— Government Bldg., etc., Inst. *v.* Richards, 32 Ind. App. 24, 68 N. E. 1039.

Iowa.— Broquet *v.* Sterling, 56 Iowa 357, 9 N. W. 301; Strong *v.* Burdick, 52 Iowa 630, 3 N. W. 707. *Compare* Savage *v.* Scott, 45 Iowa 130.

Kansas.— Waterson *v.* Devoe, 18 Kan. 223.

Michigan.— See Pond *v.* Drake, 50 Mich. 302, 15 N. W. 466.

Nebraska.— Johnson *v.* Payne, 11 Nebr. 269, 9 N. W. 81.

New York.— Marshall *v.* Davies, 78 N. Y. 414; Robinson *v.* Ryan, 25 N. Y. 320; Kortright *v.* Cady, 23 Barb. 490; Burr *v.* Veeder, 3 Wend. 412; Quin *v.* Brittain, Hoffm. 353.

Ohio.— Bates *v.* People's Sav., etc., Assoc., 42 Ohio St. 655. See, however, Lawton *v.* Adams, 13 Ohio Cir. Ct. 233, 7 Ohio Cir. Dec. 129.

Pennsylvania.— See *In re* Morris, 8 Wkly. Notes Cas. 178.

Wisconsin.— Endress *v.* Shove, 110 Wis. 133, 85 N. W. 653.

See 35 Cent. Dig. tit. "Mortgages," § 530.

But see Fuller *v.* Jillett, 2 Fed. 30, 9 Biss. 296.

31. Vincent *v.* Moore, 51 Mich. 618, 17 N. W. 81; Horrigan *v.* Wellmuth, 77 Mo.

judgment of foreclosure, as in that case all liens depending on the mortgage are extinguished.[32]

c. On Redemption. It is also the right of a mortgagee who has paid delinquent taxes on the land to have the amount thereof added to the sum required to be paid by the mortgagor when he offers to redeem the property or brings his bill for that purpose,[33] or if the amount of the redemption money is settled on an accounting, the mortgagee having been in possession and being charged with rents and profits, he will be entitled to allowance or credit for all sums properly paid by him for taxes.[34]

d. On Foreclosure. Where a mortgagee pays taxes on the mortgaged property which the mortgagor should have paid, the amount so paid should be allowed to the mortgagee in the judgment or decree in his suit for foreclosure, or ordered paid to him out of the proceeds of the foreclosure sale,[35] provided there is a

542. *Compare* West *v.* Hayes, 117 Ind. 290, 20 N. E. 155.

32. McCrossen *v.* Harris, 35 Kan. 178, 10 Pac. 583; Vincent *v.* Moore, 51 Mich. 618, 17 N. W. 81; Young *v.* Brand, 15 Nebr. 601, 19 N. W. 494. But see Mutual L. Ins. Co. *v.* Newell, 78 Hun (N. Y.) 293, 28 N. Y. Suppl. 913.

33. *Illinois.*— Rodman *v.* Quick, 211 Ill. 546, 71 N. E. 1087; Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 508; Rawson *v.* Fox, 65 Ill. 200; Blair *v.* Chamblin, 39 Ill. 521, 89 Am. Dec. 322.

Iowa.— Stillman *v.* Rosenberg, (1899) 78 N. W. 913.

Missouri.— Bender *v.* Zimmerman, 122 Mo. 194, 26 S. W. 973.

Nebraska.— Bourgeois *v.* Gapen, 58 Nebr. 364, 78 N. W. 639.

New York.— Brevoort *v.* Randolph, 7 How. Pr. 398.

Vermont.— Howard *v.* Clark, 72 Vt. 429, 48 Atl. 656.

United States.—Savings, etc., Soc. *v.* Davidson, 97 Fed. 696, 38 C. C. A. 365; Sanford *v.* Savings, etc., Soc., 80 Fed. 54.

See 35 Cent. Dig. tit. "Mortgages," § 1786.

Taxes paid after foreclosure.— In redeeming from a foreclosure sale, a second mortgagee is not required to pay the amount expended by the first mortgagee in redeeming the mortgaged premises from a tax-sale, where such amount was paid after the foreclosure sale had taken place. Nopson *v.* Horton, 20 Minn. 268.

34. *Alabama.*— Pollard *v.* American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767; McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548; Blum *v.* Mitchell, 59 Ala. 535. See American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

California.— Murdock *v.* Clarke, 90 Cal. 427, 27 Pac. 275; Hidden *v.* Jordan, 28 Cal. 301.

Colorado.— Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067.

Illinois.— Roberts *v.* Fleming, 53 Ill. 196; McCumber *v.* Gilman, 15 Ill. 381; Rhodes *v.* Missouri Sav., etc., Co., 63 Ill. App. 77. See also Union Mut. L. Ins. Co. *v.* Kirchoff, 149 Ill. 536, 36 N. E. 1031.

Indiana.— Goodrich *v.* Friedersdorff, 27 Ind. 308.

Maine.— Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053.

Massachusetts.— Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499.

Michigan.— Millard *v.* Truax, 73 Mich. 381, 41 N. W. 328.

Minnesota.— Martin *v.* Lennon, 19 Minn. 67.

New Hampshire.— Brown *v.* Simons, 44 N. H. 475.

New Jersey.— Dolman *v.* Cook, 14 N. J. Eq. 56.

New York.— Wood *v.* Kroll, 4 N. Y. Suppl. 678.

Ohio.— O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203.

Pennsylvania.— Lysle *v.* Williams, 15 Serg. & R. 135; Shoemaker *v.* The Bank, 15 Phila. 297.

See 35 Cent. Dig. tit. "Mortgages," § 1786.

35. *California.*— German Sav., etc., Soc. *v.* Hutchinson, 68 Cal. 52, 8 Pac. 627.

Colorado.— Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286.

Florida.— Jackson *v.* Relf, 26 Fla. 465, 8 So. 184.

Illinois.—Loughridge *v.* Northwestern Mut. L. Ins. Co., 180 Ill. 267, 54 N. E. 153; Abbott *v.* Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Kepley *v.* Jansen, 107 Ill. 79; De Leuw *v.* Neely, 71 Ill. 473; Wilson *v.* Spring, 64 Ill. 14; Wright *v.* Langley, 36 Ill. 381; Douglass *v.* Miller, 102 Ill. App. 345; McCasland *v.* Allen, 60 Ill. App. 285.

Kansas.— Douthitt *v.* Farrell, 60 Kan. 195, 56 Pac. 9; Harris *v.* McCrossen, 31 Kan. 402, 2 Pac. 814; Seaman *v.* Huffaker, 21 Kan. 254; Opdyke *v.* Crawford, 19 Kan. 604; Stanclift *v.* Norton, 11 Kan. 218.

Louisiana.—Scholfield *v.* West, 44 La. Ann. 277, 10 So. 806; Brady *v.* His Creditors, 43 La. Ann. 165, 9 So. 59.

Michigan.— Walsh *v.* Robinson, 135 Mich. 16, 97 N. W. 55, 99 N. W. 282; Walton *v.* Hollywood, 47 Mich. 385, 11 N. W. 209; Vaughn *v.* Nims, 36 Mich. 297. But see Maxfield *v.* Willey, 46 Mich. 252, 9 N. W. 271, holding that where a mortgagee, on default by the mortgagor in the payment of taxes, and consequent sale of the property, bids in the land at the tax-sale, he cannot

proper averment and prayer in the bill, in regard to such taxes, and evidence of their payment.[36] Moreover, the purchaser of the property at the foreclosure sale is entitled to credit for taxes paid by him when they constituted a lien on the property at the time of the sale.[37]

e. Redemption From Tax-Sale. A mortgagee or a trustee in a deed of trust has such an interest in the mortgaged property as entitles him to redeem it from a sale for non-payment of taxes,[38] and the amount paid by him to effect such redemption is properly allowed to him in his account, or added to the amount for which he forecloses or to the amount which the mortgagor must pay to redeem ;[39]

on subsequent foreclosure, have the sums so paid included in the decree.

Minnesota.— Hamel *v.* Corbin, 69 Minn. 223, 72 N. W. 106; Northwestern Mut. L. Ins. Co. *v.* Allis, 23 Minn. 337.

Nebraska.— Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524; Townsend *v.* J. I. Case Threshing-Mach. Co., 31 Nebr. 836, 48 N. W. 899; Johnson *v.* Payne, 11 Nebr. 269, 9 N. W. 81; Southard *v.* Dorrington, 10 Nebr. 119, 4 N. W. 935.

New Jersey.— Stonington Sav. Bank *v.* Davis, 14 N. J. Eq. 286.

New York.—Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Cornell *v.* Woodruff, 77 N. Y. 203.

South Carolina.— Annely *v.* De Saussure, 12 S. C. 488.

See 35 Cent. Dig. tit. "Mortgages," § 1431.

Foreclosure for unpaid interest.— A decree foreclosing, for unpaid interest, a mortgage under which interest is payable annually, may include taxes paid by the mortgagee to preserve his security, without obliging him to wait until the maturity of the principal debt. Kepley *v.* Jansen, 107 Ill. 79.

Tax penalties.— It being the mortgagor's duty to pay the taxes, he is chargeable with the additional burden arising from interest, penalties, and costs caused by delay in making payment. Rapid City First Nat. Bank *v.* McCarthy, 18 S. D. 218, 100 N. W. 14.

Outstanding tax title.— The proceeds of a mortgage foreclosure sale cannot, without the consent of the owner, be applied in discharge of the claim of a prior purchaser of the same premises at a tax-sale, where such purchaser was not a party to the foreclosure proceedings; but the foreclosure purchaser must take the land subject to the tax lien. Ketcham *v.* Fitch, 13 Ohio St. 201.

Mortgagee in possession.—It being the duty of a mortgagee in possession to apply the rents and profits in discharge of the taxes, he cannot claim to have such taxes included in his decree of foreclosure, unless he has fully accounted for the rents and income. Pollard *v.* American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767; Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1.

36. De Leuw *v.* Neely, 71 Ill. 473; Iowa Sav., etc., Assoc. *v.* Selby, 111 Iowa 402, 82 N. W. 968; Geo. C. Miller Sons' Carriage Co. *v.* Jeptha G. Miller, etc., Co., 21 Ohio Cir. Ct. 207, 11 Ohio Cir. Dec. 455; Williams *v.* Williams, 117 Wis. 125, 94 N. W. 25.

Taxes paid pending suit.— Where a mortgagee, suing for foreclosure, pays taxes on the premises after the filing of the bill, the amount thereof may properly be allowed to him in the foreclosure decree, under the prayer for general relief, the contingencies which would justify such payment having been set forth in the bill; that is, it will not be necessary for him to file a supplemental bill. Loewenstein *v.* Rapp, 67 Ill. App. 678; Rhodes *v.* Missouri Sav., etc., Co., 63 Ill. App. 77; Brown *v.* Miner, 21 Ill. App. 60 [*affirmed* in 128 Ill. 148, 21 N. E. 223]; Jehle *v.* Brooks, 112 Mich. 131, 70 N. W. 440; Barnwell *v.* Marion, 60 S. C. 314, 38 S. E. 593.

37. Cutting *v.* Tavares, etc., R. Co., 61 Fed. 150, 9 C. C. A. 401. And see Seamans *v.* Harvey, 52 Ind. 331; Swan *v.* Emerson, 129 Mass. 289.

38. *Iowa.*— Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450; Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890; Lloyd *v.* Bunce, 41 Iowa 660; Burton *v.* Hintrager, 18 Iowa 348, heir of mortgagee entitled to redeem from tax-sale.

Louisiana.— Rondez *v.* Buras, 34 La. Ann. 1245; Montgomery *v.* Burton, 31 La. Ann. 330; Alter *v.* Shepherd, 27 La. Ann. 207.

Massachusetts.— Stone *v.* Stone, 163 Mass. 474, 40 N. E. 897; Hawes *v.* Howland, 136 Mass. 267; Coughlin *v.* Gray, 131 Mass. 56; Faxon *v.* Wallace, 98 Mass. 44.

Missouri.— Cowell *v.* Gray, 85 Mo. 169; Corrigan *v.* Bell, 73 Mo. 53; Rowse *v.* Johnson, 66 Mo. App. 57.

New York.— Chard *v.* Holt, 136 N. Y. 30, 32 N. E. 740.

Ohio.— Plumb *v.* Robinson, 13 Ohio St. 298.

West Virginia.— Elliott *v.* Shaffer, 30 W. Va. 347, 4 S. E. 292.

United States.— Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086.

39. *Alabama.*— Red Mountain Min. Co. *v.* Jefferson County Sav. Bank, 113 Ala. 629, 21 So. 74, 59 Am. St. Rep. 151.

Connecticut.— Mix *v.* Hotchkiss, 14 Conn. 32.

Illinois.— Stinson *v.* Connecticut Mut. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262; Clark *v.* Laughlin, 62 Ill. 278; Wright *v.* Langley, 36 Ill. 381.

Iowa.— Dickinson *v.* White, 64 Iowa 708, 21 N. W. 153; Strong *v.* Burdick, 52 Iowa 630, 3 N. W. 707.

Kansas.— Galbreath *v.* Drought, 29 Kan. 711.

Louisiana.— Shannon *v.* Lane, 33 La. Ann. 489.

Massachusetts.— Walsh *v.* Wilson, 130 Mass. 124.

and this, under ordinary circumstances, will include not only the amount of the delinquent tax, but also penalties, costs, and the special rate of interest allowed by statute to the holder of a tax certificate from whom a redemption is made.[40]

4. Liability as Between Mortgagees. A senior mortgagee paying taxes for the preservation of the property is entitled, not only as against the mortgagor but also as against the junior encumbrancer, to reimbursement for the sum so paid with legal interest.[41] And conversely, where the junior mortgagee pays the taxes he is entitled to credit therefor as against the senior encumbrancer, his lien therefor, according to some of the authorities, being paramount to the first mortgage, on account of his equitable right to be subrogated to the lien of the state or municipality,[42] or, according to others, being of the same rank and grade with the lien of his mortgage, and entitling him simply to reimbursement.[43] As between several creditors secured by the same mortgage or deed of trust, one who pays the taxes is entitled to contribution from the others or to be credited as against them with the amount paid.[44]

G. Insurance[45] **— 1. Covenants to Insure.** A covenant in a mortgage to the effect that the mortgagor will keep the buildings on the mortgaged premises insured for the benefit of the mortgagee, and authorizing the latter to effect insurance in case of the mortgagor's failure to do so, is valid and binding.[46]

Michigan.— Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225.

New York.— Cornell *v.* Woodruff, 77 N. Y. 203; Kortright *v.* Cady, 23 Barb. 490; Brevoort *v.* Randolph, 7 How. Pr. 398; Rapelye *v.* Prince, 4 Hill 119, 40 Am. Dec. 267; Burr *v.* Veeder, 3 Wend. 412; Faure *v.* Winans, Hopk. 283, 14 Am. Dec. 545; Eagle F. Ins. Co. *v.* Pell, 2 Edw. 631.

South Dakota.— Rapid City First Nat. Bank *v.* McCarthy, 18 S. D. 218, 100 N. W. 14.

United States.— Windett *v.* Union Mut. L. Ins. Co., 144 U. S. 581, 12 S. Ct. 751, 36 L. ed. 551.

See 35 Cent. Dig. tit. "Mortgages," § 529.

Mortgage invalid.— Where a mortgage was made in breach of trust, of which fact the mortgagee had notice, he has no right to a lien on the land for the amount paid by him to redeem it from a tax-sale. Graham *v.* British Canadian Loan, etc., Co., 12 Manitoba 244.

Redemption after foreclosure.— A mortgagee who sells under a power of sale contained in his mortgage cannot deduct from the proceeds money afterward paid to redeem outstanding tax titles, the sale having been made subject to such liens. Skilton *v.* Roberts, 129 Mass. 306.

40. Merchants Sav. Bank *v.* Moore, 5 Kan. App. 362, 48 Pac. 455; Rapid City First Nat. Bank *v.* McCarthy, 18 S. D. 218, 100 N. W. 14.

A mortgagee in possession, who allows the land to be sold for taxes, will be allowed only the amount of the tax, with legal interest — not the amount paid by him to redeem. Moshier *v.* Norton, 100 Ill. 63. And see Fisk *v.* Brunette, 30 Wis. 102.

41. Butterfield *v.* Hungerford, 68 Iowa 249, 26 N. W. 136.

Illegal assessments.— A first mortgagee will not, as against a second mortgagee, who was not made a party to the suit to foreclose the first mortgage, be allowed in the decree of foreclosure by the second mortgagee the amount of illegal municipal assessments on the property, paid by him after his purchase thereof at the foreclosure sale, where the payment of such assessments might have been successfully resisted. Atwater *v.* West, 28 N. J. Eq. 361.

42. *Arkansas.*—Ringo *v.* Woodruff, 43 Ark. 469; Chaffe *v.* Oliver, 39 Ark. 531.

Kansas.— Atchison Sav. Bank *v.* Wyman, 65 Kan. 314, 69 Pac. 326.

Michigan.— Noeker *v.* Howry, 119 Mich. 626, 78 N. W. 669.

New Jersey.— Fiacre *v.* Chapman, 32 N. J. Eq. 463.

Washington.— Fischer *v.* Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742; Farrell *v.* Gustin, 18 Wash. 239, 51 Pac. 372.

43. Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539; Chrisman *v.* Hough, 146 Mo. 102, 47 S. W. 941; Hill *v.* Buffington, 106 Wis. 525, 82 N. W. 712; Allison *v.* Corson, 83 Fed. 752.

Junior mortgagee in possession.— A junior mortgagee, who has controlled the property as agent of the mortgagor, for the purpose of applying the rents to the mortgage debts, is not entitled to a lien for advances made for taxes, where the rents were sufficient to pay them, and the property is insufficient to pay the balance of the senior mortgagee's debt. Fifth Ward Bldg. Assoc. *v.* Dines, 60 S. W. 9, 22 Ky. L. Rep. 1116.

44. Gardner *v.* Diederichs, 41 Ill. 158; Weaver *v.* Alter, 29 Fed. Cas. No. 17,308, 3 Woods 152.

45. See, generally, Fire Insurance.

46. Mann *v.* Mann, 49 Ill. App. 472 (holding that a mortgagor is not entitled to any abatement of the mortgage debt on account of premiums paid by him for insurance effected under an agreement to insure for the mortgagee's benefit); Swearingen *v.* Hartford F. Ins. Co., 56 S. C. 355, 34 S. E. 449 (holding

There is a conflict of authority as to whether such a covenant can be considered as one running with the land.[47] Certainly, unless it is waived,[48] its breach will give the mortgagee the right to take out insurance for the protection of his security and at the expense of the mortgagor,[49] or even, if the mortgage so provides, to foreclose and have a sale of the property, as in the case of any other default.[50] But such a covenant, when duly observed, does not prevent the mortgagor from procuring additional insurance in favor of himself or of a subsequent encumbrancer, provided the total insurance does not exceed the value of the property.[51]

2. Rights and Liabilities as to Insurance — a. In General. A mortgagor of real property, or grantor in a deed of trust, retains an insurable interest in the buildings and improvements thereon,[52] even though the property be mortgaged up

that the law will presume that insurance taken out by a mortgagor in his own name, after an agreement to insure for the mortgagee's benefit, was procured in pursuance and execution of the agreement); Book *v.* West, 29 Wash. 70, 69 Pac. 630 (holding that a covenant in a mortgage to insure buildings, which are in reality situated on an adjoining lot not covered by the mortgage, will not have the effect of bringing the buildings within the lien of the mortgage, but only of giving the insurance as an additional security). See also Harper *v.* Ely, 70 Ill. 581.

Sufficiency of covenant.— Such a covenant must specify the amount of insurance to be taken out for the mortgagee's benefit. If this is left blank the covenant is of no effect. McCaslin *v.* Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67. And if a statute requires mortgages to state the exact amount of the liability accruing under them, a covenant to keep the property insured "for an amount satisfactory to the holders of the notes secured" is void. State *v.* Citizens' Bank, 33 La. Ann. 705. And a provision that the mortgage trustee may in his discretion effect insurance on the premises, but that it shall be no part of his duty to do so, is not sufficient to impose on the mortgagor an obligation to insure the property for the benefit of the bondholders on the demand of the trustee. Farmers' L. & T. Co. *v.* Penn Plate-Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710.

Covenant to insure as additional security. — The stipulation for insurance for the mortgagees' benefit, being intended to afford security supplementary to and connected with the mortgage and to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagees' interest in case the buildings should burn, is in equity a sort of adjunct to the mortgage, and is binding on the mortgagor and all others in his shoes with notice. Miller *v.* Aldrich, 31 Mich. 408.

Mortgage of vacant lots.— Plaintiff bought two vacant lots of land, and was to give a mortgage back for a part of the purchase-price. The mortgage prepared by defendant contained a clause that the buildings on the property should be insured and kept insured. This clause was objected to because the lots were vacant, but it was held that the mortgage was a proper one, and plaintiff had no excuse for not executing it. Day *v.* Hunt, 10 N. Y. St. 365.

Selection of companies.— Where a deed of trust gives the trustee full power to select the company in which to insure the property covered by the trust, he will be required to exercise due care in the selection of good and solvent companies, but he will not be a guarantor of their solvency. Gettins *v.* Scudder, 71 Ill. 86. And see Southern Bldg., etc., Assoc. *v.* Miller, 110 Fed. 35, 49 C. C. A. 21.

Failure to pay premiums in advance not a breach of covenant.— Such a covenant does not imply an agreement to pay the premiums in advance, and if the mortgagor procures the policies and delivers them to the mortgagee the covenant is not broken until the policies are canceled by the insurance company. Provident Sav. L. Assur. Soc. *v.* Georgia Industrial Co., 124 Ga. 399, 52 S. E. 289.

47. Covenant runs with land.— Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. (D. C.) 304; Thomas *v.* Vonkapff, 6 Gill & J. (Md.) 372; Miller *v.* Aldrich, 31 Mich. 408; *In re* Sands Ale Brewing Co., 21 Fed. Cas. No. 12,307, 3 Biss. 175.

Covenant does not run with land.— Reid *v.* McCrum, 91 N. Y. 412; Dunlop *v.* Avery, 89 N. Y. 592 [*reversing* 23 Hun 509]; Farmers' L. & T. Co. *v.* Penn Plate-Glass Co., 186 U. S. 434, 22 S. Ct. 842, 46 L. ed. 1234 [*affirming* 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710].

48. Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638; Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345; Philips *v.* Bailey, 82 Mo. 639.

49. Leland *v.* Collver, 34 Mich. 418; Garza *v.* Western Mortg., etc., Co., (Tex. Civ. App. 1894) 27 S. W. 1090.

50. Walker *v.* Cockey, 38 Md. 75.

51. Nordyke, etc., Co. *v.* Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219; Kirchgraber *v.* Park, 57 Mo. App. 35.

52. See Fire Insurance, 19 Cyc. 587. And see the following cases:

Illinois.—Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121; Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.

Maine.— Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447.

Massachusetts.— Jackson *v.* Massachusetts Mut. F. Ins. Co., 23 Pick. 418, 34 Am. Dec. 69.

to its full value,[53] and even after he has conveyed his equity of redemption to a third person, if he remains personally liable for the mortgage debt.[54] And a mortgagee of real property has an insurable interest, distinct from that of the mortgagor, in the improvements thereon,[55] and so has a trustee in a deed of trust in the nature of a mortgage,[56] as also the assignee of the mortgage,[57] and the assignor, if he remains liable to the assignee on his indorsement of the mortgage note;[58] and different mortgagees of the same property have independent interests which each may insure for his own benefit to the full amount.[59] A policy issued to the mortgagor payable in case of loss to the mortgagee is an insurance of the mortgagor's interest and does not make the mortgagee an assignee.[60] Where a loss occurs under a policy of insurance effected by the mortgagor under an agreement so to do and made payable to the mortgagee, and the latter might have collected the money if he had been diligent, but delays to act until the insurance company has become insolvent, the loss must fall on the mortgagee, not on the mortgagor; this on the same principle that is applied when a creditor loses a collateral security by neglect to collect it.[61]

b. As to Premiums. If there is no provision in the mortgage requiring the mortgagor to keep the property insured, or authorizing the mortgagee to do so, the latter cannot charge the mortgagor with premiums paid by him for insurance taken out for his own interest and benefit.[62] But where there is a covenant to

New York.— Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401.

United States.— Royal Ins. Co. *v.* Stinson, 103 U. S. 25, 26 L. ed. 473.

Absolute deed as mortgage.— Where the owner of property has conveyed the same by a deed which is absolute on its face, but was in reality intended to operate only as a security for a debt, he occupies the position of a mortgagor and has an insurable interest in the property. Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416.

53. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Higginson *v.* Dall, 13 Mass. 96.

The insurable interest of the mortgagor is the full value of the property; it is not measured merely by the excess of the value of the property over the amount of the encumbrance. Ætna F. Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90.

54. Buck *v.* Phœnix Ins. Co., 76 Me. 586; Wilson *v.* Hill, 3 Metc. (Mass.) 66; Waring *v.* Loder, 53 N. Y. 581; Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401.

The grantee of the equity of redemption in mortgaged premises has an insurable interest in the buildings thereon. Agricultural Ins. Co. *v.* Clancey, 9 Ill. App. 137.

55. See FIRE INSURANCE, 19 Cyc. 586. And see the following cases:

Illinois.— Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.

Maine.— Emery *v.* Piscataqua F. & M. Ins. Co., 52 Me. 322.

Maryland.— Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 3 Am. Rep. 149.

Massachusetts.— Foster *v.* Equitable Mut. F. Ins. Co., 2 Gray 216; Jackson *v.* Massachusetts Mut. F. Ins. Co., 23 Pick. 418, 34 Am. Dec. 69.

Nebraska.— Rochester Loan, etc., Co. *v.* Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

New Jersey.— Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541.

New York.— Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. 570; Slocovich *v.* Oriental Mut. Ins. Co., 13 Daly 264.

Pennsylvania.— Smith *v.* Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546.

Wisconsin.— Appleton Iron Co. *v.* British America Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

Effect of provision for insurance at mortgagor's expense.— A provision in the mortgage that the mortgagee may take out insurance if the mortgagor fails to do so, and charge the latter with the premium, does not restrict the mortgagee in respect to insuring his own interest separately and directly. Foster *v.* Van Reed, 70 N. Y. 19, 26 Am. Rep. 544.

56. Dick *v.* Franklin F. Ins. Co., 10 Mo. App. 376 [*affirmed* in 81 Mo. 103].

57. Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271.

58. Williams *v.* Roger Williams Ins. Co., 107 Mass. 377, 9 Am. Rep. 41.

59. Fox *v.* Phenix F. Ins. Co., 52 Me. 333.

60. Baldwin *v.* Phœnix Ins. Co., 60 N. H. 164.

61. Charter Oak L. Ins. Co. *v.* Smith, 43 Wis. 329.

62. *Idaho.*— Miller *v.* Hunt, 6 Ida. 523, 57 Pac. 315.

Maine.— Snow *v.* Pressey, 85 Me. 408, 27 Atl. 272; Stinchfield *v.* Milliken, 71 Me. 567; Pierce *v.* Faunce, 53 Me. 351.

Maryland.— Booth *v.* Baltimore Steam Packet Co., 63 Md. 39.

Massachusetts.— Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Clark *v.* Wilson, 103 Mass. 219, 4 Am. Rep. 532; Clark *v.* Washington Ins. Co., 100 Mass. 509, 1 Am. Rep. 135; White *v.* Brown, 2 Cush. 412; Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394.

insure, which the mortgagor fails or refuses to fulfil, it is proper for the mortgagee to procure the insurance to be written, and he will be entitled to be reimbursed for the cost thereof, whether the settlement be made on accounting, on redemption, or on foreclosure;[63] or he may, without waiting for the debt to mature, maintain assumpsit for the amount of the premium paid.[64] But such a covenant does not make the mortgagor liable for the premiums on any greater amount of insurance than that specified in the mortgage,[65] nor for the cost of insurance extending beyond the day for the payment of the mortgage.[66] On the other hand, where the mortgagee retains money out of the mortgage loan with which to pay for insurance, and agrees to procure it, this imposes on him a

Michigan.— Walton *v.* Hollywood, 47 Mich. 385, 11 N. W. 209.

Minnesota.— Hamel *v.* Corbin, 69 Minn. 223, 72 N. W. 106.

New York.— Faure *v.* Winans, Hopk. 283, 14 Am. Dec. 545. But *compare In re* Bogart, 28 Hun 466.

England.— Dobson *v.* Land, 4 De G. & Sm. 575, 64 Eng. Reprint 963, 8 Hare 216, 32 Eng. Ch. 216, 68 Eng. Reprint 337, 14 Jur. 288, 19 L. J. Ch. 484; Bellamy *v.* Brickenden, 2 Johns. & H. 137, 70 Eng. Reprint 1002; Sclater *v.* Cottam, 3 Jur. N. S. 630, 5 Wkly. Rep. 744; Brooke *v.* Stone, 34 L. J. Ch. 251, 12 L. T. Rep. N. S. 114, 13 Wkly. Rep. 401. But see Scholefield *v.* Lockwood, 9 Jur. N. S. 407, 33 L. J. Ch. 106, 8 L. T. Rep. N. S. 407, 11 Wkly. Rep. 555.

Sufficiency of agreement.— Where a mortgage provided that the mortgagor should keep the buildings insured, and out of the proceeds of the mortgage sale were to be paid all moneys advanced for taxes "and other liens," it was held that the mortgagee was not entitled to reimbursement for the cost of insurance taken out by him. Culver *v.* Brinkerhoff, 180 Ill. 548, 54 N. E. 585.

63. *Connecticut.*— Mix *v.* Hotchkiss, 14 Conn. 32.

Georgia.— Robinson *v.* Sulter, 85 Ga. 875, 11 S. E. 887.

Illinois.— Baker *v.* Aalberg, 183 Ill. 258, 55 N. E. 672; Baker *v.* Jacobson, 183 Ill. 171, 55 N. E. 724; Loughridge *v.* Northwestern Mut. L. Ins. Co., 180 Ill. 267, 54 N. E. 153; Harper *v.* Ely, 70 Ill. 581; McCumber *v.* Gilman, 15 Ill. 381.

Indiana.— Hosford *v.* Johnson, 74 Ind. 479.

Iowa.— Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178; Fockler *v.* Beach, 32 Iowa 187.

Kentucky.— Allen *v.* Brown, 62 S. W. 726, 23 Ky. L. Rep. 217.

Louisiana.—Grunewald *v.* Commercial Soap, etc., Manufactory, 49 La. Ann. 489, 21 So. 646.

Massachusetts.— Carr *v.* Hodge, 130 Mass. 55; Montague *v.* Boston, etc., R. Co., 124 Mass. 242; Fowley *v.* Palmer, 5 Gray 549.

Michigan.— Jehle *v.* Brooks, 112 Mich. 131, 70 N. W. 440; Walton *v.* Hollywood, 47 Mich. 385, 11 N. W. 209; Leland *v.* Collver, 34 Mich. 418.

Missouri.— McLean *v.* Burr, 16 Mo. App. 240, holding that a bondholder who has paid insurance premiums to preserve the mortgaged property may enforce a lien therefor, although the other bondholders secured by the trust deed did not know of the payment.

Nebraska.— Sanford *v.* Lichtenberger, 62 Nebr. 501, 87 N. W. 305; White *v.* Atlas Lumber Co., 49 Nebr. 82, 68 N. W. 359.

New Jersey.— Neale *v.* Albertson, 39 N. J. Eq. 382.

North Carolina.— Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 56.

Pennsylvania.— Hollis *v.* Spring Garden Ins. Co., 12 Phila. 321.

Tennessee.— Bowman *v.* Cleveland Bldg., etc., Assoc., (Ch. App. 1900) 59 S. W. 669.

Texas.— Garza *v.* Western Mortg., etc., Co., (Civ. App. 1894) 27 S. W. 1090.

Wisconsin.— Northwestern Mut. L. Ins. Co. *v.* Drown, 51 Wis. 419, 8 N. W. 237.

United States.— Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858; Burgess *v.* Southbridge Sav. Bank, 2 Fed. 500.

England.— Richards *v.* Macclesfield, 10 L. J. Ch. 329.

Canada.— English, etc., Inv. Co. *v.* Gray, 8 Ont. Pr. 199; Bethune *v.* Calcutt, 3 Grant Ch. (U. C.) 648.

See 35 Cent. Dig. tit. "Mortgages," §§ 535, 1787.

Demand unnecessary.— Where the mortgage provides that the mortgagor shall keep the property insured, and that any sums advanced by the mortgagee for that purpose shall be allowed him out of the proceeds of sale on foreclosure, it is not necessary for the mortgagee to make a demand on the mortgagor before renewing the insurance, the policy expiring during the life of the mortgage. Baker *v.* Jacobson, 183 Ill. 171, 55 N. E. 724.

Abandonment of claim.— Where the mortgagee seeks and obtains a foreclosure of the mortgage for the amount due under its terms, but without setting up a claim to reimbursement for the cost of insurance procured by him, it will be presumed that he has waived or abandoned his claim therefor. L'Hote *v.* Dubuch, 26 La. Ann. 717; Northwestern Mut. L. Ins. Co. *v.* Drown, 51 Wis. 419, 8 N. W. 237.

64. Cassatt *v.* Vogel, 14 Mo. App. 317.

65. Conover *v.* Grover, 31 N. J. Eq. 539; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 41 N. Y. Super. Ct. 369; Garza *v.* Western Mortg., etc., Co., (Tex. Civ. App. 1894) 27 S. W. 1090.

66. Garza *v.* Western Mortg., etc., Co., (Tex. Civ. App. 1894) 27 S. W. 1090.

duty for the breach of which the mortgagor may have a remedy.[67] Where the mortgagee charges the mortgagor with the cost of insurance paid for by him, he should account to the mortgagor for any rebate of premium obtained by him from the insurance company upon a cancellation of the policy;[68] and so, if the policy is assigned to the mortgagee as collateral, the mortgage debt paid when due, the insurance canceled, and a return premium paid by the company to the mortgagee, the latter is bound to pay over to the mortgagor the money so received.[69] The debtor in a deed of trust should be charged with the amount paid by the *cestui que trust* in effecting insurance on the property, where the insurance was effected in the name of the debtor and with his consent.[70]

c. As to Proceeds. Where the mortgagor insures his own interest and pays the premium, and there is no covenant in the mortgage requiring him to insure for the benefit of the mortgagee, and the policy is not assigned to the mortgagee nor the loss made payable to him, and the mortgagor does not act as his agent or for his interest in effecting the insurance, the mortgagee has no claim on the proceeds of the policy;[71] but where the mortgagor covenants to keep the premises insured for the benefit of the mortgagee, the latter will have a specific equitable lien on the policy taken out by the mortgagor, or on its proceeds, although it may not have been made payable to him or assigned to him.[72] Where the mortgagee procures insurance on his separate interest, for his own benefit and at his own cost, and without any agreement with the mortgagor in respect thereto, the mortgagor has no interest in the policy, and is not entitled to have the money collected on a loss by fire applied in reduction of the mortgage debt.[73] Where,

67. Land Mortg. Inv., etc., Co. *v.* Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

68. Parker *v.* Smith Charities, 127 Mass. 499. See also Doty *v.* Oriental Print Works, 24 R. I. 102, 52 Atl. 802.

69. Merrifield *v.* Baker, 9 Allen (Mass.) 29; Felton *v.* Brooks, 4 Cush. (Mass.) 203.

70. Fockler *v.* Beach, 32 Iowa 187.

71. *Alabama.*— Ridley *v.* Ennis, 70 Ala. 463.

Georgia.— Ennis *v.* Harralson, 101 Ga. 282, 28 S. E. 839.

Illinois.— Niagara F. Ins. Co. *v.* Scammon, 144 Ill. 490, 28 N. E. 919, 32 N. E. 914, 19 L. R. A. 114; Commercial Union Assur. Co. *v.* Scammon, 126 Ill. 355, 18 N. E. 562, 9 Am. St. Rep. 651; Lindley *v.* Orr, 83 Ill. App. 70.

Iowa.— Ryan *v.* Adamson, 57 Iowa 30, 10 N. W. 287.

Kentucky.— Guill *v.* Corinth Deposit Bank, 68 S. W. 870, 24 Ky. L. Rep. 482.

New York.— Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410; Herkimer *v.* Rice, 27 N. Y. 163; Carter *v.* Rockett, 8 Paige 437. See also Cornell *v.* Savage, 49 N. Y. App. Div. 429, 63 N. Y. Suppl. 540.

Ohio.— McDonald *v.* Black, 20 Ohio 185, 55 Am. Dec. 448.

United States.— See Amadeo *v.* Northern Assur. Co., 201 U. S. 194, 26 S. Ct. 507, 50 L. ed. 722.

In England and Canada under 14 Geo. III, c. 78, § 83, which is not merely of local application but extends to Canada, although the mortgage contains no covenant by the mortgagor to insure, yet if he does insure and collects the money on a loss by fire, the mortgagee is entitled to have such money laid out in rebuilding. Carr *v.* Fire Assur. Assoc., 14 Ont. 487; Stinson *v.* Pennock, 14 Grant Ch. (U. C.) 604.

72. *Illinois.*— Grange Mill Co. *v.* Western Assur. Co., 118 Ill. 396, 9 N. E. 274; Norwich F. Ins. Co. *v.* Boomer, 52 Ill. 442, 4 Am. Rep. 618; Wilson *v.* Hakes, 36 Ill. App. 539.

Indiana.— Nordyke, etc., Co. *v.* Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

Maryland.— Thomas *v.* Vonkapff, 6 Gill & J. 372.

Massachusetts.— Providence County Bank *v.* Benson, 24 Pick. 204.

Michigan.— Miller *v.* Aldrich, 31 Mich. 408.

Minnesota.— Ames *v.* Richardson, 29 Minn. 330, 13 N. W. 137.

Nebraska.— Hyde *v.* Hartford F. Ins. Co., 70 Nebr. 503, 97 N. W. 629.

New Hampshire.— Ætna Ins. Co. *v.* Thompson, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552.

New Jersey.— Doughty *v.* Van Horn, 29 N. J. Eq. 90.

New York.— Cromwell *v.* Brooklyn F. Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641; Wattengel *v.* Schultz, 11 Misc. 165, 32 N. Y. Suppl. 91; Carter *v.* Rockett, 8 Paige 437.

United States.— American Ice Co. *v.* Eastern Trust, etc., Co., 188 U. S. 626, 23 S. Ct. 432, 47 L. ed. 623; New Jersey Eastern Milling, etc., Co. *v.* Pennsylvania Eastern Milling, etc., Co., 125 Fed. 143; *In re* Sands Ale Brewing Co., 21 Fed. Cas. No. 12,307, 3 Biss. 175.

Canada.— McKenzie *v.* Ætna Ins. Co., Ritch. Eq. Cas. (Nova Scotia) 346; Greet *v.* Citizens' Ins. Co., 27 Grant Ch. (U. C.) 121; Watt *v.* Gore Dist. Mut. Ins. Co., 8 Grant Ch. (U. C.) 523.

And see FIRE INSURANCE, 19 Cyc. 885.

73. *Illinois.*— Ely *v.* Ely, 80 Ill. 532; Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.

however, a mortgagee receives from the insurance company the amount of a policy on the mortgaged property, which was made payable to him but which was effected for the benefit and at the cost of the mortgagor, he must apply it in satisfaction or reduction of the debt secured by the mortgage,[74] and such money cannot be appropriated to the payment of other debts of the mortgagor's, unless by the express authority or consent of the latter.[75]

H. Repairs and Improvements — 1. Duty to Make Repairs. A mortgagor in possession will not be compelled to repair mortgaged premises injured without his fault;[76] and he is not bound to replace or restore burned buildings unless he

Indiana.— Keith *v.* Crump, 22 Ind. App. 364, 53 N. E. 839.

Kansas.— Deming Inv. Co. *v.* Dickerman, 63 Kan. 728, 66 Pac. 1029.

Maine.— Stinchfield *v.* Milliken, 71 Me. 567; McIntire *v.* Plaisted, 68 Me. 363; Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447; Cushing *v.* Thompson, 34 Me. 496.

Massachusetts.— King *v.* State Mut. F. Ins. Co., 7 Cush. 1, 54 Am. Dec. 683; White *v.* Brown, 2 Cush. 412.

Michigan.— Pendleton *v.* Elliott, 67 Mich. 496, 35 N. W. 97.

Minnesota.— Sterling F. Ins. Co. *v.* Beffrey, 48 Minn. 9, 50 N. W. 922.

Missouri.— McDowell *v.* Morath, 64 Mo. App. 290.

New York.— Foster *v.* Van Reed, 70 N. Y. 19, 26 Am. Rep. 544; Springfield F. & M. Ins. Co. *v.* Allen, 43 N. Y. 389, 3 Am. Rep. 711.

Pennsylvania.— Young *v.* Craig, 4 Am. L. Reg. 384.

West Virginia.— Dunbrack *v.* Neall, 55 W. Va. 565, 47 S. E. 303.

United States.— Russell *v.* Southard, 12 How. 139, 13 L. ed. 927.

England.— Bell *v.* Ahearne, 12 Ir. Eq. 576.

Canada.— Russell *v.* Robertson, 1 Ch. Chamb. (U. C.) 72; Westmacott *v.* Hanley, 22 Grant Ch. (U. C.) 382.

See 35 Cent. Dig. tit. "Mortgages," § 536.

74. *Illinois.*— Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.

Kansas.— Home Ins. Co. *v.* Marshall, 48 Kan. 235, 29 Pac. 161.

Maine.— Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447; Larrabee *v.* Lumbert, 32 Me. 97.

Maryland.— Callahan *v.* Linthicum, 43 Md. 97, 20 Am. Rep. 106.

Michigan.— Pendleton *v.* Elliott, 67 Mich. 496, 35 N. W. 97; Wilcox *v.* Allen, 36 Mich. 160.

Missouri.— McDowell *v.* Morath, 64 Mo. App. 290.

New Hampshire.— Smith *v.* Packard, 19 N. H. 575.

New Jersey.— Peiffer *v.* Bates, 45 N. J. Eq. 311, 19 Atl. 612.

New York.— Kernochan *v.* New York Bowery F. Ins. Co., 17 N. Y. 428; Soule *v.* Union Bank, 45 Barb. 111; Wattengel *v.* Schultz, 11 Misc. 165, 32 N. Y. Suppl. 91.

United States.— Connecticut Mut. L. Ins. Co. *v.* Scammon, 117 U. S. 634, 6 S. Ct. 889, 29 L. ed. 1007.

Canada.— Troop *v.* Mosier, Ritch. Eq. Cas. (Nova Scotia) 189; Green *v.* Hewer, 21 U. C. C. P. 531.

Compare Jarrett *v.* Walsh, 20 Montg. Co. Rep. (Pa.) 147, holding that a mortgagee is not bound to take the proceeds of an insurance policy held by him as collateral as payment on account of his mortgage debt.

See 35 Cent. Dig. tit. "Mortgages," § 536.

Where portion of debt overdue.— It has been held that if several notes, payable at different times, were secured by the mortgage, and have become overdue, the insurance money is to be appropriated first to the payment of interest on all the notes, and the surplus, if any, to the payment of the principal of the notes in the order in which they fall due. Larrabee *v.* Lumbert, 32 Me. 97. But there are cases holding that the mortgagee is not bound to apply the insurance money in payments of arrears, but may hold the whole of it in reserve as collateral security while any portion of the mortgage debt remains unpaid, although, if he does apply part upon overdue principal, he is then bound to apply the balance in discharge of overdue interest. Edmonds *v.* Hamilton Provident, etc., Soc., 18 Ont. App. 347; Austin *v.* Story, 10 Grant Ch. (U. C.) 306. And see Gemmell *v.* Burn, 7 Ont. Pr. 381.

Increased rate of interest on default.— Where the mortgage provided that, on default in the payment of interest, the debt should thereafter bear interest at a higher rate, and the destruction of the mortgaged premises by fire rendered the mortgagor insolvent and unable to pay interest thereafter, the mortgagee is entitled to take interest at the higher rate out of the insurance money. Pan Handle Nat. Bank *v.* Security Co., (Tex. Civ. App. 1901) 61 S. W. 731.

75. Sherman *v.* Foster, 158 N. Y. 587, 53 N. E. 504; Buckley *v.* Garrett, 47 Pa. St. 280; Memphis City Bank *v.* Smith, 102 Tenn. 467, 52 S. W. 149; *In re* Union Assur. Co., 23 Ont. 627.

Agreement for disposition of surplus.— Where the amount of the insurance exceeds the amount of the mortgage debt, the parties may agree that the surplus shall be paid over to a named creditor of the mortgagor; but the mortgagee, on receiving the money from the insurance company, is not liable to an action by such creditor to recover such surplus, nor to be held as garnishee therefor, for want of privity of contract. Field *v.* Crawford, 6 Gray (Mass.) 116.

76. Campbell *v.* Macomb, 4 Johns. Ch. (N. Y.) 534.

has covenanted to do so.[77] If the mortgagee is in possession, he is not only allowed but is bound to make all reasonable and necessary repairs to the property, unless its condition is such as to render repairs injudicious, in order to keep the estate in good condition and prevent its deterioration.[78]

2. Compensation For Repairs. On redemption or accounting, or on foreclosure, the mortgagee in possession should be allowed credit or compensation for the cost of repairs made by him upon the estate, to the extent that such repairs were proper and necessary;[79] but no allowance can be made for expenditures for mere convenience or ornament,[80] nor for repairs which were not necessary for the preservation of the estate, although they may have been beneficial to it,[81] or made with a view to its yielding a higher profit or bringing a larger price at foreclosure sale;[82] and the question whether given repairs were "necessary" in

77. Reid *v.* Tennessee Bank, 1 Sneed (Tenn.) 262; Breed *v.* Glasgow Inv. Co., 92 Fed. 760 [*affirmed* in 101 Fed. 863, 42 C. C. A. 61].

78. Clark *v.* Finlon, 90 Ill. 245; Mosier *v.* Norton, 83 Ill. 519; McCumber *v.* Gilman, 15 Ill. 381; McConnel *v.* Holobush, 11 Ill. 61; Magnusson *v.* Charleson, 9 Ill. App. 194; Pickersgill *v.* Brown, 7 La. Ann. 297; Sandon *v.* Hooper, 6 Beav. 246, 12 L. J. Ch. 309, 49 Eng. Reprint 820; Hardy *v.* Reeves, 4 Ves. Jr. 466, 31 Eng. Reprint 239.

Extent of mortgagee's duty.— The mortgagee is bound to make all reasonable and necessary repairs upon the property while in his possession, and he will be responsible for the damage occasioned by any wilful default or gross neglect in this respect. But he is not bound to make good dilapidations caused by the natural effects of waste and decay from lapse of time. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108; Russel *v.* Smithies, Anstr. 96.

Effect of tenant's agreement to repair.— The mortgaged premises having been leased to tenants, who agreed to keep the property in repair, and the lease having been assigned to the mortgagee on the exeeution of the mortgage, the mortgagee cannot recover from the mortgagor the cost of repairs made by him, at least without proof of a demand and refusal on the part of the tenants to carry out their agreement, since, in that case, he is a mere volunteer as to such repairs. Harper's Appeal, 1 Leg. Gaz. (Pa.) 212. And see Eggensperger *v.* Lanpher, 92 Minn. 503, 100 N. W. 372.

Repairs ordered by municipal authorities.— Where a third person, under authority of an order from the fire department, entered on the mortgaged premises and did work and furnished materials claimed to be necessary to make the building secure, and then applied to the court to be paid the amount of his expenditures out of the rents and profits in the hands of a receiver appointed in foreclosure proceedings, it was held that the funds in court, being for the benefit of the mortgagee, could not be thus appropriated, and that the petitioner's remedy was by an action against the owner of the building. Wyckoff *v.* Scofield, 53 N. Y. Super. Ct. 237.

79. *Alabama.*— American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

California.— Hidden *v.* Jordan, 28 Cal. 301.

Illinois.— Mosier *v.* Norton, 83 Ill. 519; Roberts *v.* Fleming, 53 Ill. 196; McCumber *v.* Gilman, 15 Ill. 381; Magnusson *v.* Charleson, 9 Ill. App. 194.

Indiana.— Miller *v.* Curry, 124 Ind. 48, 24 N. E. 219, 374; Johnson *v.* Hosford, 110 Ind. 572, 10 N. E. 407.

Kansas.— Cook *v.* Ottawa University, 14 Kan. 548.

Kentucky.— Allen *v.* Brown, 62 S. W. 726, 23 Ky. L. Rep. 217.

Maryland.— Booth *v.* Baltimore Steam Packet Co., 63 Md. 39; Hagthorp *v.* Hook, 1 Gill & J. 270.

Massachusetts.—Sparhawk *v.* Wilis, 5 Gray 423; Boston Iron Co. *v.* King, 2 Cush. 400; Reed *v.* Reed, 10 Piek. 398; Russell *v.* Blake, 2 Pick. 505.

Minnesota.— Darling *v.* Harmon, 47 Minn. 166, 49 N. W. 686.

Missouri.— Stevenson *v.* Edwards, 98 Mo. 622, 12 S. W. 255.

Nebraska.— Bourgeois *v.* Gapen, 58 Nebr. 364, 78 N. W. 639.

New Jersey.— Johns *v.* Norris, 28 N. J. Eq. 147.

New York.— Moore *v.* Cable, 1 Johns. Ch. 385.

Ohio.— O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203.

Oregon.— Adkins *v.* Lewis, 5 Oreg. 292.

Pennsylvania.— Lysle *v.* Williams, 15 Serg. & R. 135.

South Carolina.— Lowndes *v.* Chisolm, 2 McCord Eq. 455, 16 Am. Dec. 667.

England.— Sandon *v.* Hooper, 6 Beav. 246, 12 L. J. Ch. 309, 49 Eng. Reprint 820; Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co., 7 Ch. D. 192, 47 L. J. Ch. 152, 26 Wkly. Rep. 348.

Canada.— Bullen *v.* Renwick, 9 Grant Ch. (U. C.) 202.

See 35 Cent. Dig. tit. "Mortgages," § 538.

80. Woodward *v.* Phillips, 14 Gray (Mass.) 132.

81. Hidden *v.* Jordan, 28 Cal. 301; Ruby *v.* Abyssinian Religious Soc., 15 Me. 306; Barnard *v.* Paterson, 137 Mich. 633, 100 N. W. 893; Quin *v.* Brittain, Hoffm. (N. Y.) 353.

82. Fletcher *v.* Bass River Sav. Bank, 182 Mass. 5, 64 N. E. 207, 94 Am. St. Rep. 632; Clark *v.* Smith, 1 N. J. Eq. 121.

this sense depends upon the particular circumstances, which should be made to appear.[83]

3. Improvements — a. In General. As a general rule improvements on mortgaged land inure to the benefit of the mortgagee,[84] and a mortgagor remaining in possession can set up no adverse claim or right as against the mortgagee for such improvements, nor claim any abatement or reduction of the mortgage debt on account of their cost;[85] and the same rule applies to a purchaser of the equity of redemption,[86] or a lessee of the mortgaged premises,[87] and to a third person who enters and makes improvements without license or title.[88] There is nothing in the mortgagee's position merely as such to make him responsible for the cost of improvements made or ordered by the mortgagor, or to give third persons a right of action against him for labor or materials furnished in connection with such improvements.[89] As between joint mortgagees, one who enters and makes valuable improvements cannot compel the other, by an action at law, to contribute to the expense, except in so far as the improvements may be regarded as repairs necessary to the preservation of the property; but in equity he has a right to reimbursement to the extent to which the price of the property was enhanced by the improvements.[90] Where the mortgagor is not the beneficial owner of the premises mortgaged, the real owner should pay for improvements made thereon.[91]

b. By Mortgagee in Possession — (I) *Right to Compensation* — (A) *In General.* A mortgagee in possession has no right to make permanent and valuable improvements on the land, and cannot claim compensation for their cost, over and above what may have been necessary for the proper repair and preservation of the estate,[92] unless the expenditure was justified by peculiar

83. Lash *v.* Lambert, 15 Minn. 416, 2 Am. Rep. 142.

84. See *supra*, XII, A, 9.

85. *Illinois.*— Mann *v.* Mann, 49 Ill. App. 472.

Indiana.— Catterlin *v.* Armstrong, 79 Ind. 514.

Maine.— Heath *v.* Williams, 25 Me. 209, 43 Am. Dec. 265.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275.

Massachusetts.— Childs *v.* Dolan, 5 Allen 319; Hunt *v.* Hunt, 14 Pick. 374, 25 Am. Dec. 400. The statute allowing compensation to tenants in real actions for buildings or improvements made or erected on the premises, in certain circumstances, is not applicable to the case of improvements made by a mortgagor or any person claiming under him. Haven *v.* Adams, 8 Allen 363.

North Carolina.— Phillips *v.* Holmes, 78 N. C. 191.

England.— Norris *v.* Caledonian Ins. Co., L. R. 8 Eq. 127, 38 L. J. Ch. 721, 20 L. T. Rep. N. S. 939, 17 Wkly. Rep. 954.

See 35 Cent. Dig. tit. "Mortgages," § 541.

86. Tripe *v.* Marcy, 39 N. H. 439.

Purchaser without actual notice.— On the enforcement of a lien created by a deed of trust to secure a creditor, the party in possession, a purchaser for value, with only constructive notice of the contents of the trust deed, may be allowed for his permanent improvements, but he must account for the rents and profits by way of offset. Wood *v.* Krebbs, 33 Gratt. (Va.) 685.

In Louisiana a purchaser of property subject to a mortgage, although it contains the pact *de non alienando*, is a "third possessor" within the meaning of La. Civ. Code, art. 3407, entitling third possessors of mortgaged land to compensation for their improvements to the extent to which they have enhanced the value of the mortgage security. Citizens' Bank *v.* Miller, 45 La. Ann. 493, 12 So. 516, 44 La. Ann. 199, 10 So. 779. And in prorating values between the makers of improvements on lands and a claimant under a mortgage thereon, the respective values of the land and the improvements are ascertained, and the latter receives the value which the land bears relatively to the amount of the sale, and the former the value of the improvements, considered in the same way. Taylor *v.* Marshall, 43 La. Ann. 1060, 10 So. 368.

87. Haven *v.* Boston, etc., R. Corp., 8 Allen (Mass.) 369.

88. Price *v.* Weehawken Ferry Co., 31 N. J. Eq. 31; Merriam *v.* Barton, 14 Vt. 501.

89. Holmes *v.* Morse, 50 Me. 102.

90. Gardner *v.* Diedrichs, 41 Ill. 158.

91. Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166.

92. *Alabama.*— Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630; Gresham *v.* Ware, 79 Ala. 192.

Arkansas.— Robertson *v.* Read, 52 Ark. 381, 14 S. W. 387, 20 Am. St. Rep. 188; McCarron *v.* Cassidy, 18 Ark. 34.

California.— Malone *v.* Roy, 107 Cal. 518, 40 Pac. 1040; Mahoney *v.* Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Hidden *v.* Jordan, 32 Cal. 397, 28 Cal. 301.

Illinois.— Equitable Trust Co. *v.* Fisher, 106 Ill. 189; McCumber *v.* Gilman, 15 Ill. 381; McConnel *v.* Holobush, 11 Ill. 61; Smith

circumstances in the particular case, or was authorized or consented to by the mortgagor.[93]

(B) *As Affected by Good Faith.* If a person has actually the rights of a mortgagee in possession of real property, but makes improvements under the honest although mistaken belief that he has acquired the absolute title, he will be entitled to compensation for the cost of such improvements.[94]

v. Sinclair, 10 Ill. 108. *Compare* Roberts *v.* Fleming, 53 Ill. 196.

Indiana.— Miller *v.* Curry, 124 Ind. 48, 24 N. E. 219, 374; Marshall *v.* Stewart, 80 Ind. 189.

Kansas.— Cook *v.* Ottawa University, 14 Kan. 548.

Kentucky.— Hopkins *v.* Stephenson, 1 J. J. Marsh. 341.

Louisiana.— Pickersgill *v.* Brown, 7 La. Ann. 297.

Maine.— Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132, 88 Me. 319, 34 Atl. 160; Rowell *v.* Jewett, 73 Me. 365.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275.

Massachusetts.— Merriam *v.* Goss, 139 Mass. 77, 28 N. E. 449; Reed *v.* Reed, 10 Pick. 398; Russell *v.* Blake, 2 Pick. 505.

Nebraska.— White *v.* Atlas Lumber Co., 49 Nebr. 82, 68 N. W. 359.

New York.— Decker *v.* Zeluff, 23 N. Y. App. Div. 107, 48 N. Y. Suppl. 385.

Oregon.— Adkins *v.* Lewis, 5 Oreg. 292.

Pennsylvania.— Harper's Appeal, 64 Pa. St. 315.

Wisconsin.— Green *v.* Dixon, 9 Wis. 532.

United States.— Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143.

See 35 Cent. Dig. tit. "Mortgages," § 542.

But see Bollinger *v.* Chouteau, 20 Mo. 89; O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203; Howard *v.* Clark, 72 Vt. 429, 48 Atl. 656.

English and Canadian rule.— If a mortgagee in possession has reasonably expended money in permanent improvements on the property, he is entitled, on *prima facie* evidence to that effect, to an inquiry whether the outlay has increased the value of the property, and if so, he is entitled to compensation to the extent to which the improvements have enhanced the value, and in such case it is immaterial whether the mortgagor had notice of the expenditure; notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of showing that he acquiesced in it. Shepard *v.* Jones, 21 Ch. D. 469, 47 L. T. Rep. N. S. 604, 31 Wkly. Rep. 308. And see Henderson *v.* Astwood, [1894] A. C. 150, 6 Reports 450; Powell *v.* Trotter, 1 Dr. & S. 388, 7 Jur. N. S. 206, 4 L. T. Rep. N. S. 45, 62 Eng. Reprint 428; Scholefield *v.* Lockwood, 9 Jur. N. S. 1258, 33 L. J. Ch. 106, 8 L. T. Rep. N. S. 407, 11 Wkly. Rep. 555; Houghton *v.* Sevenoaks Estate Co., 33 Wkly. Rep. 341. But a mortgagee in possession is not justified in increasing the value of the estate by improvements so as to cripple the mortgagor's power of redemption. Sandon *v.* Hooper, 6 Beav. 246, 12 L. J. Ch. 309, 49 Eng. Reprint 820. And a second mortgagee who is in possession of the mortgaged property and spends money in permanent improvements is not entitled, as against the first mortgagee, to any charge on the property for the money so expended. Landowners West of England, etc., Land Drainage, etc., Co. *v.* Ashford, 16 Ch. D. 411, 50 L. J. Ch. 276, 44 L. T. Rep. N. S. 20. In Canada the rules are substantially the same as in England. Romanes *v.* Herns, 22 Grant Ch. (U. C.) 469; Harrison *v.* Jones, 10 Grant Ch. (U. C.) 99. And see McKibbon *v.* Williams, 24 Ont. App. 122. Where a mortgagee in possession of a grist-mill and other property erected a carding and fulling mill, the expense was not allowed to him, the improvement being considered one which a mortgagee could not make without the mortgagor's consent. Kerby *v.* Kerby, 5 Grant Ch. (U. C.) 587.

Failure to make formal objection.— One entitled to redeem from a mortgage is not rendered liable for unreasonable improvements made by the mortgagee in possession by the mere fact that he knew they were in progress and did not formally object. Merriam *v.* Goss, 139 Mass. 77, 28 N. E. 449.

93. Harrill *v.* Stapleton, 55 Ark. 1, 16 S. W. 474; Gleiser *v.* McGregor, 85 Iowa 489, 52 N. W. 366. And see *Ex p.* Smith, 2 Deac. 236, 3 Mont. & A. 63; Brotherton *v.* Hetherington, 23 Grant Ch. (U. C.) 187.

94. *Georgia.*— McPhee *v.* Guthrie, 51 Ga. 83.

Illinois.— Blair *v.* Chamblin, 39 Ill. 521, 89 Am. Dec. 322; Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564; McConnel *v.* Holobush, 11 Ill. 61.

Iowa.— Montgomery *v.* Chadwick, 7 Iowa 114.

Maryland.— Dougherty *v.* McColgan, 6 Gill & J. 275; Hagthorp *v.* Hook, 1 Gill & J. 270.

Massachusetts.— McSorley *v.* Larissa, 100 Mass. 270.

Minnesota.— Bacon *v.* Cottrell, 13 Minn. 194.

Nebraska.— Cram *v.* Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714.

New York.— Mickles *v.* Dillaye, 17 N. Y. 80; Fogal *v.* Pirro, 17 Abb. Pr. 113.

North Carolina.— Gillis *v.* Martin, 17 N. C. 470, 25 Am. Dec. 729.

South Carolina.— McAbee *v.* Harrison, 50 S. C. 39, 27 S. E. 539, holding that where improvements are made by one in possession of land of another, held as security for a debt, merely under the expectation and belief that it would never be redeemed, he is not entitled to compensation therefor on redemption by the owner.

Vermont.— Howard *v.* Clark, 72 Vt. 429, 48 Atl. 656; Brighton *v.* Doyle, 64 Vt. 616,

(c) *Under Absolute Deed as Mortgage.* Where a deed, although absolute in form, was intended by both the parties to be merely a security for a debt, the grantee, going into possession, is in the position of a mortgagee in possession, and is not ordinarily entitled to be reimbursed for improvements made by him on the land.[95]

(II) *Rent on Improvements.* On accounting by a mortgagee in possession, if he is allowed credit for improvements made by him, he must account for the rental value of the premises at a proportionately higher rate; but if his claim for improvements is disallowed, he cannot be charged with the higher rental value attributable to the increase in value of the whole property in consequence of such improvements.[96]

e. By Purchaser at Foreclosure Sale. Generally, after a foreclosure sale, one seeking to redeem from the purchaser or party in possession must pay for improvements made in good faith.[97] The purchaser of the property, whether the mortgagee or another, at a foreclosure sale which he believed to be valid and

25 Atl. 694; Morgan *v.* Walbridge, 56 Vt. 405.

Canada.— Carroll *v.* Robertson, 15 Grant Ch. (U. C.) 173; Paul *v.* Johnson, 12 Grant Ch. (U. C.) 474.

See 35 Cent. Dig. tit. "Mortgages," § 543.

Title based on judgment.— The fact that the mortgagee did not make improvements until after he had obtained a judgment quieting his title will not entitle him to recover for their value, where the mortgagor appealed and the judgment was reversed. Malone *v.* Roy, 107 Cal. 518, 40 Pac. 1040.

95. Malone *v.* Roy, 107 Cal. 518, 40 Pac. 1040; Mahoney *v.* Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Miller *v.* Curry, 124 Ind. 48, 24 N. E. 219, 374. See also Harper's Appeal, 64 Pa. St. 315.

In New York the rule in such cases is that the grantee, on a redemption by the grantor, will be allowed for repairs and improvements on the premises only so far as may be necessary to offset a claim on the part of the grantor for compensation for the use and occupation of the premises. Foley *v.* Foley, 15 N. Y. App. Div. 276, 44 N. Y. Suppl. 588.

Understanding of parties as to redemption. — The cost of improvements may be allowed to a mortgagee in possession, on redemption, where the understanding and belief of both parties was that the mortgage, in the form of an absolute deed, would never be redeemed. Blair *v.* Chamblin, 39 Ill. 521, 89 Am. Dec. 322. And see Brotherton *v.* Hetherington, 23 Grant Ch. (U. C.) 187.

Agreement made by widow of grantor.— Where redemption is effected by the widow and heirs of the deceased grantor, and the widow has agreed to allow the grantee the cost of his improvements, and the heirs, although informed of such agreement, have not objected, the grantee may recover for improvements. Harrill *v.* Stapleton, 55 Ark. 1, 16 S. W. 474.

Where the land is in the possession of a purchaser from the grantee, who made valuable improvements on the supposition and belief that such grantee had a perfect title to sell and that he had acquired it, the cost of improvements may be recovered. Miller *v.* Thomas, 14 Ill. 428.

96. *Alabama.*— American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

Iowa.— Poole *v.* Johnson, 62 Iowa 611, 17 N. W. 900; Montgomery *v.* Chadwick, 7 Iowa 114.

New Jersey.— Clark *v.* Smith, 1 N. J. Eq. 121.

New York.— Bell *v.* New York, 10 Paige 49; Moore *v.* Cable, 1 Johns. Ch. 385.

North Carolina.— Gillis *v.* Martin, 17 N. C. 470, 25 Am. Dec. 729.

Canada.— Constable *v.* Guest, 6 Grant Ch. (U. C.) 510.

97. *Alabama.*— Williams *v.* Rouse, 124 Ala. 160, 27 So. 16; Prichard *v.* Sweeney, 109 Ala. 651, 19 So. 730; Cramer *v.* Watson, 73 Ala. 127.

Connecticut.—Ensign *v.* Batterson, 68 Conn. 298, 36 Atl. 51.

Missouri.— Stevenson *v.* Edwards, 98 Mo. 622, 12 S. W. 255.

Nebraska.— Jones *v.* Dutch, 3 Nebr. (Unoff.) 673, 92 N. W. 735.

Canada.— Weaver *v.* Vandusen, 27 Grant Ch. (U. C.) 477; McLaren *v.* Fraser, 17 Grant Ch. (U. C.) 567; Carroll *v.* Robertson, 15 Grant Ch. (U. C.) 173.

See 35 Cent. Dig. tit. "Mortgages," § 1783.

But see Goodrich *v.* Friedersdorff, 27 Ind. 308

A junior mortgagee who was not made a party to the suit for foreclosure of the senior mortgage is not required, on offering to redeem, to pay for improvements put upon the premises by the foreclosure purchaser, if the latter had notice of the junior lien (Moulton *v.* Cornish, 61 Hun (N. Y.) 438, 16 N. Y. Suppl. 267), or if the purchaser has removed the improvement, consisting of a house which he built, without injury to the premises, before the redemption (Poole *v.* Johnson, 62 Iowa 611, 17 N. W. 900), or where the improvements were made after the filing of the bill to redeem (Smith *v.* Sinclair, 10 Ill. 108). But it is otherwise, if the purchaser acts in good faith and without notice, he must be compensated for his improvements. American Buttonhole, etc., Co. *v.* Burlington Mut. L. Assoc., 68 Iowa 326, 27 N. W. 271; Higginbottom *v.* Benson, 24 Nebr. 461, 39 N. W. 418, 8 Am. St. Rep. 211.

effective to convey the absolute title to him, but which is afterward shown to be void or voidable, is entitled to compensation for improvements.[98]

I. Injuries to Property and Actions Therefor — 1. Waste or Other Injury by Mortgagor. A mortgagee may maintain an action for damages against the mortgagor or his grantee for acts of waste or spoliation committed upon the mortgaged premises, which have resulted in impairing the security of the mortgage,[99] or which have so impaired the value of the property that it does not realize enough on foreclosure to satisfy the mortgage,[1] as for example, in the case where buildings which were covered by the lien of the mortgage are unlawfully removed from the premises.[2] The proper form of action for this purpose is

98. *Alabama.* — American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

Iowa.— Stillman *v.* Rosenberg, (1899) 78 N. W. 913.

Minnesota.— Bacon *v.* Cottrell, 13 Minn. 194.

Nebraska.— Jones *v.* Dutch, 3 Nebr. (Unoff.) 673, 92 N. W. 735.

New Hampshire.— Pearson *v.* Gooch, 69 N. H. 571, 45 Atl. 406.

New York.— Kendall *v.* Treadwell, 5 Abb. Pr. 16; Benedict *v.* Gilman, 4 Paige 58.

Wisconsin.— Green *v.* Dixon, 9 Wis. 533.

United States.— Hicklin *v.* Marco, 46 Fed. 424.

Canada.— McLaren *v.* Fraser, 17 Grant Ch. (U. C.) 567.

See 35 Cent. Dig. tit. "Mortgages," § 1784.

Purchaser with notice.—One who purchases land with notice of the equities of the real owner is not entitled to payment for improvements made without the express or implied consent of such owner, where there is no concealment of the latter's title or delay in the assertion of his rights. Witt *v.* Grand Grove U. A. O. of D., 55 Wis. 376, 13 N. W. 261.

Fraudulent sale.— A mortgagee who purchases at a fraudulent sale, made without a decree of foreclosure, is not entitled to compensation for improvements made by him on the land. Gunn *v.* Brantley, 21 Ala. 633.

99. *Colorado.*— Arnold *v.* Broad, 15 Colo. App. 389, 62 Pac. 577.

Maine.— Holbrook *v.* Greene, 98 Me. 171, 56 Atl. 659.

Massachusetts.— Miner *v.* Stevens, 1 Cush. 482.

Missouri.— Girard L. Ins. Annuity, etc., Co. *v.* Mangold, 83 Mo. App. 281. The mortgagee, after foreclosure, cannot maintain an action for the mortgagor's cutting of timber on the premises prior to the execution of the mortgage, although after an understanding that the mortgage should be executed, and although the timber was not taken away until after the mortgage was made. Girard L. Ins. Annuity, etc., Co. *v.* Mangold, 94 Mo. App. 125, 67 S. W. 955.

Montana.— Dutro *v.* Kennedy, 9 Mont. 101, 22 Pac. 763.

New Hampshire.—Smith *v.* Moore, 11 N. H. 55.

New Jersey.— Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170; Fidelity Trust Co. *v.* Hoboken, etc., R. Co., (Ch. 1906) 63 Atl. 273; Coggill *v.* Millburn Land Co., 25 N. J. Eq. 87.

New York.— Van Pelt *v.* McGraw, 4 N. Y. 110.

See 35 Cent. Dig. tit. "Mortgages," § 555.

After default.— Some of the cases refuse to sanction an action of this kind by the mortgagee until after default in payment or other breach of condition, or proceedings to foreclose. Cooper *v.* Davis, 15 Conn. 556; Peterson *v.* Clark, 15 Johns. (N. Y.) 205.

Purpose or motive of mortgagor.— To sustain an action of this kind, it is not necessary to show that the primary motive of the mortgagor in committing the acts of waste complained of was to injure the mortgagee's security; it is enough that the acts were done by him with a full knowledge of the circumstances and of their probable result, although done primarily with a view to his own profit. Van Pelt *v.* McGraw, 4 N. Y. 110.

The measure of damages, in an action by a mortgagee of realty against the mortgagor or his assigns for an injury to the mortgaged land caused by acts of waste, is the injury to the mortgage as a security. Turrell *v.* Jackson, 39 N. J. L. 329.

1. Heitkamp *v.* La Motte Granite Co., 59 Mo. App. 244; Jones *v.* Costigan, 12 Wis. 677, 78 Am. Dec. 771. *Compare* Corbin *v.* Reed, 43 Iowa 459 (holding that if the mortgagee, on foreclosure, buys the property at the sale for the amount of the debt and costs, he cannot recover for waste committed by the mortgagor before the sale); Byrom *v.* Chapin, 113 Mass. 308 (holding that the mortgagee can sue the mortgagor for substantial injuries done by him to the mortgaged property, although the value of the property after the damage is sufficient to satisfy the mortgage debt).

2. *Massachusetts.*— Tarbell *v.* Page, 155 Mass. 256, 29 N. E. 585.

Minnesota.— Bean *v.* Cochran, 24 Minn. 60.

Montana.— Dutro *v.* Kennedy, 9 Mont. 101, 22 Pac. 763.

New Jersey.— Verner *v.* Betz, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630.

South Carolina.— Heath *v.* Haile, 45 S. C. 642, 24 S. E. 300.

Wisconsin.— Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57; Seatoff *v.* Anderson, 28 Wis. 213.

United States.— Patterson *v.* Kingsland, 18 Fed. Cas. No. 10.827, 8 Blatchf. 278.

See 35 Cent. Dig. tit. "Mortgages," § 545.

case,[3] although some of the authorities recognize the right to maintain trespass,[4] and circumstances may warrant an action of replevin to recover specific property unlawfully removed,[5] or an application to take the property out of the mortgagor's hands and commit it to the care of a receiver.[6]

2. INJUNCTION TO RESTRAIN WASTE. Where a mortgagor in possession or his assignee, or any one acting under his authority or direction, threatens to commit waste upon the mortgaged premises, as by cutting timber, removing buildings, or taking away machinery or other fixtures, to such an extent as will impair the security of the mortgagee, equity will grant the latter a writ of injunction to restrain the anticipated injury,[7] although the mortgage debt is not yet due.[8] But

Measure of damages.— In an action for damages to a mortgage security caused by the removal of a building from the premises, the measure of damages has been variously stated. Thus it has been held to be the diminution in the value of the security (Schalk *v.* Kingsley, 42 N. J. L. 32); the value of the house or other building when standing on the premises, subject to the mortgage (Beck *v.* Zimmerman, 75 N. C. 60); or the difference in the value of the land with and without the building up to the amount of the mortgage debt remaining unsatisfied after exhausting the mortgaged premises remaining (Heath *v.* Haile, 45 S. C. 642, 24 S. E. 300).

3. Williams *v.* Chicago Exhibition Co., 86 Ill. App. 167; Chelton *v.* Green, 65 Md. 272, 4 Atl. 271; Van Pelt *v.* McGraw, 4 N. Y. 110.

4. Linscott *v.* Weeks, 72 Me. 506; Stowell *v.* Pike, 2 Me. 387; Page *v.* Robinson, 10 Cush. (Mass.) 99; Miner *v.* Stevens, 1 Cush. (Mass.) 482; Girard L. Ins. Annuity, etc., Co. *v.* Mangold, 83 Mo. App. 281; Harris *v.* Haynes, 34 Vt. 220.

5. Waterman *v.* Matteson, 4 R. I. 539.

6. Mooney *v.* Brinkley, 17 Ark. 340; Philips *v.* Preston, 14 Grant Ch. (U. C.) 67.

7. *Alabama.*— Malone *v.* Marriott, 64 Ala. 486; Coleman *v.* Smith, 55 Ala. 368; Coker *v.* Whitlock, 54 Ala. 180.

Connecticut.— Cooper *v.* Davis, 15 Conn. 556.

Illinois.— Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Matzon *v.* Griffin, 78 Ill. 477; Nelson *v.* Pinegar, 30 Ill. 473; Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350.

Indiana.— Gray *v.* Baldwin, 8 Blackf. 164.

Maryland.— Brown *v.* Stewart, 1 Md. Ch. 87; Salmon *v.* Clagett, 3 Bland 106; Murdock's Case, 2 Bland 461, 20 Am. Dec. 381.

Michigan.— Collins *v.* Rea, 127 Mich. 273, 86 N. W. 811.

Minnesota.— Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233. See also Russell *v.* Merchants' Bank, 47 Minn. 286, 50 N. W. 228, 28 Am. St. Rep. 368.

Montana.— Dutro *v.* Kennedy, 9 Mont. 101, 22 Pac. 763.

New Jersey.— Verner *v.* Betz, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630; Chenango Bank *v.* Cox, 26 N. J. Eq. 452; Phœnix *v.* Clark, 6 N. J. Eq. 447; Brick *v.* Getsinger, 5 N. J. Eq. 391; Capner *v.* Flemington Min. Co., 3 N. J. Eq. 467; Allen *v.* Taylor' 3 N. J. Eq. 435, 29 Am. Dec. 721.

New York.— Ensign *v.* Colburn, 11 Paige 503; Brady *v.* Waldron, 2 Johns. Ch. 148; Robinson *v.* Preswick, 3 Edw. 246.

Oregon.— Beaver Lumber Co. *v.* Eccles, 43 Oreg. 400, 73 Pac. 201, 99 Am. St. Rep. 759.

Pennsylvania.— Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907; Martin's Appeal, 6 Pa. Cas. 312, 9 Atl. 490; Stanhope *v.* Suplee, 2 Brewst. 455; McGeorge *v.* Hancock Steel, etc., Co., 11 Phila. 602.

Vermont.— Hastings *v.* Perry, 20 Vt. 272.

Wisconsin.— Starks *v.* Redfield, 52 Wis. 349, 9 N. W. 168; Scott *v.* Webster, 50 Wis. 53, 6 N. W. 363.

United States.— Benson *v.* San Diego, 100 Fed. 158; Clapp *v.* Spokane, 53 Fed. 515; Bradley *v.* Reed, 3 Fed. Cas. No. 1,785.

England.— Goodman *v.* Kine, 8 Beav. 379, 50 Eng. Reprint 149; Usborne *v.* Usborne, Dick. 75, 21 Eng. Reprint 196; Humphreys *v.* Harrison, 1 Jac. & W. 581, 21 Rev. Rep. 238, 37 Eng. Reprint 489; Harper *v.* Aplin, 54 L. T. Rep. N. S. 383; Hampton *v.* Hodges, 8 Ves. Jr. 105, 32 Eng. Reprint 292.

Canada.— McLeod *v.* Avey, 16 Ont. 365; Dewar *v.* Mallory, 27 Grant Ch. (U. C.) 303; Gordon *v.* Johnston, 14 Grant Ch. (U. C.) 402; Philips *v.* Preston, 14 Grant Ch. (U. C.) 67.

See 35 Cent. Dig. tit. "Mortgages," § 547.

The removal of a house from mortgaged premises, if it impairs the security of the mortgage, may be enjoined in equity. Dorr *v.* Dudderar, 88 Ill. 107. But where the house has been actually removed, it becomes personalty and is no longer subject to the mortgage lien, and therefore the mortgagee cannot have an injunction to restrain any further dealing with it. Stowell *v.* Waddingham, 100 Cal. 7, 34 Pac. 436. But *compare* Meyers *v.* Smith, 15 Grant Ch. (U. C.) 616.

Parties.— The owner of the land and the holder of a mortgage thereon are properly joined in a suit for an injunction to stay waste thereon. Beebe *v.* Coleman, 8 Paige (N. Y.) 392.

Bond for debt or damages.— Defendant should not be permitted to execute a bond for the payment of the mortgage debt, or of such damages as plaintiff may suffer by reason of the waste complained of, and thereby avoid the injunction. Beaver Lumber Co. *v.* Eccles, 43 Oreg. 400, 73 Pac. 201, 99 Am. St. Rep. 759.

8. Cahn *v.* Hewsey, 8 Misc. (N. Y.) 384, 29 N. Y. Suppl. 1107, 31 Abb. N. Cas. 387.

to obtain this remedy, the mortgagee must show that his security will be materially impaired by the threatened waste, or in other words, that if it were allowed to proceed the premises would thereafter furnish a scanty or doubtful security for the mortgage debt;[9] and although the insolvency of the mortgagor is a circumstance which may influence the court in this connection,[10] it is not essential to the mortgagee's right to an injunction, for the writ may issue upon his showing the serious impairment of the value of the premises as security for his claims, without regard to the mortgagor's solvency or responsibility.[11] A mortgagor who has sold his equity of redemption cannot have an injunction to stay waste upon the mortgaged premises, although he took no indemnity against his bond, and is still liable to supply any deficiency in the land to satisfy the mortgage.[12]

3. Mortgagee Liable For Waste. If a mortgagee who has not taken possession, or is not entitled to possession, enters upon the premises and commits acts of waste or spoliation, the mortgagor may bring an action against him.[13] If the mortgagee has been lawfully in possession, he is chargeable with the damages resulting from such acts, on accounting or redemption,[14] as also with any loss or damage occasioned by his gross negligence in respect to bad cultivation and non-repair of the mortgaged premises.[15] The trustee in a mortgage securing bondholders is not to be charged with waste in allowing the removal of valuable timber from the mortgaged premises, unless it was actually received and used by him.[16]

9. *Alabama.*— Coker *v.* Whitlock, 54 Ala. 180.

California.— Robinson *v.* Russell, 24 Cal. 467.

Illinois.— Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611.

Minnesota.— Moriarty *v.* Ashworth, 43 Minn. 1, 44 N. W. 531, 19 Am. St. Rep. 203, holding that waste by a mortgagor in possession will not be enjoined unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt; but the value of the property should remain largely in excess of the debt secured by it.

England.— King *v.* Smith, 2 Hare 239, 7 Jur. 694, 24 Eng. Ch. 239, 67 Eng. Reprint 99; Hippesley *v.* Spencer, 5 Madd. 422, 56 Eng. Reprint 956.

Canada.— McLean *v.* Burton, 24 Grant Ch. (U. C.) 134, holding that unless the mortgagor proves demonstrably, so as to leave no room for doubt, that the mortgaged premises will remain ample security for the mortgage debt, the court will restrain him from cutting timber over the whole tract.

See 35 Cent. Dig. tit. "Mortgages," § 547.

10. Bunker *v.* Locke, 15 Wis. 635.

11. Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Triplett *v.* Parmlee, 16 Nebr. 649, 21 N. W. 403; Starks *v.* Redfield, 52 Wis. 349, 9 N. W. 168; Fairbank *v.* Cudworth, 33 Wis. 358.

12. Brumley *v.* Fanning, 1 Johns. Ch. (N. Y.) 501.

13. Marden *v.* Jordan, 65 Me. 9; Morse *v.* Whitcher, 64 N. H. 591, 15 Atl. 207; Chellis *v.* Stearns, 22 N. H. 312; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; Linen *v.* Feltz, 13 Lanc. Bar (Pa.) 24.

Mortgagee entitled to possession.— Where the right of possession was not reserved to the mortgagor, an action of trespass will not lie in his favor against the mortgagee for peaceably entering on the premises, and digging up and converting to his own use portions of the soil, although the mortgagee had no actual possession prior to such entry. Furbush *v.* Goodwin, 29 N. H. 321.

Election of damages.— The mortgagor cannot charge the mortgagee in possession with damages or penalties as for waste in clearing and cultivating the land, and also with the improved rent arising from such clearing, although it seems that he may claim either at his election. Morrison *v.* McLeod, 37 N. C. 108.

14. *Alabama.*— Pollard *v.* American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767; Daniel *v.* Coker, 70 Ala. 260.

Georgia.— Ashley *v.* Wilson, 61 Ga. 297.

Indiana.— McCormick *v.* Digby, 8 Blackf. 99.

Iowa.— See Conway *v.* Sherman, 78 Iowa 588, 43 N. W. 541.

Massachusetts.— Place *v.* Sawtell, 142 Mass. 477, 8 N. E. 343; Howe *v.* Lewis, 14 Pick. 329; Taylor *v.* Townsend, 8 Mass. 411, 5 Am. Dec. 107.

New Hampshire.— Morse *v.* Whitcher, 64 N. H. 590, 15 Atl. 217.

New York.— Maurer *v.* Grimm, 84 N. Y. App. Div. 575, 82 N. Y. Suppl. 760.

Pennsylvania.— Givens *v.* McCalmont, 4 Watts 460.

England.— Williams *v.* Shaw, 1 Esp. 93; Withrington *v.* Banks, Sel. Cas. Ch. 30, 31 Eng. Ch. 88.

See 35 Cent. Dig. tit. "Mortgages," § 551.

15. Wragg *v.* Denham, 6 L. J. Exch. 38, 2 Y. & C. Exch. 117. See also Wann *v.* Coe, 31 Fed. 369.

16. Beecher *v.* Chicago, etc., R. Co., 14 Fed. 211, 11 Biss. 246.

4. Rights and Liabilities As Between Mortgagees. A junior mortgagee may maintain an action against the mortgagor for injury to his security resulting from acts of waste, although his recovery may be subject to a prior claim of the senior mortgagee upon the fund,[17] and he is not necessarily bound by a settlement between the mortgagor and the senior mortgagee in respect to such injuries.[18] The holder of a junior lien may also sue at law for any interference with the mortgaged property under the authority of an invalid first mortgage,[19] and he may have redress for waste committed by the senior mortgagee, either in a direct proceeding for the purpose, or by intervention in the senior mortgagee's foreclosure suit.[20] But the mere failure of the senior mortgagee to prevent or restrain waste by the mortgagor will not render him liable in damages to the junior mortgagee.[21]

5. Trespass or Injury by Third Persons. As against strangers, the mortgagor of realty remains the owner, and they cannot plead the mortgage in defense to actions against them for trespass or injuries to the property; hence the mortgagor is entitled to sue in his own name for such torts committed by third persons, at least so long as he remains in possession,[22] although some of the cases deny him this right after the mortgagee has taken possession.[23] The mortgagee also has a right of action against a stranger for any act done upon the mortgaged premises which destroys or impairs the value of his security,[24] although this right is conditioned upon the fact of the mortgage debt remaining still unpaid, wholly

17. Sanders *v.* Reed, 12 N. H. 558; Turrell *v.* Jackson, 39 N. J. L. 329.

18. Byrom *v.* Chapin, 113 Mass. 308, holding that, where the mortgagor has damaged the property, but has settled therefor with the first mortgagee, the junior mortgagee may bring his action on the ground that the damage caused to the premises was greater than the sum paid by the mortgagor, but that such action will be defeated if it is shown that the settlement amounted to a reasonable satisfaction for the injury.

19. Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

20. Whorton *v.* Webster, 56 Wis. 356, 14 N. W. 280.

21. Coleman *v.* Smith, 55 Ala. 368.

22. *Alabama.* — Hamilton *v.* Griffin, 123 Ala. 600, 26 So. 243.

Illinois.— Emory *v.* Keighan, 88 Ill. 482; Hall *v.* Lance, 25 Ill. 277; Abney *v.* Austin, 6 Ill. App. 49.

Maine.— Atwood *v.* Moose Head Paper, etc., Co., 85 Me. 379, 27 Atl. 259.

Maryland.— Arnd *v.* Amling, 53 Md. 192; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115.

Missouri.— Logan *v.* Wabash Western R. Co., 43 Mo. App. 71.

New York.— Johnson *v.* White, 11 Barb. 194.

North Carolina.— Watkins *v.* Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617.

Vermont.— Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598.

England.—Fairclough *v.* Marshall, 4 E. & D. 37, 48 L. J. Exch. 146, 39 L. T. Rep. N. S. 389, 27 Wkly. Rep. 145.

Canada.—Brookfield *v.* Brown, 22 Can. Sup. Ct. 398; Down *v.* Lee, 4 Manitoba 177; Ford *v.* Jones, 12 U. C. C. P. 358; Rogers *v.* Dickson, 10 U. C. C. P. 481.

See 35 Cent. Dig. tit. "Mortgages," §§ 553, 559.

Necessity of joining mortgagee.— Even in equity, the mortgagor is regarded as the owner, where the land mortgaged is worth considerably more than the mortgage debt, and it is for the court to direct that the mortgagee be added as a party, or to direct the sum recovered to be paid into court for his protection, if it appears that his interests are being affected prejudicially by the litigation; but the failure to join him as a party is no ground for dismissing the action. McMullen *v.* Free, 13 Ont. 57; Platt *v.* Grand Trunk R. Co., 12 Ont. 119.

23. Clark *v.* Beach, 6 Conn. 142; Sparhawk *v.* Bagg, 16 Gray (Mass.) 583; Seaver *v.* Durant, 39 Vt. 103; Morey *v.* McGuire, 4 Vt. 327. *Contra*, Frankenthal *v.* Mayer, 54 Ill. App. 160.

24. *Arkansas.*— Edge *v.* Emerson, (1903) 73 S. W. 793.

California.— Robinson *v.* Russell, 24 Cal. 467.

Colorado.— Arnold *v.* Broad, 15 Colo. App. 389, 62 Pac. 577; Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63; Vaughn *v.* Grigsby, 8 Colo. App. 373, 46 Pac. 624.

Maine.— Frothingham *v.* McKusick, 24 Me. 403.

Massachusetts.— James *v.* Worcester, 141 Mass. 361, 5 N. E. 826; Wilbur *v.* Moulton, 127 Mass. 509; Searle *v.* Sawyer, 127 Mass. 491, 34 Am. Rep. 425; Gooding *v.* Shea, 103 Mass. 360, 4 Am. Rep. 563; Cole *v.* Stewart, 11 Cush. 181.

Michigan.— Wilkinson *v.* Dunkley-Williams Co., 139 Mich. 621, 103 N. W. 170.

New Hampshire.— Burley *v.* Pike, 62 N. H. 495; Bellows *v.* Boston, etc., R. Co., 59 N. H. 491; Sanders *v.* Reed, 12 N. H. 558.

New Jersey.— Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170.

or in part,[25] and it seems according to some of the authorities upon the insolvency of the mortgagor.[26] But for any injury to or trespass upon the freehold, as distinguished from an injury to the mortgage security, the mortgagee has not a right of action until he has taken possession for breach of condition or for purposes of foreclosure.[27] Where one holds title to property merely as security and all he does is to act as agent of the owner in receiving part of the price of timber cut therefrom, he is not liable for the act of a person in taking timber off the land.[28]

6. Criminal Responsibility. A statute making it a criminal offense for a mortgagor to remove any building situate upon the mortgaged premises, to the prejudice of the mortgagee, "with intent to impair or lessen the value of the mortgage," and without the mortgagee's consent, does not apply where the mortgagor removes such a building, not with intent to impair the value of the mortgage, but in the performance of his duty to remove a nuisance, especially if done in pursuance of an order from public authority.[29]

New York.— E. H. Ogden Lumber Co. *v.* Busse, 92 N. Y. App. Div. 143, 86 N. Y. Suppl. 1098.

Ohio.— Carpenter *v.* Cincinnati, etc., Canal Co., 35 Ohio St. 307; Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605.

Pennsylvania.— Patterson *v.* Cunliffe, 11 Phila. 564.

Vermont.— Jeffers *v.* Pease, 74 Vt. 215, 52 Atl. 422.

Wisconsin.— Atkinson *v.* Hewett, 63 Wis. 396, 23 N. W. 889; Whorton *v.* Webster, 56 Wis. 356, 14 N. W. 280.

England.— Ocean Acc., etc., Corp. *v.* Ilford Gas Co., [1905] 2 K. B. 493, 74 L. J. K. B. 799, 93 L. T. Rep. N. S. 381, 21 T. L. R. 610.

Canada.— Mann *v.* English, 38 U. C. Q. B. 240.

See 35 Cent. Dig. tit. "Mortgages," § 560.

Measure of damages.— In a suit by a mortgagee against a third person for waste impairing plaintiff's security, the measure of damages is the diminution in the market value of the whole property by reason of the injury, unless such amount is greater than the reasonable cost of repairing the injury, in which case such cost only will be allowed. E. H. Ogden Lumber Co. *v.* Busse, 92 N. Y. App. Div. 143, 86 N. Y. Suppl. 1098.

Negligent distinguished from fraudulent injury.— A mortgagee cannot maintain an action against a third person for negligently injuring the mortgaged premises, whereby plaintiff lost his security, although an action may be maintained for fraudulently injuring the premises, with averments that defendant knew of plaintiff's lien and that the mortgagor is insolvent. Gardner *v.* Heartt, 3 Den. (N. Y.) 232.

Personal property not subject to lien.— The removal of personal property from the mortgaged premises, or an injury to it, gives the mortgagee no right of action where such property was not subject to the lien of the mortgage (Meyer *v.* Frederick, 26 La. Ann. 537), as in the case of personal property which was placed on the mortgaged premises on its purchase by the mortgagor, but under an agreement that the title thereto should not vest in the mortgagor but remain in the vendor until full payment for it (New York Inv., etc., Co. *v.* Cosgrove, 167 N. Y. 601, 60 N. E. 1117).

Although growing stock in a nursery is covered by a mortgage of the land, it is not waste for the mortgagor's tenant to sell and remove it in good faith in the usual course of business, before foreclosure. Hamilton *v.* Austin, 36 Hun (N. Y.) 138.

Damages in condemnation proceedings.— Where mortgaged property is damaged by the construction or abandonment of a public work, and the damages are settled by negotiation with the mortgagor, the mortgagee has an equitable lien on the money paid over to the mortgagor, after exhausting his legal lien on the premises; and he may follow a draft given for such damages into the hands of any parties who were not *bona fide* holders. Auburn Bank *v.* Roberts, 45 Barb. (N. Y.) 407.

25. Kennerly *v.* Burgess, 38 Mo. 440; Triplett *v.* Parmlee, 16 Nebr. 649, 21 N. W. 403; Vogel *v.* Walker, 3 Utah 227, 2 Pac. 210.

26. See Gardner *v.* Heartt, 3 Den. (N. Y.) 232; Morgan *v.* Gilbert, 2 Fed. 835, 2 Flipp. 645. But see E. H. Ogden Lumber Co. *v.* Busse, 92 N. Y. App. Div. 143, 86 N. Y. Suppl. 1098, holding the question of the solvency or insolvency of the mortgagor to be immaterial.

27. *Colorado.*— Pueblo, etc., R. Co. *v.* Beshoar, 8 Colo. 32, 5 Pac. 639.

Maine.— Hewes *v.* Bickford, 49 Me. 71. See also Leavitt *v.* Eastman, 77 Me. 117.

Massachusetts.—Gooding *v.* Shea, 103 Mass. 360, 4 Am. Rep. 563; Woodward *v.* Pickett, 8 Gray 617; Mayo *v.* Fletcher, 14 Pick. 525; Hatch *v.* Dwight, 17 Mass. 289, 9 Am. Dec. 145.

New Hampshire.— Bellows *v.* Boston, etc., R. Co., 59 N. H. 491.

Pennsylvania.— Guthrie *v.* Kahle, 46 Pa. St. 331.

Vermont.— Harris *v.* Haynes, 34 Vt. 220.

Canada.— Delaney *v.* Canadian Pac. R. Co., 21 Ont. 11; Western Bank *v.* Greey, 12 Ont. 68.

See 35 Cent. Dig. tit. "Mortgages," § 560. But see Robinson *v.* Russell, 24 Cal. 467.

28. Tucker *v.* Benedict, 116 La. 968, 41 So. 226.

29. Chute *v.* State, 19 Minn. 271.

J. Actions on Indebtedness — 1. Personal Liability of Mortgagor. In the absence of a covenant in a mortgage to pay the mortgage debt,[30] the mortgage is not of itself an instrument which imports a personal liability, and no suit can be maintained upon it as a substantive cause of action, the mortgagee's remedy being confined to the land put in pledge.[31] But a personal action may be maintained if the mortgage is accompanied by a note, bond, or other evidence of debt,[32] or if the intention of the mortgagor to assume a personal liability can be made out by fair implication,[33] or upon the production of evidence of a subsisting debt or claim and of the mortgagor's promise or agreement to pay it,[34] although such evidence is entirely extraneous to the mortgage, and even rests in mere parol.[35]

2. Right of Action on Debt Secured — a. In General. Unless it is otherwise provided by statute,[36] where a mortgage is given to secure the payment of a bond or a promissory note, the creditor may pursue his remedy either on the mortgage or on the evidence of the debt, or on both concurrently.[37] He is not required to

30. As to effect of covenant or promise to pay the debt secured see *supra*, VIII, C, 1.

31. *Massachusetts.*— Cook *v.* Johnson, 165 Mass. 245, 43 N. E. 96; Ball *v.* Wyeth, 99 Mass. 338.

Minnesota.— Van Brunt *v.* Mismer, 8 Minn. 232.

New York.— Hone *v.* Fisher, 2 Barb. Ch. 559.

Ohio.— See Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

Canada.— Gordon *v.* Warren, 24 Ont. App. 44; London Loan Co. *v.* Smyth, 32 U. C. C. P. 530; Jackson *v.* Yeomans, 19 U. C. C. P. 394; McDonald *v.* Clarke, 30 U. C. Q. B. 307; Pearman *v.* Hyland, 22 U. C. Q. B. 202; Hall *v.* Morley, 8 U. C. Q. B. 584.

32. Sacramento Bank *v.* Copsey, 133 Cal. 663, 66 Pac. 8, 205, 85 Am. St. Rep. 242; Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535. See also Liehtenstein *v.* Lyons, 115 La. 1051, 40 So. 454; Hutchinson *v.* Ward, 114 N. Y. App. Div. 156, 99 N. Y. Suppl. 708.

Note executed by one of joint mortgagors. — Where two persons execute a mortgage to secure a note made by one of them, a judgment in foreclosure proceedings should not fix a personal liability for the debt upon both the mortgagors. Garretson Inv. Co. *v.* Arndt, 144 Cal. 64, 77 Pac. 770.

Agreement as to liability.— An agreement between the parties to a mortgage that no judgment shall be taken on the bond accompanying the mortgage, but that the mortgaged property alone shall be liable, is binding between them; but where the mortgagee is a corporation, owing debts and insolvent, the court will not stay the collection of the debt evidenced by the bond, the amount being necessary to satisfy creditors, even partially. Insurance Co. *v.* Strahl, 25 Pa. L. J. 131.

33. New Orleans Canal, etc., Co. *v.* Hagan, 1 La. Ann. 62; Smith *v.* Rice, 12 Daly (N. Y.) 307.

34. Evans *v.* Thompson, 89 Minn. 202, 94 N. W. 692; Marshall *v.* Davies, 78 N. Y. 414; Jackson *v.* Yeomans, 28 U. C. Q. B. 307.

35. Tonkin *v.* Baum, 114 Pa. St. 414, 7 Atl. 185.

36. See the section next succeeding, and cases there cited.

37. *Alabama.*— Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

Arkansas.— Very *v.* Watkins, 18 Ark. 546.

Delaware.— Newbold *v.* Newbold, 1 Del. Ch. 310.

Illinois.— Tartt *v.* Clayton, 109 Ill. 579; Palmer *v.* Harris, 100 Ill. 276; Rogers *v.* Meyers, 68 Ill. 92; Karnes *v.* Lloyd, 52 Ill. 113; Vansant *v.* Allmon, 23 Ill. 30; Russell *v.* Hamilton, 3 Ill. 56.

Indiana.— Cross *v.* Burns, 17 Ind. 441; Fairman *v.* Farmer, 4 Ind. 436; Youse *v.* McCreary, 2 Blackf. 243.

Kansas.— Lichty *v.* McMartin, 11 Kan. 565.

Louisiana.— Croghan *v.* Conrad, 11 Mart. 555.

Massachusetts.— Ely *v.* Ely, 6 Gray 439; Hale *v.* Rider, 5 Cush. 231; Hedge *v.* Holmes, 10 Pick. 380.

New York.— Wadsworth *v.* Lyon, 93 N. Y. 201, 45 Am. Rep. 190; Scott *v.* Frink, 53 Barb. 533; Jackson *v.* Hull, 10 Johns. 481; Jones *v.* Conde, 6 Johns. Ch. 77. But see Tice *v.* Annin, 2 Johns. Ch. 125.

North Carolina.— Ellis *v.* Hussey, 66 N. C. 501, holding that the provisions of the code of procedure merging legal and equitable remedies in one form of action, denominated a "civil action," do not prevent a mortgagee from electing whether to sue the mortgagor personally for the debt, or to proceed for foreclosure of the mortgage.

South Carolina.— Hatfield *v.* Kennedy, 1 Bay 501.

Tennessee.— Stephens *v.* Greene County Iron Co., 11 Heisk. 71; Donaho *v.* Bales, (Ch. App. 1900) 59 S. W. 409.

Texas.— Blackwell *v.* Barnett, 52 Tex. 326.

Virginia.— Priddy *v.* Hartsook, 81 Va. 67.

United States.— Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829; Kimber *v.* Gunnell Gold Min., etc., Co., 126 Fed. 137, 61 C. C. A. 203; U. S. *v.* Myers, 27 Fed. Cas. No. 15,844, 2 Brock. 516.

Canada.— Toronto Bank *v.* Irwin, 28 Grant Ch. (U. C.) 397; Parr *v.* Montgomery, 27 Grant Ch. (U. C.) 521.

See 35 Cent. Dig. tit. "Mortgages," § 568.

Mortgagee in possession under absolute deed.— Where a grantee of land, who had been in possession and received the rents

foreclose the mortgage before resorting to his action on the note or bond;[38] but he may sue on the latter at law without regard to the mortgage,[39] or prove it as a claim in the administration of the estate of the deceased mortgagor;[40] and such an action will lie, although the mortgage itself is illegal and void,[41] although the court would have no jurisdiction to decree a foreclosure if that had been asked for,[42] or although plaintiff does not produce the mortgage, or cannot produce it on account of its loss or destruction;[43] and conversely, an action may be maintained on the mortgage without production of the note secured, if its absence is sufficiently accounted for, and plaintiff's case otherwise made out.[44] But the creditor can have only one satisfaction, and his action on the note or bond will be defeated by proof of the payment, release, or satisfaction of the mortgage.[45]

b. Statutory Provisions. In several states it is provided by statute that only one action shall be maintained for the recovery of any debt secured by mortgage, and that it shall be by foreclosure, or else that the remedy by foreclosure shall be exhausted before an action is brought upon the debt.[46] A law of this kind, in

and profits for several years, alleged that the deed was a mortgage given only to secure the price of certain corporate stock, his remedy is in equity to have the deed declared a mortgage, and an accounting of the rents and profits, and not an action at law to recover the price of the stock. Weise *v.* Anderson, 134 Mich. 502, 96 N. W. 575.

38. *Illinois.*— Friedlander *v.* Fenton, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207.

Iowa.— Newbury *v.* Rutter, 38 Iowa 179.

Kansas.— Lichty *v.* McMartin, 11 Kan. 565.

Nebraska.— See Maxwell *v.* Home F. Ins. Co., 57 Nebr. 207, 77 N. W. 681; Grable *v.* Beatty, 56 Nebr. 642, 77 N. W. 49; Meehan *v.* Fairfield First Nat. Bank, 44 Nebr. 213, 62 N. W. 490.

New York.— Elder *v.* Rouse, 15 Wend. 218.

See 35 Cent. Dig. tit. "Mortgages," § 569.

39. Hunt *v.* McConnell, 1 T. B. Mon. (Ky.) 219, holding that an estate mortgaged to secure the payment of a debt is bound for the costs of an action brought for the recovery of the debt.

Several mortgagees.— Where a group of notes or a series of bonds are in the hands of different holders, the fact that they are all secured by one mortgage is no defense to an action upon any one of the notes or bonds by the holder thereof. Esty *v.* Brooks, 54 Ill. 379; Kimber *v.* Gunnell Gold Min., etc., Co., 126 Fed. 137, 61 C. C. A. 203.

Action against mortgagor's vendee.— Although a purchaser from the mortgagor covenants with him to pay off the mortgage debt, this, on account of the want of privity, affords no ground for the mortgagee to proceed against the purchaser, either at law or in equity, to compel him to perform such covenant. Clarkson *v.* Scott, 25 Grant Ch. (U. C.) 373.

40. Schuelenburg *v.* Martin, 2 Fed. 747, 1 McCrary 348; Rhodes *v.* Moxhay, 10 Wkly. Rep. 103; *In re* Stewart, 10 Grant Ch. (U. C.) 169.

41. Shaver *v.* Bear River, etc., Water, etc., Co., 10 Cal. 396.

42. App *v.* Bridge, McCahon (Kan.) 118.

43. Hodgdon *v.* Naglee, 5 Watts & S. (Pa.) 217; Shelmardine *v.* Harrop, 6 Madd. 39, 22 Rev. Rep. 232, 56 Eng. Reprint 1004; Macauley *v.* Boyle, 25 U. C. C. P. 239.

44. McCauseland *v.* Baltimore Humane Impartial Soc., 95 Md. 741, 52 Atl. 918.

45. Yourt *v.* Hopkins, 24 Ill. 326; Aldrich *v.* Aldrich, 143 Mass. 45, 8 N. E. 870; Hamilton Provident, etc., Soc. *v.* Northwood, 86 Mich. 315, 49 N. W. 37.

Agreement cutting off right of redemption. — Where land is conveyed as security for a debt, under an agreement that, on default in payment, the title shall vest absolutely in the grantee, he cannot maintain an action at law on such default to recover the debt, for this only entitles him to the premises, not to a money judgment. Curl *v.* Foehler, 113 Iowa 597, 85 N. W. 811. And see Kepler *v.* Jessup, 11 Ind. App. 241, 37 N. E. 655.

Release as evidence.— A release of a mortgage reciting that it has been fully paid, or an entry of satisfaction, is not conclusive as to such payment in a personal action on the mortgage debt, but is open to explanation like any other receipt. South Missouri Land Co. *v.* Rhodes, 54 Mo. App. 129; Hughes *v.* Torrence, 111 Pa. St. 611, 4 Atl. 825.

46. See the statutes of the different states. And see McGue *v.* Rommel, 148 Cal. 539, 85 Pac. 1000 (the statute refers solely to debts secured by mortgages on property within the state); Powell *v.* Patison, 100 Cal. 236, 34 Pac. 677; Barbieri *v.* Ramelli, 84 Cal. 154, 23 Pac. 1086; Bartlett *v.* Cottle, 63 Cal. 366; Cooper *v.* Burch, (Cal. App. 1906) 86 Pac. 719; Brophy *v.* Downey, 26 Mont. 252, 67 Pac. 312; Colton *v.* Salomon, 67 N. J. L. 73, 50 Atl. 588 (the statute does not apply unless the property mortgaged is within the state); Hellyer *v.* Baldwin, 53 N. J. L. 141, 20 Atl. 1080; Dey *v.* Waters, 7 N. J. L. J. 335 (where mortgaged premises have been sold under a prior lien, it is not necessary to foreclose the mortgage before suing on the bond).

In South Dakota it is provided by statute (S. D. Comp. Laws, §§ 5432–5435) that, in complaints to foreclose mortgages, it shall be stated whether or not any judgment at law has been obtained for the same debt, and that

force in the state where the mortgaged land lies, may be pleaded in defense to an action on the note or bond in another state.[47] But it is doubtful whether such a statute should be applied, even at home, where the security is entirely without value, so that a foreclosure suit would be an idle and fruitless ceremony.[48]

c. Provisions of Mortgage. Provisions may be inserted in a mortgage restricting or postponing the common-law right of the mortgagee to sue for the recovery of the debt secured;[49] but generally the remedies provided in the mortgage for the better securing of the debt, such as a power of sale or an agreement that the mortgagee may take possession on default, are cumulative to the rights which he would enjoy at law or in equity without such provisions, and hence will not displace his right to proceed for foreclosure or to sue on the debt or to take both courses concurrently.[50]

3. Pendency of Foreclosure Proceedings. At common law, the pendency of proceedings in equity for the foreclosure of a mortgage cannot be pleaded in bar or abatement of an action at law to recover the debt secured,[51] although the equity court having the foreclosure proceeding before it has power to enjoin the prosecution of the suit at law as being vexatious and unnecessary litigation.[52] But this rule has been met in some of the states by statutes which forbid the maintenance of a suit at law on the debt while foreclosure proceedings are pending,[53] except

where such a judgment has been obtained, no further proceedings shall be had, unless an execution has been issued thereon and returned unsatisfied. This does not confine a mortgagee to one action for his debt, but recognizes his right to maintain successive actions until satisfaction is obtained. Bennett *v.* Ellis, 13 S. D. 401, 83 N. W. 429.

47. Newman *v.* Brigantine Beach R. Co., 15 Pa. Co. Ct. 625.

48. See Brophy *v.* Downey, 26 Mont. 252, 67 Pac. 312; Dey *v.* Waters, 7 N. J. L. J. 335. But *compare* Barbieri *v.* Ramelli, 84 Cal. 154, 23 Pac. 1086, holding that, even though the mortgage security proves to be valueless, the creditor cannot waive it and bring an action on the debt, but must sue for foreclosure.

49. *Missouri.*— Brownlee *v.* Arnold, 60 Mo. 79.

Nebraska.— Grable *v.* Beatty, 56 Nebr. 642, 77 N. W. 49.

New York.— Rothschild *v.* Rio Grande Western R. Co., 84 Hun 103, 32 N. Y. Suppl. 37.

Ohio.— Riblet *v.* Davis, 24 Ohio St. 114.

Canada.— Wilson *v.* Fleming, 24 Ont. 388; Munro *v.* Orr, 17 Ont. Pr. 53.

See 35 Cent. Dig. tit. "Mortgages," § 570.

50. Manning *v.* Norfolk Southern R. Co., 29 Fed. 838; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

Stipulation for sale at a date later than maturity.— Where a mortgage is given to secure a note made payable at a certain day, the mortgagee may sue on the note if not paid at maturity, notwithstanding the fact that the mortgage contains a stipulation giving a power of sale which may be exercised at a date later than the maturity of the note. Billingsley *v.* Billingsley, 24 Ala. 518.

Default as to part of notes secured.— A provision in a deed of trust, given to secure notes to different persons, that on default in the payment of any of the notes or interest the entire principal shall, at the option of the holders of any of the notes, become due and payable, authorizes the holder of one of the notes to sue thereon at law, without instituting foreclosure proceedings, before its maturity, after the maker has defaulted on other notes held by others, secured by the trust deed. Hennessy *v.* Gore, 35 Ill. App. 594. And see Calwell *v.* Prindle, 11 W. Va. 307.

51. *Georgia.*—Juchter *v.* Boehm, 63 Ga. 71.

Illinois.— Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Barchard *v.* Kohn, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; Erickson *v.* Rafferty, 79 Ill. 209; Kansas *v.* Lloyd, 52 Ill. 113; Delahay *v.* Clement, 4 Ill. 201.

Indiana.— Brown *v.* Wernwag, 4 Blackf. 1.

Michigan.— Goodrich *v.* White, 39 Mich. 489.

New Jersey.— Copperthwait *v.* Dummer, 18 N. J. L. 258.

Ohio.— Spence *v.* Union Cent. L. Ins. Co., 40 Ohio St. 517.

England.— Rees *v.* Parkinson, Anstr. 497, 3 Rev. Rep. 618; Cockell *v.* Bacon, 16 Beav. 158, 51 Eng. Reprint 737; Lockhart *v.* Hardy, 9 Beav. 349, 10 Jur. 532, 15 L. J. Ch. 347, 50 Eng. Reprint 378; Burnell *v.* Martin, Dougl. (3d ed.) 417; Dyson *v.* Morris, 1 Hare 413, 6 Jur. 297, 11 L. J. Ch. 241, 23 Eng. Ch. 413, 66 Eng. Reprint 1094; Colby *v.* Gibson, 3 Smith K. B. 516, 8 Rev. Rep. 738.

See 35 Cent. Dig. tit. "Mortgages," § 572.

52. Whitley *v.* Dumham Lumber Co., 89 Ala. 493, 7 So. 810; Poulett *v.* Hill, [1893] 1 Ch. 277, 62 L. J. Ch. 466, 68 L. T. Rep. N. S. 476, 2 Reports 288, 41 Wkly. Rep. 503; Munsen *v.* Hauss, 22 Grant Ch. (U. C.) 279.

53. See the statutes of the different states. And see Matter of Byrne, 81 N. Y. App. Div. 74, 80 N. Y. Suppl. 977; Wyckoff *v.* Devlin, 12 Daly (N. Y.) 144; Thomas *v.* Brown, 9 Paige (N. Y.) 370; Williamson *v.* Champlin, Clarke (N. Y.) 9 [*affirmed* in 8 Paige 70]; Weille *v.* Reinhard, 108 Wis. 72, 83 N. W.

where leave of court to bring such a suit has been duly applied for and obtained.[54]

4. After Foreclosure. As a general rule there can be no suit at law on the instrument secured by a mortgage after a valid and completed foreclosure of the mortgage,[55] unless there is an ascertained deficiency on the foreclosure sale, not provided for in the decree,[56] or where the foreclosure has not been consummated, the court still retaining power to set aside the sale,[57] or where only a part of the notes secured were included in the foreclosure proceedings.[58]

5. Right of Action For Instalments of Interest. Where an instalment of interest on the note or bond secured by a mortgage falls due and remains unpaid, without precipitating the maturity of the entire debt, an action may be maintained to recover such instalment, independently of the mortgage,[59] unless such a course is forbidden by the statute.[60]

6. Operation and Effect of Judgment. A judgment recovered upon the debt secured by a mortgage does not merge the mortgage nor operate as a release, discharge, or abandonment of the mortgage security.[61] Its lien, however, dates only from the rendition of the judgment, and does not relate back to the date of the mortgage,[62] and ordinarily does not attach upon the premises covered by the mortgage.[63]

7. Execution and Sale. It is a general rule that such a judgment cannot be satisfied by levy and sale of the specific property covered by the mortgage, or, in other words, the mortgagor's equity of redemption cannot be sold under such a judgment but recourse must be had to other property of the debtor.[64] If the

1098; Witter *v.* Neeves, 78 Wis. 547, 47 N. W. 938.

54. Belmont *v.* Cornen, 48 Conn. 338; Steele *v.* Grove, 109 Mich. 647, 67 N. W. 963; Mann *v.* Burkland, 68 Nebr. 269, 94 N. W. 116; La Grave *v.* Hellinger, 109 N. Y. App. Div. 515, 96 N. Y. Suppl. 564; Matter of Moore, 81 Hun (N. Y.) 389, 31 N. Y. Suppl. 110; U. S. Life Ins. Co. *v.* Poillon, 7 N. Y. Suppl. 834.

55. Lockhart *v.* Hardy, 9 Beav. 349, 10 Jur. 532, 15 L. J. Ch. 347, 50 Eng. Reprint 378; Tooke *v.* Hartley, 2 Bro. Ch. 125, 29 Eng. Reprint 73; Perry *v.* Barker, 8 Ves. Jr. 527, 9 Rev. Rep. 171, 32 Eng. Reprint 459. But see *In re* Burrell, L. R. 7 Eq. 399, 38 L. J. Ch. 382, 17 Wkly. Rep. 516.

56. Palmer *v.* Harris, 100 Ill. 276; Esty *v.* Brooks, 54 Ill. 379; Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. ed. 383.

57. Morgan *v.* Sherwood, 53 Ill. 171.

58. Langdon *v.* Paul, 20 Vt. 217. But see Schermer *v.* Merrill, 33 Mich. 284.

59. Bahr *v.* Arndt, 9 Iowa 39; Tylee *v.* Yates, 3 Barb. (N. Y.) 222; Lyon *v.* New York, etc., R. Co., 14 Daly (N. Y.) 489, 15 N. Y. St. 348; De Tuyl *v.* McDonald, 8 U. C. Q. B. 171. But *compare* Forsyth *v.* Johnson, 6 U. C. Q. B. O. S. 97.

60. See the statutes of the different states.

In New Jersey the statute providing that a mortgage securing a bond must be foreclosed before suit can be brought on the bond applies to a suit to recover on interest coupons of the bond. Holmes *v.* Seashore Electric R. Co., 57 N. J. L. 16, 29 Atl. 419; Newman *v.* Brigantine Beach R. Co., 15 Pa. Co. Ct. 625.

61. *Illinois.*— Hamilton *v.* Quimby, 46 Ill. 90.

Maine.— Jewett *v.* Hamlin, 68 Me. 172.

New Jersey.— Chew *v.* Brumagim, 21 N. J. Eq. 520.

Pennsylvania.— Com. *v.* Wilson, 34 Pa. St. 63.

Tennessee.— Harris *v.* Vaughn, 2 Tenn. Ch. 483.

Texas.— Edrington *v.* Hermann, (Civ. App. 1903) 74 S. W. 936.

Virginia.— Gibson *v.* Green, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888.

See 35 Cent. Dig. tit. "Mortgages," § 581.

In Louisiana a presumption arises from a suit and judgment for a debt, without asserting the mortgage by which it is secured, that the creditor has abandoned the latter; but this does not apply in a case where, at the time of the suit, the creditor held the ownership of the mortgaged property. Dawson *v.* Thorpe, 39 La. Ann. 366, 1 So. 686. And a judgment *in personam* against the maker of notes secured by a special mortgage, in which there is a recognition of the mortgage and a decree for its enforcement, merges the notes, but not the mortgage, which thereafter retains the same force, effect, and rank as before. Lalane *v.* Payne, 42 La. Ann. 152, 7 So. 481.

62. State *v.* Lake, 17 Iowa 215; Wilbelmi *v.* Leonard, 13 Iowa 330; Redfield *v.* Hart, 12 Iowa 355. But *compare* Christy *v.* Dyer, 14 Iowa 438, 81 Am. Dec. 493.

63. Loomis *v.* Stuyvesant, 10 Paige (N. Y.) 490; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. (N. Y.) 70. But *compare* Mayer *v.* Farmers' Bank, 44 Iowa 212, holding that the judgment may properly be made a lien on the lands covered by the mortgage.

64. *Alabama.*— Boswell *v.* Carlisle, 55 Ala. 554; Barker *v.* Bell, 37 Ala. 354.

Georgia.— Athens Nat. Bank *v.* Danforth,

creditor causes the mortgaged premises to be sold and himself becomes the purchaser, he stands just where he did before, and holds the land subject to the right of redemption;[65] but if a stranger buys at the sale, the mortgagee cannot be allowed to assert any title under his mortgage as against him.[66] If the execution is levied on other land, the sale does not release the lien of the mortgage or discharge it, unless full satisfaction is obtained, and then only on the ground that the mortgage debt has been extinguished.[67]

XVI. ASSIGNMENT OF MORTGAGES.[68]

A. In General — 1. ASSIGNABILITY OF MORTGAGES. A mortgage is not assignable by the common law so as to vest the legal title, although equity has always recognized and enforced the rights of an assignee;[69] but in most of the states

80 Ga. 55, 7 S. E. 546. See Reeves *v.* Bolles, 95 Ga. 402, 22 S. E. 626.

Indiana.— Reynolds *v.* Shirk, 98 Ind. 480; Boone *v.* Armstrong, 87 Ind. 168; Linville *v.* Bell, 47 Ind. 547.

Kentucky.— Waller *v.* Tate, 4 B. Mon. 529; Goring *v.* Shreve, 7 Dana 64.

Massachusetts.— Washburn *v.* Goodwin, 17 Pick. 137. A stranger who purchases without notice that the equity is sold to satisfy a judgment founded on the mortgage debt is not protected in his title by his want of notice. Atkins *v.* Sawyer, 1 Pick. 351, 11 Am. Dec. 188. The first mortgagee of land may sell on execution, to satisfy the mortgage debt, the mortgagor's right to redeem from the second mortgage on the same land. Johnson *v.* Stevens, 7 Cush. 431. And a party to whom one of several notes secured by a mortgage has been indorsed, but no assignment of the mortgage made, may levy on the equity of redemption to satisfy a judgment recovered by him on the note. Andrews *v.* Fiske, 101 Mass. 422.

Michigan.— Preston *v.* Ryan, 45 Mich. 174, 7 N. W. 819.

Mississippi.— Carpenter *v.* Bowen, 42 Miss. 28; Valentine *v.* Planters' Bank, Freem. 727.

Missouri.— Young *v.* Ruth, 55 Mo. 515; McNair *v.* O'Fallon, 8 Mo. 188.

New Jersey.— Van Mater *v.* Conover, 18 N. J. Eq. 38; Severns *v.* Woolston, 4 N. J. Eq. 220. Where a mortgagee recovers judgment on the mortgage debt, and causes the mortgaged premises to be levied on and sold, the mortgage debt is extinguished to the amount of the purchase-money. Deare *v.* Carr, 3 N. J. Eq. 513.

New York.— See Tice *v.* Annin, 2 Johns. 125, holding that where the equity of redemption is sold on execution issued on a judgment recovered on the mortgage debt, the mortgagee must, on payment, assign the mortgage to the mortgagor.

North Carolina.— Simpson *v.* Simpson, 93 N. C. 373; Schoffner *v.* Fogleman, 60 N. C. 564; Bissell *v.* Bozman, 17 N. C. 154.

United States.— Lippincott *v.* Shaw Carriage Co., 25 Fed. 577. And see Hackettstown Nat. Bank *v.* D. G. Yuengling Brewing Co., 74 Fed. 110, 20 C. C. A. 327. But see Coggswell *v.* Warren, 6 Fed. Cas. No. 2,958, 1 Curt. 223.

See 35 Cent. Dig. tit. "Mortgages," § 583.

But see Levy *v.* Lake, 43 La. Ann. 1034, 10 So. 375; Ker *v.* Evershed, 41 La. Ann. 15, 6 So. 566; Bienvenu *v.* Factors', etc., Ins. Co., 33 La. Ann. 213; Lord *v.* Crowell, 75 Me. 399; Forsyth *v.* Rowell, 59 Me. 131; Crooker *v.* Frazier, 52 Me. 405; McLure *v.* Wheeler, 6 Rich. Eq. (S. C.) 343; Lowndes *v.* Chisolm, 2 McCord Eq. (S. C.) 455, 16 Am. Dec. 667.

Under mortgage transferring absolute title. — Where a mortgagor, by the conditions of his mortgage, has parted with the right of property and the right to the possession of the property, in favor of the mortgagee, he cannot maintain trespass against the latter for selling the property, under a judgment obtained on the mortgage note, although the property, if not mortgaged, would have been exempt from execution. Frost *v.* Shaw, 3 Ohio St. 270.

65. Thornton *v.* Pigg, 24 Mo. 249.

66. Goring *v.* Shreve, 7 Dana (Ky.) 64; Hoover *v.* Gravitt, 7 Ky. L. Rep. 367. *Compare* Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188.

Purchaser with notice that debt remains unpaid.— Where a mortgage creditor brings an action on his bond and obtains judgment and sells the mortgaged land on execution, the purchaser knowing at the time that the mortgage debt is unpaid, the mortgagee's interest is not otherwise affected by such sale than that the purchase-money of the equity must be applied to diminish the mortgage debt. Jackson *v.* Hull, 10 Johns. (N. Y.) 481.

67. Schock *v.* Lesley, 2 Del. Ch. 304; Ridgway *v.* Longaker, 18 Pa. St. 215; Pierce *v.* Potter, 7 Watts (Pa.) 475.

68. **Restraining assignment.** — A bill in equity may be maintained to restrain the assignment of a mortgage and compel its cancellation by one whose rights would be prejudiced by its assignment. Hulsman *v.* Whitman, 109 Mass. 411.

69. Longan *v.* Carpenter, 1 Colo. 205; Kleeman *v.* Frisbie, 63 Ill. 482; Olds *v.* Cummings, 31 Ill. 188; Hass *v.* Lobstein, 108 Ill. App. 217; Foster *v.* Strong, 5 Ill. App. 223; Grassly *v.* Reinback, 4 Ill. App. 341. *Compare* Hubbard *v.* Turner, 12 Fed. Cas. No. 6,819, 2 McLean 519.

such assignments are now good at law, either by aid of statutes or in consequence of the prevalence of the modern doctrine which regards a mortgage as a mere lien or security and not as a conveyance of title;[70] and this quality of assignability attaches not only to mortgages given to secure a loan or other fixed debt, but also to indemnity mortgages and those given to secure a contingent debt, at least when the liability of the mortgagee has become fixed,[71] although not after the condition has been saved by performance on the part of the mortgagor.[72] A mortgage for support and maintenance may also be assigned, unless the condition of the mortgage requires the support to be furnished personally.[73]

2. Parties to Assignment — a. Who May Assign — (i) *In General.* A valid assignment of a mortgage can be made only by the person who has the real and beneficial ownership of the debt secured, and it is generally the duty of the asssignee to satisfy himself of the title of the assignor.[74] Hence, where the security takes the form of a trust deed, a proper assignment must be made by the

70. *Alabama.*— Smith *v.* Lusk, 119 Ala. 394, 24 So. 256; Conner *v.* Banks, 18 Ala. 42, 52 Am. Dec. 209.

California.— Peters *v.* Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134.

Louisiana.— Duncan *v.* Elam, 1 Rob. 135.

Maine.— Hurd *v.* Coleman, 42 Me. 182.

Massachusetts.— Gould *v.* Newman, 6 Mass. 239.

Tennessee.— Cleveland *v.* Martin, 2 Head 128.

See 35 Cent. Dig. tit. "Mortgages," § 586.

Although a mortgage may have been paid, yet, on a good and sufficient consideration, it may he kept alive for other purposes, and assigned to a stranger, saving the intervening rights of purchasers and creditors. Purser *v.* Anderson, 4 Edw. (N. Y.) 17. And see Bonham *v.* Galloway, 13 Ill. 68; Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687.

Clause restricting assignability.— A provision in a mortgage that it shall not be negotiable or collectable in the hands of any other person than the original mortgagee is not operative against an assignment effected hy law or through an order of court. Scaife *v.* Scammon Inv., etc., Assoc., 71 Kan. 402, 80 Pac. 957.

71. *Connecticut.*— Camp *v.* Smith, 5 Conn. 80. See also Jones *v.* Quinnipiack Bank, 29 Conn. 25.

Florida.— Stewart *v.* Preston, 1 Fla. 11, 44 Am. Dec. 621.

Indiana.— Carper *v.* Munger, 62 Ind. 481.

Louisiana.— Amonett *v.* Fisk, 2 La. Ann. 265.

Nebraska.— Murray *v.* Porter, 26 Nebr. 288, 41 N. W. 1111.

New Hampshire.— Bancroft *v.* Marshall, 16 N. H. 244.

Tennessee.— Waller *v.* Oglesby, 85 Tenn. 321, 3 S. W. 504.

72. Abbott *v.* Upton, 19 Pick. (Mass.) 434.

73. Bryant *v.* Erskine, 55 Me. 153; Ottaquechee Sav. Bank *v.* Holt, 58 Vt. 166, 1 Atl. 485; Joslyn *v.* Parlin, 54 Vt. 670.

74. Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419; Bonham *v.* Galloway, 13 Ill. 68; McConnell *v.* Hodson, 7 Ill. 640.

Effect of disseizin of mortgagee.— It was formerly held that an assignment of a mortgage by a mortgagee who was disseized was invalid. Williams *v.* Buker, 49 Me. 427; Dadmun *v.* Lamson, 9 Allen (Mass.) 85; Poignard *v.* Smith, 8 Pick. (Mass.) 272. But this rule has generally given way to statutes or to the more modern doctrine of mortgages. Lincoln *v.* Emerson, 108 Mass. 87; Nichols *v.* Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Converse *v.* Searls, 10 Vt. 578. And at any rate the possession of the mortgagor is not adverse to the mortgagee in any such sense that the latter must recover the possession before he can assign the mortgage. Tobias *v.* New York, 17 Hun (N. Y.) 534; Murray *v.* Blackledge, 71 N. C. 492; Chapman *v.* Armistead, 4 Munf. (Va.) 382.

Life-estate in mortgagee.— The validity of an assignment of a mortgage is not impaired by a showing merely that the interest of the assignor was but a life-estate, where it is not made to appear that the transfer operated to diminish the bulk of the estate at the death of the life-tenant. Sutphen *v.* Ellis, 35 Mich. 446.

A married woman may make a valid assignment of a mortgage executed to her, although it will require the concurrence of her husband (Tryon *v.* Sutton, 13 Cal. 490; Baker *v.* Armstrong, 57 Ind. 189; Moreau *v.* Branson, 37 Ind. 195; Cox *v.* Wood, 20 Ind. 54), except where the law gives her entire freedom to deal with her separate estate (Langston *v.* Smyley, 38 S. C. 121, 16 S. E. 771).

A guardian of a minor does not require the permission of the probate court to sell and convey to a *bona fide* purchaser a promissory note and the mortgage securing it belonging to the estate of his ward. Humphrey *v.* Buisson, 19 Minn. 221.

Joint mortgagees.— Where a mortgage is made to two persons as collateral security for a joint debt, it is held in joint tenancy, and consequently, after the death of one of the mortgagees, the other may alone assign the mortgage. Blake *v.* Sanborn, 8 Gray (Mass.) 154; Appleton *v.* Boyd, 7 Mass. 131. But it is otherwise if the mortgage is given to secure the several debts of the two mortgagees. Burnett *v.* Pratt, 22 Pick. (Mass.) 556.

beneficiary or creditor secured, and cannot be made by the trustee, the latter not having any interest in the trust.[75]

(II) *AGENT OR ATTORNEY.* An assignment of a mortgage may be made by one acting as agent or attorney for the owner of it, but no title passes unless he was duly authorized to make such transfer,[76] although the authority need not be in writing.[77]

(III) *EXECUTOR OR HEIR.* Upon the death of the owner of a mortgage a sale or assignment thereof must be made by his executor or administrator.[78] An assignment by the heir of the deceased mortgagee is not valid or effectual,[79] unless made after the mortgage has been set off to him by order of the court as a part of his distributive share of the decedent's estate.[80]

(IV) *PARTNERSHIPS.* In the absence of restrictive provisions in the articles of partnership, either member of a firm may validly assign a mortgage by an instrument to which he signs the firm-name.[81]

(V) *CORPORATIONS.*[82] When the owner of a mortgage is a corporation, authority to assign the debt and security should regularly emanate from the board of directors.[83] But the assignment may be made by a principal officer of

75. McFarland *v.* Dey, 69 Ill. 419; Gimbel *v.* Pignero, 62 Mo. 240; Hatz's Appeal, 40 Pa. St. 209; Ryckman *v.* Canada L. Assur. Co., 17 Grant Ch. (U. C.) 550.

Knowledge of assignee.— Where the purchaser of a mortgage, by assignment from a trustee, is not bound to see to the application of the purchase-money, his title to the mortgage can be defeated only by evidence showing that, at the time of the assignment, he knew that the trustee contemplated a breach of trust and intended to misappropriate the money, or was, by the very act, applying it to his own private uses. Foster *v.* Dey, 27 N. J. Eq. 599; Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441.

Mortgage securing negotiable paper.—When a trustee, having no title to a trust deed and promissory note, transfers them to another person, as collateral, it devolves upon that person to show that he took the paper in good faith, without notice, for value, before maturity, and in the usual course of business; and if the indorsements on the note show that another person than the trustee is the legal holder of it, the assignee has no right to rely on his explanation of the indorsements, but must make inquiry as to the real ownership of the note. Chicago Title, etc., Co. *v.* Brugger, 196 Ill. 96, 63 N. E. 637.

76. California L. & T. Co. *v.* Hammell, 101 Cal. 250, 35 Pac. 765; Yard's Appeal, 9 Pa. Cas. 209, 12 Atl. 359.

77. Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285.

78. *Alabama.*— Baldwin *v.* Hatchett, 56 Ala. 461.

Massachusetts.— Baldwin *v.* Timmins, 3 Gray 302; Richardson *v.* Hildreth, 8 Cush. 225; Johnson *v.* Bartlett, 17 Pick. 477; Smith *v.* Dyer, 16 Mass. 18.

New York.— La Tourette *v.* Decker, 18 N. Y. Suppl. 840.

North Carolina.— Neil *v.* Newbern, 5 N. C. 133.

Vermont.— Collamer *v.* Langdon, 29 Vt. 32; Pierce *v.* Brown, 24 Vt. 165.

Wisconsin.— Hitchcock *v.* Merrick, 15 Wis. 522; Williams *v.* Ely, 13 Wis. 1.

Canada.— Doe *v.* Hanson, 8 N. Brunsw. 427. See also Robinson *v.* Byers, 9 Grant. Ch. (U. C.) 572; Hunter *v.* Farr, 23 U. C. Q. B. 324.

And see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 359 *et seq.*

Either of two joint executors or administrators may sell or assign. George *v.* Baker, 3 Allen (Mass.) 326 note; New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328; Bogert *v.* Hertell, 4 Hill (N. Y.) 492 [*reversing* 9 Paige 52].

Land in another state.— It is not material, in this respect, that the mortgaged land lies in another state from that in which administration is granted. Clark *v.* Blackington, 110 Mass. 369; Gove *v.* Gove, 64 N. H. 503, 15 Atl. 121; Smith *v.* Tiffany, 16 Hun (N. Y.) 552. See, however, Cutter *v.* Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149.

79. Douglass *v.* Durin, 51 Me. 121; White *v.* Erskine, 10 Me. 306; Taft *v.* Stevens, 3 Gray (Mass.) 504. But see Cook *v.* Parham, 63 Ala. 456, holding that a conveyance of the mortgaged premises by the heirs of the deceased mortgagee to the wife of the mortgagor may operate in equity as an assignment of the secured debt; and their assignment of the secured debt to her, whether they have the legal title or not, passes an equity against all persons except creditors whose rights are affected.

80. McConnell *v.* Hodson, 7 Ill. 640; Albright *v.* Cobb, 30 Mich. 355; Ford *v.* Smith, 60 Wis. 222, 18 N. W. 925; Hammond *v.* Lewis, 1 How. (U. S.) 14, 11 L. ed. 30.

81. Morrison *v.* Mendenhall, 18 Minn. 232; Everit *v.* Strong, 5 Hill (N. Y.) 163 [*affirmed* in 7 Hill 585]; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538. And see PARTNERSHIP.

82. See CORPORATIONS, 10 Cyc. 758 *et seq.*

83. Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868; Manahan *v.* Varnum, 11 Gray (Mass.) 405; Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207; Continental Trust Co. *v.* Winton, 4 Lack. Jur. (Pa.) 383.

Unincorporated society.— Where a mort-

the corporation, if duly authorized thereto,[84] or, if he acted originally without authority, the assignment is validated by the subsequent ratification and acceptance of the directors.[85]

b. Capacity of Assignee. The right and capacity of a person to take an assignment of a mortgage will in general be tested by the same rules which determine his capacity to hold the estate as original mortgagee.[86] The mortgagor himself may take a valid assignment of the mortgage after he has lost or parted with his equity of redemption in the premises, although not while he remains the beneficial owner,[87] or he may buy it for the purpose of reissuing it, with the knowledge of the mortgagee, and may then assign it to another person as a valid and continuing security.[88] So an assignment may be made to one who is a surety for the mortgagor,[89] or to a purchaser of the equity of redemption, provided he has not made himself personally liable for the payment of the mortgage debt.[90] The assignment of a mortgage to two persons gives them equal rights, as joint tenants, in the absence of an agreement to the contrary.[91]

3. Consent of Mortgagor. Ordinarily the consent of the mortgagor is not necessary to the validity of an assignment of the mortgage,[92] and if the transfer of the mortgage is prohibited or restricted by a clause in the instrument or a

gage is made to certain persons, described as the trustees of an unincorporated association, the legal title under the mortgage vests in the named persons as individuals, and an assignment of the mortgage purporting to be made by the association, or made by only one of the mortgagees, will not be valid. Austin *v.* Shaw, 10 Allen (Mass.) 552.

84. Lay *v.* Austin, 25 Fla. 933, 7 So. 143; Jackson *v.* Campbell, 5 Wend. (N. Y.) 572; Irwin *v.* Bailey, 13 Fed. Cas. No. 7,079, 8 Biss. 523. See also Collier *v.* Alexander, 142 Ala. 422, 38 So. 244. And see Corporations, 10 Cyc. 903 *et seq.*

85. Darst *v.* Gale, 83 Ill. 136; Palmer *v.* Yates, 3 Sandf. (N. Y.) 137.

86. Brewer *v.* Slater, 18 App. Cas. (D. C.) 48 (holding that the trustee in a trust deed may become the purchaser and *bona fide* holder for value of the note secured by the deed, his duty as trustee concerning only the security and not the debt); Elliott *v.* Deason, 64 Ga. 63 (holding that where a mortgage is assigned to a married woman, and the negotiable note which it is given to secure is also assigned, but to a trustee for her use, the title to both is in her, and she may foreclose the mortgage in her own name); Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288 (holding that where a mortgage is assigned to one as state treasurer, and to his successors and assigns, to protect policy-holders in an insurance company, the assignment being made merely because of his position as treasurer, his successor in office may maintain a suit to foreclose).

As to the right of a national bank to take an assignment see Banks and Banking, 5 Cyc. 590 *et seq.*

87. See *infra*, XVI, F, 1, b.

Assignment to personal representative.— Where an administrator takes an assignment of a mortgage given by his intestate, it will be presumed that he buys it in his capacity as administrator and with funds of the estate, and for the purpose of redeeming or discharging the encumbrance, and the assignment will inure to the benefit of the estate; but it may be shown that he bought the mortgage with his own funds and had no assets of the estate with which to take it up. Clapp *v.* Beardsley, 1 Vt. 151.

Purchase by agent.— If the agent of the maker of a mortgage note has no funds of the principal in his possession, there is no reason why, on the request of the principal, he cannot buy for his own account the mortgage note and hold it as security for the amount advanced by the principal. If the agent has money of the principal in his possession, and purchases the note, and makes a payment thereon with the funds of the principal, such payment will be considered as having been made by the principal, and the mortgage will be extinguished to the extent thereof. Gumbel *v.* Boyer, 46 La. Ann. 762, 15 So. 84.

Assignment to wife of mortgagor.—A mortgage is not extinguished by being assigned to the wife of the mortgagor, after he has conveyed to a third person all his interest in the estate. Bean *v.* Boothby, 57 Me. 295; Model Lodging House Assoc. *v.* Boston, 114 Mass. 133.

88. Sturtevant *v.* Jaques, 14 Allen (Mass.) 523; Sturges *v.* Hart, 84 Hun (N. Y.) 409, 32 N. Y. Suppl. 422; Angel *v.* Boner, 38 Barb. (N. Y.) 425.

89. Murray *v.* Catlett, 4 Greene (Iowa) 108.

90. *Georgia.*— Clay *v.* Banks, 71 Ga. 363.

Iowa.— Hollenbeck *v.* Stearns, 73 Iowa 570, 35 N. W. 643.

Maine.— Randall *v.* Bradley, 65 Me. 43.

Michigan.— Winans *v.* Wilkie, 41 Mich. 264, 1 N. W. 1049.

New Hampshire.— Bell *v.* Woodward, 34 N. H. 90.

91. Webster *v.* Vandeventer, 6 Gray (Mass.) 428. And see Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

92. Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127; Smith *v.* Commercial Nat. Bank, 7 S. D. 465, 64 N. W. 529; Jones *v.* Gibbons,

separate written agreement, this may be waived by the mortgagor, even by parol.[93] But without his consent nothing can be done between the mortgagee and assignee to add to his liability or increase the burden of the mortgage.[94]

4. Assignment of Trust Notes. The assignment of a note secured by a deed of trust carries with it the benefit of the security, and the assignee will succeed to all the rights of his assignor under the deed.[95] If several notes are secured by the same deed, the assignee of one or a portion of them will be entitled to the benefit of the security in proportion to his interest.[96]

5. Agreements to Assign. An agreement to assign a mortgage is enforceable according to its terms;[97] but so long as it remains unexecuted it does not prevent the holder of the mortgage from availing himself of all the rights and remedies of a mortgagee.[98]

6. What Law Governs. A mortgage is governed by the law of the jurisdiction in which the mortgaged land is situated;[99] but an assignment of the mortgage is a new and independent contract, and this is governed by the law of the place where it is made.[1]

B. Form, Requisites, and Validity of Assignment — 1. In General — a. Essentials of Valid Assignment. At common law, an assignment of a mortgage, to be effectual to convey the mortgagee's legal title and enable the assignee to maintain ejectment, must be by such a conveyance in form and words as is required to convey the legal title to land in ordinary cases.[2] But under the modern doctrine which recognizes a mortgage as a lien and not an estate, it is not required that its transfer should be attended by the formalities of a deed;[3] and

9 Ves. Jr. 407, 7 Rev. Rep. 247, 32 Eng. Reprint 659.

93. Houseman *v.* Bodine, 122 N. Y. 158, 25 N. E. 255; Hidden *v.* Kretzschmar, 37 Fed. 465.

94. Ashenhurst *v.* James, 3 Atk. 270, 26 Eng. Reprint 958; Matthews *v.* Wallwyn, 4 Ves. Jr. 118, 31 Eng. Reprint 62.

95. Sargent *v.* Howe, 21 Ill. 148; Lee *v.* Clark, 89 Mo. 553, 1 S. W. 142; Boatmen's Sav. Bank *v.* Grewe, 84 Mo. 477; Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931.

Notice of equities.— One taking a trust deed as assignee of the note secured thereby is chargeable with notice of all equities appearing in the chain of title whereby he acquires a lien under the trust deed; and he is bound by recitals in a deed to the grantor in the deed of trust showing equities in a third person. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

96. Schofield *v.* Cox, 8 Gratt. (Va.) 533.

97. Preble *v.* Conger, 66 Ill. 370; Griggs *v.* Moors, 168 Mass. 354, 47 N. E. 128.

Part performance.— Where, pursuant to an agreement between a mortgagor and a mortgagee that the latter should place an assignment of the mortgage in escrow, to be delivered to the wife of the mortgagor, on his making certain payments, the first payment was made and the assignment delivered in escrow by the mortgagee, he was estopped to rescind the agreement on his own motion. Booth *v.* Williams, 11 Phila. (Pa.) 266.

98. Isham *v.* Therasson, 53 N. J. Eq. 10, 30 Atl. 969; Stonington Sav. Bank *v.* Davis, 14 N. J. Eq. 286.

99. See *supra*, I, F.

1. Franklin *v.* Twogood, 25 Iowa 520, 96 Am. Dec. 73; Frank *v.* Morehead, (N. J. Ch. 1895) 31 Atl. 1016; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; Dundas *v.* Bowler, 8 Fed. Cas. No. 4,141, 3 McLean 397. But see Kennedy *v.* Chapin, 67 Md. 454, 10 Atl. 243; Murrell *v.* Jones, 40 Miss. 565; Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727; Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15.

2. Sanders *v.* Cassady, 86 Ala. 246, 5 So. 503; Dacus *v.* Streety, 59 Ala. 183; Graham *v.* Newman, 21 Ala. 497; Stanley *v.* Kempton, 59 Me. 472; Lyford *v.* Ross, 33 Me. 197; Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595; Warden *v.* Adams, 15 Mass. 233; Gould *v.* Newman, 6 Mass. 239; Auston *v.* Boulton, 16 U. C. C. P. 318; Doe *v.* Fox, 3 U. C. Q. B. 134. And see Kearney *v.* Creelman, 14 Can. Sup. Ct. 33.

Operative words.— In an assignment of a mortgage, "assign, transfer, and set over" are the proper technical words to pass an estate in lands and tenements. Watt *v.* Feader, 12 U. C. C. P. 254. And it has been held that a conveyance of all the mortgagee's "right, title, and interest in and to the within mortgage" will not pass the land mortgaged. Moran *v.* Currie, 8 U. C. C. P. 60. But *compare* Mason *v.* York, etc., R. Co., 52 Me. 82. But although these words are used in the granting part of a deed of assignment, yet if the *habendum* transfers the interest in the land described in the indenture, the estate passes. Doe *v.* Fox, 3 U. C. Q. B. 134.

The omission of words of inheritance does not reduce the interest conveyed by a regular deed of assignment to a mere life-estate. Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785.

3. Pease *v.* Warren, 29 Mich. 9, 18 Am.

hence it may be assigned by mere delivery of the papers, when made with the actual and distinct intention to transfer the debt and the security,[4] or by a specific bequest of the mortgage and debt.[5] So a reassignment of the mortgage back to the assignor may be effected without a written transfer.[6] An assignment of a mortgage of realty by a corporation, concluding that in witness thereof the corporation by its treasurer, duly authorized, has set its hand and seal, and signed by a person as treasurer of such corporation and sealed, is in form executed by the corporation.[7] An assignment of a mortgage describing the mortgage by the names of the mortgagor and mortgagee and the book and page where it is recorded sufficiently identifies the mortgage.[8] A transferee of a note and mortgage may obtain an order of seizure and sale in executory proceedings, although he was not a party to the transfer and made no acceptance of it.[9]

b. Seal. An assignment of a mortgage, made in the form of a deed, is ineffectual to pass the legal title unless under seal.[10]

c. Acknowledgment and Attestation. In the absence of a statutory requirement to that effect, it is not necessary to the validity of an assignment of a mortgage that it should be acknowledged or attested by witnesses,[11] except where these formalities are necessary to entitle it to record, and then only for that purpose.[12]

d. Names and Description of Parties. The assignment must designate the parties to it, either by their correct names or by such a description as will identify

Rep. 58; Dougherty *v.* Randall, 3 Mich. 581; Wilson *v.* Kimball, 27 N. H. 300; Rigney *v.* Lovejoy, 13 N. H. 247; Kamena *v.* Huelbig, 23 N. J. Eq. 78.

4. *Indiana.*— Clearwater *v.* Rose, 1 Blackf. 137.

Kansas.— Hill *v.* Alexander, 2 Kan. App. 251, 41 Pac. 1066.

New Jersey.— New York, etc., R. Co. *v.* Daly, 57 N. J. Eq. 347, 45 Atl. 1092; Lake *v.* Flemington Nat. Bank, 50 N. J. Eq. 486, 27 Atl. 636; Denton *v.* Cole, 30 N. J. Eq. 244; Harris *v.* Cook, 28 N. J. Eq. 345.

New York.— Strause *v.* Josephthal, 77 N. Y. 622; John H. Mahnken Co. *v.* Pelletreau, 93 N. Y. App. Div. 420, 87 N. Y. Suppl. 737.

North Carolina.— See Collins *v.* Davis, 132 N. C. 106, 43 S. E. 579, holding that the mere transfer of the note and mortgage does not divest the mortgagee of the legal title, but he holds the same in trust to secure the payment of the note in the hands of his assignee, with the equity of redemption in the mortgagor.

Good in equity but not at law.— Although such a transfer by mere delivery of the mortgage papers is not sufficient to constitute a legal assignment of the mortgage, yet it is an assignment which equity will recognize and enforce. McMillan *v.* Craft, 135 Ala. 148, 33 So. 26; Docus *v.* Streety, 59 Ala. 183; Cutler *v.* Haven, 8 Pick. (Mass.) 490.

5. Proctor *v.* Robinson, 35 Mich. 284; Clark *v.* Clark, 56 N. H. 105. See Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

6. Dean *v.* Millard, 1 R. I. 283.

7. Hutchins *v.* Byrnes, 9 Gray (Mass.) 367.

8. Matthews *v.* Nefsy, 13 Wyo. 458, 81 Pac. 305, 110 Am. St. Rep. 1020.

9. Bacon *v.* Maskell, 8 La. Ann. 507.

10. *Illinois.*— Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331.

Maine.— Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595.

Minnesota.— Morrison *v.* Mendenhall, 18 Minn. 232.

Missouri.— Crinion *v.* Nelson, 7 Mo. 466.

North Carolina.— Dameron *v.* Eskridge, 104 N. C. 621, 10 S. E. 700; Williams *v.* Teachey, 85 N. C. 402.

Texas.— Henderson *v.* Pilgrim, 22 Tex. 464.

Canada.— Tiffany *v.* Clarke, 6 Grant Ch. (U. C.) 474.

See 35 Cent. Dig. tit. "Mortgages," § 593.

In New Jersey it is otherwise by statute. See Mulford *v.* Peterson, 35 N. J. L. 127; Morris *v.* Taylor, 23 N. J. Eq. 131. Before the enactment of the statute the general rule obtained. Dimon *v.* Dimon, 10 N. J. L. 156; Kinna *v.* Smith, 3 N. J. Eq. 14.

11. *Illinois.*— Honore *v.* Wilshire, 109 Ill. 103.

Michigan.— Dougherty *v.* Randall, 3 Mich. 581; Livingston *v.* Jones, Harr. 165.

New Hampshire.— Salvage *v.* Haydock, 68 N. H. 484, 44 Atl. 696.

New York.— Strever *v.* Earl, 60 Hun 528, 15 N. Y. Suppl. 350; Heilbrun *v.* Hammond, 13 Hun 474.

United States.— West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

See 35 Cent. Dig. tit. "Mortgages," § 594.

But see Adams *v.* Parker, 12 Gray (Mass.) 53, holding that an unacknowledged assignment of a mortgage, although indorsed on the mortgage deed and delivered and recorded with it, will not support a writ of entry by the assignee to foreclose the mortgage, this being an action at law, which cannot be maintained without showing the legal title in plaintiff.

Necessity when assignor a married woman see Moore *v.* Cornell, 68 Pa. St. 320.

12. See the statutes of the different states. And see Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108.

them with equal certainty,[13] although it seems that the mortgage may be assigned in blank, if authority is given to insert the name of the assignee when ascertained.[14]

e. Consideration. An assignment of a mortgage, like any other contract, must, as between the parties to it, be supported by a good and sufficient consideration,[15] and may be avoided on showing a want or total failure of the consideration.[16] But the consideration of the transfer is in general no concern of the mortgagor, and he cannot be permitted to impeach it,[17] nor can a junior mortgagee do so.[18] The illegality of the consideration for the assignment does not affect

13. *Connecticut.*—Woronieki *v.* Pariskiego, 74 Conn. 224, 50 Atl. 562.

New York.— Lady Superior Montreal Cong. Nunnery *v.* McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184.

North Dakota.— Morris *v.* McKnight, 1 N. D. 266, 47 N. W. 375.

Washington.— Fidelity Ins., etc., Co. *v.* Nelson, 30 Wash. 340, 70 Pac. 961.

United States.— Curtis *v.* Cutler, 76 Fed. 16, 22 C. C. A. 16, 37 L. R. A. 737.

See 35 Cent. Dig. tit. "Mortgages," § 595.

An assignment of a mortgage belonging to a firm, describing the partners by their individual names and by their firm-name, and signed by their individual names, and sealed with their individual seals, is effective. Morrison *v.* Mendenhall, 18 Minn. 232.

An assignment by an administrator of a mortgage which is part of the assets of the intestate is valid, although not stated to be executed by the assignor in the character of administrator. Yarrington *v.* Lyon, 12 Grant Ch. (U. C.) 308.

Misspelling.— It is no objection to the assignment of a mortgage that the names of the mortgagees are spelled differently therein from the spelling of them in the mortgage, if they are intended for the same names. Doe *v.* McLoskey, 1 Ala. 708.

14. Phelps *v.* Sullivan, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442; Strong *v.* Jackson, 123 Mass. 60, 25 Am. Rep. 19. See also Graves *v.* Mumford, 26 Barb. (N. Y.) 94.

15. *California.*—Ambrose *v.* Drew, 139 Cal. 665, 73 Pac. 543.

Iowa.— Fairburn *v.* Goldsmith, 58 Iowa 339, 12 N. W. 273.

Maryland.— Russum *v.* Wanser, 53 Md. 92.

Michigan.— Tate *v.* Whitney, Harr. 145.

New Jersey.— Chancellor *v.* Bell, 45 N. J. Eq. 538, 17 Atl. 684, holding that the assignee of a mortgage, who has given no other consideration therefor than his own promissory note, upon which he has paid nothing, is not a *bona fide* holder for value. The assignment of a bond and mortgage is *prima facie* evidence that the money has been paid for it. Westervelt *v.* Scott, 11 N. J. Eq. 80.

New York.—Commercial Bank *v.* Catto, 163 N. Y. 569, 57 N. E. 1107; Palmer *v.* Smith, 10 N. Y. 303; Beach *v.* Allen, 7 Hun 441; McClave *v.* Sterne, 17 N. Y. Suppl. 892; Kursheedt *v.* McCune, 20 Abb. N. Cas. 265.

South Carolina.— Ravenel *v.* Lyles, Speers Eq. 281.

Wisconsin.— Croft *v.* Bunster, 9 Wis. 503.

See 35 Cent. Dig. tit. "Mortgages," § 596.

Inquiring into consideration.— The consideration for the assignment of a mortgage may be inquired into at any time; and it may be proved by parol, and a different consideration may be established than that expressed in the instrument. Bennett *v.* Solomon, 6 Cal. 134.

What is a sufficient consideration.— Where a mortgage was executed to secure the payment of a note executed by the mortgagee and on which money had been obtained for the mortgagor, the liability of a surety on the note is a sufficient consideration for an assignment of the mortgage to him (Hall *v.* Redding, 13 Cal. 214), so is an extension of time to the debtor (Conrad *v.* Corkum, 35 Nova Scotia 288), and so is marriage (Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870).

Effect of seal.— In the absence of any evidence to the contrary, an assignment under seal imports a valuable consideration; but if there be any evidence, however slight, to impeach the *bona fides* of the transaction, the assignee may be required to give full proof of consideration. Twitchell *v.* McMurtrie, 77 Pa. St. 383; Hancock's Appeal, 34 Pa. St. 155.

Fraudulent mortgage.— An assignment of a fraudulent mortgage to secure a creditor of the mortgagor is valid without any consideration moving from the assignee to the assignor; for such a transaction is in effect a release of the fraudulent mortgage and the making of a new mortgage by the debtor to his creditor. Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

After the lapse of twenty years, the acknowledgment, in the assignment, of the payment of the consideration is sufficient evidence of the payment of the price. Pryor *v.* Wood, 31 Pa. St. 142.

16. See Lillibridge *v.* Tregent, 30 Mich. 105.

A defect in the title to the mortgaged premises, which was equally within the knowledge of both parties to the assignment, although both supposed the title to be good, will not, of itself alone, entitle the assignee to reclaim the money paid. Butman *v.* Hussey, 30 Me. 263.

An assignment of a mortgage to the mortgagor is good notwithstanding the total failure of the consideration for which it was given. Sawyer *v.* Hirst, 7 Del. Co. (Pa.) 404.

17. Johnson *v.* Beard, 93 Ala. 96, 9 So. 535; Adair *v.* Adair, 5 Mich. 204, 71 Am. Dec. 779; Croft *v.* Bunster, 9 Wis. 503.

18. Saenger *v.* Nightingale, 48 Fed. 708.

the mortgage and will be no objection to its enforcement by the assignee.[19] Nor is the mortgagor permitted to resist a foreclosure, or otherwise impeach the rights of the assignee, by showing that the amount paid for the mortgage was less than the face value of the mortgage debt; he has nothing to do with this, and remains liable for the full amount of the mortgage,[20] unless there are circumstances of fraud in the transaction affecting his rights.[21] And inadequacy of the price paid is not of itself sufficient to avoid the transfer, even as between the immediate parties to it.[22]

f. Delivery of Papers. If an assignment of a mortgage is made by a separate written instrument, it must be delivered to the assignee before the transaction can be regarded as complete and his rights vested under it.[23] As to delivery of the mortgage itself and the note or bond which it secures, the assignee is entitled to the possession of them,[24] and should of course obtain possession of them; but still the assignment may be complete without manual delivery of the securities if the fact of the assignment and the intention of the assignor to transfer the ownership and control of them are fully established.[25]

g. Assignment by Indorsement on Mortgage. An assignment may be made by an indorsement on the back of the mortgage, as well as by a separate instru-

19. Rowan *v.* Adams, Sm. & M. Ch. (Miss.) 45; Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165.

Usury in the assignment is no defense. Allison *v.* Schmitz, 31 Hun (N. Y.) 106 [*affirmed* in 98 N. Y. 657]; Wells *v.* Chapman, 13 Barb. (N. Y.) 561; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36; Bush *v.* Livingston, 2 Cai. Cas. (N. Y.) 66, 2 Am. Dec. 316; Pearsall *v.* Kingsland, 3 Edw. (N. Y.) 195.

20. *Alabama.*—Sanders *v.* Cassady, 86 Ala. 246, 5 So. 503.

Maine.— Pease *v.* Benson, 28 Me. 336.

Nebraska.— Loney *v.* Courtnay, 24 Nebr. 580, 39 N. W. 616.

New Jersey.— Donnington *v.* Meeker, 11 N. J. Eq. 362.

New York.— Grissler *v.* Powers, 53 How. Pr. 194 [*affirmed* in 81 N. Y. 57]; Lovett *v.* Dimond, 4 Edw. 22.

South Carolina.—Wright *v.* Eaves, 10 Rich. Eq. 582.

Wisconsin.— Knox *v.* Galligan, 21 Wis. 470.

21. Union, etc., Bank *v.* Smith, 107 Tenn. 476, 64 S. W. 756.

22. Erwin *v.* Parham, 12 How. (U. S.) 197, 13 L. ed. 952.

23. *Massachusetts.*— Shurtleff *v.* Francis, 118 Mass. 154.

Michigan.— Hutton *v.* Cuthbert, 51 Mich. 229, 16 N. W. 386.

New Jersey.— Ruckman *v.* Ruckman, 33 N. J. Eq. 354; Rose *v.* Kimball, 16 N. J. Eq. 185.

New York.—Aldrich *v.* Ward, 68 N. Y. App. Div. 647, 73 N. Y. Suppl. 918; Weed *v.* Hewlett, 12 N. Y. Suppl. 606; Brown *v.* Johnston, 7 Abb. N. Cas. 188.

Pennsylvania.— Pringle *v.* Pringle, 59 Pa. St. 281.

See 35 Cent. Dig. tit. "Mortgages," § 597.

24. Moore *v.* Sloan, 50 Barb. (N. Y.) 442.

Delivery to third person for assignee's benefit.— If the mortgagee delivers the papers to the mortgagor for the use and benefit of the assignee, it is a good delivery to the latter, provided he does not dissent. Lady Superior Montreal Cong. Nunnery *v.* McNamara, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184.

Assignor as assignee's attorney.— Where an attorney is accustomed to make mortgage loans for a client, the act of charging to the client the amount of a loan made by the attorney out of his own funds, and secured by mortgage, is a sufficient transfer of the note and mortgage, although they remain in the attorney's hands, and the client is not informed of the transaction until long after. Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

Effect of failure to deliver.— A mortgagee, having turned over to his wife a note and mortgage in satisfaction of claims held by her against him, and having afterward formally assigned the same, without delivery, to a third person, the mortgagor, having made payment to the wife and taken up the mortgage, will be granted an injunction to restrain such subsequent assignee from proceeding to foreclose the mortgage. Haescig *v.* Brown, 34 Mich. 503.

25. *Georgia.*— Elliott *v.* Deason, 64 Ga. 63.

Maine.— Pratt *v.* Skolfield, 45 Me. 386.

Maryland.—Aldridge *v.* Weems, 2 Gill & J. 36, 19 Am. Dec. 250.

Massachusetts.— Warden *v.* Adams, 15 Mass. 233.

New York.— Syracuse Sav. Bank *v.* Merrick, 96 N. Y. App. Div. 581, 89 N. Y. Suppl. 238; Lazarus *v.* Rosenberg, 70 N. Y. App. Div. 105, 75 N. Y. Suppl. 11. See also Van Gaasbeek *v.* Staples, 177 N. Y. 524, 69 N. E. 1132.

Pennsylvania.— Piper's Estate, 11 Phila. 141.

But see Wilson *v.* Carpenter, 17 Wis. 512, holding that, where a mortgage is executed to secure the payment of a note, the delivery of the mortgage, duly assigned, in part fulfilment of a promised and intended transfer of both the note and the security as a gift *inter vivos* does not convey any interest, if the note is not in fact delivered to the assignee.

ment, provided it contains words of grant appropriate to transfer the interest of the mortgagee.[26]

h. Assignment of Mortgage Without Debt. A mortgage, as distinct from the debt which it secures, is not a thing of value nor a fit subject of transfer; hence an assignment of the mortgage alone, without the debt, is nugatory and confers no rights whatever upon the assignee.[27] But equity, sedulous to save any transaction from being declared a mere nullity, and to give it effect according to the real intention of the parties, will search for such an intention, and even raise a presumption that they meant to transfer the ownership of the debt, as well as the mortgage, where circumstances favor such a construction and no conflicting rights intervene,[28] and especially where the mortgage debt is not evidenced by a note or bond or any other separate instrument.[29] And the assignment is valid, although the mortgage notes are not specified in it, if they are at the same time delivered to the assignee.[30]

i. Transfer of Debt or Obligation — (i) *Effect in General.* The debt secured being the principal thing, and the mortgage only an incident or accessory to it, a proper assignment of the debt will carry with it the mortgage security, in the absence of any agreement to the contrary, without a formal assignment of the mortgage, and the assignor will have no further interest in the security than to hold it as a trustee for the assignee of the debt.[31] And this rule has been

26. *Alabama.*— Ward *v.* Ward, 108 Ala. 278, 19 So. 354; Robinson *v.* Cahalan, 91 Ala. 479, 8 So. 415.

Illinois.— Mallory *v.* Mallory, 86 Ill. App. 193.

Indiana.— Clearwater *v.* Rose, 1 Blackf. 137.

Kentucky.— Barnes *v.* Lee, 1 Bibb 526.

Maryland.— Western Maryland R. Land, etc., Co. *v.* Goodwin, 77 Md. 271, 26 Atl. 319.

Massachusetts.— Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26.

Canada.— Tiffany *v.* Clarke, 6 Grant Ch. (U. C.) 474; Moran *v.* Currie, 8 U. C. C. P. 60.

See 35 Cent. Dig. tit. "Mortgages," § 601.

27. *California.*— Nagle *v.* Macy, 9 Cal. 426; Peters *v.* Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329; Carter *v.* Bennett, 4 Fla. 283.

Illinois.— Sanford *v.* Kane, 133 Ill. 199, 24 N. E. 414, 23 Am. St. Rep. 602, 8 L. R. A. 724; Medley *v.* Elliott, 62 Ill. 532; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562.

Indiana.— Hamilton *v.* Browning, 94 Ind. 242; Hubbard *v.* Harrison, 38 Ind. 323; Johnson *v.* Cornett, 29 Ind. 59; Hough *v.* Osborne, 7 Ind. 140.

Iowa.— Pope *v.* Jacobus, 10 Iowa 262.

Maine.— Webb *v.* Flanders, 32 Me. 175.

Michigan.— Fletcher *v.* Carpenter, 37 Mich. 412; Bailey *v.* Gould, Walk. 478.

Minnesota.— Foster *v.* Johnson, 39 Minn. 378, 40 N. W. 255.

Missouri.— Thayer *v.* Campbell, 9 Mo. 280, But *compare* Pickett *v.* Jones, 63 Mo. 195, holding that, where the mortgagee has possession by virtue of his mortgage, or where the mortgagee is not in possession, but the condition has been broken, a conveyance or assignment of the mortgaged premises would be valid to transfer the mortgagee's right of possession.

Nebraska.— Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638.

New Hampshire.— Ellison *v.* Daniels, 11 N. H. 274.

New Jersey.— Johnson *v.* Clarke, (Ch. 1894) 28 Atl. 558; Garroch *v.* Sherman, 6 N. J. Eq. 219.

New York.—Merritt *v.* Bartholick, 36 N. Y. 44; Raynor *v.* Raynor, 21 Hun 36; Carpenter *v.* O'Dougherty, 67 Barb. 397 [*affirmed* in 2 Thomps. & C. 427]; Bloomingdale *v.* Bowman, 4 N. Y. Suppl. 60; Cooper *v.* Newland, 17 Abb. Pr. 342; Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458; Jackson *v.* Bronson, 19 Johns. 325; Runyan *v.* Mersereau, 11 Johns. 534, 6 Am. Dec. 393; Jackson *v.* Willard, 4 Johns. 41; Aymar *v.* Bill, 5 Johns. Ch. 570.

South Carolina.— Cleveland *v.* Cohrs, 10 S. C. 224.

South Dakota.— Miller *v.* Berry, (1905) 104 N. W. 311.

Vermont.— Edgell *v.* Stanford, 3 Vt. 202.

Wisconsin.— Wright *v.* Sperry, 21 Wis. 331.

United States.— Carpenter *v.* Longan, 16 Wall. 271, 21 L. ed. 313.

Canada.— See Masuret *v.* Mitchell, 26 Grant Ch. (U. C.) 435.

See 35 Cent. Dig. tit. "Mortgages," § 603.

See, however, Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

28. Campbell *v.* Birch, 60 N. Y. 214; Philips *v.* Lewistown Bank, 18 Pa. St. 394; Northampton Bank *v.* Balliet, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297. See also Sprague *v.* Lovett, (S. D. 1906) 106 N. W. 134.

29. See Fitts *v.* Beardsley, 8 N. Y. Suppl. 567; Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701.

30. Pratt *v.* Skolfield, 45 Me. 386; King *v.* Harrington, 2 Aik. (Vt.) 33, 16 Am. Dec. 675.

31. *Alabama.*— McMillan *v.* Craft, 135 Ala. 148, 33 So. 26; Graham *v.* Newman, 21 Ala. 497; Emanuel *v.* Hunt, 2 Ala. 190.

applied in a case where the assignee, at the time of the transfer, did not even know that such a mortgage existed.[32]

(II) *Transfer of Note or Bond.* Where the debt secured by a mortgage is evidenced by a bond or note, the formal assignment of the one or the transfer of the other by indorsement, or by mere delivery, according to its tenor, without an assignment of the mortgage, will carry to the assignee the full benefit of the security and all the rights and remedies of an equitable owner of the mortgage;[33]

California.— Cortelyou *v.* Jones, (1900) 61 Pac. 918; Mack *v.* Wetzlar, 39 Cal. 247.

Colorado.— Fassett *v.* Mulock, 5 Colo. 466.

Connecticut.— Jones *v.* Quinnipiack Bank, 29 Conn. 25; Austin *v.* Burbank, 2 Day 474, 2 Am. Dec. 119; Crosby *v.* Brownson, 2 Day 425.

Georgia.— Van Pelt *v.* Hurt, 97 Ga. 660, 25 S. E. 489. Although a transfer of the debt by the grantee in a security deed does not pass title to the land, in the absence of a conveyance, yet the transferee acquires an equitable interest in the security effected by the deed. Clark *v.* Havard, 122 Ga. 273, 50 S. E. 108.

Illinois.— Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Towner *v.* McClelland, 110 Ill. 542; Miller *v.* Larned, 103 Ill. 562; Petillon *v.* Noble, 73 Ill. 567; Kleeman *v.* Frisbie, 63 Ill. 482; Wayman *v.* Cochrane, 35 Ill. 152; Mapps *v.* Sharpe, 32 Ill. 13; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259; Vansant *v.* Allmon, 23 Ill. 30; Lucas *v.* Harris, 20 Ill. 165; Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Barlow *v.* Cooper, 109 Ill. App. 375; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224; Foster *v.* Strong, 5 Ill. App. 223; Grassly *v.* Reinback, 4 Ill. App. 341. It is only in equity that this rule prevails. Kilgour *v.* Gockley, 83 Ill. 109; Olds *v.* Cummings, 31 Ill. 188.

Indiana.— Reeves *v.* Hayes, 95 Ind. 521; Bayless *v.* Glenn, 72 Ind. 5; Gower *v.* Howe, 20 Ind. 396.

Iowa.— Preston *v.* Case, 42 Iowa 549; Crow *v.* Vance, 4 Iowa 434.

Kansas.— Kurtz *v.* Sponable, 6 Kan. 395.

Kentucky.— Waller *v.* Tate, 4 B. Mon. 529.

Louisiana.— Gardner *v.* Maxwell, 27 La. Ann. 561; Williams *v.* Morancy, 3 La. Ann. 227.

Maine.— Steward *v.* Welch, 84 Me. 308, 24 Atl. 860.

Maryland.— Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25.

Michigan.— Briggs *v.* Hannowald, 35 Mich. 474; Nelson *v.* Ferris, 30 Mich. 497; Martin *v.* McReynolds, 6 Mich. 70; Dougherty *v.* Randall, 3 Mich. 581; Cooper *v.* Ulmann, Walk. 251.

Minnesota.— Humphrey *v.* Buisson, 19 Minn. 221.

Missouri.— Watson *v.* Hawkins, 60 Mo. 550; Potter *v.* Stevens, 40 Mo. 229; Anderson *v.* Baumgartner, 27 Mo. 80; Laberge *v.* Chauvin, 2 Mo. 179; Smith *v.* Mohr, 64 Mo. App. 39. But *compare* Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045 (holding that the assignee of a note secured by a mortgage cannot recover in ejectment, where there is no assignment of the mortgage or transfer of the legal estate by the mortgagee); Polliham *v.* Reveley, 116 Mo. App. 711, 93 S. W. 829.

Nebraska.— Frerking *v.* Thomas, 64 Nebr. 193, 89 N. W. 1005; Anderson *v.* Kreidler, 56 Nebr. 171, 76 N. W. 581; Kuhns *v.* Bankes, 15 Nebr. 92, 17 N. W. 356; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638.

New Hampshire.— Whittemore *v.* Gibbs, 24 N. H. 484.

North Carolina.— Hyman *v.* Devereux, 63 N. C. 624.

Ohio.— Swartz *v.* Leist, 13 Ohio St. 419; Swartz *v.* Hurd, 2 Ohio Dec. (Reprint) 134, 1 West. L. Month. 510.

Oregon.— Watson *v.* Dundee Mortg., etc., Co., 12 Oreg. 474, 8 Pac. 548; Roberts *v.* Sutherlin, 4 Oreg. 219.

Pennsylvania.— Partridge *v.* Partridge, 38 Pa. St. 78; Cathcart's Appeal, 13 Pa. St. 416; Donley *v.* Hays, 17 Serg. & R. 400.

South Carolina.— Muller *v.* Wadlington, 5 S. C. 342; Wright *v.* Eaves, 10 Rich. Eq. 582.

Texas.— Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72; Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

Vermont.— Keyes *v.* Wood, 21 Vt. 331; Pratt *v.* Bennington Bank, 10 Vt. 293, 33 Am. Dec. 201.

Wisconsin.—Franke *v.* Neisler, 97 Wis. 364, 72 N. W. 887; Croft *v.* Bunster, 9 Wis. 503; Martineau *v.* McCollum, 3 Pinn. 455, 4 Chandl. 153.

United States.— Baldwin *v.* Raplee, 2 Fed. Cas. No. 801, 4 Ben. 433.

See 35 Cent. Dig. tit. "Mortgages," § 620.

See, however, Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253, holding that the assignment of a debt secured by a deed of trust is not an assignment of the trust.

32. Betz *v.* Heebner, 1 Penr. & W. (Pa.) 280; Keyes *v.* Wood, 21 Vt. 331.

33. *Alabama.*— O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745; Center *v.* Planters', etc., Bank, 22 Ala. 743; Graham *v.* Newman, 21 Ala. 497.

California.— Druke *v.* Heiken, 61 Cal. 346, 44 Am. Rep. 553; Ord *v.* McKee, 5 Cal. 515.

Colorado.— Fassett *v.* Mulock, 5 Colo. 466; Kenney *v.* Jefferson County Bank, 12 Colo. App. 24, 54 Pac. 404.

Connecticut.— Lawrence *v.* Knap, 1 Root 248, 1 Am. Dec. 42.

Florida.— Stewart *v.* Preston, 1 Fla. 10.

Georgia.— Athens Nat. Bank *v.* Athens Exch. Bank, 110 Ga. 692, 36 S. E. 265.

and hence, if an assignment of the mortgage is at the same time attempted to be made, it is immaterial that it proves to be irregular or defective.[34]

Illinois.— Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; Miller *v.* Larned, 103 Ill. 562; Kittler *v.* Studabaker, 113 Ill. App. 342; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224; Elgin City Banking Co. *v.* Center, 83 Ill. App. 405; Grassly *v.* Reinback, 4 Ill. App. 341.

Indiana.— Thomson *v.* Madison Bldg., etc., Assoc., 103 Ind. 279, 2 N. E. 735; Garrett *v.* Puckett, 15 Ind. 485; Burton *v.* Baxter, 7 Blackf. 297; Blair *v.* Bass, 4 Blackf. 539.

Iowa.— Updegraft *v.* Edwards, 45 Iowa 513; Indiana Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390; Sangster *v.* Love, 11 Iowa 580; Pope *v.* Jacobus, 10 Iowa 262; Crow *v.* Vance, 4 Iowa 434.

Kansas.— Mutual Ben. L. Ins. Co. *v.* Huntington, 57 Kan. 744, 48 Pac. 19.

Kentucky.— Burdett *v.* Clay, 8 B. Mon. 287; Miles *v.* Gray, 4 B. Mon. 417.

Louisiana.— Perkins *v.* Gumbel, 49 La. Ann. 653, 21 So. 743; Gumbel *v.* Boyer, 46 La. Ann. 762, 15 So. 84; Forstall's Succession, 39 La. Ann. 1052, 3 So. 277; Perot *v.* Levasseur, 21 La. Ann. 529; Scott *v.* Turner, 15 La. Ann. 346; Auguste *v.* Renard, 3 Rob. 389.

Maine.— Jordon *v.* Cheney, 74 Me. 359; Stone *v.* Locke, 46 Me. 445; Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595; Vose *v.* Handy, 2 Me. 322, 11 Am. Dec. 101. The transfer of a note secured by mortgage does not, at law, assign the mortgage; this consequence follows only in equity. Warren *v.* Homestead, 33 Me. 256; Dwinel *v.* Perley, 32 Me. 197.

Massachusetts.— Morris *v.* Bacon, 123 Mass. 58, 25 Am. Rep. 17; Belcher *v.* Costello, 122 Mass. 189.

Michigan.— Nelson *v.* Ferris, 30 Mich. 497; Martin *v.* McReynolds, 6 Mich. 70.

Minnesota.— Mankato First Nat. Bank *v.* Pope, 85 Minn. 433, 89 N. W. 318; Meeker County Bank *v.* Young, 51 Minn. 254, 53 N. W. 630.

Mississippi.— Holmes *v.* McGinty, 44 Miss. 94; Henderson *v.* Herrod, 10 Sm. & M. 631, 49 Am. Dec. 41; Lewis *v.* Starke, 10 Sm. & M. 120; Dick *v.* Mawry, 9 Sm. & M. 448; Terry *v.* Woods, 6 Sm. & M. 139, 45 Am. Dec. 274.

Missouri.— German American Bank *v.* Carondelet Real Estate Co., 150 Mo. 570, 51 S. W. 691; Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73; Lee *v.* Clark, 89 Mo. 553, 1 S. W. 142; Boatmen's Sav. Bank *v.* Grewe, 84 Mo. 477; Bell *v.* Simpson, 75 Mo. 485; Logan *v.* Smith, 62 Mo. 455; Chappell *v.* Allen, 38 Mo. 213.

Nebraska.— Snell *v.* Margritz, 64 Nebr. 6, 91 N. W. 274; Daniels *v.* Densmore, 32 Nebr. 40, 48 N. W. 906; Kuhns *v.* Bankes, 15 Nebr. 92, 17 N. W. 356; Moses *v.* Comstock, 4 Nebr. 516; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638.

New Hampshire.— Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Blake *v.* Williams, 36 N. H. 39; Rigney *v.* Lovejoy, 13 N. H. 247; Southerin *v.* Mendum, 5 N. H. 420.

New Jersey.— Ferry *v.* Meckert, 32 N. J. Eq. 38. But see Shipman *v.* Lord, 58 N. J. Eq. 380, 44 Atl. 215 [*affirmed* in 60 N. J. Eq. 484, 46 Atl. 1101], holding that, when a note owing at the time of the execution of an assignment of an equitable interest in real estate to secure an indebtedness owing by the assignor to the assignee is not mentioned in the agreement whereby such interest is assigned, it will be presumed that it was not intended to have the security include it.

New York.— Matter of Falls, 66 N. Y. App. Div. 616, 73 N. Y. Suppl. 1134; Cooper *v.* Newland, 17 Abb. Pr. 342; Green *v.* Hart, 1 Johns. 580; Johnson *v.* Hart, 3 Johns. Cas. 322. Where a mortgagor gives a note as a conditional part payment of the mortgage debt, the assignment of the note does not carry with it a *pro tanto* assignment of the mortgage. Fitch *v.* McDowell, 145 N. Y. 498, 40 N. E. 205.

North Carolina.— Davison *v.* Gregory, 132 N. C. 389, 43 S. E. 916; Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696; Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601; Miller *v.* Hoyle, 41 N. C. 269.

North Dakota.— Brynjolfson *v.* Osthus, 12 N. D. 42, 96 N. W. 261.

Ohio.— Crumbaugh *v.* Kugler, 3 Ohio St. 544; Paine *v.* French, 4 Ohio 318.

Oregon.— Barringer *v.* Loder, 47 Oreg. 223, 81 Pac. 778.

South Carolina.— Walker *v.* Kee, 14 S. C. 142; Wright *v.* Eaves, 10 Rich. Eq. 582.

South Dakota.— Miller *v.* Berry, (1905) 104 N. W. 311; Grether *v.* Smith, 17 S. D. 279, 96 N. W. 93.

Tennessee.— Union, etc., Bank *v.* Smith, 107 Tenn. 476, 64 S. W. 756; Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931; Cleveland *v.* Martin, 2 Head 128; Frame *v.* Tabler, (Ch. App. 1898) 52 S. W. 1014; Ford *v.* McDowell, (Ch. App. 1899) 52 S. W. 694; Perrin *v.* Trimble, (Ch. App. 1898) 48 S. W. 125.

Texas.— Cannon *v.* McDaniel, 46 Tex. 303.

Utah.— Donaldson *v.* Grant, 15 Utah 231, 49 Pac. 779.

West Virginia.— Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

Wisconsin.— Boyle *v.* Lybrand, 113 Wis. 79, 88 N. W. 904; Fred Miller Brewing Co. *v.* Manasse, 99 Wis. 99, 74 N. W. 535; Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962; Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452; Croft *v.* Bunster, 9 Wis. 503; Martineau *v.* McCollum, 3 Pinn. 455, 4 Chandl. 153.

United States.— Swift *v.* Smith, 102 U. S. 442, 26 L. ed. 193; Converse *v.* Michigan Dairy Co., 45 Fed. 18; Winstead *v.* Bingham, 14 Fed. 1, 4 Woods 510.

See 35 Cent. Dig. tit. "Mortgages," § 621.

34. Bremer County Bank *v.* Eastman, 34 Iowa 392; Robinson Female Seminary *v.*

(III) *TRANSFER OF PART OF DEBT.* The assignment of a part of a debt secured by a mortgage, or of one of several notes so secured, carries with it a proportional interest in the mortgage and the security which it affords, unless it is otherwise agreed between the parties, although there is no formal assignment of the mortgage or any part of it.[35] On the other hand if the mortgage is assigned together with a part of the notes secured, this does not transfer the residue of the notes;[36] but in such a case the assignee will hold the estate in trust for the payment of all the notes, and the mortgage itself is notice to him of the trust.[37]

(IV) *TRANSFERS TO DIFFERENT ASSIGNEES.* Where several notes secured by one mortgage are transferred to different parties, each transfer amounts to a proportional assignment of the mortgage, in the absence of any stipulation to the contrary.[38]

j. Validity of Assignment — (I) *IN GENERAL.* The validity of an assignment of a mortgage is not affected by the assignor's being out of possession,[39] nor by the existence of confidential relations between the parties, unless the assignment has been procured by an abuse of such relations,[40] nor generally, by any objection

Campbell, 60 Kan. 60, 55 Pac. 276; Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

35. *Alabama.*— Cullum *v.* Erwin, 4 Ala. 452.

California.— Phelan *v.* Olney, 6 Cal. 478.

Illinois.— Sargent *v.* Howe, 21 Ill. 148; Magloughlin *v.* Clark, 35 Ill. App. 251.

Indiana.— Stanley *v.* Beatty, 4 Ind. 134.

Iowa.— Walker *v.* Schreiber, 47 Iowa 529.

Kansas.— Champion *v.* Hartford Inv. Co., 45 Kan. 103, 25 Pac. 590, 10 L. R. A. 754.

Massachusetts.— Foley *v.* Rose, 123 Mass. 557; Andrews *v.* Fiske, 101 Mass. 422; Lane *v.* Davis, 14 Allen 225.

Michigan.— Cooper *v.* Ulmann, Walk. 251.

Minnesota.— Brown *v.* Delaney, 22 Minn. 349.

Nebraska.— Whitney *v.* Lowe, 59 Nebr. 87, 80 N. W. 266; New England L. & T. Co. *v.* Robinson, 56 Nebr. 50, 76 N. W. 415, 71 Am. St. Rep. 657; Harman *v.* Barhydt, 20 Nebr. 625, 31 N. W. 488; Studebaker Bros. Mfg. Co. *v.* McCargur, 20 Nebr. 500, 30 N. W. 686; Curtiss *v.* McCune, 4 Nebr. (Unoff.) 483, 94 N. W. 984.

New Hampshire.— Johnson *v.* Brown, 31 N. H. 405; Page *v.* Pierce, 26 N. H. 317.

Oklahoma.— Miller *v.* Campbell Commission Co., 13 Okla. 75, 74 Pac. 507.

South Carolina.— Muller *v.* Wadlington, 5 S. C. 342.

Vermont.— Blair *v.* White, 61 Vt. 110, 17 Atl. 49; Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414; Langdon *v.* Keith, 9 Vt. 299.

Virginia.— Glaize *v.* Glaize, 79 Va. 429.

See 35 Cent. Dig. tit. "Mortgages," § 622.

Interest coupons.— This rule applies where interest coupons on a mortgage bond are detached and separately assigned to a third person. Champion *v.* Hartford Inv. Co., 45 Kan. 103, 25 Pac. 590, 10 L. R. A. 754; Whitney *v.* Lowe, 59 Nebr. 87, 80 N. W. 266; New England L. & T. Co. *v.* Robinson, 56 Nebr. 50, 76 N. W. 415, 71 Am. St. Rep. 657; Curtiss *v.* McCune, 4 Nebr. (Unoff.) 483, 94 N. W. 984.

The assignment of a judgment for part of a debt secured by a mortgage, "with full power to take all necessary proceedings for its recovery," is an assignment of the debt and carries an interest in the mortgage *pro tanto.* Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

Agreement of parties.— By agreement of all the parties the holder of a mortgage may transfer by indorsement one of several notes secured thereby, without passing any interest in the mortgage. Rolston *v.* Brockway, 23 Wis. 407.

36. Stockton *v.* Johnson, 6 B. Mon. (Ky.) 408.

37. Moore *v.* Ware, 38 Me. 496. But *compare* Wright *v.* Parker, 2 Aik. (Vt.) 212.

38. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Hall, 58 Ala. 1; Nelson *v.* Dunn, 15 Ala. 501.

Arkansas.— Penzel *v.* Brookmire, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23.

Illinois.— Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

Indiana.— Parkhurst *v.* Watertown Steam-engine Co., 107 Ind. 594, 8 N. E. 635.

Mississippi.— Henderson *v.* Herrod, 10 Sm. & M. 631, 49 Am. Dec. 41.

Missouri.— Anderson *v.* Baumgartner, 27 Mo. 80.

Nebraska.— Guthrie *v.* Treat, 66 Nebr. 415, 92 N. W. 595, 103 Am. St. Rep. 718; Todd *v.* Cremer, 36 Nebr. 430, 54 N. W. 674.

New Hampshire.— Page *v.* Pierce, 26 N. H. 317.

New Jersey.— Stevenson *v.* Black, 1 N. J. Eq. 338.

Pennsylvania.— McLean's Appeal, 103 Pa. St. 255.

Vermont.— Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414; Wright *v.* Parker, 2 Aik. 212.

Washington.—Aberdeen First Nat. Bank *v.* Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

See 35 Cent. Dig. tit. "Mortgages," § 623.

39. Lincoln *v.* Emerson, 108 Mass. 87; Tobias *v.* New York, 17 Hun (N. Y.) 534.

40. Snyder *v.* Snyder, 131 Mich. 658, 92 N. W. 353; O'Grady *v.* Coe, 13 Hun (N. Y.) 598.

not going to the lawful power of the parties to make the transfer.[41] But if the assignment is made as security for the performance of a contract which is void for illegality, it transfers no title, although the original bond and mortgage may be perfectly free from objection.[42]

(II) *Induced by Fraud.* Where an assignment of a mortgage is procured, or its purchase induced, by false representations, false personation, artifice, or any other fraud, it is invalid and may be so declared in appropriate proceedings for that purpose or in a foreclosure suit;[43] and such fraud may invalidate the security in the hands of a purchaser from the assignee, if he was aware of circumstances which should have aroused his suspicions or put him upon inquiry.[44]

k. Proof of Assignment. To prove the title of one claiming to be the assignee of a mortgage, the instrument of transfer, duly acknowledged and recorded, is the best evidence.[45] Mere possession of the securities by a person other than the mortgagee or payee, without any written assignment or any indorsement of the note, is not enough.[46] And if the assignment was made by one as administrator of the mortgagee, the death of the latter and the official capacity of the assignor must be shown.[47] Payment of the consideration for the assignment may be proved by a receipt or acknowledgment in the assignment,[48] or *prima facie* by the

41. See Brown *v.* Newell, 64 S. C. 27, 41 S. E. 835; Literer *v.* Huddleston, (Tenn. Ch. App. 1898) 52 S. W. 1003; Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1 L. R. A. N. S. 891.

Limited interest of assignor.— The validity of an assignment of a mortgage is not impaired by showing that the assignor had a life-interest only, where it does not appear that the bulk of the estate at the death of the life-tenant was diminished thereby. Sutphen *v.* Ellis, 35 Mich. 446.

Mortgage for future advances.— Although a statute may forbid the giving of mortgages as security for future advances, yet, where the mortgage is given for an existing debt, an assignment of it is not within the prohibition of the statute, altbough made as security for future advances from the assignee to the mortgagee. Lime Rock Nat. Bank *v.* Mowry, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294.

Assignment to corporation ultra vires.— A junior mortgagee cannot impeach the senior mortgage and have it set aside, merely on the ground that the present holder of the senior lien, a corporation, which acquired it by assignment, was incapable under its charter of taking such assignment; because, if the assignment was void, the elder mortgage would still be a valid lien in favor of the assignor. Daniels *v.* Belvidere Cemetery Assoc., 193 Ill. 181, 61 N. E. 1031.

42. De Witt *v.* Brisbane, 16 N. Y. 508.

43. *Michigan.*— Webster *v.* Bailey, 31 Mich. 36.

Minnesota.— Conkey *v.* Dike, 17 Minn. 457.

New Jersey.— Borden *v.* White, 44 N. J. Eq. 291, 18 Atl. 57, 9 Atl. 25.

New York.— Hall *v.* Erwin, 66 N. Y. 649 [*affirming* 60 Barb. 349]; Smith *v.* Howlett, 21 Misc. 386, 47 N. Y. Suppl. 1002.

Pennsylvania.— *In re* Plankinton, 212 Pa. St. 235, 61 Atl. 888.

See 35 Cent. Dig. tit. "Mortgages," § 607.

For circumstances not sufficient to constitute fraud see Hippee *v.* Pond, 77 Iowa 235, 42 N. W. 192; Sample *v.* Bridgforth, 72 Miss. 293, 16 So. 876; Wood *v.* Condit, 34 N. J. Eq. 434; Collier *v.* Miller, 62 Hun (N. Y.) 99, 16 N. Y. Suppl. 633 [*affirmed* in 137 N. Y. 332, 33 N. E. 374]; Adams *v.* Green, 17 N. Y. Suppl. 921; Cheney *v.* Stone, 29 Fed. 885.

See 35 Cent. Dig. tit. "Mortgages," § 607.

Inadequacy of price.—Where the price paid for a mortgage is equal to the value of the land mortgaged, which has greatly depreciated, although only ten per cent of the face of the mortgage, the disproportion is not such proof of fraud as will justify a rescission of the contract, although the assignee knew, and the mortgagee did not know, that a subsequent solvent grantee of the land had assumed the payment of the mortgage. Opie *v.* Pacific Inv. Co., 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778.

44. Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 451.

45. Maillan *v.* Perron, 8 La. 138; Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58; *Re* Mara, 16 Ont. 391.

Presumption of ownership.—A statute providing that the title to notes secured by mortgage shall, after maturity, be conclusively presumed to be in the holder of the record title to the mortgage, does not apply to a mortgage recorded outside the state, although the transfer of the notes claimed to be invalidated by the statute took place in the state. Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33 (construing Acts (1892), c. 392).

46. Bilderback *v.* McConnell, 48 Mich. 345, 12 N. W. 195; Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661; Bowers *v.* Johnson, 49 N. Y. 432. And see Clayton's Estate, 5 N. Y. Suppl. 266, 17 N. Y. Civ. Proc. 68.

47. La Tourette *v.* Decker, 18 N. Y. Suppl. 840.

48. Westervelt *v.* Scott, 11 N. J. Eq. 80; Kinna *v.* Smith, 3 N. J. Eq. 14; Pryor *v.* Wood, 31 Pa. St. 142.

indorsement of the note secured, although the latter is not conclusive proof but may be explained.[49]

2. Conveyance of Premises by Mortgagee — a. Deed in General. Under the doctrine that a mortgage conveyed the legal title to the premises, it was held that a deed of conveyance by the mortgagee to a third person would pass not only such legal title but also all his interest in the mortgage and would therefore operate as an assignment of the debt secured;[50] and in some states this effect is still attributed to a deed given by a mortgagee who has taken and holds the actual possession of the estate.[51] But the modern conception of a mortgage gives it no other character than that of a mere lien or security for a debt; and hence the mortgagee's deed of the land does not operate to transfer the debt to the grantee,[52] unless the conveyance contains an express grant of the debt or obligation secured by the mortgage or such terms as will manifest clearly an intention of the parties that the debt should be assigned.[53] Where, however, the mortgagee attempts to foreclose, and purchases at the sale under his decree, takes possession, and then conveys to a third person, and the foreclosure sale proves to have been void, his

49. Horn *v.* Thompson, 31 N. H. 562.

50. *Alabama.*— Sadler *v.* Jefferson, 143 Ala. 669, 39 So. 380; Welsh *v.* Phillips, 54 Ala. 309, 25 Am. Rep. 679.

Indiana.— Givan *v.* Doe, 7 Blackf. 210.

Massachusetts.— Gould *v.* Newman, 6 Mass. 239. See also Wade *v.* Howard, 11 Pick. 289.

Michigan.— Niles *v.* Ransford, 1 Mich. 338, 51 Am. Dec. 95.

North Carolina.— Deans *v.* Gay, 132 N. C. 227, 43 S. E. 643, holding that when a mortgagee sells his "right, title, and interest," in the land, even if his vendee has no power to sell under the mortgage, he has such title as the mortgagee had.

Vermont.— King *v.* Harrington, 2 Aik. 33, 16 Am. Dec. 675.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108.

Canada.— McLellan *v.* Maitland, 3 Grant Ch. (U. C.) 164.

See 35 Cent. Dig. tit. "Mortgages," § 611.

51. Hooper *v.* Birchfield, 138 Ala. 423, 35 So. 351.

In Massachusetts a warranty deed from a mortgagee, who has entered upon the land for breach of condition of the mortgage, passes his title, and, although unaccompanied by a transfer or assignment of the mortgage notes, enables his grantee to maintain a writ of entry to foreclose the mortgage and, on producing and filing the notes to have a conditional judgment. Ruggles *v.* Barton, 13 Gray 506. And see Smith *v.* Hitchcock, 130 Mass. 570; Bown *v.* Smith, 116 Mass. 108; McSorley *v.* Larissa, 100 Mass. 270; Ruggles *v.* Barton, 13 Gray 506. But where a person, by taking possession of the mortgaged premises, disseizes the mortgagor, he also disseizes the mortgagee, and while the disseizor remains in possession, the deed of the mortgagee will not pass his interest in the premises. Poignard *v.* Smith, 8 Pick. 272.

In New Hampshire a deed of a mortgagee in possession, without an assignment of the debt, conveys his possession and his interest under and by virtue of the mortgage, and enables the grantee and those claiming under him to defend against a writ of entry on the part of the mortgagor, and also to maintain an action against all who do not show a better title, in fact, against all persons but the mortgagor and those claiming under him, and even as against them until redemption. Hinds *v.* Ballou, 44 N. H. 619; Lamprey *v.* Nudd, 29 N. H. 299; Hutchins *v.* Carleton, 19 N. H. 487; Wallace *v.* Goodall, 18 N. H. 439; Smith *v.* Smith, 15 N. H. 55. It is otherwise if the mortgagee is not in possession of the premises. Hobson *v.* Roles, 20 N. H. 41; Dearborn *v.* Taylor, 18 N. H. 153; Weeks *v.* Eaton, 15 N. H. 145; Smith *v.* Smith, *supra*; Ellison *v.* Daniels, 11 N. H. 274; Bell *v.* Morse, 6 N. H. 205; Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.

52. *California.*— Mack *v.* Wetzlar, 39 Cal. 247; Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Peters *v.* Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134.

Illinois.— Ellis *v.* Sisson, 96 Ill. 105; Delano *v.* Bennett, 90 Ill. 533. *Compare* Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222.

Indiana.— Johnson *v.* Cornett, 29 Ind. 59.

Iowa.— Swan *v.* Yaple, 35 Iowa 248.

Missouri.—Watson *v.* Hawkins, 60 Mo. 550.

New Jersey.— Devlin *v.* Collier, 53 N. J. L. 422, 22 Atl. 201.

New York.— Purdy *v.* Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

South Dakota.— Yankton Bldg., etc., Assoc. *v.* Dowling, 10 S. D. 540, 74 N. W. 438.

Tennessee.—McGan *v.* Marshall, 7 Humphr. 121.

See 35 Cent. Dig. tit. "Mortgages." § 611.

53. Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823; Everest *v.* Ferris, 16 Minn. 26; Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229; Gale *v.* Battin, 12 Minn. 287; Hill *v.* Edwards, 11 Minn. 22; McCammant *v.* Roberts, 87 Tex. 241, 27 S. W. 86.

Authority to collect debt.— Where a mortgagee gives a deed of the mortgaged land, containing an authorization to collect the mortgage debt to the grantee's use, such grantee may do so, although there is no legal

conveyance will be held to operate as an assignment of the mortgage,[54] and so also where he gives a deed in attempting to execute a power of sale contained in the mortgage, which deed proves to be defective or insufficient as a conveyance.[55]

b. Quitclaim Deed. A quitclaim deed given by a mortgagee is not generally regarded as operating as an assignment of the mortgage,[56] although in some states it may be accorded that effect at least in equity.[57]

c. Mortgage by Mortgagee. It has been held that a conveyance executed by a mortgagee of land to a third person, not as a deed in fee, but by way of mortgage, together with a delivery of the mortgage notes, will operate as an assignment of the mortgage.[58]

d. Conveyance by Grantee in Absolute Deed. A deed of land which is absolute in form but is intended by the parties merely as a security for a debt, being in legal effect a mortgage, a conveyance executed by the grantee therein to a third person, who has notice of the defeasible nature of the original deed, operates as an assignment of the mortgage and of the debt secured, and nothing more.[59]

e. Conveyance by Assignee of Mortgage. The case of a conveyance by an assignee or subsequent holder of a mortgage is governed by the same rules which apply in the case of the original mortgagee; that is, the deed may operate as an

assignment of the mortgage debt. Givan *v.* Tout, 7 Blackf. (Ind.) 210.

54. Cooke *v.* Cooper, 18 Oreg. 142, 22 Pac. 945, 17 Am. St. Rep. 709, 7 L. R. A. 273; Smithson Land Co. *v.* Brantigam, 16 Wash. 174, 47 Pac. 434; Brobst *v.* Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002.

55. Salvage *v.* Haydock, 68 N. H. 484, 44 Atl. 696; Williams *v.* Washington, 40 S. C. 457, 19 S. E. 1.

56. New Haven Sav., etc., Assoc. *v.* McPartlan, 40 Conn. 90; Johnson *v.* Lewis, 13 Minn. 364; Clark *v.* Clark, 56 N. H. 105; Furbush *v.* Goodwin, 25 N. H. 425; Hobson *v.* Roles, 20 N. H. 41; Weeks *v.* Eaton, 15 N. H. 145; Smith *v.* Smith, 15 N. H. 55; Ellison *v.* Daniels, 11 N. H. 274; Bell *v.* Morse, 6 N. H. 205. *Compare* Bell *v.* Woodward, 34 N. H. 90.

In Massachusetts one taking a conveyance of a mortgagee's interest by a quitclaim deed may claim as a *bona fide* purchaser, as against a grantee holding under a prior but unrecorded deed. Stark *v.* Boynton, 167 Mass. 443, 45 N. E. 764. And see Southwick *v.* Atlantic F. & M. Ins. Co., 133 Mass. 457. *Compare* Wolcott *v.* Winchester, 15 Gray 461.

57. Collamer *v.* Langdon, 29 Vt. 32.

In Maine a quitclaim deed given by the mortgagee to a third person is sufficient to assign the mortgage and all his interest under it, when the debt secured is not evidenced by any separate obligation (Dorkray *v.* Noble, 8 Me. 278), when it is accompanied by a delivery of the mortgage notes (Dikfield *v.* Newton, 41 Me. 221), when it is made by an executor of the mortgagee (Crooker *v.* Jewell, 31 Me. 306), or when the mortgagee is in possession (Conner *v.* Whitmore, 52 Me. 185); and in general when it is the intention of the parties that the deed shall be effectual to carry the mortgagee's interest in the estate (Johnson *v.* Leonards, 68 Me. 237). But it has been held that while the grantee in a quitclaim deed may be regarded as an equitable assignee of the mortgage, yet, if so, his rights will be cognizable only in equity, and the deed would be no defense to an ejectment against him. Lunt *v.* Lunt, 71 Me. 377.

58. Dudley *v.* Cadwell, 19 Conn. 218. And see Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Callaghan *v.* O'Brien, 136 Mass. 378. See, however, Aymar *v.* Bill, 5 Johns. Ch. (N. Y.) 570.

59. *California.*— Halsey *v.* Martin, 22 Cal. 645.

Georgia.— Cumming *v.* McDade, 118 Ga. 612, 45 S. E. 479. And see Clark *v.* Havard, 122 Ga. 273, 50 S. E. 108.

Illinois.— Brown *v.* Gaffney, 28 Ill. 149; Howat *v.* Howat, 101 Ill. App. 158. But where a third person, in addition to receiving a conveyance from the mortgagee, procures from the mortgagor an assignment of his equity of redemption, it invests him with the absolute title, such being the intention of the parties, notwithstanding his grantor held only a mortgage title to the land. Gannon *v.* Moles, 209 Ill. 180, 70 N. E. 689.

Indiana.— Mott *v.* Fiske, 155 Ind. 597, 58 N. E. 1053.

Iowa.— Radford *v.* Folsom, 58 Iowa 473, 12 N. W. 536.

Mississippi.— Klein *v.* McNamara, 54 Miss. 90.

Nebraska.—O'Neill State Bank *v.* Mathews, 45 Nebr. 659, 63 N. W. 930, 50 Am. St. Rep. 565; Eiseman *v.* Gallagher, 24 Nebr. 79, 37 N. W. 941.

New Jersey.— English *v.* Rainear, (Ch. 1903) 55 Atl. 41.

New York.— Decker *v.* Leonard, 6 Lans. 264.

Rhode Island.— Nichols *v.* Reynolds, 1 R. I. 30, 36 Am. Dec. 238.

South Dakota.— State *v.* Mellette, 16 S. D. 297, 92 N. W. 395.

See 35 Cent. Dig. tit. "Mortgages," § 615.

assignment of the security if the intention thereto is manifest or if accompanied by delivery of the evidences of debt.[60]

3. CONSTRUCTIVE AND EQUITABLE ASSIGNMENTS — a. In General. There are numerous cases in which courts of equity will recognize a third person as entitled to the rights and privileges of an assignee of a mortgage, although there has been no formal transfer of the security to him; as in the case of an attempted written assignment which proves defective or invalid,[61] an informal agreement to assign or to give the third person the benefit of the security,[62] an advance of money to the mortgagee under an agreement for the transfer of the mortgage as security,[63] a bequest of the mortgage,[64] the substitution of a new security which proves to be invalid,[65] or a transaction amounting *prima facie* to a discharge of the mortgage, but which should be held an assignment in order to carry out the meaning of the parties and effect justice to all.[66] An equitable assignment of a note secured by a mortgage may be made by a sale and delivery thereof, without indorsement of the note or a formal assignment of the mortgage.[67]

b. By Operation of Law. A constructive assignment of a mortgage may be brought about by a change in the legal relations of the parties, whereby one becomes entitled to the position of an assignee, without any formal transfer to him.[68] Thus a payment of the debt secured does not necessarily operate as a discharge of the mortgage; it may effect an assignment of it, if such result would best accord with justice and the intentions of the parties.[69] So the purchaser at a void foreclosure sale, who has paid his money, becomes an assignee of the mort-

60. See Woodbury *v.* Aikin, 13 Ill. 639; Swan *v.* Yaple, 35 Iowa 248; Bell *v.* Woodward, 34 N. H. 90. *Compare* Lanigan *v.* Sweany, 53 Ark. 185, 13 S. W. 740.

61. Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285; Raynor *v.* Raynor, 21 Hun (N. Y.) 36; Olmsted *v.* Elder, 2 Sandf. (N. Y.) 325; Partridge *v.* Partridge, 38 Pa. St. 78.

62. See Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118; *Ex p.* Rogers, 8 De G. M. & G. 271, 2 Jur. N. S. 480, 25 L. J. Bankr. 41, 57 Eng. Ch. 211, 44 Eng. Reprint 394. *Compare* Lumsden *v.* Manson, 96 Me. 357, 52 Atl. 783, holding that the fact that the assignee of a mortgage has agreed with the original mortgagor to purchase the mortgage or foreclose it, and, if not redeemed, to convey the property to him on agreed terms, does not entitle the purchaser from the mortgagor to have the mortgage and debt assigned to him.

63. *Alabama.*—McMillan *v.* Gordon, 4 Ala. 716.

Illinois.— Stelzich *v.* Weidel, 27 Ill. App. 177.

Massachusetts.— Smith *v.* Hitchcock, 130 Mass. 570; Freeman *v.* McGaw, 15 Pick. 82; Hunt *v.* Hunt, 14 Pick. 374, 25 Am. Dec. 400.

New York.— White *v.* Knapp, 8 Paige 173; Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

Ohio.— Cook *v.* Shiras, 1 Cinc. Super. Ct. 398.

See 35 Cent. Dig. tit. "Mortgages," § 618.

64. Densmore *v.* Savage, 110 Mich. 27, 67 N. W. 1103; Proctor *v.* Robinson, 35 Mich. 284.

65. Miller *v.* Childs, 120 Mich. 639, 79 N. W. 924.

66. Guckian *v.* Riley, 135 Mass. 71.

67. Greeley State Bank *v.* Line, 50 Nebr. 434, 69 N. W. 966.

68. Iglehart *v.* Bierce, 36 Ill. 133, holding that a mortgage executed to the receiver of an insolvent corporation may be sued upon in equity by his successor, in his own name, as equitable assignee.

Rights as against surety.— The payee of a note is entitled, by equitable assignment, to a proportionate share of the security of a mortgage given by the maker to a surety to indemnify him as surety on that and other notes named, when the maker is insolvent, although his right of action against the surety is barred by statute, and the mortgage assigned to and foreclosed by the payees in the other notes mentioned. Holt *v.* Penacook Sav. Bank, 62 N. H. 551.

Garnishment of mortgage debt.—Where, in proceedings in attachment, the process of garnishment is served upon one who is indebted to defendant on notes secured by mortgage, and judgment is rendered for plaintiff, the notes and mortgage are in legal effect assigned to plaintiff, and he may maintain an action to foreclose the mortgage. Alsdorf *v.* Reed, 45 Ohio St. 653, 17 N. E. 73.

69. Short *v.* Currier, 153 Mass. 182, 26 N. E. 444; McClaskey *v.* O'Brien, 16 W. Va. 791.

Rights of surety.— Where several bonds are secured by a mortgage, a surety, upon paying one of them to its assignee, becomes subrogated to all the rights of the assignee, and as such is in equity the assignee of a proportionate part of the mortgage, with the mortgagee as his trustee. Lynch *v.* Hancock, 14 S. C. 66.

Redemption by one of joint owners.— Where land encumbered by a mortgage is owned by joint tenants or tenants in common, and one of them redeems the property from a

gage, whether the sale was made in the ordinary statutory proceeding for foreclosure,[70] or in the attempt to execute a power of sale contained in the mortgage.[71]

c. By Paying Off Encumbrances. It is also a general rule that payment of a mortgage debt by one not directly liable for it, but who has an interest to protect against the lien of the mortgage, will operate as an assignment of the mortgage to him, if the intention was not to extinguish the mortgage but to hold it.[72] This rule applies in the case of a purchaser of the mortgaged premises,[73] and also where the payment is made by a judgment creditor or junior mortgagee.[74]

d. Compelling Assignment. A mortgagor cannot compel the holder of the mortgage to receive payment of the amount due, from a third person, and assign the mortgage to the latter;[75] and when a third person has become entitled to succeed to the rights of the mortgagee, the courts will not generally order or compel the latter to execute a formal assignment of the security, because the rights of such third person can be perfectly well worked out by the application of equitable principles, without his holding the formal title to the mortgage.[76] But an assignment may be ordered where it is necessary to protect an unquestioned right, which cannot be made effective without the legal title to the securities, or to prevent a manifest injustice.[77] The right to redeem a mortgage does not carry with it the right, on such redemption, to an assignment of the mortgage, unless the redeeming party has the position of a surety or can be regarded as a surety for the mortgage debt.[78]

C. Recording Assignment — 1. Necessity of Record and Effect of Failure to Record. In many states the recording acts are expressly made applicable to

foreclosure by paying the entire amount due, he is entitled to hold the mortgage as an equitable assignee, for the purpose of compelling the others to contribute to his reimbursement, or to enable him to obtain the whole title to the property if they decline to do so. Hubbard *v.* Ascutney Mill-Dam Co., 20 Vt. 402, 50 Am. Dec. 41.

70. Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; Muir *v.* Berkshire, 52 Ind. 149; Johnson *v.* Robertson, 34 Md. 165; Robinson *v.* Ryan, 25 N. Y. 320; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429. And see *infra*, XXI, H, 7, c, (II), (D).

71. Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229; Holmes *v.* Turner's Falls Co., 142 Mass. 590, 8 N. E. 646; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Hayes *v.* Lienlokken, 48 Wis. 509, 4 N. W. 584.

72. Booker *v.* Anderson, 35 Ill. 66.

Where an administrator, with his own money, pays off a note and mortgage given by his intestate, it will not extinguish the debt, or discharge the mortgage, but may be regarded as an equitable assignment of the security to the administrator. Goodbody *v.* Goodbody, 95 Ill. 456.

73. Stiger *v.* Bent, 111 Ill. 328; Wheeler *v.* Willard, 44 Vt. 640; Walker *v.* King, 44 Vt. 601; Moore *v.* Cord, 14 Wis. 213.

74. *California.*— Swift *v.* Kraemer, 13 Cal. 526, 74 Am. Dec. 603.

Illinois.— Ebert *v.* Gerding, 116 Ill. 216, 5 N. E. 591; Tyrrell *v.* Ward, 102 Ill. 29; Pursley *v.* Forth, 82 Ill. 327; Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295].

New Hampshire.— Bacon *v.* Goodnow, 59 N. H. 415.

New York.— Magilton *v.* Holbert, 52 Hun 444, 5 N. Y. Suppl. 507.

Vermont.— Ward *v.* Seymour, 51 Vt. 320.

United States.— U. S. Bank *v.* Peters, 13 Pet. 123, 10 L. ed. 89; Dodge *v.* Fuller, 48 Fed. 347, 2 Flipp. 603.

75. McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11; Holland *v.* Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

76. *Illinois.*— Handley *v.* Munsell, 109 Ill. 362.

Maine.— Lumsden *v.* Manson, 96 Me. 357, 52 Atl. 783.

Massachusetts.— Blunt *v.* Norris, 123 Mass. 55, 25 Am. Rep. 14; Lamb *v.* Montague, 112 Mass. 352; Butler *v.* Taylor, 5 Gray 455. But see Morris *v.* Bacon, 123 Mass. 58, 25 Am. Rep. 17.

Pennsylvania.— Bishop *v.* Ogden, 9 Phila. 524.

Canada.— Gooderham *v.* Traders Bank, 16 Ont. 438; Rogers *v.* Wilson, 12 Ont. Pr. 322.

77. Twombly *v.* Cassidy, 82 N. Y. 155; Ellsworth *v.* Lockwood, 42 N. Y. 89; Bayles *v.* Husted, 40 Hun (N. Y.) 376; Johnson *v.* Zink, 52 Barb. (N. Y.) 396 [*affirmed* in 51 N. Y. 333]; Dauchy *v.* Bennett, 7 How. Pr. (N. Y.) 375; Mount *v.* Suydam, 4 Sandf. Ch. (N. Y.) 399. And see Lyon's Appeal, 61 Pa. St. 15.

78. Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Ellsworth *v.* Lockwood, 42 N. Y. 89. But see Averill *v.* Taylor, 8 N. Y. 44.

A widow, to protect her dower, may compel the assignment of a mortgage on redeeming it. Bayles *v.* Husted, 40 Hun (N. Y.) 376.

assignments of mortgages,[79] or such instruments are held by the courts to be "conveyances" or otherwise to be within the meaning and intent of those statutes.[80] Where this is the case, an assignment of a mortgage will be entitled to record, if in due form and acknowledged,[81] and when recorded will impart constructive notice of the rights of the assignee to all third persons dealing with either the mortgage or the property affected after such recording;[82] and conversely, the failure to record it will invalidate the assignment as against subsequent purchasers or lienors in good faith and without actual notice,[83] and will leave the assignee at the mercy of his assignor with respect to receiving payment or discharging the mortgage,[84] although it will not destroy the validity of the mortgage or of the assignment as against the mortgagor or impair the right of the assignee to fore-

79. See the statutes of the different states. And see Artz *v.* Yeager, 30 Ind. App. 677, 66 N. E. 917; Perry *v.* Fisher, 30 Ind. App. 261, 65 N. E. 935. But see Dixon *v.* Hunter, 57 Ind. 278; Hasselman *v.* McKernan, 50 Ind. 441, decided before the enactment of this statute.

80. *Illinois.*— Williams *v.* Pelley, 96 Ill. App. 346. And see Smith *v.* Keohane, 6 Ill. App. 585 [*reversed* on other grounds in 97 Ill. 156]. But see Walker *v.* Dement, 42 Ill. 272.

Iowa.— Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; Parmenter *v.* Oakley, 69 Iowa 388, 28 N. W. 653; Bowling *v.* Cook, 39 Iowa 200; McClure *v.* Burris, 16 Iowa 591; Indiana State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390.

Maine.—Mitchell *v.* Burnham, 44 Me. 286.

Massachusetts.— Swasey *v.* Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368; Wolcott *v.* Winchester, 15 Gray 461; Clark *v.* Jenkins, 5 Pick. 280.

Minnesota.— See Huitink *v.* Thompson, 95 Minn. 392, 104 N. W. 237, 111 Am. St. Rep. 476.

New York.— Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Decker *v.* Boice, 83 N. Y. 215; Viele *v.* Judson, 82 N. Y. 32; Westbrook *v.* Gleason, 79 N. Y. 23; Weideman *v.* Zielinska, 102 N. Y. App. Div. 163, 92 N. Y. Suppl. 493; Briggs *v.* Thompson, 86 Hun 607, 33 N. Y. Suppl. 765; Davies *v.* Jones, 29 Misc. 253, 61 N. Y. Suppl. 291; New York Sav. Bank *v.* Frank, 56 How. Pr. 403 [*affirmed* in 45 N. Y. Super. Ct. 404]; Vanderkemp *v.* Shelton, 11 Paige 28. *Compare* Purdy *v.* Huntington, 46 Barb. 389 [*reversed* on other grounds in 42 N. Y. 334, 1 Am. Rep. 532]. Prior to 1821, it was not necessary that the assignment of a mortgage should be recorded in order to protect the assignee. James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475. The fact that a mortgage is assigned as collateral security for a sum less than its amount does not make it a mortgage of a mortgage so as to subject it to the statutes relating to chattel mortgages. Harrison *v.* Burlingame, 48 Hun 212.

North Dakota.— Henniges *v.* Paschke, 9 N. D. 489, 84 N. W. 350, 81 Am. St. Rep. 588.

Pennsylvania.— Pepper's Appeal, 77 Pa. St. 373; Philips *v.* Lewiston Bank, 18 Pa. St. 394. These cases practically overrule Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566.

Utah.— Donaldson *v.* Grant, 15 Utah 231, 49 Pac. 779.

Vermont.— Torrey *v.* Deavitt, 53 Vt. 331. *Compare* Pratt *v.* Bennington Bank, 10 Vt. 293, 33 Am. Dec. 201.

See 35 Cent. Dig. tit. "Mortgages," § 599.

81. Fisher *v.* Cowles, 41 Kan. 418, 21 Pac. 228 (the recording of an assignment of a mortgage which is not acknowledged is ineffective); Potter *v.* Stransky, 48 Wis. 235, 4 N. W. 95 (an assignment of a mortgage with only one attesting witness is not entitled to record).

82. *California.*— Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483.

Minnesota.— Robbins *v.* Larson, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572.

New Jersey.—Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757; Stein *v.* Sullivan, 31 N. J. Eq. 409.

New York.— Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Viele *v.* Judson, 82 N. Y. 32; Larned *v.* Donovan, 84 Hun 533, 32 N. Y. Suppl. 731; Yates County Nat. Bank *v.* Baldwin, 43 Hun 136; St. John *v.* Spaulding, 1 Thomps. & C. 483. *Compare* James *v.* Johnson, 6 Johns. Ch. 417 [*reversed* on other grounds in 2 Cow. 246, 14 Am. Dec. 475].

Pennsylvania.— Pepper's Appeal, 77 Pa. St. 373; Leech *v.* Bonsall, 9 Phila. 204; Neide *v.* Pennypacker, 9 Phila. 86.

83. *Indiana.*— Citizens' State Bank *v.* Julian, 153 Ind. 655, 55 N. E. 1007.

Iowa.— Jenks *v.* Shaw, 99 Iowa 604, 68 N. W. 900, 61 Am. St. Rep. 256.

Michigan.— Pritchard *v.* Kalamazoo College, 82 Mich. 587, 47 N. W. 31.

New Jersey.— Cannon *v.* Wright, 49 N. J. Eq. 17, 23 Atl. 285.

New York.— Breed *v.* Auburn Nat. Bank, 171 N. Y. 648, 63 N. E. 1115; Crane *v.* Turner, 67 N. Y. 437; Greene *v.* Warnick, 64 N. Y. 220. But it has been held that the record of a mortgage avails an assignee thereof as against one taking a second mortgage subsequent to the assignment, although the assignment is not recorded. Spicer *v.* Ft. Edward First Nat. Bank, 170 N. Y. 562, 62 N. E. 1100 [*affirming* 55 N. Y. App. Div. 172, 66 N. Y. Suppl. 902].

North Dakota.— Henniges *v.* Paschke, 9 N. D. 489, 84 N. W. 350, 81 Am. St. Rep. 588.

South Dakota.— State *v.* Coughran, (1905) 103 N. W. 31.

84. Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep.

close where no rights of third persons intervene.[85] On the other hand the laws of several states either do not require or do not permit the recording of an assignment of a mortgage;[86] and where this is the case the rights of an assignee are in no way affected by the fact that his assignment is not of record.[87]

2. Mode and Sufficiency. The assignment of a mortgage is generally to be recorded in the same manner as the mortgage itself or any other instrument relating to lands.[88] In the absence of a statute requiring the record of the assignment to be made on the margin of the record of the mortgage, it is not the duty of the recorder to note the assignment on such margin, the assignment itself being duly recorded;[89] and the assignment is sufficiently connected with the mortgage, for purposes of identification, by being recorded on a different page, with cross-references from each to the other.[90] The certificate of the registry of an assignment of a mortgage, required by statute to be indorsed thereon, is evidence of its record.[91]

D. Construction and Operation — 1. In General — a. Operation and Effect of Assignment. The effect of a valid assignment of a mortgage is to transfer to the assignee all the rights and interests of the assignor,[92] leaving in the latter

655; Peaks *v.* Dexter, 82 Me. 85, 19 Atl. 100; Lea *v.* Welsh, 12 Ohio Cir. Ct. 670, 4 Ohio Cir. Dec. 190; Strait *v.* Ady, 6 Ohio S. & C. Pl. Dec. 263, 4 Ohio N. P. 86; *In re* Mortgage, 5 Ohio S. & C. Pl. Dec. 556, 7 Ohio N. P. 534; Passumpsic Sav. Bank *v.* Buck, 71 Vt. 190, 44 Atl. 92.

85. *Indiana.*— Zehner *v.* Johnston, 22 Ind. App. 452, 53 N. E. 1080.

Iowa.— Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109, 68 N. W. 587, 61 Am. St. Rep. 226.

Kansas.— Hulme *v.* Neosho Valley Inv. Co., 63 Kan. 886, 66 Pac. 239; Neosho Valley Inv. Co. *v.* Sharpless, 63 Kan. 885, 65 Pac. 667; Burt *v.* Moore, 62 Kan. 536, 64 Pac. 57; Erving *v.* Phelps, etc., Windmill Co., 52 Kan. 787, 35 Pac. 800.

Maryland.— Byles *v.* Tome, 39 Md. 461.

Massachusetts.— Willcox *v.* Foster, 132 Mass. 320.

North Carolina.— Williams *v.* Brown, 127 N. C. 51, 37 S. E. 86.

Rhode Island.— Bacon *v.* Wood, 22 R. I. 255, 47 Atl. 388.

Vermont.— King *v.* Harrington, 2 Aik. 33, 16 Am. Dec. 675.

In Minnesota, to authorize the foreclosure by advertisement of a mortgage by an assignee thereof, the assignment must have been duly acknowledged and recorded; and if it is not properly acknowledged, so as to entitle it to be recorded, the foreclosure is a nullity. Lowry *v.* Mayo, 41 Minn. 388, 43 N. W. 78.

86. See the statutes of the different states. And see U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Bartlett *v.* Eddy, 49 Mo. App. 32; Hull *v.* Diehl, 21 Mont. 71, 52 Pac. 782; Wilson *v.* Kimball, 27 N. H. 300; Williams *v.* Paysinger, 15 S. C. 171; Howard *v.* Shaw, 10 Wash. 151, 38 Pac. 746.

87. *Louisiana.*— Rouquette *v.* His Creditors, 9 La. 154.

New Hampshire.— Wilson *v.* Kimball, 27 N. H. 300.

Oregon.— Bamberger *v.* Geiser, 24 Oreg. 203, 33 Pac. 609; Watson *v.* Dundee Mortg., etc., Co., 12 Oreg. 474, 8 Pac. 548.

South Carolina.— Singleton *v.* Singleton, 60 S. C. 216, 38 S. E. 462; Williams *v.* Paysinger, 15 S. C. 171.

United States.— Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,556, 5 Sawy. 336.

88. Merrill *v.* Lucc, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844; Henderson *v.* Pilgrim, 22 Tex. 464.

89. Viele *v.* Judson, 82 N. Y. 32 [*overruling* Moore *v.* Sloan, 50 Barb. (N. Y.) 442].

90. Soule *v.* Corbley, 65 Mich. 109, 31 N. W. 785; Carli *v.* Taylor, 15 Minn. 171; Viele *v.* Judson, 82 N. Y. 32.

91. Jakway *v.* Jenison, 46 Mich. 521, 9 N. W. 836.

92. Densmore *v.* Savage, 110 Mich. 27, 67 N. W. 1103; Carpenter *v.* O'Dougherty, 67 Barb. (N. Y.) 397 [*affirmed* in 2 Thomps. & C. 427]; Paine *v.* French, 4 Ohio 318.

Partial assignment.— The assignment of a mortgage and a part of the notes secured thereby does not operate as an assignment of the residue of the notes. Stockton *v.* Johnson, 6 B. Mon. (Ky.) 408.

Merger of previous debt.— A promissory note is merged in an assignment of a bond and mortgage for the same amount. Hall *v.* Hopkins, 14 Mo. 450.

Effect on pending foreclosure.— A mortgage may he assigned after an entry for the purpose of foreclosure, and the assignment will not of itself stay the foreclosure. Deming *v.* Comings, 11 N. H. 474.

Assignment of substituted mortgage.— Where a mortgage is given as a substitute for another, which is canceled, and in an action hy the assignee of the second mortgage, the court permits defendants to elect which of the two mortgages they will have foreclosed, and they elect to have the first one foreclosed, equity will treat the assign-

nothing which would be available for the satisfaction of his creditors or as assets of his estate.[93] Payment of the amount of the mortgage debt by one who intends and understands that he is taking it as an assignee does not extinguish the debt nor effect a cancellation or discharge of the mortgage;[94] on the contrary, the original mortgagee, even if the legal title to the mortgage has not been transferred, will thereafter hold it in trust for the assignee,[95] and cannot release or discharge any portion of the debt secured or of the property covered, to the prejudice of the rights of the assignee.[96]

b. Assignment of Mortgage as Transfer of Debt. Although a mortgage by itself, and without the debt secured, is not a proper subject for assignment,[97] yet an assignment of the mortgage coupled with anything showing the intention of the parties to pass the secured debt as well may operate to transfer to the assignee the ownership of such debt and the right to collect it, as where the assignment is expressed to include "all sums due or to become due" on the mortgage, or "the notes therein described," or the "right to receive payment" of such notes.[98]

c. Title Conveyed. Where a mortgagee is regarded as vested with the legal title to the lands mortgaged, an assignment of the mortgage may be considered as passing such title to the assignee.[99] According to the doctrine generally prevailing, however, no title to the land itself, nor any estate therein, is created or transferred by the assignment;[1] but if it is in proper form and otherwise valid it will invest the assignee with the full legal title to the mortgage and give him

ment of the second mortgage as covering the first one. Conklin *v.* Buckley, 19 Wash. 262, 53 Pac. 52.

93. Parsons *v.* Fairbanks, 22 Cal. 343; Hall *v.* Redding, 13 Cal. 214; Crosby *v.* Brownson, 2 Day (Conn.) 425; Schock *v.* Lesley, 4 Del. Ch. 96; Briggs *v.* Hannowald, 35 Mich. 474.

Mortgagee selling as agent.— Where one purchases a mortgage with knowledge that the mortgagee in selling is acting as the agent of the mortgagor, he in effect loans to the mortgagor, on the mortgage, the amount actually paid therefor. Smithers *v.* Heather, 25 Mich. 447.

94. Crane *v.* March, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; Robinson *v.* Urquhart, 12 N. J. Eq. 515; Coonley *v.* Coonley, Lalor (N. Y.) 312; Carter *v.* Taylor, 3 Head (Tenn.) 30.

95. Bryant *v.* Damon, 6 Gray (Mass.) 564; Crane *v.* March, 4 Pick. (Mass.) 131, 16 Am. Dec. 329.

96. Dick *v.* Mawry, 9 Sm. & M. (Miss.) 448; Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73.

97. See *supra*, XVI, B, 1, h.

98. *California.*— Miller *v.* Hicken, 92 Cal. 229, 28 Pac. 339.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329.

Indiana.— French *v.* Turner, 15 Ind. 59.

Iowa.— Pope *v.* Jacobus, 10 Iowa 262, holding that an assignment of the mortgage, coupled with a verbal assignment of the debt, may be good as between the parties.

Maryland.— Hewell *v.* Coulbourn, 54 Md. 59.

Michigan.— Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58. The assignment of a mortgage without delivering the securities does not transfer the securities, unless such was the intent of the parties and a consideration was paid. Fletcher *v.* Carpenter, 37 Mich. 412.

New York.—Fitts *v.* Beardsley, 126 N. Y. 645, 27 N. E. 853; Andrews *v.* Townshend, 56 N. Y. Super. Ct. 140, 1 N. Y. Suppl. 421; Larned *v.* Donovan, 29 N. Y. Suppl. 825, 31 Abb. N. Cas. 308.

Vermont.— King *v.* Harrington, 2 Aik. 33, 16 Am. Dec. 675.

Virginia.— Ayres *v.* Wells, (1889) 9 S. E. 326.

United States.—Baldwin *v.* Raplee, 2 Fed. Cas. No. 801, 4 Ben. 433.

See 35 Cent. Dig. tit. "Mortgages," § 625.

99. Hoitt *v.* Webb, 36 N. H. 158. See, however, Williams *v.* Teachey, 85 N. C. 402.

Words of inheritance omitted.— An assignment by a mortgagee, signed, sealed, acknowledged, and recorded, purporting to pass absolutely all his interest in the premises and the debt secured by the mortgage, vests the assignee with all the mortgagee's rights, and not merely with a life-estate, although no words of inheritance are used therein. Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785.

Assignment as collateral or for collection. — An assignment of a mortgage merely as collateral security, or for the purpose of collection by the assignee, does not convey the legal title to the latter. Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Fortier *v.* Darst, 31 Ill. 212.

1. Jackson *v.* Myers, 11 Wend. (N. Y.) 533; Wright *v.* Sperry, 21 Wis. 331; Cottrell *v.* Adams, 6 Fed. Cas. No. 3,272, 2 Biss. 351.

Where the grantee in an absolute deed, given as security for notes, indorsed on the deed a transfer to plaintiff of the notes and his rights under the deed, it was held that such transfer did not pass title to the land to plaintiff so that he could reconvey to the

all the rights of a mortgagee,[2] although it will not transfer to him any other estate in the land of which the assignor may be seized, nor any independent and after-acquired title, whether coming to him by deed, by second mortgage, or otherwise.[3] And if the mortgage debt has been paid, or the condition of the mortgage otherwise saved, an assignment thereafter made passes nothing at all.[4]

d. Rights Passing as Incidents. A formal and valid assignment of a mortgage and the debt which it secures will generally invest the assignee with all the rights, powers, and equities possessed by the mortgagee,[5] including the benefit of any collateral undertaking, obligation, or security which constitutes a part of the mortgage security,[6] any covenant to pay the mortgage debt,[7] any right which the mortgagee may have as to receiving the rents and profits, coupled with a corresponding obligation as to their application,[8] any benefit from existing insurance or the proceeds of the policies,[9] as also the benefit of any entry or possession on

debtor on payment of the notes. Henry *v.* McAllister, 93 Ga. 667, 20 S. E. 66.

2. *Iowa.*— Hull *v.* McCall, 13 Iowa 467.

Maryland.— McCauseland *v.* Baltimore Humane Impartial Soc., 95 Md. 741, 52 Atl. 918.

Massachusetts.— Marcus *v.* Dyer, 174 Mass. 64, 54 N. E. 352; Merritt *v.* Harris, 102 Mass. 326.

New York.— Caryl *v.* Williams, 7 Lans. 416; Severance *v.* Griffith, 2 Lans. 38.

Pennsylvania.— Pryor *v.* Wood, 31 Pa. St. 142.

See 35 Cent. Dig. tit. "Mortgages," § 625.

3. Barnstable Sav. Bank *v.* Barrett, 122 Mass. 172; Weed Sewing Mach. Co. *v.* Emerson, 115 Mass. 554; Durgin *v.* Busfield, 114 Mass. 492.

4. Flye *v.* Berry, 181 Mass. 442, 63 N. E. 1071; Abbott *v.* Upton, 19 Pick. (Mass.) 434.

5. Bulkley *v.* Chapman, 9 Conn. 5; Beatty *v.* Clement, 12 La. Ann. 82; Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444.

A tax title acquired by the mortgagor after the assignment inures to the benefit of the assignee of the mortgage. Gardiner *v.* Gerrish, 23 Me. 46.

Right to purchase at foreclosure sale.— Where a mortgage contains a clause providing that it shall be lawful for the mortgagee to purchase the property at any sale made under the power of sale contained in the mortgage, such authority passes to his assignee as a part of the security. Smith *v.* Lusk, 119 Ala. 394, 24 So. 256.

Right to accelerate maturity of debt.— Where the mortgage gives the mortgagee the privilege of electing to declare the entire debt due upon default in the payment of any instalment of principal or interest when due, the assignee of the mortgage may exercise this option, and his election will bind both the mortgagor and the assignor. Stewart *v.* Ludlow, 68 Ill. App. 349; Swett *v.* Stark, 31 Fed. 858.

6. *Alabama.*— Buell *v.* Underwood, 65 Ala. 285.

Michigan.—Byles *v.* Lawrence, 35 Mich. 458.

Minnesota.— Longfellow *v.* McGregor, 61 Minn. 494, 63 N. W. 1032, holding that the assignment of a mortgage and the debt which it secures will pass to the assignee a bond given by the mortgagor to the mortgagee conditioned to rebuild a house on the mortgaged premises which had been burned.

New York.— Curtis *v.* Tyler, 9 Paige 432.

Pennsylvania.—Philips *v.* Lewistown Bank, 18 Pa. St. 394.

See 35 Cent. Dig. tit. "Mortgages," § 629.

But see Kansas City Inv. Co. *v.* Fulton, 86 Mo. App. 138, holding that the transfer of a note secured by mortgage on real estate will not operate as a transfer of a covenant for title contained in the deed conveying the land to the mortgagor.

7. Wilcox *v.* Campbell, 35 Hun (N. Y.) 254 [*affirmed* in 106 N. Y. 325, 12 N. E. 823]. See, however, Gable *v.* Scarlett, 56 Md. 169, holding that the assignee of a mortgage cannot maintain a suit in his own name upon the agreement of a vendee of the mortgagor, made with the latter, to pay the debt, without an assignment of the agreement or covenant to himself.

8. *Alabama.*—Thornton *v.* Strauss, 79 Ala. 164, not rent past due at the time of the assignment.

Minnesota.— Spencer *v.* Levering, 8 Minn. 461.

New Jersey.— Ackerson *v.* Lodi Branch R. Co., 31 N. J. Eq. 42.

New York.— Jackson *v.* Myers, 11 Wend. 533.

Rhode Island.— Hall *v.* Westcott, 17 R. I. 504, 23 Atl. 25.

South Carolina.— Boyce *v.* Boyce, 6 Rich. Eq. 302.

Wisconsin.—Ackerman *v.* Lyman, 20 Wis. 454.

United States.— Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143; Upham *v.* Brooks, 28 Fed. Cas. No. 16,797, 2 Woodb. & M. 407.

See 35 Cent. Dig. tit. "Mortgages," § 631.

Royalties.— Where the coal under land is the most valuable part of it, royalties paid for an exclusive lease are part of the *corpus* of the estate, and not a profit; and, as between the owner or his assignee in bankruptcy and the assignee of a mortgage executed prior to the lease, such royalties go to the latter. Duff's Appeal, 10 Pa. Cas. 483, 14 Atl. 364.

9. Haskell *v.* Monmouth F. Ins. Co., 52 Me. 128.

the part of the mortgagee,[10] any right of priority possessed by the mortgage,[11] and the right in equity to have it reformed by the correction of a mistake or omission.[12] And while the assignee will have no right to maintain an action for waste committed upon the mortgaged property, or for any other injury to it or conversion of it, happening before the assignment to him, he may sue any person who injures the property or does any act diminishing the value of the security, after the assignment.[13]

e. Right to Execute Power of Sale. A power of sale contained in a mortgage is a part of the security and passes to, and may be exercised by, an assignee of the mortgage and debt, this being expressly provided by statute in some jurisdictions,[14] and cannot be exercised by the original mortgagee after making such assignment,[15] provided the assignment was valid and in such form as to pass both the mortgage and the secured debt,[16] for an assignment of the mortgage alone without the debt, or of a mortgage securing a debt which is not evidenced by any instrument assignable at law, is not effective in law and cannot pass the power of sale to the assignee.[17] And an assignment will not carry a power of sale which was so expressed in the mortgage as to be personal to the mortgagee, as where it is given only to the mortgagee as such, or his "representatives or attorney," without mentioning "assigns."[18]

10. Howard *v.* Handy, 35 N. H. 315; Brown *v.* Cram, 1 N. H. 169.

Agreement as to possession.— An oral agreement between the mortgagor and the mortgagee that the former shall have possession until demanded by the latter has no force as against an assignee of the mortgage. Downing *v.* Sullivan, 64 Conn. 1, 29 Atl. 130.

11. Coonrod *v.* Kelly, 119 Fed. 841, 56 C. C. A. 353; Zeis *v.* Potter, 105 Fed. 671, 44 C. C. A. 665. And see Havighorst *v.* Bowen, 116 Ill. App. 230 [*affirmed* in 214 Ill. 90, 73 N. E. 402], holding that a purchaser of notes secured by a trust deed in good faith and in due course of business is regarded as having the superior equity over another claim which is stale and apparently acquired by way of speculation and not in good faith.

12. Frink *v.* Neal, 37 Ill. App. 621; Ruhling *v.* Hackett, 1 Nev. 360.

13. *Illinois.*—Bowers *v.* Bodley, 4 Ill. App. 279.

Maine.— Kimball *v.* Lewiston Steam Mill Co., 55 Me. 494.

Mississippi.— Gabbert *v.* Wallace, 66 Miss. 618, 5 So. 394.

Pennsylvania.— Overton *v.* Williston, 31 Pa. St. 155.

United States.— Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243.

14. *Alabama.*— Ward *v.* Ward, 108 Ala. 278, 19 So. 354; Johnson *v.* Beard, 93 Ala. 96, 9 So. 535; Martinez *v.* Lindsey, 91 Ala. 334, 8 So. 787; Buell *v.* Underwood, 65 Ala. 285; McGuire *v.* Van Pelt, 55 Ala. 344.

Georgia.— Ray *v.* Home, etc., Inv., etc., Co., 98 Ga. 122, 26 S. E. 56.

Illinois.— Sanford *v.* Kane, 133 Ill. 199, 24 N. E. 414, 23 Am. St. Rep. 602, 8 L. R. A. 724; Bush *v.* Sherman, 80 Ill. 160; Heath *v.* Hall, 60 Ill. 344; Strother *v.* Law, 54 Ill. 413; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Olds *v.* Cummings, 31 Ill. 188; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219.

Maryland.— Maslin *v.* Marshall, 94 Md. 480, 51 Atl. 85; Western Maryland R. Land, etc., Co. *v.* Goodwin, 77 Md. 271, 26 Atl. 319; Harnickell *v.* Orndorff, 35 Md. 341; Dill *v.* Satterfield, 34 Md. 52; Berry *v.* Skinner, 30 Md. 567. See also Taylor *v.* Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479.

Massachusetts.— Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; Varnum *v.* Meserve, 8 Allen 158.

Michigan.— Niles *v.* Ransford, 1 Mich. 338, 51 Am. Dec. 95. See also Olcott *v.* Crittenden, 68 Mich. 230, 36 N. W. 41.

Minnesota.— Hathorn *v.* Butler, 73 Minn. 15, 75 N. W. 743; Brown *v.* Delaney, 22 Minn. 349.

Missouri.— Pickett *v.* Jones, 63 Mo. 195.

New Hampshire.— Bell *v.* Twilight, 22 N. H. 500.

New York.— Slee *v.* Manhattan Co., 1 Paige 48.

Canada.— Barry *v.* Anderson, 18 Ont. App. 247.

See 35 Cent. Dig. tit. "Mortgages," § 1037.

15. Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Cushing *v.* Ayer, 25 Me. 383; Cohoes Co. *v.* Goss, 13 Barb. (N. Y.) 137.

16. Hickey *v.* Richards, 3 Dak. 345, 20 N. W. 428; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Sanborn *v.* Eads, 38 Minn. 211, 36 N. W. 338; Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661; Hussey *v.* Hill, 120 N. C. 312, 26 S. E. 919, 58 Am. St. Rep. 789; Dameron *v.* Eskridge, 104 N. C. 621, 10 S. E. 700.

17. Mason *v.* Ainsworth, 58 Ill. 163; Northern Cattle Co. *v.* Munro, 83 Minn. 37, 85 N. W. 919, 85 Am. St. Rep. 444; Morris *v.* McKnight, 1 N. D. 266, 47 N. W. 375. And see Bradford *v.* King, 18 R. I. 743, 31 Atl. 166.

18. Flower *v.* Elwood, 66 Ill. 438; Wilson *v.* Spring, 64 Ill. 14; Dolbear *v.* Norduft, 84

2. Priorities — a. In General. As a general rule a mortgage occupies the same relative rank and priority to other liens and claims on the property in the hands of an assignee as in the hands of the original mortgagee; such for instance is the rule in regard to judgments recovered after the execution of the mortgage, although before its assignment,[19] and so also as to the claims and equities of general creditors of the mortgagor,[20] subject to the question of the assignee's knowledge of such claims or equities, his ignorance of them, if in good faith and not the result of carelessness, generally entitling him to hold free from them.[21] The assignee will be preferred to an elder lien on the same premises of which he had no notice, actual or constructive, even though his assignor had knowledge of it;[22] and it is not necessary for the assignee of a second mortgage, in order to protect his equitable rights, to give notice of the assignment to the first mortgagee.[23]

b. Between Assignee of Recorded Mortgage and Prior Unrecorded Mortgage. The *bona fide* assignee of a note and mortgage on land, the mortgage being duly recorded, will have priority as against an elder but unrecorded mortgage of which he had no notice, although his assignor may have had notice thereof,[24] provided,

Mo. 619. But see Maslin *v.* Marshall, 94 Md. 480, 51 Atl. 85.

19. *Alabama.*— Martinez *v.* Lindsey, 91 Ala. 334, 8 So. 787.

Michigan.— Barnum *v.* Phenix, 60 Mich. 388, 27 N. W. 577.

New Jersey.— Lambertsville Nat. Bank *v.* Boss, (Ch. 1888) 13 Atl. 18.

Pennsylvania.— Fasholt *v.* Reed, 16 Serg. & R. 266. The assignee of a mortgage, prior to a judgment lien on the same land, will not be postponed to the judgment creditor by reason of the mortgagee being guarantor for the payment of the judgment, although the guaranty was given before the assignment was made. Moore's Appeal, 7 Watts & S. 298.

United States.— Cutler *v.* Clementson, 67 Fed. 409; Converse *v.* Michigan Dairy Co., 45 Fed. 18.

See 35 Cent. Dig. tit. "Mortgages," § 633.

20. Jones *v.* Quinnipiack Bank, 29 Conn. 25. But see Symes *v.* Hill, Quincy (Mass.) 318, holding that an assignment of a bond secured by a mortgage does not pass the land as against an attachment by creditors of the assignor before the assignment of the mortgage is recorded.

21. Graydon *v.* Church, 4 Mich. 646; Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; New York Sav. Bank *v.* Frank, 45 N. Y. Super. Ct. 404; Purser *v.* Anderson, 4 Edw. (N. Y.) 17. But see Simonson *v.* Falihee, 25 Hun (N. Y.) 570.

Assignment after payment.— An assignee of a note and mortgage before maturity and for value and without notice of payment has a lien superior to the assignee of a note and mortgage on the same property given in payment. Watson *v.* Wyman, 161 Mass. 96, 36 N. E. 692.

Where a release of a mortgage appears of record, executed by an attorney in fact, subsequent purchasers of the mortgage buy at their peril, although the power of attorney is not of record. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

22. Willis *v.* Vallette, 4 Metc. (Ky.) 186; Sprague *v.* Drew, (N. J. Ch. 1886) 6 Atl. 307. *Compare* Short *v.* Fogle, 42 Kan. 349, 22 Pac. 323, holding that it is otherwise if the assignee was informed in general terms that there was another mortgage on the property but made no effort to discover whether it was prior to his own or not.

Assignment of prior mortgage to mortgagor.— Where it appeared that a person who had given a mortgage on his lands, containing covenants of seizin, against encumbrances, and of warranty, took an assignment of a prior outstanding mortgage, there being no merger of estates, it was held that such prior mortgage must be postponed to the junior mortgage, on account of the covenants in the latter. Hooper *v.* Henry, 31 Minn. 264, 17 N. W. 476.

23. Swift *v.* Edson, 5 Conn. 531. But *compare* Hasselman *v.* Yandes, Wils. (Ind.) 276.

24. *Alabama.*— Harrison *v.* Yerby, (1893) 14 So. 321; Dulin *v.* Hunter, 98 Ala. 539, 13 So. 301.

Iowa.— Clasey *v.* Sigg, 51 Iowa 371, 1 N. W. 590.

Kansas.— Jackson *v.* Reid, 30 Kan. 10, 1 Pac. 308.

New York.— Paul *v.* Paul, 5 N. Y. Suppl. 743; Jackson *v.* Van Valkenburgh, 8 Cow. 260, holding that if the assignee of a second mortgage has notice of a prior unrecorded mortgage, he takes subject to it, and notice to the attorney who is employed to obtain the assignment will be notice to the principal. But the notice must be full and clear, and more than such as is barely sufficient to put a party upon inquiry. *Compare* Decker *v.* Boice, 83 N. Y. 215; David Stevenson Brewing Co. *v.* Iba, 12 Misc. 329, 33 N. Y. Suppl. 642.

North Dakota.— Morris *v.* Beecher, 1 N. D. 130, 45 N. W. 696.

Ohio.— Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846.

United States.— Coonrod *v.* Kelly, 119 Fed. 841, 56 C. C. A. 353 [*affirming* 113 Fed. 378].

See 35 Cent. Dig. tit. "Mortgages," § 634.

however, that in those states where the recording of assignments is required or permitted, the assignee must be the first to get his title on record; for if the elder mortgage is recorded before the assignment is recorded, the assignee will be postponed to it.[25]

c. Between Assignee and Junior Mortgagee. A senior mortgage has the same right of priority over a junior mortgage on the same premises after its assignment to a third person as before;[26] and, to preserve this priority, it is not necessary to record the assignment unless the statute so directs.[27] On the other hand, the lien of the assigned mortgage is liable to be postponed, in the hands of the assignee, by the same superior equities which would give the junior mortgage the preference over it in the hands of the assignor,[28] at least where the assignee had notice of such equities.[29]

d. Between Assignee and Subsequent Purchaser. There are cases holding that a purchaser or mortgagee of land cannot avoid a prior recorded mortgage on the ground that an assignment of such mortgage was not recorded.[30] But the doctrine more generally prevailing is that an assignment of a mortgage is a conveyance, and, if not recorded, is void as against subsequent purchasers of the mortgaged premises whose interests may be affected by such assignment, while, on the other hand, if the assignment is recorded, it imparts constructive notice of the assignee's rights to such subsequent purchasers.[31] The failure to record the assignment, however, is immaterial if the subsequent purchaser had actual knowledge of it.[32]

e. Successive Assignments of Same Mortgage — (i) *In General.* Where priority between successive assignments of the same mortgage is not fixed by priority of record, it must be determined by the relative strength of their equities, as fixed by such circumstances as that one of the assignees is a purchaser in good faith while the other is not;[33] that one relied, justifiably, upon the apparent legal

See, however, Conover *v.* Van Mater, 18 N. J. Eq. 481.

25. English *v.* Waples, 13 Iowa 57; Rumery *v.* Loy, 61 Nebr. 755, 86 N. W. 478; Westbrook *v.* Gleason, 79 N. Y. 23.

26. Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Angel *v.* Boner, 38 Barb. (N. Y.) 425; Grant *v.* Ludlow, 8 Ohio St. 1.

27. Pratt *v.* Bennington Bank, 10 Vt. 293, 33 Am. Dec. 201; Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,556, 5 Sawy. 336.

28. Bergen Sav. Bank *v.* Barrows, 30 N. J. Eq. 89; McFarland *v.* Gilchrist, 25 N. J. Eq. 487; Scheurer *v.* Brown, 67 N. Y. App. Div. 567, 73 N. Y. Suppl. 877; Conrad *v.* Corkum, 35 Nova Scotia 288.

29. Clason *v.* Shepherd, 6 Wis. 369, holding that an agreement by a first mortgagee, under seal, with a second mortgagee, to waive his prior lien, when recorded, is constructive notice to an assignee of the first mortgage.

30. Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Wilson *v.* Kimball, 27 N. H. 300; Bamberger *v.* Geiser, 24 Oreg. 203, 33 Pac. 609; Watson *v.* Dundee Mortg., etc., Inv. Co., 12 Oreg. 474, 8 Pac. 548; Smith *v.* Smith, 23 Tex. Civ. App. 304, 55 S. W. 541.

31. *Nebraska.*— Gillian *v.* McDowall, 66 Nebr. 814, 92 N. W. 991; Ames *v.* Miller, 65 Nebr. 204, 91 N. W. 250. Where a mortgage was duly executed and recorded and afterward assigned, but the assignment was not recorded, a subsequent deed by the mortgagor and mortgagee will not discharge the mortgage in the hands of a *bona fide* holder, the mortgage remaining on the record unsatisfied. Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302.

New York.— Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Purdy *v.* Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Smyth *v.* Knickerbocker L. Ins. Co., 21 Hun 241 [*affirmed* in 84 N. Y. 589]; Heilbrun *v.* Hammond, 13 Hun 474; Clark *v.* Ulrich, 14 N. Y. St. 4; Vanderkemp *v.* Shelton, 11 Paige 28; Mills *v.* Comstock, 5 Johns. Ch. 214. See, however, Curtis *v.* Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506 [*affirming* 10 Misc. 341, 31 N. Y. Suppl. 19]; Campbell *v.* Vedder, 1 Abb. Dec. 295, 3 Keyes 174; Miller *v.* Lindsley, 19 Hun 207.

Pennsylvania.—Brownback *v.* Ozias, 117 Pa. St. 87, 11 Atl. 301; Neide *v.* Pennypacker, 9 Phila. 86. But *compare* Gossin *v.* Brown, 11 Pa. St. 527; McCurdy *v.* Leslie, 2 Wkly. Notes Cas. 273.

South Dakota.— Pickford *v.* Peebles, 7 S. D. 166, 63 N. W. 779; Merrill *v.* Luce, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844.

Wisconsin.— Fallass *v.* Pierce, 30 Wis. 443.

Wyoming.— Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78.

See 35 Cent. Dig. tit. "Mortgages," § 637.

32. Miller *v.* Larned, 103 Ill. 562; Artz *v.* Yeager, 30 Ind. App. 677, 66 N. E. 917.

33. See Hoyt *v.* Thompson, 19 N. Y. 207; Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511; Batchel-

title;[34] that the later assignee knew of the earlier assignment;[35] that one of them failed to require the production and delivery to him of the note and mortgage with his assignment, thus charging him with notice that they were outstanding in the hands of someone else than the mortgagee;[36] or that one of them was an assignment as collateral while the other was an absolute assignment.[37] Failing any such tests, the general rule applies that he who is first in time is first in right.[38]

(II) *Record of Assignment as Notice to Subsequent Assignee.* Where an assignment of a mortgage is duly recorded, the assignee will be protected against one claiming under a subsequent assignment of the same mortgage, the record imparting constructive notice of his rights.[39]

(III) *Priority of Assignment First Recorded.* As between successive assignees of the same mortgage, both taking in equal good faith, the assignment which is first recorded will have the priority.[40] But where a person takes an assignment of a note and mortgage, the fact that the securities are not in the possession of the assignor at the time of the assignment is sufficient to put him on inquiry as to the assignor's title, and if he fails to make inquiry he is not a purchaser in good faith, and his assignment, although recorded, does not take precedence of a prior unrecorded assignment of the same mortgage.[41]

(IV) *Assignment of Genuine and of Forged Mortgage or Note.* A person who is induced to accept by assignment a forged mortgage or note has no standing or rights as against an assignee of the genuine mortgage and note who purchased the same in good faith, no matter which assignment was prior in time, and although the genuine assignment is not recorded.[42]

f. Assignment of Simultaneous Mortgages. Priority of record will not give preference to one mortgage over another given at the same time and to the same mortgagee; but such mortgages, in the hands of assignees, are concurrent liens

lor *v.* Richardson, 17 Oreg. 334, 21 Pac. 392; Potter *v.* Stransky, 48 Wis. 235, 4 N. W. 95.

34. See Murphy *v.* Barnard, 162 Miss. 72, 38 N. E. 29, 44 Am. St. Rep. 340.

35. Van Vleet *v.* Blackwood, 33 Mich. 334; Urbansky *v.* Shirmer, 111 N. Y. App. Div. 50, 97 N. Y. Suppl. 577. *Compare* Warden *v.* Adams, 15 Mass. 233, holding that it is not sufficient that one assignee knew merely that the assignor intended to assign the mortgage to another.

36. Harding *v.* Durand, 36 Ill. App. 238; Murphy *v.* Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Blunt *v.* Norris, 123 Mass. 55, 25 Am. Rep. 14; Kitchin's Appeal, 196 Pa. St. 321, 46 Atl. 418; Porter *v.* King, 1 Fed. 755. See also Buehler *v.* McCormick, 169 Ill. 269, 48 N. E. 287. But see Richards Trust Co. *v.* Rhomberg, (S. D. 1905) 104 N. W. 268.

37. Chew *v.* Brumagim, 21 N. J. Eq. 520.

38. Conover *v.* Grover, 31 N. J. Eq. 539.

39. *Maine.*— Wiley *v.* Williamson, 68 Me. 71.

Massachusetts.— Murphy *v.* Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Strong *v.* Jackson, 123 Mass. 60, 25 Am. Rep. 19.

New Jersey.— Stein *v.* Sullivan, 31 N. J. Eq. 409. But see Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870, as to the effect of a fraudulent purpose in making the first and recorded assignment.

New York.— Crane *v.* Turner, 67 N. Y. 437; Greene *v.* Warnick, 64 N. Y. 220; Yates County Nat. Bank *v.* Baldwin, 43 Hun 136; New York L. Ins., etc., Co. *v.* Smith, 2 Barb. Ch. 82.

Pennsylvania.— Pepper's Appeal, 77 Pa. St. 373.

See 35 Cent. Dig. tit. "Mortgages," § 639.

An assignment of a mortgage which is defective and incomplete, because lacking delivery, acceptance, and consideration, although recorded, will not prevail over a subsequent assignment of the same mortgage to a *bona fide* purchaser. Brown *v.* Johnston, 7 Abb. N. Cas. (N. Y.) 188.

40. Welch *v.* Priest, 8 Allen (Mass.) 165; Greene *v.* Warnick, 64 N. Y. 220; Pickett *v.* Barron, 29 Barb. (N. Y.) 505; New York Sav. Bank *v.* Frank, 56 How. Pr. (N. Y.) 403 [*affirmed* in 45 N. Y. Super. Ct. 404]; Potter *v.* Stransky, 48 Wis. 235, 4 N. W. 95; Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,556, 5 Sawy. 336. See also Harrison *v.* Burlingame, 48 Hun (N. Y.) 212. But *compare* Purdy *v.* Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511. *Contra,* Adler *v.* Sargent, 109 Cal. 42, 41 Pac. 799; Byles *v.* Tome, 39 Md. 461.

41. O'Mulcahy *v.* Holley, 28 Minn. 31, 8 N. W. 906; Kellogg *v.* Smith, 26 N. Y. 18. But *compare* Miller *v.* Berry, (S. D. 1905) 104 N. W. 311; Richards Trust Co. *v.* Rhomberg, (S. D. 1905) 104 N. W. 268.

42. *California.*—Adler *v.* Sargent, 109 Cal. 42, 41 Pac. 799.

Illinois.— Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373 [*affirming* 44 Ill. App. 516].

payable ratably out of the proceeds of the mortgaged premises,[43] unless one of them is expressly made subject to the other.[44]

g. Effect of Satisfaction or Release of Assigned Mortgage. One who takes a deed or mortgage of land without any actual notice of an unrecorded assignment of a prior mortgage thereon, relying on a recorded satisfaction or release of such prior mortgage, will hold free from the claims of the assignee, although the satisfaction or release was executed by the assignor in fraud of the rights of the assignee.[45] But it is otherwise if the subsequent purchaser or mortgagee cannot show stronger equities than the assignee under the unrecorded assignment; and it has been held that his position is inferior if he knew of the prior assignment, or if his conveyance was expressly made subject to the elder mortgage, or if the debt secured by his mortgage was already overdue when he took it.[46]

h. Estoppel Affecting Priority. As between assignees of mortgages or of the notes secured, one who would otherwise be entitled to priority may be held to have waived it in consequence of his dealings with the property or the securities, his representations or assurances given to the other, or his laches in failing to assert and protect his rights.[47]

3. Transfer of Part of Debt — a. Separate Assignment of Separate Notes. When a mortgage is given to secure the payment of several different notes or demands, it is an encumbrance upon the land for the security of all and each of the notes, in whosesoever hands they may legally be, until all are paid.[48] When a

Massachusetts.—Morris *v.* Bacon, 123 Mass. 58, 25 Am. Rep. 17.

Michigan.— Lee *v.* Kellogg, 108 Mich. 535, 66 N. W. 380.

Ohio.— Kernohan *v.* Manss, 53 Ohio St. 118, 41 N. E. 258, 29 L. R. A. 317; Martin *v.* Drake, 10 Ohio Dec. (Reprint) 77, 18 Cinc. L. Bul. 290; Martin *v.* Martin, Ohio Prob. 1. *Compare* Kernohan *v.* Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41.

See 35 Cent. Dig. tit. "Mortgages," § 641.

43. Gausen *v.* Tomlinson, 23 N. J. Eq. 405. And see Van Aken *v.* Gleason, 34 Mich. 477. See, however, Van Rensselaer *v.* Stafford, Hopk. (N. Y.) 569 [*affirmed* in 9 Cow. 316], holding that of two concurrent or simultaneous mortgages held by the same person, the one first assigned will have the priority; the other will be postponed, not only in the hands of the original mortgagee, but also in the hands of a subsequent assignee.

Representation as to priority.— Where two mortgages are given concurrently to the same person, and he assigns one of them on a representation that it is a first lien, it will be regarded as such as against him, but not as against a subsequent assignee of the other, without notice of such representation, since the representation creates a secret equity not binding on him. Vredenburgh *v.* Burnet, 31 N. J. Eq. 229. And see Riddle *v.* George, 58 N. H. 25.

44. Pease *v.* Hoag, 11 Phila. (Pa.) 549.

45. *Illinois.*— Ogle *v.* Turpin, 102 Ill. 148; Smith *v.* Keohane, 6 Ill. App. 585; Howard *v.* Ross, 5 Ill. App. 456.

Indiana.— Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655. See, however, Reeves *v.* Hayes, 95 Ind. 521; Ayers *v.* Hays, 60 Ind. 452.

Iowa.— Quincy *v.* Ginshach, 92 Iowa 144, 60 N. W. 511; Livermore *v.* Maxwell, 87 Iowa 705, 55 N. W. 37; Bowling *v.* Cook, 39 Iowa 200; Cornog *v.* Fuller, 30 Iowa 212.

New York.— Clark *v.* McNeal, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638; Bacon *v.* Van Schoonhoven, 19 Hun 158 [*affirmed* in 87 N. Y. 446].

Ohio.— Swartz *v.* Hurd, 2 Ohio Dec. (Reprint) 134, 1 West. L. J. 510.

See 35 Cent. Dig. tit. "Mortgages," § 645.

Contra.— Bamberger *v.* Geiser, 24 Oreg. 203, 33 Pac. 609; Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541.

46. Willcox *v.* Foster, 132 Mass. 320; Clark *v.* McNeal, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638.

47. *Michigan.*— Powell *v.* Smith, 30 Mich. 451.

New Mexico.— Coon *v.* Bosque Bonita Land, etc., Co., 8 N. M. 123, 42 Pac. 77.

New York.— Crane *v.* Turner, 67 N. Y. 437.

Ohio.—Exchange Bank *v.* Eddy, 9 Ohio Dec. (Reprint) 85, 10 Cinc. L. Bul. 389.

Vermont.— Nash *v.* Kelley, 50 Vt. 425.

Wisconsin.— See Marling *v.* Nommensen, 127 Wis. 363, 106 N. W. 844.

See 35 Cent. Dig. tit. "Mortgages," § 646.

48. *Illinois.*— Humphreys *v.* Morton, 100 Ill. 592.

Indiana.— Chaplin *v.* Sullivan, 128 Ind. 50, 27 N. E. 425.

Louisiana.— Reine *v.* Jack, 31 La. Ann. 859.

Maine.— Moore *v.* Ware, 38 Me. 496.

New Hampshire.— Johnson *v.* Brown, 31 N. H. 405; Page *v.* Pierce, 26 N. H. 317.

New York.— Matter of Preston, 54 Hun 10, 7 N. Y. Suppl. 92.

Vermont.— Belding *v.* Manly, 21 Vt. 550.

Right of action of assignees.— Where a mortgage secures several notes, and they are separately assigned to different persons, and all have been paid but one, the holder of that

part of the notes so secured are assigned, it is a question whether the whole mortgage, or a proportionate part of it, or any interest therein, is assigned, depending upon the intention and agreement of the parties;[49] for the mortgagee may transfer one or more of the notes or debts secured, reserving to himself the entire mortgage interest as security for the remainder, and passing to his assignee only the right to recover on the note assigned.[50] But generally, in the absence of such an agreement or reservation, an assignment of a portion of the mortgage debt carries with it, by operation of law, an assignment of a proportionate share of the mortgage security.[51]

b. Rights as Between Mortgagee and Assignee of Part of Debt. Where the holder of several notes or other debts secured by a mortgage transfers one, retaining the others, the mortgage lien accompanies the assignment of the debt as an incident, and in case the proceeds of the mortgage are not sufficient to pay all the debts, the holder of the assigned debt has a preference, and the assignor cannot compete with him.[52] And the rule is the same between an assignee of all the debts or claims and a subassignee of part of them.[53] But of course it may be varied by an express agreement of the parties, the assignor being entitled, if he chooses, to reserve to himself a proportionate share of the security.[54]

c. Rights as Between Assignees of Separate Parts of Debt — (i) *Distribution Pro Rata.* The rule as laid down in many cases is that, in the absence of an agreement or special equities to the contrary, the assignees and holders of the several separate notes or debts secured by a mortgage are entitled to share *pro rata* and without any preferences in the proceeds of the mortgage, when insufficient to satisfy them all; and it makes no difference that some of the debts matured earlier than the others or that the assignments were made at different times.[55]

one may maintain an action for foreclosure in his own name. Page *v.* Pierce, 26 N. H. 317. See also Johnson *v.* Brown, 31 N. H. 405.

49. Magloughlin *v.* Clark, 35 Ill. App. 251; Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; Foley *v.* Rose, 123 Mass. 557; Bryant *v.* Damon, 6 Gray (Mass.) 564; Langdon *v.* Keith, 9 Vt. 299.

50. Rolston *v.* Brockway, 23 Wis. 407.

51. *Connecticut.*— Smith *v.* Stevens, 49 Conn. 181.

Kansas.— Champion *v.* Hartford Inv. Co., 45 Kan. 103, 25 Pac. 590, 10 L. R. A. 754.

Massachusetts.— Norton *v.* Palmer, 142 Mass. 433, 8 N. E. 346; Young *v.* Miller, 6 Gray 152.

New Hampshire.— Page *v.* Pierce, 26 N. H. 317.

Vermont.— Blair *v.* White, 61 Vt. 110, 17 Atl. 49.

52. *Alabama.*— Knight *v.* Ray, 75 Ala. 383; Alabama Gold L. Ins. Co. *v.* Hall, 58 Ala. 1; Cullum *v.* Erwin, 4 Ala. 452.

Georgia.— Roberts *v.* Mansfield, 32 Ga. 228.

Indiana.— Parkhurst *v.* Watertown Steam-engine Co., 107 Ind. 594, 8 N. E. 635.

Kentucky.— McClanahan *v.* Chambers, 1 T. B. Mon. 43.

Louisiana.— Abney *v.* Walmsley, 33 La. Ann. 589; Barkdull *v.* Herwig, 30 La. Ann. 618; Ventress *v.* His Creditors, 20 La. Ann. 359; Salzman *v.* His Creditors, 2 Rob. 241.

Massachusetts.— Lane *v.* Davis, 14 Allen 225.

Minnesota.— Solberg *v.* Wright, 33 Minn. 224, 22 N. W. 381.

New Jersey.— Stevenson *v.* Black, 1 N. J. Eq. 338.

New York.— Mechanics' Bank *v.* Niagara Bank, 9 Wend. 410; Van Rensselaer *v.* Stafford, Hopk. 569 [*affirmed* in 9 Cow. 316].

Ohio.— Anderson *v.* Sharp, 44 Ohio St. 260, 6 N. E. 900.

Rhode Island.— Waterman *v.* Hunt, 2 R. I. 298.

Texas.— Cannon *v.* McDaniel, 46 Tex. 303.

Virginia.— McClintic *v.* Wise, 25 Gratt. 448, 18 Am. Rep. 694; Schofield *v.* Cox, 8 Gratt. 533.

Wisconsin.— Rogers *v.* Cross, 3 Pinn. 36, 6 Chandl. 34.

United States.— New York Security, etc., Co. *v.* Lombard Inv. Co., 65 Fed. 271.

See 35 Cent. Dig. tit. "Mortgages." § 647.

Contra.— Jennings *v.* Moore, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601; Cooper *v.* Ulmann, Walk. (Mich.) 257; Patrick's Appeal, 105 Pa. St. 356.

Bequest of part of mortgage debt.— Where one holding several notes, maturing at different times, secured by a mortgage, bequeaths those last falling due, such notes, in foreclosure proceedings, are entitled to priority over those retained by the testator. Wilber *v.* Buchanan, 85 Ind. 42.

53. Jenkins *v.* Hawkins, 34 W. Va. 799, 12 S. E. 1090.

54. Gumbel *v.* Boyer, 46 La. Ann. 1499, 16 So. 465; Howard *v.* Schmidt, 29 La. Ann. 129.

55. *Arkansas.*— Penzel *v.* Brookmire, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23.

(II) *Priority of Assignment.* According to a few cases the rule is that the holders of the notes, in such a case, are to be paid in the order in which their assignments were made,[56] unless the mortgage or deed of trust which is the common security expressly prescribes a different order;[57] but if all are assigned concurrently, all will share *pro rata*.[58]

(III) *Distribution According to Order of Maturity.* And there are still other cases holding that the assignment of one of such notes is an equitable transfer of the mortgage *pro tanto*, and the proceeds of a foreclosure, if not sufficient to pay all the obligations, should be applied to the notes in the order of their maturity, the holder of the note first falling due being entitled to satisfaction

California.— Grattan *v.* Wiggins, 23 Cal. 16; Phelan *v.* Olney, 6 Cal. 478.

Connecticut.— Smith *v.* Stevens, 49 Conn. 181; Lewis *v.* De Forest, 20 Conn. 427.

Kentucky.— Moore *v.* Moberly, 7 B. Mon. 299; Campbell *v.* Johnston, 4 Dana 177.

Louisiana.— Reine *v.* Jack, 31 La. Ann. 859; Begnaud *v.* Roy, 21 La. Ann. 624; Adams *v.* Lear, 3 La. Ann. 144; Salzman *v.* His Creditors, 2 Rob. 241; Florance *v.* Orleans Nav. Co., 1 Rob. 224; Pepper *v.* Dunlap, 16 La. 163; Lovell *v.* Cragin, 136 U. S. 130, 10 S. Ct. 1024, 34 L. ed. 372.

Maine.— Holway *v.* Gilman, 81 Me. 185, 16 Atl. 543; Moore *v.* Ware, 38 Me. 496; Johnson *v.* Candage, 31 Me. 28.

Maryland.— Dixon *v.* Clayville, 44 Md. 573; Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25. *Compare* Chew *v.* Buchanan, 30 Md. 367.

Massachusetts.—Eastman *v.* Foster, 8 Metc. 19.

Michigan.— Wales *v.* Gray, 109 Mich. 346, 67 N. W. 334; Jennings *v.* Moore, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601; Wilcox *v.* Allen, 36 Mich. 160; McCurdy *v.* Clark, 27 Mich. 445; English *v.* Carney, 25 Mich. 178; Cooper *v.* Ulmann, Walk. 251. But see Edgar *v.* Beck, 96 Mich. 419, 56 N. W. 15.

Minnesota.— Hall *v.* McCormick, 31 Minn. 280, 17 N. W. 620; Wilson *v.* Eigenbrodt, 30 Minn. 4, 13 N. W. 907; Borup *v.* Nininger, 5 Minn. 523.

Mississippi.— Davidson *v.* Allen, 36 Miss. 419; Jefferson College *v.* Prentiss, 29 Miss. 46; Pugh *v.* Holt, 27 Miss. 461; Bank of England *v.* Tarleton, 23 Miss. 173; Henderson *v.* Herrod, 10 Sm. & M. 631, 49 Am. Dec. 41; Terry *v.* Woods, 6 Sm. & M. 139, 45 Am. Dec. 274; Cage *v.* Iler, 5 Sm. & M. 410, 43 Am. Dec. 521; Parker *v.* Mercer, 6 How. 320, 38 Am. Dec. 438.

Nebraska.— Cram *v.* Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714; O'Neill State Bank *v.* Mathews, 45 Nebr. 659, 63 N. W. 930, 50 Am. St. Rep. 565; Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15; Todd *v.* Cremer, 36 Nebr. 430, 54 N. W. 674; Harman *v.* Barhydt, 20 Nebr. 625, 31 N. W. 488; Studebaker Bros. Mfg. Co. *v.* McCargur, 20 Nebr. 500, 30 N. W. 686.

New Hampshire.— Johnson *v.* Brown, 31 N. H. 405; Page *v.* Pierce, 26 N. H. 317.

New Jersey.— Collerd *v.* Huson, 34 N. J. Eq. 38; Stevenson *v.* Black, 1 N. J. Eq. 338.

New York.— Orleans County Nat. Bank *v.* Moore, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775, 3 L. R. A. 302; Granger *v.* Crouch, 86 N. Y. 494; Bridenbecker *v.* Lowell, 32 Barb. 9; Pattison *v.* Hull, 9 Cow. 747.

Pennsylvania.— Zimmerman *v.* Raup, 162 Pa. St. 112, 29 Atl. 352; Patrick's Appeal, 105 Pa. St. 356; McLean's Appeal, 103 Pa. St. 255; Hodge's Appeal, 84 Pa. St. 359; Hancock's Appeal, 34 Pa. St. 155; Perry's Appeal, 22 Pa. St. 43, 60 Am. Dec. 63; Mohler's Appeal, 5 Pa. St. 418, 47 Am. Dec. 413; Donley *v.* Hays, 17 Serg. & R. 400. Where one of the holders of the notes is also a surety upon all the notes, and is insolvent, his share of the proceeds of foreclosure, when such proceeds are insufficient to pay all the notes in full, should be distributed to the others. New York Fourth Nat. Bank's Appeal, 123 Pa. St. 473, 16 Atl. 779, 10 Am. St. Rep. 538.

South Carolina.— Gordon *v.* Hazzard, 32 S. C. 351, 11 S. E. 100, 17 Am. St. Rep. 857; Graham *v.* Jones, 24 S. C. 241; Lynch *v.* Hancock, 14 S. C. 66; Adger *v.* Pringle, 11 S. C. 527.

South Dakota.— Union City Commercial Bank *v.* Jackson, 7 S. D. 135, 63 N. W. 548.

Tennessee.— Shields *v.* Dyer, 86 Tenn. 41, 5 S. W. 439; Andrews *v.* Hobgood, 1 Lea 693; Ellis *v.* Roscoe, 4 Baxt. 418; McDermott *v.* State Bank, 9 Humphr. 123; Ewing *v.* Arthur, 1 Humphr. 537; Smith *v.* Cunningham, 2 Tenn. Ch. 565.

Texas.— Delespine *v.* Campbell, 52 Tex. 4; Robertson *v.* Guerin, 50 Tex. 317; Paris Exch. Bank *v.* Beard, 49 Tex. 358; Tinsley *v.* Boykin, 46 Tex. 592.

Vermont.— Bartlett *v.* Wade, 66 Vt. 629, 30 Atl. 4; Blair *v.* White, 61 Vt. 110, 17 Atl. 49; Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414; Sewall *v.* Brainerd, 38 Vt. 364; Belding *v.* Manly, 21 Vt. 550; Keyes *v.* Wood, 21 Vt. 331.

Washington.— Aberdeen First Nat. Bank *v.* Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885 [*explaining* Miller *v.* Washington Sav. Bank, 5 Wash. 200, 31 Pac. 712].

See 35 Cent. Dig. tit. "Mortgages," § 651.

56. Alabama Gold L. Ins. Co. *v.* Hall, 58 Ala. 1; Griggsby *v.* Hair, 25 Ala. 327; Nelson *v.* Dunn, 15 Ala. 501; Mobile Bank *v.* Planters', etc., Bank, 9 Ala. 645; Cullum *v.* Erwin, 4 Ala. 452.

57. McVay *v.* Bloodgood, 9 Port. (Ala.) 547.

58. Morton *v.* New Orleans, etc., R. Co., etc., 79 Ala. 590.

in full and then the others in their order.[59] And this order of priority is not affected by a clause in the mortgage providing that default in the payment of any of the notes at maturity shall make all of them fall due,[60] nor by an extension of the time of payment of the note first maturing.[61] If all the notes mature at the same time, so that there is no basis for the application of this rule, all should share *pro rata* in the proceeds of the security.[62]

(iv) *Agreement of Parties Affecting Priority.* Whatever may be the rule as to the order of priority of the notes or debts secured, it is applicable only in the absence of an agreement of the parties; and it is competent for them to insert in the mortgage a provision establishing a different order of payment from that which the law would ordain,[63] or such different order may be fixed by

59. *Florida.*— Wilson *v.* Hayward, 6 Fla. 171.

Illinois.— Schultz *v.* Plankinton Bank, 141 Ill. 116, 30 N. E. 346, 33 Am. St. Rep. 290; Humphreys *v.* Morton, 100 Ill. 592; Koester *v.* Burke, 81 Ill. 436; Herrington *v.* McCollum, 73 Ill. 476; Flower *v.* Elwood, 66 Ill. 438; Gardner *v.* Diederichs, 41 Ill. 158; Vansant *v.* Allmon, 23 Ill. 30; Chandler *v.* O'Neil, 62 Ill. App. 418.

Indiana.— Horn *v.* Bennett, 135 Ind. 158, 34 N. E. 321, 956, 24 L. R. A. 800; Parkhurst *v.* Watertown Steam-engine Co., 107 Ind. 594, 8 N. E. 635; Carithers *v.* Stuart, 87 Ind. 424; Shaw *v.* Newsom, 78 Ind. 335; Gerber *v.* Sharp, 72 Ind. 553; Doss *v.* Ditmars, 70 Ind. 451; People's Sav. Bank *v.* Finney, 63 Ind. 460; Minor *v.* Hill, 58 Ind. 176, 26 Am. Rep. 71; Davis *v.* Langsdale, 41 Ind. 399; Crouse *v.* Holman, 19 Ind. 30; Murdock *v.* Ford, 17 Ind. 52; Hough *v.* Osborne, 7 Ind. 140; Stanley *v.* Beatty, 4 Ind. 134; State Bank *v.* Tweedy, 8 Blackf. 447, 46 Am. Dec. 486. There is no priority in the case of a single mortgage given to secure different parties on claims maturing at different times. Shaw *v.* Newsom, *supra.*

Iowa.— Leavitt *v.* Reynolds, 79 Iowa 348, 44 N. W. 567, 7 L. R. A. 365; Walker *v.* Schreiber, 47 Iowa 529; Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572; Massie *v.* Sharpe, 13 Iowa 542; Reeder *v.* Carey, 13 Iowa 274; Sangster *v.* Love, 11 Iowa 580; Hinds *v.* Mooers, 11 Iowa 211; Rankin *v.* Major, 9 Iowa 297; Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Kansas.— Aultman-Taylor Co. *v.* McGeorge, 31 Kan. 329, 2 Pac. 778; Richardson *v.* McKim, 20 Kan. 346.

Missouri.— Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; Huffard *v.* Gottberg, 54 Mo. 271; Hurck *v.* Erskine, 45 Mo. 484; Ellis *v.* Lamme, 42 Mo. 153; Thompson *v.* Field, 38 Mo. 320; Mitchell *v.* Ladew, 36 Mo. 526, 88 Am. Dec. 156; Freeman *v.* Elliott, 48 Mo. App. 74; New York Security, etc., Co. *v.* Lombard Inv. Co., 65 Fed. 271.

Ohio.— Winters *v.* Franklin Bank, 33 Ohio St. 250; Kyle *v.* Thompson, 11 Ohio St. 616; U. S. Bank *v.* Covert, 13 Ohio 240; Lockwood *v.* Robbins, 4 Ohio Dec. (Reprint) 192, 1 Clev. L. Rep. 101. See, however, Towne *v.* Wolfe, 26 Ohio St. 491.

Virginia.— Gordon *v.* Fitzhugh, 27 Gratt. 835; Gwathmeys *v.* Ragland, 1 Rand. 466. See, however, McClintic *v.* Wise, 25 Gratt. 448, 18 Am. Rep. 694.

Wisconsin.— Lyman *v.* Smith, 21 Wis. 674; Buffalo Mar. Bank *v.* International Bank, 9 Wis. 57; Wood *v.* Trask, 7 Wis. 566, 76 Am. Dec. 230.

See 35 Cent. Dig. tit. "Mortgages," § 655.

Notes securing indorsements.—The priority accorded to successive instalments of a mortgage debt has its foundation in the rule governing the application of payments, and does not apply to mortgage notes given to secure indorsements. Thomson *v.* Bradford, 23 Fed. Cas. No. 13,981, 7 Biss. 351.

60. Horn *v.* Bennett, 135 Ind. 158, 34 N. E. 321, 956, 24 L. R. A. 800; Leavitt *v.* Reynolds, 79 Iowa 348, 44 N. W. 567, 7 L. R. A. 365; Hurck *v.* Erskine, 45 Mo. 484.

In North Carolina, Ohio, and Wisconsin a contrary rule prevails, and it has been held that a provision in the mortgage anticipating the maturity of all the notes on default in the payment of any will have the effect of making them share *pro rata* in the proceeds of a foreclosure. Whitehead *v.* Morrill, 108 N. C. 65, 12 S. E. 894; Kitchin *v.* Grandy, 101 N. C. 86, 7 S. E. 663; Bushfield *v.* Meyer, 10 Ohio St. 334; Pierce *v.* Shaw, 51 Wis. 316, 8 N. W. 209.

61. Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

62. Humphreys *v.* Morton, 100 Ill. 592.

63. *Alabama.*— McVay *v.* Bloodgood, 9 Port. 547.

California.—Redman *v.* Purrington, 65 Cal. 271, 3 Pac. 883; Grattan *v.* Wiggins, 23 Cal. 16; Sherwood *v.* Dunbar, 6 Cal. 53.

Illinois.— Romberg *v.* McCormick, 104 Ill. 205, 62 N. E. 537; Walker *v.* Dement, 42 Ill. 272.

Iowa.— Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; Morgan *v.* Kline, 77 Iowa 681, 42 N. W. 558.

Kansas.— Noyes *v.* White, 9 Kan. 640.

Louisiana.— Howard *v.* Schmidt, 29 La. Ann. 129.

Massachusetts.— Foley *v.* Rose, 123 Mass. 557; Bryant *v.* Damon, 6 Gray 564.

Michigan.— Cooper *v.* Ulmann, Walk. 251.

Minnesota.— Solberg *v.* Wright, 33 Minn. 224, 22 N. W. 381; Wilson *v.* Eigenbrodt, 30 Minn. 4, 13 N. W. 907.

Mississippi.— Goar *v.* McCanless, 60 Miss.

the mortgagee in making assignments of the various notes to different holders;[64] and in either case the stipulation will be binding on the parties and all others who deal with the securities with notice of it.[65]

E. Rights and Liabilities — 1. Rights and Liabilities of Assignee — a. In General. A valid assignment of a mortgage and the debt which it secures transfers to the assignee all the rights, claims, and equities possessed at the time by his assignor,[66] without regard to whether the assignee paid more or less than the face value of the mortgage;[67] and although the mortgagee may be under a special duty to account to the mortgagor, or to another, for the money raised by the sale of the mortgage, the assignee is not generally required to see to the application of the money which he pays for it.[68] But the assignee can in general claim no other rights or privileges, nor any better position or stronger equities, than such as appertained to his assignor.[69]

244; Bank of England *v.* Tarleton, 23 Miss. 173.

Missouri.— Ellis *v.* Lamme, 42 Mo. 153.

New York.— Pattison *v.* Hull, 9 Cow. 747.

Ohio.— Winters *v.* Franklin Bank, 33 Ohio St. 250; Beresford *v.* Ward, 1 Disn. 169, 12 Ohio Dec. (Reprint) 555.

Pennsylvania.— McLean's Appeal, 103 Pa. St. 255; Thayer's Appeal, 6 Pa. Cas. 392, 9 Atl. 498.

Tennessee.— Christian *v.* Clark, 10 Lea 630.

Vermont.— Keyes *v.* Wood, 21 Vt. 331; Langdon *v.* Keith, 9 Vt. 299; Wright *v.* Parker, 2 Aik. 212.

Wisconsin.— Rolston *v.* Brockway, 23 Wis. 407.

See 35 Cent. Dig. tit. "Mortgages," § 652.

Sufficiency of agreement.— Where several notes are secured by the same mortgage, and one is paid under an agreement that the party who advances the money to pay it shall have a preference over the original holder of the note, this agreement does not give him any preference over the holders of the other notes. Laplace *v.* Laplace, 43 La. Ann. 284, 8 So. 914. And see Henderson *v.* Herrod, 10 Sm. & M. (Miss.) 631, 49 Am. Dec. 41. So the mere fact that an indorser of one of the notes guarantees its payment will not be sufficient to give it a priority over the other notes which it would not otherwise have. Jefferson College *v.* Prentiss, 29 Miss. 46.

64. Grattan *v.* Wiggins, 23 Cal. 16; Solberg *v.* Wright, 33 Minn. 224, 22 N. W. 381; Preston *v.* Morsman, (Nebr. 1905) 106 N. W. 320. *Compare* Henderson *v.* Herrod, 10 Sm. & M. (Miss.) 631, 49 Am. Dec. 41.

65. Wohlgemuth *v.* Standard Drug Co., 14 Ohio Cir. Ct. 316, 8 Ohio Cir. Dec. 9.

66. *Louisiana.*— Beatty *v.* Clement, 12 La. Ann. 82.

Maryland.— Demuth *v.* Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322.

Massachusetts.— Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26.

Minnesota.— Meeker County Bank *v.* Young, 51 Minn. 254, 53 N. W. 630; Solberg *v.* Wright, 33 Minn. 224, 22 N. W. 381.

Nebraska.— Hall *v.* Hooper, 47 Nebr. 111, 66 N. W. 33.

New York.— Jackson *v.* Minkler, 10 Johns. 480.

Wisconsin.— Franke *v.* Neisler, 97 Wis. 364, 72 N. W. 887.

United States.— Hastings *v.* Manhattan Trust Co., 77 Fed. 347, 23 C. C. A. 191.

See 35 Cent. Dig. tit. "Mortgages," § 656. And see *supra*, XVI, D, 1, d.

Assignment without recourse.— The assignee of a note and mortgage has all the rights of the assignor, although the note was assigned "without recourse." Hunt *v.* New England Mortg. Security Co., 92 Ga. 720, 19 S. E. 27.

Bankruptcy of mortgagor.— When a mortgage is given by a principal debtor to his surety, and is transferred by the latter for a valuable consideration to the creditor, the subsequent discharge in bankruptcy of the principal surety does not destroy the lien of the mortgage or affect the assignee's right to foreclose it. Carlisle *v.* Wilkins, 51 Ala. 371.

Use of assignor's name.— The assignment of the note or bond secured by a mortgage is an equitable assignment of the mortgage, unless there is some agreement to the contrary, and the assignee may use the name of the mortgagee; but if the mortgage itself is assigned in proper form, the assignee must then use his own name. Graham *v.* Newman, 21 Ala. 497.

After-acquired title.— An assignee of a mortgage has the benefit of a title acquired by his assignor subsequent to the assignment. Center *v.* Planters', etc., Bank, 22 Ala. 743.

67. Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36. And see Grissler *v.* Powers, 53 How. Pr. (N. Y.) 194 [*affirmed* in 81 N. Y. 57, 37 Am. Rep. 475].

Amount recoverable by assignee.— An assignment of a mortgage by the mortgagee carries to the assignee only the right to recover the amount actually paid on the mortgage note by the mortgagee up to the time of the assignment. O'Hara *v.* Baum, 88 Pa. St. 114.

68. Foster *v.* Dey, 27 N. J. Eq. 599; Westervelt *v.* Scott, 11 N. J. Eq. 80.

69. *California.*— Camden *v.* Vail, 24 Cal. 392; Godeffroy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

Georgia.— Cumming *v.* McDade, 118 Ga. 612, 45 S. E. 479.

Iowa.— Burbank *v.* Warwick, 52 Iowa 493, 3 N. W. 519.

b. Rights as to Property Mortgaged — (i) *In General.* The assignee of a mortgage has the same right of possession of the mortgaged premises, or right to recover possession thereof, as his assignor; and if he is lawfully in possession he cannot be put out without redemption.[70] He may recover for waste or other injury to the premises occurring subsequent to the assignment;[71] and conversely, he is liable for damage done to the mortgaged estate while he is in possession.[72] He cannot, unless in actual possession, confer any rights by giving a lease of the premises.[73]

(ii) *Payment of Taxes.* The assignee of a mortgage paying delinquent taxes on the mortgaged land, or redeeming it from a tax-sale, may recover the amount, or have it included in the security of the mortgage, where the taxes accrued after the assignment of the mortgage;[74] but taxes accruing before the assignment cannot thus be added to the amount protected by the lien of the mortgage.[75]

c. Rights as Against Mortgagor. An assignment of a mortgage ordinarily transfers to the assignee all the rights of the assignor and the remedies necessary for its enforcement,[76] so that he may proceed at law upon a covenant to pay the mortgage debt,[77] or maintain an action upon the note or other obligation secured against the mortgagor[78] or against a grantee of the equity of redemption who has assumed the mortgage debt and agreed to pay it,[79] and therein recover the full amount of the debt secured, notwithstanding the fact that he may have bought the mortgage at a discount.[80]

Massachusetts.— Pomeroy *v.* Latting, 2 Allen 221.

New Jersey.— Kline *v.* McGuckin, 24 N. J. Eq. 411; Garroch *v.* Sherman, 6 N. J. Eq. 219.

New York.— Sheldon *v.* Ferris, 45 Barb. 124; Von Bernuth *v.* Sutton, 6 N. Y. Suppl. 377.

North Dakota.— Nash *v.* Northwest Land Co., (1906) 108 N. W. 792.

See 35 Cent. Dig. tit. "Mortgages," § 656.

70. *Illinois.*— Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17.

Maine.— Smith *v.* Porter, 35 Me. 287.

New Hampshire.— Mason *v.* Davis, 11 N. H. 383; Marsh *v.* Rice, 1 N. H. 167.

New Jersey.— Jouet *v.* Spinning, 6 N. J. L. 446.

New York.— Jackson *v.* Minkler, 10 Johns. 480.

See 35 Cent. Dig. tit. "Mortgages," § 657.

Possession wrongful.— The purchase of a mortgage, on which no default has been made, by one who is already wrongfully in possession of the mortgaged premises, gives him no right to hold the property as mortgagee in possession. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 19 Abb. Pr. (N. Y.) 105.

Lessee as assignee.— A lessee does not, by the purchase of a mortgage on the premises, become entitled to possession in the character of a mortgagee. Constant *v.* Barrett, 13 Misc. (N. Y.) 249, 34 N. Y. Suppl. 163.

A fraudulent conveyance of real estate by one who holds the title thereto under a deed which, although absolute in form, is in reality only a mortgage, to a purchaser with knowledge, is only effective as an assignment of the grantor's interest as mortgagee, and gives the purchaser no right to the possession of the property, when it is sufficient to pay the debt. Shimerda *v.* Wohlford, 13 S. D. 155, 82 N. W. 393.

71. Lane *v.* Hitchcock, 14 Johns. (N. Y.) 213; Jones *v.* Costigan, 12 Wis. 677, 78 Am. Dec. 771.

72. Mitchell *v.* Black, 64 Me. 48.

73. Worster *v.* Great Falls Mfg. Co., 41 N. H. 16.

74. Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278.

75. Macomb *v.* Prentis, 78 Mich. 255, 44 N. W. 324. But *compare* McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996.

76. Tripod Paint Co. *v.* Hamilton, 111 Ga. 823, 35 S. E. 696; Kilgour *v.* Gockley, 83 Ill. 109.

Failure to record to avoid paying taxes.— It is no defense to a suit on a mortgage that plaintiff is an assignee who failed to record his assignment, for the purpose of avoiding the payment of taxes, and that he has paid no taxes on the mortgage. Terry *v.* Durand Land Co., 112 Mich. 665, 71 N. W. 525.

77. Wilcox *v.* Campbell, 106 N. Y. 325, 12 N. E. 823 [*affirming* 35 Hun 254].

78. Ducasse *v.* Keyser, 28 La. Ann. 419; Harris *v.* Masterson, 91 Tex. 171, 41 S. W. 482; Dewing *v.* Crueger, 7 Wash. 590, 35 Pac. 393. *Compare* Oliver *v.* Lowery, 2 Harr. (Del.) 467; Seymour *v.* Lewis, 19 Wend. (N. Y.) 512.

Prior satisfaction.— A junior mortgagee who forecloses and bids in the property, with knowledge of the elder lien, and who thereafter becomes assignee of the senior mortgage and note, cannot sue the mortgagor on such note, as it will be presumed that he allowed for the prior lien in fixing the amount of his bid at the foreclosure sale. Crowley *v.* Harader, 69 Iowa 83, 28 N. W. 446.

79. Fitzgerald *v.* Barker, 85 Mo. 13.

80. *Maine.*— Pease *v.* Benson, 28 Me. 336.

d. Right to Foreclose. The assignee of a mortgage may maintain in his own name a bill in equity,[81] or a statutory action for its foreclosure;[82] and if the mortgage gives the right to foreclose on default in the payment of interest or of any instalment of principal, anticipating the maturity of the rest, this right may be exercised by the assignee as well as by the original mortgagee.[83]

e. Right of Recourse Against Assignor — (i) *In General.* An assignee of a mortgage must exhaust his remedies against the mortgagor and the mortgaged premises before calling upon the assignor to make good any loss;[84] and generally he must take his chance of realizing on the securities, and cannot hold his assignor liable for any deficiency on the foreclosure sale,[85] unless the assignor has made himself personally liable by giving a guaranty of payment or a bond or covenant to see the debt paid,[86] or can be held so liable on the ground of fraud or a breach of trust.[87] Where the loss to the assignee is caused by a failure of title to the

Massachusetts.— Urann *v.* Coates, 117 Mass. 41.

Pennsylvania.— Knox *v.* Moatz, 15 Pa. St. 74.

Wisconsin.— Knox *v.* Galligan, 21 Wis. 470.

England.— Macrae *v.* Goodman, 10 Jur. 555, 5 Moore P. C. 316, 13 Eng. Reprint 512.

Canada.— Reid *v.* Whitehead, 10 Grant Ch. (U. C.) 446.

See 35 Cent. Dig. tit. "Mortgages," § 659.

Mortgagee selling mortgage for mortgagor's benefit.— Where a mortgage, as originally executed, is without any consideration, but is placed in the mortgagee's hands to be sold for the benefit of the mortgagor, and is accordingly sold and assigned for less than its face value, the proceeds being paid to the mortgagor, the assignee is entitled to enforce it only for the amount he paid for it. Verity *v.* Sternberger, 172 N. Y. 633, 65 N. E. 1123. And see Albertson *v.* Fellows, 45 N. J. Eq. 306, 17 Atl. 816.

Acccommodation mortgage.— A purchaser in good faith, for less than its face value, of a mortgage executed for accommodation, can enforce it only for the amount paid by him. Rollins *v.* Barnes, 11 N. Y. App. Div. 150, 42 N. Y. Suppl. 954.

Previous advances to mortgagor.— Where a third person makes advances to a mortgagor, pays taxes on the mortgaged land, and interest on the mortgage, and finally takes an assignment of the mortgage, there having been a mere understanding in an indefinite way that he should get his money when the mortgagor should sell the land, the mortgage cannot be held as security for the advances made before the assignment. Brooks *v.* Brooks, 169 Mass. 38, 47 N. E. 448.

81. See *infra*, XXI, C, 1, l, (III).

Scire facias to foreclose a mortgage should be brought in the name of the mortgagee for the use of the assignee. Bourland *v.* Kipp, 55 Ill. 376. See also Hay *v.* Node, 2 Yeates (Pa.) 534; Hummel *v.* Siddal, 11 Phila. (Pa.) 308.

The assignor is not a necessary party in a proceeding to foreclose a trust deed by an assignee of the note secured. McNamara *v.* Clark, 85 Ill. App. 439.

82. Lamson *v.* Falls, 6 Ind. 309; Pratt *v.* Poole, 15 N. Y. Suppl. 789 [*affirmed* in 133 N. Y. 686, 31 N. E. 628].

83. Stewart *v.* Ludlow, 68 Ill. App. 349; Brand *v.* Smith, 99 Mich. 395, 58 N. W. 363; Swett *v.* Stark, 31 Fed. 858. *Compare* Bomar *v.* West, 87 Tex. 299, 28 S. W. 519.

84. Miles *v.* Gray, 4 B. Mon. (Ky.) 417; Gregg *v.* Thurber, 69 N. H. 480, 45 Atl. 241.

Right to proceeds of insurance.— Where a mortgage contains a covenant to keep the premises insured for the benefit of the mortgagee, with a provision that the latter may take out insurance if the mortgagor fails to do so, and is assigned by the mortgagee with a guaranty of payment, and the mortgagee afterward becomes the owner of the property and takes out insurance, and a loss occurs, the assignee will have an equitable lien on the proceeds of the policy to the extent of his interest. Hyde *v.* Hartford F. Ins. Co., 70 Nebr. 503, 97 N. W. 629.

85. Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035.

Assignment as collateral.— Mortgagees, on assignment of the mortgage as collateral, are personally liable to the assignee for any deficiency, they being liable to him on the original indebtedness sought to be recovered, although they have not rendered themselves liable on the note assigned, as indorsers or otherwise. Wilcox *v.* Allen, 36 Mich. 160. And see Peay *v.* Morrison, 10 Gratt. (Va.) 149.

86. Buehler *v.* Pierce, 175 N. Y. 264, 67 N. E. 573; Willard *v.* Welch, 94 N. Y. App. Div. 179, 88 N. Y. Suppl. 173; Westphal *v.* Carter, 1 Misc. (N. Y.) 403, 20 N. Y. Suppl. 945. See Bartlett *v.* Johnson, 9 Allen (Mass.) 530; Burdick *v.* Burdick, 20 Wis. 348.

Effect of guaranty.— A mortgagee, after assigning the mortgage with a guaranty of payment, may acquire a tax title to the premises covered thereby, prior to foreclosure. Manhattan Trust Co. *v.* Richards Trust Co., 13 S. D. 377, 83 N. W. 425.

Indorsement of note.— Where the mortgagee, on assigning the mortgage, indorses the note secured thereby, he will be liable for any deficit remaining after a sale of the mortgaged premises. Wood *v.* Sands, 4 Greene (Iowa) 214.

87. See Roberts *v.* Mansfield, 38 Ga. 452; Franklin *v.* Greene, 2 Allen (Mass.) 519.

mortgaged premises or by the existence of superior liens, the assignor will be liable only in case he covenanted that the mortgage assigned was the first lien or made statements as to the title, on which the assignee had a right to rely.[88] But after the assignment, it is not competent for the mortgagee, by any dealings with the mortgagor, to affect the rights of the assignee or impair the value of the security.[89] Hence he will be liable if he releases the mortgaged premises or cancels the mortgage, provided the right of the assignee to foreclose is thereby cut off.[90]

(II) *Representations and Concealment.* If the assignor intentionally conceals material facts from the assignee, or makes representations to him, on which the assignee is justified in relying and does rely to his prejudice, it is tantamount to a fraud, and will warrant an action for damages by the assignee. This rule is applied where the representations or concealment have reference to the state of the title or the superiority of lien of the mortgage assigned,[91] to the amount remaining due and unpaid on the mortgage,[92] or to the adequacy of the premises as security and the solveney or responsibility of the mortgagor.[93]

(III) *Covenants and Warranties* — (A) *In General.* On transferring a mortgage and debt, the assignor may warrant the validity of the security and its collectability, or guarantee its payment, either in writing or by parol;[94] and where

88. Hinds *v.* Allen, 34 Conn. 185; Vincent *v.* Berry, 46 Iowa 571.

89. Bryant *v.* Jackson, 59 Me. 165.

90. Anglo-American Land Mortg., etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063. *Compare* Smith *v.* Long, 50 Nebr. 749, 70 N. W. 401.

Right of assignee not impaired.— Where the circumstances under which a mortgage was canceled of record are such as not to impair the right of the assignee to proceed for a foreclosure, he cannot sue his assignor as for money had and received. Brewer *v.* Atkeison, 121 Ala. 410, 25 So. 992, 77 Am. St. Rep. 64.

91. *Iowa.*— Vincent *v.* Berry, 46 Iowa 571.

Michigan.— Cornell *v.* Crane, 113 Mich. 460, 71 N. W. 878.

Missouri.— Smithers *v.* Bircher, 2 Mo. App. 499.

Wisconsin.— Potter *v.* Taggart, 54 Wis. 395, 11 N. W. 678. See also Goninan *v.* Stephenson, 24 Wis. 75.

United States.— Pagan *v.* Sparks, 18 Fed. Cas. No. 10,659, 2 Wash. 325.

Alienation by mortgagor.— Where a mortgagee assigns the mortgage, with knowledge of the fact that the mortgagor has parted with his interest, he is bound to communicate the fact to his assignee, otherwise he will be bound to pay the costs of an unsuccessful foreclosure suit brought by the assignee against the mortgagor. Masson *v.* Roblin, 2 U. C. Q. B. O. S. 41.

92. Eaton *v.* Knowles, 61 Mich. 625, 28 N. W. 740; Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874.

93. Webster *v.* Bailey, 31 Mich. 36; Riggs *v.* Thorpe, 67 Minn. 217, 69 N. W. 891; Real Estate Inv. Co. *v.* Metropolitan Bldg. Soc., 3 Ont. 476.

Contents of complaint.— In a suit for damages for the false representations of defendant in the sale of a note and mortgage, where the validity of the instrument is not denied, and it does not appear that the mortgage has been foreclosed, the complaint is bad if it fails to show that the securities are insufficient, and what would be the probable deficiency on a sale on foreclosure of the mortgage. Foster *v.* Taggart, 54 Wis. 391, 11 N. W. 793.

94. Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311. But see Nally *v.* Long, 71 Md. 585, 18 Atl. 811, 17 Am. St. Rep. 547, holding that, in an action for breach of warranty of a mortgage sold to plaintiff, where the declaration does not allege fraud or deceit, and there is no warranty contained in the written assignment indorsed on the mortgage, parol evidence of such warranty is not admissible.

Promise to give guaranty if called for.— Where the assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it if the transferee calls upon him to do so, to enable him to dispose of it, and the transferee disposes of the bond without calling for the guaranty, the assignee is no longer liable on his promise. Fant *v.* Fant, 17 Gratt. (Va.) 11.

A covenant created by a statute, providing that the words "grant, bargain, and sell" shall be adjudged to express a covenant to the grantee that the grantor was seized in fee simple, free from encumbrances suffered by him, and also for quiet enjoyment, is not applicable to the assignment of a mortgage. Lieberman *v.* Reichard, 7 North. Co. Rep. (Pa.) 237.

Agreement as to foreclosure of prior mortgage.— An agreement, by an assignor of a mortgage with his assignee, that, on the foreclosure of a prior mortgage covering the same and other premises, the decree shall contain a provision that the other premises shall be sold first and their proceeds applied to the prior mortgage is not void as a wager nor against public policy, if it is not shown that the relation of the parties interested in the fund was such as to render it inequitable.

a corporation has power to take and hold such securities, it also has power to assign them with such a guaranty.[95] An action on the guaranty is a proceeding to recover the debt, within the meaning of a statute forbidding such suits to be brought without leave of court pending a foreclosure suit.[96]

(B) *Validity of Mortgage and Right to Assign.* Where a mortgagor has no title to the mortgaged premises, or has lost his title by a tax-sale or otherwise, a covenant that the mortgage is a good and valid security, given on its assignment to a third person, is broken as soon as made;[97] and although such a covenant in terms applies only to the mortgage, it is in legal effect a covenant that the bond or debt secured is also valid.[98] The same rule applies to a covenant that the mortgage assigned is a first lien on the land, or that there is no other encumbrance;[99] and a covenant that the assignor has good right and lawful authority to sell and assign the security is broken by a previous release of so much of the mortgaged property as seriously to impair the value of the mortgage as a security for the debt.[1]

(C) *Guaranty of Payment.* A guaranty of the collectability of a mortgage, or that it will be paid when due, or that the assignor will make good any deficiency, covers the entire debt secured by the mortgage with interest.[2] But generally it puts the assignor in the position of a surety for the payment of the debt,[3] so that the assignee must exhaust his legal remedies under the mortgage and against the mortgaged property before coming upon the assignor,[4] and the assignor will be released from liability upon his guaranty if the assignee unrea-

Cowdrey *v.* Carpenter, 1 Abb. Dec. (N. Y.) 445.

95. Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 23 Atl. 287.

96. McKernan *v.* Robinson, 84 N. Y. 105, holding that if such a suit is brought without leave, the court may by order *nunc pro tunc* grant the necessary authority. See, however, Schaaf *v.* O'Brien, 8 Daly (N. Y.) 181.

97. Real Estate Inv. Co. *v.* Metropolitan Bldg. Soc., 3 Ont. 476; Powell *v.* Baker, 13 U. C. C. P. 194. But see McEwan *v.* Henderson, 10 Manitoba 503, holding that a covenant in an assignment of a mortgage that the mortgage is a good and valid security does not mean that the mortgagor had a good title to the land, or that the mortgage is effective to charge the land with the payment of the mortgage debt, but only that the instrument is a genuine one, duly executed by the mortgagor, and that there is nothing to affect its validity as a binding contract between the original parties for payment of the debt assigned.

Covenant that nothing has been paid.— When the assignment contains this covenant, and it is shown that the mortgage debt had in reality been paid before the assignment, the assignee is entitled to recover only the value of the note and mortgage, and the burden of proof is upon him to show their value. Eaton *v.* Knowles, 61 Mich. 625, 28 N. W. 740.

98. Ross *v.* Terry, 63 N. Y. 613.

99. Hinds *v.* Allen, 34 Conn. 185; People's Sav. Bank *v.* Hill, 81 Me. 71, 16 Atl. 337.

1. Byles *v.* Lawrence, 35 Mich. 458.

2. King *v.* Bates, 149 Mass. 73, 21 N. E. 237, 4 L. R. A. 268; Waters *v.* Chase, 142 Pa. St. 463, 21 Atl. 882; Morson *v.* Hunter, 11 U. C. C. P. 585. See also Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379. *Compare* Macomb *v.* Prentis, 78 Mich. 255, 44 N. W. 324; Griffith *v.* Robertson, 15 Hun (N. Y.) 344, holding that where the guaranty was "against loss from this mortgage," it was limited to the amount paid on the assignment.

3. Curtis *v.* Tyler, 9 Paige (N. Y.) 432; Ontario Trusts Corp. *v.* Hood, 27 Ont. 135 [*affirmed* in 23 Ont. App. 589]; Darling *v.* McLean, 20 U. C. Q. B. 372. See, however, Clarke *v.* Best, 8 Grant Ch. (U. C.) 7.

Not agent of assignee.— A person who guarantees a promissory note secured by a mortgage and the prompt payment of coupon interest notes is not thereby constituted the agent of the holder of the notes and mortgage, nor has he such an interest in the matter as would authorize him to take any steps which the holder himself could take under the terms of the mortgage. Dewing *v.* Crueger, 7 Wash. 590, 35 Pac. 393.

4. Barnes *v.* Baker, 2 Mich. 377; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Griffith *v.* Robertson, 15 Hun (N. Y.) 344; Baxter *v.* Smack, 17 How. Pr. (N. Y.) 183; Jones *v.* Stienbergh, 1 Barh. Ch. (N. Y.) 250; Timmermann *v.* Howell, 2 Ohio Cir. Ct. 27, 1 Ohio Cir. Dec. 342; Taylor *v.* Sharp, 2 Manitoba 35; Richmond *v.* Evans, 8 Grant Ch. (U. C.) 508. See also Goldsmith *v.* Brown, 35 Barb. (N. Y.) 484.

Where one assigns a mortgage which has in fact been paid, and guarantees its payment, the purchaser, as against the assignor, is not restricted to an action on the guaranty, but may institute suit to foreclose the mortgage and secure judgment therein against defendant for the deficiency. Gans *v.* McGowan, 41 N. Y. App. Div. 461, 58 N. Y. Suppl. 951.

sonably delays to proceed for the collection of the mortgage, and during such delay the property depreciates in value.[5]

(iv) *Transferability of Guaranty.* A guaranty given to a person to secure the payment of a mortgage which has been assigned to him may be so expressed as to be personal and not transferable; but in the absence of any express stipulations to the contrary, the guaranty may be assigned by him with the mortgage to a subassignee.[6]

(v) *Implied Covenants and Warranties.* The assignment of a mortgage for value implies a warranty that it is a genuine instrument, and to that extent that it is a valid and subsisting security;[7] and also that it is a lien on the property described in the mortgage, so that, if the assignor had previously released part of the property, he will be liable as on an implied warranty.[8] But there is no implied warranty that the mortgage debt is collectable, or that the mortgagor is solvent;[9] and the mere assignment of a second mortgage does not import a guaranty that it is a first lien on the premises, although the elder mortgage was not then recorded.[10]

f. Rights of Assignee Against Third Persons. An assignee of a mortgage, acquiring it in good faith, for value, and before the maturity of the debt, has the rights of a purchaser for value,[11] provided he complies with any statute requiring

5. Griffith *v.* Robertson, 15 Hun (N. Y.) 344.

6. Lemmon *v.* Strong, 59 Conn. 448, 22 Atl. 293, 21 Am. St. Rep. 123, 12 L. R. A. 270; Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379 [*overruling* Smith *v.* Starr, 4 Hun (N. Y.) 123]; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Tucker *v.* Blaudin, 48 Hun (N. Y.) 439, 1 N. Y. Suppl. 842 [*affirmed* in 125 N. Y. 699, 26 N. E. 751]. *Compare* Sheers *v.* Thimbleby, 76 L. T. Rep. N. S. 709.

Want of consideration for guaranty.— A guaranty of a mortgage note, made without any consideration, by a person who never owned the note and was under no kind of obligation as to its payment, is not a negotiable guaranty; and hence a subsequent indorsee of the note has no greater rights in respect to the guaranty than belonged to the holder to whom it was originally given, and want of consideration may be pleaded against such indorsee. Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129.

Merger of guaranty.— Where one N, by assignment, became the owner of a mortgage against S, and afterward assigned it and guaranteed it, and it passed by a number of assignments back to the administrators of N, and they assigned it to B "with all the rights, remedies, incidents, &c., thereunto belonging," it was held that the original covenant of guaranty by N, having passed into his estate, was extinguished. Fluck *v.* Hager, 51 Pa. St. 459, 91 Am. Dec. 132.

7. Waller *v.* Staples, 107 Iowa 738, 77 N. W. 570; Ross *v.* Terry, 63 N. Y. 613.

Estoppel to deny validity.— The assignor of a mortgage is estopped to deny its validity as against his assignee. Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 144. And see Rogers *v.* Cross, 3 Pinn. (Wis.) 36, 3 Chandl. 34.

Usury.— On a sale and assignment of a note and mortgage, without representations as to the legality of the securities, there is no implied warranty as to the origin of the debt or that it is free from usury. Littauer *v.* Goldman, 72 N. Y. 506, 28 Am. Rep. 171; Buehler *v.* Pierce, 70 N. Y. App. Div. 621, 75 N. Y. Suppl. 1120. But it is otherwise if the assignor was personally concerned in the making of the note and mortgage, and in the unlawful acts which vitiated them. Ross *v.* Terry, 63 N. Y. 613.

8. Lieberman *v.* Reichard, 7 North. Co. Rep. (Pa.) 237. But *compare* Jackson *v.* Waldron, 13 Wend. (N. Y.) 178.

9. Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035; French *v.* Turner, 15 Ind. 59; Nally *v.* Long, 71 Md. 585, 18 Atl. 811, 17 Am. St. Rep. 547; Dixon *v.* Clayville, 44 Md. 573. *Contra*, Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

10. Collier *v.* Miller, 62 Hun (N. Y.) 99, 16 N. Y. Suppl. 633 [*affirmed* in 137 N. Y. 332, 33 N. E. 374].

11. Mack *v.* Prang, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848, 45 L. R. A. 407.

Effect of transfer of note.— Although the transfer of a note transfers also the mortgage by which it is secured, as an equitable incident, third parties are not bound by such equitable consequences. Indiana State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390.

Assignee as encumbrancer.— The assignee of a mortgage is an "encumbrancer" within a statute making the filing of a notice of *lis pendens* notice to all purchasers and encumbrancers of the property affected. Hovey *v.* Hill, 3 Lans. (N. Y.) 167.

As against prior judgment.—One who takes an assignment of a mortgage is not a *bona fide* purchaser as to a judgment rendered before the mortgage was made. Stephens *v.* Weldon, 151 Pa. St. 520, 25 Atl. 28. And see Neilson *v.* Churchill, 5 Dana (Ky.) 333; Yelverton *v.* Shelden, 2 Sandf. Ch. (N. Y.) 481. But, although a mortgage unaccompanied by a note was without consideration, and given merely to enable the mortgagee to

him to record his assignment,[12] and so is protected against subsequent purchasers, lienors, or judgment creditors,[13] of whose rights or interests he had no notice, either personally or by being affected by notice to his assignor,[14] or where an examination of the records would not have disclosed the rights or titles of such third persons.[15] In these particulars, however, the general rule applies that the assignee can take no better position and no stronger rights than were possessed by his assignor,[16] although the assignee who has given value, even though it were the discharge of an antecedent debt, does not hold the mortgage subject to the claims of any creditors of the assignor.[17] A first mortgage, being valid, may be enforced by a donee thereof as against the second mortgagee.[18] A mortgagee who has assigned the mortgage is estopped to set up a conflicting title to the mortgaged premises in himself to defeat the mortgage; and so also are his representatives and privies.[19]

g. Rights and Liabilities of Subsequent Assignees. As a general rule the rights and interests of a subsequent or remote assignee of a mortgage are coextensive with those of his immediate assignor;[20] but he can occupy no better or stronger position, and must take the securities subject to such equities and defenses as would have been available against them in the hands of his assignor,[21] although it seems that the remote assignee, if his own title to the mortgage is good, will not be affected by a want of capacity in his assignor to take or to enforce it.[22]

h. Assignment as Collateral Security. Where a mortgage is assigned as collateral security for a debt, it amounts to a mortgage of a mortgage,[23] and the

raise money on it, a *bona fide* purchaser thereof has a superior right to persons who were general creditors of the mortgagor when the mortgage was made and obtained judgments after the assignment. Economy Sav. Bank *v.* Gordon, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63.

12. Citizens' State Bank *v.* Julian, 153 Ind. 655, 55 N. E. 1007.

13. Spicer *v.* Ft. Edward First Nat. Bank, 170 N. Y. 562, 62 N. E. 1100; Curtis *v.* Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; Wallach *v.* Schulze, 22 N. Y. App. Div. 57, 47 N. Y. Suppl. 936.

14. Pickering *v.* Beckner, 48 S. W. 148, 20 Ky. L. Rep. 1060; Cressman's Appeal, 57 N. J. Eq. 619, 42 Atl. 768; Armstrong *v.* Combs, 15 N. Y. App. Div. 246, 44 N. Y. Suppl. 171. But see Hull *v.* Diehl, 21 Mont. 71, 52 Pac. 782, holding that where it appeared that an assignor of a duly recorded mortgage had notice of a prior unrecorded mortgage, but his assignee did not, and purchased in good faith for value the assignor's notice did not affect the assignee.

Notice before assignment.— The assignee of a mortgage is protected against all claims which were invalid against his assignor, by reason of want of notice, although the assignee himself had knowledge of such claims before the assignment. Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

15. Lockwood *v.* Noble, 113 Mich. 418, 71 N. W. 856; Wilson *v.* Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544.

16. See State Finance Co. *v.* Commonwealth Title Ins., etc., Co., 69 Minn. 219, 72 N. W. 68; Potter *v.* McDowell, 43 Mo. 93; Butler *v.* Mazeppa Bank, 94 Wis. 351, 68 N. W. 998.

17. Hubbard *v.* Turner, 12 Fed. Cas. No. 6,819, 2 McLean 519.

18. Dyer *v.* Dean, 69 Vt. 370, 37 Atl. 1113.

19. Rogers *v.* Cross, 3 Pinn. (Wis.) 36, 3 Chandl. 34.

20. Hugunin *v.* Starkweather, 10 Ill. 492; Hoitt *v.* Webb, 36 N. H. 158; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566.

A declaration of no defense or set-off on a mortgage, given by the mortgagor, avails a subsequent assignee as well as the first assignee; but the second assignee, to avail himself of such declaration, must be a purchaser for value. Burns *v.* Ashton, 1 Leg. Gaz. (Pa.) 417.

21. *Michigan.*— Nichols *v.* Lee, 10 Mich. 526, 82 Am. Dec. 57.

New Jersey.— Morris *v.* Joyce, 63 N. J. Eq. 549, 53 Atl. 139; Rose *v.* Kimball, 16 N. J. Eq. 185.

New York.—Bush *v.* Lathrop, 22 N. Y. 535; Freeman *v.* Auld, 37 Barb. 587 [*affirmed* in 44 Barb. 14]; Clute *v.* Robison, 2 Johns. 595; Sweet *v.* Van Wyck, 3 Barb. Ch. 647. And see Syracuse Sav. Bank *v.* Merrick, 182 N. Y. 387, 75 N. E. 232.

Ohio.— Stover *v.* Bound, 1 Ohio St. 107.

South Dakota.— Richards Trust Co. *v.* Rhomberg, (1905) 104 N. W. 268.

Virginia.— Payne *v.* Huffman, 98 Va. 372, 36 S. E. 476.

See 35 Cent. Dig. tit. "Mortgages," § 665.

22. Richards *v.* Kountze, 4 Nebr. 200, holding that where notes secured by a mortgage on land have been assigned to a national bank, and by it to a *bona fide* purchaser, the latter is entitled to enforce the security, even though the bank could not have done so, by reason of its having taken the assignment otherwise than for a debt previously contracted.

23. Graydon *v.* Church, 7 Mich. 36. But see Harrison *v.* Burlingame, 48 Hun (N. Y.)

assignor retains the right to redeem or recover the securities on payment of the debt for which they were pledged.[24] It is the duty of the assignee to use proper diligence and care in the management of the securities, in order that the assignor may have the benefit of their avails.[25] He may execute a power of sale contained in the mortgage,[26] and may foreclose it, cutting off the rights not only of the mortgagor but also of his assignor, if the latter is properly joined as a party in the proceedings;[27] but in that case the assignor will have a claim upon the proceeds of the sale in so far as they exceed the amount of the debt for which the mortgage was pledged as security,[28] although he will not be liable for any deficiency;[29] and if the mortgage is foreclosed without the joinder of the assignor, or by a private arrangement with the mortgagor, involving the release of the equity of redemption to the assignee, the latter can be credited only with the amount of the debt for which the mortgage was pledged and will be chargeable with the balance.[30] A junior mortgagee, having assigned the mortgage as collateral security for a debt of his own, may redeem the mortgaged premises from a sale made on the foreclosure of a senior mortgage, and such redemption will inure to the benefit of the assignee of the junior mortgage.[31]

2. Payment or Release — a. In General. It is for the assignee of a mortgage to receive payment of the debt secured and to give a good satisfaction and discharge of the mortgage.[32] Where the debt is evidenced by several notes or other obligations, which are in the hands of various parties, payment to one of the amount due to him will extinguish his interest in the mortgage;[33] but such a holder, although he also has an assignment of the mortgage, which the others have not, cannot discharge the mortgage, so as to prevent the other assignees from proceeding to foreclose it as against the mortgagor.[34] If an assigned mort-

212, holding that an assignment of a mortgage as collateral does not amount to a mortgage of a mortgage so as to bring the transaction within the statutes relating to chattel mortgages.

Parol evidence is admissible in equity to show that an assignment of a mortgage, although absolute in form, was in fact as collateral security for a debt or loan. Pond *v.* Eddy, 113 Mass. 149; Wormuth *v.* Tracy, 15 Hun (N. Y.) 180.

24. Compton *v.* Jones, 65 Ind. 117; Cutts *v.* York Mfg. Co., 18 Me. 190; Briggs *v.* Rice, 130 Mass. 50; Sweet *v.* Van Wyck, 3 Barb. Ch. (N. Y.) 647.

Agreement for forfeiture.— A mortgagee does not lose his interest in the mortgage by assigning it to his creditor as collateral security for his own debt, although he stipulates in the assignment to forfeit all interest in the mortgage if he fails to pay his debt by a certain day, and fails to pay it; the agreement for forfeiture amounts to nothing in a court of equity. Hughes *v.* Johnson, 38 Ark. 285.

25. Holmes *v.* Williams, 177 Ill. 386, 53 N. E. 93; Synod *v.* De Blaquiere, 27 Grant Ch. (U. C.) 536.

26. Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283. See also Slee *v.* Manhattan Co., 1 Paige (N. Y.) 48, holding that on execution of a power of sale by such assignee, if the land is sold to a third person, it will be discharged of all claims on the part of the assignor; but if purchased by the assignee it will be subject to the right of redemption in the assignor.

27. Anderson *v.* Olin, 145 Ill. 168, 34 N. E. 55; Baldwin *v.* Sager, 70 Ill. 503; Underhill *v.* Atwater, 22 N. J. Eq. 16.

Foreclosure by assignor.— One who has assigned a note as collateral security for a debt of his own may sue to foreclose the mortgage given to secure such note, but in that case equity will require the holder to be brought in as a party. Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597.

28. Graydon *v.* Church, 7 Mich. 36; Dalton *v.* Smith, 86 N. Y. 176; Hoyt *v.* Martense, 16 N. Y. 231.

29. Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035.

30. Kelly *v.* Matlock, 85 Cal. 122, 24 Pac. 642; Chester *v.* Hill, 66 Cal. 480, 6 Pac. 132; *In re* Gilbert, 104 N. Y. 200, 10 N. E. 148.

31. Manning *v.* Markel, 19 Iowa 103.

32. Peaks *v.* Dexter, 82 Me. 85, 19 Atl. 100; Terry *v.* Woods, 6 Sm. & M. (Miss.) 139, 45 Am. Dec. 274; Collamer *v.* Langdon, 29 Vt. 32.

Payment to agent.— An agent of a mortgagee to collect interest has not thereby implied authority to collect and receive the principal, and such an unauthorized receipt of the principal will not bind an assignee of the mortgage. Cornish *v.* Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Taylor *v.* Vingert, 33 Leg. Int. (Pa.) 238.

Payment to trustee.— Where a mortgagee assigned his mortgage and the accompanying bond to two trustees, payment to either of them will discharge the debt. Bowes *v.* Seeger, 8 Watts & S. (Pa.) 222.

33. Furbush *v.* Goodwin, 25 N. H. 425.

34. Norton *v.* Palmer, 142 Mass. 433, 8 N. E. 346; Page *v.* Pierce, 26 N. H. 317.

gage is abated or partially extinguished by operation of law, it may be discharged by payment to the assignee of so much only as may remain due under it.[35]

b. Payment to Mortgagee After Assignment. Subject to the question of notice to the mortgagor, presently to be discussed,[36] as a rule the mortgagee has no right to receive payment of the debt secured by the mortgage, after he has assigned the securities, and payment so made to him will not affect the rights of the assignee.[37] It is otherwise of course if the assignee's title is not good, the assignment to him having been procured by fraud and deceit;[38] and where the security is in the form of a deed of trust expressly authorizing the trustee to receive payment, a subsequent holder of the note secured will be bound by a payment made to the trustee unless he has revoked the latter's authority.[39]

c. Giving Notice to Mortgagor — (i) *Necessity.* So far as concerns the validity of a mortgage in the hands of an assignee and his right to enforce it, it is not necessary for him to give the mortgagor any notice of the assignment,[40] although it is the part of prudence to do so, and in some cases the rights of the assignee may be compromised by the omission of such notice.[41]

(ii) *Payments Without Notice of Assignment.* Where a mortgagor, acting in good faith and without any actual or constructive notice of the fact that the mortgage has been assigned to a third person, makes a payment on the same to the mortgagee, the mortgage will be discharged, wholly or *pro tanto*, as against the claims of the assignee.[42]

35. Henderson *v.* Stryker, 164 Pa. St. 170, 30 Atl. 386.

36. See *infra*, XVI, E, 2, c.

37. *Illinois.*— Keohane *v.* Smith, 97 Ill. 156; Viskocil *v.* Doktor, 27 Ill. App. 232.

Iowa.— Franklin Sav. Bank *v.* Colby, 105 Iowa 424, 75 N. W. 346.

Maryland.— Hoffacker *v.* Manufacturers' Nat. Bank, (1892) 23 Atl. 579.

Michigan.— Chase *v.* Brown, 32 Mich. 225.

Nebraska.— Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37; Eggert *v.* Beyer, 43 Nebr. 711, 62 N. W. 57.

New Jersey.— Emery *v.* Gordon, 33 N. J. Eq. 447.

New York.—Mitchell *v.* Cook, 29 Barb. 243.

Pennsylvania.— Sweetzer *v.* Atterbury, 100 Pa. St. 18.

See 35 Cent. Dig. tit. "Mortgages," § 668.

38. Hall *v.* Erwin, 66 N. Y. 649.

39. Goodfellow *v.* Stillwell, 73 Mo. 17.

40. Mulcahy *v.* Fenwick, 161 Mass. 164, 36 N. E. 689; Biggerstaff *v.* Marston, 161 Mass. 101, 36 N. E. 785; Davies *v.* Jones, 29 Misc. (N. Y.) 253, 61 N. Y. Suppl. 291; Jones *v.* Gibbons, 9 Ves. Jr. 407, 7 Rev. Rep. 247, 32 Eng. Reprint 659.

41. Williams *v.* Pelley, 96 Ill. App. 346. See also McCabe *v.* Farnsworth, 27 Mich. 52, holding that where the assignee of a mortgage fails to give notice of the assignment, and so acts as to authorize the mortgagor and his grantees to believe that the assignor is still the owner thereof, and they deal with him on that basis, the assignee is estopped to deny the right or authority of the assignor, whether the money for which the mortgage was originally given was his or not.

42. *Alabama.*— Rice *v.* Jones, 71 Ala. 551.

Idaho.— Pennypacker *v.* Latimer, 10 Ida. 618, 625, 81 Pac. 55.

Illinois.— Napieralski *v.* Simon, 198 Ill. 384, 64 N. E. 1042; McAuliffe *v.* Reuter, 166 Ill. 491, 46 N. E. 1087; Towner *v.* McClelland, 110 Ill. 542; Carey *v.* Kutten, 98 Ill. App. 197; Sheldon *v.* McNall, 89 Ill. App. 138; Sroelowitz *v.* Schultz, 86 Ill. App. 541 [*reversed* on other grounds in 191 Ill. 249, 61 N. E. 92].

Iowa.— McKinley-Lanning L. & T. Co. *v.* Gordon, 113 Iowa 481, 85 N. W. 816.

Kansas.— Fox *v.* Cipra, 5 Kan. App. 312, 48 Pac. 452. But see Burhans *v.* Hutcheson, 25 Kan. 625, 37 Am. Rep. 274.

Kentucky.— Fidelity Trust, etc., Co. *v.* Carr, 66 S. W. 990, 24 Ky. L. Rep. 156; Kentucky Mut. L. Ins. Co. *v.* Hall, 50 S. W. 254, 20 Ky. L. Rep. 1880.

Maine.— Mitchell *v.* Burnham, 44 Me. 286.

Massachusetts.— Fitzgerald *v.* Beckwith, 182 Mass. 177, 65 N. E. 36. But *compare* Mulcahy *v.* Fenwick, 161 Mass. 164, 36 N. E. 689.

Michigan.— Castle *v.* Castle, 78 Mich. 298, 44 N. W. 378; Ingalls *v.* Bond, 66 Mich. 338, 33 N. W. 404; Jones *v.* Smith, 22 Mich. 360. But see Brooke *v.* Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536.

Minnesota.— Robbins *v.* Larson, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572; Olson *v.* Northwestern Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100; Johnson *v.* Carpenter, 7 Minn. 176.

Nebraska.— Breck *v.* Meeker, 68 Nebr. 99, 93 N. W. 993; Bullock *v.* Pock, 57 Nebr. 781, 78 N. W. 261.

New Jersey.— Weinberger *v.* Brumberg, (Ch. 1905) 61 Atl. 732; Fritz *v.* Simpson, 34 N. J. Eq. 436; Emery *v.* Gordon, 33 N. J. Eq. 447.

New York.— Van Keuren *v.* Corkins, 66 N. Y. 77; Barnes *v.* Long Island Real Estate Exch., etc., Co., 88 N. Y. App. Div. 83, 84 N. Y. Suppl. 951; Hetzell *v.* Barber, 6 Hun

(III) *What Constitutes Notice* — (A) *In General.* Notice of the assignment of a mortgage, given to the mortgagor for the purpose of directing his future payments to the proper recipient, should be distinct and unequivocal,[43] and such as to identify the assignee clearly.[44] It may be sent by mail; but in that case, if its receipt is denied, there must be proof of its actual receipt; the ordinary presumption of delivery of a letter properly addressed will not suffice.[45] Notice to the mortgagor's agent or attorney may be imputed to him,[46] notice to the mortgagor may be inferred from his knowledge of circumstances which should have put him on inquiry, but these must be strong enough to give him a clear warning that the mortgagee has parted with his interest in the securities.[47]

(B) *Record of Assignment as Notice.* Under the recording acts of many jurisdictions the mere recording of an assignment of a mortgage is not of itself notice to the mortgagor so as to protect the assignee against payments thereafter made by the mortgagor to the original mortgagee in good faith and without proof of his actual knowledge of the assignment;[48] but in other jurisdictions the con-

534 [*reversed* on other grounds in 69 N. Y. 1]; Ely *v.* Scofield, 35 Barb. 330; O'Callaghan *v.* Barrett, 21 N. Y. Suppl. 368; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475; New York L. Ins., etc., Co. *v.* Smith, 2 Barb. Ch. 82; Reed *v.* Marble, 10 Paige 409; Noyes *v.* Clark, 7 Paige 179, 32 Am. Dec. 620.

Ohio.— Wirtz *v.* Leich, 4 Ohio Dec. (Reprint) 388, 2 Clev. L. Rep. 89.

Pennsylvania.— Foster *v.* Carson, 159 Pa. St. 477, 28 Atl. 356, 39 Am. St. Rep. 696; Horstman *v.* Gerker, 49 Pa. St. 282, 88 Am. Dec. 501; Philips *v.* Lewistown Bank, 18 Pa. St. 394; Com. *v.* Watmough, 12 Pa. St. 316; Northampton Bank *v.* Balliet, 8 Watts & S. 311, 42 Am. Dec. 297; Hodgdon *v.* Naglee, 5 Watts & S. 217; Bury *v.* Hartman, 4 Serg. & R. 175.

United States.—Hubbard *v.* Turner, 12 Fed. Cas. No. 6,819, 2 McLean 519.

England.— Dixon *v.* Winch, 68 L. J. Ch. 572, 81 L. T. Rep. N. S. 111, 47 Wkly. Rep. 620; Williams *v.* Sorrell, 4 Ves. Jr. 389, 31 Eng. Reprint 198.

Canada.— McDonough *v.* Dougherty, 10 Grant Ch. (U. C.) 42; Engerson *v.* Smith, 9 Grant Ch. (U. C.) 16; Galbraith *v.* Morrison, 8 Grant Ch. (U. C.) 289. *Compare* Wilson *v.* Kyle, 28 Grant Ch. (U. C.) 104.

See 35 Cent. Dig. tit. "Mortgages," § 673.

See, however, Mead *v.* Leavitt, 59 N. H. 476.

Payment by mortgagor's vendee.— It has been held that this rule is not to be extended to subsequent purchasers of the property who assume and agree to pay the encumbrance; and, notwithstanding the assignee has not recorded the assignment or given notice thereof to any one, he is entitled to protection against payments made by the purchasers to the mortgagee in the belief that be still owned the indebtedness. "Their equities must be classed with those mentioned as the latent equities of third persons." Schultz *v.* Sroelowitz, 191 Ill. 249, 61 N. E. 92. See, however, Barry *v.* Stover, (S. D. 1906) 107 N. W. 672.

43. Barnes *v.* Long Island Real Estate Exch., etc., Co., 88 N. Y. App. Div. 83, 84 N. Y. Suppl. 951.

44. Noyes *v.* Clark, 7 Paige (N. Y.) 179, 32 Am. Dec. 620.

45. Vann *v.* Marbury, 100 Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325; Barnes *v.* Long Island Real Estate Exch., etc., Co., 88 N. Y. App. Div. 83, 84 N. Y. Suppl. 951.

46. Walker *v.* Schreiber, 47 Iowa 529; Dixon *v.* Winch, [1900] 1 Ch. 736, 69 L. J. Ch. 465, 82 L. T. Rep. N. S. 437, 48 Wkly. Rep. 612.

Inquiries addressed to agent.— Where the assignee of a mortgage, prior to its purchase, sent his agent to a person whom the mortgagor had employed as his agent in improving the mortgaged property, to make inquiries as to the solvency of the mortgagor, it was held that this did not charge the mortgagor with notice of the subsequent sale of the mortgage, his agent having no authority to bind him as to that matter. Fidelity Trust, etc., Co. *v.* Carr, 66 S. W. 990, 24 Ky. L. Rep. 156.

47. Vann *v.* Marbury, 100 Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325; Gregory *v.* Savage, 32 Conn. 250; Foster *v.* Beals, 21 N. Y. 247.

48. See the statutes of the different states. And see the following cases:

Indiana.— Citizens' State Bank *v.* Julian, (1899) 54 N. E. 390.

Michigan.— Goodale *v.* Patterson, 51 Mich. 532, 16 N. W. 890.

Minnesota.— Robbins *v.* Larson, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572; Blumenthal *v.* Jassoy, 29 Minn. 177, 12 N. W. 517; Hostetter *v.* Alexander, 22 Minn. 559; Johnson *v.* Carpenter, 7 Minn. 176.

New York.— Laws (1896), p. 616, c. 547, § 271; Barnes *v.* Long Island Real Estate Exch., etc., Co., 88 N. Y. App. Div. 83, 84 N. Y. Suppl. 951; Pettus *v.* McGowan, 37 Hun 409; New York L. Ins., etc., Co. *v.* Smith, 2 Barb. Ch. 82; Reed *v.* Marble, 10 Paige 409; Wolcott *v.* Sullivan, 1 Edw. 399 [*affirmed* in 6 Paige 117].

Pennsylvania.— Foster *v.* Carson, 147 Pa. St. 157, 23 Atl. 342, 159 Pa. St. 477, 28 Atl. 356, 39 Am. St. Rep. 696.

See 35 Cent. Dig. tit. "Mortgages," § 675.

trary rule obtains.[49] Such record is notice to persons subsequently dealing either with the securities or with the mortgaged premises, including subsequent assignees of the same mortgage[50] and purchasers of the equity of redemption.[51]

(IV) *Laches or Negligence of Mortgagor.* If the mortgagor, on making a payment to the mortgagee, neglects to demand the production of the mortgage and note or bond, so that they may be delivered up to him for cancellation if the payment is a final one, or so that the payment may be properly indorsed or credited, if a partial one, he is chargeable with laches, and acts at his peril if the securities have actually been assigned to a *bona fide* holder.[52]

(V) *Payment After Notice of Assignment.* After receiving notice of an assignment of the mortgage, the mortgagor is not justified in making payments to the mortgagee; payments so made are void as against the assignee, and the mortgagor may be compelled to pay the money a second time, unless he can prove that the mortgagee was duly authorized, as the agent of the assignee or otherwise, to receive the payment.[53]

49. Detwilder *v.* Heckenlaible, 63 Kan. 627, 66 Pac. 653; Fisher *v.* Cowles, 41 Kan. 418, 21 Pac. 228; Merriam *v.* Bacon, 5 Metc. (Mass.) 95; Cornish *v.* Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Gilleland *v.* Wadsworth, 1 Ont. App. 82.

The recording of an unacknowledged assignment of a mortgage, such an instrument not being entitled to record, will not impart constructive notice of such assignment. Fisher *v.* Cowles, 41 Kan. 418, 21 Pac. 228.

In Illinois such indications as the decisions afford appear to sustain the theory that the recording of the assignment is equivalent to actual notice to the mortgagor. See Schultz *v.* Sroelowitz, 191 Ill. 249, 61 N. E. 92; Carey *v.* Kutten, 98 Ill. App. 197; Sheldon *v.* McNall, 89 Ill. App. 138.

50. Viele *v.* Judson, 82 N. Y. 32.

51. Woodward *v.* Brown, 119 Cal. 285, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Eggert *v.* Beyer, 43 Nebr. 711, 62 N. W. 57; Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Smyth *v.* Knickerbocker L. Ins. Co., 84 N. Y. 589; Larned *v.* Donovan, 84 Hun (N. Y.) 533, 32 N. Y. Suppl. 731.

52. *Iowa.*— Baumgartner *v.* Peterson, 93 Iowa 572, 62 N. W. 27; Brayley *v.* Ellis, 71 Iowa 155, 32 N. W. 254.

Maryland.— Hoffacker *v.* Manufacturers' Nat. Bank, (1892) 23 Atl. 579.

Massachusetts.— Murphy *v.* Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Biggerstaff *v.* Marston, 161 Mass. 101, 36 N. E. 785.

Michigan.— Wilson *v.* Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Williams *v.* Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438.

Montana.— Dodge *v.* Birkenfeld, 20 Mont. 115, 49 Pac. 590.

Nebraska.— Snell *v.* Margritz, 64 Nebr. 6, 91 N. W. 274; Eggert *v.* Beyer, 43 Nebr. 711, 62 N. W. 57.

New Hampshire.— Mcad *v.* Leavitt, 59 N. H. 476.

New Jersey.— See Weinberger *v.* Brumberg, (Ch. 1905) 61 Atl. 732.

North Carolina.— Clinton Loan Assoc. *v.* Merritt, 112 N. C. 243, 17 S. E. 296.

South Dakota.— See McVay *v.* Tousley, (1905) 105 N. W. 932.

United States.— Windle *v.* Bonebrake, 23 Fed. 165.

Canada.— Gilleland *v.* Wadsworth, 1 Ont. App. 82.

See 35 Cent. Dig. tit. "Mortgages," § 669.

In Minnesota and New York it has been held that the mere facts that a bond and mortgage are not in the possession of the mortgagee, and are not produced at the time a payment is made, are not of themselves sufficient to charge the mortgagor with notice that they have been assigned. Olson *v.* Northwestern Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100; Van Keuren *v.* Corkins,, 66 N. Y. 77; Barnes *v.* Long Island Real Estate Exch., etc., Co., 88 N. Y. App. Div. 83, 84 N. Y. Suppl. 951; Armstrong *v.* Combs, 15 N. Y. App. Div. 246, 44 N. Y. Suppl. 171. See also Clark *v.* Igelstrom, 51 How. Pr. (N. Y.) 407. But *compare* Blumenthal *v.* Jassoy, 29 Minn. 177, 12 N. W. 517.

53. *Alabama.*— Lehman *v.* McQueen, 65 Ala. 570.

Indiana.— Daggett *v.* Flanagan, 78 Ind. 253.

Iowa.— Livermore *v.* Maxwell, 87 Iowa 705, 55 N. W. 37.

Maine.— Mitchell *v.* Burnham, 44 Me. 286; Dorkray *v.* Noble, 8 Me. 278. And see Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595, holding that, where the debt secured by the mortgage has been assigned, but the mortgage itself has not, a tender of the amount due must be made to the mortgagee and not to the assignee of the debt.

Massachusetts.— Cutler *v.* Haven, 8 Pick. 490.

Missouri.— Lord *v.* Schamloeffel, 50 Mo. App. 360.

New York.— Mitchell *v.* Cook, 29 Barb. 243; Jackson *v.* Blodget, 5 Cow. 202.

See 35 Cent. Dig. tit. "Mortgages," § 670.

Rights of junior mortgagee.— Where a mortgagor, before the recording of an assignment of the mortgage, although with knowledge of the fact of the assignment, made a payment to the mortgagee, taking a partial release, which was recorded, and thereafter,

d. Discharge of Mortgage After Assignment — (I) *By Mortgagee.* After assigning a mortgage and the debt secured to a *bona fide* holder, the mortgagee has no control over the securities, and cannot prejudice the rights of his assignee by entering a satisfaction or discharge of the mortgage, or releasing any portion of the property covered by it.[54] If he does the assignee may maintain an action for damages against him, recovering the value of the mortgage, not exceeding the amount due on the note secured,[55] or a court of equity will order the entry of satisfaction or release to be canceled.[56]

(II) *Rights of Subsequent Purchasers, Mortgagees, or Assignees.* A subsequent purchaser or mortgagee of the mortgaged premises, or a subsequent assignee of the mortgage, who acts in good faith and pays value, relying on the mortgagee's apparent ownership of the securities and on a satisfaction or release by him, is, according to most of the cases, protected against the claims of one owning the mortgage under a prior assignment, of which such third person had no knowledge,[57] although in some jurisdictions this doctrine is expressly

and before the assignment was recorded, gave another mortgage on the premises, it was held that the second mortgagee was entitled, as against the assignee of the first mortgage, to have the payment made to the first mortgagee by the mortgagor after the assignment treated as a payment on the first mortgage. Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78.

54. *Colorado.*— Fassett *v.* Mulock, 5 Colo. 466.

Connecticut.— Smith *v.* Stevens, 49 Conn. 181.

District of Columbia.— Ramsey *v.* Daniels, 1 Mackey 16.

Illinois.—Center *v.* Elgin City Banking Co., 185 Ill. 534, 57 N. E. 439; Harding *v.* Durand, 36 Ill. App. 238; Jennings *v.* Hunt, 6 Ill. App. 523.

Indiana.— Fox *v.* Wray, 56 Ind. 423; Hough *v.* Osborne, 7 Ind. 140; McCormick *v.* Digby, 8 Blackf. 99.

Iowa.— Franklin Sav. Bank *v.* Colby, 105 Iowa 424, 75 N. W. 346; Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; Martindale *v.* Burch, 57 Iowa 291, 10 N. W. 670; Vandercook *v.* Baker, 48 Iowa 199.

Louisiana.— Mechanics' Bldg. Assoc. *v.* Ferguson, 29 La. Ann. 548.

Massachusetts.— Cutler *v.* Haven, 8 Pick. 490.

Missouri.— Ripley Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 145 Mo. 142, 47 S. W. 1; Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73; Lee *v.* Clark, 89 Mo. 553, 1 S. W. 142; Lord *v.* Schamloeffal, 50 Mo. App. 360; Bartlett *v.* Eddy, 49 Mo. App. 32; Gottschalk *v.* Neal, 6 Mo. App. 596.

New Jersey.— Tradesmen's Bldg., etc., Assoc. *v.* Thompson, 31 N. J. Eq. 536.

New York.— Heilbrun *v.* Hammond, 13 Hun 474; Ely *v.* Scofield, 35 Barb. 330.

Oregon.— Bamberger *v.* Geiser, 24 Oreg. 203, 33 Pac. 609.

South Carolina.— Lynch *v.* Hancock, 14 S. C. 66.

South Dakota.—Parker *v.* Randolph, 5 S. D. 549, 59 N. W. 722, 29 L. R. A. 33.

Vermont.— Nash *v.* Kelley, 50 Vt. 425.

Washington.— Fischer *v.* Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742.

Wisconsin.— Gordon *v.* Mulhare, 13 Wis. 22. *Compare* Seymour *v.* Laycock, 47 Wis. 272, 2 N. W. 297.

United States.— Swift *v.* Smith, 102 U. S. 442, 26 L. ed. 193; Black *v.* Reno, 59 Fed. 917.

See 35 Cent. Dig. tit. "Mortgages," § 671.

55. Fox *v.* Wray, 56 Ind. 423; Howland *v.* McLaren, 22 Grant Ch. (U. C.) 231.

56. Fassett *v.* Mulock, 5 Colo. 466; Ferris *v.* Hendrickson, 1 Edw. (N. Y.) 132; Gordon *v.* Mulhare, 13 Wis. 22.

57. *Alabama.*— Vann *v.* Marbury, 100 Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325.

California.— Beal *v.* Stevens, 72 Cal. 451, 14 Pac. 186.

Illinois.— Ogle *v.* Turpin, 102 Ill. 148; Edgerton *v.* Young, 43 Ill. 464.

Indiana.—Ayers *v.* Hays, 60 Ind. 452.

Iowa.— Bowling *v.* Cook, 39 Iowa 200; Indiana Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390.

Kansas.— Fisher *v.* Cowles, 41 Kan. 418, 21 Pac. 228; Lewis *v.* Kirk, 28 Kan. 497, 42 Am. Rep. 173. See also Parker *v.* Biddle, 23 Kan. 471.

Massachusetts.— Com. *v.* Globe Inv. Co., 168 Mass. 80, 46 N. E. 410; Welch *v.* Priest, 8 Allen 165.

Michigan.— Moran *v.* Roberge, 84 Mich. 600, 48 N. W. 164.

Nebraska.— Porter *v.* Ourada, 51 Nebr. 510, 71 N. W. 52; Cram *v.* Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714; Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15; Cheshire Provident Inst. *v.* Gibson, 2 Nebr. (Unoff.) 392, 89 N. W. 243; Montgomery *v.* Waite, 1 Nebr. (Unoff.) 144, 95 N. W. 343.

Nevada.— Gibson *v.* Miln, 1 Nev. 526, holding that a subsequent purchaser with notice of the prior assignment takes subject to it.

New York.— Gibson *v.* Thomas, 180 N. Y. 483, 73 N. E. 484, 70 L. R. A. 768; Clark *v.* McNeal, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638; Clark *v.* Mackin, 30 Hun 411. This rule does not apply if the purchaser has not parted with any valuable consideration in

denied.[58] Certain of the decisions also make the conflicting rights of the parties in such a case depend upon their comparative prudence or carelessness, holding that if the subsequent purchaser or mortgagee has been guilty of laches or negligence in failing to require full and satisfactory proof of the authority of the mortgagee to discharge or release the mortgage, he has no equity superior to that of the innocent holder;[59] while, on the other hand, if the assignee, by his carelessness or indifference, has put it in the power of the original mortgagee to accomplish a deceit upon the third person, he should bear the loss.[60]

(III) *Failure to Record Assignment.* Where the statute authorizes or requires the recording of assignments of mortgages, the effect of recording such assignment is to give constructive notice to all subsequent purchasers and encumbrancers; and on the other hand, failure to record it places the assignee in such a position that he can claim no rights against a person subsequently buying the property or acquiring a lien on it, for value, and in reliance on a release or discharge of the mortgage by the original mortgagee.[61]

reliance on the discharge of the mortgage. Spicer *v.* Ft. Edward First Nat. Bank, 170 N. Y. 562, 62 N. E. 1100.

Ohio.— Swartz *v.* Leist, 13 Ohio St. 419.

Pennsylvania.— Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541.

South Carolina.— McAdams *v.* Robinson, 35 S. C. 385, 14 S. E. 825.

Texas.— Henderson *v.* Pilgrim, 22 Tex. 464.

Vermont.— Torrey *v.* Deavitt, 53 Vt. 331.

Wisconsin.— Girardin *v.* Lampe, 58 Wis. 267, 16 N. W. 614.

United States.— Williams *v.* Jackson, 107 U. S. 478, 2 S. Ct. 814, 27 L. ed. 529. But *compare* Block *v.* Reno, 59 Fed. 917.

See 35 Cent. Dig. tit. "Mortgages," § 672.

58. Fassett *v.* Mulock, 5 Colo. 466; Hewell *v.* Coulbourn, 54 Md. 59; Lee *v.* Clark, 89 Mo. 553, 1 S. W. 142; Rice *v.* McFarland, 34 Mo. App. 404; McCormick *v.* Cockburn, 31 Ont. 436.

59. *Illinois.*— Skeele *v.* Stocker, 11 Ill. App. 143.

Nebraska.— Snell *v.* Margritz, 64 Nebr. 6, 91 N. W. 274; Heintz *v.* Klebba, 5 Nebr. (Unoff.) 289, 98 N. W. 431.

New Jersey.— Morris *v.* Joyce, 63 N. J. Eq. 549, 53 Atl. 139.

New York.— Larned *v.* Donovan, 155 N. Y. 341, 49 N. E. 942; Brown *v.* Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506.

South Carolina.— Williams *v.* Paysinger, 15 S. C. 171.

See 35 Cent. Dig. tit. "Mortgages," § 672.

60. Daws *v.* Craig, 62 Iowa 515, 17 N. W. 778; Costello *v.* Meade, 55 How. Pr. (N. Y.) 356.

61. *Illinois.*— Keohane *v.* Smith, 97 Ill. 156; Howard *v.* Ross, 5 Ill. App. 456; Turpin *v.* Ogle, 4 Ill. App. 611.

Iowa.— Quincy *v.* Ginsbach, 92 Iowa 144, 60 N. W. 511; Parmenter *v.* Oakley, 69 Iowa 388, 28 N. W. 653; Daws *v.* Craig, 62 Iowa 515, 17 N. W. 778.

Massachusetts.— Wolcott *v.* Winchester, 15 Gray 461.

New Jersey.— Higgins *v.* Jamesburg Mut. Bldg. Assoc., 67 N. J. Eq. 525, 58 Atl. 1078; Shotwell *v.* Matthews, (Ch. 1891) 21 Atl. 1067.

New York.— Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Smyth *v.* Knickerbocker L. Ins. Co., 84 N. Y. 589; Van Keuren *v.* Corkins, 66 N. Y. 77; Belden *v.* Meeker, 47 N. Y. 307; Clark *v.* Mackin, 30 Hun 411; Heilbrun *v.* Hammond, 13 Hun 474; Ely *v.* Scofield, 35 Barb. 330; Warner *v.* Winslow, 1 Sandf. Ch. 430.

Ohio.— Swartz *v.* Hurd, 2 Ohio Dec. (Reprint) 134, 1 West. L. Month. 510.

South Dakota.— Pickford *v.* Peebles, 7 S. D. 166, 63 N. W. 779; Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; Merrill *v.* Luce, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844.

Texas.— Henderson *v.* Pilgrim, 22 Tex. 464.

Vermont.— Ladd *v.* Campbell, 56 Vt. 529.

See 35 Cent. Dig. tit. "Mortgages," § 676.

Deed from mortgagor and mortgagee.— A mortgage upon land having been duly executed and recorded, and remaining unsatisfied upon the record, a subsequent deed of the land by the mortgagor and mortgagee jointly will not discharge the mortgage in the hands of a *bona fide* assignee for value, although his assignment has not been recorded. Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302.

Recourse against assignor.— Although the failure to record the assignment may impair or destroy the lien of the mortgage, it does not discharge it as between the assignee and his assignor, and the former may recover damages against the latter, whether his intent in discharging the mortgage was fraudulent or not. Ferris *v.* Hendrickson, 1 Edw. (N. Y.) 132.

In the absence of a statute providing for the recording of assignments of mortgages, laches cannot be imputed to an assignee for failure to put his assignment on record, and he may have a good lien, although the mortgage appears by the record to have been satisfied as between mortgagor and mortgagee, and another person, relying on the satisfaction, and without notice of the assignment, has taken a junior mortgage. Reeves *v.* Hayes, 95 Ind. 521; Dixon *v.* Hunter, 57 Ind. 278.

3. Equities and Defenses — a. In General. Where the debt secured by a mortgage is created or evidenced in any other manner than by a negotiable promissory note, one taking it by assignment is the assignee of a chose in action, and therefore takes the debt and the security subject to any equities or defenses existing against it in the hands of the original mortgagee, at the time of the assignment, whether or not he had notice or knowledge thereof.[62] But it is not subject in his

62. *California.*— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Meyer *v.* Weber, 133 Cal. 681, 65 Pac. 1110; San Jose Ranch Co. *v.* San Jose Land, etc., Co., 132 Cal. 582, 64 Pac. 1097; Raymond *v.* Glover, (1894) 37 Pac. 772; Brown *v.* Witts, 57 Cal. 304; McCabe *v.* Grey, 20 Cal. 509.

Dakota.— Grand Haven First Nat. Bank *v.* Honeyman, 6 Dak. 275, 42 N. W. 771.

Florida.— Reddish *v.* Ritchie, 17 Fla. 867.

Georgia.— Foster *v.* McGuire, 96 Ga. 447, 23 S. E. 398; Winn *v.* Ham, R. M. Charlt. 70.

Illinois.— Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Buehler *v.* McCormick, 169 Ill. 269, 48 N. E. 287; Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Towner *v.* McClelland, 110 Ill. 542; Ellis *v.* Sisson, 96 Ill. 105; Hass *v.* Lobstein, 108 Ill. App. 217; Elser *v.* Williams, 104 Ill. App. 238; Bebber *v.* Moreland, 100 Ill. App. 198; Hahn *v.* Geiger, 96 Ill. App. 104; Faris *v.* Briscoe, 78 Ill. App. 242; Cameron *v.* Bouton, 72 Ill. App. 264; Belt *v.* Winsor, 38 Ill. App. 333; Foster *v.* Strong, 5 Ill. App. 223.

Indiana.— Sharts *v.* Awalt, 73 Ind. 304.

Iowa.— Henry *v.* Laurens State Bank, (1906) 107 N. W. 1034; Tabor *v.* Fox, 56 Iowa 539, 9 N. W. 897; Yerger *v.* Barz, 56 Iowa 77, 8 N. W. 769; Burbank *v.* Warwick, 52 Iowa 493, 3 N. W. 519. But see Hollenbeck *v.* Stearns, 73 Iowa 570, 35 N. W. 643.

Kansas.— Bull *v.* Sink, 8 Kan. 860, 57 Pac. 853.

Louisiana.— Brou *v.* Becnel, 20 La. Ann. 254. But see Carpenter *v.* Allen, 16 La. Ann. 435.

Maryland.— Cumberland Coal, etc., Co. *v.* Parish, 42 Md. 598; Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597. If a purchaser of land accepts a deed with special warranty, and executes his bond and mortgage for the purchase-money, and a suit in equity is brought by an assignee of the mortgage to enforce its payment, such purchaser cannot be allowed to claim a deduction from the mortgage debt by reason of an outstanding encumbrance on the land within the warranty. Timms *v.* Shannon, 19 Md. 296, 81 Am. Dec. 632.

Michigan.— Walker *v.* Thompson, 108 Mich. 686, 66 N. W. 584; Cooly *v.* Harris, 92 Mich. 126, 135, 52 N. W. 997; Humphrey *v.* Beckwith, 48 Mich. 151, 12 N. W. 28; Terry *v.* Tuttle, 24 Mich. 206; Nichols *v.* Lee, 10 Mich. 526, 82 Am. Dec. 57. An assignee of a mortgage, who has purchased the same in good faith, does not take it subject to any equities between the mortgagor and his grantor, growing out of the fraud of the mortgagor in procuring the title to the land. Bloomer *v.* Henderson, 8 Mich. 395, 77 Am. Dec. 453.

Minnesota.— Paulsen *v.* Koon, 85 Minn. 240, 88 N. W. 760; Redin *v.* Branhan, 43 Minn. 283, 45 N. W. 445.

Mississippi.— Farmers' Bank *v.* Douglass, 11 Sm. & M. 469.

Missouri.— Missouri Real Estate Syndicate *v.* Sims, 179 Mo. 679, 78 S. W. 1006.

Nebraska.— Richardson *v.* Woodruff, 20 Nebr. 132, 29 N. W. 308.

New Hampshire.— Clark *v.* Clark, 62 N. H. 267.

New Jersey.— Tate *v.* Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313; Hutchinson *v.* Abbott, 33 N. J. Eq. 379; Union Nat. Bank *v.* Pinner, 25 N. J. Eq. 495; Bennett *v.* Hadsell, 23 N. J. Eq. 174; Kamena *v.* Huelbig, 23 N. J. Eq. 78; Atwater *v.* Underhill, 22 N. J. Eq. 599; Andrews *v.* Torrey, 14 N. J. Eq. 355; Donnington *v.* Meeker, 11 N. J. Eq. 362; Jaques *v.* Esler, 4 N. J. Eq. 461; Bolles *v.* Wade, 4 N. J. Eq. 458; Stevenson *v.* Black, 1 N. J. Eq. 338. See also Smallwood *v.* Lewin, 13 N. J. Eq. 123.

New York.— Hill *v.* Hoole, 116 N. Y. 299, 22 N. E. 547, 5 L. R. A. 620; Briggs *v.* Langford, 107 N. Y. 680, 14 N. E. 502; Bennett *v.* Bates, 94 N. Y. 354; Green *v.* Fry, 93 N. Y. 353; Westbrook *v.* Gleason, 79 N. Y. 23; Reid *v.* Sprague, 72 N. Y. 457; Davis *v.* Bechstein, 69 N. Y. 440, 25 Am. Rep. 218; Crane *v.* Turner, 67 N. Y. 437; Union College *v.* Wheeler, 61 N. Y. 88; Ingraham *v.* Disborough, 47 N. Y. 421; Mickles *v.* Townsend, 18 N. Y. 575; Parmerter *v.* Colrick, 32 N. Y. App. Div. 631, 53 N. Y. Suppl. 1111; Merkle *v.* Beidleman, 30 N. Y. App. Div. 14, 51 N. Y. Suppl. 916; Rochester Sav. Bank *v.* Whitmore, 25 N. Y. App. Div. 491, 49 N. Y. Suppl. 862; Sparling *v.* Wells, 24 N. Y. App. Div. 584, 49 N. Y. Suppl. 321; Dodge *v.* Manning, 19 N. Y. App. Div. 29, 46 N. Y. Suppl. 1049; Rapps *v.* Gottlieb, 67 Hun 115, 22 N. Y. Suppl. 52 [*affirmed* in 142 N. Y. 164, 36 N. E. 1052]; Harrison *v.* Burlingame, 48 Hun 212; Bockes *v.* Hathorn, 20 Hun 503; Hovey *v.* Hill, 3 Lans. 167; Westfall *v.* Jones, 23 Barb. 9; Hartley *v.* Tatham, 10 Bosw. 273; Quackenbush *v.* Wheaton, 46 Misc. 357, 94 N. Y. Suppl. 823; Colton Imp. Co. *v.* Richter, 26 Misc. 26, 55 N. Y. Suppl. 486; Wood *v.* Travis, 24 Misc. 589, 54 N. Y. Suppl. 60; Parmerter *v.* Colrick, 20 Misc. 202, 45 N. Y. Suppl. 748; Masten *v.* Reilly, 10 N. Y. St. 595; Frear *v.* Sweet, 4 N. Y. St. 877; Scamoni *v.* Ruck, 53 How Pr. 317; Marvin *v.* Inglis, 39 How. Pr. 329; Freeman *v.* Auld, 25 How. Pr. 327; Clute *v.* Robison, 2 Johns. 595; Ellis *v.* Messervie, 11 Paige 467; Little *v.* Barker, Hoffm. 487. See also Kilner *v.* O'Brien, 14 Hun 414.

Ohio.— Timmerman *v.* Howell, 2 Ohio Cir. Ct. 27, 1 Ohio Cir. Dec. 342.

hands to equities or defenses or any matters affecting the validity or amount of the mortgage which existed against it as between the mortgagor and a prior assignee.[63]

b. Equities Arising Subsequent to Assignment. The rule just stated applies only to such equities, claims, or defenses as accrued or arose prior to the assignment; if they arise afterward, the assignee, taking in good faith and having no notice of them, is not affected.[64]

c. Collateral Agreements Between Mortgagor and Mortgagee. An assignee of a mortgage in good faith is not affected by any collateral agreement between the original parties, not incorporated in the mortgage, of which he had no notice.[65]

d. Assignee of Mortgage as Bona Fide Purchaser — (i) *In General.* Notwithstanding the general rule as to defenses against a mortgage in the hands of an assignee, some of the authorities recognize him as entitled to the character of a "purchaser," so as to protect him against equities or defenses of which he had

Pennsylvania.— Wilson *v.* Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767; Geiger *v.* Peterson, 164 Pa. St. 352, 30 Atl. 262; Earnest *v.* Hoskins, 100 Pa. St. 551; Reineman *v.* Robb, 98 Pa. St. 474; Twitchell *v.* McMurtrie, 77 Pa. St. 383; Downey *v.* Tharp, 63 Pa. St. 322; Horstman *v.* Gerker, 49 Pa. St. 282, 88 Am. Dec. 501; Thompson *v.* Humboldt Safe Deposit, etc., Co., 6 Pa. Cas. 450, 9 Atl. 511. The obligor in a bond secured by mortgage cannot defalcate against the assignee of an assignee of the bond a claim or set-off which he holds against the first assignee. Blair *v.* Mathiott, 46 Pa. St. 262. And where a conveyance, absolute on its face, is in effect a mortgage, the payment of the whole mortgage debt by the mortgagor can have no effect upon the title of a person claiming under the mortgagee, without notice of the true nature of his title. Sweetzer *v.* Atterbury, 100 Pa. St. 18.

South Carolina.— Patterson *v.* Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; Moffatt *v.* Hardin, 22 S. C. 9; Gantt *v.* Gantt, 15 S. C. 610.

South Dakota.— Citizens' Bank *v.* Shaw, 14 S. D. 197, 84 N. W. 779. See, however, Barry *v.* Stover, (1906) 107 N. W. 672.

Wisconsin.— Croft *v.* Bunster, 9 Wis. 503; Martineau *v.* McCollum, 3 Pinn. 455, 4 Chandl. 153.

United States.— U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525.

England.— Turner *v.* Smith, [1901] 1 Ch. 213, 70 L. J. Ch. 144, 83 L. T. Rep. N. S. 704, 49 Wkly. Rep. 186; Walker *v.* Jones, L. R. 1 P. C. 50, 12 Jur N. S. 381, 35 L. J. P. C. 30, 14 L. T. Rep. N. S. 686, 14 Wkly. Rep. 484; Parker *v.* Clarke, 30 Beav. 54, 7 Jur. N. S. 1267, 9 Wkly. Rep. 877, 54 Eng. Reprint 809; Nant-y-Glo, etc., Ironworks Co. *v.* Tamplin, 35 L. T. Rep. N. S. 125; Chambers *v.* Goldwin, 9 Ves. Jr. 254, 7 Rev. Rep. 181, 32 Eng. Reprint 600; Matthews *v.* Wallwyn, 4 Ves. Jr. 118, 31 Eng. Reprint 62.

Canada.— London Loan Co. *v.* Manley, 26 Can. Sup. Ct. 443; McCormick *v.* Cockburn, 31 Ont. 436; Court *v.* Holland, 29 Grant Ch. (U. C.) 19; Pressy *v.* Trotter, 26 Grant Ch. (U. C.) 154; Atkinson *v.* Gallagher, 23 Grant Ch. (U. C.) 201; Baskerville *v.* Otterson, 20 Grant Ch. (U. C.) 379; McPherson *v.* Dougan, 9 Grant Ch. (U. C.) 528.

See 35 Cent. Dig. tit. "Mortgages," § 678.

But see Potts *v.* Blackwell, 57 N. C. 58; Langdon *v.* Keith, 9 Vt. 299.

63. Reineman *v.* Robb, 98 Pa. St. 474.

64. *California.*— Perre *v.* Castro, 14 Cal. 519, 76 Am. Dec. 444.

Maryland.— Hopper *v.* Williams, 95 Md. 734, 51 Atl. 167.

Massachusetts.— Breen *v.* Seward, 11 Gray 118.

New Jersey.— Bush *v.* Cushman, 27 N. J. Eq. 131.

New York.— Titus *v.* Haynes, (1890) 9 N. Y. Suppl. 742; New York Sav. Bank *v.* Frank, 56 How. Pr. 403 [*affirmed* in 45 N. Y. Super. Ct. 404]; Chance *v.* Isaacs, 5 Paige 592; Smith *v.* Clark, 4 Paige 368; Smith *v.* Smith, 1 Paige 391; Coster *v.* Griswold, 4 Edw. 364.

United States.— Carpenter *v.* Longan, 16 Wall. 271, 21 L. ed. 313.

See 35 Cent. Dig. tit. "Mortgages," § 679.

Compare Jones *v.* Smith, 22 Mich. 360.

65. *Connecticut.*— Downing *v.* Sullivan, 64 Conn. 1, 29 Atl. 130, agreement for retention of possession by mortgagor until demand.

Illinois.— Colehour *v.* State Sav. Inst., 90 Ill. 152.

Iowa.— Cook *v.* Stone, 63 Iowa 352, 19 N. W. 280.

Michigan.— Dutton *v.* Ives, 5 Mich. 515.

New Jersey.— Ferdon *v.* Miller, 34 N. J. Eq. 10.

New York.— Merchants' Bank *v.* Weill, 29 N. Y. App. Div. 101, 52 N. Y. Suppl. 37 (optional executory contract of defeasance); St. John *v.* Spalding, 1 Thomps. & C. 483 (collateral agreement to release part of land from mortgage lien).

Pennsylvania.— Jeffers *v.* Gill, 91 Pa. St. 290; McMasters *v.* Wilhelm, 85 Pa. St. 218; Wells *v.* Shumway, 1 Leg. Rec. 44.

See 35 Cent. Dig. tit. "Mortgages," § 688.

Assignee with notice.— A promise by the mortgagee to repay money expended on the mortgaged premises, out of such premises, is binding on an assignee with notice. Godef-

no notice, when he takes his assignment in good faith and for value, and this, not only as against third persons subsequently dealing with the property,[66] but also as against the mortgagor and his grantees,[67] although a distinction is also drawn as to the character of the obligation secured, the approved doctrine being that a mortgage is not in itself negotiable, and therefore if it is assigned without any separate evidence of debt, or with an obligation which is not of the nature of negotiable paper, the assignee cannot claim the standing of a purchaser for value.[68]

(II) *Payment of Consideration.* An assignee of a mortgage cannot claim the position of a *bona fide* purchaser unless he has paid a valuable consideration for the assignment or parted with value on the strength of it;[69] and a preëxisting debt due by the assignor to him is not a sufficient consideration for this purpose, where the assignee has not granted an extension of time for payment or surrendered securities previously held for the debt.[70]

(III) *Notice.* The assignee cannot claim the protection of a *bona fide* purchaser as against any defenses, rights, or equities of which he had actual or suffi-

froy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

66. Bridges *v.* Real Estate Loan, etc., Co., 8 Ont. 493. And see Meldon *v.* Devlin, 31 N. Y. App. Div. 146, 53 N. Y. Suppl. 172; Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1 L. R. A. N. S. 891. But see Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710, holding that where the purchaser of a tax title which is void on its face sells the land covered by it and takes back a purchase-money mortgage, the assignee of such mortgage is not an innocent purchaser as against the purchaser claiming under covenants in the deed to him.

67. *California.*—Raymond *v.* Glover, (1894) 37 Pac. 772.

Iowa.— Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252.

Massachusetts.— Bassett *v.* Daniels, 136 Mass. 547.

Michigan.—Cicotte *v.* Gagnier, 2 Mich. 381. And see Detroit Sav. Bank *v.* Galvin, 99 Mich. 55, 57 N. W. 1083.

Nebraska.— Campbell *v.* O'Connor, 55 Nebr. 638, 76 N. W. 167.

New Jersey.— Bogert *v.* Stevens, (1906) 63 Atl. 246; Jacobsen *v.* Dodd, 32 N. J. Eq. 403; Appleton *v.* Small, 31 N. J. Eq. 382; Danbury *v.* Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244; McCurdy *v.* Agnew, 8 N. J. Eq. 733. But see Magie *v.* Reynolds, 51 N. J. Eq. 113, 26 Atl. 150, holding that an assignee for value of a mortgage by deed of assignment, in form a conveyance of the land, does not thereby attain the position of a purchaser for value without notice, but takes subject to all defenses which the mortgagor or his grantor has to the debt secured by the mortgage.

New York.— Weideman *v.* Zielinska, 102 N. Y. App. Div. 163, 92 N. Y. Suppl. 493; Mitchell *v.* Cook, 29 Barb. 243.

Pennsylvania.— Pryor *v.* Wood, 31 Pa. St. 142; Boyer *v.* Webber, 22 Pa. Super. Ct. 35.

United States.— Sawyer *v.* Prickett, 19 Wall. 146, 22 L. ed. 105.

See 35 Cent. Dig. tit. "Mortgages," § 682.

Voidable mortgage.— The fact that a mortgagor is induced by fraudulent representations to sign a mortgage without reading it renders it voidable merely, and therefore it cannot be avoided in the hands of a person who in good faith buys the mortgage or advances money on it. Dixon *v.* Wilmington Sav., etc., Co., 115 N. C. 274, 20 S. E. 464; Medlin *v.* Buford, 115 N. C. 260, 20 S. E. 463.

68. *California.*— Brown *v.* Witts, 57 Cal. 304.

Iowa.— Sangster *v.* Love, 11 Iowa 580; Pope *v.* Jacobus, 10 Iowa 262.

Louisiana.— Bouligny *v.* Fortier, 17 La. Ann. 121.

Maryland.— Cumberland Coal, etc., Co. *v.* Parish, 42 Md. 598.

Minnesota.— Scott *v.* Austin, 36 Minn. 460, 32 N. W. 89, 864.

North Carolina.— Henderson *v.* Stewart, 11 N. C. 256.

Canada.— Smart *v.* McEwan, 18 Grant Ch. (U. C.) 623; Totton *v.* Douglas, 15 Grant Ch. (U. C.) 126.

See 35 Cent. Dig. tit. "Mortgages," § 682.

69. *New Jersey.*— Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870; Chancellor *v.* Bell, 45 N. J. Eq. 538, 17 Atl. 684.

New York.— Hall *v.* Erwin, 60 Barb. 349; Kursheedt *v.* McCune, 20 Abb. N. Cas. 265; Real Estate Trust Co. *v.* Rader, 53 How. Pr. 231; Day *v.* Perkins, 2 Sandf. Ch. 359.

Pennsylvania.— Carothers *v.* Sims, 194 Pa. St. 386, 45 Atl. 47; Gill *v.* Hutchinson, 37 Leg. Int. 293.

South Carolina.— Dearman *v.* Trimmier, 26 S. C. 506, 2 S. E. 501.

United States.— Hicks *v.* Jennings, 4 Fed. 855, 4 Woods 496.

Marriage is such a consideration for the assignment of a mortgage as will make the assignee a purchaser for full value. Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870.

70. Glidden *v.* Hunt, 24 Pick. (Mass.) 221; Clark *v.* Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; Waterbury *v.* Andrews, 67 Mich. 281, 34 N. W. 575; Tate *v.* Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313; Pickett *v.* Barron, 29 Barb. (N. Y.) 505.

cient constructive notice[71] at the time of taking his assignment.[72] He is charged with notice of all facts affecting his interests which are shown by the public records,[73] including judgments duly docketed.[74] He may be affected with notice by an outstanding possession which is so held as to be inconsistent with the validity or continuance of the mortgage lien;[75] and generally, where he purchases with knowledge of suspicious or peculiar circumstances, which should have warned him and put him upon inquiry, he will be charged with knowledge of all the facts which he would have discovered by a diligent pursuit of the inquiry so suggested.[76]

Mixed consideration.— Where a mortgage is transferred partly in consideration of a precedent debt and partly for a consideration paid at the time, the purchaser will not be regarded as a holder for value as against one having the legal title, so far as the assignment was received in payment of the precedent debt, but he is entitled to a lien for the amount of the consideration paid. French *v.* O'Brien, 52 How. Pr. (N. Y.) 394.

71. *Illinois.*—Heppe *v.* Szczepanski, 209 Ill. 88, 70 N. E. 737, 101 Am. St. Rep. 221; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

Iowa.— Huff *v.* Farwell, 67 Iowa 298, 25 N. W. 252; Burbank *v.* Warwick, 52 Iowa 493, 3 N. W. 519.

Massachusetts.— Flye *v.* Berry, 181 Mass. 442, 63 N. E. 1071; Norman *v.* Towne, 130 Mass. 52; Richardson *v.* Brackett, 101 Mass. 497.

Michigan.— Woodcock *v.* Niles First Nat. Bank, 113 Mich. 236, 71 N. W. 477; Anderson *v.* Northern Nat. Bank, 98 Mich. 543, 57 N. W. 808; Bilderback *v.* McConnell, 48 Mich. 345, 12 N. W. 195; Wilcox *v.* Allen, 36 Mich. 160.

Nebraska.— Garnett *v.* Meyers, 65 Nebr. 280, 91 N. W. 400, 94 N. W. 803.

New Jersey.— Lorey *v.* Overton, 42 N. J. Eq. 330, 11 Atl. 15; Frink *v.* Adams, 36 N. J. Eq. 485; Bergen Sav. Bank *v.* Barrows, 30 N. J. Eq. 89; Wilson *v.* Hill, 13 N. J. Eq. 143. See also Block *v.* Thurston, (Ch. 1906) 63 Atl. 999. The fact that the assignee of a mortgage knew that one of the parties thereto had joined therein as surety, and had no interest in the transaction for which the mortgage was given as security, does not in any way discharge such mortgagor from liability on the mortgage. Larre *v.* Lewis, (Ch. 1886) 5 Atl. 900.

New York.— Verity *v.* Sternberger, 172 N. Y. 633, 65 N. E. 1123; Earl *v.* Clute, 2 Abb. Dec. 1, 1 Keyes 36; Nichols *v.* Nussbaum, 10 Hun 214; Chamberlain *v.* Barnes, 26 Barb. 160; Jackson *v.* Van Valkenburgh, 8 Cow. 260. A purchaser of a mortgage, knowing of the existence of a subsequent mortgage, is not thereby charged with knowledge that the latter was sold on the representation that it was a first lien. Gearon *v.* Kearney, 22 Misc. 285, 50 N. Y. Suppl. 26.

Ohio.— Durbin *v.* Fisk, 16 Ohio St. 533; Bardshar *v.* Holtzman, 18 Ohio Cir. Ct. 668, 4 Ohio Cir. Dec. 174.

Oregon.— Rayburn *v.* Davisson, 22 Oreg. 242, 29 Pac. 738.

South Carolina.— Mathews *v.* Heyward, 2 S. C. 239.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264.

See 35 Cent. Dig. tit. "Mortgages," § 684.

72. Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

73. *California.*—Peters *v.* Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134.

Illinois.— Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505.

Louisiana.— Layman *v.* Vicknair, 47 La. Ann. 679, 17 So. 265.

Michigan.— Van Aken *v.* Gleason, 34 Mich. 477.

New York.— Hetzel *v.* Easterly, 96 N. Y. App. Div. 517, 89 N. Y. Suppl. 154; Davies *v.* Jones, 29 Misc. 253, 61 N. Y. Suppl. 291.

See 35 Cent. Dig. tit. "Mortgages," § 684.

Instrument improperly recorded.— The record of a release by one of two mortgagees of the lien of a mortgage is not constructive notice to an assignee of the mortgage, since it is not such an instrument as is required to be recorded. Lynch *v.* Hancock, 14 S. C. 66.

74. Stephens *v.* Weldon, 151 Pa. St. 520, 25 Atl. 28.

75. Heppe *v.* Szczepanski, 209 Ill. 88, 70 N. E. 737, 101 Am. St. Rep. 221; Dawson *v.* Danbury Bank, 15 Mich. 489; Briggs *v.* Thompson, 86 Hun (N. Y.) 607, 33 N. Y. Suppl. 765; Mutual L. Ins. Co. *v.* Wilcox, 55 How. Pr. (N. Y.) 43; Montague County *v.* Meadows, 21 Tex. Civ. App. 256, 51 S. W. 556.

76. Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398; McConnell *v.* Hodson, 7 Ill. 640; Tantum *v.* Green, 21 N. J. Eq. 364; Davies *v.* Jones, 29 Misc. (N. Y.) 253, 61 N. Y. Suppl. 291.

Reference to other papers.— Where a mortgage to secure bonds contains a clause limiting the effect of the contract contained in the bonds as to matters not pertinent to the mortgage, a holder of such bonds will not be presumed to have notice of such clause merely by reason of a general reference to the "terms and conditions" of the mortgage contained in the bonds. Raymond *v.* Spring Grove, etc., R. Co., 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103.

Non-production of papers.— In a purchase of a bond and mortgage, the failure to produce the bond and mortgage by the assignor is such notice as will deprive the assignee of the protection afforded to purchasers without notice. Kellogg *v.* Smith, 26 N. Y. 18.

(iv) *Taking After Maturity.* An assignee taking a mortgage after the debt secured is overdue takes it subject to all equities and defenses which would have been available against it in the hands of the mortgagee.[77]

(v) *Duty to Make Inquiry.* One about to take an assignment of a mortgage is bound in his own interest to inquire of the mortgagor as to the validity of the instrument and of the transaction on which it was founded and as to the amount due, and whether the mortgagor has any defenses or set-offs to interpose against it; if he neglects to do this he takes the mortgage subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee, being charged with knowledge of all facts which such an inquiry would have disclosed.[78]

e. Mortgages Securing Negotiable Paper — (i) *In General.* In several of the states the doctrine prevails that, as a mortgage is not a negotiable instrument, an assignee must take it subject to all equities and defenses between the original parties, even where the mortgage debt is evidenced by a negotiable promissory note passing to the assignee for value and before maturity, the position being taken that, whatever may be the rights of the holder of such a note, when he sues on the note, yet, when he seeks a foreclosure of the mortgage, his rights must be determined by the principles of equity applicable to non-negotiable instruments, and not by the law merchant.[79] But the rule generally recognized is that the

The expression of a nominal consideration in a mortgage assignment will not charge a purchaser from the assignee with knowledge that the latter had previously sold a subsequent mortgage representing it as a first lien. Gearon *v.* Kearney, 22 Misc. (N. Y.) 285, 50 N. Y. Suppl. 26. But see Riggs *v.* Pennsylvania, etc., R. Co., 16 Fed. 804, holding that, where railroad mortgage bonds are signed and issued by a trustee, who puts them upon the market for a very small percentage of their nominal value, purchasers are put upon inquiry as to the regularity and validity of the bonds.

Advice of counsel that a mortgage is valid does not relieve the client afterward purchasing the mortgage from the effect of his failure to make a proper investigation as to material facts showing its invalidity, and of which he has notice sufficient to put him on inquiry. Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

77. *California.*— Higgins *v.* McDonald, 17 Cal. 289.

Michigan.—McKenna *v.* Kirkwood, 50 Mich. 544, 15 N. W. 898; Nichols *v.* Lee, 10 Mich. 526, 82 Am. Dec. 57.

New Jersey.— Robeson *v.* Robeson, 50 N. J. Eq. 465, 26 Atl. 563.

New York.— Owen *v.* Evans, 134 N. Y. 514, 31 N. E. 999.

Wisconsin.— Whitney *v.* Traynor, 74 Wis. 289, 42 N. W. 267.

United States.— U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525.

Canada.— Elliott *v.* McConnell, 21 Grant Ch. (U. C.) 276.

See 35 Cent. Dig. tit. "Mortgages," § 685.

But *compare* Congregational Church Bldg. Soc. *v.* Scandinavian Free Church, 24 Wash. 433, 64 Pac. 750, holding that the assignee, in good faith and for value, of a past-due instrument secured by a mortgage, is not bound by the assignor's knowledge of a prior defectively recorded mortgage.

78. *Illinois.*— Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901; Bouton *v.* Cameron, 205 Ill. 50, 68 N. E. 800; Chicago Title, etc., Co. *v.* Aff, 183 Ill. 91, 55 N. E. 659; Buehler *v.* McCormick, 169 Ill. 269, 48 N. E. 287; Hass *v.* Lobstein, 108 Ill. App. 217; Hahn *v.* Geiger, 96 Ill. App. 104; Sheldon *v.* McNall, 89 Ill. App. 138.

New Jersey.— Magie *v.* Reynolds, 51 N. J. Eq. 113, 26 Atl. 150.

New York.— Rosenbaum *v.* Silverman, 22 Misc. 589, 50 N. Y. Suppl. 860, assignee justified in relying on affidavits of mortgagor and others.

Oregon.— Barringer *v.* Loder, 47 Oreg. 223, 81 Pac. 778.

Pennsylvania.— Myerstown Bank *v.* Roessler, 186 Pa. St. 431, 40 Atl. 963; Morgan's Appeal, 126 Pa. St. 500, 17 Atl. 666; Theyken *v.* Howe Mach. Co., 109 Pa. St. 95; Earnest *v.* Hoskins, 100 Pa. St. 551; Sellers *v.* Benner, 94 Pa. St. 207; Twitchell *v.* McMurtrie, 77 Pa. St. 383; McCandless *v.* Engle, 51 Pa. St. 309; Michener *v.* Cavender, 38 Pa. St. 334, 80 Am. Dec. 486.

United States.— U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525.

England.— Matthews *v.* Wallwyn, 4 Ves. Jr. 118, 31 Eng. Reprint 62.

Canada.— Gilleland *v.* Wadsworth, 1 Ont. App. 82; Atkinson *v.* Gallagher, 23 Grant Ch. (U. C.) 201; Totten *v.* Douglas, 15 Grant Ch. (U. C.) 126; Gooderham *v.* De Grassi, 2 Grant Ch. (U. C.) 135.

See 35 Cent. Dig. tit. "Mortgages," § 686.

79. Bouton *v.* Cameron, 205 Ill. 50, 68 N. E. 800 [*affirming* 99 Ill. App. 600]; Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Chicago Title, etc., Co. *v.* Aff, 183 Ill. 91, 55 N. E. 659; Buehler *v.* McCormick, 169 Ill. 269, 48 N. E. 287; McAuliffe *v.* Reuter, 166 Ill. 491, 46 N. E. 1087; Hodson *v.* Eugene

mortgage follows the debt as a mere incident, and shares the immunity of the note from defenses and equities, so that in proceedings to enforce the mortgage nothing can be alleged against it which could not have been set up in defense to an action at law upon the note.[80]

Glass Co., 156 Ill. 397, 40 N. E. 971; Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Towner *v.* McClelland, 110 Ill. 542; Miller *v.* Larned, 103 Ill. 562; Ellis *v.* Sisson, 96 Ill. 105; U. S. Mortgage Co. *v.* Gross, 93 Ill. 483; Bryant *v.* Vix, 83 Ill. 11; Thompson *v.* Shoemaker, 68 Ill. 256; Haskell *v.* Brown, 65 Ill. 29; White *v.* Sutherland, 64 Ill. 181; Kleeman *v.* Frisbie, 63 Ill. 482; Sumner *v.* Waugh, 56 Ill. 531; Walker *v.* Dement, 42 Ill. 272; Olds *v.* Cummings, 31 Ill. 188; Wright *v.* Taylor, 8 Ill. 193; Bebber *v.* Moreland, 100 Ill. App. 198; Whiting Paper Co. *v.* Busse, 95 Ill. App. 288; Denison *v.* Gambill, 81 Ill. App. 170; Faris *v.* Briscoe, 78 Ill. App. 242; Frink *v.* Neal, 37 Ill. App. 621; Jenkins *v.* Bauer, 8 Ill. App. 634; Grassly *v.* Reinback, 4 Ill. App. 341; Pertuit *v.* Demare, 50 La. Ann. 893, 24 So. 681; Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762; Butler *v.* Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; Jennings *v.* Vickers, 31 La. Ann. 679; Gardner *v.* Maxwell, 27 La. Ann. 561; Bouligny *v.* Fortier, 17 La. Ann. 121; Schmidt *v.* Frey, 8 Rob. (La.) 435; Ironton Land Co. *v.* Butchart, 73 Minn. 39, 75 N. W. 749; Watkins *v.* Goessler, 65 Minn. 118, 67 N. W. 796; Smith *v.* Parsons, 55 Minn. 520, 57 N. W. 311; Redin *v.* Branhan, 43 Minn. 283, 45 N. W. 445; Oster *v.* Mickley, 35 Minn. 245, 28 N. W. 710; Hostetter *v.* Alexander, 22 Minn. 559; Johnson *v.* Carpenter, 7 Minn. 176; Baily *v.* Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Timmerman *v.* Howell, 2 Ohio Cir. Ct. 27, 1 Ohio Cir. Dec. 342; Union Trust Co. *v.* New York, etc., R. Co., 9 Ohio Dec. (Reprint) 773, 17 Cinc. L. Bul. 176; Baxter *v.* Roelofson, 3 Ohio Dec. (Reprint) 250, 5 Wkly. L. Gaz. 110. But *compare* State Nat. Bank *v.* Flathers, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216; Dwyer *v.* Woulfe, 39 La. Ann. 423, 1 So. 868; Billgery *v.* Ferguson, 30 La. Ann. 84; Taylor *v.* Bowles, 28 La. Ann. 294.

Restrictions upon rule in Illinois.—It should be noticed that the courts of Illinois have often shown uneasiness and dissatisfaction under the rule as thus established in the leading case of Olds *v.* Cummings, 31 Ill. 188, and while not venturing to overrule it, have sought occasion to restrict rather than to extend it. Thus the rule has been held not applicable to an assignee or holder of accommodation paper secured by mortgage. Miller *v.* Larned, 103 Ill. 562. And the court has refused to extend it to deeds of trust given to secure railroad coupon bonds intended to be thrown on the market and circulated as commercial paper and to be used as securities for permanent investments. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187. And the rule does not extend to a set-off in respect to a debt due from the assignor to the mortgagor arising out of a collateral matter. Colehour *v.* State Sav. Inst., 90 Ill. 152. Moreover the legislature has attempted to reverse the rule by statute, so as to make the laws of the state conform in this respect to those obtaining almost everywhere else. See Ill. Laws (1901), p. 248. But there is grave doubt whether this statute was ever constitutionally enacted, the journal of the house of representatives showing its defeat in that branch of the legislature. See Black Mortg. Ill. § 198; 33 Chic. Leg. N. p. 369; 4 Jones & A. Suppl. to Starr & C. Annot. St. Ill. p. 891.

80. *Alabama.*— Jordan *v.* Thompson, 117 Ala. 468, 23 So. 157; Hart *v.* Adler, 109 Ala. 467, 19 So. 894; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

Colorado.— Cowing *v.* Cloud, 16 Colo. App. 326, 65 Pac. 417.

Indiana.— Reeves *v.* Hayes, 95 Ind. 521; Gabbert *v.* Schwartz, 69 Ind. 450.

Iowa.—Clasey *v.* Sigg, 51 Iowa 371, 1 N. W. 590; Vandercook *v.* Baker, 48 Iowa 199; Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252; Preston *v.* Case, 42 Iowa 549. The rule applies only where the note is transferred by indorsement. Franklin *v.* Twogood, 18 Iowa 515.

Kansas.— Converse *v.* Bartels, (1896) 46 Pac. 940; Lewis *v.* Kirk, 28 Kan. 497, 42 Am. Rep. 173.

Kentucky.— Duncan *v.* Louisville, 13 Bush 378, 26 Am. Rep. 201.

Massachusetts.— Watson *v.* Wyman, 161 Mass. 96, 36 N. E. 692; Bassett *v.* Daniels, 136 Mass. 547; Taylor *v.* Page, 6 Allen 86.

Michigan.— Woodcock *v.* Niles First Nat. Bank, 113 Mich. 236, 71 N. W. 477; Barnum *v.* Phenix, 60 Mich. 388, 27 N. W. 577; Helmer *v.* Krolick, 36 Mich. 371; Dutton *v.* Ives, 5 Mich. 515; Reeves *v.* Scully, Walk. 248.

Missouri.— Borgess Inv. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Crawford *v.* Aultman, 139 Mo. 262, 40 S. W. 952; Mauch Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; Goodfellow *v.* Stilwell, 73 Mo. 17.

Nebraska.—Mathews *v.* Jones, 47 Nebr. 616, 66 N. W. 622; Cheney *v.* Janssen, 20 Nebr. 128, 29 N. W. 289; Cheney *v.* Cooper, 14 Nebr. 415, 16 N. W. 471; Wortendyke *v.* Meehan, 9 Nebr. 221, 2 N. W. 339; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638. The defense of usury is available to the maker of the mortgage note against the assignee, where the transfer was by a written assignment on the mortgage only, without an indorsement on the note. Doll *v.* Hollenbeck, 19 Nebr. 639, 28 N. W. 286.

New Hampshire.— Paige *v.* Chapman, 58 N. H. 333.

New Jersey.— Magie *v.* Reynolds, 51 N. J. Eq. 113, 26 Atl. 150.

(II) *Purchase After Maturity.* The plea of *bona fide* purchaser cannot avail an assignee of a note, although negotiable in form, and the mortgage securing it when he took them after the maturity of the debt.[81]

f. Estoppel or Waiver of Defenses. A mortgagor having a good defense or set-off against the mortgage or debt may nevertheless be estopped to claim the benefit thereof against an assignee in good faith and without notice; and this is held to be the case where the mortgage is made and placed in the hands of the mortgagee for the express purpose of being sold by him to raise money for the

North Carolina.— Coor *v.* Spicer, 65 N. C. 401.

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867.

Texas.— Van Burkleo *v.* Southwestern Mfg. Co., (Civ. App. 1896) 39 S. W. 1085.

Wisconsin.— Mack *v.* Prang, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848, 45 L. R. A. 407; Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697; Bange *v.* Flint, 25 Wis. 544; Andrews *v.* Hart, 17 Wis. 297; Crosby *v.* Roub, 16 Wis. 616, 84 Am. Dec. 720; Stilwell *v.* Kellogg, 14 Wis. 461; Cornell *v.* Hichens, 11 Wis. 353; Croft *v.* Bunster, 9 Wis. 503; Martineau *v.* McCollum, 3 Pinn. 455, 4 Chandl. 153; Fisher *v.* Otis, 3 Pinn. 78.

United States.— Carpenter *v.* Longan, 16 Wall. 271, 21 L. ed. 313; O'Rourke *v.* Wahl, 109 Fed. 276, 48 C. C. A. 360; Jarvis-Conklin Mortg. Trust Co. *v.* Willhoit, 84 Fed. 514; Myers *v.* Hazzard, 50 Fed. 155, 4 McCrary 94; Swett *v.* Stark, 31 Fed. 858; Hayden *v.* Snow, 14 Fed. 70, 9 Biss. 511; Hayden *v.* Drury, 3 Fed. 782 [*reversed* on other grounds in 111 U. S. 223, 4 S. Ct. 405, 28 L. ed. 408]; Beals *v.* Neddo, 2 Fed. 41, 1 McCrary 206.

Duress.— This rule has been held not to apply where the mortgage covered a wife's homestead and was procured from her by duress, and secured a debt of her husband. Nevada First Nat. Bank *v.* Bryan, 62 Iowa 42, 17 N. W. 165; Berry *v.* Berry, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351.

Forgery.— Where the note secured is void because the name of one of the makers was forged, the mortgage is void, although passed to a *bona fide* holder. Mersman *v.* Werges, 3 Fed. 378, 1 McCrary 528 [*reversed* on facts in 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641].

Note barred by limitations.— The doctrine that the transfer of a negotiable note secured by a mortgage, before maturity and without notice, carries with it the mortgage impressed with the qualities incident to the note, applies only where the note is capable of being used and is used in the proceeding to foreclose the mortgage; but where the note has lost its legal vitality, and all right of action upon it is gone, by reason of the running of the statute of limitations against it, so that the holder's only recourse is upon the mortgage standing alone, then the doctrine does not apply, but the mortgagor may set up equities and defenses which would have been available against the mortgagee. In all the cases sustaining this doctrine in its full extent the note secured still remained a living and effective cause of action; but where it is barred by time, there is no longer anything to impart quasi-negotiability to the mortgage. Dearman *v.* Trimmier, 26 S. C. 506, 2 S. E. 501.

81. *Georgia.*— Howard *v.* Gresham, 27 Ga. 347.

Illinois.— Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Scott *v.* Magloughlin, 133 Ill. 33, 24 N. E. 1030; Roberts *v.* Pierce, 79 Ill. 378; McLain *v.* Lohr, 25 Ill. 507.

Iowa.— Theisen *v.* Dayton, 82 Iowa 74, 47 N. W. 891; Blake *v.* Koons, 71 Iowa 356, 32 N. W. 379; Crosby *v.* Tanner, 40 Iowa 136.

Kansas.— Holden *v.* Clark, 16 Kan. 346.

Louisiana.— Vance *v.* Shreveport First Nat. Bank, 51 La. Ann. 89, 24 So. 607.

Maine.— Sprague *v.* Graham, 29 Me. 160.

Maryland.—The only defenses against which the indorsee of a mortgage note which is overdue has to guard are those which have arisen since the execution of the note and which are not collateral but relate to the note itself, and those which are inherent in the note and which would show it to have been void *ab initio*, such as fraud, mistake, or want of consideration. Eversole *v.* Maull, 50 Md. 95; Renwick *v.* Williams, 2 Md. 356.

Massachusetts.— Fish *v.* French, 15 Gray 520.

Missouri.— Murphy *v.* Simpson, 42 Mo. App. 654; Lee *v.* Turner, 15 Mo. App. 205.

New York.— Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443.

South Carolina.— British American Mortg. Co. *v.* Smith, 45 S. C. 83, 22 S. E. 747.

Vermont.— Miller *v.* Bingham, 29 Vt. 82.

Washington.— Fischer *v.* Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742.

United States.— Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, 9 S. Ct. 131, 32 L. ed. 472; The John W. Cannon, 24 Fed. 392.

See 35 Cent. Dig. tit. "Mortgages," § 690.

Part of notes overdue.— The assignee of a mortgage securing several notes, one of which is overdue, takes the assignment subject to any equities that may exist between the original parties, not only as to that note but as to the notes not yet due. Abele *v.* McGuigan, 78 Mich. 415, 44 N. W. 393.

After default in interest.— Where a mortgage makes the whole debt secured fall due on default in any payment of interest, one who purchases the mortgage note after default in the payment of interest is not a *bona fide* purchaser before maturity, although the note did not contain the stipulation as to maturing on such default. Piersol *v.* Shelley, 3 Kan. App. 386, 42 Pac. 922.

mortgagor,[82] where the mortgagor induces or encourages the assignee to take the securities, concealing his defenses or equities,[83] or where he misleads or deceives the purchaser by false or equivocal representations,[84] and generally where the transfer is made with the knowledge, consent, or acquiescence of the mortgagor, and with such a recognition on his part of the validity of the securities as may be implied from his allowing an innocent third party to pay out his money without warning him of any defenses or equitable claims to be relieved from the obligations of the mortgage.[85] In some states also it is customary, on taking an assignment of a mortgage, to procure from the mortgagor a written certificate of the validity of the mortgage, including his statement that he has no defense or set-off against it, and that the whole amount purporting to be secured by the mortgage is really due, and this certificate, called a "declaration of no defense or set-off," will of course estop the mortgagor from alleging any invalidity, infirmity, or defense as against one who buys the securities in reliance upon it;[86] and it inures, not only to the benefit of the immediate assignee who procures it, but also for the protection of any subsequent assignee who relies on it.[87]

g. Latent Equities of Third Persons. A *bona fide* assignee of a mortgage takes it free and discharged from any latent or secret equities in favor of third

82. McIntire *v.* Yates, 104 Ill. 491; Van Glahn *v.* Dunham, 18 Ohio Cir. Ct. 797, 4 Ohio Cir. Dec. 177; Thompson *v.* Humboldt Safe Deposit, etc., Co., 6 Pa. Cas. 450, 9 Atl. 511.

83. Fay *v.* Valentine, 12 Pick. (Mass.) 40, 22 Am. Dec. 397; Barnett *v.* Zacharias, 24 Hun (N. Y.) 304 [*affirmed* in 89 N. Y. 637].

84. Woodruff *v.* Morristown Sav. Inst., 34 N. J. Eq. 174; Chapin *v.* Thompson, 23 Hun (N. Y.) 12 [*affirmed* in 89 N. Y. 270]; Day *v.* Perkins, 2 Sandf. Ch. (N. Y.) 359; Jeffers *v.* Gill, 91 Pa. St. 290.

Declarations after assignment.— Declarations by the mortgagor subsequent to the assignment of the mortgage, to one taking subject to equities, cannot create an estoppel in the assignee's favor. Myerstown Bank *v.* Roessler, 186 Pa. St. 431, 40 Atl. 963. And see Earnest *v.* Hoskins, 100 Pa. St. 551.

85. *Illinois.*— Melendy *v.* Keen, 89 Ill. 395.

New Jersey.— Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687. But see Magie *v.* Reynolds, 51 N. J. Eq. 113, 26 Atl. 150, holding that the mere failure of the mortgagor to take proceedings to procure the discharge of record and delivery up of the mortgage, to which he has a valid defense, does not estop him from setting up such defense against an assignee for value without notice.

New York.— Houseman *v.* Bodine, 122 N. Y. 158, 25 N. E. 255; Simpson *v.* Del Hoyo, 94 N. Y. 189; Smart *v.* Bement, 4 Abb. Dec. 253, 3 Keyes 241; Daly *v.* Reineldt, 97 N. Y. App. Div. 147, 89 N. Y. Suppl. 647; Haden *v.* Buddensick, 67 Barb. 188; Carpenter *v.* O'Dougherty, 2 Thomps. & C. 427 [*affirmed* in 58 N. Y. 681]; Purser *v.* Anderson, 4 Edw. 17.

South Dakota.— Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

United States.— Matthews *v.* Warner, 33 Fed. 369.

See 35 Cent. Dig. tit. "Mortgages," § 692.

Renewal mortgage.— Where a mortgagor gives a new mortgage and notes to his mortgagee in renewal of the old ones, knowing that the old notes had been transferred, he will be liable on the old notes to an innocent purchaser of the same for value. Franklin Sav. Bank *v.* Colby, 105 Iowa 424, 75 N. W. 346.

86. Smyth *v.* Knickerbocker L. Ins. Co., 84 N. Y. 589; Smyth *v.* Munroe, 84 N. Y. 354; Payne *v.* Burnham, 62 N. Y. 69; Mason *v.* Anthony, 3 Abb. Dec. (N. Y.) 207, 3 Keyes 609, 3 Transcr. App. 255, 35 How. Pr. 477; Platt *v.* Newcomb, 27 Hun (N. Y.) 186; Smyth *v.* Lombardo, 15 Hun (N. Y.) 415; Hedden's Appeal, (Pa. 1889) 17 Atl. 29; Taylor *v.* Mayer, 93 Pa. St. 42; Hutchison *v.* Gill, 91 Pa. St. 253; Robertson *v.* Hay, 91 Pa. St. 242; Ashton's Appeal, 73 Pa. St. 153; Wetzel *v.* Linnard, 15 Pa. Super. Ct. 503; McMurtrie *v.* Twitchell, 11 Phila. (Pa.) 351; Rogers *v.* Henderson, 29 Pittsb. Leg. J. N. S. (Pa.) 35.

Extent of protection to assignee.— When the mortgagor gives a certificate of the validity of the mortgage, which is really without consideration and void, the assignee is protected thereby only to the extent of the advances actually made by him on the faith of the certificate. Payne *v.* Burnham, 62 N. Y. 69.

Assignee's knowledge of falsity of certificate.— It seems that the mortgagor is not estopped from defending against the mortgage, on the ground of his having given a certificate of its validity to an assignee of it, when such assignee had actual knowledge that the certificate was false, as he could not then be called an "innocent" purchaser. Verity *v.* Sternberger, 62 N. Y. App. Div. 112, 70 N. Y. Suppl. 894.

87. Ashton's Appeal, 73 Pa. St. 153

Strangers.— "Such declarations operate in favor of all those whose conduct it may fairly be supposed they were intended to influence; but strangers, casually hearing of them, cannot, by acting upon them, preclude the party from showing the truth." Griffiths *v.* Sears, 112 Pa. St. 523, 529, 4 Atl. 492.

persons of which he had no notice or knowledge.[88] It is otherwise of course if he actually knew of the equity or claim of a third person,[89] or had constructive notice from the public records;[90] and the assignee is not excused from the exercise of prudence and vigilance in making such inquiries as the circumstances of the case suggest.[91] He is not entitled to protection against the equities of third persons where his assignment was taken without consideration,[92] or after the maturity of the debt secured,[93] or, it has been held, where he has failed to record his assignment.[94]

88. *Alabama.*— Dulin *v.* Hunter, 98 Ala. 539, 13 So. 301; Goldthwaite *v.* Montgomery First Nat. Bank, 67 Ala. 549; Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323.

California.— San Luis Obispo County Bank *v.* Fox, 119 Cal. 61, 51 Pac. 11.

Connecticut.— Jones *v.* Quinnipiack Bank, 29 Conn. 25.

Illinois.— Schultz *v.* Sroelowitz, 191 Ill. 249, 61 N. E. 92; Humble *v.* Curtis, 160 Ill. 193, 43 N. E. 749; Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373 [*affirming* 44 Ill. App. 516]; Mullanphy Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Silverman *v.* Bullock, 98 Ill. 11; Sumner *v.* Waugh, 56 Ill. 531; Walker *v.* Dement, 42 Ill. 272; Olds *v.* Cummings, 31 Ill. 188; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224.

Iowa.— Dillon *v.* Shugar, 73 Iowa 434, 35 N. W. 509.

Louisiana.— Bach *v.* Abbott, 6 La. Ann. 809.

Maine.— Pierce *v.* Faunce, 47 Me. 507.

Massachusetts.— Fairfield *v.* McArthur, 15 Gray 526.

Michigan.— Bloomer *v.* Henderson, 8 Mich. 395, 77 Am. Dec. 453; Cicotte *v.* Gagnier, 2 Mich. 381.

Minnesota.— Moffett *v.* Parker, 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319.

New Jersey.— Tate *v.* Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313; Sprague *v.* Drew, (Ch. 1886) 6 Atl. 307; Ferdon *v.* Miller, 34 N. J. Eq. 10; Appleton *v.* Small, 31 N. J. Eq. 382; Vredenburgh *v.* Burnet, 31 N. J. Eq. 229; Putnam *v.* Clark, 29 N. J. Eq. 412.

Pennsylvania.— Bigley *v.* Jones, 114 Pa. St. 510, 7 Atl. 54; Reineman *v.* Robb, 98 Pa. St. 474; Pryor *v.* Wood, 31 Pa. St. 142; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566; Wethrill's Appeal, 3 Grant 281; Boyer *v.* Webber, 22 Pa. Super. Ct. 35.

Wisconsin.— Croft *v.* Bunster, 9 Wis. 503.

United States.— Bronson *v.* La Crosse, etc., R. Co., 2 Wall. 283, 17 L. ed. 725; Porter *v.* King, 1 Fed. 755; Hubbard *v.* Turner, 12 Fed. Cas. No. 6,819, 2 McLean 519.

England.— Redfearn *v.* Ferrier, 1 Dow. 50, 3 Eng. Reprint 618.

See 35 Cent. Dig. tit. "Mortgages," § 693.

But see Hellebush *v.* Richter, 7 Ohio Dec. (Reprint) 355, 2 Cinc. L. Bul. 155; Williams *v.* Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Elliott *v.* McConnell, 21 Grant Ch. (U. C.) 276.

In New York there are a number of cases holding otherwise. Decker *v.* Boice, 83 N. Y. 215; Viele *v.* Judson, 82 N. Y. 32; Greene *v.* Warnick, 64 N. Y. 220; Union College *v.* Wheeler, 61 N. Y. 88; Schafer *v.* Reilly, 50 N. Y. 61; Bush *v.* Lathrop, 22 N. Y. 535; Simonson *v.* Falihee, 25 Hun 570; Rice *v.* Dewey, 54 Barb. 455; Murdock *v.* Hitchcock, 37 Misc. 442, 75 N. Y. Suppl. 782; Mertens *v.* Wakefield, 35 Misc. 501, 71 N. Y. Suppl. 1062; New York Sav. Bank *v.* Frank, 56 How. Pr. 403 [*affirmed* in 45 N. Y. Super Ct. 404]; Mutual L. Ins. Co. *v.* Wilcox, 55 How. Pr. 43. The earlier decisions, however, supported the rule which generally prevails elsewhere. Hovey *v.* Hill, 3 Lans. 167; Hartley *v.* Tatham, 10 Bosw. 273 [*affirmed* in 26 How. Pr. 158]; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475; Murray *v.* Lylburn, 2 Johns. Ch. 441. And some later decisions seem to incline in the same direction. See Marden *v.* Dorthy, 12 N. Y. App. Div. 176, 42 N. Y. Suppl. 834; Gould *v.* Marsh, 1 Hun 566; Gearon *v.* Kearney, 22 Misc. 285, 50 N. Y. Suppl. 26.

89. Sumner *v.* Waugh, 56 Ill. 531; Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311; Reid *v.* Sprague, 72 N. Y. 457; Pitcher *v.* Carter, 4 Sandf. Ch. (N. Y.) 1; Rayburn *v.* Davisson, 22 Oreg. 242, 29 Pac. 738.

Knowledge of assignor.— The assignee of a mortgage, although he has notice of a latent equity or secret trust, may nevertheless take advantage of want of notice to his assignor. Bartlett *v.* Varner, 56 Ala. 580. But see Sims *v.* Hammond, 33 Iowa 368.

90. Buchanan *v.* International Bank, 78 Ill. 500; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543.

Recitals in instrument forming part of chain of title.— The purchaser of a note secured by a mortgage or deed of trust is chargeable with notice of all the recitals in any recorded deed forming a link in his chain of title. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483; Orrick *v.* Durham, 79 Mo. 174.

Reliance on abstract.— That an assignee of a mortgage relied on an abstract of title, which did not recite an encumbrance existing in the chain of title to the land, raises no equity in his favor, although it was the usual custom to rely upon abstracts. Daughaday *v.* Paine, 6 Minn. 443.

91. Tantum *v.* Green, 21 N. J. Eq. 364; Hartley *v.* Tatham, 10 Bosw. (N. Y.) 273 [*affirmed* in 26 How. Pr. 158].

92. Hovey *v.* Hill, 3 Lans. (N. Y.) 167.

93. Owen *v.* Evans, 134 N. Y. 514, 31 N. E. 999.

94. Parmenter *v.* Oakley, 69 Iowa 388, 28 N. W. 653.

F. Assignment to Mortgagor or Owner of Property — 1. Right of Mortgagor to Take Assignment — a. In General. As a general rule a mortgagor, while remaining the owner of the property, cannot take an assignment of the mortgage, the effect of his purchase of it being simply to pay off and discharge the encumbrance.[95] But this rule is modified in the case of joint mortgagors, so as to permit one who pays the whole debt to hold the lien of the mortgage against the others for their shares,[96] and it does not apply where the debt secured was not that of the mortgagor but of another person.[97] A mortgage is not generally canceled or extinguished by its purchase by the husband or wife of the mortgagor.[98]

b. After Sale of Equity of Redemption. After a mortgagor has sold his equity of redemption in the mortgaged premises, the grantee taking subject to the mortgage or assuming and agreeing to pay it, or after it has been sold on execution, such mortgagor may take an assignment of the mortgage, without discharging it, and hold it as a valid lien against the property.[99]

2. Merger of Estates — a. In General. As a rule, where the owner of mortgaged premises becomes also the owner of the mortgage, or where the mortgagee buys or otherwise acquires the interest of the mortgagor there is a fusion or merger of estates, resulting in either case in the extinguishment of the lien of the mortgage.[1] But this rule is not applied where the party affected has manifested an intention that there should be no merger but that it is his purpose to hold the

95. *Illinois.*— Drury *v.* Holden, 121 Ill. 130, 13 N. E. 547.

Kansas.— Kingsley *v.* Purdom, 53 Kan. 56, 35 Pac. 811.

Missouri.— Parkey *v.* Veatch, 164 Mo. 375, 64 S. W. 114, 86 Am. St. Rep. 627.

Nebraska.— Lomison *v.* Leach, 12 Nebr. 9, 10 N. W. 407.

North Carolina.— Hussey *v.* Hill, 120 N. C. 312, 26 S. E. 919, 58 Am. St. Rep. 789.

But *compare* Juckett *v.* Fargo Mercantile Co., (S. D. 1905) 102 N. W. 604, holding that where a husband and wife were the principal stock-holders in a corporation, and the husband was its treasurer, president, and managing agent, a purchase by the corporation of a mortgage on land belonging to the wife did not extinguish the mortgage.

Mortgage created by predecessor in title.— The rule that payment by the mortgagor operates as an extinguishment of the mortgage does not apply where the payment is directed to an encumbrance existing before he acquired title to the estate. Abbott *v.* Kasson, 72 Pa. St. 183.

96. See Peakes *v.* Dexter, 82 Me. 85, 19 Atl. 100; Blodgett *v.* Hildreth, 8 Allen (Mass.) 186; Saint *v.* Cornwall, 207 Pa. St. 270, 56 Atl. 440. But *compare* Crittenden *v.* Rogers, 8 Gray (Mass.) 452.

97. Baker *v.* Terrell, 8 Minn. 195.

98. *Connecticut.*— Skinner *v.* Hale, 76 Conn. 223, 56 Atl. 524.

Maine.— Bean *v.* Boothby, 57 Me. 295.

Massachusetts.— Model Lodging House Assoc. *v.* Boston, 114 Mass. 133.

New York.— Miller *v.* Miller, 22 Misc. 582, 49 N. Y. Suppl. 407. An assignment of a mortgage to the wife of the mortgagor does not effect a merger with her inchoate right of dower, where that is not the intention of the parties. Newton *v.* Manwarring, 10 N. Y. Suppl. 347.

Rhode Island.— See McGale *v.* McGale, 18 R. I. 675, 29 Atl. 967.

See 35 Cent. Dig. tit. "Mortgages," § 709.

99. *Indiana.*—Smith *v.* Ostermeyer, 68 Ind. 432.

Maine.—Hatch *v.* Kimball, 14 Me. 9; Bullard *v.* Hinckley, 5 Me. 272.

Massachusetts.— Pratt *v.* Buckley, 175 Mass. 115, 55 N. E. 889; Fenton *v.* Lord, 128 Mass. 466; Barker *v.* Parker, 4 Pick. 505.

Michigan.— See Hall *v.* Harrington, 41 Mich. 146, 1 N. W. 958.

Minnesota.— Merritt *v.* Byers, 46 Minn. 74, 48 N. W. 417; Gerdine *v.* Menage, 41 Minn. 417, 43 N. W. 91; Baker *v.* Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464; Hooper *v.* Henry, 31 Minn. 264, 17 N. W. 476.

Missouri.— Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422. And see Wilson *v.* Schoenlaub, 99 Mo. 96, 12 S. W. 361.

New Jersey.— Borden *v.* White, 44 N. J. Eq. 291, 18 Atl. 57, 9 Atl. 25; Stillman *v.* Stillman, 21 N. J. Eq. 126.

New York.— Carter *v.* Holahan, 92 N. Y. 498; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; Moore *v.* Hamilton, 48 Barb. 120 [*affirmed* in 44 N. Y. 666]; Mills *v.* Watson, 1 Sweeny 374. But *compare* Mickles *v.* Townsend, 18 N. Y. 575; Mickles *v.* Dillaye, 15 Hun 296; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273.

See 35 Cent. Dig. tit. "Mortgages," § 708.

1. *Georgia.*— Arrowood *v.* McKee, 119 Ga. 623, 46 S. E. 871.

Iowa.— Moore *v.* Olive, 114 Iowa 650, 87 N. W. 720; Waters *v.* Waters, 20 Iowa 363, 89 Am. Dec. 540.

Louisiana.— Gumbel *v.* Boyer, 46 La. Ann. 762, 15 So. 84; Hill *v.* Hall, 4 Rob. 416.

Missouri.— Bray *v.* Conrad, 101 Mo. 331, 13 S. W. 957.

estate and the security separate and apart,[2] provided this can be done without fraud or injustice to the rights of others.[3]

b. Nature of Title to Mortgage. Where the mortgagor or owner of the equity of redemption becomes the owner of the mortgage also, not in his individual capacity, but as an executor, there is no merger of estates;[4] and this is so where he acquires the mortgage in the character of a trustee.[5]

c. Nature of Interest in Property. A merger does not take place where the person acquiring the mortgage has an interest in the mortgaged land less than the complete legal title;[6] where his estate therein is defeasible,[7] as in the case of a purchaser at execution or foreclosure sale where the right of redemption has not yet expired;[8] where his title is that of a junior mortgagee of the same land;[9] or where it is partial, as that of a cotenant,[10] or expectant, as in the case of one who is the sole beneficiary of an estate which is as yet unsettled.[11]

3. Assignment to Purchaser of Equity of Redemption — a. In General. Where the purchaser of an equity of redemption in mortgaged lands takes an

Nevada.— Winnemucca First Nat. Bank *v.* Kreig, 21 Nev. 404, 32 Pac. 641.

New York.—Armstrong *v.* Purcell, 74 N. Y. App. Div. 623, 78 N. Y. Suppl. 36; Beal *v.* Miller, 1 Hun 390; Hackney *v.* Vrooman, 62 Barb. 650; Moore *v.* Hamilton, 48 Barb. 120 [*affirmed* in 44 N. Y. 666]. *Compare* Hancock *v.* Hancock, 22 N. Y. 568.

Pennsylvania.— Loverin *v.* Humboldt Safe Deposit, etc., Co., 113 Pa. St. 6, 4 Atl. 191.

Rhode Island.— Bradford *v.* Burgess, 20 R. I. 290, 38 Atl. 975.

South Carolina.— Singleton *v.* Singleton, 60 S. C. 216, 38 S. E. 462.

Wisconsin.— Mason *v.* Beach, 55 Wis. 607, 13 N. W. 884.

See 35 Cent. Dig. tit. "Mortgages," § 696.

Rescission of contract to purchase.— Where one who has contracted to purchase property and pay off a mortgage on it, as part consideration for the sale, rescinds the contract for good cause, his subsequent purchase of the mortgage does not extinguish it. Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738.

Life-interest reserved to assignor.—A mortgage assigned to the owner of the premises, subject to a life-interest reserved to the assignor, is not merged in the fee. Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826.

Where a dower interest comes in between and thus prevents a union of estates there is no merger. Brendt *v.* Brendt, 53 N. Y. Suppl. 1026. And see Dyer *v.* Dean, 69 Vt. 370, 37 Atl. 1113.

Where, after a mortgagee has assigned the mortgage, he acquires the title of the mortgagor to the mortgaged premises, and conveys the same to a third person there is no merger of the equitable title in the legal. Lime Rock Nat. Bank *v.* Mowry, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294.

2. *California.*— Anglo-Californian Bank *v.* Field, 146 Cal. 644, 80 Pac. 1080.

Connecticut.— Hough *v.* De Forest, 13 Conn. 472.

Illinois.— Security Title, etc., Co. *v.* Schlender, 93 Ill. App. 617.

Iowa.— Moore *v.* Olive, 114 Iowa 650, 87 N. W. 720; Patterson *v.* Mills, 69 Iowa 755, 28 N. W. 53.

Minnesota.— Davis *v.* Pierce, 10 Minn. 376.

Missouri.— Sater *v.* Hunt, 66 Mo. App. 527.

New York.— Ewell *v.* Hubbard, 46 N. Y. App. Div. 383, 61 N. Y. Suppl. 790; Betts *v.* Betts, 9 N. Y. App. Div. 210, 41 N. Y. Suppl. 285; Browne *v.* Perris, 56 Hun 601, 11 N. Y. Suppl. 97; Angel *v.* Boner, 38 Barb. 425; Carter *v.* Holahan, 11 Daly 104 [*affirmed* in 92 N. Y. 498].

Ohio.— Warner *v.* York, 25 Ohio Cir. Ct. 310.

Pennsylvania.— Carrow *v.* Headley, 155 Pa. St. 96, 25 Atl. 889; Moore *v.* Harrisburg Bank, 8 Watts 138.

South Carolina.— Bredenberg *v.* Landrum, 32 S. C. 215, 10 S. E. 956.

Tennessee.— Irvine *v.* Shrum, 97 Tenn. 259, 36 S. W. 1089.

Wisconsin.— Goulding *v.* Bunster, 9 Wis. 513.

United States.— McDaniel *v.* Stroud, 106 Fed. 486, 45 C. C. A. 446.

See 35 Cent. Dig. tit. "Mortgages," § 696.

3. Moore *v.* Olive, 114 Iowa 650, 87 N. W. 720.

4. Pettee *v.* Peppard, 120 Mass. 522; Miller *v.* Donaldson, 17 Ohio 264; Clowney *v.* Cathcart, 2 S. C. 395.

5. Denzler *v.* O'Keefe, 34 N. J. Eq. 361; Hadley *v.* Chapin, 11 Paige (N. Y.) 245.

6. Hatch *v.* Kimball, 14 Me. 9, holding that where a mortgage is assigned to one having only an interest in the mortgaged premises, the mortgage is not thereby extinguished if it is for the interest of the assignee to keep it alive. But see Putnam *v.* Collamore, 120 Mass. 454, holding that an assignment of a mortgage to the equitable owner of the mortgaged estate held in trust for him is an extinguishment of the mortgage.

7. Towle *v.* Hoit, 14 N. H. 61.

8. Myers *v.* O'Neal, 130 Ind. 370, 30 N. E. 510; Shimer *v.* Hammond, 51 Iowa 401, 1 N. W. 656; Southworth *v.* Scofield, 51 N. Y. 513.

9. Loud *v.* Lane, 8 Metc. (Mass.) 517; Willard *v.* Harvey, 5 N. H. 252.

10. Lang *v.* Cadwell, 13 Mont. 458, 34 Pac. 957.

11. Swayze *v.* Schuyler, 59 N. J. Eq. 75, 45 Atl. 347.

assignment of the mortgage, there will not be a merger of estates if it is manifestly his intention, as required by his interest, to hold the mortgage separate from the title to the property, and if the justice and equities of the case permit this to be done.[12] As a general rule, however, if the purchaser simply pays the amount of the mortgage debt to the person entitled, without having the mortgage assigned to him, or otherwise showing his intention to keep it alive, it will extinguish the mortgage;[13] and this is so also, where his purchase of the property was made at an execution sale or other judicial sale.[14]

b. Effect of Intervening Rights. A mortgage lien purchased by the owner of the equity of redemption will not merge, in the absence of a manifest intention to the contrary, but will be kept alive in equity, where that course is necessary to protect the purchaser against a junior mortgage or other intervening lien or claim.[15]

c. Purchaser Assuming Mortgage. If the purchaser of an equity of redemption has assumed the payment of the mortgage debt, or otherwise made himself personally liable for it, his payment of the amount of such debt will be held to work an extinguishment of the mortgage, and he cannot take an assignment of it to himself.[16] On the other hand, if he has not assumed the mortgage or agreed

12. *Idaho.*— Westheimer *v.* Thompson, 3 Ida. 560, 32 Pac. 205.
Illinois.— Hester *v.* Frary, 99 Ill. App. 51.
Indiana.— Morrow *v.* U. S. Mortgage Co., 96 Ind. 21; McClain *v.* Sullivan, 85 Ind. 174; Howe *v.* Woodruff, 12 Ind. 214.
Iowa.— Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293.
Louisiana.— Offutt *v.* Hendsley, 9 La. 1.
Maine.— Lovejoy *v.* Vose, 73 Me. 46; Randall *v.* Bradley, 65 Me. 43; Simonton *v.* Gray, 34 Me. 50; Pool *v.* Hathaway, 22 Me. 85; Thompson *v.* Chandler, 7 Me. 377.
Maryland.— Dircks *v.* Logsdon, 59 Md. 173.
Minnesota.— Flanigan *v.* Sable, 44 Minn. 417, 46 N. W. 854; Horton *v.* Maffitt, 14 Minn. 289, 100 Am. Dec. 222; Davis *v.* Pierce, 10 Minn. 376; Wilcox *v.* Davis, 4 Minn. 197.
New Hampshire.— Salvage *v.* Haydock, 68 N. H. 484, 44 Atl. 696; Bell *v.* Woodward, 34 N. H. 90; Wilson *v.* Kimball, 27 N. H. 300; Bailey *v.* Willard, 8 N. H. 429.
New Jersey.— Duncan *v.* Smith, 31 N. J. L. 325.
New York.— Binsse *v.* Paige, 1 Abb. Dec. 138, 1 Keyes 87; Stewart *v.* Smith, 29 Misc. 235, 60 N. Y. Suppl. 329; Franklyn *v.* Hayward, 61 How. Pr. 43; Starr *v.* Ellis, 6 Johns. Ch. 393; Gardner *v.* Astor, 3 Johns. Ch. 53, 8 Am. Dec. 465.
See 35 Cent. Dig. tit. "Mortgages," § 704.

13. *Alabama.*— Mobile Branch Bank *v.* Hunt, 8 Ala. 876.
Louisiana.— Serapurn *v.* La Croix, 1 La. 373.
Maine.— Given *v.* Marr, 27 Me. 212.
Maryland.— Boyd *v.* Parker, 43 Md. 182.
Massachusetts.— Wade *v.* Merwin, 11 Pick. 280; Wade *v.* Howard, 6 Pick. 492.
Michigan.— Olcott *v.* Crittenden, 68 Mich. 230, 36 N. W. 41; Smith *v.* Austin, 11 Mich. 34; Bassett *v.* Hathaway, 9 Mich. 28.
Missouri.— Wead *v.* Gray, 78 Mo. 59; Wade *v.* Beldmeir, 40 Mo. 486.
New Jersey.— Garwood *v.* Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195.
New York.— McGiven *v.* Wheelock, 7 Barb. 22; Cooper *v.* Whitney, 3 Hill 95. But see Huntley *v.* Re Voir, 66 Hun 291, 20 N. Y. Suppl. 920.
Rhode Island.— Holland *v.* Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.
Wisconsin.— Briggs *v.* Seymour, 17 Wis. 255; Frey *v.* Vanderhoof, 15 Wis. 397.
See 35 Cent. Dig. tit. "Mortgages," § 704.

14. *Illinois.*— Cox *v.* Garst, 105 Ill. 342.
Indiana.— Bunch *v.* Grave, 111 Ind. 351, 12 N. E. 514.
Massachusetts.—Eaton *v.* Simonds, 14 Pick. 98. But see Gleason *v.* Dyke, 22 Pick. 390.
New York.— Tice *v.* Annin, 2 Johns. Ch. 125.
Pennsylvania.— Dollar Sav. Bank *v.* Burns, 87 Pa. St. 491; Cooley's Appeal, 1 Grant 401.
See 35 Cent. Dig. tit. "Mortgages," § 704.

15. *California.*—Matzen *v.* Shaeffer, 65 Cal. 81, 3 Pac. 92.
Illinois.— Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192; Hester *v.* Frary, 99 Ill. App. 51.
Massachusetts.— Evans *v.* Kimball, 1 Allen 240; Crosby *v.* Taylor, 15 Gray 64, 77 Am. Dec. 352; Savage *v.* Hall, 12 Gray 363; Grover *v.* Thatcher, 4 Gray 526.
Michigan.— Dutton *v.* Ives, 5 Mich. 515.
New Hampshire.— Green *v.* Currier, 63 N. H. 563, 3 Atl. 428; Fellows *v.* Dow, 58 N. H. 21; Bell *v.* Woodward, 34 N. H. 90.
New Jersey.— Newcomb *v.* Lubrasky, 65 N. J. Eq. 125, 55 Atl. 89.
New York.— Skeel *v.* Spraker, 8 Paige 182; Millspaugh *v.* McBride, 7 Paige 509, 34 Am. Dec. 360.
Ohio.— Bell *v.* Tenny, 29 Ohio St. 240.
Rhode Island.—Duffy *v.* McGuiness, 13 R. I. 595.
See 35 Cent. Dig. tit. "Mortgages," § 705.
But see Byington *v.* Fountain, 61 Iowa 512, 14 N. W. 220, 16 N. W. 534.

16. *Iowa.*— Northwestern Nat. Bank *v.* Stone, 97 Iowa 183, 66 N. W. 91; Fouche *v.*

to pay it, the primary obligation therefor still resting on the mortgagor, the purchaser may discharge the encumbrance to prevent a sale or to perfect his own title, and thereupon take an assignment of the mortgage or be subrogated to the rights of the mortgagee.[17]

d. Purchaser of Part of Premises. Where a purchaser of part of the mortgaged premises pays the mortgage debt and takes an assignment thereof, the general rule of equity applies that, if it be for the interest of the assignee of the mortgage that it should be upheld, it will be considered as still a subsisting lien;[18] but this is not so where the purchaser has assumed and agreed to pay the whole mortgage debt as a part of the consideration for his purchase.[19]

4. Assignment to Third Person Having Interest — a. In General. Where payment of a mortgage is made by one who is under a legal duty to pay it, the mortgage will be extinguished and discharged, so far as concerns third persons, although an assignment in form may be taken.[20] But if the payment be made by one who is under no direct liability for it, but who has an interest in the premises, the effect on the status of the mortgage will depend on the intention of the party so paying; and if he intended to keep the mortgage alive, such intention being consistent with the just rights of others, equity will regard it as a subsisting lien in his favor, with or without a formal assignment.[21]

b. Assignment Procured by Mortgagor. Where a mortgage debt is paid by a

Delk, 83 Iowa 297, 48 N. W. 1078; Johnson *v.* Walter, 60 Iowa 315, 14 N. W. 325.

Michigan.— Byles *v.* Kellogg, 67 Mich. 318. 34 N. W. 671; Jerome *v.* Seymour, Harr. 357.

Mississippi.— Lewis *v.* Starke, 10 Sm. & M. 120.

Missouri.— Wonderly *v.* Giessler, 118 Mo. App. 708, 93 S. W. 1130.

South Carolina.— Fretwell *v.* Branyon, 67 S. C. 95, 45 S. E. 157.

Vermont.— Willson *v.* Burton, 52 Vt. 394; Converse *v.* Cook, 8 Vt. 164.

West Virginia.— Bier *v.* Smith, 25 W. Va. 830.

Canada.— Blake *v.* Beaty, 5 Grant Ch. (U. C.) 359.

See 35 Cent. Dig. tit. "Mortgages," § 706.

But see Rorer *v.* Ferguson, 96 Va. 411, 31 S. E. 817.

17. *Connecticut.*— Lewis *v.* Hinman, 56 Conn. 55, 13 Atl. 143.

Idaho.— Westheimer *v.* Thompson, 3 Ida. 560, 32 Pac. 205.

Illinois.— Matteson *v.* Thomas, 41 Ill. 110.

Kentucky.— Goriug *v.* Shreve, 7 Dana 64.

Maine.— Carll *v.* Butman, 7 Me. 102.

Massachusetts.— Strong *v.* Converse, 8 Allen 557, 85 Am. Dec. 732; Gibson *v.* Crehore, 5 Pick. 146.

New Hampshire.— Kelly *v.* Duff, 61 N. H. 435; Fletcher *v.* Chase, 16 N. H. 38.

New York.— Betts *v.* Betts, 159 N. Y. 547, 54 N. E. 1089; Clark *v.* Simmons, 55 Hun 175, 8 N. Y. Suppl. 74; Winslow *v.* McCall, 32 Barb. 241.

Ohio.— Fithian *v.* Corwin, 17 Ohio St. 118.

Tennessee.— Irvine *v.* Shrum, 97 Tenn. 259, 36 S. W. 1089.

Canada.— Leitch *v.* Leitch, 2 Ont. L. Rep. 233.

See 35 Cent. Dig. tit. "Mortgages," § 704.

18. *Indiana.*—Smith *v.* Ostermeyer, 68 Ind. 432.

Maine.— Holden *v.* Pike, 24 Me. 427.

New Hampshire.— Clark *v.* Clark, 56 N. H. 105.

New York.— Casey *v.* Buttolph, 12 Barb. 637; King *v.* McVicker, 3 Sandf. Ch. 192.

Pennsylvania.— Fluck *v.* Replogle, 13 Pa. St. 405; Duncan *v.* Drury, 9 Pa. St. 332, 49 Am. Dec. 565.

South Carolina.— See Bailey *v.* Wood, 71 S. C. 36, 50 S. E. 631.

Vermont.— Collamer *v.* Langdon, 29 Vt. 32.

See 35 Cent. Dig. tit. "Mortgages," § 707.

19. Drury *v.* Holden, 121 Ill. 130, 13 N. E. 547; Cushing *v.* Ayer, 25 Me. 383; Pike *v.* Goodnow, 12 Allen (Mass.) 472.

20. Clay *v.* Banks, 71 Ga. 363; Carithers *v.* Stuart, 87 Ind. 424; Burnham *v.* Dorr, 72 Me. 198; Carlton *v.* Jackson, 121 Mass. 592; Wadsworth *v.* Williams, 100 Mass. 126.

Whose money used in making payment.— Where the owner of the equity of redemption pays off a mortgage with the funds of a third person, for the purpose of purchasing it for the latter, the mortgage will not be considered satisfied, either as to the owner or as to subsequent encumbrances; it is otherwise, if the mortgage is paid with the money of the owner, although he may pay it for the purpose of repledging it. Kimble *v.* Denton, 30 N. J. Eq. 732; Denton *v.* Cole, 30 N. J. Eq. 244. And see Wahl *v.* Zoelck, 178 Ill. 158, 52 N. E. 870.

21. *Connecticut.*— New Haven Sav. Bank, etc., Assoc. *v.* McPartlan, 40 Conn. 90.

Maine.— Hatch *v.* Kimball, 16 Me. 146.

Massachusetts.— Guckian *v.* Riley, 135 Mass. 71; Freeman *v.* McGaw, 15 Pick. 82.

Missouri.— Wilson *v.* Schoenlaub, 99 Mo. 96, 12 S. W. 361.

New Hampshire.— Hoysradt *v.* Holland, 50 N. H. 433; Heath *v.* West, 26 N. H. 191.

New Jersey.— Lambert *v.* Hall, 7 N. J. Eq. 410.

New York.— Champney *v.* Coope, 32 N. Y. 543.

third person, but at the procurement of the mortgagor and with money furnished by the latter, it operates as an extinguishment of the mortgage, notwithstanding an assignment of it to such third person.[22] But this rule may be modified on showing a contrary intention of the parties and where no intervening rights of creditors or other persons would be prejudiced,[23] and also where the mortgage has passed by assignment from the person so paying the debt to a new holder who has no notice of the character of the payment.[24]

5. REISSUE OR REASSIGNMENT. Although some of the decisions recognize the right of a mortgagor, after paying off the mortgage and recovering possession of the securities, to reissue them, or pass them to a third person as a valid and subsisting lien,[25] the weight of authority is against this, the mortgage being held incapable of revitalization under such circumstances;[26] and at any rate such a transaction cannot prejudice the rights of other encumbrancers or creditors, raised to a relatively higher position by the payment of the mortgage.[27] The erasure of the name of the assignee of a mortgage, and the delivery of the mortgage back to the original mortgagee, do not reinvest the title in him, but the title remains in the assignee.[28]

XVII. SALE OF MORTGAGED PREMISES.

A. Rights and Liabilities of Mortgagor — 1. RIGHT TO SELL AND CONVEY — a. In General. The owner of property subject to a mortgage has the right to sell and convey the same to a third person, transferring to the purchaser all his own rights and equities in the premises,[29] with or without a reservation of the

Pennsylvania.— Wilson *v.* Murphy, 1 Phila. 203.

South Carolina.— Dargan *v.* McSween, 33 S. C. 324, 11 S. E. 1077.

South Dakota.— Smith *v.* Commercial Nat. Bank, 7 S. D. 465, 64 N. W. 529.

Texas.— Focke *v.* Weishuhn, 55 Tex. 33.

West Virginia.— McClaskey *v.* O'Brien, 16 W. Va. 791.

Wisconsin.— Pelton *v.* Knapp, 21 Wis. 63.

See 35 Cent. Dig. tit. "Mortgages," § 699.

Presumption as to intention.— Where one pays to the holder of a mortgage the amount due thereon, and takes a deed of quitclaim, if the intention to extinguish the mortgage appears at the time, it is decisive of the question; but if no such intention appears, equity will presume the mortgage to be outstanding or to be extinguished as the interests of the party may require. Hatch *v.* Kimball, 16 Me. 146.

22. *Illinois.*— O'Neal *v.* Boone, 82 Ill. 589.

Kansas.— Kingsley *v.* Purdom, 53 Kan. 56, 35 Pac. 811.

Michigan.— Wright *v.* Patterson, 45 Mich. 261, 7 N. W. 820; Nichols *v.* Lee, 10 Mich. 526, 82 Am. Dec. 57.

New Jersey.— Shepherd *v.* McClain, 18 N. J. Eq. 128.

New York.— Campbell *v.* Burch, 1 Lans. 178; Fitch *v.* Cotheal, 2 Sandf. Ch. 29.

See 35 Cent. Dig. tit. "Mortgages," § 700.

Compare Borland *v.* Meurer, 139 Pa. St. 513, 21 Atl. 86.

23. Cole *v.* Edgerly, 48 Me. 108; Hoy *v.* Bramhall, 19 N. J. Eq. 74; Coles *v.* Appleby, 87 N. Y. 114 [*affirming* 22 Hun 72].

24. Hall *v.* Southwick, 27 Minn. 234, 6 N. W. 799; Bolles *v.* Wade, 4 N. J. Eq. 458; Goulding *v.* Bunster, 9 Wis. 513.

25. Smith *v.* Moore, 112 Iowa 60, 83 N. W. 813; Kelley *v.* Jenness, 50 Me. 455, 79 Am. Dec. 623; Sheddy *v.* Geran, 113 Mass. 378.

26. *Illinois.*— Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901. *Compare* Security Title, etc., Co. *v.* Schlender, 190 Ill. 609, 60 N. E. 854, holding that there is no merger, such as to extinguish a note and mortgage, on their return to the owner of the land on which they are secured, where he indorses an extension on the note and sells it and the mortgage to another.

Louisiana.— Schinkel *v.* Hanewinkel, 19 La. Ann. 260; Hill *v.* Hall, 4 Rob. 416. But *compare* Merchants' Mut. Ins. Co. *v.* Jamison, 25 La. Ann. 363.

Michigan.—Winans *v.* Wilkie, 41 Mich. 264, 1 N. W. 1049. But see Powell *v.* Smith, 30 Mich. 451.

New York.— Fairfield *v.* Lynch, 46 N. Y. Super. Ct. 1; Ely *v.* McNight, 30 How. Pr. 97; Pelletreau *v.* Jackson, 11 Wend. 110 [*affirmed* in 13 Wend. 178]. But see Kellogg *v.* Ames, 41 N. Y. 259; Sturges *v.* Hart, 84 Hun 409, 32 N. Y. Suppl. 422; Mertens *v.* Wakefield, 35 Misc. 501, 71 N. Y. Suppl. 1062, holding that a mortgage so reissued may be a valid obligation as against the mortgagor, on the ground that his action in transferring it to another will estop him from denying its validity.

United States.— New York Security, etc., Co. *v.* Equitable Mortg. Co., 77 Fed. 64.

See 35 Cent. Dig. tit. "Mortgages," § 710.

27. Bailey *v.* Malvin, 53 Iowa 371, 5 N. W. 515.

28. Carter *v.* Smith, 142 Ala. 414, 38 So. 184, 110 Am. St. Rep. 36.

29. *Arkansas.*— Terry *v.* Rosell, 32 Ark. 478.

right of sale in the mortgage.[30] This right exists as well after default in the payment of the debt secured by the mortgage as before.[31] The premises may be so sold as a whole or in parcels.[32] Although the sale may be fraudulent as to other creditors of the mortgagor, this furnishes no ground of objection to the mortgagee because he is not affected by it.[33]

b. Pact De Non Alienando. This stipulation, sometimes found in mortgages made in Louisiana, and derived from the Spanish law, binds the mortgagor not to sell or encumber the mortgaged premises to the prejudice of the mortgagee; it does not avoid a sale to a third person, but gives the mortgagee the right to proceed directly against the property, in the hands of the purchaser, in a proceeding against the mortgagor alone and without notice to such purchaser.[34]

c. Donation or Dedication of Property. It is not in the power of the mortgagor of lands, without the assent of the mortgagee, to make a valid dedication or donation of any part of the premises to the public;[35] but the assent of the mortgagee need not be express; it may be implied from his failure to object and from his subsequent acts in relation to the property, or an estoppel may be raised against him.[36]

Colorado.— Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067.

Georgia.— Hudson *v.* Hudson, 119 Ga. 637, 46 S. E. 874; Williams *v.* E. E. Foy Mfg. Co., 111 Ga. 856, 36 S. E. 927.

Illinois.— Medley *v.* Elliott, 62 Ill. 532; Baker *v.* Bishop Hill Colony, 45 Ill. 264; Coffing *v.* Taylor, 16 Ill. 457.

Maine.— Wilkins *v.* French, 20 Me. 111; Blaney *v.* Bearce, 2 Me. 132.

Massachusetts.—Bigelow *v.* Willson, 1 Pick. 485.

Missouri.— Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Kennett *v.* Plummer, 28 Mo. 142; Blair *v.* St. Louis, etc., R. Co., 92 Mo. App. 538.

Texas.— Buchanan *v.* Monroe, 22 Tex. 537; Morrison *v.* Barry, 10 Tex. Civ. App. 22, 30 S. W. 376.

Utah.— Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477.

Wisconsin.— Hodson *v.* Treat, 7 Wis. 263.

United States.— Russell *v.* Ely, 2 Black 575, 17 L. ed. 258.

England.— Duly *v.* Nalder, 11 Jur. N. S. 921, 35 L. J. Ch. 52, 13 Wkly. Rep. 269, 14 Wkly. Rep. 45.

Canada.— Blackley *v.* Kenny, 16 Ont. App. 522.

See 35 Cent. Dig. tit. "Mortgages," § 712.

30. Whitney *v.* Heywood, 6 Cush. (Mass.) 82, holding that where the mortgage provides that the mortgagor may sell any portion of the premises and that the mortgagee will release the portion so sold, on the payment to him of the proceeds of the sale thereof, the agreement is conditional, and gives the mortgagor no power to divest the mortgagee's lien on the premises in any other way than by paying over the purchase-money to him.

Compliance with agreement.— The mortgagee is entitled to a strict compliance, on the part of the mortgagor, with the terms and conditions of such an agreement. Neither party in fact has any right to compel the other to act on such an arrangement except in the mode and subject to the terms agreed upon. Middleton Sav. Bank *v.* Dubuque, 19 Iowa 467; Weeks *v.* Boynton, 37 Vt. 297. But where the mortgagor complies with the conditions of such an agreement, the mortgagee may be compelled to do his part as agreed. Frierson *v.* Blanton, 1 Baxt. (Tenn.) 272.

31. Paulling *v.* Barron, 32 Ala. 9.

32. Rice *v.* Dewey, 54 Barb. (N. Y.) 455. *Compare* Franklin *v.* Gorham, 2 Day (Conn.) 142, 2 Am. Dec. 86; Wamsley *v.* Levy, 36 La. Ann. 226.

33. Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564; Hodson *v.* Treat, 7 Wis. 263.

34. Dodds *v.* Lanaux, 45 La. Ann. 287, 12 So. 345; Citizens' Bank *v.* Miller, 44 La. Ann. 199, 10 So. 779; Watson *v.* Bondurant, 30 La. Ann. 1; Pittman *v.* Obercamp, 23 La. Ann. 342; Scarborough *v.* Stinson, 15 La. Ann. 665; Stanbrough *v.* McCall, 4 La. Ann. 324; Ducros *v.* Fortin, 8 Rob. (La.) 165; Nathan *v.* Lee, 2 Mart. N. S. (La.) 32; New Orleans Nat. Banking Assoc. *v.* Le Breton, 120 U. S. 765, 7 S. Ct. 772, 30 L. ed. 821; Avegno *v.* Schmidt, 113 U. S. 293, 5 S. Ct. 487, 28 L. ed. 976.

35. *Alabama.*—Hoole *v.* Atty.-Gen., 22 Ala. 190.

Arkansas.— Moore *v.* Little Rock, 42 Ark. 66.

Illinois.— Alton *v.* Fishback, 181 Ill. 396, 55 N. E. 150; Elson *v.* Comstock, 150 Ill. 303, 37 N. E. 207; Smith *v.* Heath, 102 Ill. 130; Gridley *v.* Hopkins, 84 Ill. 528.

Missouri.— McShane *v.* Moberly, 79 Mo. 41.

New Jersey.— Hague *v.* West Hoboken, 23 N. J. Eq. 354.

West Virginia.— Walker *v.* Summers, 9 W. Va. 533.

See 35 Cent. Dig. tit. "Mortgages," § 714.

36. Smith *v.* Heath, 102 Ill. 130, holding that where the mortgage expressly provides for the making of a subdivision of the mortgaged premises into lots, whenever the mortgagor shall deem it advisable, the consent of the mortgagee will be implied to the laying out of the usual and proper streets and alleys and their dedication to the public use.

d. Consent of Mortgagee. A sale of the mortgaged premises subject to the mortgage does not ordinarily require the consent of the mortgagee;[37] but if the absolute title, free from the lien of the mortgage, is to be passed to the purchaser, the mortgagee must be a consenting party to the transaction.[38] His agreement, however, may be inferred from circumstances,[39] particularly where he receives to his own use the money paid by the purchaser and applies it on the mortgage debt.[40] It is also entirely competent for the parties, either in the mortgage itself or by a separate agreement, to grant to the mortgagor the right to alienate the premises free from the encumbrance on condition of his paying over to the mortgagee the proceeds of the sale.[41]

2. Liabilities of Mortgagor on Selling — a. As to Mortgagee. By selling the mortgaged premises, the mortgagor does not relieve himself from his personal or primary liability on the note or bond evidencing the mortgage debt.[42] This can only be done by the mortgagee's voluntary acceptance of the purchaser as his debtor, in place of the mortgagor, and releasing the latter,[43] failing which he retains his claim against the mortgagor as well as his lien on the land,[44] or a claim upon the proceeds of the sale, if for any reason the lien has been discharged by the conveyance.[45] The owner of an unrecorded mortgage may maintain an action for damages against the mortgagor, who sold the mortgaged premises to one who took for value and without knowledge of the mortgage, where the mortgagor refuses to pay the debt secured by the mortgage out of the proceeds of the sale.[46]

b. As to Purchaser or Grantee. One who takes a conveyance of land which is already under a mortgage, his deed containing covenants against encumbrances

Accepting payment and executing releases. — Assent may be implied from his acceptance of a stipulated sum per lot and executing releases therefor. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276. And see Hoole *v.* Atty.-Gen., 22 Ala. 190.

37. Bryant *v.* Erskine, 55 Me. 153, 56 Me. 569, holding that an exception to this rule is found in the case of a mortgage for support and maintenance, where the mortgagor has elected to furnish the stipulated support.

38. Addison *v.* Crow, 5 Dana (Ky.) 271; Haney *v.* Barney, 22 S. W. 550, 15 Ky. L. Rep. 142; Bryant *v.* Jackson, 59 Me. 165; Title Guarantee, etc., Co. *v.* Weiher, 30 Misc. (N. Y.) 250, 63 N. Y. Suppl. 224.

Mortgagee's knowledge of intended sale insufficient. — Mere knowledge on the part of the mortgagee that the mortgagor intends to sell, or has sold, a part of the mortgaged premises, or willingness on the part of the mortgagee to authorize such a sale, is not enough; the title cannot be freed from the mortgage lien without his actual consent. Linscott *v.* Weeks, 72 Me. 506; Walhoefer *v.* Hobgood, 18 Tex. Civ. App. 291, 44 S. W. 566.

A junior mortgagee who does not consent to a sale agreed to by the senior mortgagee and the mortgagor is not bound by it. Brooks *v.* Kelly, 63 Miss. 616.

39. Taylor *v.* Cole, 4 Munf. (Va.) 351, 6 Am. Dec. 526; McLeod *v.* Campbell, 3 Nova Scotia Dec. 456.

40. McCormick *v.* Digby, 8 Blackf. (Ind.) 99; Beall *v.* Barclay, 10 B. Mon. (Ky.) 261; Pearson *v.* Carr, 94 N. C. 567.

Promise of payment from another fund. — If a mortgagee permits the mortgagor to sell the premises, under a promise of payment from another fund, the purchaser will hold the land discharged from the mortgage, although the mortgagee obtains nothing from such fund. Taylor *v.* Cole, 4 Munf. (Va.) 351, 6 Am. Dec. 526.

41. Woodward *v.* Jewell, 140 U. S. 247, 11 S. Ct. 784, 35 L. ed. 478, holding that such an agreement need not be executed with the formalities required for a deed, as it is a mere permission for the mortgagor to sell and convey land which is his own. See also Bartels *v.* Davis, (Mont. 1906) 85 Pac. 1027.

42. Anthony Inv. Co. *v.* Law, 62 Kan. 193, 61 Pac. 745; Donaldson *v.* Maurin, 1 La. 29; Wadsworth *v.* Lyon, 93 N. Y. 201, 45 Am. Rep. 190; Metropolitan L. Ins. Co. *v.* Stimpson, 28 N. Y. App. Div. 544, 51 N. Y. Suppl. 226; Bumgardner *v.* Allen, 6 Munf. (Va.) 439.

43. See *infra*, XVII, D, 2.

44. Reed *v.* Jennings, 196 Ill. 472, 63 N. E. 1005, holding that the lien of a mortgagee cannot be discharged or affected by an agreement entered into between the mortgagor and a purchaser of the premises; but the mortgagee may restrict or apportion his lien, in accordance with such agreement, if all interested parties consent.

45. Ball *v.* Green, 90 Ind. 75; Brown *v.* Stewart, 1 Md. Ch. 87.

Amount of the mortgage debt payable out of proceeds. — Where mortgagor and mortgagee join in conveying the mortgaged premises to a third person, the mortgagee is only entitled to receive out of the price the amount of the mortgage debt. Elliott *v.* Wyatt, 74 N. C. 55.

46. Conley *v.* Blinebry, 29 Misc. (N. Y.) 371, 60 N. Y. Suppl. 531.

or a covenant of the grantor to pay the mortgage or to indemnify the grantee against it, will be entitled, on foreclosure of the mortgage or steps taken to enforce it, to sue on the covenant or to withhold payment of the balance of the purchase-price or to resist enforcement of his purchase-money mortgage.[47] But this is of course not the case where the covenant expressly excepts the outstanding mortgage,[48] or where the deed is expressed to be subject to the mortgage and allowance is made for it in the purchase-price.[49]

B. Rights and Liabilities of Purchaser — 1. In General. Usually the purchaser of mortgaged property succeeds to all the rights, titles, and equities of his grantor,[50] including the right to sell and convey the premises to others,[51] the right to require from the mortgagee releases of portions of the property, on complying with the conditions therefor fixed in the mortgage,[52] and the right to redeem from the mortgage, or, in other words, to pay it off when due and according to its terms, and thereby clear his title.[53] And although the mortgagor may

47. *Illinois.*— Zimpleman *v.* Veeder, 98 Ill. 613; Coffman *v.* Scoville, 86 Ill. 300.

Massachusetts.— Bock *v.* Gallagher, 114 Mass. 28.

Ohio.—Hubbard *v.* Harris, 4 Ohio Dec. (Reprint) 577, 2 Clev. L. Rep. 403.

Texas.— Merritt *v.* Freiberg, 13 Tex. Civ. App. 201, 35 S. W. 835.

Vermont.— Way *v.* Raymond, 16 Vt. 371.

United States.— Upham *v.* Brooks, 28 Fed. Cas. No. 16,797, 2 Woodb. & M. 407.

Canada.— Henderson *v.* Brown, 18 Grant Ch. (U. C.) 79; Seney *v.* Porter, 12 Grant Ch. (U. C.) 546; Heap *v.* Crawford, 10 Grant Ch. (U. C.) 442; Tully *v.* Bradbury, 8 Grant Ch. (U. C.) 561; Maitland *v.* McLarty, 1 Grant Ch. (U. C.) 576.

See 35 Cent. Dig. tit. "Mortgages," § 717.

Necessity of eviction.— Where the grantee in a warranty deed conveying premises subject to a prior mortgage remains in undisturbed possession, no suit to collect the debt secured, foreclose the mortgage, or evict him being brought, it is no defense to a foreclosure of his purchase-money mortgage that the prior mortgage is an outstanding encumbrance. Gager *v.* Edwards, 26 Ill. App. 487.

Release of covenants.— If, after a sale of mortgaged land by the mortgagor for full value, and a conveyance with full covenants, the grantee releases the covenants, the mere fact of such release will not constitute the grantee the principal debtor; but, in the absence of evidence showing what was the consideration for the release, or showing expressly that the grantee assumed the mortgage debt, he will be entitled, upon payment of it, to enforce it against the mortgagor. Murray *v.* Fox, 104 N. Y. 382, 10 N. E. 864.

Mortgage subsequently acquired.— The grantor is not estopped by a covenant of warranty from asserting the lien of a mortgage executed before the delivery of the deed, but after the payment of the purchase-price, and assigned to him by the mortgagee. Judd *v.* Seekins, 3 Thomps. & C. (N. Y.) 266 [*affirmed* in 62 N. Y. 266].

48. Lively *v.* Rice, 150 Mass. 171, 22 N. E. 888.

49. Lynch *v.* Rinaldo, 58 How. Pr. (N. Y.) 133; Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 618; Brewer *v.* Staples, 3 Sandf. Ch. (N. Y.) 579; Allen *v.* Robbins, 7 R. I. 33. And see Drury *v.* Tremont Imp. Co., 13 Allen (Mass.) 168.

50. *California.*— Houghton *v.* Allen, (1887) 14 Pac. 641.

Colorado.— Brewer *v.* Harrison, 27 Colo. 349, 62 Pac. 224.

Connecticut.— Lounsbury *v.* Norton, 59 Conn. 170, 22 Atl. 153.

Illinois.— Robbins *v.* Arnold, 11 Ill. App. 434. In case of a conveyance of property, of which the grantor had given a trust deed, a grantee who has not required of the trustee a conveyance of the legal title may still require him to execute the trust. Meacham *v.* Steele, 93 Ill. 135.

Indiana.— Wright *v.* Crump, 25 Ind. 339.

Kentucky.— Hynes *v.* Rogers, Litt. Sel. Cas. 229.

Massachusetts.—Stone *v.* Lane, 10 Allen 74.

Missouri.—Westminster College *v.* Peirsol, 161 Mo. 270, 61 S. W. 811, holding that one who has simply bought land subject to a trust deed, without assuming payment of the note secured thereby, is not entitled to question the ownership of the note by plaintiff in a suit to foreclose the deed.

South Carolina.— State Bank *v.* Campbell, 2 Rich. Eq. 179.

Canada.— Stephens *v.* Twining, 3 Nova Scotia Dec. 445.

See 35 Cent. Dig. tit. "Mortgages," § 718.

51. See Burks *v.* Yorkshire Guarantee, etc., Corp., 108 Ga. 783, 33 S. E. 711.

52. Gammel *v.* Goode, 103 Iowa 301, 72 N. W. 531. And see Weir *v.* Iron Springs Co., 27 Colo. 385, 61 Pac. 619.

Payment of proportionate part of debt.— Where several lots were covered by a mortgage which provided for their release, lot by lot, as a stipulated sum was paid on each, a purchaser of the property with notice of the mortgage is not entitled to a decree compelling the creditor to release the lots purchased, in the absence of proof of payment or of an unconditional tender of the due proportion of the debt secured. Smith *v.* Black, 9 Colo. App. 64, 47 Pac. 394.

53. Baker *v.* Bishop Hill Colony, 45 Ill. 264; Schoffner *v.* Fogleman, 60 N. C. 564.

be bound to apply the proceeds of his sale in reduction of the mortgage debt, the purchaser is not bound to see that this is done.[54] The rights of the purchaser, thus fixed at the time of the conveyance to him, cannot be diminished or impaired by any subsequent act or concession on the part of the mortgagor,[55] nor by any subsequent agreement between the original parties.[56] But on the other hand he is not permitted to do anything which will destroy or impair the value of the mortgage as a security.[57]

2. TITLE OR INTEREST ACQUIRED. A mortgage on land is not extinguished, nor its lien divested, by a sale of the premises to a purchaser who has notice of the mortgage;[58] but on the contrary his title is taken subject to the mortgage, and is no better or stronger than that of his grantor, which, according to one theory of the nature of mortgages, is a mere equity of redemption, or, according to the other, is a legal title charged with the mortgage lien; but in either case is subject to the contractual and statutory rights of the mortgagee.[59] The purchaser's pos-

Mistake as to amount.— Where one purchases land subject to a mortgage of the amount shown of record, without knowledge that there was a mistake in the record thereof, the land in his hands is not liable on the mortgage for any greater sum than that shown by the record. Osborn *v.* Hall, 160 Ind. 153, 66 N. E. 457. But a purchaser of real estate having requested a third person, not the agent of one having an unrecorded mortgage thereon, to ascertain the amount thereof, cannot defeat a recovery of the mortgage debt on account of a mistake as to the amount made by such third person. Enyart *v.* Moran, 64 Nebr. 401, 89 N. W. 1045.

Redemption by third person.— If the mortgage is redeemed by any other person than the purchaser of the equity, the latter cannot avail himself of such payment against the mortgagee or his assigns. Forster *v.* Mellen, 10 Mass. 421.

Title to notes.— The party buying mortgaged premises must, at his peril, ascertain who then owns the notes accompanying the mortgage, and whether the same have been actually paid. Lee *v.* Clark, 89 Mo. 553, 1 S. W. 142.

Possession of notes on payment.— A purchaser of land subject to a mortgage is entitled, on paying the mortgage note, to possession of such note. Stiger *v.* Bent, 111 Ill. 328.

Agreement increasing interest.— A purchaser from the mortgagor has a right to rely on the terms of the mortgage, and as against him an agreement in the note for a higher rate of interest than that stated in the mortgage cannot be enforced, unless he has assumed to pay such higher rate. George *v.* Butler, 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396.

54. Woodward *v.* Jewell, 140 U. S. 247, 11 S. Ct. 784, 35 L. ed. 478.

55. Klauber *v.* Vigneron, (Cal. 1893) 32 Pac. 248; Brolasky *v.* Miller, 9 N. J. Eq. 807.

Extension of payment.— A mortgagor who still retains his ownership of the mortgaged property may make a valid contract of extension of the original mortgage, which will be binding upon a subsequent grantee, whether he takes with or without notice of such extension. White *v.* Krutz, 37 Wash. 34, 79 Pac. 495.

Substitution of new mortgage.— Where, after a sale of the equity of redemption to several grantees, the mortgagor gives a new mortgage in place of the original one, for the purpose of correcting an error of description, the interest of any grantee who gives his express consent to the execution of the new mortgage will be bound by it, but not so as to a grantee who does not consent. Pool *v.* Horton, 45 Mich. 404, 8 N. W. 59.

56. *Dakota.*—Grand Haven First Nat. Bank *v.* Honeyman, 6 Dak. 275, 42 N. W. 771.

Louisiana.— Overton *v.* Archinard, 5 Mart. N. S. 207.

Missouri.— McGready *v.* McGready, 17 Mo. 597.

New Hampshire.— Johnson *v.* Elliot, 26 N. H. 67.

North Carolina.— Ballard *v.* Williams, 95 N. C. 126.

See 35 Cent. Dig. tit. "Mortgages," § 723.

Adjustment of rights as between several mortgagees.— Where the purchaser takes the property subject to two different mortgages, he is not concerned as to the order in which they shall rank, and therefore has no right to object to an arrangement by which the senior mortgagee yields his priority of lien to the junior. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472.

57. People *v.* Herbel, 96 Ill. 384.

58. *Alabama.*— Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

Connecticut.—Mead *v.* Fitzpatrick, 74 Conn. 521, 51 Atl. 515.

Illinois.— Dunlap *v.* Wilson, 32 Ill. 517; Kruse *v.* Scripps, 11 Ill. 98; Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120.

Kentucky.— Morrison *v.* Hampton, 49 S. W. 781, 20 Ky. L. Rep. 1573.

Louisiana.— Field's Succession, 3 Rob. 5.

Nebraska.— Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

United States.— Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,556, 5 Sawy. 336.

See 35 Cent. Dig. tit. "Mortgages," § 718.

59. *Colorado.*—Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740.

session under his deed is in subordination to the title of the mortgagee, to the same extent as that of his grantor, and cannot cease to be of that character, and become such an adverse possession as may ripen into a title under the statute of limitations, until there is an open assertion of a distinct and hostile title with the knowledge of the mortgagee.[60] The interest of one who has purchased the equity in mortgaged premises is such as to enable him to stipulate with the mortgagee for an extension of the time of payment.[61] Since the right of a purchaser from the mortgagor to redeem from the foreclosure sale can be enforced only in equity, it gives him no right to bring an action to confirm and establish a fee-simple title.[62]

3. Rights of Bona Fide Purchaser. A purchaser of property taking the same in good faith and for value is entitled to protection against an unrecorded mortgage on the premises of which he had no notice, actual or constructive,[63] nor

Illinois.— Fetrow *v.* Merriwether, 53 Ill. 275; Wright *v.* Jacksonville Ben. Bldg. Assoc., 48 Ill. App. 505.

Indiana.— Bibbler *v.* Walker, 69 Ind. 362.

Missouri.— Kelly *v.* Staed, 136 Mo. 430, 37 S. W. 1110, 58 Am. St. Rep. 648; Pickett *v.* Jones, 63 Mo. 195.

New York.— Stoddard *v.* Whiting, 46 N. Y. 627.

South Carolina.— Team *v.* Baum, 47 S. C. 410, 25 S. E. 275, 58 Am. St. Rep. 893; McClure *v.* Mounce, 2 McCord 423.

Vermont.— Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63.

Virginia.— Ruffners *v.* Lewis, 7 Leigh 720, 30 Am. Dec. 513.

West Virginia.— Camden *v.* Alkire, 24 W. Va. 674.

United States.— Warner *v.* Grayson, 200 U. S. 257, 26 S. Ct. 240, 50 L. ed. 470; Wright *v.* Phipps, 98 Fed. 1007, 38 C. C. A. 702; U. S. *v.* Flint, etc., R. Co., 95 Fed. 551, 37 C. C. A. 156.

See 35 Cent. Dig. tit. "Mortgages," § 719.

Pact de non alienando.— Where a mortgage contains the stipulation known as the pact *de non alienando*, one who subsequently purchases the property from the mortgagor cannot claim to be in any better condition than his vendor, and cannot plead any exception which the latter could not, any alienation in violation of the pact being null as to the creditor. Stanbrough *v.* McCall, 4 La. Ann. 324; Haley *v.* Dubois, 10 Rob. (La.) 54.

Sale after breach of condition.— The purchaser of the mortgagor's interest after condition broken takes but an equitable right to redeem, and is not a *bona fide* purchaser without notice, but is bound by all prior equities. Harvey *v.* Jones, 1 Disn. (Ohio) 65, 12 Ohio Dec. (Reprint) 490. But where a statute provides that, after breach of condition, the mortgagor is still the owner in fee of the land mortgaged, and the mortgagee has his lien on the land to secure the debt, a grantee of the mortgagor, after condition broken, does not hold the land in trust for the mortgagee or his successors in interest. Simms *v.* Kearse, 42 S. C. 43, 20 S. E. 19.

Absolute deed as mortgage.— Where an absolute conveyance of land is in reality intended as a security in the nature of a mortgage, it retains its character as a mortgage in the hands of each grantee who takes it with notice of the rights of the parties. Howat *v.* Howat, 101 Ill. App. 158. But see Porter *v.* Millet, 9 Mass. 101, holding that where a mortgage is created by an absolute deed and a bond of defeasance, the assignment of the bond does not operate as a conveyance of the equity of redemption.

Extent of right of redemption.— A vendee of a parcel of land, which is subject to a mortgage covering also other parcels of land, succeeds to the mortgagor's rights only in the parcel purchased, and he cannot redeem the unalienated parcels from the mortgagee. Pine Bluff, etc., R. Co. *v.* James, 54 Ark. 81, 15 S. W. 15.

60. Smith *v.* Gillam, 80 Ala. 296; Foster *v.* Goree, 5 Ala. 424; Alsup *v.* Stewart, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; Harding *v.* Durand, 36 Ill. App. 238.

61. Veerhoff *v.* Miller, 30 N. Y. App. Div. 355, 51 N. Y. Suppl. 1048.

62. Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85.

63. *Connecticut.*—Osborn *v.* Carr, 12 Conn. 195; Porter *v.* Seabor, 2 Root 146.

Illinois.— McDaid *v.* Call, 111 Ill. 298; Baldwin *v.* Sager, 70 Ill. 503. One buying land which is subject to a mortgage of record will take no benefit from declarations made to him by the mortgagor that the mortgage has been paid. Pratt *v.* Pratt, 96 Ill. 184.

Indiana.— Citizens' State Bank *v.* Julian, (1899) 54 N. E. 390.

North Carolina.— Collins *v.* Davis, 132 N. C. 106, 43 S. E. 579.

Ohio.— Harvey *v.* Jones, 1 Disn. 65, 12 Ohio Dec. (Reprint) 490, holding that the purchaser of the mortgagor's interest after breach of condition takes but the equitable right to redeem, and is not protected by the rule favoring *bona fide* purchasers without notice.

Pennsylvania.— Eagle Ben. Soc.'s Appeal, 75 Pa. St. 226.

See 35 Cent. Dig. tit. "Mortgages," § 720. And see *supra*, XIV, F, 2, a.

Quitclaim deed.— It will not be presumed that a mortgagor, who owned only an equity of redemption, intended by his conveyance in the form of a quitclaim deed to convey a greater interest than he had; and therefore his grantee cannot assert that he was not

knowledge of facts sufficient to put a prudent man on inquiry.[64] He is justified in relying on the recorded satisfaction or discharge of the mortgage, if he has no notice that the entry was fraudulent or unauthorized.[65]

4. Right to Possession or Rent. The purchaser of mortgaged premises will be entitled, as against the mortgagee, to recover or retain the possession only in case his vendor would have been so entitled.[66] As against the mortgagor, he may recover the possession by an appropriate action,[67] unless the property is in the possession of a tenant under a valid lease previously made by the mortgagor, in which case he must await the end of the term.[68] If the mortgagee is lawfully in possession, under an arrangement with the mortgagor, the purchaser cannot oust him without redemption from the mortgage, but is entitled to an account of the rents and profits.[69] Such purchaser will also generally be entitled to all rents of the property accruing after the date of his purchase.[70]

5. Improvements by Purchaser. Where a purchaser takes the property subject to an existing mortgage, or with knowledge of it, and makes improvements, they inure to the benefit of the mortgagee, and the purchaser is not entitled to compensation for them out of the proceeds of a foreclosure sale, unless there is a surplus.[71] But he may make any changes or alterations he pleases in the buildings on the premises, provided they do not impair its value or diminish the security of the mortgage.[72]

6. Right to Reduction of Amount of Mortgage. The purchaser is entitled to the benefit of any payment or credit which should properly go in reduction of the

affected by the unrecorded mortgage, of which he had no actual notice. Smith *v.* Mobile Branch Bank, 21 Ala. 125.

Subsequent fraudulent conduct of grantee. — The rights accruing to the grantee as a *bona fide* purchaser may be forfeited by his subsequent fraudulent endeavor to defeat the lien of the mortgage. See Pickett *v.* Foster, 149 U. S. 505, 13 S. Ct. 998, 37 L. ed. 829.

64. Slattery *v.* Rafferty, 93 Ill. 277.

65. Lennartz *v.* Quilty, 191 Ill. 174, 60 N. E. 913, 85 Am. St. Rep. 260 [*affirming* 92 Ill. App. 182]; Sheldon *v.* Holmes, 58 Mich. 138, 24 N. W. 795.

66. *Florida.*— Pasco *v.* Gamble, 15 Fla. 562.

Illinois.— Fetrow *v.* Merriwether, 53 Ill. 275.

Massachusetts.— Stebbins *v.* Miller, 12 Allen 591.

Mississippi.— Heard *v.* Baird, 40 Miss. 793.

North Carolina.— Wellborn *v.* Finley, 52 N. C. 228.

Rhode Island.— Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709, holding that the possession of a purchaser of mortgaged land is not adverse to the mortgagee; nor if, after a sale under the mortgage, he is allowed by the foreclosure purchaser to remain in possession, is such possession of itself adverse; for the mortgagor and his assigns hold in privity with the mortgagee and in subordination to his rights.

Vermont.— Warner *v.* Pate, 5 Vt. 166, holding that one who has accepted a conveyance of mortgaged premises after the law day has expired, and who exercises acts of ownership, excluding the mortgagee, is liable in an action of ejectment by the mortgagee for mesne profits, if the land remains unredeemed.

Canada.— Doe *v.* Cumberland, 7 U. C. Q. B. 494.

See 35 Cent. Dig. tit. "Mortgages," § 721.

67. Porter *v.* Millet, 9 Mass. 101.

68. Johnson *v.* Dopkins, 3 Cal. 391.

69. Clark *v.* Missouri, etc., Trust Co., 59 Nebr. 53, 80 N. W. 257; Morton *v.* Covell, 10 Nebr. 423, 6 N. W. 477; Ruckman *v.* Astor, 9 Paige (N. Y.) 517.

70. *Alabama.*— Lovelace *v.* Webb, 62 Ala. 271.

California.— Dewey *v.* Latson, 6 Cal. 609.

Maine.— Fox *v.* Harding, 21 Me. 104.

New York.—Argall *v.* Pitts, 78 N. Y. 239.

Vermont.— Walker *v.* King, 45 Vt. 525.

United States.— Commercial Bank *v.* Sandford, 103 Fed. 98.

See 35 Cent. Dig. tit. "Mortgages," § 721.

But *compare* Turner *v.* Watkins, 31 Ark. 429; Castleman *v.* Belt, 2 B. Mon. (Ky.) 157.

71. Wharton *v.* Moore, 84 N. C. 479, 37 Am. Rep. 627; Annely *v.* De Saussure, 12 S. C. 488; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142. And see *supra*, XII, A, 9. See, however, Linn *v.* Dee, 31 La. Ann. 217, holding that a third possessor, evicted by the mortgagee, can claim for his improvements to the extent of the increased value of the property resulting from them.

72. Boatner *v.* Henderson, 5 Mart. (La.) N. S. 186.

Removal of building.— A purchaser of the equity of redemption is charged with notice of a covenant of the mortgagor to erect a building on the premises, and when he removes such building, it being of a permanent character and affixed for use with the realty, he is presumed to have done so as a wilful wrong-doer, and will not be permitted to profit thereby. Tate *v.* Field, 57 N. J. Eq. 53, 40 Atl. 206.

mortgage debt,[73] but cannot avail himself of a set-off which is personal to the mortgagor.[74] Neither can he insist, at least where he buys at judicial sale, that some other fund, or some other property covered by the mortgage, shall be applied to the satisfaction of the creditor in exoneration of his estate.[75]

7. Liability to Mortgagor or Grantor. Where the purchaser of mortgaged premises assumes and agrees to pay the mortgage, or takes expressly subject to it, the amount of the mortgage debt being a part of the consideration or being deducted from the purchase-price, he incurs an obligation to indemnify his vendor, and the latter will be entitled to reimbursement if compelled to pay the mortgage debt;[76] and this right of reimbursement need not be based on an express contract, but is raised by the law as an implied obligation from the relative rights and duties of the parties.[77] If the property is sold without any agreement or understanding as to the payment of the mortgage, and without any allowance for it in the purchase-price, the burden of the mortgage debt is not shifted to the purchaser and the mortgagor will not be entitled to charge it upon him.[78]

8. Liability For Mortgage Debt. The mere purchase of the equity of redemp-

73. James *v.* Hicks, 76 Mo. App. 108.

Credit for taxes paid see Union Nat. Bank *v.* Pinner, 25 N. J. Eq. 495.

As to allowing credit for money paid in discharge of prior encumbrances see Henderson *v.* Brown, 18 Grant Ch. (U. C.) 79; Tully *v.* Bradbury, 8 Grant Ch. (U. C.) 561.

Money paid as consideration for release from personal liability.— Where an agreement was made, on good consideration, between the original parties to the mortgage, releasing the mortgagor from his personal liability on the mortgage debt, the mortgagor's grantee, taking subject to the mortgage, cannot complain of such release, nor can the money paid in consideration of such release be regarded as a satisfaction of the mortgage as to him. Osborn *v.* Williams, 82 Iowa 456, 48 N. W. 811.

74. Dirks *v.* Humbird, 54 Md. 399; Vanhouten *v.* McCarty, 4 N. J. Eq. 141. See also Lefmann *v.* Brill, 142 Fed. 44.

75. Lovelace *v.* Webb, 62 Ala. 271; Ferry *v.* Krueger, 43 N. J. Eq. 295, 14 Atl. 811 [*affirming* 41 N. J. Eq. 432, 5 Atl. 452]. But see Dirks *v.* Humbird, 54 Md. 399, holding that, where real and personal property are mortgaged to secure the same debt, and the realty has been sold and the proceeds received by the mortgagee, the purchaser thereof has a right to insist that such proceeds shall be credited upon the mortgage debt as a part payment thereof.

76. Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901 [*affirming* 110 Ill. App. 16]; Pearson *v.* Bailey, 180 Mass. 229, 62 N. E. 265; Walton *v.* Ruggles, 180 Mass. 24, 61 N. E. 267; *In re* Stanhope, 184 Pa. St. 414, 39 Atl. 217; Farmers' L. & T. Co. *v.* Penn Plate-Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710; Small *v.* Thompson, 28 Can. Sup. Ct. 219; Fraser *v.* Fairbanks, 23 Can. Sup. Ct. 79; Joice *v.* Duffy, 5 Can. L. J. 141; Roberts *v.* Rees, 5 Can. L. J. 41; Boyd *v.* Johnston, 19 Ont. 598; McDonald *v.* Reynolds, 14 Grant Ch. (U. C.) 691; Seney *v.* Porter, 12 Grant Ch. (U. C.) 546; Mathers *v.* Helliwell, 10 Grant Ch. (U. C.) 172; Thompson *v.* Wilkes, 5 Grant Ch (U. C.) 594. And see *infra*, XVII, D, 2, f.

Mistake in amount.— Where part of the purchase-money of mortgaged lands is left in the hands of the purchaser, to cover any excess that may be found due on computation of the amount due under the mortgage above an estimated amount, and the mortgagee's agent furnishes a statement of the amount due, but afterward declines to abide by his statement, having made a mistake in the calculation, the vendor cannot hold the purchaser to the mistaken calculation and recover the excess in his hands. Baird *v.* Randall, 58 Mich. 175, 24 N. W. 659.

77. Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901 [*affirming* 110 Ill. App. 16]; Higgins *v.* Ontario Trusts Corp., 27 Ont. App. 432; Gooderham *v.* Moore, 31 Ont. 86; Boyd *v.* Johnston, 19 Ont. 598.

May be rebutted.— This implication of an obligation to indemnify the vendor against the mortgage debt may be rebutted by evidence of an express agreement between the parties to the contrary. British Canadian Loan Co. *v.* Tear, 23 Ont. 664; Beatty *v.* Fitzsimmons, 23 Ont. 245.

Where the purchaser is a married woman this implied obligation does not arise, not being a contract or promise in respect to her separate property. McMichael *v.* Wilkie, 18 Ont. App. 464.

This implied obligation is assignable and gives the assignee a direct right of action against the person liable to pay the mortgage debt. Maloney *v.* Campbell, 28 Can. Sup. Ct. 228; Campbell *v.* Morrison, 24 Ont. App. 224.

This implied obligation is raised by equity only as against a purchaser in fact; and where, at the request of the actual purchaser, the land is conveyed to his nominee, by a deed absolute in form but for the purpose of security only, such nominee is not liable to indemnify the vendor. Walker *v.* Dickson, 20 Ont. App. 96.

78. Maher *v.* Lanfrom, 86 Ill. 513; Middaugh *v.* Bachelder, 33 Fed. 706; *In re* Errington, [1894] 1 Q. B. 11, 69 L. T. Rep. N. S. 766, 10 Reports 91.

tion in mortgaged lands does not make the purchaser personally liable for the payment of the mortgage debt; no such obligation rests upon him unless by a contract or agreement by which he assumes the debt, retains the amount of it out of the purchase-money, or otherwise makes it his own.[79] And generally a mortgagee has no claim against one who has bought and afterward sold the mortgaged premises.[80] But a new contract as to payment of the debt may be made between

79. *Colorado.*— Crebbin *v.* Shinn, 19 Colo. App. 302, 74 Pac. 795.

Illinois.— Scholten *v.* Barber, 217 Ill. 148, 75 N. E. 460; Schmitt *v.* Merriman, 101 Ill. App. 443; Garrett *v.* Peirce, 74 Ill. App. 225. The criterion of personal liability for the encumbrance on property purchased is to be found in contract or consent of the purchaser to become bound for the debt, where it forms a part of the price he is to pay for the encumbered property; but where the property is cast on a person by act of law, or by the agency of others, who are the beneficiaries, there is no reason for assuming that he intended to bind himself, and thereby add a new security for the payment. Lobdell *v.* Ray, 110 Ill. App. 230 [*affirmed* in 213 Ill. 389, 72 N. E. 1076]. But where a grantee of land purchases for full value, and retains in his hands from the consideration a sufficient sum to satisfy the encumbrance, he is personally liable for the payment thereof, although he has not expressly agreed to pay it. Ray *v.* Lobdell, 213 Ill. 389, 72 N. E. 1076 [*affirming* 110 Ill. App. 230].

Iowa.— Ritchie *v.* McDuffie, 62 Iowa 46, 17 N. W. 167; Johnson *v.* Monell, 13 Iowa 300.

Kansas.— Searing *v.* Benton, 41 Kan. 758, 21 Pac. 800.

Kentucky.— Patterson *v.* Pope, 5 Dana 241; Peck *v.* Hewlett, 45 S. W. 104, 20 Ky. L. Rep. 45.

Louisiana.— Thompson *v.* Levy, 50 La. Ann. 751, 23 So. 913. If an heir sells property mortgaged by the ancestor, the coheirs must exhaust his property before claiming from his vendee a contribution to the mortgage debt. Chew *v.* McDermott, 2 La. 135.

Maryland.— Commercial Bldg., etc., Assoc. *v.* Robinson, 90 Md. 615, 45 Atl. 449.

Massachusetts.— Patch *v.* Loring, 17 Pick. 336.

Michigan.— Gage *v.* Jenkinson, 58 Mich. 169, 24 N. W. 815.

Minnesota.— Nelson *v.* Rogers, 47 Minn. 103, 49 N. W. 526; Brown *v.* Stillman, 43 Minn. 126, 45 N. W. 2.

Missouri.— National Home Bldg., etc., Assoc. *v.* Scudder-Gale Grocer Co., 82 Mo. App. 245.

Montana.— Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512.

Nebraska.— Griffith *v.* Salleng, 54 Nebr. 362, 74 N. W. 619.

New Jersey.— Tichenor *v.* Dodd, 4 N. J. Eq. 454; Stevenson *v.* Black, 1 N. J. Eq. 338.

New York.— Kellogg *v.* Ames, 41 N. Y. 259; Wandle *v.* Turney, 5 Duer 661; Miller *v.* Parkhurst, 9 N. Y. St. 759. See also Sheldon *v.* Ferris, 45 Barb. 124. *Compare* Watkins *v.* Vrooman, 123 N. Y. 211, 25 N. E. 322 [*reversing* 51 Hun 175, 5 N. Y. Suppl. 172].

North Carolina.— Collins *v.* Davis, 132 N. C. 106, 43 S. E. 579. See also Pullen *v.* Heron Min. Co., 71 N. C. 563.

Ohio.— Teaff *v.* Ross, 1 Ohio St. 469.

Pennsylvania.— Schaeffer *v.* Schaeffer, 182 Pa. St. 598, 38 Atl. 474; Wolbert *v.* Lucas, 10 Pa. St. 73, 49 Am. Dec. 578; Moore's Estate, 12 Phila. 104.

South Carolina.— Hull *v.* Young, 29 S. C. 64, 6 S. E. 938. Where a mortgage has been duly registered, a subsequent purchaser will not be protected by presumptions of payment arising from lapse of time, where the mortgagor himself is not so protected. Bryce *v.* Bowers, 11 Rich. Eq. 41.

Virginia.— Bumgardner *v.* Allen, 6 Munf. 439; Davison *v.* Waite, 2 Munf. 527.

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872; Ludington *v.* Harris, 21 Wis. 239.

United States.— Farmers' L. & T. Co. *v.* Penn Plate Glass Co., 186 U. S. 434, 22 S. Ct. 842, 46 L. ed. 1234 [*affirming* 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710]; Green *v.* Turner, 80 Fed. 41 [*affirmed* in 86 Fed. 837, 30 C. C. A. 427].

Canada.— Higgins *v.* Ontario Trusts Corp., 30 Ont. 684; Nichols *v.* Watson, 23 Grant Ch. (U. C.) 606.

See 35 Cent. Dig. tit. "Mortgages," § 726.

The purchase on execution of the mortgagor's equity of redemption by a stranger to the mortgage will not render the purchaser the debtor of the mortgagee, or release the mortgagor, either at law or in equity. Rogers *v.* Meyers, 68 Ill. 92.

Pact de non alienando.—Where a mortgage contains this pact, a purchaser from the mortgagor, subsequent to the mortgage, will be considered as standing in the mortgagor's place, and is subject to the same liabilities, and he is bound to pay the debt or see it paid. Stanbrough *v.* McCall, 4 La. Ann. 324; Carter *v.* Caldwell, 15 La. 471.

Payment to relieve encumbrance.—The purchaser of mortgaged premises, who is made defendant in an action of ejectment founded on the mortgage, must pay, in order to relieve the land from the encumbrance, the sum due in quity upon the mortgage. McDaniels *v.* Lapham, 21 Vt. 222.

A covenant against encumbrances will not estop the grantor from enforcing a collateral agreement entered into by the grantee binding him to discharge a mortgage on the premises. Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263.

80. Thompson *v.* Bell, 4 La. 447. *Compare* Cable *v.* Davenport, 4 La. 557, holding that a third possessor cannot, by a simulated sale

the mortgagee and the purchaser, and a promise by the mortgagee, whether verbal or written, to extend the time of payment on the mortgage, whereby the purchaser is induced to take the land, is binding.[81]

C. Conveyance Subject to Mortgage — 1. In General. Where a conveyance of land is made expressly subject to an existing mortgage, the effect, as between the grantor and the grantee, is to charge the encumbrance primarily on the land, so as to prevent the purchaser from claiming reimbursement or satisfaction from his vendor in case he loses the land by foreclosure or is compelled to pay the mortgage to save a foreclosure; in reality it amounts simply to a conveyance of the equity of redemption.[82] Although this is usually accomplished by a proper clause in the deed, it has been held that the same result follows from the acceptance of a deed without any covenants,[83] or where the mortgage is expressly excepted from the covenants in the deed.[84] This is, however, a matter between the grantor and the grantee. No matter what may be the arrangement between them, the lien of the mortgage continues on the land, if it be duly recorded or brought home to the knowledge of the purchaser, and is not divested by the mere sale of the land, or by the agreement of the vendor and the vendee as to its payment, without the privity and consent of the mortgagee.[85] Hence they may cancel or eliminate the clause in the deed which made it subject to the mortgage, without consulting the mortgagee or affecting his interests in any way,[86] or may arrange

on the very day he is cited, defeat the mortgagee.

81. Cary *v.* Cary, 9 Kulp (Pa.) 354.

82. *Illinois.*— Monarch Coal, etc., Co. *v.* Hand, 99 Ill. App. 322 [*affirmed* in 197 Ill. 288, 64 N. E. 381].

Indiana.— Hancock *v.* Fleming, 103 Ind. 533, 3 N. E. 254.

Minnesota.— Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95.

Missouri.— Landau *v.* Cottrill, 159 Mo. 308, 60 S. W. 64. One who accepts a warranty deed reciting that it is made subject to a deed of trust executed on the same date takes the land subject to the trust deed, although he is in possession under a prior unrecorded land contract. Westminster College *v.* Piersol, 161 Mo. 270, 61 S. W. 811.

Nebraska.—McNaughton *v.* Burke, 63 Nebr. 704, 89 N. W. 274, holding that a conveyance subject to a mortgage is substantially a conveyance of so much of the property only as is not required for payment of the mortgage debt.

New Jersey.— Chadwick *v.* Island Beach Co., 43 N. J. Eq. 616, 12 Atl. 380.

New York.— Jackson *v.* Hoffman, 9 Cow. 271.

Pennsylvania.— Wilson *v.* Murphy, 1 Phila. 203. And see Fest's Estate, 11 Pa. Dist. 212.

Vermont.— Passumpsic Sav. Bank *v.* Buck, 71 Vt. 190, 44 Atl. 93.

England.—*In re* Alms Corn Charity, [1901] 2 Ch. 750, 71 L. J. Ch. 76, 85 L. T. Rep. N. S. 533.

Canada.— Doe *v.* Hanson, 8 N. Brunsw. 427.

See 35 Cent. Dig. tit. "Mortgages," § 729.

Defective mortgage.— Where a deed of land recited that there were certain mortgages upon it, enumerating, among others, one which was defective because it had only one witness, such mention did not make the land subject to such defective mortgage as against subsequent purchasers. Kane *v.* Moulton, 1 Ohio S. & C. Pl. Dec. 410, 7 Ohio N. P. 293.

Remote grantee of land.— Where a deed of land recited that it was subject to a mortgage, and was duly recorded, one taking by conveyance from the grantee therein takes subject to the mortgage, although his own deed makes no express reference to it. Foster *v.* Bowles, 138 Cal. 346, 71 Pac. 494.

Purchase-money mortgage.— Where a purchaser buys mortgaged premises from the mortgagor, and his deed is expressly made subject to the mortgage, an assignee of the purchase-money notes is charged with notice of the mortgage lien, and is estopped to deny its priority. Swope *v.* Jordan, 107 Tenn. 166, 64 S. W. 52.

Grant of right of way.— Where a vendee of land gives a mortgage to secure the price, and thereafter grants a right of way over the land to a railroad company, such right of way is subject to the mortgage. Stewart *v.* Raymond R. Co., 7 Sm. & M. (Miss.) 568.

83. Atherton *v.* Toney, 43 Ind. 211.

84. Gerdine *v.* Menage, 41 Minn. 417, 43 N. W. 91. But see Bennett *v.* Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112.

85. *California.*— Benedict *v.* Peppers, 58 Cal. 618.

Illinois.— Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Dunlap *v.* Wilson, 32 Ill. 517.

Louisiana.— Nasb *v.* Muggah, 23 La. Ann. 539. A purchaser at public sale of mortgaged premises takes the property subject to previous mortgages, the amount of which constitutes part of the price. Alling *v.* Beamis, 15 La. 385.

New York.— Murray *v.* Barney, 34 Barb. 336; Brockway *v.* Tayntor, 5 N. Y. St. 73.

Ohio.— Kuhns *v.* McGeah, 38 Ohio St. 468.

Tennessee.— Swope *v.* Jordan, 107 Tenn. 166, 64 S. W. 52.

See 35 Cent. Dig. tit. "Mortgages," § 729.

86. Milliken *v.* Golden, 73 Hun (N. Y.) 212, 25 N. Y. Suppl. 885.

the transfer so that as between themselves the grantee shall not take subject to the mortgage at all.[87]

2. Liability of Mortgaged Property. Where land is sold subject to a mortgage, the effect, as between the grantor and the grantee, is to make the land the primary fund for the satisfaction of the encumbrance,[88] so that, if the purchaser has not also assumed the payment of the mortgage debt, the vendor will remain liable for any deficiency after a foreclosure sale fairly made;[89] and on the other hand the purchaser cannot complain of the act of the mortgagee in releasing the mortgagor from personal liability on the debt, nor have money paid as a consideration for such release applied in part satisfaction of such debt.[90]

3. Personal Liability of Purchaser. The grantee of mortgaged land does not incur a personal liability for the payment of the mortgage debt, enforceable by the mortgagee, merely because the deed recites that it is made subject to the mortgage; such personal liability is created only by a distinct assumption of the debt or contractual obligation to pay it.[91]

87. See Maher *v.* Lanfrom, 86 Ill. 513; Bennett *v.* Kehn, 57 Wis. 582, 15 N. W. 776.

88. *Illinois.*— Miller *v.* Robinson Bank, 34 Ill. App. 460; Donk *v.* St. Louis Glucose, etc., Sugar Co., 17 Ill. App. 369.

Indiana.— Hancock *v.* Fleming, 103 Ind. 533, 3 N. E. 254.

Louisiana.— Lee *v.* Darramon, 3 Rob. 160; Valetti *v.* Alpuente, 15 La. 269.

Michigan.— Berry *v.* Whitney, 40 Mich. 65; *In re* Wisner, 20 Mich. 442.

Nebraska.— Frerking *v.* Thomas, 64 Nebr. 193, 89 N. W. 1005; McNaughton *v.* Burke, 63 Nebr. 704, 89 N. W. 274.

New York.—Johnson *v.* Zink, 51 N. Y. 333; Harris *v.* Jex, 66 Barb. 232 [*affirmed* in 55 N. Y. 421, 14 Am. Rep. 285]; Cady *v.* Merchants' Bank, 14 N. Y. St. 99; Brewer *v.* Staples, 3 Sandf. Ch. 579. *Compare* Watkins *v.* Vrooman, 123 N. Y. 211, 25 N. E. 322 [*reversing* 51 Hun 175, 5 N. Y. Suppl. 122].

Pennsylvania.— Blood *v.* Crew Levick Co., 171 Pa. St. 328, 33 Atl. 344; Hansell *v.* Lutz, 20 Pa. St. 284.

Liability for interest.— A conveyance of land subject to a certain mortgage, "with interest thereon," is subject to accrued as well as to future interest (Smith *v.* Read, 51 Conn. 10. And see State Bank *v.* Rose, 2 Strobh. Eq. (S. C.) 90; Walker *v.* King, 45 Vt. 525); and to interest at a higher rate than that stipulated in the mortgage, if such higher rate was fixed by agreement of the original parties before the execution of the conveyance (Hill *v.* Howell, 36 N. J. Eq. 25. See also Hinricks *v.* Brady, (S. D. 1906) 108 N. W. 332); and where A conveyed property to B subject to a mortgage, and afterward, by arrangement with the mortgagee, the mortgage was released, a lease made, and a new mortgage given to the same mortgagee, it was held that B was not entitled to have credited upon his mortgage debt sums in excess of legal interest paid by A (Reeder *v.* Martin, 58 Md. 215).

89. Cleveland *v.* Southard, 25 Wis. 479.

90. Osborn *v.* Williams, 82 Iowa 456, 48 N. W. 811; Tripp *v.* Vincent, 3 Barb. Ch. (N. Y.) 613. And see *In re* Muskerry, 9 Ir. Ch. 94, holding that where a mortgage covers several parcels of land, and the mortgagor sells some of them to a purchaser for value, without the concurrence of the mortgagee, and the interest due under the mortgage is regularly paid out of the remaining parcels, those sold are not discharged from the mortgage, although no proceedings have been taken against them within twenty years.

91. *Arkansas.*— Patton *v.* Adkins, 42 Ark. 197.

Illinois.— Crawford *v.* Nimmons, 180 Ill. 143, 54 N. E. 209; Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467; Rapp *v.* Stoner, 104 Ill. 618; Fowler *v.* Fay, 62 Ill. 375; Comstock *v.* Hitt, 37 Ill. 542; Elser *v.* Williams, 104 Ill. App. 238; Richardson *v.* Venn, 84 Ill. App. 601; Rourke *v.* Coulton, 4 Ill. App. 257.

Iowa.—Bristol Sav. Bank *v.* Stiger, 86 Iowa 344, 53 N. W. 265; Duncan *v.* Finn, 79 Iowa 658, 44 N. W. 888; Ritchie *v.* McDuffie, 62 Iowa 46, 17 N. W. 167; Lewis *v.* Day, 53 Iowa 575, 5 N. W. 753; Aufricht *v.* Northrup, 20 Iowa 61. But *compare* Williams *v.* Everham, 90 Iowa 420, 57 N. W. 901.

Kansas.— Crane *v.* Hughes, 5 Kan. App. 100, 48 Pac. 865.

Louisiana.— Balfour *v.* Chew, 4 Mart. N. S. 154.

Massachusetts.—Fiske *v.* Tolman, 124 Mass. 254, 26 Am. Rep. 659; Strong *v.* Converse, 8 Allen 557, 85 Am. Dec. 732.

Michigan.— Canfield *v.* Shear, 49 Mich. 313, 13 N. W. 605; Booth *v.* Connecticut Mut. L. Ins. Co., 43 Mich. 299, 5 N. W. 381; Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161. *Compare* Carley *v.* Fox, 38 Mich. 387; Crawford *v.* Edwards, 33 Mich. 354. But see Gage *v.* Jenkinson, 58 Mich. 169, 24 N. W. 815, holding that if the vendee of land accepts a deed subject to a mortgage on the land conveyed, containing a clause that he shall pay the encumbrance, he will then become liable for the payment thereof, and a personal decree may be rendered against him on foreclosure; but the promise must be clearly made out, and it cannot be made out by implication.

4. Rights and Liabilities of Mortgagor. Where land is sold subject to a mortgage, but without an assumption of it by the grantee, the mortgagor remains liable for any deficiency.[92] But still, the contract being one of indemnity and the land being the primary fund for the payment of the mortgage, if the grantor is compelled to pay it, he may require an assignment of the mortgage to himself, or he will be regarded as an equitable assignee so as to be subrogated to the rights of the mortgagee, and so will be enabled to use the mortgage to force reimbursement from his grantee.[93] And his liability being quasi that of a surety, he will be released by an extension of time for payment accorded to the purchaser of the premises, without his knowledge or consent;[94] and it seems also by the failure of the mortgagee to foreclose, after the maturity of the debt, upon being called upon to do so.[95]

D. Assumption of Mortgage by Grantee[96] — 1. Requisites and Validity of Assumption — a. Form and Sufficiency of Agreement. The purchaser of mortgaged land may assume the payment of the mortgage debt, in such a manner as not only to relieve the grantor of the encumbrance but also to make himself liable to the mortgagee, by any contract or agreement on his part which distinctly manifests his consent and intention to charge himself with such personal responsibility.[97] This contract may be created by a clause inserted in the deed under

Minnesota.— Nelson *v.* Rogers, 47 Minn. 103, 49 N. W. 526.

Missouri.— Hall *v.* Morgan, 79 Mo. 47; Keifer *v.* Shacklett, 85 Mo. App. 449; Walker *v.* Goodsill, 54 Mo. App. 631.

Montana.— Lang *v.* Cadwell, 13 Mont. 458, 34 Pac. 957.

Nebraska.— Mendelssohn *v.* Christie, 54 Nebr. 684, 74 N. W. 1096.

New Hampshire.— Lawrence *v.* Towle, 59 N. H. 28; Woodbury *v.* Swan, 58 N. H. 380.

New Jersey.— Loudenslager *v.* Woodbury Heights Land Co., 64 N. J. L. 405, 45 Atl. 784.

New York.— Equitable L. Assur. Soc. *v.* Bostwick, 100 N. Y. 628, 3 N. E. 296; Carter *v.* Holahan, 92 N. Y. 498; Dingeldein *v.* Third Ave. R. Co., 37 N. Y. 575; Stebbins *v.* Hall, 29 Barb. 524; Collins *v.* Rowe, 1 Abb. N. Cas. 97. *Compare* Smith *v.* Johnson, Lalor 240.

Pennsylvania.— A recital in a conveyance that the grantee takes "under and subject to" a mortgage is a covenant of indemnity only as between the grantor and grantee, for the protection of the grantor, and does not make the grantee liable to the mortgagee for the payment of the mortgage debt, in the absence of circumstances showing an implied agreement to discharge it. Taylor *v.* Mayer, 93 Pa. St. 42; Davis' Appeal, 89 Pa. St. 272; Samuel *v.* Peyton, 88 Pa. St. 465; Moore's Appeal, 88 Pa. St. 450, 32 Am. Rep. 469; Girard L. Ins., etc., Co. *v.* Stewart, 86 Pa. St. 89; Paul *v.* Casselberry, 8 Wkly. Notes Cas. 334; Thomas *v.* Wiltbank, 6 Wkly. Notes Cas. 477; Stokes *v.* Williams, 6 Wkly. Notes Cas. 473. See, however, Insurance Co. *v.* Addicks, 12 Phila. 490.

Texas.— See Gunst *v.* Pelham, 74 Tex. 586, 12 S. W. 233.

United States.— Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456; Elliott *v.* Sackett, 108 U. S. 132, 2 S. Ct. 375, 27 L. ed. 678; Middaugh *v.* Bachelder, 33 Fed. 706.

Canada.— London Loan Co. *v.* Manley, 26 Can. Sup. Ct. 443 [*affirming* 23 Ont. App. 139]; Real Estate Loan Co. *v.* Molesworth, 3 Manitoba 116.

See 35 Cent. Dig. tit. "Mortgages," § 731.

92. Binsse *v.* Paige, 1 Abb. Dec. (N. Y.) 138, 1 Keyes 87.

93. *Illinois.*— Donk *v.* St. Louis Glucose, etc., Co., 17 Ill. App. 369.

Iowa.— Iowa L. & T. Co. *v.* Mowery, 67 Iowa 113, 24 N. W. 747.

Maine.— Kinnear *v.* Lowell, 34 Me. 299.

New York.—Johnson *v.* Zink, 51 N. Y. 333; Vanderkemp *v.* Shelton, 11 Paige 28; Wells *v.* Chapman, 4 Sandf. Ch. 312 [*affirmed* in 13 Barb. 561].

Pennsylvania.— *In re* Stanhope, 184 Pa. St. 414, 39 Atl. 217; Hansell *v.* Lutz, 20 Pa. St. 284.

United States.— Farmers' L. & T. Co. *v.* Penn Plate-Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710.

See 35 Cent. Dig. tit. "Mortgages," § 734.

94. Dedrick *v.* Den Bleyker, 85 Mich. 475, 48 N. W. 633; Travers *v.* Dorr, 60 Minn. 173, 62 N. W. 269; Murray *v.* Marshall, 94 N. Y. 611. But see Chilton *v.* Brooks, 72 Md. 554, 20 Atl. 125; Penfield *v.* Goodrich, 10 Hun (N. Y.) 41.

95. See Blake *v.* Moore, 10 N. Y. Suppl. 674. And see *infra*, XVII, D, 2, e, (III).

96. **Need not be contemporaneous.**— It is not necessary that the assumption of the mortgage debt should be contemporaneous with the conveyance of the title to the purchaser. Hazleton Nat. Bank *v.* Kintz, 24 Pa. Super. Ct. 456.

97. Thompson *v.* Dearborn, 107 Ill. 87.

Covenant in mortgage.— A covenant in the mortgage by which the mortgagor binds himself, his representatives and assigns, to pay the mortgage debt, does not run with the land, although the mortgage may expressly declare that it shall; and therefore it does not bind a purchaser of the land, who does not in

which he acquires the title,[98] for which no particular form of words is required, the only requisite being that it should unequivocally show his undertaking to be answerable for the payment of the mortgage,[99] or it may be by a separate written instrument,[1] which need not be executed with the formalities necessary for a deed;[2] and which, if it precedes the execution of the deed of conveyance, is not so merged in such deed that the omission of an assumption clause from the deed will release the purchaser from his prior covenant to assume the mortgage,[3] or the agreement may even rest wholly in parol,[4] and in that case is not considered as being within the statute of frauds.[5]

b. Acceptance of Deed Containing Assumption Clause. A grantee who with a knowledge of its contents accepts a conveyance which requires him to assume the payment of an existing mortgage becomes personally liable therefor.[6] It is

any other way assume the mortgage. Glenn *v.* Canby, 24 Md. 127.

Application of purchase-money.—An agreement between vendor and vendee that the instalments of the purchase-money, as they fall due, shall be applied to the satisfaction of a mortgage on the premises until it is reduced to a specified sum, does not amount to an assumption of the mortgage by the purchaser. Ayers *v.* Makely, 131 N. C. 60, 42 S. E. 454. And see Ayres *v.* Randall, 108 Ind. 595, 9 N. E. 464.

A partial payment of a mortgage debt by a grantee to whom the land has been conveyed under a deed reciting that the debt was assumed by the grantee does not create a contract between such grantee and the mortgagee that he will pay the balance. Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210.

Agreement by agent.— An agent, having general authority to purchase real estate for his principal, has the power to bind his principal by assuming a mortgage on land so purchased. Schley *v.* Fryer, 100 N. Y. 71, 2 N. E. 280.

98. Daniel *v.* Creditors, 50 La. Ann. 391, 23 So. 241; Lincoln University *v.* Polk, 1 Nebr. (Unoff.) 403, 95 N. W. 611.

Assumption clause invalid as to grantor.— Where a clause in a deed binding the grantee to assume a mortgage on the premises is nullified by another agreement between the parties, so that it could not be enforced by the grantor, neither can it be enforced by the mortgagee. Arnaud *v.* Grigg, 29 N. J. Eq. 482.

99. Eggleston *v.* Morrison, 84 Ill. App. 625; Schley *v.* Fryer, 100 N. Y. 71, 2 N. E. 280, both holding where a clause in the deed recites a mortgage on the premises which the grantee "assumes," the word is construed as meaning that he "assumes to pay" the mortgage, or "assumes and agrees to pay" it, and amounts to a personal covenant to pay the mortgage debt.

A covenant to pay the mortgage is a covenant to pay the debt secured by it. Hine *v.* Myrick, 60 Minn. 518, 62 N. W. 1125. But it seems that a clause excepting from the covenant against encumbrances a certain mortgage which the grantee "accepts and agrees to pay," unexplained by other evidence, is not sufficient to show an assumption of the mortgage by the grantee. Hopper *v.* Calhoun, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363.

A mere recital that the premises are subject to a certain mortgage is not an assumption of the debt by the purchaser. State Ins. Co. *v.* Irwin, 67 Mo. App. 90.

1. Wyatt *v.* Dufrene, 106 Ill. App. 214; Eggleston *v.* Morrison, 84 Ill. App. 625; Iowa L. & T. Co. *v.* Haller, 119 Iowa 645, 93 N. W. 636; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

2. See Watkins *v.* Vrooman, 51 Hun (N. Y.) 175, 5 N. Y. Suppl. 172 [*reversed* on other grounds in 123 N. Y. 211, 25 N. E. 322].

3. Lynch *v.* Moser, 72 Conn. 714, 46 Atl. 153. *Compare* Slauson *v.* Watkins, 2 Abb. N. Cas. (N. Y.) 366 note [*reversed* in 44 N. Y. Super. Ct. 73 (*affirmed* in 86 N. Y. 597)]. But see Keller *v.* Lee, 66 N. Y. App. Div. 184, 72 N. Y. Suppl. 948.

4. *Illinois.*— Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901; Lang *v.* Dietz, 191 Ill. 161, 60 N. E. 841; Wyatt *v.* Dufrene, 106 Ill. App. 214; Eggleston *v.* Morrison, 84 Ill. App. 625.

Iowa.— Bossingham *v.* Syck, 118 Iowa 192, 91 N. W. 1047; Lamb *v.* Tucker, 42 Iowa 118.

North Dakota.— Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

Ohio.— Indiana Yearly Meeting of Religious Soc. of Friends *v.* Haines, 47 Ohio St. 423, 25 N. E. 119.

Texas.— See Thurmond *v.* Thurmond, (Civ. App. 1905) 87 S. W. 878.

Washington.— Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892.

See 35 Cent. Dig. tit. "Mortgages," § 742.

5. Tuttle *v.* Armstead, 53 Conn. 175, 22 Atl. 677; Neiswanger *v.* McClellan, 45 Kan. 599, 26 Pac. 18.

6. *Connecticut.*— Foster *v.* Atwater, 42 Conn. 244.

Idaho.— Hadley *v.* Clark, 8 Ida. 497, 69 Pac. 319.

Illinois.— Bay *v.* Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467; Blakeslee *v.* Hoit, 116 Ill. App. 83. *Compare* Merriman *v.* Schmitt, 211 Ill. 263, 71 N. E. 986 [*affirming* 101 Ill. App. 443]; Swisher *v.* Palmer, 106 Ill. App. 432; Elser *v.* Williams, 104 Ill.

essential, however, that he should have knowledge of the fact that the deed contains such a clause;[7] and if he accepts the conveyance in ignorance of that fact, he may escape liability by repudiating and disclaiming it as soon as he discovers the truth;[8] but he must act promptly, for if he exercises acts of ownership, as by collecting the rents or selling portions of the property, after acquiring knowledge of the assumption clause in his deed, it will then be too late for him to repudiate it.[9]

c. Ratification or Acceptance by Mortgagee. To make the grantee personally liable to the mortgagee, it is necessary that the former's assumption of the mortgage should have been accepted or ratified by the latter; prior to such acceptance it may be rescinded or modified.[10] But such acceptance need not be formal or express,[11] and it is sufficiently manifested by bringing a suit against the grantee or a proceeding to foreclose in which a personal judgment against him is demanded.[12]

d. Consideration For Agreement. An assumption of the mortgage debt by the purchaser of the premises must be supported by a consideration, as between the grantor and purchaser.[13] But a sufficient consideration may be found in the conveyance of the title, or equity of redemption,[14] so that the same consideration which supports the deed will also sustain the assumption clause in it; while, on

App. 238; Boisot *v.* Chandler, 82 Ill. App. 261; Baer *v.* Knewitz, 39 Ill. App. 470.

Indiana.— Martindale *v.* Parsons, 98 Ind. 174.

Iowa.— Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555.

Kansas.—Neiswanger *v.* McClellan, 45 Kan. 599, 26 Pac. 18. See also Munsel *v.* Beals, 5 Kan. App. 736, 46 Pac. 984. *Compare* Rutland Sav. Bank *v.* White, 4 Kan. App. 435, 46 Pac. 29.

Massachusetts.— Williams *v.* Fowle, 132 Mass. 385; Reed *v.* Paul, 131 Mass. 129; Locke *v.* Homer, 131 Mass. 93, 41 Am. Rep. 199; Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341.

Michigan.— Unger *v.* Smith, 44 Mich. 22, 5 N. W. 1069; Crawford *v.* Edwards, 33 Mich. 354.

Missouri.— Smith *v.* Davis, 90 Mo. App. 533; MacAdaras *v.* King, 10 Mo. App. 578. *Compare* Heffernan *v.* Weir, 99 Mo. App. 301, 72 S. W. 1085.

New Jersey.— Sparkman *v.* Gove, 44 N. J. L. 252; Huyler *v.* Atwood, 26 N. J. Eq. 504.

New York.— Bowen *v.* Beck, 94 N. Y. 86, 46 Am. Rep. 124; Camphell *v.* Smith, 71 N. Y. 26, 27 Am. Rep. 5; Ranney *v.* McMullen, 5 Abb. N. Cas. 246. *Compare* Vrooman *v.* Turner, 8 Hun 78 [*reversed* in 69 N. Y. 280, 25 Am. Rep. 195].

Oregon.— Windle *v.* Hughes, 40 Oreg. 1, 65 Pac. 1058.

South Dakota.— Connor *v.* Jones, (1897) 72 N. W. 463.

Vermont.— Davis *v.* Hulett, 58 Vt. 90, 4 Atl. 139.

Wisconsin.— Ludington *v.* Harris, 21 Wis. 239.

See 35 Cent. Dig. tit. "Mortgages," § 740.

See, however, *In re* Gould, 3 Ohio S. & C. Pl. Dec. 701, 3 Ohio N. P. 314, holding that the acceptance of a voluntary conveyance of land subject to a mortgage, which is excepted from the covenants for title in the deed, is not an assumption of the mortgage debt by the grantee.

7. Keller *v.* Ashford, 3 Mackey (D. C.) 444; Merriman *v.* Schmitt, 211 Ill. 263, 71 N. E. 986; Adams *v.* Wheeler, 122 Ind. 251, 23 N. E. 760; Kelly *v.* Geer, 101 N. Y. 664, 5 N. E. 332.

8. Metzger *v.* Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235; Green *v.* Stone, (N. J. Ch. 1895) 32 Atl. 706; Cordts *v.* Hargrave, 29 N. J. Eq. 446.

9. Ver Planck *v.* Lee, 19 Wash. 492, 53 Pac. 724; Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667.

10. Whicker *v.* Hushaw, 159 Ind. 1, 64 N. E. 460; Berkshire L. Ins. Co. *v.* Hutchings, 100 Ind. 496; Talhurt *v.* Berkshire L. Ins. Co., 80 Ind. 434; Swaim *v.* Grinley, 21 Ind. App. 51, 51 N. E. 375; Searing *v.* Benton, 41 Kan. 758, 21 Pac. 800; Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

11. Bay *v.* Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209.

12. Carnahan *v.* Tousey, 93 Ind. 561; New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732 [*reversing* 58 N. Y. Super. Ct. 586, 11 N. Y. Suppl. 349]; Bissel *v.* Bughee, 3 Fed. Cas. No. 1,445. But *compare* Knickerbocker L. Ins. Co. *v.* Nelson, 78 N. Y. 137.

13. *Colorado.*— Cobb *v.* Fishel, 15 Colo. App. 384, 62 Pac. 625.

Illinois.— Merriman *v.* Schmitt, 211 Ill. 263, 71 N. E. 986.

Nebraska.— Goos *v.* Goos, 57 Nebr. 294, 77 N. W. 687. See also Green *v.* Hall, 45 Nebr. 89, 63 N. W. 119.

New York.—Dunning *v.* Fisher, 20 Hun 178 [*affirmed* in 85 N. Y. 30, 39 Am. Rep. 617].

South Carolina.— Groce *v.* Jenkins, 28 S. C. 172, 5 S. E. 352.

Texas.—Taylor *v.* Witherspoon, 23 Tex. 642.

14. Bay *v.* Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Steele *v.* Johnson, 96 Mo. App. 147, 69 S. W. 1065.

the other hand, a failure or defect of the title, amounting to a failure of consideration, will also release the purchaser from the assumption.[15] A conveyance in consideration of love and affection will support the assumption of a mortgage on the land,[16] and a sufficient consideration may also be found in an extension of time for payment granted to the purchaser,[17] or an agreement of the mortgagee to release the mortgagor from personal liability.[18] But if there is a sufficient consideration, as between the vendor and purchaser, it is not necessary that any consideration should move from the mortgagee to the purchaser in order to sustain an action by the former against the latter.[19]

e. **Validity — Fraud and Mistake.** Where a mortgagee seeks to enforce against a purchaser of the premises a contract by which the latter assumed the payment of the mortgage, such purchaser may defend on the ground that the contract of assumption was inserted in the deed by fraud or mutual mistake, provided he has promptly repudiated it and not led the mortgagee into reliance on his promise.[20] And a similar rule applies where the purchaser assumed the mortgage on condition that there were no other charges on the land, and repudiates it on discovering the existence of other valid liens.[21]

f. **Construction and Operation of Agreement.** A purchaser assuming a mortgage takes the encumbrance as it stands and subject to all its conditions and limitations;[22] and the rights of the mortgagee, as based on and growing out of such assumption, cannot be limited by any qualification or restriction of it agreed on between the grantor and grantee;[23] on the other hand, the lien of the mortgage is not enlarged or extended to other property by the fact of its assumption by a

15. Higman *v.* Stewart, 38 Mich. 513; Dunning *v.* Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Redfearn *v.* Craig, 57 S. C. 534, 35 S. E. 1024; Ward *v.* Green, (Tex. Civ. App. 1894) 28 S. W. 574.

16. Adee *v.* Hallett, 3 N. Y. App. Div. 308, 38 N. Y. Suppl. 273.

17. Iowa L. & T. Co. *v.* Haller, 119 Iowa 645, 93 N. W. 36; Citizens' Permanent Sav., etc., Assoc. *v.* Rampe, 68 N. Y. App. Div. 556, 74 N. Y. Suppl. 192.

18. Ream *v.* Jack, 44 Iowa 325.

19. McKay *v.* Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

20. *Arizona.*— Johns *v.* Wilson, 6 Ariz. 125, 53 Pac. 583.

Iowa.— Logan *v.* Miller, 106 Iowa 511, 76 N. W. 1005; Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606.

Michigan.— Bogart *v.* Phillips, 112 Mich. 697, 71 N. W. 320.

Minnesota.— Clifford *v.* Minor, 76 Minn. 12, 78 N. W. 861.

Missouri.— Saunders *v.* McClintock, 46 Mo. App. 216.

New Jersey.— Stevens Inst. *v.* Sheridan, 30 N. J. Eq. 23.

New York.— Dey Ermand *v.* Chamberlin, 88 N. Y. 658; King *v.* Sullivan, 31 N. Y. App. Div. 549, 52 N. Y. Suppl. 130. But see Albany City Sav. Bank *v.* Martin, 56 How Pr. 500, holding that, in an action to foreclose a mortgage assumed by defendant, the latter ought not to be allowed to set up that the assumption clause was inserted in his deed fraudulently and without his knowledge, especially if he had sufficient opportunity to examine the deed before it was accepted and recorded.

Texas.— Southern Home Bldg., etc., Assoc. *v.* Winans, 24 Tex. Civ. App. 544, 60 S. W. 825.

Washington.— Hull *v.* Vining, 17 Wash. 352, 49 Pac. 537.

United States.— Drury *v.* Hayden, 111 U. S. 223, 4 S. Ct. 405, 28 L. ed. 408.

See 35 Cent. Dig. tit. "Mortgages," § 744.

21. Connerton *v.* Millar, 41 Mich. 608, 2 N. W. 932.

22. Williams *v.* Moody, 95 Ga. 8, 22 S. E. 30, holding that a grantee who assumes a mortgage is charged with knowledge that coupons for interest attached to the principal note provide that the entire debt may be declared due upon default in the payment of any instalment of interest. *Compare* Oak Grove Land Co. *v.* Ellis, 28 Pittsb. Leg. J. N. S. (Pa.) 279, holding that where land is sold subject to a mortgage which provides for the release of the several lots comprised in the tract upon the payment of a proportional sum of money for each, and the grantee sells all but one of the lots to a third person, subject to the mortgage, the payment of which is made part of the consideration, the agreement to release the mortgage is inconsistent with this last deed and is therefore not applicable to the interest of the last purchaser.

23. Alvord *v.* Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27; Nettleton *v.* Ramsey County Land, etc., Co., 54 Minn. 395, 56 N. W. 128, 40 Am. St. Rep. 342; Wise *v.* Fuller, 29 N. J. Eq. 257.

Agreement to pay mortgage without assumption of notes.— A clause in a deed by which the grantee takes subject to the payment of a mortgage on the land, "but does not assume the payment of the various outstanding notes given for the debts secured

purchaser.[24] As between the parties to the conveyance it has been held that a grant of land subject to a mortgage which the purchaser assumes creates in him an estate upon condition, so that, upon breach of the condition, failure to pay the mortgage as agreed, the grantor may enter for forfeiture of the estate,[25] although the more generally accepted doctrine is that the grantor, in such case, may maintain an action on the grantee's covenant, or, having paid the mortgage debt, take an assignment of the mortgage or claim subrogation to the rights of the mortgagee.[26]

g. Evidence as to Assumption of Mortgage. If the deed contains an express contract of assumption of the mortgage, it is ordinarily sufficient evidence by itself to establish the liability of the purchaser.[27] If there is uncertainty or ambiguity in the recital of the mortgage to be assumed, parol evidence is admissible to apply the recital to the mortgage in suit.[28] Evidence cannot be received in contradiction of the assumption clause in the deed, in the absence of allegations of fraud or mistake or of the grantee's ignorance of the insertion of such clause;[29] but if any such reasons for avoiding the contract of assumption are alleged, their existence becomes a question of fact to be determined by competent evidence *dehors* the deed.[30] If the deed contains no such clause or covenant, but reliance is placed on a verbal contract to pay the mortgage, it may be established by parol evidence, which, however, must be clear and convincing.[31] The fact

by said mortgages," is in effect a covenant by the purchaser to pay the amount due upon the mortgage without the duty of hunting up the notes and paying the same to the holders, so that the payment to the holder of the mortgage should discharge their obligation. Blood *v.* Crew Levick Co., 171 Pa. St. 328, 33 Atl. 344.

24. Abell *v.* Coons, 7 Cal. 105, 68 Am. Dec. 229. *Compare* Scionneaux *v.* Waguespack, 32 La. Ann. 283.

Land omitted by mistake.—Where, by mistake, a deed of trust failed to specify a certain tract of land, and the mortgagor sold this land subject to the mortgage, which the grantee assumed and agreed to pay, it was held that the lien of the deed of trust attached to the land in the grantee's hands. Sidwell *v.* Wheaton, 114 Ill. 267, 2 N. E. 183.

25. Bacon *v.* Huntington, 14 Conn. 92; Stone *v.* Ellis, 9 Cush. (Mass.) 95; Sanborn *v.* Woodman, 5 Cush. (Mass.) 36.

26. See *infra*, XVII, D, 2, f.

27. See Fitzgerald *v.* Barker, 85 Mo. 13.

Proof of the record of deed containing an assumption clause raises a presumption that the title vested in the grantee and that he is bound by the covenant to assume the mortgage. Lawrence *v.* Farley, 9 Abb. N. Cas. (N. Y.) 371.

Blanks in deed.—Where the space in a deed for the designation of the person who is to assume and pay the mortgage on the property is left blank, the grantee is not personally liable, in the absence of other proof. Holcomb *v.* Thompson, 50 Kan. 598, 32 Pac. 1091; Shumway *v.* Hawley, 8 Kan. App. 861, 55 Pac. 352.

Deed without covenants.—The purchaser of an equity of redemption by a deed without covenants takes the estate charged with the payment of the mortgage debt, and it will be presumed, in the absence of any special contract, that what he paid or agreed to pay was the price less the amount of the mortgage. Guernsey *v.* Kendall, 55 Vt. 201.

The omission to insert, in a deed, a covenant that the grantee will assume or pay a mortgage is strong evidence that the parties did not intend that he should be liable. Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 516.

28. Clifford *v.* Minor, 76 Minn. 12, 78 N. W. 861; New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732 [*reversing* 57 N. Y. Super. Ct. 42, 4 N. Y. Suppl. 879].

29. Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652.

30. Moran *v.* Pellifant, 28 Ill. App. 278; Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606; Coolidge *v.* Smith, 129 Mass. 554.

Evidence as to fraud.—A written agreement for the sale of land subject to a mortgage debt is not evidence upon an issue as to whether the vendee was induced by fraud subsequently to accept a deed providing for the assumption of the mortgage debt. Weaver *v.* McKay, 108 Cal. 546, 41 Pac. 450.

31. *Illinois.*— Siegel *v.* Borland, 191 Ill. 107, 60 N. E. 863. And see Assets Realization Co. *v.* Heiden, 215 Ill. 9, 74 N. E. 56.

Indiana.— Whicker *v.* Hushaw, 159 Ind. 1, 64 N. E. 460; Offutt *v.* Cooper, 136 Ind. 701, 36 N. E. 273.

Kansas.— Van Pelt *v.* Elgin Wind-Power, etc., Co., 4 Kan. App. 568, 45 Pac. 1104.

Nebraska.— See Rose *v.* Dempster Mill Mfg. Co., (1906) 106 N. W. 990.

New Jersey.— Conover *v.* Brown, 29 N. J. Eq. 510.

New York.— Vilas *v.* McBride, 62 Hun 324, 17 N. Y. Suppl. 171 [*affirmed* in 136 N. Y. 634, 32 N. E. 1014]; Murray *v.* Smith, 1 Duer 412.

Oregon.— Rolston *v.* Markham, 36 Oreg. 112, 58 Pac. 1099.

Pennsylvania.— Merriman *v.* Moore, 90 Pa. St. 78; Insurance Co. *v.* Addicks, 12 Phila. 490.

that the grantee paid interest or a part of the principal of the debt, or negotiated with the mortgagee in regard to its payment, is pertinent;[32] but his liability is not proved by the mere fact that he paid less for the land than its real value, or even that the price paid was the fair value of the property over and above the amount of the mortgage.[33]

h. Promise to Pay Debt as Part of Purchase-Money. Where it is agreed between the parties to a deed of land that the payment of an outstanding mortgage shall constitute a part of the purchase-money, this imports an assumption of the mortgage debt by the purchaser; it is not merely a purchase of the equity of redemption subject to the mortgage, but of the land in fee, with a stipulation as to the manner in which the price shall be paid, and therefore it imposes upon the vendee a liability for any deficiency in the value of the land.[34]

i. Deduction of Mortgage Debt From Purchase-Money. Where land is sold subject to a mortgage, and the amount of the mortgage debt has been deducted and retained by the purchaser out of the agreed price, he will be held to have assumed the payment of the mortgage.[35]

2. Rights and Liabilities of Parties — a. Rights of Mortgagee — (I) *Right to Enforce Covenant.* A contract or covenant by which the purchaser of mort-

Washington.—Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892.

Wisconsin.— Arnold *v.* Randall, 121 Wis. 462, 98 N. W. 239.

See 35 Cent. Dig. tit. "Mortgages," § 746.

32. McKay *v.* Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623. See Keller *v.* Ashford, 3 Mackey (D. C.) 444.

33. Maher *v.* Lanfrom, 86 Ill. 513; Kilborn *v.* Robbins, 8 Allen (Mass.) 466; Vilas *v.* McBride, 62 Hun (N. Y.) 324, 17 N. Y. Suppl. 171; Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 516.

34. *California.* — Racouillat *v.* Sansevain, 32 Cal. 376; Lewis *v.* Covillaud, 21 Cal. 178.

Colorado.— Cobb *v.* Fishel, 15 Colo. App. 384, 62 Pac. 625.

Illinois.— Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865; Sidwell *v.* Wheaton, 114 Ill. 267, 2 N. E. 183; People *v.* Herbel, 96 Ill. 384.

Kentucky.— See Pike *v.* Wathen, 78 S. W. 137, 25 Ky. L. Rep. 1264.

Massachusetts.— Jager *v.* Vollinger, 174 Mass. 521, 55 N. E. 458.

Michigan.— Webber *v.* Lawrence, 118 Mich. 630, 77 N. W. 266.

Nebraska.— Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351. But see Green *v.* Hall, 45 Nebr. 89, 63 N. W. 119.

New Jersey.— Torrey *v.* Thayer, 37 N. J. L. 339.

New York.— Trotter *v.* Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Douglass *v.* Cross, 56 How. Pr. 330; Dorr *v.* Peters, 3 Edw. 132.

Ohio.— Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436.

Pennsylvania.— Blood *v.* Crew Levick Co., 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 742, 171 Pa. St. 328, 33 Atl. 344; Metzgar's Appeal, 71 Pa. St. 330.

Rhode Island.— Urquhart *v.* Brayton, 12 R. I. 169.

United States.— Twichell *v.* Mears, 24 Fed. Cas. No. 14,286, 8 Biss. 211, 6 N. Y. Wkly. Dig. 400.

See 35 Cent. Dig. tit. "Mortgages," § 738.

But *compare* Marling *v.* Nommensen, (Wis. 1906) 106 N. W. 844.

Exchange of lands.— Where the real consideration of a deed of mortgaged land is other land given in exchange, a recital that the granted premises are "subject to a mortgage, which is part of the above-mentioned consideration," and that the grantor warrants the title, "except as above stated," does not show that the amount of the mortgage was retained from the consideration, and hence does not import an assumption of the mortgage debt by the grantee. Bristol Sav. Bank *v.* Stiger, 86 Iowa 344, 53 N. W. 265. And see Hubbard *v.* Ensign, 46 Conn. 576.

35. *Connecticut.*— Townsend *v.* Ward, 27 Conn. 610.

Illinois.— Siegel *v.* Borland, 191 Ill. 107, 60 N. E. 863.

Iowa.— Bristol Sav. Bank *v.* Stiger, 86 Iowa 344, 53 N. W. 265.

Michigan.— Winans *v.* Wilkie, 41 Mich. 264, 1 N. W. 1049.

New Jersey.— Heid *v.* Vreeland, 30 N. J. Eq. 591.

Pennsylvania.— Kostenbader *v.* Spotts, 80 Pa. St. 430.

Not conclusive evidence.—According to some of the decisions the mere deduction of the amount of a mortgage from the purchase-price on sale of the lands does not, in the absence of an agreement to pay, impose upon the grantee the duty of paying or suffering his land to be taken in payment of the mortgage. While it is evidence of the grantor's intention to subject such land to the payment of the mortgage, it is not controlling or conclusive. It may be inferred that the deduction was made to protect the grantee against a questionable encumbrance. Equitable L. Assur. Soc. *v.* Bostwick, 100 N. Y. 628, 3 N. E. 296; Bennett *v.* Bates, 94 N. Y. 354; Belmont *v.* Coman, 22 N. Y. 438, 78 Am. Dec. 213; Ferris *v.* Crawford, 2 Den. (N. Y.)

gaged land assumes and agrees to pay the mortgage inures to the benefit of the mortgagee, although the latter is not directly a party to it; and the mortgagee may enforce such contract for his own protection and advantage.[36]

595. And see Wick *v.* Green, 4 Ohio Dec. (Reprint) 430, 2 Clev. L. Rep. 147.

36. *California.*— Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139; Roberts *v.* Fitzallen, 120 Cal. 482, 52 Pac. 818; Ward *v.* De Oca, 120 Cal. 102, 52 Pac. 130; Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868; Williams *v.* Naftzger, 103 Cal. 438, 37 Pac. 411; Biddel *v.* Brizzalara, 64 Cal. 354, 30 Pac. 609.

Colorado.— Stuyvesant *v.* Western Mortg., etc., Co., 22 Colo. 28, 43 Pac. 144; Cooley *v.* Murray, 11 Colo. App. 241, 52 Pac. 1108.

Connecticut.— Colchester Sav. Bank *v.* Brown, 75 Conn. 69, 52 Atl. 316; Boardman *v.* Larrabee, 51 Conn. 39; Bassett *v.* Bradley, 48 Conn. 224. *Compare* Meech *v.* Ensign, 49 Conn. 191, 44 Am. Rep. 225, holding that there is no right of action in the mortgagee where it does not appear that the promise was made with intent to benefit him.

Illinois.— Huebsch *v.* Scheel, 81 Ill. 281.

Indiana.— Whicker *v.* Hushaw, 159 Ind. 1, 64 N. E. 460; Hammons *v.* Bigelow, 115 Ind. 363, 17 N. E. 192; Ayres *v.* Randall, 108 Ind. 595, 9 N. E. 464; Martindale *v.* Parsons, 98 Ind. 174; Helms *v.* Kearns, 40 Ind. 124.

Iowa.— Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555; Bristol Sav. Bank *v.* Stiger, 86 Iowa 344, 53 N. W. 265; Ross *v.* Kennison, 38 Iowa 396; Thompson *v.* Bertram, 14 Iowa 476.

Kentucky.— Dunn *v.* Shannon, 51 S. W. 14, 21 Ky. L. Rep. 138.

Louisiana.— Truxillo *v.* Delaune, 47 La. Ann. 10, 16 So. 642; Dodds *v.* Lanaux, 45 La. Ann. 287, 12 So. 345; Kenner *v.* Holliday, 19 La. 154; Woodward *v.* Dashiell, 15 La. 184; Gravier *v.* Baron, 4 La. 239; Verret *v.* Candolle, 4 Mart. N. S. 402; Gurlie *v.* Coquet, 3 Mart. N. S. 498; Croghan *v.* Conrad, 11 Mart. 555; Bernard *v.* Vignaud, 10 Mart. 482.

Maine.—Cumberland Nat. Bank *v.* St. Clair, 93 Me. 35, 44 Atl. 123; Flint *v.* Winter Harbor Land Co., 89 Me. 420, 36 Atl. 634.

Maryland.— George *v.* Andrews, 60 Md. 26, 45 Am. Rep. 706; Worthington *v.* Bicknell, 2 Harr. & J. 58.

Massachusetts.— Coffin *v.* Adams, 131 Mass. 133.

Michigan.— Webber *v.* Lawrence, 118 Mich. 630, 77 N. W. 266; Corning *v.* Burton, 102 Mich. 86, 62 N. W. 1040; Booth *v.* Connecticut Mut. L. Ins. Co., 43 Mich. 299, 5 N. W. 381; Hicks *v.* McGarry, 38 Mich. 667; Higman *v.* Stewart, 38 Mich. 513; Miller *v.* Thompson, 34 Mich. 10; Crawford *v.* Edwards, 33 Mich. 354.

Minnesota.— Connecticut Mut. L. Ins. Co. *v.* Knapp, 62 Minn. 405, 64 N. W. 1137; Rogers *v.* Castle, 51 Minn. 428, 53 N. W. 651; Follansbee *v.* Menage, 28 Minn. 311, 9 N. W. 882.

Missouri.— Fitzgerald *v.* Barker, 85 Mo. 13; Wayman *v.* Jones, 58 Mo. App. 313.

Nebraska.— Garneau *v.* Kendall, 61 Nebr. 396, 85 N. W. 291; Martin *v.* Humphrey, 58 Nebr. 414, 78 N. W. 715; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506.

New Jersey.— Green *v.* Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; Emley *v.* Mount, 32 N. J. Eq. 470; Youngs *v.* Public School Trustees, 31 N. J. Eq. 290; Arnaud *v.* Grigg, 29 N. J. Eq. 482; Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650; Hoy *v.* Bramhall, 19 N. J. Eq. 74; Klapworth *v.* Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69.

New York.— Wager *v.* Link, 150 N. Y. 549, 44 N. E. 1103; Pardee *v.* Treat, 82 N. Y. 385; Campbell *v.* Smith, 71 N. Y. 26, 27 Am. Rep. 5; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; Thorp *v.* Keokuk Coal Co., 47 Barb. 439 [*affirmed* in 48 N. Y. 253]; Ranney *v.* McMullen, 5 Abb. N. Cas. 246; King *v.* Whitely, 10 Paige 465; Halsey *v.* Reed, 9 Paige 446.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; Butler *v.* Creager, 2 Ohio Cir. Ct. 542, 1 Ohio Cir. Dec. 632.

Oregon.— Windle *v.* Hughes, 40 Oreg. 1, 65 Pac. 1058.

Pennsylvania.— Blood *v.* Crew Levick Co., 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 742; Republic Bldg., etc., Assoc. *v.* Webb, 12 Pa. Super. Ct. 545.

Rhode Island.— Mechanics' Sav. Bank *v.* Goff, 13 R. I. 516; Urquhart *v.* Brayton, 12 R. I. 169.

Texas.— McCown *v.* Schrimpf, 21 Tex. 22, 73 Am. Dec. 221. And see Gunst *v.* Pelham, 74 Tex. 586, 12 S. W. 233; Southern Home Bldg., etc., Assoc. *v.* Winans, 24 Tex. Civ. App. 544, 60 S. W. 825.

Utah.— Clark *v.* Fisk, 9 Utah 94, 33 Pac. 248.

Virginia.— Osborne *v.* Cabell, 77 Va. 462.

Washington.— Solicitors' L. & T. Co. *v.* Robins, 14 Wash. 507, 45 Pac. 39.

United States.— Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667; Green *v.* Turner, 86 Fed. 837, 30 C. C. A. 427; Knapp *v.* Connecticut Mut. L. Ins. Co., 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861; North Alabama Development Co. *v.* Orman, 55 Fed. 18, 5 C. C. A. 22; Episcopal City Mission *v.* Brown, 43 Fed. 834; Bissell *v.* Bugbee, 3 Fed. Cas. No. 1,445; Twichell *v.* Mears, 24 Fed. Cas. No. 14,286, 8 Biss. 211, 6 N. Y. Wkly. Dig. 400.

See 35 Cent. Dig. tit. "Mortgages," § 747.

See, however, Giesy *v.* Truman, 17 App. Cas. (D. C.) 449, holding that unless the mortgagee has acted on the faith of the agreement of the purchaser to pay the debt, or has otherwise made himself a party to it, he has no right of action.

Reason for rule.—The right of a mortgagee to hold the purchaser of the equity of redemption for a deficiency, who assumes the payment of the mortgage by covenant to the

(II) *FORM OF ACTION AND PARTIES.* According to the older and stricter rule, the mortgagee could take advantage of such a covenant on the part of the purchaser only by a proceeding in equity, his right being one of subrogation to the remedies of the mortgagor, and the want of privity between the purchaser and himself being regarded as an insuperable obstacle to his proceeding at law.[37] But the doctrine now generally accepted gives him the option either to proceed directly against the purchaser on the covenant or to enforce the latter's liability in a suit for foreclosure,[38] and if he chooses the former, he may sue the purchaser in an action at law[39] brought in his own name and without the concurrence of the mortgagor;[40] and the same right accrues to the assignee of the mortgage or to any one standing in the place of the mortgagee or entitled to claim the benefit of the covenant.[41] The action may be maintained against the mortgagor or the

mortgagor, does not rest upon the theory of contract between the purchaser and the mortgagee, upon which an action at law may be maintained, but stands exclusively on the ground that the covenant of the purchaser is a collateral security obtained by the mortgagor, which, by equitable subrogation, inures to the benefit of the mortgagee. Crowell *v.* Currier, 27 N. J. Eq. 152; Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789.

Liability of purchaser after foreclosure for one of several notes.— The holder of a mortgage and of several notes secured thereby, payable at different dates, cannot, after having foreclosed the mortgage for the note last due only, foreclose again for the residue of such notes, as against a person who, after the first foreclosure, and without notice that such notes remained unpaid, purchases the mortgaged premises, assuming the amount of such mortgage as part of the purchase-money and paying the remainder thereof to his grantor. Minor *v.* Hill, 58 Ind. 176, 26 Am. Rep. 71.

Express promise to pay necessary.— To entitle the mortgagee to enforce the covenant of the purchaser, it must be a distinct promise to pay the mortgage debt, and not merely an agreement that the purchaser shall have the option of paying it if he chooses. Ayres *v.* Randall, 108 Ind. 595, 9 N. E. 464.

Subject to equities.— On the theory that the mortgagee's right is a mere right of substitution, it is said that it is subject to equities existing between the mortgagor and the purchaser. Osborne *v.* Cabell, 77 Va. 462.

In Canada the rule is that, although a purchaser covenants with the mortgagor to assume and pay off the mortgage debt, this, owing to the want of privity, affords no ground to the mortgagee to proceed against the purchaser, either at law or in equity, to compel him to perform his covenant (Canada Landed, etc., Co. *v.* Shaver, 22 Ont. App. 377; Frontenac Loan, etc., Soc. *v.* Hysop, 21 Ont. 577; Clarkson *v.* Scott, 25 Grant Ch. (U. C.) 373) unless, perhaps, where the amount of the mortgage debt is included in the consideration for the sale of the land, and is retained by the vendee as so much money belonging to the mortgagee (*Re* Crozier, 24 Grant Ch. (U. C.) 537); but the obligation of the purchaser arising from such a covenant may be assigned by the vendor to the mortgagee, and such assignment will give the mortgagee a direct right of action against the purchaser (Maloney *v.* Campbell, 28 Can. Sup. Ct. 228; Barber *v.* McCuaig, 24 Ont. App. 492; Campbell *v.* Morrison, 24 Ont. App. 224; Barber *v.* McCuaig, 31 Ont. 593).

37. Mellen *v.* Whipple, 1 Gray (Mass.) 317; Insurance Co. *v.* Truesdell, 10 N. J. L. J. 48; Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362; Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118; Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210 [*affirming* 4 Mackey (D. C.) 538]; Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667; Knapp *v.* Connecticut Mut. L. Ins. Co., 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861; Winters *v.* Hub Min. Co., 57 Fed. 287.

38. Wright *v.* Briggs, 99 Ind. 563; Rockwell *v.* Blair Sav. Bank, 31 Nebr. 128, 47 N. W. 641; Keedle *v.* Flack, 27 Nebr. 836, 44 N. W. 34; Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506.

39. Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652; Flint *v.* Winter Harbor Land Co., 89 Me. 420, 36 Atl. 634; Thorp *v.* Keokuk Coal Co., 47 Barb. (N. Y.) 439 [*affirmed* in 48 N. Y. 253].

40. *Alabama.*— Ryall *v.* Prince, 82 Ala. 264, 2 So. 319.

Colorado.— Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652.

Illinois.— Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975; Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467. *Compare* Gautzert *v.* Hoge, 73 Ill. 30.

Kentucky.— Colvin *v.* Newell, 8 Ky. L. Rep. 959.

New York.— Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327.

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

Contra.— Creesy *v.* Willis, 159 Mass. 249, 34 N. E. 265; Fisler *v.* Reach, 202 Pa. St. 74, 51 Atl. 599; Blood *v.* Crew Levick Co., 171 Pa. St. 328, 33 Atl. 344.

41. Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652 (action by assignee of mortgagee); Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865 (action by indorsee of notes secured by the mortgage); Gaw *v.* Glassboro Novelty Glass Co., 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec.

purchaser who has thus assumed the payment of the mortgage, or against both jointly.[42]

b. Land as Primary Fund. As between the parties to a sale of real property, the land is the primary fund for the payment of a mortgage assumed by the purchaser.[43]

c. Effect of Assumption on Mortgagor's Liability. As between the grantor of mortgaged premises and a grantee who assumes the mortgage, personal liability for the mortgage debt is transferred from the former to the latter.[44] But this is not so as to the mortgagee; the assumption of the mortgage does not deprive him of any rights or remedies he possessed against the mortgagor, or relieve the latter from liability for the debt secured,[45] unless the mortgagee has expressly agreed to release him and to accept the purchaser as his debtor in place of the mortgagor.[46]

32 (action by holders of corporate bonds secured by mortgage).

Purchaser of one of two lots subject to mortgage.— The agreement of the grantee of one of two lots owned by the grantor and subject to a mortgage, to assume and pay it as part of the purchase-price, inures to the benefit of the subsequent grantee of the other lot, in case the mortgage is not paid, and the second lot is sold to satisfy it. Cooley *v.* Murray, 11 Colo. App. 241, 52 Pac. 1108.

Trustee in a corporation mortgage.— A right of action does not vest in the trustee in a corporation mortgage securing an issue of bonds, as the holders of the bonds and not he are the real parties in interest. Conner *v.* Bramble, 9 Ohio S. & C. Pl. Dec. 516, 6 Ohio N. P. 195.

A purchaser at a foreclosure sale under a second mortgage has no right of recovery either at law or in equity against a grantee of the equity of redemption who has assumed the prior mortgage. Eggleston *v.* Hadfield, 90 Ill. App. 11.

A judgment creditor of the mortgagor cannot take advantage of such a covenant, although he sues and applies for a receivership on behalf of himself and all other creditors of the mortgagor. Palmer *v.* McKnight, 31 Ont. 306.

42. Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477.

Successive purchasers.— Where the mortgaged property has passed through several hands by successive conveyances, each purchaser assuming the mortgage, the mortgagee may maintain an action against the mortgagor and one or more or all of the grantees. Hyde *v.* Miller, 45 N. Y. App. Div. 396, 60 N. Y. Suppl. 974.

Purchaser pending suit.— In a suit to require a grantee of land to pay a mortgage assumed by him as part of the price, a purchaser of the land after commencement of the suit is not a necessary party. Moran *v.* Pellifant, 28 Ill. App. 278.

43. Michigan State Ins. Co. *v.* Soule, 51 Mich. 312, 16 N. W. 662; Manwaring *v.* Powell, 40 Mich. 371; Wilbur *v.* Warren, 104 N. Y. 192, 10 N. E. 263; Comstock *v.* Drohan, 71 N. Y. 9; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; Huntley *v.* Re Voir, 66 Hun (N. Y.) 291, 20 N. Y. Suppl. 920; Coffin *v.* Lockhart, 60 Hun (N. Y.) 178, 14 N. Y. Suppl. 719; Johnson *v.* Zink, 52 Barb. (N. Y.) 396; Troy Nat. State Bank *v.* Hibbard, 45 How. Pr. (N. Y.) 280; Halsey *v.* Reed, 9 Paige (N. Y.) 446; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 229.

Subsequent grantees of mortgaged real estate who have assumed the mortgage are not discharged by the fact that the mortgagee refused an offer of the owner of the equity of redemption to surrender the premises to the mortgagee. Merritt *v.* Youmans, 21 N. Y. App. Div. 256, 47 N. Y. Suppl. 664.

44. People's Sav. Bank, etc., Assoc. *v.* Collins, 27 Conn. 142; *In re* Ervin, 21 Pa. Co. Ct. 281; Helmholz *v.* Everingham, 24 Wis. 266. And see *infra*, XVII, D, 2, f.

45. *Colorado.*— Campbell *v.* Clay, 4 Colo. App. 551, 36 Pac. 909.

Illinois.— Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671.

Iowa.— James *v.* Day, 37 Iowa 164.

Missouri.— Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268.

New York.— Marshall *v.* Davies, 58 How. Pr. 231.

Ohio.— Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

Pennsylvania.— Green *v.* Rick, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48.

South Dakota.— Hull *v.* Hayward, 13 S. D. 291, 83 N. W. 270, 79 Am. St. Rep. 890.

United States.— Connecticut Mut. L. Ins. Co. *v.* Tyler, 6 Fed. Cas. No. 3,109, 8 Biss. 369.

See 35 Cent. Dig. tit. "Mortgages," § 749.

Partial payment by purchaser.— An original debtor is not released because he conveyed the mortgaged premises to a purchaser who promised to pay the mortgage debt, and did, with the consent of the creditor, make a partial payment. Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268.

46. *Colorado.*— Campbell *v.* Clay, 4 Colo. App. 551, 36 Pac. 909.

Illinois.— Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975.

Louisiana.— Latiolais *v.* Citizens' Bank, 33 La. Ann. 1444.

New York.— Mutual L. Ins. Co. *v.* Hall, 31 N. Y. App. Div. 574, 52 N. Y. Suppl. 404.

d. Personal Liability of Purchaser — (i) *In General.* A purchaser of mortgaged premises who in his deed assumes and agrees to pay the mortgage thereby becomes personally and primarily liable for its satisfaction, which liability may be enforced by the holder of the mortgage in an appropriate action,[47] provided

Ohio.— Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

Wisconsin.— Spycher *v.* Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414.

United States.— Connecticut Mut. L. Ins. Co. *v.* Tyler, 6 Fed. Cas. No. 3,109, 8 Biss. 369.

See 35 Cent. Dig. tit. "Mortgages," § 749.

The acceptance by the mortgagee of a second mortgage upon the same premises, from the purchaser of the mortgaged estate, who agreed with the mortgagor to assume and pay the mortgage, would not constitute a release of the original mortgagor from his personal liability to pay a deficiency. Connecticut Mut. L. Ins. Co. *v.* Tyler, 6 Fed. Cas. No. 3,109, 8 Biss. 369.

47. *California.*— Farmers', etc., Bank *v.* Copsey, 134 Cal. 287, 66 Pac. 324; Roberts *v.* Fitzallen, 120 Cal. 482, 52 Pac. 818.

Colorado.— Burbank *v.* Roots, 4 Colo. App. 197, 35 Pac. 275.

Connecticut.— Bassett *v.* Bradley, 48 Conn. 224; Chapman *v.* Beardsley, 31 Conn. 115; People's Sav. Bank, etc., Bldg. Assoc. *v.* Collins, 27 Conn. 142.

District of Columbia.— Osborne *v.* S. L. Davidson Mortg. Co., 8 App. Cas. 481.

Illinois.— Ingram *v.* Ingram, 172 Ill. 287, 50 N. E. 198; Sawyer *v.* Campbell, 130 Ill. 186, 22 N. E. 458; Bay *v.* Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Thompson *v.* Dearborn, 107 Ill. 87; Rapp *v.* Stoner, 104 Ill. 618; Rogers *v.* Herron, 92 Ill. 583; Wyatt *v.* Dufrene, 106 Ill. App. 214; Murray *v.* Emery, 85 Ill. App. 348 [*affirmed* in 187 Ill. 408, 58 N. E. 327]; Richardson *v.* Venn, 84 Ill. App. 601.

Indiana.— Birke *v.* Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; State *v.* Davis, 96 Ind. 539.

Iowa.— Santee *v.* Keefe, 127 Iowa 128, 102 N. W. 803; Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555; Windsor *v.* Evans, 72 Iowa 692, 34 N. W. 481.

Kansas.— Anthony *v.* Mott, 10 Kan. App. 105, 61 Pac. 509.

Louisiana.— Schlatre *v.* Greaud, 19 La. Ann. 125; Petrovic *v.* Hyde, 16 La. 223; Andrus *v.* Wilkin, 4 La. 237; Durnford *v.* Jackson, 8 Mart. 59.

Massachusetts.—Cilley *v.* Fenton, 130 Mass. 323.

Michigan.— Jehle *v.* Brooks, 112 Mich. 131, 70 N. W. 440; Unger *v.* Smith, 44 Mich. 22, 5 N. W. 1069; Miller *v.* Thompson, 34 Mich. 10.

Minnesota.— Pinch *v.* McCulloch, 72 Minn. 71, 74 N. W. 897; Probstfield *v.* Czizek, 37 Minn. 420, 34 N. W. 896; Follansbee *v.* Johnson, 28 Minn. 311, 9 N. W. 882.

Missouri.— Fitzgerald *v.* Barker, 70 Mo. 685. See Mason *v.* Barnard, 36 Mo. 384.

Nebraska.— Martin *v.* Humphrey, 58 Nebr. 414, 78 N. W. 715; Gibson *v.* Hambleton, 52 Nebr. 601, 72 N. W. 1033.

New York.— Hyde *v.* Miller, 168 N. Y. 590, 60 N. E. 1113; Wager *v.* Link, 134 N. Y. 122, 31 N. E. 213; New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Gifford *v.* Father Matthew Total Abstinence Ben Soc., 104 N. Y. 139, 10 N. E. 39; Bernheimer *v.* Blumenthal, 42 N. Y. App. Div. 193, 58 N. Y. Suppl. 1003; Matter of Simpson, 36 N. Y. App. Div. 562, 55 N. Y. Suppl. 697 [*affirmed* in 158 N. Y. 720, 53 N. E. 1132]. *Compare* Pardee *v.* Treat, 18 Hun 298 [*reversed* in 82 N. Y. 385]; Torrey *v.* Orleans, etc., Bank, 9 Paige 649 [*affirmed* in 7 Hill 260].

Ohio.— Brewer *v.* Mauer, 4 Ohio Dec. (Reprint) 433, 2 Clev. L. Rep. 155.

Oregon.— Haas *v.* Dudley, 30 Oreg. 355, 48 Pac. 168.

Pennsylvania.—Thomas *v.* Fourth St. M. E. Church, 24 Pa. Co. Ct. 642.

Wisconsin.— Stites *v.* Thompson, 98 Wis. 329, 73 N. W. 774. *Compare* Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57 (holding that a purchaser of mortgaged property does not, by the assumption of the mortgage, become the debtor of the mortgagee; but there must be an agreement by the mortgagee to accept him as his debtor); Wynn *v.* Carter, 20 Wis. 107.

United States.— Johns *v.* Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613; North Alabama Development Co. *v.* Orman, 55 Fed. 18, 5 C. C. A. 22.

See 35 Cent. Dig. tit. "Mortgages," § 751.

Agreement postponing grantee's liability. — Where the amount of the mortgage assumed by the purchaser is greater than the purchase-price, and the vendor gives the vendee his note for the difference, the vendee does not become liable to the mortgage creditor until after the payment of such note by the vendor. Brandon *v.* Hughes, 22 La. Ann. 360.

Liability of joint grantees.—Joint grantees of land, taking the same as tenants in common, and assuming a mortgage on the premises, are jointly liable for a breach of their covenant to pay it. Fenton *v.* Lord, 128 Mass. 466.

Grantee's name left blank.— Where a grantee assumed a mortgage debt on the premises, and at his request the name of the grantee was left blank in the deed, so that he might insert the name of the person to whom he should eventually transfer the title, and the title was transferred to a third person, who did not assume the mortgage, it was held that the grantee was personally liable under his assumption of the mortgage debt. Santee *v.* Keefe, 127 Iowa 128, 102 N. W. 803. And see Stockton *v.* Gould, 149 Pa. St. 68, 24 Atl. 160.

Assumption of prior mortgage by subsequent mortgagee.— A stipulation in a mort-

always that he is a real and genuine purchaser, and not one whose name was inserted in the deed for convenience or as a mere channel for passing the title to another,[48] and provided that the debt secured by the mortgage has become and remains due and payable.[49] This being so, the purchaser cannot defend on the ground that the mortgage was void; for if the debt remains, he is liable on his assumption of that, whatever may become of the mortgage.[50] Neither can he escape liability by conveying the property to a stranger, even though the latter in turn assumes the mortgage;[51] nor can the purchaser, under such circumstances, on paying the mortgage, take an assignment of it or keep it alive, by subrogation or otherwise, as against junior encumbrancers or other creditors.[52] The purchaser cannot set up want of consideration between the assignor and assignee of the mortgage as a defense against his liability under the assumption clause, in a suit by the assignee.[53]

(II) *Promise to Pay Debt as Part of Purchase-Money.* Where a purchaser of land undertakes and agrees, as a part of the consideration or price to be paid, to discharge an existing mortgage on the property, or deducts and retains from the price a sufficient sum for that purpose, he becomes personally and primarily liable to the mortgagee therefor, the same as where he assumes the mortgage by covenant in his deed.[54]

gage by which the mortgagee assumes the payment of a prior mortgage on the premises does not render him personally liable to the prior mortgagee for the prior mortgage debt. Such a stipulation is not a promise by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is for the benefit of the mortgagor only, being intended to protect his property by advancing money to pay his debt. Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440.

48. Gill *v.* Robertson, 18 Colo. App. 313, 71 Pac. 634; Deyermand *v.* Chamberlin, 22 Hun (N. Y.) 110; Arnold *v.* Randall, 121 Wis. 462, 98 N. W. 239.

49. Carnahan *v.* Lloyd, 4 Kan. App. 605, 46 Pac. 323.

Before the maturity of the debt the purchaser is not the mortgagee's debtor, unless there has been a proper contract of novation, in such sense that the amount of the mortgage debt could be garnished in his hands in a suit against the mortgagee. Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

Limitations must run against the mortgage obligation, and not against the promise to pay the mortgage as a new and independent agreement, where such payment was assumed by the mortgagor's vendee, as his liability is based on the mortgage debt rather than the new promise. Roberts *v.* Fitzallen, 120 Cal. 482, 52 Pac. 818.

50. Daub *v.* Englebach, 109 Ill. 267; Harts *v.* Emery, 84 Ill. App. 317; Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351.

51. Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975; Reed *v.* Paul, 131 Mass. 129.

In Pennsylvania it is provided by statute (Act June 12, 1878, Pamphl. Laws, p. 205) that where the grantee of land expressly agrees in writing to assume a mortgage thereon, his personal liability shall not continue after he has in good faith parted with the encumbered property, and unless he shall have expressly assumed such continuing liability. See Stockton *v.* Gould, 149 Pa. St. 68, 24 Atl. 160.

Reconveyance to grantor.— Where a purchaser of mortgaged premises has assumed the mortgage, a voluntary reconveyance of the premises to the mortgagor, his grantor, will not relieve him from liability to pay the mortgage. Ingram *v.* Ingram, 172 Ill. 287, 50 N. E. 198.

52. *Iowa.*— Kellogg *v.* Colby, 83 Iowa 513, 49 N. W. 1001; Johnson *v.* Walter, 60 Iowa 315, 14 N. W. 325.

New York.— Hilton *v.* Bissell, 1 Sandf. Ch. 407.

Texas.— Beitel *v.* Dobbin, (Civ. App. 1898) 44 S. W. 299.

Wisconsin.— Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749.

Canada.— Thompson *v.* McCarthy, 13 Can. L. J. N. S. 226; Forbes *v.* Adamson, 1 Ch. Chamb. (U. C.) 117; Blake *v.* Beaty, 5 Grant Ch. (U. C.) 359.

53. Terry *v.* Durand Land Co., 112 Mich. 665, 71 N. W. 525.

54. *Illinois.*—Merriman *v.* Schmitt, 211 Ill. 263, 71 N. E. 986; Wyatt *v.* Dufrene, 106 Ill. App. 214; Schmitt *v.* Merriman, 101 Ill. App. 443.

Indiana.— Birke *v.* Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; Snyder *v.* Robinson, 35 Ind. 311, 9 Am. Rep. 738.

Kansas.— Stephenson *v.* Elliott, 53 Kan. 550, 36 Pac. 980.

Michigan.— Miller *v.* Thompson, 34 Mich. 10.

Nebraska.— Rockwell *v.* Blair Sav. Bank, 31 Nebr. 128, 47 N. W. 641; Keedle *v.* Flack, 27 Nebr. 836, 44 N. W. 34; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506.

New York.— Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437; Campbell *v.* Smith, 71 N. Y. 26, 27 Am. Rep. 5; Ricard *v.* Sanderson, 41 N. Y. 179; Flagg *v.* Munger, 9 N. Y. 483. See Brockway *v.* Tayntor, 5 N. Y. St. 73.

(III) *Liability Dependent on Liability of Grantor.* If mortgaged property passes through the hands of successive grantees, each of whom assumes the mortgage, the personal liability of the last holder inures to the benefit of the mortgagee and may be enforced by him.[55] But where a grantee who assumes the mortgage derives his title from the grantor who did not assume it, or otherwise becomes personally liable for it, the decisions are in conflict. Some of the cases give the mortgagee the benefit of such grantee's promise to pay the mortgage, without regard to the liability of his predecessor in the title;[56] but others maintain that a contract to assume the mortgage is primarily one of indemnity to the grantor, and that if the grantor was not personally liable, so that there is nothing to indemnify him against, there can be no benefit accruing to the mortgagee from such promise.[57]

(IV) *Extent of Liability.* Where a purchaser of mortgaged premises assumes the payment only of a specified share or proportion of the mortgage debt, he cannot be held personally liable for anything beyond the particular terms of his covenant.[58] But if he assumes the mortgage in general terms, or without

South Dakota.— Granger *v.* Roll, 6 S. D. 611, 62 N. W. 970, holding that to render the grantee of mortgaged premises personally liable for the payment of a mortgage debt, he must have assumed and agreed to pay the same, merely retaining the amount of the mortgage from the purchase-price not being sufficient.

Texas.— Mitchell *v.* National R. Bldg., etc., Assoc., (Civ. App. 1899) 49 S. W. 624.

United States.— Twichell *v.* Mears, 24 Fed. Cas. No. 14,286, 8 Biss. 211.

See 35 Cent. Dig. tit. "Mortgages," § 752.

55. Jager *v.* Vollinger, 174 Mass. 521, 55 N. E. 458; Stover *v.* Tompkins, 34 Nebr. 465, 51 N. W. 1040; King *v.* Sullivan, 31 N. Y. App. Div. 549, 52 N. Y. Suppl. 130; Rawson *v.* Copeland, 2 Sandf. Ch. (N. Y.) 251; Fant *v.* Wright, (Tex. Civ. App. 1901) 61 S. W. 514.

Deed destroyed before recording.— The rights of a subsequent purchaser of mortgaged property cannot be affected by a deed to his grantor containing an assumption of the mortgage, which was destroyed before recording by consent of the parties thereto, and new deeds made not containing such provision. Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671.

56. *Colorado.*— Cobb *v.* Fishel, 15 Colo. App. 384, 62 Pac. 625.

Illinois.— Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467. The fact that the notes secured by a deed of trust were not signed by the maker of a deed, but by a third person, does not affect the validity of a contract of assumption by a purchaser of the mortgaged premises, by which he agrees to pay specified portions of the indebtedness evidenced by the notes as part of the purchase-price. Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865.

Iowa.— Marble Sav. Bank *v.* Mesarvey, 101 Iowa 285, 70 N. W. 198.

Missouri.— Crone *v.* Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907 [expressly *disapproving* or virtually *overruling* Hicks *v.* Hamilton, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431; Kansas City Sewer Pipe Co. *v.* Thomson, 120 Mo. 218, 25 S. W. 522; Harberg *v.* Arnold, 78 Mo. App. 237].

Nebraska.— Hare *v.* Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851. A grantee who has assumed to pay a mortgage which is an apparent lien on real estate, as a part of the price, cannot have his title quieted against the lien on the ground that it was not enforceable against his grantor. McGregor *v.* Eastern Bldg., etc., Assoc., 5 Nebr. (Unoff.) 563, 99 N. W. 509.

Ohio.— Little *v.* Thoman, 4 Ohio Dec. (Reprint) 513, 2 Clev. L. Rep. 292.

Utah.— McKay *v.* Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

Wisconsin.— Enos *v.* Sanger, 96 Wis. 150, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862.

57. *California.*— Ward *v.* De Oca, 120 Cal. 102, 52 Pac. 130.

Kansas.— New England Trust Co. *v.* Nash, 5 Kan. App. 739, 46 Pac. 987; Skinner *v.* Mitchell, 5 Kan. App. 366, 48 Pac. 450; Morris *v.* Mix, 4 Kan. App. 654, 46 Pac. 58.

Minnesota.— Nelson *v.* Rogers, 47 Minn. 103, 49 N. W. 526; Brown *v.* Stillman, 43 Minn. 126, 45 N. W. 2.

New Jersey.— Eakin *v.* Schultz, 61 N. J. Eq. 156, 47 Atl. 274; Norwood *v.* De Hart, 30 N. J. Eq. 412; Wise *v.* Fuller, 29 N. J. Eq. 257.

New York.— Williams *v.* Van Geison, 76 N. Y. App. Div. 592, 79 N. Y. Suppl. 95; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; King *v.* Sullivan, 31 N. Y. App. Div. 549, 52 N. Y. Suppl. 130; Carrier *v.* United Paper Co., 73 Hun 287, 26 N. Y. Suppl. 414; Smith *v.* Cross, 16 Hun 487; Cashman *v.* Henry, 44 N. Y. Super. Ct. 93; King *v.* Whitely, 10 Paige 465. *Compare* Wilcox *v.* Campbell, 35 Hun 254.

Oregon.— Young Men's Christian Assoc. *v.* Croft, 34 Oreg. 106, 55 Pac. 439, 75 Am. St. Rep. 568.

See 35 Cent. Dig. tit. "Mortgages," § 753.

58. Garrett *v.* Peirce, 74 Ill. App. 225; Logan *v.* Smith, 70 Ind. 597; Tomlinson *v.* Givens, 144 Mo. 19, 45 S. W. 645; Stites *v.* Erhart, 113 Wis. 479, 89 N. W. 486.

Assuming half of mortgage.—Where a tract of land covered by a mortgage for twelve hun-

restrictions, he becomes liable for all that may be actually due upon it,[59] which may include overdue as well as accruing interest, according to the terms of the contract,[60] and taxes on the premises which it was the duty of the mortgagor to pay,[61] and also attorney's fees and costs of suit;[62] but his responsibility cannot be extended beyond the particular mortgage specified and described,[63] unless he has undertaken generally to discharge all other liens on the property, and in that case his contract will be strictly construed.[64]

e. Liability of Parties as Principal and Surety — (i) *In General.* A purchaser of mortgaged land who assumes and agrees to pay the mortgage debt becomes, as between himself and the mortgagor or grantor, the principal debtor, and the mortgagor or grantor the surety.[65] But this does not affect the relations of the mortgagor and the mortgagee; and the latter cannot be compelled to treat

dred dollars was divided into two parcels and sold to different purchasers, each assuming the payment of a certain mortgage for six hundred dollars on the parcel conveyed to him, it was held that each was liable to pay six hundred dollars on the general mortgage covering the whole property, although there was not in fact a separate mortgage for six hundred dollars on either tract. Thompson *v.* Bird, 57 N. J. Eq. 175, 40 Atl. 857.

59. Jones *v.* Hughes, 66 Miss. 413, 6 So. 239; Freeman *v.* Auld, 44 N. Y. 50 (the purchaser who assumes payment in general terms is liable for the full amount expressed in the mortgage, although less than that amount was actually loaned or advanced by the mortgagee to the mortgagor); Southern Home Bldg., etc., Assoc. *v.* Winans, 24 Tex. Civ. App. 544, 60 S. W. 825. *Compare* Colquhoun *v.* Murray, 26 Ont. App. 204.

Mortgage covering other lands also.— One who contracts, as a consideration for a deed conveying realty to him, to pay "all notes" secured by a trust deed on the land is liable for the entire debt evidenced by such notes, although the trust deed covers other premises also, and his liability in such case is not limited to so much of the debt as is equitably chargeable to the lands purchased. Mead *v.* Peabody, 183 Ill. 126, 55 N. E. 719. But *compare* Folken *v.* Hahn, 114 Iowa 178, 86 N. W. 258.

60. *California.*— Beverly *v.* Blackwood, 102 Cal. 83, 36 Pac. 378.

District of Columbia.— Sawyer *v.* Weaver, 2 MacArthur 1.

Illinois.— Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865.

Kentucky.— Gardner *v.* Continental Ins. Co., 75 S. W. 283, 25 Ky. L. Rep. 426.

New Jersey.— Biddle *v.* Pugh, 59 N. J. Eq. 480, 45 Atl. 626.

Pennsylvania.— Gross *v.* Partenheimer, 159 Pa. St. 556, 28 Atl. 370.

Wisconsin.— Webster *v.* Tibbits, 19 Wis. 438.

See 35 Cent. Dig. tit. "Mortgages," § 755.

Compare Edwards *v.* Thostenson, 64 Iowa 680, 21 N. W. 136; Duncan *v.* Ewing, 3 Tenn. Ch. 29.

Liability for interest without principal.— An agreement to assume the payment of the interest upon a mortgage cannot be construed so as to impose a liability to assume the payment of the principal also. Manhattan L. Ins. Co. *v.* Crawford, 9 Abb. N. Cas. (N. Y.) 365.

Usury.— Where the purchaser assumes the payment of a mortgage on the land which stipulates for usurious interest, being allowed an abatement of the purchase-price to the full amount of the mortgage, the mortgagee may enforce his liability to the full extent of the mortgage. Butler *v.* Creager, 2 Ohio Cir. Ct. 542, 1 Ohio Cir. Dec. 632.

61. Woods Inv. Co. *v.* Palmer, 8 Colo. App. 132, 45 Pac. 237; Field *v.* Thistle, 58 N. J. Eq. 339, 43 Atl. 1072 [*affirmed* in 60 N. J. Eq. 444, 46 Atl. 1099]; Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667. *Compare* Fuller *v.* Jillett, 2 Fed. 30, 9 Biss. 296.

62. Johnson *v.* Harder, 45 Iowa 677; Johnson *v.* Rice, 8 Me. 157.

63. Moore *v.* Graves, 97 Iowa 4, 65 N. W. 1008.

64. Whicker *v.* Hushaw, 159 Ind. 1, 64 N. E. 460.

65. *Illinois.*— Scholten *v.* Barber, 217 Ill. 148, 75 N. E. 460; Gandy *v.* Coleman, 196 Ill. 189, 63 N. E. 625; Flagg *v.* Geltmacher, 98 Ill. 293; Murray *v.* Emery, 85 Ill. App. 348 [*affirmed* in 187 Ill. 408, 58 N. E. 327]; Harts *v.* Emery, 84 Ill. App. 317; Kinney *v.* Wells, 59 Ill. App. 271.

Indiana.— Josselyn *v.* Edwards, 57 Ind. 212; Fleming *v.* Reed, 20 Ind. App. 462, 49 N. E. 1087.

Iowa.— Bryson *v.* Close, 60 Iowa 357, 14 N. W. 350; Corbett *v.* Waterman, 11 Iowa 86.

Maryland.— Warner *v.* Williams, 93 Md. 517, 49 Atl. 559; George *v.* Andrews, 60 Md. 26, 45 Am. Rep. 706.

Missouri.— Regan *v.* Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; Nelson *v.* Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; Wonderly *v.* Giessler, 118 Mo. App. 708, 93 S. W. 1130; Citizens' State Bank *v.* Pettit, 85 Mo. App. 499.

Nebraska.— Merriam *v.* Miles, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731; Stover *v.* Tompkins, 34 Nebr. 465, 51 N. W. 1040.

New Jersey.— Cuhberly *v.* Yager, 42 N. J. Eq. 289, 11 Atl. 113; Newark Firemen's Ins. Co. *v.* Wilkinson, 35 N. J. Eq. 160; Huyler *v.* Atwood, 28 N. J. Eq. 275; Cromwell *v.* St.

the purchaser as the principal debtor, looking to the original mortgagor as a surety only; but this change of position can be brought about, as regards the mortgagee, only by his voluntary agreement to accept the parties in their new relation.[66]

(II) *Effect of Extension of Time of Payment.* On the general principles governing the relation of principal and surety, it is generally held that if a mortgagee, who has notice of a conveyance of the premises to a purchaser who has assumed the payment of the mortgage debt, grants him an extension of the time of payment, without the knowledge or consent of the mortgagor, the personal liability of the mortgagor for the debt will thereby be released;[67] although

Barnabas Hospital, 27 N. J. Eq. 650; Klapworth *v.* Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69; Tichenor *v.* Dodd, 4 N. J. Eq. 454.

New York.— New York L. Ins. Co. *v.* Casey, 178 N. Y. 381, 70 N. E. 916; Fairchild *v.* Lynch, 99 N. Y. 359, 2 N. E. 20; Germania L. Ins. Co. *v.* Casey, 98 N. Y. App. Div. 88, 90 N. Y. Suppl. 418 [*affirmed* in 184 N. Y. 554, 76 N. E. 1095]; Laird *v.* Wittkowski, 67 N. Y. App. Div. 476, 73 N. Y. Suppl. 1115; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; Hyde *v.* Miller, 45 N. Y. App. Div. 396, 60 N. Y. Suppl. 974 [*affirmed* in 168 N. Y. 590, 60 N. E. 1113]; Binghamton Sav. Bank *v.* Binghamton Trust Co., 85 Hun 75, 32 N. Y. Suppl. 657; Calvo *v.* Davies, 8 Hun 222 [*affirmed* in 73 N. Y. 211, 29 Am. Rep. 130]; Johnson *v.* Zink, 52 Barb. 396; Mills *v.* Watson, 1 Sweeny 374; Ranney *v.* McMullen, 5 Ahb. N. Cas. 246; Wales *v.* Sherwood, 52 How. Pr. 413; Torrey *v.* Orleans Bank, 9 Paige 649 [*affirmed* in 7 Hill 260]; Blyer *v.* Monholland, 2 Sandf. Ch. 478; Marsh *v.* Pike, 1 Sandf. Ch. 210. See also Hyde *v.* Miller, 168 N. Y. 590, 60 N. E. 1113.

North Carolina.— Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713.

Pennsylvania.— Cook *v.* Berry, 193 Pa. St. 377, 44 Atl. 771.

South Carolina.— Latimer *v.* Latimer, 38 S. C. 379, 16 S. E. 995.

Texas.— Merchants' Ins. Co. *v.* Story, 13 Tex. Civ. App. 124, 35 S. W. 68.

Virginia.— Moore *v.* Triplett, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882; Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789; Willard *v.* Worsham, 76 Va. 392.

Canada.— Joice *v.* Duffy, 5 Can. L. J. 141; Campbell *v.* Robinson, 27 Grant Ch. (U. C.) 634.

See 35 Cent. Dig. tit. "Mortgages," § 756.

Assumption of mortgage debt on new consideration.— Where the vendee pays the full purchase-money, and then, on an independent consideration, such as a secured note of the vendor, assumes a mortgage debt on the land, the relation of principal and surety does not exist. Citizens' State Bank *v.* Pettit, 85 Mo. App. 499.

66. *Connecticut.*— Waters *v.* Hubbard, 44 Conn. 340.

Illinois.— Fish *v.* Glover, 154 Ill. 86, 39 N. E. 1081.

Iowa.— Corbett *v.* Waterman, 11 Iowa 86.

Kansas.— Mulvane *v.* Sedgley, 63 Kan. 105, 64 Pac. 1038, 55 L. R. A. 552.

Michigan.—Crawford *v.* Edwards, 33 Mich. 354.

Nebraska.— Merriam *v.* Miles, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731.

New Jersey.—Palmer *v.* White, 65 N. J. L. 69, 46 Atl. 706.

New York.— New York Mut. L. Ins. Co. *v.* Hall, 166 N. Y. 595, 59 N. E. 1127; Marsh *v.* Pike, 10 Paige 595.

Canada.— Forster *v.* Ivey, 32 Ont. 175; Aldous *v.* Hicks, 21 Ont. 95.

See 35 Cent. Dig. tit. "Mortgages," § 756.

67. *California.*— Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139.

Illinois.— Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901; Wyatt *v.* Dufrene, 106 Ill. App. 214.

Maryland.— George *v.* Andrews, 60 Md. 26, 45 Am. Rep. 706.

Massachusetts.— Franklin Sav. Bank *v.* Cochrane, 182 Mass. 586, 66 N. E. 200, 61 L. R. A. 760.

Missouri.— Pratt *v.* Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; Nelson *v.* Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755. But see Higgins *v.* Evans, 188 Mo. 627, 87 S. W. 973.

Nebraska.— Merriam *v.* Miles, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731.

New York.— Spencer *v.* Spencer, 95 N. Y. 353; Winslow *v.* Stoothoff, 104 N. Y. App. Div. 28, 93 N. Y. Suppl. 335; Germania L. Ins. Co. *v.* Casey, 98 N. Y. App. Div. 88, 90 N. Y. Suppl. 418 [*affirmed* in 184 N. Y. 554, 76 N. E. 1095]; New York L. Ins. Co. *v.* Casey, 81 N. Y. App. Div. 92, 81 N. Y. Suppl. 1; Fish *v.* Hayward, 28 Hun 456 [*affirmed* in 93 N. Y. 646]; Jester *v.* Sterling, 25 Hun 344; Calvo *v.* Davies, 8 Hun 222 [*affirmed* in 73 N. Y. 211, 29 Am. Rep. 130]; Merrill *v.* Reiners, 14 Misc. 583, 36 N. Y. Suppl. 634. *Compare* Meyer *v.* Lathrop, 10 Hun 66.

South Dakota.— Iowa L. & T. Co. *v.* Schnose, (1905) 103 N. W. 22; Miller *v.* Kennedy, 12 S. D. 478, 81 N. W. 906; Dillaway *v.* Peterson, 11 S. D. 210, 76 N. W. 925.

Utah.— Schroeder *v.* Kinney, 15 Utah 462, 49 Pac. 894; Bunnell *v.* Carter, 14 Utah 100, 46 Pac. 755.

United States.— Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118 [*affirming* 27 Fed. 588], applying law of Illinois.

See 35 Cent. Dig. tit. "Mortgages," § 757.

according to some decisions this will result only in case the mortgagee has expressly agreed to the substitution of the purchaser as the principal debtor in place of the mortgagor.[68] And in any case the extension must be granted after the mortgagee has knowledge of the conveyance,[69] and by a valid agreement,[70] founded on a sufficient consideration,[71] plainly manifesting an intention to accord a longer time for the discharge of the mortgage debt.[72]

(III) *Notice to Mortgagee to Foreclose.* In pursuance of the same principle, it is held that if the mortgagee fails to foreclose the mortgage or to sue the purchaser who has assumed it, when called upon by the mortgagor to do so, the latter will be discharged from personal liability if the property afterward becomes insufficient to satisfy the mortgage.[73]

f. Rights of Mortgagor Against Grantee — (I) *On Breach of Agreement.* When a mortgagor, after conveying lands to a purchaser who assumes the payment of the mortgage, is held liable for a deficiency arising on foreclosure sale, or loses other lands covered by the same mortgage, in consequence of the purchaser's failure to discharge it, he has a right of action against such purchaser on the agreement of assumption,[74] or may compel him to satisfy a judgment recov-

68. *Connecticut.*— Boardman *v.* Larrabee, 51 Conn. 39.

Iowa.— Iowa L. & T. Co. *v.* Haller, 119 Iowa 645, 93 N. W. 636.

Ohio.— Denison University *v.* Manning, 65 Ohio St. 138, 61 N. E. 706; Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

United States.— Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456.

Canada.— Canada Trust, etc., Co. *v.* McKenzie, 23 Ont. App. 167; Forster *v.* Ivey, 2 Ont. L. Rep. 480 [*affirming* 32 Ont. 175]. *Compare* Mathers *v.* Helliwell, 10 Grant Ch. (U. C.) 172.

See 35 Cent. Dig. tit. "Mortgages," § 757.

69. Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539.

70. Merritt *v.* Youmans, 21 N. Y. App. Div. 256, 47 N. Y. Suppl. 664. See also Egbert *v.* McGuire, 36 Misc. (N. Y.) 245, 73 N. Y. Suppl. 302, holding that where one of two trustees under a mortgage extends the time of payment, it does not release the mortgagor, who had become a surety through the assumption of the mortgage by his grantee, as such extension is invalid unless acquiesced in by both the trustees.

71. Regan *v.* Williams, 88 Mo. App. 577; Metropolitan L. Ins. Co. *v.* Stimpson, 28 N. Y. App. Div. 544, 51 N. Y. Suppl. 226.

72. See Chilton *v.* Brooks, 72 Md. 554, 20 Atl. 125; New York L. Ins. Co. *v.* Casey, 178 N. Y. 381, 70 N. E. 916; King *v.* Whitely, 10 Paige (N. Y.) 465.

73. Osborne *v.* Heyward, 40 N. Y. App. Div. 78, 57 N. Y. Suppl. 542; Russell *v.* Weinberg, 4 Abb. N. Cas. (N. Y.) 139. *Contra*, Fish *v.* Glover, 154 Ill. 86, 39 N. E. 1081.

74. *Connecticut.*— Atwood *v.* Vincent, 17 Conn. 575.

Iowa.— Folken *v.* Hahn, 114 Iowa 178, 86 N. W. 258.

Kansas.— Pearson *v.* Ford, 1 Kan. App. 580, 42 Pac. 257.

New York.— Cornell *v.* Prescott, 2 Barb. 16; Torrey *v.* Orleans Bank, 9 Paige 649 [*affirmed* in 7 Hill 260].

Oregon.— Haas *v.* Dudley, 30 Oreg. 355, 48 Pac. 168.

Pennsylvania.— Blatz *v.* Denniston, 7 Pa. Super. Ct. 310.

Texas.— Devine *v.* U. S. Mortg. Co., (Civ. App. 1898) 48 S. W. 585.

Wisconsin.— Enos *v.* Sanger, 96 Wis. 150, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862.

See 35 Cent. Dig. tit. "Mortgages," § 759.

Measure of damages.— Where a purchaser of mortgaged land who has assumed the mortgaged debt has failed to pay it, and judgment for a deficiency has been rendered against the mortgagor, the amount for which the latter is still liable on the debt and mortgage will be the measure of his damages against the purchaser. Adams *v.* Symon, 6 N. Y. Suppl. 652, 22 Abb. N. Cas. 469.

No equitable lien in favor of vendor.— The purchaser's assumption of a mortgage previously given by the vendor, the amount of which is expressed to have been deducted from the purchase-money, leaves no equitable lien in favor of the vendor, although the purchaser made default and allowed the mortgage to be foreclosed. Lea *v.* Fabbri, 45 N. Y. Super. Ct. 361.

Satisfaction obtained from mortgaged land. — A promise of a purchaser of mortgaged property to pay the mortgage note is a promise to the holder of the note and not to the maker, and when the note is paid from the proceeds of a sale of the mortgaged premises, the vendor acquires no right of action against the vendee. Gunst *v.* Pelham, 74 Tex. 586, 12 S. W. 233.

What complaint must allege.—A complaint which alleges the conveyance of land by plaintiff to defendant subject to a mortgage, which defendant assumed and agreed to pay, the recovery of a judgment against plaintiff by the mortgagee for the amount of the mortgage debt, together with a decree for foreclosure, does not state a cause of action if it

ered against him for the mortgage debt.[75] It is generally held that an action accrues in favor of the mortgagor immediately upon breach of the agreement, that is, upon the purchaser's failure to pay the mortgage at maturity or within a reasonable time thereafter, even though the mortgagor has not himself paid it, the agreement being considered an absolute obligation to pay or satisfy the mortgage,[76] although on the theory that the contract is merely one of indemnity, it has been decided that the mortgagor has no right of action until he has been damnified, that is, compelled to pay the mortgage debt or to make good a deficiency.[77]

(II) *On Payment of Debt.* If the vendor has been compelled to pay the mortgage debt, in an action to enforce his original personal liability for it, or to pay a deficiency arising on foreclosure sale, he may maintain an action against his vendee, on the latter's assumption of the mortgage, as for money paid,[78] or he may take an assignment of the mortgage and enforce it against the vendee for the same purpose;[79] but it seems that he cannot make the vendee his debtor by a

does not also allege that the debt, or some part of it, is due and unpaid. Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19.

75. Heritage *v.* Bartlett, 8 Wkly. Notes Cas. (Pa.) 26. And see Marshall *v.* Davies, 58 How. Pr. (N. Y.) 231.

76. *California.*— Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546; Abell *v.* Coons, 7 Cal. 105, 68 Am. Dec. 229. *Compare* Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609.

Colorado.— Burbank *v.* Roots, 4 Colo. App. 197, 35 Pac. 275.

Connecticut.— Foster *v.* Atwater, 42 Conn. 244.

Maine.— Baldwin *v.* Emery, 89 Me. 496, 36 Atl. 994. But see decision in the early case of Burbank *v.* Gould, 15 Me. 118, holding that the vendor can recover only nominal damages unless he has first paid off the mortgage.

Massachusetts.— Jager *v.* Vollinger, 174 Mass. 521, 55 N. E. 458; Rice *v.* Sanders, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315; Williams *v.* Fowle, 132 Mass. 385; Reed *v.* Paul, 131 Mass. 129; Locke *v.* Homer, 131 Mass. 93, 41 Am. Rep. 199; Braman *v.* Dowse, 12 Cush. 227.

Nebraska.— Stichter *v.* Cox, 52 Nebr. 532, 72 N. W. 848.

New Jersey.— Sparkman *v.* Gove, 44 N. J. L. 252; Cubberly *v.* Yager, 42 N. J. Eq. 289, 11 Atl. 113.

New York.— Adams *v.* Symon, 6 N. Y. Suppl. 652, 22 Abb. N. Cas. 469; Marsh *v.* Pike, 10 Paige 595; Blyer *v.* Monholland, 2 Sandf. Ch. 478; Rawson *v.* Copland, 2 Sandf. Ch. 251. But *compare* Rochester Sav. Bank *v.* Whitmore, 25 N. Y. App. Div. 491, 49 N. Y. Suppl. 862; Slauson *v.* Watkins, 44 N. Y. Super. Ct. 73; Halsey *v.* Reed, 9 Paige 446.

South Dakota.— Callender *v.* Edmison, 8 S. D. 81, 65 N. W. 425.

See 35 Cent. Dig. tit. "Mortgages," § 759.

77. Blood *v.* Crew Levick Co., 171 Pa. St. 328, 33 Atl. 344; Smith *v.* Pears, 24 Ont. App. 82; Credit Foncier Franco-Canadien *v.* Lawrie, 27 Ont. 498. And see McAbee *v.* Crihbs, 194 Pa. St. 94, 44 Atl. 1066; Maule *v.* Ardley, 3 Pa. L. J. Rep. 28, 4 Pa. L. J. 356; McConaghy's Estate, 13 Phila. (Pa.) 399.

78. *Connecticut.*— Tuttle *v.* Armstead, 53 Conn. 175, 22 Atl. 677; New Haven Pipe Co. *v.* Work, 44 Conn. 230.

Georgia.— Williams *v.* Moody, 95 Ga. 8, 22 S. E. 30.

Louisiana.— Baldwin *v.* Thompson, 6 La. 474.

Maine.— Kinnear *v.* Lowell, 34 Me. 299.

Massachusetts.— Lappen *v.* Gill, 129 Mass. 349; Pike *v.* Brown, 7 Cush. 133.

Michigan.— Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161.

Missouri.— Orrick *v.* Durham, 79 Mo. 174; Hoffman *v.* Loudon, 96 Mo. App. 184, 70 S. W. 162.

New Jersey.— Tichenor *v.* Dodd, 4 N. J. Eq. 454.

New York.— Taintor *v.* Hemmingway, 18 Hun 458 [*affirmed* in 83 N. Y. 610]; Ferris *v.* Crawford, 2 Den. 595; Rawson *v.* Copland, 2 Sandf. Ch. 251.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713.

Pennsylvania.— Burke *v.* Gummey, 49 Pa. St. 518; Kearney *v.* Tanner, 17 Serg. & R. 94, 17 Am. Dec. 648.

Tennessee.— Duncan *v.* Ewing, 3 Tenn. Ch. 29.

Utah.— Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477.

United States.— Weems *v.* George, 13 How. 190, 14 L. ed. 108.

See 35 Cent. Dig. tit. "Mortgages," § 760.

Vendee released by mortgagee.— If the vendee of land, who has assumed the mortgage on it, makes an arrangement with the mortgagee whereby he is discharged, and the original mortgagor afterward makes a payment to the mortgagee, the mortgagor cannot recover this amount from the vendee, even though the mortgagor, when he paid, did not know that the vendee had obtained his release, there being no fraud. Knobloch *v.* Zschwetzke, 53 N. Y. Super. Ct. 391 [*followed* in Knobloch *v.* Zschwetzke, 55 N. Y. Super. Ct. 556].

79. Flagg *v.* Geltmacher, 98 Ill. 293; Swett *v.* Sherman, 109 Mass. 231; Morris *v.* Oak-

merely voluntary and officious payment of the mortgage debt without giving the latter an opportunity to discharge it.[80]

g. Rescission of Agreement or Release Therefrom. A contract for the assumption of a mortgage, on a sale of the mortgaged premises, may be rescinded or canceled between the parties to it, so long as the mortgagee has done nothing to show his adoption of the benefits of such contract or his acceptance of the purchaser as the principal debtor; and this may be accomplished either by a formal release or revocation of the contract,[81] or by a rescission of the contract of sale or reconveyance of the property.[82] But after the mortgagee has accepted or adopted the contract, or acted on the faith of it, it is not in the power of the parties, as against his rights, to change or annul it.[83]

E. Estoppel of Purchaser to Contest Mortgage — 1. Estoppel to Deny Validity of Mortgage — a. In General. A purchaser of mortgaged premises is not estopped, by his mere acceptance of the deed, from disputing the validity of the mortgage or the amount due under it, on grounds of objection which were open to the mortgagor,[84] although the mortgage may be recited in the deed or

ford, 9 Pa. St. 498. And see *supra*, XVI, F, 1, b.

80. Postell *v.* Ramsay, 1 Treadw. (S. C.) 429.

81. *California.*— Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609.

Iowa.— Gilbert *v.* Sanderson, 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103.

Minnesota.— Gold *v.* Ogden, 61 Minn. 88, 63 N. W. 266.

New Jersey.— O'Neill *v.* Clark, 33 N. J. Eq. 444; Youngs *v.* Public School Trustees, 31 N. J. Eq. 290. See, however, Field *v.* Thistle, 58 N. J. Eq. 339, 46 Atl. 1072. And see New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732, applying law of New Jersey.

Texas.— Huffman *v.* Western Mortg., etc., Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

See 35 Cent. Dig. tit. "Mortgages," § 761.

But *compare* New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732.

Mortgagee's consent necessary.— Where a granteee assumes in his deed to pay the mortgage debt, his grantor cannot release him from his obligation to the mortgagee, without the latter's consent. Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652.

Mortgagor cannot discharge after conveyance is made.— Where a mortgagor's grantee expressly assumes payment of the mortgage, his liability to the mortgagee becomes absolute on the making of the conveyance, and cannot thereafter be discharged by the mortgagor. Douglass *v.* Wells, 18 Hun (N. Y.) 88; Whiting *v.* Gearty, 14 Hun (N. Y.) 493; Ranney *v.* McMullen, 5 Abb. N. Cas. (N. Y.) 246. *Compare* Flagg *v.* Munger, 9 N. Y. 483; Stephens *v.* Casbacker, 8 Hun (N. Y.) 116.

82. Laing *v.* Byrne, 34 N. J. Eq. 52; Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650; Devlin *v.* Murphy, 56 How. Pr. (N. Y.) 326; Phipps *v.* Goulding, 9 Ohio Dec. (Reprint) 467, 14 Cinc. L. Bul. 50. But see Boissac *v.* Downs, 16 La. Ann. 187, holding that one who assumes to pay a mortgage debt by notarial act is not properly speaking a third possessor, in such sense that he can discharge himself by abandoning the property.

83. *Illinois.*— Bay *v.* Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209.

Indiana.— Ellis *v.* Johnson, 96 Ind. 377.

Kentucky.— Woodward *v.* Woodward, 7 B. Mon. 116.

Nebraska.— Gibson *v.* Hambleton, 52 Nebr. 601, 72 N. W. 1033.

New Jersey.— Field *v.* Thistle, 58 N. J. Eq. 339, 43 Atl. 1072.

New York.— New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610 [*affirming* 4 N. Y. Suppl. 89]; Fleischauer *v.* Doellner, 58 How. Pr. 190.

Utah.— Clark *v.* Fisk, 9 Utah 94, 33 Pac. 248.

Virginia.— Willard *v.* Worsham, 76 Va. 392.

United States.— Betts *v.* Drew, 3 Fed. Cas. No. 1,372.

See 35 Cent. Dig. tit. "Mortgages," § 761.

84. *Iowa.*— Steckel *v.* Standley, 107 Iowa 694, 77 N. W. 489; Huston *v.* Stringham, 21 Iowa 36.

Louisiana.— Peets *v.* Wilson, 19 La. 478. See also Barrow *v.* Louisiana Bank, 2 La. Ann. 453.

Maine.— Williams *v.* Thurlow, 31 Me. 392.

Minnesota.— Welbon *v.* Webster, 89 Minn. 177, 94 N. W. 550.

New Jersey.— Magie *v.* Reynolds, 51 N. J. Eq. 113, 26 Atl. 150.

Texas.— Gray *v.* Freeman, (Civ. App. 1905) 84 S. W. 1105.

Contra.— Fairfield *v.* McArthur, 15 Gray (Mass.) 526.

Deed purporting to convey whole title.— Where the conveyance of mortgaged premises is not expressed to be subject to the mortgage, but by its terms purports to convey the whole title, and the amount thereof is not deducted from the purchase-money, the grantee does not take his title subject to the mortgage in that sense which prevents him from defending against it for fraud or want of consideration, especially if the conveyance

excepted from the covenants of warranty, if the deed is not expressed to be subject to it,[85] unless the purchaser has given a separate promise to the mortgagee to pay the mortgage;[86] but he is limited to such objections or defenses as could have been pleaded by the mortgagor himself,[87] and cannot even set up all of those, for he is not permitted to allege defenses strictly personal to the mortgagor.[88]

b. Taking Deed Subject to Mortgage. Where a deed of land is expressly made subject to an existing mortgage on the property, it is generally held that the purchaser, by accepting the deed, is estopped to dispute the validity of the mortgage;[89] but it has been held that this result does not follow from the mere recital that the deed is subject to the mortgage, but only where the mortgage is made a part of the consideration for the deed or the amount of it deducted from the purchase-price.[90]

c. Purchaser Assuming Mortgage. Where the purchaser of mortgaged premises expressly assumes and agrees to pay the mortgage, he is estopped to deny its existence, validity, or lien,[91] at least to the same extent to which the mortgagor

contains full covenants of warranty. Bennett *v.* Keehn, 57 Wis. 582, 15 N. W. 776.

A purchaser at a sale in bankruptcy, subject to encumbrances generally, is not estopped to show that a mortgage on the property was made by the bankrupt in fraud of his creditors. Murray *v.* Jones, 50 Ga. 109.

85. Weed Sewing Mach. Co. *v.* Emerson, 115 Mass. 554; Calkins *v.* Copley, 29 Minn. 471, 13 N. W. 904; Bennett *v.* Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112. *Contra,* Holmes *v.* Ferguson, 1 Oreg. 220.

The pact de non alienando in a mortgage does not prevent a subsequent purchaser of the property mortgaged from contesting the validity of the mortgage; such purchaser acquires a property subject to the pact, provided the mortgage is valid, and if it is not the pact is of no effect. State *v.* Citizens' Bank, 33 La. Ann. 705.

86. Kellums *v.* Hawkins, 36 Ill. App. 161.

87. *California.*— Houseman *v.* Chase, 12 Cal. 290.

Iowa.— State *v.* Shaw, 28 Iowa 67; Coe *v.* Winters, 15 Iowa 481.

Louisiana.— Citizens' Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728.

New Hampshire.— Brewer *v.* Hyndman, 18 N. H. 9.

North Carolina.— Pass *v.* Lynch, 117 N. C. 453, 23 S. E. 357.

Vermont.— Wade *v.* Hennessy, 55 Vt. 207.

United States.— Daggs *v.* Ewell, 6 Fed. Cas. No. 3,537, 3 Woods 344.

See 35 Cent. Dig. tit. "Mortgages," § 772.

88. Lamar Land, etc., Co. *v.* Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210; West *v.* Miller, 125 Ind. 70, 25 N. E. 143; Blake *v.* Koons, 71 Iowa 356, 32 N. W. 379; Greither *v.* Alexander, 15 Iowa 470; Forgy *v.* Merryman, 14 Nebr. 513, 16 N. W. 836.

89. *Indiana.*— Garrett *v.* Puckett, 15 Ind. 485.

Iowa.— Foy *v.* Armstrong, 113 Iowa 629, 85 N. W. 753; Fuller *v.* Hunt, 48 Iowa 163.

Louisiana.— Citizens' Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728.

Massachusetts.— Johnson *v.* Thompson, 129 Mass. 398; Tuite *v.* Stevens, 98 Mass. 305.

Minnesota.— Moulton *v.* Haskell, 50 Minn. 367, 52 N. W. 960; Alt *v.* Banholzer, 36 Minn. 57, 29 N. W. 674.

New York.— Hopkins *v.* Wolley, 81 N. Y. 77; Brinsmade *v.* Hurst, 3 Duer 206; Pittman *v.* Hall, 5 N. Y. St. 853; Styles *v.* Price, 64 How. Pr. 227; Lovett *v.* Dimond, 4 Edw. 22. But *compare* More *v.* Deyoe, 22 Hun 208; Russell *v.* Kenney, 1 Sandf. Ch. 34. And see Purdy *v.* Coar, 109 N. Y. 448, 17 N. E. 352, 4 Am. St. Rep. 491.

Ohio.— Riley *v.* Rice, 40 Ohio St. 441.

Texas.— Mott *v.* Maris, (Civ. App. 1894) 29 S. W. 825. And see Batts *v.* Middlesex Banking Co., 26 Tex. Civ. App. 515, 63 S. W. 1046.

United States.—American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133.

See 35 Cent. Dig. tit. "Mortgages," § 773.

But see Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560.

The purchaser may show that the mortgage is void for uncertainty, although his deed was expressly subject to it. Osborne *v.* Rice, 107 Ga. 281, 33 S. E. 54.

Want of existence of mortgage.— It may be shown that no such mortgage as that described in the deed had any actual existence. Goodman *v.* Randall, 44 Conn. 321.

Mortgage defectively executed.— Although a mortgage may on account of its defective execution be invalid or ineffectual as a mortgage, still the purchaser, taking a deed expressly subject to the mortgage, is bound by the equities of the mortgagee. Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95 [*modifying* Thompson *v.* Morgan, 6 Minn. 292].

90. Lanphier *v.* Desmond, 187 Ill. 370, 58 N. E. 343; Robinson Bank *v.* Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Stough *v.* Badger Lumber Co., 70 Kan. 713, 79 Pac. 737; Selby *v.* Sanford, 7 Kan. App. 781, 54 Pac. 17; Brooks *v.* Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; Hartley *v.* Tatham, 2 Abb. Dec. (N. Y.) 333, 1 Keyes 222 [*affirming* 10 Bosw. 273, 24 How. Pr. 505].

91. *Alabama.*— Kennedy *v.* Brown, 61 Ala. 296.

would have been estopped, although there are some cases permitting him to set up a defense which exists entirely between himself and the holder of the mortgage.[92] But the rule does not apply where the purchaser has been evicted by a paramount title. In this case the covenant of assumption cannot be enforced by the mortgagee because the consideration for it was the conveyance of a title, which consideration fails on the successful assertion of the paramount title.[93]

d. Purchaser at Execution Sale. The rule of estoppel to dispute the validity of the mortgage is generally applied to a purchaser of the mortgagor's interest at execution sale;[94] and this is clearly correct where the sale is made expressly subject to the mortgage,[95] or where only the equity of redemption is levied on and the purchaser bids only the value of such equity.[96]

2. Estoppel to Set Up Defense of Usury — a. In General. Some of the decisions lay down a general rule forbidding the purchaser of mortgaged premises to plead usury in the mortgage debt as a defense against its enforcement.[97] It has been held otherwise, however, where both the grantor and grantee have expressed their purpose to attack and defeat the mortgage on this ground;[98] and

Arkansas.— Millington *v.* Hill, 47 Ark. 301, 1 S. W. 547.

California.—Alvord *v.* Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27.

Georgia.— Hill *v.* Moulton, 76 Ga. 831.

Idaho.— Hadley *v.* Clark, 8 Ida. 497, 69 Pac. 319.

Illinois.— Lang *v.* Dietz, 191 Ill. 161, 60 N. E. 841; Campbell *v.* Benjamin, 69 Ill. 244; Pidgeon *v.* School Trustees, 44 Ill. 501.

Indiana.— Figart *v.* Halderman, 75 Ind. 564.

Kansas.— Gowans *v.* Pierce, 57 Kan. 180, 45 Pac. 586; Green *v.* Houston, 22 Kan. 35.

Louisiana.— Mithoff *v.* Bohn, 26 La. Ann. 566. *Compare* Brou *v.* Becnel, 20 La. Ann. 254.

Michigan.— Comstock *v.* Smith, 26 Mich. 306.

Missouri.— Fitzgerald *v.* Barker, 85 Mo. 13 [*affirming* 4 Mo. App. 105].

Nebraska.— Goos *v.* Goos, 57 Nebr. 294, 77 N. W. 687; Skinner *v.* Reynick, 10 Nebr. 323, 6 N. W. 369, 35 Am. Rep. 479.

New Jersey.— Cummings *v.* Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Clark *v.* Davis, 32 N. J. Eq. 530.

New York.— Thayer *v.* Marsh, 75 N. Y. 340; Parkinson *v.* Sherman, 74 N. Y. 88, 30 Am. Rep. 268; Ritter *v.* Phillips, 53 N. Y. 586; Haile *v.* Nichols, 16 Hun 37; National State Bank *v.* Hibbard, 45 How. Pr. 280.

Texas.— Mitchell *v.* National R. Bldg., etc., Assoc., (Civ. App. 1899) 49 S. W. 624.

United States.— Reeves *v.* Vinacke, 20 Fed. Cas. No. 11,663, 1 McCrary 213.

See 35 Cent. Dig. tit. "Mortgages," § 774.

As to amount due.— Where a deed is taken subject to a certain mortgage which is expressed to be for a named sum, "if there shall be found anything owing and unpaid on the same," the purchaser who assumed the mortgage may show fraud in its procurement and have it reduced to the amount for which it should have been given. Bennett *v.* Bates, 26 Hun (N. Y.) 364. The statement in the deed that the mortgage is for a certain sum is merely a description of the mortgage which the purchaser is to assume, and does not prevent him from showing that a part of the named sum has already been paid. Briggs *v.* Seymour, 17 Wis. 255.

92. American Nat. Bank *v.* Klock, 58 Mo. App. 335; Hartley *v.* Tatham, 26 How. Pr. (N. Y.) 158.

93. Dunning *v.* Leavitt, 85 N. Y. 30, 39 Am. Rep. 617.

94. *Massachusetts.*— Taylor *v.* Dean, 7 Allen 251.

Missouri.— Knoop *v.* Kelsey, 102 Mo. 291, 14 S. W. 110, 22 Am. St. Rep. 777.

Nebraska.— Morton *v.* Covell, 10 Nebr. 423, 6 N. W. 477.

South Carolina.— State Bank *v.* Campbell, 2 Rich. Eq. 179.

United States.— Wright *v.* Phipps, 90 Fed. 556 [*affirmed* in 98 Fed. 1007, 38 C. C. A. 702].

See 35 Cent. Dig. tit. "Mortgages," § 775.

Purchase at sale on execution against vendee.— Where property is purchased subject to a mortgage which is duly recorded, and the purchaser expressly agrees with the seller and the mortgagee to pay the mortgage debt, which is deducted from the cash payment required, a purchaser of the land at a sale on execution against the vendee merely succeeds to his rights, and is estopped to deny the validity of the mortgage. Kennedy *v.* Brown, 61 Ala. 296.

95. Lord *v.* Sill, 23 Conn. 319; Willis *v.* Terry, 24 S. W. 621, 15 Ky. L. Rep. 753; Crooks *v.* Douglass, 56 Pa. St. 51. See, however, Carpenter *v.* Simmons, 28 How. Pr. (N. Y.) 12.

96. Brown *v.* Snell, 46 Me. 490.

97. Huston *v.* Stringham, 21 Iowa 36; Perry *v.* Kearns, 13 Iowa 174; Stayton *v.* Riddle, 114 Pa. St. 464, 7 Atl. 72. See also Chamberlain *v.* Dempsey, 36 N. Y. 144 [*reversing* 9 Bosw. 540]. But see Chaffe *v.* Wilson, 59 Miss. 42; Knickerbocker L. Ins. Co. *v.* Hill, 3 Hun (N. Y.) 577 (case of a purchaser at sale on foreclosure of a mechanic's lien); Jackson *v.* Henry, 10 Johns. (N. Y.) 185, 6 Am. Dec. 328.

A purchaser at sale on execution is within this rule. Green *v.* Turner, 38 Iowa 112.

98. Newman *v.* Kershaw, 10 Wis. 333.

it is well settled that if the sale is of the title as a whole, and not merely of the equity of redemption, with no deduction from the purchase-price on account of the mortgage, the purchaser is not estopped to set up usury.[99]

b. Purchase Subject to Mortgage. If the purchaser takes his deed expressly subject to the mortgage, the amount of the mortgage being allowed for in the price, he cannot set up usury.[1]

c. Purchaser Assuming Mortgage. If the purchaser expressly assumes and agrees to pay the mortgage, he cannot dispute or defeat it on the ground of usury.[2]

3. Estoppel to Set Up Outstanding Title. One who takes a deed of land subject to a mortgage, which he assumes, is privy in estate with the mortgagor and bound to defend the mortgagee's title, and therefore cannot defeat the mortgage by the purchase and assertion of an outstanding title.[3] And on the same

99. *Georgia.*— Lillenthal *v.* Champion, 58 Ga. 158.

Illinois.— Maher *v.* Lanfrom, 86 Ill. 513.

New Jersey.— Camden F. Ins. Co. *v.* Reed, (Ch. 1897) 38 Atl. 667.

New York.— Berdan *v.* Sedgwick, 40 Barb. 359 [*affirmed* in 44 N. Y. 626]; Chamberlain *v.* Dempsey, 9 Bosw. 212.

Ohio.— Union Bank *v.* Bell, 14 Ohio St. 200.

See 35 Cent. Dig. tit. "Mortgages," § 776.

1. *Illinois.*— Stiger *v.* Bent, 111 Ill. 328; Flanders *v.* Doyle, 16 Ill. App. 508; Essley *v.* Sloan, 16 Ill. App. 63. See also Valentine *v.* Fish, 45 Ill. 462.

Indiana.— Stein *v.* Indianapolis Bldg. Loan Fund, etc., Assoc., 18 Ind. 237, 81 Am. Dec. 353.

New Jersey.— Trusdell *v.* Dowden, 47 N. J. Eq. 396, 20 Atl. 972; Pinnell *v.* Boyd, 33 N. J. Eq. 190; Conover *v.* Hobart, 24 N. J. Eq. 120; Dolman *v.* Cook, 14 N. J. Eq. 56.

New York.— Hartley *v.* Harrison, 24 N. Y. 170.

Tennessee.— Nance *v.* Gregory, 6 Lea 343, 40 Am. Rep. 41.

See 35 Cent. Dig. tit. "Mortgages," § 777.

But see Lewis *v.* Farmers' Loan, etc., Assoc., 183 Mo. 351, 81 S. W. 887.

Recital in deed without actual assumption of debt.— A statement in a deed that the conveyance is made subject to certain mortgages will not prevent the grantee from setting up the defense of usury to one of them, when sought to be foreclosed, where it appears that he did not actually purchase the property subject to any of the mortgages, and that the statement in the deed was inserted merely with a view to prevent a breach of the covenant against encumbrances, it having been agreed that the grantor should remove all the encumbrances from the property, and the grantee having paid the full consideration. Van Winkle *v.* Earl, 26 N. J. Eq. 242.

Conveyance back to mortgagor.— Where a mortgagor has sold the property subject to the mortgage, and it is afterward conveyed back to him, although without stating that it is subject to the mortgage, he is entitled to set up usury in defense to a foreclosure. Knickerbocker L. Ins. Co. *v.* Nelson, 13 Hun (N. Y.) 321 [*affirmed* in 78 N. Y. 137].

2. *Illinois.*— Henderson *v.* Bellew, 45 Ill. 322.

Iowa.— Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317, 89 Am. St. Rep. 351.

Maryland.— Mahoney *v.* Mackubin, 54 Md. 268.

Michigan.— Sellers *v.* Botsford, 11 Mich. 59.

Minnesota.— Scanlon *v.* Grimmer, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326.

New York.— Hartley *v.* Harrison, 24 N. Y. 170. *Compare* Root *v.* Wright, 84 N. Y. 72, 38 Am. Rep. 495; Berdan *v.* Sedgwick, 44 N. Y. 626.

Ohio.— Jones *v.* Franklin Ins. Co., 40 Ohio St. 583; Cramer *v.* Lepper, 26 Ohio St. 59, 20 Am. Rep. 756.

Virginia.— Crenshaw *v.* Clark, 5 Leigh 65.

Wisconsin.— Thomas *v.* Mitchell, 27 Wis. 414.

See 35 Cent. Dig. tit. "Mortgages," § 778.

3. *Illinois.*— Pontiac Nat. Bank *v.* King, 110 Ill. 254.

Iowa.— Porter *v.* Lafferty, 33 Iowa 254.

Michigan.— Taylor *v.* Whitmore, 35 Mich. 97.

Minnesota.— Washington L. & T. Co. *v.* McKenzie, 64 Minn. 273, 66 N. W. 976; Probstfield *v.* Czizek, 37 Minn. 420, 34 N. W. 986. But see Preiner *v.* Meyer, 67 Minn. 197, 69 N. W. 887.

Missouri.— Benton County *v.* Czarlinski, 101 Mo. 275, 14 S. W. 114; Heim *v.* Vogel, 69 Mo. 529.

New Jersey.— Chadwick *v.* Island Beach Co., 43 N. J. Eq. 616, 12 Atl. 380.

New York.— Miller *v.* McGuckin, 15 Abb. N. Cas. 204; Torrey *v.* Orleans Bank, 9 Paige 649 [*affirmed* in 7 Hill 260]; Eagle F. Ins. Co. *v.* Lent, 6 Paige 635.

See 35 Cent. Dig. tit. "Mortgages," § 779.

But see Knox *v.* Easton, 38 Ala. 345 (holding that when the vendee of a mortgagor buys in the outstanding paramount title of a third person the purchase does not inure to the benefit of the mortgagee, nor does it operate as a confirmation of his title); Gardiner *v.* Gerrish, 23 Me. 46 (holding that, where one contracts to buy a part of mortgaged premises from one of the mortgagors, he is not estopped from acquiring a title as against the mortgagors under a tax-sale and holding it for his own benefit).

principle a purchaser of land who takes it subject to two mortgages, both of which he assumes, cannot deal with the first so as to destroy the lien of the second.[4]

F. Transfer of Parts of Property Mortgaged — 1. Effect as to Liability Under Mortgage — a. In General. A mortgagor cannot, by selling a portion of the property covered by the mortgage, reduce the security of the mortgagee or withdraw such portion from the lien of the mortgage,[5] unless the mortgagee will consent thereto or give to the purchaser a release of the portion so sold;[6] but on the contrary, if the purchaser assumes the payment of a proportionate share of the mortgage debt, he becomes personally liable therefor and his undertaking inures to the benefit of the mortgagee.[7]

b. Subjection of Separate Portions to Mortgage. A mortgagee of land, which is afterward divided into portions and separately sold, is not ordinarily restricted in enforcing his security against the property as a whole or against the separate portions of it,[8] unless equities have arisen between the mortgagor and his grantees, or between the different grantees, which require that resort should be had to a particular portion of the property before coming upon the rest, in which case, without depriving the mortgagee of his ultimate security upon the entire property covered by his mortgage, the different portions will be marshaled in their proper order;[9] and a similar rule is applied for the benefit of a junior encum-

4. Johnson *v.* Johnson, Walk. (Mich.) 331; Conner *v.* Howe, 35 Minn. 518, 29 N. W. 314; Toulmin *v.* Steere, 3 Meriv. 210, 17 Rev. Rep. 67, 36 Eng. Reprint 81.

5. State *v.* Ripley, 32 Conn. 150.

Mortgage of undivided interest.—The mortgagor of an undivided portion of a tract of land cannot, without the consent of the mortgagee, by an after conveyance by metes and bounds of any part of the mortgaged premises, withdraw from the lien created by the mortgage the part so conveyed. Webber *v.* Mallett, 16 Me. 88.

Sale of undivided interest.— When a mortgagor sells and conveys an undivided half of the mortgaged premises, the title of the purchaser is liable to the satisfaction of the mortgage, at least to the extent of its proportionate share. Montague *v.* Haviland, 101 Mich. 80, 59 N. W. 404.

Reconveyance to grantor.—Where an owner of land mortgages it, and afterward reconveys part of it to his grantor, as a credit on the price, the reconveyance does not free such part from the lien of the mortgage. Bente *v.* Lange, 9 Tex. Civ. App. 328, 29 S. W. 813.

6. See Gordon *v.* Clarke, 10 Fla. 179.

Agreement for release.— A stipulation in a purchase-money mortgage that, on a sale by the purchaser of any portion of the premises, the mortgagee should release that portion on receiving a proportionate part of the amount then due, is personal to the mortgagor, and not available to the grantees of a person to whom he sold the entire tract. Squier *v.* Shepard, 38 N. J. Eq. 331.

Effect of unauthorized release.— Where one buys a portion of a tract covered by a mortgage which, in accordance with the terms of the sale, is released by the mortgagee as to the part purchased, if the purchaser is without notice that the mortgagee is not at the time the owner of all the notes secured by the mortgage, and is without knowledge of facts which should put him on inquiry, but takes the land trusting to the release, and parts with his own property on the strength of it and without any fault on his own part, he may recover the amount he has to pay to redeem the land from a foreclosure for the notes which had already been assigned by the mortgagee. Craft *v.* Phillips, 9 Pa. Cas. 223, 12 Atl. 331.

7. Russell *v.* Pistor, 7 N. Y. 171, 57 Am. Dec. 509. See also McKinley-Lanning L. & T. Co. *v.* Bassett, 5 Kan. App. 469, 46 Pac. 999, holding that the mortgagee is not obliged to accept the personal liability of a grantee of a part of the mortgaged premises, who assumes the mortgage, as against that of the mortgagor or of a subsequent purchaser of the remainder of the premises.

8. Bush *v.* Sherman, 80 Ill. 160; Riggs *v.* Clark, 71 Fed. 560, 18 C. C. A. 242.

9. *Arkansas.*— Bagley *v.* Weaver, 72 Ark. 29, 77 S. W. 903, holding that one who buys property without notice of an improperly recorded mortgage embracing other property is entitled to have such other property first sold to satisfy the indebtedness secured before resort is had to the property purchased by him.

Connecticut.— Osborn *v.* Carr, 12 Conn. 195.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329.

Georgia.— Semmes *v.* Moses, 21 Ga. 439.

Indiana.— Grave *v.* Bunch, 83 Ind. 4; Roswell *v.* Simonton, 2 Ind. 516.

Kentucky.—Griffin *v.* Gingell, 79 S. W. 284, 25 Ky. L. Rep. 2031; Wilmer *v.* Huntington, 25 S. W. 602, 16 Ky. L. Rep. 4.

Massachusetts.— Pearson *v.* Bailey, 177 Mass. 318, 58 N. E. 1028.

Michigan.— Holliday *v.* Snow, 129 Mich. 494, 89 N. W. 443; Carley *v.* Fox, 38 Mich. 387.

brancer who is secured on only a portion of the property covered by the elder mortgage.[10]

c. Apportionment of Mortgage — (I) *In General.* A mortgagee cannot be required, at the instance of a purchaser of part of the premises, to apportion his mortgage debt among the several parts into which the property has been divided, and look to each only for its proportional share,[11] unless where such apportionment is necessary for the benefit of one who has taken a part of the property under necessity and for the protection of his own interests;[12] or unless the mortgagee has himself become the owner of a part of the property, in which case he can hold the remainder liable only for its ratable proportion;[13] but he may consent to an apportionment of the debt, and such an agreement is valid and enforceable.[14]

(II) *Mode of Apportionment.* Where apportionment of a mortgage debt is to be made among the separate parcels into which the property has been divided, it should be done according to their relative value,[15] and not according to area or acreage;[16] and improvements made upon any of the lots by the purchaser thereof are not to be taken into account for this purpose.[17]

d. Contribution Between Mortgagor and Vendee. As a general rule, if the mortgagor of land sells a part of it, the portion which he retains will be primarily liable for the whole of the mortgage debt,[18] and if he is compelled to pay the whole he cannot obtain contribution from his vendee.[19] But if by the terms of sale the mortgage is to remain a common charge upon the whole, and to be paid by the mortgagor and the purchaser, without any specific agreement as to the proportions, they must contribute according to the relative value of their holdings.[20]

e. Contribution Between Separate Purchasers. Where the equities of the parties are equal, the purchasers of several parts of a tract of land covered by a mortgage are bound to contribute to the payment or redemption of the mortgage

New Jersey.— Kipp *v.* Merselis, 30 N. J. Eq. 99.

New York.— Coutant *v.* Servoss, 3 Barb. 128.

Ohio.— Grandin *v.* Anderson, 15 Ohio St. 286; Wilson *v.* Otis, 5 Ohio Cir. Ct. 228, 3 Ohio Cir. Dec. 114; Cincinnati Sav. Soc. *v.* Thompson, 9 Ohio Dec. (Reprint) 41, 10 Cinc. L. Bul. 230.

Pennsylvania.— Roddy's Appeal, 72 Pa. St. 98; Morris *v.* Griffith, 1 Yeates 189.

South Carolina.— Walker *v.* Covar, 2 S. C. 16.

See 35 Cent. Dig. tit. "Mortgages," § 783.

10. McIntire *v.* Parks, 59 N. H. 258; Reilly *v.* Mayer, 12 N. J. Eq. 55; Warren *v.* Foreman, 19 Wis. 35. See also Kilborn *v.* Robbins, 8 Allen (Mass.) 466.

11. Bagley *v.* Tate, 10 Rob. (La.) 45. And see Herzog *v.* Boll, 62 Wis. 21, 21 N. W. 800.

Agreement by one joint mortgagor.— A subsequent unrecorded agreement, by which one of two joint mortgagors of lands owned by them severally agrees to pay off the whole debt, does not affect subsequent *bona fide* purchasers of his lands for value without notice of the agreement; and as to them the mortgage debt will be charged one half upon the lands of each mortgagor. Hoyt *v.* Doughty, 4 Sandf. (N. Y.) 462.

12. Tarbell *v.* Durant, 61 Vt. 516, 17 Atl. 44; Howe *v.* Chittenden, 1 Vt. 28.

13. Colton *v.* Colton, 3 Phila. (Pa.) 24.

14. Andreas *v.* Hubbard, 50 Conn. 351; Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747; Cowen *v.* Loomis, 91 Ill. 132; Jackson *v.* Condict, 57 N. J. Eq. 522, 41 Atl. 374; Barnwell *v.* Marion, 60 S. C. 314, 38 S. E. 593.

15. Skinner *v.* Harker, 23 Colo. 333, 48 Pac. 648; Funk *v.* McReynolds, 33 Ill. 481; Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494. See, however, Leech *v.* Bonsall, 10 Phila. (Pa.) 384.

16. Skinner *v.* Harker, 23 Colo. 333, 48 Colo. 333, 48 Pac. 648. *Compare* Johnson *v.* Nordyke, 35 Iowa 251, holding that the apportionment may be by acreage if it was so agreed by the mortgagor with his vendees and stipulated in their deeds.

17. Bates *v.* Ruddick, 2 Iowa 423, 65 Am. Dec. 774; Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312; Leech *v.* Bonsall, 10 Phila. (Pa.) 384. *Contra*, Mobile Mar. Dock, etc., Ins. Co. *v.* Huder, 35 Ala. 713.

18. See *infra*, XVII, F, 2, a, (I).

19. Clark *v.* Warren, 55 Ga. 575; George *v.* Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; Allen *v.* Clark, 17 Pick. (Mass.) 47; Holcomb *v.* Holcomb, 2 Barb. (N. Y.) 20; Weber *v.* Zeimet, 30 Wis. 283.

20. Hoy *v.* Bramhall, 19 N. J. Eq. 74.

Partition of premises.— Where the interest of a part-owner of land subject to a joint mortgage, executed before partition, is sold at sheriff's sale, the purchaser may be compelled to pay off the whole mortgage in order to save his property, and in that case he will be entitled to recover one half

in proportion to the relative value of their parts; and if one is compelled, in self-protection, to pay the whole, he may compel the others to contribute their shares;[21] and this rule may apply where one of the purchasers acquired his interest at a judicial sale.[22] But it is not applied where the relative situation of the parties casts the whole burden of the mortgage upon the one paying it, or raises an equity in favor of the others that he should be solely chargeable with it.[23]

f. Effect of Release of Part. If a mortgagee releases part of the mortgaged premises, the value of that part is to be credited upon the mortgage as of the date of the release, as to purchasers of other parts, the mortgagee having actual knowledge of their deeds at the time of the release, so that they can be charged only with the remainder of the debt;[24] and if the mortgagee has diminished the secu-

of the money paid from the other mortgagor. Stroud *v.* Casey, 27 Pa. St. 471.

21. *Georgia.*— Williams *v.* E. E. Foy Mfg. Co., 111 Ga. 856, 36 S. E. 927.

Illinois.— Moore *v.* Shurtleff, 128 Ill. 370, 21 N. E. 775; Briscoe *v.* Power, 85 Ill. 420; Matteson *v.* Thomas, 41 Ill. 110; Brown *v.* Shurtleff, 24 Ill. App. 569.

Iowa.— Tufts *v.* Stanley, 42 Iowa 628; Barney *v.* Myers, 28 Iowa 472; Griffith *v.* Lovell, 26 Iowa 226.

Kentucky.— Beall *v.* Barclay, 10 B. Mon. 261; Dickey *v.* Thompson, 8 B. Mon. 312; Morrison *v.* Beckwith, 4 T. B. Mon. 73, 16 Am. Dec. 136.

Maryland.— Burger *v.* Greif, 55 Md. 518.

Massachusetts.— Chase *v.* Woodbury, 6 Cush. 143; Allen *v.* Clark, 17 Pick. 47; Gibson *v.* Crehore, 5 Pick. 146; Taylor *v.* Porter, 7 Mass. 355.

Missouri.— Hall *v.* Morgan, 79 Mo. 47; Parkey *v.* Veatch, 68 Mo. App. 67.

New Hampshire.— Aiken *v.* Gale, 37 N. H. 501; Salem *v.* Edgerley, 33 N. H. 46; Taylor *v.* Bassett, 3 N. H. 294.

New York.—Coffin *v.* Parker, 127 N. Y. 117, 27 N. E. 814; Sawyer *v.* Lyon, 10 Johns. 32.

North Carolina.—Stanly *v.* Stocks, 16 N. C. 314.

Pennsylvania.— Beddow *v.* Dewitt, 43 Pa. St. 326.

Canada.— Pierce *v.* Canavan, 7 Ont. App. 187; Clemow *v.* Booth, 27 Grant Ch. (U. C.) 15.

Failure to obtain release as provided.— Where a mortgage provided that in case of sale the mortgagee, on receipt or tender of a certain portion of the purchase-money, should release the portion sold, it was held that the first person who thereafter purchased and paid to the mortgagor his purchase-money, but obtained no release from the mortgagee, was not entitled, as otherwise he would have been, to pay off the whole mortgage and demand payment of the whole from a subsequent purchaser redeeming from him, but that each purchaser, including the first, was entitled to redeem his own part on payment of the stipulated proportion. Davis *v.* White, 16 Grant Ch. (U. C.) 312.

Attorney's fees not recoverable.— A tenant in common, who has been obliged to take up a mortgage, and sues to enforce contribution thereon against his cotenant's interest, cannot be allowed, as part of his recovery, attorney's fees stipulated in the mortgage in case of suit thereon for the benefit of the mortgagee, but not paid by plaintiff in taking up the mortgage. Lang *v.* Cadwell, 13 Mont. 458, 34 Pac. 957.

22. Wager *v.* Chew, 15 Pa. St. 323; Fisher *v.* Clyde, 1 Watts & S. (Pa.) 544. And see Gill *v.* Lyon, 1 Johns. Ch. (N. Y.) 447. But *compare* Pope *v.* Boyd, 22 Ark. 535.

23. Sanford *v.* Hill, 46 Conn. 42; Pike *v.* Goodnow, 12 Allen (Mass.) 472; George *v.* Kent, 7 Allen (Mass.) 16; Cook *v.* Hinsdale, 4 Cush. (Mass.) 134; Brooks *v.* Harwood, 8 Pick. (Mass.) 497.

24. *California.*—Merced Security Sav. Bank *v.* Simon, 141 Cal. 11, 74 Pac. 356; Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

Illinois.— Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

Maine.— Johnson *v.* Rice, 8 Me. 157.

Maryland.— Gibson *v.* McCormick, 10 Gill & J. 65.

Michigan.— Balen *v.* Lewis, 130 Mich. 567, 90 N. W. 416, 97 Am. St. Rep. 499.

Missouri.— Cohn *v.* Souders, 175 Mo. 455, 75 S. W. 413.

New Jersey.— Souther *v.* Pearson, (Ch. 1894) 28 Atl. 450; Hill *v.* Howell, 36 N. J. Eq. 25.

New York.— Stevens *v.* Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499.

Pennsylvania.— *In re* Poor Ministers Relief Corp. *v.* Wallace, 3 Rawle 109.

Virginia.— Bridgewater Roller Mills Co. *v.* Strough, 98 Va. 721, 37 S. E. 290; Lynchburg Perpetual Bldg., etc., Assoc. *v.* Fellers, 96 Va. 337, 31 S. E. 505, 79 Am. St. Rep. 851.

Wisconsin.— Deuster *v.* McCamus, 14 Wis. 307.

See 35 Cent. Dig. tit. "Mortgages," § 789.

Effect of purchase by mortgagee.— Where several lots covered by one mortgage were conveyed at the same time to different purchasers, and afterward the equities of redemption in certain of them were conveyed to the mortgagee, the lien of the mortgage was thereby extinguished, as to them, and the mortgagee was properly charged with their market value, as against the other purchasers, although it exceeded their ratable contributory share of the total indebtedness. Brooks *v.* Benham, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87.

rity of a subsequent purchaser of part of the mortgaged premises, without his consent, by releasing the mortgagor from his personal liability, the land so purchased is discharged from the lien of the mortgage.[25]

g. Actions to Determine Rights. Where the relief sought by a person interested in mortgaged land is to have the different portions marshaled for purposes of foreclosure, or to determine the order of their liability, he will proceed by bill in equity;[26] but if he has been compelled to pay the mortgage debt, when he claims that it should not have fallen upon his land at all, or to pay more than his proper share, he may maintain an action to recover back the amount so paid,[27] or an action for damages against the person responsible to him.[28]

2. Order of Liability — a. Rule as to Inverse Order of Alienation — (i) *Between Mortgagor and Purchaser of Part of Premises.* Where an owner of mortgaged property sells and conveys a part of it, the portion which he retains becomes primarily liable for the whole of the mortgage debt, as between himself and his grantee, so that, on a foreclosure of the mortgage, the grantee has an equity to require that the part remaining in the mortgagor shall be first sold under the mortgage, and that recourse shall be had to the part which he has purchased only in case of a deficiency;[29] and the benefit of this rule is

Purchaser assuming half of mortgage.— Where an undivided half of the mortgaged premises is conveyed to a purchaser who assumes the payment of half the mortgage debt, and the mortgagor afterward pays his half, the mortgagee may then release the mortgagor's half of the premises, without affecting his right to charge the purchaser with the other half, as this does not injure the purchaser. Clinton *v.* Buffalo Land Security Co., 166 N. Y. 621, 59 N. E. 1120.

25. Coyle *v.* Davis, 20 Wis. 564.

26. See George *v.* Kent, 7 Allen (Mass.) 16. Coffin *v.* Parker, 2 N. Y. Suppl. 75 [*affirmed* in part and *reversed* in part in 127 N. Y. 117, 27 N. E. 814].

27. Craft *v.* Phillips, 9 Pa. Cas. 223, 12 Atl. 331. But *compare* Sheperd *v.* Adams, 32 Me. 63.

28. Wilcox *v.* Campbell, 106 N. Y. 325, 12 N. E. 823. See also Pearson *v.* Ford, 1 Kan. App. 580, 42 Pac. 257.

29. *Alabama.*— Howser *v.* Cruikshank, 122 Ala. 256, 25 So. 206, 82 Am. St. Rep. 76; Scheuer *v.* Kelly, 121 Ala. 323, 26 So. 4; Farmers', etc., Bldg., etc., Assoc. *v.* Kent, 117 Ala. 624, 23 So. 757; Dacus *v.* Streety, 59 Ala. 183.

Arkansas.— Bourland *v.* Wittich, 38 Ark. 167; Terry *v.* Rosell, 32 Ark. 478.

California.— Summerville *v.* March, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145; Raun *v.* Reynolds, 11 Cal. 14; Cheever *v.* Fair, 5 Cal. 337.

Colorado.— Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Fassett *v.* Mulock, 5 Colo. 466.

Florida.— Ellis *v.* Fairbanks, 38 Fla. 257, 21 So. 107.

Georgia.— Cumming *v.* Cumming, 3 Ga. 460.

Illinois.— Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Tompkins *v.* Wiltberger, 56 Ill. 385; Lock *v.* Fulford, 52 Ill. 166; Iglehart *v.* Crane, 42 Ill. 261; Clark *v.* Wallick, 56 Ill. App. 30.

Indiana.— Hahn *v.* Behrman, 73 Ind. 120; Houston *v.* Houston, 67 Ind. 276.

Iowa.— Witt *v.* Rice, 90 Iowa 451, 57 N. W. 951; Mickley *v.* Tomlinson, 79 Iowa 383, 41 N. W. 311, 44 N. W. 684.

Kentucky.— Dickey *v.* Thompson, 8 B. Mon. 312.

Louisiana.— Maskell *v.* Merriman, 9 Rob. 69.

Maine.— Wallace *v.* Stevens, 64 Me. 225.

Maryland.— Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Massachusetts.— North *v.* Dearborn, 146 Mass. 17, 15 N. E. 129.

Michigan.— Gantz *v.* Toles, 40 Mich. 725; Mason *v.* Payne, Walk. 459.

Minnesota.— Cullen *v.* Minnesota L. & T. Co., 60 Minn. 6, 61 N. W. 818; Clark *v.* Kraker, 51 Minn. 444, 53 N. W. 706; Johnson *v.* Williams, 4 Minn. 260.

Mississippi.— Georgia Pac. R. Co. *v.* Walker, 61 Miss. 481.

New Hampshire.— Mahagan *v.* Mead, 63 N. H. 570, 3 Atl. 919; Gage *v.* McGregor, 61 N. H. 47; Brown *v.* Simons, 44 N. H. 475.

New Jersey.—Sternberger *v.* Sussman, (Ch. 1905) 60 Atl. 195; Thompson *v.* Bird, 57 N. J. Eq. 175, 40 Atl. 857; Harrison *v.* Guerin, 27 N. J. Eq. 219; Stelle *v.* Andrews, 19 N. J. Eq. 409; Weatherby *v.* Slack, 16 N. J. Eq. 491; Keene *v.* Munn, 16 N. J. Eq. 398; Gaskill *v.* Sine, 13 N. J. Eq. 400, 78 Am. Dec. 105; Reilly *v.* Mayer, 12 N. J. Eq. 55; Gilbert *v.* Galpin, 11 N. J. Eq. 445; Winters *v.* Henderson, 6 N. J. Eq. 31; Shannon *v.* Marselis, 1 N. J. Eq. 413.

New York.— St. John *v.* Bumpstead, 17 Barb. 100; Johnson *v.* White, 11 Barb. 194; Howard Ins. Co. *v.* Halsey, 4 Sandf. 565 [*affirmed* in 8 N. Y. 271, 59 Am. Dec. 478]; Breese *v.* Busby, 13 How. Pr. 485; Kellogg *v.* Rand, 11 Paige 59; Skeel *v.* Spraker, 8 Paige 182; Keirsted *v.* Avery, 4 Paige 1. The rule that one who has purchased and received a conveyance of a portion of mortgaged premises may require that all of the balance shall first be sold to satisfy the mort-

given also to a person who has an executory contract for the purchase of a part of the land, such as he could enforce by specific performance,[30] and to a lessee of part of the property, who has expended money in carrying out the purposes and conditions of the lease.[31] But this is an equity between the mortgagor and his vendee, and does not impose a limitation upon the mortgagee, who, unless otherwise ordered by the court, may proceed to collect his money in the way which is most to his interest, without regard to their relative rights.[32] And further, a purchaser who desires the benefit of this rule must ask the court for it; if he does not, the court is not bound to shape its decree in his interest, or to set aside a sale otherwise properly made.[33]

(11) *Between Successive Purchasers.* As between successive purchasers of separate portions of the mortgaged premises, the rule is to subject their holdings to the satisfaction of the mortgage in the inverse order of their alienation, so that the portion last sold is first chargeable to its full value before recourse is had to the next in order.[34] But this rule may be waived, limited, or modified by the

gage, before resort shall be had to his portion, applies, although part of the residue is situated in another state. Welling *v.* Ryerson, 94 N. Y. 98.

Pennsylvania.—Arna's Appeal, 65 Pa. St. 72; Mevey's Appeal, 4 Pa. St. 80.

Texas.— Miller *v.* Rogers, 49 Tex. 398; Henkel *v.* Bohnke, 7 Tex. Civ. App. 16, 26 S. W. 645.

Virginia.—Alley *v.* Rogers, 19 Gratt. 366; Schofield *v.* Cox, 8 Gratt. 533.

Washington.— Solicitors' L. & T. Co. *v.* Washington, etc., R. Co., 11 Wash. 684, 40 Pac. 344.

United States.— Philadelphia Mortg., etc., Co. *v.* Needham, 71 Fed. 597; Black *v.* Reno, 59 Fed. 917; The Romp, 20 Fed. Cas. No. 12,030, Olcott 196.

England.— Hartley *v.* O'Flaherty, Ll. & G. t. Pl. 216.

See 35 Cent. Dig. tit. "Mortgages," § 791.

Voluntary partition of property covered by an indivisible mortgage, and a subsequent mortgage of one part thereof, do not prevent enforcement of the first mortgage against that part, nor can the holder of the junior mortgage complain thereof. Groves *v.* Sentell, 153 U. S. 465, 14 S. Ct. 898, 38 L. ed. 785.

Voluntary conveyance.—Where a grantor made a voluntary conveyance of one of several parcels of land, all of which were mortgaged when he obtained title thereto, and covenanted merely against his own acts, the land still held by him did not become primarily liable for all of the indebtedness, but the land granted remained liable for its proportionate share. Mills *v.* Kelley, 62 N. J. Eq. 213, 50 Atl. 144.

Sale on execution.— The rule does not apply to cases where a portion of the equity of redemption is sold on execution against the mortgagor, unless the execution is on a judgment for the debt secured by the mortgage. Erlinger *v.* Boul, 7 Ill. App. 40.

30. Watson *v.* Neal, 38 S. C. 90, 16 S. E. 833.

31. Mack *v.* Shafer, 135 Cal. 113, 67 Pac. 40.

32. Knowles *v.* Lawton, 18 Ga. 476, 63 Am. Dec. 290; Hawhe *v.* Snydaker, 86 Ill. 197; La Farge F. Ins. Co. *v.* Bell, 22 Barb. (N. Y.) 54; Rugg *v.* Brainerd, 57 Vt. 364.

33. Prickett *v.* Sibert, 75 Ala. 315; St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556. See also Breese *v.* Busby, 13 How. Pr. (N. Y.) 485, holding that the purchaser, in order to secure his rights, need not bring a separate suit; but, if made a party to the foreclosure suit, may have relief on motion.

34. *Alabama.*— Threefoot *v.* Hillman, 130 Ala. 244, 30 So. 513, 89 Am. St. Rep. 39; Howser *v.* Cruikshank, 122 Ala. 256, 25 So. 206, 82 Am. St. Rep. 76; Dacus *v.* Streety, 59 Ala. 183; Mobile Mar. Dock, etc., Ins. Co. *v.* Huder, 35 Ala. 713.

Colorado.— Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Fassett *v.* Mulock, 5 Colo. 466.

Georgia.— Cumming *v.* Cumming, 3 Ga. 460.

Illinois.— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Meacham *v.* Steele, 93 Ill. 135; Niles *v.* Harmon, 80 Ill. 396; Tompkins *v.* Wiltberger, 56 Ill. 385; Briscoe *v.* Power, 47 Ill. 447; Matteson *v.* Thomas, 41 Ill. 110; Iglehart *v.* Crane, 42 Ill. 261; Alexander *v.* Welch, 10 Ill. App. 181.

Indiana.— Evansville Gaslight Co. *v.* State, 73 Ind. 219, 38 Am. Rep. 129; Houston *v.* Houston, 67 Ind. 276; McCullum *v.* Turpie, 32 Ind. 146; Aiken *v.* Bruen, 21 Ind. 137; Day *v.* Patterson, 18 Ind. 114.

Louisiana.— Patin *v.* Prejean, 7 La. 301; Jackson *v.* Williams, 12 Mart. 334.

Maine.— Cushing *v.* Ayer, 25 Me. 383; Holden *v.* Pike, 24 Me. 427.

Maryland.— Burger *v.* Greif, 55 Md. 518.

Michigan.— Gray *v.* H. M. Loud, etc., Lumber Co., 128 Mich. 427, 87 N. W. 376, 54 L. R. A. 731; McVeigh *v.* Sherwood, 47 Mich. 545, 11 N. W. 379; McKinney *v.* Miller, 19 Mich. 142; Cooper *v.* Bigly, 13 Mich. 463; Mason *v.* Payne, Walk. 459; Briggs *v.* Kaufman, 2 Mich. N. P. 160.

Minnesota.— Johnson *v.* Williams, 4 Minn. 260.

Missouri.— Crosby *v.* Farmers' Bank, 107 Mo. 436, 17 S. W. 1004; Holy Ghost Assoc. *v.* Fehlig, 72 Mo. App. 473; Parkey *v.* Veatch, 68 Mo. App. 67.

terms of the deed to any of the grantees which will bind those claiming under him;[35] and it will not be applied where it would work manifest injustice to any of the parties, but in that case may be controlled by other established equitable principles;[36] nor will it be allowed to operate to the material detriment of the mortgagee;[37] and since it is for the benefit of the purchasers, one who remains passive and does not claim his rights cannot have the foreclosure sale set aside merely because the parcels were sold in some other order.[38]

(III) *Between Purchaser of Part and Mortgagee of Part.* The rule subjecting different parts of a tract of land covered by a general mortgage to sale for its satisfaction, in the inverse order of their alienation, applies as between a purchaser of one portion and a person taking a junior mortgage on another part.[39]

New Hampshire.— Mahagan *v.* Mead, 63 N. H. 570, 3 Atl. 919; Gage *v.* McGregor, 61 N. H. 47.

New Jersey.— Mount *v.* Potts, 23 N. J. Eq. 188; Keene *v.* Munn, 16 N. J. Eq. 398; Gilbert *v.* Galpin, 11 N. J. Eq. 445; Wikoff *v.* Davis, 4 N. J. Eq. 224; Britton *v.* Updike, 3 N. J. Eq. 125; Shannon *v.* Marselis, 1 N. J. Eq. 413. But *compare* Jackson *v.* Condict, 57 N. J. Eq. 522, 41 Atl. 374, holding that the rule does not apply where the alienations were not made by deeds of general warranty, and were given for a nominal consideration, and where there are no circumstances from which an agreement could be implied that the portions conveyed were to be free from the mortgage.

New York.— Miles *v.* Fralich, 11 Hun 561; Howard Ins. Co. *v.* Halsey, 8 N. Y. St. 271, 59 Am. Dec. 478; *Ex p.* Merriam, 4 Den. 254; Ferguson *v.* Kimball, 3 Barb. Ch. 616; Kellogg *v.* Rand, 11 Paige 59; Rathbone *v.* Clark, 9 Paige 648; Patty *v.* Pease, 8 Paige 277, 35 Am. Dec. 683; Skeel *v.* Spraker, 8 Paige 182; Gouverneur *v.* Lynch, 2 Paige 300.

Ohio.— Sternberger *v.* Hanna, 42 Ohio St. 305; Cary *v.* Folsom, 14 Ohio 365.

South Carolina.— Norton *v.* Lewis, 3 Rich. 25; Meng *v.* Houser, 13 Rich. Eq. 210; Stoney *v.* Shultz, 1 Hill Eq. 465, 27 Am. Dec. 429.

Texas.— Rippetoe *v.* Dwyer, 49 Tex. 498; Miller *v.* Rogers, 49 Tex. 398.

Vermont.— Deavitt *v.* Judevine, 60 Vt. 695, 17 Atl. 410; Root *v.* Collins, 34 Vt. 173.

Virginia.— Hudson *v.* Barham, 101 Va. 63, 43 S. E. 189, 99 Am. St. Rep. 849; Lynchburg Perpetual Bldg., etc., Co. *v.* Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851; Henkle *v.* Allstadt, 4 Gratt. 284.

Wisconsin.— Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469; State *v.* Titus, 17 Wis. 241; State *v.* Throup, 15 Wis. 314; Ogden *v.* Glidden, 9 Wis. 46.

United States.— District of Columbia Nat. Sav. Bank *v.* Cresswell, 100 U. S. 630, 25 L. ed. 713; Philadelphia Mortg., etc., Co. *v.* Needham, 71 Fed. 597; *In re* Longfellow, 15 Fed. Cas. No. 8,486, 2 Hask. 221. See also Orvis *v.* Powell, 98 U. S. 176, 25 L. ed. 238.

Canada.— Jones *v.* Beck, 18 Grant Ch. (U. C.) 671.

See 35 Cent. Dig. tit. "Mortgages," § 792.

See, however, Huff *v.* Farwell, 67 Iowa 298, 25 N. W. 252.

Where the first purchaser failed to record his deed, and the second purchaser duly placed his on the record, the rule does not apply. Gray *v.* H. M. Loud, etc., Lumber Co., 128 Mich. 427, 87 N. W. 376, 54 L. R. A. 731.

The United States government is not affected by the rule stated in the text. U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

35. Vogel *v.* Shurtliff, 28 Ill. App. 516.

36. Irvine *v.* Perry, 119 Cal. 352, 51 Pac. 544, 949; Worth *v.* Hill, 14 Wis. 559; Philadelphia Mortg., etc., Co. *v.* Needham, 71 Fed. 597.

37. Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Hanscom *v.* Meyer, 57 Nebr. 786, 78 N. W. 367, 73 Am. St. Rep. 544.

One purchaser assuming part of mortgage. — Where part of the mortgaged land has been sold to one who assumed payment of the mortgage, and part of it to one who did not, the latter cannot compel the mortgagee to exhaust his personal remedy against the former before foreclosing. Palmer *v.* Snell, 111 Ill. 161.

Inability of mortgagee to accord rights to first purchaser.— It has been held that if the mortgagee has so acted with other tracts and purchasers that he cannot accord the first purchaser his rights, such inability on the part of the mortgagee will inure to the discharge of such first purchaser. Miller *v.* Rogers, 49 Tex. 398.

38. Matteson *v.* Thomas, 41 Ill. 110.

39. *Iowa.*— Windsor *v.* Evans, 72 Iowa 692, 34 N. W. 481.

Michigan.— Case Threshing-Mach. Co. *v.* Mitchell, 74 Mich. 679, 42 N. W. 151.

New York.— La Farge F. Ins. Co. *v.* Bell, 22 Barb. 54.

Washington.— See Stulb *v.* Ainslie, 14 Wash. 567, 45 Pac. 157, holding that a second mortgagee, holding the legal title, but as mortgagee only, who, at the request of the debtor, conveys a portion of the premises, thus releasing his lien thereon, to one having knowledge of the facts, is entitled to have such portion first sold under a foreclosure of the first mortgage.

West Virginia.—Gracey *v.* Myers, 15 W. Va. 194.

Wisconsin.— State *v.* Titus, 17 Wis. 241.

Canada.— Clark *v.* Bogart, 27 Grant Ch. (U. C.) 450.

See 35 Cent. Dig. tit. "Mortgages," § 793.

But see Devine *v.* U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. 585.

But if the sale and the junior mortgage do not exhaust the whole tract, the portion which remains in the mortgagor must be first sold before resorting to either of the portions which he has aliened.[40]

(iv) *Between Several Mortgagees of Different Parts.* The same rule is applied as between successive mortgagees of different portions of the land covered by a prior general mortgage.[41]

(v) *Between Subsequent Purchasers From Mortgagor's Grantee.* Where mortgaged premises are sold in several parcels by a purchaser of the whole from the mortgagor, they will be applied in equity to the satisfaction of the mortgage in the inverse order of their alienation;[42] but subject always to the limitation that this rule will not be applied where it would operate to the prejudice of the mortgagee in collecting his debt.[43]

b. Effect of Assumption of Mortgage by Purchaser. Where a mortgagor sells part of the mortgaged land, and the purchaser assumes and agrees to pay the mortgage, the land so conveyed must be exhausted in satisfaction of the mortgage debt before any other part of the mortgaged lands can be resorted to for payment, whether they remain in the hands of the mortgagor himself or have been conveyed to other parties;[44] and if the purchaser has assumed a specified portion of the mortgage debt, his lands must first be exhausted to the extent of the portion so assumed.[45] But this rule, while raising an equity between the owners of the different parts of the land, does not operate as a limitation upon the mortgagee, who is not compelled to observe it to his prejudice, and if he has not accepted the grantee who assumed the mortgage as his debtor, he cannot be forced to proceed first against such grantee personally or against his land.[46]

40. Millsaps *v.* Bond, 64 Miss. 453, 1 So. 506.

41. *Colorado.*— Fassett *v.* Mulock, 5 Colo. 466.

Michigan.— Payne *v.* Avery, 21 Mich. 524.

New Jersey.— Dawes *v.* Cammus, 32 N. J. Eq. 456.

New York.— Steere *v.* Childs, 15 Hun 511; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Shryver *v.* Teller, 9 Paige 173. This rule is one of equity, and will yield to superior equities existing in the last encumbrancer. See Denton *v.* Ontario County Nat. Bank, 150 N. Y. 126, 44 N. E. 781; Smith *v.* Roberts, 91 N. Y. 470; Bernhardt *v.* Lymburner, 85 N. Y. 172.

Ohio.— Long *v.* Harbers, 6 Ohio Dec. (Reprint) 1066, 10 Am. L. Rec. 53.

Pennsylvania.— Milligan's Appeal, 104 Pa. St. 503.

See 35 Cent. Dig. tit. "Mortgages," § 794.

Marshaling liens.— Where there is a general mortgage to A covering a tract of land, a second mortgage to B which covers a portion of that tract and also certain other lands, and a third mortgage to C which covers another portion of the tract but no outside lands, and it appears that the outside lands covered by B's mortgage are ample security for the whole of his claim, C will have an equity to require that so much of the first-named tract as is included in B's mortgage shall be subject to the satisfaction of A's mortgage before coming upon the property covered by his (C's) mortgage. Worth *v.* Hill, 14 Wis. 559.

42. Moore *v.* Shurtleff, 128 Ill. 370, 21 N. E. 775; Sheperd *v.* Adams, 32 Me. 63; Hiles *v.* Coult, 30 N. J. Eq. 40; Wikoff *v.* Davis, 4 N. J. Eq. 224; Hopkins *v.* Wolley, 81 N. Y. 77; Guion *v.* Knapp, 6 Paige (N. Y.) 35, 29 Am. Dec. 741.

43. Cashman *v.* Martin, 50 How. Pr. (N. Y.) 337.

44. *Colorado.*— Skinner *v.* Harker, 23 Colo. 333, 48 Pac. 648; Cooley *v.* Murray, 11 Colo. App. 241, 52 Pac. 1108.

Connecticut.— State *v.* Ripley, 32 Conn. 150. See also Waters *v.* Hubbard, 44 Conn. 340.

Illinois.— Mead *v.* Peabody, 183 Ill. 126, 55 N. E. 719; Pool *v.* Marshall, 48 Ill. 440.

Indiana.— Wright *v.* Briggs, 99 Ind. 563.

Iowa.— Windsor *v.* Evans, 72 Iowa 692, 34 N. W. 481; Iowa L. & T. Co. *v.* Mowery, 67 Iowa 113, 24 N. W. 747.

Maryland.— Burger *v.* Greif, 55 Md. 518.

Massachusetts.— Welch *v.* Beers, 8 Allen 151.

Michigan.— Caruthers *v.* Hall, 10 Mich. 40; Mason *v.* Payne, Walk. 459.

New Jersey.— Mills *v.* Kelley, 62 N. J. Eq. 213, 50 Atl. 144; Black *v.* Morse, 7 N. J. Eq. 509; Wikoff *v.* Davis, 4 N. J. Eq. 224.

New York.— Wilcox *v.* Campbell, 106 N. Y. 325, 12 N. E. 823; Bowne *v.* Lynde, 91 N. Y. 92; Coles *v.* Appleby, 87 N. Y. 114; Hart *v.* Wandle, 50 N. Y. 381; Burank *v.* Babcock, 3 N. Y. St. 458; Baring *v.* Moore, 4 Paige 166. *Compare* Judson *v.* Dada, 79 N. Y. 373.

Ohio.— Clark *v.* Benthem, 4 Ohio Dec. (Reprint) 498, 2 Clev. L. Rec. 266.

See 35 Cent. Dig. tit. "Mortgages," § 796.

45. Thompson *v.* Bird, 57 N. J. Eq. 175, 40 Atl. 857.

46. Palmer *v.* Snell, 111 Ill. 161; Duckwall *v.* Kisner, 136 Ind. 99, 35 N. E. 697.

c. Conveyance of Part Subject to Mortgage. Where a part of mortgaged premises is sold under and subject to the mortgage, it becomes primarily liable therefor, and the liability of the remainder of the land, whether retained by the mortgagor or sold to other persons, secondary, so that the rule as to subjecting the parcels in the inverse order of alienation does not apply.[47] But according to some of the authorities, the mere recital in the deed that the land sold is subject to the mortgage is not enough to bring about this result;[48] but there must also be something to show that the purchaser becomes responsible for the mortgage debt, as where it is declared to be part of the consideration, or the amount of it is deducted from the purchase-price.[49]

d. Rights Depending on Consideration Paid. In order to entitle a purchaser of part of mortgaged land to insist that some other portion shall be sold to satisfy the mortgage before recourse is had to his portion, according to the rule of subjection of the parcels in the inverse order of alienation, it is necessary that he should have paid value for his purchase;[50] and in this respect the equity of one who buys a part of the lands in consideration of an obligation then assumed is stronger than the equity of one who previously purchased another portion in consideration of a past-due debt.[51]

e. Rights Depending on Notice and Record. Where a mortgagor makes successive sales of different portions of the mortgaged premises to different persons, having actual or constructive notice of the prior sales, the rule applies as to their subjection to the mortgage in the inverse order of alienation.[52] But the portion last sold cannot be applied in satisfaction of the mortgage, in exoneration of the portions first sold, unless the last purchaser took with notice of the earlier sales.[53]

47. *Illinois.*— Monarch Coal, etc., Co. *v.* Hand, 197 Ill. 288, 64 N. E. 381; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Briscoe *v.* Power, 47 Ill. 447; Vogel *v.* Shurtliff, 28 Ill. App. 516.

Indiana.— De Haven *v.* Musselman, 123 Ind. 62, 24 N. E. 171.

Massachusetts.— Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

New Jersey.— Hanes *v.* Denby, (Ch. 1894) 28 Atl. 798; Hill *v.* McCarter, 27 N. J. Eq. 41.

New York.— Zabriskie *v.* Salter, 80 N. Y. 555.

Utah.— New England L. & T. Co. *v.* Stephens, 16 Utah 385, 52 Pac. 624.

See 35 Cent. Dig. tit. "Mortgages," § 797.

48. Slater *v.* Breese, 36 Mich. 77; Cooper *v.* Bigly, 13 Mich. 463; Hall *v.* Morgan, 79 Mo. 47.

49. Engle *v.* Haines, 5 N. J. Eq. 186, 43 Am. Dec. 624; Wood *v.* Harper, 9 N. Y. App. Div. 229, 41 N. Y. Suppl. 242.

50. Harrison *v.* Guerin, 27 N. J. Eq. 219. But see Watson *v.* Neal, 38 S. C. 90, 16 S. E. 833, holding that where it appeared that different portions of the mortgaged premises were conveyed to different persons at different times, some by contract, with bond for titles, and afterward consummated by warranty deeds; some for full, and others for partial, money consideration; and one in trust in consideration of love and affection, the parcels should be subjected to the payment of the mortgage debt in the inverse order of their alienation.

51. Libby *v.* Tufts, 121 N. Y. 172, 24 N. E. 12.

52. *Connecticut.*—Sanford *v.* Hill, 46 Conn. 42.

Illinois.— Lock *v.* Fulford, 52 Ill. 166; Iglehart *v.* Crane, 42 Ill. 261.

Ohio.— Miami Exporting Co. *v.* U. S. Bank, Wright 249.

Vermont.— Root *v.* Collins, 34 Vt. 173; Lyman *v.* Lyman, 32 Vt. 79, 76 Am. Dec. 151.

Wisconsin.— State *v.* Titus, 17 Wis. 241.

See 35 Cent. Dig. tit. "Mortgages," § 799.

Possession as notice.— In a contest between purchasers of different portions of the mortgaged premises as to whose lands shall be first sold, the dates when their respective legal titles vested *prima facie* determines the order of such sales; but the holder of a junior conveyance, or his grantee, may show that prior to the taking effect of either conveyance he was in the actual and open possession of the parcel of land purchased by him, under a contract of purchase, and had so far performed his contract as to entitle him to a specific performance, prior to the title acquired by the senior conveyance. Sternberger *v.* Hanna, 42 Ohio St. 305.

Execution sales.— Where different portions of mortgaged premises have been sold under judgments, those portions are to stand, in the order of sale on a foreclosure suit, as of the times when the judgments respectively became liens, and not as of the times when conveyances therefor were executed by the sheriff. Woods *v.* Spalding, 45 Barb. (N. Y.) 602.

53. *New Hampshire.*— Brown *v.* Simons, 44 N. H. 475.

New Jersey.— Hill *v.* Howell, 36 N. J. Eq. 25; Sanborn *v.* Adair, 27 N. J. Eq. 425.

f. Notice to Mortgagee as Affecting Rights of Purchasers. The rule as to selling portions of the mortgaged land in the inverse order of their alienation is never applied to an innocent mortgagee who has no notice of such order.[54] A purchaser, meaning to insist upon the application of this rule, for the protection of his property, must give the mortgagee actual notice of his rights;[55] and the recording of his deed is not even constructive notice to the mortgagee, as it is no part of the latter's duty to search the records for subsequent conveyances.[56] But when the mortgagee has such actual notice, he cannot disturb or disregard the equities between the different purchasers, and must take the consequences of releasing or exonerating the portion to which he should have resorted in the first instance.[57]

g. Effect of Release of Part of Land—(I) *Release of Part Primarily Liable.* Where a mortgagee, with notice of several successive alienations of parts of the mortgaged premises, releases that part which is primarily liable in equity for the payment of the mortgage debt, he cannot be permitted to charge the other portions of the premises with the payment of the mortgage, without deducting from the amount due the value of the part released.[58] But this rule does not apply where he makes the release in good faith and without knowledge of the equities of the parties,[59] nor where the portion released was the first sold and therefore the last to be liable.[60]

(II) *Release of Part Unsold.* Where a mortgagor conveys a portion of the mortgaged lands, and the mortgagee subsequently releases the whole or a part of the lands retained by the mortgagor, having knowledge of the previous sale, and acting without the consent of the purchaser, the latter is entitled to have the value of the property so released deducted from the mortgage debt before the lands bought by him are subjected to its satisfaction.[61]

New York.— Ellison *v.* Pecare, 29 Barb. 333.

North Carolina.—Stanly *v.* Stocks, 16 N. C. 314.

Rhode Island.— Warwick Sav. Inst. *v.* Providence, 12 R. I. 144.

United States.— Ricker *v.* Greenbaum, 13 Fed. 363.

See 35 Cent. Dig. tit. "Mortgages," § 799.

54. Matteson *v.* Thomas, 41 Ill. 110.

55. Hosmer *v.* Campbell, 98 Ill. 572; Dates *v.* Winstanley, 53 Ill. App. 623; Lausman *v.* Drahos, 8 Nebr. 457, 1 N. W. 445; Bridgewater Roller Mills Co. *v.* Baltimore Bldg., etc., Assoc., 124 Fed. 718.

56. Hosmer *v.* Campbell, 98 Ill. 572; Matteson *v.* Thomas, 41 Ill. 110; Dates *v.* Winstanley, 53 Ill. App. 623; Talmadge *v.* Wilgers, 1 N. Y. Leg. Obs. 42; Stuyvesant *v.* Hone, 1 Sandf. Ch. (N. Y.) 419 [*affirmed* in 2 Barb. Ch. 151].

57. Lock *v.* Fulford, 52 Ill. 166; Iglehart *v.* Crane, 42 Ill. 261; Layman *v.* Willard, 7 Ill. App. 183; Howard Ins. Co. *v.* Halsey, 4 Sandf. (N. Y.) 565 [*affirmed* in 8 N. Y. 271, 59 Am. Dec. 478].

58. *Alabama.*— Northwestern Land Assoc. *v.* Harris, 114 Ala. 468, 21 So. 999.

Illinois.— Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Iglehart *v.* Crane, 42 Ill. 261.

Michigan.— Webb *v.* Rowe, 35 Mich. 58.

Minnesota.— Groesbeck *v.* Mattison, 43 Minn. 547, 46 N. W. 135.

Nebraska.— Brigham *v.* McDowell, 19 Nebr. 407, 27 N. W. 384.

New Jersey.— Hoy *v.* Bramhall, 19 N. J. Eq. 563 [*reversing* 19 N. J. Eq. 74].

Pennsylvania.— Shepherd's Appeal, 2 Grant 402.

See 35 Cent. Dig. tit. "Mortgages," § 802.

Compare Barney *v.* Myers, 28 Iowa 472, opinion of the Court by Cole, C. J.

Oral offer to release.— An oral offer made by a mortgagee, at the sale of the equities of redemption in several lots covered by the mortgage, to release each lot sold, for a certain sum, did not constitute an apportionment of the indebtedness, where it was not accepted and made effectual by subsequent conveyances. Brooks *v.* Benham, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87.

Invalid release.— This rule does not apply where the release given by the mortgagee has been declared invalid and set aside for fraud. Fassett *v.* Mulock, 5 Colo. 466.

59. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151.

60. Edgington *v.* Hefner, 81 Ill. 341; Libby *v.* Tufts, 121 N. Y. 172, 24 N. E. 12; Guion *v.* Knapp, 6 Paige (N. Y.) 35, 29 Am. Dec. 741 note; Lyman *v.* Lyman, 32 Vt. 79, 76 Am. Dec. 151. *Compare* Parkman *v.* Welch, 19 Pick. (Mass.) 231.

61. *Illinois.*— Hawhe *v.* Snydaker, 86 Ill. 197; Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

Iowa.— Thompson *v.* Thompson, 42 Iowa 218; Taylor *v.* Short, 27 Iowa 361, 1 Am. Rep. 280.

(III) *Release of Part Last Sold.* A similar rule obtains where different parts of the mortgaged premises have been conveyed successively to different purchasers. If the mortgagee releases the part last sold, and therefore first chargeable, it relieves the land of the next prior purchaser to the extent of the value of that released,[62] unless done with the knowledge and acquiescence of such prior purchaser,[63] or without knowledge of his rights on the part of the mortgagee,[64] or unless, from other circumstances, the application of the rule, which is merely a principle of equity, would be repugnant to justice.[65]

G. Sale of Equity of Redemption to Mortgagee — 1. In General — a. Validity of Conveyance. Although a waiver of the equity of redemption, inserted in and forming a part of the mortgage itself, is not valid and will not be supported in equity,[66] yet it is perfectly competent for the mortgagor to sell, and for the mortgagee to buy, the equity of redemption, by a subsequent and independent contract entered into in good faith and for a good consideration,[67] or for

Louisiana.— See Powell *v.* Hayes, 31 La. Ann. 789.

Michigan.— McVeigh *v.* Sherwood, 47 Mich. 545, 11 N. W. 379; Hall *v.* Edwards, 43 Mich. 473, 5 N. W. 652.

Minnesota.— Benton *v.* Nicoll, 24 Minn. 221; Johnson *v.* Williams, 4 Minn. 260.

New Hampshire.— Brown *v.* Simons, 44 N. H. 475.

New Jersey.— Gaskill *v.* Sine, 13 N. J. Eq. 400, 78 Am. Dec. 105.

New York.— Kendall *v.* Woodruff, 87 N. Y. 1; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478 [*affirming* 4 Sandf. 565]; La Farge F. Ins. Co. *v.* Bell, 22 Barb. 54.

Pennsylvania.— Schrack *v.* Shriner, 100 Pa. St. 451.

See 35 Cent. Dig. tit. "Mortgages," § 803.

Contra.— Holman *v.* Norfolk Bank, 12 Ala. 369.

Release of land for streets and alleys.— Where mortgaged premises are platted into lots, a purchaser of a lot, buying by the plat, is estopped from insisting that the portions of the premises embraced in the platted streets and alleys shall be treated as premises released, and their value credited upon the mortgage debt. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

Sufficiency of notice.— It has been held that notice to the mortgagee of the sale and conveyance of a portion of the premises, such as will prevent him from releasing the portion unsold and retaining his lien for the full amount on the part sold, must be actual notice, and not such constructive notice as may be implied from the record of the purchaser's deed. Sharp *v.* Myers, 2 Ohio Cir. Ct. 82, 1 Ohio Cir. Dec. 374. But on the contrary it has been held that the notice need not be actual; and although mere possession by the purchaser is not sufficient to charge the mortgagee with knowledge, if he does not know who it is that holds the possession (Cogswell *v.* Stout, 32 N. J. Eq. 240), yet if he actually knows that a third person is in possession, he is bound to examine the records to ascertain what such person's rights may be, and is chargeable with notice of such facts as might have been discovered thereby (Dewey *v.* Ingersoll, 42 Mich. 17, 3 N. W. 235). And the notice need not be communicated directly by the purchaser to the mortgagee; it is sufficient if he is notified by letter from the mortgagor as to the name of the buyer, and if the deed is on record. Hall *v.* Edwards, 43 Mich. 473, 5 N. W. 652.

62. *Indiana.*— Stewart *v.* McMahan, 94 Ind. 389; Alsop *v.* Hutchings, 25 Ind. 347.

Massachusetts.— George *v.* Wood, 9 Allen 80, 85 Am. Dec. 741.

Michigan.— See Gray *v.* H. M. Loud, etc., Lumber Co., 128 Mich. 427, 87 N. W. 376, 54 L. R. A. 731.

Mississippi.— Dillon *v.* Bennett, 14 Sm. & M. 171.

New Jersey.—Stillman *v.* Stillman, 21 N. J. Eq. 126.

New York.— Booth *v.* Swezey, 8 N. Y. 276; Guion *v.* Knapp, 6 Paige 35, 29 Am. Dec. 741. *Compare* Evertson *v.* Ogden, 8 Paige 275.

Pennsylvania.— Turner *v.* Flenniken, 164 Pa. St. 469, 30 Atl. 486, 44 Am. St. Rep. 624; Martin's Appeal, 97 Pa. St. 85; Paxton *v.* Harrier, 11 Pa. St. 312.

See 35 Cent. Dig. tit. "Mortgages," § 804.

63. Williams *v.* Wilson, 124 Mass. 257.

64. Patty *v.* Pease, 8 Paige (N. Y.) 277, 35 Am. Dec. 683.

65. Kendall *v.* Niebuhr, 45 N. Y. Super. Ct. 542, 58 How. Pr. 156.

66. See *supra*, VIII, H, 1.

67. *Alabama.*— McMillan *v.* Jewett, 85 Ala. 476, 5 So. 145.

Arkansas.— Bazemore *v.* Mullins, 52 Ark. 207, 12 S. W. 474.

California.— Bradbury *v.* Davenport, 120 Cal. 152, 52 Pac. 301; De Martin *v.* Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115; Green *v.* Butler, 26 Cal. 595.

Illinois.— Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193; Miller *v.* Green, 37 Ill. App. 631.

Maryland.— Hinkley *v.* Wheelwright, 29 Md. 341; Hicks *v.* Hicks, 5 Gill & J. 75.

Michigan.— Batty *v.* Snook, 5 Mich. 231.

Missouri.— Wilson *v.* Vanstone, 112 Mo. 315, 20 S. W. 612.

New York.— Braun *v.* Vollmer, 89 N. Y. App. Div. 43, 85 N. Y. Suppl. 319; Remsen *v.* Hay, 2 Edw. 535.

the mortgagor to surrender the absolute ownership of the premises to the mortgagee as payment of the debt.[68] But courts of equity scrutinize such a transaction between the parties closely and with jealous care, and will not allow it to stand unless shown to be entirely fair and honest; for the bargain will be set aside if it appears to have been induced by any fraud, artifice, overreaching, or advantage taken by the mortgagee of his commanding position with reference to the property, or of the ignorance, inexperience, or necessitous circumstances of the mortgagor.[69] A mortgagor's claim for relief on this ground must be made promptly, and will be denied if unreasonably delayed.[70]

b. Consideration. A release of the equity of redemption to the mortgagee will be set aside if there was no consideration for it,[71] or if the consideration was grossly inadequate, a trifling inadequacy not being sufficient to vitiate the transaction unless coupled with proof of fraud or overreaching.[72] But it is not necessary

North Carolina.—Barnes *v.* Brown, 71 N. C. 507.

England.— Rushbrook *v.* Lawrence, L. R. 5 Ch. 3, 21 L. T. Rep. N. S. 477, 18 Wkly. Rep. 101; Gossip *v.* Wright, 9 Jur. N. S. 592, 32 L. J. Ch. 648, 8 L. T. Rep. N. S. 627, 11 Wkly. Rep. 632.

Canada.— Forrest *v.* Gibson, 6 Manitoba 612; Ingalls *v.* McLaurin, 11 Ont. 380; McDougall *v.* Barron, 9 Grant Ch. (U. C.) 450.

See 35 Cent. Dig. tit. "Mortgages," § 806.

68. Shelton *v.* Hampton, 28 N. C. 216; Ruggles *v.* Southern Minnesota R. Co., 20 Fed. Cas. No. 12,121.

69. *Alabama.*— Goree *v.* Clements, 94 Ala. 337, 10 So. 906; Stoutz *v.* Rouse, 84 Ala. 309, 4 So. 170 (the mere fact that the mortgagor was in bad health at the time does not show that there was any undue influence or unconscionable advantage taken of him); Thompson *v.* Lee, 31 Ala. 292; Lock *v.* Palmer, 26 Ala. 312; Adams *v.* McKenzie, 18 Ala. 698; McKinstry *v.* Conly, 12 Ala. 678.

California.— Phelan *v.* De Martin, 85 Cal. 365, 24 Pac. 725.

Delaware.— Walker *v.* Farmers' Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819.

Florida.— Franklin *v.* Ayer, 22 Fla. 654.

Illinois.— Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Scanlan *v.* Scanlan, 134 Ill. 630, 25 N. E. 652; West *v.* Reed, 55 Ill. 242; Brown *v.* Gaffney, 28 Ill. 149; Wynkoop *v.* Cowing, 21 Ill. 570.

Maryland.— Baugher *v.* Merryman, 32 Md. 185; Dougherty *v.* McColgan, 6 Gill & J. 275; Hicks *v.* Hicks, 5 Gill & J. 75; Sheckell *v.* Hopkins, 2 Md. Ch. 89.

Massachusetts.— Trull *v.* Skinner, 17 Pick. 213; Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Butler *v.* Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; Dorrill *v.* Eaton, 35 Mich. 302; Cornell *v.* Hall, 22 Mich. 377.

Minnesota.— De Lancey *v.* Finnegan, 86 Minn. 255, 90 N. W. 387; Marshall *v.* Thompson, 39 Minn. 137, 39 N. W. 309; Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

New Jersey.— Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722.

New York.— Odell *v.* Montross, 68 N. Y. 499; Faulkner *v.* Cody, 45 Misc. 64, 91 N. Y. Suppl. 633; Remsen *v.* Hay, 2 Edw. 535.

Ohio.— Shaw *v.* Walbridge, 33 Ohio St. 1.

South Carolina.— Hall *v.* Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696.

Vermont.— Hyndman *v.* Hyndman, 19 Vt. 9, 46 Am. Dec. 171.

Wisconsin.— Moeller *v.* Moore, 80 Wis. 434, 50 N. W. 396.

United States.— Alexander *v.* Rodriguez, 12 Wall. 323, 20 L. ed. 406; Russell *v.* Southard, 12 How. 139, 13 L. ed. 927; Morris *v.* Nixon, 1 How. 118, 11 L. ed. 69; Lewis *v.* Wells, 85 Fed. 896; Oliver *v.* Cunningham, 7 Fed. 689.

England.—Australasia Nat. Bank *v.* United Hand-in-Hand, etc., Co., 4 App. Cas. 391, 40 L. T. Rep. N. S. 697, 27 Wkly. Rep. 889.

See 35 Cent. Dig. tit. "Mortgages," § 808

Presumption as to fraud.— It has been held that where a mortgagee buys the equity of redemption from his mortgagor the law presumes fraud, and the burden of proof is on the mortgagee to show the fairness and good faith of the transaction. McLeod *v.* Bullard, 86 N. C. 210, 84 N. C. 515. But this is too strong a statement to accord with the decisions elsewhere, as it is generally held that there is no presumption of fraud, but on the contrary the parties are presumed to deal with each other on the ordinary footing of vendor and purchaser, and that there is no fiduciary relation between them, such as to prevent the mortgagee from buying the equity of redemption as cheaply as he can. De Martin *v.* Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115; Walker *v.* Farmers' Bank, 8 Houst. (Del.) 258, 10 Atl. 94, 14 Atl. 819; Melbourne Banking Corp. *v.* Brougham, 7 App. Cas. 307, 51 L. J. P. C. 65, 46 L. T. Rep. N. S. 603, 30 Wkly. Rep. 925; Knight *v.* Marjoribanks, 2 Hall & T. 308, 47 Eng. Reprint 1700, 2 Macn. & G. 10, 48 Eng. Ch. 7, 42 Eng. Reprint 4.

70. Goree *v.* Clements, 94 Ala. 337, 10 So. 906.

71. Holridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 30; Liskey *v.* Snyder, 56 W. Va. 610, 49 S. E. 515; Russell *v.* Southard, 12 How. (U. S.) 139, 13 L. ed. 927.

72. *Alabama.*— Goree *v.* Clements, 94 Ala. 337, 10 So. 906; Stoutz *v.* Rouse, 84 Ala. 309, 4 So. 170; McKinstry *v.* Conly, 12 Ala. 678.

to show a new consideration,[78] for the property may be turned over to the mortgagee in payment of the mortgage debt, and this will be allowed to stand if it appears that the property was really worth no more than the amount of the mortgage, or that the debt was not grossly inadequate as a price for it.[74] And further, the mortgagee's release to the mortgagor of a part of the premises is a valid consideration for the mortgagor's conveyance in fee of the residue to the mortgagee.[75]

c. Form and Requisites of Conveyance. The equity of redemption may be transferred to the mortgagee by a formal deed of conveyance,[76] or a written and sealed agreement in the form of a release of the mortgagor's rights and title,[77] or may be embodied in a lease of the premises accepted by the mortgagor as the mortgagee's tenant,[78] or may even be effected by a parol surrender to the mortgagee if followed by a proper deed.[79] In case the mortgage took the form of an absolute conveyance of the title, no formal deed is necessary to convey the equity of redemption to the mortgagee, but this may be accomplished by a parol settlement and agreement of the parties,[80] with a surrender, cancellation, or destruction of the instrument of defeasance,[81] or may be established by any circumstances

California.— Phelan *v.* De Martin, 85 Cal. 365, 24 Pac. 725.
Connecticut.— Mills *v.* Mills, 26 Conn. 213.
Illinois.— Brown *v.* Gaffney, 28 Ill. 149.
Kentucky.— Perkins *v.* Drye, 3 Dana 170.
Maryland.— Hicks *v.* Hicks, 5 Gill & J. 75.
New York.— Martin *v.* New Rochelle Water Co., 162 N. Y. 599, 57 N. E. 1117.
Wisconsin.— Moeller *v.* Moore, 80 Wis. 434, 50 N. W. 396.
Canada.— Parr *v.* Montgomery, 27 Grant Ch. (U. C.) 521.

73. Watson *v.* Edwards, 105 Cal. 70, 38 Pac. 527.

74. *Delaware.*— Walker *v.* Farmers' Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819.
Indian Territory.— Glover *v.* Fitzpatrick, 4 Indian Terr. 224, 69 S. W. 856.
Michigan.— King *v.* Brewer, 121 Mich. 339, 80 N. W. 238.
New York.—Martin *v.* New Rochelle Water Co., 11 N. Y. App. Div. 177, 42 N. Y. Suppl. 893.
North Carolina.— Shelton *v.* Hampton, 28 N. C. 216.
Wisconsin.— Marking *v.* Marking, 106 Wis. 292, 82 N. W. 133.
But see Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251.
Debt much less than value of property.— A conveyance of the mortgaged premises by the mortgagor to the mortgagee, by delivery of a deed in escrow, to be delivered in case of the non-payment of the mortgage debt within a certain time, will be set aside where the property is worth twice the amount of the indebtedness. Bradbury *v.* Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92.
Burden of proof.— Where a mortgagee has obtained from the mortgagor a release of his equity of redemption, the burden is on him to show that he paid for the property what it is worth. Liskey *v.* Snyder, 56 W. Va. 610, 49 S. E. 515.

75. McCagg *v.* Heacock, 42 Ill. 153.

76. *Alabama.*— Hitchcock *v.* U. S. Bank, 7 Ala. 386, holding that the equity of redemption may be conveyed by a deed by which the mortgagor "remised . . . and forever quitclaimed" his title, etc.
Arkansas.— Garretson *v.* White, 69 Ark. 603, 65 S. W. 115.
California.— McDonald *v.* Huff, 77 Cal. 279, 19 Pac. 499, deed in escrow.
Iowa.— Gray *v.* Nelson, 77 Iowa 63, 41 N. W. 566, deed of land operates as an assignment of the equity of redemption, although the mortgage notes are not surrendered nor the mortgage satisfied of record.
Tennessee.— Frierson *v.* Blanton, 1 Baxt. 272.
Wisconsin.—Slaughter *v.* Bernards, 97 Wis. 184, 72 N. W. 977.
See 35 Cent. Dig. tit. "Mortgages," § 807.

77. *Alabama.*— Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157.
Connecticut.— Austin *v.* Bradley, 2 Day 466.
Delaware.— Walker *v.* Farmers' Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819.
New Hampshire.— Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.
Vermont.— Catlin *v.* Washburn, 3 Vt. 25.
United States.— Peugh *v.* Davis, 96 U. S. 332, 24 L. ed. 775.
See 35 Cent. Dig. tit. "Mortgages," § 807.

78. Seymour *v.* Mackay, 126 Ill. 341, 18 N. E. 552; Longfellow *v.* Moore, 102 Ill. 289; Doying *v.* Chesebrough, (N. J. Ch. 1897) 36 Atl. 893. *Compare* Atkinson *v.* Morrissy, 3 Oreg. 332.

79. Duff *v.* McDonough, 155 Pa. St. 10, 25 Atl. 608. *Compare* Taber *v.* Boston, 190 Mass. 101, 76 N. E. 727.

80. McMillan *v.* Jewett, 85 Ala. 476, 5 So. 145; Scanlan *v.* Scanlan, 134 Ill. 630, 25 N. E. 652; Stall *v.* Jones, 47 Nebr. 706, 66 N. W. 653; Shaw *v.* Walbridge, 33 Ohio St. 1. But see Keller *v.* Kirby, 34 Tex. Civ. App. 404, 79 S. W. 82.

81. Wilson *v.* Carpenter, 62 Ind. 495; Rice *v.* Rice, 4 Pick. (Mass.) 349; Harrison *v.* Phillips Academy, 12 Mass. 456; Shaw *v.* Walbridge, 33 Ohio St. 1. See, however, Porter *v.* Millet, 9 Mass. 101; Howe *v.* Carpenter, 49 Wis. 697, 6 N. W. 357.

showing that it would be inequitable to allow the grantor to redeem.[82] In case of a deed of trust, the legal title, residing in the trustee, will not be divested by a conveyance from the grantor to the creditor.[83]

d. Rights and Liabilities of Parties. A mortgagee purchasing the equity of redemption succeeds to the mortgagor's title as it then stands,[84] with the benefit of any collateral agreements not necessarily merged in the mortgage,[85] and subject to any easements or rights previously granted by the mortgagor.[86] The mortgagee will be entitled to possession,[87] and if the mortgagor retains the possession without a lease, he will hold it as a tenant at sufferance.[88] Thereafter the mortgagee becomes responsible for insurance, taxes, and other expenses connected with the property.[89]

e. Rights as to Junior Liens. The acquisition of the equity of redemption by a mortgagee does not defeat or discharge intervening liens or encumbrances.[90]

82. Scanlan *v.* Scanlan, 134 Ill. 630, 25 N. E. 652; West *v.* Reed, 55 Ill. 242.

83. Leech *v.* Karthaus, 141 Ala. 509, 37 So. 696.

84. Farmers', etc., Bank *v.* Bronson, 14 Mich. 361.

Equty of redemption acquired after its expiration.— Where the assignee of a mortgage debt has also acquired the mortgagor's equity of redemption, which has expired, he cannot maintain a bill in equity for confirmation of his title. Ormsby *v.* Phillips, 4 Dana (Ky.) 232.

85. Decatur *v.* Walker, 137 Mass. 141.

86. Rothschild *v.* Bay City Lumber Co., 139 Ala. 571, 36 So. 785 (subject to a sale of timber standing on the land); Archer *v.* Salinas, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145 (subject to a dedication of part of land to the public); Triplett *v.* Parmlee, 16 Nebr. 649, 21 N. W. 403 (subject to a sale of buildings on the land).

Subject to equity created by a bond for title.— A purchase-money mortgagee, who voluntarily releases the mortgage and takes a quitclaim deed to the mortgaged premises, knowing that the mortgagor has executed a bond for title therefor, takes the property subject to the equity so created. Scott *v.* Lewis, 40 Oreg. 37, 66 Pac. 299.

87. See Plumer *v.* Robertson, 6 Serg. & R. (Pa.) 179.

88. Johnson *v.* Prairie, 94 N. C. 773.

89. Merrifield *v.* Baker, 9 Allen (Mass.) 29.

Agreement as to taxes.— Where a purchaser of the equity of redemption made a special agreement with the mortgagee for the payment of certain interest and taxes in consideration of the forbearance of the mortgagee to foreclose, and afterward conveyed the property to the mortgagee, the deed omitting any stipulation as to such interest and taxes, it was held that the special agreement was neither superseded by nor merged in the subsequent deed. Cook *v.* Adams, 32 N. Y. App. Div. 385, 53 N. Y. Suppl. 120.

Expenses of operating cotton press.— If the mortgagee allows the mortgagor to retain possession and use of the mortgaged lands, and operate a cotton press on the premises, the former is not liable for expenses incurred by the latter on his own credit for such operation. McCauley *v.* Hagan, 6 Rob. (La.) 359.

90. *Colorado.*— Fassett *v.* Mulock, 5 Colo. 466.

Illinois.— Powell *v.* Jeffries, 5 Ill. 387.

Iowa.— Stimpson *v.* Pease, 53 Iowa 572, 5 N. W. 760; Davis *v.* Rogers, 28 Iowa 413.

Kentucky.— Crow *v.* Tinsley, 6 Dana 402.

Maine.— Thompson *v.* Chandler, 7 Me. 377.

Missouri.— Wilson *v.* Vanstone, 112 Mo. 315, 20 S. W. 612.

New Hampshire.— Bennett *v.* Cutler, 44 N. H. 69; Blake *v.* Williams, 36 N. H. 39.

South Carolina.— Navassa Guano Co. *v.* Richardson, 26 S. C. 401, 2 S. E. 307.

Texas.— Silliman *v.* Gammage, 55 Tex. 365.

England.— Garnett *v.* Armstrong, 2 C. & L. 458, 4 Dr. & War. 82, 5 Ir. Eq. 533.

See 35 Cent. Dig. tit. "Mortgages," § 812.

Equity of redemption worthless.— The mortgagee may show that his debt was equal to the value of the property, and therefore the equity of redemption worthless, so that his acquisition of the whole title can work no prejudice to the holders of junior liens. Yates *v.* Mead, 68 Miss. 787, 10 So. 75.

Purchase at foreclosure sale.— A mortgagee who forecloses and buys the mortgagor's title at the foreclosure sale becomes the owner of the premises, and is not liable to account to a junior mortgagee for the rents and profits. Gault *v.* Equitable Trust Co., 100 Ky. 578, 38 S. W. 1065, 18 Ky. L. Rep. 1038.

Bankruptcy sale.— It is competent for a court of bankruptcy to order and approve a sale and conveyance of mortgaged property, by the assignee in bankruptcy, to the holder of the mortgage in discharge of his claims; but such sale will not divest either prior or subsequent liens, where the lien-holders were not made parties to the proceeding. Stimpson *v.* Pease, 53 Iowa 572, 5 N. W. 760. And see Ray *v.* Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116.

Subsequent attachment.— To make a deed of the equity of redemption of the grantor in real estate available against an attaching creditor of the grantor, proof of the registry of the deed or notice to the attaching creditor, before his attachment, of the existence of the deed, must appear. Slocum *v.* Catlin, 22 Vt. 137.

But on the other hand he does not thereby lose his priority over subsequent judgment or mortgage liens, if it is his intention and interest to keep his own security alive for that purpose,[91] unless, in the deed which he receives, he expressly assumes the payment of other liens on the property, in which case his undertaking may be enforced by the other claimants.[92]

f. Setting Aside Conveyance. A conveyance of the equity of redemption to the mortgagee may be set aside for fraud or oppression practised in its procurement, at the instance of the mortgagor[93] or his assignee in bankruptcy,[94] or at the suit of joint mortgagors, provided they both join in the application, although not at the instance of one only where the other opposes it,[95] or on the application of the mortgagee, when he shows fraud or deceit practised on him.[96] Where such an application is granted, the mortgagee is remitted to his rights under the mortgage, which are not lost or impaired.[97]

2. Merger and Extinguishment — a. In General. Under the rules of law, the ordinary consequence of the purchase or acquisition of the equity of redemption in mortgaged premises by the mortgagee is to merge the two estates, vest the mortgagee with the complete title, and put an end to his rights or title under the mortgage.[98] But to this end it is necessary that, holding the mortgage already,

Invalid junior lien.— Where plaintiff held a mortgage on a piece of land in payment of a valid debt owing to her by her husband, and the land was afterward given to her by her husband, it was held that she took the land free from a junior mortgage which she might have disregarded in enforcing her rights. Perret *v.* Sanarens, 26 La. Ann. 593.

91. See Fitts *v.* Davis, 42 Ill. 391; Adams *v.* Angell, 5 Ch. D. 634, 46 L. J. Ch. 352, 36 L. T. Rep. N. S. 334; Hayden *v.* Kirkpatrick, 34 Beav. 645, 11 Jur. N. S. 836, 13 L. T. Rep. N. S. 56, 13 Wkly. Rep. 1010, 55 Eng. Reprint 784. And see *infra*, XVII, G, 2, f.

92. Thurman *v.* Stoddard, 63 Ala. 336; Huebsch *v.* Scheel, 81 Ill. 281; Head *v.* Thompson, 77 Iowa 263, 42 N. W. 188; Brown *v.* Stead, 5 Sim. 535, 2 L. J. Ch. 45, 9 Eng. Ch. 535, 58 Eng. Reprint 439.

93. See *supra*, XVII, G, 1, a.

94. Ford *v.* Olden, L. R. 3 Eq. 461, 36 L. J. Ch. 651, 15 L. T. Rep. N. S. 558.

95. Humphrey *v.* Norris, 7 S. W. 888, 10 Ky. L. Rep. 8.

96. Horton *v.* Handvil, 41 N. J. Eq. 57, 3 Atl. 72; Hawkins *v.* British, etc., Mortg. Co., 84 Fed. 526, 28 C. C. A. 484; Roddy *v.* Williams, 3 J. & L. 1.

97. Lebanon First Nat. Bank *v.* Essex, 84 Ind. 144; Chaffe *v.* Morgan, 30 La. Ann. 1307.

98. *Georgia.*— Jackson *v.* Tift, 15 Ga. 557.

Illinois.— Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Ernst *v.* McChesney, 186 Ill. 617, 58 N. E. 399; Coryell *v.* Klehm, 157 Ill. 462, 41 N. E. 864; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Fowler *v.* Fay, 62 Ill. 375; Lilly *v.* Palmer, 51 Ill. 331; Weiner *v.* Heintz, 17 Ill. 259.

Indiana.— Poulson *v.* Simmons, 126 Ind. 227, 26 N. E. 152; Thomas *v.* Simmons, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381.

Iowa.— Wilhelmi *v.* Leonard, 13 Iowa 330.

Louisiana.— Raymond *v.* Palmer, 47 La. Ann. 786, 17 So. 312; Clarke *v.* Peak, 15 La. Ann. 407.

Maine.— Marston *v.* Marston, 45 Me. 412.

Massachusetts.— Pearson *v.* Bailey, 180 Mass. 229, 62 N. E. 265; Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Nelson *v.* Ferris, 30 Mich. 497; Snyder *v.* Snyder, 6 Mich. 470; Graydon *v.* Church, 4 Mich. 646; Mason *v.* Payne, Walk. 459.

New Hampshire.— See Drew *v.* Rust, 36 N. H. 335.

New Jersey.— Eldridge *v.* Eldridge, 14 N. J. Eq. 195.

New York.— Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402; Hull *v.* Cronk, 55 N. Y. App. Div. 83, 67 N. Y. Suppl. 54; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475. See also Sherow *v.* Livingston, 22 N. Y. App. Div. 530, 48 N. Y. Suppl. 269.

Ohio.— Jennings *v.* Wood, 20 Ohio 261.

Pennsylvania.— Dull's Estate, 137 Pa. St. 116, 20 Atl. 419; Bender *v.* Siegel, 1 Lehigh Val. L. Rep. 62.

South Carolina.— Bleckeley *v.* Branyan, 26 S. C. 424, 2 S. E. 319; Taylor *v.* Stockdale, 3 McCord 302.

Vermont.— Harvey *v.* Hurlburt, 3 Vt. 561.

Washington.— Chase Nat. Bank *v.* Hastings, 20 Wash. 433, 55 Pac. 574.

Wisconsin.— Clark *v.* Clark, 76 Wis. 306, 45 N. W. 121; Crane *v.* Aultman-Taylor Co., 61 Wis. 110, 20 N. W. 673.

United States.— Hill *v.* Smith, 12 Fed. Cas. No. 6,499, 2 McLean 446.

Canada.— North of Scotland Mortg. Co. *v.* Udell, 46 U. C. Q. B. 511.

See 35 Cent. Dig. tit. "Mortgages," § 815.

See, however, Boardman *v.* Larrabee, 51 Conn. 39; Lockwood *v.* Sturdevant, 6 Conn. 373.

If the assignee of a mortgage purchases the equity of redemption, this is not such a merger of the legal and equitable estate as to prevent him from maintaining ejectment against the mortgagor on the mortgage. Den *v.* Vanness, 10 N. J. L. 102. And see Porter *v.* Millet, 9 Mass. 101.

Indemnity mortgage.— Where a borrower executes a trust deed for his surety on the

he should acquire nothing less than the complete legal title in fee,[99] and that the two estates or interests should unite in the same person in the same right.[1] Further, this rule is not invariably applied in equity, but may be disregarded and the fusion of the two estates prevented when, in the particular case, this is required by justice, the well established principles of equity, or the intention of the parties,[2] the mortgagee having an election in equity to prevent a merger and keep the mortgage alive.[3]

b. Extinguishment of Right of Redemption. The conveyance of the mortgaged premises to the mortgagee, whether in satisfaction of the debt or for an additional price paid, extinguishes all right or equity of redemption on the part of the mortgagor, as effectually as if there had been a foreclosure,[4] provided it was fair and honest; but if there were circumstances of fraud, deceit, or oppression, equity will still give the mortgagor a right to redeem on such terms as may be just.[5]

c. Merger or Extinguishment of Debt. A reciprocal consequence of the

note to the lender, to indemnify the surety against loss, and afterward executes a deed absolute in form of the same premises to such surety to secure him for going on the grantor's bond, the lien of the trust deed is not merged in the title conveyed by such subsequent deed. Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429.

Estoppel to claim merger.— The assignee of a mortgage, having purchased the premises and assumed its payment, afterward representing it to be valid and transferring it as such to a purchaser in good faith without notice of any defects, is estopped as against such purchaser to insist on the fact of the payment of the mortgage debt, or to claim that the mortgage title was merged in the fee. Graves *v.* Rogers, 59 N. H. 452.

The record of deeds does not impart notice of a merger, which depends on the intention of the parties or other extrinsic facts; and if any one takes a conveyance of premises on the assumption that a former mortgage to his grantor has been merged in a subsequent conveyance of the fee, he does so at his own peril. Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,556, 5 Sawy. 336.

Mortgage fraudulent as to creditors.— A mortgage is not lost by a subsequent conveyance of the premises by the mortgagor to the mortgagee which was in fraud of the former's creditors. Lebanon First Nat. Bank *v.* Essex, 84 Ind. 144.

99. Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227; Chase *v.* Van Meter, 140 Ind. 321, 39 N. E. 455 (no merger results where the mortgagee acquires an incomplete equitable title to the land mortgaged); Powers *v.* Patten, 71 Me. 583 (no merger by a lease for life to the mortgagee).

1. Bush *v.* Herring, 113 Iowa 158, 84 N. W. 1036; Butler *v.* Ives, 139 Mass. 202, 29 N. E. 654; Rowse *v.* Johnson, 66 Mo. App. 57; Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469.

2. *Maine.*— Crosby *v.* Chase, 17 Me. 369.
Maryland.— Polk *v.* Reynolds, 31 Md. 106.
Massachusetts.— Tucker *v.* Crowley, 127 Mass. 400.
Michigan.— Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261; Snyder *v.* Snyder, 6 Mich. 470.
Nebraska.— Wyatt-Bullard Lumber Co. *v.* Bourke, 55 Nebr. 9, 75 N. W. 241.
New York.— Townsend *v.* Provident Realty Co., 110 N. Y. App. Div. 226, 96 N. Y. Suppl. 1091.
Vermont.— Gleason *v.* Carpenter, 74 Vt. 399, 52 Atl. 966.
Canada.— Pegg *v.* Hobson, 14 Ont. 272; Henry *v.* Low, 9 Grant Ch. (U. C.) 265.
See 35 Cent. Dig. tit. "Mortgages," § 815. And see *infra*, XVII, G, 2, d.

3. New Jersey Ins. Co. *v.* Meeker, 40 N. J. L. 18; Silliman *v.* Gammage, 55 Tex. 365.

4. *Illinois.*—Goodell *v.* Dewey, 100 Ill. 308; Roberts *v.* Fleming, 53 Ill. 196.
Maryland.— Sheckell *v.* Hopkins, 2 Md. Ch. 89.
New York.— Farmers' F. Ins., etc., Co. *v.* Edwards, 26 Wend. 541.
Ohio.— Marshall *v.* Stewart, 17 Ohio 356.
Tennessee.— Wallen *v.* Huff, 5 Humphr. 91.
Texas.— Harris *v.* Masterson, 91 Tex. 171, 41 S. W. 482.
United States.— Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531.
See 35 Cent. Dig. tit. "Mortgages," § 816.

The common-law rule was that an equity of redemption could be cut off only by a foreclosure in equity. But this does not now prevail generally. When the mortgagee acquires the mortgagor's title, either by conveyance from him, or by causing the premises to be sold on execution under a judgment recovered for the amount of the mortgage debt, and buying the same and taking a sheriff's deed, he acquires the equity of redemption, which unites with his estate under the mortgage and gives him the absolute title. Cottingham *v.* Springer, 88 Ill. 90.

Right of grantee of timber.—A grantee, under a duly recorded deed, of the trees standing on the mortgaged land is not prejudiced in his right to redeem from the mortgage by the fact that the mortgagee, subsequent to such deed, took a deed of the land from the mortgagor. Rothschild *v.* Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

5. Noble *v.* Graham, 140 Ala. 413, 37 So. 230; Brown *v.* Gaffney, 28 Ill. 149; Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

mortgagee's purchase of the equity of redemption is that the mortgage debt is extinguished, and no longer subsists either as a lien on the premises or as a personal obligation of the mortgagor.[6] If the mortgagee acquires only a portion of the mortgaged premises, the debt will ordinarily be satisfied *pro tanto*, but the residue of it may be enforced against the remainder of the property;[7] and if the holder of one of several bonds secured by the mortgage acquires the whole property, his bond is satisfied, although the mortgage will continue as security for the holders of the other bonds.[8]

d. Intent of Parties — (1) *As Determining Question of Merger.* The technical doctrine of merger will not be applied contrary to the agreement or the express or implied intention of the parties; and therefore, in equity, there will be no merger of estates when a mortgagee receives a conveyance of the equity of redemption, when such a result would be contrary to his real intention in the transaction or to the bargain made by the parties at the time.[9] This is the case

6. *Connecticut.*—Bassett *v.* Mason, 18 Conn. 131.

Illinois.— Lilly *v.* Palmer, 51 Ill. 331.

Indiana.— Shirk *v.* Whitten, 131 Ind. 455, 31 N. E. 87.

Iowa.— Fouche *v.* Delk, 83 Iowa 297, 48 N. W. 1078; Massachusetts L. & T. Co. *v.* Moulton, 81 Iowa 155, 46 N. W. 978.

Minnesota.— Milnor *v.* Home Sav., etc., Assoc., 64 Minn. 500, 67 N. W. 346; National Inv. Co. *v.* Nordin, 50 Minn. 336, 52 N. W. 899.

New York.— Burnet *v.* Denniston, 5 Johns. Ch. 35.

Pennsylvania.— Cock *v.* Bailey, 146 Pa. St. 328, 23 Atl. 370.

Wisconsin.— Webb *v.* Meloy, 32 Wis. 319.

Canada.— Finlayson *v.* Mills, 11 Grant Ch. (U. C.) 218; Woodruff *v.* Mills, 20 U. C. Q. B. 51.

See 35 Cent. Dig. tit. "Mortgages," § 817.

Contra.—Cattel *v.* Warwick, 6 N. J. L. 190.

Void judicial sale.— Where the mortgagee recovers judgment on the mortgage note, levies on the mortgaged premises, and takes a deed of the same in satisfaction, in ignorance of the fact that the mortgagor had previously conveyed the property to a third person, the debt is not thereby extinguished, as he gets no title to the land. Hollister *v.* Dillon, 4 Ohio St. 197.

Sale subject to mortgage.— Where the mortgagor's trustee in insolvency sells the property, giving public notice at the sale that it is made subject to the mortgage, and the mortgagee buys it for a price less than the mortgage debt, such debt is not thereby satisfied and extinguished. Post *v.* Tradesmen's Bank, 28 Conn. 420.

Release of equity under collateral mortgage.— Where a mortgagee assigned the mortgage to secure his note, and afterward mortgaged his own land for further security, and then released the equity in the last-mentioned land to the party holding his note and the mortgages, it was held that the original mortgagor had no right to raise the question of the merger and extinguishment of the note. Simpson *v.* Hall, 47 Conn. 417.

Trustee in deed of trust.— Where a deed of trust was given by a partner on his individual property to secure a firm debt and a claim of the trustee, in the order named, and the firm creditor refused to accept the security, but assigned his claim to the trustee, in his individual capacity, such claim will not be held to have been satisfied merely because he was at the same time in possession of the property covered by the deed of trust, he not having exercised his power to sell thereunder till after he had reduced the claim to judgment and assigned it. McDonald *v.* Meek, 57 Mo. App. 254.

7. Hull *v.* Young, 29 S. C. 64, 6 S. E. 938; Trimmier *v.* Vise, 17 S. C. 499, 43 Am. Rep. 624.

8. Stevenson *v.* Black, 1 N. J. Eq. 338.

9. *Alabama.*— Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

Connecticut.— Goodwin *v.* Keney, 47 Conn. 486.

Georgia.—Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347; Knowles *v.* Lawton, 18 Ga. 476, 63 Am. Dec. 290.

Illinois.— Security Title, etc., Co. *v.* Schlender, 190 Ill. 609, 60 N. E. 854; Farrand *v.* Long, 184 Ill. 100, 56 N. E. 313; Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Goodell *v.* Dewey, 100 Ill. 308; Ætna L. Ins. Co. *v.* Corn, 89 Ill. 170; Shaver *v.* Williams, 87 Ill. 469; Dunphy *v.* Riddle, 86 Ill. 22; Huebsch *v.* Scheel, 81 Ill. 281; Fowler *v.* Fay, 62 Ill. 375; Ennor *v.* Thompson, 46 Ill. 214; Edgerton *v.* Young, 43 Ill. 464; Cole *v.* Beale, 89 Ill. App. 426.

Indiana.— McCrory *v.* Little, 136 Ind. 86, 35 N. E. 836.

Iowa.— McElhaney *v.* Shoemaker, 76 Iowa 416, 41 N. W. 58; Smith *v.* Swan, 69 Iowa. 412, 29 N. W. 402; Pike *v.* Gleason, 60 Iowa 150, 14 N. W. 210; Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606; Shimer *v.* Hammond, 51 Iowa 401, 1 N. W. 656; Lyon *v.* McIlvaine, 24 Iowa 9.

Kansas.— Shattuck *v.* Belknap Sav. Bank, 63 Kan. 443, 65 Pac. 643.

Massachusetts.— Aldrich *v.* Blake, 134 Mass. 582.

Michigan.— Quick *v.* Raymond, 116 Mich. 15, 74 N. W. 189; Tower *v.* Divine, 37 Mich. 443. *Compare* Ann Arbor Sav. Bank *v.* Webb, 56 Mich. 377, 23 N. W. 51, holding that a

where the mortgagee means to keep the security alive for his own protection as against other liens or encumbrances,[10] and also where the conveyance is not intended by the parties to be in satisfaction of the mortgage debt, but only as additional security for it.[11]

(II) *Evidence as to Intent.* The question whether or not the parties intended that a merger of estates should take place is a question of fact. It is not settled by the mere recording of the deed.[12] But the intention that there should be no merger may be shown by a stipulation in the deed or other express declaration of the parties,[13] or the fact that the mortgagee does not cancel or surrender the evidences of the debt or release the mortgage, but on the contrary retains them,[14] or that he assigns the mortgage to a *bona fide* purchaser, representing it as a good and valid security.[15] On the other hand, if he assumes to

mortgage was not merged in the legal title, to the destruction of the lien of the assignor, a woman without counsel, who was induced to believe that the transfer would not have that effect.

Minnesota.— Flanigan *v.* Sable, 44 Minn. 417, 46 N. W. 854.

Nebraska.— Ames *v.* Miller, 65 Nebr. 204, 91 N. W. 250.

New Hampshire.— Stantons *v.* Thompson, 49 N. H. 272; Hutchins *v.* Carleton, 19 N. H. 487.

New Jersey.— Harron *v.* Du Bois, 64 N. J. Eq. 657, 54 Atl. 857; Gore *v.* Brian, (Ch. 1896) 35 Atl. 897; Lockard *v.* Joines, (Ch. 1892) 23 Atl. 1075; Andrus *v.* Vreeland, 29 N. J. Eq. 394; Clos *v.* Boppe, 23 N. J. Eq. 270.

New York.— Hubbell *v.* Blakeslee, 71 N. Y. 63; Clift *v.* White, 12 N. Y. 519; Clements *v.* Griswold, 46 Hun 377; Van Nest *v.* Latson, 19 Barb. 604. Where a mortgagor of realty conveyed the premises to the mortgagee, the deed providing that the mortgage was not to be considered as merged in the title, but was to be "held as protection to title," the provision should be construed as intended only to protect the grantee against such liens or charges on the title as intervened between the time of the execution of the mortgage to him and the time of the execution of the deed, and it cannot prevent a merger of the mortgage in the fee where there were no such liens. Coon *v.* Smith, 43 Misc. 112, 88 N. Y. Suppl. 261.

Pennsylvania.— Continental Title, etc., Co. *v.* Devlin, 209 Pa. St. 380, 58 Atl. 843; Carrow *v.* Headley, 155 Pa. St. 96, 25 Atl. 889; Bryar's Appeal, 111 Pa. St. 81, 2 Atl. 344; Sellers *v.* Montgomery, 2 Pa. Dist. 551.

South Carolina.— Glenn *v.* Rudd, 68 S. C. 102, 46 S. E. 555, 102 Am. St. Rep. 659.

Texas.— C. M. Hapgood Shoe Co. *v.* Crockett First Nat. Bank, 23 Tex. Civ. App. 506, 56 S. W. 995.

Vermont.—Belknap *v.* Dennison, 61 Vt. 520, 17 Atl. 738.

Washington.— Woodhurst *v.* Cramer, 29 Wash. 40, 69 Pac. 501; Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147.

Wisconsin.— Gilchrist *v.* Foxen, 95 Wis. 428, 70 N. W. 585; Scott *v.* Webster, 44 Wis. 185.

England.— Liquidation Estates Purchase Co. *v.* Willoughby, [1898] A. C. 321, 67 L. J. Ch. 251, 78 L. T. Rep. N. S. 329, 46 Wkly. Rep. 589; Gifford *v.* Fitzhardinge, [1899] 2 Ch. 32, 68 L. J. Ch. 529, 81 L. T. Rep. N. S. 106, 47 Wkly. Rep. 618.

Canada.— *In re* Major, 5 Brit. Col. 244; Macdonald *v.* Bullivant, 10 Ont. App. 582; Brown *v.* McLean, 18 Ont. 533; Cameron *v.* Gibson, 17 Ont. 233; Hart *v.* McQuesten, 22 Grant Ch. (U. C.) 133; Barker *v.* Eccles, 18 Grant Ch. (U. C.) 440; Finlayson *v.* Mills, 11 Grant Ch. (U. C. 218; North of Scotland Mortg. Co. *v.* German, 31 U. C. C. P. 349; Haar *v.* Henley, 18 U. C. Q. B. 494.

See 35 Cent. Dig. tit. "Mortgages," § 819.

10. See *infra*, XVII, G, 2, f.

11. Huebsch *v.* Scheel, 81 Ill. 281.

12. Chase *v.* Van Meter, 140 Ind. 321, 39 N. E. 455.

13. *Indiana.*— Chase *v.* Van Meter, 140 Ind. 321, 39 N. E. 455.

Louisiana.— Clarke *v.* Peak, 15 La. Ann. 407.

Nebraska.— Chappell *v.* Smith, 50 Nebr. 116, 69 N. W. 748; Mathews *v.* Jones, 47 Nebr. 616, 66 N. W. 622.

New York.— Abbott *v.* Curran, 98 N. Y. 665; Spencer *v.* Ayrault, 10 N. Y. 202; Parker *v.* Loring, 10 N. Y. St. 354. A declaration by a mortgagee, who had purchased the equity of redemption, that he was the absolute owner and that he could give a perfect title, was held to be no evidence of an intention on his part that the mortgage should merge in the fee. James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475.

South Carolina.— Agnew *v.* Charlotte, etc., R. Co., 24 S. C. 18, 58 Am. Rep. 237.

See 35 Cent. Dig. tit. "Mortgages," § 820.

14. *Georgia.*— Coleman, etc., Co. *v.* Rice, 115 Ga. 510, 42 S. E. 5.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Dunphy *v.* Riddle, 86 Ill. 22.

Iowa.— Linscott *v.* Lamart, 46 Iowa 312.

Michigan.— Gibbs *v.* Johnson, 104 Mich. 120, 62 N. W. 145.

Nebraska.— Peterborough Sav. Bank *v.* Pierce, 54 Nebr. 712, 75 N. W. 20.

New Hampshire.— Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685.

New Jersey.— Hoppock *v.* Ramsey, 28 N. J. Eq. 413.

South Carolina.—See Bleckeley *v.* Branyan, 26 S. C. 424, 2 S. E. 319.

See 35 Cent. Dig. tit. "Mortgages," § 820.

15. *Connecticut.*— Goodwin *v.* Keney, 47 Conn. 486.

deal with the estate as absolute owner, and conveys it to another, it proves a merger.[16] In the absence of any such proof, the question must be determined by a preponderance of the evidence presented.[17]

e. Interest of Parties as Determining Question. There will be no merger of estates where such a result would be productive of injustice to the mortgagee, or injurious to his interests, by depriving him of his rights which he could claim and exercise by keeping the two estates distinct;[18] for, the result depending on his intention in the matter, if there is no proof of what such intention was, the law will presume that he intended what would best accord with his interests, and therefore will prevent a merger, in accordance with such presumed intention.[19] But if there is no evidence of intention, and it appears to be a matter of entire indifference to the mortgagee whether there is a merger or not, then equity will follow the rule at law and a merger will be held to have taken place.[20]

f. Effect of Other Liens or Encumbrances. Where a mortgagee receives a conveyance of the equity of redemption, his estate under the mortgage will not

Illinois.— Cole *v.* Beale, 89 Ill. App. 426.
Nebraska.— Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.
New York.— James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475.
United States.— Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,557, 6 Sawy. 52.
See 35 Cent. Dig. tit. "Mortgages," § 820.

16. Ames *v.* Miller, 65 Nebr. 204, 91 N. W. 250.

17. McKinnis *v.* Estes, 81 Iowa 749, 46 N. W. 987; Wyatt-Bullard Lumber Co. *v.* Bourke, 55 Nebr. 9, 75 N. W. 241.

18. *Alabama.*— Gresham *v.* Ware, 79 Ala. 192.
Connecticut.— Boardman *v.* Larrabee, 51 Conn. 39.
Illinois.— Farrand *v.* Long, 184 Ill. 100, 56 N. E. 313; Coryell *v.* Klehm, 157 Ill. 462, 41 N. E. 864; Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192; Lowman *v.* Lowman, 118 Ill. 582, 9 N. E. 245 [*affirming* 19 Ill. App. 481]; International Bank *v.* Wilkshire, 108 Ill. 143; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Richardson *v.* Hockenhull, 85 Ill. 124; Mann *v.* Mann, 49 Ill. App. 472.
Indiana.— Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782.
Iowa.— Gray *v.* Nelson, 77 Iowa 63, 41 N. W. 566; Colby *v.* McOmber, 71 Iowa 469, 32 N. W. 459; Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 541, 3 N. W. 547; Wickersham *v.* Reeves, 1 Iowa 413.
Kansas.— Fort Scott Bldg., etc., Assoc. *v.* Palatine Ins. Co., (1906) 86 Pac. 142.
Maine.—Holden *v.* Pike, 24 Me. 427; Campbell *v.* Knights, 24 Me. 332; Hatch *v.* Kimball, 14 Me. 9.
Massachusetts.— Keith *v.* Wheeler, 159 Mass. 161, 34 N. E. 174.
Missouri.— Hayden *v.* Lauffenburger, 157 Mo. 88, 57 S. W. 721; Walker *v.* Goodsill, 54 Mo. App. 631.
New Hampshire.— Stantons *v.* Thompson, 49 N. H. 272.
New Jersey.— Johnson *v.* Dubel, (Ch. 1886) 3 Atl. 705; Van Wagenen *v.* Brown, 26 N. J. L. 196.
New York.— Brockway *v.* Tayntor, 5 N. Y. St. 73; Vanderkemp *v.* Shelton, 11 Paige 28. See also Smith *v.* Smith, 1 N. Y. Suppl. 835.
Ohio.— Bell *v.* Tenny, 29 Ohio St. 240; Hulshoff *v.* Bowman, 19 Ohio Cir. Ct. 554, 10 Ohio Cir. Dec. 343.
Oregon.— Watson *v.* Dundee Mortg., etc., Co., 12 Oreg. 474, 8 Pac. 548.
Pennsylvania.— See Equitable Bldg., etc., Assoc. *v.* Thomas, 37 Pittsb. Leg. J. 5.
Vermont.— Slocum *v.* Catlin, 22 Vt. 137; Marshall *v.* Wood, 5 Vt. 250.
Wisconsin.— Morgan *v.* Hammett, 34 Wis. 512.
United States.— Factors, etc., Ins. Co. *v.* Murphy, 111 U. S. 738, 4 S. Ct. 679, 28 L. ed. 582.
Canada.— North of Scotland Mortg. Co. *v.* German, 31 U. C. C. P. 349.
See 35 Cent. Dig. tit. "Mortgages," § 818.

19. *Connecticut.*—Delaware, etc., Canal Co. *v.* Bonnell, 46 Conn. 9; Mallory *v.* Hitchcock, 29 Conn. 127.
Illinois.— Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Meacham *v.* Steele, 93 Ill. 135; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Dunphy *v.* Riddle, 86 Ill. 22; Edgerton *v.* Young, 43 Ill. 464; Sprague *v.* Beamer, 45 Ill. App. 17.
Iowa.— Patterson *v.* Mills, 69 Iowa 755, 28 N. W. 53; Smith *v.* Swan, 69 Iowa 412, 29 N. W. 402; Woodward *v.* Davis, 53 Iowa 694, 6 N. W. 74. But *compare* Beacham *v.* Gurney, 91 Iowa 621, 60 N. W. 187.
Maine.— Freeman *v.* Paul, 3 Me. 260, 14 Am. Dec. 237.
Nebraska.— Oak Creek Valley Bank *v.* Helmer, 59 Nebr. 176, 80 N. W. 891.
New Jersey.— Andrus *v.* Vreeland, 29 N. J. Eq. 394; Hinchman *v.* Emans, 1 N. J. Eq. 100.
Oregon.— Watson *v.* Dundee Mortg., etc., Co., 12 Oreg. 474, 8 Pac. 548; Besser *v.* Hawthorn, 3 Oreg. 129.
Rhode Island.— Knowles *v.* Carpenter, 8 R. I. 548.
See 35 Cent. Dig. tit. "Mortgages," § 818.

20. Jarvis *v.* Frink, 14 Ill. 396; Campbell *v.* Carter, 14 Ill. 286; Freeman *v.* Paul, 3 Me. 260, 14 Am. Dec. 237.

merge, but will be kept alive to enable him to defend under it against liens of third persons, whether by mortgage, judgment, or otherwise, attaching between the execution of the mortgage and the giving of the deed, if his intention to that effect is shown, or if there is nothing to rebut the presumption that his intention corresponded with his interest;[21] and if he was ignorant of the existence of such intervening liens or encumbrances a merger will be prevented, on the theory that his interests require it, and that he could not have intended to extinguish his mortgage rights if he had known of the other liens.[22]

g. Sufficiency of Conveyance to Effect Merger. A conveyance of the equity of redemption to the mortgagee does not effect a merger if the deed, although duly executed and even recorded, is repudiated or never accepted by the mortgagee,[23] or if it is radically defective,[24] or made by a person having no authority

21. *Arkansas.*— Cohn *v.* Hoffman, 45 Ark. 376.

California.— Hines *v.* Ward, 121 Cal. 115, 53 Pac. 427; Davis *v.* Randall, 117 Cal. 12, 48 Pac. 906; Scrivner *v.* Dietz, 84 Cal. 295, 24 Pac. 171; Matzen *v.* Schaeffer, 65 Cal. 81, 3 Pac. 92; Brooks *v.* Rice, 56 Cal. 428.

Connecticut.— Baldwin *v.* Norton, 2 Conn. 161; Hoyt *v.* Dimon, 5 Day 479.

Illinois.— Lowman *v.* Lowman, 118 Ill. 582, 9 N. E. 245; Rogers *v.* Herron, 92 Ill. 583; Richardson *v.* Hockenhull, 85 Ill. 124; Fowler *v.* Fay, 62 Ill. 375.

Indiana.— Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Jewett *v.* Tomlinson, 137 Ind. 326, 36 N. E. 1106; Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782.

Iowa.— Kilmer *v.* Hannifan, 113 Iowa 281, 85 N. W. 16; Smith *v.* Swan, 69 Iowa 412, 29 N. W. 402; Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293. But *compare* Byington *v.* Fountain, 61 Iowa 512, 14 N. W. 220, 16 N. W. 534.

Louisiana.— Millaudon *v.* Allard, 2 La. 547.

Massachusetts.— New England Jewelry Co. *v.* Merriam, 2 Allen 390.

Michigan.— Dickerson *v.* Uhl, 71 Mich. 398, 39 N. W. 472.

Missouri.— Seiberling *v.* Tipton, 113 Mo. 373, 21 S. W. 4; Wilson *v.* Vanstone, 112 Mo. 315, 20 S. W. 612; Collins *v.* Stocking, 98 Mo. 290, 11 S. W. 750.

Nebraska.— Topliff *v.* Richardson, (1906) 107 N. W. 114; Oak Creek Valley Bank *v.* Helmer, 59 Nebr. 176, 80 N. W. 891; Miller *v.* Finn, 1 Nebr. 254.

Nevada.— Grellet *v.* Heilshorn, 4 Nev. 526.

New Jersey.— Mulford *v.* Peterson, 35 N. J. L. 127.

Ohio.— Bell *v.* Tenny, 29 Ohio St. 240.

Oregon.— Katz *v.* Obenchain, (1906) 85 Pac. 617.

South Carolina.— Kennedy *v.* Roundtree, 63 S. C. 395, 41 S. E. 477; Lipscomb *v.* Goode, 57 S. C. 182, 35 S. E. 493.

Vermont.— Gleason *v.* Carpenter, 74 Vt. 399, 52 Atl. 966; Belknap *v.* Dennison, 61 Vt. 520, 17 Atl. 738.

Washington.—Hitchcock *v.* Nixon, 16 Wash. 281, 47 Pac. 412.

Canada.— Weaver *v.* Vandusen, 27 Grant Ch. (U. C.) 477; Beaty *v.* Gooderham, 13 Grant Ch. (U. C.) 317; Elliot *v.* Jayne, 11 Grant Ch. (U. C.) 412. But see Emmons *v.* Crooks, 1 Grant Ch. (U. C.) 159.

See 35 Cent. Dig. tit. "Mortgages," § 821.

Mechanic's lien.— Where a mortgagor conveys the premises by quitclaim deed to the mortgagee in satisfaction of the mortgage debt, the lien of the mortgage is not merged in the fee so as to let in a mechanic's lien for material furnished under a contract made after the mortgage was recorded. Coburn *v.* Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218.

Intervening rights of federal government.— Where a distillery is placed on mortgaged lands with the mortgagor's knowledge and consent, in violation of the internal revenue law, it operates as a statutory conveyance to the United States of the mortgagor's title; and his subsequent deed of the land to the mortgagee will pass no title as against the intervening right of the United States, nor does it have the effect of merging the mortgage and the equity of redemption in one estate. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555.

Assumption of junior mortgage.— If the owner of land subject to two mortgages, made by his predecessors in title, conveys it, reserving an easement therein, to the first mortgagee, by a warranty deed, wherein the grantee assumes and agrees to pay both mortgages, the first mortgage is extinguishd. Knecland *v.* Moore, 138 Mass. 198.

22. Rumpp *v.* Gerkens, 59 Cal. 496; Troost *v.* Davis, 31 Ind. 34; Gray *v.* Nelson, 77 Iowa 63, 41 N. W. 566. See also Howard *v.* Clark, 71 Vt. 424, 45 Atl. 1042, 76 Am. St. Rep. 782.

23. Cook *v.* Foster, 96 Mich. 610, 55 N. W. 1019; Longstreet *v.* Shipman, 5 N. J. Eq. 43; Bredenberg *v.* Landrum, 32 S. C. 215, 10 S. E. 956.

24. Crosby *v.* Taylor, 15 Gray (Mass.) 64, 77 Am. Dec. 352 (deed fraudulent as to creditors); Zarkowski *v.* Schroeder, 71 N. Y. App. Div. 526, 75 N. Y. Suppl. 1021 (defective conveyance by mortgagor's executor). But see Lasselle *v.* Barnett, 1 Blackf. (Ind.) 150, 12 Am. Dec. 217, holding that, where land is conveyed in satisfaction of a mortgage and the conveyance proves defective, so that no title passes, the defect constitutes a new demand, which may support a new mortgage, but cannot revive the old mortgage without the consent of the mortgagor, nor

to execute it, not being invested with the title or not having the right to convey.[25]

h. Nature of Transfer. A merger of estates may be effected by the mortgagee's acquisition of the title, not only by deed in fee from the mortgagor, but also by his buying in the outstanding interests of joint owners or heirs,[26] or by his purchase at a tax-sale,[27] sheriff's sale on execution,[28] or foreclosure sale,[29] or at a public sale by the mortgagor's administrator[30] or his assignee in bankruptcy or insolvency,[31] or a sale otherwise judicially ordered.[32] But this result does not follow when the deed to the mortgagee is coupled with such conditions or agreements as show that it was not intended to convey the absolute title,[33] or when he has acquired possession of property covered by his mortgage in a tortious or unlawful manner.[34]

i. Value of Property. Where the equity of redemption acquired by the mortgagee is of value equal to or greater than the amount of the mortgage debt, there will ordinarily be a merger and extinguishment of the mortgage;[35] but if it is of less value there will be no merger, unless the equities of the particular

even with his consent, to the prejudice of a subsequent mortgagee.

25. Williams *v.* Brownlee, 101 Mo. 309, 13 S. W. 1049; Denn *v.* Wynkoop, 8 Johns. (N. Y.) 168, mortgage executed by husband and wife on her land, and the deed to the mortgagee made by the husband alone.

26. Clark *v.* Clark, 76 Wis. 306, 45 N. W. 121.

27. *Ex p.* Powell, 68 S. C. 324, 47 S. E. 440; Devereux *v.* Taft, 20 S. C. 555.

Purchase to protect mortgage lien.— Where the purchase at tax-sale is only to protect the mortgage lien and save the property there is no merger. Jackson *v.* Relf, 26 Fla. 465, 8 So. 184. And see Smith *v.* Perkins, 10 Kan. App. 577, 63 Pac. 297; Smart *v.* Cottle, 10 Grant Ch. (U. C.) 59.

Debt also secured by a chattel mortgage.— Where the mortgagee buys the land at tax-sale, and the same debt is secured by a chattel mortgage, which has been assigned to a third party, the purchase of the mortgaged land does not satisfy the bond secured by both mortgages. Powell *v.* Patrick, 64 S. C. 190, 41 S. E. 894.

28. *Illinois.*— Biggins *v.* Brockman, 63 Ill. 316.

Indiana.— Murphy *v.* Elliott, 6 Blackf. 482.

New Jersey.— Speer *v.* Whitfield, 10 N. J. Eq. 107. See, however, Lydecker *v.* Bogert, 38 N. J. Eq. 136.

New York.— See Reed *v.* Latson, 15 Barb. 9, holding that where mortgaged premises were sold at sheriff's sale, and the sheriff's certificate was given to the purchaser, who assigned it to the mortgagee, and he assigned it to another person, to whom the deed was given, the two estates did not meet in the same person and therefore there was no merger.

Pennsylvania.— Greensburg Fuel Co. *v.* Irwin Nat. Gas Co., 162 Pa. St. 78, 29 Atl. 274; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566.

South Carolina.— McLure *v.* Wheeler, 6 Rich. Eq. 343; Schnell *v.* Schroder, Bailey Eq. 334.

Canada.— McPhelim *v.* Weldon, 10 N. Brunsw. 358; Woodruff *v.* Mills, 20 U. C. Q. B. 51.

See 35 Cent. Dig. tit. "Mortgages," § 823.

29. Belleville Sav. Bank *v.* Reis, 136 Ill. 242, 26 N. E. 646; Wilson *v.* McDowell, 78 Ill. 514; Robins *v.* Swain, 68 Ill. 197; Mines *v.* Moore, 41 Ill. 273. *Compare* Hospes *v.* Almstedt, 83 Mo. 473 (holding that a purchase by a mortgagee at a sale under a junior mortgage does not merge the mortgage, in the absence of the purchaser's intention to do so); Crombie *v.* Rosentock, 19 Abb. N. Cas. (N. Y.) 312; Mawhinney *v.* Shallcross, 10 Pa. Co. Ct. 102.

30. See Walker *v.* Baxter, 26 Vt. 710.

31. Murphy *v.* Factors', etc., Ins. Co., 33 La. Ann. 454; East Saginaw Sav. Bank *v.* Grant, 41 Mich. 101, 2 N. W. 1. *Compare* Clark *v.* Jackson, 64 N. H. 388, 11 Atl. 59.

32. Parkinson *v.* Higgins, 37 U. C. Q. B. 308, foreclosure of maritime lien under decree in admiralty.

Confiscation proceedings.— Since the confiscation of land under an act of congress (Act Cong. July 17, 1862) did not divest the fee, which remained in the owner, but passed only an estate during the life of such owner to the adjudicatee under the proceedings, where the latter was likewise a mortgage creditor, his claim as such was not lost by merger. Citizens' Bank *v.* Hyams, 42 La. Ann. 729, 7 So. 700.

33. Gresham *v.* Ware, 79 Ala. 192.

34. Palmer *v.* Burnside, 18 Fed. Cas. No. 10,685, 1 Woods 179.

35. Davis *v.* Geary, 1 Root (Conn.) 410; McClain *v.* Weise, 22 Ill. App. 272; Loomer *v.* Wheelwright, 3 Sandf. Ch. (N. Y.) 135. *Compare* Kilmer *v.* Hannifan, 113 Iowa 281, 85 N. W. 16, holding that where it appeared that premises mortgaged by heirs were sold by the administrator for the payment of debts, and purchased by the mortgagee, and there was a surplus after the debts were paid, the mortgage did not merge in the fee, there being no rights of third persons to be prejudiced thereby.

case require it;[36] but in that case, if the mortgagee retains the title, the land will satisfy the mortgage *pro tanto*.[37] Where the equity of redemption was purchased by the mortgagee after the decease of the mortgagor, the mortgage debt should be shared between the owner of the equity of redemption and the widow having dower and homestead, according to the relative value of the proportion of mortgaged property held by each.[38]

j. Conveyance to Mortgagee of Part of Property. Where the mortgagee acquires title to only a portion of the mortgaged premises, there is no merger and no extinguishment of his right to enforce the mortgage against the remainder.[39] This rule applies where the title vests in him by devise,[40] or descends to him under the intestate laws,[41] and not only where he acquires a specific portion of the property but also where he takes an undivided interest.[42] It has been held, however, that if he buys a part of the premises at a judicial sale other than on foreclosure of the mortgage, the mortgage is extinguished *pro tanto*;[43] and this may also be the case where a previous purchaser of another part of the property has an equity to look to the part acquired by the mortgagee as the primary fund for the satisfaction of the mortgage.[44]

k. Purchase by Holder of Part of Mortgage. Where the equity of redemption is conveyed to one who holds a portion of the mortgage debt, or an undivided interest therein, his interest under the mortgage will generally merge in the fee, while the land as a whole remains liable for the satisfaction of the rest of the mortgage debt,[45] unless there is an intention on the part of such purchaser, consistent with the equities of other parties concerned, to keep his portion of the mortgage alive.[46]

l. Transfer of Equity of Redemption to Agent or Cestui Que Trust. A merger does not take place unless the two estates meet in the same person in the same right, and hence does not result from the conveyance of the equity of redemption to an agent of the mortgagee,[47] or to the beneficiary of a trust deed, the legal title having been conveyed to the trustee therein.[48]

m. Transfer After Assignment of Mortgage. A conveyance of the equity of redemption to the mortgagee, after he has transferred the mortgage by an assignment in good faith to a third person, does not effect a merger or extinguish the

36. See Dickason *v.* Williams, 129 Mass. 182, 37 Am. Rep. 316.

37. Edgerton *v.* Young, 43 Ill. 464; Myers *v.* O'Neal, 130 Ind. 370, 30 N. E. 510; Spencer *v.* Hartford, 4 Wend. (N. Y.) 381.

38. Norris *v.* Morrison, 45 N. H. 490.

39. *Alabama.*— Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86, holding that a mortgagee, by the purchase of a part of the mortgaged premises, in payment of a debt not secured thereby, does not prejudice his mortgage in respect to the residue.

Illinois.— Meacham *v.* Steele, 93 Ill. 135.

Indiana.— Chase *v.* Van Meter, 140 Ind. 321, 39 N. E. 455; Haggerty *v.* Byrne, 75 Ind. 499.

Iowa.— Wilhelmi *v.* Leonard, 13 Iowa 330.

New Jersey.— Souther *v.* Pearson, (Ch. 1894) 28 Atl. 450.

New York.— Sanford *v.* Van Arsdall, 53 Hun 70, 6 N. Y. Suppl. 494; Klock *v.* Cronkhite, 1 Hill 107; King *v.* McVicker, 3 Sandf. Ch. 192.

See 35 Cent. Dig. tit. "Mortgages," § 826.

40. Sahler *v.* Signer, 44 Barb. (N. Y.) 606.

41. Thebaud *v.* Hollister, 37 N. J. Eq. 402.

42. Cole *v.* Beale, 89 Ill. App. 426; Mann *v.* Mann, 49 Ill. App. 472; Smith *v.* Roberts, 91 N. Y. 470.

43. Hull *v.* Young, 29 S. C. 64, 6 S. E. 938; Trimmier *v.* Vise, 17 S. C. 499, 43 Am. Rep. 624.

44. Meacham *v.* Steele, 93 Ill. 135.

45. *Alabama.*— Ehrman *v.* Alabama Mineral Land Co., 109 Ala. 478, 20 So. 112.

Illinois.— Hughes *v.* Frisby, 81 Ill. 188.

Michigan.— Graydon *v.* Church, 7 Mich. 36.

New York.— Strever *v.* Earl, 60 Hun 528, 15 N. Y. Suppl. 350.

South Carolina.— Agnew *v.* Renwick, 27 S. C. 562, 4 S. E. 223.

See 35 Cent. Dig. tit. "Mortgages," § 827.

46. Carpenter *v.* Gleason, 58 Vt. 244, 4 Atl. 706; Stewart *v.* Eaton, 20 Wash. 378, 55 Pac. 314. And see Wallace *v.* Blair, 1 Grant (Pa.) 75, holding that, when one of the mortgagees purchases the mortgaged estate on a judgment entered after the mortgage, the two interests or estates do not merge, and the mortgage is not extinguished.

47. Leonard *v.* Swanson, 58 Minn. 231, 59 N. W. 1009.

48. Brown *v.* Bartee, 10 Sm. & M. (Miss.) 268; Collins *v.* Stocking, 98 Mo. 290, 11 S. W. 750; Hatz's Appeal, 40 Pa. St. 209.

lien of the mortgage;[49] and the rule is the same whether the assignment is an outright sale of the mortgage or a transfer of it as collateral security for a debt of the mortgagee.[50]

n. Revival of Mortgage Lien. Where a release of the equity of redemption to the mortgagee was made with a full understanding and intention on both sides that it should operate to extinguish the mortgage, it will have that effect as to intervening rights of third persons, and the lien of the mortgage cannot afterward be revived for the purpose of defeating a junior encumbrancer,[51] unless the conveyance was taken by the mortgagee under the influence of deceit or false representations,[52] or was otherwise invalid.[53]

3. Absolute Deed as Mortgage — a. In General. Although a conveyance of the mortgagor's title to the mortgagee may be in the form of an absolute deed, yet it will be held in equity to be a mere mortgage, and therefore subject to redemption, if accompanied by a bond to reconvey or other form of defeasance, or if subject to such conditions or limitations as show the intention of the parties not to extinguish the right of redemption but only to furnish new, substituted, or additional security for the original mortgage debt.[54] But in the absence of any such collateral agreement or evidence of intention, it will be given its natural effect as an absolute conveyance.[55] And if the agreement is not for a defeasance and does not impose on the grantor a liability to pay the necessary amount in any event, but only gives him the right to repurchase the property at a stipulated price within a limited time, it is not a mortgage but a conditional sale, or an absolute sale with right of repurchase on conditions.[56]

49. *Illinois.*— Chicago International Bank *v.* Wilkshire, 108 Ill. 143; Buchanan *v.* International Bank, 78 Ill. 500; Edgerton *v.* Young, 43 Ill. 464; Cole *v.* Beale, 89 Ill. App. 426.

Indiana.— Durham *v.* Craig, 79 Ind. 117.

Iowa.— White *v.* Hampton, 13 Iowa 259.

New Hampshire.— Lime Rock Nat. Bank *v.* Mowry, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294.

New York.— Curtis *v.* Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506 [*affirming* 10 Misc. 341, 31 N. Y. Suppl. 19]; Purdy *v.* Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Brown *v.* Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506; Card *v.* Bird, 10 Paige 426; Skeel *v.* Spraker, 8 Paige 182.

Vermont.— Pratt *v.* Bennington Bank, 10 Vt. 293, 33 Am. Dec. 201.

United States.— Case *v.* Fant, 53 Fed. 41, 3 C. C. A. 418; Oregon, etc., Trust Inv. Co. *v.* Shaw, 18 Fed. Cas. No. 10,557, 6 Sawy. 52.

See 35 Cent. Dig. tit. "Mortgages," § 829.

50. Campbell *v.* Vedder, 1 Abb. Dec. (N. Y.) 295, 3 Keyes 174; Chase Nat. Bank *v.* Security Sav. Bank, 28 Wash. 150, 68 Pac. 454.

51. Weidner *v.* Thompson, 69 Iowa 36, 28 N. W. 422; Frazee *v.* Inslee, 2 N. J. Eq. 239.

52. Vannice *v.* Bergen, 16 Iowa 555, 85 Am. Dec. 531; Elliott *v.* Gilchrist, 64 N. H. 260, 9 Atl. 382.

53. Corwin *v.* Collett, 16 Ohio St. 289.

54. *Alabama.*— Stoutz *v.* Rouse, 84 Ala. 309, 4 So. 170.

Connecticut.— Gunn's Appeal, 55 Conn. 149, 10 Atl. 498.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Union Mut. L. Ins. Co. *v.* Slee, 110 Ill. 35; Bearss *v.* Ford, 108 Ill. 16; Rue *v.* Dole, 107 Ill. 275; Ennor *v.* Thompson, 46 Ill. 214.

Iowa.— McElhaney *v.* Shoemaker, 76 Iowa 416, 41 N. W. 58.

Louisiana.— Keough *v.* Meyers, 43 La. Ann. 952, 9 So. 913, holding that an act by which the purchaser of land, on which the vendors have vendors' privileges and a special mortgage to secure the purchase-money notes, ostensibly sells the land to his vendors, reserving a right to redeem within a certain time, and takes the notes canceled, is neither a sale nor a mortgage, but a "*dation en paiment.*"

Maine.— Bailey *v.* Myrick, 50 Me. 171.

Michigan.— Ferris *v.* Wilcox, 51 Mich. 105, 16 N. W. 252, 47 Am. Rep. 551.

Minnesota.— Marshall *v.* Thompson, 39 Minn. 137, 39 N. W. 309.

New York.— Mooney *v.* Byrne, 1 N. Y. App. Div. 316, 37 N. Y. Suppl. 388; Quackenbush *v.* O'Hare, 61 Hun 388, 16 N. Y. Suppl. 33 [*affirmed* in 129 N. Y. 485, 29 N. E. 958].

Pennsylvania.— Peele *v.* Greene, 1 Lack. Leg. Rec. 405.

Tennessee.— Blizzard *v.* Craigmiles, 7 Lea 693.

Texas.— De Bruhl *v.* Maas, 54 Tex. 464.

See 35 Cent. Dig. tit. "Mortgages," § 832.

55. Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; Miller *v.* Green, 138 Ill. 565, 28 N. E. 837; Shays *v.* Norton, 48 Ill. 100.

56. *California.*— Fletcher *v.* Northcross, (1893) 32 Pac. 328.

Connecticut.—Adams *v.* Adams, 51 Conn. 544; Phipps *v.* Munson, 50 Conn. 267.

Illinois.— Rue *v.* Dole, 107 Ill. 275.

Indiana.— Shubert *v.* Stanley, 52 Ind. 46.

Iowa.— Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217.

b. Agreement to Sell and Apply Proceeds. Where the mortgaged property is conveyed to the mortgagee under an agreement that he shall sell it and apply the proceeds in payment of his own and other debts, and account to the mortgagor for the surplus, it is generally considered that the deed of conveyance, although absolute in form, should be treated in equity merely as a mortgage.[57]

XVIII. PAYMENT, RELEASE, AND SATISFACTION.

A. Payment of Debt — 1. In General — a. Who May Pay Off Mortgage. Payment of a debt secured by mortgage, with the effect of extinguishing the mortgage, may be made by the mortgagor himself, even after he has sold the equity of redemption,[58] by either of two joint mortgagors,[59] or by any person claiming under the mortgagor or succeeding to his rights, as, his widow,[60] his executor,[61] or his guardian, if he is a minor,[62] or a purchaser of the equity of redemption;[63] or by a surety or guarantor of the mortgage debt when the principal debtor makes default;[64] or by the holder of a junior lien on the same premises;[65] or generally by any person having a right or interest in the property which he is obliged to protect by paying the mortgage, the rule as to such a person being that, if he is not primarily responsible for the mortgage debt, he will be entitled, on paying it off, to an assignment of the mortgage, or to be subrogated to the rights of the mortgagee.[66] This rule applies also to one who advances to the mortgagor the money necessary to pay the mortgage debt, under an agreement that he shall have the benefit of the mortgage security for his own reim-

Kentucky.— Tyret *v.* Potter, 97 Ky. 54, 29 S. W. 976, 16 Ky. L. Rep. 809.

Massachusetts.— Murray *v.* Riley, 140 Mass. 490, 6 N. E. 512.

Michigan.— Knight *v.* Hartman, 93 Mich. 69, 52 N. W. 1044.

New York.— Fiedler *v.* Darrin, 50 N. Y. 437; Brown *v.* Dewey, 2 Barb. 28.

Washington.— Swarm *v.* Boggs, 12 Wash. 246, 40 Pac. 941.

See 35 Cent. Dig. tit. "Mortgages," § 832.

57. *Iowa.*—Sanborn *v.* Magee, 79 Iowa 501, 44 N. W. 720.

Kentucky.—Trimble *v.* McCormick, 15 S. W. 358, 12 Ky. L. Rep. 857.

Minnesota.— Jones *v.* Blake, 33 Minn. 362, 23 N. W. 538.

Nebraska.— Tower *v.* Fetz, 26 Nebr. 706, 42 N. W. 884, 18 Am. St. Rep. 795.

Vermont.— See Hyndman *v.* Hyndman, 19 Vt. 9, 46 Am. Dec. 171.

United States.—Alexander *v.* Rodriguez, 12 Wall. 323, 20 L. ed. 406.

See 35 Cent. Dig. tit. "Mortgages," § 834.

But see Wilson *v.* Parshall, 129 N. Y. 223, 29 N. E. 297; Clark *v.* Haney, 62 Tex. 511, 50 Am. Rep. 536, both holding that an absolute deed cannot be converted into a mortgage by a mere verbal promise to sell and apply the proceeds.

Mortgagor's right to surplus.— Where a mortgagee takes a conveyance of the mortgaged premises, and in a collateral agreement in writing covenants that, if he shall sell the premises for more than the amount of the mortgage, he will pay over the surplus to the mortgagor, and thereafter the mortgagee in possession makes improvements, with the knowledge of the mortgagor, and after the mortgagee's death the property is sold for an amount equal in the aggregate to the mortgage and the value of the improvements, the mortgagor is not entitled to any share of the proceeds of the sale. Hoerr's Estate, 20 Pa. Super. Ct. 425.

58. Blim *v.* Wilson, 5 Phila. (Pa.) 78. And see Everett *v.* Gately, 183 Mass. 503, 67 N. E. 598.

59. Simpson *v.* Gardiner, 97 Ill. 237.

60. Stinson *v.* Anderson, 96 Ill. 373.

61. Bishop *v.* Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

62. Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019.

63. Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Poole *v.* Kelsey, 95 Ill. App. 233; Smith *v.* Dinsmore, 16 Ill. App. 115; Swope *v.* Leffingwell, 72 Mo. 348; Watts *v.* Symes, 13 Jur. 245, 16 Sim. 640, 39 Eng. Ch. 640, 60 Eng. Reprint 1022; Reid *v.* Cooper, 2 Ch. Chamb. (U. C.) 90.

Purchaser of part of property.— The owner of a part of the land included in a mortgage, made by a former owner, may pay the mortgage, and will be entitled to an assignment of the mortgage. Salem *v.* Edgerly, 33 N. H. 46. But where there is a dispute as to the title to the equity of redemption, the mortgagee is not obliged to accept a tender of the mortgage money from one who holds but a moiety of the land, in redemption and satisfaction of the whole mortgage. Rowell *v.* Jewett, 73 Me. 365.

64. Richeson *v.* Crawford, 94 Ill. 165.

65. Tyrrell *v.* Ward, 102 Ill. 29; Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295].

66. *California.*— Ingham *v.* Weed, (1897) 48 Pac. 318.

Georgia.— Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387, holding that where money due on a mortgage is paid by one whose duty it is to

bursement.[67] But a stranger or mere volunteer can claim no right to pay off the mortgage, nor can he compel the mortgagee to accept his tender of the amount due, nor found any rights under the mortgage or in the mortgaged property on such tender or its acceptance by the mortgagee.[68] And this is also true of one who claims an interest in the estate not under or subject to the mortgage, as the holder of a tax title.[69]

b. To Whom Payment May Be Made — (i) *In General.* Payment of a mortgage debt should be made to the mortgagee in person, or to someone who is duly authorized by law to receive the payment in his stead,[70] or to whom he has given the power and authority to receive it.[71] But generally the mortgagor is justified in paying or settling with the person having the apparent authority to receive satisfaction of the mortgage; and a discharge thus obtained will prevail against any person having a secret or reserved interest in the mortgage.[72] If there is doubt as to the person entitled to the money, the mortgagor may file a bill of interpleader or bring the money into court.[73] The trustee in a deed of trust in the

pay the mortgage, it is a release, although it purports to be an assignment.

Maryland.— Weber *v.* Lauman, 91 Md. 90, 45 Atl. 870, payment by one having an estate in remainder in the mortgaged premises.

Minnesota.— See Ahern *v.* Freeman, 46 Minn. 156, 48 N. W. 677, 24 Am. St. Rep. 206.

New York.— Hover *v.* Hover, 21 N. Y. App. Div. 565, 48 N. Y. Suppl. 395.

South Carolina.— Hairston *v.* Hairston, 35 S. C. 298, 14 S. E. 634, payment by wife of mortgagor out of her own earnings.

67. Home Sav. Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; Wells *v.* Chapman, 4 Sandf. Ch. (N. Y.) 312 [*affirmed* in 13 Barb. 561]. *Compare* Camp *v.* Smith, 5 Conn. 80.

68. Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052; Young *v.* Morgan, 89 Ill. 199; Hough *v.* Ætna L. Ins. Co., 57 Ill. 318, 11 Am. Rep. 18; McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11.

69. Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672.

70. Cutler *v.* Haven, 8 Pick. (Mass.) 490; Parker *v.* Lincoln, 12 Mass. 16; Cary *v.* Cary, 189 Pa. St. 65, 42 Atl. 19, all holding that payment or tender of a mortgage may be made to the legal guardian of the infant mortgagee.

Garnishing creditor.— In states where a mortgage is regarded as a mere security and not as passing an estate in the land, the debt secured by a mortgage may be attached in garnishment proceedings by a creditor of the mortgagee. McGurren *v.* Garrity, 68 Cal. 566, 9 Pac. 839. And see Phipps *v.* Rieley, 15 Oreg. 494, 16 Pac. 185; Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

71. Forbes *v.* Reynard, 49 Misc. (N. Y.) 154, 98 N. Y. Suppl. 708 [*affirmed* in 113 N. Y. App. Div. 306, 98 N. Y. Suppl. 710]; Cerney *v.* Pawlot, 66 Wis. 262, 28 N. W. 183; Lewis *v.* King, 2 Bro. Ch. 600, 29 Eng. Reprint 330 (payment to devisee of mortgagee); Greenwood *v.* Commercial Bank, 14 Grant Ch. (U. C.) 40 (a person authorized to collect rents and contract for the sale of property is not entitled to receive payment of a mortgage).

72. Sheldon *v.* McNall, 89 Ill. App. 138; Verdine *v.* Olney, 77 Mich. 310, 43 N. W. 975. A person who holds an assignment of a mortgage as collateral security has authority to receive payment and discharge it. Lowry *v.* Bennett, 119 Mich. 301, 77 N. W. 935; Gimbel *v.* Pignero, 62 Mo. 240; Mason *v.* Beach, 55 Wis. 607, 13 N. W. 884.

Notice of rights of third person.— If the mortgagor knows that the ostensible or original owner of the mortgage has no longer the right to receive payment of it, he is not protected in making a payment to him; and if he knows that a third person sets up an apparently well-founded claim to the money, he must take measures to protect himself in making the payment. See Foy *v.* Armstrong, 113 Iowa 629, 85 N. W. 753; Koetter *v.* German-American Title Co., 53 S. W. 32, 21 Ky. L. Rep. 813; Waterman *v.* Webster, 108 N. Y. 157, 15 N. E. 380. *Compare* Casner *v.* Johnson, 66 Kan. 404, 71 Pac. 819, holding that, where a note secured by mortgage has been assigned, and the assignment has been recorded, the maker must pay the holder, claiming the right to collect, and receive the cancellation of the mortgage from him, although such mortgagor knew at the time that another claimed in good faith the right to collect the debt.

Possession of papers as evidence of authority.— Possession of the mortgage securities by one who claims the right to collect the debt will generally be sufficient to justify the mortgagor in making the payment to him. Carey *v.* Rauguth, 82 Ill. App. 418. See, however, Lawson *v.* Nicholson, 52 N. J. Eq. 821, 31 Atl. 386. And conversely, it is not the part of prudence to pay the mortgage debt to one who is unable to produce the papers, and in such cases the mortgagor generally makes the payment at his peril. Jummel *v.* Mann, 80 Ill. App. 288 [*affirmed* in 183 Ill. 523, 56 N. E. 161]; Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962. See, however, Kentucky Mut. L. Ins. Co. *v.* Hall, 50 S. W. 254, 20 Ky. L. Rep. 1880; Massaker *v.* Mackerley, 9 N. J. Eq. 440.

73. Blake *v.* Garwood, 42 N. J. Eq. 276, 10 Atl. 874; Varrian *v.* Berrien, 42 N. J. Eq. 1,

nature of a mortgage has generally no authority to receive payment, not being the owner of the debt, and payment to him is not safe.[74] And when the mortgage runs to a public officer very great care should be taken in seeing to his authority to receive payment of it and his proper accounting for the money paid to him.[75]

(II) *Executors or Heirs.* Where the mortgagee is dead at the time the mortgage debt matures, payment should be made to his executor or administrator, rather than to the heirs;[76] and payment to either of two joint executors is sufficient;[77] but a foreign administrator, although he may be authorized to receive the money, cannot effectually release the land from the lien of the mortgage.[78]

(III) *Agent or Attorney.* Payment of a mortgage debt may be made to an agent of the mortgagee when the mortgagor has been told that such agent has authority to receive it,[79] or when the agent acts under a power of attorney[80] which has not been revoked,[81] or generally when the agent is in any way authorized to collect the debt, although, in the absence of written authorization, the right of the agent to receive the money is a question of fact, as to which the mortgagor must fully satisfy himself, and which, in case of dispute, becomes a matter for proof by evidence.[82] A loan agent, empowered generally to lend his principal's money on mortgage, call in the loans when due, and renew or change the investments, is generally a proper person to receive payment of any particular mortgage so negotiated by him, especially if he has the securities in his possession,[83] and so

10 Atl. 875; Hockey *v.* Western, [1898] 1 Ch. 350, 67 L. J. Ch. 166, 78 L. T. Rep. N. S. 1, 46 Wkly. Rep. 312; *In re* Bell, [1896] 1 Ch. 1, 65 L. J. Ch. 188, 73 L. T. Rep. N. S. 391, 44 Wkly. Rep. 99.

74. Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239; Fortune *v.* Stockton, 182 Ill. 454, 55 N. E. 367; Stiger *v.* Bent, 111 Ill. 328; Leon *v.* McIntyre, 88 Ill. App. 349; Miller *v.* Mitchell, 58 W. Va. 431, 52 S. E. 478.

No competent beneficiary.— If there is no person in existence competent to receive payment of the debt secured by a trust deed, the court, after the lapse of sixteen years, will decree a conveyance by the trustee to the heirs of the debtor. Saunders *v.* Mason, 21 Fed. Cas. No. 12,376, 5 Cranch C. C. 470.

75. See Slaughter *v.* State, 132 Ind. 465, 31 N. E. 1112; Knox County *v.* Goggin, 105 Mo. 182, 16 S. W. 684; Farmers' L. & T. Co. *v.* Walworth, 1 N. Y. 433; Welsh *v.* Freeman, 21 Ohio St. 402.

76. Van Buren *v.* Olmstead, 5 Paige (N. Y.) 1; Briggs *v.* Briggs, 134 Pa. St. 514, 19 Atl. 677; Trotter *v.* Shippen, 2 Pa. St. 358; Thornborough *v.* Baker, 3 Swanst. 628, 36 Eng. Reprint 1000; Robinson *v.* Byers, 9 Grant Ch. (U. C.) 572; Hunter *v.* Farr, 23 U. C. Q. B. 324. And see Executors and Administrators, 18 Cyc. 185.

Statement of administrator as to ownership of mortgage.— A mortgagor has a right to rely in good faith on the statements of the mortgagee's administrator as to the present ownership of the mortgage; and a payment to the party designated will relieve him from subsequent liability. Reynolds *v.* Smith, 57 Mich. 194, 23 N. W. 727.

77. Fesmire *v.* Shannon, 143 Pa. St. 201, 22 Atl. 898; *Ex p.* Johnson, 6 Ont. Pr. 225; Bacon *v.* Shier, 16 Grant Ch. (U. C.) 485. See also McPhadden *v.* Bacon, 13 Grant Ch. (U. C.) 591.

78. *In re* Thorpe, 15 Grant Ch. (U. C.) 76.

79. Ambrose *v.* Barrett, 121 Cal. 297, 53 Pac. 805, 54 Pac. 264; Jones *v.* Dulick, 8 Kan. App. 855, 55 Pac. 522; Haines *v.* Pohlmann, 25 N. J. Eq. 179; Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1 L. R. A. N. S. 891.

80. Lee *v.* Morrow, 25 U. C. Q. B. 604.

81. Weber *v.* Bridgman, 113 N. Y. 600, 21 N. E. 985 (revocation by death of principal); Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325; Green *v.* Rick, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48.

82. *Illinois.*— Willemin *v.* Dunn, 93 Ill. 511; Viskocil *v.* Doktor, 27 Ill. App. 232.

Iowa.— U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311.

Michigan.— Donaldson *v.* Wilson, 79 Mich. 181, 44 N. W. 429.

Minnesota.— Rand *v.* Perkins, 74 Minn. 16, 76 N. W. 950.

New York.— Converse *v.* Dillaye, 62 N. Y. 621.

Wisconsin.— Spence *v.* Pieper, 107 Wis. 453, 83 N. W. 660.

Canada.— Cameron *v.* McDonald, 33 Nova Scotia 469; McCormick *v.* Cockburn, 31 Ont. 436; McMullen *v.* Polley, 12 Ont. 702.

See 35 Cent. Dig. tit. "Mortgages," § 838.

Husband of mortgagee.— Proof of payment to the husband of the mortgagee is not sufficient to establish a credit on the mortgage debt, where the only evidence that the husband was authorized to receive payment for his wife is that of a single witness, who is directly contradicted by both the husband and wife. O'Callaghan *v.* Barrett, 21 N. Y. Suppl. 368.

83. *Arkansas.*— Scruggs *v.* Scottish Mortg. Co., 54 Ark. 566, 16 S. W. 563.

Illinois.— Thornton *v.* Lawther, 169 Ill.

is the attorney of record of the mortgagee in proceedings begun for the foreclosure of the mortgage.[84] But an agent authorized merely to collect the interest on a mortgage loan has no implied authority to receive payment of the principal when due;[85] and although he may be authorized to collect the principal when it shall be due, this gives him no right to receive payment before the maturity of the debt.[86] A mortgagee, however, may be estopped to deny the authority of an agent to receive the money, when he has ratified the act, or failed seasonably to repudiate it, or more especially where he has accepted the fruits of the agent's acts.[87]

(IV) *JOINT MORTGAGEES.* A mortgage running to several persons jointly to secure a joint debt may be paid to and released by either of the mortgagees.[88] It is otherwise where a mortgage or trust deed is given to secure the separate debts of several different creditors.[89]

c. Time and Place of Payment. Neither the mortgagor nor any third person can compel the mortgagee to accept payment of the mortgage debt before it falls due according to the terms of the mortgage,[90] unless the right has been reserved

228, 48 N. E. 412. And see Schultz *v.* Sroelowitz, 191 Ill. 249, 61 N. E. 92.

Iowa.— Sessions *v.* Kent, 75 Iowa 601, 39 N. W. 914.

Kansas.— Jones *v.* Dulick, 8 Kan App. 855, 55 Pac. 522.

Minnesota.—Lynn *v.* Hanson, 75 Minn. 346, 77 N. W. 976; Bailey *v.* Anderson, 75 Minn. 49, 77 N. W. 414.

Missouri.— Mumford *v.* Knox, 50 Mo. App. 356.

Nebraska.— See Bull *v.* Mitchell, 47 Nebr. 647, 66 N. W. 632.

United States.— Wilcox *v.* Carr, 37 Fed. 130; Kent *v.* Congdon, 33 Fed. 228.

See 35 Cent. Dig. tit. "Mortgages," § 838.

84. Harbach *v.* Colvin, 73 Iowa 638, 35 N. W. 663; Jackson *v.* Crafts, 18 Johns. (N. Y.) 110. But see Heyman *v.* Beringer, 1 Abb. N. Cas. (N. Y.) 315, holding that payment to an attorney intrusted with an overdue mortgage for the purpose of foreclosure is not payment on the mortgage.

85. Cox *v.* Cutter, 28 N. J. Eq. 13; Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Wilkinson *v.* Candlish, 5 Exch. 91, 19 L. J. Exch. 166; Kent *v.* Thomas, 1 H. & N. 473; *In re* Tracy, 21 Ont. App. 454; *In re* Flint, 8 Ont. Pr. 361; Gillen *v.* Roman Catholic Episcopal Corp., 7 Ont. 146; Palmer *v.* Winstanley, 23 U. C. C. P. 586.

86. Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Schermerhorn *v.* Farley, 58 Hun (N. Y.) 66, 11 N. Y. Suppl. 466.

87. Ernst *v.* McChesney, 186 Ill. 617, 58 N. E. 399. And see Cameron *v.* McDonald, 33 Nova Scotia 469.

88. *Georgia.*— Wright *v.* Ware, 58 Ga. 150.

Illinois.— Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

Minnesota.— Flanigan *v.* Seelye, 53 Minn. 23, 55 N. W. 115.

New York.— People *v.* Keyser, 28 N. Y. 226, 84 Am. Dec. 338.

England.— Powell *v.* Brodhurst, [1901] 2 Ch. 160, 70 L. J. Ch. 587, 84 L. T. Rep. N. S. 620, 49 Wkly. Rep. 532; *In re* Jackson, 34 Ch. D. 732, 56 L. J. Ch. 593, 56 L. T. Rep. N. S. 562, 35 Wkly. Rep. 646; Vickers *v.* Cowell, 1 Beav. 529, 3 Jur. 864, 8 L. J. Ch. 371, 17 Eng. Ch. 529, 48 Eng. Reprint 1046. See Matson *v.* Dennis, 4 De G. J. & S. 345, 10 Jur. N. S. 461, 10 L. T. Rep. N. S. 391, 12 Wkly. Rep. 926, 69 Eng. Ch. 267, 46 Eng. Reprint 952.

See 35 Cent. Dig. tit. "Mortgages," § 839.

89. Ingram *v.* Kirkpatrick, 43 N. C. 62, holding that where a deed of trust is given to secure two separate creditors, who are not cosureties, one who receives part payment of what is due to him is not bound to carry it into the trust account, unless, after deducting that payment, the trust property is more than sufficient to satisfy his debt. And see Brasier *v.* Hudson, 9 Sim. 1, 16 Eng. Ch. 1, 59 Eng. Reprint 256.

90. *Massachusetts.*— Gordon *v.* Ware Sav. Bank, 115 Mass. 588.

New Jersey.— See Greenville Bldg., etc., Assoc. *v.* Wholey, 68 N. J. Eq. 92, 59 Atl. 341.

New York.— Lisman *v.* Michigan Peninsular Car Co., 50 N. Y. App. Div. 311, 63 N. Y. Suppl. 999; French *v.* Kennedy, 7 Barb. 452 (mortgage payable in instalments); Hoag *v.* Rathbun, Clarke 12.

United States.—Weldon *v.* Tollman, 67 Fed. 986, 15 C. C. A. 138.

England.— Burrough *v.* Cranston, 2 Ir. Eq. 203.

Canada.— Green *v.* Adams, 2 Ch. Chamb. (U. C.) 134.

See 35 Cent. Dig. tit. "Mortgages," § 840.

A mortgage payable at or before a certain date may be paid immediately, and the mortgagor cannot be required to keep the money and pay interest until the day specified in the mortgage. *In re* John St., etc., 19 Wend. (N. Y.) 659.

Happening of contingency.— Where a mortgage stated that it was to secure the purchase-money of land, and was to be paid at a fixed time, if a mortgage then on the property should be discharged of record or should "outlaw," the latter term refers to the time when a presumption of law would arise that the mortgage had been paid. Curtis *v.* Goodenow, 24 Mich. 18.

to obtain a release of the property, wholly or in part, upon a sale of it by the mortgagor;[91] and a provision that any default in the payment of an instalment of interest shall cause the whole debt to become due and payable is for the benefit of the mortgagee, and operative only at his option, and does not give the mortgagor the privilege, on such default, of paying off the entire debt.[92] At the law-day the right and duty to pay the mortgage debt become fixed, unless varied by agreement of the parties.[93] A payment made on Sunday is good unless repudiated and returned by the mortgagee.[94] The place of payment is usually designated in the mortgage or the accompanying note or bond, but a stipulation in this regard may be overcome by special arrangement or by the usual course of dealing of the parties.[95]

d. What Constitutes Payment — (1) *In General.* Payment and discharge of a mortgage debt may be effected by a transfer to the mortgagee of the mortgaged premises and the acceptance of the same by him as satisfaction, wholly or *pro tanto*,[96] or under similar conditions, his acceptance of other property of the mortgagor;[97] by a foreclosure of the mortgage and the setting off to him of the mortgaged property or his purchase of it at the foreclosure sale;[98] by his recovery of a judgment for the mortgage debt and its satisfaction;[99] by his acceptance of a

Paying money into court to obtain release. — Where an estate was conveyed, among other purposes, to secure a debt of small amount in comparison with the value of the property, and the debtor offered to pay into court the largest sum to which the debt could in any probability amount, and asked a release thereupon, the court refused his application, holding that the creditor was entitled to retain the security until actual payment of the debt. Postlethwaite *v.* Blythe, 2 Swanst. 256, 36 Eng. Reprint 613.

91. Snow *v.* Bass, 174 Mo. 149, 73 S. W. 630.

92. Watts *v.* Hoffman, 77 Ill. App. 411; Cox *v.* Kille, 50 N. J. Eq. 176, 24 Atl. 1032.

93. Ford *v.* Chesterfield, 19 Beav. 428, 2 Wkly. Rep. 640, 52 Eng. Reprint 416, holding that where a mortgagee agrees to take a portion of his debt in lieu of the whole, on payment on a given day, the courts will not relieve against the effect of its non-payment on that day.

The pendency of a scire facias on a mortgage does not deprive the mortgagor, who disputes the amount due upon the mortgage, of his statutory right to pay the amount of the mortgage into court, and have the mortgage satisfied and his objection to the mortgagee's claim determined. Pennock *v.* Stewart, 104 Pa. St. 184.

94. Shields *v.* Klopf, 70 Wis. 69, 35 N. W. 284.

95. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90. And see Adams *v.* Rutherford, 13 Oreg. 78, 8 Pac. 896.

96. Chapman *v.* Lester, 12 Kan. 592; Jennings *v.* Wood, 20 Ohio 261; Brown *v.* Stead, 5 Sim. 535, 2 L. J. Ch. 45, 9 Eng. Ch. 535, 58 Eng. Reprint 439. And see *supra*, XVII, G, 2, c.

97. Shepard *v.* Boulevard Land Co., 57 N. Y. App. Div. 617, 68 N. Y. Suppl. 106. See also McKenzie *v.* Yielding, 11 Grant Ch. (U. C.) 406.

Agreement that debt shall subsist. — This consequence does not follow where the parties agree that the mortgage debt shall still subsist. McAfee *v.* McAfee, 28 S. C. 218, 5 S. E. 593.

98. *Alabama.* — Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

Arkansas. — Turman *v.* Forrester, 55 Ark. 336, 18 S. W. 167.

Connecticut. — Hall *v.* Way, 47 Conn. 467.

Kansas. — Curtis *v.* Parker, 29 Kan. 130.

Maine. — Androscoggin Sav. Bank *v.* McKenney, 78 Me. 442, 6 Atl. 877, holding that where the creditor holds a real estate mortgage and also a chattel mortgage as security for the same debt, and forecloses the latter and takes the property himself, its value exceeding the debt secured, this satisfies both mortgages.

Massachusetts. — Dooley *v.* Potter, 140 Mass. 49, 2 N. E. 935, holding that where the creditor has a mortgage on two tracts of land, one of which lies in another state, and of which he becomes the absolute owner by foreclosure, the mortgagor is entitled to a credit for the value of that tract.

United States. — Sagory *v.* Wissman, 21 Fed. Cas. No. 12,217, 2 Ben. 240, holding that a strict foreclosure is an extinguishment of the debt, provided the premises are of sufficient value to pay it.

See 35 Cent. Dig. tit. "Mortgages," § 841.

99. Price *v.* Atchison First Nat. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419; Yeomans *v.* Rexford, 35 Pa. St. 273; Nelson *v.* Robertson, 1 Grant Ch. (U. C.) 530.

Payment or satisfaction of judgment necessary. — The mere recovery of a judgment on the mortgage debt, while it will merge the debt or the instrument evidencing it, will not extinguish the mortgage, nor prevent proceedings for its foreclosure; this can only be accomplished by payment or satisfaction of the judgment. Matthews *v.* Davis, 61 Iowa 225, 16 N. W. 102; Lalane *v.* Payne, 42 La. Ann. 152, 7 So. 481.

sufficient share of the proceeds of a sale of the mortgaged premises in partition or any other judicial proceeding;[1] by the application to the mortgage debt of a distinct debt or claim due from him to the mortgagor;[2] or by applying to the mortgage debt, in an amount sufficient to satisfy it, rents collected from tenants or due from the mortgagee as tenant in possession, or insurance money,[3] or damages collected by the mortgagee from a corporation condemning the property or part of it under the power of eminent domain,[4] or money paid as a premium for an extension of the time of payment of the principal of the mortgage debt.[5] And although a mortgage is not extinguished by the mere fact of the appointment of the debtor as the executor of the creditor's will,[6] it is extinguished if he includes the mortgage in his inventory, charges himself with it, and makes his settlement on that basis.[7] It has also been held that a mortgage is extinguished, or at least barred, if the mortgagee has put himself in a position where he cannot reconvey the estate on payment, as where he has sold it to a third person.[8] And an equitable mortgage, created by the deposit of title deeds, may be satisfied in any of these ways, although not by the mere delivery up of the deeds without actual payment.[9] In any case, however, the mortgage is not discharged unless the intended means of satisfaction actually reaches the creditor and becomes and remains effective in his hands;[10] and if a payment is conditional, it does not release the mortgage until the condition is performed.[11] Where a mortgagee was induced by

1. Rogers *v.* Rogers, 5 N. J. Eq. 32; Baird *v.* Corwin, 17 Pa. St. 462; Jackson *v.* Dickerson, 5 Phila. (Pa.) 356. *Compare* Clark *v.* Jackson, 64 N. H. 388, 11 Atl. 59 (holding that the purchase of the equity of redemption by the mortgagee, at a sale by the mortgagor's assignee in insolvency, does not amount in law to a payment of the mortgage debt); Smith *v.* Elliott, 25 Grant Ch. (U. C.) 598.

2. Brown *v.* Scott, 87 Ala. 453, 6 So. 384; Gallup *v.* Jackson, 47 Mich. 475, 11 N. W. 277; Holcomb *v.* Campbell, 118 N. Y. 46, 22 N. E. 1107; Merkle *v.* Beidleman, 30 N. Y. App. Div. 14, 51 N. Y. Suppl. 916; Beebe *v.* Richmond Light, etc., Co., 3 N. Y. App. Div. 334, 38 N. Y. Suppl. 395 [*affirming* 13 Misc. 737, 35 N. Y. Suppl. 1].

3. Brake *v.* Sparks, 117 Ind. 89, 19 N. E. 719; Bean *v.* Brackett, 34 N. H. 102; Baum *v.* Beard, 47 S. C. 344, 25 S. E. 168; Ford *v.* Smith, 60 Wis. 222, 18 N. W. 925.

The mere assignment of a lease as additional security does not operate as a discharge of, or as a payment on, a note of the assignor, nor prevent the foreclosure of a mortgage given to secure such note. Maloney *v.* Lafayette Bldg., etc., Assoc., 69 Ill. App. 35.

When rents and insurance money not applicable in reduction of the mortgage debt see Badger *v.* Platts, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572; Scott *v.* Fritz, 51 Pa. St. 418.

4. Bennett *v.* Cook, 2 Hun (N. Y.) 526.

5. Laing *v.* Martin, 26 N. J. Eq. 93.

Money paid by the agent of a mortgagor for the purpose of obtaining a postponement of foreclosure sale, and which was expended by the mortgagee for readvertisements, cannot be applied to the reduction of the mortgage debt. Holland Trust Co. *v.* Hogan, 17 N. Y. Suppl. 919.

6. Crow *v.* Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427.

7. Ipswich Mfg. Co. *v.* Story, 5 Metc. (Mass.) 310.

8. Palmer *v.* Hendrie, 28 Beav. 341, 54 Eng. Reprint 397; Munsen *v.* Hauss, 22 Grant Ch. (U. C.) 279; Burnham *v.* Galt, 16 Grant Ch. (U. C.) 417.

9. *In re* Hancock, 57 L. J. Ch. 793, 59 L. T. Rep. N. S. 197 36 Wkly. Rep. 710; Hurst *v.* Beach, 5 Madd. 351, 21 Rev. Rep. 304, 56 Eng. Reprint 929.

10. Middlesex Freeholders *v.* Thomas, 20 N. J. Eq. 39 (where the money to pay the mortgage was deposited in a bank, and the mortgagee notified thereof, and he receipted for the debt and canceled the mortgage, but the money was lost by the failure of the bank, the mortgage is not discharged); Bax *v.* Hoagland, 13 Nebr. 571, 14 N. W. 514 (where the mortgagee accepted in satisfaction of his debt a judgment against a third person, which was afterward, by a secret and covinous agreement between the parties to it, opened up, appealed, and reversed the mortgage is not discharged); Donaho *v.* Bales, (Tenn. Ch. App. 1900) 59 S. W. 409 (the setting aside of a mortgage sale abrogates the credit placed on the mortgage note by the sale); Deaton Grocery Co. *v.* Pepper, 98 Va. 587, 36 S. E. 988 (where the mortgagee purchases the land at foreclosure sale, but it is afterward taken from him by enforcement of a superior lien there is no discharge of the mortgage).

11. Becker *v.* Carey, (N. J. Ch. 1897) 36 Atl. 770; Gage *v.* Gage, 11 S. D. 301, 77 N. W. 109; Stoel *v.* Flanders, 68 Wis. 256, 32 N. W. 114.

Death of mortgagee. — A mortgage and the note secured thereby were to become void either by payment of the note or "if the said mortgagee should die before the note is paid, then this deed and note are null and void." It was held that the mortgage became void upon the death of the mortgagee

fraud and duress to indorse a credit on the mortgage note in settlement of a groundless suit against him the mortgage is not discharged.[12]

(II) *Medium of Payment.* If not otherwise agreed between the parties, payment of a mortgage, or of the note or bond which it secures, must be made in lawful money.[13] The acceptance of a check on a bank operates to discharge the mortgage only in case it is paid.[14] But the mortgagee may agree to accept articles of merchandise or any other form of personal property in satisfaction of the mortgage debt; and the tender and acceptance of such property, pursuant to such agreement, will be equivalent to payment.[15] The mortgage may be discharged, if the parties so agree, by allowing credit to the mortgagor for labor performed or services rendered for the mortgagee.[16]

(III) *Accounts and Settlements Between Parties.* It has been held that a mortgagor cannot discharge his mortgage debt by setting up an independent personal demand against the mortgagee.[17] But it is certainly competent for the parties to agree that a debt due from the mortgagee to the mortgagor, or a balance so due on a settlement of accounts between them, may be applied on the mortgage debt, and when this is done the mortgage will be extinguished to the extent of the credit so allowed.[18]

before payment of the note. Hollis *v.* Hollis, 84 Me. 96, 24 Atl. 581.

12. Foss *v.* Hildreth, 10 Allen (Mass.) 76.

13. Morrell *v.* Ward, 10 Grant Ch. (U. C.) 231; Crawford *v.* Beard, 14 U. C. C. P. 87, both holding that "lawful money of the United States" means such money as is actually and lawfully current at the time payment is to be made.

Gold coin.— A mortgage stipulating for payment of the debt secured thereby in gold coin of the United States of the existing standard of weight and fineness is valid, and may be enforced in the courts without violating any principle of law or public policy, although legal tender notes and silver may be in circulation. Dorr *v.* Hunter, 183 Ill. 432, 56 N. E. 159; Rae *v.* Homestead Loan, etc., Co., 178 Ill. 369, 53 N. E. 220; Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

Alternative as to medium of payment.— When the promise to pay a mortgage or the bond secured is in the alternative, that is, a promise to pay in money or in some other medium of payment, such as scrip, corporate stock, or good paper, the debtor has an election to pay either in money or in the equivalent; but after default of payment at the stipulated time, this right of election is lost, and the creditor is entitled to payment in money. Marlor *v.* Texas, etc., R. Co., 21 Fed. 383.

14. Harbach *v.* Colvin, 73 Iowa 638, 35 N. W. 663; Blumberg *v.* Life Interests, etc., Corp., [1897] 1 Ch. 171, 66 L. J. Ch. 127, 75 L. T. Rep. N. S. 627, 45 Wkly. Rep. 246.

Dishonored draft.— Where the mortgagee draws on the mortgagor for the amount due, and discounts the draft at his bank and has the proceeds placed to his credit, and the draft is duly accepted, but afterward, on its maturity, it is dishonored, and the amount charged back against the mortgagee's account by the bank, there is no payment of the mortgage. Cameron *v.* Knapp, 7 U. C. C. P. 502.

15. *California.*— Neylan *v.* Green, 82 Cal. 128, 23 Pac. 42.

Illinois.— Burke *v.* Grant, 116 Ill. 124, 4 N. E. 655; Ryan *v.* Duniap, 17 Ill. 40, 63 Am. Dec. 334.

New Hampshire.— See Deming *v.* Comings, 11 N. H. 474.

New Jersey.— Ketchem *v.* Gulick, (Ch. 1890) 20 Atl. 487.

United States.—Very *v.* Levy, 13 How. 345, 14 L. ed. 173.

16. Webber *v.* Ryan, 54 Mich. 70, 19 N. W. 751; Smith *v.* Oster, 1 Nebr. (Unoff.) 222, 95 N. W. 335; Peart *v.* Reedy, 8 Pa. Super. Ct. 456. *Compare* Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249.

17. Brown *v.* Coriell, 50 N. J. Eq. 753, 26 Atl. 915, 35 Am. St. Rep. 789, 21 L. R. A. 321.

18. *Georgia.*— Kennedy *v.* Davis, 82 Ga. 210, 8 S. E. 52.

Massachusetts.— Hartshorn *v.* Davis, 174 Mass. 34, 54 N. E. 244; Davis *v.* Thompson, 118 Mass. 497.

Michigan.— Gallup *v.* Jackson, 47 Mich. 475, 11 N. W. 277. See also Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42.

Mississippi.— Perkins *v.* Coleman, 51 Miss. 298.

New York.— Holcomb *v.* Campbell, 118 N. Y. 46, 22 N. E. 1107; Rosevelt *v.* Niagara Bank, Hopk. 579 [*affirmed* in 9 Cow. 409]. In a suit to foreclose a mortgage, brought by parties in interest after the death of the mortgagee, the mortgagor cannot set up, as payments toward the mortgage debt in the mortgagee's lifetime, certain debts due to him from the mortgagee. Green *v.* Storm, 3 Sandf. Ch. 305.

England.— See Campbell *v.* Dent, 2 Moore P. C. 292, 12 Eng. Reprint 1016, holding that where a mortgage was transferred, with the concurrence of the mortgagor, to a third person, who was the correspondent of the mortgagor, and such third person paid the money to the mortgagee by bills, for which he

(iv) *Payment by Note or Bond.* The giving of a note or bond for the amount due on a mortgage and its acceptance by the mortgagee with the understanding and intention that it is to operate as a payment of the mortgage debt will extinguish the mortgage;[19] and in that case the mortgage will not be revived or restored by the failure to pay the new note or bond at its maturity.[20] But in the absence of such an agreement and intention, the taking of a note or bond will not be treated as a payment of the mortgage debt;[21] but, according to the circumstances and the meaning of the parties, as a renewal,[22] a conditional payment,[23] a substitution of securities,[24] or the furnishing of an additional security.[25]

(v) *Intent of Parties.* The passing of any consideration, even the due amount of money, from the mortgagor to the mortgagee may or may not discharge the mortgage, according to their intention, and it will not be held to operate as a payment, if the parties meant to keep the security alive and not to extinguish it.[26] After payment and receipt of the whole amount due, the parties have the right to treat the mortgage as unpaid and as standing as security for

charged the mortgagor in the general account between them, it was held that this was a transfer, but not a satisfaction, of the mortgage.

Canada.— Ross *v.* Perrault, 13 Grant Ch. (U. C.) 206; Fair *v.* Tate, 13 Grant Ch. (U. C.) 160.

See 35 Cent. Dig. tit. "Mortgages," § 843.

As against junior encumbrancer.— Where a mortgagor made an assignment for the benefit of creditors, and a first mortgagee, without notice of the second mortgage on the same premises, paid over, in good faith, to the mortgagor's assignee a balance due the mortgagor on book-account, it was held that the second mortgagee was not entitled to have such balance applied to diminish the debt secured by the first mortgage. Prouty *v.* Price, 50 Barb. (N. Y.) 344.

19. *Colorado.*— Olson *v.* Scott, 1 Colo. App. 94, 27 Pac. 879.

Iowa.— Iowa County *v.* Foster, 49 Iowa 676.

Massachusetts.— Boston Iron Co. *v.* King, 2 Cush. 400; Fowler *v.* Bush, 21 Pick. 230.

Michigan.— Olcott *v.* Crittenden, 68 Mich. 230, 36 N. W. 41.

Minnesota.— Wiley *v.* Dean, 67 Minn. 62, 69 N. W. 629.

Missouri.— Strine *v.* Williams, 159 Mo. 582, 60 S. W. 1060.

New Jersey.— Rhinesmith *v.* Slote, 44 N. J. Eq. 578, 14 Atl. 900.

New York.— Fitch *v.* McDowell, 145 N. Y. 498, 40 N. E. 205.

South Carolina.— Bean *v.* Bean, 28 S. C. 607, 5 S. E. 827.

See 35 Cent. Dig. tit. "Mortgages," § 846.

As to notes of third person as payment see Johnson *v.* Moore, 112 Ind. 91, 13 N. E. 106.

20. Shipman *v.* Cook, 16 N. J. Eq. 251.

21. *California.*— Bonestell *v.* Bowie, 128 Cal. 511, 61 Pac. 78.

Massachusetts.—Baker *v.* Gavitt, 128 Mass. 93.

Missouri.— Wiener *v.* Peacock, 31 Mo. App. 238.

New Jersey.— Campbell *v.* Perth Amboy Shipbuilding, etc., Co., (Ch. 1905) 62 Atl. 319; Humphreys *v.* Danser, 32 N. J. Eq. 220.

Pennsylvania.— Coursin *v.* Schrader, 146 Pa. St. 475, 23 Atl. 801; Hamilton *v.* Callender, 1 Dall. 420, 1 L. ed. 204.

United States.— Union Bank *v.* Stafford, 12 How. 327, 13 L. ed. 1008.

Canada.— Cotton *v.* Stack, 16 N. Brunsw. 424; Gibb *v.* Warren, 7 Grant Ch. (U. C.) 496; Palmer *v.* Winstanley, 23 U. C. C. P. 586.

See 35 Cent. Dig. tit. "Mortgages," § 846.

22. Loveridge *v.* Larned, 7 Fed. 294.

As to effect of taking new note in renewal of mortgage note see *infra*, XVIII, B, 3, b.

23. Crary *v.* Bowers, 20 Cal. 85.

24. Bolles *v.* Chauncey, 8 Conn. 389.

25. Saunders *v.* Leslie, 2 Ball & B. 509, 12 Rev. Rep. 114.

26. *Alabama.*— Brown *v.* Scott, 87 Ala. 453, 6 So. 384.

Iowa.— Martin *v.* Central L. & T. Co., 78 Iowa 504, 43 N. W. 301.

Kansas.— Champion *v.* Hartford Inv. Co., 45 Kan. 103, 25 Pac. 590, 10 L. R. A. 754.

Massachusetts.— Howe *v.* Lewis, 14 Pick. 329.

Missouri.— Keet *v.* Baker, 141 Mo. 175, 42 S. W. 940.

New Hampshire.— Felker *v.* Mowry, 69 N. H. 164, 38 Atl. 726.

New York.— Squire *v.* Greene, 168 N. Y. 659, 61 N. E. 1135; Peck *v.* Minot, 3 Abb. Dec. 465, 4 Transcr. App. 27 [*affirming* 4 Rob. 323].

Vermont.— Johnson *v.* Valido Marble Co., 64 Vt. 337, 25 Atl. 441.

England.—Thorne *v.* Cann, [1895] A. C. 11, 64 L. J. Ch. 1, 71 L. T. Rep. N. S. 852, 11 Reports 67; Liquidation Estates Purchase Co. *v.* Willoughby, [1896] 1 Ch. 726, 65 L. J. Ch. 486, 74 L. T. Rep. N. S. 228, 44 Wkly. Rep. 612; *In re* Harvey, [1896] 1 Ch. 137, 65 L. J. Ch. 370, 73 L. T. Rep. N. S. 613, 44 Wkly. Rep. 242; *In re* Pride, [1891] 2 Ch. 135, 61 L. J. Ch. 9, 64 L. T. Rep. N. S. 768, 39 Wkly. Rep. 471.

Canada.— Canada Trust, etc., Co. *v.* Stevenson, 20 Ont. App. 66.

See 35 Cent. Dig. tit. "Mortgages," § 842.

future advances, and it will be good for such advances as between themselves and as to all others not prejudiced thereby.[27]

e. Application of Payments. The parties to a mortgage may agree as to the application of a payment, and may, by agreement, withdraw a payment once credited on the mortgage and apply it otherwise, provided no third person is prejudiced thereby.[28] The debtor may also give a binding direction to his creditor to apply a payment made by him on the mortgage debt rather than on another account between them.[29] In the absence of such agreement or direction, the payment will be applied first to interest due and then in reduction of principal,[30] and if several notes are secured by the same mortgage, the payment will be applied to them in the order of their maturity.[31] But if the creditor holds two separate mortgages, or a mortgage and an unsecured account, he may, in the absence of a specific direction, apply the payment to either.[32] Money realized from a sale of the mortgaged property must be applied on the mortgage, even without a direction to that effect,[33] and the rule is the same as to rents collected by the mortgagee.[34] A subsequent encumbrancer has the right in equity to have a payment made to the first mortgagee applied on the elder lien; and in this he cannot be prejudiced by a private arrangement between the parties;[35] and a similar equity is recognized in favor of a purchaser of the property from the mortgagor.[36] One who is a surety on some of the claims secured by the mortgage, and not on others, has no equity to require the mortgagee to apply a payment first on the secured claims.[37]

f. Recovery Back of Payment. Money paid on account of a mortgage debt, in excess of what is justly due, may be recovered back in an action at law, if paid under compulsion and protest,[38] as, where the payment was forced by an impending sale under a power contained in the mortgage or was necessary to avert foreclosure proceedings,[39] but not where the payment was purely voluntary,[40] or where it was made out of the proceeds of a judicial sale or otherwise under the order or direction of the court.[41]

27. Darst *v.* Gale, 83 Ill. 136.

28. Brockschmidt *v.* Hagebusch, 72 Ill. 562; McVicar *v.* Denison, 81 Mich. 348, 45 N. W. 659. See also Jorgensen *v.* Young, 1 Alaska 335.

29. New York L. Ins., etc., Co. *v.* Howard, 2 Sandf. Ch. (N. Y.) 183; Ellis *v.* Mason, 32 S. C. 277, 10 S. E. 1069.

30. McFadden *v.* Fortier, 20 Ill. 509; Lash *v.* Edgerton, 13 Minn. 210; Ross *v.* Perrault, 13 Grant Ch. (U. C.) 206.

31. Trimble *v.* McCormick, 15 S. W. 358, 12 Ky. L. Rep. 857.

32. Kellogg *v.* Rockwell, 19 Conn. 446; Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790; Whilden *v.* Pearce, 27 S. C. 44, 2 S. E. 709.

33. Ellis *v.* Mason, 32 S. C. 277, 10 S. E. 1069; Young *v.* English, 7 Beav. 10, 13 L. J. Ch. 76, 29 Eng. Ch. 10, 49 Eng. Reprint 965.

Profit on purchase.— Bondholders, who buy property securing their bonds at a sale made by an assignee in bankruptcy, and afterward resell at a large profit, are not required to apply such profit on the bonds. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

34. See Darden *v.* Gerson, 91 Ala. 323, 9 So. 278; Borel *v.* Kappeler, 79 Cal. 342, 21 Pac. 841; Roberts *v.* Pierce, 79 Ill. 378; Hadley *v.* Chapin, 11 Paige (N. Y.) 245.

35. *Alabama.*— Webster *v.* Singley, 53 Ala. 208, 25 Am. Rep. 609.

Louisiana.— Favrot *v.* Allain, 6 La. Ann. 428.

Maine.— York County Sav. Bank *v.* Roberts, 70 Me. 384.

Massachusetts.— Parker *v.* Green, 8 Metc. 137.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508.

See 35 Cent. Dig. tit. "Mortgages," § 847.

Compare Sims *v.* Lester, 55 Ga. 620.

36. Payne *v.* Avery, 21 Mich. 524; Moody *v.* Haselden, 1 S. C. 129.

Mortgagee without notice.—Where a mortgagor conveys the land, the holder of a note secured by the mortgage, who has no actual notice of such conveyance, is not bound to act with reference to the grantee's rights in applying payments as credits. Riddle *v.* Rosenfeld, 103 Ill. 600.

37. Wilson *v.* Allen, 11 Oreg. 154, 2 Pac. 91.

38. Sawyer *v.* Goodwin, 1 Ch. D. 351, 45 L. J. Ch. 289, 34 L. T. Rep. N. S. 635, 24 Wkly. Rep. 493; Chapple *v.* Mahon, Ir. R. 5 Eq. 225; Taylor *v.* Waters, 5 L. J. Ch. 210, 1 Myl. & C. 266, 13 Eng. Ch. 266, 40 Eng. Reprint 376. But *compare* Miller *v.* Seeley, 90 Mich. 218, 51 N. W. 366.

39. McMurtrie *v.* Keenan, 109 Mass. 185; Cazenove *v.* Cutler, 4 Metc. (Mass.) 246. But see Rodgers *v.* Wittenmyer, 88 Cal. 553, 26 Pac. 369.

40. Goldberg *v.* Rouse, 2 N. Y. City Ct. 61.

41. See Jackson *v.* Dickerson, 5 Phila. (Pa.) 356; Sweet *v.* Tucker, 43 Vt. 355.

2. Operation and Effect of Payment — a. In General. Upon the payment of a debt secured by a mortgage, the mortgage becomes *functus officio*, and the relation of the parties in and through it is at an end,[42] at least in the absence of a clear intention on their part to keep the security alive.[43] Such payment will also revoke and cancel any power of sale contained in the mortgage,[44] and terminate the right of possession of a lessee under the mortgagee.[45] The performance of the stipulated conditions will fully discharge and extinguish an indemnity mortgage;[46] and payment of a part of the mortgage debt will satisfy the mortgage *pro tanto*.[47]

b. Title to Mortgaged Premises. By the rules of the common law, payment of the debt secured by a mortgage on or before the day appointed puts an end to the mortgagee's interest, and revests the legal title in the mortgagor without the necessity of any release or reconveyance;[48] but where a forfeiture has occurred by failure to pay at the proper time, the title of the mortgagee is not divested, nor that of the mortgagor restored, by the mere payment and acceptance of the money due;[49] it is necessary in this case that there should be a reconveyance of the legal title, and this will be ordered by a court of equity on an application by the mortgagor showing full payment and satisfaction of the mortgage debt.[50] Under the modern doctrine, which regards the debt as the principal thing and

42. Benham *v.* Pennock, 13 Hun (N. Y.) 103.

An attorney's commission in a mortgage is a part of the mortgage, belongs to the mortgagee, and is released by payment to the mortgagee. Faulkner *v.* Wilson, 3 Wkly. Notes Cas. (Pa.) 339.

Payment without discharge.— Where a mortgage is paid but not discharged, the right of the mortgagor is legal only and not equitable, and he cannot have relief on equitable grounds in a suit in regard thereto. McNair *v.* Picotte, 33 Mo. 57.

Paying off an equitable mortgage and directing the mortgagee to make a deed to a certain person who has obtained the legal title from the mortgagor does not raise a resulting trust. Boyer *v.* Floury, 80 Ga. 312, 5 S. E. 63.

A mortgagor has no property in his mortgage note after it has been extinguished by payment. Field *v.* Weaver, 32 La. Ann. 1242.

43. Thurber *v.* Stimmel, 119 N. Y. 641, 24 N. E. 4; Cady *v.* Merchants' Bank, 14 N. Y. St. 99.

44. Redmond *v.* Packenham, 66 Ill. 434.

45. Holt *v.* Rees, 44 Ill. 30.

46. See McConnel *v.* Dickson, 43 Ill. 99.

47. Howard *v.* Gresham, 27 Ga. 347; Babbitt *v.* McDermott, (N. J. Ch. 1893) 26 Atl. 889.

48. *Connecticut.*— Clinton *v.* Westbrook, 38 Conn. 9; Munson *v.* Munson, 30 Conn. 425.

Iowa.— Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Maine.— Stewart *v.* Crosby, 50 Me. 130.

Maryland.— Paxon *v.* Paul, 3 Harr. & M. 399.

Massachusetts.— Merrill *v.* Chase, 3 Allen 339.

Mississippi.—Griffin *v.* Lovell, 42 Miss. 402.

Missouri.— Pease *v.* Pilot Knob Iron Co, 49 Mo. 124; McNair *v.* Picotte, 33 Mo. 57.

New York.— Hatfield *v.* Reynolds, 34 Barb. 612; Weeks *v.* Weeks, 16 Abb. N. Cas. 143; Jackson *v.* Davis, 18 Johns. 7; Rogers *v.* De Forest, 7 Paige 272.

Ohio.— Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

Tennessee.— Furguson *v.* Coward, 12 Heisk. 572; Carter *v.* Taylor, 3 Head 30.

United States.—Gray *v.* Jenks, 10 Fed. Cas. No. 5,720, 3 Mason 520.

See 35 Cent. Dig. tit. "Mortgages," § 851.

49. *Alabama.*— Askew *v.* Sanders, 84 Ala. 356, 4 So. 167; Slaughter *v.* Swift, 67 Ala. 494; Jackson *v.* Scott, 67 Ala. 99.

California.— Chielovich *v.* Krauss, (1886) 9 Pac. 945; Perre *v.* Castro, 14 Cal. 519, 76 Am. Dec. 444.

Connecticut.— Munson *v.* Munson, 30 Conn. 425; Cross *v.* Robinson, 21 Conn. 379; Dudley *v.* Cadwell, 19 Conn. 218; Doton *v.* Russell, 17 Conn. 146; Griswold *v.* Mather, 5 Conn. 435; Phelps *v.* Sage, 2 Day 151.

Maine.— Rowell *v.* Mitchell, 68 Me. 21; Stewart *v.* Crosby, 50 Me. 130; Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595.

Massachusetts.— Currier *v.* Gale, 9 Allen 522.

England.— Whitlock *v.* Waltham, 1 Salk. 157.

See 35 Cent. Dig. tit. "Mortgages," § 851.

50. Plomley *v.* Felton, 14 App. Cas. 61, 58 L. J. P. C. 50, 60 L. T. Rep. N. S. 193; Walker *v.* Jones, L. R. 1 P. C. 50, 12 Jur. N. S. 381, 35 L. J. P. C. 30, 14 L. T. Rep. N. S. 686, 14 Wkly. Rep. 484; Harrison *v.* Owen, 1 Atk. 520, 26 Eng. Reprint 328; Lockhart *v.* Hardy, 9 Beav. 349, 10 Jur. 532, 15 L. J. Ch. 347, 50 Eng. Reprint 378; Young *v.* Whitchurch, etc., Banking Co., 37 L. J. Ch. 186, 17 L. T. Rep. N. S. 406; Lacey *v.* Waghorne, 59 L. T. Rep. N. S. 208; Postlethwaite *v.* Blythe, 3 Madd. 242, 56 Eng. Reprint 498; Schoole *v.* Sall, 1 Sch. & Lef. 176; Ellis *v.* Ellis, 1 Ch. Chamb. (U. C.) 257. And see Upham *v.* Brooks, 27 Fed. Cas. No. 16,797, 2 Woodb. & M. 407.

A court of common law has no power to compel a reconveyance under these circumstances; it belongs to the jurisdiction of equity. Gorely *v.* Gorely, 1 H. & N. 144.

the mortgage as a mere incident, payment of the debt at any time before foreclosure will extinguish the mortgage, and nothing is required to restore the legal title to the mortgagor except an entry of satisfaction in the usual form.[51] But the mortgagor is still entitled to require an actual reconveyance if the form of the security, or the subsequent dealings of the parties with it, were such as to make a conveyance from the mortgagee necessary to clear the mortgagor's title.[52]

c. Discharge of Mortgage and Lien — (i) *Payment by Mortgagor.* Payment of the debt secured by a mortgage, when made by the mortgagor to the holder of the debt, for the purpose of extinguishing it, discharges the mortgage and lifts its lien from the property affected;[53] and the rule is the same when the

A reconveyance obtained by fraud will not prevent a foreclosure. Withington *v.* Tate, L. R. 4 Ch. 288, 20 L. T. Rep. N. S. 637, 17 Wkly. Rep. N. S. 559.

A reconveyance may be presumed after a great lapse of time. Hillary *v.* Waller, 12 Ves. Jr. 239, 33 Eng. Reprint 92.

If the money is paid, but no reconveyance taken, the mortgagor in possession becomes tenant at will to the mortgagee; but the legal title remaining in the mortgagee may be extinguished by adverse possession. Sands *v.* Thompson, 22 Ch. D. 614, 52 L. J. Ch. 406, 48 L. T. Rep. N. S. 210, 31 Wkly. Rep. 397.

51. *Illinois.*— Willemin *v.* Dunn, 93 Ill. 511, holding that a grantor in a deed of trust who, after the maturity of the note secured thereby, tenders the amount to the payee, which tender is refused, may maintain a bill to redeem.

Michigan.— Van Husan *v.* Kanouse, 13 Mich. 303; Caruthers *v.* Humphrey, 12 Mich. 270.

New Hampshire.— Swett *v.* Horn, 1 N. H. 332.

New York.— Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145; Arnot *v.* Post, 6 Hill 65.

Tennessee.— Schilling *v.* Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892.

52. Robinson *v.* Cross, 22 Conn. 171; Heacock *v.* Swartwout, 28 Ill. 291; Smith *v.* Orton, 21 How. (U. S.) 241, 16 L. ed. 104.

Where a deed absolute on its face is given as security for a debt, the title does not revert to the grantor on the payment of the debt, and a deed from the grantee conveys the legal title. McCarthy *v.* McCarthy, 36 Conn. 177. So that it is proper for the court, on proof of the payment of the debt secured by such a deed, to require the grantee (mortgagee) to execute a reconveyance to the grantor. Sherwood *v.* Wilson, 2 Sweeny (N. Y.) 684. But where a debt secured by a deed which is absolute in form, but in reality intended only as security, is paid, and the deed surrendered for destruction, never having been recorded, the lien of the mortgage is extinguished, and the title revests in the grantor. Decker *v.* Decker, 64 Nebr. 239, 89 N. W. 795.

Deed of trust.— The payment of the debt secured by a deed of trust, without any entry of release or satisfaction of record or a reconveyance, does not reinvest the grantor with the legal title. Smith *v.* Otley, 26 Miss. 291.

53. *California.*— Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Illinois.— Loewenthal *v.* McCormick, 101 Ill. 143; Redmond *v.* Packenham, 66 Ill. 434; Funk *v.* McReynolds, 33 Ill. 481; Carroll *v.* Haigh, 97 Ill. App. 576.

Iowa.— Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Louisiana.— Hibernia Nat. Bank *v.* Gragard, 109 La. 677, 33 So. 728.

Maine.— Hussey *v.* Fisher, 94 Me. 301, 47 Atl. 525; Danforth *v.* Briggs, 89 Me. 316, 36 Atl. 452; Moody *v.* Moody, 68 Me. 155; Williams *v.* Thurlow, 31 Me. 392.

Maryland.— Marriott *v.* Handy, 8 Gill 31.

Mississippi.— Griffin *v.* Lovell, 42 Miss. 402.

New Hampshire.— Swett *v.* Horn, 1 N. H. 332.

New York.— Hatfield *v.* Reynolds, 34 Barb. 612.

North Carolina.— Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127.

Ohio.— Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

Pennsylvania.— Meigs *v.* Bunting, 141 Pa. St. 233, 21 Atl. 588, 23 Am. St. Rep. 273; Kinley *v.* Hill, 4 Watts & S. 426; Anderson *v.* Neff, 11 Serg. & R. 208.

South Carolina.— Dargan *v.* McSween, 33 S. C. 324, 11 S. E. 1077.

Texas.— Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72.

Wisconsin.— Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1 L. R. A. N. S. 891.

United States.— Kilpatrick *v.* Haley, 66 Fed. 133, 13 C. C. A. 480.

See 35 Cent. Dig. tit. "Mortgages," § 852.

Sale after payment.— In an action of ejectment by the purchaser of land at a sale under a deed of trust, it is a good defense that the debt secured by the deed of trust was satisfied before the sale. Furguson *v.* Coward, 12 Heisk. (Tenn.) 572.

Subsequent fraudulent assignment.— If a mortgage is in fact paid, but instead of being discharged is fraudulently assigned with intent to defraud creditors, it is not a valid lien; and one buying the land from the mortgagor's assignee in bankruptcy is entitled to a decree declaring the mortgage paid and the assignment of it void. McMaster *v.* Campbell, 41 Mich. 513, 2 N. W. 836.

payment is made by a purchaser of the mortgaged premises with a like intent,[54] or by a third person who advances the money to pay off the mortgage without meaning to hold it as security for his reimbursement;[55] or where the debt secured is not due from the mortgagor, but from another person who pays it off, the mortgagor in that case occupying the position of a surety.[56] The mortgagor's payment of the debt relieves and exonerates a grantee of the mortgaged premises so far as regards the lien of the mortgage and the rights of the mortgagee, whatever claim against him on behalf of the mortgagor may be founded on such payment.[57] If two mortgages on different properties are given to secure the same debt, payment of either satisfies both.[58] But where one of two joint mortgagors pays the whole debt, it satisfies the mortgage only as to his share of the debt; for the balance he may enforce it against the other.[59] And payment of a part of the mortgage debt pending foreclosure proceedings does not necessarily delay or defeat the proceedings.[60]

(II) *Payment by Indorser or Surety.* When the mortgage debt is paid by an indorser of the mortgage note or by a surety it does not necessarily discharge the mortgage; but the person making the payment may, if such was the intention and understanding at the time, hold the mortgage as security for his reimbursement by the person primarily liable.[61]

(III) *Payment by Purchaser of Part of Property.* Where a purchaser of part of the property covered by a mortgage pays the entire mortgage debt, it discharges the mortgage as to the entire property,[62] saving only his right to enforce contribution.[63] But such a purchaser cannot discharge the mortgage as to his own portion of the land merely by paying a proportionate share of the mortgage debt,[64] unless the mortgage itself apportions the debt so that specific portions of it are charged upon particular lots,[65] or unless there is an agreement in the mortgage for the release of portions of the property on payment of a specified sum per acre or per lot.[66]

3. Evidence of Payment — a. Burden of Proof. The burden of proving payment of a mortgage debt is on the party setting it up, whether he pleads it in defense to a suit to foreclose the mortgage,[67] or alleges it as a ground of

Mortgage as collateral.—Where a mortgage is made for the purpose of being deposited as collateral security for a loan, the payment of the whole sum so secured leaves the mortgage *functus officio* and no longer available in the hands of any one. Ledyard *v.* Chapin, 6 Ind. 320.

Dispute as to amount.— The receipt by the mortgagee of the amount tendered by the mortgagor in payment of the mortgage, concerning the amount of which there is a dispute, operates as a discharge, notwithstanding the mortgagee's declaration after he has taken the money that he only receives it as a partial payment. Fisher *v.* Holden, 84 Mich. 494, 47 N. W. 1063.

54. Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177; Given *v.* Marr, 27 Me. 212; Kilborn *v.* Robbins, 8 Allen (Mass.) 466.

55. Loewenthal *v.* McCormick, 101 Ill. 143; Poole *v.* Kelsey, 95 Ill. App. 233. And see Dedrick *v.* Den Bleyker, 85 Mich. 475, 48 N. W. 633.

56. Allen *v.* O'Donald, 28 Fed. 346.

57. Sebor *v.* Robbins, 1 Root (Conn.) 460; Fidelity Trust, etc., Co. *v.* Carr, 67 S. W. 258, 23 Ky. L. Rep. 2409. And see *supra*, XVII, D, 2, f.

58. Matheson *v.* Thompson, 20 Fla. 790.

59. Sumner *v.* Rhodes, 14 Conn. 135.

60. Welch *v.* Stearns, 74 Me. 71.

61. Peirce *v.* Garrett, 65 Ill. App. 682; Worthy *v.* Warner, 119 Mass. 550; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583; Knight *v.* Rountree, 99 N. C. 389, 6 S. E. 762. And see *supra*, XVI, B, 3, b.

As to necessity for contemporaneous agreement as to assignment of mortgage to payor see Pelton *v.* Knapp, 21 Wis. 63.

A payment by some of several joint guarantors is a payment by all; and if a mortgage has been given to secure them against a several liability, the non-paying mortgagees will in equity be trustees for the payers. Dye *v.* Mann, 10 Mich. 291.

62. Hicks *v.* Bingham, 11 Mass. 300; Taylor *v.* Porter, 7 Mass. 355. And see Walton *v.* Lizardi, 15 La. 588.

63. Kennelly *v.* Kelly, 51 Conn. 329.

64. Colby *v.* Cato, 47 Ala. 247.

65. Barge *v.* Klausman, 42 Minn. 281, 44 N. W. 69.

66. Hawhe *v.* Snydaker, 86 Ill. 197. And see *supra*, XVII, F, 1, c, f; *infra*, XVIII, C, 1, b.

67. *Illinois.*— Archibald *v.* Banks, 203 Ill. 380, 67 N. E. 791.

Maine.— Crooker *v.* Crooker, 49 Me. 416.

Michigan.— Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72. *Compare* Lashbrooks *v.*

relief in an action to redeem or to cancel the mortgage or otherwise stop its enforcement.[68]

b. Admissibility. Parol evidence is admissible to establish the entire or partial payment of a mortgage debt,[69] or to explain or limit the effect of a written receipt.[70] Payment may also be proved by a written acknowledgment or entry of release or satisfaction,[71] or by admissions or declarations of the parties against their interest,[72] but not by an indorsement or written document, advantageous to the interest of the party who executes it, but not communicated to the other.[73]

c. Weight and Sufficiency. The fact of payment, when disputed, must be established by a preponderance of the evidence.[74] Unexplained possession of the

Hatheway, 52 Mich. 124, 17 N. W. 723, holding that the rule imposing on defendant in foreclosure the burden of proving payment of the debt will be relaxed where for ten years no notice has been taken of the debt, where the debtor has confided in the creditor, and where the evidence concerning the existence of the debt is uncertain and conflicting.

Missouri.— Brown *v.* Morgan, 56 Mo. App. 382.

New Jersey.— McKinney *v.* Slack, 19 N. J. Eq. 164.

Pennsylvania.— Association *v.* Wall, 7 Phila. 240.

Vermont.— Austin *v.* Downer, 25 Vt. 558.

Canada.—Colwell *v.* Robinson, 23 N. Brunsw. 69.

See 35 Cent. Dig. tit. "Mortgages," § 861.

68. Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545. But see Manaudas *v.* Heilner, 12 Oreg. 335, 7 Pac. 347, holding that, where productive property, conveyed to a creditor as security, has been in his possession for a number of years, and he has also received large payments from the debtor, the burden is on the creditor, in an action against him to compel a reconveyance of such property, to show that the debt has not been paid.

69. Mauzey *v.* Bowen, 8 Ind. 193; Thornton *v.* Wood, 42 Me. 282; Baker *v.* Gavitt, 128 Mass. 93; Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790.

Parol evidence adding to recitals of deed of trust.— As between the original parties, parol evidence is admissible to prove that other payments have been made on certain notes than those mentioned in a deed of trust afterward given to secure them. Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660.

When production of receipt necessary.— Under an agreement between the mortgagee of land and a purchaser from the mortgagor that the former will cancel the mortgage on condition that such purchaser shall pay the amount alleged to be due on it, unless the mortgagor produces a receipt for the payment of the sum, which he claims to hold, only the production of the receipt can exonerate the purchaser from his promise, and he cannot prove by other evidence that the debt was paid. Jones *v.* Hughes, 66 Miss. 413, 6 So. 239.

70. Thompson *v.* Layman, 41 Minn. 295, 42 N. W. 1061. And see Austin *v.* Austin, 9 Vt. 420, holding that a receipt in full of all demands is no evidence of the discharge of a mortgage given to secure the future support of the mortgagee.

71. Giddings *v.* Seward, 16 N. Y. 365; Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826.

Proving voluntary release without payment.— A debt secured by bond and mortgage cannot be extinguished by a mere voluntary statement by the creditor that he will forgive it, but the purpose voluntarily to extinguish such a debt must be executed by an instrument as solemn as that by which the debt is created. Tulane *v.* Clifton, 47 N. J. Eq. 351, 20 Atl. 1086.

72. Burnham *v.* Ayer, 35 N. H. 351.

A statement made by the mortgagee to the assessor of taxes, on an examination for assessment, that the mortgage has been paid with the exception of a certain balance, is competent evidence on the question of payment. Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. 725.

The inventory of an estate assigned for the benefit of creditors is competent evidence that a mortgage not included therein, but of which the assignor was the record owner, had been satisfied before the assignment. Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826.

73. Coleman *v.* Howell, (N. J. Ch. 1888) 16 Atl. 202; Ranney *v.* Hardy, 43 Ohio St. 157, 1 N. E. 523.

74. Zook *v.* Odle, 3 Colo. App. 87, 32 Pac. 82.

Sufficiency of particular evidence.— As to the sufficiency or insufficiency of particular facts and circumstances to prove the payment of a mortgage see the following cases:

Alabama.— Ladd *v.* Lookout Distilling Co., (1906) 40 So. 610.

Colorado.— Smith *v.* Stark, 3 Colo. App. 453, 34 Pac. 258.

Illinois.— Telford *v.* Howell, 220 Ill. 52, 77 N. E. 82 [*affirming* 119 Ill. App. 83]; Garrels *v.* Meyer, 21 Ill. App. 381.

Maryland.— Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

Michigan.— Lyon *v.* McDonald, 51 Mich. 435, 16 N. W. 800; Green *v.* Engelmann, 39 Mich. 460.

New Jersey.— Hann *v.* Dekater, (Ch. 1890) 20 Atl. 657; Coleman *v.* Howell, (Ch. 1888) 16 Atl. 202; Rockhill *v.* Rockhill, (Ch. 1888) 14 Atl. 760.

New York.— Hunt *v.* Gleason, 141 N. Y. 552, 36 N. E. 343; Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. 725; Paget *v.* Melcher, 42 N. Y. App. Div. 76, 58 N. Y. Suppl. 913; Humphrey *v.* Sweeting, 92 Hun 447, 36 N. Y.

mortgaged premises by the mortgagor for a long period of time, although less than twenty years, may be left to the jury, in connection with other evidence, on the question of payment.[75] A written acknowledgment of the debt as unpaid may be conclusive against the mortgagor, when acted on, on the principle that he should be estopped to dispute it.[76]

d. Presumption of Payment — (I) *In General.* The production of a mortgage or the note or bond which it secures, by one showing title thereto, with no indorsement on the papers or any other marks upon them to indicate payment, raises a presumption that the debt remains unpaid.[77] And a presumption of payment,[78] not conclusive, but requiring evidence to overcome it,[79] arises from the cancellation or entry of satisfaction of the mortgage,[80] or from the refusal of the mortgagee, being in possession, to exercise a power of sale contained in the mortgage.[81]

(II) *Failure to Produce Mortgage or Bond.* If the person seeking to enforce a mortgage does not produce the mortgage or the note or bond secured by it, the debt will be presumed to have been paid, and this presumption can be overcome only by proof of the loss of the securities or a sufficient explanation of their absence.[82]

(III) *Possession of Securities by Mortgagor.* Since one paying a mortgage note or bond usually requires the surrender and delivery of the papers to him, the fact that the mortgage securities are in the possession of the mortgagor raises a presumption that the debt has been paid.[83] But this presumption is not

Suppl. 967; Jantzen *v.* Nelson, 76 Hun 611, 27 N. Y. Suppl. 1075; Hamel *v.* Culver, 14 Misc. 550, 36 N. Y. Suppl. 5.

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 275, 86 N. W. 864.

Ohio.— Bardshar *v.* Holtzman, 18 Ohio Cir. Ct. 668, 4 Ohio Cir. Dec. 174.

Washington.— Hersner *v.* Martin, 8 Wash. 698, 36 Pac. 1096.

Wisconsin.— Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649.

Canada.— Scatcherd *v.* Kiely, 21 Grant Ch. (U. C.) 30.

See 35 Cent. Dig. tit. "Mortgages," § 863.

A statement on the back of a note secured by deed of trust that a release of the trust deed was made and delivered by order of the holder, which is canceled, where no release is shown, and the note and deed are found among the papers of the deceased payee, is not sufficient to show payment. Steinmetz *v.* Lang, 81 Ill. 603. But *compare* Sherman *v.* Matthieu, 106 N. Y. App. Div. 368, 94 N. Y. Suppl. 565.

75. Gould *v.* White, 26 N. H. 178.

76. Gay *v.* Hassom, 64 Vt. 495, 24 Atl. 715.

77. Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Olmsted *v.* Elder, 2 Sandf. (N. Y.) 325.

78. **Presumption from payment of recited consideration.** — Where a mortgage recites that it is given upon a certain consideration, it will be presumed, in the absence of evidence to the contrary, that the consideration specified is the whole consideration, and if a presumption of payment of this consideration arises, the mortgage will be held discharged. Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833.

Presumption as to abandonment of mortgage security.—The presumption arising from the prosecution to judgment of a suit for the recovery of a debt, without asserting any claims under a mortgage given to secure such debt, that the creditor has abandoned the mortgage, does not apply in a case where, at the time of the suit, the creditor held ownership of the mortgaged property. Dawson *v.* Thorpe, 39 La. Ann. 366, 1 So. 686.

Payments before mortgage due. — Where payments are claimed to have been made by a mortgagor to the mortgagee on account of the mortgage, but a long time before any money became due on the mortgage, it will be presumed that the money so paid was paid on account of a liability not embraced within the mortgage. Tomlinson *v.* Seifert, 2 N. Y. St. 283.

Payment by promissory note.— There is no legal presumption that negotiable notes, given and accepted for the amount of a mortgage by the mortgagor to the mortgagee, were given and accepted in satisfaction of the mortgage; but the question whether they were so given may be left to the jury. Brown *v.* Scott, 51 Pa. St. 357.

79. Gray's Estate, 13 Phila. (Pa.) 246.

80. Miller *v.* Wack, 1 N. J. Eq. 204; Fleming *v.* Parry, 24 Pa. St. 47.

81. Malone Third Nat. Bank *v.* Shields, 55 Hun (N. Y.) 274, 8 N. Y. Suppl. 298.

82. Ward *v.* Munson, 105 Mich. 647, 63 N. W. 498; Bassett *v.* Hathaway, 9 Mich. 28; Butler *v.* Washington, 28 S. C. 607, 5 S. E. 601.

Absence of any written evidence of debt.— Where advances had been made for a long time by a man to his son-in-law, and were not evidenced by any writing, a jury may be authorized to presume that they were never intended to be repaid, and therefore were insufficient to uphold a mortgage; but these facts do not of themselves create a presumption of law that the mortgage was satisfied. McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268.

83. *Kentucky.*— Tharp *v.* Feltz, 6 B. Mon. 6.

conclusive; it may be rebutted by proof of circumstances explaining how the papers came into the mortgagor's hands without actual payment,[84] and it has little or no weight when the circumstances attending the mortgagor's possession are such as to raise a suspicion that he is not fairly entitled to them.[85]

(iv) *Lapse of Time.* Continued possession of the mortgaged premises by the mortgagor for twenty years or more, with no payment on account of the mortgage debt and no recognition of it as a subsisting obligation, and no attempt to enforce it, raises a presumption of payment,[86] and the same inference may be drawn from the lapse of a less period of time when there are other facts indicating payment.[87] And in some jurisdictions a shorter period is prescribed by stat-

Michigan.— Ormsby *v.* Barr, 21 Mich. 474.

New Hampshire.— Smith *v.* Smith, 15 N. H. 55.

New York.— Braman *v.* Bingham, 26 N. Y. 483; Fitzmahoney *v.* Caulfield, 87 Hun 66, 33 N. Y. Suppl. 876; Levy *v.* Merrill, 52 How. Pr. 360 [*affirmed* in 14 Hun 145].

West Virginia.— See Mynes *v.* Mynes, 47 W. Va. 681, 35 S. E. 935.

See 35 Cent. Dig. tit. "Mortgages," § 857.

Compare Ward *v.* Ward, 144 Fed. 308, no presumption of payment where the mortgagor in possession of the mortgage is the mortgagee's prospective administrator and takes possession of his papers at once on his death.

84. Allen *v.* Sawyer, 88 Ill. 414; Flower *v.* Elwood, 66 Ill. 438; Smith *v.* Smith, 15 N. H. 55; Anderson *v.* Culver, 127 N. Y. 377, 28 N. E. 32; Killops *v.* Stephens, 66 Wis. 571, 29 N. W. 390.

85. Anderson *v.* Culver, 127 N. Y. 377, 28 N. E. 32.

86. *Alabama.*— Goodwyn *v.* Baldwin, 59 Ala. 127.

Illinois.— Locke *v.* Caldwell, 91 Ill. 417; Blaisdell *v.* Smith, 3 Ill. App. 150.

Kansas.— Pattie *v.* Wilson, 25 Kan. 326.

Maine.— Jarvis *v.* Albro, 67 Me. 310; Mathews *v.* Light, 40 Me. 394; Blethen *v.* Dwinal, 35 Me. 556; Sweetser *v.* Lowell, 33 Me. 446.

Maryland.— Boyd *v.* Harris, 2 Md. Ch. 210.

Massachusetts.— Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346; Inches *v.* Leonard, 12 Mass. 379.

Michigan.— Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191; Cowie *v.* Fisher, 45 Mich. 629, 8 N. W. 586; Michigan Ins. Co. *v.* Brown, 11 Mich. 265.

Missouri.— Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209.

New Jersey.— Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Rockhill *v.* Rockhill, (Ch. 1888) 14 Atl. 760; Downs *v.* Sooy, 28 N. J. Eq. 55; Barned *v.* Barned, 21 N. J. Eq. 245; Evans *v.* Huffman, 5 N. J. Eq. 354.

New York.— Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328; Belmont *v.* O'Brien, 12 N. Y. 394; Townshend *v.* Townshend, 1 Abb. N. Cas. 81; Jackson *v.* Wood, 12 Johns. 242, 7 Am. Dec. 315; Jackson *v.* Pierce, 10 Johns. 414; Jackson *v.* Pratt, 10 Johns. 381; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273; Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500; Kellogg *v.* Wood, 4 Paige 578; Dunham *v.* Minard, 4 Paige 441; Giles *v.* Baremore, 5 Johns. Ch. 545; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. 636.

North Carolina.— Ray *v.* Pearce, 84 N. C. 485; Roberts *v.* Welch, 43 N. C. 287.

Pennsylvania.— Sawyer *v.* Link, 193 Pa. St. 424, 44 Atl. 457; Smith *v.* Nevin, 31 Pa. St. 238; Michener *v.* Michener, 1 Pa. Cas. 391, 2 Atl. 508; Lancaster *v.* Flowers, 11 Pa. Dist. 495; *In re* Liggett, 33 Pittsb. Leg. J. N. S. 164.

Rhode Island.— Staples *v.* Staples, 20 R. I. 264, 38 Atl. 498.

South Carolina.— Agnew *v.* Renwick, 27 S. C. 562, 4 S. E. 223.

Vermont.—Atkinson *v.* Patterson, 46 Vt. 750.

Virginia.— Jones *v.* Comer, 5 Leigh 350.

United States.— Burnham *v.* Hewey, 4 Fed. Cas. No. 2,175, 1 Hask. 372.

England.— Trash *v.* White, 3 Bro. Ch. 289, 29 Eng. Reprint 542; Christophers *v.* Sparke, 2 Jac. & W. 223, 37 Eng. Reprint 612; Hillary *v.* Waller, 12 Ves. Jr. 239, 33 Eng. Reprint 92. *Compare* Toplis *v.* Baker, 2 Cox Ch. 119, 2 Rev. Rep. 21, 30 Eng. Reprint 55.

Canada.— *Re* Caverhill, 8 Can. L. J. N. S. 50; Imperial Bank *v.* Metcalfe, 11 Ont. 467; Doe *v.* Hawke, 5 U. C. Q. B. O. S. 496.

See 35 Cent. Dig. tit. "Mortgages," §§ 858, 859.

The lapse of eleven years is not sufficient to raise a presumption of payment. Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365.

The mere neglect to foreclose a mortgage for four years after it falls due is not conclusive ground for assuming, in favor of purchasers of the mortgagor's interest, that the mortgage debt has been paid, or that it is barred by the statute of limitations. Ware *v.* Bennett, 18 Tex. 794.

Note payable at maker's death.— Where a mortgage was given to secure a note payable on or before the death of the maker and another, no presumption of payment will arise from lapse of time before the decease of both, nor will the statute of limitations begin to run. Dwight *v.* Eastman, 62 Vt. 398, 20 Atl. 594.

Non-payment of interest.— Payment of the principal of a mortgage cannot be presumed from the fact that no interest has been paid for nineteen years. Boon *v.* Pierpont, 28 N. J. Eq. 7.

87. In McMurray *v.* McMurray, 63 Hun (N. Y.) 183, 17 N. Y. Suppl. 657 (holding that a lapse of fifteen years without any effort to enforce the mortgage, together with

ute.[88] The rule as to presumption of payment from lapse of time applies where the security, although in the form of an absolute deed, is shown to have been intended as a mortgage.[89] But no such presumption arises where the mortgagee has been actually or constructively in possession of the mortgaged estate,[90] or has actively asserted his right to foreclose it,[91] or, it has been held, where the mortgagor, during the time relied on, has not resided within the state.[92] And it has been held that while this presumption can be relied on as a shield, it is not available as a weapon of attack by a party invoking affirmative relief based on the alleged payment.[93] No presumption of the payment of a mortgage debt can arise from mere lapse of time, so long as the debt is not barred by the statute.[94] And the fact that an action on the note is barred raises no presumption of payment in a suit to foreclose the mortgage.[95]

(v) *Rebuttal of Presumption From Lapse of Time.* The presumption of payment of a mortgage from lapse of time is not conclusive, but may be rebutted by evidence,[96] and for this purpose any competent evidence having a tendency to prove non-payment may be received,[97] including parol testimony.[98] The presumption is repelled by proof of a payment of interest or of any part of the principal within the time relied on,[99] by evidence of a distinct admission or acknowledgment by the mortgagor that the debt remains unpaid,[1] or by attempts by the mortgagee to enforce his security by legal proceedings or to collect the debt in

evidence that the mortgagor was at all times solvent and able to pay the debt, is sufficient to raise a presumption of payment); Brownell *v.* Oviatt, 215 Pa. St. 514, 64 Atl. 670; Butler *v.* Washington, 28 S. C. 607, 5 S. E. 601 (holding that a lapse of thirteen years, with corroborating circumstances, may sustain a finding that the mortgage has been paid). But see Ingraham *v.* Baldwin, 9 N. Y. 45.

88. See the statutes of the different states. And see Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122; Powell *v.* Brinkley, 44 N. C. 154; Roberts *v.* Welch, 43 N. C. 287; McCraw *v.* Fleming, 40 N. C. 348; Whitney *v.* French, 25 Vt. 663.

89. Swart *v.* Service, 21 Wend. (N. Y.) 36, 34 Am. Dec. 211. But see Webb *v.* Rice, 6 Hill (N. Y.) 219.

90. Crooker *v.* Jewell, 31 Me. 306; Mahar *v.* Fraser, 17 U. C. C. P. 408.

91. Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191. But see Barnard *v.* Onderdonk, 98 N. Y. 158, holding that, where the mortgagee obtains a decree of foreclosure, the presumption of payment arising from lapse of time is the same as if there had been no foreclosure.

92. Brobst *v.* Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002; Kibbe *v.* Thompson, 14 Fed. Cas. No. 7,754, 5 Biss. 226.

93. Allen *v.* Everly, 24 Ohio St. 97.

94. Locke *v.* Caldwell, 91 Ill. 417.

95. Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78.

96. *Maine.*— Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744; Jarvis *v.* Albro, 67 Me. 310; Joy *v.* Adams, 26 Me. 330.

Maryland.— Brown *v.* Hardcastle, 63 Md. 484.

Massachusetts.— Delano *v.* Smith, 142 Mass. 490, 8 N. E. 644.

Michigan.— Cowie *v.* Fisher, 45 Mich. 629, 8 N. W. 586; Abbott *v.* Godfroy, 1 Mich. 178.

New Hampshire.— Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 413.

New Jersey.— Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Rockhill *v.* Rockhill, (Ch. 1888) 14 Atl. 760.

New York.— Mead *v.* Mead, 1 Silv. Sup. 368, 5 N. Y. Suppl. 302.

Virginia.— Bowie *v.* Westmoreland Poor School Soc., 75 Va. 300.

United States.— Burnham *v.* Hewey, 4 Fed. Cas. No. 2,175, 1 Hask. 372.

England.— Stewart *v.* Nicholls, Taml. 307, 12 Eng. Ch. 307, 48 Eng. Reprint 122.

Canada.— McIntosh *v.* Rogers, 12 Ont. Pr. 389.

See 35 Cent. Dig. tit. "Mortgages," § 860.

97. *In re* Hagan, 33 Pittsb. Leg. J. N. S. (Pa.) 49.

98. Philbrook *v.* Clark, 77 Me. 176; Sweetser *v.* Lowell, 33 Me. 446.

99. Howard *v.* Hildreth, 18 N. H. 105; New York L. Ins., etc., Co. *v.* Covert, 3 Abb. Dec. (N. Y.) 350, 3 Transcr. App. 24, 6 Abb. Pr. N. S. 154; Hughes *v.* Blackwell, 59 N. C. 73; Hollister *v.* York, 59 Vt. 1, 9 Atl. 2.

1. Lyon *v.* McDonald, 51 Mich. 435, 16 N. W. 800; Murphy *v.* Coates, 33 N. J. Eq. 424; Jackson *v.* Wood, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582.

Sufficiency of admission.—The presumption of payment of a mortgage debt by the mortgagor, who has been in uninterrupted possession of the mortgaged premises for twenty years, must be overcome by some positive act of unequivocal recognition, like a part payment or a written admission, or at least a clear and well identified verbal promise or admission intelligently made by the mortgagor within the period of twenty years. Cheever *v.* Perley, 11 Allen (Mass.) 584.

Admission twenty years before foreclosure suit.— An admission by the mortgagor that

like manner;[2] and corroborating circumstances helping to rebut the presumption may be found in the fact that the mortgagor has been insolvent or in embarrassed circumstances,[3] in the near relationship of the parties,[4] or in fact in almost any circumstance which is inconsistent with the theory that the debt has been paid.[5]

B. Discharge of Debt or Mortgage — 1. In General — a. What Operates as Discharge. It is laid down as a general rule that nothing will discharge a mortgage but payment of the debt secured or the release of the security by the mortgagee.[6] But this is subject to numerous qualifications, as will appear from the rules stated in the succeeding sections; and in particular it is clear that the mortgage may be extinguished by a gift of the mortgage note or bond to the mortgagor, either *inter vivos* or by way of bequest;[7] by a sale of the mortgaged premises to a third person, entire or in part, to which the mortgagee consents and of which he accepts the proceeds;[8] by a foreclosure and enforcement of the mortgage against a part only of the property which it covers;[9] by the convey-

the debt was unpaid is not sufficient to rebut the presumption, where it was made more than twenty years before suit was brought to foreclose. Simms *v.* Kearse, 42 S. C. 43, 20 S. E. 19.

Recording a defeasance bond ten years after recording the deed is not an admission that the mortgage debt has not been paid, but is to be construed as an act in support of the mortgagor's title. Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124.

The admissions of the mortgagor's widow, who remained in possession of the land until her death, are admissible to overcome the presumption of payment from lapse of time. Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386.

2. Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386; Jackson *v.* Slater, 5 Wend. (N. Y.) 295; Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365; Levers *v.* Van Buskirk, 4 Pa. St. 309 [*affirming* 7 Watts & S. 70].

3. Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748. See, however, Wiley *v.* Lineberry, 89 N. C. 15.

4. Stimis *v.* Stimis, 54 N. J. Eq. 17, 33 Atl. 468; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Vaughn *v.* Tate, (Tenn. Ch. App. 1896) 36 S. W. 748. But *compare* Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103.

5. Abbott *v.* Godfroy, 1 Mich. 178 (evidence that there was no one, from the death of the mortgagee until administration was granted on his estate, forty-five years later, who could receive payment and discharge the mortgage); Smith *v.* Smith, 15 N. H. 55 (evidence that the mortgagee delivered the mortgage notes to the mortgagor in the mistaken belief that the mortgage had been foreclosed); Jackson *v.* Slater, 5 Wend. (N. Y.) 295 (premises occupied by a mere naked possessor, neither holding nor claiming under the mortgage).

6. *California.*— Boyce *v.* Fisk, 110 Cal. 107, 42 Pac. 473.

Georgia.— Harris *v.* Glenn, 56 Ga. 94.

Indiana.— Clarke *v.* Henshaw, 30 Ind. 144.

Maine.— Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744; Hadlock *v.* Bulfinch, 31 Me. 246; Crosby *v.* Chase, 17 Me. 369.

Minnesota.— Folsom *v.* Lockwood, 6 Minn. 186; Whittacre *v.* Fuller, 5 Minn. 508.

New Hampshire.— Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551.

Pennsylvania.— Duncan *v.* Reiff, 3 Penr. & W. 368, holding that a mortgage to the state is discharged only by actual payment into the state treasury.

See 35 Cent. Dig. tit. "Mortgages," § 864.

Death of mortgagor.— Although, in a mortgage by a husband and wife, pledging the wife's estate for the husband's debt, the wife is only a surety, her death does not discharge her estate from the lien of the mortgage. Miner *v.* Graham, 24 Pa. St. 491.

Payment partly by note.—Where an attorney, who was foreclosing a mortgage for his client, made a settlement with the debtor, taking part cash and the debtor's note to himself personally for the balance, by way of a loan to the debtor, and discontinued the suit, declaring the mortgage paid, it was held that the mortgage was intended to be and was extinguished. Hawkes *v.* Dodge County Mut. Ins. Co., 11 Wis. 188.

7. Thomas *v.* Fuller, 68 Hun (N. Y.) 361, 22 N. Y. Suppl. 862; Weeks *v.* Weeks, 16 Abb. N. Cas. (N. Y.) 143. See also Finch *v.* Houghton, 19 Wis. 149.

8. Carson *v.* Phelps, 40 Md. 73; Fredonia Nat. Bank *v.* Borden, 166 Pa. St. 177, 30 Atl. 975, 976; Pratt *v.* Waterhouse, 158 Pa. St. 45, 27 Atl. 855; Field *v.* Doyon, 64 Wis. 560, 25 N. W. 653. *Compare* Van Amburgh *v.* Kramer, 16 Hun (N. Y.) 205.

Partition.— Where an entire tract covered by a deed of trust is partitioned among the joint tenants, in a suit to which the trustee is made a party, but not the beneficiary, and one portion is set apart for the payment of the deed of trust, and is sold by the master in chancery for that purpose, the lien on the balance of the land is not released, and if this parcel fails to satisfy the trust deed, it may be enforced against the rest of the land. Brown *v.* Shurtleff, 24 Ill. App. 569.

9. Mascarel *v.* Raffour, 51 Cal. 242.

As to effect of foreclosure for overdue instalments on the land as security for the portion of the debt not due see Rains *v.* Mann, 68 Ill. 264; Smith *v.* Smith, 32 Ill. 198.

ance of the equity of redemption to the mortgagee in satisfaction of the mortgage debt;[10] or by the mortgagee's acceptance of a new security for the same debt, not intended as cumulative nor as a renewal or extension of the mortgage, but in substitution for it;[11] but not generally by the mortgagor's purchase of the property at a sale under foreclosure of a prior mortgage.[12] Where property is mortgaged to answer for the debt of another, it occupies the position of a surety, and anything which will discharge an individual surety will under like circumstances discharge the property.[13] A bond to reconvey lands, with a penalty, although amounting to a mortgage, may be discharged and satisfied as any other bond.[14]

b. Performance of Particular Conditions. Where a mortgage is conditioned otherwise than for the payment of money, or is stipulated to be satisfied or released on the performance of some particular condition, due performance of the condition discharges the mortgage by operation of law.[15] This is the case, for example, with a mortgage conditioned for the support and maintenance of the mortgagee,[16] or for the erection of a building, according to specifications, on the same or other premises.[17]

c. Indemnity Mortgages. A mortgage given to indemnify the mortgagee against a debt or obligation for which he is secondarily liable is discharged by operation of law as soon as the debt or obligation is paid, or as soon as it becomes legally certain that it cannot be enforced against the mortgagee.[18]

10. See *supra*, XVII, G, 2, c.

11. Robinson *v.* Leavitt, 7 N. H. 73; Duntz *v.* Horton, 83 Hun (N. Y.) 332, 31 N. Y. Suppl. 742 [*affirmed* in 146 N. Y. 368, 41 N. E. 88]; Schad *v.* Schad, 7 N. Y. St. 635; Leake *v.* Woolsey, 1 Cai. Cas. (N. Y.) 73; Interstate Bldg., etc., Assoc. *v.* Tabor, 21 Tex. Civ. App. 112, 51 S. W. 300; Proctor *v.* Thrall, 22 Vt. 262.

New mortgage by heir of mortgagor.— An heir executing a mortgage on inherited lands, to secure a debt of his ancestor, does not thereby, as against the mortgagee, release a mortgage on such lands executed in his favor by such ancestor in his lifetime. Newell *v.* Buckner, 24 La. Ann. 185.

12. Wineman *v.* Phillips, 93 Mich. 223, 53 N. W. 168; Manwaring *v.* Powell, 40 Mich. 371.

13. Finnegan *v.* Janeway, 85 Minn. 384, 89 N. W. 4.

14. Reynolds *v.* Scott, Brayt. (Vt.) 75.

15. *Alabama.*— Bradshaw *v.* Gunter, 135 Ala. 240, 33 So. 549.

Massachusetts.— Merrill *v.* Chase, 3 Allen 339; Fay *v.* Cheney, 14 Pick. 399; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

Missouri.— Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371, holding that where a mortgage is executed under an agreement that the mortgagee shall retain it only until he can satisfy himself as to the solvency of a person who is offered as surety for the debt, the mortgage becomes impliedly satisfied on the mortgagee's assurance of the solvency of such person.

New Hampshire.— Furbush *v.* Goodwin, 25 N. H. 425.

New Jersey.— Fowler *v.* Tovell, (Ch. 1897) 39 Atl. 725.

New York.— Gutwillig *v.* Wiederman, 26 N. Y. App. Div. 26, 49 N. Y. Suppl. 984.

Pennsylvania.— Tucker *v.* Taylor, 191 Pa. St. 402, 43 Atl. 318.

See 35 Cent. Dig. tit. "Mortgages," § 865.

16. Rhoades *v.* Parker, 10 N. H. 83; Gescheidt *v.* Drier, 17 N. Y. Suppl. 741; Ottaquechee Sav. Bank *v.* Holt, 58 Vt. 166, 1 Atl. 485; Stoel *v.* Flanders, 68 Wis. 256, 32 N. W. 114. See also Pattee *v.* Boynton, 73 N. H. 525, 63 Atl. 787.

17. Goldbeck's Appeal, 4 Pa. Cas. 488, 8 Atl. 29; Swain *v.* Seamens, 9 Wall. (U. S.) 254, 19 L. ed. 554.

18. Taft *v.* Stoddard, 142 Mass. 545, 8 N. E. 586; Hayden *v.* Smith, 12 Metc. (Mass.) 511; Newell *v.* Hurlburt, 2 Vt. 351. And see Clambey *v.* Corliss, 41 Wash. 327, 83 Pac. 422.

Mortgage discharged by renewal of note see Bonham *v.* Galloway, 13 Ill. 68.

New note with other sureties.— Where the mortgage is given to indemnify the mortgagee against liability on a note which he has signed as surety, it is discharged when the note is taken up and a new note given with other sureties. Abbott *v.* Upton, 19 Pick. (Mass.) 434.

Debt barred by statute.— The mortgage is legally extinguished when the debt indemnified against becomes barred by the statute of limitations, although never actually paid. Archambau *v.* Green, 21 Minn. 520.

Where the mortgagee is to be indemnified against a prior mortgage, the condition is fulfilled when such prior mortgage is foreclosed and the property bought in by its holder. Sergeant *v.* Ruble, 33 Minn. 354, 23 N. W. 535.

Where the mortgagee's liability is that of bail for the mortgagor in a criminal case, he is saved harmless by the due appearance of the mortgagor, and the mortgage is accordingly discharged. Nichols *v.* Cabe, 3 Head (Tenn.) 92.

d. Non-Performance of Conditions by Mortgagee. Where a mortgage in terms imposes conditions subsequent upon the mortgagee, or where its consideration wholly or in part consists in his undertaking to do certain acts, his failure of performance will virtually discharge the mortgage and entitle the mortgagor to a cancellation or release.[19]

e. Happening of Contingency. A mortgage conditioned to become void on the occurrence of a future event, other than payment of the debt secured or as an alternative to such payment, is discharged by operation of law upon the happening of the contingency provided for.[20]

f. Compromise or Settlement. Although the debt secured by a mortgage is not paid according to its strict terms, the mortgage is none the less discharged by a settlement and compromise by the parties of all claims arising under it or a general settlement of all claims including the mortgage.[21]

g. Release of Debt or Liability Therefor. The modern doctrine being that the debt is the principal thing and the mortgage only an incident or accessory to it, it follows that whatever extinguishes the debt will also discharge the mortgage.[22] But the debt and the mortgagor's liability for it are not the same thing in law. Hence the mortgage is not discharged if it is the intention of the parties merely to release the mortgagor's personal liability for it and not to extinguish the debt.[23] A discharge in bankruptcy or insolvency, or a release from arrest on civil process, may set the mortgagor free from the payment of the debt, without

19. Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740; McClellan *v.* Coffin, 93 Ind. 456; Van Dyke *v.* Davis, 2 Mich. 144.

20. *Connecticut.*— Munson *v.* Munson, 30 Conn. 425.

Maine.— Hollis *v.* Hollis, 84 Me. 96, 24 Atl. 581, mortgage conditioned to be null and void "if the said mortgagee should die before the note is paid."

Maryland.— Power *v.* Jenkins, 13 Md. 443.

Massachusetts.— Fiske *v.* Ruggles, 4 Gray 528, mortgage to be void if the mortgagee, within two years, should sell other land purchased by him from the mortgagor for a certain price, or refuse an offer therefor.

South Carolina.— Rickard *v.* Talbird, Rice Eq. 158, holding that a mortgage given to secure the repayment of a legacy in case such payment should prove to have been invalid is *functus officio* upon the rendering of a judicial decision sustaining the payment, and cannot be enforced in the hands of an assignee.

Washington.— Church Erection Fund *v.* Seattle First Presb. Church, 19 Wash. 455, 53 Pac. 671.

See 35 Cent. Dig. tit. "Mortgages," § 868.

21. *Alabama.*— Cade *v.* Floyd, 120 Ala. 484, 24 So. 944.

Illinois.— Swartzbaugh *v.* Swartzbaugh, 81 Ill. App. 196.

Massachusetts.— Hammond *v.* Lovell, 136 Mass. 184.

Ohio.— Heighway *v.* Pendleton, 15 Ohio 735.

Vermont.— Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517.

See 35 Cent. Dig. tit. "Mortgages," § 869.

Fairness of settlement.— There are no such confidential relations existing between a mortgagor and mortgagee, as such, as will justify the former in relying on statements made by the latter in a settlement, without taking steps which are open to him to ascertain their truthfulness, except at his own peril. Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133.

22. *Indiana.*— Sherman *v.* Sherman, 3 Ind. 337.

Kentucky.— Armitage *v.* Wickliffe, 12 B. Mon. 488.

Louisiana.— Chatenond *v.* Hebert, 30 La. Ann. 404; Conrad *v.* Prieur, 5 Rob. 49; Auguste *v.* Renard, 3 Rob. 389; Harrod *v.* Voorhies, 16 La. 254; Walton *v.* Lizardi, 15 La. 588; Shields *v.* Brundige, 4 La. 326; Abat *v.* Nolte, 6 Mart. N. S. 636.

Maryland.— Martin *v.* Goldsborough, (1892) 25 Atl. 420.

Massachusetts.— Hastings *v.* Hastings, 110 Mass. 280.

New Jersey.— Atwater *v.* Underhill, 22 N. J. Eq. 599.

New York.— Weeks *v.* Weeks, 16 Abb. N. Cas. 143; Blodgett *v.* Wadhams, Lalor 65; Jackson *v.* Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

Pennsylvania.— See Morris *v.* Brady, 5 Whart. 541.

See 35 Cent. Dig. tit. "Mortgages," § 870.

A covenant not to sue on a mortgage debt operates as a release. Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

Release to mortgagor's vendee.— A mortgage debt is not released, nor the mortgage discharged, by a release from the mortgagee to a purchaser of the mortgaged estate, who has assumed payment of the mortgage debt, of all claims and demands arising by virtue of that agreement. Knowles *v.* Carpenter, 8 R. I. 548.

23. Donnelly *v.* Simonton, 13 Minn. 301; Bentley *v.* Vanderheyden, 35 N. Y. 677.

in any way affecting the lien of the mortgage given to secure it.[24] And although the mortgagee may lose the benefit of an indorsement on the mortgage note by his neglect or delay, this does not necessarily release the maker or discharge the mortgage;[25] and the rule is the same as to a release given to one of two joint makers of the mortgage note, on his payment of a part of the debt.[26]

h. Possession of Evidence of Debt. The surrender of the note, bond, or other evidence of the debt to the mortgagor, or his obtaining possession of it otherwise, does not necessarily extinguish the mortgage or even prove payment; that will depend on the purpose with which it is placed in his hands and the title by which he holds it, whether for himself or for the mortgagee.[27]

i. Conveyance or Other Disposition of Mortgaged Property. A conveyance in fee of mortgaged premises, from the mortgagee to the mortgagor, whether by warranty or quitclaim deed, extinguishes the lien of the mortgage and operates as a discharge of it.[28] This is also true where there is a sale of the premises by the mortgagor to a third person, to which the mortgagee assents and of which he receives the consideration in satisfaction of the mortgage debt.[29] And the mortgage is discharged by a conveyance of the premises to a third person, made by the mortgagee with the consent of the mortgagor,[30] and even without the agreement or participation of the mortgagor, where the mortgage was in the form of an absolute deed, and the purchaser is without any knowledge of the right of redemption.[31]

j. Rescission of Sale as Discharge of Purchase-Money Mortgage. A mortgage

24. *California.*— Luning *v.* Brady, 10 Cal. 265.

Indiana.— Bergein *v.* Brehm, 123 Ind. 160, 23 N. E. 496.

Kansas.— Burtis *v.* Wait, 33 Kan. 478, 6 Pac. 783.

Massachusetts.— Cary *v.* Prentiss, 7 Mass. 63.

Mississippi.— Bush *v.* Cooper, 26 Misc. 599, 59 Am. Dec. 270; Terry *v.* Woods, 6 Sm. & M. 139, 45 Am. Dec. 274.

25. Kerr *v.* Wells, 2 La. Ann. 832; Hilton *v.* Catherwood, 10 Ohio St. 109; Mitchell *v.* Clark, 35 Vt. 104. But see Fulton Co. *v.* Wright, 12 La. 386.

26. Walls *v.* Baird, 91 Ind. 429.

27. Bourland *v.* Wittich, 38 Ark. 167; Norton's Succession, 18 La. Ann. 36; Dixfield *v.* Newton, 41 Me. 221; Killops *v.* Stephens, 66 Wis. 571, 29 N. W. 390. See also Schinkel *v.* Hanewinkel, 19 La. Ann. 260.

The surrender of a defeasance to the obligor to be canceled, and the retention of it by him, amount in law to a cancellation of the instrument, although it is not actually destroyed. Green *v.* Butler, 26 Cal. 595.

28. *Alabama.*— Mutual Bldg., etc., Assoc. *v.* Wyeth, 105 Ala. 639, 17 So. 45.

Illinois.— Donlin *v.* Bradley, 119 Ill. 412, 10 N. E. 11.

Maine.— Bullard *v.* Hinckley, 5 Me. 272.

Minnesota.— Gille *v.* Hunt, 35 Minn. 357, 29 N. W. 2.

Missouri.— See Williams *v.* Brownlee, 101 Mo. 309, 13 S. W. 1049.

Nebraska.— Perry *v.* Baker, 61 Nebr. 841, 86 N. W. 692.

New York.— Stoddard *v.* Rotton, 5 Bosw. 378. See also Clements *v.* Griswold, 46 Hun 377.

Simultaneous deed and mortgage.— A quitclaim deed, conveying mortgaged premises, given by the mortgagee to the mortgagor, cannot be set up as a release of the mortgage, because bearing a later date than the mortgage, when it appears that they were both delivered on the same date and as parts of one transaction. Kelly *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 221, 43 Pac. 1003; Fish *v.* Gordon, 10 Vt. 288.

Conveyance by trustee.— A quitclaim deed, made by the trustee in a deed of trust securing a note, which does not profess to be executed in pursuance of the powers in the trust deed, and is given for a nominal consideration, in advance of the maturity of the secured note, and without surrender of such note, does not extinguish the lien of the trust deed. Weldon *v.* Tollman, 67 Fed. 986, 15 C. C. A. 138.

29. Wilkens *v.* Potts, (Tex. Civ. App. 1899) 54 S. W. 279.

30. Craig *v.* Feland, 4 T. B. Mon. (Ky.) 223.

A conveyance by a mortgagee to a third person of a specific part of the land mortgaged does not discharge that part from the mortgage, as against the mortgagor. Grover *v.* Thatcher, 4 Gray (Mass.) 526; Wyman *v.* Hooper, 2 Gray (Mass.) 141.

Mortgage by mortgagee.—Where the grantee in a deed, which is in fact a mortgage, mortgages part of the land conveyed, and such mortgage is foreclosed in a suit in which both grantor and grantee are made parties, the grantor should have credit on the debt secured by the deed, in an accounting with the grantee, for the amount realized upon such foreclosure. Turman *v.* Forrester, 55 Ark. 336, 18 S. W. 167.

31. Mooney *v.* Byrne, 1 N. Y. App. Div. 316, 37 N. Y. Suppl. 388. See also to same general effect Turman *v.* Forrester, 55 Ark. 336, 18 S. W. 167.

given to secure the purchase-money of land bought from the mortgagee is discharged by a rescission or annulment of the contract of sale.[32]

k. Resort to or Release of Other Security or Remedy. When a mortgagee has an additional or collateral security for his debt, or other means of securing its payment, and avails himself thereof, the mortgage is discharged or reduced to the extent to which the mortgagee's proceedings have resulted in satisfaction of his claim.[33] And this is the rule also where he voluntarily releases his other security or remedy, or loses it by laches or neglect, under such circumstances that the subsequent enforcement of the mortgage for its full amount would work injustice to the mortgagor or a fraud on the rights of third parties having interests;[34] but not where the additional security is lost by the act of the law or otherwise without his fault.[35]

l. Evidence of Discharge. As in the case of alleged payment of a mortgage,[36] so where it is claimed to have been discharged otherwise the fact may be established by any competent testimony, which, however, must be sufficient to establish it by a fair preponderance of the evidence.[37] The satisfaction or discharge of the mortgage may be presumed from a very great lapse of time without proceedings taken to enforce it, especially in connection with corroborating circumstances.[38] The mortgagee's receipt or acknowledgment is not conclusive proof of satisfaction, but is open to explanation, as other receipts.[39]

2. Tender — a. Sufficiency of Tender — (i) *In General.* A tender of payment or performance of a mortgage, to be effective, must be open, fair, and reasonable,[40] so clear and explicit as to leave no doubt of the intention to satisfy and discharge the mortgage,[41] made by the mortgagor or someone duly authorized to act for him,[42] and to the mortgagee or someone authorized to receive

32. Wanzer *v.* Cary, 76 N. Y. 526; Eveland *v.* Wheeler, 37 N. Y. 244; Williams *v.* Washington, 40 S. C. 457, 19 S. E. 1. But see Lawrence *v.* Lawrence, 42 N. H. 109, holding that the surrender by a grantee, who has mortgaged back the premises as security, of his original warranty deed, which had not been recorded, and his acceptance of a quit-claim deed in lieu thereof, will not discharge the mortgage.

33. Hanna *v.* Reeves, 22 Wash. 6, 60 Pac. 62, holding that suing the mortgage debt to judgment and selling the premises on execution thereunder operates as an abandonment of the mortgage, at least to the extent of the available proceeds of the sale.

Chattel mortgage securing same debt.— Where the mortgagee of realty also holds a chattel mortgage to secure the same debt, which he forecloses, the real estate mortgage is discharged to the extent of the amount realized from the chattels. Androscoggin Sav. Bank *v.* McKenney, 78 Me. 442, 6 Atl. 877; Wendell *v.* Highstone, 52 Mich. 552, 18 N. W. 354; Spencer *v.* Forcht, 16 S. D. 287, 92 N. W. 392.

Claim against deceased mortgagor's estate. — Where the mortgagee files his claim under the mortgage as a claim against the estate of his deceased mortgagor, in the probate court, has it allowed, and receives payment, the mortgage is discharged. Findlay *v.* Hosmer, 2 Conn. 350. But this result does not follow from the mere filing of the claim (National L. Ins. Co. *v.* Fitzgerald, 61 Nebr. 692, 85 N. W. 948), nor even from its allowance by the probate court, until fully paid (Walker *v.* Baxter, 26 Vt. 710).

As to application of insurance money to satisfaction of mortgage debt see Ballard *v.* Nye, (Cal. 1902) 69 Pac. 481.

As to application of rents of mortgaged property on debt see Wilmarth *v.* Johnson, 124 Wis. 320, 102 N. W. 562.

34. A. P. Cook Co. *v.* Bell, 114 Mich. 283, 72 N. W. 174; Grow *v.* Garlock, 97 N. Y. 81; Soule *v.* Union Bank, 45 Barb. (N. Y.) 111; Gates *v.* Adams, 24 Vt. 70.

35. Thurmond *v.* Woods, 27 Gratt. (Va.) 727.

36. See *supra*, XVIII, A, 3, b, c.

37. Steinmetz *v.* Lang, 81 Ill. 603; Crocker *v.* Thompson, 3 Metc. (Mass.) 224; Slayton *v.* Slayton, 99 Mich. 35, 57 N. W. 1079; Morgan *v.* Freeborn, 68 Hun (N. Y.) 296, 22 N. Y. Suppl. 982.

38. Nelson *v.* Lee, 10 B. Mon. (Ky.) 495; Murray *v.* Fishback, 5 B. Mon. (Ky.) 403; Morgan *v.* Davis, 2 Harr. & M. (Md.) 9; Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 545. *Compare* Owings *v.* Norwood, 2 Harr. & J. (Md.) 96.

39. Pearce *v.* Savage, 45 Me. 90; Austin *v.* Austin, 9 Vt. 420.

40. Darling *v.* Chapman, 14 Mass. 101; Post *v.* Springsted, 49 Mich. 90, 13 N. W. 370; Haney *v.* Clark, 65 Tex. 93; Kinnaird *v.* Trollope, 42 Ch. D. 610, 58 L. J. Ch. 556, 60 L. T. Rep. N. S. 892.

41. Proctor *v.* Robinson, 35 Mich. 284; Frost *v.* Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627.

42. Graffin *v.* State, 103 Md. 171, 63 Atl. 373; Johnston *v.* Gray, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577, holding that the tender

it,[43] and offering payment in money or performance of the condition of the mortgage according to its true meaning and intent;[44] and it must be established, if disputed, by clear and satisfactory evidence.[45] Nor will tender which is not kept good affect the rights of the mortgagee unless deliberately refused;[46] and it cannot be made conditional upon his immediate acceptance, for he must be allowed a reasonable time to examine the papers and calculate and ascertain the amount due and consider whether he will be satisfied with the sum tendered.[47]

(II) *CONDITIONS.* A tender must not be coupled with any other conditions than those which it is the clear legal duty of the mortgagee to fulfil on receiving payment or satisfaction.[48] But the mortgor, on making tender to a person who claims to be the assignee of the mortgage, may require proof of his authority to collect the debt;[49] and he may demand the production and surrender of the mortgage and note or bond,[50] the delivery up of notes or property held as collateral security,[51] and a release, cancellation, or entry of satisfaction of the mortgage.[52]

(III) *AMOUNT.* The tender must include the whole and full amount stipulated to be paid according to the terms of the mortgage,[53] unless made pursuant to a

is equally effective whether made by the mortgagor himself or by a purchaser of the estate from him or by his agent.

Tender by the mortgagor's assignee in insolvency sufficient.— Davies *v.* Dow, 80 Minn. 223, 83 N. W. 50.

43. Post *v.* Springsted, 49 Mich. 90, 13 N. W. 370.

Showing money to servant.— It is not a sufficient tender to show the money to a servant at the house of the mortgagee, when he is not at home. Jewett *v.* Earle, 53 N. Y. Super. Ct. 349.

44. McGoon *v.* Shirk, 54 Ill. 408, 5 Am. Rep. 122.

The tender of a check, not certified, and which would not be honored unless the note and mortgage were first surrendered to the drawer is not sufficient. Harding *v.* Commercial Loan Co., 84 Ill. 251. And a solicitor, authorized to accept a tender of the amount due on the mortgage, has no implied authority to accept the tender of a check in lieu of cash. Blumberg *v.* Life Interests, etc., Corp., [1897] 1 Ch. 171, 66 L. J. Ch. 127, 75 L. T. Rep. N. S. 627, 45 Wkly. Rep. 246.

Offer to do equity.— Where one is entitled to recover certain land on paying or tendering his share of the encumbrance thereon, he does not make a sufficient tender in suit by offering to do full equity. Ailey *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137.

45. McLelland *v.* A. P. Cook Co., 94 Mich. 528, 54 N. W. 298; Engle *v.* Hall, 45 Mich. 57, 7 N. W. 239; Potts *v.* Plaisted, 30 Mich. 149.

46. Tuthill *v.* Morris, 81 N. Y. 94.

47. Post *v.* Springsted, 49 Mich. 90, 13 N. W. 370; Root *v.* Bradley, 49 Mich. 27, 12 N. W. 896; Waldron *v.* Murphy, 40 Mich. 668; Potts *v.* Plaisted, 30 Mich. 149; Wilshaw *v.* Smith, 9 Mod. 441.

48. Sager *v.* Tupper, 35 Mich. 134; Mott *v.* Rutter, (N. J. Ch. 1903) 54 Atl. 159 [*affirmed* in 66 N. J. Eq. 435, 57 Atl. 1132].

Threat to sue for recovery back.—A tender of mortgage money, with a statement that the party tendering did not consider that the amount tendered was due, and that the other would thereafter be compelled to pay back the excess, was not invalidated by the implied threat. Peers *v.* Allen, 19 Grant Ch. (U. C.) 98.

49. Kennedy *v.* Moore, 91 Iowa 39, 58 N. W. 1066.

50. Halpin *v.* Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Bailey *v.* Buchanan County, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562; Smith *v.* Rockwell, 2 Hill (N. Y.) 482; Bardshar *v.* Holtzman, 18 Ohio Cir. Ct. 668, 4 Ohio Cir. Dec. 174; Robarts *v.* Jefferys, 8 L. J. Ch. O. S. 137. But see Peers *v.* Allen, 19 Grant Ch. (U. C.) 98.

Demand of assignment.— A tender by a junior mortgagee will not discharge a prior mortgage, where the tender is accompanied by a demand for an assignment of the mortgage. Day *v.* Strong, 29 Hun (N. Y.) 505. And see Nelson *v.* Loder, 55 Hun (N. Y.) 173, 7 N. Y. Suppl. 849 [*affirmed* in 132 N. Y. 288, 30 N. E. 369].

51. Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Cutler *v.* James Goold Co., 43 Hun (N. Y.) 516.

52. Halpin *v.* Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Wheelock *v.* Tanner, 39 N. Y. 481. And see Saunders *v.* Frost, 5 Pick. (Mass.) 259, 16 Am. Dec. 394. But see Storey *v.* Krewson, 55 Ind. 397, 23 Am. Dec. 668; McCormick *v.* McDonald, 70 Mo. App. 389.

Demand for quitclaim deed.— A tender to an assignee of the mortgage is spoiled by coupling it with a condition that he shall execute to the mortgagor a quitclaim deed of the premises. Dodge *v.* Brewer, 31 Mich. 227.

53. Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684; Thornton *v.* National Exch. Bank, 71 Mo. 221 (a joint mortgagor responsible for only half the debt may tender to holder of one of the notes secured one half his debt with interest); Cupples *v.* Galligan, 6 Mo. App. 62 (tender must be of the whole debt, and not merely of so much as is due at the time); Graham *v.* Linden, 50

valid agreement by the mortgagee to accept less than the full amount of the debt.[54] If there have been partial payments, rents applied on the mortgage debt, or other dealings between the parties reducing its original amount, then the tender must be of the full balance justly due.[55] After an action has been commenced on the mortgage, a tender must include costs to date,[56] and also an attorney's fee, if that is stipulated for in the mortgage.[57] It should also cover taxes on the property paid by the mortgagee or the amount necessary to redeem from an intervening tax-sale.[58]

(iv) *Time of Making Tender.* A tender of a mortgage debt, to be effective, need not be made on the exact day specified in the mortgage, but may be made after default, at any time before effective proceedings taken to cut off the mortgagor's right of redemption,[59] and hence at any time before the exercise of a power of sale contained in the mortgage,[60] and even after the entry of a decree of foreclosure, if before sale made therennder.[61] But a tender cannot be made before the maturity of the debt secured by the mortgage, even by so little as one day.[62]

b. Effect of Tender — (i) *In General.* Although there are cases holding that a tender and refusal of the amount due on a mortgage does not discharge the lien,[63]

N. Y. 547; Robinson *v.* Cumming, 2 Atk. 409, 26 Eng. Reprint 646 (a mortgagee is not bound to accept half of his debt).

Trifling inadequacy in amount.—Where the holder of the mortgage does not object to the tender made to him on the ground that it is insufficient in amount, nor claim a larger sum to be due, equity will relieve against a forfeiture claimed on the ground that the amount tendered was less, by a trifling sum, than the amount really due. Ricker *v.* Blanchard, 45 N. H. 39.

Tender of half of debt by purchaser of half interest.— Where purchasers of a one-half interest in land agree to pay one half of a mortgage debt on the land, a tender by them of the amount of such half of the debt does not entitle them to a release of their half interest in the land. Ward *v.* Green, (Tex. Civ. App. 1894) 28 S. W. 574.

The amount claimed by the mortgagee and not the amount admitted by the mortgagor to be due and payable must be paid into court by a mortgagor desiring an entry of satisfaction under the Pennsylvania act of April 3, 1851. Atchison *v.* Rankin, 10 Del. Co. (Pa.) 99.

54. Juckett *v.* Fargo Mercantile Co., (S. D. 1905) 102 N. W. 604.

55. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; Hartley *v.* Tatham, 1 Rob. (N. Y.) 246; McDaniels *v.* Lapham, 21 Vt. 222.

56. Neiman *v.* Wheeler, 87 Ill. App. 670; Marshall *v.* Wing, 50 Me. 62; Connecticut River Banking Co. *v.* Voorhies, 3 Abb. Pr. (N. Y.) 173.

57. Healy *v.* Protection Mut. F. Ins. Co., 213 Ill. 99, 72 N. E. 678; Smith *v.* Jackson, 153 Ill. 399, 39 N. E. 130; Neiman *v.* Wheeler, 87 Ill. App. 670; Brand *v.* Kleinecke, 77 Ill. App. 269; Mjones *v.* Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072; Easton *v.* Woodbury, 71 S. C. 250, 50 S. E. 790.

58. Connecticut Mut. L. Ins. Co. *v.* Stinson, 62 Ill. App. 319; Equitable L. Assur. Soc. *v.* Von Glahn, 107 N. Y. 637, 13 N. E. 793. See also Williams *v.* Williams, 117 Wis. 125, 94 N. W. 25.

59. McSorley *v.* Hughes, 58 Hun (N. Y.) 360, 12 N. Y. Suppl. 179; Farmers' F. Ins., etc., Co. *v.* Edwards, 26 Wend. (N. Y.) 541; McDaniels *v.* Reed, 17 Vt. 674; Pioneer Gold Min. Co. *v.* Baker, 23 Fed. 258, 10 Sawy. 539. And see McCue *v.* Bradbury, 149 Cal. 108, 84 Pac. 993.

Alternative conditions.— Where the mortgage is to become void either on payment of a specified sum, or on the mortgagor's erecting a building on the premises, insuring it for the full amount of the debt, and assigning the policy to the mortgagee, the mortgagor has a right of election until the day of payment specified, but on that day his right ceases, and a subsequent tender of a policy of insurance, as agreed on, need not be accepted by the mortgagee. Chapin *v.* Jacobs, 10 Mich. 405.

60. Flower *v.* Elwood, 66 Ill. 438.

61. Davies *v.* Dow, 80 Minn. 223, 83 N. W. 50; Foster *v.* Union Nat. Bank, 34 N. J. Eq. 371.

62. Bowen *v.* Julius, 141 Ind. 310, 40 N. E. 700; Moore *v.* Kime, 43 Nebr. 517, 61 N. W. 736.

63. *Florida.*—Matthews *v.* Lindsay, 20 Fla. 962.

Mississippi.— Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

Missouri.— Knollenberg *v.* Nixon, 171 Mo. 445, 72 S. W. 41, 94 Am. St. Rep. 790, holding that tender of the amount due, secured by a deed of trust, although refused, does not forfeit the lien of the deed of trust, unless the tender is kept up, which amounts to payment of the debt.

New Jersey.— Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56.

Tennessee.— Lincoln Sav. Bank *v.* Ewing, 12 Lea 598.

England.—New South Wales Bank *v.* O'Connor, 14 App. Cas. 273, 58 L. J. P. C. 82, 60 L. T. Rep. N. S. 467, 38 Wkly. Rep. 465.

See 35 Cent. Dig. tit. "Mortgages," § 884.

it is more generally held that a good and sufficient tender of the right amount, refused by the mortgagee, will relieve the land from the lien of the mortgage,[64] and take away the right of action on the mortgage itself,[65] unless in cases where the refusal was not unreasonable or arbitrary, but grounded on an honest belief that the tender was insufficient.[66] The tender, however, is an admission that the amount offered is due, and hence its refusal does not in any way discharge or cancel the debt,[67] although it will stop the running of interest.[68]

(II) *After Default.* An unaccepted tender of money secured by a mortgage on land, made after the day prescribed for payment, does not impair the lien of the mortgage, being neither a performance of the condition nor a satisfaction of the debt; its only effect is to stop the running of interest, and to put the mortgagor to his remedy in equity.[69] But if a good tender is made after the institution of a suit for foreclosure, it will entitle the mortgagor to have the proceedings stayed or dismissed.[70]

c. Keeping Tender Good. A due tender at maturity discharges the lien of the mortgage, although not kept good.[71] But if the mortgagor wishes to stop the running of interest, or to claim any affirmative relief, such as the cancellation of the mortgage, he must keep his tender good by keeping the money separate from his other funds and having it always at the command of the mortgagee;[72] and if the tender is made after suit brought to foreclose the mortgage, the money should be brought into court.[73]

3. Change in Form of Debt or Terms of Payment — a. In General. A mortgage is not discharged or its lien affected by any change in the form of the debt which

64. *Dakota.*— Kronebusch *v.* Raumin, 6 Dak. 243, 42 N. W. 656.

Michigan.— Ferguson *v.* Popp, 42 Mich. 115, 3 N. W. 287; Fuller *v.* Parrish, 3 Mich. 211.

New Hampshire.— Willard *v.* Harvey, 5 N. H. 252.

New York.— Breunich *v.* Weselman, 100 N. Y. 609, 2 N. E. 385; Jackson *v.* Crafts, 18 Johns. 110. *Compare* Harris *v.* Jex, 55 N. Y. 421, 14 Am. Rep. 285.

South Carolina.— Salinas *v.* Ellis, 26 S. C. 337, 2 S. E. 121; Wood *v.* Babb, 16 S. C. 427.

See 35 Cent. Dig. tit. "Mortgages," § 884.

A mortgagee becomes a trespasser if he takes possession of the mortgaged premises, after the refusal of a good and sufficient tender. Greer *v.* Turner, 36 Ark. 17.

65. McDaniels *v.* Reed, 17 Vt. 674.

66. Renard *v.* Clink, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458; Waldron *v.* Murphy, 40 Mich. 668; Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90.

67. Cowles *v.* Marble, 37 Mich. 158; Cobbey *v.* Knapp, 23 Nebr. 579, 37 N. W. 485.

68. Cowles *v.* Marble, 37 Mich. 158; Knollenberg *v.* Nixon, 171 Mo. 445, 72 S. W. 41, 94 Am. St. Rep. 790.

69. *California.*—Chielovich *v.* Krauss, (1886) 9 Pac. 945; Himmelmann *v.* Fitzpatrick, 50 Cal. 650.

Michigan.— Renard *v.* Clink, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458.

New Jersey.—Shields *v.* Lozear, 34 N. J. L. 496, 3 Am. St. Rep. 256.

New York.— Hartley *v.* Tatham, 2 Abb. Dec. 333, 1 Keyes 222; Post *v.* Arnot, 2 Den. 344; Merritt *v.* Lambert, 7 Paige 344.

North Carolina.— Parker *v.* Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231.

United States.— Gibson *v.* Lyon, 115 U. S. 439, 6 S. Ct. 129, 29 L. ed. 440.

Canada.— Gentles *v.* Canada Permanent, etc., Mortg. Corp., 32 Ont. 428.

See 35 Cent. Dig. tit. "Mortgages," § 886.

70. Hoyt, etc., Co. *v.* Smith, 4 Wash. 640, 30 Pac. 664; Babcock *v.* Perry, 8 Wis. 277; Smith *v.* Cormier, 25 N. Brunsw. 487; Nixon *v.* Hunter, 17 Grant Ch. (U. C.) 96.

71. Potts *v.* Plaisted, 30 Mich. 149; Van Husan *v.* Kanouse, 13 Mich. 303; Caruthers *v.* Humphrey, 12 Mich. 270; Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145; New York Exch. F. Ins. Co. *v.* Norris, 74 Hun (N. Y.) 527, 26 N. Y. Suppl. 823. *Compare* Balme *v.* Wambaugh, 16 Minn. 116; Knollenberg *v.* Nixon, 171 Mo. 445, 72 S. W. 41, 94 Am. St. Rep. 790.

72. Nelson *v.* Loder, 132 N. Y. 288, 30 N. E. 369; McNeil *v.* Sun, etc., Bldg., etc., Assoc., 75 N. Y. App. Div. 290, 78 N. Y. Suppl. 90; Gyles *v.* Hall, 2 P. Wms. 378, 24 Eng. Reprint 774.

73. *Florida.*— Franklin *v.* Ayer, 22 Fla. 654.

Maine.— Marshall *v.* Wing, 50 Me. 62.

Maryland.— Moore *v.* Pearce, 2 Harr. & M. 236.

New Jersey.— Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56.

New York.— Werner *v.* Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443.

Pennsylvania.— Streng *v.* Holyoke Water Power Co., 12 Pa. Super. Ct. 323.

Vermont.— Holten *v.* Brown, 18 Vt. 224, 46 Am. Dec. 148. *Compare* McDaniels *v.* Reed, 17 Vt. 674.

See 35 Cent. Dig. tit. "Mortgages," § 887.

it secures, or in the form of the evidence of it, so long as there is no agreement or mutual intention that the change shall operate as a payment nor any express release.[74] Thus suit and the recovery of a judgment for the amount of the debt do not change the security of the mortgage.[75] A mortgage cannot, by a mere parol agreement, be so altered in its operation as to stand as security for a new debt, different in character and amount from that described in the mortgage and payable at another time and to another person.[76]

b. New Notes and Renewal Notes. Where a note secured by mortgage is taken up, at or before its maturity, and a new or renewal note substituted for it, the mortgage continues as security for the debt in its new form and there is no change in the rights or remedies of the mortgagee,[77] unless there be an actual

74. *Illinois.*— Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312; Flower *v.* Elwood, 66 Ill. 438; Rogers *v.* School Trustees, 46 Ill. 428.

Iowa.— Heively *v.* Matteson, 54 Iowa 505, 6 N. W. 732.

Louisiana.— Mechanics', etc., Bank *v.* Powell, 27 La. Ann. 647.

Maine.— Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282.

Maryland.— Cross *v.* Cohen, 3 Gill 257.

Massachusetts.— Davis *v.* Maynard, 9 Mass. 242.

Minnesota.— Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923.

Missouri.— Busby *v.* Compton, 112 Mo. App. 569, 87 S. W. 109.

Nebraska.— Davis *v.* Thomas, 66 Nebr. 26, 92 N. W. 187.

New York.— Peck *v.* Minot, 4 Rob. 323; St. Lawrence University *v.* Farmer, 32 Misc. 410, 66 N. Y. Suppl. 584.

Pennsylvania.— Cover *v.* Black, 1 Pa. St. 493.

Virginia.— Artrip *v.* Rasnake, 96 Va. 277, 31 S. E. 4.

And see 35 Cent. Dig. tit. "Mortgages," § 889.

Compare Sigourney *v.* Zellerbach, 55 Cal. 431.

Objection by bondholders to substitution of securities.— The holder of bonds secured by a trust mortgage cannot enjoin the execution of a new trust mortgage, and the issue of new bonds collateral thereto to the holders of old bonds, who consent, in exchange therefor, where the new mortgage and bonds will not impair the security of the holders who do not consent to the new arrangement. Emery *v.* New York, etc., R. Co., 9 Misc. (N. Y.) 310, 30 N. Y. Suppl. 306.

75. Darst *v.* Bates, 95 Ill. 493; Flower *v.* Elwood, 66 Ill. 438; Priest *v.* Wheelock, 58 Ill. 114; Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118; Jordan *v.* Smith, 30 Iowa 500; Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

76. Morris *v.* Alston, 92 Ala. 502, 9 So. 315; Thompson *v.* George, 86 Ky. 311, 5 S. W. 760, 8 Ky. L. Rep. 588; Tucker *v.* Alger, 30 Mich. 67. And see *supra*, VII, E, 1.

77. *Alabama.*— McGuire *v.* Van Pelt, 55 Ala. 344; Cullum *v.* Mobile Branch Bank, 23 Ala. 797; Conner *v.* Banks, 18 Ala. 42, 52 Am. Dec. 209.

California.— Spring *v.* Hill, 6 Cal. 17.

Connecticut.— Bolles *v.* Chauncey, 8 Conn. 389.

District of Columbia.— Dodge *v.* Freedman's Sav., etc., Co., 2 MacArthur 420.

Florida.— De Cottes *v.* Jeffers, 7 Fla. 284.

Illinois.— Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Jeneson *v.* Jeneson, 66 Ill. 259; Darst *v.* Bates, 51 Ill. 439.

Indiana.— Bodkin *v.* Merit, 86 Ind. 560.

Iowa.— Reid *v.* Abernethy, 77 Iowa 438, 42 N. W. 364.

Kentucky.— Handy *v.* New Orleans Com. Bank, 10 B. Mon. 98; Burdett *v.* Clay, 8 B. Mon. 287; Mullins *v.* Clark, 15 S. W. 784, 13 Ky. L. Rep. 29.

Maine.— Parkhurst *v.* Cummings, 56 Me. 155; Hadlock *v.* Bulfinch, 31 Me. 246.

Maryland.— Keene *v.* Gaehle, 56 Md. 343.

Massachusetts.— Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2; Pomroy *v.* Rice, 16 Pick. 22; Watkins *v.* Hill, 8 Pick. 522.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508.

Nebraska.— Davis *v.* Thomas, 66 Nebr. 26, 92 N. W. 187.

New Hampshire.— New Hampshire Bank *v.* Willard, 10 N. H. 210; Elliot *v.* Sleeper, 2 N. H. 525.

New Jersey.— Shipman *v.* Lord, 58 N. J. Eq. 380, 44 Atl. 215; Humphreys *v.* Danser, 32 N. J. Eq. 220.

North Carolina.— Vick *v.* Smith, 83 N. C. 80.

Ohio.— Choteau *v.* Thompson, 3 Ohio St. 424.

Pennsylvania.— Kimberly's Appeal, 3 Pa. Cas. 528, 7 Atl. 75.

South Carolina.— State Bank *v.* Rose, 1 Strobh. Eq. 257; Burton *v.* Pressly, Cheves Eq. 1.

Tennessee.— Lover *v.* Bessenger, 9 Baxt. 393; Cleveland *v.* Martin, 2 Head 128.

Texas.— Willis *v.* Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229.

Vermont.— Richardson *v.* Wright, 58 Vt. 367, 5 Atl. 287; Seymour *v.* Darrow, 31 Vt. 122; Dana *v.* Binney, 7 Vt. 493.

Wisconsin.— Williams *v.* Starr, 5 Wis. 534.

United States.— Jones *v.* Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030; *In re* Freyvogel, 9 Fed. Cas. No. 5,115; Osborne *v.* Benson, 18 Fed. Cas. No. 10,596, 5 Mason 157; *In re* Wynne, 30 Fed. Cas. No. 18,117, Chase 227.

See 35 Cent. Dig. tit. "Mortgages," § 890.

agreement or mutual intention of the parties that the mortgage shall be discharged, or the debt regarded as paid, by the new note,[78] or that the new note shall not be included within the security of the mortgage;[79] and if the debtor claims such an agreement or understanding, he must assume the burden of proving it.[80] It makes no difference in the application of this rule that the old note was canceled or marked "paid,"[81] although of course it is otherwise where the mortgage is actually discharged of record.[82]

c. Mortgages to Secure Indorsers or Sureties. A mortgage given to secure or indemnify an indorser or surety for a note covers any renewal of the note, if the indemnitee's liability on it continues.[83]

d. Changing Terms of Note on Renewal. Parties to a note secured by mortgage may substitute a new note for the original without impairing the security, although the terms of the two notes are not identical, the debt remaining the same.[84]

e. New Notes After Part Payment. Where a note secured by a mortgage has been partly paid, and is given up, and a new note taken for the balance due upon it, the mortgage security is not thereby released as against the mortgagor or subsequent mortgagees,[85] although it may be so as to third persons having no

New note to correct mistake.— Where, by agreement of the parties, new notes are given and accepted in lieu of and for the purpose of correcting a mistake in notes previously given and secured by mortgage, the maker is entitled to have the old notes canceled, but the mortgage will stand as security for the new notes. Granger *v.* Bissonnette, 68 Ill. App. 235.

New note for interest.— Where, instead of paying an instalment of interest due on a mortgage note, the debtor gives a new note for the amount of such interest, the new note comes within the security of the mortgage, and may be included in a decree of foreclosure. Frink *v.* Branch, 16 Conn. 260; Dean *v.* Ridgeway, 82 Iowa 757, 48 N. W. 923.

Renewal after assignment.— When a mortgage and the debt secured by it are assigned, the acceptance by the assignee of a new note from the debtor, while it discharges the mortgagee as the assignor of the old note, in the absence of an agreement to the contrary, does not extinguish the debt or impair the mortgage as security for it. McGuire *v.* Van Pelt, 55 Ala. 344.

78. Jarnagan *v.* Gaines, 84 Ill. 203; Joyner *v.* Stancill, 108 N. C. 153, 12 S. E. 912; Jaffray *v.* Crane, 50 Wis. 349, 7 N. W. 300.

79. Citizens' Bank *v.* Bailey, 18 La. Ann. 697; Grafton Bank *v.* Foster, 11 Gray (Mass.) 265.

80. Sloan *v.* Rice, 41 Iowa 465. And see Wildrick *v.* Swain, 34 N. J. Eq. 167, holding that, where a debtor has attempted to discharge a mortgage with his own unsecured paper promise, given to a person of great age and limited education, he should be required to exercise the most scrupulous good faith, and unless he can show that his creditor fully comprehended the legal effect of the acquittance he induced him to give, it should be adjudged invalid.

81. Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84; Heively *v.* Matteson, 54 Iowa 505, 6 N. W. 732; Swan *v.* Yaple, 35 Iowa 248; Heard *v.* Evans, Freem. Ch. (Miss.) 79.

82. Sioux City Electrical Supply Co. *v.* Sioux City, etc., Electric R. Co., 106 Iowa 573, 76 N. W. 838.

83. *Connecticut.*—Smith *v.* Prince, 14 Conn. 472.

Florida.— De Cottes *v.* Jeffers, 7 Fla. 284.

Indiana.— Pollard *v.* Pittman, (App. 1906) 77 N. E. 293.

Kentucky.— Mullins *v.* Clark, 15 S. W. 784, 13 Ky. L. Rep. 29.

Louisiana.— Ory *v.* His Creditors, 8 La. 529; Palfrey *v.* His Creditors, 8 La. 276. See also Bell *v.* Murphy, 2 La. Ann. 765.

Michigan.— Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261; Boxheimer *v.* Gunn, 24 Mich. 372.

New York.— Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Babcock *v.* Morse, 19 Barb. 140.

Pennsylvania.— Gault *v.* McGrath, 32 Pa. St. 392.

South Carolina.— Enston *v.* Friday, 2 Rich. 427.

See 35 Cent. Dig. tit. "Mortgages," § 891.

84. *Illinois.*— Darst *v.* Bates, 51 Ill. 439, where a new note without an indorser was substituted for the original indorsed note.

Louisiana.— Palfrey *v.* His Creditors, 8 La. 276, renewal note given in a new name.

Maine.— Buck *v.* Wood, 85 Me. 204, 27 Atl. 103.

Massachusetts.— Commercial Bank *v.* Cunningham, 24 Pick. 270, 35 Am. Dec. 322, the mortgagors were partners, and a change having occurred in the composition of the firm, the renewal note was made out in the new partnership name.

Mississippi.— Whittaker *v.* Dick, 5 How. 296, 35 Am. Dec. 436, note made payable at a particular place being substituted for one payable generally.

See 35 Cent. Dig. tit. "Mortgages," § 892.

85. *Indiana.*— McCormick *v.* Digby, 8 Blackf. 99.

knowledge of the transaction but relying on the surrender and cancellation of the original note.[86]

f. Taking Note From Mortgagor's Vendee. Where, on a sale of mortgaged premises, the mortgagee gives up the notes secured, and takes from the purchaser his own notes, as evidences of the same continuing debt, this does not release or extinguish the mortgage;[87] but it is otherwise if both the original note and mortgage are surrendered and a new note and new mortgage, executed by the purchaser, taken in their place; this has the effect of satisfying the original mortgage.[88]

g. Change in Terms of Payment — (I) *In General.* It is competent for the parties to a mortgage to change the time, the mode, or the medium of payment without in any way impairing the mortgage security.[89]

(II) *Extension of Time of Payment.*[90] An agreement by a mortgagee to extend the time for payment of the debt secured by a mortgage, whether indorsed on the instrument or otherwise evidenced, will continue the lien of the mortgage and all his rights and remedies thereunder for the new period.[91] Such an agreement may even be made out by a mere parol promise;[92] but in any case it must

Iowa.— Chase *v.* Abbott, 20 Iowa 154.
Maryland.— Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill 170.
Mississippi.— Gleason *v.* Wright, 53 Miss. 247.
Missouri.— Lippold *v.* Held, 58 Mo. 213.
South Carolina.— Kaphan *v.* Ryan, 16 S. C. 352.
Vermont.— Dunshee *v.* Parmelee, 19 Vt. 172; McDonald *v.* McDonald, 16 Vt. 630.
See 35 Cent. Dig. tit. "Mortgages," § 893.

86. See Levistone *v.* Bona, 4 Rob. (La.) 459.

87. Bond *v.* Liverpool, etc., Ins. Co., 106 Ill. 654; Foster *v.* Paine, 63 Iowa 85, 18 N. W. 699; Hynes *v.* Rogers, Litt. Sel. Cas. (Ky.) 229. But see Hadlock *v.* Bulfinch, 31 Me. 246.

88. Tucker *v.* Conwell, 67 Ill. 552; Sharp *v.* Collins, 74 Mo. 266. But *compare* Bank of England *v.* Tarleton, 23 Miss. 173.

89. Lehman *v.* Marshall, 47 Ala. 362 (agreement to accept cotton instead of money in discharge of the mortgage debt); Belloc *v.* Davis, 38 Cal. 242 (agreement to pay in gold instead of legal tender notes); Pennsylvania Hospital Contributors *v.* Gibson, 2 Miles (Pa.) 324 (agreement to accept part of the principal before due); Williams *v.* Starr, 5 Wis. 534.

90. A provision in a mortgage that the mortgagor might extend it for a year from the expiration of the term thereof will be construed as including the notes secured. Corson *v.* McDonald, (Cal. App. 1906) 85 Pac. 861.

91. *California.*— Lent *v.* Morrill, 25 Cal. 492.
Illinois.— Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838; Hairston *v.* Ward, 108 Ill. 87; Maher *v.* Lanfrom, 86 Ill. 513; Schoonhoven *v.* Pratt, 25 Ill. 457; Russell *v.* Bosworth, 106 Ill. App. 314; Rounsavell *v.* Crofoot, 4 Ill. App. 671.
Iowa.— Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.
Louisiana.— See Blanchard *v.* Naquin, 116 La. 806, 41 So. 99.
Michigan.— Griffin *v.* Walter, 74 Mich. 1, 41 N. W. 843; Case *v.* O'Brien, 66 Mich. 289, 33 N. W. 405.
Nebraska.— Eby *v.* Ryan, 22 Nebr. 470, 35 N. W. 225.
New York.— Noyes *v.* Anderson, 124 N. Y. Pearce, (N. J. Ch. 1886) 4 Atl. 678; Veerhoff *v.* Miller, 30 N. Y. App. Div. 355, 51 N. Y. Suppl. 1048; Utica Bank *v.* Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175.
North Carolina.— Hinton *v.* Ferrebee, 107 N. C. 154, 12 S. E. 235.
Ohio.— Union Cent. L. Ins. Co. *v.* Bonnell, 35 Ohio St. 365.
Tennessee.— Cleveland *v.* Martin, 2 Head 128.
Texas.— Montague County *v.* Meadows, 21 Tex. Civ. App. 256, 51 S. W. 556.
United States.— Warner *v.* Connecticut Mut. L. Ins. Co., 109 U. S. 357, 3 S. Ct. 221, 27 L. ed. 962.
Canada.— Canada Trust, etc., Co. *v.* McKenzie, 23 Ont. App. 167.
See 35 Cent. Dig. tit. "Mortgages," § 895.
Parol agreement made on Sunday.— A parol agreement extending the time of payment of a mortgage debt, entered into on Sunday, is void under the laws of New Jersey. Rush *v.* Rush, (N. J. Ch. 1889) 18 Atl. 221.
Authority of trustee.—A trustee appointed by a creditor in a trust deed given to secure the indebtedness will be presumed to have the right to grant an extension on behalf of the creditor. Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862.

92. Hauser *v.* Capital City Brewing Co., (N. J. Ch. 1904) 57 Atl. 722; Measurall *v.* Pearce, (N. J. Ch. 1886) 4 Atl. 678; Veerhoff *v.* Miller, 30 N. Y. App. Div. 355, 51 N. Y. Suppl. 1048.
In North Dakota the statute (Rev. Code, § 4699) providing that a mortgage can be "extended" only by an instrument in writing formally executed does not apply to an extension of time for the payment of the debt secured. People's State Bank *v.* Francis, 8 N. D. 369, 79 N. W. 853.

be clearly shown and not left to mere inference or conjecture,[93] and it must be supported by a sufficient consideration.[94] But these facts being established, the agreement will prevent the mortgagee from taking proceedings to enforce the mortgage before the end of the extended period.[95]

h. As Discharging Mortgage Given by Surety. Where a mortgage is given to secure the debt of another, for which the mortgagor assumes the liability of a surety, any change in the form of the debt or the terms of payment, as by renewal, extension of time, or otherwise, not assented to by the mortgagor, will discharge the mortgage,[96] unless the mortgage itself contains provisions authorizing such arrangements to be made.[97]

i. Change or Substitution of Securities. The lien of a mortgage is not affected, nor the mortgage itself released, by a change or substitution in the securities to which it is collateral, as by the substitution of a bond for a simple note, or of an indorsed note for one-name paper, or by the taking of additional security, in the absence of an intention of the parties that the transaction should operate as a payment.[98]

j. Taking New Mortgage. The execution of a new mortgage on the same property to secure the same debt covered by the old mortgage will release and discharge it, if intended by the parties to operate as a payment or satisfaction, or to cancel the one security and substitute the other,[99] unless there are equitable

93. Booth *v.* Wiley, 102 Ill. 84; Jenkins *v.* Daniel, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632.

94. Sturgeon *v.* Mudd, 190 Mo. 200, 88 S. W. 630; McKinley-Lanning L. & T. Co. *v.* Johnson, (Nebr. 1905) 105 N. W. 899; Hauser *v.* Capital City Brewing Co., (N. J. Ch. 1904) 57 Atl. 722; Moser *v.* Walker, 23 N. Y. App. Div. 91, 48 N. Y. Suppl. 341; Furness *v.* Stiles, 18 Wash. 383, 51 Pac. 470.

Sufficiency of consideration.— The reduction by the mortgagor of the amount due on a first mortgage is a sufficient consideration to support an agreement by the second mortgagee extending the time for payment of his mortgage. Bradley *v.* Glenmary Co., 64 N. J. Eq. 77, 53 Atl. 49. But payment of the interest then due on a bond and mortgage executed by another is not sufficient consideration to support an agreement to extend the time for payment thereof. Ganz *v.* Lancaster, 50 N. Y. App. Div. 204, 63 N. Y. Suppl. 800.

Usurious consideration.— A bonus which is in excess of the legal rate of interest, paid for the extension of a mortgage, is usurious, and should be applied toward satisfaction of the mortgage on final settlement. Burhans *v.* Burhans, 1 N. Y. Suppl. 37.

95. Clevinger *v.* Ross, 109 Ill. 349; Webber *v.* Curtiss, 104 Ill. 309; Eby *v.* Ryan, 22 Nebr. 470, 35 N. W. 225; Macauley *v.* Hayden, 48 Misc. (N. Y.) 21, 96 N. Y. Suppl. 64. But see Ayers *v.* Hamilton, 131 Ind. 98, 30 N. E. 895, holding that an agreement, after the maturity of a note, to extend the time of payment, is no bar to a foreclosure, before the expiration of the period of extension, of the mortgage securing the note; the only remedy for violation of the agreement being an action for damages.

96. *Michigan.*— Metz *v.* Todd, 36 Mich. 473.

Minnesota.— Campion *v.* Whitney, 30 Minn. 177, 14 N. W. 806.

New York.— Smith *v.* Townsend, 25 N. Y. 479.

Ohio.— People's Ins. Co. *v.* McDonnell, 41 Ohio St. 650; Eisenberg *v.* Albert, 40 Ohio St. 631. But see Wise *v.* Willard, 41 Ohio St. 679.

Pennsylvania.— Ayres *v.* Wattson, 57 Pa. St. 360.

Wisconsin.— Jaffray *v.* Crane, 50 Wis. 349, 7 N. W. 300.

See 35 Cent. Dig. tit. "Mortgages," § 896.

97. Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838.

98. *Alabama.*— Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756.

Arkansas.— Ford *v.* Burks, 37 Ark. 91.

Connecticut.— Franklin *v.* Cannon, 1 Root 500.

Illinois.— Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Flower *v.* Elwood, 66 Ill. 438; Hugunin *v.* Starkweather, 10 Ill. 492; Maloney *v.* Lafayette Bldg., etc., Assoc., 69 Ill. App. 35.

Kentucky.— Johnson *v.* Howe, 21 S. W. 239, 14 Ky. L. Rep. 897.

New Hampshire.—Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551.

New York.— McLallen *v.* Jones, 20 N. Y. 162; New York L. Ins., etc., Co. *v.* Howard, 2 Sandf. Ch. 183.

Pennsylvania.— Heath *v.* Page, 48 Pa. St. 130.

Texas.— Wright *v.* Wooters, 46 Tex. 380; Clarkson *v.* Graham, 21 Tex. Civ. App. 355, 52 S. W. 269.

Wisconsin.— Whitney *v.* Traynor, 74 Wis. 289, 42 N. W. 267.

See 35 Cent. Dig. tit. "Mortgages," § 897.

99. *California.*— Williamson *v.* Strong, (1902) 68 Pac. 484.

Indiana.— Walters *v.* Walters, 73 Ind. 425.

Massachusetts.— Callahan *v.* Mercantile Trust Co., 188 Mass. 393, 74 N. E. 666.

circumstances entitling the mortgagee to claim the benefit of his earlier security.[1] But this is entirely a question of intention, and it has been laid down as a general rule that the original mortgage will not be discharged in the absence of a clear intention to that effect.[2] Certainly it is not discharged if the purpose of the parties was merely to give and receive an additional or cumulative security,[3] to correct an error in the first mortgage,[4] to change its form,[5] or to renew the loan or extend the time for its payment, in which case the lien of the original mortgage is simply continued without interruption, by and under the new mortgage,[6] not only against the mortgagor, but also as against intervening encumbrancers who are without countervailing equities.[7]

C. Release and Satisfaction[8] — **1. In General — a. Right to Release or Discharge.** Upon full payment or other performance of the conditions of a mortgage, the mortgagor is entitled to receive from the mortgagee a release or discharge of the mortgage, or a surrender of the securities for cancellation,[9] and this right

Mississippi.— Lewis *v.* Starke, 10 Sm. & M. 120.

Missouri.— Benton Land Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94.

North Dakota.— Prescott *v.* Brooks, (1902) 94 N. W. 88.

Virginia.— Towler *v.* Buchanan, 1 Call 187.

West Virginia.— Dryden *v.* Stephens, 19 W. Va. 1.

Wisconsin.— Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1 L. R. A. N. S. 891.

United States.— Brown *v.* Bass, 4 Wall. 262, 18 L. ed. 330; Kilgour *v.* Scott, 101 Fed. 359; Chattanooga First Nat. Bank *v.* Radford Trust Co., 80 Fed. 569, 26 C. C. A. 1; Ames *v.* New Orleans, etc., R. Co., 1 Fed. Cas. No. 329, 2 Woods 206; *In re* Wynne, 30 Fed. Cas. No. 18,117, Chase 227.

See 35 Cent. Dig. tit. "Mortgages," § 897.

1. Woodburn *v.* Woodburn, 115 Ill. 427, 5 N. E. 82 (check accepted in payment of the old note dishonored); Russell *v.* Bosworth, 106 Ill. App. 314 (defect in new security).

Mistake.— Where one was induced to give up a prior security on land and take a subsequent one in lieu thereof, not knowing at the time that he had the prior right, equity will relieve him on the ground of mistake alone, although there was no fraud. Skillman *v.* Teeple, 1 N. J. Eq. 232.

2. Birrell *v.* Schie, 9 Cal. 104; Bearss *v.* Ford, 108 Ill. 16; Christian *v.* Newberry, 61 Mo. 446; New England L. & T. Co. *v.* Stephens, 16 Utah 385, 52 Pac. 624.

3. Dillon *v.* Byrne, 5 Cal. 455; Cissna *v.* Haines, 18 Ind. 496; Cortelyou *v.* McCarthy, 37 Nebr. 742, 56 N. W. 620.

4. Mississippi Valley Trust Co. *v.* McDonald, 146 Mo. 467, 48 S. W. 483.

5. Spitzer *v.* Williams, 98 Ill. App. 146, substituting trust deed in place of mortgage.

6. *Alabama.*— Higman *v.* Humes, 127 Ala. 404, 30 So. 733; Wilson *v.* Knight, 59 Ala. 172.

California.— White *v.* Stevenson, 144 Cal. 104, 77 Pac. 828.

Indiana.— Pouder *v.* Ritzinger, 119 Ind. 597, 20 N. E. 654.

Iowa.— Young *v.* Shaner, 73 Iowa 555, 35 N. W. 629, 5 Am. St. Rep. 701.

Kentucky.— Burdett *v.* Clay, 8 B. Mon. 287.

Maine.— Smith *v.* Stanley, 37 Me. 11, 58 Am. Dec. 771.

New Hampshire.—Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551.

United States.— Irwin *v.* West, 50 Fed. 362; Ames *v.* New Orleans R. Co., 1 Fed. Cas. No. 329, 2 Woods 206.

See 35 Cent. Dig. tit. "Mortgages," § 898.

New mortgage for proportional share of debt.— A mortgage given by one of several holders of land, for his ratable proportion of a debt secured by a mortgage upon the whole, is a continuation of the lien acquired under the original mortgage. Lee *v.* Porter, 5 Johns. Ch. (N. Y.) 268.

7. Wooster *v.* Cavender, 54 Ark. 153, 15 S. W. 192, 26 Am. St. Rep. 31; Roberts *v.* Doan, 180 Ill. 187, 54 N. E. 207; Campbell *v.* Trotter, 100 Ill. 281; Shaver *v.* Williams, 87 Ill. 469; Christie *v.* Hale, 46 Ill. 117; McChesney *v.* Ernst, 89 Ill. App. 164; Roberts *v.* McNeal, 80 Ill. App. 536; Piper *v.* Headlee, 39 Ill. App. 93; Geih *v.* Reynolds, 35 Minn. 331, 28 N. W. 923. *Compare* Washington County *v.* Slaughter, 54 Iowa 265, 6 N. W. 291.

8. **Release to junior mortgagee.**— A junior mortgagee has sufficient title to uphold a release made to him of the prior mortgage. Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402.

9. *Colorado.*— Walker *v.* Tiffin Gold, etc., Min. Co., 2 Colo. 89.

Illinois.— Whitesides *v.* Cook, 20 Ill. App. 574.

Louisiana.— Gillett *v.* Deranco, 10 La. Ann. 21.

Maine.— Hodgkins *v.* Merritt, 53 Me. 208.

Michigan.— McCarn *v.* Wilcox, 106 Mich. 64, 63 N. W. 978; Bush *v.* Freer, 91 Mich. 315, 51 N. W. 1002; Flynn *v.* Flynn, 68 Mich. 20, 35 N. W. 817.

Minnesota.— Lankton *v.* Stewart, 27 Minn. 346, 7 N. W. 360.

Missouri.— McClung *v.* Missouri Trust Co., 137 Mo. 106, 38 S. W. 578.

New York.— Headley *v.* Goundry, 41 Barb. 279.

South Carolina.—Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232.

he may enforce by a bill in equity.[10] But equity will not decree the release or cancellation of a mortgage on any other terms than the payment or full satisfaction of the mortgagee's claims,[11] although it may, if the circumstances render it equitable, grant the mortgagor a right to redeem,[12] as in the case of an absolute deed intended as a mortgage, where this is the only proper form of relief.[13] Where the security takes the form of a trust deed, the trustee is bound to execute a release upon the authorization or consent of the beneficiary.[14]

b. Right to Partial Release. Although a mortgagee cannot be compelled to accept a part of his debt and release a corresponding part of the land, unless he has expressly agreed to do so,[15] a provision in the mortgage for the release of separate parcels of the mortgaged property, on demand of the mortgagor, and on paying for each lot released a fixed sum or a proportional part of the whole debt, is perfectly valid, and confers on the mortgagor a full right to require such successive partial releases on complying strictly with the conditions thereof.[16] More-

Wisconsin.— Mallory *v.* Mariner, 15 Wis. 172.

United States.— Bell *v.* Kruegel, 74 Fed. 581, 20 C. C. A. 542.

See 35 Cent. Dig. tit. "Mortgages," § 900.

10. Cross *v.* Zellerbach, 63 Cal. 623; Travelers' Ins. Co. *v.* Jones, 16 Colo. 515, 27 Pac. 807; Hubbard *v.* Jasinski, 46 Ill. 160; Gibbins *v.* Campbell, 148 N. Y. 410, 42 N. E. 1055.

11. Cowles *v.* Marble, 37 Mich. 158; McMillen *v.* Mason, 71 Wis. 405, 37 N. W. 253. See also Stone *v.* Billings, 63 Ill. App. 371; McClung *v.* Missouri Trust Co., 137 Mo. 106, 38 S. W. 578.

A judgment for plaintiff in ejectment will not of itself entitle him to a decree in a suit in equity against the same defendant, directing entry of satisfaction of mortgages and judgments owned by defendant binding the property. Mawhinney *v.* Shallcross, 10 Pa. Co. Ct. 102.

Lapse of time as ground for relief.— A court of equity will not decree the satisfaction of a mortgage unless it is proved to have been paid; lapse of time is not sufficient ground for its interference. Coates *v.* Roberts, 2 Phila. (Pa.) 244. But see Kingman *v.* Sinclair, 80 Mich. 427, 45 N. W. 187, 20 Am. St. Rep. 522, holding that a court of equity will, without proof of actual payment, discharge from record a mortgage, barred by the statute of limitations, which was given before complainant's purchase of the land covered by it, by one who then owned an equitable interest therein, and of which complainant had no actual knowledge.

12. Parks *v.* Allen, 42 Mich. 482, 4 N. W. 227.

13. Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464.

14. Blumenthal *v.* Huerter, (Ill. 1885) 3 N. E. 425; Pearce *v.* Bryant Coal Co., 25 Ill. App. 51 [*affirmed* in 121 Ill. 590, 13 N. E. 561].

15. Fidelity Ins., etc., Co. *v.* Earle, 23 Pa. Co. Ct. 449.

16. *California.*— Ontario Land, etc., Co. *v.* Bedford, 90 Cal. 181, 27 Pac. 39; McComber *v.* Mills, 80 Cal. 111, 22 Pac. 55.

Dakota.— Obern *v.* Gilbert, 6 Dak. 119, 50 N. W. 620.

Illinois.— Lane *v.* Allen, 162 Ill. 426, 44 N. E. 831; Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Sanders *v.* Peck, 30 Ill. App. 238.

Iowa.— Gammel *v.* Goode, 103 Iowa 301, 72 N. W. 531.

Massachusetts.— Reed *v.* Jones, 133 Mass. 116.

Michigan.— Commercial Bank *v.* Hiller, 106 Mich. 118, 63 N. W. 1012.

New Jersey.— American Net, etc., Co. *v.* Githens, 57 N. J. Eq. 539, 41 Atl. 405.

New York.— Queens County Sav. Bank *v.* Graham, 38 Misc. 711, 78 N. Y. Suppl. 76; Hazard *v.* Wilson, 22 Misc. 397, 50 N. Y. Suppl. 280.

Pennsylvania.— Saeger's Appeal, 96 Pa. St. 479.

Canada.— Almon *v.* Fairbanks, 10 Nova Scotia 407; *In re* Thuresson, 3 Ont. L. Rep. 271; Davis *v.* White, 16 Grant Ch. (U. C.) 312.

See 35 Cent. Dig. tit. "Mortgages," § 901.

In California, although the statute (Civ. Code, § 2938) which prescribes the manner in which mortgages may be released does not in terms provide for partial releases, yet such releases are valid. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

Sufficiency of payment.— Where the mortgage provides for a partial release on payment of a certain sum, it means an absolute payment, and a deposit of the money, remaining under the control of the payer, is not sufficient. Smith *v.* Black, 9 Colo. App. 64, 47 Pac. 394.

Amount of payment.— Where the mortgage provides for the release, one by one, of lots containing each two thousand square feet, on payment of ninety dollars for each, the mortgagee is not obliged to accept a payment of less than ninety dollars, or to release a fractional part of two thousand square feet. Hall *v.* Home Bldg. Co., (N. J. Eq. Ch. 1897) 37 Atl. 1019.

Application of payment.— Where the mortgagor pays in a sum of money which would have entitled him to a release of one lot, but gives no direction as to the application of the payment, it will be applied in payment of accrued interest and not to the release of a

over this right inures to the benefit of a grantee of a part of the mortgaged land,[17] although not to a purchaser of the premises at execution sale,[18] and may be exercised after as well as before default in the payment of the mortgage debt, and even after foreclosure suit begun, if before final decree.[19]

e. Who May Release — (1) *In General.* A valid and effectual release of a mortgage can only be given by the person who is the rightful owner of the debt which it secures.[20] Hence, after an assignment of the debt and mortgage, authority to give a release resides in the assignee, not in the assignor.[21] A release may be executed under a power of attorney from the owner of the debt,[22] or, if he is dead, by his executor or administrator.[23] In the case of joint mortgagees, either may give a binding and effective release, at least if it is assented to or not repudiated by the other.[24] Where the mortgage runs to a corporation,

lot. Bay View Land Co. *v.* Myers, 62 Minn. 265, 64 N. W. 816.

Fixing value of parcel.— An agreement to release from a mortgage any parcel of the land covered by it, on payment of a sum equal to the value of such parcel, must be construed as referring to the value of the parcel at the time of the release, and not at the date of the agreement. People's Sav. Bank *v.* Nebel, 92 Mich. 348, 52 N. W. 727.

Provision void for indefiniteness of description see McCormick *v.* Parsons, 195 Mo. 91, 92 S. W. 1162.

17. *Illinois.*— Lane *v.* Allen, 162 Ill. 426, 44 N. E. 831.

Massachusetts.— Clark *v.* Fontain, 144 Mass. 287, 10 N. E. 831.

Minnesota.— Vawter *v.* Crafts, 41 Minn. 14, 42 N. W. 483.

Pennsylvania.— Robins *v.* Mayer, 191 Pa. St. 163, 43 Atl. 137.

Canada.— Webber *v.* O'Neil, 10 Grant Ch. (U. C.) 440.

See 35 Cent. Dig. tit. "Mortgages," § 901.

Contra.— Pierce *v.* Kneeland, 16 Wis. 672, 84 Am. Dec. 726.

18. Palmer *v.* Snell, 111 Ill. 161.

19. Gammel *v.* Goode, 103 Iowa 301, 72 N. W. 531; Vawter *v.* Crafts, 41 Minn. 14, 42 N. W. 483; American Net, etc., Co. *v.* Githens, 57 N. J. Eq. 539, 41 Atl. 405; Wilkinson *v.* Hiyer, 30 Pittsb. Leg. J. N. S. (Pa.) 86. But *compare* Baldwin *v.* Benedict, 111 Iowa 741, 82 N. W. 956 (where the mortgagor was privileged to demand a release "during the pendency of the mortgage"); Werner *v.* Tuch, 52 Hun (N. Y.) 269, 5 N. Y. Suppl. 219; Pierce *v.* Kneeland, 16 Wis. 672, 84 Am. Dec. 726; Chrisman *v.* Hay, 43 Fed. 552.

20. Frerking *v.* Thomas, 64 Nebr. 193, 89 N. W. 1005; Whitney *v.* Lowe, 59 Nebr. 87, 80 N. W. 266.

Estoppel of mortgagee.— A mortgagee may be estopped to deny the validity of a release of the mortgage, made by a third person in favor of a purchaser of the property, where he has induced the purchaser to believe that such third person was authorized to give a discharge. Curtiss *v.* Tripp, Clarke (N. Y.) 318.

Forged release.— A mortgagee whose mortgage has been released of record by forgery, and without his knowledge, by a person to whom he had given the notes merely for the purpose of collecting the interest thereon, is entitled to have the release declared void, and to have the mortgage foreclosed to protect his rights. Hait *v.* Ensign, 61 Iowa 724, 17 N. W. 163.

21. Center *v.* Elgin City Banking Co., 185 Ill. 534, 57 N. E. 439; George *v.* Somerville, 153 Mo. 7, 54 S. W. 491; Bissett *v.* Grantham, 67 Mo. App. 23; Tradesmen's Bldg., etc., Assoc. *v.* Thompson, 31 N. J. Eq. 536. And see *supra*, XVI, E, 2, d, (1).

22. See Storch *v.* McCain, 85 Cal. 304, 24 Pac. 639 (discharge under insufficient power of attorney may be validated by mortgagee's recognition of it or by circumstances estopping him to deny it); McIntire *v.* Conrad, 93 Mich. 526, 53 N. W. 829.

A release of a mortgage signed by one as "attorney in fact," when there is nothing of record to show that he had any authority to give a release, is insufficient. O'Neill *v.* Douthitt, 40 Kan. 689, 20 Pac. 493.

As to authority of attorney at law to receive payment and give release see Ross *v.* Sutherland, 32 Nova Scotia 243.

23. Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Reynolds *v.* Smith, 57 Mich. 194, 23 N. W. 727; Moss *v.* Lane, 50 N. J. Eq. 295, 23 Atl. 481.

As between the mortgagee's administrator and the guardian of his minor heirs, authority to collect the money due on the mortgage and discharge the encumbrance rests with the former; but if he turns over the securities to the guardian, giving him also a power of attorney to act in his name in receiving the benefits of the mortgage, the guardian may release or discharge the mortgage. Cutler *v.* Haven, 8 Pick. (Mass.) 490.

24. Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Hubbard *v.* Jasinski, 46 Ill. 160; Upjohn *v.* Ewing, 1 Ohio Dec. (Reprint) 480, 10 West. L. J. 155; Wall *v.* Bissell, 125 U. S. 382, 8 S. Ct. 979, 31 L. ed. 772. *Compare* Waterman *v.* Webster, 108 N. Y. 157, 15 N. E. 380.

Holder of one of several notes.— Where several notes were secured by the same deed of trust, the owner of one of the notes is not authorized to discharge the lien, although all the notes have been paid; only the payee, or his assignee under the statute, is authorized to enter satisfaction or give a re-

private or municipal, the release may be made by its chief fiscal officer, or by another officer authorized to execute such papers by statute, vote, or rule of the corporation.[25]

(II) *Trustee in Deed of Trust.* Where a mortgage security takes the form of a deed of trust, the legal title is vested in the trustee, and he is therefore the proper person to execute a release.[26] But his authority is limited by the terms of the deed, and he cannot give a valid release without payment of the debt secured or other performance of the conditions of the trust,[27] or without the authority or consent of the beneficiary,[28] although the latter, by his subsequent conduct, may estop himself to repudiate the act of the trustee in giving a release originally unauthorized.[29]

(III) *Indemnity Mortgages.* An indorser or surety, taking a mortgage for his own indemnification, generally has a right to release or discharge it.[30] But where the mortgage is conditioned, not only to indemnify such person, but also

lease. Busby *v.* Compton, 112 Mo. App. 569, 87 S. W. 109.

Liquidating partner.— A partner to whom, by agreement upon dissolution, is given power to use the firm-name and sign in liquidation of the firm business, and who has given bond to account for money coming into his hands in settling up the business, is authorized to discharge a mortgage received, held, and considered as partnership property. Burhans *v.* Burhans, 1 N. Y. Suppl. 37.

25. Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334 (the cashier of a bank, acting in conformity with the practice and rules of the institution, may release a debt secured by mortgage in its favor); Baldwin *v.* Crary, 30 Hun (N. Y.) 422 (release by county treasurer); *In re* Mifflin County Bank, 29 Pa. Co. Ct. 401 (state banking commissioner may satisfy a mortgage given to the state by a stock-holder of a state bank).

26. Day *v.* Brenton, 102 Iowa 482, 71 N. W. 538, 63 Am. St. Rep. 460, holding that a decree in equity fixing the liability for the payment of a debt secured by a trust deed, and providing that on payment thereof the clerk of the court should satisfy the trust deed, does not deprive the trustee of the power to satisfy it, the beneficiaries not being parties.

In Missouri under the statute (Rev. St. (1889) § 7094), providing that the beneficiary under a trust deed, and not the trustee, shall release the deed on the margin of the record, the indorsee and holder of a note secured by a deed of trust is the proper party to release the same. Ripley Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 145 Mo. 142, 47 S. W. 1.

Non-resident trustees.— Although a state statute makes it unlawful to name or appoint any person as trustee in a deed of trust who is not at the time a resident of the state, yet a release made by a non-resident trustee, who was within the prohibition of the statute, is valid, for he is at least the "lawful agent" of the mortgagee, within the meaning of another statute authorizing releases to be made by such agents. Bryant *v.* Richardson, 126 Ind. 145, 25 N. E. 807.

27. *Colorado.*—Harker *v.* Scudder, 15 Colo. App. 69, 61 Pac. 197.

Illinois.— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Lang *v.* Metzger, 86 Ill. App. 117.

Missouri.— Armstrong *v.* Robards, 81 Mo. 445; Lakenan *v.* Robards, 9 Mo. App. 179.

New York.— See Bendheim *v.* Morrow, 9 N. Y. App. Div. 617, 41 N. Y. Suppl. 812.

North Carolina.— Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321.

See 35 Cent. Dig. tit. "Mortgages," § 902.

Effect of unauthorized release.— The legal title to the property being vested in the trustee, his release of the deed of trust will restore the title to the grantor, although it may constitute a breach of trust, the debt being actually unsatisfied. But a release or entry of satisfaction made by the trustee when the secured debt has not been paid, and the act is not authorized by the holder of the obligation, will not discharge the lien of the trust deed as between the original parties, nor as to any subsequent purchasers or encumbrancers who are chargeable with notice of the non-payment of the debt. But as to one who had no notice, and relied on the title as shown by the record, whether as a purchaser from the mortgagor or as a subsequent encumbrancer, the trustee's release would be effective both at law and in equity. Lennartz *v.* Quilty, 191 Ill. 174, 60 N. E. 913, 85 Am. St. Rep. 260; Stiger *v.* Bent, 111 Ill. 328; Williams *v.* Jackson, 107 U. S. 478, 2 S. Ct. 814, 27 L. ed. 529; Connecticut Gen. L. Ins. Co. *v.* Eldredge, 102 U. S. 545, 26 L. ed. 245. But see Murto *v.* Lemon, 19 Colo. App. 314, 75 Pac. 160, holding that, where a trust deed authorizes the trustee to release on payment of the debt secured, the trustee is without power to release except on payment, and that purchasers of the property must be held to have knowledge of this limitation through the record of the trust deed.

28. Creede First Nat. Bank *v.* Miner, 9 Colo. App. 361, 48 Pac. 837; Barbour *v.* Scottish-American Mortg. Co., 102 Ill. 121; Lakenan *v.* Robards, 9 Mo. App. 179.

29. Barbour *v.* Scottish-American Mortg. Co., 102 Ill. 121; Lowe *v.* Protestant Episcopal Church Convention, 83 Md. 409, 35 Atl. 87.

30. Tilford *v.* James, 7 B. Mon. (Ky.) 336.

as security for the debt, the owner of the debt also has an interest in it, and it cannot be released by the indemnitee without the concurrence of the creditor.[31]

d. Agreements to Discharge. The parties to a mortgage may agree to its release or discharge on terms other than those specified in the mortgage itself, and this may be done even by parol, provided there be a consideration.[32] A verbal agreement, without consideration, cannot bind third parties interested who are not parties to the agreement.[33] Upon performance of the stipulated conditions, or on the happening of the specified event, the mortgagor is entitled to have a formal release or discharge of the mortgage;[34] and if the mortgagee refuses to perform his part, equity, treating that as done which ought to have been done, will hold the mortgage as released.[35]

2. Requisites and Validity — a. Form and Sufficiency. Although a formal release of a mortgage should be in writing and under seal,[36] yet it may be recognized and enforced, at least in equity, if made by any informal instrument, and even by parol.[37] A mortgage may be released by a paper in the form of a deed, provided it expresses clearly the intention to release the encumbrance, rather than

31. Mitchell *v.* Fisher, 94 Ind. 108; McCracken *v.* German F. Ins. Co., 43 Md. 471; Boyd *v.* Parker, 43 Md. 182. See also Mosher *v.* Rogers, 117 Ill. 446, 5 N. E. 583.

32. Ellis *v.* Sisson, 96 Ill. 105.

Agreement without consideration.— A verbal agreement to release a mortgage for less than the amount due is without consideration and cannot be enforced. Stone *v.* Lannon, 6 Wis. 497. Where, at the time of the making of a loan secured by a mortgage, there was no arrangement that the mortgage should not be paid according to its terms, evidence of subsequent statements by the mortgagee that he did not expect the mortgagor to pay the principal, and that he would have the money after the mortgagee's death, did not establish a binding promise on the mortgagee's part to forbear collection of the debt, there being no consideration to support such a promise. Trombly *v.* Klersy, 139 Mich. 209, 102 N. W. 638.

33. Snell *v.* Palmer, 12 Ill. App. 337.

34. *Iowa.*— Brooks *v.* Jones, 114 Iowa 385, 82 N. W. 434, 86 N. W. 300.

Michigan.— Vary *v.* Chatterton, 50 Mich. 541, 15 N. W. 896.

New Hampshire.— Kimball *v.* Grover, 11 N. H. 375.

New York.— Sheldon *v.* Palliser, 23 N. Y. App. Div. 191, 48 N. Y. Suppl. 770; Griswold *v.* Griswold, 7 Lans. 72.

South Carolina.— Bean *v.* Bean, 28 S. C. 607, 5 S. E. 827.

Vermont.— Brigham *v.* Avery, 48 Vt. 602.

United States.— Swain *v.* Seamens, 9 Wall. 254, 19 L. ed. 554.

Canada.— Spinney *v.* Pugsley, Ritch. Eq. Cas. (Nova Scotia) 398.

See 35 Cent. Dig. tit. "Mortgages," § 905.

Necessity for fulfilment of conditions.— Where defendant covenanted with plaintiff to pay a certain sum of money to one T on a certain day, and plaintiff covenanted that, on such payment, he would surrender and discharge a certain mortgage, it was held that the payment was a condition precedent to the performance on the part of plaintiff. Northrup *v.* Northrup, 6 Cow. (N. Y.) 296. So an agreement by a mortgagee to release his mortgage whenever it should appear that the one personally liable on the mortgage debt would suffer loss unless the same were released does not entitle the latter to a release because the mortgage is about to be foreclosed, since he could not be said to suffer loss by a foreclosure. Irwin *v.* Brown, 145 Ill. 199, 34 N. E. 43.

Duty of trustee in deed of trust.— Where the debtor and creditor, or those representing them, agree to a release of a deed of trust executed to secure the indebtedness, the fact that the evidences of the debt are not surrendered affords no reason for the refusal of the trustee to execute the release. Pearce *v.* Bryant Coal Co., 121 Ill. 590, 13 N. E. 561.

35. Ellis *v.* Sisson, 96 Ill. 105; Huff *v.* Farwell, 67 Iowa 298, 25 N. W. 252.

36. Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Clifton *v.* Tulane, 48 N. J. Eq. 310, 24 Atl. 131.

37. *Alabama.*— Wallis *v.* Long, 16 Ala. 738.

Illinois.— Vansant *v.* Allmon, 23 Ill. 30; Lucas *v.* Harris, 20 Ill. 165; Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

New Jersey.— Johnston *v.* Corlies, 6 N. J. L. J. 25.

New York.— Headley *v.* Goundry, 41 Barb. 279.

Pennsylvania.—Ackla *v.* Ackla, 6 Pa. St. 228. *Compare* Kidder *v.* Kidder, 33 Pa. St. 268.

See 35 Cent. Dig. tit. "Mortgages," § 907.

Where a discharge of a mortgage is not under seal, it is not an estoppel as to the fact of payment. Bigelow *v.* Staley, 14 U. C. C. P. 276.

Agreement with junior mortgagee.—Where, after an assignment of a mortgage, the mortgagee enters into an agreement with a junior encumbrancer that the latter's lien shall take precedence of the first mortgage, this does not operate as a release of the mortgaged premises, being merely a personal contract between the parties, if the mortgagee had the right to make it. Gillig *v.* Maass, 28 N. Y. 191.

to assign or otherwise transfer it, and will not be vitiated by lack of form,[38] by a misdescription or partial failure of description of the property mortgaged, provided it identifies the mortgage,[39] or by a misnomer of one of the parties not calculated to mislead or deceive.[40] So also the release may be made by a quitclaim deed executed by the mortgagee,[41] by an indorsement on the back of the mortgage,[42] by a testamentary disposition in favor of the mortgagor,[43] by a release or relinquishment of all claims and demands against the mortgagor, provided its terms will embrace the mortgage debt,[44] by a waiver or failure to assert claims under the mortgage, when such failure shows an intention to abandon it,[45] or even by an executory agreement to release, the conditions of which have been performed by the other party, equity in this case applying its maxim that that is recognized as done which ought to have been done.[46] A release may be made conditional, and will not then become operative unless the conditions are complied with.[47] A release of a mortgage without the surrender of the accompanying note is ineffectual, even where the note has passed to a third party.[48]

b. Consideration. A release of a mortgage made without any consideration cannot be enforced,[49] and so also if the consideration is not adequate or sufficient

38. Allen *v.* Leominster Sav. Bank, 134 Mass. 580; Wade *v.* Howard, 6 Pick. (Mass.) 492; Agnew *v.* Renwick, 27 S. C. 562, 4 S. E. 223. And see A. W. Stevens Lumber Co. *v.* Hughes, (Miss. 1905) 38 So. 769.

Question of intention.— Whether or not a particular transaction amounts to a release of a lien on real estate is a question of intention on the part of the releasor. In a doubtful case such an intention will not be implied, but when it is clear that such was the intention, a court of equity will enforce the release, although no formal release has been executed. Stribling *v.* Splint Coal Co., 31 W. Va. 82, 5 S. E. 321. And see Collins *v.* Stocking, 98 Mo. 290, 11 S. W. 750.

39. Miller *v.* Hicken, 92 Cal. 229, 28 Pac. 339; Gadsden *v.* Latey, 42 Nebr. 128, 60 N. W. 322.

40. Bryan *v.* Stump, 8 Gratt. (Va.) 241, 56 Am. Dec. 139; *Re* Clarke, 18 Ont. 270. But see Cerney *v.* Pawlot, 66 Wis. 262, 28 N. W. 183, holding a misnomer of "Josepha" as "Joseph" fatal.

41. *Illinois.*— Woodbury *v.* Aikin, 13 Ill. 639; Mallory *v.* Mallory, 86 Ill. App. 193.

Michigan.— Bridgman *v.* Johnson, 44 Mich. 491, 7 N. W. 83.

New York.— Nickell *v.* Tracy, 100 N. Y. App. Div. 80, 91 N. Y. Suppl. 287.

Vermont.— Stockwell *v.* Fitzgerald, 70 Vt. 468, 41 Atl. 504.

Wisconsin.— Mason *v.* Beach, 55 Wis. 607, 13 N. W. 884.

Not intended as release.—A quitclaim deed will not be construed as a release of the mortgage where the intention that it shall not have that effect, but shall serve some other purpose, is expressed in the deed itself or otherwise clearly apparent. Barr *v.* Foster, 25 Colo. 28, 52 Pac. 1101; Mabie *v.* Hatinger, 48 Mich. 341, 12 N. W. 198; Green *v.* Currier, 63 N. H. 563, 3 Atl. 428.

42. Turner *v.* Flinn, 72 Ala. 532; Allard *v.* Lane, 18 Me. 9.

43. Weeks *v.* Ostrander, 52 N. Y. Super. Ct. 512.

Debtor made executor.— A mortgagee does not extinguish the mortgage merely by making the debtor his executor. Miller *v.* Donaldson, 17 Ohio 264.

Memorandum signed by deceased mortgagee.— In defense to a foreclosure suit, the mortgagor produced a memorandum signed by the mortgagee and alleged to have been handed to him by the mortgagee, since deceased, which stated that the mortgage, describing it, "is not payable to my heirs, executors, or administrators after my death." There were some suspicious circumstances connected with this memorandum, but it was held that, even in the absence of such circumstances, it would not operate as a release of the mortgage either at law or in equity. Woodworth *v.* Woodworth, Ritch. Eq. Cas. (Nova Scotia) 337. See also Randall *v.* Peckham, 11 R. I. 600.

44. Hubbard *v.* Mulligan, 34 Colo. 236, 82 Pac. 783; Stopp *v.* Wilt, 76 Ill. App. 531; McIntyre *v.* Williamson, 1 Edw. (N. Y.) 34.

45. Wells *v.* Ordway, 108 Iowa 86, 78 N. W. 806, 75 Am. St. Rep. 209; Freeby *v.* Tupper, 15 Ohio 467; Fosdick *v.* Risk, 15 Ohio 84, 45 Am. Dec. 562.

46. Huff *v.* Farwell, 67 Iowa 298, 25 N. W. 252.

47. *Illinois.*— Gould *v.* Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497; Stanley *v.* Valentine, 79 Ill. 544; Hale *v.* Morgan, 68 Ill. 244.

Kentucky.—Boli *v.* Citizens' Bank, 61 S. W. 271, 22 Ky. L. Rep. 1699.

Michigan.— Vary *v.* Shea, 36 Mich. 388.

Missouri.— Barcroft *v.* Lessieur, 48 Mo. 418.

Tennessee.— Emert *v.* Williams, (Ch. App. 1897) 42 S. W. 491.

48. Dickinson *v.* Worthington, 10 Fed. 860, 4 Hughes 430.

49. Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Snell *v.* Palmer, 12 Ill. App. 337; Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782; Jones *v.* Jones, 66 N. H. 198, 20 Atl. 929; Upper Canada Bank *v.* Shickluna, 10 Grant Ch. (U. C.) 157. But *compare* Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512, holding

to support it,[50] and the same rule applies where the consideration, although good originally, has failed.[51]

c. Acknowledgment and Execution. Where a release of a mortgage is made by a formal instrument, it should, with the same formalities usual in the case of other instruments affecting realty, be signed and executed,[52] acknowledged,[53] and delivered.[54]

d. Record. A release of a mortgage is a "conveyance," within the meaning of statutes requiring conveyances to be recorded in order to be effectual against subsequent purchasers or encumbrancers without notice.[55] In Canada, by statute, the registration of a duly executed certificate of discharge of a mortgage operates as a reconveyance of the estate to the mortgagor.[56]

e. Validity of Release. A release of a mortgage will be held invalid and inoperative in equity if procured by means of false representations or other fraud,[57]

that a mortgage may be canceled or released at any time without consideration and with or without the consent of the mortgagor.

50. An agreement for the release of a mortgage is supported by a sufficient consideration when founded on a surrender of property (Ellis *v.* Sisson, 96 Ill. 105), or the execution of a new mortgage on other lands (Keeler *v.* Salisbury, 27 Barb. (N. Y.) 485 [*affirmed* in 33 N. Y. 648]), the payment of certain taxes which are a prior lien on the premises (Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365), the promise of a third person to pay a part of the mortgage debt (Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185), the desire of the mortgagor to obtain a clear title to enable him to sell the property as unencumbered (McMillan *v.* McMillan, 184 Ill. 230, 56 N. E. 302), valuable services rendered by the mortgagor to the mortgagee (Sherman *v.* Matthieu, 106 N. Y. App. Div. 368, 94 N. Y. Suppl. 565), or an apportionment of the mortgage debt between the joint mortgagors, on their effecting a partition of the mortgaged premises (Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747). But a release of a mortgage procured under a promise to pay is inoperative until the mortgage debt is paid. Hale *v.* Morgan, 68 Ill. 244.

51. Hemstreet *v.* Burdick, 90 Ill. 444; Doe *v.* Pendleton, 15 Ohio 735. *Compare* Seymour *v.* Mackay, 126 Ill. 341, 18 N. E. 552.

52. Carter *v.* Van Bokkelen, 73 Md. 175, 20 Atl. 781.

53. Bryant *v.* Richardson, 126 Ind. 145, 25 N. E. 807 (holding that a duly recorded release is not invalidated by the omission of the word "acknowledge" from the certificate of acknowledgment thereof); Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 63 N. W. 553 (holding that where the acknowledgment is left blank, it will be presumed that, when properly signed by the mortgagee, the blank will be properly filled by the officer taking the acknowledgment).

54. Weed *v.* Harris, 54 Iowa 747, 6 N. W. 138.

Manual delivery is not necessary where the mortgagee himself causes the release to be recorded. Mann *v.* Jummel, 183 Ill. 523, 56 N. E. 161.

55. Palmer *v.* Bates, 22 Minn. 532; Baker *v.* Thomas, 61 Hun (N. Y.) 17, 15 N. Y. Suppl. 359; Mutual L. Ins. Co. *v.* Wilcox, 55 How. Pr. (N. Y.) 43.

Possession of premises by the mortgagor is not notice to a purchaser at foreclosure sale of the rights of the mortgagor under an unrecorded partial release of such premises. Palmer *v.* Bates, 22 Minn. 532.

Sufficiency of record.—Leaving a release of a mortgage with the county clerk with instructions to record it when certain papers are sent to him is not a leaving of it to be recorded, within the meaning of the law, especially when it does not appear that the other papers were ever sent to him. Gibson *v.* Thomas, 85 N. Y. App. Div. 243, 83 N. Y. Suppl. 552.

56. Dilke *v.* Douglas, 5 Ont. App. 63; Imperial Bank *v.* Metcalfe, 11 Ont. 467; *In re* Music Hall Block, 8 Ont. 225; *Re* Moore, 8 Ont. Pr. 471; Canada Trust, etc., Co. *v.* Gallagher, 8 Ont. Pr. 97; Carrick *v.* Smith, 35 U. C. Q. B. 348; Magrath *v.* Todd, 26 U. C. Q. B. 87; Lee *v.* Morrow, 25 U. C. Q. B. 604; Crookshank *v.* Humberstone, 6 U. C. Q. B. O. S. 103.

Necessity for registration.—A certificate of discharge is of no effect to revest the legal estate until registered. So, where such a certificate was lost before registration, it was held that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors, were not sufficient to enable the court to declare the mortgagor entitled to the legal estate in fee. *Re* Moore, 8 Ont. Pr. 471.

Registration of partial release.— The registrar is bound to register or file a certificate of discharge of a portion of the lands covered by a mortgage. *In re* Ridout, 2 U. C. C. P. 477.

57. Lewis *v.* Farrell, 51 Conn. 216; Sidener *v.* Pavey, 77 Ind. 241; Reed *v.* King, 23 Iowa 500; Groye *v.* Robards, 36 Mo. 523.

Presumption of validity.— A release of a trust deed securing a debt, duly executed and acknowledged, is *prima facie* valid, and the mere fact that the debt remains outstanding and unpaid when the release was executed is not sufficient to raise a presumption of fraud, accident, or mistake. Battenhausen *v.* Bullock, 8 Ill. App. 312.

Fraud as to third persons.— The release of a mortgage as to a portion of land on which

or by imposition or undue influence,[58] or if altered without authority in a material particular.[59]

f. Evidence as to Release. If reliance is placed on an alleged release of a mortgage, which is disputed, any competent evidence may be received to prove the existence[60] or the genuineness of the instrument.[61] And a parol release may be shown by circumstances and declarations and acts of the parties inconsistent with the continued existence of the mortgage;[62] but in this case the proof should be very clear and satisfactory.[63]

3. Entry of Satisfaction — a. Right to Entry. In those states where it is customary to enter the satisfaction of a mortgage on the margin of the record of the mortgage, it is the absolute right of the mortgagor to have such an entry made when he has paid all that is due under the mortgage[64] or has otherwise fully satisfied its conditions.[65] It is his duty, as between himself and third persons dealing with the property without knowledge of the payment, to see that proper evidence of satisfaction is put on the record.[66]

b. Authority to Enter Satisfaction. An entry of satisfaction of a mortgage may be made by the person appearing on the record to be entitled to receive and receipt for the debt,[67] or his attorney in fact,[68] or by a duly accredited agent, although his authority does not take the form of a power of attorney.[69] In the case of a trust deed the satisfaction will be entered by the trustee, although he has no authority to do this without payment or other actual satisfaction of the debt.[70] Such an entry, when made by a mere stranger without authority, is void and of no effect.[71]

c. Authority and Duty of Officers. The officer whose duty it is to enter satis-

there were prior mortgages for more than its value on foreclosure is not a fraud on those claiming subrogation. Perrett *v.* Yardsdorfer, 37 Mich. 596.

58. McMillan *v.* McMillan, 184 Ill. 230, 56 N. E. 302.

59. Sayles *v.* Brown, 28 Grant Ch. (U. C.) 10.

60. Hendrickson *v.* Tracy, 53 Minn. 404, 55 N. W. 622.

61. Latourette *v.* Gardner, 75 Mich. 134, 42 N. W. 610.

62. Ackla *v.* Ackla, 6 Pa. St. 228.

63. Stevenson *v.* Adams, 50 Mo. 475; Thornton *v.* Irwin, 43 Mo. 153; Sanford *v.* Story, 15 Misc. (N. Y.) 536, 38 N. Y. Suppl. 104.

64. Murray *v.* Brokaw, 67 Ill. App. 402; Hillman *v.* Stumph, Wils. (Ind.) 285; Verges *v.* Giboney, 47 Mo. 171; Dodson *v.* Clark, 49 Mo. App. 148; People *v.* Keyser, 28 N. Y. 226, 84 Am. Dec. 338; Sherwood *v.* Wilson, 2 Sweeny (N. Y.) 684.

To whom payment made.— The payment by a mortgagor of the debt, with interest and costs of entry of satisfaction thereon, to one of the executors of the mortgagee, is sufficient to entitle him to such entry, although made without the consent of the other executor. Crawford *v.* Simon, 159 Pa. St. 585, 28 Atl. 491.

65. Valle *v.* American Iron Mountain Co., 27 Mo. 455, holding that it is not necessary that there should be an actual payment in money of the mortgage debt to entitle the mortgagor to have it satisfied of record, but full satisfaction in any other way gives him the same right.

66. Bausman *v.* Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201; Merchant *v.* Woods, 27 Minn. 396, 7 N. W. 826. But see Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997, 110 Am. St. Rep. 924, 1 L. R. A. N. S. 891.

67. Summers *v.* Kilgus, 14 Bush (Ky.) 449. And see Seymour *v.* Laycock, 47 Wis. 272, 2 N. W. 297; Jefferson *v.* Burhans, 85 Fed. 924, 29 C. C. A. 487.

A mortgage to a husband and wife reciting that the grant is to secure payment of a debt to the mortgagees, with a proviso that the grant shall become void when payment is made to the mortgagees, their executors, administrators, or assigns, and also providing that the debt shall be paid at the expiration of five years after the decease of the mortgagees, payable share and share alike to their legal heirs, may be satisfied by the husband after the death of the wife. Heilig *v.* Heilig, 215 Pa. St. 256, 64 Atl. 442 [*reversing* 28 Pa. Super. Ct. 396, and *affirming* 21 Lanc. L. Rev. 52].

68. Hutchings *v.* Clark, 64 Cal. 228, 30 Pac. 805.

The power of attorney need not be under seal nor recorded unless it is so required by statute. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Valle *v.* American Iron Mountain Co., 27 Mo. 455.

69. Storch *v.* McCain, 85 Cal. 304, 24 Pac. 639; Douglass *v.* Douglass Bagging Co., 94 Mo. 226, 7 S. W. 280.

70. Ill. Rev. St. c. 95, § 8; Browne *v.* Davis, 109 N. C. 23, 13 S. E. 703. And see *supra*, XVIII, C, 1, c, (II).

71. Mallett *v.* Page, 8 Ind. 364; De Laureal *v.* Kemper, 9 Mo. App. 77; Matter of Brownell, 15 N. Y. Suppl. 475.

faction of a mortgage may, and should, in any doubtful case, require reasonably satisfactory proof of its actual payment or of the authority of the person who directs him to make the entry.[72] He would not for instance be justified in canceling a mortgage at the simple request of a stranger, although the mortgage was exhibited to him with the seals torn off.[73] But where the case is clear, or proper proof of authority is shown to him, it is his imperative duty to make the entry as directed, and in this he may be compelled by mandamus.[74]

d. Form and Requisites of Entry. The entry of satisfaction should show the authority of the person making it,[75] and a material discrepancy between his name and that of the mortgagee will vitiate it.[76] It is necessary in some states, and proper in all, that the entry should be witnessed by the recording officer.[77] But it is not required to describe the land affected, and an erroneous description does not affect its validity if it sufficiently describes and identifies the mortgage.[78] In the absence of evidence to the contrary and after the lapse of considerable time it will be presumed that an entry of satisfaction was made in compliance with the law.[79]

e. Entry of Partial Payments. In one state a statute requires the mortgagee to enter partial payments on the margin of the record on the written request of the mortgagor.[80] This includes payments of stipulated interest.[81] But the statute

72. Winsmith *v.* Winsmith, 15 S. C. 611, holding that a written request, not under seal, made by a mortgagee to the register, to enter satisfaction on the record of the mortgage, is full authority to the register to do so.

Satisfaction of a school fund mortgage cannot be entered before foreclosure by the county recorder except upon the indorsement by the county auditor of full payment thereof. Stockwell *v.* State, 101 Ind. 1.

Requiring production of notes secured.—A statute providing that the recorder of deeds shall require the releasor of a mortgage to present for cancellation the notes secured, or an affidavit of their loss, probably does not apply to mortgages securing railroad bonds, and in any event is not retrospective. Lyman *v.* Kansas City, etc., R. Co., 101 Fed. 636.

Where mortgage is discharged otherwise than by payment.—The recorder is not bound to erase mortgages extinguished by a probate sale, or by the want of a new inscription, when informed of the circumstances relied on as discharging them; he may do so, but at his peril. Leverich *v.* Prieur, 8 Rob. (La.) 97. And see Guesnard *v.* Soulie, 8 La. Ann. 58; Macarty *v.* Landreaux, 8 Rob. (La.) 130, holding that a mortgage, duly recorded, can be erased only by a decree of erasure or the mortgagee's consent; it is his property, which no act of the recorder can destroy.

Proof of authority of personal representative.— Where a mortgage runs to two persons "as executors," and the sum thereby secured is made payable to them "or their personal representatives," the register is bound to record a certificate of payment made by the surviving executor. People *v.* Keyser, 39 Barb. (N. Y.) 587 [*affirmed* in 28 N. Y. 226, 84 Am. Dec. 338]. And he cannot require the production and filing of a certified copy of the will, under which it is claimed that one executor has authority to acknowledge satisfaction. People *v.* Miner, 37 Barb. (N. Y.) 466. So where a satisfaction of the mortgage is produced, executed by the administrator of the mortgagee and duly acknowledged, the officer is bound to discharge the mortgage of record, and cannot require a certificate from the surrogate that the person executing the satisfaction is the administrator. Matter of Wadsworth, 27 Misc. (N. Y.) 264, 57 N. Y. Suppl. 911. So a satisfaction of a mortgage executed by a foreign executor of the mortgagee must be accepted by a register of deeds in New York, when no letters testamentary have been issued in that state, such executor being a "personal representative" of the mortgagee within the meaning of the statute. People *v.* Fitzgerald, 21 N. Y. Suppl. 911, 29 Abb. N. Cas. 471.

73. Baldwin *v.* Howell, 45 N. J. Eq. 519, 15 Atl. 236.

74. People *v.* Miner, 37 Barb. (N. Y.) 466; Water, etc., Co. *v.* Jenkyn, 20 Pa. Co. Ct. 102.

75. O'Neill *v.* Douthitt, 40 Kan. 689, 20 Pac. 493.

76. Cerney *v.* Pawlot, 66 Wis. 262, 28 N. W. 183.

77. See the statutes of the different states. And see Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512.

In North Carolina an entry of the word "satisfied" on the margin of the record of a mortgage, signed by the mortgagee and witnessed by the register of deeds, is competent evidence of the payment of the debt secured. Robinson *v.* Sampson, 121 N. C. 99, 28 S. E. 189.

Necessity for witnesses.—Where no statute requires it, a satisfaction of a mortgage need not be attested by two witnesses. Charleston *v.* Ryan, 22 S. C. 339, 53 Am. Rep. 713.

78. Bryant *v.* Richardson, 126 Ind. 145, 25 N. E. 807.

79. Metz *v.* Wright, 116 Mo. App. 631, 92 S. W. 1125.

80. Ala. Code (1896), § 1065, amended by Acts (1898–1899), p. 26.

81. Southwestern Bldg., etc., Assoc. *v.* Rowe, 125 Ala. 491, 28 So. 484; New South

cannot be invoked where the partial payments, at the time of the request, aggregate enough to satisfy the mortgage in full, another statute being then applicable.[82]

4. Proceedings to Compel Release or Satisfaction — a. Nature and Form of Remedy. Upon the refusal of a mortgagee to release or satisfy a mortgage which has been fully paid, or the condition of which has been otherwise performed, a remedy against him may be obtained by a bill in equity[83] or a civil action equivalent thereto,[84] or in some jurisdictions, by a rule or motion,[85] or a summary proceeding provided by statute for the purpose.[86] The same relief may be obtained, if proceedings to enforce the mortgage are pending, by paying the money into court, or otherwise showing full satisfaction in fact.[87] If any affirmative action is instituted for redress of this kind, the proceeding should be brought in the jurisdiction where the mortgaged premises lie.[88]

b. Right of Action. A right of action to obtain satisfaction of a mortgage does not arise until full performance of its conditions, either by actual payment of the full amount due under it,[89] or a good tender of such amount, which must also

Bldg., etc., Assoc. *v.* Bowie, 121 Ala. 465, 25 So. 844.

82. Ayres *v.* Craft, 128 Ala. 407, 29 So. 446.

83. Pratt *v.* Skolfield, 45 Me. 386; Eaton *v.* Eaton, 68 Mich. 158, 36 N. W. 50; Saeger's Appeal, 96 Pa. St. 479; Walsh *v.* Leonard, 8 Luz. Leg. Reg. (Pa.) 282; McLennan *v.* McLean, 27 Grant Ch. (U. C.) 54.

In Massachusetts, by statute, a decree discharging a mortgage may be based on the presumption of payment arising from the lapse of twenty years since the time set for performance of its conditions. Short *v.* Caldwell, 155 Miss. 57, 28 N. E. 1124.

Equity jurisdiction necessary.— Whatever may be the ground on which application to a court of equity for satisfaction of a mortgage is based, it must be brought under some known head of equity jurisdiction. Stevens *v.* Hayden, 129 Mass. 328.

84. Bush *v.* Maklin, 87 Ky. 482, 9 S. W. 420, 10 Ky. L. Rep. 473; Beach *v.* Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Mosher *v.* Campbell, 30 Hun (N. Y.) 230 [*affirmed* in 102 N. Y. 695]; Knox *v.* Johnston, 26 Wis. 41.

85. New Orleans Nat. Banking Assoc. *v.* Adams, 18 Fed. Cas. No. 10,184, 3 Woods 21.

86. See the statutes of the different states. And see Moore *v.* Cord, 14 Wis. 213.

In Pennsylvania the court has no jurisdiction, in such summary proceedings, to decree a satisfaction on payment of any sum less than the face of the mortgage shows to be due. *In re* Shea, 4 Pa. Dist. 206.

In Virginia the statute authorizes a summary proceeding to have the mortgage satisfied of record on proof that the debt has been "paid or discharged"; but this does not apply where the demand for relief is based on a presumption of payment from lapse of time or on the statute of limitations. Turnbull *v.* Mann, 94 Va. 182, 26 S. E. 510.

87. Chappell *v.* Clarke, 92 Md. 98, 48 Atl. 36; Howard Sav. Inst. *v.* Essex Bldg., etc., Assoc., (N. J. Ch. 1899) 46 Atl. 223; Pennock *v.* Stewart, 104 Pa. St. 184; Keyer *v.* Cosmopolitan Sav., etc., Assoc., 8 Pa. Dist. 708.

88. Byrne's Petition, 13 Pa. Dist. 701; New Orleans Nat. Banking Assoc. *v.* Adams, 18 Fed. Cas. No. 10,184, 3 Woods 21.

89. Ames *v.* New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385.

Amount actually received.— Where the mortgagee without sufficient excuse refuses to pay over to the mortgagor the full amount of the loan agreed on, the latter may sue to cancel the mortgage on repayment of the amount actually advanced. Travelers' Ins. Co. *v.* Jones, 16 Colo. 515, 27 Pac. 807; Payne *v.* Loan, etc., Co., 54 Minn. 255, 55 N. W. 1128.

Usurious mortgage.— A mortgage securing a usurious contract being satisfied by payment of the principal debt without interest, the mortgagor may maintain an action to have it satisfied, on such payment. Cleveland *v.* Western Loan, etc., Co., (Ida. 1901) 63 Pac. 885.

Agreement for part payment.— If the parties have specially agreed for the satisfaction of the mortgage on payment of a part of the amount due under it, such payment will justify an action to obtain satisfaction. Brewer's Appeal, 104 Pa. St. 417.

Presumption of payment.— In some jurisdictions an action may be maintained to have a mortgage satisfied of record, or for a reconveyance, on the strength of the presumption of payment which arises from the lapse of twenty years without acknowledgment or attempt to enforce it. Brintnall *v.* Graves, 168 Mass. 384, 47 N. E. 119; *In re* Tarbell, 160 Mass. 407, 36 N. E. 55; Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124; Bell *v.* Brown, Ritch. Eq. Cas. (Nova Scotia) 20.

Costs and expenses.— A decree for the satisfaction of a mortgage will not be made until the mortgagee has been reimbursed for costs and expenses incurred by him (Lewis *v.* Conover, 21 N. J. Eq. 230), including in some states where it is required by statute the expenses of acknowledging an instrument of release or satisfaction (Mader *v.* Plano Mfg. Co., 17 S. D. 553, 97 N. W. 843).

Compensation for services of trustee included see Mercantile Trust, etc., Co. *v.* Atlantic, etc., R. Co., 99 N. C. 139, 5 S. E. 417.

be kept good,[90] or by showing that the debt has been extinguished by operation of law, or otherwise than by payment;[91] or if the mortgage was conditioned for the performance of some act other than the payment of money, then the action cannot be maintained without showing performance of the particular act.[92] There must have been a demand on the mortgagee to give a satisfaction and refusal by him,[93] and the right of action may be barred by the continued adverse possession of the mortgagee.[94]

c. Parties Plaintiff. An action to obtain the cancellation or satisfaction of a mortgage may be maintained by a junior mortgagee,[95] or by a purchaser of the premises who has assumed the mortgage;[96] but if several persons are interested in procuring the discharge of the mortgage, and some furnish their quota of the money, and others do not, the latter cannot maintain a bill to have the funds supplied by the former applied to the discharge of the mortgage.[97]

d. Parties Defendant. A decree for the cancellation or satisfaction of a mortgage cannot be made unless all persons interested therein who are not plaintiffs are made defendants so that the rights of all may be determined.[98] If the mortgage has been assigned, the assignee is a necessary defendant;[99] and if only a partial interest in the mortgage, or a part of the debt has been assigned, the mortgagee, holding the remainder, must also be joined.[1]

e. Pleading and Evidence. The complaint in an action to procure the cancellation or satisfaction of a mortgage should distinctly allege its payment or per-

90. Trombley *v.* Cannon, 134 Mich. 417, 96 N. W. 516; Foster *v.* Mayer, 70 Hun (N. Y.) 265, 24 N. Y. Suppl. 46; Werner *v.* Tuch, 52 Hun (N. Y.) 269, 5 N. Y. Suppl. 219 [*affirmed* in 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443]; Covert *v.* Covert, 44 Oreg. 1, 74 Pac. 205.

91. Schilling *v.* Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892.

92. Goldbeck's Appeal, 4 Pa. Cas. 488, 8 Atl. 29.

Conditions beyond those specified in the mortgage cannot be imposed by the mortgagee. Brown *v.* Stewart, 56 Md. 421. But see Lewie *v.* Hallman, 53 S. C. 18, 30 S. E. 601, holding that equity will require a grantor, who has conveyed land as security, to satisfy all his subsequent debts to the grantee before it will enforce a reconveyance.

93. Murdock *v.* Cox, 118 Ind. 266, 20 N. E. 786; Larned *v.* Donovan, 29 N. Y. Suppl. 825, 31 Abb. N. Cas. 308.

94. Crook *v.* Glenn, 30 Md. 55.

95. Klotz *v.* Macready, 44 La. Ann. 166, 10 So. 706; Redin *v.* Branhan, 43 Minn. 283, 45 N. W. 445.

96. Milliken *v.* Golden, 73 Hun (N. Y.) 212, 25 N. Y. Suppl. 885, holding that the mortgagor and his vendee may eliminate from their deed the clause by which the vendee assumed the mortgage, and thereby enable the mortgagor alone to maintain an action against the mortgagee to have the mortgage canceled. See also Assurance Co. *v.* Power, 12 Phila. (Pa.) 377, holding that the mortgagor only, and not the terre-tenant, is the person authorized to pay the amount of the mortgage into court and have it satisfied.

97. Holden *v.* Pike, 24 Me. 427.

98. Delavigne *v.* Gaiennie, 11 Rob. (La.) 171; Leverich *v.* Prieur, 8 Rob. (La.) 97; French *v.* Prieur, 6 Rob. (La.) 299; Gasquet *v.* Dimitry, 6 La. 453; State *v.* Le Blanc, 5 La. 329; Winterson *v.* Wilson, 8 N. Y. App. Div. 619, 40 N. Y. Suppl. 961.

Personal representative and heir.— A bill in equity cannot be maintained against an executor alone to cancel a mortgage of real estate made to his testator in the latter's lifetime, where the will does not vest title to realty in the executor; the heirs at law or devisees are indispensable parties. Steere *v.* Tention, 46 Fla. 510, 35 So. 106. If the mortgagee is dead and the action is brought aginst his heir, it is not necessary to join his administrator. Mullinix *v.* Perkins, 2 Coldw. (Tenn.) 87.

Void mortgage.— Where the mortgage sought to be satisfied of record is void as to the complainant, it is immaterial that it may be valid as to others, where all parties interested are before the court. Eaton *v.* Eaton, 68 Mich. 158, 36 N. W. 50.

99. Marshall *v.* Shiff, 130 Ala. 545, 30 So. 335; Griffith *v.* Lovell, 26 Iowa 226.

Assignment after payment.—Where a mortgage which has been paid in fact, but not satisfied of record, is afterward assigned, an action to have it adjudged satisfied may be maintained against both the mortgagee and assignee. Galloway *v.* Litchfield, 8 Minn. 188.

Mortgagor as party.— Where a debt is secured by a mortgage, the land is the primary fund for the payment of the bond and mortgage, and a purchaser of the land subject to the mortgage cannot have the mortgage alone adjudged satisfied, the bond being in the hands of an assignee, without making the obligor and mortgagor a party. Gilbert *v.* Averill, 15 Barb. (N. Y.) 20.

1. Dreux *v.* Ducournau, 5 Mart. (La.) 625; Ranger *v.* Goodrich, 4 Abb. Dec. (N. Y.) 1, 3 Keyes 503, 3 Transcr. App. 303.

formance of its other conditions,[2] as well as all other circumstances necessary to show plaintiff's right to sue and defendant's liability.[3] The payment or performance is a question of fact, to be determined upon any competent and sufficient evidence;[4] but the proof on this point must be clear and precise and must distinctly preponderate over the evidence, if any, to the contrary.[5]

f. Judgment or Decree. In a proceeding of this kind the court, according to the circumstances of the case and the prayer of the petition, may order the execution of a deed of release or reconveyance,[6] or the execution and delivery of a formal satisfaction,[7] or the entry of satisfaction on the record of the mortgage.[8] The successful plaintiff will ordinarily be entitled to his costs.[9]

5. Penalties For Failure to Release or Enter Satisfaction — a. Statutory Provisions. The statutes in force in several states,[10] authorizing the recovery of a

2. Johnson *v.* Moore, 112 Ind. 91, 13 N. E. 106; *In re* Townsend, 4 Hun (N. Y.) 31.

3. See Flynn *v.* Flynn, 68 Mich. 20, 35 N. W. 817; Lovett *v.* Slocumb, 109 N. C. 110, 13 S. E. 893.

In Pennsylvania a bill in equity for the satisfaction of a mortgage must allege the execution, delivery, and payment of the mortgage and the refusal of the mortgagee to enter satisfaction, although often requested so to do, and should also aver that defendant was the legal holder of the mortgage; that plaintiff was the owner of the premises bound by it; that plaintiff was injured by defendant's refusal to enter satisfaction; how, when, or to whom the alleged payment was made; and payment or tender of reasonable charges for making the entry requested. Owens *v.* Owens, 1 C. Pl. 15.

Mortgage not necessary part of complaint.— In a suit to cancel a mortgage, it is not necessary to make the mortgage a part of the complaint. Johnson *v.* Moore, 112 Ind. 91, 13 N. E. 106; Morley *v.* National Bldg., Loan, etc., Assoc., 28 Ind. App. 369, 62 N. E. 1023.

4. Gould *v.* Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497; Pearce *v.* Bryant Coal Co., 121 Ill. 590, 13 N. E. 561; Connelly *v.* Connelly, 36 Ill. App. 210; Bush *v.* Freer, 91 Mich. 315, 51 N. W. 1002; Newerf *v.* Jebb, 1 Silv. Sup. (N. Y.) 109, 6 N. Y. Suppl. 581.

5. *Illinois.*— Gould *v.* Elgin City Banking Co., 36 Ill. App. 390.

Iowa.— Kreck *v.* Pitzelberger, 64 Iowa 108, 19 N. W. 874.

Maryland.— Herbert *v.* Rowles, 30 Md. 271.

New Jersey.— Pape *v.* Ludeman, (Ch. 1904) 59 Atl. 9.

Pennsylvania.— Dinner *v.* Van Dyke, 25 Pa. Super. Ct. 433; Kaiser's Case, 30 Pittsb. Leg. J. N. S. 171. See also Minteer *v.* Brickell, 37 Pittsb. Leg. J. N. S. 48.

See 35 Cent. Dig. tit. "Mortgages," § 927.

The mortgagor's production of the mortgage note does not entitle him to an erasure of the mortgage. Lemos *v.* Duralde, 3 Mart. N. S. (La.) 258.

6. Ragan *v.* Lower, 3 Ind. 253; Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211; Orme *v.* Clarke, 18 Fed. Cas. No. 10,577, 1 Hayw. & H. 114.

Nature of release ordered.— Where, for all that appears in the case, defendant may have some other interest in the property than that acquired by the mortgage, it is error to decree an absolute release, which may operate against some other interest or estate. Walker *v.* Tiffin Gold, etc., Min. Co., 2 Colo. 89.

7. Beach *v.* Cooke, 28 N. Y. 508, 86 Am. Dec. 260.

Where the court finds a balance due on the mortgage, the judgment should fix a reasonable time for the payment into court of such balance, and order satisfaction on such payment. Frutig *v.* Trafton, 2 Cal. App. 47, 83 Pac. 70.

8. Schoenberger's Estate, 11 Pa. Co. Ct. 534. But *compare* Graham's Case, 26 Pa. Co. Ct. 146.

9. Hillman *v.* Stumph, Wils. (Ind.) 285; Howard Sav. Inst. *v.* Essex Bldg., etc., Assoc., (N. J. Ch. 1899) 46 Atl. 223. But see Rood *v.* Winslow, 2 Dougl. (Mich.) 68 (holding that where the bill seeks to set aside the mortgage as wholly void, and it is decreed that the mortgage is good as to a part of the security and void as to the residue, costs are properly awarded against the complainant); Barnard *v.* Savier, 2 Mich. N. P. 174 (holding that the mortgagee should not be charged with costs where his conduct has not been unreasonable).

In Pennsylvania the mortgagor must pay all the costs. Parker *v.* Rawle, 148 Pa. St. 208, 23 Atl. 1041; Graham's Case, 26 Pa. Co. Ct. 146.

10. See the statutes of the different states.

Unenforceable security.— Where a note was embodied in the mortgage, and was left entirely blank as to the amount for which it was given, although an amount was stated in figures in the margin, and the mortgage merely referred to the note, it was held that the mortgage was not such an instrument as could be enforced, and therefore there was no right of action to recover the statutory penalty for failure to enter satisfaction. Duke *v.* Chandler, (Ala. 1905) 39 So. 567.

Joint mortgagors.— One of two joint mortgagors cannot maintain an action in his own name against the mortgagee to recover the statutory penalty if his co-mortgagor is living. Harris *v.* Swanson, 62 Ala. 299.

Garnishment.— A statute providing that a garnishment summons may issue in any action to recover damages founded on contract or upon judgment does not authorize garnishment in an action to recover the statutory

specific sum against a mortgagee who fails or refuses to release or satisfy the mortgage, on receiving payment thereof and on being requested to satisfy it, are not unconstitutional.[11] They are not to be regarded as imposing a fine or forfeiture, but only as awarding exemplary damages,[12] although they apply the same penalty in the case of all mortgages, whether large or small;[13] but these laws are certainly in the nature of penal statutes, and are therefore to be strictly construed.[14]

b. Liability of Mortgagee. The penalty prescribed by the statute falls upon the personal representatives of a deceased mortgagee,[15] and upon either of the joint holders of the mortgage who refuses to join in the satisfaction executed by the other,[16] but not upon a mortgagee who has sold and transferred the mortgage before the demand for its satisfaction, retaining no interest in it,[17] nor upon a corporation mortgagee, unless the statute specifically applies to such artificial persons.[18] Where something else than payment is set up as effecting a discharge of the mortgage, the mortgagee's liability under the statute will depend upon whether the circumstances relied on constitute an actual satisfaction of his claims under the mortgage,[19] and so the statute may be satisfied by other transactions or the passing of other instruments between the parties which are equivalent in their effect to an entry of satisfaction;[20] but the mortgagee cannot escape liability by delivering an order for satisfaction, which is so defective that the recording officer properly refuses to act under it.[21]

c. Liability of Assignee of Mortgage. The assignee of a mortgage, having received payment of the debt, is liable under the statute for a failure to execute or enter a satisfaction of it,[22] although in some states this is the case only where

penalty for neglect or failure to discharge a mortgage which has been paid. Pennsylvania Mortg., etc., Co. *v.* Norris, 8 Kan. App. 699, 54 Pac. 283.

11. Gay *v.* Rogers, 109 Ala. 624, 20 So. 37; Judy *v.* Thompson, 156 Ind. 533, 60 N. E. 270.

12. Shields *v.* Klopf, 70 Wis. 69, 35 N. W. 284.

13. Collar *v.* Harrison, 28 Mich. 518.

14. Lane *v.* Frake, 70 Ill. App. 303; Osborn *v.* Hocker, 160 Ind. 1, 66 N. E. 42; Murphy *v.* Fleming, 69 Mich. 185, 36 N. W. 787; Crumbly *v.* Bardon, 70 Wis. 385, 36 N. W. 19; Stone *v.* Lannon, 6 Wis. 497.

Illustrations.— Where the statute relates only to the satisfaction of "mortgages," the penalty cannot be recovered for failure to satisfy a deed of trust given to secure a debt. Southern Bldg., etc., Assoc. *v.* McCants, 120 Ala. 616, 25 So. 8. And if it is amended so as to include deeds of trust, still it will not impose a liability upon the beneficiary if he is not included in the penal clause. Southwestern Bldg., etc., Assoc. *v.* Acker, 138 Ala. 523, 35 So. 468; Southwestern Bldg., etc., Assoc. *v.* Rowe, 125 Ala. 491, 28 So. 484. Such a statute does not apply to mortgages made by one partner to another covering only the interest of the former in the partnership property. Wood *v.* Ethridge, 62 Mo. App. 127. And it applies only where the mortgage debt is paid without a foreclosure. Murray *v.* Brokaw, 67 Ill. App. 402.

15. Wiener *v.* Peacock, 31 Mo. App. 238.

16. Crawford *v.* Simon, 159 Pa. St. 585, 28 Atl. 491.

17. Harris *v.* Swanson, 67 Ala. 486; Murphy *v.* Fleming, 69 Mich. 185, 36 N. W. 787.

Unrecorded assignment.— It has been held that an assignment of the mortgage does not relieve the mortgagee from liability under the statute, unless it is recorded, so that the assignee has power to discharge the mortgage of record. Perkins *v.* Matteson, 40 Kan. 165, 19 Pac. 633; Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 63 N. W. 553.

18. Studebaker Bros. Mfg. Co. *v.* Morden, 159 Ind. 173, 64 N. E. 594. See also Southern Indiana Loan, etc., Inst. *v.* Doyle, 26 Ind. App. 102, 59 N. E. 179.

19. See Phelps *v.* Relfe, 20 Mo. 479; Pierce *v.* Potter, 7 Watts (Pa.) 475.

20. See Pollock *v.* Milburn, 112 Iowa 528, 84 N. W. 521; Kinne *v.* Tullis, (Kan. App. 1900) 62 Pac. 114.

21. Boyes *v.* Summers, 46 Nebr. 308, 64 N. W. 1066.

22. Galloway *v.* Litchfield, 8 Minn. 188; Ewing *v.* Shelton, 34 Mo. 518.

In Alabama, as the statute was originally framed, it applied only to the mortgagee, and was held not to include an assignee, being subject to a strict construction on account of its highly penal character. Grooms *v.* Hannon, 59 Ala. 510. But it was afterward amended so as to include assignees of mortgages and transferees of deeds of trust. Southwestern Bldg., etc., Assoc. *v.* Acker, 138 Ala. 523, 35 So. 468.

In Wisconsin, as the statute specifies the "mortgagee, or his personal representative, or his assignee," it is held not to apply to an executor or administrator of an assignee. Page *v.* Johnston, 23 Wis. 295.

Assignee for collection.— Wherever the law applies to an assignee of the mortgage, it covers the case of one to whom the mortgage

the assignment is an instrument entitled to be recorded and duly appears of record.[23]

d. Right of Action. To make out a right of action under these statutes it is necessary to show that plaintiff is entitled to the release or satisfaction demanded,[24] and that the debt secured by the mortgage has been paid in full,[25] or that the whole amount justly due has been tendered,[26] including any fees and costs accrued and the statutory allowance, if any, for the expense of acknowledging satisfaction,[27] or, if the mortgage covers or includes other things than the payment of money, that all its legal conditions have been fulfilled.[28] In some states, in addition to the fixed penalty, the statute allows the recovery of such damages as may be shown,[29] but these include only such damages as are the natural and necessary result of the mortgagee's breach of duty, and the mortgagor is not entitled to exemplary damages where he is not shown to have been actually injured.[30]

e. Demand or Request For Release. A demand or request to the mortgagee to enter satisfaction of the mortgage is a condition precedent to the right to sue for the statutory penalty.[31] No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested.[32] It may be made by a duly authorized agent or attorney of the mortgagor, whose authority need not be in writing,[33] but it cannot be made by one of two joint mortgagors alone.[34] It may be served on an agent or clerk of the mortgagee, in which case

is assigned for collection. Henry *v.* Orear, 104 Mo. App. 570, 78 S. W. 283.

An assignee of a note secured by a mortgage is an assignee of the mortgage also, within the meaning of such statutes. Daniels *v.* Densmore, 32 Nebr. 40, 48 N. W. 906.

23. Low *v.* Fox, 56 Iowa 221, 9 N. W. 131; Thomas *v.* Reynolds, 29 Kan. 304.

24. Livingston *v.* Cudd, 121 Ala. 316, 25 So. 805; Thomason Grocery Co. *v.* Mitchell, 114 Ala. 315, 21 So. 461; Headley *v.* Bell, 84 Ala. 346, 4 So. 391; Lane *v.* Frake, 57 Ill. App. 616.

Grantees and heirs of mortgagor.— The right of action under these statutes inures to the benefit of the mortgagor's grantees and heirs. Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 63 N. W. 553.

25. Barnes *v.* Pitts Agricultural Works, 6 Ida. 259, 55 Pac. 237; Stone *v.* Lannon, 6 Wis. 497.

Knowledge of payment.—It must be shown that the mortgagee knew of the payment. Henson *v.* Stever, 69 Mo. App. 136.

Additional sum due in another transaction.— When he has received all that is due under the mortgage, he cannot lawfully refuse to execute a release unless paid an additional sum claimed to be due to him from the mortgagor in another transaction. Buonocore *v.* De Feo, 76 Conn. 705, 56 Atl. 510.

26. Kronebusch *v.* Raumin, 6 Dak. 243, 42 N. W. 656; Weeks *v.* Downing, 30 Mich. 4; Campbell *v.* Seeley, 38 Mo. App. 298.

27. Collar *v.* Harrison, 30 Mich. 66; Neefe *v.* Snyder, 20 Pa. Co. Ct. 6.

28. Wilber *v.* Peirce, 56 Mich. 169, 22 N. W. 316.

29. See the statutes of the different states.

30. Chinn *v.* Wagoner, 26 Mo. App. 678; Mickie *v.* McGehee, 27 Tex. 134.

31. Hill *v.* Wainwright, 83 Mo. App. 460; Dunkin *v.* Newark Mut. Ben. L. Ins. Co., 63 Mo. App. 257; Peckham *v.* Van Bergen, 10 N. D. 43, 84 N. W. 566.

Demand in another state.— A mortgagee is not subject to the penalty for refusal to discharge a mortgage on payment thereof and on demand by the mortgagor, where the demand is made in another state, but is still liable in damages to the mortgagor. Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 63 N. W. 553.

Mortgagee's residence unknown.— In Kansas the demand is excused if the residence of the holder of the mortgage cannot be ascertained with due diligence; but, to sustain an action, there must be proof either of demand or of facts constituting the legal excuse for failure thereof. Shultz *v.* Morgan, 1 Kan. App. 572, 42 Pac. 254.

32. Henderson *v.* Wilson, 139 Ala. 327, 36 So. 516; Chattanooga Nat. Bldg., etc., Assoc. *v.* Echols, 125 Ala. 548, 27 So. 975; Perryman *v.* Smith, 105 Ala. 573, 17 So. 100; Steiner *v.* Snow, 80 Ala. 45.

Illustration.— A request to "please cancel all mortgages against me on the record at once" is a sufficient demand on the mortgagee to enter "the fact of payment or satisfaction on the margin of the record," as the statute directs. Partridge *v.* Wilson, 141 Ala. 164, 37 So. 441.

A request for "cancellation" of a mortgage is not sufficient to sustain an action for failure to "acknowledge satisfaction" of the mortgage. British, etc., Mortg. Co. *v.* Burke, 80 Miss. 643, 32 So. 51.

A letter asking the mortgagee to take the mortgage note off the record is not a sufficient request. Clark *v.* Wright, 123 Ala. 594, 26 So. 501.

33. Lamar *v.* Smith, 129 Ala. 418, 29 So. 576; Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Bell *v.* Wilkinson, 65 Ala. 477.

34. Jowers *v.* Brown, 137 Ala. 581, 34 So. 827; Jarratt *v.* McCabe, 75 Ala. 325.

it will be sufficient if such person had authority to receive it or if knowledge of it is brought home to the mortgagee.[35]

f. Defenses. On tender of payment to a mortgagee, he is not bound at his peril to determine disputed or doubtful questions, and he is not liable to the statutory penalty if his refusal is made in good faith and in the honest belief that he is not bound to accept it.[36] But on the other hand, his unjustifiable refusal to satisfy the mortgage exposes him to the penalty, although not wilful or oppressive, if resulting from mere inadvertence, inattention, or indifference.[37] It is no defense that the mortgage was invalid because it covered the mortgagor's homestead and was not signed by his wife, if it has actually been paid.[38] Nor is it a defense that the mortgagee, who lived in another state, was physically unable to travel, where it does not appear that he was incapacitated from transacting business.[39] And an entry of satisfaction tardily made by the mortgagee, after the bringing of a suit against him to recover the penalty, is no defense to such suit.[40] Neither will he be permitted to set up in defense rights or claims against plaintiff not connected with the mortgage transaction.[41]

g. Pleading and Evidence. The declaration or complaint should show plaintiff's title to maintain the action,[42] and should describe the mortgage and show the relation of the parties to be that of mortgagor and mortgagee,[43] and should aver distinctly the payment of the debt secured or other full performance of the conditions of the mortgage,[44] and the demand for entry of satisfaction and refusal thereof;[45] and should not unite in one count claims for damages and claims for the statutory penalty.[46] Matters tending to excuse or justify the mortgagee's refusal must be specially pleaded and cannot be given under the general issue.[47] The burden of proving the essential facts is on plaintiff.[48] The record of the

35. Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Bangs *v.* Gray, 60 Nebr. 457, 83 N. W. 680.

36. *Dakota.*— Kronebusch *v.* Raumin, 6 Dak. 243, 42 N. W. 656.

Illinois.— Lane *v.* Frake, 70 Ill. App. 303.

Louisiana.—Williams *v.* State Bank, 7 Rob. 316.

Michigan.— Parkes *v.* Parker, 57 Mich. 57, 23 N. W. 458; Wilber *v.* Peirce, 56 Mich. 169, 22 N. W. 316; Huxford *v.* Eslow, 53 Mich. 179, 18 N. W. 630; Canfield *v.* Conkling, 41 Mich. 371, 2 N. W. 191; Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553.

Missouri.— Snow *v.* Bass, 174 Mo. 149, 73 S. W. 630. *Compare* Campbell *v.* Seeley, 43 Mo. App. 23.

Nebraska.— Sullivan Sav. Inst. *v.* Sharp, 2 Nebr. (Unoff.) 300, 96 N. W. 522.

Pennsylvania.— Haubert *v.* Haworth, 9 Phila. 123. See also Steigerwald *v.* Philadelphia Brewing Co., 21 Pa. Super. Ct. 540.

Wisconsin.— Schumacher *v.* Falter, 113 Wis. 563, 89 N. W. 485. *Compare* Shields *v.* Klopf, 70 Wis. 69, 35 N. W. 284.

Contra.—Malarkey *v.* O'Leary, 34 Oreg. 493, 56 Pac. 521.

37. Renfro *v.* Adams, 62 Ala. 302. And see Crawford *v.* Simon, 159 Pa. St. 585, 28 Atl. 491; Eaton *v.* Copeland, 17 Wis. 218.

Misunderstanding.— It is no defense to an action to recover the penalty that the mortgagee did not understand the mortgagor's demand as a request for satisfaction of the mortgage, if such was its fair and reasonable meaning. Jordan *v.* Mann, 57 Ala. 595.

Failure, not refusal, the essential thing.— It is no defense that the mortgagee did not refuse to enter the satisfaction as demanded; for it is his failure to do so, not his refusal, which is the gist of the action. Walker *v.* English, 106 Ala. 369, 17 So. 715.

38. Wilber *v.* Peirce, 56 Mich. 169, 22 N. W. 316.

39. Walker *v.* English, 106 Ala. 369, 17 So. 715.

40. Kelly *v.* Johnson, 129 Ala. 627, 29 So. 672; Steiner *v.* Snow, 80 Ala. 45; Deeter *v.* Crossley, 26 Iowa 180; Hall *v.* Hurd, 40 Kan. 740, 21 Pac. 585; Dodson *v.* Clark, 38 Mo. App. 150.

41. Henry *v.* Orear, 104 Mo. App. 570, 78 S. W. 283; Malarkey *v.* O'Leary, 34 Oreg. 493, 56 Pac. 521. *Compare* Stevens *v.* Home Sav., etc., Assoc., 5 Ida. 741, 51 Pac. 779, 986, holding that the mortgagee may set up any rights under the mortgage by way of counterclaim.

42. Teetshorn *v.* Hull, 30 Wis. 162.

As to the sufficiency of the complaint in such actions see, generally, Burns *v.* Reeves, 127 Ala. 127, 28 So. 554; Sweet *v.* Ward, 43 Kan. 695, 23 Pac. 941.

43. Williams *v.* Bowdin, 68 Ala. 126; Spaulding *v.* Sones, 11 Ind. App. 562, 39 N. E. 526.

44. Gamble *v.* Canadian, etc., Mortg., etc., Co., 6 Ida. 202, 55 Pac. 241; Crumbly *v.* Bardon, 70 Wis. 385, 36 N. W. 19.

45. Steiner *v.* Ellis, (Ala. 1890) 7 So. 803.

46. Scott *v.* Robards, 67 Mo. 289.

47. Petty *v.* Dill, 53 Ala. 641; Henry *v.* Orear, 104 Mo. App. 570, 78 S. W. 283.

48. Thomason Grocery Co. *v.* Mitchell, 114 Ala. 315, 21 So. 461.

mortgage is admissible to show its existence and contents as well as the fact of its recordation.[49]

6. Effect of Release or Satisfaction — a. In General. Presumptively the release or satisfaction of a mortgage extinguishes the debt which it was given to secure,[50] and therefore also puts an end to any remedies or proceedings by the mortgagee to recover the debt or make it available;[51] but this is not a necessary consequence, but largely a matter of intention, and it is entirely possible to discharge the lien of the mortgage, and put an end to its effect as a security, without releasing the debt.[52] An entry of release or satisfaction on the record is generally binding, and beyond contradiction, as respects the rights of third persons dealing with the property without other notice than the record affords;[53] but as between the parties it is open to contradiction, or to be deprived of its effect by proof of fraud, accident, or mistake;[54] and so also is a receipt acknowledging payment of the mortgage debt.[55] A mortgagee may also release his security for the benefit

49. Steiner *v.* Snow, 80 Ala. 45; Williams *v.* Bowdin, 68 Ala. 126.

50. *Arkansas.*— Burke *v.* Snell, 42 Ark. 57.

California.— Kelly *v.* Matlock, 85 Cal. 122, 24 Pac. 642.

Indiana.— Smith *v.* Lowry, 113 Ind. 37, 15 N. E. 17.

Iowa.— Kuen *v.* Upmier, 98 Iowa 393, 67 N. W. 374.

Missouri.— Chappell *v.* Allen, 38 Mo. 213.

New Jersey.— Harrison *v.* Johnson, 18 N. J. Eq. 420.

Pennsylvania.— Seiple *v.* Seiple, 133 Pa. St. 460, 19 Atl. 406. See also Peter's Appeal, (1886) 4 Atl. 727.

See 35 Cent. Dig. tit. "Mortgages," § 942.

Presumption as to payer.— Where a prior mortgage has been satisfied of record, the recorded certificate of satisfaction not showing by whom payment was made, a purchaser who has no other notice than the record gives him may assume that the payment was made by the person upon whom was the primary duty to make it; and although it appears of record that if some other person had made the payment he would have been entitled to subrogation, this does not put the purchaser upon inquiry to ascertain whether such person made it. Ahern *v.* Freeman, 46 Minn. 156, 48 N. W. 677, 24 Am. St. Rep. 206.

51. McBride *v.* Wright, 46 Mich. 265, 9 N. W. 275.

After mortgaged land has been taken on execution, and notice of a sale given by the sheriff according to law, payment and discharge of the mortgage by the debtor will not defeat a subsequent sale by the sheriff. Capen *v.* Doty, 13 Allen (Mass.) 262.

If there has been no actual payment or satisfaction, a recorded certificate of satisfaction will not suspend the execution of a decree for the foreclosure and sale of the land. Clark, etc., Inv. Co. *v.* Hamilton, 54 Nebr. 95, 74 N. W. 430.

Lien by attachment acquired before release.— Where a mortgagee releases all his right to the mortgaged premises, this does not discharge a lien acquired by attachment before the release. Lacey *v.* Tomlinson, 5 Day (Conn.) 77.

A release given by the holder of a second mortgage, who afterward acquires title to the first mortgage, does not affect his rights under such first mortgage. Tarbell *v.* Page, 155 Mass. 256, 29 N. E. 585.

The mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of mortgage with the latter's consent, by releasing his debt and reconveying the security. Jamieson *v.* London, etc., Loan, etc., Co., 30 Can. Sup. Ct. 14.

52. Sherwood *v.* Dunbar, 6 Cal. 53; Clark *v.* Smith, 1 N. J. Eq. 121; Moore *v.* Bond, 75 N. C. 243; Safe Deposit, etc., Co. *v.* Kelly, 159 Pa. St. 82, 28 Atl. 221. And see Bigelow *v.* Staley, 14 U. C. C. P. 276.

53. *Florida.*— Edwards *v.* Thom, 25 Fla. 222, 5 So. 707.

Illinois.— Carey *v.* Rauguth, 82 Ill. App. 418.

Indiana.— Smith *v.* Lowry, 113 Ind. 37, 15 N. E. 17.

Missouri.— Bristow *v.* Thackston, 187 Mo. 332, 86 S. W. 94, 106 Am. St. Rep. 472. *Compare* Lanier *v.* McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676.

Montana.— Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512.

Ohio.— Swartz *v.* Hurd, 2 Ohio Dec. (Reprint) 134, 1 West. L. Month. 510.

Compare Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762.

Negligence of mortgagee.— If cancellation of a mortgage on the record be the result of negligence on the part of the mortgagee, as, if he permits the mortgagor to retain possession of the mortgage, he will not be permitted to establish his lien as against a *bona fide* purchaser or mortgagee acting on the faith of such recorded cancellation. Heyder *v.* Excelsior Bldg. Loan Assoc., 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49.

54. Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117; Sells *v.* Tootle, 160 Mo. 593, 61 S. W. 579; Valle *v.* American Iron Mountain Co., 27 Mo. 455; Stebbins *v.* Howell, 4 Abb. Dec. (N. Y.) 297, 1 Keyes 240; Tweeddale *v.* Tweeddale, 116 Wis. 517, 93 N. W. 440, 96 Am. St. Rep. 1003, 61 L. R. A. 509.

55. Parsons *v.* Welles, 17 Mass. 419; Perkins *v.* Pitts, 11 Mass. 125; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22.

of a junior encumbrancer, without affecting his rights as against the mortgagor.[56] But a release given by one of two co-mortgagors or joint owners of the debt secured, although it may be valid as to him, will not affect the rights of the other.[57] The delivery by a mortgagee of a discharge, and its acceptance by the mortgagor, operates as a recognition by the latter of the mortgagee's right to the amount of the debt.[58] Where a mortgage is paid, and an agreement is made to discharge it of record, the instrument of discharge, executed a few days later, and after the commencement of a suit to foreclose, takes effect from the time of the agreement.[59]

b. Effect of Partial Release. A release as to a part only of the mortgage debt, or as to the lien of the mortgage on a part of the land affected, does not extinguish the residue of the debt or impair the lien as to the remainder of the land.[60]

c. Effect as to Title. According to the modern doctrine, a formal release or discharge of a mortgage, or an entry of satisfaction on the record, revests the legal title in the mortgagor or his heirs or grantees.[61] But it does not pass to the mortgagor an independent title acquired by the mortgagee through a junior mortgage.[62]

d. Effect as to Lien and Other Rights Under Mortgage. A formal release or satisfaction of a mortgage terminates and extinguishes its lien on the land affected,[63]

56. Remann *v.* Buckmaster, 85 Ill. 403; Flower *v.* Elwood, 66 Ill. 438; Wood *v.* Wood, 61 Iowa 256, 16 N. W. 132. See also Hill *v.* West, 8 Ohio 222, 31 Am. Dec. 442.

57. Phelan *v.* Olney, 6 Cal. 478; Howe *v.* White, 162 Ind. 74, 69 N. E. 684.

58. Fry *v.* Russell, 35 Mich. 229.

59. Burhans *v.* Burhans, 1 N. Y. Suppl. 37.

60. *California.*— Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Cuddeback *v.* Detroy, 61 Cal. 80.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329.

Illinois.— Cowen *v.* Loomis, 91 Ill. 132; Edgington *v.* Hefner, 81 Ill. 341; Bush *v.* Sherman, 80 Ill. 160; Hazle *v.* Bondy, 70 Ill. App. 185.

Iowa.— Wood *v.* Brown, 104 Iowa 124, 73 N. W. 608.

Maine.— Johnson *v.* Rice, 8 Me. 157.

Michigan.— Durm *v.* Fish, 46 Mich. 312, 9 N. W. 429.

Missouri.— Martin *v.* Turnbaugh, 153 Mo. 172, 54 S. W. 515.

Nebraska.—Anderson *v.* McCloud-Love Live-Stock Commission Co., 58 Nebr. 670, 79 N. W. 613.

Pennsylvania.— Neale *v.* Dempster, 179 Pa. St. 569, 36 Atl. 338; Culp *v.* Fisher, 1 Watts 494.

Texas.— Walhoefer *v.* Hobgood, 18 Tex. Civ. App. 291, 44 S. W. 566.

Canada.— Crawford *v.* Armour, 13 Grant Ch. (U. C.) 576. See Gowland *v.* Garbutt, 13 Grant Ch. (U. C.) 578.

See 35 Cent. Dig. tit. "Mortgages," § 944.

Release of a portion and appurtenances.— A release by a mortgagee of a portion of the mortgaged premises, "with all the appurtenances and privileges thereunto belonging," in favor of the vendee of the mortgagor, does not include a right of way over the remaining portion, which was granted by the mortgagor, but never used, and of which the mortgagee was not aware when the release was signed. Hyde Park Thompson-Houston Light Co. *v.* Brown, 69 Ill. App. 582. See also Travelers' Ins. Co. *v.* Childs, 25 Colo. 360, 54 Pac. 1020.

Drainage rights.— A release by the mortgagee to the mortgagor of one of two parcels of land included in the mortgage does not convey the right to drain, previously exercised by the mortgagor, on to the parcel released. Harlow *v.* Whitcher, 136 Mass. 553.

61. *Maine.*— Patterson *v.* Yeaton, 47 Me. 308; Baylies *v.* Bussey, 5 Me. 153.

Mississippi.— Wolfe *v.* Doe, 13 Sm. & M. 103, 51 Am. Dec. 147.

Missouri.— Gale *v.* Mensing, 20 Mo. 461, 64 Am. Dec. 197; White *v.* Todd, 10 Mo. 189.

South Carolina.— Agnew *v.* Renwick, 27 S. C. 562, 4 S. E. 223.

Tennessee.— Vaughn *v.* Vaughn, 100 Tenn. 282, 45 S. W. 677.

Canada.— Lawlor *v.* Lawlor, 10 Can. Sup. Ct. 194. See also Lee *v.* Howes, 30 U. C. Q. B. 292.

See 35 Cent. Dig. tit. "Mortgages," § 945.

See, however, Cumps *v.* Kiyo, 104 Wis. 656, 80 N. W. 937.

At common law satisfaction of a mortgage will not of itself revest the legal title in the mortgagor; nevertheless an outstanding satisfied mortgage cannot be set up against the mortgagor. Peltz *v.* Clarke, 5 Pet. (U. S.) 481, 8 L. ed. 199.

62. Barnstable Sav. Bank *v.* Barrett, 122 Mass. 172.

63. *Illinois.*— Mann *v.* Jummel, 183 Ill. 523, 56 N. E. 161.

Indiana.— Smith *v.* Lowry, 113 Ind. 37, 15 N. E. 17.

Louisiana.— Nathan *v.* Gardere, 11 La. 262.

Montana.— Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512.

Nebraska.— Gadsden *v.* Johnson, 65 Nebr. 447, 91 N. W. 285.

New Jersey.— Clark *v.* Stryker, 26 N. J.

unless there be some valid agreement of the parties that the lien shall nevertheless continue,[64] and is a bar to any action for the foreclosure of the mortgage,[65] although, if such be the intention of the parties or the legal effect of the circumstances attending the transaction, the debt itself may still subsist and support a personal action against the mortgagor.[66]

7. Canceling or Setting Aside Release or Satisfaction — a. Unauthorized Entry of Satisfaction. Where a release or satisfaction of a mortgage is executed by a person who had no authority to give it, or who had authority to do so only on certain terms or conditions which were not complied with, equity may cancel or set aside the satisfaction, or, without formal action of that kind, may disregard it and enforce the mortgage notwithstanding.[67] But this will not be done where the mortgagee is shown to have received actual satisfaction or to have accepted the benefits of the arrangement which resulted in the entry of satisfaction,[68] nor will such action be taken in prejudice of the rights of a subsequent purchaser or mortgagee in good faith, who relied on the apparent authority of the person executing the satisfaction and had no notice of any defects in his powers or any want of actual authority.[69]

Eq. 33; Hague *v.* West Hoboken, 23 N. J. Eq. 354.

New York.— Bogert *v.* Bliss, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684; Murray *v.* Fox, 104 N. Y. 382, 10 N. E. 864; Cambreleng *v.* Graham, 84 Hun 550, 32 N. Y. Suppl. 843; Ennis *v.* Ennis, 48 Hun 11.

Vermont.— Hodgman *v.* Hitchcock, 15 Vt. 374.

Wisconsin.— Cumps *v.* Kiyo, 104 Wis. 656, 80 N. W. 937.

See 35 Cent. Dig. tit. "Mortgages," § 946.

Want of consideration.— As between a first and second mortgagee, a release of the first mortgage, without consideration, is not effective, the second mortgagee having advanced nothing on the faith of the release. Sells *v.* Tootle, 160 Mo. 593, 61 S. W. 579.

After assignment of part of debt secured. — The satisfaction of a mortgage by the mortgagee, after he has parted with one of a number of bonds secured thereby, will not discharge the lien existing in favor of the bondholder to the extent of the bond assigned and held by him. *In re* Meloy Mortg., 22 Pa. Co. Ct. 337. And see Ruberg *v.* Brown, 71 S. C. 287, 51 S. E. 96.

64. See Rochester Loan, etc., Co. *v.* Morse, 181 Ill. 64, 54 N. E. 628; Martin *v.* Righter, 10 N. J. Eq. 510, holding that the release of a bond and mortgage, executed to make the releasee a competent witness in a pending suit, and understood by all the parties to be for that single purpose only, does not prevent a recovery thereon.

65. Mason *v.* Beach, 55 Wis. 607, 13 N. W. 884; Ivinson *v.* Hutton, 3 Wyo. 61, 2 Pac. 238. See also Ferguson *v.* Glassford, 68 Mich. 36, 35 N. W. 820.

Rights of foreclosure purchaser.— If foreclosure proceedings are prosecuted to sale, notwithstanding a release or satisfaction of the mortgage, not entered on the record, the purchaser, paying value and having no notice of the satisfaction, will take a good title. Merchant *v.* Woods, 27 Minn. 396, 7 N. W. 826; Saint *v.* Cornwall, 207 Pa. St. 270, 56 Atl. 440.

66. Security L. & T. Co. *v.* Mattern, 131 Cal. 326, 63 Pac. 482; Wood *v.* Wood, 61 Iowa 256, 16 N. W. 132; Sullivan *v.* Neary, 186 Mass. 158, 71 N. E. 193; Hughes *v.* Torrence, 111 Pa. St. 611, 4 Atl. 825; Fleming *v.* Parry, 24 Pa. St. 47. See also Beal *v.* Stevens, 72 Cal. 451, 14 Pac. 186. But see Townsend Sav. Bank *v.* Munson, 47 Conn. 390; Robb *v.* Douglass, 88 Iowa 111, 55 N. W. 72.

67. *California.*— Martin *v.* De Ornelas, 139 Cal. 41, 72 Pac. 440.

Colorado.— Harker *v.* Scudder, 15 Colo. App. 69, 61 Pac. 197.

Illinois.— Reed *v.* Jennings, 196 Ill. 472, 63 N. E. 1005; Stiger *v.* Bent, 111 Ill. 328.

Indiana.— Conley *v.* Dibber, 91 Ind. 413; Mallett *v.* Page, 8 Ind. 364.

Louisiana.— Mechanics' Bldg. Assoc. *v.* Ferguson, 29 La. Ann. 548; Ball *v.* Ball, 15 La. 173.

Missouri.— Seitz *v.* Durning, 8 Mo. App. 208.

Nebraska.— Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15.

New Jersey.— Harris *v.* Cook, 28 N. J. Eq. 345.

New York.— King *v.* McVicker, 3 Sandf. Ch. 192.

North Carolina.— Davis *v.* Rogers, 84 N. C. 412.

See 35 Cent. Dig. tit. "Mortgages," § 948.

68. Burns *v.* Yeizer, 27 Miss. 188. And see Lord *v.* Schamloeffel, 50 Mo. App. 360, holding that an entry of satisfaction of a mortgage, made by the mortgagee's agent authorized to receive payment, will not be set aside at the suit of the mortgagee, as against a purchaser of the land subject to the mortgage, who subsequently paid its amount to the agent, although the latter failed to account therefor to the mortgagee.

69. Delta County Land, etc., Co. *v.* Talcott, 17 Colo. App. 316, 68 Pac. 985; Havighorst *v.* Bowen, 116 Ill. App. 230; Day *v.* Brenton, 102 Iowa 482, 71 N. W. 538, 63 Am. St. Rep. 460; Columbia Nat. Bank *v.* Marsball, 2 Nebr. (Unoff.) 790, 90 N. W. 218.

b. Forgery or Fraud. Equity will cancel or set aside, or simply disregard, a release or satisfaction of a mortgage forged by the mortgagor or someone acting in his interest,[70] or which was procured from the mortgagee by fraud, concealment, or misrepresentations, or by means of promises which have not been fulfilled,[71] provided this can be done without injury to the rights of innocent third persons who have dealt with the property in good faith and in reliance on the release or satisfaction and without notice of its infirmity.[72] Where a fraudulent and forged satisfaction of a mortgage is entered on the record, whereby a subsequent purchaser of the land is misled to his detriment, he cannot maintain an action for damages against the recorder, unless he can show that the latter knew of the

70. Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95.

Duty of mortgagee on discovering forgery. — It is the duty of the mortgagee, or of both the trustee and the beneficiary in a deed of trust, when a forged satisfaction or release of the security is recorded, to inform all persons who may apply to them for information that such release is a forgery; but the law does not require them to execute and record any instrument to counteract the forgery. Chandler *v.* White, 84 Ill. 435.

Estoppel of mortgagee. — A mortgagee may be estopped to allege that a recorded satisfaction of his mortgage is a forgery, where he has remained silent for many years after discovering it and has allowed a stranger to purchase the property in reliance on the state of the title as it appeared of record. Costello *v.* Meade, 55 How. Pr. (N. Y.) 356.

71. *California.* — San Francisco Mut. Loan Assoc. *v.* Bowden, 137 Cal. 236, 69 Pac. 1059; Red Jacket Tribe No. 28 *v.* Gibson, 70 Cal. 128, 12 Pac. 127.

Colorado. — Delta County Land, etc., Co. *v.* Talcott, 17 Colo. App. 316, 68 Pac. 985; Harker *v.* Scudder, 15 Colo. App. 69, 61 Pac. 197.

Illinois. — Henschel *v.* Mamero, 120 Ill. 660, 12 N. E. 203; Remann *v.* Buckmaster, 85 Ill. 403; Olney Loan, etc., Assoc. *v.* Rush, 97 Ill. App. 349.

Indiana. — Burton *v.* Reagan, 75 Ind. 77.

Iowa. — Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390; Livermore *v.* Maxwell, 87 Iowa 705, 55 N. W. 37.

Kansas. — Southern Kansas Farm, etc., Co. *v.* Garrity, 57 Kan. 805, 48 Pac. 33.

Michigan. — Beal *v.* Congdon, 75 Mich. 77, 42 N. W. 685; Ferguson *v.* Glassford, 68 Mich. 36, 35 N. W. 820.

Mississippi. — Holmes *v.* Bacon, 28 Miss. 607.

Nebraska. — Frerking *v.* Thomas, 64 Nebr. 193, 89 N. W. 1005; Nelson *v.* Bevins, 14 Nebr. 153, 15 N. W. 208.

New Jersey. — Stimis *v.* Stimis, 60 N. J. Eq. 313, 47 Atl 20; Heyder *v.* Excelsior Bldg. Loan Assoc., 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49; Wood *v.* Stover, 28 N. J. Eq. 248; Stover *v.* Wood, 26 N. J. Eq. 417; Dudley *v.* Bergen, 23 N. J. Eq. 397. See also Fidelity Trust Co. *v.* Baker, 60 N. J. Eq. 170, 47 Atl. 6.

New York. — Lynch *v.* Tibbits, 24 Barb. 51; Barnes *v.* Camack, 1 Barb. 392. *Compare* Bendheim *v.* Morrow, 158 N. Y. 729, 53 N. E. 1123.

Pennsylvania. — Saint *v.* Cornwall, 207 Pa. St. 270, 56 Atl. 440; Independent Bldg., etc., Assoc. *v.* Real Estate Title Co., 156 Pa. St. 181, 27 Atl. 62; Callahan's Appeal, 124 Pa. St. 138, 16 Atl. 638.

Virginia. — Poore *v.* Price, 5 Leigh 52, 27 Am. Dec. 582.

West Virginia. — Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

Wisconsin. — See Leffingwell *v.* Freyer, 21 Wis. 392.

United States. — McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587.

See 35 Cent. Dig. tit. "Mortgages," § 951.

No presumption of fraud. — A release of a mortgage, duly executed and acknowledged, is *prima facie* valid, and the mere fact that the debt remained outstanding and unpaid when the release was executed is not sufficient to raise a presumption of fraud, accident, or mistake. Battenhausen *v.* Bullock, 8 Ill. App. 312.

Want of consideration. — In a proceeding to cancel a release of a mortgage on the ground of fraudulent representation and mistake, in the absence of evidence of such fraud or mistake, the release cannot be avoided on the mere ground of want of consideration. Stephenson *v.* Hawkins, 67 Cal. 106, 7 Pac. 198.

Reliance on representations. — Where a mortgagee releases his mortgage and accepts a new mortgage on other property, as to which he is assured by the mortgagor that there are no existing liens upon it, he cannot procure a cancellation of his release and the reinstatement of his original mortgage on a mere showing that there were in fact other valid liens on such property, but he must also show that he executed the release in reliance upon the mortgagor's misrepresentation. McKeen *v.* Haseltine, 46 Minn. 426, 49 N. W. 195.

72. Burton *v.* Reagan, 75 Ind. 77; Kinsley *v.* Davis, 74 Me. 498; Minehart *v.* Jahn, 35 Pittsb. Leg. J. (Pa.) 173. And see Pendleton *v.* Eaton, 3 Johns. Ch. (N. Y.) 69.

The good faith of a second mortgagee, in taking his mortgage on the strength of a forged discharge of an earlier one, will not avail him in a suit to foreclose the earlier mortgage, if its holder had nothing to do with deceiving him. Keller *v.* Hannah, 52 Mich. 535, 18 N. W. 346.

unauthentic character of the instrument and recorded it with a fraudulent or corrupt intent.[73]

c. Accident or Mistake. On the same principle, a release or satisfaction entered by accident or inadvertence, as where it is made to apply to the wrong mortgage, or by a mistake as to an essential fact, so that it is not in accordance with the real intention of the party, may be set aside and the mortgage reinstated,[74] although not to the prejudice of third persons subsequently dealing with the property in good faith, in reliance on the release or satisfaction, and without notice of the accident or mistake.[75]

D. Reinstatement and Reissue of Mortgage — 1. Reinstatement — a. In General. When a mortgage has been canceled or discharged, but without actual satisfaction, it may be reinstated and enforced as a lien by the agreement of the parties, or, against the will of the mortgagor, on the occurrence of circumstances which give the mortgagee the right to rescind the cancellation or release and require full satisfaction;[76] and this right, if resisted, may be enforced by suit in

73. Ramsey *v.* Riley, 13 Ohio 157.

74. *California.*— White *v.* Stevenson, 144 Cal. 104, 77 Pac. 828; Russell *v.* Mixer, 42 Cal. 475.

Illinois.— Seymour *v.* Mackay, 126 Ill. 341, 18 N. E. 552; Henschel *v.* Mamero, 120 Ill. 660, 12 N. E. 203.

Iowa.— Bowen *v.* Gilbert, 122 Iowa 448, 98 N. W. 273; Bruse *v.* Nelson, 35 Iowa 157.

Kansas.— Southern Kansas Farm, etc., Co. *v.* Garrity, 57 Kan. 805, 48 Pac. 33.

Maine.— Cobb *v.* Dyer, 69 Me. 494.

Maryland.— Bond *v.* Dorsey, 65 Md. 310, 4 Atl. 279.

Massachusetts.— Bruce *v.* Bonney, 12 Gray 107, 71 Am. Dec. 739.

Michigan.— Ferguson *v.* Glassford, 68 Mich. 36, 35 N. W. 820; Wright *v.* Garrison, 40 Mich. 50; French *v.* De Bow, 38 Mich. 708.

Minnesota.— Ligget *v.* Himle, 38 Minn. 421, 38 N. W. 201; Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923.

Missouri.— Martin *v.* Turnbaugh, 153 Mo. 172, 54 S. W. 515.

Montana.— Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512.

Nebraska.— Gadsden *v.* Johnson, 65 Nebr. 447, 91 N. W. 285; Farrell *v.* Bouck, 60 Nebr. 771, 84 N. W. 260, 61 Nebr. 874, 86 N. W. 907.

New Hampshire.— Hammond *v.* Barker, 61 N. H. 53.

New Jersey.— Swedesboro Loan, etc., Assoc. *v.* Gans, 65 N. J. Eq. 132, 55 Atl. 82; Land Title, etc., Co. *v.* Kohlenberg, (Ch. 1896) 35 Atl. 295.

New York.— Barnes *v.* Wintringham, 32 Hun 43; Dodin *v.* Dodin, 26 Misc. 153, 56 N. Y. Suppl. 786; Lumber Exch. Bank *v.* Miller, 18 Misc. 127, 40 N. Y. Suppl. 1073.

Ohio.— Challen *v.* Clay, 7 Ohio Dec. (Reprint) 259, 2 Cinc. L. Bul. 22.

Oregon.— Talbot *v.* Garretson, 31 Oreg. 256, 49 Pac. 978.

Pennsylvania.— Saint *v.* Cornwall, 207 Pa. St. 270, 56 Atl. 440; Binney's Appeal, 116 Pa. St. 169, 9 Atl. 186; West's Appeal, 88 Pa. St. 341; Cross *v.* Stahlman, 43 Pa. St. 129; Pierie *v.* Metz, 9 Pa. Dist. 341; St. Peter's Catholic Ben. Assoc. *v.* Baller, 21 Lanc. L. Rev. 377. See also Seigler *v.* Ripple, 7 Del. Co. 406.

South Carolina.— Hutchison *v.* Fuller, 67 S. C. 280, 45 S. E. 164.

South Dakota.— Ipswich Bank *v.* Brock, 13 S. D. 409, 83 N. W. 436; Ricker *v.* Stott, 13 S. D. 208, 83 N. W. 47.

West Virginia.— Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

Wisconsin.— Lee *v.* Wagner, 71 Wis. 191, 36 N. W. 597.

See 35 Cent. Dig. tit. "Mortgages," §§ 948, 952.

Parol evidence is admissible in support of a bill to set aside a discharge of a mortgage entered upon the margin of the record, to show that the entry was made by mistake. Bruce *v.* Bonney, 12 Gray (Mass.) 107, 71 Am. Dec. 739.

Intention of mortgagee.— If the act of the mortgagee in releasing or discharging the mortgagee was deliberate and intentional, it must stand, although it operates to his prejudice, and whatever may have been his reasons for satisfying it. Weidner *v.* Thompson, 69 Iowa 36, 28 N. W. 422; Faurot *v.* Neff, 32 Ohio St. 44.

75. *Florida.*— Barco *v.* Doyle, 50 Fla. 488, 39 So. 103.

Georgia.— Woodside *v.* Lippold, 113 Ga. 877, 39 S. E. 400, 84 Am. St. Rep. 267.

Iowa.— Raymond *v.* Whitehouse, 119 Iowa 132, 93 N. W. 292.

Michigan.— Lowry *v.* Bennett, 119 Mich. 301, 77 N. W. 935.

New York.— Perry *v.* Fries, 90 N. Y. App. Div. 484, 85 N. Y. Suppl. 1064.

Tennessee.— Cumberland Bldg., etc., Assoc. *v.* McMullen, (Ch. App. 1899) 54 S. W. 63.

76. *Kentucky.*— Evans *v.* Rhea, 14 S. W. 82, 12 Ky. L. Rep. 224.

New Hampshire.— Benson *v.* Tilton, 58 N. H. 137.

Ohio.— Challen *v.* Clay, 7 Ohio Dec. (Reprint) 259, 2 Cinc. L. Bul. 22.

Vermont.— Sowles *v.* Hall, 62 Vt. 247, 20 Atl. 810, 22 Am. St. Rep. 101.

Wisconsin.— Weber *v.* Zeimet, 30 Wis. 283.

equity,[77] although not to the prejudice of the intervening rights of third persons without notice.[78]

b. Grounds For Reinstatement. It will be ground for the reinstatement of a mortgage that the release or discharge thereof was forged or was procured by fraud, false representations, accident, or mistake, or entered without authority.[79] And generally this action may be taken where the mortgagee shows some special equity,[80] as, a failure of the consideration on which the release was given,[81] or the invalidity of a new mortgage which was given on the surrender and cancellation of the old,[82] or where the mortgage was released upon the conveyance of the mortgaged property to a third person and the sale is rescinded or proves ineffective,[83] or where the lien of the mortgage has failed because the title then held by the mortgagor is adjudged invalid, and he afterward acquires a confirmation of it.[84]

2. Reissue of Mortgage. Numerous cases hold that when the debt secured by a mortgage has been paid, the mortgage becomes *functus officio* and dead, and it cannot be made to stand as security for a new or different debt between the original parties or reissued to a different creditor.[85] Certainly no such arrangement can be made to the prejudice of the intervening rights of subsequent purchasers or encumbrancers or creditors of the mortgagor.[86] But where no rights of

United States.— McLean *v.* Clapp, 141 U. S. 429, 12 S. Ct. 29, 35 L. ed. 804.

See 35 Cent. Dig. tit. "Mortgages," § 949.

77. Linn *v.* Linn, 122 Mich. 130, 80 N. W. 1000; Greenlee *v.* Marquis, 49 Mo. App. 290; Ricker *v.* Stott, 13 S. D. 208, 83 N. W. 47.

78. Lord *v.* Morris, 18 Cal. 482; Purser *v.* Anderson, 4 Edw. (N. Y.) 18; Anderson *v.* Neff, 11 Serg. & R. (Pa.) 208.

79. See *supra*, XVIII, C, 7.

80. See Everson *v.* McMullen, 113 N. Y. 293, 21 N. E. 52, 10 Am. St. Rep. 445, 4 L. R. A. 118; Proctor *v.* Thrall, 22 Vt. 262.

Assignment after release.— Where a party purchases a mortgage which has been released, as to part of the property covered, by the holder, although the release is not recorded, with full knowledge of such release, he cannot claim to have the lien restored upon such property. Huff *v.* Farwell, 67 Iowa 298, 25 N. W. 252.

Rights of third persons secured by mortgage. — Where a mortgage is given to A, but it is distinctly provided therein that only a part of the amount shall be paid to him and the remainder to others, a satisfaction-piece executed by A on his receipt of the whole amount will be set aside. Waterman *v.* Webster, 108 N. Y. 157, 15 N. E. 380.

81. Smith *v.* Smith, 8 N. Y. Suppl. 637; Nommenson *v.* Angle, 17 Wash. 394, 49 Pac. 484.

82. Underhill *v.* Crennan, 25 Hun (N. Y.) 569. And see Cansler *v.* Sallis, 54 Miss. 446. But *compare* Baldwin *v.* Moffett, 94 N. Y. 82.

83. Hunt *v.* Fox, 5 B. Mon. (Ky.) 327; Browne *v.* Davis, 109 N. C. 23, 13 S. E. 703.

Failure to object.— The mortgagee can base no claim to have his mortgage restored on irregularities or defects in the sale of the property, which are acquiesced in or not objected to by the immediate parties to the sale, such as a faulty delivery of the deed (Fewell *v.* Kessler, 30 Ind. 195), nor on the fact that the land, conveyed to a city for the special purpose of being used as a public park, is diverted to other uses, where the parties immediately in interest do not object, and it does not appear that the mortgagee's interests have been injured (Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865).

84. Toms *v.* Boyes, 50 Mich. 352, 15 N. W. 506.

85. *Arkansas.*— Bailey *v.* Rockafellow, 57 Ark. 216, 21 S. W. 227.

Dakota.— Luce *v.* American Mortg., etc., Co., 6 Dak. 122, 50 N. W. 621.

Iowa.— Theisen *v.* Dayton, 82 Iowa 74, 47 N. W. 891; Gammon *v.* Kentner, 55 Iowa 508, 8 N. W. 348.

Massachusetts.— Flye *v.* Berry, 181 Mass. 442, 63 N. E. 1071.

Missouri.— Murphy *v.* Simpson, 42 Mo. App. 654.

Ohio.— Coppock *v.* Kuhn, 3 Ohio Cir. Ct. 599, 2 Ohio Cir. Dec. 347. But see Jordan *v.* Forlong, 19 Ohio St. 89.

See 35 Cent. Dig. tit. "Mortgages," § 955.

86. *Illinois.*— Lanphier *v.* Desmond, 187 Ill. 370, 58 N. E. 343.

New Hampshire.— Bowman *v.* Manter, 33 N. H. 530, 66 Am. Dec. 743.

New Jersey.— Peiffer *v.* Bates, 45 N. J. Eq. 311, 19 Atl. 612; Large *v.* Van Doren, 14 N. J. Eq. 208.

New York.— Bogert *v.* Bliss, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684 [*affirming* 13 Misc. 72, 34 N. Y. Suppl. 147]; Adams *v.* Perry, 43 N. Y. 487; Marvin *v.* Vedder, 5 Cow. 671.

North Carolina.— Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127.

Pennsylvania.— Mitchell *v.* Coombs, 96 Pa. St. 430; Grater *v.* Sunderland, 11 Montg. Co. Rep. 195.

Rhode Island.— Gardner *v.* James, 7 R. I. 396.

South Carolina.— McCown *v.* Westbury, 52 S. C. 421, 29 S. E. 663, 30 S. E. 142.

See 35 Cent. Dig. tit. "Mortgages," § 955.

third persons are concerned, there are decisions holding that the parties may agree that the lien of the mortgage shall remain on the land for the purpose of securing a different debt or future advances,[87] although it seems that a mere parol agreement is not sufficient for this purpose, but there must be a redelivery of the mortgage.[88]

E. Rights of Third Person Paying or Satisfying Mortgage — 1. General Doctrine of Subrogation. As applied in the law of mortgages, subrogation is a device of equity by which a person who is not primarily responsible for the payment of the mortgage debt, but who has paid it as a measure necessary for the protection of his own rights or interests, or who has paid it under an agreement with the debtor that he shall have the protection of the security, is substituted in the place of the original creditor, so far as to enable him to control the mortgage and to enforce it against the debtor, as the original mortgagee could have done if there had been no payment, without receiving any assignment or other formal transfer of the mortgage to himself. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person.[89] The right is not lost by the fact that the party asserting it takes or holds collateral security.[90] But it cannot be claimed, as a matter of equitable right and independent of any agreement of the parties, on anything less than a payment of the mortgage debt in full.[91]

2. Who Entitled to Subrogation or Benefit of Mortgage — a. In General. The right of subrogation cannot be claimed by one who was primarily responsible for the payment of the mortgage debt,[92] as where the payment is made by the mortgagor himself or with his money;[93] nor, on the other hand, will it be decreed in favor of a mere volunteer, who interferes and pays the mortgage debt without any agreement that he shall have the benefit of the security and without any interests to be jeopardized by default in the payment.[94] The right is accorded only to one who, not being the original debtor, is compelled to make the pay-

87. McIntier *v.* Shaw, 6 Allen (Mass.) 83; Robinson *v.* Urquhart, 12 N. J. Eq. 515; Hubbell *v.* Blakeslee, 71 N. Y. 63; Bogert *v.* Striker, 11 Misc. (N. Y.) 88, 32 N. Y. Suppl. 815; Purser *v.* Anderson, 4 Edw. (N. Y.) 18; Bradley *v.* Franck, 2 Pa. Co. Ct. 537; Pechin *v.* Brown, 3 Phila. (Pa.) 62; Wilson *v.* Murphy, 1 Phila. (Pa.) 203. See also Dunn *v.* Seymour, 11 N. J. Eq. 278. *Compare* Bockes *v.* Hathorn, 20 Hun (N. Y.) 503; Champney *v.* Coope, 34 Barb. (N. Y.) 539; Thomas' Appeal, 30 Pa. St. 378. And see *supra*, VII, E, 2.

In Louisiana a mortgage note may be reissued to a third and innocent holder, for value before maturity, without impairing the security of the mortgage, provided it is only a collateral security. Herber *v.* Thompson, 47 La. Ann. 800, 17 So. 318; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

88. Lanphier *v.* Desmond, 187 Ill. 370, 58 N. E. 343, 79 Am. St. Rep. 234; Thompson *v.* George, 86 Ky. 311, 5 S. W. 760, 9 Ky. L. Rep. 588; Mead *v.* York, 6 N. Y. 449, 57 Am. Dec. 467.

89. Richards *v.* Griffith, 92 Cal. 493, 28 Pac. 484, 27 Am. St. Rep. 156; Home Sav. Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831; Detroit F. & M. Ins. Co. *v.* Aspinall, 48 Mich. 238, 12 N. W. 214. And see, generally, Subrogation.

90. Smith *v.* Dinsmoor, 119 Ill. 656, 4 N. E. 648; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

91. Loeb *v.* Fleming, 15 Ill. App. 503; Graff's Estate, 139 Pa. St. 69, 21 Atl. 233; Forrest Oil Co.'s Appeal, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 584; Kyner *v.* Kyner, 6 Watts (Pa.) 221; Allegheny Nat. Bank's Appeal, 4 Pa. Cas. 456, 7 Atl. 788.

92. Pearce *v.* Bryant Coal Co., 121 Ill. 590, 13 N. E. 561; Richardson *v.* Traver, 112 U. S. 423, 5 S. Ct. 201, 28 L. ed. 804.

93. Hammond *v.* Barker, 61 N. H. 53, holding that payment of a mortgage debt with funds of the debtor will extinguish the mortgage; and where the payment is made with money belonging partly to the debtor and partly to another, the mortgage will be upheld only to the extent of the funds furnished by the stranger. But see Gifford *v.* Fitzhardinge, [1899] 2 Ch. 32, 68 L. J. Ch. 529, 81 L. T. Rep. N. S. 106, 47 Wkly. Rep. 618.

94. *Connecticut.*— Brethauer *v.* Schorer, 77 Conn. 575, 60 Atl. 125.

Illinois.— White *v.* Cannon, 125 Ill. 412, 17 N. E. 753; Bouton *v.* Cameron, 99 Ill. App. 600.

Louisiana.— Weil *v.* Enterprise Ginnery, etc., Co., 42 La. Ann. 492, 7 So. 622; Nicholls *v.* His Creditors, 9 Rob. 476; Kirkland *v.* His Creditors, 7 Mart. N. S. 130.

Minnesota.— Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; Knoblauch *v.* Foglesong, 38 Minn. 459, 38 N. W. 366.

Missouri.— Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48.

ment in order to safeguard rights or interests of his own dependent on the discharge of the mortgage.[95]

b. Indorser or Surety. An indorser of the mortgage note, or surety for its payment, who is compelled to take it up when due, may generally be subrogated to the rights of the mortgagee, for the purpose of enforcing reimbursement from the principal debtor;[96] but not where this course would work injury to the rights of third persons resting on the apparent discharge of the mortgage.[97]

c. Party Paying to Protect an Interest. Where a party is so related to a mortgage that he is not personally liable upon it, but is obliged to pay it to save an estate in the land or protect an interest, his payment will be presumed to be made for that purpose, and he may keep the mortgage alive for his own benefit without an assignment of it.[98]

d. Junior Lienor. A junior encumbrancer who pays off the senior lien to prevent the sacrifice of his own security on the property will be entitled to subrogation to the rights of the elder lienor as against the common debtor;[99] but

Pennsylvania.— McCleary *v.* Savage, 9 Pa. Cas. 271, 12 Atl. 158.

See, however, Lovejoy *v.* Vose, 73 Me. 46.

95. *Illinois.*— Goodbody *v.* Goodbody, 95 Ill. 456; Conwell *v.* McCowan, 81 Ill. 285.

Michigan.— Bush *v.* Wadsworth, 60 Mich. 255, 27 N. W. 532, a president of a corporation, who, to preserve the property for the parties he represents, pays the interest due on a mortgage of such property out of his own money, is entitled to be subrogated to their rights.

New Hampshire.— Drew *v.* Rust, 36 N. H. 335, holding that if a party who has a right to require an assignment pays the mortgage debt and takes a discharge the mortgage will be held a subsisting security for his protection.

New Jersey.— Howard Sav. Inst. *v.* Essex Bldg., etc., Assoc., (Ch. 1899) 46 Atl. 223.

Vermont.— Johnson *v.* Valido Marble Co., 64 Vt. 337, 25 Atl. 441.

See 35 Cent. Dig. tit. "Mortgages," § 956.

96. *Illinois.*— Richeson *v.* Crawford, 94 Ill. 165; Conwell *v.* McCowan, 53 Ill. 363.

Indiana.— Begein *v.* Brehm, 123 Ind. 160, 23 N. E. 496.

Kentucky.— Madison First Nat. Bank *v.* Schussler, 2 S. W. 145, 8 Ky. L. Rep. 516.

Minnesota.— Conner *v.* Howe, 35 Minn. 518, 29 N. W. 314.

New York.— Havens *v.* Willis, 100 N. Y. 482, 3 N. E. 313.

South Carolina.— Bowen *v.* Barksdale, 33 S. C. 142, 11 S. E. 640; Canaday *v.* Boliver, 25 S. C. 547.

Wisconsin.— Levy *v.* Martin, 48 Wis. 198, 4 N. W. 35.

See 35 Cent. Dig. tit. "Mortgages," § 957.

Compare Troxall *v.* Silverthorne, (N. J. Ch. 1887) 11 Atl. 684.

But see Lynn *v.* Richardson, 78 Me. 367, 5 Atl. 877.

Indorser of interest notes.— Where notes were given by the purchaser of the mortgaged property to the assignee of the mortgage, for interest due on the mortgage, and were paid at maturity by the indorser, it was held that the latter, having been no party to the original transaction, and never having been the surety of the original debtor, and having paid only a portion of the debt, could not maintain a claim to subrogation, but must take rank as a simple contract creditor. Swan *v.* Patterson, 7 Md. 164.

97. Rand *v.* Cutler, 155 Mass. 451, 29 N. E. 1085; *In re* Warner, 82 Mich. 624, 47 N. W. 102.

98. *Alabama.*— Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663. See also Wiley *v.* Boyd, 38 Ala. 625.

Arkansas.— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903, widow entitled to dower in the equity of redemption.

Illinois.— Dinsmoor *v.* Rowse, 211 Ill. 317, 71 N. E. 1003 (protection of widow's homestead estate); McMillan *v.* James, 105 Ill. 194; Magill *v.* De Witt County Nat. Bank, 26 Ill. App. 381 (judgment creditor).

Missouri.— Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350.

New York.— Pease *v.* Egan, 131 N. Y. 262, 30 N. E. 102 (contingent interest in the land); Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1; Matter of Coster, 2 Johns. Ch. 503.

Vermont.— Tarbell *v.* Durant, 61 Vt. 516, 17 Atl. 44; Walker *v.* King, 44 Vt. 601; Chandler *v.* Dyer, 37 Vt. 345, attaching creditor.

United States.— Peltz *v.* Clarke, 5 Pet. 481, 8 L. ed. 199, owner of an equitable estate.

See 35 Cent. Dig. tit. "Mortgages," § 958.

99. *California.*— Swain *v.* Stockton Sav., etc., Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118.

Connecticut.— Brethauer *v.* Schorer, 77 Conn. 575, 60 Atl. 125.

Illinois.— Tyrrell *v.* Ward, 102 Ill. 29; Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295].

Indiana.— Spaulding *v.* Harvey, 129 Ind. 106, 28 N. E. 323, 28 Am. St. Rep. 176, 13 L. R. A. 619; Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153; Erwin *v.* Acker, 126 Ind. 133, 25 N. E. 888; Bunting *v.* Gilmore, 124 Ind. 113, 24 N. E. 583.

Iowa.— White *v.* Hampton, 13 Iowa 259.

Kansas.— Everston *v.* Central Bank, 33 Kan. 352, 6 Pac. 605.

not where he has also become the owner of the equity of redemption,[1] nor where his own mortgage was void;[2] and he can found no claim to subrogation on the fact that a part of the money to be advanced under his own mortgage was retained for the purpose of being applied on the senior mortgage, or was so applied by the mortgagor.[3]

e. Purchaser of Mortgaged Premises. Where a purchaser of mortgaged property has assumed and agreed to pay the mortgage debt, he cannot claim to be subrogated to the rights of the mortgagee on paying off the encumbrance.[4] But if he has not become responsible for the mortgage debt, the primary obligation still resting on the mortgagor, he may discharge the encumbrance to prevent a sale, or to perfect his own title, and thereupon claim the right to succeed to the position of the mortgagee.[5] The same principle may also be applied in favor of a purchaser of the property at an execution sale or other judicial sale;[6] and one who buys the property at a sale made under foreclosure of the mortgage will be entitled to be subrogated to the rights of the mortgagee in the event that the sale

Kentucky.— Rafferty *v.* Buckler, 17 S. W. 272, 13 Ky. L. Rep. 375.

Maryland.— Rappanier *v.* Bannon, (1887) 8 Atl. 555.

Massachusetts.— Washburn *v.* Hammond, 151 Mass. 132, 24 N. E. 33.

Michigan.— Scriven *v.* Hursh, 68 Mich. 176, 36 N. W. 54; Manwaring *v.* Powell, 40 Mich. 371.

Minnesota.— Gerdine *v.* Menage, 41 Minn. 417, 43 N. W. 91. See also Miller *v.* Fasler, 42 Minn. 366, 44 N. W. 256.

New Hampshire.— Weld *v.* Sabin, 20 N. H. 533, 51 Am. Dec. 240.

New Jersey.— Speer *v.* Whitfield, 10 N. J. Eq. 107.

New York.— Quinlan *v.* Stratton, 128 N. Y. 659, 28 N. E. 529; Emigrant Industrial Sav. Bank *v.* Clute, 114 N. Y. 634, 21 N. E. 1021; Clark *v.* Mackin, 95 N. Y. 346; Sheldon *v.* Hoffnagle, 51 Hun 478, 4 N. Y. Suppl. 287.

Rhode Island.— Harvey *v.* Chapman, 22 R. I. 316, 47 Atl. 888.

Texas.—Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

Vermont.— Downer *v.* Wilson, 33 Vt. 1; Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41; Downer *v.* Fox, 20 Vt. 388; Lyman *v.* Little, 15 Vt. 576. See also Sweet *v.* Tucker, 43 Vt. 355.

United States.— Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595; Peter *v.* Smith, 19 Fed. Cas. No. 11,020, 5 Cranch C. C. 383.

See 35 Cent. Dig. tit. "Mortgages," § 959.

Payment of interest only.—Where only the interest on a debt secured by a prior mortgage is due, and it is paid by a subsequent mortgagee, his lien on the mortgaged premises which results from such payment will be postponed to the payment of the residue of the prior mortgage debt. Penn *v.* Atlantic, etc., R. Co., 3 Ohio Dec. (Reprint) 508, 11 Am. L. Reg. N. S. 576.

A holder of a second mortgage which was not the next lien is not entitled to an assignment of the first mortgage on paying it in full. Bishop *v.* Ogden, 9 Phila. (Pa.) 524.

1. Long *v.* Long, 111 Mo. 12, 19 S. W. 537; Viles *v.* Moulton, 11 Vt. 470.

2. Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406; Perkins *v.* Hall, 105 N. Y. 539, 12 N. E. 48. But see Ebert *v.* Gerding, 116 Ill. 216, 5 N. E. 591.

3. Baker *v.* Reed, 162 Mo. 341, 62 S. W. 1001; Ayers *v.* Staley, (N. J. Ch. 1889) 18 Atl. 1046.

4. Goodyear *v.* Goodyear, 72 Iowa 329, 33 N. W. 142; Crouse *v.* Caldwell, 1 Ohio Dec. (Reprint) 359, 8 West. L. J. 256.

Rights of grantor.— Where a mortgage debt forms part of the consideration of the purchase of encumbered real property, although the purchaser has not entered into any agreement by deed or other writing to pay it, the grantor becomes, as between the parties, the surety of the grantee; and if he pays the mortgage debt, he has a right to be subrogated to all the rights of the mortgagee. Wood *v.* Smith, 51 Iowa 156, 50 N. W. 581.

5. *Illinois.*— Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Young *v.* Ward, 115 Ill. 264, 3 N. E. 512; Young *v.* Morgan, 89 Ill. 199; Hough *v.* Ætna L. Ins. Co., 57 Ill. 318, 11 Am. Rep. 18; Smith *v.* Dinsmore, 16 Ill. App. 115.

Louisiana.— Hobgood *v.* Schuler, 44 La. Ann. 537, 10 So. 812.

Massachusetts.— Howard *v.* Agry, 9 Mass. 179.

Mississippi.— McIntyre *v.* Agricultural Bank, Freem. 105.

Missouri.— Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823.

New York.— Platt *v.* Brick, 35 Hun 121.

Vermont.— Slocum *v.* Catlin, 22 Vt. 137.

See 35 Cent. Dig. tit. "Mortgages," § 960.

Where one claiming title to land voluntarily discharges a mortgage thereon given by his grantor, and a third party is subsequently adjudged to be the owner in fee, the former is not entitled to have the amount so paid adjudged a charge upon the land as against the latter. Wadsworth *v.* Blake, 43 Minn. 509, 45 N. W. 1131.

6. Matteson *v.* Thomas, 41 Ill. 110; Magill *v.* De Witt County Nat. Bank, 26 Ill. App. 381; Jellison *v.* Halloran, 44 Minn. 199, 46 N. W. 332. *Compare* Lowe *v.* Rawlins, 83 Ga.

proves void or ineffectual to convey the title, and he may thereupon demand a valid foreclosure of the mortgage for his own benefit.[7]

f. Stranger Advancing Money to Pay Mortgage. Where a third person pays a debt which is secured by a mortgage, at the instance and request of the mortgagor, or furnishes the latter with money for the purpose, under an agreement with the debtor that he shall receive an assignment of the security, or that a new mortgage shall be made to secure him, such person will be entitled to subrogation to the rights of the original creditor, if the debtor fails to procure the assignment of the old mortgage, or refuses to make a new mortgage as agreed, or if the new mortgage, when executed, proves to be invalid or defective.[8] But this doctrine cannot be invoked in favor of a mere volunteer, who pays off the mortgage without any request from the mortgagor,[9] or without any agreement or understanding that he shall have the benefit of the security;[10] and in any case the equitable right of subrogation will be defeated by the existence of equal or superior equities in other persons.[11]

320, 10 S. E. 204, 6 L. R. A. 73; Cox *v.* Garst, 105 Ill. 342.

Fraud of purchaser.— Where a purchaser of land at a guardian's sale pays off a mortgage on the premises as a part of the price, but was guilty of fraud in acquiring his title, having made a corrupt agreement by which he prevented competition at the sale and secured the land at a sacrifice, there will be no error in allowing him only six per cent interest on the money paid by him, although the mortgage bore interest at the rate of ten per cent, for his payment was one made in wrong and in the carrying out of a wrongful bargain, and therefore presents no case for the application of the equitable doctrine of subrogation. Devine *v.* Harkness, 117 Ill. 145, 7 N. E. 52.

7. *Florida.*— Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823.

Georgia.— Dutcher *v.* Hobby, 86 Ga. 198, 12 S. E. 356, 22 Am. St. Rep. 444, 10 L. R. A. 472.

Illinois.—Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

Iowa.— Brown *v.* Brown, 73 Iowa 430, 35 N. W. 507.

Rhode Island.— Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

8. *Alabama.*— Cullum *v.* Mobile Branch Bank, 23 Ala. 797; McMillan *v.* Gordon, 4 Ala. 716.

California.— Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743.

Illinois.— Home Sav. Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; Caudle *v.* Murphy, 89 Ill. 352; White *v.* Fisher, 62 Ill. 258.

Kansas.— Yaple *v.* Stephens, 36 Kan. 680, 14 Pac. 222; Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

Louisiana.— Hobgood *v.* Schuler, 44 La. Ann. 537, 10 So. 812.

Maryland.— Robertson *v.* Mowell, 66 Md. 530, 8 Atl. 273.

Minnesota.— Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566.

New Hampshire.— Moore *v.* Beasom, 44 N. H. 215.

South Dakota.— Ipswich Bank *v.* Brock, 13 S. D. 409, 83 N. W. 436; Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

Vermont.— Stebbins *v.* Willard, 53 Vt. 665; Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414.

Wisconsin.— Wilton *v.* Mayberry, 75 Wis. 191, 43 N. W. 901, 17 Am. St. Rep. 193, 6 L. R. A. 61; Levy *v.* Martin, 48 Wis. 198, 4 N. W. 35.

United States.— Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; Shapley *v.* Rangeley, 21 Fed. Cas. No. 12,707, 1 Woodb. & M. 213.

England.— Chetwynd *v.* Allen, [1899] 1 Ch. 353, 68 L. J. Ch. 160, 80 L. T. Rep. N. S. 110, 47 Wkly. Rep. 200.

Canada.— Brown *v.* McLean, 18 Ont. 533.

See 35 Cent. Dig. tit. "Mortgages," § 961.

Effect of release or discharge.— Although the original mortgage was released or discharged on the payment of the money, and the debt may be considered at law as extinguished, yet it will not be so regarded in equity if the payer has an equitable right to keep it alive. Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831; Citizens' Nat. Bank *v.* Wert, 26 Fed. 294.

9. Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052. See also Bicknell *v.* Bicknell, 111 Mass. 265.

10. *New York.*—Bockes *v.* Hathorn, 20 Hun 503.

South Carolina.— Jeffries *v.* Allen, 29 S. C. 501, 7 S. E. 828.

Texas.— Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273.

Vermont.— See Bartlett *v.* Wade, 66 Vt. 629, 30 Atl. 4; Collins *v.* Adams, 53 Vt. 433.

Wisconsin.—Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63; Downer *v.* Miller, 15 Wis. 612.

United States.— See Robbins *v.* Clark, 127 U. S. 622, 8 S. Ct. 1339, 32 L. ed. 292.

11. Home Sav. Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; White *v.* Fisher, 62 Ill. 258; Mather *v.* Jenswold, 72 Iowa 550, 32 N. W. 512, 34 N. W. 327; Cameron *v.* Tome, 64 Md. 507, 2 Atl. 837.

XIX. FORECLOSURE BY ENTRY AND WRIT OF ENTRY.

A. Entry, Possession, and Notice — 1. In General — a. Statutory Provisions. In several states the statutes authorize the foreclosure of a mortgage by proceedings out of court, consisting essentially in a peaceable entry on the mortgaged premises, by the mortgagee on breach of condition, in the presence of witnesses, and sometimes publication of notice by advertisement, and the retention of such possession for a limited period, at the end of which, if no redemption has been effected, the foreclosure is complete.[12] If it is desired to take advantage of such a statute, its provisions must be fully complied with; a foreclosure cannot be effected by the written admission of the parties in a manner not authorized by the statute.[13]

b. Right to Foreclose. The right to proceed under these statutes does not accrue until there has been a distinct breach of the condition of the mortgage or failure of performance.[14] It is not barred by twenty years' possession by the mortgagor, his tenure not being hostile to the mortgagee.[15] There can, however, be no such foreclosure by the mortgagee after he has assigned all his interest in the mortgage and the premises,[16] nor as to a portion only of the mortgaged estate.[17]

2. Entry For Foreclosure — a. Purpose of Entry. To effect a foreclosure, it is necessary that the entry of the mortgagee should be not merely after breach of condition, but in consequence thereof, and for the purpose of foreclosing;[18] an entry merely to take the rents and profits is not sufficient.[19] And the purpose of the entry must be made known to the witnesses.[20] It has been held, however, that, if there had been a breach of condition, it will be presumed that the mortgagee's entry was for foreclosure, unless the contrary appears.[21]

b. Who May Enter. The right of entry of the mortgagee descends to his heirs and may be exercised by their grantees;[22] and the mortgagee may employ

12. See the statutes of the different states. And see Whitney *v.* Guild, 11 Gray (Mass.) 496; Woods *v.* Shields, 1 Nebr. 453; Stebbins *v.* Robbins, 67 N. H. 232, 38 Atl. 15.

13. Pease *v.* Benson, 28 Me. 336.

14. Hill *v.* More, 40 Me. 515; Stevens *v.* Cohen, 170 Mass. 551, 49 N. E. 926 (mortgagee may foreclose for breach of condition to pay taxes, without waiting for levy on the land for the taxes, they being overdue and bearing interest); Shepard *v.* Richardson, 145 Mass. 32, 11 N. E. 738 (deed of trust not capable of a strict foreclosure); Flanders *v.* Lamphear, 9 N. H. 201; Haselton *v.* Florentine Marble Co., 94 Fed. 701.

As to what constitutes a breach of mortgage for support and maintenance see Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163; Holmes *v.* Fisher, 13 N. H. 9; Flanders *v.* Lamphear, 9 N. H. 201.

A demand of performance of the condition of a mortgage is not a prerequisite to the right to foreclose it, unless such demand is made necessary by the condition itself. Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

15. Sheafe *v.* Gerry, 18 N. H. 245.

16. Call *v.* Leisner, 23 Me. 25.

17. Spring *v.* Haines, 21 Me. 126.

18. Gordon *v.* Lewis, 10 Fed. Cas. No. 5,612, 1 Sumn. 525.

Entry by assignee of one mortgage note. An entry by the assignee of the mortgage must be considered as made by reason of the non-payment of the whole amount secured by the mortgage, which had then become payable, although he owns only one of the notes, the other remaining the property of the mortgagee. Haynes *v.* Wellington, 25 Me. 458.

Entry for other purposes. An entry by the mortgagee to survey the mortgaged premises merely for the purpose of obtaining information respecting the boundaries, or to exercise a power not warranted by the mortgage, as, to flow the land by means of a dam erected on other lands belonging to him, cannot be regarded as a possession under the mortgage, because not made in the exercise of his rights as mortgagee. Great Falls Co. *v.* Worster, 15 N. H. 412.

In an action to foreclose a mortgage, there is no occasion for an entry for breach of condition. Cook *v.* Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452.

19. Hunt *v.* Stiles, 10 N. H. 466.

20. Gordon *v.* Lewis, 10 Fed. Cas. No. 5,612, 1 Sumn. 525. But see Skinner *v.* Brewer, 4 Pick. (Mass.) 468, holding that the mortgagee need not have his deed with him when he enters, nor make an express declaration that his entry is for foreclosure, but it is sufficient if it appears that the entry is for breach of the condition.

21. Taylor *v.* Weld, 5 Mass. 109; Hunt *v.* Stiles, 10 N. H. 466. But *compare* Scott *v.* McFarland, 13 Mass. 309.

22. Kibbe *v.* Thompson, 14 Fed. Cas. No. 7,754, 5 Biss. 226.

another person to act in this matter under his own direction, and the authority of such agent need not be under seal or even in writing.[23]

c. Sufficiency of Entry. The entry of the mortgagee, in order to be effective, must be in strict conformity with the directions of the statute.[24] There must be an actual entry,[25] the necessity of which is not dispensed with by the written consent of the mortgagor,[26] and it must be open and peaceable,[27] and made in the presence of two witnesses.[28] If several pieces of land are included in the same mortgage, there need not be an entry upon each; an entry upon one in the name of the whole will be sufficient.[29]

d. Certificate of Entry. These statutes generally require that the two witnesses[30] and the mortgagor[31] shall sign a certificate of the entry by the mortgagee, which must set forth that the entry was made for breach of condition or for the purpose of foreclosure,[32] and which must state the date of the entry,[33] and should also recite that the entry was open and peaceable, although the omission of this clause will not invalidate it if there is no evidence to the contrary.[34] The certificate must be sworn to before a competent officer,[35] and recorded as the law directs.[36]

3. Notice — a. Necessity of Notice. In Maine one seeking to foreclose should give notice to all parties whose interests may be affected thereby.[37] And in Massachusetts there must be actual notice to the mortgagor or owner of the equity of redemption.[38]

23. Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106.

24. Freeman *v.* Atwood, 50 Me. 473; Roberts *v.* Littlefield, 48 Me. 61; Hurd *v.* Coleman, 42 Me. 182; Ireland *v.* Abbott, 24 Me. 155.

25. Boyd *v.* Shaw, 14 Me. 58. And see Reed *v.* Elwell, 46 Me. 270.

26. Jones *v.* Bowler, 74 Me. 310; Storer *v.* Little, 41 Me. 69; Chamberlain *v.* Gardiner, 38 Me. 548; Chase *v.* Gates, 33 Me. 363; Pease *v.* Benson, 28 Me. 336.

27. Boyd *v.* Shaw, 14 Me. 58; Whitney *v.* Guild, 11 Gray (Mass.) 496; Thayer *v.* Smith, 17 Mass. 429.

When entry peaceable and open.— The mortgagee's entry is "peaceable," within the meaning of the statute, if not opposed by the mortgagor or other persons claiming the land, and "open," if made in the presence of two witnesses, whose certificate thereof is sworn to and recorded. Thompson *v.* Kenyon, 100 Mass. 108.

Secret entry.— An entry by the mortgagee, made, certified, and recorded in conformity with the statute, will effectually foreclose the mortgage, after the lapse of three years without redemption, although it was purposely made in secret. Ellis *v.* Drake, 8 Allen (Mass.) 161.

28. Gordon *v.* Hobart, 10 Fed. Cas. No. 5,609, 2 Sumn. 401, holding that possession acquired under a writ of possession, in the presence of the sheriff delivering it and the mortgagee's agent receiving it, is not a possession "in the presence of two witnesses," within the meaning of that phrase as used in the statute.

29. Bennett *v.* Conant, 10 Cush. (Mass.) 163; Green *v.* Pettingill, 47 N. H. 375, 93 Am. Dec. 444; Green *v.* Cross, 45 N. H. 574; Shapley *v.* Rangeley, 21 Fed. Cas. No. 12,707, 1 Woodb. & M. 213.

30. See Whitney *v.* Guild, 11 Gray (Mass.) 496.

Place of certificate.— The validity of a foreclosure by entry is not impaired by the fact that the certificate of the witnesses is not made upon the back of the mortgage. Bartlett *v.* Johnson, 9 Allen (Mass.) 530.

Estoppel of mortgagor signing certificate.— A mortgagor who signs a certificate on the mortgage of a lawful entry on the mortgaged premises cannot deny the fact of such entry. Bennett *v.* Conant, 10 Cush. (Mass.) 163; Lawrence *v.* Fletcher, 10 Metc. (Mass.) 344.

31. See Sisson *v.* Tate, 109 Mass. 230.

32. Morris *v.* Day, 37 Me. 386.

33. Snow *v.* Pressey, 82 Me. 552, 20 Atl. 78; Freeman *v.* Atwood, 50 Me. 473.

34. Hawkes *v.* Brigham, 16 Gray (Mass.) 561.

35. Murphy *v.* Murphy, 145 Mass. 224, 13 N. E. 474 (although the statute directs that the certificate shall be sworn to before a justice of the peace, it is sufficient if sworn to before a notary public); Judd *v.* Tryon, 131 Mass. 345 (the mortgagee, although a justice of the peace, cannot himself administer the oath).

36. Chase *v.* Marston, 66 Me. 271; Potter *v.* Small, 47 Me. 293; Hayden *v.* Peirce, 165 Mass. 359, 43 N. E. 119.

37. Stone *v.* Bartlett, 46 Me. 438. But *compare* Davis *v.* Rodgers, 64 Me. 159, where there has been a default in performance of condition a mortgagee in active possession may enter peaceably without notice to the debtor.

38. Barnes *v.* Boardman, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; Thayer *v.* Smith, 17 Mass. 429; Scott *v.* McFarland, 13 Mass. 309. *Compare* Hobbs *v.* Fuller, 9 Gray (Mass.) 98; Reed *v.* Davis, 4 Pick. (Mass.) 216.

As against second mortgagee.— An entry

b. Sufficiency of Notice. The notice of foreclosure must be given by the mortgagee himself or under his authority or direction,[39] and must state that the possession was taken for breach of condition and for the purpose of foreclosure,[40] and it must describe the premises with reasonable certainty,[41] and be free from errors calculated to mislead.[42] An agreement in a mortgage limiting the time of redemption to one year need not be inserted in the notice of foreclosure.[43] It should ordinarily be given to the mortgagor personally or published as the statute directs.[44]

c. Publication of Notice. A statute requiring publication of the notice of foreclosure is mandatory.[45] The publication must be made in the county where the land lies, unless, by a change of boundaries, it has been thrown into another county,[46] and in a newspaper printed in the county, if any there be; and it is not a compliance with the statute to show that the paper was published in the county.[47] The advertisement must run for the requisite length of time, or be published the specified number of times,[48] and the proof or record of it is fatally defective unless it states the name and date of the newspaper in which the notice was last published.[49]

4. Possession by Mortgagee — a. Acquisition of Possession. It is essential to this method of foreclosure that the mortgagee should take and hold the actual possession of the mortgaged premises, either upon his entry thereon for the purpose of foreclosure,[50] or on a written and recorded surrender of the possession by the mortgagor.[51]

b. What Constitutes Possession. Although the mortgagee, after an entry for foreclosure, must hold possession of the premises for the prescribed length of

to foreclose, duly made under a first mortgage and recorded, is effectual as against a second mortgagee without actual notice, although the first mortgagee is also the owner of the equity of redemption. Thompson *v.* Tappan, 139 Mass. 506, 1 N. E. 924.

Breach of several conditions.— A mortgagee who has entered for the breach of one condition and given notice thereof need not give further notice of the breach of other conditions. Mann *v.* Richardson, 21 Pick. (Mass.) 355.

39. Treat *v.* Pierce, 53 Me. 71.

By assignee of mortgage.—A notice of foreclosure, given by an assignee of the mortgage, will not be valid and effectual, unless, at the time, the assignment had been recorded, or unless the person entitled to redeem had actual notice of the assignment. Reed *v.* Elwell, 46 Me. 270.

40. Green *v.* Davis, 44 N. H. 71.

41. Smith *v.* Larrahee, 58 Me. 361; Chase *v.* McLellan, 49 Me. 375; Wilson *v.* Page, 76 Me. 279, ordinarily it will be sufficient if the description in the foreclosure notice follows the description in the mortgage.

42. Abbot *v.* Banfield, 43 N. H. 152, substituting the word "mortgagee" where the word "mortgagor" should occur is a material error, likely to mislead, and vitiates the notice.

43. Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684.

44. Scott *v.* McFarland, 13 Mass. 309, holding that if the mortgagor is without the state, and has no agent or family within it, perhaps a public declaration to that effect, in the presence of witnesses, might be equivalent to notice.

45. Ashuelot R. Co. *v.* Elliot, 52 N. H. 387; Howard *v.* Handy, 35 N. H. 315.

Evidence of publication.— A certificate of the mortgagee is not competent evidence of publication of notice of foreclosure. Bragdon *v.* Hatch, 77 Me. 433, 1 Atl. 140.

Effect of publication.— The publication of notice by a mortgagee that he claims to foreclose the mortgage for condition broken is no bar to an action afterward brought to obtain possession of the mortgaged premises. Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447.

46. Welch *v.* Stearns, 74 Me. 71.

47. Hollis *v.* Hollis, 84 Me. 96, 24 Atl. 581; Bragdon *v.* Hatch, 77 Me. 433, 1 Atl. 140.

48. Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684.

49. Hollis *v.* Hollis, 84 Me. 96, 24 Atl. 581; Chase *v.* Savage, 55 Me. 543.

50. Bartlett *v.* Tarbell, 12 Allen (Mass.) 123; Mitchell *v.* Shanley, 12 Gray (Mass.) 206; Thayer *v.* Smith, 17 Mass. 429.

A mortgagee cannot by mere lapse of time become the owner of the land mortgaged, unless he elects to be so and makes formal entry for condition broken in the presence of witnesses, or enters by virtue of an execution on the mortgage deed. Goodwin *v.* Richardson, 11 Mass. 469.

Mortgagee under guardianship.— Where a mortgagee enters for breach of condition, and is thereafter put under guardianship as a spendthrift, the guardian is authorized to restore possession to the mortgagor in order to prevent a foreclosure. Botham *v.* McIntier, 19 Pick. (Mass.) 346.

51. Southard *v.* Wilson, 29 Me. 56.

time, this does not mean that he must remain physically in the actual occupation and use of the property.[52] His possession may be passed on to one to whom he assigns the mortgage,[53] or held by a tenant who attorns to him or takes a lease from him,[54] or even by the mortgagor himself, if he recognizes his occupation as being subject and subordinate to the possession of the mortgagee;[55] and, although the latter cannot claim to have held the possession when he has never taken steps to oust a third person, who has remained on the premises, claiming as a purchaser from the mortgagor,[56] yet the mortgagee's possession is not broken by the occasional intrusion of a third person, claiming under a title subsequent to the mortgage, who exercises acts of ownership with respect to the products of the land.[57]

c. Duration of Possession. In most of the states where this system is in force, the mortgagee's possession must continue for three years after his entry, in order to complete the foreclosure,[58] and in reckoning the time, the day of the entry is to be excluded.[59] The continuity of this possession is broken by the filing of a bill to redeem,[60] but not by a conveyance of the premises by the mortgagor to a stranger.[61]

d. Proof of Entry and Possession. The proper statutory evidence of the entry and possession of the mortgagee is the certificate required to be executed by the witnesses to the entry.[62] But the fact may also be established by affidavits of persons having knowledge,[63] or by other competent evidence.[64]

e. Prior and Continuing Possession of Mortgagee. Where the mortgagee, at the time a breach of condition occurs, is already in possession, he must give the mortgagor notice of his intention to hold the possession thereafter for the purpose of foreclosure, and the period of possession required to complete a foreclosure will not begin to run until such notice is given;[65] although it seems that, in the

52. Bennett *v.* Conant, 10 Cush. (Mass.) 163; Green *v.* Pettingill, 47 N. H. 375, 93 Am. Dec. 444; Wallace *v.* Goodall, 18 N. H. 439. And see also Carrington *v.* Smith, 8 Pick. (Mass.) 419; Couch *v.* Stevens, 37 N. H. 169.

53. Hurd *v.* Coleman, 42 Me. 182.

54. Lucier *v.* Marsales, 133 Mass. 454; Kittredge *v.* Bellows, 4 N. H. 424.

55. Swift *v.* Mendell, 8 Cush. (Mass.) 357; Howard *v.* Handy, 35 N. H. 315; Gilman *v.* Hidden, 5 N. H. 30. But see Worster *v.* Great Falls Mfg. Co., 41 N. H. 16, holding that an acknowledgment, in writing, by a mortgagor, that the mortgagee has entered and taken peaceable possession of the mortgaged premises for the purpose of foreclosing, and that he is in full and peaceable possession, with an agreement that an entry by the mortgagor during the year, for the purpose of taking the crops and carrying on the premises, shall not be considered, treated, or claimed to be in derogation of the mortgagee's possession, but in subordination to it, is not evidence of a foreclosure of the mortgage, nor of actual possession, against a stranger.

56. Bartlett *v.* Sanborn, 64 N. H. 70, 6 Atl. 486. But see Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281, holding that the foreclosure cannot be defeated by the wrongful retention of possession by the mortgagor, by means of merely fictitious possession which is supposed to exist alongside the actual possession of the mortgagor.

57. Lennon *v.* Porter, 5 Gray (Mass.) 318.

58. Jarvis *v.* Albro, 67 Me. 310; Chase *v.* Marston, 66 Me. 271; Bartlett *v.* Tarbell, 12 Allen (Mass.) 123; Daniels *v.* Mowry, 1 R. I. 151.

In New Hampshire the period of time during which the mortgagee must hold the possession is fixed at one year. Wendell *v.* New Hampshire Bank, 9 N. H. 404.

59. Jager *v.* Vollinger, 174 Mass. 521, 55 N. E. 458; Ricker *v.* Blanchard, 45 N. H. 39.

60. Van Vronker *v.* Eastman, 7 Metc. (Mass.) 157.

61. Daniels *v.* Mowry, 1 R. I. 151.

62. Smith *v.* Johns, 3 Gray (Mass.) 517; Oakham *v.* Rutland, 4 Cush. (Mass.) 172. And see *supra*, XIX, A, 2, d.

63. Farrar *v.* Fessenden, 39 N. H. 268. See also Wendell *v.* Abbott, 43 N. H. 68.

64. Hadley *v.* Houghton, 7 Pick. (Mass.) 29, holding that a paper signed and sealed by both the parties to the mortgage, reciting that, there having been a breach of the condition of the mortgage, the mortgagee had taken peaceable possession of the premises in the presence of the subscribing witnesses, and had leased them to the mortgagor, was insufficient evidence to support a foreclosure, where there was no other evidence of possession taken, and the mortgagor had continued in possession without any demand or payment of rent, and his wife, having an interest in the property, had no knowledge of the instrument or of any agreement as to foreclosure.

65. Ayres *v.* Waite, 10 Cush. (Mass.) 72; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Scott

absence of any such notice, the mortgagor may elect to consider and treat him as being in for the purpose of a foreclosure.[66]

5. Operation and Effect — a. In General. A proper and sufficient entry for foreclosure entitles the mortgagee to retain and defend the possession of the premises,[67] and to collect the rents and profits;[68] and if his possession is continued for the statutory period of time, it effects a complete foreclosure,[69] cuts off all right of redemption at law or in equity,[70] and invests him with a complete and indefeasible title to the land.[71] Although the owners of a mortgage may be regarded as joint tenants, yet when the mortgage is foreclosed they hold the estate in common, and may convey separately to a third person.[72]

b. Discharge of Mortgage Debt. Although the foreclosure of a mortgage by entry and possession is in no sense a payment, yet it operates as a satisfaction and discharge of the mortgage debt to the extent of the value of the land taken.[73]

v. McFarland, 13 Mass. 309; Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

66. Scott *v.* McFarland, 13 Mass. 309; Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91.

67. Simpson *v.* Dix, 131 Mass. 179; Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Smith *v.* Smith, 15 N. H. 55.

As to the remedies of the mortgagee to recover the possession from the mortgagor see Gerrish *v.* Mason, 4 Gray (Mass.) 432; Hastings *v.* Pratt, 8 Cush. (Mass.) 121; Larned *v.* Clarke, 8 Cush. (Mass.) 29; Miner *v.* Stevens, 1 Cush. (Mass.) 468.

Nature of mortgagee's seizin.— The owner of land, by mortgaging an undivided half thereof, and allowing the mortgagee to enter for foreclosure before condition broken, does not become a tenant in common with him, and a judgment creditor of the mortgagor cannot, by levying execution on the land, maintain against the mortgagee a petition for partition. Norcross *v.* Norcross, 105 Mass. 265.

68. Welch *v.* Adams, 1 Metc. (Mass.) 494; Stone *v.* Patterson, 19 Pick. (Mass.) 476, 31 Am. Dec. 156; Connecticut Mut. L. Ins. Co. *v.* U. S., 21 Ct. Cl. 191. And see Cook *v.* Johnson, 121 Mass. 326, holding that a mortgagee's entry for foreclosure is no waiver of his right to the rents under a previous, but ineffectual, entry for the same purpose.

69. Tompson *v.* Tappan, 139 Mass. 506, 1 N. E. 924; Raymond *v.* Raymond, 7 Cush. (Mass.) 605; Colby *v.* Poor, 15 N. H. 198.

70. Palmer *v.* Fowley, 5 Gray (Mass.) 545; Skinner *v.* Brewer, 4 Pick. (Mass.) 468; Bates *v.* Conrow, 11 N. J. Eq. 137.

Rights of minor heirs.—A statutory foreclosure by entry and possession bars the minor heirs of the mortgagor as well as all other persons claiming under him. Thompson *v.* Paris, 63 N. H. 421.

Payment of amount due.— When the mortgagee is in possession for foreclosure, the owner of the equity may save the effect of a foreclosure by paying the sum then due on the mortgage; but he will not be let into possession unless he pays or secures the amount not yet due; and this, although the mortgage provides that the mortgagee shall not be entitled to possession till breach of condition. Wood *v.* Goodwin, 49 Me. 260, 77 Am. Dec. 259.

Opening foreclosure.— The foreclosure of a mortgage may be opened, after the three years have elapsed, by the express agreement of the parties, or by circumstances from which such an agreement may be inferred, where they choose to consider the property merely as a security for an existing debt, provided no rights of third persons have intervened. Lawrence *v.* Fletcher, 8 Metc. (Mass.) 153.

71. See Randall *v.* Bradley, 65 Me. 43.

In states where a foreclosure cannot be effected in this manner, but only by an action or suit, the mere entry and possession by the mortgagee, under the mortgage, cannot affect the nature of his interest; it can neither abridge nor enlarge that interest, nor convert what was previously a security into a seizin of the freehold. Nagle *v.* Macy, 9 Cal. 426. But where a mortgagee, without foreclosure, takes possession of the property, and rents it, and then sells it at private sale, the mortgagor may adopt such sale, and hold the mortgagee for the surplus of the rent and sale price over and above the amount of the mortgage. McKarsie *v.* Citizens' Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 53 S. W. 1007.

72. Pearce *v.* Savage, 45 Me. 90.

73. Haynes *v.* Wellington, 25 Me. 458; Morse *v.* Merritt, 110 Mass. 458; Briggs *v.* Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Stevens *v.* Fellows, 70 N. H. 148, 47 Atl. 135; Ray *v.* Scripture, 67 N. H. 260, 29 Atl. 454; Lane *v.* Barron, 64 N. H. 277, 9 Atl. 544; Green *v.* Cross, 45 N. H. 574; Smith *v.* Packard, 19 N. H. 575; Hunt *v.* Stiles, 10 N. H. 466.

How value of land ascertained.— The value of the realty to be credited on notes secured by mortgage, on a foreclosure thereof, is the amount of money for which it could have been sold, at a fair price, at a reasonable time and place, and after reasonable notice; and in this connection evidence showing the value at which the property had been appraised for taxation is competent. Stevens *v.* Fellows, 70 N. H. 148, 47 Atl. 135.

6. Waiver of Entry — a. In General. An entry for the purpose of foreclosure may be waived and released by the mortgagee,[74] either expressly or by conduct inconsistent with an intention on his part to retain the benefit of the entry and complete the foreclosure in that manner,[75] as, by the commencement and prosecution of an action or bill in equity upon the mortgage.[76] Where a mortgagee, after recovering conditional judgment in an action for possession, enters *in pais* for condition broken, and afterward enters under the judgment, the last entry is a waiver of the first.[77]

b. Acceptance of Security or Part Payment. If, after an entry for foreclosure, the mortgagee accepts a new security for the same debt, it is a waiver of the entry.[78] So the acceptance of payment of the mortgage debt annuls the uncompleted foreclosure proceedings;[79] and it has been held that the payment of even a portion of the debt will release and waive the prior entry.[80]

7. Action For Deficiency. Since a foreclosure by entry and possession satisfies the mortgage only to the extent of the value of the land taken, the mortgagee may maintain an action on the mortgage debt, or the note or bond evidencing it, to recover the deficiency, where the property is not worth the amount of the debt.[81]

B. Writ of Entry — 1. Nature and Scope of Remedy. In several of the states, the mortgagee, after breach of condition, may recover possession of the premises by means of a writ of entry, founded on his title as mortgagee. The judgment is conditional, as it fixes the amount due and awards the possession to the mortgagee unless the mortgagor shall pay such amount within a limited time. On failure of such payment, the mortgagee may have a writ of possession, and must hold the property for a fixed time, usually three years, during which the mortgagor has a right to redeem. If no redemption is effected, the title becomes absolute in the mortgagee. This procedure is therefore a substitute for

Application of payment.— Where but one of the notes secured by a mortgage had fallen due at the time of an entry to foreclose, the mortgaged property must be first applied to the satisfaction of that note. Hunt *v.* Stiles, 10 N. H. 466.

Action on bond.— An entry on mortgaged premises for the purpose of foreclosure is no bar to an action on the bond secured by the mortgage. Minot *v.* Prout, Quincy (Mass.) 9; Sagory *v.* Wissman, 21 Fed. Cas. No. 12,217, 2 Ben. 240.

74. Fisher *v.* Shaw, 42 Me. 32; Trow *v.* Berry, 113 Mass. 139; Botham *v.* McIntier, 19 Pick. (Mass.) 346; Batchelder *v.* Robinson, 6 N. H. 12; Daniels *v.* Mowry, 1 R. I. 151.

Waiver by assignee of mortgage.— An assignee of a mortgage, holding it as collateral security for a debt, has the right to waive and release to the mortgagor an entry for foreclosure already made by him; and, although this is done without the assent of the assignor, it is not a fraud upon the rights of the latter. Cutts *v.* York Mfg. Co., 14 Me. 326.

75. Hobbs *v.* Fuller, 9 Gray (Mass.) 98, holding that an entry is not waived by the mortgagee's subsequently rendering an account to the owner of the equity of redemption, charging himself with rent beginning at a later date.

An oral agreement of an assignee of the mortgage to hold it as security for the amount paid by him, and, subject to that, to hold the estate for the use and benefit of the mortgagor and to permit the latter to redeem the land at any time on paying the amount due with interest, does not operate as a waiver. Capen *v.* Richardson, 7 Gray (Mass.) 364.

76. Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595. *Compare* Page *v.* Robinson, 10 Cush. (Mass.) 99.

77. Fay *v.* Valentine, 5 Pick. (Mass.) 418. But see Stewart *v.* Davis, 63 Me. 539.

78. Trow *v.* Berry, 113 Mass. 139.

79. Joslin *v.* Wyman, 9 Gray (Mass.) 63; Gould *v.* White, 26 N. H. 178; McNeil *v.* Call, 19 N. H. 403, 51 Am. Dec. 188.

80. Dow *v.* Moor, 59 Me. 118; Ross *v.* Leavitt, 70 N. H. 602, 50 Atl. 110; Scott *v.* Childs, 64 N. H. 566, 15 Atl. 206; Moore *v.* Beasom, 44 N. H. 215; Deming *v.* Comings, 11 N. H. 474.

In Massachusetts the question depends upon the intention of the parties, and the mere receipt of part of the mortgage debt, without any other evidence of an intention to waive the foreclosure, is not sufficient for that purpose. Tompson *v.* Tappan, 139 Mass. 506, 1 N. E. 924; Lawrence *v.* Fletcher, 10 Metc. 344.

81. West *v.* Chamberlin, 8 Pick. (Mass.) 336; Amory *v.* Fairbanks, 3 Mass. 562; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98; Stevens *v.* Fellows, 70 N. H. 148, 47 Atl. 135; Hatch *v.* White, 11 Fed. Cas. No. 6,209, 2 Gall. 152; Omaly *v.* Swan, 18 Fed. Cas. No. 10,508, 3 Mason 474.

an entry *in pais* upon the land for the purpose of foreclosure, plus a judicial determination of the right of entry.[82] It is not proper to allow the litigation in this action of outside controversies between the parties,[83] nor the consolidation of mortgages on different parcels of land,[84] although the holder of two mortgages on the same land, made by the same mortgagor at different times, may unite them in one writ of entry.[85]

2. RIGHT OF ACTION. A writ of entry may be maintained by the mortgagee,[86] or an assignee of the mortgage,[87] or by a junior mortgagee,[88] when a breach of the condition of the mortgage has occurred, but not ordinarily before breach,[89] or after payment or performance of the condition.[90] It is no objection that he is already in possession of the mortgaged premises.[91]

3. DEFENSES — a. In General. On a writ of entry to foreclose a mortgage, the same defenses may be made except the plea of the statute of limitations, as in an action on the debt secured by the mortgage.[92] Thus defendant may plead want of consideration for the mortgage,[93] that there has been no breach of condition,[94] or that the debt has been fully paid or otherwise discharged.[95] He may also show that he has conveyed away his equity of redemption and disclaim all interest in the mortgaged premises;[96] but he cannot defend on the ground that he has acquired a new title since action brought, under which he now claims to hold.[97] A previous entry to foreclose is not admissible in defense, under the general issue, to show that the tenant was not in possession of the demanded premises; and prob-

82. Dooley *v.* Potter, 140 Mass. 49, 2 N. E. 935; Ingalls *v.* Richardson, 3 Metc. (Mass.) 340; Whiting *v.* Wellington, 10 Fed. 810.

Purpose of writ not dependent upon form. — The question whether a writ of entry is brought for the foreclosure of a mortgage depends on the case as disclosed by the proof, and not on the form of the writ. Blanchard *v.* Kimball, 13 Metc. (Mass.) 300.

83. Parker *v.* Moore, 63 N. H. 196.

84. Peck *v.* Hapgood, 10 Metc. (Mass.) 172.

85. Pierce *v.* Balkham, 2 Cush. (Mass.) 374.

86. Walcutt *v.* Spencer, 14 Mass. 409; Penniman *v.* Hollis, 13 Mass. 429, both holding that the mortgagee of an estate in remainder or reversion, after breach of the condition of the mortgage, and before the determination of the particular estate, may maintain a writ of entry against the mortgagor to foreclose the right of redemption.

Mortgage of different parcels. — Although a mortgage may cover two distinct parcels of real estate, a real action may be maintained at the option of the mortgagee to foreclose and recover possession of one parcel only; but the conditional judgment rendered in such action must be for the full amount of the mortgage debt. Phillips *v.* Crippen, (Me. 1886) 5 Atl. 69.

Mortgagor taking lease. — Where a mortgagor takes a lease of the mortgaged premises, and conveys his interest by deed, he becomes, after the expiration of the lease, a tenant at sufferance, and the mortgagee may maintain a writ of entry against him to recover the premises, without notice to quit. Tuttle *v.* Lane, 17 Me. 437.

87. See Day *v.* Philbrook, 85 Me. 90, 26 Atl. 999; Page *v.* Pierce, 26 N. H. 317.

88. Cochran *v.* Goodell, 131 Mass. 464; Walcutt *v.* Spencer, 14 Mass. 409. See also Batcheller *v.* Pratt, 10 Cush. (Mass.) 185. But *compare* Kilborn *v.* Robbins, 4 Allen (Mass.) 369, holding that the assignee of a first mortgage may enjoin the prosecution of a writ of entry against him to foreclose the junior mortgage, when the latter embraces another lot, now owned by the holder of the second mortgage and liable to contribute to the payment of the mortgage debt.

89. Shaw *v.* Loud, 12 Mass. 447 (breach of condition of mortgage to indemnify a surety); Estabrook *v.* Moulton, 9 Mass. 258 (breach of condition by failure to pay an instalment).

In New Hampshire, a writ of entry on a mortgage may be brought before breach of condition, and without previous notice of suit, unless it appears, expressly or by necessary implication, that it was the agreement of the parties that the mortgagor should remain in possession. Gray *v.* Gillespie, 59 N. H. 469; Hobart *v.* Sanborn, 13 N. H. 226, 38 Am. Dec. 483; Dearborn *v.* Dearborn, 9 N. H. 117; Hartshorn *v.* Hubbard, 2 N. H. 453.

90. Prescott *v.* Ellingwood, 23 Me. 345.

91. Tufts *v.* Maines, 51 Me. 393; Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1058; Beavin *v.* Gove, 102 Mass. 298; Merriam *v.* Merriam, 6 Cush. (Mass.) 91.

92. Ladd *v.* Putnam, 79 Me. 568, 12 Atl. 628; Fiske *v.* Fiske, 20 Pick. (Mass.) 499; Lebanon Sav. Bank *v.* Waterman, (N. H. 1890) 19 Atl. 1000.

93. Hannan *v.* Hannan, 123 Mass. 441, 25 Am. Rep. 121.

94. Pettee *v.* Case, 11 Gray (Mass.) 478.

95. Benson *v.* Tilton, 54 N. H. 174; Green *v.* Cross, 45 N. H. 574.

96. Olney *v.* Adams, 7 Pick. (Mass.) 31. But see Straw *v.* Greene, 14 Allen (Mass.) 206.

97. Nash *v.* Spofford, 10 Metc. (Mass.) 192, 43 Am. Dec. 425.

ably it would not be a bar under any pleadings.[98] It is no defense on a writ of entry brought on an unassigned mortgage of land by the mortgagee against the mortgagor that the mortgage and the notes secured thereby are the property of a third person, who has forbidden the suit;[99] and on a writ of entry to foreclose a mortgage releasing all homestead rights, it is a defense that the tenant had acquired a homestead right before the mortgage deed, and that the estate is sufficient to satisfy the mortgage without having recourse to the homestead.[1]

b. Set-Off. In a writ of entry on a mortgage, a set-off may be pleaded which would be admissible in an action on the debt secured.[2] This includes the legal penalties for usury in the mortgage debt,[3] but not distinct debts having no connection with the mortgage or the indebtedness which it secures.[4]

4. Parties. When the mortgage has been assigned, the writ of entry should be brought in the name of the assignee,[5] and cannot be brought in the name of the original mortgagee unless the assignment has been canceled or the estate reconveyed to him.[6] In case of joint mortgagees or owners of the several obligations secured, all must join in the writ.[7] Where a testamentary guardian of infant wards has loaned money of his wards, and taken as security a mortgage of real estate in favor of himself, the wards cannot maintain a writ of entry for possession of the mortgaged premises.[8] The proper defendant is the owner of the equity of redemption whether it be the original mortgagor,[9] or his grantee or grantees,[10] although it appears that in some cases the writ will lie against a tenant in possession,[11] and a junior mortgagee may proceed in this manner against the first mortgagee, when the latter has taken possession of the premises for the purpose of foreclosure and has obtained a conveyance of the equity of redemption.[12]

5. Pleading. In a writ of entry a declaration is not good unless it counts on a mortgage,[13] describes the demanded premises with sufficient certainty and par-

98. Devens *v.* Bower, 6 Gray (Mass.) 126.

99. Stanley *v.* Kempton, 59 Me. 472.

1. Searle *v.* Chapman, 121 Mass. 19.

2. Davis *v.* Bean, 114 Mass. 360; Holbrook *v.* Bliss, 9 Allen (Mass.) 69; Northy *v.* Northy, 45 N. H. 141.

3. Manahan *v.* Varnum, 11 Gray (Mass.) 405.

4. Davis *v.* Thompson, 118 Mass. 497; Bird *v.* Gill, 12 Gray (Mass.) 60; Moulton *v.* Adams, 67 N. H. 102, 32 Atl. 760.

5. Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613; Wolcott *v.* Winchester, 15 Gray (Mass.) 461; Gould *v.* Newman, 6 Mass. 239.

A warranty deed from a mortgagee, who has entered upon the land for breach of condition, passes his title and enables his grantee to maintain a writ of entry. Ruggles *v.* Barton, 13 Gray (Mass.) 506.

Parol and equitable assignments.—In New Hampshire it has been held that a parol assignment of a mortgage, or one enforceable only in equity, will entitle the assignee to maintain a writ of entry on the mortgage. Drew *v.* Rust, 36 N. H. 335; Rigney *v.* Lovejoy, 13 N. H. 247. But a contrary rule prevails in Massachusetts. Adams *v.* Parker, 12 Gray (Mass.) 53. And see Young *v.* Miller, 6 Gray (Mass.) 152, holding that the indorsee of one of two notes secured by a mortgage which is not assigned to him cannot maintain a writ of entry in his own name to foreclose the mortgage.

6. Ward *v.* Gunn, 12 Allen (Mass.) 81; Howe *v.* Wilder, 11 Gray (Mass.) 267; Rigney *v.* Lovejoy, 13 N. H. 247.

7. Cochran *v.* Goodell, 131 Mass. 464; Webster *v.* Vandeventer, 6 Gray (Mass.) 428; Noyes *v.* Barnet, 57 N. H. 605.

Survivor of joint mortgagees may maintain. —A writ of entry on a mortgage made to secure a note to two persons jointly may be prosecuted, after the death of one of them, by the survivor. Blake *v.* Sanborn, 8 Gray (Mass.) 154.

8. Martel *v.* Desjardin, 93 Me. 413, 45 Atl. 522.

9. Whittier *v.* Dow, 14 Me. 298.

10. Campbell *v.* Bemis, 16 Gray (Mass.) 485; Johnson *v.* Phillips, 13 Gray (Mass.) 198.

Where different portions of the land have been conveyed to different persons as tenants in common, they should all be joined in a writ of entry to foreclose the mortgage. Taylor *v.* Porter, 7 Mass. 355.

11. Wheelwright *v.* Freeman, 12 Metc. (Mass.) 154, holding that a writ of entry to foreclose a mortgage cannot be maintained against a tenant for years or at will, if he is ready and willing to surrender the possession; but if he denies the mortgagee's right, and refuses to give up the possession, the mortgagee may treat him as a tenant of the freehold by disseizin, and maintain the writ of entry against him. And see Fales *v.* Gibbs, 8 Fed. Cas. No. 4,621, 5 Mason 462.

12. Doten *v.* Hair, 16 Gray (Mass.) 149.

13. Warner *v.* Brooks, 14 Gray (Mass.) 109; Blanchard *v.* Kimball, 13 Metc. (Mass.) 300; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71. And see Briggs *v.* Sholes, 14 N. H. 262, holding that, in a writ of entry founded

ticularity,[14] and shows that the purpose of the proceeding is to effect a foreclosure of the mortgage.[15] Defendant may plead the general issue, *nul disseizin*,[16] or non-tenure with a disclaimer,[17] or such special matters as payment or tender,[18] usury,[19] or accord and satisfaction.[20]

6. Evidence. A writ of entry should be supported by production of the mortgage deed or proof of its execution, delivery, and recording,[21] and, when necessary, by proof of plaintiff's title to it as assignee.[22] If want of consideration is alleged in defense, the question may be determined on any competent evidence, defendant assuming the burden,[23] and this applies also to the issue raised by a plea of payment.[24]

7. Trial, Verdict, and Findings. In case of a discrepancy between the description of the premises in the writ and that in the mortgage, the identity of the property is a question for the court.[25] The verdict in this proceeding should either affirm or deny plaintiff's right to possession; and hence a special verdict, without a general verdict, that plaintiff is entitled to a "mortgage judgment" is irregular and irrelevant.[26] Where one mortgage is made to secure several debts due to the different mortgagees, an assignee of the mortgage and of all the debts but one may maintain a writ of entry, if the remaining debt is outstanding in the hands of some third person, other than the mortgagor himself, and if he shows himself otherwise entitled, he may have an absolute verdict.[27] Where defendant pleads payment of the mortgage, if the jury finds that nothing is due upon the mortgage, plaintiff cannot recover, although the payment was made after breach of condition.[28]

8. Judgment. Judgment for plaintiff in a writ of entry will be entered in the conditional form, that is, that he shall have possession of the premises unless defendant shall within a limited time pay the amount ascertained and declared to be due,[29] except where neither party desires or claims a conditional judgment, in

on a mortgage, if the declaration is general in form, a suggestion that it is on a mortgage, and that a conditional judgment only should be entered, may be filed at any stage of the proceedings, even after verdict.

14. Sherman *v.* Hanno, 66 N. H. 160, 28 Atl. 18.

The declaration may be amended so as to embrace a lot of land accidentally omitted from the description in the declaration. Noyes *v.* Richardson, 59 N. H. 490.

15. Fiedler *v.* Carpenter, 8 Fed. Cas. No. 4,759, 2 Woodb. & M. 211.

16. Perkins *v.* Eaton, 64 N. H. 359, 10 Atl. 704, holding that this plea admits that defendant is in possession of the demanded premises, claiming a freehold, and denies plaintiff's right to recover any part of the premises.

Evidence inadmissible under general issue. — On the trial of the general issue in a writ of entry to foreclose a mortgage, defendant cannot show that the demanded premises are subject to a mortgage previous and paramount to that of the demandant, and that the holder of such earlier mortgage, before the commencement of the suit at bar, recovered judgment for possession to foreclose, and took and holds possession under such judgment. Amidown *v.* Peck, 11 Metc. (Mass.) 467. Nor can he show an officer's deed to the demandant of the right, in equity, of redeeming the land, made previous to the assignment of the mortgage to him. Tuttle *v.* Brown, 14 Pick. (Mass.) 514.

17. Stark *v.* Brown, 40 N. H. 345; Wheeler *v.* Bates, 21 N. H. 460; Marsh *v.* Smith, 18 N. H. 366. *Compare* Fiedler *v.* Carpenter, 8 Fed. Cas. No. 4,759, 2 Woodb. & M. 211.

18. Richmond Iron Works *v.* Woodruff, 8 Gray (Mass.) 447; Ffrost *v.* Butler, 58 N. H. 146. See also Foss *v.* Hildreth, 10 Allen (Mass.) 76; Rochester *v.* Whitehouse, 15 N. H. 468.

19. Divoll *v.* Atwood, 41 N. H. 446; Briggs *v.* Sholes, 14 N. H. 262.

20. See Slayton *v.* McIntyre, 11 Gray (Mass.) 271.

21. Thompson *v.* Watson, 14 Me. 316; Burridge *v.* Fogg, 8 Cush. (Mass.) 183; Union Bank *v.* Thayer, 14 Mass. 362; Hobart *v.* Sanborn, 13 N. H. 226, 38 Am. Dec. 483.

22. Richardson *v.* Noble, 77 Me. 390.

23. Hannan *v.* Hannan, 123 Mass. 441, 25 Am. Rep. 121; Parker *v.* Floyd, 12 Cush. (Mass.) 230; Wearse *v.* Peirce, 24 Pick. (Mass.) 141.

24. See Waugh *v.* Riley, 8 Metc. (Mass.) 290.

25. Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1058.

26. Hadley *v.* Hadley, 80 Me. 459, 15 Atl. 47.

27. Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613.

28. Slayton *v.* McIntyre, 11 Gray (Mass.) 271.

29. Raynham *v.* Wilmarth, 13 Metc. (Mass.) 414; Fales *v.* Gibbs, 8 Fed. Cas. No. 4,621, 5 Mason 462.

which case it may be entered in the common form.[30] And in an action upon a mortgage of the fee to recover the mortgaged premises, an absolute judgment, for them and for waste committed thereon, may be rendered against a stranger.[31] The amount due and recoverable will be computed by the court,[32] such amount being ascertained according to equity and good conscience and by the same rules that would apply on a bill in chancery for redemption;[33] and the recovery will include all that has become due and payable at the date of entering the judgment, not merely at the date of the commencement of the suit,[34] and may, in proper cases, include taxes paid by the mortgagee,[35] interest,[36] and costs.[37] Where the mortgage was given to secure the performance of various acts from time to time, other than the payment of money, the court, in order to accomplish the purposes of the mortgage, is authorized to enter any decree, from time to time, *toties quoties*, which may be made in a suit in equity, and to issue any process to carry such a decree into effect.[38]

9. Enforcement of Judgment and Possession Thereunder. A mortgagee does not, by bringing a writ of entry to foreclose, and obtaining a conditional judgment, waive his right to take possession of the land during the time allowed to the mortgagor to pay the amount ascertained by the judgment to be due;[39] and if the limited time expires without payment of the amount fixed by the judgment, he will then be entitled to be put in possession by means of an appropriate writ for that purpose, and if no redemption is thereafter effected within the time limited by the statute, the foreclosure becomes complete.[40] After judgment the

If defendant is defaulted, the conditional judgment may be entered by filing an attested copy of the mortgage deed, instead of the original. Union Bank *v.* Thayer, 14 Mass. 362.

A contingent debt, secured by mortgage, may be assigned therewith; and after the debt becomes absolute the assignee may have a conditional judgment in a suit on the mortgage. Bancroft *v.* Marshall, 16 N. H. 244.

Absolute deed as mortgage.— In an action for the land after condition broken, the grantee, suing on an absolute deed with a bond to reconvey, will be entitled to conditional judgment. Jackson *v.* Ford, 40 Me. 381.

Judgment as evidence.—A conditional judgment on a writ of entry to foreclose a mortgage is conclusive evidence of the amount then due on the mortgage (Sparhawk *v.* Wills, 5 Gray (Mass.) 423), although not as against a purchaser of the equity of redemption before the bringing of the writ (Dooley *v.* Potter, 140 Mass. 49, 2 N. E. 935).

Effect of payment.— If it appears that the debt secured by the mortgage has been paid, the mortgagee, in a writ of entry, cannot have judgment for possession of the land. Vose *v.* Handy, 2 Me. 322, 11 Am. Dec. 101.

30. Howard *v.* Houghton, 64 Me. 445; Treat *v.* Pierce, 53 Me. 71; Provident Sav. Inst. *v.* Burnham, 128 Mass. 457.

31. Bird *v.* Decker, 64 Me. 550.

32. Ladd *v.* Putnam, 79 Me. 568, 12 Atl. 628; Rice *v.* Clark, 10 Metc. (Mass.) 500; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71. See also Sargent *v.* McFarland, 8 Pick. (Mass.) 500; Wilder *v.* Whittemore, 15 Mass. 262.

Indemnity mortgage.— Where the mortgage was given to indemnify the mortgagee for liability incurred by signing accommodation notes, the conditional judgment should be for the amount he has been compelled to pay on such notes, with interest from the date of payment. Athol Sav. Bank *v.* Pomroy, 115 Mass. 573.

33. Holbrook *v.* Bliss, 9 Allen (Mass.) 69.

Deductions.— Allowance may be made to defendant for the statutory penalties for usury (Divoll *v.* Atwood, 41 N. H. 446; Briggs *v.* Sholes, 14 N. H. 262), but not for a payment to the mortgagee of a sum of money over and above the interest due on his debt, in consideration of his forbearance to enter and foreclose, where such payment and forbearance were not originally stipulated for (Drury *v.* Morse, 3 Allen (Mass.) 445).

34. Stewart *v.* Clark, 11 Metc. (Mass.) 384; Northy *v.* Northy, 45 N. H. 141.

35. Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729.

36. Kimball *v.* Cotton, 58 N. H. 515.

37. Holmes *v.* French, 70 Me. 341; Dodge *v.* Clark, 39 N. H. 243.

38. Stewart *v.* Clark, 11 Metc. (Mass.) 384.

39. Mann *v.* Earle, 4 Gray (Mass.) 299.

40. Hurd *v.* Coleman, 42 Me. 182; Doyle *v.* Coburn, 6 Allen (Mass.) 71; Creighton *v.* Proctor, 12 Cush. (Mass.) 433; Deming *v.* Comings, 11 N. H. 474; Downer *v.* Clement, 11 N. H. 40.

Subsequent disseizin.— A mortgagee, to whom possession of the premises has been delivered on an execution issued on the conditional judgment, if subsequently disseized by the mortgagor, before the expiration of the time for redemption, may maintain a writ of entry against such mortgagor. Miner *v.* Stevens, 1 Cush. (Mass.) 468.

mortgagee is entitled, on the same grounds as before, to take possession of the land.[41]

XX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

A. Nature of Remedy and Right to Foreclose — 1. NATURE OF REMEDY. A power of sale in a mortgage or deed of trust, when properly exercised, enables the party in interest to effect a complete foreclosure of the mortgage by entirely *ex parte* proceedings, without submitting his rights to a court of law or of equity and without invoking the aid of such a court.[42] This method of foreclosure *in pais* therefore is not in any sense a suit or action,[43] and will be reviewed by the courts only to the extent of seeing that the sale was justified by a default, and was made in strict conformity to the terms of the deed and was free from fraud, deceit, or oppression.[44] There is no redemption from such a sale unless given by a statute; and a statute allowing it will be strictly construed, and cannot be extended by implication to persons or cases not clearly within its terms.[45] It has been held that a foreclosure of a mortgage, when made in conformity to a statute, is a judicial sale,[46] or at least one of a quasi-judicial character.[47]

2. VALIDITY OF POWER — a. In General. A power of sale in a mortgage or deed of trust, authorizing foreclosure by advertisement and sale without resort to the courts, is not contrary to public policy or the policy of the law; but on the contrary is perfectly legal and valid,[48] except in a few states, where the statutes expressly forbid the exercise of such powers and require all foreclosures to be effected by judicial proceedings.[49] And such a power may be incorporated in a

41. As to right to maintain a scire facias on the judgment see Porter *v.* Shaw, 98 Mass. 505; Sigourney *v.* Stockwell, 4 Metc. (Mass.) 518.

42. *Alabama.*—Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515.

California.— Koch *v.* Briggs, 14 Cal. 256, 73 Am. Dec. 651.

Illinois.— Bloom *v.* Van Rensselaer, 15 Ill. 503.

Iowa.— Crocker *v.* Robertson, 8 Iowa 404.

Maryland.— Wilson *v.* Watts, 9 Md. 356.

Massachusetts.— Judge *v.* Pfaff, 171 Mass. 195, 50 N. E. 524.

Minnesota.— See Tappan *v.* Huntington, 97 Minn. 31, 106 N. W. 98.

Mississippi.— Hyde *v.* Warren, 46 Miss. 13; Sims *v.* Hundly, 2 How. 896. But *compare* Ford *v.* Russell, Freem. 42.

North Dakota.— McCann *v.* Mortgage, etc., Co., 3 N. D. 172, 54 N. W. 1026.

See 35 Cent. Dig. tit. "Mortgages," § 1013.

43. Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868; Hall *v.* Bartlett, 9 Barb. (N. Y.) 297.

44. Elliott *v.* Wood, 45 N. Y. 71. And see Colson *v.* Williams, 58 L. J. Ch. 539, 61 L. T. Rep. N. S. 71.

45. Walden *v.* Speigner, 87 Ala. 379, 6 So. 81; Commercial R., etc., Assoc. *v.* Parker, 84 Ala. 298, 4 So. 268; Powers *v.* Andrews, 84 Ala. 289, 4 So. 263 [*overruling* Bailey *v.* Timberlake, 74 Ala. 221]; Dickerson *v.* Hayes, 26 Minn. 100, 1 N. W. 834.

46. Sturdevant *v.* Norris, 30 Iowa 65. See also Alexander *v.* Howe, 85 Va. 198, 7 S. E. 248.

47. Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348.

48. *California.* — Fogarty *v.* Sawyer, 17 Cal. 589.

Georgia.— Moseley *v.* Rambo, 106 Ga. 597, 32 S. E. 638, holding that a power of sale in a mortgage given to secure a debt which is part usurious may be exercised, at least to the extent of collecting the principal with lawful interest.

Illinois.— Strother *v.* Law, 54 Ill. 413; Weld *v.* Rees, 48 Ill. 428; Longwith *v.* Butler, 8 Ill. 32.

Michigan.— Lariverre *v.* Rains, 112 Mich. 276, 70 N. W. 583. *Compare* Pierce *v.* Grimley, 77 Mich. 273, 43 N. W. 932.

Montana.— Butte First Nat. Bank *v.* Bell Silver, etc., Min. Co., 8 Mont. 32, 19 Pac. 403 [*affirmed* in 156 U. S. 470, 15 S. Ct. 440, 39 L. ed. 497].

New Hampshire.— Pearson *v.* Gooch, (1898) 40 Atl. 390; Very *v.* Russell, 65 N. H. 646, 23 Atl. 522 [*disapproving* Bell *v.* Twilight, 22 N. H. 500].

New York.— Elliott *v.* Wood, 45 N. Y. 71.

South Dakota.— Male *v.* Longstaff, 9 S. D. 389, 69 N. W. 577.

Virginia.—Taylor *v.* Chowning, 3 Leigh 654.

United States.— Bowen *v.* Kendall, 3 Fed. Cas. No. 1,724, 1 Brunn. Col. Cas. 704; Platt *v.* McClure, 19 Fed. Cas. No. 11,218, 3 Woodb. & M. 151.

England.— Craddock *v.* Rogers, 53 L. J. Ch. 968, 51 L. T. Rep. N. S. 191, holding that the validity of such powers is fully recognized, but their exercise may be restrained where granted under circumstances indicating extortion or oppression.

Canada.— Nesbitt *v.* Rice, 14 U. C. C. P. 409.

See 35 Cent. Dig. tit. "Mortgages," § 1013. And see *supra*, I, C, 3; VIII, H, 8.

49. See *infra*, XX, A, 2, b.

mortgage conditioned otherwise than for the payment of a specific sum of money.[50]

b. Statutory Provisions. In several of the states the right to exercise a power of sale contained in a mortgage or deed of trust has been taken away by statutes requiring judicial proceedings for foreclosure in all cases, or much restricted;[51] and in others laws have been passed regulating the exercise of such powers in respect to the notice to be given, the time and place of sale, and other particulars, which statutes must of course be fully complied with in order to effect a valid foreclosure.[52] But no statute of either class will be held to apply to mortgages or deeds executed before its passage,[53] unless it is made retroactive by its express terms;[54] and if it is to be given a retrospective application it will not be valid in so far as it operates to take away entirely the right of foreclosure by advertisement and sale, under existing mortgages, or to invalidate such foreclosures previously made,[55] although it may constitutionally apply to mortgages previously made, in so far as it merely regulates the manner or conditions of the exercise of the power.[56] It is also within the constitutional power of the legislature to validate, by a curative act, foreclosures previously made by an irregular or defective exercise of the power.[57] Statutes regulating the exercise of such powers do not apply where the mortgaged land lies in another state.[58]

50. Richards *v.* Bibb County Loan Assoc., 24 Ga. 198 (mortgage securing an unliquidated demand); Jackson *v.* Turner, 7 Wend. (N. Y.) 458 (mortgage securing the payment of a debt in specific articles of property).

51. See the statutes of the different states. And see the following cases:

Colorado.— Brewer *v.* Harrison, 27 Colo. 349, 62 Pac. 224; Hamill *v.* Copeland, 26 Colo. 178, 56 Pac. 901.

Idaho.— Brown *v.* Bryan, 5 Ida. 145, 51 Pac. 995.

Nebraska.— Comstock *v.* Michael, 17 Nebr. 288, 22 N. W. 549; Hurley *v.* Estes, 6 Nebr. 386; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; Kyger *v.* Ryley, 2 Nebr. 20; Staunchfield *v.* Jeutter, 4 Nebr. (Unoff.) 847, 96 N. W. 642; Cullen *v.* Casey, 1 Nebr. (Unoff.) 344, 95 N. W. 605.

Oregon.— Marquam *v.* Ross, 47 Oreg. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; Thompson *v.* Marshall, 21 Oreg. 171, 27 Pac. 957.

United States.— Wheeler *v.* Sexton, 34 Fed. 154; Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400, McCahon (Kan.) 214, construing the statute of the Territory of Kansas.

See 35 Cent. Dig. tit. "Mortgages," § 1014.

In Iowa an act was passed in 1858 declaring that no mortgage should be foreclosed otherwise than by an action in court; but there was an exception as to deeds of trust, and it was held that a mortgage with power of sale was within the exception. Fanning *v.* Kerr, 7 Iowa 450.

Statute as to effect of mortgage.—A power of sale in an instrument given to secure a debt is not rendered invalid, nor its exercise prohibited, by a statute declaring that a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without foreclosure and sale. Bell Silver, etc., Min. Co. *v.* Butte First Nat. Bank, 156 U. S. 470, 15 S. Ct. 440, 39 L. ed. 497.

52. See the statutes of the different states. And see the following cases:

Maryland.— Walker *v.* Cockey, 38 Md. 75; Eichelberger *v.* Hardesty, 15 Md. 548.

Massachusetts.— Judge *v.* Pfaff, 171 Mass. 195, 50 N. E. 524.

Mississippi.— Williams *v.* Dreyfus, 79 Miss. 245, 30 So. 633.

North Dakota.— Orvik *v.* Casselman, (1905) 105 N. W. 1105.

Texas.— Fischer *v.* Simon, 95 Tex. 234, 66 S. W. 447, 882; Marston *v.* Yaites, (Civ. App. 1901) 66 S. W. 867; Swain *v.* Mitchell, 27 Tex. Civ. App. 62, 66 S. W. 61.

53. *Arkansas.*— Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104.

Colorado.— Smissaert *v.* Prudential Ins. Co., 15 Colo. App. 442, 62 Pac. 967.

Illinois.— Fisher *v.* Green, 142 Ill. 80, 31 N. E. 172.

Iowa.— Thatcher *v.* Haun, 12 Iowa 303.

Minnesota.— Webb *v.* Lewis, 45 Minn. 285, 47 N. W. 803.

North Dakota.— Nichols *v.* Tingstad, 10 N. D. 172, 86 N. W. 694.

Texas.— Childs *v.* Hill, 20 Tex. Civ. App. 162, 49 S. W. 652.

See 35 Cent. Dig. tit. "Mortgages," § 1014.

54. Webb *v.* Lewis, 45 Minn. 285, 47 N. W. 803.

55. Fisher *v.* Green, 43 Ill. App. 595; O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

56. James *v.* Stull, 9 Barb. (N. Y.) 482 [*affirmed* in Seld. 9].

57. Madigan *v.* Workingmen's Permanent Bldg., etc., Assoc., 73 Md. 317, 20 Atl. 1069; Johnson *v.* Peterson, 90 Minn. 503, 97 N. W. 384. *Compare* Finlayson *v.* Peterson, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532.

58. Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43; Elliott *v.* Wood, 45 N. Y.

3. Right to Foreclose — a. In General. No valid or effectual sale can be made under a power in a mortgage or deed of trust until there has been a breach of the condition of the security or default in the payment of the debt secured,[59] or, if such be the terms of the deed, default in the payment of one or more of the separate items of the debt or an instalment thereof,[60] or, if the instrument so provides, default in the payment of taxes on the property[61] or insurance premiums,[62] nor until such default has continued for the number of days fixed by the instrument itself.[63] Nor can the power be exercised after it appears from the face of the mortgage that the debt secured has become barred by the statute of limitations.[64] But the right to exercise it is not affected by the bankruptcy or insolvency of the mortgagor.[65]

b. Default in Payment of Interest. If the mortgage or deed of trust so pro-

71; Central Gold Min. Co. *v.* Platt, 3 Daly (N. Y.) 263. And see Smith *v.* Green, 41 Fed. 455.

59. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Lane *v.* Westmoreland, 79 Ala. 372.

California.— Meetz *v.* Mohr, 141 Cal. 667, 75 Pac. 298.

Colorado.— Coler *v.* Barth, 24 Colo. 31, 48 Pac. 656.

Georgia.— Moseley *v.* Rambo, 106 Ga. 597, 32 S. E. 638.

Illinois.— Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Ventres *v.* Cobb, 105 Ill. 33; Chapin *v.* Billings, 91 Ill. 539; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350.

Massachusetts.— Rogers *v.* Barnes, 169 Mass. 179, 47 N. E. 602, 38 L. R. A. 145.

Mississippi.— Walker *v.* Brungard, 13 Sm. & M. 723.

Missouri.— Eitelgeorge *v.* Mutual House Bldg. Assoc., 69 Mo. 52.

New York.— Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458.

Texas.— Harrold *v.* Warren, (Civ. App. 1898) 46 S. W. 657.

West Virginia.— Curry *v.* Hill, 18 W. Va. 370.

See 35 Cent. Dig. tit. "Mortgages," § 1019.

Indemnity mortgages.— The right to foreclose an indemnity mortgage, by exercise of the power of sale, accrues as soon as the person to be secured has paid the debt against which he was to be protected, or become fixedly liable for it. Butler *v.* Ladue, 12 Mich. 173.

As to sale under mortgage for support and maintenance see Hebert *v.* Turgeon, 84 Minn. 34, 86 N. W. 757.

Option to renew.— A note for one year provided that, "if not paid at maturity, it is hereby renewed from year to year at the option of the holder until paid, and during such year the maker shall not have the right to pay the same." The trustee in the deed securing the note advertised the property for sale, and sold it three years and sixteen days after the date of the note. It was held that the payee thereby treated the note as due and exercised the option not to renew it. Sacramento Bank *v.* Copsey, 133 Cal. 663, 66 Pac. 8, 205, 85 Am. St. Rep. 242.

Mortgagor in possession.— The fact that the grantor in a trust deed remains in possession of the premises does not affect the right to enforce a power of sale contained in the deed. Dimmit County *v.* Oppenheimer, (Tex. Civ. App. 1897) 42 S. W. 1029.

60. *Alabama.*— Ford *v.* Lewis, (1906) 41 So. 144; Moody *v.* Atkins, (1906) 40 So. 305; Keith *v.* McLaughlin, 105 Ala. 339, 16 So. 886.

Illinois.— Gibbons *v.* Hoag, 95 Ill. 45.

Kentucky.— Ormsby *v.* Tarascon, 3 Litt. 404, holding that where a power in a mortgage authorizes a sale of the whole of the mortgaged land or such part of it as may suffice to discharge the instalments then due, a sale for instalments yet to become due, as well as for those already due, is void.

Maryland.— State *v.* Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172.

Minnesota.— See Felton *v.* Bissel, 25 Minn. 15.

Mississippi.— Bridges *v.* Ballard, 62 Miss. 237.

Missouri.— Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223; Pfeninghausen *v.* Shearer, 65 Mo. App. 348.

North Carolina.— See Hinton *v.* Jones, 136 N. C. 53, 48 S. E. 546.

Ohio.— Cobb *v.* Voorhees, 1 Ohio Dec. (Reprint) 380, 8 West. L. J. 472.

See 35 Cent. Dig. tit. "Mortgages," § 1019.

61. Pope *v.* Durant, 26 Iowa 233. See also Lawler *v.* French, 104 Va. 140, 51 S. E. 180, holding that the right given by a deed of trust to foreclose if the debtor fails to pay the taxes within ten days after they are due is not waived by failure to sell till after the taxes have been due for three years and the creditor has paid them.

62. Walker *v.* Cockey, 38 Md. 75.

63. Holden *v.* Gilbert, 7 Paige (N. Y.) 208; Fenley *v.* Cassidy, (R. I. 1899) 43 Atl. 296; Young *v.* Van Benthuysen, 30 Tex. 762.

64. Ford *v.* Nesbitt, 72 Ark. 267, 79 S. W. 793; Hill *v.* Gregory, 64 Ark. 317, 42 S. W. 408; Union, etc., Bank *v.* Smith, 107 Tenn. 476, 64 S. W. 756. *Contra*, Miller *v.* Coxe, 133 N. C. 578, 45 S. E. 940; Adams *v.* Kaufman, 11 Tex. Civ. App. 179, 32 S. W. 712.

65. Ensor *v.* Lewis, 54 Md. 391; Gordon *v.* Ross, 11 Grant Ch. (U. C.) 124. But *compare* Mackubin *v.* Boarman, 54 Md. 384; Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 1 Woods 552.

vides, the power of sale may be exercised upon default in the payment of any instalment of the stipulated interest, although the principal be not yet due;[66] and where it gives the creditor the right to declare the whole secured debt due upon such default in the payment of interest, no formal declaration of his intention in that regard is necessary, nor, unless expressly provided in the instrument, is he required to give the debtor any other notice than such as is afforded by the advertisement of sale.[67]

c. Effect of Payment, Tender, or Release. No valid sale can be made under a mortgage or trust deed after the debt secured has been paid,[68] after a sufficient tender of the whole amount due,[69] or after the execution of a sufficient release or discharge of the security.[70]

4. Revocation or Suspension of Power — a. In General. A power of sale granted in a mortgage or deed of trust is not revocable at the will of the mort-

66. *Arizona.*— Hooper *v.* Stump, (1887) 14 Pac. 799.

District of Columbia.— Wheeler *v.* McBlair, 5 App. Cas. 375.

Illinois.— Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Parmly *v.* Walker, 102 Ill. 617.

Missouri.— Butler Bldg., etc., Inv. Co. *v.* Dunsworth, 146 Mo. 361, 48 S. W. 449; Waples *v.* Jones, 62 Mo. 440; Dalton *v.* Eaves, 92 Mo. App. 72. *Compare* Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402.

Texas.— Jouett *v.* Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194; Martin *v.* Land Mortg. Bank, 5 Tex. Civ. App. 167, 23 S. W. 1032.

United States.— Wheeler *v.* McBlair, 172 U. S. 643, 19 S. Ct. 882, 43 L. ed. 1182; Richards *v.* Holmes, 18 How. 143, 15 L. ed. 304.

Premature sale.— Where, by mistake, the interest on a mortgage is calculated at an unlawful rate, and appears, according to such calculation, to be in default, a sale made thereupon is premature and invalid if the payments of interest already made would be more than sufficient to keep down the interest accruing at the lawful rate. Duncan *v.* Hough, (Tex. Civ. App. 1894) 27 S. W. 945.

Relief in equity.— In an early case it was held that a stipulation of this kind in a deed of trust was in the nature of a penalty or forfeiture, against which equity should relieve the debtor, on terms of his paying the interest overdue, at any time before sale actually made. Mayo *v.* Judah, 5 Munf. (Va.) 495. But the approved modern doctrine refuses to regard these stipulations as imposing penalties, or in any unfavorable light. They impose nothing more than a fixed pecuniary obligation, and are to be enforced according to the intention and agreement of the parties; and equity will not interfere unless some special circumstances of fraud or oppression are shown. Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336; Houston *v.* Curran, 101 Ill. App. 203; Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Holland *v.* Sampson, 4 Pa. Cas. 164, 6 Atl. 772.

Place of payment of interest.— Where former payments of interest have been made at a place other than that designated in the deed of trust, the creditor cannot properly demand payment of an accruing instalment at the stipulated place, and declare a forfeiture for its non-payment there, without first giving some notice to the debtor as to the place where he expected the payment to be made. Rounsavell *v.* Crofoot, 4 Ill. App. 671.

67. *Colorado.*— Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223.

Dakota.— Hodgdon *v.* Davis, 6 Dak. 21, 50 N. W. 478.

Illinois.— Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Princeton L. & T. Co. *v.* Munson, 60 Ill. 371; Harper *v.* Ely, 56 Ill. 179; Owen *v.* Occidental Bldg., etc., Assoc., 55 Ill. App. 347.

Minnesota.— Fowler *v.* Woodward, 26 Minn. 347, 4 N. W. 231.

Mississippi.— Dunton *v.* Sharpe, 70 Miss. 850, 12 So. 800.

Texas.— Chase *v.* Cleburne First Nat. Bank, 1 Tex. Civ. App. 595, 20 S. W. 1027.

See 35 Cent. Dig. tit. "Mortgages," § 1020.

68. Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302, 25 Am. Rep. 386; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350; Penny *v.* Cook, 19 Iowa 538; Tisomingo Sav. Inst. *v.* Duke, (Miss. 1887) 1 So. 165.

Unpaid check.— Foreclosure of a trust deed by exercise of the power of sale is not prevented or rendered invalid by the mere fact that the trustee has in his hands a check given by the mortgagor in part payment of the principal of the debt secured, when payment of the check has been refused. Stevenson *v.* Dana, 166 Mass. 163, 44 N. E. 128.

69. Wittmeier *v.* Tidwell, (Ala. 1906) 40 So. 963 (holding that tender must include attorney's fees when mortgage so provides); Philips *v.* Bailey, 82 Mo. 639; Jenkins *v.* Jones, 2 Giffard 99, 6 Jur. N. S. 391, 29 L. J. Ch. 493, 8 Wkly. Rep. 270, 66 Eng. Reprint 43. *Compare* Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532, holding that where default has been made both in the payment of interest and of taxes, and either default would justify a sale, a tender of the interest alone will not prevent a foreclosure for breach of the condition to pay taxes.

70. Benson *v.* Markoe, 41 Minn. 112, 42 N. W. 787.

gagor or grantor, nor by his subsequent acts or conduct, without the consent of the party secured.[71] Nor is it revoked or suspended by the supervening insanity of the mortgagor,[72] nor ordinarily by the mortgagee's resorting to other remedies, such as garnishment, to collect his debt,[73] although it may be suspended by the filing of a bill to redeem, accompanied by a sufficient tender or offer to pay.[74] Where the description in a trust deed of lots in a subdivision of a city block is a matter of record, the trustee's power to sell on default of payment is not defeated by a resubdivision of the block.[75] It has been held that a sale made during the Civil war while the mortgagor was residing within the military lines of the Confederate states[76] or engaged in making war against the government was valid.[77]

b. Death of Party. According to the doctrine generally accepted, a power of sale contained in a mortgage or deed of trust is not revoked by the death of the grantor or mortgagor.[78] But the power is so far personal to a trustee that it does not pass to his heirs or representatives upon his death, but must be exercised by a successor duly appointed.[79]

5. Right of Junior Encumbrancers. A senior mortgagee, proceeding to foreclose by means of his power of sale, is not bound to notify the junior encum-

71. Ray *v.* Hemphill, 97 Ga. 563, 25 S. E. 485; Hyde *v.* Warren, 46 Miss. 13; Bancroft *v.* Ashhurst, 2 Grant (Pa.) 513; State Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232. *Compare* Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 1 Woods 552.

72. Berry *v.* Skinner, 30 Md. 567; Lundberg *v.* Davidson, 72 Minn. 49, 74 N. W. 1018, 42 L. R. A. 103; Vanmeter *v.* Darrah, 115 Mo. 153, 22 S. W. 30; Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422.

73. Benjamin *v.* Loughborough, 31 Ark. 210.

74. Clark *v.* Griffin, 148 Mass. 540, 20 N. E. 169.

75. Meacham *v.* Steele, 93 Ill. 135.

76. Mitchell *v.* Nodaway County, 80 Mo. 257; Martin *v.* Paxson, 66 Mo. 260; De Jarnette *v.* De Giverville, 56 Mo. 440. But see Green *v.* Alexander, 7 D. C. 147; Walker *v.* Beauchler, 27 Gratt. (Va.) 511; Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

77. Bush *v.* Sherman, 80 Ill. 160.

78. *Arkansas.* — Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104; Hannah *v.* Carrington, 18 Ark. 85.

California. — More *v.* Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128.

Illinois. — Strother *v.* Law, 54 Ill. 413.

Massachusetts. — Conners *v.* Holland, 113 Mass. 50; Varnum *v.* Meserve, 8 Allen 158.

Missouri. — Beatie *v.* Butler, 21 Mo. 313, 64 Am. Dec. 234.

Montana. — Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

New York. — Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281.

North Carolina. — Carter *v.* Slocomb, 122 N. C. 475, 29 S. E. 720, 65 Am. St. Rep. 714.

North Dakota. — Grandin *v.* Emmons, 10 N. D. 223, 86 N. W. 723, 88 Am. St. Rep. 684, 54 L. R. A. 610.

South Dakota. — Reilly *v.* Phillips, 4 S. D. 604, 57 N. W. 780.

Tennessee. — Hodges *v.* Gill, 9 Baxt. 378; Wilburn *v.* Spofford, 4 Sneed 698.

Virginia. — State Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

See 35 Cent. Dig. tit. "Mortgages," § 1018.

Contra. — Wilkins *v.* McGehee, 86 Ga. 764, 13 S. E. 84; Miller *v.* McDonald, 72 Ga. 20; Lathrop *v.* Brown, 65 Ga. 312; Williams *v.* Washington, 40 S. C. 457, 19 S. E. 1; Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636; Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 1 Woods 552.

In Texas the death of the mortgagor so far revokes the power conferred upon a trustee to sell that a sale made pending an administration, or within four years after the death of the mortgagor, is void. Whitmire *v.* May, 96 Tex. 317, 72 S. W. 375; McLane *v.* Paschal, 47 Tex. 365; Buchanan *v.* Monroe, 22 Tex. 537; Robertson *v.* Paul, 16 Tex. 472; Williams *v.* Armistead, (Civ. App. 1905) 90 S. W. 925; Texas Loan Agency *v.* Dingee, 33 Tex. Civ. App. 118, 75 S. W. 866; Swearingen *v.* Williams, 28 Tex. Civ. App. 559, 67 S. W. 1061; Markham *v.* Wortham, (Civ. App. 1902) 67 S. W. 341. See also Gillaspie *v.* Murray, 27 Tex. Civ. App. 580, 66 S. W. 252; Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689; National Exch. Bank *v.* Jackson, (Civ. App. 1895) 33 S. W. 277.

Death of member of partnership. — Where a partnership has conveyed land in trust, with power of sale, to secure a firm debt, the death of one of the partners does not affect the power of the trustee to sell. Schwab Clothing Co. *v.* Claunch, (Tex. Civ. App.) 1895) 29 S. W. 922.

Consent of grantor required. — Where a condition is attached to a power of sale in a trust deed that the trustee shall only sell by and with the consent of the grantor, to be manifested by his joining in the conveyance, and no provision is made for the execution of the power in case of the death of the grantor, the power will be extinguished on the happening of that event, and a sale cannot afterward be made. Kissam *v.* Dierkes, 49 N. Y. 602.

79. Crittenden *v.* Johnson, 11 Ark. 94.

brancer, nor can the latter, in the absence of special equities, stop the proceedings by anything less than payment or redemption of the elder mortgage.[80]

6. Concurrent Remedies and Pending Proceedings. The fact that the mortgage creditor has another and an adequate remedy for the collection of his debt or the enforcement of his mortgage does not compel him to forego the exercise of a power of sale given him by the mortgage, unless in cases where the rights of the parties are of such a nature that they cannot be properly ascertained and adjusted except through the aid of a court of equity.[81] Nor is he prevented from exercising his power of sale even by the fact that other proceedings to collect the debt or enforce the mortgage have been commenced and are pending,[82] unless this is specially forbidden by statute.[83] On the other hand, where there is any reason why the power of sale cannot be exercised, the mortgagee may resort to a proper court for foreclosure.[84]

B. Restraining Exercise of Power — 1. Grounds For Injunction — a. In General. A court of equity will not interfere to delay or stop the sale of mortgaged premises under a power in the mortgage or deed of trust, unless it is shown that the collection of the debt would be against good conscience or that particular circumstances, extrinsic to the instrument, render its enforcement in this manner inequitable.[85] If the breach of condition justifying the sale is established or undisputed,[86] and the right and authority of the creditor to proceed in this manner are not successfully controverted,[87] he will not be enjoined merely because some party in interest prefers another method of foreclosure or desires an

80. Lowe *v.* Grinnan, 19 Iowa 193; Hardwicke *v.* Hamilton, 121 Mo. 465, 26 S. W. 342; Chase *v.* Williams, 74 Mo. 429; Hornby *v.* Cramer, 12 How. Pr. (N. Y.) 490.

The bankruptcy of a subsequent mortgagee is no objection to the execution of a power of sale contained in the senior mortgage; that is, although the sale will cut off the junior mortgagee's right of redemption, it is not necessary first to obtain leave of the bankruptcy court. Long *v.* Rogers, 15 Fed. Cas. No. 8,482, 6 Biss. 416.

Ratification of sale.— Where a junior encumbrancer, in a proceeding to set aside a sheriff's sale and a deed of trust, moves that the sheriff be ordered to pay to him the surplus proceeds of the sale, he ratifies the sale. Chase *v.* Williams, 74 Mo. 429.

Junior mortgagee filing bill to foreclose.— A junior mortgagee, because he has first commenced proceedings to foreclose by filing a complaint and notice of *lis pendens*, cannot interfere, to arrest the senior mortgagee in his proceedings to foreclose by advertisement and sale, where the senior mortgagee had in fact published his advertisement previous to the service of the summons in the foreclosure suit. Bedell *v.* McClellan, 11 How. Pr. (N. Y.) 172.

81. See Erwin *v.* Hall, 18 Ill. App. 315; Drayton *v.* Chandler, 93 Mich. 383, 53 N. W. 558; Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108; Strong *v.* Tomlinson, 88 Mich. 112, 50 N. W. 106.

82. *California.*— Mayhall *v.* Eppinger, 137 Cal. 5, 69 Pac. 489.

Illinois.— Sawyer *v.* Campbell, 130 Ill. 186, 22 N. E. 458; Jenkins *v.* International Bank, 111 Ill. 462; Tartt *v.* Clayton, 109 Ill. 579.

Louisiana.— Lacassagne *v.* Abrabam, 51 La. Ann. 840, 25 So. 441.

Maryland.— Ensor *v.* Keech, 64 Md. 378, 1 Atl. 756.

Massachusetts.— Montague *v.* Dawes, 12 Allen 397.

Minnesota.— Jones *v.* Ewing, 22 Minn. 157; Goenen *v.* Schroeder, 18 Minn. 66; Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95; Montgomery *v.* McEwen, 9 Minn. 103.

Ohio.— Brisbane *v.* Stoughton, 17 Ohio 482.

Wisconsin.— Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

See 35 Cent. Dig. tit. "Mortgages," § 1025.

83. See Lee *v.* Clary, 38 Mich. 223; Larzelere *v.* Starkweather, 38 Mich. 96.

84. Dutton *v.* Cotton, 10 Iowa 408.

85. Vaughan *v.* Marable, 64 Ala. 60; Bank of Metropolis *v.* Guttschlick, 14 Pet. (U. S.) 19, 10 L. ed. 335.

86. O'Brien *v.* Oswald, 45 Minn. 59, 47 N. W. 316; Legrand *v.* Rixey, 83 Va. 862, 3 S. E. 864; Stimpson *v.* Bishop, 82 Va. 190. *Compare* Wood *v.* Hare, Ritch. Eq. Cas. (Nova Scotia) 201.

Indemnity mortgage.— The sale of land under a trust deed given to indemnify a surety will not be enjoined where the debt is past due, and the parties have agreed that the trustee may advertise in time to sell by a certain day, although the surety has not yet paid the debt. Brower *v.* Buxton, 101 N. C. 419, 8 S. E. 116.

87. Ray *v.* Home, etc., Inv., etc., Co., 98 Ga. 122, 26 S. E. 56. See Chapman *v.* Younger, 32 S. C. 295, 10 S. E. 1077 (holding that a mortgage sale will not be enjoined because of want of legal authority in defendant to sell, since, if he has no power to sell, the sale will be a nullity); Cockell *v.* Bacon, 16 Beav. 158, 51 Eng. Reprint 737.

Land in another state.— Where a mortgage

opportunity to redeem,[88] nor because the proposed terms of the sale appear to be harsh or onerous, if it is fully within the mortgagee's power to fix them as he has;[89] and although the creditor will not be allowed to use the power of sale for purposes of oppression, or pervert it from its legitimate use, as, to coerce the payment of an independent debt,[90] yet he should not be restrained from exercising a right clearly vested in him merely because a sale of the property at the particular time or place, or under the proposed conditions of sale, may result in loss or even sacrifice of the property, in consequence of financial depression, scarcity of money, or other cause.[91] Where, however, the property is subject to conflicting liens or rights, it should not be disposed of in this manner, but brought into a court of equity for administration.[92] It has been held that, although limitations have run against a mortgage, a court of equity will not restrain a sale under a power of sale contained therein.[93] A sale by the trustee in a deed of trust will not be enjoined on an allegation that such trustee is insolvent, where there is nothing to show that he became so after he was appointed or that there is danger of his misapplying the money arising from the sale.[94] A temporary injunction may be granted against the sale of mortgaged premises under a power of sale in the mortgage, if a purchaser of the property from the mortgagor bought in ignorance of the existence of such a power and the mortgage was not recorded; and the purchaser will be allowed time to raise the money and redeem the land.[95]

b. Payment or Tender. Equity will enjoin a sale under a mortgage or deed of trust on a showing that the whole debt secured has been paid or a good and sufficient tender made and refused.[96]

of land situated in one state authorizes a sale of the property, in pursuance of a power of sale, to be conducted and held in another state, the courts of the latter state will not enjoin the sale if there is no proof that it would be contrary to the laws of the former state. Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43; Central Gold Min. Co. *v.* Platt, 3 Daly (N. Y.) 263.

88. Bedell *v.* McClellan, 11 How. Pr. (N. Y.) 172; Hyman *v.* Devereaux, 63 N. C. 624; Ferrand *v.* Clay, 1 Jur. 165. But see Ramoneda *v.* Loggins, (Miss. 1906) 39 So. 1007.

89. Johnson Co. *v.* Henderson, 83 Md. 125, 34 Atl. 835; Powell *v.* Hopkins, 38 Md. 1; Armstrong *v.* Sanford, 7 Minn. 49; Scott *v.* Ballard, 117 N. C. 195, 23 S. E. 185; Kershaw *v.* Kalow, 1 Jur. N. S. 974.

90. McCalley *v.* Otey, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 87; Merest *v.* Murray, 14 L. T. Rep. N. S. 321.

91. Anderson *v.* White, 2 App. Cas. (D. C.) 408; Case *v.* O'Brien, 66 Mich. 289, 33 N. W. 405; Montgomery *v.* McEwen, 9 Minn. 103; Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889; Muller *v.* Bayly, 21 Gratt. (Va.) 521; Shonk *v.* Knight, 12 W. Va. 667; Caperton *v.* Landcraft, 3 W. Va. 540. But *compare* Faulkner *v.* Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698; Anchor Stove Works *v.* Gray, 9 W. Va. 469.

92. Draper *v.* Davis, 104 U. S. 347, 26 L. ed. 783.

The grantor in a deed of trust cannot impeach his own title for the purpose of preventing a sale thereunder. Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 238.

93. House *v.* Carr, 185 N. Y. 453, 78 N. E. 171, 6 L. R. A. N. S. 510 [*reversing* 105 N. Y. App. Div. 625, 93 N. Y. Suppl. 1135]. But see Scott *v* Barnes County Dist. Ct., (N. D. 1906) 107 N. W. 61, construing Rev. Codes (1899), § 5845].

94. Tooke *v.* Newman, 75 Ill. 215.

95. Platt *v.* McClure, 19 Fed. Cas. No. 11,218, 3 Woodb. & M. 151.

96. *Alabama.*—Wittmeier *v.* Tidwell, (1906) 40 So. 963 (money need not be paid into court); Whitley *v.* Dunham Lumber Co., 89 Ala. 493, 7 So. 810.

Illinois.— Long *v.* Little, 119 Ill. 600, 8 N. E. 194.

Iowa.— Stringham *v.* Brown, 7 Iowa 33.

Michigan.— Verdine *v.* Olney, 77 Mich. 310, 43 N. W. 975.

Missouri.— Wolz *v.* Parker, 134 Mo. 458, 35 S. W. 1149; Fitch *v.* Buckingham, 84 Mo. 192.

North Carolina.— Davis *v.* Lassiter, 112 N. C. 128, 16 S. E. 899; Capehart *v.* Biggs, 77 N. C. 261.

See 35 Cent. Dig. tit. "Mortgages," § 1026.

Effect of acceleration clause.—A mortgagor who has given notes secured by mortgage, providing that in case of default in any payment all the notes might be declared due, is not entitled to have a stay of foreclosure proceedings, commenced after such default and declaration, on paying what otherwise would have been due and the expenses to date. Lincoln *v.* Corbett, 31 Tex. Civ. App. 352, 72 S. W. 224.

Debt barred.— An injunction will not be granted to restrain a sale of land conveyed in trust to secure the payment of a note, because an action on the note would be barred by the statute. Goldfrank *v.* Young, 64 Tex. 432 [*overruling* Blackwell *v.* Barnett, 52 Tex. 326]; Gillis *v.* Rosenheimer, 64 Tex. 243.

c. Dispute as to Amount Due. The sale may also be enjoined where it appears that the amount of the debt is unliquidated, uncertain, or only capable of ascertainment on a detailed and complicated accounting,[97] or where it is alleged that there was a total want or failure of consideration for the mortgage,[98] but not merely for the purpose of allowing the mortgagor to set up an independent demand or set-off, if it does not appear that the mortgagee is insolvent, or that such claim will otherwise be lost by allowing the sale to proceed.[99]

d. Defects in Notice or Advertisement. It is also ground for enjoining the sale that the requisite notice or advertisement of it has not been given,[1] or that the notice is radically defective or insufficient;[2] but the proceedings should not be stopped for unimportant defects in the notice, such as do not prevent it from serving its purpose substantially.[3]

e. Objection to Title of Holder. The execution of a power of sale may be restrained where the holder of the obligation secured has procured it by means of fraud,[4] but not on the ground of an original want of authority in the person taking the mortgage, which has been cured by the acceptance or ratification of the real party in interest.[5]

97. *Alabama.*— Alston *v.* Morris, 113 Ala. 506, 20 So. 950.

California.— More *v.* Calkins, 85 Cal. 177, 24 Pac. 729.

Iowa.— Boyd *v.* Ellis, 11 Iowa 97.

Minnesota.— Montgomery *v.* McEwen, 9 Minn. 103.

Mississippi.— Carey *v.* Fulmer, 74 Miss. 729, 21 So. 752.

North Carolina.— Gooch *v.* Vaughan, 92 N. C. 610; Bridgers *v.* Morris, 90 N. C. 32; Pritchard *v.* Sanderson, 84 N. C. 299; Purnell *v.* Vaughan, 77 N. C. 268; Capehart *v.* Biggs, 77 N. C. 261.

North Dakota.— McCann *v.* Mortgage, etc., Co., 3 N. D. 172, 54 N. W. 1026.

Virginia.— Hogan *v.* Duke, 20 Gratt. 244.

England.— Macleod *v.* Jones, 24 Ch. D. 289, 53 L. J. Ch. 145, 49 L. T. Rep. N. S. 321, 32 Wkly. Rep. 43; Hickson *v.* Darlow, 23 Ch. D. 690, 48 L. T. Rep. N. S. 449, 31 Wkly. Rep. 417.

Canada.— Auchterlony *v.* Palgrave Gold Min. Co., 29 Nova Scotia 414.

See 35 Cent. Dig. tit. "Mortgages," § 1027.

Compare Curry *v.* Hill, 18 W. Va. 370.

No injunction when amount easily ascertainable.— A bill to enjoin the foreclosure of a deed of trust pending an accounting cannot be maintained where it appears that the bill is interposed for delay, that the amount due is easily ascertained by deducting the disputed items, and that no offer to pay the amount due has been made. Barber *v.* Levy, (Miss. 1895) 18 So. 438.

Amount of deduction trifling.— Where the amount of the debt is thirty-five thousand dollars, and the mortgagor seeks an injunction against the sale, merely to preserve his right to an abatement of ten dollars on account of a failure of title to a comparatively minute portion of the land, it will not be granted. Sidney Land, etc., Co. *v.* Milner, etc., Lumber Co., 138 Ala. 185, 35 So. 48.

Uncertainty as to amount and priority of debts.— Equity will not enjoin a sale under a deed of trust by which a debtor conveyed all his property to the trustee, with power of sale, merely because of uncertainty as to the amount and priority of his debts and as to the persons to whom they are due. Sandusky *v.* Faris, 49 W. Va. 150, 38 S. E. 563.

Alleged error in amount.— An injunction will not be granted to restrain the sale of mortgaged premises, under a statutory foreclosure, on the ground that an appeal is pending from a decree dismissing a bill filed by the mortgagor to correct an alleged error in the amount of the mortgage. Outtrin *v.* Graves, 1 Barb. Ch. (N. Y.) 49.

98. Phillips *v.* W. T. Adams Mach. Co., 52 La. Ann. 442, 27 So. 65; Devlin *v.* Quigg, 44 Minn. 534, 47 N. W. 258, 20 Am. St. Rep. 592, 10 L. R. A. 665; Brooks *v.* Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; Ryan *v.* Gilliam, 75 Mo. 132.

99. *Alabama.*— Glover *v.* Hembree, 82 Ala. 324, 8 So. 251; Knight *v.* Drane, 77 Ala. 371.

Georgia.— McDaniel *v.* Cowart, 109 Ga. 419, 34 S. E. 589.

Missouri.— Gregg *v.* Hight, 6 Mo. App. 579.

Rhode Island.— National Rubber Co. *v.* Rhode Island Hospital Trust Co., (1895) 33 Atl. 254; Frieze *v.* Chapin, 2 R. I. 429.

Virginia.— Cleaver *v.* Matthews, 83 Va. 801, 3 S. E. 439.

See 35 Cent. Dig. tit. "Mortgages," § 1027.

1. Capehart *v.* Biggs, 77 N. C. 261; Walker *v.* Boggess, 41 W. Va. 588, 23 S. E. 550; Gill *v.* Newton, 12 Jur. N. S. 220, 14 L. T. Rep. N. S. 240, 14 Wkly. Rep. 490; Prichard *v.* Wilson, 10 Jur. N. S. 330, 11 L. T. Rep. N. S. 437, 3 New Rep. 350; Anonymous, 6 Madd. 10, 56 Eng. Reprint 992.

2. Vaught *v.* Rider, 83 Va. 659, 3 S. E. 293, 5 Am. St. Rep. 305.

3. Conlin *v.* Carter, 93 Ill. 536; Wilson *v.* Gray, 97 Mo. App. 632, 71 S. W. 718; Moore *v.* Barksdale, (Va. 1896) 25 S. E. 529; Sandusky *v.* Faris, 49 W. Va. 150, 38 S. E. 563.

4. Holden *v.* Hoyt, 134 Mass. 181; Dey *v.* Dey, 23 N. J. Eq. 88.

5. Sangston *v.* Gordon, 22 Gratt. (Va.) 755.

f. Dispute as to Title and Pending Litigation. A sale under a power in a mortgage should not be allowed to proceed where the title to the property is in dispute and litigation, so that the sale might either result in a sacrifice of the property or cloud a title otherwise sought to be established.[6] But a mere defect in the chain of title is not ground for an injunction where no suit upon it has ever been brought or threatened.[7] The pendency of proceedings in equity to foreclose another mortgage or lien is also sufficient ground for restraining the sale under the power.[8]

2. Time For Application. An application to restrain the execution of a power of sale should be made before the sale is held; afterward the mortgagor must fully excuse his negligence before equity will grant him any relief.[9]

3. Parties. A suit to restrain the enforcement of the mortgage may be maintained by the widow or heir of the mortgagor,[10] or by a junior encumbrancer.[11] A statute authorizing a suit by a mortgagor for this purpose includes any person claiming title to the mortgaged premises under and in privity with the original mortgagor.[12] The mortgagor or grantor is always a necessary party,[13] but not an assignor of the mortgage, whose assignee is seeking to foreclose it.[14] In the case of a deed of trust, both the trustee and the beneficiary must be joined;[15] and so, where there are various creditors secured, all must be made parties, although only one is proceeding for foreclosure.[16]

4. Pleading and Evidence. A bill for an injunction to restrain the sale of land under a power in the mortgage must state distinctly sufficient equitable grounds to justify the relief asked,[17] and describe the premises with reasonable certainty,[18] and, unless all liability under the mortgage is denied, it must tender or offer to pay so much as is admitted to be due.[19] Such a bill must be supported

6. Gardner *v.* Terry, 99 Mo. 523, 12 S. W. 888, 7 L. R. A. 67; Martin *v.* Jones, 72 Mo. 23; Mott *v.* Maris, (Tex. Civ. App. 1894) 29 S. W. 825; Miller *v.* Argyle, 5 Leigh (Va.) 460; Gay *v.* Hancock, 1 Rand. (Va.) 72; Lane *v.* Tidhall, Gilm. (Va.) 130. *Compare* North Carolina Gold Amalgamating Co. *v.* North Carolina Ore Dressing Co., 73 N. C. 468.

7. Harding *v.* Commercial Loan Co., 84 Ill. 251; Morgan *v.* Glendy, 92 Va. 86, 22 S. E. 854.

8. Davis *v.* Briggs, 3 How. Pr. (N. Y.) 65; Keith *v.* Harbison, (Tenn. Ch. App. 1899) 52 S. W. 1109. And see Commercial Bank *v.* Upper Canada Bank, 1 Ch. Chamb. (U. C.) 64. *Compare* Mayhall *v.* Eppinger, 137 Cal. 5, 69 Pac. 489.

A junior mortgagee, who has brought an action to foreclose his mortgage, is not entitled to an injunction to restrain the foreclosure of a prior mortgage by advertisement, where the validity of such prior mortgage is admitted, as he may avail himself of other remedies for the protection of his rights in the premises. Bedell *v.* McClellan, 11 How. Pr. (N. Y.) 172.

The fact that an action is pending to have a mortgaged adjudged satisfied is not alone ground for an injunction to stay foreclosure thereof by advertisement. Montgomery *v.* McEwen, 9 Minn. 103.

9. Johnson *v.* Williams, 4 Minn. 260.

Delay without prejudice.—Although a statute provides that such an application shall be made "immediately" after receiving notice of the intended sale, it is within the discretion of the court to grant the injunction, although the application was delayed for a month after such notice, and the delay is unexplained, where it does not appear that the delay has caused any prejudice to the other party. O'Brien *v.* Oswald, 45 Minn. 59, 47 N. W. 316.

10. Ready *v.* Hamm, 46 Miss. 422; Van Bergen *v.* Demarest, 4 Johns. Ch. (N. Y.) 37.

11. Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Meysenburg *v.* Schlieper, 46 Mo. 209.

12. Scott *v.* Barnes County Dist. Ct., (N. D. 1906) 107 N. W. 61.

13. Lemmon *v.* Dunn, 61 Miss. 210. See also Abrabams *v.* Vollbaum, 54 Tex. 226.

14. Redin *v.* Branhan, 43 Minn. 283, 45 N. W. 445.

15. Benjamin *v.* Loughborough, 31 Ark. 210.

16. Calwell *v.* Prindle, 11 W. Va. 307.

17. Ensor *v.* Keech, 64 Md. 378, 1 Atl. 756; Armstrong *v.* Sanford, 7 Minn. 49; Holland *v.* Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553; Reed *v.* Patterson, 7 W. Va. 263.

18. Conant *v.* Warren, 6 Gray (Mass.) 562, holding that it is not necessary to describe the premises with such certainty as would be required if a writ of possession were to issue.

19. Williams *v.* Troy, 39 Ala. 118; Meetz *v.* Mohr, 141 Cal. 667, 75 Pac. 298.

Question as to amount due.—A mortgagor wishing to present the question whether a sale can, under the power in the mortgage,

by reasonably convincing and satisfactory evidence.[20] Where a statute provides that application may be made to a district judge for an order enjoining a foreclosure by advertisement, and directing that all further proceedings be had in the district court, the application by the mortgagor is designed to be so far *ex parte* as not to allow of resisting affidavits.[21]

5. Hearing and Decree — a. In General. An injunction should not finally be made perpetual if the objection goes only to the validity of the pending foreclosure proceedings.[22] The court may grant other relief within the prayer of the bill, such as ordering the cancellation or discharge of the mortgage if it is shown to have been fraudulently obtained,[23] but cannot try common-law issues and settle disputed indebtedness between the parties.[24] Where creditors, asking for a sale of lands under a trust deed, have permitted a bill to enjoin the sale to be taken as confessed, they have no right to any decree not warranted by the facts stated in the bill.[25] In New York in an action to restrain foreclosure by advertisement an order may be made requiring defendant to show cause why a temporary injunction should not be granted and meanwhile restraining him from selling the premises at the time advertised.[26]

b. Continuing or Dissolving Injunction. If the bill or complaint discloses a meritorious case, and it appears that substantial questions or issues will require determination, the injunction should be continued until the final hearing;[27] but it should be dissolved if the bill is totally insufficient, or not supported by the proofs, or if defendant shows a good right to proceed with his foreclosure.[28] Such dissolution may be on terms, as, for example, requiring the publication of a new notice of the sale,[29] or the injunction may be retained, after the removal of the grounds on which it was granted, to await the termination of a pending suit between the parties.[30]

c. Supervision of Sale by Court. As the method of foreclosure by advertisement and sale under a power is one created by the voluntary act of the parties, and does not ordinarily require the aid of a court, they should be allowed to proceed in their own way where there is no sufficient legal objection; and therefore

be made for the whole amount secured, must do so in his pleadings, and not seek to enjoin the sale entirely. Conlin *v.* Carter, 93 Ill. 536.

20. Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271; German Sav. Inst. *v.* Jacoby, 97 Mo. 617, 11 S. W. 256; Van Meter *v.* Hamilton, 96 Mo. 654, 10 S. W. 71; Martin *v.* Jones, 59 Mo. 181.

21. Commercial Nat. Bank *v.* Smith, 1 S. D. 28, 44 N. W. 1024.

22. Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95.

23. Mason *v.* Daly, 117 Mass. 403.

24. Gregg *v.* Hight, 6 Mo. App. 579.

25. Smith *v.* Flint, 6 Gratt. (Va.) 40.

26. Babcock *v.* Clark, 23 Hun (N. Y.) 391.

27. Whittaker *v.* Hill, 96 N. C. 2, 1 S. E. 639; Dockery *v.* French, 69 N. C. 308; High Shoals Min., etc., Co. *v.* Grier, 57 N. C. 132.

28. *Iowa.*— Street *v.* Rider, 14 Iowa 506.

Maryland.— Rappanier *v.* Bannon, (1888) 13 Atl. 627.

Mississippi.— Bramlett *v.* Reily, (1888) 3 So. 658; Osburn *v.* Andre, 58 Miss. 609.

North Carolina.— Hutaff *v.* Adrian, 112 N. C. 259, 17 S. E. 78.

Virginia.— Spencer *v.* Jones, 85 Va. 172, 7 S. E. 180.

West Virginia.—Welton *v.* Peerce, 5 W. Va. 437. See also Atkinson *v.* Beckett, 36 W. Va. 438, 15 S. E. 179.

See 35 Cent. Dig. tit. "Mortgages," § 1032.

Dispute as to amount due.— After granting an injunction against a sale of land under a deed of trust, if it is found that there is a debt due, but less than the amount called for in such deed, a decree should be entered fixing the amount due, and, in the discretion of the court, either dissolving the injunction as to that amount and dismissing the bill, or the court should retain the cause and enter a decree for a sale under its supervision. Fry *v.* Old Dominion Bldg., etc., Assoc., 48 W. Va. 61, 35 S. E. 842.

Election of remedies.— In a suit by mortgagors to restrain a sale of the mortgaged property by the trustee under a power of sale in the mortgage, where the mortgagees file a cross bill, asking a foreclosure by the court, they cannot complain that the court treated such cross bill as an election of remedies, and, on granting the relief prayed for therein, enjoined them from proceeding under the power of sale. Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47.

29. Nichols *v.* Wilson, 4 Johns. Ch. (N. Y.) 115.

30. Tillou *v.* Sharpsteen, 5 Johns. Ch. (N. Y.) 260; White *v.* Mechanics' Bldg. Fund Assoc., 22 Gratt. (Va.) 233.

where a preliminary injunction is dissolved, in a clear case, the court should remit the sale entirely to the parties or their appointed agent, and not retain the cause for supervision of the sale.[31] Still there may be circumstances in which such action by the court will be justified, as, where the trustee is dead or disqualified, or where there are conflicting liens or claims upon the property. Here it will be proper for the court to order the sale to be made by its own officer, or under its own supervision, and, if necessary for the protection of all parties in interest, to order the proceeds brought into court for distribution.[32]

6. Damages, Costs, and Fees. On the dissolution of an injunction, defendant will be allowed costs and expenses already incurred by him in advertising the sale or otherwise,[33] and attorney's fees for defending the suit,[34] and, if so provided by statute, damages for the delay entailed upon him, calculated as a certain percentage on the amount involved.[35]

7. Effect of Injunction. A sale in proceedings to foreclose a mortgage by advertisement, had in violation of an injunction restraining it, is void;[36] and so long as the injunction is in force the mortgagor is not in default in not paying the debt purporting to be secured.[37]

C. Persons Entitled to Execute Power — 1. Under Mortgage — a. In General. Where a mortgage vests a power of sale on default in the mortgagee himself, it is personal to him and he alone may exercise it.[38] Although some of the decisions maintain that such a sale, if carried out wholly by an agent or attorney, is at most voidable at the instance of the mortgagor,[39] yet the general rule remains that the power of sale cannot be delegated by the mortgagee, unless by express authority in the mortgage, in such sense as to remove it wholly from his own direction and control.[40] Where a corporation is the mortgagee it may and must

31. Watterson *v.* Miller, 42 W. Va. 108, 24 S. E. 578; Walker *v.* Summers, 9 W. Va. 533; Hyre *v.* Hoover, 3 W. Va. 11.

32. Alexander *v.* Howe, 85 Va. 198, 7 S. E. 248; Michie *v.* Jeffries, 21 Gratt. (Va.) 334; Hogan *v.* Duke, 20 Gratt. (Va.) 244; Pate *v.* McClure, 4 Rand. (Va.) 164; Martin *v.* Kester, 49 W. Va. 647, 39 S. E. 599. *Compare* Anderson *v.* Phlegar, 93 Va. 415, 25 S. E. 107.

33. Marsh *v.* Morton, 75 Ill. 621; J. I. Case Threshing-Mach. Co. *v.* Mitchell, 74 Mich. 679, 42 N. W. 151; Kennedy *v.* Hammond, 16 Mo. 341.

34. Kennedy *v.* Hammond, 16 Mo. 341; Knight *v.* Jackson, 36 S. C. 10, 14 S. E. 982.

35. See the statutes of the different states. And see Johnson *v.* Blackford, Litt. Sel. Cas. (Ky.) 187; Wynne *v.* Mason, 72 Miss. 424, 18 So. 422; Williams *v.* Memphis Bank of Commerce, 71 Miss. 858, 16 So. 238, 42 Am. St. Rep. 503; Burns *v.* Dreyfus, 69 Miss. 211, 11 So. 107, 30 Am. St. Rep. 539; St. Louis *v.* Alexander, 23 Mo. 483; Gibson *v.* O'Connell, 30 Tex. 684.

36. Lash *v.* McCormick, 14 Minn. 482. But see Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350, holding that a sale under a power contained in a mortgage is not rendered void by the pendency of an action by the mortgagor to enjoin the sale and for an accounting, where the bill admits that a certain sum is due to the mortgagee, and it does not appear that such sum was either paid or tendered.

37. Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

38. Clark *v.* Mitchell, 81 Minn. 438, 84 N. W. 327. And see Sadler *v.* Jefferson, 143 Ala. 669, 39 So. 380 (holding that a sale under a mortgage by the mortgagee after he has conveyed all his interest is void); Dempster *v.* West, 69 Ill. 613.

Joint mortgagees.— A power of sale in a mortgage to two joint mortgagees may be exercised by the survivor of them. Hind *v.* Poole, 3 Eq. Rep. 449, 1 Jur. N. S. 371, 1 Kay & J. 383, 3 Wkly. Rep. 331, 69 Eng. Reprint 507. So the first and second mortgagees, each having a power of sale, may join together in selling, each receiving his portion of the purchase-money and receipting to the purchaser, and the title passing by such sale will be good. McCarogher *v.* Whieldon, 34 Beav. 107, 55 Eng. Reprint 574.

Effect of assignment for creditors.— A sale cannot be made under notices signed by the mortgagee, where, after the publication of the first notice, but before the last, he made an assignment for the benefit of creditors. Merrick *v.* Putnam, 73 Minn. 240, 75 N. W. 1047.

An employee of the mortgagee may be authorized in the deed to act as trustee, and a sale made by him will not be void merely because he acts by the direction of his employer. Randolph *v.* Allen, 73 Fed. 23, 19 C. C. A. 353.

39. McHany *v.* Schenk, 88 Ill. 357; Munn *v.* Burges, 70 Ill. 604.

40. Flower *v.* Elwood, 66 Ill. 438; Taylor *v.* Hopkins, 40 Ill. 442; Green *v.* Stevenson,

act through a duly appointed officer or agent.[41] The power of sale may be exercised by an assignee of the mortgage, if there are apt words to vest it in him, as, where the power runs to the mortgagee "and his assigns."[42]

b. Executor or Administrator. After the death of the mortgagee, the power of sale contained in the mortgage may be executed by his executor or administrator,[43] more especially if the power runs to the mortgagee, "his heirs, executors, administrators, and assigns," or equivalent words;[44] and it is no objection, unless otherwise provided by statute, that the mortgagee was a resident of a foreign state and his executor was there appointed and qualified.[45]

2. Under Trust Deed — a. In General. The power of sale on default, vested by a deed of trust in the nature of a mortgage, must be executed by a competent and duly authorized trustee,[46] and cannot be exercised by the holder of the obli-

(Tenn. Ch. App. 1899) 54 S. W. 1011; Bitter *v.* Calhoun, (Tex. 1888) 8 S. W. 523.

41. Long *v.* Powell, 120 Ga. 621, 48 S. E. 185; Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868.

42. See *supra*, XVI, D, 1, e.

43. Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35; Richmond *v.* Hughes, 9 R. I. 228. See also Bradford *v.* King, 18 R. I. 743, 31 Atl. 166.

44. *Alabama.*—Lewis *v.* Wells, 50 Ala. 193.

Illinois.— Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350; Merrin *v.* Lewis, 90 Ill. 505.

Iowa.— Collins *v.* Hopkins, 7 Iowa 463.

North Carolina.— Yount *v.* Morrison, 109 N. C. 520, 13 S. E. 892.

England.— Saloway *v.* Strawbridge, 7 De G. M. & G. 594, 1 Jur. N. S. 1194, 25 L. J. Ch. 121, 4 Wkly. Rep. 34, 56 Eng. Ch. 460, 44 Eng. Reprint 232.

See 35 Cent. Dig. tit. "Mortgages," § 1038.

Evidence of authority.— To show the right of one to execute the power of sale in a mortgage, as the administrator of the mortgagee, some evidence of the death of the latter and of the appointment of the person making the sale as administrator is necessary, beyond the mere recital of these facts in the administrator's deed. Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74.

Power of sale to one having no interest in the mortgage.— Where a power of sale in a mortgage is given to a person by name and his heirs, executors, etc., and the person named has no interest in the mortgaged estate nor in the debt secured, he takes merely a naked power, which on his death does not pass to his personal representatives. Barrick *v.* Horner, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283.

45. Sloan *v.* Frothingham, 65 Ala. 593 (holding that a foreign administrator may execute the power of sale, but it is first necessary for him to have his letters recorded in Alabama and give bond); Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350; Yoerg *v.* Holcombe, 38 Minn. 46, 35 N. W. 718; Holcombe *v.* Richards, 38 Minn. 38, 35 N. W. 714; Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

In Minnesota the statute (Gen. St. (1894) § 6053) requires the foreign representative to file in the office of the register of deeds of the county where the foreclosure is to be commenced an authenticated copy of his appointment as executor or administrator. But this does not apply to the assignee of a foreign executor. Cone *v.* Nimocks, 78 Minn. 249, 80 N. W. 1056.

46. Watson *v.* Perkins, (Miss. 1906) 40 So. 643; Washington, etc., R. Co. *v.* Alexandria, etc., R. Co., 19 Gratt. (Va.) 592, 100 Am. Dec. 710, both holding that a sale under a deed of trust by a person not authorized to act as trustee is void. *Compare* Haggard *v.* Wilczinski, 143 Fed. 22, 74 C. C. A. 176, holding that a sale by a substituted trustee whose appointment was invalid is voidable only and not void.

Waiver of want of authority.— A want of authority in the trustee making the sale may be waived by the parties in interest, or they may estop themselves by their conduct with relation to the sale from objecting to such want of authority, at least as against the purchaser at the sale. See Reynolds *v.* Kroff, 144 Mo. 433, 46 S. W. 424; Spencer *v.* Hawkins, 39 N. C. 288.

Trustee owner of note secured.— A sale under a power in a deed of trust is not void because the trustee was the real owner of the note secured when the deed was executed. Cassady *v.* Wallace, 102 Mo. 575, 15 S. W. 138.

Acceptance of trust.— The trustee must accept the trust, in order to be qualified to act under it; but his proceeding to sell under the power signifies a sufficient acceptance. Mayhall *v.* Eppinger, 137 Cal. 5, 69 Pac. 489; Crocker *v.* Lowenthal, 83 Ill. 579.

Personal representative of trustee.— A provision in a trust deed, authorizing the trustee or his legal representative to execute the trust, will be construed as meaning that the grantee or assignee of the trustee, having the legal title that was in the trustee, shall execute the power, and not that a mere stranger, having no legal title, such as the administrator of the trustee, may do so. Warnecke *v.* Lembca, 71 Ill. 91, 12 Am. Rep. 85. But in North Carolina, by statute, the executor or administrator of a deceased trustee may execute the trust on the written request of the creditor. Eason *v.* Dortch, 136 N. C. 291, 48 S. E. 741.

Where a trust deed to a certain person, as guardian of certain minors, empowered the

gation secured, although he is the only party beneficially interested,[47] the latter's control over the security consisting in his right to call upon the trustee, when default occurs, to advertise and sell and to require him to comply.[48] If no trustee is designated for this purpose, the court may, on application, appoint a commissioner to make the sale.[49] It is also competent for the parties to provide in the deed that the sale shall be made by some suitable person appointed in writing by the creditor, and when this is done a good title passes by the sale.[50]

b. Joint Trustees. Where two trustees are designated in the deed of trust, the concurrence of both is requisite to the due exercise of the power of sale,[51] unless the power is so worded as to show the intention of the parties that either of the trustees might act or that they might act severally,[52] or unless one of the trustees is dead, in which case the power may be executed by the survivor.[53]

c. Delegation of Power. A trustee in a deed of trust cannot delegate the trust or power of sale to any third person, unless expressly authorized to do so by the deed,[54] although he may employ a clerk or auctioneer to attend to the actual conduct of the sale, the whole being under his direct supervision.[55] It is not regarded as a delegation of power when the sale is made by one duly appointed successor to an original trustee who is dead or has resigned.[56]

d. Appointment of New Trustee. In case of the death or resignation of the trustee named in the deed,[57] or his removal from the jurisdiction,[58] or other disqualification,[59] or where he unjustifiably neglects or refuses to act,[60] a new or sub-

trustee to sell, without any provision for a sale by his successor in the guardianship, such power does not pass to such successor. Gillaspie *v.* Murray, 27 Tex. Civ. App. 580, 66 S. W. 252.

In West Virginia the trustee need not give a bond, under Code, c. 72, § 6, before advertising and selling the property, unless thereto required by the grantor or by a *cestui que trust*. Thompson *v.* Halstead, 44 W. Va. 390, 29 S. E. 991.

47. Cushman *v.* Stone, 69 Ill. 516.

The creditor may fix the time, place, and terms of sale and the conditions as to publication of notice, etc., and the sale is not invalidated by his doing this instead of the trustee, if the latter actually conducts the sale. Singleton *v.* Scott, 11 Iowa 589.

48. Sargent *v.* Howe, 21 Ill. 148.

49. Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272.

50. Lang *v.* Stansel, 106 Ala. 389, 17 So. 519; Cloud *v.* Kansas L. & T. Co., 52 Mo. App. 318.

51. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 122 Fed. 914, 59 C. C. A. 140.

Presence of both unnecessary.— It is not necessary that both of the trustees should be actually present at the sale; it is enough if one is present and conducts the sale, the other not dissenting, and no fraud or impropriety being charged. Smith *v.* Black, 115 U. S. 308, 6 S. Ct. 50, 29 L. ed. 398. And see *infra*, XX, F, 3, c.

52. Loveland *v.* Clark, 11 Colo. 265, 18 Pac. 544; Taylor *v.* Dickinson, 15 Iowa 483.

53. Cawfield *v.* Owens, 129 N. C. 286, 40 S. E. 62.

54. *Alabama.* — Shahan *v.* Tethero, 114 Ala. 404, 21 So. 951.

Arkansas.— Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497.

Georgia.— Greenfield *v.* Stout, 122 Ga. 303, 50 S. E. 111.

Illinois.— Flower *v.* Elwood, 66 Ill. 438.

Missouri.— Pollihan *v.* Reveley, 181 Mo. 622, 81 S. W. 182; St. Louis *v.* Priest, 88 Mo. 612; Whittelsey *v.* Hughes, 39 Mo. 13.

Texas.— Fuller *v.* O'Neil, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59.

Virginia.— Morriss *v.* Virginia State Ins. Co., 90 Va. 370, 18 S. E. 843.

See 35 Cent. Dig. tit. "Mortgages," § 1040.

55. See *infra*, XX, F, 3, c.

56. Western Maryland R. Land, etc., Co *v.* Goodwin, 77 Md. 271, 26 Atl. 319.

57. Reynolds *v.* Kroff, 144 Mo. 433, 46 S. W. 424, holding that no express resignation is necessary if the trustee distinctly transfers his powers to his successor.

58. Barstow *v.* Stone, 10 Colo. App. 396, 52 Pac. 48; Marshall *v.* Kraak, 23 App. Cas. (D. C.) 129; Ward *v.* Forrester, (Tex. Civ. App. 1905) 87 S. W. 751.

59. Leech *v.* Karthaus, 141 Ala. 509, 37 So. 696; Ravold *v.* Grumme, 118 Mo. App. 305, 94 S. W. 298, trustee a son of the beneficiary.

60. Stallings *v.* Thomas, 55 Ark. 326, 18 S. W. 184; Smissaert *v.* Prudential Ins. Co., 15 Colo. App. 442, 62 Pac. 967; Irish *v.* Antioch College, 126 Ill. 474, 18 N. E. 768, 9 Am. St. Rep. 638; Kelsay *v.* Farmers', etc., Bank, 166 Mo. 157, 65 S. W. 1007.

Request to act necessary.— Where a deed of trust containing a power of sale named a trustee to execute it, and provided that, in case of his failure or refusal to execute, an alternate trustee, also named in the deed, should execute it, a sale thereunder by a substituted trustee, without a previous request to the original trustee to act, is void. Davis *v.* Hughes, (Tex. Civ. App. 1905) 85 S. W. 1161.

stitute trustee may be appointed by a court of equity on a proper application by parties in interest;[61] or, if the deed so provides, the appointment may be made by the beneficiary or holder of the debt secured,[62] or the deed may even provide that the trustee shall himself select and appoint his successor.[63] In either case the new trustee derives his powers from the deed of trust and his appointment, without the necessity of a conveyance of the estate to him.[64] The appointment of a substituted trustee need not be made on the instrument itself, where it is so filled with writing that it cannot be so made, but it may be written on a separate paper and attached thereto.[65]

e. Sheriff as Substitute For Trustee. It is sometimes provided in trust deeds that the sheriff of the county shall act in place of the trustee, in case the latter is dead, is absent from the jurisdiction, or refuses to act.[66] This makes the sheriff the trustee *pro hac vice* and clothes him with all the authority possessed by the originally appointed trustee,[67] unless his powers are in some particular limited by the provisions of the deed.[68] He acts, however, in his individual capacity, and not in his official character.[69] The officer intended is the person who is acting as sheriff at the time of default made.[70]

D. Proceedings Preliminary to Sale — 1. Time For Exercise of Power and Limitations. There can be no valid execution of a power of sale in a mortgage or deed of trust before or after the expiration of the time expressly specified by statute,[71]

61. *Illinois.*— Davis *v.* Lusk, 191 Ill. 620, 61 N. E. 483; Rice *v.* Brown, 77 Ill. 549.

Mississippi.— In this state, by statute, the sale is not effectual to convey the title of the grantor, when made by a substituted trustee, unless the substitution appears of record in the office of the chancery clerk. Brown *v.* British, etc., Mortg. Co., 86 Miss. 388, 38 So. 312; Shipp *v.* New South Bldg., etc., Assoc., 81 Mass. 17, 32 So. 904; Hyde *v.* Hoffman, (Miss. 1902) 31 So. 415; White *v.* Jenkins, 79 Miss. 57, 28 So. 570. And see Searles *v.* Kelley, (1906) 40 So. 484.

New York.— New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 157 N. Y. 689, 51 N. E. 1092; Matter of Bostwick, 114 N. Y. App. Div. 199, 99 N. Y. Suppl. 925.

Texas.— Converse *v.* Davis, 90 Tex. 462, 39 S. W. 277; Davis *v.* Converse, (Civ. App. 1898) 46 S. W. 910.

England.— *Ex p.* Orgill, 2 Deac. & C. 413.

62. Watson *v.* Perkins, (Miss. 1906) 40 So. 643 (holding that power cannot be delegated to an attorney in fact); Weir *v.* Jones, 84 Miss. 602, 36 So. 533; Allen *v.* Alliance Trust Co., 84 Miss. 319, 36 So. 285; McNeill *v.* Lee, 79 Miss. 455, 30 So. 821; Perrin *v.* Trimble, (Tenn. Ch. App. 1898) 48 S. W. 125; Bracken *v.* Bounds, 96 Tex. 200, 71 S. W. 547; Peacock *v.* Cummings, 34 Tex. Civ. App. 431, 78 S. W. 1002; Bemis *v.* Williams, 32 Tex. Civ. App. 393, 74 S. W. 332.

Authority of agent of holder.— Where a trust deed authorized the holder of the note secured to appoint a substitute trustee, an agent of such holder has no power to make such appointment, although he has a power of attorney to sell and convey his principal's real estate, execute deeds, and do any other act concerning the premises. Wilder *v.* Moren, (Tex. Civ. App. 1905) 89 S. W. 1087.

63. Reynolds *v.* Kroff, 144 Mo. 433, 46 S. W. 424.

64. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132; *Re* Gilmour, 14 Ont. 694.

65. Watkins *v.* McDonald, (Miss. 1906) 41 So. 376.

66. Dunham *v.* Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; Chase *v.* Williams, 74 Mo. 429; Hickman *v.* Dill, 32 Mo. App. 509.

Previous request to trustee.— Where a trust deed provides for the execution of the power of sale by the sheriff in case the trustee should refuse to act, a sale made by the sheriff without the knowledge of the trustee, and without any previous request to him to act under the deed, will not vitiate the title of one who took in good faith from the purchaser at the sheriff's sale. Adams *v.* Carpenter, 187 Mo. 613, 86 S. W. 445.

67. Kelsay *v.* Farmers', etc., Bank, 166 Mo. 157, 65 S. W. 1007; White *v.* Stephens, 77 Mo. 452; McKnight *v.* Wimer, 38 Mo. 132; Morrissey *v.* Dean, 97 Wis. 302, 72 N. W. 873.

68. Woods *v.* Rozelle, 75 Miss. 782, 23 So. 483, a case where the sheriff was empowered to make the sale but not to execute a deed to the purchaser.

69. Dunham *v.* Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741.

70. McNutt *v.* Mutual Ben. L. Ins. Co., 181 Mo. 94, 79 S. W. 703.

71. Cobb *v.* Bord, 40 Minn. 479, 42 N. W. 396; Duncan *v.* Cobb, 32 Minn. 460, 21 N. W. 714; Lass *v.* Sternberg, 50 Mo. 124 (holding that the statute of Missouri which forbids a sale of property under a deed of trust within nine months after the death of the owner applies only to deeds of trust executed by the decedent, and not to such deeds as may have been given by some prior owner of the property); Clark *v.* Beck, (N. D. 1905) 103 N. W. 755.

In Texas a sale by the trustee in a deed of trust under a power, pending administration of the estate of the deceased grantor, is void.

or prescribed by the instrument itself.[72] But statutes of limitation governing actions or suits to foreclose mortgages have no application to proceedings of this kind, taken *ex parte* and out of court,[73] and in the absence of a specific statutory or contractual restriction there is no limit of time for the execution of the power, aside from questions of laches and estoppel by unreasonable delay;[74] and indeed the trustee in such a deed is bound to exercise a proper discretion in fixing the time of sale, with a view to obtaining the best possible price for the property.[75] It is no objection to a sale under a deed of trust that the holder of the note secured has obtained a judgment thereon against the maker, on which execution has been issued and is outstanding.[76]

2. Conditions Precedent — a. In General. The purchaser of property at a sale under a power in a mortgage or trust deed must assume the burden of showing compliance with the necessary conditions precedent to the sale, but the recitals in his deed will make out a *prima facie* case in his behalf.[77] Among these conditions are usually to be reckoned, first, a default in the payment of the debt secured or other breach of condition;[78] then, if required by circumstances or the language of the instrument, a demand on the debtor;[79] and then the creditor's request to the trustee to sell the property, or at least his consent to or authorization of such sale.[80] If there are conflicting liens on the property, or the amount due is uncertain or unliquidated, it may be necessary first to have an accounting or to resort to a court of equity for a determination of the liabilities or specific instructions as to the sale.[81] If it is so provided by statute, the property must be valued by disinterested appraisers;[82] and in case of the death of the mortgagor or grantor, it may be necessary to obtain an allowance of the claim against his estate in the probate proceedings.[83] It may be the duty of the creditor under some circumstances to exhaust other security for the payment of the debt before proceeding to sell under the trust deed.[84] Where a warranty deed to secure a debt contains no defeasance clause, and there is no bond to reconvey, the grantee having power

Harris *v.* Wilson, (Civ. App. 1897) 40 S. W. 868.

72. Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 1 Woods 552. *Compare* Arnold *v.* McBride, (Ark. 1906) 93 S. W. 989.

73. Golcher *v.* Brisbin, 20 Minn. 453; Cone *v.* Hyatt, 132 N. C. 810, 44 S. E. 678; Menzel *v.* Hinton, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647; Stevens *v.* Osgood, 18 S. D. 247, 100 N. W. 161. And see Williams *v.* Armistead, (Tex. Civ. App. 1905) 90 S. W. 925, holding that where a trust deed contains a power of sale, the fact that the debt secured has become barred by the statute of limitations does not affect the power to sell, although in a proceeding in court to foreclose such a plea would be good.

74. Stevens *v.* Osgood, 18 S. D. 247, 100 N. W. 161.

75. Hawkins *v.* Alston, 39 N. C. 137; Rossett *v.* Fisher, 11 Gratt. (Va.) 492; Walker *v.* Teal, 5 Fed. 317, 7 Sawy. 39 [*reversed* on other grounds in 111 U. S. 242, 28 L. ed. 415].

76. Connecticut Mut. L. Ins. Co. *v.* Jones, 8 Fed. 303, 1 McCrary 388.

77. Tyler *v.* Herring, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. 263.

78. See Heller *v.* Neeves, 93 Wis. 637, 67 N. W. 923, 68 N. W. 412.

79. Clevinger *v.* Ross, 109 Ill. 349; Jamison *v.* Bancroft, 20 Kan. 169; Grosvenor *v.* Day, Clarke (N. Y.) 109.

80. Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Brock *v.* Headen, 13 Ala. 370; Cheney *v.* Crandell, 28 Colo. 383, 65 Pac. 56; Miller *v.* McLaughlin, 141 Mich. 433, 104 N. W. 780; Magee *v.* Burch, 108 Mo. 336, 18 S. W. 1078; Jouett *v.* Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194. And see Collier *v.* Alexander, 142 Ala. 422, 38 So. 244.

81. National Mut. Bldg., etc., Assoc. *v.* Ashworth, 91 Va. 706, 22 S. E. 521; Michie *v.* Jeffries, 21 Gratt. (Va.) 334; Wilkins *v.* Gordon, 11 Leigh (Va.) 547; Gibson *v.* Jones, 5 Leigh (Va.) 370; Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285; Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810. And see Heider *v.* Bladen, 83 Md. 242, 34 Atl. 836. *Compare* Preston *v.* Stuart, 29 Gratt. (Va.) 289.

A mistake in computing the amount due on a mortgage at the time of the first publication of notice of sale will not be sufficient to vitiate the sale under proceedings to foreclose the mortgage. Jencks *v.* Alexander, 11 Paige (N. Y.) 619.

82. See the statutes of the different states. And see Merryman *v.* Blount, (Ark. 1906) 94 S. W. 714; Kelley *v.* Graham, 70 Ark. 490, 69 S. W. 551; Moresi *v.* Coleman, 115 La. 792, 40 So. 168.

83. See Harris *v.* Wilson, (Tex. Civ. App. 1897) 40 S. W. 868.

In Massachusetts the death of the mortgagor does not oblige the creditor to await the appointment of an administrator. Conners *v.* Holland, 113 Mass. 50.

84. Swan *v.* Morehouse, 6 D. C. 225.

to sell on default, it is not necessary that the title should be placed again in the grantor in order to bring the property to sale.[85]

b. Notice of Intention to Foreclose. In the absence of express stipulation in a mortgage or deed of trust containing a power of sale, no notice of an intention to foreclose is necessary.[86] It is otherwise where the creditor has promised that he will not sell without first giving actual notice.[87]

c. Taking Possession. Although the mortgage or trust deed provides that the mortgagee or trustee, on default, may "take possession" of the premises and proceed to foreclose by advertisement and sale, an actual entry into possession, or demand for possession, is not a condition precedent to the right to exercise the power of sale.[88]

3. Record of Mortgage and Assignment. Where the statute forbids the execution of a power of sale in a mortgage or trust deed, unless the instrument and all assignments of it shall have been duly recorded, it is a prerequisite to a valid exercise of the power, not only that there should have been a record of the mortgage, or assignment, but also that it should have been entitled to record and that the record should be proper and sufficient.[89]

4. Bond For Sale. It is essential to the validity of the sale that the mortgagee or trustee should comply with the statute requiring him, before exercising the power of sale, to give a bond for the indemnification of parties in interest;[90] and, if the law so directs, this bond must be executed before the sale is commenced;

85. Greenfield *v.* Stout, 122 Ga. 303, 50 S. E. 111.

86. Cleaver *v.* Green, 107 Ill. 67; Marston *v.* Brittenham, 76 Ill. 611; Princeton L. & T. Co. *v.* Munson, 60 Ill. 371; Jopling *v.* Walton, 138 Mo. 485, 40 S. W. 99; Carver *v.* Brady, 104 N. C. 219, 10 S. E. 565; Manning *v.* Elliott, 92 N. C. 48. *Compare* Capehart *v.* Biggs, 77 N. C. 261.

Notice to junior mortgagee.— There may be circumstances in which the junior mortgagee is entitled to notice of the intention of the senior mortgagee to foreclose and sell under his power. See Denton *v.* Ontario County Nat. Bank, 150 N. Y. 126, 44 N. E. 781.

87. Clarkson *v.* Creely, 40 Mo. 114.

88. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345.

Illinois.— Kiley *v.* Brewster, 44 Ill. 186.

Maryland.— Dircks *v.* Logsdon, 59 Md. 173.

Mississippi.— Williams *v.* Dreyfus, 79 Miss. 245, 30 So. 633; Hamilton *v.* Halpin, 68 Miss. 99, 8 So. 739; Tyler *v.* Herring, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. 263; Vaughn *v.* Powell, 65 Miss. 401, 4 So. 257.

South Dakota.— Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893.

See 35 Cent. Dig. tit. "Mortgages," § 1022.

Contra.— Roarty *v.* Mitchell, 7 Gray (Mass.) 243.

89. *Alabama.*— Bibb *v.* Crews, 113 Ala. 617, 21 So. 341, holding that the right to sell under a mortgage is not affected by the loss of the original instrument if there is a record of it.

Massachusetts.— Montague *v.* Dawes, 12 Allen 397, holding that a sale by the assignee is not invalid because his assignment was not first recorded, if it does not appear that the neglect was from improper motives, or that purchasers were misled.

Michigan.— Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108, holding that an assignment not entitled to record, because not properly acknowledged, cannot support a foreclosure sale, although actually placed on the record.

Minnesota.— Burke *v.* Backus, 51 Minn. 174, 53 N. W. 458; Lowry *v.* Mayo, 41 Minn. 388, 43 N. W. 78; Thorp *v.* Merrill, 21 Minn. 336 (effect of misdescription in record); Morrison *v.* Mendenhall, 18 Minn. 232 (holding that, although the assignment must be recorded, a power under which it was executed need not be); Carli *v.* Taylor, 15 Minn. 171 (place of record of assignment); Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95 (holding that retroactive curative statute does not legalize prior improper registration).

New York.— Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281.

North Dakota.— Morris *v.* McKnight, 1 N. D. 266, 47 N. W. 375.

South Dakota.— Langmaack *v.* Keith, (1905) 103 N. W. 210; Shelby *v.* Bowden, 16 S. D. 531, 94 N. W. 416.

Land in two counties.— Where parts of the property covered by a mortgage or trust deed lie in two or more counties, it must be recorded in all before it can be foreclosed in either under a power of sale. Van Meter *v.* Knight, 32 Minn. 205, 20 N. W. 142; Wells *v.* Wells, 47 Barb. (N. Y.) 416. But see Balme *v.* Wambaugh, 16 Minn. 116, holding that a mortgage of lands in several counties, which is foreclosed as to the portion lying in one county only, need not, to render the foreclosure valid, be recorded in another county, in which are situated only the lands which are unaffected by the foreclosure.

90. Erb *v.* Grimes, 94 Md. 92, 50 Atl. 397; Dickerson *v.* Small, 64 Md. 395, 1 Atl. 870; Warehime *v.* Carroll County Bldg. Assoc. No. 1, 44 Md. 512; McCahe *v.* Ward, 18 Md. 505; White *v.* Malcolm, 15 Md. 529. And see Ferris *v.* Eichbaum, 4 Baxt. (Tenn.) 70.

filing it after the sale, although before ratification by the court, is not sufficient.[91] But the sale will not be declared void in a collateral proceeding merely because the bond did not conform to the requirements of the statute.[92] A court of equity, in the exercise of its general power to supervise and control proceedings of this kind, on the application of parties in interest, may require the trustee, who is about to execute a power of sale, to give bonds, independently of any statutory requirement to that effect.[93]

5. Transfer of Proceedings to Court. Where the rights of parties are in conflict, or there is opposition on legal grounds to the execution of a power of sale, proceedings may be instituted in a proper court, having for their object the determination of all disputed questions and the foreclosure of the mortgage in accordance therewith,[94] or proceedings already begun under the power of sale may be transferred to the court on a proper application,[95] and the court may in its discretion direct and order the trustee to proceed with the sale,[96] giving specific directions, if it is necessary, as to the notice to be published, the terms and conditions of the sale, and the distribution of the proceeds.[97] The trustee on his own initiative may apply to a court of equity for directions, if there are impediments in the way of a fair execution of the trust, or if he is in substantial doubt as to his rights and duties in the premises.[98]

6. General Rules as to Execution of Power. A power of sale contained in a mortgage or trust deed must be strictly pursued and all its terms and conditions fully complied with, in order to render the sale valid;[99] and a misstep or defect

91. Union Trust Co. *v.* Ward, 100 Md. 98, 59 Atl. 192.

Where it appears that the bond was filed on the day of the sale it will be presumed that it was filed before the sale was begun, and this will be a sufficient compliance with the law. Hubbard *v.* Jarrell, 23 Md. 66.

92. Cockey *v.* Cole, 28 Md. 276, 92 Am. Dec. 684.

93. Terry *v.* Fitzgerald, 32 Gratt. (Va.) 843.

Bond not requested.— It is not reversible error for the court to refuse to require a bond of a trustee who is ordered to sell land under a deed of trust, where the debtor, having brought proceedings to enjoin the sale, did not ask that a bond should be ordered, and no other creditor is involved. Watterson *v.* Miller, 42 W. Va. 108, 24 S. E. 578.

94. American Freehold Land Mortg. Co. *v.* McCall, 96 Ala. 200, 11 So. 288; Frink *v.* Neal, 37 Ill. App. 621; Davison *v.* Gregory, 132 N. C. 389, 43 S. E. 916.

Trustee a necessary party.— The trustee in the deed of trust is an indispensable party to any suit in equity for its foreclosure, and failure to make him a party will be fatal to the decree. Hayes *v.* Owen, 69 Ill. App. 553; Chandler *v.* O'Neil, 62 Ill. App. 418; Lambert *v.* Hyers, 22 Ill. App. 616; Walsh *v.* Truesdell, 1 Ill. App. 126. But the original trustee is not a necessary party where his successor has been duly appointed. Fisher *v.* Stiefel, 62 Ill. App. 580.

95. James River Lodge No. 32 I. O. O. F. *v.* Campbell, 6 S. D. 157, 60 N. W. 750; West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

96. Sargent *v.* Howe, 21 Ill. 148; Walters *v.* Senf, 115 Mo. 524, 22 S. W. 511; Ayres *v.* Cayce, 10 Tex. 99.

97. Fitch *v.* Wetherbee, 110 Ill. 475; Mosby *v.* Hodge, 76 N. C. 387; Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

98. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132; Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889; Dryden *v.* Stephens, 19 W. Va. 1.

99. *Illinois.*— Flower *v.* Elwood, 66 Ill. 438; Hall *v.* Towne, 45 Ill. 493.

Kentucky.— Hahn *v.* Pindell, 1 Bush 538.

Massachusetts.— Stickney *v.* Evans, 127 Mass. 202.

Michigan.— Lee *v.* Mason, 10 Mich. 403.

Minnesota.— Butterfield *v.* Farnham, 19 Minn. 85; Spencer *v.* Annon, 4 Minn. 542; Dana *v.* Farrington, 4 Minn. 433.

Missouri.— Powers *v.* Kueckhoff, 41 Mo. 425, 97 Am. Dec. 281.

New York.— Elliott *v.* Wood, 53 Barb. 285 [*affirmed* in 45 N. Y. 71]; James *v.* Stull, 9 Barb. 482.

Pennsylvania.— Bradley *v.* Chester Valley R. Co., 36 Pa. St. 141.

United States.— Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967.

See 35 Cent. Dig. tit. "Mortgages," § 1046.

Duty of trustee.— The trustee in a deed of trust should adopt all reasonable precautions to render the sale beneficial to the debtor; a bare compliance with the terms of the deed is not sufficient. Stoffel *v.* Schroeder, 62 Mo. 147.

Effect of non-compliance.— A trustee in a deed of trust may divest himself of the legal title without compliance with the conditions of the trust, but without such compliance a sale and deed do not pass the equitable estate of the grantor in the trust deed. To execute the trust under such circumstances, equity will grant relief either by a regular judicial foreclosure and sale, or by a decree

in matter of substance cannot be cured by showing that it was accidental or caused by a mistake and not the result of fraud or bad faith;[1] and if an agent, appointed by the mortgagee to make the sale, exceeds the powers given by the mortgage, he acts outside the scope of his employment and does not bind his principal.[2] Moreover, the courts are always ready to set aside sales of this character on any showing of fraud, oppression, or want of good faith.[3]

E. Notice of Sale — 1. Necessity. It is essential to the validity of a sale under a power in a mortgage or deed of trust to comply fully with its requirements as to giving notice of the sale.[4] But if the instrument contains no such requirement, or expressly waives notice, it may be dispensed with,[5] as also in the case where the sale is private, instead of public, in accordance with permission given in the deed or mortgage.[6]

2. Form and Requisites — a. In General. The notice of sale, in respect to all things required by the statute, must conform strictly to its provisions.[7] But in so far as the details of the notice are not prescribed by statute, or if there is no statute on the subject, no particular form of words is necessary to make a good notice,[8] and if it contains all that the law requires it will not be void for errors or omissions in other respects which are not misleading.[9] The notice should show that a sale is intended, for the purpose of foreclosing the mortgage or deed of trust, and by reason of a default or breach of condition,[10] that the proceeding is

requiring the grantee to execute the power in accordance with the terms of the trust, or by appointing a new trustee and devolving upon him the execution of such power. Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

1. Grover *v.* Fox, 36 Mich. 461.

2. Lamm *v.* Port Deposit Homestead Assoc., 49 Md. 233, 33 Am. Rep. 246.

3. Jencks *v.* Alexander, 11 Paige (N. Y.) 619. See also Horsey *v.* Hough, 38 Md. 130. And see *infra*, XX, M, 2, b, (I).

4. Wood *v.* Lake, 62 Ala. 489; Ford *v.* Nesbitt, 72 Ark. 267, 79 S. W. 793; Patterson *v.* Miller, 52 Md. 388; Chace *v.* Morse, 189 Mass. 559, 76 N. E. 142; Minuse *v.* Cox, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313. But see Adams *v.* Carpenter, 187 Mo. 613, 86 S. W. 445, holding that a deed by a trustee under a deed of trust conveying land on foreclosure will pass the legal title, although the land was advertised for sale for less than the time required by the deed.

Purchase with knowledge of want of notice.— A clause in a mortgage providing that the purchaser at a sale made under the power in it should not be required to ascertain whether previous notice of the sale had been given does not protect one who buys at the sale with actual knowledge that notice has not been given. Parkinson *v.* Hanbury, 1 Dr. & Sm. 143, 8 Wkly. Rep. 575, 62 Eng. Reprint 332.

Giving publicity to sale.— Although the trustee conducting the sale should use all reasonable endeavors to make it result as beneficially as possible to the parties in interest, it may be stated as a general rule that he is not bound to hunt up prospective bidders. But in some recent cases the courts have approved the course of the trustee in causing plats or printed descriptions of the property to be distributed among persons who, as he supposed, might possibly become purchasers. See Carroll *v.* Hutton, 91 Md. 379, 46 Atl. 967; Wilson *v.* Wall, 99 Va. 353, 38 S. E. 181.

5. Princeton L. & T. Co. *v.* Munson, 60 Ill. 371; Canada Permanent Bldg. Soc. *v.* Teeter, 19 Ont. 156; Clark *v.* Harvey, 16 Ont. 159; Grant *v.* Canada L. Assur. Co., 29 Grant Ch. (U. C.) 256. See *Re* British Canadian Loan, etc., Co., 16 Ont. 15; Lyon *v.* Ryerson, 17 Ont. Pr. 516.

6. *Re* Shore, 6 Manitoba 305.

7. Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691; Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967.

8. Newman *v.* Jackson, 12 Wheat. (U. S.) 570, 6 L. ed. 732.

9. *Illinois.*— Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812.

Michigan.—Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691.

Missouri.— Mitchell *v.* Nodaway County, 80 Mo. 257.

New York.— Judd *v.* O'Brien, 21 N. Y. 186.

North Dakota.— McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729.

South Dakota.— Iowa Inv. Co. *v.* Shepard, 8 S. D. 332, 66 N. W. 451.

Wisconsin.— Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649; Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

See 35 Cent. Dig. tit. "Mortgages," § 1051.

10. Pearce *v.* Savage, 45 Me. 90; White *v.* McClellan, 62 Md. 347; Gooch *v.* Addison, 13 Tex. Civ. App. 76, 35 S. W. 83; Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649. But see Model Lodging House Assoc. *v.* Boston, 114 Mass. 133, holding that the notice is not invalidated by an omission to state that there has been a default or breach of condition. And at any rate it is not necessary to state for what breach of condition the land is to be sold. Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532.

taken in pursuance of a power of sale granted in the mortgage,[11] and by the authority of the mortgagee or owner of the debt secured,[12] and the terms of sale should also be set forth with reasonable certainty.[13] The notice need not show the commencement and discontinuance of previous proceedings.[14] Nor, where it is given by a successor to the original trustee, need it show the conditions, the happening of which devolved the trust upon him.[15] Nor is the notice invalidated by failure to advertise the land in parcels.[16] One notice may be made to serve for the foreclosure of two or more mortgages between the same parties, if there is no confusion between them or uncertainty in the descriptions.[17]

b. Description of Mortgage and Record. The notice of sale must describe the mortgage to be foreclosed with sufficient certainty to identify it, and this will include a statement of the date of its execution,[18] although an error in this particular will not invalidate it, if there is a correct reference to the record of the mortgage and no other circumstances to make the wrong date misleading,[19] and also the names of the parties.[20] It is also necessary to comply closely with a statutory requirement that the notice shall state the date or place of the record of the mortgage.[21]

c. Assignment of Mortgage. If the mortgage has been assigned and the foreclosure proceedings are taken at the instance of the assignee, that fact must appear, either by recital in the body of the notice or by his signing the notice as assignee.[22]

d. Designation of Parties. The notice is not sufficient if it fails to name the mortgagee or holder of the debt secured, and the mortgagor or owner of the equity of redemption,[23] or to furnish the means for their certain identifi-

11. See McKarsie *v.* Citizens' Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 53 S. W. 1007.

12. Welsh *v.* Cooley, 44 Minn. 446, 46 N. W. 908; Sanborn *v.* Eads, 38 Minn. 211, 36 N. W. 338; Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661, all holding that if the mortgagee is dead, a foreclosure by advertisement on a notice of sale purporting to be given by authority of the mortgagee is void, and cannot be cured by proof that in fact the notice was given by another person. And see People *v.* Prescott, 3 Hun (N. Y.) 419, holding that it is not necessary for the notice to state that the subscriber has lawful right or authority to foreclose.

13. See Powers *v.* Kueckhoff, 41 Mo. 425, 97 Am. Dec. 281; Preston *v.* Johnson, 105 Va. 238, 53 S. E. 1.

14. Lee *v.* Clary, 38 Mich. 223.

15. Irish *v.* Antioch College, 126 Ill. 474, 18 N. E. 768, 9 Am. St. Rep. 638.

16. Loveland *v.* Clark, 11 Colo. 265, 18 Pac. 544.

17. Tyler *v.* Massachusetts Mut. L. Ins. Co., 108 Ill. 58. And see Wheeler *v.* McBlair, 172 U. S. 643, 19 S. Ct. 882, 43 L. ed. 1182. *Compare* Morse *v.* Byam, 55 Mich. 594, 22 N. W. 54, holding that a foreclosure under power of sale is void if one advertisement is made to cover two mortgages in which the descriptions are not identical.

18. Clifford *v.* Tomlinson, 62 Minn. 195, 64 N. W. 381; Morgan *v.* Joy, 121 Mo. 677, 26 S. W. 670.

19. Brown *v.* Burney, 128 Mich. 205, 87 N. W. 221; Baker *v.* Cunningham, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490; McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729.

20. Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691; Hoffman *v.* Anthony, 6 R. I. 282, 75 Am. Dec. 701.

21. See McCammon *v.* Detroit, etc., R. Co., 103 Mich. 104, 61 N. W. 273; Lee *v.* Clary, 38 Mich. 223; Peaslee *v.* Ridgway, 82 Minn. 288, 84 N. W. 1024; Martin *v.* Baldwin, 30 Minn. 537, 16 N. W. 449; Judd *v.* O'Brien, 21 N. Y. 186.

22. Niles *v.* Ransford, 1 Mich. 338, 51 Am. Dec. 95; Dunning *v.* McDonald, 54 Minn. 1, 55 N. W. 864; Weir *v.* Birdsall, 27 N. Y. App. Div. 404, 50 N. Y. Suppl. 275; Babcock *v.* Wells, 25 R. I. 23, 54 Atl. 599, 105 Am. St. Rep. 848. *Compare* Woonsocket Sav. Inst. *v.* American Worsted Co., 13 R. I. 255.

Assignment as collateral.— It is not necessary to recite an assignment of the mortgage which was made merely as collateral security for a debt which was paid before the notice of sale was published. White *v.* McClellan, 62 Md. 347.

Executors not assignees.— Where the statute requires that the notice shall state the assignments of the mortgage, if any, it refers only to such assignments as are the subject of contract and made by act of the parties; and hence the executor or administrator of the deceased mortgagee is not an "assignee" within its meaning. Baldwin *v.* Allison, 4 Minn. 25; People *v.* Prescott, 3 Hun (N. Y.) 419; Thurber *v.* Carpenter, 18 R. I. 782, 31 Atl. 5.

23. *Arkansas.*— Ford *v.* Nesbitt, 72 Ark. 267, 79 S. W. 793.

Maryland.— Reeside *v.* Peter, 33 Md. 120.

cation.[24] A misspelling or other error in the name is not fatally defective if the notice itself furnishes the means of correcting the mistake.[25]

e. Description of Property and State of Title. The property to be sold must be described in the notice with such a reasonable degree of certainty that the public by the exercise of ordinary intelligence may be enabled to identify it, and may be directed to the means of obtaining an exact description if desired.[26] For this purpose it is ordinarily sufficient to copy the description contained in the mortgage itself;[27] but the notice is fatally defective if it contains no description at all, although it refers to the record of the mortgage.[28] It is not considered a material objection that the notice fails to enumerate or describe the improvements on the premises,[29] nor is it faulty in stating that the sale will be of the property described "or so much thereof as may be necessary" to satisfy the debt secured,[30] while on the other hand, although a portion of the property may be sufficient to satisfy the debt, it is not wrong to advertise the whole.[31] If the notice attempts to describe the state of the title, it must be done with exactness. Thus if it

Massachusetts.— Roche *v.* Farnsworth, 106 Mass. 509.

Michigan.— Lee *v.* Clary, 38 Mich. 223.

Minnesota.— Menard *v.* Crowe, 20 Minn. 448.

See 35 Cent. Dig. tit. "Mortgages," § 1054.

Signing notice as sufficient designation.— Where the name of the mortgagee was omitted from the body of the notice, but was signed at the bottom thereof, it was held a sufficient signing. Candee *v.* Burke, 1 Hun (N. Y.) 546, 4 Thomps. & C. 143.

In Massachusetts the notice need not give the names of persons acquiring an interest in the mortgaged premises from the mortgagor since the execution of the mortgage. Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532; Learned *v.* Foster, 117 Mass. 365.

In Missouri an advertisement of an intended sale under a deed of trust is not insufficient because it does not mention the name of the grantor. Ohnsburg *v.* Turner, 87 Mo. 127 [*affirming* 13 Mo. App. 533].

24. Colgan *v.* McNamara, 16 R. I. 554, 18 Atl. 157, holding that a notice of a sale of land under a power in a mortgage which sets out correctly the place of record of the mortgage is sufficient, although neither the name of the mortgagor nor of the mortgagee, nor of any one connected with the mortgage, is given, for any one desiring to know the names can learn them from the record.

25. Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691; Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258, 9 S. Ct. 787, 33 L. ed. 128. But see Zlotoeczski *v.* Smith, 117 Mich. 202, 75 N. W. 470 (mortgagor described as "Julia" the right name being "Tofila"); Texas Sav. Loan Assoc. *v.* Seitzler, 12 Tex. Civ. App. 551, 34 S. W. 348 (where the name "Seitzler" was incorrectly given as "Stezler").

26. *Colorado.*— Loveland *v.* Clark, 11 Colo. 265, 18 Pac. 544.

Indiana.— Richardson *v.* Hedges, 150 Ind. 53, 49 N. E. 822.

Maryland.— Carroll *v.* Hutton, 88 Md. 676, 41 Atl. 1081; Dickerson *v.* Small, 64 Md. 395, 1 Atl. 870; Mahoney *v.* Mackubin, 52 Md. 357; Stevens *v.* Bond, 44 Md. 506; White *v.* Malcolm, 15 Md. 529.

Massachusetts.— Streeter *v.* Ilsley, 151 Mass. 291, 23 N. E. 837; Colcord *v.* Bettinson, 131 Mass. 233; Model Lodging House Assoc. *v.* Boston, 114 Mass. 133.

Michigan.— Yale *v.* Stevenson, 58 Mich. 537, 25 N. W. 488.

Minnesota.— Schoch *v.* Birdsall, 48 Minn. 441, 51 N. W. 382; Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436.

Missouri.— Noland *v.* Lee's Summit Bank, 129 Mo. 57, 31 S. W. 341; Stephenson *v.* January, 49 Mo. 465.

Rhode Island.— Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

Wisconsin.— Sexton *v.* Appleyard, 34 Wis. 235.

United States.— Bell Silver, etc., Min. Co. *v.* Butte First Nat. Bank, 156 U. S. 470, 15 S. Ct. 440, 39 L. ed. 497; Newman *v.* Jackson, 12 Wheat. 570, 6 L. ed. 732.

See 35 Cent. Dig. tit. "Mortgages," § 1056.

Faulty descriptions.— Where the notice of a foreclosure sale described the property, as in the mortgage, as four lots, whereas one of the lots, improved by a house, had been released from the mortgage, the sale was held invalid (People's Sav. Bank *v.* Wunderlich, 178 Mass. 453, 59 N. E. 1040, 86 Am. St. Rep. 493); so where the property was described as "lot 8, in block 109, of Coggins & Parks addition to W. & Co." (Texas Sav. Loan Assoc. *v.* Seitzler, 12 Tex. Civ. App. 551, 34 S. W. 348); and so where the tract of land as advertised, although by its description it included the lot mortgaged, contained a much greater quantity of land than the latter (Fenner *v.* Tucker, 6 R. I. 551).

27. Stickney *v.* Evans, 127 Mass. 202; Robinson *v.* Amateur Assoc., 14 S. C. 148.

28. Dela *v.* Stanwood, 61 Me. 51; Yellowly *v.* Beardsley, 76 Miss. 613, 24 So. 973, 71 Am. St. Rep. 536.

29. Lepper *v.* Mooyer, 82 Md. 649, 33 Atl. 263; Brown *v.* Wentworth, 181 Mass. 49, 62 N. E. 984; Austin *v.* Hatch, 159 Mass. 198, 34 N. E. 95.

30. Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381.

31. Cleaver *v.* Matthews, 83 Va. 801, 3 S. E. 439; Curry *v.* Hill, 18 W. Va. 370.

erroneously states that the property will be sold subject to prior encumbrances, there being none outstanding, it is fatally defective;[32] and conversely, if no attention is called to the fact that the only title sold is an equity of redemption from a superior lien, the purchaser cannot be compelled to complete his purchase.[33]

f. Amount Claimed as Due. It is not necessary for the notice of sale to specify the amount claimed to be due under the mortgage, unless required by statute or by the terms of the mortgage;[34] and in the latter case it is sufficient if the amount is given with reasonable certainty, or data given from which it can be computed, without going into details as to the particular nature of the debt or of the default alleged;[35] and a mistake or inaccuracy in the amount, or a slight overestimate of what is due, will not invalidate the sale, unless shown to have been fraudulently intended or to have resulted in injury to the mortgagor;[36] but a gross overstatement of the amount, so excessive that it might deter and discourage bidders, will render the sale invalid.[37]

g. Time and Place of Sale. The notice must specify the place at which the sale will be held with such a degree of certainty that intending bidders will not be misled but will easily be able to find it,[38] and it must also give the time of the sale with equal certainty,[39] stating not only the day but also the hour at which it will be held.[40]

32. Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Pearson *v.* Gooch, (N. H. 1898) 40 Atl. 390; Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35.

33. Callaghan *v.* O'Brien, 136 Mass. 378; Fowle *v.* Merrill, 10 Allen (Mass.) 350.

34. Wiswall *v.* Ross, 4 Port. (Ala.) 321; Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028; Jenkins *v.* Pierce, 98 Ill. 646.

Where several lots are covered by the same mortgage, and the amount thereof is apportioned among them, so that each is bound only for an aliquot share of the total indebtedness, a notice of sale under the mortgage must show the amount due on each of the lots separately; if it states only the amount of the entire debt claimed to be due, it is insufficient and the sale invalid. Child *v.* Morgan, 51 Minn. 116, 52 N. W. 1127; Bitzer *v.* Campbell, 47 Minn. 221, 49 N. W. 691; Mason *v.* Goodnow, 41 Minn. 9, 42 N. W. 482; Grace *v.* Noel Mill Co., (Tenn. Ch. App. 1901) 63 S. W. 246.

35. Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028; Hoyt *v.* Pawtucket Sav. Inst., 110 Ill. 390; Trafton *v.* Cornell, 62 Minn. 442, 64 N. W. 1148; Kirkpatrick *v.* Lewis, 46 Minn. 164, 47 N. W. 970, 48 N. W. 783; Jones *v.* Cooper, 8 Minn. 334.

36. *Illinois.*— Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804; Fairman *v.* Peck, 87 Ill. 156; Bowman *v.* Ash, 36 Ill. App. 115.

Indiana.— Richardson *v.* Hedges, 150 Ind. 53, 49 N. E. 822.

Maryland.— White *v.* McClellan, 62 Md. 347.

Massachusetts.— Way *v.* Dyer, 176 Mass. 448, 57 N. E. 678; Model Lodging House Assoc. *v.* Boston, 114 Mass. 133.

Michigan.— Cook *v.* Foster, 96 Mich. 610, 55 N. W. 1019; Millard *v.* Truax, 47 Mich. 251, 10 N. W. 358.

Minnesota.— Bowers *v.* Hechtman, 45 Minn. 238, 47 N. W. 792; Menard *v.* Crowe, 20 Minn. 448; Butterfield *v.* Farnham, 19 Minn. 85; Ramsey *v.* Merriam, 6 Minn. 168.

Missouri.— Miller *v.* Evans, 35 Mo. 45.

New York.— Mowry *v.* Sanborn, 62 Barb. 223 [*reversed* on other grounds in 65 N. Y. 581].

United States.—Swenson *v.* Halberg, 1 Fed. 444, 1 McCrary 96.

See 35 Cent. Dig. tit. "Mortgages," § 1057.

37. Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Seiler *v.* Wilber, 29 Minn. 307, 13 N. W. 136; Spencer *v.* Annon, 4 Minn. 542.

38. *Illinois.*— Gregory *v.* Clarke, 75 Ill. 485.

Michigan.— McCammon *v.* Detroit, etc., R. Co., 103 Mich. 104, 61 N. W. 273.

Minnesota.— Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436; Bottineau *v.* Ætna L. Ins. Co., 31 Minn. 125, 16 N. W. 849; Thorwarth *v.* Armstrong, 20 Minn. 464; Golcher *v.* Brisbin, 20 Minn. 453; Merrill *v.* Nelson, 18 Minn. 366.

Missouri.— Beatie *v.* Butler, 21 Mo. 313, 64 Am. Dec. 234.

New York.— Hornby *v.* Cramer, 12 How. Pr. 490.

See 35 Cent. Dig. tit. "Mortgages," § 1058.

39. Fenner *v.* Tucker, 6 R. I. 551, holding that a sale is invalid where, by a mistake in the notice, it was advertised to be made in one year, and was designed to be made, and was actually made, in the succeeding year. *Compare* Gray *v.* Shaw, 14 Mo. 341, holding that where a notice dated December 7 stated that the sale would be made "on the 28th of December next," this could not mislead purchasers into supposing that the December of the following year was meant.

40. Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

Sale between certain hours. — Where the sale is announced to take place on a certain

h. Date and Signature. An error in the date of the notice of sale is not generally regarded as material in any such sense as to affect the validity of the sale.[41] The notice should be signed by the person foreclosing, whether it be the mortgagee or the trustee in a deed of trust; but it is not necessary that such a trustee should physically write his name on the notice; the creditor secured may sign the trustee's name with the latter's consent.[42] And if the law only requires that the notice should show the name of the person making the foreclosure, it is not necessary for him to sign it, if his name appears in the body of the notice.[43]

3. Personal Notice — a. Necessity of Notice — (1) *To Mortgagor or Representatives.* If it is so required by the statute or by the terms of the instrument to be foreclosed, personal notice of the intended sale under a mortgage or deed of trust must be given to the mortgagor or grantor,[44] or, if he is dead, to his personal representatives,[45] and according to some of the decisions to his widow also if she joined in the mortgage,[46] and to his heirs;[47] but otherwise personal notice is not a condition precedent to the valid exercise of the power of sale,[48] unless in cases where a promise was given to the mortgagor that a sale should not be made

designated day, between the hours of nine A. M. and four P. M., the advertisement is sufficient, the hours named constituting the ordinary business portion of the day. Burr *v.* Borden, 61 Ill. 389.

Notice not required by mortgage or statute. — The sale will not be set aside, after the lapse of a long period of time, merely because the notice failed to specify the hour of the day when it would be held, if neither the mortgage itself nor the statute required that the hour should be named. Menard *v.* Crowe, 20 Minn. 448; Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223.

41. *Indiana.*— Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344.

Michigan.—Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691.

Minnesota.— Ramsey *v.* Merriam, 6 Minn. 168.

Wisconsin.— Jensen *v.* Weinlander, 25 Wis. 477.

United States.— Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258, 9 S. Ct. 787, 33 L. ed. 128.

See 35 Cent. Dig. tit. "Mortgages," § 1052.

42. Crutchfield *v.* Hewett, 2 App. Cas. (D. C.) 373. And see Menard *v.* Crowe, 20 Minn. 448.

43. Michigan State Ins. Co. *v.* Soule, 51 Mich. 312, 16 N. W. 662. And see Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

44. *New York.*— Mowry *v.* Sanborn, 65 N. Y. 581; Cole *v.* Moffitt, 20 Barb. 18; King *v.* Duntz, 11 Barb. 191; Van Slyke *v.* Shelden, 9 Barb. 278; Kellogg *v.* Dennis, 38 Misc. 82, 77 N. Y. Suppl. 172. The insufficiency of service of notice of foreclosure as to certain parties other than the mortgagor renders the sale irregular or invalid as to such parties only, and those claiming under them. Youker *v.* Treadwell, 4 N. Y. Suppl. 674. And see Hubbell *v.* Sibley, 5 Lans. 51 [*affirmed* in 50 N. Y. 468].

Tennessee.— Henderson *v.* Galloway, 8 Humphr. 692.

Texas.— Bell *v.* Williams, 23 Tex. Civ. App. 407, 56 S. W. 774.

England.— Hoole *v.* Smith, 17 Ch. D. 434, 50 L. J. Ch. 576, 45 L. T. Rep. N. S. 38, 29 Wkly. Rep. 601.

Canada.— Fenwick *v.* Whitwam, 1 Ont. L. Rep. 24; Smith *v.* Brown, 20 Ont. 165.

See 35 Cent. Dig. tit. "Mortgages," § 1059.

45. Van Schaack *v.* Saunders, 32 Hun (N. Y.) 515; Mackenzie *v.* Alster, 12 Abb. N. Cas. (N. Y.) 110, both holding that if the executor named in the mortgagor's will never qualifies and no administrator is ever appointed, no valid foreclosure can be had under the power of sale, the statute expressly requiring service of notice on the personal representatives. But see Pitt *v.* Amend, 84 Hun (N. Y.) 492, 32 N. Y. Suppl. 423, where the court refused to disturb a sale, twenty years afterward, because of a failure to give notice of the sale to the personal representatives of the deceased mortgagor, on a showing that no personal representatives had been appointed, and that the decedent's husband and co-mortgagor was served with notice, and that the proceedings were otherwise regular.

A general agent of a deceased mortgagor is not his "personal representative," within the meaning of the statute. Atkinson *v.* Duffy, 16 Minn. 45; Jones *v.* Tainter, 15 Minn. 512.

46. See King *v.* Duntz, 11 Barb. (N. Y.) 191; Bartlett *v.* Jull, 28 Grant Ch. (U. C.) 140.

47. Bond *v.* Bond, 51 Hun (N. Y.) 507, 4 N. Y. Suppl. 569; Tracey *v.* Lawrence, 2 Drew. 403, 18 Jur. 590, 2 Wkly. Rep. 610, 61 Eng. Reprint 775. But see King *v.* Duntz, 11 Barb. (N. Y.) 191; Carter *v.* Slocomb, 122 N. C. 475, 29 S. E. 720, 65 Am. St. Rep. 714, holding that a power of sale in a mortgage may be exercised without notice to the heirs of the mortgagor after his death.

48. Ritchie *v.* Judd, 137 Ill. 453, 27 N. E. 682; Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Marston *v.* Brittenham, 76 Ill. 611; Princeton L. & T. Co. *v.* Munson, 60 Ill. 371; Harlin *v.* Nation, 126 Mo. 97, 27 S. W. 330; Fischer *v.* Simon, 95 Tex. 234, 66 S. W. 447, 882; Georgi *v.* Juergen, (Tex. Civ. App. 1902) 66 S. W. 873; Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

without notifying him, or where the conduct or situation of the parties was such that he was justified in expecting a notice.[49]

(II) *To Subsequent Grantees and Encumbrancers.* Notice of the intended sale must be given to the mortgagor's grantee, or to any person holding a junior lien on the premises, if so required by the mortgage or deed of trust or by statute,[50] but otherwise it is not necessary.[51]

(III) *To Occupant of Premises.* A statutory provision requiring notice of the foreclosure sale to be served on the person in the actual occupation of the premises is imperative, and its neglect will invalidate the sale.[52]

b. Service and Evidence Thereof. Unless the statute requires service of the notice to be made by a public officer, it may be well made by the mortgagee himself,[53] and in any manner that is sufficient for the service of ordinary legal process.[54] Proof of service may be made by affidavits, if the statute so provides, or by any evidence which would be admissible and sufficient at common law.[55]

4. Publication of Notice — a. In General. Where notice is to be given by advertisement in a newspaper, the publication[56] must conform fully to the require-

49. Clevinger *v.* Ross, 109 Ill. 349; Webber *v.* Curtiss, 104 Ill. 309.

50. Groff *v.* Morehouse, 51 N. Y. 503; Soule *v.* Ludlow, 3 Hun (N. Y.) 503; Winslow *v.* McCall, 32 Barb. (N. Y.) 241; Stanton *v.* Kline, 16 Barb. (N. Y.) 9 [*reversed* on other grounds in 11 N. Y. 196]; Stewart *v.* Rowsom, 22 Ont. 533; *Re* Abbott, 20 Ont. 299.

An assignee in bankruptcy, to whom the register has conveyed mortgaged land of the bankrupt, is a "grantee" within the meaning of the statute. Ostrander *v.* Hart, (N. Y. 1892) 30 N. E. 504.

51. *Illinois.*— Cleaver *v.* Green, 107 Ill. 67.

Maryland.— Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868.

Massachusetts.— See Drinan *v.* Nichols, 115 Mass. 353.

Minnesota.— Bennett *v.* Healey, 6 Minn. 240.

Mississippi.— Tisomingo Sav. Inst. *v.* Duke, (1887) 1 So. 165.

North Carolina.— McIver *v.* Smith, 118 N. C. 73, 23 S. E. 971.

West Virginia.— Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

See 35 Cent. Dig. tit. "Mortgages," § 1060.

52. Cutting *v.* Patterson, 82 Minn. 375, 85 N. W. 172; Swain *v.* Lynd, 74 Minn. 72, 76 N. W. 958; Casey *v.* McIntyre, 45 Minn. 526, 48 N. W. 402; Heath *v.* Hall, 7 Minn. 315.

If there is no actual occupancy of the premises, but mere acts of ownership, this notice is not required. Moulton *v.* Sidle, 52 Fed. 616.

A person is not entitled to notice who goes into possession of the mortgaged premises without proving any title, and merely relying on an equity in favor of a third person, with whom he does not connect himself. Wing *v.* De la Rionda, 131 N. Y. 422, 30 N. E. 243.

Notice to husband.— Where a husband and wife reside on the land as a homestead, the fee being in the husband, he is the person in possession on whom the notice must be served. Coles *v.* Yorks, 28 Minn. 464, 10 N. W. 775.

Mortgagor occupying part of premises.— And the notice is good if served on the mortgagor in possession of part of the mortgaged premises, although his tenant, occupying a dwelling and stable thereon, is not served. Holmes *v.* Crummett, 30 Minn. 23, 13 N. W. 924.

Waiver of notice.— Where the premises are occupied, at the time of the foreclosure, by one who is not the owner, a subsequent waiver by him of the failure to serve notice of the foreclosure on him will not validate the foreclosure as respects the owner. Casey *v.* McIntyre, 45 Minn. 526, 48 N. W. 402.

53. Kirkpatrick *v.* Lewis, 46 Minn. 164, 47 N. W. 970, 48 N. W. 783.

54. See Groff *v.* National Bank of Commerce, 50 Minn. 348, 52 N. W. 934; Major *v.* Ward, 5 Hare 598, 26 Eng. Ch. 598, 67 Eng. Reprint 1049; O'Donohoe *v.* Whitey, 2 Ont. 424.

In New York the notice may be served by mail. See Mowry *v.* Sanborn, 65 N. Y. 581; Stanton *v.* Kline, 11 N. Y. 196; Chalmers *v.* Wright, 5 Rob. (N. Y.) 713.

55. Mowry *v.* Sanborn, 68 N. Y. 153; Youker *v.* Treadwell, 4 N. Y. Suppl. 674. *Compare* Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672, holding that where the notice of foreclosure sale is given by the party in interest, and not by a public officer, there is no presumption in favor of it.

56. What constitutes publication.— When the publishers of a newspaper deposit in the post-office copies of the paper to be delivered to subscribers, some of whom reside in the city where it is printed and some at a distance, it is, as to the papers so mailed, a "publication" thereof. Pratt *v.* Tinkcom, 21 Minn. 142.

Different editions of paper.— It is not ground for setting aside a foreclosure sale that the notice was not published in all the editions of the paper issued on the days of publication. Everson *v.* Johnson, 22 Hun (N. Y.) 115.

Place of publication.— Where, after the execution of the mortgage, there is a division of the county in which the premises lie, so that they are thrown into a new county or municipality, it is in the new district, not

ments of the statute regulating it,[57] or to the provisions in regard to this matter which may be found in the mortgage or deed of trust.[58] In so far as the details are left to the discretion of the trustee or mortgagee, it is his duty to exercise care and entire good faith in giving reasonable publicity to the time, place, and terms of sale, for the protection of the interests of all concerned.[59]

b. Length and Continuity of Publication. Directions of the statute or of the mortgage as to the length of time the notice must be published, or the number of times it must appear, are imperative, and a sale made without strict compliance therewith is invalid and passes no title.[60] If the provision is that a certain number of days' notice shall be given, this means that that number of days must elapse between the first publication and the day of sale, not necessarily between the last publication and the sale.[61] In computing the number of days the first is to be excluded and the last included,[62] and the intervening Sundays may be counted in to make up the requisite number of days, although there was no publication on such Sundays.[63] Under a provision of this kind some of the decisions hold that the publication of notice must be continuous; that is, there must be a publi-

the old, that the publication must be made. Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684.

57. King *v.* Duntz, 11 Barb. (N. Y.) 191; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

What statute governs.— The statute to be followed in respect to the publication of notice is that which is in force at the time when the publication is made, not one which may have been in force when the mortgage was executed. Atkinson *v.* Duffy, 16 Minn. 45. And see Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868.

58. *District of Columbia.*— Crutchfield *v.* Hewett, 2 App. Cas. 373.

Maryland.— Direks *v.* Logsdon, 59 Md. 173.

Missouri.— Nations *v.* Pulse, 175 Mo. 86, 74 S. W. 1012.

Rhode Island.— Colgan *v.* McNamara, 16 R. I. 554, 18 Atl. 157.

Virginia.— Morriss *v.* Virginia State Ins. Co., 90 Va. 370, 18 S. E. 843.

Land in two counties.— Where a mortgage covers several different tracts of land, lying in different counties, and provides for publication of a notice of foreclosure "in the county where the premises intended to be sold or some part thereof are situated," it is sufficient if the notice is published in any one of such counties. Paulle *v.* Wallis, 58 Minn. 192, 59 N. W. 999.

59. Meacham *v.* Steele, 93 Ill. 135.

60. Thornton *v.* Boyden, 31 Ill. 200; Siemers *v.* Schrader, 88 Mo. 20 [*affirming* 14 Mo. App. 346]; Childs *v.* Hill, 20 Tex. Civ. App. 162, 49 S. W. 652; Bigler *v.* Waller, 14 Wall. (U. S.) 297, 20 L. ed. 891.

As to retroactive effect of statute reducing time of notice see Orvik *v.* Casselman, (N. D. 1905) 105 N. W. 1105.

Concurrency of default and notice.— Where a power of sale in a mortgage provides that after a month's default of payment, and a month's notice of sale, the mortgaged premises may be sold, the month's default and notice of sale cannot run concurrently. Gibbons *v.* McDougall, 26 Grant Ch. (U. C.) 214.

Waiver of time of notice.— Where the owner of the property agrees that the advertisement of sale may be for a shorter period than that required by the deed of trust, he is estopped to deny the validity of the sale on that ground. Maulsby *v.* Barker, 3 Mackey (D. C.) 165.

Longer notice than required.— Where the deed of trust provides that the last of the notices shall be published ten days before the sale, it is not invalidated by a publication more than ten days before the sale, if the excess is not great. Tooke *v.* Newman, 75 Ill. 215.

Meaning of "month."—The word "month," in a statute relating to notices of mortgage foreclosure sales, means a lunar month and not a calendar month. Loring *v.* Halling, 15 Johns. (N. Y.) 119.

61. *Illinois.*— Taylor *v.* Reid, 103 Ill. 349; St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556.

Iowa.— Leffler *v.* Armstrong, 4 Iowa 482, 68 Am. Dec. 672; Armstrong *v.* Scott, 3 Greene 433.

Montana.— Butte First Nat. Bank *v.* Bell Silver, etc., Min. Co., 8 Mont. 32, 19 Pac. 403.

Texas.— Howard *v.* Fulton, 79 Tex. 231, 14 S. W. 1061.

United States.— Bell Silver, etc., Min. Co. *v.* Butte First Nat. Bank, 156 U. S. 470, 15 S. Ct. 440, 39 L. ed. 497.

See 35 Cent. Dig. tit. "Mortgages," § 1064.

62. *Illinois.*— Harper *v.* Ely, 56 Ill. 179.

Minnesota.— Worley *v.* Naylor, 6 Minn. 192.

New York.— Howard *v.* Hatch, 29 Barb. 297; Bunce *v.* Reed, 16 Barb. 347.

Texas.— Lerch *v.* Snyder, 2 Tex. Civ. App. 421, 21 S. W. 183.

Utah.— See Mallory *v.* Kessler, 18 Utah 11, 54 Pac. 892, 72 Am. St. Rep. 765.

Virginia.— Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356.

See 35 Cent. Dig. tit. "Mortgages," § 1064.

63. Magnusson *v.* Williams, 111 Ill. 450; Cushman *v.* Stone, 69 Ill. 516; Kellogg *v.* Carrico, 47 Mo. 157; German Bank *v.* Stumpf, 6 Mo. App. 17; El Paso *v.* Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21. But see Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356.

cation on every one of the required number of days, or at least on each of the secular days;[64] but others maintain that it is sufficient if the requisite number of days elapse between the first publication and the sale, although the notice may not have been published an equal number of times.[65] If the requirement is that the notice shall be published a specified number of times per week for a certain number of consecutive weeks before the sale, it does not imply that so many whole weeks should elapse between the first publication and the sale.[66] Publication of notice of a foreclosure sale on the same day on which the debt secured by the mortgage falls due is premature and invalidates the sale.[67]

c. Character of Newspaper. If the statute, the mortgage or trust deed, or an order of court specifies the newspaper in which the notice is to be published, either by name or with reference to the place of its publication, or by describing it as the paper having the "largest circulation" in the place, it must be strictly followed.[68] Otherwise the selection of the paper is left to the discretion of the mortgagee or trustee;[69] and while it is not imperative that he should choose that paper which will in fact give the utmost possible publicity to the notice, yet he must act in good faith and exercise reasonable care, and it will be ground for vacating the sale if he caused the notice to be printed in an obscure newspaper of very small circulation.[70] The paper should be a "newspaper" in the general acceptance of that term, excluding trade journals and papers devoted exclusively to religious or other special interests.[71] A change in the name of the newspaper pending the publication will not invalidate the publication, if there is no change

64. Washington *v.* Bassett, 15 R. I. 563, 10 Atl. 625, 2 Am. St. Rep. 929. And see Stine *v.* Wilkson, 10 Mo. 75. But *compare* German Bank *v.* Stumpf, 73 Mo. 311.

65. *Georgia.*— Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348.

Illinois.— Jenkins *v.* Pierce, 98 Ill. 646.

Maryland.— White *v.* Malcolm, 15 Md. 529.

West Virginia.— Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

United States.— Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47.

See 35 Cent. Dig. tit. "Mortgages," § 1064.

66. *Illinois.*— Taylor *v.* Reid, 103 Ill. 349.

Massachusetts.— Dexter *v.* Shepard, 117 Mass. 480.

Minnesota.— Atkinson *v.* Duffy, 16 Minn. 45.

North Dakota.—McDonald *v.* Nordyke Marmon Co., 9 N. D. 290, 83 N. W. 6. And see Grandin *v.* Emmons, 10 N. D. 223, 86 N. W. 723, 88 Am. St. Rep. 684, 54 L. R. A. 610. But *compare* Finlayson *v.* Peterson, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532.

South Dakota.— Thomas *v.* Issenhuth, 18 S. D. 303, 100 N. W. 436.

West Virginia.— Sandusky *v.* Faris, 49 W. Va. 150, 38 S. E. 563.

See 35 Cent. Dig. tit. "Mortgages," § 1064.

Contra.— Bacon *v.* Kennedy, 56 Mich. 329, 22 N. W. 824; McMahan *v.* American Bldg., etc., Sav. Assoc., 75 Miss. 965, 23 So. 431; Valentine *v.* McCue, 26 Hun (N. Y.) 456.

67. Pratt *v.* Tinkcom, 21 Minn. 142.

68. Knapp *v.* Anderson, 89 Md. 189, 42 Atl. 933; Moore *v.* Dick, 187 Mass. 207, 72 N. E. 967; Brown *v.* Wentworth, 181 Mass. 49, 62 N. E. 984; Rose *v.* Fall River Five Cents Sav. Bank, 165 Mass. 273, 43 N. E. 93; Stevenson *v.* Hano, 148 Mass. 616, 20 N. E. 200; Lowell *v.* North, 4 Minn. 32.

A statute requiring legal and judicial notices to be published in newspapers to be designated for the purpose by certain public officers does not apply to notices of foreclosure sales to be made under powers of sale in the mortgages. Dart *v.* Bagley, 110 Mo. 42, 19 S. W. 311; Ruffin *v.* Johnson, 5 Heisk. (Tenn.) 604.

69. Campbell *v.* Tagge, 30 Iowa 305; Singleton *v.* Scott, 11 Iowa 589.

70. Webber *v.* Curtiss, 104 Ill. 309; Taylor *v.* Reid, 103 Ill. 349; St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556; Stevenson *v.* Hano, 148 Mass. 616, 20 N. E. 200; Briggs *v.* Briggs, 135 Mass. 306; Wake *v.* Hart, 12 How. Pr. (N. Y.) 444.

71. Hull *v.* King, 38 Minn. 349, 37 N. W. 792, holding that a weekly paper, containing principally religious news and religious reading, but also a column devoted to the general news of the day, embracing every sort of news of interest to the general reader, is a "newspaper."

Publication in legal journal.— Such a notice may well be published in a legal newspaper, or journal devoted to the dissemination of legal news, the publication of legal and judicial notices, and the like. Taylor *v.* Reid, 103 Ill. 349; Kellogg *v.* Carrico, 47 Mo. 157; Meyer *v.* Opperman, 76 Tex. 105, 13 S. W. 174.

Publication in real estate journal.— A paper called the "Real-Estate Register and Rental Guide," containing only such matters as are implied in its name, never used as a medium of publication for foreclosure or other legal notices, and not likely to be consulted by persons interested in mortgage sales, is not such a newspaper as the statute or the deed of trust contemplates. Crowell *v.* Parker, 22 R. I. 51, 46 Atl. 35, 84 Am. St. Rep. 815.

in the identity of the paper, or if it is merely consolidated with another newspaper.[72]

d. Affidavits and Proof. Although the statute may require an affidavit of the due publication of the notice of foreclosure, this is not regarded as essential to the validity of the exercise of the power.[73] It has been held, however, that such an affidavit, when required by law to be not merely made but also recorded, is an essential requisite to a valid sale.[74] The facts regarding the publication may be proved by other evidence,[75] and defects or errors in the affidavit do not invalidate the sale.[76] The affidavit is presumptive, but not conclusive, evidence of the facts which it recites and of the sufficiency of the publication.[77]

5. Posting Notices. A provision either in the mortgage or in the statute requiring posting of the notices of sale must be strictly complied with, in respect to the places designated for such posting, the length of time prescribed, and other particulars.[78] If no particular places are specified, but it is only required that they shall be "public places," their selection is left to the mortgagee or trustee, but the places chosen must be such as to give reasonable publicity to the notices.[79] If the notices are actually put up the required number of days before the sale it is not essential that they should have remained intact and visible during every one of the intervening days.[80]

6. Correction of Mistakes. A trifling mistake in the notice of sale, not of such a nature as to mislead or injure any one, may be corrected in the subsequent publications of the notice without affecting the validity of the proceedings.[81] But if the mistake is serious and of a nature to mislead or deceive parties

72. Perkins *v.* Keller, 43 Mich. 53, 4 N. W. 559; Wilkerson *v.* Eilers, 114 Mo. 245, 21 S. W. 514. See also Stine *v.* Wilkson, 10 Mo. 75.

73. Golcher *v.* Brisbin, 20 Minn. 453; Gray *v.* Worst, 129 Mo. 122, 31 S. W. 585; Tuthill *v.* Tracy, 31 N. Y. 157. *Compare* Layman *v.* Whiting, 20 Barb. (N. Y.) 559.

Who may make affidavit.— An affidavit required of the "publisher" of the paper may be made by its "proprietor," the terms being synonymous. Palmer *v.* McCormick, 28 Fed. 541. So the "publisher" and the "printer" of the paper may be taken to be the same person. Golcher *v.* Brisbin, 20 Minn. 453; Menard *v.* Crowe, 20 Minn. 448; Bunce *v.* Reed, 16 Barb. (N. Y.) 347.

74. Van Vleck *v.* Enos, 88 Hun (N. Y.) 348, 34 N. Y. Suppl. 754; Burnham *v.* Hewey, 4 Fed. Cas. No. 2,175, 1 Hask. 372. But see Howard *v.* Hatch, 29 Barb. (N. Y.) 297.

75. Mowry *v.* Sanborn, 72 N. Y. 534; Osborn *v.* Merwin, 12 Hun (N. Y.) 332.

Printers' marks as proof.— The court cannot know officially the meaning of printers' marks at the foot of an advertisement, and, in the absence of further evidence on the subject, will not infer that such marks indicate the date and number of times a notice has been published. Johnson *v.* Robertson, 31 Md. 476.

An entry by a printer on his account-book of a payment of a charge for printing does not prove an advertisement of a mortgage sale for the requisite length of time. Osborn *v.* Merwin, 50 How. Pr. (N. Y.) 182.

76. Taylor *v.* Reid, 103 Ill. 349; Goenen *v.* Schroeder, 18 Minn. 66; Mowry *v.* Sanborn, 72 N. Y. 534; George *v.* Arthur, 4 Thomps. & C. (N. Y.) 635.

77. Griswold *v.* Taylor, 8 Minn. 342; Mowry *v.* Sanborn, 72 N. Y. 534; Bunce *v.* Reed, 16 Barb. (N. Y.) 347; Burke *v.* Adair, 23 W. Va. 139.

78. Sears *v.* Livermore, 17 Iowa 297, 85 Am. Dec. 564; New York Baptist Union *v.* Atwell, 95 Mich. 239, 54 N. W. 760; King *v.* Duntz, 11 Barb. (N. Y.) 191; Howard *v.* Fulton, 79 Tex. 231, 14 S. W. 1061; National Loan, etc., Co. *v.* Dorenblaser, 30 Tex. Civ. App. 148, 69 S. W. 1019; Clark *v.* Burke, (Tex. Civ. App. 1897) 39 S. W. 306.

Who may post notices.— A sale under a deed of trust is not invalidated by the fact that the notices were posted by the agents of the trustee, instead of by the trustee himself, if he ratified their acts. Tyler *v.* Herring, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. 263.

79. Rice *v.* Brown, 77 Ill. 549; Campbell *v.* Wheeler, 69 Iowa 588, 29 N. W. 613.

What are public places.— The door of the court-house and the door of the post-office, at the county-seat, are public places within the meaning of this requirement. Edwards *v.* Meadows, 71 Ala. 42. And see Carter *v.* Abshire, 48 Mo. 300.

80. Hornby *v.* Cramer, 12 How. Pr. (N. Y.) 490.

Notice posted on inside of post-office door. — One of the notices was posted on the inside of the door of the post-office. The office was open, and the notice consequently visible, during six days of the week; but on Sunday the office was open only for two hours in the forenoon, and on that day the notice could not be seen except during those hours. It was held that this did not render the sale invalid. Graham *v.* Fitts, 53 Miss. 307.

81. Chandler *v.* Cook, 2 MacArthur (D. C.) 176; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51 [*affirmed* in 50 N. Y. 468].

interested in the sale, or if it is shown actually to have misled them, the publication must be discontinued, and an entirely new advertisement begun and continued for the requisite length of time; if this is not done, the sale will be set aside.[82]

F. Sale — 1. Time of Sale — a. In General. In order to be valid, the sale must take place precisely at the time specified in the published advertisements.[83] But if advertised for a particular hour of the day, the sale is regular if made or commenced at any time during that hour, that is, before the next hour strikes.[84] It is no valid objection to the sale that it was made on a day generally observed as a legal holiday, or even made a legal holiday by statute, provided the statute does not forbid the transaction of secular business on that day.[85] A statute designating a certain day of the month as the day for public sales, such as execution sales and the like, does not apply to sales under a power in a mortgage or deed of trust.[86]

b. Postponement of Sale — (I) *Right to Postpone or Adjourn.* The mortgagee exercising his power of sale, or the trustee proceeding to sell under the deed of trust, has power and authority to postpone the sale beyond the day fixed in the notice, if sufficient grounds for such action exist,[87] or, after having commenced the sale, to adjourn it to a different day or hour.[88] Moreover, if it appears that going on with the sale at the appointed time will result in a great sacrifice of the property, it is his positive duty to adjourn the sale, and if he fails to do so he takes the risk of having it vacated.[89] If he has promised the mort-

82. Ritchie *v.* Judd, 137 Ill. 453, 27 N. E. 682; Pratt *v.* Tinkcom, 21 Minn. 142; Banning *v.* Armstrong, 7 Minn. 46; Dana *v.* Farrington, 4 Minn. 433; Wells *v.* Pfeiffer, 4 Yeates (Pa.) 203.

83. Hall *v.* Towne, 45 Ill. 493; Richards *v.* Finnegan, 45 Minn. 208, 47 N. W. 788.

Ratification by mortgagor.— Where land is sold under a power in a mortgage on a day other than that prescribed by the statute for such purposes, but the surplus proceeds of the sale, after paying the debt, are paid over to and accepted by the mortgagor, this amounts to a ratification of the sale, especially when fortified by a letter from the mortgagor in which he states that he is satisfied with the sale; and a writing, signed and acknowledged, is not needed to cure the irregularity. McLaren *v.* Jones, (Tex. Civ. App. 1895) 32 S. W. 17.

Unusual hour.— It appeared that the sale occurred about eleven o'clock A. M.; the sheriff testified that he usually made sales from half-past one to two o'clock, and had never made a mortgage sale as early in the day as this one; and there was also evidence of a custom to make such sales after one o'clock. It was held that the sale should be set aside, as having taken place at an unusual hour. Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719.

84. Lathrop *v.* Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 251; McGovern *v.* Union Mut. L. Ins. Co., 109 Ill. 151; Erwin *v.* Hall, 18 Ill. App. 315; Lester *v.* Citizens' Sav. Bank, 17 R. I. 88, 20 Atl. 231.

85. Mutual F. Ins. Co. *v.* Barker, 17 App. Cas. (D. C.) 205; Anderson *v.* White, 2 App. Cas. (D. C.) 408; Stewart *v.* Brown, (Mo. 1891) 16 S. W. 389.

86. Crawford *v.* Garrett, 121 Ga. 706, 49 S. E. 677; Thompson *v.* Cobb, 95 Tex. 140, 65 S. W. 1090, 93 Am. St. Rep. 820.

87. *District of Columbia.*— Crutchfield *v.* Hewett, 2 App. Cas. 373.

Minnesota.— Bennett *v.* Brundage, 8 Minn. 432; Banning *v.* Armstrong, 7 Minn. 46.

Missouri.— See Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161.

New York.— Westgate *v.* Handlin, 7 How. Pr. 372.

North Carolina.— Starke *v.* Etheridge, 71 N. C. 240.

See 35 Cent. Dig. tit. "Mortgages," § 1070.

Tender of payment may be cause for postponing or abandoning the sale, but not a tender merely of the interest, where the whole debt is due and payable. Weir *v.* Jones, 84 Miss. 602, 36 So. 533. And see Dunton *v.* Sharpe, 70 Miss. 850, 12 So. 800.

88. Griffin *v.* Marine Co., 52 Ill. 130; Dexter *v.* Shepard, 117 Mass. 480; Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304.

89. Thornton *v.* Boyden, 31 Ill. 200; Stevenson *v.* Hano, 148 Mass. 616, 20 N. E. 200; Howard *v.* Thornton, 50 Mo. 291; Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401.

Inclement weather, such as to prevent bidders from attending, may be regarded as imposing on the trustee the duty of adjourning the sale; but the sale will not be vacated, for failure to make an adjournment, merely on a showing that the afternoon of the sale was raw and cold, but that there was neither rain nor snow and the cold was not excessive. Mutual F. Ins. Co. *v.* Barker, 17 App. Cas. (D. C.) 205. Nor is an adjournment necessary merely because there had been rain earlier in the day. Mahoney *v.* Mackubin, 52 Md. 357.

gagor to postpone or adjourn the sale, but nevertheless proceeds to sell at the time originally appointed, the sale is fraudulent and void and will be set aside.[90]

(II) *Notice on Postponement or Adjournment.* Where a mortgage foreclosure sale is postponed or adjourned, a new and sufficient notice of the time and place for the sale must be published; but it is generally held that it need not be published or advertised for the same length of time that is requisite in the first instance, such notice as will give reasonable publicity being sufficient,[91] provided the notice is given in good faith,[92] and contains all the essential requisites of a notice of sale.[93]

2. Place of Sale. In the face of a statute providing that mortgage sales shall be made only in the county where the mortgaged land lies, a sale held elsewhere is entirely invalid,[94] although otherwise the sale is not avoided by being held in another county or even outside the state.[95] If the mortgage or deed of trust specifies the place where the sale shall be made, it must be strictly obeyed.[96] Thus if it provides for a sale "at the door of the court-house," no valid sale can be made elsewhere,[97] although, under a provision of this kind, if the court-house in existence at the time the mortgage was made has been destroyed by fire, closed for repairs, or removed to another site, it has been held that the sale may lawfully be made at the site of the ruined or abandoned court-house,[98] or at the door of the new court-house or of the building temporarily designated and used as the

90. Hoppes *v.* Cheek, 21 Ark. 585; Ventres *v.* Cobb, 105 Ill. 33. See Bailey *v.* Brown, 14 Colo. App. 392, 60 Pac. 20; Leet *v.* McMaster, 51 Barb. (N. Y.) 236.

91. Crutchfield *v.* Hewett, 2 App. Cas. (D. C.) 373; Way *v.* Dyer, 176 Mass. 448, 57 N. E. 678; Marcus *v.* Collamore, 168 Mass. 56, 46 N. E. 432; Stevenson *v.* Dana, 166 Mass. 163, 44 N. E. 128; Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304. See also Westgate *v.* Handlin, 7 How. Pr. (N. Y.) 372; Jackson *v.* Clark, 7 Johns. (N. Y.) 217. *Contra,* Griffin *v.* Marine Co., 52 Ill. 130; Thornton *v.* Boyden, 31 Ill. 200.

92. Clark *v.* Simmons, 150 Mass. 357, 23 N. E. 108; Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304.

93. Sanborn *v.* Petter, 35 Minn. 449, 29 N. W. 64; Miller *v.* Hull, 4 Den. (N. Y.) 104.

94. Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868; Webb *v.* Hoeffer, 53 Md. 187; Kerr *v.* Galloway, 94 Tex. 641, 64 S. W. 858; Beitel *v.* Dobbin, (Tex. Civ. App. 1898) 44 S. W. 299. But *compare* Harrison *v.* Annapolis, etc., R. Co., 50 Md. 490, holding that a statute of this kind applies only to mortgages technically so called, and not to deeds of trust in the nature of a mortgage.

Statutes not retrospective.— Statutes of this kind do not apply to mortgages or deeds of trust executed before their enactment. McConneaughey *v.* Bogardus, 106 Ill. 321; White *v.* Malcolm, 15 Md. 529; Chandler *v.* Peters, (Tex. Civ. App. 1898) 44 S. W. 867.

95. Ingle *v.* Jones, 43 Iowa 286; Greenwood *v.* Fontaine, (Tex. Civ. App. 1896) 34 S. W. 826.

96. Patterson *v.* Reynolds, 19 Ind. 148; Chandler *v.* Peters, (Tex. Civ. App. 1898) 44 S. W. 867; Fry *v.* Old Dominion Bldg., etc., Assoc., 48 W. Va. 61, 35 S. E. 842.

Who may object.— An objection to a trustee's sale on the ground that it was made at the door of the court-house, whereas the deed required that the property should be sold "on the premises," cannot be raised by a party who is a stranger to the deed and not one of those for whose benefit the direction as to the mode of sale was inserted. Nixon *v.* Cobleigh, 52 Ill. 387.

Subdivision of municipality.— A sale on the premises is good, although, since the making of the mortgage, that portion of the city or county has been set off and incorporated under a new name, and although the mortgage required the sale to be made in the city or county under its old name. Colcord *v.* Bettinson, 131 Mass. 233.

Subdivision of county.— Where the deed of trust provides that the property shall be sold at the county-seat of a certain county, and the county is afterward subdivided, a sale made at the county-seat of one of the new counties is void. Durrell *v.* Farwell, (Tex. Civ. App. 1894) 27 S. W. 795.

97. See Gray *v.* Worst, 129 Mo. 122, 31 S. W. 585; Maloney *v.* Webb, 112 Mo. 575, 20 S. W. 683.

Particular door of court-house.— Under a deed of trust providing for a sale at the east door of the court-house, a sale at the south door is valid in the absence of proof that any injury resulted therefrom. Hickey *v.* Behrens, 75 Tex. 488, 12 S. W. 679. So in an action to set aside a sale under a deed of trust, where the deed empowered the trustee to sell "at the front door of the court-house," and the court-house had three front doors, and there was nothing in the deed to indicate that the door at which the sale was actually made was not the door contemplated, the sale will not be avoided because not made at a different door, especially where it appears that it was fairly made in a public manner. Martin *v.* Barth, 4 Colo. App. 346, 36 Pac. 72.

98. Chandler *v.* White, 84 Ill. 435; Waller *v.* Arnold, 71 Ill. 350.

court-house.[99] If neither the statute nor the deed of trust specifies the place of sale, it is left to the selection of the trustee, who is bound to exercise a reasonable and prudent discretion in this matter, having regard to the probable attendance of bidders and to the wishes of the mortgagor if he expresses any.[1]

3. Conduct of Sale — a. In General. A sale under a power in a mortgage or deed of trust must be conducted in strict compliance with the terms of the power[2] and fairly and openly.[3] It will be vitiated by any fraud against the rights of the debtor or any collusion between interested parties of a nature to cause a sacrifice or depreciation of the property,[4] or by anything which tends to prevent or stifle competition among the bidders,[5] as, by false or misleading statements concerning the value of the property or the state of the title, or threats to cause trouble for the purchaser.[6] It is the duty of the mortgagee or trustee to use every reasonable care and exertion to make the property bring the highest price obtainable;[7] but, although he should probably adjourn the sale if he finds none

99. Wilhelm *v.* Schmidt, 84 Ill. 183; Alden *v.* Goldie, 82 Ill. 581; Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436; Snyder *v.* Chicago, etc., R. Co., 131 Mo. 568, 33 S. W. 67; Riggs *v.* Owen, 120 Mo. 176, 25 S. W. 356; Davis *v.* Hess, 103 Mo. 31, 15 S. W. 324; Napton *v.* Hurt, 70 Mo. 497; Hambright *v.* Brockman, 59 Mo. 52; Boone *v.* Miller, 86 Tex. 74, 23 S. W. 574. But see Stewart *v.* Brown, 112 Mo. 171, 20 S. W. 451.

1. *Mississippi.*—Goodman *v.* Durant Bldg., etc., Assoc., 71 Miss. 310, 14 So. 146.

North Carolina.— Jenkins *v.* Daniel, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632.

Texas.— Hess *v.* Dean, 66 Tex. 663, 2 S. W. 727.

Virginia.— Morriss *v.* Virginia State Ins. Co., 90 Va. 370, 18 S. E. 843; Shurtz *v.* Johnson, 28 Gratt. 657.

Canada.— Carruthers *v.* Hamilton Provident, etc., Soc., 12 Manitoba 60.

See 35 Cent. Dig. tit. "Mortgages," § 1048.

2. Wood *v.* Lake, 62 Ala. 489; Chace *v.* Morse, 189 Mass. 559, 76 N. E. 142; Stine *v.* Wilkson, 10 Mo. 75; Atkins *v.* Crumpler, 118 N. C. 532, 24 S. E. 367.

Effect of irregularity.— Where everything is done upon which the jurisdiction and authority to make a sale under a power in a mortgage depend, mere irregularities in the manner of doing it, or in the subsequent proceedings, which may injuriously affect the rights of the mortgagor, do not necessarily render the sale a nullity, but merely invalidate it, so far as to enable the mortgagor, or perhaps the purchaser, to avoid it; and such sale is effectual if all the parties interested desire to have it stand. Chace *v.* Morse, 189 Mass. 559, 76 N. E. 142.

3. Atkins *v.* Crumpler, 118 N. C. 532, 24 S. E. 367.

4. Harris *v.* Creveling, 80 Mich. 249, 45 N. W. 85; Mann *v.* Best, 62 Mo. 491; Longuemare *v.* Bushy, 56 Mo. 540; Boehlert *v.* McBride, 48 Mo. 505; Jackson *v.* Crafts, 18 Johns. (N. Y.) 110; Marlin *v.* Sawyer, (Tenn. Ch. App. 1899) 57 S. W. 416. See also Bush *v.* Sherman, 80 Ill. 160; Dempster *v.* West, 69 Ill. 613.

An agreement between the mortgagee and a prospective buyer, by which the former agrees to foreclose and the latter agrees to bid at the sale the full amount due on the mortgage, and to buy up certain conflicting claims to the land, but which contains no provision that the land shall be sold to him unless he is the highest bidder, is not fraudulent as against the mortgagor. Ritchie *v.* Judd, 137 Ill. 453, 27 N. E. 682.

5. Littell *v.* Grady, 38 Ark. 584; Mapps *v.* Sharpe, 32 Ill. 13; Longwith *v.* Butler, 8 Ill. 32; Smith *v.* Deeson, (Miss. 1893) 14 So. 40, holding that it is not enough, to set aside a sale under a power in a mortgage, that the agent of the creditor had made a map, from which he read the descriptions of the parcels to the trustee making the sale, and used it in making his bids, without showing it to the other bidders, there being no evidence that any one wished or asked to see it); Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377; Miltenberger *v.* Morrison, 39 Mo. 71; Barnard *v.* Duncan, 38 Mo. 170, 90 Am. Dec. 416.

6. McGuire *v.* Briscoe, 16 Fed. Cas. No. 8,813*a*, 2 Hayw. & H. 54.

Mistaken statement as to value of improvements.— A sale under a deed of trust will not be set aside merely because of a mistaken statement by the auctioneer that the value of recent improvements on the premises was three thousand dollars instead of eight thousand dollars. Anderson *v.* White, 2 App. Cas. (D. C.) 408.

7. *Kentucky.*—Aultman, etc., Co. *v.* Meade, 89 S. W. 137, 28 Ky. L. Rep. 208.

Minnesota.— Simonton *v.* Connecticut Mut. L. Ins. Co., 90 Minn. 24, 95 N. W. 451.

Missouri.— Givens *v.* McCray, 196 Mo. 306, 93 S. W. 374; Axman *v.* Smith, 156 Mo. 286, 57 S. W. 105; Tatum *v.* Holliday, 59 Mo. 422; Chesley *v.* Chesley, 49 Mo. 540; Dwyer *v.* Rohan, 99 Mo. App. 120, 73 S. W. 384.

England.—Australasia Nat. Bank *v.* United Hand-in-Hand Co., 4 App. Cas. 391, 40 L. T. Rep. N. S. 697, 27 Wkly. Rep. 889; Warner *v.* Jacob, 20 Ch. D. 220, 51 L. J. Ch. 642, 46 L. T. Rep. N. S. 656, 30 Wkly. Rep. 721; Marriott *v.* Anchor Reversionary Co., 3 De G. F. & J. 177, 7 Jur. N. S. 713, 30 L. J. Ch. 571, 4 L. T. Rep. N. S. 590, 9 Wkly. Rep. 726, 64 Eng. Ch. 140, 45 Eng. Reprint 846; Orme *v.* Wright, 3 Jur. 19; Wolff *v.* Vander-

but sham competitors present,[8] it cannot be said to be a part of his duty to hunt up bidders, or persuade them to attend, if the sale has been properly advertised.[9]

b. Mode of Sale. The parties to a mortgage or trust deed have the power to fix the mode and conditions of a sale to be made in execution of the power of sale, and these must be complied with.[10] If it is provided that the sale shall be at public auction, a sale made privately by the mortgagee or trustee is voidable, and it is immaterial that he can or does obtain a higher price thereby.[11] A parol sale of lands under a power of sale in a mortgage is a mere nullity.[12]

c. Who May Make Sale and Presence of Trustee or Mortgagee. The mortgagee or trustee charged with the duty of making the sale may employ an auctioneer or other person to cry the sale;[13] but it must be conducted under his own supervision, and, according to the doctrine generally accepted, he must be present in person,[14] although it has been held that a valid sale may be made by a duly authorized agent or attorney of the mortgagee or trustee, in the absence of the latter, or at least that the irregularity may be cured by subsequent ratification.[15]

zee, 20 L. T. Rep. N. S. 353, 17 Wkly. Rep. 547.

Canada.— Rennie *v.* Block, 26 Can. Sup. Ct. 356; Latch *v.* Furlong, 12 Grant Ch. (U. C.) 303; Richmond *v.* Evans, 8 Grant Ch. (U. C.) 508.

8. Fairfax *v.* Hopkins, 8 Fed. Cas. No. 4,614, 2 Cranch C. C. 134. And see Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

9. Harlin *v.* Nation, 126 Mo. 97, 27 S. W. 330; Seip *v.* Grinnan, (Tex. Civ. App. 1896) 36 S. W. 349; Davey *v.* Durrant, 1 De G. & J. 535, 26 L. J. Ch. 830, 58 Eng. Ch. 414, 44 Eng. Reprint 830.

10. Calloway *v.* People's Bank, 54 Ga. 441; Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43. See also Ingle *v.* Jones, 43 Iowa 286.

11. Williamson *v.* Stone, 128 Ill. 129, 22 N. E. 1005; Griffin *v.* Chicago Mar. Co., 52 Ill. 130; Heermans *v.* Montague, (Va. 1890) 20 S. E. 899; Greenleaf *v.* Queen, 1 Pet. (U. S.) 138, 7 L. ed. 85.

Private sale authorized by mortgage.— Where the mortgage contains a power of sale permitting a sale "by public auction or private contract," a private sale may be made without previous advertisement of it, although not without notice to the mortgagor. *Re* Shore, 6 Manitoba 305.

Authority from mortgagor.— Although a trust deed required that the property should be sold at public auction, yet if the two highest bidders at the sale are unable to comply with their bids, it is competent for the owner of the property, by parol, to authorize the trustee to sell it at private sale to the highest responsible bidder for the amount bid by him at the public sale. Cockrill *v.* Whitworth, (Tenn. Ch. App. 1899) 52 S. W. 524.

Confirmation of private sale by court.— A court of chancery will confirm a private sale by trustees, although the trust deed required a sale at public auction, where it appears that a higher price was obtained than could have been obtained at public auction, since the court, on such a showing, would have granted an order for a private sale. Cunningham *v.* Schley, 6 Gill (Md.) 207.

12. Jackson *v.* Scott, 67 Ala. 99.

13. *Alabama.*— Welsh *v.* Coley, 82 Ala. 363, 2 So. 733.

California.—Kennedy *v.* Dunn, 58 Cal. 339; Fogarty *v.* Sawyer, 23 Cal. 570.

Georgia.— Palmer *v.* Young, 96 Ga. 246, 22 S. E. 928, 51 Am. St. Rep. 130.

Illinois.— McPherson *v.* Sanborn, 88 Ill. 150; Taylor *v.* Hopkins, 40 Ill. 442; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328.

Massachusetts.— Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215.

Mississippi.— See Cox *v.* American Freehold, etc., Mortg. Co., (1906) 40 So. 739, appointment of auctioneer required by trust deed to be in writing.

Rhode Island.— Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94.

See 35 Cent. Dig. tit. "Mortgages," § 1077.

Unlicensed auctioneer.— The sale of mortgaged property under a power of sale, by an auctioneer whose license has expired, will not be void, where it does not appear that the mortgagor was injured, and the mortgagee did not know that the auctioneer had neglected to renew his license. Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215.

14. *Illinois.*— Grover *v.* Hale, 107 Ill. 638; Chambers *v.* Jones, 72 Ill. 275; Munn *v.* Burges, 70 Ill. 604; Taylor *v.* Hopkins, 40 Ill. 442.

Maryland.—Wicks *v.* Westcott, 59 Md. 270.

Missouri.— Spurlock *v.* Sproule, 72 Mo. 503; Brickenkamp *v.* Rees, 69 Mo. 426; Vail *v.* Jacobs, 62 Mo. 130; Howard *v.* Thornton, 50 Mo. 291; Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401.

Texas.— Fuller *v.* Oneal, 82 Tex. 417, 18 S. W. 479, 481; Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850.

West Virginia.— Smith *v.* Lowther, 35 W. Va. 300, 13 S. E. 999.

See 35 Cent. Dig. tit. "Mortgages," § 1077.

15. Ray *v.* Home, etc., Inv., etc., Co., 98 Ga. 122, 26 S. E. 56; Dunton *v.* Sharpe, 70 Miss. 850, 12 So. 800; Tyler *v.* Herring, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. 263; Johns *v.* Sergeant, 45 Miss. 332; Parker *v.* Banks, 79 N. C. 480; Connolly *v.* Belt, 6 Fed. Cas. No. 3,117, 5 Cranch C. C. 405.

In the case of two or more joint trustees, it is conceded that the presence of one of them is sufficient to validate the sale, if the absence of the others was not procured by fraud or contrivance, and if all joined in the notices and in the deed to the purchaser.[16] Where the statute so provides, the sale may be made by the sheriff of the county, instead of by the mortgagee,[17] and in such case the sale is well made by a deputy sheriff.[18]

4. Order of Sale. It is proper for the trustee or mortgagee making the sale to marshal the different parts or tracts of land, and to sell them in such order as will preserve the rights or equities of all concerned; as for instance where the mortgagor has sold a part of the land and retains the rest, the portion retained should be first sold;[19] and so a junior encumbrancer secured on only a portion of the property covered by the elder lien should be protected;[20] and where the mortgage covers a homestead and also other lands the mortgagor is entitled to have the non-exempt property sold first.[21] Still this matter rests very much in the discretion of the trustee or mortgagee, and his action will not generally be set aside by the courts where the manner of sale proposed does not appear to have been practicable or advantageous, or where parties affected do not take measures before the sale to protect themselves, or do not complain afterward.[22]

5. Amount of Property to Be Sold. If the power of sale in the mortgage or trust deed provides for a sale of the premises, or so much thereof as may be necessary, it is not only permissible for the mortgagee or trustee to divide the property and sell the necessary portion, but it is his duty to do so.[23] In the absence of such a provision, a sale of the property as a whole is valid notwithstanding the fact that a sale of a portion of it would have been sufficient to raise the money required.[24] But if the mortgagee or trustee begins to sell by parcels, his power is exhausted as soon as he has sold enough to realize the debt secured and the costs; and if he sells another parcel after that the sale is invalid, at least as regards the last parcel.[25]

16. Crutchfield *v.* Hewett, 2 App. Cas. (D. C.) 373; Weld *v.* Rees, 48 Ill. 428; Smith *v.* Black, 115 U. S. 308, 6 S. Ct. 50, 29 L. ed. 398.

17. Watson *v.* Lynch, 127 Mich. 365, 86 N. W. 870, holding that if the notice of sale specifies that the mortgagee will make the sale, the sheriff is not authorized to make the sale except under instructions from the mortgagee. *Compare* Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381.

The sheriff of an organized county, attached to another county for judicial purposes, is the proper officer to conduct a mortgage sale of lands lying in such organized county. Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233.

When title to office in dispute.— Where the papers and instructions for a foreclosure sale are placed in the hands of one of two rival claimants of the office of sheriff of the county, under the mistaken belief that he was legally entitled to the office, but the other claimant, being in fact the legal incumbent, proceeds to sell the property in accordance with the published notice of foreclosure, but without any authority from the mortgagee and without having possession of any of the papers, the sale will be set aside on the ground of mistake. Stacy *v.* Smith, 9 S. D. 137, 68 N. W. 198.

18. Hodgdon *v.* Davis, 6 Dak. 21, 50 N. W. 478; Heinmiller *v.* Hatheway, 60 Mich. 391, 27 N. W. 558; Clark *v.* Mitchell, 81 Minn. 438, 84 N. W. 327. And see Singer Mfg. Co. *v.* Chalmers, 2 Utah 542.

19. Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556.

20. Brown *v.* Wentworth, 181 Mass. 49, 62 N. E. 984.

21. Horton *v.* Kelly, 40 Minn. 193, 41 N. W. 1031.

22. See St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556; Brown *v.* Wentworth, 181 Mass. 49, 62 N. E. 984; Hinton *v.* Pritchard, 120 N. C. 1, 26 S. E. 627, 58 Am. St. Rep. 789.

23. Pryor *v.* Baker, 133 Mass. 459; Miller *v.* Mann, 88 Va. 212, 13 S. E. 337. And see Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *In re* Wilkinson, L. R. 13 Eq. 634, 41 L. J. Ch. 392; Stewart *v.* Rowsom, 22 Ont. 533.

Division of single lot.— The trustee in a deed of trust, where there are subsequent encumbrancers, cannot sell a part only of a single lot without the consent of all parties concerned. Connolly *v.* Belt, 6 Fed. Cas. No. 3,117, 5 Cranch C. C. 405.

24. Singleton *v.* Scott, 11 Iowa 589; Johnson *v.* Williams, 4 Minn. 260; Connolly *v.* Belt, 6 Fed. Cas. No. 3,117, 5 Cranch C. C. 405.

25. Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336; Grover *v.* Fox, 36 Mich. 461; Baker *v.* Halligan, 75 Mo. 435; Kirby *v.* Howie, 9 S. D. 471, 70 N. W. 640. But see Hall *v.* Gould, 79 Ill. 16.

6. Sale En Masse or in Parcels. Where the property covered by a mortgage is separated into several distinct tracts or lots, either by natural boundaries, by the way in which it is platted or laid out, or by the fact that the parcels are not contiguous, it should not be put up for sale as a whole, but the separate parcels should first be offered singly.[26] On the other hand, although the premises may be susceptible of division or actually divided, yet if they are used, occupied, or naturally constitute, one farm or one lot, the property should be offered as a whole.[27] In other cases and unless otherwise directed by the mortgage or deed of trust, the question of selling the property *en masse* or in parcels rests in the sound discretion of the trustee or other person making the sale;[28] and he should be guided by the effect of a division on the value of the property, his duty being to choose that course which will most encourage competition in bidding and result in the largest price.[29] If his discretion is exercised arbitrarily, or if he makes an improper or unwise division of the property for the purpose of the sale, equity may set it aside.[30] Where mortgaged property is sold in bulk, instead of being divided and sold in separate parcels, as required by the statute or by the terms of the mortgage, the sale may be voidable, but is not void; and it will not be set aside except on a showing of fraud, unfairness, or abuse of discretion in making the sale and of prejudice to the owner of the equity of redemption resulting from the mode of sale adopted.[31] But this does not apply

26. *Illinois.*— Meacham *v.* Steele, 93 Ill. 135.

Maryland.— Mays *v.* Lee, 100 Md. 227, 59 Atl. 848; Patterson *v.* Miller, 52 Md. 388.

Massachusetts.— Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

Michigan.— Hawes *v.* Detroit F. & M. Ins. Co., 109 Mich. 324, 67 N. W. 329, 63 Am. St. Rep. 581; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32; Keyes *v.* Sherwood, 71 Mich. 516, 39 N. W. 740; Lee *v.* Mason, 10 Mich. 403.

Minnesota.— Bay View Land Co. *v.* Myers, 62 Minn. 265, 64 N. W. 816; Ryder *v.* Hulett, 44 Minn. 353, 46 N. W. 559; Worley *v.* Naylor, 6 Minn. 192.

Missouri.— Sumrall *v.* Chaffin, 48 Mo. 402.

New York.— Lamerson *v.* Marvin, 8 Barb. 9.

West Virginia.— Shears *v.* Traders' Bldg. Assoc., 58 W. Va. 665, 52 S. E. 860.

Canada.— Aldrich *v.* Canada Permanent Loan, etc., Soc., 24 Ont. App. 193.

See 35 Cent. Dig. tit. "Mortgages," § 1072.

Subsequent division.— Where land is mortgaged as one entire lot, and is subsequently subdivided by the mortgagor into smaller lots for the purposes of sale or for the convenience of the mortgagor, it is not necessary, on foreclosing the mortgage, to advertise and sell in parcels. Lamerson *v.* Marvin, 8 Barb. (N. Y.) 9.

27. *Michigan.*— Harris *v.* Creveling, 80 Mich. 249, 45 N. W. 85; Yale *v.* Stevenson, 58 Mich. 537, 25 N. W. 488.

Minnesota.— Merrill *v.* Nelson, 18 Minn. 366.

Missouri.— Kellogg *v.* Carrico, 47 Mo. 157.

New York.— Anderson *v.* Austin, 34 Barb. 319.

Wisconsin.— Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

Compare Coffman *v.* Scoville, 86 Ill. 300.

See 35 Cent. Dig. tit. "Mortgages," § 1072.

28. *Colorado.*— Loveland *v.* Clark, 11 Colo. 265, 18 Pac. 544.

District of Columbia.— Mutual F. Ins. Co. *v.* Barker, 17 App. Cas. 205.

Illinois.— Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804; Cleaver *v.* Green, 107 Ill. 67.

Missouri.— Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078; Chase *v.* Williams, 74 Mo. 429; Gray *v.* Shaw, 14 Mo. 341.

Rhode Island.— See Babcock *v.* Wells, 25 R. I. 30, 54 Atl. 599.

Texas.— Detroit Nat. Loan, etc., Co. *v.* Dorenblaser, 30 Tex. Civ. App. 148, 69 S. W. 1019.

See 35 Cent. Dig. tit. "Mortgages," § 1072.

29. Cassidy *v.* Cook, 99 Ill. 385; Lazarus *v.* Caeser, 157 Mo. 199, 57 S. W. 751; Tatum *v.* Holliday, 59 Mo. 422; Carter *v.* Abshire, 48 Mo. 300; Morriss *v.* Virginia State Ins. Co., 90 Va. 370, 18 S. E. 843; Terry *v.* Fitzgerald, 32 Gratt. (Va.) 843.

30. Carroll *v.* Hutton, 91 Md. 379, 46 Atl. 967, 88 Md. 676, 41 Atl. 1081.

31. *Alabama.*— Mahone *v.* Williams, 39 Ala. 202.

Illinois.— Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328.

Michigan.— Long *v.* Kaiser, 81 Mich. 518, 46 N. W. 19. Where mortgaged property is subsequently subdivided and parts of it sold, and the parties have joined in obtaining a release of a parcel so situated as to leave the rest in distinct parcels, and thus affect the security, the sale is void if not made in parcels. Durm *v.* Fish, 46 Mich. 312, 9 N. W. 429.

Minnesota.— Clark *v.* Kraker, 51 Minn. 444, 53 N. W. 706; Ryder *v.* Hulett, 44 Minn. 353,

where separate parcels, covered by distinct mortgages, are lumped together and sold as one on a bid in gross.[32] A sale made in parcels, on a statutory foreclosure of a mortgage, if invalid as a sale in parcels, cannot be sustained as a sale in bulk, even though the sale might have been made in bulk.[33]

7. Terms and Conditions of Sale — a. In General. Where the terms of sale are prescribed by the mortgage or deed of trust, they must be strictly observed,[34] and cannot be changed even by an order of the court, unless with the consent of all parties concerned.[35] Where it is left to the discretion of the trustee to fix the terms, those determined upon and advertised by him cannot be changed unless all parties concur.[36] Where the sale is made on foreclosure of a junior lien, there is generally no power to sell free of encumbrances, but only the equity of redemption can be offered and sold.[37]

b. Sale For Cash or on Credit. Where it rests with the mortgagee to fix the terms of sale, uncontrolled either by statute or the terms of the mortgage, it is not an unreasonable condition that the sale shall be made for cash;[38] and, in the

46 N. W. 559; Willard *v.* Finnegan, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50; Abbott *v.* Peck, 35 Minn. 499, 29 N. W. 194. See Paquin *v.* Braley, 10 Minn. 379.

Mississippi.— Smith *v.* Deeson, (1893) 14 So. 40.

Missouri.— Benton Land Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94; Snyder *v.* Chicago, etc., R. Co., 131 Mo. 568, 33 S. W. 67; Harlin *v.* Nation, 126 Mo. 97, 27 S. W. 330; German Bank *v.* Stumpf, 73 Mo. 311; Benkendorf *v.* Vincenz, 52 Mo. 441; Miller *v.* Evans, 35 Mo. 45; Kline *v.* Vogel, 11 Mo. App. 211.

South Dakota.— Middlesex Banking Co. *v.* Lester, 7 S. D. 333, 64 N. W. 168.

Texas.— Shaw *v.* Holloway, 13 Tex. Civ. App. 254, 35 S. W. 800.

United States.— Swenson *v.* Halberg, 1 Fed. 444, 1 McCrary 96.

See 35 Cent. Dig. tit. "Mortgages," § 1073.

Waiver of statutory requirement.— A sale of land under a deed of trust in bulk, in pursuance of a provision in the deed, is valid, although a statute provides that land sold under trust deeds shall be offered in subdivisions not exceeding one hundred and sixty acres, as this requirement may be waived by the parties. Brown *v.* British, etc., Mortg. Co., 86 Miss. 388, 38 So. 312.

Interests of grantor sacrificed.—A trustee's foreclosure sale of land *en masse* will be set aside where the land was capable of an easy division, and the interests of the grantor were sacrificed by the sale as made. Chesley *v.* Chesley, 54 Mo. 347.

Inadequacy of price.— Where property worth sixty thousand dollars, and consisting of distinct tracts of land, some of which were four miles distant from others, is sold as a whole at one bidding for fifteen thousand dollars, the sale will be set aside. Ryerson *v.* Boorman, 7 N. J. Eq. 167.

Offer of amount of debt for one parcel.— Where a junior mortgagee had requested that the land might be sold in separate parcels, and offered in good faith to bid the amount of the mortgage debt and costs for one designated parcel, which was so situated that it could be conveniently sold and conveyed separately a sale *en masse* will be set aside. Ellsworth *v.* Lockwood, 42 N. Y. 89.

32. Morse *v.* Byam, 55 Mich. 594, 22 N. W. 54; Hull *v.* King, 38 Minn. 349, 37 N. W. 792.

33. Grover *v.* Fox, 36 Mich. 461.

34. May *v.* Shepherd, 1 Mackey (D. C.) 430; Emmons *v.* Van Zee, 78 Mich. 171, 43 N. W. 1100. *Compare* Sandford *v.* Flint, 24 Mich. 26, holding that a mortgagee will not be allowed in any case to execute the power of sale contained in his mortgage so as to compel the mortgagor to pay more than he owes on pain of forfeiting his estate.

Liability of mortgagor for failure to observe conditions.— Where the mortgage authorizes the sale of the property only at a price to be agreed upon between the parties or fixed by an umpire, but the creditor sells the property without observing such agreement, he is accountable to the debtor for the actual value of the property at the time of settlement, if greater than the price received. Kilgour *v.* Scott, 101 Fed. 359.

Exchanging mortgaged premises.— A mortgagee who has the power under the terms of the mortgage, on default, to sell or "absolutely dispose of" the property, at public or private sale, can exercise the power by exchanging the mortgaged property for other lands. Smith *v.* Spears, 22 Ont. 286.

35. Hoff *v.* Crafton, 79 N. C. 592.

36. Burche *v.* Wallach, 1 Mackey (D. C.) 236. And see Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503.

37. Dearnaley *v.* Chase, 136 Mass. 288; Donohue *v.* Chase, 130 Mass. 137; Meyer *v.* Opperman, 76 Tex. 105, 13 S. W. 174; Curry *v.* Hill, 18 W. Va. 370. But see Story *v.* Hamilton, 86 N. Y. 428; Mayer *v.* Adrian, 77 N. C. 83.

38. *District of Columbia.*— Hitz *v.* Jenks, 16 App. Cas. 530.

Maryland.— Powell *v.* Hopkins, 38 Md. 1.

New York.— Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281.

Tennessee.— Knox *v.* McCain, 13 Lea 197.

Virginia.— Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889.

same circumstances, he may fix terms allowing payment by instalments,[39] or combine both terms and arrange to sell for part cash and the balance on credit.[40] But where it is required that the sale shall be for cash, either by a statute or by the terms of the deed, it is improper to vary such terms,[41] although some of the decisions maintain that the sale is not invalidated by giving credit, unless it appears that there was some fraudulent purpose in so doing or that it operated to the disadvantage of the mortgagor;[42] and clearly it is permissible for the creditor to loan money to the purchaser with which to complete his purchase, or to give him credit for so much of the purchase-price as will be payable in any event to the creditor;[43] and where the creditor himself becomes the purchaser, it is a sufficient compliance with the requirement of a sale for cash if the amount of his bid is simply credited on the mortgage debt.[44]

8 WHO MAY PURCHASE — a. In General. As a general rule any person may become a purchaser at a mortgage foreclosure sale who does not stand in such a relation of trust or confidence to the mortgagor as to make his purchase a fraud or breach of duty.[45] In accordance with this rule the purchase may be made by

West Virginia.— Walker *v.* Boggess, 41 W. Va. 588, 23 S. E. 550.

See 35 Cent. Dig. tit. "Mortgages," § 1079.

Check as cash.—A certified check is "cash" within the requirement that the sale shall be made for cash. Jacobs *v.* Turpin, 83 Ill. 424. So it appears is any check which is actually good for the amount and will be paid if presented at the bank. McConneaughey *v.* Bogardus, 106 Ill. 321.

A promissory note of the purchaser is not cash, within the meaning of such a requirement. Pursley *v.* Forth, 82 Ill. 327; Tompkins *v.* Drennen, 56 Fed. 694, 6 C. C. A. 83. But it has been held that the mortgagee may accept the purchaser's note for so much of the purchase-price as will be payable to him, no injury being done to the mortgagor, if the latter receives the surplus proceeds in cash. Mead *v.* McLaughlin, 42 Mo. 198; Marlin *v.* Sawyer, (Tenn. Ch. App. 1899) 57 S. W. 416; Rodburn *v.* Swinney, 16 Can. Sup. Ct. 297.

39. White *v.* Malcolm, 15 Md. 529; Bailey *v.* Ætna Ins. Co., 10 Allen (Mass.) 286; Patch *v.* Morrisett, (Va. 1895) 22 S. E. 173.

Interest on deferred payments.—Where the trustees, in a deed of trust given to secure the payment of a debt bearing a larger rate of interest, in selling to foreclose, allow time on the purchase-money at a reasonable rate of interest, not by direction of the creditor secured, the debt secured by the trust deed continues to bear interest at the higher rate. *In re* Carter, 5 Fed. Cas. No. 2,471, 2 Hughes 447.

40. Markey *v.* Langley, 92 U. S. 142, 23 L. ed. 701. But see Tatum *v.* Holliday, 59 Mo. 422, holding that a trustee under a deed of trust, in selling the land, is bound to adopt that mode, as to selling for cash or on credit, which will be most beneficial to the debtor.

41 Scott *v.* Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131; Strother *v.* Law, 54 Ill. 413; Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270; Charles Green Real Estate Co. *v.* St. Louis Mut. House Bldg. Co. No. 3, 196 Mo. 358, 93 S. W. 1111.

Medium of payment.— Where a trust deed provided for a sale for cash, and the creditor instructed the trustee to accept in payment only gold and silver or legal tender currency, the announcement of that fact at the sale, without any fraudulent purpose, will not vitiate the sale. Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775.

42. Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Mewburn *v.* Bass, 82 Ala. 622, 2 So. 520; Whitfield *v.* Riddle, 78 Ala. 99; Mahone *v.* Williams, 39 Ala. 202; Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253. And see Hubbard *v.* Jarrell, 23 Md. 66; Snyder *v.* Chicago R. Co., 131 Mo. 568, 33 S. W. 67.

43. Sawyer *v.* Campbell, 130 Ill. 186, 22 N. E. 458; Burr *v.* Borden, 61 Ill. 389; Waterman *v.* Spaulding, 51 Ill. 425; Chase *v.* Cleburne First Nat. Bank, 1 Tex. Civ. App. 595, 20 S. W. 1027.

44. Ivey *v.* New South Bldg., etc., Assoc., 103 Ga. 585, 30 S. E. 540; Jacobs *v.* Turpin, 83 Ill. 424; Beal *v.* Blair, 33 Iowa 318; Smith *v.* Black, 115 U. S. 308, 6 S. Ct. 50, 29 L. ed. 398.

45. Eastman *v.* Littlefield, 164 Ill. 124, 45 N. E. 137; Plum *v* Studebaker Bros. Mfg. Co., 89 Mo. 162, 1 S. W. 217.

Illustrations.—Purchases at such sales have been sustained when made by the following persons: A creditor of the mortgagor to whom the mortgage bonds had been pledged as collateral security (Easton *v.* German-American Bank, 127 U. S. 532, 8 S. Ct. 1297, 32 L. ed. 210); a purchaser of an undivided interest in the mortgaged premises (Burr *v.* Mueller, 65 Ill. 258. And see Turner *v.* Littlefield, 142 Ill. 630, 32 N. E. 522); a coöwner of the mortgaged estate (Kennedy *v.* De Trafford, [1897] A. C. 180, 66 L. J. Ch. 413, 76 L. T. Rep. N. S. 427, 45 Wkly. Rep. 671); an administrator of the estate of the deceased mortgagor (Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078); his adult heirs (Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350); a receiver of the insolvent mortgagee corporation (Jacobs *v.* Turpin, 83 Ill. 424); and an assignee for the benefit of the cred-

one who has acted as agent for either of the parties,[46] or as the attorney of either, if the sale is perfectly fair and open,[47] or by a junior mortgagee,[48] or by a director in the corporation which executed the mortgage.[49]

b. Mortgagee or Trustee — (i) *Right to Purchase in General.* The mortgagee or trustee in a mortgage or deed of trust which contains a power of sale on default cannot become the purchaser at a sale which he himself makes under the power, either directly or through the agency of a third person,[50] unless

itors of the mortgagee (Thompson *v.* Browne, 10 S. D. 344, 73 N. W. 194).

A stepfather does not stand in such a relation of trust to his minor children that he is bound to extinguish a mortgage on their real estate; and therefore, on a sale under the mortgage, he can purchase the land as a stranger. Otto *v.* Schlapkahl, 57 Iowa 226, 10 N. W. 651.

46. Parmly *v.* Walker, 102 Ill. 617; Weld *v.* Rees, 48 Ill. 428; Seip *v.* Grinnan, (Tex. Civ. App. 1896) 36 S. W. 349. But *compare* Gibson *v.* Barhour, 100 N. C. 192, 6 S. E. 766.

47. Herr *v.* Payson, 157 Ill. 244, 41 N. E. 732; Nutt *v.* Easton, [1900] 1 Ch. 29, 69 L. J. Ch. 46, 81 L. T. Rep. N. S. 530. *Compare* Howard *v.* Harding, 18 Grant Ch. (U. C.) 181.

48. Kirkwood *v.* Thompson, 2 De G. J. & S. 613, 34 L. J. Ch. 501, 12 L. T. Rep. N. S. 811, 13 Wkly. Rep. 1052, 67 Eng. Ch. 478, 46 Eng. Reprint 513; Shaw *v.* Bunny, 2 De G. J. & S. 468, 11 Jur. N. S. 99, 34 L. J. Ch. 257, 11 L. T. Rep. N. S. 645, 13 Wkly. Rep. 374, 67 Eng. Ch. 365, 46 Eng. Reprint 456; Brown *v.* Woodhouse, 14 Grant Ch. (U. C.) 682; Watkins *v.* McKellar, 7 Grant Ch. (U. C.) 584. *Per Contra*, Taylor *v.* Heggie, 83 N. C. 244.

49. Saltmarsh *v.* Spaulding, 147 Mass. 224, 17 N. E. 316.

50. *Alabama.* — American Freehold Land Mortg. Co. *v.* Pollard, 120 Ala. 1, 24 So. 736.

California.— Copsey *v.* Sacramento Bank, 133 Cal. 659, 66 Pac. 7, 85 Am. St. Rep. 238.

Illinois.— Nichols *v.* Otto, 132 Ill. 91, 23 N. E. 411; Jenkins *v.* Pierce, 98 Ill. 646; Burr *v.* Borden, 61 Ill. 389; Harper *v.* Ely, 56 Ill. 179; Roberts *v.* Fleming, 53 Ill. 196; Griffin *v.* Chicago Mar. Co., 52 Ill. 130; Waite *v.* Dennison, 51 Ill. 319; Hall *v.* Towne, 45 Ill. 493; Ross *v.* Demoss, 45 Ill. 447; Moore *v.* Titman, 44 Ill. 367; Mapps *v.* Sharpe, 32 Ill. 13.

Massachusetts.— Clark *v.* Simmons, 150 Mass. 357, 23 N. E. 108; Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215. *Compare* Montague *v.* Dawes, 14 Allen 369, holding that one who has a power of sale of mortgaged premises and becomes the purchaser at the sale will be held by a court of equity to the strictest good faith and the utmost diligence for the protection of the rights of his principal; and if, owing to the meager information afforded by the notice of sale, its irresponsible character, and the remoteness of the place appointed for the sale from the premises to be sold, proper purchasers are not attracted to the sale, it will be set aside as invalid.

Minnesota.— Allen *v.* Chatfield, 8 Minn. 435; Lowell *v.* North, 4 Minn. 32.

Missouri.— McKee *v.* Spiro, 107 Mo. 452, 17 S. W. 1013; Gaines *v.* Allen, 58 Mo. 537; Reddick *v.* Gressman, 49 Mo. 389; Dwyer *v.* Rohan, 99 Mo. App. 120, 73 S. W. 384. Where lands are conveyed by a debtor to a trustee to be sold, and the proceeds distributed among his sureties proportionally to the sums they have paid on his behalf, either of the sureties may bid at the sale. Landis *v.* Curd, 63 Mo. 104.

New York.— See Dobson *v.* Racey, 8 N. Y. 216; Benedict *v.* Gilman, 4 Paige 58.

North Carolina.— Shew *v.* Call, 119 N. C. 450, 26 S. E. 33, 55 Am. St. Rep. 678; Averitt *v.* Elliot, 109 N. C. 560, 13 S. E. 785; Whitehead *v.* Whitehurst, 108 N. C. 458, 13 S. E. 166; Simpson *v.* Simpson, 107 N. C. 552, 12 S. E. 447; Gibson *v.* Barhour, 100 N. C. 192, 6 S. E. 766; Whitehead *v.* Hellen, 76 N. C. 99.

Rhode Island.— Parmenter *v.* Walker, 9 R. I. 225.

Tennessee.— Wade *v.* Harper, 3 Yerg. 383.

Virginia.— Harrison *v.* Manson, 95 Va. 593, 29 S. E. 420.

United States.— Hammond *v.* Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. ed. 134; Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 1 Woods 552.

England.— Henderson *v.* Astwood, [1894] A. C. 150, 6 Reports 450; Parkinson *v.* Hanbury, 2 De J. & S. 450, 11 L. T. Rep. N. S. 755, 13 Wkly. Rep. 331, 67 Eng. Ch. 350, 46 Eng. Reprint 449.

Canada.— Taylor *v.* Sharp, 3 Manitoba 4; Mitchell *v.* Kinnear, 1 N. Brunsw. Eq. 427; Spain *v.* Watt, 16 Grant Ch. (U. C.) 260; Ellis *v.* Dellabough, 15 Grant Ch. (U. C.) 583.

See 35 Cent. Dig. tit. "Mortgages," § 1081.

Contra.— Macy *v.* Southern Bldg., etc., Assoc., 102 Ga. 812, 30 S. E. 430; Palmer *v.* Young, 96 Ga. 246, 22 S. E. 928, 51 Am. St. Rep. 136; Bohn *v.* Davis, 75 Tex. 24, 12 S. W. 837; Marsh *v.* Hubbard, 50 Tex. 203; Howard *v.* Davis, 6 Tex. 174; Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

Purchase by corporation in which mortgagee a stock-holder.— It has been held that, although a mortgagee cannot sell to himself, nor can two mortgagees sell either to one of themselves, or to one of themselves and another, for the reason that, in such a case, there could be no real independent bargaining as between two opposite parties, yet where the mortgagees sold to a corporation, there were *prima facie* two independent contracting parties and a valid contract, and if the bargaining was real and honest, and con-

expressly permitted by the terms of the instrument[51] or authorized by the statute,[52] or unless the transaction is assented to and ratified by the mortgagor or grantor.[53] But this does not apply to the creditor secured by a deed of trust. Not holding the legal title, he is not a trustee for the debtor in any such sense as to preclude him from buying at the sale.[54] And where a sale under the power has been made in good faith to a stranger, with no understanding or arrangement for a purchase from him, the fiduciary relation of the trustee or mortgagee to the property is at an end, and he may thereafter acquire title to it as any third person might.[55]

(II) *Effect of Permission in Mortgage.* It is competent for the parties to insert in the mortgage a provision authorizing the mortgagee to bid and become the purchaser at his own sale under the mortgage, and when this is done a purchase by the mortgagee is perfectly legal and valid, if the sale is fairly and honestly conducted.[56]

(III) *Affirmance or Avoidance of Sale.* A mortgagee's purchase at his own foreclosure sale, when not authorized by the mortgage or by statute, is voidable, although not absolutely void; it gives the mortgagor an election either to

ducted independently by the mortgagees on the one hand and the directors of the corporation on the other hand, and it was satisfactorily shown that in concluding the terms of the sale the parties were in no way affected by the circumstance that one of the mortgagees was a stock-holder in the corporation, there was no sufficient reason for setting aside the sale. Farrar *v.* Farrars, 40 Ch. D. 395, 58 L. J. Ch. 185, 60 L. T. Rep. N. S. 121, 37 Wkly. Rep. 196.

The appointment of a temporary trustee, in place of the trustee originally named in a deed of trust, on account of the latter's absence from the state, the deed making provision for such appointment, does not divest the original trustee of his trust relationship to the property and the parties so as to enable him to become a purchaser at the sale. Brewer *v.* Harrison, 27 Colo. 349, 62 Pac. 224.

51. See *infra*, XX, F, 8, b, (II).

52. See the statutes of the different states. And see Lewis *v.* Duane, 69 Hun (N. Y.) 28, 23 N. Y. Suppl. 433 [*affirmed* in 141 N. Y. 302, 36 N. E. 322]; Galvin *v.* Newton, 19 R. I. 176, 36 Atl. 3; McLaughlin *v.* Hanley, 12 R. I. 61.

In Minnesota the statute authorizes the mortgagee to purchase at the sale made in execution of the power contained in the mortgage, when the sale is made, not by himself, but by the sheriff or other public officer. Allen *v.* Chatfield, 8 Minn. 435; Ramsey *v.* Merriam, 6 Minn. 168.

53. Medsker *v.* Swaney, 45 Mo. 273; Dawkins *v.* Patterson, 87 N. C. 384.

54. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345.

Arkansas.— Merryman *v.* Blount, (1906) 94 S. W. 714; Hamilton *v.* Rhodes, 72 Ark. 625, 83 S. W. 351.

California.— Herbert Kraft Co. *v.* Bryan, 140 Cal. 73, 73 Pac. 745; Sacramento Bank *v.* Copsey, 133 Cal. 663, 66 Pac. 8, 205, 85 Am. St. Rep. 242.

Mississippi.— See Searles *v.* Kelley, (1906) 40 So. 484.

Missouri.— Landrum *v.* Union Bank, 63 Mo. 48.

North Carolina.— Monroe *v.* Fuchtler, 121 N. C. 101, 28 S. E. 63.

United States.— Smith *v.* Black, 115 U. S. 308, 6 S. Ct. 50, 29 L. ed. 398.

Bid by trustee for creditor.— Where the creditor secured by a deed of trust directs the trustee to sell for the entire debt due, but sends no bid nor authorizes any to be made for him, a bid by the trustee in the creditor's name is without authority, and the making of a deed for the property to the creditor and recording the same will not affect his rights if he does not accept the deed, and no title will pass. Ellsworth *v.* Harmon, 101 Ill. 274.

55. Durden *v.* Whetstone, 92 Ala. 480, 9 So. 176; Watson *v.* Sherman, 84 Ill. 263; Bush *v.* Sherman, 80 Ill. 160.

56. *Alabama.*— Gamble *v.* Caldwell, 98 Ala. 577, 12 So. 424; Knox *v.* Armistead, 87 Ala. 511, 6 So. 311, 13 Am. St. Rep. 65, 5 L. R. A. 297.

Arkansas.— Matthews *v.* Daniels, (1893) 21 S. W. 469; Ellenbogen *v.* Griffey, 55 Ark. 268, 18 S. W. 126.

California.— Kennedy *v.* Dunn, 58 Cal. 339.

Georgia.— Mutual Loan, etc., Co. *v.* Haas, 100 Ga. 111, 27 S. E. 980, 62 Am. St. Rep. 317.

Illinois.— Hall *v.* Towne, 45 Ill. 493.

Massachusetts.— Hall *v.* Bliss, 118 Mass. 554, 19 Am. Rep. 476.

Mississippi.— Houston *v.* National Mut. Bldg., etc., Assoc., 80 Miss. 31, 31 So. 540, 92 Am. St. Rep. 565.

New York.— Elliott *v.* Wood, 45 N. Y. 71.

North Carolina.—Jones *v.* Pullen, 115 N. C. 465, 20 S. E. 624.

South Carolina.— Robinson *v.* Amateur Assoc., 14 S. C. 148.

See 35 Cent. Dig. tit. "Mortgages," § 1082.

Such a provision will be strictly construed and cannot avail the mortgagee unless expressed in clear and unmistakable terms. Griffin *v.* Chicago Mar. Co., 52 Ill. 130.

ratify and affirm the sale or to avoid it and have it set aside.[57] But this right belongs only to the mortgagor, or his grantees or heirs,[58] and the validity of the sale cannot be questioned by any third person in a collateral proceeding.[59] The mortgagor must exercise his option within a reasonable time and without undue delay,[60] and before the property has passed into the hands of a third person taking title in good faith,[61] by filing his bill in equity asking to have the sale set aside,[62] and offering to do equity.[63] If the mortgagor does not act promptly, the mortgagee may come into equity with his bill to compel the mortgagor either to affirm or disavow the sale, and in the latter case to have a resale ordered by the court.[64] If in either way the sale is ratified or affirmed, the validation of it relates back to the date of the sale;[65] and on the other hand if it is avoided the parties are remitted to their rights as they stood after the default and before the sale.[66] It has also been held that where the trustee in a deed of trust becomes a purchaser at his own sale it is the right of the secured creditor, if he so chooses, to have the sale vacated.[67]

(IV) *ASSIGNEE OF MORTGAGE.* The assignee of a mortgage is under the same disability as the mortgagee himself, in respect to purchasing at a foreclosure sale under a power in the mortgage,[68] unless enabled by statute.[69] But his purchase is valid as against all persons except the mortgagor or his heirs or assigns.[70]

9. RIGHTS AND RESPONSIBILITIES OF BIDDERS — a. In General. The property should be knocked down to the highest and best bidder, and he has the right to become the purchaser,[71] although he was not present in person, but requested the

57. *Alabama.* — Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515; McCall *v.* Mash, 89 Ala. 487, 7 So. 770, 18 Am. St. Rep. 145; Thomas *v.* Jones, 84 Ala. 302, 4 So. 270; Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652; Garland *v.* Watson, 74 Ala. 323; McLean *v.* Presley, 56 Ala. 211; Carter *v.* Thompson, 41 Ala. 375.

California. — Blockley *v.* Fowler, 21 Cal. 326, 82 Am. Dec. 747.

Georgia. — Standback *v.* Thornton, 106 Ga. 81, 31 S. E. 805.

Illinois. — Nichols *v.* Otto, 132 Ill. 91, 23 N. E. 411; Jenkins *v.* Pierce, 98 Ill. 646; Gibbons *v.* Hoag, 95 Ill. 45; Mulvey *v.* Gibbons, 87 Ill. 367.

Missouri. — Thornton *v.* Irwin, 43 Mo. 153.

New Hampshire. — Very *v.* Russell, 65 N. H. 646, 23 Atl. 522.

North Carolina. — Austin *v.* Stewart, 126 N. C. 525, 36 S. E. 37; Whitehead *v.* Whitehurst, 108 N. C. 458, 13 S. E. 166; Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231; Joyner *v.* Farmer, 78 N. C. 196.

See 35 Cent. Dig. tit. "Mortgages," § 1083.

58. Lovelace *v.* Hutchinson, 106 Ala. 417, 17 So. 623; Alexander *v.* Hill, 88 Ala. 487, 7 So. 238, 16 Am. St. Rep. 55, right of infant heirs of mortgagor to disaffirm the sale after attaining their majority.

59. American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; People *v.* Wiltshire, 9 Ill. App. 374.

60. Ezzell *v.* Watson, 83 Ala. 120, 3 So. 309; Robinson *v.* Cullom, 41 Ala. 693; Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; Jones *v.* Pullen, 115 N. C. 465, 20 S. E. 624; Joyner *v.* Farmer, 78 N. C. 196.

61. American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; Jenkins *v.* Pierce, 98 Ill. 646; Gibbons *v.* Hoag, 95 Ill. 45; Farrar *v.* Payne, 73 Ill. 82; Burns *v.* Thayer, 115 Mass. 89; Averitt *v.* Elliot, 109 N. C. 560, 13 S. E. 785.

62. Tipton *v.* Wortham, 93 Ala. 321, 9 So. 596; Powell *v.* New England Mortg. Security Co., 89 Ala. 490, 8 So. 136 (action for use and occupation against the mortgagee in possession is not the proper proceeding); Thomas *v.* Jones, 84 Ala. 302, 4 So. 270; Blockley *v.* Fowler, 21 Cal. 326, 82 Am. Dec. 747.

63. American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; Thomas *v.* Jones, 84 Ala. 302, 4 So. 270.

64. Craddock *v.* American Freehold Land Mortg. Co., 88 Ala. 281, 7 So. 196; McHan *v.* Ordway, 82 Ala. 463, 2 So. 276.

65. American Freehold Land Mortg. Co. *v.* Pollard, 120 Ala. 1, 24 So. 736.

66. Lindsay *v.* American Mortg. Co., 97 Ala. 411, 11 So. 770.

67. Carter *v.* Thompson, 41 Ala. 375; Sypher *v.* McHenry, 18 Iowa 232; Old Dominion Bank *v.* Dubuque, etc., R. Co., 8 Iowa 277, 74 Am. Dec. 302.

68. Mapps *v.* Sharpe, 32 Ill. 13; Patten *v.* Pearson, 60 Me. 220; Allen *v.* Chatfield, 8 Minn. 435; Turner *v.* Smith, 11 Tex. 620. *Compare* Ward *v.* Ward, 108 Ala. 278, 19 So. 354.

69. See the statutes of the different states. And see Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868.

70. Martinez *v.* Lindsey, 91 Ala. 334, 8 So. 787.

71. McCammon *v.* Detroit, etc., R. Co., 103 Mich. 104, 61 N. W. 273.

Discretion as to accepting bids. — Where trust property is sold at auction, the trustee is not bound to accept every bid; he is necessarily clothed with a certain discretion, and

trustee or auctioneer to make the bid for him,[72] although his bid is the only one made,[73] or although higher bids duly made were rejected for sufficient cause or were withdrawn, so leaving the successful offer as the highest available.[74] The contract of purchase is complete when the trustee, selling as auctioneer, knocks down the property to such bidder and makes and signs a memorandum of the sale and its terms.[75]

b. Payment of Bid and Set-Off. The terms of sale may require the deposit of a fixed sum, or of a certain percentage of the successful bid, on the day of sale,[76] and this requirement may be waived or dispensed with by the parties entitled to enforce it.[77] But the sale is not legally complete or binding until the purchaser has actually paid the amount of his bid,[78] and the tender of the mortgagor's receipt for the surplus which will be due to him is not equivalent to a payment in cash for this purpose.[79] The purchaser cannot complete his payment by setting off debts against those persons who will be entitled to receive the money, at least where any rights of third persons intervene.[80] The mortgagee or trustee thus selling under a power is not a vendor of the property in such sense as to give him a vendor's lien on the property for the purchase-money.[81]

c. Failure to Comply With Bid. The foreclosure purchaser cannot be compelled to complete his payment and accept a deed if he was deceived or misled as to the state of the title or as to the existence of other liens on the property,[82] or if it was materially misdescribed in the notice of sale.[83] But otherwise he is liable for the amount of his bid, which may be recovered in a proper suit against him ;[84]

will be sustained by the court in refusing a bid, the acceptance of which would frustrate the very purpose of the sale, even though such bid was nominally the highest. Gray *v.* Veirs, 33 Md. 18.

Urging advance of bid.— The mere fact that, at a foreclosure sale under a deed of trust, the trustee requested a bidder to advance his bid is no ground for setting aside the foreclosure. Sternberg *v.* Valentine, 6 Mo. App. 176.

72. Springfield Engine, etc., Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500; Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304.

73. Mutual F. Ins. Co. *v.* Barker, 17 App. Cas. (D. C.) 205. And see Anderson *v.* White, 2 App. Cas. (D. C.) 408.

74. See Waterman *v.* Spaulding, 51 Ill. 425; Cockrill *v.* Whitworth, (Tenn. Ch. App. 1899) 52 S. W. 524. *Compare* Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525, holding that where the mortgagee himself bid a certain sum at the trustee's sale, but withdrew the bid at the suggestion of the trustee, and afterward bid in the property for a much smaller sum, the sale was void.

Buying off competitor.— A foreclosure sale will not be set aside at the instance of the mortgagor for the reason that the purchaser at the sale bought off, without the privity of the mortgagee, one who threatened to bid up the property, but who did not intend to become a purchaser in good faith. Brown *v.* Wentworth, 181 Mass. 49, 62 N. E. 984.

75. Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

76. Pope *v.* Burrage, 115 Mass. 282; Smith *v.* Deeson, (Miss. 1893) 14 So. 40.

77. See Muhlig *v.* Fiske, 131 Mass. 110; Farrer *v.* Lacy, 31 Ch. D. 42, 55 L. J. Ch. 149, 53 L. T. Rep. N. S. 515, 34 Wkly. Rep. 22.

78. Dwelle *v.* Blackshear Bank, 115 Ga. 679, 42 S. E. 49; Louder *v.* Burch, 47 Mich. 109, 10 N. W. 129; Reynolds *v.* Hennessy, 15 R. I. 513, 8 Atl. 715; McKarsie *v.* Citizens' Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 53 S. W. 1007.

As to interest on deferred payments see Markoe *v.* Coxe, 16 Fed. Cas. No. 9,092, 5 Cranch C. C. 537.

79. McClung *v.* Missouri Trust Co., 137 Mo. 106, 38 S. W. 578; Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525.

80. Coler *v.* Barth, 24 Colo. 31, 48 Pac. 656; Wolfe *v.* Bate, 9 B. Mon. (Ky.) 208.

81. Burr *v.* Robinson, 25 Ark. 277.

82. Schaeffer *v.* Bond, 70 Md. 480, 17 Atl. 375; Mayer *v.* Adrian, 77 N. C. 83. *Compare* Fleming *v.* Holt, 12 W. Va. 143, holding that, if the purchaser of lands at public auction was not misled by the seller as to the amount of prior liens on the land, he will be compelled to accept a special warranty deed from the trustee at whose instance it was sold, although he afterward ascertains that the liens are larger than he had supposed.

83. Jackson *v.* Binnicker, 106 Mo. App. 721, 80 S. W. 682.

84. Gardner *v.* Armstrong, 31 Mo. 535; Fleming *v.* Holt, 12 W. Va. 143.

Forfeiture of deposit.—A purchaser at foreclosure sale, who has deposited money under an agreement that it should be forfeited to the seller if he fails to comply with the terms of the sale, cannot recover the deposit on such failure on his part. Donahue *v.* Parkman, 161 Mass. 412, 37 N. E. 205, 42 Am. St. Rep. 415.

Liability of trustee.— Trustees who sell trust property, without taking bond or other

or if he is unable to comply with his bid the property may be put up for sale a second time.[85] This may be done immediately, if the purchaser's refusal or inability is clearly manifested, and the necessity of advertising a second time or giving new notices may be avoided if the resale is made on the spot and before the bidders disperse,[86] although otherwise there must be a new publication and evidence of the trustee's or mortgagee's continuing authority to make the sale.[87] It is no valid objection to such a resale that the property did not bring as much as at the first sale.[88] But if the terms of sale provided that the property might be resold at the risk and cost of a defaulting purchaser, or if such purchaser was told that he would be held responsible, he will be answerable for the difference between the price realized and the amount of the bid on which he defaulted.[89]

10. Affidavits and Record of Sale. There should be a careful compliance with any statutory provision requiring the making and recording of an affidavit of publication of notice or an affidavit reciting the facts and circumstances of the sale.[90]

11. Report and Confirmation of Sale. In some states the trustee making a foreclosure sale is required to report the sale to a court of competent jurisdiction for confirmation or ratification.[91] His failure to make such report, or the making of an imperfect report, will not alone be ground for setting aside the sale; but he will be ordered to file a proper report.[92] On the coming in of the report the court obtains jurisdiction of the case,[93] and thereupon, and at any time before ratification, parties in interest are permitted to file objections or exceptions to the sale,[94] which they must support by competent evidence.[95] Objections so heard and determined are conclusively settled as against the party making them, and he cannot thereafter raise the same objections in any collateral proceeding.[96]

security for the unpaid part of the purchase-price, are personally liable if the purchaser makes default. Miller *v.* Holcombe, 9 Gratt. (Va.) 665.

85. See Miller *v.* Miller, 48 Mich. 311, 12 N. W. 209; St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988; Jackson *v.* Binnicker, 106 Mo. App. 721, 80 S. W. 682.

Deed to next highest bidder.— Where, at a cash sale of property under a deed of trust, the debtor makes the highest bid, which he is unable to pay, it is not error to make a deed to the next highest bidder. Maloney *v.* Webb, 112 Mo. 575, 20 S. W. 683.

86. Davis *v.* Hess, 103 Mo. 31, 15 S. W. 324.

87. Hogan *v.* Lepretre, 1 Port. (Ala.) 392; Barnard *v.* Duncan, 38 Mo. 170, 90 Am. Dec. 416.

88. Anderson *v.* White, 2 App. Cas. (D. C.) 408; Stevenson *v.* Dana, 166 Mass. 163, 44 N. E. 128; Wing *v.* Hayford, 124 Mass. 249.

89. Gardner *v.* Armstrong, 31 Mo. 535; Gross *v.* Jancsok, 16 Daly (N. Y.) 346, 10 N. Y. Suppl. 541. See also Barnard *v.* Duncan, 38 Mo. 170, 90 Am. Dec. 416. *Compare* Fleming *v.* Holt, 12 W. Va. 143.

90. *Maine.*— Blake *v.* Dennett, 49 Me. 102.

Massachusetts.— Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532; Childs *v.* Dolan, 5 Allen 319.

Michigan.— Lee *v.* Clary, 38 Mich. 223; Doyle *v.* Howard, 16 Mich. 261.

New York.— Cowdrey *v.* Turner, 85 Hun 451, 32 N. Y. Suppl. 889; Bryan *v.* Butts, 27 Barb. 503; Arnot *v.* McClure, 4 Den. 41.

Wisconsin.— Bond *v.* Carroll, 71 Wis. 347, 37 N. W. 91.

See 35 Cent. Dig. tit. "Mortgages," § 1091.

91. See the statutes of the different states. And see Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684.

Reversal of confirmation.— A sale of land by trustees appointed to make a sale under a mortgage is not vacated by the mere fact of a reversal on appeal of the order ratifying the sale. Holthaus *v.* Nicholas, 41 Md. 241.

92. White *v.* Malcolm, 15 Md. 529; Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

93. Wilson *v.* Watts, 9 Md. 356.

94. Aukam *v.* Zantzinger, 94 Md. 421, 51 Atl. 93; Chew *v.* Tome, 93 Md. 244, 48 Atl. 701; White *v.* Malcolm, 15 Md. 529; Gayle *v.* Fattle, 14 Md. 69.

Defect of title.— Where the confirmation of a sale made under the power of sale contained in a mortgage is resisted by the purchaser on the ground of defects in the title, the court will not determine whether the title is good or bad absolutely, but only whether its validity is free from reasonable doubt. Chew *v.* Tome, 93 Md. 244, 48 Atl. 701.

Absolute deed as mortgage.— The court cannot determine, upon exceptions to a report of sale, that a deed purporting to convey the absolute title is but a mortgage, no pleading being filed attacking the genuineness of the transaction. Hill *v.* Pettit, 66 S. W. 190, 23 Ky. L. Rep. 2004.

95. Haskie *v.* James, 75 Md. 568, 23 Atl. 1030; Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684.

96. Dill *v.* Satterfield, 34 Md. 52.

12. Certificate of Sale. In some states, where the sale is made by a public officer, and a period of redemption is allowed to the mortgagor, a certificate of sale is in the meantime issued to the purchaser. No title passes until a certificate is delivered to him,[97] sufficient in form and substance.[98] Such a certificate is supported by a presumption of regularity and is *prima facie* evidence of the validity of the acts which it recites.[99]

G. Title, Rights, and Liabilities of Purchaser — 1. In General. The purchaser at a valid foreclosure sale acquires all the title originally conveyed by the mortgage, divested of the equity of redemption, that is, such a title as would have passed by the mortgage originally if it had been an absolute deed instead of a conditional conveyance,[1] together with all appurtenances, easements, and incidental rights,[2] and the right to take appropriate steps to perfect his title or free it from clouds.[3] But the rule of *caveat emptor* applies to such sales, and the trustee or mortgagee making the sale is not ordinarily liable to him for any defects in the title.[4] When the statute requires the observance of conditions

97. See the statutes of the different states. And see Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459; Smith *v.* Buse, 35 Minn. 234, 28 N. W. 220.

Necessary to record.— In some states such a certificate is required to be recorded. See the statutes of the different states. And see Ryder *v.* Hulett, 44 Minn. 353, 46 N. W. 559; Merrill *v.* Nelson, 18 Minn. 366; Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701.

Certificate made by deputy sheriff.— If the sale is made by a deputy sheriff, he may also make and acknowledge the certificate. Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645; Burke *v.* Lacock, 41 Minn. 250, 42 N. W. 1016; Merrill *v.* Nelson, 18 Minn. 366; McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729.

98. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Richards *v.* Finnegan, 45 Minn. 208, 47 N. W. 788; Goenen *v.* Schroeder, 18 Minn. 66.

What it must contain.— It must contain, among other things, a description of the mortgage under which the sale was made. Golcher *v.* Brisbin, 20 Minn. 453. And see Cable *v.* Minneapolis Stock-Yards, etc., Co., 47 Minn. 417, 50 N. W. 528, holding that an error in stating the amount of the note secured by the mortgage does not necessarily vitiate the certificate. And it must also contain a description of the property sold (Smith *v.* Buse, 35 Minn. 234, 28 N. W. 220; Lowry *v.* Tilleny, 31 Minn. 500, 18 N. W. 452), with the name of the purchaser (Kenaston *v.* Lorig, 81 Minn. 454, 84 N. W. 323, a certificate purporting to be made to "the estate of Anthony Huyck, deceased," is void for want of a capable grantee), and a statement of the time when the period allowed for redemption will expire (Johnstone *v.* Scott, 11 Mich. 232; Cable *v.* Minneapolis Stock-Yards, etc., Co., 47 Minn. 417, 50 N. W. 528; Wells *v.* Atkinson, 24 Minn. 161; Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695).

99. Casey *v.* McIntyre, 45 Minn. 526, 48 N. W. 402; Burke *v.* Lacock, 41 Minn. 250, 42 N. W. 1016; Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121; Merrill *v.* Nelson, 18 Minn. 366; Goenen *v.* Schroeder, 18 Minn. 66.

1. *Alabama.*— Cheek *v.* Waldrum, 25 Ala. 152.

California.— See Stockton Sav., etc., Soc. *v.* Saddlemire, (App. 1906) 86 Pac. 723.

Illinois.— Beach *v.* Shaw, 57 Ill. 17; Chicago, etc., R. Co. *v.* Slee, 33 Ill. App. 416.

Minnesota.— Hokanson *v.* Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354.

Missouri.— Martin *v.* Castle, 193 Mo. 183, 91 S. W. 930.

North Carolina.— Hogan *v.* Strayhorn, 65 N. C. 279.

Tennessee.— Cockrill *v.* Whitworth, (Ch. App. 1899) 52 S. W. 524.

Texas.— Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273.

See 35 Cent. Dig. tit. "Mortgages," § 1102.

Rights of licensee of mortgagor.— A license to flood a certain lot, given by the owner of the equity of redemption, confers no right on the licensee as against the purchaser at a sale under a trust deed made prior to the license. Simpson *v.* Wabash R. Co., 145 Mo. 64, 46 S. W. 739.

Purchase-money mortgage.— When a mortgage for the purchase-price of land is foreclosed, and the premises are bid in by the mortgagee, he is reinvested with the original estate as perfectly as though he had never parted with it. Andrews *v.* Wolcott, 16 Barb. (N. Y.) 21.

Where a partnership buys land, assuming a mortgage thereon, and allows the mortgage to be foreclosed for non-payment, a purchase by one of the partners at the mortgage sale does not entitle him to a deed of the land, but constitutes merely a satisfaction of the mortgage. Freeman *v.* Moffitt, 119 Mo. 280, 25 S. W. 87.

2. Swedish-American Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 83 Minn. 377, 86 N. W. 420; Born *v.* Turner, [1900] 2 Ch. 211, 69 L. J. Ch. 593, 83 L. T. Rep. N. S. 148, 48 Wkly. Rep. 697.

3. Ehrman *v.* Alabama Mineral Land Co., 109 Ala. 478, 20 So. 112; McHan *v.* Ordway, 82 Ala. 463, 2 So. 276.

4. Brewer *v.* Christian, 9 Ill. App. 57; Sutton *v.* Sutton, 7 Gratt. (Va.) 234, 56 Am. Dec. 109.

subsequent to the sale, such as the making of prescribed affidavits, or allows a time for redemption by the mortgagor, the purchaser's title does not vest until such conditions have been fulfilled and such time has expired.[5] The principal liability of a foreclosure purchaser is to complete his contract of purchase according to its terms, in respect to deferred payments and interest thereon,[6] and an action for specific performance will lie against him for this purpose.[7] He is under no obligation whatever to reconvey the property to the mortgagor on tender of reimbursement,[8] nor to the mortgagee, although the latter, after he has effected a sale under the power to a purchaser in good faith, without any agreement for the transfer of the title to himself, is free from any fiduciary relation to the property and may buy it from the purchaser.[9] Where a mortgagee sells portions of the premises as the owner thereof, and afterward, in the exercise of a power of sale in the mortgage, sells for the purpose of foreclosure and becomes the purchaser, his purchase inures to the benefit of his prior grantees *pro tanto*.[10]

2. Possession of Property — a. Right of Possession. The foreclosure purchaser is entitled to the possession of the premises immediately upon the vesting of his title,[11] unless his right of possession is suspended by the pendency of a bill for redemption,[12] and the mortgagor, continuing in possession, is not entitled to notice to quit.[13]

b. Recovery of Possession. In some of the states the statutes authorize summary proceedings on the part of a purchaser at a foreclosure sale to recover possession of the premises;[14] and the circumstances may be such as to entitle him to

Prior payment of debt.— If the debt secured by the mortgage or trust deed had been in fact paid before the sale, the purchaser, having knowledge of that fact, takes no title. Skinner *v.* Chapman, 78 Ala. 376; Mayo *v.* Leggett, 96 N. C. 237, 1 S. E. 622.

5. Audretsch *v.* Hurst, 126 Mich. 301, 85 N. W. 746; Lindgren *v.* Lindgren, 73 Minn. 90, 75 N. W. 1034; Donnelly *v.* Simonton, 7 Minn. 167; Mowry *v.* Sanborn, 7 Hun (N. Y.) 380 [*reversed* on other grounds in 68 N. Y. 153]; Howard *v.* Hatch, 29 Barb. (N. Y.) 297.

6. See Swedish-American Nat. Bank *v.* Connecticut L. Ins. Co., 83 Minn. 377, 86 N. W. 420; Wicks *v.* Caruthers, 13 Lea (Tenn.) 353; Pleasants *v.* Flood, 89 Va. 96, 15 S. E. 504.

Interest on deferred payment.— Where the terms of sale provide for payment of the price in instalments, with interest from the day of sale, and with leave to the purchaser to take immediate possession, he is bound to pay interest from that day, although he should decline to take possession until some months afterward, while investigating the title and waiting for the vendor to clear it. Markoe *v.* Coxe, 16 Fed. Cas. No. 9,092, 5 Cranch C. C. 537.

Mortgage for balance of price.— One who buys at a sale under a trust deed, and gives his own trust deed on the land to secure the payment of his bid, cannot claim title under the sale and at the same time resist enforcement of his own deed, on the ground of want of power in the trustee to make the sale at which he purchased, or on the ground of an insufficient description of the land in his own deed. McCarley *v.* Tippah County, 58 Miss. 483, 38 Am. Rep. 338.

7. Corder *v.* Morgan, 18 Ves. Jr. 344, 34 Eng. Reprint 347.

8. Rose *v.* Fall River Five Cents Sav. Bank, 165 Mass. 273, 43 N. E. 93; Sherrill *v.* Crosby, 14 Johns. (N. Y.) 358.

9. Munn *v.* Burges, 70 Ill. 604.

10. Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

11. *Alabama.*— Collier *v.* Alexander, 142 Ala. 422, 38 So. 244.

Illinois.— Merrin *v.* Lewis, 90 Ill. 505.

Massachusetts.— Lewis *v.* Jackson, 165 Mass. 481, 43 N. E. 206; Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106.

Michigan.— Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191.

Minnesota.— Daniels *v.* Smith, 4 Minn. 172.

Mississippi.— Parker *v.* Eason, 68 Miss. 290, 8 So. 844; Stephenson *v.* Miller, 57 Miss. 48.

Missouri.— Hale Bank *v.* Pennington, 62 Mo. App. 585; Pullis *v.* Kalb, 62 Mo. App. 27.

New York.— Dwight *v.* Phillips, 48 Barb. 116.

Texas.— Marsh *v.* Hubbard, 50 Tex. 203.

See 35 Cent. Dig. tit. "Mortgages," § 1111.

12. Clark *v.* Griffin, 148 Mass. 540, 20 N. E. 169.

13. Jackson *v.* Colden, 4 Cow. (N. Y.) 266; Waters *v.* Butler, 29 Fed. Cas. No. 17,263, 4 Cranch C. C. 371.

14. See the statutes of the different states. And see Lewis *v.* Jackson, 165 Mass. 481, 43 N. E. 206; North Brookfield Sav. Bank *v.* Flanders, 161 Mass. 335, 37 N. E. 307; Lowe *v.* Moore, 134 Mass. 259; Warren *v.* James, 130 Mass. 540; Lydston *v.* Powell, 101 Mass. 77; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32; Pinney *v.* Fridley, 9 Minn. 34; Marks *v.* Howard, 70 Miss. 445, 12 So. 145.

Forcible detainer maintainable.— Rice *v.* Brown, 77 Ill. 549; Preston *v.* Zahl, 4 Ill.

a writ of possession or a writ of assistance.[15] Where the purchaser cannot or does not care to resort to summary proceedings his appropriate remedy is by an action of ejectment,[16] or writ of entry.[17] He must plead facts showing the right to foreclose the mortgage in the particular manner chosen,[18] and assume the burden of proving the regularity and validity of all preceding steps and of the sale,[19] except in so far as the recitals of the deed are made *prima facie* evidence in his favor.[20] Recovery of possession may be resisted on the ground of payment of the debt secured before the sale,[21] or of any fatal omission or defect in the foreclosure proceedings;[22] but not on grounds going merely to the original validity of the mortgage.[23]

3. Rents and Profits. The foreclosure purchaser is entitled to the rents and profits of the estate from the time his title vests until he takes possession,[24] and thereafter to receive and recover the rents from tenants in the actual occupation of the premises.[25] But on the other hand, if he takes possession under a void fore-

App. 423; Parker *v.* Eason, 68 Miss. 290, 8 So. 844; Wishart *v.* Gerhart, 105 Mo. App. 112, 78 S. W. 1094; Pullis *v.* Kalb, 62 Mo. App. 27; Wilson *v.* Wall, 99 Va. 353, 38 S. E. 181. *Compare* Burford *v.* Nolan, 30 Miss. 427; Blount *v.* Winright, 7 Mo. 50.

Mortgagor not necessary party.— On a conveyance by the mortgagor, all his rights pass from him to his grantee; and therefore a suit for possession by a purchaser under a power of sale mortgage should be against the grantee and it is not necessary to join the mortgagor. Buchanan *v.* Monroe, 22 Tex. 537.

15. See Meloy *v.* Squires, 42 Md. 378; Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 318.

16. *Alabama.*— Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3.

Colorado.— Wells *v.* Caywood, 3 Colo. 487.

Michigan.— Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191.

Mississippi.— Stephenson *v.* Miller, 57 Miss. 48.

Missouri.— Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422.

Virginia.— Creigh *v.* Henson, 10 Gratt. 231.

See 35 Cent. Dig. tit. "Mortgages," § 1113.

17. Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106.

18. Cowdrey *v.* Turner, 85 Hun (N. Y.) 451, 32 N. Y. Suppl. 889.

19. *Illinois.*— Preston *v.* Zahl, 4 Ill. App. 423.

Michigan.— Wyman *v.* Baer, 46 Mich. 418, 9 N. W. 455; Caswell *v.* Ward, 2 Dougl. 374.

Mississippi.— Tyler *v.* Herring, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. 263.

New York.— Weir *v.* Birdsall, 27 N. Y. App. Div. 404, 50 N. Y. Suppl. 275.

North Carolina.— McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Virginia.— State Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

See 35 Cent. Dig. tit. "Mortgages," § 1113.

20. Burke *v.* Lacock, 41 Minn. 250, 42 N. W. 1016; Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; German Bank *v.* Stumpf, 73 Mo. 311; McCreary *v.* Reliance Lumber Co., 16 Tex. Civ. App. 45, 41 S. W. 485; Western Union Tel. Co. *v.* Hearne, (Tex. Civ. App. 1897) 40 S. W. 50.

21. Joerdens *v.* Schrimpf, 77 Mo. 383; Hancock *v.* Whybark, 66 Mo. 672; Kirby *v.* Howie, 9 S. D. 471, 70 N. W. 640.

22. See Diefenbach *v.* Vaughan, 116 Ala. 150, 23 So. 88; Meyer *v.* Opperman, 76 Tex. 105, 13 S. W. 174.

23. Ingraham *v.* Baldwin, 12 Barb. (N. Y.) 9 [*affirmed* in 9 N. Y. 45] (not a proper defense that the mortgagor was *non compos mentis* when the mortgage was made); Northwestern Mortg. Trust Co. *v.* Bradley, 9 S. D. 495, 70 N. W. 648 (usury not a good defense).

24. *Indiana.*— Bryson *v.* McCreary, 102 Ind. 1, 1 N. E. 55.

Maine.— Porter *v.* Pillsbury, 36 Me. 278.

Missouri.— *In re* Life Assoc. of America, 96 Mo. 632, 10 S. W. 69.

Tennessee.— Miller *v.* Buchanan, 2 Baxt. 390. *Compare* Greenfield *v.* Dorris, 1 Sneed 548.

United States.— Lathrop *v.* Nelson, 14 Fed. Cas. No. 8,111, 4 Dill. 194; Markoe *v.* Coxe, 16 Fed. Cas. No. 9,092, 5 Cranch C. C. 537.

See 35 Cent. Dig. tit. "Mortgages," § 1115.

Delay caused by purchaser.— Where a purchaser at a sale under a mortgage pays only a small part of the price at the time of the sale, and causes delay in making the deed, but pays no interest on the unpaid balance, he is not entitled to the rents of the property from the date of the sale to the date of making the deed. Grosvenor *v.* Bethell, 93 Tenn. 577, 26 S. W. 1096.

In Arkansas, if the purchaser takes possession before the period for redemption has expired, he is accountable for the rents and profits. Dailey *v.* Abbott, 40 Ark. 275.

In Minnesota a purchaser of land sold under a power in a mortgage is not entitled to the rents during the year allowed for redemption, although the mortgage pledges them, as it ceases to be a security for the debt on foreclosure. McDowell *v.* Hillman, 50 Minn. 319, 52 N. W. 897; Pioneer Sav., etc., Co. *v.* Farnham, 50 Minn. 315, 52 N. W. 897.

25. Hatch *v.* Sykes, 64 Miss. 307, 1 So. 248; Jones *v.* Hill, 64 N. C. 198; Clement *v.* Shipley, 2 N. D. 430, 51 N. W. 414. *Compare* Siems *v.* Pierre Sav. Bank, 7 S. D. 338,

closure sale, he is liable to account for the rents and profits during the time of his occupancy.[26]

4. Crops and Timber. The foreclosure purchaser acquires a right to all crops sown on the land and growing at the time of the foreclosure sale,[27] but not to crops severed from the land before his title accrued.[28] Similar rules apply to the case of timber. Such as may have been cut by the mortgagor before the foreclosure sale, although not removed from the land, does not pass to the foreclosure purchaser;[29] but after the latter's title has vested he may have an injunction to restrain the commission of waste by further cutting, or may maintain an action on the case for injury done to the estate by such cutting.[30]

5. Buildings and Improvements. Buildings and other improvements placed on the mortgaged premises inure to the benefit of the purchaser at a foreclosure sale,[31] although he holds them subject to existing mechanics' liens.[32] If the foreclosure sale was void, the purchaser is entitled to compensation for permanent improvements placed by him on the land in reliance on the validity of his title;[33] and on the other hand, if he disposes of the buildings standing on the property and permits them to be removed, he is liable for waste.[34]

6. Taxes and Insurance. The purchaser at a foreclosure sale is bound to pay the taxes and cannot recover them from the mortgagor or a junior encumbrancer.[35] And so if, by way of keeping good his lien during the period of redemption, he pays taxes and insurance which, under the mortgage, the mortgagor himself was bound to pay, he cannot, when further instalments fall due, again resort to the power of sale for the purpose of securing repayment.[36]

7. Liens or Encumbrances. Where the sale is made on foreclosure of a junior mortgage or trust deed, the purchaser does not acquire an absolute title, but only the mortgagor's equity of redemption, that is, he takes subject to the elder lien.[37]

64 N. W. 167; Security Mortg., etc., Co. *v.* Gill, 8 Tex. Civ. App. 358, 27 S. W. 835.

26. Lovelace *v.* Hutchinson, 106 Ala. 417, 17 So. 623; Atkins *v.* Tutwiler, 98 Ala. 129, 11 So. 640; Sloan *v.* Frothingham, 72 Ala. 589; Welch *v.* Greenalge, 2 Heisk. (Tenn.) 209; Bigler *v.* Waller, 14 Wall. (U. S.) 297, 20 L. ed. 891. And see Brock *v.* Leighton, 11 Ill. App. 361.

27. Harmon *v.* Fisher, 9 Ill. App. 22; Fowler *v.* Carr, 63 Mo. App. 486; Watson *v.* Menteer, 59 Mo. App. 387; Fischer *v.* Johnson, 51 Mo. App. 157; Gillett *v.* Balcom, 6 Barb. (N. Y.) 370; Shepard *v.* Philbrick, 2 Den. (N. Y.) 174; Hubbs *v.* Swabacker, 51 W. Va. 438, 41 S. E. 164; Kerr *v.* Hill, 27 W. Va. 576.

In Missouri a statute saves and excepts from the property passing to the foreclosure purchaser growing crops sown on the land by a tenant of the mortgagor. See Reed *v.* Swan, 133 Mo. 100, 34 S. W. 483; Walton *v.* Fudge, 63 Mo. App. 52.

28. Watson *v.* Menteer, 59 Mo. App. 387.

29. Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233.

30. Stout *v.* Keyes, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465; Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233.

31. Watkins *v.* Owens, 47 Miss. 593; Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937; Neal *v.* Hamilton, (Tex. 1887) 7 S. W. 672.

Cost of party-wall.— A purchaser under a trust deed has a right prior to the claim of the assignee of an adjoining owner for contribution for the cost of a party-wall under an unrecorded agreement, although the assignee and the mortgagor have agreed in writing as to the amount of such claim. Kells *v.* Helm, 56 Miss. 700.

32. Seibel *v.* Siemon, 72 Mo. 526.

33. Hogan *v.* Stone, 1 Ala. 496, 35 Am. Dec. 39; Queen City Perpetual Bldg. Assoc. *v.* Price, 53 Md. 397; Wetmore *v.* Roberts, 10 How. Pr. (N. Y.) 51; Carroll *v.* Robertson, 15 Grant Ch. (U. C.) 173.

34. Staunchfield *v.* Jeutter, 4 Nebr. (Unoff.) 847, 96 N. W. 642.

35. Swan *v.* Emerson, 129 Mass. 289; Sevier *v.* Minnis, 71 Miss. 473, 15 So. 234; State *v.* Stelbrink, 58 Mo. App. 662; Grosvenor *v.* Bethell, 93 Tenn. 577, 26 S. W. 1096.

36. Walton *v.* Hollywood, 47 Mich. 385, 11 N. W. 209.

37. *Alabama.*— Graham *v.* King, 15 Ala. 563.

Arkansas.— Gerson *v.* Pool, 31 Ark. 85.

Illinois.— Booker *v.* Anderson, 35 Ill. 66, holding that the purchaser of land subject to a mortgage, at a sale under a trust deed given to secure the payment of a subsequent encumbrance, does not become the equitable assignee of the mortgage by paying it off, where the intention at the time was to extinguish it.

Maryland.— Berry *v.* Derwart, 55 Md. 66; Speed *v.* Smith, 4 Md. Ch. 299.

Michigan.— Bailey *v.* Gould, Walk. 478.

Minnesota.— American Bldg., etc., Assoc. *v.* Waleen, 52 Minn. 23, 53 N. W. 867.

Missouri.— Scheppelmann *v.* Fuerth, 87 Mo. 351; Tanner *v.* Taussig, 11 Mo. App. 534.

But on the other hand the foreclosure of a senior mortgage will cut off junior liens or encumbrances,[38] unless where the owner of the equity of redemption himself becomes the purchaser, or there are other equities to preserve the junior liens.[39] If the property is advertised to be sold free and clear of all encumbrances, the purchaser is entitled to be relieved from his bid when it appears that there are superior liens not divested by the sale.[40] A purchaser at a mortgage sale under a power does not buy the mortgagor's title at the sale so as to hold subject to a mechanic's lien filed against the mortgagor.[41]

8. EFFECT OF DEFECTS OR INVALIDITY IN PROCEEDINGS — a. In General. A purchaser at a foreclosure sale buys subject to the risk of the sale proving invalid for material defects or irregularities,[42] and is chargeable with notice of any such defects or irregularities as could have been discovered by careful attention and diligent inquiry.[43] Therefore he takes no title unless all the facts exist which are necessary to authorize the exercise of the power of sale,[44] and unless the sale is

North Carolina.— Taylor *v.* Heggie, 83 N. C. 244.

Canada.— Gill *v.* Gamble, 13 Grant Ch. (U. C.) 169.

See 35 Cent. Dig. tit. "Mortgages," § 1105.

In Pennsylvania a purchaser at a sale under a power in a deed of trust takes a title divested of all encumbrances. Bancroft *v.* Ashhurst, 2 Grant 513.

Mortgages of even date.— A foreclosure by advertisement of one of two mortgages of even date, designed to be simultaneous, would not be effective to settle the relative rights of the foreclosure purchaser and the holder of the other mortgage; and a bill in equity would be necessary to determine such rights and to marshal the assets; and to do this, a sale is necessary, unless one of the parties will take up the other's mortgage. Van Aken *v.* Gleason, 34 Mich. 477.

Mortgage securing several notes or instalments.— Where a mortgage is given to secure several separate notes or instalments, and a foreclosure sale is had on the first, and the period for redemption has expired and the sale has become complete by the execution of a deed to the purchaser, his title will be discharged from all further liens as to the other notes or instalments. Miles *v.* Skinner, 42 Mich. 181, 3 N. W. 918; Daniels *v.* Smith, 4 Minn. 172.

38. Mutual Loan, etc., Co. *v.* Haas, 100 Ga. 111, 27 S. E. 980, 62 Am. St. Rep. 317; Solberg *v.* Wright, 33 Minn. 224, 22 N. W. 381; Bolles *v.* Carli, 12 Minn. 113; Decker *v.* Boice, 19 Hun (N. Y.) 152 [*affirmed* in 83 N. Y. 215]; Root *v.* Wheeler, 12 Abb. Pr. (N. Y.) 294; Benedict *v.* Gilman, 4 Paige (N. Y.) 58. But see More *v.* Deyoe, 22 Hun (N. Y.) 208.

39. Stewart *v.* Anderson, 10 Ala. 504; Thompson *v.* Heywood, 129 Mass. 401.

40. Schaeffer *v.* Bond, 70 Md. 480, 17 Atl. 375. And see Speed *v.* Smith, 4 Md. Ch. 299.

41. Hokanson *v.* Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354.

42. Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Kerr *v.* Galloway, 94 Tex. 641, 64 S. W. 858; Shears *v.* Traders' Bldg. Assoc., 58 W. Va. 665, 52 S. E. 860.

43. Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Gunnell *v.* Cockerill, 79 Ill. 79; Kelsay *v.* Farmers', etc., Bank, 166 Mo. 157, 65 S. W. 1007; Parkinson *v.* Hanbury, L. R. 2 H. L. 1, 36 L. J. Ch. 292, 16 L. T. Rep. N. S. 243, 15 Wkly. Rep. 642; Selwyn *v.* Garfit, 38 Ch. D. 273, 57 L. J. Ch. 609, 59 L. T. Rep. N. S. 233, 36 Wkly. Rep. 513; Jenkins *v.* Jones, 2 Giffard 99, 6 Jur. N. S. 391, 29 L. J. Ch. 493, 8 Wkly. Rep. 270, 66 Eng. Reprint 43.

44. Kenney *v.* Jefferson County Bank, 12 Colo. App. 24, 54 Pac. 404; Ormsby *v.* Tarascon, 3 Litt. (Ky.) 404.

Sale before debt is due.— A sale under a trust deed before the maturity of the debt secured passes no title. Long *v.* Long, 79 Mo. 644.

Sale after payment of debt.— When the debt secured by a mortgage or deed of trust has been fully paid, there can be no rightful exercise of the power of sale, and a sale made thereafter conveys no title to the purchaser. Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350; Penny *v.* Cook, 19 Iowa 538; Wells *v.* Estes, 154 Mo. 291, 55 S. W. 255; Cameron *v.* Irwin, 5 Hill (N. Y.) 272. But see Dicker *v.* Angerstein, 3 Ch. D. 600, 45 L. J. Ch. 754, 24 Wkly. Rep. 844, where a *bona fide* purchaser without notice was protected in his title, although the debt secured had already been paid, by virtue of a provision in the mortgage that the purchaser should not be bound to inquire whether any default in payment had been made or as to the propriety or expediency of the sale.

Sale after tender.— It is also held that, where the trustee to whom property has been conveyed in trust to secure a debt wrongfully sells the property after a tender made by the debtor, the purchaser takes no title. Welch *v.* Greenalge, 2 Heisk. (Tenn.) 209. But see Hudson Bros. Commission Co. *v.* Glencoe Sand, etc., Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722.

Violation of agreement for extension.— A sale under a trust deed, made in violation of an agreement to extend the time for payment, may be set aside, where the holder of the note himself became the purchaser. Missouri Real Estate Syndicate *v.* Sims, 179 Mo. 679, 78 S. W. 1006.

made in strict conformity to the terms and conditions of the mortgage or trust deed,[45] and is free from all fraud and illegality.[46] But his title is not vitiated by irregularities not going to the right to sell or rendering the sale illegal,[47] and even where the defects are more serious they may be waived by the mortgagor, who may, by his acquiescence in the sale or by accepting and retaining the surplus proceeds, estop himself to object.[48] And generally the purchaser is not affected by the failure of the mortgagee or others to comply with conditions subsequent to the sale, nor by any mistake or irregularity in the distribution of the proceeds, with which, as a rule, he has nothing to do.[49] A sale by the trustee under a deed of trust, without disclosing the fact that a portion of the property mentioned in the notice read at the sale had previously been released, renders the trustee liable in an action for deceit by the purchaser, who bought in the belief that he was purchasing the property described in the deed of trust and in the notice of sale.[50]

b. Notice of Sale. It has been held that a foreclosure sale, made without giving the notice provided for or required by the mortgage or deed of trust, passes no title.[51] But there are decisions holding that the sale, in such a case, is voidable at most, and at any rate passes the legal title.[52]

c. Rights on Vacation of Sale. Where a foreclosure sale under a power in a mortgage or deed of trust is void, or is set aside, the purchaser will have the rights of an equitable assignee of the mortgage,[53] or, if the purchase was made by

Invalidity of mortgage.— The sale passes no title where the mortgage or deed of trust was itself invalid (Shields *v.* Hobart, 172 Mo. 521, 72 S. W. 675); as where the deed of trust, made by a married woman, was insufficiently acknowledged (Schmertz *v.* Hammond, 47 W. Va. 527, 35 S. E. 945).

Request by creditor for sale.— It is no defense to ejectment by the foreclosure purchaser, where no offer to redeem is made, that the sale was not made at the request of the legal holder of the note secured, as required by the trust deed. Biffle *v.* Pullam, 125 Mo. 108, 28 S. W. 323. But see Bent-Otero Imp. Co. *v.* Whitehead, 25 Colo. 354, 54 Pac. 1023, 71 Am. St. Rep. 140.

45. Smith *v.* Provin, 4 Allen (Mass.) 516; Leet *v.* McMaster, 51 Barb. (N. Y.) 236; Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232. See also Penny *v.* Cook, 19 Iowa 538. But *compare* Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Koester *v.* Burke, 81 Ill. 436.

A sale on credit, contrary to the terms of the mortgage, which required it to be for cash, cannot be enforced by the purchaser. Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270.

A sale in gross of several distinct parcels of land, although not entirely void, is voidable. Phelps *v.* Western Realty Co., 89 Minn. 319, 94 N. W. 1085.

46. Lawrence *v.* Hand, 23 Miss. 103; Kelsay *v.* Farmers', etc., Bank, 166 Mo. 157, 65 S. W. 1007; Jackson *v.* Crafts, 18 Johns. (N. Y.) 110; Fenner *v.* Tucker, 6 R. I. 551.

47. Beedle *v.* Mead, 81 Mo. 297; Greenleaf *v.* Queen, 1 Pet. (U. S.) 138, 7 L. ed. 85.

Illustrations.—The sale is not void because made under a power of attorney which was not under seal (Watson *v.* Sherman, 84 Ill. 263), nor because made by a substituted trustee whose appointment was not in writing (Daniel *v.* Garner, 71 Ark. 484, 76 S. W. 1063), nor because made by an agent of the mortgagee, although the mortgage did not give the mortgagee any power to delegate his trust (Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850).

48. Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672; Austin *v.* Stewart, 126 N. C. 525, 36 S. E. 37; Taylor *v.* Heggie, 83 N. C. 244; Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

49. Coler *v.* Barth, 24 Colo. 31, 48 Pac. 656; Waterman *v.* Spaulding, 51 Ill. 425; Field *v.* Gooding, 106 Mass. 310; Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672.

50. Hayes *v.* Delzell, 21 Mo. App. 679.

51. Sanders *v.* Askew, 79 Ala. 433; Gebhard *v.* Sattler, 40 Iowa 152; Bigler *v.* Waller, 14 Wall. (U. S.) 297, 20 L. ed. 891.

52. Price *v.* Blankenship, 71 Mo. App. 548; Fowler *v.* Carr, 63 Mo. App. 486; McMannis *v.* Butler, 49 Barb. (N. Y.) 176; Minuse *v.* Cox, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313. And see Stanley *v.* Freckelton, 65 Hun (N. Y.) 138, 19 N. Y. Suppl. 913.

53. *Alabama.*— Sawyers *v.* Baker, 77 Ala. 461; Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

Arkansas.— Littell *v.* Grady, 38 Ark. 584.

Colorado.— Lewis *v.* Hamilton, 26 Colo. 263, 58 Pac. 196.

Illinois.— Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

Indiana.— Muir *v.* Berkshire, 52 Ind. 149.

Maryland.— Johnson *v.* Robertson, 34 Md. 165.

Michigan.— Lariverre *v.* Rains, 112 Mich. 276, 70 N. W. 583; Hoffman *v.* Harrington, 33 Mich. 392; Gilbert *v.* Cooley, Walk. 494.

Minnesota.— Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Johnson *v.* Sandhoff, 30 Minn. 197, 14 N. W. 889.

New York.— Robinson *v.* Ryan, 25 N. Y. 320; Grosvenor *v.* Day, Clarke 109.

North Dakota.— Nash *v.* Northwest Land Co., (1906) 108 N. W. 792.

the creditor secured, he will occupy the position of a mortgagee in possession after breach of condition,[54] and an action for the possession of the estate cannot be maintained against him without payment of the debt.[55]

d. Bona Fide Purchasers and Subsequent Grantees. The *bona fides* of the foreclosure purchaser will save him from the effect of claims or equities between the original parties of which he had no notice;[56] and a subsequent or remote grantee, taking innocently and in good faith, is not bound to look beyond the recitals of the trustee's deed, and takes a good title as against any defects or irregularities of which he had no actual knowledge.[57]

H. Conveyance to Purchaser — 1. Purchaser's Right to Deed. The foreclosure sale does not by itself fully vest the legal title in the purchaser; this requires the execution and delivery to him of a sufficient deed.[58] He becomes entitled to such a deed immediately upon payment of the purchase-price and the expiration of the period, if any, allowed for redemption,[59] and may take proceedings to compel its execution by the mortgagee or trustee,[60] or he may have a

Tennessee.— Green *v.* Stevenson, (Ch. App. 1899) 54 S. W. 1011.

See 35 Cent. Dig. tit. "Mortgages," § 1108.

54. Stallings *v.* Thomas, 55 Ark. 326, 18 S. W. 184; Harper *v.* Ely, 70 Ill. 581; Watson *v.* Perkins, (Miss. 1906) 40 So. 643; Haggart *v.* Milczinski, 143 Fed. 22, 74 C. C. A. 176.

55. Daniel *v.* Garner, 71 Ark. 484, 76 S. W. 1063; Haggart *v.* Wilczinski, 143 Fed. 22, 74 C. C. A. 176.

56. Merchant *v.* Woods, 27 Minn. 396, 7 N. W. 826; Baldwin *v.* Little, 64 Miss. 126, 8 So. 168; Adams *v.* Carpenter, 187 Mo. 613, 86 S. W. 445; Mathews *v.* Lecompte, 24 Mo. 545; Beatie *v.* Butler, 21 Mo. 313, 64 Am. Dec. 234. And see Runkle *v.* Gaylord, 1 Nev. 123.

One who purchases on credit at a sale under a trust deed, which provides that the sale must be for cash, is not a *bona fide* purchaser. Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270.

Pendency of bill to redeem as notice to purchaser at foreclosure sale see Ryan *v.* Newcomb, 125 Ill. 91, 16 N. E. 878.

57. *California.*— Carey *v.* Brown, 62 Cal. 373.

Illinois.— Grover *v.* Hale, 107 Ill. 638; Gibbons *v.* Hoag, 95 Ill. 45; McHany *v.* Schenk, 88 Ill. 357; Fairman *v.* Peck, 87 Ill. 156; Gunnell *v.* Cockerill, 84 Ill. 319, 79 Ill. 79; Watson *v.* Sherman, 84 Ill. 263; Wilson *v.* McDowell, 78 Ill. 514; McNary *v.* Southworth, 58 Ill. 473; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562.

Massachusetts.— Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532; Montague *v.* Dawes, 12 Allen 397.

Minnesota.— Tuttle *v.* Boshart, 88 Minn. 284, 92 N. W. 1117; Bausman *v.* Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201; Holton *v.* Bowman, 32 Minn. 191, 19 N. W. 734; Merchant *v.* Woods, 27 Minn. 396, 7 N. W. 826.

New Hampshire.— Very *v.* Russell, 65 N. H. 646, 23 Atl. 522.

New York.— Warner *v.* Blakeman, 36 Barb. 501 [*affirmed* in 4 Abb. Dec. 530].

Texas.— Schneider *v.* Sellers, 98 Tex. 380, 84 S. W. 417. *Compare* Huntington *v.* Crafton, 76 Tex. 497, 13 S. W. 542.

Virginia.— Dugger *v.* Dugger, 84 Va. 130, 4 S. E. 171; Walker *v.* Beauchler, 27 Gratt. 511.

West Virginia.— Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423; Dryden *v.* Stephens, 19 W. Va. 1.

United States.— Long *v.* Rogers, 6 Biss. 416, 15 Fed. Cas. No. 8,482.

See 35 Cent. Dig. tit. "Mortgages," § 1109.

58. Daniels *v.* Smith, 4 Minn. 172; Tripp *v.* Ide, 3 R. I. 51.

When deed unnecessary.— The statutes of some states provide for the filing of affidavits of the publication of notice and of the circumstances of the sale, and make these equivalent to a deed when the holder of the mortgage is the purchaser; and when this is the case no deed is necessary to vest the title in him. Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649. And see Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

As to the validity of deed made to an assignee of the purchaser see Southy *v.* McIntire, 7 App. Cas. (D. C.) 447.

59. Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354; Daniels *v.* Smith, 4 Minn. 172; Kennedy *v.* Hammond, 16 Mo. 341.

The death of the purchaser before the confirmation of the sale does not avoid the sale, but it may be confirmed by the court and a deed ordered, on the motion of any party interested, as if such death had not occurred. Cronkhite *v.* Buchanan, 59 Kan. 541, 53 Pac. 863, 68 Am. St. Rep. 379.

Delay in execution of deed.— Where, in a contest concerning land sold on foreclosure of a mortgage under a power of sale, no deed is produced except one executed nineteen years after the sale, and purporting to be made for better security, a deed contemporaneous with the sale will be presumed. Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467. And see Jones *v.* Hagler, 95 Ala. 529, 10 So. 345, where the court refused to hold that a delay of twelve years in executing the deed was in itself a badge of fraud.

60. Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256.

decree establishing his title on a proper application to the court and proof of his rights.[61]

2. Authority to Execute. Authority to a trustee or mortgagee to execute a conveyance to the purchaser at a foreclosure sale is necessarily incident to the power of sale.[62] The deed may therefore be executed, according to the circumstances of the case, by the trustee in a deed of trust,[63] by the mortgagee having a power of sale or by his assignee,[64] or by the sheriff or other officer who made the sale.[65] If the mortgagee or trustee was himself the purchaser at the sale, he may make the deed directly to himself.[66] But whoever may be the purchaser, the mortgagee or sheriff should not execute the deed in his own name as grantor, but in the name of the mortgagor, as the latter's attorney in fact.[67]

3. Requisites and Sufficiency. The deed given by the trustee or mortgagee must contain all the recitals required by the statute;[68] and it should recite the facts and circumstances of the advertisement and of the sale, so far as to show that the conditions of the power of sale were fully complied with, although errors or omissions in this respect will not vitiate the deed if they do not show a violation of the terms of the trust or render the deed unintelligible or inoperative as a conveyance.[69] A trustee's deed is not invalid because the trustee's name is not mentioned in the body of the deed, where reference is made to the record of the deed of trust, from which his identity could be ascertained.[70] If the deed con-

61. Brunson *v.* Morgan, 84 Ala. 598, 4 So. 589.

62. Lang *v.* Stansel, 106 Ala. 389, 17 So. 519; Fogarty *v.* Sawyer, 17 Cal. 589; McNeill *v.* Lee, 79 Miss. 455, 30 So. 821; Hunter *v.* Wooldert, 55 Tex. 433.

Deed by auctioneer.— A mortgagor may, by a provision in the mortgage, authorize the auctioneer who shall sell the property under the power in the mortgage to execute a conveyance to the purchaser, the mortgage being a power of attorney to that end. Gamble *v.* Caldwell, 98 Ala. 577, 12 So. 424. The auctioneer must make the deed in the name of the mortgagor, not in his own name. Sanders *v.* Cassady, 86 Ala. 246, 5 So. 503.

63. Balfour-Guthrie Inv. Co. *v.* Woodworth, 124 Cal. 169, 56 Pac. 891 (holding that the execution by a trustee of a defective conveyance does not exhaust his power, but the trust continues until he has made a valid conveyance of all his title); Kenney *v.* Jefferson County Bank, 12 Colo. App. 24, 54 Pac. 404 (holding that after having made a good deed to the purchaser a trustee has no power to erase the name of the grantee and substitute a third person).

64. Heath *v.* Hall, 60 Ill. 344.

65. Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937.

Ex-sheriff.— The deed is properly made by the sheriff who made the sale, although his term of office has in the meantime expired. Hoffman *v.* Harrington, 33 Mich. 392; Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

Deputy sheriff.— Where the sale was made by a deputy sheriff, the deed is properly executed by his principal, or by the latter's successor in office. Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645; Morrissey *v.* Dean, 97 Wis. 302, 72 N. W. 873.

66. Hall *v.* Bliss, 118 Mass. 554, 19 Am. Rep. 476; Marsh *v.* Hubbard, 50 Tex. 203.

67. Speer *v.* Hadduck, 31 Ill. 439; Miller *v.* Evans, 35 Mo. 45; Dendy *v.* Waite, 36 S. C. 569, 15 S. E. 712; Webster *v.* Brown, 2 S. C. 428.

Equitable title passes.— The mortgagee's sale is not invalidated merely by his executing the deed in his own name, instead of in the name of the mortgagor as his attorney in fact. An equitable title passes, and a court of equity will aid in establishing the legal title in the grantee. Moseley *v.* Rambo, 106 Ga. 597, 32 S. E. 638; Gibbons *v.* Hoag, 95 Ill. 45.

68. Pratt *v.* Skolfield, 45 Me. 386; Carter *v.* Reeves, 75 Mo. 104.

69. Grover *v.* Fox, 36 Mich. 461 (holding that where the deed represents the sale as one made in bulk for a single bid, when the sale was in fact in separate parcels and on several bids, it is not a proper deed); Fuller *v.* O'Neal, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59 (holding that where the trustee's deed shows that the sale was made by his agent, not by the trustee himself, there being no authority to delegate the trust, it is not admissible in evidence to prove title).

The deed is not rendered void by a failure to recite the date of the sale or an error in stating such date (Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67); nor by a similar error or omission in regard to the date of posting the notices of sale (O'Neil *v.* Vanderburg, 25 Iowa 104); nor by a mistake in giving the date of the mortgage, if it is so described otherwise as to be clearly identified (Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691); nor is it void because of uncertainty or ambiguity in regard to the notice of sale given by the mortgagee or trustee, the fact being provable by evidence *aliunde* (Farrar *v.* Payne, 73 Ill. 82; Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494, 1049).

70. Jones *v.* Hagler, 95 Ala. 529, 10 So. 345.

veys "all the right, title, and interest" of the mortgagor, this will cut off the equity of redemption of a grantee of his.[71] It will not ordinarily contain any covenants of warranty, and the purchaser has no right to require such covenants.[72] The deed must of course be acknowledged by the person making it, even if this is not required by statute.[73]

4. Filing and Recording. In a mortgage foreclosure the presumption that an officer performs his duty applies to the immediate filing by the sheriff of his deed, as required by statute.[74] Delay in recording the deed given to the foreclosure purchaser does not invalidate the foreclosure;[75] and the deed relates back to the execution of the deed of trust, as against attaching creditors of the original owner.[76]

5. Operation and Effect — a. In General. It has been decided in a number of cases that the recitals of the deed given to the foreclosure purchaser are *prima facie* evidence of the regularity of the sale and of the facts recited,[77] and an express stipulation to this effect is sometimes inserted.[78] In Michigan a sheriff's deed by itself is no evidence of a regular and legal foreclosure of a mortgage by advertisement.[79] Such a deed is ordinarily to be construed as an execution of the power of sale, and not as an assignment of the mortgage,[80] and although made a long time after the sale it will relate back to the day of the sale, if there are no intervening rights.[81]

b. Defects and Irregularities in Proceedings. The deed to the foreclosure purchaser will be deprived of all validity and effect as a legal conveyance by a total want of authority to make the sale,[82] although not by irregularities or defects not going to the right to exercise the power of sale;[83] and in any case, although it lacks effect as a legal conveyance, it will operate as an assignment or transfer of all the rights of the mortgagee.[84]

I. Proceeds of Sale — 1. Disposition of Proceeds — a. In General. Out of the proceeds of foreclosure sale, the mortgage creditor is entitled to retain the

71. Tyler *v.* Massachusetts Mut. L. Ins. Co., 108 Ill. 58; Snyder *v.* Chicago, etc., R. Co., 131 Mo. 568, 33 S. W. 67.

72. Johnson City First Nat. Bank *v.* Pearson, 119 N. C. 494, 26 S. E. 46; Faircloth *v.* Isler, 75 N. C. 551. *Compare* Thurmond *v.* Brownson, 69 Tex. 597, 6 S. W. 778, holding that where the deed of trust empowers the trustee, in case of sale thereunder, to convey by deed with full covenants of warranty, a covenant of warranty contained in the trustee's deed will bind the grantor in the trust deed.

73. Grover *v.* Fox, 36 Mich. 461. And see McCammon *v.* Detroit, etc., R. Co., 103 Mich. 104, 61 N. W. 273.

74. Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672.

75. Sanford *v.* Cahoon, 63 Mich. 223, 29 N. W. 840; Perkins *v.* Keller, 43 Mich. 53, 4 N. W. 559.

76. Farrar *v.* Payne, 73 Ill. 82.

77. *Alabama.* — Tew *v.* Henderson, 116 Ala. 545, 23 So. 128; Naugher *v.* Sparks, 110 Ala. 572, 18 So. 45 [*distinguishing* Wood *v.* Lake, 62 Ala. 489].

California. — Savings, etc., Soc. *v.* Deering, 66 Cal. 281, 5 Pac. 353. See also Carey *v.* Brown, 62 Cal. 373.

Colorado. — Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225; Carico *v.* Kling, 11 Colo. App. 349, 53 Pac. 390.

Illinois. — See Miller *v.* Shaw, 103 Ill. 277, by statute.

Minnesota. — See Goenen *v.* Schroeder, 18 Minn. 66.

North Carolina. — Lunsford *v.* Speaks, 112 N. C. 608, 17 S. E. 430.

Virginia. — See Preston *v.* Johnson, 105 Va. 238, 53 S. E. 1, by statute.

See 35 Cent. Dig. tit. "Mortgages," § 1121.

78. Chapin *v.* Billings, 91 Ill. 539; Swain *v.* Mitchell, 27 Tex. Civ. App. 62, 66 S. W. 61; Allen *v.* Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200; Jesson *v.* Texas Land, etc., Co., 3 Tex. Civ. App. 25, 21 S. W. 624.

In Missouri an express stipulation is necessary. Vail *v.* Jacobs, 62 Mo. 130; Neilson *v.* Chariton, 60 Mo. 386; De Laureal *v.* Kemper, 9 Mo. App. 77.

79. Hebert *v.* Bulte, 42 Mich. 489, 4 N. W. 215; Barman *v.* Carhartt, 10 Mich. 338.

80. Lanigan *v.* Sweany, 53 Ark. 185, 13 S. W. 740.

81. Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

82. Pierce *v.* Grimley, 77 Mich. 273, 43 N. W. 932; Enochs *v.* Miller, 60 Miss. 19.

83. Springfield Engine, etc., Co. *v.* Donovan, 120 Mo. 423, 25 S. W. 536; Freeman *v.* Moffitt, 119 Mo. 280, 25 S. W. 87; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67; Lunsford *v.* Speaks, 112 N. C. 608, 17 S. E. 430.

84. Dearnaley *v.* Chase, 136 Mass. 288; Brown *v.* Smith, 116 Mass. 108; Johnson *v.* Sandhoff, 30 Minn. 197, 14 N. W. 889; Olmsted *v.* Elder, 2 Sandf. (N. Y.) 325; Jackson

whole amount of his debt,[85] and although the sale was made upon non-payment of interest only, he may retain the principal also, if, by the terms of the mortgage, he is given the right to declare the whole debt due upon such default of interest.[86] A prior mortgage or other lien may be first satisfied out of the proceeds if the property was sold free from its lien, or if there was an agreement of the parties to that effect;[87] but otherwise it is not proper to divert any portion of the proceeds to such elder lien.[88]

b. Debts Secured by Same Mortgage. Where several notes or debts are secured by the same mortgage or deed of trust, the proceeds of a foreclosure sale will be applied to their satisfaction in the order, if any, designated in the mortgage or deed.[89] If they have passed into the hands of different assignees or holders, and the proceeds are insufficient to pay all in full, it is the rule in some states that the proceeds are to be divided *pro rata*, while in others it is held that the money should be applied to the notes in the order of their maturity.[90]

c. Payment of Taxes. Taxes standing due against the land at the time of the sale, or which had previously been paid by the mortgagee, should be discharged out of the proceeds of the sale;[91] but the mortgagee cannot be reimbursed for taxes which did not mature until after the sale,[92] nor for those which he personally paid after the completion of the foreclosure.[93]

2. Disposition of Surplus — a. In General. Where a surplus remains after satisfying the mortgage or deed of trust under which the sale is made, together with costs and commissions, it is generally held that it may be applied to the payment of the claims of a junior mortgagee,[94] provided he duly and seasonably asserts his right to look to such surplus for his satisfaction,[95] and, it has been held,

v. Bowen, 7 Cow. (N. Y.) 13; Williams *v.* Washington, 40 S. C. 457, 19 S. E. 1.

85. Holden *v.* Gilbert, 7 Paige (N. Y.) 208. And see Olmstead *v.* Tarsney, 69 Mo. 396.

86. Davis *v.* Dodson, 4 Ariz. 168, 35 Pac. 1058. See also Taylor *v.* Burgess, 26 Minn. 547, 6 N. W. 350.

87. Morton *v.* Hall, 118 Mass. 511; Dendy *v.* Waite, 36 S. C. 569, 15 S. E. 712.

88. Scott *v.* Shy, 53 Mo. 478; Tanner *v.* Taussig, 11 Mo. App. 534; Nelson *v.* Turner, 97 Va. 54, 33 S. E. 390.

89. See Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535; Hutchings *v.* Reinhalter, 23 R. I. 518, 51 Atl. 429, 58 L. R. A. 680.

90. See *supra*, XVI, D, 3, c.

91. Gorham *v.* National L. Ins. Co., 62 Minn. 327, 64 N. W. 906. But *compare* Schmidt *v.* Smith, 57 Mo. 135; Scott *v.* Shy, 53 Mo. 478.

Redemption from tax-sale.— Where a trust deed contains a provision authorizing the trustee, in case of a sale, to pay out of the proceeds all money advanced for taxes, the trustee may, out of such proceeds, redeem the land from a tax-sale. Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086. But a mortgagee who sells under the power cannot deduct from the proceeds money afterward paid to redeem outstanding tax titles, where the sale was made subject to such titles. Skilton *v.* Roberts, 129 Mass. 306.

92. Rappanier *v.* Bannon, (Md. 1887) 8 Atl. 555.

93. Wyatt *v.* Quinby, 65 Minn. 537, 68 N. W. 109; Tanner *v.* Taussig, 11 Mo. App. 534.

94. *Illinois.*— Ballinger *v.* Bourland, 87 Ill. 513, 29 Am. Rep. 69.

Maryland.— Rappanier *v.* Bannon, (1888) 13 Atl. 627.

Massachusetts.— Donahue *v.* Hubbard, 154 Mass. 537, 28 N. E. 909, 26 Am. St. Rep. 271, 14 L. R. A. 123; Converse *v.* Ware Sav. Bank, 152 Mass. 407, 25 N. E. 733.

Minnesota.— Fagan *v.* People's Sav., etc., Assoc., 55 Minn. 437, 57 N. W. 142; Fuller *v.* Langum, 37 Minn. 74, 33 N. W. 122; Brown *v.* Crookston Agricultural Assoc., 34 Minn. 545, 26 N. W. 907.

Mississippi.— Fryar *v.* Fryar, 62 Miss. 205.

Missouri.— Perkins *v.* Heiser, 34 Mo. App. 465.

New York.— Barber *v.* Cary, 11 Barb. 549.

North Dakota.— Nichols *v.* Tingstad, 10 N. D. 172, 86 N. W. 694.

Virginia.— Gayle *v.* Wilson, 30 Gratt. 166.

United States.— Markey *v.* Langley, 92 U. S. 142, 23 L. ed. 701.

England.— Baglioni *v.* Cavalli, 83 L. T. Rep. N. S. 500, 49 Wkly. Rep. 236; Eley *v.* Read, 76 L. T. Rep. N. S. 39; Bingham *v.* King, 14 Wkly. Rep. 414.

Canada.— Discher *v.* Canada Permanent Loan, etc., Co., 18 Ont. 273.

See 35 Cent. Dig. tit. "Mortgages," § 1128.

Sale under second mortgage.— If there are three successive mortgages on real estate, and a sale is made under the second, leaving a surplus, it must be applied in payment of the third; the lien of the first continues. Helweg *v.* Heitcamp, 20 Mo. 569.

95. See Waller *v.* Harris, 7 Paige (N. Y.) 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590]; Norman *v.* Hallsey, 132 N. C. 6, 43

provided he was notified of the foreclosure under the senior lien, the want of such notice leaving his own lien undisturbed.[96] In some jurisdictions a similar right to participate in the surplus is accorded to junior judgment and execution creditors;[97] and it is clearly within the right of the mortgagee or trustee to satisfy their claims if the mortgage or deed of trust authorizes him to pay off other liens on the land after discharging the particular debt secured.[98] But the creditor has no right to retain any part of the surplus to satisfy simple contract debts of the mortgagor to himself.[99] Aside from the question of subsequent liens or encumbrances, the surplus belongs to the mortgagor and must be paid over to him,[1] to his heirs,[2] or to his grantee of the equity of redemption.[3] The maker of a deed of trust may provide for and direct any disposition he chooses to be made of the surplus, provided only that there is no fraud upon his creditors.[4] Where property is sold by the trustee under a deed of trust to satisfy the first due of certain notes, the surplus, after satisfying the expenses and the first note, must be held by the trustee subject to the same lien as attached to the property.[5] Where land subject to a vendor's lien, which has been merged in a judgment foreclosing the same, is sold on foreclosure of a trust deed, which is a subsequent lien on the property, the surplus arising on the foreclosure of such trust deed is only applicable to a deficiency arising on a sale of the land under the judgment foreclosing the vendor's lien.[6]

b. Liability of Mortgagee. Where a mortgagee sells the property under his power of sale and receives the proceeds, an action at law may be maintained against him for the surplus proceeds by the mortgagor or other person entitled thereto;[7] and if he sells on credit, instead of for cash, he must account for the

S. E. 473; Marshall *v.* Cross, 26 Gratt. (Va.) 679.

96. Winslow *v.* McCall, 32 Barb. (N. Y.) 241.

97. *Maryland.*— Dodge *v.* Stanhope, 55 Md. 113.

South Carolina.— Robins *v.* Ruff, 2 Hill 406.

Texas.— Wynne *v.* Ft. Worth State Nat. Bank, 82 Tex. 378, 17 S. W. 918.

England.— Thornton *v.* Finch, 4 Giffard 515, 34 L. J. Ch. 466, 66 Eng. Reprint 810.

Canada.— Glover *v.* Southern Loan, etc., Co., 1 Ont. L. Rep. 59 [*affirming* 31 Ont. 552].

See 35 Cent. Dig. tit. "Mortgages," § 1128.

Contra.— Chase *v.* Parker, 14 Iowa 207; Norman *v.* Hallsey, 132 N. C. 6, 43 S. E. 473.

98. Hall *v.* Gould, 79 Ill. 16.

99. Berner *v.* German State Bank, 125 Iowa 438, 101 N. W. 156; Talbot *v.* Frere, 9 Ch. D. 568, 27 Wkly. Rep. 148. *Compare* Connolly *v.* Belt, 6 Fed. Cas. No. 3,117, 5 Cranch C. C. 405, intimating that this may be done, by aid of an order of the court, if the debtor is insolvent.

1. Mayo *v.* Merrick, 127 Mass. 511; Perkins *v.* Stewart, 75 Minn. 21, 77 N. W. 434; Reid *v.* Mullins, 48 Mo. 344. See also Brinkerhoff Zinc Co. *v.* Boyd, 192 Mo. 597, 91 S. W. 523.

2. Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94.

3. Buttrick *v.* Wentworth, 6 Allen (Mass.) 79; Johnson *v.* Wilson, 77 Mo. 639; Reid *v.* Mullins, 43 Mo. 306. And see *Re* Croskery, 16 Ont. 207.

An execution purchaser of the equity of redemption is entitled to so much of the surplus of a mortgage sale as will suffice to redeem from his judgment and execution, but the balance goes to the debtor. Johnson *v.* Cobleigh, 152 Mass. 17, 25 N. E. 73. And see Wilkinson *v.* Baxter, 97 Mich. 536, 56 N. W. 931.

4. Hall *v.* Gould, 79 Ill. 16. And see Union Sav. Bank *v.* Pool, 143 Mass. 203, 9 N. E. 545; Hayes *v.* Stockwell, 73 Mich. 366, 41 N. W. 324.

5. Huffard *v.* Gottberg, 54 Mo. 271. But see Cox *v.* Wheeler, 7 Paige (N. Y.) 248, holding that, on a statutory foreclosure of a mortgage, the mortgagee is entitled to sell the premises discharged of the lien of an instalment not yet due, and to retain the amount of such instalment out of the surplus proceeds of the sale.

6. Eubauk *v.* Finnell, 118 Mo. App. 535, 94 S. W. 591.

7. *Alabama.*— Hayes *v.* Woods, 72 Ala. 92.

Illinois.— Laughlin *v.* Heer, 89 Ill. 119.

Massachusetts.— Alden *v.* Wilkins, 117 Mass. 216.

Michigan.— Millard *v.* Truax, 50 Mich. 343, 15 N. W. 501; Kennedy *v.* Brown, 50 Mich. 336, 15 N. W. 498.

Minnesota.— Johnson *v.* Stewart, 75 Minn. 20, 77 N, W. 435; Fagan *v.* People's Sav., etc., Assoc., 55 Minn. 437, 57 N. W. 142; Seiler *v.* Wilber, 29 Minn. 307, 13 N. W. 136; Spottswood *v.* Herrick, 22 Minn. 548.

Missouri.— Price *v.* Blankenship, 144 Mo. 203, 45 S. W. 1123.

North Carolina.— Vick *v.* Smith, 83 N. C. 80.

See 35 Cent. Dig. tit. "Mortgages," § 1129.

proceeds as if the price were paid in cash;[8] he may also be held liable for interest on the surplus, at least after notice and demand.[9] As respects the rights of junior encumbrancers entitled to the surplus, it is generally held that the senior mortgagee, realizing more than the amount of his debt on a foreclosure sale, is to be regarded as a trustee for their benefit.[10]

c. Liability of Purchaser. Where the mortgage or trust deed provides that the purchaser shall not be required to see to the application of the proceeds of the sale, his responsibility ends on paying the whole purchase-money to the mortgagee or trustee;[11] and even without such a provision he is not generally to be held responsible for any misapplication of the money,[12] unless where he had actual notice of the rights of the claimant who is injured by the improper distribution of the fund.[13]

d. Proceeding to Recover Surplus. The proper proceeding to recover the surplus proceeds of a foreclosure sale is by an action at law,[14] and not by bill in equity.[15] If the statute so directs, the claimant may assert his rights by filing his claim with the officer making the sale,[16] or, in case of rival claimants, by a proceeding in the nature of an interpleader.[17] No demand is ordinarily prerequisite to bringing such suit.[18] But all persons having claims upon the fund should be made parties.[19] If the trust deed itself directs the disposition to be made of the

An attaching creditor must make a demand on the mortgagee in order to render the latter liable for a surplus remaining in his hands. Western Union Tel. Co. *v.* Caldwell, 141 Mass. 489, 6 N. E. 737.

As to right of a cotenant of the mortgagor to sue for his proportion of the surplus see Roche *v.* Hampden Sav. Bank, 128 Mass. 115.

Assignability of right.— The right to recover any surplus remaining in the mortgagee's hands after foreclosure sale, and wrongfully appropriated by him, is assignable, without an assignment of the equity of redemption. Lynott *v.* Dickerman, 65 Minn. 471, 67 N. W. 1143.

8. Bailey *v.* Ætna Ins. Co., 10 Allen (Mass.) 286; Beatty *v.* O'Connor, 5 Ont. 731.

9. Russell *v.* Duflon, 4 Lans. (N. Y.) 399; Mathison *v.* Clark, 25 L. J. Ch. 29, 4 Wkly. Rep. 30. And see Perkins *v.* Stewart, 75 Minn. 21, 77 N. W. 434, holding that the mortgagee is chargeable with interest on the surplus, without demand, except where he could not pay it on account of the absence of the mortgagor or of adverse claims, or for some other good reason and the fund remained unproductive in his hands.

10. White *v.* Dougherty, Mart. & Y. (Tenn.) 309, 17 Am. Dec. 802; West London Commercial Bank *v.* Reliance Permanent Bldg. Soc., 29 Ch. D. 954, 54 L. J. Ch. 1081, 53 L. T. Rep. N. S. 442, 33 Wkly. Rep. 916; Southwaite *v.* Rippon, 8 L. J. Ch. 139; Harper *v.* Culbert, 5 Ont. 152; Upper Canada Bank *v.* Wallace, 16 Grant Ch. (U. C.) 280. *Contra*, Russell *v.* Duflon, 4 Lans. (N. Y.) 399.

Duties of mortgagee as trustee.— In this situation the mortgagee is justified in requiring proper proof of the rights of any one claiming to be entitled to the surplus, and in paying the money into court in case of dispute. *Re* Kingsland, 8 Ont. Pr. 77. But it has been held that if he cannot ascertain who is entitled to the surplus, it is his duty to set it apart so that it will be fruitful for the benefit of the real owner, in default of which he may be charged with interest. Charles *v.* Jones, 35 Ch. D. 544, 56 L. J. Ch. 745, 56 L. T. Rep. N. S. 848, 35 Wkly. Rep. 645.

11. Mosca Milling, etc., Co. *v.* Murto, 18 Colo. App. 437, 72 Pac. 287.

12. Damon *v.* Deeves, 62 Mich. 465, 29 N. W. 42; Gardner *v.* Armstrong, 31 Mo. 535; Story *v.* Hamilton, 86 N. Y. 428; Woodwine *v.* Woodrum, 19 W. Va. 67.

13. Gair *v.* Tuttle, 49 Fed. 198; Leake *v.* Moore, 2 Molloy 127.

14. *Massachusetts.*— Mattel *v.* Conant, 156 Mass. 418, 31 N. E. 487.

Minnesota.— Bailey *v.* Merritt, 7 Minn. 159, 8 Minn. 84.

Rhode Island.— Reynolds *v.* Hennessy, 15 R. I. 215, 2 Atl. 701.

England.—Warner *v.* Jacob, 20 Ch. D. 220, 51 L. J. Ch. 642, 46 L. T. Rep. N. S. 656, 30 Wkly. Rep. 721.

Canada.— Biggs *v.* Freehold Loan, etc., Co., 26 Ont. App. 232.

See 35 Cent. Dig. tit. "Mortgages," § 1131.

Action of assumpsit.— Hayes *v.* Woods, 72 Ala. 92; Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434.

15. Ballinger *v.* Bourland, 87 Ill. 513, 29 Am. Rep. 69. But *compare* Judge *v.* Herbert, 124 Mass. 330; Wiggin *v.* Heywood, 118 Mass. 514.

16. Allen *v.* Wayne Cir. Judges, 57 Mich. 198, 23 N. W. 728.

17. Kirby *v.* Fitzgerald, 31 N. Y. 417.

18. Bailey *v.* Merritt, 7 Minn. 159. But *compare* Aultman *v.* Siglinger, 2 S. D. 442, 50 N. W. 911.

19. **The grantor and not the trustee in the deed of trust is the proper person to sue.** Gair *v.* Tuttle, 49 Fed. 198. See Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512, holding that if there were two joint mortgagors one

surplus, its provisions must be followed and parol evidence is not admissible to vary its terms.[20]

3. Accounting by Trustee or Mortgagee. In case of mutual charges or offsets between the parties, an action for an accounting may be the proper form of determining the distribution of the proceeds of sale.[21]

J. Deficiency and Personal Liability. If a sale made under a power of sale in a mortgage or deed of trust does not realize enough to satisfy the claims of the mortgagee, he may maintain an action against the mortgagor for the deficiency;[22] and this is so if he is forced by the purchaser's failure to comply with his bid, or his insolvency, to sell a second time, the second sale resulting in a deficiency.[23] But any fraud, misconduct, or unfairness in the sale will be a defense to such action.[24]

K. Fees and Costs — 1. Compensation or Commissions of Trustee or Mortgagee. In the absence of a contract or stipulation therefor, the mortgagee or

cannot sue alone for the surplus, without alleging his right to the whole of it.

The sheriff who made the sale, but who did not receive any part of the money, is not a necessary party defendant. Bailey *v.* Merritt, 7 Minn. 159.

A junior mortgagee whose rights under his mortgage are set up in defense to a suit by the mortgagor for the surplus on a sale under the first mortgage should be made a party. Itasca Inv. Co. *v.* Dean, 84 Minn. 388, 87 N. W. 1020.

20. Jones *v.* Shepley, 90 Mo. 307, 2 S. W. 400. And see Wyatt *v.* Quinby, 65 Minn. 537, 68 N. W. 109.

21. *Iowa.*— Berner *v.* German State Bank, 125 Iowa 438, 101 N. W. 156.

Maryland.— Rappanier *v.* Bannon, (1887) 8 Atl. 555, holding that the mortgagee cannot be required to account for the proceeds of a sale of part of the premises, if such proceeds were not received by him.

Massachusetts.—Urann *v.* Coates, 117 Mass. 41.

Rhode Island.— Fenley *v.* Cassidy, (1899) 43 Atl. 296, showing where the mortgagor should be credited with the rents and profits, and with insurance money received by the mortgagee.

Canada.— Boulton *v.* Rowland, 4 Ont. 720, holding that costs of suit for accounting should be charged to mortgagee where a balance was found due from him.

See 35 Cent. Dig. tit. "Mortgages," § 1132.

22. *California.* — Herbert Kraft Co. *v.* Bryan, 140 Cal. 73, 73 Pac. 745.

Colorado.— Scott *v.* Wood, 14 Colo. App. 341, 59 Pac. 844.

Kentucky.— Aultman, etc., Co. *v.* Meade, 89 S. W. 137, 28 Ky. L. Rep. 208, holding that where the mortgagee, by virtue of his mortgage, takes the property but fails to apply it on the debt, such failure is a matter of defense in a suit to recover the balance of the debt.

Massachusetts.— See Draper *v.* Mann, 117 Mass. 439.

Minnesota.— Blake *v.* McKusick, 10 Minn. 251.

Utah.— Salt Lake Valley L. & T. Co. *v.* Millspaugh, 18 Utah 283, 54 Pac. 893.

See 35 Cent. Dig. tit. "Mortgages," § 1124.

Statutory provisions.— A statute providing that there shall be but one action for the recovery of any debt secured by mortgage, in which the judgment shall direct the sale of the property, and in which there may be a judgment for any deficiency, applies only to foreclosures by action or suit, and does not prevent a suit to recover the deficiency after a foreclosure by exercise of a power of sale. Mallory *v.* Kessler, 18 Utah 11, 54 Pac. 892, 72 Am. St. Rep. 765. At any rate such a statute applies only to mortgages on land within the state; and if a mortgage on land lying in another state is foreclosed under a power of sale, without action, and results in a deficiency, an action therefor may be maintained in the state where such statute is in force, that being the residence of the mortgagor. Felton *v.* West, 102 Cal. 266, 36 Pac. 676. See Herbert Craft Co. *v.* Bryan, (Cal. 1902) 68 Pac. 1020.

Credit for land released.— If the mortgagor has sold part of the mortgaged premises, and the mortgagee, without his consent, has released that part from the mortgage, the mortgagor must be credited with the full value of the portion so released, when sued by the mortgagee to recover the balance remaining due after a foreclosure under the power of sale. Worcester Mechanics' Sav. Bank *v.* Thayer, 136 Mass. 459.

Unmatured instalments of the mortgage debt cannot be considered due on a foreclosure sale, in such sense as to justify a personal judgment for their amount, the proceeds of sale being insufficient. Mason *v.* Barnard, 36 Mo. 384.

Illegal interest.— Where the land sells for enough to pay the mortgage note with legal interest, there can be no action to recover, as a deficiency, excessive interest stipulated for in the note. Potter *v.* Marvin, 4 Minn. 525; Banker *v.* Brent, 4 Minn. 521; Culbertson *v.* Lennon, 4 Minn. 51.

23. Fall River Sav. Bank *v.* Sullivan, 131 Mass. 537; Wing *v.* Hayford, 124 Mass. 249; Hull *v.* Pace, 61 Mo. App. 117.

24. Fenton *v.* Torrey, 133 Mass. 138; Howard *v.* Ames, 3 Metc. (Mass.) 308; Lowell *v.* North, 4 Minn. 32.

trustee in a deed of trust is not entitled to any compensation for executing the trust.[25] But if it is so provided in the deed or by contract of the parties, he may retain out of the proceeds his fixed fee or commission.[26] If it is merely described as a reasonable commission, its amount must be determined by the circumstances of the case, particularly the amount of the mortgage debt.[27]

2. Attorney's Fees. Reasonable fees for the mortgagee's or trustee's attorney may be retained out of the proceeds of the sale, when authorized by statute,[28] or provided for in the mortgage or deed of trust, either specially by name,[29] or by inclusion in the general provision for the payment of all fees and charges or costs and expenses;[30] and it seems also without a stipulation in the deed, when the employment of an attorney in and about the foreclosure was necessary on account

25. Heffron *v.* Gage, 44 Ill. App. 147; Johnson *v.* Glenn, 80 Md. 369, 30 Atl. 993 (a provision authorizing the payment out of the proceeds of the sale of "all expenses incident to such sale" does not entitle the mortgagee to commissions on the sale); Rappanier *v.* Bannon, (Md. 1887) 8 Atl. 555; Northern Cent. R. Co. *v.* Keighler, 29 Md. 572. *Contra,* Varnum *v.* Meserve, 8 Allen (Mass.) 158; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 311.

Contract for extra commissions.— Where the trustee postponed the sale at the request of the mortgagor, who agreed thereupon to allow him double commissions, this made a personal contract between the trustee and the mortgagor, and gave the trustee no right to claim double commissions out of the proceeds of sale. Stewart *v.* Glenn, 3 Md. 323; Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

26. Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Duffy *v.* Smith, 132 N. C. 38, 43 S. E. 501.

When commissions earned.— Where the commission to the trustee is distinctly expressed to be a commission on the sale of the property, or a compensation for making the sale, it is not earned merely by advertising the property on the mortgagor's default and making ready for a sale. If, after this is done, the debtor or a junior encumbrancer pays off the debt, and so stops the sale, the trustee is not entitled to commissions. Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 31 S. E. 629; Fry *v.* Graham, 122 N. C. 773, 30 S. E. 330; Pass *v.* Brooks, 118 N. C. 397, 24 S. E. 736. But *compare* Cannon *v.* McCape, 114 N. C. 580, 19 S. E. 703, 20 S. E. 276.

27. Marsh *v.* Morton, 75 Ill. 621; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 311.

28. See the statutes of the different states. And see Morse *v.* Home Sav., etc., Assoc., 60 Minn. 316, 62 N. W. 112; Collins *v.* Standish, 6 How. Pr. (N. Y.) 493.

A statute allowing an attorney's fee for prosecuting or defending any action in a court of equity does not apply to a case where a mortgagee exercises his power of sale, without application to the court, and merely reports the sale to the court, which ratifies it and takes order for the distribution of the proceeds. **Ruley *v.* Hyland,** 77 Md. 487, 26 Atl. 1038.

29. Tompkins *v.* Drennen, 95 Ala. 463, 10 So. 638.

Trustee acting as attorney.— Where foreclosure of a trust deed is effected by a firm of attorneys, of which the trustee is a member, he is not entitled to the attorney's fee stipulated for in the deed, but only to a reasonable compensation as trustee. Elkin *v.* Rives, 82 Miss. 744, 35 So. 200.

County attorney entitled to fee.— An attorney's fee is recoverable where the proceedings are conducted on behalf of a county, the holder of the mortgage, by the county attorney, who receives a fixed salary. Swift *v.* Hennepin County, 76 Minn. 194, 78 N. W. 1107.

Fee in case of foreclosure.— A provision in a mortgage for the payment of an attorney's fee in case of foreclosure under the power of sale does not make such fee payable where the mortgage is foreclosed by action or suit. Bynum *v.* Frederick, 81 Ala. 489, 8 So. 198; Danforth *v.* Charles, 1 Dak. 285, 46 N. W. 576. Under a statute providing that, where the mortgagee himself became the purchaser at the sale, he may bring an action to compel the mortgagor to elect whether he will affirm or disaffirm the sale, the mortgagee cannot recover an attorney's fee in such action on the strength of a provision in the mortgage allowing an attorney's fee in case of foreclosure. American Freehold Land Mortg. Co. *v.* Pollard, 120 Ala. 1, 24 So. 736, 103 Ala. 289, 16 So. 801.

Several parcels sold.— Where a mortgage of several lots was so drawn as to constitute a separate mortgage on each lot, and stipulated that, in case of foreclosure on any one lot, an attorney's fee of twenty-five dollars should be retained, only that amount can be taken in case of a single foreclosure embracing several of the lots. Eliason *v.* Sidle, 61 Minn. 285, 63 N. W. 730.

Payment before sale.— Payment of an attorney's fee stipulated for in a trust deed and payable out of the proceeds of a sale cannot be required before the sale. Philips *v.* Bailey, 82 Mo. 639.

30. Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Brady *v.* Dilley, 27 Md. 570; Varnum *v.* Meserve, 8 Allen (Mass.) 158; Cannon *v.* McCape, 114 N. C. 580, 19 S. E. 703, 20 S. E. 276. *Contra,* Condict *v.* Flower, 47 Mo. App. 514.

of the peculiar circumstances of the case.[31] Any money illegally and improperly retained out of the proceeds of sale, as an attorney's fee, is a part of the surplus, which the mortgagor may recover by suit.[32]

3. Costs and Expenses of Sale. The mortgagee or trustee is entitled to retain out of the proceeds the costs and expenses incurred in connection with the sale,[33] even though the sale proves ineffective, if the attempt to sell was made in good faith,[34] including the cost of printing and publishing the notices or advertisements of the sale,[35] the fees of the auctioneer, if one was employed,[36] and any other proper and legitimate items of expense.[37] On the other hand if the trustee and creditor conspire to make a fraudulent sale of the property they will be charged with the costs and expenses of the sale.[38]

4. Affidavit of Costs and Disbursements. In some states the law requires one foreclosing a mortgage to make and file an affidavit of the costs and expenses of the sale.[39] This is mandatory,[40] and the omission to file the affidavit will prevent the mortgagee from retaining such costs out of the proceeds,[41] or give the mortgagor a right of action to recover them,[42] although it will not invalidate the foreclosure.[43]

L. Operation and Effect — 1. In General. The effect of a regular foreclosure under a power of sale in a mortgage is equivalent to a strict foreclosure by a court of equity.[44] It operates as a satisfaction and extinguishment of the debt secured by the mortgage,[45] saving to the mortgagee the right to sue for any

31. Duffy *v.* Smith, 132 N. C. 38, 43 S. E. 501; Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94. But see Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553.

32. Wilkinson *v.* Baxter, 97 Mich. 536, 56 N. W. 931; Truesdale *v.* Sidle, 65 Minn. 315, 67 N. W. 1004. And see Millard *v.* Truax, 47 Mich. 251, 10 N. W. 358.

33. *Illinois.*— Cooper *v.* McNeil, 9 Ill. App. 97.

Kentucky.— Guenther *v.* Wisdom, 84 S. W. 771, 27 Ky. L. Rep. 230.

Maryland.— Rappanier *v.* Bannon, (1887) 8 Atl. 555.

Minnesota.— Farnsworth Loan, etc., Co. *v.* Commonwealth Title Ins., etc., Co., 87 Minn. 179, 91 N. W. 469.

South Carolina.— Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525.

Canada.— *Re* Vanluven, 19 Ont. Pr. 216; *Re* Cronyn, 8 Ont. Pr. 372; *Re* McDonald, 8 Ont. Pr. 88; *Re* Crerar, 8 Ont. Pr. 56.

See 35 Cent. Dig. tit. "Mortgages," § 1135.

Who liable.— One who claims the surplus as heir at law of the mortgagor, and has been recognized as a claimant in interpleader proceedings, is a party liable to pay the costs. Matter of Moss, 6 How. Pr. (N. Y.) 263.

In Minnesota the statute (Gen. St. (1878) c. 81, § 24) provides for the recovery of treble damages for making excessive charges on a foreclosure. See Hobe *v.* Swife, 58 Minn. 84, 59 N. W. 831.

34. Cameron *v.* McIlroy, 1 Manitoba 242.

35. See Brown *v.* Ogg, 85 Ind. 234; Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553; Collins *v.* Standish, 6 How. Pr. (N. Y.) 493; Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94. *Compare* Ferguson *v.* Wooley, 9 N. Y. Civ. Proc. 236, holding that costs cannot be taxed for matters contained in the notice of sale which were not required to be inserted in it; nor for serving the notice on persons not required by the statute to be served, although it may have been prudent to serve them.

36. Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94. *Compare* Smith *v.* Olcott, 19 App. Cas. (D. C.) 61. But see Duffy *v.* Smith, 132 N. C. 38, 43 S. E. 501.

37. Cheltenham Imp. Co. *v.* Whitehead, 128 Ill. 279, 21 N. E. 569 (holding that the mortgagee cannot charge for the cost of an abstract of the title to the premises); Hobe *v.* Swift, 58 Minn. 84, 59 N. W. 831 (holding that the mortgagee cannot charge for a postponement of the sale procured at his own request).

38. Hopkins *v.* Granger, 52 Ill. 504.

39. See the statutes of the different states.

40. Brown *v.* Baker, 65 Minn. 133, 67 N. W. 793; Larocque *v.* Chapel, 63 Minn. 517, 65 N. W. 941.

41. Brown *v.* Scandia Bldg., etc., Assoc., 61 Minn. 527, 63 N. W. 1040; Johnson *v.* Northwestern Loan, etc., Assoc., 60 Minn. 393, 62 N. W. 381.

42. Brown *v.* Baker, 65 Minn. 133, 67 N. W. 793; Larocque *v.* Chapel, 63 Minn. 517, 65 N. W. 941.

43. Farnsworth Loan, etc., Co. *v.* Commonwealth Title Ins., etc., Co., 84 Minn. 62, 86 N. W. 877; Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436; Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701.

44. Aiken *v.* Bridgeford, 84 Ala. 295, 4 So. 266.

45. *Alabama.*— Harris *v.* Miller, 71 Ala. 26.

Georgia.— Ryan *v.* Rice, 109 Ga. 448, 34 S. E. 569.

Massachusetts.— Hood *v.* Adams, 124 Mass. 481, 26 Am. Rep. 687.

Michigan.— Kimmell *v.* Willard, 1 Dougl. 217.

deficiency,[46] except where the sale was made only for one instalment of the mortgage debt,[47] or perhaps where it was made on credit instead of for cash,[48] and extinguishes any title granted by the mortgagor subsequent to the execution of the mortgage.[49] The regularity and validity of such a sale cannot be attacked in a collateral proceeding.[50] But on the other hand, if the sale was void, it is no obstacle to a suit to recover the secured debt or a proceeding to foreclose again.[51]

2. Effect on Liens and Encumbrances. A regular and valid foreclosure of a mortgage by exercise of a power of sale cuts off and extinguishes all liens on the property junior to the mortgage so foreclosed, including not only subsequent mortgages,[52] but also junior judgment liens.[53]

3. Extinguishment of Equity of Redemption. Such a sale under a mortgage or deed of trust, if valid and free from fraud or unfairness, will also extinguish the debtor's equity of redemption in the mortgaged premises, leaving him no title or interest of any kind,[54] unless there be a statutory right of redemption for a limited time, which, however, is not a title or estate but a mere privilege.[55]

4. Waiver of Sale. The parties to the mortgage, where no rights of third persons are involved, may agree to waive the sale and disregard it, with the effect

Minnesota.— Loomis *v.* Clambey, 69 Minn. 469, 72 N. W. 707, 65 Am. St. Rep. 576; Evans *v.* Rhode Island Hospital Trust Co., 67 Minn. 160, 69 N. W. 715, 1069.

Missouri.— New York Store Mercantile Co. *v.* Thurmond, 186 Mo. 410, 85 S. W. 333.

New York.— Cox *v.* Wheeler, 7 Paige 248.

Tennessee.— Wade *v.* Harper, 3 Yerg. 383; Brown *v.* Tucker, (Ch. App. 1896) 39 S. W. 346. But see Shields *v.* Dyer, 86 Tenn. 41, 5 S. W. 439.

See 35 Cent. Dig. tit. "Mortgages," § 1137.

But see Hussey *v.* Hill, 120 N. C. 312, 26 S. E. 919, 58 Am. St. Rep. 789, holding that a sale of mortgaged lands by an assignee of a note and mortgage securing it, under a power of sale in the mortgage, and a subsequent sale of the land by the purchaser at the foreclosure sale, amount merely to equitable assignments of the note and mortgage.

46. See *supra*, XX, J.

47. Edgar *v.* Beck, 96 Mich. 419, 56 N. W. 15.

48. Union Bank *v.* Stafford, 12 How. (U. S.) 327, 13 L. ed. 1008; Wallis *v.* Thornton, 29 Fed. Cas. No. 17,111, 2 Brock. 422.

49. Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223. See also Wells *v.* Bente, 86 Mo. App. 264.

50. Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. (D. C.) 304; Damon *v.* Deeves, 66 Mich. 347, 33 N. W. 512; Risch *v.* Jensen, 92 Minn. 107, 99 N. W. 628; Reid *v.* Mullins, 48 Mo. 344.

51. Bottineau *v.* Ætna L. Ins. Co., 31 Minn. 125, 16 N. W. 849; Interstate Bldg., etc., Assoc. *v.* Barker, 16 Tex. Civ. App. 676, 39 S. W. 317.

52. Plum *v.* Studebaker Bros. Mfg. Co., 89 Mo. 162, 1 S. W. 217; Root *v.* Wheeler, 12 Abb. Pr. (N. Y.) 294 (this results only where the junior mortgagee was served with process); Nichols *v.* Tingstad, 10 N. D. 172, 86 N. W. 694; Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621. But *compare* Howe *v.* Woodruff, 12 Ind. 214.

53. Post *v.* Arnot, 2 Den. (N. Y.) 344; Kennard *v.* Mabry, 78 Tex. 151, 14 S. W. 272. *Compare* Warner *v.* Blakeman, 4 Abb. Dec. (N. Y.) 530, 4 Keyes 487.

54. *Alabama.*— Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515; Hambrick *v.* New England Mortg. Security Co., 100 Ala. 551, 13 So. 778; Durden *v.* Whetstone, 92 Ala. 480, 9 So. 176; Aiken *v.* Bridgeford, 84 Ala. 295, 4 So. 266; Newburn *v.* Bass, 82 Ala. 622, 2 So. 520; McGuire *v.* Van Pelt, 55 Ala. 344.

Arkansas.— Crittenden *v.* Johnson, 11 Ark. 94.

Illinois.— Ryan *v.* Sanford, 133 Ill. 291, 24 N. E. 428; Bloom *v.* Van Rensselaer, 15 Ill. 503.

Massachusetts.— Kinsley *v.* Ames, 2 Metc. 29.

Minnesota.— Jacoby *v.* Crowe, 36 Minn. 93, 30 N. W. 441.

New York.— Osborn *v.* Merwin, 12 Hun 332; Bryan *v.* Butts, 27 Barb. 503 [*affirmed* in 28 How. Pr. 582].

North Carolina.— Paschal *v.* Harris, 74 N. C. 335.

North Dakota.— Grandin *v.* Emmons, 10 N. D. 223, 86 N. W. 723, 88 Am. St. Rep. 684, 54 L. R. A. 610.

Ohio.— Brisbane *v.* Stoughton, 17 Ohio 482.

Texas.— Davidson *v.* Jefferson, (Civ. App. 1903) 76 S. W. 765.

Canada.— Brown *v.* Woodhouse, 14 Grant Ch. (U. C.) 682.

See 35 Cent. Dig. tit. "Mortgages," § 1138.

Countervailing equities.— Where one holds mortgaged land on a parol agreement that he shall sell the property and pay the mortgage debts, and account to the grantor for the balance, he holds it subject to the debtor's equities, and cannot cut off those equities by selling the land mortgaged, under the power of sale, and bidding it in himself. Emerson *v.* Atwater, 7 Mich. 12.

55. Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652.

of restoring the title to its previous condition and giving the mortgagor a right to redeem.[56] But their mutual intention to this effect must be clear.[57]

M. Wrongful, Defective, or Inequitable Foreclosure — 1. In General — a. Effect of Defects and Irregularities. A foreclosure sale which is marred by defects and irregularities such as are not merely superficial but touch its validity is inoperative for all purposes,[58] as, where the mortgage had been fully paid or otherwise extinguished before the sale,[59] where the power of sale was void or the mortgagee had no right to exercise it,[60] or where it was exercised fraudulently or unfairly,[61] or without compliance with essential statutory directions.[62]

b. Right to Object, Ratification, and Estoppel. The right to impeach a foreclosure sale on account of defects or irregularities belongs only to those persons who are injured by it.[63] And the mortgagor may ratify and confirm a sale which

56. Dodge *v.* Brewer, 31 Mich. 227. See also Patterson *v.* Tanner, 22 Ont. 364.

57. Weld *v.* Rees, 48 Ill. 428 (holding that where the property sold for only part of the debt, and the creditor recovered judgment for the remainder and collected it, this does not open the sale or authorize the debtor to redeem); Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32 (holding that an assignment of the mortgage and a quitclaim deed by the mortgagee (he having been the purchaser at the sale), executed before the end of the statutory time for redemption, do not annul the foreclosure); Cameron *v.* Adams, 31 Mich. 426 (holding that part payments made after the sale, and received with the clear understanding that the redemption is to be completed by paying the whole sum necessary for that purpose, within the year allowed by the statute, are in affirmance and not in avoidance of the sale, and that their acceptance does not operate as a waiver of the foreclosure).

58. Woodruff *v.* Coffman, 139 Mich. 634, 103 N. W. 166; Folsom *v.* Lockwood, 6 Minn. 186; Cox *v.* American, etc., Mortg. Co., (Miss. 1906) 40 So. 739; Williams *v.* Armistead, (Tex. Civ. App. 1905) 90 S. W. 925; Lerch *v.* Snyder, 2 Tex. Civ. App. 421, 21 S. W. 183. But see Claytor *v.* Anthony, 6 Rand. (Va.) 285, holding that, where an invalid sale is made under a valid deed of trust, which sale is void as between the purchaser or *cestui que trust* and the creditors of the original debtor, yet the deed, being good, will still operate to shield the property from executions at the suit of other creditors.

As to irregularities not vitiating the sale entirely see Green *v.* Collins, (Miss. 1905) 38 So. 188; Matthews *v.* Nefsy, 13 Wyo. 458, 81 Pac. 305, 110 Am. St. Rep. 1020.

Land wrongly included.— Where, at a foreclosure sale under a power in the mortgage, parcels not covered by the mortgage were sold with one parcel which was covered by it, as one tract and for a gross sum, it was held that this did not render the sale void as to the parcel rightly included. Bottineau *v.* Ætna L. Ins. Co., 31 Minn. 125, 16 N. W. 849.

Rule as to bona fide purchasers.— The generally accepted doctrine in this country is that the purchaser at the sale is chargeable with notice of defects and irregularities, and as to him, the rule of *caveat emptor* applies; but not so as to a remote purchaser or a grantee of the original foreclosure purchaser; he will be protected in the absence of actual knowledge of defects or want of power. Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Gunnell *v.* Cockerill, 79 Ill. 79; Wilson *v.* South Park Com'rs, 70 Ill. 46; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562. And see *supra*, XX, G, 8, d. In Canada it seems that a *bona fide* purchaser without notice is not affected by irregularities. See Crotty *v.* Taylor, 8 Manitoba 188; Swinny *v.* Rodburn, 27 N. Brunsw. 175 [*affirmed* in 16 Can. Sup. Ct. 297]; Smith *v.* Hunt, 2 Ont. L. Rep. 134.

59. Misener *v.* Gould, 11 Minn. 166.

60. McMeel *v.* O'Connor, 3 Colo. App. 113, 32 Pac. 182.

61. Dwyer *v.* Rohan, 99 Mo. App. 120, 73 S. W. 384.

62. Pierce *v.* Grimley, 77 Mich. 273, 43 N. W. 932.

63. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Gary *v.* Colgin, 11 Ala. 514.

California.— Weber *v.* McCleverty, (1906) 86 Pac. 706.

Georgia.— Williams *v.* J. P. Williams Co., 122 Ga. 178, 50 S. E. 52, 106 Am. St. Rep. 100, holding that the right to disaffirm a voidable sale is personal to the mortgagor, and cannot be exercised by a junior judgment creditor.

Illinois.— Beach *v.* Shaw, 57 Ill. 17.

Mississippi.— Wightman *v.* Doe, 24 Miss. 675.

Missouri.— Adams *v.* Carpenter, 187 Mo. 613, 86 S. W. 445, holding that the fact that a sale by a trustee under a deed of trust was irregular can be taken advantage of by the mortgagor or one claiming under him, only by an action to redeem); Dwyer *v.* Rohan, 99 Mo. App. 120, 73 S. W. 384.

New York.— Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458; Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281.

See 35 Cent. Dig. tit. "Mortgages," § 1142.

Defective memorandum of sale.— Where the only irregularity attending the sale is in the insufficiency of the memorandum made by the auctioneer, and the mortgagee and the purchaser take no notice of it, the mortgagor cannot impeach the sale on this ground. Lewis *v.* Wells, 50 Ala. 198.

otherwise would have been invalid, by acquiescing in it, delaying for too long a time to raise objections, or by accepting and retaining the surplus proceeds.[64] So also his conduct may raise an estoppel against him to object to the sale as against rights accruing under it.[65]

c. Liability of Trustee or Mortgagee. Where a sale by a mortgagee or by a trustee in a deed of trust was absolutely unlawful, fraudulent, or wilfully oppressive, the mortgagor, instead of proceeding to have the sale set aside, may maintain an action for damages against the mortgagee or trustee;[66] but the latter is not to be held responsible in this way for mere errors of judgment, however unfortunately they may have resulted.[67]

2. Setting Aside Sale[68] — a. Nature of Remedy and Right to Relief. A proceeding to set aside a foreclosure sale on the ground of fraud or illegality may be maintained by a bill in equity,[69] at the suit of the mortgagor,[70] his heirs and per-

Rights of mortgagor's grantee.— A subsequent purchaser from the mortgagor cannot impeach the foreclosure sale, on the ground of the omission to give due and proper notice of the sale (Wade *v.* Thompson, 52 Miss. 367), but he may dispute the validity of the sale on the ground of fraud in the execution of the power (Hayward *v.* Cain, 110 Mass. 273).

64. *Alabama.*— Ehrman *v.* Alabama Mineral Land Co., 109 Ala. 478, 20 So. 112. Failure to object to the sale is not a waiver of invalidity in the sale nor a confirmation of it, unless continued long enough to form a bar under the statute of limitations. Sloan *v.* Frothingham, 65 Ala. 593.

Illinois.— Walker *v.* Carleton, 97 Ill. 582, holding that the fact that the mortgagor asked and obtained a postponement of the sale, or that he delayed eight months in bringing suit to set it aside, will not estop him from insisting on a want of power to sell.

Minnesota.— Saxe *v.* Rice, 64 Minn. 190, 66 N. W. 268.

Mississippi.— Watson *v.* Perkins, (1906) 40 So. 643.

New York.— Story *v.* Hamilton, 86 N. Y. 428.

North Carolina.— Norwood *v.* Lassiter, 132 N. C. 52, 43 S. E. 509 (acceptance and retention of surplus proceeds of sale amounts to a ratification); Lunsford *v.* Speaks, 112 N. C. 608, 17 S. E. 430.

Rhode Island.— Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749, holding that where mortgagors receive the surplus proceeds of a sale made under a power, in ignorance of defects invalidating the sale, but afterward acquire knowledge of such defects, and continue to retain the proceeds, they are estopped from denying the purchaser's title.

See 35 Cent. Dig. tit. "Mortgages," § 1142.

65. Banker *v.* Brent, 4 Minn. 521; Bidwell *v.* Whitney, 4 Minn. 76; Culbertson *v.* Lennon, 4 Minn. 51; Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258, 9 S. Ct. 787, 33 L. ed. 128.

Failure to object to sale.— The grantor in a trust deed is not estopped to set aside an irregular sale on default because he was present at the sale and did not object to it. Shears *v.* Traders' Bldg. Assoc., 58 W. Va. 665, 52 S. E. 860.

66. *Kentucky.*— Aultman, etc., Co. *v.* Meade, 89 S. W. 137, 28 Ky. L. Rep. 208.

Maryland.— Lamm *v.* Port Deposit Homestead Assoc., 49 Md. 233, 33 Am. Rep. 246.

Massachusetts.— Rogers *v.* Barnes, 169 Mass. 179, 47 N. E. 602, 38 L. R. A. 145.

Minnesota.— Lowell *v.* North, 4 Minn. 32.

Missouri.— Missouri Real Estate Syndicate *v.* Sims, 179 Mo. 679, 78 S. W. 1006; Sherwood *v.* Saxton, 63 Mo. 78. An administrator of a mortgagee who sells property under the mortgage and buys it himself, at a nominal price, and afterward sells it at a high price, does not thereby become a trustee for the mortgagor for the profits. Woodlee *v.* Burch, 43 Mo. 231.

New Jersey.— Melick *v.* Voorhees, 24 N. J. Eq. 305.

North Carolina.— Kornegay *v.* Spicer, 76 N. C. 95; Hunt *v.* Bass, 17 N. C. 292, 24 Am. Dec. 274.

South Carolina.— Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579.

Texas.— Ullman *v.* Devereux, (Civ. App. 1906) 93 S. W. 472.

Virginia.— Mosby *v.* Johnson, 86 Va. 429, 10 S. E. 425.

Canada.—Edmonds *v.* Hamilton Provident, etc., Soc., 19 Ont. 677.

See 35 Cent. Dig. tit. "Mortgages," § 1143.

67. Markey *v.* Langley, 92 U. S. 142, 23 L. ed. 701.

68. **Right of appeal.**— A purchaser of mortgaged premises at a public sale under the mortgage may appeal from an order of the court setting aside the sale. Heider *v.* Bladen, 83 Md. 242, 34 Atl. 836.

69. Dawson *v.* Hayden, 67 Ill. 52.

In Michigan the proper remedy is a bill to redeem. Schwarz *v.* Sears, Walk. 170.

In Minnesota it has been held that where the sale was absolutely void, and the person making it, an alleged assignee of the mortgage, and those claiming under him are mere wrong-doers, the law will afford adequate relief, and therefore a bill in equity will not lie. Bolles *v.* Carli, 12 Minn. 113.

70. Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342; Blake *v.* McKusick, 8 Minn. 338, both holding that if the mortgagor does not object to the sale, nor any one standing in

sonal representatives,[71] a purchaser of the equity of redemption,[72] or judgment creditors.[73] The bill should be accompanied by an offer to redeem, or to pay the amount due under the mortgage, if the sale is attacked on the ground of a mere informality or defect, but this is not necessary where it is assailed as fraudulent or absolutely illegal.[74]

b. Grounds For Relief — (1) *In General.* A court of equity will set aside a foreclosure sale under a power in a mortgage or deed of trust, on proof of any fraud, concealment, or deceit in the sale,[75] or of any misconduct or partiality of the trustee,[76] or of any unfair and oppressive conduct in forcing the sale;[77] where there appears to have been a scheme or confederacy to obtain possession of the land;[78] upon proof of a material mistake,[79] or a failure to pursue the power strictly;[80] where the mortgage debt is shown to have been paid or sufficiently tendered before the sale;[81] on account of a failure to give the proper notice or a

his place or succeeding to his rights, no one else can attack it.

71. Dobson *v.* Racey, 3 Sandf. Ch. (N. Y.) 60; Spencer *v.* Lee, 19 W. Va. 179. See also Russell *v.* Roberts, 121 N. C. 322, 28 S. E. 406.

72. Brewer *v.* Harrison, 27 Colo. 349, 62 Pac. 224; Grover *v.* Hale, 107 Ill. 638. But see Lazarus *v.* Caeser, 157 Mo. 199, 57 S. W. 751.

73. Swain *v.* Lynd, 74 Minn. 72, 76 N. W. 958; Commercial Bank *v.* Watson, 5 Can. L. J. 163.

74. *Arkansas.*— Helena First Nat. Bank *v.* Waddell, 74 Ark. 241, 85 S. W. 417; Littell *v.* Grady, 38 Ark. 584.

Colorado.— Brewer *v.* Harrison, 27 Colo. 349, 62 Pac. 224.

Illinois.— Phœnix Ins. Co. *v.* Rink, 110 Ill. 538.

Minnesota.— Van Meter *v.* Knight, 32 Minn. 205, 20 N. W. 142.

Missouri.— Axman *v.* Smith, 156 Mo. 286, 57 S. W. 105; Lipscomb *v.* New York L. Ins. Co., 138 Mo. 17, 39 S. W. 465; Meyer *v.* Jefferson Ins. Co., 5 Mo. App. 245.

Rhode Island.— Briggs *v.* Hall, 16 R. I. 577, 18 Atl. 177.

See 35 Cent. Dig. tit. "Mortgages," § 1093.

75. *Illinois.*— St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556; Flint *v.* Lewis, 61 Ill. 299; Stone *v.* Fargo, 55 Ill. 71; Weld *v.* Rees, 48 Ill. 428; Longwith *v.* Butler, 8 Ill. 32; Stone *v.* Williamson, 17 Ill. App. 175.

Missouri.—New York Store Mercantile Co. *v.* Thurmond, 186 Mo. 410, 85 S. W. 333; Nations *v.* Pulse, 175 Mo. 86, 74 S. W. 1012; Kelsay *v.* Farmers', etc., Bank, 166 Mo. 157, 65 S. W. 1007; Reynolds *v.* Kroff, 144 Mo. 433, 46 S. W. 424; Clarkson *v.* Creely, 35 Mo. 95.

North Carolina.— Russell *v.* Roberts, 121 N. C. 322, 28 S. E. 406.

Tennessee.— Stewart *v.* Hamilton Bldg., etc., Assoc., (Ch. App. 1898) 47 S. W. 1106.

Texas.— Bemis *v.* Williams, 32 Tex. Civ. App. 393, 74 S. W. 332.

West Virginia.— Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

Wisconsin.— Newman *v.* Ogden, 82 Wis. 53, 51 N. W. 1091.

Statement of rule.— Equity will relieve against and set aside foreclosure proceedings by advertisement, whenever by any fraud, mistake, deceit, or unfair contrivance or practice, or bad faith in conducting them, the rights of the mortgagor or of subsequent encumbrancers have been injuriously affected, on the same grounds that would authorize a foreclosure by action to be opened. Soule *v.* Ludlow, 3 Hun (N. Y.) 503.

76. Williamson *v.* Stone, 128 Ill. 129, 22 N. E. 1005; Cassidy *v.* Cook, 99 Ill. 385; Wallwork *v.* Derby, 40 Ill. 527; Sahlgard *v.* Kennedy, 2 Fed. 295, 1 McCrary 291.

77. Whelan *v.* Reilly, 61 Mo. 565.

Illness and death of debtor.— Equity will not vacate a sale made lawfully and fairly under a mortgage or trust deed, merely because the debtor was ill at the time, or even because of his death before the sale. Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356; Spencer *v.* Lee, 19 W. Va. 179.

Pending litigation.— A sale otherwise fair will not be set aside because, at the time, the debtor was prosecuting an appeal from an order refusing to grant him an injunction against the sale. Hitz *v.* Jenks, 16 App. Cas. (D. C.) 530. But see Supreme Ct. I. O. F. *v.* Pegg, 19 Ont. Pr. 254, where the court refused to sustain a sale made under a power in the mortgage, while proceedings for its foreclosure were pending.

78. Long *v.* McGregor, 65 Miss. 70, 3 So. 240; Baier *v.* Berberich, 85 Mo. 50; Ellis *v.* Dellabough, 15 Grant Ch. (U. C.) 583.

79. Root *v.* King, 91 Mich. 488, 51 N. W. 1118; Coons *v.* North, 27 Mo. 73; Hinton *v.* Leigh, 102 N. C. 28, 8 S. E. 890.

80. Stine *v.* Wilkson, 10 Mo. 75.

81. Liddell *v.* Carson, 122 Ala. 518, 26 So. 133; Redmond *v.* Packenham, 66 Ill. 434; Jenkins *v.* Jones, 2 Giffard 99, 6 Jur. N. S. 391, 29 L. J. Ch. 493, 8 Wkly. Rep. 270, 66 Eng. Reprint 43. And see Freemansburg Bldg., etc., Assoc. *v.* Billig, 30 Pa. Super. Ct. 101; Rossett *v.* Fisher, 11 Gratt. (Va.) 492.

Payment after sale.— A payment on a note secured by a trust deed, which payment was made after a sale, and was to be applied to the balance due on the original debt, if redemption was not made by a certain day, is no ground for vacating the sale, where the debtor has not carried out the contract. Lake *v.* Brown, 116 Ill. 83, 4 N. E. 773.

misleading error in the published notice;[82] or upon proof of any unfairness, trickery, or lack of integrity in the conduct of the sale or any attempt to stifle competition.[83] Some of the decisions, however, draw the rule closely and hold that it is improper to interfere on other grounds than those of fraud or undervalue;[84] and it is generally conceded that the sale should not be set aside on the ground of mere informalities or irregularities not affecting the right to sell or the substantial rights of the parties.[85] Equity will not set aside a sale merely on the ground that the property was encumbered with other mortgage and judgment liens, at least if there appears to be no controversy as to the amount and priority of such liens.[86]

(II) *Inadequacy of Price*— (A) *As Ground For Vacating Sale.* The validity of a sale under a mortgage or deed of trust is not impaired by the fact that the property brought less than its value; that is, mere inadequacy of price is not sufficient ground for vacating the sale, where the sale was lawfully made and rightly conducted, with full opportunity for competition in the bidding, and without fraud, partiality, or oppression.[87] Especially is this rule applied where the

82. Wheeler *v.* McBlair, 5 App. Cas. (D. C.) 375; Reeside *v.* Peter, 33 Md. 120; Peaslee *v.* Ridgway, 82 Minn. 288, 84 N. W. 1024; Lowell *v.* North, 4 Minn. 32; Wells *v.* Pfeiffer, 4 Yeates (Pa.) 203. But *compare* Metters *v.* Brown, 9 Jur. N. S. 958, 33 L. J. Ch. 97, 8 L. T. Rep. N. S. 567, 11 Wkly. Rep. 744, where it is said that the sale should not be set aside, even where there was a serious irregularity in the notice, if no fraud is shown, and the purchaser has taken possession and spent money on the property.

83. *Alabama.*— British, etc., Mortg. Co. *v.* Norton, 125 Ala. 522, 28 So. 31.

California.— Haynes *v.* Backman, (1892) 31 Pac. 745.

Colorado.— Lathrop *v.* Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229.

Illinois.— Hurd *v.* Case, 32 Ill. 45, 83 Am. Dec. 249; Mapps *v.* Sharpe, 32 Ill. 13.

Maryland.— Wicks *v.* Westcott, 59 Md. 270.

Michigan.— Louder *v.* Burch, 47 Mich. 109, 10 N. W. 129.

Mississippi.— Herring *v.* Sutton, 86 Miss. 283, 38 So. 235; Elmslie *v.* Mayor, (1903) 35 So. 201.

Missouri.— Montgomery *v.* Miller, 131 Mo. 595, 33 S. W. 165; Stoffel *v.* Schroeder, 62 Mo. 147. *Compare* Givens *v.* McCray, 196 Mo. 306, 93 S. W. 374.

Tennessee.— Myers *v.* James, 2 Lea 159.

Canada.— Howard *v.* Harding, 18 Grant Ch. (U. C.) 181.

See 35 Cent. Dig. tit. "Mortgages," § 1094.

84. See Mahone *v.* Williams, 39 Ala. 202; Mutual F. Ins. Co. *v.* Barker, 17 App. Cas. (D. C.) 205; McClurg *v.* McSpadden, 101 Tenn. 433, 47 S. W. 698; Kennedy *v.* De Trafford, [1897] A. C. 180, 66 L. J. Ch. 413, 76 L. T. Rep. N. S. 427, 45 Wkly. Rep. 671; Dolman *v.* Nokes, 22 Beav. 402, 52 Eng. Reprint 1163; Matthie *v.* Edwards, 11 Jur. 761, 16 L. J. Ch. 405; Bettyes *v.* Maynard, 49 L. T. Rep. N. S. 389, 31 Wkly. Rep. 461.

85. Burns *v.* Middleton, 104 Ill. 411; Booth *v.* Wiley, 102 Ill. 84; Watson *v.* Sherman, 84 Ill. 263; Johnson *v.* Visnuskki, 72 Ill. 591; Weir *v.* Jones, 84 Miss. 602, 36 So. 533; Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078; Dunn *v.* McCoy, 150 Mo. 548, 52 S. W. 21; Farm Land Co. *v.* St. Rayner, (Nebr. 1905) 102 N. W. 610.

86. Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775. And see Fairman *v.* Peck, 87 Ill. 156.

87. *Alabama.*— Ward *v.* Ward, 108 Ala. 278, 19 So. 354.

Arkansas.— Hamilton *v.* Rhodes, 72 Ark. 625, 83 S. W. 351; Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104.

California.— Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922; Kennedy *v.* Dunn, 58 Cal. 339.

Colorado.— Lathrop *v.* Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229.

District of Columbia.— Hitz *v.* Jenks, 16 App. Cas. 530; Anderson *v.* White, 2 App. Cas. 408; Bailor *v.* Daly, 7 Mackey 175.

Illinois.— Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Laclede Bank *v.* Keeler, 109 Ill. 385; Burns *v.* Middleton, 104 Ill. 411; Parmly *v.* Walker, 102 Ill. 617; Waterman *v.* Spaulding, 51 Ill. 425; Booker *v.* Anderson, 35 Ill. 66; Bowman *v.* Ash, 36 Ill. App. 115.

Iowa.— Singleton *v.* Scott, 11 Iowa 589.

Maryland.— Carroll *v.* Hutton, 91 Md. 379, 46 Atl. 967; Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868.

Massachusetts.— Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215.

Minnesota.— Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436.

Mississippi.— Newman *v.* Meek, Freem. 441.

Missouri.— Charles Green Real Estate Co. *v.* St. Louis Mut. House Bldg. Co. No. 3, 196 Mo. 358, 93 S. W. 1111; Reynolds *v.* Kroff, 144 Mo. 433, 46 S. W. 424; Keith *v.* Browning, 139 Mo. 190, 40 S. W. 764; Hardwicke *v.* Hamilton, 121 Mo. 465, 26 S. W. 342; Landrum *v.* Union Bank, 63 Mo. 48; Routt *v.* Milner, 57 Mo. App. 50; Kline *v.* Vogel, 11 Mo. App. 211; Million *v.* McRee, 9 Mo. App. 344.

North Carolina.— McNair *v.* Pope, 100

inadequacy of the price appears to have been the result of the mortgagor's own conduct or of his carelessness or indifference to his interests,[88] or where it is not shown, with reasonable certainty, that the property would bring a larger price on a resale.[89] Inadequacy of price is, however, always a circumstance to be considered in connection with other grounds of objection to the sale, and will be sufficient to justify setting the sale aside, when coupled with any other circumstance showing unfairness, misconduct, fraud, or even stupid management resulting in the sacrifice of the property.[90]

(B) *What Constitutes Inadequacy.* Where the price realized at the sale was so grossly inadequate as to shock the conscience, it may by itself raise a presumption of fraud, trickery, unfairness, or culpable mismanagement, and therefore be sufficient ground for setting the sale aside.[91] But this action will not be taken

N. C. 404, 6 S. E. 234; Haines *v.* Cowles, 16 N. C. 420.

Rhode Island.— Babcock *v.* Wells, 25 R. I. 30, 54 Atl. 599.

South Carolina.— Robinson *v.* Amateur Assoc., 14 S. C. 148.

Texas.— Shaw *v.* Holloway, 13 Tex. Civ. App. 254, 35 S. W. 800.

Virginia.— Old Dominion Inv. Co. *v.* Moomaw, (1896) 25 S. E. 540.

Wisconsin.— Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

United States.— Clark *v.* Eaton, 100 U. S. 149, 25 L. ed. 573; Fletcher *v.* Ann Arbor R. Co., 116 Fed. 479, 53 C. C. A. 647; Riggs *v.* Clark, 71 Fed. 560, 18 C. C. A. 242; Haggart *v.* Ranger, 15 Fed. 860, 4 Woods 402.

England.— Kennedy *v.* De Trafford, [1896] 1 Ch. 762, 65 L. J. Ch. 465, 74 L. T. Rep. N. S. 599, 44 Wkly. Rep. 454.

See 35 Cent. Dig. tit. "Mortgages," § 1086.

88. Kennedy *v.* Dunn, 58 Cal. 339; King *v.* Bronson, 122 Mass. 122; Taylor *v.* Von Schraeder, 107 Mo. 206, 16 S. W. 675; Jones *v.* Neale, 2 Patt. & H. (Va.) 339.

89. Lathrop *v.* Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229; Farmers' Bank *v.* Quick, 71 Mich. 534, 39 N. W. 752, 15 Am. St. Rep. 280; Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

90. *Maryland.*— Chilton *v.* Brooks, 69 Md. 584, 16 Atl. 273.

Michigan.— Fix *v.* Loranger, 50 Mich. 199, 15 N. W. 81.

Minnesota.— Lalor *v.* McCarthy, 24 Minn. 417.

Mississippi.— Helm *v.* Yerger, 61 Miss. 44; Martin *v.* Swofford, 59 Miss. 328.

Missouri.— Meyer *v.* Kuechler, 10 Mo. App. 371.

South Dakota.— Middlesex Banking Co. *v.* Lester, 7 S. D. 333, 64 N. W. 168.

Wisconsin.— Encking *v.* Simmons, 28 Wis. 272.

England.— Jones *v.* Linton, 44 L. T. Rep. N. S. 601.

Canada.— Dufresne *v.* Dufresne, 10 Ont. 773.

See 35 Cent. Dig. tit. "Mortgages," § 1086.

91. *Colorado.*— Martin *v.* Barth, 4 Colo. App. 346, 36 Pac. 72.

Illinois.— Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804; Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Magnusson *v.* Williams, 111 Ill. 450; Jenkins *v.* Pierce, 98 Ill. 646; Booker *v.* Anderson, 35 Ill. 66.

Maryland.— Chilton *v.* Brooks, 69 Md. 584, 16 Atl. 273; Loeber *v.* Eckes, 55 Md. 1; Horsey *v.* Hough, 38 Md. 130; Hubbard *v.* Jarrell, 23 Md. 66.

Michigan.— Nugent *v.* Nugent, 54 Mich. 557, 20 N. W. 584.

Texas.— Seip *v.* Grinnan, (Civ. App. 1896) 36 S. W. 349.

West Virginia.— Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775; Bradford *v.* McConihay, 15 W. Va. 732.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843; Clark *v.* Eaton, 100 U. S. 149, 25 L. ed. 573.

See 35 Cent. Dig. tit. "Mortgages," § 1087.

Inadequacy sufficient to set aside sale see Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719 (property reasonably worth four hundred dollars sold for one hundred and twenty-one dollars); Vail *v.* Jacobs, 62 Mo. 130 (price was little more than one tenth the value of the property); Meyer *v.* Jefferson Ins. Co., 5 Mo. App. 245 (property brought one fifth its cash value); Runkle *v.* Gaylord, 1 Nev. 123 (price one third the value of the estate); Stacy *v.* Smith, 9 S. D. 137, 68 N. W. 198 (property worth six hundred dollars sold for ten dollars and sixty cents and costs); Domville *v.* Berrington, 7 L. J. Exch. 58, 2 Y. & C. Exch. 723 (biddings opened on an advance of £365 on £7,300).

Inadequacy insufficient to set aside sale see the following cases:

Arkansas.— Hamilton *v.* Rhodes, 73 Ark. 625, 83 S. W. 351, where property appraised at four hundred dollars was sold for three hundred and thirty dollars.

District of Columbia.— Mutual F. Ins. Co. *v.* Barker, 17 App. Cas. 205 (property sold for nine thousand five hundred dollars which the owner had offered to sell for fourteen thousand dollars); Anderson *v.* White, 2 App. Cas. 408 (lands worth thirty-five thousand dollars sold for twenty thousand one hundred dollars).

Illinois.— Hoyt *v.* Pawtucket Sav. Inst., 110 Ill. 390, land sold for five thousand two hundred and fifty dollars with two thousand dollars of unpaid taxes, which witnesses testified was worth fifteen thousand dollars, but was afterward sold for twelve thousand dol-

where there is a substantial dispute as to the market value of the property or as to the fairness of the price paid.[92] Under a statute providing that real property shall not be sold under mortgages for less than two thirds of its appraised value, and that the appraisers shall view and appraise the property and make a written report, they cannot deduct encumbrances from its appraised value, and a sale under a power for less than two thirds of the appraised value is void.[93]

c. Limitations and Laches. In some states the time within which an application to set aside a mortgage foreclosure sale must be brought is limited by statute;[94] and generally the courts will refuse to grant this relief when there has been great and unreasonable delay, amounting to laches, in seeking their aid.[95]

d. Pleading and Evidence. A bill for the setting aside of a foreclosure sale must allege distinctly and issuably the particular facts or special equities on which the complainant relies for the relief asked;[96] and, where the sale is merely void-

lars); Parmly *v.* Walker, 102 Ill. 617 (land on which ten thousand dollars had formerly been loaned, and which was sold several years after the mortgage sale for eighteen thousand dollars, brought six thousand dollars at foreclosure); Weld *v.* Rees, 48 Ill. 428 (in which case the land brought two thirds its value).

Maryland.— Mahoney *v.* Mackubin, 52 Md. 357, land brought nearly the value at which it was assessed for taxes.

Massachusetts. — Austin *v.* Hatch, 159 Mass. 198, 34 N. E. 95, land worth five thousand dollars sold for two thousand five hundred and twenty-five dollars.

Michigan.— Page *v.* Kress, 80 Mich. 85, 44 N. W. 1052, 20 Am. St. Rep. 504, where mortgaged property fairly worth nine hundred dollars is sold on foreclosure for eight hundred and ninety dollars, the fact that a person who was present at the first sale is willing to bid one thousand dollars is no ground for ordering a resale.

Missouri.— Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078 (land brought one third of its value); Harlin *v.* Nation, 126 Mo. 97, 27 S. W. 330 (land worth five hundred dollars brought one hundred dollars); Maloney *v.* Webb, 112 Mo. 575, 20 S. W. 683 (land brought half its value); Carter *v.* Abshire, 48 Mo. 300 (land brought one thousand six hundred dollars, and two years later the purchaser sold it for five thousand dollars).

North Carolina.— Monroe *v.* Fuchtler, 121 N. C. 101, 28 S. E. 63, property brought half its value.

West Virginia.— Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775, price was half the estimated value of the land.

See 35 Cent. Dig. tit. "Mortgages," § 1087.

92. Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223; Basnett *v.* Higgins, 2 W. Va. 485.

93. Ellenbogen *v.* Griffey, 55 Ark. 268, 18 S. W. 126.

94. See the statutes of the different states. And see Morgan *v.* Carter, 54 Minn. 141, 55 N. W. 1117; Burke *v.* Backus, 51 Minn. 174, 53 N. W. 458; Bitzer *v.* Campbell, 47 Minn. 221, 49 N. W. 691; Russell *v.* H. C. Akeley Lumber Co., 45 Minn. 376, 48 N. W. 3; Hull *v.* King, 38 Minn. 349, 37 N. W. 792 (holding that a mortgagor is not required to bring an action to set aside an unauthorized and void sale of the mortgaged premises before the expiration of the year for redemption); Sanborn *v.* Eads, 38 Minn. 211, 36 N. W. 338; Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661 (both holding that the limitation does not apply to a foreclosure which is absolutely void, by reason of a total want of authority to exercise the power of sale); Helm *v.* Yerger, 61 Miss. 44.

In Alabama the limitation of two years within which sales under a power in a mortgage must be disaffirmed because the mortgagee purchased at his own sale is not a statutory but a judicial limitation, and rests on the presumption of ratification after the lapse of two years in ordinary cases. Alexander *v.* Hill, 88 Ala. 487, 7 So. 238, 16 Am. St. Rep. 55; Askew *v.* Sanders, 84 Ala. 356, 4 So. 167; Ezzell *v.* Watson, 83 Ala. 120, 3 So. 309.

95. *Alabama.*— Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515; Askew *v.* Sanders, 84 Ala. 356, 4 So. 167.

Illinois.— Eastman *v.* Littlefield, 164 Ill. 124, 45 N. E. 137; Cornell *v.* Newkirk, 144 Ill. 241, 33 N. E. 37; Hoyt *v.* Pawtucket Sav. Inst., 110 Ill. 390; Gibbons *v.* Hoag, 95 Ill. 45; Bush *v.* Sherman, 80 Ill. 160; Dempster *v.* West, 69 Ill. 613; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562. A delay of only about eight months in bringing suit to set aside a sale under a deed of trust is not unreasonable and will not bar the suit. Walker *v.* Carleton, 97 Ill. 582.

Minnesota.—Dimond *v.* Manheim, 61 Minn. 178, 63 N. W. 495; Marcotte *v.* Hartman, 46 Minn. 202, 48 N. W. 767.

Missouri.— Kelsay *v.* Farmers', etc., Bank, 166 Mo. 157, 65 S. W. 1007; Baker *v.* Cunningham, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490.

South Dakota.—Northwestern Mortg. Trust Co. *v.* Bradley, 9 S. D. 495, 70 N. W. 648.

Virginia.— Hughes *v.* Caldwell, 11 Leigh 342.

West Virginia.— Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447; Corrothers *v.* Harris, 23 W. Va. 177.

See 35 Cent. Dig. tit. "Mortgages," § 1095.

96. *Alabama.*— Dickerson *v.* Winslow, 97 Ala. 491, 11 So. 918. And see Sullivan *v.* McLaughlin, 99 Ala. 60, 11 So. 447.

able for irregularities, must show the state of the account between the parties or how much is due on the mortgage debt,[97] and in case of any unusual or protracted delay, it must also present a sufficient excuse for it.[98] The complainant must also assume the burden of proving, by clear and satisfactory evidence, the particular facts alleged as invalidating the sale or as a ground for vacating it,[99] except, it may be, where fraud or unfairness is charged, in which case it has been held that slight evidence will suffice.[1] A subsequent grantee, to be protected on a bill in equity to set aside a sale under a deed of trust, must introduce in evidence the trustee's deed and the deed from the purchaser to himself.[2]

e. Decree and Relief Awarded. If the mortgage sale was not absolutely void but only voidable, and it appears that the debt secured is due and unpaid, the complainant should be granted relief only on condition of paying what is due; in other words, he will simply be allowed to redeem.[3] In proper cases a personal decree may be made against the trustee or other person in fault, but only where it is prayed for.[4] The purchaser at the sale, or party in possession, may be charged with the reasonable rents and profits of the land for the time of his occupancy,[5] and may be enjoined from removing buildings or other valuable property from the premises;[6] but it is also proper to allow him the cost of improvements on the land, made by him in the honest belief that he was the absolute owner.[7] On a bill to set aside a foreclosure sale at which the mortgagee purchased, as having been made after full payment of the debt, a decree setting aside the sale before preliminary ascertainment of the fact of payment is premature.[8]

f. Operation and Effect. On a decree setting aside the sale, the parties are placed *in statu quo*, as if no sale had taken place.[9] The decree cannot be

California.— Copsey *v.* Sacramento Bank, 133 Cal. 659, 66 Pac. 7, 85 Am. St. Rep. 238.

Illinois.—Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812.

Massachusetts. — Austin *v.* Hatch, 159 Mass. 198, 34 N. E. 95.

Minnesota.— Ramsey *v.* Merriam, 6 Minn. 168.

Mississippi.— Weir *v.* Jones, 84 Miss. 602, 36 So. 533.

Missouri.— Axman *v.* Smith, 156 Mo. 286, 57 S. W. 105; Thornton *v.* Irwin, 43 Mo. 153.

West Virginia.— Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775.

See 35 Cent. Dig. tit. "Mortgages," § 1097.

Allegation as to subsequent purchaser.— A bill to set aside a sale of mortgaged premises under a power of sale, on the ground that the debt had been already paid, need not allege that a subsequent purchaser of the premises, who still holds them, is not a *bona fide* purchaser, since that is an affirmative defense. Liddell *v.* Carson, 122 Ala. 518, 26 So. 133.

97. Garland *v.* Watson, 74 Ala. 323.

98. Abbott *v.* Peck, 35 Minn. 499, 29 N. W. 194.

99. *Alabama.*—Naugher *v.* Sparks, 110 Ala. 572, 18 So. 45.

Colorado.— Mosca Milling, etc., Co. *v.* Murto, 18 Colo. App. 437, 72 Pac. 287.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486; Tartt *v.* Clayton, 109 Ill. 579; Hairston *v.* Ward, 108 Ill. 87.

Mississippi.— McNeill *v.* Lee, 79 Miss. 455, 30 So. 821; Hamilton *v.* Halpin, 68 Miss. 99, 8 So. 739; Graham *v.* Fitts, 53 Miss. 307; Newman *v.* Meek, Freem. 441.

Missouri.— Orr *v.* McKee, 134 Mo. 78, 34 S. W. 1087; Hardwicke *v.* Hamilton, 121 Mo. 465, 26 S. W. 342; Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377.

North Carolina.— Yarborough *v.* Hughes, 139 N. C. 199, 51 S. E. 904; Cawfield *v.* Owens, 129 N. C. 286, 40 S. E. 62.

West Virginia.— Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253; Lallance *v* Fisher, 29 W. Va. 512, 2 S. E. 775; Burke *v.* Adair, 23 W. Va. 139; Dryden *v.* Stephens, 19 W. Va. 1.

See 35 Cent. Dig. tit. "Mortgages," § 1098.

But see Bartlett *v.* Jull, 28 Grant Ch. (U. C.) 140.

1. Longwith *v.* Butler, 8 Ill. 32; Stone *v.* Williamson, 17 Ill. App. 175.

2. Gunnell *v.* Cockerill, 84 Ill. 319.

3. Burgess *v.* Ruggles, 146 Ill. 506, 34 N. E. 1036; Bremer *v.* Calumet, etc., Canal, etc., Co., 127 Ill. 464, 18 N. E. 321; Massachusetts Mut. L. Ins. Co. *v.* Boggs, 121 Ill. 119, 13 N. E. 550; Decker *v.* Patton, 120 Ill. 464, 11 N. E. 897; Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253; Montgomery *v.* Ford, 5 Grant Ch. (U. C.) 210.

4. Gunnell *v.* Cockerill, 84 Ill. 319.

5. Equitable Trust Co. *v.* Fisher, 106 Ill. 189.

6. Wofford *v.* Clayton, 69 Ga. 774.

7. Watson *v.* Perkins, (Miss. 1906) 40 So. 643; Carroll *v.* Robertson, 15 Grant Ch. (U. C.) 173. *Compare* Adams *v.* Sayre, 76 Ala. 509; James *v.* Withers, 126 N. C. 715, 36 S. E. 178.

8. Askew *v.* Sanders, 84 Ala. 356, 4 So. 167.

9. Thomas *v.* Jones, 84 Ala. 302, 4 So. 270; Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652; Folsom *v.* Lockwood, 6 Minn. 186.

regarded as in any way constituting a payment or merger or satisfaction of the mortgage.[10]

3. New Foreclosure and Resale — a. In General. Where a mortgage foreclosure sale proves to have been invalid, or fatally irregular, or where it is necessary to correct a mistake, the parties concerned may themselves agree to disregard the sale, and proceed to a new foreclosure by sale.[11] Where the court sets aside a sale, on a bill for that purpose, it may order a resale to be made, under its own direction if that is deemed expedient, where such a course is necessary on account of conflicting rights or directions must be made as to the disposition of the proceeds.[12]

b. Power as Authority For Resale. It has been held that a power of sale given in a mortgage or trust deed is exhausted by one attempted exercise of it, so that, if the sale proves invalid, the power will not give authority for a new sale.[13] But according to the weight of authority the power is not exhausted by a sale which is entirely void or fails to pass the legal title.[14]

XXI. FORECLOSURE BY ACTION OR SUIT.

A. Nature and Form of Remedy — 1. Necessity For Foreclosure. A mortgagor's rights cannot be forfeited, and the estate vested absolutely in the mortgagee, by mere failure to pay the mortgage debt at the appointed time, even though it is so stipulated and agreed in the mortgage itself; the equity of redemption can be cut off only by proper proceedings for foreclosure;[15] and if the mortgage provides a method of foreclosure which is forbidden by statute, as, a sale by a trustee without judicial proceedings, it is the duty of the trustee to pursue the

10. Lash *v.* McCormick, 17 Minn. 403.

11. *Illinois.*— Ritchie *v.* Judd, 137 Ill. 453, 27 N. E. 682.

Michigan.— Vary *v.* Chatterton, 50 Mich. 541, 15 N. W. 896.

Minnesota.— Bottineau *v.* Ætna L. Ins. Co., 31 Minn. 125, 16 N. W. 849.

Missouri.— Lanier *v.* McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676.

North Carolina.— Whitehead *v.* Whitehurst, 108 N. C. 458, 13 S. E. 166.

West Virginia.— Fulton *v.* Johnson, 24 W. Va. 95.

See 35 Cent. Dig. tit. "Mortgages," § 1101.

But see Boone *v.* Miller, 86 Tex. 74, 23 S. W. 574.

12. *Alabama.*— Orr *v.* Blackwell, 93 Ala. 212, 8 So. 413.

Illinois.— Koester *v.* Burke, 81 Ill. 436.

Maryland.—Aukam *v.* Zantzinger, 94 Md. 421, 51 Atl. 93, holding that the purchaser at the first sale is an interested party and has a right to object to the second sale.

Minnesota.— Lane *v.* Holmes, 55 Minn. 379, 57 N. W. 132, 43 Am. St. Rep. 508; Johnson *v.* Williams, 4 Minn. 260.

North Carolina.— Joyner *v.* Farmer, 78 N. C. 196.

South Carolina.— Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525.

See 35 Cent. Dig. tit. "Mortgages," § 1101.

13. Paquin *v.* Braley, 10 Minn. 379. But *compare* Daniels *v.* Smith, 4 Minn. 172.

Land sold and conveyed.— Where the trustee in a deed of trust makes a sale of land and executes a conveyance he can make no second sale. Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; Koester *v.* Burke, 81 Ill. 436.

14. Atwater *v.* Kinman, Harr. (Mich.) 243; McClung *v.* Missouri Trust Co., 137 Mo. 106, 38 S. W. 578; Lanier *v.* McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676; Ohnsburg *v.* Turner, 87 Mo. 127; Texas Loan Agency *v.* Gary, 12 Tex. Civ. App. 430, 34 S. W. 650; Kelly *v.* Imperial Loan, etc., Co., 11 Can. Sup. Ct. 516.

15. Tennery *v.* Nicholson, 87 Ill. 464; Hull *v.* McCall, 13 Iowa 467; Butte First Nat. Bank *v.* Bell Silver, etc., Min. Co., 8 Mont. 32, 19 Pac. 403; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62 [*reversed* on other grounds in 1 Cow. 744 note]; Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746. And see *supra*, VIII, H, 1.

Liability of mortgagee.— A mortgagee who, on breach of condition, converts the mortgaged property to his own use, without proceedings to foreclose, will be held to account for its value. Waite *v.* Dennison, 51 Ill. 319.

Absolute deed as mortgage.— Where land is conveyed by an absolute deed to secure a loan, and a contract entered into between the parties that the property shall be reconveyed on payment of the loan, the entire legal title vests in the grantee, and no action is required on his part to divest the grantor of his equitable right to redeem. Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650. But *compare* Smidt *v.* Jackson, 11 Hun (N. Y.) 361. Where an absolute deed is accompanied by an agreement of defeasance rendering the transaction a mortgage, the agreement may be surrendered and canceled, so as to vest the estate unconditionally in the grantee without foreclosure or other conveyance. Seawell *v.* Hendricks, 4 Okla. 435, 46 Pac. 557.

remedy provided by law.[16] On the other hand, no one can compel a mortgagee to foreclose against his will, although the condition of the mortgage has been broken, the remedy of a party in interest in such cases being a bill to redeem.[17]

2. MORTGAGES WHICH MAY BE FORECLOSED. Any instrument in the nature of a mortgage may be made the basis for foreclosure proceedings,[18] provided it conveys to the mortgagee an estate of any nature or degree which is still subsisting,[19] and has been recorded, if the statute so requires,[20] including deeds of trust,[21] equitable mortgages,[22] and absolute deeds intended as mortgages.[23]

3. NATURE OF REMEDY. In theory a suit for foreclosure of a mortgage is resorted to for the purpose of extinguishing or divesting that privilege of redemption which equity gives to the mortgagor after his rights at law are cut off by breach of the condition of the mortgage; but in modern practice it is merely a suit for the collection of a debt charged on specific property by resorting to the property as a means of satisfying it.[24] It must, however, be brought by some person entitled to enforce the payment of the debt, and with the object of subjecting the specific property pledged for such payment.[25] Such a suit is, to a certain extent and for certain purposes, a proceeding *in rem*, since it is primarily directed against the mortgaged land; but still it is an adversary proceeding against the mortgagor in which his rights are to be passed on and in which he must have an opportunity for

16. Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

17. Hannah *v.* Hannah, 109 Mo. 236, 19 S. W. 87; Winship *v.* West, 6 Ohio S. & C. Pl. Dec. 93, 4 Ohio N. P. 84.

18. See Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598.

In Louisiana a mortgagee can proceed by seizure and sale only where the mortgage is an authentic act, that is, an instrument executed before a notary public or other competent public officer. Livingston *v.* Dick, 1 La. Ann. 323; Harrod *v.* Voorhies, 16 La. 254; Oldham *v.* Polk, 6 Mart. N. S. 465; Tilghman *v.* Dias, 12 Mart. 691.

A Welsh mortgage cannot be foreclosed. But where a second mortgagee reserved the right to collect the rents and apply the same on his mortgage, and the mortgage provided for payment and foreclosure in case of default, it was held that this was not in the nature of a Welsh mortgage, but could be foreclosed. O'Neill *v.* Gray, 39 Hun (N. Y.) 566.

Necessity for reformation.—Where there is a misdescription of the property, the mortgage must be reformed before it can be foreclosed; but where the mortgage, by mistake, described two lots, only one of which was meant to be included, the mortgagee was allowed to foreclose on the lot intended. Conklin *v.* Bowman, 11 Ind. 254.

A parol agreement to execute and deliver a deed of trust cannot be foreclosed as a mortgage. Poarch *v.* Duncan, (Tex. Civ. App. 1906) 91 S. W. 1110.

19. Hill *v.* Meeker, 23 Conn. 592; Wooden *v.* Haviland, 18 Conn. 101. And see Lansing *v.* Albany Ins. Co., Hopk. (N. Y.) 102.

20. Pratt *v.* Bennington Bank, 10 Vt. 293, 33 Am. Dec. 201, holding that it is not necessary that an assignment of a mortgage should be recorded to enable the assignee to maintain a bill for foreclosure.

Destruction of record.— It is no bar to the foreclosure of a mortgage that the book in which it was recorded has been destroyed by fire or otherwise. Alvis *v.* Morrison, 63 Ill. 181, 14 Am. Rep. 117. And where the foreclosure is based on the original document, it is no sufficient objection that it has been injured or partially destroyed by fire, if enough remains so that its purport and extent are easily comprehended. Marrero *v.* Barker, 23 La. Ann. 302.

21. Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400.

22. Riddle *v.* Hudgins, 58 Fed. 490, 7 C. C. A. 335.

23. Clark *v.* Havard, 122 Ga. 273, 50 S. E. 108; Jewell *v.* Walker, 109 Ga. 241, 34 S. E. 337; Merrihew *v.* Fort, 98 Fed. 899.

24. Anderson *v.* Baxter, 4 Oreg. 105.

25. De Walt *v.* Kinard, 33 S. C. 522, 12 S. E. 367 (holding that an action by a purchaser under a power of sale contained in a mortgage, to recover possession of the premises, cannot be converted into a suit to foreclose the mortgage on the failure of the purchaser to establish his right to the possession); Hudnit *v.* Nash, 16 N. J. Eq. 550 (holding that a bill to foreclose, brought by a second mortgagee, making the first mortgagee a defendant as well as the owner of the equity of redemption, is, as against such first mortgagee, a bill to redeem, not to foreclose).

Action at law on note.—The lien of a mortgage may be enforced in an action on the note by an order making the judgment a lien as of the date of the mortgage, and for the enforcement of the judgment against the mortgaged property. Morrison *v.* Morrison, 38 Iowa 73.

Where two mortgages are made, between the same parties, and identical in terms, except that the second is given to cure a want of authority in respect to the execution of the first, the two mortgages are properly foreclosed as one, on a bill seeking foreclosure of the second. Robinson *v.* Piedmont Marble Co., 75 Fed. 91.

defense,[26] and in which, under proper circumstances, a personal judgment or decree may be rendered against him.[27] Where proceedings of this kind are regulated by statute, the law must of course be closely followed in their conduct.[28]

4. Form of Remedy — a. Action at Law. Although proceedings for the foreclosure of mortgages were originally matters of equitable cognizance, in numerous states courts of law now have this jurisdiction, the remedy being sought by an ordinary formal action, in which a judgment may be rendered for foreclosure of the mortgage and the sale of the property.[29] The mortgagee may also maintain an action of ejectment, if warranted by the terms of the mortgage or the agreement of the parties, after breach of condition, which, however, does not operate as a foreclosure of the mortgage, but only gives him the possession.[30]

b. Suit in Equity. Unless prohibited by statute, a court of equity always has jurisdiction of a bill for the foreclosure of a mortgage, without showing any other ground for its action than a breach of the condition,[31] and in such action may give all the relief which falls within the scope of the bill and its own powers.[32] Even where a statutory method of foreclosure is provided, or jurisdiction given to the courts of law, this will not be exclusive of the remedy in equity in cases where a resort to that tribunal is justified by the peculiar circumstances of the

26. Williams *v.* Ives, 49 Ill. 512; Russell *v.* Brown, 41 Ill. 183; Wisdom *v.* Parker, 31 La. Ann. 52; Whalley *v.* Eldridge, 24 Minn. 358; Moore *v.* Starks, 1 Ohio St. 369.

27. Du Val *v.* Johnson, 39 Ark. 182; Price *v.* State Bank, 14 Ark. 50. See also Dickson *v.* Loehr, 126 Wis. 641, 106 N. W. 793, 4 L. R. A. N. S. 986.

28. Griffin *v.* Marshall, 45 Ga. 549; Withrow *v.* Clark, 2 Ind. 107; Wood *v.* Adams, 35 Vt. 300; Beebee *v.* O'Brien, 10 Wis. 481.

29. *Florida.*— Manley *v.* Union Bank, 1 Fla. 160.

Massachusetts.— Lowell *v.* Daniels, 2 Cush. 234.

Missouri.— Riley *v.* McCord, 24 Mo. 265; Thayer *v.* Campbell, 9 Mo. 280; Carr *v.* Holbrook, 1 Mo. 240; White *v.* Black, 115 Mo. App. 28, 90 S. W. 1153.

New York.— Fuller *v.* Van Geesen, 4 Hill 171.

North Carolina.— See Simpson *v.* Simpson, 107 N. C. 552, 12 S. E. 447.

South Carolina.— Trescott *v.* McLaughlin, 4 McCord 264; Durand *v.* Isaacks, 4 McCord 54.

Vermont.— Miller *v.* Hamblet, 11 Vt. 499.

30. *Connecticut.*— Alsop *v.* Peck, 2 Root 224.

Georgia.— Biggers *v.* Bird, 55 Ga. 650; Carswell *v.* Hartridge, 55 Ga. 412.

Illinois.— Pollock *v.* Maison, 41 Ill. 516.

Ohio.— Bradfield *v.* Hale, 67 Ohio St. 316, 65 N. E. 1008.

Pennsylvania.— Smith *v.* Shuler, 12 Serg. & R. 240; King *v.* Wimley, 26 Leg. Int. 254.

United States.— Hazzart *v.* Wilczinski, 143 Fed. 22.

See 35 Cent. Dig. tit. "Mortgages," § 1152.

Contra.—Kelley *v.* Leachman, 3 Ida. 629, 29 Pac. 849; Faulkner *v.* Cody, 45 Misc. (N. Y.) 64, 91 N. Y. Suppl. 633; Stewart *v.* Hutchins, 6 Hill (N. Y.) 143 [*affirming* 13 Wend. 485].

Ejectment against tenant.— Where a mortgagee forecloses for condition broken, he has the right to treat a lessee of the mortgagor, whose lease is subsequent to the mortgage, as a trespasser, and may bring ejectment without notice. Gartside *v.* Outley, 58 Ill. 210, 11 Am. Rep. 59.

31. *Illinois.*— Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197.

Iowa.— Sawyer *v.* Landers, 56 Iowa 422, 9 N. W. 341; Scott *v.* Simeral, 9 Iowa 388; Kramer *v.* Rebman, 9 Iowa 114.

Massachusetts.— Hallowell *v.* Ames, 165 Mass. 123, 42 N. E. 558, holding that under the statute providing for foreclosure by entry and taking possession and the retention of such possession for three years, and providing also that, where the mortgage contains a power of sale, the mortgagee may, instead of a writ of possession, have a decree of sale, a court of equity has no jurisdiction to decree a foreclosure and sale under a mortgage not containing a power of sale.

Mississippi.—Burnet *v.* Boyd, 60 Miss. 627; McDonald *v.* Vinson, 56 Miss. 497.

New Jersey.—Bullowa *v.* Orgo, 57 N. J. Eq. 428, 41 Atl. 494.

New York.— Fuller *v.* Van Geesen, 4 Hill 171.

Vermont.— Ross *v.* Shurtleff, 55 Vt. 177.

Wisconsin.—Jarvis *v.* Dutcher, 16 Wis. 307.

See 35 Cent. Dig. tit. "Mortgages," § 1151.

But see State *v.* Bailey, 27 Ark. 473.

Complainant must do equity.— Where a mortgage is given to secure a debt, on a condition and in consideration of a promise never complied with on the part of the mortgagee, a court of equity will not lend its aid to enforce the security. Fresh *v.* Million, 9 Mo. 315.

When a breach of the condition of a mortgage is unintentional, or purely technical, a court of equity will relieve the mortgagor from a forfeiture of the estate on such terms as will provide for the mortgagee a full compensation and indemnity for all that he has lost by the breach. Weeks *v.* Boynton, 37 Vt. 297.

32. Price *v.* State Bank, 14 Ark. 50.

case, or where a court of law could not adequately determine and enforce the rights of all the parties concerned.[33] Where the defenses to a bill for foreclosure raise issues which are purely of legal cognizance, it should be dismissed as to the party so defending.[34] In states where the formal distinction between actions at law and suits in equity is abolished by statute, although they are still differentiated as to the mode of trial and relief granted, a suit for foreclosure may be considered either at law or in equity, the question depending on the nature of the issues raised and the relief demanded.[35] In the federal courts the jurisdiction for the foreclosure of mortgages is exclusively in equity, and is not affected by the local state statutes prescribing the courts in which such proceedings shall be brought or the form of action.[36]

c. Strict Foreclosure. As a strict foreclosure of a mortgage cuts off the debtor's equity of redemption absolutely and finally, unless he pays the amount ascertained as due within a fixed time, and vests the absolute title to the property in the mortgagee without any sale,[37] it is regarded as a harsh remedy and is little favored, although it may be resorted to in some of the states under exceptional circumstances, or where all parties agree to the rendition of such a decree.[38]

d. Scire Facias. In some states a proceeding for the foreclosure of a mortgage may be begun by the issue of a writ of scire facias, requiring the mortgagor to show cause why judgment should not be given against him for the amount of the mortgage debt with a special execution for the sale of the mortgaged premises.[39]

e. Rule Nisi. In Georgia in a proceeding to foreclose a mortgage a rule *nisi* may be granted, which is made absolute after the lapse of a certain time and on the mortgagor's default or failure to establish his defense.[40]

f. Executory Process. In Louisiana the methods of foreclosing a mortgage are by order of seizure and sale, a somewhat summary proceeding which may be resorted to against the mortgagor or against a purchaser of the property when the mortgage contained the pact *de non alienando*, and a hypothecary action, which is a formal and plenary proceeding, resembling a suit in equity for foreclosure.[41]

33. Bateman *v.* Archer, 65 Ga. 271; Jones *v.* Lawrence, 18 Ga. 277; Old Colony Trust Co. *v.* Great White Spirit Co., 178 Mass. 92, 59 N. E. 673; Weary *v.* Wittmer, 77 Mo. App. 546; Seewald *v.* Raynolds, 3 N. M. 344, 9 Pac. 376; Milligan *v.* Cromwell, 3 N. M. 327, 9 Pac. 359.

34. Corning *v.* Smith, 6 N. Y. 82.

35. State *v.* Evans, 176 Mo. 310, 75 S. W. 914; Brim *v.* Fleming, 135 Mo. 597, 37 S. W. 501; Weary *v.* Wittmer, 77 Mo. App. 546.

36. Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32; U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969; Woodbury *v.* Allegheny, etc., R. Co., 72 Fed. 371; Ray *v.* Tatum, 72 Fed. 112, 18 C. C. A. 464; Alexander *v.* Scotland Mortg. Co., 47 Fed. 131; Gamewell Fire-Alarm Tel. Co. *v.* New York, 31 Fed. 312; Davis *v.* James, 2 Fed. 618, 10 Biss. 51.

37. As to form and essentials of decree of strict foreclosure see *infra*, XXI, G, 2, b, (II).

38. See *infra*, XXI, G, 2, b, (II), (B).

39. Russell *v.* Brown, 41 Ill. 183; Chickering *v.* Failes, 26 Ill. 507; Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354; Osgood *v.* Stevens, 25 Ill. 89; McFadden *v.* Fortier, 20 Ill. 509; Woodbury *v.* Manlove, 14 Ill. 213; State Bank *v.* Moreland, 1 Ill. 282; Doe *v.* Pendleton, 15 Ohio 735; Tryon *v.* Munson, 77 Pa. St. 250; Solms *v.* McCulloch, 5 Pa. St. 473; Ewart *v.* Irwin, 1 Phila. (Pa.) 78.

Scire facias will not lie on an unsealed equitable mortgage (Spencer *v.* Haynes, 12 Phila. (Pa.) 452), on a mortgage which was not duly acknowledged (Kenosha, etc., R. Co. *v.* Sperry, 14 Fed. Cas. No. 7,712, 3 Biss. 309), nor on mortgages made to secure the delivery of specific articles of property or the performance of other acts, but only on mortgages conditioned for the payment of money (McCumber *v.* Gilman, 13 Ill. 542).

Assigned mortgage.— An assignment of a note secured by mortgage does not prevent a foreclosure by scire facias, but it must be brought in the name of the mortgagee for the use of the assignee. Bourland *v.* Kipp, 55 Ill. 376; Olds *v.* Cummings, 31 Ill. 188.

Defenses.— In a scire facias on a mortgage, the only admissible defenses, unless enlarged by statute, are payment and *nul tiel record*, that is, such defenses as show that there never was a valid lien, or that it has been satisfied or discharged. White *v.* Watkins, 23 Ill. 480.

40. Montgomery *v.* King, 123 Ga. 14, 50 S. E. 963; Michelson *v.* Cunningham, 96 Ga. 601, 24 S. E. 144; Ledbetter *v.* McWilliams, 90 Ga. 43, 15 S. E. 634; Cherry *v.* Home Bldg., etc., Assoc., 57 Ga. 361; Hightower *v.* Williams, 38 Ga. 597; Dixon *v.* Cuyler, 27 Ga. 248; Lawrence *v.* Jones, 20 Ga. 342; De Lorme *v.* Pease, 19 Ga. 220; Jackson *v.* Stanford, 19 Ga. 14.

41. See Bonnecaze *v.* Lieux, 52 La. Ann. 285, 26 So. 832; Learned *v.* Walton, 42 La.

5. Concurrent and Cumulative Remedies. The fact that a mortgage or trust deed contains a power of sale does not prevent a court of equity from taking jurisdiction of a bill for foreclosure, the remedies being cumulative and the mortgagee having the right to pursue either.[42] And the jurisdiction of equity is not ousted by the fact that a statutory method of foreclosure is open and available to the mortgagee if he chooses to adopt it.[43] Where the mortgage debt is evidenced by a note or bond, it may be collected either by an action at law on the debt or by a proceeding in equity to foreclose the mortgage, the creditor having a perfectly free choice of either remedy,[44] and it has been held that these remedies may both be pursued at the same time, or successively, although of course there can be but one satisfaction.[45] But these principles do not apply in states where

Ann. 455, 7 So. 723; Leonard *v.* Sheriff, 37 La. Ann. 299; Montejo *v.* Gordy, 33 La. Ann. 1113; Gally *v.* Dowling, 30 La. Ann. 323; Reggio *v.* Blanchin, 26 La. Ann. 532; Randolph *v.* Chapman, 21 La. Ann. 486; Lavillebeuvre *v.* Frederic, 20 La. Ann. 374; Ricks *v.* Bernstein, 19 La. Ann. 141; Lewis *v.* Labauve, 13 La. Ann. 382; Bacon *v.* Maskell, 8 La. Ann. 507; Williams *v.* Morancy, 3 La. Ann. 227; Brooks *v.* Walker, 3 La. Ann. 150; Chambliss *v.* Atchison, 2 La. Ann. 488; New Orleans City Bank *v.* Walton, 5 Rob. (La.) 158; Porter's Succession, 5 Rob. (La.) 96; Fitzwilliams *v.* Wilcox, 2 Rob. (La.) 303; Elwyn *v.* Jackson, 14 La. 411; Moore *v.* Allain, 10 La. 490; Joyce *v.* Poydras de la Lande, 6 La. 277; Rowlett *v.* Shepherd, 7 Mart. N. S. (La.) 513; Richards *v.* Nolan, 3 Mart. N. S. (La.) 336; Layton *v.* Menard, 2 Mart. N. S. (La.) 505; New Orleans Nat. Banking Assoc. *v.* Le Breton, 120 U. S. 765, 7 S. Ct. 772, 30 L. ed. 821; Evans *v.* Pike, 118 U. S. 241, 6 S. Ct. 1090, 30 L. ed. 234.

42. *Alabama.*— Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013; Vaughan *v.* Marable, 64 Ala. 60; Carradine *v.* O'Connor, 21 Ala. 573; Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Mobile Branch Bank, 7 Ala. 823.

Arkansas.— Martin *v.* Ward, 60 Ark. 510, 30 S. W. 1041.

California.— Cormerais *v.* Genella, 22 Cal. 116.

District of Columbia.— Utermehle *v.* McGreal, 1 App. Cas. 359.

Illinois.— Reid *v.* McMillan, 189 Ill. 411, 59 N. E. 948.

Mississippi.— Carey *v.* Fulmer, 74 Miss. 729, 21 So. 752; McDonald *v.* Vinson, 56 Miss. 497; McAllister *v.* Plant, 54 Miss. 106; Thompson *v.* Houze, 48 Miss. 444.

New Jersey.— McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

Tennessee.— Bennet *v.* Union Bank, 5 Humphr. 612.

Texas.— Morrison *v.* Bean, 15 Tex. 267.

Utah.— Dupee *v.* Rose, 10 Utah 305, 37 Pac. 567.

Vermont.— Herrick *v.* Teachout, 74 Vt. 196, 52 Atl. 432.

Wisconsin.— Walton *v.* Cody, 1 Wis. 420; Byron *v.* May, 2 Pinn. 443, 2 Chandl. 103.

United States.— Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487; Furbish *v.* Sears, 9 Fed. Cas. No. 5,160, 2 Cliff. 454; Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613.

See 35 Cent. Dig. tit. "Mortgages," § 1156.

Jurisdiction not ousted by agreement.— A provision in a mortgage or deed of trust, prohibiting foreclosure and judicial sale, by providing that the mode of sale by the trustee set forth in the instrument shall be exclusive of all others, is of no avail to oust the jurisdiction of a court of equity over a proper bill for foreclosure. Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116.

43. Fox *v.* Wharton, 5 Del. Ch. 200; Riley *v.* McCord, 24 Mo. 265; Anonymous, 1 Ohio 235; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489.

44. *Alabama.*— Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

Iowa.— Bahr *v.* Arndt, 9 Iowa 39.

Kansas.— Hunt *v.* Bowman, 62 Kan. 448, 63 Pac. 747.

New Jersey.—Crosby *v.* Washburn, 66 N. J. L. 494, 49 Atl. 455.

New York.— Jackson *v.* Hull, 10 Johns. 481.

North Carolina.— Ellis *v.* Hussey, 66 N. C. 501.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Johnson, 54 Pa. St. 127.

South Dakota.— St. Paul F. & M. Ins. Co. *v.* Dakota Land, etc., Co., 10 S. D. 191, 72 N. W. 460.

Washington.— Frank *v.* Pickle, 2 Wash. Terr. 55, 3 Pac. 584.

45. Newbold *v.* Newbold, 1 Del. Ch. 310; Barchard *v.* Kohn, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; Erickson *v.* Rafferty, 79 Ill. 209; Karnes *v.* Lloyd, 52 Ill. 113; Vansant *v.* Allmon, 23 Ill. 30; Brown *v.* Schintz, 109 Ill. App. 598; Colby *v.* McClintock, 68 N. H. 176, 40 Atl. 397, 73 Am. St. Rep. 557.

In Iowa, if separate actions are brought in the same county on the note and on the mortgage, plaintiff must elect which he will prosecute and the other will be discontinued at his cost. McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011, construing Code, § 4288.

In Nebraska an action at law on the debt and a suit for the foreclosure of the mortgage cannot be pursued at the same time, unless by permission of the court. Maxwell *v.* Home F. Ins. Co., 57 Nebr. 207, 77 N. W. 681.

the statutes provide that there shall be but one action for the recovery of any debt secured by mortgage, which shall be an action for foreclosure of the mortgage.[46] A provision in a mortgage that, in case of breach of condition, the mortgagee may enter on the mortgaged premises and receive the rents and profits for his indemnity, does not confine him to such rents and profits for payment of his debt, but he may have a foreclosure and sale as in other cases.[47]

B. Jurisdiction and Venue — 1. Jurisdiction of Subject-Matter — a. Jurisdictional Amount. Where the jurisdiction of a particular court is limited to actions involving a certain maximum or minimum amount, its right to take cognizance of a foreclosure proceeding will depend on the amount of the debt secured,[48] or, according to some of the decisions, the value of the mortgaged premises.[49] In the absence of such a limitation jurisdiction of foreclosure proceedings does not at all depend on the amount in controversy.[50]

b. Property of Decedent's Estate. The fact that a mortgagor is dead, and his estate under process of administration in a probate court, does not oust the equity court of jurisdiction of a suit for foreclosure; the creditor is not obliged to work out his security through the probate court.[51] Where the mortgagee is dead, one taking the mortgage and debt as a legacy may maintain a bill for foreclosure in the state where the land lies, although the will was executed in another state.[52]

c. Conflict of Jurisdiction. The mere pendency in a federal court of a proceeding for the foreclosure of a mortgage will not prevent a state court from taking jurisdiction of a similar action on the same mortgage, and *vice versa*.[53] So the pendency of proceedings in bankruptcy or insolvency against the mortgagor will not bar the foreclosure of the mortgage in the ordinary way, although leave to sue should first be obtained,[54] and although the mortgaged property is in the possession of a receiver, a foreclosure suit may be brought. If it is brought without leave, this will be a contempt, but will not deprive the court in which the bill is filed of jurisdiction over it.[55]

In New Jersey it is provided by statute that the first proceeding to be taken for collection of a bond and mortgage shall be an action for foreclosure. See Van Aken *v.* Tice, 60 N. J. L. 377, 38 Atl. 20; Andrus *v.* Burke, 61 N. J. Eq. 297, 48 Atl. 228.

46. Otto *v.* Long, 127 Cal. 471, 59 Pac. 895; Santa Ana Commercial Bank *v.* Kershner, 120 Cal. 495, 52 Pac. 848; Merced Security Sav. Bank *v.* Casaccia, 103 Cal. 641, 37 Pac. 648; Salt Lake Valley L. & T. Co. *v.* Millspaugh, 18 Utah 283, 54 Pac. 893.

47. Harkins *v.* Forsyth, 11 Leigh (Va.) 294.

48. Truxillo's Succession, 24 La. Ann. 453; Hyde *v.* Greenough, 11 Cush. (Mass.) 87; Douw *v.* Shelden, 2 Paige (N. Y.) 323.

49. Griswold *v.* Mather, 5 Conn. 435; Barton *v.* Farbore, 2 Ch. Sent. (N. Y.) 59.

50. Bibb *v.* Martin, 14 Sm. & M. (Miss.) 87; Hawley *v.* Whalen, 64 Hun (N. Y.) 550, 19 N. Y. Suppl. 521. And see Murphy *v.* McNeill, 82 N. C. 221, holding that the superior court has jurisdiction of an action to foreclose a mortgage, although the debt secured is less than two hundred dollars, as the action is not founded on the contract merely, but on an equity growing out of the relation of mortgagor and mortgagee.

51. *California.*— Carr *v.* Caldwell, 10 Cal. 380, 70 Am. Dec. 740.

Illinois.— Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Kittredge *v.* Nicholes, 162 Ill. 410, 44 N. E. 742.

Kansas.— Shoemaker *v.* Brown, 10 Kan. 383.

Louisiana.— Berens *v.* Boutte, 31 La. Ann. 112.

Nevada.— Corbett *v.* Rice, 2 Nev. 330.

New York.— Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064.

Oregon.— Verdier *v.* Bigne, 16 Oreg. 208, 19 Pac. 64.

Texas.— Phillips *v.* J. B. Watkins Land Mortg. Co., 90 Tex. 195, 38 S. W. 270, 470; Bradford *v.* Knowles, 86 Tex. 505, 25 S. W. 1117. And see Western Mortg., etc., Co. *v.* Jackman, 77 Tex. 622, 14 S. W. 305. *Compare* Cunningham *v.* Taylor, 20 Tex. 126.

See 35 Cent. Dig. tit. "Mortgages," § 1249.

52. Smith *v.* Webb, 1 Barb. (N. Y.) 230.

53. Seymour *v.* Bailey, 66 Ill. 288; Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. ed. 383; Woodbury *v.* Allegheny, etc., Co., 72 Fed. 371; Pierce *v.* Feagans, 39 Fed. 587; Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161; Weaver *v.* Field, 16 Fed. 22, 4 Woods 152; Brooks *v.* Vermont Cent. R. Co., 4 Fed. Cas. No. 1,964, 14 Blatchf. 463.

54. Miller *v.* Hardy, 131 Ind. 13, 29 N. E. 776; Fidelity Trust Co. *v.* Gill Car Co., 25 Fed. 737. *Compare* Poutz *v.* Bistes, 15 La. Ann. 636. But see Keys Mfg. Co. *v.* Kimpel, 22 Fed. 466.

55. Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702; Heffron *v.* Knickerbocker, 57 Ill. App. 339; Muncie Nat. Bank *v.* Brown,

d. Authority of Courts — (I) *In General.* Where a court has by constitutional provision or by statute general original jurisdiction of actions and proceedings at law and in equity, it is competent to entertain a suit or bill for the foreclosure of a mortgage.[56] But this jurisdiction does not belong to courts of special and limited statutory powers,[57] unless foreclosure suits are among the actions specially enumerated as being within their cognizance.[58] The foreclosure of a mortgage does not involve the title to land within the meaning of a statute providing that certain courts shall not have jurisdiction of actions involving land titles.[59]

(II) *Courts of Equity.* The foreclosure of mortgages has always been a subject within the cognizance of chancery, and any court of general equity powers has jurisdiction of a bill for this purpose.[60]

2. Jurisdiction of Person. To sustain a suit for foreclosure, there must be jurisdiction of the person of defendant, the mortgagor or owner of the equity of redemption, acquired in some legal and sufficient mode, as well as of the subject-matter.[61]

112 Ind. 474, 14 N. E. 358; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136.

56. *Indiana.*— Noerr *v.* Schmidt, 151 Ind. 579, 51 N. E. 332.

Maine.— Gardiner *v.* Gerrish, 23 Me. 46.

Maryland.— Cockey *v.* Cole, 28 Md. 276, 92 Am. Dec. 684.

Missouri.— Ayres *v.* Shannon, 5 Mo. 282.

New York.— Thomas *v.* Harmon, 122 N. Y. 84, 25 N. E. 257.

United States.— Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 6 S. Ct. 742, 20 L. ed. 892.

See 35 Cent. Dig. tit. "Mortgages," § 1251.

Judgment on a note secured by a mortgage may be rendered by a court which would have no jurisdiction to foreclose the mortgage, by reason of the property being beyond its reach. App *v.* Bridge, McCahon (Kan.) 118.

Decree in vacation.— A decree of foreclosure of a trust deed made by a judge in proceedings had in vacation is void, and does not bar another suit to foreclose the same instrument. Babbitt *v.* Field, 6 Ariz. 6, 52 Pac. 775.

57. Graham *v.* Markey, 22 La. Ann. 266.

58. Griswold *v.* Atlantic Dock Co., 21 Barb. (N. Y.) 225; Benson *v.* Cromwell, 6 Abb. Pr. (N. Y.) 83.

59. Reynolds *v.* Atlanta Nat., etc., Assoc., 104 Ga. 703, 30 S. E. 942.

60. *Delaware.*— Fox *v.* Wharton, 5 Del. Ch. 200.

District of Columbia.— Phœnix Mut. L. Ins. Co. *v.* Grant, 3 MacArthur 42.

Florida.— State *v.* Florida Cent. R. Co., 15 Fla. 690.

Maine.— See Chase *v.* Palmer, 25 Me. 341; Shaw *v.* Gray, 23 Me. 174; French *v.* Sturdivant, 8 Me. 246.

Maryland.— Donohue *v.* Daniel, 58 Md. 595.

Michigan.— Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108 (holding that where a tenant in common, in possession of the property, has three separate mortgages on his cotenant's interest, all of which are past due, he cannot foreclose them by three separate advertisements, but must foreclose in equity, where all the rights of the parties can be determined and protected); Strong *v.* Tomlinson, 88 Mich. 112, 50 N. W. 106.

Mississippi.— McAllister *v.* Plant, 54 Miss. 106; Champenois *v.* Fort, 45 Miss. 355; Bibb *v.* Martin, 14 Sm. & M. 87.

Missouri.— Mississippi Valley Trust Co. *v.* McDonald, 146 Mo. 467, 48 S. W. 483; Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161; Laberge *v.* Chauvin, 2 Mo. 179.

New York.— Wheeler *v.* Van Kuren, 1 Barb. Ch. 490.

Oregon.— Verdier *v.* Bigne, 16 Oreg. 208, 19 Pac. 64.

See 35 Cent. Dig. tit. "Mortgages," § 1252. And see *supra*, XXI, A, 4, b.

In Pennsylvania mortgagees are left to their common-law and statutory remedies. Bradley *v.* Chester Valley R. Co., 36 Pa. St. 141; Ashhurst *v.* Montour Iron Co., 35 Pa. St. 30.

Suit for possession not founded on mortgage.— Where two opposing parties claim land under absolute conveyances, tracing their titles to the same grantors, and relying on the legal efficacy of their respective deeds, there is no ground for chancery jurisdiction on a bill by the claimant out of possession to obtain it, although there may also have been conveyances on both sides to secure debts, there being no claim under such conveyances, no claim of subsisting indebtedness on either side, and no fraud, accident, or mistake. Woodruff *v.* Robb, 19 Ohio 212.

61. *Alabama.*— Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488.

Massachusetts.— Hunnewell *v.* Goodrich, 3 Cush. 469.

New York.— Hopkins *v.* Frey, 64 Hun 213, 18 N. Y. Suppl. 903, holding that a judgment of foreclosure is not invalidated by the fact that the guardian *ad litem* of certain minors interested in the mortgaged property did not appear, or that he failed to perform any of the acts or duties required of him by law.

Ohio.— Moore *v.* Starks, 1 Ohio St. 369.

Texas.— Battle *v.* Carter, 44 Tex. 485, holding that a non-resident can maintain an action by publication and without attachment, against another non-resident, to foreclose a mortgage on lands within the state.

3. Venue — a. In General. Unless otherwise provided by statute, a suit for the foreclosure of a mortgage must be brought in the county where the mortgaged land lies.[62] An objection to the jurisdiction on the ground that the action is brought in the wrong county may be taken by plea in abatement,[63] or by demurrer,[64] except in states where the law provides that the objection is waived unless defendant seasonably demands a change of venue to the proper county.[65] The court does not lose jurisdiction of the suit by reason of the fact that, pending the action, a new county is created which includes the mortgaged land.[66]

b. Effect of Mortgagor's Residence. By force of statutes in several states, a foreclosure suit may be brought in the proper court of the county where the mortgagor resides, although the land is in another county.[67]

Wisconsin.— Pereles *v.* Albert, 12 Wis. 666.

United States.— Dean *v.* Nelson, 10 Wall. 158, 19 L. ed. 926.

See 35 Cent. Dig. tit. "Mortgages," § 1253.

62. *Alabama.*— Hitchcock *v.* U. S. Bank, 7 Ala. 386.

California.— Staacke *v.* Bell, 125 Cal. 309, 57 Pac. 1012; Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Campbell *v.* West, 86 Cal. 197, 24 Pac. 1000; Vallejo *v.* Randall, 5 Cal. 461.

District of Columbia.— See Whitaker *v.* Middle States Loan, etc., Co., 7 App. Cas. 203.

Georgia.— Hackenhull *v.* Westbrook, 53 Ga. 285.

Indiana.— Urmston *v.* Evans, 138 Ind. 285, 37 N. E. 792.

Kansas.— App *v.* Bridge, McCahon 118; Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, McCahon 214, Woolw. 400.

Kentucky.— Shields *v.* Yellman, 100 Ky. 655, 39 S. W. 30, 18 Ky. L. Rep. 1092; Galloway *v.* Craig, 92 S. W. 320, 29 Ky. L. Rep. 1. *Compare* Caufman *v.* Sayre, 2 B. Mon. 202.

Louisiana.— Elwyn *v.* Jackson, 14 La. 411; Gravier *v.* Baron, 4 La. 239; Skipwith *v.* Gray, 3 Mart. N. S. 655.

Michigan.— Richard *v.* Boyd, 124 Mich. 396, 83 N. W. 106.

New York.— Miller *v.* Hull, 3 How. Pr. 325. But *compare* La Farge *v.* Van Wagenen, 14 How. Pr. 54.

North Carolina.— Fraley *v.* March, 68 N. C. 160.

Pennsylvania.— Tryon *v.* Munson, 77 Pa. St. 250.

South Carolina.— Trapier *v.* Waldo, 16 S. C. 276.

Utah.— Sherman *v.* Droubay, 27 Utah 47, 74 Pac. 348.

Wisconsin.—Beach *v.* Sumner, 20 Wis. 274.

See 35 Cent. Dig. tit. "Mortgages," § 1254.

But see Broome *v.* Beers, 6 Conn. 198; Cavanaugh *v.* Peterson, 47 Tex. 197; Vandever *v.* Freeman, 20 Tex. 333, 70 Am. Dec. 391; Givens *v.* Davenport, 8 Tex. 451; Branch *v.* Wilkens, (Tex. Civ. App. 1901) 63 S. W. 1083; Spikes *v.* Brown, (Tex. Civ. App. 1899) 49 S. W. 725; Hawes *v.* Parrish, 16 Tex. Civ. App. 497, 41 S. W. 132; Seymour *v.* De Marsh, 11 Ont. Pr. 472.

In Iowa the action may be brought either in the county where the land lies, or in the county where the note secured is made payable. See Orcutt *v.* Hanson, 71 Iowa 514, 32 N. W. 482; Iowa L. & T. Co. *v.* Day, 63 Iowa 459, 19 N. W. 301; Equitable L. Ins. Co. *v.* Gleason, 56 Iowa 47, 8 N. W. 790; Cole *v.* Conner, 10 Iowa 299.

63. Chouteau *v.* Allen, 70 Mo. 290.

64. Orcutt *v.* Hanson, 71 Iowa 514, 32 N. W. 482.

65. Territory *v.* Judge Dist. Ct., 5 Dak. 275, 38 N. W. 439; Trapier *v.* Waldo, 16 S. C. 276; Snyder *v.* Pike, 30 Utah 102, 83 Pac. 692.

66. Security L. & T. Co. *v.* Kauffman, 108 Cal. 214, 41 Pac. 467; Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743.

67. See the statutes of the different states. And see the following cases:

Alabama.— Reeves *v.* Brown, 103 Ala. 537, 15 So. 824; Harwell *v.* Lehman, 72 Ala. 344 (holding that a bill by a junior mortgagee to foreclose may be filed in the district where the senior mortgagee resides); Ashurst *v.* Gibson, 57 Ala. 584.

Iowa.— Finnagan *v.* Manchester, 12 Iowa 521; Cole *v.* Conner, 10 Iowa 299; Iowa L. & T. Co. *v.* Day, 63 Iowa 459, 19 N. W. 301, holding that an action to foreclose a mortgage, where no jurisdiction of the person of the mortgagor is acquired, and the notice to him is by publication only, is purely an action *in rem*, and can be brought only in the county where the land lies or the note secured is payable.

Louisiana.— Gantt *v.* Eaton, 25 La. Ann. 507; Jex *v.* Keary, 18 La. Ann. 81; Davenport *v.* Fortier, 2 Mart. N. S. 374.

South Carolina.— Wagener *v.* Swygert, 30 S. C. 296, 9 S. E. 107.

Texas.— Kinney *v.* McCleod, 9 Tex. 78, holding that it is the general right of a defendant to be sued in his own county; but to foreclose a mortgage, he may be sued in the county where the land lies.

See 35 Cent. Dig. tit. "Mortgages," § 1256.

Independently of statute, the county where defendant resides, if different from that in which the mortgaged property is situated, is not the proper venue. The jurisdiction of a chancellor to order a sale of mortgaged land depends on the locality of the land, and not on the domicile of its owner. Elliot *v.* Van Voorst, 8 Fed. Cas. No. 4,390, 3 Wall. Jr. 299.

c. Property in Several Counties or States. Where tracts of land situated in different counties are embraced in one mortgage, the proper court of either county has jurisdiction to foreclose the mortgage and order the sale of all the land.[68] But it is different where the land lies partly in two states. A decree of foreclosure pronounced by a court having jurisdiction of defendant's person and of part of the land will have no effect on the land lying in the other state, except in so far as it may operate personally on the mortgagor, as where he is ordered to convey the foreign lands to the foreclosure purchaser, and except that it may be made the basis of a suit in the other state and will there have the ordinary conclusive effect of a judgment.[69]

d. Change of Venue. Under the statutes of Iowa a foreclosure suit should not be dismissed because brought in the wrong county, but the venue should be changed.[70]

C. Right to Foreclose and Defenses — 1. Right to Foreclose — a. Grounds of Action — (i) *In General.* Where there is a valid mortgage,[71] securing a debt or duty which remains wholly or in part unpaid or unperformed,[72] and by which any kind of estate or title was conveyed to the mortgagee as security,[73] and an equity of redemption outstanding in the mortgagor or in some other person,[74] it is in general only necessary to the mortgagee's right of action for foreclosure that there should be a breach of the condition of the mortgage;[75] and he is not required to give notice of his intention to foreclose,[76] nor prevented from doing so by the mortgagor's giving notice of his intention to pay off the mort-

68. *Alabama.*—Bolling *v.* Munchus, 65 Ala. 558.

California.— Goldtree *v.* McAlister, 86 Cal. 93, 24 Pac. 801.

Indiana.— Holmes *v.* Taylor, 48 Ind. 169.

Iowa.— See Chadbourne *v.* Gilman, 29 Iowa 181.

Kentucky.— Hendrix *v.* Nesbitt, 96 Ky. 652, 29 S. W. 627, 16 Ky. L. Rep. 746; Owings *v.* Beall, 3 Litt. 103.

New York.— Strong *v.* Eighme, 41 How. Pr. 117.

Pennsylvania.— Prospect Bldg., etc., Assoc. *v.* Russel, 36 Wkly. Notes Cas. 260.

South Carolina.— Wagener *v.* Swygert, 30 S. C. 296, 9 S. E. 107.

Washington.— Commercial Nat. Bank *v.* Johnson, 16 Wash. 536, 48 Pac. 267.

United States.— Stevens *v.* Ferry, 48 Fed. 7.

See 35 Cent. Dig. tit. "Mortgages," § 1257.

69. *Connecticut.*— Farmers' L. & T. Co. *v.* Postal Tel. Co., 55 Conn. 334, 11 Atl. 184, 3 Am. St. Rep. 53. But see Mead *v.* New York, etc., R. Co., 45 Conn. 199.

Kentucky.— Brown *v.* Todd, 29 S. W. 621, 16 Ky. L. Rep. 697.

Michigan.— Richard *v.* Boyd, 124 Mich. 396, 83 N. W. 106.

Ohio.— Price *v.* Johnston, 1 Ohio St. 390.

Pennsylvania.— Pittsburgh, etc., R. Co.'s Appeal, 8 Pa. Cas. 83, 4 Atl. 385.

Wyoming.— Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78.

United States.— Booth *v.* Clark, 17 How. 322, 15 L. ed. 164; Watkins *v.* Holman, 16 Pet. 25, 10 L. ed. 873; Lynde *v.* Columbus, etc., R. Co., 57 Fed. 993. See also Fitch *v.* Remer, 9 Fed. Cas. No. 4,836, 1 Biss. 337, 1 Flipp. 15.

England.— The English courts, if they have jurisdiction of the parties, will decree the foreclosure of mortgages on lands situated in the English colonies. Paget *v.* Ede, L. R. 18 Eq. 118, 43 L. J. Ch. 571, 30 L. T. Rep. N. S. 228, 22 Wkly. Rep. 625.

Canada.— The rule stated in the text applies to foreclosure suits brought in one province but affecting lands situated in another. Henderson *v.* Hamilton Bank, 23 Can. Sup. Ct. 716; Strange *v.* Radford, 15 Ont. 145; Bryson *v.* Huntington, 25 Grant Ch. (U. C.) 265.

But *compare* Mead *v.* Brockner, 82 N. Y. App. Div. 480, 81 N. Y. Suppl. 594.

70. See Brown *v.* Holden, 120 Iowa 191, 94 N. W. 482; McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Orcutt *v.* Hanson, 71 Iowa 514, 32 N. W. 482; Cole *v.* Conner, 10 Iowa 299.

71. See Whitaker *v.* Middle States Loan, etc., Co., 7 App. Cas. (D. C.) 203 (holding that a mortgage with power of sale may be foreclosed by bill in equity); Stone *v.* Nix, 101 Ga. 290, 28 S. E. 840 (holding that an instrument in the form of an absolute deed may be foreclosed as an equitable mortgage, where, in another case between the same parties, it has been adjudged to be a mortgage).

72. See Long *v.* Little, 119 Ill. 600, 8 N. E. 194; Emory *v.* Keighan, 88 Ill. 482.

73. See Williams *v.* Robinson, 16 Conn. 517; Cary *v.* White, 7 Lans. (N. Y.) 1.

74. See Long *v.* Long, 141 Mo. 352, 44 S. W. 341, holding that one cannot foreclose as holder of a first mortgage on the property, and at the same time claim that the entire equity of redemption was extinguished by his foreclosure and purchase under a second mortgage.

75. Mussina *v.* Bartlett, 8 Port. (Ala.) 277.

76. Mullanphy *v.* Simpson, 3 Mo. 492.

gage, or even by a decree for redemption.[77] In so far as the mortgagee's rights in this respect are governed by the statute law, they will depend on the law of the state where the land lies and in force at the time of the execution of the mortgage.[78]

(II) *Ownership of Debt and Securities.* It is essential to the complainant's right of action that he should be the lawful and present owner of the debt secured by the mortgage;[79] and although his suit will be barred by anything which operates as a payment or satisfaction of the debt, or will be affected *pro tanto* by a partial payment,[80] or by any cancellation or discharge of the mortgage,[81] this result does not follow from a conditional surrender of the mortgage and securities to the mortgagor on a condition which has not been performed,[82] nor from a surrender of them induced by the false and fraudulent representations of the mortgagor, without any actual satisfaction of the debt.[83]

(III) *Performance of Conditions by Mortgagee.* A mortgagee cannot maintain an action for foreclosure so long as he has not fulfilled a condition, to be performed by him, as a part of the consideration for the mortgage,[84] or where he retains in his hands a part of the money which he was to loan or advance to the mortgagor and refuses to pay it over.[85]

(IV) *Time For Foreclosure.* Unless restrained by a valid agreement to extend the time for payment of the mortgage debt,[86] or by a provision in the mortgage that foreclosure proceedings shall not be begun until the default has continued for a specified time,[87] the mortgagee may commence his suit imme-

77. Grugeon *v.* Gerrard, 4 Y. & C. Exch. 119.

78. Palmer *v.* McCormick, 28 Fed. 541.

Retroactive statute affecting remedy.—"In this country the proceeding [for foreclosure of a mortgage] in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law 'impairing the obligation of the contract' within the meaning of the provision of the Constitution upon the subject." Clark *v.* Reyburn, 8 Wall. (U. S.) 318, 322, 19 L. ed. 354.

79. Weaver *v.* Field, 114 U. S. 244, 5 S. Ct. 844, 29 L. ed. 143, holding that where it appears that the complainant tortiously obtained possession of the notes secured by the mortgage, and has no rightful claim to them, the suit will be dismissed.

Effect of assignment.—The right of a mortgagee to maintain a bill to foreclose is not affected by an equitable assignment of a portion of the indebtedness, where he has retained the legal title as well as a large equitable interest. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276. Where the assignor of the mortgage is estopped from disputing the validity of the assignment, the mortgagor cannot question the right of the assignee to foreclose. Atlantic Trust Co. *v.* Behrend, 15 Wash. 466, 46 Pac. 642.

80. See Rogers *v.* Stevenson, 42 Ark. 555; Fitch *v.* McDowell, 80 Hun (N. Y.) 207, 30 N. Y. Suppl. 31 [*affirmed* in 145 N. Y. 498, 40 N. E. 205]; Casey-Swasey Co. *v.* Anderson, (Tex. Civ. App. 1904) 83 S. W. 840.

A tender of the amount in arrear on a mortgage, together with expenses incurred by the mortgagee, is not sufficient to bar foreclosure proceedings, where other covenants in the mortgage have been broken by the mortgagor. Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684.

81. Benson *v.* Markoe, 41 Minn. 112, 42 N. W. 787; Conklin *v.* Buckley, 19 Wash. 262, 53 Pac. 52.

82. Pugh *v.* Fairmount Gold, etc., Min. Co., 112 U. S. 238, 5 S. Ct. 131, 28 L. ed. 684.

83. Lovell *v.* Wall, 31 Fla. 73, 12 So. 659; Grimes *v.* Kimball, 3 Allen (Mass.) 518.

84. Nicholson *v.* Cinque, 51 N. Y. App. Div. 604, 64 N. Y. Suppl. 191. See also Pfeninghausen *v.* Shearer, 65 Mo. App. 348.

85. Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081. But see Petty *v.* Grisard, 45 Ark. 117. In this case it appeared that the mortgage covered both land and chattels, and was to secure both a present debt and future supplies to be furnished by the mortgagee. On finding that the chattels were otherwise encumbered, he refused to furnish the supplies, but released the mortgage so far as concerned the chattels, so that they might be obtained from others. The debtor having been put to no additional expense, it was held that the mortgagee might foreclose on the land.

86. See *infra*, XXI, C, 1, b, (III).

87. Potomac Mfg. Co. *v.* Evans, 84 Va. 717, 6 S. E. 2; Central Trust Co. *v.* Worcester Cycle Mfg. Co., 93 Fed. 712, 35 C. C. A. 547. *Compare* Allan *v.* Manitoba, etc., R. Co., 11 Manitoba 106, holding that a mortgagee may proceed in equity for a sale of the mortgaged property immediately after default in payment, notwithstanding the

diately upon default of payment of the debt secured or any other breach of condition.[88]

(v) *Unlawful Foreclosure as Tort.* An unlawful foreclosure of a mortgage, attempted solely from a malicious desire to injure the mortgagor, is a tort for which the mortgagee is answerable in damages.[89]

b. Maturity of Debt — (i) *In General.* If a mortgage is given to secure an existing debt, and no time is specified for its payment, it is due on demand and may be foreclosed immediately.[90] This is true also, where the amount secured is expressed to be payable on demand.[91] But if the mortgage or note fixes a certain future date as the time for its payment, there can be no legal default, and consequently no right to foreclose, before the maturity of the debt as thus fixed.[92] And a like rule obtains where the time for payment of the mortgage debt is made to depend on the happening of some future event,[93] or on the performance

mortgage contains a power of sale which could not be exercised until after the lapse of a designated time.

88. Barroilhet *v.* Battelle, 7 Cal. 450; Bennett *v.* Foreman, 15 Grant Ch. (U. C.) 117, holding that a mortgagee has a right to file a bill of foreclosure the day after default, and, although such a course may be "extremely sharp," he cannot be refused his costs.

When the mortgagor is dead, the mortgagee is not required to wait for the expiration of a year from the time of his decease before suing out scire facias to foreclose. Menard *v.* Marks, 2 Ill. 25.

89. Tanton *v.* Boomgarden, 79 Ill. App. 551.

It must be averred and shown in a manner sufficient to satisfy a reasonable man that the mortgagee had no other ground for proceeding than his desire to injure the mortgagor, and also that the attempted foreclosure proceedings terminated favorably to the mortgagor; and want of probable cause cannot be inferred from the existence of malice. Marable *v.* Mayer, 78 Ga. 710, 3 S. E. 429.

Liability of third person.— The mere fact that a third person induced the mortgagee to foreclose, although the former sought to profit thereby by purchasing the property, is not such a fraud on the mortgagor as to make the third person liable to him. Johnson *v.* Reed, 125 Cal. 74, 57 Pac. 680.

90. *Arkansas.*— Carnall *v.* Duval, 22 Ark. 136.

Pennsylvania.—Saving Fund *v.* Henneberg, 2 Leg. Rec. 150.

United States.— Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

England.— Balfe *v.* Lord, 1 C. & L. 519, 2 Dr. & War. 480, 4 Ir. Eq. 648.

Canada.— Higgins *v.* McLachlan, Ritch. Eq. Cas. (Nova Scotia) 441.

91. Alsop *v.* Hall, 1 Root (Conn.) 346; Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743.

92. *California.*— Pendleton *v.* Rowe, 34 Cal. 149.

Georgia.— Cumberland Island Co. *v.* Bunkley, 108 Ga. 756, 33 S. E. 183.

Illinois.— Dorn *v.* Geuder, 171 Ill. 362, 49 N. E. 492. See also Jackson *v.* Grosser, 218 Ill. 494, 75 N. E. 1032.

Iowa.— Radford *v.* Folsom, 58 Iowa 473, 12 N. W. 536.

Kentucky.— Miller *v.* Cravens, 2 Duv. 246.

Louisiana.— Ledoux *v.* Jamieson, 18 La. Ann. 130.

Montana.— Gassert *v.* Black, 18 Mont. 35, 44 Pac. 401.

Nebraska.— Hartsuff *v.* Hall, 58 Nebr. 417, 78 N. W. 716.

North Carolina.— Harshaw *v.* McKesson, 66 N. C. 266.

Texas.— Harrold *v.* Warren, (Civ. App. 1898) 46 S. W. 657.

United States.— American L. & T. Co. *v.* Union Depot Co., 80 Fed. 36.

See 35 Cent. Dig. tit. "Mortgages," § 1158.

Different date in note and mortgage.— Where a mortgage given to secure payment of an antecedent note specifies a future day for payment, such day must be deemed to be substituted for the day originally named in the note. Durkee *v.* Ft. Edward Nat. Bank, 36 Hun (N. Y.) 565.

Mortgage by trustee.— Where a note given by a trustee for money borrowed from the trust estate and secured by a trust deed is past due, the grantee may maintain an action to foreclose the deed, although there has been no default in the trust and nothing is due the beneficiaries. Wolfe *v.* Jaffray, 88 Iowa 358, 55 N. W. 91.

Several mortgages on same land.— Where several mortgages on the same land, but securing debts maturing at different times, are all held by the same person, he may foreclose them all in a single proceeding after the maturity of the last note. Sams *v.* Derrick, 103 Ga. 678, 30 S. E. 668. But if only part of them are due he cannot include in his foreclosure any mortgage not yet matured. Thibodo *v.* Collar, 1 Grant Ch. (U. C.) 147.

93. See Steinbach *v.* Leese, 13 Cal. 363; Wall *v.* Boisgerard, 11 Sm. & M. (Miss.) 574; Painter *v.* Wilson, 197 Pa. St. 434, 47 Atl. 349; Ohio Cent. R. Co. *v.* New York Cent. Trust Co., 133 U. S. 83, 10 S. Ct. 235, 33 L. ed. 561.

Mortgagee reaching majority.— Where the debt secured by a mortgage is conditioned to be paid when the mortgagee, a female minor, attains her majority, it is no ground for foreclosure that she has married and is there-

of a condition subsequent,[94] or on the accruing of a liability, as in the case of a mortgage given to secure an indorser or surety.[95]

(II) *Anticipation of Maturity on Partial Default*—(A) *In General.* A provision in a mortgage giving the mortgagee the right to declare and treat the entire amount secured as immediately due and payable upon default in the payment of any instalment or of interest or taxes due is not in the nature of a penalty or forfeiture, but is a valid and enforceable contract,[96] against which equity will not relieve the delinquent mortgagor in the absence of circumstances showing peculiar hardship or oppression or the taking of an unconscionable advantage.[97] A provision of this kind enables the mortgagee to sue for and obtain a foreclosure, not merely for the instalment or interest in arrear, but for the entire amount of the debt, although, without such covenant, it would not yet be due or payable.[98] And the conditions upon the exercise of this right are

fore emancipated by law, if it is not also shown that she has reached her majority. Hoffman *v.* Steib, 22 La. Ann. 267.

94. A. P. Cook Co. *v.* Bell, 114 Mich. 283, 72 N. W. 174; Robinson *v.* Ryan, 25 N. Y. 320.

95. Miller *v.* Miller Knitting Co., 23 Misc. (N. Y.) 404, 52 N. Y. Suppl. 184; Burton *v.* Wheeler, 42 N. C. 217.

96. *Illinois.*— Magnusson *v.* Williams, 111 Ill. 450.

Iowa.—Swearingen *v.* Lahner, 93 Iowa 147, 61 N. W. 431, 57 Am. St. Rep. 261, 26 L. R. A. 765; Cassidy *v.* Caton, 47 Iowa 22.

Kansas.— Stanclift *v.* Norton, 11 Kan. 218.

Missouri.— Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223.

Nebraska.— Connecticut Mut. L. Ins. Co. *v.* Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101; Morling *v.* Bronson, 37 Nebr. 608, 56 N. W. 205.

New York.— Crane *v.* Ward, Clarke 393.

Pennsylvania.— Holland *v.* Sampson, 4 Pa. Cas. 164, 6 Atl. 772; Gulden *v.* O'Byrne, 7 Phila. 93.

Wyoming.— Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925.

And see *supra*, VIII, H, 7.

97. Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Hothorn *v.* Louis, 170 N. Y. 576, 62 N. E. 1096; Osborne *v.* Ketcham, 76 Hun (N. Y.) 325, 27 N. Y. Suppl. 694; Broderick *v.* Smith, 26 Barb. (N. Y.) 539; O'Connor *v.* Shipman, 48 How. Pr. (N. Y.) 126. *Compare* Provident Sav. L. Assur. Soc. *v.* Georgia Industrial Co., 124 Ga. 399, 52 S. E. 289 (holding that good faith requires the creditor, before enforcing a provision of this kind, to give the debtor a reasonable opportunity to meet his obligations); Tiernan *v.* Hinman, 16 Ill. 400.

Negligence of mortgagor.— Where a mortgage provides that the principal shall become due if the interest remains unpaid for thirty days after it is due, the fact that the mortgagor makes a mistake in calculating the time when the thirty days expired, and does not tender the interest until the thirty-first day, is no ground for equitable relief against a foreclosure, the mistake being due to pure carelessness. Serrell *v.* Rothstein, 49 N. J. Eq. 385, 24 Atl. 369. And see Spring *v.* Fisk, 21 N. J. Eq. 175, holding that mere negligence will not excuse the failure to pay punctually, or avoid the consequences of non-payment; and that forgetfulness as to the time when, the place where, and the person to whom the interest is payable is such negligence.

98. *Arkansas.*— Mooney *v.* Tyler, 68 Ark. 314, 57 S. W. 1105.

California.— Phelps *v.* Mayers, 126 Cal. 549, 58 Pac. 1048; San Gabriel Valley Bank *v.* Lake View Town Co., (App. 1906) 86 Pac. 727.

Colorado.— Rasmussen *v.* Levin, 28 Colo. 448, 65 Pac. 94.

Illinois.— Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248; Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Terry *v.* Eureka College, 70 Ill. 236; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336; Sweeney *v.* Kaufmann, 64 Ill. App. 151; Hennessy *v.* Gore, 35 Ill. App. 594. A provision that, on default in the payment of any instalment of interest, it shall be lawful to sell the mortgaged premises, does not make the entire debt due on such default. Brokaw *v.* Field, 33 Ill. App. 138.

Missouri.— Rumsey *v.* People's R. Co., 154 Mo. 215, 55 S. W. 615.

Nebraska.— National L. Ins. Co. *v.* Butler, 61 Nebr. 449, 85 N. W. 437, 87 Am. St. Rep. 462; Coad *v.* Home Cattle Co., 32 Nebr. 761, 49 N. W. 757, 29 Am. St. Rep. 465; Hartley *v.* Gregory, 9 Nebr. 279, 2 N. W. 878.

New Jersey.— Phillips *v.* Youmans, (1898) 41 Atl. 924; Arkenburgh *v.* Lakeside Residence Assoc., 56 N. J. Eq. 102, 38 Atl. 297.

New York.— New York City Baptist Mission Soc. *v.* Tabernacle Baptist Church, 17 Misc. 699, 41 N. Y. Suppl. 513.

Pennsylvania.— Oaks *v.* Fisher, 20 Pa. Co. Ct. 74.

United States.— Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278; Richards *v.* Holmes, 18 How. 143, 15 L. ed. 304; Gregory *v.* Marks, 10 Fed. Cas. No. 5,802, 8 Biss. 44. See also Little Rock Water Works Co. *v.* Barrett, 103 U. S. 516, 26 L. ed. 523. *Compare* Pomeroy *v.* Woodward, 38 Oreg. 212, 63 Pac. 194, holding that a provision in a mortgage authorizing foreclosure on default "in the payment of principal or interest" does not authorize

only that there should have been a default within the terms of the mortgage,[99] that it should have continued for a specified length of time, if so provided in the mortgage,[1] and that there should have been a demand for payment and notice of intention to declare the whole sum due, if that is required by the language of the covenant.[2] Payment of the delinquent taxes, if that is the cause of acceleration, by the mortgagor, before the bringing of a suit for foreclosure, will take away the right to proceed under the clause in the mortgage,[3] and a tender of the instalment or interest which is in arrear, if accepted by the mortgagee, has this effect;[4] but not if the payment or tender is made after the mortgagee has begun his foreclosure suit.[5]

(B) *Mortgagee's Election.* A provision of this kind in a mortgage is permissive only and not self-executing; it makes the whole debt due and collectable only in case the mortgagee so elects,[6] and while the election is not required

foreclosure for the whole debt on default in the payment of one instalment of the principal, as such a provision does not amount to an agreement that the whole debt shall become due on default of an instalment.

Remitting interest.— Where a mortgagee declares the whole debt due for a default in one of the instalments, under a power in the mortgage, he must remit interest capitalized and unearned at the date of the default. Williams *v.* Douglass, 47 La. Ann. 1277, 17 So. 805.

Effect of assignment.— A provision in a trust deed authorizing an election to declare the whole sum due upon default in a partial payment is binding on the assignor of the trust deed who indorsed the notes. Stewart *v.* Ludlow, 68 Ill. App. 349.

Waiver of right.— Statements indicating a considerate feeling on the part of the mortgagee toward the mortgagor and a disposition to treat him with forbearance, made at the time of executing the mortgage, do not constitute a waiver of the right, under an express clause in the mortgage, to declare the whole amount due on a partial default, nor a contract not to exercise that privilege. O'Connor *v.* Meskill, (N. J. Ch. 1898) 39 Atl. 1061. Nor can such a waiver be predicated on a delay of three months after default in an interest payment, when caused by the mortgagor's request to be allowed additional time in which to pay the interest. Hewett *v.* Dean, (Cal. 1891) 25 Pac. 753.

Default as giving right to sue on notes.— Where a mortgage to secure notes contemporaneously executed provides that all the notes shall become due on default in the payment of either of them, or in the payment of taxes or insurance premiums, on such default the notes become due, not merely for foreclosure proceedings, but for general purposes, so that suit may be brought on any of them. Chambers *v.* Marks, 93 Ala. 412, 9 So. 74. And see Stanclift *v.* Norton, 11 Kan. 218; Noell *v.* Gaines, 68 Mo. 649; Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. 741. But there are decisions holding that the notes become due only for the purpose of foreclosure. Mallory *v.* West Shore Hudson River R. Co., 35 N. Y. Super. Ct. 174; McClelland *v.* Bishop, 42 Ohio St. 113.

99. Lewis *v.* Lewis, 58 Kan. 563, 50 Pac. 454.

1. Potomac Mfg. Co. *v.* Evans, 84 Va. 717, 6 S. E. 2.

2. Mutual Ben. Loan, etc., Co. *v.* Jaeger, 34 N. Y. App. Div. 90, 54 N. Y. Suppl. 99.

3. Ver Planck *v.* Godfrey, 42 N. Y. App. Div. 16, 58 N. Y. Suppl. 784.

The fact that the mortgagee pays the taxes instead of allowing them to continue delinquent does not take away his right to declare the debt due and foreclose, as it is not so much the delinquency of the taxes as the failure of the mortgagor to pay them which gives this right. Hartsuff *v.* Hall, 58 Nebr. 417, 78 N. W. 716.

4. Sykes *v.* Arne, (Cal. 1897) 47 Pac. 868. And see Schmitz *v.* Scheifele, (N. J. Ch. 1887) 7 Atl. 351.

5. Plummer *v.* Park, 62 Nebr. 665, 87 N. W. 534; Rosche *v.* Kosmowski, 61 N. Y. App. Div. 23, 70 N. Y. Suppl. 216.

6. Blakeslee *v.* Hoit, 116 Ill. App. 83; Brokaw *v.* Field, 33 Ill. App. 138; Lowenstein *v.* Phelan, 17 Nebr. 429, 22 N. W. 561; Richardson *v.* Warner, 28 Fed. 343.

Rights of mortgagor.— A provision in a mortgage for the anticipation of the maturity of the entire debt on default in a payment of interest or of an instalment is for the benefit of the mortgagee only. The mortgagor himself, being thus in default, could not treat the whole debt as due and force the unwilling mortgagee to accept a tender of the entire amount. Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207; Green *v.* Adams, 2 Ch. Chamb. (U. C.) 134.

Rights of other creditors.— Where a trust deed is given to secure various notes given to several different creditors, with a provision that the entire amount secured shall become due and payable upon default in the payment of either or any part of the notes, at the option of "the legal holder or holders or any or either of them," a holder of one of the notes can declare the whole indebtedness due and foreclose when default is made in the payment of any of the other notes, although the note which he himself holds is not yet due. Hennessy *v.* Gore, 35 Ill. App. 594. But see Bomar *v.* West, 87 Tex. 299, 28 S. W. 519.

to be made instantly upon the default, it must be exercised within a reasonable time thereafter.[7] The mortgagee may, if he chooses, waive an election once made,[8] but cannot be compelled to do so on a tender of the amount in arrear.[9]

(c) *Notice of Election.* If the mortgage itself requires that the mortgagor shall be notified of the mortgagee's election and determination to make the entire indebtedness fall due upon a partial default, some explicit and sufficient form of notice will be required.[10] But in the absence of such a provision no notice to the mortgagor is necessary, nor any demand of payment before suit; the commencement of a suit for foreclosure of the entire mortgage is a sufficient declaration of the mortgagee's intention and is all the notice to which the mortgagor is entitled.[11] And in the case of a deed of trust, a written notice from the holder of the debt to the trustee, requesting him to foreclose, is a sufficient exercise of the creditor's option to declare the whole debt due.[12] But if it is part of the stipulation in the mortgage that the debt shall bear a different and higher rate of interest after the mortgagee's declaration of the maturity of the whole, some form of notice to the mortgagor is necessary to charge him with such increased interest.[13]

7. *Arkansas.*— Farnsworth *v.* Hoover, 66 Ark. 367, 50 S. W. 865.

Colorado.—Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223.

Iowa.—Swearingen *v.* Lahner, 93 Iowa 147, 61 N. W. 431, 57 Am. St. Rep. 261, 26 L. R. A. 765.

Wisconsin.— Berrinkott *v.* Traphagen, 39 Wis. 219.

United States.— Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. 741; Wilson *v.* Winter, 6 Fed. 16.

8. Van Vlissingen *v.* Lenz, 171 Ill. 162, 49 N. E. 422. But see Kilpatrick *v.* Germania L. Ins. Co., 183 N. Y. 163, 75 N. E. 1124, 111 Am. St. Rep. 722, 2 L. R. A. N. S. 574, holding the election once made to be irrevocable. And see Cruso *v.* Bond, 1 Ont. 384, holding that the mortgagee must abide by his election once made, and must accept a tender of principal, interest, and costs whenever made.

9. Malcolm *v.* Allen, 49 N. Y. 448.

10. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47.

11. *California.*— Clemens *v.* Luce, 101 Cal. 432, 35 Pac. 1032; Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220; Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Monroe *v.* Fohl, 72 Cal. 568, 14 Pac. 514; Leonard *v.* Tyler, 60 Cal. 299; Whitcher *v.* Webb, 44 Cal. 127; San Gabriel Valley Bank *v.* Lake View Town Co., (App. 1906) 86 Pac. 727.

Connecticut.— Austin *v.* Burbank, 2 Day 474, 2 Am. Dec. 119.

Dakota.— Hodgdon *v.* Davis, 6 Dak. 21, 50 N. W. 478.

Idaho.— Broadbent *v.* Brumback, 2 Ida. (Hasb.) 366, 16 Pac. 555.

Illinois.— Smith *v.* Billings, 170 Ill. 543, 49 N. E. 212; Sweeney *v.* Kaufmann, 168 Ill. 233, 48 N. E. 144; Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Hoodless *v.* Reid, 112 Ill. 105, 1 N. E. 118; Harper *v.* Ely, 56 Ill. 179; Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354; Holdroff *v.* Remlee, 105 Ill. App. 671; Owen *v.* Occidental Bldg., etc., Assoc., 55 Ill. App. 347; Cundiff *v.* Brokaw, 7 Ill. App. 147.

Indiana.— Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510.

Iowa.— Swearingen *v.* Lahner, 93 Iowa 147, 61 N. W. 431, 57 Am. St. Rep. 261, 26 L. R. A. 765; Kramer *v.* Rebman, 9 Iowa 114.

Michigan.— Hawes *v.* Detroit F. & M. Ins. Co., 109 Mich. 324, 67 N. W. 329, 63 Am. St. Rep. 581; Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

Minnesota.—Fowler *v.* Woodward, 26 Minn. 347, 4 N. W. 231.

Nebraska.— National L. Ins. Co. *v.* Butler, 61 Nebr. 449, 85 N. W. 437, 87 Am. St. Rep. 462; Northwestern Mut. L. Ins. Co. *v.* Butler, 57 Nebr. 198, 77 N. W. 667; Eastern Banking Co. *v.* Seeley, 55 Nebr. 660, 75 N. W. 1102.

New York.— Hothorn *v.* Louis, 170 N. Y. 576, 62 N. E. 1096; New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 157 N. Y. 689, 51 N. E. 1092. But see Beach *v.* Shanley, 35 N. Y. App. Div. 566, 55 N. Y. Suppl. 130.

United States.— Quackenbush *v.* Lane, 20 Fed. Cas. No. 11,491.

See 35 Cent. Dig. tit. "Mortgages," §§ 1208, 1209.

But see Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336; Schoonmaker *v.* Taylor, 14 Wis. 313; Basse *v.* Gallegger, 7 Wis. 442, 76 Am. Dec. 225.

Default in paying taxes.— Where a mortgage stipulates that it may be foreclosed upon failure to pay the taxes on the premises when the same are by law due and payable, the mortgagee, as soon as the taxes become delinquent, may pay them and then at once foreclose. It is not necessary for him to notify the mortgagor that the taxes are due, that he is about to pay the same, or that he has paid them, as the mortgagor is bound to know when the taxes fall due. Ellwood *v.* Wolcott, 32 Kan. 526, 4 Pac. 1056.

12. Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569.

13. Dean *v.* Applegarth, 65 Cal. 391, 4 Pac. 375.

(III) *Extension of Time For Payment*—(A) *In General.* A new agreement extending the time for payment of the debt secured by a mortgage has the effect in equity of modifying the original condition of the mortgage to the same extent as if it were incorporated in such condition, and suspends the right to foreclose until the expiration of the extended time.[14] But the agreement must be supported by a valid and sufficient consideration,[15] and not canceled or abandoned.[16] Although regularly it should be indorsed on the note or mortgage, it may be valid, although resting only in parol,[17] and may be made by a duly authorized agent of the mortgagee as well as by the mortgagee himself.[18] But if its existence is not shown on the face of the papers, it is not binding on a purchaser of the mortgagor who takes it in good faith and without actual notice.[19]

(B) *Effect on Mortgagee's Right to Anticipate Maturity.* An agreement to extend the time for payment of the principal sum secured by a mortgage does not waive or abrogate a stipulation in the mortgage giving the mortgagee the

14. *Illinois.*— Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239.

Indiana.— Trayser *v.* Indiana Asbury University, 39 Ind. 556; Loomis *v.* Donovan, 17 Ind. 198. *Compare* Ayers *v.* Hamilton, 131 Ind. 98, 30 N. E. 895.

Louisiana.— Malone *v.* Barker, 2 Rob. 369.

Missouri.— Dunnaway *v.* O'Reilly, 102 Mo. App. 718, 79 S. W. 1004.

Nebraska.— Eby *v.* Ryan, 22 Nebr. 470, 35 N. W. 225.

New Jersey.— Bradley *v.* Glenmary Co., 64 N. J. Eq. 77, 53 Atl. 49; Worrall *v.* Eastwood, 44 N. J. Eq. 277, 18 Atl. 54; Maryott *v.* Renton, 21 N. J. Eq. 381.

New York.— Dodge *v.* Crandall, 30 N. Y. 294; Gilbert *v.* Shaw, 63 Hun 148, 17 N. Y. Suppl. 621; Macaulay *v.* Hayden, 48 Misc. 21, 96 N. Y. Suppl. 64.

Ohio.— Union Cent. L. Ins. Co. *v.* Bonnell, 35 Ohio St. 365.

Pennsylvania.— Wallace *v.* Hussey, 63 Pa. St. 24; Hoffman *v.* Lee, 3 Watts 352.

Texas.— Kearby *v.* Hopkins, 14 Tex. Civ. App. 166, 36 S. W. 506.

See 35 Cent. Dig. tit. "Mortgages," § 1159.

Indefinite extension.— Where payment is extended, not for any definite time, but until the holder of the note wants his money, and until the debtor shall be notified of that fact, a notice and demand of payment are essential before foreclosure; and a foreclosure and sale made without such notice are fraudulent and will be relieved against in equity. Rounsavell *v.* Crofoot, 4 Ill. App. 671. It is otherwise if there is no time fixed for payment and no provision for notice to the debtor. Seymour *v.* Bailey, 66 Ill. 288.

Agreement between mortgagee and assignee.— A mortgagor in a mortgage made payable in one year is not entitled to any benefit from a subsequent agreement made between the mortgagee and his assignee, extending the time of payment on condition of the mortgagee's guaranty and the prompt payment of the interest. Lee *v.* West Jersey Land, etc., Co., 29 N. J. Eq. 377.

A mortgage given to secure the debt of another, the mortgagor having assumed no personal liability, is released by an extension of the time of payment of the debt secured, without the mortgagor's consent, precluding a foreclosure. Jones *v.* Turner, 6 Ohio Dec. (Reprint) 1059, 10 Am. L. Rec. 31.

15. Kester *v.* Hulman, 65 Ind. 100; Eby *v.* Ryan, 22 Nebr. 470, 35 N. W. 225; Priest *v.* Gumprecht, 178 N. Y. 595, 70 N. E. 1108; Trenor *v.* Le Count, 84 Hun (N. Y.) 426, 32 N. Y. Suppl. 412; Knickerbocker *v.* Chester Park Athletic Co., 20 Ohio Cir. Ct. 655, 12 Ohio Cir. Dec. 842. See, however, Measurall *v.* Pearce, (N. J. Ch. 1886) 4 Atl. 678.

Partial failure of consideration.— Foreclosure proceedings are not prematurely begun because of an agreement for an extension of time, if part of the agreement was that the mortgagor should put up certain buildings, the mortgagee making advances therefor, and the mortgagor has failed to perform. Ferris *v.* Spooner, 102 N. Y. 10, 5 N. E. 773.

Effect of usury.— A promise to extend the time for the payment of a mortgage, in consideration of a note given for a usurious premium, is void, and the mortgage may be foreclosed before the expiration of the extension. Trusdell *v.* Jones, 23 N. J. Eq. 121. And see Church *v.* Maloy, 70 N. Y. 63, holding that objecting to usury in the consideration of an agreement to extend the time is a waiver of the benefit of the extension.

16. Fausel *v.* Schabel, 22 N. J. Eq. 126.

17. Measurall *v.* Pearce, (N. J. Eq. 1886) 4 Atl. 678. See also Bassett *v.* Hathaway, 9 Mich. 28.

Proof of agreement.— The unsupported oath of the mortgagor is not sufficient to prove an extension of time for payment beyond the date stipulated in the mortgage itself, when opposed by the oath of the mortgagee. Moore *v.* Moore, 20 Lanc. L. Rev. (Pa.) 61.

18. Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239, holding that when the owner of a note secured by a trust deed permits the trustee to hold possession of the note and deed, he holds out the trustee to the grantor in the deed as his agent, with authority to make an extension of the time of payment, and is bound by an agreement for such extension made between the trustee and the debtor.

19. Lesley *v.* Johnson, 41 Barb. (N. Y.) 359.

right to declare the whole indebtedness due on default in the payment of interest or of an instalment of the debt or of taxes on the property, unless so expressed.[20]

c. Default in Payment — (i) *In General.* Default in the payment of the debt secured by a mortgage, at its maturity, constitutes a breach of the condition of the mortgage, and justifies an immediate suit for foreclosure,[21] after presentation and demand of payment, if that is required by the terms of the mortgage,[22] or after the default shall have continued for a certain length of time, if it is so stipulated in the instrument.[23]

(ii) *Instalments.* Where the debt secured by a mortgage is payable in instalments, default in the payment of any such instalment gives the mortgagee a right to foreclose as to such instalment without waiting for the maturity of the whole debt, unless there is a stipulation to the contrary.[24] And of course where

20. *Colorado.*— Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223; Smith *v.* McCourt, 8 Colo. App. 146, 45 Pac. 239.

Illinois.— Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037.

Iowa.— Iowa L. & T. Co. *v.* Haller, 119 Iowa 645, 93 N. W. 636.

New York.—Leopold *v.* Hallheimer, 1 N. Y. App. Div. 202, 37 N. Y. Suppl. 154 [*affirmed* in 157 N. Y. 696, 51 N. E. 1091]; Jester *v.* Sterling, 25 Hun 344; Church *v.* Maloy, 9 Hun 148 [*affirmed* in 70 N. Y. 63]; Weber *v.* Huerstel, 11 Misc. 214, 32 N. Y. Suppl. 1109; Abrahams *v.* Claussen, 52 How. Pr. 241. But see Beach *v.* Shanley, 35 N. Y. App. Div. 566, 55 N. Y. Suppl. 130.

South Dakota.— Germond *v.* Hermosa Ice Co., 9 S. D. 387, 69 N. W. 578.

Utah.— Kelley *v.* Kershaw, 5 Utah 417, 16 Pac. 488, 5 Utah 295, 14 Pac. 804.

United States.— *In re* Johnston, 13 Fed. Cas. No. 7,424.

See 35 Cent. Dig. tit. "Mortgages," § 1159.

21. McDonough *v.* Fost, 1 Rob. (La.) 295; Gardner *v.* Corey, 11 Gray (Mass.) 30; Morton *v.* Covell, 10 Nebr. 423, 6 N. W. 477.

No foreclosure for costs only.— Where the debt secured by a mortgage has been fully paid, the mortgagee cannot have a decree of foreclosure for a balance to which he is entitled, consisting only of costs. Drought *v.* Redford, 1 Molloy 572.

No foreclosure for interest in the nature of a penalty.— Where a mortgage given to secure payment of a bond with six per cent interest contains a provision that, if the interest is not punctually paid, the debt shall bear interest at the rate of ten per cent, and the principal sum is paid, with interest at six per cent, a bill will not lie to foreclose for the additional four per cent, incurred as a penalty for failure to pay promptly. Watts *v.* Watts, 11 Mo. 547.

Covenant against mechanics' liens.— Where a mortgagor covenants to pay, within a time fixed, all debts contracted by him for labor and material for the construction of a building, and not merely that he will indemnify the mortgagee against liens on it, it is not necessary, to constitute a default, that the debts shall have been adjudged liens, or even that claims for liens shall have been filed. Houston *v.* Nord, 39 Minn. 490, 40 N. W. 568.

In Pennsylvania by force of a statute a scire facias sur mortgage cannot be brought until the expiration of a year and a day from the maturity of the debt secured. Pittsburgh Bank *v.* Zweidinger, 7 Pa. Dist. 694; Saving Fund *v.* Henneberg, 2 Leg. Rec. (Pa.) 150; Whitecar *v.* Worrell, 1 Phila. (Pa.) 44. But this provision may be waived by an express stipulation in the mortgage authorizing the issuance of a scire facias immediately upon default. Kelley's Estate, 14 Lanc. Bar (Pa.) 51; Nicholas *v.* Putnam Mach. Co., 7 North. Co. Rep. (Pa.) 36; Walker *v.* Tracey, 1 Phila. (Pa.) 225. And the statute does not apply to a bill in equity to foreclose. Woodbury *v.* Allegheny, etc., R. Co., 72 Fed. 371.

22. See *infra*, XXI, C, 1, k, (VI).

23. See Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. 221, 1 L. R. A. 397.

24. *Alabama.*—Fields *v.* Drennen, 115 Ala. 558, 22 So. 114; Johnson *v.* Buckhaults, 77 Ala. 276; McLean *v.* Presley, 56 Ala. 211.

Arkansas.— Land *v.* May, 73 Ark. 415, 84 S. W. 489.

California.— Grattan *v.* Wiggins, 23 Cal. 16.

Delaware.— Fox *v.* Wharton, 5 Del. Ch. 200; Giles *v.* Lewis, 4 Del. Ch. 51.

Georgia.— Hatcher *v.* Chancey, 71 Ga. 689.

Illinois.—Morgenstern *v.* Klees, 30 Ill. 422. See also Fisher *v.* Milmine, 94 Ill. 328; Houston *v.* Curran, 101 Ill. App. 203. See, however, Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354; Osgood *v.* Stevens, 25 Ill. 89, both holding that in case of a debt payable by instalments, the mortgagee cannot have a scire facias to foreclose until the last and all are due; upon default in the payment of the earlier instalments, he has other remedies against the mortgagor, as ejectment to obtain possession of the mortgaged premises, but not scire facias.

Indiana.— Miller *v.* Remley, 35 Ind. 539; Hunt *v.* Harding, 11 Ind. 245; Withrow *v.* Clark, 2 Ind. 107. Under the act of 1831 a bill for foreclosure would not lie until default in the payment of the last of the instalments. Hough *v.* Doyle, 8 Blackf. (Ind.) 300.

Iowa.— Colby *v.* McOmber, 71 Iowa 469, 32 N. W. 459; Harrington *v.* Christie, 47 Iowa 319. And see Battle Creek Nat. Bank *v.* Dean, 86 Iowa 656, 53 N. W. 338.

the mortgage provides that the whole sum shall be due upon such partial default the mortgagee may foreclose.[25] And the mortgagee need not show that he owns all the mortgage notes or all the instalments which are not yet due.[26] But it is the mortgagor's right in these circumstances to stop the proceedings at any time by paying what is presently due.[27]

(III) *INTEREST.* Where a debt, payable at a future day, with interest payable in the meantime at stated intervals, is secured by a mortgage, and default is made in the payment of an instalment of such interest, a suit in equity may be maintained to enforce the lien of such mortgage, so far as such instalment is concerned,[28] or for the foreclosure of the whole mortgage, if it provides, as is now

Kentucky.— Caufman *v.* Sayre, 2 B. Mon. 202; Adams *v.* Essex, 1 Bibb 149, 4 Am. Dec. 623.

Louisiana.— Penouilh *v.* Abraham, 44 La. Ann. 188, 10 So. 676; Union Bank *v.* Smith, 10 Rob. 49; Robinson *v.* Aubert, 6 Rob. 461; McDonough *v.* Fost, 1 Rob. 295; Florance *v.* Orleans Nav. Co., 1 Rob. 224; Pepper *v.* Dunlap, 16 La. 163.

Massachusetts.— Coffin *v.* Loring, 5 Allen 153.

Michigan.—Hanford *v.* Robertson, 47 Mich. 100, 10 N. W. 125.

Mississippi. — Magruder *v.* Eggleston, 41 Miss. 284.

Missouri.—Benton Land Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. 193, 70 L R. A. 94; Reddick *v.* Gressman, 49 Mo. 389.

New York.— Maitland *v.* Godwin, 19 N. Y. Suppl. 275; Mitchell *v.* Tighe, Hopk. Ch. 119.

Ohio.— Baker *v.* Lehman, Wright 522.

Pennsylvania.—Kennedy *v.* Ross, 25 Pa. St. 256; Smith *v.* Shuler, 12 Serg. & R. 240; Duerr *v.* Wiederbold, 2 Leg. Rec. 32. A scire facias cannot be issued as each annual instalment of a mortgage falls due; the party must bring ejectment or proceed on the bond. Fickes *v.* Ersick, 2 Rawle 166.

South Carolina.— Anderson *v.* Pilgram, 30 S. C. 499, 9 S. E. 587, 14 Am. St. Rep. 917, 4 L. R. A. 205.

Texas.— Vieno *v.* Gibson, (Civ. App. 1892) 20 S. W. 717; Gillmour *v.* Ford, (1892) 19 S. W. 442; Tinsley *v.* Boykin, 46 Tex. 592; Lynch *v.* Elkes, 21 Tex. 229.

Utah.— Dupee *v.* Salt Lake Valley L. & T. Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902.

United States.— Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258, 9 S. Ct. 787, 33 L. ed. 128; Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 48 Fed. 139.

Canada.— Cameron *v.* McRae, 3 Grant Ch. (U. C.) 311.

See 35 Cent. Dig. tit. "Mortgages," § 1162.

Compare Harshaw *v.* McKesson, 66 N. C. 266, holding that where a mortgage stipulated that if the mortgagor should "well and truly pay and discharge said mortgage according to agreement, the one-third part in three years, one-third in four years, and the remainder in five years from date, then the said deed to be void," the mortgage could not be foreclosed until five years had expired.

Foreclosure upon notes proving worthless. — Where the mortgage is given to secure the payment of certain promissory notes, conditioned "that if any of the notes prove to be insolvent or worthless, the mortgage is to be good and valid, otherwise to be null and void," to constitute a breach of the condition, the notes, or some of them, must prove worthless; the mere non-payment of the notes does not constitute a breach. Fetrow *v.* Merriwether, 53 Ill. 275.

Intervening receivership.— The fact that, at the time the first of a series of mortgage notes falls due, the land is in the possession of a receiver appointed in a suit brought against the mortgagor by a third person, does not deprive the mortgagee of the right to declare the whole debt due, according to the option given to him by the mortgage, and to bring suit to foreclose it. Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702.

Note maturing pending suit.— Where suit to foreclose is brought on default of payment of the first of a series of notes, it being the only one then due, but a second note matures before a decree is made, the decree may cover the latter as well as the former, if a proper foundation has been laid in the bill. But where no foundation is so laid for including in the decree the note or notes that may become due, it is irregular to include them in it, unless a supplemental bill is filed. McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

25. Phillips *v.* Taylor, 96 Ala. 426, 11 So. 323; Wisner *v.* Chamberlain, 117 Ill. 568, 7 N. E. 68; Vansant *v.* Allmon, 23 Ill. 30; Andrews *v.* Jones, 3 Blackf. (Ind.) 440; Holland *v.* Sampson, 4 Pa. Cas. 164, 6 Atl. 772; Robinson *v.* Loomis, 51 Pa. St. 78.

26. Pepper *v.* Dunlap, 16 La. 163. But *compare* Goodall *v.* Mopley, 45 Ind. 355, which recognizes the rule that a mortgage given to secure several notes payable to the same person, but falling due at different times, is to be regarded as a separate mortgage for each note; but holds that it cannot be extended so as to be applicable to a mortgage given to secure claims held by several different creditors.

27. Mussina *v.* Bartlett, 8 Port. (Ala.) 277; Salmon *v.* Clagett, 3 Bland (Md.) 125; Standish *v.* Vosberg, 27 Minn. 175, 6 N. W. 489; Schroeder *v.* Laubenheimer, 50 Wis. 480, 7 N. W. 427.

28. *Arkansas.* — Stillwell *v.* Adams, 29 Ark. 346.

California.— Yoakam *v.* White, 97 Cal. 286, 32 Pac. 238; Marye *v.* Hart, 76 Cal. 291, 18 Pac. 325; Brickell *v.* Batchelder, 62 Cal. 623; San Luis Obispo Bank *v.* Johnson, 53

commonly the case, that the principal sum shall become due and payable on such default as to interest,[29] or gives the mortgagee the option to declare the entire

Cal. 99; Hunt *v.* Dohrs, 39 Cal. 304. See, however, Van Loo *v.* Van Aken, 104 Cal. 269, 37 Pac. 925; Brodribb *v.* Tibbets, 58 Cal. 6.

Connecticut.— Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354; Butler *v.* Blackman, 45 Conn. 159.

Illinois.— Silverman *v.* Silverman, 189 Ill. 394, 59 N. E. 949; Boyer *v.* Chandler, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113; Morgenstern *v.* Klees, 30 Ill. 422; Romberg *v.* McCormick, 95 Ill. App. 309; Schlatt *v.* Johnson, 85 Ill. App. 445; Caldwell *v.* Ellebrecht, 68 Ill. App. 596. And see Jones *v.* Ramsey, 3 Ill. App. 303.

Indiana.— Perry *v.* Fisher, 30 Ind. App. 261, 65 N. E. 935; Smart *v.* McKay, 16 Ind. 45.

Iowa.— Swearingen *v.* Lahner, 93 Iowa 147, 61 N. W. 431, 57 Am. St. Rep. 261, 26 L. R. A. 765; Dean *v.* Ridgeway, 82 Iowa 757, 48 N. W. 923; German Bank *v.* Griffin, 54 Iowa 749, 6 N. W. 155; Booknau *v.* Burnett, 49 Iowa 303.

Kansas.— Meyer *v.* Graeber, 19 Kan. 165; Kansas L. & T. Co. *v.* Gill, 2 Kan. App. 488, 43 Pac. 991.

Minnesota.— Cleveland *v.* Booth, 43 Minn. 16, 44 N. W. 670.

Missouri.— Butler Bldg., etc., Co. *v.* Dunsworth, 146 Mo. 361, 48 S. W. 449.

Nebraska.— Omaha L. & T. Co. *v.* Kitton, 58 Nebr. 113, 78 N. W. 374.

New Jersey.— Van Doren *v.* Dickerson, 33 N. J. Eq. 388.

New York.— Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 178 N. Y. 588, 70 N. E. 1102; Cook *v.* Clark, 68 N. Y. 178; Central Trust Co. *v.* New York City, etc., R. Co., 33 Hun 513; Burt *v.* Saxton, 1 Hun 551; Cook *v.* Rogers, 5 Thomps. & C. 493; Mallory *v.* West Shore Hudson River R. Co., 35 N. Y. Super. Ct. 174; Asendorf *v.* Meyer, 8 Daly 278.

North Carolina.— Gore *v.* Davis, 124 N. C. 234, 32 S. E. 554.

Ohio.— Goodman *v.* Cincinnati, etc., R. Co., 2 Disn. 176.

Rhode Island.— Carpenter *v.* Carpenter, 6 R. I. 542.

Texas.— Warren *v.* Harrold, 92 Tex. 417, 49 S. W. 364; McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

Washington.— See Bank *v.* Doherty, 29 Wash. 233, 69 Pac. 732, 92 Am. St. Rep. 903.

Wisconsin.— Scheibe *v.* Kennedy, 64 Wis. 564, 25 N. W. 646.

United States.— New York Security, etc., Co. *v.* Lincoln St. R. Co., 74 Fed. 67; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 61 Fed. 543; Black *v.* Reno, 59 Fed. 917; Swett *v.* Stark, 31 Fed. 858; Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 24 Fed. 407; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846; London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

England.— Leeds, etc., Theatre *v.* Broadbent, [1898] 1 Ch. 343, 67 L. J. Ch. 135, 77 L. T. Rep. N. S. 665, 46 Wkly. Rep. 230; Edwards *v.* Martin, 25 L. J. Ch. 284, 4 Wkly. Rep. 219.

Canada.— Canada Settlers' Loan Co. *v.* Nicholles, 5 Brit. Col. 41.

See 35 Cent. Dig. tit. "Mortgages," § 1163.

Interest not payable periodically.— When the interest on notes payable in five years and secured by mortgage is not conditioned to be paid annually or at any time before the principal is due, a default in paying interest is not a "failure to make any of the payments required" so as to authorize a foreclosure before the maturity of the debt. Rowe *v.* Griffiths, 57 Nebr. 488, 78 N. W. 20.

Usurious interest.— An action to foreclose because of default in the payment of usurious and void coupon interest notes, the principal note not being due, is prematurely brought. Vermont L. & T. Co. *v.* Tetzlaff, 6 Ida. 105, 53 Pac. 104.

Forfeiture should not be enforced where the cause of the delay of payment was that the mortgagor in good faith denied his liability, although erroneously (Wilcox *v.* Allen, 36 Mich. 160); where the mortgagee changed his residence, and gave the mortgagor no notice, so that the latter was unable to find him (Schieck *v.* Donohue, 92 N. Y. App. Div. 330, 87 N. Y. Suppl. 206); where the mortgagor supposed that the interest had been paid, and it appears that the mortgagee had been accustomed to receive it from one to six months after it became due, and that he had an ulterior purpose in seeking to foreclose (French *v.* Row, 77 Hun (N. Y.) 380, 28 N. Y. Suppl. 849).

Neglect of mortgagor.— The mortgagor will not be relieved from the consequences of his mere neglect, where he does not tender the interest due, and it does not appear that the mortgagee has done anything to prevent the payment being made. Hunt *v.* Keech, 3 Abb. Pr. (N. Y.) 204. And see Probasco *v.* Vaneppes, (N. J. Ch. 1888) 13 Atl. 598.

29. *Arkansas.*— Farnsworth *v.* Hoover, 66 Ark. 367, 50 S. W. 865.

California.—Clemens *v.* Luce, 101 Cal. 432, 35 Pac. 1032.

Illinois.— Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336.

Iowa.— Fox *v.* Gray, 105 Iowa 433, 75 N. W. 339; Clayton *v.* Whitaker, 68 Iowa 412, 27 N. W. 296.

Maryland.— Mobray *v.* Leckie, 42 Md. 474.

Nebraska.— Lantry *v.* French, 33 Nebr. 524, 50 N. W. 679.

New Jersey.— Security Trust, etc., Co. *v.* New Jersey Paper Board, etc., Mfg. Co., 57 N. J. Eq. 603, 42 Atl. 746; Schmitz *v.* Scheifele, (Ch. 1887) 7 Atl. 351; Baldwin *v.* Van Vorst, 10 N. J. Eq. 577.

New York.— Price *v.* Wood, 76 Hun 318, 27 N. Y. Suppl. 691; Martin *v.* Clover, 17 N. Y. Suppl. 638; Lyon *v.* New York, etc., R. Co., 13 N. Y. St. 732.

Ohio.— Cincinnati Hotel Co. *v.* Central

indebtedness due thereupon.[30] But if the mortgage also provides that foreclosure shall not be had, or that the entire debt shall not fall due, until such default has continued for a stated length of time, a bill filed before the expiration of that time is premature.[31]

(IV) *TAXES AND INSURANCE.* In the absence of any condition in a mortgage that the debt shall become due before the date of maturity fixed therein, a foreclosure will not be decreed before that date for default of the mortgagor in the payment of taxes on the premises.[32] But if it provides that the whole indebtedness shall become due, either absolutely or at the option of the mortgagee, on the failure of the mortgagor to pay the taxes, such a default will justify an immediate foreclosure, although the debt secured would not otherwise be due.[33] The same rules apply to a breach of a condition to keep the property insured and default in the payment of the premiums.[34]

d. Breach of Other Conditions — (I) *IN GENERAL.* A mortgage may be conditioned otherwise than for the payment of money, and a breach of the condition will generally give an immediate right of foreclosure.[35] This also results accord-

Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

Wisconsin.— Schoonmaker *v.* Taylor, 14 Wis. 313.

See 35 Cent. Dig. tit. "Mortgages," § 1163.

30. *California.* — Foerst *v.* Masonic Hall Assoc., (1893) 31 Pac. 903; Campbell *v.* West, 86 Cal. 197, 24 Pac. 1000.

Indiana.— Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510.

Iowa.— Wood *v.* Whisler, 67 Iowa 676, 25 N. W. 847.

Nebraska.— Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207.

New Jersey.— De Groot *v.* McCotter, 19 N. J. Eq. 531.

New York.— Malcolm *v.* Allen, 49 N. Y. 448; Schieck *v.* Donohue, 77 N. Y. App. Div. 321, 79 N. Y. Suppl. 233.

Pennsylvania.— Thompson *v.* Johnson, 1 Phila. 506.

Texas.— Dugan *v.* Lewis, 79 Tex. 246, 14 S. W. 1024, 23 Am. St. Rep. 332, 12 L. R. A. 93.

Wisconsin.— Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336.

United States.— Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350; Scottish-American Mortg. Co. *v.* Wilson, 24 Fed. 310.

See 35 Cent. Dig. tit. "Mortgages," § 1163.

31. Potomac Mfg. Co. *v.* Evans, 84 Va. 717, 6 S. E. 2; Indiana, etc., R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554; Mercantile Trust Co. *v.* Chicago, etc., R. Co., 61 Fed. 372; Alabama, etc., Mfg. Co. *v.* Robinson, 56 Fed. 690, 6 C. C. A. 79.

32. *Florida.*— Kirk *v.* Van Petten, 38 Fla. 335, 21 So. 286.

Iowa.— Savage *v.* Scott, 45 Iowa 130.

Kansas.— Noble *v.* Greer, 48 Kan. 41, 28 Pac. 1004.

Missouri.— Swon *v.* Stevens, 143 Mo. 384, 45 S. W. 270.

New Jersey.— Bradley *v.* Glenmary Co., 64 N. J. Eq. 77, 53 Atl. 49, holding that in a suit to foreclose a mortgage, a failure to pay taxes after the filing of the bill is of no avail to the complainant.

New York.— Williams *v.* Townsend, 31 N. Y. 411, holding that where the provision of the mortgage is that the mortgagee may pay the taxes, on the mortgagor's failure to do so, and collect them as a part of the mortgage debt, this does not mean that the mortgagee may foreclose and collect the whole debt merely on the mortgagor's failure to pay taxes.

Wisconsin.— Heller *v.* Neeves, 93 Wis. 637, 67 N. W. 923, 68 N. W. 412, holding that, although the mortgagor expressly covenants to pay the taxes, yet if there is no stipulation that the mortgagee may pay them and recover the amount as part of the mortgage debt, or that the debt should become due on default in the payment of taxes, a mere breach of the covenant gives no right to foreclose.

See 35 Cent. Dig. tit. "Mortgages," § 1164.

33. *Kansas.*— Bonner Springs Lodge, etc., Co. *v.* McClelland, (1898) 53 Pac. 866; Ellwood *v.* Wolcott, 32 Kan. 526, 4 Pac. 1056.

Maryland.— Gustav Adolph Bldg. Assoc. No. 1 *v.* Kratz, 55 Md. 394.

New York.— Martin *v.* Clover, 17 N. Y. Suppl. 638.

Texas.— Clark *v.* Elmendorf, (Civ. App. 1904) 78 S. W. 538.

Washington.— Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345.

See 35 Cent. Dig. tit. "Mortgages," § 1164.

Payment before suit.—Where the mortgage provided that the whole indebtedness should become due if the taxes remained unpaid for a given time, and the mortgagor defaulted in the payment of the taxes, but afterward paid them without prejudice to the mortgagee and before suit brought to declare the debt due because of such default, it was held that such payment was a bar to the suit. Smalley *v.* Ranken, 85 Iowa 612, 52 N. W. 507. And see Fox *v.* Helmuth, 27 Pa. Super. Ct. 81.

34. Uedelhofen *v.* Mason, 201 Ill. 465, 66 N. E. 364; Lange *v.* Grabe, 11 Ohio Cir. Ct. 171, 5 Ohio Cir. Dec. 148.

35. King *v.* King, 215 Ill. 100, 74 N. E. 89; Blakey *v.* Martin Emerich Outfitting Co.,

ing to some of the decisions, when it has become impossible for the mortgagor to fulfil the condition, by reason of his insolvency or otherwise.[36] And where the mortgage is conditioned for other acts beside the payment of a note, any breach of its conditions will give a right of foreclosure, although the note is not yet due.[37] But ordinarily a conveyance of the fee by the mortgagor is not such a violation of the conditions of the mortgage or such a breach of trust as will warrant an action to foreclose.[38]

(II) *Mortgage For Support and Maintenance.* A mortgage conditioned for the support and maintenance of the mortgagee or a third person is broken, so as to justify a foreclosure, not merely by a continued and persistent neglect to comply with its terms, but by a single refusal to furnish what the mortgage requires, if definite and absolute, or by a declaration that the mortgagor does not intend to comply with it, if positive and final.[39]

(III) *Indemnity Mortgages.* As has been already stated an indemnity mortgage cannot be enforced by foreclosure until the mortgagee has been actually damnified by paying the debt or obligation assumed, or until his liability for it has become immediately and absolutely fixed.[40]

(IV) *Contingent Liabilities.* Where the liability under a mortgage is con-

58 Ill. App. 298; Waters *v.* Bossel, 58 Miss. 602; Metropolitan L. Ins. Co. *v.* Hall, 10 N. Y. Suppl. 196; Graham *v.* Ross, 6 Ont. 154, breach of agreement to build a house on the premises.

Failure to pay a judgment.— A judgment against a corporation is not collusive in the legal sense, so as to prevent its non-payment from constituting a default for which a mortgage debt may be declared due under a provision of the mortgage, merely because the action was undertaken for the purpose of creating such default, if it was brought for a debt that was due and was properly conducted. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423.

36. Harding *v.* Mill River Woolen Mfg. Co., 34 Conn. 458; Green *v.* Conkling, 3 Md. 384.

37. Taylor *v.* Alliance Trust Co., 71 Miss. 694, 15 So. 121.

38. Coffing *v.* Taylor, 16 Ill. 457; Palma *v.* Abat, 21 La. Ann. 11; Nathan *v.* Lee, 2 Mart. N. S. (La.) 32.

39. *Connecticut.*— Cook *v.* Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452.

Indiana.— Green *v.* Green, 32 Ind. 276.

Maine.— Plummer *v.* Doughty, 78 Me. 341, 5 Atl. 526.

Massachusetts.— Pettee *v.* Case, 2 Allen 546; Fiske *v.* Fiske, 20 Pick. 499.

Michigan.— Tucker *v.* Tucker, 24 Mich. 426; Hawkins *v.* Clermont, 15 Mich. 511.

New Hampshire.— Rhoades *v.* Parker, 10 N. H. 83.

Ohio.— Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214.

Wisconsin.— Peterson *v.* Oleson, 47 Wis. 122, 2 N. W. 94.

See 35 Cent. Dig. tit. "Mortgages," § 1167.

Place of furnishing support.— Where the condition of the mortgage requires the mortgagee to furnish support for the mortgagor, without any limitation as to the place where it is to be furnished, it is the mortgagee's right to appoint such place, and if he appoints a reasonable place the condition of the mortgage is broken by a failure to support him there. Powers *v.* Mastin, 62 Vt. 433, 20 Atl. 105. But see Rhoades *v.* Parker, 10 N. H. 83.

Measure of damages.— The breach of the condition of a bond given by a son to support his parents during their natural lives entitles them to foreclose the mortgage securing the bond, but does not necessarily entitle them to the full penalty of the bond as damages, especially if the condition has been satisfactorily carried out for several years, and no evidence is given of the actual injury resulting from the breach. Wright *v.* Wright, 49 Mich. 624, 14 N. W. 571.

Equivalent performance.— Where a son who had given his mother a mortgage binding himself to support her for her life made substantial provision for her support, and no demand was made on him for other or additional support, no recovery could be had for a breach of the covenant. Calhoun *v.* Calhoun, 49 N. Y. App. Div. 520, 63 N. Y. Suppl. 601.

40. See *supra*, VII, C, 4.

Mortgage more than a contract of indemnity.— Where plaintiff, having mortgaged lands, afterward sold them to defendant in consideration of his agreement to pay the mortgage, and defendant mortgaged them back to secure performance, it was held that the latter mortgage was not merely a contract of indemnity, but could be sued on at once, on his failure to keep his agreement, although plaintiff had paid nothing on his own mortgage. Wells *v.* Merritt, 17 Ind. 255.

Setting up claims not yet due.— In a suit to foreclose an indemnity mortgage given to protect a buyer of land against encumbrances, it is proper to set up, with other demands, claims not yet due but which will become liens on the land. Hickox *v.* Avery, 4 Ohio Dec. (Reprint) 275, 1 Clev. L. Rep. 196.

ditioned upon some future and contingent event, the right to foreclose accrues immediately upon its happening.[41]

e. Stipulations Against Forfeiture — (i) *Stipulation in Mortgage.* A stipulation in a mortgage postponing the right to foreclose until a period later than the maturity of the debt or obligation secured is valid and will be given due effect;[42] and so will a provision that the other property of the mortgagor shall be exhausted before resort is had to foreclosure.[43] A stipulation by a mortgagee not to "assign or dispose of the mortgage" until he has made advances to a certain amount will not prevent him from foreclosing for the sum actually advanced, before the advances amount to the sum specified.[44]

(ii) *Extrinsic Agreements.* The parties to a mortgage may postpone the right to foreclose it, by a separate agreement to that effect.[45] Such a contract must be supported by a consideration.[46] And it is doubtful if the provisions of the mortgage can be thus varied by a parol agreement.[47]

41. *Illinois.*— Fetrow *v.* Merriwether, 53 Ill. 275.

Michigan.— Ligare *v.* Semple, 32 Mich. 438.

Minnesota.— Farwell *v.* Bale, 49 Minn. 13, 51 N. W. 621.

Vermont.— Van Namee *v.* Groot, 40 Vt. 74.

West Virginia.— Pitzer *v.* Burns, 7 W. Va. 63.

See 35 Cent. Dig. tit. "Mortgages," § 1169.

Where a judgment was assigned after it had been extinguished by the statute of limitations, and a mortgage was given with it to secure a guaranty that it was valid, the condition of the mortgage was broken when it was given. Duecker *v.* Goeres, 104 Wis. 29, 80 N. W. 91.

Performance before decree.— Where a bill was filed to foreclose a mortgage conditioned to convey land, for failure of the mortgagor to give a title, he is entitled to have the mortgage delivered up on his giving a good title at any time before decree. Clute *v.* Robinson, 2 Johns. (N. Y.) 595.

42. Duvall *v.* Farmers' Bank, 9 Gill & J. (Md.) 31; Stewart *v.* Bardin, 113 N. C. 277, 18 S. E. 320; Union Trust Co. *v.* Chattanooga Electric R. Co., 101 Tenn. 297, 47 S. W. 422.

43. Riblet *v.* Davis, 24 Ohio St. 114.

44. Baldwin *v.* Flagg, 36 N. J. Eq. 48.

45. *Colorado.*— Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

Illinois.— Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248.

Iowa.— Malli *v.* Willett, 57 Iowa 705, 11 N. W. 661.

Louisiana.— Relf *v.* McDonogh, 19 La. 100.

Michigan.— Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58; Brown *v.* Miller, 63 Mich. 413, 29 N. W. 879.

New Hampshire.— Rogers *v.* Mitchell, 41 N. H. 154.

New York.— Cook *v.* Adams, 32 N. Y. App. Div. 385, 53 N. Y. Suppl. 120; Noyes *v.* Anderson, 14 Daly 526, 1 N. Y. Suppl. 5; Union Dime Sav. Inst. *v.* Quinn, 63 How. Pr. 211.

See 35 Cent. Dig. tit. "Mortgages," § 1171.

Agreement between mortgagor and purchaser.— The mortgagor and purchaser of the mortgaged premises cannot affect the rights of the mortgagee to enforce a later mortgage, given on other land by the mortgagor to the purchaser, by any agreement between themselves after the earlier mortgagee had commenced suit for foreclosure of the later mortgage. Magill *v.* Brown, 20 Tex. Civ. App. 662, 50 S. W. 143, 642.

Conditional agreement.— Where certain holders of the notes of a corporation, secured by mortgage, agree to convert their notes into stock, if all holders of notes will do the same, and all do not, the agreement is no bar to a foreclosure. Pugh *v.* Fairmount Gold, etc., Min. Co., 112 U. S. 238, 5 S. Ct. 131, 28 L. ed. 684.

Estoppel of mortgagor.—Where it has been agreed that a purchase-money mortgage shall not be foreclosed until the mortgagee has removed all clouds on the title, but the mortgagor has endeavored to prevent him from doing so, by acquiring and setting up independent titles in himself, he is estopped to rely on the agreement. Haney *v.* Roy, 54 Mich. 635, 20 N. W. 621.

Agreements insufficient to stop foreclosure. — Where a subsequent agreement with the mortgagor is merely that no deficiency judgment shall be taken against him, this does not prevent the mortgagee from foreclosing (Mentzer *v.* Abbott, 20 Wash. 708, 54 Pac. 762); neither does a junior mortgagee's agreement merely to allow a renewal of the senior lien (Mjones *v.* Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072).

46. Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228; Richardson *v.* Noble, 77 Me. 390; McLean *v.* Towle, 3 Sandf. Ch. (N. Y.) 117.

47. Unity Co. *v.* Equitable Trust Co., 107 Ill. App. 449 [*affirmed* in 204 Ill. 595, 68 N. E. 654]; Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228. *Compare* Byers *v.* Byers, 65 Mich. 598, 32 N. W. 831.

Parol agreement made prior to execution of mortgage.— It is clear that parol agreements between the parties to a mortgage concerning the time of foreclosure, made before the execution of the mortgage, cannot affect the rights of the mortgagee, as they become merged in the written instrument.

f. Waiver of Default — (I) *In General.* A waiver of a breach of the condition of the mortgage, and of the consequent right to foreclose, may be inferred from the conduct of the mortgagee in resorting to other means of obtaining satisfaction of his debt,[48] from his abandoning his prayer for sale of the mortgaged premises and asking for a money judgment instead,[49] or from his neglect to perform conditions binding on him and on which his right to take advantage of the default is predicated;[50] but not generally from loose declarations which he is under no obligation to make, and on which no person relies to his prejudice.[51]

(II) *By Agreement.* A mortgagee may waive his right to foreclose, either absolutely or for a limited period, by a sufficient agreement with the mortgagor, by which he relinquishes that right,[52] but not by a mere verbal agreement or promise,[53] unless an estoppel can be raised against him by the fact that the other party to the agreement has relied on such promise and has performed his part of the bargain.[54]

(III) *By Accepting Overdue Instalment of Interest.* Where a mortgagee accepts payment of an instalment of interest after it is in arrear, it is a waiver of his right to declare the entire indebtedness due on account of such default;[55] but the fact that he has done so does not prejudice his right to declare

Mead *v.* Mead, 27 Misc. (N. Y. 459, 59 N. Y. Suppl. 444.

48. *Alabama.*—Porter *v.* Wheeler, 105 Ala. 451, 17 So. 227, holding that where the mortgagee sues for a debt not covered by the mortgage, recovers judgment, and has the mortgaged premises sold on execution, this does not prevent him from foreclosing for the mortgage debt.

California.— Gerig *v.* Loveland, 130 Cal. 512, 62 Pac. 830; McArthur *v.* Magee, 114 Cal. 126, 45 Pac. 1068.

Connecticut.— Mallory *v.* Hitchcock, 29 Conn. 127, taking rents and profits from the land sufficient to discharge the debt.

Indiana.— Goff *v.* Hedgecock, 144 Ind. 415, 43 N. E. 644.

Louisiana.— Learned *v.* Walton, 42 La. Ann. 455, 7 So. 723.

New York.— Williams *v.* Townsend, 1 Bosw. 411. An offer to pay a mortgage, not accepted, is no estoppel to a subsequent denial of the amount due, or of the right of the holder to enforce payment thereof. Jackson *v.* Campbell, 5 Wend. 572.

Pennsylvania.— Schweitzer *v.* Stoeckel, 4 Phila. 281, widow's election between dower and rights secured under a mortgage.

Utah.— Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

See 35 Cent. Dig. tit. "Mortgages," § 1172.

49. Ladd *v.* Ruggles, 23 Cal. 232.

A demand made by a mortgagee for payment of interest on his mortgage debt, after properly commencing suit for foreclosure, has no effect on his right to foreclose. Parker *v.* Olliver, 106 Ala. 549, 18 So. 40.

50. Lawrance *v.* Ward, 28 Utah 129, 77 Pac. 229.

51. See Powell *v.* Rogers, 105 Ill. 318; Kilhorn *v.* Robbins, 8 Allen (Mass.) 466; Sweetzer *v.* Atterbury, 137 Pa. St. 188, 20 Atl. 569.

52. *Alabama.*— Bolling *v.* Roman, 95 Ala. 518, 10 So. 553.

California.— Seaton *v.* Fiske, 128 Cal. 549, 61 Pac. 666.

Georgia.— Byars *v.* Bancroft, 22 Ga. 34.

New Hampshire.— Sanborn *v.* Ladd, 69 N. H. 221, 39 Atl. 1072.

New York.— Nicholson *v.* Cinque, 51 N. Y. App. Div. 604, 64 N. Y. Suppl. 191.

See 35 Cent. Dig. tit. "Mortgages," § 1173.

Agreement for judgment.— A stipulation between the parties to a mortgage that judgment may be entered for a certain sum of money is no waiver of the right to foreclose the mortgage. Nosler *v.* Haynes, 2 Nev. 53.

An entry of satisfaction on the record, on the payment of the first of five notes secured by the mortgage, may deprive the mortgagee of the right to a decree against the property, but not of his right to a personal decree against the mortgagor for the remaining notes. Beal *v.* Stevens, 72 Cal. 451, 14 Pac. 186.

53. Leavitt *v.* Pratt, 53 Me. 147. And see Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423. But see Lyon *v.* New York, etc., R. Co., 13 N. Y. St. 732, holding that where a large majority of the holders of bonds of a railroad secured by mortgage entered into a scheme by which interest in arrear was released, and a new mortgage taken in its place, this, as against a minority bondholder, amounted to a waiver of the right to treat the principal as due on account of such default of interest, although the scheme was not evidenced by any written instrument.

54. Faxton *v.* Faxton, 28 Mich. 159. See also McCotter *v.* De Groot, 19 N. J. Eq. 72.

55. *Alabama.*— Parker *v.* Olliver, 106 Ala. 549, 18 So. 40.

California.— Mason *v.* Luce, 116 Cal. 232, 48 Pac. 72.

Illinois.— Houston *v.* Curran, 101 Ill. App. 203. See also Van Vlissingen *v.* Lenz, 171 Ill. 162, 49 N. E. 422.

Indiana.— Huston *v.* Fatka, 30 Ind. App. 693, 66 N. E. 74.

Iowa.— Smalley *v.* Ranken, 85 Iowa 612, 52 N. W. 507.

Kansas.— Jacobs *v.* Swift, 8 Kan. App. 857, 56 Pac. 1127.

a forfeiture of the entire mortgage on a subsequent occurrence of a similar default in the payment of interest.[56] And where the mortgagee exercises this option on the first default in the payment of interest, his rights are not affected by his acceptance of the amount of the second instalment, maturing while his foreclosure suit on the first is pending.[57]

(IV) *By Accepting Taxes.* Where a mortgagor who has defaulted in the payment of taxes pays the same without prejudice to the mortgagee and before suit brought to declare the debt due because of the default, such payment operates as a waiver of the default;[58] but a mortgagee by failure to foreclose on the first delinquency in paying taxes does not waive his right to foreclose on a subsequent delinquency in this respect.[59] Where the mortgagor covenants that he will pay the taxes on the property, in default of which the mortgagee may foreclose, the latter does not waive his right to foreclose for breach of this covenant by paying the taxes himself and charging them to the mortgagor.[60]

(V) *By Delay or Failure to Foreclose.* Proceedings to foreclose a mortgage should be taken with reasonable promptness,[61] and the right under the terms of the mortgage to foreclose for the entire indebtedness on a partial default may be lost by laches, although not, it seems, by any delay which has not operated to the benefit of the mortgagee or the detriment of the mortgagor.[62]

g. Rights of Junior Encumbrancers — (I) *In General.* A junior encumbrancer, either bringing his own suit or intervening in that of the senior lienor, has the right to contest the superiority of the alleged elder lien,[63] or the validity of the mortgage under which it is claimed;[64] but not the title of the senior lienor, as assignee of the mortgage, where it is not disputed by either the mortgagor or the original first mortgagee,[65] nor can he have the first mortgagee's sale

Michigan.— Brown *v.* Thompson, 29 Mich. 72.

New Jersey.— Sire *v.* Wightman, 25 N. J. Eq. 102.

New York.— Ver Planck *v.* Godfrey, 42 N. Y. App. Div. 16, 58 N. Y. Suppl. 784; Lawson *v.* Barron, 18 Hun 414; Lyon *v.* New York, etc., R. Co., 14 Daly 489, 15 N. Y. St. 348. See also Rubens *v.* Prindle, 44 Barb. 336.

Virginia.— Faulkner *v.* Brockenbrough, 4 Rand. 245.

United States.—Alabama, etc., Mfg. Co. *v.* Robinson, 56 Fed. 690, 6 C. C. A. 79.

See 35 Cent. Dig. tit. "Mortgages," § 1175.

Partial payment of an instalment of interest due on a mortgage does not satisfy a clause therein which provides that, if default is made in payment of interest for thirty days, the principal shall become due. Smith *v.* Hooton, 3 Pa. Dist. 250.

The unauthorized acceptance of interest by an agent of the mortgagee, after default, does not restore the contract. Sloat *v.* Bean, 47 Iowa 60.

Default as to principal.— Under a mortgage giving the mortgagee the right to declare the whole debt due on default in the payment of either interest or principal, as they respectively matured, the subsequent acceptance of interest due does not waive a default in the payment of the matured principal. Northwestern Mut. L. Ins. Co. *v.* Butler, 57 Nebr. 198, 77 N. W. 667.

56. *Alabama.*— Parker *v.* Olliver, 106 Ala. 549, 18 So. 40.

California.— Campbell *v.* West, 86 Cal. 197, 24 Pac. 1000.

Indiana.— Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466.

Nebraska.— Baldwin Inv. Co. *v.* Bailey, 45 Nebr. 580, 63 N. W. 847.

New Jersey.— O'Connor *v.* Meskill, (Ch. 1898) 39 Atl. 1061; Industrial Land Development Co. *v.* Post, 55 N. J. Eq. 559, 37 Atl. 892; Post *v.* Industrial Land Development Co., (Ch. 1896) 34 Atl. 137.

New York.— Odell *v.* Hoyt, 73 N. Y. 343.

Pennsylvania.— Pennsylvania Trust Co. *v.* Bogert, 11 Kulp 247; Pennsylvania Hospital Contributors *v.* Gibson, 2 Miles 324.

See 35 Cent. Dig. tit. "Mortgages," § 1175.

57. Curran *v.* Houston, 201 Ill. 442, 66 N. E. 228.

58. Smalley *v.* Ranken, 85 Iowa 612, 52 N. W. 507.

59. Parker *v.* Olliver, 106 Ala. 549, 18 So. 40.

60. Brickell *v.* Batchelder, 62 Cal. 623; Rasmussen *v.* Levin, 28 Colo. 448, 65 Pac. 94.

61. Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331; North American F. Ins. Co. *v.* Mowatt, 2 Sandf. Ch. (N. Y.) 108.

62. Fletcher *v.* Dennison, 101 Cal. 292, 35 Pac. 868; Kansas L. & T. Co. *v.* Gill, 2 Kan. App. 488, 43 Pac. 991; Kansas City Sav. Assoc. *v.* Mastin, 61 Mo. 435. See also Arnot *v.* Union Salt Co., 109 N. Y. App. Div. 433, 96 N. Y. Suppl. 80.

63. Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609; Bleidorn *v.* Abel, 6 Iowa 5.

64. Howell *v.* McCrie, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584.

65. Markson *v.* Ide, 29 Kan. 649. But see Manne *v.* Carlson, 49 N. Y. App. Div. 276,

set aside or annulled except for good and sufficient reasons;[66] and although he can require the property covered by the respective mortgages to be so marshaled as to produce satisfaction for both if possible,[67] the senior mortgagee cannot be compelled to delay his proceedings to enable junior encumbrancers to settle their rights as between themselves.[68]

(II) *JUNIOR MORTGAGEE.* The rules just stated apply to the holder of a junior mortgage. He is entitled to contest the right of the senior mortgagee to foreclose, or the validity or rank of his lien, where the attempted foreclosure would be injurious to his own interests;[69] to assert his rights and have them recognized by means of a cross bill;[70] to insist upon an equitable marshaling of the property liable to the satisfaction of their respective mortgages;[71] or to pay off and redeem the senior lien.[72] But he cannot compel the senior mortgagee to foreclose, or maintain a bill in his own name for the foreclosure of both the mortgages,[73] nor can he set up independent claims against the first mortgagee or

63 N. Y. Suppl. 162, holding that, where a subsequent lien-holder is made a party to an action to foreclose a mortgage, he is entitled to demur to the complaint, and object to the foreclosure of the mortgage by one who has no title to it.

66. Harris *v.* Hooper, 50 Md. 537.

67. State *v.* Ætna L. Ins. Co., 117 Ind. 251, 20 N. E. 144; Knox *v.* Moser, 69 Iowa 341, 28 N. W. 629; Sowell *v.* Cox, 10 Rob. (La.) 68. See also Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397, holding that a mortgagee who asserts the right to foreclose his mortgage to the exclusion of a subsequent lienor cannot object to such lienor's enforcing his lien, to the exclusion of such mortgagee, on other property to which his lien applies, and on which such mortgagee also claims a similar lien for any possible deficiency.

68. Miller *v.* Case, Clarke (N. Y.) 395.

69. Mann *v.* Thayer, 18 Wis. 479.

Validity of senior mortgage.— The junior mortgagee can contest the validity of the senior mortgage on the ground of fraud or other cause. Pickersgill *v.* Brown, 7 La. Ann. 297.

Priority of lien. — The junior mortgagee may contest the priority of the alleged elder mortgage and show grounds for subordinating it to his own. See Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609; Simmons Hardware Co. *v.* Brokaw, 7 Nebr. 405; First Nat. Bank *v.* Tamble, (Tenn. Ch. App. 1900) 62 S. W. 308. Where the same deed of trust secures two notes, an agreement by a purchaser of one of the notes that his lien shall be subordinate to the lien of the other note is valid, and he may, on foreclosing the trust deed to satisfy his note, procure a decree and sale of the property subject to the continuing lien of the other note, provided third persons are not injured thereby. Jackson *v.* Grosser, 218 Ill. 494, 75 N. E. 1032.

Amount of senior mortgage.— The junior mortgagee may show that the claim of the senior mortgagee is exaggerated, or any similar fact which will increase the margin of his own security. Carpentier *v.* Brenham, 40 Cal. 221.

Usury.— A junior mortgagee has no right to set up usury in opposition to the foreclosure of the senior mortgage, if the mortgagor does not plead it. Stickney *v.* Moore, 108 Ala. 590, 19 So. 76; Union Nat. Bank *v.* International Bank, 123 Ill. 510, 14 N. E. 859; Churchill *v.* Cole, 32 Vt. 93.

Statute of limitations.— The junior mortgagee may plead the statute of limitations against the foreclosure of the senior mortgage (Carpentier *v.* Brenham, 40 Cal. 221); but not where his mortgage was expressly made subject to the prior mortgage (Park *v.* Prendergast, 4 Tex. Civ. App. 566, 23 S. W. 535).

70. Stockton Sav., etc., Soc. *v.* Harrold, 127 Cal. 612, 60 Pac. 165. But see Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375.

71. See Vanmeter *v.* Savage, 60 S. W. 646, 22 Ky. L. Rep. 1476; Rogers *v.* Holyoke, 14 Minn. 220; First Nat. Bank *v.* Tamble, (Tenn. Ch. App. 1900) 62 S. W. 308.

Compelling prior mortgagee to resort to mortgagor's personal liability. — This rule does not give the second mortgagee the right to compel the holder of the prior mortgage to resort to the personal liability of the mortgagor, instead of proceeding against the land. McKinstry *v.* Curtis, 10 Paige (N. Y.) 503.

If part of the mortgaged premises have been sold under the senior mortgage, they may be excepted in a bill to foreclose the subsequent mortgage. Sedam *v.* Williams, 21 Fed. Cas. No. 12,609, 4 McLean 51.

A junior mortgagee is not bound to see that an amount sufficient to satisfy prior liens is realized from a sale under his mortgage, nor is the prior mortgagee bound to take notice of such sale and bid. Herrick *v.* Tallman, 75 Iowa 441, 39 N. W. 699.

72. Frost *v.* Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Citizens' Sav. Bank *v.* Foster, 6 N. Y. Suppl. 420, 22 Abb. N. Cas. 425; Foster *v.* Furlong, 8 N. D. 282, 78 N. W. 986; Adams *v.* Angell, 5 Ch. D. 634, 46 L. J. Ch. 352, 36 L. T. Rep. N. S. 334.

73. Threefoot *v.* Hillman, 130 Ala. 244, 30 So. 513, 89 Am. St. Rep. 39; Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Garrett *v.* Peirce, 74 Ill. App. 225; Wytheville Crystal Ice, etc., Co. *v.* Frick Co., 96 Va. 141, 30 S. E. 491.

a co-defendant which are not connected with, or do not grow out of, the mortgages in suit.[74]

(III) *Assignee of Junior Mortgagee.* To support the equitable rights of an assignee of a junior mortgage, it is not necessary that he should have given the first mortgagee notice of the assignment.[75] It is the right of such assignee to file a bill for an account against the holder of the first mortgage, and also against the mortgagor, to foreclose the right to redeem.[76] A bill for foreclosure of a junior mortgage, filed by its assignee, will be dismissed where it appears that the holder of the senior mortgage, who is also the grantee of the equity of redemption, had agreed with the assignee to purchase his mortgage at a certain price, but that the assignee refused to transfer it.[77]

h. Existence of and Resort to Other Remedies — (I) *In General.* That satisfaction of a mortgage could be obtained by the execution of a power of sale which it contains is no reason why the mortgagee should not resort to an action for foreclosure if he so chooses,[78] nor will such action be barred by a previous abortive or invalid attempt to exercise the power of sale,[79] nor by the fact that the mortgagee has recovered possession of the premises in ejectment or other appropriate action.[80] So, where the mortgage imports a confession of judgment, and, by statute, may be enforced by a writ of seizure and sale, this does not preclude a bill in equity to foreclose it.[81]

(II) *Additional Security.* The fact that a mortgagee of real property may at the same time hold additional or cumulative security for the same debt does not interfere with his right to foreclose the mortgage, or compel him to exhaust such other security before foreclosing.[82]

74. Stockton Sav., etc., Soc. *v.* Harrold, 127 Cal. 612, 60 Pac. 165; Conover *v.* Sealy, 45 N. J. Eq. 589, 19 Atl. 616; Bybee *v.* Hawkett, 12 Fed. 649, 8 Sawy. 176.

75. Swift *v.* Edson, 5 Conn. 531.

76. Blake *v.* Williams, 36 N. H. 39.

77. Cavanaugh *v.* McWilliams, 22 Ill. App. 197.

78. Forepaugh *v.* Pryor, 30 Minn. 35, 14 N. W. 61; Milligan *v.* Cromwell, 3 N. M. 327, 9 Pac. 359; Furbish *v.* Sears, 9 Fed. Cas. No. 5,160, 2 Cliff. 454.

79. *Iowa.*— Tucker *v.* Silver, 9 Iowa 261.

Minnesota.— Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Lash *v.* McCormick, 17 Minn. 403.

Mississippi.— Baldwin *v.* Jenkins, 23 Miss. 206.

Missouri.— Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161.

North Carolina.— Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231.

Pennsylvania.— Lewis *v.* Germania Sav. Bank, 96 Pa. St. 86.

United States.— Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706.

See 35 Cent. Dig. tit. "Mortgages," § 1181.

Contra.— McLean *v.* Presley, 56 Ala. 211; Cox *v.* Wheeler, 7 Paige (N. Y.) 248.

80. Thompson *v.* Norwood, 56 Miss. 487; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Smith *v.* Shuler, 12 Serg. & R. (Pa.) 240; Mann *v.* Falcon, 25 Tex. 271.

Payment of money into court.— In ejectment on a mortgage, the court will not allow the money due on the mortgage to be paid into court, if there is a bill in equity pending on the mortgage. Smith *v.* Fen, 9 N. J. L. 335.

81. See Townsend *v.* Payne, 42 La. Ann. 909, 8 So. 626; Rousseau *v.* Bourgeois, 28 La. Ann. 186; Bullier *v.* Huppenbauer, 23 La. Ann. 339; Benjamin *v.* Cavaroc, 3 Fed. Cas. No. 1,300, 2 Woods 168.

82. *California.*— Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

Connecticut.— Gushee *v.* Union Knife Co., 54 Conn. 191, 6 Atl. 192, holding that a creditor whose claim is secured by a mortgage on property and a judgment lien on other property can foreclose both securities at once, notwithstanding one alone may be sufficient to satisfy the debt.

Idaho.— Hailey First Nat. Bank *v.* Glenn, 10 Ida. 224, 77 Pac. 623, 109 Am. St. Rep. 204.

Indiana.— O'Haver *v.* Shidler, 26 Ind. 278; Ballenger *v.* Oswalt, 26 Ind. 182.

Kentucky.— Com. *v.* Louisville Trust Co., 26 S. W. 582, 16 Ky. L. Rep. 131.

Michigan.— Dutton *v.* Merritt, 41 Mich. 537, 2 N. W. 806; Davis *v.* Rider, 5 Mich. 423.

Nebraska.— Appleget *v.* Greene, 12 Nebr. 304, 11 N. W. 322.

New Jersey.— Dickerson *v.* Wenman, 35 N. J. Eq. 368.

South Carolina.— Georgia Cent. R., etc., Co. *v.* Claghorn, Speers Eq. 545, the court will not compel a mortgage creditor to proceed against a mere surety for the debt, in order to relieve the mortgaged property for the benefit of other creditors.

Utah.— Thompson *v.* Skeen, 14 Utah 209, 46 Pac. 1103.

Vermont.— Burpee *v.* Parker, 24 Vt. 567, holding that a mortgagee may hold two mortgages on different pieces of land to se-

(III) *Judgment on Debt.* Where a mortgagee sues and recovers judgment on the debt secured by the mortgage, or on the note or bond evidencing it, but without reference to the mortgage, this does not merge the mortgage, and the existence of the judgment in full force and unsatisfied will not prevent him from maintaining a suit for foreclosure.[83] But in several states this rule has been modified or abrogated by statute.[84]

(IV) *Concurrent Remedies.* Unless restrained by statute,[85] or by some special equity in favor of the debtor, a mortgagee may pursue concurrently all the different remedies which the law affords him for the collection of his debt, as by action at law on the note or bond, ejectment for possession of the premises, and suit in equity for foreclosure, and the pendency of one such proceeding is no

cure the same debt, and may foreclose one without the other; and a foreclosure of one will bar a foreclosure of the other only where the land foreclosed is equal in value to the debt.

Washington.— Hersner *v.* Martin, 8 Wash. 698, 36 Pac. 1096.

United States.— Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207.

Canada.— Bald *v.* Thompson, 16 Grant Ch. (U. C.) 177.

See 35 Cent. Dig. tit. "Mortgages," § 1182.

But see Soule *v.* Ludlow, 3 Hun (N. Y.) 503, holding that, where a junior mortgage is collateral to other security for the same debt, the holder may be compelled to exhaust the principal security before he can claim any equitable relief under the mortgage.

Mortgage of land and chattels.— A bill to foreclose a mortgage on real property will not lie if it appears that the mortgage also covers personal property sufficient to satisfy the debt secured, and available for its satisfaction. Koger *v.* Weakly, 2 Port. (Ala.) 516. But see Mayo *v.* Tomkies, 6 Munf. (Va.) 520.

83. *Connecticut.*— Gushee *v.* Union Knife Co., 54 Conn. 101, 6 Atl. 192.

District of Columbia.— Sis *v.* Boarman, 11 App. Cas. 116.

Indiana.— Conyers *v.* Mericles, 75 Ind. 443; Duck *v.* Wilson, 19 Ind. 190; O'Leary *v.* Snediker, 16 Ind. 404; Hensicker *v.* Lamborn, 13 Ind. 468; Stevens *v.* Dufour, 1 Blackf. 387.

Iowa.— Sigworth *v.* Meriam, 66 Iowa 477, 24 N. W. 4; Matthews *v.* Davis, 61 Iowa 225, 16 N. W 102; Morrison *v.* Morrison, 38 Iowa 73; Wahl *v.* Phillips, 12 Iowa 81.

Louisiana.—Montejo *v.* Gordy, 33 La. Ann. 1113.

Minnesota.— Macomb Sewer-Pipe Co. *v.* Hanley, 61 Minn. 350, 63 N. W. 744.

Missouri.— Kansas City Sav. Assoc. *v.* Mastin, 61 Mo. 435; Thornton *v.* Pigg, 24 Mo. 249.

New Hampshire.— Tappan *v.* Evans, 11 N. H. 311.

Pennsylvania.— See Tisdall *v.* Paul, 8 Wkly. Notes Cas. 357.

South Carolina.— Curtis *v.* Renneker, 34 S. C. 468, 13 S. E. 664.

Tennessee.— Stephens *v.* Greene County Iron Co., 11 Heisk. 71.

Texas.— Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194.

United States.— Connecticut Mut. L. Ins. Co. *v.* Jones, 8 Fed. 303, 1 McCrary 388.

Canada.— Tucker *v.* Creighton, Ritch. Eq. Cas. (Nova Scotia) 261.

See 35 Cent. Dig. tit. "Mortgages," § 1183.

84. See the statutes of the different states.

One action for debt secured by mortgage. — Where the statute provides that there shall be but one action for the recovery of any debt secured by a mortgage, the recovery of a final judgment on the mortgage debt will prevent a subsequent suit for foreclosure of the mortgage. Ould *v.* Stoddard, 54 Cal. 613; Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

Suit for foreclosure the first proceeding.— Under a statute providing that the first proceeding to recover a debt secured by mortgage shall be a suit for foreclosure of the mortgage, a judgment by confession entered on the bond, before the foreclosure of the accompanying mortgage, is irregular. Hellyer *v.* Baldwin, 53 N. J. L. 141, 20 Atl. 1080. See also Van Horn *v.* McInnes Brick Mfg. Co., 19 Pa. Co. Ct. 89.

Execution returned unsatisfied.— In several states, under statutes, no proceeding can be had for the foreclosure of a mortgage, where it appears that judgment has been recovered for the mortgage debt, unless execution issued on the judgment shall have been returned unsatisfied in whole or in part. Dennis *v.* Hemingway, Walk. (Mich.) 387; McDowell *v.* Markey, (Nebr. 1906) 108 N. W. 152; Hargreaves *v.* Menken, 45 Nebr. 668, 63 N. W. 951; Montpelier Sav. Bank, etc., Co. *v.* Follett, 68 Nebr. 416, 94 N. W. 635; Zug *v.* Forgan, 3 Nebr. (Unoff.) 149, 90 N. W. 1129; Grosvenor *v.* Day, Clarke (N. Y.) 109; Guilford *v.* Crandall, 69 Hun (N. Y.) 414, 23 N. Y. Suppl. 465; Shephard *v.* New York, 13 How. Pr. (N. Y.) 286; Shufelt *v.* Shufelt, 9 Paige (N. Y.) 137, 37 Am. Dec. 381.

85. See the statutes of the different states. And see Barbieri *v.* Ramelli, 84 Cal. 154, 23 Pac. 1086; Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Joslin *v.* Millspaugh, 27 Mich. 517; Hargreaves *v.* Menken, 45 Nebr. 668, 63 N. W. 951; Meehan *v.* Fairfield First Nat. Bank, 44 Nebr. 213, 62 N. W. 490; Heintz *v.* Klebba, 5 Nebr.

bar to the maintenance of another, although of course he can have but one satisfaction.[86]

1. Successive Foreclosures. A decree in a foreclosure suit, so long as it remains in full force, is a bar to any second action for foreclosure between the same parties on the same mortgage, although a new action may be instituted to bring in and foreclose a defendant who was omitted through a mistake or ignorance of his claims.[87] But this does not prevent the subsequent foreclosure of a separate mortgage given to secure any deficiency that might arise on the foreclosure of the first.[88]

(Unoff.) 289, 98 N. W. 431; Easton *v.* Lindegod, 3 Nebr. (Unoff.) 786, 92 N. W. 1000; Ure *v.* Bunn, 3 Nebr. (Unoff.) 61, 90 N. W. 904; London, etc., Bank *v.* Dexter, 126 Fed. 593, 61 C. C. A. 515.

86. *Alabama.*—Micou *v.* Ashurst, 55 Ala. 607.

Arkansas.— Very *v.* Watkins, 18 Ark. 546.

Connecticut.— Coit *v.* Fitch, Kirby 254, 1 Am. Dec. 20.

Delaware.— Newbold *v.* Newbold, 1 Del. Ch. 310. Where a mortgagee begins foreclosure by scire facias, and afterward files a bill in equity for the same purpose, the former proceeding will be held to be abandoned. Van Vrankin *v.* Roberts, 7 Del. Ch. 16, 29 Atl. 1044.

Illinois.— Barchard *v.* Kohn, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; Erickson *v.* Rafferty, 79 Ill. 209; Karnes *v.* Lloyd, 52 Ill. 113; Sant *v.* Allmon, 23 Ill. 30; Delahay *v.* Clement, 4 Ill. 201. But *compare* Rogers *v.* Meyers, 68 Ill. 92, holding that the fact that the mortgagor's equity of redemption has been sold on execution for other indebtedness deprives the holder of the mortgage indebtedness of his right of election of remedies between suit on the notes or foreclosure.

Indiana.— Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; Cross *v.* Burns, 17 Ind. 441; Fairman *v.* Farmer, 4 Ind. 436. *Compare* Youse *v.* McCreary, 2 Blackf. 243.

Iowa.— Guest *v.* Byington, 14 Iowa 30; Knetzer *v.* Bradstreet, 1 Greene 382.

Maryland.— Wilhelm *v.* Lee, 2 Md. Ch. 322; Brown *v.* Stewart, 1 Md. Ch. 87.

Massachusetts.— Ely *v.* Ely, 6 Gray 439.

North Carolina.— Silvey *v.* Axley, 118 N. C. 959, 23 S. E. 933; Ellis *v.* Hussey, 66 N. C. 501.

Ohio.— Spence *v.* Union Cent. L. Ins. Co., 40 Ohio St. 517.

Oregon.— Cooke *v.* Cooper, 18 Oreg. 142, 22 Pac. 945, 17 Am. St. Rep. 709, 7 L. R. A. 273.

Virginia.— Priddy *v.* Hartsook, 81 Va. 67.

Washington.— Frank *v.* Pickle, 2 Wash. Terr. 55, 3 Pac. 584.

United States.— Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829; Hughes *v.* Edwards, 9 Wheat. 489, 6 L. ed. 142; Bridgeport Electric, etc., Co. *v.* Meader, 72 Fed. 115, 18 C. C. A. 451; Manning *v.* Norfolk Southern R. Co., 29 Fed. 838; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442; U. S. *v.* Myers, 27 Fed. Cas. No. 15,844, 2 Brock. 516.

See 35 Cent. Dig. tit. "Mortgages," § 1184.

As to pursuing various remedies when the mortgage contains a power of sale see *supra*, XX, A, 6.

Rule rejected or modified.— While the rule stated in the text is undoubtedly the rule of the common law, and is still recognized in many of the states, still in some it is rejected altogether or materially modified by the disposition of the courts to prevent a multiplicity of actions where all proper relief can be afforded in one suit. See the following cases:

Louisiana.— Taylor *v.* Hill, 21 La. Ann. 639.

New York.— A court of chancery has discretionary power to allow a mortgagee to proceed to foreclose at the same time that he is suing on the bond; but this power will be exercised only in extraordinary cases. Engle *v.* Underhill, 3 Edw. 249. Where the mortgaged premises are not of sufficient value to pay the debt, and one of defendants, in a suit at law for the same debt, sets up a defense of which the validity can only be tested at law, plaintiff may proceed in both actions at the same time. Suydam *v.* Bartle, 9 Paige 294. An action on a bond secured by mortgage need not be actually discontinued to entitle plaintiff to file a bill for foreclosure; but proceedings in the suit at law must be suspended on filing the bill to foreclose. Williamson *v.* Champlin, 8 Paige 70.

South Carolina.— Anderson *v.* Pilgram, 30 S. C. 499, 9 S. E. 587, 14 Am. St. Rep. 917, 4 L. R. A. 205. But see Hatfield *v.* Kennedy, 1 Bay 501, an early case decided in accordance with the general rule.

Tennessee.— Where a creditor sues at law to recover his debt and also in equity to foreclose a mortgage securing it, he may elect to proceed altogether in equity, in which event the action at law will be enjoined until the hearing in equity; or he may make a special election to proceed at law to try his legal right and in the chancery court to establish his equitable lien, in which case the foreclosure suit will be suspended until the legal right is ascertained. Franklin *v.* Hersch, 3 Tenn. Ch. 467.

Canada.— Perry *v.* Perry, 10 Ont. Pr. 275; Hay *v.* McArthur, 8 Ont. Pr. 321; Merchants' Bank *v.* Sparkes, 28 Grant Ch. (U. C.) 108; Imperial Loan, etc., Co. *v.* Boulton, 22 Grant Ch. (U. C.) 121.

See 35 Cent. Dig. tit. "Mortgages," § 1184.

87. See *infra*, XXI, L, 1, d, (I).

88. Conklin *v.* Stackfleth, 65 Kan. 310, 69

j. Restraining Foreclosure — (i) *Grounds For Relief* — (a) *In General.* A court of equity may by injunction restrain the prosecution of an action for the foreclosure of a mortgage, on the ground of fraud or duress in the inception of the mortgage,[89] or where the creditor is attempting to use the mortgage as a means of oppression or to coerce the debtor in a separate matter,[90] or on any other grounds sufficient to justify the interposition of chancery,[91] and perhaps merely to prevent a multiplicity of suits.[92] But this action should not be taken on account of any matters which properly constitute a defense to the foreclosure suit or which do not show it to be illegal or unconscionable for the suit to proceed.[93] The pendency of an action brought against the holder of a mortgage to declare the mortgage void and cancel it is no ground for an injunction restraining the prosecution of a subsequent foreclosure suit brought by the mortgagee on the mortgage.[94] In the case of a purchase-money mortgage, a failure or defect in the title purporting to be conveyed is not generally a ground for enjoining foreclosure, an action for damages being a sufficient remedy.[95]

(b) *Payment or Tender.* Foreclosure of a mortgage will be enjoined on the ground of a payment or other equivalent satisfaction which entirely extinguishes

Pac. 194. And see Reichert *v.* Stilwell, 172 N. Y. 83, 64 N. E. 790.

89. *Alabama.*— Bergan *v.* Jeffries, 80 Ala. 349.

Georgia.— Hollingsworth *v.* North American Deposit, etc., Co., 97 Ga. 391, 24 S. E. 35.

Minnesota.— Belote *v.* Morrison, 8 Minn. 87.

New York.— Bennett *v.* Stevenson, 53 N. Y. 508.

Ohio.— Totten *v.* Lawton, 8 Ohio Cir. Ct. 377, 4 Ohio Cir. Dec. 518.

See 35 Cent. Dig. tit. "Mortgages," § 1190.

But see Hoss *v.* McWilliams, 26 La. Ann. 643; Crow *v.* Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427.

Fraud as to mortgagor's creditors.— An injunction will not be granted to restrain the foreclosure of a mortgage, at the suit of a purchaser of the property at execution sale, on the ground that the mortgage is contrary to the statutes against fraudulent conveyances, where complainant is not a creditor and the execution creditors are not made parties to the suit. Baird *v.* Warwick Mach. Co., 40 Fed. 386. And see Putney *v.* Kohler, 84 Ga. 528, 11 S. E. 127.

90. McCalley *v.* Otey, 90 Ala. 302, 8 So. 157.

When motives of creditor immaterial.— If the money secured by a mortgage is justly due, the motives of plaintiff in foreclosure, in acquiring an assignment of it and in foreclosing it, and his refusal to assign it to a third person, the money due being tendered to him, lay no ground for an injunction against the prosecution of the foreclosure suit. Davis *v.* Flagg, 35 N. J. Eq. 491; Williams *v.* Brown, 127 N. C. 51, 37 S. E. 86.

91. Colesbury *v.* Dart, 59 Ga. 839; Vanderkemp *v.* Shelton, Clarke (N. Y.) 321 (in this case the principles of equity required that the remedy against the mortgagor on his bond should be first exhausted); Milliken *v.* Barrow, 55 Fed. 148 (where the debtor had made a surrender of his property under a state insolvency law, which prevented the mortgagee from seizing it on executory process).

Dispute as to amount due.— Where the amount due under the mortgage is disputed and uncertain, and can only be fixed by a more or less complicated accounting, it may be ground for staying the foreclosure suit until the question is settled. Farmers' Sav., etc., Assoc. *v.* Kent, 117 Ala. 624, 23 So. 757; Vance *v.* Shreveport First Nat. Bank, 49 La. Ann. 130, 21 So. 266; Harrison *v.* Bray, 92 N. C. 488.

92. Mayer *v.* Coley, 80 Ga. 207, 7 S. E. 164.

93. *Delaware.*— Foxwell *v.* Slaughter, 5 Del. Ch. 396.

Georgia.— Myers *v.* Pierce, 86 Ga. 786, 12 S. E. 978; Citizens' Bank *v.* Cook, 61 Ga. 177.

Louisiana.— Williams *v.* Douglass, 47 La. Ann. 1277, 17 So. 805; Snow *v.* Trotter, 3 La. Ann. 268; Woodward *v.* Dashiell, 15 La. 184.

New York.— Davidson *v.* John Good Cordage, etc., Co., 63 N. Y. App. Div. 366, 71 N. Y. Suppl. 565; Daily *v.* Kingon, 41 How. Pr. 22. See also Sire *v.* Long Acre Square Bldg. Co., 50 Misc. 29, 100 N. Y. Suppl. 307.

Pennsylvania.— Saving Fund *v.* Ball, 2 Leg. Rec. 203.

United States.— Matthews *v.* Warner, 6 Fed. 461 [*affirmed* in 112 U. S. 600, 5 S. Ct 312, 28 L. ed. 851].

See 35 Cent. Dig. tit. "Mortgages," § 1188.

94. Tarrant *v.* Quackenbos, 10 How. Pr. (N. Y.) 244.

95. Crocker *v.* Robertson, 8 Iowa 404; Hill *v.* Butler, 6 Ohio St. 207; Marr *v.* Howland, 20 Wis. 282. And see *infra*, XXI, C, 2, h, (II). But *compare* Greenwell *v.* Roberts, 7 La. 63; Briggs *v.* Langford, 107 N. Y. 680, 14 N. E. 502, holding that the *bona fide* purchaser of land, in an action to stay the foreclosure of a mortgage given thereon by his vendor, may show that such mortgage was fraudulent and without consideration.

the debt secured,[96] or on a tender of the entire amount due, provided the tender is kept good.[97] A bill to restrain foreclosure of a mortgage will not lie on the ground that usurious interest has been paid in excess of the mortgage debt.[98]

(II) *Excuses For Breach of Condition.* A mortgagor seeking to restrain the foreclosure of the mortgage must offer a reasonable and sufficient excuse for his default in making payments when due or otherwise fulfilling the conditions of the mortgage.[99] Such an excuse is sickness or accident,[1] an extension of time granted by the mortgagee,[2] or a statutory stay of proceedings,[3] or the fault of the mortgagee himself, as where he has not kept a promise to call at a certain place for the money.[4] But a mistake or oversight caused by the mortgagor's own carelessness or forgetfulness is no excuse.[5]

(III) *Existence of Other Remedy.* A foreclosure suit will not be stayed by injunction where the party asking such relief has an adequate remedy at law,[6] or can fully protect his rights by setting up a claim to share in the proceeds of sale,[7] or by redemption,[8] or by interposing a defense in the foreclosure proceedings.[9]

(IV) *Parties.* A suit to restrain the foreclosure of a mortgage may be maintained not only by the mortgagor but also by any owner of the equity of redemption deriving title from or under him,[10] but not by a stranger to the mortgage

96. Matheson *v.* Thompson, 20 Fla. 790; Long *v.* Little, 119 Ill. 600, 8 N. E. 194; Eakle *v.* Hagan, 101 Md. 22, 60 Atl. 615; Brown *v.* Miller, 63 Mich. 413, 29 N. W. 879; Haescig *v.* Brown, 34 Mich. 503; Gray *v.* Bryson, 87 Miss. 304, 39 So. 694; Lynch *v.* Cunningham, 6 Abb. Pr. (N. Y.) 94.

Equitable assignment to payer.— An injunction will not be granted on showing a transaction which amounts on its face to a payment of the mortgage, but more properly has the effect of an equitable assignment of the mortgage to the person making the payment or supplying the money. Morris *v.* Alston, 92 Ala. 502, 9 So. 315.

97. Tuthill *v.* Morris, 81 N. Y. 94.

98. Mullin *v.* Hart, 31 La. Ann. 677; Livingston *v.* Burton, 43 Mo. App. 272.

99. Thurston *v.* Marsh, 5 Abb. Pr. (N. Y.) 389.

It is no excuse for failure to pay purchase-money secured by mortgage that a suit concerning the title is pending between other parties (Seymour *v.* Bailey, 66 Ill. 288), or that there is an outstanding paramount title, when there has been no eviction (Price *v.* Lawton, 27 N. J. Eq. 325 [*affirmed* in 28 N. J. Eq. 274].

1. Doty *v.* Whittlesey, 1 Root (Conn.) 310; Lynch *v.* Cunningham, 6 Abb. Pr. (N. Y.) 94.

2. British, etc., Mortg. Co. *v.* Ralston, 38 La. Ann. 593; Asendorf *v.* Meyer, 8 Daly (N. Y.) 278.

3. Drexel *v.* Miller, 49 Pa. St. 246; Breitenbach *v.* Bush, 44 Pa. St. 313, 84 Am. Dec. 442.

4. McCotter *v.* De Groot, 19 N. J. Eq. 72.

5. Serrell *v.* Rothstein, 49 N. J. Eq. 385, 24 Atl. 369; Noyes *v.* Clark, 7 Paige (N. Y.) 179, 32 Am. Dec. 620; Warwick Iron Co. *v.* Morton, 148 Pa. St. 72, 23 Atl. 1065.

6. Bergan *v.* Jeffries, 80 Ala. 349.

7. Hoss *v.* McWilliams, 26 La. Ann. 643; Bludworth *v.* Hunter, 9 Rob. (La.) 256; Noble *v.* Martin, 7 Mart. N. S. (La.) 282; Hebert *v.* Babin, 6 Mart. N. S. (La.) 614.

8. Dickinson *v.* Gunn, 12 Allen (Mass.) 547; American Dock, etc., Co. *v.* Public School Trustees, 35 N. J. Eq. 181.

9. Wolfe *v.* Titus, 124 Cal. 264, 56 Pac. 1042; Bushnell *v.* Avery, 121 Mass. 148.

10. *Illinois.*— Hubbard *v.* Jasinski, 46 Ill. 160.

Kansas.— Sheldon *v.* Motter, (App. 1898) 53 Pac. 89, holding that where the suit is brought by the mortgagor's vendee, the mortgagor is a necessary party.

Louisiana.— Babin *v.* Laine, 4 Mart. N. S. 611, holding that a third possessor who makes no defense within ten days after notice of the order of seizure cannot enjoin the execution.

Massachusetts.— Clark *v.* Fontain, 135 Mass. 464.

Michigan.— Dedrick *v.* Den Bleyker, 85 Mich. 475, 48 N. W. 633, holding that a mortgagor and his vendee with warranty have such a common interest in removing the mortgage lien that they may unite in a suit to enjoin its enforcement.

New York.— Baldwin *v.* Isham, 25 Hun 560. *Compare* New York Shot, etc., Co. *v.* Cary, 10 Abb. Pr. 44.

See 35 Cent. Dig. tit. "Mortgages," § 1195.

A widow has no right of action to restrain a sale of land as part of her husband's estate, without showing that her husband died seized of it or that she has some estate therein. Haggerson *v.* Phillips, 37 Wis. 364.

Title not derived from mortgagor.— One who alleges that he is the owner of land, but does not show that he derived his title through the mortgagor, has no interest that will support an action to enjoin a foreclosure sale, or to compel an accounting to ascertain the amount of the mortgage debt, so as to permit him to redeem. Hazen *v.* Nicholls, 126 Cal. 327, 58 Pac. 816.

unless he has been made a party to the foreclosure proceedings.[11] All persons claiming ownership of the mortgage debt or portions of it, or the notes or other obligations evidencing it should be made defendants.[12]

(v) *Jurisdiction and Proceedings.* A bill to restrain foreclosure of a mortgage must generally be brought in the court where the foreclosure suit is pending.[13] The bill must set forth with certainty and precision the matters relied on as a ground for equitable relief,[14] must show how and to what extent plaintiff will be injured by the foreclosure,[15] must contain an offer to pay any sum which is admitted to be due from the complainant,[16] and must be supported by pertinent and sufficient evidence.[17] An answer to such a bill cannot be entertained if not responsive to the allegations of the complaint.[18]

(vi) *Judgment or Decree.* The question of continuing the preliminary injunction or allowing the mortgagee to proceed with his suit depends upon the state of facts disclosed by the pleadings.[19] If a tender is made of the amount admitted to be due, payment thereof should be made a condition of the relief asked,[20] or if the money has been paid into court it may be ordered paid over to the mortgagee, and thereupon the foreclosure suit discontinued or stayed.[21] On a bill to enjoin a sale under a deed of trust, the beneficiary is not to be deprived of his special security, on the ground that he owes the maker of the note on special account.[22] A decree dissolving the injunction operates merely as a judgment of nonsuit and does not merge the mortgage or affect the mortgagee's right to proceed with his foreclosure.[23] In such injunction proceedings costs may be allowed to the prevailing party.[24] It has been held that damages cannot be

11. McDougald *v.* Hall, 3 Ga. 174. And see Vanhille *v.* Her Husband, 5 Rob. (La.) 496.

12. Smith *v.* Allen, 28 Tex. 497. *Compare* Redin *v.* Branhan, 43 Minn. 283, 45 N. W. 445.

Bondholders represented by trustees.— In a suit to enjoin the foreclosure of a trust deed made by a corporation to secure its bonds, and to enjoin a certain trustee from acting under the deed, it is not necessary that all the bondholders should be made parties, where all the trustees, representing numerous bondholders, were made parties, and were expressly authorized by the bondholders to foreclose the trust deed, and vested with the exclusive right of action, whether at law or in equity, under the trust deed. Farmers' L. & T. Co. *v.* Lake Street El. R. Co., 173 Ill. 439, 51 N. E. 55.

13. Waymire *v.* San Francisco, etc., R. Co., 112 Cal. 646, 44 Pac. 1086; Kilborn *v.* Robbins, 8 Allen (Mass.) 466.

Suit pending in another state.— In an action for the removal of a trustee in a mortgage of property of a corporation in another state, given to secure bonds of the corporation, the court has jurisdiction to restrain the trustee from proceeding with an action to foreclose the mortgage, brought in a court of such other state. Gibson *v.* American L. & T. Co., 58 Hun (N. Y.) 443, 12 N. Y. Suppl. 444.

14. Hazen *v.* Nicholls, 126 Cal. 327, 58 Pac. 816; Clark *v.* Vilas Nat. Bank, 22 N. Y. App. Div. 605, 48 N. Y. Suppl. 192; Hemmings *v.* Doss, 125 N. C. 400, 34 S. E. 511.

15. Glover *v.* Hembree, 82 Ala. 324, 8 So. 251; Saunders *v.* Baltimore Bldg., etc., Assoc., 99 Va. 140, 37 S. E. 775.

16. Whitley *v.* Dumham Lumber Co., 89 Ala. 493, 7 So. 810; Dorsey *v.* Armor, 10 Colo. App. 255, 50 Pac. 726.

17. Tenney *v.* Abraham, 43 La. Ann. 240, 9 So. 40, holding that evidence of an agreement to grant an extension of time, of a date prior to that of the mortgage sought to be foreclosed, is not admissible to vary or contradict the mortgage, in the absence of an allegation of fraud or error.

Admissibility of evidence as to fraud and deceit see Foster *v.* Beardsley Scythe Co., 47 Barb. (N. Y.) 505; Briggs *v.* Langford, 12 N. Y. Suppl. 657.

18. Teasey *v.* Baker, 19 N. J. Eq. 61.

19. See Walker *v.* Cucullu, 15 La. Ann. 689; Grey *v.* Bowman, (N. J. Ch. 1888) 13 Atl. 226; Lansing *v.* Capron, 1 Johns. Ch. (N. Y.) 617; Atkinson *v.* Everett, 114 N. C. 670, 19 S. E. 659.

20. Hine *v.* Handy, 1 Johns. Ch. (N. Y.) 6; Cook *v.* Patterson, 103 N. C. 127, 9 S. E. 402.

21. Bartow *v.* Cleveland, 7 Abb. Pr. (N. Y.) 339.

22. Gregg *v.* Hight, 6 Mo. App. 579.

23. State *v.* Judge Fourteenth Judicial Dist. Ct., 25 La. Ann. 653; Hunt *v.* Innis, 12 Fed. Cas. No. 6,892, 2 Woods 103.

24. Speakman *v.* Oaks, 97 Ala. 503, 11 So. 836; Otcheck *v.* Hostetter, 77 Iowa 509, 42 N. W. 383; Lynch *v.* Cunningham, 6 Abb. Pr. (N. Y.) 94; Sprong *v.* Snyder, 6 How. Pr. (N. Y.) 11.

Charging mortgagee with costs.— In a suit to enjoin the foreclosure of a grossly fraudulent and usurious mortgage, the mortgagee cannot avoid liability for costs by disclaiming all interest in the mortgage, under an allegation that he has sold it to his co-defendant. Costigan *v.* Howard, 100 Mich. 335, 58 N. W. 1116.

allowed defendant on the dissolution of an injunction in a case of executory process or which arrests an order of seizure and sale.[25]

k. Conditions Precedent — (i) *In General.* Before suing to foreclose plaintiff must perform any conditions which are necessary either to complete his right of action or to fix liability upon defendant.[26] In the case of a trust mortgage securing an issue of bonds, this generally includes a request for the institution of foreclosure proceedings by a certain number or percentage of the holders.[27] An entry for breach of condition is not usually a prerequisite to the suit,[28] nor the obtaining of leave to sue,[29] nor notice of the mortgagee's intention to foreclose,[30] nor a prior foreclosure of collaterals, where such action would result in nothing.[31]

(ii) *Prior Action or Litigation.* Where the right of one claiming to foreclose a mortgage depends on the establishment of certain facts in an action at law, a bill for foreclosure filed before judgment therein is premature.[32] Ordinarily, however, it is not necessary first to establish the mortgagor's liability for the debt by recovering a judgment against him.[33]

(iii) *Ascertainment or Discharge of Other Liens.* A mortgagee may be required to pay off or otherwise extinguish other liens on the premises, before being entitled to foreclose, as where the mortgage contains a covenant that no part of the mortgage debt shall be payable until all encumbrances are removed from the mortgaged promises,[34] or, in the case of a purchase-money mortgage, which cannot be foreclosed until the mortgagee has removed encumbrances against which he warranted the title.[35] But a junior mortgagee is not ordinarily required to pay off the senior lien before foreclosing his own,[36] and the senior

25. Boyer *v.* Joffrion, 40 La. Ann. 657, 4 So. 872; Testart *v.* Belot, 33 La. Ann. 1469; Hodgson *v.* Roth, 33 La. Ann. 941. But see Pepper *v.* Dunlap, 19 La. 491; Cannon *v.* Labarre, 13 La. 399; Landry *v.* L'Eglise, 3 La. 219.

26. See Kingsbury *v.* Fisher, 4 Colo. App. 431, 36 Pac. 309.

The return of payments or advancements made may be a condition precedent to the foreclosure of a mortgage, where the right to foreclose depends on the canceling or repudiation of the transaction in which they were made or given. See Griffith *v.* Townley, 69 Mo. 13, 33 Am. Rep. 476; Smith *v.* Northern Pac. R. Co., 22 Wash. 500, 61 Pac. 255.

Possession of securities.— A corporation, being indebted to plaintiff and others, executed a trust mortgage on all its property to secure an issue of bonds, which were to be given to consenting creditors in exchange for their notes against such corporation and plaintiff surrendered the notes which he held, for which he was to receive a certain number of the bonds when issued, taking meanwhile a certificate of indebtedness for the amount. It was held that plaintiff's equities attached on the giving of the mortgage, and he might therefore maintain an action to foreclose, although the bonds were never delivered to him. Jenkins *v.* John Good Cordage, etc., Co., 168 N. Y. 679, 61 N. E. 1130.

Reformation of deed.— In a foreclosure suit against a grantee of the equity of redemption, it appeared that his name had not been inserted in the deed from the mortgagor to him; but as there was sufficient evidence to show that he was in fact the grantee, it was held that reformation of the deed was not necessary before decree of foreclosure. Bossingham *v.* Syck, 108 Iowa 192, 91 N. W. 1047.

An assignee of the mortgage must first complete his title by paying the sum for which he has bought it from the original mortgagee (Browning *v.* Clymer, Smith (Ind.) 298), and obtaining or proving the mortgagee's indorsement of the note secured (Chaffe *v.* Carroll, 34 La. Ann. 122).

27. Farmers' L. & T. Co. *v.* New York, etc., R. Co., 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76. *Compare* Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 178 N. Y. 588, 70 N. E. 1102.

28. Cook *v.* Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452.

29. Pretzfeld *v.* Lawrence, 34 Misc. (N. Y.) 329, 69 N. Y. Suppl. 807.

30. Robbins *v.* Arnold, 11 Ill. App. 434. See also Lamb *v.* McCormack, 6 Grant Ch. (U. C.) 240.

31. Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408.

32. Race *v.* Traders Ins. Co., 31 Ill. App. 625.

33. Miller *v.* Mercier, 3 Mart. N. S. (La.) 229; Alley *v.* Rogers, 19 Gratt. (Va.) 366.

34. Stewart *v.* Clark, 8 Kan. 210. See also Lewis *v.* Duane, 141 N. Y. 302, 36 N. E. 322.

35. Coffman *v.* Scoville, 86 Ill. 300; Raffel *v.* Epworth, 107 Mich. 143, 64 N. W. 1052; Stiger *v.* Bacon, 29 N. J. Eq. 442.

36. Stewart *v.* Johnson, 30 Ohio St. 24; Bexar Bldg., etc., Assoc. *v.* Newman, (Tex. Civ. App. 1893) 25 S. W. 461. And see Gaither *v.* Clarke, 67 Md. 18, 8 Atl. 740.

After the foreclosure of a senior mortgage, and sale and conveyance to enforce the same, a junior mortgagee cannot foreclose his mortgage without first redeeming from the sale, although he was not a party to the first

mortgagee need not offer to redeem the junior, as he is under no obligation to satisfy the inferior lien.[37]

(iv) *Indemnity Mortgages.* As has been previously stated to sustain an action to foreclose an indemnity mortgage it is necessary that the mortgagee should have been actually damnified by having to pay the obligation secured against, or at least that both the fact and the extent of his liability should have become absolutely fixed.[38]

(v) *Performance of Conditions.* Where a mortgage is not to become operative or enforceable until certain essential conditions have been complied with by the mortgagee, no right to foreclose arises until performance on his part.[39]

(vi) *Demand For Payment.* No previous demand and refusal of payment is necessary before suing to foreclose a mortgage,[40] unless the parties have expressly stipulated for such demand.[41] This rule is not altered by the fact that the debt, or interest, was expressly made payable at a particular place.[42]

foreclosure. Rose *v.* Walk, 149 Ill. 60, 36 N. E. 555. And see Gillian *v.* McDowall, 66 Nebr. 814, 92 N. W. 991.

Vendor's lien.— Where the vendee of an agreement to sell lands mortgages it, after payment of a part of the purchase-money, the mortgagee cannot foreclose without paying the balance of the purchase-money to the holder of the title. Crummey *v.* Mechanics', etc., Bank, 30 Ga. 670.

37. Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

38. See *supra*, VII, C, 4.

39. *Florida.*— Coy *v.* Downie, 14 Fla. 544.

Illinois.— Iglehart *v.* Bierce, 36 Ill. 133 (proviso that mortgage bond should be void if a compromise was not ratified by a certain court); Gammon *v.* Wright, 31 Ill. App. 353 (agreement to transfer a business interest in consideration for the mortgage).

Indiana.—Miller *v.* Hardy, 131 Ind. 13, 29 N. E. 776, where a bankruptcy court gave permission for the foreclosure of a mortgage on the property of the bankrupt, on condition that the mortgagee should release his claim against the estate.

Iowa.— Grimmell *v.* Warner, 21 Iowa 11, holding that a plaintiff in a proceeding to foreclose a title bond is not bound to tender a deed before bringing suit.

Missouri.— Soulard *v.* Lane, 16 Mo. 366, promise of vendor of land to complete improvements before enforcing purchase-money mortgage.

New Jersey.— Titsworth *v.* Holly, 32 N. J. Eq. 57, promise to assign second mortgage.

See 35 Cent. Dig. tit. "Mortgages," § 1206.

Removing defects in title.— This rule applies where a purchase-money mortgage is not to be enforced until defects in the title have been removed. Nix *v.* Draughon, 54 Ark. 340, 15 S. W. 893; Church *v.* Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; Weaver *v.* Wilson, 48 Ill. 125; Goodenow *v.* Curtis, 33 Mich. 505.

40. *Alabama.*— Strang *v.* Moog, 72 Ala. 460.

California.— Citizens' Bank *v.* Los Angeles Iron, etc., Co., 131 Cal. 187, 63 Pac. 462, 82 Am. St. Rep. 341; Bank of Commerce *v.* Scofield, 126 Cal. 156, 58 Pac. 451; Hewett *v.* Dean, (1891) 25 Pac. 753.

New Hampshire.— Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

New York.— Ferris *v.* Spooner, 102 N. Y. 10, 5 N. E. 773; Arnot *v.* Union Salt Co., 109 N. Y. App. Div. 433, 96 N. Y. Suppl. 80; Gillett *v.* Balcom, 6 Barb. 370; Boigeol *v.* Eigabroadt, 35 Misc. 606, 72 N. Y. Suppl. 133.

Ohio.— Union Cent. L. Ins. Co. *v.* Curtis, 35 Ohio St. 357.

Pennsylvania.— Conshohocken Tube Co. *v.* Iron Car Equipment Co., 161 Pa. St. 391, 28 Atl. 1119. But see Commonwealth Bldg., etc., Assoc. *v.* Stroh, 20 Lanc. L. Rev. 123, holding that where, by the acts of plaintiff, defendant is lulled into a fancied security, there should be at least a demand made on him before a scire facias issues, in order to render him liable for attorneys' commissions.

South Carolina.— Lipscomb *v.* Hammett, 56 S. C. 549, 35 S. E. 194.

Canada.— Lamb *v.* McCormack, 6 Grant Ch. (U. C.) 240.

See 35 Cent. Dig. tit. "Mortgages," § 1207.

In Louisiana, in order to maintain foreclosure proceedings against a third possessor, there must be a demand on the original mortgagor and notice of non-payment to the third possessor. Boone *v.* Carroll, 35 La. Ann. 281; Taylor *v.* Pearce, 15 La. Ann. 564; Wilcoxon *v.* Maskell, 8 La. Ann. 460; Robin *v.* Flower, 2 La. Ann. 721; Maskell *v.* Merriman, 9 Rob. 69; Valetti *v.* Gurlie, 15 La. 188; Barrow *v.* King, 11 La. 174; Williams *v.* Holloway, 4 La. 323; Robichaud *v.* Worsham, 4 La. 125; Broussard *v.* Philips, 6 Mart. N. S. 309. But a demand or notice is not necessary before the writ issues against the mortgagor. Nichols *v.* McCall, 13 La. Ann. 215; Ursuline Nuns *v.* Depassau, 7 Mart. N. S. 645. And personal demand on the debtor, before suing the third possessor, will not be required where the debtor has absconded; a return by the sheriff of *nulla bona* is sufficient. Sprigg *v.* Beaman, 6 La. 59.

41. Popple *v.* Day, 123 Mass. 520; Union Cent. L. Ins. Co. *v.* Curtis, 35 Ohio St. 343; Case *v.* Burton, 19 U. C. Q. B. 540.

42. Yeaton *v.* Berney, 62 Ill. 61; Posey *v.* State Bank, 5 La. Ann. 187; Norton *v.* Ohrns, 67 Mich. 612, 35 N. W. 175; Long

(VII) *Proceedings Against Estate of Deceased Mortgagor.* Where the mortgagor is dead, the mortgagee is not required, before proceeding to foreclose, to present his claim for allowance in the probate court, provided he makes no claim on the personal estate; nor, on the other hand, is he estopped to foreclose by procuring the allowance of his claim in that court.[43]

1. Persons Entitled to Foreclose — (I) *In General.* The right to proceed for the foreclosure of a mortgage pertains to the legal holder of the mortgage, who may enforce it for the benefit of any one having an interest therein,[44] or to the actual creditor, that is, the real and beneficial owner of the debt or obligation secured and who is entitled to receive the money due.[45] Where the person named as mortgagee or payee of the note is not the creditor, but is merely to negotiate the securities for the benefit of the mortgagor, foreclosure may be had at the instance of a third person who advances or loans the money.[46] And an agent of

Island L. & T. Co. *v.* Long Island City, etc., R. Co., 178 N. Y. 588, 70 N. E. 1102.

Where the debt secured is evidenced by a negotiable promissory note payable at a certain place it must be shown that a demand has been made at such place (Moss *v.* Byrnes, 12 La. 615), but this is not necessary where the note includes or imports a confession of judgment (Pargoud *v.* Richardson, 30 La. Ann. 1286); nor where presentment for payment has been waived (Ray *v.* Tatum, 72 Fed. 112, 18 C. C. A. 464).

43. See Executors and Administrators, 18 Cyc. 464 *et seq.* And see the following cases:

Georgia.— May *v.* Rawson, 21 Ga. 461.

Indiana.— Ball *v.* Green, 90 Ind. 75; Krauss *v.* Rich, 29 Ind. 379; Slaughter *v.* Foust, 4 Blackf. 379.

Louisiana.— Berens *v.* Boutte, 31 La. Ann. 112; Elmore *v.* Ventress, 24 La. Ann. 382; Randolph *v.* Chapman, 21 La. Ann. 486.

South Dakota.— Hull *v.* Hayward, 13 S. D. 291, 83 N. W. 270, 79 Am. St. Rep. 890.

Virginia.— Patton *v.* Page, 4 Hen. & M. 449.

Canada.— *In re* Stewart, 10 Grant Ch. (U. C.) 169.

44. Rawle *v.* Skipwith, 19 La. 207; Lee *v.* Clary, 38 Mich. 223.

The purchase of the equity of redemption by the mortgagee will not prevent him from maintaining a bill to foreclose the mortgage, for the purpose of quieting his title, as such a purchase is viewed with suspicion by courts of equity, and it might not be safe for him to rely upon it. Hitchcock *v.* U. S. Bank, 7 Ala. 386.

45. *Alabama.*— Hartwell *v.* Blocker, 6 Ala. 581.

Illinois.— Darst *v.* Bates, 95 Ill. 493.

Kansas.— Swenney *v.* Hill, 69 Kan. 868, 77 Pac. 696.

Louisiana.— Mourain *v.* Devall, 12 La. 93; Barbarin *v.* Daniels, 7 La. 479.

Michigan.— Martin *v.* McReynolds, 6 Mich. 70.

Minnesota.— Bolles *v.* Carli, 12 Minn. 113, holding that the foreclosure of a mortgage by a person not the mortgagee, where no assignment has been made, is absolutely void.

Mississippi.— Ratliff *v.* Davis, 38 Miss. 107, holding that where a guardian gave a mortgage to his ward, on the termination of the guardianship, to secure whatever might be due her on accounting, and she afterward married, and died, leaving her husband surviving but no children, the mortgage may be foreclosed by the surviving husband.

Missouri.— Barber *v.* Stroub, 111 Mo. App. 57, 85 S. W. 915, holding that the right to maintain an action on a mortgage note carries with it the right to foreclose the mortgage.

Texas.— See Harwell *v.* Harbison, (Civ. App. 1906) 95 S. W. 130.

Virginia.— Castleman *v.* Berry, 86 Va. 604, 10 S. E. 884.

United States.— Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

See 35 Cent. Dig. tit. "Mortgages," § 1227.

Grantor of mortgaged premises.— Where a grantee of land agreed, as part of the consideration, to pay a mortgage on the land conveyed and other land retained by the grantor, the latter is entitled to sue to have the mortgage foreclosed and the land conveyed sold first, his remedy at law not being adequate. Mowry *v.* Mowry, 137 Mich. 277, 100 N. W. 388.

Extension to new indebtedness.— Although a mortgage cannot, by an oral agreement, be continued in force as security for a new indebtedness not embraced within the terms of its condition, yet if such an agreement has been made and money has been advanced in accordance with it, a court of equity will not aid the mortgagor, or one who has taken a conveyance from him with knowledge of the facts, in obtaining a release or discharge of the mortgage from the mortgagee. Joslyn *v.* Wyman, 5 Allen (Mass.) 62.

46. Baker *v.* Ward, 7 Bush (Ky.) 240; Browning *v.* Fountain, 1 Duv. (Ky.) 13; Ward *v.* Northern Bank, 14 B. Mon. (Ky.) 351.

Payee who is not creditor cannot foreclose.— If the person in whose hands the notes are placed for the purpose of raising money on them for the mortgagor fails to do so, and retains the notes in his own possession without the consent of the mortgagor, he cannot foreclose the mortgage. Weaver *v.* Field, 114 U. S. 244, 5 S. Ct. 844, 29 L. ed. 143.

the mortgagee may maintain foreclosure proceedings if he is directly interested in the payment of the mortgage.[47] A mortgage made to a partnership in the firm-name may be foreclosed by the partners in their individual names.[48]

(II) *Assignor of Mortgage.* After a mortgagee has formally assigned and transferred the mortgage and debt, he cannot maintain an action for foreclosure;[49] but if the assignment, for lack of formality or on account of irregularity, was not sufficient to vest the legal title to the securities in the assignee, the suit must be brought in the name of the assignor, for the use and benefit of the assignee.[50] But the owner of a mortgage is not prevented from foreclosing it in his own name by the fact that he has pledged it as collateral security for a debt less than the face value of the mortgage, if he acts with the consent of the pledgee, or if, on the latter's refusal to foreclose, he joins him as a party.[51]

(III) *Assignee of Mortgage* — (A) *In General.* Any form of assignment of a mortgage, if absolute and unconditional, which suffices to transfer to the assignee the real and beneficial ownership of the securities, will entitle him to maintain an action for foreclosure.[52]

Mortgage for support and maintenance.— This rule does not apply to a mortgage for support and maintenance; such a mortgage is solely for the benefit of the mortgagee, and cannot be foreclosed at the suit of a third person who has supplied the stipulated support, although at the request of the mortgagor. Daniels *v.* Eisenlord, 10 Mich. 454.

47. Ord *v.* McKee, 5 Cal. 515; Consolidated Barb-Wire Co. *v.* Purcell, 48 Kan. 267, 29 Pac. 160.

48. Chicago Lumber Co. *v.* Ashworth, 26 Kan. 212; Foster *v.* Johnson, 39 Minn. 378, 40 N. W. 255.

49. *Illinois.*— Crabtree *v.* Levings, 53 Ill. 526.

Michigan.— Wallace *v.* Dunning, Walk. 416.

New York.— Martin *v.* Moore, 3 N. Y. App. Div. 416, 38 N. Y. Suppl. 652; Fougera *v.* Moissen, 16 Hun 237.

Pennsylvania.— Pryor *v.* Wood, 31 Pa. St. 142.

United States.— Cutler *v.* Clementson, 67 Fed. 409.

See 35 Cent. Dig. tit. "Mortgages," § 1228.

Assignment of part of debt.— The right of a mortgagee to maintain a bill for foreclosure is not affected by an equitable assignment of a portion of the indebtedness, where he retains the legal title as well as a large equitable interest. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

50. *Connecticut.*— New Haven Sav. Bank, etc., Assoc., *v.* McPartlan, 40 Conn. 90.

Illinois.— Camp *v.* Small, 44 Ill. 37.

Nebraska.— Burnett *v.* Hoffman, 40 Nebr. 569, 58 N. W. 1134.

Pennsylvania.— Partridge *v.* Partridge, 38 Pa. St. 78.

United States.— Saenger *v.* Nightingale, 48 Fed. 708; Cottrell *v.* Adams, 6 Fed. Cas. No. 3,272, 2 Biss. 351.

See 35 Cent. Dig. tit. "Mortgages," § 1228.

51. *California.*—Consolidated Nat. Bank *v.* Hayes, 112 Cal. 75, 44 Pac. 469.

Connecticut.— Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597.

New York.— Simson *v.* Satterlee, 64 N. Y. 657; Norton *v.* Warner, 3 Edw. 106. The owner of a bond and mortgage pledged as collateral security for a debt less than the face value of the mortgage has no right to declare the principal of the mortgage due for default in the payment of taxes, without the authority or concurrence of the pledgee, and cannot sue to foreclose on such a declaration. Shaw *v.* Wellman, 59 Hun 447, 13 N. Y. Suppl. 527.

Wisconsin.— Brunette *v.* Schettler, 21 Wis. 188.

See 35 Cent. Dig. tit. "Mortgages," § 1228.

52. *Alabama.*— Mobile Branch Bank *v.* Hunt, 8 Ala. 876.

Florida.— Stewart *v.* Preston, 1 Fla. 10.

Illinois.— Sedgwick *v.* Johnson, 107 Ill. 385; Irish *v.* Sharp, 89 Ill. 261; Hahn *v.* Huber, 83 Ill. 243; McNamara *v.* Clark, 85 Ill. App. 439; Stelzich *v.* Weidel, 27 Ill. App. 177.

Indiana.— Martin *v.* Reed, 30 Ind. 218; Lamson *v.* Falls, 6 Ind. 309.

Iowa.— See Moore *v.* Olive, 114 Iowa 650, 87 N. W. 720.

Kansas.— Burt *v.* Moore, (App. 1900) 61 Pac. 332.

Louisiana.— Williams *v.* Morancy, 3 La. Ann. 227; Armstrongs *v.* Baldwin, 13 La. 564; Denton *v.* Duplessis, 12 La. 83; Maillan *v.* Perron, 8 La. 138.

Massachusetts.— Barker *v.* Flood, 103 Mass. 474; Phelps *v.* Townsley, 10 Allen 554; Coffin *v.* Loring, 9 Allen 154; Gould *v.* Newman, 6 Mass. 239.

Michigan.— Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285; Youmans *v.* Loxley, 56 Mich. 197, 22 N. W. 282.

Missouri.— Overall *v.* Ellis, 32 Mo. 322; Crinion *v.* Nelson, 7 Mo. 466.

Nebraska.— Darr *v.* Spencer, 63 Nebr. 89, 88 N. W. 164; Murray *v.* Porter, 26 Nebr. 288, 41 N. W. 1111.

Nevada.— Lockwood *v.* Marsh, 3 Nev. 138.

New Jersey.— Kinna *v.* Smith, 3 N. J. Eq. 14.

New York.— Pratt *v.* Poole, 133 N. Y. 686, 31 N. E. 628; American Guild *v.* Damon, 107 N. Y. App. Div. 140, 94 N. Y. Suppl.

(B) *Holder of Note or Debt Secured.* As an absolute assignment or transfer of the debt secured by a mortgage, or of the note or bond evidencing it, vests the ownership of the securities in the assignee, with all the assignor's rights accruing under the mortgage, even without any formal assignment of the mortgage itself,[53] a person so holding and owning the debt secured will be entitled to foreclose the mortgage, although the latter instrument does not stand in his name.[54]

(IV) *JUNIOR MORTGAGEE.* Although a junior mortgage encumbers only the equity of redemption remaining in the mortgagor subject to the senior mortgage, yet a foreclosure may be had against this estate at the suit of the holder of the second mortgage.[55] And such holder is under no obligation to pay off the elder lien before bringing his own suit,[56] although, if the senior mortgage is due, he may so frame his bill as to secure the right to redeem from it, and then foreclose for the amount of his own debt plus the redemption money,[57] or, according to the practice sometimes prevailing, he may have the property sold under decree for both debts, the lien of the senior mortgage being then transferred to the proceeds of the sale.[58]

(V) *REPRESENTATIVES OF DECEASED MORTGAGEE.* On the death of a mortgagee, his interest and rights under the mortgage vest as assets in the hands of his executor or administrator, and the latter is the proper party to bring an action for foreclosure,[59] although it seems that such a suit may be maintained by one of

985; Greene *v.* Mussey, 76 N. Y. App. Div. 174, 78 N. Y. Suppl. 434; Bigelow *v.* Davol, 62 Hun 245, 16 N. Y. Suppl. 646. *Compare* Champney *v.* Coope, 34 Barb. 539.

North Carolina.— Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696.

Ohio.— Wayne *v.* Minor, 6 Ohio Dec. (Reprint) 10, 7 Am. L. Rec. 9.

South Dakota.— Smith *v.* Commercial Nat. Bank, 7 S. D. 465, 64 N. W. 529.

Vermont.— King *v.* Harrington, 2 Aik. 33, 16 Am. Dec. 675.

Wisconsin.— Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623; Gardinier *v.* Kellogg, 14 Wis. 605.

United States.— Bendey *v.* Townsend, 109 U. S. 665, 3 S. Ct. 482, 27 L. ed. 1065.

See 35 Cent. Dig. tit. "Mortgages," § 1231. And see *supra*, XVI, E, 1, d.

53. See *supra*, XVI, B, 1, i.

54. *Alabama.*— Center *v.* Planters', etc., Bank, 22 Ala. 743.

California.— Adler *v.* Sargent, 109 Cal. 42, 41 Pac. 799.

Connecticut.—Austin *v.* Burbank, 2 Day 474, 2 Am. Dec. 119.

Georgia.— Calhoun *v.* Tullass, 35 Ga. 119.

Indiana.— Hardin *v.* Helton, 50 Ind. 319.

Iowa.— Guest *v.* Byington, 14 Iowa 30; Haynes *v.* Seachrest, 13 Iowa 455; Crow *v.* Vance, 4 Iowa 434.

Louisiana.— Macon First Nat. Bank *v.* Simmes, 26 La. Ann. 147; Bayly *v.* McKnight, 19 La. Ann. 321. As to official evidence of transfer to assignee see Commercial Bank *v.* Poland, 6 La. Ann. 477; Tulane *v.* Wilcox, 11 La. 50; Planters' Bank *v.* Proctor, 6 Mart. N. S. 531; Wray *v.* Henry, 10 Mart. 222.

Michigan.— Martin *v.* McReynolds, 6 Mich. 70.

Mississippi.—O'Hara *v.* Haas, 46 Miss. 374; Lewis *v.* Starke, 10 Sm. & M. 120, Sharkey, C. J., delivering the opinion of the court.

Tennessee.— Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931.

Texas.— Griffin *v.* Stone River Nat. Bank, (Civ. App. 1904) 80 S. W. 254.

United States.— Winstead *v.* Bingham, 14 Fed. 1, 4 Woods 510.

See 35 Cent. Dig. tit. "Mortgages," § 1232.

Ejectment.—The assignee of a note secured by mortgage cannot recover in ejectment where there has been no assignment of the mortgage or transfer of the legal estate by the mortgagee. Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045.

55. *Massachusetts.*— Kilborn *v.* Robbins, 8 Allen 466; Cronin *v.* Hazletine, 3 Allen 324.

New York.— Guilford *v.* Jacobie, 69 Hun 420, 23 N. Y. Suppl. 462; Bache *v.* Purcell, 6 Hun 518; Benedict *v.* Gilman, 4 Paige 58.

Ohio.— Rittinger *v.* Northrop, 10 Ohio Dec. (Reprint) 35, 18 Cinc. L. Bul. 101.

Vermont.— Blandin *v.* Silsby, 62 Vt. 69, 19 Atl. 639.

United States.— Olyphant *v.* St. Louis Ore, etc., Co., 23 Fed. 465.

See 35 Cent. Dig. tit. "Mortgages," § 1229.

56. Chambers *v.* Mauldin, 4 Ala. 477.

57. Rogers *v.* Herron, 92 Ill. 583.

58. Davis *v.* Cook, 65 Ala. 617; Cullum *v.* Erwin, 4 Ala. 452.

59. *California.*— Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8.

Maine.— Plummer *v.* Doughty, 78 Me. 341, 5 Atl. 526.

Massachusetts.— Marsh *v.* Austin, 1 Allen 235.

Mississippi.— Griffin *v.* Lovell, 42 Miss. 402.

New York.— Bunn *v.* Vaughan, 1 Abb. Dec. 253, 3 Keyes 345, 5 Abb. Pr. N. S. 269; Robinson *v.* Brower, 57 Hun 585, 10 N. Y. Suppl. 854.

Vermont.— Herrick *v.* Teachout, 74 Vt. 196, 52 Atl. 432.

See 35 Cent. Dig. tit. "Mortgages," § 1233.

the heirs, to whom the mortgage and debt have been assigned or distributed under the orders or sanction of the court.[60]

(VI) *Trustee.* In the ordinary form of a deed of trust or a trust mortgage, where the legal title is vested in a trustee or trustees, for the benefit of the holders, whoever they may be at the time, of the notes, bonds, or other obligations secured, the right to institute proceedings for foreclosure is in the trustee or trustees,[61] and, on their removal or disqualification, in the trustees appointed in their place by the court or by the bondholders.[62]

(VII) *Beneficiary Under Trust Deed.* Under such a trust deed, any beneficiary may institute a suit for foreclosure in his own name, when the trustee unreasonably neglects or refuses to do so,[63] or when the trustee is not a proper person to represent the bondholders or other beneficiaries, either by reason of an interest hostile to theirs or conduct prejudicial to their rights, or for other reasons,[64] or, according to many authorities, even without any such cause, provided only that the deed of trust itself does not forbid a single beneficiary to sue, or restrict the right.[65]

Foreign executor.— The executor of the will of a deceased non-resident mortgagee whose will was not probated in the state where the mortgaged premises are situated when suit to foreclose was commenced may nevertheless maintain the action where the will is duly probated before hearing. Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130.

After administration is closed, or where no administration was ever taken out, it is a legal presumption that the widow and children are the owners of any uncollected assets, and hence they may sue to foreclose a mortgage. Wright *v.* Robinson, 94 Ala. 479, 10 So. 319; Fountain *v.* Walther, 66 Ill. App. 529.

60. *Iowa.*— White *v.* Secor, 58 Iowa 533, 12 N. W. 586.

Nebraska.— Walter *v.* Wala, 10 Nebr. 123, 4 N. W. 938.

Vermont.— Babbitt *v.* Bowen, 32 Vt. 437.

Wisconsin.— Ford *v.* Smith, 60 Wis. 222, 18 N. W. 925.

United States.— Stanley *v.* Mather, 31 Fed. 860.

See 35 Cent. Dig. tit. "Mortgages," § 1233.

61. Illinois Trust, etc., Bank *v.* Pacific R. Co., 117 Cal. 332, 49 Pac. 197; Gallagher *v.* Yosemite Min., etc., Co., 10 Utah 189, 37 Pac. 264; New York Security, etc., Co. *v.* Lincoln St. R. Co., 74 Fed. 67; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

Demand in writing.— Where a mortgage provided in one place that suit "might" be brought by the trustee in case of default, and in another place that suit "must" be brought on demand in writing of a majority of the beneficiaries, a demand in writing is not necessary to authorize the trustee to sue on default. Barnwell *v.* Marion, 54 S. C. 223, 32 S. E. 313.

62. Gibson *v.* American L. & T. Co., 58 Hun (N. Y.) 443, 12 N. Y. Suppl. 444.

Successor in office.— A mortgage assigned to one S, as state treasurer, and to his successors and assigns, to protect policy-holders in an insurance company, the assignment being made merely because of his position as treasurer, may be foreclosed by his successor in office. Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288.

63. *California.*— Citizens' Bank *v.* Los Angeles Iron, etc., Co., 131 Cal. 187, 63 Pac. 462, 82 Am. St. Rep. 341.

Minnesota.— Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535.

New Jersey.— McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

New York.— Davies *v.* New York Concert Co., 41 Hun 492.

Tennessee.— Hull *v.* Schachter, (Ch. App. 1899) 53 S. W. 1004.

United States.— Omaha Hotel Co. *v.* Wade, 97 U. S. 13, 24 L. ed. 917; Chattanooga First Nat. Bank *v.* Radford Trust Co., 80 Fed. 569, 26 C. C. A. 1; Owens *v.* Ohio Cent. R. Co., 20 Fed. 10; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

See 35 Cent. Dig. tit. "Mortgages," § 1235.

64. Ettlinger *v.* Persian Rug, etc., Co., 142 N. Y. 189, 36 N. E. 1055, 40 Am. St. Rep. 587; Clay *v.* Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141; Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. 814; Alabama, etc., Mfg. Co. *v.* Robinson, 56 Fed. 690, 6 C. C. A. 79; American Tube, etc., Co. *v.* Kentucky Southern Oil, etc., Co., 51 Fed. 826; Robinson *v.* Alabama, etc., Mfg. Co., 48 Fed. 12; Webb *v.* Vermont Cent. R. Co., 9 Fed. 793, 20 Blatchf. 218; Mercantile Trust Co. *v.* Lamoille Valley R. Co., 16 Blatchf. 324, 17 Fed. Cas. No. 9,432.

65. *Alabama.*—Moses *v.* Pbiladelphia Mortg., etc., Co., 131 Ala. 554, 32 So. 612; Marriott *v.* Givens, 8 Ala. 694.

Illinois.— Dorn *v.* Colt, 180 Ill. 397, 54 N. E. 167; Surine *v.* Winterbotham, 96 Ill. App. 123; Frink *v.* Neal, 37 Ill. App. 621.

Kansas.— Hutchison *v.* Myers, 52 Kan. 290, 34 Pac. 742.

Minnesota.— Le Sueur First State Bank *v.* Sibley County Bank, 93 Minn. 317, 101 N. W. 309.

Ohio.—Wright *v.* Ohio, etc., R. Co., 1 Disn. 465, 12 Ohio Dec. (Reprint) 736.

(VIII) *PART OF SEVERAL MORTGAGEES OR BONDHOLDERS.* Where a mortgage is given to secure several separate debts or claims held by different creditors, or several notes which have passed into different hands, it is the right of either one of the creditors or holders to proceed alone for the foreclosure of the mortgage.[66] And so, where the mortgage secures an issue of bonds, any holder may file a bill to foreclose in behalf of himself and all other bondholders who may join him.[67]

m. Compelling Foreclosure. Neither the mortgagor, a judgment creditor, nor any other third person having an interest in the premises can compel a mortgagee to proceed for the foreclosure of his mortgage, although past due, if he does not choose to do so.[68]

n. Persons as to Whom Mortgage May Be Foreclosed — (I) *IN GENERAL.* The general rule is that a mortgage may be foreclosed against the owner of the

Texas.— Hammond *v.* Tarver, 89 Tex. 290, 32 S. W. 511, 34 S. W. 729.

Vermont.— Sargent *v.* Baldwin, 60 Vt. 17, 13 Atl. 854.

West Virginia.— Johnson *v.* Billups, 23 W. Va. 685.

See 35 Cent. Dig. tit. "Mortgages," § 1235.

See, however, Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905. But see Consolidated Water Co. *v.* San Diego, 92 Fed. 759, 89 Fed. 272; General Electric Co. *v.* La Grande Edison Electric Co., 87 Fed. 590, 31 C. C. A. 118, both holding that no one bondholder can ignore the trustee and proceed on his own account to foreclose the mortgage; this cannot be done without first showing a refusal or unreasonable neglect on the part of the trustee, or some reason why he is not a proper party to represent the bondholders.

Agreement restricting right to foreclose.— The bondholders of a railroad may agree among themselves on what conditions the right to foreclose may be exercised by an individual bondholder; and a provision in the mortgage that no proceedings at law or in equity shall be taken by any bondholder secured thereby, to foreclose the equity of redemption independently of the trustee, until after the refusal of the trustee to comply with a requisition first made on him by the holders of a certain percentage of the bonds secured by such mortgage, is reasonable and valid. Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535.

66. *Connecticut.*— Sanford *v.* Bulkley, 30 Conn. 344.

Georgia.— Hawkins *v.* Taylor, 61 Ga. 171.

Indiana.—A mortgage securing a note payable to either of two payees, although executed to one alone, may be enforced by either. Collyer *v.* Cook, 28 Ind. App. 272, 62 N. E. 655. But *compare* Goodall *v.* Mopley, 45 Ind. 355.

Louisiana.— Utz *v.* Utz, 34 La. Ann. 752; Soniat *v.* Miles, 32 La. Ann. 164; Armor *v.* Downes, 2 La. Ann. 242; New Orleans City Bank *v.* McIntyre, 8 Rob. 467.

Massachusetts.— Gilson *v.* Gilson, 2 Allen 115.

Michigan.— Cooley *v.* Kinney, 109 Mich. 34, 66 N. W. 674.

Missouri.— Thayer *v.* Campbell, 9 Mo. 280.

New Jersey.— Currie *v.* Bittenbinder, (Ch. 1887) 7 Atl. 872.

New York.— Batterman *v.* Albright, 6 N. Y. St. 334. But *compare* Potter *v.* Crandall, Clarke 119, holding that where the purchaser of land owned by several persons gave separate mortgages to secure the several shares of the purchase-money, each including the whole land purchased, and all simultaneously executed and delivered, the holder of one mortgage could not file a bill for the foreclosure of his mortgage alone, unless the holders of the other mortgages should refuse to join him in a suit to foreclose, in which case he could file a bill making them defendants, and setting forth all the circumstances attending the execution of the mortgages.

South Carolina.— Walker *v.* Walker, 17 S. C. 329; Pedrieau *v.* Hunt, Riley Eq. 88; Rodgers *v.* Jones, 1 McCord Eq. 221.

See 35 Cent. Dig. tit. "Mortgages," § 1236.

The survivor of two joint mortgagees may maintain a suit on the mortgage for foreclosure. Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729; Childs *v.* Alexander, 22 S. C. 169.

67. Mason *v.* York, etc., R. Co., 52 Me. 82; Michigan Trust Co. *v.* Red Cloud, 3 Nebr. (Unoff.) 722, 92 N. W. 900; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487. But *compare* Nashville, etc., R. Co. *v.* Orr, 18 Wall. (U. S.) 471, 21 L. ed. 810.

Holder of interest coupons.— The holder, by purchase, of overdue interest coupons, cannot, by reason of that interest alone, maintain an action in his own name to enforce a trust and the sale of property covered by a deed of trust, executed to secure a series of negotiable bonds, with such non-negotiable interest coupons attached. Wright *v.* Ohio, etc., R. Co., 1 Disn. (Ohio) 465, 12 Ohio Dec. (Reprint) 736.

68. *Alabama.*— Mims *v.* Cobbs, 110 Ala. 577, 18 So. 309; Kelly *v.* Longshore, 78 Ala. 203.

Illinois.— Town *v.* Alexander, 85 Ill. App. 512 [*affirmed* in 185 Ill. 254, 56 N. E. 1111]; Garrett *v.* Peiree, 74 Ill. App. 225.

Iowa.— White *v.* Lucas, 46 Iowa 319.

Kentucky.— Warner *v.* Everett, 7 B. Mon. 262.

equity of redemption or any person whose rights are subordinate to the mortgage, although not against one to whose rights the mortgage is subject.[69]

(II) *Government or State.* On account of the immunity of the United States and of the several states from suit, except by their own consent, it has been held that no foreclosure decree can be made against the general government or any state, as the owner or tenant of the mortgaged premises.[70] In England, where the crown has succeeded to the title of the mortgagor, as by escheat, attainder, or otherwise, the court will not decree a foreclosure, but will merely decree the mortgagee to be entitled to possession until the crown shall think fit to redeem,[71] or it may order a sale, passing only the mortgagee's rights, with leave to the mortgagee or purchaser to petition the crown for a grant of the fee.[72]

(III) *Representatives of Deceased Mortgagor.* When the mortgagor is dead foreclosure proceedings should be taken against his executor or administrator and not the heir or devisee.[73]

(IV) *Subsequent Purchaser.* A purchaser of mortgaged premises, acquiring title from the mortgagor after the execution of the mortgage, takes subject to it, and therefore is liable to be foreclosed of his equity of redemption on proper proceedings against him.[74]

(V) *Effect of Possession of Property.* Possession under a license to occupy the mortgaged premises permanently is notice to a subsequent mortgagee of whatever title the possessor may have, whether legal or equitable, precluding a foreclosure of the mortgage as against such possessor.[75] In Louisiana a third

Missouri.— Hannah *v.* Hannah, 109 Mo. 236, 19 S. W. 87.

New York.— Marshall *v.* Davies, 58 How. Pr. 231.

South Carolina.— Kinlock *v.* Savage, Speers Eq. 464.

See 35 Cent. Dig. tit. "Mortgages," §§ 1238–1240.

But see Guaranty Trust, etc., Co. *v.* Powell, 150 Pa. St. 16, 24 Atl. 345 (construing the Pennsylvania act of May 25, 1887, Pamphl. Laws 270); Compton *v.* Major, 30 Gratt. (Va.) 180 (construing the Virginia act of March 3, 1866); Laidley *v.* Hinchman, 3 W. Va. 423.

After entry of a judgment of foreclosure for an instalment due under a mortgage, a subsequent purchaser or encumbrancer has a right to insist on a strict compliance with the law by the mortgagee in case of any further default in the payment of interest or principal, and an order thereupon for a sale of the premises. Farmers', etc., Bank *v.* Luther, 14 Wis. 96.

69. Beer *v.* Haas, 40 La. Ann. 413, 4 So. 326; Strong *v.* Ehle, 86 Mich. 42, 48 N. W. 868; Pool *v.* Horton, 45 Mich. 404, 8 N. W. 59.

Same persons as mortgagors and mortgagees.— A note and mortgage given by thirteen persons to three of their own number is equivalent to a note for ten thirteenths of the apparent amount, and therefore the payees can sue thereon, and can foreclose the mortgage against the other makers as defendants. McDowell *v.* Jacobs, 10 Cal. 387.

Joint tenants.— One joint owner may enforce his mortgage on the undivided portion of the other, although a suit for partition is pending. Gleises *v.* Maignan, 3 La. 530, 23 Am. Dec. 466.

Joint mortgagors.— If several persons have purchased land, and given their obligations for the price *in solido*, with a single mortgage on the entire tract as security therefor, the mortgagee may pursue his remedies against either one of the obligors for the whole amount. Hughes *v.* Patterson, 23 La. Ann. 679.

70. Annely *v.* De Saussure, 12 S. C. 488; Christian *v.* Atlantic, etc., R. Co., 133 U. S. 233, 10 S. Ct. 260, 33 L. ed. 589; Stewart *v.* Chesapeake, etc., Canal Co., 1 Fed. 361, 4 Hughes 41. *Contra*, McCabe *v.* Kenney, 52 Hun (N. Y.) 514, 5 N. Y. Suppl. 678; Jackson *v.* Pierce, 10 Johns. (N. Y.) 414; Elliot *v.* Van Voorst, 8 Fed. Cas. No. 4,390, 3 Wall. Jr. 299.

71. Powell *v.* Knowler, 2 Atk. 224, 26 Eng. Reprint 539; Hodges *v.* Atty.-Gen., 8 L. J. Exch. 28, 3 Y. & C. Exch. 342.

72. Bartlett *v.* Rees, L. R. 12 Eq. 395, 40 L. J. Ch. 599, 24 L. T. Rep. N. S. 779, 25 L. T. Rep. N. S. 373, 19 Wkly. Rep. 1046; Anonymous, 4 Ir. Eq. 701; Hancock *v.* Atty.-Gen., 10 Jur. N. S. 557, 33 L. J. Ch. 661, 10 L. T. Rep. N. S. 222, 12 Wkly. Rep. 569; Rogers *v.* Maule, 1 Y. & Coll. 4, 62 Eng. Reprint 765.

73. Magruder *v.* Offutt, Dudley (Ga.) 227; Citizens' Bank *v.* Buisson, 7 Rob. (La.) 506; German Sav., etc., Soc. *v.* Cannon, 65 Fed. 542. *Contra*, Slaughter *v.* Foust, 4 Blackf. (Ind.) 379; Graham *v.* Carter, 2 Hen. & M. (Va.) 6.

74. Truxillo *v.* Dulaune, 47 La. Ann. 10, 16 So. 642; Dobel *v.* Delavallade, 30 La. Ann. 604; Henry *v.* Goldman, 27 La. Ann. 670; Kisterbock *v.* Building Assoc., 7 Phila. (Pa.) 185; Felder *v.* Murphy, 2 Rich. Eq. (S. C.) 58.

75. Pope *v.* Henry, 24 Vt. 560.

possessor or purchaser of the equity of redemption may be proceeded against in a hypothecary action.[76]

2. Defenses — a. In General. As a general rule the same defenses may be made in a suit to foreclose a mortgage which might be made in an action on the debt which the mortgage is given to secure.[77] Beside the defenses specially mentioned in the succeeding sections, it has been held that the mortgagor may plead the mortgagee's want of capacity to sue or that he is not the owner of the securities,[78] that the action is prematurely brought,[79] that the amount claimed by the mortgagee is excessive or is not due,[80] that there has been no breach of condition, or that the default was caused by the mortgagee's own act or fault,[81] that there is a reasonable and sufficient excuse for the mortgagor's default in making payments of principal or interest,[82] that the mortgage debt has been paid to a third person under process of attachment or garnishment,[83] that the matters in controversy were formerly in issue and adjudicated in another suit between the same parties,[84]

76. Labauve *v.* Slack, 31 La. Ann. 134, holding that in a hypothecary action against a third possessor, who is not the judgment debtor, no other property is liable to seizure but that on which the mortgage rests.

If the third possessor is dead, the mortgagee may pursue the property by executory process in the hands of the administrator or any probate purchaser. Vancourt's Succession, 11 La. Ann. 383.

Ownership not necessary.— To support a hypothecary action, the ownership need not be in defendant; but possession suffices. Walker *v.* Dunbar, 6 Mart. N. S. (La.) 627.

The mortgagee need not proceed against the third possessor who last acquired, if his property is free from the mortgage. Lanusse *v.* Lanna, 6 Mart. N. S. (La.) 103.

Failure of mortgagor.— The mortgagee may proceed against a third party in possession when the mortgagor has failed. Rowel *v.* Buhler, 3 Mart. N. S. (La.) 348.

Judgment against the mortgagor.— Under the old code the mortgagee could not have process against the third possessor until after judgment against the mortgagor. Ragant *v.* Gremillon, 1 Mart. N. S. (La.) 67; Bernard *v.* Vignaud, 1 Mart. N. S. (La.) 1; Curtis *v.* Murray, 8 Mart. (La.) 640; Knight *v.* Hall, 7 Mart. (La.) 410; Mouchon *v.* Delor, 5 Mart. (La.) 395.

77. Miller *v.* Marckle, 21 Ill. 152; Vinton *v.* King, 4 Allen (Mass.) 562; Raguet *v.* Roll, 7 Ohio 76; Kenicott *v.* Wayne County, 16 Wall. (U. S.) 452, 21 L. ed. 319.

In scire facias on a mortgage, the only admissible defenses are such as show the mortgage to be void or to have been discharged. Carpenter *v.* Mooers, 26 Ill. 162.

78. Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369; Renaud *v.* Conselyea, 4 Abb. Pr. (N. Y.) 280 [*affirmed* in 5 Abb. Pr. 346]; Chapin *v.* Walker, 6 Fed. 794, 2 McCrary 175. *Compare* Montgomery *v.* King, 125 Ga. 388, 54 S. E. 135. And see *supra*, XXI, C, 1, a, (II).

Production of evidences of debt.—In a suit to foreclose a trust deed, the bonds need not be produced until a decree of foreclosure is rendered. Northern Trust Co. *v.* Columbia Straw-Paper Co., 75 Fed. 936. And see Massaker *v.* Mackerley, 9 N. J. Eq. 440.

79. *Illinois.*— Stone *v.* Billings, 167 Ill. 170, 47 N. E. 372.

Indiana.— Jordan *v.* D'Heur, 71 Ind. 199.

New York.— Rosche *v.* Kosmowski, 61 N. Y. App. Div. 23, 70 N. Y. Suppl. 216.

Ohio.—Belmont County Branch State Bank *v.* Price, 8 Ohio St. 299.

Pennsylvania.— Lesher *v.* Brown, 3 Del. Co. 69.

Vermont.— Mason *v.* Peters, 4 Vt. 101.

See 35 Cent. Dig. tit. "Mortgages," § 1210.

80. Gassert *v.* Black, 11 Mont. 185, 27 Pac. 791. But *compare* Price *v.* Metsger, 20 Fla. 683, holding that a defendant in foreclosure who has no interest in the mortgaged land has no right to plead that the whole amount of the mortgage debt is not due from the mortgagor.

Error in mortgage.— When a mortgage contains a palpable clerical error in the figures of the sum due, a foreclosure may be had for the true amount of the debt, without the necessity of first reforming the mortgage. Damon *v.* Deeves, 62 Mich. 465, 29 N. W. 42.

81. See Seymour *v.* Bailey, 66 Ill. 288; Ewart *v.* Irwin, 1 Phila. (Pa.) 78.

82. See Bonner Springs Lodge, etc., Co. *v.* McClelland, 59 Kan. 778, 53 Pac. 866; Atkinson *v.* Walton, 162 Pa. St. 219, 29 Atl. 898; McClelland *v.* Misho, 21 Pa. Co. Ct. 45; Gumpert *v.* Ell, 7 Kulp (Pa.) 513; Hummel *v.* Siddal, 11 Phila. (Pa.) 308. And see *supra*, XXI, C, 1, j, (II).

Mere negligence on the part of the mortgagor in failing to pay interest is no defense. Ferris *v.* Ferris, 28 Barb. (N. Y.) 29.

83. Greenman *v.* Fox, 54 Ind. 267; Dickinson *v.* Dickinson, 59 Vt. 678, 10 Atl. 821. *Compare* Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502 (where the attachment proceedings were void); Streng *v.* Holyoke Water Power Co., 12 Pa. Super. Ct. 323.

84. Cheney *v.* Patton, 134 Ill. 422, 25 N. E. 792; Kay *v.* Gray, 30 Pa. Super. Ct. 450; Western Pennsylvania Hospital *v.* Zweidinger, 29 Pittsb. Leg. J. N. S. (Pa.) 393. And see *infra*, XXI, L, 1, d. But see Herber *v.* Christopherson, 30 Minn. 395, 15 N. W. 676.

that the mortgage debt has been settled by an accord and satisfaction,[85] or that the mortgagee has refused to comply with a condition binding him to release portions of the property on payment of portions of the debt.[86] But the personal liability of defendant for the mortgage debt is not a necessary part of the right to foreclose.[87] And in no case can the mortgagor plead his own want of title to the mortgaged premises.[88] Fraudulent conduct of the mortgagee toward the mortgagor and junior creditors, consisting in waste and spoliation of the estate, may constitute a defense to foreclosure proceedings.[89] But it is no defense to an action to foreclose that the action was induced by malicious feelings toward the mortgagor.[90] A defense cannot be founded on equities arising between the mortgagor and a third party.[91] Where the mortgaged property is in the possession of a receiver, leave of court should first be obtained before instituting foreclosure proceedings against him; but failure to obtain leave is no defense to the foreclosure suit.[92] That mortgaged property is subject to be administered in bankruptcy is no defense to foreclosure proceedings in a state court having jurisdiction.[93] It is no defense to foreclosure proceedings that the mortgaged property is in process of administration in the probate court as part of the estate of the deceased mortgagor.[94]

b. Invalidity of Mortgage. The validity of a mortgage may be attacked, in foreclosure proceedings, for illegality, fraud, duress, or other such matters which

A former adjudication cannot be pleaded in bar where the present plaintiff was not in any way connected with that suit (Cheney *v.* Patton, 134 Ill. 422, 25 N. E. 792), where the present action is jointly against the mortgagor and a purchaser from him, while the former suit was against the mortgagor alone (Watt *v.* Alvord, 25 Ind. 533), or where the former proceedings were abortive and void (Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613).

Pendency of similar action.— A foreclosure suit is not abated or barred by the mere pendency of a similar action against the mortgagor in the same or another court. West *v.* Morris, 2 Disn. (Ohio) 415; Trimmier *v.* Hardin, 32 S. C. 600, 11 S. E. 103; Wood *v.* Lake, 13 Wis. 84.

85. Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193. See also Chandler *v.* Herrick, 11 N. J. Eq. 497.

86. See Stone *v.* Billings, 167 Ill. 170, 47 N. E. 372; Lane *v.* Allen, 162 Ill. 426, 44 N. E. 831; Middleton Sav. Bank *v.* Dubuque, 15 Iowa 394. *Compare* Ewart *v.* Irwin, 1 Phila. (Pa.) 78.

87. Lewis *v.* Labauve, 13 La. Ann. 382. See also Christy *v.* Dana, 42 Cal. 174; Catterlin *v.* Armstrong, 101 Ind. 258.

88. *Alabama.*— Strong *v.* Waddell, 56 Ala. 471.

California.— Whitney *v.* Buckman, 13 Cal. 536; Redman *v.* Bellamy, 4 Cal. 247.

Illinois.— Roderick *v.* McMeekin, 204 Ill. 625, 68 N. E. 473; Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; Parlin, etc., Co. *v.* Galloway, 95 Ill. App. 60.

Massachusetts.— Wilkinson *v.* Scott, 17 Mass. 249.

Mississippi.— Bush *v.* Cooper, 26 Miss. 599, 59 Am. Dec. 270.

Nebraska.— Joslin *v.* Williams, 61 Nebr. 859, 86 N. W. 473.

New Jersey.— Wyckoff *v.* Gardner, 20 N. J. L. 556, 45 Am. Dec. 388; State Mut. Bldg., etc., Assoc. *v.* Batterson, 65 N. J. Eq. 610, 56 Atl. 703; Bird *v.* Davis, 14 N. J. Eq. 467.

New York.— Barber *v.* Harris, 15 Wend. 615; Jackson *v.* Stevens, 13 Johns. 316; Jackson *v.* Murray, 12 Johns. 201.

Oregon.— Edgar *v.* Golden, 36 Oreg. 448, 48 Pac. 1118, 60 Pac. 2.

Pennsylvania.— Pennsylvania L. Ins., etc., Co. *v.* Beaumont, 190 Pa. St. 101, 42 Atl. 522; Krupp *v.* Krugel, 12 Phila. 174.

United States.— Bush *v.* Marshall, 6 How. 284, 12 L. ed. 440.

England.— Doe *v.* Penfold, 3 Q. B. 757, 3 G. & D. 239, 7 Jur. 38, 12 L. J. Q. B. 72, 43 E. C. L. 960; Guardian Assur. Co. *v.* Avonmore, Ir. R. 6 Eq. 391.

89. Stickney *v.* Blair, 50 Barb. (N. Y.) 341.

90. Trenor *v.* Le Count, 84 Hun (N. Y.) 426, 32 N. Y. Suppl. 412.

91. Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231.

92. Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702; Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136.

Assets in receiver's hands no defense.— It is no defense to a foreclosure begun on failure to pay an instalment of interest that the mortgagor corporation had no funds with which to make the payment because its assets had been taken from it and placed in the hands of a receiver under decree of a court. Penn Mut. L. Ins. Co. *v.* Walton, etc., Co., 2 Marv. (Del.) 179, 42 Atl. 424.

93. Broach *v.* Powell, 79 Ga. 79, 3 S. E. 763.

94. Cook *v.* De la Guerra, 24 Cal. 237; Derrick *v.* Sams, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309; McCallam *v.* Pleasants,

undermine its very foundation;[95] but not on account of a mere want of authority to execute it, or to receive it, as the case may be, not affecting the validity of the debt intended to be secured,[96] nor for indefiniteness or mistake in the description of the property intended to be pledged.[97] The mortgagor may be estopped to allege fraud in which he himself participated, and which was directed against his other creditors or other third persons.[98] And one who in obtaining a loan has violated an express statutory provision is estopped to set up the illegality of the loan as a defense to an action to foreclose the mortgage securing it.[99]

c. Want or Failure of Consideration. Want or failure of consideration may be set up as a defense to a suit for the foreclosure of a mortgage.[1] The mort-

67 Ind. 542. And see *supra*, XXI, C, 1, k, (VII).

95. *California.*— Thatcher *v.* Edsall, (1884) 4 Pac. 202. *Compare* Levy *v.* Burkle, (1887) 14 Pac. 564, as to defense of duress and threats.

Georgia.— Derrick *v.* Sams, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309.

Louisiana.— Dabezies *v.* Barthe, 104 La. 781, 29 So. 346.

Minnesota.— Nutting *v.* McCutcheon, 5 Minn. 382.

New Jersey.— Marsh *v.* Mitchell, 26 N. J. Eq. 497.

New York.— Myers *v.* Wheeler, 161 N. Y. 637, 57 N. E. 1118 [*affirming* 24 N. Y. App. Div. 327, 48 N. Y. Suppl. 611]; Caryl *v.* Williams, 7 Lans. 416.

Oregon.— Conklin *v.* La Dow, 33 Oreg. 354, 54 Pac. 218.

Pennsylvania.— Wister *v.* Pollitt, 5 Pa. Co. Ct. 192.

South Carolina.— Garvin *v.* Garvin, 55 S. C. 360, 33 S. E. 458.

See 35 Cent. Dig. tit. "Mortgages," § 1211.

Unauthorized stipulation.— In the absence of fraud, the mere fact that a mortgage, drawn by an agent of the mortgagor, contained an unauthorized stipulation, would not avail as a defense to its foreclosure, although the mortgagor could not read the mortgage and the same was not read to him before execution. Wilson *v.* Winter, 6 Fed. 16.

96. *Indiana.*— State *v.* Greene, 101 Ind. 532; Sturgeon *v.* Daviess County, 65 Ind. 302; Kendallville M. E. Church *v.* Shulze, 61 Ind. 511.

Michigan.— Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288.

New Jersey.— Third Ave. Sav. Bank *v.* Dimock, 24 N. J. Eq. 26, holding that mortgagors cannot defend foreclosure by alleging that complainants, in making the loan to secure which the mortgage was given, were acting *ultra vires*.

New York.— Gillette *v.* Smith, 18 Hun 10.

Pennsylvania.— Moyer *v.* Dodson, 212 Pa. St. 344, 61 Atl. 937, as to want of delivery of mortgage and notes as a defense.

Wisconsin.— Dodge *v.* Silverthorn, 12 Wis. 644.

See 35 Cent. Dig. tit. "Mortgages," § 1211.

97. Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555; Tryon *v.* Sutton, 13 Cal. 490; Des Moines Nat. Bank *v.* Harding, 86 Iowa 153, 53 N. W. 99.

98. Evans *v.* Pence, 78 Ind. 439; Barwick *v.* Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. Rep. 512; Dunn *v.* O'Connor, 25 N. Y. App. Div. 73, 49 N. Y. Suppl. 270.

99. Dunn *v.* O'Connor, 25 N. Y. App. Div. 73, 49 N. Y. Suppl. 270.

1. *Florida.*— Otis *v.* McCaskill, (1906) 41 So. 458; Braxton *v.* Liddon, 49 Fla. 280, 38 So. 717.

Georgia.— Hall *v.* Davis, 73 Ga. 101; Mell *v.* Moony, 30 Ga. 413.

Illinois.— Scott *v.* Magloughlin, 133 Ill. 33, 24 N. E. 1030. A mortgage purporting to secure a note which does not exist cannot be foreclosed as drawn, although an indebtedness actually existed at the time it was executed. Whiting Paper Co. *v.* Busse, 95 Ill. App. 288.

Indiana.— Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106.

Mississippi.— Hughes *v.* Thweatt, 57 Miss. 376.

New York.— See Merchants' Nat. Bank *v.* Snyder, 170 N. Y. 565, 62 N. E. 1097. *Compare* Best *v.* Thiel, 79 N. Y. 15; Gilleland *v.* Failing, 5 Den. 308. A partial failure of consideration is no defense to an action to foreclose a mortgage, when it is not pleaded as a set-off or counter-claim. Revoir *v.* Barton, 71 Hun 457, 24 N. Y. Suppl. 985.

Texas.— See Elmendorf *v.* Tejada, (Civ. App. 1894) 28 S. W. 563.

Wisconsin.— Cawley *v.* Kelley, 60 Wis. 315, 19 N. W. 65. See also Callis *v.* Day, 38 Wis. 643.

See 35 Cent. Dig. tit. "Mortgages," § 1212.

Effect of former adjudication.— Where a judgment has been entered on a bond, in pursuance of a warrant of attorney contained therein to confess judgment, and a petition to open the judgment, on the ground of fraud and want of consideration for the bond, is denied, such defense becomes *res judicata*; and it cannot afterward be pleaded in an action to foreclose the mortgage given to secure the bond. Heilman *v.* Kroh, 155 Pa. St. 1, 25 Atl. 751.

Fraud as to mortgagor's creditors.— Where creditors of the mortgagor, joined as defendants in a suit for foreclosure of the mortgage attempt to show want of consideration for the mortgage, on the ground that it was given for the purpose of defrauding them, the defense is not admissible, as against the mortgagee's proof of the due execution of the mortgage and note. Palmer *v.* Mead, 7 Conn. 149.

gagor may be estopped to deny an indebtedness recited and set forth in the mortgage;[2] but where the note and mortgage were executed in consideration of the mortgagee's agreement to transfer property to the mortgagor, or to perform some other act for his benefit, a foreclosure can be prevented by showing a failure of performance on the part of the mortgagee.[3] The wife of the mortgagor, who joined with him in the mortgage to relinquish her dower, the mortgage being valid as to him, cannot defend a foreclosure suit by pleading that there was no pecuniary consideration moving to her.[4]

d. Payment. Payment and satisfaction of the debt secured by a mortgage may always be pleaded in defense to an action to foreclose it,[5] no matter how or from what source the satisfaction was received by the mortgagee.[6] And, although the note was paid before its maturity, it is a good defense if the mortgagee con-

2. Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350; Brokaw *v.* Field, 33 Ill. App. 138.

3. *Arkansas.*— Choate *v.* Kimball, 56 Ark. 55, 19 S. W. 108.

Illinois.— Gammon *v.* Wright, 31 Ill. App. 353; De Land *v.* Metzger, 21 Ill. App. 89. This defense, however, cannot be set up where the proceeding to foreclose is by scire facias. Fitzgerald *v.* Forristal, 48 Ill. 228; Woodbury *v.* Manlove, 14 Ill. 213; Hall *v.* Byrne, 2 Ill. 140.

Indiana.— Hoffa *v.* Hoffman, 33 Ind. 172; Branham *v.* Cossett, 17 Ind. 502. An answer to a complaint to foreclose a mortgage, showing a contemporaneous written contract making payment contingent on an event that has never happened, is good on demurrer. Lucas *v.* Hendrix, 92 Ind. 54.

New Jersey.— Chamberlain *v.* Hoffman, 38 N. J. Eq. 40 (holding that where the mortgage secured nine notes given to plaintiff for goods sold, six of which remained unpaid, and secured three notes given to another person, all of which were paid, it is no defense that the title to some of the goods sold by the other person had failed); Coursen *v.* Canfield, 21 N. J. Eq 92 (holding that a mortgagee's failure to keep his covenant to procure certain releases is no defense, in a foreclosure suit, where the mortgagor agreed to pay the money at a certain time absolutely, and not on condition that the releases should be procured).

Pennsylvania.— See Krimm *v.* Devlin, 206 Pa. St. 508, 56 Atl. 23. The fact that a mortgagee agreed to satisfy a mechanic's lien on the mortgaged land and failed to do so cannot be pleaded in bar to a suit on the mortgage for failure to pay interest, the covenants not being dependent. Hummel *v.* Siddal, 11 Phila. 308.

See 35 Cent. Dig. tit. "Mortgages," § 1212.

4. McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

5. *California.*— Anglo-California Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077.

Georgia.— Meeks *v.* Johnson, 75 Ga. 629.

Illinois.— Brand *v.* Kleinecke, 77 Ill. App. 269. A mortgagee may accept a partial payment of money due, and on failure to pay the balance he is not prevented from enforcing the provisions of his mortgage to collect the same at any time thereafter, until barred by the statute of limitations. Salomon *v.* Stoddard, 107 Ill App. 227.

Kansas.— Pattie *v.* Wilson, 25 Kan. 326.

Kentucky.— Aultman, etc., Co. *v.* Meade, 89 S. W. 137, 28 Ky. L. Rep. 208.

Michigan.— Zlotoeczski *v.* Smith, 171 Mich. 202, 75 N. W. 470.

Mississippi.— Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78.

Nebraska.— Curtis *v.* Perry, 33 Nebr. 519, 50 N. W. 426.

New York.— Moody *v.* Belden, 15 N. Y. Suppl. 119; Earle *v.* Hammond, 2 Abb. N. Cas. 368; Loomer *v.* Wheelwright, 3 Sandf. Ch. 135.

Pennsylvania.— German Ins. Co. *v.* Davenport, 6 Pa. Cas. 441, 9 Atl. 517; Wanner *v.* Roth, 1 Woodw. 13.

Washington.— Peterson *v.* Johnson, 20 Wash. 497, 55 Pac. 932.

United States.— American L. & T. Co. *v.* Union Depot Co., 80 Fed. 36, holding that the acceptance of interest less than the whole amount due, pending a suit for foreclosure based on default in payment of interest, does not defeat the suit.

See 35 Cent. Dig. tit. "Mortgages," § 1214.

Where the presumption of satisfaction of a mortgage arises from lapse of time, it is only necessary to aver the fact of payment, in answer to a bill for foreclosure, and insist on the presumption. Roberts *v.* Welch, 43 N. C. 287.

Pending suit for partition no defense.— In an action to foreclose a mortgage, it is not a good defense that defendant is prosecuting with diligence proceedings for partition in the probate court, under which the mortgage, being against his undivided interest, will be discharged and payment made from the fund raised by the sale, where plaintiff is not a party to that proceeding. Lawrence *v.* Korn, 184 Pa. St. 500, 39 Atl. 295.

6. **As to allowance of debt as claim in probate court** see Consolidated Nat. Bank *v.* Hayes, 112 Cal. 75, 44 Pac. 469; Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390.

As to payment by application of insurance money see St. Helena Sav. Bank *v.* Middlekauff, 113 Cal. 463, 45 Pac. 840; Fergus *v.* Wilmarth, 117 Ill. 542, 7 N. E. 508.

As to application of rents and profits see Ford *v* Smith, 60 Wis. 222, 18 N. W. 925.

As to application of usurious interest see Ward *v.* Sharp, 15 Vt. 115.

As to garnishment of mortgage debt see Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

sented to receive the money then.[7] If the debt has been overpaid, defendant may have affirmative relief on a cross bill.[8]

e. Failure to Exhaust Other Remedy or Security. A mortgagee may be defeated in an action to foreclose where he has released other security or failed to pursue another remedy which he was bound to exhaust before coming upon the mortgaged property.[9]

f. In Action by Assignee — (i) *In General.* An assignee of a mortgage takes the same subject to equities and defenses between the original parties,[10] except perhaps where the mortgage is given to secure a negotiable promissory note;[11] and therefore as a rule the mortgagor may set up the same defenses against a foreclosure suit brought by an assignee of the mortgage as would be available to him if the action were by the original mortgagee,[12] including illegality,[13] fraud or false representations,[14] and want of consideration,[15] but not a set-off or counter-claim against the original mortgagee.[16]

(ii) *Want of Consideration For Assignment.* The mortgagor is not entitled to inquire into the consideration passing between the assignor and assignee; and he cannot defend a foreclosure suit brought by the assignee on the ground that such consideration was less than the value of the mortgage, or that it was invalid, illegal, or totally lacking.[17]

g. In Action Against Subsequent Purchaser. A purchaser of the equity of

7. Kelly *v.* Butterworth, 103 Ill. App. 87.

8. Hathaway *v.* Hagan, 59 Vt. 75, 8 Atl. 678.

9. See Security L. & T. Co. *v.* Mattern, 131 Cal. 326, 63 Pac. 482; Farmers' L. & T. Co. *v.* Turner, 111 Iowa 738, 82 N. W. 944; Ottawa First Nat. Bank *v.* Renn, 63 Kan. 334, 65 Pac. 698; Ricard *v.* Harrison, 19 La. Ann. 181; Bagley *v.* Tate, 10 Rob. (La.) 45; Guidry *v.* Rees, 7 La. 278; Delahoussaye *v.* Delahoussaye, 7 Mart. N. S. (La.) 199; Crum *v.* Laidlaw, 10 Mart. (La.) 468.

Marshaling securities.— The right of a second mortgagee to compel the first mortgagee to resort first to property covered by the first mortgage and not by the second cannot be raised by a counter-claim filed in a suit to foreclose the first mortgage on property covered by both. New York Co-operative Bldg., etc., Assoc. *v.* Brennan, 62 N. Y. App. Div. 610, 70 N. Y. Suppl. 916.

10. See *supra*, XVI, E, 3, a.

11. See *supra*, XVI, E, 3, e.

12. Haskell *v.* Brown, 65 Ill. 29; Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727; Western Pennsylvania Hospital *v.* Zweidinger, 29 Pittsb. Leg. J. N. S. (Pa.) 393.

Certificate of no defense.— As to the effect of a certificate given by the mortgagor to the assignee, at the time of the assignment, setting forth that the mortgage is valid and that he has no defense against it, as estopping him to set up available defenses see Eitel *v.* Bracken, 38 N. Y. Super. Ct. 7 (mortgagor may still defend on the ground of usury); Earle *v.* Hammond, 2 Abb. N. Cas. (N. Y.) 368 (unlawful bonus paid for extension of time of payment a defense); Hutchison *v.* Gill, 91 Pa. St. 253 (mortgagor cannot set up fraud of mortgagee in obtaining the mortgage); Robertson *v.* Hay, 91 Pa. St. 242. And see *supra*, XVI, E, 1, c.

13. De Witt *v.* Brisbane, 16 N. Y. 508; Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47. See also Hawley *v.* Bibb, 69 Ala. 52, holding that no defenses relating to the validity of the debt, other than such as could be made in a suit at law thereon, are available in a suit in equity to foreclose a mortgage by an assignee of the secured debt.

14. Cornell *v.* Corbin, 64 Cal. 197, 30 Pac. 629; Melendy *v.* Keen, 89 Ill. 395; Lathrop *v.* Godfrey, 3 Hun (N. Y.) 739. See also Dolman *v.* Cook, 14 N. J. Eq. 56.

15. Dwyer *v.* Woulfe, 39 La. Ann. 423, 1 So. 868.

16. Weil *v.* Fischer, 42 N. Y. Super. Ct. 32; Blakely *v.* Twining, 69 Wis. 238, 34 N. W. 132.

17. *Alabama.*— Johnson *v.* Beard, 93 Ala. 96, 9 So. 535.

Arkansas.— Martin *v.* O'Bannon, 35 Ark. 62.

Illinois.— Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276, champertous agreement between assignor and assignee.

Maine.— Pease *v.* Benson, 28 Me. 336.

Michigan.— McKinney *v.* Miller, 19 Mich. 142; Adair *v.* Adair, 5 Mich. 204, 71 Am. Dec. 779.

Mississippi.— Rowan *v.* Adams, Sm. & M. Ch. 45.

New York.— Morris *v.* Tuthill, 72 N. Y. 575; American Guild *v.* Damon, 107 N. Y. App. Div. 140, 94 N. Y. Suppl. 985; Pearsall *v.* Kingsland, 3 Edw. 195, usury in assignment.

Pennsylvania.— Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165.

Wisconsin.— Wisconsin Trust Co. *v.* Chapman, 121 Wis. 479, 99 N. W. 341, 105 Am. St. Rep. 1032; Crowns *v.* Forest Land Co., 99 Wis. 103, 74 N. W. 546; Knox *v.* Galligan, 21 Wis. 470; Croft *v.* Bunster, 9 Wis. 503.

Wyoming.— Conradt *v.* Lepper, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2.

redemption may plead such defenses to the mortgage as could be made by the mortgagor,[18] except such as are purely personal to the mortgagor,[19] and except where he has taken his title expressly subject to the mortgage, or has assumed and agreed to pay it, in which case he will be estopped to deny its validity or the right of the mortgagee to enforce it,[20] although even in this case he may allege that he was induced to make the purchase by false and fraudulent representations or that the assumption clause was fraudulently inserted;[21] but a merely erroneous belief that he was to get the title free from the mortgage or that the mortgage was ineffective cannot be set up as a defense.[22]

h. Purchase-Money Mortgage — (i) *In General.* In a suit to foreclose a purchase-money mortgage, defendant may plead fraud or want of consideration,[23] or false and fraudulent representations by which he was induced to make the purchase,[24] or a breach by the vendor of a collateral agreement which was part of the consideration, as to procure conveyances or releases from third persons or to turn over other property as a part of the bargain;[25] and, if he is ousted by the vendor and possession given to other persons, he may defend the foreclosure suit on the ground of a breach of the covenant for quiet enjoyment.[26]

(ii) *Defect or Failure of Title.* A grantee of land cannot defeat foreclosure of the mortgage given by him for the purchase-money, on the ground of want or defect of title in the grantor, where he has remained in possession and has not been evicted by a paramount title, and where no fraud was practised on him, and it is not alleged that the grantor is insolvent; his remedy in such case being by an action on the covenants in his deed.[27] But it is otherwise if there

United States.— Saenger *v.* Nightingale, 48 Fed. 708.

See 35 Cent. Dig. tit. "Mortgages," § 1213.

18. Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Creech *v.* Abner, 106 Ky. 239, 50 S. W. 58, 20 Ky. L. Rep. 1812; McDonough *v.* Zacharie, 3 La. 313; Eby *v.* Ryan, 22 Nebr. 470, 35 N. W. 225.

In scire facias on a mortgage, it is no defense for a terre-tenant that the mortgagor had title to only a part of the land described in the mortgage (Faucett *v.* Harris, 185 Pa. St. 164, 39 Atl. 842), nor that the mortgagor's negotiable notes for the mortgage debt are still outstanding (Brown *v.* Scott, 51 Pa. St. 357).

19. As to right of subsequent purchaser to plead usury see Borum *v.* Fouts, 15 Ind. 50. And see *supra*, XVII, E, 2, a.

20. Price *v.* Pollock, 47 Ind. 362; Stonebreaker *v.* Kerr, 40 Ind. 186; Brown *v.* Sadler, 16 La. Ann. 206; Reed *v.* Latson, 15 Barb. (N. Y.) 9; Gaw *v.* Glassboro Novelty Glass Co., 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 32. And see *supra*, XVII, E, 1, b, c.

21. Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606; Benedict *v.* Hunt, 32 Iowa 27; Green *v.* Turner, 86 Fed. 837, 30 C. C. A. 427.

Fraud of stranger.— The purchaser cannot set up as a counter-claim in the suit to foreclose the mortgage a fraud practised on him four years after the mortgage was given, by a stranger to the mortgage, the mortgagee not being connected with the fraud by any testimony. Reed *v.* Latson, 15 Barb. (N. Y.) 9.

Fraud known to purchaser.— A vendee, in whose favor a mortgage on the property sold to him has been fraudulently erased, and who was cognizant of the fraud, cannot avail himself of such erasure. Bachemin *v.* Chaperon, 15 La. Ann. 4.

22. Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 268, 77 N. W. 677; Parker *v.* Harvey, (N. J. Ch. 1897) 36 Atl. 681.

23. Wilber *v.* Buchanan, 85 Ind. 42; Dunn *v.* Leidy, 3 Phila. (Pa.) 358; Hicks *v.* Jennings, 4 Fed. 855, 4 Woods 496. And see Wall *v.* McMillan, 44 S. C. 402, 22 S. E. 424. But *compare* Elphick *v.* Hoffman, 49 Conn. 331, holding that where, in an action to foreclose a mortgage, defendant set up fraud and a breach of warranty in the original transaction, damages having been assessed for the breach of warranty, he could not also rely on the fraud.

24. Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62; Fairchild *v.* McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701. But *compare* Kennedy *v.* Richardson, 70 Ind. 524; Bay View Land Co. *v.* Myers, 62 Minn. 265, 64 N. W. 816; Jacobs *v.* Edelson, 83 N. Y. App. Div. 363, 82 N. Y. Suppl. 270; De Milt *v.* Hill, 89 Hun (N. Y.) 56, 34 N. Y. Suppl. 1060.

25. Hutson *v.* Pressnall, 83 Ind. 163; Johnston *v.* Donvan, 50 Hun (N. Y.) 215, 2 N. Y. Suppl. 858; Mallery *v.* Pearson, 1 Pa. L. J. Rep. 317; Akerly *v.* Vilas, 15 Wis. 401.

26. Cassada *v.* Stahel, 98 N. Y. App. Div. 600, 90 N. Y. Suppl. 533.

27. *Alabama.*— McLemore *v.* Mabson, 20 Ala. 137.

Arkansas.— See Birnie *v.* Main, 29 Ark. 591.

California.—Alden *v.* Pryal, 60 Cal. 215.

Florida.—Adams *v.* Fry, 29 Fla. 318, 10 So. 559. *Compare* Coy *v.* Downie, 14 Fla. 544.

Georgia.— O'Neal *v.* Carmichael, 84 Ga.

was a covenant of seizin in the deed,[28] if the purchaser was defrauded,[29] if he shows an eviction under a paramount title,[30] or if the mortgage was not to become due and payable until the title was perfected in his grantor, in which case he may rely on the condition precedent instead of the covenant of warranty.[31]

(III) *Outstanding Encumbrances.* A breach of the warranty against encumbrances in a deed conveying land is no defense to a foreclosure of the mortgage given to secure the purchase-money, where the mortgagor has not been evicted under the outstanding encumbrance, nor compelled to pay it off, and has not otherwise suffered special damage from it, and where no actual fraud is shown, his remedy in such case being on the covenants of the deed.[32] But if a personal judg-

511, 11 S. E. 352; Byrd *v.* Turpin, 62 Ga. 591.

Illinois.— Barry *v.* Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334; Hall *v.* Sheer, 76 Ill. 296. But *compare* Smith *v.* Newton, 38 Ill. 230; McFadden *v.* Fortier, 20 Ill. 509.

Indiana.—Black *v.* Thompson, 136 Ind. 611, 36 N. E. 643; Axtel *v.* Chase, 83 Ind. 546; Stahl *v.* Hammontree, 72 Ind. 103; Conwell *v.* Clifford, 45 Ind. 392; Jackson *v.* Fosbender, 45 Ind. 305; Hanna *v.* Shields, 34 Ind. 84; Rogers *v.* Place, 29 Ind. 577; Estep *v.* Estep, 23 Ind. 114; Hubbard *v.* Chappel, 14 Ind. 601.

Iowa.— Gifford *v.* Ferguson, 19 Iowa 166.

Kansas.— Emmons *v.* Gille, 51 Kan. 178, 32 Pac. 916.

Kentucky.— Perciful *v.* Hurd, 5 J. J. Marsh. 670.

Michigan.— Pfirrman *v.* Wattles, 86 Mich. 254, 49 N. W. 40.

Mississippi.— Stone *v.* Buckner, 12 Sm. & M. 73.

New Jersey.— Cooper *v.* Bloodgood, 32 N. J. Eq. 209; Hulfish *v.* O'Brien, 20 N. J. Eq. 230; Hile *v.* Davison, 20 N. J. Eq. 228; Long *v.* Long, 14 N. J. Eq. 462. *Compare* Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467.

New York.— National F. Ins. Co. *v.* McKay, 21 N. Y. 191; Farnham *v.* Hotchkiss, 2 Abb. Dec. 93, 2 Keyes 9; Dime Sav. Bank *v.* Crook, 29 Hun 671; Burke *v.* Nichols, 34 Barb. 430, 21 How. Pr. 459; Platt *v.* Gilchrist, 3 Sandf. 118; Edwards *v.* Bodine, 26 Wend. 109; Banks *v.* Walker, 3 Barb. Ch. 438; Lee *v.* Porter, 5 Johns. Ch. 268; Abbott *v.* Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Leggett *v.* McCarty, 3 Edw. 124; Davison *v.* De Freest, 3 Sandf. Ch. 456. *Compare* Withers *v.* Morrell, 3 Edw. 560.

Ohio.— Hill *v.* Butler, 6 Ohio St. 207.

South Carolina.— Munro *v.* Long, 35 S. C. 354, 14 S. E. 824, 28 Am. St. Rep. 851; Lessly *v.* Bowie, 27 S. C. 193, 3 S. E. 199; Mitchell *v.* Pinckney, 13 S. C. 203.

Vermont.— Darling *v.* Osborne, 51 Vt. 148.

Washington.— Kley *v.* Geiger, 4 Wash. 484, 30 Pac. 727. *Compare* Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710.

Wisconsin.— Clementson *v.* Streeter, 59 Wis. 429, 18 N. W. 340; Ludlow *v.* Gilman, 18 Wis. 552; Miller *v.* Larson, 17 Wis. 624; Juneau *v.* Wells, 1 Pinn. 580.

United States.— Curtis *v.* Innerarity, 6 How. 146, 12 L. ed. 380.

Canada.— Hamilton *v.* Banting, 13 Grant Ch. (U. C.) 484; Cockenour *v.* Bullock, 12 Grant Ch. (U. C.) 138.

See 35 Cent. Dig. tit. "Mortgages," § 1220.

But see Wilson *v.* Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767; Murphy *v.* Richardson, 28 Pa. St. 288; Poyntell *v.* Spencer, 6 Pa. St. 254; Morris *v.* Buckley, 11 Serg. & R. (Pa.) 168; Steinhauer *v.* Witman, 1 Serg. & R. (Pa.) 438.

Counter-claim for damages.— The mortgagor may set up a counter-claim, or a claim to have the amount of the foreclosure decree reduced, to the extent of the damages he has suffered by reason of a total or partial failure of title. Coy *v.* Downie, 14 Fla. 544; Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Tone *v.* Wilson, 81 Ill. 529; Schmisseur *v.* Penn, 47 Ill. App. 278; Patterson *v.* Sweet, 3 Ill. App. 550; Lowry *v.* Hurd, 7 Minn. 356; Merritt *v.* Gouley, 58 Hun (N. Y.) 372, 12 N. Y. Suppl. 132; Wacker *v.* Straub, 88 Pa. St. 32; Akerly *v.* Vilas, 23 Wis. 207, 99 Am. Dec. 165.

See 35 Cent. Dig. tit. "Mortgages," § 1224.

Estoppel of mortgagor.—A covenant against encumbrances in a purchase-money mortgage will not estop the mortgagor to show a breach of a like covenant in the deed of his grantor. Hubbard *v.* Norton, 10 Conn. 422; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504; Sumner *v.* Barnard, 12 Metc. (Mass.) 459; Haynes *v.* Stevens, 11 N. H. 28.

28. Latham *v.* McCann, 2 Nebr. 276.

29. O'Brien *v.* Hulfish, 22 N. J. Eq. 471.

30. Steinhauer *v.* Witman, 1 Serg. & R. (Pa.) 438.

31. Weaver *v.* Wilson, 48 Ill. 125; Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459.

32. *Florida.*— Adams *v.* Fry, 29 Fla. 318, 10 So. 559; Randall *v.* Bourgardez, 23 Fla. 264, 2 So. 310, 11 Am. St. Rep. 379.

Illinois.— Gager *v.* Edwards, 26 Ill. App. 487. But *compare* Schmisseur *v.* Penn, 47 Ill. App. 278.

Indiana.— Lucas *v.* Hendrix, 92 Ind. 54; Cook *v.* Fuson, 66 Ind. 521; Gillfillan *v.* Snow, 51 Ind. 305.

Kentucky.— Hunt *v.* McConnell, 1 T. B. Mon. 219.

Michigan.— Smith *v.* Fiting, 37 Mich. 148; Adams *v.* Bradley, 12 Mich. 346; Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117.

Minnesota.— Bay View Land Co. *v.* Myers, 62 Minn. 265, 64 N. W. 816.

New Jersey.—Frenche *v.* McConnell, (1897) 38 Atl. 687; Glenn *v.* Whipple, 12 N. J. Eq. 50.

ment or deficiency decree is asked, he may set up in reduction of damages, or by way of counter-claim, the amount of the outstanding encumbrance, provided its amount is fixed and it is certain that he will have to discharge it.[33]

(iv) *Defects in Quantity or Quality of Land.* On foreclosure of a purchase-money mortgage, defense may be made on the ground of false representations as to the quantity, situation, character, or productiveness of the land conveyed,[34] especially if the part of the purchase-money already paid amounts to all that the land is really worth,[35] or such facts may be shown in reduction of the amount of the foreclosure decree or by way of counter-claim against it.[36] But this rule does not apply where there were no false representations, but merely a mutual mistake of the parties,[37] or where the purchaser took immediate possession of the land and had an opportunity to discover any defects, but made no complaint, and afterward gave his mortgage for the purchase-price.[38]

i. Set-Off or Counter-Claim. As a general rule, a claim or demand of defendant against plaintiff in a foreclosure suit cannot be set up by way of counter-claim or set-off,[39] unless it grows out of the transaction which involved the giving of the

New York.— Sandford *v.* Travers, 40 N. Y. 140; York *v.* Allen, 30 N. Y. 104; Grant *v.* Tallman, 20 N. Y. 191, 75 Am. Dec. 384; McCrea *v.* Connor, 30 N. Y. App. Div. 598, 52 N. Y. Suppl. 231; Curtiss *v.* Bush, 39 Barb. 661; Soule *v.* Dixon, 1 N. Y. Suppl. 697.

Pennsylvania.— Thomas *v.* Harris, 43 Pa. St. 231; Jewell *v.* Bannon, 12 Pa. Co. Ct. 399.

South Carolina.— Lessly *v.* Bowie, 27 S. C. 193, 3 S. E. 199; Childs *v.* Alexander, 22 S. C. 169.

South Dakota.— Philip *v.* Stearns, (1905) 105 N. W. 467.

See 35 Cent. Dig. tit. "Mortgages," § 1221.

But see Warren *v.* Stoddart, 6 Ida. 692, 59 Pac. 540.

33. *Nebraska.*— Nesbitt *v.* Campbell, 5 Nebr. 429.

New Jersey.— Kuhnen *v.* Parker, 56 N. J. Eq. 286, 38 Atl. 641; Zabriskie *v.* Baudendistel, (Ch. 1890) 20 Atl. 163 [*affirmed* in 50 N. J. Eq. 453, 26 Atl. 455]; Union Nat. Bank *v.* Pinner, 25 N. J. Eq. 495.

New York.— Seligman *v.* Dudley, 14 Hun 186.

Ohio.— Craig *v.* Heis, 30 Ohio St. 550.

Pennsylvania.— Owens *v.* Salter, 38 Pa. St. 211. And see Parker *v.* Sulouff, 94 Pa. St. 527.

Wisconsin.— See Wylie *v.* Karner, 54 Wis. 591, 12 N. W. 57.

Canada.— Church Soc. *v.* McQueen, 15 Grant Ch. (U. C.) 281.

See 35 Cent. Dig. tit. "Mortgages," § 1224.

34. Hervey *v.* Parry, 82 Ind. 263; Sweezey *v.* Collins, 36 Iowa 589; Lurch *v.* Holder, (N. J. Ch. 1893) 27 Atl. 81; Twitchell *v.* Bridge, 42 Vt. 68. *Contra*, Alden *v.* Pryal, 60 Cal. 215.

35. Allen *v.* Henn, 197 Ill. 486, 64 N. E. 250.

36. *Illinois.*— White *v.* Sutherland, 64 Ill. 181.

Iowa.— Moberly *v.* Alexander, 19 Iowa 162.

New Hampshire.— Nelson *v.* Hall, 60 N. H. 274.

New Jersey.— McMichael *v.* Webster, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630; Dayton *v.* Melick, 32 N. J. Eq. 570.

New York.— Horton *v.* Childs, 54 Hun 636, 7 N. Y. Suppl. 570.

Ohio.— Pierce *v.* Tiersch, 40 Ohio St. 168; Allen *v.* Shackelton, 15 Ohio St. 145.

Oregon.— Farmers' Nat. Bank *v.* Gates, 33 Oreg. 388, 54 Pac. 205, 72 Am. St. Rep. 724.

Pennsylvania.— Comegys *v.* Davidson, 154 Pa. St. 534, 26 Atl. 618; Strohecker *v.* Housel, 5 Pa. L. J. 327.

Rhode Island.—Fullen *v.* Providence County Sav. Bank, 14 R. I. 363.

Vermont.— Darling *v.* Osborne, 51 Vt. 148.

Wisconsin.— Kobiter *v.* Albrecht, 82 Wis. 58, 51 N. W. 1124; Hall *v.* Gale, 14 Wis. 54.

United States.— Hicks *v.* Jennings, 4 Fed. 855, 4 Woods 496.

See 35 Cent. Dig. tit. "Mortgages," § 1224.

37. Davis *v.* Clark, 33 N. J. Eq. 579 [*affirming* 32 N. J. Eq. 530]; Northrop *v.* Sumney, 27 Barb. (N. Y.) 196; Dresbach *v.* Stein, 41 Ohio St. 70.

Mere enumeration of quantity at the end of a particular description of the premises, where there is no fraud or gross mistake, is matter of description only, and not of the essence of the contract; and in such case no deduction will be made from the amount of the mortgage given to secure the purchase-money. Melick *v.* Dayton, 34 N. J. Eq. 245.

38. Wright *v.* Peet, 36 Mich. 213.

39. *Alabama.*— Brown *v.* Scott, 87 Ala. 453, 6 So. 384.

California.— McKean *v.* German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656.

Connecticut.— Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608.

Indiana.— Ball *v.* Green, 90 Ind. 75.

Maryland.— Spencer *v.* Almoney, 56 Md. 551.

Michigan.—Adams *v.* Bradley, 12 Mich. 346.

Montana.— Collier *v.* Ervin, 3 Mont. 142.

New Jersey.— McMichael *v.* Webster, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630; Parker *v.* Hartt, 32 N. J. Eq. 225; Onderdonk *v.* Gray, 19 N. J. Eq. 65; Bird *v.* Davis, 14 N. J. Eq. 467; Dolman *v.* Cook, 14

mortgage or is connected with its consideration.[40] A defendant in several foreclosure suits, claiming a set-off in each exceeding the interest on the mortgages, will not be compelled to elect to which of the mortgages he will apply the set-off.[41]

j. Persons to Whom Defenses Available. As a general rule persons coming into a foreclosure suit by intervention cannot set up defenses which the mortgagor himself has not chosen to allege.[42] And whatever may be the conflicting claims or equities between joint mortgagors, they cannot affect the mortgagee's right to a decree.[43] But other creditors of the mortgagor, coming or brought into the suit, may plead that the mortgage was fraudulent as to them; this will not prevent a decree against the mortgagor, but will entitle them to protection against

N. J. Eq. 56; Hendrickson *v.* Anderson, 6 N. J. Eq. 594; White *v.* Williams, 3 N. J. Eq. 376.

New York.— Dart *v.* McAdam, 27 Barb. 187; Warner *v.* Gouverneur, 1 Barb. Ch. 36; Irving *v.* De Kay, 10 Paige 319; Wolcott *v.* Sullivan, 6 Paige 117. But see Niagara Bank *v.* Rosevelt, 9 Cow. 409.

North Carolina.— Ryan *v.* Martin, 104 N. C. 176, 10 S. E. 169.

Ohio.— Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502.

Oregon.— Sears *v.* Martin, 22 Oreg. 311, 29 Pac. 890; Burrage *v.* Bonanza Gold, etc., Min. Co., 12 Oreg. 169, 6 Pac. 766.

See 35 Cent. Dig. tit. "Mortgages," § 1223.

Contra.— Gumpert *v.* Ell, 7 Kulp (Pa.) 513; Ott *v.* Masters, 1 Lehigh Val. L. Rep. (Pa.) 137; Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741; Hattier *v.* Etinaud, 2 Desauss. (S. C.) 570; Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

In Illinois under the statute (Rev. St. c. 95, § 20) providing that "the defendant may plead or set off any defense, and be allowed to set off a demand in his favor, in the same manner, and the same rules shall apply thereto, as if the suit were in any other form of action," where defendant in a foreclosure proceeding has a fixed and liquidated claim or demand against the complainant, although it is not connected with the transaction out of which the mortgage debt arose, he may be permitted to plead it as a set-off against complainant's demand, if it would be pleadable in a similar manner at law. If, for example, defendant's demand is such as could be presented as a set-off in an action at law upon the note or bond secured by the mortgage, it may be so presented in a suit to foreclose. It is also true that a court of equity will sometimes allow a set-off where the same would not be permitted at law. But the circumstances calling for such action must be special, that is, special grounds demanding such action must be shown, as, the insolvency of the complainant, which is perhaps the reason which has most frequently moved courts of equity to allow a set-off when not permissible at law. But an unliquidated demand, in no way connected with the mortgage debt, which demand is not a proper subject of set-off at law, cannot be set off in the foreclosure suit, unless there is some peculiar equity to take it out of the general rule. Smith *v.* Billings, 62 Ill. App. 77 [*affirmed* in 170 Ill. 543, 49 N. E. 212]. And see Morris *v.* Calumet, etc., Canal, etc., Co., 195 Ill. 101, 62 N. E. 813; Alderton *v.* Conger, 78 Ill. App. 533; Detwiler *v.* Hibbard, 66 Ill. App. 82. A plea of set-off is not available in a scire facias to foreclose a mortgage. Woodbury *v.* Manlove, 14 Ill. 213.

40. *Connecticut.*— Rowan *v.* Sharps' Rifle Mfg. Co., 31 Conn. 1, 29 Conn. 282.

Kentucky.— Aultman, etc., Co. *v.* Meade, 89 S. W. 137, 28 Ky. L. Rep. 208.

Louisiana.—Learned *v.* Walton, 42 La. Ann. 455, 7 So. 723; Phillippi *v.* Clairteaux, 34 La. Ann. 796.

New Jersey.— Fisher *v.* Bull, 52 N. J. Eq. 298, 29 Atl. 440.

New York.— Hamilton *v.* Gunther, 32 Hun 22; Rawson *v.* Copland, 3 Barb. Ch. 166; Matter of Globe Ins. Co., 2 Edw. 625.

Ohio.— Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

See 35 Cent. Dig. tit. "Mortgages," § 1223.

41. McLane *v.* Geer, 3 Edw. (N. Y.) 245.

42. Wilson *v.* Reuter, 29 Iowa 176; Mayer *v.* Stahr, 35 La. Ann. 57; Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423; Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682.

New party required to adopt mortgagor's answer.— In a suit to foreclose a mortgage given to secure railroad bonds, where the mortgagor admits that it has made default in the payment of the bonds, a new party, which was admitted on condition that it should adopt the mortgagor's answer as its own, cannot object that the suit was prematurely brought because there was as yet no default in the payment of the principal. Wade *v.* Chicago, etc., R. Co., 149 U. S. 327, 13 S. Ct. 892, 37 L. ed. 755.

Lien claimant.— Where a third party is brought into a foreclosure suit on an allegation that he has or claims some interest or right in the mortgaged premises, but that such right or interest is subordinate to complainant's mortgage, such party has a standing in court to resist the enforcement of complainant's alleged lien without establishing his own. Hill *v.* Whale Min. Co., 15 S. D. 574, 90 N. W. 853. And see Riggs *v.* Hulbert, 7 Ohio Dec. (Reprint) 306, 2 Cinc. L. Bul. 95.

43. Hards *v.* Burton, 79 Ill. 504. And see Evans *v.* Wilmer, 210 Pa. St. 624, 60 Atl. 312, holding that when the bond of the mortgagor has been released and he has no longer any interest in the land, he cannot defend an action on a scire facias to foreclose.

it.[44] The mortgagor's assignee in bankruptcy may set up any defense which would be admissible between the original parties.[45]

k. Abatement on Death of Party — (I) *Before Decree.* At common law a foreclosure suit will abate on the death of the complainant pending the action, and must be revived by his personal representative,[46] and on the death of the mortgagor such a suit abates.[47] But this rule is abrogated by statute in some states,[48] and it does not apply on the death of parties defendant, who were joined on account of some interest in the subject-matter or some ultimate liability for the mortgage debt, but were not necessary parties,[49] and the failure to revive an action on the death of the mortgagee and substitute his executor, and the entry of a decree in his own name, has been sometimes treated as a mere irregularity.[50]

(II) *After Decree.* Foreclosure proceedings are not abated by the death of the mortgagee after the making of a decree,[51] or by the death of the mortgagor,[52] although in the latter case statutes sometimes impose a delay in making the sale or require the joinder of the personal representatives.[53]

3. Limitations and Laches — a. Limitations in General.[54] In most jurisdictions there are now statutes of limitation specifically applying to proceedings for the foreclosure of mortgages, varying greatly in respect to the length of time allowed for such actions and in other particulars.[55] A statute of this kind is not generally

44. Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Dobson *v.* Markle, 77 Ind. 53; Pittman *v.* Hall, 5 N. Y. St. 853.

45. Clark *v.* Clark, 62 N. H. 267.

46. Koger *v.* Weakly, 2 Port. (Ala.) 516; Gray *v.* Webb, 2 Root (Conn.) 257; Vail *v.* Ely, Wright (Ohio) 518.

Death of trustee or bondholder.— A foreclosure suit by the trustees in a mortgage is not abated by the death of one of them, but must be postponed until the vacancy is filled. Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162. Nor is such an action abated by the death of one of the bondholders who was allowed to intervene, nor is it necessary to bring in his executor, as the trustees represent all the bondholders. Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

47. Avery *v.* Ryerson, 34 Mich. 362; Cincinnati Sav. Soc. *v.* Jones, 6 Ohio Dec. (Reprint) 778, 8 Am. L. Rec. 96; Wright *v.* Phipps, 58 Fed. 552.

Mortgagor dead before suit.— A judgment in proceedings to foreclose a mortgage, which were instituted after the death of the mortgagor, is void. Bollinger *v.* Chouteau, 20 Mo. 89.

48. See the statutes of the different states. And see Union Sav. Bank *v.* Barrett, 132 Cal. 453, 64 Pac. 713, 1071.

49. Hancock *v.* Hancock, 22 N. Y. 568; Daniels *v.* Moses, 12 S. C. 130.

50. Smith *v.* Joyce, 14 Daly (N. Y.) 73, 3 N. Y. St. 560. And see Jones *v.* Tainter, 15 Minn. 512.

51. Robinson *v.* Brisbane, 67 N. Y. 606; Lynde *v.* O'Donnell, 21 How. Pr. (N. Y.) 34; Bryant *v.* McCollum, 4 Heisk. (Tenn.) 511.

52. Cowell *v.* Buckelew, 14 Cal. 640; Nagle *v.* Macy, 9 Cal. 426; Leake *v.* Bundy, 48 Hun (N. Y.) 208.

53. See the statutes of the different states. And see Kronenberger *v.* Heinemann, 104 Ill. App. 156; Appold *v.* Prospect Bldg. Assoc., 37 Md. 457, holding that where, after a decree to foreclose the mortgage of complainant, defendant dies, and there is no suggestion of his death, and no action of the court in regard thereto, and no order directing the execution of the decree, the sale of the property and the ratification thereof is irregular and improvident, and will be set aside on appeal.

54. See, generally, Limitations of Actions.

55. See the statutes of the different states. And see the following cases:

Arkansas.— Livingstone *v.* New England Mortg. Security Co., 77 Ark. 379, 91 S. W. 752; New England Mortg. Security Co. *v.* Reding, 65 Ark. 489, 47 S. W. 132; Coleman *v.* Fisher, (1897) 41 S. W. 49. *Compare* Wright *v.* Walker, 30 Ark. 44, holding that the statute requiring suit for the recovery of land sold for taxes to be brought within two years does not apply to a proceeding to foreclose a mortgage.

California.— Ludwig *v.* Murphy, 143 Cal. 473, 77 Pac. 150; Newhall *v.* Sherman, 124 Cal. 509, 57 Pac. 387; German Sav., etc., Soc. *v.* Fisher, 92 Cal. 502, 28 Pac. 591; Anglo-Nevada Assur. Corp. *v.* Nadeau, 90 Cal. 393, 27 Pac. 302.

Illinois.— Boone *v.* Colehour, 165 Ill. 305, 46 N. E. 253; Von Campe *v.* Chicago, 140 Ill. 361, 29 N. E. 892; McCormick *v.* Bauer, 122 Ill. 573, 13 N. E. 852.

Indiana.— Leonard *v.* Binford, 122 Ind. 200, 23 N. E. 704; Cole *v.* McMickle, 30 Ind. 94, holding that a mortgage executed by a decedent in his lifetime is not barred by failure to file a statement of it with the clerk of the common pleas within one year from the appointment of an executor or administrator.

Louisiana.— Bibb *v.* Union Bank, 3 La. Ann. 334.

Minnesota.—Slingerland *v.* Sherer, 46 Minn. 422, 49 N. W. 237; Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653; Babcock *v.* Wyman, 19

retroactive, or if so, it must allow a reasonable time for the foreclosure of mortgages already in force.[56] In case of suit brought in another jurisdiction, the statute which should govern is that of the state where the mortgage and note were executed and are payable.[57] Independently of any such specific statute courts of equity have sometimes applied the analogies of the law and refused to allow the enforcement of a mortgage after adverse possession continued for such a length of time as would bar an action at law for the recovery of the land.[58] A foreclosure cannot be had after twenty years' uninterrupted possession, without any payment on the mortgage or any recognition of it as a subsisting obligation, as in that case a presumption of payment arises from the mere lapse of time which has the same effect as a statute of limitation.[59]

b. Bar of Note or Obligation Secured.[60] In many states the rule is established that no suit for the foreclosure of a mortgage can be maintained after the right to sue at law on the note or other obligation which it secures is barred by the statute of limitations, the rule being based either on an express statute or on the ground that the mortgage is a mere incident to the debt, and that when the latter is outlawed the former loses its vitality.[61] But in others it is considered

How. 289, 15 L. ed. 644; Reeves *v.* Vinacke, 20 Fed. Cas. No. 11,663, 1 McCrary 213.

Nebraska.— Nares *v.* Bell, 66 Nebr. 606, 92 N. W. 571; Spencer *v.* Moyer, 29 Nebr. 305, 45 N. W. 464; Studebaker Bros. Mfg. Co. *v.* McCargur, 20 Nebr. 500, 30 N. W. 686; Herdman *v.* Marshall, 17 Nebr. 252, 22 N. W. 690; Stevenson *v.* Craig, 12 Nebr. 464, 12 N. W. 1.

New York.— Burnett *v.* Wright, 17 N. Y. Suppl. 309.

North Carolina.— Bunn *v.* Braswell, 139 N. C. 135, 51 S. E. 927; Fraser *v.* Bean, 96 N. C. 327, 2 S. E. 159.

North Dakota.— Clark *v.* Beck, (1905) 103 N. W. 755.

South Carolina.— Jennings *v.* Peay, 51 S. C. 327, 28 S. E. 949.

South Dakota.— Sprague *v.* Lovett, (1906) 106 N. W. 134; Bruce *v.* Wanzer, (1905) 105 N. W. 282.

Tennessee.— Paris *v.* Webb, 104 Tenn. 122, 56 S. W. 835.

Texas.— Brown *v.* Cates, (1905) 87 S. W. 1149; King *v.* Brown, 80 Tex. 276, 16 S. W. 39.

Wisconsin.— Wells *v.* Scanlan, 124 Wis. 229, 102 N. W. 571; Cleveland Ins. Co. *v.* Reed, 24 How. 284, 16 L. ed. 686.

Wyoming.— Ingersoll *v.* Davis, 14 Wis. 120, 82 Pac. 867.

United States.— Cleveland Ins. Co. *v.* Reed, 24 How. 284, 16 L. ed. 686 [*affirming* 5 Fed. Cas. No. 2,889, 1 Biss. 180].

England.— London, etc., Bank *v.* Mitchell, [1899] 2 Ch. 161, 68 L. J. Ch. 568, 81 L. T. Rep. N. S. 263, 47 Wkly. Rep. 602; Dearman *v.* Wyche, 9 Sim. 570, 9 L. J. Ch. 76, 16 Eng. Ch. 570, 59 Eng. Reprint 478.

See 35 Cent. Dig. tit. "Mortgages," § 1263.

56. Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Drury *v.* Henderson, 143 Ill. 315, 32 N. E. 186; McKisson *v.* Davenport, 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507; Duncan *v.* Cobb, 32 Minn. 460, 21 N. W. 714; Batey *v.* Walter, (Tenn. Ch. App. 1897) 46 S. W. 1024.

57. Crooker *v.* Pearson, 41 Kan. 410, 21 Pac. 270.

58. *Arkansas.*— Guthrie *v.* Field, 21 Ark. 379.

Connecticut.— Hough *v.* Bailey, 32 Conn. 288; Haskell *v.* Bailey, 22 Conn. 569.

Illinois.— Reed *v.* Kidder, 70 Ill. App. 498. But see Palmer *v.* Snell, 111 Ill. 161.

Michigan.— Baent *v.* Kennicutt, 57 Mich. 268, 23 N. W. 808.

Mississippi.— Green *v.* Mizelle, 54 Miss. 220.

United States.—Allen *v.* O'Donald, 28 Fed. 17, 12 Sawy. 17 [*affirmed* in 145 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843]. But see Higginson *v.* Mein, 4 Cranch 415, 2 L. ed. 664.

See 35 Cent. Dig. tit. "Mortgages," § 1263.

Contra.— Lynch *v.* Hancock, 14 S. C. 66; Balch *v.* Arnold, 9 Wyo. 17, 59 Pac. 434.

59. *Maine.*— Chick *v.* Rollins, 44 Me. 104.

Maryland.— Baldwin *v.* Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489.

Michigan.— Cook *v.* Rounds, 60 Mich. 310, 27 N. W. 517.

New Jersey.— Colton *v.* Depew, 59 N. J. Eq. 126, 44 Atl. 662; Blue *v.* Everett, 56 N. J. Eq. 455, 39 Atl. 765 [*affirming* 55 N. J. Eq. 329, 36 Atl. 960].

Virginia.— Turnbull *v.* Mann, 99 Va. 41, 37 S. E. 288.

United States.— Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644; Opie *v.* Castleman, 32 Fed. 511 [*reversed* on the facts in 145 U. S. 214, 12 S. Ct. 822, 36 L. ed. 680]; Wyman *v.* Russell, 30 Fed. Cas. No. 18,115, 4 Biss. 307.

60. See LIMITATIONS OF ACTIONS, 25 Cyc. 1001 *et seq.*

61. *Arkansas.*— Austin *v.* Steele, 68 Ark. 348, 58 S. W. 352, by statute.

California.— London, etc., Bank *v.* Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179.

Georgia.—Allen *v.* Glenn, 87 Ga. 414, 13 S. E. 565.

Idaho.— Law *v.* Spence, 5 Ida. 244, 48 Pac. 282.

Illinois.— Richey *v.* Sinclair, 167 Ill. 184, 47 N. E. 364; Boone *v.* Colehour, 165 Ill. 305, 46 N. E. 253; Harding *v.* Durand, 138

that, as the statute of limitations does not extinguish the debt, but simply prescribes the legal remedy for its recovery by suit at law, the remedy on the mortgage remains unaffected, so that foreclosure may be had at any time until a statute specifically applicable to foreclosure suits may have run against it, or until it is barred by adverse possession.[62]

c. Computation of Period of Limitation. The statute of limitations begins to run against the foreclosure of a mortgage from the time a right of action thereon accrues, which is ordinarily the time of the maturity of the note or other obligation secured or other breach of the condition.[63] If the mortgage gives the creditor a right to declare the entire indebtedness due on default in the payment of any instalment of interest or principal, or for non-payment of taxes, the statute does not begin to run from such partial default, but only from the maturity of the full principal, or of the last instalment of the principal, unless the creditor has in some way manifested his election to consider the whole as due.[64] Where

Ill. 515, 28 N. E. 948; Merritt *v.* Merritt, 33 Ill. App. 63.

Iowa.— Iowa L. & T. Co. *v.* McMurray, 129 Iowa 65, 105 N. W. 361; Jenks *v.* Shaw, 99 Iowa 604, 68 N. W. 900, 61 Am. St. Rep. 256.

Kansas.— McLane *v.* Allison, 7 Kan. App. 263, 53 Pac. 781.

Missouri.— Bumgardner *v.* Wealand, 197 Mo. 433, 95 S. W. 211; Stockton *v.* Teasdale, 115 Mo. App. 245, 92 S. W. 133, both construing Rev. St. (1899) § 4276.

Texas.— See Foote *v.* O'Roork, 59 Tex. 215.

Wyoming.— See Balch *v.* Arnold, 9 Wyo. 17, 59 Pac. 434.

United States.— Haggart *v.* Wilczinski, 143 Fed. 22, 74 C. C. A. 176 (construing Mississippi statute); Foster *v.* Jett, 74 Fed. 673, 20 C. C. A. 670 (construing Arkansas statute).

62. Ellis *v.* Fairbanks, 38 Fla. 257, 21 So. 107; Irvine *v.* Shrum, 97 Tenn. 259, 36 S. W. 1089; Camden *v.* Alkire, 24 W. Va. 674.

In North Dakota an action to foreclose a mortgage is a remedy distinct from the remedies by which the creditor may enforce the personal obligation for the debt secured, and it may become barred by limitations, although the debt is not outlawed. Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (1905) 103 N. W. 915.

63. *Georgia.*— Coleman *v.* Worrill, 57 Ga. 124.

Louisiana.— Planters Consol. Assoc. *v.* Lord, 35 La. Ann. 425.

Maryland.— Rees *v.* Logsdon, 68 Md. 93, 11 Atl. 708. See also Subers *v.* Hurlock, 82 Md. 42, 33 Atl. 409.

Mississippi.— Nevitt *v.* Bacon, 32 Miss. 212, 66 Am. Dec. 609.

Missouri.— Bush *v.* White, 85 Mo. 339.

New Hampshire.—Clough *v.* Rowe, 63 N. H. 562, 3 Atl. 314.

North Carolina.— The statute of limitations on a mortgage begins to run from the maturity, and not from the date, of the note which it secures. Triplett *v.* Foster, 115 N. C. 335, 20 S. E. 475.

Ohio.— Dater *v.* Bruner, 8 Ohio Dec. (Reprint) 699, 9 Cinc. L. Bul. 220.

South Carolina.— Lyles *v.* Lyles, 71 S. C. 391, 51 S. E. 113.

Tennessee.— Brown *v.* Brown, 107 Tenn. 349, 65 S. W. 413.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, holding that limitations do not begin to run against an action to enforce against heirs a debt of their decedent until administration closes; and so, where it is secured by mortgage, its foreclosure cannot be said to be barred by limitations where that does not appear.

See 35 Cent. Dig. tit. "Mortgages," § 1264.

Mortgage payable on demand.— Where a mortgage is payable on demand, the statute begins to run from its date. Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285.

Possession of mortgagee.— Where a mortgagee, after breach of condition and before the debt becomes barred by the statute of limitations, takes possession of the mortgaged property, or acquires possession under a void foreclosure sale, the statute will not run against him while he retains such possession. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; Investment Securities Co. *v.* Adams, 37 Wash. 211, 79 Pac. 625.

Indemnity mortgage.— A right of action to foreclose a mortgage given as indemnity to a surety or person secondarily liable accrues, and the statute of limitations begins to run, from the time he is actually damnified or suffers loss, or when his liability becomes absolutely fixed. Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115; McLean *v.* Ragsdale, 31 Miss. 701.

64. *California.*— California Sav., etc., Soc. *v.* Culver, 127 Cal. 107, 59 Pac. 292; Richards *v.* Daley, 116 Cal. 336, 48 Pac. 220; Mason *v.* Luce, 116 Cal. 232, 48 Pac. 72. See also Meyer *v.* Weber, 133 Cal. 681, 65 Pac. 1110.

Colorado.— Greeley First Nat. Bank *v.* Park, (1906) 86 Pac. 106.

Kansas.— York-Ritchie Exch., etc., Co. *v.* Mitchell, 6 Kan. App. 317, 51 Pac. 57. But see Snyder *v.* Miller, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250.

Texas.— Bowman *v.* Rutter, (Civ. App. 1898) 47 S. W. 52.

Washington.— Snohomish First Nat. Bank *v.* Parker, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828.

foreclosure is resisted on the ground of adverse possession continued for such a length of time as to bar the mortgagee's rights, the limitation must be started by some act or claim on the part of the mortgagor openly and notoriously adverse to the rights of the mortgagee, because, until something of this sort occurs to change the relation of the parties, the possession of the mortgagor is not hostile to the title of the mortgagee but in subordination to it.[65] As against the mortgagee, a purchaser from the mortgagor cannot assert title by seven years' payment of taxes or twenty years' possession, unless such period began to run after the mortgage had been foreclosed and the land sold.[66]

d. Circumstances Tolling Statute. The running of the statute of limitations against the foreclosure of a mortgage will be arrested by either a partial payment of principal or interest,[67] a written agreement between the parties to keep the mortgage alive,[68] an acknowledgment of the mortgage as an obligation still subsisting and unsatisfied,[69] or the institution of proceedings by the mortgagee to enforce it or to collect his debt.[70] The absence of the mortgagor from the state will stop the running of the statute of limitations; but such absence after the mortgagor has parted with his title will not prevent the running of the statute in favor of his grantee.[71] After the statute has once completely run against the mortgage, no payment, acknowledgment, or new promise on the part of the mortgagor will revive it as against a purchaser of the premises or any other person whose rights accrued prior to the revivor.[72]

United States.— Keene Five Cent Sav. Bank *v.* Reid, 123 Fed. 221, 59 C. C. A. 225.

65. *Alabama.*— Elsberry *v.* Boykin, 65 Ala. 336; Boyd *v.* Beck, 29 Ala. 703.

Arkansas.— Duke *v.* State, 56 Ark. 485, 20 S. W. 600.

California.—Palmtag *v.* Roadhouse, (1893) 34 Pac. 111.

Iowa.— Jamison *v.* Perry, 38 Iowa 14.

Missouri.— St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988; Orr *v.* Rode, 101 Mo. 387, 13 S. W. 1066.

United States.— Smith *v.* Woolfolk, 115 U. S. 143, 5 S. Ct. 1177, 29 L. ed. 357.

Canada.— Bucknam *v.* Stewart, 11 Manitoba 625.

See 35 Cent. Dig. tit. "Mortgages," § 1264.

The sale of the premises by a mortgagor in possession, and the grantee's subsequent occupancy and improvement of the land by building on it, are not sufficient to set the statute of limitations running as against the mortgagee, in the absence of an explicit denial of the latter's title. Whittington *v.* Flint, 43 Ark. 504, 51 Am. Rep. 572.

66. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Palmer *v.* Snell, 111 Ill. 161; Medley *v.* Elliott, 62 Ill. 532.

67. *California.*— California Sav., etc., Soc. *v.* Culver, 127 Cal. 107, 59 Pac. 292.

Illinois.— Schifferstein *v.* Allison, 123 Ill. 662, 15 N. E. 275; Kreitz *v.* Hamilton, 28 Ill. App. 566.

Nebraska.— Teegarden *v.* Burton, 62 Nebr. 639, 87 N. W. 337.

New Jersey.— Longstreet *v.* Brown, (Ch. 1897) 37 Atl. 56.

North Carolina.— Leach *v.* Curtin, 123 N. C. 85, 31 S. E. 269.

Canada.— Doe *v.* Wright, 11 N. Brunsw. 241. See also Lewin *v.* Wilson, 9 Can. Sup. Ct. 637.

An unauthorized payment on a mortgage by the widow of the mortgagor, she having only a homestead and dower interest in the premises affected, will not operate to remove the bar of the statute of limitations from the indebtedness as against the heirs, who own the fee. Ætna L. Ins. Co. *v.* McNeely, 166 Ill. 540, 46 N. E. 1130.

68. Austin *v.* Steele, 68 Ark. 348, 58 S. W. 352. And see Alden *v.* Barnard, 15 Misc. (N. Y.) 512, 37 N. Y. Suppl. 1069; McKay *v.* Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

69. Harding *v.* Durand, 36 Ill. App. 238; Stimis *v.* Stimis, 60 N. J. Eq. 313, 47 Atl. 20; Whetstone *v.* Thorp, 1 Ohio Dec. (Reprint) 414, 9 West. L. J. 303; Barwick *v.* Barwick, 21 Grant Ch. (U. C.) 39.

Acknowledgment to stranger. — An acknowledgment of the existence of the debt secured by a mortgage, made by the mortgagor to a stranger, without an express promise to the mortgagee to pay the debt, will not arrest the running of the statute of limitations. Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609.

70. Stanbrough *v.* McCall, 4 La. Ann. 324; Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091 (procuring judgment of foreclosure); Hays *v.* Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479 (mortgagee procuring his claim to be approved by the probate court administering on the mortgagor's estate); McKeen *v.* McKay, Ritch. Eq. Cas. (Nova Scotia) 121 (where the mortgagee brought an action of ejectment to recover possession of the mortgaged premises).

71. Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (N. D. 1905) 103 N. W. 915.

72. Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765; Grayson *v.* Mayo, 2 La. Ann. 927; Damon *v.* Leque, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927.

e. Who May Plead Limitations. The statute of limitations is not a defense purely personal to the mortgagor. It may be pleaded by his grantee or any subsequent purchaser of the premises in privity with his title,[73] or by a junior mortgagee.[74] But a person brought into the foreclosure suit as a defendant merely on an allegation that he claims some interest in the premises cannot set up this defense unless he shows that he has an interest or title to the property and what it is.[75]

f. Effect of Bar by Limitations. The right of a mortgagee to maintain an action on the mortgage debt and to enforce the lien, and the right of the mortgagor to maintain an action for the redemption of the property, are reciprocal, and when one is barred by the statute of limitations, the other is also.[76] And so, where the right of a grantee in a deed absolute in form, although in fact a mortgage, to foreclose has become barred by the statute, he loses also his right to recover possession.[77]

g. Laches. Independently of the statute of limitations, a court of equity may refuse to decree the foreclosure of a mortgage, where the complainant has been guilty of very great and unreasonable delay in instituting his proceedings, such as to raise the presumption that he has either been paid or has abandoned his claim.[78] But as a general rule delay short of the whole period allowed by the statute of limitations will not have this effect; that is, laches cannot be imputed to the mortgagee because he takes all the time which the statute allows him.[79]

D. Parties and Process — 1. Necessary and Proper Parties — a. In General. In proceedings to foreclose a mortgage, a distinction must be made between

73. Houston *v.* Workman, 28 Ill. App. 626; Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466; Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (N. D. 1905) 103 N. W. 915; Levy *v.* Williams, 20 Tex. Civ. App. 651, 49 S. W. 930, 50 S. W. 528. But see Board of Church Erection Fund *v.* Seattle First Presb. Church, 19 Wash. 455, 53 Pac. 671, holding that a purchaser of the mortgaged premises at execution sale cannot set up the defense of the statute of limitations.

Grantee of purchaser who assumed debt.— If the debt secured by the mortgage has been kept alive by a purchaser of the property who assumed its payment, in any such manner as to arrest the running of the statute, a grantee of such purchaser takes subject to the mortgage and cannot plead the statute of limitations to defeat foreclosure while the debt remains alive. Murray *v.* Emery, 187 Ill. 408, 58 N. E. 327.

74. California Bank *v.* Brooks, 126 Cal. 198, 59 Pac. 302; Fox *v.* Blossom, 9 Fed. Cas. No. 5,008, 17 Blatchf. 352. But see Sanger *v.* Nightingale, 122 U. S. 176, 7 S. Ct. 1109, 30 L. ed. 1105.

75. Corbey *v.* Rogers, 152 Ind. 169, 52 N. E. 748; Lincoln Mortg., etc., Co. *v.* Parker, 65 Kan. 819, 70 Pac. 892; Blair *v.* Silver Peak Mines, 84 Fed. 737.

76. Cunningham *v.* Hawkins, 24 Cal. 403, 85 Am. Dec. 73; Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650; Gordon *v.* Lee, 102 Ind. 125, 1 N. E. 290; Parsons *v.* Noggle, 23 Minn. 328; King *v.* Meighen, 20 Minn. 264; Holton *v.* Meighen, 15 Minn. 69. *Compare* Conner *v.* Howe, 35 Minn. 518, 29 N. W. 314.

77. Meighen *v.* King, 31 Minn. 115, 16 N. W. 702.

78. *Alabama.*— Bailey *v.* Butler, 138 Ala. 153, 35 So. 111.

Arkansas.— Nix *v.* Draughon, 54 Ark. 340, 15 S. W. 893.

Illinois.— Locke *v.* Caldwell, 91 Ill. 417; Leon *v.* McIntyre, 88 Ill. App. 349.

Kentucky.— Bettis *v.* Allen, 10 Bush 40; McArthur *v.* Preston, 61 S. W. 365, 22 Ky. L. Rep. 1769.

Maryland.— Robertson *v.* Mowell, 66 Md. 530, 8 Atl. 273; Hawkins *v.* Chapman, 36 Md. 83.

Michigan.— Olmstead *v.* Taylor, 126 Mich. 316, 85 N. W. 740; Burrow *v.* Debo, 47 Mich. 242, 10 N. W. 469; Thompson *v.* Jarvis, 39 Mich. 689; Abbott *v.* Godfroy, 1 Mich. 178.

New Jersey.— Stimis *v.* Stimis, 60 N. J. Eq. 313, 47 Atl. 20.

New York.— Coonley *v.* Coonley, Lalor 312; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. 636.

North Carolina.— Brown *v.* Becknall, 58 N. C. 423.

Rhode Island.— Eddy *v.* Campbell, 23 R. I. 192, 49 Atl. 702.

Tennessee.— Wallace *v.* Goodlett, 104 Tenn. 670, 58 S. W. 343.

Virginia.— The remedy in equity to enforce the lien of a trust deed is not affected by any lapse of time short of a period sufficient to raise the presumption of payment. Gibson *v.* Green, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888. And see McClintic *v.* Wise, 25 Gratt. 448, 18 Am. Rep. 694.

West Virginia.— Pitzer *v.* Burns, 7 W. Va. 63.

United States.— Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 13 S. Ct. 944, 37 L. ed. 799; London, etc., Bank *v.* Dexter, 126 Fed. 593, 61 C. C. A. 515.

See 35 Cent. Dig. tit. "Mortgages," § 1267.

79. *Colorado.*— Murto *v.* Lemon, 19 Colo. App. 314, 75 Pac. 160.

necessary parties and proper parties. Those only are necessary parties who must be before the court before any valid and effectual decree can be made. Proper parties are those who are so connected with the subject-matter that their presence on the record cannot be objected to as a misjoinder, while, on the other hand, if they are not included, a full and complete decree can still be made without considering or affecting their rights.[80] In the strictest sense the only necessary parties are the mortgagee, the mortgagor, and those who have acquired interests in the premises subsequent to the mortgage.[81] But the mortgagee here means not

District of Columbia.— Sis *v.* Boarman, 11 App. Cas. 116.

Illinois.— Richey *v.* Sinclair, 167 Ill. 184, 47 N. E. 364.

Iowa.— Burdick *v.* Wentworth, 42 Iowa 440.

Nebraska.— Phelps *v.* Wolff, (1905) 103 N. W. 1062, the mortgagee is not guilty of laches if he proceeds as rapidly as the nature of the case will permit.

New Jersey.— Gray *v.* Case, 51 N. J. Eq. 426, 26 Atl. 805.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843; Burns *v.* Cooper, 140 Fed. 273, 72 C. C. A. 25.

See 35 Cent. Dig. tit. "Mortgages," § 1267.

80. Dow *v.* Seely, 29 Ill. 495; Robbins *v.* Arnold, 11 Ill. App. 434; Williams *v.* Bankhead, 19 Wall. (U. S.) 563, 22 L. ed. 184; Ribon *v.* Chicago, etc., R. Co., 16 Wall. (U. S.) 446, 21 L. ed. 367; Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158.

Position on record immaterial.— In an action for the foreclosure of a mortgage and other equitable relief, where parties in interest are joined as complainants, it is not ground for dismissing the bill that they should more properly have been made defendants. MacMillan *v.* Clements, 33 Ind. App. 120, 70 N. E. 997.

Strangers.— Where a bill to foreclose a mortgage fails to show any connection between a person named as a defendant and the mortgage or the equity of redemption, such person is not a proper party, and the bill should be dismissed, at least as to him. Havens *v.* Jones, 45 Mich. 253, 7 N. W. 818. And see Petteys *v.* Comer, 34 Oreg. 36, 54 Pac. 813.

Persons without interest.— One who has no interest in or lien upon the mortgaged premises is neither entitled to be made a defendant in a foreclosure suit, nor can he properly be joined. Kearsing *v.* Kilian, 18 Cal. 491; Carey *v.* Kieferdorf, 8 N. Y. App. Div. 616, 40 N. Y. Suppl. 941. Thus it is not necessary to join a mortgagee whose equity of redemption has been cut off by a former foreclosure. Broome *v.* Beers, 6 Conn. 198.

81. *California.*— Hefner *v.* Urton, 71 Cal. 479, 12 Pac. 486; Farwell *v.* Jackson, 28 Cal. 105.

Minnesota.— Banning *v.* Bradford, 21 Minn. 308, 18 Am. Rep. 398.

New York.— Brooklyn Fifth Ave. Bank *v.* Cudlipp, 1 N. Y. App. Div. 524, 37 N. Y. Suppl. 248. On a bill for foreclosure, all persons having interests existing at the commencement of the suit, subsequent or prior in date to the mortgage, should be made parties, or they will not be bound by the decree. But this does not mean that a party having a secondary or derivative interest, not a party to the mortgage, is a necessary party to the foreclosure suit, in such sense that no valid decree can be made without his presence on the record, but only that he is a proper party, inasmuch as the consequence of omitting him from the suit will be that the decree, although binding on parties of record, will not be effective as against him. Haines *v.* Beach, 3 Johns. Ch. 459.

United States.— Tug River Coal, etc., Co. *v.* Brigel, 86 Fed. 818, 30 C. C. A. 415.

England.—Audsley *v.* Horn, 26 Beav. 195, 53 Eng. Reprint 872.

Assignor of prior lien.— In an action to foreclose, where one of the defendants answered claiming a prior lien and asking to have it satisfied, and also alleged that since the commencement of the action he had assigned his claim, and the action proceeded, defendant being treated as the representative of his assignee's interest, it was held that he could take whatever steps he deemed necessary to protect such interest, including the prosecution of an appeal. *Ex p.* South, etc., Alabama R. Co., 95 U. S. 221, 24 L. ed. 355.

Drawer of draft.— Where the money, the payment of which is secured by the mortgage, was advanced in the form of a draft, drawn by one corporation on another, the drawer is not a necessary party to a foreclosure suit brought by the mortgage trustee and the drawee. Kuhn *v.* Morrison, 75 Fed. 81.

Indemnity mortgage.— Where the maker of a note executed to his sureties a deed of mortgage, containing a personal covenant to indemnify and save them harmless on his failure to pay the note, and a bill was filed by the sureties to enforce the covenant by a foreclosure of the mortgage, the payee of the note was not a necessary party. De Cottes *v.* Jeffers, 7 Fla. 284.

Third person whose land included by mistake.— Where an error of description in the mortgage makes it include land belonging to a third person, and to which the mortgagor has no claim, such third person cannot properly be joined as a defendant. Ramsdell *v.* Eaton, 12 Mich. 117.

Where a note and mortgage are canceled, the note and mortgage of another person being substituted for them, the first mortgagor is not a necessary party to foreclosure proceedings under the second mortgage. Rogers *v.* Torbert, 66 Ala. 547.

only the mortgagee of record, but also the real owner of the debt, or all the persons who are entitled to share in it, or generally those to whom the substantial benefit of the foreclosure will accrue,[82] while the term "mortgagor" must be broadened so as to include not only the original maker of the security, who is always a necessary party,[83] unless, before the institution of proceedings, he has parted absolutely with all his interest in the premises,[84] but also his successor in interest or the owner of the equity of redemption at the time being.[85]

b. Joint Mortgagees or Owners of Debt. As a general rule no decree of foreclosure can be made unless all the parties entitled to the mortgage money are before the court.[86] Therefore one of two or more joint mortgagees cannot maintain an action for foreclosure without joining the others; if they refuse to join him as complainants, they should be made defendants.[87] And the same rule applies where the mortgage was given to secure several different notes, which are

82. Le Sueur First State Bank *v.* Sibley County Bank, 93 Minn. 317, 101 N. W. 309; Snyder *v.* Harris, 61 N. J. Eq. 480, 48 Atl. 329; Tyson *v.* Applegate, 40 N. J. Eq. 305.

Where notes are given to one person, and a mortgage to secure them to another, who by the terms thereof is given authority over the subjects of the mortgage relation, the mortgagee is a necessary party to an action to foreclose. Swenney *v.* Hill, 65 Kan. 826, 70 Pac. 868.

83. Ætna L. Ins. Co. *v.* Stryker, (Ind. App. 1906) 78 N. E. 245; Michigan Ins. Co. *v.* Brown, 11 Mich. 265; Howes *v.* Wadham, Ridgw. t. Hardw. 199, 27 Eng. Reprint 803.

Receiver of mortgagor.— On a bill to foreclose a mortgage, a receiver of one of the mortgagors, appointed on a bill by that mortgagor against another to wind up and settle a partnership, where no conveyance of the mortgagor's property has been made to the receiver, is not a necessary party. Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569.

Where the mortgagor is a corporation, the stock-holders are not necessary parties defendant to a bill for foreclosure, although they might be permitted to intervene in cases where circumstances existed giving them a well defined right to be heard in defense of their own interests. Gunderson *v.* Illinois Trust, etc., Bank, 100 Ill. App. 461 [*affirmed* in 199 Ill. 422, 65 N. E. 326].

Mortgagor in collateral mortgage.— To a bill of foreclosure against the principal mortgagor, the mortgagor of another estate, as a collateral security, is a necessary party. Stokes *v.* Clendon, 3 Swanst. 158, 19 Rev. Rep. 188, 36 Eng. Reprint 812.

Bill by second mortgagee.— The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage and foreclose the equity of redemption. Fell *v.* Brown, 2 Bro. Ch. 276, 29 Eng. Reprint 151; Farmer *v.* Curtis, 2 Sim. 466, 29 Rev. Rep. 140, 2 Eng. Ch. 466, 57 Eng. Reprint 862; Palk *v.* Clinton, 12 Ves. Jr. 48, 8 Rev. Rep. 283, 33 Eng. Reprint 19.

84. See *infra*, XXI, D, 3, e.

85. *California.*— Skinner *v.* Buck, 29 Cal. 253.

Indiana.— Daugherty *v.* Deardorf, 107 Ind. 527, 8 N. E. 296.

South Dakota.— Carpenter *v.* Ingalls, 3 S. D. 49, 51 N. W. 948, 44 Am. St. Rep. 753.

Texas.— Hall *v.* Hall, 11 Tex. 526.

United States.—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634.

86. Trades Sav. Bank *v.* Freese, 26 N. J. Eq. 453; Palmer *v.* Carlisle, 1 Sim. & St. 423, 1 Eng. Ch. 423, 57 Eng. Reprint 169.

One claiming to own a mortgage is a proper party to a suit to foreclose it, and, if not made a party, may impeach the decree on the ground that the complainant in the suit was not the owner of the mortgage. Wellington *v.* Heermans, 110 Ill. 564.

87. *Alabama.*— Beebe *v.* Morris, 56 Ala. 525.

Illinois.— Wellington *v.* Heermans, 110 Ill. 564.

Iowa.— Collier *v.* Collins, 9 Iowa 126. The holder of one of several notes secured by mortgage, whose interest in the mortgage does not appear of record, is not a necessary party to an action by the holder of another note first maturing to foreclose the mortgage. Hensley *v.* Whiffin, 54 Iowa 555, 6 N. W. 725.

Kentucky.— Hopkins *v.* Ward, 12 B. Mon. 185; Stucker *v.* Stucker, 3 J. J. Marsh. 301.

New Hampshire.— Johnson *v.* Brown, 31 N. H. 405.

New Jersey.— Trades Sav. Bank *v.* Freese, 26 N. J. Eq. 453.

New York.— Simson *v.* Satterlee, 64 N. Y. 657.

United States.—McRea *v.* Alabama Branch Bank, 19 How. 376, 15 L. ed. 688.

England.— Luke *v.* South Kensington Hotel Co., 11 Ch. D. 121, 48 L. J. Ch. 361, 40 L. T. Rep. N. S. 638, 27 Wkly. Rep. 514; Lowe *v.* Morgan, 1 Bro. Ch. 368, 28 Eng. Reprint 1183.

Suit by surviving mortgagee.— Where the mortgage was given to two mortgagees to secure a joint debt, and one of them is dead, the foreclosure suit may be maintained by the survivor, without joining the executor or heir of the decedent. Lannay *v.* Wilson, 30 Md. 536; Martin *v.* McReynolds, 6 Mich. 70. *Contra*, Vickers *v.* Cowell, 1 Beav. 529, 3 Jur. 864, 8 L. J. Ch. 371, 17 Eng. Ch. 529, 48 Eng. Reprint 1046. Where an instrument names three persons as mortgagees, but they are in reality trustees, having no beneficial

in different hands at the time a foreclosure suit is begun, all the holders must be parties.[88] But a mortgage given to secure the separate debts of several different persons gives each a general interest and a separate right of action.[89]

c. In Actions by Assignees. A suit to foreclose a mortgage which has been assigned, if begun by scire facias, should be brought in the name of the mortgagee for the use of the assignee;[90] but if by bill in equity it should be in the name of the real owner of the debt secured.[91] Hence if the assignment was absolute and unconditional, transferring all the rights and interest of the assignor, and was in such legal form as to pass the legal ownership of the mortgage and debt, the assignor is not a necessary party in the assignee's suit to foreclose,[92] although, if he guaranteed the payment of the mortgage debt or the collectability of the mortgage, it is proper to make him a party for the purpose of fixing his ultimate liability.[93] On the other hand, if the assignment was by parol only, or was so informal, irregular, or defective as to pass to the assignee only an equitable claim to the proceeds as against his assignor, the latter must be joined as a party in the foreclosure suit.[94] And this is likewise so where the assignment was not

interest in the debt secured, the survivor of them may maintain a foreclosure suit, and the representatives of the decedents are not necessary parties. Landale *v.* McLaren, 8 Manitoba 322.

88. *Florida.*— Wilson *v.* Hayward, 2 Fla. 27.

Illinois.— Koester *v.* Burke, 81 Ill. 436; Flower *v.* Elwood, 66 Ill. 438; Lietze *v.* Clabaugh, 59 Ill. 136; Preston *v.* Hodgen, 50 Ill. 56; Funk *v.* McReynold, 33 Ill. 481; Myers *v.* Wright, 33 Ill. 284.

Kentucky.— Bell *v.* Shrock, 2 B. Mon. 29.

New Hampshire.— Johnson *v.* Brown, 31 N. H. 405.

Texas.— Delespine *v.* Campbell, 45 Tex. 628.

Wisconsin.— Pettibone *v.* Edwards, 15 Wis. 95.

But see Grattan *v.* Wiggins, 23 Cal. 16; Harris *v.* Harlan, 14 Ind. 439; Richardson *v.* Owings, 86 Md. 663, 39 Atl. 100.

The unknown owners of notes secured by deeds of trust on real estate are necessary parties to proceedings affecting such notes. St. Louis Brewing Assoc. *v.* Geppart, 95 Ill. App. 187.

Holders of unmatured coupon notes secured by a mortgage are not necessary parties to a bill to foreclose the mortgage for coupon notes which have matured, where no relief that may affect them injuriously is sought, but the premises are to be sold subject to the balance due or to become due on the mortgage. Boyer *v.* Chandler, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113.

89. Thayer *v.* Campbell, 9 Mo. 280; Bronson *v.* La Crosse, etc., R. Co., 2 Black (U. S.) 524, 17 L. ed. 347.

90. Winchell *v.* Edwards, 57 Ill. 41; Bourland *v.* Kipp, 55 Ill. 376. And see Montgomery *v.* King, 123 Ga. 14, 50 S. E. 963.

91. See *supra*, XVI, E, 1, d.

92. *Alabama.*— Walker *v.* Mobile Bank, 6 Ala. 452.

Arkansas.— Barraque *v.* Manuel, 7 Ark. 516.

California.— Cortelyou *v.* Jones, (1900) 61 Pac. 918.

Illinois.— Marsh *v.* Wells, 89 Ill. App. 485; McNamara *v.* Clark, 85 Ill. App. 439.

Indiana.— Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161; Westerfield *v.* Spencer, 61 Ind. 339; Markel *v.* Evans, 47 Ind. 326; Gower *v.* Howe, 20 Ind. 396; Garrett *v.* Puckett, 15 Ind. 485.

Kentucky.— Royalty *v.* Deposit Bldg., etc., Assoc., 40 S. W. 455, 19 Ky. L. Rep. 282.

New Jersey.— Woodruff *v.* Depue, 14 N. J. Eq. 168; Miller *v.* Henderson, 10 N. J. Eq. 320.

New York.— Clark *v.* Mackin, 95 N. Y. 346; Merrill *v.* Bischoff, 3 N. Y. App. Div. 361, 38 N. Y. Suppl. 194; Haaren *v.* Lyons, 9 N. Y. Suppl. 211 [*affirmed* in 132 N. Y. 551, 30 N. E. 866]; Cohen *v.* Lane, 4 N. Y. Suppl. 228; Christie *v.* Herrick, 1 Barb. Ch. 254; Hosford *v.* Nichols, 1 Paige 220; Whitney *v.* McKinney, 7 Johns. Ch. 144; Johnson *v.* Hart, 3 Johns. Cas. 322.

North Carolina.— Pullen *v.* Heron Min. Co., 71 N. C. 567; Etheridge *v.* Vernoy, 71 N. C. 184.

Ohio.— Larimer *v.* Clemmer, 31 Ohio St. 499; Grant *v.* Ludlow, 8 Ohio St. 1; McGuffey *v.* Finley, 20 Ohio 474; Hill *v.* Welsh, 1 Ohio Dec. (Reprint) 367, 8 West. L. J. 371.

Pennsylvania.— Strawn *v.* Shank, 110 Pa. St. 259, 20 Atl. 717; Woodrow *v.* Blythe, 2 Del. Co. 94.

South Carolina.— Smythe *v.* Brown, 25 S. C. 89.

South Dakota.— Alexander *v.* Ransom, 16 S. D. 302, 92 N. W. 418.

Virginia.—Omohundro *v.* Henson, 26 Gratt. 511; Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766.

Canada.— Russell *v.* Robertson, 5 Can. L. J. 118; Vankleek *v.* Tyrrell, 8 Grant Ch. (U. C.) 321; Gooderham *v.* De Grassi, 2 Grant Ch. (U. C.) 135.

See 35 Cent. Dig. tit. "Mortgages," § 1279.

93. Jarman *v.* Wiswall, 24 N. J. Eq. 267; Western Reserve Bank *v.* Potter, Clarke (N. Y.) 432; Bristol *v.* Morgan, 3 Edw. (N. Y.) 142.

94. *Alabama.*— Langley *v.* Andrews, 132

absolute, but was only made by way of collateral security for a debt due to the assignee.[95]

d. In Actions by Representatives of Deceased Mortgagee. It was formerly held that the heir of a deceased mortgagee was a necessary party to a foreclosure, on the technical ground that the mortgage conveyed a legal estate, and he was the only person who could reconvey it to the mortgagor.[96] But mortgages are now generally regarded as merely personal assets in the hands of the executor or administrator, and he is the proper plaintiff in foreclosure proceedings, in which the heir need not be joined.[97] On the other hand the personal representative is an indispensable party, and the heir cannot maintain the suit alone; even if he is the sole heir, he must first take out letters of administration.[98]

e. Trustees in Trust Deeds. In the case of a trust deed, or a mortgage executed to a trustee to secure a number of bondholders or other creditors, the trustee is an indispensable party to foreclosure proceedings and no valid decree can be made without his presence.[99] This, however, does not apply to a trustee who has failed to accept the trust or qualify, or who has been discharged, or has removed from the state.[1] In such a case the proper party is his co-trustee, if any, or if not, his duly appointed successor.[2] Where a trustee dies, his associates in the trust may maintain the action without joining his heirs.[3] But if he was

Ala. 147, 31 So. 469; Bibb *v.* Hawley, 59 Ala. 403; Denby *v.* Mellgrew, 58 Ala. 147; Prout *v.* Hoge, 57 Ala. 28.

Florida.— Stewart *v.* Preston, 1 Fla. 10.

Indiana.— Nichol *v.* Henry, 89 Ind. 54; Holdridge *v.* Sweet, 23 Ind. 118; Green *v.* McCord, 30 Ind. App. 470, 66 N. E. 494.

Kentucky.— Morgan *v.* Magoffin, 2 Bibb 395.

New York.— Sprague *v.* Cochran, 84 Hun 240, 32 N. Y. Suppl. 572.

See 35 Cent. Dig. tit. "Mortgages," § 1279.

Compare Parker *v.* Stevens, 3 N. J. Eq. 56.

95. *California.*— Cerf *v.* Ashley, 68 Cal. 419, 9 Pac. 658.

New Jersey.— Ackerson *v.* Lodi Branch R. Co., 28 N. J. Eq. 542.

New York.— Johnson *v.* Hart, 3 Johns. Cas. 322; Christie *v.* Herrick, 1 Barb. Ch. 254; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76.

Wisconsin.— Stevens *v.* Campbell, 13 Wis. 375.

Canada.— Jones *v.* Upper Canada Bank, 12 Grant Ch. (U. C.) 429.

See 35 Cent. Dig. tit. "Mortgages," § 1279.

96. Huggins *v.* Hall, 10 Ala. 283; Worthington *v.* Lee, 2 Bland (Md.) 678; McIver *v.* Cherry, 8 Humphr. (Tenn.) 713; Scott *v.* Nicoll, 3 Russ. 476, 3 Eng. Ch. 476, 38 Eng. Reprint. 654.

97. *Florida.*— Merritt *v.* Daffin, 24 Fla. 320, 4 So. 806.

Illinois.— Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Marsh *v.* Wells, 89 Ill. App. 485; Dayton *v.* Dayton, 7 Ill. App. 136.

Mississippi.— Griffin *v.* Lovell, 42 Miss. 402.

New Jersey.— Kinna *v.* Smith, 3 N. J. Eq. 14.

New York.— Shaw *v.* McNish, 1 Barb. Ch. 326.

Canada.— Lawrence *v.* Humphries, 11 Grant Ch. (U. C.) 209. And see Kelly *v.* Ardell, 11 Grant Ch. 579.

98. Vanhorn *v.* Duckworth, 42 N. C. 261; Clark *v.* Clark, 76 Wis. 306, 45 N. W. 121; Clerkson *v.* Bowyer, 2 Vern. Ch. 66, 23 Eng. Reprint 652.

99. *Alabama.*— Hambrick *v.* Russell, 86 Ala. 199, 5 So. 298.

Illinois.— Rodman *v.* Quick, 211 Ill. 546, 71 N. E. 1087; Kinsella *v.* Cahn, 185 Ill. 208, 56 N. E. 1119; Dearlove *v.* Hatterman, 102 Ill. App. 329; Hayes *v.* Owen, 69 Ill. App. 553; Chandler *v.* O'Neil, 62 Ill. App. 418; Lambert *v.* Hyers, 22 Ill. App. 616; Walsh *v.* Truesdell, 1 Ill. App. 126. *Compare* Wilson *v.* Spring, 64 Ill. 14.

Iowa.— Tucker *v.* Silver, 9 Iowa 261.

Mississippi.— Moyse *v.* Cohn, 76 Miss. 590, 25 So. 169; Harlow *v.* Mister, 64 Miss. 25, 8 So. 164; Hill *v.* Boyland, 40 Miss. 618.

New York.— Paton *v.* Murray, 6 Paige 474.

Ohio.— Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330.

Texas.— Shelby *v.* Burtis, 18 Tex. 644; Parks *v.* Lubbock, (Civ. App. 1899) 50 S. W. 466.

United States.— Gardner *v.* Brown, 21 Wall. 36, 22 L. ed. 527; Maher *v.* Tower Hotel Co., 94 Fed. 225.

England.— Wood *v.* Williams, 4 Madd. 186, 20 Rev. Rep. 291, 56 Eng. Reprint 676; Hichens *v.* Kelly, 2 Smale & G. 264, 2 Wkly. Rep. 441, 65 Eng. Reprint 392.

See 35 Cent. Dig. tit. "Mortgages," §§ 1270, 1273.

But see Sidney Stevens Implement Co. *v.* South Ogden Land, etc., Co., 20 Utah 267, 58 Pac. 843; Bryan *v.* McCann, 55 W. Va. 372, 47 S. E. 143.

1. Wagnon *v.* Pease, 104 Ga. 417, 30 S. E. 895; Fisher *v.* Stiefel, 62 Ill. App. 580; Steinhardt *v.* Cunningham, 130 N. Y. 292, 29 N. E. 100.

2. Johnes *v.* Outwater, 55 N. J. Eq. 398, 36 Atl. 483; Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228.

3. McAllister *v.* Plant, 54 Miss. 106.

the sole trustee, it appears that his personal representatives should be made parties.[4]

f. Beneficiaries Under Mortgage or Deed to Trustee. Where a deed of trust or mortgage is made to a trustee for the purpose of securing the holder of a note or other obligation, or for securing the creditors named in a list or schedule, it is necessary that the beneficiaries as well as the trustee should be parties to a suit for its foreclosure,[5] except in states where the statutes provide that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted.[6] But this rule cannot apply in cases where the beneficiaries are so numerous that it would not be practicable to join them all, and particularly where it would be scarcely possible to identify them all, as in the case of a trust mortgage securing a large issue of bonds. In such cases therefore the courts are obliged to hold that the bondholders or beneficiaries are sufficiently represented by the trustee.[7]

4. Lambertville Nat. Bank *v.* McCready Bag, etc., Co., (N. J. Ch. 1888) 15 Atl. 388, 1 L. R. A. 334. See also Less *v.* English, 75 Ark. 288, 87 S. W. 447. But *compare* Read *v.* Rowan, 107 Ala. 366, 18 So. 211.

5. *Arkansas.*— Boyd *v.* Jones, 44 Ark. 314.

Illinois.— Town *v.* Alexander, 85 Ill. App. 512 [*affirmed* in 185 Ill. 254, 56 N. E. 1111]; Woolner *v.* Wilson, 5 Ill. App. 439. See also Boley *v.* Lake St. El. R. Co., 64 Ill. App. 305.

New Jersey.— Butler *v.* Farry, 68 N. J. Eq. 760, 63 Atl. 240; Woodruff *v.* Depue, 14 N. J. Eq. 168; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377; Stillwell *v.* McNeely, 2 N. J. Eq. 305.

North Carolina.— Springer *v.* Sheets, 115 N. C. 370, 20 S. E. 469.

Ohio.— Union Bank *v.* Bell, 14 Ohio St. 200.

Vermont.— Davis *v.* Hemingway, 29 Vt. 438.

Washington.— Bacon *v.* O'Keefe, 13 Wash. 655, 43 Pac. 886.

England.— Whistler *v.* Webb, Bunb. 53; Calverley *v.* Phelp, 6 Madd. 229, 56 Eng. Reprint 1078.

Canada.— Rogers *v.* Rogers, 2 Grant Ch. (U. C.) 137.

See 35 Cent. Dig. tit. "Mortgages," § 1274.

But see Swift *v.* Stebbins, 4 Stew. & P. (Ala.) 447.

Creditors of a different class.— In a suit to foreclose a first mortgage, to which the trustees of a junior trust mortgage are defendants, the beneficiaries under the trust mortgage are sufficiently represented by making the trustees defendants. New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507. So in general where creditors claim under a deed of trust for the payment of debts, they need not join, as parties to their bill, those who are in a posterior class to themselves; it is sufficient if all who are in their own class are joined. Patton *v.* Bencini, 41 N. C. 204.

Testamentary trust.— In a foreclosure suit, the trustee and executor of the mortgagor sufficiently represent the *cestui que trust* under the mortgagor's will, and therefore the latter is not a necessary party. *In re* Booth, 62 L. J. Ch. 40, 67 L. T. Rep. N. S. 550, 3 Reports 93.

6. See the statutes of the different states. And see Glide *v.* Dwyer, 83 Cal. 477, 23 Pac. 706; Rinker *v.* Bissell, 90 Ind. 375; Wright *v.* Bundy, 11 Ind. 398; Vance *v.* Lane, 82 S. W. 297, 26 Ky. L. Rep. 619; Union Trust Co. *v.* Brashears, 39 S. W. 44, 19 Ky. L. Rep. 37; Hays *v.* Dorsey, 5 Md. 99; Tainter *v.* Abrams, (Nebr. 1906) 107 N. W. 225.

7. *Illinois.*— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Chillicothe Paper Co. *v.* Wheeler, 68 Ill. App. 343.

Indiana.—Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. 423.

Massachusetts.— Shaw *v.* Norfolk County R. Co., 5 Gray 162.

Mississippi.— Wall *v.* Boisgerard, 11 Sm. & M. 574. And see Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770.

New Jersey.— Lambertville Nat. Bank *v.* McCready Bag, etc., Co., (Ch. 1888) 15 Atl. 388, 1 L. R. A. 334; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377. See also Elizabethtown Sav. Bank *v.* Union County Mfg. Co., 3 N. J. L. J. 56.

Ohio.— Carpenter *v.* Canal Co., 35 Ohio St. 307; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania.—McElrath *v.* Pittsburg, etc., R. Co., 28 Leg. Int. 197.

Washington.— Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 19 Wash. 493, 53 Pac. 951.

United States.— Gasquet *v.* Fidelity Trust, etc., Co., 57 Fed. 80, 6 C. C. A. 253; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368.

England.— Doble *v.* Manley, 28 Ch. D. 664, 54 L. J. Ch. 636, 52 L. T. Rep. N. S. 246, 33 Wkly. Rep. 409; Morley *v.* Morley, 25 Beav. 253, 53 Eng. Reprint 633.

See 35 Cent. Dig. tit. "Mortgages," § 1274.

Mortgage direct to bondholders.— This rule does not apply where a corporation executes a mortgage directly to all its bondholders, without the intervention of a trustee, to secure specifically to each the amount due to him, particularly where the sufficiency of the security is doubtful. All the bondholders must join in a foreclosure suit. No one of

g. Beneficiary in Mortgage Given by Trustee. Where a mortgage on land is executed by one holding the title as a trustee for others, the beneficiaries must be made defendants to a suit for foreclosure.[8]

2. PLAINTIFFS — a. In General. Plaintiff in a foreclosure suit should be the real and beneficial owner of the debt secured,[9] together with any others who are jointly interested with him in the security,[10] or a person who is legally empowered to collect it for him, as his guardian,[11] receiver,[12] or assignee in bankruptcy.[13] If the mortgage was made to a corporation, the suit should be in the name of the corporation,[14] and if to a firm, all the partners should be plaintiffs.[15] The purchaser at an invalid sale under a deed of trust is a proper plaintiff in a subsequent bill in equity to foreclose it.[16]

them, even when professing to act in behalf of all who may come in and contribute to the expenses of the suit, can proceed alone against the company. Nashville, etc., R. Co. *v.* Orr, 18 Wall. (U. S.) 471, 21 L. ed. 810.

Creditors not represented by trustee in collateral matters.— Where the court which had appointed a receiver for an insolvent corporation authorized him to issue certificates of indebtedness, the lien of which should take precedence of the lien of an existing mortgage securing an issue of bonds, and some of the bondholders agreed with the purchasers of the certificates that the latter should be the superior lien, and the purchasers intervened in an action to foreclose the mortgage, in order to have their certificates declared the prior lien, it was held that the bondholders who signed the agreement were necessary parties, as the trustee of the mortgage did not represent them in matters growing out of such agreement. Pool *v.* Farmers' L. & T. Co., 7 Tex. Civ. App. 334, 27 S. W. 744.

8. Mavrich *v.* Grier, 3 Nev. 52, 93 Am. Dec. 373; Hamilton *v.* Jacobs, 6 Ohio Dec. (Reprint) 1094, 10 Am. L. Rec. 445; Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622. *Compare* Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120; Harlem Co-operative Bldg., etc. *v.* Quinn, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 682.

Beneficiaries very numerous.— Where real estate had been purchased by a joint fund raised by subscription in shares by more than two hundred and fifty subscribers, and the property conveyed to trustees for them, who executed a mortgage thereon, it was held unnecessary to make all the subscribers parties to a bill to foreclose the mortgage, as they were sufficiently represented by the trustees. Van Vechten *v.* Terry, 2 Johns. Ch. (N. Y.) 197.

Trustee really acting in his individual capacity.— Where the complaint described the defendant as "R. A. Johnson, trustee," and the note and mortgage were signed by him in that style, but there was no allegation that he signed them as a trustee for any one in particular, or that he held the property as a trustee for others, it was held that the word "trustee" was merely *descriptio personæ*, and the beneficiary was not a necessary party. Moss *v.* Johnson, 36 S. C. 551, 15 S. E. 709.

9. Anglo-Californian Bank *v.* Cerf, 147 Cal. 384, 81 Pac. 1077; Winkelman *v.* Kiser, 27 Ill. 21.

A mortgagee being dead, foreclosure proceedings purporting to be instituted by him or by his authority are void. Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661.

10. Swenney *v.* Hill, 65 Kan. 826, 70 Pac. 868. See also Martin *v.* McReynolds, 6 Mich. 70, holding that where one holds the equitable title alone, he should join as a party to a foreclosure suit the person holding the legal title to the mortgage.

Attorney given interest by mortgagee.— Where a mortgagee agrees to give his attorney an interest in the amount collected for his services, this does not give the attorney such an interest in the suit as to render him a proper co-plaintiff with the mortgagee. Hall *v.* Gird, 7 Hill (N. Y.) 586.

Since one cannot be both plaintiff and defendant in the same suit, where a second mortgagee is joined as plaintiff and also as defendant in the first mortgagee's foreclosure suit, the writ and pleadings must be amended by striking out his name as a defendant. Wavell *v.* Mitchell, 64 L. T. Rep. N. S. 560.

11. Comer *v.* Bray, 83 Ala. 217, 3 So. 554.

12. Iglehart *v.* Bierce, 36 Ill. 133. See also New Orleans Nat. Banking Assoc. *v.* Le Breton, 14 Fed. 646, 4 Woods 203.

13. Norton *v.* Ohrns, 67 Mich. 612, 35 N. W. 175.

14. Charleston *v.* Caulfield, 19 S. C. 201.

Mortgage to cashier of bank.— A mortgage given to the cashier of a bank as security for a loan made by the bank may be enforced by suit in the name of the bank, without a formal transfer to it, and the cashier is not a necessary party. Moore *v.* Pope, 97 Ala. 462, 11 So. 840; Michigan State Bank *v.* Trowbridge, 92 Mich. 217, 52 N. W. 632.

Unidentified corporation.— Where a mortgage was given to plaintiff in a bill for its foreclosure, as acting in behalf of a turnpike company, but it did not appear who composed the company, whether or not it was incorporated, or what were its powers, it was held that a demurrer would not lie for the non-joinder of such company. Crane *v.* Deming, 7 Conn. 387.

15. Jewell *v.* West Orange, 36 N. J. Eq. 403; De Grieff *v.* Wilson, 30 N. J. Eq. 435; Noyes *v.* Sawyer, 3 Vt. 160.

16. Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161.

b. Joint Mortgagees and Holders of Separate Notes. Where a mortgage is given to two or more persons to secure a joint debt, all may and should join as plaintiffs in a suit for its foreclosure;[17] or the suit may be instituted by one, making the other a defendant if he will not join as complainant;[18] or in case of the death of one, the survivor may sue.[19] So, if the debt is represented by several claims due to the mortgagees separately, or by notes which have passed into several hands, but is secured by one mortgage, all the creditors may join as plaintiffs in foreclosure proceedings.[20]

3. DEFENDANTS — a. Persons Interested in Premises. Since the object of a foreclosure is to extinguish the equity of redemption and obtain a sale of the mortgaged premises, all persons who own that equity, wholly or in shares, or who are interested in it adversely to the mortgage and by way of claiming title or beneficial rights in it, as distinguished from having a mere lien upon it, should be made defendants;[21] but not persons whose interests in the equity of redemp-

17. Hawke *v.* Banning, 3 Minn. 67.

18. Armstrong *v.* Pratt, 2 Wis. 299; Davenport *v.* James, 7 Hare 249, 12 Jur. 827, 27 Eng. Ch. 249, 68 Eng. Reprint 102; Remer *v.* Stokes, 4 Wkly. Rep. 730.

19. Erwin *v.* Ferguson, 5 Ala. 158.

20. *Georgia.*— Chamberlin *v.* Beck, 68 Ga. 346.

Illinois.— Pogue *v.* Clark, 25 Ill. 351.

Indiana.— Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301; Shirkey *v.* Hanna, 3 Blackf. 403, 26 Am. Dec. 426.

Nebraska.— Guthrie *v.* Treat, 66 Nebr. 415, 92 N. W. 595, 103 Am. St. Rep. 718.

New Hampshire.— Benton *v.* Barnet, 59 N. H. 249.

See 35 Cent. Dig. tit. "Mortgages," § 1271.

Contra.— Rankin *v.* Major, 9 Iowa 297; Collins *v.* Mansfield, 13 Ohio Cir. Ct. 258, 7 Ohio Cir. Dec. 446.

21. *Arkansas.*— Buckner *v.* Sessions, 27 Ark. 219.

California.— Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756.

Georgia.— Bolles *v.* Munnerlyn, 83 Ga. 727, 10 S. E. 365.

Illinois.— Shinn *v.* Shinn, 91 Ill. 477; Hurd *v.* Case, 32 Ill. 45, 83 Am. Dec. 249; Ohling *v.* Luitjens, 32 Ill. 23.

Kansas.— Finch *v.* Magill, 37 Kan. 761, 15 Pac. 907.

Kentucky.— Armstrong *v.* Foley, 15 S. W. 355, 11 Ky. L. Rep. 802.

Louisiana.— O'Bryan *v.* McVey, 26 La. Ann. 608; Poutz *v.* Bistes, 15 La. Ann. 636.

Michigan.— Adams *v.* Bradley, 12 Mich. 346.

Minnesota.— Nichols *v.* Randall, 5 Minn. 304.

Missouri.— Wall *v.* Nay, 30 Mo. 494.

Nebraska.— Merriman *v.* Hyde, 9 Nebr. 113, 2 N. W. 218.

New Jersey.— Pettingill *v.* Huhbell, 53 N. J. Eq. 584, 32 Atl. 76.

New York.— Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; King *v.* McVicker, 3 Sandf. Ch. 192.

Ohio.— Knierim *v.* Zaengerle, 9 Ohio Dec. (Reprint) 47, 10 Cinc. L. Bul. 292; Tobin *v.* Smith, 1 Ohio S. & C. Pl. Dec. 675, 1 Ohio N. P. 75; Haywood *v.* Victor, Wright 338.

Pennsylvania.— Kaufhold *v.* Burke, 5 Lack. Jur. 223.

South Carolina.— Annely *v.* De Saussure, 17 S. C. 389.

South Dakota.— Kelsey *v.* Welch, 8 S. D. 255, 66 N. W. 390.

Texas.— Jenkins *v.* Volz, 54 Tex. 636; Brigham *v.* Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358.

Virginia.— Mayo *v.* Tomkies, 6 Munf. 520.

United States.— Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634; Detweiler *v.* Holderbaum, 42 Fed. 337; Martin *v.* Pond, 30 Fed. 15; Wyman *v.* Russell, 30 Fed. Cas. No. 18,115, 4 Biss. 307.

Canada.— Whan *v.* Lucas, 1 Ch. Chamb. (U. C.) 58; Buckley *v.* Wilson, 8 Grant Ch. (U. C.) 566; Baxter *v.* Turnbull, 2 Grant Ch. (U. C.) 521.

See 35 Cent. Dig. tit. "Mortgages," § 1277.

Park commissioners are necessary parties to a suit to foreclose a trust deed on land sought to be taken and condemned by them for public use, in proceedings commenced since the execution of the deed. Colehour *v.* State Sav. Inst., 90 Ill. 152.

A city which has purchased and taken possession of waterworks subject to a mortgage placed thereon by a former owner is a necessary party. Centerville *v.* Fidelity Trust, etc., Co., 118 Fed. 332, 55 C. C. A. 348.

An adjoining owner, with whom the mortgagor, after executing the mortgage, has made an agreement as to the boundary line, is a proper defendant. Fleischmann *v.* Tilt, 10 N. Y. App. Div. 271, 42 N. Y. Suppl. 506.

Conditional vendees of personalty situated on the mortgaged premises, claiming absolute ownership thereof, are not proper parties. Condit *v.* Goodwin, 44 Misc. (N. Y.) 312, 89 N. Y. Suppl. 827 [*affirmed* in 107 N. Y. App. Div. 616, 95 N. Y. Suppl. 1122].

Vendor of land mortgaged by vendee.— Where a vendee who holds under a bond for title executes a mortgage to a third person, the vendor is not a proper party to a suit for foreclosure. Prigden *v.* Andrews, 7 Tex. 461.

Rival claimants of equity.— Where a mortgagee files a bill to foreclose against two rival claimants of the equity of redemption, the

tion are such that they could not be cut off or affected by any decree made in the foreclosure proceedings.[22]

b. Owners of Expectant or Contingent Interests. Persons having vested estates in remainder in the mortgaged premises should be made parties to the foreclosure suit.[23] But where there are more remote limitations, it is sufficient to join the holder of the first vested estate of inheritance, or at most the life-tenant and first remainder-man, and executory devisees and persons having mere contingent or expectant interests are not necessary parties.[24]

c. Subsequent Purchaser of Premises — (i) *In General.* A purchaser of mortgaged premises, taking title from the mortgagor after the execution of the mortgage, is not a necessary party to a foreclosure suit, in the strictest sense, for, although he is not joined, the decree will not for that reason be void;[25] but on

court will direct the usual redemption by, and conveyance to, the person *prima facie* entitled to the equity, with a right to the other claimant, at any time before the day appointed for payment, to show himself to be entitled. Rumsey *v.* Thompson, 8 Grant Ch. (U. C.) 372.

Where one of four joint tenants made a mortgage of land conveyed to the four, which purported to pledge the whole estate, it was held, on a bill for foreclosure, that it was not necessary to make the other three parties defendant. Stephen *v.* Beall, 22 Wall. (U. S.) 329, 22 L. ed. 786.

Effect of partition.— A mortgagee is compelled to notice a partition of the mortgaged premises only so far as that, in a proceeding to foreclose, he must see that the proper parties are before the court. Hull *v.* Lyon, 27 Mo. 570.

Where a mortgage of a leasehold estate is foreclosed, the lessor should be made a party, or his rights will remain unaffected. Pardee *v.* Steward, 37 Hun (N. Y.) 259.

Disclaimer.— A party brought in under the general allegation that he has or claims to have some interest in the equity of redemption, and who does not disclaim, is properly retained as a defendant, and cannot claim immunity from liability for costs. Botsford *v.* Botsford, 49 Mich. 29, 12 N. W. 897. But generally, if he disclaims all interest in the mortgaged premises, he may have his costs. See Drury *v.* O'Neil, 15 Grant Ch. (U. C.) 123; Waring *v.* Hubbs, 12 Grant Ch. (U. C.) 227; Hatt *v.* Park, 6 Grant Ch. (U. C.) 553.

22. *Alabama.*— Blakeslee *v.* Mobile L. Ins. Co., 57 Ala. 205.

Indiana.— Wimberg *v.* Schwegeman, 97 Ind. 528; Miller *v.* Tipton, 6 Blackf. 238.

Michigan.— Strong *v.* Ehle, 86 Mich. 42, 48 N. W. 868.

Missouri.— Tierney *v.* Spiva, 97 Mo. 98, 10 S. W. 433.

New York.— Seybel *v.* Workingmen's Co-operative Assoc., 158 N. Y. 694, 53 N. E. 1132.

Texas.— Monroe *v.* Buchanan, 27 Tex. 241; Phelps *v.* Farmers' Nat. Bank, (Civ. App. 1900) 56 S. W. 1003.

Vermont.— Sowles *v.* Buck, 62 Vt. 203, 20 Atl. 146.

See 35 Cent. Dig. tit. "Mortgages," § 1277.

23. Hodges *v.* Walker, 76 N. Y. App. Div. 305, 78 N. Y. Suppl. 447; Kortright *v.* Smith, 3 Edw. (N. Y.) 402; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Clark *v.* Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354; Blake *v.* Foster, 2 Ball & B. 574; Anderson *v.* Stather, 2 Coll. 209, 9 Jur. 806, 14 L. J. Ch. 377, 33 Eng. Ch. 209, 63 Eng. Reprint 702.

24. *Florida.*— Wilson *v.* Russ, 17 Fla. 691.

New York.— Townshend *v.* Frommer, 125 N. Y. 446, 26 N. E. 805; U. S. Trust Co. *v.* Roche, 116 N. Y. 120, 22 N. E. 265; Goebel *v.* Iffla, 111 N. Y. 170, 18 N. E. 649; Lockman *v.* Reilly, 95 N. Y. 64; Curtis *v.* Murphy, 58 N. Y. Super. Ct. 292, 11 N. Y. Suppl. 726; Eschmann *v.* Alt, 4 Misc. 305, 24 N. Y. Suppl. 763; Nodine *v.* Greenfield, 7 Paige 544, 34 Am. Dec. 363; Williamson *v.* Field, 2 Sandf. Ch. 533.

Ohio.— Dye *v.* Giou, 6 Ohio Dec. (Reprint) 623, 7 Am. L. Rec. 144.

South Carolina.— Rutledge *v.* Fishburne, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757.

United States.— Clark *v.* Reyburn, 8 Wall. 318, 19 L. ed. 354.

England.— Reynoldson *v.* Perkins, Ambl. 564, 27 Eng. Reprint 362, Dick. 427, 21 Eng. Reprint 335; Yates *v.* Hambly, 2 Atk. 237, 26 Eng. Reprint 547; Marriott *v.* Kirkham, 3 Giffard 536, 8 Jur. N. S. 379, 31 L. J. Ch. 312, 6 L. T. Rep. N. S. 17, 10 Wkly. Rep. 240, 66 Eng. Reprint 521.

See 35 Cent. Dig. tit. "Mortgages," § 1277.

25. *Alabama.*— Doe *v.* Magee, 8 Ala. 570.

Arkansas.— Livingston *v.* New England Mortg. Security Co., 77 Ark. 379, 91 S. W. 752.

California.— Johnson *v.* Friant, 140 Cal. 260, 73 Pac. 993; Wise *v.* Griffith, 78 Cal. 152, 20 Pac. 675.

Illinois.—Alsup *v.* Stewart, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Connely *v.* Rue, 148 Ill. 207, 35 N. E. 824; Taylor *v.* Adam, 115 Ill. 570, 4 N. E. 837; Stiger *v.* Bent, 111 Ill. 328.

Iowa.— Street *v.* Beal, 16 Iowa 68, 85 Am. Dec. 504.

New York.— Baker *v.* Potts, 73 N. Y. App. Div. 29, 76 N. Y. Suppl. 406; Title Guarantee, etc., Co. *v.* Weiher, 30 Misc. 250, 63 N. Y. Suppl. 224.

Tennessee.— Mims *v.* Mims, 1 Humphr. 425.

the other hand it will not bar or in any way affect his rights if he is not made a party.[26] Hence he is always a proper party, against whom the action may be prosecuted, who may defend the same, and who will be bound by the decree.[27] But where there have been successive alienations of the estate since the mortgage, it is neither necessary nor proper to join any of the grantees who have parted absolutely with their interest in the premises and have not assumed any liability as respects the mortgage debt to their own vendees.[28] And one who has purchased a part of the property is not a necessary defendant in an action which seeks foreclosure only as against the residue.[29]

Vermont.— Barton *v.* Kingsbury, 43 Vt. 640.

See 35 Cent. Dig. tit. "Mortgages," § 1283.

Where a mortgage contains the pact de non alienando, the mortgagee may enforce his mortgage by proceedings against the mortgagor alone, notwithstanding the alienation of the property; and all those claiming under the mortgagor, whether directly or remotely, will be bound, although not made parties. Fleitas *v.* Meraux, 47 La. Ann. 232, 16 So. 848; Truxillo *v.* Delaune, 47 La. Ann. 10, 16 So. 642; Haley *v.* Dubois, 10 Rob. (La.) 54; Shields *v.* Shiff, 124 U. S. 351, 8 S. Ct. 510, 31 L. ed. 445; Avegno *v.* Schmidt, 113 U. S. 293, 5 S. Ct. 487, 28 L. ed. 976.

26. See *infra*, XXI, L, 2.

27. *Alabama.*— Merritt *v.* Phenix, 48 Ala. 87; Hall *v.* Huggins, 19 Ala. 200; Singleton *v.* Gayle, 8 Port. 270.

California.— Johnson *v.* McDuffee, 83 Cal. 30, 23 Pac. 214; Hefner *v.* Urton, 71 Cal. 479, 12 Pac. 486; Porter *v.* Muller, 65 Cal. 512, 4 Pac. 531; Cornell *v.* Corbin, 64 Cal. 197, 30 Pac. 629; Heyman *v.* Lowell, 23 Cal. 106; Burton *v.* Lies, 21 Cal. 87; Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561; Goodenow *v.* Ewer, 16 Cal. 461, 76 Am. Dec. 540; De Leon *v.* Higuera, 15 Cal. 483; Luning *v.* Brady, 10 Cal. 265.

Georgia.— May *v.* Rawson, 21 Ga. 461.

Illinois.— Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Kepley *v.* Jansen, 107 Ill. 79; Jeneson *v.* Jeneson, 66 Ill. 259; Cutter *v.* Jones, 52 Ill. 84; Robbins *v.* Arnold, 11 Ill. App. 434.

Indiana.—Armstrong *v.* Hufty, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; Goodell *v.* Starr, 127 Ind. 198, 26 N. E. 793; Daugherty *v.* Deardorf, 107 Ind. 527, 8 N. E. 296; Cox *v.* Vickers, 35 Ind. 27; Watt *v.* Alvord, 25 Ind. 533; Sumner *v.* Coleman, 20 Ind. 486.

Iowa.— Semple *v.* Lee, 13 Iowa 304.

Kansas.— Boatmen's Bank *v.* Herington First Nat. Bank, 70 Kan. 624, 79 Pac. 125; Mudge *v.* Hull, 56 Kan. 314, 43 Pac. 242; Lenox *v.* Reed, 12 Kan. 223.

Kentucky.— Hundley *v.* Webb, 3 J. J. Marsh. 643, 20 Am. Dec. 189.

Missouri.— Collins *v.* Stocking, 98 Mo. 290, 11 S. W. 750.

New Jersey.— Pruden *v.* Williams, 26 N. J. Eq. 210.

New York.— Wait *v.* Getman, 32 N. Y. App. Div. 168, 52 N. Y. Suppl. 965; Titcomb *v.* Fonda, etc., R. Co., 38 Misc. 630, 78 N. Y. Suppl. 226; Mills *v.* Van Voorhis, 10 Abb. Pr. 152; Thornton *v.* St. Paul, etc., R. Co., 45 How. Pr. 416; Crooke *v.* O'Higgins, 14 How. Pr. 154; Reed *v.* Marble, 10 Paige 409.

North Carolina.— Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466.

Ohio.— C., S. & L. Assoc. *v.* Kreitz, 41 Ohio St. 143; Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512.

Pennsylvania.— Hulett *v.* Mutual L. Ins. Co., 114 Pa. St. 142, 6 Atl. 554; Mevey's Appeal, 4 Pa. St. 80. And see Buckby *v.* Sturtevant, 28 Pa. Super. Ct. 552.

Texas.— Miller *v.* Rogers, 49 Tex. 398.

Utah.— Brereton *v.* Miller, 7 Utah 426, 27 Pac. 81.

Wisconsin.— Martin *v.* Morris, 62 Wis. 418, 22 N. W. 525.

Canada.— Orford *v.* Bayley, 1 Ch. Chamb. (U. C.) 272.

See 35 Cent. Dig. tit. "Mortgages," § 1283.

A purchaser pendente lite from a mortgagor is to all intents and purposes a party to the decree of foreclosure; the same proceedings can be taken against him that can be taken against the mortgagor, and he is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

Effect of want of proof as to alleged purchase.— Where the only defense set up in a suit to foreclose a trust deed, after breach of condition, is an alleged sale by the trustee of a portion of the property at public auction, but no memorandum of the sale is produced, and the testimony as to the acceptance of the bid by the auctioneer is conflicting, the alleged purchaser is not a necessary party to the suit. Cook *v.* Hilliard, 9 Fed. 4.

28. *Alabama.*— Merritt *v.* Phenix, 48 Ala. 87.

Indiana.— Scarry *v.* Eldridge, 63 Ind. 44.

New Jersey.— Biddle *v.* Pugh, 59 N. J. Eq. 480, 45 Atl. 626. It is otherwise where each of the successive grantees has assumed and agreed to pay the mortgage. Field *v.* Thistle, 58 N. J. Eq. 339, 43 Atl. 1072 [*affirmed* in 60 N. J. Eq. 444, 46 Atl. 1099].

New York.— Lockwood *v.* Benedict, 3 Edw. 472.

Canada.— Walker *v.* Dickson, 20 Ont. App. 96.

See 35 Cent. Dig. tit. "Mortgages," § 1283.

29. Winfrey *v.* Williams, 5 B. Mon. (Ky.) 428; Batterman *v.* Albright, 122 N. Y. 484, 25 N. E. 856, 19 Am. St. Rep. 510, 11 L. R. A. 800; Hosford *v.* Nichols, 1 Paige (N. Y.) 220.

(II) *Purchaser Under Unrecorded Deed.* If the mortgagor, after the execution of the mortgage, makes a conveyance of the mortgaged property, and the conveyance is not recorded before foreclosure proceedings are commenced, and the mortgagee is not notified of the grantee's interest, by his being in possession or otherwise, such grantee need not be made a defendant, and a judgment against the mortgagor is conclusive against him.[30] But if the deed is put on record at any time after the commencement of proceedings and before sale, the grantee should then be brought in.[31]

d. Assignee in Bankruptcy of Mortgagor. Where a mortgagor is adjudged bankrupt, the equity of redemption vests in the assignee or trustee in bankruptcy, and the latter must be made a party to foreclosure proceedings; if not, his title is not affected by the decree.[32] But where the adjudication in bankruptcy and appointment of the assignee do not occur until after the commencement of the foreclosure proceedings, the assignee stands in the position of a purchaser *pendente lite*; and while he may be made a party on his own petition, yet if he fails to do so he will be bound by the decree.[33]

e. Vendor of Premises Under Mortgage. A mortgagor who has sold and conveyed the premises absolutely and unconditionally before the institution of foreclosure proceedings is not a necessary party thereto, if no personal judgment or deficiency decree against him is sought, or if he no longer remains liable on the mortgage debt,[34] although it is otherwise if he is sought to be bound personally by

Corporation condemning part of land.— Where, during the pendency of a foreclosure suit, a railway company condemned a part of the premises, and an appeal was taken to the circuit court from the award, which was still undetermined, the court properly refused a motion by the mortgagor, defendant in the foreclosure suit, that the railway company should be made a party to that suit. Farmers', etc., Bank *v.* Eldred, 20 Wis. 196.

30. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Aldrich *v.* Stephens, 49 Cal. 676. Under the express provision of Code Civ. Proc. § 726, that no person holding a conveyance from the mortgagor, which is not recorded at the commencement of the action to foreclose, need be made a party to the action, it is immaterial that plaintiff has actual knowledge of the unrecorded conveyance. Hager *v.* Astorg, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68; Hibernia Sav., etc., Soc. *v.* Cochran, 141 Cal. 653, 75 Pac. 315.

Illinois.— Connely *v.* Rue, 148 Ill. 207, 35 N. E. 824; Oakford *v.* Robinson, 48 Ill. App. 270.

Indiana.— Boice *v.* Michigan Mut. L. Ins. Co., 114 Ind. 480, 15 N. E. 825.

Kansas.— Shippen *v.* Kimball, 47 Kan. 173, 27 Pac. 813.

New Jersey.— Dinsmore *v.* Westcott, 25 N. J. Eq. 302.

New York.— Hatfield *v.* Malcolm, 71 Hun 51, 24 N. Y. Suppl. 596; Earle *v.* Barnard, 22 How. Pr. 437. *Compare* Hall *v.* Nelson, 23 Barb. 88.

Washington.— Murdoch *v.* Leonard, 15 Wash. 142, 45 Pac. 751.

See 35 Cent. Dig. tit. "Mortgages," § 1283.

Subsequent record of prior deed.— Where a deed of land, executed but not recorded before the execution of a mortgage on the same property by the same grantor, was placed on the record before the institution of foreclosure proceedings under the mortgage, it was held that those claiming under the deed were necessary parties to the suit. Goodwin *v.* Tyrrell, (Ariz. 1903) 71 Pac. 906.

31. Farmers' L. & T. Co. *v.* Dickson, 17 How. Pr. (N. Y.) 477; Patterson *v.* Mills, 121 N. C. 258, 28 S. E. 368; Green *v.* Dixon, 9 Wis. 532.

32. *Alabama.*— Robinson *v.* Denny, 57 Ala. 492.

Illinois.— Cole *v.* Duncan, 58 Ill. 176. Where the proceeding to foreclose is by scire facias, under the practice in this state, it is not necessary to make the assignee in bankruptcy a party; no one is a necessary defendant but the mortgagor himself, or, in case of his death, his personal representative. Chickering *v.* Failes, 26 Ill. 507.

New York.— Andrews *v.* Townshend, 56 N. Y. Super. Ct. 140, 1 N. Y. Suppl. 421; Ostrander *v.* Hart, 8 N. Y. Suppl. 809 [*affirmed* in 130 N. Y. 406, 29 N. E. 744].

United States.— Dendel *v.* Sutton, 20 Fed. 787; Barron *v.* Newberry, 2 Fed. Cas. No. 1,056, 1 Biss. 149.

England.— Waddell *v.* Toleman, 9 Ch. D. 212, 38 L. T. Rep. N. S. 910, 26 Wkly. Rep. 802; Garth *v.* Thomas, 3 L. J. Ch. O. S. 94, 2 Sim. & St. 188, 1 Eng. Ch. 188, 57 Eng. Reprint 317; Lloyd *v.* Lander, 5 Madd. 282, 21 Rev. Rep. 292, 56 Eng. Reprint 903; Hanson *v.* Preston, 3 Y. & C. Exch. 229.

Canada.— Goodhue *v.* Whitmore, 7 Can. L. J. 124; Hoskins *v.* Johnston, 6 Ont. Pr. 257; Torrance *v.* Winterbottom, 2 Grant Ch. (U. C.) 487.

33. Mount *v.* Manhattan Co., 43 N. J. Eq. 25, 9 Atl. 114; Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403; Oliver *v.* Cunningham, 6 Fed. 60.

34. *Alabama.*—Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375; Mims *v.* Mims, 35 Ala. 23.

the decree in the case,[35] and perhaps also where he may be liable to his grantee for a breach of the warranty against encumbrances.[36]

f. Wife of Mortgagor. Where the wife of the mortgagor has joined in the execution of the mortgage, she is generally a necessary party to a suit to foreclose the same;[37] but not where the mortgage was made by the husband alone,[38] unless

California.— Ingham *v.* Weed, (1897) 48 Pac. 318; California Title Ins., etc., Co. *v.* Muller, (App. 1906) 84 Pac. 453.

Colorado.— De Cunto *v.* Johnson, 18 Colo. App. 220, 70 Pac. 955.

Connecticut.— Swift *v.* Edson, 5 Conn. 531.

Illinois.— Stiger *v.* Bent, 111 Ill. 328. *Compare* Sickmon *v.* Wood, 69 Ill. 329.

Indiana.— West *v.* Miller, 125 Ind. 70, 25 N. E. 143; Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; Davis *v.* Hardy, 76 Ind. 272; Burkham *v.* Beaver, 17 Ind. 367; Shaw *v.* Hoadley, 8 Blackf. 165; Stumph *v.* Bigham, Wils. 367.

Iowa.— Watts *v.* Creighton, 85 Iowa 154, 52 N. W. 12; Johnson *v.* Foster, 68 Iowa 140, 26 N. W. 39; Semple *v.* Lee, 13 Iowa 304; Johnson *v.* Monell, 13 Iowa 300; Murray *v.* Catlett, 4 Greene 108.

Kansas.— Jones *v.* Lapham, 15 Kan. 540.

Maryland.— Worthington *v.* Lee, 2 Bland 678, holding that the mortgagor is a proper party to a hill to foreclose the mortgage, where his equity has been sold on execution against him at law.

New Jersey.— Johnes *v.* Outwater, 55 N. J. Eq. 398, 36 Atl. 483; Andrews *v.* Stelle, 22 N. J. Eq. 478; Somerset County Bldg., etc., Assoc. *v.* Camman, 11 N. J. Eq. 382; Chester *v.* King, 2 N. J. Eq. 405.

New York.— Van Nest *v.* Latson, 19 Barb. 604; Daly *v.* Burchell, 13 Abb. Pr. N. S. 264; Bigelow *v.* Bush, 6 Paige 343.

North Carolina.— Bernard *v.* Shemwell, 139 N. C. 446, 52 S. E. 64.

Pennsylvania.— Broomell *v.* Anderson, 5 Pa. Cas. 142, 8 Atl. 764; Hunsicker *v.* Richardson, 13 Pa. Co. Ct. 524.

South Carolina.— Craig *v.* Miller, 41 S. C. 37, 19 S. E. 192.

South Dakota.— Carpenter *v.* Ingalls, 3 S. D. 49, 51 N. W. 948, 44 Am. St. Rep. 753.

Texas.— McKeen *v.* Sultenfuss, 61 Tex. 325; Perryman *v.* Smith, (Civ. App. 1895) 32 S. W. 349; Puckett *v.* Reed, 3 Tex. Civ. App. 350, 22 S. W. 515.

Vermont.— Lockwood *v.* White, 65 Vt. 466, 26 Atl. 639; Miner *v.* Smith, 53 Vt. 551; Soule *v.* Albee, 31 Vt. 142.

Wisconsin.— Delaplaine *v.* Lewis, 19 Wis. 476.

United States.— Grove *v.* Grove, 93 Fed. 865; Townsend Sav. Bank *v.* Epping, 24 Fed. Cas. No. 14,120, 3 Woods 390.

See 35 Cent. Dig. tit. "Mortgages," § 1280.

Contra.— Reggio *v.* Blanchin, 26 La. Ann. 532.

Effect of sale on execution.— Where the statute gives the judgment debtor a year in which to redeem from a sale on execution, he retains, during that year, such an interest in the premises as makes him a necessary party to a bill to foreclose a mortgage previously executed by him. Hallock *v.* Smith, 4 Johns. Ch. (N. Y.) 649.

35. Stevens *v.* Campbell, 21 Ind. 471; Miller *v.* Thompson, 34 Mich. 10; Crenshaw *v.* Thackston, 14 S. C. 437; Coney *v.* Winchell, 116 U. S. 227, 6 S. Ct. 366, 29 L. ed. 610; Ayres *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693.

36. Gifford *v.* Workman, 15 Iowa 34; Bigelow *v.* Bush, 6 Paige (N. Y.) 343; Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127. See also Thompson *v.* Price, 37 Wash. 394, 79 Pac. 951.

37. *Alabama.*— Houston *v.* Williamson, 81 Ala. 482, 1 So. 193. *Compare* Flowers *v.* Barker, 79 Ala. 445.

California.— Sargent *v.* Wilson, 5 Cal. 504. A defendant in an action for foreclosure cannot object that his wife, who joined in the execution of the mortgage, is not made a party defendant. Powell *v.* Ross, 4 Cal. 197.

Florida.— Daniels *v.* Henderson, 5 Fla. 452.

Illinois.— Camp *v.* Small, 44 Ill. 37; Leonard *v.* Villars, 23 Ill. 377; Orvis *v.* Cole, 14 Ill. App. 283. Where it appears that the acknowledgment of the mortgagor's wife was insufficient and void, she is neither a necessary nor a proper party to the suit. Sheldon *v.* Patterson, 55 Ill. 507.

Indiana.— State *v.* Kennett, 114 Ind. 160, 16 N. E. 173.

Maryland.— Hurtt *v.* Crane, 36 Md. 29; Johns *v.* Reardon, 3 Md. Ch. 57.

New York.— Franklin *v.* Beegle, 102 N. Y. App. Div. 412, 92 N. Y. Suppl. 449; Denton *v.* Nanny, 8 Barb. 618; Conde *v.* Shepard, 4 How. Pr. 75.

Canada.— Blong *v.* Fitzgerald, 15 Ont. Pr. 467; Ayerst *v.* McClean, 14 Ont. Pr. 15; Building, etc., Assoc. *v.* Carswell, 8 Ont. Pr. 73. *Compare* Davidson *v.* Boyes, 6 Ont. Pr. 27; Moffat *v.* Thomson, 3 Grant Ch. (U. C.) 111.

See 35 Cent. Dig. tit. "Mortgages," § 1281.

But see Pitts *v.* Aldrich, 11 Allen (Mass.) 39; Thornton *v.* Pigg, 24 Mo. 249.

In Kentucky under the statute (St. § 2135), providing that the wife shall not be endowed of land sold to satisfy an encumbrance created by deed in which she joined, but that, if there is a surplus after satisfying the lien, she may have dower out of such surplus, a wife who joins with her husband in a mortgage on the husband's land has no interest therein, and is not a necessary party to a suit to foreclose the mortgage. Morgan *v.* Wickliffe, 115 Ky. 226, 72 S. W. 1122, 24 Ky. L. Rep. 2104. See also Deusch *v.* Questa, 116 Ky. 474, 76 S. W. 329, 25 Ky. L. Rep. 707.

38. *Indiana.*— Fletcher *v.* Holmes, 32 Ind. 497.

she sets up an adverse claim to the premises as her separate property,[39] or unless her joinder in the action is necessary to bar a claim to dower in the equity of redemption,[40] or a claim of homestead.[41] But as dower is not claimable against a purchase-money mortgage, the wife need not be joined in proceedings to foreclose a mortgage of that kind.[42]

g. Heirs and Representatives of Deceased Mortgagor. At common law, where the mortgagor dies before the institution of foreclosure proceedings, his heirs are necessary parties defendant, as being the owners of the equity of redemption,[43] except in cases where the mortgagor in his lifetime parted with all his

New York.— Barker *v.* Burton, 67 Barb. 458.

North Carolina.— Etheridge *v.* Vernoy, 71 N. C. 184.

Ohio.— Ruffner *v.* Evans, 2 Ohio Cir. Ct. 70, 1 Ohio Cir. Dec. 368.

Texas.— Thompson *v.* Jones, (1889) 12 S. W. 77.

Washington.— Oates *v.* Shuey, 25 Wash. 597, 66 Pac. 58. But *compare* Sloane *v.* Lucas, 37 Wash. 348, 79 Pac. 949.

See 35 Cent. Dig. tit. "Mortgages," § 1281.

39. Kohner *v.* Ashenauer, 17 Cal. 578; Oates *v.* Shuey, 25 Wash. 597, 66 Pac. 58.

40. McIntire *v.* Yates, 104 Ill. 491; Wright *v.* Langley, 36 Ill. 381; Gilbert *v.* Maggord, 2 Ill. 471; Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075; Denniston *v.* Potts, 11 Sm. & M. (Miss.) 36; Foster *v.* Hickox, 38 Wis. 408.

Dower barred by intermediate conveyance. — Where the owner of real estate mortgages the same, and afterward sells and conveys the same to a third person, if his wife joins in that conveyance, she need not be made a party to a suit to foreclose the mortgage, her inchoate right of dower having been already cut off. Stiger *v.* Bent, 111 Ill. 328; Koerner *v.* Gauss, 57 Ill. App. 668.

41. Hefner *v.* Urton, 71 Cal. 479, 12 Pac. 486. But see Kuhnert *v.* Conrad, 6 N. D. 215, 69 N. W. 185; Townsend Sav. Bank *v.* Epping, 24 Fed. Cas. No. 14,120, 3 Woods 390, both holding that, where a mortgage lien is paramount to a claim for homestead in the premises, the wife of the mortgagor is not a necessary party to a bill to foreclose.

42. Lohmeyer *v.* Durbin, 206 Ill. 574, 69 N. E. 523; Short *v.* Raub, 81 Ill. 509; Baker *v.* Scott, 62 Ill. 86; Stephens *v.* Bichnell, 27 Ill. 444, 81 Am. Dec. 242. *Contra*, Mills *v.* Van Voorhies, 20 N. Y. 412.

43. *Alabama.*— Bell *v.* Hall, 76 Ala. 546; Abernathy *v.* Moses, 73 Ala. 381; Erwin *v.* Ferguson, 5 Ala. 158.

Arkansas.— Pillow *v.* Sentelle, 39 Ark. 61; Simms *v.* Richardson, 32 Ark. 304; Kiernan *v.* Blackwell, 27 Ark. 235.

Florida.— McGregor *v.* Kellum, 50 Fla. 589, 39 So. 697; Mote *v.* Morton, 46 Fla. 478, 35 So. 656.

Illinois.— Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Jeneson *v.* Jeneson, 66 Ill. 259; Ohling *v.* Luitjens, 32 Ill. 23; Harvey *v.* Thornton, 14 Ill. 217; Lane *v.* Erskine, 13 Ill. 501. Children of the husband by a former marriage are not necessary parties to a suit to foreclose a mortgage made by the husband and his second wife, covering her property. Douglas *v.* Soutter, 52 Ill. 154. The heirs of a deceased mortgagor need not be made parties to a scire facias to foreclose a mortgage, as the statute authorizes that proceeding by making either the heirs, executors, or administrators parties. Rockwell *v.* Jones, 21 Ill. 279.

Indiana.— Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075; Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698; Daugherty *v.* Deardorf, 107 Ind. 527, 8 N. E. 296; Pauley *v.* Cauthorn, 101 Ind. 91; Curtis *v.* Gooding, 99 Ind. 45; Muir *v.* Gibson, 8 Ind. 187; Slaughter *v.* Foust, 4 Blackf. 379; John *v.* Hunt, 1 Blackf. 324, 12 Am. Dec. 245.

Kansas.— Richards *v.* Thompson, 43 Kan. 209, 23 Pac. 106; Britton *v.* Hunt, 9 Kan. 228.

Kentucky.— Shiveley *v.* Jones, 6 B. Mon. 274.

Louisiana.— Barton *v.* Burbank, 114 La. 224, 38 So. 150.

New Jersey.— Somerset County Bldg., etc., Assoc. *v.* Camman, 11 N. J. Eq. 382, holding that where a husband and wife gave a bond, secured by a mortgage on the wife's property, the heirs at law of the husband are not necessary parties to a bill to foreclose brought after his death.

New York.— McGown *v.* Yerks, 6 Johns. Ch. 450; Eagle F. Ins. Co. *v.* Cammet, 2 Edw. 127. The heirs and devisees of a deceased guarantor of the mortgage, having no interest in the mortgaged premises, cannot be made parties for the purpose of reaching real estate descended or devised to them, to satisfy an anticipated deficiency on the sale of the mortgaged premises. Leonard *v.* Morris, 9 Paige 90. And see Hebron Soc. *v.* Schoen, 60 How. Pr. 185.

North Carolina.— Chadbourn *v.* Johnston, 119 N. C. 282, 25 S. E. 705.

Ohio.— Green *v.* Ulyatt, 2 Ohio Dec. (Reprint) 427, 3 West. L. Month. 44.

Oregon.— Renshaw *v.* Taylor, 7 Oreg. 315.

South Carolina.— Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

South Dakota.— Kelsey *v.* Welch, 8 S. D. 255, 66 N. W. 390.

Tennessee.— McIver *v.* Cherry, 8 Humphr. 713. The widow of the mortgagor need not be made a party to a bill to foreclose a subsequent mortgage, where her dower in the land has not been assigned, as her rights cannot be affected by the decree. Mims *v.* Mims, 1 Humphr. 425.

interest in the premises, in which event of course there is nothing to descend to the heirs.[44] But this rule has been changed in several jurisdictions by statutes which make a foreclosure suit maintainable against the personal representatives alone, or make them the only necessary defendants.[45] In some jurisdictions where the suit is properly brought against the heirs, the executor or administrator is not a necessary party, having no title to the realty and no possession of it except so far as may be necessary for the purpose of administration,[46] but in several jurisdictions the rule is otherwise.[47] The personal representative is always a proper

Vermont.— Sargent *v.* Baldwin, 60 Vt. 17, 13 Atl. 854.

Washington.—Anrud *v.* Scandinavian-American Bank, 27 Wash. 16, 67 Pac. 364.

West Virginia.— George *v.* Cooper, 15 W. Va. 666.

Wisconsin.— Zaegel *v.* Kuster, 51 Wis. 31, 7 N. W. 781.

United States.— Chew *v.* Hyman, 7 Fed. 7, 10 Biss. 240. And see Lewis *v.* Hawkins, 23 Wall. 119, 23 L. ed. 113.

England.— Batchelor *v.* Middleton, 6 Hare 75, 31 Eng. Ch. 75, 67 Eng. Reprint 1088; Scully *v.* Scully, 3 Ir. Eq. 494. See Duncombe *v.* Hansley, 3 P. Wms. 334, 24 Eng. Reprint 1089; Lewis *v.* Nangle, 2 Ves. 431, 30 Eng. Reprint 275; Bradshaw *v.* Outram, 13 Ves. Jr. 234, 9 Rev. Rep. 183, 33 Eng. Reprint 282.

See 35 Cent. Dig. tit. "Mortgages," § 1282.

44. *Alabama.*—Wilkins *v.* Wilkins, 4 Port. 245.

California.— Hibernia Sav., etc., Soc. *v.* Herbert, 53 Cal. 375.

Illinois.— Medley *v.* Elliott, 62 Ill. 532.

South Carolina.— Butler *v.* Williams, 27 S. C. 221, 3 S. E. 211.

Texas.— Howard *v.* Johnson, 69 Tex. 655, 7 S. W. 522. See also Givens *v.* Davenport, 8 Tex. 451.

Wisconsin.—Houghton *v.* Kneeland, 7 Wis. 244.

See 35 Cent. Dig. tit. "Mortgages," § 1282.

45. See the statutes of the different states. and see the following cases:

California.— Dickey *v.* Gibson, 121 Cal. 276, 53 Pac. 704; Finger *v.* McCaughey, 119 Cal. 59, 51 Pac. 13; Bayly *v.* Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; Hearfield *v.* Bridge, 67 Fed. 333 [*affirmed* in 75 Fed. 47, 21 C. C. A. 212]. But *compare* Browne *v.* Sweet, 127 Cal. 332, 59 Pac. 774; Suisun Bank *v.* Stark, 106 Cal. 202, 39 Pac. 531; Gutzeit *v.* Pennie, 98 Cal. 327, 33 Pac. 199.

Delaware.— Seals *v.* Chadwick, 2 Pennew. 381, 45 Atl. 718.

Missouri.— Hall *v.* Klepzig, 99 Mo. 83, 12 S. W. 372; Tierney *v.* Spiva, 97 Mo. 98, 10 S. W. 433; Perkins *v.* Wood, 27 Mo. 547; Riley *v.* McCord, 21 Mo. 285.

Oklahoma.— McClung *v.* Cullison, 15 Okla. 402, 82 Pac. 499.

Pennsylvania.— Tryon *v.* Munson, 77 Pa. St. 250; Wallace *v.* Blair, 1 Grant 75; Hare *v.* Mallock, 1 Miles 268.

South Carolina.— The personal representative of a deceased mortgagor is a necessary party to a suit for foreclosure. Simon *v.* Sabb, 56 S. C. 38, 33 S. E. 798, construing the act of 1894. But see Butler *v.* Williams, 27 S. C. 221, 3 S. E. 211; Trapier *v.* Waldo, 16 S. C. 276; Bryce *v.* Bowers, 11 Rich. Eq. (S. C.) 41; Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582; Drayton *v.* Marshall, Rice Eq. (S. C.) 373, 33 Am. Dec. 84, decided prior to statute.

Texas.— Howard *v.* Johnson, 69 Tex. 655, 7 S. W. 522.

Canada.— Carter *v.* Clarkson, 15 Ont. Pr. 379; Ramus *v.* Dow, 15 Ont. Pr. 219; Emerson *v.* Humphries, 15 Ont. Pr. 84; Keen *v.* Codd, 14 Ont. Pr. 182. But *compare* Barnaby *v.* Munroe, 1 N. Brunsw. Eq. 94; White *v.* Haight, 11 Grant Ch. (U. C.) 420; Forsythe *v.* Drake, 1 Grant Ch. (U. C.) 223.

See 35 Cent. Dig. tit. "Mortgages," § 1282.

46. *Illinois.*— Roberts *v.* Tunnell, 165 Ill. 631, 46 N. E. 713; Stiger *v.* Bent, 111 Ill. 328; Bissell *v.* Chicago Mar. Co., 55 Ill. 165; Roberts *v.* Flatt, 42 Ill. App. 608.

Maryland.— David *v.* Grahame, 2 Harr. & G. 94; Worthington *v.* Lee, 2 Bland 678.

Michigan.— Abbott *v.* Godfroy, 1 Mich. 178.

Minnesota.— Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653.

Nevada.— Rickards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

New Jersey.— Harlem Co-operative Bldg., etc., Assoc. *v.* Freeburn, 54 N. J. Eq. 37, 33 Atl. 514; United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 26 Atl. 985.

North Carolina.— Fraser *v.* Bean, 96 N. C. 327, 2 S. E. 159; Averett *v.* Ward, 45 N. C. 192. But *compare* McGowan *v.* Davenport, 134 N. C. 526, 47 S. E. 27 (holding that the representative of a deceased mortgagor who joined with his wife in giving a mortgage on her separate property is a necessary party to a suit against the widow and trustee for foreclosure of the mortgage); Mebane *v.* Mebane, 80 N. C. 34.

Ohio.— McMahan *v.* Davis, 19 Ohio Cir. Ct. 242, 10 Ohio Cir. Dec. 467. *Compare* Hall *v.* Musler, 1 Disn. 36, 12 Ohio Dec. (Reprint) 471.

Wisconsin.— Walker *v.* Jarvis, 16 Wis. 28.

See 35 Cent. Dig. tit. "Mortgages," § 1282.

47. *Alabama.*— Bell *v.* Hall, 76 Ala. 546; Dooley *v.* Villalonga, 61 Ala. 129; Hitchcock *v.* U. S. Bank, 7 Ala. 386. *Contra,* Inge *v.* Boardman, 2 Ala. 331.

Iowa.— Huston *v.* Stringham, 21 Iowa 36.

Louisiana.— O'Hara *v.* Folwell, 26 La. Ann. 370.

Missouri.— Perkins *v.* Woods, 27 Mo. 547; Miles *v.* Smith, 22 Mo. 502.

England.— Meeker *v.* Tanton, 2 Ch. Cas. 29, 22 Eng. Reprint 831; Christophers *v.*

party.[48] And it should be observed that in no case can the personal representative be omitted except where the complaint seeks merely the remedy against the land by foreclosure. If plaintiff asks a money judgment or deficiency decree, whereby assets in the hands of the executor or administrator may be charged, the latter must be made a party.[49]

h. Adverse Claimants of Title — (i) *In General.* A person setting up a claim of title to the mortgaged premises adverse and paramount to that of the mortgagor, and not derived from him, is not a proper party to the foreclosure suit, as he has no interest in the subject-matter of the action and his rights or title could not properly be litigated therein.[50]

(ii) *Tax-Title Claimants.* The rule against joining in a foreclosure suit claimants of an adverse and paramount title is generally applied to such persons as claim under a tax-sale of the mortgaged premises,[51] although it has been held

Sparke, 2 Jac. & W. 229, 37 Eng. Reprint 612.

See 35 Cent. Dig. tit. "Mortgages," § 1282.

48. Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Darlington *v.* Effey, 13 Iowa 177; Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653; United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 26 Atl. 985; Hall *v.* Musler, 1 Disn. (Ohio) 36, 12 Ohio Dec. (Reprint) 471.

49. *Alabama.*— Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013; Boyle *v.* Williams, 72 Ala. 351.

California.— Belloc *v.* Rogers, 9 Cal. 123.

Illinois.— Roberts *v.* Tunnell, 165 Ill. 631, 46 N. E. 713; Roberts *v.* Flatt, 42 Ill. App. 608.

Indiana.— Lovering *v.* King, 97 Ind. 130.

Michigan.—Abbott *v.* Godfroy, 1 Mich. 178.

Nevada.— Rickards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

Ohio.— McMahan *v.* Davis, 19 Ohio Cir. Ct. 242, 10 Ohio Cir. Dec. 467.

See 35 Cent. Dig. tit. "Mortgages," § 1282.

50. *Alabama.*— Bolling *v.* Pace, 99 Ala. 607, 12 So. 796; Hambrick *v.* Russell, 86 Ala. 199, 5 So. 298.

California.— Cady *v.* Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; Croghan *v.* Minor, 53 Cal. 15.

Florida.— Berlack *v.* Halle, 22 Fla. 236, 1 Am. St. Rep. 185.

Illinois.— Gage *v.* Perry, 93 Ill. 176; Frye *v.* State Bank, 11 Ill. 367; Parlin, etc., Co. *v.* Galloway, 95 Ill. App. 60; Smith *v.* Kenny, 89 Ill. App. 293; Runner *v.* White, 60 Ill. App. 247; Davis *v.* Hamilton, 53 Ill. App. 94.

Indiana.— Pancoast *v.* Travelers Ins. Co., 79 Ind. 172; Comley *v.* Hendricks, 8 Blackf. 189. But see Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698, holding that the owner of the record title to a part of a tract of land is a necessary party to a suit to foreclose a mortgage thereon.

Michigan.— Pool *v.* Horton, 45 Mich. 404, 8 N. W. 59; Chamberlain *v.* Lyell, 3 Mich. 448. In order to foreclose all interests derived from the mortgagor subsequent to his own mortgage, the complainant in foreclosure may make defendant a person claiming under a paramount title, when the latter is also the owner of an interest in the equity of redemption. Horton *v.* Ingersoll, 13 Mich. 409.

Minnesota.— Banning *v.* Bradford, 21 Minn. 308, 18 Am. Rep. 398.

Nebraska.— Joslin *v.* Williams, 61 Nebr. 859, 86 N. W. 473.

New York.— Corning *v.* Smith, 6 N. Y. 82; Crosby *v.* Workingman's Co-operative Assoc., 6 N. Y. App. Div. 440, 39 N. Y. Suppl. 678; Dumond *v.* Church, 4 N. Y. App. Div. 194, 38 N. Y. Suppl. 557; Holcomb *v.* Holcomb, 2 Barb. 20; Banks *v.* Walker, 3 Barb. Ch. 438; Eagle F. Ins. Co. *v.* Lent, 6 Paige 635. But *compare* Brown *v.* Volkening, 64 N. Y. 76.

Texas.— Byers *v.* Brannon, (1892) 19 S. W. 1091; Branch *v.* Wilkens, (Civ. App. 1901) 63 S. W. 1083; Wolf *v.* Harris, 20 Tex. Civ. App. 99, 48 S. W. 529. *Compare* Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56.

Vermont.— Kinsley *v.* Scott, 58 Vt. 470, 5 Atl. 390.

Washington.— California Safe Deposit, etc., Co. *v.* Cheney Electric Light, etc., Co., 12 Wash. 138, 40 Pac. 732.

Wisconsin.— Hekla F. Ins. Co. *v.* Morrison, 56 Wis. 133, 14 N. W. 12; Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336.

United States.— Dial *v.* Reynolds, 96 U. S. 340, 24 L. ed. 644; California Safe-Deposit, etc., Co. *v.* Cheney Electric Light, etc., Co., 56 Fed. 257.

See 35 Cent. Dig. tit. "Mortgages," § 1278.

But see Busenbark *v.* Park, 6 Kan. App. 1, 49 Pac. 682; Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51; Wofford *v.* Holmes County Bd. of Police, 44 Miss. 579.

Claimant in possession.— Where a person has actual possession of a part of mortgaged realty, under a title paramount to that of the mortgagor, but from the same common source, and his possession amounts to an eviction sufficient to entitle the mortgagor to claim damages for breach of warranty, and the mortgagor has tendered payment of the value of the rest of the land, and it is a question whether such person owned the part he was in possession of in fee, or owned a life-estate in it with ultimate reversion to the mortgagor, he is a necessary party defendant in an action to foreclose the mortgage. Hunt *v.* Nolen, 40 S. C. 284, 18 S. E. 798. And see Sale *v.* Meggett, 25 S. C. 72.

51. *California.*— Williams *v.* Cooper, 124 Cal. 666, 57 Pac. 577.

that they are proper parties, and that their rights may be litigated and determined in the foreclosure proceedings.[52]

1. Prior Encumbrancers. It is generally held that the senior mortgagee is not a necessary party to a suit for foreclosure by the junior mortgagee.[53] But the prior mortgagee is a proper party where relief is sought against him, as where the validity or priority of his lien is disputed or the amount due to him, or where plaintiff seeks to redeem him, or to have a sale made under both mortgages.[54] In any case if he is not joined as a party his rights are not in any way affected by the decree.[55]

Colorado.— Tinsley *v.* Atlantic Mines Co., 20 Colo. App. 61, 77 Pac. 12.

Florida.— Brown *v.* Atlanta Nat. Bldg., etc., Assoc., 46 Fla. 492, 35 So. 403.

Illinois.— Runner *v.* White, 60 Ill. App. 247; Zitzer *v.* Polk, 19 Ill. App. 61; Whittemore *v.* Shiell, 14 Ill. App. 414; Gage *v.* Chicago Theological Seminary, 8 Ill. App. 410; Carbine *v.* Sebastian, 6 Ill. App. 564.

Nebraska.— Western Land Co. *v.* Buckley, 3 Nebr. (Unoff.) 776, 92 N. W. 1052. A holder of a tax title, improperly made a party to a foreclosure suit, will be allowed to defend; that is, he is not a proper party to the proceeding, but still, if he is brought in, he has a right to defend his title. Hurley *v.* Cox, 9 Nebr. 230, 2 N. W. 705.

See 35 Cent. Dig. tit. "Mortgages," § 1278.

52. Lyon *v.* Powell, 78 Ala. 351; Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

In New York the purchaser at a tax-sale who, by failure to give notice to the mortgagee of the property as required by statute, does not acquire a title superior to the mortgage, is a proper party defendant in an action to foreclose the mortgage, as the only right he has, the right to repayment of the amount of the tax with interest, is a proper subject for adjustment in that action. Ruyter *v.* Wickes, 4 N. Y. Suppl. 743.

53. *Alabama.*— Walker *v.* Mobile Bank, 6 Ala. 452.

Arkansas.— White *v.* Holman, 32 Ark. 753.

Florida.— Broward *v.* Hoeg, 15 Fla. 370; Ritch *v.* Eichelberger, 13 Fla. 169.

Illinois.— Hibernian Banking Assoc. *v.* Law, 88 Ill. App. 18; Chandler *v.* O'Neil, 62 Ill. App. 418; Galford *v.* Gillett, 55 Ill. App. 576; Crawford *v.* Munford, 29 Ill. App. 445; Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

Indiana.— Wright *v.* Bundy, 11 Ind. 398.

Iowa.— Heimstreet *v.* Winnie, 10 Iowa 430.

Michigan.— Dickerson *v.* Uhl, 71 Mich. 398, 39 N. W. 472.

Nebraska.— Stratton *v.* Reisdorph, 35 Nebr. 314, 53 N. W. 136; White *v.* Bartlett, 14 Nebr. 320, 15 N. W. 702.

New York.— Salmon *v.* Allen, 11 Hun 29; Smith *v.* Davis, 4 N. Y. Civ. Proc. 158; Western Reserve Bank *v.* Potter, Clarke 432.

South Carolina.— Evans *v.* McLucas, 12 S. C. 56; Warren *v.* Burton, 9 S. C. 197.

Tennessee.— Mims *v.* Mims, 1 Humphr. 425.

Texas.— Hague *v.* Jackson, 71 Tex. 761, 12 S. W. 63; Garza *v.* Howell, (Civ. App. 1905) 85 S. W. 461; Big Sandy Lumber Co. *v.* Kuteman, (Civ. App. 1897) 41 S. W. 172.

United States.— Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 16 S. Ct. 537, 40 L. ed. 638; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288; McClure *v.* Adams, 76 Fed. 899; Wabash, etc., R. Co. *v.* Central Trust Co., 22 Fed. 138.

England.— Fisher *v.* Barry, Beatty 143; Richards *v.* Cooper, 5 Beav. 304, 49 Eng. Reprint 595; Rose *v.* Page, 2 Sim. 471, 29 Rev. Rep. 142, 2 Eng. Ch. 471, 57 Eng. Reprint 864.

See 35 Cent. Dig. tit. "Mortgages," § 1284.

But see McMurtry *v.* Montgomery Masonic Temple Co., 86 Ky. 206, 5 S. W. 570, 9 Ky. L. Rep. 541; Champlin *v.* Foster, 7 B. Mon. (Ky.) 104; Clark *v.* Prentice, 3 Dana (Ky.) 468; Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475; Tome *v.* Merchants', etc., Permanent Bldg., etc., Co., 34 Md. 12; Wylie *v.* McMakin, 2 Md. Ch. 413; Finley *v.* U. S. Bank, 11 Wheat. (U. S.) 304, 6 L. ed. 480; Atkins *v.* Volmer, 21 Fed. 697; Leggo *v.* Thibaudeau, 7 Manitoba 38; Creighton *v.* Moore, 3 Nova Scotia 227; Sibley *v.* Chisholm, Ritch. Eq. Cas. (Nova Scotia) 167; White *v.* Beasley, 2 Grant Ch. (U. C.) 660.

54. *Alabama.*— Harwell *v.* Lehman, 72 Ala. 344; Judson *v.* Emanuel, 1 Ala. 598.

Indiana.— Masters *v.* Templeton, 92 Ind. 447; Merritt *v.* Wells, 18 Ind. 171.

Kentucky.— Clark *v.* Prentice, 3 Dana 468.

Minnesota.— Foster *v.* Johnson, 44 Minn. 290, 46 N. W. 350.

Nebraska.— Missouri, etc., Trust Co. *v.* Richardson, 57 Nebr. 617, 78 N. W. 273.

New York.— Guilford *v.* Jacobie, 69 Hun 420, 23 N. Y. Suppl. 462; Walsh *v.* Rutgers F. Ins. Co., 13 Abb. Pr. 33; Vanderkemp *v.* Shelton, 11 Paige 28.

Oregon.— Besser *v.* Hawthorn, 3 Oreg. 129.

Tennessee.— Hays *v.* Cornelius, 3 Tenn. Ch. 461.

Texas.— Silberberg *v.* Trilling, 82 Tex. 523, 18 S. W. 591; Bexar Bldg., etc., Assoc. *v.* Newman, (Civ. App. 1893) 25 S. W. 461.

Wisconsin.— Person *v.* Merrick, 5 Wis. 231; Farwell *v.* Murphy, 2 Wis. 533.

United States.— Salem First Nat. Bank *v.* Salem Capital Flour Mills Co., 31 Fed. 580, 12 Sawy. 485, 496; Sutherland *v.* Lake Superior Ship Canal R., etc., Co., 23 Fed. Cas. No. 13,643.

See 35 Cent. Dig. tit. "Mortgages," § 1284.

55. McMurtry *v.* Montgomery Masonic Temple Co., 86 Ky. 206, 5 S. W. 570, 9 Ky. L. Rep. 541; Forrer *v.* Kloke, 10 Nebr. 373, 6 N. W. 428; Young *v.* Montgomery, etc.,

j. Subsequent Encumbrancers. A junior encumbrancer is not a necessary party to a suit by a senior mortgagee to foreclose in such a sense that his presence on the record is necessary to a valid decree, but it is always both proper and prudent to join him as a defendant, both to give him an opportunity to defend and to extinguish his right of redemption,[56] for if he is not thus connected with the action his rights will not be in any way affected by the decree.[57]

k. Persons Liable on Debt Secured. Unless there is an express statutory provision, or facts giving equitable jurisdiction over the demand, a third person who is liable for the payment of the mortgage debt as a guarantor or indorser cannot be joined as a defendant in a foreclosure suit, he having no interest in the mortgage, and the rendition of a personal judgment against him being without the jurisdiction of the court in such a case.[58] But in several states the laws now

R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606. And see *infra*, XXI, L, 3.

56. *Alabama.*— Walker *v.* Mobile Bank, 6 Ala. 452. But see Cullum *v.* Batre, 2 Ala. 415; Judson *v.* Emanuel, 1 Ala. 598.

California.— Carpentier *v.* Brenham, 40 Cal. 221.

Connecticut.—Andreas *v.* Hubbard, 50 Conn. 351; Smith *v.* Chapman, 4 Conn. 344.

Florida.— Ritch *v.* Eichelberger, 13 Fla. 169; Wilson *v.* Hayward, 6 Fla. 171.

Illinois.— Chandler *v.* O'Neil, 62 Ill. App. 418; Woolner *v.* Wilson, 5 Ill. App. 439. But see Augustine *v.* Doud, 1 Ill. App. 588.

Indiana.—Meredith *v.* Lackey, 14 Ind. 529; Mack *v.* Grover, 12 Ind. 254. But see Murdock *v.* Ford, 17 Ind. 52.

Iowa.— Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443; Bunce *v.* West, 62 Iowa 80, 17 N. W. 179; Donnelly *v.* Rusch, 15 Iowa 99; Heimstreet *v.* Winnie, 10 Iowa 430.

Maryland.— Hughes *v.* Riggs, 84 Md. 502, 36 Atl. 269; Johnson *v.* Hambleton, 52 Md. 378; Harris *v.* Hooper, 50 Md. 537; Leonard *v.* Groome, 47 Md. 499; Carroll *v.* Kershner, 47 Md. 262.

Michigan.— Campbell *v.* Bane, 119 Mich. 40, 77 N. W. 322.

Mississippi.— Brown *v.* Nevitt, 27 Miss. 801.

Missouri.— Mullanphy *v.* Simpson, 3 Mo. 492.

New Jersey.— New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507. But see Gould *v.* Wheeler, 28 N. J. Eq. 541; Vandeveer *v.* Holcomb, 17 N. J. Eq. 87.

New York.— Nathans *v.* Hope, 100 N. Y. 615, 3 N. E. 77; Older *v.* Russell, 8 N. Y. App. Div. 518, 40 N. Y. Suppl. 892; General Synod of Reformed Church *v.* Lincoln, 6 N. Y. St. 13; Griswold *v.* Fowler, 6 Abb. Pr. 113. But see Mutual L. Ins. Co. *v.* Dake, 1 Abb. N. Cas. 381 [*affirmed* in 87 N. Y. 257]; Ensworth *v.* Lambert, 4 Johns. Ch. 605; New York L. Ins., etc., Co. *v.* Bailey, 3 Edw. 416.

North Carolina.— Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501.

Ohio.— Belmont Branch Bank *v.* Durbin, 2 Ohio Dec. (Reprint) 372, 2 West. L. Month. 543. But see Pinney *v.* Merchants' Nat. Bank, 71 Ohio St. 173, 72 N. E. 884.

Oregon.— Besser *v.* Hawthorn, 3 Oreg. 129.

South Carolina.— Douthit *v.* Hipp, 23 S. C. 205.

Tennessee.— Rowan *v.* Mercer, 10 Humphr. 359.

Texas.— Silberberg *v.* Trilling, 82 Tex. 523, 18 S. W. 591; Webb *v.* Maxan, 11 Tex. 678. But see Ewell *v.* Anderson, 49 Tex. 697.

United States.— Brooks *v.* Vermont Cent. R. Co., 4 Fed. Cas. No. 1,964, 14 Blatchf. 463. But see Mercantile Trust Co. *v.* Portland, etc., R. Co., 10 Fed. 604.

England.— Whitla *v.* Halliday, 4 Dr. & War. 267; Bodkin *v.* Fitzpatrick, 1 Hog. 308.

Canada.— Grimshawe *v.* Parks, 6 Can. L. J. 142; Phillipps *v.* Prout, 12 Manitoba 143; Wilgress *v.* Crawford, 12 Ont. Pr. 658; McMaster *v.* Demmery, 12 Grant Ch. (U. C.) 193.

See 35 Cent. Dig. tit. "Mortgages," § 1285.

See, however, Dickinson *v.* Duckworth, 74 Ark. 138, 85 S. W. 82.

The assignee of a mechanic's lien is a necessary party to a suit to foreclose a mortgage given after the lien commenced, although the mortgagee had no knowledge of the existence of the same, and the mortgage was filed of record before the commencement of statutory proceedings to enforce the lien. Atkins *v.* Volmer, 21 Fed. 697.

57. See *infra*, XXI, L, 4.

58. *Alabama.*—O'Connor *v.* Nadel, 117 Ala. 595, 23 So. 532.

Illinois.— Walsh *v.* Van Horn, 22 Ill. App. 170.

Iowa.— Deland *v.* Mershon, 7 Iowa 70; Wilkerson *v.* Daniels, 1 Greene 179.

Louisiana.— Duncan *v.* Elam, 1 Rob. 135. *Compare* Hughes *v.* Patterson, 23 La. Ann. 679.

New Jersey.— Raritan Sav. Bank *v.* Lindsley, 58 N. J. Eq. 214, 42 Atl. 574.

Ohio.— Larimer *v.* Clemmer, 31 Ohio St. 499.

England.— Gedye *v.* Matson, 25 Beav. 310, 53 Eng. Reprint 655.

Canada.— Real Estate Loan Co. *v.* Molesworth, 3 Manitoba 116.

See 35 Cent. Dig. tit. "Mortgages," § 1276.

But see Davis *v.* Converse, 35 Vt. 503; Matcalm *v.* Smith, 16 Fed. Cas. No. 9,272, 6 McLean 416; Seidler *v.* Sheppard, 12 Grant Ch. (U. C.) 456.

A state which is an indorser of bonds secured by a statutory mortgage is not a necessary party to a suit brought by holders of the bonds to foreclose the mortgage. Young

authorize the mortgagee to join as defendants any who may be personally liable for the mortgage debt, and have judgment against them, as well as against the mortgagor, for any deficiency; and under such a provision an indorser or guarantor may be made a party.[59]

1. Creditors of Mortgagor. A judgment creditor of the mortgagor having a general lien on the equity of redemption is not a necessary party to a suit for foreclosure,[60] although it is proper to make him a party,[61] as otherwise his rights will not be affected by the decree.[62] A purchaser at an execution sale under a judgment junior to the mortgage is not a necessary party,[63] especially if the sale was voidable or void,[64] nor is an attaching creditor,[65] and it is neither necessary

v. Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

59. See the statutes of the several states. And see the following cases:

California.— Jacks *v.* Estee, 139 Cal. 507, 73 Pac. 247; Security L. & T. Co. *v.* Mattern, 131 Cal. 326, 63 Pac. 482; Hubbard *v.* University Bank, 125 Cal. 684, 58 Pac. 297. See, however, London, etc., Bank *v.* Smith, 101 Cal. 415, 35 Pac. 1027.

Connecticut.— Curtiss *v.* Hazen, 56 Conn. 146, 14 Atl. 771.

Michigan.— Miller *v.* McLaughlin, 132 Mich. 234, 93 N. W. 435; Steele *v.* Grove, 109 Mich. 647, 67 N. W. 963; Dederick *v.* Barber, 44 Mich. 19, 5 N. W. 1064. See, however, Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

New York.— Glacius *v.* Fogel, 88 N. Y. 434; Robert *v.* Kidansky, 111 N. Y. App. Div. 475, 97 N. Y. Suppl. 913; Herring *v.* New York, etc., R. Co., 63 How. Pr. 497 [*affirmed* in 105 N. Y. 340, 12 N. E. 763]; Thorne *v.* Newby, 59 How. Pr. 120; Jones *v.* Stienbergh, 1 Barb. Ch. 250; Leonard *v.* Morris, 9 Paige 90; Weed *v.* Stevenson, Clarke 166.

Utah.— Smith *v.* McEvoy, 8 Utah 58, 29 Pac. 1030.

Wisconsin.— Fanning *v.* Murphy, 117 Wis. 408, 94 N. W. 335; Kuener *v.* Smith, 108 Wis. 549, 84 N. W. 850; Halbach *v.* Trester, 102 Wis. 530, 78 N. W. 759; Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135, 8 N. W. 15; Bishop *v.* Douglass, 25 Wis. 696. See, however, Borden *v.* Gilbert, 13 Wis. 670.

See 35 Cent. Dig. tit. "Mortgages," § 1276.

60. *Indiana.*— Gaines *v.* Walker, 16 Ind. 361.

Iowa.— Sutherland *v.* Tyner, 72 Iowa 232, 33 N. W. 645.

New Jersey.— Hendry *v.* Quinan, 8 N. J. Eq. 534.

North Carolina.— Bruce *v.* Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562.

Ohio.— Estep *v.* Adams, 4 Ohio Dec. (Reprint) 40, Clev. L. Rec. 51.

South Carolina.— Felder *v.* Murphy, 2 Rich. Eq. 58.

West Virginia.—Linn *v.* Patton, 10 W. Va. 187.

Wisconsin.—Person *v.* Merrick, 5 Wis. 231.

England.— Cook *v.* Hart, L. R. 12 Eq. 459, 41 L. J. Ch. 143, 24 L. T. Rep. N. S. 779, 19 Wkly. Rep. 947; *In re* Bailey, 38 L. J. Ch. 237, 20 L. T. Rep. N. S. 168, 17 Wkly. Rep. 393. *Compare* Rolleston *v.* Morton, 1 C. & L. 252, 1 Dr. & War. 171, 4 Ir. Eq. 149.

See 35 Cent. Dig. tit. "Mortgages," § 1286.

Compare Duvall *v.* Speed, 1 Md. Ch. 229.

But see Jenkins *v.* John Good Cordage, etc., Co., 168 N. Y. 679, 61 N. E. 1130; Morris *v.* Wheeler, 45 N. Y. 708; Carroll *v.* McKaharay, 35 N. Y. App. Div. 582, 55 N. Y. Suppl. 113; Wood *v.* Oakley, 4 Edw. (N. Y.) 562 [*affirmed* in 11 Paige 400].

Assignee of judgment.— Where a judgment is assigned to one merely that he may collect it for his assignor, he is not entitled to be made a party to a suit for the foreclosure of a mortgage on the premises. McKee *v.* Murphy, 34 N. Y. Super. Ct. 261.

61. *Alabama.*— Marriott *v.* Givens, 8 Ala. 694.

Indiana.— Milroy *v.* Stockwell, Smith 19.

Nebraska.— White *v.* Bartlett, 14 Nebr. 320, 15 N. W. 702.

North Carolina.— Gammon *v.* Johnson, 126 N. C. 64, 35 S. E. 185.

Vermont.— Bullard *v.* Leach, 27 Vt. 491.

Washington.— Bisbee *v.* Carey, 17 Wash. 224, 49 Pac. 220.

United States.— Converse *v.* Michigan Dairy Co., 45 Fed. 18.

England.— Adams *v.* Paynter, 1 Coll. 530, 8 Jur. 1063, 14 L. J. Ch. 53, 28 Eng. Ch. 530, 63 Eng. Reprint 530; Johnson *v.* Holdsworth, 15 Jur. 31, 20 L. J. Ch. 63, 1 Sim. N. S. 106, 61 Eng. Reprint 41; Gordon *v.* Horsfall, 11 Jur. 569, 5 Moore P. C. 393, 13 Eng. Reprint 542; McGorney *v.* Croghan, 1 Molloy 508; Winchester *v.* Beavor, 3 Ves. Jr. 314, 30 Eng. Reprint 1029; Appleton *v.* Sturgis, 10 Wkly. Rep. 312.

Canada.— Kaulbach *v.* Taylor, Ritch. Eq. Cas. (Nova Scotia) 400; Sterling *v.* Campbell, 1 Ch. Chamb. (U. C.) 147; Canada Landed Credit Co. *v.* McAllister, 21 Grant Ch. (U. C.) 593; Darling *v.* Wilson, 16 Grant Ch. (U. C.) 255.

See 35 Cent. Dig. tit. "Mortgages," § 1286.

62. De Lashmut *v.* Sellwood, 10 Oreg. 319; De Saussure *v.* Bollmann, 7 S. C. 329; Knight *v.* Pocock, 24 Beav. 436, 4 Jur. N. S. 197, 27 L. J. Ch. 297, 53 Eng. Reprint 426.

63. Wise *v.* Griffith, 78 Cal. 152, 20 Pac. 675; Jewett *v.* Tomlinson, 137 Ind. 326, 36 N. E. 1106; Batterman *v.* Albright, 6 N. Y. St. 334. *Contra*, Kepley *v.* Jansen, 107 Ill. 79.

64. Hall *v.* Yoell, 45 Cal. 584; Raymond *v.* Pauli, 21 Wis. 531.

65. Literer *v.* Huddleston, (Tenn. Ch. App. 1898) 52 S. W. 1003; Downer *v.* Fox, 20 Vt. 388; Nichols *v.* Holgate, 2 Aik. (Vt.)

nor proper to join general creditors of the mortgagor as distinguished from the lien creditors mentioned.[66]

m. Tenants in Possession. A tenant in possession of the mortgaged premises under the mortgagor is a proper party to the foreclosure proceedings, in order that his possession may be controlled by the decree, and even a necessary party, in the sense that his rights will not be affected if he is not joined;[67] but the mortgagor cannot complain of the non-joinder of the tenant if his own rights are not injuriously affected.[68]

n. Joinder of Parties. Where plaintiff is the holder of two different mortgages on the same land, made by the same owner at different times, he may foreclose them both in one action,[69] and this may be done where the two mortgages were given by different persons but to secure the same debt.[70] It is proper to join, in a foreclosure suit, all persons having an interest in the proceeds of the mortgage;[71] and there is no impropriety in joining as defendants the mortgagor and subsequent grantees of the land who have assumed the payment of the debt,[72] the maker and indorser of the note secured,[73] a husband and wife who joined in executing the mortgage,[74] and, where the original mortgagee has assigned the mortgage note as security, or with his indorsement, the assignee may join the mortgagor and mortgagee as defendants.[75]

4. Intervention and New Parties — a. Intervention. As a general rule any person having such an interest in or lien upon the mortgaged premises, or in the debt secured, that his rights might be compromised by the rendition of a decree in his absence, should be allowed to intervene on his own petition.[76] This rule

138; Dickinson *v.* Lamoille County Nat. Bank, 12 Fed. 747. But *compare* Pine *v.* Shannon, 30 N. J. Eq. 501.

66. Adger *v.* Pringle, 11 S. C. 527; Mims *v.* Mims, 1 Humphr. (Tenn.) 425. But see Wallace *v.* Evershed, [1899] 1 Ch. 891, 68 L. J. Ch. 415, 80 L. T. Rep. N. S. 523, 6 Manson 351; Jackson *v.* Hammond, 8 Ont. Pr. 157.

67. *Arkansas.*— Buckner *v.* Sessions, 27 Ark. 219.

Illinois.— Richardson *v.* Hadsall, 106 Ill. 476; Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Runner *v.* White, 60 Ill. App. 247.

Massachusetts.— Shelton *v.* Atkins, 22 Pick. 71.

New York.—Ruyter *v.* Reid, 121 N. Y. 498, 24 N. E. 791; Hirsch *v.* Livingston, 3 Hun 9; Snedecker *v.* Thompson, 26 Misc. 160, 56 N. Y. Suppl. 775.

South Carolina.— Cruger *v.* Daniel, McMull. Eq. 157.

Texas.— Lockhart *v.* Ward, 45 Tex. 227.

Canada.— Collins *v.* Cunningham, 21 Can. Sup. Ct. 139; Canada Permanent Loan, etc., Soc. *v.* Macdonnell, 22 Grant Ch. (U. C.) 461.

See 35 Cent. Dig. tit. "Mortgages," § 1287.

Compare Western Union Tel. Co. *v.* Ann Arbor R. Co., 90 Fed. 379, 33 C. C. A. 113 [*reversed* in 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052].

Assignor of leasehold.— A person having a leasehold interest in real estate, which he has assigned to another, is not a necessary party in a suit to foreclose a trust deed given by the assignee, although he may be liable for rent on the original lease. Unity Co. *v.* Equitable Trust Co., 204 Ill. 595, 68 N. E. 654.

Tenants entering pendente lite.— Tenants of mortgaged premises, occupying under one whose deed was not recorded until after the filing of notice of action pending to foreclose a mortgage, if it may be inferred that they entered *pendente lite*, are not necessary parties. Ostrom *v.* McCann, 21 How. Pr. (N. Y.) 431.

68. Rhodes *v.* Missouri Sav., etc., Co., 63 Ill. App. 77.

69. Pierce *v.* Balkam, 2 Cush. (Mass.) 374; Hinson *v.* Adrian, 86 N. C. 61; Dial *v.* Gary, 24 S. C. 572.

Where one gives to the same person two mortgages, each covering a separate lot and securing a different loan, and the lots have since been conveyed to different persons, who are made defendants to a bill to foreclose both mortgages in one suit, the bill is demurrable for multifariousness. Eastern Bldg., etc., Assoc. *v.* Denton, 65 Fed. 569, 13 C. C. A. 44.

70. McGowan *v.* Mobile Branch Bank, 7 Ala. 823.

71. Territory *v.* Golding, 3 Utah 39, 5 Pac. 546. And see *supra*, XXI, D, 2, b.

72. Carnahan *v.* Tousey, 93 Ind. 561; Ford *v.* David, 1 Bosw. (N. Y.) 569.

73. Michigan State Bank *v.* Trowbridge, 92 Mich. 217, 52 N. W. 632; Smith *v.* McEvoy, 8 Utah 58, 29 Pac. 1030. And see *supra*, XXI, D, 3, k.

74. Gilbert *v.* Maggord, 2 Ill. 471.

75. Farwell *v.* Jackson, 28 Cal. 105; Eastman *v.* Turman, 24 Cal. 379.

76. *California.*— Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468.

Illinois.— The interest which entitles a person to intervene in a foreclosure proceeding between other parties must be in the matter in litigation, and must be of such a direct and immediate character that the in-

has been applied in favor of interventions by senior mortgagees,[77] as well as junior encumbrancers,[78] terre-tenants and purchasers of the equity of redemption,[79] persons claiming title adversely to the mortgage,[80] individual bondholders seeking to be heard in an action brought by the mortgage trustee,[81] heirs at law of a deceased mortgagor, when the action is brought against the personal representative alone,[82] and assignees in bankruptcy or insolvency.[83] But simple contract creditors of the mortgagor are not generally allowed to intervene, simply in view of their interest in a possible surplus.[84] As to the right of judgment creditors to

tervener will either gain or lose by the direct legal operation and effect of the judgment or decree. Hence in a proceeding to foreclose a trust deed securing bonds issued by a heating and lighting corporation, parties holding unexpired contracts with the corporation cannot intervene, although the court has appointed a receiver who refuses to carry out the contracts, and although they charge fraud and collusion as to the foreclosure. Wightman *v.* Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502, 108 Am. St. Rep. 258 [*affirming* 118 Ill. App. 379].

Louisiana.— Delony *v.* George, 20 La. Ann. 216. Interventions are not allowed in proceedings *via executiva* on a mortgage; third persons must assert their rights in a direct action. Chambliss *v.* Atchison, 2 La. Ann. 488. But *compare* Brugier *v.* Miller, 114 La. 419, 38 So. 404.

New Jersey.— Kirkland *v.* Kirkland, 26 N. J. Eq. 276.

Oklahoma.— Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

West Virginia.— Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

United States.— Ruckman *v.* Stephens, 11 Fed. 793.

See 35 Cent. Dig. tit. "Mortgages," § 1289.

Compare Sutton *v.* Sutton, 25 Ga. 383, holding that, if the mortgagor submits to judgment for foreclosure, no one else can intervene to object.

A mortgagor who has conveyed the land by deed with general warranty can intervene to plead usury in an action to foreclose the mortgage. Pitman *v.* Ireland, 64 Nebr. 675, 90 N. W. 540.

The alleged right of a telegraph company to build a line on the right of way of a railroad company, whose property is in the hands of a receiver pending foreclosure, may be presented by intervention in the foreclosure proceedings. Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 63 Fed. 513.

One cotenant cannot intervene in an action to foreclose a mortgage on his cotenant's interest. Hoppe *v.* Hoppe, 104 Cal. 94, 37 Pac. 894.

Interest acquired after judgment of foreclosure.—One who acquires an interest in the mortgaged premises after the rendition of a judgment of foreclosure cannot intervene. Beebe *v.* Richmond Light, etc., Co., 6 N. Y. App. Div. 187, 40 N. Y. Suppl. 1013.

77. Dodge *v.* Fuller, 28 N. J. Eq. 578; U. S. Trust Co. *v.* Western Contract Co., 81 Fed. 454, 26 C. C. A. 472. *Contra, Ex p.* McHenry, 9 Abb. N. Cas. (N. Y.) 256; Bronson *v.* La Crosse, etc., R. Co., 2 Black (U. S.) 524, 17 L. ed. 347.

78. Lord *v.* Morris, 18 Cal. 482; Brown *v.* Nevitt, 27 Miss. 801 (but a junior mortgagee on intervening must offer to redeem); Johnston *v.* Luling Mfg. Co., (Tex. Civ. App. 1894) 24 S. W. 996.

79. Johnston *v.* Donvan, 106 N. Y. 269, 12 N. E. 594; Martine *v.* Lowenstein, 51 How. Pr. (N. Y.) 353; Packer *v.* Owens, 164 Pa. St. 185, 30 Atl. 314; Wickersham *v.* Fetrow, 5 Pa. St. 260; Mevey's Appeal, 4 Pa. St. 80; Stegmaier *v.* Keystone Coal Co., 15 Pa. Dist. 656; Sauer *v.* Martin, 10 Kulp (Pa.) 436.

A purchaser from the mortgagor pending the foreclosure proceedings is not entitled to have the proceedings suspended until he is brought in as a party. Malone *v.* Marriott, 64 Ala. 486.

80. Campbell *v.* Savage, 33 Ark. 678; Hoppe *v.* Hoppe, (Cal. 1894) 36 Pac. 389; Murphy *v.* Cannon, 18 Mont. 348, 45 Pac. 216.

81. Cooper *v.* Mohler, 104 Iowa 301, 73 N. W. 828; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; Williamson *v.* New Jersey Southern R. Co., 25 N. J. Eq. 13; New York Cent. Trust Co. *v.* California, etc., R. Co., 110 Fed. 70; New York Cent. Trust Co. *v.* Marietta, etc., R. Co., 63 Fed. 492.

Limitation upon right.—In a foreclosure suit by a trustee, a bondholder cannot become a party for the purpose of filing a cross bill setting up misconduct of the trustee, mismanagement of the trust, and asking relief against him for the sole benefit of the petitioner, and without controverting the issues made by the original bill or resisting the prayer for foreclosure. Thruston *v.* Big Stone Gap Imp. Co., 86 Fed. 484. And see Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

82. Zundel *v.* Tacke, 47 Hun (N. Y.) 239; Emerson *v.* Humphries, 15 Ont. Pr. 84. But *compare* Boon *v.* Padgett, (N. J. Ch. 1903) 54 Atl. 859; Hinzie *v.* Kempner, 82 Tex. 617, 18 S. W. 659.

83. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 86 Fed. 35; Oliver *v.* Cunningham, 6 Fed. 60.

84. *Alabama.*— Renfro *v.* Goetter, 78 Ala. 311.

Arkansas.— Foley *v.* Whitaker, 26 Ark. 95, holding that a general creditor cannot, on his own petition, be made a party defendant in a suit to foreclose a mortgage given

intervene the authorities are divided.[85] The complainant is bound to take notice of an intervention and of the proceedings thereon.[86] An intervener who sets up an issue which either wholly or partially defeats the mortgage occupies the same position as if he had originally interposed an answer,[87] and does not lose his standing, although the suit is dismissed as to all the parties save the one from whom he claims relief.[88]

b. Bringing in New Parties. Where one having such an interest in the subject-matter as to make him a necessary party, or to give him a right to intervene, has been omitted in the first instance, he may be brought in, pending the proceedings, by a supplemental bill,[89] or, if the statutes allow it, by a petition to have him joined,[90] or by an amendment to the bill or complaint.[91] Even after the rendition of a decree, new parties may be added, by amendment,[92] or, if the law

by his debtor to secure a prior indebtedness, in the absence of any fraud on his rights by the mortgagee.

Michigan.— Union Trust Co. *v.* Detroit, etc., R. Co., 127 Mich. 252, 86 N. W. 788.

New York.— Bouden *v.* Long Acre Square Bldg. Co., 92 N. Y. App. Div. 325, 86 N. Y. Suppl. 1080.

North Carolina.— Williams *v.* West Asheville, etc., R. Co., 126 N. C. 918, 36 S. E. 189.

Washington.—Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

United States.— Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 569; Louisville Trust Co. *v.* Louisville, etc., R. Co., 84 Fed. 539, 28 C. C. A. 202 [*affirmed* in 174 U. S. 674, 19 S. Ct. 827, 43 L. ed. 1130]. *Compare* Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Savings, etc., Co. *v.* Bear Valley Irr. Co., 93 Fed. 339; Lombard Inv. Co. *v.* Seaboard Mfg. Co., 74 Fed. 325.

See 35 Cent. Dig. tit. "Mortgages," § 1289.

85. **Judgment creditors have right to intervene.**— Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Loomis *v.* Stuyvesant, 10 Paige (N. Y.) 490; *Ex p.* Mobley, 19 S. C. 337; Moon *v.* Wellford, 84 Va. 34, 4 S. E. 572; Canada Landed Credit Co. *v.* McAllister, 21 Grant Ch. (U. C.) 593.

See 35 Cent. Dig. tit. "Mortgages," § 1289.

Judgment creditors have not right to intervene.— Judah *v.* Judd, 1 Conn. 309; Hitt *v.* Holliday, 2 Litt. (Ky.) 332; Denegre *v.* Mushet, 46 La. Ann. 90, 14 So. 348; Farmers' Nat. Bank *v.* Lloyd, 30 N. J. Eq. 442; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412.

See 35 Cent. Dig. tit. "Mortgages," § 1289.

Discretion of court.— The matter of allowing judgment creditors to intervene appears to rest very much in the discretion of the court. See Gammon *v.* Johnson, 126 N. C. 64, 35 S. E. 185.

86. Central Trust Co. *v.* Madden, 70 Fed. 451, 17 C. C. A. 236.

87. Farmers' L. & T. Co. *v.* Hoffman House, 96 N. Y. App. Div. 301, 89 N. Y. Suppl. 281.

88. Joliet Iron, etc., Co. *v.* Chicago, etc., R. Co., 51 Iowa 300, 1 N. W. 761.

89. *Alabama.*— Hartwell *v.* Blocker, 6 Ala. 581.

Illinois.— Lietze *v.* Clabaugh, 59 Ill. 136.

Iowa.— Miller *v.* McGalligan, 1 Greene 527.

New York.— Bowers *v.* Denton, 41 Misc. 133, 83 N. Y. Suppl. 942. See also Green *v.* Mussey, 76 N. Y. App. Div. 174, 78 N. Y. Suppl. 434.

Oklahoma.— Blanshard *v.* Schwartz, 7 Okla. 23, 54 Pac. 303.

Vermont.— *In re* Chickering, 56 Vt. 82; Ward *v.* Sharp, 15 Vt. 115; Doolittle *v.* Gookin, 10 Vt. 265.

Wisconsin.— Baass *v.* Chicago, etc., R. Co., 39 Wis. 296.

See 35 Cent. Dig. tit. "Mortgages," § 1290.

The mere consent of a person not a party to a foreclosure suit, and whose interest is not affected by the decree, to come in and be bound by the decree in the same manner as if he had been made a party, is not sufficient to authorize him to interfere in the suit. Kelly *v.* Israel, 11 Paige (N. Y.) 147.

Vendor of defendant.— It is not error to refuse to allow the mortgagor, who has sold his equity of redemption, to be made a party at the request of the defendant, merely to settle matters between them in which plaintiff has no interest. Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792. And see Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8.

90. See the statutes of the different states. And see Mutual L. Ins. Co. *v.* Schwab, 51 N. J. Eq. 204, 26 Atl. 533; Leveridge *v.* Marsh, 30 N. J. Eq. 59.

91. California Title Ins., etc., Co. *v.* Muller, (Cal. App. 1906) 84 Pac. 453; Kennedy *v.* Moore, 91 Iowa 39, 58 N. W. 1066; McDermot *v.* Dearnley, 2 Walk. (Pa.) 386. See also Farmers' L. & T. Co. *v.* Reid, 3 Edw. (N. Y.) 414; Greenwood Loan, etc., Assoc. *v.* Williams, 71 S. C. 421, 51 S. E. 272.

92. *Alabama.*— Glidden *v.* Andrews, 6 Ala. 190.

Illinois.— Scott *v.* Millikin, 60 Ill. 108.

New Jersey.— Hewitt *v.* Montclair R. Co., 25 N. J. Eq. 100.

Wisconsin.— Moore *v.* Kirby, 76 Wis. 273, 45 N. W. 114.

Canada.— Collins *v.* Cunningham, 21 Can. Sup. Ct. 139; Clarke *v.* Cooper, 15 Ont. Pr. 54; Abell *v.* Parr, 9 Ont. Pr. 564; Harrison *v.* Grier, 2 Ch. Chamb. (U. C.) 440; Orford *v.* Bayley, 1 Ch. Chamb. (U. C.) 272; Rumble *v.* Moore, 1 Ch. Chamb. (U. C.) 59.

See 35 Cent. Dig. tit. "Mortgages," § 1290.

so directs, by a supplemental summons and complaint,[93] or a second action may be brought for the purpose of foreclosing any interest they may have in the premises.[94] Where the title devolves upon a new party pending the foreclosure proceedings, it is generally considered necessary to bring him into the suit if he stands in the place of the original defendant, as in the case of the heirs or representatives of a deceased mortgagor,[95] but it is otherwise in the case of a purchaser *pendente lite*.[96]

c. **Substitution of Parties.** Where the foreclosure proceedings are by mistake instituted in the name of the original payee of the mortgage note instead of his assignee,[97] or where plaintiff has assigned the mortgage and debt after the filing of the bill,[98] it is proper to substitute as plaintiff the real owner of the securities. It is generally necessary to substitute the heirs or personal representatives in case of the death pending the suit of either plaintiff[99] or defendant.[1] Where, in an action to foreclose a mortgage, defendant, by cross bill, seeks answers to certain questions and obtains a decree by default to that extent, parties subsequently substituted as plaintiffs are charged with the default.[2]

5. Defects and Objections as to Parties — a. In General. The failure to join necessary parties is a fatal defect and will render the decree void or at least reversible;[3] but as to those who are proper parties only the rule is otherwise; their non-joinder will not vitiate the whole judgment, although it will leave their rights unaffected.[4] An objection as to parties goes to the jurisdiction, and hence may be raised at any time or enforced by the court on its own motion.[5] A party once properly joined, but losing his interest pending the suit, should not be simply ignored in the decree but the action should be dismissed or discontinued as to him.[6] A mere clerical error in the title of a foreclosure suit will not avoid the

93. Heyman *v.* Lowell, 23 Cal. 106; Voigt *v.* Schenck, 54 Hun (N. Y.) 548, 7 N. Y. Suppl. 864.

94. Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091. And see *infra*, XXI, L. 1, d.

95. See Cullum *v.* Batre, 1 Ala. 126; Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77.

96. *Alabama.*— McMillan *v.* Gordon, 4 Ala. 716.

Illinois.— Chickering *v.* Fullerton, 90 Ill. 520.

New York.— Hancock *v.* Hancock, 22 N. Y. 568, holding that an admitted prior mortgagee not being a necessary party to a foreclosure suit, if he is joined, and dies, or his interest devolves on another pending the suit, his successor need not be called in, as the decree does not affect his lien.

Pennsylvania.— Huckenstein *v.* Love, 98 Pa. St. 518.

South Carolina.— Bennett *v.* Calhoun Loan, etc., Assoc., 9 Rich. Eq. 163.

97. Service *v.* Farmington Sav. Bank, 62 Kan. 857, 62 Pac. 670. But see White *v.* Secor, 58 Iowa 533, 12 N. W. 586.

98. Malone *v.* Marriott, 64 Ala. 486; Winkelman *v.* Kiser, 27 Ill. 21; Codd *v.* Carpenter, 109 Mich. 120, 67 N. W. 819; Schlichter *v.* South Brooklyn Saw Mill Co., 35 Hun (N. Y.) 339; Van Loan *v.* Squires, 7 N. Y. Suppl. 171, 23 Abb. N. Cas. 230; Dock *v.* South Brooklyn Saw Mill Co., 6 N. Y. Civ. Proc. 144.

99. Smith *v.* Joyce, 14 Daly (N. Y.) 73, 11 N. Y. Civ. Proc. 257. See also Abadie *v.* Lobero, 36 Cal. 390.

1. Hunt *v.* Acre, 28 Ala. 580; Milroy *v.* Stockwell, Smith (Ind.) 19; Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823; Zaegel *v.* Kuster, 51 Wis. 31, 7 N. W. 781.

2. Beacham *v.* Gurney, 91 Iowa 621, 60 N. W. 187.

3. Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823; Fowler *v.* Lilly, 122 Ind. 297, 23 N. E. 767; Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698; Hays *v.* Lewis, 21 Wis. 663.

Abandonment of foreclosure.— A plaintiff in a suit on a note and to enforce a mortgage, which is defective for non-joinder of others interested in the mortgage, may abandon his suit to foreclose the mortgage after exceptions thereto, and proceed to judgment on the note. Weatherby *v.* Townes, 42 Tex. 83.

4. *Indiana.*— Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698.

Iowa.— Suiter *v.* Turner, 10 Iowa 517.

Maryland.— Speed *v.* Smith, 4 Md. Ch. 299.

Michigan.— Vary *v.* Chatterton, 50 Mich. 541, 15 N. W. 896.

Minnesota.— Foster *v.* Johnson, 44 Minn. 290, 46 N. W. 350.

Ohio.— Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Scott *v.* Hickox, 7 Ohio St. 88.

Texas.— Hammond *v.* Tarver, 11 Tex. Civ. App. 48, 31 S. W. 841.

Wisconsin.— Green *v.* Dixon, 9 Wis. 532.

See 35 Cent. Dig. tit. "Mortgages," § 1294.

5. Langley *v.* Andrews, 132 Ala. 147, 31 So. 469; Hambrick *v.* Russell, 86 Ala. 199, 5 So. 298. But *compare* Erwin *v.* Fergson, 5 Ala. 158.

6. McLaughlin *v.* Stewart, 1 Ont. L. Rep. 295.

proceedings the title of a case not being a matter of substance but of form only.[7]

b. Persons Entitled to Object. An objection on account of a defect or non-joinder of parties may be interposed by any party to the proceedings who has a direct interest in their being joined;[8] but such objection cannot be raised by one who, being properly a party himself, cannot be injured or compromised in his own rights by the failure to include other parties.[9]

c. Failure to Object. An objection for want or defect of parties must be taken by plea, answer, or demurrer, and a party who allows the defect to pass without objection until after sale under the decree of foreclosure cannot then raise it for the first time.[10]

d. Amendment. Under modern practice, the power of amendment may generally be exercised both to bring in a new party who should have been joined originally and to strike out a party improperly joined.[11]

6. Process and Notice — a. In General. To institute a foreclosure suit it is necessary that defendants should be served with process; a mere general notice

7. Ewing *v.* Hatfield, 17 Ind. 513. And see Craddock *v.* American Freehold Land Mortg. Co., 88 Ala. 281, 7 So. 196.

8. Franklin *v.* Beegle, 102 N. Y. App. Div. 412, 92 N. Y. Suppl. 449 (a defendant claiming an interest subordinate to the mortgage is entitled to demur on the ground that one whose presence was necessary to enable a purchaser at foreclosure sale to get a good title has not been made a party); Brandow *v.* Vroman, 29 N. Y. App. Div. 597, 51 N. Y. Suppl. 943 (a junior mortgagee is entitled to object for want of proper service on the mortgagor in the senior mortgagee's suit for foreclosure); Hall *v.* Nelson, 23 Barb. (N. Y.) 88, 14 How. Pr. 32 (an objection that the present owner of the equity of redemption has not been made a party may be interposed by the mortgagor, who has parted with his interest in the premises, because he is interested, under his ultimate liability for the debt, to have the title made by the sale perfect against all equities).

9. *Alabama.*— Buckheit *v.* Decatur Land Co., 140 Ala. 216, 37 So. 75.

Indiana.— Louden *v.* Dickerson, 19 Ind. 387.

Iowa.— Williams *v.* Meeker, 29 Iowa 292.

New Jersey.— Woodruff *v.* Depue, 14 N. J. Eq. 168.

New York.— Batterman *v.* Albright, 122 N. Y. 484, 25 N. E. 856, 19 Am. St. Rep. 510, 11 L. R. A. 634; Thompson *v.* Richardson, 74 N. Y. App. Div. 62, 77 N. Y. Suppl. 202; Ostrom *v.* McCann, 21 How. Pr. 431.

South Dakota.— Philip *v.* Stearns, (1905) 105 N. W. 467.

Wisconsin.— Houghton *v.* Kneeland, 7 Wis. 244.

United States.— Johns *v.* Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613.

See 35 Cent. Dig. tit. "Mortgages," § 1293.

Applications of rule.—Where a junior mortgagee is joined as a defendant with the mortgagor, he cannot avail himself of a defective service on the mortgagor, of which the mortgagor himself does not complain. Semple *v.* Lee, 13 Iowa 304. So the maker of a note and mortgage cannot complain because the payee of the note is not made a party to an action to foreclose, brought by a subsequent assignee of the mortgage. Michigan State Bank *v.* Trowbridge, 92 Mich. 217, 52 N. W. 632. And a subsequent mortgagee, after withdrawing a bill for the foreclosure of his mortgage, cannot object to a bill by a prior mortgagee on the ground that he is unnecessarily made a party. Vanderveer *v.* Holcomb, 17 N. J. Eq. 87. On the same principle the failure of the trustee to join the beneficiary in a suit to foreclose a trust deed cannot be taken advantage of by one asserting a prior lien. Hardy *v.* Swigart, 25 Colo. 136, 53 Pac. 380.

10. *Nebraska.*— Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424.

New Jersey.— Kirkpatrick *v.* Corning, 38 N. J. Eq. 234.

New York.— Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; Carpenter *v.* O'Dougherty, 2 Thomps. & C. 427 [*affirmed* in 58 N. Y. 681].

South Carolina.— Adger *v.* Pringle, 11 S. C. 527.

Vermont.— Bartlett *v.* Boyd, 34 Vt. 256.

Wisconsin.— Cord *v.* Hirsch, 17 Wis. 403.

See 35 Cent. Dig. tit. "Mortgages," § 1296.

11. *California.*— Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Illinois.— Stelzich *v.* Weidel, 27 Ill. App. 177.

New York.—Johnston *v.* Donvan, 106 N. Y. 269, 12 N. E. 594; Bowers *v.* Denton, 41 Misc. 133, 83 N. Y. Suppl. 942.

Pennsylvania.— McDermot *v.* Dearnley, 2 Walk. 386; Saving Fund *v.* Ball, 2 Leg. Rec. 263.

Vermont.— Sargent *v.* Baldwin, 60 Vt. 17, 13 Atl. 854.

Wisconsin.— Moore *v.* Kirby, 76 Wis. 273, 45 N. W. 114.

United States.— Dwight *v.* Humphreys, 8 Fed. Cas. No. 4,216, 3 McLean 104.

Canada.— Clarke *v.* Cooper, 15 Ont. Pr. 54; Harrison *v.* Greer, 2 Ch. Chamb. (U. C.) 440; Rumble *v.* Moore, 1 Ch. Chamb. (U. C.) 59.

See 35 Cent. Dig. tit. "Mortgages," § 1297.

calling on them to present their claims is not sufficient;[12] and where additional parties are to be brought in, process to them must issue on the original bill, and not on the petition to join them.[13] The process must issue the requisite length of time before an answer or other proceedings are required.[14] It must state that the object is the foreclosure of the mortgage or that the complainant will apply to the court for the relief demanded in his bill,[15] but it is not necessary for it to state the amount for which judgment will be asked in case of default,[16] or that it should describe particularly the land covered by the mortgage.[17]

b. Writ of Scire Facias. This writ serves the purpose both of process and of a declaration,[18] and therefore it should be in such form as to be a valid notice and also contain a statement of the cause of action.[19] Unlike ordinary process, its exigency is sufficiently satisfied by two returns of *nihil* and judgment may be entered thereupon,[20] or jurisdiction may be acquired by a written waiver or acknowledgment of service.[21] The writ may be served upon a terre-tenant.[22] If the mortgagor dies after being served, and after judgment, it is not necessary to warn his personal representatives by scire facias before proceeding to execution.[23]

c. Notice of Executory Process. The holder of a mortgage duly executed before a notary with the pact *de non alienando* is not bound, before proceeding to sell on executory process, to give notice to any one but the debtor in possession.[24] Where the mortgage is by authentic act, importing a confession of judgment, the creditor is entitled to executory process, and to obtain an order for the seizure and sale of the mortgaged property, without previous citation to the debtor.[25] It is not necessary to serve on defendant a copy of the petition, but a simple notice is sufficient.[26] And although the notice should be issued and signed

12. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

Omission of christian name in summons.— A judgment of foreclosure is not void merely because the summons and other papers gave only the surname of one of defendants with a blank before it, and plaintiff did not add any description identifying the person intended, as permitted by statute, or designate such defendant by fictitious name so far as his christian name was concerned, where the defendant intended was actually served. Von Hatten *v.* Scholl, 1 N. Y. App. Div. 32, 36 N. Y. Suppl. 771.

13. Glidden *v.* Andrews, 6 Ala. 190.

14. Herd *v.* Cist, 20 S. W. 1035, 14 Ky. L. Rep. 644.

15. York *v.* Boardman, 40 Iowa 57; Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583.

16. Mudge *v.* Hull, 56 Kan. 314, 43 Pac. 242; Beverly *v.* Fairchild, 47 Kan. 289, 27 Pac. 985; Knowles *v.* Armstrong, 15 Kan. 371; Sparks *v.* Beyer, 5 Kan. App. 721, 46 Pac. 980; Caldwell *v.* Peaslee, 24 Ohio Cir. Ct. 641.

17. Fleming *v.* Hager, 121 Iowa 205, 96 N. W. 752; Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218; Van Sickles *v.* Town, 53 Iowa 259, 5 N. W. 148.

18. Marsh *v.* Smith, 2 Pa. L. J. Rep. 217. And see *infra*, XXI, E, 1, a.

19. McFadden *v.* Fortier, 20 Ill. 509 (holding that a scire facias, like other process, should run in the name of the people of the state); Childs *v.* Eastburn, 1 Blackf. (Ind.) 118 (holding that a scire facias requires defendant to show cause why the mortgaged premises should not be taken in execution for payment of the mortgage debt; it is insufficient if it merely requires him to show cause why plaintiff should not have judgment for his debt).

Where the mortgage is executed by one as agent for another, the scire facias should be issued against the principal and not the agent. Maus *v.* Wilson, 15 Pa. St. 148.

A scire facias by the assignee of a mortgage, which is only for the life of the mortgagee, need not aver that he is living. Clearwater *v.* Rose, 1 Blackf. (Ind.) 137.

20. Williams *v.* Ives, 49 Ill. 512; McCourtie *v.* Davis, 7 Ill. 298; Cox *v.* McFerron, 1 Ill. 28; Taylor *v.* Young, 71 Pa. St. 81; Stevens *v.* North Pennsylvania Coal Co., 35 Pa. St. 265; Magaw *v.* Stevenson, 1 Grant (Pa.) 402; Warder *v.* Tainter, 4 Watts (Pa.) 270; Stewart *v.* Oatman, 11 Pa. Dist. 635; Faunce *v.* Subers, 10 Phila. (Pa.) 411. See Brundred *v.* Egbert, 164 Pa. St. 615, 30 Atl. 503.

21. Russell *v.* Brown, 41 Ill. 183; Hubbell *v.* Broadwell, Wright (Ohio) 248.

22. Hinds *v.* Allen, 34 Conn. 185.

23. Hunsecker *v.* Thomas, 89 Pa. St. 154; Hennis *v.* Streeper, 1 Miles (Pa.) 269.

24. Rowlett *v.* Shepherd, 7 Mart. N. S. (La.) 513; New Orleans Nat. Banking Assoc. *v.* Le Breton, 120 U. S. 765, 7 S. Ct. 772, 30 L. ed. 821.

25. Fleitas *v.* Richardson, 147 U. S. 538, 13 S. Ct. 429, 37 L. ed. 272.

26. Snow *v.* Trotter, 3 La. Ann. 268; Nash *v.* Johnson, 9 Rob. (La.) 8; Exchange, etc., Co. *v.* Walden, 15 La. 431.

by the clerk and not by the sheriff,[27] if the sheriff issues and signs it this is no ground for annulling the sale.[28]

d. Notice of Lis Pendens. At common law, the pendency of proceedings to foreclose a duly recorded mortgage is constructive notice to persons dealing with the property or acquiring liens upon it.[29] But in some states the statutes now provide that, to affect judgment creditors and others, a formal notice of the pendency of the foreclosure suit must be filed,[30] and proof made of such filing.[31] A defect in this notice or an omission to file it does not render the decree void, so that it may be impeached collaterally, nor affect the rights of a *bona fide* purchaser at the foreclosure sale,[32] nor probably is it a matter of which the mortgagor himself could in any case complain.[33] It must be filed at or after the filing of the complaint in the action; if filed before it does not become operative or in any way effective until the complaint is filed,[34] and if the bill is amended by adding new parties a new notice of *lis pendens* must be filed.[35] These statutes do not affect the case of a person purchasing the property after the rendition of a judgment of foreclosure; he is bound by the judgment.[36]

e. Notice of Subsequent Proceedings. New notice or service of process is generally necessary upon the filing of an amended or supplementary bill or complaint which makes new issues or demands different relief,[37] and on the filing of a cross bill,[38] or an answer by another lien-holder, made a defendant, where he

27. Hart *v.* Pike, 29 La. Ann. 262.

28. Sadler *v.* Henderson, 35 La. Ann. 826.

29. Roberts *v.* Doren, 10 Ohio Dec. (Reprint) 349, 20 Cinc. L. Bul. 397. But see Douglass *v.* McCrackin, 52 Ga. 596, holding that if the mortgage was not recorded there must be actual notice to a purchaser *pendente lite*.

Under the law of Louisiana, where an act of sale communicates to the purchaser the existence of a mortgage on the property, and the mortgage contains the pact *de non alienando*, the purchaser and third possessor is not entitled to notice of the proceedings to enforce the mortgage. Dodds *v.* Lanaux, 45 La. Ann. 287, 12 So. 345; Avegno *v.* Schmidt, 35 La. Ann. 585; Smith *v.* Nettles, 13 La. Ann. 241.

30. See the statutes of the different states. And see Lehanon Sav. Bank *v.* Hallenbeck, 29 Minn. 322, 13 N. W. 145; Moulton *v.* Sidle, 52 Fed. 616.

As notice to tenant.— In an action to foreclose a mortgage, the filing of a notice of *lis pendens* is constructive notice to a subsequent tenant of the mortgagor that the court, by the appointment of a receiver, may cut off whatever interest such tenant may acquire in the mortgaged premises, unless he should elect to attorn to the receiver and pay to him all rents for the use of the premises after the date of appointment, as the rights of the receiver are not affected by the provisions of the lease and the payment of the rent in advance to the mortgagor. Gaynor *v.* Blewett, 82 Wis. 313, 52 N. W. 313, 33 Am. St. Rep. 47.

31. McBride *v.* Wright, 75 Wis. 306, 43 N. W. 955; Manning *v.* McClurg, 14 Wis. 350.

32. Curtis *v.* Hitchcock, 10 Paige (N. Y.) 399; Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500; Huntington *v.* Meyer, 92 Wis. 557, 66 N. W. 500; Manning *v.* McClurg, 14 Wis. 350.

33. Boyd *v.* Weil, 11 Wis. 58. But see Catlin *v.* Pedrick, 17 Wis. 88, holding that the mortgagor and all parties interested in the proceeds of the foreclosure sale have a right to insist on proof being made of the filing of the notice of *lis pendens*; and a judgment of foreclosure rendered without such proof being made is irregular.

Where the notice of lis pendens describes the premises incorrectly, the mortgagor will be entitled to have the judgment rendered against him by default set aside. Spraggon *v.* McGreer, 14 Wis. 439.

34. Gile *v.* Colby, 92 Wis. 619, 66 N. W. 802; Dawson *v.* Mead, 71 Wis. 295, 37 N. W. 234. And see Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975, holding that the premature filing of the notice of *lis pendens* does not affect the validity of the decree where it does not appear that rights were acquired by any person between the beginning of the action and the sale.

Amended notice.— Although the notice was filed before the complaint, the error will be cured by the filing of an amended notice of *lis pendens* at the same time with an amended complaint. Daly *v.* Burchell, 13 Abb. Pr. N. S. (N. Y.) 264.

35. Clark *v.* Havens, Clarke (N. Y.) 560.

36. London, etc., Bank *v.* Dexter, 126 Fed. 593, 61 C. C. A. 515.

37. Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932; Smith *v.* Woolfolk, 115 U. S. 143, 5 S. Ct. 1177, 29 L. ed. 357. See Ursuline Nuns *v.* Depassau, 7 Mart. N. S. (La.) 645.

38. White *v.* Patton, 87 Cal. 151, 25 Pac. 270; Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555. But *compare* Jenkins *v.* Newman, 122 Ind. 99, 23 N. E. 683, holding that where a complaint seeks to have a mortgage set aside, and a cross complaint is filed asking a foreclosure

prays relief against the mortgagor or the premises,[39] or where the heir or administrator of a deceased mortgagor is brought in as a new party,[40] or on petition for a supplemental decree to order a sale for an additional instalment of the mortgage debt,[41] or to ascertain and determine a deficiency.[42] But a purchaser from the mortgagor after the entry of a decree of foreclosure is not entitled to notice of motions in the proceedings unless he has been made a party;[43] and it is not strictly necessary, although it is the better practice, to give notice to the parties of record of a petition for leave to intervene.[44]

f. Service of Process — (i) *In General.* Process in a mortgage foreclosure suit must be served strictly in accordance with the directions of the statute,[45] upon the mortgagor in person or someone authorized to represent and act for him,[46] and upon each of the other persons who are joined as defendants, at least

of the same mortgage, no summons on the cross complaint is necessary.

39. Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932. *Contra*, Klonne *v.* Bradstreet, 2 Handy (Ohio) 74, 12 Ohio Dec. (Reprint) 336.

40. Brown *v.* Wagner, (Pa. 1889) 16 Atl. 834.

41. Brown *v.* Thompson, 29 Mich. 72. See also Albany City Bank *v.* Steevens, Walk. (Mich.) 6.

42. Field *v.* Saginaw Cir. Judge, 124 Mich. 68, 82 N. W. 798.

43. Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064. See also Greenwood Loan, etc., Assoc. *v.* Williams, 71 S. C. 421, 51 S. E. 272.

44. Lombard Inv. Co. *v.* Seaboard Mfg. Co., 74 Fed. 325.

45. Dykes *v.* McClung, 74 Ga. 382, holding that where the law directs that, in foreclosure suits, the service must either be personal or by publication, service by leaving a copy at defendant's residence is insufficient.

Where defendant cannot be found, the statutes commonly provide that service of the writ may be made by leaving it at his usual place of abode with some member of his family or with some person of suitable age and discretion. This applies to mortgage foreclosure suits as well as to other actions. Groff *v.* National Bank of Commerce, 50 Minn. 348, 52 N. W. 934. But where the statute authorizes such service to be made on "some person of the family . . . at the dwelling-house or usual place of abode of the defendant," it must be strictly followed; and in a case where the return showed service of the writ on a member of the family "at his usual place of abode in said county," it was held that the service was void, and a decree based thereon was void, because the return did not show that the service was made at defendant's usual place of abode in the state, in whatever county it might be, but only at his usual place of abode in the named county. Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583. So, no jurisdiction attaches where the return shows service on defendant's son, but does not state that the copy was left with a member of defendant's family, or at his usual place of abode, or that defendant could not be found. Thornily *v.* Prentice, 121 Iowa 89, 96 N. W. 728, 100 Am. St. Rep. 317.

Authority of process server.— The fact that the summons in a foreclosure action was served by a person specially appointed by a deputy sheriff *pro hac vice* cannot be relied on as a defense to an action to enforce payment of the bid made by the purchaser at the foreclosure sale. Thrift *v.* Frittz, 7 Ill. App. 55.

Dismissal for failure to serve and return summons within specified time see White *v.* San Francisco Super. Ct., 126 Cal. 245, 58 Pac. 450.

Service of rule nisi.— In Georgia the law requires personal service of a rule *nisi* to foreclose a mortgage; and it is a good defense to the proceedings that the only service was by leaving a copy at defendant's house. Meeks *v.* Johnson, 75 Ga. 629. And see Ray *v.* Atlanta Banking Co., 110 Ga. 305, 35 S. E. 117. But in Maryland, under the act of 1833, the proceedings are to be *ex parte* until after the decree and sale, the propriety of the decree and validity of the sale to be contested after an order of ratification *nisi* and before final order; and therefore the mortgagor cannot complain of a want of notice of the application for a decree. Eichelberger *v.* Harrison, 3 Md. Ch. 39.

46. *Georgia.*— Wood *v.* Nisbet, 20 Ga. 72, in a proceeding to foreclose a purchase-money mortgage, the notes and mortgage being all signed by the purchaser as trustee for his wife service on him alone is sufficient.

Iowa.— Thornily *v.* Prentice, 121 Iowa 89, 96 N. W. 728, 100 Am. St. Rep. 317, service on a trustee holding the legal title does not authorize him to appear for the *cestui que trust.*

Minnesota.— Atkinson *v.* Duffy, 16 Minn. 45, where a statute allows service on "personal representatives" of mortgagor, this means executors or administrators, and does not include an ordinary agent.

New York.— Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064 (service of order for sale on attorney who had appeared for mortgagor in the principal action); Brandow *v.* Vroman, 29 N. Y. App. Div. 597, 51 N. Y. Suppl. 943 (service on receiver of corporation mortgagor); Bond *v.* Bond, 51 Hun 507, 4 N. Y. Suppl. 569 (service on mortgagor's heir is valid, although there are no personal representatives).

Oregon.— Watson *v.* Dundee Mortg., etc.,

if they are necessary parties.[47] But a due acknowledgment of service, or the entry of an appearance by an authorized attorney, will be equivalent to personal service.[48] Unless otherwise provided by statute, the writ may be served in any county of the state where defendant is found.[49] The recitals of the decree concerning the fact and mode of service are conclusive and not open to contradiction by extraneous evidence.[50]

(II) *NON-RESIDENT DEFENDANT.* A suit to enforce the lien of a mortgage by a sale of the mortgaged property, not seeking a personal judgment, is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident, or not found, so that he cannot be personally served with process within the state, the court may decree a sale of the property on such substituted or constructive service of process, by published advertisement or otherwise, as the legislature may prescribe;[51] but when this is done, there is no pre-

Co., 12 Oreg. 474, 8 Pac. 548, holding that, where the manager of a foreign corporation took a junior mortgage in his own name as manager, the corporation was bound by proceedings for the foreclosure of the senior mortgage in which the manager was made a party.

Canada.— Sparks *v.* Purdy, 15 Ont. Pr. 1, holding that the summons need not be served personally on the infant heirs of the mortgagor if they are not personally in possession of the property.

47. *Illinois.*— Piggott *v.* Snell, 59 Ill. 106, holding that where the mortgage was executed jointly by husband and wife, both must be served with process.

Indiana.— Martin *v.* Noble, 29 Ind. 216.

Minnesota.— Holmes *v.* Crummett, 30 Minn. 23, 13 N. W. 924, holding that due service on the mortgagor who is in possession of part of the land makes the foreclosure effectual as to him, although there was no service on another person who occupied a dwelling-house on the land as his tenant.

Nebraska.— Nelson *v.* Nebraska L. & T. Co., 62 Nebr. 549, 87 N. W. 320, holding that irregular or improper constructive service on a person who was not a necessary party to the action is no ground for setting aside the sale.

New York.— L'Amoureux *v.* Vandenburgh, 7 Paige 316, 32 Am. Dec. 635.

Pennsylvania.— Taylor *v.* Beekley, 12 Pa. Dist. 452, holding that where scire facias is served on the terre-tenant and judgment taken against him, but neither service or judgment against the mortgagor, there is nothing to support a sheriff's sale and the purchaser takes no title.

48. Hibernia Sav., etc., Soc. *v.* Cochran, 141 Cal. 653, 75 Pac. 315; Shepard *v.* Kelly, 2 Fla. 634; Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813; Snell *v.* Stanley, 63 Ill. 391; McNair *v* Biddle, 8 Mo. 257.

Acceptance of service by unauthorized attorney.— A personal judgment and decree of foreclosure, rendered against a mortgagor for whom an attorney without any authority has accepted service and appeared, are absolutely void. Ashmore *v.* McDonnell, (Kan. 1888) 16 Pac. 687.

49. Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713; Rhea *v.* Taylor, 8 La. Ann. 23; Maholm *v.* Marshall, 29 Ohio St. 611.

50. Riggs *v.* Collins, 20 Fed. Cas. No. 11,824, 2 Biss. 268.

A recital of service, if silent as to the mode of service, is to be read in connection with the sheriff's return, and if that shows a proceeding virtually equivalent to no service at all, the judgment of foreclosure will be void. Hobby *v.* Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

51. *Alabama.*— McGowan *v.* Mobile Branch Bank, 7 Ala. 823.

Georgia.— Swift *v.* Van Dyke, 98 Ga. 725, 26 S. E. 59.

Illinois.— Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Rev. St. c. 95, § 18.

Iowa.— Orcutt *v.* Hanson, 71 Iowa 514, 32 N. W. 482.

Kansas.— Ogden *v.* Walters, 12 Kan. 282; Deitrich *v.* Lang, 11 Kan. 636; Shields *v.* Miller, 9 Kan. 390.

Minnesota.— Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653.

New York.— Chevers *v.* Damon, 13 N. Y. Suppl. 452. In an action to foreclose a mortgage, it is not necessary to show the non-residence of defendants, but it is sufficient to establish the fact that after due diligence they cannot be found within the state so as to enable plaintiff to serve summons on them. Brainerd *v.* Heydrick, 32 How. Pr. 97.

South Carolina.— Greenwood Loan, etc., Assoc. *v.* Williams, 71 S. C. 421, 51 S. E. 272.

United States.— Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583; Martin *v.* Pond, 30 Fed. 15; Palmer *v.* McCormick, 28 Fed. 541.

See 35 Cent. Dig. tit. "Mortgages," § 1305.

In England it was long the rule not to foreclose an absent defendant; that is, not to give a decree barring the equity of redemption of one beyond the jurisdiction. Caddick *v.* Cook, 32 Beav. 70, 55 Eng. Reprint 27; Runcorn *v.* Nicholson, 5 L. J. Ch. 203; Leahy *v.* Dancer, 3 Molloy 109; Wolfe *v.* Jackson, 1 Molloy 250. But in Hyde *v.* Large, L. R. 19 Eq. 48, 23 Wkly. Rep. 22, which was a foreclosure suit by a mortgagee who had been in possession for twelve years, against several defendants, trustees, and bene-

sumption in favor of the jurisdiction of the court, and unless the record shows a compliance in all essential particulars with the statute authorizing such service, the decree is null and void.[52] Such constructive service gives no jurisdiction over the person of defendant, and the decree must be confined to the foreclosure of the mortgage on the specific property covered, and in so far as it attempts to give a personal judgment for the mortgage debt it is invalid,[53] although personal jurisdiction may be acquired, after such substituted service, by the entry of a general appearance by a duly authorized attorney for the mortgagor.[54] And even as to the sale of the mortgaged property, there must be such constructive service as the statute directs, and an attempt to dispense with it altogether will result in invalidating the entire proceeding.[55]

g. Return and Proof of Service. Judgment cannot be rendered in a foreclosure suit where the return of the officer serving the writ is so defective that it does not show, clearly and affirmatively, that process was regularly served on defendant,[56] or does not show the facts necessary to justify service by publication,[57] or where it is not supported by affidavit, where that is required by the statute.[58]

h. Defects and Objections as to Process and Service. Although a total want or insufficiency of notice, in a foreclosure suit, may render the whole proceeding void,[59] yet a mere defect or irregularity, not going to the jurisdiction of the court, will be waived or cured by further proceedings had without objection,[60] or by the receipt and retention of the surplus proceeds of the foreclosure sale.[61]

ficiaries under the will of the original mortgagor, some of whom lived in America, the bill having been ordered to be taken *pro confesso* against defendants out of the jurisdiction, and none of defendants appearing at the hearing, service of a copy of the decree upon defendants out of the jurisdiction was permitted to be made by advertisements in two London newspapers and one American paper. And see Lechmere *v.* Clamp, 30 L. J. Ch. 651, 9 Wkly. Rep. 860.

In Canada when proceedings are taken against an absent defendant, a decree cannot be obtained on precipe. McMichael *v.* Thomas, 14 Grant Ch. (U. C.) 249.

Personal service of the writ on defendant outside the state is equivalent to publication. La Fetra *v.* Gleason, 101 Cal. 246, 35 Pac. 765.

52. *Indiana.*—Baugher *v.* Woollen, 147 Ind. 308, 45 N. E. 94; Brenner *v.* Quick, 88 Ind. 546.

Iowa.— Scovil *v.* Fisher, 77 Iowa 97, 41 N. W. 583; Iowa L. & T. Co. *v.* Day, 63 Iowa 459, 19 N. W. 301; Royer *v.* Foster, 62 Iowa 321, 17 N. W. 516; Bardsley *v.* Hines, 33 Iowa 157; Robertson *v.* Young, 10 Iowa 291.

Kansas.— Christie *v.* Jeffries, (App. 1898) 53 Pac. 783.

Michigan.— Soule *v.* Hough, 45 Mich. 418, 8 N. W. 50, 159.

Nebraska.— Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

New York.— Moir *v.* Flood, 66 N. Y. App. Div. 544, 73 N. Y. Suppl. 364; Back *v.* Crussell, 2 Abb. Pr. 386.

Ohio.— Lawler *v.* Whetts, 1 Handy 39, 12 Ohio Dec. (Reprint) 16.

Wisconsin.— Fladland *v.* Delaplaine, 19 Wis. 459.

United States.— Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583.

See 35 Cent. Dig. tit. "Mortgages," § 1305.

Who may object.— Where several parties are joined as defendants in a mortgage foreclosure suit, as claiming interest in the property, and are all personally served, except one non-resident, as to whom service by publication is attempted, he alone can object that the publication was insufficient or irregular; that objection cannot be raised by the other defendants. Fergus *v.* Tinkham, 38 Ill. 407.

53. Smith *v.* Griffin, 59 Iowa 409, 13 N. W. 423; Post *v.* Kirkpatrick, 53 N. J. Eq. 641, 33 Atl. 1059; Wood *v.* Stanberry, 21 Ohio St. 142.

54. Clark *v.* Lilliebridge, 45 Kan. 567, 26 Pac. 43.

55. Endel *v.* Leibrock, 33 Ohio St. 254.

56. Montgomery *v.* Brown, 7 Ill. 581; Belingall *v.* Gear, 4 Ill. 575. See Rockwell *v.* Jones, 21 Ill. 279; Moomey *v.* Maas, 22 Iowa 380, 92 Am. Dec. 395.

57. See Clark *v.* Huff, 12 Iowa 606; Boyd *v.* Weil, 11 Wis. 58.

58. McMillan *v.* Reynolds, 11 Cal. 372; Manning *v.* McClurg, 14 Wis. 350.

59. Beecher *v.* Ireland, 46 Kan. 97, 26 Pac. 448; Casey *v.* McIntyre, 45 Minn. 526, 48 N. W. 402.

Effect on purchaser.— Where a tenant in common of premises sold on foreclosure has not been properly served with process, the purchaser cannot be compelled to complete his purchase. Cook *v.* Farnam, 21 How. Pr. (N. Y.) 286.

60. Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218; Chase *v.* New Orleans Gas Light Co., 45 La. Ann. 300, 12 So. 308; Jouet *v.* Mortimer, 29 La. Ann. 206; Youker *v.* Treadwell, 4 N. Y. Suppl. 674; Pritchard *v.* Huntington, 16 Wis. 569.

61. Southard *v.* Perry, 21 Iowa 488, 89 Am. Dec. 587.

And although, in the case of several defendants, want or insufficiency of service on some of them may render the decree void as to those defendants, it may still be valid and binding on those who were duly served.[62]

E. Pleadings and Evidence — 1. Bill or Complaint — a. Form and Requisites. Where foreclosure of a mortgage is sought in equity, the bill should conform to the ordinary rules of chancery pleading, and is generally sufficient if it contains a proper statement of all the facts essential to the complainant's cause of action, and to connect the various defendants, if more than one, with the liability asserted under the mortgage, and an appropriate prayer for relief.[63] If the mortgage to be foreclosed is a second lien, reference to the senior mortgage may or may not be necessary according to the relative equities of the parties.[64] If the proceedings on foreclosure are specially described and regulated by statute, it must be primarily resorted to as the guide for determining the form and sufficiency of the complaint.[65] Care must be taken to avoid the charge of multifariousness or misjoinder of causes of action;[66] but whether or not several notes or

62. Mims *v.* Mims, 35 Ala. 23; Flannery *v.* Baldwin Fertilizer Co., 94 Ga. 696, 21 S. E. 587; Youker *v.* Treadwell, 4 N. Y. Suppl. 674.

63. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136 (as to showing necessity for foreclosure by bill in equity, when the mortgage also contains a power of sale); Wall *v.* Boisgerard, 11 Sm. & M. (Miss.) 574 (as to objection to bill on the ground that a want of proper parties appears on its face).

Copies of instruments evidencing and securing the debt cannot properly be made a part of the pleading by annexation and averment in a mortgage foreclosure suit, under the laws of Nebraska. Lincoln Mortg., etc., Co. *v.* Hutchins, 55 Nebr. 158, 75 N. W. 538.

Copies of the constitution and by-laws of a building association need not be exhibited in its complaint to foreclose a mortgage, nor, if exhibited, will they be considered part of the complaint. Newman *v.* Ligonier Bldg., etc., Assoc., 97 Ind. 295.

64. Fenno *v.* Sayre, 3 Ala. 458 (holding that if the junior mortgagee admits the lien and priority of the senior mortgage, he must offer to pay or redeem it); Boyd *v.* Dodge, 10 Paige (N. Y.) 42 (holding that it is not ordinarily necessary to call on the prior mortgagee for an answer as to the amount due on his mortgage, that being left for settlement before the master); Harris *v.* Fly, 7 Paige (N. Y.) 421 (holding that if the junior mortgagee claims the rights of a *bona fide* purchaser of the property without notice of the senior lien, he must deny such notice in his bill).

Where, after a decree of foreclosure of the senior mortgage, a junior mortgagee files a bill with the object of having the benefit of such decree, and also to foreclose against other parties defendant, who should have been parties to the first bill but were not joined, the junior encumbrancer's bill will be good as an original bill against the last-mentioned defendants, and as a supplemental bill as to the others. Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117.

65. Manley *v.* Union Bank, 1 Fla. 160; Sprague *v.* Rockwell, 51 Vt. 401, holding that a statute providing for foreclosure by petition does not require the fulness and particularity required by a bill in equity; a general and comprehensive statement of ultimate facts, constituting the ground of right and liability, is sufficient.

66. A bill is not multifarious because it asks first for the reformation of the mortgage and then for its foreclosure as reformed (Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823), nor because it asks for foreclosure and also the appointment of a receiver (Carling *v.* Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1), nor where a surety, who has given a mortgage to secure the principal's debt and received from the principal counter security in the form of a mortgage on the latter's property, files a bill to foreclose the latter mortgage and redeem the former (Schram *v.* Armstrong, 1 U. C. Q. B. O. S. 679).

Allegations as to interests or liens of third persons.— A bill is not multifarious because it alleges that certain parties, made defendants, claim to have interests in or liens on the property, and prays that they be declared subject to the mortgage. Cressee *v.* Security Land Imp. Co., (N. J. Ch. 1896) 35 Atl. 451; Commercial Bank *v.* Sandford, 99 Fed. 154. And see Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 689.

Foreclosing original mortgage and mortgage from third person together.— Where the mortgagee releases part of the land covered by his mortgage, and takes a mortgage from a third person as further security for the same debt, he may foreclose both mortgages in one action. Security L. & T. Co. *v.* Mattern, 131 Cal. 326, 63 Pac. 482.

Uniting separate debts secured by same mortgage.— There is no multifariousness or misjoinder in uniting in the same action two or more separate debts where all are secured by the same mortgage. Pearce *v.* Watkins, 5 De G. & Sm. 315, 16 Jur. 832, 64 Eng. Reprint 1132; Kelly *v.* Ardell, 11 Grant Ch. (U. C.) 579.

Foreclosure and judgment for deficiency.— Where the complaint asks foreclosure as against all of several defendants, and judgment for deficiency against the mortgagor

instalments secured by the same mortgage may be united in one count, or must be separately counted on, is a matter as to which the practice varies in different jurisdictions.[67] The bill or complaint cannot be verified by an agent or attorney.[68]

b. Allegations — (I) *In General.* A bill or complaint for the foreclosure of a mortgage will in general be sufficient if it states correctly the title of the cause, the name of the court, and the venue of the action,[69] gives the names of the parties to the suit and the facts showing plaintiff to be entitled to maintain the action,[70] and alleges the execution and delivery of the mortgage and of the note or other obligation secured by it, and its date and amount, when and where it was recorded, if this is necessary to fix notice on third parties,[71] a description of the premises covered by the mortgage,[72] the time of maturity of the debt secured, the amount claimed to be due, and the non-payment or default upon which the right of action accrued.[73] Where the action is against a purchaser of the mortgaged premises, or any defendant other than the original mortgagor, there must be allegations to connect him with the suit and show the liability of the property in his hands.[74] The allegations of the bill or complaint must be distinct and specific,[75] and not in the form of mere conclusions of law.[76] It is not usually necessary to anticipate any defenses.[77] Generally the complainant in foreclosure need not set forth any other liens which he may have.[78] But if he comes into court with a mortgage which has been released, and claims that the release was procured by fraud and that the debt is still due, he must clearly allege the facts constituting the fraud.[79] A senior mortgagee is not bound to aver and prove that his rights have not been defeated in a prior action by a junior encumbrancer.[80] But if he has taken a new mortgage in substitution for the old, it may be necessary for him to allege the continuation of the lien of his original mortgage, as against an intervening lien.[81] If the complainant demands judgment on the note or debt and foreclosure of the mortgage, the failure of the bill to make a case for foreclosure may still leave enough to justify a judgment for the debt.[82] So a complaint for the foreclosure of a mortgage and the appointment of a receiver, sufficient for the former but not for the latter, is good on demurrer.[83] A writ of scire facias for the foreclosure of a mortgage serves the purpose both of a writ and of a declaration, and must contain all averments necessary to a good declaration.[84]

alone, it is not objectionable as improperly uniting different causes of action. Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109. *Contra,* Faesi *v.* Goetz, 15 Wis. 231; Cary *v.* Wheeler, 14 Wis. 281, both decided prior to the act of 1862.

67. Hannon *v.* Hilliard, 101 Ind. 310; Collins *v.* Frost, 54 Ind. 242 (in Indiana there need not be separate counts for the separate notes); Dewey *v.* Leonhardt, 37 Mo. App. 517 (in Missouri the rule is otherwise).

68. Purdon *v.* Carrington, 31 Ohio St. 168. But see Rowlett *v.* Shepherd, 7 Mart. N. S. (La.) 513.

69. Duncan *v.* Geary, 10 Grant Ch. (U. C.) 34, holding that the bill need not state that the property or the parties are within the jurisdiction of the court; if necessary that will be presumed in favor of the bill until the contrary appears.

70. See *infra,* XXI, E, 1, b, (v).

71. See *infra,* XXI, E, 1, b, (II), (B).

72. See *infra,* XXI, E, 1, h, (III).

73. Coulter *v.* Bower, 64 How. Pr. (N. Y.) 132; Tower *v.* White, 10 Paige (N. Y.) 395; Bethel *v.* Robinson, 4 Wash. 446, 30 Pac. 734. And see Skelton *v.* Kintner, 2 Ind. 476.

As to necessity and form of allegation for attorney's fees see White *v.* Allatt, 87 Cal. 245, 25 Pac. 420; Riverside First Nat. Bank *v.* Holt, 87 Cal. 158, 25 Pac. 272.

74. *Illinois.*— Baer *v.* Knewitz, 39 Ill. App. 470.

Indiana.— Easter *v.* Severin, 64 Ind. 375.

New Jersey.— Pettingill *v.* Hubbell, 53 N. J. Eq. 584, 32 Atl. 76.

Texas.— Del Rio Bldg., etc., Assoc. *v.* King, 71 Tex. 729, 12 S. W. 65.

United States.— Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 689.

See 35 Cent. Dig. tit. "Mortgages," § 1309.

75. Barnes *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 1,016, 8 Biss. 514 [*affirmed* in 122 U. S. 1, 7 S. Ct. 1043, 30 L. ed. 1128].

76. Fletcher *v.* Holmes, 25 Ind. 458.

77. Meyer *v.* Lathrop, 73 N. Y. 315. See also Pine *v.* Shannon, 30 N. J. Eq. 404.

78. Field *v.* Hawxhurst, 9 How. Pr. (N. Y.) 75.

79. Reagan *v.* Hadley, 57 Ind. 509.

80. Krutsinger *v.* Brown, 72 Ind. 466.

81. State *v.* Beal, 88 Ind. 106.

82. Taylor *v.* Hearn, 131 Ind. 537, 31 N. E. 201; Eichbredt *v.* Angerman, 80 Ind. 208.

83. Cottrell *v.* Ætna L. Ins. Co., 97 Ind. 311.

84. Osgood *v.* Stevens, 25 Ill. 89. And see *supra,* XXI, D, 6, b.

(II) *Mortgage and Debt Secured* — (A) *Description of Mortgage.* It is not necessary for the bill or complaint to set out the mortgage word for word,[85] but a copy of it should be filed in the cause and incorporated in the bill by reference.[86] The execution, acknowledgment, and delivery of the mortgage must be distinctly alleged,[87] and also the facts authorizing the mortgagor to execute it, where there is anything unusual in his status or his relation to the title, as in the case of a trustee or an attorney in fact.[88] And if the instrument is unusual or ambiguous in form, so that the court must first of all determine whether or not it is a mortgage, the bill must set forth all those provisions of the instrument, as well as surrounding facts, which are relied on as giving it the character of a mortgage.[89]

(B) *Record or Notice.* Where the action is between the original parties to the mortgage, or their assigns or legal representatives, it is not necessary to allege the recording of the mortgage.[90] But as against a subsequent purchaser in good faith, it must be alleged, according to the facts, either that he had actual notice of the mortgage or that it was duly recorded before his title accrued,[91] and in the latter case, with particulars of the place and date of record.[92]

(C) *Note or Obligation Secured.* If the mortgage secures the payment of a note or bond,[93] there must be a proper allegation of the execution and delivery of

85. Jocelyn *v.* White, 201 Ill. 16, 66 N. E. 327; Menard *v.* Marks, 2 Ill. 25; Sperry *v.* Dickinson, 82 Ind. 132; Shin *v.* Bosart, 72 Ind. 105; Cecil *v.* Dynes, 2 Ind. 266. And see Williams *v.* Soutter, 55 Ill. 130.

Correction of mortgage.— On foreclosure of a mortgage which, as originally given, misdescribed the property, but was afterward corrected by agreement of the parties, the facts as to the correction should be pleaded in the bill. Haaren *v.* Lyons, 132 N. Y. 551, 30 N. E. 866.

Indorsements.— A complaint to foreclose a mortgage is not aided by indorsements appearing on the mortgage, to which it makes no reference. Nichol *v.* Henry, 89 Ind. 54.

A bill asking reformation of a mortgage and its foreclosure as reformed should contain the mortgage. Figart *v.* Halderman, 59 Ind. 424.

86. Moore *v.* Titman, 33 Ill. 358; Knight *v.* Heafer, 79 Ill. App. 374; Scott *v.* Zartman, 61 Ind. 328; Cook *v.* White, 47 Ind. 104; Hiatt *v.* Goblt, 18 Ind. 494; Herren *v.* Clifford, 18 Ind. 411; Ellis *v.* Miller, 9 Ind. 210. *Compare* Washington Nat. Bldg., etc., Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793, 58 L. R. A. 816.

In Pennsylvania, where a rule of court provides that plaintiff, in an action on a mortgage, may file, in lieu of a copy of the mortgage, a reference to the place where the same may be found of record, if the *precipe* contains such reference, and this has been carried into the continuance docket, and appears on the face of the record, it will be sufficient to entitle him to judgment for want of a sufficient affidavit of defense. Smith *v.* Weyant, 4 Pa. Co. Ct. 386.

Certification of copy.— A bill to foreclose, which contains a copy of the mortgage certified by plaintiff's attorney, is demurrable, as he is not the proper person to certify. Browne *v.* Browne, 17 Fla. 607, 35 Am. Rep. 96.

87. Moore *v.* Titman, 33 Ill. 358; Prieto *v.* Duncan, 22 Ill. 26; McAllister *v.* Plant, 54 Miss. 106; Bledsoe *v.* Wills, 22 Tex. 650.

88. Stow *v.* Schiefferly, 120 Cal. 609, 52 Pac. 1000 (mortgage by administratrix); Wagnon *v.* Pease, 104 Ga. 417, 30 S. E. 895 (mortgage by trustee); Pease *v.* Wagnon, 93 Ga. 361, 20 S. E. 637 (mortgage by trustee); Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014 (mortgage executed by attorney in fact).

89. San Luis Obispo County Bank *v.* Goldtree, 129 Cal. 160, 61 Pac. 785; Runyon *v.* Pogue, 42 S. W. 910, 19 Ky. L. Rep. 940; Abbott *v.* Godfroy, 1 Mich. 178; Fairbanks *v.* Bloomfield, 2 Duer (N. Y.) 349.

90. Downing *v.* Le Du, 82 Cal. 471, 23 Pac. 202; Mitcheltree *v.* Stewart, 3 Ill. 17; Hoes *v.* Boyer, 108 Ind. 494, 9 N. E. 427; Snyder *v.* Bunnell, 64 Ind. 403; Cook *v.* White, 47 Ind. 104; Stevens *v.* Campbell, 21 Ind. 471; Perdue *v.* Aldridge, 19 Ind. 290; Culph *v.* Phillips, 17 Ind. 209; Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72.

91. Mann *v.* State, 116 Ind. 383, 19 N. E. 181; Hoes *v.* Boyer, 108 Ind. 494, 9 N. E. 427; Scarry *v.* Eldridge, 63 Ind. 44; Peru Bridge Co. *v.* Hendricks, 18 Ind. 11. And see Stoner *v.* Reading, 29 N. J. Eq. 152. But *compare* Stacy *v.* Barker, Sm. & M. Ch. (Miss.) 112.

A school-fund mortgage is not required by law to be recorded, to become a lien on the land as to subsequent purchasers, and an averment that it was recorded is therefore unnecessary. West *v.* Wright, 98 Ind. 335.

92. Martens *v.* Rawdon, 78 Ind. 85; Sturgeon *v.* Daviess County Com'rs, 65 Ind. 302; Faulkner *v.* Overturf, 49 Ind. 265; Smith *v.* Weyant, 4 Pa. Co. Ct. 386.

93. **Note merged in judgment.**— Where the mortgage note has been merged in a judgment, and a new mortgage given to secure such judgment, plaintiff, in suing to foreclose, should declare on the judgment and

the obligation,[94] together with the particulars essential to show its tenor, such as the date, amount, and names of parties,[95] and a statement of the consideration,[96] and the indorsements, if any.[97] But where the bill seeks only a foreclosure of the mortgage, it is not necessary to set out the note *in hæc verba* or file a copy of it,[98] although it is otherwise if a personal judgment also is demanded.[99] The description of the note in the mortgage and that in the bill or complaint should of course correspond; but trifling or unimportant differences are not to be treated as a fatal variance.[1]

(D) *Indebtedness of Defendant.* As a foundation for the action, the bill or complaint must allege an existing indebtedness of defendant to plaintiff secured by the mortgage,[2] on a note or bond or other separate evidence of debt,[3] or a covenant or promise to pay a specified sum,[4] or, in the case of a subsequent pur-

not on the note. Jocelyn *v.* White, 201 Ill. 16, 66 N. E. 327.

Lost note.— A bill for the foreclosure of a mortgage given to secure a note which has been lost need not be accompanied by an affidavit of the loss of the note. O'Bannon *v.* Myers, 36 Ala. 551, 76 Am. Dec. 335.

Unmatured note.— If one of the several notes secured by the mortgage has not matured and is unpaid, at the time of foreclosure, but is held by an assignee thereof, and the fact becomes important to defendant, he must state it in his answer; it is not necessary to allege it in the bill. Levert *v.* Redwood, 9 Port. (Ala.) 79.

Series of notes secured.— A mortgage given to secure a series of notes is properly set forth as one cause of action; it is not necessary to state a separate cause for each note. Seattle Trust Co. *v.* Kerry, 19 Wash. 389, 53 Pac. 665.

Owners of bonds.—The complaint in an action to foreclose a trust deed, brought by a bondholder secured thereby, in his own behalf as well as in behalf of all the other bondholders, need not set forth the several owners of the bonds, if it appears that they are unknown to him. Citizens' Bank *v.* Los Angeles Iron, etc., Co., 131 Cal. 187, 63 Pac. 462, 82 Am. St. Rep. 341.

94. Arnot *v.* Baird, (Cal. 1886) 12 Pac. 386; Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 10 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

95. *California.*— Riverside First Nat. Bank *v.* Holt, 87 Cal. 158, 25 Pac. 272. See also Thrasher *v.* Moran, 146 Cal. 683, 81 Pac. 32.

Florida.— See Key West Bank *v.* Navarro, 22 Fla. 474.

Illinois.— Carr *v.* Fielden, 18 Ill. 77.

Indiana.— Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301; Collins *v.* Kemp, 29 Ind. 281.

New York.— Patton *v.* Townsend, 19 N. Y. Suppl. 946.

Texas.— Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608.

96. Groce *v.* Jenkins, 28 S. C. 172, 5 S. E. 352.

97. Clemans *v.* Kersteller, 98 Ind. 373; Hohl *v.* Reed, 8 Kan. App. 54, 53 Pac. 676.

98. Fenno *v.* Sayre, 3 Ala. 458; Sperry *v.* Dickinson, 82 Ind. 132; Shin *v.* Bosart, 72 Ind. 105; Knetzer *v.* Bradstreet, 1 Greene (Iowa) 382. *Compare* Chadron First Nat. Bank *v.* Engelbercht, 57 Nebr. 270, 77 N. W. 685.

99. Roche *v.* Moffitt, 107 Ind. 58, 3 N. E. 940.

1. Dorn *v.* Bissell, 180 Ill. 73, 54 N. E. 167; Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838; Walker *v.* Sellers, 11 Ind. 376; Botsford *v.* Botsford, 49 Mich. 29, 12 N. W. 897; Merchants' Nat. Bank *v.* Raymond, 27 Wis. 567.

2. Newhall *v.* Sherman, 124 Cal. 509, 57 Pac. 387; Second Baptist Church *v.* Furber, 109 Ind. 492, 10 N. E. 118; Johnson *v.* Britton, 23 Ind. 105; Swift *v.* Allegheny Bldg., etc., Assoc., 82 Pa. St. 142; Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608. *Compare* Day *v.* Perkins, 2 Sandf. Ch. (N. Y.) 359.

Receipt given by mistake.— Where the mortgagee, by mistake, gave a receipt acknowledging full payment and discharge of the mortgage, his complaint in an action to foreclose need not set up such mistake and ask for a reformation of the receipt, as he is not bound to anticipate the defense of the mortgagor; but when such defense is presented he is entitled to introduce evidence of the mistake. Meyer *v.* Lathrop, 73 N. Y. 315.

3. Snyder *v.* State Bank, 1 Ill. 161, holding that an averment that defendant made his note to plaintiff for a specified sum is sufficient to show that he borrowed and received that amount. And see *supra*, XXI, E, 1, b, (II), (C).

Agreement to execute note.— Where defendant agreed, in consideration of satisfaction of an outstanding judgment against him, to give plaintiff his note and mortgage for the amount and executed the mortgage, which was duly recorded, but failed, either through neglect, inadvertence, or fraud, to sign the note, and afterward refused to do so when requested by plaintiff, it was held that plaintiff might maintain an action to foreclose the mortgage on pleading and proving the above facts, without being compelled first to seek a specific performance of the agreement to sign the note. Volmer *v.* Stagerman, 25 Minn. 234.

4. Pellier *v.* Gillespie, (Cal. 1884) 4 Pac. 1137; Creech *v.* Abner, 106 Ky. 239, 50 S. W. 58, 20 Ky. L. Rep. 1812; Fresenborg *v.*

chaser of the premises, by an allegation that he assumed the mortgage and agreed to pay the debt.[5]

(E) *Amount Due.* The bill or complaint will not support a decree of foreclosure unless it states definitely the amount presently claimed to be due under the mortgage.[6] And although the instrument allows the mortgagee to pay taxes and insurance premiums on the mortgagor's failure to do so, and add the amount to the mortgage debt, such items cannot be included in the decree unless alleged and claimed in the complaint.[7] And the same is true as to attorney's fees authorized or stipulated for in the mortgage.[8]

(III) *Description of Property.* The property covered by the mortgage and against which foreclosure is asked must be described in the bill or complaint with reasonable certainty and particularity, both in order that it may appear to be within the jurisdiction and that it may be accurately described in the decree and identified by the officer making the sale.[9] For this purpose it is generally sufficient to copy the description in the mortgage or to refer to the mortgage, a copy of the same being annexed or filed;[10] and according to some of the decisions the description may be made out by reference to recorded deeds or authentic

Reilly, 2 N. Y. App. Div. 44, 37 N. Y. Suppl. 290.

5. Petteys *v.* Comer, 34 Oreg. 36, 54 Pac. 813; Fant *v.* Wright, (Tex. Civ. App. 1901) 61 S. W. 514; Fisher *v.* White, 94 Va. 236, 26 S. E. 573; Stites *v.* Thompson, 98 Wis. 329, 73 N. W. 774.

6. *California.*— Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081.

Kentucky.— McMurtry *v.* Montgomery Masonic Temple Co., 86 Ky. 206, 5 S. W. 570, 9 Ky. L. Rep. 541.

Michigan.— Bailey *v.* Gould, Walk. 478.

Wisconsin.— Seely *v.* Hills, 49 Wis. 473, 5 N. W. 940.

Canada.— Boyd *v.* Wilson, 1 Ch. Chamb. (U. C.) 258. And see Crooks *v.* Hughes, 13 Grant Ch. (U. C.) 485; Strachan *v.* Murney, 6 Grant Ch. (U. C.) 378.

See 35 Cent. Dig. tit. "Mortgages," § 1310.

Unliquidated amount.— Where the bond secured by a mortgage is conditioned for the payment, at a specified time, of whatever sum may then be due from the obligor, without specifying any amount, a complaint to foreclose the mortgage is insufficient unless it gives data from which the amount actually due on the bond can be ascertained. Seely *v.* Hills, 44 Wis. 484.

7. Damon *v.* Quinn, 143 Cal. 75, 76 Pac. 818; Hibernia Sav., etc., Soc. *v.* Conlin, 67 Cal. 178, 7 Pac. 477; Brown *v.* Miner, 128 Ill. 148, 21 N. E. 223; Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130; Stonington Sav. Bank *v.* Davis, 15 N. J. Eq. 30.

8. Brooks *v.* Forington, 117 Cal. 219, 48 Pac. 1073. See also Orange Growers' Bank *v.* Duncan, 133 Cal. 254, 65 Pac. 469.

Reasonable fee.— Where the mortgage stipulates for a reasonable attorney's fee, it is not necessary for the complaint to allege what sum would be a reasonable fee, as this is for the court to determine. Damon *v.* Quinn, 143 Cal. 75, 76 Pac. 818; Cortelyou *v.* Jones, (Cal. 1900) 61 Pac. 918. And on the other hand if the complaint demands a specific sum as such fee, it is unnecessary to allege that it is reasonable. McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670.

9. *Alabama.*— Caston *v.* McCord, 130 Ala. 318, 30 So. 431; Hurt *v.* Freeman, 63 Ala. 335.

California.— Scott *v.* Sells, 88 Cal. 599, 26 Pac. 350.

Indiana.— Koons *v.* Carney, 87 Ind. 34; Barnaby *v.* Parker, 53 Ind. 271; White *v.* Hyatt, 40 Ind. 385; Magee *v.* Sanderson, 10 Ind. 261; Whittelsey *v.* Beall, 5 Blackf. 143.

Kentucky.— Bailey *v.* Fanning Orphan School, 14 S. W. 908, 12 Ky. L. Rep. 644.

New York.— Schoenewald *v.* Rosenstein, 5 N. Y. Suppl. 766.

South Dakota.— Striegel *v.* Harding, 12 S. D. 342, 81 N. W. 635, 76 Am. St. Rep. 607.

Texas.— Pressley *v.* Testard, 29 Tex. 199.

Vermont.— Howe *v.* Towner, 55 Vt. 315.

Canada.— Glass *v.* Freckelton, 8 Grant Ch. (U. C.) 522.

See 35 Cent. Dig. tit. "Mortgages," § 1311.

Error cured by amended bill.— An error in the description of the property in the bill is no ground for setting aside the decree, when cured by an amended bill, filed by consent of parties. Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580.

Right of mortgagor to object.— The mortgagor cannot be heard to complain of a defective description in the mortgage, whatever may be its effect on the foreclosure sale. German Sav., etc., Soc. *v.* Kern, 38 Oreg. 232, 62 Pac. 788, 63 Pac. 1052.

Misdescription of part of land.— In an action to foreclose a mortgage covering several tracts of land, a general demurrer will not lie to a complaint which sufficiently describes some of the tracts, although insufficiently describing others, if it is otherwise good. Rapp *v.* Thie, 61 Ind. 372.

10. Whitby *v.* Rowell, 82 Cal. 635, 23 Pac. 40, 382; Emeric *v.* Tams, 6 Cal. 155; Krathwohl *v.* Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; Cook *v.* Wiles, 42 Mich. 439, 4 N. W. 169.

maps.[11] But if reference is thus made to the mortgage, and the description contained in the mortgage itself is inaccurate or insufficient, the complaint will not stand.[12] In this case the complainant must ask for a correction or reformation of the mortgage, as concerns the description,[13] or introduce proper averments in his bill, pointing out the mistake in the mortgage and supplying a correct and sufficient description.[14] If the mortgage covers several parcels of land, and plaintiff, either purposely or by inadvertence, omits one of them from the description in his bill, it has the effect of releasing that parcel, but this affords the mortgagor no ground of complaint.[15]

(IV) *NON-PAYMENT OR OTHER BREACH OF CONDITION.* It is essential to a bill or complaint for foreclosure that it should allege non-payment of the debt secured by the mortgage,[16] or other breach of its condition according to circumstances.[17] And if the suit is brought under a provision of the mortgage allowing the creditor to declare the entire indebtedness due on default in the payment of an instalment of interest or principal, the bill must allege the default relied on and plead the conditions giving an immediate right of action for the whole, including the mortgagee's election to anticipate the maturity of the principal indebtedness.[18] If there has been an extension of the time of payment, the fact

11. Clement *v.* Draper, 108 Ala. 211, 19 So. 25; Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468 (recorded map of a city); Sanderson *v.* Phinney, 2 Walk. (Pa.) 526 (reference to record of mortgage); Lumpkin *v.* Silliman, 79 Tex. 165, 15 S. W. 231 (reference to deeds).

12. Struble *v.* Neighbert, 41 Ind. 344.

13. Sickmon *v.* Wood, 69 Ill. 329; Davis *v.* Cox, 6 Ind. 481; Murphy *v.* Robinson, 50 La. Ann. 213, 23 So. 323.

14. Noland *v.* State, 115 Ind. 529, 18 N. E. 26; Halstead *v.* Lake County, 56 Ind. 363; Slater *v.* Breese, 36 Mich. 77; Palmer *v.* Windrom, 12 Nebr. 494, 11 N. W. 750.

15. Coffeen *v.* Thomas, 65 Ill. App. 117.

16. *Alabama.*—Hollinger *v.* Mobile Branch Bank, 8 Ala. 605; Levert *v.* Redwood, 9 Port. 79.

California.— Luddy *v.* Pavkovich, 137 Cal. 284, 70 Pac. 177. An allegation that there is now due and owing to plaintiff a certain sum is not equivalent to an averment of non-payment. Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891. If the complaint shows that the debt was due and unpaid at the time the mortgage was given, it need not further allege the non-payment of the sum demanded. Chaffee *v.* Browne, 109 Cal. 211, 41 Pac. 1028.

Illinois.— Osgood *v.* Stevens, 25 Ill. 89. See also Mitcheltree *v.* Stewart, 3 Ill. 17. In a scire facias to foreclose a mortgage, it is necessary to allege the non-payment of the debt, and that the last instalment of the debt has fallen due. Osgood *v.* Stevens, *supra*; Day *v.* Cushman, 2 Ill. 475.

Kentucky.— O'Conner *v.* Stone, 43 S. W. 483, 19 Ky. L. Rep. 1929.

Michigan.— Martin *v.* McReynolds, 6 Mich. 70.

Nebraska.— Durland *v.* Durland, 62 Nebr. 813, 87 N. W. 1048; Hansen *v.* Mortensen, 2 Nebr. (Unoff.) 229, 96 N. W. 216.

New Jersey.— Cornelius *v.* Halsey, 11 N. J. Eq. 27.

New York.— Harvey *v.* Truby, 62 N. Y. App. Div. 503, 71 N. Y. Suppl. 86; Coulter *v.* Bower, 64 How. Pr. 132.

Ohio.— Brainard *v.* Rittberger, 4 Ohio Dec. (Reprint) 432, 2 Clev. L. Rep. 154, holding that in an action to foreclose a mortgage and collect notes secured thereby, an allegation that there is a certain amount due on the notes, without stating that the condition of the mortgage has been broken, and the amount is unpaid, is good against a demurrer, although in bad form.

Tennessee.— Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931.

See 35 Cent. Dig. tit. "Mortgages," § 1312.

But *compare* Wilkins *v.* Moore, 20 Kan. 538; Schupp *v.* Schupp, 1 Pa. Cas. 283, 2 Atl. 870.

17. *Arkansas.*— Nix *v.* Draughon, 54 Ark. 340, 15 S. W. 893.

Connecticut.— Nichols *v.* McCarthy, (1886) 7 Atl. 24.

Illinois.— Salomon *v.* Stoddard, 107 Ill. App. 227.

Indiana.— Catterlin *v.* Armstrong, 101 Ind. 258, holding that a complaint to foreclose an indemnity mortgage, alleging that plaintiff was compelled to pay the debt, is good without alleging failure to reimburse him.

Kentucky.— Miller *v.* McConnell, 118 Ky. 293, 80 S. W. 1103, 26 Ky. L. Rep. 181.

New Hampshire.— Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163.

New York.— Sun, etc., Bldg., etc., Assoc. *v.* Buck, 36 N. Y. App. Div. 637, 55 N. Y. Suppl. 262.

See 35 Cent. Dig. tit. "Mortgages," § 1312.

18. *Alabama.*— Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555.

California.— Fletcher *v.* Dennison, 101 Cal. 292, 35 Pac. 868.

Colorado.— Barney *v.* McClancy, 15 Colo. App. 63, 60 Pac. 948.

Florida.— White *v.* Gracey, 45 Fla. 657, 34 So. 223.

Idaho.— Broadbent *v.* Brumback, 2 Ida. (Hasb.) 366, 16 Pac. 555.

Illinois.— Heffron *v.* Gage, 149 Ill. 182, 36

must be alleged and also its expiration without payment.[19] And no decree of foreclosure can be made for a breach of condition not set forth in the complaint.[20]

(v) *Title or Right of Plaintiff to Mortgage*—(a) *In General.* A bill for foreclosure must show that the debt is owing to complainant, and that he has a right to maintain the action.[21] Where he is the original mortgagee, it is ordinarily sufficient to allege the execution and delivery to him of the mortgage and note.[22] But otherwise he must allege such facts as will show him to be the owner of the debt and security, so that his right to sue and the character in which he sues may appear.[23] This is particularly the case where plaintiff sues in a representative capacity, as an executor, administrator, or trustee.[24]

(b) *Assignment to Plaintiff.* Where a foreclosure suit is instituted by an assignee of the mortgage and debt, it is not necessary for him to set out the instrument of assignment in full; it is sufficient to allege that the securities were

N. E. 569; Wheeler *v.* Foster, 82 Ill. App. 153; Stelzich *v.* Weidel, 27 Ill. App. 177.

Indiana.— Kohli *v.* Hall, 141 Ind. 411, 40 N. E. 1060.

Montana.— Caplice Commercial Co. *v.* Cassidy, 25 Mont. 81, 63 Pac. 799.

New Jersey.— Bodine *v.* Gray, 24 N. J. Eq. 335.

Ohio.— Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

Pennsylvania.— Briscoe *v.* Philadelphia, etc., R. Co., 1 Walk. 511; Smith *v.* Weyant, 3 Pa. Co. Ct. 608; Lewis *v.* Flatly, 4 C. Pl. 176.

Texas.— Robertson *v.* Parrish, (Civ. App. 1897) 39 S. W. 646.

United States.— Quackenbush *v.* Lane, 20 Fed. Cas. No. 11,491. See also Alabama, etc., Mfg. Co. *v.* Robinson, 56 Fed. 690, 6 C. C. A. 79.

See 35 Cent. Dig. tit. "Mortgages," § 1312.

19. Eby *v.* Ryan, 22 Nebr. 470, 35 N. W. 225; Troy City Bank *v.* Bowman, 43 Barb. (N. Y.) 639; Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726.

20. Washburn *v.* Wilkinson, 59 Cal. 538.

21. Cornelius *v.* Halsey, 11 N. J. Eq. 27; Severance *v.* Griffith, 2 Lans. (N. Y.) 38; Matteson *v.* Matteson, 55 Wis. 450, 13 N. W. 463; Hays *v.* Lewis, 17 Wis. 210.

Proprietor of note.— An allegation in a bill to foreclose a mortgage that plaintiff is proprietor of the note secured is sufficient, although it does not appear how he became proprietor. Fenno *v.* Sayre, 3 Ala. 458.

The fact that plaintiffs have no joint or common interest in the money secured by the mortgage should be alleged in the complaint, and the decree be made accordingly. Higgs *v.* Hanson, 13 Nev. 356.

Where plaintiffs in a proceeding to foreclose a mortgage are partners, it is not sufficient to describe them by the firm-name only; the complaint is fatally defective if it does not disclose the names of the persons composing the firm. Day *v.* Cushman, 2 Ill. 475. See also Bernstein *v.* Hobelman, 70 Md. 29, 16 Atl. 374.

A bill to foreclose a mortgage executed to a corporation is not subject to demurrer for failing to show affirmatively the capacity of the company to loan money and take mortgages. Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601.

Identification of mortgagee when described by initials only or by a name different from that in the mortgage see Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1; Wilson *v.* Calder, 8 Kan. App. 856, 55 Pac. 552; Andrews *v.* Wynn, 4 S. D. 40, 54 N. W. 1047.

22. *Connecticut.*—Bull *v.* Meloney, 27 Conn. 560.

Louisiana.— Snow *v.* Trotter, 3 La. Ann. 268.

Maryland.— Bernstein *v.* Hobelman, 70 Md. 29, 16 Atl. 374.

South Carolina.— Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538.

Texas.— Wallace *v.* Hunt, 22 Tex. 647.

Wisconsin.— Walton *v.* Cody, 1 Wis. 420.

See 35 Cent. Dig. tit. "Mortgages," § 1313.

Purchaser for value.—A mortgagee who had no notice of any prior claim on the land need not, in an action to foreclose, allege that he was a purchaser for value. Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980.

23. *Alabama.*— Hartwell *v.* Blocker, 6 Ala. 581.

California.— Tyler *v.* Yreka Water Co., 14 Cal. 212.

Connecticut.— Frink *v.* Branch, 16 Conn. 260.

Georgia.— Taylor *v.* Blasingame, 73 Ga. 111.

Michigan.— Proctor *v.* Robinson, 35 Mich. 284; Spear *v.* Hadden, 31 Mich. 265.

See 35 Cent. Dig. tit. "Mortgages," § 1313.

24. *Alabama.*— Cowley *v.* Shelby, 71 Ala. 122.

California.— White *v.* Allatt, 87 Cal. 245, 25 Pac. 420.

Louisiana.— Chaffe *v.* Carroll, 35 La. Ann. 115.

Pennsylvania.— Lawrence *v.* Korn, 184 Pa. St. 500, 39 Atl. 295, necessity of alleging grant of letters of administration to plaintiff.

Vermont.— Babbitt *v.* Bowen, 32 Vt. 437.

Canada.— Garrett *v.* Saunders, 23 Grant Ch. (U. C.) 566; Lawrence *v.* Humphries, 11 Grant Ch. (U. C.) 209 (bill by executors of mortgagee defective if it does not allege grant of letters to them); Barrett *v.* Crosthwaite, 9 Grant Ch. (U. C.) 422.

See 35 Cent. Dig. tit. "Mortgages," § 1313.

duly assigned and transferred to him for a valuable consideration;[25] and since the transfer of a note or bond carries with it the right to enforce the mortgage security, it is sufficient to allege an assignment or transfer of the obligation, by indorsement or otherwise according to the facts, the transfer of the mortgage then following as a legal inference.[26] But an allegation of the assignment to plaintiff of the mortgage alone, without anything to show his ownership of the debt secured, is defective.[27]

(VI) *Performance of Conditions Precedent.* Where the mortgage requires the mortgagee to perform certain conditions precedent to his right to foreclose, or makes the debt payable only on a certain contingency, the bill or complaint must contain proper averments to show the performance of the one or the happening of the other, or it will not sustain a decree.[28]

(VII) *Other Proceedings on Mortgage or Debt.* In several states by reason of statutory enactments it is necessary that the complaint in an action for foreclosure shall state whether any proceedings at law have been had for the recovery of the debt secured by the mortgage or any part thereof. This is imperative, and a complaint is fatally defective which omits this averment,[29] or which, showing the institution of an action at law for the debt and its prosecu-

25. *Alabama.*— Buckheit *v.* Decatur Land Co., 140 Ala. 216, 37 So. 75.

California.— Cortelyou *v.* Jones, 132 Cal. 131, 64 Pac. 119.

Iowa.— Barthol *v.* Blakin, 34 Iowa 452; Franklin *v.* Twogood, 18 Iowa 515.

Michigan.—Martin *v.* McReynolds, 6 Mich. 70.

Minnesota.— Foster *v.* Johnson, 39 Minn. 378, 40 N. W. 255.

Nebraska.— Barber *v.* Crowell, 55 Nebr. 571, 75 N. W. 1109.

New Jersey.— Cornelius *v.* Halsey, 11 N. J. Eq. 27.

New York.— Rose *v.* Meyer, 7 N. Y. Civ. Proc. 219.

North Dakota.— Fisher *v.* Buisson, 3 N. D. 493, 57 N. W. 505.

Oregon.— Roberts *v.* Sutherlin, 4 Oreg. 219.

Pennsylvania.—Western Pennsylvania Hospital *v.* Zweidinger, 29 Pittsb. Leg. J. N. S. 393.

Vermont.— King *v.* Harrington, 2 Aik. 33, 16 Am. Dec. 675.

Washington.— Brown *v.* Elwell, 17 Wash. 442, 49 Pac. 1068.

Wisconsin.— Morris *v.* Peck, 73 Wis. 482, 41 N. W. 623; Ercanbrack *v.* Rich, 2 Pinn. 441, 2 Chandl. 100.

United States.— Cæsar *v.* Capell, 83 Fed. 403.

See 35 Cent. Dig. tit. "Mortgages," § 1313.

Irregularity in assignment.— If there is any irregularity or defect in the assignment not appearing on the face of the papers it is for defendant to allege and prove it. Ely *v.* Cram, 17 Wis. 537.

26. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Emanuel *v.* Hunt, 2 Ala. 190; Short *v.* Kerns, 95 Ind. 431; Slaughter *v.* Foust, 4 Blackf. (Ind.) 379; Kurtz *v.* Sponable, 6 Kan. 395; Scott *v.* Turner, 15 La. Ann. 346.

27. Manne *v.* Carlson, 49 N. Y. App. Div. 276, 63 N. Y. Suppl. 162. But see Preston *v.* Loughran, 58 Hun (N. Y.) 210, 12 N. Y. Suppl. 313.

28. Noerr *v.* Schmidt, 151 Ind. 579, 51 N. E. 332 (as to filing claim against estate of deceased mortgagor); Walls *v.* State, 140 Ind. 16, 38 N. E. 177 (complaint praying reformation of mortgage and foreclosure as reformed need not allege demand for reformation before suit); Lewis *v.* Richey, 5 Ind. 152 (complaint on indemnity mortgage must show payment or other damage sustained by plaintiff); Palmer *v.* Hughes, 1 Blackf. (Ind.) 328 (demand at particular place specified for payment); Curtis *v.* Goodenow, 24 Mich. 18 (title to be perfected before right of action accrues); Dye *v.* Mann, 10 Mich. 291.

29. See the statutes of the different states. And see the following cases:

Michigan.— Bailey *v.* Gould, Walk. 478.

Nebraska.— Michigan Trust Co. *v.* Red Cloud, 69 Nebr. 585, 96 N. W. 140, 98 N. W. 413; Durland *v.* Durland, 62 Nebr. 813, 87 N. W. 1048; Bing *v.* Morse, 51 Nebr. 842, 71 N. W. 712; Dimick *v.* Grand Island Banking Co., 37 Nebr. 394, 55 N. W. 1066 (holding that the provision of the statute applies only to formal mortgages, and not to mere equitable mortgages or liens); Henry, etc., Co. *v.* McCurdy, 36 Nebr. 863, 55 N. W. 261; Mundy *v.* Whittemore, 15 Nebr. 647, 19 N. W. 694; Drury *v.* Roberts, 2 Nebr. (Unoff.) 574, 89 N. W. 600; Holt *v.* Rust-Owen Lumber Co., 2 Nebr. (Unoff.) 170, 96 N. W. 613.

New York.— Schieck *v.* Donohue, 77 N. Y. App. Div. 321, 79 N. Y. Suppl. 233; Lovett *v.* German Reformed Church, 12 Barb. 67; Pattison *v.* Powers, 4 Paige 549.

North Dakota.— Fisher *v.* Bouisson, 3 N. D. 493, 57 N. W. 505.

Wisconsin.— State Bank *v.* Abbott, 20 Wis. 570; Ercanbrack *v.* Rich, 2 Pinn. 441, 2 Chandl. 100.

See 35 Cent. Dig. tit. "Mortgages," § 1315.

In Indiana the rule stated in the text once obtained (McMullen *v.* Furnass, 1 Ind. 160), but was subsequently changed by statute (Newton *v.* Newton, 12 Ind. 527).

tion to judgment, fails to allege that an execution thereon has been returned unsatisfied, as is required by such statutes.[30] Independently of such statutes, if a previous attempt to foreclose the mortgage has been made, the complaint should set forth the proceedings thereon and show that they were invalid or ineffectual.[31]

(VIII) *INTERESTS OF DEFENDANTS.* The bill or complaint, if against the original mortgagor, need not ordinarily allege title in him,[32] or, if this is attempted, it is sufficient to allege that he is seized and possessed of the premises in question.[33] Where the mortgagor is dead, the interest of defendants is sufficiently alleged by describing them as his surviving children, or as his heirs at law, or as the executor or administrator of his estate, according to the facts.[34] Where third parties are joined as defendants, it is not necessary to define or describe the exact nature and extent of the interest of each in the mortgaged property,[35] except so far as to show that such interest is subject or subordinate to the lien of the mortgage.[36] Where the purchaser of the premises from the mortgagor is defendant, it will be enough to allege his purchase and a conveyance of the title to him,[37] and the fact that he assumed and agreed to pay the mortgage debt is not a material allegation except where a personal judgment against him is demanded.[38]

(IX) *ALLEGATIONS AS TO CLAIMS OF THIRD PERSONS.* Where one who is not a party to the mortgage or a purchaser from the mortgagor is joined as a defendant the usual allegation concerning him is that he has or claims to have some interest in or lien upon the premises, but that such interest or lien, whatever it may be, is subsequent and subordinate to the lien of plaintiff's mortgage; and this has been held sufficient to show that he is a proper party, to state a cause of action against him, and to bind him by the decree which may be rendered,[39] for it puts upon such defendant the duty of setting up his interest by

30. Cooper *v.* Bresler, 9 Mich. 534; Montpelier Sav. Bank, etc., Co. *v.* Follett, 68 Nebr. 410, 94 N. W. 635; Gregory *v.* Hartley, 6 Nebr. 356; Michigan Trust Co. *v.* Red Cloud, 3 Nebr. (Unoff.) 722, 92 N. W. 900; Zug *v.* Forgan, 3 Nebr. (Unoff.) 149, 90 N. W. 1129; North River Bank *v.* Rogers, 8 Paige (N. Y.) 648.

31. Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161. See also Coleman *v.* Worrill, 57 Ga. 124.

32. Daniel *v.* Hester, 24 S. C. 301; Shed *v.* Garfield, 5 Vt. 39. And see Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 689.

33. Holman *v.* Norfolk Bank, 12 Ala. 369; Brier *v.* Brinkman, 44 Kan. 570, 24 Pac. 1108; Brewing *v.* Berryman, 15 N. Brunsw. 515.

Possession of premises.— In Arkansas it is necessary for the petition to show whether the land is occupied by the mortgagor or by any other actual occupant. Fletcher *v.* Hutchinson, 25 Ark. 30; McLain *v.* Smith, 4 Ark. 244. But in Louisiana a petition for an order of seizure on a mortgage containing the pact *de non alienando* need not allege that the property is in the mortgagor's possession. Snow *v.* Trotter, 3 La. Ann. 268.

34. Erwin *v.* Fergson, 5 Ala. 158; Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130; Rutherford *v.* Johnson, 49 S. C. 465, 27 S. E. 470. But see Kelly *v.* Ardell, 11 Grant Ch. (U. C.) 579, holding that an allegation that defendant had been appointed executor of the mortgagor's will was insufficient in the absence of any allegation that he had proved the will or had acted as executor.

35. Hinds *v.* Allen, 34 Conn. 185; Hoes *v.* Boyer, 108 Ind. 494, 9 N. E. 427; Dunham *v.* Doremus, 55 N. J. Eq. 511, 37 Atl. 62.

36. O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745; Selph *v.* Cobb, 47 Fla. 292, 36 So. 761.

An allegation that defendant is now the owner of the land is insufficient to show that the mortgage constitutes a lien on the land as against him. Nichol *v.* Henry, 89 Ind. 54. But *compare* Hohl *v.* Reed, 8 Kan. App. 54, 53 Pac. 676.

37. Christian *v.* American Freehold Land Mortg. Co., 92 Ala. 130, 9 So. 219; Allen *v.* Hollingshead, 155 Ind. 178, 57 N. E. 917; Hammons *v.* Bigelow, 115 Ind. 363, 17 N. E. 192; Carnahan *v.* Tousey, 93 Ind. 561. See also Wright *v.* Dudley, 8 Mich. 115.

38. Robinson *v.* Holmes, 82 Ill. App. 307; Hammons *v.* Bigelow, 115 Ind. 363, 17 N. E. 192. See also Wormouth *v.* Hatch, 33 Cal. 121.

39. *California.*— Foster *v.* Bowles, 138 Cal. 449, 71 Pac. 495; San Francisco Breweries *v.* Schurtz, 104 Cal. 420, 38 Pac. 92; Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220; Poett *v.* Stearns, 28 Cal. 226; Mitchell *v.* Steelman, 8 Cal. 363.

Florida.— McCoy *v.* Boley, 21 Fla. 803.

Illinois.— Kehm *v.* Mott, 187 Ill. 519, 58 N. E. 467.

Indiana.— Yorn *v.* Bracken, 153 Ind. 492, 55 N. E. 257; Hoes *v.* Boyer, 108 Ind. 494, 9 N. E. 427; Woodworth *v.* Zimmermann, 92 Ind. 349; Martin *v.* Noble, 29 Ind. 216.

answer and establishing it by proof, and if he merely denies the allegations of the bill, it is an admission that he has no interest in the property or lien thereon.[40] But this allegation will not suffice as against a lien which appears of record to be superior to plaintiff's; if he means to overthrow it or subordinate it to his own, the specific facts relied on must be pleaded.[41]

c. Prayer For Relief. Under the general prayer for "such other and further relief as equity may require" or "as may be proper," the complainant is generally entitled to any relief which the facts pleaded show to be his right.[42] But any special judgment or order outside the usual routine of mortgage foreclosures should be specially prayed for.[43] The bill should regularly demand a foreclosure of the equity of redemption,[44] and a judgment or decree for the sale of the mortgaged property to satisfy the mortgage debt;[45] and if a personal judgment against

Kansas.— German Ins. Co. *v.* Nichols, 41 Kan. 133, 21 Pac. 111.

Michigan.— Wilkinson *v.* Green, 34 Mich. 221.

New York.— Albany City Nat. Bank *v.* Hudson River Brick Mfg. Co., 79 Hun 387, 29 N. Y. Suppl. 793; Douw *v.* Keay, 16 Misc. 192, 38 N. Y. Suppl. 994; Drury *v.* Clark, 16 How. Pr. 424.

Ohio.— Winemiller *v.* Laughlin, 51 Ohio St. 421, 38 N. E. 111.

Oregon.— Petteys *v.* Comer, 34 Oreg. 36, 54 Pac. 813.

South Carolina.— Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261.

South Dakota.— Carpenter *v.* Ingalls, 3 S. D. 49, 51 N. W. 948, 44 Am. St. Rep. 753.

Washington.— Kizer *v.* Caufield, 17 Wash. 417, 49 Pac. 1064; Dexter *v.* Long, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867.

Wisconsin.— Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772; Delaplaine *v.* Lewis, 19 Wis. 476.

See 35 Cent. Dig. tit. "Mortgages," § 1316.

Compare Howard *v.* Iron, etc., Co., 62 Minn. 298, 64 N. W. 896.

40. Kehm *v.* Mott, 187 Ill. 519, 58 N. E. 467.

41. Wurcherer *v.* Hewitt, 10 Mich. 453. And see Aldrich *v.* Lapham, 6 How. Pr. (N. Y.) 129.

Where a senior mortgagee is made a party to a suit for foreclosure by the junior mortgagee, the latter should distinctly allege in his bill the purpose for which the former is brought in. If it is intended to assert that the elder mortgage is invalid, or that it should, for any reason, be postponed to the junior encumbrance, the facts relied on in that behalf should be pleaded. Under the general allegation that defendant has or claims some interest in the mortgaged premises as purchaser, mortgagee, or otherwise, which interest, if any, accrued subsequent to the lien of complainant's mortgage, the senior mortgagee is not bound to set up his rights, and is not affected by a decree taken *pro confesso* against him. Foval *v.* Benton, 48 Ill. App. 638.

42. *Alabama.*— Mutual Bldg., etc., Assoc. *v.* Wyeth, 105 Ala. 639, 17 So. 45, holding that where the suit is on a purchase-money mortgage, which is shown to be void, a vendor's lien for the purchase-money may be enforced under the prayer for general relief.

Illinois.— Beaver *v.* Slanker, 94 Ill. 175, holding that the prayer for general relief will authorize a provision in the decree correcting a clerical error in the mortgage, although reformation was not specially asked.

Indiana.— Shotts *v.* Boyd, 77 Ind. 223.

Minnesota.— Piper *v.* Sawyer, 73 Minn. 352, 76 N. W. 57.

Texas.— Hennessy *v.* Clough, (Civ. App. 1897) 40 S. W. 157.

See 35 Cent. Dig. tit. "Mortgages," § 1317.

But see Gihon *v.* Belleville White Lead Co., 7 N. J. Eq. 531, holding that the prayer for general relief will not save the bill from demurrer where the facts pleaded do not show complainant entitled to any of the specific relief asked.

43. Fields *v.* Drennen, 115 Ala. 558, 22 So. 114 (special prayer for establishment and satisfaction of a vendor's lien); De Leon *v.* Higuera, 15 Cal. 483 (prayer to hold a subsequent purchaser as a trustee); Williams *v.* Creswell, 51 Miss. 817 (prayer that instalments of debt maturing during the suit may be included in final decree); Lambertville Nat. Bank *v.* McCready Bag, etc., Co., (N. J. Ch. 1888) 15 Atl. 388, 1 L. R. A. 334.

A bill by a junior mortgagee, making the senior mortgagee a party, may pray a sale of the interest mortgaged subject to the encumbrance of the prior mortgage; or that he may be permitted to redeem the prior mortgage and have the premises sold to pay the redemption money and his own mortgage; or that the mortgaged premises may, if the prior mortgagee consents thereto, be sold, and that out of the proceeds the mortgages may be paid according to priority. Gihon *v.* Belleville White Lead Co., 7 N. J. Eq. 531.

44. Ballard *v.* Koons, 10 Iowa 534.

Foreclosure under prayer for general relief. — A foreclosure may be ordered under the prayer for general relief, if the facts pleaded and proved show the complainant to be entitled thereto. Hait *v.* Ensign, 61 Iowa 724, 17 N. W. 163; Herring *v.* Neely, 43 Iowa 157; Hutton *v.* Sealy, 4 Jur. N. S. 450, 27 L. J. Ch. 263, 6 Wkly. Rep. 350.

45. *Louisiana.*— Snow *v.* Trotter, 3 La. Ann. 268.

Mississippi.— Santacruz *v.* Santacruz, 44 Miss. 714.

the mortgagor is sought, it should be specially prayed for,[46] as also a judgment for any deficiency that may remain after the sale.[47] The bill is not demurrable because the relief demanded is greater than or different from that to which, on the pleadings, plaintiff is entitled.[48]

d. Defects, Objections, and Waiver. Defects or objectionable features in the bill or complaint, not going to the jurisdiction of the court or plaintiff's substantial right of action, will be waived or cured by defendant's answering without specific objection,[49] by the introduction without objection of proof to supply the missing averments,[50] or by the rendition of a judgment or decree.[51]

2. Plea or Answer — a. Matters Proper For Plea or Answer. Defendant's plea or answer in a mortgage foreclosure suit may deny the execution and delivery of the mortgage;[52] attack its validity, as for want or failure of consideration or other cause;[53] controvert the complainant's title or right to maintain the action or the alleged breach of condition;[54] or set up payment or release or discharge, or presumption of payment from lapse of time, or, generally, anything operating as a satisfaction or extinguishment of the mortgage debt.[55] But it need not traverse any allegations of the bill or complaint which aver merely matters of evidence rather than of fact.[56] Other persons than the mortgagor, who are joined as defendants, may set up by answer their respective claims to the property or liens upon it,[57] although this is not necessary for a prior encumbrancer, whose lien cannot be affected by the decree.[58] If a person made defendant under the general allegation that he claims some interest or lien subsequent to the mortgage in suit does not mean to assert any such right, he should enter a disclaimer and have the

Ohio.— Ebert *v.* Cubbon, 4 Ohio Dec. (Reprint) 120, 1 Clev. L. Rep. 43.

Tennessee.— Glass *v.* Porter, 7 Baxt. 114.

United States.— Stockmeyer *v.* Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. ed. 123.

See 35 Cent. Dig. tit. "Mortgages," § 1317.

46. Rollins *v.* Forbes, 10 Cal. 299; Long *v.* Herrick, 26 Fla. 356, 8 So. 50; Giddings *v.* Barney, 31 Ohio St. 80.

47. Skinner *v.* Southern Home Bldg., etc., Assoc., 46 Fla. 547, 35 So. 67; California Bank *v.* Dyer, 14 Wash. 279, 44 Pac. 534; Olinger *v.* Liddle, 55 Wis. 621, 13 N. W. 703; Merchants' Nat. Bank *v.* Raymond, 27 Wis. 567. But *compare* Rogers *v.* Turner, 19 Wash. 399, 53 Pac. 663. See, however, Russell *v.* Hank, 9 Utah 309, 34 Pac. 245; Seattle, etc., R. Co. *v.* Union Trust Co., 79 Fed. 179, 24 C. C. A. 512.

48. Scheibe *v.* Kennedy, 64 Wis. 564, 25 N. W. 646.

49. *Iowa.*— Union Nat. Bank *v.* Barber, 56 Iowa 559, 9 N. W. 890.

Kansas.—Clay *v.* Hildebrand, 34 Kan. 694, 9 Pac. 466.

Louisiana.— Powell *v.* Hayes, 31 La. Ann. 789; Sprigg *v.* Beaman, 6 La. 59.

Nebraska.— Taylor *v.* Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. Rep. 426.

Wisconsin.— Baird *v.* McConkey, 20 Wis. 297.

See 35 Cent. Dig. tit. "Mortgages," § 1318.

50. Cleavenger *v.* Beath, 53 Ind. 172; Lyon *v.* Perry, 14 Ind. 515. *Compare* Armstrong *v.* Ross, 20 N. J. Eq. 109.

51. Martin *v.* Holland, 87 Ind. 105; Knox County *v.* Brown, 103 Mo. 223, 15 S. W. 382; Berry *v.* King, 15 Oreg. 165, 13 Pac. 772.

52. Genthner *v.* Fagan, 85 Tenn. 491, 3 S. W. 351.

Effect of default.— Where the bill alleges that defendant made, executed, acknowledged, and delivered the mortgage or deed of trust, the default of defendant admits these facts and concludes him as to them. Terry *v.* Eureka College, 70 Ill. 236; Williams *v.* Soutter, 55 Ill. 130; Moore *v.* Titman, 33 Ill. 358.

53. Mayo *v.* Hughes, (Fla. 1906) 40 So. 499; McMichael *v.* Webster, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630, holding that on foreclosure of a purchase-money mortgage, false and fraudulent representations as to the quantity of the land conveyed may be shown by answer.

As to defense of want or failure of consideration see *supra*, XXI, C, 2, c.

54. See *supra*, XXI, C, 1, a, 2; XXI, C, 1, c, d; XXI, C, 2, a.

55. Jones *v.* Comer, 5 Leigh (Va.) 350.

Liability of mortgagee for rental value.— The right of the mortgagor to compel the mortgagee in possession to account for and credit him with the rental value of the mortgaged premises is a matter of defense, in a suit by the mortgagee to foreclose, of which the mortgagor may avail himself by answer. Ferry *v.* Krueger, 43 N. J. Eq. 295, 14 Atl. 811 [*affirming* 41 N. J. Eq. 432, 5 Atl. 452].

56. Wormouth *v.* Hatch, 33 Cal. 121.

57. Blatchford *v.* Blanchard, 160 Ill. 115, 43 N. E. 794 (setting up mechanic's lien by answer without cross bill); Howell *v.* McCrie, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584; Bates *v.* Miller, 48 Mo. 409; Tower *v.* White, 10 Paige (N. Y.) 395.

58. Payn *v.* Grant, 23 Hun (N. Y.) 134. And see Brinkerhoff *v.* Franklin, 21 N. J. Eq. 334.

suit dismissed as to him;[59] and if the title which he claims is adverse and paramount to the mortgage under foreclosure, and therefore not proper to be litigated in the suit, such a disclaimer will not prejudice his rights, as it merely disavows an interest subordinate to the complainant's lien.[60]

b. Form and Requisites. Defendant's answer must be responsive to the bill or complaint, and controvert all its material allegations,[61] and by way of direct averment and not by way of charge,[62] and by allegations of fact, rather than inferences or conclusions of law,[63] and it must either deny the material statements categorically or deny that defendant has any knowledge or information sufficient to form a belief concerning them.[64] Under the modern practice, a general denial will be permissible,[65] but affirmative defenses such as payment or tender should be specially pleaded.[66] In scire facias to foreclose a mortgage, the objection that the mortgage is not set out in full cannot be taken advantage of by plea in abatement,[67] nor can the plea of *nul tiel record* be set up.[68] Generally, where a husband and wife are joined as defendants, they must answer jointly, and cannot answer separately without leave of court.[69] The answer should be verified.[70]

c. Sufficiency of Averment of Matters of Defense. An objection for want or defect of parties may be taken by plea in abatement or demurrer.[71] But as to pleading to the merits of the bill or complaint, it is first of all requisite that the answer should be certain, that is, free from ambiguity and clear and explicit so as to be readily understood.[72] Again it must be a complete answer. One which undertakes to set forth the facts relied on to defeat plaintiff's right of action must do so not only explicitly but also fully, and it is open to the objection of insufficiency if it leaves open any hypothesis on which plaintiff's right to relief might be predicated.[73] So, if it undertakes to answer the whole complaint, but

59. Pelton *v.* Farmin, 18 Wis. 222; *In re* Burrell, L. R. 7 Eq. 399, 38 L. J. Ch. 382, 17 Wkly. Rep. 516; Glenny *v.* Murdock, Fl. & K. 277; Singleton *v.* Cox, 4 Hare 326, 30 Eng. Ch. 326, 67 Eng. Reprint 673; Dobree *v.* Nicholson, 22 L. T. Rep. N. S. 774, 18 Wkly. Rep. N. S. 965; Collins *v.* Shirley, 1 Russ. & M. 638, 5 Eng. Ch. 638, 39 Eng. Reprint 245; Perkin *v.* Stafford, 10 Sim. 562, 16 Eng. Ch. 562, 59 Eng. Reprint 733.

60. Comstock *v.* Comstock, 24 Mich. 39; Roberts *v.* Wood, 38 Wis. 60.

61. Severson *v.* Moore, 17 Ind. 231; Noe *v.* Noe, 32 N. J. Eq. 469; Squier *v.* Shaw, 24 N. J. Eq. 74; Brooks *v.* Vermont Cent. R. Co., 4 Fed. Cas. No. 1,964, 14 Blatchf. 463.

Denial of amount claimed.— A plea to an original petition to foreclose a mortgage, denying substantially that the amount claimed therein is due, is no answer to an amended petition which reduces that amount materially by allowing credits. Ledbetter *v.* McWilliams, 90 Ga. 43, 15 S. E. 634.

Claim of junior mortgagee.— Where a junior mortgagee, made a defendant, filed an answer attempting to allege facts which should in equity postpone plaintiff's mortgage to his own, but the answer was held insufficient on demurrer, it was allowed to stand as a statement of defendant's interest as a subsequent encumbrancer. Young *v.* Thompson, 2 Kan. 83.

62. Baldwin *v.* Buckminster, 6 N. J. L. J. 54.

63. Holland *v.* Webster, 43 Fla. 85, 29 So. 625.

64. Alexander *v.* Aronson, 65 N. Y. App. Div. 174, 72 N. Y. Suppl. 640.

65. See Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251.

66. See Shafer *v.* Thompson, 109 Mich. 406, 67 N. W. 511; Jefferson College *v.* Prentiss, 29 Miss. 46; Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145.

67. Menard *v.* Marks, 2 Ill. 25.

68. Frear *v.* Drinker, 8 Pa. St. 520.

69. See Wolf *v.* Banning, 3 Minn. 202; Pidcock *v.* Mellick, (N. J. Ch. 1887) 7 Atl. 880; Elliott *v.* Hunter, 1 Ch. Chamb. (U. C.) 158.

70. Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734; Gaylord *v.* Stebbins, 4 Kan. 42.

71. Gayle *v.* Toulmin, 5 Ala. 283; Fischer *v.* Stiefel, 179 Ill. 59, 53 N. E. 407.

72. *Colorado.*— Lockhaven Trust, etc., Co. *v.* U. S. Mortgage, etc., Co., 19 Colo. App. 294, 74 Pac. 793.

Florida.— Manley *v.* Union Bank, 1 Fla. 160.

Indiana.— Gaines *v.* Walker, 16 Ind. 361.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601, holding that an answer to a petition for foreclosure, denying "that there is anything due on the note and mortgage" tenders no issue.

South Dakota.— Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

73. *California.*— Westbay *v.* Gray, 116 Cal. 660, 48 Pac. 800.

Colorado.— Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251.

Indiana.— Church *v.* Fisher, 40 Ind. 145; Hume *v.* Dessar, 29 Ind. 112.

Nebraska.— Southard *v.* Dorrington, 10 Nebr. 119, 4 N. W. 935.

in fact is responsive only to a portion of the claims or facts set forth, it is demurrable for want of facts.[74] And where the defense depends on new matter by way of avoidance, it must be alleged circumstantially and in detail.[75] This rule applies particularly to the defense of fraud or false representations, where every fact essential to establish the fraud, including scienter and reliance on the false representations, must be particularly pleaded,[76] and to such defenses as duress,[77] want or failure of consideration,[78] usury,[79] that defendant was a *bona fide* purchaser for value without notice,[80] payment or anything going in satisfaction or discharge of the mortgage debt,[81] a subsequent agreement for extension of the time of payment or for a mode or terms of payment different from the mortgage,[82] or any facts exonerating defendant from personal liability or releasing the land in his hands.[83] Where the bill alleges that no proceedings at law have been taken for the recovery of the debt, an answer intended to deny this should state specifically what proceedings have been had, or at least that such proceedings have resulted in judgment.[84]

d. Construction of Answer. The general rule is to construe an answer in a foreclosure suit against the pleader,[85] but not contrary to his manifest inten-

New Jersey.— Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802.

New York.—Whitlock *v.* Fiske, 3 Edw. 131.

Wisconsin.— Collart *v.* Fisk, 38 Wis. 238; Kennedy *v.* Milwaukee, etc., R. Co., 22 Wis. 581; Catlin *v.* Pedrick, 17 Wis. 88.

See 35 Cent. Dig. tit. "Mortgages," § 1322.

Ruling defendant to answer further.— In Illinois the statute imperatively requires that, if an answer in chancery is adjudged insufficient on exceptions filed, defendant must be ruled to answer further before the cause can be set down for hearing. So where, in a suit to foreclose a mortgage, on allowing exceptions filed by complainant to defendant's answer, the court at once entered a decree of foreclosure, it was held that the decree was premature. Holly *v.* Powell, 63 Ill. 139.

74. Reynolds *v.* Roudabush, 59 Ind. 483; King *v.* Wright, 27 Ind. App. 600, 61 N. E. 796. *Compare* Perre *v.* Castro, 14 Cal. 519, 76 Am. Dec. 444.

75. Post *v.* Springsted, 49 Mich. 90, 13 N. W. 370; U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

76. *Colorado.*—Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251.

Georgia.— Woods *v.* Roberts, 97 Ga. 254, 22 S. E. 986.

Illinois.— White *v.* Watkins, 23 Ill. 480; McFadden *v.* Fortier, 20 Ill. 509.

Indiana.— Jenkins *v.* Long, 19 Ind. 28, 81 Am. Dec. 374.

Kentucky.— Towles *v.* Edwards-Barnard Co., 68 S. W. 1107, 24 Ky. L. Rep. 491.

Montana.—Sweetzer *v.* Diehl, 14 Mont. 498, 37 Pac. 10.

New Jersey.— Randall *v.* Reynolds, 61 N. J. Eq. 334, 48 Atl. 768. A mortgage cannot he declared fraudulent against creditors, on a bill to foreclose, except when the creditors raise that issue in their answer. MacFarlane *v.* Richardson, 56 N. J. Eq. 191, 39 Atl. 131.

New York.— Seidman *v.* Geib, 16 Daly 434, 11 N. Y. Suppl. 705; Aiken *v.* Morris, 2 Barb. Ch. 140.

Pennsylvania.— McCrelish *v.* Churchman, 4 Rawle 26.

South Dakota.— McGillivray *v.* McGillivray, 9 S. D. 18, 68 N. W. 316.

Texas.— Shelby *v.* Burtis, 18 Tex. 644.

See 35 Cent. Dig. tit. "Mortgages," § 1322.

77. Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336.

78. Philbrooks *v.* McEwen, 29 Ind. 347.

79. Dawes *v.* Cammus, 32 N. J. Eq. 456; Watson *v.* Conkling, 24 N. J. Eq. 230; Hannas *v.* Hawk, 24 N. J. Eq. 124; Strass *v.* Binder, 4 Ohio Dec. (Reprint) 216, 1 Clev. L. Rep. 123.

80. Mann *v.* State, 116 Ind. 363, 19 N. E. 181; Woodward *v.* Wilcox, 27 Ind. 207; Smalling *v.* Kreech, (Tenn. Ch. App. 1897) 46 S. W. 1019.

81. *Florida.*— Garrison *v.* Parsons, 45 Fla. 335, 33 So. 525.

Georgia.— Montgomery *v.* King, 125 Ga. 388, 54 S. E. 135; Woods *v.* Almand, 97 Ga. 255, 22 S. E. 982.

Indiana.— Manley *v.* Felty, 146 Ind. 194, 45 N. E. 74.

Texas.— Interstate Bldg., etc., Assoc. *v.* Tabor, 21 Tex. Civ. App. 112, 51 S. W. 300.

Wyoming.— Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925, plea of limitations.

82. Beach *v.* Shanley, 35 N. Y. App. Div. 566, 55 N. Y. Suppl. 130; Christmas *v.* Haywood, 119 N. C. 130, 25 S. E. 861; Davis *v.* Converse, (Tex. Civ. App. 1898) 48 S. W. 910.

83. Barnhart *v.* Edwards, (Cal. 1896) 47 Pac. 251; Le Clare *v.* Thibault, 41 Oreg. 601, 69 Pac. 552; Devine *v.* U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. 585.

84. North River Bank *v.* Rogers, 8 Paige (N. Y.) 648; St. Paul F. & M. Ins. Co. *v.* Dakota Land, etc., Co., 10 S. D. 191, 72 N. W. 460.

85. Watts *v.* Parks, 78 S. W. 1125, 25 Ky. L. Rep. 1908; Atwater *v.* Walker, 16 N. J. Eq. 42; Collart *v.* Fisk, 38 Wis. 238. But

tion,[86] or contrary to the general purport of the answer and the context, although a single sentence of the answer may be open to a construction disastrous to defendant.[87] The answer should not be so construed as to make it contradict the express terms of the mortgage or note, if this can be avoided.[88] And it has been held that where a junior mortgagee's answer admits the allegations of the bill, which shows his claim to be unpaid, and consents to a decree, this amounts to a submission of his rights to the court for protection, although he does not formally pray judgment.[89]

e. Frivolous or Sham Answer. In equity pleading an answer is sham when it may be good in form but is false in fact, and frivolous when it is clearly and on its face insufficient in law to constitute any defense, although it may be true in fact.[90] In mortgage foreclosures a frivolous or sham answer may be stricken out or a decree given for want of sufficient answer.[91]

f. Affidavit of Defense. In some states an affidavit of defense is required to a scire facias for the foreclosure of a mortgage.[92] This should be made by defendant; but a person who has sold the property to defendant, covenanting against liability on account of the mortgage, has a right to be heard on account of his interest and may therefore file an affidavit of defense.[93] This affidavit must set forth the facts constituting the defense distinctly and positively and show on its face at least a *prima facie* defense to plaintiff's action, good and available in that form of action, or it will be held insufficient and judgment given accordingly.[94] But an affidavit alleging full payment and satisfaction of the

see Kyle *v.* Hamilton, (Cal. 1902) 68 Pac. 484; Conaway *v.* Carpenter, 58 Ind. 477.

86. McWilliams *v.* Bannister, 40 Wis. 489.

87. Newaygo County Mfg. Co. *v.* Stevens, 79 Mich. 398, 44 N. W. 852.

88. See Dowden *v.* Wood, 124 Ind. 233, 24 N. E. 1042; Largey *v.* Sedman, 3 Mont. 472.

89. Johnson *v.* Hambleton, 52 Md. 378.

90. Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232. And see Goodwin *v.* Thompson, 88 Hun (N. Y.) 598, 34 N. Y. Suppl. 769; Hathaway *v.* Baldwin, 17 Wis. 616.

91. An answer is frivolous which, in defense to a suit to foreclose for non-payment of taxes on the property, states that there is a custom to allow payment of taxes after the day when the statute declares them to be due (Parker *v.* Olliver, 106 Ala. 549, 18 So. 40), which sets up a prior suit pending, when it appears to be an action in which a junior mortgagee seeks to compel the senior mortgagee to foreclose (Adams *v.* McPartlin, 11 Abb. N. Cas. (N. Y.) 369), or sets up title in a third person, but shows defendant in possession and no eviction (Parkinson *v.* Sherman, 74 N. Y. 88, 30 Am. Rep. 268); which denies that defendant is in default in the payment of a specified instalment of interest, but does not allege that it has been paid, or deny that plaintiff is entitled to it (Excelsior Sav. Bank *v.* Campbell, 48 How. Pr. (N. Y.) 347 [*affirmed* in 62 N. Y. 637]. But *compare* Grueustein *v.* Jablonsky, 1 N. Y. App. Div. 580, 37 N. Y. Suppl. 538); which denies that the mortgage contains a provision for anticipating maturity, but does not deny that there is such a condition in the bond (Kay *v.* Whittaker, 44 N. Y. 565); which states that defendant's wife is a necessary party, as having an inchoate right of dower, but at the same time shows that defendant himself has no title (Kay *v.* Whittaker, *supra*); which alleges ownership, but shows that defendant's interest, whatever it may be, is subordinate to the lien of the mortgage (Kay *v.* Whittaker, *supra*); which merely denies the recording of the mortgage and of the assignment to plaintiff (St. Marks F. Ins. Co. *v.* Harris, 13 How. Pr. (N. Y.) 95); which merely states that plaintiff holds other security for the debt, sufficient to discharge it, in addition to the mortgage (Weil *v.* Uzzell, 92 N. C. 515).

An answer is not frivolous which shows that the mortgaged property has been taken and condemned for public use and the lien of the mortgage therefore transferred to the damages awarded (Bryan *v.* Altieri, 36 N. Y. App. Div. 623, 55 N. Y. Suppl. 152); nor one which alleges tender of the amount due before suit brought (Warner *v.* Billings, 33 N. Y. App. Div. 641, 53 N. Y. Suppl. 805); nor one denying an allegation that defendant claims some interest in the property (West End Sav., etc., Assoc. *v.* Niver, 4 N. Y. App. Div. 618, 39 N. Y. Suppl. 414); nor one which in response to the same general allegation states that defendant has a lien on the premises and claims that it is prior to plaintiff's mortgage (Older *v.* Russell, 8 N. Y. App. Div. 518, 40 N. Y. Suppl. 892); and an answer that instalments are not due according to the bond, although they may be according to the condition of the mortgage, is not frivolous, although it may be insufficient (Martin *v.* Weil, 8 Wis. 220).

92. See the statutes of the different states. And see cases cited in three notes next succeeding.

As to affidavit of ownership see Scott *v.* Calvert, 10 Del. Co. (Pa.) 80.

93. Fraley *v.* Steinmetz, 22 Pa. St. 437.

94. Horner *v.* Warfield, 180 Pa. St. 103, 36

mortgage debt will generally be sufficient, as it entirely negatives the right of action.[95]

g. Time For Filing. The time within which an answer in foreclosure proceedings must be filed is generally regulated by statute.[96] Where this is not the case, plaintiff may rule defendant to answer on proper notice,[97] or a defendant who has been dilatory in this respect may obtain leave of court to file his answer, provided it presents a meritorious defense, and subject to terms, in the discretion of the court.[98]

h. Withdrawal of Answer. Where it appears that the mortgage debt has been paid, but the mortgage not satisfied, defendant mortgagor cannot, by withdrawing his answer to that effect, defeat the rights of a second mortgagee.[99]

3. Cross Bill — a. Propriety of Cross Bill. In a mortgage foreclosure suit, a cross bill may be filed by the mortgagor to obtain a reformation of the mortgage,[1] or its cancellation on the ground of invalidity,[2] or to avail himself of matters going in diminution of the mortgage debt or a set-off or counter-claim.[3] A senior mortgagee, made a defendant, may file such a bill in order to assert and establish the superiority of his lien,[4] or to obtain a foreclosure of his mortgage.[5] Such a bill may be filed by a junior mortgagee to redeem from the elder lien,[6] to

Atl. 418; Chaffey *v.* Boggs, 179 Pa. St. 301, 36 Atl. 241; Jamestown First Nat. Bank *v.* Scofield, 168 Pa. St. 407, 31 Atl. 1012, 1016; Morgan *v.* Morgan, 166 Pa. St. 450, 31 Atl. 130; May *v.* Meehan, 159 Pa. St. 419, 28 Atl. 204; Asay *v.* Lieber, 92 Pa. St. 377; Witmer *v.* Co-operative Bldg., etc., Assoc., 3 Pennyp. (Pa.) 459; Zeibert *v.* Grew, 6 Whart. (Pa.) 404; Vetter *v.* Vetter, 13 Pa. Super. Ct. 584; Kidd *v.* Koch, 2 Pa. Co. Ct. 285; Building Assoc. *v.* Bashare, 1 Leg. Rec. (Pa.) 56; McClaughry *v.* McClaughry, 22 Wkly. Notes Cas. (Pa.) 338; Birkey *v.* Whitaker, 4 Wkly. Notes Cas. (Pa.) 137; Bruner *v.* Wallace, 4 Wkly. Notes Cas. (Pa.) 53; Saving Assoc. *v.* Morrison, 1 Wkly. Notes Cas. (Pa.) 282; Rhine *v.* Rheinstrom, 1 Wkly. Notes Cas. (Pa.) 131; Haag *v.* Keely, 1 Woodw. (Pa.) 159.

95. Collins *v.* Hansen, 2 Pennew. (Del.) 155, 44 Atl. 624; Faulkner *v.* Wilson, 3 Wkly. Notes Cas. (Pa.) 339. But see Selden *v.* Building Assoc., 2 Wkly. Notes Cas. (Pa.) 481, holding that an affidavit of defense to a scire facias sur mortgage alleging payment is not sufficient unless the payment is alleged to have been made on account of the claim in suit.

96. See the statutes of the different states. And see Fisher *v.* Wannamacher, 2 Pennew. (Del.) 32, 43 Atl. 89; Foote *v.* Beckwell, 34 Iowa 492; Sweet *v.* Porter, 12 Iowa 387; Watts *v.* White, 12 Iowa 330; Smith *v.* Hoyt, 14 Wis. 252; Morley *v.* Guild, 13 Wis. 576.

97. Cornell *v.* Skinner, 10 Wis. 487.

98. Hathaway *v.* Baldwin, 17 Wis. 616; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846; Williams *v.* Atkinson, 1 Ch. Chamb. (U. C.) 34; Anonymous, 12 Grant Ch. (U. C.) 51.

99. Walker *v.* Mebane, 90 N. C. 259.

1. Cottrell *v.* Ætna L. Ins. Co., 97 Ind. 311.

2. Kuhl *v.* M. Gally Universal Press Co., 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135; Randall *v.* Reynolds, 61 N. J. Eq. 334, 48 Atl. 768.

Conveyance to subsequent purchaser.— Where a subsequent purchaser of the premises is made a defendant in a foreclosure suit, a cross bill by the mortgagor, seeking to have his conveyance of the property to that defendant set aside on the ground of fraud and failure of consideration is proper, for the purpose of determining who has the right of redemption. Dawson *v.* Vickery, 150 Ill. 398, 37 N. E. 910.

3. Morrison *v.* Morrison, 140 Ill. 560, 30 N. E. 768; Beebe *v.* Swartwout, 8 Ill. 162; Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163. *Compare* Ratliff *v.* Davis, 38 Miss. 107.

Defect of title not a ground.— On foreclosure of a purchase-money mortgage, a defect in the title is not ground for a cross bill, in the absence of fraud in the sale or insolvency of the vendor. Magee *v.* McMillan, 30 Ala. 420.

Usury in the mortgage note and partial payments thereon cannot be exhibited by means of a cross bill, where they amount to less than the mortgage debt, as they are simply matters of defense. Thompson *v.* Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193.

In New York a cross bill is not necessary to enable a defendant in foreclosure to avail himself of a set-off. Jennings *v.* Webster, 8 Paige (N. Y.) 503, 35 Am. Dec. 722; Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264 note.

4. Porter *v.* Reid, 81 Ind. 569; Salem First Nat. Bank *v.* Salem Capital Flour Mills Co., 31 Fed. 580, 12 Sawy. 485, 496.

5. Newhall *v.* Livermore Bank, 136 Cal. 533, 69 Pac. 248; Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301; Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 43 Hun (N. Y.) 521 [*affirmed* in 106 N. Y. 673, 13 N. E. 937].

6. Buckner *v.* Sessions, 27 Ark. 219; Hurd *v.* Case, 32 Ill. 45, 83 Am. Dec. 249; Hunter *v.* Stark, 17 Ont. Pr. 47.

assert facts which should in equity subordinate plaintiff's lien to his own,[7] or for the foreclosure of his own mortgage in conjunction with that of the complainant.[8] And generally, where rights exist between co-defendants in respect to the property involved, which are affected by the matters alleged in the bill, and on account of which one defendant may be compelled, in order to obtain his full rights, to demand affirmative relief against the complainant, he may file a cross bill.[9]

b. Necessity For Cross Bill. Where the mortgagor simply denies plaintiff's right of action and resists foreclosure, it may be done by plea or answer;[10] but if, beyond this, he seeks any affirmative relief against plaintiff, he must file a cross bill.[11] A defendant cannot, by answer alone, avail himself of the defense of fraud in the consideration of the mortgage, unless it goes to the extent of a complete nullification of the instrument.[12] If defendant in foreclosure means to insist on an agreement by which plaintiff was to accept a conveyance of part of the mortgaged land in fee, as a satisfaction of his whole claim, he must file a cross bill, in order to obtain specific performance of the agreement, and cannot have this relief on his answer alone.[13] Where one defendant demands relief against another defendant, it cannot be granted on their respective answers, but there must be a cross bill.[14] But ordinarily, where the answers of various defendants claim liens on the mortgaged premises, the court has power, without the filing of cross bills, to determine the existence and priority of the various liens and protect and preserve the rights of the parties in the distribution of the proceeds.[15] Thus, if a junior mortgagee is made a party and answers, his right to participate in the surplus proceeds of the foreclosure sale may be asserted in his answer and he need not file a cross bill for this purpose;[16] and some of the decisions recognize his right to set up in his answer, without a cross bill, a claim of priority

7. Porter *v.* Grady, 21 Colo. 74, 39 Pac. 1091; Vanderveer *v.* Holcomb, 21 N. J. Eq. 105.

8. Montpelier Sav. Bank, etc., Co. *v.* Arnold, 81 Iowa 158, 46 N. W. 982; U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41. But *compare* Sebring *v.* Conkling, 32 N. J. Eq. 24.

9. Camp *v.* Peacock, etc., Co., 129 Fed. 1005, 64 C. C. A. 490.

An **assignee of one of the several notes** secured by the mortgage, whose equities may turn out to be different from those of the mortgagee, has the right to file a cross bill. Wilcox *v.* Allen, 36 Mich. 160.

A partition of mortgaged premises cannot be demanded by a cross bill filed in the foreclosure suit. Matthews *v.* Lindsay, 20 Fla. 962.

Distribution of proceeds.— The mortgagor will not be permitted, by a cross bill, to compel litigation between plaintiffs as to their respective rights on distribution of the proceeds of foreclosure. Harrison *v.* Pike, 48 Miss. 46.

10. Edgerton *v.* Young, 43 Ill. 464; Genthner *v.* Fagan, 85 Tenn. 491, 3 S. W. 351.

11. Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564; Davis *v.* Cook, 65 Ala. 617; Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081; Conwell *v.* McCowan, 53 Ill. 363.

Purchase-money mortgage.— The answer to a bill to foreclose a purchase-money mortgage cannot pray anything but that the bill be dismissed; and if any other relief or discovery is sought against the complainant, it must be done by a cross bill. Miller *v.* Gregory, 16 N. J. Eq. 274. Thus, in such an action, fraud or false representations inducing the purchase must be pleaded by cross bill. Mattair *v.* Card, 18 Fla. 761; Benedict *v.* Hunt, 32 Iowa 27; Miller *v.* Gregory, *supra*. But it seems that a cross bill is not necessary to enable defendant to reduce the amount of plaintiff's recovery by a deduction for deficiency in the quantity of the land conveyed or for prior outstanding liens. Dayton *v.* Melick, 27 N. J. Eq. 362.

Reformation of the mortgage, where it does not express the true contract of the parties, in consequence of fraud or mistake, must be demanded by cross bill. French *v.* Griffin, 18 N. J. Eq. 279; Commonwealth Title Ins., etc., Co. *v.* Cummings, 83 Fed. 767.

12. Parker *v.* Jameson, 32 N. J. Eq. 222.

13. Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193.

14. *Alabama.*— Cullum *v.* Erwin, 4 Ala. 452.

Illinois.— Erlinger *v.* Boul, 7 Ill. App. 40.

Indiana.— Thompson *v.* Harlow, 150 Ind. 450, 50 N. E. 474.

New Jersey.— Grocers' Bank *v.* Neet, 29 N. J. Eq. 449; Brinkerhoff *v.* Franklin, 21 N. J. Eq. 334.

South Carolina.— Phillips *v.* Anthony, 47 S. C. 460, 25 S. E. 294.

See 35 Cent. Dig. tit. "Mortgages," § 1330.

15. Gardner *v.* Cohn, 191 Ill. 553, 61 N. E. 492; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Ames *v.* New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385; Klonne *v.* Bradstreet, 7 Ohio St. 322.

16. Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Gardner *v.* Cohn, 191 Ill. 553,

over the mortgage in suit,[17] and also extend the rule to judgment creditors joined as parties [18] and to subsequent purchasers of the premises.[19]

e. Sufficiency of Cross Bill. Where a defendant in foreclosure files a cross bill and asks for affirmative relief thereon, he must set forth his cause of action or ground for relief with the same particularity, completeness, and exactness as would be required if he were plaintiff and were setting it forth in his bill or complaint.[20] The cross bill must be confined to matters germane to the matters set forth in the original bill.[21] In some cases the cross bill must be accompanied by a tender of the amount admitted to be due.[22]

d. Parties. A cross bill may be filed by one or more of the defendants against any or all of the complainants, or by any of the defendants against one or more of his co-defendants.[23] It should be filed against all necessary parties, but need not join as defendants any persons whose rights are in no way involved in the questions presented by the cross bill, although they may be parties to the main action.[24] The fact that a cross bill in foreclosure makes the trustee a party

61 N. E. 492; Wallen *v.* Moore, 187 Ill. 190, 58 N. E. 392; Boone *v.* Colehour, 165 Ill. 305, 46 N. E. 253; Armstrong *v.* Warrington, 111 Ill. 430; Powell *v.* Starr, 100 Ill. App. 105.

17. Inter-State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342; Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; McGuckin *v.* Kline, 31 N. J. Eq. 454; Wade *v.* Strever, 42 N. Y. App. Div. 330, 59 N. Y. Suppl. 76; Gerrish *v.* Bragg, 55 Vt. 329. But see Powell *v.* Starr, 100 Ill. App. 105 (holding that a junior encumbrancer, when made a party to a foreclosure suit, cannot have affirmative relief, beyond a participation in the proceeds of the sale, without a cross bill asking for such relief); Armstrong *v.* Wade, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396.

Expenses of preserving property.— The junior mortgagee may set up in his answer, without a cross bill, a paramount claim for expenses incurred and necessarily paid to preserve the property. Fiacre *v.* Chapman, 32 N. J. Eq. 463.

18. Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408. But *compare* Speer *v.* Whitfield, 10 N. J. Eq. 107.

19. Caruthers *v.* Hall, 10 Mich. 40.

20. *Arkansas.*— Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121.

California.— Van Loben Sels *v.* Bunnell, 131 Cal. 489, 63 Pac. 773.

Illinois.— Handly *v.* Munsell, 109 Ill. 362. A cross bill filed by a defendant in foreclosure, which shows that he has an action pending against plaintiff for the same matters which he seeks to have set off against plaintiff's demand, is bad on demurrer. Smith *v.* Billings, 62 Ill. App. 77.

Indiana.— Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Dudenhofer *v.* Johnson, 144 Ind. 631, 43 N. E. 868; Sperry *v.* Dickinson, 82 Ind. 132; Stedman *v.* Freeman, 15 Ind. 86. A cross complaint seeking foreclosure of a mortgage is sufficient on appeal, although it does not describe the land, but refers to the complaint for a description. Loeb *v.* Tinkler, 124 Ind. 331, 24 N. E. 235.

Kansas.— Wright *v.* Bachelier, 16 Kan. 259.

Nebraska.— American Exch. Nat. Bank *v.* Fockler, 49 Nebr. 713, 68 N. W. 1039.

New Jersey.— Herbert *v.* Scofield, 9 N. J. Eq. 492.

United States.— Blair *v.* St. Louis, etc., R. Co., 27 Fed. 176 [*affirmed* in 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721]. A cross bill filed by a defendant in foreclosure, setting up an executory agreement for the sale and transfer of a portion of the mortgaged property to him by his co-defendant, the mortgagor, at a future date, states no ground on which the court can grant him present affirmative relief, and is demurrable. Camp *v.* Peacock, 129 Fed. 1005, 64 C. C. A. 490.

See 35 Cent. Dig. tit. "Mortgages," § 1331.

21. See Plum *v.* Smith, 56 N. J. Eq. 473, 39 Atl. 1069; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8. *Compare* Stockton Sav., etc., Soc. *v.* Harrold, 127 Cal. 612, 60 Pac. 165; Powell *v.* Sampson, 107 Ill. App. 230, holding that a cross bill by some of several defendants may be germane to the original bill, although it puts in issue matters in which only they and the complainant are interested.

Not confined to property in original mortgage.— A cross complaint brought against the mortgagor by one of the defendants may extend to all the property covered by the cross complainant's lien, and is not necessarily confined to the property covered by the original mortgage. U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

22. Stevens *v.* Meers, 11 Ill. App. 138, where the cross bill is based on the ground of usury. But *compare* Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081, holding that to maintain a cross complaint, seeking to recover from the mortgagee an unpaid portion agreed upon as the consideration for the mortgage, the mortgagor is not required to tender plaintiff the interest on the amount he has received.

23. Rankin *v.* Major, 9 Iowa 297; Hapgood *v.* Ellis, 11 Nebr. 131, 7 N. W. 845.

24. Hays *v.* McLain, 66 Ark. 400, 50 S. W. 1006; Jackson *v.* Dutton, 46 Fla. 513, 35 So.

in his individual capacity as well as in his capacity as trustee does not render the bill demurrable.[25]

4. Other Pleadings — a. Replication — (I) *In General.* Where the answer raises an issue but introduces no new matter, a replication is not necessary;[26] but otherwise, unless dispensed with by statute,[27] the material allegations of the answer must be traversed by a replication, and that with such explicitness and in such form as to raise an issue.[28]

(II) *Departure.* Plaintiff's replication in a foreclosure suit must not abandon the title or right set up in the complaint, nor rely on matter not supporting or fortifying the complaint, otherwise it will be bad for departure.[29]

b. Demurrer. If the complaint in foreclosure fails to show the facts necessary to give the court jurisdiction, it is demurrable,[30] or if it appears from its face that plaintiff has no cause of action or is entitled to no relief.[31] But if the complaint shows a cause of action in plaintiff and that he is entitled to some relief, the question as to what kind of relief or how much shall be granted to him cannot be made by demurrer.[32] A demurrer may be interposed to an answer which does not show a defense.[33] Demurrer does not lie because the bill fails to show that plaintiff paid a money consideration for the mortgage;[34] nor to determine whether outstanding receivers' certificates are liens superior or inferior to the mortgage.[35] Where the description of the property in the bill is the same as

74; Klonne *v.* Bradstreet, 2 Handy (Ohio) 74, 12 Ohio Dec. (Reprint) 336.

25. Mobile Sav. Bank *v.* Burke, 94 Ala. 125, 10 So. 328.

26. Daggs *v.* Bolton, (Ariz. 1899) 57 Pac. 611; Colby *v.* McOmber, 71 Iowa 469, 32 N. W. 459; Wade *v.* Strever, 166 N. Y. 251, 59 N. E. 825. And see American Guild *v.* Damon, 107 N. Y. App. Div. 140, 94 N. Y. Suppl. 985.

Claim of prior lien.— Where a defendant in a suit to foreclose sets up an absolute title, subject only to plaintiff's mortgage, or a lien prior to all other liens except that of plaintiff's mortgage, the decree will be conclusive against plaintiff as to any other claims he may have, if he neglects to file a replication. Tower *v.* White, 10 Paige (N. Y.) 395.

27. See the statutes of the different states. And see McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516; Devine *v.* U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. 585.

28. Bowman *v.* Mitchell, 97 Ind. 155; Reagan *v.* Hadley, 57 Ind. 509; Watt *v.* Alvord, 25 Ind. 533; Rupert *v.* Morton, 19 Ind. 313; Stedman *v.* Freeman, 15 Ind. 86; New York Mut. L. Ins. Co. Robinson, 24 N. Y. App. Div. 570, 49 N. Y. Suppl. 887; Ludington *v.* Slauson, 38 N. Y. Super. Ct. 81; Warner *v.* Scottish Mortg., etc., Co., (Tex. Civ. App. 1894) 27 S. W. 817.

Issue as to satisfaction.— Where, in an action against a purchaser of mortgaged land to foreclose the mortgage, the answer alleges that the mortgage was satisfied, a reply stating that the satisfaction was without consideration does not raise an issue. Reeder *v.* Nay, 95 Ind. 164.

29. Masillon Engine, etc., Co. *v.* Carr, 71 S. W. 859, 24 Ky. L. Rep. 1534 (holding that where the petition claimed a right to sell a homestead under the mortgage lien, the reply cannot assert a right to any different interest in the property); Darling *v.* Chapman, 14 Mass. 101 (holding that where the debt was payable on demand after twenty days' notice, and the answer pleaded want of demand, and the reply alleged demand on a certain day, a rejoinder that on that day defendant was ready and offered to pay but plaintiff waived his demand is bad for departure).

It is no departure to reply that the proceeds of a sale were appropriated to other debts where the answer alleges satisfaction by the sale of other property pledged to the mortgagee. Martin *v.* Davis, 15 Ind. 478. Nor is it a departure where the answer sets up usury, and the reply is that the excessive interest was agreed to be paid for an extension of time. Hunter *v.* Rice, 87 Ind. 312. Neither is it a departure to change the date alleged as the time of the execution and delivery of the mortgage, in order to escape the effect of an answer stating that defendant had no title to the premises at the date first alleged. McFall *v.* Murray, 4 Kan. App. 554, 45 Pac. 1100.

30. Cobb *v.* Harrison, 20 Wis. 625.

31. Shufelt *v.* Shufelt, 9 Paige (N. Y.) 137, 37 Am. Dec. 381; Walton *v.* Goodnow, 13 Wis. 661.

As a writ of scire facias to foreclose a mortgage is regarded both as process and as a declaration defects in it can be reached by demurrer. Osgood *v.* Stevens, 25 Ill. 89; McFadden *v.* Fortier, 20 Ill. 509; Marshall *v.* Maury, 2 Ill. 231.

32. Poett *v.* Stearns, 28 Cal. 226; Medley *v.* Horton, 5 Jur. 1031. And see Garrett *v.* Simpson, 115 Ill. App. 62, holding that a general demurrer to a bill to foreclose is properly overruled, where the bill sets up an equitable cause of action.

33. Pelton *v.* Farmin, 18 Wis. 222.

34. Kingsmill *v.* Gardner, 1 U. C. Q. B. O. S. 677.

35. Cleveland Sav., etc., Co. *v.* Bear Valley Irr. Co., 112 Fed. 693.

in the mortgage, it is no ground for demurrer that evidence of the situation of the property is necessary for the application of the description to it.[36] On overruling a demurrer to the bill for foreclosure, if it appears that there is no defense defendant may be required to answer instanter, and on his failure to do so the bill may be taken as confessed.[37] Where the mortgagor's demurrer to plaintiff's petition has been sustained, it is still proper for the court to hear and determine claims to liens upon the property set up by the other defendants in their answers, although the mortgagee does not amend his petition.[38]

c. Supplemental Pleadings. A supplemental bill or complaint may be filed where the action was brought on default in payment of one instalment of interest or principal of the mortgage debt and others mature pending the suit or after decree;[39] where, pending the action, there is a change in the ownership of the securities;[40] where it is necessary to bring in new parties;[41] or where plaintiff becomes entitled to further or different relief.[42] Defendant may in proper cases bring forward new matter by supplemental answer,[43] but not after a decree of sale and where nothing remains to complete its execution except the confirmation of the sale.[44]

d. Amended Pleadings — (1) *In General.* In mortgage foreclosure suits, any variance between the averments of the bill or complaint and the causes of action filed with it may generally be corrected by amendment;[45] and so plaintiff will ordinarily be allowed to amend by adding averments necessary to sustain or complete his right of action but omitted from the bill as originally drawn,[46] or by striking out allegations which prove to be inconsistent with the evidence, and inserting others in their place,[47] but not so as to create or introduce an entirely new cause of action.[48] And similar conditions may justify the granting of leave to defendant to amend his answer.[49] An amended bill or complaint takes the place of the original one, and should contain all that is essential to present a complete cause of action.[50]

36. Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. 622.

37. Snell *v.* Stanley, 63 Ill. 391.

38. Klonne *v.* Bradstreet, 7 Ohio St. 322.

39. *Iowa.*— Whiting *v.* Eichelberger, 16 Iowa 422.

Louisiana.— Mader *v.* Fox, 15 La. 132.

Michigan.— Albany City Bank *v.* Steevens, Walk. 6.

Ohio.— Glenn *v.* Hoffman, 2 Ohio Dec. (Reprint) 401, 2 West. L. Month. 599.

United States.— New York Security, etc., Co. *v.* Lincoln St. R. Co., 74 Fed. 67.

See 35 Cent. Dig. tit. "Mortgages," § 1339.

40. Cooper *v.* Bigly, 13 Mich. 463; Williamson *v.* New Jersey Southern R. Co., 25 N. J. Eq. 13.

41. See *supra*, XXI, D, 4, b.

42. Richard *v.* Bird, 4 La. 305; Belles *v.* Miller, 10 Wash. 259, 38 Pac. 1050.

43. Hall *v.* Home Bldg. Co., 56 N. J. Eq. 304, 38 Atl. 447; Farmers' L. & T. Co. *v.* Reid, 3 Edw. (N. Y.) 414.

44. Sulek *v.* McWilliams, 72 Ark. 67, 78 S. W. 769.

45. *California.*— Hutchinson *v.* Ainsworth, 63 Cal. 286.

Indiana.— Ebersole *v.* Redding, 22 Ind. 232.

Nebraska.— Gregory *v.* Tingley, 18 Nebr. 318, 25 N. W. 88.

New Jersey.— Anonymous, 10 N. J. L. J. 141.

Wisconsin.— Andrews *v.* Powers, 35 Wis. 644; Ames *v.* Ames, 5 Wis. 160.

See 35 Cent. Dig. tit. "Mortgages," § 1340.

46. Manley *v.* Mickle, 53 N. J. Eq. 155, 32 Atl. 210; Armstrong *v.* Ross, 20 N. J. Eq. 109; Tower *v.* White, 10 Paige (N. Y.) 395. See also U. S. Bank *v.* Carroll, 4 B. Mon. (Ky.) 40.

47. Erickson *v.* Rafferty, 79 Ill. 209; Lovett *v.* German Reformed Church, 12 Barb. (N. Y.) 67; North River Bank *v.* Rogers, 8 Paige (N. Y.) 648; Whitmire *v.* Boyd, 53 S. C. 315, 31 S. E. 306; Witters *v.* Sowles, 61 Vt. 366, 18 Atl. 191.

48. Fort *v.* Litmer, 31 Ohio St. 215; Barrett *v.* Crosthwaite, 9 Grant Ch. (U. C.) 422. See also Van Riper *v.* Claxton, 9 N. J. Eq. 302.

Amendment as to description of property. — An amendment setting out that there is a mistake in the description of the property in the mortgage, and asking that the mortgage be reformed, does not state a new cause of action. Keys *v.* Lardner, 59 Kan. 545, 53 Pac. 758.

49. *California.*— Woodland Bank *v.* Heron, 122 Cal. 107, 54 Pac. 537.

Michigan.— Balen *v.* Mercier, 75 Mich. 42, 42 N. W. 666.

New York.— French *v.* Row, 77 Hun 380, 28 N. Y. Suppl. 849.

South Carolina.—Duckworth *v.* McKinney, 58 S. C. 418, 36 S. E. 730.

United States.— Cross *v.* Morgan, 6 Fed. 241.

See 35 Cent. Dig. tit. "Mortgages," § 1341.

50. Holdridge *v.* Sweet, 23 Ind. 118;

(II) *TIME FOR AMENDMENT.* The complaint in a foreclosure suit may be amended, not only before trial, but at the hearing,[51] or after judgment or decree,[52] and even years after a foreclosure sale.[53] These matters rest very much in the discretion of the court, and should be determined in accordance with the requirements of equity as toward all parties; but the power of allowing amendments after judgment should be sparingly exercised.[54]

5. ISSUES, PROOF, AND VARIANCE — a. Issues For Determination — (I) *IN GENERAL.* Under pleadings properly framed for that purpose, the execution and validity of the mortgage may be put in issue,[55] as also defendant's liability and plaintiff's right to sue,[56] the extent and nature of the property covered by the mortgage,[57] and the mortgagor's title to it,[58] as well as the titles or rights of third parties made defendants under the general allegation that they claim some interest in the premises.[59] An issue may also be raised as to the amount due under the mortgage and its reduction by offsets or credits,[60] but it will not be proper to adjudicate as to other transactions and indebtedness between the parties not covered by the bill or cross bill.[61] Although an issue may properly be raised and determined as to the rights of another encumbrancer, joined as a party and pleading, as against the complainant,[62] and the issues may be so framed as to warrant an adjudication concerning the relative rights or priorities of two or more junior encumbrancers,[63] yet, aside from the question of their liens on the property in suit, it will not ordinarily be proper to pass upon the rights of co-defendants as between themselves.[64]

(II) *ADVERSE AND PARAMOUNT TITLE.* As a general rule the determination of a title hostile to the mortgage and paramount to that of the mortgagor cannot

Schultz *v.* Loomis, 40 Nebr. 152, 58 N. W. 693.

51. Slater *v.* Breese, 36 Mich. 77. See also Kiddell *v.* Bristow, 67 S. C. 175, 45 S. E. 174.

52. Swatara Sav., etc., Assoc. *v.* Foley, 2 Pearson (Pa.) 265; Court *v.* Holland, 4 Ont. 688; Clarke *v.* Cooper, 15 Ont. Pr. 54; Rumble *v.* Moore, 1 Ch. Chamb. (U. C.) 59.

53. Graves *v.* Fritz, 24 Nebr. 375, 38 N. W. 819; Forman *v.* Manley, 52 N. J. Eq. 712, 29 Atl. 434.

54. Field *v.* Hawxhurst, 9 How. Pr. (N. Y.) 75; Montreal Bank *v.* Power, 2 Ch. Chamb. (U. C.) 47; Lawrason *v.* Buckley, 15 Grant Ch. (U. C.) 585.

55. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373; Matteson *v.* Morris, 40 Mich. 52; Kay *v.* Churchill, 10 Abb. N. Cas. (N. Y.) 83 [*affirmed* in 25 Hun 193].

Defenses of invalidity and payment.— Where defendant in foreclosure sets up both invalidity of the mortgage and payment of the mortgage debt, it is error for the court, after deciding the former issue in his favor, to refuse to pass on the second, since, although the mortgage may be invalid, still a money judgment could be given for the debt if it remained unpaid. Gleaton *v.* Gibson, 29 S. C. 514, 7 S. E. 833.

56. Skinner *v.* Harker, 23 Colo. 333, 48 Pac. 648; Rosseel *v.* Jarvis, 15 Wis. 571.

Capacity of plaintiff.— Where plaintiff in foreclosure is a corporation, and joins as a defendant a subsequent judgment creditor of the mortgagor, a general denial by the latter does not put in issue the corporate character of plaintiff nor its power to sue in the court. U. S. National L. Ins. Co. *v.* Robinson, 8 Nebr. 452, 1 N. W. 124.

57. Security L. & T. Co. *v.* Boston, etc., Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; Point Breeze Ferry, etc., Co. *v.* Bragaw, 47 N. J. Eq. 298, 20 Atl. 967; Sidney Stevens Implement Co. *v.* South Ogden Land, etc., Co., 20 Utah 267, 58 Pac. 843. But see Wylie *v.* Lipsey, 31 S. C. 608, 9 S. E. 1056, holding that in an action merely for the foreclosure of a mortgage covering an undivided interest in land, the nature and extent of such interest are not matters pertinent to the question whether plaintiff is entitled to foreclose.

58. Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Gordon *v.* Collett, 104 N. C. 381, 10 S. E. 564.

59. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Holabird *v.* Burr, 17 Conn. 556; Keys *v.* Lardner, 55 Kan. 331, 40 Pac. 644.

60. Pearson *v.* Neeves, 92 Wis. 319, 66 N. W. 357.

Rents and profits.— If the question of the liability of the mortgagee to account for rents and profits is not raised by the pleadings, the master cannot, without special directions, consider it. Wycoff *v.* Combs, 28 N. J. Eq. 40.

61. Perdue *v.* Brooks, 95 Ala. 611, 11 So. 282.

62. Brown *v.* Willis, 67 Cal. 235, 7 Pac. 682; Bradshaw *v.* Van Valkenburg, 97 Tenn. 316, 37 S. W. 88.

63. Schmidt *v.* Zahrndt, 148 Ind. 447, 47 N. E. 335; Norwood *v.* Norwood, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875.

64. Lebanon Sav. Bank *v.* Waterman, 65

be brought within the proper scope of the issues in a foreclosure suit, and should not be undertaken by the court.[65] Hence the complainant has no right to join the holder of such a title as a defendant and compel the submission and adjudication of the adverse title;[66] and on the other hand a third party joined as defendant cannot, by pleading such a title, bring it before the court for determination,[67] unless it may be when plaintiff accepts the issue and consents to litigate the question;[68] but the proper course is to dismiss or discontinue the suit as to that defendant.[69]

b. Matters to Be Proved. If defendant in foreclosure suffers default or permits the bill to be taken *pro confesso*, or files an answer admitting material allegations of the bill or complaint, this dispenses with the necessity of proving such averments of the bill as are well pleaded.[70] But in the face of a denial or traverse, it is incumbent on plaintiff to present evidence in support of every fact essential to show his ownership of the securities and his right to foreclose and the liability of defendant and of the premises in suit.[71] Similarly a defendant who sets up matter in avoidance of the mortgage, or of his liability thereon, must support his answer by pertinent evidence;[72] and a general denial to a petition in

N. H. 88, 17 Atl. 577, (1890) 19 Atl. 1000; Hovenden *v.* Knott, 12 Oreg. 267, 7 Pac. 30.

65. See *infra*, XXI, G, 1, b, (III).

66. See *supra*, XXI, D, 3, h, (I).

67. Cody *v.* Bean, 93 Cal. 578, 29 Pac. 223; Ord *v.* Bartlett, 83 Cal. 428, 23 Pac. 705; Nugent *v.* Nugent, 50 Mich. 377, 15 N. W. 517; Bell *v.* Pate, 47 Mich. 468, 11 N. W. 275; Hekla F. Ins. Co. *v.* Morrison, 56 Wis. 133, 14 N. W. 12; Farmers' L. & T. Co. *v.* San Diego St. Car Co., 40 Fed. 105. But see Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706, holding that, if a third person is joined as a defendant on the general allegation that he claims some interest in or lien upon the premises, but that it is subsequent to the mortgage, he may answer setting up a paramount title, and it must be tried and determined, unless plaintiff discontinues the suit as to him.

68. Wilson *v.* Jamison, 36 Minn. 59, 29 N. W. 887, 1 Am. St. Rep. 635; Cromwell *v.* Wilson, 5 N. Y. Suppl. 474.

69. Ord *v.* Bartlett, 83 Cal. 428, 23 Pac. 705.

70. *Arkansas.*— Johnson *v.* Trotter, (1891) 15 S. W. 1025.

California.— Cortelyou *v.* Jones, (1900) 61 Pac. 918.

Colorado.— Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251.

Illinois.— Dean *v.* Ford, 180 Ill. 309, 54 N. E. 417; Loughridge *v.* Northwestern Mut. L. Ins. Co., 180 Ill. 267, 54 N. E. 153; Moore *v.* Titman, 33 Ill. 358.

Indiana.— Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407.

Iowa.— Cooley *v.* Hobart, 8 Iowa 358.

Kansas.— Case *v.* Edson, 40 Kan. 161, 19 Pac. 635.

New Jersey.— Mulford *v.* Williams, 8 N. J. Eq. 536.

Pennsylvania.— George *v.* Tradesmen's Bldg., etc., Assoc., 1 Walk. 533; Schupp *v.* Schupp, 1 Pa. Cas. 283, 2 Atl. 870.

England.— Hartland *v.* Dancocks, 5 De G. & Sm. 561, 21 L. J. Ch. 449, 64 Eng. Reprint 1243.

See 35 Cent. Dig. tit. "Mortgages," § 1344.

71. Dimon *v.* Bridges, 8 How. Pr. (N. Y.) 16 (showing conditions of bond and mortgage); Loan, etc., Bank *v.* Peterkin, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900 (showing title of mortgagor).

Plaintiff's ownership of debt and mortgage, if traversed, must be proved, by showing an assignment of them to him or otherwise. McFarland *v.* Dey, 69 Ill. 419; Brown *v.* Woodbury, 5 Ind. 254; Nesbitt *v.* Campbell, 5 Nebr. 429; Wyman *v.* Russell, 30 Fed. Cas. No. 18,115, 4 Biss. 307.

Existence and bona fides of debt secured.— De Vendal *v.* Malone, 25 Ala. 272; Bennett *v.* Taylor, 5 Cal. 502; Hull *v.* Fuller, 7 Vt. 100.

Breach of condition.— On suit to foreclose a mortgage, it is not necessary for plaintiff to prove that interest has not been paid. Sowarby *v.* Russell, 6 Rob. (N. Y.) 322. And see Markle *v.* Ross, 13 Ont. Pr. 135.

Explaining recorded satisfaction.— If defendant relies on an entry of satisfaction or cancellation on the record, plaintiff may explain it away by proof of fraud or mistake. Valle *v.* American Iron Mountain Co., 27 Mo. 455; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

Showing joinder of necessary parties.— McKenzie *v.* Hartford L., etc., Ins. Co., 42 Ill. App. 157.

Liability of subsequent purchaser, and notice of mortgagee's lien.— Mobile Bank *v.* Planters', etc., Bank, 8 Ala. 772; Merrick *v.* Leslie, 62 Ind. 459.

No proceedings at law for recovery of debt.— Woolworth *v.* Slater, 63 Nebr. 418, 88 N. W. 682; Plummer *v.* Park, 62 Nebr. 665, 87 N. W. 534; Kirby *v.* Shrader, 58 Nebr. 316, 78 N. W. 616; Jones *v.* Burtis, 57 Nebr. 604, 78 N. W. 261; Chaffee *v.* Sehestedt, 4 Nebr. 740, 96 N. W. 161; Alling *v.* Woodward, 2 Nebr. (Unoff.) 235, 96 N. W. 127; Lancashire Ins. Co. *v.* Kierstead, 1 Nebr. (Unoff.) 437, 95 N. W. 675; Pratt *v.* Gallaway, 1 Nebr. (Unoff.) 168, 172, 95 N. W. 329.

72. *Illinois.*— White *v.* Morrison, 11 Ill. 361.

intervention on foreclosure puts the intervener on proof of every fact necessary to authorize the relief sought.[73]

e. Evidence of Defenses Not Pleaded. Defendant in foreclosure may give evidence, without a special plea, of such defenses as payment,[74] former adjudication,[75] or the statute of limitations.[76] But a proper foundation in his pleadings must be laid for the defense of want, invalidity, or illegality of consideration,[77] fraud on the part of plaintiff,[78] usury,[79] or that his interest, in the case of a third party brought in as a defendant, is different from that alleged in the complaint,[80] and generally for any defense resting on special equitable circumstances.[81]

d. Evidence Admissible Under Pleadings. In foreclosure suits a general denial puts in issue the material allegations of the pleading which it answers, although not new affirmative matter;[82] but where facts are specially pleaded, the evidence must not only correspond with the allegations but must also be limited thereby and cannot extend beyond the scope of the pleading.[83]

Michigan.— Smith *v.* Fiting, 37 Mich. 148, equitable set-off.

New Jersey.—Bunker *v.* Anderson, 32 N. J. Eq. 35; Bray *v.* Hartough, 4 N. J. Eq. 46.

Texas.— Montague County *v.* Meadows, (Civ. App. 1897) 42 S. W. 326.

Wisconsin.— Richards *v.* Worthley, 5 Wis. 73, holding that where usury is set up in defense to a bill for foreclosure, strict proof of the usurious contract alleged is necessary.

See 35 Cent. Dig. tit. "Mortgages," § 1344.

73. Hill *v.* Sterling-Goold Mfg. Co., 111 Iowa 458, 82 N. W. 919.

74. Fridley *v.* Bowen, 5 Ill. App. 191 [*reversed* on other grounds in 103 Ill. 633]; Hendrix *v.* Gore, 8 Oreg. 406. But *compare* Polley *v.* Polley, 66 N. Y. App. Div. 609, 72 N. Y. Suppl. 856.

An agreement for extension of the time of payment, not pleaded, and as to which there is no definite evidence, is properly disregarded. Luce *v.* Sorensen, 2 Nebr. (Unoff.) 760, 89 N. W. 1025.

75. Carleton *v.* Byington, 24 Iowa 172.

76. Haskell *v.* Bailey, 22 Conn. 569.

77. Bolling *v.* Munchus, 65 Ala. 558; Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; Thayer *v.* Buchanan, 46 Oreg. 106, 79 Pac. 343; Ripley *v.* Harris, 20 Fed. Cas. No. 11,853, 3 Biss. 199. And see Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407, holding that parol evidence is not admissible to change the terms of a mortgage, as to consideration, unless there is a plea of *non est factum*, or an allegation of mistake in this respect with a prayer for reformation.

78. Wilson *v.* White, 84 Cal. 239, 24 Pac. 114; McGaughey *v.* American Nat. Bank, (Tex. Civ. App. 1906) 92 S. W. 1003.

79. Baldwin *v.* Norton, 2 Conn. 161; Hudnit *v.* Nash, 16 N. J. Eq. 550; Thayer *v.* Buchanan, 46 Oreg. 106, 79 Pac. 343; Cleveland Ins. Co. *v.* Reed, 5 Fed. Cas. No. 2,889, 1 Biss. 180.

80. Kehm *v.* Mott, 86 Ill. App. 549 [*affirmed* in 187 Ill. 519, 58 N. E. 467].

81. Rasmussen *v.* Levin, 28 Colo. 448, 65 Pac. 94; Petteys *v.* Comer, 34 Oreg. 36, 54 Pac. 813; Hathaway *v.* Baldwin, 17 Wis. 616.

82. Kehm *v.* Mott, 187 Ill. 519, 58 N. E. 467; Tron *v.* Yohn, 145 Ind. 272, 43 N. E. 437; Balue *v.* Sear, 131 Ind. 301, 28 N. E. 707; Sanders *v.* Farrell, 83 Ind. 28.

83. *California.*— Malone *v.* Roy, 118 Cal. 512, 50 Pac. 542; Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855.

Connecticut.— Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169.

District of Columbia.— Whitaker *v.* Middle States Loan Co., 7 App. Cas. 203.

Illinois.— Moshier *v.* Knox College, 32 Ill. 155; Gammon *v.* Wright, 31 Ill. App. 353; Carbine *v.* Sebastian, 6 Ill. App. 564.

Iowa.— Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412.

Kansas.— Brier *v.* Brinkman, 44 Kan. 570, 24 Pac. 1108.

Michigan.— Hall *v.* Nash, 10 Mich. 303.

Washington.— Scholey *v.* De Mattos, 18 Wash. 504, 52 Pas. 242.

See 35 Cent. Dig. tit. "Mortgages," § 1346.

This rule applies to matters relating to plaintiff's ownership of the mortgage or debt or his right to maintain the action (Woronieki *v.* Pariskiego, 74 Conn. 224, 50 Atl. 562; Jones *v.* Stoddart, 8 Ida. 210, 67 Pac. 650; Johnson *v.* White, 6 Hun (N. Y.) 587; Grannis *v.* Hobby, 17 N. Y. Suppl. 618 [*affirmed* in 137 N. Y. 559, 33 N. E. 486]; Hays *v.* Lewis, 17 Wis. 210), the extent and description of the premises covered by the mortgage (White *v.* Hyatt, 40 Ind. 385; Bass *v.* Buker, 6 Mont. 442, 12 Pac. 922), the nonpayment or other breach of condition (Cheltenham Imp. Co. *v.* Whitehead, 128 Ill. 279, 21 N. E. 569; Dorn *v.* Geuder, 70 Ill. App. 411), as also to a defense of payment (Stewart *v.* Smith, 111 Ind. 526, 13 N. E. 48; King *v.* King, 9 N. J. Eq. 44; Robinson *v.* Eldridge, 10 Serg. & R. (Pa.) 140), fraud on the part of the complainant (Lord *v.* Lindsay, 18 Hun (N. Y.) 484; Knight *v.* Houghtalling, 85 N. C. 17; White *v.* Provident Nat. Bank, 27 Tex. Civ. App. 487, 65 S. W. 498), counter-claim (Hess *v.* Final, 32 Mich. 515; Thornton *v.* Moore, 41 N. Y. App. Div. 617, 58 N. Y. Suppl. 1150), questions of priority of lien (Clarke *v.* Bancroft, 13 Iowa 320), and the rights and equities of third persons brought in under the general allegation that they claim some interest in or lien upon the premises in con-

e. Variance. A variance between the allegations and the evidence in a mortgage foreclosure suit will be fatal to the recovery,[84] unless where it is merely technical or immaterial and not calculated to mislead,[85] or where it relates to a matter which is only collaterally in issue and is not essential to the right of action.[86] The mortgage, if it is set out, must be copied accurately, and if it is described, must be described with exactness.[87] But a substantial correspondence of the proof with the allegations, disregarding unimportant details and trifling inaccuracies, is all that is required in respect to the debt secured[88] and the note or other obligation evidencing it,[89] as also in regard to the description of the premises.[90] A variance may be waived,[91] and if the parties ignore the issue raised by the pleadings, and by mutual consent try another issue determinative of the case, the finding will not be disturbed, but, if necessary, the pleadings will be considered amended on appeal.[92]

6. Presumptions and Burden of Proof — a. In General. The complainant in foreclosure may ordinarily make out a *prima facie* case by the production of the note and mortgage, and thereby cast on defendant the burden of proving any special defense set up in his answer.[93] These papers, if regular and sufficient on their face, raise the presumption of an actual and valid consideration for the mortgage,[94] and show *prima facie* plaintiff's right to foreclose, if the debt appears on

troversy (Koon *v.* Tramel, 71 Iowa 132, 32 N. W. 243; German Ins. Co. *v.* Nichols, 41 Kan. 133, 21 Pac. 111). But see Covington *v.* Ferguson, (Ind. 1906) 78 N. E. 241.

84. Naar *v.* Union, etc., Land Co., 34 N. J. Eq. 111; Andrews *v.* Powers, 35 Wis. 644; Ames *v.* Ames, 5 Wis. 160.

85. Hadley *v.* Chapin, 11 Paige (N. Y.) 245; Montague County *v.* Meadows, (Tex. Civ. App. 1897) 42 S. W. 326; Knowlton *v.* Bowron, 7 Wis. 500.

86. Field *v.* Brokaw, 148 Ill. 654, 37 N. E. 80; Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770.

87. McFadden *v.* Fortier, 20 Ill 509, holding that where the mortgage is described in the complaint as not under seal, a mortgage having a seal will not be admissible in evidence.

A mortgage and note executed by a husband alone, and in which the wife has no interest, will not support a judgment against the husband and wife jointly. Hibernia Sav., etc., Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425.

88. Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594; Kidder *v.* Vandersloot, 114 Ill. 133, 28 N. E. 460. See also Morrow *v.* Turney, 35 Ala. 131, holding that under a bill to foreclose an equitable mortgage securing two debts, it is not a fatal variance that the evidence shows that only one of the debts was in fact secured.

89. Bigelow *v.* Benedict, 6 Conn. 116; Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838; Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301; Kiger *v.* Franklin, 15 Ind. 102; Robertson *v.* Stark, 15 N. H. 109.

It is not a fatal variance that a note, described in the complaint as given to a county, appears on production to be payable to the supervisors of the county (Oconto County *v.* Hall, 42 Wis. 59); nor that a note described as bearing interest "payable annually" does not appear to contain those words (Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466).

There is a fatal variance where the instrument declared on as a draft proves to be a penal bond. Moore *v.* Titman, 35 Ill. 310. And see Taylor *v.* Boedicker, 21 La. Ann. 170.

90. Shepard *v.* Shepard, 36 Mich. 173; Crow *v.* Kellman, (Tex. Civ. App. 1902) 70 S. W. 564.

Variance as to quantity.— A variance between the petition and the mortgage as to the number of acres in the mortgaged tract of land is not material, where the boundaries given are the same. Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713.

91. Uedelhofen *v.* Mason, 201 Ill. 465, 66 N. E. 364.

92. Frear *v.* Sweet, 118 N. Y. 454, 23 N. E. 910; Boynton *v.* Sisson, 56 Wis. 401, 14 N. W. 373.

93. Boudinot *v.* Winter, 190 Ill. 394, 60 N. E. 553; Rhea *v.* Taylor, 8 La. Ann. 23; Gilman *v.* Crossman, (Nebr. 1906) 106 N. W. 769.

No proceedings at law.— Where a general denial is filed in a foreclosure suit, the burden is on plaintiff to show that no action or proceeding at law has been instituted for the recovery of the mortgage debt. Carter *v.* Leonard, 65 Nebr. 670, 91 N. W. 574; Omaha Sav. Bank *v.* Boonstra, 3 Nebr. (Unoff.) 382, 91 N. W. 525; Hedbloom *v.* Pierson, 2 Nebr. (Unoff.) 799, 90 N. W. 218.

94. Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34.

Positive testimony that there was no consideration for the mortgage casts on complainant the burden of proving a consideration. Bishop *v.* Felch, 7 Mich. 371. And see Simerson *v.* Decatur Branch Bank, 12 Ala. 205.

An allegation of a partial failure of consideration casts the burden of proof on the complainant. Otis *v.* McCaskill, (Fla. 1906) 41 So. 458.

their face to be overdue,[95] and nothing appears in the nature of a cancellation or satisfaction of the mortgage,[96] and also show *prima facie* the property subject to the foreclosure,[97] and the amount which complainant is entitled to recover.[98] Third persons, intervening or joined as defendants, who claim a title or lien superior to that of the mortgage in suit must assume the burden of proving their rights.[99] But when those rights depend on their notice or want of notice of plaintiff's lien, the incidence of the burden of proof depends on the record of the mortgage in suit. If it appears of record, this raises a presumption of notice;[1] but if not, plaintiff must assume the burden of showing actual notice to such third persons.[2]

b. Mortgage and Debt. The execution, acknowledgment, and delivery of a mortgage set forth in the bill or complaint will be presumed and need not be specifically proved unless denied by the answer.[3] So also the mortgage and the collateral obligation which it secures are *prima facie* evidence of the existence and amount of the debt claimed by plaintiff,[4] except in cases where the considera-

95. Sowarby *v.* Russell, 6 Rob. (N. Y.) 322; Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541. See also Benson *v.* Files, 70 Ark. 423, 68 S. W. 493.

96. Chew *v.* Chew, 23 N. J. Eq. 471.

Explaining release.— Where a person by mistake executed a full instead of a partial release of his mortgage, the burden is on him, in an action to set aside the release and foreclose the mortgage, to show that a subsequent mortgagee had notice of the mistake. Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

97. See Van Horn *v.* Bell, 11 Iowa 465, 79 Am. Dec. 506; Desohry *v.* Carmena, 9 La. Ann. 180.

98. See Gammon *v.* Johnson, 127 N. C. 53, 37 S. E. 75. *Compare* Provident Mut. Bldg., etc., Assoc. *v.* Shaffer, 2 Cal. App. 216, 83 Pac. 274.

99. *California.*— Foster *v.* Bowles, 138 Cal. 449, 71 Pac. 495.

Illinois.— Houfes *v.* Schultze, 2 Ill. App. 196 [*affirmed* in 96 Ill. 335], holding that one who holds a junior conveyance of real estate and claims to be a *bona fide* purchaser and entitled to protection against a senior conveyance, takes on himself the burden of showing that he has truly paid his money, independently of the recitals in the deed or mortgage.

Iowa.— Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601.

New York.— New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 157 N. Y. 689, 51 N. E. 1092.

South Carolina.— Daniel *v.* Hester, 24 S. C. 301.

Texas.— Seymour Opera House Co. *v.* Thurston, 18 Tex. Civ. App. 417, 45 S. W. 815.

See 35 Cent. Dig. tit. "Mortgages," § 1348.

1. Vandercook *v.* Baker, 48 Iowa 199.

2. Hiatt *v.* Renk, 64 Ind. 590; Schoonover *v.* Foley, (Iowa 1903) 94 N. W. 492; McCormick *v.* Leonard, 38 Iowa 272; White *v.* McGarry, 47 Fed. 420. *Compare* Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Oak Cliff College *v.* Armstrong, (Tex. Civ. App. 1899) 50 S. W. 610.

3. Bourke *v.* Hefter, 104 Ill. App. 126; Case *v.* Edson, 40 Kan. 161, 19 Pac. 635; Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399; McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705. *Compare* Singleton *v.* Gayle, 8 Port. (Ala.) 270; Fergus *v.* Tinkham, 38 Ill. 407.

Effect of denial.— If defendant's verified answer denies the execution or delivery of the mortgage in suit, this casts on plaintiff the burden of proving such execution or delivery. Damman *v.* Vollenweider, 126 Iowa 327, 101 N. W. 1130; Spencer *v.* Iowa Mortg. Co., 6 Kan. App. 378, 50 Pac. 1094.

Acceptance of mortgage.— If a mortgage beneficial to the grantee therein is voluntarily executed and placed on record by the grantor the grantee's acceptance thereof will be presumed, but such presumption may be rebutted by proof that the mortgagee never in fact accepted it. Atwood *v.* Marshall, 52 Nebr. 173, 71 N. W. 1064.

4. *Alabama.*— Chambers *v.* Powell, (1905) 39 So. 919; Roney *v.* Moss, 74 Ala. 390.

California.— Neylan *v.* Green, 82 Cal. 128, 23 Pac. 42.

Illinois.—Aldrich *v.* Goodell, 75 Ill. 452.

Michigan.— Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

Nebraska.— Concord L. & T. Sav. Bank *v.* Stoddard, 2 Nebr. (Unoff.) 486, 89 N. W. 301.

New York.— De Mott *v.* Benson, 4 Edw. 297.

Texas.— Dakota Bldg., etc., Assoc. *v.* Cunningham, 92 Tex. 155, 47 S. W. 714.

Canada.— Hancock *v.* Maulson, 10 Grant Ch. (U. C.) 483; Warren *v.* Taylor, 9 Grant Ch. (U. C.) 59. *Compare* Elliott *v.* Hunter, 15 Grant Ch. (U. C.) 640.

See 35 Cent. Dig. tit. "Mortgages," § 1349.

Taxes paid by mortgagee.— Where a part of the mortgagee's claim on foreclosure is for taxes on the mortgaged premises paid by him, he must prove his right to pay such taxes, on the mortgagor's failure to do so, unless this appears from the stipulations of the mortgage, and the fact of payment and the amount. Lloyd *v.* Davis, 123 Cal. 348, 55 Pac. 1003; Hartsuff *v.* Hall, 58 Nebr. 417, 78 N. W. 716.

tion of the mortgage was not definitely ascertained at the time of its execution, or consisted of contingent liabilities, or advances to be made in the future, it being incumbent on plaintiff in these cases to show the amount actually due.[5] The mortgage and note, reciting an indebtedness, and not bearing any marks of cancellation or release, are *prima facie* evidence that such debt remains unpaid,[6] so that the mortgagor must assume the burden of proving a defense of payment set up by him or anything which goes in reduction of the amount apparently due,[7] unless he can be aided by the presumption of payment which arises from the lapse of twenty years' time without any recognition of the debt.[8]

c. Validity of Mortgage. Where a mortgage and note appear to be valid on their face, a party asserting their invalidity, for fraud, illegality, or other cause, must assume the burden of proving his contention.[9]

d. Title of Plaintiff. Where the complainant in foreclosure is not the mortgagee or payee of the note secured, he cannot have a decree without proving his title to the securities, and cannot rely on his mere possession of them, especially in the face of a denial of his title.[10] Thus if he claims as assignee he must show an assignment of the note or bond or debt to him,[11] although, if the collateral obligation is a promissory note, an indorsement of it to him will be sufficient evidence until controverted.[12]

7. Admissibility of Evidence — a. Mortgage and Note. The mortgage itself is admissible in evidence after proof of its due execution, if that becomes necessary,[13]

5. *Arkansas.* — Turman *v.* Forrester, 55 Ark. 336, 18 S. W. 167; Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.

Georgia.— See Lewis *v.* Wayne, 25 Ga. 167.

Illinois.— Brant *v.* Hutchinson, 40 Ill. App. 576.

Michigan.— Wiswall *v.* Ayres, 51 Mich. 324, 16 N. W. 667.

South Carolina.— McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

See 35 Cent. Dig. tit. "Mortgages," § 1349.

6. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

7. *Arkansas.*— Tisdale *v.* Mallett, 73 Ark. 431, 84 S. W. 481.

Colorado.— Murto *v.* Lemon, 19 Colo. App. 314, 75 Pac. 160.

Michigan.— Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72. But see Wehber *v.* Ryan, 54 Mich. 70, 19 N. W. 751, holding that where the mortgagor claims to have satisfied the mortgage by services rendered to the mortgagee, the burden of proof is on the mortgagee to show that the mortgagor was paid for his services.

Mississippi.— Schumpert *v.* Dillard, 55 Miss. 348.

Nebraska.— Omaha L. & T. Co. *v.* Luellen, 3 Nebr. (Unoff.) 709, 92 N. W. 734.

Pennsylvania.— Waln *v.* Smith, 1 Phila. 362.

See 35 Cent. Dig. tit. "Mortgages," § 1349.

8. Chick *v.* Rollins, 44 Me. 104; Brohst *v.* Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142. And see *supra*, XVIII, A, 3, d, (IV).

9. *Georgia.*— Weaver *v.* Cosby, 109 Ga. 310, 34 S. E. 680; Wagnon *v.* Pease, 104 Ga. 417, 30 S. E. 895.

Illinois.— Mortimer *v.* McMullen, 202 Ill. 413, 67 N. E. 20.

Iowa.— Ressegieu *v.* Van Wagenen, 77 Iowa 351, 42 N. W. 318; Commercial Exch. Bank *v.* McLeod, 67 Iowa 718, 25 N. W. 894.

Louisiana.— Dahezies *v.* Barthe, 104 La. 781, 29 So. 346.

Maryland.— Suter *v.* Ives, 47 Md. 520; Duvall *v.* Coale, 1 Md. Ch. 168.

Michigan.— Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225.

New Jersey.— Randall *v.* Reynolds, 61 N. J. Eq. 334, 48 Atl. 768.

Utah.— Stevens *v.* Higginhotham, 6 Utah 215, 21 Pac. 946.

See 35 Cent. Dig. tit. "Mortgages," § 1350.

Compare Braxton *v.* Liddon, (Ala. 1905) 38 So. 717.

Genuineness of mortgage or note.— The rule appears to be otherwise where the attack is on the genuineness of the mortgage or note. Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130. And see Bruce *v.* Wanzer, 18 S. D. 155, 99 N. W. 1102, 112 Am. St. Rep. 788, holding that where the execution and genuineness of the notes secured by a mortgage sought to be foreclosed were denied, the burden was on plaintiff to prove that the notes were in existence, or to account for their non-production, and that they were in fact executed by the maker.

10. Ross *v.* Utter, 15 Ill. 402; New York Cent. Trust Co. *v.* California, etc., R. Co., 110 Fed. 70. See also Lenox *v.* Reed, 12 Kan. 223.

11. Tufts *v.* Beard, 9 La. Ann. 310; Cleveland *v.* Cohrs, 10 S. C. 224.

12. Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855. But see Burns *v.* Naughton, 24 La. Ann. 476; New Orleans Commercial Bank *v.* Poland, 6 La. Ann. 477.

13. James *v.* Rand, 43 La. Ann. 179, 8 So. 623; Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116; Durham *v.* Atwell, (Tex. Civ. App. 1894) 27 S. W. 316, when certified copy is admissible.

and without a written transfer of it to plaintiff, where it otherwise appears that he is the owner of it,[14] and it is also admissible against one who was not a party to it, if he had actual notice of it.[15] The note or bond is admissible when sufficiently identified as the one recited or referred to in the mortgage,[16] and may then be used to explain or modify the terms and conditions of the mortgage.[17] If the mortgage or note is lost or destroyed, the fact may be established by evidence and secondary proof of their contents be admitted.[18]

b. Invalidity of Mortgage. The invalidity of a mortgage, or want of consideration for it, may be proved by parol testimony,[19] or by declarations or statements of the mortgagee,[20] or any other competent evidence.[21] But it is error to admit evidence of a failure of consideration when there is no such plea or defense;[22] and on the other hand proof of want of consideration cannot be rebutted by evidence that the mortgage was given to defraud the mortgagor's creditors.[23]

c. Debt and Terms of Payment. The amount of the mortgage debt and the terms and mode of its payment may be proved by the recitals of the mortgage,[24] by declarations and admissions of the parties,[25] by a separate written agreement fixing the amount, regulating the manner of its payment, or extending the time for payment,[26] or by any competent extraneous evidence.[27]

d. Payment. On the issue of payment any evidence which is competent under the general rules of evidence is admissible.[28] The declarations of the mort-

Execution by married woman.— On an issue whether a married woman voluntarily signed and acknowledged a mortgage without the compulsion of her husband, evidence is admissible that she executed a deed of part of the same property a year later, for the purpose of raising money to pay on the mortgage debt. Edwards *v.* Bowden, 103 N. C. 50, 9 S. E. 194.

Indorsement on mortgage as evidence of recording.— In an action to foreclose a mortgage, defendant not appearing at the trial, an indorsement by the recorder of deeds on the mortgage in the usual form, although not expressly authorized by the statute, is admissible, in the absence of better evidence, and of objection, to show that the mortgage was recorded. Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163.

14. Hooks *v.* Hays, 86 Ga. 797, 13 S. E. 134.

15. Brewer *v.* Crow, 4 Greene (Iowa) 520.

16. Robertson *v.* Stark, 15 N. H. 109.

Unsigned note.— A mortgage executed to secure a note attached to it is binding, although the note was not signed, and the note may be read in evidence in the foreclosure suit. McFadden *v.* State, 82 Ind. 558.

17. Howard Mut. Loan, etc., Assoc. *v.* McIntyre, 3 Allen (Mass.) 571; Crafts *v.* Crafts, 13 Gray (Mass.) 360; Johnston *v.* Donvan, 50 Hun (N. Y.) 215, 2 N. Y. Suppl. 858.

18. Dowden *v.* Wilson, 71 Ill. 485; Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72; Eddy *v.* Campbell, 23 R. I. 192, 49 Atl. 702.

19. Mudgett *v.* Goler, 18 Hun (N. Y.) 302; Atkins *v.* Crumpler, 118 N. C. 532, 24 S. E. 367; Bruner *v.* Threadgill, 88 N. C. 361. See also Copeland *v.* Sullivan Sav. Inst., 90 Iowa 744, 57 N. W. 617.

20. Sime *v.* Howard, 4 Nev. 473; Grannis *v.* Hobbie, 10 N. Y. St. 304.

21. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243, power of attorney of person executing mortgage.

22. Sams *v.* Derrick, 103 Ga. 678, 30 S. E. 668. And see Doniphan *v.* Paxton, 19 Mo. 288.

23. Clark *v.* Clark, 62 N. H. 267.

24. Givens *v.* Davenport, 8 Tex. 451.

25. Van Vlissingen *v.* Lenz, 171 Ill. 162, 49 N. E. 422; Bigelow *v.* Foss, 59 Me. 162; Mackey *v.* Brownfield, 13 Serg. & R. (Pa.) 239. But *compare* Brown *v.* Becknall, 58 N. C. 423, holding that on an issue as to the abandonment of the right to enforce a mortgage, loose declarations, made after the presumption of abandonment from lapse of time has arisen, will not be allowed to rebut it.

26. Deshazo *v.* Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769 (parol agreement for extension of time of payment); Saton *v.* Fiske, 128 Cal. 549, 61 Pac. 666; Whitmore *v.* Reynolds, 46 Cal. 380; Angier *v.* Masterson, 6 Cal. 61.

27. Miller *v.* Thayer, 74 Cal. 351, 16 Pac. 187, the record of a judgment in an action for redemption between the same parties.

The mortgagor's will, tending to show that the lands mentioned therein were charged with plaintiff's claim, is not admissible. Van Dusen *v.* Kelleher, 25 Wash. 315, 65 Pac. 552.

Evidence as to amount due upon prior mortgage.— A party foreclosing subject to a prior mortgage cannot call the common mortgagor, if he has the equity of redemption, to give evidence as to the amount due upon the prior mortgage. Warren *v.* Taylor, 9 Grant Ch. (U. C.) 59.

28. Phillips *v.* Sewell, 63 Ga. 649; Long *v.* Crosson, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783; Canadian, etc., Mortg., etc., Co. *v.* Beasterfield, (Kan. App. 1899) 58 Pac. 497; Banks *v.* Goodliffe, 15 N. Y. Suppl. 466.

gagor[29] and the authorized admissions of his attorney[30] are admissible on this issue.

e. Description of Property. If the description of the premises in the mortgage is incomplete or ambiguous, parol evidence will be admissible to identify the property intended to be covered by the mortgage and to apply the description to it.[31]

f. Priority Between Mortgagees. On an issue as to priority among several mortgagees, if the question is not determinable from the face of their respective mortgages, it may be solved by any competent evidence, including testimony of witnesses as to the facts on which the claim of priority must rest,[32] or collateral writings evidencing the intention and understanding of the parties.[33]

g. Title or Right of Plaintiff. Plaintiff's ownership of the debt and mortgage may be proved by an assignment of them to him, if any;[34] and if not, by his testimony as to how he acquired them and as to his present ownership of them,[35] and his title may be controverted and disproved by like evidence.[36] When the security is in the form of a deed of trust, and it does not show who is the beneficiary or who advanced the money, extrinsic evidence is admissible to identify him.[37]

h. Interests of Defendants. Where it is necessary to determine conflicting claims to title to the mortgaged premises, as among defendants, or to settle the liability to foreclosure of their respective titles or interests, deeds or other conveyances creating or defining those interests will ordinarily be admissible,[38] and such conveyances are also admissible on a question of homestead in the mortgage premises.[39] But a deed dated and delivered after the commencement of the foreclosure action is not admissible to show title in a defendant.[40]

Gift of mortgage.— Where defendants denied that plaintiff was the owner of the mortgage, and alleged payment, plaintiff made proof of facts entitling him to relief, and defendants introduced evidence of a gift of the mortgage to them by the mortgagee, although such gift was not pleaded in the answer, plaintiff was properly allowed to show that such alleged gift was void, fraudulent, and of no effect. Livingston *v.* Eaton, 90 N. Y. App. Div. 251, 86 N. Y. Suppl. 500 [*affirmed* in 184 N. Y. 610, 77 N. E. 1190].

29. Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127.

30. Hamilton Provident, etc., Soc. *v.* Northwood, 86 Mich. 315, 49 N. W. 37.

31. Mobile Bank *v.* Planters', etc., Bank, 8 Ala. 772; Began *v.* O'Reilly, 32 Cal. 11; Cornwell *v.* Cornwell, 91 Ill. 414; Westmoreland *v.* Carson, 76 Tex. 619, 13 S. W. 559. And see *supra*, VIII, F, 12.

32. Van Wagenen *v.* Hopper, 8 N. J. Eq. 684, holding that it is competent to show by the testimony of the mortgagor that a subsequent mortgagee had notice of a prior unrecorded mortgage. See also Rose *v.* Walls, 149 Ill. 60, 36 N. E. 555; Noland *v.* State, 115 Ind. 529, 8 N. E. 26.

33. Beers *v.* Hawley, 2 Conn. 467, holding that where two mortgages on the same land, to different parties, were executed and delivered on the same day, but one was recorded before the other, a written statement by the holder of the mortgage first recorded was admissible in evidence, on foreclosure, to show the intention of the parties that the two mortgages should take effect simultaneously and without priority.

34. Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855.

35. Hooks *v.* Hays, 86 Ga. 797, 13 S. E. 134; Ingalls *v.* Ingersoll, 68 Hun (N. Y.) 239, 22 N. Y. Suppl. 965.

36. Renaud *v.* Conselyea, 7 Abb. Pr. (N. Y.) 105; Huckenstein *v.* Love, 98 Pa. St. 518.

37. Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253. And see *supra*, V, D, 3.

38. Merrick *v.* Leslie, 62 Ind. 459; Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Branch *v.* Wilkens, (Tex. Civ. App. 1901) 63 S. W. 1083; Brigham *v.* Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358.

Evidence as to adverse possession.— On a petition to enforce a mortgage lien, which alleges that the legal title is in one C, from whom the mortgagor purchased by title bond, evidence showing that the mortgagor has acquired title by adverse possession is not admissible against C, who denies the sale to the mortgagor. Creech *v.* Abner, 106 Ky. 239, 50 S. W. 58, 20 Ky. L. Rep. 1812.

39. Elias *v.* Verdugo, 27 Cal. 418.

A written application for a loan to be secured by mortgage, made by a husband and wife, which states that the land offered as security is not their homestead, and where it appears by competent evidence that they do not live on the land, is admissible, in a suit against their heirs to foreclose, as a declaration tending to show that, if the land was ever a homestead, it had been abandoned). Bowman *v.* Rutter, (Tex. Civ. App. 1898) 47 S. W. 52.

40. Lemert *v.* Robinson, 7 Kan. App. 756, 53 Pac. 485.

8. Weight and Sufficiency of Evidence — a. Mortgage and Debt. The production of a mortgage, regular on its face and duly acknowledged, is sufficient evidence of its signature and execution, in the absence of contradictory evidence,[41] and a recital of indebtedness in the mortgage is *prima facie* evidence of that fact and sufficient until disproved,[42] and where notes are produced and put in evidence which correspond on their face with those recited in the mortgage, no further proof of their execution or of their identity is required until defendant presents countervailing evidence.[43] But all these facts, if met by defendant's evidence, must be established by a fair preponderance of the evidence.[44] The amount presently due under the mortgage if this is disputed,[45] and the rate of

41. Boudinot *v.* Winter, 190 Ill. 394, 60 N. E. 553 [*affirming* 91 Ill. App. 106]; Ording *v.* Burnet, 178 Ill. 28, 52 N. E. 851; Gray *v.* Bennett, (Iowa 1905) 105 N. W. 377; Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587; Anglo-American Land Mortg., etc., Co. *v.* Hegwer, 7 Kan. App. 689, 51 Pac. 915; McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

Delivery.— The answer of a mortgagor to a bill of foreclosure, denying the delivery of the mortgage, is not of itself sufficient to overcome the presumption of delivery of the mortgage arising from the possession of the mortgage by the mortgagee, where the same was duly executed, acknowledged, and recorded. Commercial Bank *v.* Reckless, 5 N. J. Eq. 650.

Failure to produce mortgage.— After judgment in a foreclosure suit, it is too late for the mortgagor to object that plaintiff did not file or exhibit any mortgage showing that he had a lien on the land. James *v.* Webb, 71 S. W. 526, 24 Ky. L. Rep. 1382.

Secondary evidence of mortgage.— Where the mortgage cannot be produced, drafts produced from the proper custody, and bearing indorsements in the handwriting of a solicitor showing that the mortgage deed was engrossed from them and was duly executed are good secondary evidence (Waldy *v.* Gray, L. R. 20 Eq. 238, 44 L. J. Ch. 394, 32 L. T. Rep. N. S. 531, 23 Wkly. Rep. 676), so also is a copy of the mortgage purporting to have been furnished by the solicitor who held the original deed (Heath *v.* Crealock, L. R. 10 Ch. 22, 44 L. J. Ch. 157, 31 L. T. Rep. N. S. 650, 23 Wkly. Rep. 95).

42 O'Conner *v.* Nadel, 117 Ala. 595, 23 So. 532; Whitney *v.* Buckman, 13 Cal. 536; Schnadt *v.* Davis, 84 Ill. App. 669; Andrews *v.* Reed, (Kan. 1897) 48 Pac. 29.

Contradictory averments.— Where the bill sets out a mortgage apparently valid for the whole sum expressed in it, and then avers that it was given in part to secure future advances, defendant cannot rely on one of these averments as an admission and exclude the other. Craig *v.* Tappin, 2 Sandf. Ch. (N. Y.) 78.

43. Dean *v.* Ford, 180 Ill. 309, 54 N. E. 417; Ording *v.* Burnet, 178 Ill. 28, 52 N. E. 851; Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Pogue *v.* Clark, 25 Ill. 351; Loughridge *v.* Northwestern Mut. L. Ins. Co., 79 Ill. App. 223; Wolcott *v.* Lake View Bldg., etc., Assoc., 59 Ill. App. 415; Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587; Bruce *v.* Wanzer, 18 S. D. 155, 99 N. W. 1102, 112 Am. St. Rep. 788. But see Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

44. *Alabama.*— Alabama L. Ins., etc., Co. *v.* Pettway, 24 Ala. 544 (proof of mortgagor's signature to note); Judson *v.* Emanuel, 1 Ala. 598.

California.— Anglo-Californian Bank *v.* Cerf, 147 Cal. 393, 81 Pac. 1081; Wise *v.* Williams, (1895) 42 Pac. 573.

Illinois.— Walker *v.* Pritchard, 121 Ill. 221, 12 N. E. 336.

Iowa.— Damman *v.* Vollenweider, 126 Iowa 327, 101 N. W. 1130, proof of mortgagor's signature to securities.

Louisiana.—Crescent City Bank *v.* Blanque, 32 La. Ann. 264, proof of agent's authority to execute mortgage.

Michigan.— Wood *v.* Genett, 120 Mich. 222, 79 N. W. 199.

New York.— Huntington *v.* Kneeland, 102 N. Y. App Div. 284, 92 N. Y. Suppl. 944.

South Dakota.— Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297, whether a wife joined with her husband in the execution of the mortgage; testimony of the notary competent. And see Merager *v.* Madson, (1905) 103 N. W. 650.

England.— Inman *v.* Parsons, 4 Madd. 271, 56 Eng. Reprint 706, proof of handwriting of witness to mortgage.

See 35 Cent. Dig. tit. "Mortgages," § 1361.

45. *Illinois.*— Archibald *v.* Banks, 203 Ill. 380, 67 N. E. 791.

Indiana.— Brake *v.* Sparks, 117 Ind. 89, 19 N. E. 719.

Louisiana.— Sanders *v.* Dosson, 3 La. Ann. 587.

Maryland.— Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

Nebraska.— Marshall *v.* Roe, 20 Nebr. 307, 30 N. W. 59.

New York.— Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734.

England.— Caldecott *v.* Williams, 10 L. J. Exch. Eq. 26.

See 35 Cent. Dig. tit. "Mortgages," § 1361.

Tax receipts and tax certificates, showing payment of taxes by the mortgagee, which he had the right to pay on the mortgagor's failure to do so, and add the amount to the mortgage debt, are sufficient to sustain a decree in his favor, as to the amount of such taxes, where not contradicted successfully by defendant's evidence. Lloyd *v.* Davis, 123

interest if there is conflicting testimony concerning it,[46] must also be established by a preponderance of the evidence. The fact that a grantee of the mortgaged premises assumed and agreed to pay the mortgage, if disputed, must be established by proof sufficient to overcome his evidence in denial of his liability.[47] Where it is by law required to be shown that no proceedings at law have been taken for the recovery of the debt secured by the mortgage, the mere introduction in evidence of the note and mortgage is not sufficient for this purpose, but plaintiff must establish the fact, at least *prima facie*, by other evidence.[48] If the evidence establishes the existence of a debt, but fails to show any right to foreclose the mortgage, the court should not retain the bill and give a decree for the amount of the debt, as plaintiff has a more appropriate remedy at law.[49]

b. Production of Note or Bond. In proceedings to foreclose a mortgage securing a note or bond, it is imperatively necessary for plaintiff to produce the note or bond, or account satisfactorily for the failure to do so.[50] And the fact that the

Cal. 348, 55 Pac. 1003; Knox *v.* Galligan, 21 Wis. 470.

46. Phillips *v.* Crips, 108 Iowa 605, 79 N. W. 373.

47. Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901; Grover *v.* Bishop, 138 Mich. 505, 101 N. W. 627; Wise *v.* Fuller, 29 N. J. Eq. 257; Mitchell *v.* National R. Bldg., etc., Assoc., (Tex. Civ. App. 1899) 49 S. W. 624.

Delivery and acceptance of deed.— Where, by the terms of a deed, the grantee assumes a debt secured by mortgage on the land, and the grantee denies the debt and the delivery of the deed, it is necessary, to bind him, that the proof should show an actual delivery, but if this is shown, and it appears that he retained the deed, his acceptance of it may be presumed; and very clear proof will be required where the property conveyed is of much less value than the encumbrance alleged to have been assumed. Stuart *v.* Hervey, 36 Nebr. 1, 53 N. W. 1032.

48. Insurance Co. of North America *v.* Parker, 64 Nebr. 411, 89 N. W. 1040; Woolworth *v.* Slater, 63 Nebr. 418, 88 N. W. 682; Kirby *v.* Shrader, 58 Nebr. 316, 78 N. W. 616; Vradenburg *v.* Johnson, 3 Nebr. (Unoff.) 326, 91 N. W. 496; Luce *v.* Sorensen, 2 Nebr. (Unoff.) 760, 89 N. W. 1025; Massachusetts Mut. L. Ins. Co. *v.* Smith, 2 Nebr. (Unoff.) 628, 89 N. W. 595; Klingenfeld *v.* Houghton, 1 Nebr. (Unoff.) 868, 96 N. W. 76.

49. See Jaseph *v.* People's Sav. Bank, 132 Ind. 39, 31 N. E. 524; Miley *v.* Marshall, 4 Ind. 211.

50 *Arkansas.*— Field *v.* Anderson, 55 Ark. 546, 18 S. W. 1038. See also Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.

California.— Harlan *v.* Smith, 6 Cal. 173.

Florida.— Lenfesty *v.* Coe, 34 Fla. 363, 16 So. 277, 26 Fla. 49, 7 So. 2.

Illinois.— Dowden *v.* Wilson, 71 Ill. 485; Moore *v.* Titman, 35 Ill. 310; Lucas *v.* Harris, 20 Ill. 165; Ross *v.* Utter, 15 Ill. 402; Santee *v.* Day, 111 Ill. App. 495.

Kentucky.— Harlan *v.* Murrell, 3 Dana 80.

Louisiana.— Van Raalte *v.* Mission Cong., 39 La. Ann. 617, 2 So. 190; Miller *v.* Cappel, 36 La. Ann. 264; New Orleans *v.* Pigniolo, 29 La. Ann. 835; Marionneaux *v.* Dardenne, 28 La. Ann. 457. But see Brown *v.* Sadler, 13 La. Ann. 205; Patterson *v.* Hall, 1 La. Ann. 108.

Michigan.— George *v.* Ludlow, 66 Mich. 176, 33 N. W. 169; Hungerford *v.* Smith, 34 Mich. 300; Young *v.* McKee, 13 Mich. 552.

Missouri.—Pharis *v.* Surrett, 54 Mo. App. 9.

Nebraska.— Stewart *v.* Hoagland, 3 Nebr. (Unoff.) 142, 90 N. W. 1127.

New York.— Bergen *v.* Urbahn, 83 N. Y. 49. Where the answer in a suit to foreclose a mortgage does not deny the execution of the bond and mortgage, but simply pleads payment, plaintiff is not obliged to produce the bond, in order to entitle him to recover. Anderson *v.* Culver, 127 N. Y. 377, 28 N. E. 32.

North Carolina.— Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399.

Pennsylvania.— Tyson *v.* Seitz, 15 Pa. Dist. 702. See also Marshall *v.* Keller, 10 Pa. Cas. 464, 14 Atl. 362. But see Brownell *v.* Oviatt, 215 Pa. St. 514, 64 Atl. 670, holding that at the trial of a scire facias a mortgage may be admitted without the accompanying bond, the presumption being that the bond is not discharged.

South Carolina.— Chewning *v.* Proctor, 2 McCord Eq. 11.

South Dakota.— Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

Tennessee.— Vaughn *v.* Tate, (Ch. App. 1896) 36 S. W. 748.

United States.— Bonds need not be produced in evidence prior to a decree of foreclosure and sale in a suit by trustees under a mortgage securing the bonds, where the evidence is sufficient to prove that the bonds were valid and were outstanding obligations. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423; Northern Trust Co. *v.* Columbia Straw Paper Co., 75 Fed. 936.

See 35 Cent. Dig. tit. "Mortgages," § 1362.

Compare Davis *v.* Mills, 18 Pick. (Mass.) 394.

Right of assignor to object.— Where the foreclosure suit is brought by one claiming to be the owner of the mortgage and note by assignment, and the assignor is made a party and denies the assignment, the only question which the alleged assignor is entitled to litigate is the superiority of the assignee's

execution of the note is admitted will not relieve the complainant of the necessity of producing it.[51] But this rule naturally does not apply where the production of a note or bond would be impossible, either because there is no such paper in existence,[52] or because the mortgagor has it in his own possession.[53] And it has been held that failure to produce the bond secured is not fatal to an action of foreclosure where the mortgage itself expressly admits the indebtedness and contains a covenant to pay the sum due.[54]

c. Consideration and Validity. An answer setting up fraud against the mortgage, or alleging that it is a forgery, or defending on the ground of want or failure of consideration, or other ground assailing the validity of the mortgage, may prevent the recovery of a judgment by plaintiff if not replied to;[55] but if issue is taken on any such matter of defense, it must be established by satisfactory evidence preponderating over that adduced by plaintiff.[56]

d. Breach of Condition. Where the mortgage and the collateral note or bond show on their face that the day for payment has passed, plaintiff may rely on this evidence as sufficient proof of the breach of condition;[57] and if defendant means

right to his own, and hence he is not entitled to complain that the assignee neither produces the original note secured by the mortgage nor accounts for his failure to produce it. Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285.

In ejectment on a mortgage, the note described in the condition need not be produced where the equity has been released by the mortgagor in satisfaction of the note. Marshall *v.* Wood, 5 Vt. 250.

51. Beers *v.* Hawley, 3 Conn. 110; Dowden *v.* Wilson, 71 Ill. 485.

52. Field *v.* Brokaw, 148 Ill. 654, 37 N. E. 80 (holding that where the mortgage recites an indebtedness of the mortgagor on book-account, without any reference to any bond or note as evidence of the debt, it will be inferred, in the absence of sufficient evidence to the contrary, that no bond or note was given, and a foreclosure may be decreed without an order requiring the production of a note or bond); Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538 (holding that where the mortgage purports to secure a note therein described, but the petition in foreclosure alleges that there was no such note, but that the mortgage was intended to secure future advances, it is competent for the court to decree foreclosure for the amount of such advances, without requiring production of the mythical note or excuses for its non-production).

53. Hawes *v.* Rhoades, 34 Ind. 79; Parkhurst *v.* Berdell, 1 Silv. Sup. (N. Y.) 386, 5 N. Y. Suppl. 328. See also Lancaster *v.* Smith, 67 Pa. St. 427.

54. Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; Bennett *v.* Edgar, 46 Misc. (N. Y.) 231, 93 N. Y. Suppl. 203.

55. Farmers' Nat. Bank *v.* Fletcher, 40 Iowa 431; Alexander *v.* Doran, 13 Iowa 283.

56. Sufficiency of evidence as to fraud see Bacigalupi *v.* Cadamartori, 101 Cal. 671, 36 Pac. 398; Mortimer *v.* McMullen, 202 Ill. 413, 67 N. E. 20; Witt *v.* Rice, 90 Iowa 451, 57 N. W. 951; Case *v.* Hicks, 76 Iowa 36, 40 N. W. 75; Simmons *v.* Reinhardt, 78 S. W. 890, 25 Ky. L. Rep. 1804; Kimmell *v.* Caruthers, 1 S. W. 2, 8 Ky. L. Rep. 53; Duvall *v.* Coale, 1 Md. Ch. 168; Cadiz Fourth Nat. Bank *v.* Craig, 1 Nebr. (Unoff.) 349, 96 N. W. 185; Lurch *v.* Holder, (N. J. Ch. 1893) 27 Atl. 81; Polley *v.* Polley, 66 N. Y. App. Div. 609, 72 N. Y. Suppl. 856; Wasatch Min. Co. *v.* Crescent Min. Co., 7 Utah 8, 24 Pac. 586.

See 35 Cent. Dig. tit. "Mortgages," § 1364.

Sufficiency of evidence as to false representations see Clark *v.* George, 85 Iowa 710, 50 N. W. 553; Cook *v.* Weigley, 67 N. J. Eq. 716, 57 Atl. 805, 63 Atl. 1118; Wimer *v.* Smith, 22 Oreg. 469, 30 Pac. 416.

Sufficiency of evidence as to forgery see Ann Arbor Sav. Bank *v.* Ellison, 113 Mich. 557, 71 N. W. 873; Cameron *v.* Culkins, 44 Mich. 531, 7 N. W. 157; Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130; Bruce *v.* Wanzer, (S. D. 1905) 105 N. W. 282.

Sufficiency of evidence as to want or failure of consideration see Ambrose *v.* Drew, 139 Cal. 665, 73 Pac. 543; Hubbard *v.* Mulligan, 34 Colo. 236, 82 Pac. 783; Mayo *v.* Hughes, (Fla. 1906) 40 So. 499; McAllister *v.* Compton, 71 Ill. 170; Williams *v.* Baker, 116 Mich. 66, 74 N. W. 306; Winston *v.* Armstrong, (Nebr. 1905) 104 N. W. 941; Schuster *v.* Sherman, 37 Nebr. 842, 56 N. W. 707; Heintz *v.* Klebba, 5 Nebr. (Unoff.) 289, 98 N. W. 431; Gardner *v.* Winterson, 162 N. Y. 604, 57 N. E. 1110; Towanda First Nat. Bank *v.* Robinson, 105 N. Y. App. Div. 193, 94 N. Y. Suppl. 767; Sergeant *v.* Martin, 133 Pa. St. 122, 19 Atl. 568; Padgett *v.* Carter, 70 S. C. 480, 50 S. E. 182.

See 35 Cent. Dig. tit. "Mortgages," § 1364.

Sufficiency of evidence as to usury see National Mut. Bldg., etc., Assoc. *v.* Retzman, 69 Nebr. 667, 96 N. W. 204; McDaniels *v.* Barnum, 5 Vt. 279.

Sufficency of evidence as to lobbying contract see Reynolds *v.* Britton, 102 N. Y. App. Div. 609, 92 N. Y. Suppl. 2.

Sufficiency of evidence as to insanity of mortgagor see Jacobs *v.* Richards, 18 Beav. 300, 52 Eng. Reprint 118, 5 De G. M. & G. 55, 2 Eq. Rep. 299, 18 Jur. 527, 23 L. J. Ch. 557, 54 Eng. Ch. 46, 43 Eng. Reprint 790.

57. Sowarby *v.* Russell, 6 Rob. (N. Y.) 322. And see Cook *v.* Hilliard, 9 Fed. 4.

to controvert it, as, by showing an extension of the time of payment, not yet expired, he must do so by clear and satisfactory evidence.[58] On the other hand, where plaintiff's right to maintain his action does not appear on the face of the papers, as, where he claims a right to anticipate maturity in consequence of a partial default, or where he means to escape the effect of an admitted extension, he must support his case by competent evidence, and a foreclosure will not be decreed where the testimony is conflicting and his right not clear.[59]

e. Payment. Payment, release, or satisfaction of the mortgage, being an affirmative defense, defendant must establish it, as against plaintiff's denial, by a clear preponderance of the evidence.[60]

f. Title or Right of Plaintiff. In a foreclosure suit the production by plaintiff, at the trial, of a regular and formal written assignment to him of the note and mortgage is ample proof of his title thereto and of his right to bring the action,[61]

58. Jenks *v.* Lehman, 7 Colo. App. 421, 43 Pac. 1045; Cook *v.* Weigley, 67 N. J. Eq. 716, 57 Atl. 805, 63 Atl. 1118; Rush *v.* Rush, (N. J. Ch. 1889) 18 Atl. 221; Worrall *v.* Eastwood, 44 N. J. Eq. 277, 18 Atl. 54.

59. Rogers *v.* Hodgson, 46 Kan. 276, 26 Pac. 732; Eastwood *v.* Worrall, (N. J. Ch. 1886) 2 Atl. 772; Briggs *v.* Weeks, 98 N. Y. App. Div. 487, 90 N. Y. Suppl. 853; Hadley *v.* Chapin, 11 Paige (N. Y.) 245; Hughes *v.* Rutledge, 10 Manitoba 13. And see Rohrhof *v.* Schmidt, 218 Ill. 585, 75 N. E. 1062.

60. *Alabama.*— Bickerton *v.* Guttery, 124 Ala. 382, 27 So. 502.

Arkansas.— Byers *v.* Fowler, 14 Ark. 86.

California.— Collins *v.* Maude, 144 Cal. 289, 77 Pac. 945; White *v.* Stevenson, 144 Cal. 104, 77 Pac. 828.

Georgia.— Kennedy *v.* Davis, 82 Ga. 210, 8 S. E. 52.

Illinois.— Haworth *v.* Huling, 87 Ill. 23, holding that in a suit to foreclose a mortgage, a prior settlement between the debtor and creditor as to the amount of principal and interest then due will be held to be conclusive and to furnish a proper basis on which to compute the interest thereafter accruing.

Kentucky.— List *v.* List, 82 S. W. 446, 26 Ky. L. Rep. 691.

Michigan.— Saenger *v.* Von der Heide, 80 Mich. 152, 44 N. W. 1116; George *v.* Ludlow, 66 Mich. 176, 33 N. W. 169; Shattuck *v.* Foster, 32 Mich. 427.

Minnesota.— La Crosse Nat. Bank *v.* Thompson, 37 Minn. 126, 33 N. W. 907.

Nebraska.— Omaha L. & T. Co. *v.* Luellen, 3 Nebr. (Unoff.) 709, 92 N. W. 734, holding that where defendant pleaded payment, and plaintiff offered in evidence the note and mortgage described in the petition, and defendant offered no evidence, a judgment for plaintiff was proper. And see Campbell *v.* Miller, (1905) 103 N. W. 434.

New York.— Durkin *v.* Markus, 107 N. Y. App. Div. 612, 94 N. Y. Suppl. 757; Douglas *v.* Miller, 102 N. Y. App. Div. 94, 92 N. Y. Suppl. 514; Hetzel *v.* Easterly, 96 N. Y. App. Div. 517, 89 N. Y. Suppl. 154; Pratt *v.* Poole, 15 N. Y. Suppl. 789 [*affirmed* in 133 N. Y. 686, 31 N. E. 628].

Oregon.— Smith *v.* Leavenworth, 46 Oreg. 463, 80 Pac. 1010.

South Carolina.— Montague *v.* Best, 69 S. C. 280, 48 S. E. 248.

United States.— Irwin *v.* West, 50 Fed. 362.

See 35 Cent. Dig. tit. "Mortgages," § 1366.

Proof of release.— A defense to a bill for foreclosure, setting up that when one of the defendants, a subsequent purchaser, had bought in a portion of the premises, an agreement was made between him and the mortgagee that the portion so purchased should be released from the mortgage on the payment of a certain sum, and that such sum was afterward paid by the other defendants, is not supported by proof merely that some sort of a paper was given to complainant, the contents or provisions of which were uncertain, and which was neither witnessed nor acknowledged, nor drawn by a comparison with the terms of the mortgage. Suhr *v.* Ellsworth, 29 Mich. 57.

Proof of payment in services.— Where the mortgagor claims to have paid the mortgage by his services, and the mortgagee fails to meet the burden of showing that the mortgagor had been paid for his services, and to make a complete exposition of the accounts between the parties, the mortgagor having kept no accounts, and the remedy on the note being barred by limitations, equity will not decree foreclosure after long delay. Webber *v.* Ryan, 54 Mich. 70, 19 N. W. 751.

Proving payment to deceased mortgagee.— A mortgagor who claims to have made a large payment to a deceased person shortly before his death, as a defense to an action to foreclose, but who fails to produce any receipt or voucher or indorsement, and shows no entry by the decedent on his books, fails to sustain his claim. Wakeman *v.* Akey, 29 Mich. 308.

61. Lawrence *v.* Johnson, 131 Cal. 175, 63 Pac. 176; Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855; Compton *v.* Jones, 65 Ind. 117; Bloomer *v.* Burke, 94 Minn. 15, 101 N. W. 974; Wilcox *v.* Davis, 4 Minn. 197; Reichert *v.* Neuser, 93 Wis. 513, 67 N. W. 939; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

In Louisiana authentic evidence is required to authorize the issuing of an order of seizure and sale for foreclosure of a mortgage, that is, evidence created by a notarial act or acknowledged before a notary or other com-

provided the assignment identifies the complainant as the assignee,[62] and clearly shows that it applies to or includes the mortgage in suit.[63] In the case of a negotiable note, a transfer by indorsement is sufficient evidence of title to it,[64] and it has been held that the mere possession of the securities is sufficient *prima facie* evidence of ownership of them.[65] Where the complainant sues as the receiver, guardian, or syndic of the mortgagee, he should support his title by putting in evidence the letters or other instrument evidencing his appointment.[66] Where an agent sells land and retains the mortgage taken for the price under a power of attorney, the principal may foreclose without introducing such power of attorney in evidence, if the mortgage itself contains a recital that the mortgagor recognizes the agent's authority.[67] Evidence that the mortgagee bequeathed the mortgage and note to his daughter, who assigned them to plaintiff, and that plaintiff ever afterward held possession of the same is sufficient to justify a finding that he owned the mortgage debt.[68]

g. Interests of Defendants. The title of the mortgagor, or of any one succeeding to his interests, may be proved by the conveyances on which it rests.[69] Questions of notice to a subsequent purchaser, or of the *bona fides* of his purchase, are determinable upon extraneous evidence, which, however, must be clear and satisfactory.[70]

F. Injunction and Receivership — 1. Preservation and Protection of Property. For the purpose of preserving an estate which is the subject of a pending action for foreclosure, and protecting it from deterioration, a court of equity may enjoin the commission of waste by the mortgagor or the person in possession,[71] although this process will not usually be employed, at least before answer, to transfer the possession or prevent the mortgagor from receiving the rents.[72] On the other hand, if the mortgagee is wrongfully proceeding to exercise a power of sale, which, if effected, would destroy the rights and equities of the mortgagor, he may be restrained by injunction,[73] and cases sometimes occur in which it is proper to restrain the prosecution of proceedings at law by one mortgagee, at the suit of another having equal or prior rights, where this course is necessary to preserve the property for an equitable distribution.[74]

petent public officer; and it must be complete so far as it relates to the debt. Hence where a note secured by mortgage is assigned, the assignment must be proved by authentic act. Fellows *v.* Jeter, 10 La. Ann. 181; Dosson *v.* Sanders, 12 Rob. (La.) 238; Rowlett *v.* Shepherd, 7 Mart. N. S. (La.) 513; Nichol *v.* De Ende, 3 Mart. N. S. (La.) 310.

Assignment lost or destroyed.— Where defendant has admitted that the mortgage, which has been destroyed by fire, was executed and assigned, he cannot object on the ground of want of sufficient proof of the contents of the mortgage and assignment. Chickering *v.* Fullerton, 90 Ill. 520.

62. Cooper *v.* Smith, 75 Mich. 247, 42 N. W. 815.

63. Lashbrooks *v.* Hatheway, 52 Mich. 124, 17 N. W. 723.

64. Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Corn Exch. Nat. Bank *v.* Jansen, 70 Nebr. 579, 97 N. W. 814; Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37.

65. Cullum *v.* Batre, 2 Ala. 415; Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; Michigan Mut. L. Ins. Co. *v.* Klatt, 2 Nebr. (Unoff.) 870, 872, 90 N. W. 754, 92 N. W. 325. See, however, Lee *v.* Dearmond, 4 La. 320; Eddy *v.* Campbell, 23 R. I. 192, 49 Atl. 702.

66. Chaffe *v.* Carroll, 35 La. Ann. 115; Dosson *v.* Sanders, 12 Rob. (La.) 238.

67. Snow *v.* Trotter, 3 La. Ann. 268.

68. Cullman *v.* Bottcher, 58 Minn. 381, 59 N. W. 971.

69. Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Stockwell *v.* State, 101 Ind. 1; Slusher *v.* London First Nat. Bank, 76 S. W. 1, 25 Ky. L. Rep. 462; Dorenberg *v.* Ockerman, 130 Mich. 23, 89 N. W. 579.

70. Brewer *v.* Crow, 4 Greene (Iowa) 520; Grosvenor *v.* Harrison, 54 Mich. 194, 19 N. W. 951; Smith *v.* Paul, 17 N. Y. Suppl. 420.

71. Episcopate Fund *v.* Matteson, 12 N. Y. St. 370; Benson *v.* Fash, 1 Code Rep. (N. Y.) 50. And see *supra*, XV, I, 2.

72. Cheever *v.* Rutland, etc., R. Co., 39 Vt. 653; Oliver *v.* Decatur, 18 Fed. Cas. No. 10,494, 4 Cranch C. C. 458.

73. Stewart *v.* Belt, (Miss. 1896) 19 So. 957; Price *v.* Empire Loan Assoc., 75 Mo. App. 551. And see *supra*, XX, B, 1.

74. Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436, holding that where there are two sets of railroad bondholders, secured by separate mortgages, an individual holder of a bond of the second set may be enjoined from collecting his bond by execution, if there is not enough property for all, since,

2. Appointment of Receiver — a. Object of Appointment. The object of a court of equity in appointing a receiver of mortgaged property pending foreclosure is either to preserve the *corpus* of the estate from deterioration or to sequester the rents and profits to make good an anticipated deficiency. As to the former, if it be shown that the property is in danger of being wasted or materially injured, a receiver may be appointed to preserve it;[75] but it is entirely outside the scope of proceedings of this kind to appoint a receiver to manage or work the property, or to make it productive or increase its profitableness.[76] As to the latter reason for a receivership, the object is to divest the rents and profits from the mortgagor and vest them in the mortgagee, who, by the appointment of a receiver, acquires a specific equitable lien on the income of the property to pay the deficiency or anticipated deficiency, the appointment being merely a collateral remedy against a fund which, in equity, is secondarily liable for such deficiency.[77] Hence there is no reason to appoint a receiver where the property is unimproved or where there are no rents to be collected.[78]

b. Right to Appointment. The appointment of a receiver in a foreclosure suit is not a matter of legal right; it is an equitable remedy which will not be granted except upon equitable grounds and for substantial reasons,[79] and to obtain

if he were allowed to proceed, it would interfere with the prior right of the first set and with the *pro rata* right of others of the second set. And see Goodwin *v.* Williams, 5 Grant Ch. (U. C.) 178.

Injunction against harvesting crop.—Where two deeds of trust rest upon the property, and the trustee in one deed begins harvesting a crop claimed by the other, the beneficiary may seek relief in equity by injunction and a receivership. Kerr *v.* Hill, 27 W. Va. 576.

75. Meyer *v.* Thomas, 131 Ala. 111, 30 So. 89; Marshall, etc., Bank *v.* Cady, 75 Minn. 241, 77 N. W. 831, 76 Minn. 112, 78 N. W. 978; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905.

76. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. 416.

Securing tenants for unoccupied property. — The court will not appoint a receiver for the purpose of securing tenants for portions of the property which were not producing rent at the time of his appointment. Frere *v.* Hibernian Min. Co., 2 Hog. 30.

Sequestering output of mines.— As the purpose of the receivership is only the collection of rents, a receiver will not be appointed to sequester the produce of mines on the premises. Darcy *v.* Blake, 1 Molloy 249.

77. *Illinois.*— Lechner *v.* Green, 104 Ill. App. 442; McLester *v.* Rose, 104 Ill. App. 433; Ortengren *v.* Rice, 104 Ill. App. 428.

Kentucky.—Douglass *v.* Cline, 12 Bush 608.

New Jersey.— Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Northrup *v.* Roe, 10 N. J. L. J. 334.

Virginia.— Bristow *v.* Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947.

Wisconsin.— Sales *v.* Lusk, 60 Wis. 490, 19 N. W. 362, holding that a receiver will not be appointed in a foreclosure suit merely for the sake of diverting the rents and profits to the use of plaintiff, to the prejudice of prior mortgagees, where plaintiff's security is the same as when the mortgage was taken.

Canada.— Wallace *v.* Wallace, 11 Ont. 574.

See 35 Cent. Dig. tit. "Mortgages," § 1375.

78. Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. (D. C.) 304.

79. *California.*— Guy *v.* Ide, 6 Cal. 99, 65 Am. Dec. 490.

Illinois.— Ortengren *v.* Rice, 104 Ill. App. 428; White *v.* Mackey, 85 Ill. App. 282.

Michigan.— Beecher *v.* Marquette, etc., Rolling Mill Co., 40 Mich. 307; Wagar *v.* Stone, 36 Mich. 364.

New York.— McCool *v.* McNamara, 19 Abb. N. Cas. 344.

South Carolina.— Hardin *v.* Hardin, 34 S. C. 77, 12 S. E. 936, 27 Am. St. Rep. 786.

United States.— Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

See 35 Cent. Dig. tit. "Mortgages," § 1371.

Opposition by mortgagor.— A mortgagor who has conveyed the land subject to the mortgage is not in a position to oppose the appointment of a receiver for the protection of the property to other creditors. Wall Street F. Ins. Co. *v.* Loud, 20 How. Pr. (N. Y.) 95.

The English rule, before recent statutory changes, did not allow the appointment of a receiver at the suit of a mortgagee who was in possession under a legal mortgage, or who, by virtue of such a mortgage, was entitled to an immediate entry. *In re* Prytherch, 42 Ch. D. 590, 59 L. J. Ch. 79, 61 L. T. Rep. N. S. 799, 38 Wkly. Rep. 61; Sturch *v.* Young, 5 Beav. 557, 12 L. J. Ch. 56, 49 Eng. Reprint 694; Berney *v.* Sewell, 1 Jac. & W. 647, 21 Rev. Rep. 265, 37 Eng. Reprint 515. But the rule has now been modified, so that, after a default in the payment of principal, interest, or insurance premiums has continued for a certain length of time, the mortgagee is entitled to have a receiver appointed, who is regarded as the agent of the mortgagor and not of the mortgagee. See Law *v.* Glenn, L. R. 2 Ch. 634; Mason *v.* Westoby,

it the mortgagee must make a clear showing of strong grounds,[80] amounting to more than the mere fact that the secured debt is overdue and unpaid;[81] and his petition will be refused where the court can see that he has ample security for his debt,[82] or an adequate remedy at law, as by recovering possession of the property and taking the rents,[83] or where it appears that the income of the property is already being applied to the payment of taxes and interest and in partial reduction of the mortgage debt.[84] And the mortgagee has not, in any circumstances, an equitable right to have the receivership extended over other property of the mortgagor not embraced in the mortgage.[85] This remedy may, however, be granted to a junior mortgagee, in proper circumstances, or he may, in some cases, have the first mortgagee's receivership extended to cover his security or continued for his benefit.[86] And a receiver may also be appointed, on proper grounds, at the request of one of defendants in the action who is liable for the deficiency.[87]

e. **Authority and Discretion of Court.** The power to appoint receivers in foreclosure suits is a power inherent in courts of equity, as part of their general authority, and does not depend on any contractual provision in the mortgage giving a lien on the income,[88] nor does it depend on statutes, although its extent and the grounds for its exercise may be regulated by positive law,[89] nor is it abrogated or abridged by statutes which declare that the legal title remains in the mortgagor, or that a mortgage shall not be deemed a conveyance so as to entitle the mortgagee to possession without foreclosure.[90] It is a power which rests very largely in the discretion of the court where the foreclosure suit is brought, to be exercised or withheld according to a wise and provident consideration for the rights and equities of all parties, as determined by the peculiar circumstances,[91]

32 Ch. D. 206, 55 L. J. Ch. 507, 54 L. T. Rep. N. S. 526, 34 Wkly. Rep. 498.

80. *Indiana.*— Sellers *v.* Stoffel, 139 Ind. 468, 39 N. E. 52.

Missouri.—Ohnsorg *v.* Turner, 13 Mo. App. 533.

South Carolina.— Greenwood Loan, etc., Assoc. *v.* Childs, 67 S. C. 251, 45 S. E. 167.

Washington.— Sibson *v.* Hamilton, etc., Co., 21 Wash. 362, 58 Pac. 219.

Wisconsin.— Morris *v.* Branchaud, 52 Wis. 187, 8 N. W. 883.

See 35 Cent. Dig. tit. "Mortgages," § 1371.

81. Mackenzie *v.* Howard, 93 Ga. 236, 18 S. E. 399; Ortengren *v.* Rice, 104 Ill. App. 428; Myers *v.* Estell, 48 Miss. 372; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

82. Baker *v.* City Nat. Bank, 94 Ga. 87, 21 S. E. 159; Adair *v.* Wright, 16 Iowa 385; Welch *v.* Henry, 32 Kan. 425, 4 Pac. 814; Rogers *v.* Southern Pine Lumber Co., 21 Tex. Civ. App. 48, 51 S. W. 26.

83. Williams *v.* Robinson, 16 Conn. 517; Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. (D. C.) 304. See also Cortleyeu *v.* Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478.

84. Myton *v.* Davenport, 51 Iowa 583, 2 N. W. 402.

85. State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

86. Roach *v.* Glos, 181 Ill. 440, 54 N. E. 1022; Gillespie *v.* Greene County Sav., etc., Assoc., 95 Ill. App. 543; Evans *v.* Eastman, 60 Ill. App. 332; Clark *v.* John A. Logan Mut. Loan, etc., Assoc., 58 Ill. App. 311; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Phipps *v.* Bath, Dick. 608, 21 Eng. Reprint 408; Berney *v.* Sewell, 1 Jac. & W. 647, 21 Rev. Rep. 265, 37 Eng. Reprint 515.

87. Philadelphia Mortg., etc., Co. *v.* Oyler, 61 Nebr. 702, 85 N. W. 899.

88. Glos *v.* Roach, 80 Ill. App. 283; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905; American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. 610, 32 C. C. A. 275; Davidson *v.* Allis, 7 Fed. Cas. No. 3,600.

89. Woodland Bank *v.* Stephens, 144 Cal. 659, 79 Pac. 379; Hazeltine *v.* Granger, 44 Mich. 503, 7 N. W. 74; Hollenbeck *v.* Donnell, 94 N. Y. 342.

90. *Minnesota.*— Lowell *v.* Doe, 44 Minn. 144, 46 N. W. 297.

Nebraska.— Philadelphia Mortg., etc., Co. *v.* Goos, 47 Nebr. 804, 66 N. W. 843.

South Dakota.— Roberts *v.* Parker, 14 S. D. 323, 85 N. W. 591.

Wisconsin.— Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124.

United States.— American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. 610, 32 C. C. A. 275; Davidson *v.* Allis, 7 Fed. Cas. No. 3,600.

Contra.— American Inv. Co. *v.* Farrar, 87 Iowa 437, 54 N. W. 361; Grand Rapids Fifth Nat. Bank *v.* Pierce, 117 Mich. 376, 75 N. W. 1058; Wagar *v.* Stone, 36 Mich. 364; Rogers *v.* Southern Pine Lumber Co., 21 Tex. Civ. App. 48, 51 S. W. 26; Couper *v.* Shirley, 75 Fed. 168, 21 C. C. A. 288, decided under Oregon statute.

91. *Georgia.*— Patterson *v.* Clark, 89 Ga. 700, 15 S. E. 641.

and an appellate court will be slow to interfere with the exercise of such discretion,[92] although it should be remembered that the power is one to be exercised only in a strong case, and otherwise the appointment of a receiver may be reversible error.[93] Where the mortgaged property is the mortgagor's homestead, it is not usual to appoint a receiver, and the courts are very reluctant to do so.[94]

d. Grounds For Appointment[95] — (i) *Inadequacy of Security.* It is good ground for appointing a receiver in a foreclosure case, where it is shown that the mortgaged property is not worth as much as the amount due on the mortgage, and that the mortgagor, or other person liable for the deficiency, is insolvent.[96] Some of the decisions go even further than this, and hold it sufficient to show

Illinois.— Equitable Trust Co. *v.* Wilson, 200 Ill. 23, 65 N. E. 430.

Nebraska.— Jacobs *v.* Gibson, 9 Nebr. 380, 2 N. W. 893.

United States.— Dow *v.* Memphis, etc., R. Co., 20 Fed. 768; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

England.— Pease *v.* Fletcher, 1 Ch. D. 273, 45 L. J. Ch. 265, 33 L. T. Rep. N. S. 644, 24 Wkly. Rep. 158; Aberdein *v.* Chitty, 8 L. J. Exch. 30, 3 Y. & C. Exch. 379.

See 35 Cent. Dig. tit. "Mortgages," § 1372.

Considerations affecting discretion of court. — The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver, where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration. Nor will it appoint a receiver, if it perceives that a much greater injury would result to those interested in the road than by leaving the property in the hands then holding it, especially when it appears that the large majority of the stock-holders and bondholders favor a funding plan then being negotiated. Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

92. Jacobs *v.* Gibson, 9 Nebr. 380, 2 N. W. 893; Morris *v.* Branchaud, 52 Wis. 187, 8 N. W. 883; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S. 510, 17 L. ed. 900.

93. *Alabama.* — Alabama Nat. Bank *v.* Mary Lee Coal, etc., R. Co., 108 Ala. 288, 19 So. 404.

Illinois.— Silverman *v.* Northwestern Mut. L. Ins. Co., 5 Ill. App. 124.

Michigan.— Beardslee *v.* Citizens' Commercial, etc., Bank, 112 Mich. 377, 70 N. W. 1027.

New Jersey.— Baldwin *v.* Flagg, 4 N. J. L. J. 181; Williams *v.* Dube, 4 N. J. L. J. 24.

New York.— Hollenbeck *v.* Donnell, 94 N. Y. 342, holding that where it appears that only one sixth of the mortgage debt is due, and the premises are so divided that a part may be sold, a receivership of the whole should not be granted, but only of a part, sufficient protection thereby being afforded.

United States.— Appleton Water Works Co. *v.* Central Trust Co., 93 Fed. 286, 35 C. C. A. 302; Cone *v.* Combs, 18 Fed. 576, 5 McCrary 651; Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

England.— Shepherd *v.* Murdock, 2 Molloy 531.

94. See Callanan *v.* Shaw, 19 Iowa 183; Sanford *v.* Anderson, 69 Nebr. 249, 95 N. W. 632; Laune *v.* Hauser, 58 Nebr. 663, 79 N. W. 555; Chadron Loan, etc., Assoc. *v.* Smith, 58 Nebr. 469, 78 N. W. 938, 76 Am. St. Rep. 108; Johnson *v.* Young, 1 Nebr. (Unoff.) 28, 95 N. W. 497. But *compare* Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124.

95. Neglect to pay taxes. — A receiver should be appointed where the debtor suffers the premises to be sold for delinquent taxes, thereby creating a lien superior to the mortgage and which, if not redeemed, will destroy the security of the mortgage. Ortengren *v.* Rice, 104 Ill. App. 428. But *compare* Wilson *v.* Wolf, 9 Kan. App. 347, 61 Pac. 311.

96. *Alabama.* — Jackson *v.* Hooper, 107 Ala. 634, 18 So. 254; Ashurst *v.* Lehman, 86 Ala. 370, 5 So. 731. *Compare* McLean *v.* Presley, 56 Ala. 211.

Arkansas.— Weis *v.* Neel, (1890) 14 S. W. 1097; Price *v.* Dowdy, 34 Ark. 285.

District of Columbia.— See Wood *v.* Grayson, 16 App. Cas. 174. But see Phœnix Mut. L. Ins. Co. *v.* Grant, 3 MacArthur 220.

Georgia.— Hart *v.* Respess, 89 Ga. 87, 14 S. E. 910. *Compare* Garrard *v.* Amoss, 83 Ga. 765, 10 S. E. 587.

Illinois.— Cross *v.* Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322; Haas *v.* Chicago Bldg. Soc., 89 Ill. 498; Ruprecht *v.* Henrici, 113 Ill. App. 398; Pringle *v.* James, 109 Ill. App. 100; West *v.* Adams, 106 Ill. App. 114; McLester *v.* Rose, 104 Ill. App. 433; Ortengren *v.* Rice, 104 Ill. App. 428; Richey *v.* Guild, 99 Ill. App. 451; Gooden *v.* Vinke, 87 Ill. App. 562. The fact that a foreclosure sale results in a deficiency shows that the property is inadequate security and justifies the appointment of a receiver. Schaeppi *v.* Bartholomae, 217 Ill. 105, 75 N. E. 447, 1 L. R. A. N. S. 1079; Ruprecht *v.* Henrici, 116 Ill. App. 583; Walker *v.* Kersten, 115 Ill. App. 130.

Indiana.— Sweet, etc., Co. *v.* Union Nat. Bank, 149 Ind. 305, 49 N. E. 159; Merritt *v.* Gibson, 129 Ind. 155, 27 N. E. 136, 15 L. R. A. 277; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510.

Michigan.— Brown *v.* Chase, Walk. 43.

Minnesota.— Marshall, etc., Bank *v.* Cady, 75 Minn. 241, 77 N. W. 831; Farmers' Nat.

that the mortgaged property is probably insufficient to satisfy the mortgage debt, or of doubtful or uncertain sufficiency,[97] and that the mortgagee should not be deprived of this remedy in consequence of the fact that he holds another mortgage, to secure the same debt, on land in another state.[98] And other decisions hold it unnecessary to show the actual insolvency of the mortgagor, considering it to be enough if it appears that his responsibility is doubtful or questionable.[99] But if the property is in the possession of a purchaser who is solvent and responsible, a receiver should not be appointed merely because of the insolvency of the mortgagor.[1]

(II) *Danger of Waste or Injury.* A receiver may properly be appointed where it is shown that the property, if allowed to remain in the possession of the mortgagor, is in imminent danger of being wasted, depreciated, or materially injured.[2] This rule is particularly applicable where the mortgage covers a

Bank *v.* Backus, 64 Minn. 43, 66 N. W. 5; Haugan *v.* Netland, 51 Minn. 552, 53 N. W. 873. *Compare* National F. Ins. Co. *v.* Broadbent, 77 Minn. 175, 79 N. W. 676.

Nebraska.— Jacobs *v.* Gibson, 9 Nebr. 380, 2 N. W. 893; Robertson *v.* Ostrom, 1 Nebr. (Unoff.) 200, 95 N. W. 469.

Nevada.— Hyman *v.* Kelly, 1 Nev. 179.

New Jersey.— Warwick *v.* Hammell, 32 N. J. Eq. 427; Brasted *v.* Sutton, 30 N. J. Eq. 462; Chetwood *v.* Coffin, 30 N. J. Eq. 450; Stockman *v.* Wallis, 30 N. J. Eq. 449; Mahon *v.* Crothers, 28 N. J. Eq. 567; Cortleyeu *v.* Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478; Pennock *v.* Geyer, 9 N. J. L. J. 307; Anonymous, 3 N. J. L. J. 302; Wood *v.* Eckert, 3 N. J. L. J. 53. But see Frisbie *v.* Bateman, 24 N. J. Eq. 28.

New York.— Veerhoff *v.* Miller, 30 N. Y. App. Div. 335, 51 N. Y. Suppl. 1048; Hollenbeck *v.* Donell, 29 Hun 94 [*reversed* on the facts in 94 N. Y. 342]; Mutual L. Ins. Co. *v.* Spicer, 12 Hun 117; Astor *v.* Turner, 2 Barb. 444; Warner *v.* Gouveneur, 1 Barb. 36; Welche *v.* Schoenberg, 45 Misc. 126, 91 N. Y. Suppl. 880; Astor *v.* Turner, 11 Paige 436, 43 Am. Dec. 766; Sea Ins. Co. *v.* Stebbins, 8 Paige 565; Shotwell *v.* Smith, 3 Edw. 588.

North Carolina.— Durant *v.* Crowell, 97 N. C. 367, 2 S. E. 541; Kerchner *v.* Fairley, 80 N. C. 24.

Texas.—Childress *v.* State Trust Co., (Civ. App. 1895) 32 S. W. 330.

Wisconsin.— Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124; Finch *v.* Houghton, 19 Wis. 149.

United States.— Cone *v.* Combs, 18 Fed. 576, 5 McCrary 651; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442; Ruggles *v.* Southern Minnesota R. Co., 20 Fed. Cas. No. 12,121.

See 35 Cent. Dig. tit. "Mortgages," § 1375.

See, however, Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; West *v.* Conant, 100 Cal. 231, 34 Pac. 705; White *v.* Griggs, 54 Iowa 650, 7 N. W. 125; Hardin *v.* Hardin, 34 S. C. 77, 12 S. E. 936, 27 Am. St. Rep. 786; Seignious *v.* Pate, 32 S. C. 134, 10 S. E. 880, 17 Am. St. Rep. 846.

97. Philadelphia Mortg., etc., Co. *v.* Oyler, 61 Nebr. 702, 85 N. W. 899; Waldron *v.* Greenwood First Nat. Bank, 60 Nebr. 245, 82 N. W. 856; Philadelphia Mortg., etc., Co. *v.* Goos, 47 Nebr. 804, 66 N. W. 843; Ecklund *v.* Willis, 42 Nebr. 737, 60 N. W. 1026; Jacobs *v.* Gibson, 9 Nebr. 380, 2 N. W. 893; New York Bldg. Loan Banking Co. *v.* Begly, 75 N. Y. App. Div. 308, 78 N. Y. Suppl. 169; Browning *v.* Stacey, 52 N. Y. App. Div. 626, 65 N. Y. Suppl. 203; Ross *v.* Vernam, 6 N. Y. App. Div. 246, 39 N. Y. Suppl. 1031; New York L. Ins. Co. *v.* Glass, 50 How. Pr. (N. Y.) 88; Wall Street F. Ins. Co. *v.* Loud, 20 How. Pr. (N. Y.) 95; Throckmorton *v.* Slagle, 3 Ohio Dec. (Reprint) 550; Winkler *v.* Magdeburg, 100 Wis. 421, 76 N. W. 332. But see Woodlawn Bank *v.* Stephens, 144 Cal. 659, 79 Pac. 379; Murphy *v.* Hoyt, 93 Ill. App. 313; Sickles *v.* Conary, 8 N. Y. App. Div. 308, 40 N. Y. Suppl. 948.

Possibility of future insufficiency.— A receiver will not be appointed in foreclosure proceedings merely because the property at some future time may become insufficient to pay the mortgage debt. Laune *v.* Hauser, 58 Nebr. 663, 79 N. W. 555.

98. Minturn *v.* Harms, 3 N. J. L. J. 22.

99. Christie *v.* Burns, 83 Ill. App. 514; Hursh *v.* Hursh, 99 Ind. 500; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405.

1. Warren *v.* Pitts, 114 Ala. 65, 21 So. 494; Silverman *v.* Northwestern Mut. L. Ins. Co., 5 Ill. App. 124. But see Buck *v.* Stuben, 63 Nebr. 273, 88 N. W. 483, holding that a receiver may be appointed where the property is insufficient security and the person primarily liable for the debt is insolvent, although there is an indorser or guarantor of the debt who is solvent and responsible.

2. *Indiana.*— Brinkman *v.* Ritzinger, 82 Ind. 358.

Iowa.— See Paine *v.* McElroy, 73 Iowa 81, 34 N. W. 615.

Kentucky.— Mayfield *v.* Wright, 107 Ky. 530, 54 S. W. 864, 21 Ky. L. Rep. 1255; Woolley *v.* Holt, 14 Bush 788; Newport, etc., Bridge Co. *v.* Douglass, 12 Bush 673.

Mississippi.—Thompson *v.* Natchez Water, etc., Co., 68 Miss. 423, 9 So. 821.

North Carolina.— Oldham *v.* Wilmington First Nat. Bank, 84 N. C. 304.

South Dakota.—Roberts *v.* Parker, 14 S. D. 323, 85 N. W. 591.

Vermont.—Cheever *v.* Rutland, etc., R. Co., 39 Vt. 653.

manufacturing or business property,[3] although it has also been applied to farm mortgages.[4] But the mortgagee cannot have a receiver where he himself has taken possession of the property and is running it and receiving the rents and income.[5]

(III) *Pledge of Rents and Profits.* When the rents and profits are pledged for the payment of the debt, together with the land itself, they constitute a fund primarily liable for the debt, and in this case a receiver may be appointed, on the application of the mortgagee, without showing that the land is inadequate as security and without question as to the mortgagor's solvency.[6] But still, even

United States.— Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905; Lapham *v.* Ives, 14 Fed. Cas. No. 8,082; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442.

See 35 Cent. Dig. tit. "Mortgages," § 1374.

3. Farmers' L. & T. Co. *v.* Meridian Waterworks Co., 139 Fed. 661 (waterworks); Stewart *v.* Chesapeake, etc., Canal Co., 5 Fed. 149, 4 Hughes 47 (canal); Rowe *v.* Wood, 2 Jac. & W. 553, 22 Rev. Rep. 208, 37 Eng. Reprint 740 (mining property).

Hotel property.— A receiver is properly appointed for hotel property, on the application of the mortgagee, where it appears that the mortgagor has closed the house, although the business was specially lucrative, and that in consequence the property would depreciate in value until it became insufficient as security for the mortgage debt. Lowell *v.* Doe, 44 Minn. 144, 46 N. W. 297.

Newspaper plant.—It has been held proper to appoint a receiver and manager of a newspaper plant until the hearing of the cause. Chaplin *v.* Young, 6 L. T. Rep. N. S. 97. But see Whitehead *v.* Hale, 118 N. C. 601, 24 S. E. 360, where, however, it was not shown that the security was being impaired, although the mortgagor was insolvent, but it rather appeared to be increasing in value, and it was stated that the appointment of a receiver would destroy its value as a newspaper.

Manufacturing establishment.— Mere disuse of a manufacturing plant, under an agreement with other manufacturers to restrict production, although attended with the decay and dilapidation inseparable from disuse, is not such destruction or waste as to entitle the mortgagee to a receiver pending foreclosure. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90.

4. Dunlap *v.* Hedges, 35 W. Va. 287, 13 S. E. 656, where it was alleged that the mortgagor was allowing the land to run down and was cultivating it in a wasteful and destructive manner, and a receiver was appointed. But see Du Bois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067 (where a similar application was refused, the mortgagee showing that the security was inadequate and that the mortgagor was not able to farm and manage the land, but not alleging that he would commit waste or that the property would depreciate in his hands); Barkley *v.* Reay, 2 Hare 308, 12 L. J. Ch. 320, 24 Eng. Ch. 306, 67 Eng. Reprint 127.

Decrease in value.— The fact that the property has decreased in commercial value is no cause for the appointment of a receiver, where this is incident to a general depreciation of farming property, nor that the mortgagor has failed to pay the interest, when this is due to a failure of the crops. Horner *v.* Dey, 61 N. J. Eq. 554, 49 Atl. 154.

5. Sleeper *v.* Iselin, 59 Iowa 379, 13 N. W. 341.

6. *Illinois.*— Ball *v.* Marske, 202 Ill. 31, 66 N. E. 845; Bagley *v.* Illinois Trust, etc., Bank, 199 Ill. 76, 64 N. E. 1085; West *v.* Adams, 106 Ill. App. 114; Lechner *v.* Green, 104 Ill. App. 442; Ortengren *v.* Rice, 104 Ill. App. 428; Ball *v.* Marske, 100 Ill. App. 389; Fountain *v.* Walther, 66 Ill. App. 529; Niccolls *v.* Peninsular Stove Co., 48 Ill. App. 317; Oakford *v.* Robinson, 48 Ill. App. 270.

Indiana.— Harris *v.* U. S. Saving Fund, etc., Co., 146 Ind. 265, 45 N. E. 328. But see Ætna L. Ins. Co. *v.* Broecker, (1906) 77 N. E. 1092.

Iowa.— Stetson *v.* Northern Inv. Co., 101 Iowa 435, 70 N. W. 595; Des Moines Gas Co. *v.* West, 44 Iowa 23.

New York.— Sage *v.* Mendelson, 42 Misc. 137, 85 N. Y. Suppl. 1008; Butler *v.* Frazer, 57 N. Y. Suppl. 900. But see U. S. Life Ins. Co. *v.* Ettinger, 32 Misc. 378, 66 N. Y. Suppl. 1, refusing a receiver, where it appeared that the premises were adequate security for the mortgage debt.

Texas.— De Barrera *v.* Frost, 33 Tex. Civ. App. 580, 77 S. W. 637, holding that the right of the mortgagee to sue and collect rents from a tenant is not an adequate remedy, such as should prevent the appointment of a receiver to collect and apply the rents and keep the property in repair, where the creditor is entitled to such rents until the payment of his entire debt, and the rents to accrue under the outstanding lease will not be sufficient to extinguish his claim.

Compare Alabama Nat. Bank *v.* Mary Lee Coal, etc., R. Co., 108 Ala. 288, 19 So. 404; Whitley *v.* Challis, [1892] 1 Ch. 64, 61 L. J. Ch. 307, 65 L. T. Rep. N. S. 838, 4 Wkly. Rep. 291.

A mortgagee, in lawful possession and authorized to receive the rents and profits of the property to apply on his mortgage, cannot, in the absence of evidence showing waste or abuse of his trust, be displaced by a receiver, with power to subordinate the claims of the mortgagee to claims of the divorced wife of the mortgagor for alimony. Cummings *v.* Cummings, 75 Cal. 434, 17 Pac. 442.

here, the appointment of a receiver is not a matter of course; the court may exercise its discretion as in other cases, and refuse the appointment if there appears to be no reason for granting it.[7]

(iv) *Provision For Receivership in Mortgage.* Where the mortgage contains a stipulation that the mortgagee shall be entitled to have a receiver appointed upon default and the commencement of foreclosure proceedings, the court will make such appointment, upon his request therefor,[8] if not as a matter of course, still upon any showing of equitable grounds therefor, or if no good reason against the appointment is shown.[9] It has been held, however, that the question is still within the discretion of the court,[10] and that the appointment should not be made if the property appears to furnish ample security, without the rents.[11] If the statute law so restricts the power of the court in regard to appointing receivers that the appointment would not be proper in the particular case, jurisdiction to make the appointment cannot be conferred by stipulation in the mortgage.[12] If the stipulation is valid, it is binding on a purchaser of the premises,[13] and is not revoked by the death of the mortgagor.[14]

3. Proceedings on Application For Receiver[15] — a. Time For Appointment. Under exceptional circumstances the appointment of a receiver may be made even before a default has occurred, and hence before a right to foreclose accrues, if it is certain that the default will occur and that a receivership will be necessary to protect the interests of the mortgagee.[16] And on the other hand a receiver may be appointed after final judgment or decree, and pending the time allowed by statute for redemption from the foreclosure sale, if such a course is plainly necessary for the preservation of the estate or to safeguard the rights of the

7. Bagley *v.* Illinois Trust, etc., Bank, 199 Ill. 76, 64 N. E. 1085; Brick *v.* Hornbeck, 19 Misc. (N. Y.) 218, 43 N. Y. Suppl. 301.

8. Walker *v.* Kersten, 115 Ill. App. 130.

Provision in junior mortgage.— In a suit to foreclose a senior mortgage, if neither the bill nor the cross bill prays for the appointment of a receiver, the court should not appoint one, although a junior mortgage may provide for such appointment. Gillespie *v.* Greene County Sav., etc., Assoc., 95 Ill. App. 543.

Receiver after foreclosure.— Where the mortgage authorizes the mortgagee to take possession on default, and also to pursue his remedy by foreclosure, but does not contemplate the appointment of a receiver after foreclosure, the mortgagee will not be entitled to the appointment if he omits to take possession and simply resorts to the ordinary remedy of foreclosure. Swan *v.* Mitchell, 82 Iowa 307, 47 N. W. 1042.

9. Bagley *v.* Illinois Trust, etc., Bank, 199 Ill. 76, 64 N. E. 1085; Pringle *v.* James, 109 Ill. App. 100; Gooden *v.* Vinke, 87 Ill. App. 562; White *v.* Mackey, 85 Ill. App. 282; Loughridge *v.* Haughan, 79 Ill. App. 644; Wright *v.* Case, 69 Ill. App. 535; Clark *v.* John A. Logan Mut. Loan, etc., Assoc., 58 Ill. App. 311; Hubbell *v.* Avenue Inv. Co., 97 Iowa 135, 66 N. W. 85; Paine *v.* McElroy, 73 Iowa 81, 34 N. W. 615; Thomas *v.* Davis, 90 N. Y. App. Div. 1, 85 N. Y. Suppl. 661; Browning *v.* Sire, 56 N. Y. App. Dlv. 399, 67 N. Y. Suppl. 798; Fletcher *v.* Krupp, 35 N. Y. App. Div. 586, 55 N. Y. Suppl. 146; MacKellar *v.* Rogers, 52 N. Y. Super. Ct. 360; Putnam *v.* McAllister, 57 N. Y. Suppl. 404; Keogh Mfg. Co. *v.* Whiston, 14 N. Y. Suppl. 344, 26 Abb. N. Cas. 358; Warner *v.* Rising Fawn Iron Co., 29 Fed. Cas. No. 17,188, 3 Woods 514.

10. Ætna L. Ins. Co. *v.* Broecker, (Ind. 1906) 77 N. E. 1092; New York Bldg. Loan Banking Co. *v.* Begly, 75 N. Y. App. Div. 308, 78 N. Y. Suppl. 169.

11. Eidlitz *v.* Lancaster, 40 N. Y. App. Div. 446, 59 N. Y. Suppl. 54; Degener *v.* Stiles, 2 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 474; Jarvis *v.* McQuaide, 24 Misc. (N. Y.) 17, 53 N. Y. Suppl. 97.

12. Baker *v.* Varney, 129 Cal. 564, 62 Pac. 100, 79 Am. St. Rep. 140; Couper *v.* Shirley, 75 Fed. 168, 21 C. C. A. 288.

13. Hubbell *v.* Avenue Inv. Co., 97 Iowa 135, 66 N. W. 85.

14. *In re* Halc, [1899] 2 Ch. 107, 68 L. J. Ch. 517, 80 L. T. Rep. N. S. 827, 47 Wkly. Rep. 579.

15. Venue. — An application for the appointment of a receiver in mortgage foreclosure proceedings must be made in the county where the action is triable. Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 41 Misc. (N. Y.) 204, 83 N. Y. Suppl. 930. And see Commercial Tel. Co. *v.* Territorial Bank, etc., Co., (Tex. Civ. App. 1905) 86 S. W. 66.

16. Thompson *v.* Natchez Water, etc., Co., 68 Miss. 423, 9 So. 821; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124; Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513; Latimer *v.* Moore, 14 Fed. Cas. No. 8,114, 4 McLean 110. But *compare* Phillips *v.* Taylor, 96 Ala. 426, 11 So. 323; Ogdensburgh Bank *v.* Arnold, 5 Paige (N. Y.) 38.

mortgagee,[17] although not after a strict foreclosure, although the mortgagee has not yet recovered the possession.[18] A receiver to collect rents from the tenants of the mortgagor will not be appointed on filing a bill for foreclosure.[19] The beneficiary in a trust deed may have a receiver appointed, and the proceeds of the security impounded for his benefit during the litigation, after his right to a sale of the property has been adjudged.[20] It has been held that where the petition prayed for the appointment of a receiver pending the action for foreclosure, but the application was not heard until final hearing, the court erred in appointing a receiver on the final hearing before appeal or on application for a stay.[21]

b. Application and Answer. An application[22] for a receiver may be made by separate petition or by a prayer therefor in the bill or complaint for foreclosure,[23] but in either case there must be full and specific allegations of the facts entitling the mortgagee to this remedy.[24] Opposition to the application should be made by answer, explicitly denying the facts alleged,[25] and not by demurrer.[26] The denial of such an application, or the reversal on appeal of an order granting a receiver, is no bar to a second application on a new state of facts or on an amended complaint supplying the deficiencies of the first.[27]

c. Notice of Application. Where the appointment of a receiver is prayed in the original bill, its averments may make a case for such appointment on an *ex parte* application without notice;[28] but on a motion for a receivership, it is error to make the appointment without due notice to all parties interested adversely,[29]

17. *Illinois.*— Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140, 51 N. E. 200; Haas *v.* Chicago Bldg. Soc., 89 Ill. 498; Christie *v.* Burns, 83 Ill. App. 514; Wright *v.* Case, 69 Ill. App. 535; Boruff *v.* Hinkley, 66 Ill. App. 274.

Indiana.— Merritt *v.* Gibson, 129 Ind. 155, 27 N. E. 136, 15 L. R. A. 277; Connelly *v.* Dickson, 76 Ind. 440. *Compare* Sheeks *v.* Klotz, 84 Ind. 471.

Minnesota.— Hartford Nat. F. Ins. Co. *v.* Broadbent, 77 Minn. 175, 79 N. W. 676.

Nebraska.— Philadelphia Mortg., etc., Co. *v.* Goos, 47 Nebr. 804, 66 N. W. 843.

Wisconsin.— Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124.

United States.— Lapham *v.* Ives, 14 Fed. Cas. No. 8,082.

Contra.— White *v.* Griggs, 54 Iowa 650, 7 N. W. 125.

After the term of court at which a final decree of foreclosure has been entered, where no deficiency decree was sought or obtained by any one, the court has no power, in the same proceeding, to reach the rents and profits during the period of redemption, for the purpose of applying them on a second mortgage upon which no relief had been prayed or granted. Burleigh *v.* Keck, 84 Ill. App. 607.

18. Wills *v.* Luff, 38 Ch. D. 197, 57 L. J. Ch. 563, 36 Wkly. Rep. 571.

19. Best *v.* Schermier, 6 N. J. Eq. 154.

20. Bidwell *v.* Paul, 5 Baxt. (Tenn.) 693.

21. Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594.

22. **Application by one of several mortgagees.**— A receiver may be appointed over the whole of a property at the instance of a mortgagee of an undivided share of it. Sumsion *v.* Crutwell, 31 Wkly. Rep. 399. And see Fripp *v.* Chard R. Co., 1 Eq. Rep. 503, 11 Hare 241, 17 Jur. 887, 22 L. J. Ch. 1084, 1 Wkly. Rep. 477, 45 Eng. Ch. 241, 68 Eng. Reprint 1264.

23. Pasco *v.* Gamble, 15 Fla. 562; Sellers *v.* Stoffel, 139 Ind. 468, 39 N. E. 52.

Verification.— It is not proper to appoint a receiver where neither the petition therefor nor the bill of complaint filed in the case is verified; and this notwithstanding the provisions of the trust deed sought to be foreclosed. Daley *v.* Nelson, 119 Ill. App. 627.

24. *Alabama.*— Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313, 11 So. 213.

California.— Garretson Inv. Co. *v.* Arndt, 144 Cal. 64, 77 Pac. 770.

Indiana.— Pouder *v.* Tate, 96 Ind. 330.

Nebraska.— Morris *v.* Linton, 62 Nebr. 731, 87 N. W. 958; Chambers *v.* Barker, 2 Nebr. (Unoff.) 523, 89 N. W. 388.

New York.— Browning *v.* Sire, 56 N. Y. App. Div. 399, 67 N. Y. Suppl. 798; Warner *v.* Gouverneur, 1 Barb. 36; Sea Ins. Co. *v.* Stebbins, 8 Paige 565.

West Virginia.— Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909.

See 35 Cent. Dig. tit. "Mortgages," § 1377.

25. Henry *v.* Watson, 109 Ala. 355, 19 So. 413; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565.

26. Pouder *v.* Tate, 96 Ind. 330.

27. Stoffel *v.* Sellers, 142 Ind. 301, 41 N. E. 708; Nash *v.* Meggett, 89 Wis. 486, 61 N. W. 283.

28. Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313, 11 So. 213.

29. *Colorado.*— Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212.

Florida.— Moyers *v.* Coiner, 22 Fla. 422.

Michigan.— Hazeltine *v.* Granger, 44 Mich. 503, 7 N. W. 74.

except where the mortgagor is a non-resident and has been served by publication, in which case a temporary receiver may be appointed without notice;[30] and where defendant is in default for want of appearance, he is not entitled to notice of the application.[31]

d. Hearing and Determination. The burden is on the mortgagee to establish the grounds on which the receivership is asked,[32] such as the inadequacy of the security[33] or the insolvency of the mortgagor.[34] It is discretionary with the court to hear oral evidence on such an application;[35] but it will confine the hearing strictly to the question of appointing or refusing a receiver, and not undertake to determine any collateral questions, however proper may be their consideration in the main suit.[36] If the relief is granted, it may be coupled with the imposition of just and equitable terms upon the mortgagee.[37] An order denying the appointment of a receiver for mortgaged property pending foreclosure proceedings need not find the facts specifically, unless the losing party has requested it.[38]

e. Selection of Receiver. The receiver should be an indifferent person between the parties to the suit, and one having no pecuniary interest of his own which might conflict with the duties of his office.[39] The propriety of appointing the mortgagee himself is extremely doubtful,[40] and if the mortgagor's solicitor is eligible at all to the office of receiver, it appears that the mortgagee, who procures his appointment, must bear any loss occasioned by his defalcation.[41] There is more justification for appointing a second mortgagee receiver in his own foreclosure suit, especially with the consent of the senior encumbrancer; but this will

Minnesota.— Haugan *v.* Netland, 51 Minn. 552, 53 N. W. 873.

Nebraska.— Johnson *v.* Powers, 21 Nebr. 292, 32 N. W. 62.

See 35 Cent. Dig. tit. "Mortgages," § 1379.

Who entitled to notice.— Where the mortgaged property is in the possession of a subsequent purchaser of the equity of redemption, he is entitled to notice of the application for a receiver, and notice to the mortgagor alone is not sufficient. Dazian *v.* Meyer, 66 N. Y. App. Div. 575, 73 N. Y. Suppl. 328. And where a holder of mortgage bonds asks foreclosure on the ground that the trustee under the mortgage has abandoned his trust, and that his interests are antagonistic to the bondholders, notice to such trustee of an application for the appointment of a receiver will not bind other bondholders who are not parties to the action. Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212. But it is not necessary to serve notice on a receiver of property of one of the mortgagors, appointed in proceedings supplementary to execution, as he is not an adverse party. Grover *v.* McNeely, 72 N. Y. App. Div. 575, 76 N. Y. Suppl. 559.

Waiver of irregularity.— One who answers a petition for the appointment of a receiver, and resists it on the merits, waives any irregularity in the notice of the application. Robertson *v.* Ostrom, 1 Nebr. (Unoff.) 200, 95 N. W. 469.

30. Fletcher *v.* Krupp, 35 N. Y. App. Div. 586, 55 N. Y. Suppl. 146; Coleman *v.* Goodman, 37 Misc. (N. Y.) 517, 75 N. Y. Suppl. 973. But see Wolfe *v.* Jackson, 2 Hog. 199; Barlow *v.* Harvey, 1 Molloy 246; Johnson *v.* Nagle, 1 Molloy 240; London, etc., Bank *v.* Facey, 24 L. T. Rep. N. S. 126, 19 Wkly. Rep. 676.

31. Armstrong *v.* Douglas Park Bldg. Assoc., 60 Ill. App. 318.

32. Brown *v.* Chase, Walk. (Mich.) 43.

33. Wood *v.* Eckert, 3 N. J. L. J. 53 (holding that on an application for a receiver of mortgaged premises, the test of the adequacy of the security is its present market value); Shotwell *v.* Smith, 3 Edw. (N. Y.) 588 (holding that in the case of city lots the rent of the land, as a basis for the capitalization of its value, rather than what it would sell for, is the test).

34. See Johnson *v.* Young, 1 Nebr. (Unoff.) 28, 95 N. W. 497; Durant *v.* Crowell, 97 N. C. 367, 2 S. E. 541.

35. State *v.* Egan, 62 Minn. 280, 64 N. W. 813.

36. Beecher *v.* Marquette, etc., Rolling Mill Co., 40 Mich. 307; Putnam *v.* Henderson, 49 N. Y. App. Div. 361, 63 N. Y. Suppl. 250; Ross *v.* Vernam, 6 N. Y. App. Div. 246, 39 N. Y. Suppl. 1031.

37. Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488.

38. Whitehead *v.* Hale, 118 N. C. 601, 24 S. E. 360.

39. Fripp *v.* Chard R. Co., 1 Eq. Rep. 503, 11 Hare 241, 17 Jur. 887, 22 L. J. Ch. 1084, 1 Wkly. Rep. 477, 45 Eng. Ch. 241, 68 Eng. Reprint 1264.

40. See Turpin *v.* McGill, 6 Ohio Dec. (Reprint) 768, 8 Am. L. Rec. 23. *Compare* Bolles *v.* Duff, 37 How. Pr. (N. Y.) 162; Davis *v.* Barrett, 13 L. J. Ch. 304.

41. Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627; Sorchan *v.* Mayo, 50 N. J. Eq. 288, 23 Atl. 479.

not be done as against objection to the propriety of such a course, even though his good faith is not questioned.[42]

f. Operation and Effect of Appointment. By an appointment of a receiver the mortgagee acquires a specific equitable lien on the rents and profits,[43] but he also submits to the discretion of the court in respect to the management of the property through its receiver,[44] and is not to be regarded as occupying the position of a mortgagee in possession, since the receiver holds for the benefit of all parties in interest.[45] As to other mortgagees or creditors, the receivership may prevent them from gaining possession of the property;[46] but does not affect their liens or priorities or their right to assert claims against the fund in court,[47] nor dissolve attachments.[48] The order or decree appointing the receiver cannot be impeached collaterally by the mortgagor;[49] but may be attacked by other creditors, or by defendants in suits brought by the receiver, on grounds going to show its entire invalidity, as for want of jurisdiction or other fatal defect.[50]

4. Rights, Powers, and Duties of Receiver — a. In General. A receiver appointed in foreclosure proceedings is an officer of the court, and not the agent of the mortgagee,[51] and cannot be sued without leave of the court appointing him.[52] Although he is not vested with title to the mortgaged property, he is entitled to the immediate possession[53] of all the property of every kind covered by the mortgage, unless in this respect he is restricted by the terms of his appointment,[54] and is entitled to all rents accruing after the date of his appointment,[55] in which claim he cannot be defeated by the payment of rent in advance

42. See Ranney *v.* Peyser, 83 N. Y. 1; Putnam *v.* McAllister, 57 N. Y. Suppl. 404.

43. Ortengren *v.* Rice, 104 Ill. App. 428; Stephen *v.* Reibling, 45 Ill. App. 40; Citizens' Sav., etc., Co. *v.* French, 4 Ohio S. & C. Pl. Dec. 443, 4 Ohio N. P. 61.

44. Farmers' L. & T. Co. *v.* Staten Island Belt Line R. Co., 17 Misc. (N. Y.) 168, 39 N. Y. Suppl. 872 [*affirmed* in 6 N. Y. App. Div. 148, 39 N. Y. Suppl. 996].

45. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 90 Fed. 584. But see Land *v.* May, 73 Ark. 415, 84 S. W. 489.

46. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606. See also Holland Trust Co. *v.* Consolidated Gas, etc., Co., 85 Hun (N. Y.) 454, 32 N. Y. Suppl. 830.

47. Burleigh *v.* Keck, 84 Ill. App. 607; Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358; Grove *v.* Grove, 93 Fed. 865; Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

48. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659.

49. Cook *v.* Citizens' Nat. Bank, 73 Ind. 256.

50. Alabama Nat. Bank *v.* Mary Lee Coal, etc., R. Co., 108 Ala. 288, 19 So. 404; Baker *v.* Varney, 129 Cal. 564, 62 Pac. 100; Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212. See also Anderson *v.* Riddle, 10 Wyo. 277, 68 Pac. 829.

51. Robinson *v.* Arkansas L. & T. Co., 74 Ark. 292, 85 S. W. 413.

52. James *v.* James Cement Co., 8 N. Y. St. 490.

53. Wilson *v.* Welch, 157 Mass. 77, 31 N. E. 712; Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, 42 N. Y. Suppl. 481; Wyckoff *v.* Scofield, 53 N. Y. Super. Ct. 237.

As to the receiver's right to bring ejectment to oust a tenant in possession see Murtin *v.* Walker, Sau. & Sc. 139.

54. Com. *v.* Young, 11 Phila. (Pa.) 606.

As to receiver's right to growing or unharvested crops see Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Woodland Bank *v.* Heron, 120 Cal. 614, 52 Pac. 1006; Scott *v.* Hotchkiss, 115 Cal. 89, 47 Pac. 45; Montgomery *v.* Merrill, 65 Cal. 432, 4 Pac. 414; Caldwell *v.* Alsop, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782.

Property not mortgaged.—The receivership cannot be extended over any property not covered by the mortgage. St. Louis, etc., R. Co. *v.* Whitaker, 68 Tex. 630, 5 S. W. 448; Central Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659.

A receiver cannot maintain a suit in equity to obtain an adjudication that certain real property is subject to the lien of the mortgage, and to obtain possession thereof, against one claiming adversely, where neither the mortgagor nor the mortgagee is made a party, and no assignment by them to him of the property or cause of action is shown. Harland *v.* Bankers', etc., Tel. Co., 32 Fed. 305.

55. Stetson *v.* Northern Inv. Co., 101 Iowa 435, 70 N. W. 595; Conover *v.* Grover, 31 N. J. Eq. 539; Northrup *v.* Roe, 10 N. J. L. J. 334; Derby *v.* Brandt, 99 N. Y. App. Div. 257, 90 N. Y. Suppl. 980; Hennessey *v.* Sweeney, 57 N. Y. Suppl. 901, 28 N. Y. Civ. Proc. 332; Howell *v.* Ripley, 10 Paige (N. Y.) 43; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Lofsky *v.* Maujer, 3 Sandf. Ch. (N. Y.) 69; Codrington *v.* Johnstone, 1 Beav. 520, 3 Jur. 528, 8 L. J. Ch. 282, 17 Eng. Ch. 520, 48 Eng. Reprint 1042.

Rents in arrear.— The receiver may col-

by the tenant to the mortgagor, at the latter's solicitation and in anticipation of the receivership.[56] The receiver may compel the tenants to attorn to him.[57] It is his duty, under the general or specific direction of the court, to lease vacant portions of the premises on terms as advantageous as he can secure.[58]

b. Management of Property and Receivers' Certificates. In cases where the mortgaged property is used for business purposes of such a nature that the discontinuance of the business would destroy or greatly impair the value of the property, the court may authorize the receiver to carry on the business while he remains in charge, and to borrow money, where it is necessary for that purpose;[59] and the repayment of money so borrowed may be secured by the issuance of receiver's certificates, which, for the purpose of giving them credit and financial strength, may be made a first and paramount lien on the property,[60] although the practice of displacing existing liens by receivers' certificates is now severely discountenanced by the courts, except only in the case of railroads and other public service corporations.[61]

c. Application of Funds Collected by Receiver. A receiver may pay, out of the funds in his hands, and should be allowed credit for, taxes on the mortgaged premises,[62] and if he insures buildings on the premises, the insurance

lect rents which are in arrear and unpaid at the time of his appointment, if the clause in the mortgage relating to receivership authorizes it. Mutual L. Ins. Co. *v.* Belknap, 19 Abb. N. Cas. (N. Y.) 345. And see Rider *v.* Vrooman, 12 Hun (N. Y.) 299 [*affirmed* in 84 N. Y. 461]. But *compare* Noyes *v.* Rich, 52 Me. 115. But the mortgagor cannot be compelled to turn over to the receiver any rents collected by the former, although after the commencement of the foreclosure proceedings, or even after the filing of the motion for the appointment of the receiver. Wyckoff *v.* Scofield, 98 N. Y. 475; Rider *v.* Bagley, 84 N. Y. 461.

Order to tenant to pay rent.— Where a tenant of mortgaged premises was in possession prior to the commencement of the foreclosure suit, to which he was not made a party, the court in the foreclosure action cannot compel him by order to pay rent to the receiver, such rent being recoverable only in an action against him. American Mortg. Co. *v.* Sire, 103 N. Y. App. Div. 396, 92 N. Y. Suppl. 1082.

Action of distress for rent.— Fairholme *v.* Kennedy, L. R. 24 Ir. 498; Jolly *v.* Arbuthnot, 4 De G. & J. 224, 5 Jur. N. S. 689, 28 L. J. Ch. 547, 7 Wkly. Rep. 532, 61 Eng. Ch. 176, 45 Eng. Reprint 87.

56. Fletcher *v.* McKeon, 71 N. Y. App. Div. 278, 75 N. Y. Suppl. 817; Moll *v.* McKeon, 35 Misc. (N. Y.) 551, 71 N. Y. Suppl. 1127; Thorpe *v.* Mindeman, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1003, 68 L. R. A. 146; Gaynor *v.* Blewett, 82 Wis. 313, 52 N. W. 313, 32 Am. St. Rep. 47. But *compare* Lawrence *v.* Conlon, 26 Misc. (N. Y.) 44, 56 N. Y. Suppl. 345, holding that a grantor of mortgaged premises, who agreed with his grantee, without fraud or collusion, that the grantor should occupy the premises for a certain time, without liability for rent, in lieu of a part of the consideration to be paid, cannot be evicted before the expiration of such time by a receiver afterward appointed in a suit to foreclose the mortgage thereon.

57. Woodyatt *v.* Connell, 38 Ill. App. 475. See also Niccolls *v.* Peninsular Stove Co., 48 Ill. App. 317 (holding that the mortgagor and tenant cannot, by contract with an existing creditor of the mortgagor, turn over to him the rents, as against the receiver); Nealis *v.* Bussing, 9 Daly (N. Y.) 305 (holding that the mortgagor has no authority to accept a surrender from the tenant, or to execute to him a new lease of the premises during the receivership).

58. Gooden *v.* Vinke, 87 Ill. App. 562; Northwestern Mut. L. Ins. Co. *v.* Burr, 60 Nebr. 467, 83 N. W. 664; Shreve *v.* Hankinson, 34 N. J. Eq. 413; Western Union Tel. Co. *v.* Boston Safe Deposit, etc., Co., 112 Fed. 37, 50 C. C. A. 106, 104 Fed. 580, 87 Fed. 788.

59. *California.*— Staples *v.* May, 87 Cal. 178, 25 Pac. 346, carrying on the business of a mining company.

Kentucky.— Cochran *v.* Jackman, 56 S. W. 507, 21 Ky. L. Rep. 1830.

New York.— See Dow *v.* Nealis, 47 Misc. 153, 93 N. Y. Suppl. 379.

Washington.— Sibson *v.* Hamilton, 21 Wash. 362, 58 Pac. 219.

United States.— Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447, continuing the business of a hotel and borrowing money for the purpose.

60. Walton *v.* Grand Belt Copper Co., 56 Hun (N. Y.) 211, 9 N. Y. Suppl. 375; Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201.

61. Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212; Makeel *v.* Hotchkiss, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603.

62. Boyd *v.* Magill, 100 Ill. App. 316; Atwood *v.* Knowlson, 91 Ill. App. 265; Elliott *v.* Magnus, 74 Ill. App. 436; Moyer *v.* Badger Lumber Co., 10 Kan. App. 142, 62 Pac. 434; Union Trust Co. *v.* Mabley, 113 Mich. 478, 71 N. W. 872; Anonymous, 10 N. J. L. J. 184.

premiums,[63] the expenses of collecting the rents, managing the property, and otherwise administering his trust,[64] the fees of an attorney necessarily employed to aid and advise him,[65] and proper compensation for his own services,[66] but not expenses incurred in improving or even repairing the property, unless authorized by the court.[67] After the payment of such charges and expenses, the balance in the receiver's hands is available for the satisfaction of the mortgage,[68] being applied first in payment of interest on the mortgage debt,[69] and then on the principal, in case there has been an adjudication to that effect, or a deficiency decree and an ascertained deficiency.[70] If there are conflicting claims to the fund, it will be ordered to be paid into court for distribution to those who may appear to be entitled.[71] In this case the money belongs primarily to the senior mortgagee if the receiver was appointed at his instance, or if he has joined in the foreclosure proceedings, as against junior mortgagees or other creditors,[72] although the law will protect a junior mortgagee who, by superior diligence in suing for foreclosure and obtaining the appointment of a receiver for his own benefit alone, has acquired a specific lien on the rents and profits superior to the equities of the prior mortgagee.[73] Either of the mortgagees may procure an

Taxes which should not be paid.— The receiver should not pay taxes accruing after the foreclosure sale, although left in possession during the period of redemption. Davis *v.* Dale, 150 Ill. 239, 37 N. E. 215. Nor can he pay taxes which were a lien on the land at the time of the foreclosure sale, when the premises were purchased at such sale by the mortgagee himself. New Jersey Title Guarantee, etc., Co. *v.* Cone, 64 N. J. Eq. 45, 53 Atl. 97.

63. Stevens *v.* Hadfield, 196 Ill. 253, 63 N. E. 633; Robinson Bank *v.* Miller, 47 Ill. App. 310.

64. Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630; Gilbert *v.* Dyneley, 5 Jur. 843, 3 M. & G. 12, 3 Scott N. R. 364, 42 E. C. L. 16.

Wages of labor as preferred debts see McDaniel *v.* Osborn, (Ind. App. 1904) 72 N. E. 601; Olyphant *v.* St. Louis Ore, etc., Co., 22 Fed. 179.

Expenses of litigation see Western Union Tel. Co. *v.* Boston Safe Deposit, etc., Co., 112 Fed. 37, 50 C. C. A. 106; Olyphant *v.* St. Louis Ore, etc., Co., 22 Fed. 179.

65. Stevens *v.* Hadfield, 196 Ill. 253, 63 N. E. 633.

66. Stevens *v.* Hadfield, 196 Ill. 253, 63 N. E. 633.

67. Wyckoff *v.* Scofield, 103 N. Y. 630, 9 N. E. 498.

68. Ray *v.* Henderson, 210 Ill. 305, 71 N. E. 579 [*affirming* 110 Ill. App. 542]; Windsor *v.* Evans, 72 Iowa 692, 34 N. W. 481; Boyce *v.* Continental Wire Co., 125 Fed. 740, 60 C. C. A. 508; Simmons *v.* Blandy, [1897] 1 Ch. 19, 66 L. J. Ch. 83, 75 L. T. Rep. N. S. 646, 45 Wkly. Rep. 296; Paynter *v.* Carew, 3 Eq. Rep. 496, 18 Jur. 417, 23 L. J. Ch. 596, 2 Wkly. Rep. 345, 69 Eng. Reprint 331.

69. Rudd *v.* Littell, 45 S. W. 451, 46 S. W. 3, 20 Ky. L. Rep. 158; Matter of Busch Brewing Co., 41 N. Y. App. Div. 204, 58 N. Y. Suppl. 812; Law *v.* Glenn, L. R. 2 Ch. 634; National Bank *v.* Kenney, [1898] 1 Ir. 197.

70. Garretson Inv. Co. *v.* Arndt, 144 Cal. 64, 77 Pac. 770; Keyser *v.* Hitz, 4 Mackey (D. C.) 179; Post *v.* Dorr, 4 Edw. (N. Y.) 412; *In re* Kearney, L. R. 25 Ir. 89; Henkell's Estate, L. R. 23 Ir. 540; Welch *v.* National Cycle Works Co., 55 L. T. Rep. N. S. 673, 35 Wkly. Rep. 137. But see Southern Bldg., etc., Assoc. *v.* Carey, 114 Fed. 288, 52 C. C. A. 174, holding that, where there was no allegation or proof that the mortgagor was insolvent, and the receivership had not been obtained on that ground, although the sale on foreclosure did not bring enough to pay the mortgage debt, a balance in the receiver's hands should be paid over to the mortgagor, and could not be applied on the unpaid balance due to the mortgagee.

71. Sellers *v.* Stoffel, 139 Ind. 468, 39 N. E. 52; Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706; Coleman *v.* Llewellen, 34 Ch. D. 143, 56 L. J. Ch. 1, 55 L. T. Rep. N. S. 647, 35 Wkly. Rep. 82; Holt *v.* Beagle, 55 L. T. Rep. N. S. 592.

72. *Arkansas.*— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 903.

New Jersey.— New Jersey Title Guarantee, etc., Co. *v.* Cone, 64 N. J. Eq. 45, 53 Atl. 97; Cortelyeu *v.* Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478.

New York.— Harris *v.* Taylor, 35 N. Y. App. Div. 462, 54 N. Y. Suppl. 864; Harris *v.* Taylor, 22 N. Y. App. Div. 109, 47 N. Y. Suppl. 913; Forster *v.* Moore, 73 Hun 244, 25 N. Y. Suppl. 1032; Cincinnati Nat. Bank *v.* Tilden, 22 N. Y. Suppl. 11 [*affirmed* in 140 N. Y. 620, 35 N. E. 891].

Ohio.— Williamson *v.* Gerlach, 41 Ohio St. 682.

United States.— Boyce *v.* Continental Wire Co., 125 Fed. 740, 60 C. C. A. 508. See also Hitz *v.* Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 L. ed. 156.

England.— Ford *v.* Rackham, 17 Beav. 485, 23 L. J. Ch. 481, 2 Wkly. Rep. 9, 51 Eng. Reprint 1122; Lismore *v.* Chamley, Hayes 329; Boyd *v.* Burke, 8 Ir. Eq. 660.

73. *Arkansas.*— Weis *v.* Neel, (1890) 14 S. W. 1097.

extension of the other's receivership for his own protection, and will then be entitled to participate in the collections made after such extension.[74] In case of redemption after foreclosure sale, the balance in the receiver's hands, after defraying costs and expenses, goes to the owner of the equity of redemption.[75] Where a receiver appointed pending foreclosure collects money due to defendant, and uses the same in the course of the receivership, although it is not subject to the mortgage, a judgment creditor of the mortgagor is entitled to an order, as against the receiver, subjecting such money to the satisfaction of his judgment.[76] A receiver appointed to take charge of mortgaged property, after judgment of foreclosure and pending the sale, who purchases the property during his receivership, is not entitled to retain the rents and profits as his own, since his purchase is void as to the parties to the suit.[77]

d. Conflict of Rights of Several Receivers. A receiver is ordinarily entitled to the funds remaining in the hands of his predecessor.[78] As between receivers appointed in different courts, or between a receiver appointed in foreclosure proceedings and one appointed in another form of action, the right to the property will be determined by priority of possession, or by priority of attachment of the liens which they are respectively appointed to protect;[79] but usually a receiver in foreclosure has a superior right to one appointed in proceedings supplementary to execution.[80]

e. Discharge of Receiver. The receiver should be discharged and the property restored to its owner, when the foreclosure suit is abandoned or discontinued,[81] or dismissed by the court for want of jurisdiction,[82] or when the property is bid off at the foreclosure sale, whether by the mortgagee or another, for the full amount of debt, interest, and costs,[83] or failing this, when the statutory period allowed for redemption has expired.[84] It has been held that when the amount of the mortgage debt due is definitely fixed by the court, defendant has a right to pay that sum and have his property restored and the receiver discharged.[85] And where the court is satisfied that the mortgaged property is ample security for the debt the receiver should be discharged.[86] A receiver appointed pending an action of foreclosure of a deed of trust containing a stipulation for the appointment of a receiver during the pendency of the suit is properly allowed to

Illinois.— Stevens *v.* Hadfield, 196 Ill. 253, 63 N. E. 633; Cross *v.* Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322.

Kentucky.— Nesbit *v.* Wood, 56 S. W. 714, 22 Ky. L. Rep. 127.

Maryland.— Tome *v.* King, 64 Md. 166, 21 Atl. 279.

New York.— Bradley, etc., Co. *v.* Hofmann, 70 N. Y. App. Div. 77, 74 N. Y. Suppl. 1076.

74. Putnam *v.* McAllister, 57 N. Y. Suppl. 404; Anderson *v.* Matthews, 8 Wyo. 513, 58 Pac. 898; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117.

75. Stevens *v.* Hadfield, 196 Ill. 253, 63 N. E. 633; Esch *v.* White, 82 Minn. 462, 85 N. W. 238, 718; Cowen *v.* Arnold, 58 Hun (N. Y.) 437, 12 N. Y. Suppl. 601.

76. California Title Ins., etc., Co. *v.* Consolidated Piedmont-Cable Co., 117 Cal. 237, 49 Pac. 1.

77. Herrick *v.* Miller, 123 Ind. 304, 24 N. E. 111.

78. See Holland Trust Co. *v.* Consolidated Gas, etc., Co., 85 Hun (N. Y.) 454, 32 N. Y. Suppl. 830.

79. New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132; Volkening *v.* Brandt, 14 Misc. (N. Y.) 156, 35 N. Y. Suppl. 797.

As to conflicts between receivers appointed in federal and state courts see Merchants', etc., Nat. Bank *v.* Masonic Hall, 63 Ga. 549; Texas Trunk R. Co. *v.* State, 83 Tex. 1, 18 S. W. 199; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 48 Fed. 351; Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. 849, 4 Hughes 415; Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324.

80. Grover *v.* McNeely, 72 N. Y. App. Div. 575, 76 N. Y. Suppl. 559; Donlon, etc., Mfg. Co. *v.* Cannella, 89 Hun (N. Y.) 21, 34 N. Y. Suppl. 1065.

81. Johnston *v.* Riddle, 70 Ala. 219.

82. Moyer *v.* Badger Lumber Co., 10 Kan. App. 142, 62 Pac. 434.

83. Bogardus *v.* Moses, 181 Ill. 554, 54 N. E. 984; Davis *v.* Dale, 150 Ill. 239, 37 N. E. 215. *Compare* Farmers' Nat. Bank *v.* Backus, 67 Minn. 43, 69 N. W. 638.

84. Roach *v.* Glos, 181 Ill. 440, 54 N. E. 1022; Stoddard *v.* Walker, 90 Ill. App. 422; Oakford *v.* Robinson, 48 Ill. App. 270.

85. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900.

86. Howard *v.* La Crosse, etc., R. Co., 12 Fed. Cas. No. 6,760, Woolw. 49.

continue in possession after the decree of foreclosure and before the sale of the premises.[87]

G. Trial, Judgment, and Review — 1. Trial or Hearing — a. Proceedings Preliminary to Trial — (I) *In General.* Proceedings in a mortgage foreclosure action may be stayed by the court to allow the performance of a condition on which the right to foreclose depends, or to give time for the assertion of their rights by third persons brought into the action as having an interest in the premises.[88] In some jurisdictions an affidavit of merits must be filed on the part of defendant,[89] and in others, an attorney must be appointed to represent any absent party.[90] In a suit to foreclose, the fact that plaintiff is about to leave the state, to remain absent until after the cause shall be ready for hearing, is no ground for examining him prematurely in regard to alleged payments.[91]

(II) *Dismissal or Nonsuit.* A bill for foreclosure may be dismissed for want of necessary parties,[92] or as to parties who disclaim or who appear to have no interest in the premises,[93] or voluntarily by the complainant as to parties who are not necessary parties,[94] or for want of prosecution,[95] or on a total failure of complainant's case;[96] and, it may be dismissed where defendant sets up an adverse title such as cannot be litigated in the foreclosure suit.[97]

(III) *Consolidation of Actions.* Separate actions to foreclose the same mortgage may be consolidated,[98] and so may actions brought by different mortgagees or other encumbrancers, when their liens all attach against the same property and all the suits are pending;[99] but this cannot be done when the liens affect different properties, or when one mortgage includes land not covered by the other.[1]

87. Bagley *v.* Illinois Trust, etc., Bank, 199 Ill. 76, 64 N. E. 1085.

88. See Meredith *v.* Lackey, 16 Ind. 1; Jerome *v.* Seymour, Harr. (Mich.) 255; Dodge *v.* Ayerigg, 12 N. J. Eq. 82; Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467; Monell *v.* Cole, Clarke (N. Y.) 221.

89. Devlin *v.* Shannon, 8 Hun (N. Y.) 531; Aikin *v.* Morris, 2 Barb. Ch. (N. Y.) 140; Banks *v.* Walker, 1 Barb. Ch. (N. Y.) 74.

90. Frost *v.* McLeod, 19 La. Ann. 80; Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

91. Heyward *v.* Stilwell, 3 Edw. (N. Y.) 245.

92. Koger *v.* Weakly, 2 Port. (Ala.) 516.

93. Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443.

94. Perryman *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 349; Hoppin *v.* Doty, 22 Wis. 621.

Plaintiff may dismiss as to a junior encumbrancer, joined as a party but not served with process, notwithstanding the objection of a co-defendant. Heimstreet *v.* Winnie, 10 Iowa 430.

Costs necessarily incurred by a defendant as to whom plaintiff dismisses must be paid by the latter. Merchants' Ins. Co. *v.* Marvin, 1 Paige (N. Y.) 557.

95. Merced Bank *v.* Price, 145 Cal. 436, 78 Pac. 949.

96. McDowell *v.* Fisher, 25 N. J. Eq. 93, in which case the bill was dismissed with costs where the mortgage was given to secure future advances, and it appeared that no money had ever been actually advanced under the arrangement by which the mortgage was given.

97. Illinois Nat. Bank *v.* School Trustees, 111 Ill. App. 189.

98. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513, where the mortgagee began a suit for foreclosure in a state court, and also filed a cross bill, asking the same relief, to the mortgagor's bill in a federal court for a receiver, and on the removal of the former suit into the federal court the two actions were ordered consolidated. But *compare* Lockwood *v.* Fox, 8 Daly (N. Y.) 127; Bech *v.* Ruggles, 6 Abb. N. Cas. (N. Y.) 69; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8, holding that a motion to consolidate three foreclosure suits, where all are not ripe for decree, and where nothing could be gained for the purpose of a hearing, should be denied.

99. *Illinois.*— Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Schnell *v.* Clements, 73 Ill. 613; Brown *v.* Kennicott, 30 Ill. App. 89.

Kansas.— Van Laer *v.* Kansas Triphammer Brick Works, 56 Kan. 545, 43 Pac. 1134, where actions to enforce several mechanics' liens and actions to foreclose several mortgages were all consolidated. But *compare* Harsh *v.* Morgan, 1 Kan. 293.

Kentucky.— Champlin *v.* Foster, 7 B. Mon. 104.

Minnesota.— Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47.

New Hampshire.— Benton *v.* Barnet, 59 N. H. 249, holding that suits by separate holders of notes secured by the same mortgage, to foreclose by writ of entry, may be consolidated, and each have a separate judgment.

See 35 Cent. Dig. tit. "Mortgages," § 1389.

1. Wooster *v.* Case, 12 N. Y. Suppl. 769;

b. Scope of Inquiry and Powers of Court — (i) *In General.* Where, in a mortgage foreclosure suit, all the parties in interest are properly before the court on the bill and other pleadings, it is generally within the power of the court to proceed to adjust and settle all the claims and equities of all the parties,[2] although no attempt will be made to determine the rights of one who is not before the court,[3] nor to settle the contests of defendants *inter sese*, in which the complainant has no interest.[4] As essential to the full adjudication of the rights of parties, the court may and should determine the exact amount of debt or liability under the mortgage,[5] and also, in cases of doubt or contest, the location and extent of the property covered by it,[6] although it would not be at all proper in such an action to make a decree quieting title in defendant,[7] nor to order a partition of the lands, where the mortgage covers an undivided interest.[8] As a rule a court which has jurisdiction of an action to foreclose a mortgage must have power to regulate all the proceedings in the action until the case is finally disposed of.[9] Where, in a suit to foreclose, the court has found that the mortgage ought to be entered satisfied, it has power to order its clerk to enter satisfaction on the record thereof.[10]

Selkirk *v.* Wood, 9 N. Y. Civ. Proc. 141; Kipp *v.* Delamater, 58 How. Pr. (N. Y.) 183.

2. Hopkins *v.* Granger, 52 Ill. 504; Quill *v.* Gallivan, 108 Ind. 235, 9 N. E. 99; Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163.

Right of mortgagor to adjudication.— On a bill to foreclose a mortgage, where there are several parties in interest, and the mortgagor is in doubt as to the rights of the complainant, he is entitled to have the question judicially determined for his own security, but not at the cost of the mortgagee. Burlew *v.* Hillman, 16 N. J. Eq. 23.

Counter-claim.— The court having jurisdiction of an action to foreclose a mortgage has authority to dispose of issues arising on a counter-claim, made by defendant, and replies thereto by plaintiff, although it would have no original jurisdiction to entertain an action brought directly on the claim involved. Hall *v.* Hall, 30 How. Pr. (N. Y.) 51.

Sending issue to law court.— Where the defense to the suit is the presumption of payment of the mortgage bond, arising from lapse of time, the court may decline to determine the question and send plaintiff to establish his bond as a subsisting obligation by a suit at law. Gibbes *v.* Holmes, 10 Rich. Eq. (S. C.) 484.

Paying money into court.— In a suit for foreclosure, where plaintiff and also one of defendants claim ownership of the mortgage, defendant who owns the equity of redemption may be granted leave to pay into court the money due on the mortgage and have the same discharged. Van Loan *v.* Squires, 7 N. Y. Suppl. 171, 23 Abb. N. Cas. 230.

3. Hozey *v.* McDougall, 15 La. 353; McCall *v.* Yard, 11 N. J. Eq. 58; Nelson *v.* Trigg, 3 Tenn. Cas. 733.

As to determining dower right of mortgagor's wife see Ligare *v.* Semple, 32 Mich. 438; Van Doren *v.* Dickerson, 33 N. J. Eq. 388.

4. Bartmess *v.* Holliday, 27 Ind. App. 544, 61 N. E. 750; Merchants' Nat. Bank *v.* Snyder, 170 N. Y. 565, 62 N. E. 1097; Miller *v.* Case, Clarke (N. Y.). 395; Hovenden *v.* Knott, 12 Oreg. 267, 7 Pac. 30; Quattlebaum *v.* Black, 24 S. C. 48.

5. Pettibone *v.* Stephens, 15 Conn. 19, 38 Am. Dec. 57; Hazen *v.* Reed, 30 Mich. 331; Ferguson *v.* Kimball, 3 Barb. Ch. (N. Y.) 616.

6. See Churchill *v.* Proctor, 31 Minn. 129, 16 N. W. 694.

Changing description.—The court has power, on application and proof, to change the description in the mortgage. Russell *v.* Brown, 41 Ill. 183.

Determining boundaries.— In case of latent ambiguity in the description the boundaries of the property may be determined. Doe *v.* Vallejo, 29 Cal. 385. But *compare* as to this Beach *v.* Waddell, 8 N. J. Eq. 299.

Right to remove building.—It is also proper to adjudicate the right of the mortgagor to remove a building erected by him on the land. Brown *v.* Kenney Settlement Cheese Assoc., 59 N. Y. 242. But see Lessly *v.* Bowie, 27 S. C. 193, 3 S. E. 199.

Divisibility of mortgaged premises.— The court is not concerned with a question of the divisibility of the mortgaged premises, except where a judgment is to be rendered embracing instalments not yet due. Shotts *v.* Boyd, 77 Ind. 223; Denny *v.* Graeter, 20 Ind. 20.

Quantity of estate.— On a bill for foreclosure, the court will not ordinarily go into an inquiry as to the quantity of estate mortgaged. Hill *v.* Meeker, 23 Conn. 592.

7. Knowles *v.* Rablin, 20 Iowa 101.

8. Buckmaster *v.* Kelley, 15 Fla. 180; Payne *v.* Avery, 21 Mich. 524; Watkins *v.* Williams, 16 Jur. 181, 21 L. J. Ch. 601, 3 Macn. & G. 622, 49 Eng. Ch. 622, 42 Eng. Reprint 400. *Compare* Lyon *v.* Powell, 78 Ala. 351.

9. Tooley *v.* Gridley, 3 Sm. & M. (Miss.) 493, 41 Am. Dec. 628.

10. Anderson Bldg., etc., Assoc. *v.* Thompson, 87 Ind. 278.

(II) *Reformation and Foreclosure.* The reformation of a mortgage which contains a mistake or misdescription may be obtained as incidental relief on a bill to foreclose, so that, if a proper foundation is laid in the pleadings and proof, the court may first order the reformation of the mortgage and then its foreclosure as reformed.[11]

(III) *Trial of Adverse Titles.* It is not competent, in a foreclosure suit, to litigate and adjudicate the right of a party who sets up a legal title which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee.[12]

(IV) *Rights of Several Mortgagees or Encumbrancers.* Where the necessary parties are before the court and proper issues are framed, it is com-

11. *California.*— Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Connecticut.— Sumner *v.* Rhodes, 14 Conn. 135; Peters *v.* Goodrich, 3 Conn. 146.

Georgia.— McCrary *v.* Austell, 46 Ga. 450.

Illinois.— Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492.

Kansas.— Miller *v.* Davis, 10 Kan. 541.

Minnesota.— Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

New York.— Andrews *v.* Gillespie, 47 N. Y. 487. The jurisdiction conferred on the county courts of actions to foreclose mortgages of real property does not include authority to reform such mortgages. Thomas *v.* Harmon, 122 N. Y. 84, 25 N. E. 257; Avery *v.* Willis, 24 Hun 548.

Ohio.— Davenport *v.* Sovil, 6 Ohio St. 459. See 35 Cent. Dig. tit. "Mortgages," § 1391.

Contra.— Graham *v.* Berryman, 19 N. J. Eq. 29.

12. *Alabama.*— Bolling *v.* Pace, 99 Ala. 607, 12 So. 796.

Arkansas.— Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 628.

California.— Murray *v.* Etchepare, 129 Cal. 318, 61 Pac. 930; Cody *v.* Bean, 93 Cal. 578, 29 Pac. 223; Hewlett *v.* Pilcher, 85 Cal. 542, 24 Pac. 781; Ord *v.* Bartlett, 83 Cal. 428, 23 Pac. 705; Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756; Houghton *v.* Allen, 75 Cal. 102, 16 Pac. 532; McComb *v.* Spangler, 71 Cal. 418, 12 Pac. 347; Marlow *v.* Barlew, 53 Cal. 456; San Francisco *v.* Lawton, 18 Cal. 465, 79 Am. Dec. 187.

Connecticut.— Hill *v.* Meeker, 23 Conn. 592; Palmer *v.* Mead, 7 Conn. 149.

Illinois.— Ennis *v.* Wolff, 194 Ill. 420, 62 N. E. 842; Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Gage *v.* Perry, 93 Ill. 176; Gunning *v.* Sorg, 113 Ill. App. 332; Parlin, etc., Co. *v.* Galloway, 95 Ill. App. 60.

Iowa.— Smith *v.* Redmond, (1906) 108 N. W. 461.

Michigan.— Partridge *v.* Hemenway, 89 Mich. 454, 50 N. W. 1084, 28 Am. St. Rep. 322; Bell *v.* Pate, 47 Mich. 468, 11 N. W. 275; Summers *v.* Bromley, 28 Mich. 125.

Minnesota.—Churchill *v.* Proctor, 31 Minn. 129, 16 N. W. 694.

Nebraska.— Shellenbarger *v.* Biser, 5 Nebr. 195.

New Hampshire.— Dorr *v.* Leach, 58 N. H. 18.

New Jersey.—Hazeldine *v.* McVey, 67 N. J. Eq. 275, 63 Atl. 165; Hunt *v.* Bradfield, (Ch. 1888) 16 Atl. 178; Moore *v.* Clark, 40 N. J. Eq. 152; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; Hoppock *v.* Ramsey, 28 N. J. Eq. 413; Wilkins *v.* Kirkbride, 27 N. J. Eq. 93.

New York.— Brooklyn Fifth Ave. Bank *v.* Cudlipp, 1 N. Y. App. Div. 524, 37 N. Y. Suppl. 248; Mayer *v.* Margolies, 47 Misc. 24, 95 N. Y. Suppl. 204; Larremore *v.* Squires, 30 Misc. 62, 62 N. Y. Suppl. 885; Keeler *v.* McNeirney, 6 N. Y. Civ. Proc. 363; Kent *v.* Popham, 6 N. Y. Civ. Proc. 336; Jones *v.* St. John, 4 Sandf. Ch. 208.

North Carolina.— Bogey *v.* Shute, 57 N. C. 174.

Ohio.— Shillito *v.* McMahon, 6 Ohio Dec. (Reprint) 1126, 10 Am. L. Rec. 560.

South Carolina.— Wylie *v.* Lipsey, 31 S. C. 608, 9 S. E. 1056. See also Creighton *v.* Clifford, 6 S. C. 188.

Texas.— Branch *v.* Wilkens, (Civ. App. 1901) 63 S. W. 1083.

Vermont.— Kinsley *v.* Scott, 58 Vt. 470, 5 Atl. 390; Lyman *v.* Little, 15 Vt. 576. But see St. Johnsbury, etc., R. Co. *v.* Willard, 61 Vt. 134, 17 Atl. 38, 15 Am. St. Rep. 886, 21 L. R. A. 528, holding that, in a suit to foreclose a mortgage, the title of one claiming by adverse possession may be adjudicated.

Washington.— Oates *v.* Shuey, 25 Wash. 597, 66 Pac. 58; Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345; California Safe Deposit, etc., Co. *v.* Cheney Electric Light, etc., Co., 12 Wash. 138, 40 Pac. 732. But *compare* Pennsylvania Mortg. Inv. Co. *v.* Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43.

Wisconsin.—Roche *v.* Knight, 21 Wis. 324; Palmer *v.* Yager, 20 Wis. 91; Ward *v.* Clark, 6 Wis. 509.

United States.— Hefner *v.* Northwestern Mut. L. Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. ed. 309; Chapin *v.* Walker, 6 Fed. 794, 2 McCrary 175; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

See 35 Cent. Dig. tit. "Mortgages," § 1392.

Contra.— Ewing *v.* Patterson, 35 Ind. 326; Denny *v.* Graeter, 20 Ind. 20; Fisher *v.* Cowles, 41 Kan. 418, 21 Pac. 228; Bradley *v.* Parkhurst, 20 Kan. 462.

What constitutes adverse title.— The adverse title in the rule stated is not limited to one which is adverse to the mortgagor's title, but includes a title which is adverse to that which the mortgagee brings before the court. Cady *v.* Purser, 131 Cal. 552, 63

petent to work out and determine questions affecting the lien or relative priority of different mortgagees or encumbrancers.[13] But defendants should not be permitted to litigate between themselves questions affecting the validity of a junior mortgage, which can in no way affect plaintiff's interests,[14] or their relative claims upon the surplus, at least until it is ascertained that there will be a surplus, or where their claims are on different portions of the mortgaged premises,[15] nor their

Pac. 844, 82 Am. St. Rep. 391. But the title is not adverse, in this sense, if it is derived from or rests upon that of the mortgagor. Thus, in an action to foreclose a mortgage on land and on buildings removed therefrom without the mortgagee's consent, where the purchaser of the buildings is made a defendant by reason of his claim to the buildings as purchaser from the mortgagor, the right of complainant to a lien on the buildings may be determined. Partridge *v.* Hemenway, 89 Mich. 454, 50 N. W. 1084, 28 Am. St. Rep. 322.

Title as between husband and wife.—In an action to foreclose a mortgage given by a husband and wife, who covenanted that they owned the premises in fee simple, it is proper to try the question whether the property is community property or the wife's separate estate; the rule against litigating adverse titles applies only to interests not subject to the mortgage. Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743.

Prior judgment lien.—A defendant to a bill to foreclose who answers setting up a prior judgment lien does not thereby assert an adverse title within the meaning of this rule. Illinois Nat. Bank *v.* School Trustee, 111 Ill. App. 189. And see Brown *v.* Volkening, 64 N. Y. 76.

Title acquired in fraud of mortgagee.—Where a subsequent purchaser of the mortgaged premises from the mortgagor has, in order merely to perfect his title of record, procured quitclaim deeds from the mortgagor's grantors, under such circumstances as would render it fraudulent for him to set up such conveyances as a title adverse and paramount to that of the mortgagor, the mortgagee, under proper allegations in his foreclosure bill, may have such alleged adverse title declared null and void. Wilkinson *v.* Green, 34 Mich. 221.

Estoppel of defendant.—A defendant in a foreclosure suit who sets up by his answer a paramount title, which is litigated and decided in his favor, with the consent of all parties to the suit, cannot afterward assert that the question could not properly be litigated in that action. Cromwell *v.* McLean, 123 N. Y. 474, 25 N. E. 932; Helck *v.* Reinheimer, 105 N. Y. 470, 12 N. E. 37.

Litigation of titles between co-defendants.—A statute which permits a judgment to determine the ultimate rights of defendants as between themselves applies only to those cases where the relief sought by defendants is based on facts involved in the litigation of plaintiff's claim; and hence, in foreclosure proceedings, the mortgagor, who has conveyed the land to his co-defendants by a deed absolute on its face, will not be permitted to litigate with them the question whether the deed was intended merely as security for a debt, and thereby delay plaintiff in obtaining satisfaction of his mortgage. Mutual L. Ins. Co. *v.* Cranwell, 10 N. Y. Suppl. 404.

Applicability of rule to tax titles see Odell *v.* Wilson, 63 Cal. 159; Kelsey *v.* Abbott, 13 Cal. 609; Pearson *v.* Helvenston, 50 Fla. 590, 39 So. 695; Chicago Theological Seminary *v.* Gage, 103 Ill. 175 [*limiting* Gage *v.* Perry, 93 Ill. 176]; Bozarth *v.* Landers, 113 Ill. 181; Smith *v.* Kenny, 89 Ill. App. 293; Zitzer *v.* Polk, 19 Ill. App. 61; Whittemore *v.* Shiell, 14 Ill. App. 414; Connolly *v.* Connolly, 63 Iowa 202, 18 N. W. 868; Ordway *v.* Cowles, 45 Kan. 447, 25 Pac. 862; Wilson *v.* Jamison, 36 Minn. 59, 29 N. W. 887, 1 Am. St. Rep. 635; Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980; Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932; Cromwell *v.* Wilson, 5 N. Y. Suppl. 474.

13. *Iowa.*—Kramer *v.* Rebman, 9 Iowa 114.

New York.—Metropolitan Trust Co. *v.* Dolgeville Electric Light, etc., Co., 34 Misc. 354, 69 N. Y. Suppl. 822; Wendell *v.* Wendell, 3 Paige 509. See also Kay *v.* Whittaker, 44 N. Y. 565; Harris *v.* Fly, 7 Paige 421.

Ohio.—Klonne *v.* Bradstreet, 7 Ohio St. 322; Devore *v.* Dinsmore, 2 Ohio Dec. (Reprint) 600, 4 West. L. Month. 144.

South Carolina.—Norwood *v.* Norwood, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875.

Texas.—Branch *v.* Wilkens, (Civ. App. 1901) 63 S. W. 1083.

Washington.—Graham *v.* Smart, 42 Wash. 205, 84 Pac. 824.

Wisconsin.—Whorton *v.* Webster, 56 Wis. 356, 14 N. W. 280.

United States.—Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

See 35 Cent. Dig. tit. "Mortgages," § 1393.

Claims of simple contract creditors.—When, pending a suit to foreclose a mortgage on the property of a corporation, simple contract creditors file a separate bill against the corporation, and its stock-holders and bondholders, and the mortgagee, alleging the invalidity of the mortgage and attempting to subject the property to their claims, such bill must be dismissed for want of jurisdiction on the entry of a foreclosure decree in the mortgagee's suit. Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113.

14. Merchants' Nat. Bank *v.* Snyder, 52 N. Y. App. Div. 606, 65 N. Y. Suppl. 994.

15. Lansing *v.* Hadsall, 26 Hun (N. Y.) 619; Union Ins. Co. *v.* Van Rensselaer, 4 Paige (N. Y.) 85.

rights, as against each other, to have the land divided into parcels and sold in a particular order.[16]

c. Mode and Conduct of Trial — (I) *In General.* Generally this action is regulated by the ordinary rules of procedure at law or in equity, as the case may be,[17] and the usual rules of evidence obtain.[18] It is a peculiarity of the action, arising from the joinder as defendants of other encumbrancers, that such a defendant may obtain leave to proceed with and conduct the suit if the complainant abandons or neglects to prosecute it.[19] If plaintiff demands judgment on the note secured and also a foreclosure of the mortgage, but fails to show himself entitled to a foreclosure, the action may still proceed as a suit at law on the note.[20]

(II) *Reference* — (A) *When Made.* Where the question is as to the amount due on the mortgage, it is the usual and better practice to refer the case to a master or referee to find and report such amount, and then exceptions may be filed to his report, and the decree will be made on the hearing and determination of such exceptions; and this procedure is especially appropriate where the accounts are complicated or the items of debit or credit disputed.[21] But this is

16. Smart *v.* Bement, 4 Abb. Dec. (N. Y.) 253, 3 Keyes 241.

17. *Nebraska.*— Bradfield *v.* Sewall, 58 Nebr. 637, 79 N. W. 615.

New York.— Smith *v.* Jarvis, 26 Misc. 507, 57 N. Y. Suppl. 483, intervention of executor of deceased junior mortgagee who was a defendant.

South Dakota.—Merager *v.* Madson, (1905) 103 N. W. 650.

Washington.— Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345, determination of priority of liens.

Wisconsin.— Coleman *v.* Hunt, 77 Wis. 263, 45 N. W. 1085 (plea in bar alleging a prior adjudication); Austin *v.* Austin, 45 Wis. 523 (right to open and close).

In case of default on the part of defendant no writ of inquiry is necessary. Morrison *v.* Van Bibber, 25 Tex. Suppl. 153.

Partial payment.— Where defendant does not deny any of the averments of the complaint, but alleges that a payment has been made, plaintiff is entitled to admit the payment, and move for leave to enter judgment for the balance. Hall *v.* Holt, 25 Hun (N. Y.) 277.

18. *Florida.*— Mitchell *v.* Maxwell, 2 Fla. 594, compelling attendance of mortgagors and others as witnesses.

Illinois.— Stacey *v.* Randall, 17 Ill. 467.

Iowa.— Lombard *v.* Thorp, 70 Iowa 220, 30 N. W. 490, taking depositions.

Kansas.—Myers *v.* Wheelock, 60 Kan. 747, 57 Pac. 956, effect of stipulations as to facts admitted or agreed.

Maryland.— Hurtt *v.* Crane, 36 Md. 29.

North Carolina.— Blake *v.* Broughton, 107 N. C. 220, 12 S. E. 127.

See 35 Cent. Dig. tit. "Mortgages," § 1394.

19. Rowley *v.* Williams, 5 Wis. 151. And see Young *v.* Young, 17 N. J. Eq. 161. But *compare* Coulston *v.* Coulston, 37 N. J. Eq. 396, holding that the fact that another mortgagee, made a defendant and answering, alleges and establishes the priority of his mortgage over that of the complainant, does not entitle him thereafter to conduct the suit as if he were complainant.

20. Lavette *v.* Brinsfield, 111 Ga. 821, 35 S. E. 637.

21. *Illinois.*— Fitchburg Steam Engine Co. *v.* Potter, 211 Ill. 138, 71 N. E. 933; Groch *v.* Stenger, 65 Ill. 481; Russell *v.* Brown, 41 Ill. 183.

Maryland.— Wylie *v.* McMakin, 2 Md. Ch. 413.

Michigan.— McArthur *v.* Robinson, 104 Mich. 540, 62 N. W. 713; Disbrow *v.* Jones, Harr. 102.

Mississippi.—Beville *v.* McIntosh, 41 Miss. 516.

New York.— Chamberlain *v.* Dempsey, 36 N. Y. 144; Cochran *v.* Anglo-American Dry Dock, etc., Co., 69 Hun 168, 23 N. Y. Suppl. 404; Smith *v.* Warringer, 41 Misc. 94, 83 N. Y. Suppl. 655; Dow *v.* Lansdell, 10 N. Y. St. 373; Anonymous, 3 How. Pr. 158; Ontario Bank *v.* Strong, 2 Paige 301.

North Carolina.— Blackledge *v.* Nelson, 16 N. C. 418.

South Carolina.— Hampton Bank *v.* Fennell, 55 S. C. 379, 33 S. E. 485; Johnson *v.* Masters, 49 S. C. 525, 27 S. E. 474; Camden Bank *v.* Thompson, 46 S. C. 499, 24 S. E. 332.

Vermont.— Hathaway *v.* Hagan, 64 Vt. 135, 24 Atl. 131; Warner *v.* Quinlon, 50 Vt. 652.

England.— Pelly *v.* Wathen, 7 Hare 351, 14 Jur. 9, 18 L. J. Ch. 281, 27 Eng. Ch. 351, 68 Eng. Reprint 144; Creed *v.* Byrne, 1 Hog. 108.

Canada.— Cameron *v.* McIlroy, 1 Manitoba 241; Rowland *v.* Burwell, 12 Ont. Pr. 607.

See 35 Cent. Dig. tit. "Mortgages," § 1395.

Reference ordered by another judge.— Where the judge who hears the case in its preliminary stages omits to determine the amount due plaintiff, or to direct that there be a reference to ascertain it, and a reference for that purpose is ordered on an application to another judge, a judgment entered on the report of the referee so appointed is not only irregular but erroneous. Chamberlain *v.* Dempsey, 9 Bosw. (N. Y.) 212.

Necessity of awaiting report.— Where the

generally considered to be for the convenience of the court; and it is not erroneous for the judge himself to ascertain the amount due, without the aid of a master, especially where it is merely a matter of calculation.[22] A reference to a master or referee may also be appropriate or even necessary in other cases, as, where the decree is required to ascertain and fix the priorities of various encumbrances on the property,[23] or where the owner of the equity of redemption is an infant, in which case the practice is to order a reference to inquire whether the property is susceptible of division into parcels, whether a sale of less than the whole would be sufficient to satisfy the mortgage debt, and whether that method of sale would be beneficial to the infant.[24] It is also proper to order a reference to ascertain the order in which different lots owned severally by different defendants should be sold,[25] and to take proofs against a non-resident defendant as to whom the bill has been taken *pro confesso*.[26]

(B) *Order of Reference.* The inquiry before the master or referee is limited to the issues raised by the pleadings,[27] and is also limited by the terms of the order of reference,[28] which should therefore be so framed as to permit him to inquire into questions of debit and credit arising out of the receipt of rents, payment of taxes or insurance, or other matters, if it is intended to set up such

case is referred to a master to take and state an account, it is error for the chancellor to make a final order for the sale of the property before the report of the master comes in and is confirmed. Graham *v.* King, 15 Ala. 563.

A plea of payment must be determined by the court before making an order of reference or sending the case to a master or auditor. Phœnix Mut. Ins. Co. *v.* Grant, 3 MacArthur (D. C.) 42; Hanks *v.* Greenwade, 5 J. J. Marsh. (Ky.) 249; Halstead *v.* Commonwealth Bank, 4 J. J. Marsh. (Ky.) 554; Edwards *v.* Thompson, 71 N. C. 177.

22. *California.*— Guy *v.* Franklin, 5 Cal. 416.

District of Columbia.— Taylor *v.* Girard L. Ins., etc., Co., 1 App. Cas. 209.

Florida.— Trower *v.* Bernard, 37 Fla. 226, 20 So. 241.

Illinois.— Hards *v.* Burton, 79 Ill. 504; Dowden *v.* Wilson, 71 Ill. 485.

Michigan.—Vaughn *v.* Nims, 36 Mich. 297; Ireland *v.* Woolman, 15 Mich. 253.

New Jersey.— Marcole *v.* Hinnes, (Ch. 1905) 61 Atl. 975.

North Carolina.— Latham *v.* Whitehurst, 69 N. C. 33.

See 35 Cent. Dig. tit. "Mortgages," § 1395.

23. *New Jersey.*— Wright *v.* McKean, 13 N. J. Eq. 259.

New York.— Metropolitan Trust Co. *v.* Dolgeville Electric Light, etc., Co., 34 Misc. 354, 69 N. Y. Suppl. 822; Gardiner *v.* Garniss, Hopk. 306; Renwick *v.* Macomb, Hopk. 277.

Pennsylvania.—Association *v.* McDonald, 5 Phila. 442.

Virginia.—Artrip *v.* Rasnake, 96 Va. 277, 31 S. E. 4, holding that to decree a sale of land under a mortgage wherein the parties contract for a sale, without first having a reference to a commissioner to report liens, where no question of priority of liens is raised, is not erroneous.

England.— Duberly *v.* Day, 14 Beav. 9, 51 Eng. Reprint 190; Mansfield *v.* Ogle, 7 De G. M. & G. 181, 2 Jur. N. S. 603, 24 L. J. Ch. 450, 3 Wkly. Rep. 557, 56 Eng. Ch. 181, 44 Eng. Reprint 71; Mackay *v.* Martins, 1 Ir. Eq. 331, holding a reference proper to ascertain what parties were entitled to share in the surplus and what was the order and priority of their liens.

Canada.— Taylor *v.* Ward, 13 Grant Ch. (U. C.) 590; Jones *v.* Upper Canada Bank, 13 Grant Ch. (U. C.) 201.

Compare Rowan *v.* Sharps' Rifle Mfg. Co., 31 Conn. 1.

See 35 Cent. Dig. tit. "Mortgages," § 1395.

24. Gladden *v.* American Mortg. Co., 80 Ala. 270; Boyle *v.* Williams, 72 Ala. 351; Fry *v.* Merchants' Ins. Co., 15 Ala. 810; Ticknor *v.* Leaven, 2 Ala. 149; Mills *v.* Dennis, 3 Johns. Ch. (N. Y.) 367; Davis *v.* Dowding, 2 Keen 245, 7 L. J. Ch. 169, 15 Eng. Ch. 245, 48 Eng. Reprint 622.

25. Bard *v.* Steele, 3 How. Pr. (N. Y.) 110.

26. Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500.

27. Weaver *v.* Cosby, 109 Ga. 310, 34 S. E. 680.

28. See Cram *v.* Bradford, 4 Abb. Pr. (N. Y.) 193; Corning *v.* Baxter, 6 Paige (N. Y.) 178.

Validity of mortgage.— Where the only question referred to the master is the amount due on the mortgage, he has no authority to enter upon an inquiry as to the validity of the mortgage. McCrackan *v.* Valentine, 9 N. Y. 42; Brothers *v.* Harrison, (Tenn. Ch. App. 1897) 45 S. W. 446.

Sale in parcels.— Where only part of the money secured by the mortgage is due, and the bill is taken as confessed, plaintiff is entitled to have a clause inserted in the order of reference directing the master to ascertain whether the premises can be sold in parcels without prejudice to the interests of the parties. Everitt *v.* Huffman, 1 Paige (N. Y.) 648.

claims,[29] and also to ascertain and fix the amount due to subsequent mortgagees, if that is an issue in the case.[30]

(c) *Notice of Hearing Before Referee or Master.* As a general rule defendants concerned in the questions which are referred to the master or referee are entitled to notice of the hearing before him.[31]

(d) *Report of Referee or Master.* The referee's findings and report must be returned and filed,[32] and may then be excepted to,[33] and the exceptions must be disposed of, and the report either confirmed or set aside, before there can be a final order for sale.[34] Ordinarily the report will be confirmed if sufficient on its face and if there are no exceptions.[35] It should certify to the court not only the conclusions reached by the referee or master, but also the evidence on which they are founded and the reasons by which they are supported,[36] and may be set aside if not responsive to the order of reference,[37] or if it goes beyond the terms of the mortgage and disposes of matters not embraced in it,[38] or where its conclusions are contrary to the evidence or not supported by any evidence,[39] or are too indefinitely stated to form the proper basis for a decree.[40]

(iii) *Submission of Issues to Jury.* As has been stated elsewhere in this work[41] a suit for the foreclosure of a mortgage is one of equitable cognizance and is triable by the court, and defendant is not generally entitled to a jury trial as a matter of right. But it is permissible and proper for the court to submit to a jury any disputed issue of fact,[42] under properly framed issues and instruc-

29. Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Stonington Sav. Bank *v.* Davis, 15 N. J. Eq. 30; Bassett *v.* McDonel, 13 Wis. 444.

30. Beekman *v.* Gibbs, 8 Paige (N. Y.) 511.

31. Hazen *v.* Reed, 30 Mich. 331; Knapp *v.* Burnham, 11 Paige (N. Y.) 330; Bassett *v.* McDonel, 13 Wis. 444; McCormick *v.* McCormick, 6 Ont. Pr. 208. But *compare* Sanders *v.* Dowell, 7 Sm. & M. (Miss.) 206; Platt *v.* Robinson, 10 Wis. 128, holding that where the answer is adjudged frivolous, it is proper to refer the cause to a commissioner to state the amount due, without notice to defendant as to time and place of hearing.

32. Val Blatz Brewing Co. *v.* Dalrymple, 18 S. D. 97, 99 N. W. 851, holding that a stipulation in an action to foreclose a mortgage that the sale may be confirmed constitutes a formal waiver of any irregularity in the act of the referee in failing to file his findings and report until after his removal from the state.

33. Guy *v.* Franklin, 5 Cal. 416; Wetmore *v.* Winans, 8 Paige (N. Y.) 370.

34. Citizens' Sav. Bank *v.* Bauer, 49 Hun (N. Y.) 238, 1 N. Y. Suppl. 450; Knapp *v.* Burnham, 11 Paige (N. Y.) 330; Dean *v.* Coddington, 2 Johns. Ch. (N. Y.) 201; Kiddell *v.* Bristow, 67 S. C. 175, 45 S. E. 174.

35. Pogue *v.* Clark, 25 Ill. 351; Hathaway *v.* Hagan, 64 Vt. 135, 24 Atl. 131; Central Trust Co. *v.* Wabash, etc., R. Co., 24 Fed. 98.

Re-reference.— The object of a reference is to inform the court, and the court, on the coming in of the report, may confirm it or set it aside or refer it back for further proofs, as it may deem just and equitable. Mutual L. Ins. Co. *v.* Salem, 3 Hun (N. Y.) 117.

36. *Alabama.*— Walker *v.* Hallett, 1 Ala. 379; Singleton *v.* Gayle, 8 Port. 270.

Indiana.— Lacoss *v.* Keegan, 2 Ind. 406.

New Jersey.— Schenck *v.* Sedam, (Ch. 1902) 51 Atl. 492.

New York.— Security F. Ins. Co. *v.* Martin, 15 Abb. Pr. 479; Anonymous, Clarke 423.

South Carolina.— Walker *v.* Walker, 17 S. C. 329.

See 35 Cent. Dig. tit. "Mortgages," § 1398.

37. Richardson *v.* Horton, 139 Ala. 350, 35 So. 1006; Connor *v.* Edwards, 36 S. C. 563, 15 S. E. 706.

38. Wiley *v.* Eccles, 4 Ill. App. 126.

39. Thornton *v.* Commonwealth Loan, etc., Assoc., 181 Ill. 456, 54 N. E. 1037; Hart *v.* Riley, 58 Hun (N. Y.) 602, 11 N. Y. Suppl. 435; Whitman *v.* Foley, 7 N. Y. Suppl. 310 [*reversed* on other grounds in 125 N. Y. 651, 26 N. E. 725]; Killops *v.* Stephens, 66 Wis. 571, 29 N. W. 390.

40. Walker *v.* Hallett, 1 Ala. 379, holding that a report that the mortgaged premises should be sold in separate lots, "if they can be conveniently divided," is not sufficiently definite. *Compare* Albany County Sav. Bank *v.* McCarty, 71 Hun (N. Y.) 227, 24 N. Y. Suppl. 991 [*reversed* on other grounds in 149 N. Y. 71, 43 N. E. 427], holding that a statement that plaintiff "is entitled" to the usual judgment for foreclosure is sufficient to support such judgment.

41. See Juries, 24 Cyc. 116 *et seq.*

42. *Georgia.*— Ray *v.* Atlanta Banking Co., 110 Ga. 305, 35 S. E. 117.

Illinois.— Van Vlissingen *v.* Lenz, 171 Ill. 162, 49 N. E. 422.

Montana.— Clark *v.* Nichols, 3 Mont. 372.

New York.— Herb *v.* Metropolitan Hospital, etc., 80 N. Y. App. Div. 145, 80 N. Y. Suppl. 552.

North Carolina.— See Gordon *v.* Collett, 102 N. C. 532, 9 S. E. 486.

tions.[43] The court may direct a special verdict on any issue submitted to the jury,[44] and may still make a decree notwithstanding the verdict in cases where such a course would otherwise be proper.[45]

d. Decision and New Trial — (I) *Findings and Decision of Court.* Where the issues in a foreclosure suit are equitable in their nature, the court will make a decision based on the broad principles of equity and of such a nature as to distribute justice to all parties before it,[46] using the master's or referee's report as a basis for its adjudication, if satisfied of its correctness,[47] or making specific findings of fact, if that is required by the local practice,[48] and dismissing the complainant's bill, if satisfied that he is not entitled to the relief prayed.[49] Where, however, a trial by jury is had, the judgment must follow the verdict if the latter is correct in form and sufficient.[50]

(II) *New Trial or Rehearing.* An application for a rehearing or a new trial in a mortgage foreclosure action may be granted, when based on sufficient grounds[51] and presented in due time;[52] but not for the purpose of inquiring into matters outside the original pleadings and not covered by the mortgage,[53] or to admit a defense which, although pleaded, was not attempted to be supported by any evidence.[54]

2. Judgment or Decree — a. Nature of Judgment or Decree — (I) *In General.* A judgment or decree in foreclosure is *in rem*, and its object is the satisfaction

Ohio.— Fleming *v.* Fleming, 9 Ohio Dec. (Reprint) 382, 12 Cinc. L. Bul. 261.

Pennsylvania.— Kennedy *v.* Atkinson, 2 Mona. 602.

South Carolina.— Drayton *v.* Logan, Harp. Eq. 67; *Ex p.* Rutledge, Harp. Eq. 65, 14 Am. Dec. 696. See, however, Holliday *v.* Hughes, 54 S. C. 155, 31 S. E. 867, holding that it is error to submit to a jury the question whether a mortgage is void, this being an equitable issue for the determination of the court.

Texas.— See May *v.* Taylor, 22 Tex. 348.

Wisconsin.—Austin *v.* Austin, 45 Wis. 523; Hall *v.* Gale, 20 Wis. 292.

See 35 Cent. Dig. tit. "Mortgages," § 1399.

43. Reagan *v.* Hadley, 57 Ind. 509; Smith *v.* Parks, 22 Ind. 59; Fant *v.* Wright, (Tex. Civ. App. 1901) 61 S. W. 514; Wright *v.* U. S. Mortgage Co., (Tex. Civ. App. 1899) 54 S. W. 368; Bowman *v.* Rutter, (Tex. Civ. App. 1898) 47 S. W. 52; Seymour Opera House Co. *v.* Thurston, 18 Tex. Civ. App. 417, 45 S. W. 815.

44. Carleton *v.* Byington, 18 Iowa 482.

45. McLellan *v.* Fulmore, Ritch. Eq. Cas. (Nova Scotia) 453. And see Burns *v.* Haile, 112 Ga. 721, 38 S. E. 76.

46. See Brown *v.* Shearon, 17 Ind. 239; Ballinger *v.* Worley, 1 Bibb (Ky.) 195; Jefferson College *v.* Prentiss, 29 Miss. 46; Hunt *v.* Nolen, 46 S. C. 551, 24 S. E. 543.

47. See Goodwin *v.* Bishop, 145 Ill. 421, 34 N. E. 47; Canaday *v.* Boliver, 25 S. C. 547.

48. See Gutter *v.* Dallamore, 144 Cal. 665, 79 Pac. 383; Jacks *v.* Estee, 139 Cal. 507, 73 Pac. 247; McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670; Lawrence *v.* Johnson, 131 Cal. 175, 63 Pac. 176; Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Green *v.* McCord, 30 Ind. App. 470, 66 N. E. 494; Shattuck *v.* Ellas, 65 Kan. 298, 68 Pac. 1092; Wenke *v.* Hall, 17 S. D. 305, 96 N. W. 103; Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297.

49. Edwards *v.* Dwight, 68 Ala. 389; Williams *v.* Williams, 117 Wis. 125, 94 N. W. 25.

50. Byrd *v.* Turpin, 62 Ga. 591; Brown *v.* Shirk, 75 Ind. 266; Bledsoe *v.* Wills, 22 Tex. 650.

A conditional verdict is not proper in an action of ejectment on a mortgage. Bower *v.* Fenn, 90 Pa. St. 359, 35 Am. Rep. 662.

51. Loftin *v.* Strow, 4 S. W. 180, 8 Ky. L. Rep. 955, holding that the discovery by the mortgagee, after he has bought the land at sale under his decree of foreclosure, that a stranger is in possession claiming under a deed from the mortgagor, and that other parties assert liens on the premises derived in like manner, may be ground for reinstating the action, although it would be more regular to bring a new suit.

Material error in amount of decree.—A new trial may be granted in consequence of a material error in calculating the amount of the decree. Brock *v.* Becker, 8 Ohio Dec. (Reprint) 263, 6 Cinc. L. Bul. 755. And see Trudeau *v.* Mather, 7 La. 554.

Usurious notes.— The fact that notes, apparently good and secured by a mortgage, were usurious and void in the state where they were given, is not ground for granting a rehearing on foreclosure. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

Fraud of mortgagee.— Although the fraud of the mortgagee in preventing payment of the mortgage, and in suppressing competition at the foreclosure sale, may be ground for a bill, it is not so for a petition for rehearing. Hurlburd *v.* Freelove, 3 Wis. 537.

52. Williams *v.* Taylor, 11 Bush (Ky.) 375.

53. Perdue *v.* Brooks, 95 Ala. 611, 11 So. 282. And see Belleville Sav. Bank *v.* Reis, 29 Ill. App. 622.

54. Piper *v.* Force, 91 Ind. 373.

of a specific lien by the application of particular property, or its proceeds, to its payment. Although it fixes the amount due and determines who is primarily liable for its payment, it is not necessarily or properly, unless so authorized by statute, a personal judgment against that or any other defendant.[55] Hence all that it need contain is a judicial finding of the amount due under the mortgage and a designation of the person liable for its payment, and a direction that if the debt is not paid within a limited time the mortgaged premises shall be sold according to law and the proceeds applied to the satisfaction of the debt.[56] Where a suit is brought for the partition of mortgaged premises and the mortgagee does not pray a foreclosure, a decree ordering the land to be sold, because not divisible, and the proceeds apportioned among the owners, is a judgment of partition and not of foreclosure, although it orders that the mortgage shall first be paid out of such proceeds.[57]

(II) *Interlocutory or Final Judgment.* A decree fixing the amount due and the liability of defendant and ordering the sale of the premises and the application of the proceeds is a final decree, although further directions may be necessary with reference to its execution,[58] or although it may permit the subsequent assertion and litigation of claims upon the proceeds of sale.[59] But if the decree does not ascertain the amount due; or if it orders a sale but does not give any direction as to the disposition of the proceeds; or if it reserves the question of the distribution of the fund, in order to adjust conflicting claims or liens; or if, without ordering a sale, it directs the cause to stand continued for further order or decree, upon the coming in of a master's report, in any such case it is merely interlocutory.[60]

b. Scope and Extent of Relief — (I) *In General* — (A) *Nature of Relief Granted.* It is the disposition of a court of equity in a foreclosure suit to settle

55. Williams *v.* Ives, 49 Ill. 512; Osgood *v.* Stevens, 25 Ill. 89; Marshall *v.* Maury, 2 Ill. 231; Trumbo *v.* Flournoy, 77 Mo. App. 324; Boynton *v.* Sisson, 56 Wis. 401, 14 N. W. 373. See also Cockrill *v.* Johnson, 28 Ark. 193.

56. Leviston *v.* Swan, 33 Cal. 480.

57. Davis *v.* Lang, 153 Ill. 175, 38 N. E. 635.

58. *Arkansas.*— Trapnall *v.* Brownlee, 8 Ark. 207.

Illinois.— Myers *v.* Manny, 63 Ill. 211.

Kentucky.— May *v.* Ball, 108 Ky. 180, 56 S. W. 7, 21 Ky. L. Rep. 1673.

Minnesota.— Smith *v.* Valentine, 19 Minn. 452.

New York.— Morris *v.* Morange, 38 N. Y. 172; Johnson *v.* Everett, 9 Paige 636.

Ohio.— Baker *v.* Lehman, Wright 522.

Texas.— Hipp *v.* Huchett, 4 Tex. 20.

United States.— Bronson *v.* La Crosse, etc., R. Co., 2 Black 524, 17 L. ed. 347; Forgay *v.* Conrad, 6 How. 201, 12 L. ed. 404; Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Ray *v.* Law, 3 Cranch 179, 2 L. ed. 404.

See 35 Cent. Dig. tit. "Mortgages," § 1403.

But *compare* Malone *v.* Marriott, 64 Ala. 486; Allen *v.* Belches, 2 Hen. & M. (Va.) 595.

Judgment on default.— In a foreclosure suit, where defendant fails to answer within the time prescribed by the court, a final decree cannot be made, but a decree *nisi* must first be given. State *v.* Evans, 1 Mo. 698.

Judgment for deficiency.— A judgment for the deficiency arising on a sale of the property, and directing that execution may issue therefor, is not final until there has been a judicial determination of the amount of the deficiency after the sale. Eggleston *v.* Morrison, 185 Ill. 577, 57 N. E. 775; Parmele *v.* Schroeder, 59 Nebr. 553, 81 N. W. 506.

In **Louisiana** an order of seizure and sale of mortgaged property is not a final judgment until notice is given and the time has elapsed, and no executory proceedings can be had under it. Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556.

59. Kirby *v.* Runals, 140 Ill. 289, 29 N. E. 697; Carpenter *v.* Canal Co., 35 Ohio St. 307; New York Cent. Trust Co. *v.* Western North Carolina R. Co., 89 Fed. 24; New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 83 Fed. 365, 27 C. C. A. 550; London, etc., Loan, etc., Co. *v.* Everitt, 8 Ont. Pr. 489.

Intervention.— Where a petition of intervention is filed, claiming priority over the mortgage or other rights in the property, a decree which settles the rights of the intervener, and directs provision to be made for their satisfaction in the sale or in the distribution of the proceeds, is final and appealable, although the main suit has not reached a final decree. Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; New York Cent. Trust Co. *v.* Madden, 70 Fed. 451, 17 C. C. A. 236; New York Cent. Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 850, 1 C. C. A. 116.

60. Illinois Trust, etc., Bank *v.* Pacific R. Co., 99 Cal. 407, 33 Pac. 1132; Johnson *v.* Everett, 9 Paige (N. Y.) 636; Williams *v.* Walker, 107 N. C. 334, 12 S. E. 43; Burling-

all controversies, adjudicate all claims, and grant to the parties all the relief to which they may be entitled under the pleadings and proof,[61] although it cannot go beyond the mortgage in suit and create other rights or liens or enforce other claims or demands.[62] To do complete equity, it may be necessary, and will then be proper, to investigate the state of accounts between the parties and decree for the balance due,[63] or to make provision in the decree for debts or instalments falling due pending the suit or after its termination.[64] But a personal judgment against the mortgagor, enforceable by general execution, is not within the proper scope of a foreclosure decree, and cannot be granted unless authorized by statute.[65]

(B) *Conformity to Pleadings.* A foreclosure decree is not valid and cannot be sustained unless it conforms to and is supported by the case made by the pleadings.[66]

(C) *Relief Limited by Prayer.* The decree on foreclosure is limited by the

ton, etc., R. Co. *v.* Simmons, 123 U. S. 52, 8 S. Ct. 58, 31 L. ed. 73; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 1 S. Ct. 414, 27 L. ed. 237.

61. Enright *v.* Hubbard, 34 Conn. 197; Jackson *v.* Dickinson, 6 Phila. (Pa.) 1; Alabama, etc., Mfg. Co. *v.* Robinson, 72 Fed. 708, 19 C. C. A. 152.

Canceling release or satisfaction.— A recorded release or satisfaction of a mortgage, entered by fraud or mistake, may be ordered canceled or stricken out in a suit to foreclose the mortgage. Chester *v.* Hill, 66 Cal. 480, 6 Pac. 132; Russell *v.* Mixer, 39 Cal. 504.

Judgment for possession.— In a suit to foreclose a mortgage, although foreclosure is denied because the debt is not due, a judgment for possession of the premises may lawfully be rendered in favor of the mortgagee. Sperry *v.* Butler, 75 Conn. 369, 53 Atl. 899.

Title in dispute.— No sale of the mortgaged property under a trust deed should be allowed, pending an appeal from a decree in another suit adjudging the title of such property to be in the United States. Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. (D. C.) 304, 17 App. Cas. (D. C.) 422.

62. *Illinois.*— Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1.

Indiana.— Green *v.* McCord, 30 Ind. App. 470, 66 N. E. 494.

Iowa.— Malony *v.* Fortune, 14 Iowa 417, holding that the mortgagor cannot complain of a decree by which an amount due the school fund, as a penalty for usury, is declared a lien on the mortgaged premises from the date of the mortgage.

Louisiana.— Easterling *v.* Thompson, 19 La. Ann. 34.

Mississippi.— Petrie *v.* Wright, 6 Sm. & M. 647.

South Carolina.— Hartzog *v.* Goodwin, 37 S. C. 603, 15 S. E. 880.

See 35 Cent. Dig. tit. "Mortgages," § 1404.

63. Paul *v.* Land, 15 Oreg. 442, 17 Pac. 81. See also Eau Claire *v.* Payson, 109 Fed. 676, 48 C. C. A. 608.

64. Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510; Holden *v.* Gilbert, 7 Paige (N. Y.) 208. See also Tucker *v.* Tucker, 24 Mich. 426.

65. See *infra*, XXI, I.

66. *Arkansas.*— Barraque *v.* Manuel, 7 Ark. 516.

California.— Johnson *v.* Polhemus, 99 Cal. 240, 33 Pac. 908; Hewett *v.* Dean, (1891) 25 Pac. 753; White *v.* Allatt, 87 Cal. 245, 25 Pac. 420.

Illinois.— Monarch Brewing Co. *v.* Wolford, 179 Ill. 252, 53 N. E. 583; Dorn *v.* Lawrence, 77 Ill. App. 221; Seiler *v.* Schaefer, 40 Ill. App. 74.

Indiana.— Rucker *v.* Steelman, 73 Ind. 396; Halstead *v.* Lake County, 56 Ind. 363.

Iowa.— Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784.

Kansas.— Hill *v.* Alexander, 2 Kan. App. 251, 41 Pac. 1066.

Nebraska.— Likes *v.* Wildish, 27 Nebr. 151, 42 N. W. 900.

New Jersey.— Ames *v.* New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385; Hopper *v.* Sisco, 5 N. J. Eq. 343.

New York.— Ferguson *v.* Ferguson, 2 N. Y. 360.

Texas.— Branch *v.* Wilkens, (Civ. App. 1901) 63 S. W. 1083.

Washington.— Oregon Mortg. Co. *v.* Estes, 20 Wash. 659, 56 Pac. 834.

See 35 Cent. Dig. tit. "Mortgages," § 1405.

Illustrations.— A decree for the sale of mortgaged premises cannot be made on a bill filed merely for the purpose of having the mortgage deed recorded, although it prays for general relief. Chalmers *v.* Chambers, 6 Harr. & J. (Md.) 29. So, where plaintiff in his pleadings claims the ownership of the bonds secured by the mortgage, it is error to enter a decree in his favor as a pledgee. Chouteau *v.* Allen, 70 Mo. 290. And it is error to order the sale of a lot, on foreclosure, where the bill shows on its face that this was one of several lots released from the lien of the mortgage. Domestic Bldg. Assoc. *v.* Nelson, 172 Ill. 386, 50 N. E. 194. On the other hand a bill for foreclosure, although it does not show the real consideration for the mortgage, or the precise amount due on it, will authorize a decree, although the proofs may show a less sum to be due than was claimed, or a state of facts not averred in it, if these facts are not incompatible with the allegations of the bill. Collins *v.* Carlile, 13 Ill. 254.

bill or complaint and cannot grant any relief not prayed for.[67] But a prayer for general relief will authorize any action in the complainant's favor shown by the proofs to be just and equitable and not inconsistent with the pleadings.[68]

(D) *Separate Interests of Parties.* In pursuance of the chancery rule of doing complete equity to all parties before the court, it is proper for the foreclosure decree, when warranted by the pleadings and proofs, to settle and determine all questions and claims raised between different parties to the suit, as to ownership of the debt, liability for it or exoneration from it, the proportions in which it should be shared, or of priority or preference.[69] This rule applies not only to questions raised between different owners or beneficiaries of the mortgage debt,[70] and between successive mortgagees of the same property,[71] but also as between co-mortgagors or joint owners of the equity of redemption,[72] between the

67. *California.*— San Francisco Sav. Union *v.* Myers, 76 Cal. 624, 18 Pac. 686.

Illinois.— Roby *v.* Calumet, etc., Canal, etc., Co., 137 Ill. 289, 27 N. E. 72; Herdman *v.* Pace, 85 Ill. 345.

Indiana.— Wilds *v.* Ward, 138 Ind. 373, 37 N. E. 974.

New York.— Mygatt *v.* Somerville, 23 N. Y. Suppl. 808. But *compare* Clark *v.* Mackin, 95 N. Y. 346, holding that since one who has taken a mortgage without notice of a prior existing mortgage is entitled, on paying the first mortgage, to be subrogated to the rights of the holder thereof, in an action to foreclose the first mortgage, an order may be entered requiring its assignment to the second mortgagee, on payment thereof, even though such relief is not asked in the complaint.

Ohio.— Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

Tennessee.— Thruston *v.* Belote, 12 Heisk. 249. But *compare* First Nat. Bank *v.* Meachem, (Ch. App. 1896) 36 S. W. 724, holding that on foreclosure of a trust deed, a sale on time, and without redemption, in accordance with the terms of the instrument, may be decreed, although not specially prayed for in the bill.

Wisconsin.— Landon *v.* Burke, 36 Wis. 378. But see Sage *v.* McLaughlin, 34 Wis. 550, holding that, although the prayer of the complaint is merely for a strict foreclosure, the court may decree a foreclosure and sale, if the facts pleaded and proved show this to be the proper remedy.

See 35 Cent. Dig. tit. "Mortgages," § 1416.

Statutory provision.— In several states it is provided by statute that, if there be no answer, the relief granted cannot exceed that asked for in the complaint. See the statutes of the different states. And see Garretson Inv. Co. *v.* Arndt, 144 Cal. 64, 77 Pac. 770; Raun *v.* Reynolds, 11 Cal. 14; Naughton *v.* Vion, 91 Hun (N. Y.) 360, 36 N. Y. Suppl. 312; Vandenburgh *v.* New York, 57 N. Y. Super. Ct. 285, 7 N. Y. Suppl. 675; Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

68. *Alabama.*— Romanoff Min. Co. *v.* Cameron, 137 Ala. 214, 33 So. 864, holding that, although a mortgage given by a vendee for part of the purchase-price may be invalid, yet the vendor may be entitled to a decree declaring a vendor's lien, in a suit to foreclose the mortgage, where the bill also contains a prayer for general relief.

Florida.— Long *v.* Herrick, 26 Fla. 356, 8 So. 50.

Kentucky.— Hansford *v.* Holdam, 14 Bush 210; Oldham *v.* Halley, 2 J. J. Marsh. 113.

South Carolina.— Ross *v.* Carroll, 33 S. C. 202, 11 S. E. 760.

Wisconsin.— Ames *v.* Ames, 5 Wis. 169.

United States.— Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

See 35 Cent. Dig. tit. "Mortgages," § 1406.

69. Figley *v.* Bradshaw, 35 Nebr. 337, 53 N. W. 148; Burhans *v.* Burhans, 1 N. Y. Suppl. 37; New York L. Ins., etc., Co. *v.* Cutler, 3 Sandf. Ch. (N. Y.) 176.

Lessor's interest.— A decree foreclosing a mortgage on a lessee's interest in the premises, which purports to foreclose not only the title of the mortgagor but also that of the lessor, is void. Green *v.* Pierce, 60 Wis. 372, 19 N. W. 427.

Payment of proceeds into court.— A decree of foreclosure should not be delayed on account of a dispute among defendants as to their respective rights to the avails of the mortgage, but the decree should order the fund arising from the sale to be brought into court for future disposition. Cullum *v.* Erwin, 4 Ala. 452.

70. Morton *v.* New Orleans, etc., R., etc., Co., 79 Ala. 590; Cochran *v.* Jackman, 56 S. W. 507, 21 Ky. L. Rep. 1830; Johnson *v.* Brown, 31 N. H. 405. See also Kittler *v.* Studabaker, 113 Ill. App. 342.

71. Walker *v.* Abt, 83 Ill. 226; Shneider *v.* Mahl, 84 N. Y. App. Div. 1, 82 N. Y. Suppl. 27.

72. *Illinois.*— Stephens *v.* Bichnell, 27 Ill. 444, 81 Am. Dec. 242.

Kentucky.— Hunt *v.* McConnell, 1 T. B. Mon. 219.

Texas.— Wiley *v.* Pinson, 23 Tex. 486; Martin *v.* Harrison, 2 Tex. 456.

Wisconsin.— Schneider *v.* Reed, 123 Wis. 488, 101 N. W. 682.

Canada.— Cayley *v.* Hodgson, 13 Grant Ch. (U. C.) 433.

Compare Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608; Jacobson *v.* Smith, 73 N. Y. App. Div. 412, 77 N. Y. Suppl. 49.

See 35 Cent. Dig. tit. "Mortgages," § 1407.

mortgagor and successive grantees of the premises,[73] between husband and wife as mortgagors or owners,[74] and between the widow and heirs or devisees of a deceased mortgagor.[75] But since a hostile and paramount title cannot be litigated in a foreclosure suit,[76] the decree should save and reserve any rights arising under such a title.[77]

(E) *Disposition of Proceeds.* It is proper and usual for the foreclosure decree to direct the manner in which the proceeds of sale shall be applied to the liens or charges on the property or apportioned among those entitled;[78] but the omission of such a direction will not necessarily invalidate it, as it is competent for the court, after judgment, to order the surplus paid over to the proper parties.[79]

(F) *Mortgage of Real and Personal Property.* A mortgage covering both real and personal property may be foreclosed, and all the property sold, under one decree, if such a course is authorized by the statute;[80] and if not so authorized, the decree will not be invalid so far as it concerns the realty because it also erroneously includes personalty.[81]

(G) *Provision For Payment Before Foreclosure.* The formal method of decreeing a foreclosure is to order that defendant pay, within a limited time, the amount found due by the decree, and that, in default thereof, he shall be foreclosed of his equity of redemption, or that the property shall be sold and the proceeds applied as directed, according to the form of foreclosure decreed; and this provision is especially appropriate where a strict foreclosure is demanded.[82]

73. Duroe *v.* Stephens, 101 Iowa 358, 70 N. W. 610; Moss *v.* Bratton, 5 Rich. Eq. (S. C.) 1.

74. State Bank *v.* Backus, 160 Ind. 682, 67 N. E. 512; Blossom *v.* Westbrook, 116 N. C. 514, 21 S. E. 193.

75. Rudd *v.* Travelers' Ins. Co., 73 S. W. 759, 24 Ky. L. Rep. 2141; Merselis *v.* Van Riper, 55 N. J. Eq. 618, 38 Atl. 196; Thibodo *v.* Collar, 1 Grant Ch. (U. C.) 147.

76. See *supra*, XXI, G, 1, b, (III).

77. Equitable Mortg. Co. *v.* Finley, 133 Ala. 575, 31 So. 985; Elias *v.* Verdugo, 27 Cal. 418; Gilchrist *v.* Foxen, 95 Wis. 428, 70 N. W. 585.

78. *California.*— Taylor *v.* Ellenberger, 134 Cal. 31, 66 Pac. 4; Orange Growers' Bank *v.* Duncan, 133 Cal. 254, 65 Pac. 469; Ukiah Bank *v.* Reed, 131 Cal. 597, 63 Pac. 921. See also California Title Ins., etc., Co. *v.* Muller, (1906) 84 Pac. 453.

Michigan.— Shelden *v.* Erskine, 78 Mich. 627, 44 N. W. 146; Van Aken *v.* Gleason, 34 Mich. 477.

Minnesota.— Bay View Land Co. *v.* Myers, 62 Minn. 265, 64 N. W. 816.

New Jersey.— Gihon *v.* Belleville White Lead Co., 7 N. J. Eq. 531.

New York.— Ingalsbe *v.* Murphy, 84 Hun 181, 32 N. Y. Suppl. 569; Rogers *v.* Ivers, 23 Hun 424; Bostwick *v.* Pulver, 3 How. Pr. 69.

See 35 Cent. Dig. tit. "Mortgages," § 1408.

Plaintiff entitled to proceeds.— The court cannot make a decree for the foreclosure and sale of mortgaged land, and at the same time stop the money from going into the hands of plaintiff. Harrison *v.* McMennomy, 2 Edw. (N. Y.) 251.

Proceeds of subsequent sale.— Where the land has been sold since the mortgage, the court cannot direct that money due on such sale be applied in payment of the mortgage debt. Kingman *v.* Harmon, 131 Ill. 171, 23 N. E. 430.

79. Ukiah Bank *v.* Reed, 131 Cal. 597, 63 Pac. 921; Brier *v.* Brinkman, 44 Kan. 570, 24 Pac. 1108.

80. San Francisco Breweries *v.* Schurtz, 104 Cal. 420, 38 Pac. 92; Wylie *v.* Karner, 54 Wis. 591, 12 N. W. 57.

Mortgage invalid as to personalty.— Where a mortgage of land and the crop growing thereon was invalid as to the crop because not executed in the manner required by statute with reference to mortgages on such property, and the crop was subsequently covered by a second mortgage given in good faith, the court, in proceedings to foreclose the first mortgage, should direct a separate sale of the crop and the application of the proceeds thereof on the second mortgage. Simpson *v.* Ferguson, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 53 Am. St. Rep. 201.

81. Bernstein *v.* Hobelman, 70 Md. 29, 16 Atl. 374. And see Lasselle *v.* Godfroy, 1 Blackf. (Ind.) 297.

82. *Arkansas.*— Fowler *v.* Byers, 16 Ark. 196.

Connecticut.— Waters *v.* Hubbard, 44 Conn. 340; Enright *v.* Hubbard, 34 Conn. 197; Mix *v.* Hotchkiss, 14 Conn. 32.

Illinois.— Boester *v.* Byrne, 72 Ill. 466; Gochenour *v.* Mowry, 33 Ill. 331.

Kentucky.— Richardson *v.* Parrott, 7 B. Mon. 379; Champlin *v.* Foster, 7 B. Mon. 104; Thompson *v.* Taylor, 5 J. J. Marsh. 398; Oldham *v.* Halley, 2 J. J. Marsh. 113; Jouitt *v.* Gaither, 6 T. B. Mon. 251; Barnes *v.* Lee, 1 Bibb 526.

Louisiana.— Desobry *v.* Carmena, 9 La. Ann. 180; Gale *v.* Matta, 7 La. Ann. 140.

Maryland.— David *v.* Grahame, 2 Harr. & G. 94.

Massachusetts.— Pitts *v.* Tilden, 2 Mass. 118.

It is, however, entirely proper, even if not necessary, to insert in any form of foreclosure decree a provision giving to defendant a last opportunity to avert the sale of his property by paying what is due, with the interest and costs.[83] If such a clause is to be inserted, it is for the court to determine, in the exercise of a sound discretion, what is a reasonable time to allow for payment.[84]

New Jersey.—Eldridge *v.* Eldridge, 14 N. J. Eq. 195.

Ohio.— King *v.* Longworth, 7 Ohio, Pt. II, 231.

South Carolina.— Gray *v.* Toomer, 5 Rich. 261.

Tennessee. — Chadbourn *v.* Henderson, 2 Baxt. 460.

Canada. — North of Scotland Canadian Mortg. Co. *v.* Beard, 9 Ont. Pr. 546; Rigney *v.* Fuller, 4 Grant Ch. (U. C.) 198.

See 35 Cent. Dig. tit. "Mortgages," § 1410.

But *compare* Mussina *v.* Bartlett, 8 Port. (Ala.) 277.

83. *Kentucky.*— Durrett *v.* Whiting, 7 T. B. Mon. 547.

Maryland.— Johnson *v.* Robertson, 31 Md. 476; Gibson *v.* McCormick, 10 Gill & J. 65.

Mississippi. — McIntyre *v.* Whitfield, 13 Sm. & M. 88.

New Hampshire.— Brown *v.* West, 64 N. H. 385, 10 Atl. 615.

New York.— Kendall *v.* Treadwell, 5 Abb. Pr. 16; Sherwood *v.* Hooker, 1 Barb. Ch. 650.

North Carolina. — Mebane *v.* Mebane, 80 N. C. 34.

Pennsylvania. — Drexel *v.* Pennsylvania, etc., Canal, etc., Co., 6 Phila. 503.

Vermont.— Beedle *v.* Cook, 11 Vt. 206.

West Virginia. — Rohrer *v.* Travers, 11 W. Va. 146.

United States.— American L. & T. Co. *v.* Union Depot Co., 80 Fed. 36.

See 35 Cent. Dig. tit. "Mortgages," § 140.

In England and Canada this is the settled practice and six months is usually allowed for payment. Meller *v.* Woods, 1 Keen 16, 5 L. J. Ch. 109, 15 Eng. Ch. 16, 48 Eng. Reprint 212; Parker *v.* Housefield, 4 L. J. Ch. 57, 2 Myl. & K. 419, 7 Eng. Ch. 419, 39 Eng. Reprint 1004; Thorpe *v.* Gartside, 7 L. J. Exch. 30, 2 Y. & C. Exch. 730; Monkhouse *v.* Bedford Corp., 17 Ves. Jr. 380, 34 Eng. Reprint 147; Buell *v.* Fisher, 6 Ont. Pr. 51; Trust, etc., Co. *v.* Reynolds, 2 Ch. Chamb. (U. C.) 41; Commercial Bank *v.* Cooke, 1 Ch. Chamb. (U. C.) 205; Scott *v.* McKeown, 1 Ch. Chamb. (U. C.) 186; Swift *v.* Minter, 27 Grant Ch. (U. C.) 217; Hamilton Tp. *v.* Stevenson, 25 Grant Ch. (U. C.) 198; Rigney *v.* Fuller, 4 Grant Ch. (U. C.) 198; White *v.* Beasley, 2 Grant Ch. (U. C.) 660. It is in the discretion of the court to extend or enlarge the time originally allowed for payment; and this may be done where the mortgagor shows an excuse for his failure to pay within the time originally appointed and a reasonable probability that he will be able to do so within the extended time, and that the property is good security for the debt; or where payment has been deferred by negotiations between the parties, or by the pendency of an appeal; or on other equitable grounds. Jessop *v.* King, 2 Ball & B. 91; Finch *v.* Shaw, 20 Beav. 555, 52 Eng. Reprint 718; Geldard *v.* Hornby, 1 Hare 251, 6 Jur. 78, 23 Eng. Ch. 251, 66 Eng. Reprint 1026; Anonymous, 10 Ir. Eq. 174; Ford *v.* Wastell, 12 Jur. 404, 17 L. J. Ch. 368, 2 Phil. 591, 22 Eng. Ch. 591, 41 Eng. Reprint 1071; Holford *v.* Yate, 1 Kay & J. 677, 69 Eng. Reprint 631; Jones *v.* Creswicke, 9 L. J. Ch. 113, 9 Sim. 304, 16 Eng. Ch. 304, 59 Eng. Reprint 374; Lacon *v.* Tyrrell, 56 L. T. Rep. N. S. 483; Edwards *v.* Cunliffe, 1 Madd. 287, 56 Eng. Reprint 106; Quarles *v.* Knight, 8 Price 630; Renvoize *v.* Cooper, 1 Sim. & St. 364, 1 Eng. Ch. 364, 57 Eng. Reprint 146; Knowles *v.* Broome, 1 Ves. & B. 305, 35 Eng. Reprint 119; Wakerell *v.* Delight, 9 Ves. Jr. 36, 32 Eng. Reprint 514; Forrest *v.* Shore, 32 Wkly. Rep. 356; Cahuac *v.* Durie, 2 Ch. Chamb. (U. C.) 394; Street *v.* O'Reilley, 2 Ch. Chamb. (U. C.) 270; Gilmour *v.* Myers, 2 Ch. Chamb. (U. C.) 179; Waddell *v.* McColl, 2 Ch. Chamb. (U. C.) 58; Howard *v.* Macara, 1 Ch. Chamb. (U. C.) 27; Anonymous, 4 Grant Ch. (U. C.) 61; Ford *v.* Steeples, 1 U. C. Q. B. O. S. 282. But such an extension is usually granted only on terms of the immediate payment of accrued interest and costs. Coombe *v.* Stewart, 13 Beav. 111, 51 Eng. Reprint 44; Eyre *v.* Hanson, 2 Beav. 478, 9 L. J. Ch. 302, 17 Eng. Ch. 478, 48 Eng. Reprint 1266; Jones *v.* Roberts, McClell. & Y. 567; Cameron *v.* Cameron, 2 Ch. Chamb. (U. C.) 375; Street *v.* O'Reilley, 2 Ch. Chamb. (U. C.) 270. Where there are several defendants in the foreclosure proceedings, it is the general rule to fix one and the same time for payment or redemption for them all. Platt *v.* Mendel, 27 Ch. D. 246, 54 L. J. Ch. 1145, 51 L. T. Rep. N. S. 424, 32 Wkly. Rep. 918; Mutual L. Assur. Soc. *v.* Langley, 26 Ch. D. 686, 51 L. T. Rep. N. S. 284, 32 Wkly. Rep. 792; Smith *v.* Olding, 25 Ch. D. 462, 54 L. J. Ch. 250, 50 L. T. Rep. N. S. 357, 32 Wkly. Rep. 386; General Credit, etc., Co. *v.* Glegg, 22 Ch. D. 549, 52 L. J. Ch. 297, 48 L. T. Rep. N. S. 182, 31 Wkly. Rep. 421; Bartlett *v.* Rees, L. R. 12 Eq. 395, 40 L. J. Ch. 599, 25 L. T. Rep. N. S. 373, 24 L. T. Rep. N. S. 779, 19 Wkly. Rep. 1046; Stead *v.* Banks, 5 De G. & Sm. 560, 16 Jur. 945, 22 L. J. Ch. 208, 64 Eng. Reprint 1242; Edwards *v.* Martin, 4 Jur. N. S. 1044, 28 L. J. Ch. 49, 7 Wkly. Rep. 30; Cripps *v.* Wood, 51 L. J. Ch. 584; Tufdnell *v.* Nicholls, 56 L. T. Rep. N. S. 152; Hill *v.* Forsyth, 7 Grant Ch. (U. C.) 461. But see Lewis *v.* Aberdare, etc., Co., 53 L. J. Ch. 741, 50 L. T. Rep. N. S. 451; Ardagh *v.* Wilson, 2 Ch. Chamb. (U. C.) 70.

84. *Illinois.*— Wright *v.* Neely, 100 Ill. App. 310.

(H) *Possession of Premises.* Where a strict foreclosure is ordered, it is proper to provide in the decree for the surrender of possession to the mortgagee.[85] If foreclosure by sale is decreed, it is unnecessary for the decree to make any order as to the possession between its date and the time of sale, as this is regulated by law;[86] but it may very properly contain a direction for putting the purchaser at the sale into possession,[87] although it should not order a transfer of possession before the expiration of the time allowed by statute after the sale for redemption.[88]

(II) *STRICT FORECLOSURE*—(A) *Nature of Remedy and Form of Decree.* A decree of strict foreclosure does not order a sale of the premises, but on the contrary vests the legal title absolutely in the mortgagee on the failure of the mortgagor to pay, within a limited time, the amount determined by the decree to be due.[89] When drawn in the usual form, such a decree fixes the amount due and orders the same to be paid within a prescribed time, and declares that, in default of such payment, defendant shall be absolutely barred and foreclosed of all right and equity of redemption in the premises, and that all his right, title, and interest, both legal and equitable, shall be vested absolutely and unconditionally in the complainant.[90] It is absolutely essential to the correctness of such a decree that it should fix definitely the amount due on the mortgage, and that it should give the mortgagor a definite and reasonable time in which to pay it, before being foreclosed.[91] In England it is the settled practice to make a decree *nisi*, in the first instance, and the final decree of foreclosure is made only after the expiration of the time allowed for payment and on the filing of proof of non-payment;[92] but in America the decree is made final in the first instance, so that

Kentucky.— Tunstall *v.* McClelland, Hard. 519.

New York.— Ewell *v.* Hubbard, 46 N. Y. App. Div. 383, 61 N. Y. Suppl. 790; Perine *v.* Dunn, 4 Johns. Ch. 140.

Virginia.— Harkins *v.* Forsyth, 11 Leigh 294.

England.— Campbell *v.* Holyland, 7 Ch. D. 166, 47 L. J. Ch. 145, 38 L. T. Rep. N. S. 128, 26 Wkly. Rep. 109.

Canada.— Scarlett *v.* Birney, 15 Ont. Pr. 283.

Failure to make the payment within the time limited leaves the party without remedy. Delage *v.* Hazzard, 16 Ala. 196.

85. See *infra*, XXI, G, 2, b, (II), (C).

86. Cooper *v.* Davis, 15 Conn. 556; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405.

87. Bird *v.* Belz, 33 Kan. 391, 6 Pac. 627; McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W. 608.

Such a direction is not strictly necessary to the decree, and its omission is immaterial; the right of the purchaser to be put in possession follows as a matter of law from the decree, the sale under it, and his purchase; and if necessary, the court can make appropriate orders after the sale, requiring the surrender of possession to him. Horn *v.* Volcano Water Co., 18 Cal. 141; Gorton *v.* Paine, 18 Fla. 117.

88. Harlan *v.* Smith, 6 Cal. 173; Myers *v.* Manny, 63 Ill. 211; Baker *v.* Scott, 62 Ill. 86.

89. Gates *v.* Boston, etc., Air-Line R. Co., 53 Conn. 333, 5 Atl. 695.

Statement of rule.— "In a strict foreclosure at common law the decree simply cut off the equity of redemption, and foreclosed the mortgagor from redeeming his estate by payment of the mortgage debt; and the estate of the mortgagee, which in its inception was conditional and defeasible, became thereby absolute. Thereafter the mortgagee was, as of the estate granted and conveyed by the mortgage, discharged from the condition of defeasance, and he held the estate as if the original conveyance had been absolute." Champion *v.* Hinkle, 45 N. J. Eq. 162, 164, 16 Atl. 701.

Unnecessary to specify in whom title vested.— It is not necessary, in a strict foreclosure, for the decree to specify in whom the legal title to the land shall be vested; the title in the mortgagee is confirmed by barring the equity of redemption. Johnson *v.* Donnell, 15 Ill. 97.

Effect on mortgage debt.—A strict foreclosure of a mortgage does not extinguish the debt unless the value of the land is equivalent to the debt. Vansant *v.* Allmon, 23 Ill. 30.

90. Ellis *v.* Leek, 127 Ill. 60, 20 N. E. 218, 3 L. R. A. 259; Lees *v.* Fisher, 22 Ch. D. 283, 31 Wkly. Rep. 94; Wiseman *v.* Westland, 1 Y. & J. 117, 30 Rev. Rep. 765.

91. Kendall *v.* Treadwell, 5 Abb. Pr. (N. Y.) 16; King *v.* Wimley, 26 Leg. Int. (Pa.) 254; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47; Clark *v.* Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354.

Interest.— On decreeing strict foreclosure unless defendant shall pay the amount due within six months, it is proper also to require him to pay interest on such amount during that time. Bissell *v.* Chicago Mar. Co., 55 Ill. 165.

92. Clark *v.* Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354; Kinnaird *v.* Yorke, 60 L. T.

no further order of the court will be necessary to carry it into effect on the mortgagor's default.[93]

(B) *When Strict Foreclosure Proper.* The remedy of a strict foreclosure is regarded as harsh and generally inequitable, and not to be encouraged,[94] although in some jurisdictions it may be resorted to under exceptional circumstances,[95] as where all the parties in interest consent and agree to it,[96] or where the mortgagor is insolvent, so that a privilege of redemption would be of no avail to him, and it is clear that the property is not equal in value to the amount of the mortgage debt, so that it would certainly not bring a surplus over such debt if a sale were ordered.[97] This is also an appropriate remedy to cut off the equity of redemption of a junior mortgagee or judgment creditor, where the title of the mortgagor has already vested in the mortgagee, by a foreclosure sale or otherwise, the decree in such case requiring defendant to redeem within a limited time or be forever barred.[98] But a strict foreclosure will not be granted in the first instance, as against the mortgagor and other defendants, where it appears that there are other encumbrancers or creditors or purchasers of the equity of redemption;[99] and in

Rep. N. S. 380; Frith *v.* Cooke, 52 L. T. Rep. N. S. 798, 33 Wkly. Rep. 688.

93. Ellis *v.* Leek, 127 Ill. 60, 20 N. E. 218, 3 L. R. A. 259.

94. Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; Foley *v.* Foley, 15 N. Y. App. Div. 276, 44 N. Y. Suppl. 588; Flanagan *v.* Great Cent. Land Co., 45 Oreg. 335, 77 Pac. 485. See also McCaughey *v.* McDuffie, (Cal. 1903) 74 Pac. 751; Blackledge *v.* Nelson, 17 N. C. 65.

95. Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530; Farrell *v.* Parlier, 50 Ill. 274; Weiner *v.* Heintz, 17 Ill. 259; Griesbaum *v.* Baum, 18 Ill. App. 614; Brahm *v.* Dietsch, 15 Ill. App. 331.

96. Hunt *v.* Lewin, 4 Stew. & P. (Ala.) 138; Belleville Sav. Bank *v.* Reis, 136 Ill. 242, 26 N. E. 646; Bissell *v.* Chicago Mar. Co., 55 Ill. 165; Green *v.* Crockett, 22 N. C. 390.

97. *Alabama.*— Hitchcock *v.* U. S. Bank, 7 Ala. 386.

Connecticut.— Pettihone *v.* Roberts, 1 Root 527.

Illinois.— Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530; Scott *v.* Milliken, 60 Ill. 108; Sheldon *v.* Patterson, 55 Ill. 507; Horner *v.* Zimmermann, 45 Ill. 14; Young *v.* Graff, 28 Ill. 20; Stephens *v.* Bichnell, 27 Ill. 444, 81 Am. Dec. 242; Wilson *v.* Geisler, 19 Ill. 49; Johnson *v.* Donnell, 15 Ill. 97; Edwards *v.* Helm, 5 Ill. 142; Griesbaum *v.* Baum, 18 Ill. App. 614; Hollis *v.* Smith, 9 Ill. App. 109; Greenemeyer *v.* Deppe, 6 Ill. App. 490; Miller *v.* Davis, 5 Ill. App. 474.

Minnesota.— Drew *v.* Smith, 7 Minn. 301; Heyward *v.* Judd, 4 Minn. 483; Stone *v.* Bassett, 4 Minn. 298. But see Wilder *v.* Haughey, 21 Minn. 101; Bacon *v.* Cottrell, 13 Minn. 194.

Nebraska.— Miles *v.* Stehle, 22 Nebr. 740, 36 N. W. 142; South Omaha Sav. Bank *v.* Levy, 1 Nebr. (Unoff.) 255, 95 N. W. 603.

New Jersey.— Benedict *v.* Mortimer, (Ch. 1887) 8 Atl. 515.

New York.— House *v.* Lockwood, 40 Hun 532.

Ohio.— Higgins *v.* West, 5 Ohio 554.

United States.— Flagg *v.* Walker, 113 U. S. 659, 5 S. Ct. 697, 28 L. ed. 1072.

England.— Provident Clerks' Assoc. *v.* Lewis, 62 L. J. Ch. 89, 67 L. T. Rep. N. S. 644.

Canada.— Credit Foncier Franco-Canadien *v.* Schultz, 10 Manitoba 158; Lander Banking, etc., Co. *v.* Anderson, 3 Manitoba 270. And see Meyers *v.* Harrison, 1 Grant Ch. (U. C.) 449, holding that a mortgagee is entitled to a decree for a sale or for strict foreclosure at his option, as against the mortgagor.

See 35 Cent. Dig. tit. "Mortgages," § 1412.

98. Jackson *v.* Weaver, 138 Ind. 539, 38 N. E. 166; Loeb *v.* Tinkler, 124 Ind. 331, 24 N. E. 235; Jefferson *v.* Coleman, 110 Ind. 515, 11 N. E. 465; Miles *v.* Stehle, 22 Nebr. 740, 36 N. W. 142; Lockard *v.* Hendrickson, (N. J. Ch. 1892) 25 Atl. 512; Bolles *v.* Duff, 43 N. Y. 469; Kendall *v.* Treadwell, 5 Ahb. Pr. (N. Y.) 16.

Judgment lien creditor not party to foreclosure of prior mortgage.—The proper course of procedure to bar the rights of a judgment lien creditor, who was not made a party to the foreclosure of a prior mortgage, is a suit for strict foreclosure, requiring him to redeem within a reasonable time or be barred and foreclosed. Koerner *v.* Willamette Iron Works, 36 Oreg. 90, 58 Pac. 863, 78 Am. St. Rep. 759.

99. Boyer *v.* Boyer, 89 Ill. 447; Farrell *v.* Parlier, 50 Ill. 274; Warner *v.* Helm, 6 Ill. 220; Greenemeyer *v.* Deppe, 6 Ill. App. 490; Miller *v.* Davis, 5 Ill. App. 474; Rourke *v.* Coulton, 4 Ill. App. 257; South Omaha Sav. Bank *v.* Levy, 1 Nebr. (Unoff.) 255, 95 N. W. 603.

This rule is not inflexible; it is subject to exceptions, growing out of the facts of particular cases, where justice and sound reason require that exceptions should be made. "The court of conscience [will not] sacrifice or endanger the rights of a complainant who comes within her portals with a just cause, and holding the oldest and preferred lien and best equity, for the bare possibility of a wholly improbable benefit to one having a second lien and subordinate equity." Illinois

some jurisdictions it is not allowed under any circumstances,[1] while in others it is forbidden by law in the case of mortgages made by persons acting in a fiduciary capacity, such as guardians or executors.[2]

(c) *Provisions For Obtaining Possession.* In a decree of strict foreclosure, it is proper to include an order requiring the mortgagor to surrender possession to the mortgagee, if the debt is not paid by the appointed time, or providing for putting the mortgagee in possession if it is withheld from him.[3]

(III) *Sale of Property*—(A) *In General.* A decree of foreclosure in the usual form will contain an order for the sale of the mortgaged premises for the satisfaction of the debt,[4] substantially the same as under an execution at

Starch Co. *v.* Ottawa Hydraulic Co., 23 Ill. App. 272 [*affirmed* in 125 Ill. 237, 17 N. E. 486].

1. *Colorado.*— Nevin *v.* Lulu, etc., Silver Min. Co., 10 Colo. 357, 15 Pac. 611.

Iowa.— Gamut *v.* Gregg, 37 Iowa 573; Kramer *v.* Rebman, 9 Iowa 114.

Kansas.— Blood *v.* Shepard, 69 Kan. 752, 77 Pac. 565.

Michigan.— See Cooper *v.* Bigly, 13 Mich. 463; Buck *v.* Sherman, 2 Dougl. 176.

Missouri.— O'Fallon *v.* Clopton, 89 Mo. 284, 1 S. W. 302; Davis *v.* Holmes, 55 Mo. 349.

Tennessee.— Hord *v.* James, 1 Overt. 201.

Wisconsin.— Spengler *v.* Hahn, 95 Wis. 472, 70 N. W. 466. But see Bresnahan *v.* Bresnahan, 46 Wis. 385, 1 N. W. 39; Kimball *v.* Darling, 32 Wis. 675.

See 35 Cent. Dig. tit. "Mortgages," § 1412.

2. See the statutes of the different states. And see U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

3. Belleville Sav. Bank *v.* Reis, 136 Ill. 242, 26 N. E. 646; Martin *v.* Jones, 15 Iowa 240; Buswell *v.* Peterson, 41 Wis. 82; Thynne *v.* Sarl, [1891] 2 Ch. 79, 60 L. J. Ch. 590, 64 L. T. Rep. N. S. 781; Manchester, etc., Bank *v.* Parkinson, 60 L. T. Rep. N. S. 258; Williamson *v.* Burrage, 56 L. T. Rep. N. S. 702. See also Lloyd *v.* Karnes, 45 Ill. 62.

4. Wofford *v.* Wyly, 72 Ga. 863, holding that where an absolute deed is given to secure a debt, with a written agreement to reconvey on payment, in ejectment by the grantee, the grantor having set up the agreement, the decree should be for a sale and the payment of any surplus to the grantor.

Sufficiency of judgment.— A judgment for the recovery of a sum of money and "that the equity of redemption of the defendant in and [to certain lots of land] . . . together with all the rights thereof, from thenceforth be barred and foreclosed, and such other proceedings be had, as are pointed out in the statute, in such case made and provided," is a decree for the sale of the land described and is sufficient. Dickerson *v.* Powell, 21 Ga. 143.

Stipulation in mortgage.— A clause in a mortgage to the effect that after default the mortgagee may "procure by a decree of any court of competent jurisdiction, a sale, to be made of the hereby mortgaged property" does not enlarge, but simply declares, the existing right of the mortgagee to his remedy according to the usual course of law. Kenly *v.* Wierman, 18 Md. 302. And see Brooks *v.* Hays, 24 Md. 507; Black *v.* Carroll, 24 Md. 251.

On opening strict foreclosure.— Where a non-resident mortgagor against whom a decree of strict foreclosure was rendered on default obtains leave to answer, and the property has meanwhile passed into the hands of purchasers who have made valuable improvements, and the land, on valuation, is found to be of greater value than the debt, if the mortgagor does not exercise his right to redeem a sale should be decreed. Scott *v.* Milliken, 60 Ill. 108.

Sale on motion of bondholder.— Trustees to whom a mortgage securing bonds is made payable, and who have foreclosed the mortgage, have not such absolute control over the decree as will preclude the court from ordering a sale of the property on motion of one of the bondholders, although he also owns the equity of redemption. Thomas *v.* San Diego College Co., 111 Cal. 358, 43 Pac. 965.

Land taken for public use.— On a bill to foreclose a mortgage on property which has been taken for public uses, as by park commissioners, when it appears that the compensation awarded to the owner or mortgagor is more than the amount due on the mortgage, it is not proper to order a sale; but the amount due should be ordered to be paid out of the condemnation money. Colehour *v.* State Sav. Inst., 90 Ill. 152.

Restrictions on use of property.— A mortgagor may, as against a subsequent grantee of the mortgaged premises, have the foreclosure sale made subject to restrictions against nuisances, imposed after the execution of the mortgage but before the sale. Rhoades *v.* Card, 16 N. Y. App. Div. 261, 44 N. Y. Suppl. 621.

Foreclosure by junior mortgagee.— In a foreclosure suit brought by junior mortgagees, they cannot object that the decree did not direct them to pay the amount due on the senior mortgage, but merely directed the premises to be sold on default of payment by the junior mortgagees or the other defendants in the senior mortgagee's cross bill. Shaffner *v.* Appleman, 170 Ill. 281, 48 N. E. 978.

Premises sold by mortgagor.— Where the mortgagor, subsequent to the execution of the mortgage, has conveyed all his interest in the mortgaged premises, a decree may be entered in foreclosure proceedings, which,

law,[5] provided it appears that the land is legally chargeable with the debt,[6] and that the debt has not been paid;[7] and this is independent of any personal judgment for the amount of the debt, and is the proper decree in cases where a personal judgment would not be legally correct.[8]

(B) *Premises or Interests to Be Sold.* The decree should order the sale only of the title, right, or interest in the property held by the mortgagor at the time of the execution of the mortgage,[9] and should not authorize or direct the sale of any premises or property owned by the mortgagor but not included in the mortgage;[10] and in cases where it is so required by statute[11] or by the equities of the particular case,[12] the decree should not order the sale of the entire mortgaged property, but of so much thereof as may be necessary to satisfy the mortgage debt.

after finding the amount due, and without any personal judgment for the money, directs a sale of the mortgaged premises in satisfaction of the amount due. Winkelman *v.* Kiser, 27 Ill. 21; Jones *v.* Lapham, 15 Kan. 540.

5. Buckinghouse *v.* Gregg, 19 Ind. 401; Oldham *v.* Halley, 2 J. J. Marsh. (Ky.) 113; Bishop *v.* Jones, 28 Tex. 294.

6. Smith *v.* Flint, 6 Gratt. (Va.) 40.

7. Hall *v.* Metcalfe, 114 Ky. 886, 72 S. W. 18, 24 Ky. L. Rep. 1660.

8. Ashmore *v.* McDonnell, 39 Kan 669, 18 Pac. 821.

9. Schwartz *v.* Palm, 65 Cal. 54, 2 Pac. 735; Kreichbaum *v.* Melton, 49 Cal. 50; San Francisco *v.* Lawton, 21 Cal. 589; Marshall *v.* Livermore Spring Water Co., (Cal. 1884) 5 Pac. 101; Damm *v.* Damm, 91 Mich. 424, 51 N. W. 1069; Hart *v.* Wandle, 50 N. Y. 381; Wolf *v.* Stout, 9 Ohio Dec. (Reprint) 230, 11 Cinc. L. Bul. 236. But see Norris *v.* Luther, 101 N. C. 196, 8 S. E. 95, holding that, in a decree of sale under a mortgage executed by a married woman on lands acquired under a marriage settlement, without the concurrence of the trustee by whom the lands were held in trust, it is not error to direct a sale of the land itself, instead of the interest of defendant therein, as only such interest will pass by the sale, although words of larger import be used.

Mortgage conveying less than fee.— Where a mortgage, for lack of words of inheritance, conveys less than the fee, it may be rectified so as to convey the fee and then foreclosed by a decree ordering the sale of the premises. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

Land not owned by mortgagor.— It is no objection to a judgment for the sale of mortgaged premises that it does not order the sale of land embraced in the mortgage, but to which the mortgagor had no title. Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277.

Foreclosure by second mortgagee.— On a bill by a second mortgagee, nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the first mortgagee comes in with his mortgage and consents to a sale of the property for the satisfaction of both mortgages. Roll *v.* Smalley, 6 N. J. Eq. 464.

10. *California.*— Hibernia Sav., etc., Soc. *v.* Kain, 117 Cal. 478, 49 Pac. 578.

Illinois.— Troutman *v.* Schaeffer, 31 Ill. 82. See also Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

Iowa.— Wilkerson *v.* Daniels, 1 Greene 179.

Nebraska.— Clapp *v.* Maxwell, 13 Nebr. 542, 14 N. W. 653.

New York.—Clapp *v.* McCabe, 84 Hun 379, 32 N. Y. Suppl. 425.

See 35 Cent. Dig. tit. "Mortgages," § 1417.

Riparian rights.— On foreclosure of a mortgage given by a riparian owner, covering the shore, and including the land under water in front of the upland, which was afterward leased from the state by the vendee of such owner, and improved by filling below high-water mark, the rights of the mortgagee in the land that has thus been reclaimed should be defined before a sale is ordered. Point Breeze Ferry, etc., Co. *v.* Bragaw, 47 N. J. Eq. 298, 20 Atl. 967.

Sale of franchise.— Defendants to a mortgage foreclosure cannot complain that a franchise, the sale of which is forbidden by statute, but which was included in the mortgage, was directed to be sold, since if such property were sold no title would pass, and they could sustain no harm therefrom. Ukiah Bank *v.* Reed, 131 Cal. 597, 63 Pac. 921.

11. See the statutes of the different states. And see Treiber *v.* Shafer, 18 Iowa 29.

12. *Alabama.*— Fry *v.* Merchants' Ins. Co., 15 Ala. 810.

Indiana.— Little *v.* Vance, 14 Ind. 19.

Kansas.— See Kirby *v.* Childs, 10 Kan. 639.

New Jersey.— Parkhurst *v.* Cory, 11 N. J. Eq. 233.

New York.— Delabigarre *v.* Bush, 2 Johns. 490; Brevoort *v.* Jackson, 1 Edw. 447. See also Bernhardt *v.* Lymburner, 85 N. Y. 172.

North Dakota.—Scottish-American Mortg. Co. *v.* Reeve, 7 N. D. 99, 72 N. W. 1088. Where a debt is secured by mortgage on several parcels of land and the court finds that the mortgagee is entitled to a sale, it has no authority to except any part from the decree of sale, although the value of the remainder would be greater than the amount of the debt. Baker *v.* Marsh, 1 N. D. 20, 44 N. W. 662.

Virginia.— Mayo *v.* Tomkies, 6 Munf. 520.

See 35 Cent. Dig. tit. "Mortgages," § 1416.

(c) *Provisions For Sale in Gross or in Parcels.* The decree should order the sale of the land in separate parcels, rather than as a whole, if such a course is required by the statute or prescribed by the terms of the mortgage,[13] or if there are infant defendants and it is shown that a sale in parcels will be for their advantage,[14] or if only a part of the mortgage debt is due at the time of the decree.[15] And where the mortgage secures different debts separately charged on different parcels, or where two mortgages on different lots are foreclosed at the same time, a sale of the property *en masse* should not be ordered.[16] But in other cases it rests very much in the discretion of the court whether to order a sale of the mortgaged premises simply, or to give directions that separate parcels shall be separately offered,[17] or to leave this matter to the judgment and discretion of

13. *California.*— Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019, holding that error cannot be predicated of a decree in foreclosure for following the provision of the mortgage, that the lands therein embraced shall be sold in one large parcel and several other smaller parcels.

Indiana.— Piel *v.* Brayer, 30 Ind. 332, 95 Am. Dec. 699.

Iowa.— Malony *v.* Fortune, 14 Iowa 417.

Kentucky.— Hill *v.* Pettit, 66 S. W. 190, 23 Ky. L. Rep. 2004; Ficener *v.* Bott, 29 S. W. 639, 16 Ky. L. Rep. 519; McFarland *v.* Garnett, 8 S. W. 17, 10 Ky. L. Rep. 91.

Michigan.— O'Connor *v.* Keenan, 132 Mich. 646, 94 N. W. 186; Keyes *v.* Sherwood, 71 Mich. 516, 39 N. W. 740; Durm *v.* Fish, 46 Mich. 312, 9 N. W. 429; Larzelere *v.* Starkweather, 38 Mich. 96.

Nebraska.— Laughlin *v.* Schuyler, 1 Nebr. 409.

New York.— Dobbs *v.* Niehuhr, 15 Daly 52, 3 N. Y. Suppl. 415; Hemmer *v.* Hustace, 14 N. Y. Civ. Proc. 254 [*affirmed* in 51 Hun 457, 3 N. Y. Suppl. 850]; Ogdensburgh Bank *v.* Arnold, 5 Paige 38.

Texas.— Oppenheimer *v.* Reed, 11 Tex. Civ. App. 367, 32 S. W. 325.

United States.— Sioux City Terminal R., etc., Co. *v.* Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73 [*affirmed* in 173 U. S. 99, 19 S. Ct. 341, 43 L. ed. 628]; Swenson *v.* Halberg, 1 Fed. 444, 1 McCrary 96.

See 35 Cent. Dig. tit. "Mortgages," §§ 1417–1515.

In Illinois the statute (Rev. St. c. 77, § 12), which provides that when real property is taken on execution, if the same is susceptible of division, it must be sold in separate tracts or lots, applies only to sales under execution, and not to sales under decrees of foreclosure. Dates *v.* Winstanley, 53 Ill. App. 623.

14. Walker *v.* Mobile Bank, 6 Ala. 452; Walker *v.* Hallett, 1 Ala. 379; Merchants' Ins. Co. *v.* Hinman, 3 Abb. Pr. (N. Y.) 455; Mills *v.* Dennis, 3 Johns. Ch. (N. Y.) 367; Graham *v.* Davis, 2 Ch. Chamb. (U. C.) 24; Lawrason *v.* Fitzgerald, 9 Grant Ch. (U. C.) 371; Upper Canada Bank *v.* Scott, 6 Grant Ch. (U. C.) 451.

15. *Illinois.*— Blazey *v.* Delius, 74 Ill. 299.

Indiana.— Benton *v.* Wood, 17 Ind. 260; Beauchamp *v.* Leagan, 14 Ind. 401; Harris *v.* Makepeace, 13 Ind. 560; Cubberly *v.* Wine, 13 Ind. 353; Walker *v.* Sellers, 11 Ind. 376; Greenman *v.* Pattison, 8 Blackf. 465.

Mississippi.— James *v.* Fisk, 9 Sm. & M. 144, 47 Am. Rep. 111.

New Jersey.— Probasco *v.* Vaneppes, (Ch. 1888) 13 Atl. 598; American L., etc., Ins., etc., Co. *v.* Ryerson, 6 N. J. Eq. 9.

Wisconsin.— Hiles *v.* Brooks, 105 Wis. 256, 81 N. W. 422.

United States.— Black *v.* Reno, 59 Fed. 917.

See 35 Cent. Dig. tit. "Mortgages," § 1417.

16. *California.*— Home Loan Associates *v.* Wilkins, 66 Cal. 9, 4 Pac. 697.

Idaho.— Strode *v.* Miller, 7 Ida. 16, 59 Pac. 893.

Illinois.— Bailey *v.* Green, 68 Ill. App. 632; Skaggs *v.* Kincaid, 48 Ill. App. 608; Brown *v.* Kennicott, 30 Ill. App. 89.

Kentucky.—Doty *v.* Berea College, 15 S. W. 1063, 16 S. W. 268, 12 Ky. L. Rep. 964.

Michigan.— See McIntyre *v.* Wyckoff, 119 Mich. 557, 78 N. W. 654.

Minnesota.— Hull *v.* King, 38 Minn. 349, 37 N. W. 792.

New Jersey.— Pancoast *v.* Duval, 26 N. J. Eq. 445.

New York.— See Barnes *v.* Stoughton, 10 Hun 14.

South Carolina.— Ross *v.* Carroll, 33 S. C. 202, 11 S. E. 760.

West Virginia.— Hurxthal *v.* Hurxthal, 45 W. Va. 584, 32 S. E. 237.

United States.— Wabash, etc., R. Co. *v.* Central Trust Co., 22 Fed. 138. And see Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,369, 2 Woods 263.

See 35 Cent. Dig. tit. "Mortgages," §§ 1417–1515.

17. *Alabama.*—Homer *v.* Schonfeld, 84 Ala. 313, 4 So. 105.

California.— Hopkins *v.* Wiard, 72 Cal. 259, 13 Pac. 687.

Indiana.— Smith *v.* Pierce, 15 Ind. 210; Andrews *v.* Jones, 3 Blackf. 440; Shirkey *v.* Hanna, 3 Blackf. 403, 26 Am. Dec. 426.

Iowa.— Severin *v.* Cole, 38 Iowa 463.

Michigan.— Anderson *v.* Smith, 108 Mich. 69, 65 N. W. 615; Macomb *v.* Prentis, 57 Mich. 225, 23 N. W. 788; Vaughn *v.* Nims, 36 Mich. 297.

Nebraska.— Omaha L. & T. Co. *v.* Lynch, (1902) 90 N. W. 217; Kane *v.* Jonasen, 55 Nebr. 757, 76 N. W. 441; Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154.

the officer making the sale.[18] A division of the premises for the purpose of the sale is for the advantage of defendant, and he must ask for it,[19] and it is sufficient reason for refusing such a direction that the property is not shown to be susceptible of advantageous division,[20] or that it does not appear to be worth any more than the amount of the mortgage debt.[21]

(D) *Order of Sale of Several Parcels.* Where it is necessary, in order to do equity as between several encumbrancers, or between successive purchasers of the mortgaged land or parts of it, that the different portions should be put up for sale in a certain order, as, in the inverse order of their alienation, the foreclosure decree should so command, with specific directions as to the order of sale,[22] provided the existence of such equities is brought to the attention of the court by proper allegations in the pleadings, or facts shown at the hearing, or by the prayer of the party whose advantage will be promoted by a particular order of sale.[23]

(E) *Directions as to Appraisement.* Where an appraisement of the property is required by law as a preliminary to its sale, it is proper, and even necessary, for the decree specifically to order such appraisement to be made,[24] except where

North Carolina. — Montague *v.* Raleigh Sav. Bank, 118 N. C. 283, 24 S. E. 6.

South Carolina.— Ross *v.* Carroll, 33 S. C. 202, 11 S. E. 760.

United States.— Stockmeyer *v.* Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. ed. 123.

Canada. — Murdoch *v.* Belloni, 3 Nova Scotia Dec. 532.

See 35 Cent. Dig. tit. "Mortgages," § 1417.

18. *Alabama.*— Cullum *v.* Batre, 2 Ala. 415. But *compare* Walker *v.* Hallett, 1 Ala. 379.

Indiana.— Patton *v.* Stewart, 19 Ind. 233.

Maryland.— Thomas *v.* Fewster, 95 Md. 446, 52 Atl. 750; Hughes *v.* Riggs, 84 Md. 502, 36 Atl. 269.

Mississippi.— Magruder *v.* Eggleston, 41 Miss. 284.

Nebraska.— Kane *v.* Jonasen, 55 Nebr. 757, 76 N. W. 441.

Pennsylvania.— Guarantee Trust, etc., Co. *v.* Klein, 9 Kulp 499.

South Carolina.— Barnwell *v.* Marion, 60 S. C. 314, 38 S. E. 593; Kaminisky *v.* Trantham, 45 S. C. 393, 23 S. E. 132.

See 35 Cent. Dig. tit. "Mortgages," § 1417.

19. *Alabama.*—Homer *v.* Schonfeld, 84 Ala. 313, 4 So. 105.

California.— San Luis Obispo County Bank *v.* Goldtree, 129 Cal. 160, 61 Pac. 785; Connick *v.* Hill, 127 Cal. 162, 59 Pac. 832; Hopkins *v.* Wiard, 72 Cal. 259, 13 Pac. 687.

Indiana.— Kelley *v.* Canary, 129 Ind. 460, 29 N. E. 11.

Kansas.— Geuda Springs Town, etc., Co. *v.* Lombard, 57 Kan. 625, 47 Pac. 532.

New Jersey.— Guarantee Trust, etc., Co. *v.* Jenkins, 40 N. J. Eq. 451, 2 Atl. 13.

New York.— Dobbs *v.* Niebuhr, 15 Daly 52, 3 N. Y. Suppl. 415.

See 35 Cent. Dig. tit. "Mortgages," § 1417.

20. *Indiana.*— Firestone *v.* Klick, 67 Ind. 309.

Kentucky.— Jones *v.* Louisville Sav., etc., Co., 58 S. W. 534, 22 Ky. L. Rep. 570. And see Rowlett *v.* Harris, 90 S. W. 562, 28 Ky. L. Rep. 780.

Maryland.— Johnson *v.* Hambleton, 52 Md. 378.

Wisconsin.— Stewart *v.* Nettleton, 13 Wis. 465.

United States.— Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706; Hill *v.* Farmers, etc., Nat. Bank, 97 U. S. 450, 24 L. ed. 1051; Central Trust Co *v.* U. S. Rolling-Stock Co., 56 Fed. 5.

See 35 Cent. Dig. tit. "Mortgages," § 1417.

21. Watts *v.* Palmer, 4 Ind. 575; Phillips *v.* Ricards, 3 Ind. 401; Mallory *v.* Patterson, 63 Nebr. 429, 88 N. W. 686; Gregory *v.* Campbell, 16 How. Pr. (N. Y.) 417.

22. *Arkansas.*— Byers *v.* Fowler, 14 Ark. 86.

California.— Raun *v.* Reynolds, 11 Cal. 14.

Illinois.— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Hards *v.* Burton, 79 Ill. 504.

Indiana.— Smith *v.* Sparks, 162 Ind. 270, 70 N. E. 253; Cissna *v.* Haines, 18 Ind. 496; Brugh *v.* Darst, 16 Ind. 79.

Kansas.— Greene *v.* Healy, 70 Kan. 173, 78 Pac. 416.

New Jersey.— Foster *v.* Rahway Union Bank, 34 N. J. Eq. 48.

New York.—Knickerbacker *v.* Eggleston, 3 How. Pr. 130; Rathbone *v.* Clark, 9 Paige 648.

South Carolina.— Norton *v.* Lewis, 3 S. C. 25.

Wisconsin.— Warren *v.* Foreman, 19 Wis. 35; Ogden *v.* Glidden, 9 Wis. 46.

Canada.— Perkins *v.* Vanderlip, 11 Grant Ch. (U. C.) 488.

See 35 Cent. Dig. tit. "Mortgages," § 1418.

23. *California.*—Carmichael *v.* McGillivray, 57 Cal. 8.

Indiana.— Day *v.* Patterson, 18 Ind. 114.

Michigan.— Ireland *v.* Woolman, 15 Mich. 253.

New York.— Quackenbush *v.* O'Hare, 61 Hun 388, 16 N. Y. Suppl. 33 [*affirmed* in 129 N. Y. 485, 29 N. E. 958]; New York L. Ins., etc., Co. *v.* Milnor, 1 Barb. Ch. 353; Rathbone *v.* Clark, 9 Paige 648.

Wisconsin. — Cord *v.* Southwell, 15 Wis. 211.

See 35 Cent. Dig. tit. "Mortgages," § 1418.

24. Cummings *v.* Burleson, 78 Ill. 281.

the mortgage waives the benefit of the statute, in which case the provision as to appraisement may be omitted.[25]

(F) *Directions as to Notice and Time of Sale.* The decree should appoint a time for the foreclosure sale to be held, or direct that it be held after the publication of notice for a certain length of time. The time rests in the sound discretion of the court, although it should not be unreasonably short.[26] The decree should also state what notice is to be given and for how long a time.[27]

(G) *Terms and Conditions of Sale.* The terms and conditions of sale should not be left to the discretion of the master or commissioner but should be prescribed by the court, and they may, if equity requires it, be different from the terms stipulated in the mortgage itself.[28] It is generally competent for the decree to prescribe that the sale shall be for cash,[29] or that the bid may be paid in the bonds secured by the mortgage,[30] and that the mortgagee may bid, although without such permission he could not.[31]

(H) *Certificate or Report of Sale.* It has been held that the decree should require the master or commissioner conducting the sale to make a report of his doings to the court for its confirmation;[32] but according to other decisions the decree is not erroneous if it directs him to make a deed or certificate of sale to the purchaser without a preliminary report or return.[33]

(I) *Further or Subsequent Order of Sale.* Where foreclosure is decreed for default in the payment of an instalment or portion of the mortgage debt, there should be but one judgment or decree, but it may contain a provision authorizing the mortgagee, on petition, to have an order of sale in case of default as to any future instalment, and then successive orders of sale may regularly issue on such summary proceedings by petition.[34] And where only a portion of the mortgaged

As to necessity of appraisement as preliminary to sale see *infra*, XXI, H, 1, c, (I).

25. Howe *v.* Dibble, 45 Ind. 120; Culph *v.* Phillips, 17 Ind. 209. And see Northrop *v.* Cooper, 23 Kan. 432. *Compare* Pierce *v.* Butters, 21 Kan. 124.

26. *Arkansas.*— Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121, the court may order a sale on twenty days' notice, although the mortgage provides for thirty days' notice in case of sale under the power in the mortgage.

Illinois.— Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589; Moore *v.* Titman, 33 Ill. 358.

Kansas.— Blandin *v.* Wade, 20 Kan. 251.

Michigan.—Gray *v.* Federal Bank, 83 Mich. 365, 47 N. W. 221, under a statute providing that, on foreclosure of a mortgage, the lands shall not be ordered to be sold within one year after the filing of the bill, the decree must not authorize a sale before the expiration of a year after the filing of an amended bill.

North Carolina.— Nimrock *v.* Scanlin, 87 N. C. 119.

See 35 Cent. Dig. tit. "Mortgages," § 1420.

27. Sessions *v.* Peay, 23 Ark. 39, holding that the selection of a newspaper to advertise the sale is for the chancellor's discretion.

Necessity for prescribing notice.— The commissioner appointed to make the sale ought not to be left to his own discretion as to the time and manner of sale. He should be required at least to make a public sale, and advertise the time and place a reasonable time previously thereto. Harlan *v.* Murrell, 3 Dana (Ky.) 180.

Sufficiency of directions.— Where the practice in the state as to notices of sales under foreclosure and execution has been uniform, a decree directing notice of a foreclosure sale to be given "according to the course and practice of the court" is sufficiently clear to be valid, although neither the statutes nor the rules prescribe the length of notice. Ireland *v* Woolman, 15 Mich. 253.

28. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1. But see Fultz *v.* Davis, 26 Gratt. (Va.) 903, holding that the decree should follow the terms of sale prescribed in the deed of trust, so that it is error to decree a sale on credits not authorized by the deed.

29. Pool *v.* Young, 7 T. B. Mon. (Ky.) 587; Ing *v.* Cromwell, 4 Md. 31; Hodges *v.* Copley, 11 Heisk. (Tenn.) 332. *Compare* Worsham *v.* Freeman, 34 Ark. 55.

Security for deferred payments.— In decreeing foreclosure against infant defendants, the court may, on the application of their guardian, direct that the sale shall he for so much cash as will cover the amount due, with costs and expenses, and, at the purchaser's option, a bond and mortgage for the residue of the bid. Brush *v.* Shuster, 3 Abb. N. Cas. (N. Y.) 73.

30. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203. And see Sanxey *v.* Iowa City Glass Co., 63 Iowa 707, 17 N. W. 429.

31. Koerner *v.* Gauss, 57 Ill. App. 668.

32. Mebane *v.* Mebane, 80 N. C. 34.

33. Cullum *v.* Batre, 2 Ala. 415; Mussina *v.* Bartlett, 8 Port. (Ala.) 277; State *v.* Evans, 176 Mo. 310, 75 S. W. 914; Walker *v.* Jarvis, 16 Wis. 28.

34. Napa Bank *v.* Godfrey, 77 Cal. 612, 20 Pac. 142; Shores *v.* Scott River Water Co.,

property is ordered to be sold, the remainder being tied up by an injunction suit, the mortgagee, in case of a deficiency, and on notice to the mortgagor, may apply for an order for the sale of such remainder.[35] Nor is it beyond the jurisdiction of the court to render a second decree of foreclosure in the same suit, when it is in all respects the same as the first except that it is more specific in the description of the property.[36]

(IV) *Amount of Indebtedness* — (A) *Necessity For Determining Amount Due.* A decree for the foreclosure of a mortgage must find and adjudge the exact amount due to the complainant; without this, it is erroneous if not void,[37] except perhaps in cases where the amount claimed is distinctly stated in the pleadings and admitted by defendant.[38] And where several mortgages upon separate parcels of land are foreclosed in one action, the decree must find the amount due upon each, and not the aggregate amount secured by all.[39] In the foreclosure of a trust deed securing notes held by different persons who were plaintiffs, it is proper to decree the payment in a lump sum of the amounts found by the master to be due the several plaintiffs.[40] Unless the determination of the amount is a matter of mere computation, it must be acted upon judicially by the court, and not left wholly to the master or referee.[41]

(B) *Amount of Decree* — (1) In General. The amount of the debt for

17 Cal. 626; Ellis *v.* Craig, 7 Johns. Ch. (N. Y.) 7; Brinckerhoff *v.* Thallhimer, 2 Johns. Ch. (N. Y.) 486; Rice *v.* Cribb, 12 Wis. 179; Fleming *v.* Soutter, 6 Wall. (U. S.) 747, 18 L. ed. 847; Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 48 Fed. 139.

35. Allenberg *v.* Zellerbach, 65 Cal. 26, 2 Pac. 726.

36. Barrell *v.* Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 L. ed. 511.

37. *California.*— Hibernia Sav., etc., Soc. *v.* Behnke, 121 Cal. 339, 53 Pac. 812.

Colorado.— Sliney *v.* Davis, 11 Colo. App. 480, 53 Pac. 686.

District of Columbia.— Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. 304.

Idaho.— Vermont L. & T. Co. *v.* McGregor, 5 Ida. 510, 51 Pac. 104.

Illinois.— Tompkins *v.* Wiltberger, 56 Ill. 385; Aldrich *v.* Sharp, 4 Ill. 261.

Indiana.— Travellers' Ins. Co. *v.* Patten, 98 Ind. 209; Wernwag *v.* Brown, 3 Blackf. 457, 26 Am. Dec. 433.

Iowa.— Wilson Sewing Mach. Co. *v.* Rutledge, 60 Iowa 39, 14 N. W. 92.

Kentucky.— Hopkins *v.* Ward, 12 B. Mon. 185.

Louisiana.— New Orleans *v.* Pigniolo, 29 La. Ann. 835.

Minnesota.— Baker *v.* Byerly, 40 Minn. 489, 42 N. W. 395.

Missouri.— Rumsey *v.* People's R. Co., 144 Mo. 175, 46 S. W. 144.

North Carolina.— Gore *v.* Davis, 124 N. C. 234, 32 S. E. 554.

Pennsylvania.— See Citizens' Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733.

Tennessee.— Pante *v.* Bethel, 9 Heisk. 666.

Virginia.— Smith *v.* Flint, 6 Gratt. 40.

West Virginia.— Rohrer *v.* Travers, 11 W. Va. 146; Livesay *v.* Jarrett, 3 W. Va. 283.

Wisconsin.— Wylie *v.* Karner, 54 Wis. 591, 12 N. W. 57; Rice *v.* Cribb, 12 Wis. 179. Where the trial court erroneously renders a personal judgment against the mortgagor, it will be taken, on appeal, to be merely a finding of the amount due, and no other effect will be given to it. Boynton *v.* Sisson, 56 Wis. 401, 14 N. W. 373.

United States.— Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350.

See 35 Cent. Dig. tit. "Mortgages," § 1427.

Mortgage assigned as collateral.— Where a mortgage has been assigned as collateral security for a debt, whatever may remain after satisfying the creditor can be assigned to another, and on foreclosure the court may properly direct that such balance be paid to him; but it is not necessary for the court to find the amount due to such party and render a judgment therefor. Pike *v.* Gleason, 60 Iowa 150, 14 N. W. 210.

Waiver of objection as to amount.— A mortgagee, by selling under the foreclosure decree, waives any objection to the amount therein decreed to him. Trogden *v.* Safford, 21 Ill. App. 240.

38. David *v.* Grahame, 2 Harr. & G. (Md.) 94.

Where the amount of the debt is undisputed, the court may order payment of the sum to be found due by a referee. Dial *v.* Tappan, 20 S. C. 167.

39. Knight *v.* Heafer, 79 Ill. App. 374; Rader *v.* Ervin, 1 Mont. 632.

Apportionment of debt on several lots.— A provision in a mortgage that certain lots could be released on payment of not less than one hundred and fifty dollars per lot, others on payment of two hundred dollars per lot, and others on payment of two hundred and fifty dollars, does not render the mortgage a separate and distinct mortgage as to each lot for a separate amount, or require that the amount due be apportioned among the lots. Domestic Bldg. Assoc. *v.* Nelson, 172 Ill. 386, 50 N. E. 194.

40. Shaffner *v.* Healy, 57 Ill. App. 90.

41. De Leuw *v.* Neely, 71 Ill. 473; Russell *v.* Brown, 41 Ill. 183.

which the decree is to be given will ordinarily be determined from the statements and recitals of the mortgage and the accompanying obligation;[42] but cannot exceed the amount actually due to the complainant, if there was a mistake in the mortgage or if only a part of the named consideration was advanced.[43] To this may be added disbursements or charges properly incurred by the mortgagee, such as the sum paid to redeem from a prior mortgage,[44] but not any additional debt or obligation between the parties not specifically covered by the mortgage.[45] Nor should the decree be for a larger amount than that prayed by plaintiff or fixed by the findings of the court;[46] but if excessive, it may be cured by a remittitur,[47] or corrected on appeal.[48] Where the complainant holds the mortgage only as collateral security for a debt due to him from the mortgagee, the decree should award him no more than the amount of such debt.[49]

(2) Deductions and Credits. In making up the foreclosure decree, proper deductions should be made for partial payments made by the mortgagor, besides giving him credit for anything transferred and accepted in part satisfaction of the mortgage or any legitimate offset or claim against the mortgagee.[50]

42. See Pitzele *v.* Cohn, 217 Ill. 30, 75 N. E. 392; Carter *v.* Simons, 12 Ind. 476; Fiske *v.* Fiske, 20 Pick. (Mass.) 499; Troy Carriage Co. *v.* Simson, 15 Misc. (N. Y.) 424, 37 N. Y. Suppl. 846.

43. *California.*— Vogan *v.* Caminetti, 65 Cal. 438, 4 Pac. 435.

Michigan.— Laylin *v.* Knox, 41 Mich. 40, 1 N. W. 913.

New Jersey.— Van Deventer *v.* Stiger, 25 N. J. Eq. 224.

New York.— Culver *v.* Pullman, 12 N. Y. Suppl. 663.

Pennsylvania.— Wilson *v.* Ott, 160 Pa. St. 433, 28 Atl. 848.

Wisconsin.— Heidtke *v.* Krause, 97 Wis. 118, 72 N. W. 351.

See 35 Cent. Dig. tit. "Mortgages," § 1425.

44. Clark *v.* Brenneman, 86 Ill. App. 416; Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (N. J. Ch. 1899) 42 Atl. 284 (complainant cannot recover the amount of a prior mortgage which he had agreed to pay as part of the consideration of his mortgage, if he has not paid it); Johnson *v.* Masters, 49 S. C. 525, 27 S. E. 474 (costs and disbursements).

45 Wiley *v.* Eccles, 4 Ill. App. 126; Jones *v.* Brogan, 29 N. J. Eq. 139; Dorrow *v.* Kelly, 1 Dall. (Pa.) 142, 1 L. ed. 73.

46. Goodrich *v.* Stanley, 23 Conn. 79; Small *v.* Douthitt, 1 Kan. 335; Miller *v.* Highland Ave. Loan, etc., Co., 25 Ohio Cir. Ct. 753. But see Ketchum *v.* White, 72 Iowa 193, 33 N. W. 627.

47. Hoyt *v.* Little, 55 Nebr. 71, 75 N. W. 56; Morris *v.* Peck, 73 Wis. 482, 41 N. W. 623.

48. See Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589. And see McNutt *v.* Dickson, 42 Ill. 498, where the only error assigned on appeal was an excess of nine dollars and seventy cents in a foreclosure decree for two thousand four hundred and forty-one dollars, and the maxim *de minimis non curat lex* was applied.

49. Stanley *v.* Chicago Trust, etc., Bank, 165 Ill. 295, 46 N. E. 273; Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951; Security Sav. Soc. *v.* Cohalan, 31 Wash. 266, 71 Pac. 1020.

50. *Arkansas.*—Crebbin *v.* Deloney, 75 Ark. 59, 86 S. W. 829.

California.— Higgins *v.* McDonald, 17 Cal. 289.

Illinois.— Haworth *v.* Huling, 87 Ill. 23.

Indiana.— Milburn *v.* Milburn, 143 Ind. 187, 42 N. E. 611; Brake *v.* Sparks, 117 Ind. 89, 19 N. E. 719.

Iowa.— Wilson Sewing Mach. Co. *v.* Rutledge, 60 Iowa 39, 14 N. W. 92.

Michigan.—Abele *v.* McGuigan, 78 Mich. 415, 44 N. W. 393.

Minnesota.— La Crosse Nat. Bank *v.* Thompson, 37 Minn. 126, 33 N. W. 907.

Nevada.— Hoppin *v.* Winnemucca First Nat. Bank, 25 Nev. 84, 56 Pac. 1121.

New Jersey.— Conover *v.* Grover, 31 N. J. Eq. 539; Hudnit *v.* Nash, 16 N. J. Eq. 550; Woodruff *v.* Depue, 14 N. J. Eq. 168.

New York.—American Guild *v.* Damon, 107 N. Y. App. Div. 140, 94 N. Y. Suppl. 985.

Washington.— Peterson *v.* Johnson, 20 Wash. 497, 55 Pac. 932.

England.— Dodd *v.* Lydall, 1 Hare 333, 23 Eng. Ch. 333, 66 Eng. Reprint 1060.

See 35 Cent. Dig. tit. "Mortgages," § 1425.

Usury.— Where a mortgage was made to secure a debt drawing usurious interest, a decree on foreclosure for the full amount of the debt, without deducting the amount of the usury, is erroneous. Harbison *v.* Houghton, 41 Ill. 522.

Counter-claim for waste.— Where a vendor of land remained in possession after the conveyance without the purchaser's consent, and committed waste on the premises, diminishing their value, the purchaser is entitled, on foreclosure of the purchase-money mortgage, to a corresponding abatement. McMichael *v.* Webster, 54 N. J. Eq. 478, 35 Atl. 663.

Building association loan.— In a suit to foreclose a mortgage given to a building and loan association, it is proper to set off against the amount due under the mortgage any sum that may be due defendant on matured stock in the association held by him. Novak *v.* Vypomony Spolck Bldg., etc., Assoc., 68

(3) Effect of Collateral Bond. The decree should be for the true amount of the debt secured, although it is less than the amount specified in an accompanying bond;[51] and conversely, the full amount of principal and interest due may be recovered, although it exceeds the penalty of the bond.[52]

(4) Debt or Instalment Not Due. Where only part of the mortgage debt is due, the decree should not include, nor should a judgment be given for, such parts as are not yet matured,[53] nor can the court order a sale of the entire premises for the satisfaction of the entire mortgage debt, thus in effect making part of the debt payable before it is due,[54] except in cases where the mortgagee exercises his option to declare the whole debt due on a partial default;[55] but the decree may preserve the lien of the mortgage for the unpaid portion of the debt, or order that it shall stand as security therefor, or grant the mortgagee leave to apply for supplementary decrees or orders of sale as succeeding instalments fall due.[56]

(5) Instalments Maturing Before Decree. The foreclosure decree may properly include instalments or portions of the mortgage debt falling due after the commencement of the proceedings, and before the rendition of the decree, if a proper foundation therefor has been laid in the bill.[57]

Ill. App. 682 [*affirmed* in 167 Ill. 264, 47 N. E. 579].

Rate of exchange.— On foreclosure of a mortgage on land situated in New York, given to secure the payment of a loan negotiated in a foreign country with a citizen of that country, no allowance can be made for the difference of exchange between the two countries. Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264 note.

51. Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590; Scriven *v.* Hursh, 39 Mich. 98.

52. Long *v.* Long, 16 N. J. Eq. 59. And see Mower *v.* Kip, 2 Edw. (N. Y.) 165 [*reversed* in part in 6 Paige 88]. See, however, Harper *v.* Barsh, 10 Rich. Eq. (S. C.) 149; Cruger *v.* Daniel, McMull. Eq. (S. C.) 157.

53. *Alabama.*— Fulgham *v.* Morris, 75 Ala. 245; Walker *v.* Hallett, 1 Ala. 379.

Indiana.— Griffin *v.* Reis, 68 Ind. 9; Skelton *v.* Ward, 51 Ind. 46.

Iowa.— See Carr *v.* Hunt, 14 Iowa 206.

Michigan.— Smith *v.* Osborn, 33 Mich. 410.

New Jersey.— Greenville Bldg., etc., Assoc. *v.* Wholey, 68 N. J. Eq. 92, 59 Atl. 341.

New York.— Hall *v.* Bamber, 10 Paige 296.

Ohio.— King *v.* Longworth, 7 Ohio, Pt. II, 231.

South Carolina.— Ross *v.* Carroll, 33 S. C. 202, 11 S. E. 760.

Texas.— Warren *v.* Harrold, 92 Tex. 417, 49 S. W. 364.

Wisconsin.—Ames *v.* Ames, 5 Wis. 169.

United States.— Alahama, etc., Mfg. Co. *v.* Robinson, 56 Fed. 690, 6 C. C. A. 79.

Canada.— Strachan *v.* Murney, 6 Grant Ch. (U. C.) 378.

See 35 Cent. Dig. tit. "Mortgages," § 1428.

54. Hunt *v.* Dohrs, 39 Cal. 304; Hards *v.* Burton, 79 Ill. 504; Probasco *v.* Vaneppes, (N. J. Ch. 1888) 13 Atl. 598. See also Stafford *v.* Maus, 38 Iowa 133.

Exceptions to this rule have been allowed in cases where the mortgage is inadequate security and the mortgagor is insolvent (Suffern *v.* Johnson, 1 Paige (N. Y.) 450, 19 Am. Dec. 440), and also where the land is not susceptible of division into parts (Tinsley *v.* Boykin, 46 Tex. 592). But in such cases the decree should permit the mortgagor to redeem, before a sale, on payment only of the amount presently due and the costs (Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350); or if the whole debt is to he made by the sale, there should be a rebate of legal interest on the unmatured part of the debt for the time it would have had yet to run (Greenville Bldg., etc., Assoc. *v.* Wholey, 68 N. J. Eq. 92, 59 Atl. 341; Gillmour *v.* Ford, (Tex. 1892) 19 S. W. 442).

55. Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am St. Rep. 186; Chillicothe Paper Co. *v.* Wheeler, 68 Ill. App. 343; Allen *v.* Parker, 11 Ind. 504; Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278.

56. Levert *v.* Redwood, 9 Port. (Ala.) 79; Napa Bank *v.* Godfrey, 77 Cal. 612, 20 Pac. 142; Kilmer *v.* Gallaher, 107 Iowa 676, 78 N. W. 685; Burroughs *v.* Ellis, 76 Iowa 649, 38 N. W. 141; Wylie *v.* McMakin, 2 Md. Ch. 413; Peyton *v.* Ayres, 2 Md. Ch. 64.

57. *Alabama.*—Mussina *v.* Bartlett, 8 Port. 277.

Florida.— McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

Illinois.— Rhodes *v.* Missouri Sav., etc., Co., 63 Ill. App. 77; Wolcott *v.* Lake View Bldg., etc., Assoc., 59 Ill. App. 415.

Louisiana.— Penouilh *v.* Abraham, 44 La. Ann. 188, 10 So. 676.

Maryland.— Clark *v.* Abbott, 1 Md. Ch. 474.

Michigan.—Hanford *v.* Robertson, 47 Mich. 100, 10 N. W. 125; Howe *v.* Lemon, 37 Mich. 164; Vaughn *v.* Nims, 36 Mich. 297.

Mississippi.— Magruder *v.* Eggleston, 41 Miss. 284.

New Hampshire.— Clark *v.* Clark, 62 N. H. 267.

New York.— Sherman *v.* Foster, 158 N. Y. 587, 53 N. E. 504; Lyman *v.* Sale, 2 Johns. Ch. 487; Smalley *v.* Martin, Clarke 293.

(6) INTEREST. The decree should include interest on the amount of the mortgage indebtedness from the date of the note or from the time when the consideration actually passed,[58] up to the date of rendition of the decree, at the rate agreed upon by the parties in the mortgage or note,[59] or, if no rate is specified, then at the legal rate.[60] And the decree itself will carry interest at the legal rate until satisfied by sale of the property.[61] It is error to allow interest both on the indebtedness and on attorney's fees at the rate stipulated in the contract, such interest being applicable only to the principal, and the attorney's fees bearing interest at the legal rate.[62]

(7) ALLOWANCE TO MORTGAGEE FOR TAXES AND INSURANCE. The foreclosure decree should make proper allowance to the mortgagee for sums expended by him in paying taxes on the premises which it was primarily the duty of the mortgagor to pay,[63] and also for insurance premiums paid by the mortgagee in consequence of the mortgagor's failure to keep his covenant to keep the property insured.[64]

(v) *RELIEF TO DEFENDANTS*—(A) *In General.* Judgment may be rendered for defendant mortgagor, if he shows himself entitled, canceling the mortgage for fraud or ordering its satisfaction on proof of payment,[65] or if the decree is against him, it may contain such provisions for his relief as are necessary to do complete equity.[66] Other persons joined as defendants may, by proper pleadings, assert

South Carolina.— Cooke *v.* Pennington, 15 S. C. 185.

Wisconsin.— Manning *v.* McClurg, 14 Wis. 350.

See 35 Cent. Dig. tit. "Mortgages," § 1429.

58. See Toms *v.* Boyes, 59 Mich. 386, 26 N. W. 646 (a purchase-money mortgage where the vendor did not own the property at the time, and interest was allowed only from the date when the title vested in him); Bruce *v.* Wanger, (S. D. 1905) 105 N. W. 282; Baxter *v.* Blodgett, 63 Vt. 629, 22 Atl. 625.

59. *Illinois.*— Arneson *v.* Haldane, 105 Ill. App. 589.

Iowa.— Knox *v.* Moser, 69 Iowa 341, 28 N. W. 629.

Louisiana.— Barker *v.* Banks, 15 La. 453.

Michigan.— Grand Rapids Fifth Nat. Bank *v.* Pierce, 117 Mich. 376, 75 N. W. 1058.

North Carolina.— Knight *v.* Houghtalling, 91 N. C. 246.

Pennsylvania.— Mohn *v.* Hiester, 6 Watts 53.

See 35 Cent. Dig. tit. "Mortgages," § 1430.

Rate of interest after default.— After a default, and until foreclosure, interest is to be computed at the rate agreed upon by the parties; that is, it is not correct to reckon the interest at the agreed rate up to default, and then after that at the rate which the law establishes in the absence of an agreement. Burgess *v.* Southbridge Sav. Bank, 2 Fed. 500.

An interest coupon, which stipulates for a higher rate of interest from its maturity than is exacted on the principal by the note to which the coupon is attached, is valid. Connecticut Mut. L. Ins. Co. *v.* Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101.

Annual rests will be allowed against a mortgagee in possession when the annual rents and profits and wood and timber cut from the premises exceeded the interest and expenses. Shaeffer *v.* Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211.

Excessive allowance of interest.— A decree of foreclosure will not be reversed at the instance of a subsequent encumbrancer merely because it is excessive to the amount of one day's interest, where the value of the entire property is less than the sum actually due and there is a decree for deficiency, especially where the party against whom the decree was entered does not complain. Primley *v.* Shirk, 163 Ill. 389, 45 N. E. 247.

Interest after decree.— In making a final decree of foreclosure, it is error to include interest on the principal of the debt to a time beyond the date of the decree. Laflin *v.* Gato, 50 Fla. 558, 39 So. 59.

60. Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682.

61. Deshler *v.* Holmes, 44 N. J. Eq. 581, 18 Atl. 75; Windross *v.* McKillop, 98 Wis. 525, 74 N. W. 342.

Compounding interest.— This rule holds good, although its effect is to compound interest, by reason of the decree including interest on the mortgage debt. Perkyns *v.* Baynton, 1 Bro. Ch. 574, 28 Eng. Reprint 1305; Brown *v.* Barkham, 1 P. Wms. 652, 24 Eng. Reprint 555. *Compare* Sidney Stevens Implement Co. *v.* South Ogden Land, etc., Co., 20 Utah 267, 58 Pac. 843; Whatton *v.* Cradock, 1 Keen 267, 6 L. J. Ch. 178, 15 Eng. Ch. 267, 48 Eng. Reprint 309.

62. Daggs *v.* Bolton, (Ariz. 1899) 57 Pac. 611.

63. See *supra*, XV, F, 3, d.

64. See *supra*, XV, G, 2, b.

65. Brown *v.* Krause, 132 Ill. 177, 23 N. E. 1012; Walker *v.* Mebane, 90 N. C. 259.

66. *Illinois.*— Gunning *v.* Sorg, 214 Ill. 616, 73 N. E. 870, where the forfeiture of a lease was adjudged and declared in suit to foreclose mortgage on leasehold estate, at

and secure whatever relief they are entitled to. Thus, such a defendant may show that he is the true owner of the mortgage and debt, oust the complainant from the suit, and have a decree in his own favor.[67] And a defendant may secure a provision in the decree authorizing him to redeem from the mortgage,[68] or to be reimbursed for money expended in discharging liens on the premises,[69] or he may assert absolute title to a portion of the property, free from the mortgage, and have title thereto vested in him by the decree.[70] Generally, however, where an adverse paramount title is asserted, since it cannot be litigated in the foreclosure suit,[71] and yet the claimant should not be prejudiced by the decree, the decree should contain a provision saving and excepting such title or his right to maintain it.[72]

(B) *Stay on Payment of Instalment Due.* Where only a part of the mortgage debt is due at the time of the foreclosure, defendant is entitled to a stay of execution on paying to the complainant the amount then due with costs, and the judgment should so provide.[73] But this rule does not apply where plaintiff has exercised his option to declare the entire mortgage debt due on default in the payment of an instalment of principal or interest.[74] The parties may also stipulate for a postponement of the sale, and this may be incorporated in the decree.[75]

(C) *Provision For Redemption.* Unless the statute law gives a right of redemption after the sale on foreclosure, it is not necessary for the decree to contain a reservation of any such right of redemption, but the equity of redemption may be cut off absolutely by the decree and sale,[76] although a decree giving a right of redemption not authorized by statute cannot be objected to on this ground by the mortgagor.[77] But if the statute directs that the mortgagor and others shall have a limited time after the sale in which to effect a redemption, the decree must give effect to such provision by an appropriate direction, or else it will be erroneous,[78] although perhaps it could not be declared to be absolutely

instance of lessor coming in by intervention.

Montana.— Keely *v.* Gregg, 33 Mont. 216, 82 Pac. 27, 83 Pac. 222, conveyance of separate tract of land to defendant ordered.

North Carolina.— Chadbourn *v.* Dunham, 140 N. C. 501, 53 S. E. 348.

South Carolina.— Harsey *v.* Busby, 69 S. C. 261, 48 S. E. 50, right to reduction of amount corresponding to deficiency in the quantity of land conveyed on the foreclosure of a purchase-money mortgage.

Texas.— Rankert *v.* Clow, 16 Tex. 9, compelling mortgagee in possession to account for rents and profits.

67. Hansen *v.* Wagner, 133 Cal. 69, 65 Pac. 142; Bayles *v.* Husted, 40 Hun (N. Y.) 376; West *v.* Shurtliff, 28 Utah 337, 79 Pac. 180.

As to right to receive or control the proceeds of the foreclosure see Nugent *v.* Nugent, 50 Mich. 377, 15 N. W. 517; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435.

68. Fulghum *v.* Cotton, 3 Tenn. Ch. 296.

69. Canal Bank *v.* Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. ed. 354. And see Johnston *v.* Worthington, 8 Ill. App. 322.

70. Mitchell *v.* Johnson, 60 Ind. 25.

71. See *supra*, XXI, G, 1, b, (III).

72. McLaughlin *v.* Nicholson, 70 Minn. 71, 72 N. W. 827, 73 N. W. 1; Branch *v.* Wilkens, (Tex. Civ. App. 1901) 63 S. W. 1083; Wicke *v.* Lake, 21 Wis. 410, 94 Am. Dec. 552; Rosseel *v.* Jarvis, 15 Wis. 571.

73. Allen *v.* Parker, 11 Ind. 504; Walker *v.* Sellers, 11 Ind. 376; Lacoss *v.* Keagan, 2 Ind. 406; Walker *v.* Jarvis, 16 Wis. 28; Manning *v.* McClurg, 14 Wis. 350; Jurgens *v.* Cotton, 13 Wis. 374; Roe *v.* Nicholson, 13 Wis. 373; Rice *v.* Cribb, 12 Wis. 179; Sauer *v.* Steinbauer, 10 Wis. 370; Wood *v.* Trask, 7 Wis. 566, 76 Am. Dec. 230; Howe *v.* English, 6 Wis. 262; Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350.

74. Beisel *v.* Artman, 10 Nebr. 181, 4 N. W. 1011.

75. Benjamin *v.* Drafts, 44 S. C. 430, 22 S. E. 470.

76. McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209; Cherry *v.* Bowen, 4 Sneed (Tenn.) 415; Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253; Hunt *v.* Tyler, 2 Aik. (Vt.) 233.

77. Smith *v.* Hoyt, 14 Wis. 252. And see Patton *v.* Stewart, 19 Ind. 233.

78. *California.*— Levy *v.* Burkle, (1887) 14 Pac. 564.

Colorado.— Denver Brick, etc., Co. *v.* McAllister, 6 Colo. 261.

Illinois.— Gardner *v.* Cohn, 191 Ill. 553, 61 N. E. 492; Baker *v.* Scott, 62 Ill. 86.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508.

Montana.— Rader *v.* Ervin, 1 Mont. 632.

Wisconsin.— Walker *v.* Gulliford, 36 Wis. 325; Sage *v.* McLaughlin, 34 Wis. 550; Carberry *v.* Benson, 18 Wis. 489; Briggs *v.* Seymour, 17 Wis. 255; Van Nostrand *v.* Mansfield, 16 Wis. 224; Rosseel *v.* Jarvis, 15 Wis. 571; Jones *v.* Gilman, 14 Wis. 450.

United States.— Mason *v.* Northwestern Mut. L. Ins. Co., 106 U. S. 163, 1 S. Ct. 165,

void.[79] If the object of the bill is to cut off a junior encumbrance, after a proper foreclosure as against the mortgagor, the decree must give defendant an opportunity to redeem.[80]

(D) *Indemnity as to Lost Note or Bond.* Where the note or bond secured by a mortgage is not produced, but is alleged to have been lost or destroyed, a decree foreclosing the mortgage should require the complainant to indemnify defendant against the enforcement of the note or bond in case it should reappear in the hands of a stranger.[81]

(E) *Rights of Other Encumbrancers.* The foreclosure decree should take into consideration and determine liens and claims set up by the various defendants, and fix the relative rights of plaintiff and all other encumbrancers properly before the court;[82] and a junior lienor has an interest which entitles him to insist that plaintiff's recovery shall be kept down to what he is strictly entitled to, and that there shall be such a marshaling of securities as will leave for him the best possible residuum.[83] The rights of a junior mortgagee being thus established, it is proper for the court to decree that the surplus proceeds of the sale,

27 L. ed. 129; Allis *v.* Northwestern Mut. L. Ins. Co., 97 U. S. 144, 24 L. ed. 1008.

See 35 Cent. Dig. tit. "Mortgages," § 1436.

In the federal courts.— A state statute giving a right of redemption after sale is binding on the United States courts sitting in that state, and a foreclosure decree in a federal court must recognize and allow such right to redeem. Mason *v.* Northwestern Mut. L. Ins. Co., 106 U. S. 163, 1 S. Ct. 165, 27 L. ed. 129; Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858; Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed. Cas. No. 6,055, 8 Biss. 234.

79. Suitterlin *v.* Connecticut Mut. L. Ins. Co., 90 Ill. 483. And see Boester *v.* Byrne, 72 Ill. 466, holding that a decree of foreclosure which makes no reference to the subject of redemption cannot be construed as a denial by the decree of the statutory right to redeem.

A mortgagor who has made no attempt to redeem, within the time allowed by law, cannot complain because the foreclosure decree ordered a sale without redemption. Suitterlin *v.* Connecticut Mut. L. Ins. Co., 90 Ill. 483.

80. Evans *v.* Afkins, 75 Iowa 448, 39 N. W. 702; Citizens' Nat. Bank *v.* Strauss, 29 Tex. Civ. App. 407, 69 S. W. 86.

81. Walker *v.* Gillett, 98 Mich. 59, 56 N. W. 1052; Yerkes *v.* Blodgett, 48 Mich. 211, 12 N. W. 218; Burgwin *v.* Richardson, 10 N. C. 203.

82. Jenkins *v.* Barber, 85 Miss. 666, 38 So. 36; Johnson *v.* Badger Mill, etc., Co., 13 Nev. 351; Livingston *v.* Mildrum, 19 N. Y. 440.

Joint mortgagees.— Where it appears that there are joint mortgagees, and the proceeds of sale are insufficient to pay all the mortgage debt, a *pro rata* distribution of the fund should be decreed. Hopkins *v.* Ward, 12 B. Mon. (Ky.) 185.

Liens pending suit.— After the filing of a bill for foreclosure of a mortgage, it is not within the power of the mortgagor, pending the suit, by contract with a mechanic, without the consent of the mortgagee, to create an encumbrance on the property which can in any way affect the rights of the mortgagee, as they may be declared by final decree. Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed. Cas. No. 6,055, 8 Biss. 234.

83. *Connecticut.*—Sanford *v.* Hill, 46 Conn. 42.

Illinois.— Jones *v.* Ramsey, 3 Ill. App. 303.

Kentucky.— Gridley *v.* Brooks-Waterfield Co., 14 S. W. 407, 12 Ky. L. Rep. 391, 9 L. R. A. 555.

Michigan.— Slater *v.* Breese, 36 Mich. 77.

New Jersey.— Fly *v.* Perrine, 2 N. J. Eq. 396.

New York.— King *v.* McVicker, 3 Sandf. Ch. 192.

Wisconsin.— Boyd *v.* Sumner, 10 Wis. 41, holding that a subsequent encumbrancer cannot object to extra interest, or penalties in the nature of interest, secured by the senior mortgage, where he does not show that the premises are not of sufficient value to satisfy both liens.

See 35 Cent. Dig. tit. "Mortgages," § 1438.

Collateral security held by first mortgagee. — Where the senior mortgagee, suing for foreclosure, also holds other collaterals securing the mortgage debt, the decree need not require that such collaterals be applied on the debt before a sale of the land embraced in both mortgages, where the junior mortgagee does not set up the facts as to such collaterals, and does not ask for such relief. Scott *v.* Webster, 44 Wis. 185.

Junior mortgage not due.—The court is not required, on foreclosure of a senior mortgage, to postpone the sale until an inferior lien shall mature. Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556.

Personal judgment against mortgagor.— A subsequent mortgagee made defendant to the senior mortgagee's foreclosure suit is entitled to proper relief against the mortgaged premises, but not to a personal money judgment against his co-defendant, the mortgagor. Belmont Branch Bank *v.* Durbin, 2 Ohio Dec. (Reprint) 372, 2 West. L. Month. 543. And see Jesup *v.* City Bank, 14 Wis. 331.

if any, shall be paid over to him to the extent of satisfying his lien,[84] or to order the entire proceeds brought into court for distribution among the various parties entitled, according to their respective equities and priorities.[85] Where the foreclosure suit is by a junior mortgagee, the priority and rights of the senior mortgagee may properly be adjudicated,[86] and the sale ordered to be made subject to his lien,[87] although he cannot be prejudiced or his rights in any way injured by the second mortgagee's proceedings.[88]

c. Rendition and Entry[89] — (I) *In General.* The rendition of a decree of foreclosure, as distinguished from its mere entry, is a judicial act and is for the

84. *California.*— Hibernia Sav., etc., Soc. *v.* London, etc., F. Ins. Co., 138 Cal. 257, 71 Pac. 334; Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Florida.— Bigelow *v.* Stringfellow, 25 Fla. 366, 5 So. 816, holding that a decree giving a right of redemption to a person alleged to be a subsequent encumbrancer, but who is shown by the pleadings and proof to have parted with his lien on the property covered by the bill before he was made a party, is erroneous.

Illinois.— Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Wallen *v.* Moore, 187 Ill. 190, 58 N. E. 392; Dillman *v.* Will County Nat. Bank, 138 Ill. 282, 27 N. E. 1090; Shaver *v.* Williams, 87 Ill. 469.

Indiana.— State Bank *v.* Backus, 160 Ind. 682, 67 N. E. 512; Meredith *v.* Lackey, 16 Ind. 1. Where junior mortgagees are made defendants to a bill to foreclose the senior mortgage, and make default, the court can only foreclose the equity of redemption of such junior mortgages in favor of plaintiff; it is error to order the payment of the junior liens. Kenton *v.* Spencer, 6 Ind. 321.

Michigan.— Powers *v.* Golden Lumber Co., 43 Mich. 468, 5 N. W. 656.

Mississippi.— Hartman *v.* Moore, 79 Miss. 74, 29 So. 820.

Nebraska.— Seeley *v.* Wickstrom, 49 Nebr. 730, 68 N. W. 1017.

New Jersey.— Lithauer *v.* Royle, 17 N. J. Eq. 40.

United States.— Canal Bank *v.* Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. ed. 354.

Canada.— Harvey *v.* McNeil, 12 Ont. Pr. 362.

See 35 Cent. Dig. tit. "Mortgages," § 1438.

85. *Arkansas.*— Clark *v.* Carnall, 18 Ark. 209.

Illinois.— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Crocker *v.* Lowenthal, 83 Ill. 579; Hards *v.* Burton, 79 Ill. 504.

Indiana.— Pardun *v.* Dobesberger, 3 Ind. 389.

New York.— Livingston *v.* Mildrum, 19 N. Y. 440. *Compare* Mechanics', etc., Sav. Inst. *v.* Roberts, 1 Abb. Pr. 381.

United States.— Howell *v.* McAden, 94 U. S. 463, 24 L. ed. 254; Sutherland *v.* Lake Superior Ship Canal, etc., Co., 23 Fed. Cas. No. 13,643.

See 35 Cent. Dig. tit. "Mortgages," § 1438.

86. *California.*— Van Loben Sels *v.* Bunnell, 131 Cal. 489, 63 Pac. 773.

Kansas.— Kimball *v.* Connor, 3 Kan. 414.

Kentucky.— James *v.* Webb, 71 S. W. 526, 24 Ky. L. Rep. 1382.

Maryland.— Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

New York.— Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

South Carolina.— Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842.

England.— Layard *v.* Maud, 16 L. T. Rep. N. S. 738.

See 35 Cent. Dig. tit. "Mortgages," § 1438.

87. *Illinois.*— Sheen *v.* Hogan, 86 Ill. 16; Hibernian Banking Assoc. *v.* Law, 88 Ill. App. 18.

Indiana.— Trayser *v.* Indiana Asbury University, 39 Ind. 556.

New York.— Western Ins. Co. *v.* Eagle F. Ins. Co., 1 Paige 284.

Ohio.— Penn *v.* Atlantic, etc., R. Co., 3 Ohio Dec. (Reprint) 508, 11 Am. L. Reg. N. S. 576.

Pennsylvania.— Pease *v.* Hoag, 11 Phila. 549.

See 35 Cent. Dig. tit. "Mortgages," § 1438.

88. Stratton *v.* Reisdorph, 35 Nebr. 314, 53 N. W. 136; Sergeant *v.* Mettler, 43 N. J. Eq. 418, 6 Atl. 662. *Compare* Frank *v.* Davis, 61 Hun (N. Y.) 496, 16 N. Y. Suppl. 369.

89. **Necessity for prior judgment for debt.** — In a proceeding to foreclose a mortgage on real estate, made to secure a debt, no judgment barring any person's right, title, interest, or equity in or to the mortgaged property should be rendered until a judgment for the sale of such property is first rendered; and the judgment barring such rights and interests should be made to operate only in connection with such sale and after the sale has been made; and no judgment for a sale of the mortgaged property can regularly be rendered until a judgment for the amount of the debt due and secured has first been rendered in favor of the holder of the debt and mortgage. Short *v.* Nooner, 16 Kan. 220.

Necessity for new decree after assignment of decree and mortgage.— An assignment of the decree and mortgage to one who advances the money to purchase them, but without any agreement as to his reimbursement or in any way limiting his right to enforce the decree, does not amount to the making of a new mortgage so as to require a new decree before sale. Walker *v.* Lillibridge, 112 Mich. 384, 70 N. W. 1031.

Liability of clerk for preventing entry of decree.— Where a decree of foreclosure would have been rendered but for the fact that the clerk entered on the record a finding that

court,[90] although it is the duty of the clerk to record it, if that is required by law.[91] A statute requiring the docketing or enrolling of a judgment or decree, in order to make it a lien on realty, does not apply to foreclosure decrees.[92] If the issues have been submitted to a jury, the judgment or decree should of course be rendered in conformity to the verdict.[93]

(II) *TIME FOR ENTRY.* A decree of foreclosure may ordinarily be entered upon the default of defendant,[94] or as soon as the cause is ripe for decree by the determination of all issues and questions which may affect its terms or the relief granted.[95]

(III) *JUDGMENT BY DEFAULT.* A decree of foreclosure may be entered where defendant is in default for want of an appearance,[96] or for want of a plea or answer,[97] or on striking off his answer,[98] or taking the bill *pro confesso*;[99] and in such cases the decree will be supported by the ordinary presumptions of jurisdiction over defendant's person by due service or publication of process,[1] unless

the mortgagor had tendered the amount due on the mortgage and brought it into court, which the clerk afterward denied, when the mortgagee demanded the money, it was held that the latter's first remedy was against the clerk, and not by motion to enter a decree. Thompson *v.* St. Joseph, etc., Loan, etc., Assoc., 23 Kan. 209.

90. Burroughs *v.* Ellis, 76 Iowa 649, 38 N. W. 141, holding that an entry on the judge's calendar containing all the essential directions for a decree authorizes the clerk to enter up a decree.

91. See Johnson *v.* Rawls, 39 Nebr. 351, 58 N. W. 132; Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39.

Place of record.— A statute requiring the clerk to keep a book, to be known as the "Record Book," in which to enter the business of his court, is merely directory; and a decree of foreclosure is not void because entered in a book kept by the clerk and called "Decrees of the Foreclosure of Mortgages," although such a book is not mentioned in the statute. Carr *v.* Bosworth, 72 Iowa 530, 34 N. W. 317.

92. Planters' Bank *v.* Conger, 12 Sm. & M. (Miss.) 527; Dawes *v.* Wheeler, 45 N. J. L. 67; Goelet *v.* Lansing, 6 Johns. Ch. (N. Y.) 75.

93. Smith *v.* Chenault, 35 Tex. 78; Slade *v.* Young, 32 Tex. 668; Morrison *v.* Van Bibber, 25 Tex. Suppl. 153.

94. Schaefer *v.* Amicable Permanent Land, etc., Co., 47 Md. 126; Wetmore *v.* Winans, 8 Paige (N. Y.) 370; Brockway *v.* Newton, 49 Wis. 406, 5 N. W. 781.

Statutory delay.— A statute providing that the judge shall not order that lands be sold within nine months after filing a bill for foreclosure means that the land shall not be sold within that time, not that the order for sale cannot be made sooner. Smith *v.* Valentine, 19 Minn. 452.

First term after service.— The fact that a judgment of sale was not rendered at the first term of court after service by publication was completed is a mere irregularity and will not affect its validity. Christie *v.* Jeffries, 7 Kan. App. 813, 53 Pac. 783.

95. Hollibaugh *v.* Baker, 49 Iowa 695. And see Laflin *v.* Gato, 50 Fla. 558, 39 So. 59.

Controversy as to surplus.— The rendition of final decree should not be delayed because there is a controversy among defendants about the surplus which may arise after satisfying the mortgage. Fry *v.* Merchants' Ins. Co., 15 Ala. 810.

Determination as to prior lien.— Where a creditor files a petition alleging that he holds a prior lien on the property, and exhibits *prima facie* proof, the decree should not be made without determining this question. Lipscombe *v.* Rogers, 20 Gratt. (Va.) 658.

Ascertainment of amount due.— It is no objection to entering a decree of foreclosure that the amount of the judgment must depend on something to be ascertained after its rendition, provided such amount can be approximated sufficiently for all practical purposes. Richards *v.* Bibb County Loan Assoc., 24 Ga. 198. And see Hays *v.* Dorsey, 5 Md. 99.

96. Twigg *v.* James, 37 Wash. 434, 79 Pac. 959; Wade *v.* Wilson, 22 Ch. D. 235, 52 L. J. Ch. 399, 47 L. T. Rep. N. S. 696, 31 Wkly. Rep. 237; Kettle *v.* Corbin, Dick. 314, 21 Eng. Reprint 290; Patey *v.* Flint, 48 L. J. Ch. 696, 40 L. T. Rep. N. S. 651, 27 Wkly. Rep. 595; Chamberlain *v.* Armstrong, 9 Ont. Pr. 212.

Default pending inquiry as to sanity of mortgagor.— On proceeding to foreclose a mortgage, the period elapsing between an adjudication of the mortgagor's insanity and the appointment of his guardian cannot be deducted from the three months allowed before default can be taken. Taylor *v.* Ellenberger, 128 Cal. 411, 60 Pac. 1034.

97. Boyd *v.* Holmes, 9 Mo. 720; Manitoba, etc., Loan Co. *v.* Harrison, 2 Manitoba 33.

Default pending demurrer.— Judgment by default cannot be rendered while a demurrer interposed by defendant remains undisposed of. Canada Settlers' L. & T. Co. *v.* Murray, 20 Wash. 656, 56 Pac. 368.

98. See Bosworth *v.* Sandlin, 46 Fla. 532, 35 So. 66; Farmers' L. & T. Co. *v.* Jewett, 3 Ch. Sent. (N. Y.) 53.

99. Seeley *v.* Manning, 37 Wis. 574; Baby *v.* Woodbridge, 5 Can. L. J. 67; Robinson *v.* Dobson, 11 Grant Ch. (U. C.) 357; Bethune *v.* Caulcutt, 1 Grant Ch. (U. C.) 81.

1. Ireland *v.* Woolman, 15 Mich. 253; Fuchs *v.* Devlin, 12 N. Y. Suppl. 574; Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am.

the decree or the return shows on its face an entire want of service or fatal defect in the service, in which case it will be void for want of jurisdiction.[2]

(iv) *Form and Requisites of Decree*—(a) *In General.* A decree in foreclosure must conform to the statutory regulations on the subject, if there are any.[3] It should not, save where authorized by statute, be in the form of a personal judgment against defendant, but should be *in rem*, against the mortgaged property.[4] Usually all that such a decree need or should contain is a statement of the amount due to plaintiff,[5] a designation of defendant who is personally liable for the payment of the mortgage debt,[6] a direction that the mortgaged premises be sold according to law for the satisfaction of the debt,[7] and a direction as to the application of the proceeds of the sale.[8] Except in cases of strict foreclosure, the formula that defendant be "forever barred and foreclosed of his equity of redemption" is now regarded as superfluous, as this result follows from the statutes authorizing sales on foreclosure, and the wording of the decree adds nothing to their effect.[9]

(b) *Description of Premises.* The decree of foreclosure must describe the premises with particularity, so as to leave no uncertainty as to what the officer is to sell or what the purchaser will acquire.[10] But it is sufficient in this respect if

St. Rep. 812; Twigg *v.* James, 37 Wash. 434, 79 Pac. 959.

In scire facias on a mortgage, where there is service on the terre-tenant, and two returns of *nihil* as to the mortgagor, a judgment against the mortgagor for want of an affidavit of defense, on his failure to appear, is good, and judgment may be taken against the terre-tenant for not taking defense in proper form. Where the mortgagor has parted with his title to the land, and the scire facias is served on the terre-tenant, a second return of *nihil* is not necessary except for the purpose of reaching the title of the mortgagor, and to obviate the necessity of subsequently going out of the record to show that he had parted with his title to the person who appeared as terre-tenant. Stevens *v.* North Pennsylvania Coal Co., 35 Pa. St. 265.

2. Hobby *v.* Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

3. Welp *v.* Gunther, 48 Wis. 543, 4 N. W. 647. And see Goss *v.* Pilgrim, 28 Tex. 263.

In Louisiana the judgment must express the reasons on which it is founded. Nathan *v.* Lee, 2 Mart. N. S. 32.

4. Mulvey *v.* Gibbons, 87 Ill. 367; Winton's Appeal, 87 Pa. St. 77; Sanderson *v.* Phinney, 2 Walk. (Pa.) 526; Duecker *v.* Goeres, 104 Wis. 29, 80 N. W. 91; Palmer *v.* McCormick, 28 Fed. 541.

5. *Connecticut.*— Phelps *v.* Ellsworth, 3 Day 397.

District of Columbia.— Taylor *v.* Girard L. Ins., etc., Co., 1 App. Cas. 209.

Georgia.— Harris *v.* Usry, 77 Ga. 426.

Illinois.— Healy *v.* Protection Mut. F. Ins. Co., 213 Ill. 99, 72 N. E. 678.

Pennsylvania.— Tharp *v.* Smith, 2 Watts 387.

Texas.— Hague *v.* Jackson, 71 Tex. 761, 12 S. W. 63, a recital of the date of the note and mortgage in suit is not a necessary part of the judgment, and a mistake does not vitiate.

Washington.— Hays *v.* Miller, 1 Wash. Terr. 143.

See 35 Cent. Dig. tit. "Mortgages," § 1441.

6. Bowen *v.* May, 12 Cal. 348 (holding that a statute authorizing judgment against the joint property where only part of the defendants have been served does not apply to foreclosure of a mortgage executed by two or more jointly); Carson *v.* Underwood, 12 Iowa 52 (holding that judgment in foreclosure against the wife of a defendant, who was not made a party to the suit, is erroneous); Shneider *v.* Mahl, 84 N. Y. App. Div. 1, 82 N. Y. Suppl. 27 (holding that it is error to adjudicate the rights of a defaulting defendant, where the complaint does not describe his interest in the premises or ask any relief against him).

As to effect of misnomer of defendant in the summons and complaint see Stuyvesant *v.* Weil, 41 N. Y. App. Div. 551, 58 N. Y. Suppl. 697.

7. *California.*— Taylor *v.* Ellenberger, 128 Cal. 411, 60 Pac. 1034.

Illinois.— Marshall *v.* Maury, 2 Ill. 231.

Indian Territory.— Griffin *v.* Smith, 5 Indian Terr. 89, 82 S. W. 684.

Mississippi.— Tooley *v.* Gridley, 3 Sm. & M. 493, 41 Am. Dec. 628.

West Virginia.— Washington Nat. Bldg., etc., Assoc. *v.* Westfall, 55 W. Va. 305, 47 S. E. 74.

Canada.— Goodall *v.* Burrows, 7 Grant Ch. (U. C.) 449.

See 35 Cent. Dig. tit. "Mortgages," § 1441.

8. McClain *v.* Hutton, (Cal. 1900) 61 Pac. 273; Lockhaven Trust, etc., Co. *v.* U. S. Mortgage, etc., Co., 34 Colo. 30, 81 Pac. 804; Wallen *v.* Moore, 187 Ill. 190, 58 N. E. 392; Griffin *v.* Smith, 5 Indian Terr. 89, 82 S. W. 684; Gillam *v.* Barnes, 123 Mich. 119, 82 N. W. 38.

9. Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220; Leviston *v.* Swan, 33 Cal. 480; Montgomery *v.* Tutt, 11 Cal. 307. See also Hunt *v.* Lewin, 4 Stew. & P. (Ala.) 138.

10. *California.*— De Sepulveda *v.* Baugh, 74 Cal. 468, 16 Pac. 223, 5 Am. St. Rep. 455; Borel *v.* Donohoe, 64 Cal. 447, 1 Pac. 894.

it follows the terms of a correct description in the mortgage,[11] or in the bill or complaint,[12] or where it refers to either the mortgage or the bill, provided such a reference, being made, will disclose an accurate and sufficient description.[13]

(v) *Defects and Irregularities.* A decree of foreclosure is not invalidated by a clerical error which may be corrected by data furnished by other parts of the record;[14] or by an erroneous recital, where the fact recited was not necessary to the decree;[15] or by informality in its terms, or the omission of usual terms, where its purport and intent are still clear;[16] or, generally, by irregularities which do not prevent its proper execution or infringe the substantial rights of the parties.[17] But it is invalid in so far as it is in any particular contrary to the provisions of the statute.[18] The immediate parties to the decree may be held to have waived objections to it, if they consent to or participate in a sale held under it,[19] and a subsequent encumbrancer cannot object to errors in the decree unless he shows danger of injury to his own rights, that is, that the property will not be sufficient to satisfy both liens.[20] A judgment on a mortgage for the debt may be good so as to authorize a sale on execution, although it may be fatally defective so far as it also decrees a foreclosure.[21] The omission from a decree of foreclosure of the name of a defendant who has been summoned does not affect his rights.[22]

(vi) *Affidavit of Non-Payment.* According to the practice prevailing in Canada, where an order or decree *nisi* has been made, for the sale of the premises unless the mortgagor pays the debt within a limited time, it is necessary for the mortgagee, in order to obtain a final order of sale, to make and file an affidavit that the mortgage money has not been paid.[23]

Iowa.— Carson *v.* Underwood, 12 Iowa 52.

Kentucky.— Hopkins *v.* Ward, 12 B. Mon. 185; Triplett *v.* Sayre, 3 Dana 590; Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713.

Louisiana.— Murphy *v.* Robinson, 50 La. Ann. 213, 23 So. 323.

Montana.— Largey *v.* Sedman, 3 Mont. 472.

Nebraska.— Lincoln *v.* Lincoln St. R. Co., (1906) 106 N. W. 317 (the rule "that is certain which can be made certain" applies); Northern Counties Inv. Trust *v.* Wilson, 1 Nebr. (Unoff.) 348, 95 N. W. 699.

Pennsylvania.— Wilson *v.* McCullough, 19 Pa. St. 77.

Texas.— Lumpkin *v.* Silliman, 79 Tex. 165, 15 S. W. 231; Thompson *v.* Jones, (1889) 12 S. W. 77; Tinsley *v.* Boykin, 46 Tex. 592. See also Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117.

United States.— Kibbe *v.* Thompson, 14 Fed. Cas. No. 7,754, 5 Biss. 226.

See 35 Cent. Dig. tit. "Mortgages," § 1444.

Effect of clerical error.— A decree of foreclosure is not invalidated by a mere clerical error in the description of the property, which is apparent on its face, or which is susceptible of correction from other parts of the description. Bostwick *v.* Van Vleck, 106 Wis. 387, 82 N. W. 302; Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543.

Effect of omission of part of mortgaged premises.— Where the description in the decree of foreclosure entirely omits one of the parcels comprised in the mortgaged premises, the effect is to release that portion; but this is an error of which the mortgagor cannot complain. Coffeen *v.* Thomas, 65 Ill. App. 117.

11. Benner *v.* Bragg, 68 Ind. 338; Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

12. Dietrich *v.* Lang, 11 Kan. 636; Palmer *v.* Windrom, 12 Nebr. 494, 11 N. W. 750; Clapp *v.* McCabe, 155 N. Y. 525, 50 N. E. 274. *Compare* McCartney *v.* Dennison, 101 Cal. 252, 35 Pac. 766, holding that the description in the foreclosure decree need not follow that in the complaint in terms, provided it shows that it is the same land.

13. Shepard *v.* Kelly, 2 Fla. 634; Logan *v.* Williams, 76 Ill. 175.

14. Moore *v.* Semple, 11 Cal. 360; Vissman *v.* Bryant, 21 S. W. 759, 14 Ky. L. Rep. 874.

15. Snyder *v.* Chicago, etc., R. Co., 131 Mo. 568, 33 S. W. 67; Hague *v.* Jackson, 71 Tex. 761, 12 S. W. 63.

16. Lehman *v.* Comer, 89 Ala. 579, 8 So. 241; Holmes *v.* West, 17 Cal. 623; McDonald *v.* Frost, 99 Mo. 44, 12 S. W. 363.

17. McDermot *v.* Barton, 106 Cal. 194, 39 Pac. 538; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975.

18. Rhinehart *v.* Stevenson, 23 Ill. 524 (allowing only twelve months for redemption after sale, instead of fifteen as provided by statute); Edwards *v.* Hough, 5 Ind. 149 (failure to set forth that no proceedings had been had at law for the recovery of the mortgage debt).

19. Trogden *v.* Safford, 21 Ill. App. 240; White *v.* Coulter, 1 Hun (N. Y.) 357.

20. Jamison *v.* Gjemenson, 10 Wis. 411.

21. Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117.

22. Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220.

23. Where there are joint mortgagees, this affidavit should be made by all of them. Annis *v.* Wilson, 1 Ch. Chamb. (U. C.) 217. *Com-*

d. Amendment or Modification of Judgment — (I) *Power and Authority of Court.* A decree or judgment of foreclosure may be corrected after its rendition, in respect to any error, omission, or mistake which is not in the nature of a judicial error, so as to make it conform to the intention of the court or the facts of the case,[24] or so as to provide for rights or interests of parties accruing since the commencement of the suit;[25] but not where the effect would be to make an entirely new decree, not originally contemplated or rendered by the court.[26] After the expiration of the term, the decree cannot generally be amended, except as to matters relating to the detail of its enforcement, as to which it is not final until consummated by sale;[27] and it is irregular, and generally fatal, to attempt any change or modification of the decree after the sale.[28]

(II) *Matters Amendable.* Subject to the limitations just stated, the court ordinarily has power to amend the decree by inserting a provision for a deficiency judgment, inadvertently omitted, or striking out one inserted by mistake,[29] or by

pare Lyman *v.* Kirkpatrick, 2 Grant Ch. (U. C.) 625. But where the mortgagees are partners, an affidavit by one without the other may be sufficient, where such other is out of the country and never interfered in the mortgage transaction. Counter *v.* Wylde, 1 Grant Ch. (U. C.) 538. The affidavit may be made by an agent of the mortgagee, but it must state that he was authorized to receive the money. Powers *v.* Merriman, 1 Ch. Chamb. (U. C.) 225. His authority need not, however, be produced. Radclyffe *v.* Duffy, 1 Ch. Chamb. (U. C.) 302. It must also show who has had the custody of the mortgage. Rae *v.* Shaw, 1 Ch. Chamb. (U. C.) 209. And if plaintiff is a non-resident and the affidavit is made by his solicitor, it must state that he has no other agent within the jurisdiction authorized to receive the money. Taylor *v.* Cuthbert, 1 Ch. Chamb. (U. C.) 240. In case of a corporation the affidavit may be made by the officer who would receive the money in the line of his duty. Western Assur. Co. *v.* Capreol, 1 Ch. Chamb. (U. C.) 227. Where the decree orders the money to be paid in to a designated bank, the affidavit of non-payment should be made by the manager or cashier or other like officer, not an accountant, and should show that the money had not been paid before the appointed day, as well as that it had not been paid on or since that day. Campbell *v.* Garrett, 1 Ch. Chamb. (U. C.) 255; Farrell *v.* Stokes, 1 Ch. Chamb. (U. C.) 201. Plaintiff must also show that he has not been in possession of the premises or in receipt of the rents and profits, and must also negative such possession or receipt by any third person on his behalf. Ford *v.* Jones, 1 Ch. Chamb. (U. C.) 291; Burford *v.* Lymburner, 1 Ch. Chamb. (U. C.) 275; Scott *v.* McDonnell, 1 Ch. Chamb. (U. C.) 193. On the other hand, if the affidavit shows that plaintiff has been in the occupation of the property, it must be referred back to the master to take a new account, set an occupation rent, and appoint a new day for payment. Cummer *v.* Tomlinson, 1 Ch. Chamb. (U. C.) 235. But this rule does not apply where he did not enter into possession until after the day appointed for payment. Greenshields *v.* Blackwood, 1 Ch. Chamb. (U. C.) 60; Portman *v.* Smith, 2 Can. L. J. N. S. 167. The affidavit of non-payment is to be made after the day the money is due. Blong *v.* Kennedy, 2 Ch. Chamb. (U. C.) 453. And if there is a long delay after that day, plaintiff's motion for final order will not be granted *ex parte*, but only on notice. Kirchoffer *v.* Stafford, 2 Ch. Chamb. (U. C.) 52; Ardagh *v.* Orchard, 2 Can. L. J. N. S. 303; Hurd *v.* Seymour, 1 Ch. Chamb. (U. C.) 332. It need not be shown that any encumbrancer beside plaintiff attended at the time appointed for payment of the several encumbrancers. Irvine *v.* Whitehead, 1 Ch. Chamb. (U. C.) 10.

24. Batchelder *v.* Brickell, 75 Cal. 373, 17 Pac. 441; Harlan *v.* Smith, 6 Cal. 173; Rothschild *v.* Kraft, 6 Kan. App. 309, 51 Pac. 69; Hoagland *v.* Way, 35 Nebr. 387, 53 N. W. 207; Hogan *v.* Hoyt, 37 N. Y. 300; Case *v.* Mannis, 57 Hun (N. Y.) 594, 11 N. Y. Suppl. 243 [*affirmed* in 123 N. Y. 661, 26 N. E. 749]; Cole *v.* Kelly, 4 Silv. Sup. (N. Y.) 571, 8 N. Y. Suppl. 131; Vandenburgh *v.* New York, 57 N. Y. Super. Ct. 285, 5 N. Y. Suppl. 664, 7 N. Y. Suppl. 675. But *compare* Foster *v.* Malone, 45 Mich. 255, 7 N. W. 817, holding that a decree of foreclosure cannot be changed in favor of defendants when they have not appealed.

25. Holden *v.* Dunn, 144 Ill. 413, 33 N. E. 413, 19 L. R. A. 481; Gridley *v.* Brooks-Waterfield Co., 14 S. W. 407, 12 Ky. L. Rep. 391, 9 L. R. A. 555; Freeland *v.* Hodge, 12 La. 177.

26. Whitmore *v.* Stewart, 61 Kan. 254, 59 Pac. 261; Norton *v.* Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539; Hays *v.* Miller, 1 Wash. Terr. 143; Royal Trust Co. *v.* Washburn, etc., R. Co., 113 Fed. 531.

27. Hannah *v.* Dorrell, 73 Ind. 465; Kilmer *v.* Gallaher, 116 Iowa 666, 88 N. W. 959; Royal Trust Co. *v.* Washburn, etc., R. Co., 113 Fed. 531.

28. More *v.* Meek, 8 Kan. 153; Harrison *v.* Union Trust Co., 144 N. Y. 326, 39 N. E. 353; U. S. Trust Co. *v.* Schliep, 28 N. Y. Suppl. 382, 31 Abb. N. Cas. 52; Brewer *v.* Longnecker, 15 N. Y. Suppl. 937.

29. Barron *v.* Kennedy, 17 Cal. 574; Loeb *v.* Willis, 22 Hun (N. Y.) 508; Sprague *v.* Jones, 9 Paige (N. Y.) 395; Cockenour *v.* Bullock, 12 Grant Ch. (U. C.) 138.

making a similar change or modification with reference to a personal judgment for the mortgage debt,[30] or to change the amount of the decree, either by correcting a mistake, allowing the addition of items overlooked or since accruing, or reducing it in case of an excessive allowance,[31] or to correct a mistake in the description of the property intended to be sold,[32] or even, it appears, to add a tract or portion of the land erroneously omitted from the original decree.[33] An error in allowing, denying, or fixing the right of redemption may be thus corrected,[34] or an amendment may be made saving rights of defendants which should have been provided for originally,[35] or giving directions as to the application of the proceeds of sale,[36] or changing a decree for a sale into one of strict foreclosure.[37]

(III) *Application For Amendment, Notice, and Entry.* An application for amendment should be made by motion, and ordinarily a new petition or bill is not necessary.[38] Notice to the opposite party is necessary,[39] except where the purpose is merely to correct a mistake of such a character that the application will be granted of course,[40] or where such a party is so situated that he cannot possibly be injured by the proposed amendment.[41] The amendment may be made by a modified decree, prepared and entered as of the date of the original decree.[42]

e. Opening and Vacating Judgment — (I) *In General.* A court of equity is always ready to hear a meritorious application for relief against its decree of foreclosure, and will open or vacate it whenever good and substantial reasons for such a course are shown to it,[43] provided the application is seasonably made, for this

After the sale a judgment of foreclosure cannot be amended by inserting a provision for the recovery of a deficiency arising on the sale. U. S. Trust Co. *v.* Schliep, 28 N. Y. Suppl. 382, 31 Abb. N. Cas. 52.

30. Gochenour *v.* Mowry, 33 Ill. 331; Shelley *v.* Smith, 50 Iowa 543; National Bank of Commerce *v.* Kinkead, 61 Nebr. 264, 85 N. W. 70; Embury *v.* Bergamini, 24 N. J. Eq. 227.

31. *California.*— Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601.

Kansas.— Harris *v.* McCrossen, 31 Kan. 402, 2 Pac. 814, amendment adding amount paid by mortgagee in discharge of taxes.

Michigan.— Montague *v.* Haviland, 101 Mich. 80, 59 N. W. 404, correcting error in computation of interest.

Nebraska.— Smith *v.* Atkins, 27 Nebr. 248, 42 N. W. 1043.

New Jersey.— Citizens' Mut. F. & M. Ins. Co. *v.* Brittan, 25 N. J. Eq. 331 (reducing amount of decree); Ryerson *v.* Boorman, 8 N. J. Eq. 66.

New York.— Valentine *v.* McCue, 26 Hun 456.

Oregon.— Farmers' Loan Co. *v.* Oregon Pac. R. Co., 28 Oreg. 44, 40 Pac. 1089.

Wisconsin.— Hart *v.* Jos. Schlitz Brewing Co., 120 Wis. 553, 98 N. W. 526, reducing solicitor's fee originally allowed.

See 35 Cent. Dig. tit. "Mortgages," § 1450.

32. *Indiana.*— Burson *v.* Blair, 12 Ind. 371. The assignee of a purchaser of lands on foreclosure cannot move to correct the description of the lands directed to be sold. Runnels *v.* Kaylor, 95 Ind. 503.

Kansas.— Thayer *v.* Knote, 59 Kan. 181, 52 Pac. 433.

New York.— Wood *v.* Martin, 66 Barb. 241. But see Veighte *v.* Slocum, 3 N. Y. St. 153.

Texas.— Hinzie *v.* Kempner, 82 Tex. 617, 18 S. W. 659.

Washington.— State *v.* Spokane County Super. Ct., 8 Wash. 591, 36 Pac. 443.

See 35 Cent. Dig. tit. "Mortgages," § 1451.

33. Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321. *Compare* Stewart *v.* Wilson, 141 Ala. 405, 37 So. 550, 109 Am. St. Rep. 33; Ruff *v.* Elkin, 40 S. C. 69, 18 S. E. 220, holding that such an amendment cannot be made at a subsequent term without a rehearing.

34. Colwell *v.* Warner, 36 Conn. 224; Bonner Springs Lodge, etc., Co. *v.* McClelland, 59 Kan. 778, 53 Pac. 866; Smith *v.* Burnes, 8 Kan. 197.

35. Gregory *v.* Keating, (Cal. 1889) 22 Pac. 1084; Mickley *v.* Tomlinson, 79 Iowa 383, 41 N. W. 311, 44 N. W. 684.

36. Sidney Stevens Implement Co. *v.* South Ogden Land, etc., Co., 20 Utah 267, 58 Pac. 843; Moffat *v.* March, 3 Grant Ch. (U. C.) 163.

37. Horner *v.* Zimmerman, 45 Ill. 14; Loomis *v.* Stuyvesant, 10 Paige (N. Y.) 490.

38. Napa Bank *v.* Godfrey, 77 Cal. 612, 20 Pac. 142; Robins *v.* Swain, 68 Ill. 197; Allemania Loan, etc., Assoc. *v.* Mueller, 8 Ohio Dec. (Reprint) 402, 7 Cinc. L. Bul. 301.

39. Homan *v.* Hellman, 35 Nebr. 414, 53 N. W. 369; Symns *v.* Noxon, 29 Nebr. 404, 45 N. W. 680.

40. Dickey *v.* Gibson, 113 Cal. 21, 45 Pac. 15, 54 Am. St. Rep. 321.

41. Louisville Banking Co. *v.* Blake, 70 Minn. 252, 73 N. W. 155; Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064; Cole *v.* Kelly, 4 Silv. Sup. (N. Y.) 571, 8 N. Y. Suppl. 131.

42. Batchelder *v.* Brickell, 75 Cal. 373, 17 Pac. 441.

43. Golden *v.* Fowler, 26 Ga. 451; Campbell *v.* Holyland, 7 Ch. D. 166, 47 L. J. Ch. 145, 38 L. T. Rep. N. S. 128, 26 Wkly. Rep. 109; Waddell *v.* McColl, 2 Ch. Chamb.

power will be exercised sparingly, if at all, after the decree has been consummated by a sale, or after the lapse of a long time,[44] and the court will not open or set aside a decree which was settled by agreement among the parties and entered by their consent.[45] The court has power to impose terms on the granting of such relief, and the mortgagor must tender or offer to pay what is due under the mortgage, if he admits any indebtedness at all.[46] If plaintiff, after obtaining a decree of foreclosure, prosecutes to judgment an action on the debt secured, this opens the decree and lets the mortgagor in to redeem.[47] The vacation of an order referring the cause to a master to ascertain the amount due on the mortgage does not vacate a subsequent decree, made by a different judge, ordering a sale and directing distribution of the proceeds.[48]

(II) *Default Judgment.* A judgment or decree by default in foreclosure may be opened at the instance of a defendant who shows that he was not served with process, or who shows other good cause for such action;[49] but he must make it appear that he has a valid and meritorious defense to the suit,[50] and he must present a good and sufficient excuse for not setting it up at the proper time.[51] Non-resident defendants served by publication in foreclosure suits may also take advantage of statutes allowing persons so situated to have judgments against them opened within a limited time.[52]

(III) *Ground For Application*—(A) *In General.* The judgment or decree may be opened or vacated for want of service on parties,[53] or where defendant was prevented from interposing his defense at the proper time through accident, surprise, mistake, inadvertence, or excusable neglect,[54] or in consequence of an

(U. C.) 62. But see Patch *v.* Ward, 4 Giffard 96, 9 Jur. N. S. 373, 7 L. T. Rep. N. S. 413, 11 Wkly. Rep. 135, 66 Eng. Reprint 635, holding that a foreclosure decree cannot be opened at the suit of a plaintiff who admits part of the decree and impeaches the rest.

44. Rosenkrans *v.* Kline, 42 Wis. 558; Burley *v.* Flint, 105 U. S. 247, 26 L. ed. 986. And see Gerig *v.* Loveland, 130 Cal. 512, 62 Pac. 830.

45. Rowan *v.* Shawneetown First Nat. Bank, 112 Ill. App. 434.

46. *New Jersey.*— Vanderveer *v.* Holcomb, 22 N. J. Eq. 555.

New York.— Bard *v.* Fort, 3 Barb. Ch. 632. But see Lawton *v.* Lawton, 54 Hun 415, 7 N. Y. Suppl. 556.

Vermont.— Blodgett *v.* Hobart, 18 Vt. 414.

Washington.— Investment Securities Co. *v.* Adams, 37 Wash. 211, 79 Pac. 625.

Wisconsin.— Welsh *v.* Blackburn, 92 Wis. 562, 66 N. W. 528; Weber *v.* Zeimet, 27 Wis. 685.

See 35 Cent. Dig. tit. "Mortgages," § 1463.

A tender is not necessary, as a preliminary to proceedings to vacate a foreclosure decree obtained by fraud for a larger sum than was due. Lockwood *v.* Mitchell, 19 Ohio 448, 53 Am. Dec. 438.

Payment of attorney's fees.— The mortgagor's grantee, filing his bill to set aside an erroneous decree of foreclosure, cannot be required, in order to redeem the land, to pay the attorney's fees of the mortgagee in the foreclosure suit and in defending the present suit. Bondurant *v.* Taylor, 3 Greene (Iowa) 561.

47. Mills *v.* Choate, 2 Ch. Chamb. (U. C.) 433. But *compare* Thomas *v.* Warner, 15 Vt. 110.

48. Thomas *v.* Raymond, 4 S. C. 347.

49. Hibernia Sav., etc., Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425; Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401.

50. McMillan *v.* Reynolds, 11 Cal. 372; Tripp *v.* Vincent, 8 Paige (N. Y.) 176; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424.

51. Bope *v.* Ferris, 77 Mich. 299, 43 N. W. 874; Pope *v.* Hooper, 6 Nebr. 178.

52. Stone *v.* Welling, 14 Mich. 514; Bailey *v.* Murphy, Walk. (Mich.) 305 (holding that the statute is available, not only to the mortgagor, but also to a subsequent encumbrancer, joined as a defendant, but only constructively served with process because a non-resident); Russell *v.* Blakeman, 40 Minn. 463, 42 N. W. 391; Brown *v.* Conger, 10 Nebr. 236, 4 N. W. 1009; Berry *v.* Doty, 5 Wis. 605.

53. Fall *v.* Evans, 20 Ind. 210; Wakeman *v.* Hazleton, 3 Barb. Ch. (N. Y.) 148; Hughes *v.* Hodges, 94 N. C. 56.

54. *California.*— Bernheim *v.* Cerf, 123 Cal. 170, 55 Pac. 759, inadvertence of court in striking out an answer which should have been allowed to stand.

Connecticut.— Bostwick *v.* Stiles, 35 Conn. 195; Crane *v.* Hanks, 1 Root 468.

Indiana.— Laughlin *v.* Hibben, 129 Ind. 5, 27 N. E. 753.

Iowa.— Worth *v.* Wetmore, 87 Iowa 62, 54 N. W. 56.

New Hampshire.— Butler *v.* Morse, 66 N. H. 429, 23 Atl. 90, holding that a decree of foreclosure, entered in default of an answer, after appearance of defendant by counsel, will not be set aside on the ground of accident or mistake, where the only accident or mistake relied on was the neglect of the attorney to file the answer and make the defense.

excusable ignorance of the proceedings or of his defense or his rights.[55] In some cases judgments or decrees have been opened or vacated on account of an excessive recovery on the part of plaintiff,[56] or because they failed to except portions of the mortgaged premises released or agreed to be released.[57] But this relief will not be granted on account of mere technical irregularities which do not injuriously affect the substantial rights of the party,[58] nor in any case where he has an adequate remedy by proceedings at law.[59] A creditor who has delayed the collection of his debt until another creditor has obtained judgment of foreclosure of a mortgage cannot set aside the judgment or postpone it to his own claim on the ground that the mortgage debt was usurious.[60] Where judgment in a foreclosure suit is entered by default without an inquiry as to the divisibility of the premises, although only part of the mortgage debt is due, it is erroneous on its face and will be set aside on notice, or reversed back to the default.[61]

(B) *Fraud in Obtaining Judgment.* Fraud practised by the successful party in obtaining a decree or judgment of foreclosure is always ground for opening or vacating it.[62]

(IV) *Persons Entitled to Relief.* As a general rule an application to open or vacate a foreclosure decree can be made only by a person who shows that he has such an interest in the mortgaged premises as will be injuriously affected by the decree as it stands.[63] But this rule allows the mortgagor to make such an application, although he has sold the equity of redemption, if he remains liable to his grantee on the covenants in his deed.[64] A purchaser of the premises before

New Jersey.— Smith *v.* Alton, 22 N. J. Eq. 572.

Texas.— Lumpkin *v.* Williams, 1 Tex. Civ. App. 214, 21 S. W. 967.

Vermont.— Blodgett *v.* Hobart, 18 Vt. 414; Pierson *v.* Clayes, 15 Vt. 93, reliance on mortgagee's proposals for a settlement.

Washington.— Investment Securities Co. *v.* Adams, 37 Wash. 21, 79 Pac. 625, ignorance of the fact that a deceased mortgagor had left children, who were not made parties to the foreclosure suit.

Canada.— Platt *v.* Ashbridge, 12 Grant Ch. (U. C.) 105, relief granted to an illiterate mortgagor, having no solicitor, who misunderstood the object of the bill, which was the only paper served on him.

See 35 Cent. Dig. tit. "Mortgages," § 1459.

55. Monarch Brewing Co. *v.* Wolford, 179 Ill. 252, 53 N. E. 583; Gaylord *v.* Lafayette, 115 Ind. 423, 17 N. E. 899; Union Dime Sav. Inst. *v.* Clark, 59 How. Pr. (N. Y.) 342 [*affirmed* in 27 Hun 316]; Trinity College *v.* Hill, 10 Ont. App. 99; Johnston *v.* Johnston, 9 Ont. Pr. 259.

56. Malone *v.* Marriott, 64 Ala. 486; Moore *v.* Degraw, 5 N. J. Eq. 346; Peck *v.* New York, etc., R. Co., 85 N. Y. 246. *Compare* Citizens' Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733.

57. See Tucker *v.* Conwell, 67 Ill. 552; Avon-by-the-Sea Land, etc., Co. *v.* Finn, 56 N. J. Eq. 805, 41 Atl. 366.

58. May *v.* Hatcher, 130 Cal. 627, 63 Pac. 33; McBride *v.* Wright, 75 Wis. 306, 43 N. W. 955; Warren *v.* Foreman, 19 Wis. 35; Collins *v.* Denison, 2 Ch. Chamb. (U. C.) 465.

59. Collins *v.* Scott, 100 Cal. 446, 34 Pac. 1085.

60. Mahan *v.* Cavender, 77 Ga. 118.

61. Dale *v.* Bugh, 16 Ind. 233; Frame *v.* Bell, 16 Ind. 229.

62. *Iowa.*— Brown *v.* Mallory, 26 Iowa 469.

New Jersey.— Marcole *v.* Hinnes, (Ch. 1905) 61 Atl. 975; Edge *v.* Goulard, 36 N. J. Eq. 43.

United States.— Sahlgard *v.* Kennedy, 2 Fed. 295, 1 McCrary 291.

England.— Patch *v.* Ward, 4 Giffard 96, 9 Jur. N. S. 373, 7 L. T. Rep. N. S. 413, 11 Wkly. Rep. 135, 66 Eng. Reprint 635; Harvey *v.* Tebbutt, 1 Jac. & W. 197, 21 Rev. Rep. 145, 37 Eng. Reprint 350; Soley *v.* Salisbury, 9 Mod. 153.

Canada.— McLean *v.* Grant, 20 Grant Ch. (U. C.) 76.

See 35 Cent. Dig. tit. "Mortgages," § 1460.

Insufficiency of facts to show fraud see Jacobs *v.* Snyder, 82 Iowa 754, 48 N. W. 806; Case *v.* Hicks, 76 Iowa 36, 40 N. W. 75; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

63. *New Jersey.*— Graham *v.* Donohue, (Ch. 1897) 38 Atl. 857.

North Carolina.— Everett *v.* Reynolds, 114 N. C. 366, 19 S. E. 233.

Ohio.— Hubbell *v.* Mansfield, 5 Ohio Dec. (Reprint) 329, 4 Am. L. Rec. 619.

Pennsylvania.— Globe Bldg., etc., Assoc. *v.* Vanderherchen, 202 Pa. St. 325, 51 Atl. 891.

United States.— Finley *v.* U. S. Bank, 11 Wheat. 304, 6 L. ed. 480, holding that a prior mortgagee, not made a party, cannot be affected by the decree, and therefore is not ordinarily entitled to have the decree set aside.

Compare Bell *v.* Thompson, 147 Cal. 689, 82 Pac. 327.

And see 35 Cent. Dig. tit. "Mortgages," § 1462.

64. Stanley *v.* Goodrich, 18 Wis. 505.

Where the equity of redemption has been sold on execution on a judgment junior to

suit brought,[65] a subsequent encumbrancer,[66] or a holder of one of the several bonds or notes secured by the mortgage, who was not made a party originally, and who is aggrieved by the decree,[67] may also make such an application.

(v) *Waiver, Laches, and Estoppel.* A party who otherwise would be entitled to apply for the opening or vacating of a decree of foreclosure will be debarred from so doing, on the ground of waiver or estoppel, where he has acquiesced without objection in the further proceedings,[68] received and retained the surplus proceeds of sale,[69] or failed to avail himself of a right of redemption which was open to him after he acquired knowledge of the decree.[70] An application of this sort will also be denied where the petitioner has exhibited indifference to his rights, negligence, and unexcused delay amounting to laches.[71]

(vi) *Application and Proceedings Thereon.* Application to open or vacate the decree is properly made by motion or rule;[72] and the moving papers must set forth explicitly and particularly the ground of objection to the decree and the nature of the proposed defense,[73] as well as the movant's excuses for failure to defend in due season.[74] The complainant in the decree or his assignee thereof is a necessary party,[75] as is also the purchaser or owner of the equity of

the mortgage, and the mortgagor has been released from liability on the bond, he no longer has such an interest as entitles him to have the judgment opened and be let in to defend on the ground of usury. Reap *v.* Battle, 155 Pa. St. 265, 26 Atl. 439.

65. Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60; Hewitt *v.* Montclair R. Co., 25 N. J. Eq. 100.

A purchaser after the decree or after the institution of the foreclosure suit is not entitled to have the decree set aside and be let in to defend. Malone *v.* Marriott, 64 Ala. 486; Powell *v.* McDowell, 16 Nebr. 424, 20 N. W. 271. But *compare* Hilliard *v.* Campbell, 7 Grant Ch. (U. C.) 96, where such a subsequent purchaser was allowed to have the decree set aside, on showing that he had no notice of the pendency of the foreclosure suit.

Purchaser prior to mortgage.—Where a defendant, not a party to the mortgage, claims title by a deed antedating the mortgage, he cannot complain that an excessive amount of interest was allowed to plaintiff. Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679.

66. Bailey *v.* Murphy, Walk. (Mich.) 305; Quinlan *v.* Stratton, 128 N. Y. 659, 28 N. E. 529; Scottish American Inv. Co. *v.* Brewer, 2 Ont. L. Rep. 369.

67. Stevens *v.* Boston Cent. Nat. Bank, 144 N. Y. 50, 39 N. E. 68; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368. See also Glide *v.* Dwyer, 83 Cal. 477, 23 Pac. 706.

68. Bryan *v.* Pinney, 3 Ariz. 27, 20 Pac. 311; Klabunde *v.* Byron Reed Co., 69 Nebr. 120, 95 N. W. 4, 98 N. W. 182; McKaig *v.* McCallum, 60 N. J. Eq. 33, 46 Atl. 661; White *v.* Coulter, 1 Hun (N. Y.) 357.

69. Hoffmire *v.* Holcomb, 17 Kan. 378.

70. Becker *v.* Tell City Bank, 142 Ind. 99, 41 N. E. 323.

71. *Kentucky.*— Hays *v.* Gilbert, 71 S. W. 652, 24 Ky. L. Rep. 1386.

Massachusetts.— Tetrault *v.* Fournier, 187 Mass. 58, 72 N. E. 351.

New York.— Jacobson *v.* Smith, 73 N. Y. App. Div. 412, 77 N. Y. Suppl. 49; Union Dime Sav. Inst. *v.* Clark, 59 How. Pr. 342 [*affirmed* in 27 Hun 316].

North Carolina.— Arthur *v.* Broadway, 127 N. C. 407, 37 S. E. 503.

Oregon.— Lombard *v.* Wade, 37 Oreg. 426, 61 Pac. 856.

Vermont.— Hyde *v.* Hyde, 50 Vt. 301.

Washington.— McEachern *v.* Brackett, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922.

England.— Jones *v.* Kenrick, 5 Bro. P. C. 244, 2 Eng. Reprint 655; Burgh *v.* Langton, 5 Bro. P. C. 213, 15 Vin. Abr. 476, pl. 2, 2 Eng. Reprint 635; Wichalse *v.* Short, 3 Bro. P. C. 558, 1 Eng. Reprint 1497.

Canada.—Miles *v.* Cameron, 9 Ont. Pr. 502; Brothers *v.* Lloyd, 2 Ch. Chamb. (U. C.) 119; Cameron *v.* Lynes, 1 Ch. Chamb. (U. C.) 42.

See 35 Cent. Dig. tit. "Mortgages," § 1462.

72. O'Connell *v.* Cotter, 44 Iowa 48; Everett *v.* Reynolds, 114 N. C. 366, 19 S. E. 233; Longstreth *v.* Thornton, 14 Phila. (Pa.) 140. But *compare* Clark *v.* Hotailing, 1 Nebr. 436, as to the proper procedure after the decree has been enforced by sale and deed to the purchaser.

73. *Alabama.*—Malone *v.* Marriott, 64 Ala. 486.

Connecticut.— Platt *v.* Stonington Sav. Bank, 46 Conn. 476.

New Jersey.—Hallowell *v.* Daly, (Ch. 1903) 56 Atl. 234.

New York.— Cook *v.* New Amsterdam Real Estate Assoc., 2 N. Y. App. Div. 55, 37 N. Y. Suppl. 161; Powers *v.* Trenor, 3 Hun 3; Lester *v.* Mann, 1 Silv. Sup. 516, 5 N. Y. Suppl. 513; People's Bank *v.* Hamilton Mfg. Co., 10 Paige 481.

Wisconsin.— Mitchell *v.* Rolison, 52 Wis. 155, 8 N. W. 886.

See 35 Cent. Dig. tit. "Mortgages," § 1465.

74. Coffey *v.* Proctor Coal Co., 20 S. W. 286, 14 Ky. L. Rep. 415; Johnson *v.* Ashbridge, 2 Ch. Chamb. (U. C.) 251.

75. Malone *v.* Marriott, 64 Ala. 486. See also Matheson *v.* Thompson, 20 Fla. 790.

redemption.[76] The application must be supported by sufficient evidence.[77] The court will ordinarily determine nothing further than the questions arising on the grounds alleged against the decree.[78] The court may direct the trial of an issue of fact, arising upon such an application, by a jury.[79] The effect of granting the application is to restore the parties to the status they occupied before the rendition of the decree.[80]

f. Operation and Effect of Judgment or Decree — (i) *In General.* A decree of foreclosure and sale is a final decree and is not affected by a subsequent order in the suit, dismissing it.[81] Although the decree does not by itself merge the debt secured by the mortgage or extinguish its lien,[82] yet these results follow where the decree is enforced by a valid and regular sale;[83] and the decree constitutes a cause of action on which a suit may be maintained as on any other judgment,[84] is binding and conclusive upon the parties and their privies to the same extent and in respect to the same points and questions as a judgment in any other form of action,[85] draws interest from the date of its rendition,[86] and cuts off subsequent liens and encumbrances;[87] and although the decree, except in the case of a strict foreclosure, does not vest the title to the premises in the mortgagee,[88] yet a decree and sale thereunder constitute color of title in good faith, if free from fraud, although the decree is erroneous or even void.[89] A decree denying foreclosure of a mortgage without any attempt to discharge the land of the lien thereof does not affect such lien as an encumbrance prior to other liens executed after the decree, but before the time for filing a bill of exceptions on appeal from such decree has expired.[90]

(ii) *Collateral Impeachment.* A decree of foreclosure is supported by presumptions of regularity and validity,[91] and is not open to collateral impeachment on the ground of a want of jurisdiction which is not apparent on the record,[92] nor on the ground of error or of any defects or irregularities in the proceedings leading up to the foreclosure or in the sale,[93] although according to some

76. Malone *v.* Marriott, 64 Ala. 486; Blake *v.* McMurtry, 25 Nebr. 290, 41 N. W. 172; Boulton *v.* Don, etc., Road Co., 1 Ch. Chamb. (U. C.) 335.

77. Felts' Appeal, (Pa. 1889) 17 Atl. 195; Farmers' L. & T. Co. *v.* Rockaway Valley R. Co., 69 Fed. 9.

78. Conrad *v.* Mullison, 24 N. J. Eq. 65; Citizens' Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733.

79. Williams *v.* Troop, 17 Wis. 463, directing question of payment to be tried by a jury.

80. King *v.* Harris, 30 Barb. (N. Y.) 471 [*affirmed* in 34 N. Y. 330]; Cleveland *v.* Cohrs, 18 S. C. 599.

Setting the decree aside as to particular defendants does not necessarily vacate it as to others. Wright *v.* Churchman, 135 Ind. 683, 35 N. E. 835.

81. Kirby *v.* Runals, 37 Ill. App. 186 [*affirmed* in 140 Ill. 289, 29 N. E. 697].

82. *Illinois.*— Rockwell *v.* Servant, 63 Ill. 424.

Indiana.— Rodman *v.* Rodman, 64 Ind. 65.

Louisiana.— Harrod *v.* Voorhies, 16 La. 254.

Massachusetts.— Lunt *v.* Cook, 175 Mass. 1, 55 N. E. 468, 78 Am. St. Rep. 472.

Pennsylvania.— Helmhold *v.* Man, 4 Whart. 410. *Compare* Sauer *v.* Martin, 9 Kulp 483.

See 35 Cent. Dig. tit. "Mortgages," § 1469.

Contra.— Swift *v.* Edson, 5 Conn. 531.

83. See *infra*, XXI, L, 1, b, c.

84. Rowe *v.* Blake, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45; Porcheler *v.* Bronson, 50 Tex. 555.

85. See *infra*, XXI, L, 1, f.

86. Connecticut Mut. L. Ins. Co. *v.* Stinson, 86 Ill. App. 668. And see *supra*, XXI, G, 2, b, (II), (B), (6).

87. Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725.

88. Coe *v.* Finlayson, 41 Fla. 169, 26 So. 704; Cruger *v.* Daniel, Riley Eq. (S. C.) 102.

89. Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833.

90. Westminster College *v.* Fry, 192 Mo. 552, 91 S. W. 472.

91. Rowe *v.* Blake, 112 Cal. 637, 44 Pac. 1084; Kibbe *v.* Dunn, 14 Fed. Cas. No. 7,753, 5 Biss. 233 [*affirmed* in 93 U. S. 674, 23 L. ed. 1005].

92. Orland Bank *v.* Dodson, 127 Cal. 208, 59 Pac. 584, 78 Am. St. Rep. 42; Laforest *v.* Barrow, 12 La. Ann. 148; Romig *v.* Gillett, 187 U. S. 111, 23 S. Ct. 40, 47 L. ed. 97; Halliday *v.* Stuart, 151 U. S. 229, 14 S. Ct. 302, 38 L. ed. 141; Adams *v.* Conner, 133 U. S. 296, 10 S. Ct. 304, 33 L. ed. 623.

93. *Arkansas.*— Carpenter *v.* Zarbuck, 74 Ark. 474, 86 S. W. 299.

California.— Hansen *v.* Wagner, 133 Cal. 69, 65 Pac. 142; Johnson *v.* Reed, 125 Cal. 74, 57 Pac. 680; De Sepulveda *v.* Baugh, 74 Cal. 468, 16 Pac. 223, 5 Am. St. Rep. 455; Miller *v.* Sharp, 49 Cal. 233.

of the decisions it may be impeached in a collateral proceeding on the ground of fraud.[94]

(III) *LIEN OF JUDGMENT OR DECREE.* A decree of foreclosure and sale fastens a liability upon the property mortgaged which may be regarded as in the nature of a lien;[95] but such a decree does not, like an ordinary judgment at law, create a general lien upon the lands of defendant or upon any other land than that covered by the mortgage.[96] Where a judgment is entered directing a sale of the mortgaged property and an application of the proceeds on the amount due, and further declaring that, in case of a deficiency, plaintiff may have execution for the balance, the lien of the judgment does not attach to the real estate of

Florida.— Lenfesty *v.* Coe, 26 Fla. 49, 7 So. 2; Mann *v.* Jennings, 25 Fla. 730, 6 So. 771.

Illinois.— Springer *v.* Darlington, 207 Ill. 238, 69 N. E. 946; Windett *v.* Connecticut Mut. L. Ins. Co., 130 Ill. 621, 22 N. E. 474; Maloney *v.* Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; Horner *v.* Zimmerman, 45 Ill. 14; Rockwell *v.* Jones, 21 Ill. 279; Bellingall *v.* Duncan, 8 Ill. 477.

Indiana.— Smith *v.* Sparks, 162 Ind. 270, 70 N. E. 253; Ballew *v.* Roler, 124 Ind. 557, 24 N. E. 976, 9 L. R. A. 481; Woolery *v.* Grayson, 110 Ind. 149, 10 N. E. 935; Randall *v.* Lower, 98 Ind. 255; Osborn *v.* Storms, 65 Ind. 321; Wilkins *v.* De Pauw, 10 Ind. 159.

Iowa.— Suiter *v.* Turner, 10 Iowa 517.

Kansas.— Ehrsam *v.* Smith, 61 Kan. 699, 60 Pac. 740; Ogden *v.* Walters, 12 Kan. 282.

Louisiana.— Wisdom *v.* Parker, 31 La. Ann. 52; Dixey *v.* Mandell, 23 La. Ann. 499; Anderson *v.* Carroll, 23 La. Ann. 175.

Michigan.— Connerton *v.* Millar, 41 Mich. 608, 2 N. W. 932.

Minnesota.— Smith *v.* Valentine, 19 Minn. 452; Hotchkiss *v.* Cutting, 14 Minn. 537.

Missouri.— Kopp *v.* Blessing, 121 Mo. 391, 25 S. W. 757; Carson *v.* Sheldon, 51 Mo. 436.

Nebraska.— Taylor *v.* Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. Rep. 426; Nebraska L. & T. Co. *v.* Haskell, 4 Nebr. (Unoff.) 330, 93 N. W. 1045; Stein *v.* Parrotte, 2 Nebr. (Unoff.) 351, 96 N. W. 155.

New Jersey.— Cannon *v.* Wright, 49 N. J. Eq. 17, 23 Atl. 285; Gest *v.* Flock, 2 N. J. Eq. 108.

New York.— Glacius *v.* Fogel, 88 N. Y. 434; Pretzfeld *v.* Lawrence, 34 Misc. 329, 69 N. Y. Suppl. 807; Williams *v.* Hubbell, 1 N. Y. Suppl. 769. And see Vingut *v.* Ketcham, 102 N. Y. App. Div. 403, 92 N. Y. Suppl. 605; Bloodgood *v.* Zeily, 2 Cai. Cas. 124.

Oregon.— Finley *v.* Houser, 22 Oreg. 562, 30 Pac. 494.

Pennsylvania.— Dauberman *v.* Hain, 196 Pa. St. 435, 46 Atl. 442; Brundred *v.* Egbert, 164 Pa. St. 615, 30 Atl. 503; Sanderson *v.* Phinney, 2 Walk. 526; Stackpole *v.* Glassford, 16 Serg. & R. 163.

Rhode Island.— Island Sav. Bank *v.* Galvin, 20 R. I. 347, 39 Atl. 196.

Texas.— Thompson *v.* Jones, (1889) 12 S. W. 77; Beer *v.* Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010.

Washington.— Tilton *v.* O'Shea, 31 Wash. 513, 72 Pac. 106.

Wisconsin.— Salisbury *v.* Chadbourne, 45 Wis. 74.

United States.— Gibson *v.* Lyon, 115 U. S. 439, 6 S. Ct. 129, 29 L. ed. 440; Central Trust Co. *v.* Peoria, etc., R. Co., 118 Fed. 30, 55 C. C. A. 52; National Nickel Co. *v.* Nevada Nickel Syndicate, 112 Fed. 44, 50 C. C. A. 113; Elliot *v.* Van Voorst, 8 Fed. Cas. No. 4,390, 3 Wall. Jr. 299; Kibbe *v.* Dunn, 14 Fed. Cas. No. 7,753, 5 Biss. 233 [*affirmed* in 93 U. S. 674, 23 L. ed. 1005].

Canada.— Gunn *v.* Doble, 15 Grant Ch. (U. C.) 655.

See 35 Cent. Dig. tit. "Mortgages," § 1470.

94. Pray *v.* Jenkins, 47 Kan. 599, 28 Pac. 716; Bradford Sav. Bank, etc., Co. *v.* Crippen, 63 Nebr. 210, 88 N. W. 166; Butterfield's Appeal, 77 Pa. St. 197; Chase *v.* Brown, 22 Pa. Co. Ct. 598; First Nat. Bank *v.* Tamble, (Tenn. Ch. App. 1900) 62 S. W. 308. *Contra,* Damon *v.* Deeves, 66 Mich. 347, 33 N. W. 512; Griffin *v.* Wardlaw, Harp. (S. C.) 481.

95. Kirby *v.* Runals, 140 Ill. 289, 29 N. E. 697; De Witt's Appeal, 76 Pa. St. 283.

96. *California.*— Englund *v.* Lewis, 25 Cal. 337.

Florida.— Scott *v.* Russ, 21 Fla. 260.

Georgia.— Hamberger *v.* Easter, 57 Ga. 71; Spence *v.* Shell, 54 Ga. 498; Hays *v.* Reynolds, 53 Ga. 328.

Illinois.— Karnes *v.* Harper, 48 Ill. 527. But *compare* Sues *v.* Leinour, 16 Ill. App. 603.

Iowa.— Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373.

New York.— Powell *v.* Harrison, 88 N. Y. App. Div. 228, 85 N. Y. Suppl. 452.

Ohio.— Myers *v.* Hewitt, 16 Ohio 449. But see McCarthy *v.* Garraghty, 10 Ohio St. 438.

South Carolina.— Warren *v.* Raymond, 12 S. C. 9.

Vermont.— Dewey *v.* Brownell, 54 Vt. 441, 41 Am. Rep. 852.

Washington.— Hays *v.* Miller, 1 Wash. Terr. 143. But *compare* Fuller *v.* Hull, 19 Wash. 400, 53 Pac. 666, holding that a decree of foreclosure including a judgment against the mortgagor becomes a lien on his general property in advance of the sale.

Wisconsin.— Huntington *v.* Meyer, 92 Wis. 557, 66 N. W. 500.

See 35 Cent. Dig. tit. "Mortgages," § 1471.

But *compare* Lisle *v.* Cheney, 36 Kan. 578, 13 Pac. 816.

defendant other than that mortgaged, until after a sale has been made and a deficiency reported, even if the judgment is docketed when first rendered.[97]

g. Assignment of Judgment or Decree. A decree for the foreclosure of a mortgage and sale thereunder is assignable,[98] and the assignment passes to the assignee all the rights and powers possessed by the assignor, no more and no less,[99] including the right to enforce the decree.[1] The rights and liabilities of the mortgagor are ordinarily not in any way affected by such assignment.[2]

h. Execution and Enforcement — (i) *In General.* A decree in equity for the foreclosure of a mortgage ordinarily contains directions as to the means and manner of its own enforcement and is of itself sufficient authority to those acting under it,[3] and can be enforced in no other manner than as directed and requires no other process for its execution,[4] and is therefore not subject to the statutory or common-law rules regulating the execution of ordinary judgments.[5]

97. Winston *v.* Browning, 61 Ala. 80; Hershey *v.* Dennis, 53 Cal. 77; Hibberd *v.* Smith, 50 Cal. 511; Culver *v.* Rogers, 28 Cal. 520; Chapin *v.* Broder, 16 Cal. 403; Weil *v.* Howard, 4 Nev. 384; Bell *v.* Gilmore, 25 N. J. Eq. 104. *Contra*, Fletcher *v.* Holmes, 25 Ind. 458; Blum *v.* Keyser, 8 Tex. Civ. App. 675, 28 S. W. 561; Fuller *v.* Hull, 19 Wash. 400, 53 Pac. 666.

98. Wyeth *v.* Branif, 14 Hun (N. Y.) 537 [*reversed* on other grounds in 84 N. Y. 627].

99. Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Poulson *v.* Simmons, 126 Ind. 227, 26 N. E. 152; Harris *v.* Hooper, 50 Md. 537; Anderson *v.* Minnesota L. & T. Co., 68 Minn. 491, 71 N. W. 665, 819.

1. Moore *v.* Smith, 103 Mich. 387, 61 N. W. 538; Brand *v.* Smith, 99 Mich. 395, 58 N. W. 363; Lillibridge *v.* Tregent, 30 Mich. 105; Allen *v.* Wood, 31 N. J. Eq. 103; Wells *v.* Chapman, 4 Sandf. Ch. (N. Y.) 312 [*affirmed* in 13 Barb. 561]; Booth *v.* Williams, 11 Phila. (Pa.) 266.

2. Binsse *v.* Paige, 1 Abb. Dec. (N. Y.) 138, 1 Keyes 87, holding that the fact that the mortgagee, on assigning the decree of foreclosure, covenants with the assignee that the decree shall be paid, and the assignee accepts the assignment for the express purpose of applying any surplus to the assignor's indebtedness to him, does not modify the primary liability of the mortgagor in case of a deficiency. But *compare* Cooper *v.* Cole, 38 Vt. 185, holding that where the assignee bought the decree a short time before the expiration of the period of redemption, at the request of the mortgagor, and to give him further time to pay the amount then due on the mortgage debt, this opened the decree, and that the rights of the mortgagor were the same as before the decree was made.

Payment of bonus by junior encumbrancer. —Where the decree is assigned to a junior encumbrancer, who pays a bonus for it, in addition to the amount of the mortgage, the owner of the land is not entitled to credit for such bonus as a part payment on the mortgage. Wilkinson *v.* Hiyer, 22 Pa. Co. Ct. 667.

3. Newmark *v.* Chapman, 53 Cal. 557; Ewing *v.* Hatfield, 17 Ind. 513; Huber *v.* Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

4. Kellogg *v.* Tout, 65 Ind. 146; Gerald *v.* Gerald, 31 S. C. 171, 9 S. E. 792.

Strict foreclosure.— A decree of strict foreclosure is executed by enforcing delivery of the possession to the mortgagee. Ray *v.* Scripture, 67 N. H. 260, 29 Atl. 454; Withall *v.* Nixon, 28 Ch. D. 413, 54 L. J. Ch. 616, 33 Wkly. Rep. 565; Le Bas *v.* Grant, 64 L. J. Ch. 368; Jenkins *v.* Ridgley, 68 L. T. Rep. N. S. 671, 3 Reports 628, 41 Wkly. Rep. 585.

Waiver of forfeiture under strict foreclosure.— The receipt of the second instalment due under a decree of foreclosure, when the first is overdue and unpaid, is a waiver of any forfeiture which has then accrued, but does not vacate the decree as to subsequent instalments. Smalley *v.* Hickok, 12 Vt. 153.

Stranger in possession.— On entry of a decree for the sale of mortgaged property, of which a person not a party to the suit is found to be in possession, a rule may be made on such person, and unless he shows a paramount right in himself the property may be ordered to be delivered to the commissioners acting under the decree. Com. *v.* Ragsdale, 2 Hen. & M. (Va.) 8.

No execution for costs.— Execution ought not to issue against the mortgagor for costs on a bill for foreclosure; but the costs should be taxed by the court and put into the decree. Bradley *v.* Hitchcock, Kirby (Conn.) 231.

5. Kellogg *v.* Tout, 65 Ind. 146; Wood *v.* Wheater, 22 Ch. D. 281, 52 L. J. Ch. 144, 47 L. T. Rep. N. S. 440, 31 Wkly. Rep. 117.

Failure to enforce decree.— If the mortgagee fails or neglects to avail himself of the remedy and advantage given by such a decree, it does not release the land from the lien, nor prevent him from taking other means for obtaining satisfaction; the mortgage still remains a record and will support a scire facias. Roberts *v.* Lawrence, 16 Ill. App. 453.

Dormancy of decree.— A decree of foreclosure becomes dormant after the lapse of a number of years (Wheeler *v.* Eldred, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20; Jacks *v.* Johnston, 86 Cal. 384, 24 Pac. 1057, 21 Am.

(II) *Execution on Judgment or Decree.* In several states the law provides for a special form of execution to carry into effect a judgment or decree of foreclosure,[6] and such process is also necessary where the proceeding for foreclosure is by scire facias, which is a legal remedy and not in the nature of a bill in equity;[7] and in Louisiana it is necessary in order to enforce a foreclosure by seizure and sale.[8] Where there is a personal judgment against the mortgagor, or judgment for deficiency, a general execution for its enforcement may issue, but not till after the sale.[9]

(III) *Property Subject to Levy.* An execution issued for the enforcement of a judgment or decree of foreclosure may be levied on all the property covered by the mortgage and described in it and in the judgment or decree, or intended so to be.[10]

(IV) *Levy and Custody of Property.* As a general rule, where a decree

St. Rep. 50. But see Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064; Moore *v.* Ogden, 35 Ohio St. 430), or after the death of a party thereto (Havens *v.* Pope, 10 Kan. App. 299, 62 Pac. 1538. But see Kellogg *v.* Tout, 65 Ind. 146), and must thereafter be revived before it can be enforced.

6. See the statutes of the different states. And see the following cases:

Georgia.— Maddox *v.* Arthur, 122 Ga. 671, 50 S. E. 668; Benedict *v.* Sammon Theological Seminary, 122 Ga. 412, 50 S. E. 162; Freeman *v.* Coleman, 88 Ga. 421, 14 S. E. 551; Bennett *v.* McConnell, 88 Ga. 177, 14 S. E. 208; Haynes *v.* Richardson, 61 Ga. 390; Horton *v.* Kohn, 48 Ga. 183.

Idaho.— Wilson *v.* Gray, 5 Ida. 218, 47 Pac. 942.

Indiana.— Linville *v.* Bell, 47 Ind. 547; Ætna Ins. Co. *v.* Hallock, 6 Wall. (U. S.) 556, 18 L. ed. 948.

Iowa.— Ayers *v.* Rivers, 64 Iowa 543, 21 N. W. 23; Mayer *v.* Farmers' Bank, 44 Iowa 212; Cooley *v.* Brayton, 16 Iowa 10.

Nebraska.— Hoyt *v.* Little, 55 Nebr. 71, 75 N. W. 56.

New Jersey.— Mutual L. Ins. Co. *v.* Darling, 10 N. J. L. J. 47.

See 35 Cent. Dig. tit. "Mortgages," § 1480.

Variance between execution and decree.— An execution directing the sale of mortgaged premises to satisfy the debt of the mortgagee must be based on a decree which is sufficiently indicated therein; but, although there is a variance between the latter and the former as to the date of the decree, the execution and sale thereon is valid, in favor of any person claiming thereunder, if it plainly appears to the court, on a view of all the facts, that the execution was in fact issued on the decree in question, and for its enforcement. Tilton *v.* Barrell, 17 Fed. 59, 9 Sawy. 84.

7. Sidwell *v.* Schumacher, 99 Ill. 426; Tucker *v.* Conwell, 67 Ill. 552; Stackpole *v.* Glassford, 16 Serg. & R. (Pa.) 163.

8. Truxillo *v.* Delaune, 47 La. Ann. 10, 16 So. 642; Copley *v.* Hasson, 7 La. Ann. 593; Riddell *v.* Ebinger, 6 La. Ann. 407; Bonin *v.* Durand. 2 La. Ann. 776.

9. Fuller *v.* Hull, 19 Wash. 400, 53 Pac. 666.

10. *Georgia.*— Johnson *v.* McKay, 119 Ga. 196, 45 S. E. 992 (holding that, where extrinsic evidence is necessary to identify land described in a mortgage, which has been foreclosed, and a claim interposed to the levy of execution, the burden is on plaintiff in execution to identify the land by extrinsic proof); Lewis *v.* Douglass County Co-operative Store, 111 Ga. 837, 36 S. E. 222; Blackman *v.* Clements, 45 Ga. 292.

Indiana.— Nix *v.* Williams, 110 Ind. 234, 11 N. E. 36 (holding that where a mistake is made in describing the property in a mortgage, and the mortgagor has no title at all to the property described, an execution issued on the personal judgment embodied in a decree of foreclosure of the mortgage may be levied on property of the mortgagor subject to execution, without first offering the property described in the mortgage for sale under the decree); Willson *v.* Binford, 54 Ind. 569 (holding that, although an execution on a judgment of foreclosure of a mortgage securing a note constitutes a lien on the personal property of defendant, a levy and sale cannot be made until the mortgaged premises have first been sold without satisfying the judgment).

Iowa.— Southard *v.* Perry, 21 Iowa 488, 89 Am. Dec. 587. See also Davis *v.* Spaulding, 36 Iowa 610.

Louisiana.— Williamson *v.* Richardson, 31 La. Ann. 685, holding that property subject to the execution includes fixtures and appurtenances to the mortgaged land, although not specially named in it.

Pennsylvania.— Stuckert *v.* Ellis, 2 Miles 433.

See 35 Cent. Dig. tit. "Mortgages," § 1483.

In Florida under a statute (Act (1824), § 8) providing that the judgment in foreclosure should be entered and execution issue as in other cases, it was held that a decree of foreclosure should not award execution against the specific property, since the law applicable to other cases directed that executions should go against the lands and tenements of defendant. Shepard *v.* Kelly, 2 Fla. 634.

The property of a succession cannot be sold under fieri facias issued on an ordinary judgment, even though the judgment was given to enforce a mortgage and vendor's lien; the creditor must go into the probate court to enforce his rights. Hall *v.* Belden, 29 La. Ann. 118.

of foreclosure orders the sale of specific property, no formal levy on such property is necessary to enable the officer rightfully to proceed with the sale.[11] But in the case of a special execution, the levy is governed by the ordinary rules applicable in such cases.[12] If affidavits filed make it appear doubtful whether the property on which the levy is proposed to be made is the property covered by the mortgage, the levy should be enjoined until a hearing;[13] but after a levy made, it is the duty of the officer to hold the property until the injunction is disposed of.[14]

(v) *Claims of Third Persons.* Where property levied on under an execution on foreclosure of a mortgage is claimed by a third person, the only issue is whether or not the property is subject to the execution, and the claimant cannot attack the decree of foreclosure;[15] but the burden is on the execution creditor to make out a *prima facie* case by showing title, or at least possession, in the mortgagor at the date of the mortgage.[16] Whether, on scire facias on a judgment of foreclosure, a plea of paramount title acquired by defendant after the judgment should be allowed depends on whether it can more conveniently be tried then or afterward.[17]

3. Appeal and Review — a. Decisions Reviewable. A decree or judgment ordering the foreclosure of a mortgage and a sale of the mortgaged property is a final judgment and appealable;[18] and so is a judgment fixing a personal liability on defendant or authorizing execution for a deficiency,[19] or one rendered in a pro-

In **Kentucky** it has been held that a statute (Laws (1828), § 36) which subjects equities of redemption to sale under execution applies only to executions of general creditors and that where the creditor sues and recovers judgment on the debt secured by the mortgage, the execution cannot be levied on the equity of redemption. Swigert *v.* Thomas, 7 Dana (Ky.) 220; Goring *v.* Shreve, 7 Dana (Ky.) 64. And see Bronston *v.* Robinson, 4 B. Mon. (Ky.) 142.

11. Ewing *v.* Hatfield, 17 Ind. 513; Smith *v.* Burnes, 8 Kan. 197; British Columbia Bank *v.* Page, 7 Oreg. 454; State *v.* Moyer, 17 Wash. 643, 50 Pac. 492.

12. Ewing *v.* Hatfield, 17 Ind. 513.

13. Lanier *v.* Adams, 72 Ga. 145.

14. State *v.* Judge Fifth Judicial Dist. Ct., 27 La. Ann. 212.

15. Ray *v.* Atlanta Banking Co., 110 Ga. 305, 35 S. E. 117.

16. Ray *v.* Atlanta Banking Co., 110 Ga. 305, 35 S. E. 117; Morris *v.* Winkles, 88 Ga. 717, 15 S. E. 747; Butt *v.* Maddox, 7 Ga. 495.

17. Clough *v.* Fellows, 63 N. H. 133.

18. *Alabama.*— Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241; Malone *v.* Marriott, 64 Ala. 486.

Illinois.— Burgess *v.* Ruggles, 146 Ill. 506, 34 N. E. 1036; Myers *v.* Manny, 63 Ill. 211; Kronenberger *v.* Heinemann, 104 Ill. App. 156.

Kentucky.— See Tipton *v.* Harris, 82 S. W. 585, 26 Ky. L. Rep. 909.

Louisiana.— Mathe *v.* McCrystal, 11 La. Ann. 4; Dodd *v.* Crain, 6 Rob. 58; Harrod *v.* Voorhis, 16 La. 254.

Maryland.— Robertson *v.* American Homestead Assoc., 10 Md. 397, 69 Am. Dec. 145; Williams *v.* Williams, 7 Gill 302.

Nevada.— Miller *v.* Cberry, 2 Nev. 165.

New York.— Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

North Carolina.— Clement *v.* Ireland, 138 N. C. 136, 50 S. E. 570.

United States.— *In re* Farmers' L. & T. Co., 129 U. S. 206, 9 S. Ct. 265, 32 L. ed. 656; Bronson *v.* La Crosse, etc., R. Co., 2 Black 524, 17 L. ed. 347; Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33.

See 35 Cent. Dig. tit. "Mortgages," § 1647.

But *compare* Watauga Bank *v.* Matson, 95 Tenn. 632, 32 S. W. 627; Fairfax *v.* Muse, 2 Hen. & M. (Va.) 558 note.

In Michigan a bill of review attacking a decree of foreclosure on the ground that it was rendered for fifty dollars too much should be dismissed, the amount being insufficient to give jurisdiction. Sanford *v.* Haines, 71 Mich. 116, 38 N. W. 777.

In Vermont the statute (St. § 981) forbidding appeals to the supreme court in mortgage foreclosure proceedings, except by leave of the court, applies only to mortgages which are such on their face, or are recognized as such by the parties, and not to cases where the character of the instrument is in issue. Herrick *v.* Teachout, 74 Vt. 196, 52 Atl. 432.

Amount unascertained.— A decree of foreclosure is not final in such sense as to be appealable, so long as the amount of the debt to be made by the foreclosure remains undetermined. Grant *v.* Phœnix Mut. L. Ins. Co., 106 U. S. 429, 1 S. Ct. 414, 27 L. ed. 237; North Carolina R. Co. *v.* Swasey, 23 Wall. (U. S.) 405, 23 L. ed. 136.

Decree entered by default reviewable.— Where no rights of third persons have intervened, a bill lies to review a decree of foreclosure entered by default, which, by mistake not apparent on the face of the record, provides for the foreclosing of interests of heirs not parties to the mortgage. Karr *v.* Freeman, 166 Ill. 299, 46 N. E. 717.

19. Vollmer *v.* De Castillo, 74 Cal. 271, 15 Pac. 834; Lenfesty *v.* Coe, 26 Fla. 49, 7 So.

ceeding to vacate a decree of foreclosure,[20] or on a cross bill to have certain of the lands declared free from the lien of the mortgage.[21] On a bill to foreclose a mortgage a finding by the court that the contract was usurious may be reviewed on appeal.[22] Generally an appeal does not lie from orders of the court merely incidental to the main purpose of the bill or merely regulating matters of detail as to its enforcement,[23] nor from decisions on matters which rest in the discretion of the trial court, except where an abuse of such discretion is shown.[24]

b. Right of Appeal. The right of appeal from a foreclosure decree belongs generally to the mortgagee or plaintiff in foreclosure,[25] to the mortgagor or defendant,[26] in case his interests are injuriously affected by the decree,[27] which may happen even where he had parted with the equity of redemption,[28] provided he has not waived or forfeited his right to object or to appeal.[29] This right may be exercised also by a terre-tenant or grantee of the equity of redemption,[30] by another encumbrancer made a party and affected by the decree in respect to the question of the priority of his lien,[31] and generally by any person connected with the suit and who is aggrieved by the decision.[32] And the purchaser at a fore-

2; Pereles *v.* Leiser, 119 Wis. 347, 96 N. W. 799; Kane *v.* Williams, 99 Wis. 65, 74 N. W. 570.

In Nebraska a judgment fixing the personal liability of defendants in a foreclosure suit is not a final adjudication and can be reviewed only after a deficiency judgment has been rendered, and that cannot be rendered until after the sale of the property and report thereon. National L. Ins. Co. *v.* Fitzgerald, 61 Nebr. 692, 85 N. W. 948; Parmele *v.* Schroeder, 61 Nebr. 553, 85 N. W. 562, 87 Am. St. Rep. 466.

20. Morse *v.* Engle, 26 Nebr. 247, 41 N. W. 1098.

21. New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66.

22. Gale *v.* Grannis, 9 Ind. 140. And see Sickles *v.* Flanagan, 79 N. Y. 224.

23. *Alabama.*— Lehman *v.* Comer, 89 Ala. 579, 8 So. 241 (failure to give specific directions to be observed in taking an account); Trammel *v.* Simmons, 8 Ala. 271 (irregularity in ousting a stranger from the possession of the mortgaged premises).

California.— Illinois Trust, etc., Bank *v.* Pacific R. Co., 99 Cal. 407, 33 Pac. 1132.

Illinois.— Cohn *v.* Northwestern Mut. L. Ins. Co., 185 Ill. 340, 57 N. E. 38, fixing the amount of solicitor's fee.

Indiana.— Pouder *v.* Tate, 96 Ind. 330, application for receiver.

Nebraska.— Escritt *v.* Michaleson, (1905) 103 N. W. 300.

New York.— Jenkin *v.* Wild, 14 Wend. 539. See also Central Trust Co. *v.* New York City, etc., R. Co., 42 Hun 602.

Rhode Island.—Angell *v.* Angell, 17 R. I. 581, 23 Atl. 1102, fixing minimum price for the sale of the land.

See 35 Cent. Dig. tit. "Mortgages," § 1647.

24. Ledyard *v.* Phillips, 32 Mich. 13; McCann *v.* Mortgage, etc., Co., 3 N. D. 172, 54 N. W. 1026.

This rule applies to a decision on an application to open or vacate the sale on foreclosure (Judson *v.* O'Connell, 14 N. Y. Suppl. 92; White *v.* Coulter, 1 Hun (N. Y.) 357; Germer *v.* Ensign, 155 Pa. St. 464, 26 Atl. 657), and to a decision as to costs (Morris *v.* Wheeler, 45 N. Y. 708).

25. Goodlett *v.* St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505; Kam *v.* Benjamin, 158 N. Y. 725, 53 N. E. 1126; Inverarity *v.* Stowell, 10 Oreg. 261.

Right of assignee of decree see Cunningham *v.* Doran, 18 Ill. 385.

Right of trustee in trust mortgage see Farmers' L. & T. Co. *v.* Waterman, 106 U. S. 265, 1 S. Ct. 131, 27 L. ed. 115.

26. Bedell *v.* New England Mortg. Security Co., 91 Ala. 325, 8 So. 494.

The heir at law of a deceased mortgagor, who is made a party defendant in the foreclosure suit, may appeal from the final decree therein, although he was not a necessary party, and his pleadings were stricken from the files. Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327.

27. Kraemer *v.* Revalk, 8 Cal. 74; Pope *v.* North, 33 Ill. 440; Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 39, 59 N. W. 822.

28. McCabe *v.* Farnsworth, 27 Mich. 52; Andrews *v.* Stelle, 22 N. J. Eq. 478. But see Ridgley *v.* Abbott Quicksilver Min. Co., (Cal. 1905) 79 Pac. 833; Gandy *v.* Coleman, 196 Ill. 189, 63 N. E. 625.

29. Guaranty Sav. Bank *v.* Butler, 56 Kan. 267, 43 Pac. 229.

Right lost by taking stay of execution.— Ecklund *v.* Willis, 42 Nebr. 737, 60 N. W. 1026.

Right lost by receiving surplus proceeds of sale.— Dreyer *v.* Bigney, 8 Ohio Dec. (Reprint) 562, 9 Cinc. L. Bul. 15. But see Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867.

30. Prevost *v.* Pellerin, 105 La. 589, 30 So. 144; Fleming *v.* Kerkendall, 31 Ohio St. 568; Mutual L. Ins. Co. *v.* Tenan, 188 Pa. St. 239, 41 Atl. 539. But see Coy *v.* Druckamiller, 35 Ind. App. 177, 73 N. E. 195, 921.

31. Wade *v.* Strever, 42 N. Y. App. Div. 330, 59 N. Y. Suppl. 76.

32. Thompson *v.* Campbell, 57 Ala. 183 (a stranger in possession, ousted on a writ of possession at the instance of the foreclosure purchaser, may appeal from the or-

closure sale makes himself a party to the proceedings, by his bid, so far as to entitle him to appeal in respect to any matters thereafter arising and affecting his bid or his rights as a purchaser.[33] But no appeal can be taken by a party against whom no personal relief is decreed and who either disclaims or is shown to have no interest in the premises, or who has been accorded all the relief which he demanded.[34]

c. Objections and Exceptions. Objections to the sufficiency or validity of a mortgage, to plaintiff's right of action thereon, or to the decree of foreclosure, based on any alleged defects, irregularities, or judicial errors, cannot be raised for the first time on appeal; nor will the reviewing court reverse the decree on such grounds unless a proper foundation for its action has been laid by objections seasonably interposed in the court below by demurrer, plea, exceptions, or other proper proceeding.[35] But this rule does not apply where the objection is a total want of equity in plaintiff's case; hence the appellate court may always reverse where the pleadings and proof as a whole show that plaintiff was not entitled to

der); Ruprecht *v.* Henrici, 113 Ill. App. 398; Morse *v.* Holland Trust Co., 84 Ill. App. 84; Parmele *v.* Schroeder, 59 Nebr. 553, 81 N. W. 506 (defendant adjudged personally liable for the deficiency).

33. Lawrence *v.* Jarvis, 36 Mich. 281; Mortimer *v.* Nash, 17 Abb. Pr. (N. Y.) 229 note; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 10 S. Ct. 736, 34 L. ed. 97; Williams *v.* Morgan, 111 U. S. 684, 4 S. Ct. 638, 28 L. ed. 559; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. (U. S.) 655, 17 L. ed. 673. *Compare* Corcoran *v.* Pacific Bldg. Assoc., 8 Ohio Dec. (Reprint) 111, 5 Cinc. L. Bul. 712.

34. *Indiana.*— Sterne *v.* Vert, 108 Ind. 232, 9 N. E. 127.

Kentucky.— Terrill *v.* Jennings, 1 Metc. 450.

Louisiana.— Sompayrac *v.* Hyams, 23 La. Ann. 273.

Nebraska.—Rock *v.* Huff, (1905) 102 N. W. 267; Myers *v.* Mahoney, 43 Nebr. 208, 61 N. W. 580.

Wyoming.— Hinton *v.* Winsor, 2 Wyo. 206.

United States.— Crawshay *v.* Soutter, 6 Wall. 739, 18 L. ed. 845.

See 35 Cent. Dig. tit. "Mortgages," § 1648.

35. *California.*— Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226.

Colorado.— Mills *v.* Angela, 1 Colo. 334.

Connecticut.— Sperry *v.* Butler, 75 Conn. 369, 53 Atl. 899.

Illinois.—Illinois Nat. Bank *v.* School Trustees, 211 Ill. 500, 71 N. E. 1070; Harvey *v.* Dunn, 89 Ill. 585; Irish *v.* Sharp, 89 Ill. 261; Holly *v.* Powell, 63 Ill. 139; Moore *v.* Titman, 33 Ill. 358; Chillicothe Paper Co. *v.* Wheeler, 68 Ill. App. 343.

Indiana.— Loeb *v.* Tinkler, 124 Ind. 331, 24 N. E. 235; Haggerty *v.* Byrne, 75 Ind. 499; Bayless *v.* Glenn, 72 Ind. 5; Bledsoe *v.* Rader, 30 Ind. 354; Thompson *v.* Davis, 29 Ind. 264; Buell *v.* Shuman, 28 Ind. 464; Vanderpool *v.* Brake, 28 Ind. 130; Pattison *v.* Shaw, 6 Ind. 377.

Iowa.— Van Vark *v.* Van Dam, 14 Iowa 232.

Kansas.— Morrill *v.* Seip, 26 Kan. 148.

Maryland.— Rappanier *v.* Bannon, (1887) 8 Atl. 555.

Michigan.— Miller *v.* McLaughlin, 141 Mich. 433, 104 N. W. 780.

Minnesota.— See Gilman *v.* Holyoke, 14 Minn. 138.

Nebraska.— Walker *v.* Fitzgerald, 69 Nebr. 52, 95 N. W. 32; Hawver *v.* Parkway Real Estate Co., 62 Nebr. 504, 87 N. W. 312; Creighton University *v.* Mulvihill, 49 Nebr. 577, 68 N. W. 931; State *v.* Doane, 35 Nebr. 707, 53 N. W. 611; Simpson *v.* Snook, 2 Nebr. (Unoff.) 412, 89 N. W. 168.

New Jersey.— Meader *v.* Cornell, 58 N. J. L. 375, 33 Atl. 960.

New York.— Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932; Helck *v.* Reinheimer, 105 N. Y. 470, 12 N. E. 37; Tibbits *v.* Percy, 24 Barb. 39.

Oklahoma.— Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337.

Oregon.— Rayburn *v.* Davisson, 22 Oreg. 242, 29 Pac. 738.

Pennsylvania.— Garner's Appeal, 1 Walk. 438.

Vermont.— Dunshee *v.* Parmelee, 19 Vt. 172.

Wisconsin.— Richards *v.* Land, etc., Imp. Co., 99 Wis. 625, 75 N. W. 401; Sayre *v.* Langton, 7 Wis. 214.

United States.— Sloan *v.* Mitchell, 72 Fed. 89, 18 C. C. A. 443.

See 35 Cent. Dig. tit. "Mortgages," § 1649.

An objection that the foreclosure decree is for an excessive amount cannot be raised for the first time on appeal. Riverside First Nat. Bank *v.* Holt, 87 Cal. 158, 25 Pac. 272; Haldeman *v.* Massachusetts Mut. L. Ins. Co., 21 Ill. App. 146; Slater *v.* Breese, 36 Mich. 77; Wray *v.* Davenport, 79 Va. 19; Bethel *v.* Robinson, 4 Wash. 446, 30 Pac. 734; Morris *v.* Peck, 73 Wis. 482, 41 N. W. 623; Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

See 35 Cent. Dig. tit. "Mortgages," § 1649.

Defect or want of parties cannot be objected to for the first time on appeal. Dow *v.* Seely, 29 Ill. 495; Green *v.* Gaston, 56 Miss. 748; Lockwood *v.* White, 65 Vt. 466, 26 Atl. 639.

the relief which was granted to him.[36] A correlative rule is that a defendant who has tried the case below on a certain theory, negativing plaintiff's right to recover, cannot, on appeal, abandon that theory and set up a wholly new line of defense.[37]

d. Parties to Appeal. Joint owners of the mortgage debt, or separate owners of parts thereof, should all be parties to an appeal from the decree on foreclosure,[38] and so should joint mortgagors or owners of separate interests in the mortgaged premises,[39] and the mortgagor and his vendee should be joined as parties,[40] and generally, all who are included jointly with the mortgagor in the decree, as lien claimants or otherwise, should be made parties.[41] But when the mortgagor can have no possible interest in the proceeds of sale, or when he cannot be affected one way or the other by the decision on appeal, as, in a contest as to priority of liens, he is not a necessary party;[42] and on the other hand he may appeal alone, when junior lienors are so situated with reference to the suit as not to be affected by the result.[43] Generally one is not a necessary party to the appeal who has a separable and distinct interest in the subject-matter, not to be affected by the determination of the specific questions raised by the appeal.[44]

e. Taking and Perfecting Appeal. A bill in equity may be maintained to review or reverse a decree of foreclosure, but not after it has been executed by sale of the premises.[45] In regard to the more usual process of appeal or error, the various steps necessary are the same as in any other chancery suit, and are generally regulated by statute, in respect to such matters as the time within which

36. *California.*—Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891.

Illinois.—Atwood *v.* Whittemore, 94 Ill. App. 294.

Maryland.— Evans *v.* Iglehart, 6 Gill & J. 171.

Mississippi.— West Feliciana R. Co. *v.* Stockett, 27 Miss. 739.

Oregon.— See Schmidt *v.* Oregon Gold Min. Co., 28 Oreg. 9, 40 Pac. 406, 1014, 52 Am. St. Rep. 759.

See 35 Cent. Dig. tit. "Mortgages," § 1649.

37. Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130.

38. See Pickersgill *v.* Read, 7 Hun (N. Y.) 636.

39. De Arnaz *v.* Jaynes, (Cal. 1893) 34 Pac. 223; Jones *v.* Quantrell, 2 Ida. (Hasb.) 153, 9 Pac. 418.

40. *California.*— Barnhart *v.* Edwards, 111 Cal. 428, 44 Pac. 160.

Kansas.— Huston *v.* Pratt, (1900) 62 Pac. 319; Brady *v.* Corbett, 4 Kan. App. 234, 45 Pac. 969.

Nebraska.— Blake *v.* McMurtry, 25 Nebr. 290, 41 N. W. 172.

Wisconsin.— Baasen *v.* Eilers, 11 Wis. 277, holding that a purchaser of the mortgaged property *pendente lite* has no such interest in the subject-matter as will enable him to insist on an appeal against the will of the mortgagor.

United States.— Nash *v.* Harshman, 149 U. S. 263, 13 S. Ct. 845, 37 L. ed. 727.

See 35 Cent. Dig. tit. "Mortgages," § 1650.

41. *California.*— Porter *v.* Lassen County Land, etc., Co., (1898) 55 Pac. 395.

Indiana.— Hunderlock *v.* Dundee Mortg., etc., Inv. Co., 88 Ind. 139; Spahr *v.* Dickson, 67 Ind. 394.

Kansas.— Crippen *v.* Freeland, (1896) 44 Pac. 1052; Thompson *v.* Searle, 7 Kan. App. 494, 54 Pac. 142.

New York.— Simonson *v.* Lauck, 105 N. Y. App. Div. 82, 93 N. Y. Suppl. 965.

Oregon.— Moody *v.* Miller, 24 Oreg. 179, 33 Pac. 402.

See 35 Cent. Dig. tit. "Mortgages," § 1650.

42. Iona Sav. Bank *v.* Blair, 56 Kan. 430, 43 Pac. 686; Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3.

43. Bedell *v.* New England Mortg. Security Co., 91 Ala. 325, 8 So. 494; Chandler *v.* Parsons, 100 Mich. 313, 58 N. W. 1011; Norwich, etc., R. Co. *v.* Johnson, 15 Wall. (U. S.) 8, 21 L. ed. 118; Brewster *v.* Wakefield, 22 How. (U. S.) 118, 16 L. ed. 301.

44. Lemert *v.* Robinson, 7 Kan. App. 756, 53 Pac. 485 (holding that parties to a foreclosure suit, who are served by publication and make default, being only barred of any right in the premises, are not necessary parties to a suit in the appellate court between the mortgagee and defendants who claim the premises); Barger *v.* Taylor, 30 Oreg. 228, 42 Pac. 615, 47 Pac. 618 (holding that, although in a foreclosure suit the contract is found to be usurious and judgment is accordingly given for the state for the use of the school fund, the state does not thereby become a party to the action so as to be a necessary party to an appeal); Crowns *v.* Forest Land Co., 99 Wis. 103, 74 N. W. 546 (holding that the purchaser at foreclosure sale, whose title has become absolute by confirmation, if a stranger to the record, is not an adverse party such that notice of appeal must be served on him); Gray *v.* Havemeyer, 53 Fed. 174, 3 C. C. A. 497. And see Shirley *v.* Birch, 16 Oreg. 1, 18 Pac. 344.

45. Dunn *v.* Rodgers, 43 Ill. 260; Burley *v.* Flint, 105 U. S. 247, 26 L. ed. 986.

the appeal must be entered or perfected,[46] notice of the appeal and its service on parties in interest,[47] and the supersedeas or stay bond.[48]

f. Supersedeas, Stay of Proceedings, and Effect of Appeal. Unless the appeal itself operates to stay further proceedings in the action,[49] or a good and sufficient bond is given, conditioned as the statute directs,[50] the pendency of the appeal will not prevent the execution of the decree by sale of the premises,[51] the making of a deed to the purchaser,[52] the distribution to those entitled of the proceeds of

46. See the statutes of the different states. And see the following cases:

Arkansas.— Cooper *v.* Ryan, 73 Ark. 37, 83 S. W. 328.

Louisiana.— State *v.* Judge Second Dist. Ct., 16 La. Ann. 390; Lombas *v.* Robicnaux, 14 La. Ann. 105.

Nebraska.— Cox *v.* Parrotte, 59 Nebr. 701, 82 N. W. 7.

Wisconsin.— Pereles *v.* Leiser, 123 Wis. 233, 101 N. W. 413.

United States.— Duncan *v.* Atlantic, etc., R. Co., 88 Fed. 840, 4 Hughes 125.

See 35 Cent. Dig. tit. "Mortgages," § 1651.

Appeal before sale premature.— An appeal by complainant in foreclosure, before the land is sold, is premature. Watauga Bank *v.* Matson, 95 Tenn. 632, 32 S. W. 627.

47. See the statutes of the different states. And see Bair *v.* Watkins, 130 Cal. 540, 62 Pac. 929; Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; Lenfesty *v.* Coe, 26 Fla. 49, 7 So. 2; Power *v.* Murphy, 26 Mont. 327, 68 Pac. 411; Hinchman *v.* Point Defiance R. Co., 14 Wash. 171, 44 Pac. 152.

48. See the statutes of the different states. And see Wheeler *v.* Karnes, 130 Cal. 618, 63 Pac. 62; State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210; Rondout Nat. Bank *v.* McGahan, 45 Fed. 280; Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609.

49. See Kaminisky *v.* Trantham, 45 S. C. 8, 22 S. E. 746.

Dismissal of appeal operating as stay.—An appeal from a decree of sale, recognizing the priority of a mortgagee's lien, taken so as to operate as a stay, can only be dismissed on application to the chancellor. Westervelt *v.* Haff, 4 Edw. (N. Y.) 619.

50. See the statutes of the different states. And see Westerfield *v.* South Omaha Loan, etc., Assoc., (Nebr. 1906) 107 N. W. 1010, (1905) 105 N. W. 1087; Muckenfuss *v.* Fishburne, 68 S. C. 41, 46 S. E. 537; Charleston *v.* Caulfield, 19 S. C. 201.

Sufficiency of bond or undertaking.— *California.*— To stay proceedings, appellant must give a bond conditioned that, during the possession of the property by him, he will not commit waste, and that, if the decree is affirmed and the appeal dismissed, he will pay the value of the occupation of the premises until delivery thereof, and also that he will pay any deficiency arising on the mortgage sale. Wheeler *v.* Karnes, 130 Cal. 618, 63 Pac. 62; Gutzeit *v.* Pennie, 97 Cal. 484, 32 Pac. 584; Johnson *v.* King, 91 Cal. 307, 27 Pac. 644. But this does not apply to an appeal by a mortgagee from a judgment declaring the lien of the mortgage subordinate to that of a mechanic's lien. Pacific Mut. L. Ins. Co. *v.* Fisher, (1893) 35 Pac. 77.

Nebraska.— See Walker *v.* Fitzgerald, 69 Nebr. 52, 95 N. W. 32; Collins *v.* Brown, 64 Nebr. 173, 89 N. W. 754; State *v.* Thiele, 19 Nebr. 220, 27 N. W. 109.

New York.— The appellant has his election to give an undertaking conditioned against waste and to pay for use and occupation, or to pay any deficiency which may occur on the foreclosure sale, either being sufficient. Werner *v.* Tuch, 119 N. Y. 632, 23 N. E. 573; Grow *v.* Garlock, 29 Hun 598; Horton *v.* Childs, 19 N. Y. Civ. Proc. 103, 11 N. Y. Suppl. 797; Grow *v.* Snell, 4 N. Y. Civ. Proc. 334. But the ordinary stay bond, conditioned to pay the sum recovered if the appeal is affirmed, is not sufficient in a foreclosure suit (Grow *v.* Snell, *supra*), except in cases where the appellant has surrendered the possession and is not liable for any deficiency, in which case the special rule does not apply (Rosenbaum *v.* Tobler, 31 N. Y. App. Div. 312, 53 N. Y. Suppl 722; Mutual L. Ins. Co. *v.* Robinson, 23 Misc. 563, 52 N. Y. Suppl. 795).

Ohio.— The appeal-bond must be conditioned against waste, for the value of the use and occupation, and also for the payment of the deficiency. Ackerman *v.* Lazarus, 34 Ohio St. 671.

Pennsylvania.— A practice having grown up in the office of the prothonotary of the supreme court to treat a judgment, on a scire facias sur mortgage, as requiring the entry of bail, on taking a writ of error, for an amount sufficient to cover costs only, that practice has been sanctioned by the supreme court, although the act of 1836 declares that execution shall not be stayed unless plaintiff, with sufficient sureties, becomes bound to pay the debt, damages, and costs, if the debt be affirmed. Shrader *v.* Burr, 31 Leg. Int. 405.

South Carolina.— See McLemore *v.* Powell, 32 S. C. 582, 10 S. E. 550, 827.

Wisconsin.— The bond must be conditioned against waste and for the value of the use of the property pending the appeal. Pierce *v.* Kneeland, 7 Wis. 224.

United States.—A bond conditioned simply to pay costs and damages does not operate to stay a sale of the mortgaged premises. Orchard *v.* Hughes, 1 Wall. 73, 17 L. ed. 560. And see Clark *v.* Patton, 93 Fed. 342.

See 35 Cent. Dig. tit. "Mortgages," §§ 1651, 1652.

51. Home Loan Assoc. *v.* Wilkins, 64 Cal. 379, 1 Pac. 348; State *v.* Thiele, 19 Nebr. 220, 27 N. W. 109; Phœnix Mills *v.* Miller, 12 N. Y. Suppl. 268.

52. Union Mut. L. Ins. Co. *v.* Windett, 36 Fed. 838.

sale,[53] or any other proceedings appropriate at that stage of the cause,[54] although it has been held that the foreclosure purchaser should not be put into possession pending an appeal from the confirmation of the sale.[55]

g. Record on Appeal. The action of the appellate court must be based on the record, and in cases where it is silent or incomplete, a presumption will be indulged in favor of the validity and regularity of the proceedings taken below.[56] But no such presumption can be indulged in the face of explicit recitals in the record.[57]

h. Hearing. Where there are several defendants before the court on appeal, neither will be heard to present objections to the judgment which are personal to the other; nor, if their interests are separable, will a reversal or modification of the judgment be ordered as to one on an appeal by the other alone.[58] Generally missing proof cannot be supplied at the hearing on appeal.[59]

i. Scope and Mode of Review. Generally the appeal brings up nothing but errors legally assigned, and the review will be restricted to the specific questions thus pointed out and designated for review.[60] Thus the regularity or validity of

53. O'Donnell *v.* Rorer, 14 Montg. Co. Rep. (Pa.) 51.

54. Anderson Bldg., etc., Assoc. *v.* Thompson, 87 Ind. 278 (holding that the pendency of an appeal does not prevent the clerk from satisfying the mortgage of record in pursuance of an order of court); Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766 (holding that an order appointing a receiver of real property in aid of a foreclosure proceeding cannot be superseded as a matter of right pending an appeal therefrom); Hey *v.* Schooley, 7 Ohio, Pt. II, 48 (holding that a decree for the sale of mortgaged premises is not opened by an appeal from a subsequent decree confirming the sale).

55. Le Conte *v.* Irwin, 23 S. C. 106.

56. *California.*— Grewell *v.* Henderson, 7 Cal. 290.

Connecticut.— Matz *v.* Arick, 76 Conn. 388, 56 Atl. 630.

District of Columbia.— Hunt *v.* Whitehead, 19 App. Cas. 116.

Illinois.— Illinois Nat. Bank *v.* School Trustees, 211 Ill. 500, 71 N. E. 1070. *Compare* Mulvey *v.* Johnson, 90 Ill. 457.

Indiana.—Adams *v.* Laugel, 144 Ind. 608, 42 N. E. 1017. *Compare* Greenman *v.* Pattison, 8 Blackf. 465.

Iowa.— Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601.

Louisiana.—See Pele *v.* Meaux, 17 La. Ann. 58.

Minnesota.— Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 69, 59 N. W. 829.

Nebraska.— Wright *v.* Stevens, 55 Nebr. 676, 76 N. W. 441; Brown *v.* Fitzpatrick, 49 Nebr. 575, 68 N. W. 937; National L. Ins. Co. *v.* Crandall, 2 Nebr. (Unoff.) 335, 96 N. W. 624; Clark *v.* Wolf, 2 Nebr. (Unoff.) 290, 96 N. W. 495; Kingsley *v.* Svoboda, 2 Nebr. (Unoff.) 234, 96 N. W. 518; Hartsuff *v.* Huss, 2 Nebr. (Unoff.) 145, 95 N. W. 1070.

New York.— Bond *v.* Bond, 51 Hun 507, 4 N. Y. Suppl. 569; Card *v.* Bird, 10 Paige 426.

Wisconsin.— Manning *v.* McClurg, 14 Wis. 350.

See 35 Cent. Dig. tit. "Mortgages," § 1653.

As to what the record should contain see Jackson *v.* Grosser, 218 Ill. 494, 75 N. E. 1032; Union Trust Co. *v.* Cain, 29 Pa. Super. Ct. 197.

57. Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

58. *California.*— Malone *v.* Bosch, 104 Cal. 680, 38 Pac. 516; Bryan *v.* Maume, 28 Cal. 238.

Illinois.— Primley *v.* Shirk, 163 Ill. 389, 45 N. E. 247; Brown *v.* Miner, 128 Ill. 148, 21 N. E. 223; Short *v.* Raub, 81 Ill. 509.

Louisiana.— Crocker *v.* Williamson, 8 La. 216; Herman *v.* Smith, 7 Mart. (N. S.) 676.

Michigan.— Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130; Martin *v.* McReynolds, 6 Mich. 70.

Texas.— Cook *v.* Steel, 42 Tex. 53.

Washington.— Wortman *v.* Vorhies, 14 Wash. 152, 44 Pac. 129.

See 35 Cent. Dig. tit. "Mortgages," § 1654.

59. Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589, holding that where a foreclosure decree is for too large an amount, the error cannot be cured on appeal by filing in the appellate court evidence that the mortgage has been satisfied. See, however, Gillam *v.* Barnes, 123 Mich. 119, 82 N. W. 38, holding that where the mortgagee fails at the trial to produce the notes secured by the mortgage, an objection to the decree on that ground will be obviated on appeal by the production and filing of the notes in the supreme court.

60. *Illinois.*— Thomson *v.* Black, 208 Ill. 229, 70 N. E. 318; Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Freeman *v.* Freeman, 66 Ill. 53.

Iowa.—Docterman *v.* Webster, 15 Iowa 522; Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; Coe *v.* Winters, 15 Iowa 481. But *compare* Bailey *v.* Londingham, 53 Iowa 722, 6 N. W. 76.

Michigan.— Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285.

Minnesota.— Dodge *v.* Allis, 27 Minn. 376, 7 N. W. 732.

New York.— Read *v.* Knell, 143 N. Y. 484, 39 N. E. 4.

Texas.— Bullock *v.* Hayter, 24 Tex. 9.

the foreclosure decree cannot be inquired into on an appeal merely from an order confirming the sale made under it,[61] nor on appeal from an order directing the distribution of the proceeds of the sale.[62] Neither will the appellate court take into consideration questions which were not involved in the trial below nor adjudicated by the decree appealed from,[63] nor such alleged errors as are harmless,[64] or have been waived or acquiesced in by the parties concerned,[65] or rendered immaterial by events arising in the execution of the decree,[66] nor decisions on points resting wholly in the discretion of the court below, unless an abuse of such discretion is shown.[67] And where questions of fact are involved, the finding or decision of the court below will not be disturbed on appeal unless wholly unsupported by or manifestly against the weight of the evidence.[68]

j. Determination and Disposition of Cause. The disposition to be made of the cause on the determination of the appeal varies with the particular circumstances. If the decision appealed from is wholly wrong, it must be reversed,[69] although this action will not be taken on account of mere irregularities or where

Wisconsin.— Latimer *v.* Morrain, 43 Wis. 107; Landon *v.* Burke, 33 Wis. 452. Error in the rendition of a personal judgment in an action for the foreclosure of a mortgage cannot affect the judgment of foreclosure and can be reached only by an appeal from it exclusively, as a part of the judgment of foreclosure, or as a separate judgment, and not on appeal from the whole judgment. Boynton *v.* Sisson, 56 Wis. 401, 14 N. W. 373.

United States.— Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

See 35 Cent. Dig. tit. "Mortgages," § 1655.

But *compare* Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241; Stenger *v.* Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211.

61. Grass Lake Farmers' Bank *v.* Quick, 71 Mich. 534, 39 N. W. 752, 15 Am. St. Rep. 280; Thompson *v.* Purcell, 63 Nebr. 445, 88 N. W. 778; Beck *v.* McKibben, 63 Nebr. 431, 88 N. W. 765; Tichy *v.* Simecek, 5 Nebr. (Unoff.) 81, 97 N. W. 323; Nebraska L. & T. Co. *v.* Dickerson, 1 Nebr. (Unoff.) 622, 95 N. W. 774.

62. Scott *v.* Hurley, 6 Ariz. 85, 53 Pac. 578; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 10 S. Ct. 736, 34 L. ed. 97.

63. Reid *v.* McMillan, 189 Ill. 411, 59 N. E. 948; Morris *v.* Linton, 61 Nebr. 537, 85 N. W. 565. And see Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513.

64. Sawtelle *v.* Muncy, 116 Cal. 435, 48 Pac. 387; Jacobs *v.* Turpin, 83 Ill. 424; Swenney *v.* Hill, 69 Kan. 868, 77 Pac. 696.

Right decision for wrong reason. — The mere fact that the trial court, in refusing to appoint a receiver in a foreclosure case, based its decision on a wrong reason is not reversible error, when in fact the result arrived at was correct. National F. Ins. Co. *v.* Broadbent, 77 Minn. 175, 79 N. W. 676.

65. Nelson *v.* Jacobs, 99 Wis. 547, 75 N. W. 406.

66. Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60, holding that where a decree was entered fixing the priority of five lien-holders, but the property sold for only enough to satisfy the first two, the decision as to the relative rights of the holders of the fourth and fifth liens would not be reviewed on appeal. But *compare* Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350, holding that the fact that a sale has already been made pursuant to a foreclosure decree, which was erroneous in adjudging the whole debt to be due, should not prevent its reversal, the error being substantial, and the appellate court not being in position to determine the *bona fides* of the sale.

67. Ogden *v.* Packard, (Cal. 1894) 35 Pac. 642; Wood *v.* Grayson, 22 App. Cas. (D. C.) 432; Healy *v.* Protection Mut. F. Ins. Co., 213 Ill. 99, 72 N. E. 678; Miller *v.* Trudgeon, 16 Okla. 337, 86 Pac. 523.

68. *California.*— Connick *v.* Hill, 127 Cal. 162, 59 Pac. 832; Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Idaho.— Montandon *v.* Wingert, 5 Ida. 185, 47 Pac. 814.

Iowa.— Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228.

Nebraska.— White *v.* Rourke, 11 Nebr. 519, 9 N. W. 689.

New York.— Traphagen *v.* Donihee, 28 N. Y. App. Div. 627, 51 N. Y. Suppl. 261; Marvin *v.* Inglis, 39 How. Pr. 329.

Ohio.— Niles *v.* Parks, 49 Ohio St. 370, 34 N. E. 735.

South Carolina.—Alexander *v.* Messervey, 35 S. C. 409, 14 S. E. 854; Aultman *v.* Utsey, 34 S. C. 559, 13 S. E. 848.

Wisconsin.— Lace *v.* Schoenhalss, 93 Wis. 665, 68 N. W. 395.

Wyoming.— Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726.

United States.— Fowler *v.* Equitable Trust Co., 141 U. S. 411, 12 S. Ct. 8, 35 L. ed. 794.

69. Sullivan *v.* Whisler, 16 Ind. 200.

Different terms of sale fixed after reversal. — After a judgment of foreclosure is reversed on the ground that it includes usury, the trial court, in reëntering judgment, may fix different terms of sale. Morgan *v.* Wickliffe, 70 S. W. 680, 24 Ky. L. Rep. 1039.

it is possible to sustain the decree as a whole.[70] Where it is possible to cure the errors determined by modifying the decree, the appellate court may add to or deduct from its amount, or otherwise alter it so as to make it conform to the law and the equities of the case,[71] or it may be remanded to the court below for further proceedings necessary to correct errors or fix the rights of parties in accordance with the opinion,[72] or with directions to enter a judgment in conformity with the decision of the appellate court,[73] or the latter court may, in certain circumstances, itself give a wholly new judgment.[74] Where the judgment is found to be free from substantial errors, it should of course be affirmed and the appeal dismissed, and this is also the course where the appellant is found to have no interest entitling him to maintain the appeal.[75] In case of joint defendants, where one procures the reversal of the judgment on grounds equally affecting them all, it should be reversed as to all.[76] Where a sale has already been made under the judgment, a reversal will generally make the sale voidable at the instance of the appellant, saving the rights of a purchaser in good faith.[77] And a sale may be avoided by the decision on appeal, where the decree is modified in respect to the manner of the sale.[78]

H. Sale — 1. Proceedings Preliminary to Sale — a. Judgment or Decree and Order of Sale. A sale on foreclosure must be supported and authorized by a valid judgment or decree of a competent court, ordering the sale to be made, and giving sufficient directions for its execution,[79] which in some states constitutes the sufficient and only necessary authority to the officer or master or commissioner

70. *California.*— Ukiah Bank *v.* Reed, 131 Cal. 597, 63 Pac. 921.

Florida.— McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

Mississippi.— Terry *v.* Woods, 6 Sm. & M. 139, 45 Am. Dec. 274.

Nebraska.— Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753; Gray *v.* Naiman, 2 Nebr. (Unoff.) 196, 96 N. W. 343.

New York.— House *v.* Eisenlord, 102 N. Y. 713, 7 N. E. 428; Catlin *v.* Grissler, 57 N. Y. 363. On appeal from an order setting aside a foreclosure sale, the court will not reverse the order except in a very strong case. Mortimer *v.* Nash, 17 Abb. Pr. 229 note.

See 35 Cent. Dig. tit. "Mortgages," § 1656.

71. Roby *v.* Chicago Title, etc., Co., 194 Ill. 228, 62 N. E. 544; Hardwick *v.* Bassett, 29 Mich. 17; Dunn *v.* Dunn, 99 Tenn. 598, 42 S. W. 259. See also San Francisco Sav. Union *v.* Myers, 76 Cal. 624, 18 Pac. 686.

72. *Iowa.*— Kilmer *v.* Gallaher, 116 Iowa 666, 88 N. W. 959.

Kansas.— Swenney *v.* Hill, 69 Kan. 868, 77 Pac. 696; Cooper *v.* Haythorn, 66 Kan. 91, 71 Pac. 277.

Maryland.— Fitzhugh *v.* McPherson, 9 Gill & J. 51.

Michigan.— Holliday *v.* Snow, 129 Mich. 494, 89 N. W. 443.

New York.— Germania L. Ins. Co. *v.* Rae, 99 N. Y. 674, 2 N. E. 152.

See 35 Cent. Dig. tit. "Mortgages," § 1656.

73. Cowdery *v.* London, etc., Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. Rep. 115; Walsh *v.* Hyland, (Cal. 1898) 54 Pac. 148; Glover *v.* Benjamin, 73 Ill. 42; Sallee *v.* Morgan, 67 Ill. 376; Thompson *v.* Hoagland, 65 Ill. 310; Tanguay *v.* Felthousen, 45 Wis. 30.

74. See Bowles *v.* Hoard, 71 Mich. 150, 39 N. W. 24; Henne *v.* Moultrie, (Tex. Civ. App. 1904) 78 S. W. 11; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. (U. S.) 655, 17 L. ed. 673.

75. Chadron Loan, etc., Assoc. *v.* Hayes, 4 Nebr. (Unoff.) 685, 95 N. W. 868; Hoag *v.* Hatch, 1 Silv. Sup. (N. Y.) 534, 5 N. Y. Suppl. 524; Ætna L. Ins. Co. *v.* McCormick, 20 Wis. 265. And see Evans *v.* Wilmer, 210 Pa. St. 624, 60 Atl. 312.

76. Kopmeier *v.* Larkin, 47 Wis. 598, 3 N. W. 373. See also Hemphill *v.* Pry, 188 Pa. St. 243, 41 Atl. 530.

77. *California.*— Cowdery *v.* London, etc., Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115.

New York.— Hidden *v.* Godfrey, 92 N. Y. App. Div. 373, 87 N. Y. Suppl. 14.

Tennessee.— Hughes Bros. Mfg. Co. *v.* Conyers, 97 Tenn. 274, 36 S. W. 1093.

Washington.— Hinchman *v.* Point Defiance R. Co., 17 Wash. 399, 49 Pac. 1061.

United States.— Hubinger *v.* New York Cent. Trust Co., 94 Fed. 788, 36 C. C. A. 494.

78. Abernathy *v.* Moses, 73 Ala. 381. See also State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936.

79. *California.*— Granger *v.* Sheriff, 140 Cal. 190, 73 Pac. 816; Van Loben Sels *v.* Bunnell, 131 Cal. 489, 63 Pac. 773.

District of Columbia.— Wood *v.* Grayson, 22 App. Cas. 432.

Illinois.— Wattson *v.* Jones, 101 Ill. App. 572.

Indiana.— Elston *v.* Piggott, 94 Ind. 14.

Kentucky.— James *v.* Webb, 71 S. W. 526, 24 Ky. L. Rep. 1382; Lebus *v.* Slade, 71 S. W. 510, 24 Ky. L. Rep. 1325; Kincheloe *v.* McCane, 3 S. W. 3, 8 Ky. L. Rep. 693. Where a trust deed, made to secure a debt, provides for a sale and directs the mode of advertising and place of sale, a decree directing a sale at a different place and a different mode of

making the sale,[80] and by which his authority is strictly limited.[81] But in some states the practice is for the officer to act under an order of sale which is in the nature of a special writ or process based on the decree, and which issues from the clerk's office as of course, on failure of defendant to pay the amount of the decree within the time limited, and on direction of plaintiff or owner of the decree,[82] and, if so required by law, on the filing of an affidavit or sworn statement of non-payment and of the amount due.[83] But since the sale is by virtue of the decree and not of the order, and the decree, and not the order, is the officer's authority and warrant to proceed,[84] it follows that the sale is not invalidated by defects in the order, such as the want of a proper signature or a seal,[85] or by other irregularities;[86] and hence also if the sale is made in conformity with the decree, it will be confirmed, although not made strictly in accordance with the specific directions of the order.[87] In some other states process for the enforcement of the decree takes the form of a special execution against the mortgaged property or a special fieri facias.[88]

advertising is erroneous. Campbell *v.* Johnston, 4 Dana 177.

Virginia.— Kyger *v.* Sipe, 89 Va. 507, 16 S. E. 627; Michie *v.* Jeffries, 21 Gratt. 334.

West Virginia.— Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

United States.— Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

See 35 Cent. Dig. tit. "Mortgages," § 1489.

Property of decedent's estate.— A statute relating to the estates of deceased persons, and which provides that "no sale of property of an estate shall be valid unless made under order of the probate court" applies only to sales made by executors or administrators, and does not refer to sales under judicial decrees of the district courts. Cowell *v.* Buckelew, 14 Cal. 640. But *compare* Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486.

80. Kelly *v.* Israel, 11 Paige (N. Y.) 147.

81. Miller *v.* Kolb, 47 Ind. 220; Citizens' Bank *v.* Cuny, 38 La. Ann. 360.

Mistake as to meaning of decree.— A marshal's sale, in proceedings to foreclose a mortgage, is not valid when made under a wrong interpretation of an order of court, even where the court confirmed the record of the sale, the attention of the court not being called to the mistake, nor any issue raised as to what the order really meant. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 609, 17 L. ed. 886.

82. Cuyler *v.* Lilly, 65 Nebr. 507, 91 N. W. 391; State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; Walker *v.* Walker, 17 S. C. 329.

Necessity for direction of plaintiff.— After a decree of foreclosure, the clerk should not issue an order of sale without plaintiff's direction; but if he does a *bona fide* purchaser at the sale, without notice, will not be affected by the error. Sowles *v.* Harvey, 20 Ind. 217, 83 Am. Dec. 315.

Death of plaintiff.— As to the necessity of a revivor after the death of plaintiff in the decree as preliminary to an order of sale see Cowell *v.* Buckelew, 14 Cal. 640; Havens *v.* Pope, 10 Kan. App. 305, 62 Pac. 540; Moore *v.* Ogden, 35 Ohio St. 430.

Assignment of decree.— An objection that the order and notice of sale made no mention of an assignment of the decree is not available, in the absence of any showing of prejudice. MacLagan *v.* Witte, 1 Nebr. (Unoff.) 438, 96 N. W. 490.

83. See the statutes of the different states. And see Brooks *v.* Hays, 24 Md. 507; People *v.* Becker, 20 N. Y. 354.

84. Mead *v.* Hoover, 63 Nebr. 419, 88 N. W. 655; Salisbury *v.* Murphy, 63 Nebr. 415, 88 N. W. 764; Young *v.* Wood, 63 Nebr. 291, 88 N. W. 528; Gooding *v.* Ransom, 63 Nebr. 78, 88 N. W. 169; Bristol Sav. Bank *v.* Field, 57 Nebr. 670, 78 N. W. 254, 73 Am. St. Rep. 539; Wagenknecht *v.* Seeley, 55 Nebr. 769, 76 N. W. 473; McKinney *v.* Glassburn, 2 Nebr. (Unoff.) 615, 89 N. W. 598.

85. Hager *v.* Astorg, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68; Spaulding *v.* Howard, 121 Cal. 194, 53 Pac. 563; Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213; Passumpsic Sav. Bank *v.* Maulick, 60 Nebr. 469, 83 N. W. 672, 83 Am. St. Rep. 539; Wheldon *v.* Cornett, 4 Nebr. (Unoff.) 421, 94 N. W. 626.

86. Cross *v.* Knox, 32 Kan. 725, 5 Pac. 32; Cuyler *v.* Lilly, 65 Nebr. 507, 91 N. W. 391; Mead *v.* Hoover, 63 Nebr. 419, 88 N. W. 655; Lamson *v.* Bohrer, 63 Nebr. 105, 88 N. W. 161; Gooding *v.* Ransom, 63 Nebr. 78, 88 N. W. 169; Wilson *v.* Neu, 4 Nebr. (Unoff.) 348, 93 N. W. 941; Colony *v.* Billingsley, 2 Nebr. (Unoff.) 670, 89 N. W. 744; Rutland Sav. Bank *v.* O'Bryan, 2 Nebr. (Unoff.) 519, 89 N. W. 377; Tootle *v.* Willy, 1 Nebr. (Unoff.) 711, 96 N. W. 342.

Order issued in another county.— Where a mortgage foreclosure decree was entered in the county in which the mortgaged premises were situated, the fact that the order directing the sale thereof was passed in another county did not invalidate it. Lipscomb *v.* Hammett, 56 S. C. 549, 35 S. E. 194. *Compare* Farmers', etc., Bank *v.* Luther, 14 Wis. 96.

87. National Bank of Commerce *v.* Kinkead, 61 Nebr. 264, 85 N. W. 70; Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313.

88. *Illinois.*— Sidwell *v.* Schumacher, 99 Ill. 426; Karnes *v.* Harper, 48 Ill. 527.

Iowa.— International Trust Co. *v.* Keokuk

b. Injunction or Stay of Sale — (i) *In General.* A sale to be made under a decree of foreclosure may be enjoined[89] when it would operate as a fraud upon the rights of the mortgagor or third parties,[90] or when the complainant is seeking to make an unconscionable or oppressive use of his decree or to enforce it in violation of his agreement,[91] or generally, when the sale would work an irreparable injury to the just rights of the applicant.[92] And although matters which might have been pleaded in defense to the foreclosure suit would appear to constitute no sufficient reason for enjoining the sale,[93] it has been held that this relief may be granted where there was a total want of consideration for the mortgage,[94] where defendant's liability under it has been released or discharged,[95] or where the decree is for an excessive amount, or includes usury, at least on defendant's tendering the sum justly due.[96] An injunction may be granted to prevent the sale of land not included in the mortgage or in the decree.[97] But as a rule it will

Electric St. R., etc., Co., 90 Iowa 90, 57 N. W. 712; Bevans *v.* Dewey, 82 Iowa 85, 47 N. W. 1009.

Louisiana.— Chase *v.* New Orleans Gas Light Co., 45 La. Ann. 300, 12 So. 308; Levy *v.* Lake, 43 La. Ann. 1034, 10 So. 375; Watson *v.* Bondurant, 21 Wall. (U. S.) 123, 22 L. ed. 509.

Missouri.— Lord *v.* Johnson, 102 Mo. 680, 15 S. W. 73.

Texas.— Thompson *v.* Jones, (1889) 12 S. W. 77.

See 35 Cent. Dig. tit. "Mortgages," § 1489.

89. Powell *v.* Lemoore Bank, 125 Cal. 468, 58 Pac. 83, holding that where an injunction restraining the sale of property under a trust deed was obtained by false allegations, complainant cannot subsequently attack the sale on the ground that it was made in violation of the injunction.

90. Struve *v.* Childs, 63 Ala. 473; Rau *v.* Katz, 26 La. Ann. 463; Conkey *v.* Dike, 17 Minn. 457.

91. Security Loan Assoc. *v.* Lake, 69 Ala. 456; Eaton *v.* Eaton, 68 Mich. 158, 36 N. W. 50; Frost *v.* Myrick, 1 Barb. (N. Y.) 362; Foster *v.* Hughes, 51 How. Pr. (N. Y.) 20; Van Wagenen *v.* La Farge, 13 How. Pr. (N. Y.) 16; Goodwin *v.* Williams, 5 Grant Ch. (U. C.) 178. *Compare* Buell *v.* San Francisco Sav. Union, 65 Cal. 292, 4 Pac. 14, holding that, where parties to a judgment of foreclosure agree as to the time and manner of enforcing it, an injunction will not lie to restrain a sale contrary to the agreement, since the court granting the decree has power to control the writ. But see McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11.

92. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,433, 3 Woods 674, holding that an injunction will not be refused in a proper case, merely because a favorable chance to sell the property may be lost by delay, where the sale would entirely destroy complainant's rights.

Where a tenant in common has mortgaged the entire estate, and such mortgage has been foreclosed, equity may enjoin a sale until after a partition, especially where the mortgagor is insolvent. Arnett *v.* Munnerlyn, 71 Ga. 14; Hines *v.* Munnerlyn, 57 Ga. 32.

A sale under a mortgage given by a married woman should be enjoined until a hear-

ing as to her power to execute it. Strom *v.* American Freehold Land Mortg. Co., 42 S. C. 97, 20 S. E. 16.

An injunction will be refused where complainant has an adequate remedy at law, by proceedings to set aside an illegal mortgage. Gatewood *v.* Macon City Bank, 49 Ga. 45. And it is no ground for enjoining the sale that the property is subject to the support of the mortgagor's mother during her life, if the sale is to be made subject to her rights. Colquitt *v.* Tarver, 45 Ga. 631. Nor can the sale be enjoined merely because a second master was appointed to make it, in place of the one named in the decree and who died, without notice to the mortgagor (Merritt *v.* Daffin, 24 Fla. 320, 4 So. 806); nor on a merely gratuitous assumption that the sheriff will subsequently misinterpret or violate the law applicable to such sales (Gordon *v.* Bodwell, 55 Kan. 131, 39 Pac. 1044).

93. See Glynn County Bd. of Education *v.* Franklin, 61 Ga. 303; Dowling *v.* Gally, 30 La. Ann. 328.

94. Brooks *v.* Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492.

95. Smith *v.* Parker, 131 N. C. 470, 42 S. E. 910.

96. *Alabama.*— Hinson *v.* Brooks, 67 Ala. 491.

Louisiana.— State *v.* Judge Eleventh Dist. Ct., 40 La. Ann. 206, 3 So. 561; Ricks *v.* Bernstein, 19 La. Ann. 141.

Maryland.— Gustav Adolph Bldg. Assoc. No. 1 *v.* Kratz, 55 Md. 394.

Michigan.— Scriven *v.* Hursh, 39 Mich. 98, holding that a decree, on a mortgage foreclosure, for the face of a bond with interest, when the bond is for double the real amount of the debt, will entitle the mortgagor to an injunction restraining the sale under such decree.

New York.— Hine *v.* Handy, 1 Johns. Ch. 6.

Ohio.— Leighton *v.* Durrell, 6 Ohio Dec. (Reprint) 903, 8 Am. L. Rec. 632.

See 35 Cent. Dig. tit. "Mortgages," § 1491.

Contra.— Ketchum *v.* Crippen, 37 Cal. 223; McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11.

97. Corles *v.* Lashley, 15 N. J. Eq. 116; Winters *v.* Henderson, 6 N. J. Eq. 31. But

not issue where the sale, if allowed to proceed, would be a mere nullity, as this would not irreparably injure any one or cloud any title;[98] and the mere pendency of a suit on the debt secured, or concerning the property subject or the validity of liens upon it, is no ground for enjoining the sale.[99] One who has conveyed land by warranty deed may be enjoined from selling it under a prior mortgage; and so may one taking the mortgage by assignment from him.[1]

(II) *Persons Entitled to Injunction or Stay.* Application for an injunction to restrain or stay the sale under a decree of foreclosure may be made, on proper facts, by the mortgagor's trustee in insolvency,[2] by a trustee of his wife's separate property,[3] by the mortgagor's administrator, provided he shows some interest in the land descended to him, as otherwise the heirs alone are interested,[4] by a purchaser of the equity of redemption,[5] or by one who, claiming under an adverse title, has been in possession of the premises for the period of limitation, on the theory that the sale would cloud his title;[6] and such an application may also be made by another mortgagee of the same premises, whether senior or junior,[7] provided he was a party to the foreclosure proceedings, for if not, his rights would not be affected by the sale.[8] In case of several mortgages, which are undisputed, and subsequent judgments, of which some are in controversy, the court will not, on the mortgagor's application, stay proceedings on the execution, under decree of foreclosure, but will order the surplus money to be brought into court to abide the result of the contest touching the judgments.[9] A statute providing that an order of sale on foreclosure shall be stayed on request of defendant applies to the mortgagor or persons in privity with him and not to cross petitioners or to parties defendant having only a contingent or collateral interest in the property.[10]

(III) *Grounds For Staying Execution of Decree.* The statutes of several states prescribe the grounds and terms on which the execution of a decree of foreclosure may be stayed;[11] and it is in the power and discretion of the court to grant a stay of execution in such cases on sufficient grounds,[12] as to allow an

compare Preiss *v.* Campbell, 59 Ala. 635; Trexler *v.* Duby, 16 Pa. Co. Ct. 141.

98. Preiss *v.* Campbell, 59 Ala. 635; Chapman *v.* Younger, 32 S. C. 295, 10 S. E. 1077.

99. Gibson *v.* Niblett, Sm. & M. Ch. (Miss.) 278; Fulghum *v.* Cotton, 3 Tenn. Ch. 296. But *compare* Crane *v.* Brigham, 11 N. J. Eq. 29.

1. Martin *v.* Martin, 24 S. C. 446.

2. Zeigler *v.* King, 9 Md. 330. And see Parks *v.* Baldwin, 123 Ga. 869, 51 S. E. 722.

3. Talmage *v.* Pell, 9 Paige (N. Y.) 410.

4. Stringham *v.* Brown, 7 Iowa 33.

5. Shields *v.* Keys, 24 Iowa 298; Davis *v.* Bonar, 15 Iowa 171; Moses *v.* Clerk Dallas Dist. Ct., 12 Iowa 139; Lausman *v.* Drahos, 8 Nebr. 457, 1 N. W. 445; State Bank *v.* Bell, 7 N. J. Eq. 372; Floyd *v.* Borland, 33 Tex. 777. But *compare* State *v.* Judge Eleventh Dist. Ct., 40 La. Ann. 206, 3 So. 561 (holding that the purchaser of real property has no interest therein, after eviction by a third person, to enjoin its sale by his vendor proceeding on his purchase-money mortgage by seizure and sale); New York Shot, etc., Co. *v.* Cary, 20 How. Pr. (N. Y.) 444.

6. Gardner *v.* Terry, 99 Mo. 523, 12 S. W. 888, 7 L. R. A. 67.

7. Huppenbauer *v.* Durlin, 24 La. Ann. 359; Fortier *v.* Zimpel, 5 Rob. (La.) 189; Weekes *v.* McCormick, 16 N. Y. App. Div. 432, 45 N. Y. Suppl. 30. But *compare* Adams *v.* Moulton, McGloin (La.) 239.

8. Tome *v.* Merchants', etc., Permanent Bldg., etc., Co., 34 Md. 12; Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621.

9. Schenck *v.* Conover, 13 N. J. Eq. 31.

10. Clock *v.* Pahl, (Nebr. 1905) 106 N. W. 420.

11. See the statutes of the several states. And see State *v.* Twenty-Third Dist. Judge, 37 La. Ann. 846; Exchange, etc., Co. *v.* Walden, 15 La. 431; Harrington *v.* Birdsall, 38 Nebr. 176, 56 N. W. 961; Spencer *v.* Moyer, 29 Nebr. 305, 45 N. W. 464; Jones *v.* Dow, 15 Wis. 582.

Estoppel to dispute judgment.— Where a defendant in foreclosure avails himself of the statutory stay of execution, he is estopped to dispute the validity of the judgment. Gilbert *v.* Provident Life, etc., Co., 1 Nebr. (Unoff.) 282, 95 N. W. 488.

The New Jersey statute allowing an absent defendant in a foreclosure suit to enter an appearance before sale of the premises, and authorizing the issue of a supersedeas thereon, is not mandatory; but the interference of the court is discretionary and the party who invokes its aid should show surprise and a meritorious defense. Horner *v.* Corning, 28 N. J. Eq. 254.

12. Clay *v.* Hildebrand, 34 Kan. 694, 9 Pac. 466; Equitable Mut. Land Imp. Assoc. *v.* Becker, 45 Md. 632. *Compare* Carroll *v.* Reddington, 7 Iowa 386. And see Stearns *v.*

appeal,[13] or the settlement of collateral controversies between claimants or lienors which may affect the validity of the sale or the rights of the primary parties,[14] or where an immediate sale would be in violation of plaintiff's agreement or promises.[15] And where foreclosure is had when only a part of the debt is due, the sale may be stayed on defendant's paying the instalment due with the costs.[16] When the officer appointed to make the sale is about to proceed under such circumstances as must necessarily result in a sacrifice of the property, it is within the discretion of the court to grant a stay; but this should not be done merely on account of a general and widespread business depression, causing a shrinking of real estate values.[17]

(iv) *Application and Proceedings.* A bill in equity to restrain foreclosure of a mortgage is not a local suit, but may be brought where jurisdiction of defendant by personal service can be obtained.[18] The bill must contain distinct allegations of the facts relied on as grounds for the injunction, including any averments required by statute,[19] and must be filed in due season,[20] and supported by a clear preponderance of the evidence.[21] A preliminary injunction will be continued to the hearing if the answer does not fully meet the bill,[22] or may be dissolved on terms of payment or security for payment.[23] The equities appearing to be with the complainant, an injunction will be made perpetual, where the grounds alleged are such as show that the mortgagee has no right whatever to enforce the mortgage;[24] but where the cause of enjoining its execution was only temporary or transient, the injunction should be dissolved when the cause has ceased to operate.[25]

c. Appraisement — (i) *Necessity For Appraisement.* Where a statute requires an appraisement of lands about to be sold on foreclosure of a mortgage, as a preliminary to the sale,[26] it is mandatory, and a sale made without such

Welsh, 50 How. Pr. (N. Y.) 186 [*affirmed* in 7 Hun 676].

13. Wilson *v.* Grant, 59 How. Pr. (N. Y.) 350; Ashworth *v.* Tramwell, 102 Va. 852, 47 S. E. 1011.

14. Wyckoff *v.* Noyes, 36 N. J. Eq. 227; Dayton *v.* Dusenbury, 25 N. J. Eq. 110; Fisher *v.* Hartman, 165 Pa. St. 16, 30 Atl. 513. But *compare* Horner *v.* Corning, 28 N. J. Eq. 254; Clark *v.* Vilas Nat. Bank, 24 Misc. (N. Y.) 621, 53 N. Y. Suppl. 641, holding that a sale under decree of foreclosure should not be stayed, on the application of subsequent judgment creditors of the mortgagor, on the ground that the mortgagor had, for the purpose of defrauding such creditors, transferred personal property to the mortgagee, and that in an action to set aside such transfer a receiver had been appointed and an accounting was being had.

15. Bigelow *v.* Rommelt, 24 N. J. Eq. 115.

As to agreement to release portions of the mortgaged premises see Mevey's Appeal, 4 Pa. St. 80; Ewart *v.* Irwin, 1 Phila. (Pa.) 78.

16. Campbell *v.* Macomb, 4 Johns. Ch. (N. Y.) 534.

17. Thomas *v.* San Diego College Co., 111 Cal. 358, 43 Pac. 965; McGown *v.* Sandford, 9 Paige (N. Y.) 290; Hill *v.* Hillsman, 7 Lea (Tenn.) 196.

18. Jones *v.* Fletcher, 42 Ark. 422.

19. Barrick *v.* Horner, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; Gayle *v.* Fattle, 14 Md. 69; Evans *v.* Fields, (Miss. 1891) 11 So. 224; Drane *v.* Bailey, (Tenn. Ch. App. 1899) 58 S. W. 459.

20. State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; Plowman *v.* Satterwhite, 3 Tenn. Ch. 1.

21. Van Meter *v.* Hamilton, 96 Mo. 654, 10 S. W. 71. But see Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,433, 3 Woods 674, holding that an injunction to restrain a mortgage foreclosure sale should be allowed because the evidence on the motion for injunction raised grave doubts on the question whether the bondholders in whose behalf the trustee was about to make a sale were *bona fide* holders.

22. Ponton *v.* McAdoo, 71 N. C. 101. And see Whitley *v.* Dunham Lumber Co., 89 Ala. 493, 7 So. 810.

23. Phillips *v.* Davis, 61 Ga. 159; Lyon's Appeal, 61 Pa. St. 15; Davison *v.* Waite, 2 Munf. (Va.) 527; Kinports *v.* Rawson, 36 W. Va. 237, 15 S. E. 66.

As to damages on dissolution of injunction see Fox *v.* Miller, 71 Miss. 598, 14 So. 145.

24. Van Horn *v.* Keenan, 28 Ill. 445; Frazier *v.* Keller, 71 Md. 58, 20 Atl. 134; Fisk *v.* Wilson, 15 Tex. 430.

25. Thibodeau *v.* Thibodeau, 18 La. Ann. 609.

26. See the statutes of the different states. And see the following cases:

Arkansas.— Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665, holding that the statute requiring an appraisement of the property before sale under powers contained in mortgages and trust deeds does not apply to a sale under a decree of foreclosure.

Connecticut.— The statute, providing that the court shall order an appraisement on motion of either party, leaves it optional

appraisement is not valid,[27] unless it is waived by a stipulation in the mortgage or otherwise.[28] A provision of this kind is usually coupled with a direction that the sale shall not be made for less than a certain proportion, generally two thirds, of the appraised value of the property, and the object is to prevent a sacrifice of the debtor's property.[29]

(II) *Qualifications of Appraisers.*[30] It is usually required by law that the appraisers shall be disinterested persons,[31] and freeholders,[32] resident in the county.[33] They must be properly designated in the appointment and sworn.[34] But an objection to their qualifications comes too late after the sale has been

with the parties whether there shall be an appraisal or whether the court shall determine the value of the property on proper evidence. Windham County Sav. Bank *v.* Himes, 55 Conn. 433, 12 Atl. 517; City Sav. Bank *v.* Kutscher, 52 Conn. 407.

Louisiana.— State *v.* Nicholls, 30 La. Ann. 980; Union Bank *v.* Bradford, 2 La. Ann. 416.

Nebraska.— Wolcott *v.* Henninger, 1 Nebr. (Unoff.) 552, 96 N. W. 612.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Anonymous, 1 Ohio 235.

Pennsylvania.— Lancaster Bank *v.* Hogendobler, 4 Pa. L. J. 372.

West Virginia.— Tracey *v.* Shumate, 22 W. Va. 474.

See 35 Cent. Dig. tit. "Mortgages," § 1501.

Appraisement set aside.— Property cannot be offered for sale or sold in a mortgage foreclosure under an appraisement which has been set aside by the court. Carstens *v.* Eller, 60 Nebr. 460, 83 N. W. 743.

Notice of appraisement.— It is not essential to the validity of an appraisement that the parties should be notified of the time and place of making it. Green *v.* Paul, 60 Nebr. 7, 82 N. W. 98; Eastern Banking Co. *v.* Seeley, 59 Nebr. 676, 81 N. W. 852; Maginn *v.* Pickard, 57 Nebr. 642, 78 N. W. 295; Mills *v.* Hamer, 55 Nebr. 445, 75 N. W. 1105; Tillson *v.* Benschoter, 55 Nebr. 443, 75 N. W. 1101; Home Ins. Co. *v.* Clark, 1 Nebr. (Unoff.) 844, 95 N. W. 1056; Doughty *v.* Hubbell, 1 Nebr. (Unoff.) 709, 96 N. W. 632; Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

27. Tyler *v.* Wilkerson, 27 Ind. 450; Meddis *v.* Fenley, 98 Ky. 432, 33 S. W. 197, 17 Ky. L. Rep. 691; Doak *v.* Reynolds, 58 Nebr. 393, 78 N. W. 710. But see Stockwell *v.* State, 101 Ind. 1 (holding that lands embraced in a school fund mortgage may be ordered sold without appraisement); Neligh *v.* Keene, 16 Nebr. 407, 20 N. W. 277.

28. Harris *v.* Makepeace, 13 Ind. 560; Soniat *v.* Miles, 32 La. Ann. 164; New Orleans Mut. Ins. Co. *v.* Bagley, 19 La. Ann. 89; Broadwell *v.* Rodrigues, 18 La. Ann. 68; Craig *v.* Stevenson, 15 Nebr. 362, 18 N. W. 510; Stockmeyer *v.* Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. ed. 123. But *compare* Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

29. Hart *v.* Beardsley, 67 Nebr. 145, 93 N. W. 423; Pearson *v.* Badger Lumber Co., 2 Nebr. (Unoff.) 251, 96 N. W. 493.

30. See the statutes of the different states. And see the cases cited in notes in this subsection.

31. Durland *v.* McKibbin, 5 Nebr. (Unoff.) 47, 97 N. W. 228 (holding that it is not an available objection that one of the appraisers was a constable and the other a justice of the peace); David Adler, etc., Clothing Co. *v.* Hellman, 4 Nebr. (Unoff.) 557, 95 N. W. 467 (holding that the fact that an appraiser had testified on plaintiff's behalf as to the value of the property at the trial of a foreclosure suit does not necessarily show that he is interested and therefore disqualified as an appraiser); First Nat. Bank *v.* Tyler, 4 Nebr. (Unoff.) 63, 93 N. W. 388 (holding that the fact that an appraiser once inquired the price at which the owner would sell the land, and also inquired of the mortgagee what he would take for his decree, where the negotiations were dropped, does not disqualify him); Stafford *v.* Harmon, 2 Nebr. (Unoff.) 528, 89 N. W. 380 (holding that the fact that one of the appraisers had served in the same capacity twenty-four times, on appointment by the sheriff, and the other thirty times, does not show that they were not disinterested, although it was remarked by the court that the practice of calling the same persons repeatedly was an improper one).

32. Salisbury *v.* Murphy, 63 Nebr. 415, 88 N. W. 764; Ackerman *v.* Allender, 62 Nebr. 700, 87 N. W. 543; Iowa L. & T. Co. *v.* Whistler, 62 Nebr. 698, 87 N. W. 538; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695; Wheldon *v.* Cornett, 4 Nebr. (Unoff.) 421, 94 N. W. 626; Lombard *v.* Pasusta, 2 Nebr. (Unoff.) 446, 89 N. W. 255.

33. State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36, holding that where the land is a single tract, but lies partly in two counties, the appraisers must be freeholders residing in the county where the decree was rendered.

34. National L. Ins. Co. *v.* Crandall, 2 Nebr. (Unoff.) 335, 96 N. W. 624.

Designation of appraisers.— An objection that the appraisers, appointed by the sheriff, were designated in the appointment by the initials of their christian names, is not well taken. Peterboro Sav. Bank *v.* Johnson, 2 Nebr. (Unoff.) 788, 90 N. W. 212.

Oath of appraisers.— A master commissioner appointed to make a foreclosure sale has authority to administer the oath to the appraisers. George *v.* Keniston, 57 Nebr. 313, 77 N. W. 772; Northwestern Mut. L. Ins. Co. *v.* Mulvihill, 53 Nebr. 538, 74 N. W. 78.

made.[35] The sheriff appoints the appraisers and conducts the appraisement or acts with them in making it; but this duty can as well be performed by his lawfully appointed deputy.[36]

(III) *Mode and Sufficiency of Appraisement*—(A) *In General.* The appraisement should clearly state the estimated value of the property,[37] and the names of the owners of the equity of redemption,[38] and be signed by the appraisers.[39] Separate and distinct parcels or tracts of land should not be appraised as a whole, but separately.[40] But the appraisement is not vitiated by clerical errors which do not mislead any one,[41] nor by irregularities which are cured by the fact that the property brings more than two thirds of its appraised value at the sale.[42] The business of the appraisers is to fix the value of the debtor's interest, and not to determine the extent of that interest or the character of the title which will be offered for sale.[43] If the appraisers are qualified and possess the requisite knowledge of the value of the property, or if their lack of familiarity with it is not shown, it is not essential that the appraisement should be made upon an actual view of the premises.[44]

(B) *Deducting Prior Liens and Encumbrances.* If the statute merely requires the appraisers to ascertain and report the value of the property, they are not obliged to take into account any prior liens upon it.[45] But in some states the rule is for the appraisers to determine the real value of the lands levied on and deduct therefrom the amount of all liens and encumbrances superior or prior to that of the mortgage under which the sale is to be made.[46] They must deduct

35. Unland *v.* Crane, 63 Nebr. 451, 88 N. W. 667; Union Cent. L. Ins. Co. *v.* Baker, 2 Nebr. (Unoff.) 57, 96 N. W. 116.

36. Wells *v.* Frazier, 64 Nebr. 370, 89 N. W. 1033; Richardson *v.* Hahn, 63 Nebr. 294, 88 N. W. 527; Carstens *v.* Eller, 60 Nebr. 460, 83 N. W. 743; Nebraska Loan, etc., Assoc. *v.* Marshall, 51 Nebr. 534, 71 N. W. 63; Union Trust Co. *v.* King, 3 Nebr. (Unoff.) 155, 91 N. W. 190; Doughty *v.* Hubbell, 1 Nebr. (Unoff.) 709, 96 N. W. 632.

37. Rouse *v.* Bartholomew, 51 Kan. 425, 32 Pac. 1088; Amato *v.* Ermann, 47 La. Ann. 967, 17 So. 505 (effect of fraudulent undervaluation); Ramser *v.* Johnson, 2 Nebr. (Unoff.) 526, 89 N. W. 381; Thatcher *v.* Dickinson, 3 Ohio Cir. Ct. 144, 2 Ohio Cir. Dec. 82 (appraisement must be made in money, and cannot be made subject to a certain indeterminate indebtedness).

38. Wells *v.* Frazier, 64 Nebr. 370, 89 N. W. 1033. See Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154; Union Trust Co. *v.* King, 3 Nebr. (Unoff.) 155, 91 N. W. 190.

39. Iowa L. & T. Co. *v.* Greenman, 63 Nebr. 268, 88 N. W. 518, as to sufficiency of signature by mark.

40. Iowa L. & T. Co. *v.* Whistler, 62 Nebr. 698, 87 N. W. 528; Smith Bros. L. & T. Co. *v.* Weiss, 56 Nebr. 210, 76 N. W. 564; Nye *v.* Rogers, 55 Nebr. 353, 75 N. W. 854; American Inv. Co. *v.* McGregor, 48 Nebr. 779, 67 N. W. 785; Tichy *v.* Simecek, 5 Nebr. (Unoff.) 81, 97 N. W. 323.

41. American Inv. Co. *v.* McGregor, 48 Nebr. 779, 67 N. W. 785.

42. Drew *v.* Kirkham, 8 Nebr. 477, 1 N. W. 451.

Appraiser becoming purchaser.—The appraisement of land in proceedings to foreclose a mortgage is not invalidated by the fact that one of the appraisers became the purchaser at the sale. Ison *v.* Kinnaird, 17 S. W. 633, 13 Ky. L. Rep. 569.

43. Hart *v.* Beardsley, 67 Nebr. 145, 93 N. W. 423.

44. Zabel *v.* Masonic Sav. Bank, 16 S. W. 588, 13 Ky. L. Rep. 197; Iowa L. & T. Co. *v.* Devall, 63 Nebr. 826, 89 N. W. 381; Bostwick *v.* Keller, 62 Nebr. 815, 87 N. W. 1060; Crook *v.* Moore, 5 Nebr. (Unoff.) 314, 98 N. W. 713; Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154; Levy *v.* Hinz, 3 Nebr. (Unoff.) 11, 90 N. W. 640; Reynolds *v.* Fagan, 2 Nebr. (Unoff.) 415, 89 N. W. 170; Provident Life, etc., Co. *v.* Dennis, 1 Nebr. (Unoff.) 195, 95 N. W. 361. *Contra*, Alfred *v.* Hazelton Bank, 48 Kan. 124, 29 Pac. 471.

45. Sisson *v.* Tubbs, 50 Conn. 292.

46. Eddy *v.* Kimerer, 61 Nebr. 498, 85 N. W. 540; Globe L. & T. Co. *v.* Eller, 61 Nebr. 226, 85 N. W. 48; Farmers' L. & T. Co. *v.* Schwenk, 54 Nebr. 657, 74 N. W. 1063; Harte *v.* Wedge, 5 Nebr. (Unoff.) 231, 97 N. W. 1035.

No authority to determine priority.—Where the decree of foreclosure determines that a lien of one of the parties to the action is a junior lien, the appraisers have no authority to adjudge it to be a superior lien, and deduct it on that assumption. Hart *v.* Beardsley, 67 Nebr. 145, 93 N. W. 423.

Deducting amount not included in decree.—Where the decree is entered for less than is due on the mortgage, the appraisers cannot deduct from the value of the property the balance omitted from the decree on the theory that it is a subsisting lien on the property. Schultz *v.* Loomis, 40 Nebr. 152, 58 N. W. 693.

Deduction where there are several tracts.—An appraisement is not fatally defective

unpaid taxes not included in the decree of foreclosure,[47] but they cannot decrease their valuation by considering adverse claims of title.[48] Errors in making such deductions are considered immaterial where the property sells for more than two thirds of its appraised value;[49] and it has been held that the owner of the equity of redemption is not entitled to object to the confirmation of the sale because of errors or wrongful acts of the appraisers in failing to make the proper deductions, since this provision is not for his benefit, but for that of the mortgagee alone.[50]

(c) *Return and Filing of Appraisement.* A statutory provision requiring the return of the appraisement by the sheriff and its filing in the office of the county clerk must be substantially complied with;[51] but the filing of a substantially correct copy is sufficient, a mere clerical error not vitiating it.[52] Where the law requires the return to be made "forthwith," this means with reasonable despatch in the ordinary course of business, and it is sufficient if made on the day following the appraisement.[53] The sheriff's return is presumptive evidence of the facts stated, and conclusive in the absence of evidence to the contrary.[54]

(iv) *Objections to Appraisement.* All presumptions are indulged in favor of the regularity of an appraisement duly made by qualified persons;[55] but a party desiring to question or impeach the appraisement may do so by a motion to vacate it, seasonably made,[56] and stating specifically and particularly the grounds of his

where it finds the value of each of several tracts and the encumbrances on each separately, but concludes by stating defendants' interest in gross. Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313.

Deduction made after separation of appraisers.— Where the officer conducting the appraisement has the certificate of prior liens in his possession and shows it to the other appraisers, the proceeding is not invalidated by the fact that the deduction is not actually made until after their separation. Omaha L. & T. Co. *v.* Borders, 3 Nebr. (Unoff.) 3, 90 N. W. 642.

47. Beck *v.* McKibben, 63 Nebr. 413, 88 N. W. 765; Young *v.* Wood, 63 Nebr. 291, 88 N. W. 528; Newark Mut. Ben. L. Ins. Co. *v.* Siefken, 1 Nebr. (Unoff.) 860, 96 N. W. 603.

Taxes included in decree not to be deducted.— It is error to deduct the amount of taxes which are already included in the decree of foreclosure. Beck *v.* McKibben, 63 Nebr. 413, 88 N. W. 765.

Invalidity of taxes deducted.— The fact that city taxes still standing on the treasurer's books as a lien on the property were certified by him to the appraisers on foreclosure, and deducted from the appraised value of the land, will not avoid the appraisement, although, in an action between other parties, some taxes of the same levy had been held void. David Adler, etc., Clothing Co. *v.* Hellman, 4 Nebr. (Unoff.) 557, 95 N. W. 467.

48. McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614.

49. Peck *v.* Starks, 64 Nebr. 341, 89 N. W. 1040; Dartmouth Sav. Bank *v.* Foley, 2 Nebr. (Unoff.) 459, 89 N. W. 317; Sanford *v.* Anderson, 2 Nebr. (Unoff.) 315, 96 N. W. 486; Keene Five Cent Sav. Bank *v.* Johnson, 1 Nebr. (Unoff.) 69, 95 N. W. 504.

50. Green *v.* Paul, 60 Nebr. 7, 82 N. W. 98; Amoskeag Sav. Bank *v.* Robbins, 53 Nebr. 776, 74 N. W. 261; Hamer *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 705, 72 N. W. 1041; Nebraska Land, etc., Co. *v.* Cutting, 51 Nebr. 647, 71 N. W. 312; American Inv. Co. *v.* McGregor, 48 Nebr. 779, 67 N. W. 785; Smith *v.* Foxworthy, 39 Nebr. 214, 57 N. W. 994; Craig *v.* Stevenson, 15 Nebr. 362, 18 N. W. 510; Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154; Wright *v.* Patrick, 2 Nebr. (Unoff.) 695, 89 N. W. 746.

51. Armington *v.* Maben, 2 Nebr. (Unoff.) 416, 89 N. W. 251; Northern Counties Inv. Trust *v.* Wilson, 1 Nebr. (Unoff.) 348, 95 N. W. 699.

Contents of return.— Appraisers are not to set out in their return the evidence on which they acted in making the appraisement. Omaha L. & T. Co. *v.* Keck, 63 Nebr. 266, 88 N. W. 520.

Revenue stamps.— The certificates of prior encumbrances and of the appraisement of lands on foreclosure did not require to be stamped under the War Revenue Act of 1898. Moulthan *v.* Apking, 64 Nebr. 378, 89 N. W. 1051; Rieck *v.* Zoller, 3 Nebr. (Unoff.) 721, 92 N. W. 728.

52. Naperville Northwestern College *v.* Shreck, 2 Nebr. (Unoff.) 484, 89 N. W. 289; Emory *v.* Boyer, 2 Nebr. (Unoff.) 1, 95 N. W. 1061.

53. Wheldon *v.* Cornett, 4 Nebr. (Unoff.) 421, 94 N. W. 626; Hubbard *v.* Hennessey, 2 Nebr. (Unoff.) 816, 90 N. W. 220; Naperville Northwestern College *v.* Shreck, 2 Nebr. (Unoff.) 484, 89 N. W. 289.

54. Iowa L. & T. Co. *v.* Greenman, 63 Nebr. 268, 88 N. W. 518; Anthony L. & T. Co. *v.* Fiorelli, 2 Nebr. (Unoff.) 532, 89 N. W. 377.

55. McIntyre *v.* Evanson, 63 Nebr. 849, 89 N. W. 397; De Groot *v.* Wilson, 63 Nebr. 423, 88 N. W. 657; Union Trust Co. *v.* King, 3 Nebr. (Unoff.) 155, 91 N. W. 190.

56. Mills *v.* Hamer, 55 Nebr. 445, 75 N. W. 1105; Ecklund *v.* Willis, 44 Nebr. 129, 62

objection.[57] On such a motion the court may set aside the appraisement on account of any substantial defect or error,[58] not cured by the subsequent proceedings,[59] and found to be actually prejudicial to the party complaining.[60] But an objection that the appraisement is too low is not of this character, unless the disparity between the real value of the property and its appraised value results from fraud on the part of the appraisers, or is so gross as to raise a presumption of fraud; for the appraisers act judicially,[61] and their determination will not be overturned on account of a mere mistake or underestimate;[62] and to establish a disparity such as to justify a presumption of fraud requires very strong and clear evidence, much more than a mere difference of opinion among several persons as to the value of the land.[63] Objections to the appraisement must be made before the sale; after that it is too late to resist confirmation or have the sale vacated on account of any objections to the appraisement, save only on a showing of actual fraud.[64]

(v) *Reappraisement.* Where the court vacates or sets aside an appraisement of real property for the purposes of a foreclosure sale, it has power, and it

N. W. 493; Nebraska L. & T. Co. *v.* Dickerson, 1 Nebr. (Unoff.) 622, 95 N. W. 774.

57. Bird *v.* McCreary, 4 Nebr. (Unoff.) 183, 93 N. W. 684; Union Sav. Bank *v.* Lincoln Normal University, 4 Nebr. (Unoff.) 70, 93 N. W. 408.

58. An appraisement will not be vacated merely because the premises were not appraised in the smallest governmental subdivisions (Hartwick *v.* Woods, 4 Nebr. (Unoff.) 103, 93 N. W. 415), because an appraiser signed the appraisement by his initials only (Rieck *v.* Zoller, 3 Nebr. (Unoff.) 721, 92 N. W. 728), or because one of the appraisers became the purchaser at the sale (Ison *v.* Kinnaird, 17 S. W. 633, 13 Ky. L. Rep. 569).

59. Unland *v.* Crane, 63 Nebr. 451, 88 N. W. 667, holding that an objection that the appraisement was too low is unavailing where the property, at the sale, brought more than two thirds of the value alleged by the party objecting.

60. Union Sav. Bank *v.* Lincoln Normal University, 4 Nebr. (Unoff.) 70, 93 N. W. 408.

61. Williams *v.* Taylor, 63 Nebr. 717, 89 N. W. 261; Brown *v.* Fitzpatrick, 56 Nebr. 61, 76 N. W. 456; Ecklund *v.* Willis, 44 Nebr. 129, 62 N. W. 493; Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538; David Adler, etc., Clothing Co. *v.* Hellman, 4 Nebr. (Unoff.) 557, 95 N. W. 467; Hartwick *v.* Woods, 4 Nebr. (Unoff.) 103, 93 N. W. 415; Hubbard *v.* Hennessey, 2 Nebr. (Unoff.) 816, 90 N. W. 220; Omaha Loan, etc., Co. *v.* Walenz, 2 Nebr. (Unoff.) 806, 90 N. W. 222; Jones *v.* Cleary, 2 Nebr. (Unoff.) 541, 89 N. W. 386; National L. Ins. Co. *v.* Crandall, 2 Nebr. (Unoff.) 335, 96 N. W. 624; Pearson *v.* Badger Lumber Co., 2 Nebr. (Unoff.) 251, 96 N. W. 493; New York Home Ins. Co. *v.* Clark, 1 Nebr. (Unoff.) 844, 95 N. W. 1056; Wolcott *v.* Henninger, 1 Nebr. (Unoff.) 552, 96 N. W. 612.

62. Green *v.* Doerwald, 69 Nebr. 698, 96 N. W. 634; Williams *v.* Taylor, 63 Nebr. 717, 89 N. W. 261; Cole *v.* Willard, 62 Nebr. 839, 88 N. W. 134; Taylor *v.* Reis, 2 Nebr. (Unoff.) 533, 89 N. W. 374. *Contra,* Big Boom Loan, etc., Co. *v.* Ryan, 9 Ohio S. & C. Pl. Dec. 518, 6 Ohio N. P. 536.

63. Moulthan *v.* Apking, 64 Nebr. 378, 89 N. W. 1051; Union Trust Co. *v.* Davis, 64 Nebr. 340, 89 N. W. 1052; Goldsmith *v.* Wright, 62 Nebr. 763, 87 N. W. 908; Woolworth *v.* Parker, 60 Nebr. 142, 82 N. W. 317; Nebraska Loan, etc., Assoc. *v.* Marshall, 51 Nebr. 534, 71 N. W. 63; Bird *v.* McCreary, 4 Nebr. (Unoff.) 183, 93 N. W. 684; North Platte First Nat. Bank *v.* Tyler, 4 Nebr. (Unoff.) 63, 93 N. W. 388; Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154; Sutton First Nat. Bank *v.* Ashley, 3 Nebr. (Unoff.) 18, 90 N. W. 639; Stafford *v.* Harmon, 2 Nebr. (Unoff.) 528, 89 N. W. 380; Tootle *v.* Willy, 1 Nebr. (Unoff.) 711, 96 N. W. 342; Doughty *v.* Hubbell, 1 Nebr. (Unoff.) 709, 96 N. W. 632; Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

64. Wells *v.* Frazier, 64 Nebr. 370, 89 N. W. 1033; Peck *v.* Starks, 64 Nebr. 341, 89 N. W. 1040; Farmers', etc., State Bank *v.* Thornburg, 64 Nebr. 76, 89 N. W. 626; Waite *v.* Malchow, 63 Nebr. 650, 88 N. W. 863; Mallory *v.* Patterson, 63 Nebr. 429, 88 N. W. 686; National Bank of Commerce *v.* Kinkead, 61 Nebr. 264, 85 N. W. 70; Security Inv. Co. *v.* Sizer, 58 Nebr. 669, 79 N. W. 554; Smith Bros. L. & T. Co. *v.* Weiss, 56 Nebr. 210, 76 N. W. 564; Scottish-American Mortg. Co. *v.* Bigsby, 52 Nebr. 104, 71 N. W. 961; Nebraska Land, etc., Co. *v.* Cutting, 51 Nebr. 647, 71 N. W. 312; Union Sav. Bank *v.* Lincoln Normal University, 4 Nebr. (Unoff.) 70, 93 N. W. 408; Bourke *v.* Sommers, 3 Nebr. (Unoff.) 761, 92 N. W. 990; Foster *v.* McKinley-Lanning L. & T. Co., 3 Nebr. (Unoff.) 65, 90 N. W. 765; Omaha L. & T. Co. *v.* Borders, 3 Nebr. (Unoff.) 3, 90 N. W. 642; Potter *v.* Lynch, 2 Nebr. (Unoff.) 798, 90 N. W. 217; Roberts *v.* Rouse, 2 Nebr. (Unoff.) 669, 89 N. W. 749; McKinney *v.* Glassburn, 2 Nebr. (Unoff.) 615, 89 N. W. 598; Simpson *v.* Snook, 2 Nebr. (Unoff.) 412, 89 N. W. 168; Stein *v.* Parrotte, 2 Nebr. (Unoff.) 351, 96 N. W. 155; Sanford *v.* Anderson, 2 Nebr. (Unoff.) 315, 96 N. W. 486; Emory *v.* Boyer, 2 Nebr. (Unoff.) 1, 95 N. W. 1061.

is proper, to order a new appraisement to be made;[65] and under the statutes of some of the states a reappraisement must be made where the property has been twice advertised and offered for sale under the original appraisement but remains unsold for want of bidders.[66] But where a foreclosure sale has been set aside, a new appraisement should not be made, unless the original appraisement was also vacated.[67]

d. Certificates of Liens. In some states it is required that the officer making a sale on foreclosure shall obtain from the proper public officers certificates as to the amount and character of all liens appearing of record against the land which is to be sold,[68] which certificates must be filed before the notice of sale is published.[69]

e. Notice or Advertisement of Sale — (i) *Necessity For Notice.* Due notice of a mortgage foreclosure sale must always be given,[70] in accordance with the statute in force at the time it is given,[71] or in accordance with the provisions of the decree.[72] But although a total want of notice is a defect which probably cannot be waived,[73] mere defects in the notice or in the manner of its service cannot be urged as a ground for vacating the sale by a party who acquiesced or participated in the sale.[74] And an unsuccessful attempt to sell the property, without notice, will not invalidate a subsequent sale of which notice was duly given.[75]

65. Kline *v.* Camp, 49 Kan. 114, 30 Pac. 175; Thompson *v.* Purcell, 63 Nebr. 445, 88 N. W. 778; Ackerman *v.* Allender, 62 Nebr. 700, 87 N. W. 543; Carstens *v.* Eller, 60 Nebr. 460, 83 N. W. 743; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695; Hubbard *v.* Draper, 14 Nebr. 500, 16 N. W. 847.

66. See the statutes of the different states. And see Logan *v.* Wittum, 67 Nebr. 143, 93 N. W. 146; Thompson *v.* Purcell, 63 Nebr. 445, 88 N. W. 778; Cartens *v.* Eller, 60 Nebr. 460, 83 N. W. 743; Wilson *v.* Neu, 4 Nebr. (Unoff.) 348, 93 N. W. 941; Lombard *v.* Pasusta, 2 Nebr. (Unoff.) 496, 89 N. W. 255.

In Ohio it is otherwise. Brown *v.* Connecticut Mut. L. Ins. Co., 6 Ohio Cir. Ct. 62, 3 Ohio Cir. Dec. 350.

67. State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36; McKinney *v.* Glassburn, 2 Nebr. (Unoff.) 615, 89 N. W. 598.

68. See the statutes of the different states. And see Orcutt *v.* Polsley, 59 Nebr. 575, 81 N. W. 616 (holding that, although the statute directs these certificates to be made under the "hands and seals" of the officers certifying, a certificate merely signed by an officer who has no official seal is sufficient); Wright *v.* Patrick, 2 Nebr. (Unoff.) 695, 89 N. W. 746; Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218.

Provisions may be waived by the mortgagee.— Nye *v.* Rogers, 55 Nebr. 353, 75 N. W. 854.

The authority of the sheriff or other officer to sell does not depend on compliance with this statute. Hart *v.* McDonnell, 64 Nebr. 856, 90 N. W. 910.

Non-compliance is rendered immaterial if the property sells for as much as two thirds of its gross value. Hart *v.* McDonnell, 64 Nebr. 656, 90 N. W. 910.

69. Foster *v.* McKinley-Lanning L. & T. Co., 3 Nebr. (Unoff.) 65, 90 N. W. 765.

70. *Iowa.*— Jensen *v.* Woodbury, 16 Iowa 515.

Louisiana.— Routh *v.* Citizens' Bank, 28 La. Ann. 569; Saillard *v.* White, 14 La. 84; Grant *v.* Walden, 6 La. 623.

Michigan.— Perrien *v.* Fetters, 35 Mich. 233.

Nebraska.— Miller *v.* Lefever, 10 Nebr. 77, 4 N. W. 929.

Wisconsin.— Allis *v.* Sabin, 17 Wis. 626.

See 35 Cent. Dig. tit. "Mortgages," § 1512.

71. Kopmeier *v.* O'Neil, 47 Wis. 593, 3 N. W. 365. See also Allis *v.* Sabin, 17 Wis. 626.

72. Trust Co. *v.* Mauch Chunk R. Co., 1 Lehigh Co. L. J. (Pa.) 84. See also Smith *v.* Valentine, 19 Minn. 452.

In Illinois the statute prescribing the kind and manner of notice which shall be given of execution sales of land does not apply to sales by a master in chancery under a decree of foreclosure, although it is said that it would be good practice for the court, in its decree, to direct the master to give the same notice which a sheriff is required to give. Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589.

Notice different from that provided for in mortgage.— The court, on foreclosure of a mortgage, may order the sale to be made on twenty days' notice, although the mortgage provided that thirty days' notice should be given in case a sale was made under the power contained in it, as this provision does not control the court. Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121.

73. See Hawthorn *v.* Sayers, 2 Marv. (Del.) 177, 42 Atl. 478.

74. Erwin *v.* Lowry, 7 How. (U. S.) 172, 12 L. ed. 655.

75. May *v.* Hatcher, 130 Cal. 627, 63 Pac. 33; Empkie *v.* McLean, 15 Nebr. 629, 19 N. W. 593.

(II) *Mode of Giving Notice*—(A) *In General.* Where the law requires personal notice of the foreclosure sale, it is essential to the validity of the foreclosure proceedings that such notice should be duly given to the persons designated by the statute as entitled to it.[76] It will be presumed, in the absence of contrary proof, that the sheriff or other officer making the sale gave all the notices required by law.[77]

(B) *Publication or Posting of Notice.* A requirement of personal notice is not very common, the usual rule being that a duly published or posted notice or advertisement is sufficient for all purposes.[78] It is necessary to the validity of the sale that the notice should be published in such a newspaper as the statute directs, as, where it is required to be a paper "printed in the county" or "of general circulation in the county," or having a minimum circulation.[79] The character of the paper or its circulation may be proved by the affidavit of its pub-

76. See Louser *v.* Light, 202 Pa. St. 582, 52 Atl. 84; Gibbons *v.* Williams, 10 Pa. Co. Ct. 299.

As to notice to tenant see Lewis *v.* Woodall, 4 Houst. (Del.) 543.

Person in possession.— Where the statute requires notice to be served on the person in possession of the premises, service need not be made on the wife of the mortgagor, but only on the mortgagor himself, although they both reside on the land as a homestead. Coles *v.* Yorks, 28 Minn. 464, 10 N. W. 775.

"Personal representatives," in a statute prescribing service of notice of sale on foreclosure, means the executor or administrator of the mortgagor, not the heir or devisee. Anderson *v.* Austin, 34 Barb. (N. Y.) 319.

A creditor recovering judgment pending the foreclosure suit is not entitled to notice. American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 259.

Purchaser pendente lite.— One who purchases property bound by a decree of foreclosure is, in the absence of special equities, charged with such notice as the record imparts, and is not entitled to personal notice of the sale. Link *v.* Connell, 48 Nebr. 574, 67 N. W. 475.

Notice of appearance, although ordinarily it entitles the defendant to notice of all subsequent proceedings, does not give him a right to personal notice of the sale, unless this is reserved in the notice of appearance, so that he may cause the judgment and sale to be set aside for lack of such notice, where the referee gave the statutory notice by publication. Collins *v.* McArthur, 32 Misc. (N. Y.) 538, 67 N. Y. Suppl. 460; Eidlitz *v.* Doctor, 24 Misc. (N. Y.) 209, 53 N. Y. Suppl. 525.

Notice by mail.— Where the notice is directed or authorized to be sent by mail, its deposit in the post-office is *prima facie* good service; but if it fails to reach the party intended, so that he has no knowledge of the sale, this is regarded by equity as one of the "accidents" against which it may give relief. National Bank of North America *v.* Norwich Sav. Soc., 37 Conn. 444. And see Back *v.* Crussell, 2 Abb. Pr. (N. Y.) 386.

77. Soniat *v.* Miles, 32 La. Ann. 164.

78. Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57 [*affirming* 84 Ill. App. 623]; Sanford *v.* Haines, 71 Mich. 116, 38 N. W. 777.

Promise to notify personally.— The neglect by a master in chancery to fulfil a promise to give a party interested in a decree of foreclosure actual personal notice of the day of sale is not such an official delinquency as would justify a court in setting aside a sale otherwise regularly made. Crumpton *v.* Baldwin, 42 Ill. 165.

Advertisement not seen by mortgagor.— Averments that a party to a foreclosure suit was too blind to read the newspapers, and therefore did not see the advertisement and had no notice of the sale, and therefore there was no bidder present and the property was sold for much less than its real value, are not sufficient grounds for ordering a resale. Parkhurst *v.* Cory, 11 N. J. Eq. 233.

79. Minchrod *v.* Ullmann, 163 Ill. 25, 44 N. E. 864; Mallory *v.* Patterson, 63 Nebr. 429, 88 N. W. 686; Nye *v.* Rogers, 55 Nebr. 353, 75 N. W. 854; Drew *v.* Kirkham, 8 Nebr. 477, 1 N. W. 451; Trenery *v.* American Mortg. Co., 11 S. D. 506, 78 N. W. 991.

Character of paper.—The fact that a paper is an organ for the propagation of socialistic doctrines does not make it unlawful to publish foreclosure notices in it, if it has the requisite circulation. Michigan Mut. L. Ins. Co. *v.* Klatt, 5 Nebr. (Unoff.) 305, 98 N. W. 436.

"Printed" in the county means the same as "published" in the county, and the notice is not invalidated by the fact that the paper was partly printed elsewhere, if its place of publication was within the county. Ætna L. Ins. Co. *v.* Wortaszewski, 63 Nebr. 636, 88 N. W. 855; Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 410, 72 N. W. 357. *Contra,* Bragdon *v.* Hatch, 77 Me. 433, 1 Atl. 140.

Circulation in the county.— A requirement that the publication shall be made in some newspaper in general circulation in the county does not mean that it must have a general circulation in any particular city or portion of the county. Smith *v.* Foxworthy, 39 Nebr. 214, 57 N. W. 994. And an advertisement in county papers having an extensive circulation may be good and sufficient, although the property lay in a city. Barlow *v.* McClintock, 11 S. W. 29, 10 Ky. L. Rep. 894.

lisher.[80] It is also essential to obey the statute in respect to the number of times the notice must be published, the continuity of the publication, and the number of days or weeks between the first publication and the sale.[81] Proof of publication is ordinarily made by the affidavit of the printer or publisher of the paper, or, if it is published by a corporation, by one of its officers.[82] Due regard must also be had to the provisions of a statute requiring that the notices shall be posted in specified places or in a number of "public" places.[83]

(III) *Form and Contents of Notice*—(A) *In General.* A notice of foreclosure sale is generally sufficient if it describes the property to be sold and gives the time, place, and terms of sale,[84] with such other particulars as may attract the attention of bidders and give them all necessary information. It should state

Change in name and location of paper.—A foreclosure is not invalidated by a change in the name of the newspaper in which the notice of sale is published, and the removal of the publication office to another place in the same county, if the paper otherwise preserves its identity. Perkins *v.* Keller, 43 Mich. 53, 4 N. W. 559; Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

Where a portion of the county is cut off, including the mortgaged land, and annexed to a city, the notice of sale should be published in the city papers. Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684.

80. Bourke *v.* Sommers, 3 Nebr. (Unoff.) 761, 92 N. W. 990; Foster *v.* McKinley-Lanning L. & T. Co., 3 Nebr. (Unoff.) 65, 90 N. W. 765.

81. *Arkansas.*— Farnsworth *v.* Hoover, 66 Ark. 367, 50 S. W. 865.

Illinois.— Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Garrett *v.* Moss, 20 Ill. 549.

Kansas.— Northrop *v.* Cooper, 23 Kan. 432.

Kentucky.— Wilson *v.* Petzold, 116 Ky. 873, 76 S. W. 1093.

Louisiana.— Jouet *v.* Mortimer, 29 La. Ann. 206; Luckett *v.* Crain, 29 La. Ann. 128.

Michigan.— Bacon *v.* Kennedy, 56 Mich. 329, 22 N. W. 824.

Nebraska.— Mallory *v.* Patterson, 63 Nebr. 429, 88 N. W. 686; Nebraska Land, etc., Co. *v.* McKinley-Lanning, L. & T. Co., 52 Nebr. 410, 72 N. W. 357; Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154; Potter *v.* Lynch, 2 Nebr. (Unoff.) 798, 90 N. W. 217.

New Jersey.— Parsons *v.* Lanning, 27 N. J. Eq. 70.

New York.— Denning *v.* Smith, 3 Johns. Ch. 332.

Oregon.— German Sav., etc., Soc. *v.* Kern, 38 Oreg. 232, 62 Pac. 788, 63 Pac. 1052.

South Carolina.— *Ex p.* Alexander, 35 S. C. 409, 14 S. E. 854.

Wisconsin.— Kopmeier *v.* O'Neil, 47 Wis. 593, 3 N. W. 365.

See 35 Cent. Dig. tit. "Mortgages," § 1512.

Premature publication.—A sale under judgment of foreclosure is not to be set aside as irregular because the notice of the sale was first published before the actual entry and service of an order dissolving an order by which the proceedings had been stayed. La Farge *v.* Van Wagenen, 14 How. Pr. (N. Y.) 54. But where a statute provides that no step can be taken for the sale of the mortgaged premises until a year from the date of the judgment of foreclosure, the fact that the published notice of sale was dated before the expiration of such year will be fatal to the proceeding, unless it is proved that the notice was in fact published at and for the time required by law. Kopmeier *v.* O'Neil, 47 Wis. 593, 3 N. W. 365.

82. Clarke *v.* Chamberlain, 70 Ill. App. 262; Brown *v.* Phillips, 40 Mich. 264; Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 410, 72 N. W. 357; Northwestern College *v.* Shreck, 2 Nebr. (Unoff.) 484, 89 N. W. 289; Home Ins. Co. *v.* Clark, 1 Nebr. (Unoff.) 844, 95 N. W. 1056.

An affidavit of publication is presumptive evidence of the facts which it recites. Bond *v.* Carroll, 71 Wis. 347, 37 N. W. 91.

In Nebraska under Code Civ. Proc. § 403, proof of the due publication of such notice may be made by the affidavit of any person having knowledge of that fact. Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313; Miller *v.* Lefever, 10 Nebr. 77, 4 N. W. 929; Home Ins. Co. *v.* Clark, 1 Nebr. (Unoff.) 844, 95 N. W. 1056.

83. Ison *v.* Kinnaird, 17 S. W. 633, 13 Ky. L. Rep. 569; Kopmeier *v.* O'Neil, 47 Wis. 593, 3 N. W. 365; Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218.

Posting notice on premises.—A general provision in a mortgage, or in a statute, requiring notice of foreclosure sale to be posted in a number of "public places," does not require a notice to be posted on the premises. McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30.

84. Anglo-Californian Bank *v.* Cerf, 142 Cal. 303, 75 Pac. 902 (holding that where the judgment does not state the character of money in which the successful bid must be paid, a statement in the notice that the sale will be made for "gold coin" is not enough to require the vacating of the sale); Brownfield *v.* Weicht, 9 Ind. 394 (holding that the notice need not state that the rents and profits will be first offered for sale); McCarn *v.* Cooley, 30 Nebr. 552, 46 N. W. 715 (holding that a notice is not void because it states that the sale will be for "costs" instead of for "cash"); Coxe *v.* Halsted, 2 N. J. Eq. 311 (holding that a notice is not void because it was not signed by the master in chancery in his own hand).

that the sale is to be made under a judgment or decree of foreclosure,[85] and should recite the title of the cause and the names of the parties with substantial accuracy, although mistakes in these particulars are not held fatal if not calculated to mislead.[86] It is proper and usual to state the amount of the judgment or decree under which the sale is to be made, or the amount to be raised by the sale, but this is not essential, and a mistake or inaccuracy does not vitiate the notice.[87] And generally a sale will not be vacated for any mistakes in the recitals of the notice of sale which are not shown to have prejudiced the parties or the purchaser.[88]

(B) *Description of Property.* The notice of sale must describe the property with substantial accuracy, and in such a manner as to identify it clearly and inform intending purchasers of its situation, character, and extent; otherwise it may be ground for vacating the sale.[89] For this purpose it is generally sufficient to follow the description contained in the mortgage.[90] If the property is to be sold in separate parcels, it is the better practice to state the fact and describe them separately, although it appears to be unnecessary where the decree itself furnishes full information on this point.[91] If the property is improved, the notice of sale should so state, although it is not required to describe the improvements in detail.[92]

See also Brumley *v.* Nichols, 93 S. W. 667, 29 Ky. L. Rep. 561.

85. Pearson *v.* Badger Lumber Co., 60 Nebr. 167, 82 N. W. 374. But *compare* Ramser *v.* Johnson, 2 Nebr. (Unoff.) 526, 89 N. W. 381, holding that such a statement is not absolutely necessary.

Date of decree.— The sale will not be vacated merely because the notice does not correctly state the date of the decree. Mead *v.* Hoover, 63 Nebr. 419, 88 N. W. 655.

86. Field *v.* Brokaw, 159 Ill. 560, 42 N. E. 877; Omaha L. & T. Co. *v.* Keck, 63 Nebr. 266, 88 N. W. 520; Bowlby *v.* Lott, 30 N. J. Eq. 1; Ray *v.* Oliver, 6 Paige (N. Y.) 489.

A misnomer of a party does not invalidate the sale if it does not appear that any one was misled or injured thereby. Field *v.* Brokaw, 159 Ill. 560, 42 N. E. 877; Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218.

87. Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344; Iowa L. & T. Co. *v.* Devall, 63 Nebr. 826, 89 N. W. 381; Iowa L. & T. Co. *v.* Whistler, 62 Nebr. 698, 87 N. W. 538; Amoskeag Sav. Bank *v.* Robbins, 53 Nebr. 776, 74 N. W. 261; Stratton *v.* Reisdorph, 35 Nebr. 314, 53 N. W. 136; Gallentine *v.* Cummings, 4 Nebr. (Unoff.) 690, 96 N. W. 178; Bourke *v.* Sommers, 3 Nebr. (Unoff.) 761, 92 N. W. 990; Levy *v.* Hinz, 3 Nebr. (Unoff.) 11, 90 N. W. 640; Lewis *v.* Duane, 69 Hun (N. Y.) 28, 23 N. Y. Suppl. 433 [*affirmed* in 141 N. Y. 302, 36 N. E. 322].

88. Rogers *v.* St. Martin, 110 La. 80, 34 So. 137; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695; Power *v.* Foster, 37 Can. L. J. N. S. 508.

89. *Arkansas.*— Cooper *v.* Ryan, 73 Ark. 37, 83 S. W. 328.

Iowa.— Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218.

Kentucky.— Campbell *v.* Johnston, 4 Dana 177.

Louisiana.— Wright *v.* Roussel, 5 La. Ann. 126.

Maryland.— Dickerson *v.* Small, 64 Md. 395, 1 Atl. 870; Brooks *v.* Hays, 24 Md. 507.

Michigan.— Morse *v.* Byam, 55 Mich. 594, 22 N. W. 54; Brown *v.* Phillips, 40 Mich. 264.

Minnesota.— Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436.

Nebraska.— Cross *v.* Leidich, 63 Nebr. 420, 88 N. W. 667; Salisbury *v.* Murphy, 63 Nebr. 415, 88 N. W. 764; Hamer *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 705, 72 N. W. 1041; Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 410, 72 N. W. 357, 51 Nebr. 647, 71 N. W. 312; Phœnix Mut. L. Ins. Co. *v.* Sparks, 2 Nebr. (Unoff.) 215, 96 N. W. 214.

Pennsylvania.— McGonigle *v.* Johnson, 8 Pa. Co. Ct. 653.

Canada.—Diocesan Synod *v.* O'Brien, Ritch. Eq. Cas. (Nova Scotia) 352.

See 35 Cent. Dig. tit. "Mortgages," § 1512.

Leasehold interest.— Where the notice of sale under judgment of foreclosure of a mortgage on a leasehold interest refers to the lease, a purchaser at such sale is chargeable with notice of the contents of the lease, and will be presumed to have made his bid in view of its provisions. Riggs *v.* Pursell, 66 N. Y. 193.

90. Beck *v.* Smyrna Bank, 5 Houst. (Del.) 120; Schoch *v.* Birdsall, 48 Minn. 441, 51 N. W. 382; German Sav., etc., Soc. *v.* Kern, 38 Oreg. 232, 62 Pac. 788, 63 Pac. 1052; Guarantee Trust, etc., Co. *v.* Klein, 9 Kulp (Pa.) 499.

91. Fraser *v.* Seeley, 71 Kan. 169, 79 Pac. 1081; Hutchison *v.* Yahn, 9 Kan. App. 837, 61 Pac. 458; Carstens *v.* Eller, 60 Nebr. 460, 83 N. W. 743; Miller *v.* Lanham, 35 Nebr. 886, 53 N. W. 1010; Eldridge *v.* Wesierski, 4 Nebr. (Unoff.) 517, 94 N. W. 961.

92. Thompson *v.* King, 2 Marv. (Del.) 358, 43 Atl. 168; Guarantee Trust, etc., Co. *v.* Jenkins, 40 N. J. Eq. 451, 2 Atl. 13; Louser *v.* Light, 202 Pa. St. 582, 52 Atl. 84; Parker *v.* Lynch, 2 Pa. Dist. 752; Kebahian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743.

(c) *Time and Place of Sale.* A notice of sale will be vitiated by any substantial mistake or indefiniteness in setting forth the place at which the sale will be held,[93] or the time of its occurrence,[94] although if the day is correctly stated it has been held sufficient to set forth that the sale will be held between certain designated hours in the business portion of that day.[95]

2. Place and Time of Sale — a. Place of Sale. A foreclosure sale should be made in the county in which the land is situated,[96] and at some public place accessible and convenient to bidders.[97] The court-house at the county-seat is regarded as such a place, and is commonly designated as the place for the sale to be held,[98] unless there are special reasons why it should be held on the premises or the debtor so demands.[99] But it is competent for the court to leave it to the judgment and discretion of the master to fix the place of sale.[1]

b. Time of Sale.[2] A mortgage foreclosure sale must take place on the day and at the hour directed by the court, or fixed by statute, and specified in the notice of sale,[3] and is invalid, or at least voidable, if made before such day and

93. Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436.

94. May *v.* Hatcher, 130 Cal. 627, 63 Pac. 33; Green *v.* Corson, 50 Kan. 624, 32 Pac. 380; Hendrix *v.* Nesbitt, 96 Ky. 652, 29 S. W. 627, 16 Ky. L. Rep. 746.

Knowledge of correct date.— Where a mistake is made in giving notice of the date of the sale to an interested party, the sale cannot be set aside if such party was actually informed of the correct date in such time that he could have been present at the sale. Hazard *v.* Hodges, 17 N. J. Eq. 123.

Standard time or local time.— A foreclosure sale should not be set aside because the notice of sale did not indicate whether the hour appointed for the sale was standard time or true time, at least where there is no evidence that the sale was by standard time, as the presumption is that official business is carried on according to local or sun time. Iowa L. & T. Co. *v.* Devall, 63 Nebr. 826, 89 N. W. 381; Colony *v.* Billingsley, 2 Nebr. (Unoff.) 670, 89 N. W. 744.

95. School Tp. No. 23 *v.* Snell, 19 Ill. 156, 68 Am. Dec. 586; Northrop *v.* Cooper, 23 Kan. 432.

96. Haines *v.* Taylor, 3 How. Pr. (N. Y.) 206. But see Sessions *v.* Peay, 23 Ark. 39, holding that, if the chancellor directs the sale to take place at the court-house of another county, it will be presumed that he acted from good and sufficient reasons and his discretion will not be overruled.

Land in different counties.— Where the mortgage embraces several tracts of land lying in different counties, and is foreclosed by suit in one of such counties, each tract should be ordered to be sold at the court-house of the county wherein it is situated. Holmes *v.* Taylor, 48 Ind. 169.

97. School Tp. No. 23 *v.* Snell, 19 Ill. 156, 68 Am. Dec. 586. See also Farnsworth *v.* Hoover, 66 Ark. 367, 50 S. W. 865.

Changing place of sale.— Where the sale was opened at the time and place designated, but a storm came up, and the officer and all the persons in attendance adjourned to a building about six hundred feet distant, where the sale was continued and completed about twenty-five minutes later, and there was no evidence that any one was prejudiced by the adjournment, it was held that the sale was valid. Morrissey *v.* Dean, 97 Wis. 302, 72 N. W. 873.

98. See Peck *v.* Starks, 64 Nebr. 341, 89 N. W. 1040; Smith Bros. L. & T. Co. *v.* Weiss, 56 Nebr. 210, 76 N. W. 564; Iowa L. & T. Co. *v.* Nehler, 3 Nebr. (Unoff.) 680, 92 N. W. 729; Reynolds *v.* Fagan, 2 Nebr. (Unoff.) 415, 89 N. W. 170.

99. Aukam *v.* Zantzinger, 98 Md. 380, 56 Atl. 820, holding that where a mortgage sale was made at the county-seat, eight or ten miles from the premises, it will not be set aside because not made on the premises, in the absence of a showing of injury resulting therefrom.

Who may object as to place.—An objection that a sale under a deed of trust was made at the court-house door, instead of on the premises, as provided in the deed, cannot be raised by a stranger to the deed, who is not the party for whose benefit the mode of sale was inserted. Nixon *v.* Cobleigh, 52 Ill. 387.

In Louisiana, where a plantation is to be sold under a mortgage, the sale must be made at the seat of justice, unless the debtor requires it to be made on the premises. Walker *v.* Villavaso, 26 La. Ann. 42; Stockmeyer *v.* Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. ed. 123.

1. Old Colony Trust Co. *v.* Great White Spirit Co., 181 Mass. 413, 63 N. E. 945.

2. Immediate sale.— A statute in New Jersey authorizes an immediate sale, in a foreclosure suit, of premises which are likely to deteriorate in value pending the suit; but the depreciation in value of a farm attending the removal of the crops therefrom is not ground for an order of immediate sale. Horner *v.* Dey, 61 N. J. Eq. 554, 49 Atl. 154.

3. See Ætna L. Ins. Co. *v.* Wortaszewski, 63 Nebr. 636, 88 N. W. 855. See, however, Farmers' Loan Co. *v.* Oregon Pac. R. Co., 28 Oreg. 44, 40 Pac. 1089, holding that a sale made on a day different from that designated in the decree of the court may still be confirmed by the court, and if so confirmed will be valid.

hour,[4] or before the expiration of a stay prescribed by statute or allowed by the decree,[5] or fixed by the agreement of the parties.[6] A sale is likewise invalid or voidable if it is held after the day specified in the notice without a proper adjournment.[7] The right to execute a decree of foreclosure by sale of the property is not generally lost by the running of the time within which the statute allows executions to issue on judgments at law, or after which it declares that such judgments shall become dormant.[8]

c. Postponement and Adjournment. The court has power to order a postponement of a mortgage foreclosure sale, on petition of parties in interest, and should do so where any good cause is shown, as, that a sale on the day originally appointed would be unfair or oppressive or would result in material loss.[9] And the master or other officer appointed to make the sale has the power, for good cause shown and in the exercise of a sound discretion, to adjourn the sale from time to time, as for want of bidders or where he perceives that an immediate sale would sacrifice the property;[10] but due notice must be given of any such adjournment.[11] Where the sale is made in violation of an agreement of the parties for

4. Shier *v.* Prentis, 55 Mich. 175, 20 N. W. 892. See also Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 119 N. Y. 15, 23 N. E. 173.

Where a sale is directed to be made "upon or after" a designated day, if defendant does not sooner make a payment on the decree, a sale made on that day, in the absence of such payment, is not premature. Hooper *v.* Young, 58 Ala. 585.

5. *Kansas.*—Phillips *v.* Love, 57 Kan. 828, 48 Pac. 142; Geuda Springs Town, etc., Co. *v.* Lombard, 57 Kan. 625, 47 Pac. 532; Cross *v.* Knox, 32 Kan. 725, 5 Pac. 32.

Kentucky.— See Hendrick *v.* Robert Mitchell Furniture Co., 29 S. W. 750, 16 Ky. L. Rep. 769.

Michigan.— Burt *v.* Thomas, 49 Mich. 462, 12 N. W. 911, 13 N. W. 818; Canfield *v.* Shear, 49 Mich. 313, 13 N. W. 605; Culver *v.* McKeown, 43 Mich. 322, 5 N. W. 422.

Pennsylvania.— Walker *v.* Tracy, 1 Phila. 225, holding that a waiver of the privilege of twelve months' delay, allowed by the act of assembly on a mortgage, must clearly appear and not be left to mere inference or construction.

Washington.— Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

Wisconsin.— Citizens' L. & T. Co. *v.* Witte, 119 Wis. 517, 97 N. W. 161; Meehan *v.* Blodgett, 86 Wis. 511, 57 N. W. 291; Hiles *v.* Milwaukee Power, etc., Co., 85 Wis. 90, 55 N. W. 175; Andrews *v.* Welch, 47 Wis. 132, 2 N. W. 98.

See 35 Cent. Dig. tit. "Mortgages," § 1511.

The mortgagee and the officer making the sale are not liable in damages for a sale otherwise legal and regular, although, after the rendition of the judgment, a petition for a new trial was filed, if no injunction issued. Brown *v.* Hudson, 3 Bush (Ky.) 60.

6. Gallup *v.* Miller, 25 Hun (N. Y.) 298.

7. Brown *v.* Belles, 17 Colo. App. 529, 69 Pac. 275. *Compare* Philadelphia Mortg., etc., Co. *v.* Hutchins, 61 Nebr. 2, 84 N. W. 416. But see Cole *v.* Porter, 4 Greene (Iowa) 510; Hudson *v.* Bodin, 11 La. 348.

8. Karnes *v.* Harper, 48 Ill. 527; Kirby *v.* Runals, 37 Ill. App. 186; Tierney *v.* Spiva, 97 Mo. 98, 10 S. W. 433; Lone Jack Min. Co. *v.* Megginson, 82 Fed. 89, 27 C. C. A. 63. But see Dalgardno *v.* Barthrop, 40 Wash. 191, 82 Pac. 285.

9. *California.*— Merzbach *v.* Hadley, 109 Cal. 614, 42 Pac. 157.

Massachusetts.— Old Colony Trust Co. *v.* Great White Spirit Co., 181 Mass. 413, 63 N. E. 945.

New York.— Astor *v.* Romayne, 1 Johns. Ch. 310.

United States.— Bound *v.* South Carolina R. Co., 55 Fed. 186; Farmers' L. & T. Co. *v.* Oxford Iron Co., 13 Fed. 169.

Canada.— Murdock *v.* Lawson, 3 Nova Scotia Dec. 454.

Existence of war.— The sale of mortgaged premises under a decree of foreclosure will not be postponed on account of the existence of war, war, as a general calamity, not being sufficient to justify the court in interrupting the regular administration of justice and collection of debts. Astor *v.* Romayne, 1 Johns. Ch. (N. Y.) 310.

10. Reese *v.* Dobbins, 51 Iowa 282, 1 N. W. 540; Birbeck Inv., etc., Co. *v.* Gardner, 55 N. J. Eq. 632, 37 Atl. 767; Public Schools *v.* New Jersey West Line R. Co., 30 N. J. Eq. 494; Kelly *v.* Israel, 11 Paige (N. Y.) 147; Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43. But see Chamberlain *v.* Larned, 32 N. J. Eq. 295.

Mortgagee the only bidder.— It is not necessary that a sheriff should adjourn a mortgage foreclosure sale merely because the mortgagee is the only bidder. Equitable Trust Co. *v.* Shrope, 73 Iowa 297, 34 N. W. 867.

Effect of adjournment.— While the sheriff has a right to postpone a foreclosure sale to a future day, yet after declaring the sale postponed, with the consent of the bidder to whom the property was knocked down, and giving to the printers the notice of the adjourned day of sale for publication, he has no right to execute a deed as if a valid sale had been made. Miller *v.* Miller, 48 Mich. 311, 12 N. W. 209.

11. Sanborn *v.* Petter, 35 Minn. 449, 29 N. W. 64; Stearns *v.* Welsh, 50 How. Pr. (N. Y.) 186 [*affirmed* in 7 Hun 676]; La

its adjournment or postponement, it will be ground for setting it aside and ordering a resale.[12]

3. Mode and Conduct of Sale — a. Persons Who May Sell — (i) *Master or Commissioner.* A court of equity having jurisdiction of mortgage foreclosures has power, and it was the original chancery practice, to appoint a master in chancery or a special commissioner to make the sale,[13] notwithstanding general statutory provisions designating the sheriff or some other officer as the proper person to conduct judicial sales, if they do not specially ordain that foreclosure sales shall be made by such officer.[14] A master or commissioner so appointed must make the sale personally or under his immediate direction, and cannot delegate his authority to another,[15] and where two joint commissioners are appointed, both must be present at the sale.[16]

(ii) *Officer or Deputy.* A sale made and deed executed by an officer *de facto* are good against collateral attack.[17] If the sheriff is designated by law or by the decree to make the sale on foreclosure, it may be made by his deputy duly appointed.[18]

(iii) *Persons Entitled to Direct Sale.* The right to control and direct the foreclosure sale rests generally with the complainant in the suit; but any party to the action who is interested in having the sale made promptly or in the proceeds, such as a junior mortgagee, may apply to the court to commit the prose-

Farge *v.* Van Wagenen, 14 How. Pr. (N. Y.) 54; Pier *v.* Storm, 37 Wis. 247.

12. Demaray *v.* Little, 19 Mich. 244; Nevius *v.* Egbert, 31 N. J. Eq. 460; Williams *v.* Doran, 23 N. J. Eq. 385; Corwith *v.* Barry, 69 Hun (N. Y.) 113, 23 N. Y. Suppl. 200.

13. *California.*— McDermot *v.* Barton, 106 Cal. 194, 39 Pac. 538.

Indian Territory.— Griffin *v.* Smith, 5 Indian Terr. 89, 82 S. W. 684, where the decree fails to designate any person to make the sale, the clerk of court may make the sale by virtue of his general powers as commissioner of the court.

Missouri.— Rumsey *v.* Peoples' R. Co., 154 Mo. 215, 55 S. W. 615.

Nebraska.—American Inv. Co. *v.* Nye, 40 Nebr. 720, 59 N. W. 355, 42 Am. St. Rep. 692.

Ohio.— Mayer *v.* Wick, 15 Ohio St. 548.

United States.— Deck *v.* Whitman, 96 Fed. 873.

Mistake in designation.— It is immaterial that the person appointed to make the sale on mortgage foreclosure is styled in the decree appointing him "commissioner" instead of "master," when the authority and duties prescribed in the appointment are appropriate to the function given. Mann *v.* Jennings, 25 Fla. 730, 6 So. 771.

Mortgagee as commissioner.— On a mortgage foreclosure it is bad practice to appoint the mortgagee as commissioner to make the sale. Worsham *v.* Freeman, 34 Ark. 55.

Changing order of appointment.— So much of an order of court for the sale of land as designates the office or person by whom the sale shall be made is merely administrative, and may be modified or rescinded by a succeeding judge having jurisdiction of the subject-matter. Meetze *v.* Padgett, 1 S. C. 127.

Need not be sworn.— Unless specially required by statute, it is not necessary for a master or commissioner appointed to hold a foreclosure sale to be sworn to the faithful discharge of his duties. George *v.* Keniston, 57 Nebr. 313, 77 N. W. 772; Wright *v.* Stevens, 55 Nebr. 676, 76 N. W. 441; Northwestern Mut. L. Ins. Co. *v.* Mulvihill, 53 Nebr. 538, 74 N. W. 78; Mayer *v.* Wick, 15 Ohio St. 548. In California the statute requires the commissioner to be sworn, but the fact that his affidavit is not on file is not conclusive proof that he was not sworn, but the fact may be proved by other evidence. May *v.* Hatcher, 130 Cal. 627, 63 Pac. 33.

Need not give bond.— Nicholl *v.* Nicholl, 8 Paige (N. Y.) 349; Mayer *v.* Wick, 15 Ohio St. 548. Where a bond is required by law, it may be given at any time before the sale. Brooks *v.* Hays, 24 Md. 507.

14. Taylor *v.* Ellenberger, 134 Cal. 31, 66 Pac. 4; McDermot *v.* Barton, 106 Cal. 194, 39 Pac. 538; Knickerbacker *v.* Eggleston, 3 How. Pr. (N. Y.) 130; Mayer *v.* Wick, 15 Ohio St. 548, holding that the statute providing for the appointment of master commissioners to hold office for three years does not deprive the courts of power to appoint special masters for the sale of specific realty under mortgage. *Contra*, Blitz *v.* Moran, 17 Colo. App. 253, 67 Pac. 1020; Armstrong *v.* Humphreys, 5 S. C. 128.

Appointment of referee by consent of parties see Abbott *v.* Curran, 98 N. Y. 665; Dickinson *v.* Dickey, 14 Hun (N. Y.) 617.

15. Penn Mut. L. Ins. Co. *v.* Creighton Theatre Bldg. Co., 54 Nebr. 228, 74 N. W. 583; Heyer *v.* Deaves, 2 Johns. Ch. (N. Y.) 154.

16. Powell *v.* Tuttle, 3 N. Y. 396.

17. Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314.

18. Hodgdon *v.* Davis, 6 Dak. 21, 50 N. W. 478; Union Trust Co. *v.* Davis, 64 Nebr. 340, 89 N. W. 1052; Richardson *v.* Hahn, 63 Nebr. 294, 88 N. W. 527; Passumpsic Sav. Bank *v.* Maulick, 60 Nebr. 469, 83 N. W. 672, 83 Am.

cution of the decree to him, if the complainant unreasonably delays the sale or neglects to proceed with it.[19] On the other hand defendant has no such right as he might have under an ordinary execution, to point out the particular property to be taken and sold, since the mortgage is a lien only on the property covered by it.[20]

b. Conduct of Sale — (i) *In General.* The officer conducting a foreclosure sale must act in strict conformity to the terms and directions of the decree,[21] and of the statute, if there be any, which is applicable to such proceedings,[22] and also in obedience to the writ, order, or other process which more immediately defines his authority;[23] and, as he is allowed a certain amount of discretion, he must exercise it with a due regard to the rights of all the parties and not allow a sacrifice either of the just claims of plaintiff or the property of defendant.[24] Where various mortgages which are foreclosed do not convey the same land, a separate sale under each mortgage should be made.[25]

(ii) *Sale in Parcels or in Gross.* As to selling the property as one entire tract or offering it in separate parcels, the officer must look to the decree, and if he finds specific directions there, he has no discretion, but must obey the decree literally;[26] and the same is true as to any statutory directions;[27] and if he disobeys either, the court may refuse to confirm the sale, or may set it aside and order a resale.[28] But where the land is offered in separate parcels, as ordered by the court or by the statute, and no bids are made, the officer is then justified in putting it up as a whole.[29] If neither the decree nor the statute gives him any

St. Rep. 539; Bell *v.* Omaha Sav. Bank, 1 Nebr. (Unoff.) 88, 95 N. W. 486. And see Meyer *v.* Patterson, 28 N. J. Eq. 239.

19. Kelly *v.* Israel, 11 Paige (N. Y.) 147.

As to the rights of a purchaser of part of the mortgaged premises see Wade *v.* Filan, 5 Luz. Leg. Reg. (Pa.) 106.

20. Flemming *v.* Powell, 2 Tex. 225.

21. Langsdale *v.* Mills, 32 Ind. 380; Vail *v.* McKernan, 21 Ind. 421; Old Colony Trust Co. *v.* Great White Spirit Co., 181 Mass. 413, 63 N. E. 945. See also Moller *v.* Watts, 56 N. Y. App. Div. 562, 67 N. Y. Suppl. 488.

22. Franklin *v.* Thurston, 8 Blackf. (Ind.) 160; Sheets *v.* Peabody, 7 Blackf. (Ind.) 613, 43 Am. Dec. 107; Doe *v.* Heath, 7 Blackf. (Ind.) 154; Kidder *v.* McIlhenny, 81 N. C. 123; Doe *v.* Pendleton, 15 Ohio 735; Wood *v.* Hudson, 5 Munf. (Va.) 423.

Rents and profits.— Where the statute authorizes a sale of the rents and profits on foreclosure of a mortgage, the sheriff must offer them for sale. Brownfield *v.* Weicht, 9 Ind. 394.

As to setting off homestead see Cummings *v.* Burleson, 78 Ill. 281.

23. Thompson *v.* McManama, 2 Disn. (Ohio) 213, holding that where the officer making the sale has returned that the property has been struck off to a given purchaser, his control over it ceases; and if the parties in interest afterward agree to set the sale aside, he cannot on the same process again offer it for sale, and much less disregard the sale and make return that the next highest bidder is the purchaser.

Sale without process.— If the master proceeds to sell the property without any process or a copy of the decree, the sale is not void, if it conforms to all the requirements of the decree. Karnes *v.* Harper, 48 Ill. 527.

Sale under several writs.— The purchaser at a mortgage sale, made in execution of three writs or orders, cannot refuse to comply with his bid when a valid legal title is conveyed through the execution of one of the writs, although the sheriff, in the execution of the others, may have departed from their terms. Danneel *v.* Klein, 47 La. Ann. 928, 17 So. 466.

24. Slack *v.* Cooper, 219 Ill. 138, 76 N. E. 84; Whittacre *v.* Fuller, 5 Minn. 508; Kane *v.* Jonasen, 55 Nebr. 757, 76 N. W. 441; Stoddard *v.* Denison, 38 How. Pr. (N. Y.) 296.

25. Ryan *v.* Shaneyfelt, (Ala. 1906) 40 So. 223.

26. *Illinois.*— Patton *v.* Smith, 113 Ill. 499.

Indiana.— Meriwether *v.* Craig, 118 Ind. 301, 20 N. E. 769.

New York.— Wiley *v.* Angel, Clarke 217.

Wisconsin.— Babcock *v.* Perry, 8 Wis. 277.

England.— Scott *v.* Scott, L. R. 9 Ir. 367.

Compare Summerville *v.* March, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

27. Haynes *v.* Cox, 118 Ind. 184, 20 N. E. 758; Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344; Duckworth *v.* Payne, 26 La. Ann. 683; Hemmer *v.* Hustace, 14 N. Y. Civ. Proc. 254 [*affirmed* in 51 Hun 457, 3 N. Y. Suppl. 850].

28. *Illinois.*—Fergus *v.* Woodworth, 44 Ill. 374; Waldo *v.* Williams, 3 Ill. 470; Flynn *v.* Wilkinson, 56 Ill. App. 239.

Indiana.— Tyler *v.* Wilkerson 27 Ind. 450.

Iowa.— White *v.* Watts, 18 Iowa 74; Lay *v.* Gibbons, 14 Iowa 377, 81 Am. Dec. 487; Boyd *v.* Ellis, 11 Iowa 97.

New Jersey.— Schilling *v.* Lintner, 43 N. J. Eq. 444, 11 Atl. 153.

Texas.— Oppenheimer *v.* Reed, 11 Tex. Civ. App. 367, 32 S. W. 325.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

29. *California.*—Anglo-Californian Bank *v.* Cerf, 142 Cal. 303, 75 Pac. 902; Connick *v.*

specific directions in this particular, very much is left to the discretion of the officer.[30] A sale *en masse* is not necessarily invalid, in the absence of proof of fraud or of injury to a party in interest, merely because the premises might have been divided into several parcels,[31] and it is necessary for the officer to pursue this course where the property is not susceptible of advantageous division,[32] and it is generally right for him to do so where the premises are mortgaged as a single tract and so described in the mortgage,[33] where all the land is improved, occupied, or used as a single piece or employed for a single purpose, although it may embrace several lots,[34] or where breaking it up into parts or lots would materially lessen its selling value.[35] On the other hand he is not obliged to sell the premises as a whole where it can be divided to good advantage and it appears that the sale of a portion will bring enough to satisfy the mortgage debt,[36] or where such a

Hill, 127 Cal. 162, 59 Pac. 832; Marston *v.* White, 91 Cal. 37, 27 Pac. 588.

Illinois.— Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Malaer *v.* Damron, 31 Ill. App. 572.

Indiana.— Carpenter *v.* Russell, 129 Ind. 571, 29 N. E. 36; Nesbit *v.* Hanway, 87 Ind. 400; Adler *v.* Sewell, 29 Ind. 599; Sowle *v.* Champion, 16 Ind. 165.

Iowa.— Brumbaugh *v.* Shoemaker, 51 Iowa 148, 50 N. W. 493; Burmeister *v.* Dewey, 27 Iowa 468.

Nebraska.— Empkie *v.* McLean, 15 Nebr. 629, 19 N. W. 593; Tichy *v.* Simecek, 5 Nebr. (Unoff.) 81, 97 N. W. 323.

Utah.— Dickert *v.* Weise, 2 Utah 350.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

30. Benton *v.* Wood, 17 Ind. 260; Wallace *v.* Feely, 61 How. Pr. (N. Y.) 225 [*affirmed* in 10 Daly 331].

31. *Illinois.*— Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Dates *v.* Winstanley, 53 Ill. App. 623.

Iowa.— Olmstead *v.* Kellogg, 47 Iowa 460.

Kentucky.— Scott *v.* Ford, 50 S. W. 552, 20 Ky. L. Rep. 1932.

Louisiana.— Stinson *v.* Lelievre, 22 La. Ann. 191.

Minnesota.— Von Hemert *v.* Taylor, 76 Minn. 386, 79 N. W. 319; Willard *v.* Finnegan, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50.

Nebraska.— Iowa L. & T. Co. *v.* Devall, 63 Nebr. 826, 89 N. W. 381.

South Carolina.— Tankersley *v.* Anderson, 4 Desauss. Eq. 44.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

32. Craig *v.* Stevenson, 15 Nebr. 362, 18 N. W. 510; Ellsworth *v.* Lockwood, 9 Hun (N. Y.) 548.

33. *Illinois.*— Field *v.* Brokaw, 159 Ill. 560, 42 N. E. 877; Patton *v.* Smith, 113 Ill. 499; Davis *v.* Dresback, 81 Ill. 393.

Indiana.— Shannon *v.* Hay, 106 Ind. 589, 7 N. E. 376.

Iowa.— Street *v.* Beal, 16 Iowa 68, 85 Am. Dec. 504.

Michigan.— Durm *v.* Fish, 46 Mich. 312, 9 N. W. 429.

New York.— Griswold *v.* Fowler, 24 Barb. 135; Woodhull *v.* Osborne, 2 Edw. 614.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

34. *California.*— Meux *v.* Trezevant, 132 Cal. 487, 64 Pac. 848.

Michigan.— Harris *v.* Creveling, 80 Mich. 249, 45 N. W. 85; Yale *v.* Stevenson, 58 Mich. 537, 25 N. W. 488.

Nebraska.— Craig *v.* Stevenson, 15 Nebr. 362, 18 N. W. 510.

New Jersey.— Guarantee Trust, etc., Co. *v.* Jenkins, 40 N. J. Eq. 451, 2 Atl. 13.

New York.— Lane *v.* Conger, 10 Hun 1; McLaughlin *v.* Teasdale, 9 Daly 23; Coudert *v.* De Logerot, 30 N. Y. Suppl. 114.

South Dakota.— Thompson *v.* Browne, 10 S. D. 344, 73 N. W. 194.

United States.— Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

35. Stone *v.* Missouri Guarantee Sav., etc., Assoc., 58 Ill. App. 78; Barlow *v.* McClintock, 11 S. W. 29, 10 Ky. L. Rep. 894.

Railroad property.— Where a mortgage covers the entire plant of a railroad company, embracing its real and personal estate and franchises, the court will assume in the absence of evidence to the contrary that the plant is an entirety, the elements of which are so essentially intermingled, and each so indispensable to the value of the others, that they cannot be separated without material injury to the value of each, and hence such property should be ordered sold as an entirety and not in separate parts. McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932. And see Chicago, etc., R. Co. *v.* Loewenthal, 93 Ill. 433; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Property of telegraph company.— On foreclosure of a mortgage on united telegraph lines, they should not be sold in parcels, as that would be an injury to the property. Farmers' L. & T. Co. *v.* United Tel. Lines, 10 N. J. L. J. 340.

Manufacturing plant.— On foreclosure of a mortgage on the property of a manufacturing company, the property may be sold as an entirety when the division of it into parcels would lessen its selling value. Central Trust Co. *v.* U. S. Rolling-Stock Co., 56 Fed. 5.

36. *Iowa.*—State Bank *v.* Brown, 128 Iowa 665, 105 N. W. 49.

Louisiana.— Gaiennie *v.* Questi, 3 La. 433. A mortgaged square may be divided and sold in lots. Plauche *v.* Gravier, 6 Mart. N. S. 597.

Maryland.— Thomas *v.* Fewster, 95 Md. 446, 52 Atl. 750.

course is demanded by the equities of separate owners of different portions,[37] or a larger price can be realized by a judicious division of the property.[38] When the sale is to be made in parcels, the law in some jurisdictions gives to the owner of the property the right to direct the manner of division and order of sale; and it is always proper for the officer to regard his wishes in this respect if it can be done without injury to others.[39] The rule requiring the sale of disconnected pieces of land to be made separately is not an arbitrary one, but is enforced when necessary to protect the rights of the debtor and to secure the best prices.[40]

(III) *Order of Offering For Sale.* As has been previously stated where part of mortgaged property has been sold to a third person, that portion retained by the mortgagor is first liable to satisfaction of the mortgage, and where all the property has been sold in parcels to different purchasers at different times, the parcels are liable in the inverse order of their alienation,[41] and this principle should be observed in the decree of foreclosure and the sale should be made in accordance with it.[42] And where the mortgage in suit covers two tracts or parcels of land, on one of which alone another mortgagee has security, the sale should be so ordered that recourse shall first be had to that parcel not subject to the other mortgage.[43] Equities between joint owners or cotenants of the mortgaged land may also require that specific portions of it or interests in it shall be

Michigan.— McIntyre *v.* Wyckoff, 119 Mich. 557, 78 N. W. 654.

New Jersey.— Parkhurst *v.* Cory, 11 N. J. Eq. 233.

New York.— Wiley *v.* Angel, Clarke 217.

Pennsylvania.— Mevey's Appeal, 4 Pa. St. 80.

United States.— Warner *v.* Grayson, 200 U. S. 257, 26 S. Ct. 240, 50 L. ed. 470.

See 35 Cent. Dig. tit. "Mortgages," § 1515.

37. Skaggs *v.* Kincaid, 48 Ill. App. 608.

38. Bernhard *v.* Hovey, 9 Kan. App. 25, 57 Pac. 245.

39. *California.*— Ontario Land, etc., Co. *v.* Bedford, 90 Cal. 181, 27 Pac. 39.

Iowa.— Taylor *v.* Trulock, 59 Iowa 558, 13 N. W. 661.

Missouri.—Crosby *v.* Andrew County Farmers' Bank, 107 Mo. 436, 17 S. W. 1004.

Nebraska.— See Michigan Trust Co. *v.* Red Cloud, 3 Nebr. (Unoff.) 722, 92 N. W. 900.

New York.— Knapp *v.* Conger, 59 N. Y. 635; Woodruff *v.* Bush, 8 How. Pr. 117; Brown *v.* Frost, Hoffm. 41 [*reversed* on other grounds in 10 Paige 243]. The owner of the decree has no right to control the action of the master in relation to the order of sale of the different parcels. Snyder *v.* Stafford, 11 Paige 71.

Canada.— Beaty *v.* Radenhurst, 3 Ch. Chamb. (U. C.) 344.

In Pennsylvania in a common foreclosure by scire facias, the administratrix cannot compel "the mansion house or most profitable part of the estate" to be sold last, as is required in orphans' court sales under the act of 1832. Lehman *v.* Tammany, 7 Kulp 235.

40. Miller *v.* Trudgeon, 16 Okla. 337, 86 Pac. 523.

41. See *supra*, XVII, F, 2, a.

42. *Colorado.*— Stephens *v.* Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

Illinois.— Monarch Coal, etc., Co. *v.* Hand, 197 Ill. 288, 64 N. E. 381; Mead *v.* Peabody, 183 Ill. 126, 55 N. E. 719; Hyde Park Thomson-Houston Light Co. *v.* Brown, 172 Ill. 329, 50 N. E. 127; Lock *v.* Fulford, 52 Ill. 166.

Iowa.— Dilger *v.* Palmer, 60 Iowa 117, 10 N. W. 763, 14 N. W. 134. But *compare* Huff *v.* Farwell, 67 Iowa 298, 25 N. W. 252.

Michigan.— Long *v.* Kaiser, 81 Mich. 518, 46 N. W. 19; Sibley *v.* Baker, 23 Mich. 312.

Nebraska.— Bradfield *v.* Sewall, 58 Nebr. 637, 79 N. W. 615.

New Jersey.— Warwick *v.* Ely, 29 N. J. Eq. 82.

New York.— Van Slyke *v.* Van Loan, 26 Hun 344.

Ohio.— Sternberger *v.* Hanna, 42 Ohio St. 305.

Wisconsin.—Perkins *v.* McAuliffe, 105 Wis. 582, 81 N. W. 645.

United States.— District of Columbia Nat. Sav. Bank *v.* Creswell, 100 U. S. 630, 25 L. ed. 713.

See 35 Cent. Dig. tit. "Mortgages," § 1516.

43. *Illinois.*— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408.

Mississippi.— Millsaps *v.* Bond, 64 Miss. 453, 1 So. 506.

Missouri.—Condit *v.* Maxwell, 142 Mo. 266, 44 S. W. 467.

Nebraska.— Mitchelson *v.* Smith, 28 Nebr. 583, 44 N. W. 871, 26 Am. St. Rep. 357.

New Jersey.— Hellyer *v.* Stover, (Ch. 1898) 42 Atl. 98; Locker *v.* Riley, 30 N. J. Eq. 104.

United States.— Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706.

Where two mortgages on different tracts of land are foreclosed, each tract should be sold to satisfy the sum for which it was separately mortgaged; both should not be sold for the aggregate sum. Home Loan Assoc. *v.* Wilkins, 66 Cal. 9, 4 Pac. 697.

Where necessity requires and equity demands that two lots shall be sold together on a foreclosure of a mortgage on one, and no injustice can result to an encumbrancer on the other lot, the sale will be so ordered. Pepper *v.* Shepherd, 4 Mackey (D. C.) 269.

sold in a certain order;[44] and circumstances may render it proper to protect the interests of the mortgagor's wife by ordering that his interest alone shall be first sold or offered for sale, or that her dower right shall be excepted or reserved.[45]

(IV) *Terms and Conditions of Sale.* An officer selling property under a decree of foreclosure has no authority to sell on credit, or to accept in payment of the bid anything else than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sales.[46] But the parties may consent to a sale on credit, instead of for cash, in order to obtain a better price, and a sale so made will be valid if approved and confirmed by the court;[47] and the court itself, in the exercise of its discretion, may order the sale to be made on time,[48] unless this would be contrary to the express provisions of the mortgage.[49] It is also competent to require an immediate deposit by the purchaser of a reasonable part of his bid.[50]

4. Bids and Bidders — a. Who May Purchase — (I) *In General.* The mortgagor himself cannot become the purchaser at the foreclosure sale; at least, if there are junior encumbrances, such a purchase will be treated merely as a redemption;[51] nor is it competent for any other person to buy the property who is under any duty to discharge the encumbrance,[52] or who occupies a position of

44. *Alabama.*— Austin *v.* Bean, 101 Ala. 133, 16 So. 41.

Illinois.— Schoenewald *v.* Dieden, 8 Ill. App. 389.

Indiana.— Smith *v.* Sparks, 162 Ind. 270, 70 N. E. 253; Higham *v.* Harris, 108 Ind. 246, 8 N. E. 255; Williams *v.* Perry, 20 Ind. 437, 83 Am. Dec. 327.

Iowa.— Miller *v.* Felkner, 42 Iowa 458.

Wisconsin.— Quaw *v.* Lameraux, 36 Wis. 626.

See 35 Cent. Dig. tit. "Mortgages," § 1516.

45. Smith *v.* Sparks, 162 Ind. 270, 70 N. E. 253; Leary *v.* Shaffer, 79 Ind. 567; Grable *v.* McCulloh, 27 Ind. 472; Lane *v.* Traders' Deposit Bank, 21 S. W. 756, 14 Ky. L. Rep. 873; Hale *v.* Gouverneur, 4 Edw. (N. Y.) 207.

46. Rice *v.* Schmidt, 11 La. 70; Hooper *v.* Castetter, 45 Nebr. 67, 63 N. W. 135.

Meaning of "cash."— This term does not necessarily mean coin, but ready money, as distinguished from credit. Meng *v.* Houser, 13 Rich. Eq. (S. C.) 210.

A certified check tendered at a sale late on Saturday afternoon, and paid the following Monday, is equivalent to cash. Jacobs *v.* Turpin, 83 Ill. 424.

A sale for cash undoubtedly means an immediate payment. Sauer *v.* Steinbauer, 14 Wis. 70, holding that such a payment must be made on the spot, and that a local custom to postpone payment for a sale made on Saturday until the following Monday was contrary to law and void, where the payment being required to be made immediately in full, or within one hour after the completion of the sale, the sale was set aside. See, however, Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

In Louisiana under Civ. Code, art. 3249, where part of the debt secured is not due, the property will be sold on terms of credit to meet the payments not yet due. Pepper *v.* Dunlap, 16 La. 163.

47. Rhodes *v.* Dutcher, 6 Hun (N. Y.) 453.

Where there are two joint mortgagors, one of them cannot, without the concurrence of the other, give his consent to a variance from the terms of sale prescribed by the mortgage. Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503.

48. Sedgwick *v.* Fish, Hopk. (N. Y.) 594; Lowndes *v.* Chisholm, 2 McCord Eq. (S. C.) 455, 16 Am. Dec. 667. And see Willett *v.* Johnson, 84 Ky. 411, 1 S. W. 674, 8 Ky. L. Rep. 398.

49. Pool *v.* Young, 7 T. B. Mon. (Ky.) 587; Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931; Wytheville Crystal Ice, etc., Co. *v.* Frick, 96 Va. 141, 30 S. E. 491. *Compare* Mitchell *v.* McKinny, 6 Heisk. (Tenn.) 83; Low *v.* Blackford, 87 Fed. 392, 31 C. C. A. 15, holding that the court is not bound to decree a sale in strict accordance with the terms prescribed in the mortgage for the execution of the power of sale therein contained, but should exercise a sound discretion, having due regard to the interests of all the parties.

50. Maryland Permanent Land, etc., Soc. *v.* Smith, 41 Md. 516; Hand *v.* Savannah, etc., R. Co., 13 S. C. 467.

51. Campbell *v.* Benjamin, 69 Ill. 244; Shinn *v.* Shinn, 15 Ill. App. 141. And see Morris *v.* Housley, (Tex. Civ. App. 1898) 47 S. W. 846, as to a purchase by the mortgagor's son, who was a minor, but had been emancipated and had some money of his own.

Guardian of infant party.— The provision of N. Y. Code Civ. Proc. § 1679, that a guardian of an infant party to the action shall not purchase or be interested in the purchase of any of the property sold, applies only to guardians *ad litem*, not to general guardians or guardians *in socage*. Boyer *v.* East, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290; O'Brien *v.* General Synod of Reformed Church, 10 N. Y. App. Div. 605, 42 N. Y. Suppl. 356.

52. Holcomb *v.* Holcomb, 11 N. J. Eq. 281, holding that the mortgagor's executor may purchase for the benefit of the estate and to prevent a sacrifice of the property.

A purchaser of an undivided half of the

trust or confidence toward the mortgagor such as would make it inequitable for him to acquire the title for himself.[53] But a junior encumbrancer may become the purchaser,[54] and so may the mortgagor's assignee in bankruptcy or insolvency,[55] and so also may the mortgagor's wife, if she makes the purchase in entire good faith and with her own money;[56] and, unless the statute expressly forbids[57] it, one who has acted as an appraiser in valuing the property for the purpose of the sale is not disqualified from bidding.[58]

(II) *Trustee or Mortgagee.* It has been held in a number of cases that a mortgagee or trustee in a deed of trust cannot purchase at a foreclosure sale, or at least if he does the sale is voidable.[59] But one who has received the title to lands

mortgaged land may buy. Burr *v.* Mueller, 65 Ill. 258.

53. *Indiana.*— Russell *v.* Metzgar, 2 Ind. 345.

Missouri.— Tuggles *v.* Callison, 143 Mo. 527, 45 S. W. 291.

New Jersey.— Wakeman *v.* Dodd, 27 N. J. Eq. 564.

Pennsylvania.— McHenry's Appeal, 61 Pa. St. 432; Campbell *v.* Pennsylvania L. Ins. Co., 2 Whart. 53.

Tennessee.— Hunt *v.* Memphis Gaslight Co., 95 Tenn. 136, 31 S. W. 1006.

See 35 Cent. Dig. tit. "Mortgages," § 1518.

Applications of rule.— The relation of the life-tenant to the remainder-men is not of such a fiduciary nature that he cannot purchase the property at a foreclosure sale. German-American Title, etc., Co.'s Appeal, 132 Pa. St. 36, 18 Atl. 1090. And this is true of the relation of a lessee of the premises to his lessor, the mortgagor (Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545), and of the relation of a stepfather to his minor stepchildren (Otto *v.* Schlapkahl, 57 Iowa 226, 10 N. W. 651), nor is there any objection to a purchase by the attorney for plaintiff in the foreclosure suit (Le Conte *v.* Irwin, 19 S. C. 554). And the purchase by the solicitor of a railroad company of its property, at a foreclosure sale, is not necessarily invalid; while it will be closely scrutinized, it will stand until successfully impeached. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932.

54. Rawiszer *v.* Hamilton, 51 How. Pr. (N. Y.) 297; *Ex p.* Slack, 1 L. J. Ch. O. S. 70.

55. Fisk *v.* Sarber, 6 Watts & S. (Pa.) 18; *Ex p.* Ellis, 3 Deac. & C. 297.

56. Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121; Houston *v.* Nord, 39 Minn. 490, 40 N. W. 568.

57. See the statutes of the different states. And see McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614.

58. Ison *v.* Kinnaird, 17 S. W. 633, 13 Ky. L. Rep. 569; Barlow *v.* McClintock, 11 S. W. 29, 10 Ky. L. Rep. 894.

59. *Alabama.*— American Freehold Land Mortg. Co. *v.* Pollard, 127 Ala. 227, 29 So. 598; McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320.

District of Columbia.—The purchase by the trustee under a deed of trust of the trust property for his own benefit is not absolutely void, but voidable only, and may be confirmed or acquiesced in by the parties interested. Quirk *v.* Liebert, 12 App. Cas. 394.

Illinois.— Burr *v.* Borden, 61 Ill. 389; Waite *v.* Dennison, 51 Ill. 319. But see Chillicothe Paper Co. *v.* Wheeler, 68 Ill. App. 343, holding that a holder of bonds secured by a deed of trust may bid, either for himself or for himself and other bondholders jointly, at the foreclosure sale.

North Carolina.— Sherrod *v.* Vass, 128 N. C. 49, 38 S. E. 133; Craft *v.* Mechanics' Home Assoc., 127 N. C. 163, 37 S. E. 190.

United States.— Cunningham *v.* Macon, etc., R. Co., 156 U. S. 400, 15 S. Ct. 361, 39 L. ed. 471.

Canada.— Faulds *v.* Harper, 11 Can. Sup. Ct. 639; Taylor *v.* Sharpe, 8 Manitoba 163; Bowen *v.* Fox, 1 Ch. Chamb. (U. C.) 387. See also Parr *v.* Montgomery, 27 Grant Ch. (U. C.) 521.

See 35 Cent. Dig. tit. "Mortgages," § 1518.

See, however, Cooley *v.* Rankin, 11 Mo. 642; Stover *v.* Stark, 61 Nebr. 374, 85 N. W. 286, 87 Am. St. Rep. 460 (holding that a plaintiff in foreclosure proceedings may lawfully purchase the property sold to satisfy a decree in his favor); Mott *v.* Walkley, 3 Edw. (N. Y.) 590 (holding that where the proceedings under a decree of foreclosure are fair, the sale will not be set aside, although the mortgagee is the purchaser); Sabin *v.* Stickney, 9 Vt. 155 (construing New York statutes).

Trustee cannot purchase for his own benefit.— A trustee of mortgaged property will not be permitted to purchase the same for his own benefit, where such purchase would be in contravention or violation of his duties, and such purchase, if made, is in equity for the benefit of the *cestui que trust*, regardless of the amount paid, or whether there was actual fraud or not. Marquam *v.* Ross, 47 Oreg. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1.

The heirs and administrator of a deceased mortgagee may purchase the premises at foreclosure sale. Briant *v.* Jackson, 99 Mo. 585, 13 S. W. 91.

At a sale on a levari facias the mortgagee may purchase, although the property sells for less than the mortgage money and costs. Blythe *v.* Richards, 10 Serg. & R. (Pa.) 261, 13 Am. Dec. 672.

Where mortgaged premises are sold under execution the mortgagee may purchase. Poultney *v.* Cecil, 8 La. 321.

Provision authorizing any party to suit to purchase.— The sole purpose of a provision

by an arrangement under which his rights are no more than those of a mortgagee may become a purchaser at a sale on the foreclosure by a third person of another mortgage.[60] And where a note is secured by a trust deed to a third person the *cestui que trust* can lawfully bid at such a sale.[61]

b. Bids — (i) *In General.* A valid and binding contract of sale is made as soon as the property is struck off to the successful bidder, there being either an express or implied acceptance of his bid,[62] and when he has made the deposit on account of purchase-money, if any is required.[63] Thereafter he cannot retract or withdraw his bid.[64] He may transfer it to another person;[65] but the officer making the sale has no power to substitute one purchaser for another, or to reject the highest and best bid, unless for very good cause.[66] A bidder whose bid has not been accepted has no standing and no claims on the property.[67] In some states the law provides that the property shall not be sold for less than a certain proportion, usually two thirds, of its appraised value; this therefore constitutes the minimum bid which may be received, and no valid sale can be made for less.[68]

(ii) *Freedom of Competition and Contracts as to Bidding.* Any contract or arrangement which is designed or tends to prevent fair and free competition among the bidders at a mortgage foreclosure sale is void and will invalidate the sale.[69] But a contract that an outsider shall bid on the property up to a

in a decree authorizing any party to a foreclosure suit to become a purchaser is to avoid the supposed technical rule that a party to suit cannot become a purchaser under the decree without special leave, and not to authorize him to purchase and hold contrary to equity. Conger *v.* Ring, 11 Barb. (N. Y.) 356. Such a provision does not authorize one whose breach of an equitable duty to the owner brought about the sale. Bennett *v.* Austin, 81 N. Y. 308.

An agent for complainants in a foreclosure suit may bid upon the property for his principals without giving notice to other bidders that he is not bidding for himself but for complainants. National F. Ins. Co. *v.* Loomis, 11 Paige (N. Y.) 431.

In England while it is the usual and prudent practice for the mortgagee to apply to the court for leave to bid at the foreclosure sale, yet the court will not rescind the sale, where the mortgagee has bought in the property without obtaining such leave, if his purchase was made in entire good faith. Tennant *v.* Trenchard, L. R. 4 Ch. 537, 38 L. J. Ch. 169, 20 L. T. Rep. N. S. 856 (purchase by trustee); *Ex p.* Duncane, Buck 18; *Ex p.* Pedder, 3 Deac. & C. 622, 1 Mont. & A. 327; *Ex p.* Ashley, 3 Deac. & C. 510, 3 L. J. Bankr. 9, 1 Mont. & A. 82; *Ex p.* Davis, 3 Deac. & C. 504, 1 Mont. & A. 89. See Steele *v.* Devonport, 11 Ir. Eq. 339; *Ex p.* Commercial Bank, 9 L. T. Rep. N. S. 782; *Ex p.* Marsh, 1 Madd. 148, 56 Eng. Reprint 56; *Ex p.* Robinson, Mont. & M. 261.

60. Moote *v.* Scriven, 33 Mich. 500.

61. Freeman's Appeal, 74 Conn. 247, 50 Atl. 748.

62. Jackson *v.* Warren, 32 Ill. 331.

Reporting bids to court.— It is not the modern practice to report the bids to the court for its consideration and acceptance, but to strike off the property to the highest bidder. Comstock *v.* Purple, 49 Ill. 158 [*overruling* Dills *v.* Jaspar, 33 Ill. 262].

Statute of frauds.— A mortgage foreclosure sale is not within the statute of frauds, and is binding on the purchaser without any written contract or memorandum of the terms of sale. Andrews *v.* O'Mahoney, 112 N. Y. 567, 20 N. E. 374.

63. Michigan Mut. L. Ins. Co. *v.* Klatt, 5 Nebr. (Unoff.) 305, 98 N. W. 436; *Ex p.* Tatham, 4 Deac. & C. 360, 1 Mont. & A. 335; *Ex p.* Stephens, 2 Mont. & A. 31.

64. Dills *v.* Jasper, 33 Ill. 262. See also Miller *v* Miller, 48 Mich. 311, 12 N. W. 209. *Compare* State Bank *v.* Brown, 128 Iowa 665, 105 N. W. 49, holding that the officer conducting the sale may allow a bid to be withdrawn.

65. Culver *v.* McKeown, 43 Mich. 322, 5 N. W. 422; Thompson *v.* McManama, 2 Disn. (Ohio) 213.

66. Vannerson *v.* Cord, Sm. & M. Ch. (Miss.) 345; Spalding *v.* Murphy, 63 Nebr. 401, 88 N. W. 489. But see State Bank *v.* Brown, 128 Iowa 665, 105 N. W. 49, holding that the sheriff is entitled, for reasons satisfactory to himself, to refuse a bid, or, having accepted it, before the transaction is closed to repudiate it or authorize its withdrawal and resell the property.

67. Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43.

68. See the statutes of the different states. And see Ellenbogen *v.* Griffey, 55 Ark. 268, 18 S. W. 126; Delahay *v.* McConnel, 5 Ill. 156; Williams *v.* Waldo, 4 Ill. 264; Kline *v.* Camp, 49 Kan. 114, 30 Pac. 175; Walmsley *v.* Theus, 107 La. 417, 31 So. 869.

69. *Michigan.*— Innes *v.* Stewart, 36 Mich. 285.

Nebraska.— Goble *v.* O'Connor, 43 Nebr. 49, 61 N. W. 131; Aldrich *v.* Lewis, 28 Nebr. 502, 44 N. W. 735.

New Jersey.— Morris *v.* Woodward, 25 N. J. Eq. 32.

New York.— Atkins *v.* Judson, 33 N. Y. App. Div. 42, 53 N. Y. Suppl. 504.

certain sum, or that he will buy it if it is not run up above a certain price, is not unlawful, if there is no arrangement that the property shall be struck off to him in the face of a higher bid.[70] And persons having a common interest in the property, as different creditors of the mortgagor, or several holders of the bonds secured by the mortgage, are not obliged to bid against each other, but may make a combination to buy the property, provided there is no effort or intention to discourage outside bidders.[71]

(III) *Payment of Bid.* The successful bidder at a mortgage foreclosure sale must make his payment in accordance with the terms of sale, paying the whole price immediately if the sale was strictly for cash,[72] or paying down a part of it as earnest money, if the sale was partly on credit,[73] and furnishing bonds or such other security as the court requires for the deferred payments.[74] On a sale for cash, the payment must be made in money,[75] and to the full amount of the

Ohio.— Thompson *v.* McManama, 2 Disn. 213.

South Carolina.— *Ex p.* Cooley, 69 S. C. 143, 48 S. E. 92; Herndon *v.* Gibson, 38 S. C. 357, 17 S. E. 145, 37 Am. St. Rep. 765, 20 L. R. A. 545; Hamilton *v.* Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58.

Virginia.— Wood *v.* Hudson, 5 Munf. 423.

Compare Cooper *v.* French, 52 Iowa 531, 3 N. W. 538.

And see 35 Cent. Dig. tit. "Mortgages," § 1519.

70. Ritchie *v.* Judd, 137 Ill. 453, 27 N. E. 682; Davis *v.* Citizens' Bank, 39 La. Ann. 523, 2 So. 401.

71. *California.*— Santa Marina *v.* Connolly, 79 Cal. 517, 21 Pac. 1093.

New Jersey.— Walker *v.* Montclair, etc., R. Co., 30 N. J. Eq. 525.

New York.— Hopkins *v.* Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731.

Pennsylvania.— Huber *v.* Crosland, 140 Pa. St. 575, 21 Atl. 404.

United States.— Kropholler *v.* St. Paul, etc., R. Co., 2 Fed. 302, 1 McCrary 299.

See 35 Cent. Dig. tit. "Mortgages," § 1519.

72. Davis *v.* Hess, 103 Mo. 31, 15 S. W. 324. But *compare* Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

Time to examine title.— The purchaser is not entitled to sixty days in which to examine the title before paying his bid. Hildreth *v.* Turner, 89 Va. 858, 17 S. E. 471. But a sale is not invalidated by an agreement between the purchaser and the sheriff that the latter shall retain the purchase-money until a satisfactory title is given, and in default thereof shall return it. Bacchus *v.* Moreau, 4 La. Ann. 313.

73. Cummings *v.* Hart, 4 Nebr. (Unoff.) 20, 93 N. W. 150; Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394. See also Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429.

Effect of part payment.— Payment of a part only of the price is not enough to protect the purchaser against outstanding equities of which he had no actual notice. Marchbanks *v.* Banks, 44 Ark. 48.

74. Cornwall *v.* Falls City Bank, 92 Ky. 381, 18 S. W. 452, 13 Ky. L. Rep. 606; Brown *v.* Lambeth, 2 La. Ann. 822; Burthe *v.* Bernard, 1 Rob. (La.) 395; Cook *v.* Fultz, 10 Sm. & M. (Miss.) 369.

As to interest on deferred payments see Grabfelder *v.* Tallman, 36 Misc. (N. Y.) 247, 73 N. Y. Suppl. 282.

75. Pursley *v.* Forth, 82 Ill. 327, holding that the tender of a note executed by the person entitled to the proceeds of the sale is not a compliance with the terms of a sale for cash.

The acceptance of a check, especially a certified check, in lieu of the money, is not such an irregularity as will vitiate the sale, where it is shown that the check was afterward paid, or would have been paid if presented. McConneaughey *v.* Bogardus, 106 Ill. 321; Jacobs *v.* Turpin, 83 Ill. 424; Sheldon *v.* Pruessner, 52 Kan. 593, 35 Pac. 204; Leslie *v.* Saratoga Brewing Co., 59 N. Y. App. Div. 400, 69 N. Y. Suppl. 581.

Obligations of mortgagee.— The purchaser cannot give, in payment of his bid, obligations of the mortgage creditor, especially where it is shown that the latter is insolvent. Felps *v.* Clinton, etc., R. Co., 10 Rob. (La.) 89. See also Mt. Pleasant First Nat. Bank *v.* Conger, 37 Iowa 474.

Presumption of payment.— Where the return of the sheriff on foreclosure shows a sale for a certain sum, the presumption is that the money was paid. Kingsley *v.* Svoboda, 2 Nebr. (Unoff.) 234, 96 N. W. 518.

Payment in bonds.— Where the debt secured by a mortgage is represented by a series of bonds, as in the case of the usual corporation mortgage, it is customary for the court to order that, if the property is bought by one or more bondholders, the price may be paid in the bonds, and such a payment is equivalent to payment in lawful money. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 119 N. Y. 15, 23 N. E. 173; Holland Trust Co. *v.* Thomson-Houston Electric Co., 9 N. Y. App. Div. 473, 41 N. Y. Suppl. 457; Moran *v.* Hagerman, 64 Fed. 499, 12 C. C. A. 239. But bonds should not be received in payment of the bid except for such proportion of the bid as the purchaser, on a distribution of the purchase-money, will be entitled to receive out of the purchase-price on account of the bonds held by him and tendered in payment; and the right to pay a bid in bonds should not be limited to any particular bond-

bid,[76] except where the mortgagee himself became the purchaser, in which case he will receive credit for the amount of his claim and pay only the surplus in money;[77] and it has been held that the purchaser may retain the surplus for the purpose of applying it on an elder mortgage or other valid lien.[78]

(IV) *Failure to Comply With Bid*—(A) *Grounds For Refusal.* The bidder is justified in refusing to pay his money and complete the purchase if the mortgage in suit was invalid, so that no sale could lawfully be made under it,[79] or if there were such fatal defects in the proceedings in the foreclosure suit, or such a want of jurisdiction, as would lay the judgment open to collateral impeachment or vacation.[80] A purchaser at foreclosure sale is entitled to a good and marketable title, and if the title offered to him is defective, or of such doubtful validity that it does not answer this description, he cannot be compelled to accept it,[81] provided of course that he had no knowledge of the defects or causes

holder, but should be extended to all bondholders on the same terms. American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133.

76. Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336, holding that the purchaser cannot have a reduction of the price on account of illegal attorney's fees included in the sum for which the property was sold.

Fraudulent competition.— Where the mortgagee was induced to bid in the property at a sum exceeding the amount of the decree and greater than its value, by a fraudulent competition among the parties, it was held proper for the court to relieve him to the amount of the bid over the amount due on the decree. Buchoz *v.* Walker, 19 Mich. 224.

77. Briant *v.* Jackson, 99 Mo. 585, 13 S. W. 91; Lockwood *v.* Cook, 58 Nebr. 302, 78 N. W. 624; Guthrie *v.* Guthrie, 4 Nebr. (Unoff.) 365, 93 N. W. 1131; MacLagan *v.* Witte, 1 Nebr. (Unoff.) 438, 96 N. W. 490; Thomas *v.* Jarden, 57 Pa. St. 331; McMaster *v.* Kempshall, 1 Ch. Chamb. (U. C.) 329. See also Burton *v.* Ferguson, 69 Ind. 486.

Purchase by senior mortgagee.— Where the property is sold on foreclosure of a junior mortgage, and bought by the senior mortgagee, he has the right to retain the amount of his mortgage in satisfaction *pro tanto* of his bid. Mentz *v.* Train, 35 La. Ann. 955.

78. See Cowles *v.* Raguet, 14 Ohio 38.

In Louisiana the purchaser must retain the surplus, over the amount of the decree under which the sale is made, for the purpose of paying junior mortgages or other valid liens on the property; and so, if the sale is made to satisfy one of a series of mortgage notes, he must retain the surplus until demanded by the legal holders of the other notes. Citizens' Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Cummings *v.* Erwin, 15 La. Ann. 289.

79. Springfield Five Cents Sav. Bank *v.* South Cong. Soc., 127 Mass. 516 (mortgage not under seal); Ely *v.* Perrine, 2 N. J. Eq. 396 (mortgagor's wife did not execute the mortgage).

Prior decision as to validity.—Invalidity of the mortgage cannot be alleged as ground for refusing to pay the bid, where its validity has already been established by a judicial decision, rendered in proceedings in which any such objection might have been set up and adjudicated. Lyon *v.* Lyon, 67 N. Y. 250; Darvin *v.* Hatfield, 4 Sandf. (N. Y.) 468.

80. Montz *v.* Schwabacher, 119 Ky. 256, 83 S. W. 569, 26 Ky. L. Rep. 1214; McCahill *v.* U. S. Equitable L. Assur. Soc., 26 N. J. Eq. 531; Lyon *v.* Lyon, 67 N. Y. 250; Stuyvesant *v.* Weil, 41 N. Y. App. Div. 551, 58 N. Y. Suppl. 697; Griffin *v.* Baust, 26 N. Y. App. Div. 553, 50 N. Y. Suppl. 905; Welsh *v.* Schoen, 59 Hun (N. Y.) 356, 13 N. Y. Suppl. 71; Knight *v.* Moloney, 4 Hun (N. Y.) 33; Hutchinson *v.* Wall, 56 N. Y. Super. Ct. 104, 4 N. Y. Suppl. 717; Miller's Case, 14 Pa. Co. Ct. 479.

Objections personal to mortgagor.—Grounds of objection to foreclosure proceedings which are merely personal to the mortgagor cannot be urged by the purchaser at the foreclosure sale as a reason why he should not comply with his bid. Smith *v.* Logan, 21 La. Ann. 577.

Want of jurisdiction see Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561; Gaskin *v.* Meek, 42 N. Y. 186; Empire City Sav. Bank *v.* Silleck, 98 N. Y. App. Div. 139, 90 N. Y. Suppl. 561; O'Connor *v.* Felix, 87 Hun (N. Y.) 179, 33 N. Y. Suppl. 1074 [*affirmed* in 147 N. Y. 614, 42 N. E. 269]; Bixby *v.* Smith, 3 Hun (N. Y.) 60; Darvin *v.* Hatfield, 4 Sandf. (N. Y.) 468; Atkinson *v.* Richardson, 14 Wis. 157.

Want of parties see Hayes *v.* Stiger, 29 N. J. Eq. 196; Verdin *v.* Slocum, 71 N. Y. 345; Hecker *v.* Sexton, 43 Hun (N. Y.) 593; Moran *v.* Conoma, 59 N. Y. Super. Ct. 101, 13 N. Y. Suppl. 625; Phillips *v.* Wilcox, 12 Misc. (N. Y.) 382, 33 N. Y. Suppl. 561; *Ex p.* Sidebotham, 4 Deac. & C. 693, 2 Mont. & A. 146, 4 L. J. Bankr. 27.

81. *Illinois.*— Thrift *v.* Frittz, 7 Ill. App. 55.

Kentucky.— Mitchell *v.* Kinnaird, 29 S. W. 309, 34 S. W. 226, 17 Ky. L. Rep. 1250.

Louisiana.— Neuhauser *v.* Barthe, 110 La. 825, 34 So. 793.

Maryland.— Heuisler *v.* Nickum, 38 Md. 270; Preston *v.* Fryer, 38 Md. 221.

New York.— Scripture *v.* Morris, 159 N. Y. 534, 53 N. E. 1132; Fryer *v.* Rockefeller, 63 N. Y. 268; Title Guarantee, etc., Co. *v.* Fallon, 101 N. Y. App. Div. 187, 91 N. Y. Suppl.

of invalidity, for if he knew of these matters, or was duly warned of them before the sale, he must be considered to have had them in mind in making his bid, and consequently he will get all he bargained for,[82] and provided also that if the defect is of such a nature that it can be remedied, and it is remedied after the sale, by the execution and tender of further assurances or otherwise, the purchaser must then comply with his bid.[83] It will be a good reason for refusing to pay the bid that there are encumbrances upon the property not cut off by the foreclosure sale,[84] and of which the purchaser had no knowledge or notice,[85] or that it is burdened with servitudes or covenants or restrictions respecting its use which lessen its value,[86] or that the quantity of the land or the state of the improvements is less than that advertised and purporting to be sold.[87] And since the enforcement of such a purchase rests, to some extent at least, in the discretion of the court, it will not be ordered where the purchaser shows that he acted under an honest mistake, such that it would be unconscionable to require him to pay the amount bid.[88]

(B) *Resale.* Where the foreclosure purchaser fails or refuses to complete his purchase, a second sale of the property may be ordered.[89] This should be done on an application to the court, on which some disposition should be made of the

497 (purchaser may rest on a patent defect in the record title, but otherwise he must give evidence justifying his refusal to pay his bid); Huber *v.* Case, 93 N. Y. App. Div. 479, 87 N. Y. Suppl. 663 (payment of bid not compelled where title depends on questions of fact which must be proved by parol evidence); Dana *v.* Jones, 91 N. Y. App. Div. 496, 86 N. Y. Suppl. 1000; Moir *v.* Flood, 66 N. Y. App. Div. 544, 73 N. Y. Suppl. 364 (outstanding dower interest); Platt *v.* Finck, 60 N. Y. App. Div. 312, 70 N. Y. Suppl. 74; College Point Sav. Bank *v.* Vollmer, 44 N. Y. App. Div. 619, 60 N. Y. Suppl. 389; Argall *v.* Raynor, 20 Hun 267 (where person not a party to the suit has a claim which clouds the title); Graham *v.* Bleakie, 2 Daly 55; Goebel *v.* Iffla, 10 N. Y. St. 726; Thorn *v.* Sheil, 15 Abb. Pr. N. S. 81; People *v.* Knickerbocker L. Ins. Co., 66 How. Pr. 115.

The test of a marketable title, within the meaning of this rule, is not the question whether it is likely to be attacked and overturned; the purchaser cannot be compelled to take a title which is doubtful, although it is probable that it will never be questioned. College Point Sav. Bank *v.* Vollmer, 44 N. Y. App. Div. 619, 60 N. Y. Suppl. 389.

82. Stephens *v.* Humphryes, 141 N. Y. 586, 36 N. E. 739; Van Rensselaer *v.* Bull, 133 N. Y. 625, 30 N. E. 1147; Riggs *v.* Pursell, 66 N. Y. 193; Dunlop *v.* Mulry, 85 N. Y. App. Div. 498, 83 N. Y. Suppl. 477, 1104; German-American Real Estate Title Guarantee Co. *v.* Meyers, 32 N. Y. App. Div. 41, 52 N. Y. Suppl. 449.

83. Moir *v.* Flood, 66 N. Y. App. Div. 544, 73 N. Y. Suppl. 364; Von Hatton *v.* Scholl, 1 N. Y. App. Div. 32, 36 N. Y. Suppl. 771; Grady *v.* Ward, 20 Barb. (N. Y.) 543.

84. Hunting *v.* Walter, 33 Md. 60; Empire City Sav. Bank *v.* Silleck, 180 N. Y. 541, 73 N. E. 1123; Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209; Dodd *v.* Neilson, 90 N. Y. 243; Lawrence *v.* Cornell, 4 Johns. Ch. (N. Y.) 542; Charleston *v.* Blohme, 15 S. C. 124, 40 Am. Rep. 690. See also Andrews *v.* O'Mahoney, 1 N. Y. Suppl. 750; Holden *v.* Sackett, 12 Abb. Pr. (N. Y.) 473.

85. Ledyard *v.* Phillips, 32 Mich. 13; Hooper *v.* Castetter, 45 Nebr. 67, 63 N. W. 135; Norton *v.* Nebraska L. & T. Co., 35 Nebr. 466, 53 N. W. 481, 37 Am. St. Rep. 441, 18 L. R. A. 88.

86. Kingsland *v.* Fuller, 157 N. Y. 507, 52 N. E. 562; Riggs *v.* Pursell, 74 N. Y. 370 (restrictions on use of property); Scripture *v.* Morris, 38 N. Y. App. Div. 377, 56 N. Y. Suppl. 476; Ray *v.* Adams, 28 Misc. (N. Y.) 664, 59 N. Y. Suppl. 1047 (covenant against nuisance); Crocker *v.* Gollner, 20 N. Y. Suppl. 17.

87. Dunn *v.* Herbs, 56 Hun (N. Y.) 457, 10 N. Y. Suppl. 34 (where the lot sold contained only eight or nine acres, instead of eighty-nine as advertised); Beckenbaugh *v.* Nally, 32 Hun (N. Y.) 160 (where it is afterward discovered that a tenant in possession has a right to remove a valuable building then on the land).

Encroachments on the land of an unsubstantial character do not constitute a ground for refusal. Kitching *v.* Shear, 26 Misc. (N. Y.) 436, 57 N. Y. Suppl. 464.

Damage to the property by fire, where the injury is slight and compensation can be made, is no ground for refusal. Aspinwall *v.* Balch, 4 Abb. N. Cas. (N. Y.) 193.

88. Barnard *v.* Wilson, 66 Cal. 251, 5 Pac. 237; Waterman *v.* Spaulding, 51 Ill. 425; Sullivan *v.* Jennings, 44 N. J. Eq. 11, 14 Atl. 104. But *compare* Shear *v.* Robinson, 18 Fla. 379; Mott *v.* Shreve, 25 N. J. Eq. 438.

89. Aukam *v.* Zantzinger, 98 Md. 380, 56 Atl. 820; Schaefer *v.* O'Brien, 49 Md. 253; Chancellor *v.* Gummere, 39 N. J. Eq. 582; Barnwell *v.* Marion, 62 S. C. 446, 40 S. E. 873; Childs *v.* Frazee, 15 S. C. 612; Stuart *v.* Gay, 127 U. S. 518, 8 S. Ct. 1279, 32 L. ed. 191.

sale already consummated,[90] and of which the defaulting purchaser should have notice;[91] but an order of court is not necessary where an immediate payment of the bid is called for and the purchaser does nothing whatever toward complying; in such case the officer may at once proceed to reoffer the property for sale;[92] and the same rule applies where the advertised terms of sale reserve the right to resell on the purchaser's default, without application to the court.[93] An order for resale releases the first purchaser from all liability on account of his original bid.[94]

(c) *Liabilities of Defaulting Bidder.* A resale may be and generally is ordered to be made at the cost and risk of the defaulting purchaser, so that, if the net proceeds of the second sale do not amount to as much as his original bid, he must make good the difference;[95] and money paid by him on his original bid, as a deposit or as a first instalment of the price, will be applied on the deficiency.[96] The fact that a mortgagee, after bidding in the mortgaged property at foreclosure sale, fails to comply with his bid, and allows the property to be resold for a less sum, does not affect the lien of the mortgage, so as to justify a distribution to subsequent lien-holders of the sum so realized.[97]

(d) *Enforcement of Bid.* The purchaser at a foreclosure sale becomes constructively a party to the suit and submits himself to the jurisdiction of the court so far as concerns his bid and the enforcement of it;[98] so that if he defaults it is in the power of the court either to compel him to complete his purchase or to order a resale, and the court will exercise its discretion in choosing one of these

90. Augustine *v.* Doud, 1 Ill. App. 588.

The proceeding may be by rule on the defaulting purchaser to show cause why the property should not be resold at his cost and risk. Ash *v.* Southern Chemical, etc., Co., 107 La. 311, 31 So. 656; Stuart *v.* Gay, 127 U. S. 518, 8 S. Ct. 1279, 32 L. ed. 191.

The sheriff making the sale has a standing in court to move to set aside the ineffectual sale because of non-payment of the bid. Ash *v.* Southern Chemical, etc., Co., 107 La. 311, 31 So. 656.

91. Schaefer *v.* O'Brien, 49 Md. 253; Rowley *v.* Feldman, 173 N. Y. 607, 66 N. E. 1116; Tyer *v.* Charleston Rice Milling Co., 32 S. C. 598, 10 S. E. 1067.

92. Converse *v.* Clay, 86 Mich. 375, 49 N. W. 473; Hewlett *v.* Davis, 3 Edw. (N. Y.) 338; Thompson *v.* McManama, 2 Disn. (Ohio) 213. But see Judge *v.* Booge, 47 Mo. 544, holding that, when a purchaser at a trustee's sale of real estate refuses to complete the contract, it would be improper for the trustee to resell the property on the same day; his duty is to readvertise, and sell upon full notice, when the bidding would be open to competition and a fair price might be obtained.

93. Mead *v.* Brunnemer, 6 N. Y. St. 38; Home Ins. Co. *v.* Jones, 45 How. Pr. (N. Y.) 498.

94. Phelan *v.* Downs, 173 N. Y. 619, 66 N. E. 1115.

95. Burhans *v.* Beam, 36 N. J. Eq. 497; Shann *v.* Jones, 19 N. J. Eq. 251; Townshend *v.* Simon, 38 N. J. L. 239; Rowley *v.* Feldman, 173 N. Y. 607, 66 N. E. 1116 [*affirming* 74 N. Y. App. Div. 492, 77 N. Y. Suppl. 453]; Richardson *v.* Searles, 37 Misc. (N. Y.) 33, 74 N. Y. Suppl. 771; Leslie *v.* Saratoga Brewing Co., 31 Misc. (N. Y.) 129, 64 N. Y. Suppl. 1069; Anthon *v.* Batchelor, 5 N. Y. Suppl. 798, 22 Abb. N. Cas. 423; New York Cent. Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. 500. But *compare* Leslie *v.* Saratoga Brewing Co., 31 Misc. (N. Y.) 129, 64 N. Y. Suppl. 1069, holding that where an attorney bid in the property at the direction of one person for another, the latter not having authorized either of the others to make the bid for him, it was held that the attorney was not liable for the difference between his bid and the price obtained on a resale.

The costs and expenses of the second sale may properly be imposed on the defaulting purchaser as a condition of his release from his obligation. Schaefer *v.* O'Brien, 49 Md. 253. But see State Bank *v.* Brown, 128 Iowa 665, 105 N. W. 49. But he is not chargeable with the auctioneer's fees where, by the terms of the resale, that item is to be paid by the purchaser in addition to his bid. Rowley *v.* Feldman, 173 N. Y. 607, 66 N. E. 1116.

Interest on the difference between the bid of the defaulting purchaser and the bid obtained at the resale may properly be charged, and may be made to run from the filing of the report of the resale. Rowley *v.* Feldman, 173 N. Y. 607, 66 N. E. 1116; Atkinson *v.* Richardson, 15 Wis. 594.

96. Smith *v.* Cunningham, (N. J. Ch. 1905) 61 Atl. 561; Winants *v.* Traphagen, 66 N. J. Eq. 455, 59 Atl. 164; Willets *v.* Van Alst, 26 How. Pr. (N. Y.) 325. *Compare* Nesbit *v.* Knowlton Hall Co., 45 Misc. (N. Y.) 510, 92 N. Y. Suppl. 761.

97. Smith *v.* Wilson, 152 Pa. St. 552, 25 Atl. 601.

98. Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Cazet *v.* Hubbell, 36 N. Y. 677; Kershaw *v.* Dyer, 6 Utah 239, 21 Pac.

alternatives, the decision depending principally on the bidder's probable ability to pay the money.[99] If the former course is chosen, a rule will issue requiring him to show cause why he should not be ordered to pay the money into court,[1] and his obedience to such order may be enforced by attachment as for contempt,[2] or, in some states, as it appears, by execution against his property.[3] Another method of enforcing compliance is by an action against the defaulting purchaser in the name of the sheriff, commissioner, or other officer who made the sale.[4] But it is doubtful whether such an action could be maintained by plaintiff in foreclosure,[5] although it is his duty, in the interest of others who may be entitled to share in the proceeds, to invoke the power of the court to compel the payment of the bid, unless he is released from this duty by an order for resale.[6]

5. Report and Confirmation — a. Report or Return of Sale — (i) *Form and Requisites.* While it is the duty of the sheriff or other officer making the sale to make a proper report or return to the court, neither the omission of such a report,[7] nor the failure to make it within the limited time, will be ground for vacating the sale or refusing to confirm it.[8] The report should contain a reasonably full and explicit recital of the facts of the sale,[9] and in regard to the giving and publication of notice, should at least recite that notice was given in accordance with the terms of the decree.[10] Defects or irregularities in the report not showing the sale to be void will not vitiate the entire proceeding,[11] but

1000, 24 Pac. 621; Atkinson *v.* Richardson, 14 Wis. 157. And see Baltimore Trust, etc., Co. *v.* Hofstetter, 85 Fed. 75, 29 C. C. A. 35.

99. Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Dunlop *v.* Mulry, 85 N. Y. App. Div. 498, 83 N. Y. Suppl. 477, 1104 [*affirming* 40 Misc. 131, 81 N. Y. Suppl. 260].

Releasing purchaser from bid. — It is in the discretion of the court to release the purchaser and refuse to order him to pay the bid, when it appears that the property is worth nothing at all over and above the liens existing on it and which he would have to assume. Twining *v.* Neil, 38 N. J. Eq. 470. An order of court relieving a purchaser at foreclosure sale from completing his purchase is a matter of discretion and not reviewable on appeal. Crocker *v.* Gollner, 135 N. Y. 662, 32 N. E. 114.

1. *Kentucky.* — Williams *v.* Glenn, 87 Ky. 87, 7 S. W. 610, 9 Ky. L. Rep. 941, 12 Am. St. Rep. 461.

Nebraska. — Gregory *v.* Tingley, 18 Nebr. 318, 25 N. W. 88.

New Jersey. — Sullivan *v.* Jennings, 44 N. J. Eq. 11, 14 Atl. 104.

New York. — Cazet *v.* Hubbell, 36 N. Y. 677; Miller *v.* Collyer, 36 Barb. 250; Crane *v.* Robinson, 19 Misc. 40, 42 N. Y. Suppl. 874.

South Carolina. — Kaminisky *v.* Trantham, 45 S. C. 8, 22 S. E. 746.

See 35 Cent. Dig. tit. "Mortgages," § 1524.

2. Lyon *v.* Elliott, 3 Ala. 654; Burton *v.* Linn, 21 N. Y. App. Div. 609, 47 N. Y. Suppl. 835; Graham *v.* Bleakie, 2 Daly (N. Y.) 55; Corcoran *v.* Pacific Bldg. Assoc. No. 2, 8 Ohio Dec. (Reprint) 111, 5 Cinc. L. Bul. 712; Lansdown *v.* Elderton, 14 Ves. Jr. 512, 33 Eng. Reprint 617.

3. Shotwell *v.* Webb, 23 Miss. 375; Atkinson *v.* Richardson, 18 Wis. 244.

4. *Georgia.* — Sharman *v.* Walker, 68 Ga. 148.

Nebraska. — Gregory *v.* Tingley, 18 Nebr. 318, 25 N. W. 88, the officer may bring such an action, but he is not required to do so.

New Jersey. — Townshend *v.* Simon, 38 N. J. L. 239.

New York. — Hegeman *v.* Johnson, 35 Barb. 200; Bicknell *v.* Byrnes, 23 How. Pr. 486.

United States. — Lee *v.* Terbell, 40 Fed. 44.

See 35 Cent. Dig. tit. "Mortgages," § 1524.

5. See Parkinson *v.* Jacobson, 18 Hun (N. Y.) 353; Culver *v.* Burgher, 21 Barb. (N. Y.) 324; Paine *v.* Smith, 2 Duer (N. Y.) 298.

6. Goodwin *v.* Simonson, 74 N. Y. 133.

7. McPherson *v.* Wood, 52 Ill. App. 170; Lovely *v.* Speisshoffer, 85 Ind. 454.

8. Taylor *v.* Graham, 18 La. Ann. 656, 89 Am. Dec. 699; De Groot *v.* Wilson, 63 Nebr. 423, 88 N. W. 657; Cross *v.* Leidich, 63 Nebr. 420, 88 N. W. 667; Young *v.* Wood, 63 Nebr. 291, 88 N. W. 528; Amoskeag Sav. Bank *v.* Robbins, 53 Nebr. 776, 74 N. W. 261; Taylor *v.* Reis, 2 Nebr. (Unoff.) 533, 89 N. W. 374.

9. Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116; McLagan *v.* Witte, 1 Nebr. (Unoff.) 438, 96 N. W. 490 (showing name of purchaser); Sims *v.* Cross, 10 Yerg. (Tenn.) 460 (identifying land sold).

10. *Illinois.* — Moore *v.* Titman, 33 Ill. 358.

Indiana. — Woolen *v.* Rockafeller, 81 Ind. 208.

Maine. — Townsend *v.* Meader, 58 Me. 288.

New Jersey. — Kappes *v.* Rutherford Park Assoc., 60 N. J. Eq. 129, 46 Atl. 218.

Nebraska. — Shepherd *v.* Venuto, 5 Nebr. (Unoff.) 30, 97 N. W. 226; Nash *v.* Wilkinson, 2 Nebr. (Unoff.) 228, 96 N. W. 623.

See 35 Cent. Dig. tit. "Mortgages," § 1525.

11. *Alabama.* — Walker *v.* Hallett, 1 Ala. 379.

Illinois. — Hughes *v.* Frisby, 81 Ill. 188.

Indiana. — Lovely *v.* Speisshoffer, 85 Ind. 454.

Minnesota. — Hotchkiss *v.* Cutting, 14 Minn. 537.

it may be amended, so as to cure any such faults or defects, on a proper showing.[12]

(II) *Objections or Exceptions.* On the filing of a sheriff's return or master's report, parties in interest may file exceptions to it, challenging the validity of the steps taken by him in executing the decree.[13]

(III) *Conclusiveness.* The rule that the return of a sheriff, after a mortgage sale, is conclusive and not to be contradicted by parol, does not apply when the purchaser at such sale and plaintiff in execution treat the sale as a nullity.[14] And his return on a mortgage, of sale and satisfaction to the amount bid, is at least in a collateral proceeding only *prima facie* evidence of such satisfaction.[15] Where a sheriff makes a return that a writ issued to him upon a decree of foreclosure was satisfied by the sale it must be deemed to have been satisfied by the sale of the proper title, notwithstanding there may be some discrepancy between the particular description in the decree and the return.[16] Affidavits showing that the terms of a sale were different from those reported are not admissible to sustain a referee's report as against exceptions filed.[17]

b. Confirmation of Sale — (I) *Necessity For Confirmation.* According to the practice in some states a foreclosure sale is not complete until it has been confirmed by the court, prior to which no title vests in the purchaser.[18] But elsewhere, although confirmation of the sale by the court may be a regular step in the proceedings, yet it is not essential to the vesting of title in a purchaser who has received his deed from the master.[19]

(II) *Motion For and Order of Confirmation.* Unless otherwise directed by statute, confirmation of a foreclosure sale may be ordered at any time after the return or report of the officer, on the motion of any interested party, and will relate back to the date of the sale;[20] and jurisdiction to confirm a sale carries

Tennessee.— Windle *v.* Coffee, 7 Humphr. 420.

Wisconsin.— See Krebs *v.* Dodge, 9 Wis. 1. See 35 Cent. Dig. tit. "Mortgages," § 1525.

12. Diamond State Loan Assoc. *v.* Collins, 4 Pennew. (Del.) 77, 60 Atl. 861; Wilson, etc., Co. *v.* Schorop, 62 Hun (N. Y.) 621, 16 N. Y. Suppl. 823.

13. Hunt *v.* Whitehead, 19 App. Cas. (D. C.) 116; Dow *v.* Seely, 29 Ill. 495; Zable *v.* Masonic Sav. Bank, 16 S. W. 588, 13 Ky. L. Rep. 197; Wilson *v.* Thorne, 13 S. W. 365, 11 Ky. L. Rep. 945; Drew *v.* Kirkham, 8 Nebr. 477, 1 N. W. 451. But *compare* Myers *v.* James, 4 Lea (Tenn.) 370, holding that exceptions to a clerk's report of a judicial sale of land, seeking either to modify the decree of sale or to go outside the record on which the report is based, are not admissible.

14. Winnebago *v.* Brones, 68 Iowa 682, 28 N. W. 15.

15. Howell County *v.* Wheeler, 108 Mo. 294, 18 S. W. 1080.

16. Allen *v.* Shannon, 74 Ind. 164.

17. Koch *v.* Purcell, 45 N. Y. Super. Ct. 162.

18. *Arkansas.*— Wells *v.* Rice, 34 Ark. 346.

Iowa.— Central Trust Co. *v.* Gate City Electric St. R. Co., 96 Iowa 646, 65 N. W. 982.

Kansas.— See Zinkeisen *v.* Lewis, 71 Kan. 837, 80 Pac. 44, 83 Pac. 28.

Mississippi.— Martin *v.* Kelly, 59 Miss. 652; Allen *v.* Poole, 54 Miss. 323; Mitchell *v.* Harris, 43 Miss. 314; Sanders *v.* Dowell, 7 Sm. & M. 206. See, however, Gowan *v.* Jones, 10 Sm. & M. 164; Tooley *v.* Gridley, 3 Sm. & M. 493, 41 Am. Dec. 628, both holding that a confirmation of the sale by the act and agreement of the parties may take the place of a judicial confirmation.

Nebraska.— Hatch *v.* Shold, 62 Nebr. 764, 87 N. W. 908.

South Dakota.— State *v.* Campbell, 5 S. D. 636, 60 N. W. 32.

Wisconsin.— Strong *v.* Catton, 1 Wis. 471. See 35 Cent. Dig. tit. "Mortgages," § 1531.

Time for confirmation.— It has been held that, although it was more than six years after the sale of land under execution in foreclosure of a mortgage before confirmation of the sale, the purchaser obtained a valid title, in the absence of any negligence on his part to the prejudice of innocent parties, as the purchaser obtained the equitable title on the sale, and the statute prescribing the duration of liens and judgments did not affect him. Hyde *v.* Heaton, (Wash. 1906) 86 Pac. 664.

19. Brown *v.* Marzyck, 19 Fla. 840; Fort *v.* Burch, 6 Barb. (N. Y.) 60; Fuller *v.* Van Geesen, 4 Hill (N. Y.) 171 [*affirmed* in How. App. Cas. 240]; Ward *v.* Ward, 131 Fed. 946. And see State *v.* Evans, 176 Mo. 310, 75 S. W. 914.

20. Galbreath *v.* Drought, 29 Kan. 711; Brown *v.* Fitzpatrick, 56 Nebr. 61, 76 N. W. 456; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695 (order of confirmation may be made at an adjourned term of court); Lawson *v.* Gibson, 18 Nebr. 137, 24

jurisdiction to overrule objections to it.[21] The question before the court on such a motion will be strictly confined to the legal propriety of confirming the sale,[22] and the court has no authority thereupon to modify the original decree of foreclosure, change the terms of sale, or impose conditions on the confirmation.[23] But the court may set aside an order of confirmation which was entered without objection, on grounds not appearing on the face of the record.[24]

(III) *Objections.* The parties to a foreclosure sale may, by express agreement, waive their right to object to its confirmation.[25] But if the right is not waived, this is the proper time to interpose objections based on any substantial irregularity in the proceedings preliminary and leading up to the sale, prejudicial to the party excepting,[26] as, in regard to the appraisement, its method or results, or the qualifications of the appraisers;[27] the publication or other notice of the sale;[28] objections based on any fraud, misconduct, or irregularity in the sale itself;[29] the manner in which the property was divided or grouped for the pur-

N. W. 447 (order of confirmation made in vacation).

A reasonable time should be allowed to parties in interest to file objections; and where a foreclosure sale was confirmed in the afternoon of the same day in which the sale was made, it was held sufficient cause for setting aside the confirmation. Clement *v.* Ireland, 129 N. C. 220, 39 S. E. 838. Where it is claimed that the time limited to show cause against a confirmation is too short, the party objecting should apply for further time. Murphy *v.* Gunn, 54 Nebr. 670, 74 N. W. 1065.

Where the foreclosure sale was made prior to the death of the mortgagor, it is not necessary to revive the action, against his representatives, before the confirmation of the sale. Johnson L. & T. Co. *v.* Ball, 7 Kan. App. 667, 53 Pac. 878; Hochgraef *v.* Hendrie, 66 Mich. 556, 34 N. W. 15.

21. Hutchinson *v.* Smidt, 4 Nebr. (Unoff.) 850, 96 N. W. 601.

22. Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352 (holding that where objections are filed for the sole purpose of deciding who is entitled to the surplus, an order disposing of the surplus amounts to a confirmation of the sale); Mills *v.* Ralston, 10 Kan. 206; Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806; Cord *v.* Hirsch, 17 Wis. 403. But see Slack *v.* Cooper, 219 Ill. 138, 76 N. E. 84.

Judge examining premises.—Where a judge, while a motion for the confirmation of a foreclosure sale was pending before him, made a personal inspection of the premises in question, it was held that there was no prejudicial error in this. Kremer *v.* Thwaits, 105 Wis. 534, 81 N. W. 654.

23. Briggs *v.* Wilson, 9 Kan. App. 718, 59 Pac. 1095; Green *v.* State Bank, 9 Nebr. 165, 2 N. W. 228; Archer *v.* Brockschmidt, 5 Ohio S. & C. Pl. Dec. 348, 5 Ohio N. P. 349. But *compare* Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203, which was a case of a foreclosure and sale under a railroad mortgage, and in which it was held that, on the subsequent presentation of intervening claims, the court might require, as a condition precedent to the confirmation of the sale, that the purchaser should make a larger cash payment than that fixed by the decree, so as to meet all exigencies.

24. Kirby *v.* Ramsey, 9 S. D. 197, 68 N. W. 328.

25. Muscatine Mortg., etc., Co. *v.* McGaughey, 58 Nebr. 709, 79 N. W. 730; Phœnix Ins. Co. *v.* Boehl, 2 Nebr. (Unoff.) 272, 96 N. W. 633.

26. Gatchell *v.* Presstman, 5 Md. 161; Gallentine *v.* Cummings, 4 Nebr. (Unoff.) 690, 96 N. W. 178 (holding that it is not a valid objection to confirmation that a copy of the decree was not attached to the order of sale); Union Sav. Bank *v.* Lincoln Normal University, 4 Nebr. (Unoff.) 70, 93 N. W. 408 (holding that it is not a sufficient reason for not confirming a sale that the purchaser, prior to the sale, had violated an injunction in relation to the property covered by the decree); German Sav., etc., Soc. *v.* Kern, 38 Oreg. 232, 62 Pac. 788, 63 Pac. 1052 (holding that the failure of the sheriff to levy execution on the mortgaged premises is not ground for refusing to confirm the sale, no levy being necessary); Feek *v.* Brewer, 11 Wash. 264, 39 Pac. 655. See also Primrose *v.* Wright, 102 Md. 105, 62 Atl. 238.

27. McIntyre *v.* Evenson, 63 Nebr. 849, 89 N. W. 397; Eddy *v.* Kimerer, 61 Nebr. 498, 85 N. W. 540; Wood *v.* Clark, 58 Nebr. 115, 78 N. W. 396; Nebraska L. & T. Co. *v.* Barnes, 50 Nebr. 324, 69 N. W. 761; Gray *v.* Eurich, 2 Nebr. (Unoff.) 194, 96 N. W. 343.

Qualifications of appraisers see Laughlin *v.* Schuyler, 1 Nebr. 409; Crook *v.* Moore, 5 Nebr. (Unoff.) 314, 98 N. W. 713.

Appraisement too low see Iowa L. & T. Co. *v.* Nehler, 3 Nebr. (Unoff.) 680, 92 N. W. 729; Bowman *v.* Bellows Falls Sav. Inst., 3 Nebr. (Unoff.) 583, 92 N. W. 204; Phœnix Mut. L. Ins. Co. *v.* Williams, 3 Nebr. (Unoff.) 79, 90 N. W. 756.

28. Cooper *v.* Ryan, 73 Ark. 37, 83 S. W. 328; Miller *v.* Lefever, 10 Nebr. 77, 4 N. W. 929.

29. New England Mortg. Security Co. *v.* Smith, 25 Kan. 622; Cutter *v.* Woodard, 4 Nebr. (Unoff.) 508, 94 N. W. 971; Dartmouth Sav. Bank *v.* Foley, 2 Nebr. (Unoff.) 459, 89 N. W. 317, 5 Nebr. (Unoff.) 223, 97 N. W. 1033; Hartsuff *v.* Huss, 2 Nebr.

pose of sale or the order of offering parcels for sale;[30] or objections to the adequacy of the price obtained as compared with the intrinsic value of the property.[31] An erroneous or imperfect description of the premises in any of the proceedings may also be ground for objection at this point, provided it is shown to be prejudicial to the party objecting.[32] But generally no objection can be considered which might and should have been interposed before the decree,[33] nor any objection to the decree itself, unless perhaps where it is contended that the decree was absolutely void.[34] The court cannot be prevented from passing on the propriety and justice of a sale by reason of any transfers made by the purchaser before its confirmation.[35] The objections, on whatever ground they are based, must be stated specifically and so as to direct the attention of the court clearly to the defect complained of.[36]

(IV) *Effect of Confirmation.* An order confirming a foreclosure sale is a judicial decision which is conclusive and impervious to collateral attack, and precludes all inquiry into the regularity and validity of the previous proceedings,[37]

(Unoff.) 145, 95 N. W. 1070; Zimmerman *v.* Place, 61 N. J. Eq. 273, 48 Atl. 994; Adams Express Co. *v.* Hoey, (Ch. 1901) 48 Atl. 823; Worth *v.* Newlin, (Ch. 1896) 36 Atl. 30.

30. Meux *v.* Trezevant, 132 Cal. 487, 64 Pac. 848; Worth *v.* Newlin, (N. J. Ch. 1896) 36 Atl. 30; Andrews *v.* O'Mahoney, 112 N. Y. 567, 20 N. E. 374; Mathers *v.* Kinney, 8 Ohio Dec. (Reprint) 516, 8 Cinc. L. Bul. 267.

31. Aukam *v.* Zantzinger, 98 Md. 380, 56 Atl. 820; Marsh *v.* Sheriff, (Md. 1888) 14 Atl. 664; Murphy *v.* Gunn, 54 Nebr. 670, 74 N. W. 1065; Jones *v.* Stairs, 5 Nebr. (Unoff.) 243, 97 N. W. 1017; Durland *v.* McKibbin, 5 Nebr. (Unoff.) 47, 97 N. W. 228; Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429 (the statute of New Jersey, requiring that foreclosure sales shall not be confirmed unless the property has been sold at the best price it would bring, merely prevents sacrifice of the property, so far as it may be done by requiring proof to the satisfaction of the court that, at the sale made, it brought the best price then obtainable for it on foreclosure, and does not authorize the court to protect the property from sacrifice by setting aside one sale after another until an adequate price has been obtained); Mutual Ben. L. Ins. Co. *v.* Gould, 34 N. J. Eq. 417; Gibson *v.* McLaurin, 90 N. C. 256. See also Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Stirling *v.* McLane, 103 Md. 47, 63 Atl. 205.

32. Stephenson *v.* Allison, 123 Ala. 439, 26 So. 290; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506; Hutchinson *v.* Smidt, 4 Nebr. (Unoff.) 850, 96 N. W. 601; Bowditch *v.* O'Linn, 3 Nebr. (Unoff.) 202, 91 N. W. 523.

33. Vance *v.* Lane, 82 S. W. 297, 26 Ky. L. Rep. 619; Patapsco Guano Co. *v.* Elder, 53 Md. 463; Hamer *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 705, 72 N. W. 1041. But see Albert *v.* Hamilton, 76 Md. 304, 25 Atl. 341, holding that the question of the validity of the mortgage may be determined on exceptions to the ratification of the sale.

34. Richardson *v.* Owings, 86 Md. 663, 39 Atl. 100; Baldwin *v.* Burt, 54 Nebr. 287, 74 N. W. 594; Bloor *v.* Smith, 112 Wis. 340, 87 N. W. 870.

35. Pendleton *v.* Spear, 56 Ark. 194, 19 S. W. 578; New York Eastern Christian Benev. Missionary Soc. *v.* Bishop, 8 N. Y. Suppl. 60; *Ex p.* Lancaster, 46 S. C. 274, 24 S. E. 195.

36. Murphy *v.* Gunn, 54 Nebr. 670, 74 N. W. 1065; Ecklund *v.* Willis, 44 Nebr. 129, 62 N. W. 493; Keene Five Cent Sav. Bank *v.* Johnson, 1 Nebr. (Unoff.) 69, 95 N. W. 504.

37. *Illinois.*— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408.

Kansas.— Norton *v.* Reardon, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459.

Kentucky.— Beard *v.* Morris, 19 S. W. 598, 14 Ky. L. Rep. 97.

Maryland.— Rouskulp *v.* Kershner, 49 Md. 516.

Michigan.— Bullard *v.* Green, 10 Mich. 268.

Minnesota.— Coles *v.* Yorks, 36 Minn. 388, 31 N. W. 353; Smith *v.* Valentine, 19 Minn. 452; Hotchkiss *v.* Cutting, 14 Minn. 537.

Nebraska.— McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614; Findley *v.* Bowers, 9 Nebr. 72, 2 N. W. 349; Jones *v.* Cleary, 2 Nebr. (Unoff.) 541, 89 N. W. 386.

New Jersey.— See —— *v.* O'Rourke, 10 N. J. L. J. 339.

Ohio.— Mayer *v.* Wick, 15 Ohio St. 548.

South Carolina.— Le Conte *v.* Irwin, 23 S. C. 106; Pope *v.* Frazee, 5 S. C. 269.

South Dakota.— State *v.* Campbell, 5 S. D. 636, 60 N. W. 32.

Tennessee.— McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209; Owen *v.* Hawkins, 1 Baxt. 190; Spence *v.* Armour, 9 Heisk. 167; Henderson *v.* Lowry, 5 Yerg. 240.

Virginia.— Ashworth *v.* Tramwell, 102 Va. 852, 47 S. E. 1011.

Washington.— Terry *v.* Furth, 40 Wash. 493, 82 Pac. 882; Parker *v.* Dacres, 1 Wash. 190, 24 Pac. 192.

Wisconsin.— Kneeland *v.* Smith, 13 Wis. 591; Hill *v.* Hoover, 5 Wis. 354.

United States.— Wetmore *v.* St. Paul, etc., R. Co., 3 Fed. 177, 1 McCrary 466.

See 35 Cent. Dig. tit. "Mortgages," § 1534.

although it may be vacated or set aside for sufficient cause.[38] It vests in the foreclosure purchaser a complete equitable title, with which the legal title blends when his deed is executed,[39] and which relates back to the date of the sale.[40]

6. Opening or Setting Aside Sale — a. Who May Object to Validity of Sale — (I) *In General.* It has been stated in general terms that every person whose rights are injuriously affected by a judgment of foreclosure and a sale under it has a right to move the court to set aside the sale, although he was not a party to the action.[41] At any rate this right pertains to the mortgagor, if he has not parted absolutely with his interest in the premises,[42] to an owner of the equity of redemption whose position with reference to the title is such that he may be prejudiced by the sale,[43] in some cases to the mortgagee or plaintiff in foreclosure,[44] and to a junior encumbrancer, whose rights are injuriously affected by error in the decree or fraud or irregularity in the sale.[45]

(II) *Estoppel or Waiver.* A party who otherwise would be entitled to raise objections to the validity or regularity of a foreclosure and sale may be prevented from doing so, on principles of estoppel; as where he fails to interpose objections at the proper time or to take an appeal,[46] or expressly or impliedly agrees to waive the objections,[47] or participates in the sale or bids for the property or becomes the purchaser.[48] And it is a general principle that one who claims, or accepts and retains, a share of the proceeds of the sale, whether it be the mortgagor or another creditor, is estopped to dispute the legality of the sale.[49] By

38. Tooley *v.* Kane, Sm. & M. Ch. (Miss.) 518; Clement *v.* Ireland, 138 N. C. 136, 50 S. E. 570; Kirby *v.* Ramsey, 9 S. D. 197, 68 N. W. 328; Mound City Mut. L. Ins. Co. *v.* Hamilton, 3 Tenn. Ch. 228; Downer *v.* Cross, 2 Wis. 371; Strong *v.* Catton, 1 Wis. 471.

39. Stang *v.* Redden, 28 Fed. 11. But see Meddis *v.* Fenley, 98 Ky. 432, 33 S. W. 197, 17 Ky. L. Rep. 974, as to effect of confirming a sale which was absolutely void.

40. McGehee *v.* Lehman, 65 Ala. 316; Galbreath *v.* Drought, 29 Kan. 711; Lathrop *v.* Nelson, 14 Fed. Cas. No. 8,111, 4 Dill. 194.

41. Gould *v.* Mortimer, 16 Abb. Pr. (N. Y.) 448. And see Lacey *v.* Lacey, (Ala. 1905) 39 So. 922; Goodell *v.* Harrington, 76 N. Y. 547.

If the foreclosure sale was absolutely void, it may be impeached collaterally. Sidwell *v.* Schumacher, 99 Ill. 426.

42. Edmonson *v.* Welsh, 27 Ala. 578; Mescall *v.* Tully, 91 Ind. 96; Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429. But see Walker *v.* Schum, 42 Ill. 462; Robinett *v.* Compton, 2 La. Ann. 861.

43. See Derouen *v.* Hebert, 46 La. Ann. 1388, 16 So. 160; Woodhull *v.* Osborne, 2 Edw. (N. Y.) 614; Taylor *v.* Beekley, 211 Pa. St. 606, 61 Atl. 79. But see Bentley *v.* Beacham, 91 Md. 677, 47 Atl. 1024, holding that an application to vacate the sale cannot be made by one whose only right to the property arose from an alleged secret trust, while the title was in another.

One who holds an unrecorded title to a portion of the premises, discharged by release from the mortgage, cannot move to vacate the sale when his grantor was properly made a party to the action and appeared therein. Leonard *v.* New York Bay Co., 28 N. J. Eq. 192.

44. See Lamb *v.* San Pedro, etc., Co., 3 N. M. 358, 9 Pac. 525. But *compare* Peters *v.* Guthrie, 119 Ind. 44, 20 N. E. 536.

45. *Alabama.*— Bethune *v.* Oates, 58 Ala. 460.

Illinois.— Gage *v.* McDermid, 150 Ill. 598, 37 N. E. 1026.

Kentucky.— Com. *v.* Robinson, 96 Ky. 553, 29 S. W. 306, 16 Ky. L. Rep. 558.

Louisiana.— Walmsley *v.* Theus, 107 La. 417, 31 So. 869.

Minnesota.— Rogers *v.* Holyoke, 14 Minn. 220.

Mississippi.— White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

Missouri.— See Briant *v.* Jackson, 99 Mo. 585, 13 S. W. 91.

Wisconsin.— Jesup *v.* City Bank, 14 Wis. 331.

See 35 Cent. Dig. tit. "Mortgages," § 1535.

46. Baker *v.* Shephard, 30 Ga. 706; French *v.* Powers, 120 N. Y. 128, 24 N. E. 296; Hogan *v.* Hoyt, 37 N. Y. 300; Francis *v.* Church, Clarke (N. Y.) 475; Curtis *v.* Renneker, 34 S. C. 468, 13 S. E. 664; Gibson *v.* Lyon, 115 U. S. 439, 6 S. Ct. 129, 29 L. ed. 440.

47. Smith *v.* Briscoe, 65 Md. 561, 5 Atl. 334; Clark *v.* Stilson, 36 Mich. 482. See also Brown *v.* Isbell, 11 Ala. 1009; Cohoes Co. *v.* Goss, 13 Barb. (N. Y.) 137.

48. Pursley *v.* Forth, 82 Ill. 327; Routh *v.* Citizens' Bank, 28 La. Ann. 569; Farr *v.* Lachman, 130 Mich. 40, 89 N. W. 688. But *compare* Hooks *v.* Montgomery Branch Bank, 15 Ala. 609; Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 299, holding that an attaching creditor, who bids on property at a sale under a mortgage in a foreign state, is not estopped to insist on his attachment lien on property in West Virginia.

49. *Iowa.*— France *v.* Haynes, 67 Iowa 139, 25 N. W. 98.

claiming a right to redeem one affirms the validity of the sale and cannot assail it;[50] and a foreclosure purchaser who retains the property, or his grantee who rests on his title, is in the same situation.[51]

b. Power and Authority of Court. It is within the authority of the court which made the decree of foreclosure to vacate or set aside the sale made thereunder, on a proper application and the showing of a sufficient cause,[52] not only as against the purchaser at the sale, but as against his *bona fide* grantee;[53] and the action of the court in granting or refusing such an application will not generally be interfered with on appeal, except for manifest abuse of discretion.[54]

c. Grounds For Vacating Sale — (i) *In General.* Alleged errors in the foreclosure decree cannot be considered on a motion to vacate the sale, and generally such a motion cannot be based on grounds of objection which were or might have been set up in defense to the foreclosure suit or against the confirmation of the sale,[55] unless the party, without fault on his own part, was deprived of

Louisiana.— Baltimore *v.* Parlange, 25 La. Ann. 335; Theurer *v.* Knorr, 24 La. Ann. 597; Howe *v.* Whited, 21 La. Ann. 495.

Michigan.— Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

New York.— Tilton *v.* Nelson, 27 Barb. 595. *Compare* Candee *v.* Burke, 1 Hun 546.

Ohio.— Dreyer *v.* Bigney, 8 Ohio Dec. (Reprint) 562, 9 Cinc. L. Bul. 15.

See 35 Cent. Dig. tit. "Mortgages," § 1536.

50. *Arkansas.*— Dailey *v.* Abbott, 40 Ark. 275.

Iowa.— Miller *v.* Ayres, 59 Iowa 424, 13 N. W. 436.

Kentucky.— Zahle *v.* Masonic Sav. Bank, 16 S. W. 588, 13 Ky. L. Rep. 197.

New York.— Toll *v.* Hiller, 11 Paige 228.

Wisconsin.— Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

See 35 Cent. Dig. tit. "Mortgages," § 1536.

51. Miller *v.* Shaw, 103 Ill. 277; Swann *v.* Wright, 110 U. S. 590, 4 S. Ct. 235, 28 L. ed. 252. See also Horton *v.* Howard, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198.

52. *California.*— Taylor *v.* Ellenberger, 134 Cal. 31, 66 Pac. 4; Van Loben Sels *v.* Bunnell, 131 Cal. 489, 63 Pac. 773.

Illinois.— Senft *v.* Vanek, 209 Ill. 361, 70 N. E. 720.

Kentucky.— Brown *v.* Hudson, 3 Bush 60.

Michigan.— Chandler *v.* Graham, 123 Mich. 327, 82 N. W. 814.

Minnesota.— Rogers *v.* Holyoke, 14 Minn. 220.

Nebraska.— State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36.

New Jersey.— Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1; Cawley *v.* Leonard, 28 N. J. Eq. 467.

New York.— Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 119 N. Y. 15, 23 N. E. 173; Pruden *v.* Rutler, 34 Misc. 117, 68 N. Y. Suppl. 737.

Ohio.— Niles *v.* Parks, 49 Ohio St. 370, 34 N. E. 735.

Pennsylvania.— Lieb *v.* Bean, 1 Ashm. 207.

See 35 Cent. Dig. tit. "Mortgages," § 1537.

Non-resident a party to motion.— The jurisdiction of the court to set aside a foreclosure sale on motion in the original action is not affected by the fact that the purchaser, who is made a party to the motion, is not a resident within the territorial jurisdiction of the court. Hansbro *v.* Blum, 3 Tex. Civ. App. 108, 22 S. W. 270. *Compare* Pacific R. Co. *v.* Missouri Pac. R. Co., 3 Fed. 772, 1 McCrary 647.

In what court motion made.— The application to vacate the sale must be made in the court where the foreclosure decree was rendered. Muehlberger *v.* Schilling, 3 N. Y. Suppl. 705.

Acceptance of bid not a contract.— The acceptance by the officer conducting a foreclosure sale of the highest bid, and the payment by the bidder of the deposit required, do not constitute a contract which the court is obliged to complete or enforce, but, if justice requires it, the sale may be vacated and a new one ordered. Leslie *v.* Saratoga Brewing Co., 59 N. Y. App. Div. 400, 69 N. Y. Suppl. 581.

53. Hale *v.* Clauson, 60 N. Y. 339. But *compare* Campbell *v.* Benjamin, 69 Ill. 244. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 119 N. Y. 15, 23 N. E. 173.

54. Germer *v.* Ensign, 155 Pa. St. 464, 26 Atl. 657.

55. *California.*— Barnhart *v.* Edwards, (1899) 57 Pac. 1004.

Kansas.— Crebbin *v.* Powell, 68 Kan. 162, 74 Pac. 621.

Louisiana.— See Haynes *v.* Courtney, 15 La. Ann. 630.

Maryland.— Haskie *v.* James, 75 Md. 568, 23 Atl. 1030, holding that the failure of the mortgagee to exhibit the mortgage note with his account, after the decree and before the sale, where it was afterward produced in court by the trustee, is no ground for setting aside the sale.

Michigan.— Bullard *v.* Green, 10 Mich. 268.

Minnesota.— Coles *v.* Yorks, 36 Minn. 388, 31 N. W. 353.

Mississippi.— Henderson *v.* Herrod, 23 Miss. 434.

Nebraska.— Cox *v.* Parrotte, 59 Nebr. 701, 82 N. W. 7; Hoyt *v.* Little, 55 Nebr. 71, 75 N. W. 56.

New Jersey.— Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429.

an opportunity so to present his objections.[56] Thus, on a motion of this kind, irregularities in the original process or in its service, not amounting to fatal jurisdictional defects, cannot be considered,[57] nor can the question of the validity of the mortgage be tried for the first time,[58] although there are decisions to the effect that want of consideration for it,[59] or that the debt has been paid,[60] may be shown. Merely clerical errors in the proceedings will furnish no ground for vacating the sale,[61] nor will the fact that an action is pending to foreclose another mortgage, in which a superiority of lien is claimed.[62]

(II) *Defects and Irregularities in Sale.* It is proper to vacate a foreclosure sale on account of any omission or wrong method of proceeding which is of such a nature as to invalidate the sale entirely or prevent the acquisition of title by the purchaser,[63] as, for instance, where there was a sale in gross instead of in parcels, provided it is shown that a larger price could have been realized by a division of the property or that the whole mortgage debt could have been made by selling less than the entire property;[64] but this action will not be taken on account of any defects or irregularities which do not invalidate the title of the purchaser or work substantial and real injury to the rights of any party in interest,[65]

New York.— Holland Trust Co. *v.* Hogan, 17 N. Y. Suppl. 919; Mead *v.* Spink, 1 N. Y. Suppl. 390; Young *v.* Bloomer, 22 How. Pr. 383.

South Carolina.— Muckenfuss *v.* Fishburne, 68 S. C. 41, 46 S. E. 537.

Utah.— Meyer *v.* Utah, etc., R. Co., 3 Utah 280, 3 Pac. 393.

See 35 Cent. Dig. tit. "Mortgages," § 1538.

Want of parties.— It seems that a foreclosure sale may be set aside on account of a want of parties in the foreclosure suit, such as is fatal to the validity of the decree. Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274; Downing *v.* Still, 43 Mo. 309.

56. Mutual Ben. L. Ins. Co. *v.* Gould, 34 N. J. Eq. 417; Sked *v.* Sedgley, 36 Ohio St. 483; Nitro-Phosphate Syndicate *v.* Johnson, 100 Va. 774, 42 S. E. 995.

57. Leonard *v.* New York Bay Co., 28 N. J. Eq. 192; Dreyer *v.* Bigney, 8 Ohio Dec. (Reprint) 562, 9 Cinc. L. Bul. 15.

58. Haseltine *v.* Gilliland, 2 Kan. App. 456, 43 Pac. 88; Carroll *v.* Kershner, 47 Md. 262; Ruff *v.* Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709; Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 19 Wash. 493, 53 Pac. 951. But *compare* Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Conyers *v.* Frye, (Tenn. Ch. App. 1900) 58 S. W. 1126.

59. Davis *v.* Bower, 29 Colo. 422, 68 Pac. 292; Coffman *v.* Scoville, 86 Ill. 300.

60. Robinson *v.* Tate, 82 Ill. 292. But *compare* Rogers *v.* Watson, 81 Tex. 400, 17 S. W. 29.

61. Bolin *v.* Anderson, 8 Ohio Dec. (Reprint) 49, 5 Cinc. L. Bul. 328.

62. Geuda Springs Town, etc., Co. *v.* Lombard, 57 Kan. 625, 47 Pac. 532.

63. *Illinois.*—Harwood *v.* Cox, 26 Ill. App. 374.

Kansas.— Townsend *v.* Johnson, 10 Kan. App. 547, 63 Pac. 25.

Nebraska.— Globe L. & T. Co. *v.* Wood, 58 Nebr. 395, 78 N. W. 721.

New York.— Guggenheimer *v.* Sayre, 4 N. Y. Suppl. 22; Requa *v.* Rea, 2 Paige 339.

Canada.— Boutilier *v.* Harshman, 2 Nova Scotia 338.

See 35 Cent. Dig. tit. "Mortgages," § 1538.

A sale by an unauthorized person may be set aside. Penn Mut. L. Ins. Co. *v.* Creighton Theatre Bldg. Co., 54 Nebr. 228, 74 N. W. 583.

Failure to describe the premises properly in an order of sale to foreclose, so that the purchaser would be assured that he was obtaining the mortgaged premises, will be sufficient ground for vacating the sale. Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64.

64. *California.*— Summerville *v.* March, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145; Meux *v.* Trezevant, 132 Cal. 487, 64 Pac. 848; Hibernia Sav., etc., Soc. *v.* Behnke, 121 Cal. 339, 53 Pac. 812.

Illinois.— Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218.

Kansas.— Peckham *v.* Group, 3 Kan. App. 369, 42 Pac. 944.

Kentucky.— Hill *v.* Pettit, 66 S. W. 190, 23 Ky. L. Rep. 2004.

Louisiana.— Hall *v.* Hawley, 49 La. Ann. 1046, 22 So. 205.

Minnesota.— Abbott *v.* Peck, 35 Minn. 499, 29 N. W. 194.

Nebraska.—Franklin County Bank *v.* Everett, 3 Nebr. (Unoff.) 379, 91 N. W. 495.

New Jersey.— Miller *v.* Kendrick, (Ch. 1888) 15 Atl. 259.

New York.— Roosevelt *v.* Schile, 95 N. Y. App. Div. 524, 88 N. Y. Suppl. 592. See also Vingut *v.* Ketcham, 102 N. Y. App. Div. 403, 92 N. Y. Suppl. 605.

65. *California.*— Humboldt Sav., etc., Soc. *v.* March, 136 Cal. 321, 68 Pac. 968; Connick *v.* Hill, 127 Cal. 162, 59 Pac. 832, refusal to postpone sale.

Florida.— Mann *v.* Jennings, 25 Fla. 730, 6 So. 771, officer appointed to make sale erroneously styled "commissioner" instead of "master."

Illinois.— Moore *v.* Titman, 33 Ill. 358; McPherson *v.* Wood, 52 Ill. App. 170, failure of master to report the sale.

Indiana.— Sowle *v.* Champion, 16 Ind. 165.

nor for any fault or omission which can be cured without ordering a new sale.[66]

(III) *FRAUD.* A court of equity has power to vacate a foreclosure sale which is shown to be tainted with fraud or deceit, or to have been made in pursuance of a corrupt scheme to abuse the process of the court or to gain possession of the premises inequitably.[67] Fraud in obtaining the mortgage is properly a defense to the foreclosure suit and concluded by the decree;[68] but fraud in obtaining the judgment or decree is cause for setting aside the sale.[69] And where the fraud takes the form of causing the sale to be made for a larger sum than is due,[70] or collusion between the mortgagee and the purchaser, to the injury of the mortgagor's rights,[71] or of misrepresentation and deceit, practised upon the purchaser,[72] or upon a junior lien creditor[73] the sale may be set aside. But fraud, in whatever shape alleged, must be clearly and distinctly proved.[74]

(IV) *MISTAKE, SURPRISE, AND WANT OF NOTICE.* A foreclosure sale may also be set aside where the mortgagor had no notice of the foreclosure proceedings or did not understand their nature or purpose,[75] or had no knowledge or notice of the time and place of the sale;[76] or where there was a material mistake in the

Kansas.— Cronkhite *v.* Buchanan, 59 Kan. 541, 53 Pac. 863, 68 Am. St. Rep. 379.

Missouri.— Cole County *v.* Madden, 91 Mo. 585, 4 S. W. 397.

Nebraska.— Young *v.* Wood, 63 Nebr. 291, 88 N. W. 528; Kane *v.* Jonasen, 55 Nebr. 757, 76 N. W. 441; Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313.

New Jersey.— Guarantee Trust, etc., Co. *v.* Jenkins, 40 N. J. Eq. 451, 2 Atl. 13; Walker *v.* Montclair, etc., R. Co., 30 N. J. Eq. 525.

New York.— Knight *v.* Maloney, 4 Hun 33.

Ohio.— Bolin *v.* Anderson, 8 Ohio Dec. (Reprint) 49, 5 Cinc. L. Bul. 328.

Washington.— Terry *v.* Furth, 40 Wash. 493, 82 Pac. 882.

Wisconsin.— Lloyd *v.* Frank, 30 Wis. 306. See 35 Cent. Dig. tit. "Mortgages," § 1538.

66. Petermann *v.* Turner, 37 Wis. 244.

67. *Michigan.*— Fix *v.* Loranger, 50 Mich. 199, 15 N. W. 81.

Mississippi.— Long *v.* McGregor, 65 Miss. 70, 3 So. 240.

Nebraska.— Strode *v.* Hoagland, (1906) 107 N. W. 754.

New York.— Moore *v.* Moore, 5 N. Y. 256 [*affirming* 4 Sandf. Ch. 37]; Coley *v.* Tallman, 43 Misc. 280, 88 N. Y. Suppl. 896; French *v.* Kenworthy, 5 N. Y. St. 102; Livingston *v.* Painter, 28 How. Pr. 517.

Tennessee.— Moore *v.* Watson, 4 Coldw. 64.

Wisconsin.— Veit *v.* Meyer, 105 Wis. 530, 81 N. W. 653.

United States.— Sanger *v.* Nightingale, 122 U. S. 176, 7 S. Ct. 1109, 30 L. ed. 1105.

England.— Ellis *v.* Deane, Beatty 5.

Compare Hunter *v.* Mellen, 127 Ala. 343, 28 So. 468.

Fraud against fraud.— Where the mortgagee becomes the purchaser of the mortgaged premises at foreclosure sale, under circumstances which rendered the purchase fraudulent or inequitable, a distinct transaction between the parties, by which the mortgagee sustained an injury, cannot be set up as a reason why the sale should not be vacated and a resale ordered. Tripp *v.* Cook, 26 Wend. (N. Y.) 143.

68. Evans *v.* English, 10 S. W. 626, 10 Ky. L. Rep. 742; Allen *v.* Frawley, 106 Wis. 638, 82 N. W. 593. See also Murphy *v.* Farmers', etc., Bank, 131 Cal. 115, 63 Pac. 368. And see *supra*, XXI, C, 2, b.

69. McMillan *v.* Hunnicutt, 109 Ga. 699, 35 S. E. 102; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

70. *Alabama.*— Cain *v.* Gimon, 36 Ala. 168.

Indiana.— Arnold *v.* Gaff, 58 Ind. 543; Betson *v.* State, 47 Ind. 54.

Montana.— Collier *v.* Field, 1 Mont. 612.

Ohio.— Lockwood *v.* Mitchell, 19 Ohio 448, 53 Am. Dec. 438.

Tennessee.— Upchurch *v.* Anderson, (Ch. App. 1898) 52 S. W. 917. See 35 Cent. Dig. tit. "Mortgages," § 1538.

71. Cleveland *v.* Southard, 25 Wis. 479. And see Copsey *v.* Sacramento Bank, (Cal. 1901) 66 Pac. 204.

A fraudulent agreement between the sheriff and the purchaser that nothing shall be paid, and the return of the sale be withheld until the time for redemption shall have expired, if executed, will not affect the validity of the sale, where the mortgagor has been credited with the full amount of the sale at the proper time. Cooper *v.* French, 52 Iowa 531, 3 N. W. 538.

72. Paulett *v.* Peabody, 3 Nebr. 196.

73. Gilbert *v.* Haire, 43 Mich. 283, 5 N. W. 321; Fuller *v.* Brown, 35 Hun (N. Y.) 162. *Compare* Garrett *v.* Moss, 20 Ill. 549.

74. Jacobs *v.* Snyder, 82 Iowa 754, 48 N. W. 806; Carr *v.* Hunt, 14 Iowa 206; Mooring *v.* Little, 98 N. C. 472, 4 S. E. 485; Heiskell *v.* Galbraith, (Tenn. Ch. App. 1900) 59 S. W. 346.

75. Russell *v.* Blakeman, 40 Minn. 463, 42 N. W. 391; Schilling *v.* Lintner, 43 N. J. Eq. 444, 11 Atl. 153; Campbell *v.* Gardner, 11 N. J. Eq. 423, 69 Am. Dec. 598; Hill *v.* Hoover, 5 Wis. 354.

76. *Florida.*— Macfarlane *v.* Macfarlane, 50 Fla. 570, 39 So. 995.

description of the premises or as to the identity of the land to be sold,[77] or an excusable mistake or misunderstanding on the part of a party in interest, in relation to his legal rights or liabilities under the foreclosure or sale,[78] or a misapprehension of the terms of the sale.[79] And the sale may be vacated at the instance of a party injured thereby on the ground of his surprise; that is, where he justifiably relies on the existence of a certain state of facts, or on promises or representations made to him, and is guilty of no negligence or lack of attention, but discovers, too late to protect his interests, contrary facts which, had he known them in time, would have materially affected his actions with reference to the sale.[80] But relief will not be granted where the surprise was due to the party's

Michigan.— Brewer *v.* Landis, 111 Mich. 217, 69 N. W. 493; Nugent *v.* Nugent, 54 Mich. 557, 20 N. W. 584. See also Bullard *v.* Green, 10 Mich. 268, where the mortgagor received notice only the day before the sale, and was too ill to attend.

Mississippi.— Mitchell *v.* Harris, 43 Miss. 314.

New Jersey.— Polhemus *v.* Princilla, (Ch. 1904) 61 Atl. 263; Public Schools Trustees *v.* New Jersey West Line R. Co., 30 N. J. Eq. 494; Hazard *v.* Hodges, 17 N. J. Eq. 123. But see Horner *v.* Corning, 28 N. J. Eq. 254.

New York.— Kellogg *v.* Howell, 62 Barb. 280 [*affirmed* in 53 N. Y. 609]; King *v.* Morris, 2 Abb. Pr. 296. But see McCotter *v.* Jay, 30 N. Y. 80.

Pennsylvania.— Light *v.* Zeller, 195 Pa. St. 315, 45 Atl. 1055.

Washington.— Terry *v.* Furth, 40 Wash. 493, 82 Pac. 882, mortgagor absent from state.

See 35 Cent. Dig. tit. "Mortgages," § 1539.

Contra.— Shores *v.* Scott River Water Co., 17 Cal. 626; Homestead Land Co. *v.* Joseph Schlitz Brewing Co., 94 Wis. 600, 69 N. W. 346.

77. Harrington *v.* Fidelity L. & T. Co., 91 Iowa 703, 58 N. W. 1059; Latimer *v.* Jones, 55 Iowa 503, 8 N. W. 327; Snyder *v.* Ives, 42 Iowa 157; Kellogg *v.* Decatur County, 38 Iowa 524; Marx *v.* Smith, 111 Mich. 125, 69 N. W. 150; Root *v.* King, 91 Mich. 488, 51 N. W. 1118; Bigelow *v.* Blaiklock, Ritch. Eq. Cas. (Nova Scotia) 23. But see Neal *v.* Gillaspy, 56 Ind. 451, 26 Am. Rep. 37, holding that where, by mistake, land belonging to one is mortgaged by another as his property, and sold under foreclosure decree to one who has no notice of such mistake, the purchaser cannot maintain an action against the sheriff and the mortgagee to have the sale set aside and to recover back the purchase-money, as there is no warranty, express or implied, in any such sale.

78. *Minnesota.*— Landis *v.* Olds, 9 Minn. 90.

New Jersey.— Sinking Fund Com'rs *v.* Peter, 32 N. J. Eq. 113; Van Winkle *v.* Stearns, 27 N. J. Eq. 238; Campbell *v.* Gardner, 11 N. J. Eq. 423, 69 Am. Dec. 598.

New York.— Homœopathic Mut. L. Ins. Co. *v.* Sixbury, 17 Hun 424.

North Carolina.— Hinton *v.* Leigh, 102 N. C. 28, 8 S. E. 890.

Pennsylvania.— Scranton Sav. Bank *v.* Pier, 1 Lack. Leg. N. 87.

See 35 Cent. Dig. tit. "Mortgages," § 1539.

79. Hey *v.* Schooley, 7 Ohio, Pt. II, 48.

80. *District of Columbia.*—Hunt *v.* Whitehead, 19 App. Cas. 116.

Kansas.— Means *v.* Rosevear, 42 Kan. 377, 22 Pac. 319.

Missouri.— Cole County *v.* Madden, 91 Mo. 585, 4 S. W. 397.

New Jersey.— Schilling *v.* Lintner, 43 N. J. Eq. 444, 11 Atl. 153; Van Arsdalen *v.* Vail, 32 N. J. Eq. 189; Carpenter *v.* Smith, 30 N. J. Eq. 463 (where mortgagor's solicitor neglected to defend the action, which mortgagor did not know till after the property was advertised for sale); Howell *v.* Hester, 4 N. J. Eq. 266.

New York.— New York Mut. L. Ins. Co. *v.* O'Donnell, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796 (where the mortgagor relied on an oral agreement of the mortgagee's attorney that he would bid the full amount of the judgment); Commercial Bank *v.* Catto, 13 N. Y. App. Div. 608, 43 N. Y. Suppl. 777; Bradley *v.* Leahy, 54 Hun 390, 7 N. Y. Suppl. 461; Peck *v.* New Jersey, etc., R. Co., 22 Hun 129; Murdock *v.* Empie, 19 How. Pr. 79 (where an agent of the mortgagor induced him to believe that a responsible person would bid the value of the premises); Banta *v.* Maxwell, 12 How. Pr. 479 (where mortgagee promised to protect the mortgagor's rights and to allow him to repurchase); Slocum *v.* Glass, 3 How. Pr. 178 (where a third person, acting for the mortgagor, undertook to attend the sale and prevent it, but failed to do so); Williamson *v.* Dale, 3 Johns. Ch. 290 (where the mortgagor was induced to believe that no sale would take place).

North Carolina.— Clement *v.* Ireland, 129 N. C. 220, 39 S. E. 838 (where the judge of the court had given notice that no cases would be tried at that term); Weil *v.* Woodard, 104 N. C. 94, 10 S. E. 129 (where reliance was placed on misleading statements of court commissioners).

South Carolina.— *Ex p.* Jones, 47 S. C. 393, 25 S. E. 285.

Wisconsin.— Hubbard *v.* Taylor, 49 Wis. 68, 4 N. W. 1066 (where defendant neglected to attend the sale because of an agreement that it should be postponed); Strong *v.* Catton, 1 Wis. 471.

See 35 Cent. Dig. tit. "Mortgages," § 1539.

own negligence or could have been prevented by the exercise of ordinary prudence.[81]

(v) *Circumstances Discouraging Competition or Depressing Bids.* Any corrupt bargain among the parties interested in a foreclosure sale, or with or among the bidders,[82] or statements or representations as to the property or state of the title, or other circumstances which have a tendency to chill bidders or mislead or confuse them, or to discourage competition and depress the price of the property, resulting in its sale for less than it would have brought at a perfectly fair auction, will be cause for setting aside the sale.[83]

(vi) *Inadequacy of Price.* Inadequacy of price may be ground for vacating a foreclosure sale where it appears to have resulted from mistake, surprise, misunderstanding, want of notice, or fraud; or in other words, such circumstances, when they appear in the case, may be sufficient reason for setting aside the sale when coupled with the fact that the price realized was below the value of the property; but mere inadequacy of the price will not justify such action unless so gross as to shock the conscience and raise a presumption of fraud or unfair dealing.[84] And under any circumstances a motion to vacate the sale on

81. Parkhurst *v.* Cory, 11 N. J. Eq. 233; Housman *v.* Wright, 50 N. Y. App. Div. 606, 64 N. Y. Suppl. 71.

82. See *supra*, XXI, H, 4, b, (II).

83. *District of Columbia.*— Fowler *v.* Taylor, 19 D. C. 456.

Illinois.— Garrett *v.* Moss, 20 Ill. 549.

Kansas.— Fooke *v.* Equitable Securities Co., 9 Kan. App. 888, 59 Pac. 285.

Kentucky.— Dale *v.* Shirley, 5 B. Mon. 492.

Louisiana.— See American Freehold Land-Mortg. Co. *v.* Pierce, 49 La. Ann. 390, 21 So. 972.

Maryland.— Johnson *v.* Dorsey, 7 Gill 269.

Michigan.— Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108; Gilbert *v.* Haire, 43 Mich. 283, 5 N. W. 321.

Mississippi.— Brown *v.* James, (1899) 24 So. 908, holding that a sale under a decree will not be set aside, after several years, where the land has passed into the hands of a *bona fide* purchaser, on the ground that the sale was made at a time when there could be no competition, because of a quarantine which cut off travel, and so the price was inadequate.

Missouri.— Briant *v.* Jackson, 99 Mo. 585, 13 S. W. 91.

Nebraska.— Aldrich *v.* Lewis, 28 Nebr. 502, 44 N. W. 735.

New Jersey.— Bliss *v.* New York L. Ins. Co., 51 N. J. Eq. 630, 25 Atl. 381, 30 Atl. 429; Banta *v.* Brown, 32 N. J. Eq. 41; Woodward *v.* Bullock, 27 N. J. Eq. 507; Campbell *v.* Gardner, 11 N. J. Eq. 423, 69 Am. Dec. 598. See also Guarantee Trust, etc., Co. *v.* Jenkins, 40 N. J. Eq. 451, 2 Atl. 13.

New York.— Wager *v.* Link, 150 N. Y. 549, 44 N. E. 1103; McLaughlin *v.* Teasdale, 9 Daly 23; Collier *v.* Whipple, 13 Wend. 224.

Rhode Island.— Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743.

South Carolina.— *Ex p.* Lancaster, 46 S. C. 274, 24 S. E. 195.

Wisconsin.— Newman *v.* Ogden, 82 Wis. 53, 51 N. W. 1091.

United States.— Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 54 Fed. 26.

84. *Alabama.*— Littell *v.* Zuntz, 2 Ala. 256, 36 Am. Dec. 415. See also Montague *v.* International Trust Co., 142 Ala. 544, 38 So. 1025.

Arkansas.— Colonial, etc., Mortg. Co. *v.* Sweet, 65 Ark. 152, 45 S. W. 60, 67 Am. St. Rep. 910.

California.— May *v.* Hatcher, 130 Cal. 627, 63 Pac. 33; Connick *v.* Hill, 127 Cal. 162, 59 Pac. 832; Hibernia Sav., etc., Soc. *v.* Behnke, 121 Cal. 339, 53 Pac. 812; Glide *v.* Dwyer, 83 Cal. 477, 23 Pac. 706.

District of Columbia.— Hunt *v.* Whitehead, 19 App. Cas. 116; Hitz *v.* National L. Ins. Co., 3 MacArthur 170.

Illinois.— Connely *v.* Rue, 148 Ill. 207, 35 N. E. 824; Heberer *v.* Heberer, 67 Ill. 253; Mixer *v.* Sibley, 53 Ill. 61; Duncan *v.* Sanders, 50 Ill. 475; Comstock *v.* Purple, 49 Ill. 158; Garrett *v.* Moss, 20 Ill. 549; Cooper *v.* Crosby, 8 Ill. 506; Springer *v.* Law, 84 Ill. App. 623.

Iowa.— Equitable Trust Co. *v.* Shrope, 73 Iowa 297, 34 N. W. 867; Sigerson *v.* Sigerson, 71 Iowa 476, 32 N. W. 462. But see Central Trust Co. *v.* Gate City Electric St. R. Co., 96 Iowa 646, 65 N. W. 982, where the sale was made on foreclosure of a mortgage securing an issue of bonds, and it appeared that none of the bondholders except plaintiff had actual notice thereof, and the decree provided against redemption, and a resale was ordered on the application of other bondholders, no one opposing it except the highest bidder at the sale, on a showing that a higher bid would probably be obtained on the resale.

Kansas.— Fraser *v.* Seeley, 71 Kan. 169, 79 Pac. 1081; Fowler *v.* Krutz, 54 Kan. 622, 38 Pac. 808; Babcock *v.* Canfield, 36 Kan. 437, 13 Pac. 787; Northrop *v.* Cooper, 23 Kan. 432; Dewey *v.* Linscott, 20 Kan. 684; Wolfert *v.* Milford Sav. Bank, 5 Kan. App. 222, 47 Pac. 175.

Kentucky.— Forman *v.* Hunt, 3 Dana 614; Gleason *v.* Kentucky Title Co., 78 S. W. 170, 25 Ky. L. Rep. 1546; James *v.* Webb, 71

this ground is addressed to the discretion of the court, and its decision will not be reversed on appeal unless an abuse of such discretion is shown.[85]

S. W. 526, 24 Ky. L. Rep. 1382; Cohen *v.* Ripy, 33 S. W. 625, 17 Ky. L. Rep. 1078; Ison *v.* Kinnaird, 17 S. W. 633, 13 Ky. L. Rep. 569.

Maryland.— Hughes *v.* Riggs, 84 Md. 502, 36 Atl. 269; Garritee *v.* Popplein, 73 Md. 322, 20 Atl. 1070; Marsh *v.* Sheriff, (1888) 14 Atl. 664; Warfield *v.* Ross, 38 Md. 85; Harnickell *v.* Orndorff, 35 Md. 341.

Michigan.— Page *v.* Kress, 80 Mich. 85, 44 N. W. 1052, 20 Am. St. Rep. 504; Farmers' Bank *v.* Quick, 71 Mich. 534, 39 N. W. 752, 15 Am. St. Rep. 280; Bullard *v.* Green, 10 Mich. 268.

Minnesota.— Johnson *v.* Cocks, 37 Minn. 530, 35 N. W. 436.

Missouri.— Daggett Hardware Co. *v.* Brownlee, 186 Mo. 621, 85 S. W. 545; McDonnell *v.* De Soto Sav., etc., Assoc., 175 Mo. 250, 75 S. W. 438; Hoffman *v.* McCracken, 168 Mo. 337, 67 S. W. 878.

Nebraska.— Gibson *v.* Sweet, 64 Nebr. 550, 90 N. W. 548; Williams *v.* Taylor, 63 Nebr. 717, 89 N. W. 261.

New Jersey.— Polhemus *v.* Princilla, (Ch. 1904) 61 Atl. 263; Rowan *v.* Congdon, 53 N. J. Eq. 385, 33 Atl. 404; Workingmen's Mut. Bldg. Loan Assoc. *v.* McGillick, (Ch. 1894) 28 Atl. 468; Bliss *v.* New York L. Ins. Co., 51 N. J. Eq. 630, 25 Atl. 381, 30 Atl. 429; Mount *v.* Manhattan Bank, 44 N. J. Eq. 297, 18 Atl. 80; Brown *v.* Farly, (Ch. 1886) 4 Atl. 79; Guarantee Trust, etc., Co. *v.* Jenkins, 40 N. J. Eq. 451, 2 Atl. 13; Dawson *v.* Drake, 29 N. J. Eq. 383; White *v.* Zust, 28 N. J. Eq. 107; Rea *v.* Wheeler, 27 N. J. Eq. 292; Boyd *v.* Hudson City Academical Soc., 24 N. J. Eq. 349. See also Wetzler *v.* Schaumann, 24 N. J. Eq. 60, where a foreclosure sale, on a bid of two thousand six hundred dollars for property worth four thousand five hundred dollars, was set aside for inadequacy of price and for the further reason that the mortgagor was prevented by misinformation from attending the sale.

New York.— Frazier *v.* Swimm, 79 N. Y. App. Div. 53, 79 N. Y. Suppl. 787; Moller *v.* Watts, 56 N. Y. App. Div. 562, 67 N. Y. Suppl. 488; Housman *v.* Wright, 50 N. Y. App. Div. 606, 64 N. Y. Suppl. 71; White *v.* Coulter, 1 Hun 357; Crane *v.* Stiger, 2 Thomps. & C. 577; Barnard *v.* Jersey, 39 Misc. 212, 79 N. Y. Suppl. 380; Irving Sav. Inst. *v.* Robinson, 35 Misc. 449, 71 N. Y. Suppl. 193; Coudert *v.* Logerot, 30 N. Y. Suppl. 114; McEwen *v.* Butts, 20 N. Y. Suppl. 503; Provost *v.* Roedieger, 10 N. Y. Suppl. 812; New York Eastern Christian Benev., etc., Soc. *v.* Bishop, 8 N. Y. Suppl. 60; Von Stade *v.* Le Compte, 4 N. Y. Suppl. 62; Merchants' Ins. Co. *v.* Hinman, 3 Abb. Pr. 455; Burchell *v.* Voorhis, 49 How. Pr. 247; Whitheck *v.* Rowe, 25 How. Pr. 403; Thompson *v.* Mount, 1 Barb. Ch. 607; May *v.* May, 11 Paige 201; Billington *v.* Forbes, 10 Paige 487; American Ins. Co. *v.* Oakley, 9 Paige 259; Lansing *v.* McPherson, 3 Johns. Ch. 424; Francis *v.* Church, Clarke 475; Gardiner *v.* Schermerhorn, Clarke 101; Farnham *v.* Colton, Clarke 35; Mott *v.* Walkley, 3 Edw. 590; Hoppock *v.* Conklin, 4 Sandf. Ch. 582.

Oklahoma.— McLain Land, etc., Co. *v.* Swofford Bros. Dry Goods Co., 11 Okla. 429, 68 Pac. 502.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Byrnes, 166 Pa. St. 496, 31 Atl. 255; Long *v.* Miller, 10 Pa. Co. Ct. 586; Guarantee Trust, etc., Co. *v.* Klein, 9 Kulp 499.

South Carolina.— *Ex p.* Alexander, 35 S. C. 409, 14 S. E. 854.

South Dakota.— Trenery *v.* American Mortg. Co., 11 S. D. 506, 78 N. W. 991; Kirby *v.* Ramsey, 9 S. D. 197, 68 N. W. 328. But *compare* State *v.* Campbell, 5 S. D. 636, 60 N. W. 32, holding that the court, in its discretion, may set aside a sale on mortgage foreclosure when, in its opinion, the price bid is inadequate.

Tennessee.— Donaho *v.* Bales, (Ch. App. 1900) 59 S. W. 409; Fenton *v.* Bell, (Ch. App. 1899) 53 S. W. 984.

Virginia.— Forde *v.* Herron, 4 Munf. 316.

Wisconsin.— Merrill *v.* Ladendorf, 123 Wis. 140, 101 N. W. 385; John Paul Lumber Co. *v.* Neumeister, 106 Wis. 243, 82 N. W. 144; Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31; Allis *v.* Sabin, 17 Wis. 626; Strong *v.* Catton, 1 Wis. 471.

United States.— Smith *v.* Black, 115 U. S. 308, 6 S. Ct. 50, 29 L. ed. 398; Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218; West *v.* Davis, 29 Fed. Cas. No. 17,422, 4 McLean 241.

See 35 Cent. Dig. tit. "Mortgages," § 1540.

Gross inadequacy.— "Inadequacy of price, taken alone, is seldom if ever sufficient to authorize the setting aside of a sheriff's sale; yet great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such case, slight additional circumstances only are required to authorize the setting aside of the sale." Means *v.* Rosevear, 42 Kan. 377, 383, 22 Pac. 319.

Criterion of value.— After full notice of foreclosure sale, and an open sale, fairly conducted, with such competition as can be attracted by full and sufficient notice, the highest bid which is made is a fair criterion of the value of the property at the time. London Nitro Phosphate Syndicate *v.* Johnson, 100 Va. 774, 42 S. E. 995.

Conditional opening.— In some cases it has been considered a fair exercise of the court's discretion in this matter to make the setting aside of the sale conditional on the moving party's furnishing a bond or undertaking to furnish a responsible purchaser at the resale at a higher price than that bid at the first sale. Strong *v.* Smith, 68 N. J. Eq. 650, 58 Atl. 301, 64 Atl. 1135; German-American Bank *v.* Russell, 39 N. Y. App. Div. 646, 57 N. Y. Suppl. 171.

85. German-American Bank *v.* Dorthy, 39 N. Y. App. Div. 166, 57 N. Y. Suppl. 172.

d. Time For Moving and Laches.[86] Proceedings to vacate a foreclosure sale should be instituted before the confirmation of the sale,[87] or before the expiration of the time allowed by law for redemption after the sale;[88] and in any case the party objecting must move promptly and act with diligence, an unreasonable delay in the assertion of his objections, amounting to laches and not explained or excused, being sufficient to bar him from any relief.[89] Especially is this rule applied where he has done any act amounting to a ratification of the sale or acquiescence in it,[90] or where he has allowed the rights of innocent purchasers or other third persons to intervene.[91] And such a party cannot be allowed to speculate on his chances of having the sale set aside, or wait to see whether, in the light of subsequent events, it will be to his advantage to move for its vacation.[92]

e. Application and Proceedings Thereon — (i) *Form and Requisites of Application.* The proper method of proceeding to vacate a foreclosure sale is by motion, petition, or other proper application in the original suit,[93] or by opposing the order of confirmation of the sale and taking an appeal therefrom.[94] But in some cases it may be necessary to proceed by original bill, as where the fore-

86. **In Wisconsin** by the express provisions of Rev. St. (1898) § 3543, no mortgage sale shall be held invalid or be set aside for any defect in the notice of publication or proceedings of the officer conducting the sale, unless the action in which the validity is questioned be commenced, or the defense alleging the invalidity be interposed, within five years from the making of the sale. Coe *v.* Rockman, 126 Wis. 515, 106 N. W. 290.

87. Black *v.* Carroll, 24 Md. 251; Gilman *v.* Holyoke, 14 Minn. 138.

88. Fergus *v.* Woodworth, 44 Ill. 374; Walker *v.* Schum, 42 Ill. 462; Hull *v.* King, 38 Minn. 349, 37 N. W. 792.

89. *Alabama.*—Mason *v.* American Mortg. Co., 124 Ala. 347, 26 So. 900; *Ex p.* Branch, 53 Ala. 140.

Arkansas.— Ayers *v.* McRae, 71 Ark. 209, 72 S. W. 52.

California.— Orland Bank *v.* Dodson, 127 Cal. 208, 59 Pac. 584, 78 Am. St. Rep. 42; Barnard *v.* Wilson, 66 Cal. 251, 5 Pac. 237.

District of Columbia.— Quirk *v.* Liebert, 12 App. Cas. 394.

Illinois.— Quinn *v.* Perkins, 159 Ill. 572, 43 N. E. 759; Connely *v.* Rue, 148 Ill. 207, 35 N. E. 824; Vail *v.* Arkell, 146 Ill. 363, 34 N. E. 937; Cornell *v.* Newkirk, 144 Ill. 241, 33 N. E. 37; Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 86 Ill. 187; Harwood *v.* Cox, 26 Ill. App. 374.

Iowa.— York *v.* Boardman, 40 Iowa 57.

Kansas.— Mowry *v.* Howard, 65 Kan. 862, 70 Pac. 863; Vint *v.* Monk, 56 Kan. 789, 44 Pac. 986.

Kentucky.— Shiveley *v.* Jones, 6 B. Mon. 274.

Maryland.— Connaughton *v.* Bernard, 84 Md. 577, 36 Atl. 265.

Michigan.— Chesbro *v.* Powers, 70 Mich. 370, 38 N. W. 283; Lyon *v.* Brunson, 48 Mich. 194, 12 N. W. 32; Bullard *v.* Green, 10 Mich. 268.

Minnesota.— See Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661.

Mississippi.— Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770.

New York.— Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 6 N. Y. Suppl. 643; Lockwood *v.* McGuire, 57 How. Pr. 266.

South Dakota.— Thompson *v.* Browne, 10 S. D. 344, 73 N. W. 194.

Wisconsin.— Meehan *v.* Blodgett, 86 Wis. 511, 57 N. W. 291; Trilling *v.* Schumitsch, 67 Wis. 186, 30 N. W. 222; Babcock *v.* Perry, 8 Wis. 277.

United States.— Martin *v.* Gray, 142 U. S. 236, 12 S. Ct. 186, 35 L. ed. 997; Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258, 9 S. Ct. 787, 33 L. ed. 128; New Orleans Nat. Banking Assoc. *v.* Le Breton, 120 U. S. 765, 7 S. Ct. 772, 30 L. ed. 821; Cutter *v.* Iowa Water Co., 96 Fed. 777; Terbell *v.* Lee, 40 Fed. 40; McBride *v.* Gwynn, 33 Fed. 402.

See 35 Cent. Dig. tit. "Mortgages," § 1542.

90. Zable *v.* Masonic Sav. Bank, 16 S. W. 588, 13 Ky. L. Rep. 197.

91. Bryan *v.* Kales, (Ariz. 1889) 20 Pac. 311; Leonard *v.* Taylor, 12 Mich. 398.

92. London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

93. *Arkansas.*— Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704.

Louisiana.— Neuhauser *v.* Barthe, 110 La. Ann. 825, 34 So. 793.

Michigan.— Corning *v.* Burton, 102 Mich. 86, 62 N. W. 1040, holding that the validity of a foreclosure cannot be questioned on a petition for a writ of execution for a deficiency arising from the sale.

New Jersey.— Horner *v.* Corning, 28 N. J. Eq. 254.

New York.— Hopkins *v.* Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731; McCotter *v.* Jay, 30 N. Y. 80.

Ohio.— Sked *v.* Sedgley, 36 Ohio St. 483.

Wisconsin.— Lockwood *v.* Reese, 76 Wis. 404, 45 N. W. 313; Berry *v.* Nelson, 4 Wis. 375. A foreclosure sale may be set aside on the hearing of an order on the purchaser to show cause, procured by defendant in the foreclosure suit. Hubbard *v.* Taylor, 49 Wis. 68, 4 N. W. 1066.

See 35 Cent. Dig. tit. "Mortgages," § 1541.

94. Trilling *v.* Schumitsch, 67 Wis. 186, 30 N. W. 222.

closure suit is entirely determined, or where the foreclosure purchaser was not a party to it,[95] for a motion in this behalf cannot be made to perform the office of an appeal.[96] The bill, petition, or motion should set forth clearly and fully the particular facts relied on as invalidating the sale,[97] and should be accompanied by an offer to do equity in accordance with the circumstances of the particular case, as to redeem or pay what is due under the mortgage,[98] or to return to an innocent purchaser what he may have paid under the sale,[99] or, if inadequacy of price is the ground alleged, to advance the bid or offer to procure a responsible purchaser to do so.[1] Such an application cannot properly be determined without notice to the parties adversely interested, either by service on them or actual notice brought home to them.[2]

(II) *PARTIES.* An application to set aside a foreclosure sale can be made only by one who shows that he has an interest in the premises affected,[3] and that his rights are invaded or his interests prejudiced by the sale.[4] The purchaser at

95. Crawford *v.* Tuller, 35 Mich. 57; Henderson *v.* Herrod, 23 Miss. 434; Eddy *v.* Kimerer, 61 Nebr. 498, 85 N. W. 540. See Brown *v.* Frost, 10 Paige (N. Y.) 243.

96. Hartshorn *v.* Milwaukee, etc., R. Co., 23 Wis. 692.

97. *California.*— Goldtree *v.* McAlister, 86 Cal. 93, 24 Pac. 801. It must be alleged that there was a good and valid defense to the foreclosure suit on its merits. Bell *v.* Thompson, 147 Cal. 689, 82 Pac. 327.

Indiana.— Kellogg *v.* Tout, 65 Ind. 146.

Louisiana.— Herber *v.* Thompson, 46 La. Ann. 186, 14 So. 504.

Mississippi.— Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770.

Missouri.—Kelly *v.* Hurt, 61 Mo. 463, holding that, in a suit by a mortgagor to set aside a foreclosure sale on the ground that the property was sold in bulk instead of in separate parcels, he need not allege that the different parcels were fitted for separate use, or that any person proposed to buy any separate parcel; nor need there be any allegation of fraud.

Montana.— Russell *v.* Pew, 12 Mont. 509, 31 Pac. 75.

New York.— German-American Bank *v.* Dorthy, 39 N. Y. App. Div. 166, 57 N. Y. Suppl. 172; Provost *v.* Roediger, 10 N. Y. Suppl. 812.

South Carolina.— Ruff *v.* Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709, holding that allegations of fraud in the procurement of the execution of a mortgage and of payment will not support an action against the purchaser at the foreclosure sale to set aside such sale, where no fraud or bad faith on the part of such purchaser is alleged.

Wisconsin.— Warren *v.* Foreman, 19 Wis. 35.

See 35 Cent. Dig. tit. "Mortgages," § 1545.

98. *Michigan.*— Leonard *v.* Taylor, 12 Mich. 398.

Mississippi.— Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770.

Nebraska.— Loney *v.* Courtnay, 24 Nebr. 580, 39 N. W. 616.

New York.— Goldsmith *v.* Osborne, 1 Edw. 560.

Pennsylvania.— Sipp *v.* Insurance Co. of North America, 8 Pa. Dist. 283.

Rhode Island.— Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743; Briggs *v.* Hall, 16 R. I. 577, 18 Atl. 177.

Tennessee.— Mound City Mut. L. Ins. Co. *v.* Hamilton, 3 Tenn. Ch. 228.

Texas.— Hatch *v.* De la Garza, 7 Tex. 60.

Compare Huber *v.* Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

And see 35 Cent. Dig. tit. "Mortgages," § 1545.

But *compare* Benedict *v.* Sammon Theological Seminary, 122 Ga. 412, 50 S. E. 162.

99. *Indiana.*— Shannon *v.* Hay, 106 Ind. 589, 7 N. E. 376.

Louisiana.— Brown *v.* Bouny, 30 La. Ann. 174.

New Mexico.—See Lamb *v.* San Pedro, etc., Co., 3 N. M. 632, 9 Pac. 525.

New York.— See Dusenbury *v.* Lehmnier, 46 How. Pr. 417.

Washington.— Anrud *v.* Scandinavian-American Bank, 27 Wash. 16, 67 Pac. 364.

1. Warren *v.* Foreman, 19 Wis. 35.

2. Lawrence *v.* Jarvis, 36 Mich. 281; Crane *v.* Stiger, 58 N. Y. 625; Bonnett *v.* Brown, 13 N. Y. Suppl. 395. But see State *v.* Campbell, 5 S. D. 636, 60 N. W. 32.

3. *Arkansas.*— Pine Bluff, etc., R. Co. *v.* James, 54 Ark. 81, 15 S. W. 15.

California.— Glide *v.* Dwyer, 83 Cal. 477, 23 Pac. 706.

Indiana.— Peters *v.* Guthrie, 119 Ind. 44, 20 N. E. 536.

Louisiana.— Taylor *v.* Huey, 11 La. Ann. 614.

New Jersey.— Day *v.* Lyon, 11 N. J. Eq. 331.

New Mexico.— Lamb *v.* San Pedro, etc., Co., 3 N. M. 632, 9 Pac. 525.

North Carolina.— Shew *v.* Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678.

Bondholders.— The trustees of a railroad mortgage represent the bondholders; and the court will not hear a motion to set aside a foreclosure sale under its decree at the instance of an individual bondholder. Meyer *v.* Utah, etc., R. Co., 3 Utah 280, 3 Pac. 393.

4. Clark *v.* Wolf, 2 Nebr. (Unoff.) 290, 96 N. W. 495; Jones *v.* Miller, 2 Nebr. (Unoff.) 582, 92 N. W. 201; Lester *v.* Mann, 1 Silv. Sup. (N. Y.) 516, 5 N. Y. Suppl. 513; Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743.

the sale must always be made a party;[5] and where it is the purchaser himself who brings the application he must make the mortgagor a party, if the latter retains an interest in the property,[6] and also the real owner of the mortgage debt or decree, if other than the mortgagee.[7]

(III) *PRESUMPTIONS AND EVIDENCE.* A foreclosure sale is supported by presumptions of regularity, and the burden of proof is on the party impeaching its validity,[8] except where a defect appears on the face of the proceedings or consists in holding the sale in a manner different from that directed by the decree, in which case the party seeking to uphold it must assume the burden.[9] An application of this sort may generally be heard and determined on affidavits and counter-affidavits,[10] except where the local practice requires the submission of issues of fact to a jury.[11]

(IV) *DETERMINATION AND DISPOSITION OF APPLICATION.* A foreclosure sale will not be vacated where the rights alleged to be injured by it can be fully satisfied or protected by a new arrangement of the parties, concurred in by all concerned,[12] or by an order simply giving the mortgagor a right to redeem within a limited time and on proper terms.[13] But where this cannot be accomplished, the proper practice is to set aside the sale absolutely,[14] at the same time making such orders as will place the parties in the position they occupied before the sale;[15] and such orders as may be necessary to protect intervening purchasers or mortgagees and insure the application of the proceeds to their claims so far as may be just.[16] The court has a wide discretion as to the terms on which it will set aside a foreclosure sale,[17] and may require the moving party to pay costs and expenses, as

5. *Florida.*— Macfarlane *v.* Macfarlane, 50 Fla. 570, 39 So. 995.

Louisiana.— Smith *v.* Brady, 37 La. Ann. 122.

Michigan.— Jewett *v.* Morris, 41 Mich. 689, 3 N. W. 186.

New York.— Candee *v.* Burke, 1 Hun 546. But see Wood *v.* Kroll, 43 Hun 328.

United States.—Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. ed. 673; Terbell *v.* Lee, 40 Fed. 40.

See 35 Cent. Dig. tit. "Mortgages," § 1543.

Grantee of purchaser.—A grantee or mortgagee of the purchaser at foreclosure sale, taking in good faith, for value, and without notice, should be brought in to a proceeding to vacate the foreclosure sale. Colby *v.* Rowley, 4 Abb. Pr. (N. Y.) 361. See also Kirby *v.* McCook County Cir. Ct., 10 S. D. 38, 71 N. W. 140.

6. Michoud *v.* Dejoux, 3 La. Ann. 479; Schmalholz *v.* Polhaus, 49 How. Pr. (N. Y.) 59.

7. Nelson *v.* Brown, 20 Ind. 74.

8. Vail *v.* McKernan, 21 Ind. 421; Maynes *v.* Moore, 16 Ind. 116; Morgan *v.* Mitchell, 3 Mart. N. S. (La.) 576; Bernard *v.* Shaw, 9 Mart. (La.) 49; Roberts *v.* Loyola Perpetual Bldg. Assoc., 74 Md. 1, 21 Atl. 684.

9. Meriwether *v.* Craig, 118 Ind. 301, 20 N. E. 769; Kelly *v.* Hurt, 61 Mo. 463.

10. Francis *v.* Church, Clarke (N. Y.) 475; Savery *v.* Sypher, 6 Wall. (U. S.) 157, 18 L. ed. 822. See also McCall *v.* Irion, 41 La. Ann. 1126, 6 So. 845.

11. Hansbro *v.* Blum, 3 Tex. Civ. App. 108, 22 S. W. 270.

12. Morrison *v.* Bowman, 29 Cal. 337; De Mey *v.* Defer, 103 Mich. 239, 61 N. W. 524; Kropholler *v.* St. Paul, etc., R. Co., 2 Fed. 302, 1 McCrary 299.

13. Rennick *v.* Rumsey, 4 Bibb (Ky.) 2. And see O'Connor *v.* Keenan, 132 Mich. 646, 94 N. W. 186.

14. Moore *v.* Titman, 33 Ill. 358; Carr *v.* Watkins, 9 S. W. 218, 10 Ky. L. Rep. 342; Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773.

Appealability of order setting aside or refusing to set aside foreclosure sale see Woodward *v.* Bullock, 27 N. J. Eq. 507; Commonwealth L. Ins. Co. *v.* Bowman, 90 N. Y. 654; Moore *v.* Shaw, 77 N. Y. 512; Goodell *v.* Harrington, 76 N. Y. 547; Crane *v.* Stiger, 58 N. Y. 625; Buffalo Sav. Bank *v.* Newton, 23 N. Y. 160; White *v.* Coulter, 1 Hun (N. Y.) 357; Wollung *v.* Aiken, 2 Silv. Sup. (N. Y.) 493, 6 N. Y. Suppl. 331; Depew *v.* Dewey, 2 Thomps. & C. (N. Y.) 515; Jackson *v.* O'Connell, 14 N. Y. Suppl. 92; Mortimer *v.* Nash, 17 Abb. Pr. (N. Y.) 229; Young *v.* Bloomer, 22 How. Pr. (N. Y.) 383; Hazleton *v.* Wakeman, 3 How. Pr. (N. Y.) 357; Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 57 Wis. 521, 15 N. W. 840.

15. State Bank *v.* Green, 10 Nebr. 130, 4 N. W. 942; Greenwood Loan, etc., Assoc. *v.* Williams, 71 S. C. 421, 51 S. E. 272; Zylstra *v.* Keith, 2 Desauss. Eq. (S. C.) 140; Evans *v.* Borchard, 8 Tex. Civ. App. 276, 18 S. W. 258; Fort *v.* Roush, 104 U. S. 142, 26 L. ed. 664.

16. Gould *v.* Gager, 24 How. Pr. (N. Y.) 440. See also Wolcott *v.* Schenck, 23 How. Pr. (N. Y.) 385; Veit *v.* Meyer, 105 Wis. 530, 81 N. W. 653; Alabama, etc., Mfg. Co. *v.* Robinson, 72 Fed. 708, 19 C. C. A. 152 [*affirming* 67 Fed 189].

17. Vingut *v.* Ketcham, 102 N. Y. App. Div. 403, 92 N. Y. Suppl. 605; Adams *v.* Haskell, 10 Wis. 123.

well of the application for vacation as of the sale, or to furnish security for the advanced bids which he has promised to produce at the resale.[18]

f. Resale. A resale should be ordered on the same terms as the first sale, in the absence of special reasons for varying the terms,[19] and a new notice or advertisement must be given, as for an original sale.[20] The purchaser at the first sale is not liable for any deficiency on the resale, unless it was expressly ordered to be made at his risk.[21] And when he is without fault, upon a resale he should be fully indemnified for all costs and expenditures incurred by reason of the first sale.[22] A promise by the party procuring the resale to advance the bid, or to procure a responsible bidder to do so, must be fulfilled.[23] Where a new party is made on petition after decree and sale, a resale is not necessary, unless the new defendant insists on it.[24] The resale may in turn be vacated and set aside by the court if good and sufficient reasons appear therefor.[25]

7. Rights and Liabilities of Purchaser — a. In General. The purchaser at a foreclosure sale is entitled to receive a deed at the proper time and on completing his purchase,[26] and when he receives it he is *prima facie* the legal owner of the land described in it.[27] He is entitled to rest on the judgment or decree of foreclosure as the source of his title, and need not go beyond it,[28] and he is also entitled to the benefit of all presumptions supporting the jurisdiction of the court and the regularity of its proceedings.[29] If the mortgagee himself becomes the purchaser, his title relates back to the date of the mortgage,[30] otherwise the title of the purchaser relates back to the date of the sale or the expiration of the

18. *New Jersey.*— Miller *v.* Kendrick, (Ch. 1888) 15 Atl. 259. And see Avon-by-the-Sea Land, etc., Co. *v.* Finn, 56 N. J. Eq. 808, 41 Atl. 360.

New York.— Kennedy *v.* Bridgman, 27 Misc. 585, 58 N. Y. Suppl. 253; Stephens *v.* Humphreys, 19 N. Y. Suppl. 25; Lentz *v.* Craig, 13 How. Pr. 72.

Ohio.— Fallis *v.* Loughhead, 9 Ohio Dec. (Reprint) 128, 11 Cinc. L. Bul. 56.

Wisconsin.— Kremer *v.* Thwaits, 105 Wis. 534, 81 N. W. 654; Veit *v.* Meyer, 105 Wis. 530, 81 N. W. 653; Hubbard *v.* Taylor, 49 Wis. 68, 4 N. W. 1066; Adams *v.* Haskell, 10 Wis. 123.

United States.— Chase *v.* Driver, 92 Fed. 780, 34 C. C. A. 668.

See 35 Cent. Dig. tit. "Mortgages," § 1548.

19. Riggs *v.* Pursell, 74 N. Y. 370. See also Brnschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; Carting *v.* Menser, 10 N. J. L. J. 21.

Effect of different terms.— Where the terms of a foreclosure sale authorize the referee, if the purchaser failed to complete his purchase, to resell the property on the same terms, the purchaser to be liable for the deficiency, the bid of such purchaser is abandoned by a sale on different terms. Ray *v.* Adams, 44 N. Y. App. Div. 173, 60 N. Y. Suppl. 663.

20. Wilson *v.* Thorne, 13 S. W. 365, 11 Ky. L. Rep. 945; *In re* Hall, 21 La. Ann. 692; Barr *v.* Benzinger, 27 N. Y. App. Div. 590, 50 N. Y. Suppl. 499; Shepard *v.* Whaley, 13 N. Y. Suppl. 532, 19 N. Y. Civ. Proc. 381; Long *v.* Lyons, 54 How. Pr. (N. Y.) 129; Bicknell *v.* Byrnes, 23 How. Pr. (N. Y.) 486.

Under a foreclosure order directing a resale in parcels, the notice need not state that the land will be sold in parcels. Hoffman *v.* Burke, 21 Hun (N. Y.) 530.

21. Lowndes *v.* Fishburne, 69 S. C. 308, 48 S. E. 264.

22. Polhemus *v.* Princilla, (N. J. Ch. 1904) 61 Atl. 263; Duncan *v.* Dodd, 2 Paige (N. Y.) 99.

23. Max Meadows Land, etc., Co. *v.* McGavock, 96 Va. 131, 30 S. E. 460.

24. Glidden *v.* Andrews, 6 Ala. 190; Dickerson *v.* Corning, 122 Mich. 631, 81 N. W. 575.

25. Isbell *v.* Kenyon, 33 Mich. 63; State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36; Terbell *v.* Lee, 40 Fed. 40. See also Judson *v.* O'Connell, 14 N. Y. Suppl. 92; Mott *v.* Walkley, 3 Edw. (N. Y.) 590.

26. See *infra*, XXI, H, 9, b.

The colorable legal title which the mortgagor retains after the foreclosure sale, and before the recording and delivery of the deed to the purchaser, is held by him, and those claiming under him, merely in trust for the purchaser. Stang *v.* Redden, 28 Fed. 11.

27. Jackson *v.* Warren, 32 Ill. 331.

28. Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332.

The rule that there is no implied warranty in a sheriff's sale applies only to the quality and property of the thing sold; and there is always an implied covenant that he has authority to sell, especially where such authority is recited in his deed to the purchaser. Stoney *v.* Schultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429.

29. Kibbe *v.* Ditto, 93 U. S. 674, 23 L. ed. 1005.

30. Dickey *v.* Gibson, 121 Cal. 276, 53 Pac. 704; McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Jaycox *v.* Smith, 17 N. Y. App. Div. 146, 45 N. Y. Suppl. 299.

time, if any, allowed by law for redemption from the sale.[31] Further, he is in as a purchaser, and not as a mortgagee in possession, except where it is necessary to give him the latter character to save him from the consequences of invalidity in the sale;[32] and he is entitled, on the strength of his title, to defend ejectment,[33] and to protect his title in every proper way, by buying in outstanding claims or bringing any necessary actions,[34] including a proceeding for strict foreclosure or redemption against a junior mortgagee not made a party to the foreclosure suit.[35] And the purchaser is not affected by any subsequent agreements or arrangements between the original parties in which he does not acquiesce.[36]

b. Persons Entitled Under Sale. If the purchaser at a foreclosure sale occupied a fiduciary relation toward the mortgagor, his purchase may be held to have been for the benefit of the owner, or to be charged with a resulting trust in favor of the latter;[37] and so, if there are several mortgagees or a group of mortgage bondholders, one purchasing at the sale, under a joint arrangement for the mutual benefit of all, will be held to have acted as the agent for all those entitled to participate in the agreement.[38] Where a sole mortgagee becomes the purchaser at his own sale, it is in some states optional with the mortgagor to affirm or disaffirm the sale;[39] but until he repudiates it the title of the mortgagee is good,[40] and in the absence of such a right in favor of the mortgagor the title and rights of the mortgagee so purchasing are exactly the same as if he were a total stranger to the mortgage.[41]

c. Property and Rights Acquired by Purchase — (i) *In General.* As to the identity and quantity of the land passing to the purchaser at a foreclosure sale, reference must be made to the description of it contained in the mortgage and in the decree of sale, for this governs absolutely.[42] But, this point once established, the purchaser acquires, with the land itself, all permanent improve-

31. Strauss *v.* Tuckhorn, 200 Ill. 75, 65 N. E. 683; Rockwell *v.* Servant, 63 Ill. 424; Carroll *v.* Haigh, 108 Ill. App. 264; Bartlett *v.* Amberg, 92 Ill. App. 377; Stoddard *v.* Walker, 90 Ill. App. 422.

32. Russell *v.* H. C. Akeley Lumber Co., 45 Minn. 376, 48 N. W. 3; Belter *v.* Lyon, 102 N. Y. 725, 7 N. E. 821; Tryon *v.* Munson, 77 Pa. St. 250.

33. Sanderson *v.* Phinney, 4 Luz. Leg. Obs. (Pa.) 26.

34. Bush *v.* Maklin, 87 Ky. 482, 9 S. W. 420, 10 Ky. L. Rep. 473; Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521. See also Alexander *v.* Greenwood, 24 Cal. 505; Noyes *v.* Ray, 64 Ga. 283; Waugh *v.* Bailly, 115 N. Y. 654, 21 N. E. 1118.

Right to buy in outstanding titles, tax deeds, and other liens see Wright *v.* Sperry, 25 Wis. 617, 21 Wis. 331.

Right to maintain a bill to correct an erroneous description of the property in the decree of foreclosure see Merrifield *v.* Ingersoll, 61 Mich. 4, 27 N. W. 714.

Right to maintain a suit to cancel an instrument which constitutes an apparently prior encumbrance see Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061. As to the right to set up usury in the mortgage see Pinnell *v.* Boyd, 33 N. J. Eq. 600; Wells *v.* Chapman, 4 Sandf. Ch. (N. Y.) 312 [*affirmed* in 13 Barb. 561].

35. Loeb *v.* Tinkler, 124 Ind. 331, 24 N. E. 235; Kelley *v.* Houts, 30 Ind. App. 474, 66 N. E. 408; Anderson *v.* Wyant, 77 Iowa 498, 42 N. W. 382; Blanco *v.* Foote, 32 Barb. (N. Y.) 535. See also Robbins *v.* Beers, 21 N. Y. Suppl. 221.

36. Haggerty *v.* Allaire Works, 5 Sandf. (N. Y.) 230; Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78; School Land Com'rs *v.* Wiley, 10 Oreg. 86; Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368.

37. Bennett *v.* Austin, 81 N. Y. 308; Moore *v.* Moore, 5 N. Y. 256; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223; Kilgour *v.* Scott, 101 Fed. 359.

38. Hardin *v.* Dickey, 123 Cal. 513, 56 Pac. 258; Carroll *v.* Haigh, 97 Ill. App. 576 [*reversed* on other grounds in 197 Ill. 193, 64 N. E. 375]; Stemmons *v.* Duncan, 9 B. Mon. (Ky.) 351; Sullivan *v.* Haskin, 70 Vt. 487, 41 Atl. 437.

39. See *supra*, XX, F, 8, b, (III); XXI, H, 4, a, (II).

40. Hawkins *v.* Hudson, 45 Ala. 482; Herbert Craft Co. *v.* Bryan, (Cal. 1902) 68 Pac. 1020; Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231.

41. *Alabama.*— Smith *v.* Lusk, 119 Ala. 394, 24 So. 256.

Iowa.— Boyd *v.* Ellis, 11 Iowa 97.

Kansas.— Jones *v.* Standiferd, 69 Kan. 513, 77 Pac. 271.

Michigan.— Ledyard *v.* Phillips, 47 Mich. 305, 11 N. W. 170.

New Jersey.—Avon-by-the-Sea Land, etc., Co. *v.* Finn, 56 N. J. Eq. 808, 41 Atl. 360.

New York.— Brown *v.* Frost, 10 Paige 243. See 35 Cent. Dig. tit. "Mortgages," § 1553.

42. *Georgia.*— Roberts *v.* Hinson, 77 Ga. 589, 2 S. E. 752.

ments upon it,[43] all easements appurtenant to it or which it enjoys over or in relation to other lands,[44] and in some cases, according to the language of the mortgage and the intention of the parties, personal property in the nature of machinery or trade fixtures.[45] The purchaser's rights are not affected by previous alienation of portions of the property, which are made subject to the mortgage,[46] nor by the mortgagor's acts in dedicating parts of it to public use,[47] although, if it has been lawfully condemned under the power of eminent domain, his claim may be transferred from the land itself to the money paid in compensation for it.[48] It has been held that where a mortgage covers land lying in two counties, a sheriff's

Louisiana.— Jones *v.* Lake, 43 La. Ann. 1024, 10 So. 204.

New Jersey.—Adams *v.* Reynolds, 65 N. J. Eq. 232, 55 Atl. 1003; McGee *v.* Smith, 16 N. J. Eq. 462.

New York.— Bernstein *v.* Nealis, 144 N. Y. 347, 39 N. E. 328; Bell *v.* Howe, 143 N. Y. 190, 38 N. E. 200.

South Carolina.— *Ex p.* Boyce, 41 S. C. 201, 19 S. E. 495.

Tennessee.— Skaggs *v.* Kelly, (Ch. App. 1897) 42 S. W. 275, holding that, in the absence of fraud or mistake, one who purchases at foreclosure sale land embraced in the boundaries set out in the mortgage acquires title to the entire tract, although it contains more than the number of acres specified in the mortgage.

Texas.— Colonial, etc., Mortg. Co. *v.* Tubbs, (Civ. App. 1898) 45 S. W. 623.

Washington.— National Bank of Commerce *v.* Lock, 17 Wash. 528, 50 Pac. 478, 61 Am. St. Rep. 923.

See 35 Cent. Dig. tit. "Mortgages," § 1554.

Land omitted by mistake.— Where certain property was by mistake omitted from the mortgage, and the decree of foreclosure follows the mortgage in this respect, the authority of the officer who makes the foreclosure sale is bounded by the decree, and if he attempts to sell the property which the mortgage was intended to cover, rather than that which it does cover, his act is nugatory, at least as against parties in interest who do not consent. Stewart *v.* Wilson, 141 Ala. 405, 37 So. 550, 109 Am. St. Rep. 33.

Purchaser taking wrong lot.—If the sheriff, on foreclosure, sells one lot of land, and the purchaser takes possession of an entirely different lot, he acquires no title to the lot so taken. Souders *v.* Jeffries, 107 Ind. 552, 8 N. E. 288.

Blanket decree.— A decree foreclosing a mortgage on the property of a corporation and directing its sale, although it describes the property to be sold in broad and comprehensive terms, expressly including all property of every name and nature belonging to or possessed by the corporation or the receiver in the suit, cannot be construed to include money in the hands of the receiver, and such money will not pass by the sale, unless the decree expressly so states. Washington Irr. Co. *v.* California Safe Deposit, etc., Co., 115 Fed. 20, 52 C. C. A. 614.

43. Flynn *v.* Wilkinson, 56 Ill. App. 239; Hollingsworth *v.* Chaffe, 33 La. Ann. 547; Pennsylvania R. Co. *v.* Jones, 50 Pa. St. 417; Neal *v.* Hamilton, (Tex. 1887) 7 S. W. 672.

Restraining waste.— After the foreclosure sale the mortgagor remaining in possession may be restrained from committing waste. Phœnix *v.* Clark, 6 N. J. Eq. 447.

Improvements destroyed.— Under a statute providing compensation for parties whose property has been destroyed by mobs or riots, a mortgagee, not in possession at the time such an injury to the mortgaged premises occurred, who subsequently forecloses and buys in the property, cannot maintain an action to recover the damages without showing that he thereby lost a part of his debt. Levy *v.* New York, 3 Rob. (N. Y.) 194.

44. Johnson *v.* Sherman County Irr., etc., Co., 71 Nebr. 452, 98 N. W. 1096; German-American Real Estate Title Guarantee Co. *v.* Meyers, 32 N. Y. App. Div. 41, 52 N. Y. Suppl. 449 (benefit of a party-wall); Warwick *v.* New York, 28 Barb. (N. Y.) 210 (preëmption right in riparian lands); Richmond *v.* Bennett, 205 Pa. St. 470, 55 Atl. 17; Rembert *v.* Wood, 16 Tex. Civ. App. 468, 41 S. W. 525.

45. *Georgia.*— Richards *v.* Gilbert, 116 Ga. 382, 42 S. E. 715.

Montana.— Dutro *v.* Kennedy, 9 Mont. 101, 22 Pac. 763.

New York.— Mutual L. Ins. Co. *v.* Bigler, 79 N. Y. 568; New York Mut. L. Ins. Co. *v.* Newburgh Nat. Bank, 18 Hun 371.

Pennsylvania.— Lorrkin *v.* Dyer, 1 Del. Co. 388.

Texas.— Lipscomb *v.* Sanders, (Civ. App. 1901) 60 S. W. 1002.

United States.— Detweiler *v.* Voege, 8 Fed. 600, 19 Blatchf. 482.

See 35 Cent. Dig. tit. "Mortgages," § 1554.

46. See Barnard *v.* Wilson, 74 Cal. 512, 16 Pac. 307; Neilson *v.* Churchill, 5 Dana (Ky.) 333; Osterberg *v.* Union Trust Co., 93 U. S. 424, 23 L. ed. 964.

Land annexed by mortgagor's grantee.— One who for his own convenience annexes another piece of land to premises which his grantor had previously mortgaged, and erects a building covering both parcels but accessible only from the land annexed, is not deprived of his title to the annexed portion by a sale under the mortgage. Lawrence *v.* Delano, 3 Sandf. (N. Y.) 333.

47. Hague *v.* West Hoboken, 23 N. J. Eq. 354; McMannis *v.* Butler, 49 Barb. (N. Y.) 176.

48. Commercial Nat. Bank *v.* Johnson, 16 Wash. 536, 48 Pac. 267.

sale on foreclosure in one county passes no title to the land situate in the other.[49] The mortgage itself, as distinguished from any rights under it, although in some sense merged in the decree, yet remains a muniment of title, which may become important in fixing the date of the lien or the *quantum* of estate conveyed, and therefore the purchaser is entitled to it.[50]

(II) *ESTATE OR INTEREST ACQUIRED* — (A) *In General.* The purchaser at a valid foreclosure sale acquires all the title, right, and interest of the mortgagor in and to the mortgaged premises,[51] as the same existed at the date of the mortgage,[52] together with any subsequently acquired right or title which should be held, on equitable principles, to inure to his benefit;[53] and in jurisdictions where

49. Menges *v.* Oyster, 4 Watts & S. (Pa.) 20, 39 Am. Dec. 56. And see King *v.* Portis, 77 N. C. 25.

50. Vallejo Land Assoc. *v.* Viera, 48 Cal. 572.

51. *Alabama.*— Trammell *v.* Simmons, 17 Ala. 411.

Arkansas.— Hannah *v.* Carrington, 18 Ark. 85.

California.— Leet *v.* Armbruster, 143 Cal. 663, 77 Pac. 653; Webb *v.* Winter, (1901) 65 Pac. 1028; Leviston *v.* Henninger, 77 Cal. 461, 19 Pac. 834; Vallejo Land Assoc. *v.* Viera, 48 Cal. 572; Carpentier *v.* Brenham, 40 Cal. 221; Barroilhet *v.* Battelle, 7 Cal. 450.

Illinois.— McMahill *v.* Torrence, 163 Ill. 277, 45 N. E. 269; Ballinger *v.* Bourland, 87 Ill. 513, 29 Am. Rep. 69; Barlow *v.* Stanford, 82 Ill. 298; East St. Louis *v.* Illinois, etc., Bridge Co., 52 Ill. App. 436. *Compare* Schaeppi *v.* Bortholomae, 217 Ill. 105, 75 N. E. 447, 1 L. R. A. N. S. 1079, holding that, on the foreclosure of a deed of trust and a sale thereunder, the deed is merged in the decree, and the purchaser acquires only such an interest as he is entitled to under the statute, without reference to the trust deed.

Indiana.— Bibbler *v.* Walker, 69 Ind. 362; McShirley *v.* Birt, 44 Ind. 382; Fletcher *v.* Holmes, 32 Ind. 497.

Iowa.— See Hawkeye Ins. Co. *v.* Maxwell, 119 Iowa 672, 94 N. W. 207.

Kentucky.— Duncan *v.* American Standard Asphalt Co., 83 S. W. 124, 26 Ky. L. Rep. 1067.

Michigan.— Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42; Chesebro *v.* Powers, 70 Mich. 370, 38 N. W. 283.

Missouri.— Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885; Meads *v.* Hutchinson, 111 Mo. 620, 19 S. W. 1111.

Nebraska.— Lincoln *v.* Lincoln St. R. Co., (1906) 106 N. W. 317; Young *v.* Brand, 15 Nebr. 601, 19 N. W. 494; Renard *v.* Brown, 7 Nebr. 449.

New Jersey.— Wimpfheimer *v.* Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916; Henninger *v.* Heald, 52 N. J. Eq. 431, 29 Atl. 190.

New York.— Clute *v.* Voris, 31 Barb. 511; Crane *v.* Stiger, 2 Thomps. & C. 577; Graham *v.* Fountain, 2 N. Y. Suppl. 598; Vanderkemp *v.* Shelton, 11 Paige 28; Mason *v.* Sudam, 2 Johns. Ch. 172.

North Carolina.— Sherrod *v.* Vass, 128 N. C. 49, 38 S. E. 133.

Ohio.— Brockschmidt *v.* Archer, 64 Ohio St. 502, 60 N. E. 623.

Pennsylvania.— Philadelphia *v.* Bicknell, 35 Pa. St. 123; Pennsylvania L. Ins. Co. *v.* Beaumont, 8 Pa. Dist. 206.

South Carolina.— Brewster *v.* McNab, 36 S. C. 274, 15 S. E. 233.

Texas.— Bradford *v.* Knowles, (Civ. App. 1893) 24 S. W. 1095.

Wisconsin.— Eaton *v.* Tallmadge, 22 Wis. 526.

United States.— Waples *v.* Hays, 108 U. S. 6, 1 S. Ct. 80, 27 L. ed. 632; London, etc., Bank *v.* Horton, 126 Fed. 593, 61 C. C. A. 515.

See 35 Cent. Dig. tit. "Mortgages," § 1555.

Mortgagor as purchaser.— Where the mortgagor himself, directly or indirectly, becomes the purchaser at the foreclosure sale, he merely pays his debt and does not acquire a new title. Van Horne *v.* Everson, 13 Barb. (N. Y.) 526.

Purchase by equitable junior mortgagee.— Where property subject to a mortgage is conveyed by a deed absolute in form but really intended as security for a debt, a purchase of the property by the equitable mortgagee on foreclosure of the first mortgage does not confer an absolute title on him, but only entitles him to stand in the same position as if he had paid off the mortgage, foreclosed it and had it discharged. Alexander *v.* Grover, 90 Mass. 462, 77 N. E. 487.

52. Watkins *v.* Hackett, 20 Minn. 106; De Haven *v.* Landell, 31 Pa. St. 120; Secor *v.* Singleton, 41 Fed. 725.

Loss by fire after sale.— A purchaser at a foreclosure sale who is not to go into possession until the delivery of the deed and the payment of the purchase-money is not to bear the loss arising from a fire after the sale and before the giving of the deed. Yet he is not necessarily to be relieved of his contract by a court of equity; but where the damage is slight and the parties foreclosing are willing to make compensation, or repair, he must take the property. New York Mut. L. Ins. Co. *v.* Balch, 4 Abb. N. Cas. (N. Y.) 200.

53. See *supra*, XII, A, 2, d. And see Barnard *v.* Wilson, 74 Cal. 512, 16 Pac. 307; San Francisco *v.* Lawton, 18 Cal. 465, 79 Am. Dec. 187; Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449; Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; New York Water Co. *v.*

the mortgage is still considered as passing the legal title to the mortgagee, the purchaser is held to acquire also the title or interest of the mortgagee,[54] so that he may become invested with the complete title possessed by any and all of the parties to the foreclosure suit.[55] But a foreclosure sale does not create a new title in such sense as to pass to the purchaser any other or stronger rights than were possessed by the mortgagor,[56] and hence the purchaser's title may be subject to rights of dower[57] and homestead,[58] and will be subject to any reservations, conditions, or restrictions as to use imposed by the conveyance under which the mortgagor's title vested,[59] as also to servitudes for the benefit of another tenement, rights of way, or other easements created by the mortgagor,[60] or to leasehold interests acquired by tenants under the mortgagor prior to the execution of the mortgage;[61] but on the other hand the purchaser will take the estate free from any secret equities of third persons.[62]

(B) *Liens or Encumbrances.* The foreclosure purchaser takes the title to the land subject to all valid liens and encumbrances upon it, created prior to the mortgage under foreclosure and which remain undischarged,[63] except those whose

Crow, 110 N. Y. App. Div. 32, 96 N. Y. Suppl. 899. *Compare* Brennan *v.* Eggeman, 73 Mich. 658, 41 N. W. 840.

54. Baldwin *v.* Howell, 45 N. J. Eq. 519, 15 Atl. 236; Champion *v.* Hinkle, 45 N. J. Eq. 162, 16 Atl. 701; Marshall *v.* U. S. Trust Co., 93 N. Y. App. Div. 252, 87 N. Y. Suppl. 747; Frische *v.* Kramer, 16 Ohio 125, 47 Am. Dec. 368; Ames *v.* Storer, 98 Wis. 372, 74 N. W. 101, 67 Am. St. Rep. 813.

Sale invalid.— Where the mortgage sale proves invalid for any cause, the purchaser will be subrogated to the rights of the mortgagee. Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429; Raymond *v.* Holborn, 23 Wis. 57, 99 Am. Dec. 105.

55. Hart *v.* Beardsley, 67 Nebr. 145, 93 N. W. 423; Champion *v.* Hinkle, 45 N. J. Eq. 162, 16 Atl. 701; Mount *v.* Manhattan Co., 43 N. J. Eq. 25, 9 Atl. 114; Carter *v.* Walker, 2 Ohio St. 339.

56. See Webb *v.* Winter, (Cal. 1901) 65 Pac. 1028; Rudd *v.* Travelers' Ins. Co., 73 S. W. 759, 24 Ky. L. Rep. 2141.

Title under executory contract of sale.— Where the mortgagor's interest in the premises is one acquired by a contract for its purchase, on which he has made some payments, but has not acquired the title in fee, the foreclosure purchaser succeeds to his rights and may complete the payments and perfect the title. Martin *v.* Kelly, 59 Miss. 652; McWilliams *v.* Withington, 7 Fed. 326, 7 Sawy. 205. But where the mortgagor has paid nothing on his contract, and the vendor is not made a party to the foreclosure suit, the purchaser obtains no title at all. Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136. And conversely, where the mortgagor had contracted to sell the land, the foreclosure purchaser succeeds only to his rights, and takes the land subject to the equities of the vendee in possession. Laverty *v.* Moore, 33 N. Y. 658.

Life-estate.— Where a mortgage executed by husband and wife, on land belonging to the latter, and of which the former is a tenant by the curtesy, is foreclosed after the wife's death in proceedings against the husband in which her heirs are not joined, the foreclosure purchaser takes only a life-estate. Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100.

Mortgage of undivided interest.— Where a mortgagee of the undivided interest of a devisee in land purchases under foreclosure of the mortgage, he acquires an interest in the whole tract, but is not thereby entitled to the whole of the particular lot apportioned to the mortgagor. Myers *v.* Pierce, 86 Ga. 786, 12 S. E. 978.

Escheated land.— Where land subject to a mortgage has escheated to the state, and thereafter the mortgage is foreclosed in an action to which the state is not a party, the foreclosure purchaser entering into possession has the rights of a mortgagee in possession, and the state's only right is to redeem. Croner *v.* Cowdrey, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716.

57. Scott *v.* Lane, 109 N. C. 154, 13 S. E. 772; Hughes *v.* Hodges, 102 N. C. 236, 262, 9 S. E. 437.

58. Parrott *v.* Kumpf, 102 Ill. 423; School Trustees *v.* Arnold, 58 Ill. App. 103.

59. Duclaud *v.* Rousseau, 2 La. Ann. 168; Gilchrist *v.* Foxen, 95 Wis. 428, 70 N. W. 585. But see Wheeler *v.* Dunning, 33 Hun (N. Y.) 205; State Medical College *v.* Zeigler, 17 Ohio St. 52.

60. Dahlberg *v.* Haeberle, 71 N. J. L. 514, 59 Atl. 92; New York L. Ins., etc., Co. *v.* Milner, 1 Barb. Ch. (N. Y.) 353; King *v.* McCully, 38 Pa. St. 76; McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338. See also Wells *v.* Garbutt, 132 N. Y. 430, 30 N. E. 978; Thompson *v.* Somerville, 16 Barb. (N. Y.) 469.

61. West *v.* Herrod, 1 Pa. Cas. 330, 2 Atl. 871; Wilkinson *v.* Hiyer, 30 Pittsb. Leg. J. N. S. (Pa.) 85; Gregory *v.* Rosenkrans, 72 Wis. 220, 39 N. W. 378, 1 L. R. A. 176.

Tenants under leases made after the execution of the mortgage take subject to the mortgage, and may be dispossessed by the foreclosure purchaser. Bartlett *v.* Hitchcock, 10 Ill. App. 87.

62. Landell's Appeal, 105 Pa. St. 152.

63. *Arkansas.*— Hanger *v.* State, 27 Ark. 667.

binding force he can successfully impeach or of which he was fraudulently kept in ignorance or as to which he was deceived or misled,[64] and except in cases where the decree marshals the various liens, all parties being before the court, fixes their priorities, and orders the title to be sold clear of encumbrances.[65] On the other hand the purchaser under foreclosure of a senior mortgage takes the property free from the lien of junior mortgages and other encumbrances of later

California.— Littlefield *v.* Nichols, 42 Cal. 372.

Florida.— Watson *v.* Jones, 41 Fla. 241, 25 So. 678.

Illinois.— Senft *v.* Vanek, 209 Ill. 361, 70 N. E. 720; Davis *v.* Connecticut Mut. L. Ins. Co., 84 Ill. 508; Carroll *v.* Haigh, 97 Ill. App. 576 [*reversed* on other grounds in 197 Ill. 193, 64 N. E. 375]; Eggleston *v.* Hadfield, 90 Ill. App. 11.

Indiana.— Vandevender *v.* Moore, 146 Ind. 44, 44 N. E. 3.

Iowa.— Citizens' Bank *v.* Stewart, 115 Iowa 289, 88 N. W. 374; Waughtal *v.* Kane, 108 Iowa 268, 79 N. W. 91; Iowa L. & T. Co. *v.* King, 66 Iowa 322, 23 N. W. 686; Standish *v.* Dow, 21 Iowa 363.

Kansas.— Shattuck *v.* Ellas, 65 Kan. 298, 68 Pac. 1092; Myers *v.* Jones, 61 Kan. 191, 59 Pac. 275; Gibson *v.* Green, 59 Kan. 779, 54 Pac. 1059 [*affirming* 6 Kan. App. 196, 51 Pac. 312]; Ray *v.* Kansas City Nat. Bank, 9 Kan. App. 13, 57 Pac. 240; Henderson *v.* New England L. & T. Co., 6 Kan. App. 279, 51 Pac. 61; Cade *v.* Jeffers, 6 Kan. App. 61, 49 Pac. 637.

Kentucky.— Cornwall *v.* Falls City Bank, 92 Ky. 381, 18 S. W. 452, 13 Ky. L. Rep. 606.

Louisiana.— Alling *v.* Beamis, 15 La. 385.

Maryland.— Shriver *v.* Clauson, 89 Md. 753, 43 Atl. 925.

Massachusetts.— Spencer Sav. Bank *v.* Cooley, 177 Mass. 49, 58 N. E. 276.

Michigan.— See Crippen *v.* Morrison, 13 Mich. 23.

Minnesota.— Pioneer Sav., etc., Co. *v.* Freeburg, 59 Minn. 230, 61 N. W. 25.

Missouri.— White *v.* Graves, 68 Mo. 218.

Nebraska.— Omaha L. & T. Co. *v.* Omaha, 71 Nebr. 781, 99 N. W. 650; Curtis *v.* Osborne, 63 Nebr. 837, 89 N. W. 420; Lyons *v.* Godfrey, 55 Nebr. 755, 76 N. W. 464; Miller *v.* Lanham, 35 Nebr. 886, 53 N. W. 1010.

New Jersey.— Warwick *v.* Dawes, 26 N. J. Eq. 548; Mutual L. Ins. Co. *v.* Boughrum, 24 N. J. Eq. 44.

New York.— Andrews *v.* O'Mahoney, 112 N. Y. 567, 20 N. E. 374; Lewis *v.* Smith, 9 N. Y. 502, 61 Am. Dec. 706; Termansen *v.* Matthews, 49 N. Y. App. Div. 163, 63 N. Y. Suppl. 115; Welche *v.* Schoenberg, 45 Misc. 126, 91 N. Y. Suppl. 880; Kitching *v.* Shear, 26 Misc. 436, 57 N. Y. Suppl. 464; Franklin Nat. Bank *v.* Lewis, 26 Misc. 75, 56 N. Y. Suppl. 501; Simms *v.* Voght, 11 Abb. N. Cas. 48 [*affirmed* in 94 N. Y. 654]; Dodge *v.* Manning, 11 Paige 334 [*reversed* on other grounds in 1 N. Y. 298]; Wells *v.* Chapman, 4 Sandf. Ch. 312 [*affirmed* in 13 Barb. 561].

North Carolina.— Fidelity Loan, etc., Co. *v.* Lash, 135 N. C. 405, 47 S. E. 479.

Ohio.— Lewis *v.* Hutchinson, 2 Ohio Dec. (Reprint) 68, 1 West. L. Month. 283.

Pennsylvania.— Kennedy *v.* Borie, 166 Pa. St. 360, 31 Atl. 98; Rhein Bldg. Assoc. *v.* Lea, 100 Pa. St. 210; Ashmead *v.* McCarthur, 67 Pa. St. 326. See also Zane *v.* Kennedy, 73 Pa. St. 182.

Texas.— Garza *v.* Howell, (Civ. App. 1905) 85 S. W. 461.

Wisconsin.— John *v.* Larson, 28 Wis. 604.

United States.— Swann *v.* Fabyan, 110 U. S. 590, 4 S. Ct. 235, 28 L. ed. 252; Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 84 Fed. 744; Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459; McClure *v.* Adams, 76 Fed. 899; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Lafayette Co. *v.* Neely, 21 Fed. 738. See Hale *v.* Burlington, etc., R. Co., 13 Fed. 203, 2 McCrary 558.

See 35 Cent. Dig. tit. "Mortgages," § 1556.

Contra.— Brunswick Sav., etc., Co. *v.* Brunswick Nat. Bank, 102 Ga. 776, 29 S. E. 688.

Unpaid taxes, constituting a lien on the property, must be assumed by the purchaser. Semans *v.* Harvey, 52 Ind. 331; Field *v.* Thistle, 60 N. J. Eq. 444, 46 Atl. 1099 [*affirming* 58 N. J. Eq. 339, 43 Atl. 1072]. See, however, Cheltenham Imp. Co. *v.* Whitehead, 26 Ill. App. 609; Mills *v.* Waggaman, 28 La. Ann. 561; Mutual L. Ins. Co. *v.* Sage, 28 Hun (N. Y.) 595; Greenfield *v.* Beaver, 30 Misc. (N. Y.) 366, 62 N. Y. Suppl. 471; Schell *v.* Elkins, 10 N. Y. Suppl. 167; Poughkeepsie Sav. Bank *v.* Winn, 56 How. Pr. (N. Y.) 368; South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58; Cutting *v.* Tavares, etc., R. Co., 61 Fed. 150, 9 C. C. A. 401.

Lien for unpaid instalments.— As to the continuance of a lien on the premises in the purchaser's hands, to secure the unpaid instalments of the mortgage debt, where the foreclosure was had upon default in the payment of the first instalment see Poweshiek County *v.* Dennison, 36 Iowa 244, 14 Am. Rep. 521; Norton *v.* Stone, 8 Paige (N. Y.) 222; Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 409; Stuart *v.* Gay, 127 U. S. 518, 8 S. Ct. 1279, 32 L. ed. 191.

Concurrent liens.— As to the rights of the purchaser and the continuance of a lien on the property in his hands where the foreclosure is for only one of a group or series of obligations all equally secured by the mortgage see Alston *v.* Piper, 34 Tex. Civ. App. 589, 79 S. W. 357; Weaver *v.* Alter, 29 Fed. Cas. No. 17,308, 3 Woods 152.

64. Hinchley *v.* Greany, 118 Mass. 595; Edwards *v.* Tooker, 40 N. J. Eq. 313; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 626.

65. Buel *v.* Farwell, 8 Nebr. 224; O'Brien

date,[66] although, if the holder of the junior lien is not made a party to the foreclosure suit, he retains the right to redeem, which right may be foreclosed at the suit of the purchaser.[67]

(c) *Bona Fide Purchasers.* One buying land at a foreclosure sale is entitled to the protection afforded to a *bona fide* purchaser, provided he has completed his purchase by paying the amount of his bid,[68] to the extent that he will be protected against liens, equities, or interfering rights of third persons of which he had no actual or constructive notice,[69] except in cases where the application of this rule would enable him to take advantage of his own negligence or wrong.[70] But he cannot claim protection against rights or equities of which he had actual knowledge, or where he had notice of facts sufficient to put him on inquiry,[71] except

v. Kluever, 4 Nebr. (Unoff.) 571, 95 N. W. 595. And see *infra*, XXI, L, 3, c.

66. *Alabama.*— Capehart *v.* McGahey, 132 Ala. 334, 31 So. 503; Gilmer *v.* Smith, 103 Ala. 228, 15 So. 608; Simerson *v.* Decatur Branch Bank, 12 Ala. 205.

Arkansas.— Ford *v.* Harrison, 69 Ark. 205, 62 S. W. 59, 86 Am. St. Rep. 192.

California.— Felton *v.* Le Breton, 92 Cal. 457, 28 Pac. 490.

Illinois.— State Bank *v.* Wilson, 9 Ill. 57. But see Shinn *v.* Shinn, 15 Ill. App. 141.

Indiana.— Coleman *v.* Witherspoon, 76 Ind. 285; Schnantz *v.* Schellhaus, 37 Ind. 85; Hamilton *v.* State, 1 Ind. 128.

Louisiana.— Ball *v.* New Orleans, 52 La. Ann. 1550, 28 So. 109; Payne *v.* Eaton, 27 La. Ann. 160; McNeil *v.* Hauck, 24 La. Ann. 328. See also Tessier *v.* Bourgeois, 38 La. Ann. 256.

Minnesota.— Bovey de Laittre Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038.

Mississippi.— Bainbridge *v.* Woodburn, 52 Miss. 95.

Nebraska.— Smith *v.* Millard, 11 Nebr. 609, 10 N. W. 529. See also Nye, etc., Co. *v.* Fahrenholz, 49 Nebr. 276, 68 N. W. 498, 59 Am. St. Rep. 540.

New York.— Hopkins *v.* Wolley, 81 N. Y. 77; Ross *v.* Boardman, 22 Hun 527.

North Dakota.— Nichols *v.* Tingstad, 10 N. D. 172, 86 N. W. 694.

Ohio.— Pinney *v.* Merchants' Nat. Bank, 71 Ohio St. 173, 72 N. E. 884; Roberts *v.* Doren, 10 Ohio Dec. (Reprint) 349, 20 Cinc. L. Bul. 397.

Pennsylvania.— Seidle *v.* Holmes, 185 Pa. St. 549, 40 Atl. 567. See also Conrad *v.* Susquehanna Bldg., etc., Assoc., 2 Pa. Cas. 499, 4 Atl. 177; Whitehead *v.* Purnell, 2 Miles 434.

South Carolina.— Stewart *v.* Groce, 42 S. C. 500, 20 S. E. 411.

United States.— Fowler *v.* Hart, 13 How. 373, 14 L. ed. 186.

See 35 Cent. Dig. tit. "Mortgages," § 1556.

67. See *infra*, XXI, L, 4, a.

68. Richardson *v.* Stephens, 122 Ala. 301, 25 So. 39; Whelan *v.* McCreary, 64 Ala. 319; Marchbanks *v.* Banks, 44 Ark. 48; Ellis *v.* Allen, 99 Wis. 598, 74 N. W. 537, 75 N. W. 949.

A mortgagee who purchases the property on foreclosure without paying any money, but merely crediting the amount of the bid on the judgment against the mortgagor, is a purchaser for value. Barrett *v.* Eastham, (Tex. Civ. App. 1905) 86 S. W. 1057.

69. *Alabama.*— Ohio L. Ins., etc., Co. *v.* Ledyard, 8 Ala. 866. See also Hoots *v.* Williams, 116 Ala. 372, 22 So. 497.

California.— Duff *v.* Randall, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158.

Delaware.— Sharpe *v.* Tatnall, 5 Del. Ch. 302.

Georgia.— Rawles *v.* Jackson, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185; Spinks *v.* Glenn, 67 Ga. 744; Skinner *v.* Willis, 54 Ga. 192.

Illinois.— Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352.

Indiana.— Mann *v.* State, 116 Ind. 383, 19 N. E. 181.

Iowa.— Sprague *v.* White, 73 Iowa 670, 35 N. W. 751; Walker *v.* Schreiber, 47 Iowa 529; Shine *v.* Hill, 23 Iowa 264.

Louisiana.— Fay, etc., Co. *v.* Monroe Nat. Bank, 51 La. Ann. 613, 25 So. 268.

Missouri.— Smith *v.* Boyd, 162 Mo. 146, 62 S. W. 439; Butler Bldg., etc., Co. *v.* Dunsworth, 146 Mo. 361, 48 S. W. 449.

New Jersey.— State Mut. Bldg., etc., Assoc. *v.* O'Callahan, (Ch. 1904) 57 Atl. 496; Rutherford Land, etc., Co. *v.* Sanntrock, (Ch. 1899) 44 Atl. 938 [*affirmed* in 60 N. J. Eq. 471, 46 Atl. 648].

New York.— New York Mut. L. Ins. Co. *v.* Corey, 135 N. Y. 326, 31 N. E. 1095; Slattery *v.* Schwannecke, 118 N. Y. 543, 23 N. E. 922; Vose *v.* Cowdrey, 49 N. Y. 336; Zarkowski *v.* Schroeder, 71 N. Y. App. Div. 526, 75 N. Y. Suppl. 1021; Norton *v.* Stone, 8 Paige 222.

Pennsylvania.— Elder *v.* Hamilton, 195 Pa. St. 559, 46 Atl. 109; Allabach *v.* Wood, 2 Pa. Cas. 333, 4 Atl. 369.

Texas.— Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117; Schneider *v.* Sellers, (Civ. App. 1904) 81 S. W. 126; Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689; Vieno *v.* Gibson, (Civ. App. 1892) 20 S. W. 717.

Vermont.—Atwater *v.* Seymour, Brayt. 209.

Wisconsin.— Ehle *v.* Brown, 31 Wis. 405; Murphy *v.* Farwell, 9 Wis. 102.

See 35 Cent. Dig. tit. "Mortgages," § 1557.

But see Cooper *v.* Ryan, 73 Ark. 37, 83 S. W. 328.

70. Smith *v.* Mobile Branch Bank, 21 Ala. 125; Curtis *v.* Hitchcock, 10 Paige (N. Y.) 399.

71. *Kentucky.*— Cornelison *v.* Stephens, 2 S. W. 122, 8 Ky. L. Rep. 417.

where he can shelter himself under the *bona fides* of the mortgagee; for if the mortgagee is innocent and ignorant of any conflicting rights or claims, they cannot be set up against the foreclosure purchaser, although the latter may have known of them.[72] And a similar protection is afforded to the innocent grantee of the foreclosure purchaser.[73]

(D) *Relief to Purchaser For Defects or Invalidity.* If there is a material defect in the quantity of the land acquired by the foreclosure purchaser, or in the value of the improvements, he may be entitled to a corresponding abatement in the amount of his bid.[74] A fatal infirmity in the title conveyed, or destructive irregularities in the foreclosure proceedings, will be cause for relieving him from his bid altogether;[75] but if the defects are capable of being cured, he may be entitled to orders or decrees of the court requiring confirmatory deeds, releases, or other assurances to be executed to him,[76] or to protect himself by appropriate actions to quiet his title, set aside clouds, or settle conflicting claims to the purchase-money.[77] If the sale was entirely void, yet the deed given to the purchaser will constitute color of title and start the statute of limitations in his favor.[78]

Missouri.— Wells *v.* Estes, 154 Mo. 291, 55 S. W. 255; Fisher *v.* Stevens, 143 Mo. 181, 44 S. W. 769.

Nebraska.— McKinley-Lanning L. & T. Co. *v.* Hamer, 52 Nebr. 709, 72 N. W. 1042.

New York.— Boskowitz *v.* Held, 15 N. Y. App. Div. 306, 44 N. Y. Suppl. 136; Harris *v.* Norton, 16 Barb. 264; Hyland *v.* Stafford, 10 Barb. 558; King *v.* Wilcomb, 7 Barb. 263; Bonacker *v.* Weyrick, 48 Misc. 189, 96 N. Y. Suppl. 775; Requa *v.* Rea, 2 Paige 339.

South Carolina.— Stewart *v.* Groce, 42 S. C. 500, 20 S. E. 411.

Washington.— Schmidt *v.* Olympia Light, etc., Co., 40 Wash. 131, 82 Pac. 184.

Wisconsin.— Ehle *v.* Brown, 31 Wis. 405; Raymond *v.* Pauli, 21 Wis. 531.

United States.— Burns *v.* Cooper, 140 Fed. 273, 72 C. C. A. 25; Boston Safe-Deposit, etc., Co. *v.* Bankers', etc., Tel. Co., 36 Fed. 288; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

See 35 Cent. Dig. tit. "Mortgages," § 1557.

The rule of caveat emptor applies to purchasers at foreclosure sales; and such a person, having no covenants to fall back on, must exercise vigilance in examining the stats of the title, and cannot ordinarily recover his money back if it proves defective. Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Bishop *v.* O'Conner, 69 Ill. 431; Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227; Brewer *v.* Christian, 9 Ill. App. 57; Norton *v.* Nebraska L. & T. Co., 35 Nebr. 466, 53 N. W. 481, 37 Am. St. Rep. 441, 18 L. R. A. 88.

Record as notice.— The foreclosure purchaser is chargeable with notice of a duly recorded mortgage (Hawkins *v.* McVae, 14 La. Ann. 339), although not of a deed made and recorded after the mortgage under foreclosure, as it is not in the line of his title (Streeter *v.* Shultz, 127 N. Y. 652, 27 N. E. 857).

Where the mortgage which is foreclosed was not recorded, the purchaser at the sale is not such a *bona fide* purchaser as to overreach a conveyance by the mortgagor to a purchaser in good faith, after the mortgage, and before the foreclosure, the latter purchaser being in possession at the time of the sale. Hawley *v.* Bennett, 5 Paige (N. Y.) 104.

Notice given at sale.—A purchaser at a foreclosure sale takes the mortgagee's interest unaffected by notice of infirmities in the mortgagor's title, given for the first time at the sale. Sheridan *v.* Schimpf, 120 Ala. 475, 24 So. 940. And see Central Trust Co. *v.* Florida R., etc., Co., 43 Fed. 751.

72. Cahalan *v.* Monroe, 56 Ala. 303; McMillan *v.* Hunnicutt, 109 Ga. 699, 35 S. E. 102; Logan *v.* Eva, 144 Pa. St. 312, 22 Atl. 757; Fretz *v.* Gilhan, 16 Pa. Co. Ct. 586; Keyser *v.* Clifton, (Tex. Civ. App. 1899) 50 S. W. 957. But *compare* Cheney *v.* Murto, 17 Colo. App. 149, 67 Pac. 340.

73. Horner *v.* Zimmerman, 45 Ill. 14.

74. Fowler *v.* Dupassau, 3 Mart. (La.) 574; Bowdoin *v.* Hammond, 79 Md. 173, 28 Atl. 769 (purchaser entitled to an abatement in the purchase-price on account of the loss by fire of buildings on the mortgaged land, after the sale, but before he got possession); People's Bank *v.* Bramlett, 58 S. C. 477, 36 S. E. 912, 79 Am. St. Rep. 855. *Compare* Thompson *v.* Schmieder, 38 Hun (N. Y.) 504; Douthit *v.* Hipp, 23 S. C. 205, in which cases a deduction from the purchase-price was refused, the deficiency in the quantity of the land being comparatively small.

75. See *supra*, XXI, H, 4, b, (IV), (A).

76. Henderson *v.* Grammar, 66 Cal. 332, 5 Pac. 488; Westfall *v.* Stark, 24 Ind. 377; Graham *v.* Bleakie, 2 Daly (N. Y.) 55.

77. Crawford *v.* Chicago, etc., R. Co., 112 Ill. 314; Banks *v.* Allen, 127 Mich. 80, 86 N. W. 383; Waldron *v.* Letson, 15 N. J. Eq. 126; Herrick *v.* Mann, 6 N. J. Eq. 460, holding that a dispute having arisen as to the ownership of the mortgage foreclosed and the proceeds of the sale, the purchaser was entitled to an order requiring the disputing parties to interplead, and forbidding the sheriff to pay over the money until its determination.

78. Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423.

And in such circumstances he will be entitled to be subrogated to all the rights of the mortgagee or owner of the debt secured,[79] so that his possession will be held in the character of a mortgagee,[80] and he cannot be deprived of the possession except on terms of payment of what is justly due under the mortgage,[81] together with the value of permanent improvements placed on the land by him while in possession and in reliance on his apparent title.[82] But ordinarily, in the absence of express covenants or of fraud, the mortgagor is not personally liable to the purchaser because the title proves defective or the sale abortive.[83]

(III) *Emblements and Products of the Soil* — (A) *Natural Products.* Trees standing on the mortgaged premises at the time of the sale belong to the foreclosure purchaser, even though the mortgagor had previously contracted to sell them, as the title of the foreclosure purchaser relates back to the date of the mortgage;[84] and the purchaser's right to timber is not affected by the fact that the mortgagee had released it from the lien of the mortgage, if he had no notice of that fact.[85] Timber cut down and removed by the mortgagor after the commencement of proceedings in foreclosure, with a fraudulent purpose toward the mortgagee, remains liable to the satisfaction of the mortgage;[86] and the same rule has been applied to stone quarried from the premises after the decree of foreclosure and remaining on the ground.[87] But ice cut and stored before the

79. *Florida.*—Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823.

Georgia.— Dutcher *v.* Hobby, 86 Ga. 198, 12 S. E. 356, 22 Am. St. Rep. 444, 10 L. R. A. 472.

Illinois.— Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

Indiana.— Muir *v.* Berkshire, 52 Ind. 149.

Iowa.— Brown *v.* Brown, 73 Iowa 430, 35 N. W. 507; Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Kansas.— Stough *v.* Badger Lumber Co., 70 Kan. 713, 79 Pac. 737.

Maryland.— Johnson *v.* Robertson, 34 Md. 165.

Minnesota.— Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Johnson *v.* Sandhoff, 30 Minn. 197, 14 N. W. 889.

Missouri.— Honaker *v.* Shough, 55 Mo. 472. A foreclosure sale, irregular because made by order of the wrong court, does not operate as an equitable assignment of the mortgage, so as to enable the purchaser to hold the land and claim from the mortgagor the balance due besides. Wells *v.* Lincoln County, 80 Mo. 424.

New York.— Robinson *v.* Ryan, 25 N. Y. 320; Titcomb *v.* Fonda, etc., R. Co., 38 Misc. 630, 78 N. Y. Suppl. 226; Jackson *v.* Bowen, 7 Cow. 13.

Ohio.— Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833.

Rhode Island.— Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

Texas.— Attaway *v.* Carter, 1 Tex. Unrep. Cas. 73; Hanrick *v.* Gurley, (Civ. App. 1899) 48 S. W. 994.

And see *supra*, XVI, B, 3, b.

Contra.— Branham *v.* San Jose, 24 Cal. 585.

80. Harper *v.* Ely, 70 Ill. 581; Sloane *v.* Lucas, 37 Wash. 348, 79 Pac. 949.

81. Yellowly *v.* Beardsley, 76 Miss. 613, 24 So. 973, 71 Am. St. Rep. 536; McGeary *v.* Jenkins, 187 Pa. St. 440, 41 Atl. 315; Chambers *v.* Bookman, 67 S. C. 432, 46 S. E. 39. See also Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429, holding that where a court of law undertook to foreclose a mortgage in a case not authorized, whereby the purchaser took no title, equity will order a sale of the land to reimburse him.

82. Higginbottom *v.* Benson, 24 Nebr. 461, 39 N. W. 418, 8 Am. St. Rep. 211; Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611; Sloane *v.* Lucas, 37 Wash. 348, 79 Pac. 949.

83. *California.*— Branham *v.* San Jose, 24 Cal. 585.

Illinois.— Bishop *v.* O'Conner, 69 Ill. 431.

Indiana.— Parker *v.* Rodman, 84 Ind. 256.

Iowa.— Todd *v.* Johnson, 51 Iowa 192, 1 N. W. 498. *Compare* Crawford *v.* Foreman, 127 Iowa 661, 103 N. W. 1000.

Michigan.— Waterman *v.* Seeley, 28 Mich. 77.

Tennessee.— McMurray *v.* Brasfield, 10 Heisk. 529.

See 35 Cent. Dig. tit. "Mortgages," § 1558.

84. Batterman *v.* Albright, 122 N. Y. 484, 25 N. E. 856, 19 Am. St. Rep. 510, 11 L. R. A. 800; Hamilton *v.* Austin, 36 Hun (N. Y.) 138.

An injunction cannot be granted to restrain the mortgagor's vendee from removing the timber, when he was not a party to the foreclosure suit. Van Derveer *v.* Tallman, 1 N. J. Eq. 9.

85. Barber *v.* Wadsworth, 115 N. C. 29, 20 S. E. 178; Beaufort County Lumber Co. *v.* Dail, 111 N. C. 120, 15 S. E. 941.

86. Higgins *v.* Chamberlin, 32 N. J. Eq. 566; Lull *v.* Matthews, 19 Vt. 322.

Action for waste.— A mortgagee can maintain an action on the case, in the nature of waste or of trover, against the mortgagor or those claiming under him, for timber cut on the mortgaged premises after a decree of foreclosure and before the expiration of the time limited for redemption. Hagar *v.* Brainerd, 44 Vt. 294; Langdon *v.* Paul, 22 Vt. 205.

87. American Trust Co. *v.* North Belleville Quarry Co., 31 N. J. Eq. 89.

foreclosure sale, by a lessee of the mortgagor, does not pass to the foreclosure purchaser.[88]

(B) *Crops.* Crops growing on mortgaged land at the time of a sale on foreclosure are covered by the mortgage and pass to the foreclosure purchaser as a part of his purchase,[89] unless they are explicitly reserved from the sale,[90] or unless there has been a valid agreement between the mortgagor and the mortgagee that the crops shall not be subject to the sale;[91] and this rule applies not only against the mortgagor but also against his tenant in possession of the land, who took a lease and planted the crop after the execution of the mortgage.[92] But crops harvested before the foreclosure sale belong to the mortgagor, or to his tenant, as the case may be, and do not go to the foreclosure purchaser.[93] It has been held, however, that there must be an actual severance of the crop, and that the mortgagor cannot defeat the right of the foreclosure purchaser to the crop by selling it, without cutting, before the foreclosure,[94] nor by giving a chattel mortgage on it.[95] But the purchaser at foreclosure sale does not own the crop until he is entitled to possession of the land; and hence, if the mortgagor remains in possession after the sale, pending an appeal or pending the period allowed by law for redemption, he is entitled to harvest or sell the growing crop,[96] and in some states this rule is

88. Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832.

89. *Illinois.*— Yates *v.* Smith, 11 Ill. App. 459; Sugden *v.* Beasley, 9 Ill. App. 71; Harmon *v.* Fisher, 9 Ill. App. 22.

Kansas.— Missouri Valley Land Co. *v.* Barwick, 50 Kan. 57, 31 Pac. 685; Skilton *v.* Harrel, 5 Kan. App. 753, 47 Pac. 177; Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807; Shockey *v.* Johntz, 2 Kan. App. 483, 43 Pac. 993.

Louisiana.— Galliher *v.* Davidson, 43 La. Ann. 526, 9 So. 114; Williamson *v.* Richardson, 31 La. Ann. 685; Bludworth *v.* Hunter, 9 Rob. 256. See also Townsend *v.* Payne, 42 La. Ann. 909, 8 So. 626.

Maryland.— Wootton *v.* White, 90 Md. 64, 44 Atl. 1026, 78 Am. St. Rep. 425.

Michigan.— Ledyard *v.* Phillips, 47 Mich. 305, 11 N. W. 170; Scriven *v.* Moote, 36 Mich. 64.

Mississippi.— Reily *v.* Carter, 75 Miss. 798, 23 So. 435, 65 Am. St. Rep. 621.

Missouri.— Hayden *v.* Burkemper, 101 Mo. 644, 14 S. W. 767, 20 Am. St. Rep. 643; Wallace *v.* Cherry, 32 Mo. App. 436; Culverhouse *v.* Worts, 32 Mo. App. 419.

New Jersey.— Howell *v.* Schenck, 24 N. J. L. 89.

New York.— Batterman *v.* Albright, 6 N. Y. St. 334; Aldrich *v.* Reynolds, 1 Barb. Ch. 613.

Vermont.— See Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39.

See 35 Cent. Dig. tit. "Mortgages," § 1564.

Contra.— Heavilon *v.* Farmers' Bank, 81 Ind. 249; Aldrich *v.* Ohiowa Bank, 64 Nebr. 276, 89 N. W. 772, 97 Am. St. Rep. 643, 57 L. R. A. 920; Foss *v.* Marr, 40 Nebr. 559, 59 N. W. 122; Seybolt *v.* Burtner, 1 Ohio Dec. (Reprint) 225, 4 West. L. J. 545; Mason *v.* Lemmon, 4 Ohio S. & C. Pl. Dec. 322, 3 Ohio N. P. 116.

90. Sherman *v.* Willett, 42 N. Y. 146.

91. Dayton *v.* Dakin, 103 Mich. 65, 61 N. W. 349; Congden *v.* Sanford, Lalor Suppl. (N. Y.) 196.

92. Goodwin *v.* Smith, 49 Kan. 351, 31 Pac. 153, 33 Am. St. Rep. 373, 17 L. R. A. 284; Rardin *v.* Baldwin, 9 Kan. App. 516, 60 Pac. 1097; Reed *v.* Swan, 133 Mo. 100, 34 S. W. 483; Howell *v.* Schenck, 24 N. J. L. 89; Calvin *v.* Shimer, (N. J. Ch. 1888) 15 Atl. 255; Lane *v.* King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105. See 35 Cent. Dig. tit. "Mortgages," § 1564. *Contra*, Cassilly *v.* Rhodes, 12 Ohio 88.

Effect of failing to make the mortgagor's tenant a party to the foreclosure suit see St. John *v.* Swain, 14 N. Y. Suppl. 743.

As to apportionment of crops between mortgagee and tenant of the mortgagor whose lease provided for payment of rent in a portion of the crop see Citizens' Bank *v.* Miller, 44 La. Ann. 199, 10 So. 779.

93. Vogt *v.* Cunningham, 50 Mo. App. 136; Hayden *v.* Burkemper, 40 Mo. App. 346.

94. Anderson *v.* Strauss, 98 Ill. 485; Jones *v.* Thomas, 8 Blackf. (Ind.) 428; Beckman *v.* Sikes, 35 Kan. 120, 10 Pac. 592; Wootton *v.* White, 90 Md. 64, 44 Atl. 1026, 78 Am. St. Rep. 425. But *compare* Clay Centre First Nat. Bank *v.* Beegle, 52 Kan. 709, 35 Pac. 814, 39 Am. St. Rep. 365; Willis *v.* Moore, 59 Tex. 628, 46 Am. Rep. 284; McKinney *v.* Williams, (Tex. Civ. App. 1898) 45 S. W. 335; White *v.* Pulley, 27 Fed. 436.

95. Penryn Fruit Co. *v.* Sherman-Worrell Fruit Co., 142 Cal. 643, 76 Pac. 484, 100 Am. St. Rep. 150; Rankin *v.* Kinsey, 7 Ill. App. 215; Jones *v.* Adams, 37 Oreg. 473, 59 Pac. 811, 62 Pac. 16.

96. *Illinois.*— Johnson *v.* Camp, 51 Ill. 219; Knox *v.* Oswald, 21 Ill. App. 105.

Indiana.— Gregory *v.* Wilson, 52 Ind. 233.

Iowa.— Everingham *v.* Braden, 58 Iowa 133, 12 N. W. 142; Hecht *v.* Dettman, 56 Iowa 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131; Dobbins *v.* Lusch, 53 Iowa 304, 5 N. W. 205.

Minnesota.— Aultman, etc., Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

Missouri.— Nichols *v.* Lappin, 105 Mo. App.

also applied where the mortgagor remains in possession until the confirmation of the sale by the court.[97] A mortgagor who simply continues in possession after his time for redemption has expired has no right to cut and sell the crop.[98]

(IV) *Rents and Profits*—(A) *In General.* A purchaser at a foreclosure sale is not entitled to any rents or profits of the estate due up to the time of the foreclosure,[99] or accruing during the pendency of the foreclosure proceedings,[1] or between the time of the decree and the sale,[2] unless, being the mortgagee himself, he has caused the sequestration of such accruing rents by procuring the appointment of a receiver.[3] But such purchaser is entitled to the rents, issues, and profits of the property from and after the time when he becomes invested with the title and the right of possession,[4] which may be from the time of con-

401, 79 S. W. 995; McAllister *v.* Lawler, 32 Mo. App. 91.

Nebraska.— Cassell *v.* Ashley, 3 Nebr. (Unoff.) 787, 92 N. W. 1035.

North Dakota.— Whithed *v.* St. Anthony, etc., Elevator Co., 9 N. D. 224, 83 N. W. 238, 50 L. R. A. 254.

Virginia.— See Crews *v.* Pendleton, 1 Leigh 297, 19 Am. Dec. 750.

See 35 Cent. Dig tit. "Mortgages," § 1564.

97. Richards *v.* Knight, 78 Iowa 69, 42 N. W. 584, 4 L. R. A. 453; Allen *v.* Elderkin, 62 Wis. 627, 22 N. W. 842; Woehler *v.* Endter, 46 Wis. 301, 1 N. W. 329, 50 N. W. 1099.

Crops sowed after sale.— Where lands are regularly and legally sold on foreclosure, the mortgagor cannot maintain replevin for crops sowed, without the consent of the purchaser, after the sale and before the confirmation, and which, as he must have known, could not be harvested until after the confirmation. Parker *v.* Storts, 15 Ohio St. 351. And see Ruggles *v.* Centreville First Nat. Bank, 43 Mich. 192, 5 N. W. 257.

98. Perley *v.* Chase, 79 Me. 519, 11 Atl. 418.

99. *California.*— Pendola *v.* Alexanderson, 67 Cal. 337, 7 Pac. 756.

Illinois.— Gandy *v.* Coleman, 196 Ill. 189, 63 N. E. 625.

Kansas.— Jackson *v.* King, 62 Kan. 850, 62 Pac. 655.

Louisiana.— Thompson *v.* Ratcliff, 45 La. Ann. 474, 12 So. 524.

Mississippi.— Wathen *v.* Glass, 54 Miss. 382.

Pennsylvania.— Garrett *v.* Dewart, 43 Pa. St. 342, 82 Am. Dec. 570.

United States.— *In re* Foster, 9 Fed. Cas. No. 4,963, 6 Ben. 268 [*affirmed* in 9 Fed. Cas. No. 4,981].

See 35 Cent. Dig. tit. "Mortgages," § 1566.

Rent payable in crops.— Where the rent of land is payable in crops, a purchaser of the land on foreclosure of a mortgage is entitled to the rent payable out of the crops maturing at the date of sale. Williams *v.* Cochran, 8 Houst. (Del.) 420, 31 Atl. 1050.

1. Silverman *v.* Northwestern Mut. L. Ins. Co., 5 Ill. App. 124; Chaffe *v.* Purdy, 43 La. Ann. 389, 8 So. 923; Bowman *v.* McKleroy, 14 La. Ann. 587; Argall *v.* Pitts, 78 N. Y. 239; Talbot's Appeal, 2 Walk. (Pa.) 67. See also Lamorere *v.* Cox, 32 La. Ann. 1045; Plattsburgh Bank *v.* Platt, 1 Paige (N. Y.) 464.

Mortgagee in possession.— An action at law for the rents and profits will not lie on behalf of a subsequent purchaser against a mortgagee who has entered upon and retained possession on default under the provisions of the mortgage, but such mortgagee will be held to account therefor in the action to foreclose. Felino *v.* K. S. Newcomb Lumber Co., 64 Nebr. 335, 89 N. W. 755, 97 Am. St. Rep. 646.

2. Whitney *v.* Allen, 21 Cal. 233.

Delay by defendant's appeal.— Where defendants in a foreclosure suit have delayed the proceedings by an appeal, and thereby kept complainants out of the possession of the premises and of the rents and profits, and the proceeds of sale, on a decree for foreclosure, are insufficient to pay the amount due and costs, the appellants should be ordered to pay the intermediate rents and profits, or so much thereof as may be necessary to make up the deficiency, to complainants, as damages sustained by the appeal. Utica Bank *v.* Finch, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175.

Pledge of rents and profits.— This rule does not apply where the mortgage pledges the rents and profits, as well as the *corpus* of the estate, as security for the debt. Funk *v.* Mercantile Trust Co., 89 Iowa 264, 56 N. W. 496.

Strict foreclosure.— Where a decree of strict foreclosure is rendered, the mortgagee becomes entitled to the rents and profits immediately upon its entry, or, where the land is in the possession of a third person, from the time the mortgagee is put into constructive possession under the decree. Haven *v.* Adams, 8 Allen (Mass.) 363; Chapman *v.* Smith, 9 Vt. 153; Cadwallader *v.* Mason, Wythe (Va.) 188.

3. Ray *v.* Henderson, 210 Ill. 305, 71 N. E. 579; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 201. See also Marshall, etc., Bank *v.* Cady, 76 Minn. 112, 78 N. W. 978.

4. Brownfield *v.* Weicht, 9 Ind. 394; Dunton *v.* Sharpe, (Miss. 1886) 11 So. 168; West *v.* Herrod, 1 Pa. Cas. 330, 2 Atl. 871; Page *v.* Street, Speers Eq. (S. C.) 159.

Lease covering realty and personalty.—The foreclosure purchaser cannot recover from a tenant of the mortgagor the entire amount of rent accruing under the lease after the sale, where the lease includes also personal property which did not pass by the sale, but his recovery is limited to the rental value of

firmation of the sale by the court,[5] the expiration of the period allowed for redemption after sale,[6] or the delivery to him of a sheriff's or master's deed.[7] But the foreclosure sale and deed do not ordinarily establish the relation of landlord and tenant between the foreclosure purchaser and a third person who is in possession under a lease from the mortgagor.[8] In order to have the remedies of a landlord against such a person, the purchaser must exhibit to him the official deed under which he claims,[9] or take his attornment, or give him notice to quit, or otherwise demand and receive recognition of his rights as owner of the premises.[10] Aside from this, however, the purchaser's right to the subsequent rent cannot be defeated by its prepayment in advance to the mortgagor.[11]

(B) *During Period For Redemption.* In some states, where the statute allows a certain period for redemption after the foreclosure sale, the possession of the premises remains in the mortgagor, and the rents and profits continue to be his until that period expires;[12] but in others the foreclosure purchaser is entitled to receive rent, or the value of the use and occupation of the premises, from the mortgagor or his tenant in possession, during the time for redemption,[13] and this

the realty. Newton *v.* Speare Laundering Co., 19 R. I. 546, 37 Atl. 11.

Foreclosure sale set aside.— The purchaser at a void foreclosure sale, being one of the creditors secured by the deed of trust under which the sale was made, where the sale is afterward set aside, may apply the rents due from him, as tenant in possession, to the payment of the mortgage debt, unless such rents are needed to pay off prior liens. Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903.

5. Taliaferro *v.* Gay, 78 Ky. 496; Heidelbach *v.* Slader, 1 Handy (Ohio) 456, 12 Ohio Dec. (Reprint) 234. And see *supra*, XXI, H, 5, b.

6. Stoddard *v.* Walker, 90 Ill. App. 422; Stevens *v.* Hadfield, 90 Ill. App. 405. And see *infra*, XXI, H, c, (II), (B).

7. *California.*— Pacific Mut. L. Ins. Co. *v.* Beck, (1893) 35 Pac. 169. One who, pending a foreclosure suit, comes into possession of the premises under defendant is responsible as "tenant in possession," under the statute, for the rents and profits accruing after the day of sale and before delivery to the purchaser. Shores *v.* Scott River Co., 21 Cal. 135.

Iowa.— Varnum *v.* Winslow, 106 Iowa 287, 76 N. W. 708; Patton *v.* Varga, 75 Iowa 368, 39 N. W. 647.

Kansas.— Condon *v.* Marley, 7 Kan. App. 383, 51 Pac. 924.

Kentucky.— Castleman *v.* Belt, 2 B. Mon. 157.

New York.— Cheney *v.* Woodruff, 45 N. Y. 98; Clason *v.* Corley, 5 Sandf. 447 [*affirmed* in 8 N. Y. 426]; Strong *v.* Dollner, 2 Sandf. 444. See also Mitchell *v.* Bartlett, 51 N. Y. 447.

See 35 Cent. Dig. tit. "Mortgages," § 1566.

8. American Freehold Land Mortg. Co. *v.* Turner, 95 Ala. 272, 11 So. 211; Bartlett *v.* Hitchcock, 10 Ill. App. 87.

9. Clason *v.* Corley, 5 Sandf. (N. Y.) 447 [*affirmed* in 8 N. Y. 426].

10. North American Trust Co. *v.* Burrow, 68 Ark. 584, 60 S. W. 950; Bartlett *v.* Hitchcock, 10 Ill. App. 87; Lyman *v.* Mower, 6 Vt. 345; Stanbury *v.* Dean, Brayt. (Vt.) 166.

11. Barelli *v.* Szymanski, 14 La. Ann. 47; Hatch *v.* Sykes, 64 Miss. 307, 1 So. 248; Hartley *v.* Meyer, 2 Misc. (N. Y.) 56, 20 N. Y. Suppl. 855; Market Co. *v.* Lutz, 4 Phila. (Pa.) 322.

12. *Illinois.*— Schaeppi *v.* Bartholomae, 217 Ill. 105, 75 N. E. 447, 1 L. R. A. N. S. 1079; Baker *v.* Bishop Hill Colony, 45 Ill. 264; Ortengren *v.* Rice, 104 Ill. App. 428; Carroll *v.* Haigh, 97 Ill. App. 576 [*reversed* on other grounds in 197 Ill. 193, 64 N. E. 375]; Bartlett *v.* Amberg, 92 Ill. App. 377; Burleigh *v.* Keck, 84 Ill. App. 607. See also Epley *v.* Eubanks, 11 Ill. App. 272. A stipulation in a trust deed that, during the period of redemption, the rents of the mortgaged premises shall be paid to the purchaser at the foreclosure sale, being effective only for the purpose of securing satisfaction of the mortgage debt, does not authorize one who bought at the foreclosure sale for the full amount of the debt, interest, and costs, to demand the rents during the period of redemption, the mortgage being extinguished by the sale and its terms rendered inoperative. Haigh *v.* Carroll, 209 Ill. 576, 71 N. E. 317.

Minnesota.— Pioneer Sav., etc., Co. *v.* Farnham, 50 Minn. 315, 52 N. W. 897; Spencer *v.* Levering, 8 Minn. 461.

Ohio.— Brisbane *v.* Staughton, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 426.

South Dakota.— Rudolph *v.* Herman, 4 S. D. 283, 56 N. W. 901.

Vermont.— Hill *v.* Hill, 59 Vt. 125, 7 Atl. 468.

United States.— Traer *v.* Fowler, 144 Fed. 810, 75 C. C. A. 540.

See 35 Cent. Dig. tit. "Mortgages," § 1567.

13. Russell *v.* Bruce, 159 Ind. 553, 64 N. E. 602, 65 N. E. 585; Edwards *v.* Johnson, 105 Ind. 594, 5 N. E. 716; Bryson *v.* McCreary, 102 Ind. 1, 1 N. E. 55; Chase *v.* Ball, 79 Ind. 311; Ridgeway *v.* Evansville First Nat. Bank, 78 Ind. 119; Graves *v.* Kent, 67 Ind. 38; Stumph *v.* Bigham, Wils. (Ind.) 367; Clement *v.* Shipley, 2 N. D. 430, 51 N. W.

right may be enforced, if necessary, by the appointment of a receiver to collect accruing rents.[14]

d. Effect of Defects or Irregularities in Decree of Sale. One buying at a foreclosure sale is required to exercise a reasonable degree of care and vigilance, and cannot sustain his title against invalidating faults which were within his own knowledge.[15] But if he acts innocently and in good faith, the discovery of fatal defects or irregularities, before he has paid the whole of his money, may justify him in refusing to complete his purchase,[16] or may furnish ground for opening or vacating the sale.[17] After the vesting of the purchaser's title, however, it cannot be collaterally impeached, where the court had jurisdiction, for any errors or irregularities in the proceedings in the cause or in the conduct of the sale.[18] Only where the decree was void for want of jurisdiction, or where the sale was marred by such fatal defects as to make it a mere nullity, does the title of the purchaser

414; U. S. Mortgage Co. *v.* Willis, 41 Oreg. 481, 69 Pac. 266. And see Cramer *v.* Watson, 73 Ala. 127; Kaston *v.* Paxton, 46 Oreg. 308, 80 Pac. 209.

In California under Code Civ. Proc. § 707, the purchaser of real property at a sheriff's foreclosure sale, from the time of the sale until a redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. See Yndart *v.* Den, 125 Cal. 85, 57 Pac. 761; Harris *v.* Foster, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 187; Knight *v.* Truett, 18 Cal. 113. And this right on the part of the purchaser is not limited to cases where there has been a redemption, but begins at the time of the sale and continues until a redemption is made, or, if there be no redemption, until the time allowed for redemption has expired. Walker *v.* McCusker, 71 Cal. 594, 12 Pac. 723.

In Indiana in case the premises are not redeemed at the end of the year, as provided by statute, the owner or occupant shall be accountable to the purchaser for their reasonable rents and profits. Connelly *v.* Dickson, 76 Ind. 440. But a mortgagee who has bid in the property at the foreclosure sale for the full amount of his judgment and costs, and receipted therefor, is not entitled to rents which accrued and were paid to a receiver during the year for redemption. Tosetti Brewing Co. *v.* Goebel, 23 Ind. App. 99, 54 N. E. 813.

14. Russell *v.* Bruce, 159 Ind. 553, 64 N. E. 602, 65 N. E. 585. And see Hill *v.* Taylor, 22 Cal. 191.

15. Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561; Griffin *v.* Durfee, 29 Ind. App. 211, 64 N. E. 237; Graham *v.* Bleakie, 2 Daly (N. Y.) 55.

16. See *supra*, XXI, H, 4, b, (IV), (A).

17. See *supra*, XXI, H, 6, c, (II).

18. *California.*— Nagle *v.* Macy, 9 Cal. 426.

Colorado.— Thompson *v.* Crocker, 18 Colo. 328, 32 Pac. 831.

Florida.—McGregor *v.* Kellum, 50 Fla. 589, 39 So. 697.

Georgia.— Broach *v.* O'Neal, 94 Ga. 474, 20 S. E. 113; Roberts *v.* Hinson, 77 Ga. 589, 2 S. E. 752.

Illinois.— Tormohlen *v.* Walter, 175 Ill. 442, 51 N. E. 706; Foster *v.* Clark, 79 Ill. 225; Miller *v.* Handy, 40 Ill. 448; Dow *v.* Seely, 29 Ill. 495.

Indiana.— Brake *v.* Stewart, 88 Ind. 422; Splahn *v.* Gillespie, 48 Ind. 397; Maynes *v.* Moore, 16 Ind. 116.

Iowa.—Flickinger *v.* Omaha Bridge, etc., R. Co., 98 Iowa 358, 67 N. W. 372; Olmstead *v.* Kellogg, 47 Iowa 460; O'Connell *v.* Cotter, 44 Iowa 48; Bates *v.* Ruddick, 2 Iowa 423, 65 Am. Dec. 774.

Kansas.— Phillips *v.* Love, 57 Kan. 828, 48 Pac. 142; Ashmore *v.* McDonnell, 39 Kan. 669, 18 Pac. 821.

Kentucky.— Walter *v.* Brugger, 78 S. W. 419, 25 Ky. L. Rep. 1597; Robinson *v.* Columbia Finance, etc., Co., 44 S. W. 631, 19 Ky. L. Rep. 1771; Johnson *v.* Haskins, 38 S. W. 687, 18 Ky. L. Rep. 852.

Louisiana.— Ross *v.* Enaut, 46 La. Ann. 1250, 15 So. 803; Laforest *v.* Barrow, 12 La. Ann. 148; Muir *v.* Henry, 2 La. Ann. 593.

Michigan.— Hochgraef *v.* Hendrie, 66 Mich. 556, 34 N. W. 15.

Minnesota.— Banker *v.* Brent, 4 Minn. 521.

Mississippi.— Reily *v.* Carter, 75 Miss. 798, 23 So. 435, 65 Am. St. Rep. 621.

Missouri.— Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73; Miles *v.* Davis, 19 Mo. 408.

Nebraska.— Hooper *v.* Castetter, 45 Nebr. 67, 63 N. W. 135.

New Jersey.— Dinsmore *v.* Westcott, 25 N. J. Eq. 302.

New York.— Baumeister *v.* Demuth, 178 N. Y. 630, 71 N. E. 1128; Bechstein *v.* Schultz, 120 N. Y. 168, 24 N. E. 388; De Forest *v.* Farley, 62 N. Y. 628; Casler *v.* Shipman, 35 N. Y. 533; Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Smith *v.* Joyce, 14 Daly 73, 3 N. Y. St. 560, 11 N. Y. Civ. Proc. 257; Schoenewald *v.* Rosenstein, 5 N. Y. Suppl. 766.

North Carolina.—Carraway *v.* Stancill, 137 N. C. 472, 49 S. E. 957.

Ohio.— Bolin *v.* Anderson, 8 Ohio Dec. (Reprint) 49, 5 Cinc. L. Bul. 328; Miller *v.* Erdhouse, 7 Ohio Dec. (Reprint) 294, 2 Cinc. L. Bul. 84.

Pennsylvania.—Warder *v.* Tainter, 4 Watts 270; Wheelock *v.* Harding, 4 Pa. Super. Ct. 21; Dalzell *v.* Crawford, 1 Pars. Eq. Cas. 37.

as a purchaser wholly fail,[19] and even then he will be entitled to the rights of a mortgagee in possession, so that he cannot be ousted without redemption or payment of the mortgage debt,[20] and no one can urge the fault or defect against him who has waived it, or failed to take advantage of it at the proper time, or who has confirmed the sale by his acquiescence in it.[21]

e. Modification or Reversal of Judgment. In several states, by statute, the reversal of a judgment or decree of foreclosure does not affect the title of a purchaser in good faith at the sale had thereunder, but only imposes on the mortgagee the duty of making restitution of the proceeds of sale with interest;[22] and it has been held in a number of cases that, where there was no want of jurisdiction, so that the foreclosure decree is not void, although it may be reversible for error, the title of a *bona fide* purchaser who was not a party to the suit cannot be affected by the subsequent reversal of the judgment on account of error.[23] It is

South Carolina.— Moody *v.* Dickinson, 54 S. C. 526, 32 S. E. 563.

South Dakota.— Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893.

Tennessee.— Windle *v.* Coffee, 7 Humphr. 420.

Texas.— Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117.

United States.— Luhrs *v.* Hancock, 181 U. S. 567, 21 S. Ct. 726, 45 L. ed. 1005; Andrews *v.* National Foundry, etc., Works, 77 Fed. 774, 23 C. C. A. 454, 37 L. R. A. 153; Smith *v.* Pomeroy, 22 Fed. Cas. No. 13,092, 2 Dill. 414.

See 35 Cent. Dig. tit. "Mortgages," § 1559.

19. *Alabama.*— Richardson *v.* Stephens, 122 Ala. 301, 25 So. 39.

California.— Crosby *v.* Dowd, 61 Cal. 557; Branham *v.* San Jose, 24 Cal. 585.

Indiana.— Meriwether *v.* Craig, 118 Ind. Ind. 301, 20 N. E. 769.

Iowa.— Way *v.* Scott, 118 Iowa 197, 91 N. W. 1034.

Kansas.— Craven *v.* Bradley, 51 Kan. 336, 32 Pac. 1112; Pray *v.* Jenkins, 47 Kan. 599, 28 Pac. 716; Richards *v.* Thompson, 43 Kan. 209, 23 Pac. 106.

Louisiana.— Surgi *v.* Colmer, 22 La. Ann. 20; De Gruy *v.* Hennen, 2 La. 544.

Missouri.— Jones *v.* Mack, 53 Mo. 147.

Nebraska.— State Bank *v.* Green, 10 Nebr. 130, 4 N. W. 942.

Pennsylvania.— Green *v.* Scarlett, 3 Grant 228.

See 35 Cent. Dig. tit. "Mortgages," § 1559.

20. *Arizona.*— Bryan *v.* Brasius, 3 Ariz. 433, 31 Pac. 519; Bryan *v.* Pinney, 3 Ariz. 412, 31 Pac. 548.

California.— Randall *v.* Duff, 107 Cal. 33, 40 Pac. 20.

Georgia.— Dutcher *v.* Hobby, 86 Ga. 198.

Illinois.— Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

Iowa.— Harsh *v.* Griffin, 72 Iowa 608, 34 N. W. 441.

Kansas.— Stouffer *v.* Harlan, 68 Kan. 135, 74 Pac. 610, 104 Am. St. Rep. 396, 64 L. R. A. 320; Equitable Mortg. Co. *v.* Gray, 68 Kan. 100, 74 Pac. 614.

Nebraska.— Stull *v.* Masilonka, (1905) 104 N. W. 188.

New York.— Lockwood *v.* McBride, 53 N. Y. Super. Ct. 268. *Compare* Watson *v.* Spence, 20 Wend. 260.

Washington.— See Sawyer *v.* Vermont L. & T. Co., 41 Wash. 524, 84 Pac. 8.

See 35 Cent. Dig. tit. "Mortgages," § 1559.

21. Tooley *v.* Gridley, 3 Sm. & M. (Miss.) 493, 41 Am. Dec. 628; McBride *v.* Lewisohn, 17 Hun (N. Y.) 524; Oppenheimer *v.* Reed, 11 Tex. Civ. App. 367, 32 S. W. 325; National Nickel Co. *v.* Nevada Nickel Syndicate, 106 Fed. 110; Stevens *v.* Ferry, 48 Fed. 7.

22. See the statutes of the different states. And see the following cases:

Kansas.— Sheldon *v.* Pruessner, 52 Kan. 593, 35 Pac. 204.

Minnesota.— Smith *v.* Valentine, 19 Minn. 452.

Nebraska.— McGregor *v.* Eastern Bldg., etc., Assoc., 5 Nebr. (Unoff.) 563, 99 N. W. 509.

Ohio.— McMahan *v.* Davis, 19 Ohio Cir. Ct. 242, 10 Ohio Cir. Dec. 467.

Pennsylvania.— Lengert *v.* Chaninel, 26 Pa. Super. Ct. 626.

See 35 Cent. Dig. tit. "Mortgages," § 1560.

23. *District of Columbia.*— Fraser *v.* Prather, 1 MacArthur 206.

Illinois.— Tormohlen *v.* Walter, 175 Ill. 442, 51 N. E. 706; Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352; Barlow *v.* Stanford, 82 Ill. 298; Fergus *v.* Woodworth, 44 Ill. 374; Lambert *v.* Hyers, 33 Ill. App. 43.

Kentucky.— Bailey *v.* Fanning Orphan School, 14 S. W. 908, 12 Ky. L. Rep. 644.

New Jersey.— State Mut. Bldg., etc., Assoc. *v.* O'Callaghan, (Ch. 1904) 57 Atl. 496.

New York.— Green *v.* Mussey, 76 N. Y. App. Div. 174, 78 N. Y. Suppl. 434; Hening *v.* Punnett, 4 Daly 543; Graham *v.* Bleakie, 2 Daly 55.

North Carolina.— Chamblee *v.* Broughton, 120 N. C. 170, 27 S. E. 111.

South Carolina.—Armstrong *v.* Humphreys, 5 S. C. 128.

Wisconsin.— Jesup *v.* Racine City Bank, 15 Wis. 604, 82 Am. Dec. 703.

See 35 Cent. Dig. tit. "Mortgages," § 1560.

Reversal because of usury.— The reversal of a judgment for a mortgage debt, to the extent that it embraces usury, does not affect the title of the purchaser of the mortgaged lands, although he was plaintiff in the reversed judgment, defendant being entitled

laid down as a general rule, however, that the title of the foreclosure purchaser must necessarily fall with the decree which supported it,[24] and that he may thereupon be ordered to restore the property to the mortgagor or other person entitled to it,[25] although of course he must be put in his former position and protected from loss, to which end he may be charged with rents and profits actually received by him, but is also entitled to a return of the purchase-money paid, with interest, costs, and expenses, and any sums expended by him for taxes or for permanent improvements.[26] In the case where the mortgagee himself was the purchaser, and the judgment is afterward reversed on grounds not affecting the validity of the mortgage, he is entitled to the rights of a mortgagee in possession, and cannot be required to surrender the property without payment of the mortgage debt.[27]

f. Liabilities of Purchaser. The purchaser at foreclosure sale is bound to pay the whole amount of his bid,[28] unless he has a sufficient legal reason for refusing to complete his purchase,[29] or can obtain an abatement for defects or deficiencies;[30] and if his conduct has been marked by fraud or bad faith, he may be held as a trustee for the full value of the property, exceeding the amount of his bid.[31]

merely to judgment of restitution for the usury paid. James *v.* James, 55 S. W. 193, 21 Ky. L. Rep. 1401.

24. Beaulieu *v.* Furst, 8 Rob. (La.) 485; Freeman *v.* Munns, 15 Abb. Pr. (N. Y.) 468; Woodard *v.* Bird, 105 Tenn. 671, 59 S. W. 143; Adams *v.* Odom, 74 Tex. 206, 12 S. W. 34, 15 Am. St. Rep. 827.

25. Maxwell *v.* Jacksonville Loan, etc., Co., 45 Fla. 468, 34 So. 255; Schieck *v.* Donohue, 81 N. Y. App. Div. 168, 80 N. Y. Suppl. 739; Robinson *v.* Alabama, etc., Mfg. Co., 67 Fed. 189 [*affirmed* in 72 Fed. 708, 19 C. C. A. 152]. See also U. S. Title, etc., Co. *v.* Donohue, 113 N. Y. App. Div. 882, 99 N. Y. Suppl. 639.

Property not covered by mortgage.—Where the purchaser of a cotton mill at a foreclosure sale, afterward set aside, was placed in possession by the court, and during such possession used certain material found in the mill but which was not covered by the mortgage, on restitution of the property and an accounting for the rents and profits, the court has jurisdiction also to require an accounting for such material. Robinson *v.* Alabama, etc., Mfg. Co., 89 Fed. 218 [*affirmed* in 94 Fed. 269, 36 C. C. A. 236].

Lien of judgments against purchaser.—Judgments against a fraudulent purchaser at a foreclosure sale attach as a lien only to his interest in the premises purchased, and cease to encumber them when the sale to him is set aside for fraud. Colby *v.* Rowley, 4 Abb. Pr. (N. Y.) 361.

26. Littell *v.* Zuntz, 2 Ala. 256, 36 Am. Dec. 415; Trotter *v.* White, 26 Miss. 88; Raynor *v.* Selmes, 7 Lans. (N. Y.) 440; McMahan *v.* Davis, 19 Ohio Cir. Ct. 242, 10 Ohio Cir. Dec. 467. But see Miller *v.* Kelsay, 114 Mo. App. 598, 90 S. W. 395, as to effect of purchaser's knowledge of fraudulent purpose in the foreclosure proceedings.

As to charging for rents and profits see Raun *v.* Reynolds, 15 Cal. 459; Guill *v.* Corinth Deposit Bank, 68 S. W. 870, 24 Ky. L. Rep. 482; Robinson *v.* Alabama, etc., Mfg. Co., 89 Fed. 218 [*affirmed* in 94 Fed. 269, 36 C. C. A. 236].

Liability of stranger for rent or waste.—Where a party purchased mortgaged premises at a judicial sale, which was afterward set aside, and between such sale and the order annulling it possession was taken by a stranger, without the knowledge of the purchaser, it was held that the latter was not liable for waste or rent during such time if he was in no manner connected with the acts of the tenant. Vulgamore *v.* Stoddard, 21 Iowa 115.

Return of sums expended for taxes and insurance see Dawson *v.* Drake, 29 N. J. Eq. 383; Dalgardno *v.* Barthrop, 40 Wash. 191, 82 Pac. 285; Robinson *v.* Alabama, etc., Mfg. Co., 89 Fed. 218 [*affirmed* in 94 Fed. 269, 36 C. C. A. 236].

Allowance for improvements see Littell *v.* Zuntz, 2 Ala. 256, 36 Am. Dec. 415; Dawson *v.* Drake, 29 N. J. Eq. 383.

27. Cowdery *v.* London, etc., Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115; Rodman *v.* Quick, 211 Ill. 546, 71 N. E. 1087; Hubbell *v.* Broadwell, 8 Ohio 120; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 94 Fed. 269, 36 C. C. A. 236. See also Hibernia Sav., etc., Soc. *v.* Jones, 89 Cal. 507, 26 Pac. 1089.

Liability for rent.—Where a purchase by the mortgagee at a foreclosure sale is set aside for fraud, the satisfaction of the debt by the sale is canceled, and the mortgagee is liable for use and occupation of the premises only to the extent to which the value of such use and occupation exceeds the mortgage debt. Fort *v.* Roush, 104 U. S. 142, 26 L. ed. 664.

28. Mitchell *v.* Weaver, 118 Ind. 55, 20 N. E. 525, 10 Am. St. Rep. 104.

29. See *supra*, XXI, H, 4, b, (IV), (A).

30. See *supra*, XXI, H, 7, c, (II), (D).

31. Germaine *v.* Mallerich, 31 La. Ann. 371; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Drury *v.* Milwaukee, etc., R. Co., 7 Wall. (U. S.) 299, 19 L. ed. 40.

A violation of a parol promise made by a bank to its mortgage debtor to purchase the property at sheriff's sale, and, after selling it and satisfying the debt, interest, and costs

But generally he is not required to see to the application of his purchase-money,[32] except where the statute requires him to retain in his hands the surplus proceeds of the sale for the purpose of paying other liens on the property.[33] It is his duty to keep the taxes paid while in possession,[34] and he is responsible for charges against the property previously existing and not displaced by the foreclosure,[35] or created by his own act.[36] Where the mortgage foreclosed was a junior lien, the purchaser must account for rents and profits while he held possession, on the subsequent foreclosure of the senior encumbrance;[37] but a senior mortgagee is not under this obligation to the junior mortgagee, at least unless it is shown that the security is inadequate and a receiver has been appointed.[38]

g. Rights and Liabilities of Assignee or Grantee — (I) *ASSIGNEE OF CERTIFICATE.* Where the foreclosure purchaser is not entitled to a deed until the expiration of the time allowed for redemption, but in the meanwhile receives a certificate of purchase, such certificate is assignable,[39] and an assignment passes to the assignee title to all the debts secured or intended to be secured by the mortgage,[40] and all the rights of the original purchaser.[41] He takes, however, subject to equities existing between the mortgagor and mortgagee,[42] and must record his assignment in order to protect himself as a *bona fide* purchaser;[43] and he will be liable, in case the decree of foreclosure is reversed or vacated, to restore the property and account.[44]

(II) *GRANTEE OF PURCHASER.* A deed from the purchaser at foreclosure sale

from the proceeds, to return the balance to the debtor, is not sufficient ground for equity to decree the purchaser to be a trustee for the mortgagor. Bennett *v.* Dollar Sav. Bank, 87 Pa. St. 382.

32. Chalmers *v.* Turnipseed, 21 S. C. 126.

33. See the statutes of the different states. And see Johnson *v.* Duncan, 24 La. Ann. 381; Tunnard *v.* Hill, 10 La. Ann. 247; Pepper *v.* Dunlap, 16 La. 163.

34. *California.*— Kelsey *v.* Abbott, 13 Cal. 609.

Illinois.— Carroll *v.* Haigh, 108 Ill. App. 264.

Louisiana.— Martel *v.* Smith, McGloin 167.

Nebraska.— David Adler, etc., Clothing Co. *v.* Hellman, 4 Nebr. (Unoff.) 557, 95 N. W. 467.

New York.— New York Mut. L. Ins. Co. *v.* Sage, 41 Hun 535.

See 35 Cent. Dig. tit. "Mortgages," § 1578.

35. Aultman, etc., Co. *v.* Witcik, 60 Iowa 752, 14 N. W. 357; Schindel *v.* Keedy, 43 Md. 413.

36. Gaines *v.* Summers, 50 Ark. 322, 7 S. W. 301; Watts *v.* Blalock, 17 S. C. 157.

37. Crawford *v.* Munford, 29 Ill. App. 445. See also Hall *v.* Mobile, etc., R. Co., 58 Ala. 10; *In re* Life Assoc. of America, 96 Mo. 632, 10 S. W. 69.

Concurrent mortgages.—Where a mortgage has been foreclosed and the premises sold at sheriff's sale, without notice to the holder of another mortgage on the same property, neither of the mortgages having priority over the other, the holder of such other mortgage, in a suit to foreclose, cannot require the purchaser at foreclosure sale to account for the mesne profits. Cain *v.* Hanna, 63 Ind. 408.

38. Catterlin *v.* Armstrong, 79 Ind. 514; Renard *v.* Brown, 7 Nebr. 449. See Cram *v.* Farmers' L. & T. Co., 5 Rob. (N. Y.) 226; Walsh *v.* Rutgers F. Ins. Co., 13 Abb. Pr. (N. Y.) 33.

39 Pence *v.* Armstrong, 95 Ind. 191, holding that where a certificate of purchase at foreclosure sale is bought by a person to whom the mortgagor had given money to redeem the land, it operates as a redemption, and confers no title on such purchaser.

Assignment of undivided interest.— Where the purchaser at foreclosure sale of an entire tract of land has assigned an undivided interest therein, the officer making the sale may, although he is not obliged to, recognize the assignment and make a deed to the assignee in accordance therewith; and if he does the court may properly approve the conveyance. Groves *v.* Maghee, 72 Ill. 526.

Assignment to owner of equity of redemption.— If a person buys land on which there is a mortgage given by his grantor, which is afterward foreclosed, and the grantor buys at the foreclosure sale, and before the sheriff's deed is executed to him quitclaims to his grantee, the land is freed from the consequences of the foreclosure sale, and left as though the sale had never taken place, and the effect is the same as if the grantor had assigned the certificate of the sheriff to the grantee. Green *v.* Clark, 31 Cal. 591.

40. Whipperman *v.* Dunn, 124 Ind. 349, 24 N. E. 166, 1045.

41. Carleton College *v.* McNaughton, 26 Minn. 194, 2 N. W. 688; Mead *v.* Brunnemer, 6 N. Y. St. 38; Anglo-California Bank *v.* Eudey, 123 Fed. 39, 59 C. C. A. 119.

42. Van Gorder *v.* Lundy, 66 Iowa 448, 23 N. W. 918.

43. Berryhill *v.* Smith, 59 Minn. 285, 61 N. W. 144.

44. Raun *v.* Reynolds, 18 Cal. 275.

to any third person[45] transfers to the latter all the title and rights of the original purchaser,[46] including the right to receive the sheriff's or master's deed if not yet executed.[47] The grantee in such a deed is also generally charged with infirmities of title arising from illegality in the sale and with claims or equities which would have been available against the original purchaser,[48] with these exceptions: That such grantee will be protected in so far as he can claim the character of a purchaser in good faith without notice,[49] that he is not chargeable with knowledge of defects or irregularities not appearing of record,[50] and that, although he has notice himself, he may rely on his vendor's want of notice, unless there was a fraudulent purpose to interpose an innocent purchaser for the sake of this very result.[51] The remote purchaser is not entitled to the assistance of the court as a matter of right, in the same way in which that assistance would be extended to the original

45. Martin *v.* Fridley, 23 Minn. 13, a foreclosure purchaser may, after the expiration of the time allowed for redemption, convey his title by quitclaim deed.

Who may purchase from foreclosure purchaser.—One who would have been prevented from buying at the foreclosure sale, by reason of his fiduciary relation to the parties, may afterward buy the property from the foreclosure purchaser, if he acts in good faith and not in pursuance of a previous bargain. Watson *v.* Sherman, 84 Ill. 263; Bush *v.* Sherman, 80 Ill. 160; Stephen *v.* Beall, 22 Wall. (U. S.) 329, 22 L. ed. 786. And the mortgagor's wife, using her own money, may acquire a good title by purchase from the foreclosure purchaser. Miles *v.* Skinner, 42 Mich. 181, 3 N. W. 918; Gantz *v.* Toles, 40 Mich. 725.

Deed to original owner.— Where a purchaser at a mortgage foreclosure sale makes a quitclaim deed to the original owner of the land, it operates as a redemption, and perfects the owner's title. White *v.* Costigan, (Cal. 1901) 63 Pac. 1075.

A subpurchaser, who gets in the paramount title, is bound in equity to fulfil his contract with the original purchaser, deducting when he has been obliged to pay to get in such outstanding title. Smith *v.* Arden, 22 Fed. Cas. No. 13,003, 5 Cranch C. C. 485.

46. Brunson *v.* Morgan, 84 Ala. 598, 4 So. 589; Smith *v.* Mobile Branch Bank, 21 Ala. 125; Withers *v.* Jacks, 79 Cal. 297, 21 Pac. 824, 12 Am. St. Rep. 143; Martin *v.* Fridley, 23 Minn. 13; Spicer *v.* Hunter, 14 Abb. Pr. (N. Y.) 4.

Agreement to resell to mortgagor.— When property sold on foreclosure of a mortgage is resold to a third person named by the debtor, for a price actually paid by such purchaser, the fact that in a contemporaneous writing it had been agreed between this purchaser and the original owner that the former would resell to the latter, or any person designated by him, on terms and conditions therein stipulated, does not prevent the purchaser from becoming the real owner, subject only to the right of redemption on the terms agreed. Davis *v.* Citizens' Bank, 39 La. Ann. 523, 2 So. 401.

Personalty not covered by the mortgage, but remaining on the mortgaged premises and in the possession of a grantee of the foreclosure purchaser, may be recovered in an action by the mortgagor. Richards *v.* Gilbert, 116 Ga. 382, 42 S. E. 715.

47. Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Green *v.* Clark, 31 Cal. 591; McLean *v.* McCormick, 4 Nebr. (Unoff.) 187, 93 N. W. 697. And see Dodge *v.* Allis, 27 Minn. 376, 7 N. W. 732.

48. Pryor *v.* Butler, 9 Ala. 418; Ætna L. Ins. Co. *v.* Stryker, (Ind. App. 1905) 73 N. E. 953; Hilton *v.* Crist, 5 Dana (Ky.) 384; U. S. Trust Co. *v.* New Mexico, 183 U. S. 535, 22 S. Ct. 172, 46 L. ed. 315.

Where the foreclosure was illegal, the position of a grantee of the purchaser in possession is that of a trustee, and he may be required to account and surrender possession to the mortgagor on reimbursement to the extent of the mortgage debt with interest and taxes paid by him. Finlayson *v.* Peterson, 11 N. D. 45, 89 N. W. 855. But see Hollister *v.* Mann, 40 Nebr. 572, 58 N. W. 1126.

Right of redemption.— One who knows that the failure of a mortgagor to redeem was an accident, because of his not receiving notice of the time limited therefor, and who purchases from the mortgagee before the time limited in the decree for redemption has expired, taking such mortgagee's right, title, and interest in the mortgaged premises provided the redemption does not take place, has no equitable rights prior in time and superior in merit to those of the mortgagor. National Bank of North America *v.* Norwich Sav. Soc., 37 Conn. 444.

Effect of release by mortgagor see Davis *v.* Citizens' Bank, 39 La. Ann. 523, 2 So. 401; Norris *v.* Michigan State Ins. Co., 51 Mich. 621, 17 N. W. 207.

49. Hyland *v.* Stafford, 10 Barb. (N. Y.) 558; Sornberger *v.* Webster, Clarke (N. Y.) 188; Fox *v.* Robbins, (Tex. Civ. App. 1901) 62 S. W. 815; Ehle *v.* Brown, 31 Wis. 405. But see Van Bookkelin *v.* Taylor, 62 N. Y. 105 [*reversing* 4 Thomps. & C. 422].

50. Johnson *v.* Watson, 87 Ill. 535; Piel *v.* Brayer, 30 Ind. 332, 95 Am. Dec. 699; Bechstein *v.* Schultz, 120 N. Y. 168, 24 N. E. 388. See also Steinhardt *v.* Cunningham, 55 Hun (N. Y.) 375, 8 N. Y. Suppl. 627 [*affirmed* in 130 N. Y. 292, 29 N. E. 100].

51. Chance *v.* McWhorter, 26 Ga. 315; Runkle *v.* Gaylord, 1 Nev. 123.

purchaser or any party to the foreclosure proceedings for the purpose of making the decree effectual, as, by an order for putting him in possession;[52] but he may maintain a bill to correct an error in the description of the premises and clear his title from the effects of the misdescription.[53]

8. Possession and Recovery of Possession — a. Purchaser's Right of Possession — (1) *In General.* The purchaser at foreclosure sale becomes entitled to possession of the premises as soon as he has completed his purchase,[54] and received his deed,[55] and is not to be kept out of possession by the existence of any title or lien subordinate to the mortgage foreclosed, or to the title of the mortgagor, or any claim or equity which could not be set up as against the legal title.[56] If the mortgagor remains in possession after the sale, his possession is not adverse to the title of the purchaser, but subordinate to it;[57] and if the foreclosure was invalid, still the purchaser, on taking possession, becomes entitled to the rights of a mort-

52. Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33.

53. Merrifield *v.* Ingersoll, 61 Mich. 4, 27 N. W. 714; Taylor *v.* Derrom Lumber Co., 5 N. J. L. J. 53.

54. Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Armstrong *v.* Humphreys, 5 S. C. 128.

In Kentucky it was held in an early decision that the time when the purchaser should receive possession rested in the discretion of the chancellor, to be governed by the nature of the estate and the time of year when sold. Trabue *v.* Ingles, 6 B. Mon. 82.

In Washington the purchaser is entitled to possession from the day of the sale, and hence before its confirmation by the court. State *v.* Northwestern, etc., Bank, 18 Wash. 118, 50 Pac. 1023.

55. Myers *v.* Manny, 63 Ill. 211; Bennett *v.* Matson, 41 Ill. 332; Bartlett *v.* Amberg, 92 Ill. App. 377; Mitchell *v.* Bartlett, 51 N. Y. 447; Stimson *v.* Arnold, 5 Abb. N. Cas. (N. Y.) 377; Welp *v.* Gunther, 48 Wis. 543, 4 N. W. 647; Lackes *v.* Bahl, 43 Wis. 53.

In Illinois a statute (Rev. St. c. 77, § 30) invalidates a certificate of purchase at mortgage foreclosure sale unless a deed is taken within five years. Hence where the beneficiary under a trust deed foreclosed it, became the purchaser at the sale, and took possession, but failed to take out a deed within the five years, it was held that he was not a mortgagee in possession, with the right to appropriate the rents and profits, as against a subsequent purchaser from the mortgagor, since the lien of the trust deed terminated with the foreclosure and sale, and any right he might have had under his certificate was barred by the statute. Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221.

56. Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493, holding that the foreclosure purchaser is entitled to possession as against a lessee of the mortgagor, whose lease was subsequent and subordinate to the mortgage.

Grantee of mortgagor in possession.— One who bought the mortgaged premises from the mortgagor before foreclosure cannot retain possession as against the foreclosure purchaser. Rival *v.* Gallagher, 52 Ga. 630. It is otherwise where the mortgagor was the only defendant to the foreclosure suit and had parted with all his interest in the premises. Watson *v.* Spence, 20 Wend. (N. Y.) 260. And see Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204.

Constructive possession of a portion of the mortgaged premises by a third person will be terminated by the legal possession given to the foreclosure purchaser. Hunt *v.* Hunt, 17 Pick. (Mass.) 118.

Dedication to public use of a portion of the mortgaged premises, by the mortgagor after execution of the mortgage and without the consent of the mortgagee, will not prevent the purchaser from claiming possession of the whole. McMannis *v.* Butler, 49 Barb. (N. Y.) 176.

Rights of mortgagor under outstanding prior lien.— Whatever may be the rights of the holder of a lien superior to that of the mortgage foreclosed, the mortgagor is not entitled to retain possession of the premises, as against the foreclosure purchaser, merely on account of the existence of such superior lien. Milliken *v.* Piles, 24 S. W. 604, 15 Ky. L. Rep. 584. But *compare* Wells *v.* Pierce, 33 How. Pr. (N. Y.) 421.

Equities of co-defendants.— The foreclosure purchaser is entitled to possession irrespective of equities existing between the defendant in possession under a contract of purchase and his co-defendants in the foreclosure suit. Ketchum *v.* Robinson, 48 Mich. 618, 12 N. W. 877.

Dower right of mortgagor's widow.— The foreclosure sale taking place after the mortgagor's death, his widow is not entitled to possession of the land, as against the purchaser, until her dower is assigned. Trenholm *v.* Wilson, 13 S. C. 174.

An outstanding estate in remainder does not prevent the purchaser at foreclosure sale under a mortgage covering the mortgagor's life-estate from taking and holding possession during the continuance of such life-estate. Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218.

As to effect of existence of equitable title in another see Coughanour *v.* Hutchinson, 41 Oreg. 419, 69 Pac. 68.

57. Record *v.* Ketcham, 76 Ind. 482; Lowry *v.* Tilleny, 31 Minn. 500, 18 N. W. 452; Seeley *v.* Manning, 37 Wis. 574.

gagee in possession, so that he cannot be ousted except on terms of redemption, and if he remains in possession until the right of redemption is barred his title becomes unassailable.[58]

(11) *During Period of Redemption.* Where the statute gives the mortgagor a limited time after the foreclosure sale in which to redeem, the purchaser is not entitled to possession until that time has elapsed without a redemption.[59] But this right of the mortgagor to retain possession is one which may be waived or released by contract.[60]

b. Proceedings to Recover Possession — (1) *In General.* The purchaser at a foreclosure sale cannot be considered as in actual or constructive possession merely in consequence of his purchase; he obtains only a right of possession; and when adverse possession is persisted in he must resort to legal process to invest himself with it,[61] first making a demand for delivery of possession or serving a notice to quit,[62] with a showing of the facts essential to establish his right to the premises.[63] The proceedings to recover the possession may be summary, if so authorized by the statute,[64] and usually the purchaser has his choice of various remedies,

58. Kelso *v.* Norton, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308; Russell *v.* H. C. Akeley Lumber Co., 45 Minn. 376, 48 N. W. 3; Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Townsend *v.* Thomson, 139 N. Y. 152, 34 N. E. 891; Hays *v.* Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479; Whitney *v.* Krapf, 8 Tex. Civ. App. 304, 27 S. W. 843. *Contra*, Lewis *v.* Hamilton, 26 Colo. 263, 58 Pac. 196.

59. *California.*— Purser *v.* Cady, 120 Cal. 214, 52 Pac. 489; Guy *v.* Middleton, 5 Cal. 392.

Illinois.— Haigh *v.* Carroll, 209 Ill. 576, 71 N. E. 317; Myers *v.* Manny, 63 Ill. 211; Johnson *v.* Camp, 51 Ill. 219; Bennett *v.* Matson, 41 Ill. 332; Ortengren *v.* Rice, 104 Ill. App. 428; Cohn *v.* Franks, 96 Ill. App. 206; Evans *v.* Heaton, 26 Ill. App. 412; Kiblholz *v.* Wolff, 8 Ill. App. 371.

Iowa.— Dolan *v.* Midland Blast Furnace Co., 126 Iowa 254, 100 N. W. 45; Hartman Mfg. Co. *v.* Luse, 121 Iowa 492, 96 N. W. 972; Stanbrough *v.* Cook, 83 Iowa 705, 49 N. W. 1010; Hill *v.* Hewett, 35 Iowa 563; Jennison *v.* Foltz, Morr. 490.

Kansas.— See Beverly *v.* Barnitz, 55 Kan. 451, 40 Pac. 325; Watkins *v.* Glenn, 55 Kan. 417, 40 Pac. 316.

Kentucky.— Costigan *v.* Truesdell, 119 Ky. 70, 83 S. W. 98, 26 Ky. L. Rep. 971.

Minnesota.— Stone *v.* Bassett, 4 Minn. 298.

Nevada.— Gilson *v.* Boston, 11 Nev. 413.

New York.— See North River Ins. Co. *v.* Snediker, 10 How. Pr. 310.

See 35 Cent. Dig. tit. "Mortgages," § 1562.

Contra.— Vaughan *v.* Walton, 66 Ark. 572, 52 S. W. 437; Danenhauer *v.* Dawson, 65 Ark. 129, 46 S. W. 131, 44 L. R. A. 193; Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858; Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580; London Debenture Corp. *v.* Warren, 9 Wash. 312, 37 Pac. 451.

60. Edwards *v.* Woodbury, 3 Fed. 14, 1 McCrary 429.

61. Beggs *v.* Thompson, 2 Ohio 95, 15 Am. Dec. 539.

Order for delivery of possession before sale.— An order, in a foreclosure decree, requiring the mortgagor in default of payment of the judgment to render immediate possession to the complainant before sale does not require it to be delivered to the purchaser and is vacated by the sale. O'Brian *v.* Fry, 82 Ill. 87.

Sale of undivided interest.—Where a mortgagor or his grantee remains in possession after the title to an undivided interest in the land has passed by a foreclosure sale to a purchaser thereof, the former's possession is presumed amicable and in subordination to the title of the purchaser until the contrary appears. The parties so jointly owning the land become tenants in common, the possession of one being deemed the possession of both; and the statute of limitations does not begin to run against such purchaser until an ouster or the assertion of some hostile claim by the tenant in possession denoting an intention to hold adversely. Lowry *v.* Tilleny, 31 Minn. 500, 18 N. W. 452.

**Delay by the foreclosure purchaser to bring suit for the recovery of possession of the premises does not defeat his right, if for a less period than the statute of limitations; and the statute does not begin to run until the time for redemption has expired and the purchaser becomes entitled to his deed. Rockwell *v.* Servant, 63 Ill. 424; Pere Marquette R. Co. *v.* Graham, 136 Mich. 444, 99 N. W. 408.

62. Harden *v.* Collins, 138 Ala. 399, 35 So. 357, 100 Am. St. Rep. 42; Allen *v.* Carpenter, 15 Mich. 25; McDonald *v.* McLaury, 17 N. Y. Suppl. 574; Walker *v.* Matthews, 1 Ch. Chamb. (U. C.) 232. See also Hodkinson *v.* French, 1 Ch. Chamb. (U. C.) 201.

63. Heyman *v.* Babcock, 30 Cal. 367 (showing sheriff's authority to sell); Dimick *v.* Grand Island Banking Co., 37 Nebr. 394, 55 N. W. 1066; Giles *v.* Comstock, 4 N. Y. 270, 53 Am. Dec. 374 (exhibiting deed); Mordecai *v.* Stutts, 16 S. C. 622.

64. See the statutes of the different states. And see New England Mut. L. Ins. Co. *v.* Wing, 191 Mass. 192, 77 N. E. 376; Allen *v.* Chapman, 168 Mass. 442, 47 N. E. 124; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32;

which are not regarded as mutually exclusive, but he is entitled to pursue them all.[65]

(II) *Power and Authority of Equity Court* — (A) *In General.* A court of equity, having obtained jurisdiction in an action for the foreclosure of a mortgage, and having decreed a sale of the premises, retains its jurisdiction and has authority to put the purchaser in possession of the property, without compelling him to resort to an action at law.[66] But this will not be done where the occupant claims under a title paramount to that of any of the parties to the suit;[67] nor where the purchaser's right to possession, as dependent on the confirmation of the sale and his compliance with its terms, is disputed and in doubt;[68] nor, after the lapse of a long period of time, without proof of the facts concerning the possession and occupancy of the premises.[69] It is clearly in the power of the equity court to effect the transfer of possession by means of the writ of injunction, followed if necessary by attachment for contempt; but this method of proceeding is now obsolete.[70]

(B) *Writ of Possession or of Execution.* The writ of habere facias possessionem is one which may be taken out by the successful plaintiff in ejectment, requiring the sheriff to put him in possession. It is not strictly speaking a proper process for putting a foreclosure purchaser in possession of the mortgaged premises;[71] but, under our mixed systems of law and equity, is sometimes used for this purpose by any court having jurisdiction of foreclosure proceedings.[72] The "writ of possession," so called, is substantially the same, being issued from a court of law in any action in which possession of land is awarded to a claimant; this also is used in some jurisdictions to put a foreclosure purchaser in possession,[73]

Brown *v.* Martin, 49 Mich. 565, 14 N. W. 497; Greene *v.* Geiger, 46 N. Y. App. Div. 210, 61 N. Y. Suppl. 524; State *v.* Burdick, 52 Hun (N. Y.) 348, 5 N. Y. Suppl. 363; Trenholm *v.* Wilson, 13 S. C. 174.

65. Kessinger *v.* Whittaker, 82 Ill. 22; Vahle *v.* Braeckensick, 48 Ill. App. 190 [*affirmed* in 145 Ill. 231, 34 N. E. 524].

Forcible entry no bar to writ of assistance.— The right of the purchaser at a foreclosure sale to apply to the court for a writ of assistance to put him in possession is not harred by the fact that he has already been defeated in an action of forcible entry and detainer against the party in possession. The application for such writ is not the institution of a new suit, but an incident to the original suit; and the judgment in forcible detainer may have resulted from a want of demand or the insufficiency of notice, and in such case it cannot preclude the right to possession adjudicated on a direct proceeding. Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813; Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Cochran *v.* Fogler, 116 Ill. 194, 5 N. E. 383.

66. *Arkansas.*— Bright *v.* Pennywit, 21 Ark. 130.

California.— Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146.

Florida.— Gorton *v.* Paine, 18 Fla. 117.

Illinois.— Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Freeman *v.* Freeman, 66 Ill. 53; Aldrich *v.* Sharp, 4 Ill. 261.

Missouri.— State *v.* Evans, 176 Mo. 310, 75 S. W. 914.

New Jersey.— Fackler *v.* Worth, 13 N. J. Eq. 395; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— Stewart *v.* Hutchinson, 29 How. Pr. 181; Frelinghuysen *v.* Colden, 4 Paige 204; Kershaw *v.* Thompson, 4 Johns. Ch. 609.

Ohio.— Tetterbach *v.* Meyer, 10 Ohio Dec. (Reprint) 212, 19 Cinc. L. Bul. 221.

Canada.— Lazier *v.* Ranney, 6 Grant Ch. (U. C.) 323.

See 35 Cent. Dig. tit. "Mortgages," § 1571.

67. Bright *v.* Pennywit, 21 Ark. 130; Oliver *v.* Caton, 2 Md. Ch. 297.

68. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 11 N. Y. Civ. Proc. 307.

69. Irving *v.* Munn, 1 Ch. Chamb. (U. C.) 240.

70. See Jackson *v.* Warren, 32 Ill. 331; Murphy *v.* Abbott, 13 Ill. App. 68; Fackler *v.* Worth, 13 N. J. Eq. 395; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Nevieux *v.* Labadie, 1 Ch. Chamb. (U. C.) 13.

71. Blake *v.* Screven, 2 Hill (S. C.) 312.

72. Aldrich *v.* Sharp, 4 Ill. 261; Trabue *v.* Ingles, 6 B. Mon. (Ky.) 82; Schaefer *v.* Amicable Permanent Land, etc., Co., 53 Md. 83. *Compare* Morrill *v.* Gelston, 32 Md. 116.

73. Suttles *v.* Sewell, 105 Ga. 129, 31 S. E. 41; Ballinger *v.* Waller, 9 B. Mon. (Ky.) 67; Richart *v.* Goodpaster, 37 S. W. 77, 18 Ky. L. Rep. 826.

The issuance of this writ is not the institution of a new suit, but only another step in the foreclosure suit. Kessinger *v.* Whittaker, 82 Ill. 22.

Issuance not a judicial act.— The issuance of such writ is not a judicial but a ministerial act (Maynes *v.* Moore, 16 Ind. 116), and therefore may be performed by the clerk (Morris *v.* Morgan, 92 Tex. 92, 45 S. W. 1002), or by the court in vacation (Kessinger *v.* Whittaker, 82 Ill. 22).

although in some other states the proper remedy is an equitable writ of execution.[74]

(c) *Writ of Assistance.* This writ is in the nature of an equitable habere facias, and is an appropriate process to issue from a court of chancery, to place a purchaser of mortgaged premises under its decree in possession, after he has received his deed, and where the possession is withheld from him by any party bound by the decree.[75] If the decree itself contains an order for the surrender of the property to the purchaser, no further order is necessary before the writ issues;[76] but otherwise the court will, on notice, make a special order in that behalf,[77] and the purchaser should serve the decree or order on the person in possession, exhibiting at the same time his deed as evidence of his title, and demand the possession, whereupon, if surrender is refused, he may have the writ of assistance.[78] No notice of the application for the writ is necessary, at least in the case of one who was a party to the foreclosure suit.[79] Where the purchaser himself would be entitled to the writ his vendee will be also, although the latter was not a party to the foreclosure proceedings.[80] The question whether the writ was

Number of times executed.—The writ may be executed by the sheriff as many times as necessary, until the day he is required to return it. Smith *v.* State, (Tex. Civ. App. 1904) 81 S. W. 936.

74. Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Tetterbach *v.* Meyer, 10 Ohio Dec. (Reprint) 212, 19 Cinc. L. Bul. 221.

75. *Alabama.*— Creighton *v.* Paine, 2 Ala. 158.

Arizona.—Anderson *v.* Thompson, 3 Ariz. 62, 20 Pac. 803.

California.— Taylor *v.* Ellenberger, 134 Cal. 31, 66 Pac. 4; Hefner *v.* Urton, 71 Cal. 479, 12 Pac. 486; Frishie *v.* Fogarty, 34 Cal. 11; Skinner *v.* Beatty, 16 Cal. 156; Montgomery *v.* Tutt, 11 Cal. 190.

Florida.— Wilmott *v.* Equitable Bldg., etc., Assoc., 44 Fla. 815, 33 So. 447; McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

Illinois.— Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352; Jackson *v.* Warren, 32 Ill. 331; Higgins *v.* Peterson, 64 Ill. App. 256.

Indiana.— Emerick *v.* Miller, 159 Ind. 317, 64 N. E. 28.

Kansas.— Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798.

Michigan.— Howard *v.* Bond, 42 Mich. 131, 3 N. W. 289; Hart *v.* Lindsay, Walk. 144.

Nebraska.— Magruder *v.* Kittle, 2 Nebr. (Unoff.) 418, 89 N. W. 272.

New Jersey.— Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; Beatty *v.* De Forest, 27 N. J. Eq. 482; Blauvelt *v.* Smith, 22 N. J. Eq. 31; See *v.* O'Rourke, 10 N. J. L. J. 340.

New York.— Valentine *v.* Teller, Hopk. 422.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408.

Texas.— Voigtlander *v.* Brotze, 59 Tex. 286.

Wisconsin.— Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287; Meehan *v.* Blodgett, 91 Wis. 63, 64 N. W. 429; Goit *v.* Dickerman, 20 Wis. 630; Loomis *v.* Wheeler, 18 Wis. 524.

United States.—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634.

See 35 Cent. Dig. tit. "Mortgages," § 1573.

Issuance pending appeal.— A purchaser at a foreclosure sale may apply for a writ of assistance pending an appeal from the decree. Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352.

Execution of writ.— In executing a writ of assistance, the sheriff is bound to place the purchaser in the foreclosure of a mortgage of an estate in common in possession of every part and parcel of the land jointly with the other tenants in common. Tevis *v.* Hicks, 38 Cal. 234.

Alias writ.— If the return to the first writ does not clearly declare that the writ has been fully executed, and affidavits are produced showing that this has not been done, the court may issue another writ. Tevis *v.* Hicks, 38 Cal. 234.

76. Kessinger *v.* Whittaker, 82 Ill. 22; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35.

77. Montgomery *v.* Tutt, 11 Cal. 190; O'Brian *v.* Fry, 82 Ill. 87; Oglesby *v.* Pearce, 68 Ill. 220; Bruce *v.* Roney, 18 Ill. 67; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. But *compare* Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146.

78. *California.*— Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146.

Michigan.— Howard *v.* Bond, 42 Mich. 131, 3 N. W. 289.

New Jersey.— Fackler *v.* Worth, 13 N. J. Eq. 395.

New York.— New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. 35.

Oregon.— Hald *v.* Day, 36 Oreg. 189, 59 Pac. 189.

See 35 Cent. Dig. tit. "Mortgages," § 1573.

79. McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35; Coor *v.* Smith, 107 N. C. 430, 11 S. E. 1089.

As against a third person claiming to be the owner or claiming a right of possession, notice of application for the writ must be given. Ray *v.* Trice, 49 Fla. 375, 38 So. 367.

80. McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823; Emerick *v.* Miller, 159 Ind. 317, 64 N. E. 28.

properly awarded cannot be reviewed in a collateral action in any other court.[81]

(D) *Against Whom Process May Issue.* The writ of assistance, or any other summary process to deliver possession to the purchaser of mortgaged premises on foreclosure, can issue only against those persons who were parties to the foreclosure suit and parties holding under them who are bound by the decree,[82] as one who enters under the mortgagor after the commencement of the foreclosure proceedings.[83] The writ cannot be granted to oust from the possession a mere stranger to the proceedings,[84] one who claims under a title adverse and paramount to

81. Rawiszer *v.* Hamilton, 51 How. Pr. (N. Y.) 297.

82. *Alabama.*— Thompson *v.* Campbell, 57 Ala. 183.

Arizona.— Anderson *v.* Thompson, 3 Ariz. 62, 20 Pac. 803; Asher *v.* Cox, (1886) 11 Pac. 44.

California.—Finger *v.* McCaughey, 119 Cal. 59, 51 Pac. 13; Heiner *v.* Urton, 71 Cal. 479, 12 Pac. 486; Henderson *v.* McTucker, 45 Cal. 647; Harlan *v.* Rackerby, 24 Cal. 561; Burton *v.* Lies, 21 Cal. 87.

Illinois.— Kessinger *v.* Whittaker, 82 Ill. 22; Gilcreest *v.* Magill, 37 Ill. 300; Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Heffron *v.* Gage, 44 Ill. App. 147; Carpenter *v.* White, 43 Ill. App. 448.

Kansas.—Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798.

Michigan.— Haviland *v.* Chase, 116 Mich. 214, 74 N. W. 477, 72 Am. St. Rep. 519.

New Jersey.— Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; National Bldg., etc., Assoc. *v.* Strauss, (Ch. 1901) 49 Atl. 137; Pidcock *v.* Melick, (Ch. 1886) 4 Atl. 98; Blauvelt *v.* Smith, 22 N. J. Eq. 31.

New York.— Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125; Bell *v.* Birdsall, 19 How. Pr. 491; Lovett *v.* German Reformed Church, 9 How. Pr. 220; Van Hook *v.* Throckmorton, 8 Paige 33; Frelinghuysen *v.* Colden, 4 Paige 204.

Washington.— State *v.* Thurston County Super. Ct., 21 Wash. 469, 58 Pac. 572; Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

United States.— Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634; Thompson *v.* Smith, 23 Fed. Cas. No. 13,977, 1 Dill. 458.

Canada.— Scott *v.* Black, 3 Ch. Chamb. (U. C.) 323; McKenzie *v.* Wiggins, 2 Ch. Chamb. (U. C.) 391; Montreal Bank *v.* Wallace, 13 Grant Ch. (U. C.) 184.

See 35 Cent. Dig. tit. "Mortgages," § 1573.

Adding parties by amendment.— Where some of the heirs of a deceased mortgagor were not parties to the foreclosure suit, it is proper to allow an amendment, making them parties, for the purpose of aiding the foreclosure purchaser to gain possession. Isler *v.* Koonce, 83 N. C. 55.

Tenant in possession.— The court has no power to require a surrender of possession to the foreclosure purchaser by a tenant in possession under a valid lease executed by the owner before the commencement of the foreclosure proceedings, where such tenant was not a party to the action. Davidson *v.* Weed, 21 N. Y. App. Div. 579, 48 N. Y. Suppl. 368.

Mortgagor's grantee.—The foreclosure purchaser cannot, by writ of possession, dispossess a purchaser from the mortgagor in possession prior to the commencement of the suit and not made a party thereto. Poole *v.* Garfield Loan, etc., Co., 4 Ohio S. & C. Pl. Dec. 504, 7 Ohio N. P. 292.

83. Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82; Kessinger *v.* Whittaker, 82 Ill. 22.

Want of good faith.— The writ may issue to dispossess a person who came into possession since the commencement of the foreclosure suit, with the consent and connivance of the mortgagor, although he claims to hold under a tax title, if it appears that the claim is not made in good faith, but by collusion with the mortgagor for the purpose of keeping out the foreclosure purchaser. Brown *v.* Marzyck, 19 Fla. 840.

A prima facie case for issuing the writ against a person in possession is made by showing that he came into possession after the commencement of the suit; if he holds under a paramount title, it is incumbent on him to show it. Bright *v.* Pennywit, 21 Ark. 130.

Entry after sale.— One who enters more than fifteen months after the sale is not to be deemed as having entered pending the suit, and cannot be removed by a writ of assistance, although he entered under a party to the suit. Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491.

84. Trammel *v.* Simmons, 8 Ala. 271.

Rights of and remedy against stranger.— When the officer holding the writ of assistance finds the premises to be in the possession of a stranger, who held the possession before the commencement of the foreclosure proceedings, and who was not a party to such proceedings and is not named in the writ, he cannot disturb such occupant, but it is his duty to return the writ with a statement of the facts as he finds them, and a return that he was unable to execute the writ for the reasons given. If an attempt or threat is made to disturb the possession of such party by means of such a writ, he may obtain an injunction to restrain all persons concerned from dispossessing him. Or if he is actually deprived of the possession under the writ of assistance, he may maintain an action of forcible entry and detainer against the officer and so regain the possession. The foreclosure purchaser, in such circumstances, must resort to an action at law against the occupant of the property to gain possession

that forming the basis of the foreclosure suit,[85] the tenant in possession of such a claimant,[86] or one claiming to hold the possession, whether he be the mortgagor or another, under a new agreement or a new title accruing since the foreclosure decree,[87] for such a writ can be granted only where the right to it is clear, and the application for it cannot be made the means of litigating and determining conflicting rights and titles not already adjudicated in the foreclosure suit.[88]

(III) *EJECTMENT.* The foreclosure purchaser is not obliged to rely on the writ of assistance as a means of gaining possession of the premises, but may maintain ejectment,[89] in which action he will be required to show all the essentials of a valid sale and transfer of title to him.[90]

(IV) *FORCIBLE DETAINER.* In several states, by statute, the purchaser at foreclosure sale may maintain an action of forcible entry and detainer to recover possession of the premises from the party in possession.[91] But in others this is not considered an appropriate remedy, at least where such purchaser has never been in actual possession.[92]

(V) *DEFENSES.* In proceedings for the recovery of possession by the fore-

of it for himself. Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382.

85. *California.*— Stockton Bldg., etc., Assoc. *v.* Chalmers, 75 Cal. 332, 17 Pac. 229, 7 Am. St. Rep. 173; Tevis *v.* Hicks, 38 Cal. 234; Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

Illinois.— Ricketts *v.* Chicago Permanent Bldg., etc., Assoc., 67 Ill. App. 71.

Michigan.—Benhard *v.* Darrow, Walk. 519.

Nebraska— Urlan *v.* Ruhe, (1905) 104 N. W. 1053.

New Jersey.— Chadwick *v.* Island Beach Co., 42 N. J. Eq. 602, 8 Atl. 650; Thomas *v.* De Baum, 14 N. J. Eq. 37. And see Presbyterian Church Bd. of Home Missions *v.* Davis, (Ch. 1905) 62 Atl. 447.

New York.— Wilbor *v.* Danolds, 59 N. Y. 657; Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125.

North Carolina.—Exum *v.* Baker, 115 N. C. 242, 20 S. E. 448, 44 Am. St. Rep. 449.

Texas.— Brown *v.* Leath, 17 Tex. Civ. App. 262, 42 S. W. 655, 44 S. W. 42.

Canada.— Kaulbach *v.* Spidle, 20 Nova Scotia 334; Trust, etc., Co. *v.* Start, 6 Ont. Pr. 90.

Estoppel to assert paramount title.— The writ of assistance may go against the person in possession of the premises, although he was not made a party to the foreclosure suit, where he concealed his title, and where his conduct was such as to represent to the parties interested in the suit that his possession was subject thereto; and the estoppel to resist an application for this writ, which arises out of such concealment of title, is not merely for the benefit of the purchaser at the foreclosure sale, but is rather for the benefit of the complainant, who, in reliance on the concealment of title, has neglected to make such person a party, and hence the estoppel is not affected by the absence of any injury to the purchaser on account of the concealment. Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493.

86. Thomas *v.* De Baum, 14 N. J. Eq. 37; New York L. Ins., etc., Co. *v.* Cutler, 9 How. Pr. (N. Y.) 407.

87. Langley *v.* Voll, 54 Cal. 435; Stovall *v.* Haynes, 78 S. W. 895, 25 Ky. L. Rep. 1789; Ramsdell *v.* Maxwell, 32 Mich. 285; Toll *v.* Hiller, 11 Paige (N. Y.) 228.

88. Asher *v.* Cox, 2 Ariz. 71, 11 Pac. 44; Enos *v.* Cook, 65 Cal. 175, 3 Pac. 632; Autenreith *v.* Hessenauer, 43 Cal. 356; Ricketts *v.* Chicago Permanent Bldg., etc., Assoc., 67 Ill. App. 71.

89. *Alabama.*— Johnson *v.* Beard, 93 Ala. 96, 9 So. 535; O'Connor *v.* McHugh, 89 Ala. 531, 7 So. 749; Barker *v.* Bell, 37 Ala. 354; Glidden *v.* Andrews, 10 Ala. 166.

California.— Hyde *v.* Boyle, 105 Cal. 102, 38 Pac. 643; Trope *v.* Kerns, 83 Cal. 553, 23 Pac. 691.

Connecticut.— Savage *v.* Dooley, 28 Conn. 411, 73 Am. Dec. 680.

New York.— Titcomb *v.* Fonda, etc., R. Co., 38 Misc. 630, 78 N. Y. Suppl. 226, holding that where a necessary party to the foreclosure suit is omitted, the purchaser at foreclosure sale acquires only an assignment of the mortgage, so that he is not entitled to bring ejectment. And see Sahler *v.* Signer, 37 Barb. 329.

Ohio.— Harp *v.* Blackington, Wright 386.

Canada.— Moffatt *v.* White, 1 Ch. Chamb. (U. C.) 227.

See 35 Cent. Dig. tit. "Mortgages," § 1572.

Ejectment for part of land.— A purchaser who has obtained a valid title to land by foreclosure of a mortgage, and who is in possession of a portion of it, can bring ejectment for the balance, and is not compelled to rely on the writ of assistance. Trope *v.* Kerns, (Cal. 1888) 20 Pac. 82.

90. Robinson *v.* Cahalan, 91 Ala. 479, 8 So. 415.

91. See the statutes of the different states. And see Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225; Merrin *v.* Lewis, 90 Ill. 505; Rice *v.* Brown, 77 Ill. 549; Frazier *v.* Gates, 61 Ill. 180; Davis *v.* Hamilton, 53 Ill. App. 94; Brackensieck *v.* Vahle, 48 Ill. App. 312; Lehman *v.* Whittington, 8 Ill. App. 374; Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

92. Taylor *v.* Bell, (Ala. 1901) 29 So. 572; Womack *v.* Powers, 50 Ala. 5; Necklace *v.* West, 33 Ark. 682; Dowling *v.* Han-

closure purchaser, defendant will not be allowed to plead any defense which might and should have been set up in the original foreclosure suit;[93] but he may show that the decree was void for want of notice,[94] or may set up fatal irregularities in the sale,[95] or adverse possession,[96] or payment after the entry of the decree.[97]

(VI) *Hearing and Determination.* A foreclosure purchaser must generally show a valid judgment or decree, sale, and deed to himself;[98] but if he is charged with fraud, duplicity, or bad faith, defendant must support these allegations with proof.[99] The court may try and determine the validity of the foreclosure proceedings and of the purchaser's title,[1] and may not only award the writ of possession or of assistance demanded, or refuse it in case a paramount title is set up,[2] but may also set aside the foreclosure sale, if found to be fatally defective, and order a resale,[3] or restore the possession of the property to a party from whom it has been unlawfully taken.[4]

9. Conveyance to Purchaser — a. Certificate of Purchase. Where the statute allows a certain time for redemption after a foreclosure sale, the purchaser is in the mean time entitled to receive a certificate of purchase, describing the premises, and showing the amount of the price and the time when he will be entitled to a deed in default of redemption.[5] A duplicate of this certificate is ordinarily required to be filed and recorded, for the purpose of giving notice to persons subsequently dealing with the property,[6] and it is *prima facie* evidence of the facts which it recites and of due compliance with the law.[7] The certificate is not a deed and does not pass a title to the land itself, but supersedes the mortgage and creates a lien of a still higher order.[8] The rights acquired and

nant, 78 Mich. 115, 43 N. W. 1044; Ballow *v.* Motheral, 5 Baxt. (Tenn.) 600.

93. *Alabama.*— Farmers' Sav. Bldg., etc., Assoc. *v.* Greenwood, 137 Ala. 257, 34 So. 227.

Illinois.— Dawson *v.* Hayden, 67 Ill. 52.

Indiana.— Emerick *v.* Miller, 159 Ind. 317, 64 N. E. 28; Burk *v.* Hill, 55 Ind. 419; Splahn *v.* Gillespie, 48 Ind. 397.

Pennsylvania.— O'Neil *v.* Soles, (1888) 16 Atl. 89. Where a tenant in possession has no notice of the sheriff's sale of mortgaged property under a scire facias, he may make the same defense, on the allegation of payment, in ejectment by the purchaser, as if he had been summoned on the scire facias. Cowan *v.* Getty, 5 Watts 531.

South Carolina.— Murchison *v.* Miller, 64 S. C. 425, 42 S. E. 177; Gerald *v.* Gerald, 31 S. C. 171, 9 S. E. 792.

Texas.— Van Burkleo *v.* Southwestern Mfg. Co., (Civ. App. 1896) 39 S. W. 1085.

Canada.— *Re* Stuart, 19 Nova Scotia 444; Mills *v.* Choate, 2 Ch. Chamb. (U. C.) 374.

See 35 Cent. Dig. tit. "Mortgages," § 1576.

94. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614.

95. Robinson *v.* United Trust Co., 71 Ark. 222, 72 S. W. 992. But *compare* Woods *v.* Soucy, 184 Ill. 568, 56 N. E. 1015; Goff *v.* Vedder, 12 N. Y. Civ. Proc. 358.

96. See Vannoy *v.* Blessing, 36 Ind. 349; Kemerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921.

97. Burton *v.* Austin, 4 Vt. 105.

98. Indianapolis, etc., R. Co. *v.* Center Tp., 143 Ind. 63, 40 N. E. 134; Hebert *v.* Bulte, 42 Mich. 489, 4 N. W. 215.

99. Frazier *v.* Beatty, 25 N. J. Eq. 343; Abbey *v.* Dewey, 25 Pa. St. 413.

1. Crosland *v.* Mutual Sav. Fund, 121 Pa. St. 65, 15 Atl. 504; Newton *v.* Leary, 64 Wis. 190, 25 N. W. 39.

2. Scott *v.* Noel, 33 S. W. 74, 17 Ky. L. Rep. 932.

3. Gibson *v.* Barbour, 100 N. C. 192, 6 S. E. 766. And see Reily *v.* Burton, 71 Ind. 118.

4. Winters *v.* Helm, 3 Nev. 394.

5. Griffin *v.* Durfee, 29 Ind. App. 211, 64 N. E. 237 (description of premises in certificate of purchase); Dupee *v.* Salt Lake Valley L. & T. Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902 (recitals of certificate where sale is made subject to lien for portion of mortgage debt not yet due).

6. McPherson *v.* Wood, 52 Ill. App. 170; Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701, both holding that a statutory provision as to filing and recording a duplicate of the certificate is so far directory that an omission to comply with it will not invalidate the sale; it is for the benefit of subsequent purchasers and judgment and attaching creditors.

In Connecticut an omission of the mortgagee to file the certificate of foreclosure within the prescribed time is not cured, nor the cause of action for the penalty barred, by filing the certificate subsequently and before suit brought. Wells *v.* Cooper, 57 Conn. 52, 17 Atl. 281.

7. Mosness *v.* Lacy, 73 Minn. 283, 76 N. W. 34. But *compare* Brown *v.* Belles, 17 Colo. App. 529, 69 Pac. 275, holding that a certificate reciting that the sale was made on the day named in the notice, when in fact it was made on the day after, will be set aside as a cloud on title.

8. Morse *v.* Rochester Loan, etc., Co., 74 Ill. App. 326 [*reversed* on other grounds in

held under such a certificate are property rights and are transferable by assignment.[9]

b. Purchaser's Right to Deed. On compliance with the terms of sale, and the expiration of the time allowed for redemption, if any, the foreclosure purchaser becomes entitled to receive a deed of the premises,[10] and its execution by the proper officer[11] may be enforced by the court, in a suit for the purpose if necessary, or, in the case of an officer subject to the summary orders of the court, on motion;[12] and an application to the court is always proper where there is doubt or dispute as to the person entitled to the deed.[13] Until the purchaser gets his deed he has no legal title on which he could maintain an action against strangers to the foreclosure suit,[14] except perhaps where the mortgagee becomes the purchaser, in which event the merger of titles and estates in him may obviate the necessity of a deed.[15]

c. Form and Requisites of Deed. The deed to the foreclosure purchaser should be made by the sheriff, master, or other officer making the sale,[16] executed and

181 Ill. 64, 54 N. E. 628]; Shobe *v.* Luff, 66 Ill. App. 414.

9. Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125. And see *supra*, XXI, H, 7, g, (I).

The sheriff who made the foreclosure sale is not disqualified from afterward taking an assignment of the certificate of purchase. Baker *v.* Edwards, 156 Ind. 53, 59 N. E. 174.

Assignment as collateral.— The assignment and delivery of a certificate of purchase, as collateral security for a debt, is in the nature of an equitable mortgage of the holder's contingent interest in the land, and not a mere pledge of personal property; and hence the owner of such certificate has an unquestionable right to maintain a bill to redeem from such a pledge or assignment of the certificate, even after a waiver of the right to redeem contained in the agreement by which the pledge was made. Shobe *v.* Luff, 66 Ill. App. 414.

10. Schaeppi *v.* Bartholomae, 217 Ill. 105, 75 N. E. 447, 1 L. R. A. N. S. 1079; Reformed Episcopal Church Sustentation Fund *v.* Mullowney, 164 N. Y. 578, 58 N. E. 1093 [*affirming* 50 N. Y. App. Div. 465, 64 N. Y. Suppl. 236]; Battershall *v.* Davis, 23 How. Pr. (N. Y.) 383.

11. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 119 N. Y. 15, 23 N. E. 173 (authority of a referee to make deed; *Ex p.* State Bank, 21 N. C. 75 (power of clerk of court to make deed).

12. Hawkeye Ins. Co. *v.* Maxwell, 119 Iowa 672, 94 N. W. 207; Harrison *v.* Union Trust Co., 80 Hun (N. Y.) 463, 30 N. Y. Suppl. 443 [*affirmed* in 144 N. Y. 326, 39 N. E. 353]; Union Mut. L. Ins. Co. *v.* Windett, 36 Fed. 838.

A master in chancery who has conducted a foreclosure sale under decree of the court and issued a certificate of purchase is before the court at all times, on notice, and may be compelled in a summary proceeding before the chancellor to execute a deed in accordance with the rights of the holder; there is no necessity of resorting to a writ of mandamus to enforce this action on his part, and it is not the proper practice. People *v.* Bowman, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265.

13. Gardner *v.* Hearne, 122 N. C. 169, 29 S. E. 91. And see McMurtry *v.* Montgomery Masonic Temple Co., 86 Ky. 206, 5 S. W. 570, 9 Ky. L. Rep. 541; Bovey de Laittre Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038; MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281.

Deed made to wrong person.—Where lands conveyed to a trustee as security were sold in an action on the debt, and the report of the sale confirmed, but the trustee executed a conveyance to a third person without directions from the court, and the cause terminated, it was held that a motion would not lie on behalf of the purchaser at the sale, not being a party to the action, to reinstate the cause and compel the trustee to convey to him. Mock *v.* Coggin, 101 N. C. 366, 7 S. E. 899.

14. Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221; Sanders *v.* McDonald, 63 Md. 503; Blanco *v.* Foote, 32 Barb. (N. Y.) 535; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 5 Sawy. 88. *Compare* Jouet *v.* Mortimer, 29 La. Ann. 206.

15. See Monroe *v.* Stephens, 80 Ky. 155; Atty.-Gen. *v.* Purmort, 5 Paige (N. Y.) 620; Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649.

16. Ross *v.* Steele, 1 Ch. Chamb. (U. C.) 94; Moore *v.* Shinners, 1 Ch. Chamb. (U. C.) 59, both holding that the conveyance is not from the mortgagor to the purchaser, and therefore it is not necessary that the mortgagor or his wife or his heirs should join in the deed.

Sheriff's successor in office.— Under a statute authorizing the court to require the execution of a deed by the sheriff in office at the time the purchaser becomes entitled to it, the foreclosure sale having been made by a former sheriff, the court may order a deed to be made to remedy a defect in the deed executed by a former sheriff. Deputy's Petition, 1 Pennew. (Del.) 107, 39 Atl. 790. Where the statute provides that the deed shall be executed by the sheriff who made the sale or by his successor in office, a deed made by a sheriff after the expiration of his

acknowledged in his official capacity,[17] and should contain apt words of conveyance and the other ordinary essentials of a deed,[18] besides a recital showing whose title and estate were sold and are conveyed,[19] and a description of the premises sufficient for clear identification;[20] but it is not invalidated by merely clerical errors in this or other particulars or immaterial omissions,[21] but may be corrected by the officer himself by making an amended deed or by order of the court.[22] A strictly formal delivery of an official deed of this kind is not necessary to its validity,[23] nor is its recordation, although this step should of course be taken for the purpose of affecting subsequent purchasers and others.[24]

d. Time For Making Deed. The foreclosure purchaser cannot demand a deed until the time limited by law for redemption after the sale has expired.[25] But when once his right to a deed has become fixed, delay in asserting it and in procuring its execution will not prejudice him,[26] unless the statute expressly limits the time within which application for a deed must be made,[27] or unless so great a time has elapsed as to raise a presumption that the property must have been redeemed.[28] A statutory provision requiring the execution of the deed to follow the sale "forthwith" is directory only.[29]

e. Effect of Conveyance. A deed to a foreclosure purchaser, made by the proper officer and regular on its face, vests in the grantee a complete and valid legal title[30] to the premises described in the decree and actually sold and embraced

term of office is valid. Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218. And so where the sale was made by a deputy sheriff, the deed may be executed by the successor of his principal. Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645.

17. See *In re* Smith, 4 Nev. 254, 97 Am. Dec. 531.

18. See Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 23 App. Cas. (D. C.) 587; Catlin *v.* Rea, 35 Misc. (N. Y.) 535, 71 N. Y. Suppl. 1117.

Invalid deed as certificate.—An instrument purporting and intended to be a sheriff's deed on foreclosure sale, which contains all that is required in a certificate of sale, may operate as a certificate, although unauthorized as a deed. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

19. Randell *v.* Von Ellert, 4 Abb. N. Cas. (N. Y.) 88, 54 How. Pr. 363.

20. Bowen *v.* Wickersham, 124 Ind. 404, 24 N. E. 983, 19 Am. St. Rep. 106; Waldron *v.* Letson, 15 N. J. Eq. 126. See also Keener *v.* Wilkinson, 33 Colo. 445, 80 Pac. 1043.

21. Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82; Carpenter *v.* Russell, 129 Ind. 571, 29 N. E. 36; Corby *v.* Moran, 58 Kan. 278, 49 Pac. 82; Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691; Warner *v.* Sharp, 53 Mo. 598.

22. Foster *v.* Clark, 79 Ill. 225; Longworth *v.* Johnson, 66 Kan. 733, 71 Pac. 260.

23. Kingman *v.* Appleget, 20 Nebr. 605, 31 N. W. 235; Kappes *v.* Rutherford Park Assoc., 60 N. J. Eq. 129, 46 Atl. 218.

24. Rackleff *v.* Norton, 19 Me. 274; Sanford *v.* Cahoon, 63 Mich. 223, 29 N. W. 840. See also Miller *v.* McLaughlin, 141 Mich. 433, 104 N. W. 780, as to necessity and sufficiency of recording under Michigan statute.

25. Delahay *v.* McConnel, 5 Ill. 156; Miller *v.* Cousins, (Iowa 1902) 90 N. W. 814; Carroll *v.* Rossiter, 10 Minn. 174.

Effect of premature deed.— Where the officer making a foreclosure sale, in disregard of the statute, gives a deed to the purchaser in the first instance, without first giving him a certificate of purchase, this will not defeat the right to redeem or give the grantee the right to present possession; but such deed will be permitted to stand as a valid execution of the decree if the mortgagor does not redeem or offer to do so within the time allowed for redemption. Suitterlin *v.* Connecticut Mut. L. Ins. Co., 90 Ill. 483; Rucker *v.* Steelman, 73 Ind. 396.

26. Wood *v.* Young, 38 Iowa 102; McConley *v.* Jones, (Mont. 1906) 86 Pac. 422; Catlin *v.* Rea, 35 Misc. (N. Y.) 535, 71 N. Y. Suppl. 1117.

27. See the statutes of the different states. And see Bradley *v.* Lightcap, 202 Ill. 154, 67 N. E. 45, 201 Ill. 511, 66 N. E. 546; Brown *v.* Ridenhower, 161 Ill. 239, 43 N. E. 976; Seeberger *v.* Weinberg, 151 Ill. 369, 37 N. E. 1033; Peterson *v.* Emmerson, 135 Ill. 55, 25 N. E. 842; School Trustees *v.* Love, 34 Ill. App. 418.

28. Reynolds *v.* Dishon, 3 Ill. App. 173; Applegate *v.* Kingman, 17 Nebr. 338, 22 N. W. 765.

29. Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218.

30. *Arkansas.*—Hill *v.* Denton, 74 Ark. 463, 86 S. W. 402; Huggins *v.* Dabbs, 57 Ark. 628, 22 S. W. 563.

Louisiana.— Luria *v.* Cote Blanche Co., 114 La. 385, 38 So. 279, holding that where all the proceedings are regular and proper, the deed conveys a full legal title to the purchaser, although it recites a sale of the "right, title, and interest" of defendant.

Pennsylvania.—Reed *v.* McNary, 30 Pittsb. Leg. J. N. S. 317.

Texas.— Ostrom *v.* Arnold, 24 Tex. Civ. App. 192, 58 S. W. 630.

Wisconsin.— Pelton *v.* Farmin, 18 Wis. 222.

in the deed,[31] and cuts off all rights of redemption, although it cannot affect a paramount and hostile title.[32] It takes precedence from the date of its record over all outstanding conveyances and encumbrances executed by the judgment debtor which were not recorded and of which the purchaser had no actual notice.[33] It is also *prima facie* evidence of the regularity and validity of the proceedings of which it is the consummation and of the truth of all facts which it recites;[34] and, when recorded, gives constructive notice to all subsequent purchasers from any of the parties to the decree.[35]

I. Deficiency and Personal Liability — 1. Personal Liability For Debt — a. Effect of Mortgage and Collateral Obligation. Where the mortgage contains a covenant or promise to pay the debt intended to be secured, or where the debt is evidenced by a separate written obligation, there is a personal liability resting upon the mortgagor, or his grantee who has assumed the mortgage, to the whole extent of the debt, and not merely to the value of the premises, so that he may be compelled to make good any deficiency arising on a sale under foreclosure.[36] Conversely if the mortgage or note contains a stipulation that the mortgagee shall look only to the mortgaged premises for the payment of his debt, or that no

United States.— Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 199 U. S. 247, 26 S. Ct. 25, 50 L. ed. 175.

See 35 Cent. Dig. tit. "Mortgages," § 1587.

Relation back to sale.— On confirmation by the court of a foreclosure sale, the deed issued to the purchaser relates back to the time of the sale. Wimpfheimer *v.* Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916.

Joint grantees are, as to third persons, equal owners, each taking a moiety of the legal title, however unequal the amounts which they have contributed to the purchase; but in equity they hold according to their respective interests. Shinn *v.* Shinn, 91 Ill. 477; Putnam *v.* Dobbins, 38 Ill. 394.

Deed made after payment of judgment.— A sheriff's deed to a foreclosure purchaser, made after the payment of the judgment or decree, or after a valid redemption of the premises, is a nullity. Phillips *v.* Hagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369; Corby *v.* Moran, 58 Kan. 278, 49 Pac. 82.

A purchaser whose deed is invalid, but who has entered into possession under it and retained the possession for a term of years, undisturbed by any claim under the mortgage, is entitled to the rights of a mortgagee in possession, and ejectment will not lie against him. Catlin *v.* Rea, 35 Misc. (N. Y.) 535, 71 N. Y. Suppl. 1117.

31. Laverty *v.* Moore, 33 N. Y. 658.

32. Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Emigrant Industrial Sav. Bank *v.* Goldman, 75 N. Y. 127.

33. Getchell *v.* Roberts, (Nebr. 1906) 106 N. W. 781.

34. *Alabama.*— Tew *v.* Henderson, 116 Ala. 545, 23 So. 128.

Arkansas.— Huggins *v.* Dabbs, 57 Ark. 628, 22 S. W. 563.

California.— Mersfelder *v.* Spring, 139 Cal. 593, 73 Pac. 452. But see Heyman *v.* Babcock, 30 Cal. 367.

Illinois.— The master's deed is *prima facie* evidence of the regularity of the sale, but not of the decree under which it was made. Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, 17 N. E. 807; Scott *v.* Moore, 4 Ill. 306.

Missouri.— Butler Bldg., etc., Co. *v.* Dunsworth, 146 Mo. 361, 48 S. W. 449; Lewis *v.* Curry, 74 Mo. 49.

New Jersey.—Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452; New York, etc., R. Co. *v.* State, 53 N. J. L. 244, 23 Atl. 168 [*affirming* 50 N. J. L. 303, 13 Atl. 1]. And see Kappes *v.* Rutherford Park Assoc., 60 N. J. Eq. 129, 46 Atl. 218.

New York.— Catlin *v.* Rea, 35 Misc. 535, 71 N. Y. Suppl. 1117.

Wisconsin.— Ehle *v.* Brown, 31 Wis. 405.

See 35 Cent. Dig. tit. "Mortgages," § 1587.

Contra.— Seevers *v.* Drennon, 29 Iowa 225.

35. De Peyster *v.* Hildreth, 2 Barb. Ch. (N. Y.) 109. See also Hackney *v.* Rome, 33 Ga. 231.

36. German Sav. Bank *v.* Brodsky, 39 Misc. (N. Y.) 100, 78 N. Y. Suppl. 910.

Variance between mortgage and note.— A provision in a mortgage that in certain contingencies the mortgagee may declare the whole amount due authorizes the enforcement of personal liability on the collateral note on the happening of such contingencies, although the note does not contain a like provision. Grand Island Sav., etc., Assoc. *v.* Moore, 40 Nebr. 686, 59 N. W. 115.

Release of personal liability.— Where a mortgagor agreed, in consideration of a written release of his personal liability on the mortgage note, to pay off a prior mortgage on the same premises, and the release was made, but the prior mortgage was not paid but was foreclosed, the mortgagor was held liable for the unsatisfied balance of the second mortgage debt. Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

Accommodation maker.— One joining in a mortgage and notes cannot set up an understanding between himself and the other mortgagors, to the effect that he was to be liable only as an accommodation maker, for the purpose of escaping personal liability on the notes, when there is nothing in the mortgage to indicate that it was made on any such

general execution shall issue on foreclosure, there is no personal liability for any deficiency.[37] If the mortgage contains no covenant or promise to pay, and there is no separate written obligation, the relief awarded in the foreclosure suit must be confined to a sale of the mortgaged premises, and there can be no judgment against the mortgagor personally either for the whole debt or for the deficiency.[38] But this does not mean that the mortgagee may not recover the unsatisfied balance of the original debt which the mortgage was given to secure, but only that he must do so in a separate action subsequent to, or independent of, the foreclosure suit.[39]

b. Effect of Foreclosure and Sale. The personal liability of a mortgagor is released and extinguished by a foreclosure of the mortgage only to the extent of the value of the premises, in the case of a strict foreclosure,[40] or, in the case of a foreclosure and sale, to the extent of the proceeds applicable to the mortgage debt;[41] if originally liable for the mortgage debt, he remains liable for any unsatisfied balance.[42] And this rule is not affected by the fact that the mort-

terms and nothing to show that the mortgagee had any knowledge of such understanding. Williams Bros. Co. *v.* Hanmer, 132 Mich. 635, 94 N. W. 176.

37. *California.*— Moore *v.* Reynolds, 1 Cal. 351.

Iowa.— Elmore *v.* Higgins, 20 Iowa 250; Kennion *v.* Kelsey, 10 Iowa 443.

Nebraska.— Seieroe *v.* Kearney First Nat. Bank, 50 Nebr. 612, 70 N. W. 220.

Pennsylvania.— Abbott's Estate, 24 Pa. Co. Ct. 401.

Canada.— McKay *v.* Howard, 6 Ont. 135.

38. *Alabama.*— Hunt *v.* Lewin, 4 Stew. & P. 138.

Illinois.— Hoag *v.* Starr, 69 Ill. 362.

Indiana.— Fletcher *v.* Holmes, 25 Ind. 458.

Iowa.— Weil *v.* Churchman, 52 Iowa 253, 3 N. W. 38.

Kansas.— See Clay *v.* Hildebrand, 34 Kan. 694, 9 Pac. 466.

New York.— Mack *v.* Austin, 95 N. Y. 513; Spencer *v.* Spencer, 95 N. Y. 353; Vrooman *v.* Dunlap, 30 Barb. 202. See also Plattsburgh Bank *v.* Platt, 1 Paige 464. Where a loan is made, and a deed absolute in form is given to secure it, but the loan is not made on the deed, the deed must be foreclosed as a mortgage, but the borrower is liable for interest and deficiency. Bocock *v.* Phipard, 1 Silv. Sup. 407, 5 N. Y Suppl. 228.

Ohio.— Hardinger *v.* Ziegler, 8 Ohio Dec. (Reprint) 214, 6 Cinc. L. Bul. 326 (holding that where the only promise to pay is in the ordinary defeasance clause in a mortgage, which is neither acknowledged nor recorded, plaintiff is not entitled to a personal judgment for the amount); McHenry *v.* Batavia Bldg., etc., Co., 17 Ohio Cir. Ct. 206, 9 Ohio Cir. Dec. 531 (holding that while no deficiency judgment can be rendered in foreclosure proceedings against a mortgagor who did not personally agree to pay the debt, a borrowing stock-holder of a loan association, to whom the estimated value of his stock has been loaned on his promise to repay the same in instalments, to secure which a mortgage is given, is personally liable for the debt secured; and hence a personal judgment against him is proper).

United States.— Demond *v.* Crary, 9 Fed. 750. After foreclosure of a mortgage given as collateral security by the mortgagee, he is still entitled to recover the balance of the debt due him from his debtor beyond the value of the mortgaged premises at the time of the foreclosure. Omaly *v.* Swan, 18 Fed. Cas. No. 10,508, 3 Mason 474.

England.— Isaacson *v.* Harwood, L. R. 3 Ch. 225, 37 L. J. Ch. 209, 18 L. T. Rep. N. S. 622, 16 Wkly. Rep. 410.

See 35 Cent. Dig. tit. "Mortgages," § 1595.

In Montana, under Code Civ. Proc. § 358, authorizing the court, in an action for foreclosure of a mortgage, to enter a deficiency judgment for the balance due against defendants liable for the debt, a deficiency judgment may be entered against a grantor in a deed of trust given to secure a debt, independent of any provision in the deed. Butte First Nat. Bank *v.* Pardee, 16 Mont. 390, 41 Pac. 77.

39. Demond *v.* Crary, 9 Fed. 750. And see *infra*, XXI, I, 3, a.

40. Marston *v.* Marston, 45 Me. 412.

41. *Illinois.*— Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702.

Nebraska.— Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

New York.— Goodwin *v.* Simonson, 74 N. Y. 133.

Pennsylvania.— Wolfe's Appeal, 110 Pa. St. 126, 20 Atl. 410.

South Dakota.— Advance Thresher Co. *v.* Rockafellow, 16 S. D. 462, 93 N. W. 652.

42. Cord *v.* Hirsch, 17 Wis. 403, holding that, although the whole of the mortgage debt is satisfied, the mortgagor remains liable for unpaid costs and expenses.

Rank of claim for unsatisfied balance.— In South Carolina the balance remaining unsatisfied after foreclosure sale retains its rank as a mortgage debt, so that if the sale is made after the death of the mortgagor such balance has a right to priority of payment out of the estate, the same as the mortgage, as against general contract debts. Edwards *v.* Sanders, 6 S. C. 316. But in Louisiana the mortgagee ranks only as an ordinary creditor for such balance. Salzman *v.* His Creditors, 2 Rob. (La.) 241.

gagee bid in the premises at the foreclosure sale for much less than their value, if no fraud or inequitable conduct is shown.[43]

c. Persons Liable — (1) *Mortgagor.* If the mortgagor was personally liable for the debt secured by the mortgage, he is the person who must ordinarily be looked to, in the first instance, to make good any deficiency on the sale;[44] and if the mortgagor was an unincorporated association, of such a nature that a partnership liability for its debts attaches to the persons who are members of it, a deficiency judgment may be given against those individuals who were members at the time of making the mortgage.[45] But if the mortgagor acted in the character of a trustee, the personal liability may attach to the trust estate or to those for whose benefit he acted.[46] Where an executor, empowered by the will to mortgage testator's estate, executes notes and a mortgage on which he is personally liable, a foreclosure and sale of the mortgaged premises do not prevent the mortgagee from bringing suit against the executor, in his personal capacity, to recover the deficiency.[47] In case of joint mortgagors, not all personally liable for the mortgage debt, the deficiency judgment should be confined to those who are so liable.[48] The mortgagor may, however, be released from this personal liability by the act of the mortgagee,[49] or by his alienation of the premises, before foreclosure, to a *bona fide* purchaser who assumes the mortgage debt.[50] In that case the purchaser assumes the position of principal debtor, and the mortgagor that of a surety;[51] and if, on maturity of the debt, the mortgagor calls upon the mortgagee to foreclose at once, fearing that the debt cannot otherwise be realized, the mortgagee must comply; if he fails to do so, the mortgagor is released from personal liability.[52] Release from personal liability on the part of the mortgagor fol-

43. Bohde *v.* Lawless, 33 N. J. Eq. 412; Robison *v.* Sumner Brick, etc., Co., 11 Pa. Super. Ct. 48.

44. See Herber *v.* Christopherson, 30 Minn. 395, 15 N. W. 676; Dougherty *v.* Murphy, 10 Phila. (Pa.) 509, 1 Wkly. Notes Cas. 593.

Where the maker of the note and the mortgagor are not the same person, it is the mortgagor, in the absence of special agreement, who is liable for the debt secured and from whom a deficiency may be collected. Deland *v.* Mershon, 7 Iowa 70.

45. Flagg *v.* St. Elmo Inv. Co., (Cal. 1892) 30 Pac. 579; Goodlett *v.* St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505.

46. See Mulvey *v.* Carpenter, 78 Ill. 580; Farrell *v.* Reed, 46 Nebr. 258, 64 N. W. 959; Reynolds *v.* Dietz, 34 Nebr. 265, 51 N. W. 747; Stitzer *v.* Whittaker, 3 Nebr. (Unoff.) 414, 91 N. W. 713; Bowman *v.* Johnston, 6 N. Y. St. 22. *Compare* Hannah *v.* Carnahan, 65 Mich. 601, 32 N. W. 835. But see De Camp *v.* Levoy, 19 Ohio Cir. Ct. 335, 10 Ohio Cir. Dec. 509, holding that where a corporation deeded land to a stock-holder, who became a member of a building and loan association, and gave a mortgage on the property to it to secure money advanced to him as a member, which was paid directly to the corporation, the corporation was not liable for a deficiency arising on a sale of the mortgaged property, although the entire transaction was for its benefit and at its direction.

47. De Coudres *v.* Union Trust Co., 25 Ind. App. 271, 58 N. E. 90, 81 Am. St. Rep. 95.

48. Finnerty *v.* Coughlin, 53 Iowa 751, 5 N. W. 704; Smith *v.* Allen, (Nebr. 1904) 100 N. W. 129.

Where tenants in common mortgage the common property to secure joint and several notes executed by them, a judgment for any deficiency which may occur on the sale of the mortgaged premises may properly be rendered against one of them. Hull *v.* Hayward, 13 S. D. 291, 83 N. W. 270, 79 Am. St. Rep. 890.

Liability of wife joining in husband's mortgage see Johnson *v.* Ward, 82 Ala. 486, 2 So. 524; O'Brian *v.* Fry, 82 Ill. 274; Brown *v.* Kennicott, 30 Ill. App. 89; Christian *v.* Soderberg, 124 Mich. 54, 82 N. W. 819; Granger *v.* Roll, 6 S. D. 611, 62 N. W. 970; Spokane Exch. Nat. Bank *v.* Wolverton, 11 Wash. 108, 39 Pac. 248; Pawtucket Sav. Inst. *v.* Bowen, 19 Fed. Cas. No. 10,852, 7 Biss. 358.

49. Woodruff *v.* Stickle, 28 N. J. Eq. 549; Merchants' Bank *v.* Weill, 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605.

Sale of one of two pieces of mortgaged land.— If a mortgage is given on two pieces of land and the mortgagee enforces it against, and sells, one piece only, he thereby waives the lien of the mortgage on the other piece; and if the land sold fails to bring the amount due, the mortgagor cannot complain of a judgment against him for the deficiency. Mascarel *v.* Raffour, 51 Cal. 242.

50. See Brereton *v.* Miller, 7 Utah 426, 27 Pac. 81.

Fictitious conveyance.— This cannot be accomplished by a fictitious conveyance of the premises made by the mortgagor to an irresponsible person for the very purpose of relieving himself from personal liability. New Haven Sav. Bank *v.* Atwater, 51 Conn. 429.

51. See *supra*, XVII, D, 2, e.

52. Marshall *v.* Davies, 78 N. Y. 414; Gott-

lows also where the mortgagee, after conveyance of the premises to a third person, releases a portion of the premises from the lien of the mortgage without the consent of the mortgagor,[53] or, without the mortgagor's authority, grants an extension of time of payment of the mortgage debt to the grantee.[54]

(II) *DEBTOR OTHER THAN MORTGAGOR.* It is provided by law in some states that, if the mortgage debt is secured by the obligation of any person other than the mortgagor, the complainant may make such person a party and may have a deficiency decree against him;[55] and it has been held that these statutes may apply to a guarantor, indorser, or surety for the mortgage debt.[56] But without such a statute, it is not generally considered that a personal judgment can be given against a third person;[57] and no deficiency decree can be made against any person, although a party to the action, who is not personally bound for the mortgage debt.[58]

(III) *GRANTEE OF MORTGAGOR.* A purchaser of property encumbered by a mortgage who knowingly and intentionally[59] assumes the mortgage as part of the consideration for his purchase or takes the property subject to the mortgage and agrees to pay it[60] becomes personally liable for the mortgage debt and may be held for any deficiency arising on sale under foreclosure,[61] provided the mort-

schalk *v.* Jungmann, 78 N. Y. App. Div. 171, 79 N. Y. Suppl. 551; Loomis *v.* Balheimer, 5 Abb. N. Cas. (N. Y.) 263. And see *supra*, XVII, D, 2, e, (III).

53. Meigs *v.* Tunnicliffe, 214 Pa. St. 495, 63 Atl. 1019, 112 Am. St. Rep. 769; Norton *v.* Henry, 67 Vt. 308, 31 Atl. 787.

54. Johnston *v.* Paltzer, 100 Ill. App. 171; Matter of Piza, 5 N. Y. App. Div. 181, 38 N. Y. Suppl. 540.

55. See the statutes of the different states. And see Winsor *v.* Ludington, 77 Mich. 215, 43 N. W. 866; Hand *v.* Kennedy, 83 N. Y. 149; Patrick *v.* Underwood, 17 Misc. (N. Y.) 646, 40 N. Y. Suppl. 193; Jones *v.* Stienbergh, 1 Barb. Ch. (N. Y.) 250.

Oral agreement as to purchase-money.— One not a party to a mortgage cannot be made liable for a deficiency by reason of an oral agreement with the mortgagor to furnish part of the purchase-money for the estate for which the mortgage was given, although the title was taken in part for his benefit. Williams *v.* Gillies, 28 Hun (N. Y.) 175.

56. Union Trust Co. *v.* Detroit Motor Co., 117 Mich. 631, 76 N. W. 112. See, however, Walsh *v.* Van Horn, 22 Ill. App. 170; Cottrell *v.* New London Furniture Co., 94 Wis. 176, 68 N. W. 874.

57. Chittenden *v.* Gossage, 18 Iowa 157; Reeves *v.* Wilcox, 35 Nebr. 779, 53 N. W. 978. *Compare* Ogborn *v.* Eliason, 77 Ind. 393; Hilton *v.* Otoe County Nat. Bank, 26 Fed. 202.

58. Snell *v.* Stanley, 58 Ill. 31; Simon *v.* Sabb, 56 S. C. 38, 33 S. E. 799.

59. Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40; Connor *v.* Dakota Nat. Bank, 7 S. D. 439, 64 N W. 519.

Fraudulent insertion of agreement to assume.— If the clause binding the grantee to assume the mortgage was inserted in the deed fraudulently, or without his knowledge and consent, so that he never gave his intelligent agreement to it, he is not liable thereon to the mortgagee. Wilson *v.* Randolph, 38 N. J. Eq. 287; Parker *v.* Jenks, 36 N. J. Eq. 398; Bull *v.* Titsworth, 29 N. J. Eq. 73; Van Horn *v.* Powers, 26 N. J. Eq. 257.

60. Green *v.* Hall, 45 Nebr. 89, 63 N. W. 119, holding that, to entitle a mortgagee to a deficiency judgment against a subsequent purchaser, there must be such an agreement by such purchaser to pay the mortgage as would enable the mortgagee to maintain against him an action for the amount of the mortgaged debt.

Form of agreement.— Usually this agreement is embodied in the purchaser's deed, by a clause describing the mortgage and reciting that he assumes and agrees to pay it; but the same result is accomplished if he accepts the conveyance "subject to" the mortgage and agrees to pay it (Tulare County Bank *v.* Madden, 109 Cal. 312, 41 Pac. 1092; Rourke *v.* Coulton, 4 Ill. App. 257), where he accepts a deed "subject to all liens and encumbrances of record" (Styles *v.* Price, 64 How. Pr. (N. Y.) 227), or where he agrees to "hold the grantor harmless" against the mortgage (Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868).

A parol assumption of the mortgage debt by the grantee, as part of the consideration for his purchase, will make him liable to a deficiency judgment. Ketcham *v.* Brooks, 27 N. J. Eq. 347; Brunson *v.* Ferguson, 2 N. J. L. J. 121.

61. *California.*— Roberts *v.* Fitzallen, 120 Cal. 482, 52 Pac. 818; Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; O'Neal *v.* Hart, 116 Cal. 69, 47 Pac. 926; Williams *v.* Naftzger, 103 Cal. 438, 37 Pac. 411; Thomson *v.* Bettens, 94 Cal. 82, 29 Pac. 336.

District of Columbia.— Giesy *v.* Gregory, 15 App. Cas. 49.

Illinois.— Mead *v.* Peabody, 183 Ill. 126, 55 N. E. 719; Edwards *v.* Hall, 93 Ill. 326; White *v.* Mackey, 85 Ill. App. 282. See also Scholten *v.* Barber, 217 Ill. 148, 75 N. E. 460.

Indiana.— Lowe *v.* Hamilton, 132 Ind. 406,

gagor, his grantor, was also personally liable for the debt,[62] and provided the liability of such purchaser has not been released,[63] or he has not relieved himself of the obligation of satisfying the mortgage by transferring the title to another.[64] But where a purchaser of mortgaged premises does not assume the mortgage debt a judgment therefor cannot be rendered against him.[65] Where the property has passed through several hands, each successive grantee assuming the mortgage, their undertakings form a chain of liabilities for the payment of the mortgage debt, and equity will determine and settle the order of their liability.[66] But where a purchaser of the property, who does not assume the mortgage, conveys the premises to one who does assume it, it is generally held that such remote grantee is not liable for a deficiency, his grantor not having been so liable.[67] Where the chief value of mortgaged property consists in a building standing on the land, a purchaser of the equity of redemption, who removes the building from the lot, is guilty of waste and is personally liable for a deficiency on foreclosure.[68]

(IV) *Heirs or Representatives of Deceased Mortgagor.* Although the mortgagor was personally liable for the mortgage debt, no personal judgment for a deficiency can be given in a foreclosure suit against his heirs or representa-

31 N. E. 1117; Wells *v.* Merritt, 17 Ind. 255.

Kansas.— Northwestern Barb-Wire Co. *v.* Randolph, 47 Kan. 420, 28 Pac. 170.

Nebraska.— Grand Island Sav., etc., Assoc. *v.* Moore, 40 Nebr. 686, 59 N. W. 115; Reynolds *v.* Dietz, 39 Nebr. 180, 58 N. W. 89; Stover *v.* Tompkins, 34 Nebr. 465, 51 N. W. 1040; Rockwell *v.* Blair Sav. Bank, 31 Nebr. 128, 47 N. W. 641; Keedle *v.* Flack, 27 Nebr. 836, 44 N. W. 34; Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506.

New Jersey.— Green *v.* Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; Allen *v.* Allen, 34 N. J. Eq. 493; Sebring *v.* Conkling, 32 N. J. Eq. 24; Pruden *v.* Williams, 26 N. J. Eq. 210; Klapworth *v.* Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69; Brunson *v.* Ferguson, 2 N. J. L. J. 121.

New York.— Wager *v.* Link, 134 N. Y. 122, 31 N. E. 213; Gifford *v.* Father Matthew Total Abstinence Ben. Soc. No. 1, 104 N. Y. 139, 10 N. E. 39; Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437; Howard *v.* Robbins, 67 N. Y. App. Div. 245, 73 N. Y. Suppl. 172; New York L. Ins. Co. *v.* Aitkin, 57 N. Y. Super. Ct. 42, 4 N. Y. Suppl. 879; Fleishhauer *v.* Doellner, 60 How. Pr. 438; Halsey *v.* Reed, 9 Paige 446; Blyer *v.* Monholland, 2 Sandf. Ch. 478.

Ohio.— Stone *v.* Becker, 4 Ohio Dec. (Reprint) 541, 2 Clev. L. Rep. 346. See also Whitney *v.* Meister, 26 Ohio Cir. Ct. 593.

South Carolina.— Redfearn *v.* Craig, 57 S. C. 534, 35 S. E. 1024; Gerald *v.* Gerald, 30 S. C. 348, 9 S. E. 274. A personal judgment for deficiency cannot be rendered against a defendant who purchased part of the property but never assumed any personal liability for the debt. Hull *v.* Young, 29 S. C. 64, 6 S. E. 938.

South Dakota.—Hull *v.* Hayward, 13 S. D. 291, 83 N. W. 270, 79 Am. St. Rep. 890.

Wisconsin.— Palmeter *v.* Carey, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586.

United States.— Episcopal City Mission *v.* Brown, 43 Fed. 834 [*affirmed* in 158 U. S. 222, 39 L. ed. 960].

Canada.— See Turnbull *v.* Symmonds, 6 Grant Ch. (U. C.) 615.

See 35 Cent. Dig. tit. "Mortgages," § 1596.

Compare Carleton *v.* Byington, 24 Iowa 172; Fithian *v.* Monks, 43 Mo. 502.

Purchase of undivided interest.— Where the owner of lands subject to a mortgage conveys an undivided half thereof to a purchaser, subject to half of the mortgage debt, which the latter assumes, and, on foreclosure of the mortgage, the premises sell for less than the amount of the mortgage debt, such purchaser is liable for half of the deficiency. Blass *v.* Terry, 87 Hun (N. Y.) 563, 34 N. Y. Suppl. 475; Harlem Sav. Bank *v.* Mickelsburgh, 57 How. Pr. (N. Y.) 106.

62. Roberts *v.* Fitzallen, 120 Cal. 482, 52 Pac. 818; Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Williams *v.* Van Geison, 76 N. Y. App. Div. 592, 79 N. Y. Suppl. 95.

63. Scofield *v.* Doscher, 10 Hun (N. Y.) 582 [*affirmed* in 72 N. Y. 491].

64. Crowell *v.* Currier, 27 N. J. Eq. 152, holding that where the purchaser has conveyed back to the mortgagor, the latter assuming the mortgage, there is no liability on the part of such purchaser to make good a deficiency. See, however, Corning *v.* Burton, 102 Mich. 86, 96, 62 N. W. 1040, holding that ordinarily a purchaser who has assumed the payment of the mortgage will not be relieved of his responsibility by his conveyance of the premises to another person, who in turn assumed the mortgage, although the liability of the first purchaser may become secondary to that of his grantee.

65. Rabb *v.* Texas Loan, etc., Co., (Tex. Civ. App. 1906) 96 S. W. 77.

66. Biddle *v.* Pugh, 59 N. J. Eq. 480, 45 Atl. 626; Youngs *v.* Public Schools, 31 N. J. Eq. 290.

67. See *supra*, XVII, D, 2, d, (III).

68. Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

tives, unless it is shown that they assumed the liability in some way,[69] or unless, in the case of an heir, it is shown that he received the proceeds of the mortgage or some part thereof for his own use.[70] The claim for a deficiency must be presented and worked out as a claim against the mortgagor's estate in the probate court.[71]

(v) *ASSIGNOR OF MORTGAGE.* A mortgagee who assigns the mortgage and guarantees the payment of the debt secured, or indorses the mortgage notes, becomes liable to his assignee for any deficiency arising on the foreclosure sale, provided the assignee first exhausts his remedy against the mortgagor for such deficiency; and if the mortgagee is joined as a party in the foreclosure suit, a personal judgment may be rendered against him for the deficieney.[72]

d. Debt Barred by Limitations. Where the debt secured by a mortgage is barred by the statute of limitations, no deficiency judgment or decree can be made in foreclosure proceedings.[73]

2. PERSONAL JUDGMENT FOR DEBT OR DEFICIENCY[74] — a. In General. Under the original equity practice, unmodified by any statute or authorized rule of court, a proceeding to foreclose a mortgage was strictly *in rem*, and consequently the court had no authority to render a personal judgment against the mortgagor or any other defendant, either for the whole debt or for the deficiency, plaintiff being obliged, in case of such a defieiency, to pursue his remedy by a separate action at law.[75]

69. *Alabama.*— Scott *v.* Ware, 65 Ala. 174.
Arkansas.— Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.
California.—Chapman *v.* Pennie, (1895) 39 Pac. 14; Pechaud *v.* Rinquet, 21 Cal. 76.
Illinios.— Cundiff *v.* Brokaw, 7 Ill. App. 147.
Indiana.— Alexander *v.* Frary, 9 Ind. 481.
Kentucky.— Tong *v.* Eifort, 80 Ky. 152.
Minnesota.— Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653; Jones *v.* Tainter, 15 Minn. 512.
Pennsylvania.— *In re* Piper, 208 Pa. St. 636, 57 Atl. 1118.
Tennessee.— Humes *v.* Shelly, 1 Overt. 79.
See 35 Cent. Dig. tit. "Mortgages," § 1598.
But see Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Weir *v.* Field, 67 Miss. 292, 7 So. 355; Glacius *v.* Fogel, 88 N. Y. 434; Colgan *v.* Dunne, 50 Hun (N. Y.) 443, 3 N. Y. Suppl. 309; Johnson *v.* Corbett, 11 Paige (N. Y.) 265.
Contribution by executor.— Where three persons buy a tract of land and give their joint and several bond for it, secured by a mortgage in which all join, and after the death of one of them, a foreclosure suit is brought against the others, in which a deficiency judgment is rendered, which is paid by one of defendants, the other being insolvent, the executor of the deceased mortgagor may be compelled to contribute his proper proportion of the deficiency. Weed *v.* Calkins, 24 Hun (N. Y.) 582.

70. Tatum *v.* Gibbs, 41 S. W. 565, 19 Ky. L. Rep. 695.

71. Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653; Fern *v.* Leuthold, 39 Minn. 212, 39 N. W. 399; Reinig *v.* Hecht, 58 Wis. 212, 16 N. W. 548. And see Lockwood *v.* Fawcett, 17 Hun (N. Y.) 146.

72. Crane *v.* Forth, 95 Cal. 88, 30 Pac. 193; Jarman *v.* Wiswall, 24 N. J. Eq. 267; Collier *v.* Miller, 62 Hun (N. Y.) 99, 16 N. Y. Suppl. 633 [*affirmed* in 137 N. Y. 332, 33 N. E. 374]; Halbach *v.* Trester, 102 Wis. 530, 78 N. W. 759.

73. *Michigan.*— Baent *v.* Kennicutt, 57 Mich. 268, 23 N. W. 808; Michigan Ins. Co. *v.* Brown, 11 Mich. 265.
Mississippi.— Weir *v.* Field, 67 Miss. 292, 7 So. 355.
Nebraska.— Cady *v.* Usher, 71 Nebr. 236, 98 N. W. 651.
New Hampshire.— Cross *v.* Gannett, 39 N. H. 140.
New York.—Hulbert *v.* Clark, 57 Hun 558, 11 N. Y. Suppl 417 [*affirmed* in 128 N. Y. 295, 28 N. E. 638].
Wisconsin.— Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614; Wiswell *v.* Baxter, 20 Wis. 680.
United States.— Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706. *Compare* Phelps *v.* Loyhed, 19 Fed. Cas. No. 11,077, 1 Dill. 512.
See 35 Cent. Dig. tit. "Mortgages," § 1599.
Contra.— Birnie *v.* Main, 29 Ark. 591.

74. Docketing judgment.— In New York there is no statutory time for the docketing of a deficiency judgment. It may be docketed, although more than ten years have elapsed since the time of the referee's report of sale. Brown *v.* Faile, 112 N. Y. App. Div. 302, 98 N. Y. Suppl. 420.

75. *Alabama.*— Hunt *v.* Lewin, 4 Stew. & P. 138.
Florida.— Webber *v.* Blane, 39 Fla. 224, 22 So. 655.
Illinois.— Cook *v.* Moulton, 64 Ill. App. 429.
Kentucky.— McGee *v.* Davis, 4 J. J. Marsh. 70; Pool *v.* Young, 7 T. B. Mon. 587.
Maryland.— Worthington *v.* Lee, 2 Bland 678.
Michigan.— Johnson *v.* Shepard, 35 Mich. 115.
Mississippi.— Cobb *v.* Duke, 36 Miss. 60, 72 Am. Dec. 157.

But statutes have now been enacted in most jurisdictions which permit the court either to include in the foreclosure decree a provision ordering the payment of the deficiency if any shall arise, or, after the report of the sale has been filed, showing such a deficiency, to make a further order, in the same cause, directing its payment by the party liable;[76] and in some states the statutes even permit the

North Carolina. — Fleming *v.* Sitton, 21 N. C. 621.

Ohio.— Bukheimer *v.* Ashcraft, 5 Ohio Dec (Reprint) 526, 6 Am. L. Rec. 440.

Exception to rule.— To this rule, however, there was a possible exception in cases where the court of equity would have had jurisdiction, independently of the mortgage, to decree payment of the demand secured by it. See Crutchfield *v.* Coke, 6 J. J. Marsh. (Ky.) 89; Morgan *v.* Wilkins, 6 J. J. Marsh. (Ky.) 28; Durrett *v.* Whiting, 7 T. B. Mon. (Ky.) 547.

Foreclosure of railroad mortgage.— An action to foreclose a railroad mortgage, given to trustees to secure the payment of negotiable bonds, is a proceeding *in rem* and no personal judgment for deficiency therein can be entered. Welsh *v.* First Div. St. Paul, etc., R. Co., 25 Minn. 314.

76. See the statutes of the different states. And see the following cases:

Alabama.—Hastings *v.* Alabama State Land Co., 124 Ala. 608, 26 So. 881.

Arizona.— Johns *v.* Wilson, 6 Ariz. 125, 53 Pac. 583.

California.— O'Neal *v.* Hart, 116 Cal. 69, 47 Pac. 926; Cormerais *v.* Genella, 22 Cal. 116.

Illinois.— Thomson *v.* Black, 208 Ill. 229, 70 N. E. 318. But see Osgood *v.* Stevens, 25 Ill. 89, holding that in scire facias to foreclose a mortgage the judgment must be *in rem* and not against defendant personally.

Indiana.— Thomas *v.* Simmons, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381.

Iowa.— Pike *v.* Gleason, 60 Iowa 150, 14 N. W. 210 (holding that the mortgagor cannot complain because the court did not, in the decree of foreclosure, render a personal judgment against him, not being prejudiced thereby); Cooley *v.* Hobart, 8 Iowa 358.

Maine.— Flint *v.* Winter Harbor Land Co., 89 Me. 420, 36 Atl. 634.

Maryland.— McDonald *v.* Workingmen's Bldg. Assoc., 60 Md. 589, under Code, art. 16, § 125, a decree *in personam* for a deficiency after a sale under a mortgage cannot be entered where the mortgage was not sealed.

Michigan.— Shelden *v.* Erskine, 78 Mich. 627, 44 N. W. 146; Vaughan *v.* Black, 63 Mich. 215, 29 N. W. 523; Sheldon *v.* Warner, 59 Mich. 444, 26 N. W. 667.

Minnesota.— Grant *v.* Winona, etc., R. Co., 85 Minn. 422, 89 N. W. 60.

Mississippi.— Weir *v.* Field, 67 Miss. 292, 7 So. 355.

Ohio.— King *v.* Safford, 19 Ohio St. 587.

South Carolina.— Anderson *v* Pilgram, 30 S. C. 499, 9 S. E. 587, 14 Am. St. Rep. 917, 4 L. R. A. 205.

Virginia.— Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871.

Washington.— Shumway *v.* Orchard, 12 Wash. 104, 40 Pac. 634.

Wisconsin.— Richards *v.* Land, etc., Imp. Co., 99 Wis. 625, 75 N. W. 401; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623; Welp *v.* Guntber, 48 Wis. 543, 4 N. W. 647; Sauer *v.* Steinbauer, 14 Wis. 70.

United States.— Dodge *v.* Freedmans Sav., etc., Co., 106 U. S. 445, 1 S. Ct. 335, 27 L. ed. 206; Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278; Northwestern Mut. L. Ins. Co. *v.* Keith, 77 Fed. 374, 23 C. C. A. 196; Hilton *v.* Otoe County Nat. Bank, 26 Fed. 202.

In **Nebraska** it was provided by Code Civ. Proc. §§ 847–849, that a personal judgment for deficiency might be rendered in a foreclosure suit. See Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707; Flentham *v.* Steward, 45 Nebr. 640, 63 N. W. 924; Brand *v.* Garneau, 3 Nebr. (Unoff.) 879, 93 N. W. 219; Blumle *v.* Kramer, 14 Okla. 366, 79 Pac. 215. But this statute was repealed by Sess. Laws (1897), p. 378, c. 95, § 1. The repeal, however, does not affect the right of a mortgagee to recover a deficiency judgment on a mortgage executed before the date of the repealing statute, or in proceedings which were pending at the time of the repeal. Daniels *v.* Mutual Ben. Ins. Co., (1905) 102 N. W. 458; Burrows *v.* Vanderbergh, 69 Nebr. 43, 95 N. W. 57; Patrick *v.* National Bank of Commerce, 63 Nebr. 200, 88 N. W. 183; Hanscom *v.* Meyer, 61 Nebr. 798, 86 N. W. 381; Hunter *v.* Lang, 5 Nebr. (Unoff.) 323, 98 N. W. 690; Wolff *v.* Phelps, 3 Nebr. (Unoff.) 511, 92 N. W. 143; Harris *v.* Nye, etc., Co., 3 Nebr. (Unoff.) 169, 91 N. W. 250; Merrill *v.* Miller, 2 Nebr. (Unoff.) 630, 89 N. W. 606; Brayton *v.* Oaks, 2 Nebr. (Unoff.) 593, 89 N. W. 646; Rushton *v.* Dierks Lumber Co., 2 Nebr. (Unoff.) 563, 89 N. W. 616; Wolcott *v.* Henninger, 1 Nebr. (Unoff.) 552, 96 N. W. 612.

In **New Jersey** the statutes forbid the rendition of a deficiency decree in a foreclosure suit, but provide that, after the foreclosure of the mortgage, an action at law may be maintained on the accompanying bond to recover the deficiency. See Pruden *v.* Savage, 70 N. J. L. 22, 56 Atl. 690; Franklin Loan, etc., Assoc. *v.* Richman, 65 N. J. L. 526, 47 Atl. 426; Hinkle *v.* Champion, 42 N. J. Eq. 610, 8 Atl. 656; Toffey *v.* Atcheson, 42 N. J. Eq. 182, 6 Atl. 885; Chancellor *v.* Traphagen, 41 N. J. Eq. 369, 3 Atl. 263, 7 Atl. 505; Allen *v.* Allen, 34 N. J. Eq. 493; Naar *v.* Union, etc., Land Co., 34 N. J. Eq. 111; Newark Sav. Inst. *v.* Forman, 33 N. J Eq. 436.

Repeal of statute.— Where a statute providing for the entry of deficiency judgments is repealed, but with a saving clause providing that the repeal shall not affect any action

recovery of a personal judgment for the debt secured by the mortgage, on proper proof, when the demand for foreclosure of the mortgage fails or is abandoned, as, where the mortgage proves to have been invalid, or defective as a lien, although the debt is justly due.[77] A foundation for a deficiency decree cannot be laid by anticipating the maturity of the mortgage debt, when there is no provision therefor in the bond or mortgage;[78] and on the other hand the rendition of a deficiency decree will bar any subsequent action at law on the note or bond secured.[79]

b. Persons Against Whom Judgment Obtainable. It is essential to the validity of a personal judgment for the mortgage debt or for a deficiency that the court should have acquired jurisdiction of the person against whom it is rendered; and hence no such judgment can be given against any defendant who was not personally served, nor against the original mortgagor if the only service was by publication and he did not appear.[80] But if jurisdiction of the person was acquired at the beginning of the action, no new notice is required for the application for a deficiency decree, as that is only a continuation of the suit.[81] It is error to render a personal decree in a foreclosure suit against a merely nominal

then pending, nor causes of action not in suit but accruing prior to the repeal, any action pending or cause which has accrued is not affected. Blumle *v.* Kramer, 14 Okla. 366, 79 Pac. 215.

Mortgage on land in two states.— Where a mortgage is foreclosed as to the land covered by it which lies within the state where the foreclosure suit is brought, a deficiency judgment may be entered in that action, notwithstanding the mortgage also covers land in another state, as to which it is not foreclosed. Clark *v.* Simmons, 55 Hun (N. Y.) 175, 8 N. Y. Suppl. 74.

Continuance of jurisdiction.— Although, pending a suit to foreclose a mortgage and obtain a deficiency decree, the property is sold under a prior mortgage and no redemption is made, the court still has jurisdiction to pass on the question of the personal liability of a grantee of the mortgagor. Hayden *v.* Drury, 3 Fed. 782 [*reversed* on other grounds in 111 U. S. 223, 4 S. Ct. 405, 28 L. ed. 408].

77. See the statutes of the different states. And see Jaeckel *v.* Pease, 6 Ida. 131, 53 Pac. 399; Louisville Banking Co. *v.* Blake, 70 Minn. 252, 73 N. W. 155; Weatherby *v.* Townes, 42 Tex. 83. *Contra*, Bouton *v.* Cameron, 205 Ill. 50, 68 N. E. 800; Farmers' Bank *v.* Normand, 3 Nebr. (Unoff.) 643, 92 N. W. 723; Denny *v.* McCown, 34 Oreg. 47, 54 Pac. 952; Cumberland Bldg., etc., Assoc. *v.* Sparks, 106 Fed. 101.

In New York, in an action in equity to foreclose a mortgage, where plaintiff fails to establish his mortgage, he cannot have a personal judgment for the debt on the same complaint without amendment. Dudley *v.* Third Order Cong. St. Francis, 138 N. Y. 451, 34 N. E. 281. See also Mann *v.* Cooper, 1 Barb. Ch. 185.

In Pennsylvania it has been held that plaintiff cannot be permitted to change a scire facias sur mortgage into assumpsit on the bond accompanying the mortgage, as that would change the cause of action as well as the form. Eckert *v.* Phillips, 4 Pa. Co. Ct. 514.

78. Ohio Cent. R. Co. *v.* Central Trust Co., 133 U. S. 83, 10 S. Ct. 235, 33 L. ed. 561.

79. New York Mut. L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756.

80. *California.*— Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30; Blumberg *v.* Birch, 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67.

Illinois.— Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Mulvey *v.* Carpenter, 78 Ill. 580; Winkelman *v.* Kiser, 27 Ill. 21.

Iowa.— Scovil *v.* Fisher, 77 Iowa 97, 41 N. W. 583.

Kansas.— Beecher *v.* Ireland, 46 Kan. 97, 26 Pac. 448.

Michigan.— Jehle *v.* Brooks, 112 Mich. 131, 70 N. W. 440.

New York.— Schwinger *v.* Hickok, 53 N. Y. 280; McLaughlin *v.* Durr, 76 N. Y. App. Div. 75, 78 N. Y. Suppl. 798; Jones *v.* Grant, 10 Paige 348.

Ohio.— Southward *v.* Jamison, 66 Ohio St. 290, 64 N. E. 135; Wood *v.* Stanberry, 21 Ohio St. 142.

Texas.— Greenway *v.* De Young, 34 Tex. Civ. App. 583, 79 S. W. 603.

Wisconsin.— Tanguay *v.* Felthousen, 45 Wis. 30.

United States.— *In re* Linforth, 87 Fed. 386 [*affirmed* in 93 Fed. 599, 35 C. C. A. 474].

See 35 Cent. Dig. tit. "Mortgages," § 1600.

Contra.— New York Mut. L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184; Taylor *v.* Rountree, 15 Lea (Tenn.) 725.

Co-defendant not served.— One defendant against whom a deficiency judgment has been rendered cannot complain because a co-defendant was not served with notice. Brand *v.* Garneau, 3 Nebr. (Unoff.) 879, 93 N. W. 219.

81. Wells *v.* American Mortg. Co., 123 Ala. 413, 26 So. 301; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707. And see Twigg *v.* James, 37 Wash. 434, 79 Pac. 959. But *compare* McDonald *v.* Workingmen's Bldg. Assoc., 60 Md. 589; Prentis *v.* Richardson, 118 Mich. 259, 76 N. W. 381; McCrickett *v.* Wilson, 50 Mich. 513, 15 N. W. 885.

defendant,[82] or, in case of joint defendants, against any one of them who is not personally liable for the debt.[83] It is error to decree a personal judgment against a married woman or direct an execution to issue generally against her property for such deficiency as may exist after the sale of mortgaged property in foreclosure proceedings.[84]

c. Amount of Judgment. The amount of the deficiency judgment is ordinarily the balance of the mortgage debt remaining unsatisfied after the proceeds of the sale have been applied, first to the costs and expenses, and then to the mortgage debt.[85] This is not affected by the fact that the property sold for less than its real value; the court is not at liberty to deduct the actual market value of the premises and then enter a decree only for the balance of the mortgage debt.[86] But if the mortgagee has released parts of the mortgaged premises without the consent of the mortgagor, he must first give the latter credit for the full value of such parts before becoming entitled to any deficiency decree.[87] To justify a judgment of this kind it is not necessary that the amount which plaintiff seeks to recover should be indorsed on the summons.[88] If a deficiency judgment is rendered for too great an amount, the error may be cured by a remittitur.[89]

d. Form and Requisites. In England[90] and in some of our states,[91] under the blended systems of law and equity, it is permissible for the court in a foreclosure suit to give personal judgment against the mortgagor, or other defendant who is personally liable, for the entire amount of the mortgage debt and also to order sale of the mortgaged property, the proceeds being applied on the judgment, and the deficiency, if any, being thus ascertained. But the more usual practice is to render a judgment not for the entire mortgage debt, but only for so much of it as may remain unsatisfied after the sale of the premises.[92] This judgment may be

82. Cook *v.* Moulton, 64 Ill. App. 419.

83. Travelers' Ins. Co. *v.* Mayo, 170 Ill. 498, 48 N. E. 917, holding that where the holder of a mortgage note files a bill to foreclose against all parties jointly and severally liable thereon, and obtains a decree of foreclosure against them, but takes a deficiency decree, after sale, against one defendant only, no disposition being made of the case as to the others, the cause of action merges in the decree and the other defendants are released. And see Shelden *v.* Erskine, 78 Mich. 627, 44 N. W. 146.

84. Adams *v.* Fry, 29 Fla. 318, 10 So. 559; Randall *v.* Bourquardez, 23 Fla. 264, 2 So. 310, 11 Am. St. Rep. 379.

85. Frank *v.* Davis, 135 N. Y. 275, 31 N. E. 1100, 17 L. R. A. 306; Evans *v.* Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323; Kasson *v.* Tousey, 96 Wis. 511, 71 N. W. 894.

Foreclosure judgment excessive.— A mortgagee will not be precluded from obtaining a judgment for deficiency on the ground that he knowingly procured too great an amount to be found due on the mortgage, when, in proceedings for the deficiency judgment, the amount in the decree is disregarded and a new accounting had. Grand Island Sav., etc., Assoc. *v.* Moore, 40 Nebr. 686, 59 N. W. 115.

Effect of costs in the action on amount of the deficiency judgment see Peet *v.* Kent, 5 N. Y. St. 134 [*affirmed* in 122 N. Y. 669, 26 N. E. 754]; East River Nat. Bank *v.* McCaffrey, 3 Redf. Surr. (N. Y.) 97; Cord *v.* Hirsch, 17 Wis. 403.

Interest.— Where a personal decree is rendered against the mortgagor for a balance remaining after a sale of the mortgaged premises, if the proceeds of the sale should not extinguish the interest accrued on the original debt, the court should see that interest is not allowed on interest. Baker *v.* Scott, 62 Ill. 86.

86. Currie *v.* Sisson, 34 N. J. Eq. 578; Snyder *v.* Blair, 33 N. J. Eq. 208. See also East Saginaw Sav. Bank *v.* Grant, 41 Mich. 101, 2 N. W. 1.

87. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

88. Orcutt *v.* Polsley, 59 Nebr. 575, 81 N. W. 616; Caldwell *v.* Peaslee, 24 Ohio Cir. Ct. 641.

89. Mosely *v.* Schoonhoven, 12 Ill. App. 113.

90. Poulett *v.* Hill, [1893] 1 Ch. 277, 62 L. J. Ch. 466, 68 L. T. Rep. N. S. 476, 2 Reports 288, 41 Wkly. Rep. 503; Farrer *v.* Lacy, 31 Ch. D. 42, 55 L. J. Ch. 149, 53 L. T. Rep. N. S. 515, 34 Wkly. Rep. 22; Hunter *v.* Myatt, 28 Ch. D. 181, 54 L. J. Ch. 615, 52 L. T. Rep. N. S. 509, 33 Wkly. Rep. 411; Gibbon *v.* Walker, 38 L. T. Rep. N. S. 217

91. Englund *v.* Lewis, 25 Cal. 337; Taggart *v.* San Antonio Ridge Ditch, etc., Co., 18 Cal. 460; Rowland *v.* Leihy, 14 Cal. 156; Rowe *v.* Table Mountain Water Co., 10 Cal. 441; Rollins *v.* Forbes, 10 Cal. 299; Block *v.* Allen, 99 Ga. 417, 27 S. E. 733; Delespine *v.* Campbell, 52 Tex. 4. See also Herd *v.* Tuohy, 133 Cal. 55, 55 Pac. 139; Simons *v.* McDonnell, 120 Mich. 621, 79 N. W. 916.

92. *Illinois.*— Shaffner *v.* Appleman, 170 Ill. 281, 48 N. E. 978; Gunning *v.* Sorg, 113 Ill. App. 332; Rooney *v.* Moulton, 60 Ill.

conditional in form; that is, it may be a judgment providing for the collection of the balance if there is a deficiency;[93] but it must order the sale of the premises, fix definitely the defendant who is liable for any unsatisfied balance, and either order him to pay the deficiency or order that plaintiff shall recover the same,[94] or, if the statute so directs, order that execution issue for such deficiency.[95]

e. Sufficiency of Pleadings and Findings to Sustain Judgment. To warrant a personal judgment for deficiency, the complaint or bill must contain allegations showing the amount actually due,[96] and also the facts fixing a personal liability upon defendant against whom such judgment is asked,[97] and must contain a prayer

App. 306; Phelan *v.* Iona Sav. Bank, 48 Ill. App. 171.

Indiana.— Lasselle *v.* Godfroy, 1 Blackf. 297.

Montana.—Creighton *v.* Hershfield, 1 Mont. 639.

Nebraska.— Clapp *v.* Maxwell, 13 Nebr. 542, 14 N. W. 653.

New York.— Smith *v.* Fisher, 87 Hun 129, 33 N. Y. Suppl. 1059, holding that in an action by a grantee to declare the deed a mortgage, for fraud of the grantor, and to foreclose it, it is within the equity jurisdiction of the court, where the premises had been sold on foreclosure of a prior mortgage, to give a money judgment for the amount that plaintiff advanced on the faith of the deed.

Ohio.— Southward *v.* Jamison, 66 Ohio St. 290, 64 N. E. 135.

Wisconsin.— Duecker *v.* Goeres, 104 Wis. 29, 80 N. W. 91. See also Boynton *v.* Sisson, 56 Wis. 401, 14 N. W. 373.

See 35 Cent. Dig. tit. "Mortgages," § 1603.

93. Baird *v.* McConkey, 20 Wis. 297.

Form of decree approved.— In Baker *v.* Scott, 62 Ill. 86, 105, the following form of decree was approved: "And it is further ordered, adjudged, and decreed that if the moneys arising from such sale [of the mortgaged premises] shall be insufficient to pay the amount so due, etc., with the interest, costs, and expenses of sale, said master shall specify the amount of such deficiency in his report of sale, and on the coming in and confirmation of the report, the defendant, Frederick Baker, who is personally liable for the payment of the debt secured by said mortgage, pay to the complainant the amount of such deficiency, with interest thereon from the date of said last mentioned report, and that said complainant have execution therefor."

Redemption as condition.— Where a complaint in foreclosure, after alleging the foreclosure of a prior mortgage, asked that, in case the mortgagor redeemed from the sale thereunder, plaintiff might have the usual decree of sale, etc., it was held that such relief, being conditioned on the exercise by defendant of his right of redemption, could not be granted. Potter *v.* Marvin, 4 Minn. 525.

94. Freedman's Sav., etc., Co. *v.* Dodge, 3 MacArthur (D. C.) 529; Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702; Springer *v.* Law, 84 Ill. App. 623; Turner *v.* Miller, 28 Kan. 44.

Fixing liability.— Where there are several defendants in the action, some of whom may be personally liable for the mortgage debt and others not, the ones so liable should be designated in the decree; and a decree for the deficiency against "defendants who are personally liable" is too indefinite and uncertain to support an execution. Mulvey *v.* Carpenter, 78 Ill. 580.

Amending judgment.— Where it appears to have been the intention of the court to order a judgment for the unsatisfied balance of the whole debt due up to the time of collection or settlement, but by mistake it provides only for the payment of the amount due at the date of the sale, the error may be corrected on motion. Packard *v.* Kinzie Ave. Heights Co., 105 Wis. 323, 81 N. W. 488.

95. Brigel *v.* Creed, 10 Ohio S. & C. Pl. Dec. 214, 8 Ohio N. P. 456; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

96. Bailey *v.* Butler, 138 Ala. 153, 35 So. 111; Robinson *v.* West, 14 B. Mon. (Ky.) 3; Ohio Cent. R. Co. *v.* Central Trust Co., 133 U. S. 83, 10 S. Ct. 235, 33 L. ed. 561.

97. *California.*— Scamman *v.* Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Blondeau *v.* Snyder, 95 Cal. 521, 31 Pac. 591; Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185.

Illinois.— Boisot *v.* Chandler, 82 Ill. App. 261; Brown *v.* Kennicott, 30 Ill. App. 89.

Kentucky.— Bush *v.* Louisville Trust Co., 73 S. W. 775, 24 Ky. L. Rep. 2182.

Michigan.— Michigan Trust Co. *v.* Lansing Lumber Co., 121 Mich. 438, 80 N. W. 281; Simons *v.* McDonnell, 120 Mich. 621, 79 N. W. 916.

Nebraska.— Patrick *v.* National Bank of Commerce, 63 Nebr. 200, 88 N. W. 183; Davenport Plow Co. *v.* Mewis, 10 Nebr. 317, 4 N. W. 1059; Morris *v.* Linton, 4 Nebr. (Unoff.) 550, 95 N. W. 11. A deficiency judgment against a purchaser of mortgaged premises is not void because the personal liability of such purchaser is not shown by the petition; but it is sufficient if the fact is disclosed by the answer of the mortgagor, who, claiming to stand in the position of a surety, demands exoneration. Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707.

Pennsylvania.— Wunderlich *v.* Sadler, 189 Pa. St. 469, 42 Atl. 109.

South Dakota.— Connor *v.* Jones, (1897) 72 N. W. 463.

Wisconsin.— Jesup *v.* City Bank, 14 Wis. 331.

See 35 Cent. Dig. tit. "Mortgages," § 1605.

or demand for such a judgment,[98] although it seems that the prayer for general relief will be sufficient to sustain it.[99]

f. Time For Rendition.[1] According to the rule prevailing in most of the states a deficiency judgment cannot be rendered in a foreclosure suit until after the sale has taken place and a report thereof has been filed, showing both the fact and the amount of the deficiency.[2] But in some a foreclosure decree may contain a conditional or contingent provision to cover a possible deficiency, that is, an order that, if the proceeds of sale should not be sufficient to pay the mortgage debt, with interest and costs, then plaintiff may have execution for the unsatisfied balance.[3] But in no case is it permissible to render a deficiency judgment for any portion of the mortgage debt which is not yet due, when the mortgage does not contain any provision for accelerating its maturity.[4]

g. Construction and Operation. A judgment which merely finds the amount due, orders its payment by the defendant personally liable, and provides that, in default of such payment, the land shall be sold and the proceeds applied in satisfaction of such amount, is not a personal judgment such as to support an action

98. Scamman *v.* Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Dudley *v.* Third Order of St. Francis Cong., 65 Hun (N. Y.) 21, 19 N. Y. Suppl. 605; Giddings *v.* Barney, 31 Ohio St. 80; Olinger *v.* Liddle, 55 Wis. 621, 13 N. W. 703.

In Kansas a very liberal rule is applied, and it appears that plaintiff is entitled to a deficiency judgment, if the allegations and proofs will sustain it, although he has not asked for it. Conklin *v.* Stackfieth, 65 Kan. 310, 69 Pac. 194; Schuler *v.* Fowler, 63 Kan. 98, 64 Pac. 1035; Foote *v.* Sprague, 13 Kan. 155.

99. *Nebraska.*— Smith *v.* Allen, (1904) 100 N. W. 129; Grand Island Sav., etc., Assoc. *v.* Moore, 40 Nebr. 686, 59 N. W. 115.

New York.— Watkins *v.* Vrooman, 51 Hun 175, 5 N. Y. Suppl. 172 [*reversed* on other grounds in 123 N. Y. 211, 25 N. E. 322].

Tennessee.— Nolen *v.* Woods, 12 Lea 615.

Washington.— State *v.* King County Super. Ct., 34 Wash. 643, 76 Pac. 282.

United States.— Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706.

See 35 Cent. Dig. tit. "Mortgages," § 1605.

1. In Wisconsin under Laws (1862), c. 234, § 3*a*, judgment for a deficiency on foreclosure cannot be rendered in vacation. Burdick *v.* Burdick, 20 Wis. 348.

2. *Alabama.*— Hastings *v.* Alabama State Land Co., 124 Ala. 608, 26 So. 881.

California.— Hunt *v.* Dohrs, 39 Cal. 304; Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116. *Compare* Cormerais *v.* Genella, 22 Cal. 116. The grantee of a mortgagor having assumed the mortgage, and having defaulted, and a deficiency judgment having been entered against the mortgagor, the latter is not entitled to a judgment against his grantee for the amount of the deficiency until he has paid the judgment. O'Neal *v.* Hart, 116 Cal. 69, 47 Pac. 926.

Indiana.— Thomas *v.* Simmons, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381.

Michigan.— Shelden *v.* Erskine, 78 Mich. 627, 44 N. W. 146; Vaughan *v.* Black, 63 Mich. 215, 29 N. W. 523. But see Field *v.* Howry, 132 Mich. 687, 94 N. W. 213, holding that it is competent, in a proper case, to determine the question of personal liability for a deficiency by the original foreclosure decree, leaving only the amount of the deficiency to be determined in subsequent proceedings.

Mississippi.— Weir *v.* Field, 67 Miss. 292, 7 So. 355.

Nebraska.— Parratt *v.* Hartsuff, (1906) 106 N. W. 966; Brown *v.* Johnson, 58 Nebr. 222, 78 N. W. 515; Devries *v.* Squire, 55 Nebr. 438, 76 N. W. 16; Clapp *v.* Maxwell, 13 Nebr. 542, 14 N. W. 653; Sawyer *v.* Bender, 4 Nebr. (Unoff.) 304, 93 N. W. 980; Carnahan *v.* Brewster, 2 Nebr. (Unoff.) 366, 96 N. W. 590; Crary *v.* Buck, 1 Nebr. (Unoff.) 596, 95 N. W. 839. And see Pochin *v.* Conley, (1905) 104 N. W. 878.

South Carolina.— Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636; Hull *v.* Young, 29 S. C. 64, 6 S. E. 938.

Wisconsin.— Welp *v.* Gunther, 48 Wis. 543, 4 N. W. 647; Tormey *v.* Gerhart, 41 Wis. 54.

See 35 Cent. Dig. tit. "Mortgages," § 1606.

3. Ball *v.* Marske, 202 Ill. 31, 66 N. E. 845; Eggleston *v.* Morrison, 185 Ill. 577, 57 N. E. 775; Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Cook *v.* Moulton, 64 Ill. App. 429; Grimmell *v.* Warner, 21 Iowa 11. But *compare* French *v.* French, 107 N. Y. App. Div. 107, 94 N. Y. Suppl. 1026; Strong *v.* Eighme, 41 How. Pr. (N. Y.) 117; Cobb *v.* Thornton, 8 How. Pr. (N. Y.) 66 (holding that a judgment for deficiency, if any shall arise on a sale, cannot be docketed till after the sale; for the test of the right to docket a judgment is the right to issue execution upon it immediately); McCarthy *v.* Graham, 8 Paige (N. Y.) 480; Shumway *v.* Orchard, 12 Wash. 104, 40 Pac. 634.

See 35 Cent. Dig. tit. "Mortgages," § 1606.

4. Tobin *v.* Smith, 1 Ohio S. & C. Pl. Dec. 675, 1 Ohio N. P. 75; Packard *v.* Kinzie Ave. Heights Co., 96 Wis. 114, 70 N. W. 1066; Danforth *v.* Coleman, 23 Wis. 528; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 65 Fed. 717, 13 C. C. A. 87.

or a creditor's bill or authorize a general execution;[5] but it is otherwise where it provides for the contingency of a deficiency arising, by directing how it shall be ascertained, who shall be held liable for it, and how it shall be collected.[6] Such a deficiency judgment depends on the sale and its result, so that if the sale is vacated the judgment must also be set aside;[7] but otherwise it is in the nature of an ordinary money judgment, and may constitute a cause of action in another state,[8] and does not, until paid, affect the mortgagee's right to receive the money awarded on the condemnation of the mortgaged premises in eminent domain proceedings,[9] and is barred by the statute of limitations applicable to ordinary judgments.[10]

h. Lien of Judgment. A decree merely ordering foreclosure of a mortgage, without providing for the deficiency, does not create a lien on the real property of defendant generally;[11] and if a decree specifically providing for the deficiency and ordering its payment or awarding execution for its collection binds other real estate of the mortgagor as a lien, which has been denied,[12] it can attach to such property as a lien only after the sale has been made and the deficiency ascertained and fixed.[13] A judgment docketed for a deficiency after the sale of the mortgaged premises under a judgment of foreclosure is not a lien upon the premises sold, if they are purchased by any person other than the mortgagee.[14]

5. *California.*— Ridgley *v.* Abbott Quicksilver Min. Co., (1905) 79 Pac. 833; Tolman *v.* Smith, 85 Cal. 280, 24 Pac. 743.

Illinois.— Cotes *v.* Bennett, 183 Ill. 82, 55 N. E. 661; Crawford *v.* Nimmons, 180 Ill. 143, 54 N. E. 209; Glover *v.* Benjamin, 73 Ill. 42; Gochenour *v.* Mowry, 33 Ill. 331; Kronenberger *v.* Heinemann, 104 Ill. App. 156; Fountain *v.* Walther, 66 Ill. App. 529; Dates *v.* Winstanley, 53 Ill. App. 623; Parks *v.* Cadwallader, 53 Ill. App. 236; Phelan *v.* Iona Sav. Bank, 48 Ill. App. 171; Sprague *v.* Beamer, 45 Ill. App. 17.

Indiana.— Buckinghouse *v.* Gregg, 19 Ind. 401.

Nebraska.— Alling *v.* Nelson, 55 Nebr. 161, 75 N. W. 581.

Ohio.— Conn *v.* Rhodes, 26 Ohio St. 644.

South Carolina.— Gray *v.* Toomer, 5 Rich. 261.

Wisconsin.— Bean *v.* Whitcomb, 13 Wis. 431.

See 35 Cent. Dig. tit. "Mortgages," § 1607.

6. *Indiana.*— Marshall *v.* Stewart, 65 Ind. 243.

Iowa.— Cooper *v.* Miller, 10 Iowa 532.

Minnesota.— Thompson *v.* Bickford, 19 Minn. 17.

New Jersey.— Stoddard *v.* Van Bussum, 57 N. J. Eq. 34, 40 Atl. 29.

South Carolina.— Patterson *v.* Baxley, 33 S. C. 354, 11 S. E. 1065.

Wisconsin.— See Bliss *v.* Weil, 14 Wis. 35, 80 Am. Dec. 766.

See 35 Cent. Dig. tit. "Mortgages," § 1607.

Designating defendant liable.— Where a bill to foreclose made all encumbrancers defendants, and asked for a money judgment for the deficiency, if any, against the mortgagor alone, and a sale was ordered and "the defendant" was ordered to pay the deficiency, it was held that this meant the mortgagor, and the other defendants could not complain of the judgment, even if erroneous. Baasen *v.* Eilers, 11 Wis. 277.

7. Bostwick *v.* Van Vleck, 106 Wis. 387, 82 N. W. 302.

8. Meyer *v.* Brooks, 29 Oreg. 203, 44 Pac. 281, 54 Am. St. Rep. 790. But see Smith *v.* Moore, 53 Mo. App. 525, holding that where an Iowa mortgage is foreclosed in that state, and under its laws a judgment is entered in the equitable suit for the deficiency that may arise from the sale, such judgment cannot, without a sale, be enforced in Missouri as a general judgment for the whole mortgage debt, although it appears that the mortgaged property has been exhausted under a prior mortgage.

9. Rodman *v.* Buffalo, 15 N. Y. St. 583.

10. Stoddard *v.* Van Bussum, 57 N. J. Eq. 34, 40 Atl. 29.

11. *Georgia.*— Hamberger *v.* Easter, 57 Ga. 71.

Illinois.— Kirby *v.* Runals, 140 Ill. 289, 29 N. E. 697; Karnes *v.* Harper, 48 Ill. 527.

Iowa.— Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373.

South Carolina.— Gray *v.* Toomer, 5 Rich. 261.

Wisconsin.— Huntington *v.* Meyer, 92 Wis. 557, 66 N. W. 500.

12. Myers *v.* Hewitt, 16 Ohio 449.

13. Winston *v.* Browning, 61 Ala. 80; Hershey *v.* Dennis, 53 Cal. 77; Hibberd *v.* Smith, 50 Cal. 511; Culver *v.* Rogers, 28 Cal. 520; Chapin *v.* Broder, 16 Cal. 403; Mutual L. Ins. Co. *v.* Downing, 44 N. J. Eq. 604, 17 Atl. 1104; New York Mut. L. Ins. Co. *v.* Hopper, 43 N. J. Eq. 387, 12 Atl. 528; Mutual L. Ins. Co. *v.* Southard, 25 N. J. Eq. 337; Bell *v.* Gilmore, 25 N. J. Eq. 104. See also Roll *v.* Rea, 57 N. J. L. 647, 32 Atl. 214. *Contra*, Fletcher *v.* Holmes, 25 Ind. 458; Blum *v.* Keyser, 8 Tex. Civ. App. 675, 28 S. W. 561; Fuller *v.* Hull, 19 Wash. 400, 53 Pac. 666.

14. Black *v.* Gerichten, 58 Cal. 56 [*distinguishing* Frink *v.* Murphy, 21 Cal. 108, 81 Am. Dec. 149].

3. Action For Deficiency — a. Right of Action. Where the proceeds of a foreclosure sale are not sufficient to satisfy the mortgage debt, and plaintiff did not recover a deficiency judgment in the foreclosure suit, or was prevented from doing so by want of authority in the court to grant it, want of jurisdiction over defendant, or other cause, he may thereafter maintain an action at law against the person liable for such deficiency,[15] basing his action either on the note or bond secured by the mortgage,[16] or on the foreclosure judgment,[17] or simply on the indebtedness arising from the foreclosure and the failure of its proceeds to extinguish the original debt or claim.[18]

b. Leave to Sue. By statute in several states an action to recover a deficiency cannot be maintained without first obtaining leave to sue from the court in which the foreclosure proceedings were had.[19] Notice must be given of an application

15. *California.*—Allenberg *v.* Zellerbach, 65 Cal. 26, 2 Pac. 726. See also Blumberg *v.* Birch, 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67.

Connecticut.— Post *v.* Tradesmen's Bank, 28 Conn. 420.

Illinois.— Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975.

Michigan.— National City Bank *v.* Torrent, 130 Mich. 259, 89 N. W. 938; Shields *v.* Riopelle, 63 Mich. 458, 30 N. W. 90; Lawrence *v.* Fellows, Walk. 468.

Minnesota.— Washington L. Ins. Co. *v.* Marshall, 56 Minn. 250, 57 N. W. 658.

Mississippi.— Stark *v.* Mercer, 3 How. 377.

Missouri.— Scott *v.* Jackson, 2 Mo. 104.

New Jersey.— New Brunswick Relief Corp. *v.* Eden, (Ch. 1900) 46 Atl. 717; Princeton Sav. Bank *v.* Martin, 53 N. J. Eq. 463, 33 Atl. 45; Allen *v.* Allen, 34 N. J. Eq. 493.

New York.— New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Siewert *v.* Hamel, 33 Hun 44; Dunkley *v.* Van Buren, 3 Johns. Ch. 330. And see Rowley *v.* Nellis, 87 N. Y. App. Div. 621, 84 N. Y. Suppl. 1143.

Ohio.— Avery *v.* Vansickle, 35 Ohio St. 270.

Utah.— See Donaldson *v.* Grant, 15 Utah 231, 49 Pac. 779.

United States.— Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456.

Canada.— If the mortgagee becomes the purchaser at the foreclosure sale, and remains in possession, he may sue the mortgagor for the balance of the debt remaining unsatisfied by the foreclosure. But this has the effect of opening the foreclosure and he must give the mortgagor a further opportunity to redeem. If this is impossible, by reason of the fact that the mortgagee has, since the sale, disposed of the property to a stranger, the action must fail. Ryan *v.* Caldwell, 32 Nova Scotia 458; *Re* Chandler, 17 Nova Scotia 78; Almon *v.* Busch, Ritch. Eq. Cas. (Nova Scotia) 362. *Compare* Kenny *v.* Chisholm, 19 Nova Scotia 497.

See 35 Cent. Dig. tit. "Mortgages," § 1609.

In Idaho an action to recover a balance due after the foreclosure of a mortgage cannot be maintained. Winters *v.* Hub Min. Co., 57 Fed. 287.

The statute of New Jersey, which provides that no decree for a deficiency shall be made in a foreclosure suit, but which leaves to the mortgagee the right to sue for and recover the deficiency, if any shall be found to exist, in a subsequent proceeding, is not unconstitutional even in its application to proceedings on mortgages made before its enactment. Affecting the remedy only, it cannot be said to impair the obligation of contracts. Toffey *v.* Atcheson, 42 N. J. Eq. 182, 6 Atl. 885.

16. *Florida.*— Webber *v.* Blanc, 39 Fla. 224, 22 So. 655.

Indiana.— Stevens *v.* Dufour, 1 Blackf. 387.

Louisiana.— See Littell *v.* Sylvestre, 28 La. Ann. 621.

Maine.— Porter *v.* Pillsbury, 36 Me. 278.

New York.— Lansing *v.* Goelet, 9 Cow. 346; Parsons *v.* Mumford, 3 Barb. Ch. 152.

Texas.— Ward *v.* Green, 88 Tex. 177, 30 S. W. 864.

Action against guarantor.— An action may be maintained against the person who guaranteed the payment of the mortgage note or debt, to recover the deficiency arising on foreclosure sale. Collins' Petition, 6 Abb. N. Cas. (N. Y.) 227. Such an action, being on the contract of guaranty, and not on the mortgage debt, is not within a statute prohibiting a personal action for a deficiency until after foreclosure of the mortgage. Adams *v.* Wallace, 119 Cal. 67, 51 Pac. 14.

17. Hanover F. Ins. Co. *v.* Tomlinson, 3 Hun (N. Y.) 630; Doyle *v.* West, 60 Ohio St. 438, 54 N. E. 469. *Compare* Lipperd *v.* Edwards, 39 Ind. 165.

18. Blumberg *v.* Birch, 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67; Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535.

19. See the statutes of the several states. And see Culver *v.* Detroit Super. Judge, 57 Mich. 25, 23 N. W. 469; Innes *v.* Stewart, 36 Mich. 285; Waugh *v.* Newell, 62 Nebr. 438, 87 N. W. 143; Meehan *v.* Fairfield First Nat. Bank, 44 Nebr. 213, 62 N. W. 490; Scofield *v.* Doscher, 72 N. Y. 491; Comstock *v.* Drohan, 71 N. Y. 9; Robert *v.* Kidansky, 111 N. Y. App. Div. 475, 97 N. Y. Suppl. 913; Durham *v.* Chapin, 30 N. Y. App. Div. 148, 52 N. Y. Suppl. 188; U. S. Life Ins. Co. *v.* Gage, 13 N. Y. Suppl. 837, 26 Abb. N. Cas. 16; U. S. Life Ins. Co. *v.* Gage, 3 N. Y. Suppl. 398.

Action in probate court.— The rule that proceedings at law to collect a deficiency

for such leave to sue,[20] and the court is not absolutely bound to grant it, but may refuse, in the exercise of a sound discretion.[21] If the action is begun without obtaining leave, the court may grant leave *nunc pro tunc*, or authorize plaintiff to "bring and continue" the suit.[22] Such a statute does not apply where the action for deficiency is brought in a different state from that in which the foreclosure was had.[23]

c. Limitations and Laches. A statute limiting the time within which an action for a deficiency must be brought[24] begins to run from the date of the foreclosure decree.[25] Such a statute, in force in the state where the mortgaged premises lie and where the foreclosure is had, is a part of the *lex loci contractus*, and therefore may be pleaded in bar of an action for the deficiency brought in another state, where the mortgagor resides.[26] Unreasonable delay in bringing such a suit may also defeat plaintiff's right to recover, but he is not chargeable with laches because he takes all the time which the statute allows him.[27]

d. Defenses. In proceedings to recover a deficiency, the validity of the decree of foreclosure cannot be attacked, unless on the ground of fraud,[28] nor can defendant set up any defenses which existed when the foreclosure suit was tried and should have been interposed in that action.[29] It is not an available defense that the price for which the property sold on foreclosure was less than its real value, unless fraud in making the sale is charged.[30] But defendant may plead that the action is in violation of an agreement or promise that he should not be held liable for a deficiency,[31] or that the mortgagee released property subject to the satisfaction of the mortgage debt;[32] or he may set up a counter-claim for damages from waste committed on the mortgaged premises while in the mortgagee's posses-

cannot be taken without leave of the court in which the foreclosure was had does not apply to an action begun by leave of the probate court upon the bond of the mortgagor's residuary legatee. Culver *v.* Detroit Super. Judge, 57 Mich. 25, 23 N. W. 469.

Action on deficiency judgment.— This rule does not apply to an action on a judgment already recovered for the deficiency, as that becomes a new obligation on being docketed. Schultz *v.* Mead, 8 N. Y. Suppl. 663.

20. Matter of Marshall, 53 N. Y. App. Div. 136, 65 N. Y. Suppl. 760.

21. Equitable L. Ins. Soc. *v.* Stevens, 63 N. Y. 341.

22. Earl *v.* David, 20 Hun (N. Y.) 527 [*affirmed* in 86 N. Y. 634]. But see U. S. Life Ins. Co. *v.* Poillon, 3 Silv. Sup. (N. Y.) 309, 6 N. Y. Suppl. 370; Walton *v.* Grand Belt Copper Co., 11 N. Y. Suppl. 110, both cases holding that this practice is not in the orderly administration of justice and should not be encouraged.

23. Williams *v.* Follett, 17 Colo. 51, 28 Pac. 330; New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; New York Mut. L. Ins. Co. *v.* Smith, 54 N. Y. Super. Ct. 400.

24. See the statutes of the different states. And see Hinsle *v.* Champion, 42 N. J. Eq. 610, 8 Atl. 656; Stumpf *v.* Hallahan, 101 N. Y. App. Div. 383, 91 N. Y. Suppl. 1062 [*affirmed* in 185 N. Y. 550, 77 N. E. 1196].

25. Smith *v.* Pegg, 111 Mich. 232, 69 N. W. 488; Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477. And see Wheeler *v.* Ellis, 56 N. J. L. 28, 27 Atl. 911. *Compare* Bache *v.* Doscher, 41 N. Y. Super. Ct. 150.

26. Stumpf *v.* Hallahan, 101 N. Y. App. Div. 383, 91 N. Y. Suppl. 1062; Sea Grove Bldg., etc., Assoc. *v.* Stockton, 148 Pa. St. 146, 23 Atl. 1063.

27. Wallace *v.* Field, 56 Mich. 3, 22 N. W. 91.

28. Corning *v.* Burton, 102 Mich. 86, 62 N. W. 1040; Carpenter *v.* Meachem, 111 Wis. 60, 86 N. W. 552.

29. Stover *v.* Tompkins, 34 Nebr. 465, 51 N. W. 1040.

30. *Connecticut.*— Belmont *v.* Cornen, 48 Conn. 338.

Indiana.— Markel *v.* Evans, 47 Ind. 326.

Louisiana.— Reichard *v.* Michinard, 33 La. Ann. 380.

Missouri.— Hicks *v.* Beedle, 98 Mo. App. 223, 71 S. W. 1074.

New York.— Merchants' Ins. Co. *v.* Hinman, 34 Barb. 410. But *compare* Laird *v.* Wittkowski, 67 N. Y. App. Div. 476, 73 N. Y. Suppl. 1115.

Pennsylvania.— Smith *v.* Bunting, 86 Pa. St. 116.

South Dakota.— Hollister *v.* Buchanan, 11 S. D. 280, 77 N. W. 103.

Vermont.— Sabin *v.* Stickney, 9 Vt. 155.

Washington.— Howard *v.* McNaught, 9 Wash. 355, 37 Pac. 455, 43 Am. St. Rep. 837.

See 35 Cent. Dig. tit. "Mortgages," § 1614.

But *compare* Boutelle *v.* Carpenter, 182 Mass. 417, 65 N. E. 799.

31. Smith *v.* Smith, 46 Mich. 301, 9 N. W. 425; Matter of Marshall, 53 N. Y. App. Div. 136, 65 N. Y. Suppl. 760. See also McLaughlin *v.* Durr, 76 N. Y. App. Div. 75, 78 N. Y. Suppl. 798.

32. Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789.

sion.[33] On application for an execution to collect the deficiency, if defendant contests the right to execution, he should file an answer under oath setting forth the grounds of his objection.[34]

e. Parties to Action. In case of joint mortgagors, all should be made defendants to an action to enforce personal liability for the deficiency.[35] Where the action is against a purchaser of the premises, who assumed the mortgage, the original mortgagor is not a necessary party.[36]

4. Execution For Deficiency — a. In General. In some states the method of collecting the deficiency after a foreclosure sale is by the issue of a general execution, as a part of the foreclosure proceeding, and not in an independent action.[37] Such an execution cannot issue pending an appeal with supersedeas bond,[38] nor where the mortgage was given by trustees, and it is sought to collect the deficiency out of other trust property in their hands not covered by the mortgage;[39] and its issue may be enjoined or restrained by the court on a charge of fraud or irregularity in the sale.[40]

b. Application to Court. To obtain such an execution plaintiff must make a special application therefor to the court,[41] except where the foreclosure decree itself authorized the issue of execution without further proceedings,[42] in the form of a sworn petition briefly setting forth the facts relied on,[43] and due notice must be given to the party sought to be held liable.[44] The latter may resist the application on grounds which amount to a satisfaction or discharge of the foreclosure decree, although he cannot set up defenses inconsistent with the regularity and

33. Smith *v.* Fife, 2 Nebr. 10; Staunchfield *v.* Jeutter, 4 Nebr. (Unoff.) 847, 96 N. W. 642.

Waste committed by a grantee of the premises over whom the mortgagee had no control or responsibility cannot be set up as a counter-claim. Connecticut Mut. L. Ins. Co. *v.* Mayer, 8 Mo. App. 18; Van Riper *v.* Addy, 6 N. J. L. J. 370.

34. Ransom *v.* Sutherland, 46 Mich. 489, 9 N. W. 530.

35. Dorsey *v.* Manning, 15 App. Cas. (D. C.) 391; Bowie *v.* Munroe, 82 Md. 642, 36 Atl. 11; Princeton Sav. Bank *v.* Martin, 54 N. J. Eq. 435, 34 Atl. 1068.

Purchasers of different lots.— Where a mortgagee holding both a first and a second mortgage on the same premises assigned the second mortgage, and thereafter the premises were subdivided and sold to different purchasers, the deed to each lot making the purchaser thereof liable for his proportionate share of the amount of both mortgages, it is error to determine the liability of the various purchasers to the holder of the second mortgage, in an action in which the holder of the first mortgage is not made a party. Rudolf *v.* Burton, 85 N. Y. App. Div. 312, 82 N. Y. Suppl. 592.

36. Giesy *v.* Gregory, 15 App. Cas. (D. C.) 49; Pruden *v.* Williams, 26 N. J. Eq. 210; Ross *v.* Hanna, 2 Wkly. Notes Cas. (Pa.) 222.

Assumption clause inserted by mistake.— Where the action for deficiency is against a grantee of the mortgaged premises, a defense that the assumption clause was inserted in his deed by mistake, and asking for its reformation, should be made by cross bill, to which the grantor, or his personal representatives, as well as the mortgagee and all other parties in interest should be made parties. Green *v.* Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

37. *California.*— McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Nebraska.— Treitschke *v.* Western Grain Co., 10 Nebr. 358, 6 N. W. 427.

Nevada.— Weil *v.* Howard, 4 Nev. 384.

South Carolina.— Freer *v.* Tupper, 21 S. C. 75.

United States.— See Orchard *v.* Hughes, 1 Wall. 73, 17 L. ed. 560.

See 35 Cent. Dig. tit. "Mortgages," § 1618.

Compare McCall *v.* Rogers, 77 Ala. 349.

38. Kountze *v.* Erck, 45 Nebr. 288, 63 N. W. 804.

39. Zehnbar *v.* Spillman, 25 Fla. 591, 6 So. 214.

40. Mead *v.* Spink, 1 N. Y. Suppl. 390; Fairfax *v.* Hopkins, 8 Fed. Cas. No. 4,614, 2 Cranch C. C. 134.

A motion to restrain plaintiff in foreclosure from collecting a deficiency on the judgment after application of the proceeds of sale, made before a valid confirmation of the sale, will be dismissed as being premature. Kopmeier *v.* Larkin, 47 Wis. 598, 3 N. W. 373.

41. Presley *v.* McLean, 80 Ala. 309; Gies *v.* Green, 42 Mich. 107, 3 N. W. 283; Clapp *v.* Maxwell, 13 Nebr. 542, 14 N. W. 653.

42. Hawley *v.* Whalen, 64 Hun (N. Y.) 550, 19 N. Y. Suppl. 521; Moore *v.* Shaw, 15 Hun (N. Y.) 428; Freer *v.* Tupper, 21 S. C. 75.

43. Ransom *v.* Sutherland, 46 Mich. 489, 9 N. W. 530.

44. McCrickett *v.* Wilson, 50 Mich. 513, 15 N. W. 885; Ransom *v.* Sutherland, 46 Mich. 489, 9 N. W. 530. But *compare* White *v.* Zust, 28 N. J. Eq. 107.

validity of the decree,[45] and if he alleges a discharge of the decree, he must assume the burden of proving the fact.[46] A simple judgment of foreclosure, containing no provision as to a deficiency, may be enforced after the death of the mortgagor without an application to revive.[47]

c. Time For Issuing Execution. An execution for the deficiency cannot issue until the report of the sale showing the amount of the deficiency is filed and confirmed;[48] and if a statute limits the time within which such execution may be taken out,[49] it begins to run from the date of docketing a judgment or order for the payment of the deficiency.[50]

J. Distribution of Proceeds of Foreclosure Sale — 1. Disposition of Proceeds — a. Persons Entitled to Proceeds. The rule for the distribution of the proceeds of a foreclosure sale, in cases not complicated by conflicting rights or equities, is that the costs and expenses of the proceeding and sale are first to be paid, together with any delinquent taxes on the property,[51] then the mortgagee is to receive an amount which will fully satisfy his debt and interest,[52] and the surplus, if any, belongs to the mortgagor or to those who may have succeeded to his rights, unless taken from him by a creditor having a lien.[53] In case of joint mortgagees, they may or may not share equally in that portion of the fund applicable to the satisfaction of the mortgage debt, their relative rights being adjusted by the court.[54] Where there are various or conflicting liens on the property, their priority and order of payment will be determined by the decree of foreclosure or in subsequent proceedings for distribution.[55] Rents and profits collected by a receiver pending the foreclosure proceedings take the same course and are subject to the same rule as the proceeds of the sale, so far as applies to the satisfaction of the claims of the foreclosing mortgagee,[56] and the same is true of a deposit of money made by the mortgagor to secure a postponement of the foreclosure sale.[57] One claiming adversely to a mortgage cannot seek to share in the fund produced by the sale of the mortgaged property under foreclosure, but must

45. Haldane *v.* Sweet, 58 Mich. 429, 25 N. W. 383; Wallace *v.* Field, 56 Mich. 3, 22 N. W. 91.

46. Ransom *v.* Sutherland, 46 Mich. 489, 9 N. W. 530.

47. Hays *v.* Thomae, 56 N. Y. 521.

48. Rochester Bank *v.* Emerson, 10 Paige (N. Y.) 115; Russell *v.* Hank, 9 Utah 309, 34 Pac. 245.

49. See the statutes of the different states. And see Quinnin *v.* Quinnin, 144 Mich. 232, 107 N. W. 906.

50. Kupfer *v.* Frank, 30 Hun (N. Y.) 74.

In California the statute begins to run from the date of the judgment of foreclosure, not from the date when the deficiency was docketed. Bowers *v.* Crary, 30 Cal. 621.

51. See *infra*, XXI, K, 2, 4. And see Wayne International Bldg., etc., Assoc. *v.* Moats, 149 Ind. 123, 48 N. E. 793.

52. See Mellen *v.* Wallach, 112 U. S. 41, 5 S. Ct. 15, 28 L. ed. 633.

Joint mortgagor as purchaser.—Where owners of property execute their solidary note, secured by mortgage, and one of them pays his half of the debt, and thereafter, on foreclosure, purchases the property, and one half the bid pays the entire debt, the proportionate part of the bid representing his half of the debt should be returned to him; creditors of the other mortgagor have no claim thereon. Stubbs *v.* Lee, 105 La. 642, 30 So. 169.

53. See *infra*, XXI, J, 2, a.

Effect of creditor's refusal to accept mortgage bonds.— Where one sold lands to a corporation and was to receive bonds secured by a mortgage as part consideration therefor, but refused to accept the bonds because of outstanding judgments, he acquired no lien which would entitle him to share in the proceeds of a sale under the mortgage. Ahl's Appeal, 79 Pa. St. 168.

54. See Stokes *v.* Prance, [1898] 1 Ch. 212, 67 L. J. Ch. 69, 77 L. T. Rep. N. S. 595, 46 Wkly. Rep. 183.

55. Craw *v.* Abrams, 68 Nebr. 546, 94 N. W. 639, 97 N. W. 296; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136; Baglioni *v.* Cavalli, 83 L. T. Rep. N. S. 500, 49 Wkly. Rep. 236.

56. Weis *v.* Neel, (Ark. 1890) 14 S. W. 1007; Windsor *v.* Evans, 72 Iowa 692, 34 N. W. 481; Edie *v.* Applegate, 14 Iowa 273; Meigs *v.* Rinaldo, 8 Daly (N. Y.) 295; Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

Where mortgagee becomes purchaser.— Where a receiver is appointed in a foreclosure suit, and the mortgagee purchases the premises at the foreclosure sale for the full amount of his debt and costs, the rents and profits of the property in the hands of the receiver at the time of the sale belong to the mortgagor, and not to the mortgagee. Pacific Mut. L. Ins. Co. *v.* Beck, (Cal. 1893) 35 Pac. 169.

57. Dodd *v.* Fisher, 57 N. J. L. 407, 31 Atl. 392.

assert and establish his adverse title by an action of ejectment against the purchaser.[58]

b. Rights of Foreclosing Mortgagee as Against Other Creditors. Although the mortgagee effecting the foreclosure may be compelled to yield the proceeds of sale for the satisfaction of a lien or encumbrance prior to his own,[59] yet as to all other creditors he occupies a position of superiority exactly corresponding to the strength of his position as mortgagee, his lien being simply transferred from the land to the proceeds of the sale;[60] and hence he cannot be displaced unless he has voluntarily agreed to a disposition of such proceeds other than that which the law would award him;[61] unless a defect in the execution of his mortgage, or the failure to record it, may have the effect of postponing his claim to that of subsequent judgments or other liens;[62] or unless a junior claimant has acquired a prior equity by the exercise of superior diligence,[63] or can present equitable grounds for a marshaling of the securities covered by the various liens, so as to protect him against the absorption of his sole security by the foreclosing mortgagee.[64]

c. Division Between Several Claims. Where equal and concurrent bonds or other claims are secured by the mortgage which is foreclosed, all the creditors are equally entitled to share in the proceeds,[65] in the absence of an agreement to the contrary or of any equities which should give one a priority over the others.[66]

58. Housekeeper's Appeal, 49 Pa. St. 141.

59. Hawkins *v.* Harlan, 68 Cal. 236, 9 Pac. 108. And see *infra*, XXI, J, 1, d.

60. *Louisiana.*— New Orleans Canal, etc., Co. *v.* Leeds, 49 La. Ann. 123, 21 So. 168; Lee *v.* Cummings, 27 La. Ann. 529.

Michigan.— Burrows *v.* Leech, 116 Mich. 32, 74 N. W. 296; Michigan Trust Co. *v.* Grand Rapids Democrat, 113 Mich. 615, 71 N. W. 1102, 67 Am. St. Rep. 486; Cicotte *v.* Stebbins, 49 Mich. 631, 14 N. W. 666.

New Jersey.— Manning *v.* Brown, 48 N. J. Eq. 309, 23 Atl. 589.

New York.— People *v.* Bacon, 99 N. Y. 275, 2 N. E. 4. And see Wichman *v.* Aschpurwis, 55 N. Y. Super. Ct. 218.

Pennsylvania.— Selden's Appeal, 74 Pa. St. 323; Sheaff's Appeal, 55 Pa. St. 403; West Branch Bank *v.* Chester, 11 Pa. St. 282, 51 Am. Dec. 547; Chester City *v.* Sharpless, 8 Pa. Dist. 107.

Effect of resale where mortgagee purchaser.— The fact that a mortgagee, after bidding in the property at the foreclosure sale, fails to comply with his bid and allows the property to be resold for a less sum, does not affect the lien of the mortgage so as to justify a distribution of the sum so realized to subsequent lien-holders. Smith *v.* Wilson, 152 Pa. St. 552, 25 Atl. 601 [*distinguishing* Tindle's Appeal, 77 Pa. St. 201; Wright's Appeal, 25 Pa. St. 373].

The claim of a creditor for money loaned to pay interest on a prior mortgage debt is inferior in equity to the lien of the prior mortgage. Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

A judgment creditor of both mortgagor and mortgagee has no right to intervene and ask to have his judgment paid out of the fund awarded to the mortgagee by the decree; for his judgment is no lien on the mortgagee's interest, and so far as the mortgagor is concerned, it binds only his equity of redemption. Sumwalt *v.* Tucker, 34 Md. 89. And see Wylie *v.* Lyle, 7 S. C. 202.

61. See Byars *v.* Bancroft, 22 Ga. 34; Graugnard *v.* Forsyth, 44 La. Ann. 327, 10 So. 799; Perrin *v.* Kellogg, 38 Mich. 720.

62. Dyson *v.* Simmons, 48 Md. 207; Pannell *v.* Farmers' Bank, 7 Harr. & J. (Md.) 202. And see Van Meter *v.* Van Meter, 29 S. W. 624, 16 Ky. L. Rep. 731; Dodge *v.* Stanhope, 55 Md. 113.

63. Washington L. Ins. Co. *v.* Fleischauer, 10 Hun (N. Y.) 117, junior mortgagee obtaining appointment of receiver to collect rents and profits.

64. *Alabama.*— Marlowe *v.* Benagh, 60 Ala. 323.

Maryland.— Hamilton *v.* Schwehr, 34 Md. 107.

New Jersey.— Gifford *v.* McGuinness, 63 N. J. Eq. 834, 53 Atl. 87, 92 Am. St. Rep. 686.

Ohio.— Black *v.* Kuhlman, 30 Ohio St. 196.

Pennsylvania.— Bertolet's Estate, 1 Woodw. 8.

65. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; Bienvenu's Succession, 106 La. 595, 31 So. 193.

66. See *infra*, XXI, J, 1, f.

Advancements to pay interest on prior mortgage.— Where one of three creditors secured by a second mortgage advances money to pay the interest on the first mortgage, he is entitled to a preference, to that extent, over his co-mortgagees, in the proceeds of sale remaining after the satisfaction of the first mortgage. Noeker *v.* Howey, 119 Mich. 626, 78 N. W. 669.

Joint mortgagor acquiring an interest in mortgage debt.— One of two joint mortgagors in a mortgage for eight thousand dollars, who sells land to the mortgagee and takes in payment an assignment of an interest in the mortgage bond to the extent of four thousand

But where the mortgages or judgments claiming participation in the fund are of unequal rank, they are to be satisfied in the order of their relative priority, their respective liens attaching to the proceeds of sale in the same order in which they bound the land.[67] But this rule may be changed by the stipulation or agreement of the parties in interest.[68]

d. Prior Liens and Encumbrances. On foreclosure of a junior mortgage, if a senior encumbrancer is not made a party and no provision is made for him in the decree his lien is not affected or disturbed by the proceedings,[69] and consequently, as the sale passes only the equity of redemption, the senior lienor has no claim upon the proceeds.[70] But it is proper for the court to order the amount of the senior encumbrance to be first paid out of the fund resulting from the sale,[71] when the holder thereof has been made a party and has established his lien,[72] or filed a cross bill for the foreclosure of his own mortgage.[73] The right of a senior encumbrancer to preferential payment out of the proceeds may also be founded on the express agreement of the parties in interest,[74] but a mere equity not amounting to an interest in or lien upon the land will not give a creditor such right.[75] Arrears of ground-rent due at the time of a sheriff's sale under a judg-

eight hundred dollars, is entitled, on foreclosure, to have his interest in the mortgage first satisfied. Quinnin *v.* Brown, 72 Mich. 304, 40 N. W. 336.

Where the assignee of a mortgage gives in consideration a note payable when the mortgage debt is paid, and afterward the property is sold, the proceeds will be applied, first, to the expenses of the assignee, then to the mortgage debt, and then to the note. Fithian *v.* Corwin, 17 Ohio St. 118.

Contribution.— Where the mortgagor has a right of set-off against the mortgage notes, which are in the hands of various assignees, and the set-off is extinguished by one of the assignees, the proceeds of the mortgaged estate should be so distributed as to make all contribute ratably to the set-off, where the proceeds are not sufficient to satisfy all the claims. Campbell *v.* Johnston, 4 Dana (Ky.) 177.

67. *Louisiana.*— Morris *v.* Cain, 34 La. Ann. 657; Devron *v.* His Creditors, 11 La. Ann. 482.

Massachusetts.— Stark *v.* Coffin, 105 Mass. 328; Hunnewell *v.* Goodrich, 3 Cush. 469.

Missouri.— Morris *v.* Pate, 31 Mo. 315.

New Jersey.— Scattergood *v.* Keeley, 40 N. J. Eq. 491, 4 Atl. 440.

New York.—Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Thomas *v.* Moravia Foundry, etc., Co., 43 Hun 487; Vanderkemp *v.* Shelton, 11 Paige 28.

Ohio.— Williamson *v.* Gerlach, 41 Ohio St. 682.

Pennsylvania.— Sheaff's Appeal, 55 Pa. St. 403.

See 35 Cent. Dig. tit. "Mortgages," § 1624.

68. See Hardy *v.* Smith, 41 Md. 1; Grunert *v.* Becker, 100 Mich. 50, 58 N. W. 608; American Surety Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 658.

69. See *infra*, XXI, L, 3, h.

70. Howard *v.* Jones, Ga. Dec., Pt. II, 190; Bache *v.* Doscher, 67 N. Y. 429; Cross *v.* Stahlman, 43 Pa. St. 129; Pease *v.* Hoag, 11 Phila. (Pa.) 549. And see Stiles *v.* Galbreath, (N. J. Ch. 1905) 60 Atl. 224.

71. *Indiana.*— Mueller *v.* Stinesville, etc., Stone Co., 154 Ind. 230, 56 N. E. 222.

Iowa.— Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443.

Maryland.— Watson *v.* Bane, 7 Md. 117; Bell *v.* Brown, 3 Harr. & J. 484.

New York.— Easton *v.* Pickersgill, 55 N. Y. 310.

Pennsylvania.— Horning's Appeal, 90 Pa. St. 388.

South Carolina.—Williams *v.* Paysinger, 15 S. C. 171.

Vermont.— Deavitt *v.* Eldridge, 73 Vt. 332, 50 Atl. 1057.

See 35 Cent. Dig. tit. "Mortgages," § 1627.

72. *Illinois.*— Rock Island Nat. Bank *v.* Thompson, 74 Ill. App. 54.

Indiana.— Persons *v.* Alsip, 2 Ind. 67.

Louisiana.— Ledoux *v.* Morgan, 24 La. Ann. 249.

New York.— Guilford *v.* Jacobie, 69 Hun 420, 23 N. Y. Suppl. 462; Doctor *v.* Smith, 16 Hun 245.

Ohio.— Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Porter *v.* Barclay, 18 Ohio St. 546. Where a mortgagee purchases the property at a sheriff's sale on a subsequent judgment, he may, on application to a court of chancery, have the purchase-money appropriated to pay off his mortgage next after costs. Allen *v.* Brown, 1 Ohio Dec. (Reprint) 59, 1 West. L. J. 398.

West Virginia.— Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Canada.— Grange *v.* Barber, 2 Ch. Chamb. (U. C.) 189.

See 35 Cent. Dig. tit. "Mortgages," § 1627.

73. Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Troth *v.* Hunt, 8 Blackf. (Ind.) 580.

74. Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035.

75. See Hall *v.* Hall, 89 Ky. 514, 12 S. W. 945, 11 Ky. L. Rep. 715. And to the same effect see Mercantile Trust Co. *v.* Mobile, etc., R. Co., 79 Fed. 702.

ment or mortgage against the terre-tenant are not payable by the sheriff out of the purchase-money but the landlord may distrain.[76] The junior mortgagee is entitled to scale down the amount claimed by the senior encumbrancer, and to be paid to him out of the proceeds, to the sum actually due or to the real consideration of such elder lien,[77] and he may tack to his junior claim a senior lien which he has bought, as against the mortgagor, although not to the prejudice of intervening liens.[78] It is, however, a general rule that the proceeds of land sold under a mortgage must be applied to the discharge of encumbrances created by the mortgagor, and are not applicable to liens paramount to his title,[79] except in the case of taxes and assessments on the land, constituting a lien superior to all those created by the parties,[80] and except as to receivers' certificates made a paramount lien by the order of the court authorizing their issue.[81] Priority of date governs in the distribution of proceeds as between a mortgage and a mechanic's lien on the same premises.[82]

e. Application to Mortgage Debt. The proceeds of a foreclosure sale must be applied to the satisfaction of the debt secured by the mortgage, and in accordance with the specific directions, if any, of the mortgage as to the method of distribution or the provisions of the decree.[83] The rule that a creditor who holds several debts or claims against his debtor may elect to which of them he will

76. Sands *v.* Smith, 3 Watts & S. (Pa.) 9.

77. New England L. & T. Co. *v.* Wood, 2 Kan. App. 624, 42 Pac. 940; Mossop *v.* His Creditors, 41 La. Ann. 296, 6 So. 134.

78. Cullum *v.* Mobile Branch Bank, 23 Ala. 797; Glide *v.* Dwyer, 83 Cal. 477, 23 Pac. 706.

As to general doctrine of tacking see *supra*, XIV, G, 5.

79. Reybold *v.* Herdman, 2 Del. Ch. 34. But see Lowe *v.* Rawlins, 83 Ga. 320, 10 S. E. 204, 6 L. R. A. 73.

80. *California.*—Crane *v.* Forth, 95 Cal. 88, 30 Pac. 193.

Kentucky.— Newport *v.* Covington Trust Co., 60 S. W. 702, 22 Ky. L. Rep. 1361.

Minnesota.— International Trust Co. *v.* Upton Grove Land, etc., Co., 71 Minn. 147, 73 N. W. 716.

New York.— Shaw *v.* Youmans, 105 N. Y. App. Div. 329, 94 N. Y. Suppl. 178; Coudert *v.* Huerstel, 60 N. Y. App. Div. 83, 69 N. Y. Suppl. 778; Morgan *v.* Fullerton, 9 N. Y. App. Div. 233, 41 N. Y. Suppl. 465.

Pennsylvania.— Caner *v.* Bergner, 27 Pa. Super. Ct. 220.

Tennessee.— Dunn *v.* Dunn, 99 Tenn. 598, 42 S. W. 259.

Wisconsin.— Kremer *v.* Thwaits, 105 Wis. 534, 81 N. W. 654.

81. Raht *v.* Attrill, 42 Hun (N. Y.) 414. And see *supra*, XIV, G, 3.

82. Stout *v.* Sower, 22 Ill. App. 65; Langford *v.* Mackay, 12 Ill. App. 223; Hershee *v.* Hershey, 15 Iowa 185; Miller's Appeal, 122 Pa. St. 95, 15 Atl. 672; Edler *v.* Clark, 51 Fed. 117. And see MECHANICS' LIENS.

83. *District of Columbia.*— Taylor *v.* MacGreal, 15 App. Cas. 32.

Georgia.— Sloss *v.* Southern Mut. Bldg., etc., Assoc., 97 Ga. 401, 23 S E. 849.

Indiana.— Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

Maryland.— Dorsey *v.* Thompson, 37 Md. 25; Treiber *v.* Lanahan, 23 Md. 116.

Massachusetts.— Stark *v.* Coffin, 105 Mass. 328.

North Carolina.— Burwell *v.* Burgwyn, 105 N. C. 498, 10 S. E. 1099.

Ohio.— Durbin *v.* Fisk, 16 Ohio St. 533.

Pennsylvania.— Thomas *v.* Jarden, 57 Pa. St. 331; Irwin *v.* Tabb, 17 Serg. & R. 419.

See 35 Cent. Dig. tit. "Mortgages," § 1629.

Election as to application stipulated for in decree.— Where parties to a mortgage given to secure the payment of several notes maturing at different times have provided in the instrument that the mortgagee may elect as to the application of payments in case the proceeds of a sale of the mortgaged property are insufficient to satisfy the entire debt, the court upon foreclosure will, as between mortgagor and mortgagee, order application of money arising from sale in conformity with such election, if made in proper time. Advance Thresher Co. *v.* Hogan, 74 Ohio St. 307, 78 N. E. 436.

As to application of proceeds as between interest and principal of mortgage debt see Long *v.* Long, 141 Mo. 352, 44 S. W. 341; Fullerton *v.* National Burglar, etc., Ins. Co., 100 N. Y. 76, 2 N. E. 629; McTighe *v.* Keystone Coal Co., 99 Fed. 134, 39 C. C. A. 447.

Mortgage partly invalid.— Where a mortgage is given to a national bank, partly to secure notes on which there is an accommodation indorser, and partly to secure a future loan, such indorser has a right to insist that the proceeds of a foreclosure shall be applied on the notes on which he is liable, as the mortgage is invalid so far as it attempts to secure a future loan. Woods *v.* Peoples' Nat. Bank, 83 Pa. St. 57.

Deduction for waste.— Where the decree of foreclosure forbids the mortgagee, who is in possession, to cut timber, the value of such timber as he may cut thereafter, and before the day of sale, in violation of the decree, must be deducted from the amount due him under the mortgage. Whorton *v.* Webster, 56 Wis. 356, 14 N. W. 280.

apply a payment made generally and without appropriation by the debtor has no application to a case of this kind, the raising of a fund by foreclosure of the mortgage not being a voluntary payment by the debtor, but the enforcement of a security for a specific debt.[84] Still equity is willing to give the creditor the best security for his debt; and hence if he holds additional or collateral security for a portion of the mortgage debt, he will generally be permitted to apply the proceeds of foreclosure to that portion of the claim for which the mortgage is the only security.[85]

f. Debts or Obligations Secured by Same Mortgage. Several debts or claims, all equally secured by the same mortgage, are as a general rule entitled to share ratably in the proceeds of its foreclosure,[86] whether they are all held by the mortgagee, or belong to as many different owners,[87] unless, in the latter case, there

Where a mortgage covers a homestead and other property, or where a mortgage on the homestead is additional or collateral security to a mortgage on other property, such other property must first be applied in reduction of the mortgage debt before the homestead can be resorted to. Frick Co. *v.* Ketels, 42 Kan. 527, 22 Pac. 580, 16 Am. St. Rep. 507; Dunn *v.* Buckley, 56 Wis. 190, 14 N. W. 67.

84. *Alabama.*—Clement *v.* Draper, 108 Ala. 211, 19 So. 25; Johnson *v.* Thomas, 77 Ala. 367.

Georgia.— Winter *v.* Garrard, 7 Ga. 183.

Illinois.— Ray *v.* Henderson, 110 Ill. App. 542 [*affirmed* in 210 Ill. 305, 71 N. E. 579]; Snider *v.* Stone, 78 Ill. App. 17.

New York.— Orleans County Nat. Bank *v.* Moore, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775, 3 L. R. A. 302; Griswold *v.* Onondaga County Sav. Bank, 93 N. Y. 301; Matter of Georgi, 21 Misc. 419, 47 N. Y. Suppl. 1061.

Texas.— Howard *v.* Schwartz, 22 Tex. Civ. App. 400, 55 S. W. 348.

See 35 Cent. Dig. tit. "Mortgages," § 1629.

85. See cases cited *infra*, this note.

Applications of rule.— Where defendant in foreclosure, on appealing, gives a bond conditioned for the payment of interest, and the decree is affirmed, it is proper to apply the proceeds of sale first to the principal of the mortgage debt, leaving the appeal-bond as security for any unpaid balance of interest. Monson *v.* Meyer, 190 Ill. 105, 60 N. E. 63. So where the payment of the interest on the mortgage debt is guaranteed by a third person, the proceeds of foreclosure sale may be applied first on the principal of the debt. Union Trust Co. *v.* Detroit Motor Co., 117 Mich. 631, 76 N. W. 112; Smythe *v.* New England L. & T. Co., 12 Wash. 424, 41 Pac. 184. And where the proceeds of a mortgage executed to secure an individual note and a joint note are not sufficient to pay both, the creditor is not obliged to apply the sum *pro rata* on both notes, but may apply it wholly on the individual note. Small *v.* Older, 57 Iowa 326, 10 N. W. 734. See also Hanford *v.* Robertson, 47 Mich. 100, 10 N. W. 125.

86. *Louisiana.*— Gordon *v.* His Creditors, 5 Rob. 47.

Maryland.—Real Estate Trust Co. *v.* Union Trust Co., 102 Md. 41, 61 Atl. 228.

New York.—Armstrong *v.* McLean, 92 Hun 397, 36 N. Y. Suppl. 764 [*reversed* on other grounds in 153 N. Y. 490, 47 N. E. 912].

North Carolina.— Kitchin *v.* Grandy, 101 N. C. 86, 7 S. E. 663.

Ohio.— Towne *v.* Wolfe, 26 Ohio St. 491; Bushfield *v.* Meyer, 10 Ohio St. 334.

United States.— Rogers *v.* Moore, 85 Fed. 920, 29 C. C. A. 636.

See 35 Cent. Dig. tit. "Mortgages," § 1630.

Effect of usury.— On foreclosure of a mortgage given to secure the payment of several debts, some of which bear usurious interest, the proceeds of sale must be appropriated without regard to the amount of the illegal interest, if the mortgagor does not object on this ground, even though some of the debts secured, for which there were sureties, would be paid in full if the amount of the usury was deducted. Fielder *v.* Varner, 45 Ala. 429.

Duty of mortgagee as to application.— Where a mortgage is given to a bank to secure the payment of all paper held by the bank on which the mortgagor should be liable as maker, indorser, or accepter, and is foreclosed and the money received by the bank, it is not competent for the cashier, at least without the consent of the mortgagor, to appropriate any part of the money to the payment of the mortgagor's notes, indorsed by such cashier, to the exclusion of other notes of the mortgagor held by the bank. Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9.

87. *Alabama.*— Bostick *v.* Jacobs, 133 Ala. 344, 32 So. 136, 91 Am. St. Rep. 36.

District of Columbia.— Cropley *v.* Eyster, 9 App. Cas. 373.

Georgia.— Berrie *v.* Smith, 97 Ga. 782, 25 S. E. 757; Smith *v.* Bowne, 60 Ga. 484.

Illinois.— Smith *v.* Higgins, 152 Ill. 159, 38 N. E. 757; Shaffner *v.* Healy, 57 Ill. App. 90.

Indiana.— Chaplin *v.* Sullivan, 128 Ind. 50, 27 N. E. 425.

Missouri.— See Weary *v.* Wittmer, 77 Mo. App. 546, holding that the holder of the mortgage note first maturing is presumptively entitled to priority of payment out of the proceeds of sale on foreclosure.

North Carolina.— Malcolm *v.* Purnell, 38 N. C. 86.

Ohio.— Cromwell *v.* Brinton, 4 Ohio Cir. Ct. 261, 2 Ohio Cir. Dec. 535.

are countervailing equities as between the different holders such as to entitle one to a preference in payment over the other.[88] The rule is not altered by the fact that there are different sureties on the different notes, or that there are sureties on some of the notes and not on others, or that the mortgagor is bound as principal on some of the notes and as surety on others.[89] And the rule is applied as between the holders of a series of bonds all secured by the mortgage,[90] and is also applied for the benefit of holders of interest coupons detached from the bonds.[91] But no claim is entitled to participate in the distribution which was extinguished by a transaction which the parties intended and regarded as a payment of it rather than as an assignment.[92] When the foreclosure was effected on the maturity of the first instalment of the mortgage debt, the notes evidencing the other instalments may share in the proceeds if the mortgage provides for anticipating the maturity of the whole debt in this contingency, or if the proceeds, after paying the instalment due, are held to await the maturity of the others.[93]

Pennsylvania.— Zimmerman *v.* Raup, 162 Pa. St. 112, 29 Atl. 352; Perry's Appeal, 22 Pa. St. 43, 60 Am. Dec. 63. Where a majority of thirty-six mortgagees agree that another mortgage shall be executed to a third person, and shall have priority over the first mortgage, and the second mortgagee subsequently waives the preference, this does not necessarily give the dissenting mortgagees in the first mortgage a priority over their fellows in the distribution of the proceeds of sale of the premises. Kerr's Estate, 1 Leg. Op. 25.

Rhode Island.— Waterman *v.* Hunt, 2 R. I. 298.

South Carolina.— Graham *v.* Jones, 24 S. C. 241; Adger *v.* Pringle, 11 S. C. 527.

Tennessee.— Smith *v.* Cunningham, 2 Tenn. Ch. 565.

United States.— McTighe *v.* Keystone Coal Co., 99 Fed. 134, 39 C. C. A. 447.

See 35 Cent. Dig. tit. "Mortgages," § 1630.

88. *Iowa.*— Reeder *v.* Carey, 13 Iowa 274.

Kansas.— Robinson *v.* Waddell, 53 Kan. 402, 36 Pac. 730.

Massachusetts.— Marshall *v.* Bryant, 12 Mass. 321.

New York.— Bridenbecker *v.* Lowell, 32 Barb. 9.

Virginia.— Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96.

Assignment of part of notes by mortgagee. — Where the mortgagee assigns, or transfers with his indorsement, part of the notes secured by the mortgage and retains the rest, the holders of the assigned or indorsed notes are entitled to priority of payment out of the proceeds of foreclosure sale, to the exclusion of the notes retained by the mortgagee. Alden *v.* White, 32 Ind. App. 671, 66 N. E. 509, 67 N. E. 949, 102 Am. St. Rep. 261; Gumbel *v.* Boyer, 46 La. Ann. 762, 15 So. 84; Bank of England *v.* Tarleton, 23 Miss. 173.

Assignment of part of bonds and subsequent assignment for creditors.— Where a number of bonds are secured by a mortgage, and the holder parts with some of them, retaining the rest, and after the indorsement of some of the bonds, but before the sale of the mortgaged premises, he makes an assignment for the benefit of his creditors, the assignee for creditors is not a holder for value, but simply stands in the place of his assignor; and hence such assignment will in no way affect the distribution of the proceeds of sale. Fourth Nat. Bank's Appeal, 123 Pa. St. 473, 16 Atl. 779, 10 Am. St. Rep. 538.

89. Bostick *v.* Jacobs, 133 Ala. 344, 32 So. 136, 91 Am. St. Rep. 36; Fielder *v.* Varner, 45 Ala. 429; Orleans County Nat. Bank *v.* Moore, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775, 3 L. R. A. 302; Wilson *v.* Allen, 11 Oreg. 154, 2 Pac. 91; Farmers' Bank *v.* Woodford, 34 W. Va. 480, 12 S. E. 544.

Mortgage for benefit of mortgagee and sureties of mortgagor.— Where the mortgagee is a creditor of the mortgagor and accepts a mortgage as well for his own benefit as for the indemnity of the sureties of the mortgagor, he is bound to appropriate the proceeds of the mortgaged estate *pro rata*. Willis *v.* Caldwell, 10 B. Mon. (Ky.) 199.

Mortgagee a surety on notes.— Where several notes secured by a mortgage are held by different persons, and one of them is also a surety on all the notes and is insolvent, his share of the proceeds of foreclosure, when such proceeds are not sufficient to pay all the notes in full, should be distributed to the others. Fourth Nat. Bank's Appeal, 123 Pa. St. 473, 16 Atl. 779, 10 Am. St. Rep. 538.

90. Real Estate Trust Co. *v.* Union Trust Co., 102 Md. 41, 61 Atl. 228. But *compare* Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (holding that in a suit for foreclosure of a mortgage securing railroad bonds, by trustees holding merely the legal title, to which the bondholders are not parties, payment should be made to the trustees from the proceeds of sale only on bonds actually surrendered); Burke *v.* Short, 79 Fed. 6, 24 C. C. A. 422.

91. Brown *v.* Maryland Freestone Min., etc., Co., 55 Md. 547; Burke *v.* Short, 79 Fed. 6, 24 C. C. A. 422.

92. Ball *v.* Serum, 85 Ill. App. 560; Baker *v.* Meloy, 95 Md. 1, 51 Atl. 893; Union Trust Co. *v.* Monticello, etc., R. Co., 63 N. Y. 311, 20 Am. Rep. 541; Vance *v.* Monroe, 4 Gratt. (Va.) 52.

93. *Georgia.*— Hobby *v.* Pemberton, Dudley 212.

g. Reimbursement of Payments For Preservation of Security. Out of the proceeds of a foreclosure sale the mortgagee is entitled to claim reimbursement for moneys necessarily expended by him for the preservation of the property or of his security upon it,[94] including the amount paid for the purchase of outstanding and superior liens or charges, such as judgments, other mortgages, or mechanics' liens,[95] for the discharge of taxes on the premises,[96] and, where so authorized by the mortgage, for insurance on the buildings on the mortgaged land.[97]

h. Liability of Purchaser as to Application of Proceeds. Although the purchaser at a foreclosure sale is bound to account to parties entitled for the whole amount of the price,[98] the fund is usually and properly distributed under the direction of the court, to the jurisdiction of which the purchaser remains subject for this purpose,[99] so that he is not bound to see to the application of the proceeds, but is fully protected if he obeys the orders of the court.[1]

2. Right to Surplus — a. In General. The surplus proceeds of a foreclosure sale, after satisfying the mortgage debt, represent the equity of redemption,[2] and are constructively real property,[3] and belong to the mortgagor[4] or to the joint

Iowa.— McDowell *v.* Lloyd, 22 Iowa 448.

Louisiana.— Hynes *v.* Morin, 12 La. Ann. 742.

Missouri.— Rowe *v.* Scherz, 69 Mo. App. 88.

Pennsylvania.— Larimer's Appeal, 22 Pa. St. 41.

United States.— Burke *v.* Short, 79 Fed. 6, 24 C. C. A. 422.

See 35 Cent. Dig. tit. "Mortgages," § 1630.

94. Hughes *v.* Johnson, 38 Ark. 285; Richardson *v.* Dinkgrave, 26 La. Ann. 651; Balen *v.* Mercier, 75 Mich. 42, 42 N. W. 666.

95. *Colorado.*— Fitch *v.* Stallings, 5 Colo. App. 106, 38 Pac. 393.

Illinois.— Munford *v.* McIntyre, 16 Ill. App. 316.

Louisiana.— Barelli *v.* Delassus, 16 La. Ann. 280.

New York.— Silver Lake Bank *v.* North, 4 Johns. Ch. 370.

Wisconsin.— Dodge *v.* Silverthorn, 12 Wis. 644.

And see *supra*, VII, E, 3.

But *compare* Dozier *v.* Mitchell, 65 Ala. 511.

Release of dower.— When a wife joins with her husband in a mortgage on his lands, this is merely a relinquishment of her inchoate right of dower, and not a purchase by the mortgagee of an outstanding encumbrance for which he is entitled to compensation or reimbursement in a contest with other encumbrancers. Pepper *v.* George, 51 Ala. 190.

96. *California.*— Crane *v.* Forth, 95 Cal. 88, 30 Pac. 193.

Kansas.— Opdyke *v.* Crawford, 19 Kan. 604.

Louisiana.—Scholfield *v.* West, 44 La. Ann. 277, 10 So. 806; Brady *v.* His Creditors, 43 La. Ann. 165, 9 So. 59; Reichard *v.* Michinard, 33 La. Ann. 380.

Minnesota.— See Simmer *v.* Blabon, 74 Minn. 341, 77 N. W. 233.

New Jersey.— Campbell *v.* Dewick, 20 N. J. Eq. 186.

New York.— Maitland *v.* Godwin, 19 N. Y. Suppl. 275; Kortright *v.* Blunt, 12 How. Pr. 424 [*affirmed* in 23 Barb. 490, 5 Abb. Pr. 358]. Where the mortgage is on a leasehold, the judgment in foreclosure should not direct the payment of taxes out of the purchase-money. Stuyvesant *v.* Browning, 33 N. Y. Super. Ct. 203.

Ohio.— Walker *v.* McGechin, 8 Ohio Dec. (Reprint) 222, 4 Cinc. L. Bul. 340; Sibley *v.* Elliott, 6 Ohio Dec. (Reprint) 804, 8 Am. L. Rec. 301.

Pennsylvania.— Fleisher *v.* Blackburn, 15 Pa. Super. Ct. 289.

Wisconsin.— Cord *v.* Southwell, 15 Wis. 211.

See 35 Cent. Dig. tit. "Mortgages," § 1628. And see *supra*, VII, E, 5; XV, F, 3, d.

97. Burgess *v.* Southbridge Sav. Bank, 2 Fed. 500. And see *supra*, VII, E, 6; XV, G, 2.

98. Hopkins *v.* Hemm, 159 Ill. 416, 42 N. E. 848 [*affirming* 56 Ill. App. 480]; Western Union Tel. Co. *v.* Caldwell, 141 Mass. 489, 6 N. E. 737; Babcock *v.* American Sav., etc., Assoc., 67 Minn. 151, 69 N. W. 718.

99. Coulter *v.* Herrod, 27 Miss. 685.

1. McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,889, 4 McLean 430. And see Anderson *v.* Dicks, 55 S. C. 398, 33 S. E. 505.

In Louisiana a different rule prevails, and the foreclosure purchaser is required to retain in his own hands any surplus of the price which may remain after paying the mortgage foreclosed, for the purpose of satisfying junior liens, and is liable to suit and judgment on behalf of a junior lienor entitled to such surplus. Ash *v.* Southern Chemical, etc., Co., 107 La. 311, 31 So. 656; Citizens' Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728; Alford *v.* Montejo, 28 La. Ann. 593; Quertier *v.* Hille, 18 La. Ann. 65; Pepper *v.* Dunlap, 16 La. 163.

2. Warner *v.* Helm, 6 Ill. 220; Hinchman *v.* Stiles, 9 N. J. Eq. 361.

3. Fliess *v.* Buckley, 22 Hun (N. Y.) 551; Sweezy *v.* Thayer, 1 Duer (N. Y.) 286; Germania Sav. Bank *v.* Jung, 18 N. Y. Suppl. 709, 28 Abb. N. Cas. 81. But see Smith *v.* Smith, 13 Mich. 258.

4. *California.*— Bettis *v.* Townsend, 61 Cal. 333.

mortgagors or owners of the equity, if there are more than one, a proper adjustment of their relative rights being made in the latter case,[5] or to the owner of an interest, title, or estate in the premises distinct from but superior to that of the mortgagor,[6] or to those who have succeeded to the mortgagor's equity of redemption, wholly or in part, whether by alienation[7] or by inheritance or

Indiana.— Hamilton County *v.* State, 122 Ind. 333, 24 N. E. 347; Maynes *v.* Moore, 16 Ind. 116.

Kentucky.— Ryan *v.* Sugg, 61 S. W. 702, 22 Ky. L. Rep. 1798.

Massachusetts.— Johnson *v.* Cobleigh, 152 Mass. 17, 25 N. E. 73.

Michigan.— Damon *v.* Deeves, 62 Mich. 465, 29 N. W. 42; Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672; Kennedy *v.* Brown, 50 Mich. 336, 15 N. W. 498.

Nebraska.— Hatch *v.* Shold, 62 Nebr. 764, 87 N. W. 908.

New Jersey.— Troxall *v.* Silverthorne, (Ch. 1887) 11 Atl. 684. See also Case *v.* Arnett, 26 N. J. Eq. 459.

New York.— Day *v.* New Lots, 107 N. Y. 148, 13 N. E. 915; Lapham *v.* Lapham, 63 N. Y. App. Div. 597, 71 N. Y. Suppl. 666; Pierson *v.* Thompson, 1 Edw. 212.

North Carolina.— Bobbitt *v.* Blackwell, 120 N. C. 253, 26 S. E. 817.

North Dakota.— Grand Forks First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615.

Rhode Island.— Reynolds *v.* Hennessy, 15 R. I. 215, 2 Atl. 701.

South Carolina.— Easton *v.* Woodbury, 71 S. C. 250, 50 S. E. 790.

Texas.— Norris *v.* Graham, (Civ. App. 1897) 42 S. W. 575.

Washington.—Moody *v.* Northwestern, etc., Bank, 20 Wash. 413, 55 Pac. 568; Soderberg *v.* King County, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A. 670.

United States.— Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83; Shillaber *v.* Robinson, 97 U. S. 68, 24 L. ed. 967.

Canada.— Biggs *v.* Freehold Loan, etc., Co., 26 Ont. App. 232.

See 35 Cent. Dig. tit. "Mortgages," § 1632.

The levy of an execution on the surplus proceeds of a sale remaining in the sheriff's hands after the satisfaction of a mortgage prevails against a subsequent assignment of the surplus by the mortgagor. Milmo Nat. Bank *v.* Rich, 16 Tex. Civ. App. 363, 40 S. W. 1032.

5. Weaver *v.* Keith, 3 Del. Co. (Pa.) 516; *In re* Cook, [1896] 1 Ch. 923, 65 L. J. Ch. 654, 74 L. T. Rep. N. S. 652, 44 Wkly. Rep. 646.

Mortgage by husband and wife.— As to a wife's interest in the surplus proceeds of foreclosure of a mortgage on her husband's lands or on lands which they owned in common see the following cases:

Indiana.— Dean *v.* Phillips, 17 Ind. 406.

Massachusetts.— Union Sav. Bank *v.* Pool, 143 Mass. 203, 9 N. E. 545.

Michigan.— Bowles *v.* Hoard, 71 Mich. 150, 39 N. W. 24.

Missouri.— White *v.* Smith, 174 Mo. 186, 73 S. W. 610; Curtis *v.* Moore, 162 Mo. 442, 63 S. W. 80.

New York.— Germania Sav. Bank *v.* Jung, 18 N. Y. Suppl. 709, 28 Abb. N. Cas. 81.

Pennsylvania.— Biery *v.* Steckel, 19 Pa. Super. Ct. 396.

Rhode Island.— Chaffee *v.* Franklin, 11 R. I. 578.

One tenant in common cannot sue separately from his cotenant for his separate share of the surplus in the hands of a mortgagee after a sale by him, under a power in the mortgage, of the mortgaged premises. The implied promise of the mortgagee, arising from his legal duty, is that he will pay over the surplus proceeds to the mortgagors, their heirs and assigns, collectively, and not to them separately according to their several interests. Clapp *v.* Pawtucket Sav. Inst., 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915.

Where one gives a mortgage on two tracts of land, one of which he owns in his own right and the other as a trustee for himself and two other persons, the proceeds of his own lot and his one-third interest in the proceeds of the other lot should go to discharge the mortgage debt, and if there is then a surplus it belongs to the two other persons jointly interested with him. Braxton *v.* Braxton, 20 D. C. 355.

6. Leach *v.* Leach, 69 N. J. Eq. 620, 61 Atl. 562, rights of owner of life-estate.

Estate in remainder.— Where a testator devises lands to his widow for life, with remainder to his children, and the widow and children unite in a mortgage of the lands, which are sold on foreclosure, the widow may be allowed to take the surplus money out of court on giving security for the payment of the principal sum after her death. Bloomfield *v.* Budden, 1 Yeates (Pa.) 187.

Rights of holder of leasehold estate see Larkin *v.* Misland, 100 N. Y. 212, 3 N. E. 79; Clarkson *v.* Skidmore, 2 Lans. (N. Y.) 238; Ely *v.* Collins, 45 Misc. (N. Y.) 255, 92 N. Y. Suppl. 160.

The grant of an easement in land subject to a mortgage vests in the owner of the dominant estate an interest in land in the servient estate entitling such owner to such a proportion of any surplus realized on foreclosure of the mortgage as the value of the easement bore to the value of the whole servient estate. Winthrop *v.* Welling, 2 N. Y. App. Div. 229, 37 N. Y. Suppl. 729.

Homestead.— A foreclosure sale under a mortgage waiving homestead does not extinguish the right of homestead in the surplus. White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501.

7. Raber *v.* Gund, 110 Ill. 581; Ballinger

descent,[8] unless such surplus can be taken from the person thus primarily entitled to it by some creditor having a right to subject it to the payment of his debt.[9] Parties who, with full knowledge of the facts, receive and retain the

v. Bourland, 87 Ill. 513, 29 Am. Rep. 69; Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23; Frost *v.* Koon, 30 N. Y. 428; Johnson *v.* Blydenburgh, 31 N. Y. 427; Scott *v.* Madison Ave. Cong. Church, 55 N. Y. Super. Ct. 327, 18 N. Y. St. 385; Matter of Scrugham, Hopk. (N. Y.) 88; Collins *v.* Reid, 6 Nova Scotia 252.

Purchaser of part of land.— When a person buys a portion of the land included in a mortgage which he holds, he will not be allowed the full price paid for such land out of the surplus arising on foreclosure, but only the amount which such portion sold for in proportion to the other land. Frost *v.* Peacock, 4 Edw. (N. Y.) 678.

Purchase at sheriff's sale.— If at the time land is sold under a mortgage or deed of trust the legal title has passed from the grantor or mortgagor, either by his own deed or by a sheriff's deed, the grantee will be entitled to the whole of any surplus after discharging the debt secured by the mortgage and the costs and expenses of sale; but if the land has been sold under execution, and the time allowed for redemption has not expired, the purchaser under the execution will only have a lien on such surplus for the amount of his bid with the statutory interest. Hart *v.* Wingart, 83 Ill. 282.

Purchaser from mortgagee making improvements.— Where the mortgagee obtains a decree of strict foreclosure on default against a non-resident mortgagor, and sells the property to purchasers who make valuable and lasting improvements, and thereafter the mortgagor obtains an order opening the decree and admitting him to answer, but does not redeem, and a sale is made, of which the proceeds are more than sufficient to pay the costs and the mortgage debt in full, the purchasers are entitled to receive the value of their improvements out of the surplus. Scott *v.* Millikin, 60 Ill. 108. And see Lanusse *v.* Lanna, 6 Mart. N. S. (La.) 103; Davis *v.* Holmes, 55 Mo. 349.

An assignee for the benefit of the mortgagor's creditors is entitled to the surplus which would otherwise have come to the mortgagor himself. Carter *v.* Stone, 20 Ont. 340.

8. Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165; Johns *v.* Norris, 22 N. J. Eq. 102; Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94, all holding that on the death of the mortgagor the surplus proceeds of foreclosure sale belong to his heirs, and are immediately payable to them unless it appears that the money may be needed for the payment of debts of the estate. *Contra*, Smith *v.* Smith, 13 Mich. 258; Curtis *v.* Moore, 162 Mo. 442, 63 S. W. 80; Brehm *v.* New York, 104 N. Y. 186, 10 N. E. 158, holding that such surplus is to be regarded as personalty, and therefore belongs to the administrator or executor, rather than the heir.

When surplus is payable to legatee of mortgagor see King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547.

9. *Indiana.*— Firestone *v.* State, 100 Ind. 226, holding that a senior mortgagee has no claim to a surplus remaining after a sale under a junior mortgage.

Massachusetts.—Bangs *v.* Fallon, 179 Mass. 77, 60 N. E. 403; Hardy *v.* Beverly Sav. Bank, 175 Mass. 112, 55 N. E. 811, 78 Am. St. Rep. 479, holding that an attaching creditor, if he means to claim any interest in the surplus remaining in the mortgagee's hands, must give him actual notice.

Michigan.— Smith *v.* Smith, 13 Mich. 258.

Missouri.— Casebolt *v.* Donaldson, 67 Mo. 308.

New York.— Gillig *v.* Maass, 28 N. Y. 191; Muehlberger *v.* Schilling, 3 N. Y. Suppl. 705; Husted *v.* Dakin, 17 Abb. Pr. 137; De Ruyter *v.* St. Peter's Church, 2 Barb. Ch. 555.

Pennsylvania.— Wightman's Appeal, 29 Pa. St. 280.

South Carolina.— Friedheim *v.* Crescent Cotton Mill, 64 S. C. 277, 42 S. E. 119.

See 35 Cent. Dig. tit. "Mortgages," § 1634.

In Minnesota, under a statute directing that the surplus shall be paid over to "the mortgagor, his legal representatives or assigns," a junior mortgagee is an "assign" of the mortgagor, so as to be entitled to have his debt paid out of the surplus on demand. Fuller *v.* Langum, 37 Minn. 74, 33 N. W. 122; Brown *v.* Crookston Agricultural Assoc., 34 Minn. 545, 26 N. W. 907.

Rights of general creditors.—To be entitled to claim satisfaction out of the surplus proceeds of a foreclosure sale the creditor, not being connected with the mortgage, must have a lien on the land; an unsecured creditor cannot participate, however much his claim might commend itself to a court of equity. Albro *v.* Blume, 5 N. Y. App. Div. 309, 39 N. Y. Suppl. 215; King *v.* West, 10 How. Pr. (N. Y.) 333. But see German Sav. Bank *v.* Sharer, 25 Hun (N. Y.) 409, holding that where a mortgage is foreclosed after the death of the owner of the equity of redemption, the surplus money should be distributed ratably among all the general and judgment creditors of the deceased owner after notice to them and an opportunity to be heard.

Effect of order to pay creditors.— Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee, who held the title under a deed absolute in form, brought into the master's office with his account certain orders signed by the mortgagor, directing him to pay the parties named therein any surplus moneys in his hands after paying the mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered; and it was held that the mortgagee could not claim to be allowed these

surplus proceeds are estopped to allege, as against any one else, that the sale was unauthorized.[10]

b. Application to Other Claims of Mortgagee. As a general rule a mortgagee has no right to apply the surplus proceeds of foreclosure to other debts or claims which he holds against the mortgagor; he has no priority over other general creditors of the mortgagor.[11] And if he holds two mortgages given by the same mortgagor on distinct parcels of land and for different debts, the surplus arising on the foreclosure of one of the mortgages cannot be applied to make up a deficiency on the other.[12]

c. Junior Liens and Encumbrances — (i) *In General.* Where the foreclosure of a senior mortgage results in the creation of a surplus fund over and above the amount of such mortgage, the lien of a junior encumbrance on the same land, cut off by the foreclosure, is transferred in equity to such surplus fund, and the holder thereof is entitled to satisfaction out of the surplus.[13] If the junior

orders in addition to his mortgage, not having accepted or paid them, nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. Canadian Bank of Commerce *v.* Forbes, 10 Ont. Pr. 442.

10. Anderson *v.* Dicks, 55 S. C. 398, 33 S. E. 505.

11. Dale *v.* McEvers, 2 Cow. (N. Y.) 118; Jones *v.* Lackland, 2 Gratt. (Va.) 81; Johnson *v.* Harrison, 41 Wis. 381. But *compare* Butler *v.* Adler-Goldman Commission Co., 62 Ark. 445, 35 S. W. 1110; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Beekman F. Ins. Co. *v.* New York First M. E. Church, 29 Barb. (N. Y.) 658; Eddy *v.* Smith, 13 Wend. (N. Y.) 488, holding that a mortgagee was entitled to apply the surplus to a judgment which he held against the mortgagor, and which was a lien on the land, and equal in amount to such surplus.

12. Mahone *v.* Williams, 39 Ala. 202; Dodds *v.* Lanaux, 45 La. Ann. 287, 12 So. 345; Reggio *v.* McCan, 40 La. Ann. 479, 4 So. 478; Hooper *v.* Castetter, 45 Nebr. 67, 63 N. W. 135; Fliess *v.* Buckley, 22 Hun (N. Y.) 551; Bridgen *v.* Carhartt, Hopk. (N. Y.) 234. But *compare* McCraney *v.* Alden, 46 Barb. (N. Y.) 272; New York Mut. L. Ins. Co. *v.* Truchnicht, 3 Abb. N. Cas. (N. Y.) 135.

13. *California.*— Porter *v.* Muller, 112 Cal. 355, 44 Pac. 729.

Georgia.—Athens Nat. Bank *v.* Athens Exch. Bank, 110 Ga. 692, 36 S. E. 265; Habersham *v.* Bond, Ga. Dec., Pt. II, 46.

Illinois.— Hart *v.* Wingart, 83 Ill. 282; Ellis *v.* Southwell, 29 Ill. 549.

Indiana.— State *v.* Clapp, 147 Ind. 244, 46 N. E. 533, 62 Am. St. Rep. 415; Clapp *v.* Hadley, 141 Ind. 28, 39 N. E. 504, 50 Am. St. Rep. 308; White *v.* Shirk, 20 Ind. App. 589, 51 N. E. 126.

Iowa.— Deep River State Bank *v.* Brown, 128 Iowa 665, 105 N. W. 49.

Kentucky.— See Smith *v.* Allen, 108 Ky. 368, 56 S. W. 530, 21 Ky. L. Rep. 1811; Covington First Nat. Bank *v.* Root, 50 S. W. 16, 20 Ky. L. Rep. 1863.

Maryland.— Lee *v.* Boteler, 12 Gill & J. 323.

Massachusetts.— Converse *v.* Ware Sav. Bank, 152 Mass. 407, 25 N. E. 733; Beard *v.* Fitzgerald, 105 Mass. 134.

Minnesota.— Brown *v.* Crookston Agricultural Assoc., 34 Minn. 545, 26 N. W. 907.

Nebraska.— Robertson *v.* Brooks, 65 Nebr. 799, 91 N. W. 709.

New Jersey.— Johnston *v.* Reilly, 68 N. J. Eq. 130, 59 Atl. 1044.

New York.— Nutt *v.* Cuming, 155 N. Y. 309, 49 N. E. 880; Quackenbush *v.* O'Hare, 129 N. Y. 485, 29 N. E. 958; Erie County Sav. Bank *v.* Roop, 80 N. Y. 591; Bushwick Sav. Bank *v.* Traum, 26 N. Y. App. Div. 532, 50 N. Y. Suppl. 542; Bartlett *v.* Gale, 4 Paige 503; Kinney *v.* McCullough, 1 Sandf. Ch. 370. See also Rochester Sav. Bank *v.* Whitmore, 25 N. Y. App. Div. 491, 49 N. Y. Suppl. 862.

Ohio.— Black *v.* Kuhlman, 30 Ohio St. 196; Ives *v.* Insolvent Com'r, Wright 626.

Rhode Island.— East Greenwich Sav. Inst. *v.* Shippee, 20 R. I. 650, 40 Atl. 872.

South Carolina.— Stewart *v.* Groce, 42 S. C. 500, 20 S. E. 411.

South Dakota.—Aultman *v.* Siglinger, 2 S. D. 442, 50 N. W. 911.

Tennessee.— Jackson *v.* Coffman, 110 Tenn. 271, 75 S. W. 718; White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501.

Wisconsin.— Putnam *v.* Bicknell, 18 Wis. 333.

Canada.— Gzowski *v.* Beaty, 8 Ont. Pr. 146.

See 35 Cent. Dig. tit. "Mortgages," § 1636.

When junior mortgagee's right accrues.— Although a second mortgagee has a lien on the surplus arising on a foreclosure of the first mortgage, his right to demand possession thereof does not accrue until his mortgage is foreclosed and the amount due thereon judicially determined. Robertson *v.* Brooks, 65 Nebr. 799, 91 N. W. 709.

Effect of releasing surplus.— After a sale under a first mortgage, a second mortgagee cannot direct the surplus remaining after the satisfaction of the first mortgage to be paid to the owner of the equity of redemption without discharging the debt secured by the second mortgage. Andrews *v.* Fisk, 101 Mass. 422.

Right of concurrent senior mortgagee.— The holder of a sheriff's deed on foreclosure

lienor was a party to the foreclosure proceedings, it is proper for the decree to direct that he shall be satisfied out of the surplus, if there be any ;[14] but if he was not a party, he must assert his claim to the surplus by intervention or cross bill or by proving his claim before the court or the master,[15] or he may maintain an action, as for money had and received, against the person in whose hands the surplus remains, whether it be the first mortgagee or the sheriff.[16] These rules apply not only to the case of a junior mortgagee but also to a junior creditor by judgment,[17] execution,[18] or attachment,[19] and to the holder of a junior mechanic's lien,[20] or of a junior lien for taxes.[21]

(II) *PRIORITY AS BETWEEN JUNIOR LIENS.* The liens of mortgages and judgments, inferior to that of the mortgage foreclosed, attach to the surplus proceeds of the sale in the same order and relative priority which they held with reference to the premises before the foreclosure, and must be paid in that order,[22]

of a junior mortgage cannot complain of the fact that, on a subsequent sale of the premises under foreclosure of one of two senior mortgages of equal priority, the proceeds of sale, after satisfying the judgment, were applied on a special execution issued on foreclosure of the other senior mortgage; for although the proceeding may not have been regular, it accomplishes exactly what a court of equity would have decreed. Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443.

14. Bedell *v.* New England Mortg. Security Co., 91 Ala. 325, 8 So. 494; Dillman *v.* Will County Nat. Bank, 138 Ill. 282, 27 N. E. 1090; Shaver *v.* Williams, 87 Ill. 469; Crocker *v.* Lowenthal, 83 Ill. 579; Walker *v.* Abt, 83 Ill. 226; Simpkinson *v.* Sanders, 7 S. W. 32, 613, 9 Ky. L. Rep. 788; Keogh *v.* McManus, 34 Hun (N. Y.) 521.

15. *California.*— Windt *v.* Gilleran, 135 Cal. 94, 66 Pac. 970.

Indiana.— West *v.* Shryer, 29 Ind. 624; White *v.* Shirk, 20 Ind. App. 589, 51 N. E. 126.

Nebraska.— Milligan *v.* Gallen, 64 Nebr. 561, 90 N. W. 541; Moss *v.* Robertson, 56 Nebr. 774, 77 N. W. 403.

New York.— Koch *v.* Purcell, 45 N. Y. Super. Ct. 162.

Texas.— Milmo Nat. Bank *v.* Rich, 16 Tex. Civ. App. 363, 40 S. W. 1032, holding that the junior mortgagee cannot elect to transfer his lien to the surplus instead of following the regular remedy of foreclosure subject to the rights under the first mortgage.

See 35 Cent. Dig. tit. "Mortgages," § 1636.

16. *Alabama.*— Webster *v.* Singley, 53 Ala. 208, 25 Am. Rep. 609. Although the second mortgagee may maintain an action to have the surplus applied on his mortgage, he is not compelled to do so, but may collect the entire debt from the mortgagor. American Mortg. Co. *v.* Inzer, 98 Ala. 608, 13 So. 507.

Louisiana.— Hardy *v.* Pecot, 113 La. 350, 36 So. 992.

Massachusetts.— Knowles *v.* Sullivan, 182 Mass. 318, 65 N. E. 389.

Minnesota.— Gray *v.* Blabon, 73 Minn. 344, 77 N. W. 234.

Canada.— *Re* Kingsland, 8 Ont. Pr. 77.

Surplus arising through mistake of agent. — In proceedings to foreclose a mortgage, the mere fact that an agent of plaintiff therein exceeds his authority by mistake and bids in the property at a figure exceeding the face of the mortgage, which act his principal repudiates, gives no standing in equity to a junior mortgagee to compel the principal to account to him as for a surplus. Whitney *v.* National Exch. Bank, 84 Fed. 377.

17. Dean *v.* Phillips, 17 Ind. 406. *Compare* Baker *v.* Gladden, 72 Ga. 469 (holding that the surplus should be applied to the satisfaction of an unforeclosed mortgage rather than to junior judgment liens); Denegre *v.* Mushet, 46 La. Ann. 90, 14 So. 348.

Effect of judgment becoming dormant.— A judgment creditor will not lose his right to share in the surplus by the fact that his judgment became dormant pending the action. Dempsey *v.* Bush, 18 Ohio St. 376.

Effect of prior levy.— A judgment creditor cannot claim the surplus when he has already levied on and sold the land under his judgment, although in fact it is unsatisfied. Lambertville Nat. Bank *v.* Boss, (N. J. Ch. 1888) 13 Atl. 18.

Agreement as to disposition of surplus.— As between a judgment creditor and the mortgagee, the former is entitled to the proceeds of a sale of the mortgaged property after the payment of the mortgage debt, with such expenses only as are provided for in the mortgage or are necessarily incident thereto; and the mortgagor cannot make a subsequent agreement with the mortgagee, giving him the entire proceeds of the sale of the land, to the exclusion of the judgment creditor, under the guise of exorbitant commissions. Staton *v.* Webb, 137 N. C. 35, 49 S. E. 55.

18. Troy *v.* May, 101 Ala. 401, 13 So. 263; Field *v.* Brokaw, 159 Ill. 560, 42 N. E. 877; Harvey *v.* McNeil, 12 Ont. Pr. 362.

19. Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849; De Wolf *v.* Murphy, 11 R. I. 630.

20. Lacoste *v.* West, 19 La. Ann. 446; Knowles *v.* Sullivan, 182 Mass. 318, 65 N. E. 389.

21. Greene *v.* Bunzick, 23 N. Y. App. Div. 103, 48 N. Y. Suppl. 374; Black *v.* Murray, Ritch. Eq. Cas. (Nova Scotia) 311.

22. *Georgia.*— Hobby *v.* Pemberton, Dudley 212.

Kansas.— Hoffman *v.* Meyer, 6 Kan. 398.

Louisiana.— Hibernia Nat. Bank *v.* Smith, 27 La. Ann. 59; Fortier *v.* Slidell, 7 Rob. 398.

unless one creditor can found a claim to preference on his superior vigilance and activity.[23]

3. PROCEEDINGS FOR DISTRIBUTION — a. Nature and Form of Remedy — (I) *MOTION OR PETITION IN ORIGINAL ACTION.* The court ordering the foreclosure of a mortgage has jurisdiction to distribute the surplus proceeds of sale among those entitled, and for this purpose may admit or bring in all necessary parties.[24] Claimants of such surplus may ordinarily assert their rights and obtain an adjudication of them on a motion or petition filed in the foreclosure action,[25] if it is seasonably presented,[26] and if there is no such conflict among them as to require settlement in a plenary proceeding.[27] If the surplus money is in the hands of a trustee or commissioner of the court, he may be ordered, in a summary proceeding, to pay it over to the parties entitled.[28]

(II) *PAYMENT OF MONEY INTO COURT.* In case of contested or conflicting claims to the surplus on foreclosure the court, instead of ordering its distribution directly by the officer making the sale, may order the fund to be paid into court to await a determination of such claims;[29] and this course is necessary where

New York.— Burchell *v.* Osborne, 119 N. Y. 486, 23 N. E. 896; Gutwillig *v.* Wiederman, 26 N. Y. App. Div. 26, 49 N. Y. Suppl. 984; Elsworth *v.* Woolsey, 19 N. Y. App. Div. 385, 46 N. Y. Suppl 486; Lansing *v.* Clapp, 3 How. Pr. 238; Vanderkemp *v.* Shelton, 11 Paige 28; Norton *v.* Stone, 8 Paige 222.

United States.— Markey *v.* Langley, 92 U. S. 142, 23 L. ed. 701.

See 35 Cent. Dig. tit. "Mortgages," § 1637.

23. Burchard *v.* Phillips, 11 Paige (N. Y.) 66.

Docketing judgment.— As between two judgment creditors, he has the prior lien who first has his judgment docketed, without regard to the fact that he did not, while the other did, bring a suit and procure the setting aside of a fraudulent transfer of the property as to himself. Wilkinson *v.* Paddock, 57 Hun (N. Y.) 191, 11 N. Y. Suppl. 442 [*affirmed* in 125 N. Y. 748, 27 N. E. 407].

24. Montague *v.* Marunda, 71 Nebr. 805, 99 N. W. 653; Rochester Sav. Bank *v.* Whitmore, 25 N. Y. App. Div. 491, 49 N. Y. Suppl. 862; Sleight *v.* Read, 9 How. Pr. (N. Y.) 278 [*affirmed* in 18 Barb. 159].

In New York there is a statute as to the payment of the surplus arising from a foreclosure of a mortgage upon land of a deceased mortgagor to the surrogate. N. Y. Code Civ. Proc. § 2798 [*construed* in People's Trust Co. *v.* Harman, 43 N. Y. App. Div. 348, 60 N. Y. Suppl. 178; German Sav. Bank *v.* Sharer, 25 Hun 409; White *v.* Poillon, 25 Hun 69; Comey *v.* Clark, 4 N. Y. Suppl. 850; Loucks *v.* Van Allen, 11 Abb. Pr. N. S. 427].

25. *Georgia.*— Frick *v.* Taylor, 94 Ga. 683, 21 S. E. 713; Habersham *v.* Bond, Ga. Dec., Pt. II, 46.

Illinois.— Illinois Trust, etc., Bank *v.* Robbins, 38 Ill. App. 575.

Louisiana.— Reine *v.* Jack, 31 La. Ann. 859. Since a mortgage cannot be enforced as against improvements placed on the land by a third possessor, he is entitled to an appraisement of his interest after the sale. Lanusse *v.* Lanna, 6 Mart. N. S. 103.

Michigan.—Allen *v.* Wayne Cir. Judges, 57 Mich. 198, 23 N. W. 728.

New York.— Burchard *v.* Phillips, 11 Paige 66; De la Vergne *v.* Evertson, 1 Paige 181, 19 Am. Dec. 411.

North Carolina.— Faison *v.* Hicks, 127 N. C. 371, 37 S. E. 511.

See 35 Cent. Dig. tit. "Mortgages," § 1640.

Compare Clark, etc., Inv. Co. *v.* Way, 52 Nebr. 204, 71 N. W. 1021.

Where terre-tenants not served with notice came in on the proceedings for distribution and filed a petition alleging that no money was due on the mortgage, it was held objectionable as too vague and as not setting out a question of fact for an issue, especially as the case had been thoroughly litigated. Thompson's Appeal, 126 Pa. St. 434, 17 Atl. 663.

26. Ducker *v.* Belt, 3 Md. Ch. 13; Craw *v.* Abrams, 68 Nebr. 546, 94 N. W. 639, 97 N. W. 296; Clark, etc., Inv. Co. *v.* Way, 52 Nebr. 204, 71 N. W. 1021 (a motion for distribution should not be made until the fund is in the hands of the officer or has been paid into court; but if it is dismissed as premature, such dismissal should be without prejudice); Eleventh Ward Sav. Bank *v.* Hay, 55 How. Pr. (N. Y.) 444; Hulbert *v.* McKay, 8 Paige (N. Y.) 651 (neglect of an encumbrancer to file his claim before the entry of the order of reference does not preclude him from claiming the surplus on the reference); Allemania Loan, etc., Co. *v.* Mueller, 8 Ohio Dec. (Reprint) 402, 7 Cinc. L. Bul. 301 (claims to proceeds of foreclosure sale may be filed at any time up to the time of distribution).

27. See Habershaw *v.* Bond, Ga. Dec., Pt. II, 46; Rhodes *v.* Dutcher, 6 Hun (N. Y.) 453; De Ruyter *v.* St. Peter's Church, 2 Barb. Ch. (N. Y.) 555; Snyder *v.* Stafford, 11 Paige (N. Y.) 71.

28. Boteler *v.* Brookes, 7 Gill & J. (Md.) 143 (summary proceedings may be taken against a trustee appointed by the court to make the sale, but not against his sureties); People *v.* Cotes, 1 How. Pr. (N. Y.) 160 (mandamus against commissioners to compel payment).

29. *Florida.*— Jackson *v.* Dutton, 46 Fla. 513, 35 So. 74.

protection must be given to one having a contingent or reversionary interest in the fund.[30]

(III) *Suit at Law or in Equity.* One claiming the proceeds or surplus of a foreclosure sale, who has not participated in proceedings for distribution taken in the foreclosure action, may assert his right thereto against the person having the fund in his hands by an action at law,[31] or a bill in equity,[32] and may even in some cases sue the person who received the money under the order of distribution made by the court.[33]

b. Parties and Notice. In proceedings for the distribution of the proceeds of a foreclosure sale, it is proper to join as parties all those claiming liens on the fund or a right to share in it, either directly or conditionally upon the rejection of claims alleged to be prior to theirs;[34] and all such parties are entitled to notice of the proceedings.[35]

c. Scope and Extent of Inquiry. In these proceedings it is proper to inquire into and determine all questions raised as to the character, validity, and priority of liens asserted upon the fund,[36] including the issue of fraud[37] or usury[38] in any

Illinois.—Buck *v.* Delafield, 55 Ill. 31; Illinois Trust, etc., Bank *v.* Robbins, 38 Ill. App. 575.

New Jersey.— Johnston *v.* Reilly, 68 N. J. Eq. 130, 59 Atl. 1044.

New York.— McRoberts *v.* Pooley, 12 N. Y. Civ. Proc. 139; Van Slyke *v.* Van Loan, 26 Hun 344; Koch *v.* Purcell, 45 N. Y. Super. Ct. 162; Smack *v.* Duncan, 4 Sandf. Ch. 621.

Oregon.— Close *v.* Riddle, 67 Oreg. 592, 67 Pac. 932, 91 Am. St. Rep. 580, 56 L. R. A. 169.

See 35 Cent. Dig. tit. "Mortgages," § 1633.

30. Bolman *v.* Lohman, 79 Ala. 63, where the mortgagee was only entitled to the interest during life, and there was a remainder over.

31. Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Knowles *v.* Sullivan, 182 Mass. 318, 65 N. E. 389; Throckmorton *v.* O'Reilly, (N. J. Ch. 1903) 55 Atl. 56; Staton *v.* Webb, 137 N. C. 35, 49 S. E. 55. *Contra,* Fliess *v.* Buckley, 90 N. Y. 286 [*affirming* 24 Hun 514], holding that an action is not maintainable by a junior mortgagee to reach surplus money arising on sale under a foreclosure of the senior mortgage. Notwithstanding the foreclosure, the junior mortgage continues a lien and, as such, follows the surplus; and his remedy is to enforce his claim thereto in the court in which the judgment of foreclosure was rendered. So also as to any other claim to a lien on the fund; the question of its existence as a lien and as to its rank in the order for payment should be determined in proceedings for the distribution of the surplus; and an independent action is not proper.

Venue of action.— Surplus money arising on a foreclosure sale is regarded as realty (see *supra,* XXI, J, 2, *a,* text and note 3) and therefore an action relating to it must be brought in the county in which the mortgaged premises were situated. Fliess *v.* Buckley, 22 Hun (N. Y.) 551.

32. Baker *v.* Gladden, 72 Ga. 469; Ellis *v.* Southwell, 29 Ill. 549, both holding that a junior mortgagee must assert his claim to the surplus by a bill in equity or cross bill in the foreclosure suit.

33. Mathews *v.* Duryee, 3 Abb. Dec. (N. Y.) 220, 4 Keyes 525.

34. *California.*— Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849.

Connecticut.— See Griswold *v.* Mather, 5 Conn. 435.

New York.— Eleventh Ward Sav. Bank *v.* Hay, 55 How. Pr. 444.

North Carolina.— Smith *v.* Turrentine, 43 N. C. 185.

Ohio.— Moerlein Brewing Co. *v.* Westmeier, 4 Ohio Cir. Ct. 296, 2 Ohio Cir. Dec. 555.

See 35 Cent. Dig. tit. "Mortgages," § 1642.

Necessity for mortgagor as party.— Where it is clear that no part of the surplus can come to the mortgagor, the ascertained liens being sufficient to exhaust it, and the only contest being as to the order of their payment, he is not a necessary party. Gumbel *v.* Boyer, 46 La. Ann. 762, 15 So. 84. It is otherwise where he will be entitled to some part of the surplus if he can succeed in overturning a tax assessment alleged to be a lien. Day *v.* New Lots, 107 N. Y. 148, 13 N. E. 915.

35. Smith *v.* Smith, 13 Mich. 258; Van Voast *v.* Cushing, 32 N. Y. App. Div. 116, 52 N. Y. Suppl. 934; Kingsland *v.* Chetwood, 39 Hun (N. Y.) 602.

36. McRoberts *v.* Pooley, 12 N. Y. Civ. Proc. 139; Tator *v.* Adams, 20 Hun (N. Y.) 131; Bergen *v.* Snedeker, 8 Abb. N. Cas. (N. Y.) 50. See also Vance *v.* Roberts, 86 Ga. 457, 12 S. E. 653. *Compare* Frere *v.* Mentz, 23 La. Ann. 546.

37. Bergen *v.* Carman, 79 N. Y. 146; Wolfers *v.* Duffield, 72 Hun (N. Y.) 637, 25 N. Y. Suppl. 374; Wilcox *v.* Drought, 36 Misc. (N. Y.) 351, 73 N. Y. Suppl. 587; Tator *v.* Adams, 58 How. Pr. (N. Y.) 355. See Husted *v.* Dakin, 17 Abb. Pr. (N. Y.) 137.

38. Hutchinson *v.* Abbott, 33 N. J. Eq. 379; Mutual L. Ins. Co. *v.* Bowen, 47 Barb. (N. Y.) 618; Wilcox *v.* Drought, 36 Misc. (N. Y.) 351, 73 N. Y. Suppl. 587; Brooke *v.* Morris, 2 Cinc. Super. Ct. 528; Building Assoc. *v.* O'Connor, 3 Phila. (Pa.) 453.

lien or encumbrance. It is also permissible to inquire into the consideration of the mortgage foreclosed and the amount really due on it.[39]

d. Reference and Report of Referee. If the rights of parties claiming to share in the distribution are not entirely clear, it is proper for the court to refer the matter to a master, auditor, or referee, to ascertain and report the facts.[40]

e. Hearing, Determination, and Relief. On a proceeding for distribution, the rules of evidence[41] applicable in ordinary actions at law should be observed.[42] No actual payment of the money can be made until the filing of the master's or referee's report, if a reference was had, and the final order of the court.[43] This final order is in the nature of a judgment, and although it may be erroneous, it cannot be disregarded or impeached until regularly reversed,[44] although it may be vacated or set aside for a cause which would justify such action in the case of an ordinary judgment.[45] Being supplementary to the decree of foreclosure, it should not grant any relief inconsistent with the provisions of that decree.[46] Interest may be allowed on a superior lien up to the time of distribution,[47] and if the first mortgagee has received and retained the whole proceeds of the sale, being more than the amount of his debt, he may be charged with interest on the amount of the share ordered to be paid over to the junior encumbrancer.[48] The costs of the proceeding may be distributed in the discretion of the court, or charged to the party whose unsuccessful contest made such a proceeding necessary.[49]

f. Restitution or Recovery of Proceeds. Where a foreclosure decree is reversed on appeal, or the sale vacated or set aside, or where an order of distribution has erroneously awarded the proceeds of the sale to the wrong person, an action to compel restitution may be maintained by the party entitled to the proceeds, provided of course that he is not estopped to question the order by having been a party before the court.[50]

39. De Give *v.* Lewis, 52 Ga. 588. And see Green *v.* Akers, 55 Ga. 159. But *compare* Thompson's Appeal, 126 Pa. St. 434, 17 Atl. 663.

40. Whitehead *v.* Newark First Methodist Protestant Church, 15 N. J. Eq. 135; Poulson's Petition, 11 Phila. (Pa.) 297.

Contents of report.— A referee's report should show on its face that all the parties entitled to notice of the reference were duly summoned to attend (Franklin *v.* Van Cott, 11 Paige (N. Y.) 129; Hulbert *v.* McKay, 8 Paige (N. Y.) 651), and should also incorporate the facts found (Bigelow *v.* Bailey, 59 Hun (N. Y.) 403, 13 N. Y. Suppl. 362. And see Hulbert *v.* McKay, *supra*), and state specifically the amount of the surplus money and who is entitled to it (Franklin *v.* Van Cott, 11 Paige (N. Y.) 129).

41. See, generally, EVIDENCE.

42. Mutual L. Ins. Co. *v.* Anthony, 50 Hun (N. Y.) 101, 4 N. Y. Suppl. 501; Jacobs *v.* Davis, 16 N. Y. Suppl. 287. And see Weber *v.* Lauman, 91 Md. 90, 45 Atl. 870.

43. *Ex p.* Allen, 2 N. J. Eq. 388; Beekman *v.* Gibbs, 8 Paige (N. Y.) 511.

44. Carter *v.* Walker, 2 Ohio St. 339.

45. Irving Sav. Inst. *v.* Smith, 100 N. Y. App. Div. 460, 91 N. Y. Suppl. 446; Van Voast *v.* Cushing, 32 N. Y. App. Div. 116, 52 N. Y. Suppl. 934.

46. Cutting *v.* Tavares, etc., R. Co., 61 Fed. 150, 9 C. C. A. 401.

Reformation of mortgage.— In a proceeding between junior mortgagees to determine conflicting claims to a surplus, the court has no power to execute a formal reformation of the mortgage of one of the contestants, which is alleged to misdescribe the note which it secures; but this does not prevent an inquiry into the facts in relation thereto and an equitable determination of the rights of the parties. St. Lawrence University *v.* Farmer, 32 Misc. (N. Y.) 410, 66 N. Y. Suppl. 584.

47. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314. And see Stuart *v.* Gay, 127 U. S. 518, 8 S. Ct. 1279, 32 L. ed. 191.

48. Rappanier *v.* Bannon, (Md. 1887) 8 Atl. 555; Bangs *v.* Fallon, 179 Mass. 77, 60 N. E. 403; Eley *v.* Read, 76 L. T. Rep. N. S. 39.

49. Cowen *v.* King, 54 N. Y. App. Div. 331, 66 N. Y. Suppl. 621; American Mortg. Co. *v.* Butler, 36 Misc. (N. Y.) 253, 73 N. Y. Suppl. 334.

50. Patton *v.* Thomson, (Cal. 1893) 33 Pac. 97; Pierce *v.* Atwood, 67 Nebr. 296, 93 N. W. 153; Felts *v.* Martin, 20 N. Y. App. Div. 60, 46 N. Y. Suppl. 741; Bobbitt *v.* Blackwell, 120 N. C. 253, 26 S. E. 817.

In Pennsylvania where, in foreclosure proceedings, a trustee in a corporate mortgage is alleged to have received more than was proper, the remedy against the trustee is not by a bill in equity for an accounting, but by a petition under the act of June 4, 1836, for a citation to file an account. Merchants' Trust Co. *v.* Real Estate Trust Co., 215 Pa. St. 56, 64 Atl. 321.

Security to indemnify referee.—A referee appointed to sell property under foreclosure,

K. Costs and Fees in Foreclosure — 1. Costs of Action and Appeal — a. Right to Costs. The lien of a mortgage covers not only the debt which it secures but also the costs necessarily incurred in enforcing it, and hence the costs of foreclosure may be added to the decree and taken out of the proceeds of the sale.[51] Costs will be refused where plaintiff's proceedings were unnecessary and vexatious,[52] or where defendant has made a lawful tender of the amount really due;[53] and a plaintiff should not be allowed the costs of a new foreclosure or other proceedings rendered necessary by errors or irregularities in his own previous proceedings;[54] but the mere fact that he has demanded more than the court decides to be due to him is no ground for withholding his costs.[55]

b. Persons Entitled to Costs — (i) *Complainant.* Subject to the rules just stated, the complainant in a suit for the foreclosure of a mortgage is entitled to his costs,[56] unless cut off by a sufficient tender or a statutory offer to allow

when making payments under the judgment, should not exact from parties to whom the payments are made agreements to return the money and indemnify him against loss if such return becomes necessary on reversal of the judgment. Finn *v.* Smith, 45 Misc. (N. Y.) 240, 92 N. Y. Suppl. 168.

51. *Connecticut.*— Enright *v.* Hubbard, 34 Conn. 197.

Illinois.— Uedelhofen *v.* Mason, 201 Ill. 465, 66 N. E. 364.

Louisiana.— Exchange, etc., Co. *v.* Walden, 15 La. 431.

Maine.— Rawson *v.* Hall, 56 Me. 142; Hurd *v.* Coleman, 42 Me. 182.

New York.— Seitz *v.* Schrell, 30 N. Y. App. Div. 211, 51 N. Y. Suppl. 608; Rollins *v.* Barnes, 23 N. Y. App. Div. 240, 48 N. Y. Suppl. 779.

Texas.— Williams *v.* Silliman, 74 Tex. 626, 12 S. W. 534.

England.— National Provincial Bank *v.* Games, 31 Ch. D. 582, 55 L. J. Ch. 576, 54 L. T. Rep. N. S. 696, 34 Wkly. Rep. 600; *Ex p.* Brightwens, Buck 148, 1 Swanst. 3, 36 Eng. Reprint 274; Dryden *v.* Frost, 2 Jur. 1030, 8 L. J. Ch. 235, 3 Myl. & C. 670, 14 Eng. Ch. 670, 40 Eng. Reprint 1084; Aberdein *v.* Chitty, 8 L. J. Exch. 30, 3 Y. & C. Exch. 382; Ellison *v.* Wright, 3 Russ. 458, 27 Rev. Rep. 108, 3 Eng. Ch. 458, 38 Eng. Reprint 647; Gammon *v.* Stone, 1 Ves. 339, 27 Eng. Reprint 1068; Reg. *v.* Chambers, 4 Y. & C. Exch. 54; Connell *v.* Hardie, 3 Y. & C. Exch. 582.

Canada.—Middleton *v.* Scott, 3 Ont. L. Rep. 26; Thompson *v.* Holman, 28 Grant Ch. (U. C.) 35.

And see *infra*, XXI, K, 1, d.

But *compare* Binney *v.* Wetherbee, 10 Vt. 322.

Successive foreclosures.— Where a mortgagee holding several notes secured by the same mortgage, but maturing at different times, sues to foreclose as to one note due, and prosecutes but one such suit at the same term of court, he may recover costs in each successive foreclosure. Crouse *v.* Holman, 19 Ind. 30.

Effect of usury.—Defendant is not required to pay the costs of foreclosure where the mortgage reserved usurious interest. See Kelton *v.* Brown, (Tenn. Ch. App. 1897) 39 S. W. 541.

As to **taxation of costs** see Northern Illinois R. Co. *v.* Racine, etc., R. Co., 49 Ill. 356; Chamberlain *v.* Dempsey, 9 Bosw. (N. Y.) 540, 15 Abb. Pr. 1 [*reversed* in 36 N. Y. 144, 1 Transcr. App. 257, on grounds not relating to costs].

Where the mortgagee denied the mortgagor's right to redeem, and the latter denied that the mortgagee held the title as security, costs will not be awarded to either party. Costigan *v.* Costigan, 20 R. I. 535, 40 Atl. 341.

52. Mock *v.* Chalstrom, 121 Iowa 411, 96 N. W. 909; First Nat. Bank *v.* Tamble, (Tenn. Ch. App. 1900) 62 S. W. 308; Thompson *v.* Skeen, 14 Utah 209, 46 Pac. 1103; Carroll *v.* Carroll, 23 Grant Ch. (U. C.) 438. But *compare* Middleton *v.* Scott, 3 Ont. L. Rep. 26, holding that a mortgagee whose debt is overdue has the right to bring suit for its foreclosure, although such a proceeding is not necessary to a recovery of the debt; and his right to costs does not depend on his ability to give a satisfactory reason for commencing the proceeding.

53. Castle *v.* Castle, 78 Mich. 298, 44 N. W. 378; Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56; Williams *v.* Williams, 117 Wis. 125, 94 N. W. 25; McLean *v.* Cross, 3 Ch. Chamb. (U. C.) 432. *Compare* Uedelhofen *v.* Mason, 201 Ill. 465, 66 N. E. 364.

Effect of receiving payment.— Where plaintiff in a suit to foreclose a mortgage receives the amount of the debt after the institution of the suit, the court will allow him to discontinue without costs to junior encumbrancers who have appeared or to the mortgagor. Gallagher *v.* Egan, 2 Sandf. (N. Y.) 742. And see McCaleb *v.* Fluker, 14 La. Ann. 316.

54. Clark *v.* Stilson, 36 Mich. 482; Blodgett *v.* Hobart, 18 Vt. 414.

55. Davis *v.* Phelps, 7 T. B. Mon. (Ky.) 632; Concklin *v.* Coddington, 12 N. J. Eq. 250, 72 Am. Dec. 393. But *compare* Carey *v.* Fulmer, 74 Miss. 729, 21 So. 752; Large *v.* Van Doren, 14 N. J. Eq. 208.

56. Concklin *v.* Coddington, 12 N. J. Eq. 250, 72 Am. Dec. 393; Hoppock *v.* Conklin, 4 Sandf. Ch. (N. Y.) 582; Darling *v.* Osborne, 51 Vt. 148; Walter *v.* Stanton, 10 Wkly. Rep. 570; Allan *v.* McDougall, 6 Can. L. J. 64; Noble *v.* Line, 5 Can. L. J. 163.

the entry of a judgment in jurisdictions where such offers are admissible in chancery proceedings.[57]

(II) *Defendants Other Than Mortgagor.* Where defendants are brought into the foreclosure suit, not necessarily as denying or opposing plaintiff's right to foreclose, but because they claim liens upon or interests in the premises or because it is otherwise necessary to have them before the court in order to adjust and settle the equities in the case, they are generally entitled to their costs,[58] unless their conduct with reference to the litigation has been vexatious or oppressive.[59] Under this rule a junior mortgagee, made a defendant in the senior mortgagee's foreclosure suit, may have his costs.[60]

(III) *Disclaiming Defendant.* A defendant joined in the foreclosure suit on the allegation that he has or claims some interest in or lien upon the premises, who disclaims any such interest or lien, is entitled to his costs on being dismissed from the suit.[61]

c. Persons Liable For Costs. Liability for the costs of a foreclosure suit may attach to the complainant where he fails in his action or where the proceeding was unnecessary or made unduly expensive;[62] to a defendant who unsuccessfully

Junior mortgagee foreclosing.— Where a junior mortgagee forecloses and obtains a decree which also includes the senior mortgage, and the property, after satisfying such elder lien, is not sufficient for plaintiff's debt and costs, he may have a personal decree against the mortgagor for the costs, the latter having interposed an unfounded and unreasonable defense. Danbury *v.* Robinson, 14 N. J. Eq. 324.

57. Rollins *v.* Barnes, 23 N. Y. App. Div. 240, 48 N. Y. Suppl. 779.

In Connecticut the statute relating to offers of judgment does not apply to a foreclosure suit. People's Sav. Bank, etc., Assoc. *v.* Collins, 27 Conn. 142.

58. *Illinois.*— Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874; Town *v.* Alexander, 185 Ill. 254, 56 N. E. 1111; Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955, (1890) 25 N. E. 576.

New Jersey.— Currie *v.* Bittenbinder, (Ch. 1887) 7 Atl. 872; Scattergood *v.* Keeley, 40 N. J. Eq. 491, 4 Atl. 440.

New York.— Mayer *v.* Salisbury, 1 Barb. Ch. 546; Boyd *v.* Dodge, 10 Paige 42; Park *v.* Peck, 1 Paige 477. See also Davis *v.* Briggs, 3 How. Pr. 171; Vechte *v.* Brownell, 8 Paige 212.

North Dakota.— Brown *v.* Skotland, 11 N. D. 445, 97 N. W. 543.

Ohio.— Stewart *v.* Johnson, 30 Ohio St. 24.

Wisconsin.— Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706; Rowley *v.* Williams, 5 Wis. 151.

England.— Smith *v.* Chichester, 1 C. & L. 486, 2 Dr. & War. 393, 4 Ir. Eq. 580; Cane *v.* Brownrigg, 2 Ir. Eq. 413.

See 35 Cent. Dig. tit. "Mortgages," § 1659.

59. Danbury *v.* Robinson, 14 N. J. Eq. 324; De la Vergne *v.* Evertson, 1 Paige (N. Y.) 181, 19 Am. Dec. 411.

60. Farmers' L. & T. Co. *v.* Millard, 9 Paige (N. Y.) 620; Merchants' Ins. Co. *v.* Marvin, 1 Paige (N. Y.) 557; American Freehold Land Mortg. Co. *v.* Moody, 40 S. C. 187, 18 S. E. 677; Alston *v.* Parker, 5 L. J. Ch. 3; Cooke *v.* Brown, 9 L. J. Exch. 41, 4 Y. & C. Exch. 227; Wontner *v.* Wright, 2 Sim. 543, 29 Rev. Rep. 166, 2 Eng. Ch. 543, 57 Eng. Reprint 890. *Compare* Titus *v.* Velie, 6 Johns. Ch. (N. Y.) 435.

No costs when cross bill or answer unnecessary.— Where the rights of a junior encumbrancer who is made a party are correctly stated in the bill, so that it is not necessary for him to file a cross bill or an answer in order to protect his interests, he is not entitled to costs. Gillespie *v.* Greene County Sav., etc., Assoc., 95 Ill. App. 543; Merchants' Ins. Co. *v.* Marvin, 1 Paige (N. Y.) 557.

61. Haldane *v.* Sweet, 55 Mich. 196, 20 N. W. 902; Gregory *v.* Stanton, 12 Mich. 61; Mackie *v.* Cairns, 5 Cow. (N. Y.) 547, 15 Am. Dec. 477; Jay *v.* Ensign, 9 Paige (N. Y.) 230; Catlin *v.* Harned, 3 Johns. Ch. (N. Y.) 61.

In England and Canada he may have his costs only where he shows that he never claimed any interest or that he disclaimed before the bringing of the foreclosure suit. Ford *v.* Chesterfield, 16 Beav. 516, 22 L. J. Ch. 630, 1 Wkly. Rep. 217, 51 Eng. Reprint 878. And see Ohrly *v.* Jenkins, 1 De G. & Sm. 543, 11 Jur. 1001, 17 L. J. Ch. 22, 63 Eng. Reprint 1185; Higgins *v.* Frankis, 15 Jur. 277, 20 L. J. Ch. 16; Bellamy *v.* Brickenden, 4 Kay & J. 670, 70 Eng. Reprint 278; Dalton *v.* Lambert, 15 L. J. Ch. 208; Clarke *v.* Toleman, 21 Wkly. Rep. 66; Berrie *v.* Macklin, 1 Ch. Chamb. (U. C.) 351; Drury *v.* O'Neil, 15 Grant Ch. (U. C.) 123; Waring *v.* Hubbs, 12 Grant Ch. (U. C.) 227.

Form of disclaimer.— The proper form of a disclaimer, to entitle defendant to costs as against plaintiff, is a disclaimer of all right and interest, legal and equitable, and that defendant does not and never did claim, etc. Vale *v.* Merideth, 18 Jur. 992.

62. Merrill *v.* Bischoff, 3 N. Y. App. Div. 361, 38 N. Y. Suppl. 194; Hanson *v.* Winton, 3 Silv. Sup. (N. Y.) 119, 6 N. Y. Suppl. 245; Judson *v.* Gray, 17 How. Pr. (N. Y.) 289; Champlin *v.* Saytin, 1 Edw. (N. Y.) 467 (holding that a bill to foreclose filed after the mortgaged premises had become

resists the action, whether or not he be the original mortgagor,[63] or a purchaser or tenant of the equity of redemption;[64] to a junior mortgagee joined as a party in the action or intervening, so far as his own defenses or claims have swelled the total costs;[65] and even in some cases to a mortgagee whose lien is superior to that of the mortgage foreclosed.[66] There is no implied contract on the part of a mortgagee to pay the costs of a guardian *ad litem* for an infant defendant in a foreclosure suit, although the mortgagee's attorney requested such guardian to file an answer for the infant.[67]

d. Payment of Costs Out of Proceeds of Sale. Ordinarily a mortgage is a lien on the land not only for the debt secured but also for the costs of enforcing it, and a foreclosure suit is one *in rem* and not a personal action against defendant; and therefore the costs are to be paid out of the proceeds of the sale.[68] But

valueless is unnecessary, and therefore plaintiff should be charged with the costs); Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931 (holding that where a deed of trust authorizes the sale of the property without foreclosure suit, one who elects to proceed by foreclosure cannot charge the costs of the suit against the mortgagor without showing some reason why the property was not sold as provided in the deed of trust); Killam *v.* Jenkins, 25 Vt. 643; Tug River Coal, etc., Co. *v.* Brigel, 70 Fed. 647, 17 C. C. A. 367; *In re* Ellerhorst, 8 Fed. Cas. No. 4,380, 2 Sawy. 219.

Liability of complainant's attorney.—Where the complainant's solicitor insisted on the sale of the mortgaged premises and a report of such sale by the sheriff, after he had been informed that all the parties in interest had agreed in the settlement of the controversy and specifically performed their agreement, and after an offer to pay him and the sheriff their costs, such solicitor will be liable to costs on a motion to set aside such report of sale. Hobbs *v.* Lippincott, (N. J. Ch. 1892) 23 Atl. 955.

63. Van Orden *v.* Durham, 35 Cal. 136; Plattsburgh Bank *v.* Platt, 1 Paige (N. Y.) 464; Beverley *v.* Brooke, 4 Gratt. (Va.) 187; Bryson *v.* Huntington, 25 Grant Ch. (U. C.) 265.

64. Ireland *v.* Woolman, 15 Mich. 253; Doe *v.* Thompson, 22 N. H. 217.

In an action against a mortgagor and his grantee, the latter having assumed the payment of the mortgage debt, judgment for costs is properly entered against them jointly. Tulare County Bank *v.* Madden, 109 Cal. 312, 41 Pac. 1092.

Where a mortgage void as to creditors was good in the hands of a *bona fide* purchaser for value, a creditor of the mortgagor, purchasing the equity of redemption, was not liable for costs on foreclosure because of the defense set up by him of the fraud in the original making of the mortgage. Danbury *v.* Robinson, 14 N. J. Eq. 324.

65. *California.*— Luning *v.* Brady, 10 Cal. 265.

Iowa.— Davis *v.* Keith, 23 Iowa 419.

New Jersey.— Torrens *v.* Lees, 2 N. J. L. J. 154.

New York.— Bemus *v.* Thrall, 35 Misc. 137, 70 N. Y. Suppl. 463.

Ohio.— Eaton *v.* Greer, 4 Ohio S. & C. Pl. Dec. 142, 3 Ohio N. P. 164.

See 35 Cent. Dig. tit. "Mortgages," § 1660.

66. See Scott *v.* Somers, (N. J. Ch. 1887) 9 Atl. 718.

67. Hill *v.* Lee, 4 N. Y. App. Div. 154, 38 N. Y. Suppl. 641.

68. *Kentucky.*— Davis *v.* Phelps, 7 T. B. Mon. 632.

New Jersey.— Berlin Bldg., etc., Assoc. *v.* Clifford, 30 N. J. Eq. 482; McPherson *v.* Housel, 13 N. J. Eq. 299.

New York.— Bushwick Sav. Bank *v.* Traum, 158 N. Y. 668, 52 N. E. 1123; Burank *v.* Babcock, 3 N. Y. St. 458; Jones *v.* Phelps, 2 Barb. Ch. 440; Schryver *v.* Teller, 9 Paige 173; Pendleton *v.* Eaton, 3 Johns. Ch. 69.

Pennsylvania.— Wickersham *v.* Fetrow, 5 Pa. St. 260.

South Carolina.— Jennings *v.* Hare, 53 S. C. 396, 31 S. E. 282; American Freehold Land Mortg. Co. *v.* Moody, 40 S. C. 187, 18 S. E. 677.

United States.— Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950.

England.— Wright *v.* Kirby, 23 Beav. 463, 3 Jur. N. S. 851, 5 Wkly. Rep. 391, 53 Eng. Reprint 182; Hall *v.* Hill, 2 C. & L. 135, 3 Dr. & War. 59, 5 Ir. Eq. 11; *Ex p.* Berkeley, 4 Deac. & C. 572; *Ex p.* Trew, 3 Madd. 372, 56 Eng. Reprint 542; Ellis *v.* Molloy, 1 Molloy 536. *Compare* Coles *v.* Forrest, 10 Beav. 552, 50 Eng. Reprint 694.

See 35 Cent. Dig. tit. "Mortgages," § 1661. And see *supra*, XXI, K, 1, a.

But *compare* Russell *v.* Findley, 122 Cal. 478, 55 Pac. 143, holding that costs of foreclosure are not a lien on the mortgaged property if the mortgage does not declare that they shall be nor provide for their payment out of the proceeds of sale.

Mortgagor's costs.—Where a suit is brought to have an absolute deed declared to be in effect a mortgage, and therein a decree for its foreclosure is rendered, costs allowed to plaintiff, the mortgagor, should be deducted from the amount due the mortgagee and not from the proceeds of sale. Cline *v.* Robbins, (Cal. 1898) 55 Pac. 150.

Mortgage covering several estates.—On foreclosure against several estates on which the encumbrances were numerous and of a complicated nature, the costs of sale should not be paid in the first place out of the

this does not apply to unnecessary expenses incurred in the litigation when their allowance out of the fund would prejudice subsequent encumbrancers,[69] or to the costs of erroneous or invalid proceedings,[70] or to the costs of a litigation wholly between lienors, to settle their relative rights in the fund or in a surplus, and in which the mortgagor is not concerned.[71]

e. Amount and Items. The total amount of the costs to be allowed in a foreclosure proceeding, as well as the admissible items, depends upon varying statutory provisions[72] and may include the cost of notices to be served on defendant.[73] But a complainant or other party should not be allowed the costs of proceedings arising out of his own unnecessary or improper action in the case,[74] and in particular the cost of joining unnecessary parties will not be allowed.[75]

f. Allowance Additional to Costs. A statute in New York[76] authorizes the court to award to any party in a mortgage foreclosure suit a sum in addition to the taxable costs not exceeding two hundred dollars, and further, where the suit is "a difficult and extraordinary case," a sum not exceeding five per cent of the sum recovered or the value of the subject-matter.[77] But this extra allowance is cut off by a tender or offer of judgment pending the suit,[78] and cannot be claimed in a proceeding merely to distribute the surplus proceeds of a foreclosure sale.[79]

general fund, but the money arising from the sale of each separately encumbered estate should be treated in the same manner as the estate itself would have been, and the mortgagees should be paid their principal, interest, and costs according to their respective priorities. Wild *v.* Lockhart, 10 Beav. 320, 16 L. J. Ch. 519, 50 Eng. Reprint 605.

69. Millandon *v.* Brugiere, 11 Paige (N. Y.) 163; Kelly *v.* Israel, 11 Paige (N. Y.) 147. And see Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 28.

Where defendant sets up an unfounded defense and delays the proceedings, it is proper to charge him personally with the costs instead of taking them out of the proceeds. Jones *v.* Phelps, 2 Barb. Ch. (N. Y.) 440.

70. Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709.

71. Meyer *v.* Johnston, 53 Ala. 237; Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443.

72. See the statutes of the several states. And see Crane *v.* Feltz, 36 N. J. Eq. 159; Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417; Frost *v.* Frost, 1 Barb. Ch. (N. Y.) 492; New York L. Ins., etc., Co. *v.* Davis, 10 Paige (N. Y.) 507.

Mortgage of leasehold.— An action to foreclose a mortgage of a leasehold is not within the meaning of a statute restricting the amount of costs to be taxed in actions to foreclose mortgages on "real estate." Huntington *v.* Moore, 59 Hun (N. Y.) 351, 13 N. Y. Suppl. 97.

In the order for personal payment the costs will be limited to such costs only as would have been incurred if the action had been brought for payment only of the debt. Farrer *v.* Lacy, 31 Ch. D. 42, 55 L. J. Ch. 149, 53 L. T. Rep. N. S. 515, 34 Wkly. Rep. 22.

Suit settled before decree.—In a foreclosure suit which is settled before decree complainant's solicitor is not entitled to the full allowance for costs prescribed by the statute, but only to have his costs taxed according to the general fee bill in other suits. Shaw *v.* McNish, 1 Barb. Ch. (N. Y.) 326.

In proceedings for the distribution of the surplus arising on foreclosure sale among creditors of the deceased mortgagor, no costs should be allowed beyond motion costs and disbursements. German Sav. Bank *v.* Sharer, 25 Hun (N. Y.) 409.

73. See Gallagher *v.* Egan, 2 Sandf. (N. Y.) 742; Doe *v.* Green, 2 Paige (N. Y.) 347.

74. Frost *v.* Frost, 1 Barb. Ch. (N. Y.) 492; Billington *v.* Forbes, 10 Paige (N. Y.) 487; Woodstock Bank *v.* Lamson, 36 Vt. 118.

75. Shaw *v.* McNish, 1 Barb. Ch. (N. Y.) 326; Millandon *v.* Brugiere, 11 Paige (N. Y.) 163; Leonard *v.* Morris, 9 Paige (N. Y.) 90; Soule *v.* Albee, 31 Vt. 142.

76. N. Y. Code Civ. Proc. § 3253.

77. As to the construction and application of this statute see Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 178 N. Y. 588, 70 N. E. 1102 [*affirming* 85 N. Y. App. Div. 36, 82 N. Y. Suppl. 644]; Waterbury *v.* Tucker, etc., Cordage Co., 152 N. Y. 610, 46 N. E. 959; Hunt *v.* Chapman, 62 N. Y. 333; Badger *v.* Johnston, 106 N. Y. App. Div. 237, 94 N. Y. Suppl. 421; Ewell *v.* Hubbard, 46 N. Y. App. Div. 383, 61 N. Y. Suppl. 790; Shaw *v.* Wellman, 59 Hun (N. Y.) 447, 13 N. Y. Suppl. 527; O'Neill *v.* Gray, 39 Hun (N. Y.) 566; Rosa *v.* Jenkins, 31 Hun (N. Y.) 384; Bockes *v.* Hathorn, 17 Hun (N. Y.) 87; Walsh *v.* Weidenfeld, 3 Daly (N. Y.) 334; Barnes *v.* Meyer, 41 N. Y. Suppl. 210, 25 N. Y. Civ. Proc. 372; Lockwood *v.* Salmon River Paper Co., 20 N. Y. Suppl. 974; Poillon *v.* Cudlipp, 50 How. Pr. (N. Y.) 366; Austin *v.* Lashar, 2 Code Rep. (N. Y.) 81.

78. Lockman *v.* Ellis, 58 How. Pr. (N. Y.) 100. But see Astor *v.* Palache, 49 How. Pr. (N. Y.) 231; New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y.) 398.

79. New York L. Ins., etc., Co. *v.* Vanderbilt, 12 Abb. Pr. (N. Y.) 458.

g. Costs of Appeal. The costs of a successful appeal by the mortgagee, or of a successful defense to an unfounded appeal by the mortgagor, may be added to the mortgage debt and paid out of the proceeds of the sale.[80]

2. Disbursements of Mortgagee — a. In General. The mortgagee is also entitled on foreclosure to be compensated for charges and expenses necessarily incurred by him,[81] either in the way of enforcing his security[82] or for the protection or preservation of the mortgaged property;[83] but he must make proof that the money so claimed has actually been paid,[84] and he cannot be allowed for disbursements unnecessarily made,[85] or ordinarily for the cost of a search of the title or an abstract of title.[86]

b. Expense of Collateral Litigation. A mortgagee may properly be allowed the expenses incurred by him in litigation collateral to the mortgage, in which he has been compelled to embark or intervene, either for the purpose of making good his security or of preserving the property.[87]

3. Commissions and Expenses of Foreclosure and Sale — a. In General. The necessary expenses of a foreclosure sale are to be paid out of the proceeds of the sale,[88] including the costs and disbursements of court officers,[89] the expenses of

80. Kuhn *v.* Ogilvie, 6 Pa. Dist. 102; Slocum *v.* Carlton, 2 Pinn. (Wis.) 203, 1 Chandl. 165; Henry *v.* Byar, 1 Knapp 388, 12 Eng. Reprint 367.

Costs divided.— Where the mortgagee sold the property under a power contained in his mortgage, and the property was bought for him, and the trial court refused to set aside the sale, from which decision an appeal was taken, and the appellate court made an order directing a resale unless the amount offered at the second sale should be less than that paid by the mortgagee, the costs in the appellate court were evenly divided between plaintiff and defendant. Imboden *v.* Hunter, 23 Ark. 622, 79 Am. Dec. 116.

81. Matter of Gibbs, 58 How. Pr. (N. Y.) 502; *Ex p.* Banbury, 7 Jur. 660. And see Scruggs *v.* Scottish Mortg. Co., 54 Ark. 566, 16 S. W. 563.

Cost of drawing mortgage.— A mortgagee who is a solicitor and who acts in person in proceedings relating to the mortgage security is not entitled, in the absence of express contract, to recover from the mortgagor costs for the preparation of the mortgage, but will be limited to costs out of pocket. *In re* Wallis, 25 Q. B. D. 176, 59 L. J. Q. B. 500, 62 L. T. Rep. N. S. 674, 7 Morr. Bankr. Cas. 148, 38 Wkly. Rep. 482; *In re* Roberts, 43 Ch. D. 52, 59 L. J. Ch. 25, 62 L. T. Rep. N. S. 33, 38 Wkly. Rep. 225.

Expense of proving mortgage lost.— After the loss of a mortgage deed, the mortgagor offered to pay the overdue interest, on the production of an affidavit that the mortgagee had not parted with the mortgage. The affidavit was accordingly produced, but the mortgagor did not make the payment, and a bill of foreclosure was filed. It was held that plaintiff must bear the expense of proof of loss and the expense of the indemnity bond. McDonald *v.* Hime, 15 Grant Ch. (U. S.) 72.

82. Caryl *v.* Stafford, 69 Hun (N. Y.) 318, 23 N. Y. Suppl. 534 (not proper to allow fees of the attorney for the purchaser at the foreclosure sale); Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417 (cost of printing the case on appeal).

83. Wood *v.* Kroll, 4 N. Y. Suppl. 678.

84. Nichols *v.* Grice, 6 La. Ann. 446.

85. *In re* Price, 9 Beav. 234, 50 Eng. Reprint 333; Goodhue *v.* Carter, 1 Ch. Chamb. (U. C.) 13.

86. Roby *v.* Chicago Title, etc., Co., 194 Ill. 228, 62 N. E. 544; Iglehart *v.* Miller, 41 Ill. App. 439; Equitable L. Assur. Soc. *v.* Hughes, 125 N. Y. 106, 26 N. E. 1, 11 L. R. A. 280 [*affirming* 10 N. Y. Suppl. 796]. But *compare* Wilson Collegiate Inst. *v.* Van Horne, 3 Den. (N. Y.) 171; New York L. Ins., etc., Co. *v.* Davis, 10 Paige (N. Y.) 507; National Provincial Bank *v.* Games, 31 Ch. D. 582, 55 L. J. Ch. 576, 54 L. T. Rep. N. S. 696, 34 Wkly. Rep. 600.

87. Pettibone *v.* Stevens, 15 Conn. 19, 38 Am. Dec. 57; Case Threshing-Mach. Co. *v.* Mitchell, 74 Mich. 679, 42 N. W. 151; Decker *v.* Caskey, 3 N. J. Eq. 446; Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417; Pelly *v.* Wathen, 7 Hare 351, 14 Jur. 9, 18 L. J. Ch. 281, 27 Eng. Ch. 351, 68 Eng. Reprint 144; Dallas *v.* Gow, 1 Ch. Chamb. (U. C.) 65. And see Lewis *v.* John, Coop. Pr. Cas. 8, 47 Eng. Reprint 375, 9 Sim. 366, 16 Eng. Ch. 366, 59 Eng. Reprint 398; *Ex p.* Fletcher, Mont. 454; *Ex p.* Stephens, 2 Mont. & A. 31.

Vacating tax title.— Money advanced by a mortgagee for expenses and counsel fees in setting aside tax titles to the mortgaged property may be recovered by him from the mortgagor in a suit to foreclose the mortgage. Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60.

Administration proceedings.— So far as administration proceedings are necessary to enable a mortgagee to realize his security he will be entitled to add the cost of the same to his mortgage debt. *In re* Banks, 75 L. T. Rep. N. S. 387, 45 Wkly. Rep. 206.

88. Termansen *v.* Matthews, 49 N. Y. App. Div. 163, 63 N. Y. Suppl. 115; Berry *v.* Hebblethwaite, 4 Kay & J. 80, 70 Eng. Reprint 34.

89. Birbeck Inv., etc., Co. *v.* Gardner, 55

advertising the sale,[90] and the fees of the auctioneer who was employed to conduct it.[91]

b. Fees, Commissions, or Compensation of Officers. Where a foreclosure sale is made by a referee, master, court commissioner, or sheriff, he is entitled to a fee or commission, as compensation for his services, in such amount as may be fixed by the statute,[92] or allowed by the court in its decree or after the sale.[93] But the

N. J. Eq. 632, 37 Atl. 767; Home Bldg., etc., Co. *v.* Hoskins, 8 Ohio S. & C. Pl. Dec. 437, 6 Ohio N. P. 274, holding that a sheriff selling under foreclosure decree is entitled to reimbursement for the amount paid for a revenue stamp attached to his deed.

90. Cummings *v.* Burleson, 78 Ill. 281; Lauterjung *v.* Williamson, 14 N. Y. St. 856; Allen *v.* Williamson, 21 Abb. N. Cas. (N. Y.) 391. But *compare* Baltimore *v.* Parlange, 25 La. Ann. 335, holding that in executing the process of the court the sheriff has no right to incur costs for advertising in other papers than the official organ of the court.

91. Caryl *v.* Stafford, 69 Hun (N. Y.) 318, 23 N. Y. Suppl. 534.

Fee for adjournment.— In New York there is no statutory provision for paying auctioneers' fees for adjournments of the sale of real estate on foreclosure. Harrington *v.* Bayles, 40 Misc. (N. Y.) 388, 82 N. Y. Suppl. 379. But the referee will be entitled to fees for adjournments. Allen *v.* Williamson, 21 Abb. N. Cas. (N. Y.) 391.

Amount of fee.— A fee paid to an auctioneer for selling property on foreclosure, which is the ordinary and customary charge for such services where no express bargain has been made, and paid under the belief that auctioneers were entitled to such amount, is properly allowed, although it is reasonably probable that an auctioneer might have been found who would have made the sale for a much smaller fee. Bangs *v.* Fallon, 179 Mass. 77, 60 N. E. 403.

92. Black *v.* Ely, 6 N. J. L. 232; Schermerhorn *v.* Prouty, 80 N. Y. 317; Curtis *v.* McNair, 68 N. Y. 198; Matter of Upham, 82 Hun (N. Y.) 220, 32 N. Y. Suppl. 56; Innes *v.* Purcell, 2 Thomps. & C. (N. Y.) 538 [*affirmed* in 58 N. Y. 388]; Lockwood *v.* Fox, 61 How. Pr. (N. Y.) 522; Birge *v.* Ainsworth, 59 How. Pr. (N. Y.) 473; Walbridge *v.* James, 56 How. Pr. (N. Y.) 185; Delavan *v.* Payn, 8 Paige (N. Y.) 459; Harmon *v.* Boutall, 4 Ohio Dec. (Reprint) 108, 1 Clev. L. Rep. 33; Farrin *v.* Creager, 2 Disn. (Ohio) 464.

Referees' fees in New York.— Under N. Y. Code Civ. Proc. § 3297, the fee of a referee for making a sale under a judgment of foreclosure cannot exceed fifty dollars unless the property sells for ten thousand dollars or upward. See Caryl *v.* Stafford, 69 Hun 318, 23 N. Y. Suppl. 534; Harrington *v.* Bayles, 40 Misc. 388, 82 N. Y. Suppl. 379; Hover *v.* Hover, 25 Misc. 95, 54 N. Y. Suppl. 693. This statute means that the referee cannot have a fee of more than fifty dollars unless he actually receives and becomes accountable for ten thousand dollars or more in cash, and hence not where the excess of the purchase-price over prior liens, subject to which the sale was made, is less than ten thousand dollars, although the bid may exceed that sum. Hosmer *v.* Gans, 14 Misc. 229, 35 N. Y. Suppl. 471; Metropolitan L. Ins. Co. *v.* Bendheim, 59 N. Y. Suppl. 793. In case the property brings more than ten thousand dollars, the referee may receive such additional compensation as may seem proper to the court; but he is not entitled as a matter of right to additional compensation for every sale exceeding the statutory amount, but only for those wherein the fixed compensation seems to the court to be inadequate because of the unusual amount of labor required. Dime Sav. Bank *v.* Pettit, 59 N. Y. Suppl. 794. In the city and county of New York the referee is entitled to charge the same fees as are prescribed in the case of sales made by the sheriff of said city and county. Harrington *v.* Bayles, 40 Misc. 388, 82 N. Y. Suppl. 379; Hover *v.* Hover, 25 Misc. 95, 54 N. Y. Suppl. 693.

Where two mortgages are foreclosed in one action, and the sale is had under one judgment, the referee is not entitled to double fees. Sadlier *v.* Lyon, 31 N. Y. Suppl. 141, 24 N. Y. Civ. Proc. 105.

Effect of payment or settlement before sale. — Where defendant pays the amount of the foreclosure judgment, or the parties agree upon a settlement and dismiss the proceedings, so that no sale actually takes place, the sheriff or other officer is not entitled to the fees he would have received for making a sale, but only for services actually performed. Hobbs *v.* Lippincott, (N. J. Ch. 1892) 23 Atl. 955; Harrington *v.* Bayles, 40 Misc. (N. Y.) 388, 82 N. Y. Suppl. 379; Fiedeldey *v.* Diserens, 26 Ohio St. 312.

Sale rescinded.—Where a referee sold property under a judgment of foreclosure, and by reason of a defect in title the purchaser rescinded the sale, the court cannot on a summary application therefor require plaintiff to pay the referee's costs. Hover *v.* Hover, 25 Misc. (N. Y.) 95, 54 N. Y. Suppl. 693.

93. *Illinois.*— Roby *v.* Chicago Title, etc., Co., 194 Ill. 228, 62 N. E. 544.

Maryland.— McCullough *v.* Pierce, 55 Md. 540.

Michigan.— Hart *v.* Lindsay, Walk. 72.

Missouri.— Van Frank *v.* St. Louis, etc., R. Co., 88 Mo. App. 508.

North Carolina.— Howell *v.* Pool, 92 N. C. 450, holding that where a mortgage foreclosure sale is made by an appointee of the court, a provision in the mortgage that the mortgagee on sale of the property may retain five per cent from the proceeds as a commission is without effect.

trustee in a deed of trust who conducts a foreclosure sale is not entitled to a fee or commission for his services unless it is so stipulated in the deed,[94] or unless the court, for sufficient reasons, makes an allowance in his favor.[95] In a scire facias issued on a mortgage, the percentage for collection fee stipulated in the mortgage is subject to the discretion of the court.[96]

4. Attorney's Fees — a. In General. In the absence of a statutory provision, the entire matter of decreeing an allowance of any sum as an attorney's fee in a foreclosure proceeding, to be allowed and paid out of the proceeds of the sale, rests solely on contract, and no such allowance can be made in the absence of a contract or stipulation therefor.[97] Under the same circumstances it is error to allow a fee to the attorney for the trustee in a deed of trust by whom the sale was made.[98] In some states, however, statutes authorize or direct the allowance of a fee to complainant's solicitor.[99] Where a foreclosure is made when only a part of the mortgage debt is due, the counsel fees must not be calculated on the same basis as if the entire amount was in default.[1] Where an unauthorized or excessive attorney's fee is included in the judgment the mortgagor may recover it from the mortgagee in an action as for money had and received, provided he has not voluntarily paid it or waived the objection.[2]

b. Validity and Effect of Stipulation in Mortgage — (I) *In General.* It is generally held that a stipulation in a mortgage for an attorney's fee in case of foreclosure, to be included in the amount of the mortgagee's recovery, is not against public policy, but on the contrary is valid and binding, and warrants the

94. *Alabama.*— Donelson *v.* Posey, 13 Ala. 752.

Illinois.— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186 [*affirming* 53 Ill. App. 581]; Heffron *v.* Gage, 44 Ill. App. 147.

Maryland.— Gaither *v.* Tolson, 84 Md. 637, 36 Atl. 449.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

United States.—Central Trust Co. *v.* Louisville Trust Co., 87 Fed. 23; Central Trust Co. *v.* Wabash, etc., R. Co., 36 Fed. 622.

95. See Roller *v.* Pitman, 98 Va. 613, 36 S. E. 987; D. A. Tompkins Co. *v.* Chester Mills, 90 Fed. 37.

96. Philadelphia Trust, etc., Co. *v.* McDaniel, 2 Pa. Co. Ct. 102.

97. *California.*— Fender *v.* Robinson, 135 Cal. 26, 66 Pac. 969; Boob *v.* Hall, 107 Cal. 160, 40 Pac. 117; Clemens *v.* Luce, 101 Cal. 432, 35 Pac. 1032.

Illinois.— Conwell *v.* McCowan, 53 Ill. 363; Gunzenhauser *v.* Henke, 97 Ill. App. 485 [*affirmed* in 195 Ill. 130, 62 N. E. 896]; Atwood *v.* Whittemore, 94 Ill. App. 294. The correctness of allowing attorney's fees on foreclosure of a mortgage cannot be questioned for the first time on appeal. Continental Inv., etc., Soc. *v.* Wood, 168 Ill. 421, 48 N. E. 221.

Iowa.— Winnebago County *v.* Brones, 68 Iowa 682, 28 N. W. 15, holding that a defendant in foreclosure who does not seek to redeem but claims the land by a superior title is not in a position to question the amount allowed for attorney's fees.

Kansas.— Stover *v.* Johnnycake, 9 Kan. 367.

Louisiana.— Socha *v.* Renaldo, 26 La. Ann. 500.

Nebraska.— Moore *v.* Gregory, 13 Nebr. 563, 14 N. W. 535.

Pennsylvania.— Faulkner *v.* Wilson, 3 Wkly. Notes Cas. 339. See also Insurance Co. *v.* Shields, 12 Phila. 407, holding that the assessment of damages in the case of a judgment on a mortgage is within the control of the court to correct oppression, as in the case of an extravagant amount charged as counsel fees.

Wisconsin.— Killops *v.* Stephens, 73 Wis. 111, 40 N. W. 652; Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54; Wylie *v.* Karner, 54 Wis. 591, 12 N. W. 57.

See 35 Cent. Dig. tit. "Mortgages," § 1669.

98. Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Gay *v.* Davis, 107 N. C. 269, 12 S. E. 194; Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 46 Fed. 696. But *compare* Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501.

99. See the statutes of the several states. And see Hotaling *v.* Montieth, 128 Cal. 556, 61 Pac. 95; New York L. Ins., etc., Co. *v.* Davis, 10 Paige (N. Y.) 507.

1. Huggins *v.* Tinsman, Wils. (Ind.) 291; Adams *v.* Stevens, Clarke (N. Y.) 536. But see *contra*, Hardy *v.* Pecot, 113 La. 350, 36 So. 992.

Foreclosure by holder of part of debt secured.— When notes which are secured by the same mortgage are held by different parties, a suit instituted on one or more of such notes so secured does not authorize the imposition of the attorney's per cent of fees on the whole amount of the debt, but only on the amount sued for. Grunewald *v.* Commercial Soap, etc., Manufactory, 49 La. Ann. 489, 21 So. 646.

2. Remley *v.* Johnson County Sav. Bank, 52 Iowa 575, 3 N. W. 560; Eliason *v.* Sidle,

allowance of such fee as a part of the judgment or decree.[3] But the agreement in the mortgage must clearly and definitely cover the attorney's fee,[4] and not provide for an extravagant or unconscionable sum.[5] Under these conditions it is generally held that the fee may be made a lien on the land and included in the judgment or decree,[6] although in some states it is to be taxed as a part of the costs,[7] and in others such a stipulation only authorizes the recovery of a personal judgment against the mortgagor for the amount of the fee.[8] The right to recover it in any of these ways does not depend on the mortgagee's having paid or bound himself to pay such a fee to his attorney,[9] as the stipulation is not for damages, but is intended to indemnify the mortgagee against loss and enable him to recover the whole amount of his debt without deduction for legal expenses;[10] and in some cases it is held that the stipulated fee belongs to the attorney, and he has an interest in the judgment to the extent of it, and if the mortgagee receives the amount of it he holds it in trust for the attorney.[11]

(II) *Necessity For Action.* Where a mortgage provides for an attorney's fee "in case it shall become necessary to resort to legal proceedings" for the collection of the debt secured, or uses words of similar import, the decree should not include such a fee unless there was a real necessity of bringing the suit to foreclose,[12] and this fact must be apparent from the allegations of the bill or com-

61 Minn. 285, 63 N. W. 730; Beale *v.* Green, 16 Pa. Co. Ct. 607.

3. Corson *v.* McDonald, (Cal. App. 1906) 85 Pac. 861; Gravelle *v.* Canadian, etc., Mortg., etc., Co., 42 Wash. 457, 85 Pac. 36. And see *supra*, VIII, H, 9.

Effect of agreement.— Where there is an agreement in a mortgage for attorney's fees, the statutory fee will not be allowed on foreclosure. Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710. And where the court makes an allowance for attorney's fees in addition to the sum stipulated for in the mortgage, it is error; but the error is cured if plaintiff remits the excess before an appeal is taken. Killops *v.* Stephens, 73 Wis. 111, 40 N. W. 652.

4. See Lehman *v.* Comer, 89 Ala. 579, 8 So. 241; Thomas *v.* Jones, 84 Ala. 302, 4 So. 270; Klokke *v.* Escailler, 124 Cal. 297, 56 Pac. 1113; Rafferty *v.* High, (Cal. 1895) 41 Pac. 489; Burns *v.* Scoggin, 16 Fed. 734, 9 Sawy. 73.

Unauthorized stipulation.—Where the resolutions of a corporation authorizing a loan and mortgage do not give authority to have attorney's fees secured by the mortgage, the court will not allow such fees in a suit to foreclose the mortgage. Schallard *v.* Eel River Steam Nav. Co., 70 Cal. 144, 11 Pac. 590.

Provision for fee in only one of several mortgages.— A judgment foreclosing three mortgages together and ordering an attorney's fee to be paid out of the proceeds of the sale, where only one of the mortgages provided a lien for such fee, is erroneous. Taylor *v.* Ellenberger, 128 Cal. 411, 60 Pac. 1034.

Effect of claiming fee not provided for.— A statutory foreclosure is not necessarily invalid because the mortgagee claimed, in his notice of sale, a sum for an attorney's fee to which he was not legally entitled, and made the purchase for a sum which included such fee. Millard *v.* Truax, 47 Mich. 251, 10 N. W. 358.

5. Balfour *v.* Davis, 14 Oreg. 47, 12 Pac. 89.

6. Haensel *v.* Pacific States Sav., etc., Co., 135 Cal. 41, 67 Pac. 38; Sun Ins. Co. *v.* White, 123 Cal. 196, 55 Pac. 902; Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Duhé's Succession, 41 La. Ann. 209, 6 So. 502; Simon *v.* Haifleigh, 21 La. Ann. 607; Bronson *v.* Brown, 8 Pa. Dist. 365; Carroll Bldg. Assoc. *v.* Harris, 18 Wkly. Notes Cas. (Pa.) 80.

7. Spengler *v.* Hahn, 95 Wis. 472, 70 N. W. 466.

8. Thrasher *v.* Moran, 146 Cal. 683, 81 Pac. 32; Luddy *v.* Pavkovich, 137 Cal. 284, 70 Pac. 177; Haensel *v.* Pacific States Sav., etc., Co., 135 Cal. 41, 67 Pac. 38; Cortelyou *v.* Jones, 132 Cal. 131, 64 Pac. 119.

9. Renshaw *v.* Richards, 30 La. Ann. 398.

10. Burns *v.* Scoggin, 16 Fed. 734, 9 Sawy. 73. But *compare* Duhé's Succession, 41 La. Ann. 209, 6 So. 502.

11. Loofbourow *v.* Hicks, 24 Utah 49, 66 Pac. 602, 55 L. R. A. 874; Gray *v.* Denhalter, 17 Utah 312, 53 Pac. 976. But *compare* Bronson *v.* Brown, 8 Pa. Dist. 365.

12. Foster's Succession, 51 La. Ann. 1670, 26 So. 568; Alexandrie *v.* Saloy, 14 La. Ann. 327; National Sav. Fund, etc., Assoc. *v.* Waters, 141 Pa. St. 498, 21 Atl. 666; Clark *v.* Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931.

Effect of power of sale in mortgage.— Where the mortgage contains a power of sale, to be exercised by the mortgagee himself without resorting to the courts, there is ordinarily no legal "necessity" for a foreclosure suit, such as to justify the allowance of an attorney's fee; but such a necessity is shown to exist where it appears that there is a good reason why the power could not be executed or that a sale under it would be invalid or ineffectual. McCall *v.* American Freehold Land Mortg. Co., 99 Ala. 427, 12

plaint.[13] But in some states it has been held that the mere fact of the mortgagor's default in payment at the maturity of the debt secured, or his breach of any other covenant of the mortgage, since it gives a right to foreclose also creates a legal "necessity" for foreclosure and therefore authorizes the allowance of an attorney's fee,[14] and no demand of payment before the bringing of the suit is necessary;[15] and while a payment or valid tender of the money due, before a suit is instituted, would obviate the necessity of proceedings for foreclosure,[16] it is not so in the case of a tender made after suit brought; for thereafter the tender, to be effective, must include the fee of the mortgagee's attorney, and if it does not the court will be justified in decreeing a foreclosure and including such fee in its judgment.[17]

(III) *What Suits or Proceedings Justify Allowance of Fee.* To warrant the allowance of an attorney's fee the suit or proceeding in which it is claimed must be within the terms of the covenant or stipulation in the mortgage; and hence if that provides for a fee in case of the sale of the property under a power the fee cannot be claimed on a foreclosure by suit.[18] But if it stipulates for such a fee in case of foreclosure, it is immaterial whether the suit is brought

So. 806; American Freehold Land Mortg. Co. *v.* McCall, 96 Ala. 200, 11 So. 288.

Unconditional provision for fee.— Where the mortgage provides that on a sale the proceeds shall be devoted first to the payment of the expenses, including a reasonable attorney's fee for collecting the debt, the mortgagee is entitled to an allowance for such fee on a foreclosure in equity without showing a necessity for resorting to such method. Langley *v.* Andrews, 142 Ala. 665, 38 So. 238.

Mortgagor not in default.— A provision in a mortgage for payment of an attorney's fee in case of foreclosure cannot be enforced where the mortgagor was not in default, but suit was brought by the mortgagee in the attempt to enforce a claim held invalid. Keeting *v.* Donahue, 13 Ohio Cir. Ct. 653, 6 Ohio Cir. Dec. 262.

Other encumbrancers joined as parties.— It is proper to include a reasonable attorney's fee in the amount found due to a senior mortgagee who, without objection, becomes a party to the junior mortgagee's foreclosure suit. Shaffner *v.* Appleman, 170 Ill. 281, 48 N. E. 978. But see Gillespie *v.* Greene County Sav., etc., Assoc., 95 Ill. App. 543, holding that where a bill to foreclose a senior mortgage makes the junior mortgagee a party, so that it is unnecessary for him to file a cross bill to protect his interest, an attorney's fee should not be allowed him.

13. McCall *v.* American Freehold Land Mortg. Co., 99 Ala. 427, 12 So. 806; American Freehold Land Mortg. Co. *v.* McCall, 96 Ala. 200, 11 So. 288.

14. Uedelhofen *v.* Mason, 201 Ill. 465, 66 N. E. 364 (breach of covenant to keep the mortgaged property insured); Livermore *v.* Maxwell, 87 Iowa 705, 55 N. W. 37; Foster's Succession, 51 La. Ann. 1670, 26 So. 568; Walter *v.* Dickson, 175 Pa. St. 204, 34 Atl. 646.

15. Walter *v.* Dickson, 175 Pa. St. 204, 34 Atl. 646; Warwick Iron Co. *v.* Morton, 148 Pa. St. 72, 23 Atl. 1065; Kennedy *v.* Quigg, 6 Pa. Super. Ct. 53.

16. National Sav. Fund, etc., Assoc. *v.* Waters, 141 Pa. St. 498, 21 Atl. 666. But *compare* Simonds *v.* McMichael, 46 La. Ann. 469, 15 So. 23.

17. *Illinois.*—Uedelhofen *v.* Mason, 201 Ill. 465, 66 N. E. 364; Fuller *v.* Brown, 167 Ill. 293, 47 N. E. 202.

Kansas.— Life Assoc. of America *v.* Dale, 17 Kan. 185. But *compare* Jennings *v.* McKay, 19 Kan. 120.

Minnesota.— Mjones *v.* Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072.

Nebraska.— Hand *v.* Phillips, 18 Nebr. 593, 26 N. W. 388, 53 Am. Rep. 824.

Pennsylvania.— Warwick Iron Co. *v.* Morton, 148 Pa. St. 72, 23 Atl. 1065; Streng *v.* Holyoke Water Power Co., 12 Pa. Super. Ct. 323; Gallagher *v.* Stern, 8 Pa. Super. Ct. 628; Streng's Case, 22 Pa. Co. Ct. 570.

United States.— See Wolfe *v.* Lewis, 19 How. 280, 15 L. ed. 613.

But see Schmidt *v.* Potter, 35 Iowa 426; Lammon *v.* Austin, 6 Wash. 199, 33 Pac. 355.

Acceptance of payment or deposit.— Where after suit brought to foreclose defendant pays into court the principal and interest of the mortgage debt with the ordinary costs, and this is paid over to plaintiff and a receipt taken and the suit dismissed, the acceptance of the deposit does not estop plaintiff from claiming the attorney's fee stipulated for in the mortgage in case of foreclosure and procuring the vacation of the order dismissing the suit. Hoyt, etc., Co. *v.* Smith, 4 Wash. 640, 30 Pac. 664. And see L'Engle *v.* L'Engle, 21 Fla. 131, holding that a foreclosure was not precluded by an action and judgment for the amount of the debt secured by the mortgage and payment thereof, the mortgagor having refused to pay an attorney's fee.

18. Bynum *v.* Frederick, 81 Ala. 489, 8 So. 198; Danforth *v.* Charles, 1 Dak. 285, 46 N. W. 576; Fowler *v.* Equitable Trust Co., 141 U. S. 384, 12 S. Ct. 1, 35 L. ed. 786; Robinson *v.* Alabama, etc., Mfg. Co., 51 Fed.

in the name of the trustee or of the holder of the debt secured.[19] But the action or proceeding must be distinctly one for the enforcement of the mortgage by foreclosure,[20] instituted or maintained by an attorney for the mortgagee,[21] although it has been held that a fee may be claimed in case the mortgagee's rights are recognized and enforced on a cross bill filed by him in a suit for the foreclosure of another mortgage,[22] or in a suit brought against him to enjoin the foreclosure of his mortgage or the exercise of a power of sale contained in it.[23] If, however, the mortgage provides for the payment of such a fee in case of a suit or proceeding "for the collection" of the debt secured,[24] it may be allowed in almost any form of action or proceeding in which the mortgagee asserts his claim and seeks its recognition and enforcement, as in insolvency proceedings,[25] probate proceedings on the deceased mortgagor's estate,[26] or an action for partition among the mortgagor's heirs.[27]

(IV) *Services For Which Allowance May Be Made.* The sum allowed as an attorney's fee should cover all services rendered by him in the actual conduct of the foreclosure suit from its beginning to the distribution of the surplus;[28]

268. But *compare* Millsaps *v.* Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. Rep. 547.

19. Town *v.* Alexander, 185 Ill. 254, 56 N. E. 1111 [*affirming* 85 Ill. App. 512]; Cheltenham Imp. Co. *v.* Whitehead, 128 Ill. 279, 21 N. E. 569; Abbott *v.* Stone, 70 Ill. App. 671; Frink *v.* Neal, 37 Ill. App. 621. See, however, Payette *v.* Free Home Bldg., etc., Assoc., 27 Ill. App. 307; Cheltenham Imp. Co. *v.* Whitehead, 26 Ill. App. 609.

20. American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630 (holding that services of an attorney in resisting redemption are not to be allowed for except in so far as necessary to collect the sum really due); Harbinson *v.* Harrell, 19 Ala. 753 (holding that where mortgagees file a bill to separate their interest from that of the mortgagor after the levy of an execution against the latter on the property, they cannot be allowed attorney's fees); Smith *v.* Moore, 112 Iowa 60, 83 N. W. 813 (holding that the recovery of an attorney's fee in a suit in another state to foreclose a mortgage is no bar to the recovery of a similar fee in a subsequent suit to foreclose a mortgage held as collateral security for the same debt); Levy *v.* Beasley, 41 La. Ann. 832, 6 So. 630 (holding that where suit is brought on an open account secured by a collateral act of mortgage and notes secured thereby, and demand is made for the recognition and enforcement of the mortgage, plaintiff is entitled to recover the attorney's fees stipulated for in the mortgage).

On foreclosure for default in an interest payment, judgment cannot include attorney's fees without proof that the mortgagee gave notice of his election to claim the whole amount due and demanded payment made to him of such amount. Chase *v.* High, (Cal. 1894) 35 Pac. 1035; Clemens *v.* Luce, 101 Cal. 432, 35 Pac. 1032; Cooper *v.* McCarthy, (Cal. 1894) 36 Pac. 2.

21. Barry *v.* Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334 (holding that, although a mortgagee signs the bill for foreclosure *pro se*, he may be allowed a solicitor's fee, the mortgage providing for it, when he is represented in the litigation by other solicitors); Durham *v.* Behrer, 54 Ill. App. 564 (holding that a person named in a trust deed as a successor in the trust, and made a defendant in an action to foreclose, may act as attorney for the complainant and receive the stipulated fee); Allis *v.* Lash, 23 Minn. 261.

22. Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874; Town *v.* Alexander, 185 Ill. 254, 56 N. E. 1111; Lanoue *v.* McKinnon, 19 Kan. 408; McLane *v.* Abrams, 2 Nev. 199; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314. But *compare* Soles *v.* Sheppard, 99 Ill. 616; Kinney *v.* Columbia Sav., etc., Assoc., 113 Fed. 359.

23. *Alabama.*— Speakman *v.* Oaks, 97 Ala. 503, 11 So. 836.

Massachusetts.— Bangs *v.* Fallon, 179 Mass. 77, 60 N. E. 403.

South Carolina.— Knight *v.* Jackson, 36 S. C. 10, 14 S. E. 982.

Texas.— Dakota Bldg., etc., Assoc. *v.* Griffin, 90 Tex. 480, 39 S. W. 656.

United States.— Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153.

See 35 Cent. Dig. tit. "Mortgages," § 1672.

But see Lowry Banking Co. *v.* Atlanta Piano Co., 95 Ga. 146, 22 S. E. 42; Maus *v.* McKellip, 38 Md. 231.

24. Hand *v.* Simpson, 99 Ill. App. 269, holding that a proceeding to foreclose a mortgage given to secure the payment of a promissory note is a "suit for the collection" of the note.

25. Mullan *v.* Creditors, 39 La. Ann. 397, 2 So. 45.

26. Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666. But see Hinchman *v.* Clement, 8 Wash. 323, 35 Pac. 1073.

27. Branyan *v.* Kay, 33 S. C. 283, 11 S. E. 970.

28. Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94 (fee allowed for professional advice as to the proper disposition of the surplus remaining in the mortgagee's hands); Peacock, etc., Co. *v.* Thaggard, 128 Fed. 1005 (fee may be allowed for actual services required in the suit although the bill was taken *pro confesso*).

but not services performed by him which were a part of the duty of the sheriff or the referee and for which the latter officer is allowed costs or compensation.[29] Since it is against public policy to allow fees to an attorney for his professional services in his own case, he cannot receive such a fee by way of compensation where he is the mortgagee, or the trustee in a deed of trust, and conducts the foreclosure himself and without professional assistance.[30] Although the foreclosure proceedings on behalf of a corporation are conducted by its regularly salaried attorney, he may be entitled to the stipulated fee, if there is nothing to show that he occupied that position when the suit was begun or that he was then paid a salary by the corporation.[31]

c. Fixing Amount of Fee — (I) *Discretion of Court.* Where it rests with the court to fix the sum to be allowed as an attorney's fee in foreclosure, the amount depends upon the nature, extent, and difficulty of the services rendered, the amount involved, and the other pertinent circumstances of the case, and is very largely in the discretion of the court, so that its decision will not be reversed unless an abuse of discretion is shown by the allowance of an entirely unwarranted or excessive fee.[32]

(II) *Amount Stipulated in Mortgage.* Where a mortgage contains a stipulation fixing the amount or percentage to be allowed as an attorney's fee on foreclosure, the court may enforce the contract as it stands, if satisfied that it is not unreasonable or excessive or used as a cloak for usury or extortion.[33] But the court is by no means bound to do this. It is entirely within the competence and authority of the court, notwithstanding the stipulation in the mortgage, to

Services for which no fee allowed.— On the other hand no such allowance should be made for the benefit of a judgment creditor who has unsuccessfully attempted to set aside the deed of trust under foreclosure (Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590); nor to a stranger for services in trying to obtain an extension of the mortgage, where he is unsuccessful (Steckel *v.* Standley, 107 Iowa 694, 77 N. W. 489).

29. Ham *v.* Heermance, 3 How. Pr. (N. Y.) 168; Gay *v.* Davis, 107 N. C. 269, 12 S. E. 194.

30. Gantzer *v.* Schmeltz, 206 Ill. 560, 69 N. E. 584; Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248; Garrett *v.* Peirce, 74 Ill. App. 225. *Compare* Bedell *v.* McCormick, 19 Phila. (Pa.) 309; Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402.

Attorney named as successor to trustee.— A solicitor cannot be denied his fees because he is named as a successor to the trustee in the deed of trust under foreclosure, where the contingency on which he was to have succeeded never occurred and he never acted as trustee. Kehm *v.* Mott, 187 Ill. 519, 58 N. E. 467; Gray *v.* Robertson, 74 Ill. App. 201; Durham *v.* Behrer, 54 Ill. App. 564.

Although a mortgagee, or trustee, himself begins the foreclosure suit, if he afterward employs another attorney to conduct the litigation, the latter will be entitled to a part of the fee proportioned to his actual services. Gantzer *v.* Schmeltz, 206 Ill. 560, 69 N. E. 584; Barry *v.* Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334.

31. McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670.

32. Hellier *v.* Russell, 136 Cal. 143, 68 Pac. 581 (holding that the constitutionality of a statute permitting the court to fix counsel fees does not come in question where there is a valid stipulation to that effect in the mortgagee); Bonestell *v.* Bowie, 128 Cal. 511, 61 Pac. 78; Unity Co. *v.* Equitable Trust Co., 204 Ill. 595, 68 N. E. 654; Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573; Wright *v.* Neely, 100 Ill. App. 310; Follansbee *v.* Northwestern Mut. L. Ins. Co., 87 Ill. App. 609; Magloughlin *v.* Clark, 35 Ill. App. 251; Gourley *v.* Thompson, 11 Pa. Dist. 174; Ihmsen's Estate, 29 Pittsb. Leg. J. (Pa.) 218; Souder *v.* Moore, 17 Wkly. Notes Cas. (Pa.) 400; Cumberland Bldg., etc., Assoc. *v.* McKeown, 16 Wkly. Notes Cas. (Pa.) 456; Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725; Boston Safe-Deposit, etc., Co. *v.* Adrian, 47 Fed. 8.

33. *Alabama.*— Langley *v.* Andrews, 142 Ala. 665, 38 So. 238.

California.— Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Gronfier *v.* Minturn, 5 Cal. 492.

Idaho.— Jones *v.* Stoddart, 8 Ida. 210, 67 Pac. 650.

Illinois.— Rohrhof *v.* Schmidt, 218 Ill. 585, 75 N. E. 1062; Kinsella *v.* Cahn, 185 Ill. 208, 56 N. E. 1119; Baker *v.* Aalberg, 183 Ill. 258, 55 N. E. 672; Baker *v.* Jacobson, 183 Ill. 171, 55 N. E. 724; Thornton *v.* Commonwealth Loan, etc., Assoc., 181 Ill. 456, 54 N. E. 1037; Abbott *v.* Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; Sweeney *v.* Kaufmann, 168 Ill. 233, 48 N. E. 144; Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569; Goodwin *v.* Bishop, 145 Ill. 421, 34 N. E. 47; McIntire *v.* Yates, 104 Ill. 491; Salomon *v.* Stoddard, 107 Ill. App. 227; Shaffner *v.* Healy, 57 Ill. App. 90.

reduce the sum to such an amount as shall be fair and reasonable,[34] or to such sum as has been actually promised or paid to the attorney,[35] although it is not proper under any circumstances to allow a greater fee than that stipulated for.[36] Where the mortgage and the note secured both contain stipulations or covenants as to attorney's fees, but these differ in their terms, it is the contract expressed in the note which governs[37]

Iowa.— Brigham *v.* Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140.

Kansas.— Sharp *v.* Barker, 11 Kan. 381.

Nevada.— McLane *v.* Abrams, 2 Nev. 199; Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

Pennsylvania.— Lesher *v.* Brown, 3 Del. Co. 69; Hazleton *v.* Birdie, 10 Kulp 98.

Washington.— Vermont L. & T. Co. *v.* Greer, 19 Wash. 611, 53 Pac. 1103.

Wisconsin.— Gibson *v.* Southwestern Land Co., 89 Wis. 49, 61 N. W. 282.

See 35 Cent. Dig. tit. "Mortgages," §§ 1670, 1675.

34. *California.*— Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796; Hewett *v.* Dean, (1891) 25 Pac. 753; Grangers' Business Assoc. *v.* Clark, 84 Cal. 201, 23 Pac. 1081; Moran *v.* Gardemeyer, 82 Cal. 96, 23 Pac. 6.

Illinois.— Neiman *v.* Wheeler, 87 Ill. App. 670; Cook *v.* Illinois Trust, etc., Bank, 68 Ill. App. 478.

North Dakota.— Grand Forks First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615.

Pennsylvania.— Warwick Iron Co. *v.* Morton, 148 Pa. St. 72, 23 Atl. 1065; Lewis *v.* Germania Sav. Bank, 96 Pa. St. 86; Daly *v.* Maitland, 88 Pa. St. 384, 32 Am. Rep. 457; Scott *v.* Carl, 24 Pa. Super. Ct. 460 (holding that while stipulations for the payment of attorney's commissions in mortgages are valid, yet they are subject to the equitable control of the court, and will be enforced only to the extent of compensating plaintiff for reasonable and necessary expenses of collection; and where a debtor has been misled by his creditor or thrown off his guard, it is not an unreasonable exercise of the equitable power of the court to refuse any allowance for attorney's commissions; but to justify such action defendant should attest his sincerity and good faith by promptly paying or tendering the amount of debt and interest exclusive of commissions); Weigley *v.* Charlier, 9 Pa. Dist. 670, 8 Del. Co. 71; Landis *v.* Aldrich, 9 Wkly. Notes Cas. 192; Waln *v.* Massey, 7 Wkly. Notes Cas. 312. But *compare* Robinson *v.* Loomis, 51 Pa. St. 78.

Wisconsin.— Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

United States.— Fowler *v.* Equitable Trust Co., 141 U. S. 411, 12 S. Ct. 8, 35 L. ed. 794; Burns *v.* Scoggin, 16 Fed. 734, 9 Sawy. 73.

See 35 Cent. Dig. tit. "Mortgages," § 1675.

In Washington the rule is otherwise. Gordon *v.* Decker, 19 Wash. 188, 52 Pac. 856; Scholey *v.* De Mattos, 18 Wash. 504, 52 Pac. 242; Ames *v.* Bigelow, 15 Wash. 532, 46 Pac. 1046. But see Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

35. Woodland Bank *v.* Treadwell, 55 Cal. 379 (no fee allowed where the attorney's services were compensated by a salary paid to him by plaintiff corporation); Broadbent *v.* Brumback, 2 Ida. 366, 16 Pac. 555; Kennedy *v.* Richardson, 70 Ind. 524 (where mortgagee agrees with his attorney for a smaller fee than that stipulated in the mortgage, this inures to the benefit of the mortgagor, and only the actual amount paid to the attorney will be allowed).

Interest on attorney's fee paid in advance. — Where in an action to foreclose a mortgage it is claimed that the complainant paid its attorney's fees in advance, but there is no evidence to show that fact, nor the sum then necessarily paid, a decree disallowing the mortgagee's claim to interest on the amount said to have been paid to the attorney is proper. Pollard *v.* American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767.

36. Hotaling *v.* Montieth, 128 Cal. 556, 61 Pac. 95; Monroe *v.* Fohl, 72 Cal. 568, 14 Pac. 514; Henke *v.* Gunzenhauser, 195 Ill. 130, 62 N. E. 896; Palmeter *v.* Carey, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586. But *compare* Remington *v.* Willard, 15 Wis. 583.

37. Mason *v.* Luce, 116 Cal. 232, 48 Pac. 72; Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Hamlin *v.* Rogers, 79 Ga. 581, 5 S. E. 125; Sawyer *v.* Perry, 62 Iowa 238, 17 N. W. 497; Montague *v.* Stelts, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736. But *compare* Hellier *v.* Russell, 136 Cal. 143, 68 Pac. 581.

Stipulation in notes but not in deed of trust.— Where a conveyance of property in trust to pay certain debts does not provide for the addition of attorney's fees to such debts, such fees should not be allowed, although stipulated in the notes which are the evidence of certain of the debts. Evans *v.* Mansur, etc., Implement Co., 87 Fed. 275, 30 C. C. A. 640.

Stipulation in mortgage not in note.— Where a mortgage contains an agreement for attorney's fees, but the note secured, which is signed by several other persons besides the mortgagor, contains no such provision, judgment for such fees should be rendered against the mortgagor alone. Floyd County *v.* Morrison, 40 Iowa 188. And see Kyle *v.* Hamilton, (Cal. 1902) 68 Pac. 484.

Variance between different clauses.—Where the contract expressed in the instrument under foreclosure, for the allowance of solicitors' fees, provides for the allowance of the sum of one hundred dollars only, but another and different clause provides for the allowance of all costs and attorney's fees incurred or paid by the holder of the instrument or the notes secured by it, in any suit in which either of them may be plaintiff or defendant by reason of being a party to the trust deed or a holder of the notes, it is the specific provision for solicitors' fees which governs,

(III) *Evidence as to Reasonableness of Fee.* In determining what is a reasonable fee to be allowed to the complainant's attorney, it is always proper for the court to inform itself on the point by the testimony of qualified persons;[38] and indeed many of the decisions hold that this is a question of fact which must be determined on testimony, and that it is error for the court to fix the amount of the fee without evidence and on its own knowledge of the services rendered and its own estimate of their value.[39] The testimony to be heard is that of attorneys practising at the bar of the same court and having experience in foreclosure cases.[40] If the decision of the court is based on such testimony, its finding as to what is a reasonable fee will not ordinarily be disturbed on appeal.[41] But in the absence of any such evidence the fee should be fixed at the minimum amount stipulated for in the mortgage or conceded by defendant,[42] or at the amount allowed by the statute, if any.[43]

d. Averments as Basis of Allowance. Attorney's fees will not be allowed on foreclosure unless demanded in the complaint or bill,[44] and a proper foundation for such claim must be laid by averments showing the agreement or stipulation in the mortgage for the payment of such fees.[45] Where the agreement is simply for the allowance of a reasonable fee, it is proper, although probably not strictly necessary, to state in the bill the sum which complainant claims to be a reason-

and not the general one as to expenses incurred. Gunzenhauser *v.* Henke, 97 Ill. App. 485 [*affirmed* in 195 Ill. 130, 62 N. E. 896].

38. Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251; Unity Co. *v.* Equitable Trust Co., 204 Ill. 595, 68 N. E. 654; Clark *v.* Nichols, 3 Mont. 372.

Evidence of usual and customary fees.— In Illinois the courts have decided that a stipulation in a mortgage to pay a "reasonable" attorney's fee means a fee of the usual, ordinary, or customary amount; and hence evidence may be introduced showing what is the usual and customary fee charged by solicitors for similar services, and this amount will be allowed unless it should appear to the court to be exorbitant. Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771 [*affirming* 67 Ill. App. 540]; Wattson *v.* Jones, 101 Ill. App. 572; Wright *v.* Neely, 100 Ill. App. 310; Hough *v.* Wells, 86 Ill. App. 186.

39. Kellogg *v.* Singer Mfg. Co., 35 Fla. 99, 17 So. 68; Taylor *v.* Brown, 32 Fla. 334, 13 So. 957; Long *v.* Herrick, 26 Fla. 356, 8 So. 50; Dorn *v.* Ross, 177 Ill. 225, 52 N. E. 321; Casler *v.* Byers, 129 Ill. 657, 22 N. E. 507; Clawson *v.* Munson, 55 Ill. 394; Follansbee *v.* Northwestern Mut. L. Ins. Co., 87 Ill. App. 609; Morris *v.* German, 14 Kan. 221; Voechting *v.* Grau, 55 Wis. 312, 13 N. W. 230.

In California, where an attorney commences and tries a mortgage foreclosure suit before the court which renders the judgment of foreclosure, it is competent for the court to fix the amount of the fee to be allowed to him for such services without further evidence of the value thereof. Hellier *v.* Russell, 136 Cal. 143, 68 Pac. 581; Hotaling *v.* Montieth, 128 Cal. 556, 61 Pac. 95; Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

40. Stone *v.* Billings, 167 Ill. 170, 47 N. E. 372; Hough *v.* Wells, 86 Ill. App. 186; Casler *v.* Byers, 28 Ill. App. 128 [*affirmed* in 129 Ill. 657, 22 N. E. 507].

41. Cohn *v.* Northwestern Mut. L. Ins. Co., 185 Ill. 340, 57 N. E. 38; Surety Loan, etc., Co. *v.* Kick, 90 Ill. App. 231; Burke *v.* Donnovan, 60 Ill. App. 241; Gallagher *v.* Stern, 8 Pa. Super. Ct. 628; Commercial Nat. Bank *v.* Johnson, 16 Wash. 536, 48 Pac. 267. But see Stone *v.* Billings, 167 Ill. 170, 47 N. E. 372, holding that under a stipulation in a mortgage for the allowance of a reasonable fee to complainant's solicitor in case of foreclosure, the allowance of a large and apparently excessive amount will be carefully investigated on appeal and cannot be sanctioned unless it appears that there was full and satisfactory proof that such amount was the usual and customary charge.

42. Hawley *v.* Howell, 60 Iowa 79, 14 N. W. 199; McClure *v.* Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. Rep. 938 (no evidence, no fee); Dexter *v.* Long, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867.

43. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84; Bradtfeldt *v.* Cooke, 27 Oreg. 194, 40 Pac. 1, 50 Am. St. Rep. 701.

44. Thrasher *v.* Moran, 146 Cal. 683, 81 Pac. 32; White *v.* Allatt, 87 Cal. 245, 25 Pac. 420; Uhrich *v.* Livergood, 95 Ill. App. 640; Newburg *v.* Coyne, 85 Ill. App. 74; Knight *v.* Heafer, 79 Ill. App. 374; Augustine *v.* Doud, 1 Ill. App. 588.

45. Kern Valley Bank *v.* Chester, 55 Cal. 49; Lee *v.* McCarthy, (Cal. 1894) 35 Pac. 1034; Dates *v.* Winstanley, 53 Ill. App. 623.

In Iowa a statute requires the filing of an affidavit that no agreement has been made for sharing the fee with any person other than an associate attorney. This must be filed with the petition at the commencement of the suit. It may be made by one member of the firm of attorneys retained in the suit. See Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84; Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228; Sweney *v.* Davidson, 68 Iowa 386, 27 N. W.

able fee;[46] but it is not necessary to allege the actual employment of counsel, as the court will take notice that an attorney signing the bill is a member of its own bar, if that is the fact, and presume his employment by plaintiff.[47] If the clause in the mortgage provides for such a fee only in case it is necessary to resort to foreclosure proceedings, there should be averments showing such necessity.[48]

L. Operation and Effect — 1. In General — a. Effect of Valid Foreclosure. A decree of foreclosure of a mortgage, when rendered in a valid and genuine proceeding,[49] and not reversed or set aside,[50] and consummated by an effective sale, the purchaser complying with his bid and receiving a deed,[51] cuts off the equity of redemption of the mortgagor and strips him of all his remaining interest in the premises,[52] saving only such right of redemption as may be thereafter allowed by statute,[53] or fixed by the agreement of the parties.[54]

b. Satisfaction of Debt. A decree of foreclosure and a sale thereunder, not vacated or reversed on appeal,[55] will operate as a satisfaction and extinguishment of the debt secured by the mortgage, to the extent of the net proceeds of the sale,[56] except where a court of equity may deem it necessary to regard the debt

278. And see Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701.

46. Hewett *v.* Dean, (Cal. 1891) 25 Pac. 753; Riverside First Nat. Bank *v.* Holt, 87 Cal. 158, 25 Pac. 272; Carriere *v.* Minturn, 5 Cal. 435; Nelson *v.* Everett, 29 Iowa 184; Murray *v.* Chamberlain, 67 Minn. 12, 69 N. W. 474; Dexter *v.* Long, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867.

47. Avery *v.* Maude, 112 Cal. 565, 44 Pac. 1020.

48. Bedell *v.* New England Mortg. Security Co., 91 Ala. 325, 8 So. 494.

49. Connoly *v.* Cunningham, 2 Wash. Terr. 242, 5 Pac. 473, holding that a foreclosure under proceedings intended by the parties to be merely fictitious leaves the mortgagor with the same rights he had before, as against the mortgagee who colluded with him.

50. Morgan *v.* Sherwood, 53 Ill. 171.

51. Springfield Five Cents Sav. Bank *v.* South Cong. Soc., 127 Mass. 516; Howell County *v.* Wheeler, 108 Mo. 294, 18 S. W. 1080.

52. *Georgia.*—Willis *v.* McIntosh, Ga. Dec. 162.

Indiana.— Leary *v.* New, 90 Ind. 502.

Iowa.— Hartman Mfg. Co. *v.* Luse, 121 Iowa 492, 96 N. W. 972; Stoddard *v.* Forbes, 13 Iowa 296.

Louisiana.— Dixey *v.* Mandell, 23 La. Ann. 499.

New York.— Lansing *v.* Goelet, 9 Cow. 346.

See 35 Cent. Dig. tit. "Mortgages," § 1680.

A party claiming title under a sale on an execution issued on a judgment on a mortgage need not prove the mortgage, nor any proceedings anterior to the judgment. Buckmaster *v.* Jackson, 4 Ill. 104.

53. See the statutes of the different states. And see Duncan *v.* Hobart, 8 Iowa 337.

Foreclosure in federal court.— Where the law of the state allows a certain period for redemption after mortgage foreclosure sale, a federal court, sitting in such state and ordering the foreclosure of a mortgage, should make provision in its decree for such right of redemption. Suitterlin *v.* Connecticut Mut. L. Ins. Co., 90 Ill. 483; Orvis *v.* Powell, 98 U. S. 176, 25 L. ed. 238; Allis *v.* Northwestern Mut L. Ins. Co., 97 U. S. 144, 24 L. ed. 1008; Brine *v.* Hartford Ins. Co., 96 U. S. 627, 24 L. ed. 858.

54. Union Mut. L. Ins. Co. *v.* Kirchoff, 133 Ill. 368, 27 N. E. 91.

55. Salisbury *v.* Murphy, 69 Nebr. 2, 94 N. W. 960 (holding that where the mortgagor, by resisting confirmation of the sale, or prosecuting appeals, prevents the mortgagee from obtaining actual satisfaction either in land or money, the debt is not paid); Smith's Estate, 194 Pa. St. 259, 45 Atl. 82 (holding that the debt is not paid where the foreclosure and sale have been adjudged void on appeal).

56. *Alabama.*— Doe *v.* McLoskey, 1 Ala. 708.

California.— Goodenow *v.* Ewer, 16 Cal. 461, 76 Am. Dec. 540.

Connecticut.— Peck's Appeal, 31 Conn. 215; Bassett *v.* Mason, 18 Conn. 131; Debry Bank *v.* Landon, 3 Conn. 62; McEwen *v.* Welles, 1 Root 202, 1 Am. Dec. 39.

Illinois.— Belleville Sav. Bank *v.* Reis, 136 Ill. 242, 26 N. E. 646; Hughes *v.* Frisby, 81 Ill. 188; Robins *v.* Swain, 68 Ill. 197; Mines *v.* Moore, 41 Ill. 273; Vansant *v.* Allmon, 23 Ill. 30; Weiner *v.* Heintz, 17 Ill. 259; Cohn *v.* Franks, 96 Ill. App. 206.

Indiana.— See Cooper *v.* Jackson, 99 Ind. 566, holding that the debt secured by a mortgage is not so far merged in the foreclosure decree as to invalidate an agreement to assign a part of the debt by a designation thereof as the mortgage debt.

Iowa.— McDonald *v.* Magirl, 97 Iowa 677, 66 N. W. 904.

Kansas.— Dumont *v.* Taylor, 67 Kan. 727, 74 Pac. 234.

Louisiana.— Parkins *v.* Campbell, 5 Mart. N. S. 149, 16 Am. Dec. 188.

Maine.— Flint *v.* Winter Harbor Land Co., 89 Me. 420, 36 Atl. 634; Hurd *v.* Coleman, 42 Me. 182; Johnson *v.* Candage, 31 Me. 28.

Michigan.—Bridgman *v.* Johnson, 44 Mich. 491, 7 N. W. 83.

as still subsisting, for the purpose of protection against the claims of third parties.[57]

c. Satisfaction of Lien. Although the mere rendering of a decree for foreclosure does not so far merge the mortgage as to extinguish its lien,[58] yet when a valid decree, not reversed or set aside, is followed by a valid and enforceable sale,[59] this will satisfy and cancel the lien of the mortgage.[60] The same result

Missouri.—Gates *v.* Tebbetts, 100 Mo. App. 590, 75 S. W. 169.

New Hampshire.— Dearborn *v.* Nelson, 61 N. H. 249. But see McKeen *v.* Cook, 73 N. H. 410, 62 Atl. 729, 3 L. R. A. N. S. 343, holding that the foreclosure of a mortgage given to secure a series of notes operates as a payment of the notes only to the extent of the value of the land acquired by the holder of the notes under the foreclosure proceedings.

New Jersey.— Deare *v.* Carr, 3 N. J. Eq. 513.

New York.— Globe Ins. Co. *v.* Lansing, 5 Cow. 380, 15 Am. Dec. 474; Matter of Coster, 2 Johns. Ch. 503. A foreclosure of mortgaged premises without a sale does not operate as an extinguishment of the debt, unless the premises are of sufficient value to pay it. Spencer *v.* Harford, 4 Wend. 381.

Ohio.— Reedy *v.* Burgert, 1 Ohio 157.

Pennsylvania.— See Stricker *v.* McDonnell, 213 Pa. St. 108, 62 Atl. 520, holding that a mortgage is a separate obligation for the debt which it secures, and is only collateral security for the same; and suit, judgment, and satisfaction on it are not a discharge of the obligation of the mortgage bond unless the debt is actually satisfied.

South Carolina.— Eargle *v.* Lorick, 55 S. C. 431, 33 S. E. 490; Cleveland *v.* Cohrs, 18 S. C. 599; Edwards *v.* Sanders, 6 S. C. 316.

Texas.— White *v.* Security Mortg., etc., Co., (Civ. App. 1896) 37 S. W. 623. The attempted foreclosure of an invalid mortgage, and the purchase of the property under the same, pass no title and do not extinguish the debt which the mortgage was given to secure. Dever *v.* Selz, (Civ. App. 1905) 87 S. W. 891.

Vermont.— Calkins *v.* Clement, 54 Vt. 635; Devereaux *v.* Fairbanks, 52 Vt. 587; Paris *v.* Hulett, 26 Vt. 308; Lovell *v.* Leland, 3 Vt. 581.

Washington.— California Bank *v.* Dyer, 14 Wash. 279, 44 Pac. 534.

Wisconsin.— Huntzicker *v.* Dangers, 115 Wis. 570, 92 N. W. 232.

See 35 Cent. Dig. tit. "Mortgages," § 1681.

A grantee of an interest in real estate, who has assumed one half of a mortgage thereon, is not discharged from liability to the mortgagee by the fact that the latter has foreclosed the mortgage as against the mortgagor and a subsequent grantee of the property. Rouse *v.* Bartholomew, 51 Kan. 425, 32 Pac. 1088.

Assignment as collateral.— Where a mortgage of real estate is assigned as collateral security for a debt other than the mortgage debt, and foreclosed by the assignee, by whom the land is afterward sold, the debt, to secure which the assignment was made, is not paid by the foreclosure, but only by the actual sale and conversion into money. Brown *v.* Tyler, 8 Gray (Mass.) 135, 69 Am. Dec. 239. And see Haynes *v.* Pipes, 14 La. Ann. 248.

Additional security.— Where a paid-up lease for a certain period is given to mortgagees as additional security, who have the option to hold over on paying a fair rental, the foreclosure of the mortgage will not prevent them from applying in satisfaction of their debt the amount of rents due from them and unpaid. Storey *v.* Dutton, 46 Mich. 539, 9 N. W. 844.

Taxes.— A statute requiring the party selling, under judicial process or otherwise, to pay all sums due and in arrear for taxes on the premises, does not prevent his recovering the same from one liable to him for the payment thereof. Richmond Commercial Bldg., etc., Assoc. *v.* Robinson, 90 Md. 615, 45 Atl. 449.

57. Carpentier *v.* Brenham, 40 Cal. 221; Osborne *v.* Taylor, 60 Conn. 107, 21 Atl. 380.

58. Ulrich *v.* Drischell, 88 Ind. 354; Manns *v.* Brookville Nat. Bank, 73 Ind. 243; Evansville Gaslight Co. *v.* State, 73 Ind. 219, 38 Am. Rep. 129; Teal *v.* Hinchman, 69 Ind. 379; Lapping *v.* Duffy, 47 Ind. 51; Nunemacher *v.* Ingle, 20 Ind. 135; Shearer *v.* Mills, 35 Iowa 499; Hendershott *v.* Ping, 24 Iowa 134. See, however, People *v.* Beebe, 1 Barb. (N. Y.) 379.

59. Lindgren *v.* Lindgren, 73 Minn. 90, 75 N. W. 1034 (holding that no satisfaction or discharge of the lien results from a foreclosure sale which is invalid because of fraud); Monroe *v.* Buchanan, 27 Tex. 241 (holding that no discharge of the mortgage lien results from a sale of the property under a decree of foreclosure which is afterward adjudged void).

A decree in a suit to which the owner of the equity of redemption is not made a party does not merge or satisfy the mortgage, and the mortgagee, purchasing at the sale, may maintain another suit to foreclose with the proper parties. Shirk *v.* Andrews, 92 Ind. 509.

60. *Illinois.*— Bogardus *v.* Moses, 181 Ill. 554, 54 N. E. 984; Ohling *v.* Luitjens, 32 Ill. 23; Belleville Sav. Bank *v.* Reis, 34 Ill. App. 495 [*reversed* on other grounds in 136 Ill. 242, 26 N. E. 646].

Kentucky.— Lear *v.* Totten, 14 Bush 101.

Louisiana.— Davis *v.* Citizens' Bank, 39 La. Ann. 523, 2 So. 201; Jennings *v.* Vickers, 31 La. Ann. 679; Griffin *v.* His Creditors, 6 Rob. 216.

follows from the recovery of a judgment at law upon the mortgage debt, followed by an execution sale resulting in satisfaction.[61]

d. Second Foreclosure—(I) *In General.* A decree for foreclosure of a mortgage is a bar to any second action between the same parties upon the same cause,[62] when the suit was brought by the real owner of the mortgage,[63] and so long as the decree remains unreversed and not vacated.[64] But this does not prevent a supplemental suit to effect a foreclosure as against parties who were omitted from the original action by a mistake of fact or because their interests were then unknown to plaintiff.[65]

(II) *For Deficiency or Other Instalments.* As a general rule a foreclosure and sale under a mortgage exhausts the lien of the mortgage so that no second action can be maintained for foreclosure as to any deficiency resulting from the first sale or as to an instalment of the mortgage debt which was not due or not included in the first suit.[66] This rule applies with especial force where the

Nebraska.— Nebraska L. & T. Co. *v.* Haskell, 4 Nebr. (Unoff.) 330, 93 N. W. 1045.

New York.— See Westbrook *v.* Gleason, 14 Hun 245 [*reversed* in 79 N. Y. 23].

Ohio.— Rhoades *v.* Raymer, 6 Ohio Cir. Ct. 68, 3 Ohio Cir. Dec. 353.

Pennsylvania.— Stewartson *v.* Watts, 8 Watts 392; Cronister *v.* Weise, 8 Watts 215, 34 Am. Dec. 461.

South Carolina.— Manigault *v.* Deas, Bailey Eq. 283.

Wisconsin.— Huntzicker *v.* Dangers, 115 Wis. 570, 92 N. W. 232.

United States.— New Orleans Nat. Banking Assoc. *v.* Adams, 109 U. S. 211, 3 S. Ct. 161, 27 L. ed. 910; Curtis *v.* Cutler, 76 Fed. 16, 22 C. C. A. 16, 37 L. R. A. 737; Sowles *v.* Witters, 54 Fed. 568.

See 35 Cent. Dig. tit. "Mortgages," § 1682.

Part satisfaction.— A mortgage sale which does not produce enough to satisfy the mortgage debt in full does not entirely extinguish the lien of the mortgage. Barker *v.* Bell, 37 Ala. 354; Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (N. J. Ch. 1899) 42 Atl. 284.

61. Freeby *v.* Tupper, 15 Ohio 467; West Branch Bank *v.* Chester, 11 Pa. St. 282, 51 Am. Dec. 547; Clarke *v.* Stanley, 10 Pa. St. 472; Hartz *v.* Woods, 8 Pa. St. 471; Berger *v.* Hiester, 6 Whart. (Pa.) 210. But *compare* Good *v.* Schoener, 10 Leg. Int. (Pa.) 151, holding that where land encumbered by two judgments and a mortgage is sold under the latter judgment and purchased by the judgment creditor, and before the sale the judgment creditor enters into an agreement that he will immediately convey back again on the payment of the judgments, which conveyance he makes, the mortgage is not divested.

62. Dumont *v.* Taylor, 67 Kan. 727, 74 Pac. 234; Walton *v.* Hollywood, 47 Mich. 385, 11 N. W. 209; Du Bois *v.* Martin, 71 Nebr. 577, 99 N. W. 267; Barnes *v.* Chicago, etc., R. Co., 122 U. S. 1, 7 S. Ct. 1043, 30 L. ed. 1128.

Foreclosure for interest only.— The foreclosure of a mortgage for the interest only, where the whole debt is due at the time, ordinarily exhausts the lien of the mortgage, and is a bar to a second foreclosure; but where the decree provides that it is subject to the mortgage lien for the principal debt, and that the sale shall be made subject thereto, it cannot be pleaded as a bar to a second foreclosure for the principal. Nebraska L. & T. Co. *v.* Domon, 4 Nebr. (Unoff.) 334, 93 N. W. 1022.

Judgment on cross complaint.— Where a junior mortgagee, made a defendant, files a cross complaint asking for the foreclosure of his mortgage, on which no action is taken, except that the decree, ordering the foreclosure of the senior mortgage, directs that any surplus shall be applied to the junior claim, this is not such an action for foreclosure as will prevent the junior mortgagee from subsequently suing directly for foreclosure of his mortgage, especially where it includes other lands. Pauly *v.* Rogers, 121 Cal. 294, 53 Pac. 808.

63. Connecticut Trust, etc., Co. *v.* Fletcher, 61 Nebr. 166, 85 N. W. 59, holding that where one who is no longer the owner of the notes secured by a mortgage sues for its foreclosure and obtains a decree, this will not bar an action by the assignee of the notes, being a holder for value.

64. Jennings *v.* Parr, 51 S. C. 191, 28 S. E. 82, 402. And see Gerig *v.* Loveland, 130 Cal. 512, 62 Pac. 830.

65. Johns *v.* Wilson, 6 Ariz. 125, 53 Pac. 583 [*affirmed* in 180 U. S. 440, 21 S. Ct. 445, 45 L. ed. 613]; Brackett *v.* Banegas, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164; Morey *v.* Duluth, 69 Minn. 5, 71 N. W. 694; State Bank *v.* Abbott, 20 Wis. 570.

66. *Georgia.*— Willis *v.* McIntosh, Ga. Dec. 162.

Illinois.— The mortgagee must include in his foreclosure suit all the several instalments or separate obligations or claims against the mortgagor which are due at that time; and any which might have been included, but were omitted, are barred and cannot be made the basis of a second suit for foreclosure. But not so as to an instalment which was not then due. An action to foreclose as to it, brought at the proper time, is not barred by the former decree, especially where, as is proper, the first decree provides that the sale shall be made subject to the continuing lien of the mortgage as security for the remaining instalments. Boyer *v.* Chandler, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113; Telford *v.*

mortgagee himself becomes the purchaser at the original foreclosure sale.[67] But the rule does not apply where there has been a statutory redemption from the first sale, either by the mortgagor or a judgment creditor,[68] where only a portion of the land was sold on the first foreclosure,[69] or, in New York, where the first foreclosure was for interest only,[70] or where there are concurrent mortgages to different persons on the same land, or the several obligations secured are distributed among and held by different creditors.[71]

e. Title to Property Mortgaged. The effect of a valid foreclosure is to vest in the mortgagee, or purchaser at the foreclosure sale, a complete legal title to the premises, the same as he would have taken by deed directly from the mortgagor,[72]

Garrels, 132 Ill. 550, 24 N. E. 573; Hards *v.* Burton, 79 Ill. 504; Rains *v.* Mann, 68 Ill. 264; Smith *v.* Smith, 32 Ill. 198; Schlatt *v.* Johnson, 85 Ill. App. 445; Bressler *v.* Martin, 34 Ill. App. 122 [*affirmed* in 133 Ill. 278, 24 N. E. 518].

Iowa.— Burroughs *v.* Ellis, 76 Iowa 649, 38 N. W. 141; Harms *v.* Palmer, 73 Iowa 446, 35 N. W. 515, 5 Am. St. Rep. 691; Todd *v.* Davey, 60 Iowa 532, 15 N. W. 421; Micklewait *v.* Raines, 58 Iowa 605, 12 N. W. 622; Escher *v.* Simmons, 54 Iowa 269, 6 N. W. 274.

Kentucky.—Makibben *v.* Arndt, 88 Ky. 180, 10 S. W. 642, 10 Ky. L. Rep. 847.

Minnesota.— Darelius *v.* Davis, 74 Minn. 345, 77 N. W. 214; Hansom *v.* Dunton, 35 Minn. 189, 28 N. W. 221; Fowler *v.* Johnson, 26 Minn. 338, 3 N. W. 986, 6 N. W. 486.

Missouri.— Buford *v.* Smith, 7 Mo. 489; Young *v.* Clifford, 61 Mo. App. 450.

Pennsylvania.—Berger *v.* Hiester, 6 Whart. 210.

Texas.— Vieno *v.* Gibson, (Civ. App. 1890) 20 S. W. 717.

Vermont.— Noyes *v.* Rockwood, 56 Vt. 647.

See 35 Cent. Dig. tit. "Mortgages," § 1683.

But see Chaffraix *v.* Packard, 26 La. Ann. 172; Carroll *v.* Hopkins, 4 Grant Ch. (U. C.) 431.

Estoppel to plead former foreclosure.— Where a mortgage securing several notes maturing at different times was foreclosed as to the last one, it was held that it might be foreclosed again, as against a purchaser of the equity of redemption after foreclosure who assumed to pay the other notes as part of the purchase-money, he being estopped to maintain that the mortgage was merged by foreclosure. Hill *v.* Minor, 79 Ind. 48.

67. Seligman *v.* Laubheimer, 58 Ill. 124; Anderson *v.* Anderson, 129 Ind. 573, 29 N. E. 35, 28 Am. St. Rep. 211.

68. Green *v.* Stobo, 118 Ind. 332, 20 N. E. 850; Duke *v.* Beeson, 79 Ind. 24; Smith *v.* Moore, 73 Ind. 388; Crouse *v.* Holman, 19 Ind. 30; Campbell *v.* Maginnis, 70 Iowa 589, 31 N. W. 946; Herber *v.* Christopherson, 30 Minn. 395, 15 N. W. 676; Standish *v.* Vosberg, 27 Minn. 175, 6 N. W. 489; Watkins *v.* Hackett, 20 Minn. 106; Shorts *v.* Cheadle, 8 Minn. 67; Daniels *v.* Smith, 4 Minn. 172; Nebraska L. & T. Co. *v.* Haskell, 4 Nebr. (Unoff.) 330, 93 N. W. 1045.

69. Bressler *v.* Martin, 133 Ill. 278, 24 N. E. 518.

In California the statute provides that if the debt for which the mortgage is held is not all due, as soon as sufficient property has been sold to pay the amount due, with costs, the sale must cease, and as often as more of the debt becomes due the court may order more of the land to be sold. Hence the complainant may move the court for a sale of sufficient property to satisfy each of the unmatured instalments as they fall due. Napa [illegible]

70. Pretzfeld *v.* Lawrence, 34 Misc. (N. Y.) 329, 69 N. Y. Suppl. 807.

71. Moffitt *v.* Roche, 76 Ind. 75; Morgan *v.* Kline, 77 Iowa 681, 42 N. W. 558; Townsend *v.* Payne, 42 La. Ann. 909, 8 So. 626; Scott *v.* Featherston, 5 La. Ann. 306. But see Weiss *v.* Alling, 34 Conn. 60.

72. *California.*— Kidd *v.* Teeple, 22 Cal. 255; Kirkham *v.* Dupont, 14 Cal. 559; Brown *v.* Winter, 14 Cal. 31.

District of Columbia.— Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 23 App. Cas. 587.

Massachusetts.— Haven *v.* Grand Junction R., etc., Co., 12 Allen 337.

Missouri.— Finley *v.* Babb, 173 Mo. 257, 73 S. W. 180.

New York.— Slattery *v.* Schwannecke, 44 Huu 75, 7 N. Y. St. 430 [*affirmed* in 118 N. Y. 543, 23 N. E. 922].

Oregon.—Abraham *v.* Chenoweth, 9 Oreg. 348.

Wisconsin.— Tallman *v.* Ely, 6 Wis. 244.

United States.—Romig *v.* Gillett, 187 U. S. 111, 23 S. Ct. 40, 47 L. ed. 97; Julian *v.* Central Trust Co., 115 Fed. 956, 53 C. C. A. 438.

See 35 Cent. Dig. tit. "Mortgages," § 1684.

As between joint tenants.— Where one joint tenant sold the land held by himself and others jointly, and took a mortgage to himself to secure the purchase-money, and afterward foreclosed the same and bought the premises himself, it was held that this did not give him a new title on his own account, as he had no right to sell the entire estate. Jack *v.* Woods, 29 Pa. St. 375.

Agreement as to title.— Where, prior to foreclosure and sale, the mortgagor and mortgagee agree that the sale shall not operate as a satisfaction of the mortgage debt, or divest the lien, or be applied in payment of the debt, but that the buyer shall hold the land in trust for the mortgagee, the effect of the sale is part of the executory contract of the parties and subordinate to it. Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78.

but subject to titles, rights, and equities existing prior to the date of execution of the mortgage,[73] which date fixes the rights of the foreclosure purchaser, his title relating thereto, and not to the time of completion of the foreclosure proceedings.[74]

f. Conclusiveness of Decree — (1) *Persons Concluded.* All persons properly before the court in a foreclosure proceeding, whether as plaintiffs or defendants, are bound and concluded by the decree rendered therein, and estopped from disputing the validity of the proceedings or the title of the purchaser.[75] This rule includes joint or concurrent mortgagees,[76] the heirs and personal representatives of the mortgagor,[77] contingent remainder-men, even though not *in esse*, the mortgage being given by a tenant for life,[78] persons acquiring interests in the mortgaged premises pending the foreclosure proceedings,[79] and the owners of junior liens or claims who are properly brought into the action.[80] And although

73. Gates *v.* Boston, etc., Air-Line R. Co., 53 Conn. 333, 5 Atl. 695; Martin *v.* Morris, 62 Wis. 418, 22 N. W. 525. And see Citizens' State Bank *v.* Jess, 127 Iowa 450, 103 N. W. 471.

74. Gamble *v.* Horr, 40 Mich. 561.

75. *California.*— White *v.* Costigan, 134 Cal. 33, 66 Pac. 78.

Illinois.— King *v.* King, 215 Ill. 100, 74 N. E. 89; Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Bostwick *v.* Skinner, 80 Ill. 147; Bressler *v.* Martin, 34 Ill. App. 122 [*affirmed* in 133 Ill. 278, 24 N. E. 518].

Indiana.— Ballew *v.* Roler, 124 Ind. 557, 24 N. E. 976, 9 L. R. A. 481; Craighead *v.* Dalton, 105 Ind. 72, 4 N. E. 425.

Iowa.—Geiershofer *v.* Nupuf, 106 Iowa 374, 76 N. W. 745; Day *v.* Goodwin, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465; Willard *v.* Calhoun, 70 Iowa 650, 28 N. W. 22.

Maryland.— Ducker *v.* Belt, 3 Md. Ch. 13.

Massachusetts.— Le Fleur *v.* Chace, 171 Mass. 59, 50 N. E. 456.

Missouri.— Donnan *v.* Intelligencer Printing, etc., Co., 70 Mo. 168.

Nebraska.— Eastman *v.* Cain, 51 Nebr. 786, 71 N. W. 714; Franse *v.* Armbuster, 28 Nebr. 467, 44 N. W. 481, 26 Am. St. Rep. 345; Omaha, etc., R. Co. *v.* Redick, 16 Nebr. 313, 20 N. W. 309; Lounsbury *v.* Catron, 8 Nebr. 469, 1 N. W. 447.

New Jersey.— Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; McGee *v.* Smith, 16 N. J. Eq. 462.

New York.— French *v.* Powers, 120 N. Y. 128, 24 N. E. 296; Hays *v.* Thomae, 56 N. Y. 521; White *v.* Evans, 47 Barb. 179; Graham *v.* Fountain, 2 N. Y. Suppl. 598; De Peyster *v.* Hildreth, 2 Barb. Ch. 109, parties and purchasers therefrom.

South Carolina.— Zeigler *v.* Maner, 53 S. C. 115, 30 S. E. 829, 69 Am. St. Rep. 842.

Texas.— Lumpkin *v.* Silliman, 79 Tex. 165, 15 S. W. 231.

Utah.— Dupee *v.* Salt Lake Valley L. & T. Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902.

United States.— Central Trust Co. *v.* U. S. Rolling-Stock Co., 56 Fed. 5.

England.— Steele *v.* Philips, Beatty 188; Perkin *v.* Stafford, 10 Sim. 562, 16 Eng. Ch. 562, 59 Eng. Reprint 733; Metcalfe *v.* Pulvertoft, 2 Ves. & B. 200, 13 Rev. Rep. 63, 35 Eng. Reprint 295; Johnson *v.* Clarke, 3 Wkly. Rep. 193.

See 35 Cent. Dig. tit. "Mortgages," § 1685.

Representation of bondholders by their trustee and effect of decree on those whose claims are submitted see Carpenter *v.* Canal Co., 35 Ohio St. 307; McElrath *v.* Pittsburg, etc., R. Co., 28 Leg. Int. (Pa.) 197.

76. O'Brien *v.* Moffitt, 133 Ind. 660, 33 N. E. 616, 36 Am. St. Rep. 566.

77. Howard *v.* Gresham, 27 Ga. 347; Barlow *v.* Stanford, 82 Ill. 298; Craighead *v.* Dalton, 105 Ind. 72, 4 N. E. 425; Riley *v.* Condran, 26 La. Ann. 294; Nunnally *v.* Robinson, 113 N. Y. App. Div. 848, 99 N. Y. Suppl. 594.

A decree against the executor of the mortgagor is not binding on the heir, the latter not having been a party. Walker *v.* Redding, 40 Fla. 124, 23 So. 565. And see Humble *v.* Bill, 2 Vern. Ch. 444, 23 Eng. Reprint 884.

78. Robinson *v.* Columbia Finance, etc., Co., 44 S. W. 631, 19 Ky. L. Rep. 1771; Roarty *v.* McDermott, 146 N. Y. 296, 41 N. E. 30; Goebel *v.* Iffla, 111 N. Y. 170, 18 N. E. 649; Platt *v.* Sprigg, 2 Vern. Ch. 304, 23 Eng. Reprint 796. But *compare* Boskowitz *v.* Held, 15 N. Y. App. Div. 306, 44 N. Y. Suppl. 136.

79. Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27; Jackson *v.* Centerville, etc., R. Co., 64 Iowa 292, 20 N. W. 442; Maskell *v.* Merriman, 9 Rob. (La.) 69; Schnepf's Appeal, 47 Pa. St. 37; Dupee *v.* Salt Lake Valley L. & T. Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902.

Purchasers of different parts.—If the mortgagor has aliened the land to two persons, in separate parcels, a judgment obtained against one of them for the whole tract, by the mortgagee, does not foreclose the other's right to redeem. Carll *v.* Butman, 7 Me. 102.

80. *California.*— Benner *v.* Troughton, 17 Cal. 247.

Illinois.— Illinois Nat. Bank *v.* School Trustees, 111 Ill. App. 189; Clarke *v.* Chamberlin, 70 Ill. App. 262.

Kansas.— Provident L. & T. Co. *v.* Marks, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349; Crawford *v.* Redd, 7 Kan. App. 770, 53 Pac. 484.

some parties are omitted who might or should have been joined, the decree is not the less conclusive on those who are properly before the court.[81]

(II) *Effect on Persons Not Parties.* Persons having an interest in or lien upon mortgaged premises, who are not joined as parties in an action to foreclose the mortgage, are not bound or in any way affected by the decree therein, but their rights remain precisely as if no such decree had been made.[82] This rule applies not only to the original mortgagor, but also to a purchaser of the equity of redemption by deed executed before the foreclosure was begun,[83] to a tenant

Michigan.— Walsh *v.* Robinson, 135 Mich. 16, 97 N. W. 55, 99 N. W. 282.

Nebraska.— Graves *v.* Fritz, 24 Nebr. 375, 38 N. W. 819.

New Jersey.— Smith *v.* Davis, (Ch. 1890) 19 Atl. 541. And see Sibell *v.* Weeks, 65 N. J. Eq. 714, 55 Atl. 244.

Oregon.— Williams *v.* Wilson, 42 Oreg. 299, 70 Pac. 1031, 95 Am. St. Rep. 745.

Unrecorded liens.— By statute in some states, any person claiming an interest in the mortgaged premises under an instrument which he might have recorded, but which is not recorded, is bound by the decree of foreclosure, although not made a party to the proceedings. See Hager *v.* Astorg, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68; Wilson *v.* California Bank, 121 Cal. 630, 54 Pac. 119; Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493.

81. Hayward *v.* Stearns, 39 Cal. 58; Montgomery *v.* Tutt, 11 Cal. 307.

82. *Alabama.*— Probst *v.* Bush, 115 Ala. 495, 22 So. 445; Junkins *v.* Lovelace, 72 Ala. 303; Chapman *v.* Fields, 70 Ala. 403; Hunt *v.* Acre, 28 Ala. 580; Woodward *v.* Wood, 19 Ala. 213.

California.— Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756; McMillan *v.* Reynolds, 11 Cal. 372.

Connecticut.— Curtiss *v.* Hazen, 56 Conn. 146, 14 Atl. 771.

Florida.— Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823.

Georgia.— Lillenthal *v.* Champion, 58 Ga. 158; Byars *v.* Bancroft, 22 Ga. 34.

Illinois.— Lohmeyer *v.* Durbin, 213 Ill. 498, 72 N. E. 1118; Gilcreest *v.* Magill, 37 Ill. 300; Dow *v.* Seely, 29 Ill. 495; Unity Co. *v.* Equitable Trust Co., 107 Ill. App. 449; Parlin, etc., Co. *v.* Galloway, 95 Ill. App. 60.

Indiana.— Tate *v.* Hamlin, 149 Ind. 107, 47 N. E. 5; Fowler *v.* Lilly, 122 Ind. 297, 23 N. E. 767; Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698; Curtis *v.* Gooding, 99 Ind. 45; Cain *v.* Hanna, 63 Ind. 408; Goodall *v.* Mopley, 45 Ind. 355; Murdock *v.* Ford, 17 Ind. 52; Ætna L. Ins. Co. *v.* Stryker, (App. 1906) 78 N. E. 245.

Iowa.— Stastny *v.* Pease, 124 Iowa 587, 100 N. W. 482; Harsh *v.* Griffin, 72 Iowa 608, 34 N. W. 441; Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293. But see Omaha, etc., R. Co. *v.* O'Neill, 81 Iowa 463, 46 N. W. 1100, holding that general creditors cannot question the construction placed on a mortgage of their debtor's property, in a suit to foreclose, to which all persons having an interest in the mortgaged property were made parties.

Kentucky.— Miller *v.* Cravens, 2 Duv. 246; Rhodes *v.* Stone, 76 S. W. 533, 25 Ky. L. Rep. 921.

Michigan.— Sherman *v.* Fisher, 138 Mich. 391, 101 N. W. 572.

Missouri.— Hull *v.* Lyon, 27 Mo. 570.

Nebraska.— Todd *v.* Cremer, 36 Nebr. 430, 54 N. W. 674; Studebaker Bros. Mfg. Co. *v.* McCargur, 20 Nebr. 500, 30 N. W. 686.

New Jersey.— Walbridge *v.* English, 28 N. J. Eq. 266.

New York.— Brooks *v.* Wilson, 125 N. Y. 256, 26 N. E. 258; Lewis *v.* Smith, 11 Barb. 152 [*affirmed* in 9 N. Y. 502, 61 Am. Dec. 706]; Noonan *v.* Brennemann, 54 N. Y. Super. Ct. 337; Bell *v.* New York, 10 Paige 49.

Ohio.— Parmenter *v.* Binkley, 28 Ohio St. 32; Hulshoff *v.* Bowman, 19 Ohio Cir. Ct. 554, 10 Ohio Cir. Dec. 343.

Oregon.— Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Pennsylvania.— Wallace *v.* Blair, 1 Grant 75.

Texas.— Davis *v.* Lanier, 94 Tex. 455, 61 S. W. 385; Rogers *v.* Southern Pine Lumber Co., 21 Tex. Civ. App. 48, 51 S. W. 26; Hays *v.* Tilson, (Civ. App. 1896) 35 S. W. 515.

Wisconsin.— Moore *v.* Cord, 14 Wis. 213; Stark *v.* Brown, 12 Wis. 572, 78 Am. Dec. 762; Farwell *v.* Murphy, 2 Wis. 533.

United States.—Zimmerman *v.* Kansas City Northwestern R. Co., 144 Fed. 622, 75 C. C. A. 424; Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459.

England.— Dick *v.* Butler, 1 Molloy 42.

Canada.— Doe *v.* Brown, 8 N. Brunsw. 433.

See 35 Cent. Dig. tit. "Mortgages," § 1685½

A decree of foreclosure against members of a partnership as such, all the known members of the firm not being parties to the suit, does not bind the firm. Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

Effect of adverse possession.— A purchaser at an invalid sale, on foreclosure of a recorded mortgage, having held open and exclusive possession until the expiration of the time to foreclose the mortgage, or to redeem the premises, an action by a devisee of the mortgagor, not a party to the foreclosure, is barred, although he had no actual notice of the mortgage nor of the adverse possession. Jellison *v.* Halloran, 44 Minn. 199, 46 N. W. 332.

83. Carpentier *v.* Williamson, 25 Cal. 154; Cates *v.* Field, (Tex. Civ. App. 1905) 85 S. W. 52; Nacogdoches First Nat. Bank *v.* Hicks, 24 Tex. Civ. App. 269, 59 S. W. 842; Hanrick *v.* Gurley, (Tex. Civ. App. 1899) 48 S. W. 994.

lawfully in possession,[84] and to the holder of a judgment which constitutes a lien on the premises.[85]

(III) *MATTERS CONCLUDED.* A decree of foreclosure of a mortgage is a final and conclusive adjudication as to the right of plaintiff to foreclose,[86] the validity of the mortgage and its sufficiency in respect to contents and execution,[87] the power of the mortgagor to execute it,[88] the existence and amount of the mortgage debt and the fact that it remains unpaid,[89] and the identity and extent of the lands embraced in the mortgage.[90] The decree is also impervious to collateral impeachment on the ground of a want of jurisdiction not apparent on the record, or on the ground of any irregularities in the foreclosure or sale,[91] and is final and conclusive against all matters of defense which were or might have been set up and litigated in the action,[92] and as to all titles, rights, priorities, or liens which were put in issue and adjudicated, or which were necessarily involved in the decree made,[93] although not as to any title or right held by a party defendant

84. Richardson *v.* Hadsall, 106 Ill. 476; Nevil *v.* Heinke, 22 Pa. Super. Ct. 614; King *v.* Wimley, 26 Leg. Int. (Pa.) 254. See, however, McDermott *v.* Burke, 16 Cal. 580; Tyler *v.* Hamilton, 62 Fed. 187.

85. Brainard *v.* Cooper, 10 N. Y. 356; Sellwood *v.* Gray, 11 Oreg. 534, 5 Pac. 196.

After a judgment lien has expired by limitation, a foreclosure purchaser takes the title free from the judgment, although the creditor was not made a party to the foreclosure. Sumner *v.* Skinner, 80 Hun (N. Y.) 201, 30 N. Y. Suppl. 4.

86. Stewart *v.* Wilson, 141 Ala. 405, 37 So. 550, 109 Am. St. Rep. 33; Brown *v.* St. John, 18 Ohio Cir. Ct. 736, 4 Ohio Cir. Dec. 155 (decree conclusive as to ownership of mortgage); Lee *v.* British, etc., Mortg. Co., (Tex. Civ. App. 1901) 61 S. W. 134 (plea of limitations).

87. *California.*— *In re* Angle, 148 Cal. 102, 82 Pac. 668.

Indiana.— Rucker *v.* Steelman, 73 Ind. 396.

Iowa.— Harsh *v.* Griffin, 72 Iowa 608, 34 N. W. 441.

Maryland.— McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Minnesota.— Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 131, 69 N. W. 708.

New York.— See Rogers *v.* Ivers, 23 Hun 424.

Oregon.— Finley *v.* Houser, 22 Oreg. 562, 30 Pac. 494.

Pennsylvania.— Benninghoff *v.* Stephenson, 161 Pa. St. 440, 29 Atl. 87.

United States.—Adams-Booth Co. *v.* Reid, 112 Fed. 106; Black *v.* Caldwell, 83 Fed. 880.

88. Craighead *v.* Dalton, 105 Ind. 72, 4 N. E. 425.

89. *Alabama.*— Sibley *v.* Alba, 95 Ala. 191, 10 So. 831.

Iowa.— Todd *v.* Johnson, 51 Iowa 192, 1 N. W. 498.

Michigan.— Haldane *v.* Sweet, 58 Mich. 429, 25 N. W. 383; Hazen *v.* Reed, 30 Mich. 331.

New York.— Egleston *v.* Knickerbacker, 6 Barb. 458.

Vermont.— Blaisdell *v.* Greenwood, 70 Vt. 244, 39 Atl. 1097.

Wisconsin.— Hitchcock *v.* Merrick, 18 Wis. 357.

United States.— Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 12 C. C. A. 350.

90. Maynard *v.* Waidlich, 156 Ind. 562, 60 N. E. 348; Burns *v.* Rock County School Dist. No. 18, 61 Nebr. 351, 85 N. W. 284; Mosher *v.* Miller, Ritch. Eq. Cas. (Nova Scotia) 279.

91. See *supra*, XXI, G, 2, f, (II). And see Carpenter *v.* Zarbuck, 74 Ark. 474, 86 S. W. 299.

92. *California.*— San Luis Obispo County Bank *v.* Goldtree, 129 Cal. 160, 61 Pac. 785.

Florida.— Mattair *v.* Card, 19 Fla. 455.

Georgia.— McLaws *v.* Moore, 83 Ga. 177, 9 S. E. 615.

Illinois.— Goltra *v.* Green, 98 Ill. 317.

Louisiana.—Ludeling *v.* Chaffe, 40 La. Ann. 645, 4 So. 586.

Michigan.— Burt *v.* Thomas, 49 Mich. 462, 12 N. W. 911, 13 N. W. 818.

Nebraska.— Gilbert *v.* Provident Life, etc., Co., 1 Nebr. (Unoff.) 282, 95 N. W. 488.

Ohio.— Riggs *v.* Hulbert, 7 Ohio Dec. (Reprint) 306, 2 Cinc. L. Bul. 95.

Pennsylvania.— Hulett *v.* New York Mut. L. Ins. Co., 114 Pa. St. 142, 6 Atl. 554.

United States.— Oliver *v.* Cunningham, 7 Fed. 689.

93. *California.*— Greenebaum *v.* Davis, 131 Cal. 146, 63 Pac. 165, 82 Am. St. Rep. 366.

Georgia.— Durant *v.* D'Auxy, 107 Ga. 456, 33 S. E. 478.

Indiana.— Dixon *v.* Eikenberry, 161 Ind. 311, 67 N. E. 915, 68 L. R. A. 323; Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Ulrich *v.* Drischell, 88 Ind. 354.

Nebraska.— Patrick *v.* National Bank of Commerce, 63 Nebr. 200, 88 N. W. 183.

New Jersey.— Arnett *v.* Finney, 29 N. J. Eq. 309.

United States.— Graydon *v.* Hurd, 55 Fed. 724, 5 C. C. A. 258; Martin *v.* Pond, 30 Fed. 15.

See 35 Cent. Dig. tit. "Mortgages," § 1686.

Conclusiveness as to priority of liens see English *v.* Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; Case *v.* Hicks, 76 Iowa 36, 40 N. W. 75; Burchell *v.* Osborne, 119 N. Y. 486, 23 N. E. 896; Buzzell *v.* Still, 63 Vt. 490, 22 Atl. 619, 25 Am. St.

which is independent of the mortgage and hostile or superior to it, nor as to the rights of other encumbrancers, except in so far as the same may have been put in issue and adjudicated.[94] Questions not in issue nor passed on by the court are not concluded by the decree.[95]

2. Effect on Subsequent Purchasers. A purchaser of the equity of redemption in mortgaged premises, who acquires title after the execution of the mortgage, and who is made a party to the foreclosure proceedings, is bound by the decree therein and his rights in the property are cut off as effectually and completely as if he were the original owner or mortgagor.[96] But it is otherwise if he is not joined as a party. Here the decree is indeed conclusive upon him, as being in privity with the mortgagor, but his title to the property, that is to say, his right and equity of redemption, will remain unaffected by the proceedings,[97]

Rep. 777; Hefner *v.* Northwestern Mut L. Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. ed. 309.

94. *California.*— Pryor *v.* Winter, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162; Cady *v.* Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; Gregory *v.* Keating, (1890) 22 Pac. 1084; McComb *v.* Spangler, 71 Cal. 418, 12 Pac. 347; Kreichbaum *v.* Melton, 49 Cal. 50.

Florida.— Pearson *v.* Helvenston, 50 Fla. 590, 39 So. 695.

Illinois.— McCormick *v.* Wilcox, 25 Ill. 274.

Indiana.— Adair *v.* Mergentheim, 114 Ind. 303, 16 N. E. 603. But see Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420.

Iowa.— Browne *v.* Kiel, 117 Iowa 316, 90 N. W. 624; Malli *v.* Willett, 57 Iowa 705, 11 N. W. 661; Mathes *v.* Cover, 43 Iowa 512.

Nebraska.— Gillian *v.* McDowall, 66 Nebr. 814, 92 N. W. 991.

New Jersey.— Wilkins *v.* Kirkbride, 27 N. J. Eq. 93.

New York.— Burchell *v.* Osborne, 119 N. Y. 486, 23 N. E. 896; Rathbone *v.* Hooney, 58 N. Y. 463; Lee *v.* Parker, 43 Barb. 611; Williamson *v.* Field, 2 Sandf. Ch. 533. And see Pawling Sav. Bank *v.* Washburn, 50 N. Y. App. Div. 526, 64 N. Y. Suppl. 134.

Ohio.— Lloyd *v.* Quimby, 5 Ohio St. 262.

Washington.— Oates *v.* Shuey, 25 Wash. 597, 66 Pac. 58.

Wisconsin.— Hill *v.* Buffington, 106 Wis. 525, 82 N. W. 712.

See 35 Cent. Dig. tit. "Mortgages," § 1686.

95. Brill *v.* Shively, 93 Cal. 674, 29 Pac. 324; Maynard *v.* Waidlich, 156 Ind. 562, 60 N. E. 348; Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676; Dial *v.* Gary, 27 S. C. 171, 3 S. E. 84.

96. Anderson *v.* Thompson, 3 Ariz. 62, 20 Pac. 803; Watson *v.* Grand Rapids, etc., R. Co., 91 Mich. 198, 51 N. W. 990; De Peyster *v.* Hildreth, 2 Barb. Ch. (N. Y.) 109; Babcock *v.* Perry, 8 Wis. 277.

97. *Alabama.*— Glidden *v.* Doe, 10 Ala. 166.

California.— Davenport *v.* Turpin, 43 Cal. 597; Bludworth *v.* Lake, 33 Cal. 255; Haffley *v.* Maier, 13 Cal. 13.

Georgia.— Coker *v.* Smith, 63 Ga. 517; Williams *v.* Terrell, 54 Ga. 462. *Compare* Knowles *v.* Lawton, 18 Ga. 476, 63 Am. Dec. 290.

Illinois.— Alsup *v.* Stewart, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; Patton *v.* Smith, 113 Ill. 499; Scates *v.* King, 110 Ill. 456; Kelgour *v.* Wood, 64 Ill. 345; Cutter *v.* Jones, 52 Ill. 84; Ohling *v.* Luitjens, 32 Ill. 23; Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564.

Indiana.— Sumner *v.* Coleman, 20 Ind. 486; Cline *v.* Inlow, 14 Ind. 419.

Iowa.— Ayres *v.* Adair County, 61 Iowa 728, 17 N. W. 161; Porter *v.* Kilgore, 32 Iowa 379; Veach *v.* Schaup, 3 Iowa 194.

Kentucky.— Shackleford *v.* Stockton, 6 B. Mon. 390.

Michigan.— Thompson *v.* Smith, 96 Mich. 258, 55 N. W. 886.

New Jersey.— Brundred *v.* Walker, 12 N. J. Eq. 140.

New York.— Becker *v.* Howard, 66 N. Y. 5; Welsh *v.* Schoen, 59 Hun 356, 13 N. Y. Suppl. 71; Watson *v.* Spence, 20 Wend. 260; Jackson *v.* Dickenson, 15 Johns. 309, 8 Am. Dec. 236.

Ohio.— Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Frische *v.* Kramer, 16 Ohio 125, 47 Am. Dec. 368, both holding that the foreclosure purchaser takes the title to the estate, but the mortgagor's grantee, not made a party, still has a right to redeem.

Pennsylvania.— Mevey's Appeal, 4 Pa. St. 80.

South Carolina.— South Carolina Mfg. Co. *v.* Price, 4 S. C. 338.

Texas.— Bradford *v.* Knowles, 86 Tex. 505, 25 S. W. 1117; Morrow *v.* Morgan, 48 Tex. 304; Wright *v.* Wooters, 46 Tex. 380; Preston *v.* Breedlove, 45 Tex. 47; Oppermann *v.* McGown, (Civ. App. 1899) 50 S. W. 1078.

Washington.— Sawyer *v.* Vermont Loan, etc., Co., 41 Wash. 524, 84 Pac. 8.

Wisconsin.— Hodson *v.* Treat, 7 Wis. 263.

United States.— Noyes *v.* Hall, 97 U. S. 34, 24 L. ed. 909; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,609, 2 Sumn. 401.

See 35 Cent. Dig. tit. "Mortgages," § 1688.

Effect of omitting purchaser.— Although a subsequent purchaser from the mortgagor ought to be made a party to a suit to foreclose the mortgage, yet, if he is not joined, the decree of foreclosure will not for that reason be void, but will be as to him a mere nullity, leaving to him the right which he

except in cases where he purchased *pendente lite*,[98] or where he has failed to record his deed or otherwise to give notice of his rights.[99]

3. Effect on Prior Encumbrancers — a. In General. As a general rule the rights of a senior mortgagee or other encumbrancer are not affected by the foreclosure of a junior mortgage; the sale must be made subject to the lien of his mortgage or encumbrance, and he retains the right to enforce it as before.[1] In some circumstances, however, it is proper for the decree to ascertain the amount of the senior lien and order the same paid out of the proceeds of sale, and when this is done the lien of the senior mortgage is divested from the land and transferred to the fund.[2]

b. Prior Encumbrancers Not Parties. If the holder of a senior lien on the premises, whether by mortgage, judgment, or otherwise, is not made a party to the junior mortgagee's foreclosure suit, he is not bound by the decree therein, nor are his rights or interests in any wise affected by it.[3]

c. Effect of Making Senior Lienor a Party. Where a senior mortgagee is joined as a party, questions concerning the validity, amount, or priority of his

acquired by his purchase, that of redemption, in full force, and which he may still exercise, even though the decree was for a strict foreclosure. Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Cutter *v.* Jones, 52 Ill. 84; Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512.

98. Daniels *v.* Henderson, 49 Cal. 242; Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Watt *v.* Watt, 2 Barb. Ch. (N. Y.) 371; Utica Bank *v.* Finch, 1 Barb. Ch. (N. Y.) 75.

The assignee in bankruptcy of the mortgagor, appointed after the commencement of the foreclosure proceedings, and having knowledge thereof and of the mortgagor's equity of redemption, but neglecting to have himself made a party and suffering the land to be sold to an innocent purchaser, will be barred and estopped by the foreclosure decree. Cleveland *v.* Boerum, 24 N. Y. 613.

99. Oakford *v.* Robinson, 48 Ill. App. 270; Boice *v.* Michigan Mut. L. Ins. Co., 114 Ind. 480, 15 N. E. 825; Powell *v.* Jenkins, 14 Misc. (N. Y.) 83, 35 N. Y. Suppl. 265; Kipp *v.* Brandt, 49 How. Pr. (N. Y.) 358.

Notice given.— It is immaterial that the purchaser's deed was not recorded, if notice of his rights was given to those in interest. Hodson *v.* Treat, 7 Wis. 263.

1. *Georgia.*— Kirby *v.* Reese, 69 Ga. 452.

Illinois.— Romberg *v.* McCormick, 95 Ill. App. 309 [*reversed* in part in 194 Ill. 205, 62 N. E. 537].

Indiana.— Moffitt *v.* Roche, 77 Ind. 48.

Iowa.— Raymond *v.* Whitehouse, 119 Iowa 132, 93 N. W. 292.

Louisiana.— Gomez *v.* Courcelle, 8 La. Ann. 304.

Missouri.— Dickerson *v.* Bridges, 147 Mo. 235, 48 S. W. 825.

New York.— Mathews *v.* Aikin, 1 N. Y. 595; Clements *v.* Griswold, 46 Hun 377; South Baptist Soc. *v.* Clapp, 18 Barb. 35.

United States.— Fox *v.* Seal, 22 Wall. 424, 22 L. ed. 774.

See 35 Cent. Dig. tit. "Mortgages," § 1689.

But see Fisher *v.* Connard, 100 Pa. St. 63; Febiger *v.* Craighead, 3 Rawle (Pa.) 117 note.

Assignment to second mortgagee.— Where plaintiff brought suit to foreclose a second mortgage, and thereafter, but before the sale, obtained an assignment of the first mortgage, the lien of the first mortgage was not extinguished by his purchase of the property under the foreclosure proceedings for an amount only sufficient to satisfy the second mortgage. Raymond *v.* Whitehouse, 119 Iowa 132, 93 N. W. 292.

2. Emigrant Industrial Sav. Bank *v.* Goldman, 75 N. Y. 127.

3. *Connecticut.*— Lyon *v.* Sandford, 5 Conn. 544.

Iowa.— Dickerman *v.* Lust, 66 Iowa 444, 23 N. W. 916; Heimstreet *v.* Winnie, 10 Iowa 430.

Kansas.— Ferguson *v.* Tarbox, 3 Kan. App. 656, 44 Pac. 905.

Kentucky.— Combs *v.* Stewart, 10 B. Mon. 463; Shiveley *v.* Jones, 6 B. Mon. 274.

Maryland.— Ducker *v.* Belt, 3 Md. Ch. 13.

Minnesota.— Whitney *v.* Huntington, 37 Minn. 197, 33 N. W. 561.

New Jersey.— McCall *v.* Yard, 9 N. J. Eq. 358.

New York.— Winebrener *v.* Johnson, 7 Abb. Pr. N. S. 202; Vanderkemp *v.* Shelton, 11 Paige 28.

Ohio.— Myers *v.* Hewitt, 16 Ohio 449.

Pennsylvania.— Norris *v.* Brady, 4 Phila. 287.

Vermont.— Haskell *v.* Holt, 76 Vt. 413, 56 Atl. 99.

Wisconsin.— Strobe *v.* Downer, 13 Wis. 10, 80 Am. Dec. 709.

United States.— Finley *v.* U. S. Bank, 11 Wheat. 304, 6 L. ed. 480; Palmer *v.* Burnside, 18 Fed. Cas. No. 10,685, 1 Woods 179.

Adverse possession by purchaser.— A purchaser of lands at a sale under a deed of trust, who takes possession with notice that other persons claim an equity in the land under a prior verbal contract with the grantor in the deed of trust, becomes an adverse holder as against such persons, and his uninterrupted possession for over ten years constitutes a good defense to their claim. Clark *v.* Snodgrass, 66 Ala. 233.

mortgage may be litigated and decided, under proper allegations and issues,[4] and in respect thereto he will be bound by the decree.[5] He may also be joined for the purpose of having the amount of his lien ascertained and ordered first paid out of the proceeds.[6] But the mere fact that he is thus joined gives him no right to have a foreclosure of his own mortgage, when it is not due or in default.[7]

4. Effect on Junior Encumbrancers — a. Junior Encumbrancers Not Parties. A junior encumbrancer not made a party to a foreclosure proceeding by a senior mortgagee is not concluded by the decree in respect to questions affecting the validity or priority of the senior mortgage,[8] nor is he barred thereby of his right of redemption.[9] And according to numerous decisions his rights are not in any way affected thereby.[10]

b. Junior Encumbrancers Made Parties. If a junior lien-holder is made a party to the suit for the foreclosure of a senior mortgage, he will be bound and concluded by the decree, and his right of redemption from the elder lien will be

4. *Michigan.*— Dawson *v.* Danbury Bank, 15 Mich. 489.

Nebraska.— Forrer *v.* Kloke, 10 Nebr. 373, 6 N. W. 428; Butler *v.* Copp, 5 Nebr. (Unoff.) 161, 97 N. W. 634.

New Jersey.— Williamson *v.* Probasco, 8 N. J. Eq. 571.

New York.— Smith *v.* Roberts, 91 N. Y. 470; Jacobie *v.* Mickle, 24 N. Y. Suppl. 87.

Vermont.— Buzzell *v.* Still, 63 Vt. 490, 22 Atl. 619, 25 Am. St. Rep. 777.

See 35 Cent. Dig. tit. "Mortgages," § 1689.

Constructive service.— Where the holder of a first mortgage was made a defendant to a suit to foreclose a second mortgage, and served with notice thereof by publication only, and judgment was entered for plaintiff foreclosing his mortgage, under which the land was sold to an innocent purchaser, before the first mortgagee had actual notice of the action, and it appeared that the premises were worth more than enough to satisfy the first mortgage, and that the second mortgagee had full and actual notice of the prior lien, the second mortgagee was held liable to the first mortgagee for the amount of the latter's claim. Pennsylvania Mortg. Trust Co. *v.* Cowles, 3 Kan. App. 660, 45 Pac. 605.

What rights affected.— One who is made a party to a foreclosure suit expressly to cut off any claim accruing to him on the premises subsequent to the date of the mortgage sued on, and who suffers default, is not thereby barred from any of his rights existing under a prior mortgage, but may foreclose the same. Straight *v.* Harris, 14 Wis. 509.

5. Espalla *v.* Touart, 96 Ala. 137, 11 So. 219.

Decree without prejudice to senior mortgagee.— A decree of foreclosure in a suit by a junior mortgagee, to which the senior mortgagee was made a party, is no defense to an action by the senior mortgagee to foreclose, where it was amended so as to provide that it should not prejudice the senior mortgagee's rights. Scribner *v.* York, 89 Iowa 737, 55 N. W. 10.

6. Jacobie *v.* Mickle, 144 N. Y. 237, 39 N. E. 66; Hamlin *v.* McCahill, Clarke (N. Y.) 249.

7. Garza *v.* Howell, (Tex. Civ. App. 1905) 85 S. W. 461.

8. Carpentier *v.* Brenham, 40 Cal. 221.

9. *Illinois.*— Aholtz *v.* Zellar, 88 Ill. 24; Hodgen *v.* Guttery, 58 Ill. 431; Dunlap *v.* Wilson, 32 Ill. 517. See also Rose *v.* Chandler, 50 Ill. App. 421.

Indiana.— McKernan *v.* Neff, 43 Ind. 503; Johnson *v.* Hosford, 110 Ind. 572, 10 N. E. 407; Proctor *v.* Baker, 15 Ind. 178; Hasselman *v.* Yondes, Wils. 276. See also Gordon *v.* Lee, 102 Ind. 125, 1 N. E. 290.

Iowa.— Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293; Floyd County *v.* Cheney, 57 Iowa 160, 10 N. W. 324; Shaw *v.* Heisey, 48 Iowa 468; Newcomb *v.* Demey, 27 Iowa 381; Knowles *v.* Roblin, 20 Iowa 101; Johnson *v.* Harmon, 19 Iowa 56; White *v.* Watts, 18 Iowa 74. *Compare* Cook *v.* McFarland, 78 Iowa 528, 43 N. W. 519.

Kentucky.— Cooper *v.* Martin, 1 Dana 23. See also Gault *v.* Equitable Trust Co., 100 Ky. 578, 38 S. W. 1065, 18 Ky. L. Rep. 1038.

Mississippi.— Worthington *v.* Wilmot, 59 Miss. 608.

Missouri.— Williams *v.* Brownlee, 101 Mo. 309, 13 S. W. 1049; Valentine *v.* Havener, 20 Mo. 133.

New Jersey.— Van Duyne *v.* Shann, 39 N. J. Eq. 6. See also *In re* Van Valen, 46 N. J. L. 527.

Oregon.— Sellwood *v.* Gray, 11 Oreg. 534, 5 Pac. 196.

Wisconsin.— Hoppin *v.* Doty, 22 Wis. 621.

United States.— London, etc., Bank *v.* Horton, 126 Fed. 593.

See 35 Cent. Dig. tit. "Mortgages," § 1692.

10. *Arkansas.*— Memphis, etc., R. Co. *v.* State, 37 Ark. 632.

California.— Carpentier *v.* Brenham, 40 Cal. 221. See also Henderson *v.* Grammar, 53 Cal. 649. *Compare* Brown *v.* Winter, 14 Cal. 31.

Connecticut.— See Swift *v.* Edson, 5 Conn. 531. *Compare* Griswold *v.* Mather, 5 Conn. 435; Cannon *v.* Hallet, 2 Root 29.

Indiana.— See Catterlin *v.* Armstrong, 101 Ind. 258, 79 Ind. 514.

Iowa.— Anson *v.* Anson, 20 Iowa 55, 89 Am. Dec. 514; Heimstreet *v.* Winnie, 10 Iowa 430.

cut off and extinguished, unless provision for its exercise is made in the decree.[11] Where, however, he was not personally served and had no actual knowledge of the suit, a court of equity may, for sufficient equitable reasons, allow him a further time to redeem.[12]

c. Miscellaneous. Mortgaged property purchased on a foreclosure of a prior mortgage by a third person for a second mortgage debtor to whom it is thereupon

Maryland.— Ducker *v.* Belt, 3 Md. Ch. 13.

Minnesota.— Harper *v.* East Side Syndicate, 40 Minn. 381, 42 N. W. 86; Rogers *v.* Holyoke, 14 Minn. 220.

Nebraska.— See Goodwin *v.* Cunningham, 54 Nebr. 11, 74 N. W. 315; Lincoln *v.* Lincoln St. R. Co., 5 Nebr. (Unoff.) 56, 97 N. W. 255.

New Hampshire.— See Parsons *v.* Little, 66 N. H. 339, 20 Atl. 958.

New Jersey.— Atwater *v.* West, 28 N. J. Eq. 361; Chilver *v.* Weston, 27 N. J. Eq. 435; Large *v.* Van Doren, 14 N. J. Eq. 208; McCall *v.* Yard, 9 N. J. Eq. 358.

New York.— Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; Reynolds *v.* Park, 53 N. Y. 36; Bigelow *v.* Davol, 69 Hun 74, 23 N. Y. Suppl. 494; Peabody *v.* Roberts, 47 Barb. 91; Winslow *v.* McCall, 32 Barb. 241; Walsh *v.* Rutgers F. Ins. Co., 13 Abb. Pr. 33; Vanderkemp *v.* Shelton, 11 Paige 28; Haines *v.* Beach, 3 Johns. Ch. 459. See also Bache *v.* Purcell, 51 How. Pr. 270 [*affirmed* in 6 Hun 518]; Wood *v.* Oakley, 11 Paige 400.

Ohio.— Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Holliger *v.* Bates, 43 Ohio St. 437, 2 N. E. 841; Stewart *v.* Johnson, 30 Ohio St. 24.

Oregon.— Besser *v.* Hawthorn, 3 Oreg. 129.

Texas.— Hunt *v.* Makemson, 56 Tex. 9; Turner *v.* Phelps, 46 Tex. 251; Nix *v.* Cardwell, 2 Tex. Unrep. Cas. 266.

England.— Ormsby *v.* Thorp, 2 Molloy 503; Dick *v.* Butler, 1 Molloy 42.

See 35 Cent. Dig. tit. "Mortgages," § 1692.

But see Williams *v.* J. P. Williams Co., 122 Ga. 178, 50 S. E. 52, 106 Am. St. Rep. 100; Pahlman *v.* Shumway, 24 Ill. 127; Willis *v.* Willis, 22 La. Ann. 447; Wolf *v.* Lowry, 10 La. Ann. 272; Vreeland *v.* Monnier, 127 Mich. 304, 86 N. W. 819.

Right to foreclose.— A second mortgagee who is not a party to a suit to foreclose may foreclose and sell the equity of redemption. Memphis, etc., R. Co. *v.* State, 37 Ark. 632; Catterlin *v.* Armstrong, 101 Ind. 258, 79 Ind. 514; Anson *v.* Anson, 20 Iowa 55, 89 Am. Dec. 514; Stewart *v.* Johnson, 30 Ohio St. 24.

11. *Alabama.*— Cullum *v.* Batre, 2 Ala. 415.

California.— Wise *v.* Walker, 81 Cal. 11, 20 Pac. 81, 22 Pac. 293. But *compare* Camp *v.* Land, 122 Cal. 167, 54 Pac. 839.

Indiana.— Woodworth *v.* Zimmerman, 92 Ind. 349. See also Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68; Adair *v.* Mergentheim, 114 Ind. 303, 16 N. E. 603. But see Coleman *v.* Witherspoon, 76 Ind. 285.

Iowa.— Witham *v.* Blood, (1904) 100 N. W. 558; Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218; Gargan *v.* Grimes, 47 Iowa 180.

Kentucky.— Kentucky Bank *v.* Milton, 12 B. Mon. 340.

Michigan.— Tower *v.* Divine, 37 Mich. 443.

New York.— People *v.* Bacon, 99 N. Y. 275, 2 N. E. 4; Lockman *v.* Reilly, 95 N. Y. 64; Jarvis *v.* Chapin, 59 Hun 525, 13 N. Y. Suppl. 693; Elliott *v.* Pell, 1 Paige 263.

Ohio.— Atlantic, etc., R. Co. *v.* Phillips, 7 Ohio Dec. (Reprint) 591, 4 Cinc. L. Bul. 95.

United States.— Simmons *v.* Burlington, etc., R. Co., 159 U. S. 278, 16 S. Ct. 1, 40 L. ed. 150; Sutherland *v.* Lake Superior Ship Canal, R., etc., Co., 23 Fed. Cas. No. 13,643.

See 35 Cent. Dig. tit. "Mortgages," § 1691.

But see Stiger *v.* Mahone, 24 N. J. Eq. 426.

Right to execution.— Where the senior mortgagee of a homestead begins foreclosure, and the junior mortgagee files a cross bill, on which a decree foreclosing both mortgages is rendered, providing that special executions may issue to either mortgagee, sale under a special execution issued to the senior mortgagee does not exhaust the junior mortgagee's right to special execution. Bevans *v.* Dewey, 82 Iowa 85, 47 N. W. 1009.

Right to personal judgment.— A second mortgagee may maintain an action for personal judgment, the mortgaged property having been exhausted by foreclosure of the first mortgage, although he was made a defendant in the suit by the first mortgagee and did not appear. San Diego County Sav. Bank *v.* Central Market Co., 122 Cal. 28, 54 Pac. 273.

Right to have judgment executed.— Where a junior mortgagee, who is made defendant in the senior mortgagee's foreclosure suit, by suitable pleadings between the mortgagor and himself, has the amount of his mortgage determined, and provision is made in the judgment for the sale of the premises, he has the same right to have the judgment executed as though he had instituted the action. Gutzeit *v.* Pennie, 97 Cal. 484, 32 Pac. 584.

Unrecorded assignment.— The owner of a mortgage, by an unrecorded assignment, is bound by proceedings in foreclosure of a prior mortgage, to which his assignor was made a party defendant by reason of his apparent ownership of the mortgage, so far as the mortgaged premises are concerned, although he himself was not a party. Cannon *v.* Wright, 49 N. J. Eq. 17, 23 Atl. 285.

12. Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

conveyed will still be held subject to the second mortgage.[13] Where a mortgagee, foreclosing his first mortgage, also held a second mortgage, which he alleges was destroyed, the holder of a third mortgage was entitled to an assignment of his judgment of foreclosure, on executing to him an agreement to pay the amount due on the second mortgage, whenever he, in an appropriate proceeding, should establish his right to collect the amount due thereon.[14] By statute in Kansas where real estate has been sold on foreclosure, it cannot be sold again on a judgment lien inferior thereto, under which the holder of the judgment had a right to redeem within fifteen months after the foreclosure sale.[15]

XXII. REDEMPTION.

A. Right to Redeem — 1. Nature and Incidents. The equity of redemption must be distinguished from a statutory right of redemption. There is a common-law or equitable right of redemption inherent in every transaction constituting a mortgage or having the essential character of a mortgage.[16] This is a highly favored equity,[17] and unless released to the mortgagee by a bargain founded on a good consideration and entirely free from fraud and oppression,[18] or in some way waived or lost or barred by the statute of limitations,[19] it can be cut off in no other way than by a regular and proper foreclosure.[20] But that is where the equity of redemption ends. After sale under a decree of foreclosure it is entirely extinguished,[21] except in cases where the sale was voidable for fraud, illegality, or fatal irregularities,[22] or where the party seeking to redeem should have been made a party to the foreclosnre suit but was omitted,[23] or in cases where the mortgagee, by his subsequent conduct, has waived the foreclosure and reinvested the mort-

13. Tompkins *v.* Halstead, 21 Wis. 118.

14. Mayer *v.* Moore, 29 Misc. (N. Y.) 475, 61 N. Y. Suppl. 940.

15. Gille *v.* Enright, (Kan. 1906) 84 Pac. 992.

16. See *supra*, I, A, 2.

Nature of equity of redemption.—An equity of redemption is inherent in the land, and binds persons coming in in the past as well as in the present. Benzein *v.* Lenoir, 16 N. C. 225. It is a transferable equity. Hibbitt *v.* Spurrier, 3 B. Mon. (Ky.) 469. And is not affected by the fact that the note secured was founded on a consideration illegal or contrary to public policy. Cowles *v.* Raguet, 14 Ohio 38.

Not affected by possession.— The right to redeem from a mortgage is in no way affected by the possession of the premises by either the mortgagor or mortgagee. Parsons *v.* Noggle, 23 Minn. 328. And see Osborne *v.* Tunis, 25 N. J. L. 633.

Privilege of mortgagor.— No mortgagor is under any legal obligation to redeem the mortgaged premises; that is his right, which he can elect either to exercise or to omit. Lewis *v.* Hinman, 56 Conn. 55, 13 Atl. 143; Morgan *v.* Clayton, 61 Ill. 35. But he can be compelled to exercise his option. That is a mortgagee in possession may sue the holder of the legal title to compel him either to redeem or to be foreclosed. Henthorn *v.* Security Co., 70 Kan. 808, 79 Pac. 653.

17. Northern Cent. R. Co. *v.* Hering, 93 Md. 164, 48 Atl. 461; Briggs *v.* Seymour, 17 Wis. 255; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 27 L. ed. 47.

18. See *supra*, XVII, G, 1.

19. See *infra*, XXII, C, 2, 4, 5.

20. See Powell *v.* Williams, 14 Ala. 476, 48 Am. Dec. 105; Newhouse *v.* Hill, 7 Blackf. (Ind.) 584; Doody *v.* Pierce, 9 Allen (Mass.) 141.

21. *Illinois.*— Weiner *v.* Heintz, 17 Ill. 259.

Iowa.— Mayer *v.* Farmers' Bank, 44 Iowa 212; Stoddard *v.* Hays, 12 Iowa 576; Kramer *v.* Rebman, 9 Iowa 114.

Massachusetts.— Butler *v.* Seward, 10 Allen 466.

Missouri.— White *v.* Smith, 174 Mo. 186, 73 S. W. 610.

Washington.— Parker *v.* Dacres, 2 Wash. Terr. 439, 7 Pac. 893 [*affirmed* in 130 U. S. 43, 9 S. Ct. 433, 32 L. ed. 848].

See 35 Cent. Dig. tit. "Mortgages," § 1695. And see *supra*, XXI, L, 1, a.

Distinct rights of redemption in different persons.— A foreclosure by a prior mortgagee of the mortgagor's interest alone does not invest the party foreclosing with all the rights of the mortgagor or pass the title to the land; it merely extinguishes the mortgagor's personal right of redemption, and the mortgagor may, after such foreclosure, redeem a subsequent mortgage and then avail himself of such mortgagee's equity of redemption. Goodman *v.* White, 26 Conn. 317.

22. Grover *v.* Fox, 36 Mich. 461; Thurston *v.* Prentiss, Walk. (Mich.) 529.

23. Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293, holding that the equity of redemption of a junior encumbrancer is independent of the statutory right to redeem from a foreclosure; and the expiration of the time limited by statute will not preclude him from redeeming after a foreclosure to which he

gagor with the privilege of redemption.[24] On the other hand the right of redemption given by the statutes now in force in many of the states[25] does not come into existence until a foreclosure sale has been made, continues for a prescribed length of time after that, and is beyond the control of the court, so that no decree can take it away or limit it, and it is not affected by the failure of the decree to recognize or provide for it.[26] This right of redemption, being purely the creature of statute, must be claimed and exercised strictly in accordance with the provisions of the law,[27] and has none of the characteristics of a title or ownership.[28]

2. STATUTORY PROVISIONS — a. Construction. Statutes giving a right of redemption after foreclosure sales are to be construed liberally; while their terms are not to be extended by implication beyond what the legislature has authorized, the construction in any case of doubt or ambiguity should be in favor of the right to redeem.[29] They should not, however, be interpreted retrospectively unless the language employed plainly requires it.[30] Such statutes apply only to sales made under decrees or judgments of the courts;[31] but where the right is given to redeem from judicial sales in general or sales on execution, the statute applies as well to sales made in the enforcement of foreclosure decrees as to those made under any ordinary judgments.[32] It has been held that a law providing a right of redemption from sales of real estate does not cover the case of a sale of the entire property of a quasi-public corporation, such as a railroad or a water company, including its real and personal property and franchises, but such a sale may be made as an entirety and without redemption.[33]

was not made a party. And see *supra*, XXI, L, 3, b, 4, a.

24. Lounsbury *v.* Norton, 59 Conn. 170, 22 Atl. 153; Tichenor *v.* Collins, 45 N. J. L. 123; Osborne *v.* Tunis, 25 N. J. L. 633; Clarke *v.* Robinson, 15 R. I. 231, 10 Atl. 642; Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433; Gilson *v.* Whitney, 51 Vt. 552; Ward *v.* Seymour, 51 Vt. 320.

Correction of mistake.—Proceedings to correct a mistake in the description of the property, or otherwise to reform the mortgage, do not open the foreclosure and let the mortgagor in to redeem. McKissick *v.* Mill Owners' Mut. F. Ins. Co., 50 Iowa 116; Provost *v.* Rebman, 21 Iowa 419.

25. See the statutes of the different states.

26. Levy *v.* Burkle, (Cal. 1887) 14 Pac. 564; De Wolf *v.* Haydn, 24 Ill. 525; Rhinehart *v.* Stevenson, 23 Ill. 524; Mason *v.* Northwestern Mut. L. Ins. Co., 106 U. S. 163, 1 S. Ct. 165, 27 L. ed. 129; Burley *v.* Flint, 4 Fed. Cas. No. 2,168, 9 Biss. 204 [*affirmed* in 105 U. S. 247, 26 L. ed. 986]; Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed. Cas. No. 6,055, 8 Biss. 234.

27. Nichols *v.* Tingstad, 10 N. D. 172, 86 N. W. 694; Farnsworth *v.* Howard, 1 Coldw. (Tenn.) 215.

28. Smith *v.* Anders, 21 Ala. 782; Stone *v.* Tyler, 173 Ill. 147, 50 N. E. 688 (a mortgagor's statutory right of redemption after foreclosure sale is not such an ownership of the property as will support a mechanic's lien); Wimpfheimer *v.* Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916.

29. Whitehead *v.* Hall, 148 Ill. 253, 35 N. E. 871; Thornley *v.* Moore, 106 Ill. 496; Schuck *v.* Gerlach, 101 Ill. 338; Northern Cent. R. Co. *v.* Hering, 93 Md. 164, 48 Atl. 461; Lightbody *v.* Sammers, 98 Minn. 203, 108 N. W. 846.

Construction of particular statutes see the following cases:

Arkansas.— Danenhauer *v.* Dawson, 65 Ark. 129, 46 S. W. 131, 44 L. R. A. 193.

California.— Frink *v.* Murphy, 21 Cal. 108, 81 Am. Dec. 149.

Illinois.— Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Walker *v.* Schum, 42 Ill. 462.

Iowa.— Watts *v.* White, 12 Iowa 330.

New York.— North River Ins. Co. *v.* Snediker, 10 How. Pr. 310; Butler *v.* Palmer, 1 Hill 324.

North Carolina.— Deavereux *v.* Marsoratti, 10 N. C. 338.

South Dakota.— Rudolph *v.* Herman, 4 S. D. 283, 56 N. W. 901.

Vermont.—Harrington *v.* Donaldson, 31 Vt. 535.

See 35 Cent. Dig. tit. "Mortgages," § 1693.

30. Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104; Malone *v.* Roy, 134 Cal. 344, 66 Pac. 313. But see Freeborn *v.* Pettibone, 5 Minn. 277; Stone *v.* Bassett, 4 Minn. 298.

31. Bloom *v.* Van Rensselaer, 15 Ill. 503.

32. McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655; Farrell *v.* Parlier, 50 Ill. 274; Stone *v.* Bassett, 4 Minn. 298; Henderson *v.* Lowry, 5 Yerg. (Tenn.) 240. But *compare* Tenbrook *v.* Lansing, 4 Johns. Ch. (N. Y.) 601.

33. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Hammock *v.* Farmers L. & T. Co., 105 U. S. 77, 26 L. ed. 1111; Pacific Northwest Packing Co. *v.* Allen, 116 Fed. 312, 54 C. C. A. 648; Farmers' L. & T. Co. *v.* Iowa

b. Constitutionality. As has been previously stated in this work, a statute granting a right of redemption from foreclosure, where none previously existed, or extending the time for redemption previously accorded, cannot constitutionally apply to mortgages executed before its enactment, for this would impair the obligation of contracts.[34] This objection does not apply to a law merely changing the mode of effecting redemption which does not affect the right itself.[35]

c. What Law Governs. Redemption from a mortgage foreclosure sale is governed by the law in force at the time of the execution of the mortgage,[36] or according to some of the decisions at the time of entering the decree of foreclosure,[37] or of the sale.[38] It is the law of the state in which the mortgaged property lies which governs.[39] And a right of redemption given by a state statute, in force at the time the mortgage was made, is a rule of property and is as obligatory on the federal courts as on those of the state,[40] although the courts of the United States, if they give substantial effect to a right of redemption secured by the state statute, are at liberty, in so doing, to pursue their own modes of proceeding.[41]

3. Nature or Form of Mortgage as Affecting Right to Redeem. A right of redemption is inherent in and essential to every mortgage. Hence whatever form the transaction may have assumed, if a pledge of property as security for a debt is shown, a right of redemption necessarily follows.[42] This right attaches to

Water Co., 78 Fed. 881; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

34. See Constitutional Law, 8 Cyc. 1009 *et seq.* And see the following cases:

California.— San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 58 Pac. 914; Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646, (1891) 27 Pac. 30.

Florida.— Hull *v.* State, 29 Fla. 79, 11 So. 97, 30 Am. St. Rep. 95, 16 L. R. A. 308.

Kansas.— Watkins *v.* Glenn, 55 Kan. 417, 40 Pac. 316; Pawtucket Mut F. Ins. Co. *v.* Landers, 5 Kan. App. 623, 47 Pac. 621.

Maine.— Phinney *v.* Phinney, 81 Me. 450, 17 Atl. 405, 10 Am. St. Rep. 266, 4 L. R. A. 348.

Minnesota.— Goenen *v.* Schroeder, 8 Minn. 387.

New Jersey.— Morris *v.* Carter, 46 N. J. L. 260; Baldwin *v.* Flagg, 43 N. J. L. 495; Champion *v.* Hinkle, 45 N. J. Eq. 162, 16 Atl. 701.

New Mexico.— Bremen Min., etc., Co. *v.* Bremen, (1905) 79 Pac. 806.

South Dakota.— State *v.* Fylpaa, 3 S. D. 586, 54 N. W. 599.

United States.— Gantly *v.* Ewing, 3 How. 707, 11 L. ed. 794; Smith *v.* Green, 41 Fed. 455.

35. Jack *v.* Cold, 114 Iowa 349, 86 N. W. 374; Northwestern Mut. L. Ins. Co. *v.* Neeves, 46 Wis. 147, 49 N. W. 832.

36. *California.*— Haynes *v.* Tredway, 133 Cal. 400, 65 Pac. 892; San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 58 Pac. 914; Allen *v.* Allen, (1891) 27 Pac. 30.

Colorado.— See Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067.

Indiana.— Berkshire *v.* Shultz, 25 Ind. 523.

Washington.— Geddis *v.* Packwood, 30 Wash. 270, 70 Pac. 481.

United States.— Smith *v.* Green, 41 Fed. 455.

See 35 Cent. Dig. tit. "Mortgages," § 1694.

The right of a judgment creditor to redeem from a prior mortgage, and the terms on which he may redeem, are fixed by the statute in force at the date of docketing the judgment. O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

37. Michigan Trust Co. *v.* Libby, 127 Mich. 45, 86 N. W. 394; Lachman *v.* Ottawa Cir. Judge, 125 Mich. 27, 83 N. W. 1025; Turrell *v.* Morgan, 7 Minn. 368, 82 Am. Dec. 101; Heyward *v.* Judd, 4 Minn. 483; Stone *v.* Bassett, 4 Minn. 298. But *compare* Carroll *v.* Rossiter, 10 Minn. 174.

Where an appeal is taken from a decree of foreclosure, the right of redemption is governed by the law in force at the time of the entry of a decree in the appellate court. Gillam *v.* Foster, 124 Mich. 685, 83 N. W. 784.

38. Edwards *v.* Johnson, 105 Ind. 594, 5 N. E. 716; Patterson *v.* Cox, 25 Ind. 261.

39. Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858.

40. Parker *v.* Dacres, 130 U. S. 43, 9 S. Ct. 433, 32 L. ed. 848; Mason *v.* Northwestern Mut. L. Ins. Co., 106 U. S. 163, 1 S. Ct. 165, 27 L. ed. 129; Swift *v.* Smith, 102 U. S. 442, 26 L. ed. 193; Orvis *v.* Powell, 98 U. S. 176, 25 L. ed. 238; Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858; Jackson, etc., Co. *v.* Burlington, etc., R. Co., 29 Fed. 474; Singer Mfg. Co. *v.* McCollock, 24 Fed. 667; Blair *v.* Chicago, etc., R. Co., 12 Fed. 750, 11 Biss. 320; Burley *v.* Flint, 4 Fed. Cas. No. 2,168, 9 Biss. 204 [*affirmed* in 105 U. S. 247, 26 L. ed. 986]; Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed Cas. No. 6,055, 8 Biss. 234.

41. Allis *v.* Northwestern Mut. L. Ins. Co., 97 U. S. 144, 24 L. ed. 1008.

42. McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Linnell *v.* Lyford, 72 Me. 280; Cadman *v.* Peter, 12 Fed. 363 [*affirmed* in 118 U. S. 73, 6 S. Ct. 957, 30 L. ed. 78].

Right of redemption implied.— "Wherever

a deed of trust in the nature of a mortgage,[43] although not generally after a sale has been made by the trustee in accordance with the provisions of the deed.[44] So also an equitable mortgage is redeemable.[45] And where a deed is given which is absolute in form but was in reality intended as security for a debt, the grantor may, on performing the condition, redeem the property or have a reconveyance,[46] not only as against the grantee but also against one to whom such grantee has in the mean time conveyed the property, provided the purchaser had knowledge or notice of the real nature of the grantee's title, although not as against a purchaser for value and without such notice.[47]

4. Provisions of Mortgage and Agreements of Parties. A stipulation in a mortgage waiving the equity of redemption in advance and agreeing that the forfeiture shall become absolute upon breach of condition is not valid.[48] But the equity of redemption may be released by a conveyance of the property to the mortgagee, provided it is upon a consideration and the transaction is entirely free

there is a mortgage there is a right in the mortgagor or grantor to redeem the thing mortgaged. It need not be expressed, for the right to redeem will be implied wherever it is shown that property is transferred or pledged as security, unless the nature of the agreement forbids such implication." Cadman *v.* Peter, 12 Fed. 363, 364 [*affirmed* in 118 U. S. 73, 6 S. Ct. 957, 30 L. ed. 78].

A mortgage for support and maintenance admits of compensation and may be redeemed. Bryant *v.* Erskine, 55 Me. 153; Austin *v.* Austin, 9 Vt. 420.

43. Comstock *v.* Howard, Walk. (Mich.) 110.

44. Weld *v.* Rees, 48 Ill. 428; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328; Bloom *v.* Van Rensselaer, 15 Ill. 503; Turner *v.* Johnson, 10 Ohio 204.

45. *Illinois.*— Heald *v.* Wright, 75 Ill. 17.

Nebraska.—Gallagher *v.* Giddings, 33 Nebr. 222, 49 N. W. 1126.

Nevada.— Leahigh *v.* White, 8 Nev. 147.

New York.— Bowery Nat. Bank *v.* Duncan, 12 Hun 405; Tibbs *v.* Morris, 44 Barb. 138.

Wisconsin.— Rogan *v.* Walker, 2 Pinn. 463, 2 Chandl. 133.

See 35 Cent. Dig. tit. "Mortgages," § 1704.

46. *California.*— Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; De Espinosa *v.* Gregory, 40 Cal. 58.

Connecticut.— Washburn *v.* Merrills, 1 Day 139, 2 Am. Dec. 59; Belton *v.* Avery, 2 Root 279, 1 Am. Dec. 70; Daniels *v.* Alvord, 2 Root 196.

Georgia.— Gunter *v.* Smith, 113 Ga. 18, 38 S. E. 374.

Illinois.— Over *v.* Carolus, 171 Ill. 552, 49 N. E. 514.

Indiana.— Greenwood Bldg., etc., Assoc. *v.* Stanton, 28 Ind. App. 548, 63 N. E. 574.

Maine.— Libby *v.* Clark, 88 Me. 32, 33 Atl. 657; Hilton *v.* Lothrop, 46 Me. 297.

Maryland.— Pickett *v.* Wadlow, 94 Md. 564, 51 Atl. 423.

Minnesota.— Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539.

Missouri.— Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

Montana.— Mack *v.* Hill, 28 Mont. 99, 72 Pac. 307.

New Hampshire.— Kidder *v.* Barr, 35 N. H. 235.

New York.— Blazey *v.* McLean, 28 N. Y. Suppl. 286.

Ohio.— Wilson *v.* Giddings, 28 Ohio St. 554.

Vermont.— Hyndman *v.* Hyndman, 19 Vt. 9, 46 Am. Dec. 171.

West Virginia.— Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340.

See 35 Cent. Dig. tit. "Mortgages," § 1705.

Remedies of grantor.— Where an absolute deed of land was accompanied by an agreement, written or parol, for a reconveyance on payment of the debt secured, equity will compel specific performance of such agreement to reconvey, on payment by the grantor. Artz *v.* Grove, 21 Md. 456; Kenton *v.* Vandergrift, 42 Pa. St. 339. Or if the lien of the deed has been lost and the right to foreclose extinguished, the grantor may have it removed as a cloud on his title. Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200.

Fraudulent design of grantor immaterial.— One who makes an absolute deed of property to secure his debt is not debarred from asserting his right to redeem, although, when he made the mortgage, he had in mind the design to defraud his creditors. Over *v.* Carolus, 171 Ill. 552, 49 N. E. 514.

Limitation of time to redeem.— Since a deed absolute in form is in effect a mortgage where a right to redeem is reserved, a contemporaneous agreement providing that the right of redemption shall cease at a specified time will be disregarded. Simon *v.* Schmidt, 41 Hun (N. Y.) 318.

47. *Connecticut.*— Belton *v.* Avery, 2 Root 279, 1 Am. Dec. 70; Daniels *v.* Alvord, 2 Root 196.

Illinois.— Jenkins *v.* Rosenberg, 105 Ill. 157; Maxfield *v.* Patchen, 29 Ill. 39.

Indiana.— Greenwood Bldg., etc., Assoc. *v.* Stanton, 28 Ind. App. 548, 63 N. E. 574.

Nebraska.— Eiseman *v.* Gallagher, 24 Nebr. 79, 37 N. W. 941.

New York.— Mooney *v.* Byrne, 163 N. Y. 86, 57 N. E. 163.

North Carolina.— Wilcox *v.* Morris, 5 N. C. 116, 3 Am. Dec. 678.

Virginia.— Floyd *v.* Harrison, 2 Rob. 161.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109.

See 35 Cent. Dig. tit. "Mortgages," § 1705.

48. See *supra*, VIII, H, 1.

from fraud or oppression.[49] So also the parties may agree for an extension of the time for redemption beyond what would otherwise be allowed.[50] And where the right of redemption would be absolutely cut off by a sale on foreclosure, the courts will give effect to an agreement of the parties, made in advance of the sale, that the mortgagee shall bid the property in and hold it subject to the option of the mortgagor to redeem within a limited time;[51] and so also, where no such agreement was made in advance, the foreclosure purchaser may still grant a right of redemption by a contract to that effect.[52]

5. Right to Redeem as Affected by Method of Foreclosure. Statutes giving the right to redeem for a certain time after foreclosure sale apply only to sales made under a judgment or decree of foreclosure,[53] and where the sale is made by virtue of a power contained in the mortgage, and without judicial proceedings, it cuts off the right of redemption absolutely,[54] except, in a few states, where the mortgagee or beneficiary himself becomes the purchaser,[55] or where there was fraud or irregularity in the sale or other circumstances on which an equitable claim to redemption can be founded.[56]

6. Partial and Proportionate Redemption. A mortgagee cannot be compelled to allow the redemption of a part of the mortgaged property on the payment of a proportionate part of the mortgage debt; he may insist on the redemption of the entire estate.[57] But of course the parties may make an apportionment of the

49. See *supra*, XVII, G, 1, a.

50. See *infra*, XXII, C, 1, e, (II).

51. *New Jersey.*— Heald *v.* Jardine, (Ch. 1891) 21 Atl. 586; Snyder *v.* Greaves, (Ch. 1891) 21 Atl. 291.

New York.— Agate *v.* Agate, 11 N. Y. St. 579.

North Carolina.— Yarborough *v.* Hughes, 139 N. C. 199, 51 S. E. 904.

Texas.— El Paso First Nat. Bank *v.* Moor, 34 Tex. Civ. App. 476, 79 S. W. 53.

England.— Orme *v.* Wright, 3 Jur. 19.

See 35 Cent. Dig. tit. "Mortgages," § 1701.

Rescission of contract.— The failure of the mortgagee to offer to perform a contract providing for the redemption of the premises, and his absence from the state in parts unknown during the redemption period, do not constitute a rescission of the contract. Swain *v.* Jacks, 125 Cal. 215, 57 Pac. 989.

52. Potter *v.* Brown, 50 Mich. 436, 15 N. W. 540; Morrow *v.* Jones, 41 Nebr. 867, 60 N. W. 369.

53. Fitch *v.* Wetherbee, 110 Ill. 475; State Bank *v.* Wilson, 9 Ill. 57; Chew *v.* Hyman, 7 Fed. 7, 10 Biss. 240.

54. *Indiana.*— Schnantz *v.* Schellhaus, 37 Ind. 85.

Mississippi.— Hyde *v.* Warren, 46 Miss. 13.

New York.— Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714.

Rhode Island.— De Wolf *v.* Murphy, 11 R. I. 630.

Texas.— Maulding *v.* Coffin, 6 Tex. Civ. App. 416, 25 S. W. 480.

See 35 Cent. Dig. tit. "Mortgages," § 1699.

55. Gunn *v.* Brantley, 21 Ala. 633; Hogan *v.* Lepretre, 1 Port. (Ala.) 392; Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342; Rumsey *v.* People's R. Co., 144 Mo. 175, 46 S. W. 144; Keith *v.* Browning, 139 Mo. 190, 40 S. W. 764.

56. *Alabama.*— National Bldg., etc., Assoc. *v.* Cheatham, 137 Ala. 395, 34 So. 383, where a bill for accounting and redemption was pending at the time of the sale.

Massachusetts.— Chace *v.* Morse, 189 Mass. 559, 76 N. E. 142 (sale made where there had been no breach of condition); Tetrault *v.* Labbe, 155 Mass. 497, 30 N. E. 173 (pending proceedings to enjoin sale); Clark *v.* Simmons, 150 Mass. 357, 23 N. E. 108 (sale not made in good faith and without sufficient notice).

New York.— Canton Lumber Co. *v.* Spears, 36 N. Y. Suppl. 307.

Rhode Island.— Fenley *v.* Cassidy, (1899) 43 Atl. 296, constructive fraud and breach of agreement.

United States.— Stinson *v.* Pepper, 47 Fed. 676.

See 35 Cent. Dig. tit. "Mortgages," § 1699.

Mere inadequacy of the price for which the property was sold, under a power contained in the mortgage or deed of trust, is not sufficient to give the mortgagor a right to redeem. Weld *v.* Rees, 48 Ill. 428; Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; McNair *v.* Pope, 100 N. C. 404, 6 S. E. 234.

57. *Illinois.*— Union Mut. L. Ins. Co. *v.* Kirchoff, 133 Ill. 368, 27 N. E. 91; Fischer *v.* Eslaman, 68 Ill. 78.

Maine.— Stinchfield *v.* Milliken, 71 Me. 567; Spring *v.* Haines, 21 Me. 126. See Crooker *v.* Frazier, 52 Me. 405.

Ohio.— Robinson *v.* Fife, 3 Ohio St. 551.

Vermont.— Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208; Wells *v.* Tucker, 57 Vt. 223.

England.— Hall *v.* Heward, 32 Ch. D. 430, 55 L. J. Ch. 604, 54 L. T. Rep. N. S. 810, 34 Wkly. Rep. 571.

Canada.— Merritt *v.* Stephenson, 6 Grant Ch. (U. C.) 567. See also Dominion Sav., etc., Soc. *v.* Kittridge, 23 Grant Ch. (U. C.) 631.

See 35 Cent. Dig. tit. "Mortgages," § 1703.

mortgage and debt by their agreement to that effect.[58] On the same principle a tenant in common or owner of an undivided interest in the mortgaged premises cannot redeem his interest only; he must redeem the whole.[59] And the same rule applies where different parcels of the mortgaged land are in the hands of separate purchasers,[60] although it is otherwise as to a judgment creditor of one of such purchasers or one who has a lien on only a portion of the premises.[61] Where the mortgagor has given separate mortgages on the same property to the same mortgagee, but to secure different debts, he may redeem each mortgage on paying the debt it secures.[62]

B. Persons Entitled to Redeem — 1. In General. The right of redemption from a mortgage belongs primarily to the mortgagor and those succeeding to his title and to such persons as have a title or interest in the mortgaged premises which would be prejudiced by a foreclosure.[63] The title of the redemptioner, if

Right of redemption as to part lost.— Where the right to redeem as to a part of the premises has been extinguished by the mortgagee's becoming the owner of it, the other part may be redeemed. Robinson *v.* Fife, 3 Ohio St. 551.

In Washington a statute authorizes the sheriff at a foreclosure sale to sell "the lots and parcels separately or together, as he shall deem most advantageous," and provides that property so sold, "or any part thereof separately sold," may be redeemed. It is accordingly held that the mortgagor has an absolute right to redeem any parcel separately sold, by repaying the amount bid, with interest, taxes, and costs. State *v.* Carpenter, 19 Wash. 378, 53 Pac. 342.

58. Union Mut. L. Ins. Co. *v.* Kirchoff, 133 Ill. 368, 27 N. E. 91 [*affirming* 33 Ill. App. 607]; Sanders *v.* Peck, 30 Ill. App. 238.

59. *Alabama.*— Lehman *v.* Moore, 93 Ala. 186, 9 So. 590.

Indiana.— Eiceman *v.* Finch, 79 Ind. 511.

Minnesota.— Buettel *v.* Harmount, 46 Minn. 481, 49 N. W. 250.

Nebraska.— See Dougherty *v.* Kubat, 67 Nebr. 269, 93 N. W. 317, holding that after foreclosure the mortgagee, if he chooses, may accept a portion of the mortgage debt from a cotenant and allow the redemption of a partial interest, and in that case the cotenant cannot insist on redeeming the whole.

United States.— Paige *v.* Smith, 5 Fed. 340, 2 McCrary 457.

See 35 Cent. Dig. tit. "Mortgages," § 1703.

60. *Illinois.*— Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Meacham *v.* Steele, 93 Ill. 135.

Massachusetts.— Bradley *v.* George, 2 Allen 392.

New York.— Coffin *v.* Parker, 127 N. Y. 117, 27 N. E. 814.

Vermont.— Gates *v.* Adams, 24 Vt. 70.

England.— Titley *v.* Davies, 15 Vin. Abr. 447.

Exceptions.—In an action by several plaintiffs to obtain the redemption of premises from the mortgagee in possession, where the right of some of plaintiffs is barred by limitations, plaintiffs not barred are entitled to redeem their share of the land on the payment of their proportion of the debt. Fogal *v.* Pirro, 17 Abb. Pr. (N. Y.) 113. So also, where the owner of the equity of redemption of part of mortgaged premises seeks to redeem, the redemption will be restricted to such part where it would work an injustice to the mortgagee to require him to convey the entire premises on the receipt only of the mortgage debt. Shearer *v.* Field, 6 Misc. (N. Y.) 189, 27 N. Y. Suppl. 29.

61. Huber *v.* Hess, 191 Ill. 305, 61 N. E. 61; Schuck *v.* Gerlach, 101 Ill. 338. But *compare* O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

62. Clark *v.* Seagraves, 186 Mass. 430, 71 N. E. 813. But see Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397.

63. *Alabama.*— Rapier *v.* Gulf City Paper Co., 64 Ala. 330.

Arkansas.— Scott *v.* Henry, 13 Ark. 112.

Connecticut.— Loomis *v.* Knox, 60 Conn. 343, 22 Atl. 771.

Illinois.— Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564.

Indiana.— Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676.

Iowa.— Skinner *v.* Young, 80 Iowa 234, 45 N. W. 889; Dickerman *v.* Lust, 66 Iowa 444, 23 N. W. 916; Bates *v.* Ruddick, 2 Iowa 423, 65 Am. Dec. 774.

Kansas.— Mercer *v.* McPherson, 70 Kan. 617, 79 Pac. 118.

Maine.— Frisbee *v.* Frisbee, 86 Me. 444, 29 Atl. 1115; Sprague *v.* Graham, 29 Me. 160.

Michigan.— Powers *v.* Golden Lumber Co., 43 Mich. 468, 5 N. W. 656; Stone *v.* Welling, 14 Mich. 514.

Mississippi.— Boarman *v.* Catlett, 13 Sm. & M. 149.

New Hampshire.— Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 N. H. 9.

New York.— Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714; Ettenheimer *v.* Heffernan, 66 Barb. 374; Grant *v.* Duane, 9 Johns. 591.

Ohio.— Penn *v.* Atlantic, etc., R. Co., 3 Ohio Dec. (Reprint) 508, 11 Am. L. Reg. N. S. 576.

Wisconsin.— Murphy *v.* Farwell, 9 Wis. 102.

United States.— Upham *v.* Brooks, 28 Fed. Cas. No. 16,797, 2 Woodb. & M. 407.

England.— White *v.* Parnther, 1 Knapp 179, 12 Eng. Reprint 288; Lomax *v.* Bird, 1 Vern. Ch. 182, 23 Eng. Reprint 402.

a third party, must be one derived mediately or immediately from the mortgagor, and not a hostile or independent title, such as could prevail only on condition that the mortgagor had no title.[64] But subject to this limitation, the redemption may be made by one having an equitable title,[65] although not by one having a mere naked legal title with no equitable rights,[66] by the sovereign, founding a claim on an escheat,[67] or by the mortgagor's receiver,[68] but not by the holder of a tax title, where a tax-sale is considered as founding a new and independent title,[69] nor by a surety on the note secured by the mortgage.[70] The right of redemption after decree of foreclosure and sale, which rests wholly upon statute, has been extended by these laws to other persons, such as judgment and other creditors, but must be strictly confined to those persons coming within the terms of the statute.[71]

2. Purchasers of Equity of Redemption — a. Grantee of Mortgagor. One who purchases mortgaged land from the mortgagor succeeds to the latter's equity of redemption from the mortgage,[72] even though his purchase does not include the

Canada.—Cronn *v.* Chamberlin, 27 Grant Ch. (U. C.) 551.

See 35 Cent. Dig. tit. "Mortgages," § 1709.

Title founded on right to avoid fraudulent conveyance.— Where the owner of land gave a power of attorney to convey the same, and the attorney conveyed the land fraudulently and without consideration to one who mortgaged it, it was held that the owner or his heirs had a right to redeem. Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756.

Assignment of right of redemption.— Independently of statute, a right of redemption may be assigned and the right to redeem exercised by the assignee. Cooper *v.* Maurer, 122 Iowa 321, 98 N. W. 124. And see Gordon *v.* Smith, 62 Fed. 503, 10 C. C. A. 516.

After-acquired title.— Redemption may be made by one who acquires an interest in the mortgaged premises after the institution of a suit to foreclose. Gibson *v.* Nelson, 2 Ont. L. Rep. 500. Or even after the foreclosure, if he acquires an interest in the estate from one who was not a party to the foreclosure suit. Bromitt *v.* Moor, 9 Hare 374, 41 Eng. Ch. 374, 68 Eng. Reprint 552.

64. Ayres *v.* Adair County, 61 Iowa 728, 17 N. W. 161; Smith *v.* Austin, 9 Mich. 465.

A purchaser from a husband who joined as trustee with his wife in a mortgage on her lands cannot maintain a bill to redeem from sale thereunder. Holden *v.* Rison, 77 Ala. 515.

65. Rice *v.* Puett, 81 Ind. 230; Scheibel *v.* Anderson, 77 Minn. 54, 79 N. W. 594, 77 Am. St. Rep. 664. And see Brighton *v.* Doyle, 64 Vt. 616, 25 Atl. 694.

66. Beach *v.* Shaw, 57 Ill. 17.

67. Catley *v.* Sampson, 33 Beav. 551, 10 Jur. N. S. 993, 34 L. J. Ch. 96, 10 L. T. Rep. N. S. 519, 12 Wkly. Rep. 927, 55 Eng. Reprint 483; Atty.-Gen. *v.* Crofts, 4 Bro. P. C. 136, 2 Eng. Reprint 91; Downe *v.* Morris, 3 Hare 394, 8 Jur. 486, 13 L. J. Ch. 337, 25 Eng. Ch. 394, 67 Eng. Reprint 435; Rogers *v.* Maule, 1 Y. & Coll. 4, 2 Eng. Ch. 4, 62 Eng. Reprint 765.

68. Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000; Van Dusen *v.* Worrell, 4 Abb. Dec. (N. Y.) 473, 3 Keyes 311, 1 Transcr. App. 224, 5 Abb. Pr. N. S. 286, 36 How. Pr. 286.

69. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890; Crum *v.* Cotting, 22 Iowa 411. But *compare* Ayres *v.* Adair County, 61 Iowa 728, 17 N. W. 161; Smith *v.* Lewis, 2 W. Va. 39.

70. Miller *v.* Ayres, 59 Iowa 424, 13 N. W. 436. And see Brooks *v.* Keister, 45 Iowa 303.

71. See the statutes of the different states. And see the following cases:

Alabama.— Commercial Real Estate, etc., Assoc. *v.* Parker, 84 Ala. 298, 4 So. 268; Aiken *v.* Bridgeford, 84 Ala. 295, 4 So. 266; Powers *v.* Andrews, 84 Ala. 289, 4 So. 263.

Arkansas.— Dickinson *v.* Duckworth, 74 Ark. 138, 85 S. W. 82; Davies *v.* Hunt, 37 Ark. 574.

Dakota.— Kalscheuer *v.* Upton, 6 Dak. 449, 43 N. W. 816.

Georgia.— Suttles *v.* Sewell, 105 Ga. 129, 31 S. E. 41.

Illinois.— Beadle *v.* Cole, 173 Ill. 136, 50 N. E. 809.

Indiana.— Butler *v.* Thornburgh, 153 Ind. 530, 55 N. E. 417.

Iowa.—Cooper *v.* Maurer, 122 Iowa 321, 98 N. W. 124; Jack *v.* Cold, 114 Iowa 349, 86 N. W. 374.

72. *Alabama.*— Booker *v.* Waller, 81 Ala. 549, 8 So. 225; Paulling *v.* Barron, 32 Ala. 9.

Arkansas.— Livingstone *v.* New England Mortg. Security Co., 77 Ark. 379, 91 S. W. 752; Scott *v.* Henry, 13 Ark. 112.

Florida.— Licata *v.* De Corte, 50 Fla. 563, 39 So. 58.

Illinois.— Kelgour *v.* Wood, 64 Ill. 345; Farrell *v.* Parlier, 50 Ill. 274; McConnel *v.* Holobush, 11 Ill. 61.

Maryland.— Gelston *v.* Thompson, 29 Md. 595.

Massachusetts.— Drinan *v.* Nichols, 115 Mass. 353.

Michigan.— Jennings *v.* Moore, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601; Wadsworth *v.* Loranger, Harr. 113.

whole mortgaged estate but only a part of it.[73] The same rule applies to a purchaser under an executory contract of sale, provided his rights are such as to entitle him to specific performance.[74] But one claiming the right to redeem as grantee of the mortgagor must be a purchaser in good faith,[75] and fatal defects in his deed, or in its execution or delivery, such as to prevent the title from passing, will cut off his right to redeem.[76]

b. Purchaser at Judicial Sale. Where lands subject to a mortgage are sold on execution against the mortgagor, the purchaser succeeds to the rights of the mortgagor in such sense as to be entitled to redeem from the mortgage,[77] but only on condition that the execution sale was valid;[78] and if he has not received his deed, but holds only the sheriff's certificate of purchase, he must redeem in the character of a lien creditor, not that of an owner.[79] A right of redemption likewise passes to the purchaser at a sale on foreclosure of a junior mortgage.[80]

Mississippi.— Houston *v.* National Mut. Bldg., etc., Assoc., 80 Miss. 31, 31 So. 540, 92 Am. St. Rep. 565.

New Jersey.— McCall *v.* Yard, 11 N. J. Eq. 58.

New York.— Howard *v.* Robbins, 170 N. Y. 498, 63 N. E. 530; Cook *v.* Mancius, 5 Johns. Ch. 89.

Ohio.— Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Frische *v.* Kramer, 16 Ohio 125, 47 Am. Dec. 368. A purchaser of mortgaged premises from the mortgagor after the mortgage cannot be let in to redeem against a purchaser at a judicial sale under the mortgage. Dennison *v.* Allen, 4 Ohio 495; Lytle *v.* Reed, Wright 248.

Oregon.— Willis *v.* Miller, 23 Oreg. 352, 31 Pac. 827.

Rhode Island.— Hoffman *v.* Anthony, 6 R. I. 282, 75 Am. Dec. 701.

England.— Preston *v.* Wilson, 5 Hare 185, 11 Jur. 201, 16 L. J. Ch. 137, 26 Eng. Ch. 185, 67 Eng. Reprint 879; Birch *v.* Davies, 5 Jur. 909; Secretary of State *v.* British Empire Mut. L. Assur. Co., 67 L. T. Rep. N. S. 434; Howard *v.* Harris, 1 Vern. Ch. 190, 23 Eng. Reprint 406.

See 35 Cent. Dig. tit. "Mortgages," § 1711.

Sale under power.— A purchaser from the mortgagor, with notice of the mortgage and the power of sale therein, and the provision for extinguishing the equity of redemption by the exercise of such power, cannot redeem from a sale under the power. Maulding *v.* Coffin, 6 Tex. Civ. App. 416, 25 S. W. 480.

73. Rothschild *v.* Bay City Lumber Co., 139 Ala. 571, 36 So. 785; Howser *v.* Cruikshank, 122 Ala. 256, 25 So. 206, 82 Am. St. Rep. 76; Douglass *v.* Bishop, 27 Iowa 214; Carll *v.* Butman, 7 Me. 102; Read *v.* Smith, 16 Grant Ch. (U. C.) 52.

74. Skinner *v.* Miller, 5 Litt. (Ky.) 84; Lowry *v.* Tew, 3 Barb. Ch. (N. Y.) 407; Noyes *v.* Hall, 97 U. S. 34, 24 L ed. 909. But *compare* Porter *v.* Read, 19 Me. 363 (where the contract of sale was not under seal); McDougald *v.* Capron, 7 Gray (Mass.) 278 (denying the right of redemption to one who held a bond for the conveyance of the land on the performance of certain conditions).

75. Gesner *v.* Burdell, 18 Minn. 497; Buchanan *v.* Wise, 28 Nebr. 312, 44 N. W. 458. And see Stone *v.* Welling, 14 Mich. 514, holding that, although the deed is given under such circumstances that the grantee cannot be considered a *bona fide* purchaser as against the mortgagee, yet if it is perfectly valid between the parties to it he may have a right to redeem.

76. Rice *v.* Puett, 81 Ind. 230 (misdescription of the land does not affect grantee's right to redeem); Dodge *v.* Kennedy, 93 Mich. 547, 53 N. W. 795 (deed not delivered); Heller *v.* King, 54 Nebr. 22, 74 N. W. 423 (name of grantee left blank in deed); Hodson *v.* Treat, 7 Wis. 263 (immaterial that deed not recorded).

77. *Alabama.*— Watson *v.* Steele, 78 Ala. 361.

Arkansas.— Allen *v.* Swoope, 64 Ark. 576, 44 S. W. 78; Turner *v.* Watkins, 31 Ark. 429.

California.— Pollard *v.* Harlow, 138 Cal. 390, 71 Pac. 454, 648.

Georgia.— See Shumate *v.* McLendon, 120 Ga. 396, 48 S. E. 10.

Illinois.— Grob *v.* Cushman, 60 Ill. 201.

Indiana.— Jackson *v.* Weaver, 138 Ind. 539, 38 N. E. 166; Julian *v.* Beal, 26 Ind. 220, 89 Am. Dec. 460.

Iowa.— Hawkeye Ins. Co. *v.* Maxwell, 119 Iowa 672, 94 N. W. 207; Hammond *v.* Leavitt, 59 Iowa 407, 13 N. W. 397.

Kentucky.— Glazebrook *v.* Brandon, 3 Ky. L. Rep. 466.

Maine.— Millett *v.* Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275.

Maryland.— Stockett *v.* Taylor, 3 Md. Ch. 537.

Massachusetts.— Hayward *v.* Cain, 110 Mass. 273; White *v.* Bond, 16 Mass. 400; Warren *v.* Childs, 11 Mass. 222.

Missouri.— Riggs *v.* Owen, 120 Mo. 176, 25 S. W. 356; Matson *v.* Capelle, 62 Mo. 235.

Texas.— Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247.

Wisconsin.— Raymond *v.* Holborn, 23 Wis. 57, 99 Am. Dec. 105.

Canada.— Sheldon *v.* Chisholm, 3 Grant Ch. (U. C.) 655; Waters *v.* Shade, 2 Grant Ch. (U. C.) 457.

See 35 Cent. Dig. tit. "Mortgages," § 1712.

78. Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355.

79. Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

80. Buchanan *v.* Reid, 43 Minn. 172, 45 N. W. 11; Murphy *v.* Farwell, 9 Wis. 102.

3. Wife of Mortgagor. A wife has such a contingent interest in the real estate of her husband as to give her a right to redeem, during his lifetime, from a mortgage thereon in which she joined,[81] or even, according to most of the authorities, although she did not join in the mortgage.[82] Of course her equity is even stronger if she has an independent title or claim to the property or lien upon it.[83]

4. Widow of Mortgagor. A widow, in view of her dower interest, has a right to redeem from a mortgage on her late husband's lands.[84]

81. *Indiana.*— Scobey *v.* Kinningham, 131 Ind. 552, 31 N. E. 355; Vaughan *v.* Dowden, 126 Ind. 406, 26 N. E. 74.

Massachusetts.— Lamb *v.* Montague, 112 Mass. 352; Davis *v.* Wetherell, 13 Allen 60, 90 Am. Dec. 177.

Minnesota.— Williams *v.* Stewart, 25 Minn. 516.

New Hampshire.— Smith *v.* Hall, 67 N. H. 200, 30 Atl. 409.

New Jersey.— Opdyke *v.* Bartles, 11 N. J. Eq. 133.

New York.— Mackenna *v.* Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721, 112 Am. St. Rep. 620, 3 L. R. A. N. S. 163 [*modifying* 98 N. Y. App. Div. 480, 90 N. Y. Suppl. 493].

Rhode Island.— Atwood *v.* Arnold, 23 R. I. 609, 51 Atl. 216.

Virginia.— Gatewood *v.* Gatewood, 75 Va. 407.

England.— Dolin *v.* Coltman, 1 Vern. Ch. 294, 23 Eng. Reprint 478.

See 35 Cent. Dig. tit. "Mortgages," § 1722.

Compare Lacey *v.* Lacey, (Ala. 1905) 39 So. 922.

Contra.— Casner *v.* Haight, 6 Ont. 451.

Commutation of dower in lieu of redemption.— It has been held that the wife of the mortgagor should be refused the right to redeem, as against the foreclosure purchaser, if the latter will release her right of dower from the mortgage, or pay the present value of her inchoate right, she having the right to choose between these alternatives. Taggart *v.* Rogers, 12 N. Y. Suppl. 113. And see Mackenna *v.* Fidelity Trust Co., 98 N. Y. App. Div. 480, 90 N. Y. Suppl. 493.

Purchase-money mortgage.—Where a mortgage securing the purchase-price of the land is foreclosed during the lifetime of the mortgagor, his wife is not entitled to redeem, although she did not sign the mortgage and was not a party to the foreclosure proceedings. Folsom *v.* Rhodes, 22 Ohio St. 435. But *compare* Butler *v.* Thornburgh, 141 Ind. 152, 40 N. E. 514.

82. Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Moore *v.* Smith, 95 Mich. 71, 54 N. W. 701; Campbell *v.* Ellwanger, 81 Hun (N. Y.) 259, 30 N. Y. Suppl. 792; Denton *v.* Nanny, 8 Barb. (N. Y.) 618. *Contra,* Opdyke *v.* Bartles, 11 N. J. Eq. 133.

83. Roberts *v.* Fleming, 53 Ill. 196; Whitcomb *v.* Sutherland, 18 Ill. 578; Sanford *v.* Kane, 24 Ill. App. 504 [*reversed* on other grounds in 127 Ill. 591, 20 N. E. 810]. And see Gustafson *v.* Durst, 124 Iowa 203, 99 N. W. 738.

84. *Alabama.*— McGough *v.* Sweetser, 97 Ala. 361, 12 So. 162, 19 L. R. A. 470. But see Walden *v.* Speigner, 87 Ala. 379, 6 So. 81.

District of Columbia.— Loughran *v.* Lemmon, 19 App. Cas. 141.

Indiana.— Barr *v.* Vanalstine, 120 Ind. 590, 22 N. E. 965; Kissel *v.* Eaton, 64 Ind. 248.

Maine.— Wilkins *v.* French, 20 Me. 111.

Massachusetts.— McCabe *v.* Bellows, 1 Allen 269; Gibson *v.* Crehore, 5 Pick. 146.

New Jersey.— Opdyke *v.* Bartles, 11 N. J. Eq. 133.

New York.— Denton *v.* Nanny, 8 Barb. 618; Wheeler *v.* Morris, 2 Bosw. 524.

Ohio.— McArthur *v.* Franklin, 16 Ohio St. 193, 15 Ohio St. 485.

Rhode Island.— Atwood *v.* Charlton, 21 R. I. 568, 45 Atl. 580.

Tennessee.— Clark *v.* Cantwell, 3 Head 202.

Wisconsin.— Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614.

England.— Swannock *v.* Lyford, Ambl. 6, 27 Eng. Reprint 3; Hill *v.* Adams, 2 Atk. 208, 26 Eng. Reprint 529; Jones *v.* Meredith, Bunb. 346, Comyns 661; Palmes *v.* Danby, Prec. Ch. 137, 24 Eng. Reprint 66.

See 35 Cent. Dig. tit. "Mortgages," § 1723.

An assignment of dower is not necessary to enable the widow of the mortgagor to redeem by a bill in equity. Hays *v.* Cretin, 102 Md. 695, 62 Atl. 1028, 4 L. R. A. N. S. 1039; Gibson *v.* Crehore, 5 Pick. (Mass.) 146.

Husband's dower.— Under a statute giving husband and wife equal rights of dower in each other's property, a husband, after the death of his wife, cannot redeem from a mortgage executed by her on her real estate in which he did not join, as such mortgage does not affect his dower interest. Huston *v.* Seeley, 27 Iowa 183.

Mortgage executed before marriage.— Where a party, previous to his marriage, executed a mortgage on certain premises, and after the marriage the mortgage was foreclosed, his wife not being made a party to the suit, and the mortgagee became the purchaser and received a deed, and afterward the mortgagor died, it was held that the widow had no right to redeem. Burson *v.* Dow, 65 Ill. 146.

Annuity in lieu of dower.— Where the decedent mortgagor leaves his widow an annuity in lieu of her dower, which she accepts, especially if the annuity is charged on the realty, she cannot insist on redeeming the mortgage. Long *v.* Long, 17 Grant Ch. (U. C.) 251. And see White *v.* Parnther, 1 Knapp 179, 12 Eng. Reprint 288.

5. Heirs and Representatives of Mortgagor. Where the equity of redemption remained in the mortgagor at the time of his death, not having been either assigned or devised, it may be exercised by his heirs at law.[85] If the land encumbered has been disposed of by his will, the devisee may redeem.[86] And in some cases, either by statute or in consequence of the situation of the estate, the right of redemption may be claimed by the executor or administrator.[87]

6. Part-Owners and Tenants in Common. Where several persons are interested in land which is covered by a mortgage, whether as owners of distinct parcels of the land or as tenants in common of the whole, each of them is at liberty to redeem for the protection of his own interest.[88] Under this rule either member of a partnership may redeem mortgaged land belonging to the firm.[89]

7. Life-Tenants and Remainder-Men. The right of redeeming a mortgaged estate belongs alike to the tenant for life[90] and to the owner of the estate in remainder.[91]

85. *Alabama.*— Rainey *v.* McQueen, 121 Ala. 191, 25 So. 920; Jones *v.* Matkin, 118 Ala. 341, 24 So. 242; Commercial Real Estate, etc., Assoc. *v.* Parker, 84 Ala. 298, 4 So. 268; Aiken *v.* Bridgeford, 84 Ala. 295, 4 So. 266; Powers *v.* Andrews, 84 Ala. 289, 4 So. 263.

Illinois.— Hunter *v.* Dennis, 112 Ill. 568.

Minnesota.— See Peterson *v.* Webber, 46 Minn. 372, 49 N. W. 125.

Tennessee.— Elliott *v.* Patton, 4 Yerg. 10.

Texas.— Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486.

Wisconsin.— Zaegel *v.* Kuster, 51 Wis. 31, 7 N. W. 781.

England.— Kirton's Case, Cro. Car. 87.

Canada.— Anderson *v.* Hanna, 19 Ont. 58.

86. Chew *v.* Hyman, 7 Fed. 7, 10 Biss. 240; Walton *v.* Bernard, 2 Grant Ch. (U. C.) 344. *Compare* Tierney *v.* Spiva, 97 Mo. 98, 10 S. W. 433.

87. See the statutes of the different states. And see the following cases:

Massachusetts.— Clark *v.* Seagraves, 186 Mass. 430, 71 N. E. 813; Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281.

Michigan.— Palmer *v.* Bray, 136 Mich. 85, 98 N. W. 849.

Tennessee.— Pearcy *v.* Tate, 91 Tenn. 478, 19 S. W. 323.

England.— Catley *v.* Sampson, 33 Beav. 551, 10 Jur. N. S. 993, 34 L. J. Ch. 96, 10 L. T. Rep. N. S. 519, 12 Wkly. Rep. 927, 55 Eng. Reprint 483; Fray *v.* Drew, 11 Jur. N. S. 130, 11 L. T. Rep. N. S. 730, 13 Wkly. Rep. 367; Robertson *v.* Norris, 4 Jur. N. S. 443. Where an administrator mortgages leasehold premises, reserving the equity of redemption to himself and his executors, administrators, and assigns, the right to redeem after his death belongs to his own representatives, and not to the administrator *de bonis non* of his intestate. Skeffington *v.* Whitehurst, 7 L. J. Exch. 65, 3 Y. & C. Exch. 1. But see Skeffington *v.* Budd, 9 Cl. & F. 219, 6 Jur. 809, 8 Eng. Reprint 399.

Canada.— Wilkins *v.* McLean, 10 Ont. 58 [*reversed* on other grounds in 14 Can. Sup. Ct. 22].

88. *Alabama.*— McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548.

Illinois.— Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577.

Michigan.— Norton *v.* Tharp, 53 Mich. 146, 18 N. W. 601.

Minnesota.— Holterhoff *v.* Mead, 36 Minn. 42, 29 N. W. 675.

New Hampshire.— Brown *v.* Simons, 45 N. H. 211.

New Jersey.— Geishaker *v.* Pancoast, 57 N. J. Eq. 60, 40 Atl. 200.

New York.— *In re* Willard, 5 Wend. 94.

Vermont.— Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41.

England.— Wastneys *v.* Chappell, 3 Bro. P. C. 50, 1 Eng. Reprint 1170.

Canada.— Cronn *v.* Chamberlin, 27 Grant Ch. (U. C.) 551. See also Ruttan *v.* Levisconte, 2 Ch. Chamb. (U. C.) 108.

A joint mortgagor who has conveyed absolutely to the other his equity of redemption is not a necessary party to a bill to foreclose; but his right of redemption is not cut off where the property did not satisfy the debt. Townsend Sav. Bank *v.* Epping, 24 Fed. Cas. No. 14,120, 3 Woods 390.

Mortgage of undivided interest.—Where an undivided interest in land is mortgaged by the owner thereof, a coöwner has no right of redemption. Nichol *v.* Allenby, 17 Ont. 275.

A tenant in common of the equity of redemption has the same right to redeem from a mortgage that his grantor had. Dickerson *v.* Simmons, 141 N. C. 325, 53 S. E. 850.

89. Lehman *v.* Moore, 93 Ala. 186, 9 So. 590; Emerson *v.* Atkinson, 159 Mass. 356, 34 N. E. 516.

90. Lamson *v.* Drake, 105 Mass. 564; Wicks *v.* Scrivens, 1 Johns. & H. 215, 7 Eng. Reprint 726; Flud *v.* Flud, Freem. 210, 22 Eng. Reprint 1165.

91. Barnes *v.* Boardman, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; Meads *v.* Hutchinson, 111 Mo. 620, 19 S. W. 1111; Stevenson *v.* Edwards, 98 Mo. 622, 12 S. W. 255; Playford *v.* Playford, 4 Hare 546, 30 Eng. Ch. 546, 67 Eng. Reprint 764.

Where mortgagee is also tenant for life.— A mortgagee who is also the assignee or mortgagee of a particular estate in the equity of redemption is not, during the continuance of that particular estate, subject, without his consent, to redemption at the hands of a

8. Tenant For Years. A tenant for years of mortgaged property has an absolute right to redeem from the mortgage, even though his lease does not include the whole of the estate covered by the mortgage.[92]

9. Creditors — a. In General. An unsecured creditor or simple contract creditor of the owner of the equity of redemption has no such interest as entitles him to redeem the mortgaged premises.[93] So far as regards creditors, this right is reserved to those who have a lien upon the specific property;[94] but an attaching creditor may redeem.[95]

b. Judgment Creditors. A judgment creditor of the mortgagor or owner of the equity of redemption has a right to redeem,[96] provided his judgment is a valid

remainder-man. Prout *v.* Cock, [1896] 2 Ch. 808, 66 L. J. Ch. 24, 75 L. T. Rep. N. S. 409, 45 Wkly. Rep. 157; Ravald *v.* Russell, Younge 9.

Legatee.— A bill to redeem lands from a mortgage cannot be maintained by a legatee whose interest in the mortgaged premises is limited to the extent of one tenth of the proceeds of the sale of the estate in remainder after expiration of a life-estate and payment of the mortgage debt, as against the mortgagee, who holds the legal estate, and also has precisely the same beneficial interest under the will as plaintiff. Snook *v.* Zentmyer, 91 Md. 485, 46 Atl. 1008.

92. *Massachusetts.*— Loud *v.* Lane, 8 Metc. 517; Bacon *v.* Bowdoin, 2 Metc. 591, 22 Pick. 401.

New Jersey.— Hamilton *v.* Dobbs, 19 N. J. Eq. 227.

New York.— Averill *v.* Taylor, 8 N. Y. 44.

Pennsylvania.— Wunderle *v.* Ellis, 212 Pa. St. 618, 62 Atl. 106.

Rhode Island.— Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743.

England.— Tarn *v.* Turner, 39 Ch. D. 456, 57 L. J. Ch. 1085, 59 L. T. Rep. N. S. 742, 37 Wkly. Rep. 276.

Canada.— Martin *v.* Miles, 5 Ont. 404.

See 35 Cent. Dig. tit. "Mortgages," § 1725.

93. *Maryland.*— McNiece *v.* Eliason, 78 Md. 168, 27 Atl. 940.

Minnesota.— Maurin *v.* Carnes, 71 Minn. 308, 74 N. W. 139.

Missouri.— Harris *v.* Burns, 14 Mo. App. 229.

United States.— National Foundry, etc., Works *v.* Oconto City Water Supply Co., 113 Fed. 793, 51 C. C. A. 465.

England.— Francklyn *v.* Fern, Barn. Ch. 30.

Canada.— Nichol *v.* Allenby, 17 Ont. 275.

See 35 Cent. Dig. tit. "Mortages," § 1713.

A surety on the mortgage note is not entitled to redeem. Thomas *v.* Stewart, 117 Ind. 50, 18 N. E. 505, 1 L. R. A. 715; Miller *v.* Ayres, 59 Iowa 424, 13 N. W. 436.

94. Duesterberg *v.* Swartzel, 115 Ind. 180, 17 N. E. 155; Newell *v.* Pennick, 62 Iowa 123, 17 N. W. 432; Bunce *v.* West, 62 Iowa 80, 17 N. W. 179; Hospes *v.* Sanborn, 28 Minn. 48, 8 N. W. 905; Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373.

The purchaser at a foreclosure sale, so long as the statutory right of redemption from the sale continues, is not an owner, but he is a "creditor having a lien" within the meaning of the redemption laws. Dolan *v.* Midland Blast Furnace Co., 126 Iowa 254, 100 N. W. 45; Buchanan *v.* Reid, 43 Minn. 172, 45 N. W. 11.

Plaintiff in a creditor's suit, after a decree for the sale of the real estate, may sustain a suit for redemption against a mortgagee. Christian *v.* Field, 2 Hare 177, 5 Jur. 1130, 11 L. J. Ch. 97, 24 Eng. Ch. 177, 67 Eng. Reprint 74.

Effect of allowance of claim against deceased mortgagor's estate.— A general creditor of a decedent whose claim has been allowed against the estate does not thereby acquire a lien on the decedent's real estate such as to entitle him to redeem from a mortgage executed by the decedent in his lifetime. Nelson *v.* Rodgers, 65 Minn. 246, 68 N. W. 18; Whitney *v.* Burd, 29 Minn. 203, 12 N. W. 530. But *compare* Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13.

Coördinate mortgagees.— Where several notes secured by the same mortgage are in the hands of different persons, one of whom forecloses, the others may redeem. Grattan *v.* Wiggins, 23 Cal. 16; Davis *v.* Langsdale, 41 Ind. 399.

95. Whitney *v.* Metallic Window Screen Mfg. Co., 187 Mass. 557, 73 N. E. 663; Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741; Chandler *v.* Dyer, 37 Vt. 345. *Contra,* Fisher *v.* Tallman, 74 Mo. 39.

96. *Alabama.*— Raisin Fertilizer Co. *v.* Bell, 107 Ala. 261, 18 So. 168; Garner *v.* Foster, 49 Ala. 167; Jones *v.* Burden, 20 Ala. 382. See also McGough *v.* Deposit Bank, (1906) 40 So. 984.

California.— Alexander *v.* Greenwood, 24 Cal. 505; Kent *v.* Laffan, 2 Cal. 595.

Connecticut.— Lyon *v.* Sanford, 5 Conn. 544.

Georgia.— Shumate *v.* McLendon, 120 Ga. 396, 48 S. E. 10.

Illinois.— Ætna L. Ins. Co. *v.* Beckman, 210 Ill. 394, 71 N. E. 452; People *v.* Bowman, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265; Boynton *v.* Pierce, 151 Ill. 197, 37 N. E. 1024; Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Fitch *v.* Wetherbee, 110 Ill. 475; Schuck *v.* Gerlach, 101 Ill. 338; Clingman *v.* Hopkie, 78 Ill. 152; McRoberts *v.* Conover, 71 Ill. 524; Grob *v.* Cushman, 45 Ill. 119; Dwen *v.* Blake, 44 Ill. 135; Lamb *v.* Richards, 43 Ill. 312; Campbell *v.* Wilson, 68 Ill. App. 619.

and continuing obligation,[97] recovered in a court of record, if this is required by statute[98] and duly docketed and indexed, or otherwise made effective as a lien, according to the statutory requirements,[99] and attaching as a lien on the specific property affected by the mortgage.[1]

c. Prior Mortgagees. As a senior mortgagee is not generally affected by the existence of a junior lien on the same premises, nor by any proceedings to enforce it, he is not entitled to redeem the land from the junior encumbrancer nor from the latter's sale on foreclosure.[2]

Indiana.— Bowen *v.* Van Gundy, 133 Ind. 670, 33 N. E. 687; Holmes *v.* Bybee, 34 Ind. 262.

Kentucky.— Hitt *v.* Holliday, 2 Litt. 332.

Maryland.— Griffith *v.* Frederick County Bank, 6 Gill & J. 424.

Minnesota.— Swanson *v.* Realization, etc., Corp., 70 Minn. 380, 73 N. W. 165; Willard *v.* Finnegan, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50.

New York.— Groff *v.* Morehouse, 51 N. Y. 503; Brainard *v.* Cooper, 10 N. Y. 356.

North Carolina.—Tucker *v.* White, 22 N. C. 289; Stainback *v.* Geddy, 21 N. C. 479.

Ohio.— Estep *v.* Adams, 4 Ohio Dec. (Reprint) 40, Clev. L. Rec. 51.

Tennessee.— Burton *v.* Robinson, 9 Baxt. 364.

United States.— U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525. *Contra*, Burnham *v.* Fritz, 13 Fed. 368, 4 McCrary 410.

Canada.— Chamberlin *v.* Sovais, 28 Grant Ch. (U. C.) 404; Gilmour *v.* Cameron, 6 Grant Ch. (U. C.) 290.

See 35 Cent. Dig. tit. "Mortgages," § 1714.

Contra.— Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293; Mayer *v.* Farmers' Bank, 44 Iowa 212; Stadler *v.* Allen, 44 Iowa 198; Wright *v.* Howell, 35 Iowa 288; Preston-Parton Milling Co. *v.* Dexter, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

Mortgagee as judgment creditor.— That a creditor has foreclosed a mortgage and obtained a decree for the sale of the mortgaged premises does not constitute him a judgment creditor so as to entitle him to redeem the premises from the purchaser. Mobile Branch Bank *v.* Furness, 12 Ala. 367. It is otherwise where his decree of foreclosure is accompanied by a personal judgment against the mortgagor for deficiency. Greene *v.* Doane, 57 Ind. 186.

Agreement waiving redemption.— Where a confession of judgment authorizing the entry of a decree of foreclosure contains an agreement that the sale under the decree shall be absolute, with no right of redemption, a decree and sale in accordance with the terms of such agreement are conclusive against a subsequent judgment creditor, and he has no right to redeem. Cook *v.* McFarland, 78 Iowa 528, 43 N. W. 519.

97. Shroeder *v.* Bauer, 140 Ill. 135, 29 N. E. 560; Gilbert *v.* Merrill, 12 Me. 74; Bagley *v.* McCarthy Bros. Co., 95 Minn. 286, 104 N. W. 7; Lowry *v.* Akers, 50 Minn. 508, 52 N. W. 922.

Judgment by confession.— A judgment by confession if given in good faith entitles the creditor to redeem. Couthway *v.* Berghaus, 25 Ala. 393. And see Strauss *v.* Tuckhorn, 200 Ill. 75, 65 N. E. 683, holding that the owner of the equity of redemption may confess judgment for the express purpose of enabling the judgment creditor to redeem the premises, provided there is a *bona fide* existing indebtedness to support the judgment.

Judgment assigned merely for collection see McKee *v.* Murphy, 34 N. Y. Super. Ct. 261.

98. See the statutes of the different states. And see Thornley *v.* Moore, 106 Ill. 496.

99. See the statutes of the different states. And see McIlwain *v.* Karstens, 152 Ill. 135, 38 N. E. 555; Sterling Mfg. Co. *v.* Early, 69 Iowa 94, 28 N. W. 458; Brady *v.* Gilman, 96 Minn. 234, 104 N. W. 897, 1 L. R. A. N. S. 835.

1. Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Schuck *v.* Gerlach, 101 Ill. 338 (a judgment creditor of an heir of a deceased mortgagor may redeem such heir's interest in the mortgaged premises); Jackson *v.* Myrick, 29 Me. 490; Elliot *v.* Patton, 4 Yerg. (Tenn.) 10 (judgment creditor of deceased mortgagor redeeming as against heir).

Partnership property.— Where land mortgaged by a partnership was the separate property of one partner, a judgment creditor of that partner may redeem. Florence Land, etc., Co. *v.* Warren, 91 Ala. 533, 9 So. 384. But land conveyed to a firm in the firm-name vests in them as tenants in common, not jointly, and therefore a creditor of the firm cannot redeem from a mortgage on it. Powers *v.* Robinson, 90 Ala. 225, 8 So. 10.

Homestead.— In Iowa a judgment creditor has no lien on the debtor's homestead and therefore cannot redeem the same from a mortgage, even though the mortgage also covers other land. Sutherland *v.* Tyner, 72 Iowa 232, 33 N. W. 645; Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293. In Illinois a judgment creditor may redeem from a mortgage which contained a release of homestead. Herdman *v.* Cooper, 138 Ill. 583, 28 N. E. 1094; Smith *v.* Mace, 137 Ill. 68, 26 N. E. 1092; Shroeder *v.* Bauer, 41 Ill. App. 484 [*affirmed* in 140 Ill. 135, 29 N. E. 560]. In Minnesota a judgment creditor may redeem from a sale on foreclosure of a mortgage of two lots of land, sold in one parcel, although one of them is the homestead of the mortgagor. Martin *v.* Sprague, 29 Minn. 53, 11 N. W. 143.

2. Goodman *v.* White, 26 Conn. 317; Dawson *v.* Overmyer, 141 Ind. 438, 40 N. E. 1065; Hutchinson *v.* Wells, 67 Iowa 430, 25 N. W. 690.

d. Junior Mortgagees. Where a senior mortgage on land is overdue, or there has been any other breach of its condition, the junior encumbrancer is equitably entitled to redeem it,[3] although it seems that he cannot compel the senior lienor to accept a tender of his debt and release the security if he and the mortgagor desire that it should continue in force.[4] If the senior mortgagee forecloses, but does not make the junior mortgagee a party to the proceedings, the latter has an absolute right to redeem, which is founded on equitable principles and is independent of the statute, regardless of the decree and sale;[5] but if the subsequent encumbrancer is joined as a party in the foreclosure suit, his equitable rights will be cut off by the decree, and thereafter his only right of redemption will be under

3. *Dakota.*— Kalscheuer *v.* Upton, 6 Dak. 449, 43 N. W. 816.

Iowa.— Wheeler *v.* Menold, 81 Iowa 647, 47 N. W. 871.

Massachusetts.— Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Smith *v.* Provin, 4 Allen 516; Niles *v.* Nye, 13 Metc. 135; Bigelow *v.* Willson, 1 Pick. 485; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98.

New York.— Dings *v.* Parshall, 7 Hun 522; Jenkins *v.* Continental Ins. Co., 12 How. Pr. 66.

England.— Smith *v.* Green, Coll. Ch. 555, 28 Eng. Ch. 555, 63 Eng. Reprint 541; Banks *v.* Whittall, 1 De G. & Sm. 536, 17 L. J. Ch. 14, 63 Eng. Reprint 1182.

Canada.— Brewer *v.* Conger, 27 Ont. App. 10.

See 35 Cent. Dig. tit. "Mortgages," § 1716.

The right of a junior mortgagee to redeem the prior encumbrance cannot be resisted on the ground that he has other sufficient securities for his debt. Morse *v.* Smith, 83 Ill. 396; Fletcher *v.* Holmes, 25 Ind. 458. Nor can it be affected by an agreement between the parties to the first mortgage for a higher rate of interest than that specified in such mortgage (Gardner *v.* Emerson, 40 Ill. 296); nor by arrangements between the mortgagor and the holder of the first mortgage for an extension of time to pay it (Sager *v.* Tupper, 35 Mich. 134).

A purchase by a trustee in bankruptcy from the first mortgagee of the bankrupt does not extinguish the right of the second mortgagee to redeem. Bell *v.* Sunderland Bldg. Soc., 24 Ch. D. 618, 53 L. J. Ch. 509, 49 L. T. Rep. N. S. 555.

4. How *v.* Graham, 21 Mo. 163; Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Ramsbottom *v.* Wallis, 5 L. J. Ch. 92.

5. *Alabama.*— Wiley *v.* Ewing, 47 Ala. 418.

California.— Frink *v.* Murphy, 21 Cal. 108, 81 Am. Dec. 149.

Connecticut.— Goodman *v.* White, 26 Conn. 317; Frink *v.* Branch, 16 Conn. 260.

Illinois.— Steinkemeyer *v.* Gillespie, 82 Ill. 253; Hodgen *v.* Guttery, 58 Ill. 431.

Indiana.— Johnson *v.* Hosford, 110 Ind. 572, 10 N. E. 407.

Iowa.— Smith *v.* Shay, 62 Iowa 119, 17 N. W. 444; American Buttonhole, etc., Co. *v.* Burlington Mut. Loan Assoc., 61 Iowa 464, 16 N. W. 527; Anson *v.* Anson, 20 Iowa 55, 89 Am. Dec. 514.

Kentucky.— Dale *v.* Shirley, 5 B. Mon. 492.

Michigan.— J. I. Case Threshing-Mach. Co. *v.* Mitchell, 74 Mich. 679, 42 N. W. 151; Avery *v.* Ryerson, 34 Mich. 362.

Missouri.— Cassady *v.* Wallace, 102 Mo. 575, 15 S. W. 138; Williams *v.* Brownlee, 101 Mo. 309, 13 S. W. 1049; Valentine *v.* Havener, 20 Mo. 133; Mullanphy *v.* Simpson, 3 Mo. 492.

Nebraska.— Cram *v.* Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714; Renard *v.* Brown, 7 Nebr. 449; Jones *v.* Dutch, 3 Nebr. (Unoff.) 673, 92 N. W. 735; Davis *v.* Greenwood, 2 Nebr. (Unoff.) 317, 96 N. W. 526.

New York.— Soule *v.* Ludlow, 3 Hun 503; Wetmore *v.* Roberts, 10 How. Pr. 51; Kellogg *v.* Conner, 10 Paige 311.

Wisconsin.— Farwell *v.* Murphy, 2 Wis. 533.

United States.— American L. & T. Co. *v.* Atlanta Electric R. Co., 99 Fed. 313.

England.— Morret *v.* Westerne, 2 Vern. Ch. 663, 23 Eng. Reprint 1031.

See 35 Cent. Dig. tit. "Mortgages," § 1716.

Conflict of equities.— Although a junior mortgagee who was not made a party to proceedings in equity for the foreclosure of the senior mortgage is not absolutely barred by the decree, yet he cannot be permitted to assert his equity of redemption against an equity still stronger. Kenyon *v.* Shreck, 52 Ill. 382.

Extent of redemption.— Where a number of mortgages covering several pieces of property are foreclosed in the same proceeding, a person holding a junior mortgage on one of the lots may release it from the operation of the decree entered against it by paying off only that mortgage which was a charge against the particular lot. Ruprecht *v.* Galt, 119 Ill. App. 478.

Effect of redemption.— Where a second mortgagee redeems from the sale on foreclosure of the first mortgage, and afterward forecloses under his own mortgage and buys in the property at the sale, a judgment creditor, whose lien is junior to both mortgages, cannot redeem from the sale under the second mortgage by paying the amount of that mortgage alone; he must redeem from both mortgages; for the second mortgagee, by redeeming from the sale under the first mortgage, does not extinguish that lien, but becomes subrogated to the rights of the first mortgagee. Flachs *v.* Kelly, 30 Ill. 462.

the statute giving such right, after sale to certain classes of creditors, including junior lienors.[6]

e. Assignee of Junior Mortgage. The assignee of a junior mortgage has in general the same right of redemption from the senior lien as would have belonged to his assignor, but no greater.[7] He must show that the assignment was genuine and that he is the lawful owner of the mortgage;[8] and the assignment must have been recorded in order to save his right of redemption as against a decree of foreclosure of the senior mortgage to which he was not made a party.[9]

f. Holder of Mechanic's Lien. To entitle a mechanic or materialman to redeem from a mortgage on the premises, he must have taken the steps prescribed by the statute to establish his lien;[10] and further, according to the law of some states, he must have recovered a judgment against the mortgagor which is a lien on the premises.[11]

10 STRANGERS — a. In General. A stranger, having no interest in the mortgaged premises nor any lien thereon, has no right to redeem from the mortgage, and his tender of the redemption money may properly be refused.[12] But if the person entitled to the redemption money accepts it on the offer of a stranger and retains it an actual redemption is effected, the rights of the person thus paid off, whether it be the mortgagee or the purchaser at the foreclosure sale, are terminated and he cannot afterward repudiate the transaction.[13]

6. *California.*— Frink *v.* Murphy, 21 Cal. 108, 81 Am. Dec. 149.

Illinois.— Ogle *v.* Koerner, 140 Ill. 170, 29 N. E. 563; Roberts *v.* Fleming, 53 Ill. 196; Hurd *v.* Case, 32 Ill. 45, 83 Am. Dec. 249.

Indiana.— Scobey *v.* Kinningham, 131 Ind. 552, 31 N. E. 355; Duesterberg *v.* Swartzel, 115 Ind. 180, 17 N. E. 155.

Iowa.— Stephens *v.* Mitchell, 103 Iowa 65, 72 N. W. 434; Lamb *v.* West, 75 Iowa 399, 39 N. W. 666; Hervey *v.* Savery, 48 Iowa 313.

Michigan.— Kimmell *v.* Willard, 1 Dougl. 217.

Minnesota.— Darelius *v.* Davis, 74 Minn. 345, 77 N. W. 214; Buchanan *v.* Reid, 43 Minn. 172, 45 N. W. 11.

Nebraska.— Miller *v.* Finn, 1 Nebr. 254.

See 35 Cent. Dig. tit. "Mortgages," § 1716.

Character in which junior mortgagee redeems.— The right of a junior mortgagee to redeem after the sale depends on his coming within one of the classes of persons enumerated by the statute. He is clearly a "creditor having a lien" within the meaning of such statutes. Nopson *v.* Horton, 20 Minn. 268. So also he is a "person lawfully claiming from or under the mortgagor." Carter *v.* Lewis, 27 Mich. 241. And if he has obtained a judgment or decree for the foreclosure of his own mortgage, he may redeem in the character of a judgment creditor. Whitehead *v.* Hall, 148 Ill. 253, 35 N. E. 871; Bowen *v.* Van Gundy, 133 Ind. 670, 33 N. E. 687. But he is not an "assign" of the mortgagor. Cuilerier *v.* Brunelle, 37 Minn. 71, 33 N. W. 123.

Where the junior mortgagee joins in the proceedings to foreclose the senior mortgage and files a cross complaint asking for the foreclosure of his own mortgage and a sale, he cannot redeem from the sale. San Jose Water Co. *v.* Lyndon, 124 Cal. 518, 57 Pac. 481. And see Lauriat *v.* Stratton, 11 Fed. 107, 6 Sawy. 339.

Extent of redemption.— A junior mortgagee, claiming the right to redeem from a foreclosure sale under the senior mortgage, because not bound by the proceedings therein, cannot redeem merely from the sale but must redeem from the mortgage itself by paying the whole of it. Martin *v.* Fridley, 23 Minn. 13.

7. *Arkansas.*— Scott *v.* Henry, 13 Ark. 112.

California.— Frink *v.* Murphy, 21 Cal. 108, 81 Am. Dec. 149.

Connecticut.— Goodman *v.* White, 26 Conn. 317.

Indiana.— Hasselman *v.* McKernan, 50 Ind. 441.

Iowa.— Reel *v.* Wilson, 64 Iowa 13, 19 N. W. 814.

Wisconsin.— Farwell *v.* Murphy, 2 Wis. 533.

See 35 Cent. Dig. tit. "Mortgages," § 1718.

8. Patton *v.* Smith, 113 Ill. 499; Shoemaker *v.* Austin, 88 Iowa 707, 54 N. W. 137.

9. Hasselman *v.* Yandes, Wils. (Ind.) 276; Reel *v.* Wilson, 64 Iowa 13, 19 N. W. 814; Pritchard *v.* Kalamazoo College, 82 Mich. 587, 47 N. W. 31; Naylor *v.* Colville, 20 N. Y. App. Div. 581, 47 N. Y. Suppl. 267. *Compare* Hasselman *v.* McKernan, 50 Ind. 441.

10. Eaton *v.* Bender, 1 Nebr. 426.

11. See the statutes of the different states. And see Spink *v.* McCall, 52 Iowa 432, 3 N. W. 471.

12. Rogers *v.* Meyers, 68 Ill. 92; Gilbert *v.* Holmes, 64 Ill. 548; Beach *v.* Shaw, 57 Ill. 17; Skinner *v.* Young, 80 Iowa 234, 45 N. W. 889; Purvis *v.* Brown, 39 N. C. 413.

Right of redemption reserved to stranger. —A right to redeem from a mortgage may be reserved to a stranger, but only by an express agreement. Purvis *v.* Brown, 39 N. C. 413.

13. Smith *v.* Jackson, 153 Ill. 399, 39 N. E. 130; Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418; Meyer *v.* Mintonye, 106 Ill. 414;

b. Redemption by Stranger For Mortgagor's Benefit. An agreement by which a stranger undertakes to advance the redemption money and pay it for the mortgagor's benefit, to hold the premises as security for his reimbursement, and to release or reconvey to the mortgagor on being repaid, is valid and enforceable; it is not within the statute of frauds and may be made the basis for a decree for specific performance.[14] In some rare cases such an agreement has been implied, as where the mortgagor was under a personal disability or absent in parts unknown, and the tender of the redemption money was made to save his property from sacrifice, by a near relative, who nevertheless was not directly authorized to take such action.[15]

11. Person Losing Title or Lien. A person who has lost, forfeited, or repudiated his title to the mortgaged premises or his lien thereon can no longer assert a right to redeem from the mortgage or sale.[16] This rule applies to the mortgagor when he has conveyed away all his interest in the premises,[17] or when he has failed to redeem his equity of redemption from a sale thereof on execution;[18] to a judgment creditor who has failed to keep alive the lien of his judgment on the premises;[19] or to a junior mortgagee or judgment creditor whose lien has been cut off by foreclosure or sale on execution or by his own assignment and transfer of it,[20] or whose claim has been satisfied by full payment.[21]

12. Extent of Right to Redeem. A purchaser of part of the premises covered by a mortgage has a right to redeem the whole;[22] but one whose right of redemption is based on his having a lien on only a separate parcel or specific portion of the mortgaged property, as a junior mortgagee or judgment creditor, can redeem only so much as is affected by his lien.[23]

Millard *v.* Truax, 50 Mich. 343, 15 N. W. 501.

14. Joiner *v.* Duncan, 174 Ill. 252, 51 N. E. 323; O'Connor *v.* Mahoney, 159 Ill. 69, 42 N. E. 378; Mason *v.* Hartgrove, 103 Ill. App. 163.

15. Bush *v.* Walker, 6 S. W. 717, 9 Ky. L. Rep. 777; Squire *v.* Wright, 85 Mich. 76, 48 N. W. 286.

16. Brent *v.* Oyler, 49 Ind. 453; Smith *v.* Austin, 11 Mich. 34; Connecticut Mut. L. Ins. Co. *v.* King, 72 Minn. 287, 75 N. W. 376; Shields *v.* Russell, 142 N. Y. 290, 36 N. E. 1061.

17. Phillips *v.* Leavitt, 54 Me. 405; True *v.* Haley, 24 Me. 297; Manser *v.* Dix, 3 Jur. N. S. 252.

Effect of setting aside mortgagor's conveyance.— The mortgagor's right to redeem, cut off by his voluntary conveyance of the premises, is revived when his deed is subsequently set aside for fraud. Ætna L. Ins. Co. *v.* Stryker, (Ind. App. 1905) 73 N. E. 953.

18. Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276. But see Loomis *v.* Knox, 60 Conn. 343, 22 Atl. 771; Aitchison *v.* Coombs, 6 Grant Ch. (U. C.) 643.

19. *Alabama.*—Walden *v.* Speigner, 87 Ala. 390, 6 So. 80. But see Jones *v.* Burden, 20 Ala. 382, as to effect of death of judgment debtor.

Illinois.— Wilson *v.* Schneider, 124 Ill. 628, 17 N. E. 8; Ewing *v.* Ainsworth, 53 Ill. 464.

Indiana.— Breedlove *v.* Austin, 146 Ind. 694, 46 N. E. 25.

Iowa.— Long *v.* Mellet, 94 Iowa 548, 63 N. W. 190; Albee *v.* Curtis, 77 Iowa 644, 42 N. W. 508.

Michigan.— Barnum *v.* Phenix, 60 Mich. 388, 27 N. W. 577.

Minnesota.— Bartleson *v.* Thompson, 30 Minn. 161, 14 N. W. 795.

20. *California.*— McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Florida.— Bigelow *v.* Stringfellow, 25 Fla. 366, 5 So. 816.

Iowa.— See McCormick Harvesting Mach. Co. *v.* Llewellyn, 96 Iowa 745, 65 N. W. 412.

Minnesota.— Lowry *v.* Akers, 50 Minn. 508, 52 N. W. 922; Bartleson *v.* Thompson, 30 Minn. 161, 14 N. W. 795. See also Connecticut Mut. L. Ins. Co. *v.* King, 72 Minn. 287, 75 N. W. 376.

United States.— Lauriat *v.* Stratton, 11 Fed. 107, 6 Sawy. 339.

See 35 Cent. Dig. tit. "Mortgages," § 1728.

Effect of assignment of mortgage as collateral security see Manning *v.* Markel, 19 Iowa 103; Wendell *v.* New Hampshire Bank, 9 N. H. 404; Hoyt *v.* Martense, 8 How. Pr. (N. Y.) 196 [*affirmed* in 16 N. Y. 231].

21. Moreland *v.* Thorn, 143 Ind. 211, 42 N. E. 639; McHenry *v.* Cooper, 27 Iowa 137; Kinney *v.* Ensign, 18 Pick. (Mass.) 232; Owen *v.* Flack, 4 L. J. Ch. O. S. 202, 2 Sim. & St. 600, 1 Eng. Ch. 600, 57 Eng. Reprint 475.

22. *Connecticut.*— Calkins *v.* Munsel, 2 Root 333.

Indiana.— Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698.

Massachusetts.— Taylor *v.* Porter, 7 Mass. 355.

Minnesota.— O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

New York.— See Denton *v.* Ontario County Nat. Bank, 18 N. Y. Suppl. 38.

See 35 Cent. Dig. tit. "Mortgages," § 1711.

Contra.— Pine Bluff, etc., R. Co. *v.* James, 54 Ark. 81, 15 S. W. 15.

23. *California.*— White *v.* Costigan, (1901)

13. Priority of Rights. At common law, as among several persons having the right to redeem a mortgage, such right is to be exercised according to their relative priority of liens or claims or successively according to the dates of accrual of their respective rights or liens.[24] But statutes allowing redemption after foreclosure sale generally prescribe an order of priority which cannot be departed from,[25] the usual order of arrangement giving the mortgagor himself a paramount right of redemption over that of an encumbraneer or creditor.[26]

14. Persons Against Whom Right May Be Exercised. The right of redemption cannot be claimed as against a person acquiring and holding an independent title to the mortgaged premises,[27] nor against a purchaser of the property from the mortgagee unless he is chargeable with knowledge of the true nature of the transaction.[28] After foreclosure sale the right may be exercised not only against the foreclosure purchaser but also against his grantee, if the latter was cognizant of any fraud or irregularity in the sale or is otherwise so situated that he cannot claim the character of a *bona fide* purchaser.[29] An assignee of the mortgage stands liable to be redeemed on the same terms as the mortgagee,[30] and is not entitled to stand as defendant in a bill to redeem unless the assignment was recorded or the redemptioner otherwise had notice of it.[31]

15. Redemption From Person Previously Redeeming. Where a redemption is made by the mortgagor himself, there is generally no necessity, and no right, of redemption from him by any subsequent encumbrancer or creditor, since the freeing of his title from the encumbrance of the mortgage inures to the benefit of his other creditors.[32] But where a statute gives the mortgagor a limited time

63 Pac. 1075; Kirkham *v.* Dupont, 14 Cal. 559.

Illinois.— Huber *v.* Hess, 191 Ill. 305, 61 N. E. 61.

Minnesota.— Tinkcom *v.* Lewis, 21 Minn. 132.

Nebraska.— Renard *v.* Brown, 7 Nebr. 449.

New York.— See Augur *v.* Winslow, Clarke 258.

Extent of redemption by judgment creditor. — A judgment creditor who has redeemed enough property of his debtor from foreclosure to satisfy his judgment cannot make a valid redemption of other property. Scripter *v.* Bartleson, 43 Fed. 259.

24. Moore *v.* Beasom, 44 N. H. 215; Beevor *v.* Luck, L. R. 4 Eq. 537, 36 L. J. Ch. 865, 15 Wkly. Rep. 1221; Loveday *v.* Chapman, 32 L. T. Rep. N. S. 689.

Holders of separate mortgage notes.— The right of the successive holders of a series of notes, maturing at different times, and secured by the same mortgage, to redeem from a foreclosure and sale in favor of the holder of the note first maturing, is the same as that of separate junior encumbrancers to redeem from a foreclosure of a prior mortgage. Preston *v.* Hodgen, 50 Ill. 56.

25. See the statutes of the several states. And see Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369; Jack *v.* Cold, 114 Iowa 349, 86 N. W. 374.

In Rhode Island it is provided by statute that a mortgagor entitled to redeem may require the mortgagee to assign the mortgage debt to such third person as the mortgagor directs, and provides that such right shall belong to each encumbrancer or to the mortgagor notwithstanding any intermediate encumbrance, "but a requisition of an encumbrancer shall prevail over a requisition of the mortgagor, and, as between encumbrancers, a requisition of a prior encumbrancer shall prevail." Under this law it is held that the desire of the mortgagee to retain the mortgage is not prior to the right of one who takes a life-estate under the will of the mortgagor to have the mortgage assigned to a third person. Atwood *v.* Charlton, 21 R. I. 568, 45 Atl. 580.

26. Cuilerier *v.* Brunelle, 37 Minn. 71, 33 N. W. 123; Wylie *v.* Welch, 51 Wis. 351, 8 N. W. 207.

27. Toliver *v.* Morgan, 75 Iowa 619, 34 N. W. 858.

28. Johnson *v.* Williamshurst, 1 L. J. Ch. O. S. 112; Waddell *v.* Corbett, 21 Grant Ch. (U. C.) 384; Robertson *v.* Scobie, 10 Grant Ch. (U. C.) 557; Aitchison *v.* Coombs, 6 Grant Ch. (U. C.) 643; Clarke *v.* Little, 5 Grant Ch. (U. C.) 363.

29. McKeighan *v.* Hopkins, 14 Nebr. 361, 15 N. W. 711; Hoppin *v.* Doty, 25 Wis. 573; Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

30. Bacon *v.* Abbott, 137 Mass. 397; Henderson *v.* Stewart, 11 N. C. 256.

31. Mitchell *v.* Burnham, 44 Me. 286.

32. Lowrey *v.* Byers, 80 Ind. 443; Harms *v.* Palmer, 61 Iowa 483, 16 N. W. 574; Kellogg *v.* Conner, 10 Paige (N. Y.) 311.

Where the mortgagor's widow pays the mortgage debt and takes a deed to herself, the mortgagor's heir may redeem. Hunter *v.* Dennis, 112 Ill. 568.

As between mortgagor and junior mortgagee.— Where a second mortgagee has foreclosed, and subsequently redeems the prior mortgage, as he has a right to do, paying the debt as his own, the mortgagor has no right to redeem the first mortgage, if his

after foreclosure sale in which to redeem, and thereafter gives a similar right to judgment creditors, a mortgagor who has neglected his opportunity and allowed a judgment creditor to redeem cannot thereafter claim the right to redeem from such creditor.[33] It is otherwise as to successive junior mortgagees or judgment creditors. When one effects a redemption, the next in order has a right to redeem from him.[34] And while there are still rights of redemption outstanding, the lien upon which a redemption is made is not merged and extinguished in the title of the purchaser at the sale redeemed from, but it passes by subrogation to any subsequent redemptioner.[35]

C. Time For Redemption and Waiver or Loss of Right — 1. Time Within Which Right Must Be Exercised — a. In General. The right to redeem a mortgage begins at the maturity of the debt secured, or upon breach of the condition of the mortgage, not before,[36] and continues until cut off by a foreclosure[37] or by the expiration of the statutory time allowed for redemption after foreclosure sale,[38]

claim is resisted by the second mortgagee. Colwell *v.* Warner, 36 Conn. 224.

33. Gustafson *v.* Durst, 124 Iowa 203, 99 N. W. 738.

34. *Illinois.*— Strang *v.* Allen, 44 Ill. 428.

Indiana.— McClain *v.* Sullivan, 85 Ind. 174.

Iowa.—Raymond *v.* Whitehouse, 119 Iowa 132, 93 N. W. 292.

Minnesota.— Todd *v.* Johnson, 56 Minn. 60, 57 N. W. 320, 50 Minn. 310, 52 N. W. 864.

United States.— Woonsocket Sav. Inst. *v.* Goulden, 28 Fed. 900.

See 35 Cent. Dig. tit. "Mortgages," § 1808.

35. Lowry *v.* Akers, 50 Minn. 508, 52 N. W. 922.

36. Abbe *v.* Goodwin, 7 Conn. 377; Adams *v.* Holden, 111 Iowa 54, 82 N. W. 468; Brown *v.* Cole, 9 Jur. 290, 14 L. J. Ch. 167, 14 Sim. 427, 37 Eng. Ch. 427, 60 Eng. Reprint 424.

No time fixed.— If no particular time is appointed for the payment of the mortgage debt, it is redeemable immediately (Tucker *v.* White, 22 N. C. 289), or the mortgagor may file a bill to redeem within such time as the court may decree (Baker *v.* Bailey, 204 Pa. St. 524, 54 Atl. 326).

Where a mortgage note is payable on demand, the maker may pay it at any time, and the mortgage is redeemable at any time before strict foreclosure. Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743. And see Harding *v.* Pingey, 10 Jur. N. S. 872, 34 L. J. Ch. 13, 10 L. T. Rep. N. S. 323, 12 Wkly. Rep. 684.

In England, where the mortgagee takes possession, he may be redeemed before the time limited by the mortgage for the payment of the mortgage money expires. Bovill *v.* Endle, [1896] 1 Ch. 648, 65 L. J. Ch. 542, 44 Wkly. Rep. 523; Talbot *v.* Braddill, 1 Vern. Ch. 183, 23 Eng. Reprint 402.

37. *California.*— Baker *v.* Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

Illinois.— On the principle, "Once a mortgage always a mortgage," it is not essential to the right of the mortgagor to redeem that he should do so within the time limited in the defeasance; this right continues until foreclosure or until it is barred by lapse of time. Preschbaker *v.* Feaman, 32 Ill. 475.

Indiana.— Heimberger *v.* Boyd, 18 Ind. 420.

Maine.— Spring *v.* Haines, 21 Me. 126.

New Jersey.— See Dickinson *v.* Trenton, 35 N. J. Eq. 416.

New York.— Barnard *v.* Jersey, 39 Misc. 212, 79 N. Y. Suppl. 380; Brown *v.* Frost, 10 Paige 243.

Oklahoma.— Payne *v.* Long-Bell Lumber Co., 9 Okla. 683, 60 Pac. 235.

England.— Campbell *v.* Holyland, 7 Ch. D. 166, 47 L. J. Ch. 145, 38 L. T. Rep. N. S. 128, 26 Wkly. Rep. 109; Skeffington *v.* Whitehurst, 7 L. J. Exch. 65, 3 Y. & C. Exch. 1.

See 35 Cent. Dig. tit. "Mortgages," § 1733.

Deeds of trust.— A mortgage and a deed of trust to secure the payment of a debt or other thing are alike in that both are conveyances as security, and both are redeemable at any time before a sale of the property conveyed and not afterward. Hogan *v.* Lepretre, 1 Port. (Ala.) 392.

Party not joined in foreclosure suit.— A person having the right to redeem, but who was not joined in the foreclosure suit, may be called upon, by bill in equity, to redeem the premises within a reasonable time, to be fixed by the court, or be forever foreclosed. Parker *v.* Child, 25 N. J. Eq. 41; Moulton *v.* Cornish, 61 Hun (N. Y.) 438, 16 N. Y. Suppl. 267; Hess *v.* Feldkamp, 2 Disn. (Ohio) 332.

38. *Alabama.*— Douthit *v.* Nabors, 133 Ala. 453, 32 So. 625; Elrod *v.* Smith, 130 Ala. 212, 30 So. 420, mortgagee purchasing at his own sale under a power.

Arkansas.— Wood *v.* Holland, 53 Ark. 69, 13 S. W. 739.

Illinois.— Dunn *v.* Rodgers, 43 Ill. 260; Illinois Nat. Bank *v.* School Trustees, 111 Ill. App. 189.

Indiana.— Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310. Where a mortgagor was not a party to a foreclosure suit and is the owner of the land or the equity of redemption, his right to redeem is not limited to the statutory period of one year. Ætna L. Ins. Co. *v.* Stryker, (App. 1906) 78 N. E. 245.

Iowa.— People's Sav. Bank *v.* McCarty, (1902) 88 N. W. 1076; Harrington *v.* Foley, 108 Iowa 287, 79 N. W. 64; Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218; Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178.

unless otherwise fixed by the agreement of the parties.[39] If there is no foreclosure, this right continues so long as the right to maintain an action on the debt secured, the two rights being reciprocal,[40] or until waived or lost by laches,[41] or barred by the adverse possession of the mortgagee,[42] or terminated by the running of the statute of limitations.[43]

b. Computation of Time. Where a right of redemption is to be exercised within a limited time, its duration is always to be computed from a fixed starting point, which will be determined, according to the circumstances, by the agreement and intention of the parties,[44] by the time of entry and taking possession by the mortgagee,[45] or by the point fixed by the particular statute.[46] In other respects the ordinary rules for the computation of time are applicable.[47]

c. Allowance of Time For Redemption. In a decree for foreclosure it is usual and proper for the court to allow a certain time for redemption, or more properly payment, before the sale;[48] but in the absence of a statute allowing redemption

Kentucky.— Costigan *v.* Truesdell, 119 Ky. 70, 83 S. W. 98, 26 Ky. L. Rep. 971.

Massachusetts.— Lancy *v.* Abington Sav. Bank, 177 Mass. 431, 59 N. E. 115; Taylor *v.* Dean, 7 Allen 251.

Minnesota.— Law *v.* Northfield Citizens' Bank, 85 Minn. 411, 89 N. W. 320, 89 Am. St. Rep. 566; Connecticut Mut. L. Ins. Co. *v.* King, 72 Minn. 287, 75 N. W. 376; Hoover *v.* Johnson, 47 Minn. 434, 50 N. W. 475.

North Dakota.— Little *v.* Worner, 11 N. D. 382, 92 N. W. 456.

South Dakota.— Houts *v.* Olson, 14 S. D. 475, 85 N. W. 1015.

Wisconsin.— See Dickson *v.* Loehr, 126 Wis. 641, 106 N. W. 793, 4 L. A. N. S. 986.

See 35 Cent Dig. tit. "Mortgages," § 1733.

39. See *infra*, XXII, C, 1, e.

40. *California.*— Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; Taylor *v.* McClain, 60 Cal. 651; De Espinosa *v.* Gregory, 40 Cal. 58; Cunningham *v.* Hawkins, 24 Cal. 403, 85 Am. Dec. 73. But see Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200.

Illinois.— Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650; Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530; Green *v.* Capps, 142 Ill. 286, 31 N. E. 597.

Minnesota.— Bradley *v.* Norris, 63 Minn. 156, 65 N. W. 357; Holton *v.* Meighen, 15 Minn. 69.

Nebraska.— Dickson *v.* Stewart, 71 Nebr. 424, 98 N. W. 1085.

New York.— Lorst *v.* Boyd, 3 Sandf. Ch. 501.

Ohio.— Robinson *v.* Fife, 3 Ohio St. 551. An infant heir of the mortgagor, not made a party to the foreclosure suit, may be required by the purchaser to redeem within a reasonable time. Brisbane *v.* Staughton, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 426.

Washington.— Catlin *v.* Murray, 37 Wash. 164, 79 Pac. 605.

Absolute deed as mortgage.— Where the security takes the form of an absolute deed, the grantor, remaining in possession, may redeem at any time. Baker *v.* Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357. And if the grantee takes possession, the right of the grantor to redeem is never barred so long as the grantee recognizes the existence of a right of redemption. Gunter *v.* Smith, 113 Ga. 18, 38 S. E. 374.

41. See *infra*, XXII, C, 2, 4.

42. See *infra*, XXII, C, 5.

43. Mewburn *v.* Bass, 82 Ala. 622, 2 So. 520; Frederick *v.* Williams, 103 N. C. 189, 9 S. E. 298.

44. Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Bailey *v.* Carter, 42 N. C. 282.

Absolute deed as mortgage.— The statute of limitations against an action for the recovery of real estate held under an absolute deed intended as a mortgage begins to run from the date of the last payment upon such mortgage by the mortgagor, and not from the date of the agreement under which the deed was acquired. Byers *v.* Johnson, 89 Iowa 278, 56 N. W. 449.

45. Holbrook *v.* Thomas, 38 Me. 256; Freeman *v.* Paul, 3 Me. 260, 14 Am. Dec. 237; Scott *v.* McFarland, 13 Mass. 309; Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

46. See the statutes of the different states. And see Lilly *v.* Gibbs, 39 Mich. 394 (date of execution of deed to foreclosure purchaser); Thompson *v.* Foster, 21 Minn. 319 (date of filing notice of sale); Trenery *v.* American Mortg. Co., 11 S. D. 506, 78 N. W. 991 (date of foreclosure sale).

47. Wing *v.* Davis, 7 Me. 31, holding that in computing the three years after entry for condition broken, within which the mortgagor may redeem, the day of entry is to be excluded.

Meaning of months.— Where the time allowed for redemption is a specified number of months, calendar months are to be understood, not lunar months. Gross *v.* Fowler, 21 Cal. 392; Biddulph *v.* St. John, 2 Sch. & Lef. 521.

Last day Sunday.— Where the last day of the statutory year for redemption after sale falls on Sunday, a redemption made on the following Monday is good. Bovey de Laittre Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038.

48. Langdon *v.* Stiles, 2 Aik. (Vt.) 184.

after the sale, the decree may be made absolute for foreclosure and sale without any provision for redemption.[49] Where an action is brought to foreclose a party who was omitted from the original foreclosure suit, the court will usually fix a time within which he may redeem.[50] And on a bill for redemption,[51] the time to be allowed for this purpose rests very much in the discretion of the court, except that it should not be made unreasonably short.[52] But if a statute both allows and fixes the time for redemption after the sale, such right can neither be denied, abridged, nor enlarged by the court in its decree.[53]

d. Circumstances Affecting Time For Redemption — (i) *In General.* As courts do not favor forfeitures, but do favor redemptions, they will accord time to parties to effect a redemption where there is some substantial reason for such indulgence and where its refusal would work hardship or injustice,[54] but not where the grounds alleged are merely frivolous or technical or where greater injury would be done to the mortgagee.[55] These rules apply to the case of a junior mortgagee seeking to redeem because he was not made a party to the foreclosure suit;[56] but a judgment creditor of the mortgagor, unless favored by statute, has no better claim to favor or indulgence than the mortgagor.[57] As to the time allowed for redemption it is entirely immaterial whether the mortgage was given for purchase-money or for any other consideration.[58]

(ii) *Effect of Appeal.* Where the time for redemption expires pending

49. Martin *v.* Ward, 60 Ark. 510, 30 S. W. 1041; Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47.

50. Evans *v.* Atkins, 75 Iowa 448, 39 N. W. 702.

51. Davis *v.* Millen, 113 Ga. 152, 38 S. E. 327; Collins *v.* Gregg, 109 Iowa 506, 80 N. W. 562; Farmers', etc., Bank *v.* Kelsay, 186 Mo. 648, 85 S. W. 538; Meller *v.* Woods, 1 Keen 16, 5 L. J. Ch. 109, 15 Eng. Ch. 16, 48 Eng. Reprint 212.

52. McIntyre *v.* Wyckoff, 119 Mich. 557, 78 N. W. 654; Fifth Nat. Bank *v.* Pierce, 117 Mich. 376, 75 N. W. 1058; Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773; Ashdown *v.* Nash, 3 Manitoba 37. See also Gravelle *v.* Canadian, etc., Mortg., etc., Co., 42 Wash. 457, 85 Pac. 36.

53. Hollingsworth *v.* Campbell, 28 Minn. 18, 8 N. W. 873; Burley *v.* Flint, 4 Fed. Cas. No. 2,168, 9 Biss. 204 [*affirmed* in 105 U. S. 247, 26 L. ed. 986].

Effect of recital in certificate of sale.— The statement in a certificate of sale on foreclosure as to the time of redemption in no way affects the rights of either party as fixed by the law applicable to such sales; and the fact that the purchaser accepts a certificate which recites the time to be different from what it legally is does not constitute a waiver of his legal rights in any respect. Carroll *v.* Rossiter, 10 Minn. 174. And the fact that the certificate of sale fixes an impossible time for the redemption does not affect the validity of the foreclosure. Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691.

54. *Alabama.*— Sanders *v.* Askew, 79 Ala. 433.

Massachusetts.— Pierce *v.* Chace, 108 Mass. 254; Sanborn *v.* Dennis, 9 Gray 208.

New Hampshire.— Hall *v.* Cushman, 14 N. H. 171; Deming *v.* Comings, 11 N. H. 474. In the latter case it appeared that the mortgage was assigned for the purpose of preventing redemption.

New York.— Newell *v.* Whigham, 102 N. Y. 20, 6 N. E. 673.

Pennsylvania.— *In re* King, 215 Pa. St. 59, 64 Atl. 324.

Vermont.— Hill *v.* Hill, 59 Vt. 125, 7 Atl. 468, holding that where an injunction suspends the operation of a decree of foreclosure, the time of redemption does not run pending the injunction.

United States.— Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,269, 1 Woodb. & M. 61.

England.— Collinson *v.* Jeffery, [1896] 1 Ch. 644, 65 L. J. Ch. 375, 74 L. T. Rep. N. S. 78, 44 Wkly. Rep. 311, mistake as to time for payment.

See 35 Cent. Dig. tit. "Mortgages," § 1737.

55. *Iowa.*—Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218.

Kentucky.— Pickens *v.* Walker, 3 Dana 167.

Minnesota.— New England Mut. L. Ins. Co. *v.* Capehart, 63 Minn. 120, 65 N. W. 258; Hoover *v.* Johnson, 47 Minn. 434, 50 N. W. 475.

New Hampshire.— Redemption will not be extended for parties to ascertain whether it will be for their interest to redeem. Eastman *v.* Thayer, 60 N. H. 408. It is not a legal cause for extending the time for redemption that the mortgagor's administrator did not come to a knowledge of his rights until it was too late to sell the equity, unless this was caused by the fault of the mortgagee. Cilley *v.* Huse, 40 N. H. 358.

Canada.— Skae *v.* Chapman, 21 Grant Ch. (U. C.) 534.

See 35 Cent. Dig. tit. "Mortgages," § 1737.

56. Newell *v.* Pennick, 62 Iowa 123, 17 N. W. 432; Bunce *v.* West, 62 Iowa 80, 17 N. W. 179; Ten Eyck *v.* Casad, 15 Iowa 524.

57. Tucker *v.* White, 22 N. C. 289.

58. Robinson *v.* Fife, 3 Ohio St. 551.

an appeal from the judgment or decree, the time will be extended by the supreme court or a like period allowed after its decision,[59] except in cases where the statute declares that the taking of an appeal shall forfeit the right to redeem.[60]

e. Agreements as to Time For Redemption — (i) *In General.* It is not competent for the parties to a mortgage, even by express stipulation, to waive the equity of redemption, or to provide that the estate conveyed by the mortgage shall become absolute and irredeemable on breach of condition.[61] And a clause in the mortgage limiting the time for redemption is not binding; notwithstanding such a provision, the equity of redemption continues until cut off by a foreclosure or in some other effective manner.[62] But on the other hand the parties may create a right of redemption which the law does not give. Thus, where the statutory time for redemption after a strict foreclosure or after a foreclosure sale has expired, the mortgagee or purchaser may bind himself by an agreement to permit a redemption to be made;[63] and time is not so far of the essence of such a contract but that the mortgagor may enforce his right to redeem within a reasonable period after the expiration of the time specified in the agreement.[64]

(ii) *Extension of Time.* The parties to a mortgage may make a valid agreement to extend the time for redemption beyond that allowed by law,[65] and such a contract is enforceable, although it only rests in parol.[66] So a binding agreement may be made, pending the time allowed by statute for redemption after foreclosure, to give a longer period for the exercise of this right.[67] But an agreement for the extension of time must be based on a sufficient consideration, especially if the statutory time has already expired,[68] and it cannot operate to the

59. Raymond *v.* Whitehouse, 119 Iowa 132, 93 N. W. 292; Schlawig *v.* De Peyster, 83 Iowa 323, 49 N. W. 843, 32 Am. St. Rep. 308, 13 L. R. A. 785; Philadelphia Mortg., etc., Co. *v.* Gustus, 55 Nebr. 435, 75 N. W. 1107. See also Odd Fellows' Sav., etc., Bank *v.* Harrigan, 53 Cal. 229.

60. See the statutes of the different states. And see Kilmer *v.* Gallaher, 116 Iowa 666, 88 N. W. 959; Lombard *v.* Gregory, 90 Iowa 682, 57 N. W. 621; Dobbins *v.* Lusch, 53 Iowa 304, 5 N. W. 205, all construing Code, § 3102.

61. Johnson *v.* Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Bell *v.* Carter, 17 Beav. 11, 17 Jur. 478, 22 L. J. Ch. 933, 1 Wkly. Rep. 270, 51 Eng. Reprint 935. And see *supra*, VIII, H, 1.

62. Preschbaker *v.* Feaman, 32 Ill. 475; Stover *v.* Bounds, 1 Ohio St. 107; Floyer *v.* Lavington, 1 P. Wms. 268, 24 Eng. Reprint 384. See also Newcombe *v.* Bonham, Freem. 67, 22 Eng. Reprint 1063, 2 Vent. 364, 1 Vern. 7, 214, 232, 23 Eng. Reprint 266, 422, 435.

Mortgagee bound.— An agreement in a mortgage limiting the time for redemption to one year is binding on the mortgagee, although he does not sign the mortgage. Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684.

Deferring redemption.— Courts will not give effect to a stipulation in a mortgage given by a client to his solicitor, whereby the mortgagor is restricted from paying off the mortgage money for so long a period as twenty years. Cowdry *v.* Day, 1 Giffard 316, 5 Jur. N. S. 1200, 29 L. J. Ch. 39, 1 L. T. Rep. N. S. 88, 8 Wkly. Rep. 55, 65 Eng. Reprint 936.

63. McLear *v.* Morgan, 5 B. Mon. (Ky.) 282; Danforth *v.* Roberts, 20 Me. 307; Quint *v.* Little, 4 Me. 495; Murray *v.* Mutual Ben. L. Ins. Co., 3 Nebr. (Unoff.) 861, 93 N. W. 207; Pearson *v.* Douglass, 1 Baxt. (Tenn.) 151.

64. Moote *v.* Scriven, 33 Mich. 500. But *compare* Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700.

65. Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5; Steele *v.* Bond, 28 Minn. 267, 9 N. W. 772. But see Daniels *v.* Mowry, 1 R. I. 151.

66. Taggart *v.* Blair, 215 Ill. 339, 74 N. E. 372; Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67; Brown *v.* Lawton, 87 Me. 83, 32 Atl. 733; Norman *v.* Gunton, 127 Fed. 871. See also Williams *v.* Stewart, 25 Minn. 516.

67. *Illinois.*— Frederick *v.* Ewrig, 82 Ill. 363; Davis *v.* Dresback, 81 Ill. 393; Pensoneau *v.* Pulliam, 47 Ill. 58; Schoonhoven *v.* Pratt, 25 Ill. 457.

Indiana.— Williams *v.* Hoffman, (App. 1905) 76 N. E. 440.

Kentucky.— Clark *v.* Renaker, 20 S. W. 534, 14 Ky. L. Rep. 465.

Maine.— Chase *v.* McLellan, 49 Me. 375.

Massachusetts.—Clark *v.* Crosby, 101 Mass. 184.

Minnesota.— See Phelps *v.* Western Realty Co., 89 Minn. 319, 94 N. W. 1085.

Vermont.— Daggett *v.* Mendon, 64 Vt. 323, 24 Atl. 242.

See 35 Cent. Dig. tit. "Mortgages," § 1740.

Bill to redeem.— Where the purchaser at a foreclosure sale agrees with the mortgagor to allow him a longer time for the redemption of the property than the statutory period, and afterward repudiates his contract and applies for a deed, the mortgagor may maintain a bill in equity to enforce his right of redemption. Taylor *v.* Dillenburg, 168 Ill. 235, 48 N. E. 41.

68. Chytraus *v.* Smith, 141 Ill. 231, 30 N. E. 450; Honnihan *v.* Friedman, 13 Ill.

prejudice of a subsequent creditor seeking to redeem or a purchaser without notice.[69] If the redemption is not made within the extended time so agreed on the right is finally lost;[70] but if no time is specified in the agreement, redemption may be made within a reasonable time.[71]

2. Waiver of Right to Redeem. Although a mortgagor cannot in advance waive his equity of redemption by a stipulation embodied in the mortgage,[72] he may do so afterward, independently of the terms of the mortgage, by any declarations or conduct on his part which amount to a positive and definite relinquishment or surrender of this right.[73]

3. Estoppel to Assert Right of Redemption. A mortgagor is estopped to claim a right of redemption when he has conveyed the premises to the mortgagee or acquiesced in a conveyance by the mortgagee to a stranger,[74] or when he has accepted and retained the surplus proceeds of a foreclosure sale without any attempt to redeem from it;[75] and generally he is so estopped by any declarations, promises, or conduct on his part, inconsistent with his right to redeem, which have so affected the rights or actions of other persons that they would be materially prejudiced by a redemption effected contrary to their justifiable belief.[76] But as to the mortgagee, neither estoppel nor laches can be set up

App. 226; Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Smalley *v.* Hickok, 12 Vt. 153.

69. Matney *v.* Williams, 89 S. W. 678, 28 Ky. L. Rep. 494; Swanson *v.* Realization, etc., Corp., 70 Minn. 380, 73 N. W. 165. And see Rothschild *v.* Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

70. Williams *v.* Hoffman, (Ind. App. 1905) 76 N. E. 440; Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700 [see Russell *v.* Finn, 110 Iowa 301, 81 N. W. 589]; Svenson *v.* Rohrer, 206 Pa. St. 407, 55 Atl. 1070. *Contra*, Moote *v.* Scriven, 33 Mich. 500.

71. Pensoneau *v.* Pulliam, 47 Ill. 58; Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Mann *v.* Provident Life, etc., Co., 42 Wash. 581, 85 Pac. 56.

72. See *supra*, VIII, H, 1.

73. Francestown Sav. Bank *v.* Silver, 122 Iowa 685, 98 N. W. 498; Floyd *v.* Harrison, 2 Rob. (Va.) 161.

What constitutes waiver.— A mortgagor who has parted with his interest in the property by transferring his equity of redemption waives his right to redeem. Commercial Real Estate, etc., Assoc. *v.* Parker, 84 Ala. 298, 4 So. 268. So where he acquiesces in the mortgagee's claim of title and agrees to recognize the latter as absolute owner of the estate. Luesenhop *v.* Einsfeld, 93 N. Y. App. Div. 68, 87 N. Y. Suppl. 268; Roach *v.* Lundy, 19 Grant Ch. (U. C.) 243. So where he allows the mortgagee to sell and convey the property to a third person and surrenders possession to such purchaser. Clute *v.* Macaulay, 4 Grant Ch. (U. C.) 410. A waiver of the right to redeem may be inferred from his failure to defend proceedings by which such right will be cut off. Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704. But see Gentry *v.* Gentry, 1 Sneed (Tenn.) 87, 60 Am. Dec. 137.

Failure to set up right in answer.— Where a junior mortgagee filed a bill for foreclosure and sale against the senior mortgagee in possession, and the latter did not insist upon his right to be redeemed until the final hearing, it was held that he had not waived such right by failure to set it up in his answer. Rotherham *v.* Webb, 4 Ir. Eq. 52.

A judgment by confession or consent authorizing the entry of a decree and sale without redemption amounts to a waiver of the right to redeem. Cook *v.* McFarland, 78 Iowa 528, 43 N. W. 519. But see Bunn *v.* Braswell, 139 N. C. 135, 51 S. E. 927.

Release or verbal renunciation.— The right of redemption may also be waived by a specific release executed to the mortgagee (Luesenhop *v.* Einsfeld, 93 N. Y. App. Div. 68, 87 N. Y. Suppl. 268), and probably also by a verbal renunciation of it; but such a release is not easily to be inferred from a mere casual conversation, not explicit or positive in its terms (Heald *v.* Jardine, (N. J. Ch. 1891) 21 Atl. 586).

Effect of mistake.— The subsequent agreement of a mortgagor in possession to surrender it and relinquish his right to redeem, when made by mutual mistake and without adequate consideration, is not enforceable. Wells *v.* Geyer, 12 N. D. 316, 96 N. W. 289.

74. *Connecticut.*— Mallory *v.* Aspinwall, 2 Day 280.

Delaware.— Grant *v.* Jackson, etc., Co., 5 Del. Ch. 404.

Illinois.— King *v.* King, 215 Ill. 100, 74 N. E. 89.

New Hampshire.— See Ross *v.* Leavitt, 70 N. H. 602, 50 Atl. 110.

New York.— Noxon *v.* Glen, 2 N. Y. St. 661.

Ohio.— Robinson *v.* Fife, 3 Ohio St. 551, holding that mere tender of a deed to the mortgagee, which is not accepted, is no bar to a redemption.

See 35 Cent. Dig tit. "Mortgages," § 1744.

75. Norton *v.* Tharp, 53 Mich. 146, 18 N. W. 601.

76. *Iowa.*— Schlawig *v.* Fleckenstein, 80 Iowa 668, 45 N. W. 770.

against the mortgagor when the mortgagee has continuously recognized and acknowledged the right to redeem.[77]

4. Laches Barring Right to Redeem. Very long and unreasonable delay in asserting a right to redeem, amounting to laches, which is not attributable to ignorance and which is not explained or sufficiently excused, will justify a court of equity in refusing its aid to the party seeking to redeem.[78] Of course there

Maine.— Southard *v.* Sutton, 68 Me. 575.

Michigan.— Graydon *v.* Church, 7 Mich. 36.

Missouri.— Kennedy *v.* Siemers, 120 Mo. 73, 25 S. W. 512; Bedford *v.* Moore, 54 Mo. 448.

New Hampshire.—Hardy *v.* Keene, 67 N. H. 166, 32 Atl. 759.

New Jersey.— Johns *v.* Norris, 27 N. J. Eq. 485.

Vermont.— Wright *v.* Whitehead, 14 Vt. 268.

Canada.— Robson *v.* Carpenter, 11 Grant Ch. (U. C.) 293.

See 35 Cent. Dig. tit. "Mortgages," § 1744.

Ignorance of rights.— A mortgagor is not estopped to redeem by the fact that, being ignorant of his rights, he agreed to give possession before the end of the period for redemption, whereby a stranger was induced to buy from the foreclosure purchaser and to make improvements, there being no agreement not to redeem. Wood *v.* Holland, 64 Ark. 104, 40 S. W. 704.

Describing deed as absolute conveyance.— Where a deed absolute on its face is by a separate deed of defeasance rendered a mortgage, the grantor's right to redeem within the statutory period is not affected by receipts and accounts given by him to the grantee, reciting the deed as an absolute conveyance. Bayley *v.* Bailey, 5 Gray (Mass.) 505.

Fraudulent intent as to creditors.— The equity of redemption of a mortgage in the form of an absolute deed is not lost by the fact that the defeasance has been withheld from the records in order to mislead and delay the mortgagor's creditors. Clark *v.* Condit, 18 N. J. Eq. 358.

Omission of property from schedule in bankruptcy.— The owner of the record title to a tract of land, who is not made a party to a suit to foreclose a mortgage thereon, is not estopped from asserting his right to redeem because, prior to the foreclosure, he prepared schedules in bankruptcy for his brother and included the land therein, and afterward, in his own petition in bankruptcy, swore that he owned no real estate. Watts *v.* Julian, 122 Ind. 124, 23 N. E. 698.

77. McAbee *v.* Harrison, 50 S. C. 39, 27 S. E. 539.

78. *Alabama.*— Elrod *v.* Smith, 130 Ala. 212, 30 So. 420; Askew *v.* Sanders, 84 Ala. 356, 4 So. 167. Where a suit to redeem from a mortgage is brought by the mortgagor's heir within a year after attaining his majority, he is not chargeable with laches. Rainey *v.* McQueen, 121 Ala. 191, 25 So. 920.

Illinois.— Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Eastman *v.* Littlefield, 164 Ill. 124, 45 N. E. 137; McDearmon *v.* Burnham, 158 Ill. 55, 41 N. E. 1094; Munn *v.* Burges, 70 Ill. 604; Seymour *v.* Bailey, 66 Ill. 288; Hallesy *v.* Jackson, 66 Ill. 139; Kenyon *v.* Shreck, 52 Ill. 382; Hamilton *v.* Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Mason *v.* Stevens, 91 Ill. App. 623; Mann *v.* Jobusch, 70 Ill. App. 440.

Iowa.— Cooney *v.* Coppock, 119 Iowa 486, 93 N. W. 495.

Kentucky.— U. S. Bank *v.* Carroll, 4 B. Mon. 40.

Massachusetts.— Learned *v.* Foster, 117 Mass. 365; Webb *v.* Nightingale, 14 Allen 374.

Michigan.— Emmons *v.* Van Zee, 78 Mich. 171, 43 N. W. 1100; Gantz *v.* Toles, 40 Mich. 725; Hoffman *v.* Harrington, 33 Mich. 392.

Missouri.—Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; Schradski *v.* Albright, 93 Mo. 42, 5 S. W. 807; Kline *v.* Vogel, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408. But see Spurlock *v.* Sproule, 72 Mo. 503, holding that something more than mere laches of a complainant must be ready to appear before a court of equity will deny him its aid in the enforcement of a clear right.

Montana.— Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211.

New Jersey.— Chapin *v.* Wright, 41 N. J. Eq. 438, 5 Atl. 574; Ketchum *v.* Johnson, 4 N. J. Eq. 370.

New York.— Denn *v.* Wynkoop, 8 Johns. 168; Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281; Slee *v.* Manhattan Co., 1 Paige 48.

North Carolina.— Simmons *v.* Ballard, 102 N. C. 105, 9 S. E. 495; Houck *v.* Adams, 98 N. C. 519, 4 S. E. 502.

Ohio.— Piatt *v.* Smith, 12 Ohio St. 561.

Pennsylvania.— Baker *v.* Bailey, 204 Pa. St. 524, 54 Atl. 326.

Rhode Island.— Dispeau *v.* Pawtucket First Nat. Bank, 24 R. I. 508, 53 Atl. 868. See also Hall *v.* Westcott, 15 R. I. 373, 5 Atl. 629, holding that a failure to redeem from a mortgage for six years and a half does not constitute laches.

South Dakota.— MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281.

Vermont.— Mellish *v.* Robertson, 25 Vt. 603; Smith *v.* Blaisdell, 17 Vt. 199. When the writing is in the form of a mortgage, or when it has been constantly recognized as such, lapse of time short of fifteen years is regarded as unimportant. Mellish *v.* Robertson, *supra.*

Washington.—Snipes *v.* Kelleher, 31 Wash. 386, 72 Pac. 67.

Wisconsin.— Brown *v.* Johnson, 115 Wis. 430, 91 N. W. 1016.

United States.— Simmons *v.* Burlington, etc., R. Co., 159 U. S. 278, 16 S. Ct. 1, 40

can be no imputation of laches against a party who was meanwhile ignorant of his rights,[79] and the court will listen to any plausible excuse for the delay.[80] It has been held that no lapse of time short of that prescribed by the statute of limitations should be held to bar the right of redemption;[81] but the generally accepted doctrine permits a court of equity to deny relief on the ground of laches, even after a much shorter period, when there has been great negligence, unexplained acquiescence in an adverse claim, or intervening rights of third parties.[82]

5. Bar by Adverse Possession of Mortgagee. Where a mortgagee holds the actual, adverse, and uninterrupted possession of the mortgaged premises for a period of time equal to that prescribed by the statute of limitations as a bar to actions for the recovery of real property, a court of equity will, by analogy to the statute, refuse to permit the mortgagor to redeem.[83] But the possession of the mortgagee must be actual and not merely constructive;[84] it must be founded on the mortgage or on his character as a mortgagee or on a decree of foreclosure;[85] and it must be unequivocally hostile to the mortgagor and based on an

L. ed. 150; Harter *v.* Twohig, 158 U. S. 448, 15 S. Ct. 883, 39 L. ed. 1049; Slicer *v.* Pittsburg Bank, 16 How. 571, 14 L. ed. 1063; Hughes *v.* Edwards, 9 Wheat. 489, 6 L. ed. 142; Fraker *v.* Houck, 36 Fed. 403; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523.

Canada.— Kay *v.* Wilson, 24 Grant Ch. (U. C.) 212; Arkell *v.* Wilson, 5 Grant Ch. (U. C.) 470; McLellan *v.* Maitland, 3 Grant Ch. (U. C.) 164; Stanton *v.* McKinlay, 1 Grant Err. & App. (U. C.) 265; Simpson *v.* Smyth, 1 Grant Err. & App. (U. C.) 172.

See 35 Cent. Dig. tit. "Mortgages," § 1749.

United States as redemptioner.— Laches will not bar a bill filed by the United States to redeem from a mortgage property purchased by it at a sale under execution in its favor. U. S. *v.* Insley, 130 U. S. 263, 9 S. Ct. 485, 32 L. ed. 968.

Part of land sold by mortgagee.— Where a mortgage covers several parcels of land, some of which have been sold by the mortgagee absolutely while others remain in his possession, the fact that the right to redeem, as to the purchasers, is lost by lapse of time will not bar the remedy as against the mortgagee if otherwise well founded. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109.

79. Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Depew *v.* Dewey, 2 Thomps. & C. (N. Y.) 515.

80. Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

81. Coates *v.* Woodworth, 13 Ill. 654; Moore *v.* Dick, 187 Mass. 207, 72 N. E. 967; Houston *v.* National Mut. Bldg., etc., Assoc., 80 Miss. 31, 31 So. 540, 92 Am. St. Rep. 565; Ross *v.* Leavitt, 70 N. H. 602, 50 Atl. 110.

82. Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Castner *v.* Walrod, 83 Ill. 171, 25 Am. Rep. 369. And see cases cited *supra*, note 78.

83. *Alabama.*— Richter *v.* Noll, 128 Ala. 198, 30 So. 740.

Connecticut.— Jarvis *v.* Woodruff, 22 Conn. 548.

Georgia.— Benedict *v.* Gammon Theological Seminary, 122 Ga. 412, 50 S. E. 162.

Idaho.— Fountain *v.* Lewiston Nat. Bank, 11 Ida. 451, 83 Pac. 505.

Maine.— Munro *v.* Barton, 98 Me. 250, 56 Atl. 844; Roberts *v.* Littlefield, 48 Me. 61; Blethen *v.* Dwinal, 35 Me. 556.

Maryland.— Hertle *v.* McDonald, 2 Md. Ch. 128.

Massachusetts.— Barnes *v.* Boardman, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; Ayres *v.* Waite, 10 Cush. 72.

Minnesota.— Miller *v.* Smith, 44 Minn. 127, 46 N. W. 324.

New Hampshire.— Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.

New Jersey.—Coogan *v.* McCarren, 50 N. J. Eq. 611, 25 Atl. 330; Chapin *v.* Wright, 41 N. J. Eq. 438, 5 Atl. 574.

New York.— Miner *v.* Beekman, 33 N. Y. Super. Ct. 67, 11 Abb. Pr. N. S. 147, 42 How. Pr. 33; Fogal *v.* Pirro, 17 Abb. Pr. 113.

Ohio.— Clark *v.* Potter, 32 Ohio St. 49.

Vermont.— Merriam *v.* Barton, 14 Vt. 501.

United States.— Hughes *v.* Edwards, 9 Wheat. 489, 6 L. ed. 142; Cromwell *v.* Pittsburg Bank, 6 Fed. Cas. No. 3,409, 2 Wall. Jr. 569; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,609, 2 Sumn. 401.

Canada.— Kay *v.* Wilson, 2 Ont. App. 133; *Re* Leslie, 23 Ont. 143; Dedford *v.* Boulton, 25 Grant Ch. (U. C.) 561.

See 35 Cent. Dig. tit. "Mortgages," § 1751.

84. Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 385; Hall *v.* Coldwell, 8 Can. L. J. 93.

Wild lands.— Where the mortgaged property consists of wild, uncultivated, and unoccupied lands, the mere lapse of time will not bar the mortgagor's right to redeem, the mortgagee not having been in adverse possession. Locke *v.* Caldwell, 91 Ill. 417; McDonnell *v.* McDonnell, 2 Grant Err. & App. (U. C.) 393.

85. Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613.

Buying outstanding title.— A mortgagee cannot purchase an outstanding title and hold it adversely to the mortgagor, where he led the mortgagor to believe or designedly permitted him to believe that such title was acquired for his protection. Savings, etc., Soc. *v.* Davidson, 97 Fed. 696, 38 C. C. A. 365.

assertion of ownership.[86] Hence the possession of the mortgagee, however long continued, will not bar the right to redeem if he renders to the mortgagor accounts of the rents and profits,[87] or receives and retains payments on account or principal, or interest,[88] or makes any declaration or does any act which distinctly recognizes the existence of the mortgage as a continuing security and which consequently admits his own possession to be only for the purpose of enforcing or collecting the debt,[89] or if the mortgagor can bring himself within any exception to the statute of limitations, as in the case of a person under disabilities.[90]

6. EFFECT OF FAILURE TO REDEEM WITHIN TIME LIMITED. When a mortgagor fails to redeem the premises within the time limited by law, he loses all interest in the property and all right to recover it on paying off the mortgage;[91] and this, not only at law but also in equity, except in cases where he was prevented from redeeming by fraud or mistake or where there are exceptional equities in his favor.[92] And thereupon the title of the mortgagee, or foreclosure purchaser, becomes absolute and complete, and he may maintain a suit to quiet his title or to recover possession of the premises.[93]

A decree of foreclosure, although entirely void, constitutes color of title on which the mortgagee may build an adverse possession. Clark *v.* Potter, 32 Ohio St. 49.

86. McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Scott *v.* McFarland, 13 Mass. 309; Robinson *v.* Fife, 3 Ohio St. 551.

Notice of adverse claim.— The possession of the mortgagee is not "adverse" in such sense as to start the statute in his favor, until the mortgage debt is satisfied or he asserts an absolute title in himself and gives distinct notice of it to the mortgagor. McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Rigney *v.* De Graw, 100 Fed. 213.

87. Munro *v.* Barton, 98 Me. 250, 56 Atl. 844; Roberts *v.* Littlefield, 48 Me. 61; Chapin *v.* Wright, 41 N. J. Eq. 438, 5 Atl. 574.

88. Blethen *v.* Dwinal, 35 Me. 556; Ayres *v.* Waite, 10 Cush. (Mass.) 72; Miner *v.* Beekman, 33 N. Y. Super. Ct. 67, 11 Abb. Pr. N. S. 147, 42 How. Pr. 33; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

89. Robinson *v.* Fife, 3 Ohio St. 551; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152.

Character of admission.— The right to resist redemption by the mortgagor, founded on such adverse possession, is not subject to be waived by a mere incautious admission on the part of the mortgagee. Chapin *v.* Wright, 41 N. J. Eq. 438, 5 Atl. 574.

If the mortgagee commences proceedings for the foreclosure of the mortgage, it is such a recognition of the mortgage as an existing security as will waive any rights based on his adverse possession of the property. Chapin *v.* Wright, 41 N. J. Eq. 438, 5 Atl. 574; Calkins *v.* Calkins, 3 Barb. (N. Y.) 305.

Admission by one joint mortgagee.— Where two joint mortgagees have been in possession of the property for more than twenty years, letters written by one of them, amounting to a recognition of the mortgagor's title, will not be sufficient to give the latter a right to redeem. Richardson *v.* Younge, L. R. 10 Eq. 275, 39 L. J. Ch. 475, 18 Wkly. Rep. 800.

90. Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

91. *California.*— Page *v.* Vilhac, 42 Cal. 75.

Illinois.— Mix *v.* King, 55 Ill. 434.

Indiana.— Bashor *v.* Cady, 2 Ind. 582.

Iowa.—McConkey *v.* Lamb, 71 Iowa 636, 33 N. W. 146.

Kansas.— Stewart *v.* Park College, 68 Kan. 465, 75 Pac. 491.

Kentucky.— Dale *v.* Shirley, 8 B. Mon. 524.

Louisiana.— Mulhaupt *v.* Youree, 35 La. Ann. 1052.

Massachusetts.— McIntier *v.* Shaw, 6 Allen 83.

Minnesota.— Gates *v.* Ege, 57 Minn. 465, 59 N. W. 495; Hoover *v.* Johnson, 47 Minn. 434, 50 N. W. 475; Reynolds *v.* St. Paul L. & T. Co., 46 Minn. 84, 48 N. W. 458; Fisk *v.* Stewart, 26 Minn. 365, 4 N. W. 611.

North Dakota.— Nichols *v.* Tingstad, 10 N. D. 172, 86 N. W. 694.

England.— Stuart *v.* Worrall, 1 Bro. Ch. 581, 28 Eng. Reprint 1310; Faulkner *v.* Bolton, 4 L. J. Ch. 81, 7 Sim. 319, 8 Eng. Ch. 319, 58 Eng. Reprint 860.

See 35 Cent. Dig. tit. "Mortgages," § 1750.

After a mortgage has been foreclosed in a federal court having jurisdiction, and the statutory time for redemption has expired, a state court will not decree redemption on the ground that, pending the foreclosure suit, an agreement was made to extend the time of payment of the mortgage debt. Windett *v.* Connecticut Mut. L. Ins. Co., 27 Ill. App. 68 [*affirmed* in 130 Ill. 621, 22 N. E. 474].

92. *California.*— Benson *v.* Bunting, 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81.

Illinois.— Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Fitch *v.* Miller, 200 Ill. 170, 65 N. E. 650.

Missouri.— Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773; McNees *v.* Swaney, 50 Mo. 388.

North Carolina.— Anonymous, 2 N. C. 482.

Vermont.— Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742; Smith *v.* Bartholomew, 42 Vt. 356; Wright *v.* Bates, 13 Vt. 341.

See 35 Cent. Dig. tit. "Mortgages," § 1750.

93. *Alabama.*— Sanders *v.* Askew, 79 Ala. 433.

7. Revival of Right After Forfeiture. The tendency of the decisions is to discourage any claim of a revival of the right of redemption after it has once been barred or forfeited.[94] But it has been held that if the mortgagee accepts payments on account of the mortgage debt, or brings an action at law to recover it, after a foreclosure, he rehabilitates the mortgagor with a right to redeem.[95]

D. Amount Required to Redeem — 1. Amount Actually Due. Since redemption is an equitable right, it can be claimed by a mortgagor only on terms of his paying all that is justly and equitably due under the mortgage,[96] even

Iowa.—Moody *v.* Funk, 82 Iowa 1, 47 N. W. 1008, 31 Am. St. Rep. 455.

Kentucky.— Shannon *v.* Speers, 2 A. K. Marsh. 311.

Minnesota.— Finnegan *v.* Effertz, 90 Minn. 114, 95 N. W. 762; Rogers *v.* Benton, 89 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613.

Nebraska.—Gallagher *v.* Giddings, 33 Nebr. 222, 49 N. W. 1126.

See 35 Cent. Dig. tit. "Mortgages," § 1750.

94. Waters *v.* Hubbard, 44 Conn. 340; Lowe *v.* Grinnan, 19 Iowa 193; Douglass *v.* Woodworth, 51 Barb. (N. Y.) 79.

95. *Connecticut.*— Lounsbury *v.* Norton, 59 Conn. 170, 22 Atl. 153.

Massachusetts.— Fennyery *v.* Ransom, 170 Mass. 303, 49 N. E. 620.

New Hampshire.— Scott *v.* Childs, 64 N. H. 566, 15 Atl. 206.

Rhode Island.— Clarke *v.* Robinson, 15 R. I. 231, 10 Atl. 642; Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433.

England.— Kinnaird *v.* Trollope, 39 Ch. D. 636, 57 L. J. Ch. 905, 59 L. T. Rep. N. S. 433, 37 Wkly. Rep. 234.

96. *Georgia.*— Shumate *v.* McLendon, 120 Ga. 396, 48 S. E. 10; Cumming *v.* McDade, 118 Ga. 612, 45 S. E. 479.

Illinois.— Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 508, holding that where a right to redeem from a trust deed is predicated upon a tender of certain bonds, the interest coupons attached to the bonds at the time of the tender which fall due between that date and the final decree must be delivered with the bonds in order to keep the tender good.

Iowa.— Wakefield *v.* Rotherham, 67 Iowa 444, 25 N. W. 697.

Maine.— Johnson *v.* Candage, 31 Me. 28, holding that mortgaged premises cannot be redeemed without the payment of the entire debt, although such debt, or a part of it, may be separated from the mortgage by becoming the property of a third person.

Michigan.— Palmer *v.* Bray, 136 Mich. 85, 98 N. W. 849.

Missouri.— Basye *v.* Jamison, 124 Mo. 551, 27 S. W. 560; Gibson *v.* Linville, 88 Mo. App. 518.

Ohio.— Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512.

England.— Hill *v.* Rowlands, [1897] 2 Ch. 361, 66 L. J. Ch. 689, 77 L. T. Rep. N. S. 34, 46 Wkly. Rep. 26. The price of redeeming the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in like circumstances in a suit by the mortgagee to foreclose. Du Vigier *v.* Lee, 2 Hare 326, 7 Jur. 299, 12 L. J. Ch. 345, 24 Eng. Ch. 326, 67 Eng. Reprint 134.

Canada.— See Moffatt *v.* Upper Canada Bank, 5 Grant Ch. (U. C.) 374.

See 35 Cent. Dig. tit. "Mortgages," § 1753.

Indemnity mortgages.— The amount required to redeem from an indemnity mortgage is measured by the extent to which the mortgagee has been damnified by the suretyship or other liability from which he was to be protected. McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548; Morris *v.* Hulme, 71 Kan. 628, 81 Pac. 169. And it is immaterial that he has received from a cosurety contribution of a part of the amount paid. Strong *v.* Blanchard, 4 Allen (Mass.) 538.

Mortgage for future support.— On a mortgage conditioned for the support of the mortgagee, compensation may be made if the condition has been broken; and where the mortgagor has conveyed his interest the purchaser may be permitted to redeem on making compensation for past neglect of the mortgagor and paying an allowance for the future. Austin *v.* Austin, 9 Vt. 420.

Value of improvements.— On redemption from the purchaser at foreclosure sale, he is entitled to be compensated for his improvements put upon the land in good faith and in the belief that he had a good title (Ensign *v.* Batterson, 68 Conn. 298, 36 Atl. 51; Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564; Poole *v.* Johnson, 62 Iowa 611, 17 N. W. 900; McSorley *v.* Larissa, 100 Mass. 270; McLaren *v.* Fraser, 17 Grant Ch. (U. C.) 567; Carroll *v.* Robertson, 15 Grant Ch. (U. C.) 173); but not if he knew there was a junior mortgagee entitled to redeem (Cram *v.* Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714); nor where he made the improvements after the commencement of an action to redeem (Benson *v.* Bunting, 141 Cal. 462, 75 Pac. 59).

Mistake in computation.— Where one seeking to redeem from a foreclosure does not pay the full amount, by reason of a mistake made by the clerk of the court in computing the amount due, the redemption may be completed by paying the balance due after the expiration of the year allowed by statute, with interest thereon to the date of final payment. Wakefield *v.* Rotherham, 67 Iowa 444, 25 N. W. 697.

Failure to include fees.— Where one redeeming from a foreclosure sale pays the sheriff a gross sum for the redemption and the sheriff's fees, and it is accepted by the sheriff as sufficient, and the sum is enough to satisfy the purchaser's claim, it is a good

though the debt should not be recoverable at law, being barred by the statute of limitations.[97] But on the other hand the mortgagee can claim no greater sum than is actually and fairly due to him.[98] Hence if the money received by the mortgagor was only a part of the nominal consideration of the mortgage, he may redeem on payment of the lesser sum;[99] and the face value of the mortgage is not the proper measure of the redemption money if partial payments have been made upon it, but all such payments must first be deducted;[1] and if the mortgagee forecloses for more than is actually due and bids in the property, redemption will be decreed on payment of his just debt rather than the sum bid at the sale.[2]

2. CLAIMS NOT INCLUDED IN MORTGAGE — a. In General. To effect a redemption from a mortgage it is not necessary for the mortgagor to tender, nor can the mortgagee demand, payment of any debt or claim not included in and covered by the mortgage, although it be a just debt due from one to the other,[3] except in cases where the claim arose out of the same transaction in which the mortgage was given or is a claim for money expended in the protection of the property or the title,[4]

redemption, and the shortage must be deducted from the sheriff's fees. Bovey De Laittre Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038.

Commissions to clerk of United States court.— The rule of the federal court requiring a party redeeming real estate which has been sold under a foreclosure decree to pay one per cent commissions to the clerk, on the amount paid into court for the redemption of the property, in addition to the amount going to the purchaser, is in accordance with U. S. Rev. St. (1878) § 828 [U. S. Comp. St. (1901) p. 635], and is not in derogation of the right of redemption given by the state law. That right must be permitted in the federal court subject to the act of congress fixing the amount to be paid to the clerk on all moneys received, kept, and paid out by him in pursuance of any statute or order of court. Blair *v.* Chicago, etc., R. Co., 12 Fed. 750, 11 Biss. 320.

97. Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296; Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63.

98. Ensign *v.* Batterson, 68 Conn. 298, 36 Atl. 51; Tibbs *v.* Morris, 44 Barb. (N. Y.) 138; Hodgins *v.* Ontario Loan, etc., Co., 7 Ont. App. 202.

99. *Colorado.*— Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067.

Illinois.— Walker *v.* Carleton, 97 Ill. 582. See also Hardin *v.* Eames, 5 Ill. App. 153.

Kentucky.— Head *v.* Overton, 1 J. J. Marsh. 557.

Maine.— Hagerthy *v.* Webber, 100 Me. 305, 61 Atl. 685.

New Jersey.— McKee *v.* Jordan, 50 N. J. Eq. 306, 24 Atl. 398.

New York.— Bloodgood *v.* Zeily, 2 Cai. Cas. 124.

United States.— Hicklin *v.* Marco, 56 Fed. 549, 6 C. C. A. 10. See also Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108.

See 35 Cent. Dig. tit. "Mortgages," § 1754.

1. *Illinois.*— Hardin *v.* Eames, 5 Ill. App. 153.

Massachusetts.— Sisson *v.* Tate, 114 Mass. 497; Boston Iron Co. *v.* King, 2 Cush. 400.

Michigan.— McArthur *v.* Robinson, 104 Mich. 540, 62 N. W. 713.

Minnesota.— Spottswood *v.* Herrick, 22 Minn. 548.

Nebraska.— Loney *v.* Courtnay, 24 Nebr. 580, 39 N. W. 616.

Oregon.— Sellwood *v.* Gray, 11 Oreg. 534, 5 Pac. 196.

Canada.— See McLaren *v.* Fraser, 17 Grant Ch. (U. C.) 533.

See 35 Cent. Dig. tit. "Mortgages," § 1754.

2. Sandford *v.* Flint, 24 Mich. 26; Dickerson *v.* Hayes, 26 Minn. 100, 1 N. W. 834; Bennett *v.* Healey, 6 Minn. 240; Loney *v.* Courtnay, 24 Nebr. 580, 39 N. W. 616.

Protest when excessive amount demanded. — One who has a right to redeem should pay to the sheriff what he demands, accompanying the payment with a protest if he demands too much. McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

3. *Alabama.*— Parmer *v.* Parmer, 74 Ala. 285.

Arkansas.— Cohn *v.* Hoffman, 56 Ark. 119, 19 S. W. 233.

Iowa.— Veach *v.* Schaup, 3 Iowa 194.

Maryland.— Hays *v.* Cretin, 102 Md. 695, 62 Atl. 1028, 4 L. R. A. N. S. 1039.

Minnesota.— Weller *v.* Summers, 82 Minn. 307, 84 N. W. 1022; Bacon *v.* Cottrell, 13 Minn. 194.

New York.— James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475; Burnet *v.* Denniston, 5 Johns. Ch. 35; McKinstry *v.* Mervin, 3 Johns. Ch. 466.

Pennsylvania.— Tennent *v.* Dewees, 7 Pa. St. 305; Dorrow *v.* Kelly, 1 Dall. 142, 1 L. ed. 73.

Vermont.— Lamson *v.* Sutherland, 13 Vt. 309.

Virginia.— McClanachan *v.* Siter, 2 Gratt. 280.

Canada.— Canadian Bank of Commerce *v.* Forbes, 10 Ont. Pr. 442.

See 35 Cent. Dig. tit. "Mortgages," § 1761.

But see Scripture *v.* Johnson, 3 Conn. 211.

4. *California.*— Ward *v.* Matthews, 80 Cal. 343, 22 Pac. 187.

and except as to future advances made after the giving of the mortgage but intended to be secured by it.[5] There are several decisions, however, which draw a distinction between a bill to foreclose and a bill to redeem, holding that in the former case, as the mortgagee demands the aid of the court to enforce his security, the matter is wholly one of contract and he can claim no more than the exact debt secured by the mortgage, while in the latter case, as the mortgagor comes into court seeking equity, he must be prepared to do equity, and hence may be required to pay not only the mortgage debt but whatever else he justly owes the mortgagee, as a condition to being permitted to redeem.[6] The English doctrine of consolidation of mortgages, prior to the "Conveyancing and Law of Property Act" of 1881, gave to the holder of several mortgages executed by the same mortgagor on different properties the right to consolidate them and to refuse to permit a redemption of any one of the mortgages without a redemption of them all.[7] But this statute declared that a mortgagor seeking to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he desires to redeem, except in cases where a contrary intention is expressed in the mortgages or one of them.[8]

b. Prior Liens and Encumbrances. The mortgagee has a right to pay off prior liens and encumbrances upon the mortgaged premises for the protection of his own title or security, and all sums so expended by him become a charge on the land and must be paid by the mortgagor when he redeems.[9]

Illinois.— Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206.

Michigan.— Dunning *v.* Gaige, 137 Mich. 122, 100 N. W. 267.

New York.— Robinson *v.* Ryan, 25 N. Y. 320.

North Carolina.— Henderson *v.* Stewart, 11 N. C. 256.

Tennessee.— Mitchell *v.* Brown, 6 Coldw. 505.

5. *Connecticut.*— Mead's Appeal, 46 Conn. 417.

Illinois.— Brown *v.* Gaffney, 32 Ill. 251.

Kentucky.— Ogle *v.* Ship, 1 A. K. Marsh. 287; Reed *v.* Lansdale, Hard. 6.

Massachusetts.— Cox *v.* Hoxie, 115 Mass. 120.

Mississippi.— Williamson *v.* Downs, 34 Miss. 402.

North Dakota.— Merchants' State Bank *v.* Tufts, (1905) 103 N. W. 760.

See 35 Cent. Dig. tit. "Mortgages," § 1763.

6. Turman *v.* Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Anthony *v.* Anthony, 23 Ark. 479; Chase *v.* McDonald, 7 Harr. & J. (Md.) 160; Craik *v.* Clark, 3 N. C. 22; Levi *v.* Blackwell, 35 S. C. 511, 15 S. E. 243; State Bank *v.* Rose, 1 Strobh. Eq. (S. C.) 257; Walling *v.* Aikin, McMull. Eq. (S. C.) 1.

7. Jennings *v.* Jordan, 6 App. Cas. 698, 51 L. J. Ch. 129, 45 L. T. Rep. N. S. 593, 30 Wkly. Rep. 369; Pledge *v.* Carr, [1895] 1 Ch. 51, 64 L. J. Ch. 51, 71 L. T. Rep. N. S. 598, 8 Reports 253, 43 Wkly. Rep. 50; Minter *v.* Carr, [1894] 3 Ch. 498, 63 L. J. Ch. 705, 71 L. T. Rep. N. S. 526, 7 Reports 558; *In re* Walhampton, 26 Ch. D. 391, 53 L. J. Ch. 1000, 51 L. T. Rep. N. S. 280, 32 Wkly. Rep. 874; Cummins *v.* Fletcher, 14 Ch. D. 699, 49 L. J. Ch. 563, 42 L. T. Rep. N. S. 859, 28 Wkly. Rep. 772; Baker *v.* Gray, 1 Ch. D. 491, 45 L. J. Ch. 165, 33 L. T. Rep. N. S. 721, 24 Wkly. Rep. 171; Beevor *v.* Luck, L. R. 4 Eq. 537, 36 L. J. Ch. 865, 15 Wkly. Rep. 1221; Tweedale *v.* Tweedale, 23 Beav. 341, 53 Eng. Reprint 134; Willie *v.* Lugg, 2 Eden 78, 28 Eng. Reprint 825; Neve *v.* Pennell, 2 Hem. & M. 170, 33 L. J. Ch. 19, 9 L. T. Rep. N. S. 285, 11 Wkly. Rep. 986, 71 Eng. Reprint 427; Mills *v.* Jennings, 39 L. T. Rep. N. S. 442; *Ex p.* Alsager, 2 Mont. D. & De G. 328; Pope *v.* Onslow, 2 Vern. Ch. 286, 23 Eng. Reprint 784; Roe *v.* Soley, W. Bl. 726. And see Maritime Warehousing, etc., Co. *v.* Maritime Bank, 24 N. Brunsw. 170.

8. St. 44 & 45 Vict. c. 41, § 17 [*construed* in Griffith *v.* Pound, 45 Ch. D. 553, 59 L. J. Ch. 522; Slayter *v.* Johnston, 5 Nova Scotia 502].

9. *Alabama.*— Cramer *v.* Watson, 73 Ala. 127; Couthway *v.* Berghaus, 25 Ala. 393.

Illinois.— Davis *v.* Dale, 150 Ill. 239, 37 N. E. 215; Mosier *v.* Norton, 83 Ill. 519; Harper *v.* Ely, 70 Ill. 581.

Iowa.— Jack *v.* Cold, 114 Iowa 349, 86 N. W. 374; Spurgin *v.* Adamson, 70 Iowa 468, 30 N. W. 806; Strong *v.* Burdick, 52 Iowa 630, 3 N. W. 707.

Maine.— Stone *v.* Bartlett, 46 Me. 438.

Massachusetts.— Davis *v.* Winn, 2 Allen 111. See also Van Vronker *v.* Eastman, 7 Metc 157.

Michigan.— Baker *v.* Pierson, 6 Mich. 522.

Missouri.— Long *v.* Long, 111 Mo. 12, 19 S. W. 537.

New Hampshire.— Page *v.* Foster, 7 N. H. 392.

New Jersey.— Parker *v.* Child, 25 N. J. Eq. 41.

Washington.— Shepard *v.* Vincent, 38 Wash. 493, 80 Pac. 777.

3. Redemption of Assigned Mortgage. The amount required to redeem a mortgage in the hands of an assignee is generally the same as when it remains the property of the original mortgagee,[10] and in the absence of notice of special equities, the amount of the consideration paid for the assignment is immaterial; the full amount of the mortgage debt must be paid in order to redeem, even though the assignment was gratuitous.[11]

4. Redemption by Judgment Creditor. It is generally the right of a judgment creditor to redeem on paying off the valid liens and encumbrances prior to his own,[12] excluding any fraudulent claims and such as are not enforceable at law,[13] and claiming the benefit of anything which operates as a partial payment on the mortgage.[14] If his lien is not coextensive with that of the mortgage, he may redeem so much of the property as his judgment affects.[15]

5. Redemption by Junior Mortgagee. If a junior mortgagee redeems before sale under the senior lien, he must pay the full amount justly due thereon, the same as the mortgagor would have been required to do;[16] but the prior mortgagee cannot tack to his lien, in this case, an outside debt due to him from the mortgagor.[17] Where the junior mortgagee redeems from the purchaser at foreclosure sale, he must pay the amount of the latter's bid, with interest and costs, and the value of all permanent improvements erected by the purchaser, less the mesne profits.[18] And if the junior encumbrancer redeems from one who has already redeemed from the mortgage sale, he must reimburse such person for all

United States.— McCormick *v.* Knox, 105 U. S. 122, 26 L. ed. 940.

See 35 Cent. Dig. tit. "Mortgages," § 1762.

Secret agreement to pay off lien.— A redemptioner is not bound by a secret oral agreement by which the mortgagee has promised to pay an intermediate lien. MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281.

10. See *supra*, XVI, E, 1, a, c.

If a mortgagor induces a third person to purchase the mortgage by promising in writing to pay with interest the whole sum advanced, the assignee of the equity of redemption will be allowed to redeem only by paying what the assignor must have paid. Holbrook *v.* Worcester Bank, 12 Fed. Cas. No. 6,597, 2 Curt. 244.

As to amount when mortgage assigned as collateral security see Farnum *v.* Metcalf, 8 Cush. (Mass.) 46; Raynor *v.* Raynor, 21 Hun (N. Y.) 36.

As to amount upon assignment to insurance company paying loss on mortgaged premises see Baker *v.* Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357; Graves *v.* Hampden F. Ins. Co., 10 Allen (Mass.) 281. And see *supra*, XV, G, 2, a.

11. Pease *v.* Benson, 28 Me. 336; Loney *v.* Courtnay, 24 Nebr. 580, 39 N. W. 616; Knox *v.* Galligan, 21 Wis. 470.

As to effect of notice of unrecorded deed for the premises see Glidden *v.* Hunt, 24 Pick. (Mass.) 221.

12. Doerhoefer *v.* Farrell, 29 Oreg. 304, 45 Pac. 797.

13. Lehman *v.* Collins, 69 Ala. 127; Eldridge *v.* Lane, Kirby (Conn.) 75.

14. Rosevelt *v.* Niagara Bank, Hopk. C. (N. Y.) 579 [*affirmed* in 9 Cow. 409].

15. See *supra*, XXII, A, 6. And see Sutherland *v.* Tyner, 72 Iowa 232, 33 N. W. 645. But *compare* Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293.

Judgment against heir of deceased mortgagor.— From a foreclosure sale made after the death of the mortgagor, judgment creditors of the heirs of the mortgagor may redeem, the creditor of any particular heir paying that proportion of the sum for which the land was sold which such heir's interest in the land bears to the whole. Schuck *v.* Gerlach, 101 Ill. 338.

16. Johnson *v.* Hosford, 110 Ind. 572, 10 N. E. 407; Hutchinson *v.* Wells, 67 Iowa 430, 25 N. W. 690; American Button Hole, etc., Co. *v.* Burlington Mut. Loan Assoc., 61 Iowa 464, 16 N. W. 527; Strong *v.* Burdick, 52 Iowa 630, 3 N. W. 707; Taft *v.* Stoddard, 142 Mass. 545, 8 N. E. 586; Ryer *v.* Gass, 130 Mass. 227; Green *v.* Tanner, 8 Metc. (Mass.) 411; Dougherty *v.* Kubat, 67 Nebr. 269, 93 N. W. 317; Jones *v.* Dutch, (Nebr. 1902) 92 N. W. 735, junior mortgagee not required to pay the costs of the suit for foreclosure of the senior mortgage, if he was not a party to it.

Disputing amount of senior lien.— If a junior encumbrancer who was not made a party to the suit foreclosing the senior lien believes that the amount of the decree rendered therein is too great, he may allege that fact in his bill to redeem, and if a mistake has occurred it may thus be corrected. Strang *v.* Allen, 44 Ill. 428.

17. Green *v.* Tanner, 8 Metc. (Mass.) 411; Cassidy *v.* Bigelow, 25 N. J. Eq. 112.

18. Williams *v.* Rouse, 124 Ala. 160, 27 So. 16; Wiley *v.* Ewing, 47 Ala. 418; Lamb *v.* West, 75 Iowa 399, 39 N. W. 666; Hurn *v.* Hill, 70 Iowa 38, 29 N. W. 796; American Button-Hole, etc., Co. *v.* Burlington Mut. Loan Assoc., 68 Iowa 326, 27 N. W. 271; Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Hadley *v.* Stewart, 65 Wis. 481, 27 N. W. 340. But *compare* Dougherty *v.* Kubat, 67 Nebr. 269, 93 N. W. 317.

the money the latter has been compelled to pay, for the purpose of such redemption, with interest.[19]

6. Redemption by Tenants in Common and Part-Owners — a. In General. An owner of an undivided interest in mortgaged property, or one owning or having a junior lien upon a part of it, cannot ordinarily redeem from the mortgage by paying merely his proportionate share of the mortgage debt, but must pay the whole of it,[20] although such proportional redemption has been allowed where the mortgagee has also become the owner of the equity of redemption,[21] and in some other exceptional cases.[22]

b. Mortgage of Separate Parcels. Where separate parcels of land are mortgaged to secure the same debt, a subsequent purchaser of one of them, or one holding a junior lien on one of them, cannot redeem his separate lot by paying a portion of the mortgage debt; whoever makes the redemption, the mortgagee is entitled to receive his whole debt.[23] An exception to this rule is found in the case where the mortgagee has already foreclosed upon another of the lots or parcels and so obtained a partial satisfaction.[24]

7. Amount of Bid or Price on Foreclosure Sale. A person who seeks to redeem after foreclosure sale on general equitable principles, and without the aid of the statute, is ordinarily required to pay the entire amount of the mortgage debt, although it may be more than the sum bid or paid on the sale.[25] But where the

19. Strang *v.* Allen, 44 Ill. 428.

20. *Connecticut.*— Andreas *v.* Hubbard, 50 Conn. 351; Lyon *v.* Robbins, 45 Conn. 513.

Iowa.— Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293; Douglass *v.* Bishop, 27 Iowa 214; Knowles *v.* Rablin, 20 Iowa 101.

Maine.— Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595.

Massachusetts.— Kerse *v.* Miller, 169 Mass. 44, 47 N. E. 504; Crafts *v.* Crafts, 13 Gray 360; Merritt *v.* Hosmer, 11 Gray 276, 71 Am. Dec. 713; Parkman *v.* Welch, 19 Pick. 231; Allen *v.* Clark, 17 Pick. 47; Gibson *v.* Crehore, 5 Pick. 146; Taylor *v.* Porter, 7 Mass. 355.

Michigan.— Dayton *v.* Stahl, 131 Mich. 360, 93 N. W. 878.

Missouri.— Mullanphy *v.* Simpson, 4 Mo. 319.

Oregon.— Wilson *v.* Tartar, 22 Oreg. 504, 30 Pac. 499.

England.— Margrave *v.* Le Hooke, 2 Vern. Ch. 207, 23 Eng. Reprint 734.

See 35 Cent. Dig. tit. "Mortgages," § 1757.

A tenant in dower cannot maintain a bill to redeem land from a mortgage made by her husband and herself without offering to pay the whole amount due on the mortgage. McCabe *v.* Bellows, 7 Gray (Mass.) 148, 66 Am. Dec. 467. *Compare* Van Vronker *v.* Eastman, 7 Metc. (Mass.) 157; Fellows *v.* Fellows, 69 N. H. 339, 46 Atl. 474. But as between the dowress and the devisee of the fee, she should only pay a proportionate amount of the mortgage debt, to be ascertained by apportionment on the basis of the present value of her life-estate. Merselis *v.* Van Riper, 55 N. J. Eq. 618, 38 Atl. 196.

Redemption by appropriator of part of mortgaged premises under eminent domain proceedings.— A corporation which has acquired title to part of the mortgaged premises by condemnation proceedings under the power of eminent domain cannot redeem such portion only by paying a proportionate share of the mortgage debt, but must redeem the whole. New York Mut. L. Ins. Co. *v.* Easton, etc., R. Co., 38 N. J. Eq. 132. But *compare* Dows *v.* Congdon, 16 How. Pr. (N. Y.) 571.

21. See Kirkham *v.* Dupont, 14 Cal. 559; Senft *v.* Vanek, 209 Ill. 361, 70 N. E. 720; Tillinghast *v.* Fry, 1 R. I. 406.

22. Veach *v.* Schaup, 3 Iowa 194 (agreement of mortgagee to release part of premises); Bradley *v.* George, 2 Allen (Mass.) 392 (where remaining portion of land was sufficient to satisfy mortgage debt in full).

23. Andreas *v.* Hubbard, 50 Conn. 351; Franklin *v.* Gorham, 2 Day (Conn.) 142, 2 Am. Dec. 86; Franklin Bank *v.* Blossom, 23 Me. 546; Gibson *v.* Crehore, 5 Pick. (Mass.) 146.

24. George *v.* Wood, 11 Allen (Mass.) 41; Green *v.* Dixon, 9 Wis. 532. See also Gliddon *v.* Andrews, 14 Ala. 733.

25. *Alabama.*— Harris *v.* Miller, 71 Ala. 26. See also Williams *v.* Rouse, 124 Ala. 160, 27 So. 16.

Arkansas.— Wood *v.* Holland, 53 Ark. 69, 13 S. W. 739.

Illinois.— Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564.

Iowa.— Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293; Iowa County *v.* Beeson, 55 Iowa 262, 7 N. W. 597; Johnson *v.* Harmon, 19 Iowa 56; White *v.* Hampton, 13 Iowa 259.

Kansas.— Evans *v.* Kahr, 60 Kan. 719, 57 Pac. 950, 58 Pac. 467.

Massachusetts.— Atkins *v.* Sawyer, 1 Pick. 351, 11 Am. Dec. 188.

Missouri.— Potter *v.* Herring, 57 Mo. 184.

New Jersey.— Large *v.* Van Doren, 14 N. J. Eq. 208.

New York.— Benedict *v.* Gilman, 4 Paige 58.

See 35 Cent. Dig. tit. "Mortgages," § 1764.

right of redemption is distinctly founded on the statute, and could not have been claimed except for the statute, it is commonly provided that the amount required for redemption shall be measured by the bid or price at the foreclosure sale, with interest.[26]

8. FORECLOSURE FOR INSTALMENT OR INTEREST. When proceedings are taken for the foreclosure of a mortgage upon default in the payment of an instalment of principal or interest, the mortgagor may redeem upon payment of that instalment only, unless other instalments have meanwhile fallen due; but in the latter case he must pay all that is due up to the time of redemption.[27]

9. INTEREST. The money paid to effect a redemption must include interest on the mortgage debt from the date of the mortgage to the time of redemption, no matter how long it may have been in arrear;[28] and this interest will be computed at the rate specified in the contract of the parties,[29] if the agreed rate is not

26. *Alabama.*— Anniston First Nat. Bank *v.* Elliott, 125 Ala. 646, 27 So. 7, 82 Am. St. Rep. 268, 47 L. R. A. 742.

California.— Weyant *v.* Murphy, 78 Cal. 278, 20 Pac. 568, 12 Am. St. Rep. 55; Simpson *v.* Castle, 52 Cal. 644.

Iowa.—Dows *v.* Blanchard, (1887) 27 N. W. 492; Williams *v.* Dickerson, 66 Iowa 105, 23 N. W. 286; Day *v.* Cole, 44 Iowa 452; Tuttle *v.* Dewey, 44 Iowa 306.

Minnesota.— Evans *v.* Rhode Island Hospital Trust Co., 67 Minn. 160, 69 N. W. 715, 1069; Buchanan *v.* Reid, 43 Minn. 172, 45 N. W. 11; Pamperin *v.* Scanlan, 28 Minn. 345, 9 N. W. 868; Horton *v.* Maffitt, 14 Minn. 289.

Nebraska.—Swearingen *v.* Roberts, 12 Nebr. 333, 11 N. W. 325.

Ohio.— Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512.

Wisconsin.— Schroeder *v.* Richardson, 101 Wis. 529, 78 N. W. 178.

See 35 Cent. Dig. tit. "Mortgages," § 1764.

Fraudulent excessive bidding.— Where a purchaser under a decree of foreclosure bids more than the amount actually due on the decree and costs, for the purpose of defrauding a judgment creditor having a junior lien, the latter, on showing the fraud, will be entitled to redeem by paying the same sum as if the mortgaged premises had sold for the amount of the decree and costs. Grob *v.* Cushman, 45 Ill. 119.

27. Williams *v.* Dickerson, 66 Iowa 105, 23 N. W. 286; Adams *v.* Brown, 7 Cush. (Mass.) 220; Mann *v.* Richardson, 21 Pick. (Mass.) 355; Saunders *v.* Frost, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; Deming *v.* Comings, 11 N. H. 474; Moore *v.* Merritt, 6 Grant Ch. (U. C.) 550.

28. Martin *v.* Martin, 146 Mass. 517, 16 N. E. 413; Elvy *v.* Norwood, 5 De G. & Sm. 240, 16 Jur. 493, 21 L. J. Ch. 716, 64 Eng. Reprint 1099.

English and Canadian rule.— In England, where an action of foreclosure is brought, the mortgagee can recover no more than six years' arrears of interest; but this rule does not apply where it is the mortgagor who comes into court with a bill to redeem; relief will be granted to him only on terms of his paying all arrears of interest. Dingle *v.* Coppen, [1899] 1 Ch. 726, 68 L. J. Ch. 337, 79 L. T. Rep. N. S. 693, 47 Wkly. Rep. 279; Edmunds *v.* Waugh, L. R. 1 Eq. 418, 12 Jur. N. S. 326, 35 L. J. Ch. 234, 13 L. T. Rep. N. S. 739, 14 Wkly. Rep. 257. The same rule is in force in Canada. Ont. Rev. St. c. 111, § 17, which provides that no more than six years' arrears of interest on money charged on land shall be recoverable, only applies where a mortgagee is seeking to enforce payment out of the lands, and does not apply to an action for redemption or to actions similar in principle. Delaney *v.* Canadian Pac. R. Co., 21 Ont. 11; Howeren *v.* Bradburn, 22 Grant Ch. (U. C.) 96; Ford *v.* Allen, 15 Grant Ch. (U. C.) 565. But an exception is made where an action for redemption is brought by a second mortgagee against a first mortgagee; in such case the latter is entitled only to six years' arrears of interest. McMicking *v.* Gibbons, 24 Ont. App. 586 [*overruling* Delaney *v.* Canadian Pac. R. Co., *supra*].

Six months' notice or interest.— In England where the mortgagor has made default in the payment of the debt at the appointed time, but thereafter desires to pay it off, he must give the mortgagee six months' notice of his intention or six months' interest in lieu of notice, unless the latter has waived notice or has taken steps to enforce his security. Bovill *v.* Endle, [1896] 1 Ch. 648, 65 L. J. Ch. 542, 44 Wkly. Rep. 523; Smith *v.* Smith, [1891] 3 Ch. 550, 60 L. J. Ch. 694, 65 L. T. Rep. N. S. 334, 40 Wkly. Rep. 32; *In re* Moss, 31 Ch. D. 90, 55 L. J. Ch. 87, 55 L. T. Rep. N. S. 49, 34 Wkly. Rep. 59; James *v.* Rumsey, 11 Ch. D. 398, 48 L. J. Ch. 345, 27 Wkly. Rep. 617; Letts *v.* Hutchins, L. R. 13 Eq. 176; Day *v.* Day, 31 Beav. 270, 8 Jur. N. S. 1166, 31 L. J. Ch. 806, 7 L. T. Rep. N. S. 122, 10 Wkly. Rep. 728, 54 Eng. Reprint 1142; Matson *v.* Swift, 5 Jur. 645; Bartlett *v.* Franklin, 36 L. J. Ch. 671, 17 L. T. Rep. N. S. 100, 15 Wkly. Rep. 1077. And see Archbold *v.* Building, etc., Assoc., 16 Ont. App. 1.

29. Joiner *v.* Enos, 23 Ill. App. 224; Gaskell *v.* Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; Bourne *v.* Littlefield, 29 Me. 302. *Compare* Stewart *v.* Ferguson, 31 Ont. 112.

A junior mortgagee who redeems after sale will be treated as an assignee of the prior mortgage, and entitled to interest at the rate

usurious,[30] except where a proper tender has been refused, in which case only legal interest is chargeable thereafter.[31] If no rate of interest is specified in the mortgage or note, interest will be allowed at the legal rate,[32] which will be computed according to the law of the state in which the mortgaged property is situated.[33] Compound interest should not be allowed, although the interest is expressed to be payable annually or at other fixed intervals, unless expressly reserved, or unless there are special circumstances justifying it.[34]

10. Costs of Foreclosure. Where redemption is made after the commencement of a suit to foreclose, or after a sale on foreclosure, the mortgagee is entitled to be reimbursed for the costs of the proceedings,[35] except where the right of redemption is based on the invalidity of the decree or the sale.[36] But a junior mortgagee or purchaser of the premises, who claims the right to redeem on the

per cent which that mortgage bore, rather than as the holder of an equitable lien for the money paid with legal interest only. Dodge *v.* Fuller, 48 Fed. 347. And see Mosier *v.* Norton, 83 Ill. 519.

Penalty for default.— Where the mortgage secured the payment of a note, and provided that if it was not paid at maturity it should draw interest at twenty-five per cent, an execution creditor of the mortgagor must pay this penalty in order to effect a redemption. Blair *v.* Chamblin, 39 Ill. 521, 89 Am. Dec. 322.

Statutory interest.— A purchaser at foreclosure sale who resists and denies the right of redemption will not be entitled, on the successful prosecution of an action to redeem, to interest at the rate of two per cent per month until actual redemption. Benson *v.* Bunting, 141 Cal. 462, 75 Pac. 59.

Computation of interest where partial payments have been made on the mortgage debt see Dayton *v.* Dayton, 68 Mich. 437, 36 N. W. 209.

30. On the principle that he who seeks equity must do equity, a mortgagor, seeking to redeem from a mortgage in which usurious interest is reserved, will not be granted a forfeiture of all interest, but will be required to pay interest at the legal rate. Clark *v.* Finlon, 90 Ill. 245; Cushman *v.* Sutphen, 42 Ill. 255; Snyder *v.* Griswold, 37 Ill. 216; Sutphen *v.* Cushman, 35 Ill. 186; Butt *v.* Bondurant, 7 T. B. Mon. (Ky.) 421; Skinner *v.* Miller, 5 Litt. (Ky.) 84; Kidder *v.* McIlhenny, 81 N. C. 123; Beynon *v.* Cook, L. R. 10 Ch. 389, 32 L. T. Rep. N. S. 353, 23 Wkly. Rep. 531. See also Isherwood *v.* Dixon, 5 Grant Ch. (U. C.) 314. *Contra,* Barclift *v.* Fields, 145 Ala. 264, 41 So. 84, construing Gen. Acts (1900–1901), p. 164, amending Code, § 2630.

31. Donohue *v.* Chase, 139 Mass. 407, 2 N. E. 84.

32. Conant *v.* Riseborough, 139 Ill. 383, 28 N. E. 789; Mellersh *v.* Brown, 45 Ch. D. 225, 60 L. J. Ch. 43, 63 L. T. Rep. N. S. 189, 38 Wkly. Rep. 732.

33. Mallory *v.* Aspinwall, 2 Day (Conn.) 280.

34. *Maine.*— Parkhurst *v.* Cummings, 56 Me. 155; Kittredge *v.* McLaughlin, 38 Me. 513.

Massachusetts.— Reed *v.* Reed, 10 Pick. 398; Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394; Gibson *v.* Crehore, 5 Pick. 146.

Michigan.— Wallace *v.* McBride, 70 Mich. 596, 38 N. W. 592. *Compare* Millard *v.* Truax, 73 Mich. 381, 41 N. W. 328.

England.— Whatton *v.* Cradock, 1 Keen 267, 6 L. J. Ch. 178, 15 Eng. Ch. 267, 48 Eng. Reprint 309. *Compare* Howard *v.* Harris, 1 Vern. Ch. 190, 23 Eng. Reprint 406.

Canada.— Thomas *v.* Girvan, 1 N. Brunsw. Eq. 257.

Interest on overdue interest.— Where the debt secured by a mortgage is evidenced by a promissory note, and separate coupons or interest notes are given for the successive instalments of interest on the debt, it is lawful to make such interest notes or coupons bear interest, each from the date of its maturity until it is paid; and although the rate of interest stipulated for on the principal debt is already as high as the law allows, this reservation of interest on overdue instalments of interest will not make the loan usurious. Abbott *v.* Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573; Hawley *v.* Howell, 60 Iowa 79, 14 N. W. 199; Taylor *v.* Hiestand, 46 Ohio St. 345, 20 N. E. 345.

35. *Iowa.*— Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443.

Maine.— Whitcomb *v.* Harris, 90 Me. 206, 38 Atl. 138.

Maryland.— McNiece *v.* Eliason, 78 Md. 168, 27 Atl. 940.

Michigan.— Parks *v.* Allen, 42 Mich. 482, 4 N. W. 227. See also Millard *v.* Truax, 50 Mich. 343, 15 N. W. 501; Kennedy *v.* Brown, 50 Mich. 336, 15 N. W. 498, as to attorney's fees.

New Hampshire.— Emerson *v.* Gilman, 44 N. H. 235. And see Abbot *v.* Banfield, 43 N. H. 152.

New York.— Gage *v.* Brewster, 30 Barb. 387; Benedict *v.* Gilman, 4 Paige 58.

Rhode Island.— Means *v.* Anderson, 19 R. I. 118, 32 Atl. 82.

Canada.— Martin *v.* Miles, 5 Ont. 404.

See 35 Cent. Dig. tit. "Mortgages," § 1774.

36. Stallings *v.* Thomas, 55 Ark. 326, 18 S. W. 184; Bondurant *v.* Taylor, 3 Greene (Iowa) 561. See also National Mut. Bldg., etc., Assoc. *v.* Houston, 81 Miss. 386, 32 So. 911, as to effect of long acquiescence by mortgagor in voidable sale.

ground that he was not made a party to the foreclosure suit, will not be required to pay the costs of that action.[37]

E. Tender and Payment Into Court — 1. Necessity of Tender to Support Action For Redemption. Except as it may affect the question of interest or costs, a tender or offer to pay the mortgage debt is not necessary to be made before bringing an action to redeem; and in such an action the bill is not demurrable for failure to allege such a tender.[38] But a different rule has been applied where the security is in the form of an absolute deed.[39]

2. Person to Whom Tender Should Be Made. A tender for redemption should be made to the lawful owner of the mortgage and debt, whether it be the original mortgagee or his assignee,[40] or, if after foreclosure sale, to the purchaser,[41] or to the sheriff on his behalf, as the statute may direct.[42]

3. Sufficiency of Tender — a. In General. A tender to effect redemption must be made in due season,[43] by producing and offering to the person entitled to

37. Gaskell *v.* Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; Hosford *v.* Johnson, 74 Ind. 479; Gage *v.* Brewster, 31 N. Y. 218, 28 How. Pr. 582; Moulton *v.* Cornish, 61 Hun (N. Y.) 438, 16 N. Y. Suppl. 267; Vroom *v.* Ditmas, 4 Paige (N. Y.) 526; Moore *v.* Cord, 14 Wis. 213.

38. *Alabama.*— Hammett *v.* White, 128 Ala. 380, 29 So. 547; Hodges *v.* Verner, 100 Ala. 612, 13 So. 679; Thomas *v.* Jones, 84 Ala. 302, 4 So. 270; McGuire *v.* Van Pelt, 55 Ala. 344. But otherwise as to a statutory redemption after foreclosure sale. Baker *v.* Burdeshaw, 132 Ala. 166, 31 So. 497; Beatty *v.* Brown, 101 Ala. 695, 14 So. 368; Commercial Real Estate, etc., Assoc. *v.* Parker, 84 Ala. 298, 4 So. 268.

California.— De Leonis *v.* Walsh, 140 Cal. 175, 73 Pac. 813; Daubenspeck *v.* Platt, 22 Cal. 330.

Colorado.—See Hamill *v.* Copeland, 26 Colo. 15, 178, 55 Pac. 1099, 56 Pac. 901.

Illinois.— Taylor *v.* Dillenburg, 168 Ill. 235, 48 N. E. 41; Dwen *v.* Blake, 44 Ill. 135; Barnard *v.* Cushman, 35 Ill. 451; Smith *v.* Sackett, 10 Ill. 534.

Indiana.— Barr *v.* Vanalstine, 120 Ind. 590, 22 N. E. 965; Neshit *v.* Hanway, 87 Ind. 400; Cain *v.* Hanna, 63 Ind. 408. But see Dawson *v.* Overmyer, 141 Ind. 438, 40 N. E. 1065, holding that where the amount necessary to redeem is fixed, it must be alleged in the bill that a tender of the amount has been made.

Minnesota.— Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39.

Missouri.— Jopling *v.* Walton, 138 Mo. 485, 40 S. W. 99; Kline *v.* Vogel, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; McNew *v.* Booth, 42 Mo. 189.

New Hampshire.— Watkins *v.* Watkins, 57 N. H. 462.

New York.— Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000.

Oregon.— Swegle *v.* Belle, 20 Oreg. 323, 25 Pac. 633.

Pennsylvania.— Eshbach *v.* Zimmerman, 2 Pa. St. 313.

United States.— Gordon *v.* Smith, 62 Fed. 503, 10 C. C. A. 516.

See 35 Cent. Dig. tit. "Mortgages," §§ 1788, 1837.

Contra.— Lumsden *v.* Manson, 96 Me. 357, 52 Atl. 783; Willard *v.* Fiske, 2 Pick. (Mass.) 540; Tirrell *v.* Merrill, 17 Mass. 117; Hoopes *v.* Bailey, 28 Miss. 328; Jones *v.* Porter, 29 Tex. 456; Citizens' Nat. Bank *v.* Strauss, 29 Tex. Civ. App. 407, 69 S. W. 86.

The Maine statute requiring a tender of the amount due on a mortgage before action for redemption applies only to actions in the state courts and not to such as are brought under the general equity jurisdiction of the federal courts. Gordon *v.* Hobart, 10 Fed. Cas. No. 5,609, 2 Sumn. 401.

39. Broach *v.* Barfield, 57 Ga. 601; Marshall *v.* Stewart, 17 Ohio 356; Hicks *v.* Hicks, (Tex. Civ. App. 1894) 26 S. W. 227. But *compare* Rees *v.* Rhodes, 3 Ariz. 235, 73 Pac. 446; Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39; Loving *v.* Milliken, 59 Tex. 423.

40. Williams *v.* Smith, 49 Me. 564 (holding that a bill to redeem against an assignee of the mortgage cannot be supported by a tender made to a previous assignee who has since parted with all his interest); Dorkray *v.* Noble, 8 Me. 278; Wing *v.* Davis, 7 Me. 31.

To representative of deceased mortgagee.— Tender of redemption money is rightly made to the administrator of a deceased mortgagee. Scott *v.* McFarland, 13 Mass. 309.

To guardian of infant mortgagee.— Where the mortgagee or purchaser at the foreclosure sale is an infant, tender may be made to his guardian. Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73.

41. Lehman *v.* Collins, 69 Ala. 127 (tender rightly made to the foreclosure purchaser, although he has aliened the land, if the redemptioner has no notice or knowledge of such conveyance); Couthway *v.* Berghaus, 25 Ala. 393 (holding that tender may be made directly to the purchaser, who is in possession, rather than to a mere naked trustee who took title for him at the foreclosure sale); Daggs *v.* Wilson, 6 Ariz. 388, 59 Pac. 150 (holding that a tender to one not authorized to receive the money for the purchaser not sufficient).

42. Thompson *v.* Foster, 21 Minn. 319.

43. Marshall *v.* Ruddick, 28 Iowa 487; Brown *v.* Lawton, 87 Me. 83, 32 Atl. 733.

receive it[44] the correct sum in money or its equivalent,[45] with intent to extinguish the obligation of the mortgage,[46] and without coupling the offer with any condition which the mortgagee might fairly dispute or other than such as he would in any case be bound to perform;[47] and the offer may be made either by the mortgagor himself or by his duly authorized agent.[48]

b. Amount of Tender. If the amount due under the mortgage is not disputed or uncertain, the entire amount, with interest, must be tendered,[49] and an offer of any less sum than is justly due will have no effect on the rights of the parties.[50] Moreover, according to the old chancery rule, the money offered must thereafter be kept "dead" or idle, that it may be produced at any moment the mortgagee chooses to accept it.[51] If the amount is uncertain or in dispute, it is a sufficient tender if the mortgagor offers to pay whatever sum shall be found to be justly due.[52]

4. Paying Money Into Court. To sustain a bill for redemption or cancellation of the mortgage, or to defeat a foreclosure suit, the mortgagor must follow up his tender and keep it good by paying the money into court,[53] together with the

44. Wing *v.* Davis, 7 Me. 31 (tender of money in a bag, made at the window of a house, the creditor being at the window but not admitting the mortgagor within the house, is not sufficient); Reynolds *v.* St. Paul Loan, etc., Co., 46 Minn. 84, 48 N. W. 458 (sufficiency of tender by depositing money in bank for mortgagee); Pearson *v.* Douglass, 1 Baxt. (Tenn.) 151 (not essential that the money should be actually produced if the mortgagee refuses to receive it and denies the right to redeem).

45. Dougherty *v.* Hughes, 3 Greene (Iowa) 92, holding a bank certificate of deposit to be neither money nor its equivalent. And see Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 598, holding that in order to keep good a tender of certain bonds all subsequent interest coupons must be attached.

Bank-check.—A redemption made by means of a bank-check drawn by a responsible party on a solvent bank, and accepted by the officer receiving it as money, is not invalid for that reason if the money is promptly realized thereon, and is ready for the proper party when required. Sardeson *v.* Menage, 41 Minn. 314, 43 N. W. 66.

46. Chielovich *v.* Krauss, (Cal. 1886) 11 Pac. 781.

47. *Alabama.*— Harden *v.* Collins, 138 Ala. 399, 35 So. 357, 100 Am. St. Rep. 42.

Arkansas.— Fields *v.* Danenhower, 65 Ark. 392, 46 S. W. 938, 43 L. R. A. 519.

Maine.— Lumsden *v.* Manson, 96 Me. 357, 52 Atl. 783, holding that a tender for redemption cannot be made on condition that the mortgage shall be assigned to the person offering the money.

Massachusetts.— Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394, holding that a demand for possession and a release, accompanying a tender, is proper, for that is a duty imposed on the mortgagee by statute.

New Hampshire.— Wendell *v.* New Hampshire Bank, 9 N. H. 404.

Tennessee.— Bumpass *v.* Alexander, 10 Heisk. 542.

See 35 Cent. Dig. tit. "Mortgages," § 1790.

48. Walden *v.* Brown, 12 Gray (Mass.) 102.

49. Collins *v.* Riggs, 14 Wall. (U. S.) 491, 20 L. ed. 723.

Deducting rent.— When the mortgagee has been in possession, it is sufficient to tender a sum of money which, with the rent of the land, will equal the amount of the mortgage debt with interest and costs. Wood *v.* Holland, 57 Ark. 198, 21 S. W. 223.

Principal not due.— Where a redemption is to be made after non-payment of an instalment of interest, it is not proper to tender the amount of the principal not yet due, unless the mortgagee is willing to receive it; if he disclaims any such willingness, the addition of the principal to the interest, in making the tender, will invalidate it. Saunders *v.* Frost, 5 Pick. (Mass.) 259, 16 Am. Dec. 394.

Expenses of mortgagee.— Where the mortgagee makes no statement of the expenses incurred by him, it is sufficient to tender the amount of the debt and interest. Lambert *v.* Miller, 38 N. J. Eq. 117.

Mistake in amount.— Where the money tendered includes a coin which is not current, and a mistake is made in estimating its value, the tender is not good; but a court of equity may relieve against the consequent forfeiture. Abbot *v.* Banfield, 43 N. H. 152.

50. Hart *v.* Goldsmith, 1 Allen (Mass.) 145.

51. Burr *v.* Stanley, 4 Edw. (N. Y.) 27; Gyles *v.* Hall, 2 P. Wms. 378, 24 Eng. Reprint 774.

52. *Alabama.*— Cain *v.* Gimon, 36 Ala. 168.

Indiana.— Dawson *v.* Overmyer, 141 Ind. 438, 40 N. E. 1065.

Iowa.— Bunce *v.* West, 62 Iowa 80, 17 N. W. 179; Anson *v.* Anson, 20 Iowa 55, 89 Am. Dec. 514.

Massachusetts.— Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

Canada.— See Nixon *v.* Hunter, 17 Grant Ch. (U. C.) 96.

53. *Alabama.*— Given *v.* Troxel, (1905) 39 So. 578; Long *v.* Slade, 121 Ala. 267, 26 So. 31; Murphree *v.* Summerlin, 114 Ala. 54, 21 So. 470; Alexander *v.* Caldwell, 61 Ala. 543; Daughdrill *v.* Sweeney, 41 Ala. 310.

statutory fees of the clerk of the court or the sheriff according to the amount fixed by the statutes.[54]

5. Excuse For Failure to Make Tender. Where a tender is necessary to save the rights of the mortgagor, it is considered a sufficient excuse for failure to make it that the mortgagee was absent and could not be found;[55] that the redemptioner was ignorant of the amount necessary to redeem and could not ascertain it;[56] that the mortgagee unreasonably refused or neglected to render his account or rendered a false account,[57] or in any other way, by his conduct, prevented the redemption being made;[58] or that the failure to make a tender was due to an honest mistake.[59]

6. Effect of Tender. A proper and sufficient tender stops the running of interest,[60] but does not revive the mortgagor's right to redeem if made after that is barred by the statute.[61] It is an admission of the debt and that the amount tendered is due;[62] but it does not divest the title of the mortgagee or purchaser at foreclosure sale, nor reinvest the mortgagor with title,[63] except in a few states where this is expressly declared by statute to be the effect of such a tender.[64]

F. Proceedings on Redemption[65]—1. In General. Where redemption from a mortgage is made on common-law or equitable grounds, the form in which the transaction is cast is not very material, the intention of the parties and the actual satisfaction of the mortgage debt being the controlling features.[66] But in

Florida.— Franklin *v.* Ayer, 22 Fla. 654.

Massachusetts.— Brown *v.* Wentworth, 181 Mass. 49, 62 N. E. 984.

Minnesota.— Dunn *v.* Hunt, 76 Minn. 196, 78 N. W. 1110, 63 Minn. 484, 65 N. W. 948. See also McElligott *v.* Millard, 82 Minn. 251, 84 N. W. 786.

New Jersey.— See Shields *v.* Lozear, 34 N. J. L. 496, 3 Am. St. Rep. 256.

North Carolina.— See Dickerson *v.* Simmons, 141 N. C. 325, 53 S. E. 850.

United States.— Clarke *v.* Northwestern Mut. L. Ins. Co., 94 Fed. 262, 36 C. C. A. 233.

See 35 Cent. Dig. tit. "Mortgages," § 1792.

54. Parker *v.* Rawle, 148 Pa. St. 208, 23 Atl. 1041.

55. Lehman *v.* Collins, 69 Ala. 127. But see Lehman *v.* Moore, 93 Ala. 186, 9 So. 590.

In California, where a statute (Civ. Code, § 1489) provides that a tender may be made at the mortgagee's residence or place of business if the same can be found, and if not, at any place within the state, the absence of the mortgagee from the state during the time for redemption does not excuse a failure to make a tender. Swain *v.* Jacks, 125 Cal. 215, 57 Pac. 989.

56. Baker *v.* Burdeshaw, 132 Ala. 166, 31 So. 497; La France *v.* Krayer, 42 Iowa 143.

57. Munro *v.* Barton, 95 Me. 262, 49 Atl. 1069; Meaher *v.* Howes, (Me. 1887) 10 Atl. 460; Dinsmore *v.* Savage, 68 Me. 191; Roby *v.* Skinner, 34 Me. 270; Aust *v.* Rosenbaum, 74 Miss. 893, 21 So. 555.

58. Moore *v.* Smith, 95 Mich. 71, 54 N. W. 701; Holland *v.* Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

59. Collinson *v.* Jeffery, [1896] 1 Ch. 644, 65 L. J. Ch. 375, 74 L. T. Rep. N. S. 78, 44 Wkly. Rep. 311.

60. Turner *v.* Watkins, 31 Ark. 429; Manning *v.* Burges, 1 Ch. Cas. 29, 22 Eng. Reprint 678; Cliff *v.* Wadsworth, 7 Jur. 1008, 2 Y. & Coll. 598, 21 Eng. Ch. 598, 63 Eng. Reprint 268; Garforth *v.* Bradley, 2 Ves. 675, 30 Eng. Reprint 430.

61. Cunningham *v.* Hawkins, 24 Cal. 403, 85 Am. Dec. 73.

62. Cobbey *v.* Knapp, 23 Nebr. 579, 37 N. W. 485.

63. Scobee *v.* Jones, 1 Dana (Ky.) 13; Schroeder *v.* Lahrman, 28 Minn. 75, 9 N. W. 173.

64. See the statutes of the different states. And see Harden *v.* Collins, 138 Ala. 399, 35 So. 357, 100 Am. St. Rep. 42; Burke *v.* Brewer, 133 Ala. 389, 32 So. 602; Leet *v.* Armbruster, 143 Cal. 663, 77 Pac. 653; Hershey *v.* Dennis, 53 Cal. 77. But see Smith *v.* Anders, 21 Ala. 782, decided prior to present statute.

65. **Redemption bond.**— Under Mo. Rev. St. (1899) §§ 4343, 4344, providing that where land is sold by a trustee in a trust deed, and purchased by the beneficiary, the grantor may have the privilege of redeeming at any time within a year by giving a bond securing the payment of the interest on the debt, and the payment of all damages and waste occasioned or permitted, the act of a beneficiary in taking possession immediately after the sale, and receiving the rents of the land, does not defeat or render nugatory a redemption bond. Reiger *v.* Faber, 116 Mo. App. 123, 92 S. W. 183.

66. Hall *v.* Way, 47 Conn. 467; Kingsbury *v.* Buckner, 70 Ill. 514; Sibley *v.* Rider, 54 Me. 463. See also Lounsbury *v.* Norton, 59 Conn. 170, 22 Atl. 153.

To whom application made.— Where a vendee of lands from one who bought them at a sale under a power in a mortgage receives a conveyance directly from the mortgagor, but not from his vendor, the record of his deed is not constructive notice to judgment creditors of the vendee's title or claim, so

the case of a redemption after sale on foreclosure, the provisions of the statute granting the right and regulating the manner of its exercise must be strictly pursued.[67] Whether a transaction of the latter kind will amount to a redemption or to a purchase and assignment of the certificate of sale will depend on the purpose of the party making the payment and on his subsequent attitude with reference to the property, as purchaser, or redemptioner, when rights of other parties are concerned.[68]

2. Notice of Intention to Redeem. Where the statute directs the filing or service of notice of an intention to redeem from a foreclosure sale, such notice is essential to a valid redemption,[69] although the party to whom it is to be given may waive any defect in the notice, and will be held to have done so where he accepts and retains the money.[70]

3. Establishing Right to Redeem. The statutes ordinarily require a mortgagor or purchaser or junior mortgagee coming in to redeem to produce and exhibit to the officer certified copies of the documents showing his title or right to redeem,[71] together with any assignments necessary to establish his claim,[72] and sometimes

as to necessitate their making the application to redeem to him. Lehman *v.* Collins, 69 Ala. 127.

67. Wilcoxson *v.* Miller, 49 Cal. 193.

In Iowa the statute (Code, § 3115), providing that if a redeeming creditor is unwilling to hold the property and credit defendant with the full amount of his lien, he must enter on the sale book the amount he is willing to credit on his claim, does not make it necessary to make any entry on such book, but a failure to do so will give defendant credit for the full amount of such lien. Stephens *v.* Mitchell, 103 Iowa 65, 72 N. W. 434; West *v.* Fitzgerald, 72 Iowa 306, 33 N. W. 688.

Affidavit of amount due.— Where a junior mortgagee, wishing to redeem, fails to obey the statute requiring him to furnish the sheriff with an affidavit showing the amount then actually due on his lien, it will invalidate the attempted redemption. Tinkcom *v.* Lewis, 21 Minn. 132. See also Augur *v.* Winslow, Clarke (N. Y.) 258.

Redemption in federal court.— A judgment creditor may redeem premises from a sale under a judgment or decree of a United States court by suing out execution upon his judgment in the ordinary manner, placing his execution in the hands of the proper officer to execute, and paying the money needed to redeem into the hands of the clerk of the federal court together with the latter's commissions for receiving and paying out the money. Connecticut Mut. L. Ins. Co. *v.* Crawford, 21 Fed. 281.

68. Shroeder *v.* Bauer, 140 Ill. 135, 29 N. E. 560; Lloyd *v.* Karnes, 45 Ill. 62; Boynton *v.* Pierce, 49 Ill. App. 497 [*affirmed* in 151 Ill. 197, 37 N. E. 1024]; Shroeder *v.* Bauer, 41 Ill. App. 484 [*affirmed* in 140 Ill. 135, 29 N. E. 560]; Gilbert *v.* Husman, 76 Iowa 241, 41 N. W. 3; Lamb *v.* West, 75 Iowa 399, 39 N. W. 666; Wright *v.* Patterson, 45 Mich. 261, 7 N. W. 820.

69. See cases cited *infra*, this note.

If the statute directs the giving of notice to the foreclosure purchaser only, it need not be given to one to whom he has sold his certificate of purchase. Baggot *v.* Turner, 21 Wash. 339, 58 Pac. 212.

Notice to beneficiary in deed of trust.— It is sufficient if the notice is given to the beneficiary named in the trust deed, who purchased the property, instead of to the trustee who made the sale. Union Cent. L. Ins. Co. *v.* Rogers, 155 Mo. 307, 55 S. W. 1019.

Where a junior mortgagee gives the notice and then assigns his mortgage, the assignee may redeem under the notice. Bovey de Laittre Lumber Co. *v.* Tucker, 48 Minn. 223, 50 N. W. 1038.

Filing notice.— Where the statute directs the notice to be "filed" in the office of the register of deeds, it is sufficient if it is left in his office and is by him recorded and indexed. Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373.

Agreement to complete redemption included.— The notice given by defendant in a foreclosure suit of his election to redeem by paying plaintiff's claim, to be ascertained by a reference in case such an election is made, should include an agreement to complete the redemption. Kendall *v.* Treadwell, 5 Abb. Pr. (N. Y.) 16.

Giving of approved security as obviating necessity for notice see Sheridan *v.* Nation, 159 Mo. 27, 59 S. W. 972.

70. Todd *v.* Johnson, 50 Minn. 310, 52 N. W. 864. And see *infra*, XXII, F, 7.

71. See the statutes of the different states. And see Sardeson *v.* Menage, 41 Minn. 314, 43 N. W. 66; Tinkcom *v.* Lewis, 21 Minn. 132; Nopson *v.* Horton, 20 Minn. 268.

Evidence of compliance.— Where the duly recorded certificates of redemption issued by the sheriff to redemptioners recite that all the proof necessary to entitle them to redeem was furnished, and the sheriff, after showing diligent search and the loss or destruction of many papers, testifies that he was satisfied that a proper showing of the right to redeem was made, and he is corroborated in this by the attorney for the redemptioners, the evidence, after the lapse of several years, and as against a prior encumbrancer who was guilty of laches, shows a sufficient compliance with the formalities prescribed by statute for redemption. MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281.

72. Wilson *v.* Hayes, 40 Minn. 531, 42

to file such documents in the office of the register of deeds.[73] In the case of redemption by a judgment creditor, he is to exhibit an execution on his judgment, or a statement showing its date and amount, according to the statutes.[74]

4. PAYMENT OF REDEMPTION MONEY. To effect an actual redemption, there must be an actual payment of the money[75] to the person entitled to receive it, the mortgagee or purchaser, or someone duly authorized to receive it on his behalf,[76] or, in case of joint mortgagees or purchasers, to one of them,[77] or, where the statute so directs, to the sheriff or other officer designated by law for that purpose.[78] A public officer in these circumstances has no right to receive anything but money for the purpose of a redemption,[79] although there are some cases in which a check on a solvent bank has been held equivalent to cash, provided it is duly honored on presentation.[80]

5. ACCEPTANCE OF REDEMPTION MONEY. The acceptance of money offered for redemption is an admission of the right of the person tendering it to redeem,[81] and effects a valid redemption even though such person was not in fact entitled to redeem.[82] But the deposit of the money with the proper public officer, by one having no right of redemption, will not have this effect, but will only vest him with the rights of the foreclosure purchaser.[83] If the person entitled to the

N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

73. Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

74. See the statutes of the different states. And see Morava *v.* Bonner, 205 Ill. 321, 68 N. E. 707; Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68; Connecticut Mut. L. Ins. Co. *v.* Crawford, 21 Fed. 281.

75. Schroeder *v.* Lahrman, 28 Minn. 75, 9 N. W. 173.

76. See Sweet *v.* Tucker, 43 Vt. 355.

Payment after assignment of certificate of sale may be made to the original purchaser if the redemptioner had no notice or knowledge of the assignment. O'Brien *v.* Moffitt, 133 Ind. 660, 33 N. E. 616, 36 Am. St. Rep. 566.

Bank as agent.— Where mortgage money was ordered to be paid into an agency of a bank, but before the day appointed the agency was closed, it was held, on a motion to substitute another bank, that a new day for payment must be fixed and the order served. King *v.* Connor, 1 Ch. Chamb. (U. C.) 274.

Agent without authority.— On a motion to make a foreclosure decree absolute, it is not necessary that the person attending at the time and place appointed for payment of the mortgage money should have held proper authority from the mortgagee to receive the money if no one appeared to make the payment. Cox *v.* Watson, 7 Ch. D. 196, 47 L. J. Ch. 263; Lechmere *v.* Clamp, 31 Beav. 578, 9 Jur. N. S. 482, 32 L. J. Ch. 276, 7 L. T. Rep. N. S. 411, 11 Wkly. Rep. 83, 54 Eng. Reprint 1263; Hart *v.* Hawthorne, 42 L. T. Rep. N. S. 79; London Monetary Advance Co. *v.* Bean, 18 L. T. Rep. N. S. 52, 16 Wkly. Rep. 782; Macrae *v.* Evans, 24 Wkly. Rep. 55.

77. Donnelly *v.* Simonton, 7 Minn. 167.

78. See the statutes of the different states. And see Woodbury *v.* Lewis, Walk. (Mich.) 256; Sharvey *v.* Rust, 50 Minn. 97, 52 N. W. 277; Connecticut Mut. L. Ins. Co. *v.* Crawford, 21 Fed. 281.

Deputy sheriff.— Where a statute requires the redemption money to be paid to the sheriff who made the foreclosure sale, it may properly be paid to a deputy sheriff in charge of the sheriff's office during the latter's absence. Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373; Williams *v.* Lash, 8 Minn. 496.

Sheriff not the agent of the party.— A sheriff receiving money for redemption acts as an officer of the court and not as an agent of the party, and it is the business of the person redeeming to see that he deposits the proper amount. Horton *v.* Maffitt, 14 Minn. 289, 100 Am. Dec. 222.

79. Woodbury *v.* Lewis, Walk. (Mich.) 256. See also Boyd *v.* Olvey, 82 Ind. 294; Smalley *v.* Hickok, 12 Vt. 153. And *compare* Nopson *v.* Horton, 20 Minn. 268, holding that the acceptance of payment by the sheriff amounts to a waiver of any objection to the character of the money paid.

80. Hooker *v.* Burr, 137 Cal. 663, 70 Pac. 778, 99 Am. St. Rep. 17; Carter *v.* Lewis, 27 Mich. 241; Sardeson *v.* Menage, 41 Minn. 314, 43 N. W. 66. *Contra*, Woodbury *v.* Lewis, Walk. (Mich.) 256.

81. San Jose Safe-Deposit Bank *v.* Madera Bank, 121 Cal. 539, 54 Pac. 83; Stoddard *v.* Forbes, 13 Iowa 296.

Consent unnecessary.— A person entitled to redeem has an absolute right to deposit the proper redemption money with the officer who made the sale, and when he has done so the redemption is effected, provided such deposit is made within the time allowed by statute, and neither consent nor acceptance of the money by any interested party is necessary to the redemption. Traeger *v.* Chicago Mut. Bldg., etc., Assoc., 63 Ill. App. 286 [*affirmed* in 192 Ill. 166, 61 N. E. 424].

82. Clingman *v.* Hopkie, 78 Ill. 152; Pence *v.* Armstrong, 95 Ind. 191.

83. Abadie *v.* Lobero, 36 Cal. 390; Hurn *v.* Hill, 70 Iowa 38, 29 N. W. 796. But see Meyer *v.* Mintonye, 106 Ill. 414.

money accepts it under a mistake of facts as to the right of the person tendering it and returns it immediately on discovering the mistake, this will not estop him from denying the right of such person to redeem.[84]

6. Certificate of Redemption. A redemption effected by due compliance with all the requirements of the law will not be invalidated by mistakes or irregularities in the certificate of redemption issued by the sheriff,[85] or by failure to record the certificate if that is required by statute.[86] Nor is the certificate so far conclusive as to estop the redemptioner from showing his compliance with the law in all respects, although the certificate recites a different state of facts.[87]

7. Defects and Objections. Presumptions will be indulged in favor of the regularity and validity of a redemption,[88] and where the person entitled to the money accepts and retains it, he will be held to have waived any defects or irregularities.[89] Nor can any objection to the redemption be made by a third person whose own right of redemption has been lost or who does not attempt to redeem himself.[90] And where the redemptioner transfers his rights under the redemption, he is estopped to question its validity.[91]

G. Accounting by Mortgagee — 1. Demand For Account. A mortgagee in possession is bound to render an account to a person entitled to redeem and desiring to do so, showing the balance which he claims to be due to him; and in several of the states a demand for such an account is a statutory prerequisite to an action for redemption, the rule being that no bill for redemption will lie until an account has been properly demanded and unreasonably refused, or a false account rendered, but that on failure to comply with the demand a bill for redemption may be maintained without a previous tender and the redemptioner may recover his costs.[92] Such a demand may be made by other persons than the mortgagor, if entitled to redeem.[93]

84. Smith *v.* Jackson, 153 Ill. 399, 39 N. E. 130; Byer *v.* Healy, 84 Iowa 1, 50 N. W. 70.

85. Pollard *v.* Harlow, 138 Cal. 390, 71 Pac. 454, 648; Todd *v.* Johnson, 50 Minn. 310, 52 N. W. 864; Hoppenstedt *v.* Fuller, 71 Fed. 99, 17 C. C. A. 623.

86. Morava *v.* Bonner, 205 Ill. 321, 68 N. E. 707.

87. Paige *v.* Smith, 5 Fed. 340, 2 McCrary 457.

88. Morava *v.* Bonner, 205 Ill. 321, 68 N. E. 707.

89. White *v.* Costigan, 134 Cal. 33, 66 Pac. 78; Kofoed *v.* Gordon, 122 Cal. 314, 54 Pac. 1115; Clark *v.* Butts, 73 Minn. 361, 76 N. W. 199; Todd *v.* Johnson, 50 Minn. 310, 52 N. W. 864; McDonald *v.* Beatty, 10 N. D. 511, 88 N. W. 281; MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281.

90. San Jose Safe-Deposit Bank *v.* Madera Bank, 121 Cal. 539, 54 Pac. 83; Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281; Hoppenstedt *v.* Fuller, 71 Fed. 99, 17 C. C. A. 623.

91. San Jose Safe-Deposit Bank *v.* Madera Bank, 121 Cal. 539, 54 Pac. 83.

92. See the statutes of the different states. And see Roby *v.* Skinner, 34 Me. 270; Pease *v.* Benson, 28 Me. 336; Eastman *v.* Thayer, 60 N. H. 408; Wendell *v.* New Hampshire Bank, 9 N. H. 404; Morrison *v.* Nevins, 5 Grant Ch. (U. C.) 577.

Sufficiency of demand.— A demand for an account must be so made, in respect to time and place, as to give the mortgagee a reasonable and proper opportunity to make up and render his account. Wallace *v.* Stevens, 66 Me. 190; Roby *v.* Skinner, 34 Me. 270; Putnam *v.* Putnam, 13 Pick. (Mass.) 129; Fay *v.* Valentine, 2 Pick. (Mass.) 546; Willard *v.* Fiske, 2 Pick. (Mass.) 540. But if the demand is otherwise proper and sufficient it is not vitiated by superadding other demands and proposals which the mortgagee is not bound to notice. Allen *v.* Clark, 17 Pick. (Mass.) 47.

Parties to demand.— The demand for an account must be made upon the party who has the legal title of record to the mortgage. Stone *v.* Locke, 46 Me. 445. Where a bill to redeem is brought by several complainants, claiming to redeem two several mortgages, a demand by one of the complainants, made long before the title of the others accrued, will not inure to their benefit. Wallace *v.* Stevens, 64 Me. 225.

Service of demand.— The redemptioner may cause the demand to be served on the mortgagee by a proper officer (Farwell *v.* Sturdivant, 37 Me. 308), or it may be served by leaving it at the mortgagee's residence (Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687).

93. A demand for an account may be made by a junior mortgagee (Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Hall *v.* Cushman, 14 N. H. 171), by the purchaser at a sale on foreclosure of the junior mortgage (Lafayette County *v.* Neely, 21 Fed. 738), by a judgment creditor of the mortgagor (Anderson *v.* Lanterman, 27 Ohio

2. SUFFICIENCY OF ACCOUNT RENDERED. The mortgagee's account must be true and correct, without including any claims to which he is not legally entitled,[94] and must set forth the items with such particularity that the mortgagor may see in detail the sums which he is called upon to pay.[95] But it is not vitiated by an obvious arithmetical error in computing the total.[96]

3. TAKING AND STATING ACCOUNT. Where a judicial ascertainment of the state of accounts between the parties becomes necessary, in an action for redemption, the proper practice is for the court first to declare, by interlocutory decree, the rights of the parties and the rule to be adopted in stating the account, and then refer the cause to a master in chancery or referee.[97] The master must have all the necessary parties before him,[98] and the scope of his inquiry cannot extend beyond the pleadings in the case or the order or decree under which he is appointed.[99] But subject to these limitations, he is to ascertain and report the amount justly due on the mortgage,[1] and any incidental allowances, charges, or deductions,[2] basing his findings on such competent evidence as may be produced before him.[3] His decision as to the amount due will not be reviewed by the court in the

St. 104), or by a surety responsible for the payment of the mortgage debt (Teeter *v.* St. John, 10 Grant Ch. (U. C.) 85). But see White *v.* Parnther, 1 Knapp 179, 12 Eng. Reprint 288, holding that only the mortgagor or his heirs can sue the mortgagee for an account and redemption, unless it can be shown that there is collusion between them and the mortgagee.

94. Stone *v.* Locke, 46 Me. 445; Cushing *v.* Ayer, 25 Me. 383; Currier *v.* Webster, 45 N. H. 226.

95. Allen *v.* Clark, 17 Pick. (Mass.) 47; Supreme Ct. I. O. of F. *v.* Pegg, 19 Ont. Pr. 254.

Mode of keeping account.— A mortgagee of a railroad in possession under a lease reserving a rent of twenty per cent of the gross receipts, to be applied on taxes, certain liens, and the mortgage debt, is not precluded from enforcing its mortgage because of failure to keep an account strictly as the law requires, where one was kept which formed a substantial basis for an accounting, and the lessor, although complaining of the accounts rendered from time to time as not what it was entitled to, made no further efforts to get details while they were current and accessible. Spring Brook R. Co. *v.* Lehigh Coal, etc., Co., 181 Pa. St. 294, 37 Atl. 525.

Right of mortgagor to question account.— Where the mortgagee at the end of each year furnishes to the mortgagor a statement of the accounts between them, the latter is not precluded, by failure to object, from calling in question the correctness of the statements; and so long as the mortgagor's right of redemption is not barred, no statute of limitations will run against his right to open up the annual statements. Trimble *v.* McCormick, 15 S. W. 358, 12 Ky. L. Rep. 857.

96. Currier *v.* Webster, 45 N. H. 226.

97. Mosier *v.* Norton, 83 Ill. 519.

In Pennsylvania the mortgagor's equitable right of redemption may be enforced in an action of ejectment which, under the system of jurisprudence there prevailing, is an equitable action, and may be employed as a substitute for a bill to redeem. "In such cases it is the duty of the jury, under the direction of the judge sitting as a chancellor, to ascertain how much the mortgagee in possession has realized from the rents, issues, and profits. If they find he has received, or in the exercise of reasonable diligence should have realized enough to pay the sum secured, a general verdict for plaintiffs should be rendered; if not, a conditional or special verdict should be found, in such form that, upon payment of the residue, the mortgagor may, without unnecessary delay, obtain possession of the premises." Mellon *v.* Lemmon, 111 Pa. St. 56, 65, 2 Atl. 56.

Sufficiency of prayer for relief to justify inquiry as to state of accounts between the parties see McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548; Cree *v.* Lord, 25 Vt. 498.

98. Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222 (an equitable assignee of the mortgage is an indispensable party); Hunt *v.* Rooney, 77 Wis. 258, 45 N. W. 1084 (a surety who has paid the mortgage note is a necessary party).

99. Rowland *v.* Burwell, 12 Ont. Pr. 607; McDougall *v.* Lindsay Paper Mill Co., 10 Ont. Pr. 247 (the master has no power to adjudicate on the validity of the instrument in question as a mortgage); Wiley *v.* Ledyard, 10 Ont. Pr. 182 (no defense can be raised in the master's office which might result in showing that the court had made a nugatory order of reference); Boyd *v.* Wilson, 1 Ch. Chamb. (U. C.) 258.

1. Sterling *v.* Riley, 9 Grant Ch. (U. C.) 343; Pollock *v.* Perry, 5 Grant Ch. (U. C.) 591; Penn *v.* Lockwood, 1 Grant Ch. (U. C.) 547.

2. Quimby *v.* Cook, 10 Allen (Mass.) 32; Markle *v.* Ross, 13 Ont. Pr. 135.

3. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108.

Where a mortgagee's account was made up from memory after the lapse of several years, the master is at liberty to disregard it and fix his liability as it is ascertained from other evidence. Hall *v.* Westcott, 17 R. I. 504, 23 Atl. 25.

In Canada, when the mortgagee files his

absence of proper exceptions,[4] and if approved by the court will not be subject to collateral impeachment.[5]

4. Charges Against Mortgagee — a. In General. The mortgagee must be charged in his account with any deduction resulting from a want or failure of consideration for the mortgage,[6] and with any partial payments on the mortgage debt or anything equivalent to such payments,[7] including whatever he may have realized out of other or collateral securities pledged for the same debt,[8] and the proceeds of any portion of the mortgaged premises sold and conveyed by him,[9] and also with any damages resulting from his unlawful attempt to get or hold the possession or his improper resistance to redemption.[10]

affidavit stating the amount which he claims and that it is justly due, this is *prima facie* proof of the amount, and if the mortgagor seeks to reduce it he must assume the burden of proof. Court *v.* Holland, 8 Ont. Pr. 213; Elliott *v.* Hunter, 24 Grant Ch. (U. C.) 430; Hancock *v.* Maulson, 10 Grant Ch. (U. C.) 483; Warren *v.* Taylor, 9 Grant Ch. (U. C.) 59.

4. Williams *v.* Norton, 139 Ala. 402, 36 So. 11; Bowers *v.* Strudwick, 60 N. C. 612; Gordon *v.* Gordon, 12 Ont. 593.

5. Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151.

6. Brewer *v.* Hyndman, 18 N. H. 9. But *compare* Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499, holding that, where the mortgagee in a purchase-money mortgage agreed to make deductions in the mortgage debt for any defects in the title, no deductions should be made for defects which existed at that time but which were cured before suit to redeem was brought.

7. Barron *v.* Paulling, 38 Ala. 292 (mortgagee chargeable with amount of a judgment recovered by him against an assignee of the equity of redemption for cutting timber on the premises); La Crosse Nat. Bank *v.* Thompson, 37 Minn. 126, 33 N. W. 907 (distributive share of mortgagee's estate coming to mortgagor as one of his heirs; but no deduction made where estate has not been settled nor distribution ordered); Waring *v.* O'Neill, 15 Hun (N. Y.) 105.

8. *Alabama.*— Lyon *v.* Dees, 101 Ala. 700, 14 So. 564; Conner *v.* Smith, 88 Ala. 300, 7 So. 150.

Arkansas.— Dailey *v.* Abbott, 40 Ark. 275, holding that on a bill to redeem from a mortgage sale, the mortgagee, and not the purchaser, is chargeable with the excess of the proceeds of sale over the mortgage debt and costs.

Maine.— Stone *v.* Bartlett, 46 Me. 438.

Massachusetts.— Dooley *v.* Potter, 140 Mass. 49, 2 N. E. 935; White *v.* Brown, 2 Cush. 412.

England.— See Cocks *v.* Gray, 1 Giffard 77, 3 Jur. 1115, 26 L. J. Ch. 607, 5 Wkly. Rep. 749, 65 Eng. Reprint 831.

See 35 Cent. Dig. tit. "Mortgages," § 1776.

9. *California.*— Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342.

Connecticut.— See Kellogg *v.* Rockwell, 19 Conn. 446.

Illinois.— Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222.

Maine.— Hall *v.* Gardner, 71 Me. 233.

Massachusetts.— Crossman *v.* Card, 143 Mass. 152, 9 N. E. 514.

Michigan.— Clark *v.* Landon, 90 Mich. 83, 51 N. W. 357.

New Jersey.— Van Orden *v.* Budd, 33 N. J. Eq. 564 [*affirming* 33 N. J. Eq. 143].

Oregon.— Campbell *v.* McKinney, 22 Oreg. 459, 30 Pac. 231.

Canada.— Giles *v.* Hamilton Provident, etc., Soc., 10 Manitoba 567.

See 35 Cent. Dig. tit. "Mortgages," § 1776.

Amount chargeable to mortgagee.— Although the mortgagee's sale of the property was partly for cash and partly on credit, he must be charged with the whole price, not the cash consideration only. Van Orden *v.* Budd, 33 N. J. Eq. 564; Campbell *v.* McKinney, 22 Oreg. 459, 30 Pac. 231. And if he accepts in payment an article of fluctuating value, he is chargeable with the highest market value of the property sold. Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342. If the sale was for money, he must account for all he received, although he may be able to show as a fact that the price was greater than the market value. Budd *v.* Van Orden, 33 N. J. Eq. 143.

Sum awarded in condemnation proceedings. — Where part of the mortgaged premises was taken by a railway and the mortgagee was offered £100 as compensation, which he refused, and, the matter having been referred to arbitration, only £30 was awarded, it was held on a bill to redeem that he was chargeable only with the sum awarded. Gunn *v.* McDonald, 11 Grant Ch. (U. C.) 140.

Lots released on sale.— Where the mortgage bound the mortgagee to release any of the lots covered on payment to him of twenty dollars, the mortgagor is not entitled to credit, on an accounting, for that amount for each lot released at his request, unless it is shown that the mortgagee actually received the money. Somers *v.* Cresse, (N. J. Ch. 1888) 13 Atl. 23.

10. Powell *v.* Williams, 14 Ala. 476, 48 Am. Dec. 105; Smith *v.* Pilkington, 1 De G. F. & J. 120, 29 L. J. Ch. 227, 62 Eng. Ch. 93, 45 Eng. Reprint 304. And see Peterborough Real Estate Inv. Co. *v.* Ireton, 5 Ont. 47.

The mortgagee is not chargeable with the costs incurred by the mortgagor in an unsuccessful attempt to defend the possession of the land or resist the collection of rents, and those items should not be allowed. Barron *v.* Paulling, 38 Ala. 292.

b. Damages For Waste or Other Injury. The mortgagee is chargeable for waste committed by him on the premises while in his possession,[11] including the permanent depreciation in the property caused by the failure to make necessary or proper repairs,[12] or resulting from the reckless or improvident management of the property by himself or his tenants,[13] and also for the value of timber cut or taken by him;[14] but he is not chargeable with such deterioration of the property as results naturally from time and the elements and the proper use of the premises.[15]

c. Liability For Rents and Profits — (i) *In General.* On redemption from a mortgage under which the mortgagee has acquired and retained the possession, he must account and give credit for the rents and profits of the premises during the period of his occupation,[16] and it is immaterial whether he holds under a

11. American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630; Murdock *v.* Ford, 17 Ind. 52; Jones *v.* Smith, 79 Me. 446, 10 Atl. 254; Wann *v.* Coe, 31 Fed. 369. And see Coffin *v.* Batesville City R. Co., 63 Ark. 602, 40 S. W. 88.

12. Bourgeois *v.* Gapen, 58 Nebr. 364, 78 N. W. 639; Chapman *v.* Cooney, 25 R. I. 657, 57 Atl. 928; Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63.

13. Kellogg *v.* Rockwell, 19 Conn. 446; Taylor *v.* Mostyn, 33 Ch. D. 226, 55 L. J. Ch. 893, 55 L. T. Rep. N. S. 651.

14. American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630; Perdue *v.* Brooks, 85 Ala. 459, 5 So. 126; Gore *v.* Jenness, 19 Me. 53; Steinhoff *v.* Brown, 11 Grant Ch. (U. C.) 114. And see Harrill *v.* Stapleton, 55 Ark. 1, 16 S. W. 474.

15. Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

16. *Alabama.*— Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; Parmer *v.* Parmer, 74 Ala. 285; Denby *v.* Mellgrew, 58 Ala. 147; Carlin *v.* Jones, 55 Ala. 624; Davis *v.* Lassiter, 20 Ala. 561. See also Sadler *v.* Jefferson, 143 Ala. 669, 39 So. 380.

Arkansas.— Harrill *v.* Stapleton, 55 Ark. 1, 16 S. W. 474.

California.— Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

Connecticut.—Kellogg *v.* Rockwell, 19 Conn. 446; Holabird *v.* Burr, 17 Conn. 556.

Florida.— Pasco *v.* Gamble, 15 Fla. 562.

Illinois.— Roberts *v.* Fleming, 53 Ill. 196; Strang *v.* Allen, 44 Ill. 428; Moore *v.* Titman, 44 Ill. 367; McConnel *v.* Holobush, 11 Ill. 61; Connelly *v.* Connelly, 36 Ill. App. 210; Rooney *v.* Crary, 11 Ill. App. 213.

Indiana.— Jackson *v.* Weaver, 138 Ind. 539, 38 N. E. 166; Gaskell *v.* Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; Hannon *v.* Hilliard, 83 Ind. 362; Troost *v.* Davis, 31 Ind. 34; Arnold *v.* Cord, 16 Ind. 177; Taylor *v.* Conner, 7 Ind. 115; McCormick *v.* Digby, 8 Blackf. 99; Johnson *v.* Miller, Wils. 416.

Iowa.— Barrett *v.* Blackmar, 47 Iowa 565.

Kansas.— Cook *v.* Ottawa University, 14 Kan. 548.

Kentucky.— Tharp *v.* Feltz, 6 B. Mon. 6; Breckenridge *v.* Brooks, 2 A. K. Marsh. 335, 12 Am. Dec. 401; Reed *v.* Lansdale, Hard. 6; Frey *v.* Campbell, 3 S. W. 368, 8 Ky. L. Rep. 772.

Maine.— Wilcox *v.* Cheviott, 92 Me. 239, 42 Atl. 403.

Massachusetts.— Aldrich *v.* Aldrich, 143 Mass. 45, 8 N. E. 870; Hilliard *v.* Allen, 4 Cush. 532; White *v.* Brown, 2 Cush. 412; Thayer *v.* Richards, 19 Pick. 398; Gibson *v.* Crehore, 5 Pick. 146; Erskine *v.* Townsend, 2 Mass. 493, 3 Am. Dec. 71.

Missouri.— Anthony *v.* Rogers, 20 Mo. 281.

Nebraska.— Comstock *v.* Michael, 17 Nebr. 288, 22 N. W. 549.

New Hampshire.— Cilley *v.* Huse, 40 N. H. 358.

New Jersey.— Mallalieu *v.* Wickham, 42 N. J. Eq. 297, 10 Atl. 880; Krueger *v.* Ferry, 41 N. J. Eq. 432, 5 Atl. 452; Schatt *v.* Grosch, 31 N. J. Eq. 199.

New York.— Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 73 N. Y. 82; Chapman *v.* Porter, 69 N. Y. 276; Hubbell *v.* Moulson, 53 N. Y. 225, 13 Am. Rep. 519; Walsh *v.* Rutgers F. Ins. Co., 13 Abb. Pr. 33; Bell *v.* New York, 10 Paige 49; Ruckman *v.* Astor, 9 Paige 517; Vroom *v.* Ditmas, 4 Paige 526.

Ohio.— McArthur *v.* Franklin, 16 Ohio St. 193; O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203.

Oregon.— Swegle *v.* Belle, 20 Oreg. 323, 25 Pac. 633; Adkins *v.* Lewis, 5 Oreg. 292.

Pennsylvania.— Myers' Appeal, 42 Pa. St. 518; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; Givens *v.* McCalmont, 4 Watts 460.

Vermont.— Clark *v.* Paquette, 67 Vt. 681, 32 Atl. 812; Seaver *v.* Durant, 39 Vt. 103; Chapman *v.* Smith, 9 Vt. 153.

United States.—Matthews *v.* Memphis, etc., R. Co., 108 U. S. 368, 2 S. Ct. 780, 27 L. ed. 756; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243; Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143.

England.— Farrant *v.* Lovel, 3 Atk. 723, 26 Eng. Reprint 1214; Robinson *v.* Cumming, 2 Atk. 409, 26 Eng. Reprint 646; Oxenham *v.* Ellis, 18 Beav. 593, 52 Eng. Reprint 233; Trulock *v.* Robey, 15 L. J. Ch. 343, 15 Sim. 265, 38 Eng. Ch. 265, 60 Eng. Reprint 619; Hinde *v.* Blake, 11 L. J. Ch. 26.

Canada.— Phillips *v.* Prout, 12 Manitoba 143; McIntosh *v.* Ontario Bank, 19 Grant Ch. (U. C.) 155; Penn *v.* Lockwood, 1 Grant Ch. (U. C.) 547.

See 35 Cent. Dig. tit. "Mortgages," §§ 517, 1778.

Redemption by widow.— On a bill to re-

formal mortgage or under a deed absolute in form but intended as a security.[17] But this is a rule of equity and is there recognized as part of the mortgagor's right to redeem. At common law, as the mortgagee is regarded as the owner of the fee, no action will lie to recover rents and profits received by him.[18]

(II) *Character of Possession of Mortgagee.* In respect to charging the mortgagee with the rents and profits, it is immaterial whether he entered by the consent of the mortgagor or recovered possession in ejectment or forcible detainer,[19] or occupies under foreclosure proceedings which were fraudulent, informal, or defective for failure to join the redemptioner as a party;[20] but where the right to redeem is not based on any such fault or defect, but wholly on the statute, the rule does not apply, the mortgagee or purchaser being generally entitled to the rents and profits during the statutory period for redemption.[21] To charge the mortgagee, it is essential that his possession should have been acquired and held under and by virtue of his mortgage, so as to give him the technical character of a "mortgagee in possession."[22] Entirely different rules apply in case he enters and claims to hold under an independent title or right of possession,[23]

deem by the mortgagor's widow, to be let in to her dower, the mortgagee is liable to account to her for the rents and profits received from the date of his entry into possession under the mortgage, and not merely from the date of her demand. Dela *v.* Stanwood, 62 Me. 574. *Compare* Brooks *v.* Hawood, 8 Pick. (Mass.) 497. But see Wait *v.* Savage, (N. J. Ch. 1888) 15 Atl. 225, holding that a mortgagee in possession is entitled to the rents and profits until his claim is paid, as against the widow, who became the wife of the mortgagor after the execution of the mortgage.

Effect of failure to account.— Where the mortgagee has been in possession and fails to account for the rents and profits, his mortgage will be declared satisfied. Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545.

After the approval of his final account by a competent court, a mortgagee cannot be surcharged by the mortgagor for rents and profits, at least where there is no evidence that any were collected, or where it appears that if any had been collected they would have been absorbed by the debts intended to be secured by the mortgage. Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151.

17. *Alabama.*— Richter *v.* Noll, 128 Ala. 198, 30 So. 740; Turner *v.* Wilkinson, 72 Ala. 361.

Illinois.— Clark *v.* Finlon, 90 Ill. 245.

Indiana.— Cross *v.* Hepner, 7 Ind. 359.

Maine.— Rowell *v.* Jewett, 73 Me. 365.

Nebraska.— Morrow *v.* Jones, 41 Nebr. 867, 60 N. W. 369.

England.— Fulthorpe *v.* Foster, 1 Vern. Ch. 476, 23 Eng. Reprint 602.

18. Weeks *v.* Thomas, 21 Me. 465; Portland Bank *v.* Fox, 19 Me. 99; Robinson *v.* Robinson, 1 N. H. 161; Bell *v.* New York, 10 Paige (N. Y.) 49.

19. Berberick *v.* Fritz, 39 Iowa 700; Crooker *v.* Frazier, 52 Me. 405.

20. *Alabama.*— Roulhac *v.* Jones, 78 Ala. 398; Downs *v.* Hopkins, 65 Ala. 508. See also Parmer *v.* Parmer, 74 Ala. 285.

Arkansas.— Stallings *v.* Thomas, 55 Ark. 326, 18 S. W. 184.

Illinois.— Equitable Trust Co. *v.* Fisher, 106 Ill. 189. The status of a mortgagee who holds possession under an informal foreclosure as to liability for rents and profits is not that of a trespasser, but of a mortgagee in possession. Blain *v.* Rivard, 19 Ill. App. 477.

Iowa.— Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293; Bunce *v.* West, 62 Iowa 80, 17 N. W. 179; Barrett *v.* Blackmar, 47 Iowa 565; Ten Eyck *v.* Casad, 15 Iowa 524.

Massachusetts.— Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281.

Mississippi.— National Mut. Bldg., etc., Assoc. *v.* Houston, 81 Miss. 386, 32 So. 911.

New Jersey.— Parker *v.* Child, 25 N. J. Eq. 41.

See 35 Cent. Dig. tit. "Mortgages," § 1778.

21. Cramer *v.* Watson, 73 Ala. 127; Clarke *v.* Cobb, 121 Cal. 595, 54 Pac. 74; Stevens *v.* Hadfield, 178 Ill. 532, 52 N. E. 875; Knipe *v.* Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; Hardy *v.* Herriott, 11 Wash. 460, 39 Pac. 958.

22. *Kansas.*— Henthorn *v.* Security Co., 70 Kan. 808, 79 Pac. 653.

New Jersey.— Davis *v.* Flagg, 44 N. J. Eq. 109, 13 Atl. 257.

Ohio.— Anderson *v.* Lanterman, 27 Ohio St. 104.

England.— Parkinson *v.* Hanbury, L. R. 2 H. L. 1, 36 L. J. Ch. 292, 16 L. T. Rep. N. S. 248, 15 Wkly. Rep. 642.

Canada.— Frost *v.* Hines, 12 Ont. 669.

23. *Indiana.*— Gaskell *v.* Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364.

Iowa.— Gray *v.* Nelson, 77 Iowa 63, 41 N. W. 566; Barnett *v.* Nelsen, 54 Iowa 41, 6 N. W. 49, 37 Am. Rep. 183.

Michigan.— Beecher *v.* Marquette, etc., Rolling Mill Co., 45 Mich. 103, 7 N. W. 695.

Ohio.— Anderson *v.* Lanterman, 27 Ohio St. 104.

Rhode Island.— Hall *v.* Westcott, 17 R. I. 504, 23 Atl. 25.

Compare Barnhart *v.* Edwards, (Cal. 1896) 47 Pac. 251 (holding that a mortgagee who takes an assignment of an existing lease of

or a mere trespasser.[24] Moreover his possession must be actual and not merely constructive,[25] and it must be exclusive of the mortgagor; for if the parties jointly occupy the premises, or if the mortgagee, after taking possession, again relinquishes it to the mortgagor, he is not chargeable with the rents and profits.[26]

(III) *Extent of Liability*—(A) *In General.* A mortgagee who has not been in possession of the premises by himself or a tenant and is not shown to have received any rents is not chargeable with such rents.[27] But otherwise he is chargeable with the rents from the time of his taking possession up to final settlement,[28] unless some statute limits the period of recovery,[29] or unless the neglect or laches of the mortgagor induces the court, for equitable reasons, to restrict the recovery.[30] Where the mortgagee has made valuable improvements on the premises, he is not to be charged with a rent measured by the value of the property as thus improved, but by the value of the property exclusive of the improvements.[31] Nor will he be charged with interest on the rents received by him unless there

the mortgaged premises becomes a mortgagee in possession, and so liable for rents and profits); Penrhyn *v.* Hughes, 5 Ves. Jr. 99, 31 Eng. Reprint 492.

24. Freeman *v.* Campbell, 109 Cal. 360, 42 Pac. 35; Malone *v.* Roy, 107 Cal. 518, 40 Pac. 1040; Bigler *v.* Waller, 14 Wall. (U. S.) 297, 20 L. ed. 891. But see Renshaw *v.* Taylor, 7 Oreg. 315, holding that a mortgagee in possession is estopped from setting up, in answer to a claim for the rents and profits, that his possession was not lawful.

Liability as trespasser.— A person who enters wrongfully upon the possession of the property under an unjust bargain will be treated as a trespasser and dealt with more severely than a mortgagee in possession. Robertson *v.* Norris, 1 Giffard 428, 5 Jur. N. S. 1238, 1 L. T. Rep. N. S. 123, 65 Eng. Reprint 986. He will be liable for all damages resulting from his trespass, and not simply for the profits of the land. Daniel *v.* Coker, 70 Ala. 260.

25. Davis *v.* Flagg, 44 N. J. Eq. 109, 13 Atl. 257; Van Duyne *v.* Shann, 41 N. J. Eq. 311, 7 Atl. 429; Peugh *v.* Davis, 113 U. S. 542, 5 S. Ct. 622, 28 L. ed. 1127.

Acts equivalent to actual possession.— One may acquire the character of a mortgagee in possession not merely by an actual entry, but by taking attornments from the tenants. Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244. And so where he conveys the mortgaged premises by a warranty deed, this will be equivalent to taking possession. White *v.* Maynard, 54 Vt. 575.

26. *Maine.*— Bailey *v.* Myrick, 52 Me. 132.

Maryland.— Young *v.* Omohundro, 69 Md. 424, 16 Atl. 120.

Massachusetts.— Sanford *v.* Pierce, 126 Mass. 146; Merritt *v.* Hosmer, 11 Gray 276, 71 Am. Dec. 713.

New Jersey.— Ayers *v.* Staley, (Ch. 1889) 18 Atl. 1046.

Canada.— Rice *v.* George, 19 Grant Ch. (U. C.) 174; Paul *v.* Johnson, 12 Grant Ch. (U. C.) 474.

Interruption of possession.— Where the mortgagee has held the possession for ten years, without doing anything to indicate an intention to abandon it or restore it to the mortgagor, and the latter has not reëntered nor asserted a right to do so, the mere fact that the mortgagee temporarily omitted actually to occupy the premises during a portion of the ten years will not affect his rights or duties as a "mortgagee in possession." Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613.

27. *Alabama.*— Davenport *v.* Bartlett, 9 Ala. 179.

Maine.— Dinsmore *v.* Savage, 68 Me. 191 (mortgagee not chargeable for use and occupation by a third person holding the possession without right and without his consent); Bailey *v.* Myrick, 52 Me. 132.

Massachusetts.— Taft *v.* Stetson, 117 Mass. 471.

Nebraska.— Bourgeois *v.* Gapen, 58 Nebr. 364, 78 N. W. 639, holding that on a bill to redeem from a mortgage on vacant land which has no rental value, the mortgagor cannot receive credit for use and occupation.

New Jersey.— Demarest *v.* Berry, 16 N. J. Eq. 481.

See 35 Cent. Dig. tit. "Mortgages," § 1779.

28. Chase *v.* Palmer, 25 Me. 341 (mortgagee not accountable for rents and profits anterior to his entering into possession); Morisey *v.* Swinson, 104 N. C. 555, 10 S. E. 754.

Joint occupation.— Where the premises, during a portion of the time to be accounted for, were used and occupied jointly by the mortgagor and mortgagee, such time should be excluded from the computation of rents and profits against the mortgagee. Brainard *v.* Hudson, 103 Ill. 218. But see Murdock *v.* Clarke, 90 Cal. 427, 27 Pac. 275.

29. See the statutes of the different states. And see Keith *v.* McLaughlin, 114 Ala. 60, 21 So. 483; Gelston *v.* Thompson, 29 Md. 595.

30. Russell *v.* Southard, 12 How. (U. S.) 139, 13 L. ed. 927.

Failure to make counter-claim.— The right of the mortgagor to recover the rents is not lost by his failure to make a counter-claim therefor in the foreclosure suit. Freeman *v.* Campbell, 109 Cal. 360, 42 Pac. 35.

31. *Alabama.*— American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

Maine.— Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132.

are special circumstances making it proper so to charge him,[32] although it is the rule to charge interest on the rents where the mortgagee continues to hold the possession after his mortgage debt has been paid in full.[33]

(B) *Mortgagee Personally Retaining Possession.* If the mortgagee personally retains possession of the mortgaged premises, he will be chargeable on his accounting with the reasonable value of the use and occupation thereof, amounting to the fair rental value of the premises for the period.[34]

(C) *Premises Leased to Tenants.* A mortgagee in possession, who leases the premises to tenants, is bound to exercise reasonable care and diligence in their selection and in renting the property on advantageous terms, and his accountability for rents and profits is not limited to what he actually received if it appears that more could have been obtained by the exercise of such care and diligence; but on the other hand he cannot be charged with what the premises might have been made to yield on the most favorable conditions, unless it is shown that he has been guilty of fraud, gross negligence, or wilful mismanagement.[35]

New York.— Moore *v.* Cable, 1 Johns. Ch. 385.

Ohio.— McArthur *v.* Franklin, 16 Ohio St. 193.

South Carolina.— Stoney *v.* Shultz, 1 Hill Eq. 465, 27 Am. Dec. 429.

Vermont.— Howard *v.* Clark, 72 Vt. 429, 48 Atl. 656. See also Merriam *v.* Barton, 14 Vt. 501.

England.— Bright *v.* Campbell, 54 L. J. Ch. 1077, 53 L. T. Rep. N. S. 428.

32. Hogan *v.* Stone, 1 Ala. 496, 35 Am. Dec. 39; Breckenridge *v.* Brooks, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143; National Bank of Australasia *v.* United Hand-In-Hand, etc., Co., 4 App. Cas. 391, 40 L. T. Rep. N. S. 697, 27 Wkly. Rep. 889.

33. Greer *v.* Turner, 36 Ark. 17; Trimleston *v.* Hamill, 1 Ball & B. 377, 12 Rev. Rep. 38; Quarrell *v.* Beckford, 1 Madd. 269, 56 Eng. Reprint 100; Archdeacon *v.* Bowes, McClell. 149, 13 Price 353, 28 Rev. Rep. 685; Lloyd *v.* Jones, 12 Sim. 491, 35 Eng. Ch. 415, 59 Eng. Reprint 1221; Crippen *v.* Ogilvie, 15 Grant Ch. (U. C.) 568.

34. *Alabama.*— American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

District of Columbia.— Peugh *v.* Davis, 2 Mackey 23.

Illinois.— Dyer *v.* Brown, 82 Ill. App. 17.

Indiana.— Johnson *v.* Miller, Wils. 416.

Iowa.— Barnett *v.* Nelson, 54 Iowa 41, 6 N. W. 49, 37 Am. Rep. 183.

Massachusetts.— Wood *v.* Felton, 9 Pick. 171.

New Hampshire.— Clark *v.* Clark, 62 N. H. 267.

New Jersey.— Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Moore *v.* Degraw, 5 N. J. Eq. 346.

South Carolina.— Boyce *v.* Boyce, 6 Rich. Eq. 302.

United States.— Engleman Transp. Co. *v.* Longwell, 48 Fed. 129; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108; Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143.

England.— *In re* McKinley, 7 Ir. Eq. 467; Gregg *v.* Arrett, Sau. & Sc. 674.

Canada.— Bullen *v.* Renwick, 9 Grant Ch. (U. C.) 202; Pipe *v.* Shafer, 1 Ch. Chamb. (U. C.) 251.

See 35 Cent. Dig. tit. "Mortgages," § 518.

Value of crops.— Crops which the mortgagee may have appropriated or destroyed will be considered a part of the rents and profits for which he must account. Stevens *v.* Brown, Walk. (Mich.) 41.

Release of accountability for rents and profits.— When the mortgage debt bears interest, an agreement that the mortgagee shall have the occupation of the premises without being accountable for rents and profits requires some other consideration to support it than mere forbearance to foreclose the mortgage. Anderson *v.* Lanterman, 27 Ohio St. 104.

Character of possession.— Where the mortgagee occupies the premises in some other character or under another claim of title than that of a mortgagee, this rule does not apply. Young *v.* Omohundro, 69 Md. 424, 16 Atl. 120; Sisson *v.* Tate, 114 Mass. 497.

Constructive possession.— This rule does not apply where the mortgagee's possession was constructive only and the premises were actually unoccupied. Peugh *v.* Davis, 113 U. S. 542, 5 S. Ct. 622, 28 L. ed. 1127.

Untenantable property.— A mortgagee of a house, having taken possession of it, will not be charged with an occupation rent for it during a time when it was in so ruinous a state that rent could not have been obtained for it. Marshall *v.* Cave, 3 L. J. Ch. (O. S.) 57.

35. *Alabama.*— Pollard *v.* American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767; American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630; Gresham *v.* Ware, 79 Ala. 192; Barron *v.* Paulling, 38 Ala. 292; Davenport *v.* Bartlett, 9 Ala. 179; Hogan *v.* Stone, 1 Ala. 496, 35 Am. Dec. 39.

California.— Murdock *v.* Clarke, 90 Cal. 427, 27 Pac. 275.

Illinois.— Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Pinneo *v.* Goodspeed, 120 Ill. 524, 12 N. E. 196 [*affirming* 22 Ill. App. 50]; Moshier *v.* Norton, 100 Ill. 63; Clark *v.* Finlon, 90 Ill. 245; Harper *v.* Ely, 70 Ill. 581; McConnel *v.* Holobush, 11 Ill. 61; Stevens *v.* Payne, 42 Ill. App. 202; Rooney

(IV) *APPLICATION TO DEBT.* Rents and profits received by a mortgagee in possession, or chargeable to him by reason of his own occupation of the premises,

v. Crary, 11 Ill. App. 213; Magnusson *v.* Charleson, 9 Ill. App. 194.

Kentucky.— Frey *v.* Campbell, 3 S. W. 368, 8 Ky. L. Rep. 772.

Maine.— Bailey *v.* Myrick, 52 Me. 132.

Massachusetts.— Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382; Donohue *v.* Chase, 139 Mass. 407, 2 N. E. 84; Montague *v.* Boston, etc., R. Co., 124 Mass. 242; Gerrish *v.* Black, 104 Mass. 400; Richardson *v.* Wallis, 5 Allen 78; Strong *v.* Blanchard, 4 Allen 538; Nugent *v.* Riley, 1 Metc. 117, 35 Am. Dec. 355.

Michigan.— Barnard *v.* Jennison, 27 Mich. 230.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62.

Nebraska.— White *v.* Atlas Lumber Co., 49 Nebr. 82, 68 N. W. 359.

New Jersey.— Dawson *v.* Drake, 30 N. J. Eq. 601; Hamburgh Mfg. Co. *v.* Edsall, 12 N. J. Eq. 392; Hill *v.* White, 1 N. J. Eq. 435.

New York.— Walsh *v.* Rutgers F. Ins. Co., 13 Abb. Pr. 33.

Ohio.— O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203.

Pennsylvania.— Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151; Myers' Appeal, 42 Pa. St. 518.

Vermont.— Still *v.* Buzzell, 60 Vt. 478, 12 Atl. 209; Sanders *v.* Wilson, 34 Vt. 318.

United States.— Jewett *v.* Cunard, 13 Fed. Cas. No. 7,310, 3 Woodb. & M. 277.

England.— Noyes *v.* Pollock, 30 Ch. D. 336, 55 L. J. Ch. 54, 53 L. T. Rep. N. S. 430, 33 Wkly. Rep. 787; Chaplin *v.* Young, 33 Beav. 330, 11 L. T. Rep. N. S. 10, 3 New Rep. 600, 55 Eng. Reprint 395; Heales *v.* McMurray, 23 Beav. 401, 53 Eng. Reprint 157; Parkinson *v.* Hanbury, 11 L. T. Rep. N. S. 755, 13 Wkly. Rep. 331; Anonymous, 1 Vern. Ch. 45, 23 Eng. Reprint 298.

Canada.— Merriam *v.* Cronk, 21 Grant Ch. (U. C.) 60; Waddell *v.* McColl, 14 Grant Ch. (U. C.) 211.

See 35 Cent. Dig. tit. "Mortgages," §§ 518, 1779.

What constitutes negligence.— A mortgagee may be surcharged, under this rule, if he leases the premises to a tenant who is notoriously insolvent (Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Miller *v.* Lincoln, 6 Gray (Mass.) 556), or where he lets the property with such restrictions in the lease as necessarily lower the rent (White *v.* City of London Brewery, 42 Ch. D. 237, 58 L. J. Ch. 855, 61 L. T. Rep. N. S. 741, 38 Wkly. Rep. 82). He has no right to remit a part of the rent to the tenant because of an unsuccessful season (Carroll *v.* Tomlinson, 192 Ill. 398, 61 N. E. 484, 82 Am. St. Rep. 344); but he does not incur personal responsibility for a slight reduction in the rent made for the purpose of keeping a good tenant (Chapman *v.* Cooney, 25 R. I. 657, 57 Atl. 928). Where the property is a hotel, the mortgagee is not obliged to allow the keeping of a bar for the sale of liquors, although he could obtain a higher rent by allowing that privilege (Curtiss *v.* Sheldon, 91 Mich. 390, 51 N. W. 1057); nor is he bound to engage in, nor will he be allowed for, speculation and adventure (Hughes *v.* Williams, 12 Ves. Jr. 493, 8 Rev. Rep. 364, 33 Eng. Reprint 187). And if he does in fact exercise care and diligence in making an advantageous lease, he is not to be charged with more than the rent actually received merely because, after the letting, someone offered him a higher rent. Hubbard *v.* Shaw, 12 Allen (Mass.) 120. Want of diligence on the part of a mortgagee in possession cannot be inferred from the fact that the buildings have deteriorated and the land been allowed to run out, where it does not appear that such deterioration was not the result of time and proper use. Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

Mortgagor keeping off tenants.— Where a mortgagee has taken possession of a mill property under his mortgage, and has used reasonable diligence to rent it, but has been prevented by the hostile threats of the mortgagor, whereby the tenant who had been secured was led to abandon his contract, and the mortgagee has been prevented from securing any other tenant by the hostility of the mortgagor, the mortgagee will not be charged with the rents and profits while the mill was idle. La Forest *v.* William L. Blake Co., 100 Me. 218, 60 Atl. 899.

Failure to collect rents.— It is negligence on the part of the mortgagee such as to justify surcharging him, if he fails to collect the rents when he could have done so; and he cannot escape liability by showing that tenants defrauded him. Butts *v.* Broughton, 72 Ala. 294; Froud *v.* Merritt, 99 Iowa 410, 68 N. W. 728; Brandon *v.* Brandon, 10 Wkly. Rep. 287.

Failure to keep accounts.— A mortgagee who keeps no accounts of the rents and profits received by him is properly chargeable with what he may be presumed to have received. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108.

Burden of proof.—The proper mode of taking the account on a bill to redeem does not cast upon the mortgagee the burden of proving that he made the most of the mortgaged premises while in possession. If he dealt with them as his own, he is only chargeable with the rent received, unless proof can be brought, which lies on the opposite party, that he acted fraudulently, or was guilty of wilful default, as by leaving the premises vacant, which would throw upon him the burden of proving that no tenant offered or could be had with reasonable diligence. Metcalf *v.* Campion, 1 Molloy 238.

Estoppel to surcharge.— Where a mort-

must be applied in reduction of the mortgage debt,[36] first to the interest and then on the principal,[37] and no portion thereof can, without the consent of the mortgagor, be applied to any general or unsecured indebtedness existing between the parties,[38] although if there are several debts secured by the same mortgage, or if the same person is the holder of several successive mortgages, he may apply the rents and profits in such a manner upon the different debts as will be most advantageous to himself, in the absence of any specific appropriation by the debtor.[39]

(v) *Annual and Other Rests.* A "rest" is a pause made by an accountant in his entries in order to strike a balance upon which to allow interest;[40] and in taking a mortgagee's account, it is the suspension of entries at a particular time or at periodical intervals, for the purpose of striking a balance between the mortgagee's credits on the one hand, such as interest due him and his expenses for taxes and repairs, and the debits against him for rents and profits received, the rule being that if there is a surplus of rents over and above the credits allowed he is to be charged with interest on such surplus until the next rest, when the same process is repeated.[41] According to the rule of the English courts, the allowance of rests is proper where the amount of the rents is considerable or where there are other circumstances making such a course just and fair,[42] but it is by no means

gagor has assisted the agent of the mortgagee in possession in renting the premises, and has seen and approved the account of rents, without complaining of a want of diligence in renting, he is estopped to claim, on an accounting, that the mortgagee should be charged with more than the rents actually collected. Emil Kiewert Co. *v.* Juneau, 78 Fed. 708, 24 C. C. A. 294.

36. *Arkansas.*— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 903.

Connecticut.— Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244; Mallory *v.* Hitchcock, 29 Conn. 127; Harrison *v.* Wyse, 24 Conn. 1, 63 Am. Dec. 151; Kellogg *v.* Rockwell, 19 Conn. 446.

Illinois.— Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140, 51 N. E. 200; Glos *v.* Roach, 80 Ill. App. 283.

Iowa.— Huston *v.* Stringham, 21 Iowa 36.

Michigan.— Shouler *v.* Bonander, 80 Mich. 531, 45 N. W. 487.

Minnesota.— Longfellow *v.* Fisher, 69 Minn. 307, 72 N. W. 118.

New Jersey.— Denman *v.* Nelson, 31 N. J. Eq. 452.

New York.— Wolcott *v.* Sullivan, 6 Paige 117, holding that where a mortgagee takes a lease of the mortgaged premises, the rent does not necessarily compensate the interest upon the mortgage *pro tanto*.

South Carolina.— Witte *v.* Clarke, 17 S. C. 313.

Virginia.— Clarke *v.* Curtis, 1 Gratt. 289.

See 35 Cent. Dig. tit. "Mortgages," § 520.

37. *Alabama.*— Blum *v.* Mitchell, 59 Ala. 535; Powell *v.* Williams, 14 Ala. 476, 48 Am. Dec. 105.

Illinois.— Moshier *v.* Norton, 100 Ill. 63; McConnel *v.* Holobush, 11 Ill. 61.

Massachusetts.— Reed *v.* Reed, 10 Pick. 398; Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394; Gibson *v.* Crehore, 5 Pick. 146.

Missouri.— Walton *v.* Withington, 9 Mo. 549.

Pennsylvania.— Reitenbaugh *v.* Ludwick, 31 Pa. St. 131.

Vermont.— Gladding *v.* Warner, 36 Vt. 54.

See 35 Cent. Dig. tit. "Mortgages," § 1781.

38. Caldwell *v.* Hall, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64; Demick *v.* Cuddihy, 72 Cal. 110, 12 Pac. 287, 13 Pac. 166; Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6; Montgomery *v.* Donohoe, 5 Ir. Ch. 495. But see Brown *v.* Gaffney, 32 Ill. 251, holding that on a bill filed by a mortgagor to redeem, all advances made by the mortgagee to him, whether embraced in a written contract or not, should be allowed.

Application to debts of deceased mortgagor. — Where the accumulated rents and profits of mortgaged premises are to be applied to the payment of the debts of the deceased mortgagor, the mortgagees are entitled to priority over general creditors, and the eldest mortgagee is first in right. Boyce *v.* Boyce, 6 Rich. Eq. (S. C.) 302.

Where a mortgage conveys several distinct parcels of land, and the mortgagee takes possession and forecloses as to a part only, the rents received before foreclosure must be applied in reduction of the entire debt and not for the relief of the parcel from which derived. Roulhac *v.* Jones, 78 Ala. 398.

39. Borel *v.* Kappeler, 79 Cal. 342, 21 Pac. 841; Proctor *v.* Green, 59 N. H. 350; Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795. And see Murdock *v.* Clarke, 88 Cal. 384, 26 Pac. 601, holding that where, of several obligations secured by one mortgage, one bears compound interest and the others simple interest, rents must be applied so as to extinguish first the one bearing compound interest.

40. Anderson L. Dict.

41. Mahone *v.* Williams, 39 Ala. 202; Van Vronker *v.* Eastman, 7 Metc. (Mass.) 157; Chapman *v.* Cooney, 25 R. I. 657, 57 Atl. 928; Green *v.* Westcott, 13 Wis. 606.

42. Robinson *v.* Cumming, 2 Atk. 409, 26

an invariable practice or an absolute right of the mortgagor,[43] and special circumstances justifying it must be shown.[44] The mortgagee is not to be charged with rests where interest was in arrear at the time of his taking possession,[45] although he is so chargeable where he retains the possession after the mortgage debt has been fully paid off.[46] As to the frequency with which rests should be allowed, it depends very much upon the circumstances of the case and the discretion of the court, although in ordinary cases the rule is to make rests at the periods for the payment of interest, whether annually or semiannually.[47] Rests are not ordinarily to be made against the mortgagor; that is, if the amount to be accounted for by the mortgagee in the way of rents and profits is not sufficient to discharge the accrued interest on the mortgage debt, it is not proper to add the balance of interest to the principal of the debt, as this would result in compounding the interest.[48]

5. Allowances to Mortgagee — a. In General. The mortgagee is to be allowed and credited in the account with the whole of his mortgage debt if all is then due,[49] together with all interest in arrear and due,[50] and with costs and expenses properly incurred by him in proceedings to enforce the mortgage or collect the debt,[51] or in proceedings to defend the estate or the title against hostile

Eng. Reprint 646; Patch *v.* Wild, 30 Beav. 99, 7 Jur. N. S. 1181, 5 L. T. Rep. N. S. 14, 9 Wkly. Rep. 844, 54 Eng. Reprint 826; Morris *v.* Islip, 20 Beav. 654, 52 Eng. Reprint 756; Shephard *v.* Elliot, 4 Madd. 254, 20 Rev. Rep. 296, 56 Eng. Reprint 699; Wilson *v.* Metcalfe, 1 Russ. 530, 25 Rev. Rep. 128, 46 Eng. Ch. 472, 38 Eng. Reprint 204.

43. Gould *v.* Tancred, 2 Atk. 533, 26 Eng. Reprint 720; Patch *v.* Wild, 30 Beav. 99, 7 Jur. N. S. 1181, 5 L. T. Rep. N. S. 14, 9 Wkly. Rep. 844, 54 Eng. Reprint 826; Latter *v.* Dashwood, 3 L. J. Ch. 149, 6 Sim. 462, 9 Eng. Ch. 462, 58 Eng. Reprint 667; Gordon *v.* Eakins, 16 Grant Ch. (U. C.) 363.

44. Neeson *v.* Clarkson, 4 Hare 97, 9 Jur. 82, 30 Eng. Ch. 97, 67 Eng. Reprint 576.

45. Wilson *v.* Cluer, 3 Beav. 136, 4 Jur. 883, 9 L. J. Ch. 333, 43 Eng. Ch. 136, 49 Eng. Reprint 53; Finch *v.* Brown, 3 Beav. 70, 43 Eng. Ch. 70, 49 Eng. Reprint 27; Horlock *v.* Smith, 1 Coll. 287, 28 Eng. Ch. 287, 63 Eng. Reprint 422; Nelson *v.* Booth, 3 De G. & J. 119, 5 Jur. N. S. 28, 27 L. J. Ch. 782, 6 Wkly. Rep. 845, 60 Eng. Ch. 92, 44 Eng. Reprint 1214; Dobson *v.* Laud, 4 De G. & Sm. 575, 64 Eng. Reprint 963, 8 Hare 216, 32 Eng. Ch. 216, 68 Eng. Reprint 337, 14 Jur. 288, 19 L. J. Ch. 484; Davis *v.* May, 19 Ves. Jr. 383, 34 Eng. Reprint 560.

46. Ashworth *v.* Lord, 36 Ch. D. 545, 57 L. J. Ch. 230, 58 L. T. Rep. N. S. 18, 36 Wkly. Rep. 446; Wilson *v.* Metcalfe, 1 Russ. 530, 25 Rev. Rep. 128, 46 Eng. Ch. 472, 38 Eng. Reprint 204; Crippen *v.* Ogilvie, 15 Grant Ch. (U. C.) 568; Coldwell *v.* Hall, 9 Grant Ch. (U. C.) 110.

47. Adams *v.* Sayre, 76 Ala. 509; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Graham *v.* Walker, 11 Ir. Eq. 415.

Rests at intermediate periods.— In Binnington *v.* Harwood, Turn. & R. 477, 12 Eng. Ch. 477, 37 Eng. Reprint 1184, it is said that a rest should be made at the date of the receipt by the mortgagee of any sum exceeding the interest, although occurring in the interval between the annual rests. But this practice is disapproved in Graham *v.* Walker, 11 Ir. Eq. 415. And in Wrigley *v.* Gill, [1905] 1 Ch. 241, 74 L. J. Ch. 160, 92 L. T. Rep. N. S. 491, 53 Wkly. Rep. 334. it is declared that it is not the practice, in taking the account against a mortgagee in possession who has sold a portion of the mortgaged premises, that a rest as at the date of the sale should be taken of the rents and profits as well as of the principal and interest. And in accordance with this is the decision in Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400. So where the mortgagor's widow brings a bill to redeem from a foreclosure to which she was not made a party, there should be no rest made at the time of the rendition of the decree or of the confirmation of the sale. McArthur *v.* Franklin, 16 Ohio St. 193.

48. French *v.* Kennedy, 7 Barb. (N. Y.) 452; Stone *v.* Seymour, 15 Wend. (N. Y.) 19; Jencks *v.* Alexander, 11 Paige (N. Y.) 619; Snavely *v.* Pickle, 29 Gratt. (Va.) 27. And see Wrigley *v.* Gill, [1905] 1 Ch. 241, 74 L. J. Ch. 160, 92 L. T. Rep. N. S. 491, 53 Wkly. Rep. 334.

49. See *supra*, XXII, D, 1.

50. American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630; Moss *v.* Odell, 141 Cal. 335, 74 Pac. 999. And see *supra*, XXII, D, 9.

51. Gresham *v.* Ware, 79 Ala. 192 (damages of protest allowed); Allen *v.* Robbins, 7 R. I. 33 (expenses incurred in attempting a sale under a power in the trust deed and in obtaining legal advice in relation thereto); Ellison *v.* Wright, 3 Russ. 458, 27 Rev. Rep. 108, 3 Eng. Ch. 458, 38 Eng. Reprint 647. And see Brown *v.* Simons, 45 N. H. 211.

Expense of investigating title and preparing mortgage deed.— In England these items are allowed to the mortgagee in his account, except where he is a solicitor and attended to the business in person. Sweetland *v.* Smith, 1 Cromp. & M. 585, 2 L. J. Exch. 190, 3 Tyrw. 491; Field *v.* Hopkins, 59 L. J. Ch. 174; Melbourne *v.* Cottrell, 5 Wkly. Rep. 884.

attacks,[52] and with all advancements made by him to save the estate from forfeiture, injury, or loss.[53] Further, he is to be reimbursed for taxes paid by him upon the mortgaged property and which it was the duty of the mortgagor to pay,[54] for the cost of insurance taken out by him on the mortgagor's failure to comply with his covenant or agreement to insure,[55] for money expended in making proper and necessary repairs on the premises,[56] and in some cases and under particular circumstances, for the value of permanent and reasonably proper improvements placed by him upon the mortgaged property.[57] It is also a settled rule that the mortgagee may properly pay off any encumbrances on the property prior to his own, when he finds it necessary to do so for the protection of his security, and the money so expended will be credited to him on his account.[58]

b. Expenses in Care and Management of Estate. The mortgagee will be allowed credit for money properly and necessarily expended by him in the care and management of the mortgaged premises while in his possession,[59] including commissions or other compensation paid to an agent or bailiff for making leases and collecting the rents, provided the employment of such an intermediary was necessary to the proper management of the property,[60] and including

52. Blackford *v.* Davis, L. R. 4 Ch. 304, 20 L. T. Rep. N. S. 199, 17 Wkly. Rep. 336; Horlock *v.* Smith, 1 Coll. 298, 28 Eng. Ch. 287, 63 Eng. Reprint 422; Barry *v.* Stawell, 1 Dr. & Wal. 618; Ramsden *v.* Langley, 2 Vern. Ch. 536, 23 Eng. Reprint 947; Owen *v.* Crouch, 5 Wkly. Rep. 545.

Rule stated.— Where the mortgagee has been put to expense in defending the title to the estate, the defense being for the benefit of all parties interested, he is entitled to charge such expenses against the estate; but if his title to the mortgage only is disputed, the costs of his defense should not be borne by the estate as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation. Parker *v.* Watkins, Johns. 133, 70 Eng. Reprint 369.

53. Rowan *v.* Sharp's Rifle Mfg. Co., 29 Conn. 282; Hill *v.* Brown, Drury 426, 6 Ir. Eq. 403; Burrowes *v.* Molloy, 4 Ir. Eq. 482, 2 J. & L. 521.

Mortgage of leasehold.— This rule applies particularly in the case of a mortgage of a leasehold interest, where the mortgagee is entitled to be credited for sums paid by him for arrears of rent to the ground landlord or for renewal fines. Hamilton *v.* Denny, 1 Ball & B. 202, 12 Rev. Rep. 14; Kelly *v.* Staunton, 1 Hog. 393; Brandon *v.* Brandon, 10 Wkly. Rep. 287.

Water-rent.— The amount paid by a mortgagee for water-rent to prevent the water from being cut off from the premises may be charged to the mortgagor seeking to redeem. Donohue *v.* Chase, 139 Mass. 407, 2 N. E. 84.

54. See *supra*, XV, F, 3, c.

55. See *supra*, XV, G, 2, b.

56. See *supra*, XV, H, 2.

57. See *supra*, XV, H, 3, b, (I).

58. *Illinois.*— Harper *v.* Ely, 70 Ill. 581.

Maine.— Miller *v.* Whittier, 36 Me. 577.

Massachusetts.— Davis *v.* Bean, 114 Mass. 360; Davis *v.* Winn, 2 Allen 111.

Minnesota.— Darling *v.* Harmon, 47 Minn. 166, 49 N. W. 686.

Nebraska.— Bourgeois *v.* Gapen, 58 Nebr. 364, 78 N. W. 639; Comstock *v.* Michael, 17 Nebr. 288, 22 N. W. 549.

United States.— Wright *v.* Phipps, 90 Fed. 556.

England.— Sandon *v.* Hooper, 6 Beav. 246, 12 L. J. Ch. 309, 49 Eng. Reprint 820; Pelley *v.* Wathen, 7 Hare 351, 14 Jur. 9, 18 L. J. Ch. 281, 27 Eng. Ch. 351, 68 Eng. Reprint 144; Kirkwood *v.* Thompson, 2 Hem. & M. 392, 11 Jur. N. S. 392, 34 L. J. Ch. 305, 71 Eng. Reprint 514.

Canada.— Trust, etc., Co. *v.* Cuthbert, 14 Grant Ch. (U. C.) 410; Teeter *v.* St. John, 10 Grant Ch. (U. C.) 85.

59. *Arkansas.*— Mooney *v.* Brinkley, 17 Ark. 340.

California.— Hidden *v.* Jordan, 28 Cal. 301. And see Murdock *v.* Clarke, (1890) 24 Pac. 272.

Maryland.— Booth *v.* Baltimore Steam Packet Co., 63 Md. 39; Hagthorp *v.* Hook, 1 Gill & J. 270.

Massachusetts.— Cazenove *v.* Cutler, 4 Metc. 246.

Michigan.— See Michigan Trust Co. *v.* Lansing Lumber Co., 103 Mich. 392, 61 N. W. 668.

South Carolina.— Lowndes *v.* Chisholm, 2 McCord Eq. 455, 16 Am. Dec. 667.

United States.— Wann *v.* Coe, 31 Fed. 369.

England.— Bompas *v.* King, 33 Ch. D. 279, 56 L. J. Ch. 202, 55 L. T. Rep. N. S. 190; Woolley *v.* Drag, Anstr. 551; Trimleston *v.* Hamill, 1 Ball & B. 377, 12 Rev. Rep. 38.

Canada.— See Wells *v.* Canada Trust, etc., Co., 9 Ont. 170. But *compare* Ritchie *v.* Girard, 15 Quebec Super. Ct. 162.

See 35 Cent. Dig. tit. "Mortgages," § 502.

60. Murdock *v.* Clarke, 59 Cal. 683; Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62; Union Bank *v.* Ingram, 16 Ch. D. 53, 50 L. J. Ch. 74, 43 L. T. Rep. N. S. 659, 29 Wkly. Rep. 209; Davis *v.* Dendy, 3 Madd. 170, 18 Rev. Rep. 209, 56 Eng. Reprint 473; Freehold Loan Co. *v.* McLean, 9 Manitoba 15.

reasonable counsel fees necessarily paid in enforcing payment of the rents and profits.[61]

c. **Compensation For Services.** It is the generally accepted rule that the mortgagee cannot be allowed or credited with any sum as compensation for his own personal time or trouble in managing and renting the property and collecting the income,[62] unless in pursuance of a previous agreement of the parties reasonable in its terms and fairly made.[63] But in a few states such compensation, to a reasonable amount, is regarded always as a fair and proper allowance to the mortgagee.[64]

H. Actions For Redemption — 1. Nature and Form of Remedy — a. In General. A proceeding to enforce affirmatively the right of redemption from a mortgage must be by an action or suit in the nature of a bill in equity,[65] and not an action to recover the lands.[66] The same rule applies where the conveyance

Non-resident mortgagee.— While a mortgagee in possession is entitled to credit for such cost, whether of time or money, as the owner in possession, acting providently, would necessarily incur in making and collecting profits, he is not entitled to any greater credit because, being a non-resident, he was obliged to employ and pay an agent to collect the rents. American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

61. Hubbard *v.* Shaw, 12 Allen (Mass.) 120.

62. *California.*— Moss *v.* Odell, 141 Cal. 335, 74 Pac. 999; Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342. See, however, Husheon *v.* Husheon, 71 Cal. 407, 12 Pac. 410.

Illinois.— Harper *v.* Ely, 70 Ill. 581.

Kentucky.—Breckenridge *v.* Brooks, 2 A. K. Marsh. 335, 12 Am. Dec. 401.

Maryland.— Gelston *v.* Thompson, 29 Md. 595.

Michigan.— Barnard *v.* Paterson, 137 Mich. 633, 100 N. W. 893.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62.

New Jersey.— Elmer *v.* Loper, 25 N. J. Eq. 475; Vanderhaize *v.* Hugues, 13 N. J. Eq. 244.

New York.— Blunt *v.* Syms, 40 Hun 566. But see Green *v.* Lamb, 24 Hun 87.

Rhode Island.— Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94.

Wisconsin.— Chaffee *v.* Conway, 125 Wis. 77, 103 N. W. 269.

England.— Barrett *v.* Hartley, L. R. 2 Eq. 789, 12 Jur. N. S. 426, 14 L. T. Rep. N. S. 474, 14 Wkly. Rep. 684; French *v.* Baron, 2 Atk. 120, 26 Eng. Reprint 475; Court *v.* Robarts, 6 Cl. & F. 65, 7 Eng. Reprint 622; Nicholson *v.* Tutin, 3 Jur. N. S. 235, 3 Kay & J. 159, 69 Eng. Reprint 1063; Carew *v.* Johnston, 2 Sch. & Lef. 301; Bonithon *v.* Hockmore, 1 Vern. Ch. 316, 23 Eng. Reprint 492; Langstaffe *v.* Fenwick, 10 Ves. Jr. 405, 8 Rev. Rep. 8, 32 Eng. Reprint 902. See also Kavanagh *v.* Workingman's Ben. Bldg. Soc., [1896] 1 Ir. 56.

Canada— Freehold Loan Co. *v.* McLean, 9 Manitoba 15.

See 35 Cent. Dig. tit. "Mortgages," § 501.

63. Barnard *v.* Paterson, 137 Mich. 633, 100 N. W. 893; Mainland *v.* Upjohn, 41 Ch. D. 126, 58 L. J. Ch. 361, 60 L. T. Rep. N. S. 614, 37 Wkly. Rep. 411; Bucknell *v.* Vickery, 64 L. T. Rep. N. S. 701; Eyre *v.* Hughes, 2 Ch. D. 148, 45 L. J. Ch. 395, 34 L. T. Rep. N. S. 211, 24 Wkly. Rep. 597.

Disallowance notwithstanding agreement.— In some cases the courts of equity have refused to allow compensation of this kind to be credited to a mortgagee, notwithstanding a previous agreement of the parties sanctioning it. Breckenridge *v.* Brooks, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94; Comyns *v.* Comyns, Ir. R. 5 Eq. 583.

64. Waterman *v.* Curtis, 26 Conn. 241; Learned *v.* Walton, 42 La. Ann. 455, 7 So. 723; Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132; Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382; Gerrish *v.* Black, 104 Mass. 400; Boston, etc., R. Corp. *v.* Haven, 8 Allen (Mass.) 359; Adams *v.* Brown, 7 Cush. (Mass.) 220.

65. *Connecticut.*— Boles *v.* Calkins, 1 Root 553.

Illinois.— Shobe *v.* Luff, 66 Ill. App. 414.

Maine.— Lovejoy *v.* Vose, 73 Me. 46; Randall *v.* Bradley, 65 Me. 43; Cole *v.* Edgerly, 48 Me. 108; Pearce *v.* Savage, 45 Me. 90.

Wisconsin.— Gillett *v.* Eaton, 6 Wis. 30.

England.— New South Wales Bank *v.* O'Connor, 14 App. Cas. 273, 58 L. J. P. C. 82, 60 L. T. Rep. N. S. 467, 38 Wkly. Rep. 465.

See 35 Cent. Dig. tit. "Mortgages," § 1810.

Effect of agreement to compromise.— In a redemption suit against the mortgagee in possession of business premises, a compromise was agreed upon, under which the mortgagor was to pay a fixed sum on a certain day, and the mortgagee was to carry on the business in the meantime and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagor failed to pay the money at the time appointed. It was held that the compromise agreement could not be enforced on motion in the suit, but that a fresh bill must be filed for specific performance. Pryer *v.* Gribble, L. R. 10 Ch. 534, 44 L. J. Ch. 676, 32 L. T. Rep. N. S. 238, 23 Wkly. Rep. 642.

66. Schwarz *v.* Sears, Walk. (Mich.) 170; Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100; Parks

was in form an absolute deed, although in legal effect a mortgage,[67] unless the grantee therein has conveyed the property to an innocent third person without notice, in which case an action lies against such grantee to recover the value of the premises over and above the amount due on the mortgage.[68]

b. Petition or Cross Bill in Foreclosure Suit. It has been held that the mortgagor's right of redemption may be enforced by petition or cross bill in a suit to foreclose the mortgage;[69] but this right is not conceded to junior mortgagees or judgment creditors; they must file an independent bill to redeem.[70]

2. Right of Action and Defenses — a. Grounds of Action — (i) *In General.* As a general rule nothing more is required to give a right of action for redemption than performance of the condition of the mortgage or a sufficient offer of performance, an offer to redeem, and its unwarrantable refusal or denial by the mortgagee,[71] or the action of the latter in refusing to render an account or the presentation of a false or incorrect account.[72] But, except as it may be granted by statute, there is no ground for a suit for redemption after a sale on foreclosure made fairly and in good faith,[73] unless there were errors, omissions, or irregularities fatal to the validity of the sale.[74] Where foreclosure is effected by entry and possession by the mortgagee, it is essential to a bill in equity to redeem that there should have been an entry for breach of condition, a tender of payment or satisfaction, and a refusal to accept it and surrender possession.[75]

(ii) *Fraud, Ignorance, or Mistake.* Where a mortgagor has suffered his right of redemption to lapse or to become barred in consequence of fraud practised upon him, or ignorance of his rights or of the consequences of his acts, or through an unavoidable accident or justifiable mistake, he may maintain a bill in

v. Worthington, (Tex. Civ. App. 1905) 87 S. W. 720; Evans *v.* Pike, 118 U. S. 241, 6 S. Ct. 1090, 30 L. ed. 234.

Where the mortgagee has acquired possession of the mortgaged premises wrongfully or in a manner not binding on the owner of the equity of redemption, no bill to redeem is necessary to recover the possession, but the owner may pursue his legal remedy. Miner *v.* Beekman, 33 N. Y. Super. Ct. 67, 11 Abb. Pr. N. S. 147, 42 How. Pr. 33.

Ejectment is not generally maintainable for this purpose. McKeighan *v.* Hopkins, 14 Nebr. 361, 15 N. W. 711; Chase *v.* Peck, 21 N. Y. 581. In Pennsylvania, however, an action of ejectment may be brought as a substitute for a bill to redeem. Mellon *v.* Lemmon, 111 Pa. St. 56, 2 Atl. 56.

67. Cline *v.* Robbins, 112 Cal. 581, 44 Pac. 1023; Adams *v.* Holden, 111 Iowa 54, 82 N. W. 468; Davis *v.* Barrett, 64 Iowa 684, 16 N. W. 215, 21 N. W. 138; Adair *v.* Adair, 22 Oreg. 115, 29 Pac. 193. See Eaton *v.* Green, 22 Pick. (Mass.) 526.

68. Hausknecht *v.* Smith, 161 N. Y. 663, 57 N. E. 1112; Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946. And see Stoutz *v.* Rouse, 84 Ala. 309, 4 So. 170; Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501.

69. Pierce *v.* Chace, 108 Mass. 254.

70. Douglass *v.* Woodworth, 51 Barb. (N. Y.) 79; Pratt *v.* Frear, 13 Wis. 462.

71. *Iowa.*— Dolan *v.* Midland Blast Furnace Co., 128 Iowa 254, 100 N. W. 45.

Maine.— Doe *v.* Littlefield, 99 Me. 317, 59 Atl. 438.

Massachusetts.— Stone *v.* Ellis, 9 Cush. 95; Willard *v.* Fiske, 2 Pick. 540.

Michigan.— Hoffman *v.* Harrington, 33 Mich. 392.

New Hampshire.— Hall *v.* Hall, 46 N. H. 240.

New Jersey.— Fritz *v.* Simpson, 34 N. J. Eq. 436.

Tennessee.— See Bumpass *v.* Alexander, 10 Heisk. 542.

United States.— Upham *v.* Brooks, 28 Fed. Cas. No. 16,796, 2 Story 623.

England.— James *v.* Rumsey, 11 Ch. D. 398, 48 L. J. Ch. 345, 27 Wkly. Rep. 617; Caldwell *v.* Matthews, 62 L. T. Rep. N. S. 799.

See 35 Cent. Dig. tit. "Mortgages," § 1813.

As to grounds of action for redemption by junior mortgagee see Rogers *v.* Herron, 92 Ill. 583; Coombs *v.* Carr, 55 Ind. 303; Duncan *v.* Baker, 72 Mo. 469; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534.

72. Munro *v.* Barton, 95 Me. 262, 49 Atl. 1069; Brewer *v.* Hyndman, 18 N. H. 9. And see *supra*, XXII, G, 2.

73. *Alabama.*— Pitts *v.* American Freehold Land Mortg. Co., 123 Ala. 469, 26 So. 286.

Connecticut.— Pritchard *v.* Elton, 38 Conn. 434.

Illinois.— Traeger *v.* Mutual Bldg., etc., Assoc., 192 Ill. 166, 61 N. E. 424.

Missouri.— Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512.

Rhode Island.— Holland *v.* Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

74. Likes *v.* Wildish, 27 Nebr. 151, 42 N. W. 900; H. B. Claflin Co. *v.* Middlesex Banking Co., 113 Fed. 958.

75. Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91; Hicks *v.* Bingham, 11 Mass. 300; Taylor *v.* Weld, 5 Mass. 109.

equity to redeem, any of these grounds being considered sufficient to justify the intervention of equity for his relief.[76]

b. Adequate Remedy at Law. A bill in equity to redeem from a mortgage cannot be maintained if the complainant has an adequate remedy at law.[77]

c. Conditions Precedent. A bill for redemption from a mortgage or from a foreclosure sale cannot be maintained without full compliance on the part of plaintiff with all statutory prerequisites,[78] such as refunding the purchase-money,[79] delivering possession to the foreclosure purchaser,[80] or furnishing security for the payment of subsequent interest and costs;[81] and the complainant must also comply with any special stipulations of the mortgage.[82] A judgment creditor seeking to redeem must first take out execution.[83]

d. Defenses. It may be alleged in defense to a bill for redemption that there has been a valid foreclosure of the mortgage;[84] that the complainant is not the

76. *Connecticut.*— Bostwick *v.* Stiles, 35 Conn. 195 (unforeseen accident preventing mortgagor from paying off the mortgage); Weiss *v.* Alling, 34 Conn. 60 (ignorance of effect of unopposed foreclosure).

Georgia.— Horne *v.* Mullis, 119 Ga. 534, 46 S. E. 663.

Illinois.— Webber *v.* Curtiss, 104 Ill. 309 (mortgagor kept in ignorance of foreclosure sale); Flint *v.* Lewis, 61 Ill. 299 (fraudulent abuse of power granted by trust deed). But see Anderson *v.* Olin, 145 Ill. 168, 34 N. E. 55, denying the right to redeem where the mortgagor's mistake was not caused by any acts or representations of the mortgagee.

Iowa.— Penny *v.* Cook, 19 Iowa 538.

Maine.— Shaw *v.* Gray, 23 Me. 174.

Massachusetts.— Van Deusen *v.* Frink, 15 Pick. 449, fraud practised on mortgagor.

Michigan.— Newman *v.* Locke, 66 Mich. 27, 36 N. W. 166; Wilson *v.* Eggleston, 27 Mich. 257, where the mortgagor relied on the promise of a third person to furnish him funds with which to make the redemption, but such person afterward fraudulently bought up the mortgage and cut off redemption.

Minnesota.— Nolan *v.* Dyer, 75 Minn. 231, 77 N. W. 786.

Missouri.— Thacker *v.* Tracy, 8 Mo. App. 315.

New Hampshire.— Felker *v.* Mowry, 69 N. H. 164, 38 Atl. 726.

New Jersey.— Seeley *v.* Adams, (Ch. 1903) 55 Atl. 820.

New York.— Bennett *v.* Austin, 81 N. Y. 308.

North Dakota.— Prondzinski *v.* Garbutt, 8 N. D. 191, 77 N. W. 1012, fraud and false promises.

Wisconsin.— Chaffee *v.* Conway, 125 Wis. 77, 103 N. W. 269.

United States.— De Martin *v.* Phelan, 47 Fed. 761 [*affirmed* in 51 Fed. 865, 2 C. C. A. 523]; Stinson *v.* Pepper, 47 Fed. 676, 10 Biss. 107; Palmer *v.* McCormick, 30 Fed. 82, holding that failure of a mortgagor to redeem from the foreclosure, caused by his misfortunes resulting from the "grasshopper plague," is no ground for relief in equity as against a valid legal title under the foreclosure.

See 35 Cent. Dig. tit. "Mortgages," § 1706.

Fraud on part of mortgagor.— Where a bill for redemption on grounds such as those stated in the text discloses a fraudulent attempt on the part of the mortgagor to defeat the just claims of other creditors, it states no case for relief in equity. Snipes *v.* Kelleher, 31 Wash. 386, 72 Pac. 67.

77. York Mfg. Co. *v.* Cutts, 18 Me. 204; Holman *v.* Bailey, 3 Metc. (Mass.) 55; Messiter *v.* Wright, 16 Pick. (Mass.) 151; Moore *v.* Cord, 14 Wis. 213; Manhattan L. Ins. Co. *v.* Wright, 126 Fed. 82, 61 C. C. A. 138.

Ignoring attempted sale.— A mortgagor, in a suit against the original mortgagee to redeem, cannot ignore an attempted sale under the power contained in the mortgage, on the ground that the sale was made by one not an auctioneer, that the memorandum was not sufficient to satisfy the statute of frauds, and that the deed made to the purchaser, who was the auctioneer, was neither witnessed nor acknowledged. Welsh *v.* Coley, 82 Ala. 363, 2 So. 733.

78. Doe *v.* Littlefield, 99 Me. 317, 59 Atl. 438.

79. Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486.

80. Nelms *v.* Kennon, 88 Ala. 329, 6 So. 744; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204. *Compare* Fuller *v.* Varnum, (Ala. 1906) 41 So. 777.

81. Godfrey *v.* Stocke, 116 Mo. 403, 22 S. W. 733; Vanmeter *v.* Darrah, 115 Mo. 153, 22 S. W. 30; Dawson *v.* Egger, 97 Mo. 36, 11 S. W. 61; Updike *v.* Merchants' Elevator Co., 96 Mo. 160, 8 S. W. 779; Johnson *v.* Atchison, 90 Mo. 48, 1 S. W. 751.

82. Daniels *v.* Mowry, 1 R. I. 151.

83. Quin *v.* Brittain, Hoffm. (N. Y.) 353.

84. Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688; Evans *v.* Kahr, 60 Kan. 719, 57 Pac. 950, 58 Pac. 467; Strong *v.* Blanchard, 4 Allen (Mass.) 538. And see *supra*, XXI, L, 1, a.

The pendency of a suit to foreclose a mortgage, brought in a court of law, is not pleadable in defense to a bill in equity to redeem from the mortgage. Newburg *v.* Wren, 1 Vern. Ch. 220, 23 Eng. Reprint 427. But see York Mfg. Co. *v.* Cutts, 18 Me. 204.

person in whom the right of redemption is vested;[85] that there has been no performance or tender or offer of performance of the condition of the mortgage;[86] or that, defendant being other than the original mortgagee, the mortgagor promised and agreed that he would never redeem.[87] But objection cannot be taken to the complainant's right to give the mortgage,[88] nor is it a defense that he had a fraudulent purpose, in making the mortgage, as against his other creditors.[89] It is not a defense that defendant holds a second mortgage on the same premises which is overdue.[90] A mutual release of all demands executed by the parties to an absolute deed will not prevent a recovery of the land by plaintiff if the deed is shown to be a mortgage, since the release would discharge the debt but could not vest the title to the mortgaged premises in the mortgagee.[91]

e. Abatement and Revival. A suit for redemption abates on the death of the complainant, but may be revived by his heirs,[92] but not by his personal representatives.[93] If the mortgagor, pending the suit, assigns all his interest in the mortgaged premises to a third person, it is a defense to the further maintenance of the action.[94]

3. Jurisdiction and Venue — a. Jurisdiction — (I) *In General.* Since the right of redemption after forfeiture at law is available in equity only, jurisdiction of a suit for that purpose is vested only in the courts of chancery or those possessing full equity powers.[95] But where the bill is to enforce a statutory right of redemption after foreclosure sale, it need not be brought in the same court which rendered the decree of foreclosure.[96]

(II) *Amount in Controversy.* Where suit to redeem is brought in a court whose jurisdiction is limited to a maximum or minimum amount, the jurisdiction depends on the value of the property sought to be redeemed,[97] although it appears that if redemption is sought after a decree of foreclosure, the question of jurisdiction should be determined with reference to the amount of such decree.[98]

85. Patterson *v.* Yeaton, 47 Me. 308; Wells *v.* Morse, 11 Vt. 9.

Merger of titles.— If plaintiff, pending his suit to redeem, becomes the holder of the mortgage as well as of the equity of redemption, he cannot maintain his suit. Tyler *v.* Brigham, 143 Mass. 410, 9 N. E. 750.

86. See *supra*, XXII, E, 1.

Strict performance unnecessary.— On a bill in equity to redeem a mortgage, the fact that strict performance of the conditions agreed upon has not been made is no defense. Wilson *v.* Mulloney, 185 Mass. 430, 70 N. E. 448; Gerrish *v.* Black, 122 Mass. 76.

87. Fay *v.* Valentine, 12 Pick. (Mass.) 40, 22 Am. Dec. 397.

88. Bacon *v.* Bowdoin, 2 Metc. (Mass.) 591.

89. Stitt *v.* Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561; Livingston *v.* Ives, 35 Minn. 55, 27 N. W. 74.

90. Gerrish *v.* Black, 122 Mass. 76.

91. Haas *v.* Nanert, 2 N. Y. Suppl. 723.

92. Putnam *v.* Putnam, 4 Pick. (Mass.) 139; Morrow *v.* Jones, 41 Nebr. 867, 60 N. W. 369; Souillard *v.* Dias, 9 Paige (N. Y.) 393. *Compare* Smith *v.* Manning, 9 Mass. 422.

93. Souillard *v.* Dias, 9 Paige (N. Y.) 393; Douglass *v.* Sherman, 2 Paige (N. Y.) 358. *Compare* Stowell *v.* Cole, 2 Vern. Ch. 296, 23 Eng. Reprint 791.

94. Lambert *v.* Lambert, 52 Me. 544. But *compare* Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003.

95. *Illinois.*— O'Halloran *v.* Fitzgerald, 71 Ill. 53.

Kentucky.—Breckenridge *v.* Brooks, 2 A. K. Marsh. 335, 12 Am. Dec. 401.

Maine.— Stinchfield *v.* Milliken, 71 Me. 567.

Massachusetts.— Lancy *v.* Abington Sav. Bank, 177 Mass. 431, 59 N. E. 115; Boyden *v.* Partridge, 2 Gray 190; Eaton *v.* Green, 22 Pick. 526; Fowler *v.* Rice, 17 Pick. 100.

Michigan.—Bigelow *v.* Thompson, 133 Mich. 334, 94 N. W. 1077, holding that equity has jurisdiction of a suit to restrain the grantee in a deed intended as a mortgage from cutting timber on the lands, and to ascertain whether the mortgage has been paid, and if not, to determine the amount due and decree its payment.

Wisconsin.— Posten *v.* Miller, 60 Wis. 494, 19 N. W. 540.

See 35 Cent. Dig. tit. "Mortgages," § 1819.

Bill seeking advice and anticipatory decision.— It is not the business of a court to anticipate controversies, and consequently it will not take jurisdiction of a petition by the owner of the equity of redemption asking leave to redeem from a foreclosure sale, and the advice and instruction of the court as to the effect of redemption and as to the nature of the title which will accrue to the redemptioner. Clarke *v.* Northwestern Mut. L. Ins. Co., 94 Fed. 262, 36 C. C. A. 233.

96. Groh *v.* Cushman, 45 Ill. 119.

97. Scripture *v.* Johnson, 3 Conn. 211.

98. Bridgeport *v.* Blinn, 43 Conn. 274.

b. Venue. A suit in equity to redeem from a mortgage may be brought in any place where the court has jurisdiction of the parties even though the land lies in another county,[99] and even where it lies in another state.[1]

4. Time to Sue and Limitations — a. Time to Sue. Generally speaking a bill for redemption may be filed at any time after the debt is due,[2] and before the right to redeem is cut off by a valid foreclosure,[3] unless the time is limited by statute[4] or the complainant's right is cut off by his own laches.[5] After a foreclosure sale, such a bill must be filed within the period allowed by statute for redemption.[6]

b. Limitation of Actions. Statutes in several of the states expressly limit the time within which an action for redemption must be brought.[7] In the absence of such a special statute it has been held that the right to redeem is barred by the lapse of the same time which would bar the right to foreclose, the two rights

99. *Maine.*—Smith *v.* Larrabee, 58 Me. 361.
Massachusetts.— Dary *v.* Kane, 158 Mass. 376, 33 N. E. 527; Burlingame *v.* Hobbs, 12 Gray 367.
New York.— Hubbell *v.* Sibley, 4 Abb. Pr. N. S. 403. *Compare* Bush *v.* Treadwell, 11 Abb. Pr. N. S. 27.
Ohio.— Kramer *v.* Forrester, 32 Cinc. L. Bul. 199.
West Virginia.— Lawrence *v.* Du Bois, 16 W. Va. 443.
United States.— Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.
See 35 Cent. Dig. tit. "Mortgages," § 1821.
See, however, Smith *v.* Smith, (Cal. 1894) 38 Pac. 43.

1. Clark *v.* Seagraves, 186 Mass. 430, 71 N. E. 813.
Rule of Canadian courts.— A court of Ontario will not grant a decree for redemption of a mortgage over lands in Manitoba at the suit of a judgment creditor of the mortgagor, whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and the mortgagee both being domiciled in Ontario. The only *locus standi* the creditor would have in an Ontario court would be to have direct relief against the lands by means of a sale, to which relief he would be restricted in such a case in a suit in the courts of Manitoba, and a decree for a sale would not be enforceable in the latter province. Where personal equities exist between two parties over whom a court of equity has jurisdiction, although such equities may refer to foreign lands, the court may give relief by a decree operating not directly upon the lands but directly *in personam*; but such relief will never be extended so far as to decree a sale in the nature of an equitable execution. Henderson *v.* Hamilton Bank, 23 Can. Sup. Ct. 716 [*affirming* 20 Ont. App. 646].

2. Bernard *v.* Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465.

3. Potter *v.* Kimball, 186 Mass. 120, 71 N. E. 308.
Time limited in contract.— Where an absolute deed given as security provides for a reconveyance only in case the debt is paid within two years, it is no objection to a suit for redemption that it is not brought until five years after the debt matured, if no forfeiture was declared at the end of the two years. Lynch *v.* Jackson, 28 Ill. App. 160 [*affirmed* in 129 Ill. 72, 21 N. E. 580, 22 N. E. 246].

4. See *infra*, XXII, H, 4, b.

5. See Gerson *v.* Davis, 143 Ala. 381, 39 So. 198; Chace *v.* Morse, 189 Mass. 559, 76 N. E. 142; Cox *v.* American Freehold Mortg. Co., (Miss. 1906) 40 So. 739. And see *supra*, XXII, C, 4.

6. Wood *v.* Holland, 57 Ark. 198, 21 S. W. 223 (where, however, it is held that if a tender of the proper amount is made within the statutory time for redemption, it may be followed up by a suit to redeem at any time before the right to bring suit is barred); Way *v.* Mullett, 143 Mass. 49, 8 N. E. 881; Brown *v.* Burney, 128 Mich. 205, 87 N. W. 221 (as to dilatory tactics of mortgagee giving a right to sue for redemption after the statutory time).

7. See the statutes of the different states. And see the following cases:
Alabama.— Drum *v.* Bryan, 145 Ala. 686, 40 So. 131.
California.— Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866.
Georgia.— Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786.
Mississippi.— Tuteur *v.* Brown, 74 Miss. 744, 21 So. 748.
Nebraska.— Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645.
New York.— Finn *v.* Lally, 1 N. Y. App. Div. 411, 37 N. E. 437; Campbell *v.* Ellwanger, 81 Hun 259, 30 N. Y. Suppl. 792; Wood *v.* Baker, 60 Hun 337, 14 N. Y. Suppl. 821; Becker *v.* McCrea, 48 Misc. 341, 94 N. Y. Suppl. 20; Maurhoffer *v.* Mittnacht, 12 Misc. 585, 34 N. Y. Suppl. 439.
North Carolina.— Gray *v.* Williams, 130 N. C. 53, 40 S. E. 843; Simmons *v.* Ballard, 102 N. C. 105, 9 S. E. 495; Houck *v.* Adams, 98 N. C. 519, 4 S. E. 502.
Ohio.— Scott *v.* Hickox, 7 Ohio St. 88.
England.— Chapman *v.* Corpe, 41 L. T. Rep. N. S. 22, 27 Wkly. Rep. 781.
Canada.— *Re* Leslie, 23 Ont. 143; Malloch *v.* Pinhey, 9 Grant Ch. (U. C.) 550.
In Vermont the statute of limitations does not apply to a petition to redeem a mortgage. Wells *v.* Morse, 11 Vt. 9.

being reciprocal;[8] and the statute of limitations begins to run from the time when the mortgagee takes possession or when, being in possession, he openly asserts a claim of absolute ownership.[9] But where redemption is claimed after a foreclosure, on the ground that the owner of the equity was not served with process, his cause of action accrues at the maturity of the mortgage debt.[10]

5. Parties — a. Plaintiffs. All the owners of the equity of redemption must be made parties to a bill to redeem, any one refusing to join as a plaintiff being made a defendant,[11] including purchasers of parts of the mortgaged property,[12] and persons having a joint interest in the premises or jointly liable for the mortgage debt may join as plaintiffs.[13] If the mortgagor is dead the action to redeem should be brought in the name of his heirs.[14] A trustee who is vested with the legal title is the proper party to file such a bill,[15] and so is the guardian of an infant.[16] But a lien creditor suing for redemption is not generally required to join with him other encumbrancers whose rights are distinct and separable from his own.[17]

b. Defendants — (I) *In General.* All persons should be made defendants to

A specific legatee cannot maintain a suit to redeem a mortgage of the legacy executed by the executor after a suit by the executor for that purpose is barred by the lapse of time. Burkhead *v.* Colson, 22 N. C. 77.

8. Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530; Crawford *v.* Taylor, 42 Iowa 260; Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459; Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Parsons *v.* Noggle, 23 Minn. 328; King *v.* Meighen, 20 Minn. 264.

9. *Alabama.*—McCoy *v.* Gentry, 73 Ala. 105.

California.— Warder *v.* Enslen, 73 Cal. 291, 14 Pac. 874; Cohen *v.* Mitchell, (1886) 9 Pac. 649.

Iowa.— Montgomery *v.* Chadwick, 7 Iowa 114.

Kansas.— Hunter *v.* Coffman, (1906) 86 Pac. 451.

Minnesota.— Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459; Bradley *v.* Norris, 63 Minn. 156, 65 N. W. 357.

Mississippi.— Kohlheim *v.* Harrison, 34 Miss. 457.

Missouri.— Bollinger *v.* Chouteau, 20 Mo. 89.

Nebraska.— Stall *v.* Jones, 47 Nebr. 706, 66 N. W. 653; Hall *v.* Hooper, 47 Nebr. 111, 66 N. W. 33.

Nevada.— Borden *v.* Clow, 21 Nev. 275, 30 Pac. 821, 37 Am. St. Rep. 511.

New York.— Hubbell *v.* Sibley, 50 N. Y. 468; Miner *v.* Beekman, 50 N. Y. 337, 14 Abb. Pr. N. S. 1.

Wisconsin.— See Chaffee *v.* Conway, 125 Wis. 77, 103 N. W. 269; Waldo *v.* Rice, 14 Wis. 286.

See 35 Cent. Dig. tit. "Mortgages," § 1824.

10. Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645.

11. *Arkansas.*— Porter *v.* Clements, 3 Ark. 364.

Maine.— McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Welch *v.* Stearns, 69 Me. 192; Southard *v.* Sutton, 68 Me. 575.

Michigan.— Hawes *v.* Detroit F. & M. Ins. Co., 109 Mich. 324, 67 N. W. 329, 63 Am. St. Rep. 581.

New York.— Taggart *v.* Rogers, 1 Silv. Sup. 416, 5 N. Y. Suppl. 255.

Pennsylvania.— Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375.

Canada.— Kelly *v.* Imperial Loan, etc., Co., 11 Ont. App. 526.

See 35 Cent. Dig. tit. "Mortgages," § 1825.

12. Marbury Lumber Co. *v.* Posey, 142 Ala. 394, 38 So. 242; Daniels *v.* Davidson, 9 Grant Ch. (U. C.) 173; Simpson *v.* Smyth, 1 Grant Err. & App. (U. C.) 9.

Purchaser pendente lite.— A purchaser of the mortgaged property pending a bill to redeem is a proper party, but not a necessary one. Zane *v.* Fink, 18 W. Va. 693.

13. Gerson *v.* Davis, 143 Ala. 381, 39 So. 198; Berkshire *v.* Shultz, 25 Ind. 523.

An assignee of the equity of redemption and an assignee of the statutory right of redemption should not be joined as complainants in a bill to redeem. Commercial Real Estate, etc., Assoc. *v.* Parker, 84 Ala. 298, 4 So. 268.

14. *Alabama.*— Jones *v.* Richardson, 85 Ala. 463, 5 So. 194; Butts *v.* Broughton, 72 Ala. 294.

Indiana.— Lilly *v.* Dunn, 96 Ind. 220.

Maine.— Chamberlain *v.* Lancey, 60 Me. 230.

Mississippi.— Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658.

Wisconsin.— Posten *v.* Miller, 60 Wis. 494, 19 N. W. 540.

See 35 Cent. Dig. tit. "Mortgages," § 1825.

15. Boyden *v.* Partridge, 2 Gray (Mass.) 190; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109.

16. Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534.

17. Platt *v.* Squire, 12 Metc. (Mass.) 494. See also Saunders *v.* Frost, 5 Pick. (Mass.) 259, 16 Am. Dec. 394.

Subsequent encumbrancers.— Where the right to redeem is disputed between two subsequent encumbrancers, the prior mortgagee may decline to allow either to redeem except by decree in a suit to which both claimants are parties. Wimpfheimer *v.* Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916.

a suit for redemption who would have a right to call for redemption or to receive any part of the redemption money,[18] or who have interests in the mortgaged premises liable to be affected by the redemption,[19] including purchasers to whom the mortgagee has assumed to transfer and convey the premises,[20] as well as the grantees of the mortgagor.[21] But persons whose interests in either the mortgage or the property have absolutely ceased and determined are not necessary parties,[22] especially where they are not in a position to afford plaintiff any of the relief which he demands.[23] Where the suit is to set aside a foreclosure sale for the purpose of redemption, all the parties to the foreclosure proceedings who would have been proper parties to the suit to redeem if there had been no sale, and all intervening encumbrancers, must be made parties.[24]

(II) *MORTGAGOR.* The mortgagor is a necessary party to a bill to redeem by a junior encumbrancer;[25] and one of two joint mortgagors who refuses to join in a bill to redeem may be made a defendant if he still has an interest in the premises.[26] But after the mortgagor has conveyed away his entire interest in the premises he is no longer a necessary party in a suit for redemption by his grantee.[27]

18. Richards *v.* Pierce, 52 Me. 560; Stone *v.* Bartlett, 46 Me. 438; Pierce *v.* Le Monier, 172 Mass. 508, 53 N. E. 125; Chase *v.* Cleburne First Nat. Bank, 1 Tex. Civ. App. 595, 20 S. W. 1027; Kyger *v.* Depue, 6 W. Va. 288.

Nominal mortgagee.— An agent who loaned the money of his principal and took a mortgage in his own name, without informing the mortgagor of his agency, is a proper, although not a necessary, party to a suit to redeem, although plaintiff had notice of the agency at the time of filing the bill. Wolcott *v.* Sullivan, 6 Paige (N. Y.) 117.

Surety.— In a suit by a mortgagor for an accounting and reconveyance from the mortgagee, the surety who has paid the mortgage note is a necessary party. Hunt *v.* Rooney, 77 Wis. 258, 45 N. W. 1084.

Officer making levy.—Where personal property had been levied on, and a mortgage was given to secure the payment of so much of the debt as that property might be insufficient to satisfy, the officer making the levy is a proper defendant in a suit to redeem from the mortgage, because it is necessary to obtain from him an account of the proceeds of the attached personalty. Wing *v.* Cooper, 37 Vt. 169.

19. *Alabama.*— Anniston First Nat. Bank *v.* Elliott, 125 Ala. 646, 27 So. 7, 82 Am. St. Rep. 268, 47 L. R. A. 742.

Maine.— Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053; McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Rowell *v.* Jewett, 69 Me. 293.

Massachusetts.— Conant *v.* Warren, 6 Gray 562; Goodrich *v.* Staples, 2 Cush. 258.

Michigan.— Sanborn *v.* Sanborn, 104 Mich. 180, 62 N. W. 371.

Missouri.— Stillwell *v.* Hamm, 97 Mo. 579, 11 S. W. 252.

United States.— Upham *v.* Brooks, 28 Fed. Cas. No. 16,796, 2 Story 623.

Canada.— Glass *v.* Freckleton, 10 Grant Ch. (U. C.) 470.

See 35 Cent. Dig. tit. "Mortgages," § 1826.

Remainder-men are not necessary parties to a bill by a life-tenant of mortgaged property to compel an assignment of the mortgage debt to a third person. Atwood *v.* Charlton, 21 R. I. 568, 45 Atl. 580.

A municipal corporation is not a necessary party to a bill in equity to redeem a mortgage which states that a portion of the mortgaged land has been taken by such municipality for a highway, where it is not alleged that any damages were sustained or claimed by the owner of the land, whose time for claiming such damages has expired. White *v.* Curtis, 2 Gray (Mass.) 467.

All the parties to a deed, or their heirs, must be made parties to a suit in equity involving the contention that the deed, although absolute on its face, was intended as a mortgage. McNeel *v.* Auldridge, 25 W. Va. 113.

20. *Alabama.*— Carlin *v.* Jones, 55 Ala. 624.

Indiana.— Caress *v.* Foster, 62 Ind. 145.

Iowa.— Hervey *v.* Savery, 48 Iowa 313.

Maine.— Wing *v.* Davis, 7 Me. 31.

New York.— Hickock *v.* Scribner, 3 Johns. Cas. 311.

Virginia.— Chowning *v.* Cox, 1 Rand. 306, 10 Am. Dec. 530.

Wisconsin.— Beebe *v.* Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103.

See 35 Cent. Dig. tit. "Mortgages," § 1826.

21. Bailey *v.* Myrick, 36 Me. 50; McCabe *v.* Bellows, 1 Allen (Mass.) 269; Connor *v.* Atwood, 4 N. Y. Suppl. 561.

22. Lovelace *v.* Hutchinson, 106 Ala. 417, 17 So. 623; Moon *v.* Jacobs, 103 Ala. 548, 15 So. 866; Patterson *v.* Kellogg, 53 Conn. 38, 22 Atl. 1096; Dunn *v.* Dewey, 75 Minn. 153, 77 N. W. 793.

23. Jones *v.* Richardson, 85 Ala. 463, 5 So. 194; Staples *v.* Shackleford, 150 Mo. 471, 51 S. W. 1032.

24. Wimpfheimer *v.* Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916.

25. Yelverton *v.* Shelden, 2 Sandf. Ch. (N. Y.) 481; Ramsbottom *v.* Wallis, 5 L. J. Ch. 92; Long *v.* Long, 16 Grant Ch. (U. C.) 239.

26. Lovell *v.* Farrington, 50 Me. 239.

27. *Alabama.*— Rothschild *v.* Bay City

(III) *Mortgagee and Heirs and Representatives.* All the mortgagees in whom the legal title to the mortgaged premises is vested are necessary parties to a bill to redeem.[28] But if the mortgage, with other property of the mortgagee, has passed to the possession and control of a receiver appointed by a court of competent jurisdiction, such receiver is the proper defendant;[29] and if the mortgagee is dead, owning the mortgage at the time of his decease, the suit should be against his personal representative.[30]

(IV) *Mortgagee and Assignee of Mortgage or Debt.* The assignee of a mortgage is a necessary party to a suit for redemption.[31] But on the other hand the original mortgagee is not a necessary party if he has made an absolute and effective assignment of the mortgage and debt;[32] nor is it necessary, in the case of successive assignments of the mortgage to join any of the mesne assignees, the last holder being the proper defendant.[33] But the original mortgagee must be joined if he is interested in the account which may be taken, as having received partial payments of the mortgage debt or being liable for rents and profits received;[34] if the assignment was made merely as collateral security for his own debt;[35] or if he assigned the mortgage title, as by quitclaim deed, without assigning the debt secured.[36]

(V) *Beneficiary Under Mortgage or Trust Deed.* The beneficiary in a mortgage or trust deed, or the person for whose security or indemnification it is given, should be made a party to the proceedings for redemption,[37] unless the right to recover the title to the property is claimed on the ground that the debt has been paid, in which case such person has no further interest to be affected by the proceedings.[38]

6. Pleadings — a. Form and Requisites of Bill — (I) *In General.* The courts are lenient in construing bills of this kind, and almost any bill in equity which

Lumber Co., 139 Ala. 571, 36 So. 785; Thomas *v.* Jones, 84 Ala. 302, 4 So. 270.

Indiana.— Parker *v.* Small, 58 Ind. 349.

Maine.— Hilton *v.* Lothrop, 46 Me. 297.

North Carolina.— Thorpe *v.* Ricks, 21 N. C. 613, bill for redemption by purchaser of mortgaged premises at sale on execution.

United States.— Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

See 35 Cent. Dig. tit. "Mortgages," § 1827.

Contra.— Clark *v.* Long, 4 Rand. (Va.) 451.

28. *Alabama.*— Woodward *v.* Wood, 19 Ala. 213.

Illinois.— Essley *v.* Sloan, 16 Ill. App. 63 [*affirmed* in 116 Ill. 391, 6 N. E. 449].

Massachusetts.— Burns *v.* Thayer, 115 Mass. 89, mortgagee who has sold the property under a power contained in the mortgage, and become the purchaser indirectly, is a necessary party.

New York.— Dias *v.* Merle, 4 Paige 259, holding that where a mortgagee in possession has given an absolute lease of the premises, reserving rent, he must be a party to a bill against the lessee to redeem. See also Johnson *v.* Golder, 132 N. Y. 116, 30 N. E. 376 [*reversing* 9 N. Y. Suppl. 739], as to joinder of a mortgagee who has sold the premises at foreclosure sale.

Canada.— Moore *v.* Hobson, 14 Grant Ch. (U. C.) 703.

See 35 Cent. Dig. tit. "Mortgages," § 1828.

29. Southern Mut. Bldg., etc., Assoc. *v.* Andrews, 122 Ala. 598, 26 So. 113.

30. Wood *v.* Holland, 57 Ark. 198, 21 S. W. 223; Copeland *v.* Yoakum, 38 Mo. 349; Guthrie *v.* Sorrell, 41 N. C. 13. But see Hilton *v.* Lothrop, 46 Me. 297, holding that the heirs and devisees should be made parties.

31. Brown *v.* Johnson, 53 Me. 246; Stone *v.* Locke, 46 Me. 445; Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501; Barrett *v.* Sargeant, 18 Vt. 365.

An equitable assignee of the mortgage is an indispensable party to an accounting before a master in chancery between the mortgagor and mortgagee. Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222.

32. Raisin Fertilizer Co *v.* Bell, 107 Ala. 261, 18 So. 168; Beals *v.* Cobb, 51 Me. 348; Williams *v.* Smith, 49 Me. 564; Yelverton *v.* Shelden, 2 Sandf. Ch. (N. Y.) 481.

33. Bryant *v.* Erskine, 55 Me. 153; Lennon *v.* Porter, 2 Gray (Mass.) 473.

34. Sadler *v.* Jefferson, 143 Ala. 669, 39 So. 380; Doody *v.* Pierce, 9 Allen (Mass.) 141; Wolcott *v.* Sullivan, 1 Edw. (N. Y.) 399; Posten *v.* Miller, 60 Wis. 494, 19 N. W. 540.

35. Brown *v.* Johnson, 53 Me. 246. And see *supra*, XVI, E, 1, h.

36. Beals *v.* Cobb, 51 Me. 348. And see *supra*, XVI, B, 1, h, 2, b.

37. Woodward *v.* Wood, 19 Ala. 213; Glass *v.* Glass, 50 Mich. 289, 15 N. W. 460; Rogers *v.* Lewis, 12 Grant Ch. (U. C.) 257.

38. Hudson *v.* Kelly, 70 Ala. 393; Woodward *v.* Wood, 19 Ala. 213. See also to same effect Woodson *v.* Perkins, 5 Gratt. (Va.) 345.

shows the essentials of a right or equity to redeem mortgaged premises may be so treated, or may be turned into a bill to redeem, although originally framed with a different aspect.[39] Regularly, however, the bill should describe the particular mortgage to be redeemed,[40] allege a compliance by the complainant with any statutory provisions made conditions precedent to his right to redeem,[41] describe and set forth fully the particular grounds on which he rests his claim to redemption,[42] show that his right has not been cut off by a foreclosure,[43] and allege his ability and willingness to redeem,[44] and all this by certain and definite averments.[45] Moreover the prayer of the bill should be framed with particular reference to the specific relief which the complainant demands or to which he thinks himself entitled.[46] But it is not necessary that the bill should anticipate any defenses, such as the statute of limitations.[47]

(II) *Absolute Deed as Mortgage.* Where the bill seeks redemption from a security cast in the form of an absolute deed, it is necessary to allege a subsisting debt or obligation secured by the conveyance,[48] the agreement and intention of

39. *Illinois.*— Taylor *v.* Dillenburg, 168 Ill. 235, 48 N. E. 41.

Michigan.— Drayton *v.* Chandler, 93 Mich. 383, 53 N. W. 558.

New Hampshire.— Gooding *v.* Riley, 50 N. H. 400.

New York.— Beach *v.* Cook, 28 N. Y. 508, 86 Am. Dec. 260; Denton *v.* Ontario County Nat. Bank, 18 N. Y. Suppl. 38.

Rhode Island.— Koppinger *v.* O'Donnell, (1889) 16 Atl. 714.

Vermont.— Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

United States.— Merriman *v.* Chicago, etc., R. Co., 64 Fed. 535, 12 C. C. A. 275.

See 35 Cent. Dig. tit. "Mortgages," § 1833.

Applications of rule.— A bill to foreclose brought by a second mortgagee against the first mortgagee and the owner of the equity of redemption is, as against the first mortgagee, a bill to redeem. Hudnit *v.* Nash, 16 N. J. Eq. 550. So a bill to set aside a deed made on a statutory foreclosure of a mortgage, for irregularity in the sale, is in effect a bill to redeem (Hawes *v.* Detroit F. & M. Ins. Co., 109 Mich. 324, 67 N. W. 329, 63 Am. St. Rep. 581), and so is a bill by the mortgagor to enjoin an ejectment by attaching creditors of the mortgagee (Barrett *v.* Sargeant, 18 Vt. 365). But a bill by a mortgagor for an accounting of the rents and profits is not good if it fails to allege that the mortgagee had taken possession. Tetherow *v.* Chambers, 74 Mo. 183.

40. Platt *v.* Squire, 5 Cush. (Mass.) 551.

41. Lacey *v.* Lacey, (Ala. 1905) 39 So. 922; Baker *v.* Burdeshaw, 132 Ala. 166, 31 So. 497; Stocks *v.* Young, 67 Ala. 341; Sturgeon *v.* Mudd, 190 Mo. 200, 88 S. W. 630.

42. German Nat. Bank *v.* Barham, 57 Ark. 533, 22 S. W. 95; Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000. See also Merryman *v.* Blount, (Ark. 1906) 94 S. W. 714. And see, generally, cases cited *infra*, this note.

Grounds alleged.— Among the grounds which may be set forth are the following: That the redemptioner was not a party to foreclosure proceedings (Elrod *v.* Smith, 130 Ala. 212, 30 So. 420; Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688; Harlock *v.* Barnhizer, 30 Ind. 370; Ætna L. Ins. Co. *v.* Stryker, (Ind. App. 1905) 73 N. E. 953; McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Parks *v.* Worthington, (Tex. Civ. App. 1905) 87 S. W. 720); that the mortgage debt was fully paid or extinguished (Noble *v.* Graham, 140 Ala. 413, 37 So. 230; Baker *v.* Burdeshaw, 132 Ala. 166, 31 So. 497; Morris *v.* Hulme, 71 Kan. 628, 81 Pac. 169; Gooding *v.* Riley, 50 N. H. 400); that there was usury in the mortgage debt (Knowlton *v.* Walker, 13 Wis. 264); that there has been a breach of an agreement to extend time for payment (Flynn *v.* Foley, 91 Minn. 444, 98 N. W. 332); that the foreclosure was for an excessive amount (National Bldg., etc., Assoc. *v.* Cheatham, 137 Ala. 395, 34 So. 383); that the mortgagee purchased at foreclosure sale (Norton *v.* British American Mortg. Co., 113 Ala. 110, 20 So. 968); that the price obtained at the foreclosure sale was inadequate (Benson *v.* Bunting, 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81); and that there has been a refusal to permit redemption (Tetherow *v.* Chambers, 74 Mo. 183), or a refusal to account (Putnam *v.* Putnam, 13 Pick. (Mass.) 129).

43. Rainey *v.* McQueen, 121 Ala. 191, 25 So. 920.

44. Platt *v.* Stonington Sav. Bank, 46 Conn. 476.

45. Gerson *v.* Davis, 143 Ala. 381, 39 So. 198; Rainey *v.* McQueen, 121 Ala. 191, 25 So. 920; Conner *v.* Smith, 74 Ala. 115.

46. Parmer *v.* Parmer, 88 Ala. 545, 7 So. 657; White *v.* Curtis, 2 Gray (Mass.) 467; Stillwell *v.* Hamm, 97 Mo. 579, 11 S. W. 252; Australasia Nat. Bank *v.* United Hand-In-Hand, etc., Co., 4 App. Cas. 391, 40 L. T. Rep. N. S. 697, 27 Wkly. Rep. 889; Long *v.* Long, 17 Grant Ch. (U. C.) 251; Graham *v.* Chalmers, 9 Grant Ch. (U. C.) 239; Nelson *v.* Robertson, 1 Grant Ch. (U. C.) 530.

47. Green *v.* Nicholls, 4 L. J. Ch. O. S. 118.

48. Jacoby *v.* Funkhouser, (Ala. 1906) 40 So. 291; Murphy *v.* Murphy, 141 Cal. 471, 75 Pac. 60; Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92; Schultz *v.* McLean, (Cal. 1890)

the parties that the transfer should be in effect a mortgage, notwithstanding its apparent character,[49] the existence of a defeasance, if none is embodied in the deed or an agreement to reconvey, or a sufficient legal reason why the clause of redemption was omitted from the instrument,[50] and that the deed is still in force as a security and the land still subject to redemption.[51]

(III) *Right or Title of Complainant.* If the bill for redemption is brought by a person other than the original mortgagor, he must set forth the nature and extent of the title or interest under which he claims and how and when he acquired it.[52]

(IV) *Averment of Tender.* As an actual tender before bringing suit is generally unnecessary, an offer to pay what is due, incorporated in the bill for redemption, being sufficient,[53] the bill is not ordinarily demurrable for failure to allege such a previous tender.[54] But if the bill is based on a tender made and refused, it must allege the facts and follow up the tender by a payment into court.[55]

(V) *Offer to Pay Amount Due.* Where the bill for redemption is framed on the theory that the mortgage debt or some portion of it is still due, it must contain a tender or offer to pay the sum so admitted.[56] If the amount due is unliquidated or disputed, it is sufficient to offer to pay such sum as the court shall

25 Pac. 427; Jones *v.* Hubbard, 193 Mo. 147, 90 S. W. 1137.

Alleging damages.— In an action to have a deed declared a mortgage, it is only necessary to allege that it was given to secure the payment of money; it is not necessary to allege damages or any special value in the premises. Holton *v.* Meighen, 15 Minn. 69.

Allegations as to insolvency of grantor, etc.— Where the bill to redeem from an absolute deed considered as a mortgage is brought by a judgment creditor, allegations of the insolvency of the grantor and of his fraudulent purpose to defeat and delay creditors in divesting himself of the apparent legal title are not irrelevant or inconsistent with the character ascribed to the deed. Evans *v.* Burton, 42 Hun (N. Y.) 652.

49. Gerson *v.* Davis, 143 Ala. 381, 39 So. 198; Warfield *v.* Fisk, 136 Mass. 219; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809. And see Danzeisen's Appeal, 73 Pa. St. 65.

50. Norris *v.* McLam, 104 N. C. 159, 10 S. E. 140; Adair *v.* Adair, 22 Oreg. 115, 29 Pac. 193.

51. Reynolds *v.* Green, 10 Mich. 355.

52. Lamb *v.* Jeffrey, 47 Mich. 28, 10 N. W. 65; Smith *v.* Austin, 9 Mich. 465; Kling *v.* Childs, 30 Minn. 366, 15 N. W. 673; Staples *v.* Shackleford, 150 Mo. 471, 51 S. W. 1032. See also Fuller *v.* Varnum, (Ala. 1906) 41 So. 777.

Defective allegations of title cannot be cured by the recitals in exhibits attached to the bill and referred to as a part of it, which merely state that plaintiff claimed the land, had become the purchaser of it, etc., but fail to allege how, when, or from whom. Smith *v.* Austin, 9 Mich. 465.

Purchaser of equity of redemption.— The conveyance to plaintiff must be pleaded. Glass *v.* Glass, 50 Mich. 289, 15 N. W. 460. But an averment that the premises were conveyed to plaintiff, without giving the date of the deed, and that plaintiff "has ever since been and still is the lawful owner in fee simple of the same" is sufficient. Thompson *v.* Foster, 21 Minn. 319.

Widow of mortgagor.— A bill by a widow to redeem from a mortgage given by her husband, in order to obtain dower in the equity of redemption, must distinctly set forth a seizin of the husband, during coverture, of an estate in which the wife would be dowable. Wing *v.* Ayer, 53 Me. 465.

Heir of mortgagor.— Sufficiency of allegations to show descent and vesting of title in complainant see Johnson *v.* Golder, 132 N. Y. 116, 30 N. E. 376.

Junior mortgagee.— Sufficiency of allegations to show right of complainant to redeem see Lamb *v.* Jeffrey, 47 Mich. 28, 10 N. W. 65.

Judgment creditor.— A bill for redemption by a judgment creditor of the mortgagor should show how and in what manner he became a judgment creditor, in what court, and for what amount. Norton *v.* British American Mortg. Co., 113 Ala. 110, 20 So. 968; Couthway *v.* Berghaus, 25 Ala. 393; Hobart *v.* Frisbie, 5 Conn. 592; Nilson *v.* Home Bldg., etc., Assoc., 85 Ill. App. 78.

Party omitted from foreclosure proceedings. — Where lands have been sold under a mortgage a petition to redeem must show affirmatively that the party claiming the equity of redemption was not made a defendant in the foreclosure suit. Deroin *v.* Jennings, 4 Nebr. 97.

53. See *supra*, XXII, E, 1.

54. Pryor *v.* Hollinger, 88 Ala. 405, 6 So. 760; Ulrici *v.* Papin, 11 Mo. 42.

55. Daughdrill *v.* Sweeney, 41 Ala. 310; Franklin *v.* Ayer, 22 Fla. 654; Thompson *v.* Foster, 21 Minn. 319.

56. *Alabama.*—Higman *v.* Humes, 133 Ala. 617, 32 So. 574; Beebe *v.* Buxton, 99 Ala. 117, 12 So. 567; Fouche *v.* Swain, 80 Ala. 151; Smith *v.* Conner, 65 Ala. 371; Crews *v.* Threadgill, 35 Ala. 334.

find or determine to be justly due,[57] or whatever sum may be found to be due upon taking and stating the account between the parties;[58] and no such offer is necessary where plaintiff alleges that defendant has been already overpaid out of the proceeds of the property,[59] or where the only demand is for an accounting.[60]

b. Answer and Cross Bill. In answer to a bill for redemption, the mortgagee is not allowed to dispute the mortgagor's title,[61] but he may set up an independent title in himself.[62] The answer should be specific in regard to the amount claimed to be due under the mortgage,[63] and special equities relied on to defeat the action should be specially pleaded.[64] But an assignment by the mortgagor of all his interest in the premises after answer filed can be pleaded by cross bill.[65] After the case is set down for hearing a replication may be filed by leave of court.[66]

c. Issues, Proof, and Variance. The proofs in an action for redemption will be confined to the issues raised by the pleadings, and inquiry into matters not within the scope of those issues will not be permitted.[67] And any material vari-

Georgia.— Ray *v.* Pitman, 119 Ga. 678, 46 S. E. 849.

Indiana.— See Ætna L. Ins. Co. *v.* Stryker, (App. 1906) 78 N. E. 245.

Louisiana.— Bagley *v.* Bourque, 107 La. 395, 31 So. 860.

Massachusetts.—Way *v.* Mullett, 143 Mass. 49, 8 N. E. 881; Green *v.* Tanner, 8 Metc. 411.

Michigan.— Schwarz *v.* Sears, Harr. 440.

Minnesota.— See Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39, holding that in an action to redeem from an absolute deed intended as a mortgage, a formal offer to pay is not necessary in the complaint.

Mississippi.— Edgerton *v.* McRea, 5 How. 183.

Pennsylvania.— Lanning *v.* Smith, 1 Pars. Eq. Cas. 13.

Texas.— Jones *v.* Porter, 29 Tex. 456.

United States.— Collins *v.* Riggs, 14 Wall. 491, 20 L. ed. 723; American L. & T. Co. *v.* Atlanta Electric R. Co., 99 Fed. 313; Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322.

England.— Jefferys *v.* Dickson, L. R. 1 Ch. 183, 12 Jur. N. S. 281, 35 L. J. Ch. 376, 14 L. T. Rep. N. S. 208, 14 Wkly. Rep. 322; McDonough *v.* Shewbridge, 2 Ball & B. 555; Hughes *v.* Cook, 34 Beav. 407, 55 Eng. Reprint 692; Dalton *v.* Hayter, 7 Beav. 313, 29 Eng. Ch. 313, 49 Eng. Reprint 1085; Balfe *v.* Lord, 1 C. & L. 519, 2 Dr. & War. 480, 4 Ir. Eq. 648; Cave *v.* Foulks, 5 L. J. Ch. 206; Hollis *v.* Bulpett, 12 L. T. Rep. N. S. 293, 13 Wkly. Rep. 492. See Perrott *v.* O'Halloran, 2 Ir. Eq. 428.

See 35 Cent. Dig. tit. "Mortgages," § 1838.

In New York it seems that this rule does not obtain. Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000; Beach *v.* Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Quin *v.* Brittain, Hoffm. 353; Barton *v.* May, 3 Sandf. Ch. 450. But *compare* Beekman *v.* Frost, 18 Johns. 544, 9 Am. Dec. 246; Bridgen *v.* Carhartt, Hopk. 234.

Effect of specifying amount due.— Where a bill to redeem alleges an advance of a certain sum for which the land is held as security, and offers to pay that sum only, complainant cannot recover on proof of an advance of a larger sum which there is no offer to repay. Edwards *v.* Rogers, 81 Ala. 568, 8 So. 229.

57. Murphree *v.* Summerlin, 114 Ala. 54, 21 So. 470; Adams *v.* Sayre, 70 Ala. 318; Security Loan Assoc. *v.* Lake, 69 Ala. 456; Dawson *v.* Overmyer, 141 Ind. 438, 40 N. E. 1065; Gordon *v.* Smith, 62 Fed. 503, 10 C. C. A. 516.

58. Kemp *v.* Mitchell, 36 Ind. 249. *Compare* Harding *v.* Pingey, 10 Jur. N. S. 872, 34 L. J. Ch. 13, 10 L. T. Rep. N. S. 323, 12 Wkly. Rep. 684.

59. Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676.

60. Ulrici *v.* Papin, 11 Mo. 42.

61. Wroe *v.* Clayton, 4 Jur. 82, 8 L. J. Ch. 356, 9 L. J. Ch. 107.

62. Mast *v.* Wells, 110 Iowa 128, 81 N. W. 230. And see Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281 (as to claiming under a foreclosure sale which was fraudulent and voidable, but which the mortgagor has not attempted to avoid); Howells *v.* Wilson, 34 Beav. 573, 34 L. J. Ch. 593, 12 L. T. Rep. N. S. 818, 13 Wkly. Rep. 1011, 55 Eng. Reprint 756 (as to pleading a contract for the sale of the equity of redemption to the mortgagee).

63. Gresham *v.* Ware, 79 Ala. 192 (admission of usury); Cary *v.* Herrin, 62 Me. 16 (denying partial payments); Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103 (as to counter-claims); Elmer *v.* Creasy, L. R. 9 Ch. 69, 43 L. J. Ch. 166, 29 L. T. Rep. N. S. 632, 22 Wkly. Rep. 141 (setting out accounts in the answer).

64. Livingston *v.* Ives, 35 Minn. 55, 27 N. W. 74 (defense that deed alleged to be a mortgage was a fraud on grantor's creditors); Lowry *v.* Tew, 3 Barb. Ch. (N. Y.) 407 (plea of *bona fide* purchaser without notice must deny such notice, although it is not distinctly charged in the bill).

65. Lambert *v.* Lambert, 52 Me. 544.

66. Doody *v.* Pierce, 9 Allen (Mass.) 141.

67. *Arkansas.*— Scott *v.* Henry, 13 Ark. 112.

California.— Dalton *v.* Leahey, 80 Cal. 446, 22 Pac. 283.

ance between the pleadings and the evidence will be fatal to the complainant's case.[68]

7. Evidence — a. Presumptions and Burden of Proof. The burden is on the complainant in a bill to redeem to prove the payment, satisfaction, or extinguishment of the mortgage debt, if that is a fact on which he relies,[69] and also to prove that his tender or offer to redeem was made within the time limited by statute or by the conditions of the mortgage.[70] On the other hand defendant must assume the burden of proving a paramount title in himself which he sets up,[71] or support by proof his alleged character of an innocent purchaser without notice of plaintiff's rights.[72]

b. Admissibility. In an action for redemption, evidence of such a nature as would be admissible under the general rules[73] may be received to show the respective titles or relations of the parties to the property,[74] the right of the one to redeem or of the other to resist the redemption,[75] and the amount due under the mortgage or necessary to effect the redemption.[76] In case of a security deed or other ambiguous mode of pledging the property, parol evidence is admissible to explain the nature of the transaction and establish it as a mortgage.[77]

c. Weight and Sufficiency. To warrant a decree for redemption from a conveyance in the form of an absolute deed, but which is alleged to have been intended only as a mortgage, the proof to that effect must be clear, unequivocal, satisfactory, and convincing.[78] And the defense that such a deed was made for the purpose of delaying his creditors will not be sustained unless the evidence establishes such intent, as such a purpose cannot be presumed.[79] But where the right

Connecticut.— Waterman *v.* Curtis, 26 Conn. 241.

Illinois.— Decker *v.* Patton, 120 Ill. 464, 11 N. E. 897; Dwen *v.* Blake, 44 Ill. 135.

Louisiana.— Spicer *v.* Lewis, 7 Mart. 221.

Michigan.— Fosdick *v.* Van Husan, 21 Mich. 567.

United States.— Bentley *v.* Phelps, 3 Fed. Cas. No. 1,332, 3 Woodh. & M. 403.

See 35 Cent. Dig. tit. "Mortgages," § 1842.

Materiality of issues.— On a bill to redeem from a mortgagee who has acquired a tax title to the land while holding it as a mortgagee and in fraud of the owner's rights, the main issue is as to the alleged fraud, and not as to the technical validity of the tax title. O'Halloran *v.* Fitzgerald, 71 Ill. 53. But where complainant in a bill to redeem from a mortgage alleges fraud in the settlement of an open account between the parties, to secure which the mortgage was given, the material issue is as to the debt and its amount, and not as to the fraud alleged. Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244.

68. See Welsh *v.* Coley, 82 Ala. 363, 2 So. 733; Bigelow *v.* Booth, 39 Mich. 622; Gaines *v.* Brockerhoff, 136 Pa. St. 175, 19 Atl. 958.

69. *Maine.*— Furlong *v.* Randall, 46 Me. 79.

Massachusetts.— Strong *v.* Blanchard, 4 Allen 538.

New Jersey.— Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545.

New York.— Agate *v.* Agate, 11 N. Y. St. 579.

North Carolina.— McIver *v.* Smith, 118 N. C. 73, 23 S. E. 971.

70. Lovelace *v.* Hutchinson, 106 Ala. 417, 17 So. 623; Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217.

71. Hodge *v.* Dent, 80 Iowa 378, 45 N. W. 1031; Farmers', etc., Bank *v.* Bronson, 14 Mich. 361.

72. Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773.

73. See, generally, Evidence.

74. Gaskell *v.* Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; Morris *v.* Hulme, 71 Kan. 628, 81 Pac. 169; Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373; Bell *v.* Chamberlain, 3 Ch. Chamb. (U. C.) 429; Constable *v.* Guest, 6 Grant Ch. (U. C.) 510.

75. Kenyon *v.* Shreck, 52 Ill. 382 (impeaching authority of attorney to appear in foreclosure suit for one who seeks to redeem from the sale); Russ *v.* Stratton, 11 Misc. (N. Y.) 565, 32 N. Y. Suppl. 767 (showing date of acceptance of deed by one who claims the right to redeem from a foreclosure because, holding such deed, he was not made a party).

76. Harden *v.* Collins, 138 Ala. 399, 35 So. 357, 100 Am. St. Rep. 42; Stevens *v.* Coffeen, 39 Ill. 148.

Indorsements on mortgage.— In a suit by a mortgagor against the mortgagee for an accounting, payments indorsed on the mortgage by defendant are admissible. Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244.

77. Brown *v.* Johnson, 115 Wis. 430, 91 N. W. 1016; Rogan *v.* Walker, 1 Wis. 527. See also Strong *v.* Blanchard, 4 Allen (Mass.) 538. And see *supra*, III, D, 3, b.

78. See *supra*, III, D, 4, b.

79. Faulkner *v.* Cody, 45 Misc. (N. Y.) 64, 91 N. Y. Suppl. 633.

to redeem is claimed on an agreement extending the time therefor or undertaking to hold the property subject to or for the purpose of a redemption, it is sufficient to establish such right by a preponderance of the evidence; and the rule requiring clear and satisfactory evidence to engraft a trust on a title does not apply.[80] Declarations or admissions of the parties carry a high evidential force;[81] but when the fact of a foreclosure is in issue, it should be proved by record evidence,[82] and the judgment or decree is of course conclusive as to the facts which it finds, including the amount due.[83] Proof of the heirship of a person entitled to redeem from the foreclosure of a mortgage executed by his ancestor is sufficient proof of his right to redeem without the production of any document or record, where it does not appear that any probate proceedings have been begun.[84]

8. Trial or Hearing and Reference — a. In General. It is proper for the court to inquire into and determine the nature of the transaction alleged to be a mortgage,[85] as to the right of the complainant to redeem,[86] his compliance with conditions precedent to his right to maintain the action,[87] and the amount necessary to effect a redemption, including all payments, disbursements, or accounts between the parties which have a bearing on this question.[88] But the court will not pass on any questions as to the effect of the redemption when accomplished or the rights or titles which may be acquired by it,[89] nor will it determine the liabilities of several complainants *inter sese* as to the payment of the mortgage debt nor questions as to contribution between persons who are not parties to the suit.[90] On a bill by a widow to redeem from a mortgage in which she joined, it is not necessary to consider the rights of heirs at law who are not parties.[91]

b. Dismissal. The effect of simply dismissing a bill to redeem is an immediate and absolute foreclosure of the mortgage.[92] Although a bill to redeem from a mortgage is filed in the manner indicated by the particular statutes of the state, yet a court of equity will strike the cause from the calendar if plaintiff is guilty of improper delay in prosecuting his suit after it has come into court.[93]

80. *Illinois.*— Taggart *v.* Blair, 215 Ill. 339, 74 N. E. 372; Ryan *v.* Sanford, 133 Ill. 291, 24 N. E. 428 [*affirming* 25 Ill. App. 571].

Kentucky.— Williams *v.* Watson, 21 S. W. 349, 14 Ky. L. Rep. 786.

Michigan.— Sheehan *v.* Farwell, 135 Mich. 196, 97 N. W. 728.

North Dakota.— Becker *v.* Lough, (1905) 103 N. W. 417.

Texas.— El Paso First Nat. Bank *v.* Moor, 34 Tex. Civ. App. 476, 79 S. W. 53.

Vermont.— See Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941.

Wisconsin.— Brown *v.* Johnson, 115 Wis. 430, 91 N. W. 1016.

81. Couthway *v.* Berghaus, 25 Ala. 393.

82. C. W. Zimmerman Mfg. Co. *v.* Pugh, (Ala. 1905) 39 So. 989.

83. Sparhawk *v.* Wills, 5 Gray (Mass.) 423; Osborne *v.* Dunham, (N. J. Ch. 1888) 16 Atl. 231.

84. Lightbody *v.* Lammers, 98 Minn. 203, 108 N. W. 846.

85. McElmurray *v.* Blodgett, 120 Ga. 9, 47 S. E. 531. And see York Mfg. Co. *v.* Cutts, 18 Me. 204.

86. Sisson *v.* Tate, 114 Mass. 497; Brown *v.* Johnson, 115 Wis. 430, 91 N. W. 1016; Foster *v.* Ker, 12 Ir. Eq. 51.

87. Union Cent. L. Ins. Co. *v.* Rogers, 155 Mo. 307, 55 S. W. 1019.

88. *California.*— De Leonis *v.* Walsh, 140 Cal. 175, 73 Pac. 813.

Maine.— Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053.

Massachusetts.— Stone *v.* Lane, 10 Allen 74, holding that an oral agreement between the mortgagor and mortgagee to allow the mortgage to stand as security for additional advancements by the mortgagee will be enforced by a court of equity, in a suit to redeem by one claiming under the mortgagor with notice.

Mississippi.— Williamson *v.* Downs, 34 Miss. 402, in which it is held that where the mortgage was given to secure all debts, it is proper, on a bill to redeem, to examine all antecedent dealings between the parties which are not shown to have been settled.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108, holding that on a bill to redeem the master need not inquire as to the original consideration of the mortgage if no such question is raised in the pleadings.

See 35 Cent. Dig. tit. "Mortgages," § 1848.

89. Clarke *v.* Northwestern Mut. L. Ins. Co., 94 Fed. 262, 36 C. C. A. 233.

90. George *v.* Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

91. Hays *v.* Cretin, 102 Md. 695, 62 Atl. 1028, 4 L. R. A. N. S. 1039.

92. Goodenow *v.* Curtis, 33 Mich. 505.

93. Bancroft *v.* Sawin, 143 Mass. 144, 9 N. E. 539.

c. Injunction and Receiver. In an action to redeem, the mortgagee may have a receiver appointed if he shows that such a step is necessary to the preservation of his security for the amount justly due him;[94] and on the other hand a receiver may be appointed at the instance of the mortgagor as against the mortgagee in possession, but not where it appears that there is anything due to the mortgagee, unless his mismanagement of the property is likely to work irreparable injury.[95] The mortgagee may be enjoined from prosecuting proceedings for the recovery of the premises if a proper case is made therefor.[96]

d. Reference and Accounting. Where a bill to redeem involves a dispute as to the amount due or the necessity of taking and stating an account between the parties, it is proper and usual to send the case to a referee or master in chancery to hear evidence and find and report as to these matters.[97] If the master finds a subsisting right to redeem, and also a sum due to the mortgagee, it is proper for him to fix and report the time within which such right of redemption must be exercised.[98]

e. Instructions and Verdict. Where an action to redeem from an absolute deed alleged to have been intended as a mortgage is tried by a jury, it is the duty of the court to instruct them explicitly and correctly as to the nature of a mortgage and the facts and circumstances sufficient to fasten that character upon the conveyance in suit;[99] and the jury should be instructed as to the sufficiency and effect of a tender or offer to pay, if that is in evidence,[1] and as to the principles on which they should arrive at a determination of the amount due.[2] The verdict should of course be in such form as to determine the relative rights of the parties.[3]

9. Judgment or Decree — a. Form and Requisites. Where the equity is found to be with the complainant, the proper and usual form of the decree is that he be allowed to redeem upon the payment of the sum found to be due, within a reasonable time to be fixed by the court, and that upon such payment the mortgage shall be adjudged to be satisfied, but that in default of payment the bill shall be dismissed.[4] In some cases, however, it has been ordered that on failure to pay the

94. Lindsay *v.* American Mortg. Co., 97 Ala. 411, 11 So. 770.

95. O'Donnell *v.* Dum, 10 Ohio Dec. (Reprint) 48, 18 Cinc. L. Bul. 203; Boston, etc., R. Corp. *v.* New York, etc., R. Co., 12 R. I. 220.

96. Waller *v.* Harris, 7 Paige (N. Y.) 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590].

97. *Maine.*— Bartlett *v.* Fellows, 47 Me. 53; Jewett *v.* Guild, 42 Me. 246.

Massachusetts.— Merriam *v.* Goss, 139 Mass. 77, 28 N. E. 449; Doody *v.* Pierce, 9 Allen 141.

Michigan.— Shouler *v.* Bonander, 80 Mich. 531, 45 N. W. 487.

New York.— Ross *v.* Boardman, 22 Hun 527.

North Carolina.— McDonald *v.* McLeod, 36 N. C. 221.

Pennsylvania.— Reeder *v.* Trullinger, 151 Pa. St. 287, 24 Atl. 1104.

West Virginia.— Feamster *v.* Withrow, 9 W. Va. 296.

England.— Lewes *v.* Morgan, 5 Price 42, 19 Rev. Rep. 566.

See 35 Cent. Dig. tit. "Mortgages," § 1851.

Scope of inquiry before master.— Where defendant's answer to a bill to redeem asserts a mortgage title in the whole of the premises it is not competent for him to set up a different title, as for a moiety, on the hearing before the master as to the rents and profits. Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143.

Finding as to amount due.— Where the bill admits that a certain sum is due and defendant claims a larger sum, the master to whom the case has been referred to take an account cannot report that nothing is due. Bellows *v.* Stone, 18 N. H. 465.

98. Pitman *v.* Thornton, 66 Me. 469.

99. Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252; Gray *v.* Moore, (Tex. Civ. App. 1904) 84 S. W. 293; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303.

1. Harden *v.* Collins, 138 Ala. 399, 35 So. 357, 100 Am. St. Rep. 42.

2. Benham *v.* Rowe, 2 Cal. 387, 56 Am. Dec. 342; Hall *v.* Lewis, 118 N. C. 509, 24 S. E. 209.

3. See Mellon *v.* Lemmon, 111 Pa. St. 56, 2 Atl. 56.

4. *California.*— Cline *v.* Robbins, 112 Cal. 581, 44 Pac. 1023.

Illinois.— Chicago, etc., Rolling Mill Co. *v.* Scully, 141 Ill. 408, 30 N. E. 1062 [*affirming* 43 Ill. App. 622]; Bremer *v.* Calumet, etc., Canal, etc., Co., 127 Ill. 464, 18 N. E. 321; Massachusetts Mut. L. Ins. Co. *v.* Boggs, 121 Ill. 119, 13 N. E. 550; Decker *v.* Patton, 120 Ill. 464, 11 N. E. 897.

redemption money as fixed by the court the complainant shall stand foreclosed,[5] while in others this contingency has been met by ordering a sale of the property, as upon foreclosure, and the payment of the amount fixed out of the proceeds.[6] Where redemption is sought to be made after a foreclosure and sale, a strict foreclosure should be ordered on failure of plaintiff to pay the redemption money, and not a new sale.[7]

b. Scope and Extent of Relief — (i) *In General.* While a decree in a suit for redemption should not go beyond the pleadings or grant relief not prayed for,[8] yet within these limits the powers of the court are very broad and include all such orders as may be necessary to work out justice between the parties.[9] Thus the court will settle the accounts between the parties and determine the amount

Iowa.— See Meredith *v.* Lochrie, 126 Iowa 596, 102 N. W. 502.

New York.— Boqut *v.* Coburn, 27 Barb. 230; Dunham *v.* Jackson, 6 Wend. 22; Waller *v.* Harris, 7 Paige 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590].

Washington.— Sloane *v.* Lucas, 37 Wash. 348, 79 Pac. 949.

England.— Lysaght *v.* Westmacott, 33 Beav. 417, 55 Eng. Reprint 429; Cowdry *v.* Day, 1 Giffard 316, 5 Jur. N. S. 1200, 29 L. J. Ch. 39, 1 L. T. Rep. N. S. 88, 8 Wkly. Rep. 55, 65 Eng. Reprint 936.

Canada.— Bedson *v.* Smith, 10 Grant Ch. (U. C.) 292.

See 35 Cent. Dig. tit. "Mortgages," § 1856.

Decree for reconveyance.— On a bill to redeem mortgaged premises a decree for a reconveyance by the mortgagee to the mortgagor is erroneous; the latter can only claim a cancellation of the mortgage, and the former may be enjoined from setting up any title at law or in equity by virtue of the mortgage. Merriam *v.* Barton, 14 Vt. 501.

Part of debt not due.— Where part of the mortgage debt is not yet due, the mortgagee is not obliged to accept payment of that portion; but to avoid the injustice of a foreclosure a special decree will be made, upon payment of the sum due, leaving the mortgagee in possession and the whole proceeding standing open until the whole sum shall be due. Mann *v.* Richardson, 21 Pick. (Mass.) 355.

Opening decree.— A decree for redemption against a non-resident defendant, although not absolute under the Alabama statute for eighteen months, will not be opened merely as a matter of right, but it must appear that the decree was unjust by reason of defendant not having actual notice. Lehman *v.* Collins, 69 Ala. 127.

5. Smith *v.* Bailey, 10 Vt. 163; Turner *v.* Turner, 3 Munf. (Va.) 66.

6. Warner Bros. Co. *v.* Freud, 138 Cal. 651, 72 Pac. 345; Hollingsworth *v.* Koon, 117 Ill. 511, 6 N. E. 148, 8 N. E. 193; Decker *v.* Patton, 20 Ill. App. 210 [*affirmed* in 120 Ill. 464, 11 N. E. 897]; Meigs *v.* McFarlan, 72 Mich. 194, 40 N. W. 246; Newkirk *v.* Newkirk, 56 Mich. 525, 23 N. W. 206; Martin *v.* Ratcliff, 101 Mo. 254, 13 S. W. 1051, 20 Am. St. Rep. 605; Ingram *v.* Smith, 41 N. C. 97; Gillis *v.* Martin, 17 N. C. 470, 25 Am. Dec. 729.

7. Martin *v.* Ratcliff, 101 Mo. 254, 13 S. W. 1051, 20 Am. St. Rep. 605. But see Grover *v.* Fox, 36 Mich. 461, holding that on a bill to redeem from an irregular statutory mortgage foreclosure, the decree should provide for redemption from the mortgage as an unforeclosed instrument and should provide for a sale in the event of a failure to redeem.

8. *California.*— Carpentier *v.* Brenham, 50 Cal. 549.

Connecticut.— McGrath *v.* McGrath, 76 Conn. 289, 56 Atl. 551.

Illinois.— Carpenter *v.* Plagge, 93 Ill. App. 445 [*affirmed* in 192 Ill. 82, 61 N. E. 530].

Minnesota.— Hollingsworth *v.* Campbell, 28 Minn. 18, 8 N. W. 873.

New York.— Beach *v.* Cooke, 39 Barb. 360 [*affirmed* in 28 N. Y. 508, 86 Am. Dec. 260].

See 35 Cent. Dig. tit. "Mortgages," § 1860.

9. Saunders *v.* Frost, 5 Pick. (Mass.) 259, 16 Am. Dec. 394. See also Mackenna *v.* Buffalo Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721 [*modifying* 98 N. Y. App. Div. 480, 90 N. Y. Suppl. 493, 112 Am. St. Rep. 620, 3 L. R. A. N. S. 1068].

Correcting decree.— If a junior encumbrancer contends that a decree foreclosing the senior mortgage, in a suit to which he was not a party, was too large, he may allege that fact in his bill to redeem, and if a mistake was made it may be thus corrected. Strang *v.* Allen, 44 Ill. 428.

Reforming instrument.— In Illinois the equitable jurisdiction of the county and probate courts does not include the power to reform a written instrument under seal, so as to vary or qualify the language used, or to declare a deed absolute to be a mortgage. Rook *v.* Rook, 111 Ill. App. 398.

Relief against mortgagee's grantee.— Where a mortgagee illegally purchases the property at a sale under a power in the mortgage, and sells and conveys a portion of it to an innocent purchaser, the mortgagee may be required, in a decree authorizing redemption, to pay over the sum received from the latter sale, and his grantee may be required to pay any deferred payments to the mortgagor. Houston *v.* National Mut. Bldg., etc., Assoc., 80 Miss. 31, 31 So. 540, 92 Am. St. Rep. 565. And see Helt *v.* Ellis, 31 Iowa 86.

Mortgagee not compelled to take the property.— The only relief a court of equity can grant to a mortgagor is to allow him to redeem on a bill properly framed for that purpose; the mortgagee will not be compelled

due from one to the other,[10] and may give a judgment for the mortgagee for the sum found to be due to him,[11] or, if it appears that he is fully paid, may order the cancellation or satisfaction of the mortgage,[12] or order judgment for the mortgagor if the balance is found to be in his favor.[13] So it is within the power of the court to take whatever action may be necessary to adjust finally the rights of the parties with reference to the property mortgaged, setting aside a previous sale if necessary,[14] ordering a reconveyance of the legal title,[15] or a transfer or assignment of the securities,[16] or declaring in whom the title to the estate is vested and enjoining the assertion of claims inconsistent with the decree as a cloud on the title.[17]

(II) *Relief Against Absolute Deed.* Where the security took the form of an absolute deed, the proper decree on allowing redemption is one ordering the grantee, on compliance with the terms of redemption as fixed by the court, to reconvey the premises to the grantor.[18] Or if the conditions of the obligation have been fully performed, the grantor may have it removed as a cloud on his

to take the property at an assessed valuation. Craft *v.* Bullard, Sm. & M. Ch. (Miss.) 366.

10. Hollingsworth *v.* Koon, 117 Ill. 511, 6 N. E. 148, 8 N. E. 193; U. S. Bank *v.* Carroll, 4 B. Mon. (Ky.) 40; Bean *v.* Venable, 87 S. W. 262, 27 Ky. L. Rep. 927; Battle *v.* Griffin, 4 Pick. (Mass.) 6; Bloodgood *v.* Zeily, 2 Cai. Cas. (N. Y.) 124.

11. Johnson *v.* Loftin, 111 N. C. 319, 16 S. E. 179.

12. Bean *v.* Brackett, 35 N. H. 88.

13. *Indiana.*— Weiss *v.* Guerineau, 109 Ind. 438, 9 N. E. 399.

Maine.— Farwell *v.* Sturdivant, 37 Me. 308.

Massachusetts.— Tyler *v.* Brigham, 143 Mass. 410, 9 N. E. 750. *Compare* Taylor *v.* Weld, 6 Mass. 264, under an early statute.

Michigan.— Vosburgh *v.* Lay, 45 Mich. 455, 8 N. W. 91.

Canada.— Livingstone *v.* New Brunswick Bank, 11 N. Brunsw. 252.

See 35 Cent. Dig. tit. "Mortgages," § 1857.

14. Hollingsworth *v.* Koon, 117 Ill. 511, 6 N. E. 148, 8 N. E. 193; Wimpfheimer *v.* Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916. See also Proctor *v.* Baker, 15 Ind. 178.

15. Davis *v.* Duffie, 8 Bosw. (N. Y.) 691; Hall *v.* Heward, 32 Ch. D. 430, 55 L. J. Ch. 604, 54 L. T. Rep. N. S. 810, 34 Wkly. Rep. 571.

16. Rhodes *v.* Buckland, 16 Beav. 212, 51 Eng. Reprint 759. See also Cilley *v.* Huse, 40 N. H. 358.

17. Rawson *v.* Fox, 65 Ill. 200; Drayton *v.* Chandler, 93 Mich. 383, 53 N. W. 558; Stevenson *v.* Saline County, 65 Mo. 425.

18. *Iowa.*— Vennum *v.* Babcock, 13 Iowa 194.

Kentucky.— Guenther *v.* Wisdom, 84 S. W. 771, 27 Ky. L. Rep. 230.

Pennsylvania.— Logue's Appeal, 104 Pa. St. 136.

West Virginia.— Kyger *v.* Depue, 6 W. Va. 288.

United States.— Saunders *v.* Mason, 21 Fed. Cas. No. 12,376, 5 Cranch C. C. 470.

See 35 Cent. Dig. tit. "Mortgages," §§ 1806, 1858, 1859.

Compare Carter *v.* Evans, 17 S. C. 458, holding that the proper course is to order a sale of the property, payment of the debt out of the proceeds, and the surplus to be paid over to the grantor.

Title to be reconveyed.— It is not proper to require a reconveyance of anything more than the interest originally conveyed by the mortgage deed. Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200. And the mortgagee is not bound to convert an imperfect title received into an estate in fee simple. Parmelee *v.* Lawrence, 44 Ill. 405. But see Clark *v.* Laughlin, 62 Ill. 278, where the mortgagee had acquired a tax title to the premises, and he was allowed the money expended for it and ordered to convey the whole title.

Covenants in reconveyance.— The deed of reconveyance may be directed to contain covenants of warranty against all persons claiming through or under the grantee in the original security deed. Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70; Howe *v.* Russell, 36 Me. 115.

Terms of reconveyance fixed by parties.— Where the parties originally fixed the terms on which a reconveyance of the property should be made, a court of equity is justified in refusing to order a reconveyance except upon those terms, where there is nothing to impeach the fairness or competency of the transaction and it appears that substantial justice will thus be done. Goetting *v.* Weber, 71 N. Y. App. Div. 503, 75 N. Y. Suppl. 890.

Fraud of mortgagor.— If the circumstances show that plaintiff has not come into court with clean hands, relief will be denied, as where it appears that the instrument in question was executed in part for the purpose of defrauding creditors, although the evidence shows that the deed was in fact a mortgage. Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401.

Recovery of rents and profits.— Where the grantee in the security deed has taken possession, rents and profits cannot be recovered in an action to redeem if there is no demand for an accounting. Bender *v.* Zimmerman, 122 Mo. 194, 26 S. W. 973.

title.[19] If the property has already been sold and conveyed by the mortgagee to an innocent purchaser without notice, the title will not be disturbed, but the mortgagee will be required to account to the mortgagor for the proceeds of the sale.[20]

(III) *Terms of Redemption.* In settling a decree for redemption, the terms and conditions rest very much in the discretion of the court as exercised upon the facts of each particular case.[21] But the decree should find the exact amount due or necessary to redeem,[22] and condition the redemption upon its payment within a fixed and limited time, the period being a matter for the court's discretion, subject to the proviso that it should not be unreasonably short.[23] If leave has been given the parties to apply further to the court, the terms and conditions of redemption as fixed by the decree may afterward be modified as the exigencies of the case may seem to require.[24]

c. Distribution of Redemption Money. In case other persons than the original mortgagee have interests in the premises or claims upon the redemption money, the decree for redemption will apportion the money and direct the manner of its distribution among them.[25]

d. Construction and Operation — (I) *In General.* A decree of redemption is conclusive as to all facts and issues which it determines,[26] and cannot be impeached collaterally by any party in interest.[27] Generally it confers no additional rights upon the redemptioner which he would not have acquired by a redemption effected without suit,[28] but it may be declared to operate as a conveyance of the title to him.[29]

(II) *Effect of Dismissal or Failure to Redeem.* Generally the dismissal of a bill for redemption, or the failure of plaintiff to redeem within the time limited in the decree, operates as a strict foreclosure of the mortgage,[30] although in

Right to possession.— The court will determine plaintiff's right to possession, where defendant makes no claim to possession except under the deed. Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211.

An agreement to reduce the rate of interest on the loan cannot be specifically enforced. Union Mut. L. Ins. Co. *v.* Slee, 110 Ill. 35.

19. Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200.

20. Baugher *v.* Merryman, 32 Md. 185; McGinnis *v.* Oppenheim, 14 N. Y. St. 557. And see *supra*, III, E, 4.

21. Ogle *v.* Koerner, 41 Ill. App. 452 [*affirmed* in 140 Ill. 170, 29 N. E. 563]; Hannah *v.* Davis, 112 Mo. 599, 20 S. W. 686.

Requiring payment before surrender.— On a bill to redeem it is erroneous to decree the mortgaged property to be given up before the sum due to the mortgagee is paid or tendered to him. Reed *v.* Lansdale, Hard. (Ky.) 6.

22. Stevens *v.* Coffeen, 39 Ill. 148.

23. *Illinois.*— Rodman *v.* Quick, 211 Ill. 546, 71 N. E. 1087; Taylor *v.* Dillenburg, 168 Ill. 235, 48 N. E. 41; Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 508; Bremer *v.* Calumet, etc., Canal, etc., Co., 127 Ill. 464, 18 N. E. 321; Decker *v.* Patton, 20 Ill. App. 210 [*affirmed* in 120 Ill. 464, 11 N. E. 897].

Maine.— Pitman *v.* Thornton, 66 Me. 469.

Massachusetts.— Dennett *v.* Codman, 158 Mass. 371, 33 N. E. 574.

New Hampshire.— Murphy *v.* New Hampshire Sav. Bank, 63 N. H. 362.

New York.— Perine *v.* Dunn, 4 Johns. Ch. 140.

See 35 Cent. Dig. tit. "Mortgages," § 1861.

24. Gerrish *v.* Black, 109 Mass. 474.

Extending time for redemption.—The court may properly refuse to extend the time for redemption fixed in the decree, and dismiss the bill after default, unless plaintiff excuses his default by showing fraud, accident, or mistake unmixed with negligence on his own part. Segrest *v.* Segrest, 38 Ala. 674.

25. *Indiana.*— Paxton *v.* Sterne, 127 Ind. 289, 26 N. E. 557.

Iowa.— Stillman *v.* Rosenberg, (1899) 78 N. W. 913; Van Gorder *v.* Lundy, 66 Iowa 448, 23 N. W. 918.

Massachusetts.— Putnam *v.* Putnam, 13 Pick. 129.

Michigan.— Emerson *v.* Atwater, 12 Mich. 314.

New York.— Davis *v.* Duffie, 18 Abb. Pr. 360.

United States.— Collins *v.* Riggs, 14 Wall. 491, 20 L. ed. 723.

See 35 Cent. Dig. tit. "Mortgages," §§ 1805, 1866.

26. Lyon *v.* Robbins, 45 Conn. 513.

27. Kolle *v.* Clausheide, 99 Ind. 97; Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151.

28. Holt *v.* Rees, 46 Ill. 181.

29. Stitt *v.* Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561.

30. *Illinois.*— Burgess *v.* Ruggles, 146 Ill. 506, 34 N. E. 1036.

Maine.— Pitman *v.* Thornton, 66 Me. 469.

Michigan.— Goodenow *v.* Curtis, 33 Mich. 505.

Minnesota.— Hollingsworth *v.* Campbell, 28 Minn. 18, 8 N. W. 873.

some states this consequence does not follow merely from failure to redeem, until there has been a further order of the court dismissing the bill by reason of such failure or barring the right to redeem.[31]

10. Appeal and Review. An appeal lies from the judgment or decree in a suit in equity for the redemption of property under mortgage.[32] But the reviewing court will not ordinarily consider questions or issues not raised and considered below,[33] nor interfere with a finding based upon the result of conflicting evidence,[34] nor with such provisions of the decree as rest in the discretion of the court below unless manifestly improper.[35]

11. Costs — a. In General. Where both the parties to the action are chargeable with some fault or wrong, as where the mortgagee wrongfully refuses to allow redemption or defends on untenable grounds, but on the other hand the mortgagor has tendered an insufficient amount and insisted on it, the rule is to allow costs to neither party, but to order each party to pay his own costs.[36] An

Rhode Island.— Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433.

England.— Winchester *v.* Paine, 11 Ves. Jr. 194, 8 Rev. Rep. 131, 32 Eng. Reprint 1062. This rule does not apply to an equitable mortgage by deposit of title deeds (Marshall *v.* Shrewsbury, L. R. 10 Ch. 250, 44 L. J. Ch. 302, 32 L. T. Rep. N. S. 418, 23 Wkly. Rep. 803); and where the bill is dismissed merely for want of prosecution, this will not bar another bill to redeem (Hansard *v.* Hardy, 18 Ves. Jr. 455, 34 Eng. Reprint 389).

Canada.— Cornwall *v.* Henriod, 12 Grant Ch. (U. C.) 338.

See 35 Cent. Dig. tit. "Mortgages," § 1869.

Excuse for default.— It was decreed that the mortgagor should pay to the clerk of the court for the mortgagee money in two instalments or be foreclosed. He was prevented by accident from paying the first instalment on its proper day, but very soon after got the money into the clerk's hands. In the mean time the mortgagee took a writ of possession and acquired possession of the premises. The mortgagor then tendered the second instalment on the day appointed for it, but it was refused. The mortgagor then brought his bill, praying that his acts be held a compliance with the foreclosure decree, and the chancellor so decreed. On appeal it was held that there was no compliance with the decree, but as it appeared that the mortgagor would be entitled to redeem on a bill brought for that purpose, he should be permitted to amend his bill into a bill for redemption. Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

31. Tetrault *v.* Labbe, 155 Mass. 497, 30 N. E. 173; Stevens *v.* Miner, 110 Mass. 57; Bolles *v.* Duff, 43 N. Y. 469. But see Thompson *v.* Kenyon, 100 Mass. 108, as to effect of abandonment of suit to redeem.

32. Clapp *v.* Sturdivant, 10 Me. 68. And see White *v.* Hampton, 13 Iowa 259, holding that a mortgagee may appeal from a decree requiring him to take a certain sum and release his mortgage, although he did not answer the petition to redeem.

Bond for stay.— Where the decree directs the payment of the redemption money within a limited time or that the bill be dismissed, no execution could issue for the money and therefore no bond for stay of execution is necessary on appeal. Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131.

Proceedings after remand.— Where a purchaser of part of the lots covered by a mortgage sued for redemption of such lots, under a provision of the mortgage for their release on tender of a proportionate amount of the debt secured, and his right to redeem was denied by the trial court, but allowed on appeal, and the cause remanded for further proceedings in conformity with the opinion, he will not then be allowed to change his claim so as to redeem only a part of the lots purchased by him. Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 508.

Bill of review for newly discovered evidence.— Where a bill was brought to redeem from a deed which was absolute in form but accompanied by a defeasance and therefore claimed to be a mortgage, and the evidence related to the adequacy of the consideration, it was held that newly discovered evidence on this point was no foundation for a bill of review, being merely cumulative and relating to a fact collateral to the issue. Southard *v.* Russell, 16 How. (U. S.) 547, 14 L. ed. 1052.

33. Rodman *v.* Quick, 211 Ill. 546, 71 N. E. 1087; Graves *v.* McFarlane, 2 Coldw. (Tenn.) 167.

34. Newton *v.* Baker, 125 Mass. 30. And see Spangenberg *v.* Schneider, 97 N. Y. App. Div. 200, 89 N. Y. Suppl. 859.

35. Rodman *v.* Quick, 217 Ill. 162, 75 N. E. 465. And see Adams *v.* Sayre, 76 Ala. 509.

36. *Alabama.*— Perdue *v.* Brooks, 85 Ala. 459, 5 So. 126; Hudson *v.* Kelly, 70 Ala. 393.

Iowa.— Wyllie *v.* Matthews, 60 Iowa 187, 14 N. W. 232.

Massachusetts.— Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394.

New York.— Brockway *v.* Wells, 1 Paige 617.

Rhode Island.— Bowen *v.* Atwood, 10 R. I. 302.

Vermont.— Smith *v.* Blaisdell, 17 Vt. 199.

Wisconsin.— Green *v.* Wescott, 13 Wis. 606.

United States.—Loveridge *v.* Larned, 7 Fed. 294.

action of this kind is one in which the court may in its discretion grant an extra allowance of costs, under a statute authorizing such allowance.[37]

b. Rights and Liabilities of Parties as to Costs — (I) *Complainant.* The general rule is that a party who comes into a court of equity to redeem a mortgage does not recover his costs, although the decree is in his favor, but on the contrary must pay the costs.[38] But this rule does not apply where the conduct of the mortgagee is shown to have been unfair, vexatious, or oppressive;[39] where he has improperly resisted a plain right of redemption;[40] or where he unwarrantably claims to be the absolute owner of the property,[41] or sets up an unconscientious, improper, or untenable defense.[42] Nor does the rule apply where the mortgagor seeks and obtains other relief than a decree for redemption, such as an accounting for rents and profits received.[43] Where redemption is decreed, it is proper to allow the redemptioner to recover costs only in case he exercises his right of redemption.[44]

(II) *Defendant* — (A) *In General.* As the converse of the rule stated in the preceding section it follows that the mortgagee will be entitled to recover his costs, although a right of redemption is found to exist and redemption allowed by the decree,[45] unless the mortgagee has put himself in the wrong by arbitrary and oppressive conduct, improper and untenable defenses, fraud, exaggerated claims,

Canada.— Boswell *v.* Gravley, 16 Grant Ch. (U. C.) 523; Isherwood *v.* Dixon, 5 Grant Ch. (U. C.) 314.

See 35 Cent. Dig. tit. "Mortgages," § 1872.

37. Burke *v.* Candee, 63 Barb. (N. Y.) 552.

38. *Alabama.*— Blum *v.* Mitchell, 59 Ala. 535.

Maine.— Kittredge *v.* McLaughlin, 38 Me. 513; Bourne *v.* Littlefield, 29 Me. 302.

Michigan.— Lamb *v.* Jeffrey, 47 Mich. 28, 10 N. W. 65.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62.

New Jersey.— Melick *v.* Creamer, 25 N. J. Eq. 429; Phillips *v.* Hulsizer, 20 N. J. Eq. 308.

New York.— Cross *v.* Smith, 85 Hun 49, 32 N. Y. Suppl. 671; Belden *v.* Slade, 26 Hun 635.

Pennsylvania.— Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

Rhode Island.— Sessions *v.* Richmond, 1 R. I. 298.

Virginia.— Turner *v.* Turner, 3 Munf. 66.

England.— Cowdry *v.* Day, 1 Giffard 316, 5 Jur. N. S. 1200, 29 L. J. Ch. 39, 1 L. T. Rep. N. S. 88, 5 Wkly. Rep. 55, 65 Eng. Reprint 936; Wynne *v.* Brady, 5 Ir. Eq. 239; Tottenham *v.* Green, 32 L. J. Ch. 201; Drew *v.* Harman, 5 Price 319.

See 35 Cent. Dig. tit. "Mortgages," § 1873.

In New Hampshire this rule is controlled by a statute allowing costs to the prevailing party in all cases. Bean *v.* Brackett, 35 N. H. 88.

39. McNeil *v.* Call, 19 N. H. 403, 51 Am. Dec. 188; Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15; Hendee *v.* Howe, 33 N. J. Eq. 92; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Snagg *v.* Frith, 9 Ir. Eq. 285.

40. Naylor *v.* Colville, 20 N. Y. App. Div. 581, 47 N. Y. Suppl. 267; Bruner *v.* Threadgill, 93 N. C. 225; Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539, 29 N. W. 559; Pierce *v.* Canavan, 29 Grant Ch. (U. C.) 32.

41. May *v.* Eastin, 2 Port. (Ala.) 414; Guenther *v.* Wisdom, 84 S. W. 771, 27 Ky. L. Rep. 230.

42. Slee *v.* Manhattan Co., 1 Paige (N. Y.) 48; Ryer *v.* Morrison, 21 R. I. 127, 42 Atl. 509; Begbie *v.* Fenwick, L. R. 6 Ch. 869, 25 L. T. Rep. N. S. 441, 20 Wkly. Rep. 67; Montgomery *v.* Calland, 8 Jur. 436, 14 Sim. 79, 37 Eng. Ch. 79, 60 Eng. Reprint 287.

43. McConnel *v.* Holobush, 11 Ill. 61; Hawkins *v.* Nowland, 53 Mo. 328; Pawley *v.* Colyer, 16 Wkly. Rep. 114.

44. Sanders *v.* Peck, 131 Ill. 407, 25 N. E. 508.

45. *New Jersey.*— Forman *v.* Bulson, 30 N. J. Eq. 493.

Pennsylvania.— Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

Vermont.— Thrall *v.* Chittenden, 31 Vt. 183.

England.— McDonnell *v.* McMahon, L. R. 23 Ir. 283; Newsham *v.* Gray, 2 Atk. 286, 56 Eng. Reprint 575; Barlow *v.* Gains, 23 Beav. 244, 53 Eng. Reprint 95; Batchelor *v.* Middleton, 6 Hare 75, 31 Eng. Ch. 75, 67 Eng. Reprint 1088; Wilson *v.* Metcalfe, 1 Russ. 530, 25 Rev. Rep. 128, 46 Eng. Ch. 472, 38 Eng. Reprint 204; Loftus *v.* Swift, 2 Sch. & Lef. 642; Gammon *v.* Stone, 1 Ves. 339, 30 Eng. Reprint 1068; Detillin *v.* Gale, 7 Ves. Jr. 583, 6 Rev. Rep. 192, 32 Eng. Reprint 234.

Canada.— McKinnon *v.* Anderson, 17 Grant Ch. (U. C.) 636; Robertson *v.* Beamish, 16 Grant Ch. (U. C.) 676.

See 35 Cent. Dig. tit. "Mortgages," § 1874.

Lien for costs.— Where money was deposited with the clerk of the court to redeem mortgaged premises, and the right to redeem was denied on appeal, the money being repaid on application to the clerk before the mortgagee had served him with notice of his claim thereon of a lien for costs, a motion made subsequently that the lien be estab-

or refusal of a good tender.[46] Within the same limitations he may also recover the costs of his appeal from the decree.[47]

(B) *Refusal to Account or Rendering Imperfect Account.* A mortgagee in possession who neglects or refuses on demand to render an account, or renders a false or imperfect account, is liable for the costs of a subsequent suit to redeem.[48]

c. Effect of Tender Before Suit. The mortgagee's unwarrantable refusal of a good and sufficient tender, made to him before bringing suit to redeem, will throw the costs of the action upon him.[49]

I. Operation and Effect of Redemption — 1. In General. Where redemption is made by the mortgagor, it is to be considered as a payment,[50] and satisfies and discharges the mortgage.[51] If redemption is made after a sale on foreclosure,

lished will be denied. Meehan *v.* Blodgett, 91 Wis. 63, 64 N. W. 429.

46. *Maine.*— Kittredge *v.* McLaughlin, 38 Me. 513.

Michigan.— Meigs *v.* McFarlan, 72 Mich. 194, 40 N. W. 246.

New York.— Davis *v.* Duffie, 18 Abb. Pr. 360. See also Vroom *v.* Ditmas, 4 Paige 526.

England.— Francklyn *v.* Fern, Barn. Ch. 30; Barlow *v.* Gains, 23 Beav. 244, 53 Eng. Reprint 95; Gregg *v.* Slater, 22 Beav. 314, 2 Jur. N. S. 246, 25 L. J. Ch. 440, 4 Wkly. Rep. 381, 52 Eng. Reprint 1129; Wilson *v.* Cluer, 4 Beav. 214, 49 Eng. Reprint 320; Norton *v.* Cooper, 5 De G. M. & G. 728, 2 Wkly. Rep. 659, 54 Eng. Ch. 572, 43 Eng. Reprint 1053; England *v.* Codrington, 1 Eden 169, 28 Eng. Reprint 649; Squire *v.* Pardoe, 66 L. T. Rep. N. S. 243, 40 Wkly. Rep. 100; Dryden *v.* Frost, 2 Jur. 1030, 8 L. J. Ch. 235, 3 Myl. & C. 670, 14 Eng. Ch. 670, 40 Eng. Reprint 1084; Binnington *v.* Harwood, Turn. & R. 477, 12 Eng. Ch. 477, 37 Eng. Reprint 1184.

Canada.— Dominion Sac., etc., Soc. *v.* Kittridge, 23 Grant Ch. (U. C.) 631; Souter *v.* Burnham, 10 Grant Ch. (U. C.) 375; Long *v.* Glenn, 5 Grant Ch. (U. C.) 208; Le Targe *v.* De Tuyll, 3 Grant Ch. (U. C.) 595.

See 35 Cent. Dig. tit. "Mortgages," § 1874.

Excessive claim made in good faith.— A mortgagee cannot be charged with oppressive or unfair conduct, so as to deprive him of his costs, merely because the amount he claims to be entitled to is excessive, if the claim was made in good faith and honestly. Cotterell *v.* Stratton, L. R. 8 Ch. 295, 42 L. J. Ch. 417, 28 L. T. Rep. N. S. 218, 21 Wkly. Rep. 234; Smith *v.* Watts, 22 Ch. D. 5, 52 L. J. Ch. 209, 28 L. T. Rep. N. S. 167, 31 Wkly. Rep. 262; Norton *v.* Cooper, 5 De G. M. & G. 728, 2 Wkly. Rep. 659, 54 Eng. Ch. 572, 43 Eng. Reprint 1053; Little *v.* Brunker, 28 Grant Ch. (U. C.) 191.

Dispute as to rate of interest.— A mortgagee will not be deprived of his costs because the suit for redemption was made necessary by a dispute as to the rate of interest to which he was entitled. Thomas *v.* Girvan, 1 N. Brunsw. Eq. 314.

Balance due to mortgagor.— Where, in a redemption suit against a mortgagee in possession, a balance is found to have been due to the mortgagor at the institution of the suit, the mortgagee must pay the costs. O'Neil *v.* Innes, 15 Ir. Ch. 527.

47. Addison *v.* Cox, L. R. 8 Ch. 76, 42 L. J. Ch. 291, 28 L. T. Rep. N. S. 45, 21 Wkly. Rep. 180.

48. *California.*— De Leonis *v.* Walsh, 140 Cal. 175, 73 Pac. 813.

Maine.— Hall *v.* Gardner, 71 Me. 233; Milliken *v.* Bailey, 61 Me. 316; Whitney *v.* Deming, 46 Me. 382; Sprague *v.* Graham, 38 Me. 328.

Massachusetts.— Montague *v.* Phillips, 16 Gray 566; Woodward *v.* Phillips, 14 Gray 132; Whitwood *v.* Kellogg, 6 Pick. 420.

Michigan.— Crawford *v.* Osmun, 90 Mich. 77, 51 N. W. 356; Meigs *v.* McFarlan, 72 Mich. 194, 40 N. W. 246.

New Hampshire.— Currier *v.* Webster, 45 N. H. 226.

See 35 Cent. Dig. tit. "Mortgages," § 1876.

Effect of mistakes.— A statutory provision making a mortgagee liable for the costs of a suit to redeem where he has "unreasonably refused or neglected to render a just and true account" means any such refusal as shows an intention to embarrass the other party; and where a mortgagee on request did render an account without any unreasonable delay, giving all the information in his power, he was held not liable for the costs, although some of the items proved to be erroneous. Whitwood *v.* Kellogg, 6 Pick. (Mass.) 420.

49. *Maryland.*— Columbian Bldg. Assoc. No. 4 *v.* Crump, 42 Md. 192.

Massachusetts.— Miller *v.* Lincoln, 6 Gray 556.

Michigan.— Lamb *v.* Jeffrey, 47 Mich. 28, 10 N. W. 65, 41 Mich. 719, 3 N. W. 204.

New Hampshire.— Brown *v.* Simons, 45 N. H. 211.

New Jersey.— Shields *v.* Lozear, 22 N. J. Eq. 447; Phillips *v.* Hulsizer, 20 N. J. Eq. 308.

New York.— Shearer *v.* Field, 6 Misc. 189, 27 N. Y. Suppl. 29; Bridgen *v.* Carhartt, Hopk. 234. See also King *v.* Duntz, 11 Barb. 191.

Pennsylvania.— Saeger's Appeal, 96 Pa. St. 479.

Vermont.— Cree *v.* Lord, 25 Vt. 498.

West Virginia.— Lishey *v.* Snyder, 56 W. Va. 610, 49 S. E. 515.

See 35 Cent. Dig. tit. "Mortgages," § 1875.

50. Johnson *v.* Johnson, Walk. (Mich.) 331.

51. Tatum *v.* Hollis, 132 Ala. 331, 31 So. 798; Kerse *v.* Miller, 169 Mass. 44, 47 N. E.

it opens the judgment or decree and has the effect of annulling the sale and all proceedings thereunder,[52] putting an end to the inchoate title of the purchaser.[53] If such a redemption is effected by a junior mortgagee or judgment creditor, he succeeds to the position and all the rights of the foreclosure purchaser,[54] or according to some of the decisions, by a species of subrogation, to the position and rights of the mortgagee whom he redeems.[55] Whoever makes the redemption, it may inure to the benefit of others who are entitled to his rights or to the benefit of his acts.[56]

2. Assignment of Certificate of Sale or Redemption. Where a person who has the right to redeem from a foreclosure sale, but is under no legal obligation to do so, such as a junior mortgagee or judgment creditor, pays the proper sum to the foreclosure purchaser and receives an assignment of the certificate of sale, it is not a redemption, but a purchase of the rights and title of such purchaser.[57] And where a tender of the money from a person who has no right to redeem is accepted, he becomes an equitable assignee of the certificate of sale.[58]

3. Extinguishment of Liens. A redemption by the mortgagor or his grantee extinguishes the lien of the mortgage,[59] except where the foreclosure was upon a

504; Ellis *v.* Ellis, 1 Ch. Chamb. (U. C.) 257.

Accountability for rents and profits.— At common law and under the statutes, a mortgagor cannot compel the mortgagee to account for the rents and profits of the mortgaged premises after the mortgage is extinguished by a redemption. Wilcox *v.* Cheviott, 92 Me. 239, 42 Atl. 403.

Redeeming from partial foreclosure.— A quitclaim obtained by the mortgagor from the mortgagee of the premises, for the purpose of perfecting title by redeeming from a sale on partial foreclosure, cannot be construed as discharging the entire mortgage. Mabie *v.* Hatinger, 48 Mich. 341, 12 N. W. 198.

52. *Indiana.*— Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27; Teal *v.* Hinchman, 69 Ind. 379.

Iowa.— Stastny *v.* Pease, 124 Iowa 587, 100 N. W. 482; Blake *v.* Black, 55 Iowa 252, 3 N. W. 657, 7 N. W. 578; Stoddard *v.* Forbes, 13 Iowa 296.

Minnesota.— Clark *v.* Butts, 78 Minn. 373, 81 N. W. 11; Sprague *v.* Martin, 29 Minn. 226, 13 N. W. 34; Daniels *v.* Smith, 4 Minu. 172. But *compare* Darelius *v.* Davis, 74 Minn. 345, 77 N. W. 214; Chamblin *v.* Slichter, 12 Minn. 276.

Vermont.— Woodward *v.* Cowdery, 41 Vt. 496; Converse *v.* Cook, 8 Vt. 164.

Washington.— De Roberts *v.* Stiles, 24 Wash. 611, 64 Pac. 795.

See 35 Cent. Dig. tit. "Mortgages," § 1880.

Redemption of undivided interest.— A redemption by the owner of an undivided interest in land, from the sale on foreclosure, by the payment of the entire debt, annuls the sale as to the whole tract. Buettel *v.* Harmount, 46 Minn. 481, 49 N. W. 250.

53. *Alabama.*—Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73.

Indiana.— Pence *v.* Armstrong, 95 Ind. 191.

New Jersey.— Kappes *v.* Rutherford Park Assoc., 60 N. J. Eq. 129, 46 Atl. 218.

Oregon.— Kaston *v.* Storey, 47 Oreg. 150, 80 Pac. 217.

Vermont.— Crosby *v.* Leavitt, 50 Vt. 239.

54. *California.*— Eldridge *v.* Wright, 55 Cal. 531. And see San Jose Safe-Deposit Bank *v.* Madera Bank, 121 Cal. 539, 54 Pac. 83.

Illinois.— Jackson *v.* Grosser, 218 Ill. 494, 75 N. E. 1032.

Minnesota.— See Horton *v.* Maffitt, 14 Minn. 289, 100 Am. Dec. 222.

North Dakota.— McDonald *v.* Beatty, 10 N. D. 511, 88 N. W. 281.

Utah.— Dupee *v.* Salt Lake Valley L. & T. Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902.

United States.— Traer *v.* Fowler, 144 Fed. 810, 75 C. C. A. 540.

55. See Ogle *v.* Koerner, 140 Ill. 170, 29 N. E. 563; Shroeder *v.* Bauer, 140 Ill. 135, 29 N. E. 560; Lloyd *v.* Karnes, 45 Ill. 62; Johnson *v.* Johnson, Walk. (Mich.) 331; MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281.

56. *Illinois.*— Morava *v.* Bonner, 205 Ill. 321, 68 N. E. 707.

Iowa.— Witham *v.* Blood, 124 Iowa 695, 100 N. W. 558; Manning *v.* Markel, 19 Iowa 103.

Kentucky.— Potter *v.* Skiles, 114 Ky. 132, 70 S. W. 301, 71 S. W. 627, 24 Ky. L. Rep. 910.

Minnesota.— See Peterson *v.* Webber, 46 Minn. 372, 49 N. W. 125.

New York.— Slee *v.* Manhattan Co., 1 Paige 48.

Vermont.— See Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941.

57. Chytraus *v.* Smith, 141 Ill. 231, 30 N. E. 450; Shroeder *v.* Bauer, 140 Ill. 135, 29 N. E. 560; McRoberts *v.* Conover, 71 Ill. 524; Lloyd *v.* Karnes, 45 Ill. 62; Gilbert *v.* Husman, 76 Iowa 241, 41 N. W. 3; Hurn *v.* Hill, 70 Iowa 38, 29 N. W. 796; Streeter *v.* Tama City First Nat. Bank, 53 Iowa 177, 4 N. W. 915; Sprague *v.* Martin, 29 Minn. 226, 13 N. W. 34; Tichout *v.* Harmon, 2 Aik. (Vt.) 37.

58. White *v.* Costigan, (Cal. 1901) 63 Pac. 1075.

59. *Arkansas.*— Fields *v.* Danehower, 65 Ark. 392, 46 S. W. 938, 43 L. R. A. 519.

partial default, in which case the lien of the mortgage remains for the unsatisfied balance of the debt.[60] This result follows also where the redemption is by a junior mortgagee or judgment creditor,[61] unless it is necessary, for his protection against other interests, to consider him as subrogated to the lien of the first mortgagee.[62] The lien on which the redemption is made is also extinguished, so that it cannot be made the basis for further redemptions.[63] Junior liens are not cut off where the redemption is made by the mortgagor;[64] but it is otherwise where it is made by a creditor, as to whom the junior lien-holder might have redeemed but did not.[65]

4. Lien For Redemption Money. A lien creditor or other person effecting the redemption of mortgaged land has a lien for the money paid by him for that purpose which must be satisfied before he can be required to surrender the premises to the ultimate owner.[66]

J. Contribution. Where one joint owner or tenant in common of mortgaged land redeems the whole estate from the mortgage or from a foreclosure sale, he is entitled to exact contribution from his cotenants for their proportionate shares of the mortgage debt, and to enforce this right he is regarded as having a lien in the nature of an equitable mortgage upon their respective shares of the property.[67] The same rule applies where different portions of the mortgaged premises are owned by different persons in severalty, provided their equities with respect to the payment of the mortgage debt are equal and no one of them is under a special or primary obligation to discharge the whole;[68] but different parcels conveyed by the mortgagor to different purchasers successively are liable to contribute in the inverse order of their alienation.[69] A similar rule

California.— Perkins *v.* Center, 35 Cal. 713.

Iowa.— See Bleckman *v.* Butler, 77 Iowa 128, 41 N. W. 593.

Kentucky.— Makibben *v.* Arndt, 88 Ky. 180, 10 S. W. 642, 10 Ky. L. Rep. 847.

Oregon.— Willis *v.* Miller, 23 Oreg. 352, 31 Pac. 827.

South Dakota.— Merrill *v.* Luce, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844.

See 35 Cent. Dig. tit. "Mortgages," § 1883.

Resale for deficiency.— A statute prohibiting the sale of a mortgagor's equity of redemption to satisfy the mortgage does not preclude a resale to satisfy a deficiency after redemption by the mortgagor from the first sale. Mitchell *v.* Ringle, 151 Ind. 16, 50 N. E. 30, 68 Am. St. Rep. 212. And see Todd *v.* Oglebay, 158 Ind. 595, 64 N. E. 32.

60. *California.*— Hocker *v.* Reas, 18 Cal. 650.

Indiana.— Ewing *v.* Bratton, 132 Ind. 345, 31 N. E. 562.

Minnesota.— Herber *v.* Christopherson, 30 Minn. 395, 15 N. W. 676.

Nebraska.— Nebraska L. & T. Co. *v.* Haskell, 4 Nebr. (Unoff.) 330, 93 N. W. 1045.

Utah.— Dupee *v.* Salt Lake Valley L. & T. Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902.

61. Curtis *v.* Cutler, 76 Fed. 16, 22 C. C. A. 16, 37 L. R. A. 737.

62. Flachs *v.* Kelly, 30 Ill. 462; Breedlove *v.* Austin, 146 Ind. 694, 46 N. E. 25.

63. Lamb *v.* Feeley, 71 Iowa 742, 30 N. W. 653; Sprague *v.* Martin, 29 Minn. 226, 13 N. W. 34; Work *v.* Braun, (S. D. 1905) 103 N. W. 764. But see Lowry *v.* Akers, 50 Minn. 508, 52 N. W. 922.

64. Dickerman *v.* Lust, 66 Iowa 444, 23 N. W. 916.

65. Cooper *v.* Maurer, 122 Iowa 321, 98 N. W. 124; Bevans *v.* Dewey, 82 Iowa 85, 47 N. W. 1009; Moody *v.* Funk, 82 Iowa 1, 47 N. W. 1008, 31 Am. St. Rep. 455.

66. Rice *v.* Puett, 81 Ind. 230; Webb *v.* Williams, Walk. (Mich.) 544.

67. *Illinois.*— Baird *v.* Jackson, 98 Ill. 78; Illinois Land, etc., Co. *v.* Bonner, 91 Ill. 114; Fischer *v.* Eslaman, 68 Ill. 78; Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577.

Indiana.— Union Nat. Bank *v.* McConaha, 14 Ind. App. 82, 42 N. E. 495.

Louisiana.— Labauve's Estate, 39 La. Ann. 388, 1 So. 830.

Massachusetts.—Brown *v.* Worcester Bank, 8 Metc. 47; Parkman *v.* Welch, 19 Pick. 231; Allen *v.* Clark, 17 Pick. 47; Gibson *v.* Crehore, 5 Pick. 146; Taylor *v.* Porter, 7 Mass. 355.

Michigan.— Goodrich *v.* Leland, 18 Mich. 110.

Minnesota.— Buettel *v.* Harmount, 46 Minn. 481, 49 N. W. 250; Oliver *v.* Hedderly, 32 Minn. 455, 21 N. W. 478.

Vermont.—Richards *v.* Stanley, 50 Vt. 147; Adams *v.* Smilie, 50 Vt. 1; Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41.

See 35 Cent. Dig. tit. "Mortgages," § 1759.

68. *Illinois.*— Huber *v.* Hess, 191 Ill. 305, 61 N. E. 61; Moore *v.* Shurtleff, 128 Ill. 370, 21 N. E. 775; Pool *v.* Marshall, 48 Ill. 440.

Indiana.— Henderson *v.* Truitt, 95 Ind. 309.

Maine.— Bailey *v.* Myrick, 50 Me. 171.

New York.— Coffin *v.* Parker, 127 N. Y. 117, 27 N. E. 814.

Canada.— See Imrie *v.* Archibald, 25 Can. Sup. Ct. 368.

69. See Vogle *v.* Brown, 120 Ill. 338, 11 N. E. 327, 12 N. E. 252; Gridley *v.* Brook-

of contribution obtains as between the life-tenant of the mortgaged property and the owner of an estate in remainder or reversion,[70] and as between junior mortgagees of equal grade, one of whom has discharged the whole of the prior encumbrance for the protection of their common interest.[71]

MORTGAGE SECURITY COMPANY. A term which may include a company authorized to loan its money on mortgaged security, although the business of the company is not confined to making such loans.[1]

MORTGAGIUM SCUTO MAGIS QUAM GLADIO EST. A maxim meaning "A mortgage is used as a shield rather than a sword."[2]

MORTGAGOR. He that gives a mortgage.[3]

MORTMAIN. In its primary signification, an alienation of lands or tenements to any corporation aggregate, ecclesiastical or temporal.[4] (See, generally, CHARITIES; PERPETUITIES.)

MORTMAIN ACTS. Acts, the object of which was to prevent lands from getting into the possession and control of religious corporations.[5] (See MORTMAIN.)

MORTUARY. In early English history, a sort of offering to the church as a penance.[6]

MORTUARY TABLES. See CARLISLE TABLES; MORTALITY TABLES.

MORTUUS CIVILITER. See CONVICTS.

MORTUUS EXITUS NON EST EXITUS. A maxim meaning "A dead issue is no issue."[7]

MOS RETINENDUS EST FIDELISSIMÆ VETUSTATIS. A maxim meaning "A custom of the truest antiquity is to be retained."[8]

MOSS. A small herbaceous plant of the natural order *musci*.[9]

Waterfield Co., 14 S. W. 407, 12 Ky. L. Rep. 391, 9 L. R. A. 555. And see *supra*, XVII, F, 2, a.

70. Boue *v.* Kelsey, 53 Ill. App. 295.

71. Condict *v.* Flower, 106 Ill. 105; Tarbell *v.* Durant, 61 Vt. 516, 17 Atl. 44.

1. People *v.* Mutual Trust Co., 96 N. Y. 10, 14, construing the term as used in Laws (1874), c. 324.

2. Morgan Leg. Max.

3. Black L. Dict. *Compare* Westlake *v.* Westlake, 47 Ohio St. 315, 317, 24 N. E. 412, construing Rev. St. §§ 4150, 4151.

The word "mortgagor" may include any person claiming under such party or having any right. N. H. Pub. St. (1901) p. 63, c. 2, § 17. Thus it may include a grantee or heir. Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 125, 63 N. W. 553. See, generally, MORTGAGES.

4. Perin *v.* Carey, 24 How. (U. S.) 465, 495, 16 L. ed. 701, where it is said: "The consequence of which in former times was, that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation."

"The term 'mortmain,' as its derivation signifies, is not necessarily confined to the landed possessions of corporations; it equally applies to all property that, from the nature of the purposes to which it is devoted, or the character of the ownership to which it is subjected, is for every practical purpose, in a dead or unserviceable hand." Lewis Perpet. 689 [*quoted* in Yates *v.* Yates, 9 Barb. (N. Y.) 324, 333].

5. Yates *v.* Yates, 9 Barb. (N. Y.) 324, 333. See also Thompson *v.* Bennet, Smith (N. H.) 327, 329.

6. Ayrton *v.* Abbott, 14 Q. B. 1, 19, 14 Jur. 314, 18 L. J. Q. B. 314, 68 E. C. L. 1.

The origin of mortuaries is by no means clear, but they seem to have been in very early times voluntary, as a sort of offering to the church for any possible omissions of which the deceased person may have been guilty in respect to the dues of the church. Afterward the second best beast of the deceased seems to have been claimed as a mortuary of right. At any rate, so early as the reign of Edward the First, the right to a mortuary had become matter of custom. Ayrton *v.* Abbott, 14 Q. B. 1, 19, 14 Jur. 314, 18 L. J. Q. B. 314, 68 E. C. L. 1. See also Mirehouse *v.* Rennell, 8 Bing. 490, 497, 21 E. C. L. 633, 7 Bligh N. S. 241, 5 Eng. Reprint 759, 1 Cl. & F. 527, 6 Eng. Reprint 1015, 1 Moore & S. 683.

7. Black L. Dict. [*citing* Coke Litt. 29].

8. Black L. Dict.

9. Century Dict.

As used in a tariff act see Shaw *v.* Prior, 68 Fed. 421, 423.

Irish moss or sea moss.— "Worcester's Dictionary describes Irish moss or sea moss as 'a species of sea weed (Chondrus crispus) whose gelatinous qualities render it valuable as an article of food.' The Imperial Dictionary, in describing sea moss, describes it as

MOST. Used before adjectives and adverbs to form a superlative phrase.[10]

MOTHER.[11] Ordinarily a woman who has borne a child.[12] (Mother: In General, see PARENT AND CHILD. Support and Maintenance, see PARENT AND CHILD; PAUPERS. See also ADOPTION; DESCENT AND DISTRIBUTION.)

MOTION MAN. A licensee carrying on work on his own account, on the land of the licensor, to quarry out.[13]

'a marine plant of the genera corallina.' The Encyclopedia Britannica says: 'Irish moss or Carrageen, is a sea weed (Chondrus crispus), which grows abundantly along the rocky parts of the Atlantic coasts of Europe and North America. It is collected for commercial purposes on the west and northwest of Ireland, and in very large quantities on the coast of Plymouth county, Massachusetts, U. S. It is used for food, medicine, and a thickener for printing calico and for finning beer.'" *In re* F. W. Myers, 123 Fed. 952, 955.

10. Century Dict.

For example in the following expressions: "Most approved" see Missouri Pac. R. Co. *v.* Bartlett, 81 Tex. 42, 44, 16 S. W. 638. "Most contiguous" see Turley *v.* North American F. Ins. Co., 25 Wend. (N. Y.) 374, 378. "Most convenient" see Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 642, 7 Ohio N. P. 511. "Most destitute of my relatives" see Gafney *v.* Kenison, 64 N. H. 354, 356, 10 Atl. 706. "Most direct" see Maynard *v.* Cedar County, 51 Iowa 430, 431, 1 N. W. 701. "Most exact care" see Dodge *v.* Boston, etc., Steamship Co., 143 Mass. 207, 218, 19 N. E. 373, 12 Am. St. Rep. 541, 2 L. R. A. 83. "Most needy" see Fontaine *v.* Thompson, 80 Va. 229, 232, 56 Am. Rep. 588. "Most public" see Sauerhering *v.* Iron Ridge, etc., R. Co., 25 Wis. 447, 458. "Most remarkable" see Hoffman *v.* Rodman, 39 N. J. L. 252, 256.

11. **Distinguished from "parent"** in Lantznester *v.* State, 19 Tex. App. 320, 321.

12. Latshaw *v.* State, 156 Ind. 194, 204, 59 N. E. 471.

The term may include, however, a woman pregnant with child (Howard *v.* People, 185 Ill. 552, 562, 57 N. E. 441); or an unmarried woman who has either been delivered of or is pregnant with a bastard child (Latshaw *v.* State, 156 Ind. 194, 204, 59 N. E. 471). In fact, a woman may be said to be the mother of the child begotten from the beginning of the period of gestation. Latshaw *v.* State, 156 Ind. 194, 204, 59 N. E. 471, where it is said: "But . . . such is not the sense or meaning in which the word is used in the statute."

When the term does not include a natural mother see Alabama, etc., R. Co. *v.* Williams, 78 Miss. 209, 214, 28 So. 853, 84 Am. St. Rep. 624, 51 L. R. A. 836.

13. Rockport *v.* Rockport Granite Co., 177 Mass. 246, 254, 58 N. E. 1017, 51 L. R. A. 779.